PRESTITO VITALIZIO IPOTECARIO AND *MANDATUM POST MORTEM*: TWO EXAMPLES OF VALID AGREEMENTS AS TO SUCCESSION BETWEEN THE PRESENT AND THE PAST

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UDK: 341.33
Ur.: 17. ožujka 2017.
Pr.: 10. travnja 2017.
Pregledni znanstveni rad

Summary

The paper focuses on the post mortem mandate, an agreement used to protect some interests arising after the mandator's death, both in Italian legal system and in Roman Law. Given that the latest doctrine has considered invalid a post mortem mandate where the nature of the mandatory's tasks is economic, as it does not comply with art. 458 Cod. Civ., this article explores the issues suggesting that the recent introduction of the 'reverse mortgage' within the Italian legal system could be considered as a new step towards overcoming the prohibition of agreements as to succession. After analysing the current legislation, also within the framework of European private law, the research dwells on post mortem mandatum in Roman law, trying to show that such consensual contract could be considered as a succession agreement. After having demonstrated the difference between the mandatum post mortem (understood as a contract) and other testamentary dispositions defined as mandatum post mortem as well, a source showing the possible economic nature of the Roman mandatum post mortem is considered, to conclude that there were Roman law cases, like that of Gaio in D. 17.1.13, proving the existence of bilateral agreements intended to fulfil an economic function casually related to the mandator's death.

Keywords: *mandatum post mortem, agreements as to succession, prestito vitalizio ipotecario, European private law, mandatum mortis causa, Italian reverse mortgage, mandatum post mortem, actio doli's subsidiarity, Roman law, testamentary dispositions.*

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1. THE POST MORTEM MANDATE IN ITALIAN LAW AND THE RECENT INTRODUCTION OF REVERSE MORTGAGE

Within the Italian legal system, the *post mortem* mandate is an agreement used to protect some interests arising after the mandator's death[1]. This is one of the so-called "alternatives to the Will"[2] and is widely used, for example, for decisions on the deceased's funeral,[3] in the field of copyrights and intellectual property rights and for the management of the deceased's electronic accounts[4].

The rules and the validity framework to be applied to this agreement are laid down by the doctrine and the case-law,[5] in the light of the mandate contract as reference.

Clearly, the *post mortem* mandate posed systematic coherence problems: the *post mortem* mandate is indeed to be considered mainly in accordance with Italian succession law and, so, with art. 458 cod. civ., banning agreements as to succession.[6]

In providing a simple definition of "agreements as to succession" we might say that they are agreements which confer, modify or withdraw, with or without

1 On *post mortem* mandate in Italian civil law, see N. Di Staso, *Il mandato 'post mortem exequendum'*, in *Fam. Pers. Succ.*, 2011, 685 ff.; F.A. Moncalvo, *Sul mandato da eseguirsi dopo la morte del mandante*, in *Fam. Pers. Succ.*, I, 2010, 56 ff.; G. Capozzi, *Successioni e donazioni*, I, Milano, 1983, 37; A.A. Dolmetta, *Patti successori istitutivi. Mandato 'post mortem'. Contratto di mantenimento*, in *Vita notarile,* 2011, I.2, 453 ff.; A. Ansaldo, *In tema di mandato 'post mortem'. Nota a Cass. sez. I civ. 23 maggio 2006, n. 12143*, in *NGCC*, 2007, I, 496 ff.; G. Bonilini, *Una valida ipotesi di mandato 'post mortem'. Nota a Trib. Palermo sez. I civ. 16 marzo 2000*, in *I Contratti*, XII, 2000, 1101 ff.; F. Gradassi, *Mandato 'post mortem'*, in *Contratto e Impresa*, 1990, 827 ff.; M. Des Loges, *Il mandato 'post mortem'*, in *Il notaro*, 1970, XXIV, 115 f.

2 See A. Palazzo, *Istituti alternativi al testamento*, Napoli, 2003; V. Putortì, *I contratti 'post mortem'*, in *Rassegna di diritto civile*, 2012, III, 768 ff.; A. Rosa, *Successione testamentaria e istituti alternativi al testamento*, in *Il Nuovo diritto*, 2006, VII-VIII.1, 720 ff.; L. Santoro, *Le alternative al testamento*, in *Contratto e impresa*, 2003, III, 1187 ff.; M.R. Marella, *Il divieto dei patti successori e le alternative convenzionali al testamento*, in *NGCC*, 1991, II, 91 ff.

3 See G. Musolino, *Le disposizioni sulla sepoltura fra testamento e mandato 'post mortem'. Nota a Cass. sez. I civ. 23 maggio 2006, n. 12143*, in *Rivista del notariato,* 2007, III.2, 690 ff.; C.M. Bianca, *Diritto civile*, II, *La Famiglia. Le successioni*, Milano, 2002, 419; G. Bonilini, *Iscrizione a 'società' di cremazione e mandato 'post mortem'*, in *Fam. Pers. Succ.*, VI, 2007, 524 ff.

4 A. Magnani, *L'eredità digitale*, in *Notariato*, V, 2014, 519 ff.; Studio 6-2007/IG della Commissione Studi di Informatica Giuridica del CNN, *'Password', credenziali e successione 'mortis causa'*, in *Diritto dell'internet*, VI, 2007; L. Di Lorenzo, *Il legato di 'password'*, in *Notariato,* 2014, II, 144 ff.; G. Resta, *La 'morte' digitale*, in *Il Diritto dell'informazione e dell'informatica*, 2014, VI, 891 ff.; U. Bechini, *'Password', credenziali e successione 'mortis causa'*, in *Studi e materiali*, 2008, I, 279 ff.

5 C. Cecere, *Il divieto dei patti successori nella giurisprudenza*, in *Diritto privato*, 1998, IV, 343 ff.

6 See V. Putortì, *Mandato 'post mortem' e divieto dei patti successori*, in *Obbligazioni e Contratti*, XI, 2012, 737 ff.

consideration, rights to the future succession of one or more persons who are party to the agreement.

So, with respect to the possible contrast with the Italian ban of succession agreements, it has to be pointed out that, in order to be valid, the *post mortem* mandate has to be revocable (and this seldom poses problems, as revocability is part of the typical mandate structure[7]) and must have no economic nature[8]. The latest doctrine has considered invalid the so-called *mortis causa mandate*, a contract where the nature of the mandatory's tasks is economic: it is null as it does not comply with art. 458 cod. civ.[9].

On the other hand, the *post mortem* mandate is valid when the nature of the mandatory's tasks is merely material and the contract do not have economic nature (so-called *post mortem exequendum mandate*).[10]

Since the line between a valid *post mortem* mandate (which is a contract without patrimonial nature) and a void succession agreement is very fine, I contend that the recent introduction of the *reverse mortgage* within the Italian legal system could be considered as a new step towards overcoming the prohibition of succession agreements.

2. THE ITALIAN REVERSE MORTGAGE AND ITS COMPATIBILITY WITH ART. 458 COD. CIV.

The Italian *prestito vitalizio ipotecario* is a type of mortgage introduced with Law 44/2015 in which a homeowner, 60 years old or older, can borrow money against the value of his home. No repayment of the mortgage is required until the borrower dies or the home is sold. The home serves as collateral and it must be sold in order to repay the mortgage when the borrower dies.[11]

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7 Art. 1722, 1° co., n. 2, cod. civ.

8 See V. Putortì, *Disposizioni 'mortis causa' a contenuto non patrimoniale e potere di revoca da parte degli eredi*, in *Rassegna di diritto civile*, 2014, III, 787 ff.

9 See G. Capozzi, *Successioni*, cit., 62 ff.

10 A third type is the so-called *post mortem* mandate 'in senso stretto' (in its strictest sense): it tends to be seen as legal, although it should not be considered as a real contract of mandate, being, actually, a will. In this respect, the latest doctrine (N. Di Staso, *Il mandato*, cit., 685) has considered the *post mortem* mandate expression as imprecise as it does not fully embrace the juridical complexity of the legal instruments it intends to cover.

11 On the new Italian reverse mortgage, see A. Pagano (a cura di), *Novità normative. Rassegna di legislazione*, in *Corriere giuridico*, 2016, IV, 458 ff.; M. Procopio (a cura di), *Novità legislative. Rassegna di legislazione*, in *Diritto e pratica tributaria*, 2016, II.1, 672 ff.; A. Chianale, *L'inutilità dell'ipoteca nel 'prestito vecchietti'*, in *Notariato*, 2016, 358 ff.; S. Cherti, *Prime note sulle modifiche alla disciplina del prestito vitalizio ipotecario*, in *Corriere giuridico,* 2015, VIII-IX, 1099 ff.; T. Rumi, *La nuova disciplina del prestito vitalizio ipotecario*, in *I Contratti*, 2015, X, 937 ff. For some reflections before the entry into force of the Law 44/2015, see G. Gigliotti, *Il prestito vitalizio ipotecario: un 'reverse mortgage' all'italiana?*, in *Il Corriere del Merito*, 2011, VII, 677; R. Rinaldi - A. Varrati, *Credito e Imprese - Lo sviluppo del prestito ipotecario vitalizio in Italia: potenzialità e problemi normativi*, in *Bancaria,* 2007, III, 65; A. Iuliani, *Il prestito vitalizio ipotecario nel nuovo 'sistema' delle garanzie reali*, in *Le Nuove leggi civili commentate,* 2016, IV, 717 ff.

As regards this legislation, what is important to emphasize here is the power given to the financing institution – unless the borrower or his heirs repaid the loan not later than 12 months after the sale of the house or the debtor's death – to sell the property at the market price and to keep any amounts derived from the sale until the total extinction of the debt. All this is without prejudice to the obligation to pay any surplus to the heirs (or to those entitled).

Beyond the details, all the above elements make it possible to state, as already underlined by the latest doctrine[12], that a rational and more efficient reconstruction of the new regulations shows that the true nature of the reverse mortgage is that of a mandate to sell the property after the debtor's death[13].

The proposed procedure implies that, on the one hand, although having the right, no bank will ever proceed to forced execution in order to enforce its pre-emption rights (the financing institution can indeed directly exercise the power to sell the property); on the other, it leads to the non-application of the normal mandate rules (which would sanction the extinguishment of the power of representation after the sale of the property to third parties by the mandator).[14] In this regard, for example Chianale stated that the mechanism of the reverse mortgage is not based on the mortgage, but rather on the legal mandate with representation assigned to the bank *in rem propriam* and, therefore, irrevocable and also to be exercised after the debtor's death.[15]

So, the structure of such a contract reveals not only a financial nature of a *post mortem* mandate (which is in itself sufficient to demonstrate the *mortis causa* nature of the mandate[16]), but also the impossibility for the borrower to revoke the bank's power to sell the property. All these features shall suggest a high similarity between the *prestito vitalizio ipotecario* and a forbidden succession pact.

A further factor linked to the possibility of considering the Italian reverse mortgage as a succession agreement derives from the rule that prevents the financing institution from demanding reimbursement of the loan only as long as the mortgaged property remains part of the borrower's estate.

The above rule seems to hint that the legislator has given the bank a real right over an object understood as part of the *id quod superest*.

This gives me reason to expect that the *prestito vitalizio ipotecario*, in accordance with the objective criterion – based on the evaluation of the object of the contract in question, to determine whether or not it is part of the *id quod superest* – should be considered as a void succession agreement[17].

12 A. Chianale, *L'inutilità*, cit., 358 ff.
13 See E. Buda, *Mandato e trasferimento immobiliare*, in *I Contratti*, 2016, III, 267 ff.
14 Indeed, the bank can exercise its power to sell the property in any case of breach, including the sale of the property to third parties.
15 A. Chianale, *L'inutilità*, cit., 360.
16 See G. Capozzi, *Successioni*, cit., 62 ff.
17 See G. Giampiccolo, *Il contenuto atipico del testamento. Contributo ad una teoria dell'atto di ultima volontà*, Milano, 1954, 233.

In fact, today, the transfers of goods considered to form part of the remaining assets (*id quod superest*) are held to be void.

In the light of all this, I believe that the Italian legislator, giving this structure to the reverse mortgage, has created a new legal derogation from article 458 cod. civ.[18]. I think that the reverse mortgage is indeed a *mortis causa* mandate which, in accordance with the principles established by the doctrine and the case-law, should be an example of void succession agreement.

3. TOWARDS THE HARMONISATION OF EUROPEAN PRIVATE LAW IN THE FIELD OF AGREEMENTS AS TO SUCCESSION?

Although it is clear that the contrast between the reverse mortgage and the basic principles and rules of the Italian civil law is due to a non-well thoughtful legal transplant of Common law models[19], I feel that the difficulty of incorporating the reverse mortgage into the Italian legal categories provides an additional spur for a partial rethinking of some legal dogma hampering the flexibility that is increasingly needed in order to incorporate legal instruments that are being conceived within the framework of the European private law[20].

The Italian ban of succession agreements is certainly one of these dogmas, especially since the entry into force of the Regulation 659/2012, in which the agreements as to succession are mentioned as parts of a common European succession law.

Although no generally applicable rules have been fixed, the Regulation provides a definition of "agreement as to succession" and implicitly expresses the hope that the new European succession law may promote the validity of the agreements as to succession.

Art. 49 Reg. 650/2012 defines an agreement as to succession as «a type of disposition of property upon death the admissibility and acceptance of which vary among the Member States». To make it easier for succession rights acquired because of an agreement as to succession to be accepted in the Member States, art. 49 Reg. 650/2012 stipulates that the «Regulation should determine which law is to govern the admissibility of such agreements, their substantive validity and their binding effects between the parties, including the conditions for their dissolution».

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18 I would like to underline that the same reasoning could cover the trust. See U. Carnevali, *Negozio fiduciario e mandato 'post mortem'. Nota a Trib. Milano 18 aprile 1974*, in *Giurisprudenza commerciale,* 1975, V.2, 694 ff.

19 See A. Chianale, *L'inutilità*, cit., 359. For some reflections on this point before the entry into force of the Law 44/2015, see D. Cerini, *Il prestito vitalizio ipotecario: 'legal transplant' in cerca di definizione*, in *Diritto ed economia dell'assicurazione*, 2006, II, 503 ff.

20 It is generally accepted that, in the present context, the various categories are starting to collapse more and more rapidly and more and more often, and the new realities forcibly replace the existing ones. On this issue, I share the hopes expressed by N. Lipari, *Le categorie del diritto civile*, Milano, 2013, *passim*.

The objective of facilitating recognition of succession rights acquired thanks to an agreement as to succession in a Member State was also evident in the 'Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession'[21]. In fact, recital 20 of the Proposal stated that «in order to facilitate recognition of succession rights acquired in a Member State, the conflict-of-laws rule should favour the validity of the agreements as to succession by accepting alternative connecting factors. The legitimate expectations of third parties should be preserved».

As the current European trend shows that where future succession pacts are banned, Member States should consider allowing such covenants, an amendment of the applicable national rules appears necessary especially for countries such as Italy, whose laws do not allow succession agreements.[22]

In such a scenario, it is my belief that, in view of the harmonisation of the European private law, both a historical and comparative point of view merit equal importance. Considering that Roman law – as stated by the latest doctrine – «is thinking, it is a cultivated science, it is a logic proceeding, a useful model which today can be followed not much (and not only) to force its cases, its solutions, its institutes in an unsuited social and economic context, but to rediscover the creative power of legal science»[23], into the Roman *scientia iuris* some universally recognised legal principle shall be found.

But the prerequisite for such a research is to be, as far as possible, independent from all those «meta-historical ideas and teleology that are, today still, and especially in civil law systems, advocated by many scholars as the justification for constructions that aim at decoding the culture, institutions, techniques and ideologies of the ancients (Romans, Greeks, 'barbarians') using categories, principles, values that are completely alien to those worlds».[24]

Following the methodological procedure outlined, with this paper I am trying to demonstrate that the archetype of the admissibility of succession agreements could be found also in the ancient Roman law[25]: notwithstanding the general

21 Brussels, 14.10.2009, COM 2009/154 final, COD 2009/0157. The full text of the Proposal can be found on *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0154:FIN:EN:PDF*.

22 Art. 458 cod. civ.: «Fatto salvo quanto disposto dagli articoli 768-*bis* e seguenti, è nulla ogni convenzione con cui taluno dispone della propria successione. È del pari nullo ogni atto col quale taluno dispone dei diritti che gli possono spettare su una successione non ancora aperta, o rinunzia ai medesimi».

23 C. Pelloso, *The concept of 'bargain' and the (un-)bridgeable gulf between Common Law and Civil Law. Some historical observations on the Europeanization of the Law of Contract*, in *RGDR*, XIX, 2012, 37 f.

24 C. Pelloso, *The concept*, cit., 35.

25 And not only in the German tradition, as assumed by the prevailing doctrine. See, for example, B. Windscheid, *Diritto delle Pandette*, III, trad. it., Torino, 1930, 105, nt. 2; B. Biondi, *Istituti fondamentali di diritto ereditario romano*, Milano, 1946, 124 ss.; Id., *Diritto ereditario romano. Parte generale. (Corso di lezioni)*, Milano, 1954, 170; P. Voci, *Diritto*

understanding that the prohibition of succession pacts may be traced back to the ancient Romans, my research aims at pointing out that a clear stance against *mortis causa* attributions resulting from bilateral agreements cannot be found in the classical legal thought.

From this perspective, as Roman law cannot be regarded only as our past, but it is also «the memory of our future»[26], it seems possible to 'use' the concepts arising from the casuistry of the Digest not only to rediscover our very deep legal roots, but also to reinterpret some current legal issues.[27]

4. THE MANDATUM POST MORTEM

Against this background, I have studied the *post mortem mandatoris* mandate in Roman legal sources and I found that, maybe, the European trend (allowing more widely the conclusion of future succession pacts) is not contrary to our common judicial culture rooted in Roman law.[28]

So far as the *mandatum post mortem* in Roman law is concerned, my firm belief, indeed, is that such consensual contract could be considered as a succession agreement.

Even though no "succession agreement" category had been theorized in Roman law, jurists' writings could provide some guidelines (which Emilio Betti would define as 'enlightening inspirational principle'[29]) suggesting a jurists' stance

ereditario romano, I, *Introduzione. Parte generale*, Milano, 1960, 475 ss.; P. Bonfante, *Corso di diritto romano*, VI, *Le successioni. Parte generale*, Milano, 1974, 212; C. Fadda, *Concetti fondamentali del diritto ereditario romano*, I, Milano, 1949, 315 ff.; S. Solazzi, *Diritto ereditario romano. (Anno accademico 1931-32)*, Napoli, 1932, 237 ff.; R. Bonini, *'Interrogationes' forensi e attività legislativa giustinianea*, in *SDHI*, XXXIII, 1967, 286; M. Sič (Szűcs), *L'eredità futura come oggetto del contratto (patto) nel diritto classico e postclassico*, in *RIDA III S.*, LIX, 2012, 203.

26 C. Pelloso, *The concept*, cit., 38. See also L. Garofalo, *Scienza giuridica, Europa, Stati: una dialettica incessante*, in *Giurisprudenza romana e diritto privato europeo*, Padova, 2008, 1 ff.

27 As R.C. Van Caenegem, *European Law in the Past and the Future*, Cambridge, 2002, 36, said, «when I look at the present, I am a pessimist, but when I look at the past I am an optimist».

28 For the important role played by the Roman Legal tradition in the context of the introduction process of a new European private law, see the recent essays of T. dalla Massara, *New Europe-Old Values? Reform and Perseverance. Can Roman Legal Tradition Play a Role of Identity Factor Towards a New Europe?*, in *New Europe - Old Values? Reform and Perseverance*, edited by N. Bodiroga-Vukobrat, S. Rodin and G.G. Sander, Rijeka - Luxembourg - Ludwigsburg, 2016, 1 ff., and of C. Pelloso, *The concept*, cit., 1 ff.

29 See E. Betti, *Diritto romano e dogmatica odierna*, in *Questioni di metodo. Diritto romano e dogmatica odierna*, Como, 1996, 31 f.: «nella ricerca delle singole soluzioni essi (i giuristi romani) non sogliono fare applicazione consapevole di principi. Bene spesso la soluzione viene trovata di intuito e, in apparenza, balza fuori quasi per caso. C'è bensì, alla sua base, un principio ispiratore che la illumina: ma questo – lungi dal venir enunciato – resta nell'ombra come latente nella coscienza del giurista».

on the *post mortem* topic that could be analysed within the framework of the current legal dogma.

I shall not dwell on all the legal sources I studied. Basically, I have noted that Roman jurists, as shown by *Paraphrasis Graeca Institutionum* 3.19.16: *Et post mortem alterius concepta stipulatio valebat etiam apud veteres; veluti si quis dixerit: spondeo dare tibi decem aureos post mortem Titii; cum accidere potest, vivis adhuc contrahentibus, Titium mori*, did envisage the possibility to conclude a *stipulatio* taking effect after the death of a person other than the *stipulator* or the *promisor*.

Problems arose in case the contract was to produce its effect after the death of one of the parties.

The texts I consulted did not seem to entirely exclude the possibility of making a legal act subject to the time clause of one of the parties' death.

A blocking issue could derive from the enforcement of a principle set by Paul. 12 *ad Sab*. D. 45.1.46.1: *Id autem, quod in facto est, in mortis tempus conferri non potest, veluti: 'cum morieris, Alexandriam venire spondes'*, *i.e.* the impossibility of foreseeing a *facere* by the *debitor mortuus*, or from the inevitable conflict between this time clause and the legal structure of the legal act, for example the impossibility of establishing a usufruct after the death of the usufructuary, as maintained by Paolo: Paul. 3 *ad Sab*. D. 33.2.5: *Usum fructum 'cum moriar' inutiliter stipulor: idem est in legato, quia et constitutus usus fructus morte intercidere solet*.

It is in the light of these principles that I think that also the main source on *mandatum post mortem* should be considered:

Gai 3.158: *item si quis quid post mortem meam faciendum mihi mandet, inutile mandatum est, quia generaliter placuit ab heredis persona obligationem incipere non posse*.

From this text, the prevailing doctrine assumed that the *mandatum post mortem* was totally invalid in Roman law.[30]

However, contrary to the prevalent opinion, since Gaio's words only refer to *mandatum post mortem mandatarii*, and accordingly to the principles arising from other fragments (as those I mentioned before), I think that this fragment proves the only invalidity of the *mandatum post mortem mandatarii* (it is impossible to charge someone with doing something after his death), but that the text does not hinder the validity of the *mandatum post mortem mandatoris*.[31]

30 V. Arangio-Ruiz, *Il mandato in diritto romano. Corso di lezioni svolto nell'Università di Roma. Anno 1948 – 1949*, Napoli, 1949, 142 ff.; G. Castelli, *Alcune osservazioni giuridiche sull'epitaffio di 'Allia Potestas'*, in *Scritti giuridici*, a cura di E. Albertario con prefazione di P. Bonfante, Milano, 1923, 111 f.; S. Di Marzo, *Sul mandato 'post mortem'*, in *Scritti in onore di C. Ferrini*, I, Milano, 1947, 234; S. Perozzi, *Istituzioni di diritto romano*[2], II, Bologna, 1927, 310, nt. 2.

31 On this matter, I agree with C. Sanfilippo, *'Mandatum post mortem'*, in *Studi in onore di S. Solazzi*, Napoli, 1948, 556.

5. A LEGAL TRANSACTION BETWEEN CONTRACT AND TESTAMENTARY DISPOSITION

Based on this assumption, here I would like to dwell on another fundamental issue for my research.

Firstly, it is necessary to point out the difference between the *mandatum post mortem* (understood as a contract) and other testamentary dispositions defined as *mandatum post mortem* as well. The two instruments are sometimes confused with one another, because of the ambiguous terminology found in classical sources. This confusion has been a hindrance for a correct analysis of the *mandatum post mortem*.

For example, Pietro Bonfante stated that *mandatum post mortem* was not a contract, but rather a testamentary disposition because the mandate should not be considered as a contractual relationship, while it could be conceived in theory as a mandate *mortis causa*, *i.e.* a testamentary disposition.[32]

As you can expect, the choice on the perspective to be adopted (*i.e.* whether the contractual or the testamentary perspective) is the premise for my entire research, because I am trying to investigate the importance of the *post mortem mandatoris* mandate as an index of a hereditary system including also bilateral agreements. If I had not contested Bonfante's opinion, I would have implicitly accepted the nature of the *mandatum post mortem* as a testamentary disposition, thus excluding the *post mortem* mandate as a valid "source of inspiration" for my research.

For this reason, I deemed necessary to express an opinion on this matter.

It is therefore obvious that the term '*mandatum*' in legal sources not only indicates a consensual contract[33], but could also designate more generally the concepts of 'order', 'proxy', 'assignment', 'authorization'[34]. Furthermore, normal practice was that the testator often included in his/her will the so called 'atypical' dispositions in order to instruct somebody different from the heirs to organise the testator's funeral. This is corroborated by Ulp. 25 *ad ed*. D.11.7.12.4, which indicates the list of people who were to *funus facere*[35].

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32 For P. Bonfante, *Mandato 'post mortem'*, in *Scritti giuridici varii*, III, *Obbligazioni e possesso*, Torino, 1926, 270 f., the *mandatum post mortem* was «una volontà estrinsecata dal subietto perché debba valere dopo la morte, senza reciproco scambio di dichiarazioni, senza accordo di parti: si tratta, in breve di un atto *mortis causa*. I principi del sistema contrattuale, gli adagi pericolosi, *mandatum morte finitur*, *obligatio ab heredis persona*, ecc., sono fuori questione».

33 See F. Pringsheim, *L'origine des contrats consensuels*, in *RHD*, XXXII, 1954, 494.

34 For an extensive bibliography about the etymology of the term *mandatum* and the concept of *mandare* in Roman law, see S. Randazzo, *'Mandare'. Radici della doverosità e percorsi consensualistici nell'evoluzione del mandato romano*, Milano, 2005, 7 ff.

35 See Ulp. 25 *ad ed*. D.11.7.12.4: *Funus autem eum facere oportet, quem decedens elegit: sed si non ille fecit, nullam esse huius rei poenam, nisi aliquid pro hoc emolumentum ei relictum est: tunc enim, si non paruerit voluntati defuncti, ab hoc repellitur. sin autem de hac re defunctus non cavit, nec ulli delegatum id munus est, scriptos heredes ea res contingit: si nemo scriptus est, legitimos vel cognatos: quosque suo ordine quo succedunt*. On the burial expenses as a statutory obligation on the *hereditas*, see S. Di Salvo, *Il legato modale in diritto romano*, Napoli, 1973, 132.

In those cases, the terms used to convey the concept of 'assignment' included the word *mandatum*.

So, I found particularly interesting a passage by Ulpiano where the term *mandare* is used in a testamentary context:

Ulp. 25 *ad ed*. D. 11.7.14.2: *Si cui funeris sui curam testator mandaverit et ille accepta pecunia funus non duxerit, de dolo actionem in eum dandam Mela scripsit: credo tamen et extra ordinem eum a praetore compellendum funus ducere*.

In this case, a testator gave a *mandatum* to someone in order to organise his funeral using a sum of money the testator have left him for this purpose. Since the funeral was not organised, the jurist Mela gave the *actio doli* to the heirs, against the person instructed by the testator, while Ulpiano indicates the possibility of a *praetor*'s *ex officio* intervention.

This text generated confusion, as it led for example Andreas Wacke to state that the *mandatum post mortem mandatoris* was invalid[36]: the impossibility of concluding a valid *mandatum post mortem* agreement would have made the *agere ex mandato* impossible, thus making the *actio doli* the only *actio* available.

On the contrary however, I think that the expression *si mandaverit* does not resemble the consensual contract, given the ambiguous use of the term *mandatum* in Roman legal sources, as I mentioned before[37].

In my opinion, the main element showing that the text does not fall within the contractual framework is the term *testator*: therefore, most probably, the source of obligation of the supposed 'mandatary' was, actually, a will[38].

It is clear that the *actio mandati* is to be excluded, as it is impossible to bring an *ex contractu* action, as *actio mandati* is, for the performance of a contract that has never been concluded.

In contradiction with Wacke's opinion, however, I have found out that other sources referring to *mandatum post mortem* do refer to *actio mandati*, to *agere mandati* or to *iudicium mandati*. See for example:

Ulp. 31 *ad ed.* D. 17.1.12.17: *Idem Marcellus scribit, si, ut post mortem sibi monumentum fieret, quis mandavit, heres eius poterit mandati agere. illum vero qui mandatum suscepit, si sua pecunia fecit, puto agere mandati, si non ita ei mandatum est, ut sua pecunia faceret monumentum. potuit enim agere etiam cum eo qui mandavit, ut sibi pecuniam daret, ad faciendum, maxime si iam quaedam ad faciendum paravit.*

Gai. 10 *ad ed. prov.* D. 17.1.13: *Idem est et si mandavi tibi, ut post mortem meam heredibus meis emeres fundum*.

Gai 3.117: *Sponsores quidem et fidepromissores et fideiussores saepe solemus accipere, dum curamus, ut diligentius nobis cautum sit; adstipulatorem uero fere*

36 A. Wacke, *Sul concetto di 'dolus' nell' 'actio de dolo'*, in *Iura*, XXVIII, 1997, 30.

37 This opinion is also expressed by C. Sanfilippo, *Ancora un caso*, cit., 2051.

38 The text falls within the testamentary context also for J.L. Murga Gener, *Las practicas consuetudinarias en torno al 'bonum animae' en el derecho romano tardio*, in *SDHI*, XXXIV, 1968, 172, nt. 186.

tunc solum adhibemus, cum ita stipulamur, ut aliquid post mortem nostram detur; quia enim ut ita nobis detur stipulando nihil agimus, adhibetur adstipulator, ut is post mortem nostram agat; qui si quid fuerit consecutus, de restituendo eo mandati iudicio heredi meo tenetur.

Ulp. 31 *ad ed.* D. 17.1.12.16: *Si mandavero exigendam pecuniam, deinde voluntatem mutavero, an sit mandati actio vel mihi vel heredi meo? et ait Marcellus cessare mandati actionem, quia extinctum est mandatum finita voluntate. quod si mandaveris exigendam, deinde prohibuisti, exactamque recepisti, debitor liberabitur.*

As it is possible to notice, when reference is made to an action of a contractual nature (as *actio mandati*), no reference is made to the will nor to the testator.

When analysed from the procedural point of view, these two elements are consistent: on the one hand, in cases like D.11.7.14.2, reference to the *testator* is made, and therefore, it should be no surprise that the *actio mandati* is refused; on the other, in other fragments, the *actio mandati* is granted and this goes to show that there were cases of 'contractual' *mandatum post mortem.*

As a matter of fact, broad the *mandatum* concept might have been, in the case of consensual contract, any 'pathological' element of the legal relationship should have been analysed and solved within the framework of a *iudicium mandati*, and the existence of legal sources proving the use of *actio mandati* for the performance of *mandatum post mortem* shows that it was an actual contract.

6. DE DOLO ACTIONEM IN EUM DANDAM MELA SCRIPSIT

As far as the *actio doli* mentioned by Ulpiano in D.11.7.14.2 is concerned, I think that Mela granted *actio doli* for the following reason: through a *condictio* or an *actio in factum*, the claimant could have obtained only a pecuniary compensation from the defendant[39].

Conversely, by introducing the *iudicium de dolo* and thanks to the *arbitratus de restituendo*[40] in the *actio doli*'s *formula*[41], heirs could have expected that, in order

39 The connection between the patrimonial nature of all convictions in Roman civil law process and the *arbitratus de restituendo* is clearly explained by M. Marrone, *Istituzioni di diritto romano*[3], Palermo, 2006 (rist. Palermo, 2011), 95, nt. 77: «il ricorso alla clausola arbitraria va messo in relazione col principio per cui la condanna doveva essere sempre espressa in denaro, e ne rappresentava un evidente temperamento; un temperamento che giovava di norma sia al convenuto – che avrebbe evitato la condanna al pagamento di una somma di denaro di cui poteva non disporre – sia all'attore, che avrebbe conseguito direttamente l'oggetto della sua pretesa».

40 For a recent and wide analysis on *arbitratus de restituendo*, see S. Viaro, *L''arbitratus de restituendo' nelle formule del processo privato romano*, Napoli, 2012, *passim*; M. Talamanca, voce *Processo civile (dir. rom.)*, in *Enc. dir.*, XXXVI, Milano, 1987, 66; C.A. Cannata, *Profilo istituzionale del processo privato romano*, II, *Il processo formulare*, Torino, 1982, 107; E. Betti, *Istituzioni di diritto romano*, I[2], Padova, 1942, 297.

41 A different opinion about the presence of the *arbitratus* in the *actio doli*'s *formula* is in B. Biondi, *Studi sulle 'actiones arbitrariae' e l''arbitrium iudicis'*, Palermo, 1912, 83.

to avoid conviction and the *infamia*[42] (which was a consequence of the criminal nature[43] of *actio doli*[44]), the *accipiens* would decide to remedy its breach of good faith and use the money already accepted for the specific purpose set by the *de cuius*.

As a matter of fact, unlike all the other actions, the *actio dolis* indirectly gave the possibility of obtaining a specific compensation, and maybe this was sufficient for Mela (who lived in an age[45] when the only civil law process known was the *per formulas* one, where the only kind of conviction available was the pecuniary compensation) to consider that also the main pre-requisite to bring the *actio doli* was present, *i.e.* the subsidiarity, to be understood – in my opinion – not as 'lack of judicial remedies available', but rather as 'impossibility to reach a particular protection goal'.

In this case, it is clear that the main objective was to identify a legal instrument to get to the specific compensation, *i.e.* the holding of the funeral by the defendant[46]. I think this is proved in particular by the last part of the text, where Ulpiano (who lived approximately two centuries after Mela, when the civil law process allowed new means of protection introduced by the *cognitio extra ordinem*[47]) indicates the possibility of a *praetor*'s *ex officio* intervention aimed at compelling the person *cui funeris sui curam testator mandaverit* to *funus ducere.*

42 The *actio doli* was one of the few *actiones in personam* containing the *arbitratus de restituendo* in the formula, and probably – as said by P. Lambrini, *Dolo generale e regole di correttezza*, Padova, 2010, 72 – «la presenza dell'*arbitratus de restituendo* sembra si debba spiegare come un'ultima *chance* per permettere al convenuto di evitare l'infamia».

43 However, the *actio doli* is commonly defined as 'la meno penale delle azioni penali'; see L. Vacca, *Delitti privati e azioni penali nel principato*, in *ANRW*, II, 14, Berlin - New York, 1982, 702; G. Rossetti, *Problemi e prospettive in tema di 'struttura' e 'funzione' delle azioni penali private*, in *BIDR*, XXXV-XXXVI, 1993-1994, 343 ff.; P. Voci, *Azioni penali e azioni miste*, in *SDHI*, LXIV, 1998, 1 ff.

44 On the controversial and ignominious nature of the *actio doli*, see **Á**. d'Ors, *Una nueva lista de acciones infamantes*, in *'Sodalitas'. Scritti in onore di A. Guarino*, VI, Napoli, 1984, 2575 ff.; J.M. Blanch, *Nota a próposito de la 'actio de dolo' y su carácter infamante*, in *Estudios en homenaje al profesor J. Iglesias*, III, Madrid, 1988, 1151.

45 See C. Ferrini, *Saggi intorno ad alcuni giureconsulti romani*, in *Opere di C. Ferrini*, II, *Studi sulle fonti del diritto romano*, Milano, 1929, 11 ff.

46 As noted also by G. MacCormack, *'Dolus' in Republican Law*, in *BIDR*, LXXXVIII, 1985, 34, «the specific mention of *accepta pecunia* suggests that the receipt of the expenses was relevant for the determination of the *dolus*», as «it was not just the failure to carry out the undertaking but the receipt of the money and the subsequent failure to arrange the funeral that constituted *dolus*».

47 See M. Marrone, *Istituzioni*, cit., 113.

7. THE ROMAN MANDATUM POST MORTEM AND ITS POSSIBLE ECONOMIC NATURE

After having demonstrated that the presence of some testamentary provisions defined as *mandatum post mortem* does not exclude the existence of other cases of *mandatum post mortem* contracts, enforced by the *actio mandati*, I would like to introduce a source which – I think – shows that Roman law allowed agreements that, most probably, would be considered today void succession agreements.

That is:

Gai. 10 *ad ed. prov*. D. 17.1.13: *Idem est et si mandavi tibi, ut post mortem meam heredibus meis emeres fundum*.

Here Gaio talks about a *mandatum post mortem* where the *mandator* instructed the mandatary to buy a land for the *mandator*'s heir after the mandator's death.

First, I had to put the text in context: since the incipit *idem est* recalls an arrangement that is not made clear by Gaio's words, I had to look at the preceding passage:

Ulp. 31 *ad ed*. D. 17.1.12.17: *Idem Marcellus scribit, si, ut post mortem sibi monumentum fieret, quis mandavit, heres eius poterit mandati agere. illum vero qui mandatum suscepit, si sua pecunia fecit, puto agere mandati, si non ita ei mandatum est, ut sua pecunia faceret monumentum. potuit enim agere etiam cum eo qui mandavit, ut sibi pecuniam daret, ad faciendum, maxime si iam quaedam ad faciendum paravit*.

Gai. 10 *ad ed. prov.* D. 17.1.13: *Idem est et si mandavi tibi, ut post mortem meam heredibus meis emeres fundum*.

In the order of the Digest, the incipit *idem est* (which can be translated as 'likewise', 'in the same way') refers to the preceding passage by Ulpiano which grants the *actio mandati* to manage the binding relationship between the mandatary and the mandator's heirs deriving from a *mandatum post mortem.*

Idem est, therefore, hints at the possibility of requiring performance of a contract where the *mandator* instructed the mandatary to buy a land for the *mandator*'s heir after the mandator's death, and it seems to me that the patrimonial nature of this contract is clear.

However, the two texts include fragments written by two different jurists (one is Gaio and the other is Ulpiano) and, therefore, certainly, when using *idem est*, Gaio did not refer to Ulpiano.

Then, I verified the reconstruction of the correct order that can be found in Lenel's *Palingenesia*:

Gai. 9 *ad ed. prov*. (D. 17.1.27)

(pr.) Si quis alicui scripserit, ut debitorem suum liberet, seque eam pecuniam, quam is debuerit, soluturum, mandati actione tenetur.

(1.) Si servum ea lege tibi tradidero, ut eum post mortem meam manumitteres, constitit obligatio: potest autem et in mea quoque persona agendi causa intervenire, veluti si paenitentia acta servum reciperare velim. Idem est et si mandavi tibi, ut post mortem meam heredibus meis emeres fundum.

When analysing the topics dealt with by Gaio in the 9 Comment Book *ad edictum provinciale*, I found confirmation of the reference to the procedural data, as the preceding passage, in the original order, contains several hypotheses of mandate and granting of the contractual action: the *actio mandati.*

From Gai. 10 *ad ed. prov.* D. 17.1.13 we can therefore deduce not only the possibility of *agere ex mandato* to perform a *mandatum post mortem*, but also and mostly the eligibility, in Roman law, of contracts that, in applying Italian civil law, would be considered today void *mortis causa* mandates.

8. CONCLUSIVE REMARKS

Thus, looking at the typical "procedural law-reasoning" of the Roman jurists, the following conclusions may be drawn.

On the one hand, the legal sources envisage the possibility of bringing a *iudicium mandati* for the performance of a *post mortem* mandate, and this goes to show the existence of a contractual *post mortem* mandate; on the other, there were Roman law cases, like that of Gaio in D.17.1.13, proving the existence of bilateral agreements intended to fulfil a patrimonial function casually related to the *mandator*'s death.

In this respect, an interesting example for my study is set by an Italian case challenged before the Genova Court of Appeal in 1947[48]. The Court declared the invalidity of a bank deposit of bearer securities where the depositor charged the Bank to distribute those securities according to his instructions after his death. The Court's decision was taken because of the patrimonial function of the agreement (perceived as a *mortis causa* mandate) and, therefore, of the non-compliance with art. 458 cod. civ.

Such arrangement, still considered void in compliance with the Italian prohibition of succession agreements, shall fall within the framework of the legal act described by Gaio, although the outcomes differ.

Moreover, about the recent introduction of the reverse mortgage in the Italian legal system, the clear patrimonial nature of this new type of loan, containing an irrevocable mandate to sell the property after the death of the borrower/mandator, shows that the Italian legislator has opted for a legal transaction maybe closer to the Gaio's solution than to the Genova Court of Appeal's one.

Ultimately, in the framework of the gradual process leading to the creation of a 'Common European private law', the case of the Roman *post mortem mandatum* seems to hint that the Roman legal experience might represent, also in the field of the agreements as to succession, a good instrument for reaching a European legal "palingenesis"[49], which must get over the present discrepancies, to recover

48 App. Genova, 19.6.1947, in *Monitore tribunali*, 1948, 48.

49 See L. Garofalo, *Una nuova dogmatica per il diritto privato europeo*, in *Giurisprudenza*, cit., 45 ff.

the essence of the Roman *scientia iuris*[50] as a «*rational reflection*, a *creation of a spirit*, free from the often oppressing bonds of a positive power, either legislative or judicial».[51]

The concepts emerged from the sources considered in this paper apparently do not evoke any hostility towards any bilateral agreements intended to govern some aspects relevant to the inheritance.

Consequently, as long as the understanding of Roman Law remains far from «the mirage of the placeless and timeless 'Roman-Pandectist'»[52], the study of the Roman *post mortem mandatum* shall add a "letter" to the "conceptual alphabet"[53], written by the Roman jurists, where the modern jurist could also be able to find certain fundamental values on which the European culture of private law is based.[54]

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50 Following A. Schiavone, *'Ius'. L'invenzione del diritto in Occidente*, Torino, 2005, it is certainly possible to speak of a wholly Roman «invenzione del diritto», which represents a vital resource even for modern legal systems.

51 C. Pelloso, *The concept*, cit., 37.

52 C. Pelloso, *The concept*, cit., 35.

53 See T. dalla Massara, *New Europe*, cit., 4.

54 On the way to approach to the historical-comparative study of Roman law, I totally agree with C. Pelloso, *The concept*, cit., 36: «Roman law is and shall always be a model because it is unique, that is to say different from any other past or present legal experience, not because it is universal: this is the reason why we believe that the most fascinating and most current element that characterizes Roman law is its ontological 'otherness' from today's systems». On this point see also L. Vacca, *Cultura giuridica e armonizzazione del diritto europeo*, in *Europa e diritto privato*, 2004, 66, and, on the 'otherness' which characterizes Roman law, P.G. Monateri, *Roma e l'Occidente. Comparazione e critica della tradizione*, in *Ostraka*, XVII, 2008, 213 ff.

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Sažetak

PRESTITO VITALIZIO IPOTECARIO I *MANDATUM POST MORTEM*: DVA PRIMJERA VALJANIH UGOVORA O NASLJEĐIVANJU IZMEĐU PROŠLOSTI I SADAŠNJOSTI

U radu se analizira *mandatum post mortem* u rimskom i talijanskom pravu kao pravni posao koji služi zaštiti interesa koji nastaju nakon smrti davatelja mandata. Glede sadašnjeg prava, uzimajući u obzir dominantno stajalište doktrine, koja smatra *mandatum post mortem* s imovinskim sadržajem ništetnim, budući da je u suprotnosti s člankom 458. talijanskoga Građanskog zakonika, analizirat će se osnovna obilježja instituta *prestito vitalizio ipotecario* radi usporedbe kompatibilnosti tog nedavno uvedenog instituta sa zabranom ugovora o nasljeđivanju koji je još uvijek na snazi u Italiji. Istraživanje će se provesti i na razini rimskog prava. nakon dokazivanja da se *mandatum post mortem,* shvaćen kao ugovor, razlikuje od drugih oporučnih raspolaganja, premda isto nazivanih *mandatum post mortem*, autorica uzima u obzir jedan izvor (Gai 10 *ad ed.* D. 17.1.13) koji bi mogao utvrditi postojanje takvih ugovornih mandata *post mortem* imovinskog sadržaja i u rimskom pravnom sustavu.

Ključne riječi: *mandatum post mortem, ugovor o nasljeđivanju, prestito vitalizio ipotecario, europsko privatno pravo, mantadum mortis causa, rimsko pravo, oporučno raspolaganje.*

Zusammenfassung

PRESTITIO VITALIZIO IPOTECARIO UND *MANDATUM POST MORTEM*: ZWEI BEISPIELE GÜLTIGER ERBVERTRÄGE IN VERGANGENHEIT UND GEGENWART

Diese Arbeit basiert auf das Mandat *post mortem*, welches ein Vertrag zum Schutz mancher nach dem Tod des *Mandants* entstandenen Interessen sowohl im italienischen als auch im römischen Rechtssystem darstellt. Da der neuesten Doktrin nach das Mandat *post mortem*, bei welchem die Aufgaben des *Mandants* wirtschaftlicher Natur sind, als ungültig betrachtet wurde, weil es nicht in Einklang mit Art. 458 des italienischen bürgerlichen Gesetzbuches steht, schlägt diese Arbeit vor, dass der neulich eingeführte Begriff der „umgekehrten Hypothek“

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im italienischen Rechtssystem ein neuer Schritt zur Überwindung des Verbots von Erbverträgen darstellen kann. Die Arbeit analysiert die aktuelle italienische Gesetzgebung und die des Europäischen Privatrechtes. Anschließend wird der Begriff *mandatum post mortem* aus dem römischem Recht analysiert, wobei gezeigt wird, dass ein solcher Konsensualvertrag als Erbvertrag angesehen werden kann. Im nächsten Teil der Arbeit wird der Unterschied zwischen dem *mandatum post mortem* (angesehen als Vertrag) und den anderen als *mandatum post mortem* definierten letztwilligen Verfügungen erläutert. Nachfolgend wird die Quelle, welche die wirtschaftliche Natur des *mandatum post mortem* zeigt, in Betracht gezogen, wonach abschließend betont wird, dass es im römischen Recht Entscheidungen gibt (z.B. die Entscheidung von Gaio in D.17.1.13), welche das Bestehen von bilateralen Verträgen, dessen Zweck die Erfüllung von wirtschaftlichen Funktionen nach dem Tod des *Mandants* war, beweisen.

Schlüsselwörter: *mandatum post mortem, Erbverträge, prestito vitalizio ipotecario, Europäisches Privatrecht, mandatum mortis causa, umgekehrte Hypothek im italienischen Recht, mandatum post mortem, Subsidiarität von der actio doli, römisches Recht, letztwillige Verfügungen.*

Riassunto

PRESTITO VITALIZIO IPOTECARIO E *MANDATUM POST MORTEM*: DUE ESEMPI DI PATTI SUCCESSORI VALIDI TRA PRESENTE E PASSATO

Il contributo tratta, sia nel diritto italiano che nel diritto romano, del mandato *post mortem*, particolare figura negoziale che si presta ad essere eseguita per tutelare interessi che si manifestano dopo la morte del mandante. Con riferimento al diritto odierno, tenendo a mente l'opinione della dottrina maggioritaria, che considera un mandato *post mortem* avente contenuto patrimoniale nullo a causa del contrasto con l'art. 458 cod. civ., vengono analizzate le principali caratteristiche del prestito vitalizio ipotecario al fine di verificare la compatibilità di questo istituto di recente introduzione con il divieto di patti successori vigente in Italia. L'indagine si sposta quindi sul piano romanistico: dopo aver dimostrato la differenza tra il *mandatum post mortem* – inteso come contratto – e le altre disposizioni testamentarie definite ugualmente '*mandatum post mortem*', viene presa in considerazione una fonte in particolare (Gai 10 *ad ed.* D. 17.1.13) che sembrerebbe attestare l'esistenza, nel sistema giuridico romano, di mandati *post mortem* contrattuali aventi contenuto patrimoniale.

Parole chiave: *mandatum post mortem, patti successori, prestito vitalizio ipotecario, diritto privato europeo, mandatum mortis causa, diritto romano, disposizione testamentaria.*