The Law of Obligations

Roman Foundations of the Civilian Tradition

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claimed in Germany that labour law has become a distinctive and autonomous field of law, the §§ 611 sqq. BGB still remain of fundamental importance in individual labour relations. Apart from that, they govern all service contracts falling outside the area of labour law, particularly the services rendered by the so-called liberal professions: doctors, lawyers, chartered accountants, etc.[47]

II. LOCATIO CONDUCTIO OPERIS

1. Essential characteristics and range of application

We have seen that medici were able to work for mcrces.[48] In other words, they could render their services under a contract of locatio conductio. Such a contract was, however, not necessarily locatio conductio operarum. Indeed, in one of the texts referred to above,[4Y] the doctor was said to be liable ex locato: "Proculus ait, si medicus servum imperite secuerit, . . . ex locato . . . compctere actionem."[5"] Had he been employed under a contract of service, he would himself have been the locator. But since we are dealing with an operation, the services as such were not the object of the contract. What was owed was opus faciendum, a particular job to be done as a whole. This is the essential characteristic of locatio conductio opens.[51] One person undertakes to perform or execute a particular piece of work, and he promises to produce a certain specified result. This person is called the conductor (operis). The person commissioning the enterprise (the customer) is the

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in this respect, Thco Mayer-Maly, "ESemcme der Entwicklung des Arbeitsrecht", in: *La formazione storica,* vol. Ill, pp. 1320 sqq. He draws attention to the fact that the history of labour law does not commence with the Industrial Revolution, but that a scientific body of law dealing with labour relations already existed in the late Middle Ages.

[47] Cf. e.g. Gottfried Schiemann, "Der freie Dienstvertrag", 1983 *Juristische Sdiulung* 649 sqq. and also § 1163 ABGB. In so far as modern law deviates from the IUS commune which, like Roman law, did not regard the services of members of the free (liberal) professions as being rendered under a contract of locatio conductio: cf. e.g. Gliick, vol. 17, pp. 315 sqq.; D.J. Joubert, "Die kontraktuele verhouding tussen professioncle man en khe'nt", 1970 *Acta Juridica* 15 sqq.; Coing, pp. 458 scj.; cf. also Wmdscheid/Kipp, § 404 (emphasizing, however, thai the legal regime is the same as if one were dealing with locatio conductio); § 895 I 11 PrALR; art. 1779 code civil. The situation in modern South African law is unclear (locatio conductio or mandatum?): cf. Joubert, 1970 *Acta Juridica* 22 sqq. (with very sensible suggestions). Generally on locatio conductio operarum in modern South African law, cf. James Fourie, *Die Diemkontrak in die Suid-Afrikaans? Arbeidsre^* (unpublished LLD thesis, Pretoria, 1977).

[4H] Cf, supra, p. 390.

[4I] At, p. 390, note 36.

[5I] Ulp. D. 9, 2, 7, 8. Cf. e.g. Heldrich, (1939-40) *SSJhJb* 150; Just. *Scritti Guarino,* vol. VI, p. 3061.

[5I] Cf. e.g. Wmdscheid/Kipp, §§ 399, 401; Berger, *ED,* p. 567; Buckland/Stcin, p. 505; Kaser, *RPr* I, p. 570; Thomas. (1961) 64 *BIDR* 236 sq.; F.B.J. Wubbe, "Opus scion la definition de Labeon" (1982) 50 *TR* 241 sqq.; for the historical development cf. particularly Kaufmann. *Altromische Miete.* pp. 205 sqq.

locator: he places out the work to be done. "Locavi opus faciendum . . . "[52] or, as Paulus says:

> "Opere locato conducto: his verbis Labeo significari ait id opus, quod Graeci *баготЁкеа/га* vocant, non ?p"yov, id est ea opere facto corpus aliquod perfectum."[53]

In what manner was this contract utilized? Very often there was a physical object to be worked upon or to be created: clothes to be cleaned or repaired,[54] cloth to be produced from wool,[55] jewels to be engraved,[56] a ring to be made,[57] a house to be built.[58] Sometimes the object did not undergo any physical change (for example: goods or passengers to be transported),[59] occasionally it was not a thing but a person (an apprentice to be taught)[60] and in other instances of locatio conductio operis there was no physical subject matter at all (games to be arranged or a trumpet signal to be given).[61] The decisive feature of all these transactions is that the customer was not interested in the services or the labour as such, but in the product or result of such labour. Indeed, he usually was not even interested in whether the conductor performed in person or whether he drew on the assistance of his employees. The conductor was responsible for producing the result; how he did this was (usually) up to him. Thus, the conductor was typically also not bound to obey orders or instructions as to the manner of carrying out the work.

2. Problems of classification

Obviously, where somebody employs a group of labourers to work, say, in his silver mine, we are dealing with a labour relationship (locatio conductio operarum); the jeweller, on the other hand, who engraves the initials of his customer on a bracelet, works under a contract of

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[52] Iav. D. 19, 2, 51, 1.

[53] Paul. D. 50, 16, 5, 1. On this text, see Wubbe, (1982)50 *TR* 241 sqq. He points out that opus does not refer to a material result (in the form of a physical object produced) but to an activity defined by and sustained up to an end (a т?\од).

[54] Cf. e.g. Gai. Ill, 205; Ulp. D. 19, 2, 9, 5.

[55] Ulp. D. 7, 8, 12, 6.

[56] Uip. D. 19, 2, 13, 5.

[57] Gai. D. 19, 2, 2, 1; *Inst*. Ill, 24, 4.

[58] Alf. D. 19, 2, 30, 3; Lab. D. 19, 2, 60, 3; Iav. D. 19, 2, 59; Paul. D. 19, 2, 22, 2. Cf. Robert Rohle, "Das Problem der Gefahrtragung im Bereich des romischen Dienst- und Werkvertrages", (1968) 34 *SDHl* 206 sqq.; Susan D. Martin, *Building Contracts in Classical Roman Law,* (unpublished Ph.D. thesis, Michigan, 1982; not available to me). The codifications of the civil-law countries still regard building contracts as a normal instance of a contract for work (locatio conductio operis) and provide only very few special rules dealing with this subject matter. On the growth of self-made "law" in the building industry which has occurred since then, see Werner Lorenz, "Contracts for Work on Goods and Building Contracts", in: *International Encyclopedia of Comparative Law,* vol. VIII, 8, nn. 6 sqq. Modern commentators usually deal with building contracts as a distinctive category within the framework of locatio conductio opens.

[59] Ulp. D. 19, 2, 11, 3; Gai. D. 19, 2, 19, 7; Gai. D. 19, 2, 25, 7.

[60] Ulp. D. 19, 2, 13, 3; Kaser, *RPr* I, p. 569, n. 60, De Robertis, op. cit., note 2, pp 197sqq.

[61] Cf. Kaufmann, *Altrdmische Miete,* p. 257.

locatio conductio operis (or, to use the terminology of English law, as an independent contractor). It is easy to establish the intention of the parties in these cases and to categorize their agreement accordingly. It is equally obvious, however, that there are a variety of marginal cases where it can be very difficult to decide on which side of the borderline between locatio conductio operis and operarum they fall.

These difficulties continue to persist in all those modern legal systems which have adopted the trichotomy of contracts grafted on to the Roman locatio conductio by the writers of the ius commune. Take, for example, the legal relationship between physician and patient. It is normally taken to be a contract of service by the modern German courts: the contract only obliges the physician to carry out, lege artis, an indicated medical treatment; it is not intended to make him liable for the success of such treatment.[62] But it is very doubtful whether the same applies if a physician accepts a patient for sterilization.[63] The Federal Supreme Court has gone further and even regarded it as a contract of service if a dentist promises to produce a dental prosthesis or to crown a tooth.[64] This appears to be wrong,[65] even if it is conceded that removal of the toothache cannot reasonably be taken to be the object of the contract. It is, indeed, not a therapeutic success that the dentist promises. Nevertheless, he undertakes to produce a more limited result (namely to prepare and fit onto the tooth a suitable crown), which in turn will (it is hoped) have the desired therapeutic consequences. Another notorious problem area in German law is the classification of the contract between an architect and his customer.[66]

One may ask, in view of the general recognition of "pacta sunt servanda",[67] why the classification of contracts still attracts so much of our attention. In German law it is mainly the fact that special (aedilitian-type) remedies have been introduced to deal with the problem of liability for defects under a contract for work.[68] They are

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[62] Cf. e.g. Dieter Giesen, *Arzthaftungsrecht—Medical Malpractice Law* (1981), pp. 158, 283, who also refers to French law, where the position is the same as in German law: the *obligation medicale* is an *obligation de moyens*, not an *obligation de resultat;* Franz Bydlinski, "Vertrage ubcr arztliche Leistungen, in: *Festschrift fiir Winfried Kralik* (1986), pp. 345 sqq.

[63] Cf. BGH, 1980 *Neue Juristische Wochenschrift* 1452 (1453) and LG Freiburg, 1977 *Neue Juristische Wochenschrift* 340.

[64] BGHZ 63, 306 sqq.

[65] Horst Heinrich Jakobs, "Die 2ahnarztliche Behandlung als Werkleistung", 1975 *Neue Juristische Wochenschrift* 1437 sqq.

[66] Cf. e.g. Horst Heinrich Jakobs, "Der Architektenvertrag im Verhaltnis zum Dienst-und Wcrkvertragsrecht", in: *Beitrdge ¿um Zivil- und Wirtschaftsrecht, Festschrift fur Kurt Ballerstedt* (1975), pp. 355 sqq.

[67] Cf. infra, pp. 576 sqq.

[68] Neither Roman law nor the ius commune knew such special remedies. The conductor had to produce the work lege artis and according to the specifications laid down in the contract (cf. e.g. Pothier, *Traite du contrat de louage,* n. 419: he was under an obligation *"de faire bien I'ouvrage").* If the work was defective, the customer could bring the actio locati: the conductor had not (properly) fulfilled his obligation. According to the BGB, the customer may, first of all, demand removal of the defect. In the second place, he may either cancel the

subject to very harsh prescription periods, however.[69] Claims based on malperformance under a contract of service, on the other hand, prescribe in 30 years. Such a vast discrepancy of prescription periods in closely related areas of law has proved to be a most unfortunate source of unsatisfactory distinctions and distortions.

In South Africa, the term "workman" in the Workmen's Compensation Act[70] has given rise to the most interesting and historically thorough judicial attempt at drawing a line between locatio conductio operis and operarum.[71] After reviewing Roman and classical Roman-Dutch law, Joubert JA rejected the supervision and control test of English law (that had been adopted in an earlier decision)[72] and stated that a right of supervision and control on the part of the employer is merely one out of several indicia (albeit an important one) in favour of a contract of service. The legal relationship between the parties as a whole has to be evaluated in order to establish the true object of the contract. In this context a variety of important legal characteristics are

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contract or claim a reduction of the purchase price (i.e. bring the actiones redhibitoria or quanti minoris). If the defect was due to the fault of the conductor, damages may be claimed instead of cancellation or reduction (§§ 633 sqq. BGB). May the customer, insread of demanding removal of the defect, insist on the production of a new work? The BGB is silent on this point, the problem therefore controversial. It is obvious that the system of remedies as provided by the BGB has been inspired by the rules relating to the purchase of fungibles. This was not without precedent, for §§ 318 sqq. I 5 PrALR had already used the aedilitian remedies as a model for the contract *of* work. For a thorough comparative analysis concerning the obligation to execute the work free from defects and the remedies in case *of* breach of this obligation, cf. Lorenz, op. cit., note 58, nn. 50 sqq.; idem, "Rechtsvergleichendes zur Mangelhaftung des Werkunternehmers", in: *Festschrift fur Ernst von Caemmerer* (1978), pp. 907 sqq. In fact, contracts of sale and for work are closely related. This is particularly obvious where the work is to be produced from material provided by the *contractor.* According to Roman law, this was a contract of sale *(cf.* supra, p. 235). The BGB deals with these cases under the heading of contract for the delivery of work. If a fungible thing is to be produced, the law of sale applies; in case of a non-fungible, most of the rules relating to the contract for work are applicable (§ 651 BGB). All in all, as Lorenz points out, the law of sale has in many respects provided the basis for the proper development of rules governing defects liability in contracts for work. As to the interaction, along very similar lines, between the law of sale and the law of contract for work in the English common law, *cf.* Lorenz, op. cit., note 58, nn. 86 sqq.: the rules relating to the seller's warranty against defects have been transferred to the contract for work.

[69] Six months; in the case of work on land, one year; in the case of work on buildings, five years. The prescription begins to run from the moment of acceptance of the work (§ 638 I BGB). Thus it can happen that the claims are prescribed before it was possible for the customer to discover the defect. For details, critical evaluation and, particularly, what we have termed *"systemsprengendende Kraft dijferenzierter Verjahrungsfristen"* (distorting influence of diverging prescription periods), *cf.* Peters/Zimmermann, *Verja'hrun%sfristen,* pp. 196 sqq.

[70] Act 30/1941.

[71] *Smit v._ Workmen's Compensation Commissioner* 1979 (1) SA 51 (A).

[72] *Colonial Mutual Life Assurance Society Ltd. v. MacDonald* 1931 AD 412 at 434 sq. The court also rejected the "organisation test" (turning on the integration of the employee into the employer's business) as being of a "vague and nebulous nature"; cf. also the critical dictum by MacKenna J in the English case of *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance* [1968] 1 All ER 433 (QB) at 441H-444H.

listed in respect of which the two types of contract tend to differ.[73] They provide indicia as to the nature of the contract, and it is in this context that the problem of supervision and control, the employee's duty to obey lawful commands, orders or instructions, and his obligation to render his services in person feature prominently. The more independent, generally speaking, the position of the person rendering the services, the stronger the probability that we are dealing with locatio conductio operis. Very similar considerations prevail in German law.[74]

3. Range of liability of the conductor

With regard to the conductor's (the contractor's) liability we have the following interesting testimony by Gaius:

> "Qui columnam transportandam conduxit, si ca, dum tollitur aut portatur aut reponitur, fracta sit, ita id periculum praestat, si qua ipsius corumque, quorum opera uteretur, culpa accident."[75]

We are dealing with the transportation of a column,[76] locatio conductio operis. Hence, "qui . . . conduxit". First of all, then, the conductor is liable for (his own) fault ("ipsius . . . culpa"). We see, secondly, that he was obviously allowed to use others in performing his obligation.[77] But how did this affect his liability: was he liable not only for his own fault but for theirs also? Or was his liability still dependent upon whether he himself had been at fault? This is the most interesting question addressed by our text.

(a) Imperitia and custodia

Before considering this problem, we should, however, first take note of the fact that the conductor's liability actually went beyond mere culpa in two important respects. On the one hand, he was taken to have guaranteed, by implication, that he possessed the skills necessary for the

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[73] *Smit* M. *Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) at 61 sqq., esp. 64A-68B.

[74] For a detailed discussion, see Gerald Weber, *Die Unterscheiduttg von Dienstvertrag und Werkvertrag* (unpublished Dr. iur. thesis, Mimchen, 1977).

[75] D. 19, 2, 25, 7. On this text cf., most recently, Rolf Kniitel, "Die Haftung fur Hilfspersoncn im romischen Recht", (1983) 100 *ZSS* 419 sqq.

[76] Columns were very valuable and had to be handled with great care. In Rome whole columns rather than tambours were normally used and one can easily imagine that their transportation threw up problems and required special skills. For details cf. Vitruvius, *De architectura,* Lib. X, 2, §11, and Kniitel, (1983) 100 *ZSS* 420 sq.; also Story. *Bailments,* §432.

[77] But see also Ulp. D. 45, 1, 38. 21; Ulp. D. 46, 3, 31. Cf. further Gliick, vol. 17, p. 317; Maycr-Maly, *Locaiio conductio,* pp. 27 sqq. In modern civil-law systems the conductor is, as a rule, permitted to employ servants; sub-contracting is deemed to have been authorized by the customer if the contract or the nature of the relationship so permits. For a comparative analysis, see Lorenz, op. cit., note 58, nn. 26 sqq. Artists, for instance, may often have to perform in person, even where that is not expressly stipulated (as it was in the case of Albrecht Diirer, who undertook to paint the middle section of the Heller altarpiece himself, "and no other human being than myself shall paint one stroke of it": Rudolf Huebner, *A History of Germanic Private Law* (1918), p. 555).