

## Historical Development of Maritime Law\*\*

Tekst se bavi istorijskim razvojem pomorskog prava od najranijih početaka u Persijskom zalivu, pa do perioda stvaranja nacionalnih zakonodavstava, zaključno sa Srednjim vijekom. U tom smislu, tekst nije sveobuhvatan, budući da su izostavljeni periodi nacionalne kodifikacije počevši od 17. vijeka i period unifikacije pomorskog prava koji je započeo u 19. vijeku. Ovi periodi su detaljno obrađeni u knjizi autora iz kojeg su preuzeti samo djelovi najranijeg razvoja pomorskog prava. Tekst je jedan od najsveobuhvatnijih pregleda istorije pomorskog prava objavljen dosad, a naslanja se na komparativni metod na koji se naslanja ovaj istorijski pregled, budući da su komparativni i istorijski metod tijesno povezani. Oba služe potpunijem razumijevanju prava, a ovo se posebno odnosi na materiju pomorskog prava. Bez istorijskog uvida bi bilo teško razumjeti neke opskurne djelove pomorskog prava, od kojih neki ne postoje u drugim granama prava.

*Ključne riječi:* istorija, pomorsko pravo, rimsko pravo, *lex mercatoria*

„The history of what the law has been necessary to the knowledge of what the law is.”  
(*Oliver Wendell Holmes, Jr. 1881*)

### 1. Introduction

Learning history has a peculiar fascination, and so it is with the history of law. Understanding how or why specific legislation is developed can throw new light on some ambiguities or obscure elements in the legislation. The better we grasp the historical development of law, the better we will understand modern law.

The need for a historical approach is particularly strong in maritime law, given its long and rich history. Maritime law is one of the oldest bodies of law today, and maritime books almost always

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emphasise its ancient character.<sup>1</sup> Researchers in the history of maritime law often realise that ancient doctrines, which might be considered obsolete today, constitute the foundation of the modern law.

An unbroken tradition connects ancient maritime customs or rules with modern maritime law. Naturally, without the effort to understand the ancient rules and their evolution, people may find it difficult to comprehend many of the rules of modern maritime law. Some obscure and ambiguous concepts may become clearer and more transparent when their historical development is revealed. Learning about history may help understand and interpret current rules.

Maritime law resembles a tree with many branches going in different directions and at different heights. As with every tree, maritime law has its roots that define its nature and character and give the tree its unity and stability. That is why it is essential to understand the historical development of law and explore its roots, from which we can appreciate how old rules have evolved and have come to constitute the background of present regulations.

The history of maritime law may be divided into five periods. The first is the ancient period, which spanned many centuries from the earliest traces in the Hammurabi Code, and even earlier, to the demise of the Roman Empire. Most of the rules of this period can be found in Roman and Byzantine laws.

The second period began with the Crusades and the revival of maritime trade after a dark period of wars, invasions, and destruction that followed the fall of the Roman Empire. This was the Middle Ages period during which maritime customs, mixed with Roman law elements and influenced by canon law, served as a basis for the adoption of many important maritime regulations, such as the Oleron Rolls and the *Consolato del Mar*. That was the period of creation and domination of *Lex Mercatoria*.

The third period began with the creation of modern states, when maritime law acquired national character and was codified in civil law countries, whereas in common law countries it was expressed in case law.

The fourth period began in the 19th century, following the replacement of sailboats by steamships and the unification of some international instruments. We are now in a period in which new rules are being developed in response to technological developments and increased attention to environmental protection and new technologies.

The scope of this text is limited to the first two stages, in line with its purpose and character. The remaining two stages are elaborated in detail in the book itself.

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<sup>1</sup> As stated by Mme Schade, playing with words, “*la mer comme mère du droit*” (“sea as the mother of law”), R. Schade ‘La mer comme mère du droit’ In: *Studies offered to René Rodière* (Daloz, Paris 1981) 513.

## 1.1 Ancient Period

### 1.1.1 Development of Maritime Commerce

Maritime commerce was well-developed in the ancient period in the Arabian Sea, the Persian Gulf, and the Mediterranean.<sup>2</sup> Little archaeological evidence for prehistoric vessels survived because they were made from perishable materials.

The earliest representation of a ship under sail appears on an Egyptian vase from about 3500 BC.<sup>3</sup> Maritime historians know a good deal about ships of this period because the Egyptians, in those days, occasionally buried pharaohs with ships to transport them in the afterlife.<sup>4</sup>

The ablest shipbuilders of ancient times were the Phoenicians, who succeeded the Egyptians as the leaders of commerce in the Mediterranean. They constructed merchant vessels capable of carrying large cargoes from their colonies in the Mediterranean Sea, such as Carthage in North Africa and Cádiz in Spain, as well as from other territories under their control, such as Cyprus and Malta. The design of merchant ships steadily improved, enabling the Phoenicians to navigate beyond the Mediterranean Sea as far as the British Isles and the Canary Islands.

The destruction of Tyre by Alexander the Great in the 4th century BC marked the end of Phoenicia. Even before that, the Phoenicians encountered competition from the Greeks over maritime trade routes. The Greeks gradually became the dominant maritime power in the Mediterranean. Particularly, Rhodes was renowned in those days for its formidable naval fleet.

The domination then shifted again to the west, to the Roman Empire. Rome did not become a naval power until the Punic Wars of the 3rd century BC. Roman galleys and merchant ships dominated the Mediterranean until the Western Empire broke up in the 5th century AD. The Mediterranean was under Roman control during the Roman Empire, and the trade was governed by Roman law.<sup>5</sup> As a result, maritime law remained uniform and retained this characteristic despite changes throughout history.

Of course, navigation had existed in other parts of the world as well. In China, shipbuilders developed an entirely different type of

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<sup>2</sup> Frederic Sanborn, *Origins of the Early English Maritime and Commercial Law* 3–5 (1930).

<sup>3</sup> The oldest picture of a sea-going vessel of large size is the sculptured ship of Queen Hatshepsut, in Egypt, about 1500 BC.

<sup>4</sup> One such funeral ship was unearthed in 1954 during the excavation of the Great Pyramid of Giza. This ship was constructed for the pharaoh Khufu, also called Cheops, around 2600 B. C. Remarkably well preserved, it was built from wood planks and timbers and was approximately 38 m (125 ft) long. Historians learned a great deal about Egyptian shipbuilding techniques from this vessel, which has come to be known as the Cheops ship.

<sup>5</sup> Romans called the Mediterranean Sea “*Mare Nostrum*” (Our Sea).

sailing ship called a “junk”, a name derived from the Javanese *djong*, meaning ‘ship’ or ‘large vessel’.<sup>6</sup> Chinese junks were initially developed during the Han Dynasty (220 BC-200 AD) and evolved into one of the most successful ship designs in history. They were used both for military combat or trade to travel long distances. By the 9th century, Chinese junks regularly plied the coastal and open waters of China, Japan, and Southeast Asia, and by the 15th century, they travelled periodically as far as East Africa.<sup>7</sup>

In southern Asia, sea navigation was also developed. Some texts address aspects of maritime trade.<sup>8</sup>

### 1.1.2 Early Development of Maritime Law in the Persian Gulf

There is solid ground to believe that the Mediterranean was the birthplace of modern maritime law. The maritime trade was highly developed in the basin of the Mediterranean Sea; it was an ideal environment for trade, large enough to accommodate diverse people with different resources and goods, yet small enough to ensure active contact between them.<sup>9</sup> However, the early beginnings can be traced to the Persian Gulf.

There is no reliable evidence to prove the existence of maritime legislation in the ancient period. The earliest traces of rules governing boat leases can be found in the Sumerian Laws Handbook (circa 1700 B. C.). Several provisions dealing with shipping are found in the Sumerian Laws Handbook of Forms (ca. 1700 BC). For example, the Lipit-Ishtar Code (1934–1924 BC) contains a provision that deals with liability for unjustified deviation, as understood in those times:

C xiii 12–23 “If a man rents a boat and an agreed route is established for him, but he violates its route and the boat... in that place—he has acted lawlessly; the man who rented the boat shall replace the boat and [he shall measure and deliver in grain its hire].”

<sup>6</sup> [https://www.newworldencyclopedia.org/entry/junk\\_\(ship\)](https://www.newworldencyclopedia.org/entry/junk_(ship)).

<sup>7</sup> Among the most famous accomplishments were the journeys of Chinese explorer Zheng He (Chinese: 鄭和), who belonged to Hui ethnic group and who made seven voyages across the Indian Ocean, the Sea, and the Red Sea, commanding a fleet of about 200 junks in the period between 1405 and 1433. Edward, L Dreyer, *Zheng He: China and the Oceans in the Early Ming, 1405–1433* (New York: Pearson Longman, 2007).

<sup>8</sup> The Indian *Manusmriti* (Sanskrit: मनुस्मृति) (drafted between 2<sup>nd</sup> century BC and 3<sup>rd</sup> century AD) stipulates that a “carrier, who has stipulated to carry (a thing) for a certain time, or for a certain distance {lit. place} in consideration of fares, charged at the rate of compound interest, shall not be entitled to it (compound interest), if he fails to carry it for that much time or distance.” The translation is not very clear, but most likely this was a provision on maritime loans (explanation given in the footnote states that “the interest must not double the amount originally lent and advanced”). Dutt, Manmatha Nath, *Manu Sambhita: English Translation, (The Society for the Resuscitation of Indian Literature, Calcutta, 1909) p. 275.*

<sup>9</sup> Thomas Schoenbaum, *Admiralty and Maritime Law*, § 1–2.

There are also a few provisions related to liability:  
v 21–26) “If the boat sinks, he shall replace the boat and return its hire to the quay.”

Here is a quote from this Sumerian law related to the hiring of a boat:

Sect. 12–20: “If a man rents a boat, and he destroys the wooden ... and the wooden..., he shall weigh and deliver one-half of its value in silver.”<sup>10</sup>

Sect. 4 provides for a daily rate of hiring a boat, and Sect. 5 provides for liability of a negligent boatman: “If the boatman was negligent and caused the boat to sink, whatever he caused to sink he shall pay in full.”

One of the oldest legal texts known in the history of civilisation is the Hammurabi Code, made under the king of Babylon in 1755–1750 BC.<sup>11</sup> This Code contained specific rules of maritime law on vessel construction, freight, marine collisions, and the shipowner’s responsibility.

As an illustration, one provision of the Hammurabi Code deals with the liability of shipbuilders:

§ 235. “If a boatman builds a boat for a man and he does not make its construction seaworthy and that boat meets with a disaster in the same year in which it was put into commission, the boatman shall reconstruct that boat, and he shall strengthen it at his own expense and he shall give the boat, when strengthened to the owner of the boat.”

There are several provisions in the Hammurabi Code regarding boat leases. For example, Article 275 provides: “If anyone hires a boat, he shall pay three gerahs in money per day.”<sup>12</sup>

The first traces resembling salvage can also be found in the Hammurabi Code. Article 238 states:

“If a sailor wrecks anyone’s ship but saves it, he shall pay half of its value in money.”

<sup>10</sup> This Lipit-Ishtar Code originated in Lower Mesopotamia and was written in the Sumerian language; it preceded the Hammurabi Code. Laws of Eshnunna (around 1930 BC) was another Mesopotamian law that contained a few provisions related to the hire of boats.

<sup>11</sup> Some Sumerian laws, such as the Laws of Ur-Nammu (Sumerian 3<sup>rd</sup> Dynasty of Ur) are dated back to 2100 BC. Translation can be found in Marta T. Roth, *Law Collections from Mesopotamia and Asia Minor* (2<sup>nd</sup> ed., Atlanta, Ga. Scholars Press, 1997) p. 15.

<sup>12</sup> Articles 376 and 377 provide for lower amounts of hire for smaller boats, which implies that the amount of hire depended on the size of a boat. Articles 236 and 237 also contain provisions on hire of boats.

This provision contains an incentive for a party to salvage a vessel he wrecked by reducing liability for damage to half.

The Hammurabi Code also contains the oldest known legal provision on collision. Article 240 provides:

“If a boat hits and sinks another boat, the owner of the boat which sank shall seek justice before God; the master of the merchant, who wrecked the boat, must compensate the owner for the boat and all that he ruined.”

This provision demonstrates that there was compensation for loss (damages) resulting from ship collisions even in those antique times. However, under this provision, it is unclear whether fault was a requirement for liability or whether sinking a vessel alone constituted the basis for liability, which may be considered an objective responsibility.

### *1.1.3 Developments in Ancient Greece*

The period after the Hammurabi Code is covered by darkness and mystery. A considerable gap exists between the Hammurabi Code and the subsequent preserved maritime law legislation, which is found only in Roman law. Some scarce traces of maritime law are found in Greece, but no record of maritime laws has been discovered for the period that covers more than a thousand years after the Hammurabi Code. Nevertheless, there had to be something in between. It is implausible that ancient people failed to regulate maritime commerce when maritime navigation flourished.<sup>13</sup> Increasing maritime trade and navigation inevitably led to a rising number of accidents and, consequently, to a greater awareness of the need for legal regulations.

Several Mediterranean trading empires rose and fell during that time. Given that the ancient Egyptians engaged in broad-scale shipping, it can be inferred that they had at least rudimentary laws regulating maritime trade. Similarly, the Phoenicians have been masters of Mediterranean trade for centuries, so it would be reasonable to assume that specific legal rules governing maritime trade existed.<sup>14</sup> The Phoenicians likely developed maritime customs and laid the foundation for maritime law in the Mediterranean. Yet, there is no information on any maritime laws of the Phoenicians. Some authors speculate that nautical laws originated in Phoenicia but offer

<sup>13</sup> J. Pardessus, *Collections*, Vol. I, 17.

<sup>14</sup> Indirectly, the excellence of the Phoenician law is testified to by Aristotle in his *Politics*, who, referring to Carthage, a Phoenician colony, stated that its institutions were in some respects superior to those of any of the Greek States (Aristotle, *De Politica*, Book II, Chap. 11).

no evidence to support such a claim.<sup>15</sup> Some traces of nautical loans are found in Indian sources.<sup>16</sup>

The existence of maritime loans may be traced at least until ancient Greece.<sup>17</sup> The ancient Greek city-states probably had well-developed laws dealing with the carriage of goods by sea and specialised commercial courts to settle disputes among carriers, shippers, and consignees. Some traces of ancient maritime law can be found in Athens.<sup>18</sup> In his orations, Demosthenes referred to shipping contracts, particularly maritime loans.<sup>19</sup> He left abundant material that may be used to reconstruct ancient Athenian legislation on maritime loans.<sup>20</sup> Two speeches of Demosthenes (Adv. Phormionem, Adv. Lacritum) deal exclusively with this subject. A maritime loan generally contained a pledge or hypothecation, and the loan was made repayable upon the safe arrival of the subject hypothecated.<sup>21</sup> A maritime loan was a loan upon security, and the security might be a ship, its freight, or a cargo.<sup>22</sup>

Some of these laws probably originated in Rhodes. One of the earliest known maritime laws, *Lex Rhodia* (Rhodian Law), was created here.<sup>23</sup> The emperor Augustus declared the Rhodian Law the

<sup>15</sup> J. Pardessus Vol. I, xxix; Antonio Brunetti, Trattato, I, para 13. Jean Dauviller, "Le droit maritime phénicien" (1959) Rev. int. des droits des antiquités, 33.

<sup>16</sup> Manmatha Nath Dutt, *Manu Samhita: English Translation*, (*The Society for the Resuscitation of Indian Literature, Calcutta, 1909*) p. 275.

<sup>17</sup> The evidence of this kind of business can be found in old Athens preserved in court speeches delivered before commercial courts (*dikai emporikai*) attributed to Demosthenes (384–322 B. C.).

In Case No. 32, he mentioned the case of fraud in which merchants from Marseilles took a loan, repayment of which was conditioned on the safe voyage of the vessel and secured by the cargo (respondent). The merchants used the same cargo to take a loan from several other merchants, sent the money home, and then scuttled the ship to avoid repayment. This plan was discovered, and one of the merchants, who was also the ship's captain, drowned in the attempted barratry.

<sup>18</sup> Walter Ashburner (p. 209–217) provides a detailed discussion on maritime loans in Greece. The main difference from ordinary loans is that the lender takes maritime risks (W. Ashburner, 210).

<sup>19</sup> Four speeches of Demosthenes expressly deal with cases arising out of maritime loans, which seemed to be widely used in Athens in those times: Dem. 32; 34; 35; 56. For example, in a pleading against Lacritus, Demosthenes made explicit reference to maritime loans (*The Orations of Demosthenes*, Translated by Charles Rann Kennedy, (J. London George Bell & Sons, York St., Covent Garden and New York, 1892, pp. 185–202).

<sup>20</sup> Pardessus, Vol. I, 38.

<sup>21</sup> W. Ashburner states (at 210) that "in the Greek documents there is hypothecation of ship or cargo, as the case may be, and the loan is made repayable upon the safe arrival of the subject hypothecated."

<sup>22</sup> Ashburner, 213. The maritime loan generally contained a pledge or hypothecation (*evéxvrou*) as a security.

<sup>23</sup> *Lex Rhodia* originated on the island of Rhodes between the ninth and fifth centuries B. C. and is widely considered the oldest maritime law code. Many authors use the name "*Lex Rhodia de iactu*". Actually, "*de iactu*" addition is about throwing (*iactu* is ablative of *iactus*=thrown, cast), and it probably refers to the

law governing maritime cases at Rome. In contrast, the emperor Antonius referred to the Rhodian Law as the law sovereign on the sea. The Rhodian Law achieved such prominence that a part of it was carried over, after many centuries, into Justinian's legislation. This law is believed to date to the 9th-5th centuries BC, but it is known only as a reference, whose actual content will probably remain a mystery forever.<sup>24</sup>

## 1.2 Roman Law

After the Romans conquered Greece following the battle of Corinth in 146 BC, Greek culture infiltrated the Roman Empire. As part of that process, the Romans adopted and adapted Greek law into their civil law system.

The Romans did not create many new maritime law rules; they codified existing customary law and, in doing so, preserved rules that later influenced the further development of maritime law. The Romans never adopted a general code of maritime law, and its provisions are scattered throughout various rules of Roman law.<sup>25</sup> In 533 AD, Emperor Justinian published a digest of law in Constantinople that contained comprehensive provisions on maritime commerce.<sup>26</sup> At the time the Digest was drafted, the Roman Empire was divided into Western and Eastern parts, with the Western part falling to the Goths. However, there was a close relationship between Constantinople and Italian cities, so the Digest was applied there as well.

From its beginnings, maritime law has been transnational law rather than national law, and it was declared not to be a part of Roman law, which was land law. The *Lex Rhodia* inspired the Digest; *some* parts contain Greek words. Pardessus asserts that *Lex Rhodia* was

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jettison of the goods in general average. It can be assumed that the part on general average was one piece of *Lex Rhodia*, and the only one that was preserved in the Justinian digests. The text of the provision on general average states just "*lege Rhodia cavetur*" (Dig. 14.2.1).

<sup>24</sup> In 1995, a column containing legal text was found during reconstruction and enlargement work in Rhodes' harbour. The text mentions *Lex Rhodia* and is believed to be a relic of this ancient legislation: Nathan Badoud, "Une inscription du port de Rhodes mentionnant la *lex Rhodia de iactu*" (published in Werner Eck, et al, XIV Congressus Internationalis Epigraphiae Graecae et Latinae. 27-31. Augusti MMXII. Akten (De Gruter, 2014) p. 450. Acknowledging Rhodes as the birthplace of maritime jurisprudence, the maritime code of the later Eastern Empire, dating from the 7<sup>th</sup> or 8<sup>th</sup> century AD, was known as the "Rhodian Sea Law" (see 1.3.1.4).

<sup>25</sup> Donovan doubts the existence of a Roman maritime code: see James J. Donovan, "*The Origins and Development of Limitation of Shipowners' Liability*" (1979) 53 (4) Tulane LR 999, at 1000. Donovan probably misunderstood the arguments of Gilmore and Black, who doubted the existence of the Rhodian law (Grant Gilmore & Charles Black, *The Law of Admiralty*, at 3-4). There is no doubt that the Roman maritime code never existed.

<sup>26</sup> The Justinian Digest was one of the four books of the *Corpus Juris Civilis*, drafted in Constantinople between 528 and 534 A. D.

a major source of maritime law that influenced the Digests.<sup>27</sup> Two passages from the Digest evidence this. The first quotes the emperor Antonius (reigned 138–161 AD), who implied the recognition of Rhodian Law in a case of plunder following a shipwreck:

“Yes indeed, I am the Lord of the land, but the Rhodian law is the Lord of the sea. Let the Lex Rhodia decide this case, provided that no law of ours opposes it.”<sup>28</sup>

Justinian Digest provides an excellent source of information on the character and contents of maritime law in the Roman Empire.<sup>29</sup> Maritime law primarily concerns rules applicable to ships and to those who own or navigate them. Several provisions in the Digest regarding shipping are assumed to reflect customary rules of earlier periods. Most important are provisions concerning (i) general average; (ii) shipowner’s liability; (iii) maritime loans; (iv) salvage; and (v) collision. While the limitation of the shipowner’s liability was not regulated, specific Roman law provisions served as the basis for this essential maritime law concept.

#### (i) General Average

The chapter on general average is explicitly attributed to the Rhodians. It even holds the title *De Lege Rhodia de Jactu*, meaning ‘Of the Rhodian Law of Jettison’.<sup>30</sup> The chapter starts with the words “*Lege Rhodia cavetur...*” (“Lex Rhodia stipulates...”).<sup>31</sup> It refers to the Rhodian law in the statement, “If cargo is thrown overboard to lighten a ship, the loss of the cargo sacrificed for the benefit of all shall be compensated by a contribution from all.” This short sentence contains the principle of the general average. What is given up, or sacrificed, in time of danger for the sake of all is to be replaced by a general contribution of all who have been brought to safety. All parties involved must contribute to bear the loss, as the sacrifice was made voluntarily for the benefit of all; all should proportionally bear the

<sup>27</sup> J. Pardessus, Collections, Vol. 1, 22.

<sup>28</sup> Dig. 14, 2, 9. Ego quidem mundi Dominus, lex autem maris lege, id Rhodia, quae de rebus nauticis praescripta est, iudicetur, quatenus nulla nostrarum legum adversatur.

<sup>29</sup> The maritime provisions of the Digest are quoted in J. Pardessus, *Collection des Lois Maritimes Anterieur au XVIII Siecle* (1828) 85–132.

<sup>30</sup> Dig. 14, 2.

<sup>31</sup> *Lex Rhodia* originated at the island of Rhodes between the ninth and fifth century B. C. and is widely considered to be the oldest maritime law code. Many authors use the name “*Lex Rhodia de iactu*”. Actually, “*de iactu*” addition is about throwing (*iactu* is ablative of *iactus*=thrown, cast), and it probably refers to the jettison of the goods in general average. It can be assumed that the part on general average was one piece of *Lex Rhodia*, and the only one that was preserved in the Justinian digests. The text of the provision on general average states just “*lege Rhodia cavetur*” (Dig. 14.2.1).

loss according to the value of their property.<sup>32</sup> This rule has been universal amongst seamen from the oldest times, founded on the necessities of their position and the need to share the risks. This rule has applied throughout the Mediterranean and still does today, being adopted and recognised in the maritime law of all nations as the general average.

(ii) *Shipowner's Liability*

Roman law regulated the shipowner's liability for the contract concluded by the ship's master — this may be one of the earliest recognitions of an agency relationship. The rubric entitled "*De Exercitoria actione*" is intended to make the shipowner responsible for the shipmaster's acts.<sup>33</sup> A party might have action *ex delicto* against an *exercitor* in respect of the act either of the master or of the sailors, but not on the contract of the sailors. If the master substituted a person in his place, the shipowner would still be bound by any proper contract of such person. According to Ulpian, this was reasonable since the shipowner appointed the master and held him out to third parties as an agent, so the shipowner should be bound by his acts. This applied to all acts the master performed in the discharge of his duties. This included the master's power to borrow money in case of necessity, by taking a loan for the use of the ship. The concept of agency in necessity is still applied in modern contract law.

The first traces of the modern system of carrier liability can be found in Roman law. In Roman law, the contract of carriage had not achieved the status of a distinct contractual form. At that time, lawyers dealt with it within the framework of the contractual forms they knew, such as deposit and hire of services.

The rubric "*Nautae, caupones, stabularii, ut recepta restituant*" (Dig. 4, 9) is related to the responsibility of mariners and inn or stable keepers. Under Digest 4.9, shipowners (*nautae*),<sup>34</sup> innkeepers (*caupones*), and stable keepers (*stabularii*) were liable to compensate damage to the plaintiff where a delict (or tort) of theft or wrongful loss had been committed by any of their employees in the ship, inn or stable.<sup>35</sup>

From a theoretical perspective, the liability of shipowners, innkeepers, and stable keepers was based on quasi-delict (*quasi ex delicto*)

<sup>32</sup> There were some exemptions from the rule, such as free passengers on a vessel, since the body of a freeman could not be subjected to valuation, in contrast to slaves.

<sup>33</sup> Dig. 14.1. The term "*exercitor*" refers to the person who manages the ship (*qui navem exercet*). This could mean either shipowner or lessee (charterer).

<sup>34</sup> The Latin term "*nauta*" means mariner and generally relates to all persons who navigate a ship. In this context, it means the person who acts on behalf of the shipowner.

<sup>35</sup> *Actio Adversus Nautas, Caupones, Stabularios*: D. 4.9.1. Ulpianus, On the Edict, Book XIV. The praetor says: "When masters of ship, innkeepers, and the masters of stables have received property for safe keeping, I will grant an action against them if they do not restore it".

that covered several types of harm, grouped by no identifiable principle classified as analogous to extra-contractual (delict) liability. This was a vicarious liability apart from fault, or more precisely, strict liability based on presumed negligence.<sup>36</sup> The shipowners, innkeepers, and stable keepers were made liable for their employees' wrongdoing in the course of their employment, and their liability was strict<sup>37</sup>. Liability extended to cover negligent omissions (*culpa in non-faciendo*). The liability was strict: they had a duty to restore the goods in their custody and were held liable for any loss or damage, regardless of their fault. They would be liable even if they acted with due diligence and could be relieved of responsibility only by proving that the loss was attributable to a fortuitous event outside of human control (*damnum fatale*).<sup>38</sup>

The common feature linking these three parties was that goods were entrusted to their custody (*receptum nautarum*); this implied that they knew of anything that happened to the goods. They did not enjoy a good reputation as there was a risk of abusing their position as custodians and colluding with thieves.<sup>39</sup> The shipowner's liability was based on *custodia*, meaning the duty of due diligence to guard, care, and keep the goods safe. At the same time, they are entrusted to him to deliver the goods in the same condition as he received them for carriage. The rationale for this liability system was the need to protect the parties who entrusted their goods to the custody of shipowners, innkeepers, or stable keepers. Digest 4.9.1.3 provided that the master could issue an acknowledgement called "*xeirembolon*" (χειρέμβολον), which indicated that the master had taken cargo into custody.

The shipowner who agreed to carry the goods safely is bound to deliver them at the destination port in the same condition as when received (Dig. 4, 9, 1). The shipowner's responsibility for cargo that was received and kept in custody was strict. The shipowner was liable for damage even if it occurred without his fault, and he could be exempted only in the case of the peril of the seas or other inevitable accidents (*damnum fatale*) such as piracy and shipwreck (Dig. 4, 9, 3, 1). The rule was justified by public policy, as it was necessary to rely on the honesty of such parties, who were in a position to commit fraud by misappropriating the property entrusted to their custody. The shipowner was responsible to the injured person for theft or assault committed by his sailors. Still, he could exempt himself from responsibility by declaring that the passengers are responsible

<sup>36</sup> Thomas AJ McGinn (ed), *Obligations in Roman Law: Past, Present, and Future* (Ann Arbor: University of Michigan Press, 2012) 314.

<sup>37</sup> Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press, 1996). 516.

<sup>38</sup> R. Zimmermann, at 515.

<sup>39</sup> R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press, 1996) 516.

for their own goods if they consent (Dig. 4, 9, 7). Roman law made a distinction between theft by mariners and by passengers, and the shipowner was not responsible for theft by the latter unless he guaranteed the safety of the goods (Dig. 47.5).

Digest 4.9.1.3 provided that the master could issue an acknowledgement called *xeirembolon* (χειρέμβολον), which indicated that the master had taken cargo into custody.<sup>40</sup> The fact that this important term was in Greek indicates that this provision probably originated in Greece, possibly in the *Lex Rhodia*. There is insufficient evidence to determine whether this acknowledgement was in the form of a document or based on verbal consent.<sup>41</sup> Digest 4.9.1.3 stated that even if the master did not make this acknowledgement, the shipowner would nevertheless be liable for what was received. This can be construed as liability for the property received in custody, which was evidenced by *xeirembolon*, or in the absence of this acknowledgement, by other evidence. *Xeirembolon* was not a guarantee of the safe arrival of the goods, as in such a case it could be construed as a contract of carriage, instead of being just an acknowledgement evidencing that certain goods were received for carriage. However, *xeirembolon* served as the legal basis for liability for safekeeping. The owner of the goods had to prove the damage by relying on *xeirembolon* as evidence; the burden then shifted to the shipowner to prove what happened and that he was not liable.

There is merit to the assertion that *xeirembolon* was the seed from which bills of lading developed later. At the same time, the liability of *nautae* under Roman law represented the basis for the modern concept of presumed liability of the carrier.

These Roman law rules have strongly influenced later rules on the carrier's liability and form the basis of the modern principle of the carrier's presumed liability.

<sup>40</sup> D. 4.9.1.3, Ulp. Ad edictum:

*Et sunt quidam in navibus, qui custodiae gratia navibus praeponuntur, ut naufulakes et diaetarii. si quis igitur ex his receperit, puto in exercitorem dandam actionem, quia is, qui eos huiusmodi officio praeponit, committi eis permittit, quamquam ipse navicularius vel magister id faciat, quod xeirembolon appellant. sed et si hoc non exercet, tamen de recepto navicularius tenebitur.* (Translation: "There are also persons who occupy positions on board ships for merchandise such as nauflakes, that is to say, marine guards and stewards. Therefore, if any of these should receive anything, I think that an action should be granted against the owner of the ship because he who appointed persons of this kind to office permits the property to be placed in their charge; even though the captain, or master does that which is called *xeirembolon* that is to say, 'taking the property in his hands'. But even if he does not do this, the ship-owner will nevertheless be liable for what was received.")

<sup>41</sup> According to Pardessus, *xeirembolon* represented a verbal consent (J. Pardessus, *Collection de lois, maritimes antérieures au XVIIIe siècle* I. Paris 1828, 87, note 2).

### (III) Maritime Loans<sup>42</sup>

The Digest contains provisions on maritime loans, entitled *De Nautico Faenore* (Dig. 22, 2, and Code, 4, 33).<sup>43</sup> *Pecunia trajectitia* (often referred to as *faenus nauticum*) was a loan by which a merchant extended credit to the shipowner as security for performing the voyage.<sup>44</sup> The borrower, whose act is *mutuum sumere* or *mutuum accipere*, and the lender, whose act is *mutuum dare*, receive and give what must be given back by substitution<sup>45</sup>

Maritime loans were most often used when, during a voyage, the master needed supplies necessary for the completion of the voyage, and he would enter into maritime loan agreements with merchants on behalf of the shipowner, acting as an agent in necessity.<sup>46</sup>

*Foenus nauticum* was probably the earliest instrument to separate casualty risks from other business risks. If the voyage was completed successfully, the merchant was entitled to receive a part of the profit; if the ship failed to arrive safely due to any of the perils enumerated in the contract, the creditor would lose his money.<sup>47</sup> The loan was repayable only upon the safe arrival of the ship and its cargo; the loan was not recoverable in the case of the total loss of that vessel by any of the perils enumerated.

The charge paid was a risk premium (*premium periculi*) and it was far above the ordinary interest rates due to the high risks involved. An edict later restricted the interest on the originally unlimited loan to 12% (*centissimae usurae*).<sup>48</sup> Maritime loans differed from other loans because the interest rate was calculated per voyage rather than monthly. The maritime loan is considered a primitive form of marine insurance rather than usury, since the loan was

<sup>42</sup> On the history of maritime loans, GEM de Ste Croix, Ancient Greek and Roman Maritime Loans in Harold Edey and BS Yamey (eds), *Debits, Credits, Finances & Profits* (Sweet & Maxwell, London, 1974). See also, W. Asburner, 210.

<sup>43</sup> *Foenus* — interest on money lent. There are strong arguments that bottomry existed before the Roman Empire and was practiced by the Babylonians, Phoenicians, and Greeks. The traces of this kind of business can be found in the Code of Hammurabi and old Athens, preserved in the speeches of Demosthenes (see, para. 1.3.1.2).

<sup>44</sup> Some authors use “*phoenus*” instead of “*foenus*”. Dig. 22.2.0 is entitled *De nautico faenore*. There are also different English translations; some authors use the term “nautical,” others “maritime,” while Alan Watson, in his translation of the Justinian Digests, uses the term “transmarine” (The University of Pennsylvania Press, 1998).

<sup>45</sup> Paul D. 22.2.6: “*Faenerator pecuniam usuris maritimis mutuam dando*” (“A lender lent money at a maritime interest rate and took a mortgage over the goods in the ship”).

<sup>46</sup> D. 14, 1, Ulpianus.

<sup>47</sup> A contract whereby the owner of a ship borrows money to enable the vessel to complete the voyage and pledges the ship as security for the loan: Dig. 22.2.6.

<sup>48</sup> CJ 4.32.26.2.

not recoverable in the event of a total loss of the vessel due to any of the enumerated perils.<sup>49</sup>

A maritime loan was secured by ship and cargo through a pledge (*pignus*) or hypothecation (*hypotheca*).<sup>50</sup> But repayment of the capital and payment of interest were conditional on the ship's safe return. The pledge or hypothecation might be of the goods purchased with the money lent or to be purchased with the proceeds of sale of these goods, or of other goods belonging to the borrower sailing on other ships.<sup>51</sup> If the ship failed to return from the voyage, the lender would not have any right against the debtor.<sup>52</sup> One of the peculiar features of the maritime loan was that the lender undertook the risk of maritime adventure. The maritime loan was not a gambling contract, but the parties had a pecuniary interest in maritime adventure.<sup>53</sup>

#### (IV) *Law of Finds and Salvage*

The law of finds had its roots in the so-called *ius naufragii*, a customary rule that gave the inhabitants of the coast the right to the property (e. g., from the wreck of a ship) they would find on the shore, brought by the sea.<sup>54</sup> The practices based on *ius naufragii* resulted in heavy losses to those engaged in maritime trade and navigation.

Roman law did not recognise this customary rule. If a ship was wrecked, the property cast ashore was not considered derelict, and the person who would take such property was a thief.<sup>55</sup> Roman law also provided for heavy penalties against shipwreckers. According to

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<sup>49</sup> Marine insurance did not exist in ancient times, although general average and bottomry contain certain features of joint risk-sharing. The need for marine insurance was not significant because maritime navigation was not so developed. Navigation was not practiced from October to April, when it was most risky.

<sup>50</sup> Dig. 22, 2, 4.

<sup>51</sup> Dig. 22, 2, 4. Ashburner, 221.

<sup>52</sup> Dig. 22, 2, 6. Ashburner, 221.

<sup>53</sup> Dig. 22, 2, 1.

<sup>54</sup> The Pandects of Justinian contain the following passage:

“When a ship is sunk or wrecked, whatever of his property each owner may have saved, he shall keep for himself”. The condition was that the property owner has abandoned it; otherwise, it was considered theft (Ulpian D. 47, 2, 43, 11). Book II. Of Things “47. Accordingly, it is true to say that anything which is seized on, when abandoned by its owners, becomes the property of the person who takes possession of it. And anything is considered as abandoned which its owner has thrown away with a wish no longer to have it as a part of his property, as it therefore immediately ceases to belong to him.”

<sup>55</sup> Dig. 41, 1, 9, 8:

“It is another matter with those things which are jettisoned in the stress of seas to lighten the vessel; they remain the property of their owners; for they are not cast overboard because the owner no longer wants them, but that the ship may have a better chance of riding the storm. Consequently, if anyone finds any such things washed up by the waves or, for that matter, in the sea itself and appropriates them with a view to gain, he is guilty of theft.”

the title *De Incendio, Ruina, naufragis, Rate, nave expugnata*,<sup>56</sup> which is related to the plunder of vessels in distress, the praetor's edict gave fourfold damages to the owner against any person who, by force or fraud, plundered a ship in distress.<sup>57</sup> The guilty persons were criminally liable and had to make just retribution to the aggrieved party. This rule was aimed at preventing abuses in cases of ship accidents.

*Ius naufragii* has never been recognised by Roman Law.<sup>58</sup> According to Roman law, things found on the shore retained the property rights of their original owners unless the property rights were abandoned (*animus dereliquendi*). The goods jettisoned into the sea are not treated as abandoned. The principle was: "*res autem iacta domini manet nec fit adprehendetis quia prom derelicto non habetur*" (Jettisoned goods remain the property of their owner; they are not treated as being abandoned and so do not become the property of whoever collects them).<sup>59</sup> If a ship is wrecked, goods cast ashore cannot be considered derelict.<sup>60</sup> "Anything taken from the sea does not begin to be the property of him who obtains it until the owner of said property begins to consider it abandoned."<sup>61</sup>

Roman law provided severe penalties for shipwreckers.<sup>62</sup> The title *De incendio, ruina, naufragis, rate, nave expugnata* relates to the plunder of vessels in distress.<sup>63</sup> The praetor's edict gave fourfold damages to the owner against any person who, by force or fraud, plundered a ship in distress. The guilty persons were liable not only to criminal punishment at the government's hands but also to make just retribution to the aggrieved party. According to Ulpian, the severity of the rule was necessary to prevent such abuses in cases of such calamity.

<sup>56</sup> Dig. 47.9.1:

"The Praetor says: "When it is alleged that anyone at a fire, in the destruction of a building, in a shipwreck, or in an attack on a boat or a ship, has taken anything by violence, or fraudulently appropriated property, or caused any loss, I will grant an action for quadruple damages within a year after the time when an action can be brought, and, when the year has elapsed, I will grant an action for double damages. I will also grant the action against a slave, and an entire body of slaves."

Dig. 47.9.1.5:

"The Praetor also says, "If anything is taken in a shipwreck," and, in this instance, the question arises whether this means if anyone takes property at the time of the shipwreck, or if he takes it at some other time, that is to say, after the shipwreck has occurred; for anything cast upon the shore after a shipwreck is said to belong to the vessel. The better opinion is that this refers to the time of the shipwreck."

<sup>57</sup> The same sanction was provided in Dig. 41, 1, 44.

<sup>58</sup> Ulpian D. 47, 2, 43, 11 "When a ship is sunk or wrecked, whatever of his property each owner may have saved, he shall keep for himself". The condition was that the property owner had abandoned it; otherwise, it was considered theft.

<sup>59</sup> Dig. 14.2.2.8 (Paul 34).

<sup>60</sup> Dig. XLI, 1, 58; 2, 21, 1.

<sup>61</sup> Dig. 41.1.58. Javolenus, On Cassius.

<sup>62</sup> Dig. 47, 9.

<sup>63</sup> Dig 47. 9. For more details, See Chapter 1, para 1.3.1.3.

The law applied equally to the fraudulent receiver and original taker of the shipwrecked articles, and he was held to be equally guilty. The comparison was made with the things that would accidentally fall from a horse carriage. The person who would take those things was considered a thief.<sup>64</sup> The same rationale applied: the owner may return to look for his property.

Roman law gave a person who saved the property of another, lost or in peril, a cause of action for reward, while the property remained with the original owner.<sup>65</sup> The part dealing with the general average concerns divers (urinators) who undertake to salvage jettisoned goods for compensation.<sup>66</sup>

### (V) Collision

Roman law did not regulate ship collisions in detail, so the general principle of civil law liability applied. *Lex Aquilia*, which applied to general tort cases, also applied to ship collisions without exception, making a distinction between collisions caused by fault (*culpa*) and accidental collisions (*casus*) and providing for different legal effects.<sup>67</sup> Under the Roman law maxim “*casum sentit dominus*” (accident is “felt” by the owner),<sup>68</sup> there was no liability to compensate damages in the case of accidental collisions, in contrast to collisions caused by a fault that gives rise to liability. Several Digests applicable to the collision follow the principles established by *Lex Aquilia*.

According to *Ulpianus*, if a ship causes damage to another ship by collision due to a wrong manoeuvre, the owner of an innocent ship has the right to be compensated by the shipowner at fault.<sup>69</sup> Still, no liability arose if the collision resulted from a force majeure case.<sup>70</sup> If

<sup>64</sup> Dig. XLVII, 9, 3.

<sup>65</sup> Originally, the Roman law did not give the right to reward the salvor (*Ulpianus* D. 47, 2, 43, 9).

<sup>66</sup> Dig. 14, 2, 4, 1.

<sup>67</sup> See, Bruno Bissaldi, *L'urto di navi* (Saggi di diritto commerciale, A. Giuffrè, 1939) 27.

<sup>68</sup> This maxim represents the basis of the better-known principle “*res perit domino*” (the thing is lost to its owner), which is the basic principle of risk division.

<sup>69</sup> Digest 9. 2.29.2:

“If your boat causes me damage through colliding with my skiff, it is a question which action is open to me. Proculus says that if it was in the power of the sailors to prevent the collision and it happened through their fault, an action under the *Lex Aquilia* can be brought against them because it matters little whether you do damage by letting your boat run loose or by bad steering or even with your own hand, because in all these ways I suffer damage caused by you; but if a rope broke or the vessel ran into mine when no one was in control of it, no action can be brought against the owner.”

<sup>70</sup> D. 9, 2, 29, 4:

“If a ship sinks another vessel coming toward it, *Alfenus* says that an action for wrongful damage lies either against the helmsman or against the captain; but if the ship was subject to such forces that it could not be managed, no action should be given against the owner. However, if the collision was

both ships were at fault, such a collision was considered accidental, and each party bore their own damage. Negligence on the part of the plaintiff was a defence on the part of the defendant. If a person suffered damage due to his negligence (*culpa*), he was not entitled to compensation.<sup>71</sup> This was the origin of the contributory negligence doctrine, which interrupted the causal connection between the defendant's act and damage.

A few provisions about the collision that followed Roman law remained in the Mediterranean codes in the medieval period. Chapter XXXVI of Part III of The *Rodion Nautikos* regulated collisions and was based on the same principles as the Digests, with some additions, such as a duty to keep the ship's lights on while lying at anchor during the night, leading to presumed fault in case of failure.<sup>72</sup>

### (VI) Limitation of Shipowner's Liability

The concept of limitation of shipowners' liability has a long history.<sup>73</sup> The famous American judge Oliver W. Holmes developed an interesting theory from various historical sources. He argued that the limitation of liability by abandonment developed from early Roman and Germanic law. While in Roman law there are no records of limitation of liability in maritime law, noxal liability (*noxae deditio*) may have served as a theoretical basis for the concept of abandonment of the ship in favour of the claimant.<sup>74</sup> If an object caused harm or death to a person, the object was to be forfeited to the person in compensation for the harm committed. The rationale was the desire for vengeance on the offending thing. "The ox in Exodus was to be stoned."<sup>75</sup>

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caused by fault on the part of the sailors, I think that affords a basis for the Aquilian action."

<sup>71</sup> D. 50.17.203 *Pomponius libro octavo ad Quintum Mucium*: "Quod quis ex culpa sua damnum sentit, non intellegitur damnum sentire" (The loss that one suffers through his own fault is not understood to be a loss).

<sup>72</sup> Part III, Chapter 36; B. Bissaldi, 32; W. Ashburner, op cit. Sect. cclxxv-viii.

<sup>73</sup> For an analysis of the historical development of limitation of liability for maritime claims, see J J Donovan, *The Origins and Development of Limitation of Shipowners' Liability* (1979) 53 (4) *Tulane LR* 999, and Norman Martinez Gutierrez *Limitation of Liability in International Maritime Conventions: The Relationship between Global Limitation Conventions and Particular Liability Regimes* (Routledge, 2011) 5–21.

<sup>74</sup> Donovan expresses skepticism about Holmes' theory, arguing that "a Roman maritime code, if one existed, contained any provision for shipowners' limitation of liability". However, Holmes does not argue that the shipowner's liability was limited to Roman law. He connects the local liability of Roman law with the deodand of common law and links both to the abandonment of the ship to limit liability. Theoretically, there is a logical connection between these three concepts. It should also be mentioned that the Roman maritime code never existed.

<sup>75</sup> Oliver W. Holmes, *Common Law* (1881) 33.

Holmes linked the noxal liability of Roman law with the deodand of common law, looking for the origin of the limitation of liability of the shipowner by abandoning his vessel.<sup>76</sup> The liability of a ship *in rem* is comparable to the noxal liability or liability of the owner under Roman Law at various periods to surrender a vicious animal, such as a mad dog.<sup>77</sup> The deodand was an “accursed thing.”<sup>78</sup> “The original limitation of liability to surrender, when the owner was before the court, could not be accounted for if it was his liability, and not that of his property, which was in question.”<sup>79</sup> This can also be traced to Roman law.<sup>80</sup>

Holmes quoted a manuscript of the reign of Henry VI from the 15<sup>th</sup> century, which stated that “if a man was killed or drowned at sea by the motion of the ship, the vessel was forfeited to the admiral upon a proceeding in the admiral’s court, and subject to release by favour of the admiral or the king.”<sup>81</sup> Holmes has never explicitly stated that the noxal liability of Roman law was the origin of the limitation of shipowners’ liability. Still, he argued that in the Middle Ages, “the ship was not only the source but the limit of liability.”<sup>82</sup> According to this rule, the owner is discharged from responsibility for wrongful acts of a master appointed by himself “upon surrendering his interest in the vessel and the freight.”<sup>83</sup>

If noxal liability has anything to do with the limitation of shipowner’s liability, that might have been only indirect, in a similar way to how deodand was developed in common law. Certain similarities among noxal liability, deodand, and limitation of liability can be identified.<sup>84</sup>

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<sup>76</sup> “We have seen the parallel course of events in the two parents—the Roman law and the German customs—and in the offspring of those two on English soil concerning servants, animals, and inanimate things. We have seen a single germ multiplying and branching into products as different from each other as the flower from the root. It hardly remains to ask what that germ was. We have seen that it was the desire of retaliation against the offending thing itself.” (Holmes, 34).

<sup>77</sup> Noxal surrender applied in Roman law when a delict was brought against a *paterfamilias* for a wrong committed by a son or slave. In that instance, the defendant could surrender the dependent rather than pay the full damages. Alan Watson, *Roman Law & Comparative Law* (London: University of Georgia, 1991), 75. Noxal surrender also applied to theft committed by a slave on board a ship. The owner of the ship could avoid personal liability for the theft by surrendering the slave: Dig. 47.5.5: “The owner of the ship, however, can release himself from liability incurred by the act of his slave, by surrendering the latter by way of reparation for the damage committed.”

<sup>78</sup> Holmes, O. W., 35.

<sup>79</sup> Holmes, O. W., 33.

<sup>80</sup> Dig. 47.5.5: “The owner of the ship, however, can release himself from liability incurred by the act of his slave, by surrendering the latter by way of reparation for the damage committed.”

<sup>81</sup> Holmes, O. W., *Common Law* (1881) 26. 1 Black Book of the Admiralty, 242.

<sup>82</sup> Holmes, O. W., *Common Law* (1881) 29; *Customs of the Sea*, cap. 27, 141, 182, in 3 Black Book of the Admiralty, 103, 243, 345.

<sup>83</sup> O. W. Holmes, 29.

<sup>84</sup> *Liverpool, Brazil & River Plate Steam Nav. Co. v. Brooklyn Eastern District Terminal*, 251 U. S. 48, 53 (1919) (holding that “[t]he notion, as applicable to

It can be argued that the role of noxal liability was punishment and vengeance, while the role of limitation of liability is very different: compensation. The institution of noxal liability or noxal surrender was regular in more primitive societies where vengeance was widely used as a sanction. Later developments led to compensation as an alternative to vengeance, which later became compulsory, allowing vengeance to be avoided.

This transformation from vengeance and punishment to some material consideration was not unusual in history. In the case of unpaid debt, once upon a time, the creditor had a right to “put his hand” on the bad debtor, and if the debt was not paid, to kill the debtor or sell him as a slave.<sup>85</sup> The old proverb, “Who cannot apply by his purse will pay by his skin,” may have originated in Roman law; at least, it can be found there.<sup>86</sup> So, it can also be argued that noxal liability contained the seed from which the system of limitation of liability by abandonment developed, as the law is also a living thing.

While the issue of the impact of noxal liability on the later development of limitation of shipowner’s liability is open to discussion, there is no doubt that limitation of shipowner’s liability did not exist in Roman law. That would contravene the strict nature of the shipowner’s liability in Roman law.

### 1.3 Byzantine Law

One important code of laws governing commercial trade and navigation in the Byzantine Empire was the Rhodian Sea Law, called in Greek *Rodion Nomos Nautikos* (Νόμος Ροδίων Ναυτικός), was devoted to maritime law.<sup>87</sup> While it was of Byzantine origin, it was named after Rhodes, probably to lend it greater authority.<sup>88</sup>

The *Nomos Rodion Nautikos* contained chapters relevant to maritime loans, ship leases, carriage of goods and passengers, general average, and salvage. The first part is a prologue and refers to the ratification of the “*Naval Law*” by the Roman emperors. The second part specifies the crew’s participation in maritime profits and the regulations valid on the ship.

The nautical loan was expressly regulated. Part II, Chapter 17 reads:

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a collision case, seems to us to be that if you surrender the offending vessel you are free, just as it was said by a judge in the time of Edward III.: “If my dog kills your sheep and I, freshly after the fact, tender you the dog, you are without recourse against me.” (citing Fitzh. Abr. Barre, 290).

<sup>85</sup> Table III(5) of the Twelve Tables.

<sup>86</sup> The historical development of bankruptcy is another example of such a transformation.

<sup>87</sup> Sanborn summarises *Nomos Rodion Nautikos* (F. Sanborn, *Origins of the Early English Maritime and Commercial Law*, The Century Co, New York/London, 1930, at 36–37). The translation and commentary can be found in: W. Aschburner, *The Rhodian Sea Law* (Oxford: Clarendon Press, 1909). See also, J. Paredessus, I, pp. 155–260.

<sup>88</sup> Schoenbaum § 1–3.

“If anyone lends gold or silver for a common purpose on shipboard, and the terms and duration of the loan are made in writing, if the borrower of the gold or silver does not return it when the time agreed expires and the gold or silver is lost either by fire, robbers or shipwreck, the lender does not suffer the loss, but he shall wholly recover his property. But if before the time fixed for repayment has expired, a loss should occur through the fortunes of the sea, the lender shall bear the loss since he stood to make a profit.”

The third and largest part refers to the apportionment of responsibility in case of theft or damage to the cargo or the ship.

Part III, Chapter 12 provided:

“If a man making a deposit in a ship or a house, let him make it with a man known to him and worthy of confidence before three witnesses. If the amount is large, let him accompany the deposit with a writing.”

In case of theft, the man who took the goods in deposit had the burden of proof that he was not responsible and took the oath that there was no fraud on his part. If he cannot discharge the burden of proof, he is responsible for restoring the lost property.<sup>89</sup>

The Byzantine *Nomos Rodion Nautikos* contained several provisions related to the carrier’s liability. Part III, Chapter 10, contains a provision that is contrary to the modern concept of nautical fault and provides for the liability of the master and crew to the merchant for damage caused by their negligence in navigation:

“If the captain or crew are negligent and there is an injury or wreck, let the captain and crew be responsible to the merchant for making the damage good. If it is through the merchant’s negligence that the ship and cargo are lost, let the merchant be responsible for the loss caused by the shipwreck. If there is no default either of the captain or crew or merchant, and a loss or shipwreck occurs, what is saved of the ship and cargo is to come into contribution.”<sup>90</sup>

The *Nomos Rodion Nautikos* does not contain express provisions related to seaworthiness. Still, Part III, Chapter 11 provides that the merchants are required to make certain inquiries regarding the condition of the ship before they load their cargo that has elements of seaworthiness. The text of this provision places a duty on the merchants to make sure that the ship is seaworthy rather than on the shipowners to make the ship seaworthy. According to this provision,

<sup>89</sup> As explained by Ashburner, this provision was originally related to deposit in a house and later was added to deposit in a ship (W. Ashburner, Translation and Commentary, 93).

<sup>90</sup> W. Ashburner, Translation and Commentary, 1909, 91.

the merchants should “make precise inquiry from the other merchants who sailed before them before putting in their cargoes, if the ship is completely prepared with strong sailyards, sails, skins, ropes of hemp of the first quality, boats in perfect order, suitable tillers, sailors fit for their work, good seamen, brisk and smart, the ship’s sides staunch. In a word, let the merchants make inquiry into everything and then proceed to load.”<sup>91</sup>

The Byzantine Rhodian Sea Law regulated charter parties. Part III, *Chapter 19*:

“If a merchant hires the ship and pays the earnest money, and then says, “I don’t need the ship, he would lose the earnest money. But if the captain acts wrongfully, then he would have to repay the merchant the double earnest money.”<sup>92</sup>

The contract for hiring the vessel had to be in writing. The penalty for breach of contract could be explicitly provided in the contract. If the parties fail to specify remedies in case of a breach, and the merchant commits a violation, the merchant would have to pay half of the hire to the captain. If the captain were in breach, he would have to pay half-hire to the merchant.<sup>93</sup>

One provision resembles the modern concept of dead freight: if the merchant did not provide cargo in full, he would have to pay “for what is deficient, as they agreed in writing.”<sup>94</sup> Chapter 24 provides that if the captain, after receiving the half freight, has set sail and the merchant wishes to return, the merchant loses the half freight. On the other hand, if the captain commits a breach of contract, he is to restore the half freight.<sup>95</sup> Chapter 25 provides that if the merchant is guilty of undue delay in loading, he is liable to pay the whole freight.

*Nomos Rhodion Nauticos* contains rules on marine salvage. It recognised the principle of offering a reward for saving distressed property at sea, but only if the salvage was successful.

Article 31 states:

“If the merchant loads the ship and something happens to the ship, all that is saved is to come into contribution on either side; but the silver, if it is saved, is to pay a fifth; and the captain and the sailors are to give help in salving.”

This rule provides for a duty of the master and the crew to “give help in salving”, but is silent about the sanction if they fail to do so.

<sup>91</sup> W. Ashburner, 92.

<sup>92</sup> W. Ashburner, 98.

<sup>93</sup> Part III, *Chapter 20*; W. Ashburner, 98.

<sup>94</sup> Part III, *Chapter 20*; W. Ashburner, 103.

<sup>95</sup> W. Ashburner, 204.

It can be assumed that in such a case, they would be deprived of the right to the award (the award was one-fifth of the silver if saved).

Article 40 provides for a duty of passengers to reward the salvor:

“A ship is wrecked, and part of the cargo and the ship is saved. The passengers have on their gold, silver, whole silks, or pearls. The saved gold provides a tenth, and the silver contributes a fifth. Let all the silks, if they are saved dry, contribute a tenth as being equal to gold.”

The right of the salvor and the amount of salvage award depended on the particular situation in which the property was found:<sup>96</sup>

“If a ship be surprised at sea with whirlwinds or be shipwrecked, any person saving anything of the wreck shall have one-fifth of what he saves.”<sup>97</sup>

“If gold, or silver, or any other thing be drawn up out of the sea eight cubits deep,<sup>98</sup> he that draws it up shall have one-third, and if fifteen cubits, he shall have one-half because of the depth.”<sup>99</sup>

Differences in the rewards to salvors form the basis of modern salvage law criteria, which are based on the degree of danger.

Similar to Roman law, the *Nomos Rhodion Nautikos* imposes sanctions on those who plunder shipwrecks, including fourfold damages, the same sanction as provided by Roman law.<sup>100</sup>

In addition to the *Nomos Rodion Nautikos*, there was another important Byzantine source of maritime law called *Basilica* (from Greek *Τὰ Βασιλικά*, “imperial”) initiated by the emperor Basil I and completed by his son Leo the Isaurian (Wise) (886–912) in the 9<sup>th</sup> century. The *Basilica* was arranged in about 50 books and divided into three parts.

There are various opinions on the relation between the *Nomos Rodion Nautikos* and *Basilica*, with some authors arguing that Book LIII of *Basilica* was based on the *Nomos Rodion Nautikos*. As Ashburner demonstrated, Book LIII was a compilation of rearranged parts of the Digest and customary maritime rules of the eastern Mediterranean, and its contents were quite different from those of the *Nomos Rodion Nautikos*.<sup>101</sup> Unlike the Justinian Code, which continued to play an essential role in the West as the continuation of Roman law, Byzantine maritime legislation was applied only within the Byzantine Empire.

<sup>96</sup> *Nomos Rhodos Nauticos* C. 30, 31, 37, 40, 41, 45, 47.

<sup>97</sup> Article 45.

<sup>98</sup> Cubit was an ancient unit of length based on the forearm length from the elbow to the tip of the middle finger and usually equal to about 18 inches (46 cm).

<sup>99</sup> Article 47. W. Ashburner, 119.

<sup>100</sup> Article 50.

<sup>101</sup> Some parts of the *Basilica* deal with issues not related to maritime law, such as sale of wine (W. Ashburner, 108–115).

#### 1.4. *The Period after the Fall of the Roman Empire*

The Western Roman Empire ended with the deposition of its last emperor, Romulus Augustulus, in A. D. 476. The Eastern Roman Empire, known as the Byzantine Empire, became a new commercial and cultural centre in this part of the world, while Rome still maintained its important commercial position. Despite the empire's breakup, Roman law continued to be applied throughout the Mediterranean. The Byzantine influence in Italy gradually disappeared after the 11<sup>th</sup> century. This allowed the Italian cities to adopt their own regulations based on local merchant customs merged with the Roman law principles.

After the fall of the Roman Empire, Europe was broken into several states, and the seas were infested with pirates. The laws fell into almost absolute oblivion as barbarians overran the continent. The rise of Islam in the 7<sup>th</sup> century disrupted the ties between Western Europe and the Mediterranean. This unfortunate situation seriously impeded sea navigation and trade, transforming Europe into a dominantly agricultural region. With travel suspended, barbarism everywhere, knowledge buried, and ignorance about other countries became universal. In history, there have been times of depression and crises and other times of progress and advances that have come in waves. At some point, the ultimate point of decline or progress cannot go beyond a certain level. If so, Europe probably reached this ultimate point of decline around the 10<sup>th</sup> century.

The religious factor strongly influenced subsequent history through the Crusades, a Christian response to the growing power and influence of Muslims (Saracens) in the Mediterranean. The Crusades (1096–1272) served religious objectives but simultaneously stimulated commercial, social, and cultural interchange between Western European peoples and those bordering the eastern Mediterranean.

The Crusades contributed significantly to the development of maritime commerce. These wars helped restore commercial ties between Western Europe and the Middle East while inspiring people in the West to undertake more sea travel. The so-called “nautical revolution of the Middle Ages”,<sup>102</sup> which was propelled by technological advances and innovations, such as the invention of the compass, the production of more accurate maritime maps, the construction of better ships, and so on, led to the expansion of maritime commerce and, eventually, the discovery of new lands. The Crusades also enabled Europeans to become acquainted with maritime law from various parts of the Mediterranean.

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<sup>102</sup> Frederic C. Lane, *The crossbow in the nautical revolution of the middle ages, Explorations in Economic History Volume 7, Issues 1–2*, Autumn–Winter 1969, 161–171.

## 1.5 *The Middle Ages*

### 1.5.1 *Overview*

The revival of maritime trade in the Middle Ages necessitated new maritime legislation. The invaders who destroyed the Roman Empire were not seafarers, and the conquered people were permitted to keep the Roman law to which they had become accustomed. Roman law retained authority in much of continental Europe during the Middle Ages because the Holy Roman Empire was considered the Roman Empire's successor.

The gradual increase in maritime trade in the Middle Ages led to a need for a more developed body of maritime law than existed in the Roman Empire. Roman law was a highly developed legal system that greatly influenced modern law, but it was designed for a different level of societal development. The expansion of maritime trade following the discovery of new lands required a different legal framework to accommodate the rapid growth of trade.

Maritime law was established as a separate legal discipline in the trading centres of southern Europe in the Middle Ages. It was based on the codification of maritime customs, which still preserved Roman law's influence while incorporating elements of canon law, reflecting the church's growing influence in that period. This served as the basis for maritime law, which first developed in Italian cities and later in the rest of Europe. Those statutes were mainly enacted in the ports, while their formulation was influenced by the nature of trade and local customs. These customs were based on the practical needs of merchants, rationality, and the principles of equity as understood in the Middle Ages.

These codifications had a cosmopolitan character, as they were created before the development of national states. They were typically based on pre-existing merchant customs in that particular area. The maritime commerce law was autonomous and transnational, thus achieving a substantial degree of uniformity. This uniformity was derived from the similarity of merchant customs and the universality of *the ius commune, which emerged* in the medieval period and contains elements of canon law. The uniformity also derived from the universality of political, religious, and ethical theories and from the similarity of the actual conditions of life that prevailed throughout Western Europe.<sup>103</sup> The stability of merchant trade customs during those times was essential to uniformity. In 1909, Ashburner stated that "between the ninth and the thirteenth century, there was probably less change in the conditions of commerce and navigation than in the last twenty-five years".<sup>104</sup> These factors have contributed to the uniformity of maritime customs and rules because it was easy for

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<sup>103</sup> William S. Holdsworth, *A History of English Law*, Vol. 5, p. 60.

<sup>104</sup> W. Ashburner, *op. cit.* cxv.

one port to adopt the same or similar customs as another. As a further step, these ports have codified rules to enhance legal certainty.

Merchant customs were codified by statutes of Mediterranean cities, firstly in Italy, the cradle of commercial law. The trained lawyers drafted the regulations for the merchant guilds, which were usually located in seaport towns. The rules of these statutes were drafted based on merchant customs and codified in many medieval statutes. These statutes had the force of law in those cities and were binding on merchants.

Many such statutes were promulgated between the 11th and 14th centuries in Amalfi, Trani, Venice, Pisa, Genova, and other Italian port cities, each offering its own collection of laws.<sup>105</sup> These codes and statutes spread the customary law throughout Western and later Northern Europe.

The law created in this way was known as the law merchant, or *lex mercatoria*, because it was formulated and applied by merchants based on their customs and usages. In its initial period, *lex mercatoria*, or the law merchant, comprised the commercial and maritime law of modern times.<sup>106</sup> *Lex mercatoria* reflected customary law recognised across Europe and applicable to various commercial transactions. This customary-based law became somewhat standardised before being incorporated into written statutes and codes.

In essence, until the rise of modern nations, maritime law did not derive its force from territorial sovereigns. Still, it represented what was already conceived to be the customary law of the sea. So, it can be said that the customs of merchants were the parent of the law merchants, while maritime law was one branch of that law (*lex maritima*). Both applied to the merchants, developed similarly from customary rules, and were administered in the same or similar courts, distinct from the ordinary courts.<sup>107</sup> Both had an international character and were not governed by the rules of one country but by those of the commercial world.

The law merchants needed different kinds of courts and procedural rules. The application of mercantile law was initially based on the rulings of the specialised “consul” courts established around the 13th century.<sup>108</sup> From the earliest times, a summary mode of proce-

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<sup>105</sup> Ashburner has quoted early medieval city-statutes and their dates: 1156–1160 *Constitutum Usus* (Pisa), 1214 Curzola (earliest part), 1227 Ziani (Venetian), 1229–1236 Tiepolo (Venetian), 1255 Zeno (Venetian), and Marseilles, 1258 Barcelona, 1272 Ragusa and Tortosa, 1298, *Breve Curiae Maris* (Pisa), 1312 Spalato, 1313–1344 *Officium Gazarie* (Genoa), 1331 Phara, (Lesina), 1345 *Consolatum Trapani* (W. Ashburner, 119). See, also, Lefebvre d’Ovidio, Pescatore, Tullio, 18–19.

<sup>106</sup> W. S. Holdsworth, *A History of English Law*, Vol. 1, p. 526.

<sup>107</sup> W. S. Holdsworth, *ibidem*.

<sup>108</sup> The term “consul” designated a local magistrate elected by the merchants and entrusted with jurisdiction over civil, commercial, and maritime matters. These consuls were to be found spread throughout the Mediterranean world.

cedure existed, in which speedy justice was administered in mercantile disputes in accordance with the usages of commerce and equitable principles.

A vital contribution to simplifying the procedures of these courts was the bull *Saepe Contingit*, issued by Pope Clement V in 1306, which defined the formalities that remained necessary and those that could be dispensed with in summary procedure.<sup>109</sup> This was one of many contributions of canon law to the medieval *ius commune*. The result was a speedier trial due to simplified rules on evidence and for the summoning of defendants.<sup>110</sup>

Another essential element required to create the body of legal rules known as *lex mercatoria* was made by the trained lawyers who drafted the regulations based on merchant customs and developed the body of rules and principles codified in several medieval legislation, mainly adopted in the seaport towns, firstly in the Mediterranean and later moving towards northern Europe.

Mediterranean coastal cities adopted the principles of Roman maritime law and adapted them to their own needs. This resulted in different maritime statutes in each seaport city, reflecting both their Roman origins and local customs. These maritime statutes were the product of merchant associations and practices.

All compilations in the Middle Ages were based on the same principles and often reproduced other legislation, contributing to a high degree of uniformity despite some variations. The general average can serve as an illustration.<sup>111</sup> Sometimes, it was unclear in which city

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<sup>109</sup> This papal bull specified that the judges of these courts should proceed “simply and plainly, without clamor and the normal forms of procedure” (lat. “*simpliciter ac de plano ac sine strepitu et figura iudicii*”). As an illustration of its influence, Chapter XXXVI of *Consolato del Mar* provided that the consuls can decide the cases brought to them “briefly, summarily...without the noise or formality of a judgment...”.

<sup>110</sup> See, Stephan Kuttner, “The date of the constitution ‘Saepe’, the Vatican manuscripts and the Roman edition of the Clementines”, in *Medieval Councils, Decretals, and Collections of Canon Law* (Routledge, 1992).

<sup>111</sup> The Rhodian law (Byzantine) Art. 9 states: “If the captain is deliberating about jettison, let him ask the passengers who have goods on board, and let them take a vote on what is to be done.” Art. 48 the Statute of Amalfi — “If the merchants are greedy, as some people always are, and would rather die on the spot than sacrifice anything so that by their extreme avarice they refuse to jettison, then the captain, after protest may proceed to jettison.” Then under Art. 195 of the *Consolato del Mar* a similar rule included a speech, which the captain must deliver in the presence of the mate and all onboard: “Gentlemen, we cannot avoid shipwreck, and my conviction is that the owners of the vessel shall be held liable for the cargo and the owners of the cargo shall be held liable for the vessel”; then if all or the majority of the merchants’ consent, the jettison may be made; but one of the merchants must first cast over something, then the captain may cast over the remainder. The speech is made shorter in the Oleron Rolls. The speech disappeared in the Wisby Rules and the Hansa Code. It is interesting that the Maritime Law of Malacca (*Undang-Undang Laut Melaka* — *اوندڠ ٢ لاوت ملاك*), in the East Indies dating back to the 15<sup>th</sup> century,

some rules were initially drafted. In this way, various principles and regulations originating in southern Europe's seaports became the basis for uniform maritime law throughout medieval Europe. Maritime law in the Middle Ages was contained in local customs, which tended to expand. Once established in some port, other ports later adopted them, and one or other of them ruled the maritime trade of the whole of medieval Europe.<sup>112</sup>

### 1.5.2. Medieval City-States Statutes

#### (I) Amalphytan Table and Limitation of Shipowner's Liability

After the fall of the Roman Empire, Amalfi maintained "legal relations" with the Byzantines.<sup>113</sup> The city of Amalfi (which is now known as a tourist spot near Naples), has reserved a special place in the history of maritime law. The main surviving copy of the Digest, called "*Litera Florentina*", initially written in Constantinople in the 6th century AD, had been kept in Amalfi, which was later captured by Pisa (12th century AD — *Litera Pisana*) and then by Florence (14<sup>th</sup> century AD). All the editions of the Pandects are said to have been derived from this Amalfitan copy.

Towards the end of the 11th century AD, the earliest code of modern sea laws was compiled for the Republic of Amalfi during the First Crusade.<sup>114</sup> *Tabula Amalphytana*, known as *La Tabula de Amalfi*, *Amalfi's Tablets*, *Amalphytan Table*, or *Amalphytan Code*, superseded the ancient laws, and all the city-states of Italy acknowledged its authority.<sup>115</sup> The Amalfitan statute contains several provisions on the wages of the sailors, the barratry, liability of shipowners, duties of the master, jettison and general average, etc.<sup>116</sup>

Some authors argue that the limitation of liability originated in the *lex maritima* of the Middle Ages. They quote the Amalfitan Table from the 11<sup>th</sup> century as the first legal source to recognise the limitation of shipowners' liability, without mentioning any specific provision.<sup>117</sup> The text of the Amalfitan Table, however, does not contain anything that can be construed as the limitation of the shipowner's liability for maritime claims. The only provision resembling limitation of liability relates to the loss of goods of the mariner on board, in which case, if the mariner cannot prove the value of his goods, he

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contains in Art. 11 a similar provision on the general average, calling for a consultation of the owners of the cargo and fixing the rule for calculating contributions, which marks the worldwide universality of the maritime law rules.

<sup>112</sup> Holdsworth, Vol. 1, p. 526–527.

<sup>113</sup> Travers Twiss, *The Black Book of Admiralty*, IV, p. x.

<sup>114</sup> The oldest preserved copy is from 1274, but it states that it is a revision of an earlier text from 1010.

<sup>115</sup> *Tabula Amalphytana* contained 66 articles, and its text is published in Vieusseux, (ed), *Archivio storico italiano*, Volume 1, (Florence, 1842–1844) p. 257.

<sup>116</sup> See, T. Twiss, *Black Book of Admiralty*, IV, pp. 3–51.

<sup>117</sup> J. J. Donovan, *The Origins*, 1001; *Martínez Gutiérrez*, 5.

would get six *tarens*,<sup>118</sup> to cover the value of his clothes and coverlids only.<sup>119</sup> This is a limitation of liability of a different nature and rationale from the limitation of the shipowner's liability; it concerns the treatment of mariners by the shipowner, an issue that received significant attention in medieval legislation. It has nothing to do with the protection of shipping as a business, nor was it strictly related to damages caused by a ship.

There are a few similar provisions related to *commenda*, an early type of limited partnership with probable origin in *societas* of Roman law. In this kind of partnership, where investors had a share in the ship, their liability was limited to their share. However, that is very different from the shipowner's limitation of liability and is much closer to the liability of shareholders in modern joint-stock companies. For example, Article 8 of the Amalfitan Tables states that the part-owners who did not want to take part in a particular voyage had the right of recourse against other property of the shipowner (*patrone*), who had acted against their wishes and had no action against the ship and other part-owners who had shares in the common adventure. Hence, this relates to the partners sharing business risks, not the limitation of the shipowner's liability for maritime claims.

## (II) *Trani Ordinamenta et consuetudo maris*

Many other Italian city-states adopted their own legislation during the medieval period. One of the oldest was the *Ordinamenta et consuetudo maris* ("Ordinances and Custom of the Sea"), 1063.<sup>120</sup> Strict liability of the carrier continued to be applied after the fall of the Roman Empire, as evidenced by texts of statutes adopted during the Middle Ages as part of the *lex mercatoria*. Under Article XVII of the Ordinance of Trani, the master was exempted from liability only for losses caused by bad weather or from capture by pirates.<sup>121</sup>

The *Ordinamenta* of Trani contain provisions resembling those of Chapter 24 of the *Rhodium Nauticos*. If the merchant refuses to give the cargo, he pays one-fourth of the freight.<sup>122</sup> If he insists on having his cargo back before the ship leaves the harbour, he pays one-half of the freight.<sup>123</sup> If the ship starts a voyage and returns, and the

<sup>118</sup> Amalphitan currency.

<sup>119</sup> Art. 45 of the Amalphitan Table: T. Twiss (ed.), *Black Book on Admiralty*, Vol. IV, (Longman & Co., London 1876) p. 31.

<sup>120</sup> T. Twiss, *The Black Book of Admiralty*, appendix, part iv, 522 n. 1. The statute of the Adriatic city Trani is the oldest among the medieval statutes if the date of 1063 printed on its face is correct (this date is, however, doubted by many scholars, since the original in Latin is lost). Several similar statutes were adopted in other Mediterranean city-states: Ancona, Pisa, Arles (1150), Marseilles (1162), Genova (1186), Venice (1205), Barcelona (1258), Aragon (1270), Ragusa (1272), and many more.

<sup>121</sup> Article XVII.

<sup>122</sup> Chapter 7.

<sup>123</sup> Chapter 6.

merchant takes out his cargo, he must pay the whole freight.<sup>124</sup> If a ship is loaded or in the course of loading, and it is found out that there are pirates nearby, the merchants are not entitled to have their goods back except on the terms of guaranteeing the ship's ransom.<sup>125</sup>

"The shipowner has the ship ready at the appointed place and time. The merchant fails to load it without a reasonable excuse. He is liable to pay the whole freight; but if the shipowner succeeds in letting the ship, the merchant is only liable to pay the difference, if any, between the freight that he agreed to pay and that which the shipowner got."<sup>126</sup>

In those times, the standard practice was to have on board a clerk called "*scribanus*", or *scriba navis*, who would log data related to voyages, including the cargo loaded on a vessel in a particular record book (*quaterno*). Article XVI of the Ordinance of Trani provided that "every master ought to take a scribe (*scrivano*), who ought to be sworn in his commune, to be honest and loyal". Recording detailed facts concerning the cargo in these books by a scribe became a widespread practice, creating the need for legal regulation. Provisions regarding the scribe can be found in several other statutes, which use different names for this person.<sup>127</sup> Many statutes provided that every ship should have a *scribanus*, and ships above a specific size were sometimes required to have two.<sup>128</sup>

According to some authors, the ship's mate compiled the ship's register.<sup>129</sup> The scribe was not a ship's mate, but a kind of notary and not an employee of the shipowner. He was a public servant, sworn before the public authority, and had to safeguard the interests of both shipowners and merchants. "*Omnis credentia est scribani*" ("all trust goes to the scribe"), says the statute of Ragusa (VII, 45).<sup>130</sup> The scribe had great authority on the ship, in some respects even greater than the shipmaster. He fixed carriage contracts with merchants, and no cargo could be loaded on the ship without his presence.<sup>131</sup> In statutes, particular attention has been given to the security of the register, which was a core duty of the scribe.<sup>132</sup>

<sup>124</sup> Chapter 5.

<sup>125</sup> Chapter 32; W. Ashburner, 93.

<sup>126</sup> Const. Usus, Chapter 28. W. Ashburner, 205.

<sup>127</sup> The Statute of Marseilles of 1255 uses the term "*scriptor*", while Article 9 of the Amalfitan Table uses the term "*scribae*", the statute of Venice uses the term "*scribanos*" (providing for duty to have two scribes on the ship). Provisions about *scribanus* were contained in numerous statutes of medieval Mediterranean cities, e. g., Marseilles, Genoa, Sassari, Ancona, Ragusa (Dubrovnik), Zara (Zadar), etc.

<sup>128</sup> St. Ragusa, VII, 2, St. Zara, IV, 15, 17, 18, Barcelona Ordinance 2.

<sup>129</sup> Richard Aikens et al., *Bills of Lading* (2<sup>nd</sup> ed. Informa Law, London 2016) 1.

<sup>130</sup> Statute of Ancona contains a similar statement giving the scribe's book 'full faith' (*plena fides*).

<sup>131</sup> Consolato del Mare Rule 58.

<sup>132</sup> Chap. 59-Security of the Ship's Register

"In addition, the patron of the vessel will require that the clerk take an oath that he will not sleep ashore while the vessel is moored without taking the

The scribe was threatened with harsh sanctions if he abused that confidence by entering false particulars about the cargo.<sup>133</sup> In a merchant and shipowner dispute, the registry served as evidence. Some statutes provided that the shipowner was liable to restore the merchants' goods as described by the scribe in his register.<sup>134</sup>

The Statute of Trani provided a fixed percentage for the salvage awards depending on the nature of the services. A distinction was made among things found at the shore, things drifting on the sea, and those at the bottom of the sea. According to the Statute of Trani, the salvor was obliged to deliver the salvaged property to the Court. He was entitled to half of the salvaged property if the owner claimed it within 30 days. If the owner does not appear to claim his property within that period, the court will deliver all saved property to the salvor.<sup>135</sup>

### (III) Rules on Collision

Roman law influenced the statutes of city republics in the Middle Ages, such as *Constitutum usus di Pisa*,<sup>136</sup> and *Consuetudini del Valenza*.<sup>137</sup> For example, *Constitutum usus di Pisa* has a chapter entitled "*de dampno navis dato ab altera navi*" that contains several examples of collisions based on the Digests, mainly referring to collisions in the harbour, without adding anything new compared to the Roman law.<sup>138</sup>

The statute of Ancona deals with a collision on two occasions. Where a ship is anchored correctly, and the captain (*patrone*) and navigating officer (*nochiero*) perform their duties properly, including proper lookout, the ship will incur no liability even if it damages another ship. Where it does incur liability, the liability falls on the owners, but the navigating officer has to pay 10% of the damage. His total liability, however, "is not to exceed one hundred *livere*."<sup>139</sup>

### (IV) Rules on Salvage

In the Middle Ages, the seas were much more dangerous than they are today. Overseas trade was particularly vulnerable, and shipwrecks were common. With the low standard of ships, sailing ships

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keys of the chest in which the register is kept; and that he will never keep the said chest unlocked, subject to the above-described penalty."

<sup>133</sup> Consolato del Mare (Chap. 60) provides that in the case of making false entries in the ship's register, the clerk should have his right hand cut off, his forehead marked with a heated iron, and his property confiscated.

<sup>134</sup> St. Ragusa, VII, 6, St. Phara, V, 1, Ord. Trani, 16 (which provides as if the *scribanus* was personally liable), St. Zara, IV, 21.

<sup>135</sup> Article 19 of Ordinamenta Trani.

<sup>136</sup> B. Bissaldi, 42.

<sup>137</sup> Ibid. p. 42.

<sup>138</sup> W. Ashburner, op. cit. cclxxxvi; B. Bissaldi, 42.

<sup>139</sup> Ibid. p. 42.

were the most advanced at the time. With pirates at sea, a lack of safety standards, few lighthouses, and a lack of maps and navigational instruments other than a compass, casualties were common. The locals routinely plundered shipwrecks. Hence, it is unsurprising that many medieval laws referred to salvage.

The Rhodian principles were carried forward in statutes in Italy, including those of Trani, Venice, and Pisa. The Venice statute provided a salvage award of 3% of the value of the goods saved, while the Pisa statute provided a 5% reward.<sup>140</sup> The Ancona statute also distinguished between the goods floating on the sea and those recovered from the bottom of the sea. If the goods were marked, the salvor has no right to reward, but the owner is recommended to give him some reward. If the owner does not appear within 6 months, the property is transferred to the Port of Ancona.<sup>141</sup>

The Statute of Ragusa provided:

“[If] a ship comes across any goods floating on the sea, its value will be divided into four shares. One share belongs to the ship, another is added to the freight, and the remaining two would be divided among mariners and merchants.”<sup>142</sup>

Several statutes set out the obligations of the master and crew regarding salvage and assistance in the event of a shipwreck.<sup>143</sup> Statutes of Zara (Zadar) and Spalato (Split) provide for the duty of mariners to remain by the ship until it is repaired or brought safely to its destination.<sup>144</sup>

#### *(V) Rules on Corsairs and Pirates*

In medieval documents, the terms corsair and pirate are often used interchangeably, for example, in the Statute of Cattaro.<sup>145</sup> The indiscriminate use of the two terms points to a close similarity in the characteristics of the two classes. It is true that in law there was a distinction. The main difference is that corsairs operated with government authorisation, legally attacking enemy ships during wartime. On the other hand, pirates were outlaws who attacked any ship for

<sup>140</sup> W. Ashburner, cclxxxix.

<sup>141</sup> Article 60.

<sup>142</sup> Ragusa, 7, 35.

<sup>143</sup> W. Ashburner p. 172.

<sup>144</sup> Zara 4, 56, Spalato 8, 56. At Venice, they should stay for 15 days and have the right to receive 3% of what they recover (St. Zeno, 42, 90), while the Ordinance of Trani provides for a duty of staying by the ship for eight days (Ordinance, 1). W. Ashburner, 172.

<sup>145</sup> Currently, Kotor in Montenegro. Article 400 provided that the citizens of Cattaro were prohibited from attacking vessels as corsairs (*cursu*) or pirates (*pirata*), and would be punished by a fine of 50 perpers (*yperperos*), unless they had obtained a license. While this provision does not clarify the matter, it is assumed that only corsairs could obtain such a license.

their own profit without any official permission. Corsairs were essentially privateers sanctioned by a state, whereas pirates were criminals operating illegally.

### 1.6. The Oleron Rolls

The Oleron Rolls appear in different forms and are also known as “the Oleron Rules”, “the Law of Oleron”<sup>146</sup>, or in French, “*Rôles d’Oléron*”, “*Loix de Layron*”, “*La Ley Olyroun*”. The Oleron Rolls were based on local customs and were initially promulgated in French in the 12<sup>th</sup> or 13<sup>th</sup> century.<sup>147</sup>

There are various theories about the authorship of the Oleron Rolls, but none offers conclusive evidence of its accuracy; the only thing that is known with certainty is that no one knows with certainty who the author was, and the origin of the Oleron Rolls is lost in obscurity.<sup>148</sup> There are also several versions of the Oleron Rolls.<sup>149</sup> Most likely, the Oleron Rolls were based on local court judgments and customs.<sup>150</sup>

The Oleron Rolls primarily focus on the relationship between the shipowner and the crew. Still, they also contain several provisions on the general average: wrecks and the goods taken from the wrecks, salvage, collision, the duties of the master and seamen, supplies and repairs, and maritime loan. The Oleron Rolls played an essential role in the law of collisions, as they first specified the principle of equal division of damages.

The Oleron Rolls provide that a shipowner must furnish proper equipment, such as ropes on the vessel, which can be considered a

<sup>146</sup> The term “rolls” was used because the text was made on paper rolls.

<sup>147</sup> Edda Frankot *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe* (Edinburgh: Edinburgh University Press, 2012) p. 11. There are several versions of the Oleron Rolls, and all of them are prefaced by the certificate of 1266 (F. Sanborn, op. cit., p. 63).

<sup>148</sup> On various theories on the origin of the Oleron Rolls, see Twiss (ed.), *The Black Book of the Admiralty*, Appendix-Part II, 1873, xlviii et seq; Sanborn, op. cit. p. 64, James W. Shepard, *The Rôles d’Oléron — A Lex Mercatoria of the Sea?, in Piervigiovanni, Vito (ed), From Lex Mercatoria to commercial law* (Dunker / Humboldt, Berlin, 2005), p. 207 et seq. In contrast to the prevailing views, Shephard asserts that the Oleron Rolls were most likely compiled at the Oleron island based on local customs (J. W. Shepherd, 240).

<sup>149</sup> There is an opinion that the original version of the Oleron Rolls, which consisted of 24 articles, was coherent and corresponded to the stages of the sea voyage: Shepard, op. cit, 213. The text published in *Black Book on Admiralty* has 35 articles.

<sup>150</sup> Schofield argues that the Oleron Rolls were based on the “ancient *Lex Rhodia*, which had governed commercial trade in the Mediterranean for over a thousand years” (John Schofield et al., 8<sup>th</sup> ed. Informa, Abington, 2022, para. 1.9). It is more likely that the Oleron Rolls were influenced not by the ancient *Lex Rhodia* but by the Byzantine Rhodian Sea Law (see, para. 1.3.1.4). Even that influence is questionable, since the text of the Oleron Rolls is very different from this Byzantine law.

duty related to seaworthiness.<sup>151</sup> A shipowner could partly avoid liability if the merchant did not object to the condition of the ropes, and the poor condition of the ropes caused the damage; in that case, the damages would be divided between the shipowner and the merchant.

The Oleron Rolls include a provision regarding laytime. Article XXI provides:

“If a master freight his ship to a merchant, and set him a certain time within which he shall lade his vessel, that she may be ready to depart at the time appointed, and he lades it not within the time, but keep the master and mariners by the space of eight days, or a fortnight, or more, beyond the time agreed on, whereby the master loses the opportunity of a fair wind to depart; the said merchant, in this case, shall be obliged to make the master satisfaction for such delay, the fourth part whereof is to go among the mariners and the other three-fourths to the master, because he finds them their provisions.”

The Oleron Rolls played a vital role in developing the law of collisions by introducing the doctrine of equal division of damages, even when an innocent, anchored vessel was struck by another vessel under sail.

Article XIV:

“If a vessel, being moored, lying at anchor, be struck or grappled with another vessel under sail, that is not very well steered, whereby the vessel at anchor is prejudiced, as also wines, or other merchandise in each of the said ships, are damaged. In this case, the whole damage shall be in common and be equally divided and appraised half by half. The master and mariners of the vessel that struck or grappled with the other shall be bound to swear on the Holy Evangelists that they did it not willingly or willfully. The reason why this judgment was first given is that an old, decayed vessel might not purposely be put in the way of a better, which will be the more readily prevented when they know that the damage must be divided.”<sup>152</sup>

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<sup>151</sup> Article X

“The master of a ship, when he lets her out to freight to the merchants, ought to shew them his cordage, ropes and slings, with which the goods are to be hoisted aboard or ashore; and if they find they need mending, he ought to mend them; for if a pipe, hogshead or other vessel, should happen by default of such cordage or slings to be spoiled or lost, the master and mariners ought to make satisfaction for the same to the merchants. Also, if the ropes or slings break, and the master does not show them to the merchants beforehand, he is obliged to make good the damage. But if the merchants say the cordage, ropes or slings are good and sufficient, and notwithstanding it happens that they break, in that case they ought to divide the damage between them; that is to say, the merchant to whom such goods belong, and the said master with his mariners.”

<sup>152</sup> See, J. Paredessus, *Collection des lois maritimes*, Vol. 1, 334 (1834).

The rule on equal division, with some variations, was adopted in several Northern European legislations.<sup>153</sup> For example, the Wisby Rules contain a provision similar to the Oleron Rolls (“If two ships strike against one another and receive damage, the loss shall be borne equally between them...”), with an exemption if the collision was caused on purpose (“...unless the men on board one of them, did it on purpose; in which case that ship shall pay all the damage.”).<sup>154</sup>

The principle of equal division was probably used in ship collisions for centuries before it was adopted in the Oleron Rolls. According to Staring,<sup>155</sup> the principle of equal division (“*judicium rusticorum*”)<sup>156</sup> was initially applied on land, which might have governed certain distinctly non-maritime matters in Biblical times.<sup>157</sup> The historical rationale behind the equal division rule reflects the hazardous nature of sea navigation. This rule remained in force for many centuries, and it was a valid law in the US until 1975.<sup>158</sup>

In the Middle Ages, various nations enacted laws stipulating severe punishment for persons who deliberately caused shipwrecks, grounded and took advantage of ships in distress, which may be related to the influence of canon law. The Oleron Rolls may serve as an illustration of harsh punishments for such abuses.<sup>159</sup> The Oleron Rolls also provided harsh punishment for the pilots and the lord of the

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<sup>153</sup> Judgments of Damme, 1 Paredessus, *Collection des lois maritimes* 379 (1828); Lubeck, 3 Paredessus, *Collection des lois maritimes* 379, 402 (1834); and Wisby, I id. 501 (1828); J. Paredessus, *Collection des lois maritimes* Vol. 1 379 (1834); 4 *Black Book of the Admiralty* 87, 125, 284 (1876).

<sup>154</sup> Article L.

<sup>155</sup> Graydon S. Staring, “Contribution and Division of Damages in Admiralty and Maritime Cases” 45 Calif. L. Rev. 304 (1957) 306.

<sup>156</sup> The term *judicium rusticorum* is used by Cleirac, comparing the rule to Solomon’s judgment between the two mothers: Etienne Cleriac, *Vs et coutumes de la mer* (Éd. 1647). Available at: <https://gallica.bnf.fr/ark:/12148/bpt6k83968f>.  
image

<sup>157</sup> Exodus xxi, 35–36:

“And if one man’s ox hurt another’s, that he die; then they shall sell the live ox and divide the money of it; and the dead ox also they shall divide. Or if it be known that the ox hath used to push in time past, and his owner hath not kept him in; he shall surely pay ox for ox; and the dead shall his own”.

<sup>158</sup> *United States v. Reliable Transfer Co. Inc* 1975 AMC 541.

<sup>159</sup> Article 26:

“If the lord of any place be so barbarous, as not only to permit such inhuman people, but also to maintain and assist them in such villainies, that he may have a share in such wrecks, the said lord shall be apprehended, and all his goods confiscated and sold, to make restitution to such as of right it appertained; and himself to be fastened to a post or stake in the midst of his own mansion house, which being fired at the four corners, all shall be burnt together, the walls thereof shall be demolished, the stones pulled down, and the place converted into a market place for the sale only of hogs and swine to all posterity.”

place, who would intentionally cause the ship's grounding so that they could take advantage of such accidents.<sup>160</sup>

The mariners who tried to save the ship and cargo were given the right to reasonable reward "if they preserve part thereof," implying that in those days, the principle "no cure, no pay" applied.<sup>161</sup> The court should consider the efforts of the salvors and reward them, regardless of the promises made at the time of distress.<sup>162</sup>

The Oleron Rolls also implied a duty to save persons in danger.<sup>163</sup> This might be the origin of the present customary rule.<sup>164</sup> This rule was probably initially influenced by canon law, which is visible from the text of the Oleron Rolls, which provided for the excommunication from the "holy church" for those who would take advantage of the shipwreck accidents.<sup>165</sup>

The Oleron Rolls prohibited salvors from taking advantage of the salvaged property but provided salvors with the right to fair and just remuneration.<sup>166</sup> In case of a shipwreck, the lord of the place was obliged to put the saved property in safe custody and keep it for a year to deliver it to those it belonged to. When the year expired and nobody claimed the property, the lord was obliged to publicly sell it and distribute the proceeds to poor people and for charitable

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<sup>160</sup> Article 25:

"...But seeing this is contrary to the law of God, our edict and determination is that notwithstanding any law or custom to the contrary, it is said and ordained, the said lord of that place, salvors, and all others that take away any of the said goods, shall be accursed and excommunicated, and punished as robbers and thieves, as formerly hath been declared..."

<sup>161</sup> Article 3(1):

"[i]f any vessel, through misfortune, happens to be cast away, in whatsoever place it be, the mariners shall be obliged to use their best endeavors for saving as much of the ship and lading as possibly they can; and if they preserve part thereof, the master shall allow them a reasonable consideration to carry them home to their own country."

<sup>162</sup> Article 4:

"...if he has promised the people who helped him to save the ship the third, or the half part of the goods saved for the danger they ran, the judicatures of the country should consider the pains and trouble they have been at, and reward them accordingly, without any regard to the promises made them by the parties concerned in the time of their distress."

<sup>163</sup> Article 29:

"...the lord of that place or country ... and by those under his power and jurisdiction, ought to be aiding and assisting to the said distressed merchants or mariners..."

<sup>164</sup> This customary rule is enshrined in Article 98 of the UNCLOS.

<sup>165</sup> Pope Pius V's bull of 1586 made it compulsory to come to the aid of shipwrecked people on pain of excommunication. Jean-Pierre Beurrier, *De re salvationis* (2023) DMF 976.

<sup>166</sup> Article 29:

"...in saving their shipwrecked goods, and that without the least embezzlement, or taking any part thereof from the right owners; however, there may be a remuneration or consideration for salvage to such as take pains therein, according to right reason, a good conscience, and as justice shall appoint..."

purposes, “according to reason and good conscience,” without retaining any of the property, on pain of excommunication from the church and punishment as thieves.<sup>167</sup>

The Oleron Rolls were maybe the most important and influential maritime legislation in the Middle Ages, at least in Northwestern Europe. The Oleron Rolls were the early authority relied upon by the English courts. In 1402, by an act of Parliament, the Admiralty Court was instructed to govern its decisions by the Oleron Rolls and the common law of England. Several medieval legislations in Northern Europe, such as the Judgments of Damme and the Laws of Wisbuy, were influenced by the Oleron Rolls. The Oleron Rolls significantly influenced both civil law and common law traditions and have been cited in some English and US cases.<sup>168</sup>

### 1.7 *Consolat de Mar*

In the Mediterranean, the dominant role in unifying maritime legislation in this region was played by a compilation known under various names, including *Consulatus maris*, *Consulado de mar*, or *Consolato del mare* — a code of laws and customs used by Mediterranean-region countries for centuries.<sup>169</sup>

The origin of *the Consolat de mar* is obscure, but it is believed to have been drafted in the 13th or 14th century, while Pisa, Marseilles, and Barcelona have claimed authorship.<sup>170</sup> *Consolat de mar* comprises the Greek and Roman customary rules and ordinances of the kings of France, Spain, and Italian city-states.<sup>171</sup> It represented a digest of various rules and usages established among commercial nations in this part of the Mediterranean. It was initially written in the Catalan dialect and has been translated into several European languages.<sup>172</sup> Most probably, it was of Catalan origin and drawn up for the use of the Consuls of the sea at Barcelona.<sup>173</sup> *The Consolat de Mar* became the common law of many maritime nations. It greatly

<sup>167</sup> Article 30.

<sup>168</sup> *Rex v Well* (1445) *Black Book of Admiralty*, I, p. 255; *Walton v The Ship Neptune*, 1 Peters’ Adm. Dec. 142. *Natterstrom v. Ship Hazard*, in the District Court of Massachusetts, 2 Hall’s L. J. 359. *Sims v Jackson*, 1 Peters’ Adm. Dec. 157, all decided on the authority of the Oleron Rolls.

<sup>169</sup> This code has been reprinted in the second volume of the “Collection de Lois Maritimes Anterieures au XVIII. Siecle, par J. Pardessus, (Paris, 1831).

<sup>170</sup> According to Adolf Shaube, this law originated in Pisa in 1160 (*Das Konsulat des Meers in Pisa*, Leipzig, 1888); Pardessus asserts that it was adopted in Marseilles in the 13<sup>th</sup> century (Collection, Vol. III, 24); Twiss argues that this law was adopted in Barcelona (T. Twiss, *The Black Book on Admiralty* vol. III xxxiv).

<sup>171</sup> According to Sanborn (op. cit. p. 83), the probable date is around 1340.

<sup>172</sup> T. Twiss, vol. III lxxiii; B. Bissaldi, 43. The edition published in Barcelona in 1435 was entitled “*Libre de Consolat de Mar*”.

<sup>173</sup> Twiss provides several arguments to support the Catalan origin of *Consolato del Mare* (T. Twiss, vol. III xxxiv).

influenced the maritime laws of Italy, Spain, France, and England, while serving as the basis for subsequent maritime ordinances.<sup>174</sup>

*The Consolat de mar* contains several provisions that resemble the modern concept of a ship's cargo worthiness. Article 67(2) of *Consolat de mar* provided for strict liability by stating that "any goods or possessions loaded aboard the vessel and entered in the ship's register, which is subsequently lost, will be the responsibility of the patron of the vessel and its owners must be compensated by him for their loss." A shipowner's liability was strict, but there were certain exemptions. For example, a shipowner was exempted from liability when heavy seas caused damage.<sup>175</sup> Interestingly, the shipowner was liable for cargo damage caused by rats, provided there were no cats on board.<sup>176</sup> Based on the attention given to this issue, it seems that rats were commonplace, so much so that keeping cats on board a ship was an essential duty of the shipowner.<sup>177</sup>

*Consolat de mar* deals with the matter in several groups of chapters that are inconsistent with one another. According to Chapter 38, where the merchant abandons the voyage before putting anything on board, he must pay the shipowner's expenses in connection with the voyage. If he abandons the voyage after having begun loading, he pays half the freight. According to Chapter 39, when the merchant abandons the voyage before bringing his goods to the port of embarkation, he only pays the shipowner's expenses. He pays one-third of the freight if he has brought his goods to the port of embarkation before he abandons the voyage. He pays half the freight if he abandons the voyage after having begun to load or after having loaded in

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<sup>174</sup> Casaregis argued that the *Consolat* had in maritime matters, by universal custom, the force of law among all provinces and nations (Dis. 213. n. 12).

<sup>175</sup> Article 64-Waterlogged Cargo:

"The patron of the vessel is required to pay for the damage caused to the cargo aboard the vessel due to dampness caused by seepage through the deck, through the portholes, or due to lack of proper protection of the cargo from the elements. If, however, the cargo was damaged because the decks were swamped by heavy seas and not because there was seepage through the deck which was properly tarred, the patron is not obliged to pay for the damages to the cargo."

<sup>176</sup> Article 67(1) — Cargo Damaged by Rats or Lost Through Other Causes:

"If any property or merchandise aboard the vessel is damaged by rats, and no cat is kept aboard the vessel, the patron is held responsible for the damages.

<sup>177</sup> Article 68-Merchandise Damaged Aboard the Vessel Due to Lack of a Cat:

"If any merchandise or cargo is damaged by rats while aboard a vessel, and the patron had failed to provide a cat to protect it from rats, he shall pay the damage; however, it was not explained what will happen if there were cats aboard the vessel while it was being loaded, but during the journey these cats died and the rats damaged the cargo before the vessel reached a port where the patron of the vessel could purchase additional cats. If the patron of the vessel purchases and puts aboard cats at the first port of call where such cats can be purchased, he cannot be held responsible for the damages since this did not happen due to any negligence on his part."

full but before the ship sets sail. He will pay the whole freight if he abandons the voyage after the ship has set sail.<sup>178</sup>

*Conoslat de mar* contains several provisions related to the hire of ships. Some are too long to be quoted here.<sup>179</sup>

*Conoslat de mar* contained several provisions dealing with collisions in ports.<sup>180</sup> The basic principle was that the ship that reaches the port after another ship already at anchor —the ship that arrived later —should be held liable for the collision caused by dropping anchor too close.<sup>181</sup>

*Conoslat de mar* contains several provisions related to salvage. Article 94 deals with the obligation to aid another vessel in distress by towing. If a master had promised to tow another vessel and had failed to do so would be required to reimburse the vessel for all the damages “without any dispute.” Article 112 deals with the apportionment of salvage expenses among the merchants, resembling the rules on the general average. *Conoslat de mar* also contains provisions on salvage reward, stating that “anyone who salvages such a cargo... shall be allowed to keep half of such cargo, provided he has notified the local civil authority about it.”<sup>182</sup> The same article provides for the law of finds: “If the cargo had been found and salvaged after one year and a day from the date it had been lost, its owner could not make any claim upon it, and it should be judged the property of the party or parties who found it.”

*Conoslat de mar* is also quoted as a law with express provisions limiting shipowners’ liability. Donovan states that this text provided for the owner’s liability for debts incurred by the master or damage arising from improper loading or unseaworthiness, but only to the extent of their respective shares in the ship, without quoting specific provisions. No such provisions are found in the text of *Conoslat de mar*. There is a provision in Section 63 related to liability for damage resulting from improper storage. In such a case, if the patron (shipowner) would be “unable to pay the damages, the vessel must be sold to satisfy these claims”. The provision does not state that the owner could limit his liability by selling the ship. There is no limitation of liability to the share in the ship, but the whole ship

<sup>178</sup> W. Ashburner, 206.

<sup>179</sup> Chapter 83–88.

<sup>180</sup> Articles 200–202.

<sup>181</sup> Article 200:

“If behind the vessel that first dropped anchor in a port, at a sand bar, shore, or pier another vessel drops anchor, it should be moored in such a way that it will cause no damage to the vessel that first dropped its anchor at that point. If in mooring it some damage should result to the first vessel, the owners of the second vessel shall pay for the damage without any dispute. However, if the second vessel arrived during a storm and could not be moored without causing damage to the first vessel moored, damages will not be paid for the damage caused since it did not result due to any negligence”.

<sup>182</sup> Article 252.

must be sold to satisfy the claim. This is not a limitation of liability; it is *restitutio in integrum*.

Another provision demonstrates that *Conoslat de mar* adopts the *restitutio in integrum* principle: Section 72 provides that the vessel must pay the whole damage. This provision states that the owner must pay “his share” of damage, but that is a very different kind of limitation, probably related to *commenda* type of business that was developed in the Middle Ages. That kind of limitation relates to shareholders’ liability and has a very different rationale from the limitation of liability for maritime claims.<sup>183</sup> The crucial part of this section explicitly states that the vessel “must pay the whole amount of the damage”.<sup>184</sup> This is also *restitutio in integrum*.

A notable exception to the regulation of passenger carriage in the Middle Ages is the *Conoslat de mar*, which contains several provisions on the subject. It provides a detailed definition of the passenger:

“A passenger is a person who pays the patron for his own transportation as well as for the transportation of his effects, which are not part of the cargo.” It also links the status of a passenger with the quantity of cargo carried on a ship, stating that “every person whose cargo amounts to less than five quintals shall be required to pay a passage fee for his own person.”<sup>185</sup>

The passenger who would board the vessel without the approval of the master or clerk of the vessel “may be charged any amount the patron decides for his accommodations aboard the vessel.”<sup>186</sup>

Article 116 defines the shipowner’s responsibilities toward passengers. The shipowner should provide “proper accommodations and water for the passengers and carry them to the agreed-upon destination.” Article 116 also regulates the obligations of the shipowner who received a deposit on the fare from the passenger:

“If a patron has received a deposit on the fare the passenger will pay, he must carry out the promise he had made to the passenger; on the third day after the deposit was paid, the passenger

<sup>183</sup> Donovan, in his historical overview of the origins of limitation of shipowners’ liability, mentions *commenda*. This implies that he probably confuses shareholders’ limited liability with the limitation of liability for maritime claims. These two kinds of limitations have different natures and different rationales. *Commenda* was not used only for sea voyages but also for land investments in ventures conducted by local entrepreneurs with no connection to sea voyages.

<sup>184</sup> Section 72:

“In all instances where damages have to be paid, of which we have spoken or will speak about in the articles related to marine matters, the patron of the vessel is obliged to pay his share of the damages the vessel must bear, and every shareholder must likewise pay his share, as *the vessel actually must pay the whole amount of the damage*.”

<sup>185</sup> Article 113.

<sup>186</sup> *Ibid.*

should approach the patron to find out the sailing date. If the patron misleads the passenger by giving him a later date and, due to this, the passenger fails to be aboard when the vessel sails, the master of the vessel shall return to the passenger the full fare which would have been paid plus all the losses suffered by the passenger due to the patron's negligence. If, however, the passenger has removed himself from the vicinity of the vessel without finding out the actual date of sailing and fails to return at the time the vessel unfurls its sails, even if he had paid the full fare or had given the master of the vessel one thousand marks, the patron of the vessel is not required to return anything to him”

Art. 117 provides detailed rules for situations in which a passenger dies during the voyage. Particular attention is given to personal belongings and money that a deceased passenger would have on board a vessel before his death.<sup>187</sup>

Art. 122 governs the situation in which a passenger has paid for the voyage but decides not to board the vessel. In that case, the master is not required to refund the money.

Art. 123 provides for the passenger's obligation “to help, to protect, and to watch over the vessel, and not to disembark until the journey is completed, unless the patron agrees to some other arrangement.” In addition, the passengers are required “to conduct themselves according to the customs and traditions which have been established”.

*Consolat de mar* was not typical legislation but a manual based on existing customs, containing and explaining the customary rules, intended to serve as legal sources for special tribunals called *Consulatus maris*. *Consolat de mar* contained 252 short chapters that regulated issues such as the construction and ownership of ships, the rights and responsibilities of the master, seaman, and scribe, equipment and supplies, freight, general average, salvage, and the law of prize.<sup>188</sup>

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<sup>187</sup> Article 117:

“...the deceased person's best suit of clothes rightfully belongs to the navigator, and the master of the vessel will take any money which the deceased had, if the deceased did not have a relative aboard the vessel, the master will keep it safely until they reach a port where the heirs can demand that he surrender it to them at any time within three years. If after three years have elapsed and no one claims this estate, the money will be used, with the approval of the local bishop, for the repose of the soul of the deceased...”

<sup>188</sup> *Consolat de mar* is notable for its comprehensive and detailed rules:

Rule 145: “Every patron of a vessel or a boat with a deck must provide the following food for the whole crew: Meat three times per week. This means on Sunday, Tuesday, and Thursday. On the other days of the week, he shall provide soup for them in addition to the bread given to the crew each evening. Also, three times per week, he shall provide them with wine in the morning and the evening. To supplement the bread ration, they should be given cheese, onions, sardines, or another kind of fish.”

## 1.8 Northern Europe

As maritime commerce extended into northern Europe, rules and customs governing maritime trade began to appear there as well. The Oleron Rolls influenced new legislation in countries further north, such as the old laws of Flanders, known as the Judgments of Damme (Flemish, *Vonnesse van Damme*).<sup>189</sup>

Further in the North, there was an ancient compilation of maritime customs compiled by the merchants of the city of Wisbuy, on the island of Gotland, known as the Wisbuy (Visbuy, or Wisby) Rules from around the 14<sup>th</sup> century, which influenced the trade of the Baltic with foreign ports.<sup>190</sup> The Wisbuy Rules were compiled from three sources. The first is a Baltic source, and the earliest laws attributed to it come from Lübeck.<sup>191</sup> The second represents a Flemish version of the laws of Oleron. The third is of Dutch origin and is based on the Ordinances of Amsterdam.<sup>192</sup> The Wisbuy Rules played the dominant role in unifying the laws in northern Europe and influenced the laws of the Hanseatic League.

The Hanseatic League was established around the 13<sup>th</sup> century by the cities of Lubeck, Bremen, and Hamburg and later expanded to include many towns in Northern Europe. The Hanseatic League was a confederation with the main goals of mutual protection against piracy and the promotion of trade. One of the instruments adopted by the Hanseatic League to ensure smooth trade was an ordinance consisting of maritime rules under the name *Jus Hanseaticum Maritimum*.<sup>193</sup> This compilation was based on the Oleron Rolls and the Wisbuy Rules, making another contribution to the harmonisation of *lex maritima* in the Middle Ages.

Northern European medieval laws also contained salvage rules, such as those in the statutes of the Hanseatic cities of Hamburg and Lübeck.<sup>194</sup>

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Rule 170: “A sailor shall not undress for the night unless the vessel is moored in the port for a winter layover. Should he violate this rule, he should be punished for each transgression by being tied and dunked in the ocean three times while held by a rope. If he should violate this rule three times, he shall lose his wages and all his possessions aboard the vessel.”

<sup>189</sup> Damme was Bruges' port.

<sup>190</sup> T. Twiss, *The Black Book of the Admiralty* (Longman, London, 1876) vol. IV xxi. The Laws of Visby are also called the “Gotland Sea Laws”, the contents of which are introduced in *The Black Book of the Admiralty* Vol. IV xxii et seq.

<sup>191</sup> T. Twiss, vol. IV xxii.

<sup>192</sup> T. Twiss, Vol. IV, xxvii-xxviii.

<sup>193</sup> *Jus Hanseaticum Maritimum*, adopted in 1591 and later revised in 1614.

<sup>194</sup> In a letter to the Hamburg council from 13<sup>th</sup> century the *Lübeck* representatives considered the salvage money awarded to the crew for saving the cargo after a shipwreck to be too high. In contrast, in its reply the Hamburg council stated that a lower reward would lead to a diminished willingness of the crew to assist in the salvage (E. Frankot, *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe*, Edinburgh University Press, 2012, p. 126).

## 1.9 Laws of Melaka

Laws of Melaka (*Undang-undang Melaka*, also known as *Hukum Kanun Melaka Darat Melaka* and *Risalah Hukum Kanun*) were the laws of the Melaka Sultanate (1400–1511).<sup>195</sup> This legislation was made by merging customary law with Islamic principles. It consisted of six parts dealing with various issues, including Islamic marital jurisprudence, while one dealt with maritime law (*Undang-Undang Laut*). The maritime law part consists of 25 clauses. It addresses various matters, including procedures for the distribution of confiscated treasures, general average, rules on collision liability, rules on hierarchy and discipline on a ship, and penalties for breaking the rules of conduct, including rules on adultery on the ship.<sup>196</sup> Particularly interesting are detailed provisions related to adultery on board the ship, which is quite unusual for maritime legislation, and probably based on Islamic moral values.<sup>197</sup>

Under the Maritime Law of Malacca<sup>198</sup> from the 15th century, a distinction was made between collisions at night or during a storm and those in daylight, providing for stricter liability in the latter case.<sup>199</sup> This law also contained a lookout provision.<sup>200</sup>

<sup>195</sup> Richard Winstedt and Josselin de Jong, “The Maritime Laws of Malacca”, *Journal of the Malaysian Branch of the Royal Asiatic Society* 29, (1956) 29, pt. 3 (1956), pp. 22–59.

<sup>196</sup> Article 11 provides for a procedure required in case of general average that is very similar to the rules contained in some of the Mediterranean statutes:

“Before throwing cargo overboard in a storm, the crew has to be consulted, if they also have their share in the cargo. In that case, the part of each crew member’s share in the cargo that is to be thrown overboard should be proportionate to the size of that share. This is the captain’s responsibility.”

<sup>197</sup> Article 2 provides for the death penalty for both offenders for adultery on board the ship:

“If the offenders are both unmarried, fornication is punished by 100 lashes, and the offenders are obliged to marry. If the man is unwilling to do so, he is fined one and one-quarter tael of gold. If a free man commits fornication with a female slave, he pays a fine equal to the slave’s price. But if this female slave has been so long in her master’s possession as to be practically his wife, the master may claim either a fine or the death penalty. If a free man commits adultery with a sailor’s wife, he is put to death. As to the wife, her husband may put her to death. If he does not wish to do so, she becomes the unalienable slave of the captain. A male and a female slave who commit fornication are whipped at the fore-hatch.”

<sup>198</sup> *Undang-Undang Laut Melaka* (arab. لاوت ملاك). Translation of the text with commentary by Sir Richard Winstedt and P. E. De Josselin is found in: (1956) *Journal of the Malayan Branch of the Royal Asiatic Society*, Vol. 29, No. 3 (1956) pp. 22–59.

<sup>199</sup> § 12. ...

“[The master of] the vessel that caused the collision must indemnify two-thirds of the other vessel’s loss. (This applies if the collision occurs at night or during a storm. The total loss should be refunded if it occurred during the daytime.”

<sup>200</sup> § 15 (look-out) “The sailors on watch have four duties: to watch the water in the holds; to observe the winds; to keep a lookout for enemies; to guard against fire...”

The laws of Melaka had a provision for the law of finds, where the master or crew would find something ashore,<sup>201</sup> and a separate provision for salvage at sea.<sup>202</sup>

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<sup>201</sup> Article 3:

“If someone goes ashore on the captain’s business and then makes a chance find of gold or silver, etc., the captain may claim the entire treasure trove, and award the finder what he thinks fit. If the finder was ashore on his own business, he keeps one-third of the treasure trove, and the captain gets two-thirds. If the finder is a slave or the captain’s debtor, the captain gets all. If the captain himself makes a find, he retains and shares it with the crew.”

<sup>202</sup> Article 5:

“Who even rescues shipwrecked mariners can claim ½ a tael head from the boatswain. (If the rescued men are saved—with their goods, the rescuer can claim an award of 10% of the goods’ value... A member of the crew who tries to conceal his salvaged goods, which later come to light, forfeits all these goods to the captain.”

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#### ISTORIJSKI RAZVOJ POMORSKOG PRAVA

Tekst se bavi istorijskim razvojem pomorskog prava od najranijih početaka u Persijskom zalivu, pa do perioda stvaranja nacionalnih zakonodavstava, zaključno sa Srednjim vijekom. U tom smislu, tekst nije sveobuhvatan, budući da su izostavljeni periodi nacionalne kodifikacije počevši od 17. vijeka i period unifikacije pomorskog prava koji je započeo u 19. vijeku. Ovi periodi su detaljno obrađeni u knjizi autora iz kojeg su preuzeti samo djelovi najranijeg razvoja pomorskog prava. Tekst je jedan od najsveobuhvatnijih pregleda istorije pomorskog prava objavljen dosad, a naslanja se na komparativni metod na koji se naslanja ovaj istorijski pregled, budući da su komparativni i istorijski metod tijesno povezani. Oba služe potpunijem razumijevanju prava, a ovo se posebno odnosi na materiju pomorskog prava. Bez istorijskog uvida bi bilo teško razumjeti neke opskurne djelove pomorskog prava, od kojih neki ne postoje u drugim granama prava.

*Ključne riječi:* istorija, pomorsko pravo, rimsko pravo, *lex mercatoria*