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Continuity, legal principles and Roman law. The Case of General Average

Some commercial rules might appear universal and almost atemporal. This appearance has sometimes favoured theories on global commercial practices, and especially the idea of a universal lex mercatoria developed by traders for traders without external influences. While the pitfalls of such an approach have been shown time and again in the literature, this has had limited effect on the advocates of such an idea. Perhaps a more fruitful approach could be trying to distinguish general principles from their practical application in pre-modern commerce. Blurring them together has favoured general narratives of universal rules. Perhaps more importantly, it has also sidelined the underlying issue of why some general principles are indeed attested almost universally. If general principles may pass unscathed across time, the practical rules deriving from those principles usually do not. Those rules need to be interpreted within their historical and economic context: this may help to make sense of their diversity and account for their variety.

When looking at the environment in which a rule was applied, however, there is often a tendency to discount the legal features of that environment. After a period in which customary commercial rules remained largely oral, they were written down. This process is often neglected in the scholarly analysis of the rules. Straightforward as it might seem, however, the simple fact that an oral rule was written down did leave profound marks on the rule and its working. Moreover, once written down those rules often began to be studied and interpreted by learned jurists, who looked at them through the lens of legal concepts often quite alien to the environment in which the rules were originally produced. Roman law is a case in point, as during the early-modern period being a

university-trained jurist by and large meant having studied Roman law. The progressive re-writing of medieval rules and their inclusion in compilations of growing length and complexity often led to a revision of those same rules, in which Roman law concepts acquired an importance they often did not possess before. The study of those commercial rules, therefore, must take into account both the social, economic and technological circumstances in which they were produced and the intellectual and legal environment in which they were later interpreted and re-fashioned. If this second kind of environment is discounted, it may stand in the way of a better understanding of those very rules. One of the reasons that suggest taking this environment into account is not usually discussed, as it is somewhat counter-intuitive. It was not easy for jurists imbued with Roman law doctrines to leave them aside – even when they wanted to. This was the case especially in those parts of Europe whose legal character was defined by Roman law: there, to reach a solution in line with non-Roman commercial practice, some Roman law reasoning had to be employed all the same.

This article does not offer a methodological analysis that should then be applied to the sources. Rather, it shows those methodological problems as they emerge from the study of the sources, which will be both the point of departure and of arrival in the analysis. To do so, an ancient legal institution was chosen: that of general average. General average is a voluntary sacrifice of part of the cargo (and/or of part of the ship) made during navigation in order to save the rest. It is a principle that has amply withstood the test of time, and that looks apparently simple, and deceptively consistent. The challenges of seafaring are unquestionably similar across space, and – despite technological advancements – time. A storm might break out during a voyage between Izmir and Venice just as much as it could while sailing from Riga towards Lübeck, or from Bordeaux to Plymouth. In each case, if cargo was jettisoned or some masts were cut to lighten the ship, the damage had to be spread among all parties involved. The way in which the damage was apportioned, however, could vary significantly, both because of different possible ways to evaluate what was left on board, and because of the different ways in which the shipmaster could – or could not – contribute. Rules on general average are often of customary nature, and initially were often oral. When written down, however, their meaning began to change. It was no longer a question of recalling an oral tradition, but of interpreting a written text. Commercial compilations, in turn, could easily be amended, and even merged together. The result would often affect their content even further. To illustrate the point, the example will be made of the requirement of the merchants' consent to jettison their goods – a requirement which maritime compilations increasingly emphasised, to the point of rendering their provisions hardly applicable in practice. When those same compilations began to be interpreted using legal categories extraneous to the medieval and early-modern mercantile tradition (i.e., Roman law) the result was even more detached from practice – at least on a formal level.

This article was long in the making. Perceiving its complexity, I tried hard to sideline general average while working on early-modern English maritime insurance: dealing with it would have required another book. When I thought that I had escaped the danger, I received an offer by Maria Fusaro to take part in her ambitious new project on early-modern general average (ERC Grant agreement No. 724544: 'AveTransRisk – Average, Transaction Costs and Risk Management during the First Globalization (Sixteenth-Eighteenth Centuries)'). The project was too interesting to refuse. Thus, despite all my precautions to sideline general average, general average caught up with me. During the project, I had the privilege of working with many excellent scholars and friends, Andrea Addobbati, Giovanni Ceccarelli, Dave De ruysscher, Gijs Dreijer, Jake Dyble, Maria Fusaro, Marta Garcia Garralon, Sabine Go, Antonio Iodice, Luisa Piccinno, Giada Pizzoni, Ana Maria Rivera Medina, Lewis Wade and Ian Wellaway, to whom I owe a happy debt of gratitude. A preliminary draft of the article was

inflicted upon the participants in the 2024 Summer School of International Research Network PHEDRA ('Pour une Histoire Européenne du DRoit des Affaires') at La Rábida in Spain, and I am very grateful for the comments received. Finally, special thanks are due to Maria Fusaro for patiently reading the typescript, to the anonymous Reviewers for their useful suggestions and helpful remarks, and to Martin Kurz for his kind help during the editorial process. This study was completed with the support of the Leverhulme Trust (PLP-2020-361), which I gratefully acknowledge.

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1. Universality and lex mercatoria – a short mention

1 To state the obvious, few merchants ever felt the need to postpone trading until a series of general normative propositions regulating commerce was already in place. In other words, at its origins commercial law was customary. Trying to investigate the genesis of what is sometimes described as a spontaneous legal order is the prerogative of the legal philosopher and the economic theorist, from Adam Smith to Friedrich von Hayek, but not of the legal historian, for the sheer impossibility to reconstruct a state of affairs on the basis of fascinating conjectures lacking any hard fact. This limit of course does not mean that it may not be violated – only, that it is not productive to do so. Nonetheless, many scholars sought to explain this original state. To do that, most relied on the so-called *lex mercatoria*: a set of universal rules produced directly by the

merchants for themselves without the intervention of public authorities.[1] Those rules, being wholly endogenous to the mercantile community, were significantly different from those applicable in a law court,[2] and governed mercantile transactions for centuries, until the modern state began to assert its law and to impose it over other normative sources, especially customary ones.[3]

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1 Among the early proponents of a universal merchant law see esp. L. Goldschmidt, *Handbuch des Handelsrechts*, vol. 1 (Erlangen: Ferdinand Enke, 1864; reprint: Stuttgart: Ferdinand Enke, 1891), and W. Mitchell, *An essay on the Early History of the Law Merchant* (Cambridge: Cambridge University Press, 1904). The idea of a *lex mercatoria*, however, became more popular in the scholarly debate from the 1960s, with the works of Clive M. Schmitthoff and Berthold Goldman. Most studies of Schmitthoff on the subject may be found in C.-J. Cheng (ed.), *Clive M. Schmitthoff's Select Essays on International Trade Law* (The Hague: Nijhoff, 1988). For Goldman see esp. B. Goldman, *Frontières du droit et lex mercatoria* (1964) 9 *Archives de philosophie du droit,* 177-192; Id., *La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives* ([1979] 1980) 2 *Travaux du Comité français de droit international privé*, 221-270. Thereafter, the literature on the subject has greatly increased. Since, however, this growth in number has not unveiled new historical evidence, but has mainly fed on itself, in a seemingly endless game of citations, a few references will suffice: H.J. Berman, *Law and Revolution: The Formation of Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983), 341-344; L.E. Trakman, *The Law Merchant: The Evolution of Commercial Law* (Littleton, Co.: Rothman, 1983), esp. 10-14; F. Galgano, *Lex mercatoria: storia del diritto commerciale* (Bologna: Mulino, 1993) 71-83; B.L. Benson, *The Spontaneous Evolution of Commercial Law* (1989) 55 *Southern Economic Journal*, 644-661; Id., *The Enterprise of Law: Justice Without the State* (San Francisco: Pacific Research Institute for Public Policy, 1990), 30-36; Id., *Justice Without Government. The Merchant Courts of Medieval Europe and Their Modern Counterparts*, in D.T. Beito, D.T. Gordon, P. Tabarrok and P. Johnson (eds), *The Voluntary City: Choice, Community, and Civil Society* (Ann Arbor: University of Michigan Press, 2002) 127-150. For more exhaustive references on the advocates of the *lex mercatoria* it may suffice to recall the excellent study by M.E. Basile *et al.* (eds), *Lex Mercatoria and Legal Pluralism: A Late Thirteenth-Century Treatise and Its Afterlife* (Cambridge, Mass.: Ames Foundation, 1998), 123-178, together with E. Kadens, *The Myth of the Customary Law Merchant* (2012) 90 *Texas Law Review*, 1153-1206, esp. 1153-1159, notes 1-13, D. De ruysscher, *Conceptualizing Lex Mercatoria*: *Malynes, Schmitthoff and Goldman compared* (2020) 27 *Maastricht Journal of European and Comparative Law*, 465-483, and S. Gialdroni, *Il law merchant nella storiografia giuridica del Novecento: una rassegna bibliografica (14.08.2008) Forum Historiae Iuris* (https://forhistiur.net/2008-08-gialdroni, last accessed: 28/09/2025).

2 E.g., Berman, *Law and Revolution,* cit., 347.

3 E.g., Galgano, *Lex Mercatoria,* cit., 71; Trakman*, The Law Merchant*, cit., 8-9.

2 Such theories have been proved time and again to lack any historical foundation. No universal set of rules was ever produced by merchants, whose customs differed sensibly from place to place. Whenever rules on trade emerged, public authorities (a term necessarily wide and articulated in the pre-modern world) were normally involved in their making as much as in their application.[4] What we find in the sources is a highly variegated scenario: by and large, a series of layers of rules, ranging from general, supra-territorial principles to specific local customs. Their combination sometimes bestowed upon mercantile rules some degree of similarity but never

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4 E.g. A. Cordes, *Auf der Suche nach der Rechtswirklichkeit der mittelalterlichen Lex mercatoria* (2001) 118 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (GA), 168-184; English revised version: *The Search for a Medieval Lex Mercatoria* (2003) 5 *Oxford University Comparative Law Forum*, available online at: https://ouclf.law.ox.ac.uk/the-search-for-a-medieval-lex-mercatoria (last accessed: 28/09/2025); S.E. Sachs, *From St. Ives to Cyberspace. The Modern Distortion of the Medieval 'Law Merchant'* (2006) 21 *American University International Law Review*, 685-812; J.H. Baker, *The Law Merchant and the Common Law Before 1700* (1979) 38 *Cambridge Law Journal,* 295-322; Basile *et al., Lex Mercatoria and Legal Pluralism,* cit.; J.S. Rogers, *The Early History of the Law of Bills and Notes* (Cambridge: Cambridge University Press, 1995); C.H. Donahue, Jr., *Medieval and Early Modern Lex Mercatoria. An Attempt at the Probatio Diabolica* (2004) 5 *Chicago Journal of International Law*, 21-36; O. Volckart and A. Mangels, *Are the Roots of the Modern Lex Mercatoria Really Medieval?* (1999) 65 *Southern Economic Journal*, 427-450; J.M. Mousseron, *Lex Mercatoria: Bonne Mauvaise Idée ou Mauvaise Bonne Idée?*, in *Mélanges dédiés à L. Boyer, doyen de la Faculté de droit de Toulouse* (Toulouse: Presses de l'Université Toulouse Capitole, 1996), 321-336; A.D. Kessler, *A Revolution in Commerce: The Parisian Merchant Court and the Rise of Commercial Society in Eighteenth-Century France* (New Haven: Yale University Press, 2007), 99; A. Bonoldi, *Mercanti a processo: la risoluzione delle controversie tra operatori alle fiere di Bolzano (secc. XVII-XVIII)*, in A. Bonoldi, A. Leonardi and K. Occhi (eds), *Interessi e regole. Operatori e istituzioni nel commercio transalpino in età moderna (secoli XVI-XIX)* (Bologna: Mulino, 2012), 29-58, 41.

5 On the subject the literature is vast, but it may suffice to refer to some brilliant works of Emily Kadens, where a large bibliography may be found: *Order within Law, Variety within Custom: The Character of the Medieval Merchant Law* (2004) 5 *Chicago Journal of International Law*, 39-66; *The Myth of the Customary Law Merchant*, cit.; *The Medieval Law Merchant: The Tyranny of a Construct* (2015) 7 *Journal of Legal Analysis*, 251-289.

uniformity.[5] If some general principles are often attested as applied across (parts of) Europe, few specific rules applying in a given market may be found even in neighbouring ones.[6]

3 Broad-brush pictures of pre-modern commerce tend to highlight similarities among mercantile customs. Magnifying those similarities and overlooking details, such general accounts portray trade rules as uniform. The next step is an easy one to take: moving from uniformity to universality. Scratching only the surface, those general pictures often fail to recognise (or tend to downplay) the great variety of actual solutions attested locally and regionally, drawing conclusions as general as they are inaccurate.[7] The most extreme of such solutions portray general principles as immediately applicable as if they were specific rules, or (which is the same) elevate specific rules to the rank of overall principles. This is how a universal mercantile law comes into existence.

4 Most literature on the *lex mercatoria* seeks to provide some historical foundation to modern attempts to deregulate commercial practices.[8] The focus is, therefore, not on the past but on present-day law. This probably accounts for the rather flexible attitude towards historical sources, as well as for the tendency to cite previous studies as actual evidence of a past that is being

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6 The same may be said for the aquatic branch of the *lex mercatoria*, the so-called *lex maritima*: see e.g. W. Tetley, *The General Maritime Law - The Lex Maritima* (1994) 20 *Syracuse Journal of International Law and Commerce*, 105-146, 109-137; A. Maurer, *Lex Maritima. Grundzüge eines transnationalen Seehandelsrechts* (Tübingen: Mohr Siebeck, 2012), 7-11 (and more broadly also 12-22). For an all-round critique of this approach see for all A. Cordes, *Lex maritima? Local, regional and universal maritime law in the Middle Ages*. In W. Blockmans, M. Krom and J. Wubs-Mrozewicz (eds), *The Routledge Handbook of Maritime Trade around Europe 1300-1600* (London: Routledge, 2017), 69-85.

7 This crucial point is well explained by V. Piergiovanni, *Genoese Civil Rota and Mercantile Customary Law*, in V. Piergiovanni (ed.), *From lex mercatoria to Commercial law* (Berlin: Duncker & Humblot, 2005), 191-206, 201-203.

8 'For several influential scholars, the Middle Ages appeared as a perfect projection surface for their neoliberal agenda in the age of globalization.' A. Cordes and P. Höhn, *Extra-Legal and Legal Conflict Management among Long-Distance Traders (1250–1650)*, in H. Pihlajamäki, M.D. Dubber and M.A. Godfrey (eds), *The Oxford Handbook of European Legal History* (Oxford: Oxford University Press, 2018), 509-527, 512. The most articulated article by Kadens seeking to debunk the idea of a medieval *lex mercatoria* opens with a telling sentence: 'Advocates of private ordering have fallen in love with the Middle Ages.' Kadens, *The Myth of the Customary Law Merchant*, cit., 1153. Emblematic, in this regard, is the title of one of such works, W.C. Wooldridge, *Uncle Sam. the Monopoly Man* (New Rochelle, N.Y.: Arlington House, 1970). Similarly instructive is the vague use of the *lex mercatoria* in the volume (*ibid.*, esp. 96).

imagined.[9] If the result is somewhat confusing, it is however a confusion that builds a critical mass. This vagueness-cum-footnotes is difficult to disprove. As the normative universality claimed by the adherents of the *lex mercatoria* may be confuted only by punctilious reference to a series of specific local rules, such references are often taken as localised exceptions to the general rule, and so easily dismissed. Perhaps this explains why the *lex mercatoria* debate resembles a scholarly hydra: for each head one laboriously seeks to chop off, two more will grow back. Even what is probably the most accurate attempt to disprove its historical existence, Emily Kadens' lengthy and excellent article *The Myth of the Customary Law Merchant*,[10] was not exempt from criticism.[11] The efforts to debunk the idea of a *lex mercatoria* seem to have only helped to keep alive the debate surrounding it. To some extent, this is unavoidable: proving a negative is impossible by definition.[12] Only by showing what the actual norms underpinning medieval and early-modern trade were could one put an end to this never-ending saga. But, as those very norms are both extremely difficult to assess with precision and remarkably variegated across space and time, complex and detailed studies on specific segments of medieval trade cannot erase the grand narrative of a universal set of rules. Thus the debate goes on, and well-established legal historians, perhaps despairing of ever bringing it to an end, sought at least to save trees by publishing further excellent confutations of the *lex mercatoria* on the internet only.[13] As there is little that may be added to the debate, this article will not linger much on the point – if only to save some trees.

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9 As observed by Sachs, 'the historiography of mercantile law has turned into a game of "Telephone", with one generation interpreting the works of previous authors and the next interpreting the interpretations.' Sachs, *From St. Ives to Cyberspace,* cit., 806. In a study published a year before that of Sachs, Piergiovanni had already noted how 'almost all' scholarship advocating the *lex mercatoria*, 'however, manifest a determination to read the past in the light of the present. Most striking, however, is the absence of texts and studies based on the examination of new sources, with analysis restricted to a more or less critical re-reading of the historiography.' Piergiovanni, *Genoese Civil Rota,* cit., 203.

10 Kadens, *The Myth of the Customary Law Merchant*, cit., 1153-1206. See also Ead., *Order within Law,* cit., and Ead., *The Medieval Law Merchant,* cit.

11 E.g. R. Michaels, *Legal Medievalism in Lex Mercatoria Scholarship* (2012) 90 *Texas Law Review*, 259-268; N. Bose and V.V. Ramray, *Lex Mercatoria, Legal Pluralism, and the Modern State through the Lens of the East India Company, 1600-1757* (2020) 40 *Comparative Studies of South Asia, Africa and the Middle East*, 277-290, 282.

12 Cf. Donahue, *Medieval and Early Modern Lex Mercatoria*, cit.

13 E.g., Cordes, *The search for a medieval Lex mercatoria*, cit. The original German version was printed (*supra*, note 4), maybe in a more optimistic attitude as to the way the *lex mercatoria* debate was progressing.

5 As a scholar of magic law put it, 'customary law should be created for magicians in a similar way to Lex Mercatoria.'[14] The statement was made without any irony, and it is useful in that it goes straight to the core of the *lex mercatoria* idea. So, the same scholar goes on, '[t]he *Lex Magica* arose in a specific context similar to the way *Lex Mercatoria* came to be: a community of professionals created a body of common law because there were no traditional legal rules efficiently regulating the magicians' activities.'[15] This might be the best definition both of *lex mercatoria* and of the scholarly approach in its favour – the idea that, at some point after the high Middle Ages, merchants in Europe created a universal set of rules to regulate their activity. Whether this creative process took place by way of positive norms (i.e., of rules imposed, the typical top-down approach of legislation) or it consisted in the reiteration of behavioural patterns (i.e., the bottom-up approach normally associated with customs), those rules should have applied across Europe, or at least within large parts of it. Universality lies at the very core of the need for a *lex mercatoria*: had it been local or regional, it would have contradicted the very reason for postulating its existence – efficiency.[16] A local set of rules different from those of the next large market would have created just as many problems for supra-local exchanges as it would have solved for internal ones. Trading across different markets, merchants would have had little interest in developing sets of rules different and potentially conflicting for each market. Or so the story goes.

6 The analogy with the *lex magica* is more than a simple provocation. Magicians ought to abide by a deontological code, prohibiting among other things the appropriation of the authorship of tricks invented by their colleagues, or divulging them to non-magicians. The enforcement mechanisms are wholly internal to the community of magicians – access to public (i.e., state-backed) conflict-resolution and enforcement mechanisms is dubious at best. Within this community, ostracism seems to be the main threat to the dishonest magician.[17] In the case of the magic community, however, sanctions are weak, given both the lack of internal hierarchical structures within societies for magicians, and that membership is not compulsory for magicians to practice their trade. Specifically, unruly magicians may well appropriate other magicians' tricks and use them in their shows, or sell them as if they were their own, with little fear of sanctions. Currently, it seems, the only effective sanctions to dishonest magicians are those provided for by intellectual property rights[18] (insofar as magic tricks can be the object of IP rights, which is a

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14 J. Guilhem, *Lex Magica: A Lex Mercatoria Reflection* (2014) 37 *Thomas Jefferson Law Review*, 125-138, 126.

15 *Ibid.*, 127.

16 See e.g., Benson, *The Enterprise of Law*, cit., 32; Id., *Justice Without Government,* cit., 128-129; Berman, *Law and Revolution,* cit., 333; Trakman, *The Law Merchant*, cit., 39.

17 Guilhem, *Lex Magica*, cit., 129-130.

18 *Ibid.,* 132-138.

problematic issue).[19] The implied argument seems to be that, if magical societies could enforce their own rules, they would be more effective, and this would be beneficial both to the magic community and, ultimately, also to its individual members.

7 This line of reasoning is helpful in assessing the fascination of some scholarship with the *lex mercatoria* idea. Ultimately, its strength lies in the arbitrary conjunction of an axiom and a fact. The axiom is that a set of universal rules regulating trade is beneficial to those engaged in supra-local trade. The fact is that merchants did trade outside their own market before the establishment of a complex set of state-backed rules governing such trade. The best way to justify that fact is, thus, the application of the axiom.

2. Universal principles? The case of general average

8 One of the reasons why the concept of a universal *lex mercatoria* did take root is that, all in all, the main rules underpinning trade often look fairly similar across time and space. It is admittedly difficult to argue that different societies in different places at different times all came up with the same rules by sheer coincidence. It would seem far more likely that the same rule progressively spread along with the traders who used it. It is a matter of common sense. In reaching this conclusion, however, common sense is unduly encouraged by two mechanisms we often use, whether consciously or not. The first is the tendency to blur together specific rules with more general principles.[20] This tendency is all the more natural when the sources are not as clear and precise as one might wish. Medieval mercantile sources, as anyone familiar with them knows all too well, are a case in point. The second mechanism is to associate 'comparison' with 'equation' – two concepts clearly distinct in theoretical dissertations on comparative legal methodology, but far more complex to disentangle in practice.[21] Only by avoiding the easy shortcut of equating what looks similar can one distinguish between actual influences leading to the same or very similar rules on the one hand, and 'parallel but independent developments'[22] on the other. Not infrequently, the development of commercial institutions might have followed a similar pattern

19 E.g. J. Brancolini, *Abracadabra! Why Copyright Protection For Magic Is Not Just An Illusion* (2014) 33 *Loyola of Los Angeles Entertainment Law Review*, 103-136.

20 E.g. F. Schauer, *The Convergence of Rules and Standards* (2003) 303 *New Zealand Law Review*, 303-328. The point of course gets even more complicated when procedure is also taken into account: e.g. R.J. Allen and M.S. Pardo, *The Myth of the Law-Fact Distinction* (2002-2003) 97 *Northwestern University Law Review*, 1769-1808. On the trade-off between precision in rules and imprecision in their interaction (and, therefore, in the principles underpinning them) see e.g. J. Braithwaite, *Rules and Principles: A Theory of Legal Certainty* (2002) 27 *Australasian Journal of Legal Philosophy*, 47-82.

21 E.g. I. Petretta, *The Question of Comparison* (2020) 68 *American Journal of Comparative Law*, 893-928.

22 Cordes, *Auf der Suche*, cit., 181.

neither because of sheer coincidence nor by imitation from one place to another, but because of similar economic and operational necessities.

9 In this regard, a particularly relevant case is that of general average.[23] General average is the damage deliberately incurred to a ship or her cargo in order to save the rest of the cargo and the ship. The typical example is that of jettison: during a tempest, the best chance a ship often had not to sink was to throw overboard part of her cargo and/or apparel in order to lighten the hull and hopefully brave the storm. The damage was not accidental, nor did it strike masts and cargo randomly. Rather, it was deliberately inflicted on specific elements for the safety of the rest. To make the sacrifice acceptable to the owners of what was thrown overboard or cut off, some form of compensation was necessary. Hence the basic rule informing general average: any damage or loss of a part undertaken with the direct purpose of saving the rest had to be shared by all the parties interested in the voyage.

10 General average is by no means the only case that could be used to illustrate the problem of ancient maritime institutions attested with seeming continuity across time and space. Shipwreck and salvage, or bottomry and loans, could have been used instead. General average was chosen because of the advantage of a more immediate link between rules and their economic implications. Also, and moreover, in general average even minor, apparently trivial variations in the application of a rule could lead to very significant divergences as to the outcome.

11 The basic rule of general average is famously attested as the sea-law of Rhodes, better known as the *lex Rhodia de iactu*. What this *lex Rhodia* actually said, we do not know: nothing about it is known prior to the Romans.[24] Even the inscription with the general rule of the *lex Rhodia* found

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23 From the close of the Middle Ages well into the early-modern period, the term 'average' was used for a variety of different contributions required of shipmaster and merchants. Even when the contribution was the same, often the specific name (which always included the term 'average') would change in different places and different times (*infra*, note 154). This essay focuses only on one specific kind of average (usually called General): including also some other kinds might have perhaps strengthened the underlying assumption on the variety of different rules stemming from the same principles. The cost, however, would have been to torment the reader beyond what is generally deemed acceptable even among legal historians.

24 See the literature quoted in E. Mataix Ferrándiz, *Will the Circle Be Unbroken? Continuity and Change of the Lex Rhodia's Jettison Principles in Roman and Medieval Mediterranean Rulings* (2017) 29 *Al-Masāq*, 41-59, 42-43.

in a marble column in Rhodes' harbour comes in fact from a Roman jurist.[25] Modern scholars[26] have little to add to what St Isidore of Seville wrote in his *Etymologiae* (V.17) in the VI century AD – the (original) *lex Rhodia* was perhaps some ancient mercantile custom of the Rhodians, whose content is wholly unknown. The words of the Roman jurist that found a place in the Rhodian harbour are more famously reported also in the Digest of Justinian: the jurist is Paul, and his words open the title of the Digest devoted to jettison, under the title *lex Rhodia de iactu* (D.14.2.1).[27] Paul's words read as follows:[28]

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25 G. Purpura, *Ius naufragii, sylai e lex Rhodia. Genesi delle consuetudini marittime mediterranee* (2002) 47 *Annali del Seminario Giuridico dell'Università degli Studi di Palermo,* 275-292; N. Badoud, *Une inscription du port de Rhodes mentionnant la lex Rhodia de iactu*, in W. Eck and P. Funke (eds), *XIV Congressus Internationalis Epigraphiae Graecae et Latinae. 27.-31. Augusti MMXII. Akten* (Berlin: De Gruyter, 2014), 450-452, 451-452. A picture of the column (as well as a summary of the complex issues on the *Lex Rhodia* that the Author discusses in the abovementioned *Ius naufragii*) may be found in G. Purpura, *La protezione dei giacimenti archeologici in acque internazionali e la Lex Rhodia del mare*, in F. Maniscalco (ed.), *Mediterraneum. Tutela e valorizzazione dei beni culturali ed ambientali, Collana monografica per la tutela e valorizzazione dei beni culturali dell'Università "L'Orientale" di Napoli* (Naples: Massa, 2004), 13-26, 21. Dating the inscription is no easy task: some have suggested the second or third century AD (G. Marcou, "*Nomos Rhodion Nautikos" e la scoperta a Rodi di una colonna di marmo con l'iscrizione di Paolo [D. 14.2]*, in E. Turco Bulgherini (ed.), *Studi in onore di Lefebvre D'Ovidio in occasione dei cinquant'anni del diritto della navigazione* (Milan: Giuffrè, 1995), vol. 1, 609-640, 614), whereas others have not excluded that it was a modern commemorative inscription then destroyed during the Second World War (D. Liebs, *D. 14,2,1 Auf einer Inschrift aus Rhodos* (2008) 10 *Iuris Antiqui Historia, An International Journal on Ancient Law*, 161-167; V. Marotta, *Eclissi del pensiero giuridico e letteratura giurisprudenziale nella seconda metà del III secolo D.C.* (2007) 4 *Annaeus. Anales de la Tradición Romanística*, 53-86, 59, note 35).

26 E.g. J. Rougé, *Recherches sur l'organisation du commerce maritime en Mediterranee sous l'empire romain* (Paris: SEVPEN, 1966), 412.

27 To date, an excellent analysis of D.14.2 in English may be read in J.-J. Aubert, *Dealing with the Abyss: The Nature and Purpose of the Rhodian Sea-Law on Jettison (Lex Rhodia de Iactu, D 14.2) and the Making of Justinian's Digest*, in J.W. Cairns and P.J. du Plessis (eds), *Beyond Dogmatics: Law and Society in the Roman World* (Edinburgh: Edinburgh University Press, 2007), 157-172.

28 D.14.2.1 (Paul. 2 sent.): 'Lege Rhodia cavetur, ut si levandae navis gratia iactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est.' (Scott trans.) All quotations from the Digest follow the Mommsen-Krüger edition.

12 *It is provided by the Rhodian Law that where merchandise is thrown overboard for the purpose of lightening a ship, what has been lost for the benefit of all must be made up by the contribution of all.*

13 The rationale for the rule is then explained at the end of the next fragment in the same title of the Digest, where the same Paul explains that 'it is most equitable that the harm be shared among those who have secured the safety of their own merchandise with the destruction of the property of others'.[29] The sentence is intentionally rendered in a rather pedestrian English translation, which is however closer to the letter of the Latin text. It hinges on the superlative 'most equitable' (*aequissimum*): it is not because of some – specifically Roman – rules that the loss is to be shared among all participants in the venture, but rather because it is fair to do so.[30] Clearly, the way the rule is then applied in Roman law depends on the specific legal framework of that legal system. But, in itself, the principle has little to do with those technicalities.

14 The same rule is to be found in a variety of different contexts, some of which may not have been influenced by Roman law. So for instance this principle is found as early – and as far away – as in ancient China for damages to merchandise on boats sailing the Yangtze river, and it is not necessarily limited to sea trade, as it is also used in the Hammurabi code (ca. 1750 BC) for the damage suffered by caravans at the hands of pillagers while crossing the desert.[31] This principle is not even limited to commerce, and some city statutes used it for fire damages to habitations. In Europe, among the places geographically (and culturally) most distant from Rome, it may be found in thirteenth-century Bergen. When a house is torn down so as to prevent a fire from spreading, the Bergen City Law (1276) provides that all the houses saved by it must contribute to its reconstruction. The rule shares all the essential elements of general average: an intentional sacrifice of a part to save the rest when faced with external circumstances (such as water or fire)

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29 D.14.2.2 (Paul. 34 ed.): 'aequissimum enim est commune detrimentum fieri eorum, qui propter amissas res aliorum consecuti sunt, ut merces suas salvas haberent.'

30 See for all D. Mantovani, *L'aequitas romana: una nozione in cerca di equilibrio*, in D. Mantovani and S. Veca (eds), *Quante equità?* (Milan: Istituto Lombardo di Scienze e Lettere, 2017), 16-60, 58-60.

31 A. Addobbati, *Principles and Developments of General Average: Statutory and Contractual Loss Allowances from the Lex Rhodia to the Early Modern Mediterranean*, in M. Fusaro, A. Addobbati and L. Piccinno (eds), *General Average and Risk Management in Medieval and Early Modern Maritime Business* (Cham [Switz.]: Palgrave Macmillan, 2023), 145-168, 149, note 10.

that cannot be controlled. The similarity is even more striking, because the contribution is due only if the sacrifice of a house proves successful in saving the others.[32]

15 To explain the ubiquitous presence of general average in the Middle Ages, the German scholar Götz Landwehr wrote of 'natural constraints' (*naturgegebene Sachzwänge*) 'leading to the development of rules that are consistent in terms of content, regardless of the respective state of legal culture and geographical location'.[33] According to Landwehr, in other words, some principles regulating commercial activities may develop in a similar way across different regions not because they spread from one market to another, but because there is little alternative to that kind of development. Operational needs, in other words, may force societies to develop similar rules for the sheer lack of viable alternatives. We do not necessarily have to accept Landwehr's theory, but we might take it as a working hypothesis to test its limits. After all, the opposite theory – that the Roman law approach to general average spread across Europe, so that all rules on the

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32 Bergen City Law (1276), pt. 6, ch. 12: 'If it is considered necessary to tear down a house to stop the fire, and the owner of the house attempts to hinder this, then the person who organizes the hindrance pays a fine of one mark of silver to the king, and the houses are torn down without incurring a fine to the owner. But if the fire is stopped by the tearing down of houses, then the citizens whose houses are saved shall make reparations for the houses that were torn down to the owner, to the extent of fully repairing them as good as they were before being torn down. But if the fire did not stop with the houses that were torn down, then the houses are not replaced.' ('*En ef maðr þarf at ríufa hus fyrir ælldz gange oc vil sa fyrir standa er þau hus a. þa bøte mork Silfrs konunge oc scal þo niðr ríufa hus at usækíu. en ef ælldr stoðuazt uíð þau hus er níðr ero rufín. þa skulu bøar menn þeir sem sínum husum hallda. bøta honum hus sín after iamgoð semaðr varo. en ef elldr fær um þau hus er niðr varo rivín. þa skulu þeir engu bøta*'). I am grateful to Sören Koch for providing both the original text and its translation.

33 G. Landwehr, *Die Haverei in den mittelalterlichen deutschen Seerechtsquellen* (Hamburg: Joachim-Jungius-Gesellschaft der Wissenschaften, 1985), 104.

subject derive, directly or indirectly, from Roman law – is often taken for granted yet seldom explained by scholars.[34]

16 Landwehr's intuition does not mean that the nature of the problem dictated in itself the solution, but rather that it led to similar solutions: if the problem was the same, the solution was never identical, only (roughly) similar.[35] This difference might appear a mere sophism. In fact, it is significant: if it was the problem that dictated the solution, then the identity of the one would lead to the identity of the other. But it is difficult to find two customary compilations or statutes providing the same solution when faced with the same issue.[36] In the few cases in which this happens, the rules tend to be so remote from each other – both in space and in time – as to question the possibility that one drew from the other whilst skipping most other compilations and statutes attested in the places and the historical periods separating them. Among Landwehr's 'natural constraints' we may include the risks of the sea, the legal status of merchants and mariners in overseas ports, the tasks of lading and unlading the cargo and storing it safely on board, the vagaries of the weather, the competing interests of merchants and shipmaster (and of shipmaster and crew), and so on.[37] Other such 'constraints' were less uniform, or at least more related to discrete geographical areas: for instance shipbuilding technology, navigation techniques, weaponry and ship propulsion (sail and/or oars).[38] With regard to them, the divide between northern and southern (that is, Mediterranean) Europe was quite significant in the medieval and, albeit to a lesser extent, the first early-modern period. It is within the constraints of those similarities and differences that we should examine the institution of general average.

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34 In a brilliant study of five maritime compilations of the thirteenth century, Albrecht Cordes has recently acknowledged that they 'all … recognise the principle that sacrificing one's own property in the common interest establishes a claim to compensation'. Nonetheless, he concluded that 'however strongly they agree in principle, all five maritime codes of the late 13th century disagree stridently on the particulars. The rules are vividly formulated, but they differ to such a degree that it is impossible to posit descent from a common root or derivation from a common principle.' A. Cordes, *Conflicts in 13th Century Maritime Law: A Comparison between five European Ports* (2020) 2 *Oxford University Comparative Legal Forum*, available at: https://ouclf.law.ox.ac.uk/conflicts-in-13th-century-maritime-law-a-comparison-between-five-european-ports/ (last accessed: 28/09/2025). General average withstood the test of time also with regard to the complexity of possible solutions: for a modern approach to the subject (and its intricacy) see J. Kruit, *General Average, Legal basis and Applicable Law. The Overrated Significance of the York-Antwerp Rules* (Zutphen: Paris Legal Publishers, 2017).

35 Cordes, *Conflicts in 13th Century Maritime Law*, cit.

36 The same is true even for close-by regions: H. Kümpel, *Der Traum vom ehrbaren Kaufmann: Die Deutschen und die Hanse* (2nd edn., Berlin: Propyläen: 2020), 285-286.

37 The list, slightly abridged, is taken from Cordes, *Conflicts in 13th Century Maritime Law,* cit.

38 *Ibid*.

3. General Average across time and space: two examples

17 The basic principle behind the concept of general average is that of risk-spreading: leaving each player involved in a common enterprise to bear any loss that may result from it would be inefficient; it is more efficient to spread the risk of damage or loss to all participants, so as to lower the risk of total loss on each individual.[39] Spreading the risk, however, is a rather general concept which may be applied in a variety of different ways. This is indeed what happened with general average. Its concrete application did differ from place to place. Often, the reason for the different application is to be found in economic factors; other times, in cultural or social reasons. We need to be aware, however, that in most of the cases in which we reach a conclusion, we are just making an educated guess.

18 Historically, the main alternative to the spreading of the risk was simply to pass it on altogether to someone else. Instead of general average, insurance. Insurance is a more refined concept, which requires a number of additional elements – some of them economic (for instance, a market with a sufficient number of players willing to underwrite a policy and sufficient liquidity to cover losses), others astride social and legal categories (such as the tolerance of usury, given the affinity between interests and insurance premium), and others properly legal (from the concept of risk transfer to the availability of legal remedies to force the insurers to pay up in case of mishap). Even in the presence of all such requirements, then, the choice of insurance over general average is not, strictly speaking, necessary. Even if it might appear more efficient from our modern vantage point[40] (so much so that in economic literature general average is usually treated as a 'precursor of insurance proper'[41]), this enhanced efficiency rests on a number of elements that we ought not to underestimate. To come back to Landwehr's terminology, insurance is not an institution arising from natural constraints, but merely an alternative that looks (to us) more

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39 On the difference between sharing the risk and shifting it onto someone else – and so, between general average and insurance – see M. Fusaro, *Sharing Risks, on Averages and Why They Matter*, in Fusaro, Addobbati and Piccinno (eds), *General Average and Risk Management*, cit., 3-30, 10-15.

40 There is a tendency, shared among some modern economic historians and institutional scholars, to view the development of risk techniques as a progressive evolution where more efficient solutions would progressively supplant older and less efficient ones. While this approach has undoubtedly its merits, it is not exempt from pitfalls either. See e.g. the remarks by G. Dreijer, *Maritime Averages and the Complexity of Risk Management in Sixteenth-century Antwerp* (2020) 17 *Low Countries Journal of Social and Economic History*, 31-54, 32-33.

41 As noted by M. Fusaro, *Venetian Averages between East and West. Risk Management and Transaction Costs in the Early Modern Mediterranean* (2022) 171 *Quaderni Storici*, 649-671, 658.

advanced. Even then, however, this is not entirely true, as general average is still in use today[42] – it suffices to think of the *Ever Given* case (the cargo ship stranded in the Suez Canal in 2021) and of the *Dali* case (the cargo ship that destroyed the Francis Scott Key Bridge in Baltimore in 2024), to cite only two of the best-known incidents reported in the media across the globe in recent years. In both cases a general average was declared, giving rise to claims for several hundred million dollars.

19 As said, general average is attested among nearly all societies engaged in maritime commerce: when this is not the case, the exception is more often due to insufficient evidence of its use than to clear proof of its absence. As this article uses general average as a means to a different end, no exhaustive list will be given. Rather, an attempt will be made to see how the same principle could differ in practice. To do so, we will focus on two aspects of the application of the general average principle: the contribution of the shipmaster and the valuation of the cargo. Both issues could lead to very divergent applications of the same principle informing general average – namely, that the loss or damage suffered for the common safety be shared among all interested parties. Is the shipmaster an interested party too? And, if so, should he contribute in respect of his reward for carrying the merchandise (i.e., the freight), the value of his ship, or both? Likewise the valuation of the cargo could lead to substantial differences in the outcome, and therefore in the actual contribution by the merchants. Should the merchandise be valued according to the value it had when initially purchased and stored on board, or at the value it would fetch at destination? Also, should the same criterion apply throughout the whole voyage?

3.1. Freight

20 In English maritime terminology, freight is both the merchandise stored on board and the payment to the shipmaster for carrying it (since, by and large, the reward of the shipmaster was based on the weight and the value of the cargo).[43] The merchant would promise this reward to the shipmaster for the safe arrival of his merchandise, but the general rule said nothing about the case in which something happened to the merchandise during navigation. In this regard, general average constituted a further special case: not only did the merchandise fail to arrive safely at the destination, but its loss or damage was also voluntary. It should not be surprising, therefore, if different markets arrived at different solutions to the same problem. Determining whether the freight is due or not, in turn, was necessary to ascertain whether the shipmaster should contribute to the restoration of the damage suffered by the owners of the jettisoned cargo in respect of the value of the ship, and/or of the reward due to him for transporting the merchandise on that ship.

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42 See for all Kruit, *General Average, Legal basis and Applicable Law*, cit.

43 This article will purportedly avoid mentioning the complex issue of the treatment of valuables, such as jewels or precious metal, in a general average. Not all jurisdictions allowed recovery (especially if valuables were not declared), and calculating their contribution was problematic, given the disproportion between value and weight.

21 In Roman law, freight might not necessarily be due for jettisoned items. Another Digest excerpt, next to the one that we have already seen, and again by the jurist Paul, looks at the case in which the jettisoned cargo is subsequently recovered. It deals with monetary restitution where the owner of the jettisoned cargo had already been compensated for his loss (in which case the compensation received was no longer due). In so doing, however, the text would seem to refer only to other passengers on board and/or merchants to whom the non-jettisoned cargo belonged, not also to the shipmaster (D.14.2.2.7).[44] This omission might seem to suggest that the shipmaster could not claim any money back for the simple reason that he had not contributed to reimbursing the jettisoned items in the first place. Of course it is also possible that the shipmaster is not mentioned as a beneficiary because, under the structure of the Roman law rules on the subject (the *locatio-conductio* scheme), any claim between merchants had necessarily to pass through the shipmaster, and could not be settled directly between them.[45] But the first possibility might find some foothold in other excerpts of the Digest: one denies the freight to the shipmaster for the death of a slave during the voyage;[46] another states the duty of the shipmaster to return the freight (accepted as a loan) because the voyage was not completed.[47] Both texts, however, seem to reach this conclusion on the basis that the shipmaster's undertaking was to discharge the merchandise safely at the place of destination, allowing for the different agreement to carry something irrespective of its safe arrival or not. In this light, therefore, the simple fact that the shipmaster had not received any freight for the jettisoned items subsequently recovered (the case in D.14.2.2.7) would only prove that the agreement did not also include the safe delivery at destination. More such examples in Roman law sources[48] would seem to confirm the point:

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44 D.14.2.2.7 (Paul. 34 ed.): 'Si res quae iactae sunt apparuerint, exoneratur collatio: quod si iam contributio facta sit, tunc hi qui solverint agent ex locato cum magistro, ut is ex conducto experiatur et quod exegerit reddat'.

45 The *location-conductio* contract was an extremely flexible tool, which could accommodate different agreements between the parties. What even such a flexible tool could not take away, however, was privity of contract. Any damage or loss to the cargo during the execution of the contract was a problem between merchant and shipmaster (as *locator* and *conductor* respectively). If merchant A owed some money to merchant B as compensation for the jettison of B's cargo, then, B could not sue A directly, but had to sue the shipmaster, who in his turn would have recourse against A. This is because no *ad hoc* remedy was created for the case of jettison (and, more in general, for any general average). The merchant who suffered a loss had the right to receive compensation from the other merchants. However, in the absence of specific remedies (*actiones*) to achieve as much, he had to revert to his original agreement with the shipmaster.

46 D.14.2.10pr (Lab. 1 pith a Paulo epit.). See R. Fiori, *The Allocation of Risk in Carriage-by-Sea Contracts,* in P. Candy and E. Mataix Ferrandiz (eds), *Roman Law and Maritime Commerce* (Edinburgh: Edinburgh University Press, 2022), 187-201, 188-190.

47 D.19.2.15.6 (Ulp. 32 ed.). See again Fiori, *The Allocation of Risk*, cit., 194-196.

48 *Ibid.,* 187-201.

Roman law might have allowed the parties to decide whether the freight was due for the simple carriage or for the safe delivery of the cargo.[49] Though there is no text stating expressly as much, it would seem that, when the freight was due also for the jettisoned cargo, then the shipmaster would have to contribute for the jettison in respect of that freight.

22 If we move to Byzantine law, we will find first the so-called *Nomos Rhodion nautikos*, likely compiled before the ninth century.[50] Jettison is present in the third and last part of the compilation – the longer, and generally considered the most homogeneous and best constructed section of the text – dealing largely with maritime affairs.[51] There, the text attests a change, likely of customary origin: now the freight for the jettisoned cargo is due to the shipmaster in the amount of a half. Because of that, the remaining half freight is exempted from contribution.[52] The shipmaster could keep the half of the freight due for the jettisoned cargo, but he had to contribute for the safety of the ship: lightening her burden with the jettison had ensured the safety not only of the rest of the cargo but also, and obviously, of the vessel. The ship would therefore contribute on the freight due for the cargo that arrived safely at destination.[53] The contribution due for the ship is then also attested in the great compilation written towards the end of the ninth century or the beginning of the next, known as the *Basilika* (Imperial Laws)[54] (LIII.3.1), though no mention of the freight for the jettisoned cargo is made in it.

23 In the lower part of the eastern Mediterranean, the Arabs were also engaged in maritime trade. The Islamic world had no difficulty in incorporating customs of the countries it progressively

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49 *Ibid.*

50 On the point the observations of W. Ashburner, *The Rhodian Sea-Law* (Oxford: Clarendon Press, 1909), lxvi, have been confirmed by later scholars. A short and clear overview of the literature may be found in L. Burgmann, *Die Nomoi Stratiotikos, Georgikos und Nautikos* (2009) 46 *Zbornik radova Vizantoloskog Instituta*, 53-64, 53-64, subsequently published as the last chapter of Burgmann's volume *Ausgewählte Aufsätze zur byzantinischen Rechtsgeschichte* (Frankfurt: Löwenklau-Gesellschaft, 2015). Sometimes the *Nomos Rhodion* is referred to as pseudo-*Nomos Rhodion* (or 'pseudo-Rhodian law'). This confusion derives from the fact that the Digest title on jettison is 'De lege Rhodia de iactu'. The 'pseudo' was therefore added to avoid ambiguity between the (Roman) Rhodian law and the Byzantine Rhodian law. Cf. D. Penna, *General Average in Byzantium*, in Fusaro, Addobbati and Piccinno (eds), *General Average and Risk Management*, cit., 95-119, 103.

51 M.T.G. Humphreys, *Law, Power, and Imperial Ideology in the Iconoclast Era: c.680-850* (Oxford: Oxford University Press, 2014), 188-189.

52 *Nomos nautikos*, III.32.

53 *Ibid.*, III.27.

54 On the *Basilika* see *infra*, note 140.

came to include, so long as they were not contrary to the *Qur'an* and the Prophetic tradition, and the rules on general average were no exception.[55] Yet Islamic jurists opted for a more restrictive position on freight than that of Byzantium: freight was due to the shipmaster only for the goods safely arrived at destination.[56] The shipmaster did not contribute on the ship either. The reason was not due to specific local maritime customs but rather to a broader stance on trade. Islamic jurists worked it out by analogy with desert caravans. When a camel died or became disabled on the way, its owner could throw away the load without any duty to reimburse the owner of the merchandise. By the same token, the jurists argued, a ship throwing some cargo overboard in order to brave a storm ought not to contribute to a general average either.[57] This position however was not unanimous among jurists, and some – especially those belonging to the Iraqi schools – argued for the contrary solution out of fairness. Here it is difficult to imagine a Roman law influence, as the Islamic schools flourishing in the territories more likely to retain some memory of their Roman heritage were those that went against the Roman law solution. By contrast, the schools more in line with the Roman jurists – and on the same equitable grounds – belonged to territories where contacts with Roman law had been tenuous at best.

24 The name itself of 'average' spread to western and northern Europe through the Italian 'avaria', which in turn might have come from the Greek *α-βάρος* (*βάρος* meaning weight or load, so that the privative alpha designates the unlading of the cargo, that is, its jettison), or from the Arabic term *awār*, literally meaning a defect or an imperfection in merchandise, a slave, a beast or even a house or tent.[58] Either way, it is safe to say that the name came from the eastern Mediterranean, [59] and it began to appear on its western shores from the eleventh century onwards. The Statutes

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55 On the formation and development of Islamic jurisprudence see the classic study by J. Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964). For a critical re-assessment see H. Motzki, *The Origins of Islamic Jurisprudence. Meccan Fiqh before the Classical Schools* (Leiden: Brill, 2002).

56 H. Khalilieh, *Admiralty and Maritime Laws in the Mediterranean Sea, ca.800-1050* (Leiden: Brill, 2006), 164.

57 *Ibid.,* 169.

58 *Ibid.,* 150, note 2; Id., *Rules and Practices of General Average in the Islamic Mediterranean on the Eve of the Emergence of the Italian Communes*, in Fusaro, Addobbati and Piccinno (eds), *General Average and Risk Management*, cit., 121-143, 121-122.

59 As a matter of fact, the origins of the term *avaria* are far more obscure: see for all Addobbati, *Principles and Developments of General Average,* cit., 145-147.

of Trani in Apulia (1063),[60] for instance, make such an abundant use of the term 'varea' to suggest that the term was already customarily in use.[61] The same conjecture can be made for other statutes. So for example in the maritime Statutes of Venice of 1255, arguably the most advanced and complex maritime code of the time, the same term ('avaria') is not found in the main rule on the subject (art. 95) but rather in some more peripheral provisions carving out exceptions to that rule (especially in art. 74), which had in their turn to be limited by some further sub-exceptions.[62] Again, this would seem to point to a long familiarity with the concept of general average, thereby strengthening the impression that the Venetian statutes sought to regulate a pre-existing maritime practice, not to establish it.

25 Most of the early Italian statutes, however, do not give clear indications as to the contribution. This is true, for example, both for the abovementioned Statutes of Trani and Venice and for the Statutes of Pisa (1160).[63] Other, but less ancient, maritime codes provide more information, but they attest to a different position from both the Islamic and the Byzantine traditions. So for

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60 Though the year 1063 is reported in the incipit of the Statutes of Trani, this of course does not mean that their whole text dates to that year. The subject has attracted much interest among scholars: see S. Nisio, *Degli "ordinamenta et consuetudo maris" di Trani* (Bari: Grafiche Cressati, 1963), esp. 18-28 and the vast bibliography quoted in it.

61 Statutes of Trani, artt. 2, 4, 8, 13, 14. Text in J.-M. Pardessus (ed.), *Collection de Lois Maritimes antérieures au XVIIIe siècle*, vol. 5 (Paris: Imprimerie Royale, 1839), 238-242.

62 The earliest maritime statutes of Venice, up to and especially including the 1255 one, may be read in the edition by R. Predelli and A. Sacerdoti, *Gli statuti marittimi veneziani* (Venice: Federico, 1903). Art. 74 excluded from contribution to the average any damage or loss to masts, rigging and helm. The exception, however, knew a sub-exception, for it did not apply to ships carrying passengers ('peregrini', art. 78). In such a case therefore any damage to the vessel would fall into the general average. In turn, this sub-exception had to be restricted where the same ship carried both passengers and merchants (art. 79). The use of the term in those articles, however, is not entirely uniform: see on the point Addobbati, *Principles and Developments of General Average,* cit., 148, note 9.

63 The critical edition of these statutes (based on Ms. 415 of the Beinecke Library of Yale) may be read in P. Vignoli (ed.), *I costituti della legge e dell'uso di Pisa (sec. xii*) (Rome: Istituto Storico Italiano per il Medioevo, 2003). For a less accurate but easily available online edition see also F. Bonaino (ed.), *Constituta legis et usus pisanae civitatis* (Florentiae, Typis Galilaeianis, 1870).

instance the Statutes of the city of Amalfi (the so-called *Tabula Amalfitana*) provided that the ship would contribute for her full value (art. 54),[64] but said nothing about the freight.

26 Unlike in Amalfi, on the western shores of the Mediterranean, the ship would often contribute for only half of her value to the general average. This is the case in the Customs of Valencia of 1250 (II.9.17.7),[65] as well as in the Ordinances of Peter IV of Aragon of 1340 (art. 29),[66] which also specified that the shipmaster had to contribute for his whole freight – both for the merchandise arrived at destination and for that thrown overboard (art. 39).[67] In their turn, the rules on jettison attested on the eastern shores of the Iberian peninsula are not the same as those attested in Castille. There, the monumental legislative compilation known as *Siete Partidas* (ca. 1254-1265) included jettison (title 9 of book V), establishing that the loss be divided among all (V. 9.6-7), without however entering into details on either contribution or valuation.[68] The great late-medieval customary compilation known as the *Consulate of the Sea* (*Llibre del Consolat de Mar*), written in Catalan in the fourteenth century, was more detailed but again different from the other texts listed above. In the *Consulate of the Sea*, the shipmaster was left with a choice: he could either ask for the full freight on the jettisoned items and contribute to the general average in full (i.e., for the whole of his freight) or he could renounce the freight due for the jettisoned cargo and avoid paying any contribution for his remaining freight (on the merchandise safely arrived at destination).[69] As for the ship, whose safety also depended on the jettisoned cargo, under the *Consulate of the Sea* she would contribute for half her value.[70] Once again, while the basic principle remains the same (the carrier ought to contribute somehow), its practical application diverges considerably from Roman and Byzantine law, and makes it difficult to envisage continuity or even a clear link with most medieval compilations.

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64 *Capitula et ordinationes Curiae Marittimae nobilis civitatis Amalphae, quae in vulgari sermone dicuntur: la Tabula de Amalfa* (1842-1844) *Archivio Storico Italiano*, Appendix 1, 257-289, 267. While the first twenty-first articles of the Tabula (in Latin) date to the end of the eleventh century, the rest (written in vernacular) ought to be dated considerably later, likely around the late fourteenth century.

65 Customs of Valencia, II.9.17.7, in Pardessus (ed.), *Collection de Lois Maritimes*, vol. 5, cit., 336.

66 *Ibid*., 363.

67 *Ibid*.

68 *Las Siete Partidas,* vol. 3 (Madrid: Imprenta Real, 1807), 240-241.

69 Consulate of the Sea, ch. 98. Text in Pardessus (ed.), *Collection de Lois Maritimes antérieures au XVIIIe siècle*, vol. 2 (Paris: Imprimerie Royale, 1831), 103-104.

70 The provision is repeated twice: ch. 96 and ch. 98 (*ibid*., 101-102 and 103 respectively).

27 If we leave the Mediterranean and look northwards, we will still find the concept of general average known and applied, but in a variety of heterogeneous ways. First of all, the famous Rôles, or Judgments, of Oléron, a customary code that grew from 24 original articles to 47 at some point – possibly – in the late thirteenth century.[71] The Rôles of Oléron took their name from the island west of Rochefort in modern-day France, where one of the most ancient manuscripts containing them was kept. According to those Rôles, the shipmaster would receive his freight on the basis of the part of the voyage actually completed (*pro rata itineris*).[72] Thus, if some cargo had to be thrown overboard about half-voyage, he could only claim half freight for it. Here as well it seems rather unlikely to envisage some Roman or Byzantine influences. True, the *Nomos Rhodion nautikos* did provide that the shipmaster would only get half of the freight due for jettisoned items, but this half would be exempted from further contributions. Under the Rôles of Oléron, however, the payment of the freight *pro rata itineris* did not exempt the master from contributing to the general average. He had to contribute, but he could choose to contribute either in respect of the freight (for the goods arrived at destination) or of the value of the ship.[73]

28 It is beyond the point of the present short survey to argue for specific influences of one source over another, but it is not unlikely that the solution attested in Oléron was then also applied elsewhere. So for instance it is found in the Hanseatic statutes of 1447, where however it was limited to the case in which the mishap took place during the second half of the journey. If

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71 Dating the original nucleus of the Rôles of Oléron is extremely difficult, all the more since the two oldest manuscripts containing them both date to the early fourteenth century. From Karl-Friedrich Krieger onwards, most scholars dated them to the period before 1286: K.-F. Krieger, *Ursprung und Wurzeln der Rôles d'Oléron* (Cologne and Vienna: Böhlau, 1970), 71 (see further 123-145). Along the same line e.g. E. Frankot, '*Of Laws of Ships and Shipmen'. Medieval Maritime Law and its Practice in Urban Northern Europe* (Edinburgh: Edinburgh University Press, 2012), 11-12; R. Ward, *The World of the Medieval Shipmaster: Law, Business and the Sea, c.1350-c.1450* (Woodbridge: Boydell Press, 2009), 20; T.J. Runyan, *The rolls of Oléron and the Admiralty Court in Fourteenth-Century England* (1975) 19 *American Journal of Legal History*, 95-111, 98; B. Allaire, *Between Oléron and Colbert: The Evolution of French Maritime Law until the Seventeenth Century*, in M. Fusaro, B. Allaire, R. Blakemore and T. Vanneste (eds), *Law, Labour and Empire: Comparative Perspectives on Seafarers, c.1500-1800* (Houndmills: Palgrave Macmillan, 2015), 79-99, 80. For a synthesis of the literature on the Rôles of Oléron see T. Heebøll-Holm, *Ports, Piracy and Maritime War. Piracy in the English Channel and the Atlantic, c. 1280 – c. 1330* (Leiden: Brill, 2013), 130-134.

72 Oléron, *r.* 4. The text of the Rôles of Oléron may be read in Krieger, *Ursprung und Wurzeln*, cit. The same criterion applied in case the shipmaster was forced to sell part of the cargo, in case of emergency, during the voyage (Oléron, *r.* 3). See further Landwehr, *Die Haverei,* cit., 29-30.

73 Oléron, *r.* 8.

something happened during the first part of it, the shipmaster would be left with half freight.[74] It has been argued that the shipmaster's contribution in respect of freight or ship attested in Oléron was not part of the original nucleus but it was a later addition.[75] While the basis for this argument is not as strong as one might wish,[76] the inclusion of the ship's value in the total value on which the compensation for the jettison had to be reckoned is strengthened by similar conjectures in the development of other maritime rules, such as in the *Schiprecht* of Hamburg of the late thirteenth century.

29 By contrast, the inclusion of the freight in the pool for contribution would not seem widespread in the North of Europe, as it is not attested in the laws of the main Hanseatic cities, from Hamburg to Lübeck, nor in the Laws of the town of Wisby in the island of Gotland.[77] Among the main compilations on maritime usages known in medieval northern Europe, freight was included only in some Dutch ones – the Ordinances regulating shipping between the Dutch Zuiderzee and northern Europe (the so-called *Ordinancie van Staveren*) and those of the town of Kampen (written in the second half of the fourteenth century and in the first half of the fifteenth respectively). It may well be that they borrowed it from Oléron, whose influence on the *Ordinancie van Staveren* was very significant.[78] In the latter, however, the choice between freight and ship's value for contribution to the general average changed hands, as it was given to the merchants, not to the shipmaster as in Oléron.[79]

30 This shift in the decision on the contribution – from the shipmaster to the merchants – might attest to a corresponding shift in the contracting power between the parties in a carriage contract

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74 Hanseatic statutes of 1447, art. 94. Cf. Frankot, '*Of Laws of Ships and Shipmen*', cit., 29.

75 *Ibid.*, 39-40.

76 Frankot draws this conclusion on the basis of the text of the rule, which first provided for the sale of the cargo arrived at destination and the distribution of the proceeds, so as to compensate for the jettisoned items, and only then turned to the shipmaster, forcing him to choose between freight and ship's value. If the shipmaster's contribution had been part of the original rule, argues Frankot, then it would have been included in it before dealing with the compensation for the jettisoned cargo. *Ibid.,* 39.

77 Mention of Wisby as a town is needed in order to distinguish it from the Laws of the island of Wisby – that is, the Gotland Sea Law, a maritime compilation taking its name from the Swedish island where an ancient manuscript containing the compilation was kept.

78 Two rules (or judgments) of Oléron were copied verbatim in the Ordinances, and some scholars argued that the Ordinances themselves were meant as a supplement to Oléron: see Frankot, '*Of Laws of Ships and Shipmen*', cit., 14, text and notes 49 and 52. See further Ead., *De 'Ordinancie van Staveren' en het Hanzeatisch zeerecht* (2015) 77 *It Beaken*, 1-23.

79 *Ordinancie van Staveren*, art. 4. Cf. Frankot, '*Of Laws of Ships and Shipmen*', cit., 40.

during the period from the thirteenth to the fifteenth centuries. It seems more likely, however, that the change was due to the great increase in the tonnage of northern European ships. In this regard, a first significant development had already occurred from the twelfth century onwards with the introduction of the cog, whose heavily-framed bottom significantly increased the capacity of ships.[80] Larger ships allowed for more tonnage, but also required more manpower. It was the cog that most likely favoured a more clear-cut distinction between crew and passengers, thereby leading to a better distinction between carrier and merchants – but also, this way, to a progressive divergence of their interests.[81] Once again, the size of ships in northern Europe increased greatly during the fifteenth century, leading to trebling their tonnage – alongside with technical innovations in shipbuilding, such as double-mast ships.[82] Larger ships, again, meant more cargo: the corresponding increase in the freight due to the shipmaster might at times have made its value higher than that of the ship.[83] Yet, instead of changing the rule (and establishing that the ship would contribute to the valuation for general average at her full value while exempting the freight for the cargo safely arrived at destination), it was perhaps easier just to adapt its content. Thus, the *Ordinancie van Staveren* kept the choice (the shipmaster contributes for either freight or the ship's value) but replaced the party which had to make it. The Laws of Kampen, written some decades after the *Ordinancie*, went beyond it, and included in the pool for contribution both the ship's value and the freight due for the cargo safely arrived at destination.[84] This trend seems

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80 E.g. D. Ellmers, *The Cog as Cargo Carrier*, in R. Gardiner and R.W. Unger (eds), *Cogs, Caravels and Galleons. The Sailing Ship 1000-1650* (London: Naval Institute Press, 1994), 29-46. On the subject mention must be made of the work of Richard Unger, especially of some of his most significant essays, published together in R.W. Unger, *Ships and Shipping in the North Sea and Atlantic, 1400-1800* (London: Routledge, 1998): see esp. ch. 9 (*Warships and Cargo Ships in Medieval Europe*), ch. 13 (*Northern Ships and the Late Medieval Economy: Columbus and the Medieval Maritime Tradition*); ch. 14 (*The technical development of shipbuilding and government policies in the fifteenth and sixteenth centuries*); ch. 16 (*The Tonnage of Europe's Merchant Fleets 1300-1800*). For a concise overview see again R.W. Unger, *Ships and shipbuilding*, in J.B. Friedman and K. Mossler Figg (eds), *Trade, Travel, and Exploration in the Middle Ages: an Encyclopaedia* (London: Routledge, 2000), 553-558.

81 Frankot, '*Of Laws of Ships and Shipmen*', cit., 7-8.

82 F.M. Hocker, *Technical and Organizational Development in European Shipyards, 1400-1600*, in J. Bill and B.L. Clausen (eds), *Maritime Topography and the Medieval Town: Papers from the 5th International Conference on Waterfront Archaeology in Copenhagen, 14 – 16 May 1998* (Copenhagen: National Museum of Denmark, Department of Danish Collections, 1999), 21-32, 23-25.

83 Cf. the observations by Frankot, '*Of Laws of Ships and Shipmen*', cit., 41-42.

84 *Kampen Dat Boeck van Rechte,* art. 4. Cf. again Frankot, '*Of Laws of Ships and Shipmen*', cit., 42.

to have spread to some extent.[85] In 1407 the same town of Kampen passed a reform that included in the pool for contribution also the freight due to the shipmaster for the jettisoned cargo, a change also attested in some manuscripts of the Gotland Sea Law.[86]

3.2. Cargo valuation[87]

31 Another issue that the general principles of general average left unanswered – and which therefore required clarification in local customs and legislation – was how to evaluate the cargo, both that jettisoned and that safely arrived at destination. There would be little point in shipping merchandise from one place to another if its value remained the same. The value of the cargo at the place of departure (the so-called cost price) was usually considerably lower than its value at destination. The choice between these two values, therefore, had significant economic repercussions.

32 In Roman law, the answer was clear: what was jettisoned should be valued at its cost price, whereas what arrived safely should be reckoned according to its value at destination (D.14.2.2.4).[88] The Byzantine *Nomos Rhodion nautikos* was silent on the point, perhaps leaving unaltered the Roman solution – a possibility strengthened by the fact that the subsequent *Basilika* adhered expressly to the rule found in the Digest (LIII.3.3). The approach was different in the Islamic world, where most of the jurists argued for the current cost price (i.e., the market value in the place of departure of the ship) for both the jettisoned cargo and that which arrived safely at destination.[89] It is not clear whether it was possible to lower the valuation of the merchandise arriving at destination even below their cost price when they reached their destination spoiled. A

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85 This however caused problems later on, when shipmasters were no longer typically also the owners of the vessel. It is possible that this outdated model, still ultimately based on Oléron, led to the exclusion of the ship from the basis for contribution in sixteenth-century Antwerp: D. De ruysscher, *Shipping, Commerce and the Risk of Jurisdiction. The Scheldt Trade (Sixteenth Century)* (2022) 171 *Quaderni Storici*, 625-647, 636.

86 Gotland Sea Law, art. 7. Frankot, '*Of Laws of Ships and Shipmen*', cit., 42.

87 Because of the variety of different solutions adopted, a simple table will close this paragraph summing up the different position of legislation and customs cited in it.

88 D.14.2.2.4 (Paul. 2 ed.): 'Portio autem pro aestimatione rerum quae salvae sunt et earum quae amissae sunt praestari solet, nec ad rem pertinet, si hae quae amissae sunt pluris veniri poterunt, detrimenti, non lucri fit praestatio. Sed in his rebus, quarum nomine conferendum est, aestimatio debet haberi non quanti emptae sint, sed quanti venire possunt.'

89 Khalilieh, *Admiralty and Maritime Laws*, cit., 162. The rule was interpreted strictly. So for instance if the merchandise were laden on board at different locations, the value would be that of the market price at the time of the lading on board, and not at the time of their purchase. *Ibid*., 163.

fiqh (decision rendered by Islamic jurists) given by a famed Mālikī jurist in the tenth century dealt with a cargo of grain from Sicily to Al-Madhiyya (Madhia in modern-day Tunisia). During the voyage, a tempest forced the ship to jettison part of the grain; what remained on board arrived soaked. The jurist ruled that the merchants who lost their goods would 'become joint owners with merchants whose goods remained on board but suffered damage', with a share proportional to the jettisoned part of the cargo. However, the jurist continued, the grain left on board would be valued at its cost price even if it was spoiled. It may be that this line of reasoning prevented a different and lower valuation for the cargo spoiled but arrived at destination (as the joint ownership of the whole required the same criterion to evaluate each share). The only exception the jurist made was for the case in which the grain arrived at the destination was already spoiled when laden on board – which in effect is not an exception but a more exact application of the cost-price rule (poor grain would have been worth less than the average price of grain in the port of departure).[90]

33 Elsewhere, market conditions played a more significant role in the evaluation of the cargo. This may be seen from two examples. The first comes from the *Outremer*, and is found in the commercial rules of the *Assise de la court des borgès* of the crusading Kingdom of Jerusalem. There, the cargo jettisoned and the cargo that arrived at destination were both valued at their cost price.[91] Despite the obvious fact that the *Outremer* was surrounded by Arab territories, this solution was not due to Arab influences. Rather, it likely depended on the strong fluctuations to which the price of many commodities was often subjected in a market so dependent on sea imports: any other solution would have put at risk that very equity which was the foundation of the general average itself.

34 Another and opposite example comes from the Rôles of Oléron. There, the value of the jettisoned cargo was to be reckoned according to the value at destination of what arrived safely.[92] To make sense of this, we need to look outside the rules. The Rôles of Oléron focused on the wine trade, mainly from Bordeaux and La Rochelle to England.[93] When thinking of the cargo, therefore, its compilers did not have a variety of different commodities in mind, but only one. This uniformity in the merchandise transported made its valuation easier. As what arrived at

90 The *fiqh* was given by Abū Muḥammad ʿAbdallāh Ibn Abī Zayd ʿAbd al-Raḥmān al-Nafzī al-Qayrawānī (922-996 AD), and is described *ibid.,* 156 (see on the point also the ample bibliography provided *ibid.*, note 28).

91 *Assise de la court des borgès*, ch. 45 (A.A. Beugnot (ed.), *Assises de Jérusalem ou Recueil des ouvrages de jurisprudence composés pendant le XIIIe siècle dans les royaumes de Jérusalem et de Cypre,* vol. 2, *Assises de la Cour des bourgeois* (Paris: Imprimerie Royale, 1843), 44).

92 Oléron, *r.* 8.

93 Frankot, '*Of Laws of Ships and Shipmen*', cit.*,* 11; Cordes, *Conflicts in 13th Century Maritime Law,* cit. The region interested in the maritime trades described in the Rôles of Oléron, however, was broader than Anglo-French Atlantic: Krieger, *Ursprung und Wurzeln*, cit., 23-30.

destination was of the same kind and quality as what was lost during the voyage, imposing a lower valuation (cost price) on the latter would have contradicted the fairness considerations which underpinned the concept of general average.

35 Ultimately, the approach favoured by Oléron is not so distant from that of most northern European maritime compilations, many of which provided for the valuation of the cargo after the value at destination as a general rule, and therefore applicable also to the jettisoned merchandise.[94] The rationale, we might suppose, was once more based on fairness considerations: why should the unlucky merchants who owned the part of the cargo thrown overboard be penalised vis-à-vis those fortunate enough as to keep their merchandise, all the more given that the jettison was not *vis maior* but rather a deliberate choice to sacrifice something to save the rest? It might well be that those same fairness considerations – doubtless, along with economic ones – pressed for the abandonment of more ancient criteria, attested in northern maritime customs during the high Middle Ages, often based on the weight of the cargo or the number of people on board.[95] And the most equitable way to spread the loss might well have appeared to reckon all cargo after the value at the destination – both the part sacrificed and that which arrived safely at the destination thanks to that sacrifice. It may be that the same fairness considerations inspired a similar approach in the Catalan *Consulate of the Sea*, which valued the jettisoned cargo on the basis of the voyage: if the jettison happened when the ship was closer to her destination rather than her departure, then the jettisoned cargo would be reckoned at its value at destination; if on the contrary the mishap took place at a point closer to departure, then the valuation would follow the cost price.[96]

36 It would be tempting to conclude that the approach often followed in northern Europe (based on the value at the destination of all merchandise) was an improvement on the older and less sophisticated rules developed in Rome. Yet the very opposite is true. The fairness considerations inspiring both the ancient Roman rule and the medieval northern one were very similar. *Ceteris paribus* (i.e., discounting economic and technological factors), the difference in the application of the rule was due to the higher legal sophistication of classical Roman jurists over northern

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94 This is the case in the Bergen City Law of 1276 (art. 8), the Wisby Town Law (art. 10), the Lübeck Town Law (in the Reval 1257 manuscript, art. 94 – the point however is not covered in the Lübeck Sea Law, nor in the Hamburg Sea Law), in some manuscripts (and in the 1505 printed edition) of the Wisby Sea Law (art. 7), and even in the third Novgorod Skra of 1325 (art. 38). The list is based on the meticulous work of Frankot, '*Of Laws of Ships and Shipmen*', cit., 36-38, text and note 57.

95 Frankot, '*Of Laws of Ships and Shipmen*', cit., 38. An echo of this older criterion is to be found in the revised Riga Town Law, where compensation was calculated by weight (artt. 4 and 18). *Ibid.,* 39.

96 Consulate of the Sea, ch. 97. Text in Pardessus (ed.), *Collection de Lois Maritimes*, vol. 2, cit., 102.

medieval traders. The Digest text argued that the different evaluation between jettisoned cargo and cargo safely arrived at destination would best serve those fairness considerations which informed the principle of general average. What the text described as the 'most equitable' (*aequissimum*) solution was, in a literal translation, 'that the harm be common among those' (*commune detrimentum fieri eorum*) who gained through somebody else's sacrifice (D.14.2.2). The purpose of the rule, then, was to spread the *detrimentum* (broadly speaking, the 'harm') evenly – that is, proportionally – among all interested parties. But if the rationale was to spread the harm, then the loss of a potential profit was not material to the valuation of the jettisoned goods. So the valuation of the cargo thrown overboard was to be made according to its cost price, not after its value at destination. By contrast, because the profit realised by selling the cargo at destination was made possible by the sacrifice of the jettisoned items, the cargo that arrived safely ought to contribute after its higher value at destination and not according to its lesser cost price. Thus, the different evaluation of the merchandise was in fact a better application of the equity criterion informing the rule – at least, if one is a refined jurist who thinks in general terms and not a merchant who has just seen his cargo being thrown overboard to lighten the ship during a storm. It is not surprising that medieval northern merchants might have seen things differently from Roman jurists.

37 **Table 1. Valuation of jettisoned cargo - overview**

	- jettisoned: cost price - arrived: value at destination	Both jettisoned and arrived: both value at destination	jettisoned and arrived: both cost price	- jettisoned in 1st half of voyage: cost price, otherwise value at destination - arrived: value at destination
Roman Law	**X**			
Byzantine law	**X**			
Islamic jurisprudence			**X**	
Kingdom of Jerusalem			**X**	
Oléron		**X**		
Consulate of the Sea				**X**
Northern Europe		**X**		

4. Medieval commercial rules and their interpreters: the consent to jettison

4.1. The growth of the consent requirement

38 A different but related problem in the evolution of commercial rules is whether we should interpret them literally. We are so used to thinking of rules in positivist terms that we might tend to discount the environment in which they were produced. Here as well, general average may be of help to clarify the point. So far, we have looked at the question of the contribution due once the jettison was done. But we have not looked at the problem of whether the shipmaster could proceed with the jettison once the situation warranted such an extreme measure. Could he act independently of the merchants, or did he need their consent? The point was not covered, at least expressly, in Roman law. The fact that the shipmaster was not necessarily entitled to receive freight for the jettisoned cargo, however, might have reduced possible conflicts of interest between the parties. The issue of consent begins to be discussed in Byzantine law, where the *Nomos Rhodion Nauticos* (which, as we have seen, did leave the shipmaster with half freight for the jettisoned cargo) required the consent of the majority of the merchants to proceed with the jettison (III.9).[97] To emphasise the voluntariness element, the same compilation also provided that the merchants should begin to throw overboard their own merchandise first (III.38).[98] The rule however does not clarify what would happen if the merchants refused to proceed with the jettison, or if the shipmaster did not wait for their approval. The point is hardly a moot one. Islamic jurists – who generally gave broad powers to the shipmaster[99] – dealt with the issue in a very elaborate manner, taking into account many different scenarios: for instance, merchant A throwing merchant B's goods, or merchants A and C throwing merchant B's goods, or merchant A throwing merchant B's goods at the instigation of merchant C, or at his request, or at his suggestion, or under the promise to bear any responsibility for it, and so on.[100] Some of those cases might well have been hypothetical, but they were worth discussing: during a storm that threatened the very life of everybody on board it is not easy to think of merchants and crew spending precious time in long discussions, reaching a collegial decision, and then proceeding to execute it in an orderly manner. In a situation where panic spread quickly, it is easier to imagine that everybody on board would just throw overboard anything they could lay their hands on without waiting for the consent of its owner.[101]

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97 Penna, *General Average in Byzantium*, cit., 104-105.

98 *Ibid*., 110-111.

99 Not only the shipmaster enjoyed broad powers, but the carrier was not responsible for damage or loss, as attested in numerous Geniza mercantile letters: J.L. Goldberg, *Trade and Institutions in the Medieval Mediterranean* (Cambridge: Cambridge University Press, 2012), 106-108 and 110.

100 Khalilieh, *Admiralty and Maritime Laws*, cit., 154.

101 Cf. e.g. Addobbati, *Principles and Developments of General Average,* cit., 159-161.

39 The emphasis on the voluntary nature of jettison, however, becomes increasingly attested with the passing of time. The Customs of Valencia, after requiring the consent of the majority of both merchants and crew, also provided that the first to throw overboard something be a merchant and not a sailor, so as to emphasise (and prove) that the merchants did consent to the jettison.[102] The Ordinances of Peter IV of Aragon similarly asked for the consent of the majority of the merchants to proceed with the jettison, defining this majority on the basis of the quantity (not the value) of the cargo laden on board. In case no merchant was on board, then the shipmaster should obtain the consent of the majority of the crew (art. 27).[103] The last provision was already present in the Statutes of Pisa of 1160 (ch. 29, *De iactu navium*), requiring the consent of the majority of the merchants or, in their absence, of the crew. The Pisan customs also provided that if the shipmaster were to proceed with the jettison without such an agreement (*sine concordia*), he would be liable should he throw overboard more expensive cargo before the less expensive.

40 The Statutes of Amalfi, so reticent to describe the valuation of the jettisoned cargo (just like the Statutes of Pisa were), had on the contrary much to say on the need of consent to the jettison itself. First, they provided that the shipmaster ought to start himself with the jettison of the ship's appurtenances or expressly authorise his crew to do so (art. 47).[104] Then they looked at the case in which the ship had merchandise for which freight was paid (i.e., cargo belonging to merchants). In such a case, the shipmaster had to consult with the merchants and explain to them the necessity to throw their cargo overboard. After this explanation, the Statutes continued, the first merchandise ought to be thrown overboard by the merchants themselves and not by the shipmaster or his crew, so as to make sure that the merchants understood the predicament and agreed with the solution proposed to them by the shipmaster (art. 48). Should no merchant be on board, then the shipmaster could proceed with the jettison only with the consent of the helmsman and all his crew or at least the majority (art. 48).[105] The same Statutes then looked at the case in

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102 Customs of Valencia, II.9.17.7, in Pardessus (ed.), *Collection de Lois Maritimes*, vol. 5, cit., 336.

103 *Ibid.,* 362.

104 *Capitula et ordinationes … civitatis Amalphae,* cit., 265.

105 *Ibid.,* 266.

which the merchants were unwilling to agree, providing a very good description of the situation (art. 49):[106]

41 > *if the merchants were tightfisted, as there are in the world, who would sooner die than lose anything, and such [a merchant] out of extreme avarice would not consent to the jettison but refuse, then the shipmaster, together with the helmsman and the other good men of the ship, having discussed the matter, must request [his consent], showing him the reason why it is necessary to proceed with the jettison to save the ship and the cargo: and if he [the merchant] would persevere in his greed and refuse, then the shipmaster must make a protest before all the others, and then he may begin with the jettison*

42 The fifteenth-century *Consulate of the Sea* went even further. First, the shipmaster had to give a lengthy and elaborate speech to the merchants (whose text was reported in the *Consulate*), then he would ask them to vote, making sure that the ship's purser would record the voting operations. The jettison should begin once the merchants expressed their consent and, just as elsewhere, it ought to start with a merchant throwing something overboard. Only then could the shipmaster, together with the helmsman, proceed with the jettison, and each jettisoned item had to be recorded by the purser.[107]

43 This complex procedure was then further complicated in other, later statutes. So for instance the Statutes of Genoa of 1588, having incorporated all the steps prescribed by the *Consulate of the Sea*, added a few more of their own: the merchants should approve the jettison with a two-thirds majority, followed by the election of three representatives ('consuls'), two of them selected among the merchants and one among the crew.[108] A century later, the famed French *Ordonnance de la Marine* of 1681 outdid the Genoese Statutes, adding that the purser should not only register each

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106 *Ibid.,* 266-267: 'Item se li mercanti fossero persone avare, come per il mondo se ne trovano, li quali voleno più presto morire che perdere alcuna cosa, lo quale per estrema avaritia non volesse consentire lo jettito, ma repugnare: all'hora il patrone, assieme con lo nocchiero e l'altri buoni huomini de lo navilio, cominciato concilio, lo devono requedere, mostrandoli la ragione et declaratione, come per ogni ragione è necessario fare jettito per la liberatione dello navilio et delle persone et della mercantia: et se esso pur perseverasse alla sua avaritia repugnando, all'hora lo patrone del navilio si deve protestare avanti tutti li compagni, et all'hora può incomenzare a jettare …'.

107 *Consulate of the Sea*, ch. 95 and 99. Text in Pardessus (ed.), *Collection de Lois Maritimes*, vol. 2, cit., 101 and 103-104 respectively.

108 Civil Statutes of Genoa (1588), book IV, ch. 16 (*De jactu et forma in eo servanda*), text in J.-M. Pardessus (ed.), *Collection de Lois Maritimes antérieures au XVIIIe siècle*, vol. 4 (Paris: Imprimerie Royale, 1837), 530-531.

jettisoned item, but also ask the signature of all who agreed to the jettison, giving also the possibility to any recalcitrant merchant to put his dissent in writing, along with the reasons for it (III.8.4).

44 Imagining that this ever-growing number of complex procedural details could be followed during a storm is somewhat disingenuous. In the late seventeenth century the Genoese jurist Carlo Targa admitted that, in over sixty years of maritime practice, he had seen 'just four or five cases' in which the jettison had followed all the prescribed rules. And each of those cases, precisely because formally irreproachable, looked suspiciously premeditated:[109]

45 > *when great danger looms, juridical acts do not naturally come to mind, and amongst the great quantity I have seen in more than sixty years of maritime judicial practice, I can remember no more than four or five declarations which recounted all correct juridical forms, and in each of these there were reasons for criticism as they appeared too premeditated*

46 We should be mindful of Targa's remarks when we look at commercial practice through the prism of the law. Rules obviously have a prescriptive nature, not a descriptive one. But we should not assume that they also attest to the behaviour they prescribe. We cannot know to what extent those to whom the rule was directed actually followed it. This is particularly the case when those formulating the rules and those who had to abide by them were not part of a same homogeneous group. Early maritime compilations – representing (more or less faithfully) the customs of mariners and merchants – often just required the majority of those on board to agree with the jettison. This, for instance, is all that old Scandinavian compilations prescribed on the matter.[110] The ship was small: sailors and merchants formed a single community, where the role of the ones could not be easily separated from that of the others. In those conditions, it is not hard to believe

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109 '… [S]opraggiungendo un grave pericolo, poco vengono a memorie gli Atti giuridici, ed io in anni sessanta di pratiche marittime, che n'averò vedute gran quantità, non mi ricordo aver veduto Consolati appena quattro o cinque fatti per Gettito notato giuridicamente alla forma prenarrata, ed in ognuno di questi vi è stato da criticare per essere paruti troppo premeditati.' Carlo Targa, *Ponderationi sopra la contrattatione Marittima, opera del dottor Carlo Targa …*, Genova [Scionico], 1692, ch. 59 ('Di annotatione sopra il Gettito'), p. 253. The English translation is by Fusaro, *Sharing Risks,* cit., 19. See on the point esp. A. Iodice, *Through the Water and the Storm: Maritime Averages and Seaborne Trade in Early Modern Genoa, 1590–1700* (Oxford: Berghahn Books, 2025), 75. Cf. also Addobbati, *Principles and Developments of General Average,* cit., 159, and J. Dyble, *Lex Mercatoria. Private Order and Commercial Confusion. A View from Seventeenth-Century Livorno* (2022) 171 *Quaderni Storici,* 673-700, 683, note 47.

110 See for instance the Icelandic *Grágás* (art. 166), the Stockholm Town Law (*Bjärköarätte*) of the late thirteenth century (art. 20.1), and the General Swedish Town Law promulgated by King Magnus Eriksson in the middle of the fourteenth century (art. 11): Frankot, '*Of Laws of Ships and Shipmen*', cit., 33, text and note 41.

that jettison had to be agreed by most of those on board, if only because otherwise it would have been difficult to carry it out.

47 Later statutes, however, began to stress the need for consent, requiring it to be expressed in a legally valid manner. This shift is particularly clear in the *Consulate of the Sea*, whose writing shows different chronological stages.[111] The subject of jettison begins with a very short article, stating simply that the merchants should start off by throwing 'something' (*alguna cosa*) overboard; then the jettison can begin, and other things may be thrown overboard until the ship is no longer in danger (art. 95). So far, the *Consulate* said nothing new: the same provision, as we have seen, was already found in the Statutes of Valencia a century earlier.[112] The only difference is that the *Consulate* also required the ship's purser to record the merchants' consent. Then, three more provisions in the *Consulate* follow: the first establishing that the loss be divided proportionally among all (art. 96), the second providing for the cost price of the jettisoned cargo (art. 97), and the third making sure that the remaining cargo on board be used first toward the contribution for the jettison and only then distributed to the merchants. Only then do we find another article (art. 99) prescribing all the required formalities for the jettison: this article repeats what already said in the first article on jettison (art. 95), on the need for a merchant to commence it and for the purser to record what is thrown overboard, adding a series of punctilious formalities on how to reach the agreement to proceed with the jettison, how to prove it and so on (art. 99). The vivid contrast between the first, essential rule and this last, prolix and highly elaborated one seems to show a later re-elaboration, more in line with the legally-minded courts before which jettison cases were being discussed with increasing frequency.

4.2. Writing down and interpreting customs

48 This growing importance of the role of consent should also be viewed from a different yet complementary angle: that of the progressive rationalisation and systematisation of maritime compilations. Many rules found in medieval maritime codes were the written transposition of oral customs. This accounts for the vivid descriptions they often contain about rules and procedures that might leave a modern professional lawyer somewhat unsatisfied. They were not the product of abstract reflections translated into precise wording and carefully-selected expressions, but the transposition into writing of phrases meant to be easily remembered. When put into writing, however, those expressions could give rise to doubts and uncertainties; when analysed by lawyers, those ambiguities might even lead to serious misunderstandings. For instance, the Catalan *Costums de Tortosa* of 1272 (whose maritime section might possibly have been written at an even

111 Cf. M. Serna Vallejo (ed.), *Textos jurídicos marítimos medievales* (Madrid: Agencia Estatal Boletín Oficial del Estado, 2018), esp. section 1.3.

112 *Supra,* note 102.

earlier stage)[113] stated that, when faced with a danger threatening both ship and cargo, shipmaster and merchants on board could agree to a common sacrifice – that is, a general average. To explain the consequences that such an agreement would have on the distribution of damages and losses, the *Costums* provided that shipmaster and the majority of the merchants could agree that 'the ship and the goods be brothers' (*que l leyn e ls avers sien jermans*).[114] This was an easy and immediate way of signifying that any damage to one of the 'brothers' would be apportioned among all. To be 'brothers' in the *Costums de Tortosa* simply meant to be one and the same. A previous provision of the same *Costums* (on overlading the ship) stated for instance that, with regard to the loss distribution following an average, the cargo laden and that left at the port of departure be brothers (*sont germanes*), thus meaning that they would both contribute.[115] In stating that ship and cargo become brothers, and therefore all share in the loss or damage that would befall any of them, the provision was not particular. It just expressed a standard concept in a peculiar way, easy to understand and, especially, to remember.

49 In itself, the rule laid down in the *Costums de Tortosa* was nothing new. In fact, it might even seem reminiscent of some northern maritime codes. We have seen how, in northern countries, during the high middle ages the ship's tonnage was considerably inferior to that of Mediterranean vessels: possibly because of that, the shipmaster would not contribute to the general average –

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113 Both its position, at the very end of the Statutes, and especially the use of Latin in the rubric of title 27 (the only rubric where Latin was used in the Statutes) might suggest an earlier composition, as an autonomous body of rules subsequently merged with the city Statutes: Cordes, *Conflicts in 13th Century Maritime Law,* cit.

114 'Si el leyn … serà en via de son viàtge e per fortuna de temps lo senyor del leyn e els mercaders s'acordaran quen vàgen en terra y entrells empendran que el leyn els avers sien jermans' ('If while a ship … is on her way and the master of the ship and the merchants agree, because of the foul weather, to run the ship aground, they concur among themselves that the ship and the goods on board be brothers'), Customs of Tortosa, book 9 title 27, art. 32, in R. Foguet and J. Fouget Marsal (eds), *Codigo de las Costumbres escritas de Tortosa* (Tortosa: Imprenta Querol, 1912), 495-496. The same passage can also be found in Cordes, *Conflicts in 13th Century Maritime Law,* cit.

115 Customs of Tortosa, book 9 title 27, ch. 22, in Foguet and Fouget Marsal (eds), *Codigo de las Costumbres*, cit., 487-488.

much unlike his Mediterranean colleagues.[116] A good example of that 'northern' approach is the late thirteenth-century *Schiprecht* of Hamburg (art. 8). There, the default rule was that damages to the ship and to the merchandise would not be mutualised, so that only an express agreement between shipmaster and merchants could lead to the pooling of all assets. This agreement did not have to be done in writing before lading the cargo on board: it could well be made orally during the voyage, when some tough choices had to be made.[117] The maritime section of the *Costums de Tortosa* – which, as already noted, was likely written before the rest of the Statutes of 1272[118] – seems to follow the same approach, as it speaks of *agermanar* cargo and ship as the only way to mutualise the risk between merchants and shipmaster – not as an additional and different way to reach that goal.

50 About a century after the writing of the *Costums de Tortosa*, however, its maritime section was absorbed into the Catalan *Consulate of the Sea*,[119] which became one of the main sources regulating maritime trade in the Christian Mediterranean and beyond. In the *Consulate*, as we have seen, the general rule on averages was expressed concisely first (ch. 95) and then expanded in another provision that emphasised the role of consent (ch. 99). Neither provision used the concept of *agermanar*, which on the contrary was then used for another subject, beaching the ship. This case is found in a much later section of the *Consulate* (ch. 195), and the rule was different – possibly the reason for its separate treatment and the distance from the rules on general average. In case a ship is beached, stated the *Consulate*, it is possible (but not necessary) for shipmaster and merchants to decide to *agermanar* ship and cargo. This way, what is saved would answer for what is lost (*l'aver perdut deu esser comptat sobre l'aver restaurat*).[120] Otherwise, the provision continued, if master and merchants do not desire to do so, the ship will not become 'brother' to the cargo (*la nau no s' serò agermanada ab l'aver*) and each party shall

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116 By the eve of the fourteenth century, for instance, in the Hanseatic towns both the 'Mediterranean' and the 'northern' approaches to the contribution of the ship to the general average (favoured in the first, discouraged in the latter) would seem to be attested. Progressively, however, the Mediterranean approach (and thus, the contribution of the ship) would eventually prevail: Landwehr, *Die Haverei*, cit., 41-50. Cf. A. Cordes, *Flandrischer Copiar Nr. 9. Juristischer Kommentar*, in C. Jahnke and A. Graßmann (eds), *Seerecht im Hanseraum des 15. Jahrhunderts. Edition und Kommentar zum Flandrischen Copiar Nr. 9* (Lübeck: Schmidt-Römhild, 2003), 119-144, 130-131.

117 Cordes, *Conflicts in 13th Century Maritime Law,* cit., text and note 46.

118 *Supra,* note 113.

119 On the point see B. Oliver, *Historia del derecho en Cataluña, Mallorca y Valencia. Codigo de las costumbres de Tortosa*, vol. 3 (Madrid: Imprenta de Miguel Ginesta, 1879), 631-648.

120 *Consulate of the Sea*, ch. 195. Text in Pardessus (ed.), *Collection de Lois Maritimes*, vol. 2, cit., 168.

bear his loss.[121] By the same token, a further provision (ch. 197) stated that, if a mishap occurs once part of the cargo is already unladen ashore, then the loss will not be spread to all in the absence of an agreement to *agermanar* ship and cargo.[122] Again, yet another provision established that, if part of the cargo is captured by enemy ships, the loss will be divided among shipmaster and all merchants only if they decided to *agermanar* the vessel with the merchandise.[123]

51 If we look at the *Consulate of the Sea* as a unitary and homogeneous normative text, the provisions on general average would seem to be divided in two parts: the first (ch. 95-101) dealing with jettison and, by extension, other similar cases of general average; the second (ch. 195, 197, 232), where the influence of the *Costums de Tortosa* is more evident, discussing specific situations that may be assimilated to the first. The expression *agermanar*, however, is present only in the second group, where the voluntary element is highlighted and taken as precondition for the mutualisation of the risk. Although the role of consent is also stressed in the first group of norms, only the second group states expressly that, in the absence of consent, no such mutualisation would take place.

52 Taken at face value, therefore, the second group of rules might seem to point to a different kind of liability, more contractual in its nature than the first (in which the risk is to be spread anyway). This emphasis on the contractual element, as well as its description as *agermanar* (a term, as said, not present in the first group of rules), led modern jurists to conclude that the *Consulate of the Sea* envisaged two different kinds of general average. The first kind was created, so to say, *ope legis*, and so it applied by default in the case of jettison and in those other cases sharing the same rationale (voluntary sacrifice of a part to save the rest). The second kind was a veritable contract of mutualisation of the risks, stipulated between shipmaster and merchants, which took its name from its description in the *Consulate* (the decision to *agermanar* ship and cargo), and was translated into Italian as 'germinamento' by the seventeenth-century jurist Carlo Targa. For

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121 *Ibid.,* 168.

122 *Consulate of the Sea*, ch. 197. Text *ibid.,* 170-171. Towards the end, ch. 195 states that it would be pointless to describe the case in which the vessel breaks down during the beaching process, as that case is already discussed 'in that earlier chapter' ('E si la nau se romprà, açò no cal dir ni recapitulr, perçò car ia es en lo capitol deaudit esclarit è certificat'). In fact, it is likely that the reference was to the later chapter 197, which expressly provides for such an eventuality: if shipmaster and merchants have not agreed to *agermanar* cargo and ship and the ship is lost during the beaching, her loss would be entirely on the shipmaster and not also on the merchants. *Consulate of the Sea*, ch. 195. Text *ibid.,* 168. Ch. 195 however does not specify which prior chapter it refers to. The reference puzzled Pardessus (*ibid.*, 168, note 1), who took it to the letter and therefore could not find the provision. More likely, however, it was either a mistake in the manuscript tradition or a reshuffle of the chapters of the *Consulate*.

123 *Consulate of the Sea*, ch. 232. Text *ibid.,* 212-215.

Targa, this *germinamento* contract consisted of 'a deliberation made by the shipmaster, with the agreement of the merchants if present, otherwise of the majority of the crew, to voluntarily sacrifice part of the ship or cargo to avoid a greater danger which would threaten the entire venture.'[124] It is hard to see in this definition anything different from 'normal' jettison. The same Targa added that the most frequent case of *germinamento* is indeed jettison,[125] but this did not prevent him from treating the two subjects in two different chapters of his manual, relatively distant from each other.[126] Two centuries later, the greatly influential Levin Goldschmidt, in his – in many ways, still unique – comparative work on the development of general average, took Targa's description as evidence that the consent of shipmaster and merchants formed the basis of an actual contract, different from jettison. Carefully studying the wording of the *Consolate of the Sea*, as well as of the *Costums de Tortosa*, Goldschmidt concluded that the decision to *agermanar* ship and cargo constituted a partnership contract.[127]

53 On closer scrutiny, however, the difference between the two groups of provisions becomes less apparent. On the one hand, the first group (on jettison) also required the express consent of the merchants, or at least of the majority of them. Moreover, the shipmaster could still proceed even if no merchant was on board, provided that he acted 'in consultation with helmsman, shipowners and all the crew of the ship' (*ab consell del notxer è dels personers è de tot lo cominal de la nau*,

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124 Targa, *Ponderationi*, cit., ch. 76, 316-317: 'Questa non è altro che una deliberatione fatta dal Capitano di Nave, ò dal Patron di Barca, approvata da Mercanti se vi sono, ò non essendovene, dalla maggior parte della gente di Nave di volere volontariamente arrischiarsi, incontrando un pericolo remoto, o danno minore, per schivarne un maggiore più prossimo, per doversi poi ripartire il danno del perso, ò Guasto sopra il salvato …' (translation by Fusaro, *Sharing Risks,* cit., 18).

125 'The most frequent case [giving rise to this *germinamento*] is when [something] is thrown overboard to lift up the ship, and keeping her safe from that shipwreck of which we spoke in his specific chapter of jettison' ('Il caso più frequente è quando si getta in mare per sollevar la Nave e sotrarla dal naufragio di cui si è parlato in suo capo proprio di gettito …'), C. Targa, *Ponderationi*, cit., ch. 76, p. 317.

126 In his *Ponderationi,* Targa first discussed jettison in a first and short chapter (ch. 59), 'Annotation on jettison' (*Di annotatione sopra il Gettito*), *ibid.,* 252-254, and then, after dealing with several other subjects, he devoted another and slightly longer chapter (ch. 76) to 'Germinamento' (*Di Germinamento*), *ibid.,* 316-321.

127 L. Goldschmidt, *Lex Rhodia und Agermanament: der Schiffsrath. Studie zur Geschichte und Dogmatik des Europäischen Seerechts* (1889) 35 *Zeitschrift für gesamte Handelsrecht*, 37-90 and 321-395, esp. § 4.1-2. Should no merchant be found on board, Goldschmidt reasoned, the contract could be fictitious. Real or not, Goldschmidt concluded, a contract was always needed (*ibid.*, § 4.2). For a critical review of Goldschmidt's approach see Addobbati, *Principles and Developments of General Average,* cit., 159-160.

ch. 99).[128] On the other, when requiring the consent of the merchants, the second group of rules also stated that, if no merchant was present on board, the shipmaster could nonetheless proceed to *agermanar* cargo and ship, provided that he acted in accord with the crew. In this case, if we were to take the wording of the rule to the letter, the consent of the crew would seem even less strictly necessary than in the first group of provisions, as the master was required to act 'in consultation with helmsman, purser and sailors' (*ab consell del notxer è del scrivá è dels mariners*, ch. 195),[129] and so without the shipowners, and with the sailors but not necessarily all of them (as in ch. 99). Both groups, finally, allowed shipmaster and merchants to agree to the sacrifice not only before departure (in which case the agreement could be construed as an addition to the charter-party), but also at the very moment when the sacrifice had to be made.

54 The need of consent to proceed with a general average is treated with flexibility by the *Consulate of the Sea*. A further rule, found toward the end of the compilation (ch. 284), even acknowledged the possibility that the shipmaster proceed with the jettison without consulting the merchants in case of emergency. Such a case, explained the *Consulate,* is not a 'plain jettison' (*git pla*), and is to be considered more akin to a shipwreck than jettison (*è mes per semblant de naufraig que de git*).[130] Unsurprisingly, this form of 'irregular' jettison is attested far more frequently than the proper one. The same Carlo Targa, as we have already seen, observed that the very few ordinary cases of jettison he had seen throughout his long career as a jurist specialising in maritime law looked all very suspicious, precisely because they adhered so thoroughly to the letter of all the rules on the subject.[131]

55 The only difference between the two groups of provisions of the *Consulate* on general average seems to lie in their scope, as the second group (on the decision to *agermanar* cargo and ship) may also encompass cases where the risk would not otherwise be mutualised. All the same, it would be difficult to consider the two groups as different from each other, since they both permitted dispensing with the consent requirement, allowing the shipmaster to act in consultation with his crew. The case in which some merchants were present but opposed the jettison is not even taken into account – admittedly, only very few medieval maritime compilations provided for such an eventuality.[132] The difference between the two groups, in short, seems to make sense more to a jurist than to a merchant.

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128 Text in Pardessus (ed.), *Collection de Lois Maritimes*, vol. 2, cit., 105.

129 *Ibid.,* 168.

130 *Ibid.,* 323-324. Because of its similarity to shipwreck, the *Consulate* required that the ship contribute for two thirds of her value and not the ordinary half since, in case of actual shipwreck, she would contribute for her full value (*ibid*.).

131 Targa, *Ponderationi*, cit., ch. 59, p. 253, reported *supra,* note 109.

132 It is the case of the Statutes of Amalfi (art. 49) which we have already seen.

56 The analysis of consent to jettison from the *Costums de Tortosa* to the *Consolat del Mar* is but one example of a far more complex subject. Viewing a series of provisions of customary nature merged together into a single text as a unitary, highly coherent and sophisticated piece of legislation can be misleading. It superimposes on the text a series of implied conventions which, while reassuring for university-trained jurists, may lead to misrepresenting what the text sought to describe. A basic tenet of Roman law (which opened the title of the Digest devoted to 'obligations and actions', D.44.7) was that all obligations arise from contract, from crime, or are directly imposed by the law.[133] Following this tripartite scheme, a jurist trained in Roman law ought to conclude that the two forms of general average described in the *Consulate of the Sea* were in fact very different from each other. Writing in the early nineteenth century, Jean-Marie Pardessus – author of a fortunate and highly influential multi-volume edition of the history of maritime legislation in Europe – concluded that there were two 'systems' of general average in the *Consulate of the Sea*: one was created by the law, the other by the consent of the parties. This second kind of general average was called *agermanement*.[134] Because of its contractual nature, Pardessus argued, the scope of the *agermanement* could be broader and so encompass also cases which were not necessarily (i.e., *ope legis*) included in the first 'system'.[135] More recently, in his vast and invaluable study of early-modern Dutch insurance, Johan Petrus van Niekerk listed a separate kind of averages, which he called 'contractual (or conventional) averages', for the case of *agermanament*.[136]

57 Studying medieval sources through the prism of Roman law, just as Pardessus often did, may cause limited damages. It poses a problem only for today's student of pre-modern commercial customs, who will need to disentangle actual rules from their doctrinal categorisation. Roman law, alas, formed the basis and (together with canon law) for a long time the only subject in the legal education of late-medieval and early-modern jurists. This does not create a problem only to

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133 D.44.7.1pr (Gai. 2 aur.): 'Obligationes aut ex contractu nascuntur aut ex maleficio aut proprio quodam iure ex variis causarum figuris.'

134 By contrast, Goldschmidt opposed the solution of Pardessus and argued that both kinds of general average were contractual in nature: this is why Goldschmidt allowed for a fictional contract in case no merchant was present on board. *Supra,* note 127.

135 'Le Consulat a admis les deux systems: le premier comme legal; le second comme conventionnel, c'est-â-dire, comme n'ayant lieu qu'autant que les intéresés avoient fait un pacte appelé *agermanement*, par l'effet duquel toutes pertes ou sacrifices dans un accident quelconque donnoient lieu à la contribution, mème dans le cas où la loi n'y obligeoit pas.' Pardessus (ed.), *Collection de Lois Maritimes,* vol. 2, cit., 21 (emphasis in the original text).

136 J.P. van Niekerk, *The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800* (Johannesburg: Juta, 1998), vol. 1, 64. Such a category perfectly suited the Roman-Dutch law approach which informed van Niekerk's analysis, even though, as it was observed, it is not always supported by archival sources: Dreijer, *Maritime Averages,* cit., 202.

the modern student of old commercial law, but also, and especially, to the merchants who brought their disputes before a law court centuries ago.

5. The problem of Roman law in medieval and early-modern general average

58 Roman law has the surprising tendency to resurface at different times over the legal horizon, especially (but not exclusively) in Europe. Today, one could easily dispense with the whole medieval and early-modern developments of general average and simply compare the Digest text that we have seen at the beginning of this article with the latest version of the York-Antwerp rules (2016),[137] to conclude that some modern commercial rules are just a re-elaboration of Roman principles. The fact that the legal terminology in use today is often deriving from Roman law lends some veneer of truth to a continuity that is more formal than substantial.[138] If we want to know what the rule was, and how was it applied, during the long centuries separating us from the Romans,[139] we need to scratch that surface, thereby removing that veneer of continuity. And here the story gets more complicated.

59 One might well wonder why we need to know all that in the first place – a question that time and again has doubtlessly crossed the mind of more than a few first-year law students. The immediate answer of course lies in the enduring importance of Roman law. Behind this reason, however, there is another and somewhat counter-intuitive one: some knowledge of Roman law is necessary not to fall into the assumption that Roman law was really used so much. Presence and actual use of Roman law are two very different things.

60 Roman law is often viewed as a bridge between antiquity and modernity: this is not incorrect, so long as we study it from the viewpoint of neither of the two ages, but of the bridge itself. Looking at the great medieval civil lawyers who taught for centuries at the most prestigious universities in Europe, a first point to make is a very banal one, but no less necessary. Medieval jurists considered each fragment of the Digest as law, not as a commentary upon it. The change

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137 York-Antwerp Rules (2016), Rule A.1: 'There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure' (https://comitemaritime.org/work/york-antwerp-rules-yar, last accessed: 28/09/2025). On the development of the York-Antwerp Rules see Kruit, *General Average, Legal basis and Applicable Law*, cit., 32-37.

138 V. Piergiovanni, *Rapporti tra diritto mercantile e tradizione romanistica tra Medioevo ed età moderna: esempi e considerazioni* (1996) 26 *Materiali per una storia della cultura giuridica,* 5-24, 5-6.

139 Even this gross oversimplification, however, would not suffice, for it would leave aside a large part of Europe or, worse, presuppose the application of Roman law also on a vast area that remained blissfully unaware of it for long centuries.

started with Justinian, whose legal compilation extrapolated texts – sometimes short sentences, other times lengthier passages – from jurists' commentaries on legal issues and transformed them into legal rules. Justinian's monumental Digest however was soon put aside even in Constantinople, let alone in the West, as far too complex.[140] Several centuries later, when Western jurists began to actually use it, first in northern Italy and soon then also in other European regions, they did not consider those texts as comments but as normative prescriptions – that is, texts which had themselves the force of law. The point is often taken for granted by legal historians, yet it had enormous repercussions for both the use and the understanding of Roman legal sources, signalling a profound and irretrievable rupture with the past. Even if the legal sources remained the same, the way they were used changed dramatically, to the point that one might consider the medieval approach to Roman law as parallel but thoroughly separated from that of antiquity. It is from that moment, for instance, that Paul's opinions on jettison acquired a normative character. The consequence of this shift is that understanding what exactly the position of Roman law on the subject was matters more to a modern Roman lawyer than to a scholar interested in medieval law. For a medieval jurist, Paul's words *were* the law on jettison.

61 Because what Paul stated was part of the law, it was necessary to dwell on it, whether or not there was any real interest in the subject of general average. Few law teachers in a medieval university expected their students ever to encounter a general average in their professional life. But that did not make it any less necessary to study the subject: both because it was part of the law (so that it could not be skipped) and, especially, because it was possible to use those texts for altogether different purposes. The more the use of analogy in legal argumentation became widespread, the more any text could be put to good use – even for things that the jurists whose opinions had been collated in Justinian's compilation would never have dreamt of. So for instance

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140 Around the end of the ninth century AD, an imperially-sanctioned Greek translation of the *Corpus Iuris* was made: the *Basilika* (*Basilika nomima,* that is, 'Imperial Laws'), merging together titles of the largest sections of Justinian's compilation (the *Digest* and the *Code*), together with some *Novels* (imperial constitutions, mostly by the same Justinian). The *Basilika* might have been issued not to replace Justinian's *Corpus* altogether, but rather to understand it: see e.g. B.H. Stolte, *The Law of New Rome: Byzantine Law*, in D. Johnston (ed.), *The Cambridge Companion to Roman Law* (Cambridge: Cambridge University Press, 2015), 355-373, 360-361. On the relationship between the *Corpus Iuris Civilis* and the *Basilika* see e.g. H. de Jong, *Using the Basilica* (2016) 133 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (Rom. Ab.), 286-321 and, in English, B.H. Stolte, *Is Byzantine Law Roman Law?* (2003-2004) 2 *Acta Byzantina Fennica*, 111-126. The rediscovery of Justinian's *Corpus* in the West is a complex phenomenon, of which admittedly we know far less than we would like. A summary in English in L. Mayali, *The Legacy of Roman Law,* in Johnston, *The Cambridge Companion to Roman Law*, cit., 374-395. See further E. Conte, *Diritto comune: storia e storiografia di un sistema dinamico* (Bologna: Mulino, 2009), especially the first chapter and its bibliography.

medieval jurists used the text of the *lex Rhodia* to affirm the emperor's universal sovereignty,[141] and even to justify taxation – levying taxes is, after all, a way of sharing the expenses incurred for the safety of all,[142] and the ship had been the best image to depict the state since the times of Plato.[143]

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141 An obscure rescript of emperor Antoninus Pius acknowledged the (Roman) *lex Rhodia* in a rather general way – while he was lord of the world, the sea was under the *lex Rhodia* (D.14.2.9). Medieval jurists took those words entirely out of their context, to find a foothold in Roman law to affirm the emperor's universal sovereignty: see e.g. the classical interpretation by Bartolus de Saxoferrato, ad *l. Cunctos populos*, C. *De Summa Trinitate*, n. 1 (*In I partem Codicis Bartoli a Saxoferrato Commentaria …,* Basileae, 1588, *fol. 7ra*).

142 The excerpt from the Roman jurist Paul (D.14.2.2) where he explained that a contribution from all the parties involved in the venture was 'most equitable' (*supra,* text and note 29), continued saying that '[i]t was held that all those to whose interest it was that the goods should be thrown overboard must contribute, because they owed that *contribution* on account of the preservation of their property, and therefore even the owner of the ship was liable for his share' (Scott trans.) ('… Placuit omnes, quorum interfuisset iacturam fieri, conferre oportere, quia id *tributum* observatae res deberent: itaque dominum etiam navis pro portione obligatum esse …', D.14.2.2.2, emphasis added. In it, the word 'tributum' (*contribution*) attracted considerable interest among the early civil lawyers. In the *Biblioteca Apostolica Vaticana*, Ms. Lat. 1408 is a good example of this interest. It contains three glosses on the word 'tributum'. The manuscript (folios unnumbered) contains at least two sets of glosses, of which the later ones are by Azo, and the earlier ones possibly by Martinus (cf. G. Dolezalek, *Verzeichnis der Handschriften zum römischen Recht bis 1600* (Frankfurt-am-Main: Max-Planck-Institut für europäische Rechtsgeschichte, 1972), now available online in the much-improved database *Manuscripta Iuridica* (https://manuscripts.rg.mpg.de, last accessed: 28/09/2025). The first is an interlinear gloss that reads: 'Hic quod hac similitudine dicitur. Nam sicut tributum Imperatori solvimus ut cetere res que nobis remanent salve sint, ita et hic omnes contribuere debemus: nam propter res iactas cetere que remanserunt nobis salvantur.' The second is a marginal gloss: 'Tributum per simile. Sicut enim per tributum quod prestamus imperatori cetere res nobis salve sunt, ita ob iacturam mercium quesit urinarii et alie merces in navi secure remanerent.' The third, again marginal, states: 'Hae res que salve sunt debent facere id tributum et ex aliis rebus fatienda est collatio hec. Vel aliter: hee res que iacte sunt ut salve essent res, ex quibus resartiendum est dampnum, quod melius videtur'. The reference to 'urinarii' in the second gloss might be due to the mention to *urinatores* ('divers'), present three times in a text (D.14.2.4.1) found shortly after this one. It looks at the case in which the ship sinks after the jettison, but part of the cargo is then recovered by divers. I am very grateful to Emanuele Conte for drawing my attention to these glosses.

143 Plato, *The Republic*, 487*b*-497*a*.

62 If we take the Great Gloss of Accursius (d. 1263), for instance, we may see that it provides a careful and meticulous discussion of the most important elements of title 2, book 14 of the Digest: who should contribute[144] and how,[145] what remedies are available to ensure this contribution,[146] what happens if the cargo is unloaded on lighters and some then sink,[147] and so on. Accursius understood the spirit of Paul's excerpt perfectly – the question, he wrote, was not to pay for some damage to private property, but rather to compensate for the loss on equitable grounds.[148] The different valuation of jettisoned and non-jettisoned goods also responded to the same logic. This led Accursius to suggest ('perhaps') that if some merchandise arrived at destination but their market value, instead of increasing, had dropped even below the initial cost price, they ought to be reckoned after their current value.[149] The Roman jurists, Paul first of them, would have surely agreed. Accursius' commentary was thorough, just as it sought to be with every part of Justinian's legislative corpus. Thorough, but not particularly insightful, briefly summing up the most intricate points discussed in the Digest.[150] The issues that interested most medieval learned jurists were based on land and obligations, not on commerce – let alone maritime trade.

63 If we look at other pre-eminent jurists who, unlike Accursius, did not seek to provide a commentary on each and every excerpt of the Digest but only to discuss what they thought was important in it, we will find precious little on D.14.2. A contemporary of Accursius and his colleague in the Bolognese academy, Odofredus de Denariis (d. 1265) devoted a single page on D. 14.2, saying only what he thought necessary to make sure his students would understand its main

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144 Gl. *Sarciatur*, ad *l. Lege Rhodia*, ff. *De Lege Rhodia* (D.14.2.1) (*Pandectarum Iuris Civilis*, Parisiis, apud Gulielmum Merlin … et Gulielmum, Desboys …, ac Sebastianum Nivellum …, 1566, vol. 1, col. 1459).

145 Gl. *Cum in eadem*, ad *l. Si laborante*, § *Cum in eadem*, and gl. *Portio*, ad *l. Si laborante*, § *Si navis*, ff. *De Lege Rhodia* (D.14.2.2.2 and D.14.2.2.4 respectively) (*ibid.*). Accursius even provided for the case of a slave (or some specific kinds of cattle, *res mancipi* in Roman law) died while on board: gl. *Si vehenda,* ad *l. Si vehenda*, ff. *De Lege Rhodia* (D.14.2.10.pr) (*ibid.,* col. 1466).

146 Gl. *Si laborante,* ad *l. Lege Rhodia,* ff. *De Lege Rhodia* (D.14.2.2pr) (*ibid.,* col. 1459).

147 Gl. *Navis*, ad *l. Navis onustae*, ff. *De Lege Rhodia* (D.14.2.2.4.pr) (*ibid.,* col. 1462).

148 Gl. *Agere potest*, ad *l. Si laborante*, ff. *De Lege Rhodia* (D.14.2.2pr) (*ibid.,* col. 1460).

149 Gl. *Non lucri*, ad *l. Si laborante*, § *Si navis*, ff. *De Lege Rhodia* (D.14.2.2.4) (*ibid.,* col. 1461).

150 For example, the problem of whether goods damaged during the navigation ought to contribute to the jettison. The point, discussed in a complex and fairly long text by the Roman jurist Callistratus in D.14.2.4.2 (Call. 2 quaest.), was summarised in Accursius' Gloss: gl. *Cum autem* and gl. *Adhibenda est,* ad *l. Navis onustae*, § *Cum autem*, ff. *De Lege Rhodia* (D.14.2.4.2) (*ibid.*, cols. 1463 and 1464 respectively).

points.[151] The two most celebrated civil lawyers of the next century, Bartolus de Saxoferrato (1314-1357) and Baldus de Ubaldis (1327-1400) wrote ponderous works on the first part of the Digest (which, because of its size, was commonly divided in three volumes). But they spilled precious little ink on averages. For them, a few lines were enough. The famed fifteenth-century jurist Paulus de Castro (d. 1441) devoted a few more lines to the subject, but only because an excerpt in that title gave him a perfect occasion to discuss subtle questions of legal causation.[152] The mere existence of medieval commentaries on the Roman law of general average, then, does not mean that medieval jurists were experts on the subject, and even less that Roman law was actually used to regulate the subject in practice. Medieval jurists had to comment on the views of ancient Roman jurists on jettison because, by then, those views were the law and could not be ignored altogether. But they paid perfunctory courtesy to them, acknowledging their existence and then quickly moving on.

64 The interest of later jurists in the Roman law of jettison – or the lack of it – depended on the practical use of those sources. Stated otherwise, the question of whether and to what extent Roman law rules on general average were relevant in practice depended on whether and to what extent the judges were supposed to decide on their basis. The point is not as circular as it might seem. In medieval Europe, Roman law played little role in maritime commercial issues and, as recently observed by Albrecht Cordes, '[n]ot much more than a faint echo of the *Lex Rhodia* can be perceived in the [maritime] statutes of the 13th century.'[153] The situation, however, would change during the first early-modern period, when law courts (staffed by professional, university-trained Roman lawyers) progressively imposed their jurisdiction (also) on maritime trade. The Roman law tide grew first in southern Europe, and then it progressively spread also to central and (though less uniformly) northern Europe. The growth of the jurisdiction of courts staffed by learned jurists was encouraged (or at least not opposed) by central governments, bent on imposing their power across their territories, to the detriment of older local authorities. This caused profound frictions in the rules applicable to maritime trade: law courts had to strike a balance between upholding ancient customs and applying the – Roman – law. The problem is a complex one, and it has not received sufficient attention by scholars yet. An example might help to clarify the point.

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151 Odofredus, ad *l. Cum navis onustae,* § *Cum autem iactus,* ff. *De Lege Rhodia* (D.14.2.4.2) (*Odoffredi … in Secundam Digesti Veteris partem Praelectiones …*, Lugduni, 1552; anastatic reprint, Bologna: Forni, 1968 [Opera Ivridica Rariora, vol. 2, pt. 2], *fol.* 61*rb*).

152 Paulus de Castro, ad *l. Si vehenda*, § *Si ea conditione*, ff. *De Lege Rhodia* (D.14.2.10.1) (*Pauli Castrensis … In Secundam Digesti Veteris partem Commentaria …,* Lugduni [Antoine Blanc et Compagnie des libraires], 1585, *fol.* 91*r-v*).

153 Cordes, *Conflicts in 13th Century Maritime Law,* cit.

65 During the first early-modern period, the scope of general average became increasingly wider.[154] Law courts had to take into account this without forsaking the Roman law on which they were supposed to decide. The usual way of combining these two – in many respects, opposed – needs was to rely on the interpretation of the Roman law texts by contemporary jurists. This was a standard technique in use among late-medieval and early-modern lawyers: applying Roman law texts not directly but as interpreted by some jurists of great renown. This approach became so widespread that, by the sixteenth century, the jurists' opinion on the law often carried more weight than the law itself, especially when that opinion was shared by many jurists (the so-called *communis opinio,* 'common opinion'). Some among the most important early-modern jurists on commercial law acknowledged as much expressly, among them the famed Giuseppe Lorenzo Maria Casaregis (1670-1737):[155]

66 *Through the interpretation of our law professors, those texts of the Roman and Rhodian law … have been extended to any other damage whatsoever, which in similar cases was incurred voluntarily, whether on land or at sea, in order to save the goods of others*

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154 The point will be developed at the end of this section. A more in-depth analysis may be found in three excellent and recent studies: G. Dreijer, *The Power and Pains of Polysemy: Maritime Trade, Averages, and Institutional Development in the Low Countries, 15th-16th Centuries* (Leiden: Brill, 2023); J. Dyble, *Managing Maritime Risk in Early Modern Europe. General Average in Law and Practice in Seventeenth-Century Tuscany* (Woodbridge: Boydell Press, 2025); Iodice, *Through the Water*, cit. The broadening of the scope of general average ought to be seen within a more general trend, that of the multiplication of the kinds of averages: Dreijer, *The Power and Pains of Polysemy*, cit., 65-88 and esp. 196-198. In this regard the Iberian Peninsula is emblematic, as a great variety of different contributions – all called *avarias* – is attested there: see M. García Garralón, *The Nautical Republic of the Carrera de Indias: Commerce, Navigation, Casos Fortuitos and Avería Gruesa in the Sixteenth Century*, in Fusaro, Addobbati and Piccinno (eds), *General Average and Risk Management*, cit., 215-256, 225-230.

155 'Illi autem Juris Romani Rhodiisque textus … fuerunt tamen interpretationis causa a Nostris Juris Professoribus jure merito extensi ad quodcumque aliud damnum, quod in similibus casibus, sive terra, sive mari voluntarie datum fuit, ut res aliorum servarentur'. Josephus Laurentius Maria Casaregis, *Discursos Legales De Commercio* (2nd edn.), Venetiis, ex Typographia Balleoniana, 1740, vol. 2, disc. 121, n. 1, p. 1.

67 In corroborating this statement, Casaregis cited several jurists (Peckius, Weitsen, S. van Leeuwen, Vinnius, Kuricke, and Marquart),[156] none of whom was Italian, Spanish or Portuguese. The selection was not casual: while Mediterranean jurists tended to be more conservative in their approach to Roman law, their northern colleagues proved more open to accepting solutions substantially different from Roman law while at the same time formally acknowledging its application.[157] In carefully selecting his authorities, therefore, Casaregis could prove that Roman law – as commonly interpreted among modern Roman lawyers – was not opposed to contemporary practice. Showing the consistency between Roman law and market practice was of vital importance for those jurists who had to apply the former to regulate the latter. But we need to be aware that such a consistency was often more formal than real.

68 When no amount of flexibility could reconcile them, Roman law would give way to modern practice. Yet few jurists would openly acknowledge as much. A rare case comes again from Casaregis. Tellingly, however, he managed to justify as much in accordance with the canons of that same Roman law he had to push aside: the matter, he said, is only a banal question of taxonomy, where a later law takes precedence over an earlier one. So, when the *Consulate of the Sea* is not in accordance with Roman law, he concluded, the *Consulate* is to be preferred not because Roman law may be disregarded, but because the law itself provides that a newer statute is

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156 *Petri Peckii … Commentaria in omnes pene Iuris Civilis Titulos ad rem Nauticam pertinentes,* Lovanii, apud Petrum Colonaeum, 1556; Arnoldus Vinnius, *Notae quae accedunt ad Petri Pechii commentarios,* Lugduni, 1647; Quintyn Weytsen, *Een Tractet van Avaryen …,* Harlingen, Vlasboem, 1646; Latin transl. (Mattheus de Vicq ed.), *Tractatus de Avariis … Compositus per Quintinum Weitsen … denuo perlustratus atque allegatione legum, jureconsultorum, … una cum necessariis quibusdam observationibus confirmatus et ditatus per D. Simonem a Leeuwen …,* Amstelodami, apud Henricum et Theodorum Boom, 1672 (this edition contains several additions by the editor as well as by Simon van Leeuwen, whom the Genoese Rota quoted in its *decisio*); Reinoldus Kuricke, *Ius Maritimum Hanseaticum, olim Germanico tantum idiomate editum, nunc vero etiam in Latinum translatum,* Hamburgi, Zachariae Herteli, 1667; Johann Marquart, *Tractatus politico-juridicus de iure mercatorum et commerciorum singulari*, Francofurti, ex officina Thomae Matthiae Gotzii, 1662. With the exception of the German Kuricke ('Curicke') and Marquart, all the other authors quoted were Dutch. On early-modern Dutch jurists dealing with commercial law, a veritable *vademecum* may be found in B. Sirks, *Sources of Commercial Law in the Dutch Republic and Kingdom*, in H. Pihlajamäki, A. Cordes, S. Dauchy and D. De ruysscher (eds), *Understanding the Sources of Early Modern and Modern Commercial Law* (Leiden: Brill, 2018), 166-184.

157 The subject is too complex to be dealt with here. It might suffice to say that the basis for the so-called Roman-Dutch law was often more practical – and pragmatic – than the late *ius commune* in southern Europe. Though very different in its making, the results of the so-called *Usus Modernus Pandectarum* in the German territories proved similarly flexible. A brief synthesis in K. Luig, s.v. *Usus modernus*, in *Handwörterbuch zur deutschen Rechtsgeschichte*, vol. 5 (Berlin: Schmidt, 1998) 628-636.

to be applied in the place of an older one (*lex posterior priori derogat*).[158] This principle was important enough to open the Theodosian Code (C.Th.1.1.1) and, especially in the works of early canon lawyers, became well established among medieval jurists, so that it appeared in the Gloss on the Digest even though it was not explicitly stated in the text of the Digest itself.[159] The point, however, is that the *Consulate of the Sea*, which Casaregis affirmed to have been included in the Genoese statutes as early as in the twelfth century,[160] was in fact never mentioned in the legislation of Genoa; it simply remained a source customarily applied also in that city. Its use was a fact, and it could not be avoided, but this fact had to be reconciled with a system nominally based on Roman law.

69 While maritime commercial customs developed, Roman law in the background did not. The process of nominal reconciliation of modern, non-Roman practices with Roman law sources may be also glimpsed from the decisions of high courts. To spot it, though, we need to be aware of the subtleties employed by jurists. In the same city of Genoa, a famous collection of commercial decisions of its important high court (its civil *Rota*) was published in 1582[161] and had a great influence in Italy and beyond. In it, an (undated) decision dealt with the liability of the insurers for the freight of the jettisoned cargo. A shipmaster had taken up an insurance policy, which covered any risk with the exception of jettison and other cases of general average. In customary Genoese practice, influenced by the *Consulate of the Sea* (ch. 96), freight was due for the jettisoned merchandise if the jettison happened during the second half of the voyage (and so, at a point of the route that was closer to destination than to the port of departure), while it was not

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158 Casaregis, *Discursos Legales De Commercio*, vol. 2, cit., disc. 121, n. 9, p. 2.

159 The closest text was D.1.3.26 (Paul. 4 quaest.): 'Non est novum, ut priores leges ad posteriores trahantur.' When commenting on it, the Accursian Gloss was more explicit in noting the various ways in which later statutes would modify the older ones: gl. *Trahantur,* ad l. *Non est novum,* ff. *De legibus senatusque consultis* (D.1.23.6) (*Pandectarum Iuris Civilis*, cit., vol. 1, 1566, cols. 79-80). See further the observations of J.-L. Halpérin, *Lex posterior derogat priori, lex specialis derogat generali. Jalons pour une histoire des conflits de normes centrée sur ces deux solutions concurrentes* (2012) 80 *Tijdschrift voor Rechtsgeschiedenis,* 353-397, esp. 370-388.

160 Casaregis gave the date of 1186 (*Discursos Legales De Commercio*, vol. 2, cit., disc. 121, n. 9, p. 2), perhaps because there is some mention of a *breve* of that year (of which however we have only a fragment: R. Savelli, *Repertorio degli statuti della Liguria* (Genoa: Società ligure di storia patria, 2003), 17).

161 *Decisiones Rotae Genuae de Mercatura et pertinentibus ad eam …*, Genuae [Roccatagliata], 1582. Cf. V. Piergiovanni, *The Rise of the Genoese Civil Rota in the XVIth Century: The "Decisiones de Mercatura" Concerning Insurance*, in V. Piergiovanni (ed.), *The Courts and the Development of Commercial Law* (Berlin: Duncker & Humblot, 1987), 23-38.

considered as earned if the jettison took place during the first part of it.[162] In this case, it is likely that the mishap took place during the first half of the voyage, as the decision reports twice how, because of the jettison, the freight was not paid.[163] To make up for the unpaid freight, the shipmaster then sought reimbursement from the insurers, who refused to pay. Their refusal was based on the simple observation that, if they were not responsible for the jettison, they could not be liable for its consequences either.[164] The point had some strength in law: if the 'immediate act' (*actus immediatus*) was excluded, the insurers argued, then all the more no 'mediate act' (*actus mediatus*) – that is, anything deriving from it – could be included.[165] The judges however sought to reach the opposite conclusion. To do that, some foothold in Roman law was needed. The court found it in two ways. First, in the fact that Roman law favoured a strict interpretation of the terms of the contract, something visible both in various excerpts from the *Corpus Iuris* of Justinian[166] and in the interpretation of some important civil lawyers.[167] Second, by arguing that freight and jettison were two different things, so that the one could well stand without the other. To press the point, the judges went as far as stating that the immediate cause of the loss of freight was the non-delivery of the jettisoned cargo at destination, not its jettison.[168]

70 Even a summary look at the *Rota*'s arguments, however, leaves some doubts as to their strength. First, the Roman law texts supporting the strict interpretation of a contract's terms are

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162 E.g. Targa, *Ponderationi*, cit., ch. 40, 173-175. See on the point Iodice, *Through the Water*, cit., 67-68.

163 '[E]x causa iactus naula exacta non fuerint'; … 'propter iactum, ut dictum est, naula exacta non fuerint', *Decisiones Rotae Genuae,* cit., dec. 79, n. 1 and 2 respectively, *fol.* 194*rb*.

164 *Ibid.,* n. 2.

165 *Ibid.,* n. 3.

166 Especially, according to the Rota, in the following ones: *i*) it is not permitted to alter the meaning of words when they are sufficiently clear; *ii*) in case of ambiguity in the subject matter one should stick to the words of the agreement; *iii*) the words of a contract should be interpreted strictly, and ought not to be extended to cases which the same contract omitted.

167 Tartagni, *cons.* I.28, n. 14 (*Consiliorum sive responsorum Alexandri Tartagni Imolensis … Liber Primus …,* Venetiis, Apud Haeredes Alexandri Paganini, 1610, *fol.* 42*ra*) and cons. II.12, n. 14 (*Consiliorum sive responsorum Alexandri Tartagni Imolensis … Liber Secundus …,* Venetiis, Apud Haeredes Alexandri Paganini, 1610, *fol.* 16*rb*).

168 *Decisiones Rotae Genuae*, cit., dec. 79, n. 7, *fol.* 194*va*: 'sed iactus causa fuit mediata non immediata, ut naula non exigerentur, quia ipsa rerum iactarum non consignatio immediata fuit causa non solutionis'.

far from watertight, and the legal principle struggles to emerge from the texts quoted.[169] The omission of many other more relevant texts in Justinian's compilation does not appear fortuitous, as it might not have led where the judges wanted to go. Also, the choice of the civil lawyers quoted might not be entirely representative of the common opinion among the Roman law doctors, as it would have been possible to find many famed professors arguing for a different solution. Finally, one does not need to be a refined Roman lawyer to see through the last and main point on which the *Rota* reached its conclusion: the fact that jettison and freight are two different things has little to do with the causal relationship between the occurrence of the first and the non-payment of the second. No Roman law text, civil law jurist, or civil law court is known to have conditioned a causal relationship on the subordination of one element to another.[170] Arguing that the loss of the freight was directly imputable to its non-delivery and not to the fact that the cargo had to be thrown overboard is specious at best, even if one were to apply chronology to assess causation – an approach, by the sixteenth century, long discarded among both jurists and courts throughout Italy.[171]

71 The insured, in short, was entitled to recover from the insurers the freight that the merchants had not paid because of the jettison, even if the policy had explicitly excluded jettison from the risks insured against. This, according to the Court, was the Roman law position on the matter. To make sense of this liberal use of Roman law, we need to look at contemporary commercial practice. In the early-modern period, merchants would no longer accompany their cargo on board. While legal literature still commonly referred to the representative of the merchant – the 'sopraccarico', who was responsible for (*sopra*) the cargo (*carico*) – as being present on board,[172] in practice neither merchant nor *sopraccarico* routinely followed the merchandise. As a consequence, the only witness of the shipmaster's actions was his crew. This left the shipmaster in full control over the narrative of the events. With little risk of being contradicted, the shipmaster had all the interest in portraying any accident happened to his vessel as a case of general average, so as to receive a substantial contribution from the merchants.

72 Roman law restricted this contribution only to the case where the damage to the ship was voluntarily incurred also for the safety of the cargo. In any other case, the loss of riggings, masts and yards was on the ship alone (D.14.2.6). Paying lip service to Roman law was not difficult: it was sufficient to describe the damage to the ship as done for the safety of the cargo even in the most unlikely cases. So a typical scenario in which masts broke down during a tempest could be

169 Of the three texts provided in the *decisio* in support of its conclusion, two do not seem relevant (C.11.27(26).1 and D.45.1.99); only the first (D.32.[1.]69pr) seems material to the subject, even though far from suggesting the Rota's conclusion.

170 G. Rossi, *Ordinatio ad casum. Legal causation in Italy (14th-17th centuries)* (Frankfurt: Klostermann, 2023), 95-150.

171 *Ibid.*, 43-48 and esp. 56-62.

172 E.g. Targa, *Ponderationi*, cit., ch. 40, pp. 173-175.

easily transformed into a heroic struggle to save the merchandise,[173] and a ship that began to sink as soon as she left the port could be said to have rescued the cargo on board by rushing back to to the pier.[174] Soon, the description of the mishap began to follow pre-determined patterns which, it was observed, look like a 'formulaic standard specifically designed to trigger a general average declaration', clearly 'designed to counter the most predictable objections to the sacrifice.'[175]

73 The broader the general average, the more it became possible to claim from the merchants. In seventeenth-century Leghorn, for instance, a shipmaster could receive compensation for the most disparate expenses, which had patently little to do with the rescue of ship and cargo from danger: seamen's wages, costs incurred for the arrest of the ship by public authorities, interests for money borrowed during navigation, divers' fees, local taxes and even bribes routinely paid to officials.[176] The situation in Venice was not dissimilar.[177] Even though those expenses were described as being incurred for the safety of the cargo, few merchants would have bought it. Yet, pay they did: by and large litigation did not focus on the merchants' refusal to pay, but only on the amount of their contribution.[178] Progressively, therefore, the criterion for general average shifted from common safety to common benefit, although formally it remained anchored to the Roman law criteria. This change was hardly the peculiarity of some Italian markets. It is already attested in important northern centres such as Antwerp during the sixteenth century,[179] and even earlier in Bruges.[180] Just as in Italy, also in Antwerp merchants would typically accept the ever-increasing scope of general average, bringing a lawsuit only when the requested contribution was

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173 *Testimoniale* (statement) of the French ship *Cavallo Marino* (Seahorse) of 1669 in Leghorn: Dyble, *Managing Maritime Risk*, cit., 95.

174 *Testimoniale* of the Tuscan ship *La Madonna del Rosario* of 1670 in Leghorn: *ibid.,* 139-140.

175 J. Dyble, *Divide and Rule: Risk Sharing and Political Economy in the Free Port of Livorno,* in Fusaro, Addobbati and Piccinno (eds), *General Average and Risk Management*, cit., 363-388, 371.

176 Dyble, *Managing Maritime Risk*, cit., 97.

177 An interesting list of expenses routinely included in Venetian practice may be found in a 1671 petition to the authorities by a group of Armenian merchants. In it, on top of most expenses allowed in Leghorn, there may be also found costs related to the change of flags, 'donations' to officers and various other bribes to secure the departure of the ship, consular duties and, as the merchants put it, 'infinite other expenses': Fusaro, *Venetian Averages*, cit., 649-650.

178 Dyble, *Managing Maritime Risk*, cit., esp. 95-98.

179 E.g. Dreijer, *The Power and Pains of Polysemy,* cit., 202-207.

180 A significant case brought before the Aldermen of that city in 1459 may be read in D. De ruysscher, *Shipping, Commerce and the Risk of Jurisdiction*, cit., 634-635.

exceptionally high.[181] In seventeenth-century France the same trend was so advanced that it even led to a wholesale reconfiguration of the subject. Instead of listing what operational costs could be recovered by way of general average, the *Ordonnance de la Marine* of 1681 did the opposite, barring only one kind of expenses (guns and ammunition) and allowing any other (III.8.11).

74 If, on a formal level, general average remained unchanged, substantially it became increasingly akin to hull insurance – without the restrictions provided for that instrument. Admittedly, the great increase in the tonnage of most ships during the early-modern period often made the cargo more valuable than the vessel that transported it. Still, the merchants were no longer bearing the risk of the sea only for their goods, but largely also for the ship. This of course was never stated openly, but it was clear to all. To understand the point, once again, we need to look outside the law. In early-modern Europe, the growing competition in maritime commerce between states led to an increasingly protectionist attitude in favour of national shipping industries.[182] An easy way to do that was to shelter shipowners from excessive expenses that would have crippled their business, shifting part of those expenses onto the merchants. Challenging the account provided by the shipmaster, as we have seen, was remarkably difficult for the merchants. Instead, they soon realised that the only efficient response they had was to accept the situation, and make sure that someone else would pay for their ever-increasing contributions: the insurers who underwrote their cargo policies.[183] Thus, this progressive enlargement of the scope of general average ultimately transformed its very function, from a risk-spreading mechanism to a risk-shifting arrangement in which each group taking part in the venture was able to pass on a substantial part of their risk: the shipmaster onto the merchants, and the merchants onto the underwriters.[184]

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181 Dreijer, *The Power and Pains of Polysemy,* cit., 207. This, however, does not mean that Antwerp merchants offered no resistance in cases where some cargo was lost in consequence of accidents that could not be classified as general average but were plainly due to the fact of the shipmaster. The point is well illustrated in a 1563 case where a ship wrecked another vessel, losing some cargo during the accident: De ruysscher, *Shipping, Commerce and the Risk of Jurisdiction*, cit., 639-641.

182 E.g. S. Marzagalli, *Trade Across Religious and Confessional Boundaries in Early Modern France*, in F. Trivellato, L. Halevi and C. Antunes (eds), *Religion and Trade: Cross-Cultural Exchanges in World History, 1000–1900* (Oxford: Oxford University Press, 2014), 169-191, 183; Dyble, *Divide and Rule*, cit., 364-366.

183 Dreijer, *The Power and Pains of Polysemy*, cit., 190.

184 This mechanism is visible in Antwerp at least from 1548: H.L.V. De Groote, *De zeeassurantie te Antwerpen en te Brugge in de zestiende eeuw* (Antwerp: De Branding, 1975), 23. From the same period there is evidence that Antwerp underwriters would use a substantial part of the premium they pocketed to hedge against general average claims: see De Groote, *ibid.,* 150, and, more recently, J. Puttevils and M. Deloof, *Marketing and Pricing Risk in Marine Insurance in Sixteenth-Century Antwerp* (2017) 77 *Journal of Economic History*, 796-837, 824.

75 It was only towards the end of the eighteenth century that the excessively broad scope of general average became a hotly disputed question. By then, insurance had become to a large extent institutionalised: insuring the cargo had become almost the norm rather than the exception, and the insurers were professionals specialising in the field – often, powerful syndicates such as Lloyd's or corporations, which began to put pressure on governments to reduce their exposure to general average claims. Moreover, widespread insurance also meant that many merchants and shipmasters were themselves insured: in such a case, both the merchants whose cargo had been jettisoned and the shipmaster who lost some equipment would be overcompensated if they could recover under their policy alongside the contribution due to them under general average.

76 In his ponderous treatise on maritime law, published in the 1780s, to introduce the subject of general average Ascanio Baldasseroni noted how:[185]

77 > *Infinite … are the abuses introduced in this subject, so that seldom the damages suffered by a ship, whether for her own vice or for a mishap during the navigation, were not ingenuously dressed up as a consequence of a voluntary act aimed at the common safety. This way, as soon as shipmasters and shipowners have a ship at sea, they deem it lawful to consider her as a perpetual asset, and whatever the use [of the ship] they make, and though the many repairs leave not a single plank from the initial frame, they always find a way to allege that the replacement of the parts has preserved the whole. Thus, what is not true becomes in their own interest an actual fact.*

78 A similar practice, continued sarcastically Baldasseroni, is more reminiscent of the legendary ship of Theseus, kept intact for a thousand years by surreptitiously replacing the old parts. 'But in our days such miracles happen only to the detriment of the insurers, who are forced to keep alive vessels, either by way of general average befalling on them, or by way of particular averages [i.e., insurance proper] when they take up the risk in the hull and appurtenances.'[186]

6. Conclusion

79 Towards the beginning of this article Landwehr's idea of 'natural constraints' was discussed as a working hypothesis to explain the seemingly ubiquitous presence of some legal institutions underpinning segments of pre-modern commerce, as well as their surprising resilience. This of

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185 Ascanio Baldasseroni, *Delle Assicurazioni Marittime Trattato …*, vol. 3, Firenze, Stamperia Bonducciana, 1786, 9.

186 *Ibid.,* 10. Cf. on the point the observations of Dyble, *Managing Maritime Risk*, cit., 106-107. The situation was no better with regard to insurance proper: A. Addobbati, *Il romanzo del barattiere. Prova di mare e indebolimento della posizione legale del marinaio nel passaggio tra Sette e Ottocento* (2022) 171 *Quaderni Storici*, 701-733, 704-706.

course has nothing to do with universal concepts such as *lex mercatoria* and other such myths. Rather, it is an effort to explain the presence of the same legal principles in many heterogeneous societies without postulating a common normative origin. Landwehr's intuition is fascinating, though of course not sufficient to predicate the universality of any legal institution *a priori*. More important is the fact that, no matter how widespread or indeed ubiquitous some legal principle might be, its practical application tends to be highly variegated, to the point of making it very difficult to reconstruct its origin and trace it back to a single legal system. The number of variables that may change is large, and the rules that were applied in practice are far more dependent on those variables than on the general principles. The only meaningful comparison that may be undertaken ought to take place at the lower level of those practical rules, not at the higher one of those principles, no matter how inspiring that approach might appear.

80 To make sense of those rules it is essential to look at their context. This is trite knowledge, but it is worth repeating it because there may be aspects of that context influencing the rule in ways that would not strike as obvious. The analogy between camels and ships worked out by Iraqi scholars is one such case. Looking at the context requires awareness of changes that happen without leaving clear traces, but which are nonetheless important to understand the working of a rule. Imagining that refined written elaborations of older oral customs left no mark on their practical application would be wrong, just as it would be disingenuous to imagine that those re-elaborations found punctual application in practice for the simple reason that they were now the rule. By the same token, if we look at early-modern Europe, it would be a fallacy to take for granted that Roman law was applied only because in several jurisdictions lawyers and judges alike were supposed to rely on it. Invoking Roman law in order to reach a different solution was a refined way to square the circle, maintaining (non-Roman) practices within a legal environment imbued with Roman law. For our purposes this means that, when a legal principle is reminiscent of Roman law, it does not necessarily mean that it is derived from it. And, even when this is indeed the case, Roman law itself may not be sufficient to study it. Discarding Roman law entirely, however, may lead to even bigger problems than assuming its wholesale application. It needs to be handled with care.