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NAVIGATING THE LEGAL WATERS: THE ROLE AND LIABILITY OF A SHIP'S CAPTAIN IN ROMAN MARITIME LAW

The ship's captain (magister navis) held a pivotal role in overseeing maritime operations and managing the vessel. Rooted in traditional legal concepts, Roman maritime law predominantly relied on the contract of locatio conductio. Since, under this contract, captains were liable for the delivery of goods rather than their safekeeping, this often led to fraudulent activities. To address these issues, the receptum nautarum was introduced to impose liability for the safekeeping of goods, allowing merchants to sue captains if goods were damaged or stolen during transit. Given this intricate commercial venture, the author aims to elucidate the captain's legal relations with the beneficiary of the maritime venture (exercitor navis) on one hand, and with third parties on the other, as well as to prove that the captain was not initially liable for custodia.

Key words: *Lex Rhodia de iactu. – Locatio rerum vehendarum. – Receptum nautarum. – Roman maritime law. – Ship captain (magister navis).*

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1. INTRODUCTION

Recent discoveries have revealed that Romans engaged in prosperous and extensive sea trade as far back as the late Bronze Age (Cifani 2022, 11). Despite the prevailing belief among Romanists and historians that the development of maritime commerce, sea ports[1], and ship contingents began after the Second Punic War (Danilović 1969a, 359; Šarac 2008, 115; Anderson 2009, 184), contemporary research suggests that maritime business held significant economic importance since the earliest settlements along the Tiber. Moreover, it is worth noting that mythological ancestors of the Romans[2], including Aeneas and his group, were sailors (Liv. 1.1). As Cifani aptly observes, Rome was strategically situated along the most important river in central Italy, just thirty kilometres from the sea (Cifani 2022, 11). Undoubtedly, references in Aristotle's (*Pol*. 7.6.2) and Cicero's (*De rep*. 2.10) writings indicate that Romans were engaged in maritime activities as early as the 4th century BC (Cifani 2022, 11). Above all, Cicero (*Cons. Prov*. 12.31) writes that after Pompey's victory over the pirates at *Mare Nostrum*, the Romans established sea routes (*cursus maritimi*) that "linked the Mediterranean into one port" (Adams 2012, 225).

The expansion of sea routes and the establishment of large trade enterprises that occurred after the Second Punic War urged comprehensive legislative activity in the field of Roman "maritime law"[3]. The existing contracts within the scope of *ius civile*, which were utilized to govern all maritime trade operations, did not provide a satisfactory level of protection for the contractual parties, particularly the passengers[4] and

[1] Livy writes that Ancus Marcius, fourth legendary Roman king (642–617 BC), built the port and salt pans in the city of Ostia (Liv. 1.33). On the other hand, archaeological discoveries have shown that port was no older than 4th century BC, although the salt pans were much older and standing on the *Via Salaria* (Mirković 2012, 69 n. 106).

[2] However, some scholars, such as Danilović (1969a, 365), suggest that the first sailors were Greeks and that the maritime transport was primarily conducted using Greek ships.

[3] Maritime law did not exist as a distinct branch within Roman law. Therefore, the term Roman "maritime law" was used in this article as a broad, descriptive label to refer to various legal institutions employed by the Romans in the organization of maritime enterprises. According to Candy (2019, 4–5; see 241–247), these institutions do not represent separate entities of maritime law, but rather should be viewed within the broader context of Roman "merchant law".

[4] Passengers usually travelled on cargo ships. However, Ulpian's text (D.14.1.1.12) indicates the existence of passenger-only ship lines, such as those running from *Cassiope* (Corfu) and *Dyrrachium* (Durrës) to *Brundisium* (Brindisi) (Marzec 2019,

merchants. Deeply rooted in traditional legal concepts, Roman maritime law predominantly relied on contract of letting and hiring (*locatio conductio*)[5] (Kunkel 1949, 240; Zimmermann 1990, 518) for: hiring the ship *locatio conductio rei* (*conductio navis*), engaging sailors *locatio conductio operarum* and transporting the goods *locatio rerum* (*mercium*) *vehendarum* or passengers *locatio vectorum vehendarum*, as specific forms of *locatio conductio operis* (D.4.9.3.1; D.14.2.10.pr; D.19.5.1.1[6]);[7] on the other hand, if the transport was carried out gratuitously, jurists have concluded that it was *depositum* or *mandatum* (D.4.9.3.1) (Fiori 2022, 187–188; Danilović 1969a, 360). Danilović (1969a, 360) highlights that during the earliest period legal gaps in civil norms were supplemented by (uniform) customs that held sway across all ports in the Mediterranean.

Considering the numerous risks to cargo and the questionable reputation of sailors (D.4.9.3.1; D.47.5.1.pr), the praetor took measures to enhance the liability of participants in maritime enterprises. This included the introduction of the *actio furti adversus nautas* and *actio damni adversus nautas*, *actio oneris aversi*, *actio de recepto*, along with the *actio exercitoria*[8]. The latter *actio* was particularly crucial because it enabled direct lawsuit

34 n. 3). According to Zimmermann, the captain probably bore liability just for passengers' safety and their personal non-commercial luggage (Zimmermann 1990, 518).

5 In analysing Greco-Egyptian papyri, Fiori has concluded that Romans employed four types of *locatio conductio* for conducting maritime ventures. These correspond to modern categories of bareboat charters, voyage charters, time charters and contracts of carriage (Fiori 2018, 560–561; see Trajković 1997, 51–189).

6 In cases there was doubt which contract was concluded – *locatio conductio rei* or *operis*, Labeo says that the praetor granted *actio in factum* to the owner of the cargo against a captain – D.19.5.1.1. *Papinianus libro octavo quaestionum: Domino mercium in magistrum navis, si sit incertum, utrum navem conduxerit an merces vehendas locaverit, civilem actionem in factum esse dandam Labeo scribit. https://droitromain.univ-grenoble-alpes.fr/*, last visited April 17, 2024.

7 The tripartite division into *locatio conductio rei*, *locatio conductio operarum*, and *locatio conductio operis* was not created by Roman jurisprudents but by later jurists (see Fiori 1999, 305–319).

8 It should be mentioned that the *actio exercitoria* was introduced by the *De exercitoria actione* edict, likely promulgated in the years following the enactment of the *Lex Claudianum de nave senatorum* in 218 BC. This law adopted as a plebiscite (*plebiscitum Claudianum*) prohibited senators from owning ships weighing more than 300 amphorae (Liv. 21.63; Cic. *in Verr*. II 5.18.45; Solazzi 1963, 243–264; D'Arms 1981, 31–37; Miškić 2024, 86–90). The text of the edict was reconstructed based on the writings of Gaius (G. *Inst*. 4.71) and Ulpian (D.14.1.1.19–23) and probably consisted of two sentences: *Quod cum magistro navis gestum erit eius rei nomine, cui ibi praepositus fuerit, in eum, qui navem exercuerit, iudicium dabo. Si*

against the beneficiary from the venture – *exercitor navis*[9], who received all the incomes and appointed the captain. In the scope of praetorian law, the agreement formed the basis for his liability which included granting *praepositio* – naming the captain (*nominatio*) and authorizing him to conclude contracts with third parties (D.14.1.1.7. and 12). Depending on the form and scope of *praepositio*, the *exercitor*'s liability could vary, albeit he could have been sued *in solidum* (Zimmermann 1990, 53). In such case the third party could sue him with praetor's *actio exercitoria* or the captain with *actio ex contractu*.

2. CONTRACTUAL LIABILITY OF MAGISTER NAVIS IN THE SCOPE OF *IUS CIVILE*

The maritime transport of goods and passengers in Roman times was a complex, but lucrative[10] venture. It involved compound preparations such as finding a suitable ship, hiring the captain and sailors, and mitigating the constant risks of shipwrecks (*naufragium*), storms, winds, currents and pirates (*vis piratarum*). Consequently, it required an atypical legal structure

is, qui navem exercuerit, in aliena potestate erit eiusque voluntate navem exercuerit, quod cum magistro eius gestum erit, in eum, in cuius potestate is erit qui navem exercuerit, iudicium datur (Lenel 1883, 204).

[9] Ulpian explains that the *exercitor* was the person who received all the revenues, regardless of whether he was the owner of the ship (*dominus navis*) or a lessee (D.14.1.1.15). Occasionally, the *exercitor* also acted as the *dominus negotii*, while in others cases they were separate individuals. In these situations, the *dominus negotii* appointed the *exercitor* typically through *locatio conductio operis* or *mandatum*. Nonetheless, he could have been *exercitor*'s *pater familias*, patron or master. Watson (1985a, 416 n. 1) translates the term as "ship owner" or "manager", while Aubert (1994, 58) translates it as "shipper" or "principal", although there is no adequate word in English. His personal status or gender was also not important and the position of the *exercitor* could have been held by multiple persons bound in partnership or as joint owners of the ship. Each *exercitor* was personally liable in full and could have been sued separately by third party (Aubert 1994, 63; see also Sirks 2018, 88). After the entire debt derived from the captain's contract had been discharged, the *exercitor* could sue his partner(s) or joint owner(s) with the *actio pro socio* or *communi dividundo* (Aubert 1994, 63).

[10] *Aulus Persius Flaccus*, the Roman poet and satirist from the first century, mentioned the earnings from the maritime industry compared to other businesses. According to his writings (Pers. *Sat.* 5.149), the profits from the maritime venture constituted approximately 11% of the invested capital, whereas in other sectors, it amounted to about 5%.

and contractual relationships involving at least three persons: the *exercitor*, who can also be *dominus negotii*, *magister navis*, and a third party – either a passenger or the owner of the goods to be carried.

In the introduction, we highlighted that since the inception of organized communities, Roman maritime law predominantly relied on the contract of *locatio conductio*. The earliest mention of *locatio conductio* in the context of sea transport is found in the plays of Plautus[11] and Terence. In Plautus' *Rudens*, probably written in the last decade of 3rd century BCE, Leno Labrax decided to seek happiness in Sicily and, for that purpose, hires a ship (*navis clanculum conducitur*) and loads his entire fortune onto it (Plaut. *Rud*. 57–59, 199, 356–358) (Candy 2019, 156). On the other hand, one of the Terence's characters in the *Adelphi*, written around 160 BCE, hires a ship (*navem conductam*) for transporting the goods to Cyprus (Ter. *Ad*. 225–26) (Candy 2019, 156).

Given the economic significance of this contract, in the subsequent sections, we will delve into its various types and implications in the context of maritime trade.

2.1. Liability of *magister navis* towards *exercitor navis*

The legal relations between the *exercitor* and the *magister navis* were established through two legal acts – *locatio conductio operis* and *praepositio*. Within the scope of *ius civile*, the rule *alteri stipulari nemo potest* (D.45.1.38.17) dictated that contracts could not be concluded for the benefit or at the expense of third parties. Consequently, the captain could not bind the *exercitor* from contracts with third parties, nor could the *exercitor* be held liable from such agreements. Therefore, the topic of *praepositio* will not be further discussed in this paper.

From the perspective of *ius civile*, the legal framework of maritime ventures was relatively simple and primarily depended on the captain's *status libertatis* and *familiae*. If the captain was *alieni iuris* or a slave, his *pater familias* or master assumed full liability for his actions. In such circumstances, the captain had no legal capacity to enter into contracts with third parties, making any agreement merely natural obligation. Conversely, if the captain was a free person, the *exercitor* appointed him through *locatio conductio operis*.

[11] See also Plaut. *Asin*. 433. and Plaut. *Mostell*. 823 (Thomas 1974, 122 n. 31; Candy 2019, 156–157 n. 129 and 130).

According to Ulpian, the captain's primary duties were to hire the ship (as well as the crew), transport goods or passengers, and sell commodities for a fixed freight (D.14.1.1.3). The internal relationship in maritime venture depicts the relationship between the *exercitor* (*locator*) and the captain (*conductor*) governs by the rules of liability outlined in *locatio conductio operis*. Since both parties benefited from the contract, they were liable *omnis culpa* (in postclassical law *culpa levis in abstracto*), i.e. for negligence. Moreover, because the captain was responsible for selecting the ship, hiring sailors, and delivering goods (Casson 1971, 317), he was accountable to the *exercitor* if damage occurred due to a lack of knowledge (*imperitia*); for example, the captain needed to possess specialized expertise in maritime geography, celestial navigation, chart reading, and ship navigation (Miškić 2024, 143). Furthermore, the *magister navis* could be held liable for any damage caused by sailors (*culpa in eligendo*). Liability would extend to damages occurring on-board the ship, irrespective of whether the sailors were free citizens or slaves (D.4.9.7.pr).

The external relationship in maritime venture was characterized by the interaction between the captain and third parties. In that regard, captains commonly entered into contracts of *locatio rerum vehendarum* or *locatio vectorum vehendarum*, which we will discuss in the next chapter, as well as *emptio venditio*, *locatio conductio* (*rei* or *operarum*) and *mutuum*. In the event of a breach of contractual obligations, third parties retained the right to sue the captain based on the specific contract.

2.2. Liability of *magister navis* towards the merchants and passengers

2.2.1. Conductio navis et locatio loci in navem

Merchants had several options for transporting goods by sea, one of which was hiring an entire ship (*conductio navis*) (D.19.2.61.1). In this arrangement, the contractual parties were the ship owner or captain (*locator*) and entrepreneur (*conductor*). The *locator* was obligated to handover the ship with all equipment and staff, while the *conductor* was liable for paying the rent (*merces*) and return the vessel without any damage – except for that resulting from age, proper use and *vis maior* (Fiori 2022, 189). The reasonability for the goods lies exclusively with the *conductor*, and if any mishap occurred to the cargo, the captain, i.e., the *locator*, would not be held liable, since he was solely liable for handing over the ship in sailing condition. Scaevola sheds light on this issue (D.19.2.61.1). Namely, a man hired a ship for a fixed fee to sail from the province of Cyrene to Aquileia with

a cargo consisting of three thousand *metretae* of olive oil and eight thousand *modii* of grain. However, the loaded ship was detained in the province for nine months, and the cargo was subsequently unloaded and confiscated. The question arose as to whether the shipper could still collect the *merces*. The jurist answered affirmatively.

> D.19.2.61.1. *Scaevola libro septimo digestorum: Navem conduxit, ut de provincia Cyrenensi Aquileiam navigaret olei metretis tribus milibus impositis et frumenti modiis octo milibus certa mercede: sed evenit, ut onerata navis in ipsa provincia novem mensibus retineretur et onus impositum commisso tolleretur. Quaesitum est, an vecturas quas convenit a conductore secundum locationem exigere navis possit. Respondit secundum ea quae proponerentur posse*.[12]

Alternatively, the merchant could rent only a part of the ship's loading space or deck (*locatio loci in navem*) (D.14.1.1.12; D.14.2.2.pr) (Thomas 1960, 489–505; Zimmermann 1990, 519; Marzec 2019, 35). Under this arrangement, the merchant (*conductor*) would only rent free space for his goods and the captain's (*locator*) obligation was solely to provide the merchant with the agreed-upon space and nothing more (Marzec 2019, 35). The merchant could initially pay the *merces*[13] for this service provided or after the unloading of the cargo. Both contractual parties, as beneficiaries, were liable *omnis culpa*, meaning they would be liable for any harm resulting from their negligence; if the captain was a son-in-power or a slave, in the system of *ius civile*, this obligation would be uncollectible. For instance, if the captain carelessly or intentionally rented out the loading space to another person after concluding *locatio loci in navem*, or if the merchant loaded goods that damaged the ship or other cargo, both parties would be accountable, based on *actio locati* i.e. *conducti*. Importantly, as in the case of renting the whole ship, there was no guarantee for the merchant that the stored goods would safely arrive at their destination, nor was the captain liable for any loss, harm, theft or actions of the crew (Marzec 2019, 35). His

[12] *https://droitromain.univ-grenoble-alpes.fr/*, last visited April 18, 2024.

[13] In contracts of *conductio navis* and *locatio loci in navem*, the jurists raised the question of the amount of freight, resulting in two distinct views. The older view, articulated by Labeo, stipulates that freight should be paid for the entire cargo space, regardless of whether the merchant loaded goods to full capacity. Conversely, Paul introduces a distinction based on whether the ship was hired at a flat rate or if the freight was determined in relation to the number of goods loaded (D.14.2.10.2) (see De Marco 2000, 358–362; Du Plessis 2012, 89).

sole obligation was to facilitate the storage of goods, and if the goods did not reach the port, the merchant could be sued for the *merces* or if he initially paid the rent, could not claim a refund.

2.2.2. Locatio rerum vehendarum

Rather than *locatio loci in navem*, merchants were more secured if they have had conclude with the captain *locatio rerum vehendarum*. In this agreement, the merchant (*locator*) would entrust the goods to the captain (*conductor*) to be transported from port A to port B. Upon delivery and unloading of the cargo, the captain would receive compensation for the services rendered. Scholars such as Thomas (1960, 500–501) argue that the focus of this agreement was not on delivering, storing, or guarding the goods, but rather on their transportation. According to Thomas, this was an *obligation de résultat*, not an *obligation de moyens*. On the other hand, Kordasiewicz (2011, 195) rejects Thomas's ideas and highlights that *nauta*'s obligation was to deliver the cargo.

Nonetheless, the main difference between *locatio loci in navem* and *locatio rerum vehendarum* lay in the liabilities of the contractual parties. The *conductor* was liable *omnis culpa*. Moreover, since the captain's obligation was to ensure the delivery of the goods, he was required to possess adequate knowledge and skills to fulfil this task (*lege artis*). Therefore, if damage occurred due to his lack of abilities and prudence (*imperitia*), the merchant could sue him and seek compensation for damages. In this context, *imperitia* could entail scenarios such as captain recklessly steering the ship during a storm, leading to its sinking, or transferring the goods to a smaller and inadequate vessel resulting in a similar fate (D.14.2.10.1; D.19.2.13.1) (Aubert 1994, 63; Fiori 2022, 192–193). The captain's fault would lie in making poor decisions, whether by disregarding the dangers posed by the waves or winds, or selecting unsuitable watercraft (Ferrándiz 2022, 128). Additionally, the captain would be held liable for the actions of his crew (*culpa in eligendo*), as it was his duty to select competent staff (D.4.9.7.pr); the liability would extend to damages occurring only on-board the ship, regardless the *status libertatis* or *familiae* of the sailors. In practice, this meant that *locator* could compensate the lost only if he gives a proof of captain's *culpa* (Marzec 2019, 36). On the other hand, the merchant was liable for any fault (*omnis culpa*) on his part.

2.2.2.1. Were nautae *liable for* custodia*?*

Concluding *locatio rerum vehendarum*, *nautae*[14] had a greater interest in organizing the safe voyage as failure to deliver the cargo would result in the loss of earnings. However, a significant question remains unanswered: Were they liable for securing the goods entrusted to them, or solely for their delivery? In other words, were they liable for *custodia*[15] (*custodire*) which included cases of *casus minor* such as theft or damage to the cargo by third parties? This question is highly debatable and requires further analysis. However, it is likely that they, in the scope of *ius civile*, were not liable for situations classified as *casus (vis) maior*[16] (D.19.2.15.6).

The root of the problem, that is, the dilemma of whether *nauta* was liable for the *custodia*, lays in the following Gaius's text:

> D.4.9.5.pr. *Gaius libro quinto ad edictum provincial: Nauta et caupo et stabularius mercedem accipiunt non pro custodia, sed nauta ut traiciat vectores, caupo ut viatores manere in caupona patiatur, stabularius ut permittat iumenta apud eum stabulari: et tamen custodiae nomine tenentur.*

[14] In a general sense, the term *nauta* encompasses all individuals on board a ship who were liable for its navigation (D.4.9.1.2), including sailors, ship's guards (*nauphylakes*), valets (*diaetarii*), helmsmen (*gubernator / kybernetes*), captains and *exercitor*. However, the word *nauta*, as well as the words *navicularius* and *nauclerus*, were not *termini tehnici*. Noting this problem, Van Oven (1956, 137) correctly indicates that: "*Les textes du Corpus Iuris concernant la responsabilité des nautae et exercitores sont embrouillés, ténébreux, sinon énigmatiques*." Bearing in mind the terminological indeterminacy and fluid use of the term *nauta* in legal texts, in this section of the paper the author uses the term in a twofold manner: both as *exercitor* and as captain, depending of the context in which the word was used.

[15] It is important to note that some Romanists believed that classical jurists regarded the liability for *imperitia* and *culpa in eligendo* as a form of *custodia* (Wieacker 1934, 47; Luzzatto 1938, 189). However, this question remains open, and since it was not the main subject of this paper, the author will not delve into further details (see Danilović 1969b, 341–342). On the other hand, Robaye (1987, 180–181) states that since standard form of liability under *locatio conductio operis* was *culpa*, the captain was liable for *custodia* which was seen as *culpa in custodiendo*.

[16] Some authors argue that the liability of the *exercitor* and *magister navis* was initially considered objective and absolute (see Danilović 1969a, 368). However, historical accounts from Titus Livy and Plutarch (*Cato Mai*. 21.6) suggest otherwise. For instance, Livy (Liv. 23.49) recounts that during the Second Punic War, the Roman state entered into an agreement with publicans for the supply of the Roman army in Spain. This agreement included a clause stipulating that the state would bear the risk of shipwrecks and pirate attacks (also Liv. 25.3). As a result, it was clear that without this clause, the publicans, not the shippers, would have borne the risk of *vis maior* (Danilović 1969a, 368).

> *Nam et fullo et sarcinator non pro custodia, sed pro arte mercedem accipiunt, et tamen custodiae nomine ex locato tenentur.*[17]

From the quoted Gaius's text, we learn that *nauta* does not receive reward (*mercedem*) for safekeeping (*pro custodia*) of the goods and passenger, but rather for transporting them. However, in the subsequent sentence, the jurist asserts that seaman, innkeeper and stable keeper are liable for *custodia*, i.e. safekeeping of the stored goods. The issue arises as to whether Gaius is referring to the rule of *ius civile* – the liability arising from *locatio rerum vehendarum* – or from the *receptum nautarum*, which was more likeable (Kordasiewicz 2011, 206–207). Nevertheless, mere linguistic interpretation cannot resolve the issue, thus we must interpret the Gaius's observation in the context of two Labeo's (D.14.2.10.pr–1) and three Ulpian's (D.19.2.13.1–2. and D.47.5.1.3) texts.

First of all, Labeo addresses whether *nauta* can charge freight when a slave dies on the ship (D.14.2.10.pr). The jurist concluded that if goods are damaged due to a shipwreck, or if a slave dies on board, the *locator* would not have the right to claim freight because the contract has not been fulfilled (*obligation de résultat*), placing the risk (*periculum*) on the *conductor* for his goods. Labeo's text is intriguing because, as Danilović (1969b, 347) astutely observes, it was irrelevant whether the slave died (*mortuum est*) of natural causes (*vis maior*) or was murdered. The irrelevance of the cause of the slave's death suggests that *nauta* was not liable for safekeeping the goods, as Labeo does not delve into his liability for slave's death. On the other hand, Candy (2019, 161–162), referencing to Fiori (1999, 133), concluded that Labeo qualified the death of slave as *vis maior*. Below, Paul supplemented Labeo's assertion, stating that the matter of freight payment in the event of a slave's death hinges on the type of *locatio conductio* agreed upon. The jurist concluded that if determining the specific type is not feasible, *nauta* only had to present the evidences that the slave was aboard the ship.

> D.14.2.10.pr. *Labeo libro primo pithanon a Paulo epitomarum: Si vehenda mancipia conduxisti, pro eo mancipio, quod in nave mortuum est, vectura tibi non debetur. Paulus: immo quaeritur, quid actum est, utrum ut pro his qui impositi*

[17] *https://droitromain.univ-grenoble-alpes.fr/*, last visited April 18, 2024.

> *an pro his qui deportati essent, merces daretur: quod si hoc apparere non poterit, satis erit pro nauta, si probaverit impositum esse mancipium.*[18]

Secondly, Labeo considers the following dilemma: If a shipper has chartered / hired a ship (*condicione navem conduxisti*) for the carriage of cargo and *nauta* needlessly (*necessitate*) tranships the cargo to a less suitable vessel, knowing that the shipper would disapprove (*cum id sciret te fieri nolle*), and the cargo is lost with the ship while being transported, the shipper had an *actio* from *ex conducto locato* against the first *nauta*.

> D.14.2.10.1. *Labeo libro primo pithanon a Paulo epitomarum: Si ea condicione navem conduxisti, ut ea merces tuae portarentur easque merces nulla nauta necessitate coactus in navem deteriorem, cum id sciret te fieri nolle, transtulit et merces tuae cum ea nave perierunt, in qua novissime vectae sunt, habes ex conducto locato cum priore nauta actionem*.[19]

The quoted text is multi-layered and ambiguous. Firstly, it is unclear which contract the parties concluded – *conductio navis* or *locatio rerum vehendarum*. Labeo uses the phrase *condicione navem conduxisti* to indicate that the ship-owner (*exercitor*?) hired a ship to transport goods (*obligation de moyens*). However, the text also suggests that the obligation of *nauta* (*magister navis*?) was to transport specific goods (*obligations des résultat*), which Accursius in *Magna Glossa* interpreted to mean that the captain had the obligation to deliver the cargo to a precisely specified port (*ad aliquem locum*) (Candy 2019, 166).

According to Fiori (1999, 144–145; 2010, 164–165), this situation represents a mixed contract similar to today's voyage charter, where *nauta* (captain) as a *locator* rents a ship from the ship-owner, while also assuming the role of a *conductor* obligated to deliver the goods to a certain location. Consequently, both parties could use either *actio locati* or *actio conducti* depending on which part of the contract was breached (Fiori 2018, 536–539). On the other hand, Miškić (2024, 148–149 n. 207), referencing Tomas, suggests that elements of the transport of goods by sea prevail in this situation, indicating that it should be viewed within the context of

[18] *Ibid*.

[19] *Ibid*.

locatio rerum vehendarum. Additionally, some scholars argue that the text was interpolated, while others believe that the phrase *condicione navem conduxisti* lacks specific meaning (Candy 2019, 166).

Nonetheless, two points seem indisputable: the captain's liability is undoubtedly based on *culpa*, as he transhipped the goods against the co-contractors' will and chose an unsuitable vessel (Candy 2019, 166). Moreover, the text is significant because it confirms that the term *nauta* was used to denote the captain of a ship (Miškić 2024, 150; opposite Valiño del Río 1967, 381). This fact is crucial for understanding and interpreting the following Ulpian text, which causes significant confusion.

Hereafter, Ulpian poses the following scenario: If a *navicularius* agrees to transport freight to Minturnae but, due to navigational constraints, transfers the goods onto another vessel that ultimately founders at the river's mouth, is the primus *navicularius* liable? Ulpian quotes Labeo, who states that the *navicularius* bears no liability if the incident occurred without his fault (*si culpa caret*). However, if the *navicularius* acted contrary to the owner's instructions, transferred the goods during adverse conditions (such as a storm), or moved the goods to a vessel unsuitable for the task, then the owner of the cargo could pursue legal action against him *ex locato agendum*.

> D.19.2.13.1. *Ulpianus libro 32 ad edictum: Si navicularius onus Minturnas vehendum conduxerit et, cum flumen Minturnense navis ea subire non posset, in aliam navem merces transtulerit eaque navis in Ostio fluminis perierit, tenetur primus navicularius? Labeo, si culpa caret, non teneri ait: ceterum si vel invito domino fecit vel quo non debuit tempore aut si minus idoneae navi, tunc ex locato agendum*.[20]

First of all, the term *navicularius* (gr. *naukleros* / *ναύκληρος*) is highly questionable and amorphous. Watson[21] (1985a, 103) translates it as "*ship owner*", indicating that it was used to denote *exercitor*. On the other hand, Scott[22] translates it as "*master of a ship*" (gr. *pistikos*) i.e., the captain. The question remains open – did Ulpian have in mind the *exercitor* or the *magister navis*? The word *navicularius*, as a noun, is used in most cases by

[20] *Ibid*.

[21] It is noteworthy that in Book L of Justinian's Digesta, the term *navicularii* appears thirteen times. In some instances, Watson (for example 1985b, 425) retains the Latin term, while in others (Watson 1985b, 433), he translates it as "ship owner".

[22] Available at: *https://droitromain.univ-grenoble-alpes.fr/*, last visited April 18, 2024.

Roman writers (Cic. II *Ver*. 2.137, 5.153; Cic. *Ad Fam*. 16.9.4; Cic. *Att*. 9.3.2; Tac. *Ann*. 12.55) to designate the ship owner i.e., the person who hires out a vessel for money (see also Casson 1971, 315 n. 67; Salway 2019, 46). However, Lewis & Short (1958, 1192) Salway (2019, 46) and Miškić (2024, 97) write that the word could also be translated as "*ship master*" i.e., the captain. Without delving into a deeper linguistic analysis of the word, the author believes that it is correct to translate the word both as "ship owner" and as "ship master" depending on the context in which the word is used (see *CIL* III 14165). Therefore, if we read Ulpian's text (D.19.2.13.1) carefully, we can assert that all described actions were attributed to the captains, not to the *exercitor*: closing the deal (*vehendum conduxerit*), navigating the vessel, making the decision regarding which ship is suitable for further sailing, and organizing the transfer of the goods from one vessel to another (*merces transtulerit*). Moreover, if we use an analogy with the previously cited Labeo's text (D.14.2.10.1), we can assert that it was common to use the terms twofold, and that the jurists were discussing the captain's liability from *locatio conductio*.

Nonetheless, the author believes that the mentioned text implies that the captain's liability was subjective, indicating that he was held accountable due to negligence. This negligence stemmed from actions such as transhipping the goods against the owner's wishes or transferring them onto an unsuitable vessel, despite being aware of its inadequacy. The absence of liability for *custodia* is obvious, as the captain would otherwise be held liable for the cargo's loss regardless of his conscientiousness. While there is a dispute regarding the text's authenticity (see Thomas 1960, 502–503; Van Oven 1956, 148), Danilović (1969b, 347–348) contends that it is Ulpian's original text which discusses a real event, since the jurist mentions the specific river where the failed transhipment occurred. Furthermore, a systematic interpretation of the text in connection with D.14.2.10.1. *Labeo libro primo pithanon a Paulo epitomarum* suggests that the phrase *"si culpa caret"* is attributed to Labeo. The jurist likely denotes the captain's negligence, rather than clearly defining an abstract degree of guilt. Labeo operates within the principle of *bona fides* and asserts the captain's liability for incompetence and carelessness (*faute contractuelle*) based on the principles of *locatio conductio*.

Afterwards, Ulpian notes that if a captain enters a river from the sea without the assistance of the helmsman, and the ship subsequently sinks, passengers have the right to *actio locati* (D.19.2.13.2). According to one interpretation, by not seeking assistance from the helmsman, the captain clearly violates the principles of *bona fides*, and the consequences of his negligence result in the ship's sinking, even though the act of shipwreck

itself is considered force majeure. On the other hand, this could refer to a breach of a contractual provision. Namely, river navigation was rather risky due to the swift streams or currents, rapids, waterfalls, narrows, and the particular difficulties of night sailing (Adams 2012, 227). Because of all these, the shipping contracts often had a specific clause[23] such as the one (P. *Ross. Georg*. II 18) concerning the navigation on the Nile which stipulated that the captain must anchor at the safest and designated anchorages at the proper hours during the night (Adams 2012, 227; see also 2018, 175–208).

> D.19.2.13.2. *Ulpianus libro 32 ad edictum: Si magister navis sine gubernatore in flumen navem immiserit et tempestate orta temperare non potuerit et navem perdiderit, vectores habebunt adversus eum ex locato actionem*.[24]

Lastly, Ulpian states that if goods are stolen, there were two options: owner could either sue the *exercitor* with the praetorian *actio furti adversus nautas* or sue the actual thief with civile *actio furti* (D.47.5.1.3). According to Gaius's Institutions, in classical law, the *actio furti* could be initiated not only by the owner but also by individuals whose interest was in securing the property (*cuius interest rem salvam esse*) (G. *Inst*. 3.203), first of all one liable for *custodia* (G. *Inst*. 3.205–207; see Rosenthal 1951, 217–265). Since only the owner of the stolen goods could bring an *actio furti* against the actual thief, we can infer that the *exercitor* was not considered liable for *custodia* in the context of *locatio rerum vehendarum* (Danilović 1969b, 348). This is particularly evident from Gaius's text, where he specifies that, based on *locatio conductio operis*, only the clothier and the tailor were held liable for *custodia* (G. *Inst*. 3.205).

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[23] Labeo's text (D.14.2.10.pr) incorporates Paul's commentary, which distinguishes the merchant's liability for paying freight. In cases where it is uncertain which contract has been concluded – whether it is the *locatio rerum vehendarum* discussed by Labeo or any another – the captain could demand freight if he can prove (*probaverit*) that the goods were loaded (*impositum esse*) on board, even if they were not carried (*deportati*) to their destination. In this peculiar situation, it is assumed that none of three *locatio conductio* has been concluded, but special contract, likely originating from maritime customary law, characterized by an *obligation de moyens* (Fiori 2022, 189). This contract included an atypical clause that scholars named *navigationsklausel*, which stipulated that the transportation of goods should only occur during daylight, under calm water conditions, with the obligation for the ship to dock in port every day (Fiori 2022, 189). Fiori (2022, 189) further notes that the captain's liability encompassed both delivering and safeguarding the goods. However, he would not be held liable for *vis maior*, and if the cargo was not delivered, he could still demand freight payment.

[24] *https://droitromain.univ-grenoble-alpes.fr/*, last visited April 18, 2024.

> D.47.5.1.3. *Ulpianus libro 38 ad edictum: Cum enim in caupona vel in navi res perit, ex edicto praetoris obligatur exercitor navis vel caupo ita, ut in potestate sit eius, cui res subrepta sit, utrum mallet cum exercitore honorario iure an cum fure iure civili experiri*.[25]

Despite the observed controversies in the previously cited texts, primarily caused by the terminological inaccuracy of Roman jurists, the author believes that the captains, as well as *exercitor*, were not liable for *custodia*. Bearing in mind that the linguistic interpretation of the texts does not provide satisfactory and credible answers, a systematic interpretation allows us to conclude that, within the framework of *locatio conductio vehendarum*, the *exercitor* and captain were liable for negligent.

2.2.2.2. *The* receptum nautarum *and introducing liability for safekeeping the goods*

Sailors in ancient times were often regarded unfavourably (D.4.9.3.1; D.47.5.1.pr). *Nautae* frequently engaged in fraudulent activities such as collaborating with pirates or staging shipwrecks to evade their contractual duties (Liv. 25.3) (Zimmerman 1990, 516).[26] These practices were common and lucrative because under *locatio conductio* they were liable only for the delivery – not the safety of the cargo (Schulz 1960, 540; Thomas 1960, 495; Robaye 1987, 86–88; Zimmerman 1990, 519; opposite Földi 1993, 286). In response to these malpractices (*hoc genus hominum*), the praetor[27] introduced a special *in factum actio* (D.4.9.3.1), later named *actio de recepto*.

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[25] *Ibid*.

[26] Livy (Liv. 25.3) reports that, in the event of a shipwreck, the state assumed all costs. This policy led many merchants to deliberately sink their ships to claim compensation. During the Second Punic War, one such case of fraud was reported to the praetor Marcus Aemilius, who brought the matter to the senate. However, the senate refrained from punishing the carriers, fearing that doing so might provoke their anger and jeopardize the supply of the Roman army. On the other hand, the public reacted strongly to this leniency. In response, the tribunes of the plebs, Spurius and Lucius Carvilius, imposed a fine of two hundred thousand sesterces on the merchant Marcus Postumius.

[27] The Praetor's Edict *De Receptum Nautarum* has become a part of the European *ius commune* and is still in force in South Africa (Zimmerman 1990, 520). Additionally, many codifications (for example *Code Civil*) prescribe strict liability for shippers regarding the safekeeping of goods. The main characteristics of their liability for cargo are that it is *ex contractu*, subjective with presumed fault, and legally limited, as outlined in the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 1924 (Trajković 1997, 121–123).

Based on a previously concluded *receptum*[28], the owner of the goods could sue *nauta* if he failed to transport and deliver the goods without damage (Buckland 1921, 528). This innovative solution, in a form of an additional security, introduced liability for *custodia*[29] in contracts for transportation of goods by sea (D.4.9.5.pr) (Kunkel 1949, 240; Girard 1918, 618; Marzec 2019, 36).

> D.4.9.3.1. *Ulpianus libro 14 ad edictum: Ait praetor: "Nisi restituent, in eos iudicium dabo". Ex hoc edicto in factum actio proficiscitur. Sed an sit necessaria, videndum, quia agi civili actione ex hac causa poterit: si quidem merces intervenerit, ex locato vel conducto: sed si tota navis locata sit, qui conduxit ex conducto etiam de rebus quae desunt agere potest: si vero res perferendas nauta conduxit, ex locato convenietur: sed si gratis res susceptae sint, ait Pomponius depositi agi potuisse. Miratur igitur, cur honoraria actio sit inducta, cum sint civiles: nisi forte, inquit, ideo, ut innotesceret praetor curam agere reprimendae improbitatis hoc genus hominum: et quia in locato conducto culpa, in deposito dolus dumtaxat praestatur, at hoc edicto omnimodo qui receperit tenetur; ...*[30]

Paul's text clarifies this (D.4.9.4.pr). The jurist states that in cases of theft, the *nautae* could bring *actio furti*, as they bore the risk (*periculo*) for the merchandise, despite not being the owners of the goods. Furthermore, Paul confirms that this applies not only to theft but also to damage to goods (D.4.9.5.1). Comparing D.4.9.4.pr. *Paulus libro 13 ad edictum* with previously analysed D.47.5.1.3. *Ulpianus libro 38 ad edictum*, it confirms

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Similar to Roman law, the shipper is obliged to compensate for damages if he personally causes them or if any of his employees do so (*culpa in eligendo*). Conversely, the shipper's liability for the safekeeping of goods (*ex recepto*) falls under his general liability based on the concluded contract for the carriage of goods by sea. The degree of care required in the contractual relationship in modern law is referred to as "the diligence of a prudent shipper", which includes liability for even the slightest negligence (*culpa levissima*). The norms regarding the liability of the shipper are of a dispositive nature, and the grounds for exemption from liability in Serbian law are provided by the Law on Merchant Shipping, *Službeni glasnik RS* br. 96/2015 i 113/2017 – dr. zakon (see also Trajković 1997, 128–150).

[28] Besides the *receptum nautarum*, Scaevola writes (D.22.2.5.pr–1) that in contracts for transporting goods by sea, there could existed additional pact (*pacta adiecta*) that increased the obligation of the debtors.

[29] Consequently, as Ulpian states, in the case of theft the merchant would not have *actio furti*, but *nauta*, since he incurs the risk of safekeeping (D.47.5.1.4).

[30] *https://droitromain.univ-grenoble-alpes.fr/*, last visited April 18, 2024.

that under *locatio conductio*, *nautae* were not liable for *custodia*, but they became so after the introduction and conclusion of the *receptum*. Moreover, this interpretation could be supported by Suetonius (St. *Claudius* 18.11–13; 20.3. and 14–21), who writes that Emperor Claudius rebuilt the docks in Ostia and allowed merchants to earn good profits by assuming the risk of damage caused by shipwreck. The same emperor issued an edict which stipulated that shippers of Latin origin (*nave Latinus*) acquired citizenship if they had built a ship with a volume of no less than ten thousand *modii* and supplied Rome with grain for six years (Ulp. *Reg*. 3.6; St. *Claudius* 18.13–15). Both sources indicate the immeasurable importance of seafaring for Roman Empire.

> D.4.9.4.pr. *Paulus libro 13 ad edictum: Sed et ipsi nautae furti actio competit, cuius sit periculo, nisi si ipse subripiat et postea ab eo subripiatur, aut alio subripiente ipse nauta solvendo non sit.*[31]
>
> D.4.9.5.1. *Gaius libro quinto ad edictum provinciale: Quaecumque de furto diximus, eadem et de damno debent intellegi: non enim dubitari oportet, quin is, qui salvum fore recipit, non solum a furto, sed etiam a damno recipere videatur.*[32]

The introduction of the *actio de recepto* represented a significant shift in maritime law enhancing the protection of merchants against the ignominious practices of the participants in the maritime venture. In that regard, several scholars have debated the emergence and implications of this legal remedy. For example, Kordasiewicz (2011, 197 n. 28) and Candy (2019, 229) vaguely conclude that the edict on the *actio de recepto* was adopted after the introduction of the actions on letting and hiring (opposite Van Oven 1956, 138; Földi 1993, 278–279) and Zimmerman (1990, 517) that it was younger than the *actio furti adversus nautas* and *actio damni adversus nautas*. On the other hand, De Robertis (1952, 42) suggests that the *actio de recepto* was introduced around 200 BC and Danilović (1969a, 366) after the passing of *Lex Aebutia* (around 150 or 130 BC) which legalized the formulary procedure and expanded the praetor's powers. Moreover, Thomas (1960, 504–505) suggests that it was a creation of an unknown Augustan jurist. Discussing its origin, Mitteis (1898, 203), Partsch (1908, 416) and Danilović (1969a, 377) note that the *receptum* drew from Greek customary

[31] *Ibid*.

[32] *Ibid*.

law (similarly Kunkel 1949, 240) and that was later incorporated into Roman law under the framework of *ius gentium*. *A contrario*, Zimmerman (1990, 516) and Földi (1993, 276) do not mention the Greek origin of the *receptum*, but suggest that it was an informal guarantee which *nautae* used to give in order to attract potential customers.

Concerning the *receptum*, several questions arise: what was its legal nature, what degree of liability did *nautae* assume and how did it change over time? However, the most intriguing and puzzling question relates to the influence of the *receptum* on the internal relationship between the *exercitor* and the *magister navis*.

First of all, we must highlight that modern Romanists believe that *nauta* could be liable under the *actio de recepto* only if he had concluded special agreement to bear the risk for the goods taken over (Danilović 1969a, 369–376; Kaser 1974, 236). On the other hand, the question arose as to whether this agreement was an independent pact (Huvelin 1929, 135–159; De Robertis 1952, 74; Schulz 1960, 539; Betti 1962, 373), a unilateral undertaking of an obligation (Van Oven 1956, 139), *accidentale negotium* (Brecht 1962, 99–112; Zimmerman 1990, 520) or *naturale negotium* (Kunkel 1949, 240; Kaser 1974, 236; Földi 1993, 267) of *locatio conductio*.

Most likely, the *receptum* emerged as an independent *pacta*, since after its conclusion the party had two legal remedies: *actio locati* or *conducti* from *locatio conductio* and *actio de recepto* from *receptum*. Moreover, Ulpian's text (D.4.9.1.7) testifies that for transporting the same goods, one person could enter into *locatio rerum vehendarum* and another into *receptum*. Probably, during the late classical period, the liability of *nauta* from *receptum* became an integrative part of contracts for carrying goods by sea (Zimmerman 1990, 520). On the other hand, Danilović (1969a, 376) believes that *receptum* did not become *naturalium negotii* of *locatio conductio*, that it was an independent pact (1969a, 371) and that in practice both legal transactions were concluded simultaneously by the same persons (1969a, 376). She argues that the *receptum* was perceived as a standard form contract (contract of adhesion or leonine contract) because shippers publicly announced the conditions of transportation and the tariffs for the transportation of cargo. The price of the transport depended on whether the goods were transported with the assurance of *salvum fore restituere* or not (Danilović 1969a, 376), since *receptum* was *negotia onerosa* (D.20.4.6.1) (Buckland 1921, 528; Purpura 2022, 115).

Secondly, the texts raise the question of whether *nauta* was liable only for *custodia* or also for force majeure. Interpreting Labeo's opinion (D.4.9.3.1), the *communis opinio doctorum* (for example Kunkel 1949, 240; Schulz 1960, 539; Zimmermann 1990, 515; Földi 1993, 265; Marzec 2019, 36) is that

initially he was liable for all damages, including those caused by *casus* (*vis) maior*. However, from the time of classical law, possibly starting with Labeo's era, this liability was relaxed. Labeo writes that if the cargo was destroyed due to actions beyond human control (pirate attacks or sea disasters) *nauta* would be granted an exception (*exceptionem ei dari*) to the merchant's lawsuit since the *actio de recepto* was *stricti iuris* (Zimmermann 1990, 515). In practice, this meant that the merchant could only claim the value of the destroyed goods (*damnum emergens*), not the *lucrum cessans*, if the cargo was lost for a reason that excludes the actions of force majeure (Mišković 2024, 146–147). Most likely, the *exceptio Labeoniana* was introduced[33] after the affirmation of principles of *aequitas* and *bona fides*, as well as the structuring of contractual liability in classical law based on *dolus*, *culpa* and *custodia* (Molnár 1990, 152; Földi 1993, 280). Initially, it only covered the cases of shipwrecks and pirate attacks, but in Ulpian's time it refers to all cases that were treated as force majeure, since he speaks of *damno fatali* (Salazar Revuelta 2006, 1086 n. 5).

> D.4.9.3.1. *Ulpianus libro 14 ad edictum: ... at hoc edicto omnimodo qui receperit tenetur, etiam si sine culpa eius res periit vel damnum datum est, nisi si quid damno fatali contingit. Inde Labeo scribit, si quid naufragio aut per vim piratarum perierit, non esse iniquum exceptionem ei dari. ...*[34]

[33] Although sailors had a bad reputation in Rome, the sources provide some positive examples and testify to the change of attitude towards them over time. A recently discovered bronze tablet in Rome from 78 BC contains the text of a *Senatus Consultum* granting great privileges to three Greek captains: Asclepiades of Clazomenae, Polystratus of Carystus, and Meniscus of Miletus (Terpstra 2011, 220). The Senate rewarded their distinguished roles in the *Bellum sociale* or Sulla wars (*τοῦ πολέμου τοῦ Ἰταλικοῦ*) and, as *amici populi Romani*, they were given financial benefits (freedom from liturgies, restitution of property sold during their years of service) and were granted such high honours as the right to offer sacrifices on the Capitol and the right to speak in the Senate (Terpstra 2011, 220).

On the other hand, privileges engraved on tablets and placed on the Capitol were not given only to individuals but to whole families or communities, like the Aphrodisians in 39 BC (Terpstra 2011, 221). We know that Vespasian attempted to find copies of three thousand such tablets destroyed by fire, which contained alliances, treaties, and special privileges granted to individuals (Terpstra 2011, 221–222). Although these privileges were not common, they testify that at the end of the Republic and the beginning of the Principate, there was an increase in trust in seafarers and the professionalization of this activity. In all these circumstances, we can seek *raison d'être* for the introduction of *exceptio Labeoniana*.

[34] *https://droitromain.univ-grenoble-alpes.fr/*, last visited April 18, 2024. See Lenel 1929, 1–6.

In the context of *nauta*'s liability based on the *receptum*, the question arises as to which goods he took liability for – whether he bore the risk for all the merchandise brought on board or only specifically designated ones. According to one group of authors (for example Földi 1993, 267), *nauta* was liable for all items brought on board; Földi (1993, 281) concludes that this practically meant his liability transcended the liability for *custodia.* On the other hand, another group of authors (for example Danilović 1969a, 369–376; Kordasiewicz 2011, 204; Purpura 2022, 114) argues that *nauta* was liable exclusively for precisely specified, marked and handed over goods. This includes the goods on-board, as well as the merchandise on the shore (D.4.9.3.pr). Both Ulpian and Pomponius states that the edict acts covered of all passengers (D.4.9.1.8; D.4.9.3.pr), not only the members of the crew as was the case in the context of *actio furti adversus nautas* and *actio damni adversus nautas* (Kordasiewicz 2011, 204).

However, we must differentiate whether the goods were *species* or *genera*. If they were *species*, most likely *nauta* was liable only for marked cargo that could be identified upon the delivery (*χειρέμβολον*[35]). On the other hand, if the goods were *genera* (D.19.2.31), as in the case of shipping in bulk, the *mutatio dominii* occurred and *nauta* became the owner of the cargo. Consequently, he was liable not for the delivery and safekeeping of that exact grain, wine or oil, but rather for delivering the same quantity and quality of the merchandise, even in the case of *vis maior*, since *casum sentit dominus* (Purpura 2022, 114).

Furthermore, Ulpian (D.4.9.1.6) and Paul (D.4.9.4.2) paraphrase Vivianus' opinion that *nautae* were liable for passengers' personal belongings, such as clothing and daily provisions, even though fright was not paid for them. The two texts differ slightly, as Paul's version indicates that Vivianus held this position for property brought onto the ship after the contract (*locatio conductio*) had been concluded and the cargo loaded. Even though no *vectura* was owed for these items, they were still regarded as part of the agreement. This suggests that before the Vivianus' intervention, the liability from *receptum* covered only explicitly listed goods (Candy 2019, 210). The captain could waive liability if he declared that passengers were liable for their belongings (D.4.9.7.pr). This was not a unilateral declaration of will but an exculpatory clause of *locatio conductio*, as Ulpian notes that the passengers had to agree to it.

[35] See Purpura 2014, 127–152.

> D.4.9.1.6. *Ulpianus libro 14 ad edictum: Inde apud Vivianum relatum est, ad eas quoque res hoc edictum pertinere, quae mercibus accederent, veluti vestimenta quibus in navibus uterentur et cetera quae ad cottidianum usum habemus*.[36]
>
> D.4.9.4.2. *Paulus libro 13 ad edictum: Vivianus dixit etiam ad eas res hoc edictum pertinere, quae post impositas merces in navem locatasque inferentur, etsi earum vectura non debetur, ut vestimentorum, penoris cottidiani, quia haec ipsa ceterarum rerum locationi accedunt*.[37]

Lastly, we must examine who concluded the *receptum*, who was the defendant (*nauta*), and how this affected the relationship between the *exercitor* and the *magister navis*. The controversy lies in the fact that the *receptum* was concluded by the captains with the owners of goods or passengers, yet the liability was borne by the *exercitor* (D.4.9.1.2). Pomponius clarifies that the *exercitor* could be held liable only if the *receptum* was concluded by the captain[38], not by an oarsman (*remigem*) or ordinary seaman (*mesonautam*). However, if he orders the oarsman or common sailor to enter into this agreement, Pomponius or Ulpian adds that he will be under an obligation; the same goes for persons in charge of ship's security – the guards and the valets (D.4.9.1.3). Nonetheless, in the texts discussing the matter of *receptum nautarum*, the term "*nauta*" refers to the *exercitor*, who was always the defendant in disputes based on this agreement, albeit concluded between the captain and third parties. According to Cvetković-Đorđević (2020, 134) this was a rare example of direct representation in Roman law.

> D.4.9.1. *Ulpianus libro 14 ad edictum: 2. Qui sunt igitur, qui teneantur, videndum est. Ait praetor "nautae". Nautam accipere debemus eum qui navem exercet: quamvis nautae appellantur omnes, qui navis navigandae causa in nave sint: sed de exercitore solummodo praetor sentit. Nec enim debet, inquit Pomponius, per remigem aut mesonautam obligari, sed per se vel per navis*

[36] *https://droitromain.univ-grenoble-alpes.fr/*, last visited April 18, 2024.

[37] *Ibid*.

[38] Labeo writes that the same applies on those in charge of a boat or boatmen (D.4.9.1.4).

> *magistrum: quamquam si ipse alicui e nautis committi iussit, sine dubio debeat obligari. 3. Et sunt quidam in navibus, qui custodiae gratia navibus praeponuntur, ut naufulakes et diaetarii.* ...[39]

Bearing in mind that the *exercitor* bore the entire liability for the success of the maritime venture, it remains unclear what implications the conclusion of the *receptum* had on the internal relationship between him and the captain. Although the sources do not provide unequivocal confirmation of this position, if the captain is guilty of the resulting damage or if his actions contributed to the occurrence of the damage – which, in addition to liability for negligence (*culpa*), also includes liability for employees (*culpa in eligendo*), incompetence (*imperitia*), and theft[40] committed by the crew or third parties (*casus minor*) – there would be a division of liability between the captain and the *exercitor* (Miškić 2024, 147). Most likely, the *exercitor* would acquire the right to a regressive claim against the captain, commensurate with his share in the total damage, after he, as the sole debtor from the *receptum*, fully compensated the damage to third parties.

2.2.3. Lex Rhodia de iactu

Roman law recognized specific liability for contracting parties based on the *locatio rerum vehendarum* in case of so-called "general average". This principle applied when it was necessary to sacrifice part of the cargo to save the ship and the remaining goods. The resulting damage was proportionally shared by the owners of the salvaged goods (D.14.2.2.pr). This rule, still in effect and known as the "Rhodian Sea-Law on Jettison" (*Lex Rhodia de iactu*), was likely of Phoenician origin (Miškić 2022, 201) and adopted by the Republican jurists from the customary law of the port of Rhodes (Candy 2019, 176).[41] Two slightly different texts by Paul and one by Maecius regarding its content and implications in Roman law are preserved:

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[39] *https://droitromain.univ-grenoble-alpes.fr/*, last visited April 18, 2024.

[40] The jurists debated whether the owner of the goods could bring an *actio furti* or an *actio de recepto* if the goods were stolen. Ulpian writes that Pomponius was doubtful, but concludes that either by application to the judge or the defence of fraud, plaintiff ought to be restricted to one or the other (D.4.9.3.5).

[41] In *De Officiis* (Cic. *de Off*. 3.63. and 89), Cicero references an intriguing philosophical treatise by the Greek Stoic philosopher Hecaton of Rhodes (*Ἑκάτων*). In the sixth book on his work "On Moral Duties" (*De Officiis*), dedicated to Quintus Tubero, Hecaton presents a moral dilemma: in the event of general average, which should be thrown overboard first – a valuable horse or an inexpensive slave? The dilemma

> Paul. *Sent.* 2.7.1: *Levandae navis gratia iactus cum mercium factus est, omnium intributione sarciatur, quod pro omnibus iactum est.*[42]
>
> D.14.2.1. *Paulus libro secundo sententiarum: Lege Rodia [Rhodia] cavetur, ut si levandae navis gratia iactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est.*[43]
>
> D.14.2.9. *Maecianus ex lege Rhodia: Ἀξίωσις Εὐδαίμονος Νικομηδέως πρὸς Ἀντωνῖνον βασιλέα· Κύριε βασιλεῦ Ἀντωνῖνε, ναυφράγιον ποιήσαντες ἐν τῇ <Ἰκαρίᾳ> διηρπάγημεν ὑπὸ τῶν δημοσίων <δημοσίωνῶn> τῶν τὰς Κυκλάδας νήσους οἰκούντων. Ἀντωνῖνος εἶπεν Εὐδαίμονι· ἐγὼ μὲν τοῦ κόσμου κύριος, ὁ δὲ νόμος τῆς θαλάσσης τῷ νόμῳ τῶν Ῥοδίων κρινέσθω τῷ ναυτικῷ ἐν οἷς μήτις τῶν ἡμετέρων αὐτῷ νόμος ἐναντιοῦται. τοῦτο δὲ αὐτὸ καὶ ὁ θειότατος Αὔγουστος ἔκρινεν.*[44]
>
> *Id est: Petitio Eudaemonis Nicomedensis ad imperatorem Antoninum. Domine imperator Antonine, cum naufragium fecissemus in Italia (immo in Icaria), direpti sumus a publicis (immo a publicanis), qui in Cycladibus insulis habitant. Antoninus dicit Eudaemoni. Ego orbis terrarum dominus sum, lex autem maris, lege Rhodia de re nautica res iudicetur, quatenus nulla lex ex nostris ei contraria est. Idem etiam divus Augustus iudicavit.*[45]

Maecianus' text is the most significant in understanding the legal nature and application of the Rhodian Sea-Law. The text recounts the case of Eudaimon from Nicomedia, who sought legal instruction from Emperor Antoninus (Pius or Aurelius) on how to resolve a dispute with local authorities on the island of Cyclades, near which his ship was wrecked and the goods he was transporting were confiscated. The emperor replied that in such a situation, the provisions of the Rhodian Sea-Law should be applied, as well as the decision of Octavian (Augustus) that regulates this area. From this, we can draw several conclusions. First, the so-called Rhodian Sea-Law

centers on whether to prioritize personal interest or humanity. Hecaton argues in favor of prioritizing the former, a stance that Cicero cites as a negative example, criticizing any action that places self-interest above humanity.

42 *https://droitromain.univ-grenoble-alpes.fr/*, last visited April 18, 2024.

43 *Ibid*.

44 Candy 2019, 173.

45 *https://droitromain.univ-grenoble-alpes.fr/*, last visited April 18, 2024.

was not a single provision, as reported by Paulus, but most likely, as Candy (2019, 177) notes, an existing customary legal framework adopted by the Romans. Secondly, it appears that it was not a promulgated law, i.e., *lex*, but rather a body of laws which did not conflict with the existing Roman legal structure and it was considered in the context of *locatio conductio*, but also as a part of an autonomous set of rules (*lex*) (Candy 2019, 175 and 177).

If the general average occurred, the process unfolded as follows. Firstly, the owners of the destroyed goods would bring an *actio locati* against the ship's captain. Secondly, after settling the debt, the captain would then acquire the right of recourse against the shippers through an *actio conductio*, demanding a proportional settlement of the debt (D.14.2.2.pr). According to Servius' the shipmaster also acquired the right to retain (*retentio*) the goods until his damages were settled (D.14.2.2.pr). The total loss was apportioned based on the market value of the property, and it was necessary to consider the value of all property except what was placed on the ship for consumption purposes, such as foodstuffs (D.14.2.2.2). The calculation of the share in the damage was carried out only if the cargo was jettisoned and the ship was saved (Paul. *Sent*. 2.7.5).

We do not know much about the application of Rhodian Sea-Law from the period of the Republic and the early Principate. A number of authors advocate the thesis that the legal situation described above took place on the basis of previously concluded pacts (De Martino 1938, 22 and 210–211; see also Candy 2019, 179 n. 200). On the other hand, Wieacker (1953, 517) and Cardilli (1995, 266) claimed that initially, the captain acquired the right to an *exceptio ex iure tretii* against those merchants who sued him for damages, even though they had not previously paid their share. Regarding this statement, Candy (2019, 180) assumes that in Paul's time, the captain had an *actio conducti* directly against the merchant who did not pay his share. Furthermore, the same author states that initially only the *magister navis* could be sued *ex locato*, while giving him an action *ex conducto* was a later innovation (Candy 2019, 180).

Lastly, it is worth noting that Roman jurists, by analogy, applied the provisions of the Rhodian Sea-Law to all *locatio conductio*, not only *locatio rerum vehendarum*, which included maritime venture, as well as in a several related situations: the jettison of the ship's gear, the ransoming of merchandise from pirates, the loss of goods that had been offloaded to lighten a vessel, and damage caused to goods on board while the act of jettison was taking place (Candy 2019, 190).

3. CONCLUSION

The role of a ship's captain in Roman maritime law was crucial for ensuring the safe transport of goods across the seas since, according to Ulpian, his primary duties were to hire the ship and crew, transport goods or passengers, and sell commodities for a fixed freight. The relationship between the captain and the *exercitor*, i.e., *dominus negotii*, depended on whether the captain was a slave, *alieni iuris*, or a free man. If the captain was under *patria potestas* or a slave, his *pater familias* or master assumed full liability for his actions. In such circumstances, the captain had no legal capacity to enter into contracts with third parties, making any agreement merely a natural obligation. Conversely, if the captain was a free person, the *exercitor* appointed him through *locatio conductio operis*, in which case he was liable *omnis culpa*, including liability for *imperitia* and *culpa in eligendo*.

On the other hand, the relationship between the captain and merchants or passengers was more complex and depended on the type of contract they concluded. In the case of *conductio navis* or *locatio loci in navem* – both forms of *locatio conductio re* – the *magister navis* undertook to provide a ship or a place on the ship for the transport of goods, but was not liable for delivering the merchandise to the port. The merchants paid *merces* only for that service. Liability for the goods rested exclusively with the *conductor*, and if any mishap occurred to the cargo, the *locator* would not be held liable, as his liability was limited to handing over the ship in sailing condition.

By contrast, in the case of *locatio rerum vehendarum*, the captain's obligation was not to provide free dock space but to transport the goods. At the beginning, the captain's liability was limited to delivering the cargo, not ensuring its safekeeping. This limitation often led to fraudulent activities, such as collusion with pirates or false claims of shipwrecks. Most likely introduced in the late Republic, the *receptum nautarum* was a special agreement that extended the captain's liability to include the safekeeping of goods. Although it initially functioned as an independent *pactum*, by the end of the classical period it had become an integral part of the contract for the transport of goods by sea.

There are two opposing theories regarding the origin of the *receptum*: some scholars argue it derives from Greek law, while others suggest it originated from customary law. Additionally, Romanists debated whether the captain was liable for all the goods on the ship or exclusively for specially marked items. Most likely, if the goods were *species*, the captain was liable only for marked cargo that could be identified upon delivery. If the goods

were *genera*, he was liable for delivering the same quantity and quality of merchandise. Unless otherwise agreed, the captain was also liable for the passengers' personal belongings.

After the introduction of the *receptum*, the relationship between the *exercitor* and the captain regarding liability became more complex since the *receptum* was concluded by the captains, yet the liable one was the *exercitor*. While Roman sources do not explicitly clarify all aspects of this relationship, it is likely that *nautae* were held liable for damage caused by negligence (*culpa*), the actions of the crew (*culpa in eligendo*), incompetence (*imperitia*), theft by sailors or third parties (*casus minor*), and, until the inception of the *exceptio Labeoniana*, even for force majeure (*vis maior*). If the captain was found guilty of causing the damage or if his actions contributed to it, liability would be shared between the captain and the *exercitor*. Once the *exercitor* compensated third parties for the total damage under the *receptum*, he would likely have a regressive claim against the captain for a proportionate share of the loss.

Finally, in the case of general average, where part of the cargo was deliberately sacrificed to save the ship and the remaining goods, the damage was shared proportionally by the owners of the salvaged goods. The owners of the jettisoned goods would first bring an action against the ship's captain. Once the captain settled the debt, he would then have the right of recourse against the shippers, demanding a proportional contribution for the loss, which ensured a fair allocation of the financial burden resulting from such maritime incidents.

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