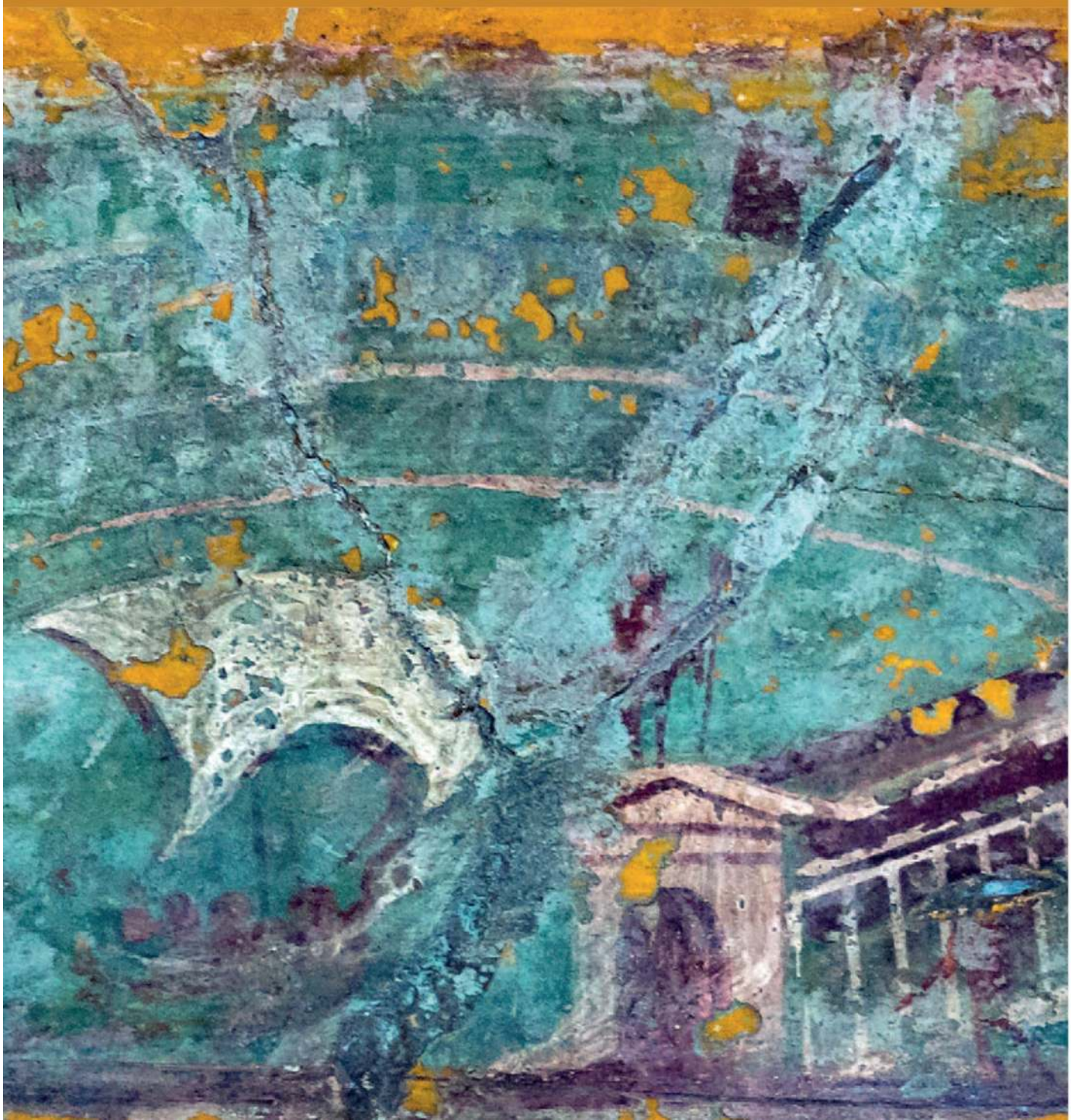
ROMAN LAW AND MARITIME COMMERCE

PETER CANDY AND
EMILIA MATAIX FERRÁNDIZ



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Edited by Peter Candy and
Emilia Mataix Ferrándiz

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PC and EMF

Illustrations

FIGURES

TABLES

List of Contributors

P. Campbell is a Lecturer in Cultural Heritage Under Threat at the Cranfield Forensic Institute, England.

P. Candy is a Fellow in Roman Law and European Legal History at the University of Edinburgh, Scotland.

G. Cifani is a Researcher in Classical Archaeology at the University of Rome 'Tor Vergata', Italy.

R. Fiori is a Professor of Roman Law at the University of Rome 'Tor Vergata', Italy.

É. Jakab is a Professor of Roman Law at the University of Szeged, Hungary.

A. Marzano is a Professor of Ancient History at the University of Reading, England.

E. Mataix Ferrándiz is a Postdoctoral Researcher at the University of Helsinki, Finland, and Research Fellow at the Käte Hamburger kolleg in Münster, Germany.

G. Purpura is a Professor Emeritus of Roman and Ancient Law at the University of Palermo, Italy.

A. Tarwacka is a Professor of Roman Law at the Cardinal Stefan Wyszyński University in Warsaw, Poland.

Abbreviations

All abbreviated references to authors from classical antiquity and their works follow the standard conventions in the Oxford Classical Dictionary (4th edn). All abbreviated references to ostraka and papyri follow the standard conventions in these disciplines.

AE	*L'Année épigraphique: revue des publications épigraphiques relatives àl'antiquité romaine* (Paris 1888 →)
Aespa	Archivo Español de Arqueología (Madrid 1940 →)
AJAH	American Journal of Archaeology (Boston 1885 →)
AJLH	American Journal of Legal History (Philadelphia, PA, then Oxford 2016 →)
ANRW	Aufstieg und Niedergang der römischen Welt (Berlin 1989 →)
Arch. Class.	Archeologia classica (Rome 1949 →)
AUPA	Annali del seminario giuridico dell'università degli studi di Palermo (Palermo 1916 →)
Bas	Basilica
BIDR	Bullettino dell'Istituto di diritto romano (Rome 1888 →)
CIE	Corpus Inscriptionum Etruscarum
CIL	Mommsen, Th. et al., *Corpus Inscriptionum Latinarum*, 17 vols. (Berlin 1863 →)
C	Codex
CGG	Cahiers du Centre Gustave Glotz (Paris 1991 →)
Coll	Mosaicarum et Romanarum Legum Collatio
CP	Classical Philology (Chicago, IL 1906 →)
CTh	Codex Theodosianus
CQ	Classical Quarterly (Cambridge 1907 →)
D	Digest
DAGR	Daremberg, C., and Saglio, E. (eds) (1900) *Dictionnaire des antiquités grecques et romaines* (Paris: Hachette)
DHA	Dialogues d'Histoire Ancienne (Besançon 1974 →)
FIRA	*Fontes Iuris Romani Antejustiniani*
G	Institutes of Gaius
IDélos	Dürrbach, F. et al., *Inscriptions de Délos*, 7 vols. (Paris 1926–1972)
IG	Dittenberger, W. et al., *Inscriptiones Graecae* (Berlin 1903 →)
IJNA	International Journal of Nautical Archaeology (New York 1972 →)
IK	Inschriften griechischer Städte aus Kleinasien (Bonn)

ILS	Dessau, H., *Inscriptiones latinae selectae*, 3 vols. (Berlin 1892–1916)
Index	Index: quaderni camerti di studi romanistici (Naples 1970 →)
Inst	Institutes of Justinian
IRAT	Inscriptions Romanes Ager Tarraconensis
IVRA	Iura: rivista internazionale di diritto romano e antico (Naples 1950 →)
JJP	Journal of Juristic Papyrology (Warsaw 1946 →)
JLH	Journal of Legal History (London 1980 →)
JRA	Journal of Roman Archaeology (Ann Arbor, MI 1988 →)
JRS	Journal of Roman Studies (London 1911 →)
Labeo	Labeo: rassegna di diritto romano (Naples 1955 →)
Lenel, EP	Lenel, O. (1927) *Das Edictum Perpetuum* (Leipzig: Tauchnitz)
Lenel, *Pal*	Lenel, O. (1889) *Palingenesia Iuris Civilis*, 2 vols. (Leipzig: Tauchnitz)
MBAH	Münstersche Beiträge zur antiken Handelsgeschichte (Marburg 1982 →)
MEFRA	Mélanges de l'école française de Rome – Antiquité (Rome 1881 →)
Mon. Eph.	Monumentum Ephesenum
Nóm. naut.	Nómos Rhodíōn nautikós (= Rhodian Sea Law)
OGIS	Dittenberger, W., *Orientis graeci inscriptiones selectae*, 2 vols, (Leipzig 1903–1905)
PS	*Pauli Sententiae*
RA	Revue Archéologique (Paris 1844 →)
RAN	Revue Archéologique de Narbonnaise (Narbonne 1968 →)
RDN	Rivista del Diritto della Navigazione (Rome 1935 →)
RHD	Revue d'Histoire du Droit (Leiden 1918 →)
RIDA	Revue Internationale des Droits de l´Antiquité (Brussels 1948 →)
SDHI	Studia Documenta Historiae et Iuris (Rome 1935 →)
SEG	*Supplementum epigraphicum graecum* (Leiden (Vols 1–25); Alphen aan den Rijn (Vols 26–27); Amsterdam (Vols 28–51); Leiden-Boston (Vols 52 →) 1923 →)
TAPhA	Transactions of the American Philological Association (Baltimore 1869 →)
TH	Tabula(e) Herculanensis(es)
TLL	Thesaurus Linguae Latinae
TPSulp	Tabula(e) Pompeiana(e) Sulpiciorum
ZPE	Zeitschrift für Papyrologie und Epigraphik (Bonn 1967 →)
ZRG RA	Zeitschrift für Rechtsgeschichte. Romanistische Abteilung (Weimar 1880 →)

Chapter 10

The Allocation of Risk in Carriage-by-Sea Contracts

Roberto Fiori

INTRODUCTION

According to the traditional view, in Roman law the contract of letting and hiring (*locatio conductio*) had a threefold structure: (a) when one contractual party granted the other the enjoyment of a thing in exchange for a price, the contract was called *locatio conductio rei*; (b) when the exchange regarded the daily activities of one of the parties, it was named *locatio conductio operarum*; and (c) when the price was paid for an amount of work, taken as a whole, the contract was a *locatio conductio operis*. An important addition to this view is that the distinction between *locatio conductio operarum* and *operis* has produced in civil law the important theoretical dichotomy between *obligation de moyens* and *obligation de résultat*[1] – that is, broadly speaking, between a duty to perform with reasonable care and a duty to attain a specific result.

The problem with this theory is that it does not explain why the Romans would have given the same name of *locatio conductio* and the same procedural remedies to very different contractual patterns: from the rental of agricultural land to the lease of houses, from labour to building contracts and so forth. In a work of a few years ago I suggested that the peculiarity of Roman law, and our difficulty in understanding it, derives from the different ways in which 'contract' is conceived in ancient and modern law.[2] In the latter – at least in civil law – the contract is understood as an agreement between two or more parties with respect to the content or 'object' of the transaction. In this perspective, since agreement is common to every transaction, the differences among contracts depend upon the differences between their objects, while the duties of the parties (the obligations) are considered 'effects' of the contract. Because of this idea, the civilian tradition has created different kinds of *locatio conductio*, one for each 'object' (*res*, *opera*, *opus*), so that by the publication of the German *Bürgerliches Gesetzbuch* of 1900, the traditional unity was abandoned and letting and hiring fragmented into a number of distinct contracts. In Roman law, on the contrary, the contract was identified with the obligation, of which the agreement was only the premise: therefore, as long as the obligation was the same, the contract was one, regardless of the diversity of the objects.[3] Since in *locatio conductio* every contractual pattern

consisted of the same mutual obligations – that is: the exchange of enjoyment (*uti frui*, for the enjoyment of things; *opera*, *opus*, for the enjoyment resulting from the activity of persons) against a price (*merces*) – each pattern fell into the contract of letting and hiring. The structure was such that the contract was one but the negotiation patterns could be modified and adapted infinitely by the parties, far beyond the traditional tripartite division of the so-called *locatio rei*, *operarum* and *operis*.

In my previous study, although I had all this in mind, I could not free myself from the traditional view when dealing with carriage-by-sea contracts. I therefore used the trichotomy and distinguished the hiring of a ship (*locatio rei*, in the form of the *conductio navis*), the transport contract (*locatio operis*, in the form of *locatio mercium vehendarum*), and the labour contract between the entrepreneur and the sailors (*locatio operarum*).

In this paper, I would like to reconsider the matter and correct my earlier ideas by taking into account a privileged point of view, the problem of the allocation of risk.[4]

THE DEAD SLAVE

The first relevant text is a fragment taken from Labeo's *pithaná* (first century AD), summarised and commented upon by Paul (third century AD):

> 'D. 14.2.10 pr. (Lab. 1 *pith. a Paulo epit.*): *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 an pro his qui deportati essent, merces daretur: quod si hoc apparere non poterit, satis erit pro nauta, si probaverit impositum esse mancipium*.
>
> If you were entrusted with the carriage of slaves, you will not be entitled to freight for the slave who dies en route. *Paul*: But this depends on the agreement, whether freight was payable for the slaves who were loaded or for those who were carried to destination. If it is not clear what the agreement was, it will be enough for the captain to prove that a slave was put on board.'

Labeo's solution looks like the perfect example of *locatio operis* as *obligation de résultat*: the obligation is fulfilled only when the foreseen result has been reached. What is not clear is Paul's notation: why, in a *locatio operis*, should the freight be calculated on the loaded (*impositi*) slaves rather than on those actually carried to destination (*deportati*)? And why should it be better to presume, in case of doubt, that the parties had preferred this arrangement over the other? The usual explanation is that Paul distinguishes between the *locatio operis* of carrying the slaves (the case discussed by Labeo) and the *locatio rei* of the whole ship or of its parts: in the first case, the freight is not due because the slave has not reached the harbour; in the other it is due because the freight is intended for the lease of the ship.[5]

What has not been considered by the interpreters is that this text clearly makes reference to documentary practices that we know were widespread in the Mediterranean, at least from the first century AD, which have come down to us

thanks to the Graeco-Egyptian papyri. An examination of these texts shows that carriage-by-sea contracts were arranged according to several patterns.

The simplest is the lease of the ship. This is a contract between a shipowner (*locator*) and an entrepreneur (*conductor*) in the area of water transportation. The *locator* provides the ship while the *conductor* has to pay the rent and give back the ship and its equipment without damage, apart from those resulting from age, use and acts of God (storm, fire and looting of enemies or pirates) that they could prove.[6] The *conductor* receives the ship assuming full management and will pay the rent in any case, even if the ship is not used at all.[7]

In other cases, the contract is between a cargo owner and a carrier, entrusted with the transportation of goods at the carrier's risk (τῷ ἐμαυτοῦ κινδύνῳ). This clause – the so-called κίνδυνος-*Klausel* – makes the carrier not only liable for any harm suffered by the cargo (this was provided by the so-called σῶος-*Klausel*) but also bound them to hand over the cargo at any cost[8]: it is probably not a coincidence that all known contracts with this clause concern the delivery of fungible goods.[9] Under these conditions, if the carrier is not able to deliver the goods at the destination, they do not receive any freight: this arrangement is therefore a clear case of *obligation de résultat*.

Alongside these two patterns – which easily fit into the traditional patterns of *locatio rei* and *operis* – there is, however, a third, in which the carrier is entrusted with the transportation of goods, but under the instructions of the cargo owner who could demand that the ship sails only by day when the water is calm and dropping anchor each day in the safest ports. All these prescriptions are set in a contractual clause that the scholars call a 'navigationsklausel'. The obligation of the carrier is therefore to put at the disposal of the cargo owner a seaworthy ship, a crew and their seamanship, and to keep the cargo safe – but not at any cost: they are explicitly exempted from acts of God, so that if the cargo or part of it cannot be delivered at destination and the carrier cannot be blamed for it, they are entitled to receive the freight. This arrangement is a case of *obligation de moyens*.

Although there are such differences of geographical, social and legal context between the trades described by Roman jurists and those attested to by the contemporary Graeco-Egyptian papyri, that the comparison should be very cautious,[10] this survey has shown a clear similarity to the arrangements described in D. 14.2.10 pr. Indeed, the arrangement discussed by Labeo is similar to the second pattern (freight due in proportion to the discharged cargo), while Paul also takes into consideration the third pattern, where the freight is due for the undelivered cargo as well. It is clear that if the freight can be calculated on the loaded (*impositi*) slaves rather than on those carried to destination (*deportati*), it implies that the carrier cannot be held responsible for acts of God, as in the case of a slave who dies on board.

This shows all the limits of the traditional trichotomy of *locatio conductio*: the third pattern is certainly not a *locatio rei*, because the carrier is obliged to convey the goods, nor a *locatio operarum*, because the carrier does not work for the cargo owner on a temporal basis, but rather is entrusted with the overall

task of transporting the goods from one place to another. However, it is not even a *locatio operis* conceived as an *obligation de résultat*, because if the carrier has performed all their duties, they must be paid even in the case that the goods are not delivered.

INTERLUDE: FROM ROMAN LAW TO ENGLISH LAW

The inadequacy of the threefold division is confirmed by the historical development of these rules in the history of maritime law.

It has to be considered that for centuries,[11] in the civil law, all maritime contracts have received the name of 'affreightment', generally understood as the contract in which a freight is paid and which can, therefore, be configured either as a simple lease of the ship or as a lease of the ship and of the carrier's activity. In the latter case, however, the freight could be calculated either: (a) on the goods loaded, so that the carrier received the freight even if the cargo was lost and their activity (*opus*) was compensated even if the expected result was not obtained; or (b) on the goods delivered, so that the carrier received the freight only if the cargo was carried to its destination, and their activity (*opus*) was compensated only if the expected result was obtained. This is clearly the system attested in Paul: the only difference is that when an express convention was lacking, it was presumed that the parties had agreed on (b) instead of (a), with the sole exception of oceanic journeys – probably because, with respect to antiquity, greater security was achieved in short journeys.

Through the *Ordonnance de la marine* issued by Louis XIV in 1681, this system was adopted in the nineteenth century by the codes of commerce of the civil law countries – even in Germany, where the *Bürgerliches Gesetzbuch* had fragmented letting and hiring into a number of contracts. However, in the most recent codes – the Italian *Codice della navigazione* (1942), the French *Code des transports* (2010) and the German *Handelsgesetzbuch* (2013) – the general 'affreightment' has been divided into four species:

(1) The hiring of the bare ship (*locazione della nave/affrètement coque nue/Schiffsmietvertrag*),[12] in which case the price is due even if the ship does not travel.
(2) the hiring of the ship and the crew for a certain time (*noleggio a tempo/affrètement à temps/Zeitchartervertrag*)[13]: also, in this case the price is due even if the ship does not travel.
(3) The hiring of the ship and the crew for a specific journey (*noleggio a viaggio/affrètement au voyage/Reisefrachtvertrag*),[14] in which case the freight is due if there is a journey, but the carrier is not held responsible for non-delivery: it is an *obligation de moyens*.
(4) The entrusting of the carrier with the transport of goods or people from one port to another (*contratto di trasporto/contrat de transport/Stückgutfrachtvertrag* or *Personenbeförderungsvertrag*),[15] in which case the freight is due only if the cargo or the people are delivered: it is an *obligation de résultat*.

For our purposes, however, the English system is the most interesting, because it is the one that has preserved and developed regulations that are the most similar to Roman law (in fact, English maritime law has long been modelled on civil law[16] and did not lose its characteristics even when, in the seventeenth century, the matter passed into the jurisdiction of the common law courts).[17] Apart from the so-called 'bills of lading', when carriers accept cargo from all-comers for a particular voyage, English maritime law knows basically two contractual patterns.[18]

The first pattern coincides with either: (1) a lease of the vessel ('bareboat charter'); or (2) a hiring of the vessel and the crew for an agreed time ('time charter'). In both cases the freight must be paid even if the charterer does not use the boat, and all risks not related to the condition of the ship and (in the time charter) of the crew are borne by the charterer. Furthermore, in both cases, if the contract is ended due to frustration a payment is due in proportion to the utility obtained from the provision of the ship (and possibly the crew) to that time.

In the second pattern, the carrier provides the charterer with the ship and the crew for one or more specific journeys ('voyage charter'), which includes both the case in which the performance of the carrier is only to transport, and that in which their performance is to deliver. Historically, the distinction is based on the exegesis of Paul's passage: during the seventeenth century the fragment was cited even by those most in favour of a transfer of maritime law to the common law courts, and in the nineteenth century it was further elaborated. What is important to us is that according to the English law there are two clues to discern whether in a voyage charter the duty of the shipowner is to transport or to deliver:

(1) if nothing has been explicitly agreed by the parties, it is presumed that the obligation is to deliver, so that in case of non-delivery freight is not due[19]; and
(2) on the contrary, if there is an express clause that calculates the freight on the loaded cargo, freight is due even in case of non-delivery.[20]

In other words, while civil law has created different contracts for the voyage charter, depending on whether it is structured as *obligation de moyens* or *obligation de résultat* (in the preceding paragraphs), in English law it is a unitary contract, and the obligations of the carrier are distinguished in (1) and (2) directly above by taking into account the way the freight is calculated. The regulations of English law are historically based on the Roman rules and have not been influenced by the civil law parallelism between *obligations de moyens* = *locatio operarum* and *obligation de résultat* = *locatio operis*. They therefore confirm the interpretation of D. 14.2.10 pr. given previously: in Roman law, a *locatio operis* did not necessarily imply an *obligation de résultat*.

THE NAVIS ONERARIA

As we have seen, English maritime law can be of help in understanding the Roman carriage-by-sea contracts. We have a further example in another opinion by Labeo, preserved in the same fragment:

> 'D. 14.2.10.2 (Lab. 1 *pith. a Paulo epit.*): *si conduxisti navem amphorarum duo milium et ibi amphoras portasti, pro duobus milibus amphorarum pretium debes.* Paulus: *immo si aversione navis conducta est, pro duobus milibus debetur merces: si pro numero impositarum amphorarum merces constituta est, contra se habet: nam pro tot amphoris pretium debes, quot portasti.*
>
> If you hire a ship capable of carrying two thousand jars and you load jars on it, you must pay freight for two thousand jars. *Paul*: But the freight for two thousand jars will only be payable if the ship was hired at a flat rate. If the freight was fixed in relation to the number of jars loaded, the result is different, for you will only owe freight for the number of jars you carried.'

The usual interpretation of this fragment is that Labeo is speaking of the hiring of a ship (that is, of a bareboat charter).[21] However, this interpretation makes Labeo say something obvious: it is clear that, if one hires a thing and decides not to use it, the price is due in full. Actually, Labeo says something different: he states that if the freight is calculated on the tonnage of the ship, it is due regardless of the quantity of goods actually transported. Now, in English law the calculation of the freight on the tonnage of the ship is typical of the time charter.[22] The possibility that Labeo is also referring to this contract becomes convincing when we consider that the bareboat charter was usually between a shipowner and an entrepreneur, while this contract was aimed at a specific transport and was therefore between a carrier and a cargo owner. What Labeo wants to make clear, therefore, is that, while in a voyage charter freight is normally computed on the cargo, in a time charter it is due regardless of the actual load.

The distinction becomes explicit in Paul's comment. This is usually explained as if he were opposing a bareboat charter to a voyage charter '*de résultat*'[23] or to a 'slot charter'[24] (that is, to the hiring of a section of the ship). However, Paul speaks of a freight calculated on the loaded (*impositae*) amphorae, which is a clause that we have seen connected with the voyage charter '*de moyens*'. It therefore becomes more probable that he is distinguishing between a time charter and a voyage charter '*de moyens*'. There is actually need for such a distinction: in both charters the cargo owner entrusts the carrier with their goods in order to have them carried on a specific ship, and therefore both charters are described as *conducere navem*.[25] Moreover, in both charters freight is due even if the destination port is not reached. Confusion may therefore arise about the charter that the parties agreed upon. The jurist makes clear that in a time charter the freight is calculated on the tonnage of the ship and in a voyage charter '*de moyens*' on the tons of the actual cargo.

THE CHANGE OF SHIP

Another interesting text is:

> 'D. 14.2.10.1 (Lab. 1 *pith. a Paulo epit.*): *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.*

> If you chartered a ship for the carriage of your cargo and the *nauta* needlessly transhipped the cargo to a less good vessel, knowing that you would disapprove, and your cargo went down with the ship lastly carrying it, you have an action on hire and lease against the original *nauta*.'

Labeo describes the case as a *conductio navis* aimed at carrying the cargo of a *dominus mercium*. The carrier transfers the goods in a worse ship against the will of the cargo owner and the goods are lost: Labeo says the cargo owner has an action *ex locato conducto*. The interpretation of the arrangement is not difficult: it is not a bareboat charter, because the carrier has been entrusted with the transport; it is also unlikely to be a time charter, because the case refers to a specific journey; rather, it is a voyage charter in which the cargo owner has chosen the ship – in other words, a voyage charter '*de moyens*'.

What is interesting is that the case is described as a *locatio mercium vehendarum* in Paul's comment (' . . . *devehendas eas merces locasset* . . . ') and in another fragment of Labeo's dealing with the same case:[26]

> 'D. 19.2.13.1 (Ulp. 32 ad ed.): *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.*
>
> If a *navicularius* was entrusted with the transport of cargo to Minturnae and then, since the ship could not go upstream Minturnae's river, transferred the goods onto another ship and the second ship foundered at the river's mouth, is the first *navicularius* liable? Labeo says he is not liable if he is free from fault; different is the case if he acted against the cargo owner's will or in a circumstance when he should not or by using a less suitable ship: then there should be an action on lease.'

The voyage charter '*de moyens*' can be represented either as a *conductio navis* or as a *locatio mercium vehendarum*, because on the one hand the carrier gives the cargo owner the use of the ship, and on the other hand they are obliged to transport. Therefore, if the cargo owner must sue the carrier for not having made the ship available, they will have the action *ex conducto*; if, on the contrary, they sue them for not having carried the goods, they will have the action *ex locato*; and if they sue for both obligations, as in D. 14.2.10.1, they will have both actions (*ex locato conducto*).

THE DETAINED SHIP

Another example of freight calculated on the loaded cargo is in an opinion by Cervidius Scaevola (second century AD):

> 'D. 19.2.61.1 (Scaev. 7 *dig.*): *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.

A man hired a ship to sail from the province of Cyrene to Aquileia with the condition that 3000 measures of oil and 8000 *modii* of corn would be loaded for a specified freight: but, as it turned out, the loaded ship was detained in that province for nine months and the loaded cargo was unloaded and confiscated. It was asked whether the ship could demand from the lessee the freight agreed on in the lease. He [Scaevola] responded that, according to what had been illustrated, it could.'

This contract has been often interpreted as a bareboat charter,[27] without considering that in the agreement the route was specified – which, in a bareboat charter, would have been unnecessary – and that the freight was called *vectura* (the usual term for the *locatio mercium vehendarum*) and not *merces* (the usual term for the *locatio rei*). However, even if this were the case, Scaevola's solution would appear very dubious. In a *locatio rei* the lessor should not simply provide the *res*, but also the actual chance of its enjoyment: when this was not possible because of some unforeseen circumstances, the price was proportionally reduced or completely cancelled (*remissio mercedis*).[28] In the present case, the carrier had placed the ship at the disposal of the cargo owner, but since the vessel had been detained in the port the carrier could not guarantee its use and the freight should not be due.[29]

Scaevola's solution cannot be explained even by thinking of a voyage charter '*de résultat*'. The scholars who have proposed such an interpretation have tried to justify the jurist's answer by presuming that the cargo owner was responsible for committing an administrative offense that had caused the blockage of the ship and the confiscation of the cargo.[30] However, nothing like this is in the fragment.[31]

In fact, since the *merces* is calculated on the loaded cargo, the case discussed by Scaevola probably regards a contract in which the carrier takes on the obligation of transporting cargo on a specific ship but is not responsible for its delivery. In other words, it is a voyage charter '*de moyens*', where all risks arising after loading are borne by the cargo owner.

This solution may seem unjust at first sight, but on closer inspection it is what happens today in English law: while in a bareboat charter or in a time charter, in case of frustration of the contract, the charterer has a right to a reduction of the freight proportional to the utility actually received, in a voyage charter the freight is due when calculated on the loaded cargo and not due when calculated on the cargo delivered at the destination port. These contractual clauses are aimed at regulating the risk allocation regime agreed upon by the parties.[32]

THE ADVANCE FREIGHT

It is now time to examine a well-known fragment by Ulpian:

'D. 19.2.15.6 (Ulp. 32 *ad ed.*): *item cum quidam nave amissa vecturam, quam pro mutua acceperat, repeteretur, rescriptum est ab Antonino Augusto non immerito procuratorem*

> *Caesaris ab eo vecturam repetere, cum munere vehendi functus non sit: quod in omnibus personis similiter observandum est.*
>
> Likewise, when someone was asked, having lost the ship, to return the freight he accepted as loan, it was replied in a rescript by Antoninus Augustus that it is not without cause for the emperor's procurator to ask him the restitution of the freight, because he did not fulfill the duty to convey: a rule that should hold for all persons alike.'

The passage is generally interpreted in the sense that the freight should be returned because the carrier did not fulfil the *obligation de résultat* of the contract, as in the case discussed by Labeo in D. 14.2.10 pr.[33] However, if this were the case, and if it had been undisputed for centuries, why would the parties need an imperial intervention and why would Ulpian report it?[34] I think we should be more cautious in identifying the nature of the contract.

The parties certainly agreed upon a duty of the carrier to convey the cargo with his own ship, and the contract was therefore certainly a voyage charter: however, it is not clear whether the obligation of the carrier was *de moyens* or *de résultat*.

To solve the problem, it may be useful to concentrate on terminology. Ulpian says that the freight has been accepted by the carrier *pro mutua*. This expression is usually interpreted as a reference to the contract of loan (*mutuum*) alongside a voyage charter '*de résultat*',[35] but in this case the clarification would be completely unnecessary: if the freight should be returned because there was no delivery, why add that the sum had been initially taken as a loan? In this reconstruction, the words *pro mutua* are so redundant that the majority of scholars commenting the text does not mention them.[36] However, the Byzantine commentators of the text translate *pro mutua* – here and in other cases[37] – with προχρεία[38]: a word that in the Graeco-Egyptian papyri means the giving of money in advance without interest, especially in relation to work performances.[39] The practice is shown once again by the papyri: when the parties agreed on an advance payment or delivery in a contract, the creditor was given a document referring to a (fictitious) loan[40]; when the future service for which the advance money had been paid or the thing had been delivered was performed, the document was returned to the debtor. Therefore, before the debtor's performance, the creditor was guaranteed by the document attesting his credit as a loan; after the performance, the payment or delivery anticipated by the creditor took on the role of counter-performance.[41]

A useful comparison is offered once again by English law, where the judges face the same problems. At the beginning of the nineteenth century – though from the tone of the discussion it is clear that the matter was not new – the question was posed whether an advance payment in favour of the carrier should be interpreted as freight or as a loan.[42] The answer was that, in case of loss of the ship the money paid in advance: (a) should be returned if it is a loan or if it is freight and the obligation of the carrier is '*de résultat*', because in this case the freight is not earned until the cargo is delivered at the destination; (b) should not be returned if it is freight and the obligation of the carrier is '*de moyens*', because in

this case the freight is earned on departure. In the first case the risk is borne by the carrier, in the second by the cargo owner.[43]

The *rescriptum* in D. 19.2.15.6 was aimed, in my opinion, at clarifying the distinction between the two forms of voyage charter. In Roman law the voyage charter '*de moyens*' was the basic form, and an advance payment would usually be acquired at any event by the carrier, even if it was not specified that the freight was computed on the loaded goods (see above). In this case, on the contrary, the freight was accepted 'as loan' and that implied it could not be considered as earned until delivery: the contract was a voyage charter '*de résultat*'.[44]

CONCLUSION

The Roman jurists adapted the commercial customs of Mediterranean trade to the structure of the contract of *locatio conductio*. Since in Roman law every exchange between enjoyment and price fell within this contract, the differences among the arrangements chosen by the parties did not create different contracts but, rather, were distinguished from one another by contractual clauses.

Differences in terminology have misled modern interpreters, who have rigidly distinguished between a *conductio navis* conceived as a (modern) *locatio rei* and a *locatio mercium vehendarum* conceived as a (modern) *locatio operis*, that is, as an *obligation de résultat*. The picture is, however, much more complex. *Conductio navis* means that the *conductor* has chosen the ship: still, the contract may consist in the simple granting of a seaworthy vessel (bareboat charter), in the obligation to supply the ship and the crew for a certain time (time charter), or in the obligation to make a specific journey at the cargo owner's instructions (voyage charter '*de moyens*'). *Locatio mercium vehendarum* means that the carrier was entrusted with a specific transportation: but the contract may consist either in a voyage charter '*de moyens*' or '*de résultat*', depending on the specific contractual clauses.

Terminology was, however, important when the parties went to trial, for it distinguished the actions from one another, helping the judge to understand the claim of the plaintiff – although a mistake could lead to the absolution of the defendant. The cargo owner was actually *conductor* in a time charter and in a voyage charter '*de moyens*', having an *actio ex conducto* for the unseaworthiness of the ship, the insufficiency of the crew, and so forth. He was instead *locator* in a voyage charter, both '*de moyens*' and '*de résultat*', having an action *ex locato* for claims regarding the obligation of the carrier to convey the goods. In fact, it is likely that in a voyage charter '*de moyens*' the Romans split the carrier's obligations, granting the cargo owner two actions, one *ex conducto* and the other *ex locato*.

According to the sources, however, there were cases so complex that it was impossible to discern whether the plaintiff was *conductor* or *locator*, so that an atypical civil action was resorted to. This situation is described once again by Labeo, who also proposes the remedy:

> 'D. 19.5.1.1 (Pap. 8 *quaest.* = Lab. *ad ed.*, in Lenel, *Pal*, fr. 98): *domino mercium in magistrum navis, si sit incertum, utrum navem conduxerit an merces vehendas locaverit, civilem actionem in factum esse dandam Labeo scribit.*
>
> Labeo writes that a civil action describing the case should be given to the owner of cargo against a ship captain when it is unclear whether he hired the ship or entrusted [the captain] with the transportation of cargo.'

The contractual clauses might vary infinitely, giving rise to ever new arrangements, even beyond the four patterns described above for carriage-by-sea contracts, and still the contract remained a *locatio conductio*, because there was an exchange between enjoyment and price and the remedy was a civil law action. This action is to be interpreted as an *agere praescriptis verbis*, that is as an action the formula of which described the case not – as in the *actiones locati conducti* – within the proper formula, but rather in a text that prefaced the formula where no reference was made to the positions of the parties as *locator* or *conductor*.

The problem of the allocation of risk is, I think, one of the best examples of how the traditional trichotomy of *locatio conductio* is an insufficient hermeneutic tool. But it is also a good example of how sometimes it is not enough to limit the study of Roman law to the analysis of the juridical sources contained in the Digest, and that the investigation should be extended to other contemporary ancient sources and to the subsequent developments of law in history, both in the civil and the common law.

BIBLIOGRAPHY

Alzon, C. (1965), *Problèmes relatifs à la location des entrepôts en droit romain* (Paris: Éditions Cujas).

Brecht, Chr. H. (1962), *Zur Haftung der Schiffer im antiken Recht* (Munich: C.H. Beck).

Cerami, P. and Petrucci, A. (2010), *Diritto commerciale romano. Profilo storico* (Turin: Giappichelli).

Coquillette, D.R. (1988), *The Civilian Writers of Doctors' Commons, London. Three Centuries of Juristic Innovation in Comparative, Commercial, and International Law* (Berlin: Duncker & Humblot).

Demogue, R. (1925), *Traité des obligations en général*, Vol. 5 (Paris: Librairie A. Rousseau).

Dernburg, H. (1912), *System des römischen Rechts (Pandekten)*, Vol. II[8] (Berlin: H.W. Müller).

du Plessis, P.J. (2003), *A History of 'Remissio Mercedis' and related Legal Institutions* (Rotterdam: Sanders Instituut).

du Plessis, P.J. (2012), *Letting and Hiring in Roman Legal Thought: 27 bce–284 ce* (Leiden: Brill).

Fercia, R. (2002), *Criteri di responsabilità dell'exercitor* (Turin: Giappichelli).

Fercia, R. (2008), *La responsabilità per fatto di ausiliari nel diritto romano* (Padua: Cedam).

Fiori, R. (1999), *La definizione della 'locatio conductio'. Giurisprudenza romana e tradizione romanistica* (Naples: Jovene).
Fiori, R. (2003), 'Il problema dell'oggetto del contratto nella tradizione civilistica', in R. Cardilli (ed), *Modelli teorici e metodologici nella storia del diritto privato*, Vol. 1 (Naples: Jovene), pp. 169–238.
Fiori, R. (2018), 'L'allocazione del rischio nei contratti relativi al trasporto', in E. Lo Cascio and D. Mantovani (eds), *Diritto romano e economia: Due modi di pensare e organizzare il mondo (nei primi tre secoli dell'Impero)* (Pavia: Pavia University Press), pp. 507–567.
Holdsworth, W.S. (1922), *A History of English Law* I, 3rd edn (Boston: Little, Brown & Co).
Holdsworth, W.S. (1937), *A History of English Law* V, 2nd edn (London: Methuen & Co).
Honoré, T. (2002), *Ulpian. Pioneer of Human Rights*, 2nd edn (Oxford: Oxford University Press).
Jakab, É. (2006), 'Vertragsformulare im Imperium Romanum', *ZRG RA* 123, pp. 71–101.
Jördens, A. (1990), *Vertragliche Regelungen von Arbeiten im Späten Griechischsprachigen Ägypten* (Heidelberg: C.H. Winter).
Mayer-Maly, Th. (1956), *Locatio conductio. Eine Untersuchung zum klassischen römischen Recht* (Vienna and Munich: Herold).
Meyer-Termeer, A.J.M. (1978), *Die Haftung der Schiffer im griechischen und römischen Recht* (Zutphen: Terra).
Quadrato, E. (2007), 'Promutuum', *SDHI* 73, pp. 71–83.
Robaye, R. (1987), *L'obligation de garde. Essai sur la responsabilité contractuelle en droit romain* (Brussels: Bruylant).
Röhle, R. (1968), 'Das Problem der Gefahrtragung im Bereich des römischen Dienst- und Werkvertrages', *SDHI* 34, pp. 183–222.
Thür, G. (2010), 'Fictitious loans and novatio: IG VII 3172, UPZ II 190, and C.Pap.Jud. I 24 reconsidered', in T. Gagos (ed), *Proceedings of the Twenty-Fifth International Congress of Papyrology (Ann Arbor 2007)* (Ann Arbor, MI: Scholarly Publishing Office, The University of Michigan Library), pp. 757–762.
Vacca, L. (2001), *Considerazioni in tema di risoluzione del contratto per impossibilità della prestazione e di ripartizione del rischio nella locatio conductio*, in *Iuris vincula. Studi M. Talamanca VIII* (Naples: Jovene), pp. 247–296.
Wilson, J.F. (2010), *Carriage of Goods by Sea*, 7th edn (Harlow: Longman).

NOTES

1. This distinction was fixed in these terms by Demogue (1925), pp. 538–549, but it was already used in Germany at the end of the nineteenth century, on the basis of the difference between *locatio operarum* and *operis*: Dernburg (1912), pp. 788–789 nt. 3.
2. Fiori (1999). The view has been accepted by, among others, du Plessis (2012).
3. For a more detailed analysis of these problems, see also Fiori (2003).

4. By 'allocation of risk' I mean the rules governing the distribution of losses between the parties when unforeseen circumstances interfere with their performances, making the contract more expensive for one party or less advantageous for the other. I will not deal instead with other issues related to the general subject of 'risk' in maritime law, such as the so-called *lex Rhodia de iactu* or the *receptum nautarum*.
5. This was also my idea in Fiori (1999), pp. 136–152 (with other references at p. 136 nt. 33–34).
6. See, e.g. P. Köln III 147.
7. Other reports involving the hiring of a ship are more complex. In a contract from AD 570 (P. Lond. V 1714) the *conductor* also undertakes to carry out transport activities for the owner and to restore and return the ship, except in the case of *force majeure*. In other cases the hire has a duration of fifty to sixty years and tends to be confused with a sale: these are the much discussed cases of the μισθοπρασία (BGU IV 1157, 10 BC; P. Lond. III 1164, AD 212; P. Oxy. XVII 2136, AD 291).
8. See for all, Jakab (2006), pp. 94–95.
9. Brecht (1962), pp. 61–67.
10. Caution is recommended, especially by Meyer-Termeer (1978), p. 171; see, also, Brecht (1962), pp. 3–27 (on the *receptum nautarum*).
11. For references see Fiori (2018), p. 524 nt. 64.
12. Artt. 376–383 Italian cod. nav.; art. L5423–8 French cod. trasp.; § 553 German HGB.
13. Artt. 384–395 Italian cod. nav.; art. L5423–10 French cod. transp.; § 557 German HGB.
14. Artt. 384–395 Italian cod. nav.; art. L5423–13 French cod. transp.; § 527 German HGB.
15. Artt. 396–456 Italian cod. nav.; art. L5422–1. French cod. trasp.; §§ 481–493 and 536–551 German HGB.
16. See for all Holdsworth (1937), pp. 63–73.
17. On the 'battle for the Law Merchant' of the seventeenth century see for all, Holdsworth (1922), pp. 552–567; *Id.* (1937), pp. 140–153; and, more recently, Coquillette (1988), pp. 106–114.
18. Those indicated in the text are the most important models but there is also the hiring of the ship's spaces ('slot charter'), the time charter of a ship for a specific cargo voyage ('trip charter'), the time charter of a ship for a series of voyages between designated ports ('consecutive voyage charter'), and the transport of a certain quantity of goods within a certain period of time through an indefinite number of trips (long-term freighting contract). On the types of charters, see Wilson (2010), pp. 3–18.
19. *De Silvale v Kendall* (1815) 4 *M&S* 37 (at 40) = 105 *ER* 749 (at 750): 'by the policy of the law of England freight and wages, strictly so called, do not become due until the voyage has been performed'. Other examples include: *Cook v Jennings* (1797) 7 *TR* 381 = 101 *ER* 1032; *Osgood v Groning* (1810) 2 *Camp.* 466 = 170 *ER* 1220.
20. See again *De Silvale v Kendall* (1815) 4 *M&S* 37 (at 42) = 105 *ER* 749 (at 751):

    > 'if the charter-party be silent the law will demand a performance of the voyage, for no freight can be due until the voyage is completed. But if the parties have chosen to stipulate by express words, or by words not express but sufficiently intelligible to that end, that a part of the freight (using the word freight) should be paid by anticipation, which should not depend upon the performance of the voyage, may they not so stipulate?'.

    Other references in Fiori (2018), pp. 528 nt. 88.
21. I did it myself in Fiori (1999), pp. 139–144.

22. See Wilson (2010), p. 86.
23. Alzon (1965), p. 242 and nt. 1121, followed by Robaye (1987), p. 64 and nt. 14.
24. Fiori (1999), p. 141, followed by Fercia (2002), p. 178; *Id.* (2008), p. 313 nt. 47. Both possibilities are considered by Cerami and Petrucci (2010), p. 253.
25. Cf the sources where the aim of the *locare conducere navem* is made explicit: to carry a cargo (D. 14.2.10.1), to sail from one port to another (D. 19.2.61.1), to carry passengers or cargo (D. 14.1.1.3).
26. See Fiori (1999), p. 149 nt. 70.
27. See literature in Fiori (2018), p. 543 nt. 128.
28. On *remissio mercedis* see for all du Plessis (2003).
29. Obviously, in a bareboat charter, the obligation of the shipowner is not to provide a ship that can only be loaded, but a ship that can actually sail, just as the obligation of the owner of land is not to put at the tenant's disposal any land, even if sterile, but land that can actually be cultivated. This is apparently not perceived by Vacca (2001), p. 285 nt. 73.
30. See for all Mayer-Maly (1956), p. 198; Röhle (1968), p. 219; du Plessis (2012), p. 131. The idea dates back to the seventeenth century: see Fiori (2018), p. 546 nt. 135.
31. Moreover, if there were some responsibility of the cargo owner, the carrier would have probably asked him not only for the payment of the freight but also – according to the general rules (see Fiori (1999), pp. 103–115) – the *id quod interest* for having blocked his activity for nine months.
32. See above, nt. 18. In some decisions it is said that the freight must be returned, but the cases are different: in *Le Buck v van Voisdonck* (1554), in *Select Pleas of the Admiralty (Selden Society)* II 93, no cargo or passengers were loaded; in *Roelandts v Harrison* (1854) 9 *Ex* 447 = 156 *ER* 189 the freight was payable on 'final sailing' of the vessel, but the ship foundered in a canal between the docks and the open sea. Another exception is *Thompson v Gillespy* (1855) 5 *E&B* 209 = 119 *ER* 459, where the ship had sailed in an unseaworthy condition.
33. Literature in Fiori (2018), p. 547 nt. 139.
34. Ulpian recalls imperial constitutions not only when they are innovative, but also when they confirm a point of view already advanced by jurists: see Honoré (2002), pp. 156–157. However, if the case was undisputed, this time the quotation would have really been useless.
35. See for all Röhle (1968), p. 218.
36. See e.g. Mayer-Maly (1956), p. 146; Vacca (2001), pp. 284–289.
37. Another fragment by the same jurist: D. 32.24.3 (Scaev. 16 *dig.*).
38. See Bas 53.1.59 (Scheltema, A VII, 2439–40) and sch. 5 ad Bas. 20.1.15 (Scheltema, B III, 1182): ὁ προχρήσας, with reference to D. 19.2.15.6; sch. 4 ad Bas. 48.5.41.4 (Scheltema, B VII, 2914), with reference to D. 40.7.40.5 (Scaev. 24 *dig.*).
39. Jördens (1990), pp. 271–285. It is doubtful whether in Scaevola's fragment one should read *pro mutua* or *promutua*: for *promutuus* and *promutuum*: see Caes. *BCiv.* 3.32; D. 40.7.40.5 (Scaev. 24 *dig.*).
40. When the sources deal with a real *mutuum*, they speak of *mutuum accipere*, not of *accipere pro mutuo* (Quadrato (2007), p. 81); moreover, in the whole of Latin literature, the words *pro mutuo* make reference to a contract of *mutuum* only once: D. 46.1.54 (Paul. 3 *quaest.*).
41. Thür (2010), pp. 757–768.

42. Cf *De Silvale v Kendall* (1815) 4 *M&S* 37 = 105 *ER* 749; *Manfield v Maitland* (1821) 4 *B&A* 582 = 106 *ER* 1049; *Wilson v Martin* (1856) 11 *Exch* 684 = 156 *ER* 1005; *Hicks v Shield* (1857) 7 *El&Bl 633* = 119 *ER* 1380; *Droege & Co v Suart (The Karnak)* (1869) 6 *Moo* PC NS 136 = 16 *ER* 677; *Allison v Bristol Marine Insurance* (1876) 1 AC 209. The solution was sometimes found thanks to express clauses qualifying the sum in one sense or the other, by identifying who insured the sum (the cargo owner would only insure the freight, because they do not bear the risk of the loan), or based on the presence or not of interest.
43. This is clearly stated in *Compania Naviera General S.A. v Kerametal Ltd. (The Lorna I)* (1983) 1 *Lloyd's Rep* 373 (at 374).
44. The memory of Caracalla's *rescriptum* may be preserved in the *Nómos Rhodíōn nautikós* – the Byzantine collection of navigation rules most likely composed in the seventh or eighth century AD (but based on older materials) – where it is said that if a disaster occurs during navigation, the cargo owner cannot request the part of the freight they have anticipated (ἡμίναυλον), unless they gave it as a προχρεία (*Nóm. naut*. 3.32).