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Lex Mercatoria. Private Order, and Commercial Confusion. A View from Seventeenth-Century Livorno

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LEX MERCATORIA, PRIVATE «ORDER», AND COMMERCIAL «CONFUSION»

A VIEW FROM SEVENTEENTH-CENTURY LIVORNO

This article examines how maritime Averages – legal procedures that were quotidian but multi-centred and potentially complex – were managed in the jurisdictionally crowded Mediterranean. One suggested solution to this difficulty was that procedures were governed by the *lex mercatoria*, a supposedly universal body of customary merchant law which allowed disputes to be resolved according to a common framework: the debunking of this historical myth demands that legal historians elucidate more clearly how the problem of different maritime customs was resolved in a transnational environment. Evidence from seventeenth-century Livorno suggests that heterogenous maritime Average rules were overcome by mutual recognition of the decisions made in other jurisdictions even when these followed different rules. This was justified with reference to the «disorder» and «confusion» that would otherwise afflict commerce. «Order» here did not mean uniformity and ex-ante certainty of outcomes but rather general expectations that judgements made in other centres would be respected. Attempts by the English and French states to press for consular jurisdiction threatened – mostly unsuccessfully – to disrupt this system. The case buttresses certain *lex mercatoria* theories only in as far as it demonstrates that early modern state building had the potential to destabilise a functioning international commercial order: yet this order was guaranteed by a legitimating authority that only state-backed institutions could provide.

Keywords: Maritime law, Lex mercatoria, Conflict of laws, Mercantilism, General averages, Mediterranean, Tuscany, Livorno.

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The lack of conflict-of-law rules in Europe before the seventeenth century ostensibly raises a problem for those looking to understand the history of commercial exchange: how did medieval and early modern merchants conduct trade and resolve disputes when hailing from different jurisdictions with potentially different rules governing trade? One highly influential answer to this question has been that merchants shared a uniform body of customs which allowed them to avoid the kind of confusion which might have resulted from a welter of different laws. Emerging spontaneously from the merchant communities themselves, this *lex mercatoria* or «law merchant» was universally shared (presumably across Europe, the geographical boundaries of this «universal» space rarely being explicitly defined). This idea was popularized by the work of two twentieth-century legal scholars, Clive Schmitthoff and Berthold Goldman, and remains highly influential in legal scholarship and practice[1]. Both theorists were primarily concerned with contemporary maritime law and how best to promote a «new» *lex mercatoria*: their historical claims were mostly simply asserted and were taken to support the idea that a customary approach to commercial law was both possible and desirable. Yet their claim that Europe possessed a uniform set of commercial customs in the medieval and early modern period appeared to solve the problem of how long-distance commerce could take place in the absence of overarching legal structures or agreements. Maritime commercial law in particular has been presented as a key witness in this respect with the idea of a *lex maritima* sometimes being proposed as a subset of a wider law merchant[2]. The idea also proved attractive to certain modern-day legal scholars who are sceptical of the efficacy of state involvement in law and who see in the *lex mercatoria* proof that spontaneously generated private legal orders are superior to those generated by the state[3]. This is particularly the case for those who cleave to Goldman's version of events: whereas Schmitthoff saw the absorption of *lex mercatoria* into national state law over the course of the early modern period as an unproblematic process, Goldman claimed that the rise of the national state balkanised this common inheritance in the early modern period[4].

Unfortunately, this explanation for how merchants managed cross-jurisdictional legal processes no longer seems to hold much water. Recent scholarship has more-or-less comprehensively disproven the existence of a *lex mercatoria*. Emily Kadens has convincingly demonstrated over a number of articles that a universal and customary law not only did not exist but did not need to exist (as merchants adapted to local rules when transacting) and is moreover more or less a logical impossibility (since regulation via customs involve imputing meaning

to repeat behaviours *after* a supposed infraction, resulting in different norms in different locations being asserted even where the repeat behaviours are identical)[5]. Elsewhere, the idea of the *lex mercatoria* has been historicized and shown to have been little more than an invented tradition: Stefania Gialdroni, Maura Fortunati, and Albrecht Cordes, among others, have all traced its origin to a highly localised English discourse. Though the terms *lex mercatoria* and law merchant are attested from the Middle Ages, in this period they merely refer to the special truncated procedures that were offered to merchants. The use of the term to refer to a universal body of law dates instead from the early modern era and was closely connected to political and jurisdictional struggles in seventeenth-century England and the antipathy between the common and civil law courts[6]. The Admiralty Court came under attack from common lawyers thanks to its perceived closeness to the Crown and gradually had its jurisdiction rolled back. Albrecht Cordes has suggested that it became necessary for English lawyers to refer to a common customary merchant law in order to receive the same treatment from the common law courts that they had once received from the Admiralty[7]. The rhetorical invocation of the term has misled modern theorists who put too much credence in the term «law merchant» as it appears in Anglophone sources. As far as maritime law is concerned, meanwhile, Albrecht Cordes and Edda Frankot, examining medieval law collections from the North Sea area, have found substantive differences in the different rules concerning important issues like jettison, salvage, and shipwreck[8].

Leaving aside the implications of this critique (if any) for the «new» *lex mercatoria*, the exposure of the idea as largely illusory leaves historians with a problem[9]. If it was not the *lex mercatoria* that enabled merchants to resolve their differences, what permitted the functioning of medieval and early modern commerce? Here historical work has been less forthcoming. This is not so much a function of scholarly disagreement, more that scholars have mainly contented themselves with showing that whatever the precise solution was, it was not a universal customary law. The fact that historians have not yet found a coherent and widely accepted way of conceptualising the interplay of local customs, usage, statutory law, contract, and Roman law that made up maritime commercial norms – in a context in which many legal principles and commercial techniques were indeed widely shared – may in part account for the continued preponderance of more simplistic explanations like that of the *lex mercatoria*. It is especially difficult to explain how this worked in the case of multi-jurisdictional procedures, as many maritime cases were. It is certainly the case, as Emily Kadens argues,

that merchants could use the local rules of a certain town or port to resolve disputes, even if these varied from those of their homeland. Often, however, legal procedures involving merchants stretched across several jurisdictions at once, with different stages happening in different ports, so using local rules was not necessarily possible or straightforward. Though the civil law maxim *actor sequitur forum rei* stipulated that the matter be resolved in the jurisdiction belonging to the defendant, in reality highly mobile merchants might bring the matter in the *forum contractus* (place of contract), the *forum rei sitae* (place of injury), or the *forum domicilii* (place of residence)[10]. Guillaume Calafat, in his study of a multi-jurisdictional trial in the seventeenth century which stretched across Genoa, Tuscany, Corsica, and Tunis demonstrates that political, social, and even familial considerations could have an important bearing on the outcome of these multi-jurisdictional disputes, which were far from straightforward to resolve and might often unfold over a number of years[11].

This article provides further empirical evidence of the way that multi-jurisdictional maritime cases were handled in the early modern period, with a view to moving towards a generalized account of how European contemporaries managed the legal problems presented by trade. It builds upon the recent study by Tijl Vanneste, which looks to provide a coherent counter-narrative grounded in historical evidence[12]. Vanneste's solution to the problem is to propose a much weaker version of the *lex mercatoria*, which he terms the «merchants' style», a phrase frequently found in his own sources produced by the eighteenth-century Dutch consular court in the Ottoman city of Izmir. One part of this style was an emphasis on equity and good faith: merchants «considered [what was] reasonable and equitable in law as the legal consequence of what was considered reasonable and fair behaviour in trade»[13]. More specifically, usages and customs, combined with political agreements and national and local law, were used to resolve legal disputes that arose through international trade. Such an approach, according to Vanneste, «equally applied to various courts in different areas of the world»[14].

This essay will show that this description can be further clarified. Contemporaries recognised a political and juridical «order» on an international scale which prevented precisely the type of «confusion» that the *lex mercatoria* supposedly avoided. Jurisdictions recognised the legitimacy of equivalent bodies in other sovereign spaces notwithstanding the fact that they applied different norms. This was an extension of the emphasis on «reasonable and fair» behaviour on the part of actors: actors who had carried out a judgement ordered in another centre should not be penalized for doing so. It was both a practical solution to the

problem of coordinating international legal procedures and also recognized that failure to recognise the equivalence of other juridical bodies might constitute a diplomatic slight and precipitate a crisis of authority, as well as confounding well-established patterns and expectations. Such an order was «spontaneous» as far as it was constituted neither through formal agreements between states nor through conflict-of-laws legislation, but it was a legal order very much entwined with political power and state-backed structures.

This will be shown by examining an inherently transnational legal procedure that sheds light on the way that these merchants overcame the problem of different rules: the resolution of seventeenth-century General Average (hereafter GA) procedures. The law of GA governs what happens when there has been a sacrifice of individual property to save a maritime voyage from peril, ensuring that the financial burden of this sacrifice (a jettison of cargo, a cut anchor rope, extraordinary expenses in port) is shared proportionally between all interested parties. Unlike the episode studied by Calafat, a «hard case» which dealt with a serious and to a large extent intractable grievance between litigants, GA procedures were often uncontentious in and of themselves. They were, in the majority of cases, an example of administration-as-justice, in which maritime-legal tribunals provided authorization and certification services for the interested parties. This concept is somewhat foreign to our own expectations, accustomed as we are to well-developed administrative and bureaucratic machinery existing largely independently of the legal system. While the majority of procedures were uncontentious, however, the resolution of GA requests clearly exemplified the kind of issues that the *lex mercatoria* was supposed to resolve: different substantive rules in different jurisdictions that led to different outcomes and might ostensibly have led to disputes between actors with different expectations. Like Vanneste's study, the article argues that state structures provided an essential legal environment for the good functioning of these procedures in a context in which local customs were different from one another. This was true even when cases were resolved privately without the direct involvement of a court.

GA is clearly only part of the picture and further empirical study will be required as we reconstruct the ways that maritime justice worked. Yet it should not be assumed that GA was able to function relatively smoothly despite divergent customs only because contemporaries were little concerned by such quotidian undertakings[15]. GA is, moreover, a particularly apposite area of law in which to explore these issues because it so often drew in participants from different jurisdictions. The «defendants» in cases of GA were receiving merchants who

might live in a number of different ports: this is a situation in which adapting to «local» rules was not so straightforward. The GA principle as it exists today is «that which has been sacrificed for the benefit of all, should be made good by the contribution of all».[16] This wording varies very little from the widely adopted definition offered by the Dutch maritime lawyer Quentyn Weitsen in the mid-sixteenth century: «[General] Average is the common contribution of the things found in the ship in order to make good the damage voluntarily inflicted upon items, whether belonging to merchants or the ship, so that lives, ship, and the remaining goods may escape unscathed»[17]. The prototypical example of a GA event is the jettison, in which cargo is cast overboard in order to lighten the vessel during a storm. The law of GA then mandates that the cost of these losses be shared proportionally among all interested parties in accordance with the size of their investment in the voyage. If the section on GA in Justinian's *Digest* is to be believed – the *Lex Rhodia de Iactu* – then the GA principle can be traced back at least 3000 years to the ninth-century-BC maritime law of Rhodes. This principle of common sacrifice for shared benefit could be extended to cover sacrifices other than a jettison of cargo, such as the cutting of masts or sails during a storm, or ransoms paid to pirates and enemies. In practice, a wide range of extraordinary costs incurred for the successful competition of the voyage were generally accepted for repartition through the GA mechanism in the early modern period[18].

When it comes to maritime law, however, we cannot assume that uniformity at the level of broad principles means uniformity at the level of norms, as Albrecht Cordes has pointed out[19]. This principal of sharing extraordinary sacrifices made to save the vessel may have been common to all maritime jurisdictions in the Christian and Islamic worlds but agreeing that the costs of sacrifices should be shared leaves plenty of questions outstanding. Different collections of norms answered in different ways: how the contributing and sacrificed property should be valued, for instance, and by who; whether certain items, such as personal effects, should be included; and whether shipmasters, who might fully or partly own their vessel, should have to also contribute with their freight, to list just a few doubts that cannot be resolved from the principle alone. It is little surprise that Jolien Kruit's study of printed early modern normative sources that deal with GA finds that, although the notion of shared sacrifice for the common good was common to all, the actual provisions that regulated the procedure could vary substantially from jurisdiction to jurisdiction[20]. And studies of the operational evidence relating to GA show that there is reason

to doubt that even the principle was understood in the same way by contemporaries[21].

Regulating GA in Tuscany

GA thus strikes at the heart of the problem of how practitioners located in different jurisdictions reached a consensus in multi-centred cases. This section will demonstrate how and why rules about GA differed in different jurisdictions on an operational level, even in centres that were geographically close to one another like Livorno and Genoa, despite the existence of some transnational written normative orders that might be expected to have resulted in uniform or near-uniform rules. The following section will then give some examples of how such differences were overcome and will show how state-backed structures provided essential enforcement, certification, and legitimation in a context of heterodox rules. In some cases, the difference between rules in different centres did not matter, because the parties interested in a GA would have all been based the same jurisdiction. In these cases, as Kadens points out, local rules could be unproblematically applied[22]. Yet the very nature of commerce meant that the interested parties often hailed from different jurisdictions, especially as the early modern period progressed and trade became increasingly multilateral.

This was especially the case in the Tuscan port of Livorno. GAs adjudicated here were, even more than most other ports, likely to involve players hailing from elsewhere. The port had been founded almost from scratch by the Medici Grand Dukes in the second half of the sixteenth century[23]. Unlike great termini such as London and Amsterdam, its fortune was built on its role as a port of deposit. Without a strong native merchant corps of its own, it mainly served as a base for commission agents trading on the account of principals abroad: most imported goods were warehoused to be redistributed to other centres. As well as housing a significant community of Sephardic Jews, it was also a favoured base for English traders, providing a strategically located harbour in the Western Mediterranean unbeholden to Spanish political influence[24]. There was also a significant Dutch-German community, as well as substantial numbers of Greeks and Armenians[25]. It enjoyed strong connections with North Africa and often served as the origin and final destination of these voyages. Yet it was also a frequent intermediate stop for ships travelling from North-Western Europe to the Ottoman Levant. Such voyages frequently involved several stops in the Western Mediterranean; as such, the interested parties were usual-

ly resident in several different jurisdictions with different GA rules[26]. Shipmasters were theoretically obliged to make the accident report that initiated the GA procedure – the «sea protest» in English, or *consolato* in Italian – in the first available port after the accident. The procedure itself then had to be carried out in the first scheduled port of call[27]. This meant that, depending on the place of the accident, a Tuscan tribunal might frequently be issuing a judgement which was then presented to merchants in other ports in order to collect contributions; merchants in Livorno might be equally frequently called upon to honour a judgement made outside of Tuscany, as even commission agents would be responsible for the interest of their principals in the first instance[28]. In both cases, the sea protest could have been drafted and certified in yet another jurisdiction with no interested parties present.

Even within the Tuscan port, however, the norms which governed seventeenth-century GA procedures are not easy to recover. Unlike Genoa, where statutes did at least partially deal with issues connected with jettison and other GA, the Tuscan state issued no legislation concerning Averages[29]. GAs were under the jurisdiction of the court of the *Consoli del Mare di Pisa* (The Consuls of the Sea in Pisa), which retained significant maritime jurisdiction in Tuscany even after and the demise of Pisa as a port city in the early seventeenth-century and the rise of nearby Livorno[30]. Having been briefly abolished by Alessandro de Medici, the court was re-founded by Cosimo I in 1551 and was reformed in 1561. Yet the 1561 reform that defined many aspects of the court's procedures made no mention at all of GA[31]. (The famous medieval collection of Pisan commercial usages, the *Constitutum usus* of 1160, is never cited in GA cases from the early modern period[32]).

Ultimately, it seems to have been local usages which were predominant in regulating procedures. The court in Pisa could have availed itself of several «transnational» written normative orders in order to regulate GA, but actual cases suggest that these provisions were applied sparingly and sometimes inconsistently. One of these was, as mentioned, the corpus of Roman law, the bedrock of the *ius commune* that underpinned the Western European legal system, which contained provisions on jettison and similar sacrifices for the common benefit[33]. Though the *Consoli* themselves were Florentine noblemen without university education and thus perhaps less inclined to insist upon the letter of the Roman law, the chancellor of the court almost certainly was a university educated lawyer who might have been expected to bring the relevant passages of the *Digest* to bear on GA procedures[34]. Yet though the Roman law provisions did have a clear effect on the language in which sea protests were couched, they do not appear to have had a definitive role

in GA cases. Though the early modern jurists who had glossed the *Lex Rhodia* were sometimes cited in Tuscan litigation, the *Lex Rhodia* was not sufficiently comprehensive to fully regulate GA. The *Digest* collects the opinions of various Roman jurists without harmonising them. It is not clear that the resulting list of scenarios in which contribution was due – jettison of cargo or equipment, cut masts, ransoms, and cargo unloaded into small boats that was subsequently lost – should be considered an exhaustive list of acceptable scenarios or rather as illustrative of a much wider principle[35]. At any rate, Tuscan practice extended the use of GA far beyond this short list of examples, effectively encompassing any extraordinary expense required for the successful competition of the journey, including «sacrifices» such as bribes to officials and victuals for the crew whilst stuck in port[36]. In doing so, the «unit» of the GA became not so much the physical ship, as the Roman law envisaged, but rather the voyage.

The Tuscans could also draw upon rules contained in the highly influential *Llibre del Consolat de Mar*, a set of maritime customs collected in Catalonia during the fourteenth and fifteenth centuries that had brought together various rules and practices employed in the western Mediterranean from the twelfth century onwards[37]. The status of the *Llibre del Consolat* was such that the influential Genoese maritime lawyer Giuseppe Casaregi went so far as to claim that the *Llibre*, though originally a collection of customs, had in fact been received as *lex* by the *ius commune*[38]. The first Italian translation was published in 1519 in Rome under the influence of the Florentine *natio* and dedicated to the Medici pope Leo X[39]. Almost all editions of the *Llibre*, including that of 1519, were prefaced with the so-called «*cronica de les promulgacions*» – a fictional lists of dates in which the provisions of the *Llibre* had supposedly been «received» in various Mediterranean cities. This collection was often brought to bear in cases coming before Tuscany's maritime tribunals[40].

Yet despite the undoubted respect and influence that the *Llibre del Consolat* commanded in Tuscan courts, the influence of the provisions contained in the *Llibre* on GA was in practice very limited. Its central importance was invoked in many of the GA cases we find in the archive: sea protests often ended by stating that the case should be regulated according to the *Capitoli* or *Ordini di Barcelona*, as the *Llibre* is usually called in the documentation[41]. Yet this invocation seems to have been largely rhetorical, and we have no instances in which a provision from the *Llibre* that directly concerned GA was cited in a procedure or in subsequent litigation.

An illustrative example of how Tuscan GA practice departed from these norms can be found when we examine the valuation of cargo; this was an important element as it determined how large the contribution of each party would be. The archival documents demonstrate that such an issue could be approached in a number of different ways even under the auspices of a single jurisdiction. The two normative collections – the *Lex Rhodia* and the *Llibre del Consolat de Mar* – provide different solutions to this problem. The *Lex Rhodia* states that the cargo that has survived thanks to the sacrifice should be assigned its sale price (though it is not clear whether this means at the price it would fetch at its intended destination or the place where the GA was being carried out). Property that has been sacrificed, on the other hand, should be valued according to its purchase price «since what is made good is loss suffered not gain foregone»[42]. The *Llibre* meanwhile declares that sacrificed property should be valued at the price in the port of origin (i.e. the purchase price) if lost in the first half of the voyage and at the price it would have fetched at the destination if lost in the second half[43]. It is not clear what should happen in a voyage with multiple scheduled stops; nor are we told how the cargo that has survived ought be valued. This «rule of halves» of the *Llibre* accords greater respect to the idea of an inherent value, with «value added» to the cargo by virtue of its being transported to another part of the world; the Roman jurists, on the other hand, saw the question in terms of personal loss and gain, with loss being concrete and definite, and gain always hypothetical and thus not worthy of recompense.

The Tuscan usage seems to have combined a few fixed elements with a great deal of flexibility and responsiveness towards the choices of the actors involved, whilst the written norms had very limited impact. It is often difficult to establish how values were arrived at in the GA records preserved in the Pisan archives; most of the calculations give no clue as to how the values recorded therein were obtained. From the few cases where such information is available, however, it is clear that that no single approach was adopted across all cases. Among all 50 GA cases surveyed, we only find the «rule of halves» explicitly adopted in two cases, occurring in 1600 and 1700 respectively; this is despite the fact that there are several other cases in the sample involving a sacrifice in the first half of the journey in which we would expect to see the rule of halves used[44]. It is interesting to note, however, that in 1600 the rule of halves is explicitly applied to both the sacrificed cargo and the cargo that survived; since the accident happened in the first half of the journey, all cargo is valued at the price in the port of origin. In the 1700 example, on the other hand, it is clearly being applied only to the

jettisoned cargo. In most cases, it seems calculators who were assigned by the court were simply using the current Livornese market rate to assign a value to all cargo involved in the GA[45]. Cases in which some of the jettisoned commodity survived – the case of a ship carrying grain in 1640, for example – allow us to see that commodities were assigned the same values when entered as both sacrificed cargo and surviving cargo, even when the sacrifice happened in the first half of the voyage, a practice that clearly contradicts both the *Llibre* and the *Lex Rhodia*[46].

Whilst the valuation method was flexible, however, certain elements were constant. The ship always contributed for half its value, whilst the master's freight – the payment for undertaking the voyage – counted for only one-third. Valuing the ship at half its value did mirror certain circumstances described in the *Llibre del Consolat* (specifically, after a jettison and after paying ransoms to pirates) where the ship ought to be counted for half its value, though Tuscan usage was clearly not following the *Llibre* because the latter envisaged the ship contributing for two-thirds its value if the jettison was carried out without the permission of the merchants, as almost all early modern jettisons were, and we never see this rule being observed in Tuscany[47]. The reduced freight contribution was a Tuscan usage without a parallel in any written norm. This meant that the shipowners and shipmaster (whose personal contribution depended on whether he owned the ship in whole or in part, and on the remuneration model adopted for the voyage in question) being paid less than they would otherwise, whilst the merchants effectively subsidized the contributions of the «ship interests», a move that was probably intended to promote the transport sector on which maritime commerce depended. As we will see, other jurisdictions sought to do likewise but through the adoption of different rules. In Genoa, the freight contributed for its full value in most cases, though sometimes the *Llibre de Consolat* was followed and the freight excluded if the accident had happened in the first half of the voyage[48].

Resolving Differences Across Jurisdictions

The practice of valuation was different again in the port of Marseille, as an example from 1668 testifies[49]. The cargo of the ship *La Madonna delle Gratie* [sic], recently arrived from Istanbul via Izmir and Livorno, was explicitly valued at the price it would fetch on the local market. From this price, however, various fees were then deducted, including the freight paid on the cargo, the warehousing fees, quarantine expenses, brokerage fees, the city tax («percentage of the city»), and the fee

paid for the upkeep of the French nation in Istanbul (the *cottimo*)[50]. The result is a formidably complex calculation since these deductions are made separately for each receiving individual or partnership (26 in total). The rationale that might justify such a time-consuming approach is not clear: it may be an attempt to arrive close to the sale price without going to the difficulty of establishing what might have been paid for the goods in Istanbul, though it would have been an imperfect method were this the case. Notwithstanding this difference of approach, the Pisan *Consoli* endorsed this judgement made in another centre without hesitation. The shipmaster, having completed his GA in Marseille, apparently had had trouble extracting payment from the receiving merchants who were based in Livorno, as well as from the Livornese merchant who had financed the voyage with a sea loan. He therefore laid the matter before the court of the *Consoli* who ordered that the sum should be paid «according to the calculation carried out in Marseille»[51]. The merchant from whom the master had received a sea loan was likewise condemned to the payment of the master's contributions.

While the Tuscan court's relaxed attitude to different valuation methods within its own jurisdiction makes it unlikely that they would ever have objected on principle to the different approach taken in Marseille, this was not simply a case of ignoring a few negligible variations. So long as an acceptable balance between the various interests was maintained, the precise valuation given to the merchandise would probably not have been of huge concern to most merchants, but Marseille's rules did have a more definite effect on the master, from whom a higher contribution was demanded. The Marseillais, like the Tuscans, sought to benefit the ship-owners and master with a «subsidized» valuation but had been slightly less generous in deciding that half the freight should contribute rather than a third. The adoption of one practice rather than another could have a perceptible impact on shipmasters' contributions; in this case, the merchant who had extended the master a sea loan and who thus covered his contribution was forced to pay a higher rate, a fact that might have contributed to this case going before the court in the first place. The official endorsement of differences such as these clearly did not trouble the *Consoli*. Even the fact that the GA had been dealt with in Marseille rather than Livorno was no impediment, even though this was legally dubious: Livorno must have been before Marseille in the order of stops on the way back from the Levant and was thus, according to widespread convention, the place where the GA should have been carried out[52]. Yet it appears that the *Consoli* preferred to respect the judgement made in Marseille and accept the principle of their jurisdiction rather than insist on their own rule regarding the

contribution of ship and freight. This is all the more remarkable given the intense commercial rivalry between the two centres, which had recently received new impetus thanks to new protectionist taxes intended to favour the French port and cut Livorno out of the trade with the Ottoman Empire[53].

A similar acceptance is evidenced in a series of insurance cases from the late 1660s[54]. The insurance contracts in question had been made on behalf of «Chealam de Nourval» or «Chealam de Norvilli» of Amsterdam in 1664, who had looked to insure some silk, mohair yarn, and «other merchandise» on the Livorno piazza before the imminent outbreak of what would become known as the second Anglo-Dutch war (1665-7). This was a prudent move since the Dutch Izmir fleet carrying the goods was to be blockaded in Cadiz for eight months before having to take a circuitous route round Ireland and the coast of Scotland in order to safely reach its destination. Three of the ships carrying Norvilli's cargo ran into difficulties and declared GA before the Amsterdam Chamber of Insurance and Averages[55]. The expenses included wages and victuals for the time spent blocked in port and taking the extended passage around Ireland. One of the ships, called *Giustizia* in the Italian sources, had scraped its hull whilst taking refuge in the river Elbe and had had to load cargo into small boats for the final stretch to Amsterdam, renting them for the occasion. Another, the *Susanna*, had had to cut its mast and anchor ropes and had also made use of small boats in the final leg of the voyage. Despite the two GAs being near-identical (the *Susanna*'s masts and ropes being the only difference between them) they were «adjusted» differently (to use the technical term for the carrying out a GA). The *Giustizia* repartitioned the damages over cargo, ship, and freight in their entirety, whilst the *Susanna* repartitioned some expenses over cargo, ship, and freight, and others – those of the extended journey and the freighting of the small boats – over only cargo and freight. This was despite the fact that the normal custom in Amsterdam, as far as we know, was that either the freight or the ship should contribute[56]. Both customs were at variance with the one in Tuscany. Neither provided an impediment to the Pisan *Consoli* who ratified the request for the insurers to pay out. The differences between the GA procedures and their variance from Tuscan usage was never mentioned, and the underwriters did not bother to object during a procedure which was concluded in under two weeks.

Such swift ratification was not carried out on faith, however, and this is a crucial point: the *Consoli*'s willingness to endorse the judgements made in different centres was predicated on the production of

official documentation certified by a recognized and equivalent political body in a foreign jurisdiction. Norvilli's agent in Livorno had to produce an attestation drawn up by the Dutch Chamber, detailing the voyage, judgement, and GA calculation, translated into Italian and further countersigned by three Amsterdam notaries. Likewise, in the example from Marseille, the *Consoli* did not hold that the Livornese receivers were liable according to the *lex mercatoria* or some universal law of the sea, but rather emphasised the legitimacy the calculation made in Marseille, despite the different practices surrounding calculation. What was important was not the contents of the calculation, but that it was possessed of juridical and political authority. It contained an attestation that explained the events leading up to the declaration of a GA; a copy of this calculation had been deposited in the chancellery and the original signed by the chancellor, «Stefano Bayon»; should anyone doubt Bayon's capacity to fulfil this role, his position as chancellor was «certified and attested to all' by «Leon di Valbelle, Signore di Mont Furon», King's councillor and judge of the admiralty in Marseille[57]. The royal seal had been affixed to the document. The translator gave his name and swore that he had translated it faithfully «word for word». In short, the mutual recognition that commercial jurisdictions gave to one another was not based on the fact that they shared the same rules. Though those rules were similar, they were not the same. Much more important was the recognition of the political authority that lay behind the documentation, an authority that could only stem – pace the proponents of the *lex mercatoria* – from state-backed authorities.

The importance of this certifying becomes clear when we consider the fact that most GA were uncontentious: the court was not involved because of its capacity to arbitrate between parties who were at loggerheads but because of its capacity to lend authority to the outcome. We know that some GA were in fact resolved privately as attested by shipmasters who explicitly stated that they had brought their GA before the *Consoli* after first failing to resolve the affair through private channels[58]. However, in all the cases from the sample that began as «private» cases, the number of interested parties was very small, and all of them involved merchants who were physically present in Livorno. As soon as the case involved an interested party who was not present, it had to come before the court and a *procuratore* was appointed to represent the interests of the absent. This was because a private agreement, while legally enforceable, could only bind those who were actually party to the agreement[59]. Most GA procedures thus entered the records not because they were contentious but because they needed to be certified: the intervention of a recognized political authority i.e., a state-backed

structure was necessary, not to provide rules, but to guarantee the acceptability of the outcome.

This importance of political authority in the functioning of trans-jurisdictional procedures is made evident in another GA case from 1671. This time the financial impact of the variation in GA rules was far greater. This case – explored in greater detail elsewhere – turned on whether slaves should be treated as cargo for the purposes of GA[60]. The ship in question, *La Madonna di Monte Nero,* had come from Izmir with scheduled stops at Messina, Livorno, and Genoa. Having made a jettison of cargo (though no slaves) to escape a corsair, the ship made a sea protest in front of the local Venetian *reggimento* in Zante. The original GA was then adjusted in Messina by the Messinian *Consoli del Mare* (Consuls of the Sea). Once the ship had arrived in Livorno it was realized that some jettisoned cargo had not been included in the original calculation: two bales of leather and four bales of wool, to be precise, collectively worth just 345 pieces of eight in a voyage worth 63,362 pieces of eight in total. Notwithstanding their negligible value, however, this required another GA judgement and calculation by the authorities in Tuscany in order that these expenses too might be repartitioned: the shipmaster's main concern in declaring this before a tribunal would have been to excuse himself of liability for their loss and protect himself against future litigation. Then, sometime after this had been concluded, one of the interested Tuscan merchants, Giovanni Maria Cardi, submitted a petition to the Tuscan Grand Duke claiming that his slaves should never have been entered into the GA as contributing items (i.e., that his slaves should not have been included in determining the contributions due from each interested party). Slaves, he claimed, should be treated as passengers as far as GA was concerned, and it had never been the practice in Tuscany to include them in the calculation[61]. This assertion was supported by other interested merchants and, as far as the extant evidence is concerned, it seems that the usage in Tuscany really was to exclude slaves from GA entirely. They were presumably only included in this case because the usage in Messina was to include them. When the Pisan *Consoli* re-adjusted the GA they did not remove the slaves from the calculation, but they had not actively decided to put them in. Here then we are confronted with an example of a stark difference between the GA usages in different ports, differences which created an explicit disagreement between players and resulted in litigation.

The way this litigation unfolded demonstrates the importance that contemporaries attached to mutual recognition of authority and its role in preserving «order» in commercial exchange. The case was delegated

by the Grand Duke to the Florentine *Ruota*, the highest civil court in Tuscany[62]. The court elicited an *informazione* from the Pisan *Consoli* asking them to defend their original decision. The Pisan *Consoli* put forward several reasons for why they felt the inclusion of the slaves was logically justified, but their trump card, which they repeatedly played, was that it was neither just nor practical to reverse a decision made in good faith before another tribunal:

> *Signore* Cardi has no grounds to complain of the Pisan judgement, as this did not do other than confirm the judgement made in Messina: if he feels aggrieved he should go to Messina to demand revision of the judgement… and the reason for this is clear: if a ship loaded in Izmir in order to unload in ten different ports, and if it had to bring a case in every port in which it unloaded, enormous inconveniences would result. Firstly, because more would be spent in litigation than the GA was worth; and secondly, because the case could thus be judged one way in one place and in another way in another… in Messina it might be decided that the sea protest made in Zante proved that a jettison was made, whilst in Genoa or Livorno or somewhere else it could be taken that it did not prove the jettison; and in this way the case would be judged one way in one part and one way in another, for which reason, one should stand by the judgement given in the first port of unloading[63].

Here, we have two contemporary judges raising the exact problem that is supposedly resolved by the *lex mercatoria*: different rules being employed in different centres creating confusion. Yet our contemporaries state explicitly that the solution was not in fact a uniform system of customary law, but rather the much more practical one of pragmatically accepting judgements made in other jurisdictions – with the crucial proviso that the decision had been made by a body with recognized political legitimacy in the jurisdiction in question.

The arguments that the *Consoli* put forward for respecting the Messinian judgement rested firstly upon recognition of the practical difficulty of reversing a decision where litigants were separated by large distances, and secondly upon a respect for the authority of the Messinian tribunal[64]. It was practical because there was no way to turn back the clock and re-adjudicate when money had already changed hands:

> Many receiving merchants in Messina will have come up with and paid the said GA, and this not being their own interest but that of their correspondents, they will have passed on the debt of the payment [...] it would not be right if the receivers were held to account when they have acted in good faith and in execution of a judgement and calculation issued by that tribunal[65].

Here, the importance of «good faith» comes to the fore: actors were not to be penalized for behaving in a reasonable and widely accepted manner and complying with the orders of a tribunal were certainly an example of this[66]. Yet the *informazione* also suggests the need to avoid a crisis of authority that would introduce «confusion» into commercial affairs. We might note that, having referred to the court as «Messina» throughout, the *Consoli* here give the tribunal its full weighty title, perhaps with the authority and dignity of their own Pisan *consolato* in mind:

> It does not seem appropriate that one should retract a judgement and calculation of GA done by the Tribunal of the *Consolato del Mare* of the city of Messina: otherwise there should follow that which is never practiced, that the judgements and calculations given and made in the tribunal of their magistrates should be retracted, which would bring great confusion to navigation and mercantile commerce[67].

National States and Mercantilism: A Threat to Legal Order?

The *Consoli*'s remarks suggest that recognition of decisions made elsewhere was the court's normal *modus operandi*, and attest to the fact that appealing in a centre other than that which had made the original judgement was unorthodox. It should be noted, however, that in this particular case their arguments do not appear to have carried the day. Though we cannot be exactly sure on what grounds the decision was made, the judges of the *Ruota* ordered that the *Consoli* should «take another look» at the case[68]. Since the decisions of the Pisan court were technically unappealable, this was probably a simple euphemism that mandated the revision of the judgement, though it is unclear what the revised judgement mandated. The Cardi family enjoyed considerable prestige and influence at the Medici court thanks to their corsairing activities, and it is possible that Giovanni Maria was thus able to secure an exception to the general rule of acceptance[69]. This reminds us that this system was not a perfect one, nor one that responded solely to the practical requirements of merchants but one which was inflected by political concerns.

The practical effect of such revision was in truth probably quite limited, and the disruptive effects that an appeal might occasion should not be exaggerated. It seems highly unlikely that the overturning of the judgement by the Pisan *Consoli* would have resulted in the Messinian merchants who had paid GA contributions being refunded. As the *Consoli* pointed out, these sums had already been paid. The revision

of the judgement would probably only have applied to the receiving merchants in Tuscany, since the judgement of the *Ruota* came eight months after the original GA was approved, probably meaning that the voyage was long since finished. Even in this case, it is difficult to see how the overturning of the judgement would have worked in practice, and we lack sources about the execution of GA judgements that might allow us to speculate about this. The final act in our records is the drawing up of the calculation establishing how much every interested party had to contribute per quantum of investment. The collected sums then must have been disbursed (presumably by the shipmaster as he was the one actually travelling from port to port) to receiving merchants in lieu of their jettisoned cargo. Even within a single jurisdiction, reclaiming these sums and distributing them to their rightful owners would have been very difficult unless Cardi had withheld his contribution when it was originally requested, and over multiple jurisdictions it surely would have been unworkable. In any case, the case reported here is a slightly unusual one, as it was unclear whether the appealed judgement was in fact the confirmation of a judgement made elsewhere (as the *Consoli* claimed) or could be considered a new judgement. This «confirmation» was a step that would not usually be required and was performed in this case only because a few items of cargo had been left off the original calculation. We might thus wish to avoid drawing too strong a conclusion about how appeals worked on the basis of such a case: the confirmation issued by the Pisan *Consoli* might have opened an avenue to appeal that may not have existed in normal circumstances, or which would have been more diplomatically fraught had there been a direct and unequivocal revision of the Messinian judgement.

With that said, one might make some tentative observations about the effect that increasingly centralised states and their ideologies were having on the commercial «order». Berthold Goldman's suggestion that greater state involvement in maritime law had a disruptive effect does have a limited degree of traction here, even if it was not a uniform *lex mercatoria* being disrupted[70]. As has been mentioned, the original ordinances that constituted the Court of the *Consoli* declared that judgements were unappealable[71]. This would have helped ensure speedy justice and avoid exactly the kind of problems with enforcement (and subsequent «un-enforcement» in the event of a revised judgement) highlighted above. This stipulation is a testament to the fact that contemporaries recognised the importance of accepting judgements and foregoing appeals in a mobile maritime world. And yet, as Guillaume Calafat as shown, over time, the Tuscan Grand Duke's absolutist ideology – the Grand Duke as the *paterfamilias* of his people, a site of justice and

clemency that transcended the strictures of the law – gave rise to what was, effectively, a system of appeal by means of a supplication to the Grand Duke's grace[72]. Since there were too many such appeals for a single Grand Duke to manage, a system emerged by which these were «delegated» to relevant courts, completing the transformation from unappealable to appealable and invalidating the sensible provision that had been put in place to ensure speedy trans-jurisdictional justice. It is possible that, on occasion, this led to exactly the kind of «confusion» that the *Consoli* argued should be avoided.

This would not be the only instance in which sovereign pretentions threatened disruption to the system. In the final third of the century, attempts by the English and French state to wrest greater consular jurisdiction for their own national consuls in Livorno threatened to upset the status quo. National consuls, once representatives of their foreign merchant community and chosen from within that community, were increasingly becoming agents of their national states and a means by which those states realized their aims and projected their power[73]. An examination of these efforts with regard to GA gives limited support to the contention that national state legislation had the potential to threaten a well-established normative order. However, this was not because they introduced new rules but rather because the national principle that informed these efforts threatened existing expectations about jurisdiction. The Tuscan evidence, moreover, suggests that we should be fairly sanguine about the impact of these changes upon the status quo, which seem to have generated more diplomatic light than jurisprudential heat.

Tuscan GA procedures nearly became a victim of these growing tensions in 1671, when the English resident in Florence, John Finch, requested that the Grand Duke hand over jurisdiction over maritime Averages to the English consul in the Livorno[74]. Finch claimed that the Pisan *Consoli* were too lenient to shipmasters to the detriment of merchants. Alighting upon a recent GA case involving an English ship that had declared GA in Tuscany and transforming it into diplomatic scandal, Finch claimed that the *Consoli* were granting outrageously large sums to be repartitioned through GA, whilst the «King of England's laws» capped these sums at 1.5% of the total value of the voyage. In order that the King's subjects might receive the protection of such laws, he requested consular jurisdiction over GA cases involving Englishmen.

Though conflicts such as these were certainly linked to the growth of national states and their intensified interest in maritime law, the claim of some mercatorists that this led to the lamentable balkanization of the commercial legal system does not quite capture the reality of the

situation – not least because states were not successful in imposing these initiatives on others. Since the contours of this complicated case have been traced elsewhere, we can restrict ourselves to drawing out a few salient points for this argument[75]. Firstly, although the introduction of new «national» law could have a disruptive effect, this was temporary and limited in a context that was already doctrinally heterodox. Though Finch's claim that GA awards were capped in England was false (whether this was deliberately misleading or an innocent misunderstanding is not clear), he does seem to have been referring to an actual piece of national legislation regulating maritime affairs: the 1664 act of Parliament «to prevent the Delivery up of Merchant Shipps, and for the Increase of good and serviceable Shipping»[76]. This, among other things, forbade the use of GA to pay for a reward for any master and his crew who had fought against enemies and corsairs to protect the ship; the practice of paying such a reward was current both in Tuscany and other European jurisdictions[77]. The English parliamentary act rendered fighting the enemy an obligation; an optional bounty of no more than 2% of the value of the voyage could be granted in recognition of the seamen's efforts could be granted if agreed by the interested merchants, but it could not be entered into GA, a move which flagrantly favoured the interests of merchants over those of the maritime labour force. Here, legislation issued by the state certainly did threaten a fairly widespread maritime practice. Yet differences between discrete normative sources was nothing new as far as maritime law was concerned, and the English were unsuccessful in trying to secure its implementation in the Tuscan port.

This change to GA rules was part of a wider trend by which the English state attempted to better control and exploit maritime labour. The ultimate aim of consular jurisdiction was control of wage disputes between English shipmasters and seamen, an important objective which had so far eluded the state despite intense diplomatic efforts. As Andrea Addobbati has shown, litigation around this issue increased in the last third of the seventeenth century, prompted both by a move away from profit sharing arrangements towards wage labour contracts, and by mercantilist policies adopted by national states that tried to organize this issue along national lines[78]. In the English case, the issue was given particularly urgency by the fact that Tuscan practice, following the *Llibre del Consolat de Mar*, recognized seamen's wages as a privileged credit, one that had to be paid even when a voyage had been unsuccessful and the master had not been paid his freight. English practice meanwhile offered no such guarantees for the maritime workforce: this would later by crystallized by the influential eighteenth-century jurist

Lord Mansfield into the maxim «freight is the mother of wage», meaning that the seamen could not be paid until the master had completed the voyage and earned his payment (generally on return to England)[79]. These protections, combined with the many employment opportunities in a hub like the Tuscan free port, could encourage seamen to end their employment and literally jump ship, a major cause of concern for English merchants and shipmasters.

The French made similar and even more intense efforts to obtain consular jurisdiction in the same period. The French state too was busy legislating in the maritime domain, most notably with the *Ordonnance de la Marine* of 1681, produced under the auspices of Jean-Baptiste Colbert[80]. Drawing on existing military, civil, and corporate laws, this collection attempted to provide a common legal framework for naval and maritime commercial affairs, which naturally included, amongst much else, provisions on the regulation of GA[81]. In 1713, a royal *ordonnance* attempted (unsuccessfully) to unilaterally remove all cases involving Frenchmen from the Tuscan courts and bring them under the French consular jurisdiction[82].

Should we conclude from these episodes that increasingly state-centred maritime law was disrupting a previously harmonious system? Mercantilist legislation undoubtedly produced new tensions, but the responses of Italian jurisdictions to these issues suggests that we should not over-exaggerate their disruptive effects[83]. The prospective effect of such changes is naturally magnified if we take as our departure point the mercatorist assertion that maritime customs were uniform. Yet new state laws were in fact simply one more normative order among many. In Tuscany, national laws, including the *Ordonnance de la Marine*, were, at best, secondary sources to fill lacuna in existing normative collections such as the *Llibre del Consolat* and local usages[84]. Moreover, efforts to promote national-consular jurisdiction of the type enjoyed by the European nations in the Levant were for the most part successfully resisted. The French attempt to wrest consular jurisdiction came to nothing when local merchants sided with the Tuscan authorities to block the French consul[85]. Likewise, John Finch's request that GAs involving Englishmen should be handed over to the English consul was politely but firmly rebuffed (as indeed would happen in Venice in 1706 when the English suggested consular jurisdiction among their list of *desiderata* presented to the *Cinque Savi alla Mercanzia*)[86].

The Tuscan explanation for their refusal was remarkably similar to the one offered by the Pisan *Consoli* when explaining why the Messinian judgement should be respected. The Grand Ducal secretary tasked with responding to the complaint, Giovanni Filippo Marucelli, wrote

that granting the English consular jurisdiction over GA «would confuse and upset the good ordinances established here to provide good government» and that «very pernicious consequences might follow»[87]. He went on to explain that GAs rarely involved only interested parties pertaining to one national group, from which might follow the «pernicious consequence» that two tribunals might judge the case differently, with no higher court capable of arbitrating between them. If it were true that English laws were more lenient to merchant interests, it would also result in fraud, with non-English merchants asking English correspondents to lend their name to merchandise that was not theirs. In actual fact, the Tuscan response was more involved than outright refusal of foreign demand for jurisdiction, and, if anything, this gave actors in Livorno more options than they had previously enjoyed. The Tuscan policy, as several case studies exemplify, was to fiercely maintain the principle of jurisdiction against foreign encroachment whilst in fact allowing the foreigners, sometimes coordinated by their national consuls, to arrange affairs between themselves[88]. The Tuscan courts would certify these arrangements, allowing them to be exported as «judgements» to other ports. Here the «rules», as far as there were any, were the respective interest and influence of the parties; but the system as a whole continued to depend on state-backed institutions for its smooth functioning.

Conclusion

When Marucelli responded to the English complaint, he alighted upon a poetic turn of phrase to express the impossibility of conceding a national-consular jurisdiction that would exist alongside that of the Pisan *Consoli*: «justice must be singular and must walk with the same tread indifferently among all, in order that things should proceed without discord and without giving an opening to claims and complaints»[89]. This rhetorical pronouncement did not mean that laws had to be uniform across all jurisdictions. Rather Marucelli meant that different norms in different jurisdictions should not be insisted upon, resulting in a proliferation of litigation in different centres that was potentially insoluble. There must instead be common acceptance of decisions made elsewhere.

This international order was spontaneous only in the very narrow sense that there was no overarching coordinating body or international agreement that had created it, but it was in no way independent of state institutions. Tribunals and individuals invested with juridical and po-

litical authority by states provided crucial legitimisation, certification, and enforcement of decisions. While the increased interest of states in promulgating and enforcing «their» maritime law had a definite and probably deleterious effect on the predictability of legal outcomes as commerce became increasingly subject to «reason of state», it did not alter the existing order in the fundamental way envisaged by the mercatorists. The system was already characterized by heterogeneity of rules and a certain adaptable practicality, whilst commercial justice was no stranger to the demands of political economy. The mutual recognition accorded to these structures in other jurisdictions may have been aided to a certain degree by the common legal framework that undergirded European jurisdictions and the many shared principles and institutions of maritime law (if not actually shared rules) that did indeed exist[90]. Yet it should also be remembered, as Guillaume Calafat has shown, that the court of the *Consoli del Mare di Pisa* could even extend the same jurisdictional recognition to Islamic norms and political structures in North Africa in order to bring a case to an acceptable conclusion[91].

Today, GA is governed by a set of conventions known as the York-Antwerp rules, which are periodically updated by the *Comité Maritime International*, a non-profit organization established to promote uniformity in international maritime law, working in consultation with stakeholders. These rules receive their force through insertion into freight contracts and are thus voluntarily adopted by the parties. In this sense, the rules are a creation of the maritime-business community they regulate. Yet, as Jolien Kruit has shown, their enforcement depends upon an undergirding support system of state law and state structures in order to function[92]. The situation is not wholly different to the one that existed in the early modern period. A mixture of local usage, written custom, city statutes, and national laws, as well as political expediency, determined how a GA would proceed. But in all cases, the successful operation of a transnational procedure depended on the guarantee provided by political authority.

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Notes

1 Both authors developed their theories on the *lex mercatoria* across multiple publications. See particularly C. SCHMITTHOFF, *International Business Law: A New Law Merchant*, in ID. (ed.),

The Sources of the Law of International Trade, London 1964, pp. 129-53; B. GOLDMAN, *Lex Mercatoria*, in J. LEW (ed.), *Contemporary Problems in International Arbitration*, London 1986, pp. 113-25; for discussion of these two theorists, see D. DE RUYSSCHER, *Conceptualizing Lex Mercatoria: Malynes, Schmitthoff and Goldman compared* in «Maastricht Journal of European and Comparative Law», 27 (2020), pp. 465-83. For a wide-ranging bibliography of literature that argues for or assumes the existence of a *lex mercatoria* see E. KADENS, *The Myth of the Customary Law Merchant*, in «Texas Law Review», 90 (2012), pp. 1153-206 at pp. 1153-4. For contemporary influence and debate in contemporary legal theory, see O. TOTH, *The Lex Mercatoria in Theory and Practice*, Oxford 2017.

2 For example, W. TETLEY, *The General Maritime Law: the Lex Maritima (with brief reference to the ius commune) in Arbitration Law and the Conflict of Laws*, in «Syracuse Journal of International Law and Commerce», 20 (1994), pp. 105-45; see A. CORDES, *Lex Maritima? Local, Regional and Universal Maritime Law in the Middle Ages*, in W. BLOCKMANS, M. KROM, J. WUBS-MROZEWICZ (eds), *The Routledge Handbook of Maritime Trade around Europe 1300-1600*, London 2017, pp. 69-85.

3 B. BENSON, *The Enterprise of Law: Justice without the State*, 2nd ed., Oakland 2011, pp. 30-6.

4 N. HATZIMIHAIL, *The Many Lives – and Faces – of Lex Mercatoria: History as Genealogy in International Business Law*, in «Law and Contemporary Problems», 71 (2008), pp. 169-90, p.187.

5 KADENS, *The Myth* cit. See also ID., *The Medieval Law Merchant: the Tyranny of a Construct*, in «Journal of Legal Analysis», 7 (2015), pp. 251-90.

6 S. GIALDRONI, *Gerard Malynes e la questione della lex mercatoria*, in «Zeitschrift der Savigny-Stiftund für Rechtsgeschichte», 126 (2009), pp. 38-69

7 M. FORTUNATI, *La lex mercatoria nella tradizione e nella recente ricostruzione storico giuridica*, in «Sociologia del diritto», 2-3 (2005), pp. 29-41; A. CORDES, *The Search for a Medieval Lex Mercatoria*, in «Oxford University Comparative Law Forum» (2003), https://ouclf.law.ox.ac.uk/the-search-for-a-medieval-lex-mercatoria/ [accessed 31 August 2022]; Cfr. J.H. BAKER, *The Law Merchant and the Common Law before 1700*, in «The Cambridge Law Journal», 38 (1979), pp. 295-322; D. COQUILLETTE, *Legal Ideology and Incorporation II: Sir Thomas Ridley, Charles Molloy, and the Literary Battle for the Law Merchant, 1607-1676*, in «Boston University Law Review», 61 (1981), pp. 315-71.

8 CORDES, *Lex Maritima?* cit.; E. FRANKOT, *Of Laws of Ships and Shipmen: Medieval Maritime Law and its Practice in Urban Northern Europe*, Edinburgh 2012.

9 GOLDMAN, *The Lex Mercatoria* cit., pp. 27-8.

10 G. CALAFAT, *Hard Cases, Multi-sited Trials and Legal Enforcement between North Africa and Italy*, in «Past & Present», 242 (2019), pp. 142-78, p. 161.

11 *Ibid*.

12 T. VANNESTE, *Intra-European Litigation in Eighteenth-Century Izmir: The Role of the Merchants' Style*, Leiden 2021.

13 Ivi, pp. 4-5.

14 Ivi, p. 4.

15 The English parliament was concerned enough to legislate about certain aspects of GA across the latter half of the seventeenth century. See A. ADDOBBATI, J. DYBLE, *One Hundred Barrels of Gunpowder. General Average, Maritime Law, and International Diplomacy between Tuscany and England in the Second Half of the 17th Century*, in «Quaderni Storici», 168 (2021), pp. 823-54, pp. 833-5.

16 R. CORNAH, *A Guide to General Average*, London 1994, p. 6.

17 M. FUSARO, *On Averages and Why They Matter*, in M. FUSARO, A. ADDOBBATI, L. PICCINO (eds), *General Average and Risk Management in Medieval and Early Modern European Maritime Business*, London 2023, pp. 3-33, p. 5.

18 See the contributions in *General Average and Risk Management* cit.

19 A. CORDES, *Conflicts in 13th-Century Maritime Law: A Comparison between five European ports*, in «Oxford University Comparative Law Forum» (2003), https://ouclf.law.ox.ac.uk/the-search-for-a-medieval-lex-mercatoria/ [accessed 31 August 2022], between endnotes 46 and 47.

20 J. KRUIT, *General Average – General Principle plus varying Practical Application equals Uniformity?*, in «Journal of International Maritime Law», 21 (2015), pp. 190-202.

21 J. DYBLE, *General Average, Human Jettison, and the Status of Slaves in Early Modern Europe*, in «The Historical Journal», 65 (2022), pp. 1197-220, at p. 1211.

22 KADENS, *The Myth* cit., p. 1172.

23 Some classic studies on the free port include A. PROSPERI, (ed.), *Livorno, 1606-1806: luogo di incontro tra popoli e culture*, Torino 2009; J.-P. FILIPPINI, *Il porto di Livorno e la Toscana (1676-1814)*, 3 vols, Napoli 1998; a recent one-volume history is L. FRATTARELLI FISCHER, *L'arcano del mare: un porto nella prima età globale: Livorno*, Pisa 2018.

24 F. TRIVELLATO, *The Familiarity of Strangers: The Sephardic Diaspora, Livorno, and Cross-Cultural Trade in the Early-Modern Period*, New Haven 2009; M. D'ANGELO, *Mercanti inglesi a Livorno, 1573-1737: alle origini di una British factory*, Messina 2004.

25 R. GHEZZI, *Mercanti armeni a Livorno nel XVII secolo*, in *Gli Armeni lungo le strade d'Italia: atti del convegno internazionale: Torino, Genova, Livorno, 8-11 marzo 1997: Giornata di studi a Livorno*, Pisa 1998, pp. 43-53; ID., *Livorno e l'Atlantico: I Commerci Olandesi nel Mediterraneo del Seicento*, Bari 2011; G. PANESSA, *Le comunità greche a Livorno. Tra integrazione e chiusura nazionale*, Livorno 1991.

26 As evidenced by the GA cases collected in the *AveTransRisk* database, which form the basis of this study. https://humanities-research.exeter.ac.uk/avetransrisk/tuscany/ [accessed 31 August 2022]. The core source base for this study comprises all GA cases brought before the *Consoli* in the years 1600, 1640, 1670, and 1700, numbering 50 cases in total, as well as a number of cases from other years.

27 FUSARO, *On Averages* cit., pp. 22-3.

28 TRIVELLATO, *The Familiarity of Strangers* cit., p. 153.

29 O. TACCONE, *Degli statuti civili della serenissima republica di Genova*, per Giuseppe Pavoni, Genova 1613, lib. IV, ch. 16, p. 139.

30 A. ADDOBBATI, *La giurisdizione marittima e commerciale dei consoli del mare in età medicea*, in M. TANGHERONI (ed.), *Pisa e il Mediterraneo: Uomini, merci, idee dagli Etruschi ai Medici*, Milano 2003, pp. 311-5.

31 Archivio di Stato di Firenze (hereafter ASF), *Auditore poi Segretario delle Riformagioni*, 116, *Dogana e Consoli di Mare di Pisa con la riforma del 1561.*

32 For discussion of this and other written norms concerning GA, see A. LEFEBVRE D'OVIDIO, *La contribuzione alle avarie dal diritto romano all'ordinanza del 1681*, in «Rivista del Diritto della Navigazione», 1 (1935), pp. 36-140, pp. 88-90.

33 A. WATSON, *The Digest of Justinian,* 4 vols, Philadelphia 2011, II, pp. 419-22.

34 The 1561 reforms do not require the chancellor to be university educated, though they also make it clear that the first to hold the post, Agapito Tito, was a doctor *in utroque*: ASF, *Auditore poi Segretario delle Riformagioni*, 116, f.1r. By 1662 we can be certain that the chancellor was also carrying out the role of *consultore legale*, which would have necessitated a university education: M. SANACORE, *I consoli del Mare a Pisa, dall'età medicea alle riforme leopoldine*, Unpublished Thesis, Università di Pisa (1983), p. 191. It seems likely, given these two facts, that the chancellor was always a doctor of law.

35 DYBLE, *General Average* cit., p.193; J.J. AUBERT, *Dealing with the Abyss: The Nature and Purpose of the Rhodian Sea-Law on Jettison* (*Lex Rhodia de Iactu, D 14.2*) *and the Making of Justinian's Digest*, in J.W. CAIRNS, P.J. DU PLESSIS (eds), *Beyond Dogmatics: Law and Society in the Roman World*, Edinburgh 2007, pp. 157-72 at p.170.

36 E.g. Archivio di Stato di Pisa (hereafter ASP), *Consoli del Mare* (hereafter CM), *Atti Civili* (hereafter AC), Register 322, Case 33 (hereafter 322-33), Judgement issued 26 June 1671 (hereafter 27 June 1671); ivi, 418-11 (14 May 1700).

37 G. COLON, *Libre del Consolat de Mar: edició del text de la Real de Mallorca, amb les variants de tots els manuscrits coneguts*, Barcelona 2001; G. CASAREGI, (ed.), *Consolato del Mare colla Spiegazione di Giuseppe Maria Casaregi*, Venezia 1802, [or. ed. Venezia 1719], Chapter 95, p. 28.

38 ID., *Discursus legales de commercio*, 2nd ed., 2 vols, Florence 1719, I, p. 280

39 L. TANZINI, *Le prime edizioni a stampa in italiano del Libro del Consolato del Mare*, in R. MATORELLI (a cura di), *Itinerando. Senza confini dalla preistoria ad oggi. Studi in ricordo di Roberto Coroneo*, Perugia 2015, pp. 965-78, pp. 968-71.

40 A. ADDOBBATI, *Until the very last nail: English Seafaring and Wage Litigation in Seventeenth-Century Livorno*, in M. FUSARO *et al.* (eds), *Law, Labour and Empire: Comparative Perspectives on Seafarers, c. 1500-1800*, London 2015, pp. 43-60, pp. 45, 57.

41 ASP, CM, AC, 319-20 (18 March 1669); ivi, 321-14 (23 July 1670); ivi, 196-37 (2 January 1639); ivi, 197-29 (26 April 1640); ivi, 25-22 (5 May 1600); ivi, 25-28 (8 April 1600).

42 WATSON, *The Digest* cit., vol. 2, p. 420 (14.2.2.4).

43 CASAREGI, *Consolato del Mare* cit., ch. 95, p. 28.

44 Cases where we find the rule: ASP, CM, AC, 27-26 (9 September 1600); ivi, 418-21 (1 July 1700). Examples of cases where we would expect to find the rule and do not: ivi, 318-26 (22 January 1669); ivi, 197-43 (6 July 1640).

45 In the first half of the century, these calculators were two merchants, one Pisan and one Florentine, whose names were drawn at random out of a bag (*la borsa di ricorso*). In the second half of the century this practice ended for unclear reasons. There are indications that the calculators were still merchants but were arbitrarily chosen by the court, or perhaps the parties themselves.

46 ASP, CM, AC, 197-29 (26 April 1640).

47 CASAREGI, *Consolato del mare* cit., ch. 228, pp. 72-3; ch. 281, pp. 113-4. The seventeenth-century Genoese jurist Carlo Targa wrote that in a lifetime of practice as a maritime lawyer, he had only seen four or five cases in which there had been such a consultation before a jettison: Carlo TARGA, *Ponderazioni sopra la contrattazione marittima*, Stamperia del Casamara dalle cinque Lampadi, Genova 1750, p. 141.

48 A. IODICE, *Maritime Average and Seaborne Trade in Early Modern Genoa, 1590-1700*, Unpublished Thesis, University of Exeter/Università di Genova (2021), p. 183.

49 ASP, CM, AC, 322-16 (9 November 1670).

50 On the *cottimo* see G. CALAFAT, *Livorno e la camera di commercio di Marsiglia nel XVII secolo: consoli francesi, agenti e riscossione del cottimo*, in A. ADDOBBATI, M. AGLIETTI, (a cura di), *La città delle nazioni: Livorno e i limiti del cosmopolitismo (1566-1834)*, Pisa 2016, pp. 237-76.

51 ASP, CM, AC, 322-16 (9 November 1670), Judgement, «*secondo il calcolo fatto in Marsilia li 26 Settembre 1668*».

52 FUSARO, *On Averages* cit., pp. 22-3.

53 CALAFAT, *Livorno e la camera di commercio di Marsiglia* cit., p. 249.

54 ASP, CM, AC, 314-14 (27 March 1669); ivi, 314-15 (27 March 1669); ivi, 314-16 (27 March 1669).

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58 E.g., ivi, 418-11 (14 May 1700); ivi, 27-30 (31 November 1600).

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60 *General Average, Human Jettison* cit.; ASP, CM, *Suppliche* (hereafter S), 985-333 (8 February 1671); ivi, CM, AC, 326-13 (26 June 1671); ivi, 326-3 (13 May 1671).

61 ivi, CM, S, 985-333, Cardi's petition; Merchants' *ragioni*. See *General Average, Human Jettison* cit.

62 G. CALAFAT, *La somme des besoins : rescrits, informations et suppliques (Toscane, 1550-1750)*, in «L'Atelier du Centre de recherches historiques», 13 (2015).

63 ASP, CM, S, 985-333, *Informazione* of the *Consoli*.

64 For a similar argument about mobility, see VANNESTE, *Intra-European Litigation* cit., p. 264.

65 ASP, CM, S, 985-333, *Informazione* of the *Consoli*.

66 KADENS, *The Myth* cit., p. 1160; O. ROBINSON, T. FERGUS, W. GORDON, *An Introduction to European Legal History*, Abingdon 1985, p. 155.

67 ASP, CM, S, 985-333, *Informazione* of the *Consoli*.

68 Ivi, 985-333 (8 February 1671), Original Petition, «*I Consoli di Mare di Pisa rivedino questa causa, sentite le parti la terminino come convenga per buona giustitia secondo il voto delli tre giudici delle 2de Appellationi dell Ruota di Firenze non ostante*».

69 L. FRATTARELLI FISCHER, *Prede di mare* in *Atti del convegno L'ordine di Santo Stefano e il mare (Pisa, 11-12 maggio 2001)*, Pisa 2001, pp. 155-67, p. 166.

70 GOLDMAN, *Lex Mercatoria* cit., p. 3.

71 SANACORE, *I consoli del mare* cit., p. 56.

72 CALAFAT, *La somme des besoins* cit.

73 M. FUSARO, *The Invasion of Northern Litigants: English and Dutch Seamen in Mediterranean Courts of Law*, in *Law, Labour and Empire* cit., pp. 21-42, p. 38; M. AGLIETTI, *L'istituto consolare tra Sette e Ottocento. Funzioni istituzionali, profilo giuridico e percorsi professionali nella Toscana granducale*, Firenze 2012.

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75 For a fuller explication of the diplomatic contours of this case see ADDOBBATI, DYBLE, *One Hundred Barrels of Gunpowder* cit.

76 *Charles II, 1664: An Act to prevent the delivering up of Merchant Ships*, in J. RAITHBY (ed.), *Statutes of the Realm: Volume 5, 1628-80*, s.l. 1819, pp. 521-2.

77 See the 1563 «Ordonnance of Philip II for the Low Countries», for example: Title IV, Article 2, quoted in J.-M. PARDESSUS, *Collection de lois maritimes antérieures au 18. siècle*, 6 vols, Paris 1837, vol. 4, p. 79.

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79 M. FUSARO, *The Burden of Risk: Early Modern Maritime Enterprise and Varieties of Capitalism*, in «Business History Review», 94 (2020), pp. 179-200, at p. 192.

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81 L. WADE, *«The honour of giving my opinion»: General Average, Insurance, and the Compilation of the Ordonnance de la marine of 1681*, in *General Average and Risk Management* cit., pp. 415-30, pp. 419-21.

82 AGLIETTI, *L'istituto consolare* cit., p. 43; FUSARO, *The Invasion of Northern Litigants* cit., p. 39.

83 See also D. PEDEMONTE, *Deserters, Mutineers and Criminals: British Sailors and Problems of Port Jurisdiction in Genoa and Livorno during the Eighteenth Century*, in *Law, Labour and Empire* cit., pp. 256-71.

84 ADDOBBATI, *Until the very last nail* cit., p. 57.

85 AGLIETTI, *L'istituto consolare* cit., p. 43.

86 FUSARO, *The Invasion of Northern Litigants* cit., p. 39.

87 ASF, MM, 358-17, Insert 2, Marucelli's Memorandum (28 Feb 1670/71).

88 ADDOBBATI, DYBLE, *One Hundred Barrels* cit.; *Until the very last nail* cit., pp. 50-1. A similar thing occurred in eighteenth-century Naples: see A. CLEMENTE, R. ZAUGG, *Hermes, the Leviathan and the Grand Narrative of New Institutional Economics. The Quest for Development in the Eighteenth-Century Kingdom of Naples*, in «Journal of Modern European History», 15 (2017), pp. 108-29, p. 125.

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90 M. BELLOMO (L. COCHRANE, trans.), *The Common Legal Past of Europe, 1000-1800*, Washington DC 1995.

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