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Norme, scienza e pratica giuridica tra Genova e l'Occidente medievale e moderno

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Genoese Civil Rota *and mercantile customary law*

I. *Preamble*

Before undertaking discussion of the law merchant (which in various contexts and with various meanings has been called *consuetudo mercatorum*, *ius mercatorum*, *lex mercatoria*), and before considering the ways in which those expressions and concepts have been interpreted by legal historiography and in continental Europe and the Anglo-Saxon countries, I shall examine the information yielded by a sixteenth-century source – the *Decisiones de mercatura* of the Genoese Civil *Rota* [1] – and provide a description of that Court.

II. *Genoa's medieval mercantile Courts and the birth of the Civil* Rota *in 1528*

During the middle age and the modern age Genoa was at first an important commercial centre and then a major financial market. Mercantile law, and the contracts most typical thereof because they concerned maritime matters (contracts of *commenda*, *societas*, insurance, transport), had been an integral part of the Republic's legal system since the twelfth century, as evidenced by the most ancient notarial cartularies. Indeed, when the local law was committed to writing in the thirteenth and fourteenth centuries, that part of it relative to *mercatura* was included among the constitutional laws, not among the common civil and criminal statutes. Special courts, mercantile and maritime, dealt with problems arising among citizens and foreigners and sought to ensure that the decisions were both rapid and fair [2].

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[1] *Decisiones Rotae Genuae et pertinentibus ad eam*, in *De mercatura Decisiones et tractatus varii et de rebus ad eam pertinentibus*, Lugduni MDCX (repr. Turin 1971). On this see V. PIERGIOVANNI, *The Rise of the Genoese Civil Rota in the XVIth Century: The "Decisiones de mercatura" Concerning Insurance*, in *The Courts and the Development of Commercial Law*, V. PIERGIOVANNI (ed.), Berlin 1987 (Comparative Studies in Continental and Anglo-American Legal History, 2), pp. 23-38.

[2] ID., *Lezioni di storia giuridica genovese: il Medioevo*, Genova 1984, pp. 85-96.

The templates for Genoese mercantile law were general models which were known to the city's merchants and applied by them. Evidencing a conscientious endeavour to refer to the broader context in which *mercatura* was conducted was the care with which jurists – and notaries especially – stressed cases in which local practice differed from the general usage. One significant example is provided by insurance law and the insistence with which it constantly pointed out the uniqueness of a Genoese law which punished fraudulent behaviour by a ship's captain. A second example pertains to the history of Genoese insurance related to local political behaviour: this concerns a decree with which the Republic marked out an independent and original normative path by ordering the punishment of contracting parties who sought to evade their obligations and civil justice by recourse to ecclesiastical law and its Courts, before which they claimed that insurance contracts constituted usury [3].

A marked change of direction and a leap in quality from the point of view of legal technique – and therefore with regard to the feasibility of a *lex mercatoria* in Genoa – came in 1528 with institution of a Civil *Rota* [4] which rapidly developed into a Court specialized in mercantile law. The *Rota*'s success was due to its safe-guarding of Genoa's technical-legal and cultural heritage, and hence to continuity of its action and judgement with the Courts whose place it had taken. It took over, moreover, the most valid mercantile practices of Genoa and the Mediterranean. To the concrete use of ancient traditions and customs the *Rota* judges added their experience as jurists trained at schools in which Roman law was taught. The consequence was a technical refinement of language and concepts that became part of the *Rota*'s 'style'. The Court constantly endeavoured to develop new directions in case law deriving from a fertile encounter with the practice marked by mutual respect, in the awareness that it was contributing – by means of the grounds of the judgements – to the growth of an autonomous science of commercial law [5].

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[3] E. BENSA, *Il contratto di assicurazione nel Medioevo: studi e ricerche*, Genova 1884, pp. 83, 150-151.

[4] V. PIERGIOVANNI, *The Rise of the Genoese Civil Rota* cit., p. 29.

[5] *Ibidem.*

III. *The* Decisiones de mercatura *and the sources of Genoese law applicable to merchants: the* regulae Rotae

The aim in what follows is to identify terms and concepts with which the judges of the Genoese *Rota* made reference to the presence and applicability of common rules to merchants. The inquiry will proceed along two lines which will often intersect. The first involves terminological analysis intended to determine the references to specific legal sources that held general operational significance for the judges of the *Rota* in that they extended beyond the confines of the purely local application of rules. The second line of inquiry concerns identification of institutes cited in judgments that may exemplify use by the Genoese judges of forms of supranational law.

The *Rota*'s references to domestic sources employ three lexical expressions: *ordinamenta Genue*, *regule Rotae*, *inveterata consuetudo huius civitatis or inveterata consuetudo mercatorum Genuae*.

It is of interest to note that the expressions *attentis regulis et ordinamentis Ianue ac inveterata consuetudine* are contained in the *Constitutiones Rotae* (1530) [6]. The decree of birth of the *Rota*, in fact, affirms that the creation of the Court should not be viewed as a break with the more ancient orders of the Republic, but rather as a rationalization marked by continuity with local norms and mercantile customs. The new rules, the decree declares, descended directly from the tradition centred on the jurisdiction of the *Ufficio di Mercanzia* and those other ancient judiciary bodies which, since the fourteenth century, had adjudicated disputes among merchants prior to institution of the *Rota* in 1528. The same decree then makes specific reference to summary procedure and the rapid execution of decisions, this too in accordance with practices accepted and used in the mercantile community since the remote past [7].

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[6] Archivio Storico Comune di Genova, ms. n. 89, *Constitutiones Rote*, cc. 18 *v.*-19 *r.*: « Magistratus Rotae intelligatur habere et habeat iurisdictionem, authoritatem et bailiam, ac competens sit, et esse intelligatur super omnibus et singulis causis, quaestionibus, et differentiis, et in dependentibus ab eis de quibus sunt et esse consueverunt tam ex regulis ordinamentorum Ianuae, quam etiam ex inveterata consuetudine sp. Officiales mercantiae, Bancorum ... ac etiam officiales Ruptorum ... attentis regulis et ordinamentis Ianue ac inveterata consuetudine ... statuunt quod in causis cambiorum et recambiorum, exationis securitatis et exationis naulorum et in aliis causis executionis ... debeat procedi et terminari executive et sub illis modis et formis prout continetur in decretis, ordinamentis et regulis antea conditis et prout antea servari consuevit quantum ad modum et formam procedendo ».

[7] V. Piergiovanni, *The Rise of the Genoese Civil Rota* cit., p. 26.

It is evident that the custom cited by the *Rota*'s decisions comprised local practices tried and tested over the centuries, and in particular procedural rules; but yet there were novel features as well, most notably the self-referentiality of the Genoese Court, and the value placed on primary sources by its *decisiones* and *regulae.*

A clear example of the presence in the Genoese tradition of practices and concepts considered by now generalized (in both substantial and trial law), and their buttressing with the *auctoritas* of a self made case law, is provided by the exchange contract and the punishment of debtors [8].

The first reason that induced the *Rota* to order that defendants must also pay the interest matured on unhonoured bills resided in the nature itself of the exchange contract: a well-established doctrinal tradition, in fact, with which the *Rota* complied, equated it to a contract of sale, and this more than any other type required good faith and attention to *utilitas* by both parties. The Genoese legislation had taken account of this principle when providing, *de stylo et forma regularum Rotae*, for the rapid execution of decisions on exchange contract disputes.

Reference to the *regulae Rotae* invariably divides into two components. The first concerns their *forma* and emphasises the interpretative respect due to their literal formulation; the second concerns the term *stylus*, which, although it had a long history behind it [9], at that particular historical juncture (the first half of the sixteenth century) signalled a different view of the Courts and their juridical production [10]. It seems that the concept of cases previously judged grew increasingly formalized in the work of a Court whose case law conjugated the legal specificities of the setting in which it operated with the common law tradition – as we have just seen in the case of the exchange contract [11]. Finding references should not have been difficult,

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[8] *Decisiones Rotae Genuae* cit., *Decisio I*, p. 11: « ... qui contractus est ad instar emptionis et venditionis ... et consistit in bona fide magis quam alii contractus, ut de stylo et forma regularum Rotae eius executio demonstrat, adeo quod natura contractuum bonae fidei assumit per ea quae tradunt Doctores ... ».

[9] L. Prosdocimi, *Observantia: ricerche sulle radici fattuali del diritto consuetudinario nella dottrina dei giuristi dei secoli XII-XV*, Milano 2001.

[10] V. Piergiovanni, *Courts and Commercial Law*, in *The Courts and the Development* cit., pp. 11-22.

[11] *Supra*, note 8.

given that the most eminent jurists of the time had pronounced on the meaning of the term *stylus.* After *Cynus Pistoriensis* and *Ioannes Andreae*, *Baldus de Ubaldis*, for example, had clarified the customary nature of the *stylus* and its reference to the judicial practice of every Court [12].

A second reason that induced the *Rota* to order the payment of interest high-lights the convergence – in this case – of the Genoese Court's practice « ita videtur servari in Rota » with the tradition of *ius commune* « quae opinio procedit omnino iure divino, et humano, et est canonizata in scholis, et in palatiis ». Decisive in this regard was a subjective condition which by now applied throughout the mercantile community and derived from the professional and non-occasional pursuit of *mercatura*, with the consequence that *solito negotiari datur interesse etiam lucri cessantis.* The quality of merchant also emerges from the tenor of texts attesting to *pluralitas negotiorum* [13].

The term *stylus* also recurs in contexts which claimed broader and more general legal validity, like the *Observantia or stylus mercatorum*, with which the *Rota* conformed. *Consuetudo mercatorum* was also present, of course; while more extensive efficacy inhered in expressions like « mercatorum observantia facit ius » or « consuetudo inter mercatores facit ius ».

To continue the lexical inquiry, it is to be noted that in some cases the decision by the *Rota* was expressed in a manner which implied that certain

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[12] About Cynus and others see L. PROSDOCIMI, *Observantia* cit., p. 202: « Non habemus de eo in iure, sed in curia sic ... Stilus est ius quoddam non scriptum, usibus introductum, ab uno iudice stillatum. Et in hoc ultimo differt a consuetudine, quondam consuetudo est ius introductum usibus plurium, ut a populo … Stilus non tamen est usus communis ... Tunc dicetur stilus curiae ... ». Baldus de Ubaldis (p. 208): « dicitur stylus consuetudo alicuius fori iudicialis, unde dicimus: ita est de stylo episcopalis curiae ... Idest talis usus est stillatus a tali curia, et non quia per populum observatur, sed quia per aliquem iudicem servatur certus modus et certa practica in causis coram eo practicandis ... et talis usus vel practica omnimodo dicitur stylus curiae, et sic ... stylus est ius non scriptum usibus introductum ab uno iudice ... ». Ioannes Andreae (pp. 203-204): « Quod prius vocavit consuetudinem, postea vocat stylum ... Stylus est ius ... non scriptum usibus introductum ab uno iudice stylatum, et in hoc differt a consuetudine, quae est usus communis, stylus usus unius iudicis. Esset ergo secundum eum stylus, quando per usum styllatum a iudice determinata ».

[13] Cf. V. PIERGIOVANNI, *Banchieri e falliti nelle* 'Decisiones de mercatura' *della Rota Civile di Genova*, in *Diritto comune, diritto commerciale, diritto veneziano*, Colloquio tenuto al Centro tedesco di studi veneziani dal 20 al 21 ottobre 1984, K. NEHLSEN VON STRYK - D. NÖRR (edd.), Venezia 1985 (Quaderni del Centro tedesco di studi veneziani, 31), pp. 29-30.

mercantile juridical practices were valid both locally and generally. A significant example concerns the value to be set on the testimony of a witness who stated that he recognized the defendant's handwriting on a bill of exchange because he had seen it many times before. The *Rota* declared that the testimony was valid against the writer of the bill for two reasons: first that numerous judgments had been made on the matter, and second that the practice adopted by a Court should comply with a judicial practice which it termed *communis* that is, generally observed [14].

With regard to the existence of a more general mercantile practice, the most distinctive feature to emerge from the *Rota*'s *decisiones* is their Constant self-referentiality. There is some sporadic evidence on the Genoese Courts that preceded the *Rota* [15], but the authority acquired by the latter's *Decisiones* was a consequence of the rise, in Italy and in Europe, of the great central Courts [16]. The *Rota* cited its own decisions as precedents, and they formed the basis for continuity and homogeneity in its future judgements, and consequently aligned local law with intemational customary law. It is important to observe, therefore, that the strength of local tradition was more evident and more forcefully asserted in its oft-contested relationship with the *ius commune.* Of relevance here is another *decisio*, which in this case concerned testimony on the authenticity of a bill: this the witness had not actually seen being written, but he recognized the signature appended to it because it was in the author's handwriting, which he knew. Here the parameters for validity were sought and found within the Genoese law that had elaborated the Court's *regulae*, and reliance was placed on the customary tradition reinforced and corroborated by the

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[14] *Decisiones Rotae Genuae* cit., *Decisio* I, p. 2: « quam testificationem pro valida probatione recognitionis literarum in auditorio Rote plusquam notissimum est indistincte admittendum esse ex communi observantia et stylo: quae quidem literae probant contra scribentes … ». We find another fondamental subject of mercantile world that is the *fides:* « scientes (sc. Iudices) quod fides et securitas domini pecuniarum et illius, qui debet postmodum cambium solvere, stat primum in bonitate et fide scribentis dictas literas cambi ... ».

[15] V. PIERGIOVANNI, *Diritto e giustizia mercantile a Genova nel XV secolo: i consilia di Bartolomeo Bosco*, in *Consilia im späten Mittelalter. Zum historischen Aussagewert einer* Quellengattung, hg. I. BAUMGÄRTNER, Sigmaringen 1995, (Studi, 13. Schriftenreihe des Deutschen Studienzentrums in Venedig), pp. 65-78.

[16] ID., *Courts and Commercial Law* cit., p. 20.

Rota's own *decisiones.* The fact that this local custom did not comply with the dictates of common law was, in the eyes of the *Rota* judges, of no legal consequence [17]. The explanation amounts to an assertion of the value of the *Rota*'s own case law: the force of these decisions residing precisely in the fact that they utilized and valorized the specificity of the law of Genoa, that is, the law of a great mercantile centre which for centuries had developed its own customs and norms of mercantile law [18].

Perhaps the most striking feature of this assertion of value and independence transpires from another decision - this time with regard to *fideicommissum*, where the conflict between local law and common law was resolved by the Rota's own precedents, which by now must have acquired great credibility. Locally involved were also political and social considerations, but important were the ones pertaining to the broader domain of legal science: the *stylus curiae* was described as *potens et efficax* and the unhesitating declaration was made that *legis vim habere creditur* [19].

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[17] *Decisiones Rotae Genuae* cit., *Decisio* LXXXIV, p. 211: « ... Fuerit probatum per plures testes dictam apodisiam fuisse scriptam, et subscriptam manu propria Antonij debitoris iudicio eorum, quia haberent notam eius manum, cum viderint eum pluries scribere, quamvis non fuerint praesentes quando fuit scripta, quae quidem probatio plenissime probat, iuxta dispositionem regularum nostrarum sub rubrica de causis executivis in § et si de aliquo debito constiterit per appodisiam, ac iuxta stylum et consuetudinem huius ciuitatis, de qua pluries mentionem fecimus in *Decisionibus* nostris, praesertim similium causarum, licet alias de iure communi secus esset: quia testes deponentes se cognoscere aliquam appodisiam esse scriptam, vel subscriptam manu alicuius ex eo, quod haberent notam manum eius, vel vidissent eum pluries scribere, non probarent ... ».

[18] *Ibidem* « Sed ab observatione regularum nostrarum, ac stylo, et consuetudine toties in foro nostro approbata, non esse recedendum in iudicando putavimus, etiam si talia essent alias contra ius commune, et contra communem opinionem ... praesertim cum verba regularum nostrarum, et sic statutorum satis clara sint, que licet dura videantur per nos servanda fuere, ut dixit Baldus ». V. PIERGIOVANNI, *The Rise of the Genoese Civil Rota* cit., p. 27.

[19] *Decisiones Rotae Genuae* cit., *Decisio* CCVI, p. 362: « Nihilominus ad hoc ut ipsa *Decisio* causae de qua tractatur magis magisque fundata remaneat postquam in confessione curatoris nulla vis fieri potest ex forma statuti Genue ... placet addere appodisiam ipsam recognitam fuisse per tres testes, quorum licet unus tantum dicat se fuisse praesentem illius confessioni, alij vero duo rationem illam reddant, quia notam habent manum dicti Bernardi, quae ratio de iure communi non concludit ... Ratio illa quia notam habent manum seu literaturam tam coram Rota quam aliis magistratibus passim admittitur, et satis, superque concludens censetur. Adeo potens, et efficax est curiae stylus, qui legis vim habere creditur ».

IV. *Stylus et consuetudo mercatoria*

When geographical spaces expanded to encompass distant and even foreign institutions, places and persons, then also themes and concepts tended to assume the maximum degree possible of generality.

In *Decisio II*, again on the theme of bills of exchange, the formal reference is to local practices, yet the underlying principles are general because they concern legal relationships relative to international exchange fairs. The decision affirms the principle that if the receiver is insolvent, the acceptance of a bill of exchange constituted the moment when the obligation to pay accrued to the drawer: the custom – or the *observantia* which is substantially a variant of it [20] – in this case is declared *generalis* and *notoria*, and capable of imposing obligatory rules: *facit ius* [21].

Whereas the previous passage only implied the more general supranational validity of mercantile legal practice, the principle is stated very clearly in another text by the same Court, which again concerned bills of exchange and international money fairs. At issue was a dispute that had arisen at an international exchange fair, and the protagonists were members of one of the richest and most important financier families of Genoa, the Lomellini. Their contention that both the writer and receiver of a bill of exchange were obligated was based on well-founded arguments drawn from a customary practice widely accepted « secundum communem stylum et consuetudinem mercatoriam ». The expression is particularly significant because the decision was drafted with both substantial law and procedural law in mind. It states, in fact, that the said custom must be applied *in causis mercantilibus licet ... de iure communi aliter esse dicendum.* Substantial and trial law had peculiarities and specificities relative to the mercantile sphere. As a consequence, any conflict with the common law was not a cause for concern: what mattered was that in those special Courts *stylus et consuetudo mercatoria omnino attendi debent* [22].

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[20] L. Prosdocimi, *Observantia* cit., p. 199 e sgg.

[21] *Decisiones Rotae Genuae* cit., *Decisio* II, p. 20: « ... erant obligati ... ex generali et notoria consuetudine mercatorum Genuae, quia quotiescumque quis facit literas, et ille, cui diriguntur, acceptat, et postea non solvit, scribens literas remanet obligatus; quia ego, qui dedi cambio, habeo utrumque obligatum, et mercatorum observantia facit ius ... ».

[22] *Ibidem*, *Decisio* VIII, p. 51: « ... cum certum sit dictos Lomelinos habuisse obligatos tam scriptores quam receptores dictarum literarum cambii, quo ad solutio sequeretur, secundum

To be noted is the appearance in this text of the expression *consuetudo mercatoria*, the use of which aids understanding of the subject of the present inquiry. Whilst on the one hand the expression served to remind the reader of both local and more general legal traditions; on the other it comprised the two specific features that characterized the *mercatura* from the standpoint of the law: in fact, the legal form – *consuetudo* – and the subjects – *mercatoria* – were embedded in a space marked out by the political and economic conditions of the medieval and modem age. It was in this manner that *mercatura* set about breaking free from the narrow confines of individual / local legal systems.

V. '*Communis stylus mercatorum*'

Nor could the expression *communis stylus mercatorum* be restricted in its meaning to a single system. It was therefore well-nigh inevitable that it should be used in another case adjudicated by the *Rota*, where, because of the parties concerned, the geographical location, and the matter at issue, we find an almost typical case of supranationality.

The judgement in question concerned a dispute provoked by a bill of exchange brought before the Genoese Consul in Carcassonne. The *Rota* confirmed the pronouncement of the magistrate on the grounds of due obedience to the *ius commune* tradition, but mainly because of its firm commitment to the *communis stylus mercatorum* [23]. Although the dispute had been judged by a Genoese judge resident in Carcassonne, in this case the principles cited pertained to a general *consuetudo mercatoria*; and it is significant that later in the text the Rota employs language which the law – mercantile in particular – had derived from morals, using, for example, the term 'to honour' the payment of a bill of exchange, or enjoining the 'good faith' of merchants [24].

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communem stylum et consuetudinem mercatoriam ut per Bal. ... Soc ... et is stylus et consuetudo mercatorum attendi omnino debet in his causis mercantilibus, licet fere de iure communi aliter esse dicendum ... ».

[23] *Ibidem*, *Decisio* XXIII, p. 115: « ...Confirmatio autem sententie dicti Consulis quo ad merita iustificatur tam ex dispositione iuris, quam ex communi stylo mercatorum, de quo Rota voluit se plene informare iuxta tradita per Doctores ».

[24] *Ibidem*, « Potest tamen per ipsum commissionarium, omissa illa conditione, et non acceptato debitore sibi delegato, solvi nomine ipsius principalis committentis, et ut aiunt, honore

VI. *The exchange contract, trial rules and the insurance contract*

Regulae, *stylus* and *consuetudo* seem to have been most constantly applied in the exchange contract: this, given its legal characteristics and the economic interests involved, lent itself well to the postulation of generally applicable clauses [25].

The letters circulated among countries, they were paid at trade fairs, and customary rules were applied which, on the basis of a doctrine by *Baldus de Ubaldis*, were *generales* as well as well-known, and as such to be considered binding [26].

Whether it related to local tradition or to common law, mercantile juridical practice – the *consuetudo mercatoria* – enjoyed its own force and autonomy. A striking example is provided by another *Rota* decision which cited the by now well-known and ubiquitous principle of the joint and several liability of partners: the only *ius* in this case was mercantile customary law:

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literarum illius, ... qui quidam gesto utili negozio ipsius comittentis, nempe solvendo pro honore eius literae, quae alias non acceptata inanis, et sine credito remansisset, quod mercatoribus est maxime perniciosum, profecto debuit sine mora satisfieri, ut dictat ordo rationis, et bonae fidei inter mercatores praecipue servandae ... Nec tenebatur de stylo mercatorio certiorem huius rei statim facere comitentem ... ».

[25] *Ibidem*, *Decisio* XXXII, p. 143: « At pro maiori dicendorum, & iam dictorum intelligentia advertendum est, quod verba (solutis sibi ipsis) in dictis literis contenta, nihil aliud important, quam *(cambiati in noi medesimi)* quali ipse dixerit *contati a noi*, quo sermone, ac stylo utuntur mercatores, quia absque hoc dicendi genere re vera non interveniente cambio, sicut hoc casu vere non intervenit, litera cambij dici non potuisset, sed quoniam est admodum utile mercatoribus, maxime Genuensibus procedere per viam cambiorum, tum propter provisiones, tum propter expeditionem, & celerem executionem datam statutis, et Rotae regulis, ideo non videatur mirum, si saepius hoc dicendi genere mercatores utuntur: qui nempe stylus, quod quis, scilicet sibi ipsi solvere possit, non est admodum iuri communi dissimilis: quia nos habemus iura quae hoc admittunt... ». The text of the *Decisio* follows reaffirming the definition of change-contract: « Cambium est contractus, et quidem separatus ab aliis, ... quem quidem contractum alij appellant nominatum, cum sit ad instar emptionis, & venditionis ... & hoc maxime cum exuberet in bona fide, magis quam alij contractus, etiam nominati, ut de stylo, & forma regularum Rotae Genuae eius executio demonstrat, adeo quod natura contractuum bonae fidei assumit per ea quae tradunt Doctores ... ».

[26] *Ibidem*, « ... Numeratio, et satisfactio actualiter facta praesumitur illis, qui literas scripserunt, & ita fuerat consuetudo, et stylus mercatorum hanc differentia inter haec, et illa verba constituentium, super quo stylo et consuetudine, ac d. verborum interpretatione multoties Rota iudicavit, cui optime constitutum fuit per testes idoneos, ita se habere in hac Genuensi civitate stylum, et consuetudinem, que procul dubio inter mercatores facit ius ... Quae consuetudo tanquam notoria hic Genuae, et generalis non indiget probatione, secundum Baldum ... ».

« ... et hoc procedit potius ex consuetudine mercatoria, quam de iure: usu enim in civtiate Genuae & quidem notorie receptum est, quod socij expendentes nomen insimul tenentur contrahentibus secum insolidum, et talis consuetudo et obseruantia attendi debet, cum faciat ius ... » [27].

A somewhat atypical example of a judgement *de mercatura* concerned a case of inheritance with *fideicommissum* and a confession of payment. It is of interest because of the specifically mercantile nature of the procedure. The reference in the text to the *auctoritas* of the jurist *Guilelmus Durantis*, the *Speculator,* the most illustrious medieval writer on trial law, and to Benvenuto Stracca [28], the first author of a specific text on mercantile trial law, here introduces the crucial topic of the trial. The *Rota*, which sought to cite its own case law as *auctoritas* in this field, fumished valuable support for the idea of a trial which combined local juridical features with more general ones: « nos sumus inter mercatores, sumus in causis, in quibus proceditur de aequitate, et habito intuitu ad Deum et veritatem » [29].

The procedural rules were intended to match the concrete reality in which traders operated, the consequence being that they acted as the formative factor in supranational mercantile customary law. By this means it was possible to over-come the formalism of the Roman-Canon law procedure, and the consensus obtained from commercial operators increased the powers of the mercantile Courts [30].

A number of interesting references are also to be found in *Decisio III*, which adjudicated a case of insurance law. In response to a request for the *Rota* to invalidate certain witness statements, the Court cited both its own

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[27] *Ibidem*, *Decisio* XLVI, p. 168.

[28] See C. DONAHUE JR., *Benvenuto Stracca's De Mercatura: Was There a Lex Mercatoria in Sixteenth-Century Italy?*, in *From Lex Mercatoria to Commercial Law*, ed. V. PIERGIOVANNI, Berlin 2005 (Comparative Studies in Continental and Anglo-American Legal History, 24), pp. 69-120.

[29] *Decisiones Rotae Genuae* cit., *Decisio* XXVI, p. 122: « ... Unde cum in casu nostro lapsum sit biennium, nec exceptio non numerate pecuniae fuerit opposita, merito dicitur probata vera, et naturalis numeratio per illam confessionem, *ho avuto io Potrò, &* ita illud, quod deductum fuit in petitione, fuit probatum. Praeterea illa opin. Specu. et dispositio l. habebat inter mercatores non procedit, ut per Ben. Stra. in suo tract. de merca... sed nos sumus inter mercatores, sumus in causis, in quibus proceditur de aequitate, et habito intuitu ad Deum, et veritatem ... ».

[30] V. PIERGIOVANNI, *Statuti, diritto comune e processo mercantil*e, in *El dret comú i Catalunya*, Actes del VII Simposi Internacional, Barcelona, 23-24 de maig de 1997, ed. A. IGLESIA FERREIRÓS, Barcelona 1998 (Estudis, Fundació Noguera, 15), p. 139.

regulae and the more general mercantile practice which sought to ascertain the truth by rejecting the *iuris apices* and the *subtilitates* [31].

Because of its economic importance and the variety of problems that it took, the insurance contract was the prime area for the correct application of these procedural principles: « in causis securitatum, quae fiunt inter mercatores, non sunt curandi apices iuris » [32]. Or again, generic reference would be made to truth and equity [33]. These were general principles that the *Rota* made its own and adapted through its decisions to local traditions, for example, those concerning evidence [34].

The dogmatic definition of the insurance contract equated it to a sales contract: this, indeed, was a constant of Genoese jurisprudence in the fifteenth century, when Bartolomeo Bosco affirmed that, *ex communi observantia*, any goods lost became the property of the insurers. Bosco, however, cited an exception *ex communi consuetudine patriae non scripta et ex communi tacito intellectu* which consisted in fraudulent behaviour by the ship's captain [35]. The *Rota*, for its part, tended to espouse the doctrine which (as in the majority of maritime contracts) proposed a classification of insurance within the canons of atypicity [36].

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[31] *Decisiones Rotae Genuae* cit., *Decisio* III, p. 26: « ... secuta quoque est ordinatio rotae, ut testes hinc inde esaminati publicarentur salvis iuribus, et exceptionibus partium; verum nos, qui a regulis admonemur, ut Deum et veritatem prae oculis habeamus, et quos non latet in curia mercatorum, ubi negotia veritate terminantur reiectis iuris apicibus, qui subtilitatem magis aspiciunt, quam facti veritatem ut per Bart. ... multa de stricto, et summo iure solere remitti, ut per Strac, in tract. de mercatura ... non pluris fecissimus hanc nullitatis oppositionem, quam par fuisset, et forte ad veritatem facti tantum libenter respexissemus ».

[32] *Ibidem*, *Decisio* V, p. 38.

[33] *Ibidem*, *Decisio* XL, p. 162: « ... veritati inhaerendo prout moris nostri est, contrariam sententiam de iure veriorem, et magis foro mercatorum et aequitati consonam esse duximus ... ».

[34] V. Piergiovanni, *Bartolomeo Bosco e il divieto genovese di assicurare navi straniere*, in « Annali della Facoltà di Giurisprudenza dell'Università di Genova » (Omaggio della Facoltà giuridica di Genova a Mario Scerni), XVI (1977), p. 868; *Decisiones Rotae Genuae* cit., *Decisio* LV, p. 176. « ... cum maxime coram Rota procedatur habito intuitu ad Deum, et veritatem negotii, vel saltem quia allegatum oretenus, et in scriptis videbatur sufficere ... ».

[35] V. Piergiovanni, *Rapporti tra diritto mercantile e tradizione romanistica tra medioevo ed età moderna*, in « Materiali per una storia della cultura giuridica », XXVI (1996), p. 12, « ... naturale est contractus emptionis, ut post eam contractam omne periculum pertineat ad emptorem… ».

[36] Id., *The Rise of the Genoese Civil Rota* cit., p. 34; *Decisiones Rotae Genuae* cit., *Decisio* III, p. 29: « ... Dictum vero reum dignum existimavimus, qui recuperaret consteum

References to local custom and to the more general mercantile customary law came increasingly to intersect with a source that sought to establish itself as paramount. I refer to the case law of the more important foreign central Courts. A significant example of the conflict of this latter source with the practice of merchants and its endeavour to interfere in the definition of exclusively legal problems was recalled, in the eighteenth century, by the Genoese jurist Casaregi[37]. This author remarks that when juridical concepts were in question, a jurisdictional restraint applied which hampered the merchants: *eorum opimo et stylus minime curandus* -or that it was of no importance that the *fides* of the merchants asserted that a contrary custom had been established[38]. Among the *auctoritates* cited in support, seemingly of great importance were the Roman *Rota* and the *Sacro Consiglio* of Naples, both of which rejected external interference and affirmed that this was the practice followed *in omnibus mundi partibus.*

VII. *The richness and organizational variety of the medieval and modern mercantile world*

The judgements of the Genoese Civil *Rota* cited and commented upon in previous sections demonstrate, I believe, the existence of a constant and constructive dialectic between the medieval legal-doctrinal tradition and the law of a great commercial centre. This dialectic took concrete form in the interweaving of references to Roman law, to local law, and to the jurisprudence used by the judges of the *Rota* to harmonize sometimes conflicting conceptual and operational legacies. Besides this nevertheless important aspect relative to the subjectivity and personality of the judges, the latters

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securitatum, vel illud retineret respective, ex quo non fuit locus assecurationi, et sic emptioni periculi: est enim contractus iste emptionis, et venditionis, seu emptioni assimilatur cum sit innominatus, facio, ut des, vel do, ut facias, ratione pretii quod datur: quia qui assecurationem facit, propter pretium dicitur emere eventum periculi. ... ». *Ibidem*, *Decisio* XXXVI, p. 154: « ... Consideravimus quoque, quod contractus assecurationis dicitur contractus innominatus ... unde debet regulari iuxta naturam contractuum nominatorum, quibus assimilatur, et cum assimiletur emptioni, et venditioni propter pretium, quod datur ratione periculi ... ».

[37] V. Piergiovanni, *Rapporti tra diritto mercantile e tradizione romanistica* cit., p. 18.

[38] J.L.M. De Casaregis, *Opera omnia cum additionibus*, Venetiis MDCCXL, I, disc. 67, p. 215: « ... quia eorum opinio vel stylus minime curandus in eis est, quae secum trahunt juris articulos, ab eorum quippe grossitia non attingendos, et ridiculum sane esset ubi habemus doctrinas ac materias in iure bene eorum iudicium investigare ».

Decisiones de mercatura – which, it should be remembered, figured among the most important sources for the nascent science of commercial law – made a Constant and central reference to mercantile custom and practice.

From this specific point of view, therefore, the historical problem of the *lex mercatoria* should be related to the variety and complexity of local substantial and procedural laws. Those who seek to gain understanding of *lex mercatoria* must start from the sources, with their rich diversity and specificity, and eschew the blinkered vision which looks only for homogeneity and universalism. The latter are notions extraneous to the ideal and cultural world of the legislators, interpreters and traders of the past. Re-evaluation of the central importance of the experience and contribution of local sources would render less ideological the correct historicization of the presence and influence of Roman law in continental Europe and England. The assumption of some commentators that this cultural tradition – which would supposedly harmonize the past and facilitate political and legal choices in the future – is the sole and constant frame of reference for a process of Europeanization amounts to a prejudiced refusal to take account, historically and critically, of the rich contributions of the past. Interpretation of that past should instead be couched in terms of its own historical tradition, and with awareness of the complexity of changes and of constant renewal. Nor do I believe that the problem can be evaded – as regards commercial law – by seeking some external element that unifies the Roman tradition with the law of the centuries since the Middle Ages until the present day, such as might be the *bona fides:* objective circumstances and subjective referents, which change from one age to the next, alter and complicate concepts, norms and forms of behaviour, rendering any over-schematization and over-simplification unacceptable [39].

Reconstruction of these phenomena is also hampered by the tendency – apparent in numerous studies – to tie history to current circumstances: for example, by propounding an uninterrupted process of Europeization. It is argued that the early phase of the development of commercial law between the eleventh and sixteenth centuries – when it was developed Europe-wide and in customary forms with cosmopolitan intent and for practical purposes – displayed three main features. The first was the formation of a European commercial law which superseded the Latin

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[39] R. MEYER, *Bona fides und lex mercatoria in der europäischen Rechtstradition*, Göttingen 1994.

tradition and received its greatest impetus from the fairs, above all those of Champagne. The second was the constitution of a European maritime law through the supranational efficacy of the rules of Oléron, Wisby and Barcelona. The third was the growth throughout Europe of a mercantile class and of statutory laws – Mediterranean and North European – which closely depended on the invention of an efficient system of commercial accounting [40]. One may agree that the principal sources of commercial law – maritime customary law, the law of fairs, mercantile statutes, as well as jurisprudence and codification – had autonomous conceptual values, but they were part of in a constructive process which was shaped, juridically but above all in fact, by custom.

Reappraisal of the historical significance of the customary law sources permits more accurate assessment to be made of the historical arguments put forward in the current political-legal debate, hearing in mind that law which emanated from public sources in the medieval and modem centuries was often only of secondary normative import [41]. Also Cordes contends that the use of *ius commune* for a European private-law system should be avoided: if indeed there was some unitary legal system centuries ago, it cannot provide the basis for the construction of a commercial law in the twenty-first century [42].

The fact that the *Rota* texts examined contain neither the expression *ius mercatorum* nor the expression *lex mercatoria*, whereas they do employ the terms *consuetudo mercatorum* or *consuetudo mercatoria*, confirms my belief that it is the latter that enable correct interpretation of the richness, variety and evolution of mercantile legal practice in the medieval and modern ages.

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[40] H. POHLMANN, *Die Quellen des Handelsrechts*, in *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, I, *Mittelalter (1100-1500)*, *Die Gelehrten Rechte und die Gesetzgebung*, ed. H. COING, München 1973, p. 801 ff.; V. PIERGIOVANNI, *Rapporti tra diritto mercantile e tradizione romanistica* cit., p. 7.

[41] E. CORTESE, *Nostalgie di romanità: leggi e legislatori nell'Alto medioevo barbarico*, in *Ideologie e pratiche del reimpiego nel medioevo*, Spoleto 1999, pp. 485-510; J. KRYNEN, *Voluntas domini regis in suo regno facit ius. Le Roi de France et la coutume*, in *El dret comù i Catalunya* cit., pp. 59-63.

[42] A. CORDES, *Auf der Suche nach der Rechtswirklichkeit der mittelalterlichen Lex Mercatoria*, in « Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung », 118 (2001), pp. 171-172; ID., *The search for a medieval Lex Mercatoria*, in *From Lex Mercatoria* cit., pp. 53-68.

VIII. *Historiography and sources of the* lex mercatoria *in the past and the future*

It would certainly be beyond the scope of this paper to reconstruct the history of the *lex mercatoria.* This in any case has recently been done by historians of law and jurists with other specializations – especially in civil and international law – almost all of which, however, manifest a determination to read the past in the light of the present. Most striking, however, is the absence of texts and studies based on examination of new sources, with analysis restricted to a more or less critical re-reading of the historiography.

A felicitous exception to the rule – because it proposes a historical reconstruction based on the re-editing of an ancient legal text – is the introduction – by Coquillette and Donahue among others – to the edition of the first English treatise that dealt, in the thirteenth century, with *lex mercatoria* [43].

The medieval legal culture and mercantile law of continental Europe never used the expression *ius mercatorum.* Instead, reference was made to *consuetudo*, *curia mercatorum* or *statutum mercatorum*, with the consequent emergence of the distinctive features of customs (not related to trial procedure alone) which, in the seventeenth century, underwent organization in the conceptual context of legal privileges [44].

The lively and constructive dialectic between common law and local laws testified to by the *Decisiones* of the Genoese *Rota* clearly evidences that its jurists were entirely unaware that they were operating as a unitary 'body of law', to use the current expression. On surveying the history of the relationships between the medieval and modem legal sources, one notes that a similar problem existed with regard to the relationships between local city law – *statuta* – and *ius commune.*

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[43] M.A. Basile, J.F. Bestor, D.R. Coquillette, C. Donahue, *Lex Mercatoria and Legal Pluralism: A Late Thirteenth-Century Treatise and its Afterlife*, Cambridge 1998.

[44] H. Monhaupt, *'Jura mercatorum' durch Privilegien. Zur Entwicklung des Handelsrechts bei Johann Marquard (1610- 1668)*, in *Wege europäischer Rechtsgeschichte, Festschrift für Karl Kroeschell*, hrsg. von G. Köbler, Frankfurt am Main 1987, pp. 308-323; E. Migliorino, *Mysteria concursus: itinerari premoderni del diritto commerciale*, Milano 1999, p. 35 ff.

One must clear away the misunderstandings and assert that *ius commune* in the modern age was certainly not solely Roman law, as Casaregi maintains, but rather the array of legislation, jurisprudence and practice that gave such complexity to the system of legal sources [45]. This was a twofold process:

> « increasing tolerance was shown by the political regime towards other processes of law formation while legal experience ... regained all its complexity; a complexity which, at the socio-cultural level signified a plurality of values and, at the legal one, a plurality of traditions and sources within a single political order » [46].

It is this richness that historiography must safeguard and restore, doing so without dogmatic assertion of universality and continuity, and without forceful imposition of systematicity and completeness on the sources.

Cordes has provided a clear and concise summary of the matter [47]. After opportunely stressing that the only universal laws in the Middle Ages were the imperial and canon law, he reminds us that the representation of *lex mercatoria* as a uniform mercantile legal order was unknown before the seventeenth century: until that time, mercantile law had been part of common law like privilege – *ius singulare* [48].

The history of *lex mercatoria* had begun in England during the thirteenth century as procedural privileges, and in the seventeenth also as substantial law. From which one may conclude that the *lex mercatoria* was a concept, not of European continental law but of English law. In order to protect privileges that were ubiquitous – and which therefore also extended to foreigners – against outside interference, the English merchants invoked the commercial tradition and proposed a new interpretation of the *lex mercatoria* as a legal system which at all times and in all lands would be independent from political power. More than the existence of a specific body of mercantile law, Cordes describes a collective conviction that these claims to uniformity had economic utility. One may likewise agree with the following thesis: the fact

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[45] F. Calasso, *Introduzione al diritto comune*, repr. Milano 1970, p. 74.

[46] P. Grossi, *L'ordine giuridico medievale*, Roma-Bari 1995, p. 53.

[47] A. Cordes, *Auf der Suche nach der Rechtswirklichkeit* cit., p. 176 ff.

[48] *Ibidem*; H. Monhaupt, '*Jura mercatorum*' cit., p. 308 ff.

that the thirteenth-century English legal literature on *lex mercatoria* was concerned with trial law does not introduce an superordinate procedural system; rather, it indicates the hope and expectation among merchants that they would receive the same treatment (especially as regards problems of proofs) as provided for in other mercantile centres [49].

At this point, we may perhaps once again consider 'custom' as constituting the overall key with which to interpret the phenomenon of medieval and modern commercial law.

The example of the judgements issued by the Genoese *Rota* is undoubtedly limited in its documentary basis and time-span. Yet it induces one to share the opinion recently put forward by Grossi that medieval legal history can be read on the basis of a « profound constitutional structure of customary nature » which « largely unaffected by events at the turbulent political surface, formed the medieval legal order, a harmonious set of relations resting on the very nature of the things that custom seemed faithfully to replicate » [50].

In this regard, what matters is the effectiveness, not the validity, of the sources, and it is clear that custom yields important insights into these matters [51]. Even terminologically, the commingling of *lex* and *consuetudo* is frequent in the medieval sources (one finds, for example, *lex consuetudinis*) [52].

In this context of custom-based, the regulation of commercial relationships - within the overall framework of trading practice - performed a decisive and propulsive role. Classical contractual models were recovered from the past, as in the case of the Genoese *Rota*. Or, as transpires from one of the text quoted above, frequent use was made of atypical forms of contract, the flexibility of which allowed local usages to be incorporated into them.

There is then a political aspect that should not be underestimated: the richness of customary law found nourishment in the new reality of the burgeoning Italian cities (while commitment to writing heightened its

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[49] A. Cordes, *Auf der Suche nach der Rechtswirklichkeit* cit., p. 173.

[50] P. Grossi, *L'ordine giuridico medievale* cit., p. 94.

[51] *Ibidem*, p. 57.

[52] *Ibidem*, pp. 89-90.

normative impact): indeed, it is no coincidence that autonomy in its use was among the main claims brought against the Emperor, his power, and his law [53]. Jurisprudence, too, was a crucial factor in the valorization of local usages, and its formulations gave rise to expressions still present in the Genoese *Rota*'s decisions, which constantly reiterated the equivalence of *consuetudo*, *observantia*, *stylus* and *regulae* with *ius* and *lex.*

There is much talk in legal science and historiography of metanationality, universality and coincidence with international markets – characteristics, it is argued, which the new *lex mercatoria* of today has acquired from its historical counterpart. For Galgano, « ... by the new *lex mercatoria* is today meant the law which the business class has created without the mediation of State legislative power, and which is formed by rules designed to impose uniform regulation, independently of the political unity of countries, on the trade relationships that arise within the economic unity of markets » [54].

Galgano, however, has stimulated me to search in uses and practices, and in their relativity, what seem to me to be the only similarities between contemporary law and the historical tradition of mercantile law. Galgano cites an American definition of trade usage as « any practice or method of dealing having such regularity of observance in a piace, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question » [55]. I disagree with the subsequent assertion that « the modern *lex mercatoria* is probably nothing other that international uniform trade practice », which tends to reflect the implications of the reference economic system; but it is certain that applying internationally uniform usages – or 'customary', to use a more evocative term – gives them considerable persuasive force over individual national judges.

The reference to usages invites us to conduct more careful assessment of their function, of their validity and effectiveness, and above all of their history. More thorough knowledge of the sources would indubitably yield constructive and important contributions.

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[53] *Ibidem*, p. 182.

[54] F. GALGANO, *Lex mercatoria: storia del diritto commerciale*, Bologna 1993, p. 43.

[55] See § 1 - 205 of the Uniform Commercial Code of the United States in *Atlante di diritto privato comparato*, ed. F. GALGANO, Bologna 1999^2, p. 43.

INDICE

Diritto canonico medievale

Scienza e pratica commerciale e marittima

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