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PECUNIA TRAIECTICIA AND PROJECT FINANCE: THE DECODIFIED LEGAL SYSTEMS AND INVESTMENTS IN RISKY VENTURES

SUMMARY: 1. *Introduction*. – 2. *The Roman concept – a universal idea?* – 3. *New types of contracts – the development of* '*pecunia traiecticia*' *in* '*ius commune*' *and in the common law*. – 4. *Decodification of law – a new hope for* '*pecunia traiecticia*'. *The phenomenon of Project Finance*. – 5. *Conclusions.*

1. *Introduction*

There are three key issues that should be addressed in the subject of *pecunia traiecticia.* First of all, a question whether the Roman concept of sea loan survived in the centuries following the Roman Empire. Secondly, did it inspire any other legal solution in the Western legal tradition? Finally, can one expect that *pecunia traiecticia* will return in the future? Answering these can help to find out whether the Roman concept of sea loan is applicable nowadays. The hypothetical revival of an ancient solution is more plausible thanks to the idea of Project Finance and the ongoing process of the decodification of private law[1].

2. *The Roman concept – a universal idea?*

To understand better the influence of the Roman law on the contract of sea loan, it is reasonable to start with the hypothesis

[1] F. LONGCHAMPS DE BÉRIER, *The Phenomenon of Decodification and the Decodification Way of Modern Thinking About Law: Ancient Legal Experience and Present Risks for Legal Systems*, in *Revista General de Derecho Romano*, 27, 2016, 1-15.

about the existence of two types of sea loans in the Roman law. The first type of loan was granted to a sailor on the sole condition that the ship will arrive safely into the port of destination. Testimony of that kind of loan can be found in the passages of Justinian's Digest and Justinian's Code. In D. 22.2.7 jurist Paulus gives an example that the debtor is obliged to pay back the loan plus interests, only if the ship arrives safely: *ut salva nave sortem cum certis usuris recipiam*. The debtor is free from the obligation if the ship did not arrive due to maritime risk, i.e. shipwreck, pirate's attack or *vis major*[2]. In C. 4.33.2 emperors Diocletian and Maximian explain that in the contract of sea loan, the privileged rates of interests were applicable until the ship arrived into the port: *quamdiu navis ad portum appulerit*. This kind of loan could have been granted either on a one-way journey or on a return voyage. The same emperors issued a constitution, which dealt with sea loan granted on a journey to Africa from the port of Salona – *ita ut navigii dumtaxat quod in Africam destinabatur periculum susceperis* (C. 4.33.4). On the contrary, Cervidius Scaevola gives an example of a return voyage from Beirut to Brindisi and the other way to Beirut – *mercibus a Beryto comparatis et Brentesium perferendis et quas Brentesio empturus esset et per navem Beryto invecturus* (D. 45.1.122).

The second type of Roman sea loan is built on the same condition as *salva navis pervenerit* and adds to that the determined term of the loan – *dies incertus* in the strict sense. The payback plus interests was possible, according to jurist Papinian, only after the end of the time limit – *post diem praestitutum et condicionem impletam* (D. 22.2.4).The effectiveness of sea loan depended not only on the condition that the ship would arrive safely but it also had to be completed within a specified time – *dies praestitutus* which was

[2] H. KUPISZEWSKI, *Sul prestito marittimo nel diritto romano classico: profili sostanziali e processuali*, in *INDEX*, 3, 1972, 373.

usually measured in days or months of sailing. After that period, the risk of journey was no longer on the side of the borrower. Jurist Cervidius Scaevola gives two examples of that term: 3 months (*per menses tres* – D. 45.1.122pr.) and 200 days of sailing (*in omnes navigii dies ducentos* – D. 45.1.122). As Papinian pointed out, after that time, the borrower could not take privileged interests and the sea loan as such was completed – of course if the ship sailed safely within the specified period – *post diem praestitutum et condicionem impletam* […] *usura faenus non debebitur* (D. 22.2.4). The second type of sea loan enables a more precise limitation of the borrower's liability. If no loss occurs during the settled period, the sea loan becomes due, even though the ship is still sailing.

Thus, there are two ways of concluding the agreement: on the safe arrival of the ship or with an attached shipping date. The first one shows that the loan could serve as an insurance. What matters, is the safe end of expedition. In the latter, the safe arrival of the ship is not so important. What is important, is making the acquisition of risk for a certain period. Without doubt, the agreed period was long enough to complete the expedition: one-way or return journey. It served to gain more influence over the debtor's shipping plans. Usually, the time limit was set to prevent the debtor from sailing during dangerous months – between November and March, when the sea was 'closed' – *mare clausum*[3]. That was the reason for establishing quite a long period of 200 days in the case of the sea loan granted to Callimachus who was told to come back before the next Ides of September – *intra idus Septembres, quae tunc proximae futurae essent* (D. 45.1.122). However, one can clearly see the possibility of an unforeseen delay on the side of the debtor. In

[3] Cfr. E. CHEVREAU, *La* '*traiecticia pecunia*'*: un mode de financemen du commerce international*, in *MHSDB*, 65, 2008, 45. *Flavii Vegetii Renati*, *Epitoma rei militaris*, 4.39.

that case, the creditor was free from the running risk and could have sued the debtor. Just like in the case of Callimachus: if there is a delay in carry on a ship expedition, according to the agreement, the debtor is obliged to pay back the loan plus interests during the voyage. This contractual provision shows that when a delay occurs, then the return to Beirut is no longer important for the borrower – *si intra diem supra scriptam non reparasset merces nec enavigasset de ea civitate, redderet universam continuo pecuniam quasi perfecto navigo* (D. 45.1.122). This contractual provision was, in fact, enforced. Scaevola reports that Callimachus' departure from Rome to Beirut was delayed. However, he continued the expedition to Beirut. Unfortunately, the ship sank – *nave submersa* (D. 45.1.122). The jurist argues that the sea loan is due because the debtor did not adhere to the contract and continued the journey beyond the settled time limit – *Respondit secundum ea quae proponerentur teneri* (D. 45.1.122). The case of Callimachus shows clearly that the second type of sea loan was in use. The distinction between the two kinds of sea loan exemplifies that in the Roman sea loan besides the flavor of insurance, there is also a taste of speculation – of investing and making money from the acquisition of risk.

Moreover, the proposed two types of Roman sea loan are confirmed at several points by the custom of the Eastern provinces of the Empire, information on which has been brought by Novel 106 from year 540. The constitution was addressed to Johannes the praetorian, prefect of the province *Oriens* – *Aug. Iohanni pp. Orientis.* As emperor Justinian pointed out, according to the legal custom – *quae aliquando antiqua consuetudo fuit* (N. 106pr.) – there were many types of sea loans known in the Eastern provinces – *modos esse varios talium mutuorum* (N. 106pr.). All of them were sea loan contracts, which Justinian calls *marina credita.* He compares them to the contract known in Roman law as *pecunia traiecticia* – *ipsa vero marina credita vocare nostra consuevit lex traiecticia* (N. 106pr.). The

pecunia traiecticia is compared to the Mediterranean custom that influenced the Roman solution[4]. One can identify three different types of these customary sea loans. In the first one, in exchange for the money received, the debtor was liable to payback plus 10% interests plus one measure of grain or wheat for each solid, and port fees[5]. In the second type, creditor received 12.5% interests. The loan was granted for an indefinite period, until the ship happily returned – *non in tempus aliquod certum numerandam, sed donec naves revertantur salvae*[6]. The third type was a modification of the second one. It appeared when the debtor took a new expedition on the way back – chose a different route or forwarded the expedition to a new sailor. If that was the case, the creditor could change the original contract and set up an individual rate of interests according to a new *pactum – per unumquodque onus definiri schema*[7]. Justinian approved, in N. 106, the sea loans that were more speculative in nature than the Roman *pecunia traiecticia*. The third type of sea loan

[4] J.R. ZISKIND, *Sea Loans at Ugarit*, in *Journal of the American Oriental Society*, 94.1, 1974, 135. Cf. C. PELLOSO, *Influenze greche nel regime romano dell'hypotheca*', in *TSDP*, 2008, 67.

[5] N. 106pr.: […] *et si quidem placuerit creditoribus, in singulis solidis pecuniarum quas dederint unum tritici modium aut hordein imponere, neque mercedem publicis praebere pro eo telonearii, sed quantum ad ipsos sine teloneo navigare naves, et hunc habere fructum earum quas crediderunt pecuniarum, et insuper etiam per decem aureos unum percipere solum pro usuris, in ipsos autem creditores respicere ex eventibus periculum.*

[6] N. 106pr.: *Si vero non sumant hanc via creditores, octavam partem percipere pro singulis solidis nomine usurarum non in tempus aliquod certum numerandam, sed donec naves revertantur salvae. Secundum hoc autem schema contingit forsan et in annum extendi tempus, si tantum foris moretur navis ut et annum aut terminos sumat aut etiam transcendat, citius autem ea remeante tempus in unum solum aut duos trahi menses, et ex tribus siliquis utilitatem habere, vel si ita breve sit tempus vel si apud alterum extra debitorem maneat debitum.*

[7] N. 106pr.: *Hoc idem valere aliam rursus negotiatoribus profectionem assumentibus, et per unumquodque onus definiri schema secundum quod competat mutuum aut manere aut permutari secundum pactum quod ob hoc convenerit partibus.*

allowed the transfer of the loan to another debtor or even re-routing the return journey, and starting a new one which was possible in the Roman law, only after the approval from the creditor[8]. In the second and the third type of customary sea loans however, we can easily identify solutions present in the Roman *pecunia traiecticia*. The sea loan could have been granted either on the condition of safe arrival of the ship – *naves revertantur salvae* or with a specified time limit – *si tantum foris moretur navis ut et annum aut terminos sumat aut etiam transcendat*. The only difference is that there were no harsh consequences for exceeding the time limit: the expedition could have lasted even more than 1 year, and even less than one month. These rules of customary loans excessively increased the risk borne by the creditor and differed from the Roman example. The crux of the matter is that the two ways of concluding the Roman *pecunia traiecticia*: on the condition or with the limit, were well known even in the legal custom of Eastern provinces. That seems to be a feature of the sea loan, which makes the idea of this maritime contract a universal, cross-border solution. On the one hand, the Roman sea loan had a twofold character: it could have served as a kind of insurance or as a speculative investment. Worth noting, it existed in a diversified legal order which was of course an uncodified legal order. *Pecunia traiecticia* competed with the Greek sea loan that gave more rights to the creditor[9] and with sea loans used in customary law of Eastern provinces, which were more speculative in nature and put the debtor in a more flexible position. Although Justinian

[8] D. 45.1.122.1: *Item quaero, si Callimacho post diem supra scriptam naviganti Eros supra scriptus servus consenserit, an actionem domino suo semel adquisitam adimere potuerit. Respondit non potuisse, sed fore exceptioni locum, si servo arbitrium datum esset eam pecuniam quocumque tempore in quemvis locum reddi.*

[9] Cf. R. RODRÍGUEZ LÓPEZ, *The Maritime Loan In The "Carrera De Indias"*, in *Revue Internationale des droits de l'antiquité*, 48, 2001, 272.

abolished the usage of customary loans already in Novel 110[10], indeed, there is a place to ask about the consequences *pecunia traiecticia* had on Western legal tradition – how the history of *pecunia traiecticia* can help understand the legal order that is not unified, in which several similar solutions compete with each other?

3. *New types of contracts – the development of* pecunia traiecticia *in* ius commune *and in the common law*

One can find references to *pecunia traiecticia* long after the end of the Roman Empire. It lasted both in theory and in practice, which is exemplified in the commentaries of Accurssius[11], Vivianus[12], and Cujas[13]. Moreover, the Roman concept was extended by Baldus de Ubaldis and in the *usus modernus* by H. Zoesius to the land transport in so called *pecunia traiecticia per terras pericolosas*[14]. Also Johannes Voet accepted this agreement, which he

[10] Cf. I. PONTORIERO, *Il prestito marittimo in diritto romano*, Bologna, 2011, 160-165.

[11] *Corpus Iuris Civilis Iustinianei, cum Commentariis Accursii, Scholiis Contii, et D. Gothofredi lucublationibus ad Accursium, in quibus Glossae obscuriores explicantur, similes & contratiae asseruntur, vitiosa notantur. Tomus hic Primus Digestum Vetus continet*, Lugduni, 1627, 2049.

[12] *Digestum Vetus seu Pandectarum Iuris civilis tomus pirmius. Ex Pandectiis Florentinis, quae olim Pisanae dicebantur, quoad eius fieri potuit, repraesentatus: Commentariis Accursii, et multorum insuper aliorum tam veterum quàm neoteoricorum Iureconsultorum scholiis atque observationibus illustratus*, Parisiis, 1566, 2066.

[13] *Corpus Iuris Civilis Iustinianei, cum Commentariis Accursii, Scholiis Contii, et D. Gothofredi lucublationibus ad Accursium, in quibus Glossae obscuriores explicantur, similes & contratiae asseruntur, vitiosa notantur. Tomus hic Primus Digestum Vetus continet*, Lugduni, 1627, 2049.

[14] H. ZOESIUS, '*Commentarius ad Digestorum seu Pandectarum*', Lovanii, 1688, *ad D. 22.2*.

referred to as *fenus quasi nauticum*[15]. According to him the risk of an attack from hostile forces or robbers on land is sufficient to apply the rules of sea loan to transports carried though dangerous territories as well. In modern times, however, the Roman concept of sea loan declined along with the development of insurance contracts[16]. It was used rather as a mere theoretical concept, mentioned in analyses regarding other types of maritime contracts: maritime insurance, bottomry loan, respondentia loan, and maritime mortgage.

R. Pothier in his commentary on Justinian's Digest referred to the Roman sea loan calling it *nauticus contractus*[17] when analyzing *cambium nauticum*. W. Blackstone, while commenting on bottomry loan and respondentia loan, gave the example of the third type of maritime contract – *usura maritima* which resembled the Roman concept to high extent[18]. On the contrary, in the German school of Roman law in the 19th century, *pecunia traiectica* was used as a mere historical concept. L. Goldschmidt or H. Sieveking[19] presented it as a past solution that served as a foundation for later development of other, more flexible maritime contracts in medieval and in modern times.

Is this the only influence that *pecunia traiecticia* had on Western legal tradition? Are these references to *pecunia traiecticia* or *fenus nauticum* the only heritage of the Roman concept? In order to

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15 J. VOET, *Lugundo-batava commentaries ad Pandectas*, 1, Coloniae, 1778, 768.

16 E. CHEVREAU, *La* '*traiecticia pecunia*', cit., 47.

17 R.J. POTHIER, '*Pandectae Justinianeae, in novum ordinem Digestae, cum legibus Codicis, et Noveliis, quae jus pandectarum confirmant, explicant aut abrogant*', 2, Pariis, 1818.

18 J. REED, *Pennsylvania Blackstone: being a modification of the Commentaries of Sir William Blackstone*, 2, Carlisle, 1831, 230.

19 L. GOLDSCHMIDT, *Handbuch des Handelsrechts*, 1, Stuttgart, 1891, 354; H. SIEVEKING, *Das Seedarlehen des Altertums*, Leipzig, 1893, 3; 47.

grasp the legacy of sea loan, it is reasonable to distinguish three ways of influence of the Roman concept on our Western tradition. The first deals with interests or profits that an investor or a creditor can gain from a risky expedition. The second refers to the way an investment in risky ventures is organized, the kind of relation, which should be preserved between the creditor, money that he invested, risky project that is carried on, and the risk that is taken over. The third deals with the shape of the debtors liability – what kind of responsibility is assumed by a person that is carrying on the risky expedition.

Having said that, let us proceed to the first subject of interests and profits. In the Roman law, interests connected with sea loan were, for a very long time, unlimited. In *Pauli Sententiae,* the rule that in case of sea loan, a borrower can be entitled to *infinitas usuras* (PS. 2.14.3) was still preserved. However, this solution was changed by Justinian in 528. He introduced the limit of interests to *centesimae* and *ultra sortem* – that they cannot exceed the principal – the amount of loan (C. 4.32.26.2). However, he still accepted the reasoning of Diocletian that the interests in a sea loan should not be governed by the statutory limits used in a typical loan – *liberam esse ab observatione communium usuraum* – C. 4.33.2 (year 286). Roman legal science, as one can imagine, inherited both solutions. The line of Accurssius, Vivanus, Cujas, H. Zoesius accepted the Justinian limitation[20], whereas the line of the French legal science, like R. Pothier and the practice of medieval Genoa, and the practice of common law followed the idea that interests should be unlimited. However they accepted the limitation of *ultra sortem*[21].

[20] H. ZOESIUS, '*Commentarius*', cit.: «*ad D. 22,2: Extenditur etiam ad usuram centesimam, idque ratione periculi, quod tanto pretio aestimabile est*».

[21] R.J. POTHIER, '*Pandectae*', cit., 339: «*ad D. 22,2: Tractationi de usuris recte subjungitur hic Titulus, qui De Nautico fenore seu de Nautico contractu agit: in quo hoc maxime speciale est, quod sub usuris ultra Centesimam licite pecunia credatur*». Cf. G.

The turning point in the history of *fenus nauticum* in the Western legal tradition was, however, the title *Naviganti* of the Decretals of Pope Gregory IX from 1234. In that decision, Gregory IX extended the ban on interests to the case of sea loans. He said that the creditor in a sea loan should be considered a loan shark. The consequences were huge for the Roman concept. Although there is a big discussion on the influence of the papal decision, one can easily connect the decline of *pecunia traiecticia* with the ban introduced by the canon law. The flourishing period of sea loan began together with the Crusades and the economical growth of the Mediterranean trade[22]. The abusive practice of sea loan, however, compelled the Pope to extend the ban on usury to the sea loans. This factor, together with the need for other types of maritime contracts, caused the disappearance of the sea loan[23]. It was not, however, a danger for the legal order. Flexibility that had an open, uncodified legal order of *ius commune,* enabled the market to immediately replace *fenus nauticum*. There was a vivid development of them – and they were many. None of them, however, inherited the complete character of *pecunia traiecticia*. The twofold character of the Roman sea loan was lost. The contracts that emerged from *pecunia traiecticia* usually inherited one of its faces. For example *cambium maritimum vel nauticum* was a speculative contract but still containing elements of insurance – namely it was used with the condition of *salva navis*. It inherited a big part of the

BLICHARZ, *Pożyczka morska w zachodniej tradycji prawnej*, in *Studia Iuridica*, 58, 2014, 9-29; B.-M. EMERIGON, *An Essay on Maritime Loans*, trans. J.E. Hall, Baltimore, 1811, 38; Q. VAN DOOSSELAERE, *Commercial Agreements and Social Dynamics in Medieval Genoa*, Cambridge, 2009, 191.

22 C.B. HOOVER, *The Sea Loan in Genoa in he Twelfth Century*, in *The Quarterly Journal of Economics*, 40.3, 1926, 497.

23 H.O. NELLI, *The Earliest Insurance Contract. A New Discovery*, in *The Journal of Risk and Insurance*, 39.2, 1972, 215.

doctrine of sea loan, which can be seen in later legal science and commentaries[24]. On the contrary, there were contracts that inherited the elements of insurance of sea loan – in Genoa *praemium*, in Florence – *ad florentinam* were used – a fictitious loan with a small premium. Both practices developed into a typical insurance contract. In Genoa, the first contract similar to an insurance contract was recorded in 1343[25]. In the Western legal tradition it was accepted, however, that the direct heir of *pecunia traiecticia* was the bottomry loan and the respondentia loan. These were loans with high interests, however their scope was narrowed significantly. The contracts were used only for maritime trade and served merely in case of necessary repairs of the ship[26]. In the 12th and 13th century, sea loan was still Roman in character and borrowed money was used for different purposes in the maritime trade[27]. Bottomry loan and respondentia loan preserved only a part of the heritage of *pecunia traiecticia*. It turns out that it was not only Justinian, who was afraid that sea loan may become a mere opportunity for speculation, a gamble. However, the history of the Roman concept shows that the end of an institution does not have to be dangerous for the legal order. *Pecunia traiecticia*, as it was said, was still present in the legal science long after the title *Naviganti*. It served as a formative factor for the legal doctrine of the new types of maritime contracts. J. Voet and R. Pothier referred to Justinian's teaching on *pecunia traiecticia* in case of *cambium maritimum vel nauticum*[28]. W. Blackstone used the Roman concept to describe and analyze bottomry loan and respondentia loan[29]. The same pattern

[24] L. GOLDSCHMIDT, *Handbuch*, cit., 412.
[25] H.O. NELLI, *The Earliest Insurance*, cit., 215.
[26] C.B. HOOVER, *The Sea Loan*, cit., 527.
[27] *Ibidem* and cf. H.O. NELLI, *The Earliest Insurance*, cit., 216.
[28] J. VOET, *Lugundo-batava commentaries*, cit., 768.
[29] J. REED, *Pennsylvania*, cit., 227-230.

was followed by the German legal science in the 19th century. L. Goldschmidt and H. Sieveking shaped their works on Bodmerei in reference to the Roman law heritage[30]. The arguments from the second title of the book 22 of Justinian's Digest were even used before the US Supreme Court in the 19th century[31]. The representative of the defendant in the case of *John Conard v. The Atlantic Insurance Company of New York* from 1828, built the argumentation favoring more speculative character of the maritime loan referring to the passage of Modestin D. 22,2,1[32]. The court denied the reasoning, however the case shows that Roman legal thought was well represented in the common law tradition.

The second way of influence on the Western legal tradition, deals with the position of the creditor and the relation that should be preserved between the invested money, carried project and the risk taken by the creditor. In the Roman law and in the Roman legal science, so called strict connection was preserved and expressed in the passage of Modestin: *Traiecticia ea pecunia est quae trans mare vehitur: ceterum si eodem consumatur, non erit traiecticia* (D.

[30] L. GOLDSCHMIDT, *Handbuch*, cit., 336-339; H. SIEVEKING, *Das Seedarlehen*, cit., 3.

[31] *John Conard v. The Atlantic Insurance Company New York*, 26 U.S. 386, 1 Pet. 386, 7 L. Ed. 189, January Term, 1828, par. 114-116, 254; *Tremont Insurance Company v. The Brig Draco*, 2 Sumner, 157 (Mass. 1835).

[32] *Conard v. The Atlantic Ins. Co. 1 Pet. S. C. R.*: Binney for the defendants: *The description of the contract is first given in the Digest, from the works of the civil lawyers. The passage above cited is taken from 'Modestinus', who was of opinion that the principle of the code in regard to 'pecunia trajectitia', was applicable to a case in which the merchandise bought with the loan, was transported by sea at the risk of the lender. But the distinction in the view of the Digest was not between goods bought, and goods not bought with the loan, but between a loan on goods transported at the risk of the lender, and a loan without any risk whatever: for this is the only sensible distinction in a title of the law which had reference to the rate of interest.*

22.2.1)[33]. The creditor was entitled to the interests, and the debtor was insured against the risk of sea only when money invested was transported through the sea or the debtor transported goods bought with that money – *Sed videndum, an merces ex ea pecunia comparatae in ea causa habentur? et interest, utrum etiam ipsae periculo creditoris navigent: tunc enim traiecticia pecunia fit* (D. 22.2.1). There had to be a strict connection between money, goods, and a risky journey[34]. Later H. Zoesius developed the idea and distinguished sea loan received *nomine mutui* and *nomine justi periculi*[35]. He just expressed that interests in sea loan are not remuneration for the use of someone else's capital, but they are the price of risk (*pretium periculi*). Sea loan granted *nomine justi periculi* was the one that fulfilled the requirement of strict connection and was not an abuse of the sea loan. In the contracts that emerged from *fenus nauticum*, especially in the bottomry loan and in the respondentia loan, these requirements were relaxed. A good example of that process can be noticed in the aforementioned case of *John Conard* from 1828. The court found that one could enter bottomry loan or respondentia loan regardless of his participation in the specific expedition even though the naval journey has already begun and one has no influence on it. The only connection that was required, was that one took over the risk of that expedition.

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[33] D. 22.2.1: (Modestinus *libro decimo pandectarum*) *Traiecticia ea pecunia est quae trans mare vehitur: ceterum si eodem consumatur, non erit traiecticia. Sed videndum, an merces ex ea pecunia comparatae in ea causa habentur? et interest, utrum etiam ipsae periculo creditoris navigent: tunc enim traiecticia pecunia fit.*

[34] Cf. the discussion in I. PONTORIERO, *Il prestito*, cit., 36 and G. PURPURA, *I. Pontoriero. Il prestito marittimo in diritto romano*, in *IURA*, 62, 2014, 412.

[35] H. ZOESIUS, '*Commentarius*', cit.: «*ad D. 22,2*, pt 3: *nisi principaliter nomine mutui receptum sit, non etiam ratione damni accepti, vel lucri cessantis, vel respectu periculi suscepti pecunia aestimabilis, uti in casu* d. l. 5. h. t. *nam tunc non tam ratione mutui quid capitur ultra sortem, quam nomine justi periculi*».

Now it is natural to proceed to the question of the liability of the debtor. In the Roman law, the debtor was free from any responsibility in case of loss. As pointed out by jurist Paulus – if the condition of *salva navis* was not fulfilled, all liens disappeared together with the obligation to pay back the loan with interests[36]. In case of success, the liability of the debtor was non-recourse: it was not personal but limited to profits from the naval journey. That is why, in the writings of Paulus, it is highlighted that creditors secured their rights on the merchandise that was carried by the sailor and not on the ship as such[37]. This limitation of liability was the reason why, in practice, a grace period after the arrival of the ship was given to the debtor. We have testimony only form the customary sea loans, in which the debtor usually had twenty days to sell the merchandise that he delivered and then repay creditors what was due to them[38]. In medieval times, the period of grace depended on the length of the route and one can imagine that a similar, quite reasonable, pattern was used in Roman law. In 12th and 13th centuries, in Genoa, the debtor was given a longer grace period than in ancient times: ranging from 60 to 80 days. Shorter

[36] D. 22.2.6: (Paulus *libro vicesimo quinto quaestionum*) *Quando ergo ad illorum pignorum persecutionem creditor admitti potuerit? Scilicet tunc cum condicio exstiterit obligationis et alio casu pignus amissum fuerit vel vilius distractum vel si navis postea perierit, quam dies praefinitus periculo exactus fuerit.*

[37] D. 22.2.6: (Paulus *libro vicesimo quinto quaestionum*) *Faenerator pecuniam usuris maritimis mutuam dando quasdam merces in nave pignori accepit, ex quibus si non potuisset totum debitum exsolvi, aliarum mercium aliis navibus impositarum propiisque faeneratoribus obligatarum si quid superfuisset, pignori accepit* […].

[38] 20 days grace period is mentioned in N. 106pr.: *Si tamen post reversionem navis salvae et nequaquam navigare propter tempus valentis revertantur, viginti et solum dierum indutias dari a creditoribus debitoribus, et nihil pro debitis usurarum causa exigere, donec vendi contingat onus.* Cf. 20 days grace period in the Greek sea loans – C. PELLOSO, *Influenze*, cit., 70.

periods of grace were also in use: from 15 days to one month[39]. However, besides these similarities in contracts that emerged from *fenus nauticum,* full acquisition of risk by the creditor and the non-recourse liability of the debtor have been abandoned. Like we could see in the *John Conard* case, creditors, due to a more speculative nature of bottomry loan and *respondentia* loan, had liens on ship (bottomry loan) and on goods (*respondentia* loan) even in case of loss – *periculum*[40]. They could sue the debtor for what survived the disaster. That right was recognized not only in American maritime contracts but also in the British bottomry and *respondentia* loans[41]. Moreover, in case of the safe arrival of the ship, the debtor was personally responsible, which was a part of common law approved at least since the times of W. Blackstone[42]. In bottomry loan, the liability was first attached to the ship and tackle, and in the next step the debtor could be personally responsible[43]. In *respondentia* loan, the liability was personal – it was relaxed by the fact that *respondentia* loan was secured by the goods and merchandise transported[44]. Personal liability of the debtor was

39 Cf. C.B. HOOVER, *The Sea Loan*, cit., 507.

40 *Ibidem*, 527.

41 Anno 19o Geo. II. A.D. 1746, Chap. XXXVII: *An Act to regulate Insurance on Ships belonging to the Subjects of Great Britain, and on Merchandizes or Effects laden thereon.*

[…] *all and every Sum and Sums of Money to be lent on Bottomree, or at Respondentia, upon any Ship or Ships belonging to any of His Majesty's Subjects, bound to or from the East Indies, shall be lent only on the Ship, or on the Merchandize or Effects laden or to be laden on board of such Ship, and shall be so expressed in the Condition of the Bond; and the Benefit of Salvage shall be allowed to the Lender, his Agents or Assigns, who alone shall have a Right to make Assurance on the Money so lent*[…]

42 J. REED, *Pennsylvania*, cit., 228: *And, in this case, the ship and tackle, if brought home, are answerable, as well as the person of the borrower, for the money lent, &c.*

43 *Ibidem.*

44 *Ibidem.*

also used in the third type of maritime contract – *usura maritima or foenus nauticum*– in which loan was made „on the mere hazard of the voyage itself" without attaching any liens[45]. These key features of decedents of Roman sea loan were presented in detail in another American court case from 19th century. In *The Brig Draco* case however, we have not only the testimony of the modern structure of bottomry loan, and *respondentia* loan. The supreme court of Massachusetts confirmed that the liability of the debtor in maritime contracts, emerged from Roman sea loan, was extended in Western legal tradition in comparison to the Roman model. In 20th century the issue was solved by the concept of company, especially limited liability company, that took over the liability[46]. The limited liability in maritime contracts were not necessary, that is why they became very narrow in application and relaxed in their requirements, becoming too risky and burdensome for debtors. The decline of bottomry loan and *respondentia* was already noticed at the end of the 19th century. However, *The Brig Draco* case seems to be also the last testimony of the powerful impact of Roman sea loan on the modern doctrines. In that case, in the name of the court, later one of the greatest US Supreme Court justices – Justice Joseph Story – made a profound analysis of the Roman law sources in the decision of the court. He followed the argumentation made by Mr. Fletcher, the representative of claimants, and extended it by the reference to Justinian Code. He presented, step by step, the Roman law sources on sea loan in order to show its universal features that should be taken into consideration when deciding the case of bottomry loan[47]. He started from passage of Modestinus (D. 22.2.1), then referred to two fragments of Paulus (D. 22.2.6

[45] *Ibidem.*

[46] A.D. KESSLER, *Limited Liability In Context: Lessons From The French Origins Of The American Limited Partnership*, in *Journal of Legal Studies*, 32, 2003, 511-548.

[47] *The Brig Draco*, 2 Sumner, 157, 181-183.

and D. 22.2.7), and finished with a reference to the constitution of Diocletian and Maximian (C. 4.33.3). Justice Story not only cited whole passages in Latin, but also considered the Roman legal science both from the civil law tradition and the common law tradition. There were references to Hugo Grotius and to later authors, like W. Blackstone, R. Pothier or B.-A. Emerigon[48]. The reasoning built on Roman law served Justice Story to broaden the scope of application of bottomry loan. This case relaxed the requirements for bottomry loan, like the *John Conard* case did for *respondentia* loan. The court used Roman law and the Western legal tradition to show that already in the ancient legal thought, sea loan had a broad character. Money that was borrowed did not have to be transported through the sea. It could be invested in merchandise or in any other way, in order to make an expedition possible. Modern bottomry loan narrowed that character and enabled investing money only in case of danger and necessary repairs or upgrades to the vessel. Following the Roman legal experience Justice Story relaxed the two requirements. The first one was in line with the Roman law. The court allowed the owner of the ship to borrow money for the expedition as such, not only for the necessities of the ship, cargo or voyage. The court made a distinction that it was possible to make such a bottomry loan only in case of the owner of a ship, whereas, in case of the master of a ship, the bottomry loan preserved its narrow scope. The second reform made by the court went beyond the Roman concept. The court allowed the owner of the brig Draco to receive a loan, even though the ship was already at sea and the money was not invested in that expedition. The court made a similar decision in the case of *John Conard* which regarded *respondentia* loan. The common law experience proves that the end of Roman concept did not end its

[48] *The Brig Draco*, 2 Sumner, 157, 183-187.

influence. Neither bottomry loan nor *respondentia* loan replaced the sea loan. In the 19th century it was clear that their scope was too narrow and did not meet the needs of the maritime trade. However, the attempts to make both contracts more flexible made them more speculative and burdensome for debtors, and on the other side, more risky for creditors who wanted more privileged rights *in rem* towards the debtor and his equipment. The relaxation of requirements on the one side showed the need for more flexible instrument that will resemble the Roman concept. On the other side, it caused the decline of medieval and modern contracts of bottomry loan, *respondentia* loan, and *cambium maritimum vel nauticium.*

4. *Decodification of law – a new hope for* pecunia traiecticia. *The phenomenon of Project Finance*

The history of *pecunia traiecticia* in the Western legal tradition shows what has changed and what has remained stable. On the one hand, the end of the ancient solution caused a vivid development of other contracts. On the other hand contracts that emerged after *pecunia traiecticia* were different in nature and there was no contract that could replace the original Roman solution. Moreover, there is still a place for a solution that can combine the three characteristics of the Roman concept. The first one is high profits from a risky project. The second is a strict connection between the investor, the carried project and the risk that is taken over. Finally, the third is a non-recourse liability combined with the acquisition of full risk. The lack of a flexible solution that could resemble the Roman concept of sea loan has become a challenge for the market of risky investments in the 20th and 21st century. Bottomry loan and respondentia loan ceased to be used due to the narrow field of

application and too much burden imposed on the debtors[49]. They started to prefer using maritime insurance and maritime liens that were not connected with high interests, but only in privileged lien[50]. However, the legislator did not react to that demands. Although in the 19th century L. Goldschmidt and H. Sieveking were sure that Bodmerei was no longer in use, it was regulated for a very long time in codes.

In France, it was removed from the Commercial Code in 1969[51]. German HGB regulated bottomry loan until 1972[52]. Spanish Commercial Code preserved a whole chapter on bottomry loan until 2014[53]. Austrian ABGB still preserves a record of Bodmerei. The legislator qualifies it as an example of a random contract (§1269). However, the regulation is already decodified by the legislator. In ABGB there is a reference to the specific regulation of Bodmerei in the statute on maritime law (§1292).

The broader issue is, however, that the regulation on bottomry loan was replaced either by specific statutes that govern maritime insurance or even by international conventions that regulate maritime liens. The first line was followed in Austria, whereas the second line was chosen by the Spanish legislator. That is the process of decodification as such. The general and codified solution is no longer regulated in one code but is spread among specific statutes or other types of legislative enactments. The process of decodification is even more complex in the matter of risky investments market. It has also been driven by many soft law regulations and uncodified practical solutions that wanted to give

[49] L. GOLDSCHMIDT, *Handbuch des Handelsrechts*, 1, Stuttgart, 1891, 354.

[50] H. SIEVEKING, *Das Seedarlehen des Altertums*, Leipzig, 1893, 3; 47.

[51] Art. 311-331 C. com. (till 1969): *contrats a la grosse aventure; contrats a retour de voyage*.

[52] §§679-699 HGB (till 1972): Bodmerei.

[53] Art. 719-736 CCE (till 2014): *del contrato a la gruesa o préstamo a riesgo marítimo*.

maritime investors more instruments of speculation and a different kind of insurance than a typical insurance contract. However, there is one phenomenon in the practice of investment market that should attract attention. There is a remarkable similarity between Project Finance and the Roman sea loan. Project Finance is a method of financing and organizing risky investments. It is not a contract but a way to use different types of contracts to do business[54]. There are two key features that distinguish it from a typical commercial bank loan[55]. First of all the payback is possible only from the profits acquired from a risky investment. Secondly, in case of loss and in case of success, there is no personal liability of the debtor that has carried the project. The liability is limited to the assets of the project – so it is a so-called – non-recourse liability[56]. There is a difference between the Roman concept of no liability in case of loss and the non-recourse liability used in Project Finance. However, the limitation of liability and the limitation of payback up to the profits of the project, seem to be universal ideas that finally returned from the times of the Roman *pecunia traiecticia*.

The ancient legal institution of *pecunia traiecticia* and the modern idea of Project Finance, are good examples of legal solutions that existed or still exist outside the codified legal structure. A broad insight into the history of sea loan shows how many different contracts were developed under the influence of *pecunia traiecticia*. Why not take advantage of that: Project Finance is not a contract, it is hard to be used by individuals[57]. On the other

[54] E.R. YESCOMBE, *Principles of Project Finance*, Oxford, 2014, 1.
[55] E. SCANNELLA, *Bank Lending in Project Finance: The New Regulatory Capital Framework*, in *International Journal of Economics and Finance*, 5.1, 2013, 218-221.
[56] T. ERME, *International project financing as contractual risk minimization arrangements*, in T.J. TEPORA, *Helsingin yliopisto, yksityisoikeuden laitos*, Helsinki, 2000, 299.
[57] B.C. ESTY, *Why Study Large Projects? An Introduction to Research on Project Finance*, in *European Financial Management*, 10.2, 2004, 213.

hand there is risk that can be taken over. There is a place for new applications of the non-recourse liability[58]. One can think especially about the market risk of small businesses or financial and market risk of startups. The risk, which was taken over in *pecunia traiecticia*, was not pure speculation. Maybe not as a sea loan, but as a contract on risk, the Roman idea can return as a type of contract that serves to take over full risk not only of forces of nature but also of market. It can serve people in starting their businesses or in financing ideas that are worth considering: space travels, IT solutions, etc.

5. *Conclusions*

The significant decentralization of legal systems in all their aspects, makes the revival of *pecunia traiecticia* more plausible. It can be a useful, less risky alternative to the instruments of a speculative nature, used in Project Finance. The history of *pecunia traiecticia* shows that a variety of legal sources is a chance, not a danger for the legal order. It shows that in the legacy of the Western legal tradition, there are solutions that can return one day. Not everything that was used in the past has lost its universal character. Having both in mind: the diversity of legal thought and the openness to legal tradition, it is more plausible to make contemporary solutions more just and effective than in the era of codification.

58 A. GARCIA-BERNABEU, F. MAYOR-VITORIA, F. MAS-VERDU, *Project Finance Recent Applications and Future Trends: The State of the Art*, in *International Journal of Business and Economics*, 14.2, 2015, 159.

ABSTRACT

The paper seeks to broaden the legal studies on the sea loan by an analysis of the western legal tradition. It undertakes an attempt to find out whether the Roman concept of the sea loan is applicable nowadays. The revival of an ancient solution is more plausible thanks to the idea of the Project Finance and the ongoing process of the decodification of private law.

The ancient legal institution of *pecunia traiecticia* and the modern idea of the Project Finance are good examples of the legal solutions that existed or exist outside the codified legal structure. A broad insight into the history of the sea loan shows how many different contracts were developed under the influence of the *pecunia traiecticia*. It was a fact in Roman law, in *ius commune* and in the common law tradition. The vivid development of contractual agreements concerning risky ventures: both on sea and on land was stopped, however, by the process of codification and by the rise of statutory liens, and insurance contracts.

The market of risky investments has started to present a challenge to the process of codification once again in the 20th and 21st century. It has been driven by many soft law regulations and uncodified practical solutions. One of them is Project Finance that today seems to be the legal regulation that is the closest to the Roman sea loan. It is an uncodified way to finance and organize risky investments. The significant decentralization of legal systems in all their dimensions, or even in their breakdown into the independent systems makes the revival of *pecunia traiecticia* more plausible. It can be a useful, less risky alternative to the instruments of speculative investment, e.g. options contracts, forward contracts, hedge contracts, and a less complicated contract than a set of instruments used in the Project Finance. Flexibility of legal

solutions used in the risky ventures, variety of legal sources and the openness to the legal tradition could make contemporary legal systems more just and effective than in the era of codification.

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