

**José Luis Zamora Manzano,
Silverste Bello Rodríguez**

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Roman Law**

Studia Prawnoustrojowe nr 9, 5-28

2009

Artykuł został opracowany do udostępnienia w internecie przez Muzeum Historii Polski w ramach prac podejmowanych na rzecz zapewnienia otwartego, powszechnego i trwałego dostępu do polskiego dorobku naukowego i kulturalnego. Artykuł jest umieszczony w kolekcji cyfrowej bazhum.muzhp.pl, gromadzącej zawartość polskich czasopism humanistycznych i społecznych.

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Studia i artykuły

José Luis Zamora Manzano

Silvestre Bello Rodríguez

Spain

Marine rescue and assistance in Roman law*

Marine rescue is, generally, a broad activity aimed at retrieving, removing, saving or assisting a vessel together with all its goods, supplies and crew in circumstances caused by various accidents such as running aground, beaching, colliding or crashing¹. This legal institution of great importance in our current Law has its origins in Roman law in the legislation of *naufragium*, which does not involve a new category or a separate branch in civil² law.

We would like to discuss some aspects that relate to marine rescue in Roman law, focusing on removal and salvage of goods on behalf of individuals as well as by *urinatores*³, divers that were in charge of the removal of

* First of all, I would like to thank the opportunity offered to us by Professor Dr. Bronisław Sitek for publishing this work and his invitation to presented it at the 2nd International, *Roman and Comparative Law in the Faculty of Law and Administration University of Warmia and Mazury in Olsztyn*. I would also like to express my gratitude for her help in translating my work into English to Sonia Daswani.

¹ Moschetti, *see. Naufragio* E.D., 547–558; Scialoja N.D.I., VII, 1939, 865 and see my monograph *Averías y accidentes en Derecho marítimo romano*, Madrid 2000, p. 75–147 on some aspects of this incident.

² Huvelin, *Études d'histoire du Droit Commercial Romain*, Paris 1929, p. 78 foll. locates the in-existent autonomy in commercial law as a separate branch from civil law “jamais les juriconsultes n’ont songé à séparer doctrinalement le droit commercial du reste du droit privé. On manque même d’un mot technique pour désigner le commerce” by also quoting Goldschmidt this stands out how the idea of a separate commercial branch does not go with the trend of the Romans towards abstraction and centralization of law (*Universalgeschichte des Handelsrechts*, 71) la tendance énergique des Romains vers abstraction et la centralisation”. About this point also see G. Sautel, *Essai sur la notion romaine de Commercium à époque ancienne*, *Études de Droit Romain*, Paris 1952.

³ Oleson, *A possible Physiological Basis for the Term urinator, “diver”*, *The American Journal of Philology*, vol. 97 (1), Spring 1976, p. 22–29. Also on the online magazine: <www.jstor.org/stable/294109> (consulta: 16.04.2008) suggest a maximum working depth between 30 and 40 m, who participated in the construction and maintenance of submarine foundations for bridges or harbour works, inspected damaged boats and anchorages, and specialized in the shallow water salvage incident upon heavy commercial harbour activity.

sunken objects. Along with the topic of removal, we will analyse the assistance given by the *scapharii* or boatmen.

We will start off from an important premise, in Roman law the retrieval and the removal of wreckage is lawful as shown in Ulpianus libr. VIII *de off. Proc.*, D.47.9.12 pr *Licere unicuique naufragium suum impune coligere, constant; idque Imperator Antoninus cum Divo patre suo rescipsit*. Antoninus already permits removals and protects the retrieval of wreckage. However, this was not always this way as legal conflicts existed that were solved in the Roman casuistry distinguishing jetsam and retrieval of objects from abandonment of goods.

Although, the structure of a legal system that regulates and protects shipwrecks was developed gradually. In fact, in the first stage, the wreckages suffered continuous pillaging as the objects that were swept back to the coast by the sea belonged to those that found them, even the shipwrecked were turned into slaves⁴. To avoid these intolerable consequences, an edict was enacted with the aim of protecting the people and the goods from these marine catastrophes⁵. Therefore, in an edict by the emperor Hadrian, all acts of larceny and pillage⁶ in shipwrecks were pursued, Callistratus libr II. Quaestionum, D.47.9.7:

Ne quid ex naufragis deripiat, vel quis extraneus interveniat colligendis iis, multifariam prospectum est; nam et Divus Hadrianus Edicto praecepit, ut hi, qui iuxta litora maris possident, scirent, si quando navis vel inflicta, vel fracta inter fines agri cuiusque fuerit, ne naufragia diripiant, in ipsos iudicia Praesides his, quia res sua direptas queruntur, reddituros, ut quidquid probaverint ademtum sibi naufragio, id a possessoribus recipiant; de his autem, quos diripuisse probatum sit, Praesidem ut de latronibus gravem sententiam dicere. Ut facilius sit probatio huiusmodi admissi permiserit his, et quidquid passos se huiusmodi queruntur, adire Praefectos, et ad eum testari eosque petere, ut pro modo culpa vel vincti, vel sub fideiussoribus ad Praesidem remittantur. A domino quoque possessionis, in qua id admissum dicatur, satis accipi, ne cognitioni desit, praecipitur. Sed nec intervenire naufragiss colligendis aut militem, aut privatum, aut libertum servumve Principis, placere sibi ait Senatus.

The text reveals the Roman's concern as regarding *direptio ex naufragio*. Callistratus already emphasizes the existence of Hadrian's Edict with which they tried to avoid larceny⁷ of goods from shipwrecks, bearing in mind that

⁴ Rougé, *La marine dans l'antiquité*, Paris 1975, p. 160. In relation to tax law in the cases of shipwreck and the study of D.14.2.9 see G. Purpura, *Relitti di navi e diritto del fisco: una congettura sulla lex Rhodia*, Studi Romanistici in tema di diritto commerciale marittimo, Messina, 1966, p. 69 foll.

⁵ Gandolfo, *La nave nel diritto romano* (1883, reed.), Genova 1980, p.196.

⁶ For the procedural aspects on the investigation and protests as described in the Codex Justinianus C.11.6 and in the Theodosian Code 13.9 see J. Zamora, *Averias...*, p. 88–101 and also in *La prueba testifical aplicada a la investigación de los naufragios según algunas constituciones postclásicas*, Actas Congreso VI Iberoamericano y III Internacional de Derecho Romano, Madrid, 2000, p. 785 foll.

⁷ He already talks about precautionary measures as regards penal suppression of this type of pillages, bearing in mind that there exist innumerable imperial orders and *senado-consultum*. Balzarini, *Ricerche in tema di danno violento e rapina nel diritto romano*, Padova 1963, p. 213.

the owners of the lands by the coastline could be called as witnesses y therefore, guarantee the retrieval of wreckage⁸. But this wasn't an isolated rule designed to protect the ownership of goods and other objects of the shipwreck. We will have the chance to see some of these legal problems that were brought up centred around the right to rescue.

1. An approximation to salvage in Roman law: protection and guardianship of wreckage against an illegitimate seizure

Roman legislation channelled the problems derived from shipwrecks in various manners, but they were always investigated⁹ as many times they were caused deceitfully. Sometimes by stealing the navigation instruments¹⁰ and others by leading the vessel with lights from the coast simulating that they were guiding it safely and instead, causing an accident against the reef resulting in sinking¹¹. With this outlook, the Roman marine salvage coordinates were located in the penal area as all those criminal behaviours that made the most of these circumstances by pillaging vessels were penalized. Therefore, an edict was enacted that punished these harmful acts with the aim of guaranteeing the interest¹² in retrieving and rescuing the goods, as it is described in Ulpianus libr. LVI *ad Edictum*, D.47.9.1 pr:

Praetor ait: in eum, qui ex incendio, ruina naufragio, rate nave expugnata quid rapuisse, recepisse dolo malo, damnive quid in his rebus dedisse dicetur, in quadruplum in anno, quod primum de ea re experiundi potestas fuerit, post annum in simplex iudicium dabo; item in servum et in familiam iudicium dabo.

⁸ For a review of this fragment and the study of the damages caused by the wreckage according to D.47.9.8 y D.10.4.5.4 see Manfredini, *Il Naufragio Adriano e Nerazio, Navires et commerces de la mediterrane antique*, homage à Jean Rougé, 1988, p. 371–377.

⁹ There was an exhaustive investigation of the shipwreck and a report to the judicial authority where the business with the purpose of transport was carried out, with the authorization of the witnesses, for which there was a time period of one year. This way, any creation o simulation of shipwreck would be known both at a private level as shown in C.11.6 and at a public level as a service carried out for the state *annona* according to CTh. 11.3 see Solazzi, *Su C.11.6 de naufragiis*, R.D.Nav. V (1939), p. 253–265 also published in Scritti di Diritto Romano, Napoli (1963), 165–174. A. Pinzone, *Naufragio, fisco e transporte marittimi nell'eta di Caracalla (Su C.I.11.6.1)* in Quaderni Catanese di studi classici e medievali 4 (1982), p. 64–109. Rougé, *Le droit de naufrage et ses limitations en Méditerranée avant l'établissement de la domination de Rome*, [in:] *Mélanges d'archéologie et d'histoire offerts à André Piganiol*, ed. R. Chevalier, vol. III, Paris 1966, p. 865 foll.

¹⁰ Reason for a precautionary measure of a *senatus-consultum Claudianum* according to Ulpianus libr. LVI D.47.9.3.8: *Senatusconsultum Claudianis temporibus factum est, ut si quis ex naufragio clavos, vel unum ex his abstulerit, omnium rerum nomine teneatur*

¹¹ Ulpianus libr. I, *Opinionum*, D.47.9.10: *Ne piscatores nocte lumine ostenso fallant navigantes, quasi in portum aliquem delaturi, eoque modo in periculum naves, et qui in iis sunt, deducant, sibi que execrandam praedam parent, Praesides provinciae religiosa constantia efficiat.*

¹² Interest that is justified by the usefulness and very just severity of the Edict D.47.9.1.1.

The legal precautionary measures¹³ in this matter were therefore aimed at protecting the injustice implied to marine trade with these acts of pillage. So, and setting off from the lawfulness of rescue and removal of wreckage¹⁴, the main aspects developed by the Roman jurisprudence were based on:

1. The lawfulness of the removal and all those acts directed to the assistance and help of people and things that were on the vessel

This right of assistance and help in accidents is inferred from the *senatus-consultum Claudianum* according to the second part of Ulpianus's fragment D.47.9.3.8:

*Item alio senatusconsulto cavetur, eos, quorum fraude aut consilio naufragi suppressi per vim fuissent, ne navi vel ibi periclitantibus opitulentur, legis Corneliae, quae de sicariis lata est, poenis afficiendos; eos autem, qui quid ex miserrima naufragiorum fortuna rapuissent, lucrative fuissent dolo malo, in quantum Edicto Praetoris actio daretur, tantum fisco dare debere*¹⁵.

The text points out the lack of assistance and help in vessels in the case of shipwreck and the robberies carried out due to this and for the punishment it refers to *lex Cornelia*, suggesting the behaviours described in it for these cases. It also mentions an important fact which is the existing relation with the *fiscus* in the sense that deterrent fiscal measures are imposed to those that carry out pillage and seizure so as to protect the right of retrieval of these goods on behalf of their legitimate owners¹⁶.

2. The prohibition of pillaging goods and wreckage, during or after the incident, to the detriment of all removals or possibility of retrieval

This jurisprudential precautionary measure is implicit in numerous fragments, where it is intended to distinguish between pillage by taking advantage of the incident from just larceny when it is carried out after the incident. So, in Ulpianus's fragment *libr. LVI ad Ed. D.47.9.1.5* the praetor states *si quid ex naufragio; hic illud quaeritur utrum, si quis eo tempore tulerit, quo naufragium fit, an vero et si alio tempore hoc est post naufragium,*

¹³ Ferrini, *Diritto Penale Romano* (1902, reed), Roma 1976, p. 230 points out that the edict equalizes the punishment to that of the *rapina*, the damage and larceny committed on the occasion of public disturbance due to calamity or disaster (as fire, shipwreck, etc) and justifies this equalness „in quanto che se la violenza non è sempre direttamente adibita da chi opera, colui che subisce il reato è paralizzato per altre cause dal timore, trovandosi in una condizione non troppo dissimile da colui, contro il quale si rivolgono minacce”.

¹⁴ D.47.9.12.

¹⁵ Bas.53.3.1.

¹⁶ However, the fiscal intervention was criticized in the private field and not in the field of the state *annona* where the captain's responsibility was minutely regulated, A. Pinzone, *op. cit.*, p. 78–79. Solazzi, *Su C.I. 11.6.*, 166 n. 5 identifies this *senado-consultum* with the above-mentioned as the end part of the fragment by Callistratus in D.47.9.7.

namque res ex naufragio etiam hae dicuntur, quae in litore post naufragium iacent. Et magis est, ut eo tempore.

It is continued by Gaius' D.47.9.2 *et loco*, continuing with the following fragment by Ulpianus D.47.9.3:

[...] quo naufragium fit, vel factum est, si quis rapuerit, incidisse in hoc Edictum videatur. Qui autem rem in litore iacentem, posteaquam naufragium factum est, abstulit, in ea conditione est, ut magis fur sit, quam hoc Edicto teneatur, quemadmodum is, qui quod de vehiculo excidit, tulit; nec rapere videtur, qui in litore rem iacentem tollit.

The regulations in these fragments mention the difference between plundering and pillage¹⁷ which take place by taking advantage of the circumstances of disturbance¹⁸, violence of shipwreck or even beaching¹⁹, to which a punishment on a level with *rapina*²⁰ is applied, and the *furtum* of goods found in the coastline.

But the Edict also provides for a punishment²¹ for the crime of receiving wreckage of a shipwreck when a third party, without having participated in the pillage, acting with *dolus*, take advantage of these objects without applying a *sensu contrario* when they are received ignoring their origin:

Non tantum autem qui rapuit, verum is quoque, qui recipit, ex causis supra scriptis tenetur, quia receptores non minus delinquit, quam aggressores. Sed enim additum est dolo malo, quia non omnis, qui recipit, statim etiam delinquit, sed qui dolo malo recipit, quid enim, si ignarus recipit, aut quid, si ad hoc recipit, ut custodiret salvaque faceret ei, qui amiserat? Utique non debet teneri²².

In the same way, it is obvious that the Edict is not applied in the cases in which the objects saved are received for their custody. But, of course, it should be clear that during the rescue, the damages caused by the objects or the vessel²³ itself, once it has reached the coastline, should be compensated. These precautionary measures are found in a text by Neracius implemented to the damage caused to the riverside the owner from the riverside

¹⁷ We understand that the delimitation given by the praetor on the concept of conquer in D.47.9.3.1 is limited and only seems to refer to the act of violence in fight, but we think that the act may also be applied to the practice of pillaging during a sinking or shipwreck either by the crew itself or by those that while assisting also committed pillaging at the same time. For this reason, it is logical to complete the concept of conquer given by Ulpianus with the one given by Paulus in D.47.9.4 *posse etiam dici ex naufragio rapere, qui, dum naufragium fiat, in illa trepidatione rapiat.*

¹⁸ They even pursued those caused by false luminous signs D.47.9.10: *ne piscatores nocte lumine ostenso fallant navigantes, quasi in portum alquem delaturi, eoque modo in periculum naves, et qui in iis sunt, deducant, sibi que execrandam praedam parent, Praesidis provinciae religiosa constantia efficiat.*

¹⁹ D.47.9.3.6.

²⁰ Ferrini, op. cit., p.230.

²¹ See D.47.9.4 on the estimation and punishments according to the people and their condition.

²² Ulpianus libr. LV ad Ed.47.9.3.3.

²³ About the retrieval of the vessel see Gandolfo, op. cit., p. 198–203.

property to which will stop the boat²⁴ and that we apply analogically to the coast²⁵. This is a particularly interesting fragment by Gaius libr. XXI Ed. Prov. D.47.9.5:

si quis ex naufragio, vel ex incendio ruinave servatam rem et alio loco positam subtraxerit aut rapuerit, fruti scilicet, aut alias vi bonorum raptorum iudicio tenetur, máxime si non intelligebat, ex naufragio, vel incendio ruinave eam esse. Iacentem quoque rem ex naufragio, quae fluctibus expulsa sit. Si quis abstulerit, plerique idem putant; quod ita verum est, si aliquod tempus post naufragium intercesserit; aliquod tempus post naufragium intercesserit; alioquin si ipso naufragii tempore id acciderit, nihil interest, ultrum ex ipso mari quisque rapiat, an ex naufragiis, an ex litore. De eo quoque, quod ex rate, nave expugnata raptum sit, eandem interpretationem adhibere debemus [...]

were any act of illegal seizure by removal, during or after the shipwreck, is protected, including the objects found by the coast. For all of these, seizure is prohibited so as to safeguard the rights of the legitimate owner.

3. The obligation to search and locate the objects thrown overboard by *iactus* due to a case of imminent danger

The Roman legislation did not only provide an interdiction for the conducts of pillage in shipwrecks and other incidents, but also stipulated an exhaustive regulation on averages²⁶ that was based on *lex Rhodia*²⁷ de *iactu*²⁸, this way taking concern about the jetsam of goods and other objects that lead to the compensation to all of those that obtained a useful result, which was included in Digest XIV, tit. II. But from the point of view of rescue²⁹ and the different types of incidents that causes jetsam, we find some texts that talk about the obligation to search and retrieve the objects:

²⁴ *Ratis vi fluminis in agrum meum delate non aliter potestatem tibi faciendam, quam si de praeterito quoque damno mihi cavisses, Neratius libr.II Responsorum, D.47.9.8.*

²⁵ The coasts had an administrative grant and, therefore, it is feasible that in the case of a shipwreck, damages were caused that had to be repaired. For more on these type of grants of the coast see S. Castan, *Régimen jurídico de las concesiones administrativas en el derecho romano*, Madrid 1996, p. 201–204 and the quoted bibliography.

²⁶ The *iactus mercium* caused is in the benefit of all the vessels and the rest of the goods. For a study of these see Zamora, *Averias...*, p. 115 foll.

²⁷ The law derives from the commercial use in the island of Rhodes Isid. *Orig* 5.17 de *legibus Rhodiis Rhodiae leges navalium commerciorum sunt, ab insula Rhodo cognominatae in qua antiquitus mercatorum usus fuit.*

²⁸ See, as well as others, De Martino, *Lex Rhodia*, Riv. D. Nav. III, 1937, 335 foll. y en *Diritto Privato e società romana*, Roma 1982, p. 72–147. For an extensive study on exegesis and translation see Ashburner, *The Rodiam Sea Law*, Oxford 1909. De Salvo, *Lex Rhodia crítica y anticrítica su D.14.2.9*, Kreller, *Lex Rhodia*, Untersuchungen zur Quellengeschichte des römischen Seerecht, Z.H. 85, 1921, p. 258 foll.

²⁹ It is understood that each one will keep for themselves what has been saved in the accident D.14.2.7.

Julianus libr. II ex Minicio, D.14.2.8: *Qui levandae navis gratia res aliquas proiciunt non hanc mentem habeant, ut eas pro derelicto habeant; quippe si invenerint ablaturus, et si suspicati fuerint, in quem locum eiectae sunt, requisiturus, ut perinde sint, ac si quis onere pressus in viam rem abiecerit, mox cum aliis reversurus, ut eandem auferret*³⁰.

The text keeps within an important premise; the objects thrown overboard to lighten the vessel are not considered as abandoned but as lost and therefore, still continue to belong to its legitimate owners. The fragment by Julianus exhorts the owners to search for and locate the objects or goods thrown overboard during marine distress. From our point of view, we think that this obligation to locate and retrieve the wreckage could be considered as one of the first jurisprudential indications of environment protection and conservation of the sea and its coast. In fact, the passage points out that if it is suspected where the wreckage could be, it should be searched for. The regulation is clear as it mentions a compulsory removal of the objects that continues to be property of the one that threw it overboard or, where appropriate, of the dockers. This act of sacrifice should not be interpreted as an abandonment or dereliction of the objects as numerous fragments vouch for:

Paul. D.14.2.2.8. *Res autem iacta domini manet, nec fit apprehendentis, quia pro derelicto non habetur. Gaius, libr. II Rerum q. D.41.1.9.8: Alia causa est earum rerum, quae in tempestate maris levandae navis causa eiiciuntur; hae enim dominorum permanent, quia non eo animo eiiciuntur, quod quis eas habere non vult, sed quod magis cum ipsa nave periculum maris effugiat; qua de causa si quis eas fluctibus expulsas vel etiam in ipso mari nactus lucrandi animo abstulerit furtim comitit.*

It is therefore obvious the non *usucapio proderelicto* of a possible rescue carried out by a third party:

Jul. libr. II ex Minicio, D.41.7.7: *Si quis merces ex nave iactatas invenisset, num ideo usucapere non possit, quia non vederentur derelictae, quaeritur, sed verius est, eum pro derelicto usucapere non posse.*

In the same way, the text by Javolenus is absolutely clear D.41.2.21.1 *quod ex naufragio expulsum est, usucapi non potest, quoniam non est in derelicto, sed in deperdito.*

From a penal point of view, the possession of these objects, without the subjective element *animus dereliquendi*³¹, means the assignment of larceny, as observed while reading D.41.1.9.8 quoted before and the fragment by Ulpianus libr. XLI ad Sab., D.47.2.43.11:

³⁰ Lenel, *Palingenesia* I, 857, 486 *De usucapionibus Iuliano ad minicium* libr II as a continuation of D.41.7.7. On the alteration of the texts Berger, *In tema di derelizione* BIDR 1915, p. 46 foll.

³¹ On the relevance of this subjective element that constitutes the centre of a possible acquisition although in the *iactus mercium ex navis* the abandonment of goods does not exist, this is not due to a lack of interest, but of a contingency that forces the throwing with the hope of retrieval S. Romano, *Studi sulla derelizione nel diritto romano*, Padova 1933, p. 139–142 and L. Vacca, *Derelictio e acquisto delle res pro derelicto habitae*, Milano 1984, p. 94 foll.

Si iactum ex nave factum alius, tulerit, an furti teneatur? Quaestio in eo est, an pro derelicto habitum sit. Et si quidem derelinquentis animo iactavit, quod plerumque credendum est, cum sciat periturum, qui invenit, suum fecit, nec furti tenetur. Si vero non hoc animo, sed hoc, ut si salvum fuerit, haberet ei, qui invenit auferendum est, et si scit hoc, qui invenit, et animo furandi tenet, furti tenetur. Enimvero si hoc animo, ut salvum faceret domino, furti non tenetur; quod si putans simpliciter iactatum, furti similiter non tenetur.

This last fragment, together with D.41.1.9.8, considers larceny the seizure on behalf of a third party over objects found, knowing that their origin is *iactus*, and that have been thrown overboard to rescue the other objects and the vessel³² itself. But the second part of the fragment talks specifically about a voluntary rescue of the objects, in which the intervention of the individuals does not imply an act of seizure as their intention is to save the objects for their legitimate owners.

In the Basilika we can also find references to the rescue of wreckage, specifically in the regulation from the rhodium law contained in it in the Book LIII tit. VIII frag. 31:

Si mercator navem oneraverit, et navi quid acciderit, omnia quae salva supersunt, in contributionem utrimque veniat. Quodsi argentum salvum fiat, quintas solvat: magister vero cum nautis opem ferat, ut servetur.

In the fragment about rescue and the involvement of money, a fifth of the value of the wreckage is compensated, the last part stands out in how the Master with his sailors have to work to retrieve everything and so, proceed to the rescue of the goods during marine distress. We see how in these cases the crew itself takes part in the rescue of the goods, but in numerous times other individuals take part in the removals as we will analyze in the next section.

2. Findings and removal on behalf of individuals and divers (*urinatores*)

In this section we are going to distinguish the rescue of goods carried out voluntarily by a third party from the rescue where professional divers are hired to be in charge of dredging and locating the objects.

1. Voluntary rescue carried out by a third party without a contractual relationship with the owners

In these cases we stand before the rescue of goods from a vessel that has thrown them overboard to save itself and the rest of the objects. To start off from, in these cases the individuals:

³² D.41.2.21.2: *Idem iuris esse existimo in his rebus, quae iactae sunt, quoniam non potest videri id pro derelicto habitum, quod salutis causa interim dimissum est.*

1) Should act knowing that the rescue of the wreckage or of the vessel does not entail the acquisition *pro derelicto* in his favour, otherwise it would be classified as larceny, as it is inferred from the end part of D.47.2.43.11: *Si vero non hoc animo, sed hoc, ut si salvum fuerit, haberet ei, qui invenit auferendum est, et si scit hoc, qui invenit, et animo furandi tenet, furti tenetur. Enimvero si hoc animo, ut salvum faceret domino, furti non tenetur; quod si putans simpliciter iactatum, furti similiter non tenetur.*

2) Will act voluntarily in the collection of goods, proceeding to its rescue awaiting the claim on behalf of its owners, which also stops from classifying the act as larceny. This is basically deduced from: *proinde videamus, si nescit, cuius esset sic tamen tulit, quasi redditurus ei, qui desderasset, vel qui ostendisset rem suam, an furti obligetur*³³.

3) Should report the findings or, where appropriate, the removal, the latter being less common by individuals, of the objects that were in the sea or obviously in the coast, with the aim that the those concerned may be informed of the rescue and so may proceed to claiming it: *solent plerique etiam hoc facere, ut libellum proponant continentem, invenisse et redditurum ei, qui desideraverit; hi ergo ostendunt, non furandi animo se fecisse*³⁴. At the same time, this need to report the findings emphasizes that the individual acts without the intention of acquiescence of the wreckage or goods thrown overboard that belong to their owner.

This action on behalf of the individuals that spontaneously take part in the retrieval of wreckage, many times without the knowledge and consent of those concerned, that is why it is so important to report the findings, allows us to classify the contractual nature of their voluntary contribution as a *negotiorum gestio* and therefore, any claim on behalf of the owner permits the finder to receive the necessary expenses for the preservation of the objects found and the compensation of the damages generated in his property, as we have pointed out before.

Therefore, due to the spontaneity of the service carried out by a third party as a substitute or alter ego of the dockers that lost the goods, we cannot talk about a legal obligation or a contractual unlike the rescue carried out the *urinatores*, that, as we will see further on, receive a remuneration and therefore, this sets a real precedent of a current contract of rescue. That is, the spontaneous service carried out by individuals in this case has to be distinguished from an agreed or a contractual one.

³³ D.47.2.43.8.

³⁴ Ibidem.

2. The rescue and retrieval of goods by divers or *urinatores*

Numerous sources vouch for the existence of *urinatores*³⁵, Varrus L.lat 5.126.³⁶ *urnae dictae, quod urinant in aqua haurienda ut urinator, urinare est mergi in aquam* describes any individual that immerses in water. Since distant times, they were in charge of carrying out numerous subaquatic activities. In fact, they were used as units of combat in a large number of wars, in which they were entrusted to sink, attack³⁷ or set on fire vessels³⁸ etc. They were also organized by setting up an important corporation as it is inferred from the inscription of the epigraph³⁹ C.I.L. VI.1872 that mentions a corporation of fisherman and divers in the river Tiber (206 A.C.):

*Ti. Claudio Esquil(ina) Severo - decuriali lictori patrono - corporis piscatorum et - urinator(um), q(uin) q(vennali tertium) eiusdem corporis - ob merita eius - quod hic primus statuas duas, una(m) - Antonini Aug(usti) domini n(ostri), aliam Ili(iae) - Agustae dominae nostr(ae) s(ua) p(ecunia) p(osuerit) - una cum Claudio Pontinano filio - suo eq(uite) Rom(ano), et hoc amplius eidem - corpori donaverit (sestertium decem) mil(ia) n(ummum), - ut ex usuris earum quodamnis - natali suo (ante diem decimum septimum) k(alendas) Febr(uarias) - sportulae viritim dividantur, - praesertim cum navigatio scapharum diligentia eius adquisita - et confirmata sit. ex decreto - ordinis corporis piscatorum - et urinatorum totius alv(ei) Tieber(is), quibus ex s(enatus) c(onsultio) coire licet, s(ua) p(ecunia) p(osuerunt) - Dedic(ata) cet*⁴⁰.

It seems that the corporation, authorized since the Principality by virtue of the *senado-consultum*⁴¹, grouped together fishermen and divers. However,

³⁵ For the etymology of *urinator* see Walde-Hofmann, *Lateinisches Etymologisches Wörterbuch* v. II, Heidelberg 1954, 840 the etymology is based on the text by Varro *urinator* one that dives under the water. Ernout-Mellet, *Dictionnaire Etym. langue latine*, Paris 1959, 755 (=Plongeur). Dirksen, *Manuale latinitatis fontium i.c. Romanorum*, Berlin 1937, 1019 *urinator* (=qui sub aqua natat). Heumann Seckel, *Handlexikon*, z.d. Quellen des Römischen Rechts, 1914, p. 604 v. *Urinator* (=Taucher).

³⁶ See, Oleson, op. cit., p. 27.

³⁷ Plinio, *H. Nat* IX.30.48 talks about the atrocious attack on the *urinatores*: *Praetera negat ullum atrocius esse animal ad conficiendum hominen in aqua. Luctatur enim complexu et sorbet acetabullis ac numeroso suctu diu trahit, cum in naufragos urinantisue impetum cepit.*

³⁸ In Caesar's wars against Pompeii 49 BC, Cassius narrates the use of these divers for war in the creation of combat for attacking that causes the beaching and shipwreck of vessels, see Cassius Dion, *Hist. Rom.* 42.12.2.

³⁹ Oleson, op. cit., p. 23 talks about the specialization of the Ostian guild was probably fostered by the greater volume of business and consequently higher enrolment in the port, as well as the absence of interest common to the local fishermen, who would not have fished the harbour waters. The river diver probably worked on much the same tasks as the harbour diver – recovery of goods lost overboard during loading and unloading, the inspection of hulls and anchorage – with additional function of assisting in the construction and maintenance of the footings below the numerous Tiber bridges. See also CIL 1080, 29700, 29702. About the etymology of the term *urinator* see also p. 24 foll.

⁴⁰ In the same way, *Inscriptionum Orelli* 4115., works on other inscriptions referring to this corporation of divers in C.I.L. VI 29700, 29701.

⁴¹ De Robertis, *Storia delle corporazioni e del regime associativo nel mondo romano*, Bari 1971, vol. I. 218, n. 60.

another one existed in Ostia⁴² that carried out port activities, but does not differ from the one mentioned before. In either case, the *corpus* acquires the level of an authorized association recognized as an organ by the State⁴³, which allows it to work in favour of the state *annona* saving their objects.

Regarding rescue, the *urinatores*⁴⁴ carried out the task of removal and rescue of goods not only in the sea but also in rivers. Although their intervention in subaquatic removal expeditions was limited due to a lack of technical means, rescues in shallow waters and being ballasted with stones in docks and rivers⁴⁵. Logically, we think that their intervention was carried out in the field of all the types of averages and marine accidents, jetsams, shipwrecks, beachings, etc. However, we also share Rougé's opinion of their likely intervention in the port itself, even in the activities of refloating the vessel.

Callistratus in *Quaestionum* libr. II, D.14.2.4.1 talks about the removals on behalf of the divers⁴⁶ and about their missions of removal and rescue of goods:

*Sed si navis, quae in tempestate iactu mercium unius mercatoris levata est, in alio loco summersa est, et aliquorum mercatorum merces per urinatores extractae sunt data mercede rationem haberi debere eius, cuius merces in navigatione levandae navis causa iactae sunt ab his, qui postea sua per urinatores servaverunt, sabinus aequae respondit. Eorum vero, qui ita servaverunt, invicem rationem haberi non debere ab eo, qui in navigatione iactum fecit, si quaedam ex his mercibus per urinatores extractae sunt: eorum enim merces non possunt videri servandae navis causa iactae esse, quae perit*⁴⁷.

The text refers to an unsuccessful lightening of goods as the vessel is not saved, even though the *urinatores*⁴⁸ manage to save some of the goods. The rescue operation, as we may deduce from the fragment, is in return of an interest or favour, *urinatores extractae sunt data mercede rationem haberi*

⁴² Inscription of Ostia in C.I.L.XIV.303.

⁴³ With the same point of view E. Gandolfo, op. cit., p. 202.

⁴⁴ Rougé, *Recherches sur L'organisation du commerce maritime en méditerranée sous L'empire romain*, Paris 1966, p. 200 sobre funciones de esta corporación señala que „sont eux qui vont chercher au fond des bassins des ports, des rivières o de la mer, dans ses régions peu profondes non loin de la côte, les marchandises qui avaient pu y tomber, soit accidentellement, soit à la suite d' un jet, soit à la suite d' un naufrage”.

⁴⁵ In the field of arqueology A. Tchernia, *Les urinatores sur l' épave de la madrague de giens, publicado en Navires et commerces de la mediterranee antique*, hommage à Jean Rougé, 1988, p. 490–497, the retrieval of amphoras stand out in this study.

⁴⁶ Plinio, *H. Nat.* IX.30.48.

⁴⁷ Lenel, *Palingenesia* I, 98, p. 102, appears with the fragment 107 D.47.9.7 quoted before regarding the protection of shipwrecked objects.

⁴⁸ On removal of *pecuniae* from the final years of the Republic Tit. Liv. XLIV.10.3: *Incautior Nicias Pellae proiciendo pecuniae partem quae fuerat ad Phacum sed in re emedabili visus lapsus esse, quod per urinatores omnis ferme extracta est. Tantusque pudor regi pavoris eius fuit ut urinatores clam interfici iusserit...* See Wieacker, *Iactus in tributum nave salva venit*, Studi Albertario I, 1953, p. 523.

debere eius, which, from our point of view, means a contractual relation between the dockers and owners with the divers in charge of executing it.

As we have said before, unlike voluntary rescues carried out by a third party in which there exists no contract, here the references to the provision of services of *urinatores* in return of retribution, gives us the chance to affirm that we are in the presence of a *locatio conductio operarum*. All the elements are present to consider it that way:

1) Individuals *locatores*, on one hand the *urinatores* and, on the other hand, as conductors, the affected in the incident. Here, we extend this application not only to the cases of jetsam, but to any incident.

2) Object of the rescue, removal of goods and other wreckage *mercatorum merces per urinatores extractae* both in cases of averages and of any accident.

3) Retribution for the provision of services for the removal of wreckage, which allows distinguishing in these cases a contractual service from the spontaneity carried out without a contract. From our point of view, this retribution guaranteed with the concession to the savers of a right to retain the objects, that was established to guarantee the compensation in the settlement of averages⁴⁹, but that also applies to our cases.

In the same way, the extract with the same content is reflected in Paul. Sent. II.7.1: *Iactu navis levata si perierit extractis aliorum per urinatores mercibus, eius quoque rationem haberi placuit, qui merces salvanave iactavit*⁵⁰.

The text shows a summary of the above, the decision of Callistratus supported by Sabinus, that connects two institutions: the rescue and removal of shipwrecks with the averages, as the compensation given in any average makes sure that those that save the goods compensate those that have suffered the *iactus*⁵¹.

So this way, those that saved the goods will be able to carry out the contribution in favour of the one that initially lost his because of a jetsam. However, the text sets out that the vessel finally sinks, so therefore the expenses of the removal will be on behalf of those that wished to save the objects, this is, the one that was initially affected by the jetsam, even if his objects are later retrieved. He is not obliged to contribute to the losses of a subsequent shipwreck. That is why the appearance of wreckage, be it naturally due to the waves or due to the provision of services by the *urinatores*, in rivers or in the sea, causes an important legal effect on averages and

⁴⁹ See D.14.2.2.pr. and the interpretation by Marrone, *D.14.2.2 pr retentio e iudicia bonae fidei*, IURA 6, 1955, p. 170 foll.

⁵⁰ De Martino, *Lex Rhodia...*, 117 states: “tanto il titolo 14.2 D. che P.S.2.7 derivano da una fonte postclassica, cioè da una compilazione sulla lex Rhodia, che doveva esser diffusa nelle scuole, data l'importanza che il tema aveva assunto fra i cultori del diritto e fra i retori”.

⁵¹ See my monograph op. cit., p. 167–182.

that is that the compensation is disregarded in favour of the one that was affected by the jetsam⁵².

The same happens with the appearance of a vessel when there exists any type of security interest as Gandolfo⁵³ points out, that distinguishes, depending on the degree of intensity of the storm⁵⁴, a common reason of sinking, the possibility of rescuing the vessel y its state emphasizing on the importance of the *urinatores* in the removal activities, as the retrieval and refloating of the vessel influences the continuation of the obligation and right that the secured creditor possesses, that's why the importance of the rescue and the removals.

The owners⁵⁵ of the wreckage are obliged to locate and remove as we said before and not only in the cases of jetsam, but in all accidents.

D.14.2.8: *qui levandae navis gratia res aliquas proiicunt non hanc mentem habent, ut eas pro derelicto habeant; quippe si invenerint eas ablaturus, et si suspicati fuerint, in quem locum eiectae sunt, requisiturus, ut perinde sint, ac si quis onere pressus in viam rem abiecerit, mox cum aliis reversurus, ut eandem auferret.*

Here we also notice how one may leave something along the voyage due to the need of avoiding a bigger disaster so that others can rescue or save the objects. It indirectly mentions the normal practice of rescue and its need in a situation of danger in which abandonment is dismissed. It seems to be that the classical jurisprudential precautionary measures oblige an inevitable and involuntary rescue. It does not limit itself to advising, it forces the retrieval and removal of the wreckage either by the crew itself or by a third party, protecting the location and the removal of wreckage as we saw before in D.47.9.12 *licere unicuique naufragium suum impune coligere.*

However, we are able to affirm that a connection may exist between rescue carried out by individuals and the one executed by the *urinatores*, the latter in the cases that no *locatio* exists. Therefore, in the case of a finding, this should be, where appropriate, compensated as it is described in the text by Ulpianus libr. 41 ad Sabinum D.47.2.43.9: *Quid ergo si inventionis praemia quae dicunt petat? Nec hic videtur furtum facere etsi non probe petat aliquid.*

⁵² Obviously, if the compensation already took place without waiting for the search and location of the wreckage, action should be filed against the person that obtained the benefit in the settlement to refund the amount *si res quae iactae sunt, apparuerint exoneratur collatio, quodsi iam contributio facta sit, tunc hi, qui solverint, agent ex locato cum magistro, ut is ex conducto experiatur, et quod exegerit, reddat, Paulus libr 34 ad Ed.D.14.2.2.7.*

⁵³ Gandolfo, op. cit., p. 239.

⁵⁴ Most of the sources talk about storm amongst others see D.14.2.4.1, D.14.2.6, Paul. Sent.2.7.2.

⁵⁵ The retrieval of wreckage was common and the search for them stopped from thinking it could be a possible abandonment Vacca, op. cit., p. 96: "e non sembri assurdo che si potesse pensare di recuperare le cose proveniente da naufragio o da iactus, ch e anzi nella pratica il recupero di alcuni tipi di merci tramite gli *urinatores* doveva essere abbastanza frequente".

In this way, it is understood that in the cases of voluntary rescue, either done by individuals or carried out by divers freely, compensation may exist so as to compensate that rescue. It is obvious that a useful result is needed, as we have said before, it should be reported so that the legitimate owners have knowledge *solent plerique etiam hoc facere, ut libellum proponant contententem, invenisse et redditurum ei, qui desideraverit; hi ergo ostendunt, non furandi animo se fecisse*⁵⁶.

The search and removal of wreckage, executed by the *urinatores* or by individuals, is a rescue activity that has already been considered by the Romans and in which case the main budget, with an eye on remuneration or compensation, is a useful⁵⁷ result for the vessel and its objects in the case of marine distress. This remuneration in the cases of *locatio* or the compensation in the cases where there is no contractual relationship, is subject to the value of the thing saved as we can gather from the fragment by Paulus D.14.2.2.4: *Portio autem pro aestimatione rerum quae salvae sunt*. Although the text refers to the regulation of the estimation and value of the averages with an eye to compensation, the valuation used may be applied to the cases we are analyzing.

Likewise, there is a direct relation between rescue and the compensation in averages as the retrieval of all the objects, whether it's for rescue or removal from the sea, when they have been thrown overboard to lighten the vessel and its goods, are object of valuation when rectifying the compensation quota when the settlement of the average has taken place, as inferred from Paulus en D.14.2.2.7:

si res, quae iactae sunt, apparuerint, exoneratur collatio, quodsi iam contributio facta sit, tunc hi qui solverint, agent ex locato cum magistro, ut is ex conducto experiatur, et quod exegerit reddat.

The danger involved in the rescue operation of the ship's wreckage and its cargo takes the shape of a parameter when calculating the remuneration. For this latter aspect, we have a text from the Basilika from the Rhodium sea law Bas. 53.8.47:

si aurum vel argentum, vel aliud quidpiam ex profundo sursum latum fuerit cubitis octo, tertiam partem accipiat is, qui conservat: sin a quindecim cubitis, semissem consequatur is qui conservat, propter periculum profunditatis. Eorum vero, quae a mari reiciuntur in terram, et ad unum cubitum demersa reperiuntur, decimam partem accipiat is, qui salva exportat.

⁵⁶ D.47.2.43.8.

⁵⁷ This requirement is clear regarding compensation according to D.14.2.4.1 where it points out *urinatores extractae sunt data mercede*, it may be deduced that there should exist a useful finding or retrieval of the objects.

This passage mentions the extraction of precious metals and other objects to which the both forms discussed before may be applied. In the case of rescue by individuals or by the *urinatores*, if professionals take part, or not, may affect the success of the retrieval. Before, we said that in this period some limitations existed in removal and diving due to the lack of technical means. However, an important innovation should be pointed out and this is that the text is based on the valuation of the risk involved in the removal operation keeping in mind the depth at which it is carried out:

1) The retrieval of the wreckage in 8 cubits depth means the collection is valued in a third of it. Although we may also interpret that the remuneration consists in the value of the things found.

2) If the removal takes place in 15 cubits depth, the collection increases to up to half the value.

It's obvious that both cases are based on the risk of the rescue operation according to the depth; the bigger the risk, the higher the retribution, provided that the removal is achieved. The end of the fragment mentions just a finding in the coast; in this case there is no type of special subaquatic activity, but rather one has accidentally come across a floating object that reaches the coast. Due to the absence of danger in the operation, unlike the previous cases, the collection pointed out is justified in a tenth of the value.

We can also find references to rescue of skiffs or smaller vessels that may be drifted Bas. 53.8.46:

Si scapha, funibus, quibus navis ligata erat, ruptis, cum navigantibus in ea nautis eversa fuerit, et nautae perierint aut obierint, mercedem annuam usque dum annus integer fuerit, nautarum heredibus solvatur. Qui vero scapham ipsam incolumem servat cum instrumentis, restituat omnia, quemadmodum reapse invenerit, mercedis loco partem quintam accipiens.

In this case, disregarding the first part, that talks about the wages of the sailors that die in the skiff, the text comments on the rescue of the auxiliary vessel, we do not know if it's by removal or finding as it cannot be inferred clearly from the text, but the fact is that the compensation is valued in a fifth of the value in equal proportions to those cases in which the rescue of goods is carried out during marine distress⁵⁸.

3. Assistance and rescue of boatmen

The assistance does not really mean a rescue, removal or finding, it means help in danger situations in which the vessel that is in danger may collaborate with help of smaller vessels or skiffs that will form a body

⁵⁸ Bas 53.8.45: *si navis in mari correpta vorticibus aut corrupta fuerit, qui aliquid in terram ex ea salvum exportat, mercedis loco rei conservatae quintam partem consequatur*

of organized boatmen *corporatorum scaphorium*⁵⁹ as described in different epigraphic sources. Tracking epigraphic sources allows us to discover the existence of professional associations in the marine field. Numerous references to the existence of this body of boatmen stand out in Ostia and also in Hispania, in the Baetica area and in Seville⁶⁰.

The Romans did not clearly distinguish rescue or assistance or theorize about these institutions. Although, from the juridical sources, their knowledge about institutions that deal with the retrieval, removal and rescue in the sea may be deduced. As well as assistance and help to vessels.

Regarding the boatmen and their activities, they provided:

1) assistance; tugging vessels⁶¹ and also in the manoeuvre for berthing in the ports;

2) tranship of goods, either during an average or for the unloading of the goods;

3) and we also think that they carried out collaboration tasks in the finding and rescue of goods.

There is no doubt about the importance of the *scapharii*⁶² as regards rescues and also the assistance they give to the rest of the vessels, both in rivers and in the sea, with the aim of reaching the expedition safely. The activity mentioned in the juridical sources mentions above all the assistance in tranships in the cases of averages.

Callistratus emphasizes the assistance by tranship of skiffs in the entrance of a port or of a river in Quaest. II, D.14.2.4 pr:

*Navis onustae levandae causa, quia intrare flume vel portum non potuerat cum onere, si quaedam merces in scapha traiectae sunt, ne aut extra flumen periclitetur, aut in ipso ostio vel portu eaque scapha submersa est, ratio haberi debet inter eos, qui in nave merces salvas habent, cum his qui in scapha perdidit, proinde, tanquam si iactura esset, idque Sabinus quoque libro secundo Responsorum probat. Contra si scapha cum parte mercium salva est, navis periit, ratio haberi non debet eorum, qui in nave perdidit, quia iactus in tributum nave salva venit*⁶³.

⁵⁹ Inscription in the port of Ostia CIL XIV.409 = Orelli 4109: *item corpor(atorum)-scaphariorum et lenuncularior(um) traiec(us) Luculli et – dendrophorum et togator(um) a foro et de sacomar(is) [...] that does not have a name for the port where the duties are carried out due to its itinerary nature unlike others that are appointed to certain places Baetis scapharii Hispanenses CIL II.1180(167) y scapharii Romulae consistentes II.1183 also see CIL II.1168,1669.*

⁶⁰ D'Ors, *Epigrafía jurídica de la España romana*, Madrid, 1953, p. 383, 390–392 shows that the inscriptions on the associated organization belongs to a second period in which they were authorized for public utility and that during the fall of the Empire is converted into necessary corporations together with the *navicularii*.

⁶¹ Festus, *Pauli Excerpta* 279 (Lindsay 347) *Remulco est, cum scaphae remis navis magna trahitur. (281) Promulco a fi dicitur navis, cum scaphate) ducitur fune.*

⁶² Walde-Hofmann, op. cit., p. 489; Ernout-Mellet v. *Scapha*, 600 boat-ship (etym. *scapharius – scaphonis. scaphula*), V.I.R. V,257. Dirksen, op. cit., 864 = *navicula exigua*.

⁶³ Paul Sent. 2.7.4: *Levandae navis gratia merces in scapham transiectas atque ideo amissas in tributione earum, quae in navi salvae erunt, refici convenit; nave autem perdita conservate cum mercibus scaphae ratio non habetur.*

From the text⁶⁴ it may be inferred that the assistance that the *scapharii* carry out is transshipping the goods to a smaller vessel that is allowed to enter in the port or cove with the probable aim of unloading the goods. But the fragment has two parts to it. In the first one, endorsed by the jurist Sabinus, it talks about an unsuccessful assistance in tranship that implies a duty of compensation on behalf of those that have saved the goods in the main vessel. In the second, it is the transferred goods that are saved, but, as the useful result is not obtained; avoid the sinking of the main vessel, there is no compensation.

But sometimes that tranship seems to obey a mere whim that obliges the marine surveyor to respond in the cases of sinking of the skiff as testified by Labeón in D.14.2.10.1:

*si ea conditione navem conduxisti, ut ea merces tua portarentur, easque merces nulla nauta necessitate coactus in navem deteriolem, cum id sciret te fieri nolle transtulit et merces tua cum ea nave perierunt, in qua novissime vectae sunt, habes ex conducto locato cum priore nauta actionem. Paulus: imo contra, si modo ea navigatione utraque navis periit, cum id sine dolo et culpa nautarum factum esset*⁶⁵.

This passage gives us enough evidence to affirm that the vessel to which the goods are transhipped, which is not justified in the text as there seems to be no reason for the transfer, should be adequate to avoid an unsuccessful assistance. However the text in question deals with the tranship from an internal contractual point of view, that is to say, the one responsible for the *locatio* of transport of goods, is, at the same time, in charge of carrying out a tranship to other smaller vessels that may even belong to the crew⁶⁶ itself or to the boatmen. Although this last interpretation is not the one of the case, as it does not mention tranship to skiffs like in the previous fragment, in search of a useful result in navigation and in transport.

The *scapharii* or boatmen had a significant role in port traffic, not only in tranship of goods to lighten the vessels⁶⁷ and improve the navigability in

⁶⁴ De Martino, *Lex Rhodia...*, p. 111.

⁶⁵ In that sense, there is a fragment by Ulpianus, D.19.2.13.1 in this case the tranship takes place to be able to sail a river which justifies the assistance to another vessel, although the responsibility in case of an unsuccessful result fall upon the captain of the vessel in the cases in which it is proved that it is his fault for carrying out an unnecessary tranship or in an inadequate: *si navicularius onus Minurnas vehendum conduxit, et cum flumen Minturnense navis ea subire non poste, in aliam navem merces transtulit, eaque navis in ostio fluminis perierit, tenetur primus navicularius, Labeo, si culpa caret, non teneri ait, ceterum si vel invito domino fecit, vel quo non debuit tempore, aut si minus idoneae navis, tunc ex locato agendum.*

⁶⁶ As a complementary boat that drags the vessel and that is used in the cases of shipwreck and other accidents.

⁶⁷ The sailing of these skiffs were not free from accidents in which the responsibilities were purged based on *lex Aquilia* according to the damage caused to the boat *si navis tua impacta in meam scapham damnum mihi dedit, quaesitum est, quae actio mihi competeret? Et ait Proculus si in potestate nautarum fuit, ne id accideret, et culpa eorum factum sit, lege Aquilia cum nautis agendum*, Ulpianus, libr. XVIII ad. Ed. D.9.2.29.2.

ports and rivers, but also, as we have said before, in the manoeuvre in ports, piloting the vessels and even towing the vessels⁶⁸. Even though the judicial sources in this matter are scarce, their intervention may also have carried out in the field of removal together with the group of the *urinatores*.

Logically, the intervention of the *scapharii* obey a contractual relationship of hiring, in which they provide a service in any of the types, be it tranship, towing for the berthing of vessels and even assistance in the removals, together with the divers, in exchange of a compensation that will be according to the useful result obtained and of the goods itself. In our judgment, it will not be a big quantity, but it will be according to the number of amphora embarked as it may be analogically inferred from the fragment by Labeón, although this fragment refers to the hiring of the vessel according to its capacity in amphora.

D.14.2.10.2: *Si conduxisti navem amphorarum duo millium, et ibi amphoras portasti, pro duobus millibus amphorarum pretium debes. Paulus imo si aversione navis conducta est, pro duobus millibus debetur merces; si pro numero impositarum amphorarum merces constituta est, contra habet, nam pro tot amphoris pretium debes, quot portasti.*

4. A brief reference to the reception of Roman law in Spanish historical law and in the supranational regulations

We have said that Romans tried to protect pillage and the condition of the shipwrecked goods with penal sanctions for seizure, but during Middle Ages reached the *ius naufragii* as a legal right or attribute to the riverside feudalists that allowed them the seizure of the goods that reached their coast⁶⁹. In view of this situation, canon law⁷⁰ played an important role and like Roman regulation, tried to pursue acts of pillage in shipwrecks.

⁶⁸ De Salvo, *I Corpora naviculariorum*, Messina, 1992, ensures the help given by the boatmen in the port maneuvers, see note 516 .

⁶⁹ Morral, *El salvamento marítimo*, Barcelona 1997, p. 68 foll., on the protection of the church and its role in this matter that tried to abolish the *ius naufragii*.

⁷⁰ In Gregory's decretals IX.17.5: *Excommunicatione quoque subdantur qui Romanos aut alios cristianos, pro negotiatione vel aliis honestis causis navigio vectos, aut capere aut rebus suis spoliare praesumunt* excommunication is imposed to those that dare to take or sack, therefore condemning the acts of pillage. We also find some bulls that protect the salvage of goods, considering that possession continues belonging to the owner as we have also seen in Roman law and establishes economic compensations to those that help in the retrieval of wreckage. See, amongst others, the bull *Romanus Pontifex* Pope Julius II de 1509, and Pope Paul III de 13 de Marzo de 1545 *Accepimus Nuper* la de Pio de 1566V *Cum Novis*. For a study on the ecclesiastic repression of these conducts see Schiapoli, *Il ius naufragii secondo il Diritto della Chiesa*, R.D.N. I, 1938, p. 147 foll.

In medieval times, the Rôles d'Oléron stands out which finds its origins in Roman law as it also protects the collection and rescue of wreckage⁷¹ in shipwrecks and averages⁷² in which jetsam does not imply abandonment, pursuing an act of pillage due to shipwrecks. Likewise, a protection of removals and remuneration of the rescue⁷³ is set in proportion to the value of the thing saved. However, we will have to wait to the French Ordinance of 1681, which was carried into the French Commercial Code of 1807, for the complete abolition of the medieval shipwreck law declaring the protection of the vessel, crew and cargo that has been thrown overboard to the coast⁷⁴.

In Spanish law we find precedents that also derive from Roman law in the Fuero Real (1255) [Royal municipal code] title XXIV, law 1 protects the property of the objects shipwrecked or thrown⁷⁵ overboard considering the seizure of these objects as larceny. Roman law also marked el Código de las Siete Partidas (The Seven Part Code) by Alfonso X the Wise of Castile (1256–1263) in where his Partida V (Fifth Part) title IX systematized regulations relating to marine law. So, regarding the matter we are dealing with in the first place, we have to point out that law 6⁷⁶ that directly derives from D.14.2.4.1 and, consequently, protects the removals of objects from an *iactus*, protects the property of the goods from a shipwreck or jetsam; the finder has to give it back to its legitimate owner. Unlike the text from the Digest previously mentioned, the Partida or Part is more summarized and does not

⁷¹ See section 36 to 41 confirming again excommunication in canon law in acts of seizure governing also the compensation for rescue, section 36: “[...] et le maistre et ses mariniers ou l’un d’eux eschappe et se saulve, ou les marchans, le seigneur du lieu ne droit empescher la salvation du bris et marchandise de ladite navier par ceulx qui seront eschappez, et par ceulx à qui appartiendra la navier ou merchandise, mais doibt ledict seigneur secourir et aider par luy ou ses sujets lesdicts poures mariniers et marchans r saulver leurs biens sans rien prendre, sauf toutesfois à remunerer les saulveurs [...] e qui fera le contraire et prendra aucuns des biens desdicts pauvres naufragans et perdus et destruitz, outre leur gré er volonté, il est excommunié de l’Eglise”. Pardessus, *Collection de lois maritimes antérieures au XVIII*, t. I, Paris 1828, p. 347 foll.

⁷² Sections 42 and 43 analyze the intention of salvage of the objects thrown overboard in the cases of average in which there is no abandonment “lors celluy qui a faict ledict gect a encores intention, vouloir et esperance de recouvrer lesdictes choses; et par ce ceulx qui trouveont ces choses son tenus à restitution à celluy qui en fera la pousuyte”. Pardessus, op. cit., p. 349–350.

⁷³ Section 3: “Le patron doit leur payer un salaire raisonnable, et les frais de conduite dans leur pays, autatn que la valeur des choses sauvées peut suffire [...]”. Pardessus, op. cit., p. 325.

⁷⁴ Morral, *El salvamento...*, p. 78 foll.

⁷⁵ “Sy nave, o galea o otro navio qualquier peligrar o quebrar, mandamos que el navio e todas las cosas que en él andavan, sean daquellos cuyas eran ante que el navio quebrase o peligrase, e ninguno non sea osado de tomar ninguna cosa dellas sin mandato de sus duennos, fueras si las tomaren por guardarlas e darlas a sus duennos, e ante que las tomen en esta guisa llamen el alcalde del lugar, si no aver pudieren, e otros omes buenos, e escríbanlas todas, e guárdenlas por escrito e por cuenta, e dotra guisa non sean osados de las tomar: et qui dotra manera las tomare, pechelas como de furto. Et esto mismo sea de las cosas que fueren echadas del navio por aliviarlo, o cayeren o se perdieren dél por alguna guisa”.

⁷⁶ Arias Bonet, *Derecho Marítimo en las Partidas*, Studi Volterra III, 1971, p. 112.

explicitly mention divers⁷⁷. Law 7 declares that the things thrown overboard to save the vessel or the things lost due to shipwreck do not lose their possession if they are later found. That is, the finding of goods is protected and therefore, continues to belong to its owner or even to the heirs, due to the lack of intention or abandonment. Although there is no compensation established for those that find the objects⁷⁸. In the same way as in the Digest⁷⁹, laws 10⁸⁰ and 11⁸¹ also punish acts of pillage that are carried out by taking advantage of the circumstances of marine accident that have been caused by its own crew or by a third party by means of false luminous signs that do not guide the vessel safely, but it guides it into breakwaters or reefs.

Later in *Llibre del Consulta de Mar* of 1370 we find some influences from Roman law in some of its chapters regarding findings, removals, and also marine assistance. In the findings, the obligation of the individual that finds the goods to report it is imposed, as it happens in D.47.2.43.8, with the right of the finder to keep half of the goods found, if they are not claimed back by its owner⁸² within a year and a day. It also mentions removal and

⁷⁷ “[...] si de las cosas que en aquel lugar cayesen pudiesen algunas cosas cobrar, los señores dellas tenudos son de ayudar a cobrar a los otros la pérdida que ficiere por razón del exhamiento que fue hecho a pro de todos comunalmente [...]”.

⁷⁸ “[...] si acaeciére que la nave se quebrantase por tormenta o de otra manera, que todo quanto puidere ser fallado della o delas cosas que eran en ella, o quier que lo fallasen, que deve ser de aquellos que lo perdieron. E defendemos que ningun ome non gelo pueda embargar, que non ayan; maguer oviese privilejio o costumbre usada, que tales cosa como éstas, que aportasen a algund puerto suyo, o que fuesen falladas cerca de algún castillo, o en ribera de la mar, que deven ser suyas, n in por otra razón que se pueda [...] non tenemos por derecho que las cosas que los omes pierden por ocasión de tal mal andaca, que las pueda ninguno tomar por costumbre”.

⁷⁹ Arias Bonet, op. cit., p. 119. considers them not derived from D.14, pointing out in relation to the law 10 the inexistence in the gloss and in Justinian’s compilation of the same disposition.

⁸⁰ “[...] guiándolos a sabiendas por logares peligrosos, porque se pereziesen los navios, e puedan aver ocasión de furtar, o de robar algo de aquello que traen. E por ende dezimos: que cualquier dellos, aq uien fuese provado que havia fecho tan grand maldad como esta, que muera por ello [...]”.

⁸¹ “Pescadores, e otros omes de aquellos que usan a pescar, e a ser cerca la ribera de la mar, facen sennales de fuego de noche engañosamente en logares peligrosos a los que andan navegando, e cuidan que es el puerto allí; o las facen con la entencion de los engañar que vengan a la lumbre o fieran los navios en penna, o en logar peligroso e se qubranten porque puedan furtar o robar algo de lo que traen; [...] e puidere ser provado tal enganno como este, e quales fueron lo que los ficiere, mandamos que todo quanto furtaron o robaron de los bienes que en el navio venian, que lo pechen quatro doblado si les fuere demandado por juicio; e si fasta no demandasen, dende adelante peche otro tanto quanto fue lo que tomaron e si por ventura acaeciése que ellos non lo robasen, mas que se perdies;devenles pechar todo quanto perdieron e menoscabaron por esta razon. E aun el judgador del logar ante quien fuere esto provado, les faga escarmiento en los cuerpos [...]”.

⁸² Chapter 252 (extracted from Pardessus, op. cit., vol. II, p. 253 foll.): “Roba que será trobada en plaia o en port ò en ribera, que vaia sobre aygua, ò que la mar la hagues exaugada en terra aquell qui trobará aquella en plaia ò en port ò en ribera, ab que la mar no la hagues exaugada en terra, ne deu haver la meytat de trobadores, en aquesta guisa que ell la deu presenar à la senyoria deufa tenir manifesta à tot hom un any é un dia”.

retrieval of goods in the open sea, gulf or in the bottom of the sea, setting the right to recover the lost goods due to shipwreck or jetsam on behalf of the legitimate owner⁸³. At the same time, it states a procedure in which the authorities take part and in which fixed periods are set for the legitimate owners to report themselves in order to recover the objects⁸⁴. From the point of view of assistance, in rules it also deals with tranship of goods with help of boatmen and similarly with the transfer carried out in Roman law by *schaparii*⁸⁵.

The Ordinance of the Consulate of Bilbao of 1737, influenced by the French one of 1681, also keeps the property of the objects retrieved by means of removals and findings, as well as the assistance and rescue of vessels, based on the rules of the previous sources and, of course, the Roman legal bases. Precautionary measures made in chapter XIX.VI stand out. Here one is induced to search and locate the objects shipwrecked or thrown overboard to lighten the vessel⁸⁶ and a third party is influenced to compensate for the findings or removals, as an incentive for the search of the goods.

With all this conglomeration or regulations, we reach to our current commercial code of 1885 where rescue is superficially regulated with the influences of the Ordinance of Bilbao particularly in the sections 840 and 45

⁸³ Continues Ch. 252: “Empero, si alguna roba será trovada en golf ò en mar deliura, [...] ò si per ventura, roba será trovada qui iaurá à fons, aquella aytal que sobre aygua no irá, ne y poria anar, aquella no deu esser venuda ne alienada”.

⁸⁴ Through a thirty day public proclamation, the owners are called to report themselves and so the the wreckage found is handed over. An exhaustive regulation on time periods to communicate the findings exists, as well as the right of the finders to a reward to satisfy the damage and costs of the removal: (cont. 252) “E si asi xom desus es dit, en ver metre porá la dita roba esser sua, é de tot en tot la dita roba ell cobrar volrá; ell es tengut de donar è de pagar à aquell qui trovada la haurá, tots dans è tots destrichs é interessos, que en vermetre porá, que per culpa de la roba desusdita li seran esdevençuts è haguts de haurá à sostenir, à coneguga de la dita senyoria è de dos bons homens qui sien dignes de fe”.

⁸⁵ Ch. 277: “Si algun senyor de nau ò leny haurá carregat de tot ò en altre loch, è si stant aquí on haurá carregat ò en altre loch li vendrá cas de ventura, que ell haurá à descarregar de tot ò de partida lo cas de ventura es à entendre, si li surtira stopa ò romball ò alguna cadeaò cadenas ò perdrá alguna exarcia perque ella fos à perill ò per lenys armats de enemichs; si en aquell loch, on lo cas de ventura li esdeventrá, haurá barques de descarregar, que ell puga haver per diners, ell les deu logar è fer descarregar tro que sia à salvament es à entendre que hagen trovada aquella malafeta ò lo dit reguart sia pasta”.

⁸⁶ Ch. XIX.VI: “Cualquier persona que sacare del fondo del Mar, o hallare sobre sus olas, o arenales después del naufragio y librando lo demás del navio y su carga, géneros, mercaderías, u otras cosa deberá acudir a entregarlo a disposición, y orden del Prior, y Cónsules, dentro de las veinte y cuatro horas, para que lo pongan con los demás que se hubiere salvado. También establece el derecho a un tercio del hallazgo y el rastreo y localización de objetos: después de haberse salvado quanto se hubiere podido del naufragio y abandonándose ya por sus interesados, hallare dichos géneros, sacándolos del fondo de el agua, ò de otra manera, y los restituyeren, han de haber, y se les deberá dar la tercia parte de lo que manifestaren, y entregaren por razón de su trabajo, y hallazgo para que por este medio se les incite a en busca, y salvamento y se eviten las extracciones y ocultaciones, qu een semejantes casos se suelen experimentar”.

where it disciplines the consequences of shipwreck and in its regulation the objects saved from the shipwreck are subject to payment of the rescue expenses. As a result of the International Agreement for the unification of some rules as regards marine assistance and rescue held in Brussels in 1910 the law 60/1962⁸⁷ was enacted in our law that refers to marine help, rescue, findings and removals, which redirects you to section 617⁸⁸ of our Civil code. The aforementioned law 60/62, in section 2 points out that any help or rescue that produces a useful result will give place to an equitable retribution, that in the cases of findings according to section 20 reaches a third of the value of the things found like in the Ordinance of Bilbao. In correspondence to the precedent legislation and following historical precedents in section 19 it points out that “the person that finds abandoned objects in the sea or objects drawn to the coast by it, things that are not a product of the sea, has to put it in disposition of the marine authority as soon as possible”. The same obligation “lies on the one that by chance retrieves sunken objects and even has to report it immediately after the finding”. The protection and consideration that the objects thrown overboard continue to belong to its owners⁸⁹ is according to section 22 which excludes the application of chapter III about findings⁹⁰.

In a supranational level, the last agreement about marine rescue drawn up in London in 1989 stands out. It specially cares about the environment and obviously about rescue⁹¹. It states as a general rule the obligation to give help and assistance to any person, vessel and its objects that are in danger and to reduce damage to the environment. It also states that the retribution or compensation is fixed, guaranteed with the right of retention

⁸⁷ Ruiz Soroa, *Manual de Derecho de accidentes de la navegación*, Vitoria 1992, p. 115 considers that the law takes into account the basic on the principles of the Agreement of 1910 complementing them with the regulation of a marginal situation like towing, or of an administrative nature in the basics like findings and removals, and providing them with an adequate carrying out of the procedure. See Real Decreto 984/1967 of the 20th of April where the regulation is passed for the law to be imposed.

⁸⁸ The rights on the objects thrown overboard or on the ones brought to the coast by the waves, of any nature, or on the plants and grass that grow on the shore are determined by special laws.

⁸⁹ In the cases of vessels or its wreckage, when the owner does not exercise his rights and abandons them during three years following the sinking see section 29a, in this case the State acquires the ownership. In any case, the law contemplates the drawing up of records of assistance, rescue, towing, findings, and removals before the local marine authority in accordance to section 35 to 62 of the quoted law.

⁹⁰ Section 22: The precepts of this chapter are applicable to: 1) abandoned vessels and airships in the sea or their cargo. 2) the objects thrown overboard to lighten the vessel or airship in the case of danger when these are retrieved immediately.

⁹¹ Section 1a: considers the rescue operation as any act of activity undertaken to rescue or assist a vessel or to safeguard any other goods that were in danger in navigable waters or any other waters.

of the saved objects (section 21.3), by paying attention to a series of criteria established in section 13 like the value of the vessel and the objects saved, the skill, the time spent, the degree of preparation of the saving team, the efforts made to reduce danger to the environment and, of course, the danger involved. There is no doubt that modern law has been influenced by some aspects of Roman law, due to its indelible character that although it does not theorize about rescue, assistance, findings or removals, it did start off to regulate some juridical aspects of rescue operations.

5. Conclusions

Having reached to this point, we have to emphasize the importance of Roman law regarding rescue that allows us to take a glimpse at how Roman regulation does not completely move away from our current law.

1) The protection of shipwreck and rescue of wreckage was originally carried out in the penal area pursuing acts of pillage and sentencing the cases of lack of assistance or help in the sea to any vessel, as we may infer from D.47.9.3.8 just like it is stated nowadays.

2) In Roman law, in the field of removals, some criteria to calculate the remuneration in the rescue operations of wreckage was taken into account like in rescue today, given that the retribution increases according to the depth at which the task of search dredging of the shipwrecked goods was carried out as we have seen in the text of the Basilika 53.8.47, in which obviously a higher compensation was established in the cases of removal than in the cases of findings, although the remuneration was protected by the virtue of the right to preserve the retrieved objects.

3) They also got to know rescue operations, removals and findings carried out by qualified professionals like the *urinatores* in the field of removals and findings and, of assistance and help preformed by the *schaparii*, individuals that were perfectly organized by means of professional corporations.

4) Another aspect to bear in mind, and that undoubtedly forms part of a historical constant in all the subsequent regulations to Roman law, is the right of keeping the property in the cases of objects shipwrecked or thrown overboard, where the protection and guardianship of the goods clearly remains in the circumstances that do not involve abandonment (D.14.2.2.8; 41.1.9.8; 41.7.7; 41.2.21.1; 47.2.43.11), and how the finder have to report the retrieval so that the legitimate owners may claim then as inferred from D.47.2.43.8.

5) From the point of view of coastal protection, the obligation imposed to locate the wreckage of the lightening of the vessel in the cases of average D.14.2.8 is significant, as we have been able o distinguish removals and

findings that may happen spontaneously from the ones that take place from a hiring agreement. The obligation to dredge and locate imposed by Roman law constitutes a remote precedent of the ecological protection of the coast and riverside where the objects are thrown overboard or spilt, reason for which its immediate withdrawal is necessary.

Streszczenie

Niniejszy artykuł poświęcony jest problematyce reasekuracji morskiej oraz ratownictwa morskiego w prawie rzymskim i zawiera pewnie elementy komparatystyki historyczno-prawnej. Autorzy omawiają zagadnienia ochrony uszkodzonych i wyrzuconych na brzeg lub skały okrętów handlowych oraz przewożonego przez nie ładunku. Przytaczają zarówno regulacje na gruncie *ius civile* (problem ochrony własności), jak i *ius publicum* (sankcje karne stosowane w przypadku plądrowania porzuconych wraków albo rabunku wyrzuconego na brzeg ładunku). W końcowej części artykułu dokonują porównania regulacji powstałych na gruncie prawa rzymskiego z prawem średniowiecznej i nowożytnej Europy, dotyczącym ochrony rozbitych okrętów i transportowanego ładunku.