

## THE MARITIME LOAN IN THE "CARRERA DE INDIAS"

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I.- The word "Carrera" or Run, which appears in this piece's title, has come to signify "a regular sailing route". This, we normally find used in relation to the Spanish colonization of the Central and South American territories (The Indias), discovered from the year 1492 onwards. The Crown had prompted and paid for the costs of exploration from the first, done so that it would have a controlling influence on the commercial and navigational regime that developed between Spain and The Indias. In this way, rules and bureaucratic procedures were set in place as a matter of high national importance: an example of this would be the first moment when The Catholic Kings entrusted the business concerning these lands to committees, which granted royal licences to fit out vessels bound for those lands<sup>1</sup>. Moreover, it quickly instituted The Contract House of Seville (1503) -la Casa de Contratación de Sevilla-, whose objectives were the organization and taxation of all matters related to this maritime route. During the period there coincided a more open and liberal political environment which was the reason for the authorization of new peninsular ports. Nevertheless, in the reign of Philip II, The Contract House of Seville was strengthened, due to a centralizing and bureaucratic current. Because of this, Seville remained the sole port of departure and return. What's more, by the end of the sixteenth century, a detailed, nationally exclusive regulation of commerce was drawn up, which included restrictive measures limiting intercontinental commerce between certain American ports

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<sup>1</sup> BONO, J., "Nueva problemática negocial en la época del descubrimiento y el documento notarial hispalense", *Escribanos y protocolos notariales en el descubrimiento de América*, Madrid 1993, pp. 73 ss.

and also between Europe and South America. However, all of this was a response to new trends in Mercantile Law during the Modern Age (1452-1789). Its most prominent trait was the disappearance of the previous European Mercantile Law - the International Trade Law setup that was applied to fairs and international markets - and the emergence of a National Mercantile Law, which made use of Ordinances. However, these aforementioned restrictive measures lasted up until the XVIII century. As a consequence of the application of this unfortunate naval policy, clandestine commerce benefitted, yet the development of great mercantile companies was hindered; if big mercantile companies had proliferated, there wouldn't have been so much recourse to insurance and the maritime loan<sup>2</sup>.

However, none of this is surprising for Imperialism in general, the characteristics of which were the same in Roman times, where its influence translated into the maritime-economic sphere, by obtaining the greatest potential possible from sailing routes and by inserting itself into the administrative workings, beyond the idea of supply or wealth creation. With these measures, commerce begins to lose freedom, and this tendency is emphasized during the Later Empire.

Following on from this, throughout all of the eighteenth century, a more liberal system of commerce was being put into place, caused partly by the influence of new economic doctrines but also because of the damaging conflict between Spain and England; thus changing the regulation and procedure of the financing operations, which dominated this route<sup>3</sup>. Moreover, it substituted single vessels recorded individually at the Indian ports over the old system of fleets and galleons. Mercantile companies were organized at some ports in the north of Spain, with certain privileges and, amongst other decisions, intercontinental American commerce was allowed. Consequently, these changes increased the total value of commerce by 700 %, which soon enriched the colonies.

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<sup>2</sup> CÉSPEDES DEL CASTILLO, G., "Seguros marítimos en la Carrera de Indias", *AHDE* 20 (1948-9) p. 63.

<sup>3</sup> BERNAL, A.M., "Riesgos y cambios en la Carrera de Indias (1760-1788)", *Actas del Congreso Internacional sobre Carlos III y la Ilustración*, II, Madrid 1989, p. 290.

II.- Although maritime traffic generated a wide range of questions related to the "New World", I would like to refer specifically to the risk loans and vicissitudes of the lender, that means, "los préstamos a riesgo y ventura del prestamista". Eventhough the Congress is dedicated to "Commercial and Maritime Law in Antiquity", I believe it might be convenient to speak here about the maritime loan during the Modern Age instead of concentrating on the *pecunia traiectica*, or of its equivalent, the *foenus nauticum*. This is for two reasons. The first is because it's worth underlining that even with the centuries that have passed, the institution hasn't been distorted, conserving its characteristic features. Secondly, because of the widespread operation of this commerce within the new territories, the scale of which overflowed both into the mentality of the age and the complexity of facing a transatlantic voyage. The importance of this credit institution was so great that, by the end of the XVII century, it would be almost completely involved in this commercial route<sup>4</sup>. A century further on, it would be generating international movements of elevated credit<sup>5</sup>, with the supremacy of Spain, France, England and Portugal.

The Carrera of the Américas engendered all types of dangers by being a new and difficult route. Frequently suffering pirate and buccaneer attacks<sup>6</sup>, as well as shipwrecks that, sometimes, were caused by factors unconnected to any maritime risk: for instance the use of old vessels; wrecks caused intentionally for speculative ends or for excess of cargo loads. What's more, the yearning for wealth required investment and capital that wasn't normally available, thus resorting to the loan, which didn't always consist of a quantity of money. On some occasions it was used to buy merchandise and, on others, to pay for the passage, bearing in mind that the normal practice was to receive the greater part of the

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<sup>4</sup> CARRASCO GONZÁLEZ, M.G., "Los instrumentos del comercio colonial en el Cádiz del siglo XVII (1650-1700)", *Estudios de Historia Económica* 35 (1996) p. 101; BERNAL, A.M., *Riesgos cit.*, p. 294, recounted that he entered in books 35.254, risk deed for the years of the reign of Carlos III (1760-1788).

<sup>5</sup> CARRIERE, C., "Renouveau espagnol et prêt à la grosse aventure (Notes sur la place de Cádiz dans la seconde moitié du XVIII siècle)", *Revue d'Histoire Moderne et Contemporaine* 17 (juin-juillet 1970) pp. 233-4.

<sup>6</sup> GARZÓN PAREJA, M., "El riesgo en el comercio de Indias", *Revista de Indias* 35 (1975) pp. 187-191.

charter cost when the merchandise was delivered in the Indias, but not before, through agents established in the colonies<sup>7</sup>. Also this maritime loan was turned to as a way of meeting the cost of the surety demanded by The Crown for carrying out its public office in The Indias<sup>8</sup>. With all these cases it can be said that *pecunia traiecticia* loan existed, which tallies with the explanation by *Modestinus* taken from D. 22,2,1: “money that is transported by sea, or which the buyer moves in the vessel at the risk of the creditor”.

II.1. From a terminological point of view, the loan institution experienced changes of name during this period due to the fact that it used to carry out other commercial operations and in some cases affected the definition of its legal characteristics: “risks” - riesgos-, exchanging -cambios- and maritime loan -préstamo a la gruesa aventura-. Also, as Bernal refers to it in relation to the generic connection between risks-insurance, there was a constant interpretative trend among the Italian jurists based on catholic insinuations with regards to money loans and usury. It explains, on the one hand, the recourse to subterfuge of the exchange and, on the other, the implication between “risks” and insurance as if they were connected operations. Anyway, it’s a fact that maritime insurance equally served in the Modern Age as a mechanism for the creditor in the maritime loan, who lost only the insurance premium if there was an accident<sup>9</sup>.

In spite of this, there was a different document type that also received the denomination of “obligación a riesgo” or “riesgo para correr los riesgos del mar por cuenta del titular de los bienes”, and it could produce confusion. This institution didn’t represent a credit transaction, but it was a mercantile agency; accordingly, crew members or passengers received merchandise or money from

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<sup>7</sup> HARING, C-H., *Comercio y navegación entre España y las Indias*, Mejico 1939, p. 355.

<sup>8</sup> CARRASCO GONZÁLEZ, M.G., *Los instrumentos cit.*, p. 106.

<sup>9</sup> CRUZ BARNEY, O., *El riesgo en el comercio hispano-indiano. Préstamos y seguros marítimos durante los siglos XVI a XIX*, Mejico 1998, p. 20, refers to: “el prestamista aseguraba la carga que garantizaba el préstamo realizado. Si el deudor viajaba sin contratiempos, el acreedor cobraba el monto prestado más la prima, si en cambio el viaje no llegaba a buen término, cobraba el seguro”.

another person in order to trade it in the Indias under specified conditions, and finally to share the profits<sup>10</sup>. As well as this, there was another quite common type of document, which worked through a commission agent, who traveled with other people's merchandise to sell in the American market. Nevertheless, instead of using the traditional "comenda", the agent utilized the maritime loan as a instrument of connection between the owner of the goods and the commissioner entrusted in the sale. To safeguard the owner's interests, this commissioner had to sign a deed of acknowledgement of the debt, including risk rates, before the departure<sup>11</sup>.

The word "exchange" -"cambio", "tomar dinero a cambio, efectivo en el tráfico marítimo"<sup>12</sup> was used by the Castilian writers of the XVI and XVIIth century, and in particular, those who dealt with the negotiation in The Indias (Mercado, Hevia, Veitia, etc.), including the last commentators Ayala or Pérez López<sup>13</sup>. See, for example, the opinion of Tomas de Mercado, a jurist in the XVIth century, who in Chapter 13, Book 6 of his *Suma*, categorized it as a particular type of exchange that was used in The Indias; he went on to comment about, as reported by García-Baquero: "monstruo de cambios, sin figura ni apariencia entera de ellos, una quimera con una parte de cambio, otra de seguro, otra de usura, una mixtura risible y horrible", and he qualifies it as: "contrato de cambio, no siéndolo en realidad de verdad, ni teniendo cosa de él, sino sólo nombre"; in the opinion of Mercado "es un préstamo y usura encubierta con aquel disfraz de tomar y correr el peligro en un casco de navío, embuste que ninguna cosa aprovecha"<sup>14</sup>. This was the case because the maritime loan acted as an instrument of exchange eventhough its prime function was providing credit. In this way, the amount given in advance on the Iberian Peninsula in

<sup>10</sup> CARRASCO GONZÁLEZ, M.G., *Los instrumentos cit.*, p. 86.

<sup>11</sup> BERNAL, A.M., *Riesgos cit.*, pp. 306-307.

<sup>12</sup> CÉSPEDES DEL CASTILLO, G., *Seguros marítimos cit.*, p. 64.

<sup>13</sup> PELAEZ, M.J., *Cambios y seguros marítimos en Derecho catalán y balear*, Bolonia 1984, p. 69, underlines that the jurists of the XVIth and XVIIth century were generally confused because they tried to find the roots of the maritime exchange in the Roman institution. The author mentions among them: Antoni Oliva, Raffaello di Turre, Flaminio or Capmany.

<sup>14</sup> GARCÍA-BAQUERO GONZÁLEZ, A., *La Carrera de Indias: Suma de la contratación y océano de negocios*, Sevilla 1992, p. 254.

the form of “Pesos” was then repaid at the destination as more valuable “pesos of diez reales”. It would seem clear that the money lent, as another currency, produced yet additional profit<sup>15</sup>. All over the Peninsula, except in Catalonia, the question wasn’t so easy from the XVIth century onwards<sup>16</sup>, because of the harmonization of the credit function with the exchange function; it also worked as a method of covering risks.

One author stands firm in the idea that the maritime loan on The Indias route was an associate organization, because, given the dangers of the sea, the merchants preferred to stay on the ground and enter into partnership with the master of the vessel for those businesses that needed maritime voyages<sup>17</sup>.

Neither can it be said that the Roman *pecunia traiectica* had a passive legal configuration. Prominent nineteenth century Roman experts (Savigny and Sieveking) described it as an innominate contract in the form of *do ut des*<sup>18</sup>, but it seems we should turn to texts D.45,1,122,1 and D.22,2,6 or C.4,33,4 to affirm its nature of *mutuum*.

According to Sánchez Garre, other terminological confusions have been produced in “La Carrera de Indias” between the maritime insurance and the maritime loan, these also known as maritime risk. Whereas in Roman Law, the loan acted as an essential instrument of maritime credit at the same time as playing the role as an instrument of guarantee, to a certain extent, in much the same way as modern maritime insurance does today. They knew only of the idea of mutual insurance against specific risks, without reaching the concept of insurance companies<sup>19</sup>. The loan played the function of assuring against maritime risks. For that reason it has

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<sup>15</sup> GARCÍA-BAQUERO GONZÁLEZ, A., “Un modelo de financiación del tráfico con Indias: el riesgo marítimo en las flotas de 1765 y 1768”, *Archivo Hispalense* 72 (1989) p. 225; GARCÍA-BAQUERO GONZÁLEZ, A., *La Carrera cit.*, p. 261; CARRASCO GONZÁLEZ, M.G., *Los instrumentos cit.*, p. 96.

<sup>16</sup> GARCÍA-BAQUERO GONZÁLEZ, A., *La Carrera cit.*, p. 255. BERNAL, A.M., *Riesgos cit.*, p. 291, relates that the exchanges in Seville, since the XVIth century, were equivalent to the Castilian risk cover, because of certain innovations that were introduced in the credit deed procedure and in its operational characteristics.

<sup>17</sup> CÉSPEDES DEL CASTILLO, G., *Seguros marítimos cit.*, p. 63.

<sup>18</sup> HUVELIN, P., *Études d’histoire du Droit Commercial romain (histoire externe-droit maritime)*, Paris 1929, pp. 204-5.

<sup>19</sup> HUVELIN, P., *Études d’histoire cit.*, pp. 94-5, 114.

been called, expressively, “the insurance of the Antiquity”<sup>20</sup>. The maritime insurance was known as “risks” in Burgos and Bilbao. On the other hand, as has been said, the word “risk” acts as “préstamo a la gruesa” or “cambio marítimo” – *obligación a riesgo de nao u obligación a riesgo* in Cadiz and Seville. A similar equivocal expression was the term “avería” –general average<sup>21</sup>; with the same word “average” was known as a tax on the exports and the imports, which paid for the upkeep of the fleets that protected The Indias route<sup>22</sup>.

However, as a general rule, these nomenclature problems of the loan institution during the Modern Age weren't reflected in the notarial documents, which were described as loans, where the risk was assumed by the lender. On numerous occasions, it was laid down in the protocols as “obligación de riesgo” or “a riesgo para Indias”<sup>23</sup>, but in general as “préstamo a riesgo del prestamista”. Anyway, it always appeared as an acknowledgement of debt for a loan, whose purpose was the transport by sea of merchandise. The maritime risk was evaluated in terms of the debt, the interest and the goods that were in the boat.

But the coming together of the terms didn't come about until the nineteenth century, with the Gallicism of the *great adventure loan*, that appears in the terminology of the legislation and the codes<sup>24</sup>.

<sup>20</sup> GABALDÓN GARCÍA, J.L. - RUIZ SOROA, J.M., *Manual de Derecho de la Navegación marítima*, Madrid-Barcelona 1999, p. 567. Therefore, article 781.1 of the Commercial Code established the nullity of the maritime insurance contract when it coincided with a maritime loan on the same vessel or merchandise, except when the loan and the insurance were partial and they didn't surpass the real value.

<sup>21</sup> SÁNCHEZ GARRE, L., “El seguro en Europa del siglo XIII al siglo XVIII: Ad risicum dei, maris et gentium ...”, *Revista de Historia Económica* 3.2 (1985) p. 319, tells of the Professor Bernal's speech at the VII Curso de Especialización en Historia Económica “Federico Melis”, when he said that the word “average” had a multiple technical meaning.

<sup>22</sup> HARING, C-H., *Comercio y navegación cit.*, p. 65, 102.

<sup>23</sup> BORREGUERO GARCÍA, E., “Flujos comerciales y financiación del comercio entre las Islas Canarias e Indias durante el siglo XVIII en el fondo de pleitos de la 9ª sección (justicia) del archivo general militar de Segovia”, *IV Coloquio Internacional de Historia de las Islas del Atlántico. Actas*, II, Las Palmas de Gran Canarias 1995 (edición digital).

<sup>24</sup> BERNAL, A.M., *Riesgos cit.*, p. 291.

II.2.- However, let us look for a moment at the legislative aspect. Historians usually take the opportunity to highlight particular landmarks, such as scientific achievements, when talking about the success of the discovery and colonization of the Americas. On the legal level, in respect to the maritime loan, the way had also been prepared during the Middle Ages as it managed to overcome the ecclesiastical prohibition which considered loans as a form of usuary. Along with this, in the XIIIth century, the “*Naveganti*” Decree of Gregorio IX included this prohibition. This explains its exclusion from the Partidas of Alfonso X’s writing. Nevertheless, this type of loan was used during the Middle Ages<sup>25</sup>, which is why the Civil Law affirmed it and the authors’ common opinion supported it<sup>26</sup>. The regulations were set in place in the XIVth century for the Mediterranean and Spain in the *libro del Consulado del Mar*, chap. 238 (The Book of the Maritime Consulate) and in the *Ordenanzas de los magistrados municipales de Barcelona sobre actos mercantiles de 1435*, chap. 2 (Ordinances of the Municipal Magistrates of Barcelona regarding Mercantile Acts)<sup>27</sup>. Later, in the Modern Age and with respect to “The Indias Run”, the legislation was principally for the owners and masters of ships and dealt with their excessive use of this type of loan. Both with the Ordinances of the Contract House and The Seville Consulate, each occurring during the XVI century<sup>28</sup> as with *la Recopilación de leyes de los Reynos de las Indias* (Compilation of laws of the Indias Kingdoms), they all dealt with the operations of money exchanges and risk, underlining the legal prohibition of giving ship’s risk loan without the permission of the Consulate. In this sense, it was necessary to receive said permission before getting any advance payment. All the masters went to the Contract House with all the papers proving the ship’s ownership and details of the vessel’s volume so that officials could determine the value of the ships and thus the amount of money they could guarantee without

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<sup>25</sup> CARRASCO GONZALEZ, M.G., *Los instrumentos cit.*, p. 81.

<sup>26</sup> CARRIERE, C., *Renouveau espagnol et prêt cit.*, p. 233.

<sup>27</sup> GARCIA SANZ, A., “Estudios sobre los orígenes del Derecho marítimo hispano-mediterráneo”, *AHDE* 39 (1969) pp. 213-316.

<sup>28</sup> CRUZ BARNEY, O., *El riesgo cit.*, pp. 54 ss., writes in relation to the regulations of the maritime risk in The Ordinances of the Consulates of Nueva España and Veracruz.



risk, writing down such transactions in a register. All of this because fraud was the norm, whether by exaggerating the price of the ships, pretending to be their owners, or by taking out several loans using the same guarantee. RRCC<sup>29</sup> of 1587 and 1588 introduced important modifications about how to use such credit instruments<sup>30</sup>. It was relatively controlled operation until the years 1620-1625, but it began to be executed in a more independent way by protagonists that intervened in this commercial traffic. Contracts in confidence appeared that were uncontrolled and without official register. Because of this, they lost the value of mortgage documents that such deeds usually had, although they gained freedom in agreeing the amount of the loan and type of repayment. In synthesis, the provisions that related to credit limits were soon passed over, and became more lax, which affected foreign participation in colonial commerce and the mineral extraction from the Kingdom. Therefore, in most cases until the XVIIIth century, it was only partial legislation that didn't offer an answer to the casuistry generated by its practice. So, in the Ordinances of the Consulate of Bilbao (1737) -*Ordenanzas del Consulado de Bilbao*<sup>31</sup>, they tried to adjust the credit regulations to the updated maritime law that was already forming in the main European areas; chapter 23, which was entitled: "De las contratas del dinero, o mercaderías que se dan a la gruesa ventura, o riesgo de nao, y forma de sus escrituras", including the forms which were needed to make out the maritime risk contract<sup>32</sup>. So, for example, it was forbidden to

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<sup>29</sup> Royal document.

<sup>30</sup> With reference to the secretaries LUJAN MUÑOZ, J., *Los escribanos en las Indias Occidentales*, Mexico 1982, pp. 78 ss., explains that they replaced the lack of academic preparation with the reading and the knowledge of diverse books of a general character, and especially for the notarial art. The author quotes lot of book that circulated around Spain and The Indies about the formation of the deeds, and they referred basically to maritime commerce.

<sup>31</sup> In respect to the field of application of these Ordinances on commercial traffic, it's necessary to distinguish between two levels. On one the Libro del Consulado del Mar was applied in Catalonia and in the Levante, and on the other the Ordinances of Bilbao was used in the Spanish colonies, as is told by GABALDÓN GARCÍA, J.L. - RUIZ SOROA, J.M., *Manual de Derecho de la Navegación cit.*, p. 10. Also, ARROYO MARTÍNEZ, I., "La aportación de las Ordenanzas del Consulado de Bilbao al desarrollo del Derecho marítimo", *Anuario de Derecho marítimo* 17 (1981) pp. 25-81.

agree the risks contract in terms of risk probability or salary, but the guarantee of the loan of vessels and merchandise was maintained<sup>33</sup>.

III.- In effect, traditionally this was documented in a maritime loan contract given to the borrower written out on a subjective form and including the identification of the borrower and, where applicable, of the representative. An author at that time, Veitía Linaje, wrote that the debtor fraudulently didn't ask for a license from the Consulate, but simply signed his obligation in the presence of the notary. This was completed with a personal paper – a contract in confidence – in which it was declared that the loan was a risk of the vessel; so the debtor obtained money for a superior value than the value of the vessel, thus, if a shipwreck occurred, he profited<sup>34</sup>. As mentioned already, the fact that the contract in confidence was sometimes used, didn't mean that in many cases the legally registered contracts were not habitual practice, such as are shown in the bulky notarial protocols.

It's evident that the deeds only give information about estimated value and about the delivery of amounts of money –*numeratio*– in circumstances stipulated by both sides. However, the irregularities produced in the legal documents brought about new controls<sup>35</sup>. To this end, a Real Cédula was published in 1760 “por los perjuicios que ocasiona el modo y forma en que se otorgan las escrituras de contratos de riesgo marítimo sobre efectos y caudales en los viajes de la Carrera de Indias”. As a result of this

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<sup>32</sup> The Ordinances of the University and Contract House of Bilbao considered the risk institution as: “dar y tomar dinero ..., por ciertos intereses o premios, sobre cascos de navíos, aparejos, bastimentos, armamentos y demás aprestos para un viaje o viajes, o sobre mercaderías, o efectos cargados en ellos para cualesquiera puertos, y navegaciones, en condición de que llegando los navíos a los de su destino, hayan de quedar libres del riesgo los dadores de tales cantidades para la cobranza de sus principales, y premios a los tiempos pactados”.

<sup>33</sup> CRUZ BARNEY, O., *El riesgo cit.*, p. 29. In the typology of the risks RAVINA MARTÍN, M., “*Riesgos marítimos en la Carrera de Indias*”, *Documentación y archivos de la colonización española. Semana Internacional de Archivos* (La Rábida 1979) II, Madrid 1980, pp. 134-141, includes the going risk, return risk, risk of permission, risk of bet, risk of life, risk spread and the risk of pledge.

<sup>34</sup> CARRASCO GONZÁLEZ, M.G., *Los instrumentos cit.*, p. 82.

<sup>35</sup> MIGUÉLLÓPEZ, I., *El comercio hispano-americano a través de Gijón, Santander y Pasajes (1778-1795)*, Valladolid 1992, p. 94.

norm, in The Indias' General Archive, Consulates section, a "register-book" was recorded, in which figured the vessels and all the risk deeds, signed in relation to the craft: "todos los contractos de riesgo, ya consten de escrituras o de papeles particulares, y privados, hayan de poder obligar los acreedores a sus deudores a que los registren dentro de seis días en la Contaduría del Consulado de Cádiz y dentro del mismo término haya de hazerse el rexistro por los contractos que se celebraren en la Ciudad de Sevilla en la Contaduría de la Diputación que allí reside , y en las escrituras o papeles de los tales contractos, se ponga nota por la Contaduría de su Rexistro en ella y no observándose esto en el término señalado no valgan las tales escrituras o qualesquiera otros documentos o recados de los tales contractos ni de ellos puedan usar los acreedores sino es en la qualidad de personales o chirographarios a la que han de quedar reducidos"<sup>36</sup>. That record turned into a document of proof, and it carried out a guarantee function for the creditors. Moreover, it impeded any improper use of the credit<sup>37</sup>.

Sometimes, people unrelated by name or economic ties to the initial credit operation and that we know only through the private documents, became part of it: such as the guarantor, intermediaries, etc... It also included clauses about solidarity, community, deposit, guarantee, recognition of debt, length of time of the risk and time and place of the repayment of the debt. The person who footed the risk was the creditor, lender or seller, according to each case; it was a fact that in the second half of the XVIIIth century, most of the creditors were intermediaries, and that was bad for the regional and national economy<sup>38</sup>. The Compilation of the Laws in the Kingdom (1680) -*Recopilación de las leyes del reyno*, VII, 10, 6- decreed that no citizen could sell a vessel to a foreign person, nor could they obtain money on loan from a foreigner or from abroad; it meant that the maritime loan was only allowed among Spanish people.

<sup>36</sup> GARCÍA-BAQUERO GONZALEZ, A., *Un modelo cit.*, p. 221.

<sup>37</sup> BERNAL, A.M., *Riesgos cit.*, p. 293. ROUGÉ, J., *Recherches sur l'organisation du commerce maritime en Méditerranée sous l'Empire romain*, Paris 1966, p. 347, writes in relation to the evidence of a Greek maritime loan: "Le prêt maritime grec est conclu en général entre deux personnes privées, mais par l'intermédiaire d'une tierce personne ou d'une banque qui conserve une copie de l'acte signé entre les deux contractans; cette copie est destinée, le cas échéant, à faire foi en justice".

<sup>38</sup> BERNAL, A.M., *Riesgos cit.*, p. 307.

Nevertheless, lot of the creditors were representing -in confidence- foreign traders, as can be verified when studying the confidential contracts, repayment papers and authority papers<sup>39</sup>.

At first, grounds for the debt could be twofold: the purchase of the merchandise or the need for money to cover the vessel's eventual shipping charges and to pay for the crew. But the acceptance of the debt showed other reasons, wherein, although this acknowledgement was usually made by the captain or owner of the vessel, it could have been made by a merchant who took out the loan to pay the transport cost for a particular merchandise. Sometimes, the debtor was a simple tailor, the "encomendero"<sup>40</sup> or the functionary who signed a risk document in order to prepare his luggage or pay for the voyage<sup>41</sup>. A disposition of the Contract House of 29-11-1507 regulated that the debtors of a maritime loan upon vessels must be their owners, and not their captains, because it facilitated in determining the loan amount; this measure extended to risks upon merchandise<sup>42</sup>.

RC 22-10-1587 fixed the loan at 1/3rd of the value of the vessels, and RC 8-8-1621 rose this amount to 2/3rds of the value. But that amount was neither appropriate to the owners nor to the captains, since they had to pay for the costs of outfitting the vessel, and therefore they breached the law<sup>43</sup>. Veitia Linaje considered that the value of American charter trip was often greater than the value of the vessel itself, and also the reason for the 2/3rds rule tended only to protect the creditor. It's probable that the irregular practices were less dangerous than they seemed to be at first sight. Later, RC 27-4-1765 authorized risk cover for the value of the charter. In relation to the risk cover upon merchandise there wasn't a cover limit, except to demand that the loan didn't exceed the value of the guaranteed goods<sup>44</sup>.

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<sup>39</sup> RAVINA MARTÍN, M., *Riesgos marítimos cit.*, pp. 124-129. CARRASCO GONZÁLEZ, M.G., *Los instrumentos cit.*, p. 109.

<sup>40</sup> Colonist granted control of land and Indians to work for him.

<sup>41</sup> GARCÍA-BAQUERO GONZÁLEZ, A., *La Carrera cit.*, p. 256.

<sup>42</sup> GARCÍA-BAQUERO GONZÁLEZ, A., *Un modelo cit.*, p. 226.

<sup>43</sup> CRUZ BARNEY, O., *El riesgo cit.*, p. 31.

<sup>44</sup> GARCÍA-BAQUERO GONZÁLEZ, A., *Un modelo cit.*, p. 227

The duration of the risk contract was established for the vessel and all that pertained to it, from the date of the contract's execution (or from the moment that the ship departed) until twenty-four hours after its arrival at the destination port. In regards to the merchandise, the duration of the risk went from the date of the contract's execution until the consignment's unloading at port. Nevertheless, RC 22-5-1671 dealt with the beginning of the risk cover; but it was RC. 27-10-1768 that determined that the risk cover should last from shore to shore<sup>45</sup>. Also, in relation to the debt repayment, the deed fixed the moment and place of the return in the contract as well as the appropriate currency for the task; for instance, a document from the end of the century XVth pointed out that the repayment would be made in Seville, eight days after the return from the voyage .

The lender's good fortune was entirely dependent on the successful arrival of the vessel or its merchandise covered by the maritime loan. For this reason, the debtor was usually expected to insert a legal pledge or privilege upon those things so that the lender could obtain the repayment of the money and the payment of the agreed premium<sup>46</sup>. The borrower didn't guarantee such repayment risking all of his personal fortune, but only with the goods covered by the loan. This merchandise was physically marked, and the relative facts had to be written in the document's margin<sup>47</sup>. Also, if bankruptcy occurred, the loans made under license of the Contract House had preference over any others<sup>48</sup>.

The aforementioned credit evolved during the XVIIIth century to become a type of mortgage loan, and it demanded a more complex casuistry than the original forms<sup>49</sup>. All of these new

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<sup>45</sup> GARCÍA-BAQUERO GONZÁLEZ, A., *Un modelo cit.*, p. 228.

<sup>46</sup> GABALDÓN GARCÍA, J.L. - RUIZ SOROA, J.M., *Manual de Derecho de la Navegación cit.*, p. 565, forgets the classic development of the maritime loan when he refers to the medieval evolution of the institution – based on Germanic law- adding the pledge characteristic.

<sup>47</sup> GABALDÓN GARCÍA, J.L. - RUIZ SOROA, J.M., *Manual de Derecho de la Navegación cit.*, pp. 565 ss.

<sup>48</sup> HARING, C-H., *Comercio y navegación cit.*, pp. 355-6.

<sup>49</sup> BERNAL, A.M., *Riesgos cit.*, p. 293.

aspects are reflected in RC of 1767, 1768<sup>50</sup> and 1770, in which clear regulation was established on deeds subscribed to the same creditor in order to regulate a favourable order of preference for the liquidation, amongst other measures<sup>51</sup>. Although, under Greek Law the mortgage guarantee was obligatory<sup>52</sup>, it however played a weak role in the *foenus nauticum*<sup>53</sup>.

Normally the specifics of the maritime loan weren't set down in the master's copy. With respect to interest, it doesn't look as if a system was available to regulate permitted margins, nor did the Ordinances of the Consulate of Burgos fix a limit. The determination of the rate - *pretium periculi* - in the maritime loan represented a difficult problem, because of the complexity of the factors that had to be considered. Thus, the risk premium was varied according to the trip, the amount of the loan and the current situation of war or peace<sup>54</sup>. Sometimes, the interest consisted of a share equivalent to the half or quarter part of the salary that a sailor was to be given when the voyage had finished, such as appears in the contracts made in Cádiz during the XVIth century, but this type of interest was prohibited in the Ordinances of Bilbao (1737)<sup>55</sup>. Normally, the rate of interest wasn't shown in the contract<sup>56</sup>. This

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<sup>50</sup> RC of 1768 defined the maritime loan as “dar unos dineros a otros con cierto premio, mediante el cual toman los primeros a su cargo todos los riesgos y contingencias del mar, y demás desgraciados sucesos, de que quedan libres los segundos; de suerte que si se verifica el siniestro están exentos del pago, y de lo contrario ganan aquellos el principal, y premios estipulados ...”.

<sup>51</sup> CÉSPEDES DEL CASTILLO, G., *Seguros marítimos cit.*, p. 71-74.

<sup>52</sup> ROUGÉ, J., *Recherches sur l'organisation du commerce maritime cit.*, p. 358.

<sup>53</sup> HUVELIN, P., *Études d'histoire cit.*, Paris 1929, pp. 36 ss., thought that there wasn't a maritime mortgage.

<sup>54</sup> MIGUEL LÓPEZ, I., *El comercio cit.*, p. 94, explains that: “en los desplazamientos a La Habana se cobraba, alrededor de 1775, de 9 a 11 % en concepto de prima. Mientras en 1795 los seguros de Santander a Veracruz alcanzaban el 15 % y los de retorno el 22 %. De Santander a La Habana era de 20 % tanto a la ida como a la vuelta”.

<sup>55</sup> CARRASCO GONZÁLEZ, M.G., *Los instrumentos cit.*, p. 88.

<sup>56</sup> BERNAL, A.M., *Riesgos cit.*, pp. 301-306, points to: “las referencias que poseemos sobre ejemplos españoles para el siglo XVIII son muy escasas y fragmentarias, siendo habitual que en el documento de préstamo se englobe en una cantidad única lo correspondiente a principal y premio; de cualquier forma, para la segunda mitad del Setecientos el tipo de interés oscila entre el 20/25 % y el 60 %, encontrando con relativa frecuencia tipos superiores al 60 %”.

was hidden in the total amount of the debt. However, the market broker inspected the contract details before the boats left port to prevent the contract being excessively out of proportion. To be able to calculate it, you tended to resort to the authorization papers, letters of credit, declarations, transfers, testaments and bankruptcy documents<sup>57</sup>. What's more, to set the fee levels for maritime risk represented a difficult and ever changing dilemma due to the complexity of the factors that one needed to take into account, depending on the type of voyage, the amount of the loan and whether there was peace or a state of war. However, in the documents from the XVIIIth century, a stereotype formula was applied: "los precios e intereses de los riesgos que irán declarados han sido moderados según el tiempo presente". That meant that the costs and interests of the risk cover declared had to be adjusted to conform to the current state of affairs<sup>58</sup>. Curiously a contract dating from the end of the fifteenth century, text number 67, had the following sentence: "por le fazer amor e buena obra para forneçimiento e desempacho del dicho su navío e xarçia dél". That's to say that the sum was lent out of love and kindness. But, no mention is made of a credit rate. At first sight, it might seem that this particular type of maritime loan was free, that it acted as an "obligación llana", it was also called "préstamo ordinario o a riesgo de tierra"<sup>59</sup>. However, as Dársete pointed out when talking of the *foenus nauticum*, the lender could neither renounce the interest nor renounce the risk cover<sup>60</sup>. Thus, in this case it was more sensible that the borrower didn't wish to declare the reason for the loan and therefore try to elude a possible sentence for usury. Because of this, together with the notarial documents, a private document was written to cover the maritime loan in which the interest level was specified<sup>61</sup>.

<sup>57</sup> CARRASCO GONZÁLEZ, M.G., *Los instrumentos cit.*, pp. 91-94. In addition, the author writes that the interest for delay oscillated among the monthly 1 %, an annual 25 %, or at 25 % for several years.

<sup>58</sup> GARCÍA-BAQUERO GONZALEZ, A., *Un modelo cit.*, p. 227.

<sup>59</sup> This deed is collected by BONO, J. - UNGUETI, C., *Los protocolos sevillanos de la época del descubrimiento*, Sevilla 1986, pp. 396-7.

<sup>60</sup> DARESTE, R., "La *lex Rhodia*", *RHDFE* 29 (1905) p. 439, n.1

<sup>61</sup> CARRASCO GONZÁLEZ, M.G., *Los instrumentos cit.*, pp. 83-85.

To be as concise as possible, we will only concentrate on one of the characteristic clauses in this type of contract, which bears a strong Romanistic stamp, that is “the law of pecunial exception”, in other words the *exceptio non numeratae pecunia*. Some documents contain it, including one from the end of the XVth century, text number 121<sup>62</sup>: “... I should and must give and pay, ... *pecunia...*”. This *exceptio*, which was introduced into Roman Law to defend any person of whom a loan repayment was demanded even though it had not been paid in the first place. In fact, in postclassical Roman law, the inclusion of this clause was already possible in a document but it lacked legal weight, as the credit contract became irrefutable proof that the loan had come into force<sup>63</sup>.

Generally, in the left margin of the same deed, the notary made a note of further details which related to the circumstances of the debt’s liquidation – the place and date when the obligation was liquidated, or if it was to be paid in installments. Besides this, notarial papers could be included to complement the risk contract. Amongst these: the powers to collect repayment in The Indies; declarations clarifying specific relationships between parties, sometimes on the debtor’s side, sometimes on the side of the creditor; and the deeds of transfer that allowed the negotiation of the loan<sup>64</sup>.

The deeds also included clauses dealing with situations such as if repayment obligations were breached, then the penalty would be to pay double the amount, writs of enforcement, etc.. Similarly with

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<sup>62</sup> ROJAS VACA, M.D., *El documento marítimo mercantil en Cádiz (1550-1600)*, *Diplomática notarial*, Cádiz 1996, pp. 350-352, reproduces the text n. 121: “...devo e me obligo de dar y pagar, ... de su expresado presçio soy e me otorgo y tengo por bien contento, pagado y entregado a toda mi voluntad y, en razón de su recibo que de presente no perezze, renunçio la ley de la ezección de la non numerata pecunia e querella de los dos años que ponen las leyes en derecho en razón de la cosa no [vista] ni contada, recibida ni pagada e las otras leyes que çerca de ello hablan...”.

<sup>63</sup> Al respecto, CASTRESANA HERRERO, A., *El préstamo marítimo griego y la pecunia traiectica romana*, Salamanca 1982, pp. 188-190; ALONSO, J.L., “Algunas consideraciones en torno a la *condictio scripturae*”, *RIDA* 46 (1999) pp. 99-122.

<sup>64</sup> CARRASCO GONZÁLEZ, M.G., *Los instrumentos cit.*, p. 83.



the Greek loan, a penal clause was introduced to secure enforcement. In addition, the debtor bound his property, and the creditor could sell the marked merchandise<sup>65</sup>. As we have examined the procedural steps of a maritime loan contract from its start, I should point out how it ended. As is the custom on any form, the date and validation was witnessed and signed by the notary, the witnesses, the guarantor if there was one and the borrower.

Examination of the grounds for any lawsuit arising from a breach of contract or a breach of the legislation applied falls outside of the scope of this work. However, it might be the subject of a monographic study, and for this, the valuable document collections of the General Military Archives of Segovia would be of great interest; The lawsuits that are found in dossier 699 – expediente 6967 and in dossier 919 – expediente 8515<sup>66</sup>, are cases which dealt with the non-payment of debt, but the legal parties generally base their respective defences on the observance or not of the maritime route agreed in the contract<sup>67</sup>. Likewise, the use of insurance and maritime loan working together generated problems, and consequently provoked countless litigation<sup>68</sup>. Anyway, there are doubts from some authors about the effectiveness of the *Juzgados de Contratación de Indias*, in the case of Canarias, where, although the documentation has been lost, there are other details that support these assertions, such as the fact of the dependence and narrow relation of this institution with the local oligarchy<sup>69</sup>.

IV. So it can be said that the institution appeared fully characterized in the regulations of the Modern Age. But it finally came to an end, along with the disappearance of the Indian route, because of the coming of independence to the Spanish American

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<sup>65</sup> HUVELIN, P. *Études d'histoire cit.*, pp. 217-8.

<sup>66</sup> BORREGUERO GARCÍA, E., *Flujos comerciales y financiación del comercio cit. (edición digital)*.

<sup>67</sup> TRUEBA, E.-LLAVADOR, J., *Jurisdicción marítima y la práctica jurídica en Sevilla (siglo XVI)*, Valencia 1993, pp. 97-105.

<sup>68</sup> BERNAL, A.M., *Riesgos cit.*, pp. 293 ss., relates that the litigation generated the need for a double register for the insurance policy and the maritime loan, by the Consulate; and this measure vouched for the whole of the speculation.

<sup>69</sup> TORRES SANTANA, E., "El riesgo en el comercio canario-americano, 1690-1725", *El Derecho y el mar en la España Moderna*, Granada 1996, pp. 81-105.

colonies (1811-1824)- meaning the practical disappearance of this special loan. Even during the XVIIIth century, the loan deed constituted the vast majority of paperwork, as it offered a short-term return for the investment, with a high rate of profitability, relatively few risks and almost no work, and not to forget that it was complementary in character to other types of business<sup>70</sup>. Following this economical inertia, the Spanish commercial Code of 1885 ruled on the maritime loan as the one mechanism in maritime law for financing the needs of the shipping – a loan with privileged legal guarantee-. It delayed the regulation of the naval mortgage (made law on 21st August 1893)<sup>71</sup>. After this, the borrower would have an institution from which to obtain credit, not so short-term for navigation purposes alone, but longer-term to allow for the acquisition of the vessel, and thus the possibility of getting larger quantities of money. Besides this, there is a new factor, the advances in the field of communications, that allowed the direct and permanent contact of the shipping company with their vessels. In contemporary navigation, one doesn't see an isolated captain having to act alone as an agent of necessity as in the past<sup>72</sup>.

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<sup>70</sup> GARCÍA-BAQUERO GONZALEZ, A., *Un modelo cit.*, p. 220.

<sup>71</sup> GABALDÓN GARCÍA, J.L. - RUIZ SOROA, J.M., *Manual de Derecho de la Navegación cit.*, pp. 233 ss.

<sup>72</sup> GABALDÓN GARCÍA, J.L. - RUIZ SOROA, J.M., *Manual de Derecho de la Navegación cit.*, p. 566.