

## ***Receptum nautarum and «Custodiam praestare» revisited\****

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The obligation to keep an object safe is probably one of the most disputed problems of Roman law<sup>1</sup>. It seems that after the studies of

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<sup>1</sup> For a detailed discussion on earlier literature see the fundamental work of C.A.CANNATA, *Ricerche sulla responsabilità contrattuale nel diritto romano I*, Milano 1966, pp.23-38; see also V.ARANGIO-RUIZ, *Responsabilità contrattuale in diritto romano*, Napoli 1933; P.KRÜCKMANN, *Custodia*, ZSS 64 (1944), pp.1-56; J.ROSENTHAL, *Custodia und Aktivlegitimation zur actio furti*, ZSS 68 (1951), pp.217-265; F.M.DE ROBERTIS, *Receptum nautarum : studio sulla responsabilità dell'armatore in diritto romano, con riferimento alla disciplina particolare concernente il caupo e lo stabularius*, Bari 1952; M.SARGENTI, *Problemi della responsabilità contrattuale*, SDHI 20 (1954), pp.127-258; J.C.VAN OVEN, *Actio de recepto et actio locati*, TR 24 (1956), pp.137-156; G.LLUZZATTO, *Spunti critici in tema di responsabilità contrattuale*, BIDR 63 (1960), pp.47-127; J.A.C.THOMAS, *Carriage by Sea*, RIDA 8 (1960), pp.491-505; C. BRECHT, *Zur Haftung der Schiffer im Römischen Recht*, München 1962; A.METRO, *L'obbligazione di custodire nel diritto romano*, Milano 1966; G.MACCORMACK, *Custodia and Culpa*, ZSS 89 (1972), pp.149-219; G.C.J.J.VAN DEN BERG, 'Custodiam praestare': *Custodia-Liability or Liability for Failing Custodia?*, TR 43 (1975), pp.59-72; A.J.M.MEYER-TERMEER, *Die Haftung der Schiffer im Griechischen und Römischen Recht*, Zutphen 1978; M.KASER, *Die actio furti des Verkäufers*, ZSS 96 (1979), pp.89-128; R.KNÜTEL, *Die Haftung für Hilfspersonen im römischen Recht*, ZSS 100 (1983), pp.340-443; R. ROBAYE, *L'obligation de garde. Essai sur la responsabilité contractuelle en droit romain*, Bruxelles 1987; P.VOCI, 'Diligentia', 'custodia', 'culpa': *i dati fondamentali*, SDHI 56 (1990), pp.29-143; A.FÖLDI, *Anmerkungen zum Zusammenhang zwischen der Haftung ex recepto nautarum cauponum stabulariorum und der Haftung für custodia*, RIDA 40 (1993), pp.263-291; C.A. CANNATA, *Sul problema della responsabilità nel diritto privato romano*, IVRA 43/44 (1992/3); F.M.DE ROBERTIS, *La responsabilità contrattuale nel diritto romano*, Bari 1994; R.CARDILLI, *L'obbligazione di «praestare» e la responsabilità contrattuale in diritto romano*, Milano 1995;

Carlo Augusto Cannata nothing more can be said about the essence, meaning and development of *custodiam praestare*<sup>2</sup>. But one question remains still without a satisfying solution. That is the relation between the civil liability based on *locatio conductio* and the liability *ex recepto*<sup>3</sup>. Despite endless studies the reasons for emanating the edict remain obscure. The main question can be stated as C.H. Brecht proposed: if the ship's master was liable for *custodia* on the ground of the civil law contract, the presence of the edict would be very difficult to explain<sup>4</sup>. In this article I will try to solve this important issue and show a new hypothesis regarding the necessity of the edict *nautae, caupones, stabularii ut recepta restituant*.

### 1. The relation between *locatio conductio* and *receptum n.c.s.* in the literature

a) According to F.M. De Robertis the edict was intended to limit the liability of *nautae*<sup>5</sup>. The theory is based on the assumption, that the transport contract had a form of *locatio conductio operis* and the *exercitor navis* was liable for not returning the cargo according to civil law. The praetor limited this objective contractual liability only to cases in which an expressed *receptum* was concluded<sup>6</sup>. This interpretation is contrary to many fundamental texts and leads the Author to suspect them of being interpolated<sup>7</sup>. F.M. De Robertis claims also, that the original edict was not applied to innkeepers and

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R.FERCIA, *Criteri di responsabilità dell'exercitor: modelli culturali dell'attribuzione di rischio e 'regime' della nozialità nelle azioni penali in factum contra nautas, caupones, et stabularios*, Torino 2002; P.CERAMI, A.DI PORTO, A.PETRUCCI, *Diritto commerciale Romano. Profilo storico II ed.*, Torino 2004; M.F.CURSI, *Actio de recepto e actio furti (damni) in factum adversus nautas, caupones, stabularios. Logiche differenziali di un sistema composito*, Studi Nicosia 3, Milano 2007, pp.117-147.

<sup>2</sup> C.A.CANNATA, *Ricerche* (cit.n.1); IDEM, *Sul problema* (cit.n.1). These contributions indicated the way for further research, especially for CARDILLI, R.CARDILLI, *L'obbligazione di « praestare »* (cit.n.1), p.16.

<sup>3</sup> "To disentangle the relationship between the *actio de recepto* and the *actio locati* is a much more difficult, if not impossible, task." R. ZIMMERMANN, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Oxford 1996, p.517.

<sup>4</sup> C. BRECHT, *Zur Haftung der Schiffer* (cit.n.1), p.95.

<sup>5</sup> F.M.DE ROBERTIS, *Receptum nautarum* (cit. n.1), p.16.

<sup>6</sup> IDEM, p.28.

<sup>7</sup> IDEM, see for example D.4.9.1.1 on p.17; D.4.9.1.8 on p.53; D. 4.9.3.1 on p.108.

stablekeepers. In his opinion they had no elements in common with ship's masters and the praetor had no reasons to limit their liability. The argument given is that *caupo* and *stabularius* concluded *locatio conductio rei* contracts and were not liable for returning goods, but this was the case with *nautae – conductores operis*<sup>8</sup>. Once again all fragments linking *caupones* and *stabularii* to the *receptum* are declared interpolated<sup>9</sup>.

The idea that the edict limited the contractual liability of ship's masters is interesting, but not convincing and there are no strong arguments to support this view<sup>10</sup>. This may be the main reason, why it was generally not approved in later doctrine<sup>11</sup>.

b) The interpretation of J.A.C. Thomas is even more difficult to accept. The Author suggests that *nauta* had no obligation to return the cargo in the contract of *locatio rerum vehendarum*. His duty was merely to carry and it was the *receptum* that first introduced the duty to restore the cargo at a certain destination<sup>12</sup>. The article focuses only on sea transport and the figures of *caupo* or *stabularius* are not mentioned.

Although the main idea has to be rejected – the *nauta* had an obligation to deliver the cargo to a certain destination on the base of *locatio-conductio* and the edict referring to *nautae, caupones, stabularii* must have had a different objective – it is worth noticing that J.A.C. Thomas based his solution on the difference between *locatio conductio rei* and *locatio conductio operis*<sup>13</sup>.

c) A different approach was presented by C.H. Brecht<sup>14</sup> and then accepted by A. Guarino<sup>15</sup>. After a detailed overview of the doctrine Brecht proposes his own solution<sup>16</sup>. The standard rules of *locatio conductio* included an objective liability for safekeeping (*custodiam praestare*) of the cargo. The edict was intended to protect only personal luggage in contracts concluded with *nautae, caupones,*

<sup>8</sup> IDEM, p.125-133.

<sup>9</sup> IDEM, p.126-150.

<sup>10</sup> J.A.C. THOMAS, *Carriage by Sea* (cit. n.1), p.490-491.

<sup>11</sup> M.F.CURSI, *Actio de recepto e actio furti* (cit.n.1), p.119.

<sup>12</sup> J.A.C. THOMAS, *Carriage by Sea* (cit. n.1), p.500-501.

<sup>13</sup> IDEM, p.498.

<sup>14</sup> C. BRECHT, *Zur Haftung der Schiffer* (cit. n.1).

<sup>15</sup> A. Guarino, *Diritto Privato Romano*, 82.6, p.944.

<sup>16</sup> C. BRECHT, *Zur Haftung der Schiffer* (cit. n.1), p.83-99.

*stabularii*<sup>17</sup>. According to the Author contractual liability was not sufficient to protect personal belongings brought onto the ship or into the inn<sup>18</sup>.

C.H. Brecht is right in pointing out, that it is necessary to reflect on legal aspects common to all three groups mentioned in the edict. It is also true that the edict had to cover aspects of liability that were left without adequate protection in the civil law; and in fact personal belongings are a good example. Nonetheless in my opinion the edict was intended for a far more important problem than the safety of personal luggage. The reconstruction of Brecht has missed the real purpose of the regulation.

d) In the opinion of Rene Robaye the standard liability in the contract of *locatio conductio operis* was based on *culpa* and also *custodia* should be seen as *culpa in custodiendo*<sup>19</sup>. Consequently the Author claims that *nautae, caupones, stabularii* were liable only for fault on the ground of civil law<sup>20</sup> and that they were not liable for safekeeping<sup>21</sup>. On the other hand the special edict introduced objective liability for not returning the cargo<sup>22</sup>.

e) The relation between liability *ex recepto* and liability for *custodia* was analyzed in detail by A. Földi<sup>23</sup>. In his reconstruction the edict was earlier than the contractual liability and covered a *lacuna iuris*. In other words the problem of the necessity of the edict in respect to the *custodia* liability based the *locatio conductio operis* contract was not present at the time of the regulation, because there were no contractual liability rules<sup>24</sup>. The arguments refer mainly to the fact that an *actio stricti iuris* was introduced and to the terminology of the regulation. In particular that the praetor used the term *nauta* and not *exercitor navis*<sup>25</sup>.

Although A. Földi is probably right in estimating an early date of the edict, the solution of our problem is not to be found here. There

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<sup>17</sup> IDEM, p.99-112.

<sup>18</sup> IDEM, p.100-107.

<sup>19</sup> R. ROBAYE, *L' obligation de garde* (cit. n.1), p.180-181.

<sup>20</sup> IDEM, p.204.

<sup>21</sup> IDEM, p.86-88.

<sup>22</sup> IDEM, p.57ss.

<sup>23</sup> A. FÖLDI, *Anmerkungen* (cit. n.1), p.263-291.

<sup>24</sup> IDEM, p.278.

<sup>25</sup> IDEM, p.279-280.

are no sufficient arguments to deny that both Pomponius and Ulpian were wrong, when they clearly stated, that the edict was later than the civil actions<sup>26</sup>.

f) The modern main doctrine: C. Cannata, R. Fercia, A. Petrucci, M.F. Corsi.

The modern main doctrine is almost unanimous in solving our problem by denying the existence of a standard *custodia* liability in the *locatio conductio* contracts concluded with *nautae, caupones, stabularii*<sup>27</sup>. According to this line of interpretation it was the special edict that introduced a particular obligation of safekeeping for ship's masters, innkeepers and stablekeepers.

But it seems that this solution is designed rather to satisfy our dogmatic needs of a coherent liability system, rather than explaining the roman legal structures. In fact, the main reason to exclude the standard obligation of safekeeping (*custodiam praestare*) based on the civil law contracts can be identified in an intellectual struggle to maintain the usefulness of the edict. In my opinion there is a better way of interpreting the new regulation that permits a more convincing interpretation of the sources.

## 2. *Contracts concluded with nautae, caupones, stabularii*

To understand the reasons of the edict it is necessary to begin with the reflection on earlier rules of contractual liability<sup>28</sup>. We have to focus on different types of contracts, which have their own set of risk allocation and obligations. Another problem is the border line of contract types, which seemed unclear for roman jurist and is still disputed.

<sup>26</sup> Ulpianus (14 ad ed.) D.4.9.3.1: *...ex hoc edicto in factum actio proficiscitur. sed an sit necessaria, videndum, quia agi civili actione ex hac causa poterit... sed si gratis res susceptae sint, ait Pomponius depositi agi potuisse. miratur igitur, cur honoraria actio sit inducta, cum sint civiles...*

<sup>27</sup> C.A.CANNATA, *Ricerche* (cit.n.1), p.107ss.; R. FERCIA, *Criteri di responsabilità* (cit.n.1), p.189ss.; P.CERAMI, A.DI PORTO, A.PETRUCCI, *Diritto commerciale* (cit.n.1), p.277-278; M.F.CURSI, *Actio de recepto e actio furti* (cit.n.1), p.135ss.

<sup>28</sup> The precise timeline is unknown, but it is generally accepted that the edict was later than the civil liability rules. See the discussion in A. FÖLDI, *Anmerkungen* (cit.n.1), p.278; M. SARGENTI, *Osservazioni sulla responsabilità dell'exercitor navis in diritto romano*, *St. Albertario*, Milano 1953, p.551; C.A.CANNATA, *Ricerche* (cit.n.1), p.105ss.

Roman law developed a variety of possible contracts for sea transport. Lease and hire was the most important of them, but it was also possible to conclude a deposit. Within the *locatio conductio* the roman jurist distinguished the possibility of hiring the whole ship (D.4.9.3.1 *si tota navis locata sit*; D.14.2.10.2 *si aversione navis conducta est*) or a part of it (D.14.2.2pr. *si non totam navem conduxerit, ex conducto aget, sicut vectores, qui loca in navem conduxerunt*). In this type of agreement the *locator*, indicated as *nauta*, *magister* or *exercitor navis*, had to deliver the possibility of use of the entire ship or of a certain cargo space. Respectively the *conductor* had to pay for the rented space, where he stored the goods for transport.

Carrying of goods could also be arranged as a *locatio conductio mercium vehendarum* (D.4.9.3.1 *si vero res perferendas nauta conduxit*; D.14.2.10pr. *Si vehenda mancipia conduxisti*). The *locator* had a duty to entrust the cargo to the *conductor* and pay him for the *opus* of transporting them to a certain destination.

The correct identification of those contracts types was fundamental. First of all the owner of the cargo had to know which action to use (*actio locati* or *actio conducti*) in order not to lose the case. But far more important were the differences in the respective liability of the parties. In the case of hiring of a ship (or a part of it), the *nauta* had the obligation to deliver an adequate cargo space. He was liable for fraud or fault in respect to damages that were caused by hiring a defected ship or transferring the merchandise to another vessel against the will of the owner<sup>29</sup>. In particular on the base of *actio conducti* it would be impossible to receive compensation for damage or theft caused by a third person<sup>30</sup>.

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<sup>29</sup> Labeo 1 pith. a Paulo epit. D.14.2.10.1: *Si ea condicione navem conduxisti, ut ea merces tuae portarentur easque merces nulla nauta necessitate coactus in navem deteriore, cum id sciret te fieri nolle, transtulit et merces tuae cum ea nave perierunt, in qua novissime vectae sunt, habes ex conducto locato cum priore nauta actionem*. See on this fragment R. FIORI, *La definizione della 'locatio conductio'*, Napoli 1999, p.142-153.

<sup>30</sup> L.VACCA, *Considerazioni in tema di risoluzione del contratto per impossibilità della prestazione e di ripartizione del rischio nella 'locatio conductio'*, *Iuris Vincula, Studi in onore di Mario Talamanca VII*, Napoli 2001, p.287; R.FIORI, *La definizione* (cit. n. 29), p.139-142.

On the other hand in the contract of *locatio conductio mercium vehendarum* the obligation of *nauta* was to deliver the cargo to a certain destination. An open question remains if he was liable for safekeeping of the goods (*custodiam praestare*) in his quality of *conductor operis*<sup>31</sup>.

In everyday commercial life it could be difficult and sometimes even impossible to distinguish between those legal nuances. The consequence being that liability issues were hard to solve. We can see a clear example of it in the following opinion of Labeo quoted by Papinian:

Papinianus (8 *quaest.*) D.19.5.1.1

*Domino mercium in magistrum navis, si sit incertum, utrum navem conduxerit an merces vehendas locaverit, civilem actionem in factum esse dandam Labeo scribit*

Labeo mentioned two forms of transport contract, the first was a *conductio navis* and the second a *locatio mercium vehendarum*. The problem of the parties was not the distinction itself, but the question about the right *actio* to use, *actio conducti* or *actio locati* respectively. If their agreement was unclear, Labeo was of the opinion that an *actio civilis in factum* should be granted. The reason behind this decision was to protect the clients of *nautae* against losing the case by choosing the wrong action<sup>32</sup>. It may seem that the border line between those two types of contract is clear. But the merchandise owner and the seamen could limit their agreement only to the most essential elements for them, which would be the amount of cargo, the port of destination, the route and the payment. In this case the lack of clarity as to which type of contract was concluded seems justified.

But legal disputes arose even if the agreement was precise, as we can observe in the well known case discussed by Labeo and Paulus:

Labeo (1 *pith. a Paulo epit.*) D.14.2.10pr.

*Si vehenda mancipia conduxisti, pro eo mancipio, quod in nave mortuum est, vectura tibi non debetur. Paulus: immo quaeritur, quid actum est, utrum ut pro his qui impositi an pro his qui deportati essent,*

<sup>31</sup> In this sense L.VACCA, *Considerazioni* (cit. n.30), p.288.

<sup>32</sup> R.FIORI, *La definizione* (cit. n.29), p.130; L.VACCA, *Considerazioni* (cit. n.30), p.187.

*merces daretur: quod si hoc apparere non poterit, satis erit pro nauta, si probaverit impositum esse mancipium*

Labeo is dealing with the contract of transport in the form of *locatio conductio operis* (*si vehenda mancipia conduxisti*). If one of the transported slaves dies on the ship, the *nauta* will not have a right to claim the transport fee. There are no details regarding the circumstances in which the slave died. Roberto Fiori claims that it must have occurred irrespective of fault otherwise we should expect direct liability of the exercitor<sup>33</sup>. But Letizia Vacca holds that these problems need to be analyzed separately. In her opinion the solution (*vectura tibi non debetur*) was based only on the fact that the main obligation of transport was not fulfilled. Further compensation could be claimed on the ground rules of *locatio-conductio*<sup>34</sup>. Labeo included the death of a transported slave to the risks normally inherent to a certain type of activity (*periculum operis*) and allocated it to the entrepreneur<sup>35</sup>.

The meaning of Paulus remark was disputed in the literature. According to Riccardo Cardilli the comment refers to the same contract of *locatio conductio operis* and shows only two different ways of calculating the transport fee. The first would be based on the number of slaves brought on board of the ship (*pro his qui impositi essent*), the second on the number of slaves transported to the final destination (*pro his qui deportati essent*). If it was impossible to determine what was agreed by the parties, Paulus approved the right of the *nauta* to a fee for all slaves he could prove being brought onto the ship<sup>36</sup>. According to Letizia Vacca this favorable decision took in to account the particular nature of slave transport and the extremely difficult conditions, which caused many deaths during the journey.

The interpretation of Riccardo Cardilli is difficult to accept. Paulus was rather discussing two types of transport contract. The first case, when the fee was calculated on the base of slaves *impositi*, was a *locatio conductio rei*. The second, with the fee based on the number

<sup>33</sup> R.FIORI, *La definizione* (cit. n.29), p.133.

<sup>34</sup> L.VACCA, *Considerazioni* (cit.n.30), p.283-284.

<sup>35</sup> EADEM, p.284; R.CARDILLI, *L'obbligazione di « praestare »* (cit.n.1), p.347-8; R.FIORI, *La definizione* (cit. n.29), p.134.

<sup>36</sup> R. CARDILLI, *L'obbligazione di « praestare »* (cit.n.1), p.349.



of transported slaves, a *locatio conductio operis*<sup>37</sup>. In the following text Paulus shows clearly, that calculating the fee in base of the loaded merchandise is indicative for hiring space on the ship:

Labeo (1 *pith. a Paulo epit.*) D.14.2.10.2

*Si conduxisti navem amphorarum duo milium et ibi amphoras portasti, pro duobus milibus amphorarum pretium debes. Paulus: immo si aversione navis conducta est, pro duobus milibus debetur merces: si pro numero impositarum amphorarum merces constituta est, contra se habet: nam pro tot amphoris pretium debes, quot portasti.*

Labeo reflects upon a contract of hiring a ship of two thousand amphorae carriage capacity. In his opinion the *conductor* had to pay a fee for two thousand amphorae irrespectively of the number of cargo brought on board. Paulus explains that this opinion is correct if the entire ship was hired (*si aversione navis conducta est*). On the other hand, then the *conductor* could pay a different amount, if the fee was agreed on the base of loaded amphorae.

The first mentioned contract is a *locatio navis per aversionem*. Nicola de Marco states that *aversio* was a particular type of contract clause common in *locatio conductio*, on base of which the conductor received a thing as a whole and could use it for his own economic purposes<sup>38</sup>. The author points out that Ulpian indicates a *conductor navis per aversionem* as an *exercitor navis*<sup>39</sup>. The second hypothesis discussed by Paulus is a clear example of a *locatio conductio rei*, where a part of a ship is given to the use of the *conductor*. Because amphorae were transported in defined shaped piles it was easy for the parties to calculate the fee for a certain cargo space referring to the number of amphore<sup>40</sup>.

Another possible contract for overseas transport was the *depositum*. Pomponius is analyzing a case with this type of agreement:

<sup>37</sup> R.FIORI, *La definizione* (cit. n. 29), p.137-138.

<sup>38</sup> N.DE MARCO, *L'aversio: una clausola dell'emptio venditio e della locatio conductio*, INDEX 28 (2000), p. 358-362.

<sup>39</sup> Ulpianus 28 *ad ed.* D.14.1.1.15: *Exercitorem autem eum dicimus, ad quem obventiones et reditus omnes perveniunt, sive is dominus navis sit sive a domino navem per aversionem conduxit vel ad tempus vel in perpetuum.*

<sup>40</sup> G.PURPURA, *Studi romanistici in tema di diritto commerciale marittimo*, Messina 1996, p.465ss.

Pomponius (22 *ad. Sab.*) D.16.3.12*pr.*

*Si in Asia depositum fuerit, ut Romae reddatur, videtur id actum, ut non in pensam eius id fiat apud quem depositum sit, sed eius qui deposuit.*

The depositor could claim the reimbursement of all expenses incurred during the transport of the deposited thing from Asia to Rome. His liability was limited to *dolus*<sup>41</sup>.

After this brief overview of possible transport agreements it is necessary to take a look at contracts concluded with *caupones* and *stabularii*<sup>42</sup>. In this case it is not difficult to ascertain the legal position of the parties. The only possibility was a *locatio conductio rei* and the client was always a *conductor* of space<sup>43</sup>.

### 3. The necessity of new liability rules relating to ship's masters, innkeepers and stablekeepers

The civil law protected clients of *nautae*, *caupones*, *stabularii* with various legal remedies. In this part of my paper I would like to analyze the new edict and the fundamental question about the reasons for emanating it. The full text of the regulation is given by Ulpian:

Ulpianus (14 *ad ed.*) D.4.9.1*pr.*

*Ait praetor: " nautae caupones stabularii quod cuiusque salvum fore receperint nisi restituent, in eos iudicium dabo".*

The praetor granted a new *actio* against entrepreneurs, who did not return goods received under their custody. The reason for this edict is explained in the *laudatio edicti*:

Ulpianus (14 *ad ed.*) D.4.9.1.1

*Maxima utilitas est huius edicti, quia necesse est plerumque eorum fidem sequi et res custodiae eorum committere. ne quisquam putet graviter hoc adversus eos constitutum: nam est in ipsorum arbitrio, ne quem recipiant, et nisi hoc esset statutum, materia daretur cum furibus adversus eos quos recipiunt coeundi, cum ne nunc quidem abstineant huiusmodi fraudibus.*

<sup>41</sup> See further D.4.9.3.1, p.204.

<sup>42</sup> T.KLEBERG, *Hôtels, restaurants et cabarets dans l'antiquité romaine*, Uppsala 1957; A.FÖLDI, *Caupones e stabularii nelle fonti del diritto romano*, *Festschrift Sturm*, Liège 1999, p.119-137.

<sup>43</sup> CIL IV 807: *Hospitium hic locatur, triclinium cum tribus lectis.*

Ulpian claims that the regulation was extremely useful, because it was often necessary to trust those people and leave goods under their custody. In fact, it would be almost impossible to guard by one's own means the cargo during a long sea transport or the merchandise left in the inn over night.

The second part of Ulpian's explanations is even more significant. For some part of the jurisprudence the new rules seemed excessive. Referring to an unnamed jurist Ulpian states, that this edict was not too strict. The argument given is that *nautae*, *caupones* and *stabularii* can decide, who will have access to the ship or into the inn and that otherwise they could cooperate with thieves. It seems that the problem of theft was of greatest concern and could be the main reason for emanating this edict (*...nisi hoc esset statutum, materia daretur cum furibus adversus eos quos recipiunt coeundi...*).

This fact requires further explanation<sup>44</sup>. Why was the edict needed to protect against thefts? Why was the civil law regulation insufficient in that aspect? What were the frauds committed by *nautae*, *caupones*, *stabularii* that remained beyond the possibility to obtain justice according to the *ius civile*?

The question about the reasons and necessity of the edict was also posed by the Roman jurist themselves. Ulpian presents a detailed analysis of the relation between civil and praetorian liability in his commentary to the edict. He begins with the explanation of the clause "quod cuiusque salvum fore receperint". After clarifying that the edict relates to whatever object or merchandise received as well as to things additional to it<sup>45</sup>, Ulpian continues with the following problem:

Ulpianus (14 *ad ed.*) D.4.9.1.8

*Recipit autem salvum fore utrum si in navem res missae ei adsignatae sunt: an et si non sint adsignatae, hoc tamen ipso, quod in navem missae sunt, receptae videntur? et puto omnium eum recipere custodiam, quae in navem illatae sunt, et factum non solum nautarum praestare debere, sed et vectorum.*

<sup>44</sup> The idea of Francesco de Robertis, who suggests an interpolation of the text to prove that the edict was intended to limit the liability of the nauta has to be rejected. F.M. DE ROBERTIS, *Receptum nautarum* (cit. n.1), p.137.

<sup>45</sup> Ulpianus 14 *ad ed.* D.4.9.1.6: *Ait praetor: "quod cuiusque salvum fore receperint": hoc est quamcumque rem sive mercem receperint. inde apud Vivianum relatum est ad eas quoque res hoc edictum pertinere, quae mercibus accederent, veluti vestimenta quibus in navibus uterentur et cetera quae ad cottidianum usum habemus.*

Ulpianus (14 *ad ed.*) D.4.9.3pr.

*Et ita de facto vectorum etiam Pomponius libro trigensimo quarto scribit. idem ait, etiamsi nondum sint res in navem receptae, sed in litore perierint, quas semel recepit, periculum ad eum pertinere.*

Both fragments deal with the modalities of receiving goods and thus the moment when liability of *nauta* arose. Two possibilities are indicated: (1) the things are sent to the ship and (2) they are directly entrusted to the ship's master. The solution is based on a direct relation between the obligation of safekeeping and the fact that the things were handed over to the *nauta*. He will be liable for all goods brought onto the ship and also for those received on the shore, in which case he would be liable from that moment. It is significant that both Ulpian and Pomponius emphasize that the edict covered acts of all passengers and not only the acts of the crew, as was the case in the special *actio furti adversus nautas cauponas stabularios*<sup>46</sup>.

The above quoted sources and the earlier mentioned *laudatio edicti* give an impression, that edict was intended to solve the problem of material loss caused by someone who was on board of the ship or in the inn, but was not necessarily a member of the personnel. Ulpian discusses in detail the purpose of the regulation and the relation between contractual liability and rules introduced by the edict in the following text<sup>47</sup>:

Ulpianus (14 *ad ed.*) D.4.9.3.1

*Ait praetor: "nisi restituent, in eos iudicium dabo". ex hoc edicto in factum actio proficiscitur. sed an sit necessaria, videndum, quia agi civili actione ex hac causa poterit: si quidem merces intervenerit, ex locato vel conducto: sed si tota navis locata sit, qui conduxit ex conducto etiam de rebus quae desunt agere potest: si vero res perferendas nauta conduxit, ex locato convenietur: sed si gratis res susceptae sint, ait Pomponius depositi agi potuisse. miratur igitur, cur honoraria actio sit inducta, cum sint civiles: nisi forte, inquit, ideo, ut innotesceret praetor curam agere reprimendae improbitatis hoc genus hominum: et quia in locato conducto culpa, in deposito dolus dumtaxat praestatur, at hoc edicto omnimodo qui receperit tenetur, etiam si sine culpa eius res periit vel damnum datum est, nisi si quid damno fatali contingit. inde Labeo scribit, si quid naufragio aut per vim piratarum perierit, non esse iniquum exceptionem*

<sup>46</sup> M.F.CURSI, *Actio de recepto* (cit.n.1), p.143ss.

<sup>47</sup> For a complete literature see E.STOLFI, *Studi sui 'libri ad edictum' di Pomponio, II Contesti e pensiero*, Milano 2001, p.399.

*ei dari. idem erit dicendum et si in stabulo aut in caupona vis maior contigerit.*

The jurist explains the meaning of the provision “*nisi restituent in eos iudicium dabo*”. The first important information is that the praetor introduced a new *actio in factum*. Then the question about the necessity of this regulation is posed. The doubt is fully justified. Ulpian emphasizes that the failure to return the cargo can result in contractual liability and gives an overview of possible civil actions.

If remuneration was agreed the party could proceed with *actio ex locato* or *actio ex conducto*, depending on the type of contract involved<sup>48</sup>. For example if the entire ship was hired an *actio ex conducto* would be available even for articles that are missing. On the other hand if the contract was formulated as a transport of goods (*locatio mercium vehendarum*) the *nauta* was liable under *actio ex locato*. Even the possibility of unremunerated transport was considered. Pomponius recognized in this case an action on deposit. So the jurists, both Pomponius and Ulpian, are faced with a difficult question: what was the reason for this edict? The rhetorical arguments based on the will of the praetor to stop the dishonesty of this kind of people may be not very compelling. But a clear motive is given by Ulpian, when he points to the important difference in type of liability involved. While in contract of *locatio-conductio* the criterion is fault and in deposit only fraud, the edict introduced absolute liability<sup>49</sup>.

The text is fundamental in the debate about the presence of the duty of safekeeping in the *locatio-conductio* contract concluded with the exercitor navis. It is clear that Ulpian does not mention *custodia* when he illustrates the differences between civil liability and the new regulation<sup>50</sup>. The main problem can be stated as Brecht proposed: if on the ground of civil law the entrepreneur had to respond irrespectively of his fault on the base of *custodia* the edict would be

<sup>48</sup> R.FERCIA, *Criteri di responsabilità* (cit.n.1), p.177ss; L.VACCA, *Considerazioni* (cit. n. 30), p.287ss; R.FIORI, *La definizione* (cit. n. 29), p.128ss.

<sup>49</sup> R.FERCIA, *Criteri di responsabilità* (cit.n.1), p.186ss.; L.VACCA, *Considerazioni* (cit. n. 30), p.280; F.CURSI, *Actio de recepto* (cit.n.1), p.132.

<sup>50</sup> A reason for this fact could be seen in the earlier quoted text (D.4.9.1.8), dedicated especially to the problem of safekeeping, but there are more important factors. There are no arguments to support an interpolation of the text in this sense, although it was suggested by some important scholars. About those unfounded doubts see E.STOLFI, *Studi sui 'libri ad edictum' di Pomponio* (cit. n.47), p.398-409.

useless<sup>51</sup>. Thus the main doctrine excludes the obligation to keep an object safe based on civil law<sup>52</sup>. This interpretation is furthermore reinforced by the following fragments from Gaius commentary to the edict<sup>53</sup>:

Gaius (5 ad ed. provinc.) D.19.2.40

*Qui mercedem accipit pro custodia alicuius rei, is huius periculum custodiae praestat.*

Gaius (5 ad ed. provinc.) D.4.9.5pr.

*Nauta et caupo et stabularius mercedem accipiunt non pro custodia, sed nauta ut traiciat vectores, caupo ut viatores manere in caupona patiatur, stabularius ut permittat iumenta apud eum stabulari: et tamen custodiae nomine tenentur. nam et fullo et sarcinator non pro custodia, sed pro arte mercedem accipiunt, et tamen custodiae nomine ex locato tenentur.*

Gaius starts with formulating a general rule: one who accepted payment for the safekeeping of a thing has to bear the risk of it. In opposition to this type of agreement contracts where *custodia* was not the main obligation are enumerated. The seamen, innkeeper and stablekeeper receive their reward not for safekeeping, but respectively for transportation of passengers, for permitting travelers to stay in the inn or for keeping the beast of burden in the stable. Nonetheless there are all liable for safekeeping. As an explanation of this principle Gaius indicates the examples of the fuller and tailor, who similarly receive a fee not for safekeeping but for their skills, but are liable on the base of *actio locati* also for safekeeping.

It is clear that for Gaius the source of the obligation to keep an object for the *nauta*, *caupo*, *stabularius* was the special edict. Not only the wording used (fuller and tailor are liable *ex locato*, while this is not stated for the ship's master, innkeeper, and stablekeeper<sup>54</sup>) but in particular the following part of the commentary demonstrates, that the jurist was explaining the difference between the standard

<sup>51</sup> C.BRECHT, *Zur Haftung der Schiffer* (cit.n.1), p.95.

<sup>52</sup> See the literature indicated in n.27.

<sup>53</sup> About this texts see R.CARDILLI, *L'obbligazione di « praestare »* (cit.n.1), p.489ss.; F.CURSI, *Actio de recepto* (cit.n.1), p.132ss.

<sup>54</sup> R.FERCIA, *Criteri di responsabilità* (cit.n.1), p.186ss, especially p.189 n.109.; F.CURSI, *Actio de recepto* (cit.n.1), p.137

contractual obligation known as *custodiam praestare* and the particular one, based on *receptum*:

Gaius (5 *ad ed. provinc.*) D.4.9.5.1

*Quaecumque de furto diximus, eadem et de damno debent intellegi: non enim dubitari oportet, quin is, qui salvum fore recipit, non solum a furto, sed etiam a damno recipere videatur.*

It is important to notice, that for Gaius the obligation to keep an object safe based on *locatio-conductio* was restricted only to theft. He underlines that the *fullo* and *sarcinator* (D.4.9.5*pr.*) are liable for *furtum*, but those bound by the edict (D.4.9.5.1) have to protect the goods received in custody not only from being stolen but also from being damaged<sup>55</sup>.

But in my opinion the main doctrine is wrong when declaring that there was no obligation of *custodiam praestare* on the part of *nauta* before the edict. It is not true that otherwise the regulation would have no reason to exist. The focus only on the *exercitor navis*, justified by the predominant role that the figure has in the texts of the Digest, and thus excluding *caupones* and *stabularii* from the analysis, inhibits a more coherent interpretation. We have to abandon this limiting perspective that influenced so strongly the results of many studies.

The only type of contract that the ship's master, innkeeper, and stablekeeper have in common is *locatio-conductio rei*. In this form of agreement a civil obligation to keep the received goods safe is impossible, because from a dogmatic point of view those entrepreneurs do not receive any goods from their clients. They merely provide a space suitable for a certain purpose. If the merchandise would be lost as a consequence of letting inadequate space, there was a possibility to obtain compensation on the base of *actio conducti*<sup>56</sup>. But if the goods would be stolen from the ship or in the inn, the client would have no possibility to sue on the ground of the contract, because it did not include the obligation of safekeeping (*custodiam praestare*). In this context Ulpian's declaration about the usefulness of the edict is very persuasive. In fact without this

<sup>55</sup> F.CURSI, *Actio de recepto* (cit.n.1), p.130ss., especially p.135; A.FÖLDI, *Anmerkungen zum Zusammenhang* (cit.n.1), p.282.

<sup>56</sup> Ulpianus (14 *ad ed.*) D.4.9.3.1... *qui conduxit ex conducto etiam de rebus quae desunt agere potest...*

regulation *nautae*, *caupones* and *stabularii* could cooperate with the thieves and avoid any kind of liability<sup>57</sup>.

It is probable that the doubts about the necessity of the edict expressed by Pomponius and Ulpian originated from the sufficient protection granted on the base of *locatio conductio mercium vehendarum*, where an obligation to keep an object safe was present. But even in this case the edict had its important rule, eliminating the problem of proving what type of contract was agreed between the parties and extending the liability to the limits of *vis maior*.

This line of interpretation removes the main obstacle to recognize an obligation of safekeeping arising directly from the contract of *locatio conductio mercium vehendarum*. As we have seen the praetor had strong arguments to introduce the new edict and it is not necessary to decline a standard *custodia* liability of the *nautae* to justify its presence. But there are texts that can prove it more directly. First of all Gaius in his *Institutiones* formulates the rules of safekeeping in a very general way, appropriate for every type of *conductor operis*:

Gai.3.206

*Quae de fullone aut sarcinatore diximus, eadem transferemus et ad eum, cui rem commodavimus. nam ut illi mercedem capiendo custodiam praestant, ita hic quoque utendi commodum percipiendo similiter necesse habet custodiam praestare.*

According to Gaius the only motive for the obligation to keep an object safe of the *fullo* and *sarcinator* is the compensation they received. Ulpian gives another interesting example of this liability rule, explaining differences between *deposit* and *locatio conductio operis*:

Ulpianus (30 ad ed.) D.16.3.1.8.

*Si vestimenta servanda balneatori data perierunt, si quidem nullam mercedem servandorum vestimentorum accepit, depositi eum teneri et dolum dumtaxat praestare debere puto: quod si accepit, ex conducto.*

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<sup>57</sup> Ulpianus (14 ad ed.) D.4.9.1.1. *...et nisi hoc esset statutum, materia daretur cum furibus adversus eos quos recipiunt coeundi, cum ne nunc quidem abstineant huiusmodi fraudibus.*



If clothing given to a bath keeper is lost and he received no payment for the safekeeping, he will be liable only for *dolus* on the base of deposit. But what if remuneration was accepted? In that case the bath keeper will be liable *ex conducto*. This concise explanation is sufficient for determining the legal consequences. Ulpian has no doubts about the limits of liability in the contract of *conductio operis* and in this case the obligation to keep an object safe (*custodiam praestare*) was present<sup>58</sup>.

Another clear example of the interdependence between compensation and liability for safekeeping of every *conductor operis* is provided by Ulpian in his commentary to the works of Sabinus. The question refers to the availability of *actio furti* in the case of a letter being stolen. In the first part Ulpian deals with the availability of *actio furti* to the sender and recipient. Then the jurists attention focuses on the carrier himself:

Ulpianus (29 *ad sab.*) D.47.2.14.17

*...et ideo quaeri potest, an etiam is, cui data est perferenda, furti agere possit. et si custodia eius ad eum pertineat, potest: sed et si interfuit eius epistulam reddere, furti habebit actionem. finge eam epistulam fuisse, quae continebat, ut ei quid redderetur fieretve: potest habere furti actionem: vel si custodiam eius rei recepit vel mercedem perferendae accipit. et erit in hunc casum similis causa eius et cauponis aut magistri navis: nam his damus furti actionem, si sint solvendo, quoniam periculum rerum ad eos pertinet.*

According to Ulpian the carrier of a letter will be entitled to *actio furti* if (1) he was liable for the safekeeping or (2) he had his own interest in the letter not being stolen, as is the case when the letter stated that something should be delivered to him or done for him. What are the grounds for the obligation to keep the letter safe?

Ulpian once again indicates two possibilities. The first one is the assumption of the liability for safekeeping of the letter (*si custodiam eius rei recepit*). The second one is concluding a contract of *locatio conductio operis* and in particular the acceptance of payment for delivering the letter (*vel mercedem perferendae accipit*). It is clear that the mere fact of receiving payment was sufficient to give rise of the obligation to keep an object safe. Ulpian follows the same line of

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<sup>58</sup> Gaius (5 *ad ed. provinc.*) D.19.2.40, see above p.206

reasoning that Gaius, when he explained that the fuller and the tailor *mercedem capiendo custodiam praestant*.

In the above analyzed texts the obligation of safekeeping in the contract of *locatio conductio operis* is based simply on the interest of the *conductor*. We have seen that *receptum* expanded the standard limits of this liability (not only *furtum* but also *damnum* in D.4.9.5.1), but we can conclude, that the obligation known as *custodiam praestare* was present in *locatio conductio mercium vehendarum* even before the edict.