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**LEX RHODIA DE IACTU AND GENERAL AVERAGE**

***Lex Rhodia* in Roman Law**

The second title of Book XIV of the Digest, entitled *De lege Rhodia de iactu*, has a special status within the *Corpus Iuris Civilis*. The entire legal adaptation that relates to D. 14.2 is based on the same legal principle: no one can enrich themselves at the expense of another.<sup>1</sup> If the goods of one of the merchants were thrown out of the ship to reduce the load on the ship and thus save the goods of other merchants traveling on the same ship, then the merchants whose goods were saved would gain an unfair property advantage compared to those whose goods were sacrificed. *Lex Rhodia de iactu* is an interesting institute for several other reasons.

Firstly, it is an example of the ancient reception of one legal institute belonging to one legal order into another order (regardless of the fact that the extent as well as the nature of reception itself is debated in jurisprudence).

Secondly, the principle of compensation for one's property sacrificed in the interest of mutual benefit was so inspirational that it influenced later legal thinking and we can encounter applications of this principle both in modern civil law (including the new Czech Civil Code from 2012 [*Občanský zákoník*] – further also as OZ 2012 – see § 3012 of this Code) and private international law (issues of the so-called collective river accidents). *Lex Rhodia* is often mentioned as one of the examples of the so-called Roman commercial law (Huvelin, 1929, 127). In its essence, it is the earliest embodiment maritime insurance (Aubert, 2007, 157).

Thirdly, within the legal issues related to the Rhodian law, Roman lawyers came to a solution that substantially influenced other issues of private law, such as the question of abandoning the subject.

<sup>1</sup> D. 12.6.66.

### *Lex Rhodia* as a reception of Greek law

In the *Lex Rhodia*, one very often sees influence of Greek law on Roman law (by name). However, this is at odds with the Roman attitude towards foreign law. For example, Cicero praises the supremacy of Roman law. If Roman law is perfect, then there is no reason to use foreign solutions. However, even in the present legal science, there exist more objections against the formal reception of Greek law. Some scholars object that such a reception is incompatible with the spirit that dominated in the closed world of the ancient city (De Martino, 1982, 72–147). This closeness is reflected especially in the rule of law, which is considered an inviolable heritage of the people, the heritage as inviolable as religion.

Nevertheless, given major influence of Greece on the antique maritime trade and the close cultural contact between Greece and Rome, it is possible to regard the use of foreign maritime and trade consuetude, commonly known as the *Lex Rhodia de iactu*. The reception of Greek law is often argued against, as the Roman legal sources refer to the island of Rhodes only in D. 14.2. And from this entire, inextensive title, only two fragments contain explicit mention of the island of Rhodes: sections D. 14.2.2 and D. 14.2.9. The first fragment comes from the jurist Paulus and describes the general principle of the Rhodian law. The second fragment is attributed to Volusius Marcianus, a lawyer from the era of Marcus Aurelius and Antoninus Pius, and represents an excerpt from the work entitled *Ex lege Rhodia*.

There were also doubts concerning the authenticity of the work, as it is not mentioned in the Florentine Index. The extract evokes the marine accident hypothesis and the shipmaster's request directed to the Emperor Antoninus who replies that the law at sea where the *Lex Rhodia* is applied does not conflict with the applicable law. Marcianus adds that Augustus had already decided in the same sense. Some of the modern authors (Wagner, 1997) limit the scope of application of the Rhodian rules only to the plunder of a shipwreck site, or to duty exemption applicable to ships driven into a port by a storm. These controversies led to the repudiation of the Greek and Rhodian origin of the "Rhodian law". Critics view this title as a law created by *a posteriori* compilers, asserting that the Rhodian law was created in the eighth century AD.

Classical Roman law therefore, according to this extreme critique, developed autonomously, even in the field of maritime law, without receiving foreign legal institutes (Ashburner, 1975, *passim*). However, we consider it proved that Roman law availed itself of the customs of Greek maritime merchants (Chevreau, 2005), which were in use in the eastern Mediterranean, and that these customs were named by way of homage to the famous Greek island by the compilers of the *Corpus Iuris Civilis*. Adoption of the "Rhodian Law" consisted in the adoption of provisions on common danger and obligation of contributing to contracts of carriage, hire and sale of goods by Roman merchants, and subsequently in inter-

pretation of these contracts by the Roman authorities, particularly the praetor. Roman law also refers to a provision in the contract as a *lex*. The thesis that the Rhodian law was adopted under emperor Augustus and confirmed by emperor Antoninus seems unlikely (Chevreau, 2005, 70).

### The principle of the Rhodian Law

The core principle of the Rhodian law is stated in the following section:

D. 14.2.1. *Paulus libro secundo sententiarum: Lege rodia [rhodia] cavetur, ut si levandae navis gratia iactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est.* – “It is provided by the Rhodian Law that where merchandise is thrown overboard for the purpose of lightening a ship, what has been lost for the benefit of all must be made up by the contribution of all.”

What led the Romans to accept this principle? It is likely that the Romans tried to adapt to the customs that predominated in the maritime trade in the Mediterranean. Among other things, these customary practices focus on the basic aspect. This is a fair legal regulation on the consequences of unpredictable sea dangers that endanger human life, including the risk of wreckage, pirate raid, and frequent damage and loss to property on sea routes. Roman lawyers of the classical period considered it unfair that all those who might benefit from the salvage of the ship should not participate in the salvage. This is evidenced by the lawyer Hermogenian’s reference to *aequitas*.

D. 14.2.5 pr. *Hermogenianus libro secundo iuris epitomarum: Amissae navis damnum collationis consortio non sarcitur per eos, qui merces suas naufragio liberaverunt: nam huius aequitatem tunc admitti placuit, cum iactus remedio ceteris in communi periculo salva navi consultum est.* – “The contribution of those who saved their merchandise from shipwreck does not indemnify anyone for the loss of the vessel; for it is held that the equity of this contribution is only admitted when, by the remedy of jetsam, during the common danger, the interest of the others is consulted, and the ship is saved.”<sup>2</sup>

However, it should be noted that the Romans were led to the recognition of the Rhodian law by a very practical need. If the Romans had not recognized this equity-based principle, no one would have wanted to trade with them. Thus, Roman law had to deal with changed social conditions, and Roman lawyers had to make this obligation part of the Roman legal code.

The following fragment shows how the Rhodian law is applied:

D. 14.2.2 pr. *Paulus libro trigensimo quarto ad edictum: Si laborante nave iactus factus est, amissarum mercium domini, si merces vehendas locaverant, ex locato cum magistro navis agere debent: is deinde cum reliquis, quorum merces salvae sunt, ex conducto, ut detrimentum pro portione communicetur, agere potest. servius quidem respondit ex locato agere cum magistro navis debere, ut ceterorum vectorum merces retineat, donec portionem damni praestent. Immo*

<sup>2</sup> See also Dostalik (2012), 121.

*etsi "non" retineat merces magister, ultro ex locato habiturus est actionem cum vectoribus: quid enim si vectores sint, qui nullas sarcinas habeant? Plane commodius est, si sint, retinere eas. at si non totam navem conduxerit, ex conducto aget, sicut vectores, qui loca in navem conduxerunt: aequissimum enim est commune detrimentum fieri eorum, qui propter amissas res aliorum consecuti sunt, ut merces suas salvoas haberent.* – "If the merchandise was jettisoned from the ship, which was in trouble, the owners of that merchandise, if they delivered the merchandise to the transportation, should sue the captain of the ship on the base of the action of the contract of lease. And captain can use the very same action against the other passengers, for the reason that their merchandise had been saved, so they have to contribute. And Servius responded that they should sue the captain by the same action to hold the merchandise of the other passengers on the board of the ship until they will contribute. But if the captain would have not retain the merchandise on board, he is still able to use the action of the contract of lease against the passengers. What is to be done if there are passengers who have no baggage? It evidently will be more convenient to retain their baggage, if there is any; but if there is not, and the party has leased the entire ship, an action can be brought on the contract, just as in the case of passengers who have rented places on a ship; for it is perfectly just that the loss should be partially borne by those who, by the destruction of the property of others, have secured the preservation of their own merchandise."

The observed method "application of the Rhodian principle" is very interesting. Roman law did not adopt the obligation to contribute to a maritime accident but, on the contrary, used the Roman legal code, thus attempting to implement this principle by its own means. From among possible contract types, Paulus choosed *locatio-conductio*, a bilateral contract based on good faith, which was opted for because it is a contract used in maritime transport. One of the contract parties, called the *vector*, entrusts cargo to the ship's captain for carriage to a determined destination, for a specified amount or for a part of goods. This is *locatio operis faciendi* where the *vector* is the locator and *magister navis* the conductor.<sup>3</sup> J. Klíma emphasizes the different approaches in Roman jurisprudence with respect to provisions of the Rhodian law: "The Institute of Rhodian Law is viewed as *locatio conductio*. The carriers whose merchandise was thrown into the sea were given *actio locati* against the captain to compensate for the sustained damage. The captain had *actionem conducti* against those carriers whose goods remained intact, and at the same time he had retention right to the saved goods" (Klíma, 1923, 5).

Pernice (1898, 84) says that the Roman jurists made the need a virtue. As he notes, "The *vectores* are not in any legal relationship with one another, after executing the *iactus* they cannot sue each other, but they concluded a contract of carriage with the captain. Therefore, the injured *vector* sues the captain for damages, the captain then sues the carriers whose goods were saved for the contribution payment. Therefore, the suit of rental relation has an unusual content. But it is given by law" (Klíma, 1923, 6).

<sup>3</sup> Some authors, e.g. Cannata (1995), 390, consider it to be *locatio conductio rei vehendae*, as in their opinion sea transport does not constitute an *opus* according to the definition from the Digest (D. 50.16.5.1).

We emphasize that Roman lawyers fundamentally modified a contract for performance of a work – a legal relationship exists only between the captain and the injured passenger on the one hand, and the captain and the passengers whose goods were not thrown away on the other. Only the captain is a party dealing with the other passengers' mercantile consortium (*consortium*) which is created on the ship, only he has a contractual relationship with each of the *vectores*. Therefore, he is the only one able to mediate the contribution payment between individual, otherwise unconnected *vectores*.

All this corroborates the fact that only the adaptation of the principle of contribution for jettisoned property into Roman law was done on the basis of *aequitas*. These contributions are paid by the owners whose goods have been saved because the goods of the others were thrown into the sea. This is where it contrasts with the Greek law, which permits formation of a certain community among the individual merchants who have been exposed to danger. E. Chevreau (2005, 75) refers to this community as a *société de risqué*, and, as a result, the claims of those whose goods have been thrown out can be settled. Roman law was not sufficiently influenced by Greek law to allow formation of a *société de risque*, but this use of foreign law is solely in the intention of bilateral relations of the rental contract. Thus, Roman law rejected the whole idea of collective responsibility, based on a society (*société*) that mutually insured all the risks of a voyage. This idea of collective responsibility was hindered by the fact that, under Roman law, no one could be forced to participate in a social contract (*societas*) or could be forced to co-ownership (*condominium*).

### Secondary issues in the Rhodian Law

However, Roman lawyers were not satisfied with the mere application of the Greek principle and they extended the term of *iactus* (lit. throwing out of the ship). In the opinion of his predecessors, Servilius, Ofilius and Labeo, Paulus claims that the obligation to contribution will apply not only to the ship's salvage from wreckage, but also to the payment of ransom to pirates (D. 14.2.2.3). Interestingly, if pirates had entered a ship and seized goods from the merchants themselves, M. Bartošek (1981, 264) thinks that the whole situation would have been deemed a *vis maior*, "and every passenger would have to bear his own damage." This fragment is the basis from which general average (*l'avarie commune*) derives.

### *Lex Rhodia within the ius commune*<sup>4</sup>

Development of this legal institute continued in the Middle Ages, when it had a particular influence on maritime law and, subsequently, reflection related to sharing the common risk. Over the following centuries, there was a discussion in

<sup>4</sup> On the notion of *ius commune* see e.g. Zalewski (2016).

the course of which it was recognized that it constituted a responsibility similar to contractual responsibility (Dajczak, Giaro, Longschamps de Bériér, Dostálík, 2014, 369). In the context of this discussion, Cuiaccius (1722, 531) considers that the purpose of *Lex Rhodia* is what Paulus, a Roman lawyer, defined as follows: *Aequissimum enim est commune detrimentum fieri eorum, qui propter amissas res aliorum consecuti sunt, ut merces suas salvas haberent* (D. 14.2.2 pr.). As a foundation of the Rhodian law, the part must be considered when the storm or strong wind cause a need to relieve the ship of the load to ensure salvage and avert the common danger, therefore goods are thrown out. This loss resulting from the jettison is supposed to be compensated (*sata*) by the common contribution of the owners of all goods or articles that have been saved.

Goods are thrown out by the *magister navis* or by some of the owners of the transported goods, or by all owners together. If the goods were thrown out by the owners themselves on the base of a joint decision, then according to Cuiaccius it would be better to consider suit by order, however the use of this suit is hindered by the fact that they did not act with the intention to execute someone's order. Therefore, it is right for those owners whose goods were thrown out to sue the shipowner, and he would sue the owners whose goods were saved so that they provided a part of the compensation (*pro rata sarcire damnum jacturae dominis jactarum mercium*) (Cuiaccius, 1722, 531).

He also considers it an erroneous presumption that the obligation of contribution also arises (yet more generally) when, in order to prevent the spread of fire, neighbours destroy a neighbouring building for fear of their homes burning down, thus preventing the fire from spreading and passing through it. It is necessary for the owner of the saved buildings to compensate for the damage caused to the owner of the destroyed building. This suit would not be allowed if the buildings were demolished whereas the fire was extinguished before it reached the buildings that were pulled down (to prevent the spread of inflammation). In this case, the neighbour responsible would be forced to pay damages by virtue of the *quod vi aut clam* interdict. If the fire reached the same level, the man whose buildings were burned would not be entitled to sue his neighbour; likewise, no action can be brought by the owner whose goods were thrown out of the ship if they acted for a just cause, that is, if the goods that were thrown out burdened the ship much more than their goods.

Cuiaccius also comments on some of the minor issues that were solved in Roman law in relation to the *lex Rhodia*: he excludes the suit pertaining to an action performed without order, because the defendant owners did not throw out their own goods to save the others having been told to do so, but after a joint deliberation and following the order of all those who sailed on the ship. According to him, the obligation of contribution also exists for those passengers who have on board only items that do not burden the ship, such as rings or pearls, as well as those passengers who have not concluded a contract of carriage with the *magister navis*.

Cuiaccius also reminds that the *magister navis* has yet another expedient besides a suit which, as Paulus says, can provide contribution: retention law. Thus, as regards those passengers who have goods, the shipowner will retain these goods on board; those who have nothing he will sue *ex locato*.

We can therefore conclude that Cuiaccius understands the duty of contribution as an obligation to avert a common danger, that this obligation is one of contractual nature. At the same time, however, he extends the obligation of contribution to those cases when the passenger does not have a contract. He is also aware of the possibility of suit in respect of action without order but excludes this possibility. He also reflects on the ongoing discussion about extending the *ex lege Rhodia* suit to cases of extreme emergency but dismisses this possibility, since there can be no action against a person who in the circumstances of extreme distress has destroyed other people's property acting for just cause.

### *Lex Rhodia* in Austrian and Czech civil law

The tradition of the Greek maritime law institute is echoed in the Austrian Civil Code (§ 1043 ABGB). According to Sedláček (1933, 91), in § 1043 ABGB "only the first sentence is very closely related to this historical basis." From the original, exclusively maritime adaptation, the general danger to both the plaintiff and the defendant remained, as well as the fact that the plaintiff sacrifices some of their property to avert this danger. Sedláček associates this institute with the necessary action (§ 1036 ABGB). The fundamental difference, however, is that the necessary agent acts in favour of the *domina negotii*, while the one who sacrifices a part of their property acts in their own interest too, seeking to save the remaining part of their property.

The wording of the governmental draft of the 1937 Civil Code, which never came into force, does not refer directly to the *lex Rhodia*, but it recalls reimbursing the cost and payment (of up to ten per cent) to the one who saved somebody else's property from "probable devastation or loss." The influence of Roman law can also be seen in the fact that the right is construed as a retention right.<sup>5</sup> The explanatory report shows that the coastal law (§ 160 and § 388 of the ABGB) was deleted with the rationale that it relates only to the seashore, whereas on the banks of a river it applies only to found property.<sup>6</sup>

The Roman institute of the *lex Rhodia de iactu* was integrated into the concise provision of § 3014 in the new Czech Civil Code: "If a person in difficulties sacrifices a thing in order to prevent greater damage, each of the persons benefiting from the situation shall provide the victim with a proportionate compensation."

<sup>5</sup> See § 152 of the Government's Draft of the Czechoslovakian Civil Code from 1937. The original document can be found here: [https://digi.law.muni.cz/handle/digilaw/7035?fbclid=IwAR1raUvZSU2XK8ojS9D6kYV\\_Rdml1MORF2C\\_O1XuaXCuroj2mCRAG4Pl-04](https://digi.law.muni.cz/handle/digilaw/7035?fbclid=IwAR1raUvZSU2XK8ojS9D6kYV_Rdml1MORF2C_O1XuaXCuroj2mCRAG4Pl-04) [access: 21.06.2019].

<sup>6</sup> Cf. also the Explanatory Report to the Government's Draft of the Czechoslovakian Civil Code from 1937, p. 266.

Contemporary commentary to the Czech Civil Code rightly claims that § 3014 is based on the Roman *lex Rhodia de iactu* (and, in this context, cites the textbook of Roman law by O. Sommer), but has already “become self-sufficient” and applies to “a variety of cases of sacrificing someone else’s property in an emergency, unrelated to maritime transport, irrespective of any shipping at all” (Hulmák, 2014, 2008). The commentary cites foreign (Austrian) literature, which permits the application of § 1043 of ABGB to road transport (Koziol, 2010, § 1044, marg. No. 1). It should simultaneously be noted that there is a judicial decision which finds the application of the Road Transport Act preferable to the above-mentioned provision (Wesener, 1975, 35 ff.).

In its essence, § 3014 OZ 2012 overlaps with the institute of extreme emergency, which is regulated individually in the provisions of § 2906 OZ 2012. As for the main difference between the provisions of § 3014 OZ 2012 and § 2906 OZ 2012, the commentary suggests that in the case of extreme emergency, the consequence must not be equally serious or even more serious than the damage which may have ensued, while the provisions of § 3014 OZ 2012 speak of averting greater damage.

This identification of the *lex Rhodia* with the institute of extreme emergency has a major impact on the interpretation of the cited provision. Consequently, the commentary admits the possibility of compensating for the damage in the case where “the averter sacrificed the property only for the benefit of another person” (Hulmák, 2014, 2008). If the “avertter” sacrificed their own property, then the provision of § 3014 would not apply, but it would constitute an action without order.

Next, payment for damage is admissible under § 3014 OZ 2012 if the damage is caused on property that does not cause danger. An example of this use of the *lex Rhodia* is pulling out a post from the fence and its use for defence against a dangerous animal. If we were to evaluate the provisions of § 3014 OZ 2012, we may argue that its basic deficiency is deletion of the term common danger or common need (as it is known in the § 717 of Czech Civil Code of International Trade from 1963). It is that element which enables distinction between extreme need and sacrifice of property in common danger. In Text addition, the two institutes derive from a different basis.

The discussion about the nature of the § 3014 OZ 2012 continues, and a variety of different interpretations are argued. K. Eliáš combines *versio in rem* and the *lex Rhodia de iactu* as examples of so-called “false acting” (*unächte negotiorum gestio* – Zimmermann, 1872, *passim*, *actio negotiorum gestio utilis*), e.g. if someone uses a property belonging to another and reasonably believes that it is their own. Cases traditionally referred to as *lex Rhodia de iactu* are understood by K. Eliáš (2017, 1064) as being different from both damage and unjust enrichment cases. On the other hand, A. Pavlíček (1873, 124), who was the only one to address the issue of unjust enrichment in detail, understands *versio in rem* as a subtype of unjust enrichment.



As Kindl states in his brand-new commentary to the Czech Civil Code (published in June 2019), this new Czech regulation does not apply in the case of maritime transport, because there are already two special enactments in force (governing both river navigation and sea transport). At the same time, he maintains that § 3014 should apply to accidents that are not related to maritime transport, e.g. in the case of a balloon or aircraft. It also outlines the possibility of applying this provision in non-accidental situations that are close to extreme emergency. As a model case, the author mentions demolition of a house in order to block the watercourse during a flood (Kindl, 2019, 877).

As Melzer states in another commentary, the provision of § 3014 OZ 2012 is somewhat “enigmatic” (Dostálík, Melzer [in:] Melzer [et al.], 2018, 1639); however, it is certain that this provision is based on the principle of “none can enrich themselves at the expense of another” and is therefore a special case of unjust enrichment (along with *specificatio*, *aluvio*, *accessio* and *versio in rem*). It contains elements that are typical of the *lex Rhodia de iactu*, such as sacrificing property in need, averting greater danger or proportional compensation for damage. At the same time, however, the requirement of common danger has been deleted, which means that this provision can be understood as a special case of extreme emergency (Dostálík, Melzer [in:] Melzer [et al.], 2018, 1640).

If we take the view that § 3014 OZ 2012, traditionally understood as the *lex Rhodia de iactu*, has not only dispensed with the question of the damage schedule in a maritime (river) accident, but also removed the concept of common emergency – as the commentary literature suggests (see above) – then we may accept that it may be used to compensate for damage that is caused to a third party when averting danger within the framework of extreme emergency (§ 2906 OZ 2012).

Moreover, § 3014 OZ 2012 (*lex Rhodia*) is considered by some Czech authors to represent unjust enrichment in a broader sense (“liability outside the *condictiones*”) and it is a question of whether and to what extent unjust enrichment regulations should be applied to cases of sacrificing of someone else’s property when averting greater danger (Dostálík, 2018, 200).

In conclusion, one may state that although Czech law demonstrates reception of this traditional provision of Roman law, Czech jurisprudence separated (under the influence of the Austrian school of private law) the *lex Rhodia* from its traditional maritime role and is looking for new application of this institute.

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### *LEX RHODIA DE IACTU AND GENERAL AVERAGE*

The article deals with the issue of general average in Roman and modern law. In Roman law, it deals with the provisions of *lex Rhodia de iactu* (D. 14.2). The Author describes the *lex Rhodia de iactu* as an example of the reception of Greek law by Roman law. He describes the basic principles of solving a general average in Roman law, the influence of this solution on Pandekton law, as well as its modern adaptation in the Czech Civil Code.