ATTI DELLA SOCIETÀ LIGURE DI STORIA PATRIA
Nuova Serie – Vol. LII (CXXVI) Fasc. II

VITO PIERGIOVANNI

Norme, scienza e pratica giuridica tra Genova e l'Occidente medievale e moderno

⁂

GENOVA MMXII
NELLA SEDE DELLA SOCIETÀ LIGURE DI STORIA PATRIA
PALAZZO DUCALE – PIAZZA MATTEOTTI, 5

The Rise of the Genoese Civil Rota in the XVIth Century: The "Decisiones de Mercatura" Concerning Insurance

I. *The rise of the civil Rota*

The origins and rise of Central Courts in the Modern Age are connected with the process of the centralization of public bodies and met the demand for the better operation and uniformity of justice for those who were subject to one power within the State.

The judgements made by these Courts reflect the realization of such legal policies, but are also a reliable indication of the problems and tension which the economic and social life of the State was prone to.

Within this jurisprudence the quantity and quality of the judgements related to trade, which were expressed in monetary terms, and the range of relevant geographical extent, can best show the extent and complexity of economic relations, and the means and skill used by the merchant classes. Favourable environmental conditions were a stimulus to the process of specialization and the technical and legal improvement of the individual mercantile institutions and explain the greater fame and diffusion of the *decisiones* of some central Courts as opposed to those of others.

These historical and environmental considerations give a clearer insight into the events surrounding the Genoese civil Rota, which can be graphically represented, in the space of a century, from 1530 to l630, by a rise and then decline in close connection with the economic and social life of the *Repubblica di S. Giorgio.* The most interesting documents showing the activity and the results achieved by this Court is the collection of judgements entitled *Decisiones Rotae Genuae de mercatura et pertinentibus ad eam*, which was printed for the first time in Genoa in 1582. This collection consists of 215 *decisiones* gathered by a private citizen, offering to dealers and to practical and theoretical lawyers the best cases from one of the most important authorities in the Mediterranean area.

---

* Pubbl. in *The Courts and the development of commercial law*, ed. V. PIERGIOVANNI, Berlin 1987 (Comparative Studies in Continental and Anglo-American Legal History, 2), pp. 23-38.

The law-court had been constituted fairly recently, having started its activity in 1530, when a rationalization process in Genoese legal life led to the abandoning of the previous system of magistrates. The tribunal of the Rota, in fact, fell within the reform plan which in 1528, mostly through Admiral Andrea Doria, aimed at achieving both the political goal of rendering the local ruling class homogeneous and the institutional goal of simplifying and qualifying the bureaucratic and law giving structure of the State [1].

The choices adopted for such modernization were quite common: in the field of jurisdiction some special non-technical magistratures were replaced by a single Bench, formed of foreign learned lawyers with a 2-year term of office, who were not immediately re-eligible and were subject to control *finito munere.*

The refom laws [2] simply gave quick lines which a committee of four greatly respected citizens stove to implement: they were assigned the task of « ... revidendi, commemorandi et refferendi quae ad rem ipsam pertinerent et iustitiae et veritatis, considerata natura ipsarum causarum, et pro litibus minuendis, ac quanto citius fieri potest, cum minori iactura litigantium expediendis ... » [3].

---

[1] *Le Leggi et Riforme della ... Repubblica di Genova, fatte ... l'anno MDXXVIII*, Pavia 1575, c. 30 *v*., 12 marzo 1529:

« I predetti Mag. Signori Dodici Reformatori della Eccelsa Repubblica di Genova, radunati in sufficiente e legittimo numero, mossi per degni rispetti, in ogni miglior modo, et c. hanno deliberato, che fra 'l primo giorno di Gennaio prossimo sia istituita una Rota di cinque Dottori forastieri dall'Illustrissimo Duce e Magnifici Governatori, con quel salario, emolumento, autorità, e balia; con appellatione e senza, come loro parrà; togliendo via e rimovendo e tenendo per tolta e rimossa, finito il presente anno, tutta quella autorità e balia, che hanno nelle cose civili i magistrati de cittadini, o altri qualsivoglia nella presente Città; cioè l'ufficio della mercatantia, della Gazaria, de banchi e tutt'altri uffici de cittadini. Intendendo però che la predetta Rota sia obligata giudicare secondo le regole, ordini e decreti, e secondo la natura dei suddetti ufficii respettivamente; eccettuando nondimeno dal predetto rimover di balia, della quale si è detto, l'ufficio de consoli della ragione. Il quale ufficio resti fermo in sua possanza ... ». For a general historical setting C. COSTANTINI, *La Repubblica di Genova nell'età moderna*, Torino 1978 (*Storia d'Italia* diretta da G. Galasso, IX).

[2] As the text of the laws establishing the civil Rota, three copies hearing no significant differences have been taken into account. Two copies are kept at Archivio Storico del Comune di Genova (ASCG), ms. 89, *Constitutiones Rotae Civilis Genuae 1529*, cc. 2 *r*.-10 *v*., 18 *r*.-26 *r*. (we shall make reference to the latter later on, as it also includes the subsequent laws concerning the Rota); while the third can be found at the Archivio di Stato di Genova (ASG, ms. 128, cc. 69 *v*.-77 *r*.).

[3] *Constitutiones Rotae*, ASCG, ms. 89 cit., c. 18 *r*. The appointed jurisconsults are Giovan Battista Cattaneo Lazagna, Giovan Battista de Nigro fu Oberto, Jacopo Cattaneo, Giovanni Imperiale Baliano.

The members of the committe were required, in short, to both determine more precisely the main features of the activity (the *natura causarum)*, assigned to the new Court, and to establish codes of procedure in order to shorten the times of judicial proceedings and to reduce Court costs borne by the parties.

At the same time, the amount of salary to be paid to the new judges was fixed, and it was decided to forward this deliberation *per litteras ad diversas Italiae civitates*, in order to urge any candidate to apply for these posts [4].

On January 8th, the definitive text of the *Constitutiones Rotae* was published and it came into force at the same time as the effective start of the new Court [5].

The problem of the activity of the new Court, which underwent subsequent stages of adjustment from the decree of institution of 1530 up to the *Statuto* of 1589, must be linked to the above-mentioned first element of the judges' professional qualities which were estimated according to the normal requirements of a university *curriculum* concluded by a degree and a subsequent *cursus honorum* in the law-courts and in the forum.

In fact, the first decree states literally:

> « Et in primis statuunt, imponunt, et ordinant Magistratum unum Rotae quinque Iurisperitorum, et Doctorum in Civitate Genuae, sub modis et formis inferius declarandis elligendorum, cuius Magistratus iurisdictio incipiat in KL. Januarii proximi anni Millesimi quingentesimi trigesimi, qui Magistratus Rotae intelligatur habere et habeat iurisdictionem, authoritatem et bailiam, ac competens sit, et esse intelligatur super omnibus et singulis causis, quaestionibus, et differentiis, et in dependentibus ab eis de quibus sunt et esse consueverunt tam ex regulis ordinamentorum Januae, quam etiam ex inveterata consuetudine sp. Officiales mercantiae, Bancorum, et Gazariae tam officii Gazariae simpliciter, quam officii Gazariae Commissarii, et Delegati etc., ac etiam officiales Ruptorum, ac etiam de causis, quae ex forma Capituli Januae positi sub Rubr. de causis civilibus et pecuniariis bonis viris committendis, possunt committi duobus bonis viris de tabula, ita et tali modo, quod omnes et singulae causae, et jurisdictiones praedictae, et quaelibet earum devolvant, et intelligantur devolutae, et spectare, et spectent iudicio, iurisdictioni, ac determinationi dicti Magistratus Rotae praedictae, de quibus omnibus et singulis causis praedictis dictus Magistratus Rotae sit competens, et de praedictis causis nullus alius Magistratus possit nec debeat se intromittere. Declarato semper ad cautelam quod dictus magistratus Rotae non sit

---

[4] *Ibidem*, « De salario Rotae ».

[5] The precise date can be drawn from the copy A.S.G., *Constitutiones Rotae*, ms. 128 cit., c. 69 *v*.

competens, nec possit se intromittere de causis quae ex forma capituli Januae positi sub rubr. De causis non commissibilibus bonis viris, non possint nec debeant bonis viris committi, nec etiam de causis de quibus officiales Monetarum sunt competentes, nec etiam de causis spectantibus DD. Consulibus rationis, nec etiam de causis Ruptorum seu Rupendorum possit se intromittere dictus Magistratus Rotae, nisi prius per DD. Antianos Januae, seu alium superiorem fuerit declaratum aliquem Bancherium sive alium ruptum esse, seu rumpendum, facta transmissione Praefato Magistratui Rotae »[6].

The activity of the new Court did not extend to all civil controversies, but it rather tended to reunify all such controversies under the authority of a body composed of qualified public magistrates, while controversies had formerly been settled by *boni viri* and by non-technical judges.

Indeed, people had previously had recourse to the *boni viri* for all issues which were not within the competence of the *Praetor* or of his *Vicarius*[7], as they concerned neither the public interest nor the prerogatives of State sovereignty.

In matters of great economic importance, for instance problems of succession, the *boni viri* would often have to turn to a jurisconsult for advice, in order to clear up and settle the most controversial legal problems.

Since the establishment of the Rota, legal aspects concerning these controversies were also better examined and more thoroughly assessed than they had been by non-technical judges.

Undoubtedly, the field in which this change in judicial development was most fruitful was the mercantile field.

The Rota, as the charter of institution claims, assumed the functions and the competence of some old special Courts: firstly of the *Officium Mercantiae*, the members of which, according to the ancient *Statuto*, of 1414:

« ... Qui officiales et officium mercantiae sint et esse intelligantur et debeant magistratus super omnibus et singulis differentiis, quaestionibus et controversiis quae coram eis movebuntur mercandi causa, scilicet occasione mercantiae, vel alicuius mercati de quibus non sit instrumentum publicum. Quas quidem differentias, quaestiones et controversias dictum officium teneatur et debeat declarare terminare et diffinire summarie et de plano, sine strepitu et figura iudicii ac etiam pignore bandi, quam cicius fieri poterit

---

[6] *Constitutiones Rotae*, ms. 89 cit., cc. 18 *v*.-19 *r*.

[7] *Statuta et Decreta Communis Genuae* etc., ed. A.M. VISDOMINI, Bononiae MCDXCVIII, Libro I, cap. 8, c. 6 *r*. « De causis civilibus et pecuniariis bonis viris committendis »; cap. 9, c. 9 *r*., « De causis non commissibilibus bonis viris ».

bona fide, vinculo iuramenti servato iuris ordine et modo (rectius, *non)* servato, oretenus et in scriptis, habendo cum per (rectius, *semper)* intuitum ad dictum (rectius, *deum)* et veritatem negotii ... sine consilio iurisperiti nisi ad utriusque partis istantiam ... » [8].

The authority of the 'Ufficio di Gazaria' (which had been replaced by the Rota) was instead more specific, responsible *super facto navigandi*, while the *Officium Banchorum* governed the *compere*, *paghe* and *luoghi* of the *Commune.*

The Rota's authority in the matter of bankruptcy was peculiar: in fact, it could only act when a political body, such as the *Magistratus Antianorum*, considered it opportune, not only by legal criteria, to start proceedings [9].

Unilke other central Tribunals, which, in the same period, tended to organize their activities in an exclusive way for all civil and criminal matters, the Genoese civil Rota tended to act mainly as a specialized Court in mercantile and maritime matters.

The decree of institution was very clear in this matter when, taking up the notion expressed by the reformers in 1528, it insisted on respect for the rules, orders, decrees and also the features of the previous mercantile Courts, which had now been replaced by the Rota, and reminded lawyers that *Uditori* had the faculty of judging *tam ex regulis quam ex inveterata consuetudine* [10].

Formally, the rules of procedure that can be found in the decree of institution are rather similar to the rules of other tribunals, and take up the texts quoted above regarding the *Officium Mercantiae* almost literally [11]: in two contexts specific reference is made to the peculiarity of the mercantile Court. Indeed a passage claims:

« ... Insuper pro maiori deliberatione, attentis regulis et ordinamentis Ianuae, ac inveterata consuetudine declarant et statuunt quod in causis cambiorum et recambiorum, exationis

---

[8] *Ibidem*, Libro IV, cap. 96, c. 81 *r*., « De potestate et bailia Officii Mercantiae ».

[9] V. PIERGIOVANNI, *Banchieri e falliti nelle* 'Decisiones de mercatura' *della Rota civile di Genova*, in *Diritto comune, diritto commerciale, diritto veneziano*, ed. K. NEHLSEN-VON STRYK e D. NÖRR, Venezia 1985, pp. 17-38 (Centro Tedesco di Studi Veneziani, Quaderni, 31).

[10] *Constitutiones Rotae*, ms. 89 cit., c. 18 *r*.

[11] The *Constitutiones Rotae* deal exhaustively with specific procedural aspects concerning evidence, testimonies, time limits in judicial proceedings, delays of information and probation appeals, which have many points of contact with the previous Genoese regulations of the *Statuti*, dating back to 1414. These regulations were supplemented and modified by reforms many times, see below paragraph 2.

securitatis et exationis naulorum, et in aliis causis executionis, videlicet illae quae iurisdictioni Praefati Magistratus spectant, debeat procedi et terminari executive et sub illis modis et formis prout continetur in Decretis, ordinamentis, et regulis antea conditis et prout antea servari consuevit, quantum ad modum et formam procedendi, praedictis non obstantibus, in quibus causis executionis de quibus supra non possit nec debeat dari, nec concedi dilatio de foris informatoria, nec etiam probatoria ... » [12]. Later on we read: « ... Praeterea pro tollendis difficultatibus, declarant et statuunt quod Cartulariis Bancheriorum Ianuae scriptis per Notarium publicum de Collegio Notariorum Genuae adhibeatur plena fides tam pro Bancheriis, quam contra Bancherium, ac etiam inter alias extraneas Personas ... » [13].

The founding decree of the Rota, after establishing the distinctive principles of the Court and the references to the rules and customs of the mercantile tradition and regular practice that it must follow, goes back to the traditional hierarchy of sources, including Roman law:

« ... Magistratus Rotae, salvis semper et servatis contentis in praesentibus constitutionibus, quae observari debeant, quod observent et observare teneantur capitula, et ordinamenta Ianuae tam condita quam condenda coram eis exhibenda et ipsis defficientibus iura romana ... » [14].

In this particular circumstance, that is at the moment of the constitution of the new tribunal, this reference to Roman law is more significant than it normally is in legal systems which were intended to cover a wider and wider range of dealings with one particular form of legislation, and thus tended to anticipate all foreseeable cases and to be based on rules of necessity which increasingly aimed at excluding possible outside influences. It is necessary to add to these general considerations that, in the specific case of Genoa, the new Court had to judge mercantile relations which often developed separately from local tradition and which were, instead, connected with customary forms and procedures which at the wish of the law-makers, the new judges hat to obey.

It would appear to be a very difficult situation for Roman law, but the innovation of the Genoese Rota lies in the personalities of the new judges, who, thanks to their ability to reconcile mercantile regular practice with school tradition, were to give success to the jurisprudence of the Court.

---

[12] *Constitutiones Rotae*, ms. 89 cit., cc. 19 *v*.-20 *r*.

[13] *Ibidem*, c. 23 *r*.-*v*.

[14] *Ibidem*, c. 24 *r*.

The *Officium Mercantiae*, *Gazariae*, *Banchorum*, which the civil Rota replaced, were not composed of legal experts but of citizens, especially merchants who, thanks to their experience, wisdom and honesty were called to sit on the Benches. The composition of the Rota was, instead, governed by other criteria, as the requirements were: « DD. Iudices Rotae eligendi ad ipsam rotam sint Doctores utriusque iuris et canonici et civilis, et seu saltem civilis tantum, ac bonis moribus ornati, et iusti habeantur, et tractentur ... »[15].

In addition to this, they were requested to have been born and to dwell within at least 50-miles of the town of Genoa, to be older than 35 and that: « ... postquam fuerint doctorati, quod se exercuerint in dicto exercitio Doctoratus advocando, et seu iudicando, et consulendo, seu practicando saltem per annos quinque ... »[16]. Therefore, merchant-judges were replaced by graduate-judges with experience in practice and in the Courts, who were shifted to an environment with its own rules and customs to which they had to adapt and which, above all, they had to enforce.

A study of the origin and previous experience of these judges would be interesting and appreciated; anyway, we think that they carried out two very important technical operations with very profitable consequences.

Firstly, through the incorporation of the most valid parts of mercantile regular practice and their fusion with the new rules of the Court procedures (both those issued by law-makers and those arising from the everyday activity and previous experience of the new judges), a *stilus* gradually developed, which, from time to time, was justified and theorized and eventually contributed to introducing the most significant example of mercantile law (not only regarding Genoa, but, at least, the Mediterranean area). The previously quoted examples of *causae cambiorum et recambiorum* or of *cartularii bancheriorum* are peculiarities of the Genoese *stilus.*

Secondly, the judges' effort to use the traditional notions of the jurists of Roman formation and the *auctoritates* which supported them, leads to corresponding research into the subject emerging from a mercantile Court.

These two experiences, one practical and one theoretical, were combined in the same group of persons and helped to give a valid contribution to the rising science of commercial law. We shall give some examples of this with regard to insurance, later on.

---

[15] *Ibidem*.

[16] *Ibidem*.

The possibility of circulating the material worked out by the Genoese civil Rota was made concrete from the time when it was decided that the *Auditores* would be obliged to justify the judgements of the Court.

The procedure of appeal against the decisions of the Rota, which was provided for by the decree of 1530, already quoted several times, established the practice of giving grounds for decisions. The decree states:

> « ... Item statuunt, declarant et decernunt, quod a sententiis ferendis per D. de Rota quando fuerint quinque, vel quatuor ex eis vere concordes in iudicando, a sententiis eorum non possit, nec debeat appellari, revocari, reclamari, nec de nullitate dici, sed ipso iure et facto transeant in rem iudicatam, et exequantur, et exequi debeant; si vero non essent concordes in iudicando ut supra, tunc et eo casu possit reclamari a sententiis eorum ad DD. Procuratores Praefatae Reipublicae. Qui causas dictae appellationis ut supra interpositae committant tribus prout eis melius videbitur, et quam commissionem faciant tribus Doctoribus extraneis ecclesiasticis, si adessent in civitate Ianuae, si eis videbitur sine suspicione eisdem possit committi, et quod ab eis administrari debeat iudicio eorum, consideratis considerandis, alioquin possit eam committere Iurisperitis ex Collegio Iurisperitorum Ianuae, quam etiam aliis non Iurisperitis et tam coniunctim quam in societate, quam aliter, et prout melius videbitur Dominis Procuratoribus Praefatae Reipublicae ... » [17].

In 1534 the obligation of giving grounds was introduced in order to increase the chance of appeal in those cases where the judges of the Rota disagreed:

> « Si enim inter ipsos D. Auditores in proferendis eorum sententiis in illis scilicet causis, quibus ex forma institutionis Rotae appellatio data est discordes fuerint teneantur et debeant in utraque eorum sententia inserere substantialiter eorum motiva, quibus moti fuerint ad sic iudicandum … » [18].

The definitive institution and generalization of the obligation of ground can be found in the *Reformationes Rotae Genuae aeditae anno MDLVII*, according to which:

> « ... Rationes et causas, quibus moti fuerint ad iudicandum, in omnibus et singulis sententiis per eos ferendis, sive fuerint concordes, sive discordes, teneantur Domini Auditores intra octo dies dare notario causae, allegando iura, rationes, et decisiones, quibus moti fuerint ad sic iudicandum, et non per relationem ad acta vel processus, exceptis causis minoris summae librarum ducentarum, et exceptis iis causis executivis, in

---

[17] *Ibidem*, cc. 21 *v*.-22 *r*.

[18] *Ibidem*, c. 28 *r*.

quibus iura partium sunt reservata in iudicio ordinario, quae motiva subscribi debeant per unumquemque ex ipsis Dominis Auditoribus et remanere debeant penes acta causae, et de eis fiat copia parti, quae illam petierit. Declarato, quod omissio motivorum non viciet sententiam nec etiam expressio ipsorum, quamvis esset iniusta et erronea, ex eo tantum, quod in ipsis sententiis apposita fuerint, non noceat aut nocere possit sententiis, adeo quod ex eo quod fuerint expressa motiva, vel non expressa, vel iniusta, vel erronea, nullo modo possit dici de nullitate, vel excessu nec aliquid opponi contra ipsas sententias, respectu ipsorum motivorum, perinde ac si ipsa motiva, et rationes in sententiis vel actis redditae non fuissent. Dicti tamen auditores debeant syndicari de praedictis, arbitrio syndacatorum ... » [19].

In 1559 the system seems to have been consolidated and the *Auditores* asked for a pay increase « respectu maioris laboris in extendendis motivis in sententiis, quae deinceps extendere debebunt » [20].

A portfolio of these decisions based on grounds had been published in two editions, a Genoese and a Venetian one, some years earlier, in 1582, while the definitive sanction, leading to circulation and renown in Europe was to be obtained by the insertion of these judgements in the Lyons volume *De mercatura decisiones et Tractatus varii et de rebus ad eam pertinentibus* (1582), also reprinted in the XVIIth century in Cologne, Frankfurt and in Amsterdam. The press was a primary sounding board for the Genoese *decisiones* and established them as one of the cornerstones in the rising science of European commercial law [21].

II. *Events concerning the rules of the Genoese civil Rota between the XVIth and XVIIth centuries*

While the publication of the *Decisiones de mercatura* marks the height of glory of the Genoese Court, the supplements and adjustments of legislation, following the *Constitutiones Rotae* of 1530, and which continued up to the first decade of the XVIIth century, show the initial eagerness and the progressive decline of the Court [22].

---

[19] *Reformationes Rotae Genuae aeditae anno MDLVII*, Genuae 1557, pp. 10-11.

[20] *Constitutiones Rotae*, ms. 89 cit., c. 29, « De salario Dominorum Auditorum Rotae » (1559, feb., 22).

[21] V. Piergiovanni, *Courts and Commercial Law at the beginning of the Modem Age*, in *The Courts and the development of commercial law* cit.

[22] V. *supra*, § I.

The first important integration into the *Constitutiones Rotae* of 1530 took place after a few years, in 1534: in addition to the obligation of stating grounds we have already discussed, some internal regulations of the Court were established such as the distribution of lawsuits among the *Uditori*, relations with parties and lawyers, documents relating to preliminary investigations and, finally, the decision [23].

In 1538, the first printed text of the *regulae* was issued at the initiative of the Genoese Government, as the laws concerning the Rota were incomplete and vague and needed to be *reformatae*, *locupletatae*, *distinctae.* It consists of a rather peculiar text, which, by concise directive statements, besides summarizing the *Constitutiones* of 1530, explains some aspects the *Constitutiones* merely touched on, such as execution proceedings, delays and terms, interventions in cases of *cambia et recambia*, insurance and sea freight [24].

In spite of this legislative clarification, the way of operating of the fledgeling Court turned out to be detective; in fact, only two years later, in 1540, the Genoese Government realized the need to consult some jurists, and to ask them to draft the reform bills of the Rota's regulation. Some of these reports, which have been preserved, are still in our hands and point out the problems and expectations of the lawyers and citizens concerning the Court.

The judges' behaviour is debated, mostly because of the tendency to avoid the rule of giving the *relatio processus* in the presence of the parties and of the lawyers for the defence; lawyers are accused of the tendency to lodge *cavillationes et exceptiones inutiles*, and it is advised that they be obliged to sign all their deeds in order to contest the habit as a pretext of many Court records. In the mercantile branch, it is suggested that the rules concerning insurance and exchanges should be cleared up, but, perhaps, the most interesting aspect is the request, regarding the appeals of the *causae mercantiles*, to set up a body in which a merchant joins with two learned lawyers [25]. This is proof that the mercantile environment did not accept the

---

[23] *Constitutiones Rotae*, ms. 89 cit., cc. 27*r*.-28*r*.; another copy, « Ordo et regula servanda per Auditores Rotae », in ASG, Biblioteca, ms. 6, *Legum*, cc. 66*v*.-68*r*.

[24] *Leges Rotae Genuensis nuper reformatae*, Genuae 1538 (the copies are extremely rare and the one I refer to can be found in the British Museum of London).

[25] ASG, Senato 1540-41, Sala Bartolomeo Senarega, filza 1231, *Commemorationes sp. d. Io. Baptistae Cattanei Lazanie et Nicolai de Senarega et soci. super regulis rotte reformandis*.

total replacement of its own members with learned lawyers and it is a prelude to the partial return to special magistratures we shall talk of later on.

The instance concerning the trial report by the *Uditori* was granted by a short reform law enforced one year later, in 1541 [26], while the presence of merchants in the appeal of mercantile suits was accepted by a subsequent reform of the Rota regulations issued in 1557 [27]. The above-mentioned edition of 1557 is a complete text which takes up, with little innovation, all previous legislation.

Some aspects of execution proceedings are better determined, above all, as far as insurance payment and compensation in case of average are concerned [28]. Moreover, in 1572, an appendix to these reforms was issued to settle certain procedural aspects again [29].

Then, a very difficult economic and political period troubled the Genoese republic, harassed by internal conflicts and by the ruinous consequences of Spanish bankruptcy [30], and the Rota seemed by that time to have ended its most creative period.

Owing to spanish bankruptcy, it was decided, in order to cope better with the wave of insolvencies, to deprive the Court of its activity in this field, by establishing an *Ufficio dei Rotti* not composed of lawyers but of trade experts [31]. The civil *statuti* of 1589 definitely seemed to confirm the reappraisal of the Rota [32]: the *Uditori* entrusted with ordinary lawsuits were

---

[26] *Constitutiones Rotae*, ms. 89 cit., cc. 28 *r*.-29 *r*.

[27] *Reformationes Rotae aeditae* cit., pp. 12-13, « ... Qui Magnifici D. Procuratores teneantur dictas appellationes committere tribus iudicibus, tam Doctoribus, et iuris peritis de collegio iudicum Civitatis Genuae vel extraneis aut ecclesiasticis, quam aliis civibus et mercatoribus, habentibus tamen domicilium Genuae, vel etiam mistim mercatoribus, et Doctoribus prout eis videbitur, ea tamen habita consideratione, quod ubi causa fuerit mercantilis, plures sint iudices mercatores, quam Doctores, et ubi fuerit de apicibus iuris, plures sint iurisperiti et hoc arbitratu, et coscientia ipsorum Magnificorum D. Procuratorum ... ».

[28] *Ibidem*, pp. 16-18.

[29] *Ad Reformationes Rotae, et Statuta Genuae, appendix aedita, anno MDLXXII*, Genuae 1572.

[30] R. Savelli, *La Repubblica oligarchica. Legislazione, istituzioni e ceti a Genova nel Cinquecento*, Milano 1981.

[31] V. Piergiovanni, *Banchieri e falliti* cit., p. 24.

[32] *Statutorum civilium Reipublicae Genuensis nuper reformatorum libri sex*, Genuae 1589.

reduced from five to three and a Rota competent for *causae executivae et breviores*, also composed of three *Uditori* was added [33].

The criminal Rota, which arose in 1576 [34], grew much more politically important within the Republic, to the extent that, in 1629, the civil *Uditori* addressed a sorrowful petition to the Government of the Republic asking to be made equal to criminal judges, considering the high-level services they performed for the Republic [35].

In the space of a century, that is, since the time when the civil Rota had first been established in 1529, the Genoese Court followed the destiny of the Republic, which from protagonist declined into a spectator of the great European political and economic events. From the golden age, that is about halfway through the XVIth century, there remain the collection of the *Decisiones de mercatura* which, with its subsequent reprints and its circulation in Europe, stood as one of the first pillars of the rising science of commercial law.

III. Decisiones *concerning insurance*

In order to esemplify the role of the Genoese civil Rota in the mercantile field, let us examine the *decisiones* concerning insurance contracts.

Insurance controversies are present in the law-making collection of the Genoese Rota to a more limited extent than might be expected (and we would point out that, in this period, the almost exclusive form in which this contract appears is connected with navigation). Although the matter is an inexhaustible source of dispute, mainly concerning the determination of the elements that were the real cause of accidents and compensantion, perhaps, lawsuits used as a pretext were curbed by the Court's attitude, which was very firm and resolute in rejecting legal corruption to the advantage of good faith and informality, which were typical of the merchants' activity and of the mercantile Courts.

---

[33] *Ibidem*, Libro I, cap. 7, pp. 11 - 14, « De Rota civili et eius iurisdictione ».

[34] R. SAVELLI, *Potere e giustizia. Documenti per la storia della Rota criminale a Genova alla fine del '500. Idee e atteggiamenti sulla repressione penale*, in « Materiali per una storia della cultura giuridica », V (1975), pp. 29-172.

[35] *Constitutiones Rotae*, ms. 89 cit., c. 41 *r.-v.*, « Memoriale M. Auditorum Rotae civilis ».

So, in *decisio III*, in reply to the demand of the invalidity of some testimonies, the Rota recalls both its one *regulae* and the mercantile regular practice:

> « ... secuta quoque est ordinatio rotae, ut testes hinc inde examinati publicarentur salvis iuribus, et exceptionibus partium; verum nos, qui a regulis admonemur, ut Deum et veritatem prae oculis habeamus, et quos non latet in curia mercatorum, ubi negotia veritate terminantur reiectis iuris apicibus, qui subtilitatem magis aspiciunt, quam facti veritatem ut per Bart. ... multa de stricto, et summo iure solere remitti, ut per Strac. in tract. de mercatura ... non pluris fecissimus hanc nullitatis oppositionem, quam par fuisset, et forte ad veritatem facti tantum libenter respexissemus ... » [36].

Another indication of the open-minded discretion used by the Court in insurance lawsuit and in the evaluation of subjective elements can be found in the same *decisio*:

> « Qua ex re forte factum fuit, ut ipse suis probationibus non admodum invigilaverit, et eo magis concedenda fuit dicta reservatio, quod de notabili quantitate agitur, ex qua non leve damnum sensurus est dictus reus, contra vero assecuratores si quandoque succumbuerint, non aequalem iacturam sunt facturi, quippe qui in totali summa assecurationis habeant particulas ... » [37].

Therefore, the refusal of legal corruption is absolute:

> « ... in causis securitatum, quae fiunt inter mercatores, non sunt curandi apices iuris ... » [38]; « ... veritati inhaerendo prout moris nostri est, contrariam sententiam de iure veriorem, et magis foro mercatorum et aequitati consonam esse duximus ... » [39]; « ... cum maxime coram Rota procedatur habito intuitu ad Deum, et veritatem negotii, vel saltem quia allegatum oretenus, et in scriptis videbatur sufficere ... » [40].

On this basis of greater understanding of the merchants' needs and of mercantile regular practice, the Rota judges tried to identify the character-

---

[36] *Decisiones Rotae Genuae de mercatura et pertinentibus ad eam*, in *De mercatura decisiones et tractatus varii et de rebus ad eam pertinentibus*, Lugduni 1610 (repr. Torino 1971), dec. III, p. 26. For a general setting and bibliography, G. GIACCHERO, *Storia delle assicurazioni marittime. L'esperienza genovese dal Medioevo all'età contemporanea*, Genova 1984, e M.J. PELÁEZ, *Cambios y seguros marítimos en derecho catalán y balear*, Bologna 1984 (Studia Albornotiana, XLII).

[37] *Decisiones* cit., dec. III, p. 29.

[38] *Ibidem*, dec. V, p. 38.

[39] *Ibidem*, dec. XL, p. 162.

[40] *Ibidem*, dec. LV, p. 176.

istic elements of the contract and, above all, to bring them back to the tradition of common law.

With regard to the dogmatic qualification of the contract, the references found in the decision are few, but sufficient to confirm the line of Genoese jurisprudence and tradition, that, after a short time in which the insurance contract had been considered as a false loan, then it came to treat it as a false sale, too. So, *decisio III*:

> « ... Dictum vero reum dignum existimavimus, qui recuperaret consteum securitatum, vel illud retineret respective, ex quo non fuit locus assecurationi, et sic emptioni periculi: est enim contractus iste emptionis, et venditionis, seu emptioni assimilatur cum sit innominatus, facio, ut des, vel do, ut facias, ratione pretii quod datur: quia qui assecurationem facit, propter pretium dicitur emere eventum periculi ... » [41]. And again *decisio XXXVI*:« ... Consideravimus quoque, quod contractus assecurationis dicitur contractus innominatus ... unde debet regulari iuxta naturam contractuum nominatorum, quibus assimilatur, et cum assimiletur emptioni, et venditioni propter pretium, quod datur ratione periculi... » [42].

In two other decisions, however the relation between the validity of the contract and the condition occurred is obvious:

> « ... tunc non aderat subiectum, super quo assecuratio fieri posset, ad quid enim assecurare, quod iam amissum est? Est enim contractus assecurationis contractus conditionis ut dicit Lusitanus ... et natura conditionis est respicere futurum casum, et cum iam casus sit praeteritus, non potest verificari conditio ... » [43].

As far as the subjects are concerned, the figure, the professional integrity and the presumed prudence of the merchant play an important role in judges' evaluations and there are several examples of this. *Decisio LV*, concerning insurance made when the ship is already lost, states: « ... Ex parte etiam assecuritatis absurdum oriebatur, si diceretur eum voluisse assecurare super periculo secuto, cum non sit hoc credendurn de mercatore, qui habetur pro viro provido, ut not. Lusit. ... » [44]; *decisio LXIII* arguing the question of whether the captain's change of course frees the insurance company, reminds us that:

---

[41] *Ibidem*, dec. III, p. 29.

[42] *Ibidem*, dec. XXXVI, p. 154.

[43] *Ibidem*, dec. CII, p. 238 and dec. LXIII, p. 187.

[44] *Ibidem*, dec. LV, p. 174.

« ... considerata intentione contrahentium quae in omnibus inspicienda est ... et maxime quia hoc dictat aequitas inter mercatores observanda ... » [45].

Again, the characteristics of the mercantile profession are decisive in *decisio CLXVI*:

> « ... assecuratos eius nomine fuisse, et esse mercatores, qui solent negotiari, et non tenere suas pecunias otiosas, sed solitos lucrari in negotiis mercium, et aliis ... merito condemnavimus reum conventum ad solvendum dicto Antonio interesse lucri cessantis a die morae ... » [46].

Two decisions regarding the joint and several liability of partners, which was ratified, as the Rota claims, because « emptum fuisse ... periculum et iam insolidum, cum non sit dubium, quin ex facto unius socii alii insolidum teneantur ... » [47].

It was decided, however, that the insured parties' heirs may take action against the insurance company, even if they had not been expressly mentioned in the *apoca assecurationis* [48].

In fact, the greatest importance is given to the content and expressions of the insurance document, as is stated again in *decisio CII*: « ... verba etiam assecurationis ponderanda sunt... quia certissimi iuris est, quod ii contractus recipiunt legem a pactis et conventionibus ... » [49]; and again, concerning the authority of Santerna and other authors *decisio* XXV reads: « ... verba assecurationis potissime ponderanda sint ...; ... clarum est, quod dicti assecuratores de alio casu, et de alio viagio non tenentur, nisi de promisso, et comprehenso in assecuratione ... » [50].

Therefore, the text of the insurance policy was fundamental in determining the extent of the risk, from which the *baratteria del capitano* was excluded by custom in Genoa, as we shall see later on, but other cases, such as *iactus et avaria* may be excluded as well, as we can read in *decisio CXXIX* [51].

---

[45] *Ibidem*, dec. LXIII, p. 187.

[46] *Ibidem*, dec. CLXVI, p. 302.

[47] *Ibidem*, dec. CLXVI, p. 301 and dec. XXIX, p. 134.

[48] *Ibidem*, dec. CII, p. 238.

[49] *Ibidem*.

[50] *Ibidem*, dec. XXV, p. 118.

[51] *Ibidem*, dec. CXXIX, p. 264.

Another element for determining risk is the sea voyage for which the contract of insurance has been drawn up, and, according to the Genoese Rota too, *viagium* means the first voyage (unless otherwise specified): *decisio XXV* declares, in fact, that when the ship begins its second voyage the insurance company covering the first is freed [52]. In the same way, the insurance company is freed in case of change of course and the Rota decides this according to *decisio LXIII* [53].

In another case, when the counterpart does not succeed in proving that there has actually been a *mutatio viagii*, the decision is, instead, judged in favour of insured parties [54]. The judges oppose all contestations put foreward by the insurance companies and accept Santerna's opinions, who

> « ... quaerit an assecurator possit opponere assecurato quaestionem, quod res non erant suae, et per consequens quamvis illae sint deperditae, quod non debet habere earum aestimationem, et respondet ibi allegando iura, et decisiones, quod quando aliquis convenitur ex contractu, non potest opponere contra agentem, quaestionem dominii, quod dicit esse notandun, quia assecuratores, quando venit tempus solvendi, securitates multas perquirunt, ut excusentur, et ut solutionem aufugiant » [55].

Again, a voyage not carried out leads the Rota to consider insurance policy on non-loaded goods null and void, against the insurance company's advice.

The text shows the Court's will to follow mercantile customs rather than the rules of strict law: « ... satis est quod ex mutatione viagii destinati resolutus sit contractus, vel illi locus non fuerit... » [56].

It is known that in Genoa the risks that insurance companies took upon themselves were the same as in other markets, with the exception of the *baratteria del capitano.*

Among the Rota's decisions only one set of examples can be found in *decisio CI* and this is not an exhaustive list. In case a ship is captured and kept for three days, even if it is afterwards salvaged, the Rota considers that an accident has taken place, with the consequent liability of the insurance company:

---

[52] *Ibidem*, dec. XXV, p. 118.

[53] *Ibidem*, dec. LXIII, p. 187.

[54] *Ibidem*, dec. V, p. 35.

[55] *Ibidem*, p. 38.

[56] *Ibidem*, dec. XL, p. 162.

« ... quoniam in processu constat navem assecuratam fuisse ab infidelibus captam, et per eos in eorum dominio, ac fortiis per tres dies detentam, et merito censuimus casum sinistrum evenisse, et propterea assecuratores iuxta promissa teneri: casus enim latronum, hostium incursus, piratorum insidiae, naufragium, et incendium aequiparantur ... » [57].

This was regular Genoese practice and, therefore, the Rota took a particular stand in the case of *baratteria del capitano*, in opposition to Santerna's opinion and the notions of common law. *Decisio III* (and in the same terms *decisio CLXVI*) reads:

« ... et licet Santerna lusitanus in suo tract. de spons. mercat. videatur tenere quod culpa commissa per gubernatores navis non excuset assecuratorem, et propterea quod assecurator, qui damnum periculi patitur, ipse agere debeat contra eum, cuius occasione periculum contigit, nihilominus in casu proposito aliud concludendum esset, in quo perinde habetur, ac si conventum expresse fuisset in apodisia securitatis, quod excepta esset fraus navarchi, ex quo reus praesuposuit in processu, quod iste casus in securitate exceptus fuisset: hic est quod ipse notificari fecit praesentem litem dicto Lambruschino, ut in processu constat: praeterea vulgo observari in hanc civitatem accepimus, ut assecuratores non teneantur de dolo, et barattaria patroni, quicquid a iure in contrarium disponatur ... » [58].

The last, most interesting subject concerns compensantion and its procedure, and is linked on the one hand to the evidence that the accident has taken place and, on their other hand, to the possibility of taking action with executory judgement sooner than with ordinary judgement.

Decisio XXXVI is perhaps the one which best clarifies the characteristics of regular Genoese Insurance practice. Discussing the validity of an insurance contract made for a ship, which, at the time when the contract is drafted has already been captured, the Rota recalls that a decree was in force in Genoa which considered even one testimony alone as being sufficient to substantiate the news, the loss of the ship. In order not to alter the well-established traditions of common law too much, which required at least two testimonies, the single witness must be at least above all suspicion [59].

The effort to justify infringements of common law was not justified by upholding the indisputable application of customary law, but rather by seeking support within common law itself: in this case, the judges claimed

---

[57] *Ibidem*, dec. CI, p. 236.

[58] *Ibidem*, dec. III, p. 25 and dec. CLXVI, p. 301.

[59] *Ibidem*, dec. XXXVI, p. 153 and dec. XLII, p. 164.

that there were *auctoritates* that gave the judge the power to assess evidence and that in difficult matters, such as the loss of a ship or of an accident, the law was satisfied with lesser evidence.

The relation between an executory judgement, instituted in order to obtain more rapid compensation and an ordinary judgement brought by the insurance company to recover what they believed they unduly paid, are dealt with in other *Decisiones.*

Decisio III, in the basis of the *regulae Rotae* and of common law considers that evidence in executory judgement does not count in ordinary judgement [60]; *decisio V* obliges insurance companies to ask to be refunded for what they paid in the executory judgement to prove a change of course [61]; *decisio C* permits a foreigner to ask for payment, in an executory way, of compensantion as *modus executionis attenditur locus contractus* [62].

It should be mentioned, even though the topic deserves to be dealt with in more detail that the *auctoritates*, to which the Rota judges referred when forming their judgements, gave particular attention to Bartolo's and Baldo's quotations regarding jurisprudence and the Roman school traditions. As far as modern lawyers are concerned, the work concerning insurance by Santerna has found great support, while Stracca seems to be used to a much more limited extent.

We have given examples of insurance matters contained in the collection of the Genoese Rota decisions *de mercatura*, considering the various aspects, which, put together, contribute to making a complete reconstruction of the institution. Apart from some local peculiarities, such as the different consideration of Captain's corruption, the solutions seem on the whole to conform to regular Italian legal practice in the XVIth century.

---

[60] *Ibidem*, dec. III, p. 23.

[61] *Ibidem*, dec. V, p. 35.

[62] *Ibidem*, dec. C, p. 235.

INDICE

Diritto canonico medievale

Scienza e pratica commerciale e marittima

Avvocatura e notariato

Associazione all'USPI
Unione Stampa Periodica Italiana

Direttore responsabile: *Dino Puncuh*, Presidente della Società
Editing: *Fausto Amalberti*

ISBN - 978-88-97099-08-6 ISSN - 2037-7134

Autorizzazione del Tribunale di Genova N. 610 in data 19 Luglio 1963
Stamperia Editoria Brigati Tiziana - via Isocorte, 15 - 16164 Genova-Pontedecimo