

Maria Fusaro

# Introduction. Risk Management and Jurisdictional Boundaries in Pre-Modern Europe

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## INTRODUCTION

### RISK MANAGEMENT AND JURISDICTIONAL BOUNDARIES IN PRE-MODERN EUROPE

Risk Management and Jurisdictional Boundaries are two topics which over the last few years have been dominating the global news cycle and been the object of lively debates, both in the public arena and across different academic disciplines such as legal and economic history. The contributions in this monographic issue link these topics together through multifaceted analyses focussing on the management of risk over the late medieval and early modern period. These essays have been developed within the ERC-funded project – *AveTransRisk – Average – Transaction Costs and Risk Management during the First Globalization (Sixteenth-Eighteenth Centuries)* (n. 724544) – dedicated to the historical analysis of the economic and legal aspects of Averages<sup>1</sup>.

The most famous variety of Averages is General Average (GA), the legal institute<sup>2</sup> regulating the proportional apportionment of extraordinary sacrifices or expenditures, intentionally and reasonably made or incurred, for the purpose of preserving from peril the property involved in a common maritime adventure<sup>3</sup>. This is an ancient (pre-Roman) mechanism for the redistribution of extraordinary expenses in maritime trade, which has recently received global press attention as the expenses of the March 2021 blockage of the Suez Canal by the *Ever Given* are being apportioned precisely through GA.

As General Average is a transnational legal institute, its comparative analysis sheds light on the variety of political and commercial dynamics at play across pre-modern Europe. General Average's longevity, as well as apparent immutability across centuries and jurisdictions, restricted scholarly attention to the study of its historical developments, as these were clearly assumed to have been limited. This has been thoroughly disproved by the results of the *AveTransRisk* project which has demonstrated how, behind a simple principle, there were many local differences in terms of both applicability and apportioning procedures<sup>4</sup>. Whatever attention was dedicated to Averages was usually focussed

on them being considered an antecedent of insurance<sup>5</sup>. Here the focus shifts on Averages from the jurisdictional perspective, arguing that this type of analysis makes their study into a privileged use case for the study of wider economic and legal developments in Europe.

One of GA's most interesting characteristics is how an universally accepted general principle was applied with a variety of local normative differences, in other words, how the operational practices of GA engendered a constant tension aimed at reconciling their innately transnationality with the very different rules of their application in different localities<sup>6</sup>. *Mutatis mutandis*, this is a dilemma which is highly resonant with the long-standing interest of «Quaderni Storici» in discussing the interplay between universal categories and specific local applications, in the words of Angelo Torre: «da un lato, la tensione tra l'universalità delle categorie e la singolarità dei contesti; dall'altro, la dialettica tra la singolarità di ciascun contesto e le connessioni e disconnessioni tra siti».<sup>7</sup>

General Average's survival is due to it providing a more equitable solution to risk, by spreading the unexpected costs proportionally across all stakeholders in the maritime venture. Its non-contractual nature also shielded it from the fierce debates which characterised the medieval and early modern development of other risk management tools, such as insurance.

Giovanni Ceccarelli's opening essay confronts these issues head on by analysing the language of risk between the thirteenth and the eighteenth centuries and introducing some of the central points related to the perception of risk and the solution for its management. His contribution focuses on how Averages were discussed by those theologians who dealt with the economic nature of risk, which already in the thirteenth century had been defined as «an object which could be bought and sold». Ceccarelli's analysis shows that Averages, unlike insurance and usury, were not central to Scholastic reflections on economic activities, something probably connected with the fact the concept was less problematic in theological terms. What instead emerges from these early debates is how jettison – as the most common instance of General Average, frequently used as its synecdoche – was tightly connected with the relationship between «voluntary» and «involuntary» actions, which for centuries was a hot topic of contention, not just from the theological point of view, but also from the philosophical and jurisprudential ones. This early lack of interest is not surprising when we consider that late medieval legal experts, and interestingly mathematicians, discuss Averages and jettison from the perspective of «reciprocity» and «sharing», which are non-contentious from a theological perspective. Things

change from the sixteenth century when the issue of how to handle property rights in cases of jettison came to the forefront of theological debates. From this point onwards, the discussion moved to issues related to extreme necessity, self-defence and survival, which strongly resonate with the contemporary resurgence of interest in the principle of General Average to tackle some of the extraordinary expenses generated by the climate crisis<sup>8</sup>.

The contributions which follow this one move from the theoretical and doctrinal analysis to the operational and normative side of risk management. Covering the period from the thirteenth to the early nineteenth centuries, they present case-studies that, from different perspectives, discuss specific instances which highlight issues related to risk management and jurisdictional boundaries. During the early modern period, maritime law enjoyed an unparalleled centrality due to the concerted efforts, by many European early modern states, to extend their authority – and hence jurisdictions – across the globe. These processes were particularly complex, especially when played out over water, something well described by Lauren Benton as «arising from the peculiar qualities of the sea as a place that cannot be occupied»<sup>9</sup>. This phenomenon has been studied mainly from the perspective of the European commercial and imperialist expansion, and how this generated a veritable war of books related to maritime law and jurisdiction<sup>10</sup>. Less attention has been given to how these phenomena fostered a general and very pragmatic re-organization of local usages and customs, which led to the early codification of maritime legislation across many European states<sup>11</sup>. This was driven by the compelling operational need to clarify and explain local usages within a sector which, as the engine of European economic growth and institutional innovation during this period, was experiencing a massive expansion in both quantitative and qualitative terms<sup>12</sup>.

Dave De ruysscher's contribution discusses late medieval riverine jurisdictions, a neglected topic which is just starting to benefit from the recent scholarly attention towards both the legal-doctrinal concept of jurisdiction and the operational functioning of legal pluralism.<sup>13</sup> Through a careful analysis of the multi-layered jurisdiction over the river Scheldt, De ruysscher unpacks the overlapping jurisdictional claims of feudal lords and urban authorities in the region between the County of Flanders and the Duchy of Brabant during a period of profound economic change. He lays the ground with a traditional analysis of the interactions between feudal and urban authorities within the economic sphere, detangling the competing claims of different polities, organizations and officials, and how their conflicts were exacerbated by a grow-

ing market integration and internationalization of transport by ship. Whilst economic historians have focussed their attention on these jurisdictional issues through the analysis of «trade», «taxes» and «tolls», De ruysscher brings forward a new way to assess the economic element of jurisdiction by untangling where the jurisdictional boundaries fell in regard to risk management. He pursues this by discussing Averages adjustment principles and their jurisdiction, and the interaction between Averages and insurances, both of these are risk management tools, but they are very different in their underlying principles and operational application. This novel approach will feed into Dave De ruysscher new ERC project on urban economic sovereignty, and how this concept underpinned the extension of cities' economic clout and influence well beyond the formal boundaries of their jurisdictions<sup>14</sup>.

Another issue which emerged during the project was that there was more to Averages than just GA, as many of the expenses which could befall ships and cargoes from the time of lading until their unloading (due to accidents, jettison, capture and unexpected expenses) – were redistributed through other types of Averages<sup>15</sup>. Maria Fusaro's contribution introduces the peculiarities and varieties of Averages in Venice, where until the eighteenth century they played an important (and neglected) role within maritime trade and shipping, functioning both as risk management tools and as a mechanism for the absorption of transaction costs. Venetian Averages were an interesting re-elaboration of the Byzantine normative tradition, and had wider scope than in the Western Mediterranean. Thanks to these hybrid roots, Averages played a fundamental role in the development of Venetian maritime trade, influencing its business practices both in terms of risk management and of transaction costs' allocation. The essay traces these normative developments across the phase of economic growth in the Middle Ages, and analyses how Averages were structurally transformed in the seventeenth century under the pressure of new maritime operators which contributed to the early modern crisis of the Venetian maritime sector. From this analysis it emerges how the jurisdiction over maritime topics was widely shared across different magistracies, and how these actively resisted the reforms proposed by the upper echelons of government, which were instead pushing for the normalization of Venetian Averages and their alignment with general European usage. These issues touch several elements of the shifting Venetian economy which need more research: the internal balance of interests between different economic sectors; and within the maritime sector itself – shipowners, merchants, investors – all elements which can explain the resilience of Venetian maritime working capital in the eighteenth century.

The importance of local laws, customs, usages and their application, already present in the analyses of De ruysscher and Fusaro, is further confirmed by how Averages were one of the tools employed in the Livorno *porto franco*. Jake Dyble's essay discusses the practical management of Averages there during the seventeenth century, providing a further contribution to the debate on *lex mercatoria*, the supposedly universal body of customary merchant law that would have allowed disputes to be resolved according to a common framework. Building on current discussions of the Mediterranean as a «jurisdictionally crowded» area, his analysis shows how the mutual recognition of diverse General Average apportioning practices was central to the functioning of (maritime) trade. Dyble brings forward a novel interpretation of how the concepts of «order» and «confusion» were employed in these debates, and proposes a conception of «order» that «did not mean uniformity and *ex-ante* certainty of outcomes but rather firm expectations that judgements made in other centres would be respected». His argument, that the variety of rules governing Averages across different jurisdictions was an acknowledged reality of maritime trade, adds further evidence to the absence of pre-modern *lex mercatoria*, a concept which shows a remarkable resilience in the face of massive evidence disproving it<sup>16</sup>. Dyble's contribution also further highlights the role of state-backed institutions in guaranteeing the practical functioning of international trade, and how early modern states fought to extend their own jurisdictions abroad to control these processes.

Andrea Addobbati's essay concludes by discussing the reforms on Averages and insurance implemented in Livorno between the end of the eighteenth and the beginning of the nineteenth centuries. Moving away from the classic analyses of Livorno in previous centuries allows him to focus on a period of political upheaval and uncertainty, not just for Livorno but for the whole of Europe, which was also witnessing profound transformations in the legal and financial underpinnings of the shipping sector. Building on the close reading of a *cause célèbre* against a leading Livorno shipowner and merchant – Girolamo Schiano – the essay elucidates the interplay between General Average and insurance, and how the evolution of these two major risk management instruments was shaped by the structural transformations of that period. Here again the subject of the dynamic movement of jurisdictional boundaries takes centre stage, through an discussion encompassing both civil and criminal proceedings, the latter influenced by the ever present possibility of fraud. Discussing these issues, Addobbati convincingly argues how the establishment of Insurance Companies changed the landscape of maritime risk management, getting rid of the *favor juris* which for centuries

had existed in favour of seafarers, and which had been considered as a partial compensation for the extremely high levels of risk associated with shipping. This brought a profound transformation of the concept of insurance itself, increasing its speculative power whilst simultaneously trying to make it a less volatile investment instrument.

From all these contributions, the historical investigation of Averages emerges as a privileged entry point for the analysis of the concept of risk and how it was defined, conceptualised and managed across the centuries, all issues which entail important cultural differences<sup>17</sup>. I would argue that one interpretative frame, which encompasses all these contributions, is that of how different approaches to risk management – even within the same legal principle, namely Averages – point in the direction of different varieties of capitalism<sup>18</sup>. Another point which emerges is that of the evolution of risk management tools from a pre-modern period in which risk was assessed and quantitatively evaluated, in a highly ad-hoc manner with a strong stress on qualitative factors such as reputation, to a modern approach based on standardization and actuarial science. Under this rubric, there is an interesting circularity in the way both Giovanni Ceccarelli and Andrea Addobbati focus directly on the nature of risk as a fungible object, something which was equally relevant from the moral perspective of Scholastic discussions to those eighteenth century's actuarial practices heralding modernization.

The analysis of where risk falls in jurisdictional terms is central for all contributions, and it provides an alternative way to analyse the historical relationship between political and economic power. However, the issue of risk management jurisdiction is possibly of even stronger relevance today, given the topical political and economic debate regarding climate change – in other words, risk management on a global scale – which needs to be handled in a polycentric and equitable manner, guaranteeing at the same time the preservation of the planet and sustainable forms of economic development.

The different languages of risk, and the different ways in which socio-economic solutions were employed for its management have therefore a crucial contemporary relevance well beyond their academic study. Already in the mid-fourteenth century, Bartolus of Saxoferrato analysed the provisions of the *Lex Rhodia* under the rubric of common good – *communis utilitas* – which also entails a shared responsibility, today there is a growing interest in the equitable nature of the General Average principle, as a legal instrument for the proportionate and equitable redistribution of costs in instances of unforeseeable and unavoidable loss, as a way to decarbonise the shipping industry, and even as a way to

conceptualise an equitable carbon tax by considering the whole population as a «community of risk»<sup>19</sup>.

MARIA FUSARO  
University of Exeter  
m.fusaro@exeter.ac.uk

## Notes

<sup>1</sup> The essays whose research has been conducted within the project AveTransRisk – Average – Transaction Costs and Risk Management during the First Globalization (Sixteenth–Eighteenth Centuries), ERC Grant agreement No. 724544, are available in OA thanks to ERC funding. For details on the project see: <https://history.exeter.ac.uk/research/centres/maritime-dev/research/avetransrisk/> (last accessed 5 May 2023).

<sup>2</sup> I use the expression «legal institute» to translate the Italian «istituto giuridico», in its meaning of «a set of norms designed to discipline a specific juridical matter», in this I follow the usage of Sir Edward Coke (1552-1634) who, in his *Institutes of the Law of England* (London, 1628-1644) uses this expression for both private and public law. I wish to thank Silvia Gasparini and Guido Rossi for our conversations on this issue.

<sup>3</sup> «There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure» is the contemporary definition as in: York-Antwerp Rules (hereafter YAR) *Comité Maritime International* (CMI), 2016, Rule A. at <https://comitemaritime.org/work/york-antwerp-rules-yar/> (last accessed 5 May 2023).

<sup>4</sup> M. FUSARO, A. ADDOBATTI, L. PICCINNO (eds), *General Average and Risk Management in Medieval and Early Modern Maritime Business*, London 2023.

<sup>5</sup> On this see R. HARRIS, *General Average and All the Rest: The Law and Economics of Early Modern Maritime Risk Mitigation*, and G. CECCARELLI, *Risky Narratives: Framing General Average into Risk-Management Strategies (Thirteenth–Sixteenth Centuries)*, both in FUSARO *et al.* (eds), *General Average and Risk Management*, pp. 33-60 and 61-91, and bibliographies therein quoted.

<sup>6</sup> For similar considerations related to the importance of «locality» in the application of the law of wrecks (*ius naufragii*), see: G. PURPURA, *Ius naufragii, sylai e lex Rhodia. Genesi delle consuetudini marittime mediterranee*, in «Annali dell'Università di Palermo», 47 (2002), pp. 275-92; F. TRIVELLATO, «Amphibious Power»: *The Law of Wreck, Maritime Customs, and Sovereignty in Richelieu's France*, in «Law and History Review», 33 (2015), pp. 915-44.

<sup>7</sup> A. TORRE, *Un commento*, in «Quaderni storici», 155 (2017), pp. 577-84, p. 578.

<sup>8</sup> On the connection between will and necessity, and the descending legal distinctions between «voluntary», «involuntary» and «mixed acts» see A. ADDOBATTI, *Principles and Developments of General Average: Statutory and Contractual Loss Allowances from the Lex Rhodia to the Early Modern Mediterranean*, in FUSARO *et al.* (eds), *General Average and Risk Management* cit., pp. 145-65, pp. 153-5.

<sup>9</sup> L. BENTON, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900*, Cambridge 2010, p. 105.

<sup>10</sup> H. DE G. [HUGO GROTIUS], *Mare Liberum, sive de jure quod Batavis competit ad Indicana commercia dissertation*, Ludovici Elzevirii, Leiden 1609; for a recent critical edition: H. GROTIUS, *The free sea*, translated by R. HAKLUYT with W. Welwod's critique and Grotius' reply, edited and with an introduction by D. ARMITAGE, Indianapolis 2004; J. SELDEN, *Mare Clausum seu de Dominio Maris libri duo*, W. Stansby for R. Meighen, London 1635. See also: G. CALAFAT,



