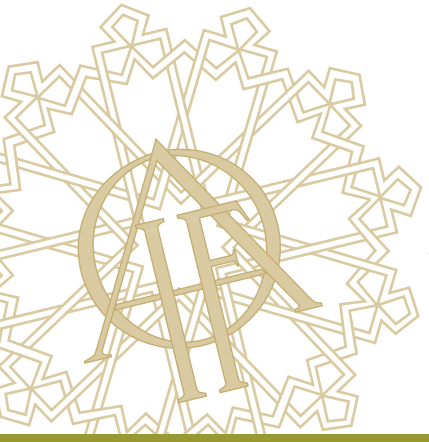

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Abraham L. Udovitch

An Eleventh Century Islamic Treatise on the Law of the Sea.

Abraham L. UDOVITCH

AN ELEVENTH CENTURY ISLAMIC TREATISE ON THE LAW OF THE SEA

From its earliest days, the Islamic polity entertained an ambivalent relationship to the sea. Within less than a century of the enunciation of the prophet Muhammad's message, his victorious followers dominated more than half of the maritime possessions of their predecessors. The eastern and southern shores of the Mediterranean were entirely under Islamic dominion as were the Red Sea, the Persian Gulf and part of the coastline of the Indian Ocean. Yet, the military advance toward these coasts resulted, paradoxically, in a political retreat from the sea, at least during the first several centuries of the Islamic era. Unlike their Hellenistic, Roman and Byzantine predecessors, the Islamic domains around the Mediterranean could not be classified as " coastline civilisations ". The great middle sea was not their binding tie. [1]

The distribution of Islamic cities during the Middle Ages reveals a rather striking fact: no major political or administrative center was located on the seacoast. Furthermore, even though there were numerous Islamic coastal towns of some economic and commercial importance, the major centers of political and economic life were almost always located some distance inland. On the Mediterranean, particularly, this represents a significant shift when compared with the Roman and Byzantine periods. Caesarea of Syro-Palestine gave way to Damascus and Ramle; Alexandria to Fustat - Cairo; and Carthage to Qayrawan. [2]

1. For the pronounced Mediterranean character of the centuries immediately preceding the advent of Islam in the Near East and North Africa, see the very evocative introductory sentences of Peter Brown's *The World of Late Antiquity*, London, 1971, p. 11: " ' We live round a sea, ' Socrates had told his Athenian friends, ' like frogs round a pond. ' Seven hundred years later, in A.D. 200, the classical world remained clustered round its ' pond ': it all clung to the shores of the Mediterranean. "

2. See S.D. Goitein, " Cairo, An Islamic City, " *Middle Eastern Cities*, éd. I.M. Lapidus, California, 1969, p. 82; *idem*, *A Mediterranean Society*, 5 volumes, University of California Press, 1967-1986, vol. IV, *Daily Life*, 1983, p. 6 sq.; A.L. Udovitch, « L'Énigme d'Alexandrie : sa position au Moyen Âge d'après les documents de la Geniza du Caire, » *Revue de l'Occident musulman et de la Méditerranée* 46 (1987), p. 72; *idem*, " Time the Sea and Society: Duration of Commercial Voyages on the Southern Shores of the Mediterranean During the High Middle Ages ", *La Navigazione Mediterranea Nell'Alto Medioevo*, Centro Italiano di Studi sull'Alto Medioevo, Spoleto, 1978, p. 503-508.

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For the pre-Ottoman Muslim polities around the Mediterranean, the sea was a menacing frontier. Throughout the Middle Ages, the coastal towns of Syria, Palestine and Egypt were regarded as frontier outposts. Tyre, Sidon, Ascalon, Damietta and Alexandria were frequently designated by the term *thaghr* (frontier fortress), the identical term used to designate the march areas of raids and counter-raids on the shifting borders separating Islam from Christendom. Crete, Cyprus, Sicily and other Mediterranean islands held by the Muslims were similarly called *al-thugūr al-jazariyya* (island frontier fortresses). The fact that such towns as Alexandria and Damietta were designated as *thaghr* and considered to be on a vulnerable frontier, even though their Mediterranean coastline for hundreds of miles in either direction had been under Muslim control for many centuries, reflects, on a political-military level, an ambivalence toward and wariness (almost rejection) of the sea which is evident in other sectors of medieval Islamic culture. [3]

The early Islamic legal tradition partook of this same reticence and ambiguity vis-à-vis maritime matters. Islamic law claimed within its jurisdiction almost all facets of human activity including, of course, the various operations of local and long-distance commerce. It is noteworthy, though consistent with the observations above, that none of the medieval treatises on Islamic religious law, even those aspiring to the most comprehensive coverage, contain chapters or subsections which treat the problems peculiar to maritime commerce and transport. To be sure, we do find references to ships and the sea dispersed throughout these treatises, especially in sections dealing with exchange, but these are almost always isolated examples extending some point concerning land-based activity to a maritime context.

The publication of the recently discovered manuscript *Kitāb akriyat al-sufun wal-nizāʿ bayna ahlihā* (Treatise concerning the leasing of ships and the claims between their passengers), a Mālikī legal text dealing with sea-law compiled in Alexandria sometime in the mid-5th/11th century, represents a quantum leap in our knowledge of the maritime commercial practices on the Islamic shores of the Mediterranean. [4]

3. See A.L. Udovitch, "A Tale of Two Cities: Commercial Relations between Cairo and Alexandria During the Second Half of the Eleventh Century" in D. Herlihy, H.A. Miskimin & A.L. Udovitch ed., *The Medieval City: Studies in Honor of Robert S. Lopez*, Yale University Press, 1977, p. 144-148. Also D. Ayalon. "The Mamluks and Naval Power — A Phase in the Struggle Between Islam and Christian Europe," *Proceedings of the Israel Academy of Sciences and Humanities*, Jerusalem, vol. I, no. 8, (1965). This appreciation of the political and military wariness of medieval Islamic societies to the sea is not shared by all scholars; see, for example, A.M. Fahmy, *Muslim Naval Organization in the Eastern Mediterranean*, Cairo, 1966.

4. The text, edited and published with notes and an introduction by Muṣṭafa A. Ṭāher, *Cahiers de Tunisie*, vol. XXXI (1983), p. 6-53, is based on a unique manuscript from the Escorial Library. Its composition is attributed to the Mālikī jurist Muḥammad b. ʿUmar b. ʿĀmir al-Kināni al-Andalusī al-Iskandarānī (d. 310/923), and its compilation is attributed to Khalaf b. Firās, another Mālikī authority, whose exact dates are unknown but who flourished about 50 years later. On the basis of a great deal of circumstantial evidence, the text, as published by M. Ṭāher, can be confidently dated to the mid-11th century. Information concerning the sources

A variety of medieval Middle Eastern sources, most prominently the documents of the Cairo Geniza, testify to the intensity of maritime trade during the 11th century between the eastern posts of the Mediterranean, such as Tripoli, Tyre, Ascalon and Alexandria, and those of North Africa and Spain, as well as to the large volume of commerce carried on the waters of the Nile between Alexandria and Fustat and as far south as the Fayyum and Qus. Thanks to the work of S.D. Goitein, we now know a great deal about the major commodities transported by the ships plying these routes, about the merchants who financed and carried this trade and even about the variety of vessels on which the products of East and West were loaded. We also have a fair amount of information concerning the procedures in the ports where the cargoes were loaded and unloaded, dispatched and delivered. [5]

We are much less well-informed about what happened on the high seas, between the ports. What were the procedures on board ? What were the relationships of captain or owner and crew, between crew and passengers, between the groups of travelling merchants themselves ? And, especially, how were the omnipresent adversities and

of the treatise and the biographies and interconnection of the authorities mentioned in it are provided in Ṭāher's introduction and notes.

There is an unexplained discrepancy between the title of the treatise as given in the Table of Contents and on the title page (*wal-nizāʿ bayna ahlihā*), p. 5 and that given on the very first line of the article (*wal-tarāʿī* [*sic*] *bayna ahlihā*) p. 6. In the latter instance, Ṭāhir apparently and mistakenly forgot to adjust his initial hypothetical reading.

The construction of the text of the *Kitāb akriyat al-sufun* is rather complex. This issue is addressed in an inconclusive manner by Ṭāher in the introductory section of his article, p. 7-12. The author of the core text is Muḥammad ibn ʿUmar ibn Yūsuf ibn ʿĀmir al-Kināni al-Andalusī al-Iskandarānī. (He was the younger brother of the famous Mālikī scholar Yaḥyā ibn ʿUmar.) Muḥammad ibn ʿUmar was active in Egypt (Alexandria), Qayrawān al-Andalus and possibly also in Morocco. In any case he had students and disciples from all across North Africa. He may have been born (and also died) on the island of Crete where his father came as part of the *jihād* that brought the island under Islamic rule. His death date is disputed: Some say, 297 A.H.; some 299 A.H. Ṭāher accepts the date of Al-Junaydī who reports that he died in Egypt in the year 310 A.H. (= 923). Junaydī also mentions his authorship of the *Kitāb akriyat al-sufun*.

One should not overlook the possible significance of Muḥammad ibn ʿUmar's Cretan roots to account, at least in part, for his interest in and knowledge concerning maritime matters. I believe that his treatise can justifiably be seen as an Islamic version of parts of the Rhodian Sea Law, which, according to scholarly consensus, originated on a neighboring Mediterranean island approximately two centuries before Muḥammad ibn ʿUmar's advent on the Mediterranean legal maritime scene.

The core text of Muḥammad ibn ʿUmar was re-arranged by the shadowy Abī al-Qāsim Khalaf ibn abī Firās as follows: He added his own preface (*ṣadr*). He interspersed passages from such eminent Mālikī authorities as Abū Muḥammad ibn Abī Zaid and Abū Saʿīd ibn Akhī Hishām and Ibn Al-Tabbān and some others. The Mālikī authorities cited in the *body* of the text go as far as the *ṭabaqa al-sādisa* of Mālikī scholars.

The addenda to the main body of the text includes queries and opinions of scholars from the seventh and subsequent levels of the Mālikī *ṭabaqāt*.

5. S.D. Goitein, *A Mediterranean Society*, vol. I: *Economic Foundations*, 1967; for maritime matters, see especially p. 301-352.

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dangers of sea voyages handled by those on board ? To put it another way: what were the rules and customs of maritime behavior in the Islamic Mediterranean ? It is some of these questions that are illuminated in our newly discovered treatise.

SUMMARY OF CONTENTS

Introduction.

The *Kitāb akriyat al-sufun* is not a comprehensive treatise of maritime law. It does not aspire to completeness. Many topics treated in other early collections of maritime law are not even mentioned in the text. It focuses only on certain select issues related to one or two of the fundamental principles affecting all contracts in Islamic commercial law. Nevertheless, even with its restricted purview, it reveals a great deal concerning the maritime realities on the southern shores of the Mediterranean during the 10th and 11th centuries.

Virtually every specific issue of maritime behavior discussed in the treatise is, in one manner or another, already treated in the *Rhodian Sea-Law*, and in most cases the rules prescribed are not very different from those we find there. Nevertheless, from the very outset, the entire discussion is framed by a typically Islamic concern, one which permeates the consideration of numerous other economic transactions in Islamic law, namely: Can any contract or agreement be licit or valid when many of its important elements necessarily remain unknown (*majhūl*) ? [6]

Indeed, it is the anguish created by this tension between legal-religious rigor and the practical imperatives of maritime transportation that inspired the compilation of this work. It was composed in response to the urgent request of the author's disciple whom he addresses directly in the introductory section as follows:

> You mentioned your great distress and disturbance when you saw the following tradition of the Prophet, may God bless him and keep him, " Whosoever hires anyone, let him pay his hireling with a known fee for a known duration. " How is it possible, then, to permit the hiring of sailors on ships without this element (*i.e.* the duration) being explicitly mentioned ? You asked me to clarify it and explain it. [7]

Significantly, the tradition quoted in this passage is the only reference *in the entire treatise* to either Qur'anic or prophetic authority. We have, instead, as the author himself tells us, a compilation of the relevant pronouncements of the " learned men " [= Maliki legal scholars] on this subject (*mā rawā fīhi min aqāwīl ahl al-ʿilm*). [8]

6. For the centrality of this concern in Islamic law, that is, of the requirement for a maximum of specific information, see, A.L. Udovitch, " Islamic Law and the Social Context of Exchange in the Medieval Middle East, " *History and Anthropology*, vol. I, 1985, p. 445-465.

7. Muṣṭafa A. Ṭāher, ed., *Kitāb akriyat al-sufun wal-nizāʿ bayna ahlihā*, p. 13.

8. *Ibid.*

Hiring Transporters.

Stated simply, the legal problem is the following: since any valid contract of hire (*ijāra*) requires that both the fee (*ajr*) and duration (*ajal*) be fixed and clearly known, how is it then possible to hire sailors and lease ships for voyages whose duration cannot be fixed and known in advance ?

The first chapter, entitled " Hiring Sailors for Boats, " is devoted to resolving this apparent contradiction. It is resolved not by any clever legal artifice but by the simple (one might even say straightforward) device of declaring ship-leasing arrangements different — as a category apart — from other lease and hire arrangements. In hiring ships and sailors or in contracting to transport goods by sea, the time factor is uncertain and thus impossible to specify in an agreement. The contractual requirement for a clearly fixed time period is here replaced by an insistence that the destination of the voyage be known and explicitly stated. " Once the distance is known, one does not need to stipulate the number of days involved. " [9] A clearly known destination acts in this context as a substitute for a clearly stipulated duration.

There are three criteria for determining the validity and binding nature of any maritime contract: a) *salāma* — safety and well-being of the cargo, *i.e.*, that the goods be safely delivered to their destination; b) *istiqāma* — responsible professional behavior; and c) the clear, unambiguous designation of the destination.

In all of this, the normal, even strict, insistence of Islamic contract law on a precise and unequivocal definition of all relevant components of the contract, including its duration, are replaced by and subordinated to a few eminently practical criteria that are not related to legal reasoning and that can be summarized quite simply as follows: the safe arrival of the ship and the delivery in good condition of the cargo to its specified destination after a voyage conducted according to professional, recognised procedures. If the ship-owner or ship-captain behaves in this manner, then all parties to the contract are urged to show patience in the face of delays in the journey caused by natural or political circumstances. If, on the other hand, the delays or the ship owner's behavior unduly expose the merchants and their goods to unnecessary risk, then, on the principle of *la ḍarar wala ḍirār* (*i.e.*, that no licit, good faith contract should lead to harm either to oneself or damage to others), the hire contract may be annulled.

In addition to the preceding very practical considerations, custom is also invoked as a supplementary basis for allowing the hire of ships and sailors:

" The hire of a ship and sailors [for voyages] going from one town to another is permissible in our view because in this case custom (*ʿurf*) stands in the place and even supercedes an explicit stipulation. " [10]

In other words, customary maritime practices with respect to ships and cargoes are elevated to the status of explicit agreements, and thus determine what the *ahl al-ʿilm*

9. M.A. Ṭāher, *ibid.*, p. 14. — 10. *Ibid.*, p. 15: *li'anna al-ʿurf ʿindanā yaqūm maqām al-sharṭ wa akthar minhu.*

will or will not allow according to Islamic law. The rules of custom govern who owes what to whom in any given circumstance and under which conditions the contract is binding or is allowed to lapse. The author cites a number of early Mālikīs authorities such as Ibn al-Qāsim (d. 191/806) and Saḥnūn (d. 240/854) who also invoke custom and common practice of the marketplace as a basis for allowing numerous other economic arrangements whose durations cannot be fixed in advance. Some of the examples cited are: the hiring of artisans to construct a house for a given fee even though neither the exact quantity of building materials nor the time necessary for its completion can be known in advance, or contracting for the tailoring of a garment or the weaving of a piece of textile.

As in the case of ships and sailors, it is the completion of the task at hand (*al-farāgh min ʿamalihi*) and the customary practices of a particular place and a particular profession that obviate the need for exact details concerning time and materials and that give these contracts their validity and binding nature. As Saḥnūn reportedly said, if hire arrangements were judged solely on the basis of analogy, most of them would be invalidated and only recourse to custom (*ʿurf al-mutaʿārif bayna al-nās*) makes these arrangements licit. [11]

To summarize: a valid contract to lease ships for transporting merchandise, or to hire sailors depended on three principal factors: a) specifying the destination; b) conducting the voyage in a responsible, professional manner (*istiqāma*) and c) safe delivery of cargoes. Most of the details concerning these arrangements were governed by custom.

Hiring Transport.

The second chapter is taken up with the actual leasing of ships and other means of transport. Here a distinction is drawn between two basic methods of hiring: one is a contract for a specific means of transportation, that is, transport via a specific ship (*safīna bi ʿaynihā*) or a particular porter or pack animal, and the second is a contract for the general service of moving goods or persons from one place to another (*maḍmūn bi dhimmatihi*). In the first case, no substitution is allowed. Should the particular ship or beast of burden be incapacitated, the lease contract lapses. It is not the service but the means of transport which was hired. In the second case, where no specific means of conveyance (boat or pack animal) is mentioned, the owner (lessor) is responsible for transporting the goods even if his own boat or animal is unavailable. " The lessor must provide a substitute boat to transport the cargo, for this service is guaranteed. " [12] Here it is the service rather than the means of conveyance that is the subject of the agreement.

The major portion of this chapter is devoted to discussing the consequences of leasing a specific boat or beast of burden, reflecting a situation in which the means of transport, like so many other aspects of the commercial economy, were non-standard. In terms

11. M.A. Ṭāher, *ibid.*, p. 15. — 12. *Ibid.*, p. 16 sq.

of seaworthiness, no two vessels were necessarily alike, nor were the reliability and skill of various shipowners and their crews necessarily of comparable quality. One might say that lease contracts were primarily between people, between individuals and not for services. By extension, animals and ships were drawn into this logic and became non-fungible and unsubstitutable in transportation agreements. This is a system which assumes a considerable degree of " local knowledge, " in which merchants and transporters knew a good deal about each other and about each other's tools, equipment and goods. [13]

The remainder of the second chapter is taken up with miscellaneous items. It is permissible, for example, to lease a portion of a boat (a parallel to the system of *loca* in Italian maritime towns ? [14]), and it is also permissible to lease a ship for a month or any other fixed period of time, even though the duration of voyages frequently depended on natural factors beyond human control.

Cargo fees can be paid in either cash or kind, but there are strong reservations about delaying payment beyond the completion of the voyage. On this point, as on many others, however, great attention is paid to local customary practice, that is in this case described as *sunnat al-kirā' bil-balad*, that is, the traditional practices of the particular town with respect to leasing and hiring. The numerous local books of maritime rules from towns around the Mediterranean from the 12th century onward — Amalfi, Barcelona, etc. — confirm the existence of variant local practices on one or another point of maritime usage. All of these, however, coexisted within the framework of a *common, shared* Mediterranean-wide set of traditions and practices on most issues of maritime law. [15]

Cargo, Freight and Fees.

Chapter Three of the treatise takes up two sets of issues: first, the consequences of either natural or human obstacles that prevent fulfillment of a ship-leasing contract; and second, the conditions under which a lessor either maintains his right to collect his fees or, conversely, forfeits payment for transporting the cargoes assigned to him.

13. See, S.D. Goitein, *Mediterranean Society*, vol. I, p. 313, for actual examples of the preference (even competition) among merchants for transporting themselves and their merchandise on specific ships because of their reputations for seaworthiness and their concommitant avoidance of others. The notion of " local Knowledge " is taken from Clifford Geertz, " Local knowledge: Fact and Law in Comparative Perspective, " in his book *Local Knowledge, Further Essays in Interpretive Anthropology*, N.Y., Basic Books, p. 167-234. For the implications of this idea in Islamic commercial law, see also, A.L. Udovitch, " Islamic Law and the Social Context of Exchange in the Medieval Middle East, " *History and Anthropology*, vol. I, 1985, p. 445-465.

14. For the *loca,* see R.S. Lopez and I.W. Raymond, ed., *Medieval Trade in the Mediterranean World*, Columbia University Press, 1955, p. 238-247.

15. For *sunnat al-balad*, see Ṭāher, ed., *Kitāb akriyat al-sufun*, p. 17 sq. For a partial listing of books of medieval local maritime rules, see Walter Ashburner, *The Rhodian Sea-Law*, Oxford, 1909, p. CXIX ff.

Any properly concluded leasing agreement would create obligations between the contracting parties that only bad faith (on the part of one of the principals) or exceptional circumstances could annul. With respect to arrangements for maritime transportation, such " exceptional " circumstances were omnipresent and constituted a normal accompaniment of any maritime lease contract. Thus, situations that could give rise to the dissolution of such agreements or to the attenuation of either of the parties' obligations under the contract were not unusual. Even after a lease contract was formally concluded, unfavorable sailing conditions, the onset of winter when no long-distance sea travel was undertaken, the interference of a local ruler, the presence of pirates or hostile naval forces in the vicinity — any of these eventualities could serve as a basis for dissolving the contract, without either party being able to claim indemnities from the other for non-performance of obligations undertaken.

The situation became much more complicated — both in law and in practice — when any of these " exceptional " factors intervened after — rather than before — a voyage had already been undertaken. Who owes what to whom, for example, if the ship cannot put in at its agreed upon destination because the port is surrounded by menacing, hostile forces ? Can a shipowner claim any fees if, while en route, bad weather or other dangerous sailing circumstances prevent the ship from reaching its destination, or if the delay in doing so would be of such duration as to be very damaging to the merchant passengers and their cargoes ? No single, general rule or legal principle governs these and other similar situations. Differences in specific circumstances, differences in detail result in different distributions of liability and responsibility. In some cases, the passengers and shippers of cargo are required to pay the full freight even when delivery to the exact destination is impossible; in other cases, the fees owed by the merchants to the shipowner are proportional to the distance covered, and still in others, passengers and shippers are absolved from paying any fees whatsoever.

Sometimes it was upon the merchants that the considerable risks of maritime shipping fell, and sometimes it was the shipowner who bore the burden of the uncertainties and dangers of sea travel in the 11th century. For example, when a vessel was unable, for reasons beyond human control, to reach its destination, payment of fees could depend on the mode of sailing. If a merchant hired space on a boat for himself and his goods to travel from Egypt to Ifriqiyya (Tunisia) by cabotage, *i.e.*, sailing close to the coast and stopping at various small ports and markets along the way, and if, after travelling only part of the way and before reaching its final destination, the ship was forced to return to Egypt, then the shipowner is entitled to collect a fee proportional to the distance covered.

Although no explanation is given for this ruling, one can suppose that the merchants travelling on the ship would have benefitted from whatever stops were made even in the course of this uncompleted journey. It was therefore reasonable and fair to expect them to pay a proportional part of the full fee. Such reasoning, however, would not apply if the ship were hired on the basis of a direct sailing which would cut across the high seas (*ʿalā qatʿ al-baḥr*). So, for example, if a merchant leased space for a voyage

from Sicily to Spain and if, after some days at sea, the boat was forced to return to its point of departure, there could be no benefit accruing to the merchant, and consequently he was not obliged to pay any fee. This case confirms, among other things, the prominence of cabotage and sailing close to the coastline, a practice amply documented in other sources concerning shipping and commerce on the southern shores of the Mediterranean during the 11th and 12th centuries. [16] However, I cited this example here to illustrate the unexpected types of conditions and considerations — considerations based on actual maritime experience — that affected the decisions of our Mālikī authorities and that probably reflected actual maritime practice.

Perhaps the most striking example of relativism and flexibility with respect to the assignment of liabilities is the last case discussed in the chapter. It concerns merchants who hired a ship to transport their cargo and themselves from Sicily to the Tunisian port of Sūsa. After reaching Tunis, the ship was prevented, by winds or other natural obstacles, from reaching its destination in Sūsa. The issue to be determined was the following: What, if anything, do the lessees owe to the lessor if the merchandise they are transporting is in greater demand at their place of forced debarkation than it would have been at Sūsa, their original destination ? And, conversely, what are the obligations of the merchants toward the shipowner if the market conditions at the place they were forced to land are less favorable than in Sūsa?

While posed here in hypothetical terms, situations of this kind were certainly frequent and familiar occurrences in the 11th century port cities of the southern Mediterranean. Mālikī scholars were not unanimous in their response to this case. Regardless of their differences, all the proposed solutions were eminently practical. Abū Saʿīd b. Akhī Hishām of Qayrawan (d. 371/981) proposed a sliding scale of fees based both on distance and on market conditions. If the boat landed at a point on the coast beyond Sūsa, *i.e.*, if the distance traversed were greater than that between Sicily and Sūsa and if the market situation were approximately comparable to that of Sūsa, then the merchants were to pay the fee agreed upon for Sūsa to the shipowner. If, however,

16. The Arabic term that I have translated as cabotage is *maʿa al-rīf*, literally meaning " with the countryside ". None of the dictionaries I was able to consult has yielded any technical nautical meaning for this phrase, and my understanding and translation is based on the context in which it is used. Sailing *maʿa al-rīf* is juxtaposed to a second method of sailing: that of *qatʿ al-baḥr* — literally, " cutting accross the sea, " with the meaning of taking the direct, *i.e.*, shortest route by sailing in the high seas. The shipping lane connecting Egypt to Tunisia is the example our text gives to illustrate sailing *maʿa al-rīf*, *i.e.*, hugging the coastline: *law kāna kirāʾuhum li-hādhihi al-safīna maʿa al-rīf mithl an yaktarū min miṣr ilā ifrīqiyya*; Ṭāher, ed., *Kitāb akriyat al-sufun wal-nizāʿ bayna ahlihā*, p. 23. For cabotage in 11th century Mediterranean trade, see A.L. Udovitch, " Time the Sea and Society, " *La Navigazione Mediterranea Nell'Alto Medioevo*, Spoleto, 1978, p. 541-545. Although the phrase *qatʿ al-baḥr* is, as far as I know, not attested in the contemporary (11th century) commercial documents of the Cairo Geniza, a semantically related term, *taʿdiya* (literally: " crossing over, passing out of sight ") is used to describe ships that reached the high seas, see S.D. Goitein, *A Mediterranean Society*, vol. I, p. 319 ff.

they encountered a significantly more favorable commercial situation at this place, then the merchants owed an increased fee to the shipowner commensurate with the benefits they reaped from their new location. Other authorities hold that in such cases the merchants are to be charged only for the additional distance covered with no attention being paid to their higher profits. Furthermore, they owe nothing at all to the shipowner if the situation at their point of debarkation is manifestly less favorable than that in the market of Sūsa. In these last circumstances, the agreement between the parties simply lapses and becomes null and void. No matter which solution is adopted, the shipowner becomes, in effect, a quasi partner with his mercantile passengers.

What is interesting about this case, and the others like it, is not the particular legal ruling itself but rather the factors which are considered significant in making the judgement. Underlying the two rulings pronounced by the Mālikī jurists are considerations of a wholly practical nature, viz., the level of demand and prices in the place of debarkation as compared to those prevailing at the intended, original destination. No general legal principle is invoked. The considerations are particular to this specific case. Furthermore, the factors to be weighed in determining who owes what to whom — comparative prices and market conditions — are rather imprecise and subject to conflicting claims and interpretations. Consequently, the Mālikī authorities assumed the existence of an accepted, customary manner for establishing and settling such matters. A further assumption is that information and knowledge under such local commercial circumstances was known to most of the parties concerned. The everyday reality and relevance of both of these assumptions to Mediterranean commercial life are repeatedly confirmed by the data deriving from the documents of the Cairo Geniza. These letters show that 11th century merchants spent almost as much time gathering and circulating economic information as they did transacting business in the marketplace. [17]

Liability for Damage.

From the early Middle Ages to the present day, the central concern of maritime law has been the fate of the cargo and the legal consequences of its damage or loss for all concerned parties — shipowner, crew, passengers and shippers. Our treatise is no exception. Its remaining chapters are basically devoted to answering two questions: First, in the event that the cargo is damaged or lost en route, is the shipowner entitled to collect all or part of his freight costs from his passengers and shippers? Second, how are losses to be distributed when the safety of the ship requires that part of the cargo be jettisoned? In the course of this discussion, which in the usual manner of Islamic law is set in very specific circumstances, we learn a great deal about maritime practice on the southern shores of the Mediterranean during the 11th century. It is the first of these two questions which is the subject of the fourth chapter of the treatise.

17. S.D. Goitein, *A Mediterranean Society*, vol. I, *Economic Foundations*, p. 281-295.

In the opinion of both Mālik and his chief disciple, Ibn al-Qāsim, the rules governing the transport of goods by sea are qualitatively different from those of transport by land (*wa farraqa Ibn Qāsim wa Mālik bayna ḥukm al-barr wa al-baḥr*). So, for example, if a ship is disabled en route before reaching its destination, even if the cargo is safe and sound, the shippers are not obliged to pay any fee to the shipowner following the principle that " the rules of the sea [require payment] only upon reaching the destination " (*aḥkām al-baḥr ʿalā al-balāgh*). [18] By contrast, a transporter via a land route is entitled to a fee proportionate to the distance covered toward the agreed upon destination. To be entitled to his fee, according to Mālik and Ibn Qāsim, the shipowner must fulfill two basic conditions. He must reach the designated destination, and the cargo must be safe and sound. Failure to perform either of these services leads to a forfeit of his claims.

Surprisingly, Saḥnūn and a number of other later Mālikī authorities hold an opposing view. Basically, these scholars hold to a doctrine which is very uncharacteristic of maritime law in any part of the Mediterranean. According to them, the risks of transportation by sea fall primarily upon the merchants and shippers. Even when the ship covers only part of the distance toward its destination, it is they who are liable to pay a fee pro-rated according to the distance actually covered. Furthermore, it is also the merchants who carry the full risk for damage or loss of the goods being shipped (*wa-in dhahaba al-maṭāʿ wa-hiya muṣība dakhalat ʿalā al-tujjār*). [19]

However, it is the opinion of Mālik and not that of Saḥnūn which holds sway in most cases of partially unfulfilled shipping contracts, and it is the oft-repeated legal principle *lā kirā' fīhi illā* [*ʿalā*] *al-balāgh wal-salāma* (" no fee is due except after the destination is reached and the cargo safely delivered ") according to which they are judged. [20]

Exceptions to the principle of *al-kirā' ʿalā al-balāgh* (" the fee is payable at the destination ") can occur when the voyage was undertaken *maʿa al-rīf* — that is, by a route which closely followed the coastline (as opposed to *qatʿ al-baḥr* : sailing across the open sea). In such cases, payment was due to the shipowner even for a partial voyage. Although the reasons for this distinction are never clearly spelled out, the ruling did make very good practical sense. Sailing close to the coast meant that even if a merchant and his goods were dropped off part way, they were nevertheless that much closer to their ultimate destination.

Implicit in the legal discussion is also a distinction in the minds of the legal scholars between the southern and northern shores of the Mediterranean. To illustrate the sailing mode *maʿa al-rīf*, the author gives an example of a voyage between Egypt and Tunisia. This was a coast which, if not always friendly, was at least familiar to the merchants who travelled between Egypt and Tunisia, and they could be expected to make their way from any of its intermediate points to their ultimate destination. This, however, would not be true for a voyage cutting across the high seas as, for example, between

18. Ṭāher, ed., *Kitāb akriyat al-sufun*, p. 26. — 19. *Ibid.*, p. 27. — 20. *Ibid.*, p. 29.

Sicily and Spain. In this case, partial progress toward one's destination would be of little use to a merchant since it would leave him stranded either in the middle of the sea or on a hostile, unfamiliar shore.

Many other cases of prematurely aborted voyages, each with its own set of specific circumstances reflecting medieval sea *and river* traffic (*i.e.*, of the Nile), are treated in this chapter. The principle in determining the responsibility for the shipping fees remains throughout that of Mālik and Ibn Qāsim, with slight adjustments depending on market condition and on the conditions of the cargo, etc.

Jettison, Salvage and the Assignment of Losses.

In the course of these legal discussions, several significant factors concerning cargo and its transportation emerge. First, there seem to have been three or four categories of damage to ship and cargo. The least serious is that designated by the verb *ʿaṭaba*, which we may translate as " disabled "; this is followed, in ascending order of seriousness, by a condition denoted by the verb *halaka*, literally " destroyed " or " perished, " but which, in this context, we can translate as " seriously damaged, " a qualification which can apply to both ship and cargo. The next category is that of *gharq*, " sinking, " which can be either of a simple variety, or a definitive and total loss which is designated as *gharqan maghrūqan*.

Aside from this very last category of total disaster, our treatise always assumes that much, or at least some part of the cargo could be retrieved from these calamities of nature and fate. I suspect that this assumption was based on the observation and experience that many, if not most, such maritime accidents took place near harbors and coasts, in waters which were shallow enough and in conditions which were easy enough to conduct salvage operations.

This assumption — *i.e.*, of the possibility of retrieving some of the damaged or jettisoned cargo — carries over, at least partially, into the discussion of jettisoned cargo, a subject extensively treated in the fifth chapter of the treatise.

Jettison.

Compensation for the owners of jettisoned cargo and assessment of its value are classic problems of maritime law in all places and all times. Not surprisingly, the solution of Mālikī law to these questions conforms to the principles that have governed such eventualities in the Mediterranean and beyond from Roman times to the present. This is not to suggest that the Mālikī authorities consciously borrowed from any earlier legal source such as the Rhodian Sea Law; it is only to say that the maritime reality of the Mediterranean and its traditional practices carried over, as one might expect, from late antiquity into the Islamic period and that this continuity encompassed the geographical area from which this treatise derives, viz., the Mediterranean sea lanes between Egypt, North Africa, and Sicily.

If, in the course of a voyage, merchandise is thrown over board in order to lighten the ship to protect it, its passengers and its remaining cargo from serious harm, then the loss suffered by the owner or owners of the jettisoned cargo is to be indemnified by the contribution of the other parties to the voyage. The principle is succinctly formulated :

" ... the [loss] of that which is jettisoned from the ship for fear of sinking is to be shared by the [other parties] proportionately " (*mā ṭuriḥa min maṭā' al-safīna khayfata al-gharq wahuwa 'alayhim bil-ḥiṣaṣ*). [21]

Virtually the identical principle is enunciated in the Rhodian Sea-Law concerning merchandise that is thrown overboard to lighten the ship : " the loss occasioned for the benefit of all must be made good by the contribution of all. " [22]

That the formula in the Digest is almost identical with that found in our Mālikī text should, of course, not be surprising since it was the realities and traditions of the Mediterranean which provided the background for both the Byzantine-Roman and Islamic legal notions on this question.

The first case discussed in the fifth chapter of our treatise leaves no doubt that the principle of " general average " is applied with uncompromising consistency in cases of justifiable jettison. It concerns a cargo-carrying ship that encountered very rough seas. The captain, fearing for the lives of the passengers and crew and judging that the ship was in danger of sinking, jettisoned some of the commercial cargo. Regardless of whether this action was undertaken with or without the consultation and agreement of the owners of the disposed goods or whether they were even present on board the ship, all Mālikī authorities, those of Medina and those of Egypt, are agreed on the following rule :

" Everything which was thrown from the ship should be deducted from the goods remaining on the ship. [The value of] the jettisoned goods should then be divided by [the value of] the remaining merchandise — be it a quarter or a third. Those whose goods remained safe are to pay proportionately for those whose goods were jettisoned. " [23]

In order to work, the application of this principle of " general average " requires some criteria for assessing the monetary value of the jettisoned merchandise. This issue is discussed in some detail, with the usual attention to the operative realities of commerce and exchange in the Mediterranean coastal markets.

" The price (*thaman*) of the jettisoned goods that is due to its owner is based on the amount he actually paid in the place from which these goods were sent on to the boat. However, this only applies if no change occurred in the market for the goods loaded on board.

21. Ṭāher, ed., *Kitāb akriyat al-sufun wal-nizā' bayna ahlihā*, p. 33.

22. Quoted in Charles Black and Grant Gilmore, *The Law of Admiralty*, 2nd ed., Mineola, NY, 1975, p. 244.

23. Ṭāher, *op. cit.*, p. 30 sq.

If, however, the market has changed, either up or down, then the purchase price of the goods is ignored, and consideration is given to the [current] value (*qīma*) of the goods, be they foodstuffs, textiles or raw materials (?) [24], or slaves, or any other commercial commodity — *i.e.*, its price is reckoned as of the moment that it was taken on the board. " [25]

Mālikī jurists debated three possible methods of evaluating (*taqwīm*) jettisoned merchandise : 1) Based on the amount the owner paid at the point of embarkation; 2) Based on the current value of the jettisoned goods at the intended destination; 3) Based on the value at the place where it was thrown overboard (*fī mawḍiʿ ṭuriḥa fī al-baḥr*). [26] It is the last possibility that is the most revealing. The only possible sense that this criteria for evaluation can have — *i.e.*, based on the value of the place where the goods were jettisoned — is with reference to the nearest coastal or inland markets where such commodities were traded. This serves as yet another confirmation of the hypothesis that much of the maritime commercial trafic of the eleventh and twelfth centuries travelled along coastal routes.

Ḥukm al-Tijāra : Personal versus Commercial Goods.

Not all jettisoned property is covered by these rules. A clear distinction is drawn between commercial goods on the one hand and all categories of personal, private property on the other.

" There is no difference of opinion between Mālik and his companions concerning goods that a cargo owner acquired for his private possession, no matter what it was, be it a slave (*ʿabd*), or a captive (?), or a jewel that he had crafted, or a precious stone that he bought for his family, or a slave (*raqīq*) or a weapon bought for his own private property, or a Qur'ān that he had illuminated for his own possession — this entire category of possessions is not taken into account in calculating the value of the jettisoned cargo.
Likewise, if the owner of the ship bought slaves to serve on the vessel, but did not acquire them for commercial purposes (*i.e.*, for resale), [if they perish], their value too is not to be taken into consideration when assessing the accounts for the jettisoned merchandise. However, anything that the shipowner bought for commercial purposes is to be included in the accounting, for in this respect he is the same category as the other merchants. " [27]

24. Arabic: *khām* = raw, unbleached cloth; see S.D. Goitein, *A Mediterranean Society* IV, p. 177 sq.

25. Ṭāher, *op. cit.*, p. 31; explain the distinction — not so readily apparent — between the two bases for calculating the jettisoned merchandise. A minority opinion on this issue is attributed to the Egyptian Maliki authority Muḥammad b. ʿAbd al-Ḥakam (d. 268 A.H.). He subscribes to the principle of " general average ", but holds that the value of the jettisoned merchandise is to be determined on the basis of the prices prevailing at the destination rather than that of the port of origin.

26. Ṭāher, *op. cit.*, p. 34.

27. Ṭāher, *op. cit.*, p. 31.

Any claim to compensation resulting from the jettison of cargo carried on a vessel is determined by the nature of the objects that were thrown overboard. The operative and strict distinction, as in the passage just cited, is between commercial and personal property. Our treatise is quite consistent in this regard, maintaining that only commercial goods are " reimbursable " under the principle of general average, whereas the loss of personal goods through jettison is borne entirely and exclusively by their owner. The operative distinction applies to the merchandise and not to their owners. Among the latter, one can have *qawm tujjār wa ghayr tujjār*, people who are merchants and non-merchants, captains, sailors, etc. It is not their status that determines their claims, but rather the character of the goods that were lost, no matter to whom they belonged. [28] It is in this context that our treatise invokes the notion of *ḥukm al-tijāra,* a phrase that we can freely translate as " the rules of commerce. " In all problems that arise from jettison of cargo, only objects and goods intended for commercial purposes are covered by the *ḥukm al-tijāra*, whereas all others are considered to be beyond the boundaries of the " rules of commerce " (*zā'il ḥukm al-tijāra*).

Distributing Losses : Involuntary Partnership.

Once it sets sail, the presence of cargo on any vessel creates an incipient association among all of its owners or their representatives as well as the ship's captain and crew. For the duration of the voyage, a sort of instantaneous ad-hoc community is created. In the event of jettison, this incipient, on-board relationship is transformed into a more explicit connection. The loss of commercial merchandise belonging to any one owner, creates an involuntary partnership among all the owners of cargo on a ship. Certain parties and certain property are excluded from this community of mutual liability and responsibility, e.g., sailors, the ship itself, etc.

" The rule in this case, according to Mālik, is that the value of the jettisoned goods is distributed among/on the goods that remained safe. The owners of the jettisoned goods become partners, proportionately, in the goods that remained safe; and it is as if the goods that were lost and the goods that were spared belonged to all of them (= the cargo owners). And their partnership comprehends both the merchandise that is gone and that which remains, and their shares are based on the value of their own goods. " [29]

This passage reads, at first sight, as a simple restatement of the venerable maritime legal principle of " general average. " However, a new notion, or at least new formulation has been introduced here, that of a post-jettison *partnership* between all the owners

28. Ṭāher, *op. cit.*, p. 31, bottom. — 29. Ṭāher, *op. cit.*, p. 32.

of commercial property on the vessel. The notion of partnership is repeatedly invoked to deal with the myriad complexities that jettison could give rise to. [30]

In practical terms, the notion of partnership does not appreciably change how matters were settled in a post-jettison situation. Nevertheless, it is interesting and, I believe, quite significant that the principle of " general average " that is formulated in the Rhodian Sea-Law in terms of a broad principle that is then applied to numerous specific instances, is, in the context of Islamic law, transformed and translated into the associational framework of a partnership. This is all the more surprising since in Islamic commercial or contract law the absolute pre-requisite for any valid exchange or association is an offer and acceptance, the famous *ījāb wa qabūl*, a procedure that is clearly not possible in this particular context.

What we observe here is a tendency, almost a need, in Islamic law, to create a temporary community to deal with problems and situations that would under normal, ordinary circumstances be dealt with in the context of an institution or framework that would have as part of its formal or informal constitution a social component. From this point of view, a remarkable parallel to the involuntary partnership following on maritime disaster is that of the *ʿāqila*. The *ʿāqila* is an involuntary, temporary quasi-kin group based on locality that is invoked by Islamic law to deal with compensation to be paid to the family of a victim of a homicide of unknown authorship. In such a case the residents of the locale, or town quarter in which the body is found become collectively liable for the blood money. Like fellow passengers on a storm-tossed boat, the co-residents of a crime-struck neighborhood are transformed into a temporary association in order to solve a specific legal, economic or social problem. [31]

In the cases of jettison and *ʿāqila*, Islamic law converts spatial proximity into temporary associations / partnerships of liability or gain. But these are not the only examples. One can point to a series of other instances in which Islamic law transforms co-residence into temporary co-proprietorship. I do not have the time or the space to give the details here, but these concern such diverse subjects as the distribution of the *zakāt* and *sadaqa*, sharing the treasure trove and sharing in the intestate inheritance of a fellow townsman. [32]

30. Ṭāher, *op. cit.*, p. 32-38 for examples of the various circumstances that give rise to post-jettison partnership.

For reasons of space, I have not summarized nor brought any examples from the last four, brief chapters of the *Kitāb akriyat al-sufun*. These are found on pages 38-48 of Muṣṭafa Ṭāher's edition and cover the following topics: The shipowner's obligation (and its limits) with respect to provisions for passengers, p. 38-43; problems of transporting foodstuffs jointly owned by several parties, p. 43-45; problems of ships that are held in partnership between two or more parties, p. 45 sq.; problems resulting from making the ship itself part of a commenda (*qirâḍ*) arrangement, p. 46-48.

31. For *ʿāqila*, see R. Brunschvig's entry (s.v. *ʿākila*) in the *Encyclopaedia of Islam*, 2nd edition, vol. I, p. 337-340.

32. See *Sharā'iʿ al-Islām fī masā'il al-ḥalāl wal-ḥarām*, vol. I, p. 165; *Al-mudawwana al-kubrā*, vol. II, p. 50 sq.

" The Longue Durée ".
Islamic Martime Practice and The Mediterranean Tradition.

More than maritime custom is illuminated by the *Treatise on the Leasing of Ships*. We learn something important about the Mediterreanness of 11th-century Islamic culture in Egypt and North Africa, that is, the extent to which it participated in traditions and practices common to all the coastal areas of the Mediterranean — Christian, Muslim and even pagan. Through this treatise we are offered a virtually unobstructed glimpse of one facet of the Mediterranean's *longue durée*, concerning practices, habits and attitudes that endured across temporal, cultural and religious boundaries, spanning the centuries from early Byzantine times to the Renaissance.

We also learn something about how, in this context, Islamic law grew and developed. Beyond the social and economic reality that they reflect, the maritime practices discussed in this treatise constitute a case study of how developing Islamic culture in the Mediterranean absorbed and transformed earlier practices into an authentic Islamic format. There is hardly any appeal made in this treatise — appeals of the kind that we encounter in numerous other instances in Islamic legal discussions — to venerable pre-Islamic practices to which Islam had no objections. Rather, the issues involved in the various maritime rules and practices are translated not only into the Arabic language, but are totally recast in Islamic terms.

These points are highlighted when we place this new treatise within the broader context of Mediterranean maritime literature. In terms of the legal history of the Mediterranean world, the *Kitāb akriyat al-sufun wa al-nizāʿ bayna ahlihā*, is the *second* oldest extant treatise on maritime law. Chronologically, it is preceded only by the famous *Rhodian Sea Law*, a collection of maritime rules that, while pretending to great antiquity, is actually of Byzantine provenance and was compiled sometime between the years 600 to 800 A.D., a period contemporaneous with the rise and spread of Islamic domination on the southern shores of the Mediterranean. [33] Its text was copied and recopied throughout the medieval period leading its editor to conclude that " the Sea Law must, even down to the fifteenth century, have represented the maritime law for some parts of the Mediterranean " and further " that the circumstances with which it dealt did not materially change from the time of its original composition until near the time when it ceased to be copied. " [34]

For approximately four and a half centuries after its compilation, the *Rhodian Sea Law* apparently monopolized the Mediterranean stage. It was not until the early or mid-twelfth century that other collections of maritime statutes begin to appear in such Italian ports

33. The *Rhodian Sea-Law* was edited with extensive introductions, notes and a partial translation by Walter Ashburner, *The Rhodian Sea-Law*, Oxford, 1909. The Prologue to the treatise claims that its rules incorporate the 4th-5th centuries B.C. practices of the island of Rhodes. Regarding the actual date of its compilation, see the introduction, p. CXII-CXIII.

34. *Ibid.*, p. XLIX-L.

as Amalfi, Pisa and Trani. By the mid-fourteenth century, we encounter a proliferation of compilations of maritime ordinances emanating from most of the major and many of the minor commercial ports of the Christian Mediterranean including Venice, Genoa, Barcelona and others. [35]

Taken as a whole, this body of legal administrative literature, whose creation stretches over almost a millenium, exhibits a remarkable Braudellian continuity. Its main headings and concerns remain the same (distribution of liability with respect to damage to cargo; freight and fees; jettison; professionalism of captains, navigators and sailors), as do the basic principles for dealing with these issues. There were, of course, many local variations on these common themes, and the passage of the centuries did give rise to new problems (e.g., the transport of pilgrims). Yet, maritime technology did not experience any revolutionary changes during this period, nor were there any fundamental transformations in the structure of Mediterranean commerce. Maritime practice and maritime law reflected this reality and this continuity.

35. For a listing of the various city statutes and their chronology, see Ashburner, *op. cit.*, p. CXIX ff.

AnIsl 27 (1994), p. 37-54 Abraham L. Udovitch
An Eleventh Century Islamic Treatise on the Law of the Sea.