Comparative Studies
in the History of Insurance Law

Studien zur vergleichenden Geschichte
des Versicherungsrechts

Volume / Band 11

Maritime Risk Management

Essays on the History of Marine Insurance, General Average and Sea Loan

Edited by

Phillip Hellwege and Guido Rossi

Duncker & Humblot · Berlin

PHILLIP HELLWEGE AND GUIDO ROSSI (EDS.)

Maritime Risk Management

Comparative Studies
in the History of Insurance Law

Studien zur vergleichenden Geschichte
des Versicherungsrechts

Edited by / Herausgegeben von
Prof. Dr. Phillip Hellwege

Volume / Band 11

Maritime Risk Management

Essays on the History of Marine Insurance, General Average and Sea Loan

Edited by

Phillip Hellwege and Guido Rossi

Duncker & Humblot · Berlin

The project 'A Comparative History of Insurance Law in Europe' (grant agreement No. 647019) and the project 'AveTransRisk. Average – Transaction Costs and Risk Management during the First Globalization (Sixteenth-Eighteenth Centuries)' (grant agreement No. 724544) have received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme.

Bibliographic information of the German national library

The German national library registers this publication in the German national bibliography; specified bibliographic data are retrievable on the Internet about http://dnb.d-nb.de.

Printing: CPI buchbücher.de GmbH, Birkach
Printed in Germany

ISSN 2625-638X (Print) / ISSN 2625-6398 (Online)
ISBN 978-3-428-18260-2 (Print)
ISBN 978-3-428-58260-0 (E-Book)

Printed on no aging resistant (non-acid) paper according to ISO 9706 ♾

Internet: http://www.duncker-humblot.de

Preface

The contributions to the present volume are based on papers presented at the conference 'Risk and the Insurance Business in History', held in June 2019 in Seville, Spain, and organized by Jerònia Pons Pons and Robin Pearson. Part of those papers were presented at the two panels organized by the editors of this volume. Phillip Hellwege organized a session as part of the research project 'A Comparative History of Insurance Law in Europe' (CHILE) which has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (grant agreement No. 647019). The session organized by Guido Rossi hosted, as speakers, a number of participants in the research project 'Average – Transaction Costs and Risk Management during the First Globalization (Sixteenth-Eighteenth Centuries)' (AveTransRisk), which has received funding from the ERC under the European Union's Horizon 2020 research and innovation programme (grant agreement No. 724544). We would like to thank all peer reviewers for the time that they have invested and for their valuable reports, which have greatly improved this volume. Finally, we would like to thank Sarah Meaney for correcting the English.

Augsburg and Edinburgh, September 2020 *Phillip Hellwege*
Guido Rossi

Summary of Contents

Maritime Risk Management: Marine Insurance, General Average, Sea Loan

By *Phillip Hellwege* and *Guido Rossi*

A. Introduction

I. Insurance as a legal product

In 1991, the German legal scholar Meinrad Dreher described private insurance as a 'legal product' ('Die Versicherung als Rechtsprodukt').[1] Indeed, more so than other contracts and transactions, insurance is in many ways dependent on the law, its legal context and regulatory framework.

(1) It is, for instance, possible to identify a sale and to distinguish it from other transactions, by simply observing what the parties do: they exchange goods for money. In the case of a barter, they exchange goods for goods. And in the case of a donation, only one party will receive either goods or money, with the giving party acting solemnly and the recipient acting gratefully. By contrast, in the case of insurance, one party will give a sum of money, and later the same party may (or may not) receive back another sum of money. This other sum of money may (or may not) be greater than the sum that the recipient had previously given. Furthermore, there are other transactions where the parties seem to simply exchange money for money: loans and lotteries, to name just two. It is impossible to identify what kind of transaction the parties are carrying out and to distinguish insurance from, for example, lottery by simply observing what the two parties do. It

[1] *Meinrad Dreher*, Die Versicherung als Rechtsprodukt. Die Privatversicherung und ihre rechtliche Gestaltung (1991).

is only possible to identify what kind of transaction the parties execute by analysing the contract terms.

(2) However, a contract is not only necessary to assess whether the parties have entered into an insurance transaction. In fact, it is possible to envisage a sale without any refined contractual documentation. If the parties agree on the goods and the price, and if they perform their reciprocal obligations simultaneously, there is no need to put anything into writing. By contrast, it would be difficult to think of an insurance in practice without some sort of written documentation, even if literature stresses that no form needs to be observed in order to conclude an insurance contract.[2] The parties have to identify when and under what circumstances the insured has a right to an indemnity or the insured sum. As that event will occur in the future – if at all – the parties will define it explicitly in their contract in order to avoid problems of evidence.[3]

(3) Furthermore, a sale is not only conceivable without any written contract, it is also conceivable without any contract law providing default rules that apply if the parties have not agreed on specific terms. The potential buyer inspects the goods that he or she wants to buy in order to assess their quality and to identify any defects. The parties then agree on a price and simultaneously exchange the goods for money. If the buyer takes seriously the task to inspect the goods before buying them, there may be no need for a refined set of rules, solving the problem of what happens if the goods turn out to be defective. And if the parties exchange performance and counter-performance simultaneously, there may be no need for a refined regime of contract enforcement. By contrast, for a number of reasons, insurance is dependent on the existence of a legal framework: the parties, for example, do not exchange their performances simultaneously; insurance is therefore unthinkable without a legal regime of contract enforcement.

(4) More specifically, insurance is dependent on trust. On the one hand, the insurer must be certain that he or she will have the information necessary to assess the risk and, thus, to decide whether and on what terms he or she is willing to conclude the contract. Such information is usually in the hands of the insured. Furthermore, the insurer must be certain that the insured will not change his or her behaviour after the conclusion of the contract. Modern insurance literature speaks of the problems of information asymmetry, adverse selection, and moral hazard.[4] On the other hand, insurance is a long-term contract: the insured pays

---

[2] Cf., e.g., *Jürgen Basedow et al.* (eds.), Principles of European Insurance Contract Law (2009), 103–106 (Art. 2:301).

[3] Cf., e.g., *Nicholas Legh-Jones et al.* (eds.), MacGillivray on Insurance Law (11th edn., 2008), para. 3-002.

[4] From the rich literature see, e.g., *Giesela Rühl*, Information Obligations (Insurance Contracts), in: Jürgen Basedow et al. (eds.), The Max Planck Encyclopedia of European

his or her premium, and he or she wants to be certain that the insurer is still able and willing to offer indemnity or to pay the insured sum once the covered risk eventuates in the future.[5] Of course, problems of information asymmetry, adverse selection and moral hazard are inherent in many, if not most, contractual relationships. Of course, the problem that one party may no longer be in the position or no longer willing to offer the counter-performance after having received the performance is inherent in all long-term contracts. Nevertheless, for insurance markets it is vital that these problems are solved, as insurance products cover risks. If there are no solutions to the problems of information asymmetry, adverse selection and moral hazard, we may observe not only a market failure, but also a market collapse. And as the insured seeks insurance especially against those risks that he or she is unable to shoulder himself or herself, we may observe a collapse on the side of the insured if it is not safeguarded that insurers are in the position to pay the insured sum once the covered risk eventuates. In principle, the measures taken to address these problems are legal measures.

(5) Finally, in the case of sale, the product is not dependent on any regulatory or legislative framework. If a seller offers to sell grain, the product will remain the same regardless of the market where he or she sells the grain and regardless of the regulatory framework of that market. Of course, in today's world producers must observe national product safety regulations and thus they have to modify their products to comply with the regulatory framework of each market. Nevertheless, in essence, these products remain the same. By contrast, insurance products are simply dependent on the regulatory framework of each national legal system. The regulatory framework will have an immediate effect on the design of the insurance product.[6]

In summary, insurance is unthinkable without a refined regulatory framework. And it is impossible to analyse insurance products without understanding this legal setting.

II. Insurance as an actuarial product

However, despite the fact that modern insurance law scholars stress that insurance is a legal product, it is evident that insurance is, at the same time, an actuarial product.

Private Law, vol. 1 (2012), 876–880; *David Rowell* and *Luke B. Connelly*, A History of the Term 'Moral Hazard', (2012) 79 The Journal of Risk and Insurance 1051–1075.

[5] These problems are, e.g., addressed by the law of insurance regulation, see *Anton K. Schnyder* and *Christian Heierli*, Insurance Regulation, in: Basedow (n. 4), 921–926.

[6] Cf., e.g., *Helmut Heiss*, Introduction, in: Basedow (n. 2), xlix–lii.

If someone intends to sell his or her used car, he or she will take the car's age, mileage and general condition into account. He or she will then research for how much similar cars are being sold. The seller will then search for a buyer who is willing to pay the expected price. If the seller is offered a lower price, he or she may decide not to sell the car after all, or to search for another potential buyer. Finding the right price may be more complex for a car producer. However, the single most important factor influencing the price are the costs of producing and marketing the car, and these costs are a factor that is, to a large extent, under the control of the producer.

Depending on the insurance product that an insurer wants to offer, the process of finding the right price is much more complex. Even though an observer may be led to believe that the parties to an insurance contract simply exchange money, the insurer in essence covers a risk. In order to calculate the premiums, the insurer must assess the risk that he or she is promising to cover. With some insurance products it may be enough to assess the risk based on the experience of past losses. However, the mere observation of how long it took to produce reliable mortality tables, which could be used to design a solid and reliable life insurance product, is proof enough that with insurance it is more difficult to set the right price.[7]

Furthermore, if a car producer notices that he or she is selling at too cheap a price, he or she may discover that he or she is generating a loss. The producer may then increase the price if such an increased price is realisable on the market. If it is not, the car producer may have to file for insolvency. Of course, such an insolvency will cause hardship to numerous people (e.g., the producer's employees). However, past customers will be able to keep the cars that they have already purchased. If an insurer has miscalculated the premiums, he or she is stuck with bad risks from existing contracts. If the insurer then has to file insolvency, this will cause hardship not only to the insurer's employees, but also to customers – customers may have paid their premiums for many years and will then find themselves without coverage. They may then also find it impossible to seek coverage with another insurer because they are, for example, too old to get life insurance in order to provide for dependants.

In summary, insurance is unthinkable without a refined actuarial knowledge.

III. Insurance as a financial product

Non-insurance scholars may have a simplistic understanding of insurance products. The insured pays the premium, and in return he or she will receive

[7] See the account in *Peter Koch*; Geschichte der Versicherungswissenschaft in Deutschland (1998), 25–40.

indemnity or the insured sum once the insured risk eventuates. If put in these terms, it looks like a simple contract of exchange just like a sale: the buyer pays the price and receives the goods as counter-performance from the seller. From this perspective, the only difference between a sale and insurance seems to be the subject matter of the contract. However, the design of insurance products is more complex. Any lawyer who is trying to regulate insurance or who argues an insurance case has to understand the financial structure of the product at his or her hand. In summary, insurance is unthinkable without a clear understanding of the financial basis of its products.

IV. Insurance as a risk management strategy

Finally, insurance is a risk management strategy. However, it is only one out of many such strategies, and the interdependence of these different risk management strategies may explain the (un-)importance of insurance in a given market. If risk prevention measures are non-existent in a market, then risks may be too high to be insurable; by contrast, if risk-prevention measures are very effective in a market, then there may be no need for insurance and insurance products will not develop. Furthermore, if there are alternative risk management strategies in a market, this will have an effect on the dispersion of insurance. Such alternative risk management may be diverse: there may be other private contracts fulfilling similar ends as private insurance does; the state may introduce forms of welfare, social insurance or poor relief; for certain risks different social groupings may offer different forms of mutual help and support to their members. Finally, it is evident that insurance will only thrive in markets where people have enough resources to buy insurance coverage. Ultimately, insurance can be understood only when its socio-economic context is taken into consideration.

V. An interdisciplinary approach to studying insurance

In conclusion, insurance law cannot be studied in isolation, nor can it be studied by any single discipline in isolation. Indeed, according to German literature, insurance law is a sub-discipline of the *Sammelwissenschaft* of *Versicherungswissenschaft*.[8] *Sammelwissenschaft* translates as ‘accumulative field of scholarship’, while *Versicherungswissenschaft* means ‘insurance scholarship’. Other sub-disciplines of the broader discipline of insurance scholarship are insurance economics or actuarial science. The classification of insurance law as being part

[8] Cf. *Koch* (n. 7), 4–10. On what follows, see *Phillip Hellwege*, Introduction, in: idem (ed.), A Comparative History of Insurance Law in Europe. A Research Agenda (2018), 9–26, 23 f.

of the greater discipline of insurance scholarship points to the importance of interdisciplinary research in the field of insurance.

B. Histories of insurance

The importance of an interdisciplinary approach to studying insurance (law) is not limited to the study of modern insurance (law). Such an interdisciplinary approach is of similar importance for the study of the history of insurance (law). By contrast, a scholar studying, for example, the legal history of sale may adopt a purely doctrinal approach, focusing exclusively on the development of legal rules as expressed in legislation, case law and legal literature. It will often prove to be of no importance whether the object of sale was in antiquity a 'defective slave', in the early modern era a defective horse, or whether the object of sale is today a defective car – the legal problems remain the same. A purely doctrinal approach to legal history is, in that example, feasible. By contrast, a legal historian studying the history of insurance law cannot limit himself or herself to a doctrinal history of insurance law. An economic historian studying the history of insurance as an institution cannot ignore the legal aspects of the history insurance. Even though each discipline may define its research questions independently, developing answers to these question calls for an interdisciplinary approach or for interdisciplinary cooperation. Indeed, scholars of economic history have in the past always studied the legal and regulatory framework of the different insurance markets as much as legal historians studying the history of insurance law have always taken the socio-economic context into consideration.

However, there are further challenges to working in insurance (legal) history compared to other fields of study. Peter Koch observed:[9] 'Die Versicherungsgeschichte ist somit im Wesentlichen die Summe der Entwicklung zahlreicher einzelner Gesellschaften […]' ('The history of insurance is basically the sum of the development of the individual insurance companies […]'). A legal historian could add that the history of insurance contract law is basically the sum of the development of all individual insurance contracts. Indeed, insurance as we know it today is the product of a long history marked by trial and error. It is only possible to understand the history of insurance by studying the development of the numerous and diverse insurance products offered by the different market actors. What is needed are detailed micro studies which focus on clearly defined time frames and on certain localities in order to be able to cope with the mass of materials. However, at the same time macro studies are needed which contextualise these findings. Furthermore, since Roman law times there has been a body of law that a legal historian could call a 'law of sales'. The same is not true for insurance

[9] *Peter Koch*, Geschichte der Versicherungswirtschaft in Deutschland (2012), 7.

law. At first, there was nothing but numerous and diverse insurance contracts. Again, what is needed are detailed micro studies focusing on the study of such insurance contracts in a clearly defined time frame and focusing on specific markets. Again, at the same time, there is a need for macro studies which contextualise these findings.

However, with insurance legal history, further complexity is added by the fact that there were further actors shaping insurance law other than insurers and the insured concluding their contracts: courts, legislatures and legal academia. It was only through a complex interplay between these different actors that a distinct body of insurance law emerged over the centuries. To disentangle their lasting input on the genesis of insurance law, is again an overly complex endeavour.

C. The objective and structure of the present volume

In conclusion, insurance (legal) history is an interdisciplinary field of study which has to adopt a variety of methodological approaches and which must find the right balance between micro and macro studies. The contributions to the present volume exhibit this breadth of methodological approaches. The theme of the present volume is maritime risk management. However, before the authors discuss the history of such strategies in the marine sector, Grietjie Verhoef will paint, in broad brushstrokes, a general history of insurance with a special focus on the development of the different functions that insurance serves.[10] Verhoef will thereby offer the general framework in which the other contributions may be set. The remaining ten contributions will then examine different risk management strategies in the maritime sector. The focus is not exclusively on insurance.[11] As pointed out, research into the history of marine insurance (law) has to take other related risk management strategies into account. In the maritime sector the most important such related strategies were sea loan,[12] bottomry,[13] and general average.[14] Some contributions focus on normative provisions,[15] others contrast practice with legal scholarship,[16] or focus on the emergence of insurance

[10] *Grietfie Verhoef*, pp. 17 ff., below.

[11] With a focus on marine insurance *Ana María Rivera Medina*, pp. 61 ff., below; *Luisa Piccinno* and *Antonio Iodice*, pp. 83 ff., below; *Andrea Addobbati*, pp. 161 ff., below; *Jerònia Pons Pons*, pp. 189 ff., below; *Mallory Hope*, pp. 209 ff., below; *Stephanie Plasschaert*, pp. 265 ff., below.

[12] *Nikol Žiha*, pp. 35 ff., below.

[13] *Ana María Rivera Medina*, pp. 61 ff., below.

[14] *Luisa Piccinno* and *Antonio Iodice*, pp. 83 ff., below; *John Ford*, pp. 111 ff., below; *David Deroussin*, pp. 139 ff., below; *Sabine Go*, pp. 247 ff., below.

[15] *Ana María Rivera Medina*, pp. 61 ff., below; *David Deroussin*, pp. 139 ff., below.

[16] *John Ford*, pp. 111 ff., below.

companies as opposed to individual insurers.[17] Again, other contributions give valuable insights in marine insurance practice in specific cities,[18] analyse the networks of the different market actors,[19] or analyse insurance practice through the lens of specific insurance litigation.[20] As to the time frame, the different contributions span from antiquity to the nineteenth century.

As editors, we have decided to present these contributions in chronological order. We have discussed other possible arrangements: the contributions could have been grouped together by the sort of transaction that they discuss: sea loan, bottomry, general average, insurance. However, with such an arrangement the connections between these different risk management strategies would have been lost. Or the contributions could have been grouped together by region, proceeding roughly from south to north. However, in an international setting as in the maritime sector, such an arrangement would have been nonsensical. It is only chronological order that is apt to reveal the progressive development of the different risk management strategies in the maritime sector. However, even when following a chronological order, we faced the problem that most contributions overlapped in the time period that they cover. The contribution by Luisa Piccinno and Antonio Iodice,[21] for example, starts in the sixteenth century and reaches into the seventeenth century, whereas John Ford's contribution is restricted to the sixteenth century.[22] Nevertheless, we have decided to place Ford's paper after that authored by Piccinno and Iodice, as this order allows the reader to better appreciate the peculiarities of the Scottish materials.

[17] *Jerònia Pons Pons*, pp. 189 ff., below.

[18] *Luisa Piccinno* and *Antonio Iodice*, pp. 83 ff., below; *Andrea Addobbati*, pp. 161 ff., below.

[19] *Stephanie Plasschaert*, pp. 265 ff., below.

[20] *Mallory Hope*, pp. 209 ff., below.

[21] *Luisa Piccinno* and *Antonio Iodice*, pp. 83 ff., below.

[22] *John Ford*, pp. 111 ff., below.

Insurance and Wealth: The Historical Trajectory of Changing Markets and Strategies in Insurance

By *Grietjie Verhoef*

A. Introduction

Sources, conceptions and disputes over wealth pervade and define world history. In Ancient times wealth was equated to precious metals or property in a variety of forms. In modern times, as the conceptions of wealth changed, so has the ability to create wealth. Aristotle associated wealth with characteristics such as responsibility, prudence and steadfastness. Deliberations on the history of risk and insurance inevitably solicit an appraisal of the relationship between wealth and responsibility, prudence and steadfastness. In 1834 John Rae, the Scottish/Canadian economist, observed that what distinguished man from other animals is what he called 'provident forethought':

> 'the capacity for perceiving, and retaining in his mind, the course of events and the connexion of one with another, that leads man to perceive what advancing futurity is to bring forth, and enables to provide for its wants'.[1]

As Rae expanded his treatise to construct a knowledge-based (or endogenous) growth theory, three core elements emerged: the end-means-relationship in human activity; the importance of knowledge in that relationship; and time. These elements of Rae's treatise align to the historical trajectory of the development of insurance. It is the human capacity to conceive of a qualitatively different, but equally concrete and continuous extension of the present into an open-ended and contingent future, which is integral to our understanding of human agency and power to exercise a considerable degree of control over their individual and collective destinies. The human provident forethought thus elicits the identification

[1] *John Rae*, Statements of some new principles on the subject of political economy, exposing the fallacies of the system of free trade and some other doctrines maintained in the 'Wealth of Nations' (1834), 81.

of risk. Strategies to mitigate or ameliorate risk involve innovation or knowledge of new instruments to contain or provide for that risk. Our shared interest in the history of risk and the strategies of provident forethought, brings us to appreciate the knowledge contribution of insurance to endogenous growth in domestic and global markets. Essentially this is wealth creation.

This present contribution will first consider the origins of the provident forethought identifying risk. Secondly, it will analyse the shifts in risk and, therefore, insurance development or provident foresight. Finally, it will present wealth creation as an essential component of the time dimension of the development of the insurance industry globally.

B. Identifying risk in society

From ancient times societies organised mutual aid and burial associations to provide for unforeseen calamities. These voluntary mutual organisations were the earliest manifestation of a social safety net, which expanded as civilisations moved from relatively isolated geographies into a global context. World history moved through revolutionary transformations, as John Darwin described. These transformations manifested in a geopolitical revolution, a cultural revolution and an economic revolution. Industrialisation and modernisation, imperialism and colonialism, disrupted or transformed the long-standing relative balance between cultures and continents.[2] Ken Pomeranz ascribes the 'Great divergence' to natural resource endowments (specifically coal) in the 'New World' acquired by European nations. This constitutes the core reason for European advance beyond Asian civilisations since the sixteenth century.[3] Such fundamental transformations elicited heightened uncertainty and resultant risk. It is in this new globalised world-changing context, that an emerging global safety net took shape. This resulted from the eighteenth century in the birth of modern-day insurance,[4] diversifying into primary insurance on lives and possessions, and reinsurance markets across the globe. It is this social preserving and existential enhancing dimension of the insurance phenomenon that calls for a more systematic consideration of the connection between insurance and wealth.

In the nascent social security markets, the design and implementation of alliances proved a vital strategy to mitigate risk in the pre-actuarial era. Where such

---

[2] *John Darwin*, Der Imperiale Traum. Die Globalgeschichte großer Reiche 1400–2000 (2010).

[3] *Kenneth Pomeranz*, The Great Divergence. China, Europe, and the making of the modern world economy, (2000).

[4] *Peter Borscheid*, Introduction, in: idem and Niels Viggo-Haueter (eds.), World Insurance. The evolution of a global risk network (2012), 1–34.

alliances were originally kin or society based, attitudes and interpersonal relationships became more critical as core foundations of trust.[5] People prefer to transact on the basis of trust and its sources (ethics, kinship, friendship and empathy) in mutual forms of organisation. Mutual associations emerged on the assumptions of shared social exchange. Social exchange relied heavily on unspecified, implicit obligations emerging from grounded underlying systems of meaning, belief and ethics, rather than on formal contracts.[6] In sixteenth-century Netherlands, guilds provided mutual insurance to its members.[7] In the English-speaking world of the USA, the UK, Australia, Canada and the British colonies in southern Africa, the voluntary self-help associations – also known as 'friendly societies' – gave concrete substance to the social dimension of provident forethought long before the advent of the welfare state.[8]

Two other significant developments impacted directly on provident forethought identifying risk. First, catastrophe incentivised the search for certainty. The Great Fire of London on 6 September 1666 destroyed 13,000 houses and the livelihood and assets of more than 100,000 people.[9] The Great Lisbon Earthquake of 1755 was equally disastrous. As Protestantism instilled a work ethic, associated with the attribute of self-help,[10] people increasingly searched for

---

[5] *Bart Nooteboom*, *Hans Berger* and *Niels G. Noorderhaven*, Effects of trust and governance on relational risk, (1997) 40 Academy of Management 308–338; *Bernard Barber*, The logic and limits of trust (1983); *David Faulkner*, International strategic alliances: Co-operating to compete (1995); *Peter J. Killing*, Understanding alliances: The role of task and organizational complexity (1987).

[6] *Peter J. Buckley* and *Mark Casson*, A theory of cooperation in international business, in: Farok J. Contractor and Peter Lorange (eds.), Cooperative strategies in international business (1988), 31–54; *Marco H. D. van Leeuwen*, Mutual insurance 1550–2015. From guild welfare and friendly societies to contemporary micro-insurers (2016).

[7] *van Leeuwen* (n. 6).

[8] *David T. Beito*, From Mutual Aid to the Welfare State: Fraternal Societies and Social Services, 1890–1967 (2000); *Peter H.J.H. Gosden*, Self-Help: Voluntary Associations in Nineteenth-Century Britain (1973); *Eric Hopkins*, Working Class Self-Help in Nineteenth-Century England: Responses to Industrialization (1996); *David G. Green* and *Lawrence G. Cromwell*, Mutual aid or welfare state. Australia's friendly societies (1984); *Grietjie Verhoef*, Informal Financial Service Organisations for Survival: the case of African Women and Stokvels in Urban South Africa, ca. 1930–1998, (2001) 2 Enterprise and Society 259–296; *idem*, From Friendly Societies to Compulsory Medical Aid Association: The History of Medical Aid Provision in South Africa's Public Sector, (2006) 30 Social Science History. Special Issue: The persistence of the Health Insurance Dilemma 601–627; *Morton Keller*, The Life Insurance Enterprise, 1885–1910 (1963).

[9] *Stephen Porter*, The Great Fire of London (2011); *Jennifer Anne Carlson*, The economics of fire protection: From the Great Fire of London to rural/metro, (2005) 25/3 Economic Affairs 39–44; *Robin Pearson*, United Kingdom: Pioneering insurance internationally, in: Borsheid/Viggo-Haueter (n. 4), 67–97, 69.

[10] *Max Weber*, The Protestant ethic and the spirit of capitalism (1905; translated by Talcott Parsons, 2005).

methods to bolster predictability, scientific methods to predict and regulate the catastrophe of fire. Secondly, the Glorious Revolution of 1688 affirmed the constitutional right to private property. This development stimulated a desire for improved specification of property rights and measures to secure such property. A fear of the loss of property added to the social demand for certainty and protection of property.[11] With rising humanism concerned about the protection of human life, the institutional sanctioning of private property and a social self-help ethos, new forms of a global safety net emerged through the international expansion of European culture. Society soon generated different forms of a safety net or 'insurance' towards the risks of the expanding Eurasian exchange.[12]

As the Enlightenment brought rational intellectual investigation, the individual emerged central to foresight. Max Weber's concept of 'rational calculation' articulated society's desire and capacity to predict and compute the lived world. European society's affinity for certainty, clarification and conformity with patterns, constituting the desire to control the environment, converged with the notion of individual responsibility. As rational persons accepted individual responsibility, society developed the instruments of computing, calculation and predicting certainty. In Germany actuarial science subsequently developed from the mid-eighteenth century. The concept of risk thus acquired the character of being calculable, manageable and therefore less uncertain. By the early twentieth century Frank H. Knight made the distinction between risk and uncertainty clear: when uncertainty is rationally incalculable, it remains a risk, but the element of risk is removed or mitigated when it can be measured rationally.[13] As rational individuals agreed on the ethical basis of insurance, religious self-help ethos and the ambition to protect life and property, converged with the newly developed tools to calculate the probability of future risk. This gave rise to different insurance strategies to protect life and property.

Expanding enterprise beyond the European metropolis charting new transport routes across the oceans, opened provident forethought to ways of protecting people and goods in transit. The earliest forms of insurance were mutual societies of merchants and ship owners operating in distant ports, seeking protection against bandits attacking transporting parties on land and the ocean, or relief to merchants and their widows and orphans, should the former perish at sea.[14] International maritime expansion opened the door to premium insurance, first organised by brokers in cities such as London, Antwerp, Amsterdam, Bruges,

---

[11] *Robin Pearson*, Insuring the Industrial Revolution. Fire Insurance in Great Britain, 1700–1850 (2004), 3, 367–368.

[12] *Pearson* (n. 11); *Borsheid/Viggo-Haueter* (n. 4).

[13] *Frank H. Knight*, Risk, uncertainty and profit (1921).

[14] See in detail *Ana Maria Rivera Medina*, pp. 61 ff., below; *Zheng Kang*, Assurances modern en Chine: une continuité interrompue (1801–1949), 31 (1997) Risques 103–120.

Genoa and Hamburg. Soon chartered companies, private underwriters (such as the private underwriters of Edward Lloyd's men) and nation state enterprises gave rise to a variety of organisational forms of marine insurance operating in national and global markets.

C. Expanding risk and insurance development

Insurance as a European invention developed in royal chartered companies, state monopolies as well as private partnership companies, private joint-stock companies and private mutual companies. Various factors contributed to the variety of corporate forms of organisation of insurance enterprises.[15] Risks are so diverse and therefore mandate corporate structures aligned to the types of risk underwritten. Marine insurance involved, and still involves, large financial risks. Insurers were organised in networks of merchants, brokers and bankers, while smaller mutual merchant clubs provided hull insurance. Large joint-stock insurance companies and Lloyd's brokers held a significant stronghold on corporate marine insurance in England during the eighteenth century. Much greater dynamics existed in the informal market. Joint-stock companies in the port cities of the Netherlands, as well as on the German and Polish coastlines, operated marine insurance. Statutory determinants and the types of risk underwritten impacted directly on the forms of organisation adopted by the various branches of insurance – in fire and property liability insurance, in marine insurance and in life assurance.

The life assurance enterprise reflected the changes in the social structure. The earliest life insurance policies circulated in late sixteenth-century England; a rapidly urbanising society. King Philip II banned life insurance in the Low Countries in 1570. The tendency towards abuse of life policies as an instrument to gamble on the lives of people was reversed through state regulation, introducing the principle of life insurance on 'a real and documented financial interest (insurable interest)'.[16] When the perception of what incentivises people to take out life insurance shifted from the responsibility to provide for dependents to the high probability that the provider may not indefinitely be able to do so, life insurance was rationalised as prudent and a moral obligation.[17] As life insurance became an instrument of alleviating the risk of life through public benevolence and fellowship, potentially disruptive market developments incentivised voluntary Christian agency in combining self-interest of markets with fellowship and

---

[15] *Robin Pearson* and *Takau Yoneyama* (eds.), Corporate forms and organizational choice in international insurance (2015).

[16] *Harold E Raynes*, A History of British insurance (2nd edn., 1956), 137; *Keller* (n. 8), 4.

[17] *Timothy Alborn* and *Sharon A. Murphy*, Anglo-American life insurance, vol. 1 (2013), xxviii f.

providence. Life insurance acquired the credentials of enhancing creditworthiness, whereby it provided security to dependents. The initial aristocratic client base of the Society for Equitable Assurances Company by 1900 shifted to the growing market of the middle class. Members of life insurance societies acquired a reputation as trustworthy persons, the members considered to belong to the upper working class, lower middle-class bourgeoisie and a growing target of established life offices.[18] It was the efflorescence of nineteenth-century laissez faire, which made chartered companies divest systematically from their public interest role. This elevated life insurance to a special role of social responsibility, a religious duty, or 'a moral urgency' to preserve and protect life and wealth.[19] Holders of life policies received income tax remittances (or what we would currently call 'beneficial income tax treatment'), because such policies reduced 'pauperism and crime'. The delayed sanctioning of limited liability status to life insurance companies was because of the special public concern with such trust-related business.[20]

The crucial aspect of life insurance is its ability to create wealth – personal and national – through scientific calculation. The application of scientific methods to research in probability theory, brought historical knowledge to bear on both qualitative and quantitative (or mathematical) approaches to probable configurations of the future. This transfer of scientific rationality to the existential realm of people, is where insurance becomes an agent of human forethought or prudence to assess risk and choose the optimal strategy to manage such risk. It is the scientific and rigorous statistical basis of insurance and annuity demand of educated property-owning people, which made them factor future contingencies into their planning. Planning for the future meant a qualitatively enhanced future, and so, wealth-enhancing behaviour. Life insurance increases total savings of society and thereby augments economic growth. From the widely held view that the 'breadwinner' – or in the nineteenth-century world, the husband – had to provide for the family, this role shifted to macro-economic national interest. 'Life offices' accumulated substantial savings, which the state increasingly

[18] The best histories of this development are *Geoffrey Clark*, Betting on lives: The culture of life insurance in England, 1695–1775 (1999); *Timothy Alborn*, Regulated lives: Life insurance and British society (2009); *Michael J. Sandel*, The moral economy of speculation: Gambling, finance and the common good (The Tanner Lecture on Human Values, University of Utah, 23 February 2013), https://tannerlectures.utah.edu/Sandel%20Lecture.pdf (last accessed 28 July 2020).

[19] *Alborn*/*Murphy* (n. 17), xxix.

[20] *Keller* (n. 8); *Robert Wright* and *George D. Smith*, Mutually Beneficial. The Guardian and Life Insurance in America (2004); *Sharon Murphy*, Investing in life. Insurance in Antebellum America (2011).

wanted invested in the national economic project, to contribute to national economic growth – 'creating a socially conscious yet profitable enterprise'.[21] Life policies became personal financial empowerment instruments available to all – thus emerging as a vehicle of social transformation. A fine example is Sanlam in South Africa. Sanlam mobilised ambitions to reverse economic and social marginalisation of a certain stratum of society to build an insurance company as the instrument towards people's economic empowerment.[22] Elsewhere, life insurance companies sought to convince the public to place the 'future of their family in the hands of the life office' – a strategy that Timothy Alborn refers to as 'domesticating risk'. Life offices thus positioned themselves as the agents of social transformation, personal empowerment[23] and national economic advancement. Wealth creation moved beyond the protection of tangible assets (as fire, casualty and marine insurance did) to the future state of personal wealth and security – be that to the individual or the wider kin or the nation state.

From life insurance take-off in the mid-eighteenth century up to the mid-twentieth century, the industry primarily preserved lives through providence – collecting premiums, guaranteeing stable returns. In the post-1945 European economic recovery, savings behaviour gradually shifted beyond the savings banks into personal wealth-enhancing life insurance. A gradual shift occurred within the next decade out of death benefits (risk products) to a growing demand for annuities, duly also incentivised by tax benefits. The volatility in global markets following the collapse of the Bretton Woods exchange rate system and subsequently the successive oil price hikes of the early 1970s, fundamentally changed the global financial landscape. The 1970s, also described as the 'second wave of globalisation', intensified the global movement of capital, trade and technology. With exponentially higher trade volumes, capital flows and movement of people, the demand for insurance rose rapidly. Simultaneously, in the non-life market the size of risks exploded. The cost of super-large oil tankers and large passenger aircraft rose to millions of dollars, the number and intensity of natural disasters escalated (to US$144 billion in 2017 – the highest-ever recorded loss in a single year,)[24] and the number of automobiles on roads had risen to more than 1.2 billion

[21] *Murphy* (n. 20), 4.

[22] *Grietjie Verhoef*, The Power of your life. The Sanlam century of insurance empowerment, 1918–2018 (2018).

[23] See *Alborn*/*Murphy* (n. 17), 203–259.

[24] Natural Disasters Cost Insurers a Record $144 Billion in 2017: Swiss Re's Sigma, Insurance Journal, 10 April 2018, www.insurancejournal.com/news/international/2018/04/10/485904.htm (last accessed 25 February 2020).

in 2014.[25] Credit insurance was equally international. Credit insurers found clients operating both inside and across national borders, often in joint ventures with enterprises incorporated in non-home markets, thus mandating knowledge of credit risks in different markets.[26]

D. Shifting demand for long-term insurance – the new wealth instruments

In the life insurance market, the nature of demand shifted. The dynamic complexity of provident forethought shifted demand from life insurance to structured financial, or wealth products. With the rise of financial capitalism, or financialisation, profit maximisation could be gained from financial market speculation. New communication technology catapulted the speed of information transfer into a new era, allowing wealth accumulation through financial instruments, such as equities and debt. Financial transactions multiplied much faster than foreign trade, incentivising speculation on volatile equity prices, in a context of extreme volatility in interest rates, exchange rates and commodity prices. This trend resulted in transactions such as the famous George Soros' Quantum Fund selling itself short in 1992, which ultimately forced the Bank of England to devalue the British Pound and secured Soros £1 billion.[27] And in 1997 Soros was again blamed for the sharp devaluation of Southeast Asian currencies.[28] The higher returns on equity markets turned corporates' focus towards the strengthening of the share price. The core of industrial corporations' operations came to centre less on real capital than on financial capital in equity markets.[29] The insurance sector was forced to adjust to the new knowledge of portfolio investment management (asset management of mutual investment funds) to address rising policyholder demand for wealth products. Linked investment service providers (LISPs) opened a wide scope to insurance product innovation. A fine example is the financial products pioneered by Vanguard, and later the exchange-traded funds (ETFs) of the early 1990s, investing in indexes, which offered innovative wealth instruments ring-fenced against risk. The trend has been sustained over the past decade. This trend as manifested in 2016 is illustrated in Graph 1.

---

[25] 1.2 Billion Vehicles on World's Roads Now, 2 Billion by 2035: Report, 29 July 2014, www.greencarreports.com/news/1093560_1-2-billion-vehicles-on-worlds-roads-now-2-billion-by-2035-report (last accessed 25 February 2020).

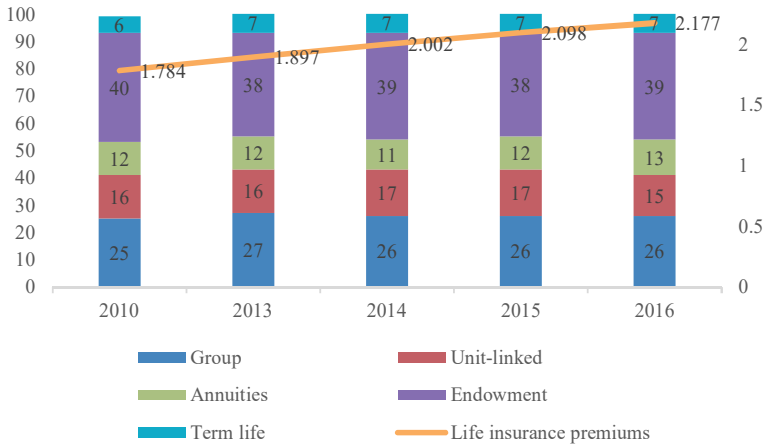
[26] *SwissRe*, (2000) 9/2000 Sigma, World insurance in 1999: Soaring life insurance business, 5.

[27] *Niall Ferguson*, The Ascent of Money. A Financial History of the World (2009).

[28] *David Serchuk*, Burma's Billionaire, 13 April 2007, www.forbes.com/global/2007/0423/058.html (last accessed 25 February 2020).

[29] *Borscheid* (n. 4) 25 f.; *SwissRe*, (2006) 1(2) Sigma, 20.

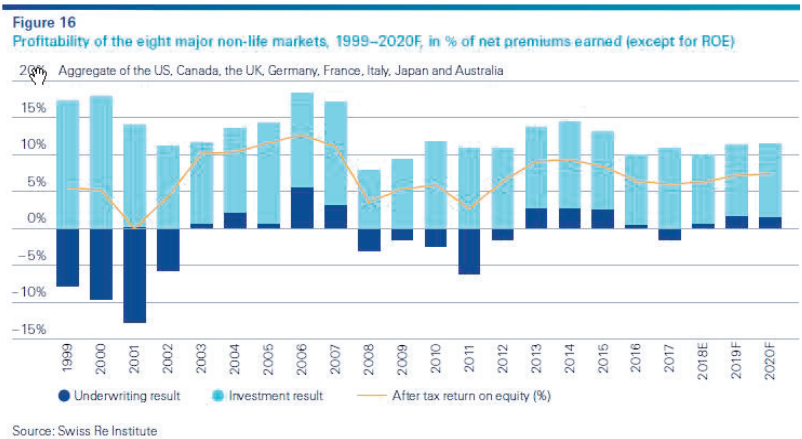
Graph 1. Life product mix in per cent and global life insurance premiums in billion Euros[30]



It was primarily profitability of investment returns, not underwriting, that drove profitability of non-life markets from 1999. In 2019, this development was illustrated as displayed below.

[30] Graph 1 is based on Exhibit 9 of *Stephan Binder* and *Jörg Mußoff*, Global Insurance Industry Insights. An in-depth perspective (McKinsey Global Insurance Pools, 7th edn., 2017), 17. On the foreign exchange rates used and estimations for 2016, see ibid.

Graph 2. Profitability of the eight major non-life markets[31]



Insurance companies were perfectly positioned to benefit from two developments in their core markets. The first was the weakening of state capacity to fund the growing welfare system.[32] The extensive post-World War II social security net (the first pillar of retirement) became unsustainable in the wake of escalating public debt as the late 1970s and early 1980s global recession unfolded. The second pillar of retirement, employer-based pensions, weakened as the rate of return of pay-as-you-go (PAYG) taxes (which equals the sum of rates of growth of the workforce and taxable wages), declined with declining fertility and unemployment and stagnant wages, and thus also showed signs of compounding distress. People started to construct retirement provisions through private savings (the third pillar of retirement) and continued employment by deferring retirement (the fourth pillar of retirement). As Thatcherite liberal market policies commenced systematically to reform markets, individual agency and entrepreneurial initiatives led to growing private retirement provision. An industry emerged which would soon constitute a substantial component of the life business as the initial occupational pension schemes based on fixed interest-bearing securities were replaced by market-related asset managed funds.[33] Despite these efforts, a pension gap has developed and is widening.

---

[31] The graph is re-printed from, and with kind permission of, *Swiss Re Institute*, Sigma 3/2019.

[32] *Van Leeuwen* (n. 6), 235–240.

[33] See *Leslie Hannah*, Inventing retirement. The development of occupational pensions in Britain (1986); *Robert Vivian*, South African insurance markets, in: David J. Cummins and Bertrand Venard (eds.), Handbook of International Insurance (2007), 677–738;

The second development was market deregulation of financial services during the 1980s and 1990s. The distinction between banks, building societies, insurance companies (mutual and stock) and other financial intermediaries blurred, allowing banks to enter the market for insurance in the so-called '*bancassurance*' segment of operations. Waves of mergers and acquisitions in the financial services industry led to the rise of composite financial intermediaries. Mega financial conglomerates emerged, such as the AIA Group Ltd (established in 1919 in Hong Kong, operating in 18 markets), the AIG Group Ltd (established in1919 in Shanghai), Allianz SE (established in 1890 in Munich, operating in more than 70 countries), AXA (established in 1816 in Paris, currently operating in 56 countries), Berkshire Hathaway (established in 1889 in the USA) and China Life Insurance (established in 1949 as the People's Insurance Company of China (PICC) in Beijing).[34] These mega-companies operate in multiple markets, giving momentum to the internationalisation of financial services, perpetuating internationalisation of insurance operations known to be the hallmark of the industry from the nineteenth century – both from Britain and settler markets.[35]

As equity markets boomed under financialisation and neo-liberal market deregulation, insurance companies had a field day. The rapidly rising share of equities in the insurance portfolios ensured enhanced profitability as long as the business cycle was in an upward trend. This afforded insurance companies expanded market control. Between 1998 and 2004 insurance companies globally expanded market share from 19.8% to 28.2%.[36] The insurance industry migrated increasingly towards diversified financial services providers, operating in the field of pension funds, asset management, employee benefits and group life schemes. The merger and acquisition wave occurred in different directions: in the USA banks acquired insurance brokers to drive *bancassurance*, while in the British and European markets insurance companies consolidated through mergers and acquisitions. In South Africa's well-established financial services sector, the state mandated domestication of the financial services industry during the period of international adversity towards the country, which resulted in the disinvestment of foreign banks, allowing local well capitalised insurance companies

---

Krzysztof Ostaszewski and *Anthony Webb*, Guest editorial, (2013) 38 Geneva Papers on Risk and Insurance 635–637.

[34] See *Prableen Bajpa*, The World's Top 10 Insurance Companies, Investopedia, update 5 February 2020, https://Investopedia.com/articles/personal-finance/010715/worlds-top-10-insurance-companies.asp (last accessed 25 February 2020); *Bethan Moorcraft*, These are the top 25 largest insurance companies in the world, Insurance Business Asia, 29 January 2019, www.insurancebusinessmag.com/asia/guides/these-are-the-top-25-largest-insurance-companies-in-the-world-123334.aspx (last accessed 25 February 2020).

[35] See *Robin Pearson*, The development of international insurance (2010).

[36] *SwissRe*, (2006) Sigma, 1/2006:2.

to construct mega-banking groups offering every possible financial service a person could ask for.[37] In markets with low levels of insurance penetration, *bancassurance* was the favoured option to distribute insurance products through the bank network. Since the mid-1980s the trends among mutual insurance companies in the USA, Canada, Australia, the UK and South Africa, was demutualisation. This allowed insurers more financial flexibility, access to capital markets, enhanced efficiency and wealth distribution (through the expropriation thesis – creating a windfall gain for members of the mutual, which can be invested in profitable investment opportunities).[38] The cycle of strong equity growth came to a halt with the dot.com crisis, the global security collapse with the 9/11 attacks and, after a brief recovery during 2003/2004, the subprime crisis of 2007/2008, which wiped out value on an unprecedented scale.

The global world thus developed into an ever more complex space, moving at an exceedingly rapid pace to the man-made risk of an ageing and over-populated society. The life insurance industry survived the destructive financial crises of the twenty-first century with costs and contraction. The non-life industry suffered the largest ever liability class action in the USA for asbestos-related liabilities, which led to similar international claims. The extent of non-life liabilities incurred in this case and subsequent cases resulted in a dramatic rise in non-life premiums, and claims. The liability claims also brought Lloyd's of London almost to near-collapse at the end of the twentieth century.[39] Successive natural catastrophes, such as hurricanes, tsunamis, fires, volcanic eruptions and earthquakes affected property insurance adversely. The magnitude of these catastrophes and potential future ones involved a renewed appraisal for the specialist expertise of reinsurance and the overarching safety net of the state as reinsurer of last resort. It is in the growing sophistication and specificity of calculating risks and the limits of insurability, that insurance specialists have made substantial progress. The fine print of insurance contracts does rein in excessive risk

---

[37] *Grietjie Verhoef*, Concentration and Competition: the changing landscape of the banking sector in South Africa, 1970–2007, (2009) 24 The South African Journal of Economic History 157–197; *idem*, Financial Intermediaries in Settler Economies: the Role of the Banking Sector development in South Africa, 1850–2000, in: Christopher Lloyd et al. (eds.), Settler Economies in World History (2013), 403–436.

[38] *Julie A. B. Cagle*, *Robert L. Lippert* and *William T Moore*, Demutualization in the Property-liability Insurance Industry, (1996) 14 Journal of Insurance Regulation 343–396; *James M. Carson*, *Mark D. Forster* and *Michael J. McNamara*, Change in Ownership Structure: Theory and Evidence from Life Insurance Demutualisations, (1998) 21 Journal of Insurance Issues 1–22; *David Mayers* and *Clifford W. Smith*, Ownership Structure and Control: The Mutualisation of Stock Life Insurance Companies, (1986) 16 Journal of Financial Economics 73–98; *Monica Keneley* and *Grietjie Verhoef*, Pressures for change in the Australian and South African insurance markets: A comparison of two companies, (2011) 15 Competition and Change 136–154.

[39] *SwissRe*, (2002) 3 Sigma, 2002.

taking, but ecological/health, economic, cyber and security/terrorist-related risks remain elusively difficult to frame. It was only during the 1980s that natural catastrophes became insurable. Now insurers are modelling the pricing options of NatCat bonds. The arrival of the Fourth Industrial Revolution (4IR) enhanced the fusion of technologies (electronics, information technology and production automation), blurring the distinction between the physical and cyber spaces. As human and business activities are increasingly inextricably intertwined in the cyber space, risk and losses abound in this space. These risks affect both tangible and non-tangible assets, mandating further regulatory expansion.

The condition of society thus portrayed is reflected in global insurance trends. The growth in the life industry slowed considerably in the wake of the Global Financial Crisis, and recovered slightly almost to pre-crisis levels. In 1999 life insurance accounted for 61% of total world premiums and non-life insurance for 39%. By 2017, the share of life premiums contracted to 54.3% of world premiums, and non-life premiums increased its share to 45.6%. Weaker global economic performance moved the life industry lifelessly sideways. The life industry responded to these challenges by developing innovative product differentiation, by moving out of no-longer-fit-for-purpose risk products, into managed wealth instruments. The life industry reinvented itself in many ways.

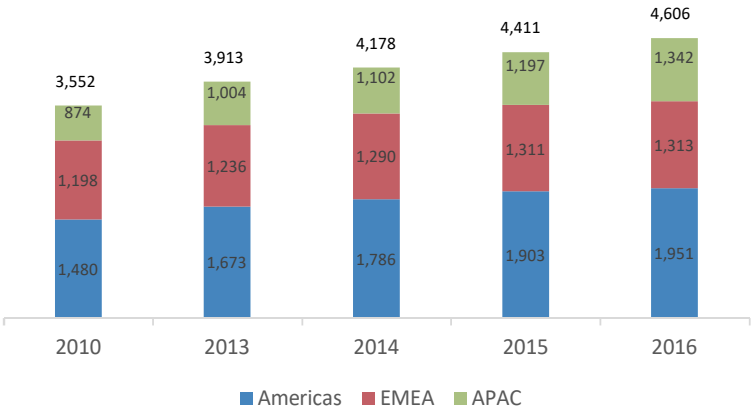
There are more encouraging signs of life in the non-life market, which simply portrays the prevalence of growing property and casualty risk levels.[40] The momentum of global insurance growth trajectory shifted from mature to emerging markets. These include Africa, Asia-Pacific (APAC) and Latin America, but primarily the APAC region, as Graph 3 illustrates.[41]

---

[40] *Daniel Staib* and *Mahesh H. Puttaiah*, World insurance in 2015: steady growth amid regional disparities (SwissRe Institute, sigma 3/2016); *Astrid Frey Kaufmann*, *Roman Lechner*, *Patrick Saner*, *Daniel Staib* and *Clarence Wong*, Global economic and insurance outlook 2020 (SwissRe Institute, Sigma 5/2018); *Binder/Mußoff* (n. 30).

[41] The data is taken from *Binder/Mußoff* (n. 30), 10.

Graph 3. Insurance premiums worldwide in billion Euros[42]



Whereas, the insurance premiums increased worldwide by 4.4% per annum, in the APAC region they increased by 9.8% between 2013 and 2014; by 8.6% between 2014 and 2015; and by 12.1% between 2015 and 2016. The growth prospects are also illustrated by the insurance density and penetration levels in the two sections of Table 1, contrasting developed countries with emerging markets.[43]

[42] Graph 3 is based on Exhibit 1 of *Binder/Mußoff* (n. 30), 10. On the foreign-exchange rates used and estimations for 2016, see ibid.

[43] Sigma, 2010–2017. Statistical Appendices.

Table 1. Insurance penetration and insurance density in selected developed countries

Selected countries	Insurance penetration		Density US$ per capita	
	2010	2017	2010	2017
Hong Kong (China)	11.3	17.9	3,648	8,270
Japan	8.4	7.4	3 895	2,893
UK	12.5	9.8	4 885	5,112
USA	10.8	11.2	5 228	6,706
OECD Total	8.7	8.9	3,115	3,457
Australia	5.0	4.4	2,901	2,541
South Korea	10.4	12.4	2,290	3,436
South Africa	13.4	14.1	989	742
Switzerland	9.0	8.6	6,755	6,904

Insurance penetration and insurance density in selected emerging markets

Emerging markets	Insurance penetration		Density US$ per capita	
	2010	2017	2010	2017
Turkey	1.2	1.4	130	152
Russia	1.1	1.4	159	152
Argentina	1.6	2.6	289	393
Brazil	2.4	3.2	298	320
Colombia	1.2	1.3	26	43
Indonesia	1.6	1.9	54	73
Latvia	1.8	2.4	203	373
Lithuania	1.6	1.9	192	316
Uruguay	1.6	2.6	231	451

Insurance penetration (total premiums as a percentage of GDP) in this selected sample shows relative high penetration in developed markets and low penetration in developing or emerging markets, with the exception of South Africa. Penetration correlates with density (the value of total premiums per capita), illustrating that insurance is a significant instrument for the preservation and creation of wealth. Emerging markets are expected to be the growth engine both of the global economy and the insurance industry over the next decade. Much improved economic growth trajectories in emerging markets, despite volatility, will contribute

up to 42% of global growth, with China contributing 27%. Historians of insurance are making a significant contribution to the knowledge and understanding of those markets. Reference is here made to the research project on 'Global Cultures of Risk' at the University of Basel, under the leadership of Martin Lengwiler and Robin Pearson. Globalisation brings people and modern technology closer, but – as was vividly illustrated by global political developments recently – does not eliminate cultural and national specificities, important dimensions for the global insurance industry.

E. Complex future of risk

The core questions of insurance scholars, as portrayed in *The International Journal of Risk and Insurance*, a publication with an 87-year track record in 2019, currently still elicit enquiry, attention and discourse among insurance scholars. Topics of investigation included ageing, tax issues, employee benefits, healthcare financing, actuarial science, financial management, financial risk management, workers' compensation, reinsurance, insurance education, catastrophe financing, and evolving legal systems.[44] These foci still constitute the core of scientific enquiry on risk. Research into the history of risk and insurance reflect on instruments of risk transfer, pricing and security in the slave trade, mutuality, health insurance, insurance law and regulation, scientific pricing models of NatCat insurance instruments, the growing physical-cyber market, performance management in the industry, emerging markets (Central and Eastern Europe), marine insurance, catastrophes and risk governance. The scholarly debates on these issues in historical perspective underline the persistence of the risk factors in the industry. Recently Robin Pearson and David Richardson refuted the unsubstantiated claim that marine insurance drove the slave trade by offering more favourable insurance contracts to shipowners. The actual insurance contracts showed that marine insurers commonly considered slaves to be animate and perishable goods and were insured only as that, nothing more.[45] The systematic analysis of insurance contracts through history underlines the core context of protecting the value of an asset, with, in the case of slaves, to secure a higher average price of the asset at sale. In a similar fashion, provident foresight seeks to protect the asset of life and future wealth. Non-life risk acquired an extensively more profound global dimension, as displayed in the strong growth in the non-life insurance market. From a loss perspective, natural catastrophes are the main

[44] *Mary Weiss* and *Joseph Qiu*, The Journal of Risk and Insurance: A 75-year historical perspective, (2008) 75 Journal of Risk and Insurance 253–274.

[45] *Robin Pearson* and *David Richardson*, Insuring the Transatlantic slave trade, (2019) 79 The Journal of Economic History 417–446.

threats to global resilience.[46] Currently, health insurance is driving the slow growth observed in the life market. The persistent low interest rate environment is a major cause of the slowdown in the life market, containing investment returns – a major concern for the industry. The non-life industry is advancing faster than the life market. This growth is driven by long-term health needs, health epidemics, natural catastrophes and cyber risk – the typical rising property and casualty risks of our increasingly over-populated planet. A number of key trends manifest in the insurance industry:

- the growing demand for health insurance, specifically long-term care, due to an ageing population;
- the expected retirement savings (pension) gap caused by an ageing population;[47]
- alignment of growing state involvement in the insurance market through social security provision, with private insurance enterprise;
- a renewed trend towards mutualisation, as reinsurance and alternative risk transfer mechanisms, such as insurance-linked securities, offer mutual insurers with increased financial flexibility to cope with unexpected losses;[48] and
- responding swiftly to the demand for modern technology in addressing demand and distribution.[49]

In the aftermath of the Global Financial Crisis the International Association of Insurance Supervisors (IAIS) concluded that traditional insurance activities were not systemically risky.[50] As suggested by John Rae, the strategies of provident forethought (insurance) generate 'knowledge' contributing to endogenous growth. Research has confirmed the positive relationship between insurance ex-

---

[46] *Thomas Holzheu*, *Patrick Saner*, *Kulli Tamm*, *Maurus Rischatsch* and *Roman Lechner*, Indexing resilience (SwissRe Institute, Sigma 5/2019), 2.

[47] The World Economic Forum (WEF) estimated that the pension gap will widen from US$70 trillion in 2017 to US$400 trillion by 2050: *World economic Forum*, We'll live to 100. How can we afford it? (White paper, Ref 020417 – case 000029250, 2017).

[48] *Kulli Tamm*, *Melissa Li* and *Irina Fan*, Mutual insurance in the 21st century: back to the future? (SwissRe Institute, Sigma 4/2016).

[49] These developments include personalised products, AI and automation for faster claim resolution, advanced analytics and proactiveness, insurtech partnerships and mainstreaming blockchain: Top trends in the insurance industry, WNS, 2018 www.wns.com/insights/articles/articledetail/590/top-5-trends-in-the-insurance-industry (last accessed 25 February 2020).

[50] *Etti Baranoff*, The financial and economic attributes of insurers, (2012) 37 The Geneva Papers on Risk and Insurance 401–404.

cess returns and future economic growth, thus confirming the contribution of insurance to economies, stability and growth.[51] My personal interest in insurance history is in the human agency of provident foresight, the socio-cultural dimensions of probability mitigation and the global conversion of innovation and technology to transfer the advantages of insurance into marginalised markets. The power of insurance lies in its holistic nature as an instrument of individual and collective providence, with a distinct vision of the future. Throughout history the insurance industry has preserved and created wealth by securing assets and human lives, which supported long-term stability in markets. Fundamental shortcomings in global economic resilience, as portrayed by lower growth, higher debt, financial market structural adjustment through increasing central bank intervention, disrupting bond price signalling capacity, and less open economies (tendencies of protectionism) may impact adversely on the stabilising role of the insurance industry. It is this historical dimension and simultaneous vision of future possibilities, which brings together research on risk and the history of insurance.

[51] *Chunyang Zhou*, *Chongfeng Wu*, *Donghui Li* and *Zhian Chen*, Insurance stock returns and economic growth, (2012) 37 Geneva Papers on Risk and Insurance 405–428.

The Insurance Function of Roman Maritime Loan

By *Nikol Žiha*

A. Back to the roots

'Levius communia tangunt.'
'Common things are easier to bear.'
Claudius Claudianus, De raptu Proserpinae 3.197.

As the late antique poet Claudian emphasized, previously anticipated and shared hazards are indeed considerably easier to bear. Accordingly, if a single risk is distributed among multiple carriers, it is more likely that a person who suffered the damage due to their joint risk will be able to receive indemnification. It is commonly recognized that the concept of insurance, primarily as a principle of reciprocity and solidarity, did not emerge as a result of a single historical period but rather gradually developed in reaction to hazards that permanently threatened human existence. Over the course of history, even before the development of insurance in the modern context, the risks and possible consequences of seafaring influenced the emergence of various types of damage distribution mechanism and the contractual transfer of risk. An important stage of development was the Greco-Roman institute of maritime loan (*fenus nauticum, pecunia traiecticia*) as a means of financing and insuring overseas sales in the Mediterranean.[1]

[1] The institution of maritime loan has received much attention in scholarship on Roman law. Cf. e.g., *Balthazard-Marie Émérigon*, An essay on maritime loans (1811); *Hermann Kleinschmidt*, Das Foenus Nauticum und dessen Bedeutung im römischen Rechte (1878);

This loan of money constituted a capital that was made available to the merchant for a maritime venture and was repayable with very high interest rates on condition that the vessel reached its destination safely. The essential characteristics that differentiated it from ordinary loans (*mutuum*) were the transfer of risk to the lender, an unlimited interest rate whose amount depended on risk assessment, and the informal conclusion of a contract. Since the interest rate (*periculi pretium*) in terms of its value and risk adjustment can be compared to a premium, and especially because the risk of commercial journey was transferred to the party not directly participating in the maritime venture, maritime loans were attributed a function similar to modern-day marine insurance. Roman legal sources available to us unfortunately do not contain an insurance contract in its modern sense, meaning that for specified consideration paid in advance, one party assumes the obligation to compensate the loss of the other if the designated hazard occurs. However, as naval navigation in antiquity was exposed to numerous dangers, risk coverage had to be taken over by some of the existing legal institutes.

The impulse for offering an in-depth analysis of the insurance function of maritime loan in the present contribution came from Rudolf von Jhering, who was the first to define 'maritime loan' as 'Assekuranzgeschäft des Altertums'.[2] And

---

Bernhard Matthiass, Das foenus nauticum und die Geschichtliche Entwicklung der Bodmerei (1881); *Heinrich Sieveking*, Das Seedarlehen des Altertums (1893); *Theodor Spitta*, Die geschichtliche Entwicklung des 'foenus nauticum' (1896); *Obrad Stanojević*, Zajam i kamata – istorijska i uporednopravna studija (1966); *Karoly Visky*, Das Seedarlehn und die damit verbundene Konventionalstrafe im römischen Recht, (1969) 16 Revue internationale des droits de l'antiquité 389–419; *Wieclaw Litewsky*, Römisches Seedarlehn, (1973) 24 Rivista internazionale di diritto romano e antico 112–183; *Arnaldo Biscardi*, Actio pecuniae traiecticiae. Contributo alla dottrina delle clausole penali (1974); *Gianfranco Purpura*, Ricerche in tema di prestito marittimo, (1987) 39 Annali del Seminario Giuridico della Università di Palermo 189–336; *Ulrich von Lübtow*, Catos Seedarlehen, in: idem, Schriften zur römischen Geschichte, vol. 4: Aspekte der Wirtschaft (1993), 154–176; *idem*, Das Seedarlehen des Callimachus, in: ibid., 177–201; *Ivano Pontoriero*, Il prestito marittimo in diritto romano (2011); *Grzegorz Jan Blicharz*, Pecunia Traiecticia and Project Finance: The Decodified Legal Systems and Investments in Risky Ventures, (2017) 10 Teoria e storia del diritto privato 1–23.

[2] *Rudolf von Jhering*, Das angebliche gesetzliche Zinsmaximum beim foenus nauticum, (1881) 19 Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts 2–23, 6. In addition, see *Friedrich Carl von Savigny*, Pandektenvorlesung 1824/25 (Horst Hammen ed., 1993), 295.

indeed, most Romanists and insurance historians support the idea that the maritime loan served an insurance function,[3] they recognize the existence of insurance-specific elements in the maritime loan,[4] or highlight its role as precursor to marine insurance.[5] However, there is an entire group of authors who deny the insurance function of this type of contractual agreement.[6] Therefore, irrespective of the interest in this institute, the dispute concerning its insurance aspects does not abate, as Erwin Seidl observed: 'der nicht zur Ruhe kommende Streit, ob das Seedarlehen mit Versicherungsfunktion benützt werden kann oder nicht.'[7]

---

[3] Cf. *Kleinschmidt* (n. 1), 16 f.; *Paul Huvelin*, Études d'histoire du droit commercial Romain (1929), 196; *Bertold Eisner* and *Marijan Horvat*, Rimsko pravo (1948), 406; *Jacques Henri Michel*, Gratuité en droit romain (1962), 121; *Max Kaser*, Das Römische Privatrecht, vol. 1 (2nd edn., 1971), 533; *Henryk Kupiszewski*, Sul prestito marittimo nel diritto romano classico: profili sostanziali e processuali, (1972) 3 Index 368–381, 376; *Litewsky* (n. 1), 120; *Jonathan R. Ziskind*, Sea Loans at Ugarit, (1974) 94/1 Journal of the American Oriental Society 134–137, 134; *Jean Rougé*, Prêt et société maritime dans le monde romain, (1980) 36 Memoirs of the American Academy in Rome 291–303, 295; *Reinhard Zimmermann*, The Law of Obligations. Roman foundations of the civilian tradition (1990), 182; *Stephan Schuster*, Das Seedarlehn in den Gerichtsreden des Demosthenes (2005), 20; *Brigitte Schlösser*, Die Bedeutung der praepositio für den Handelsverkehr im antiken Rom (2008), 66; *Emmanuelle Chevreau*, La traiecticia pecunia: un mode de financement du commerce international, (2008) 65 Mémoires de la Société pour l'histoire du droit et des institutions des anciens pays bourguignons, comtois et romands (MSHDB) 37–47, 45; *Albert Schug*, Der Versicherungsgedanke und seine historischen Grundlagen (2011), 112.

[4] Cf. *Wilhelm Endemann*, Das Wesen des Versicherungsgeschäftes, (1866) 9 Zeitschrift für das gesamte Handelsrecht und Konkursrecht 284–327, 285; *Levin Goldschmidt*, Universalgeschichte des Handelrechts, vol. 1 (3rd edn., 1891), 55; *Otto Hagen*, Seeversicherungsrecht (1938), 7; *Sebastian Lohsse*, Vom Seedarlehen zur Versicherung in der mittelalterlichen Rechtswissenschaft, (2016) 133 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Romanistische Abteilung) 372–399, 372 f.

[5] Cf. *Goldschmidt* (n. 4), 81; *Spitta* (n. 1), V; *Alfred Manes,* Versicherungslexikon (1930), 1766; *Franz Büchner*, Grundriss der Versicherungsgeschichte, in: Walter Grosse et al. (eds.), Die Versicherung, vol. 1 (1964), 2299; *Peter Ulrich Lehner*, Die Entstehung des Versicherungswesens aus gemeinwirtschaftlichen Ursprüngen, (1989) 12 Zeitschrift für öffentliche und gemeinwirtschaftliche Unternehmen 31–48, 35; *Clemens von Zedtwitz*, Die rechtgeschichtliche Entwicklung der Versicherung (2000), 52.

[6] Cf. *Adolf Schaube*, Der Versicherungsgedanke in den Verträgen des Seeverkehrs vor der Entstehung des Versicherungswesens. Eine Studie zur Vorgeschichte der Seeversicherung, (1894) 2 Zeitschrift für Social- und Wirthschaftsgeschichte 149–223, 166–168; *Fritz Klingmüller*, Fenus, in: Georg Wissowa (ed.), Paulys Realenzyklopädie der classischen Altertumswissenschaft, Halbband 12 (1909), 2187–2205, 2202; *Francesco De Martino*, Wirtschaftsgeschichte des alten Rom (1991), 152; *Gerhard Thür*, Stephan Schuster, Das Seedarlehen in den Gerichtsreden des Demosthenes, (2007) 124 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Romanistische Abteilung) 682–684, 683.

[7] *Erwin Seidl*, Der Eigentumsübergang beim Darlehen und depositum irregulare, in: Hans Niedermeyer and Werner Flume (eds.), Festschrift für Fritz Schulz, vol. 1 (1951), 373–379, 377.

The generally accepted view, based on the idea of its originator, Levin Goldschmidt, is that the insurance contract has two roots: Germanic, established on a cooperative basis, and Roman-Mediterranean, which ensued from maritime loans.[8] In more recent writings, under the influence of Alfred Manes and Peter Koch, another root has been added: state initiative.[9] Contrary to this German approach, other European historiographies predominantly suggest that today's different forms of insurance come from a common foundation, namely maritime insurance.[10] The latest research rightly emphasizes, nonetheless, that both discourses represent 'oversimplifications' of the institute's development and should not be used as a 'basis for a doctrinal history of insurance law'.[11] Despite various interdisciplinary approaches to insurance history, a detailed analysis of its legal aspects is still insufficient, and after a long period of neglect, it has only recently come to the attention of legal historians.[12] The purpose of the re-initiated comparative historical research is to establish common roots of insurance law through

[8] 'Das heutige Assekuranzrecht hat zwei sich mannigfach verschlingende Wurzeln: das antike Seedarlehnsrecht, welchem die Seeversicherung auf Prämie und das Recht der genossenschaftlichen, überwiegend germanischen Verbindung, welcher die Gegenseitigkeitsversicherung entsprungen ist.' *Goldschmidt* (n. 4), 40. The idea of maritime loan as a precursor of marine insurance, that Goldschmidt is referring to, was already established in the very beginning of scientific discourse on insurance, see *Benvenuto Stracca*, Tractatus de assecurationibus (Venice 1569), 101 (gloss XV, n. 2): 'traiecticiam pecuniam, instar cuius assecuratio inventa est'.

[9] 'Hervorgegangen ist die Assekuranz aus drei Wurzeln: genossenschaftlichen Zusammenschlüssen, staatlicher Initiative und Gründungen auf Kaufmännischer Grundlage.': *Peter Koch*, Bedeutung und Aufgabe der Versicherungsgeschichte, (1962) Versicherungswirtschaft 870–876, 874. In addition, see *Alfred Manes*, Versicherungswesen (1905), 22; *Franz Büchner*, Betrachtungen zum Begriff 'Gefahrgemeinschaft', (1978) 67 Zeitschrift für die gesamte Versicherungswissenschaft 579–585, 579; *Hans Pohl*, Versicherungsgeschichte – Wirtschaftsgeschichte – Versicherungspraxis, (1978) 67 Zeitschrift für die gesamte Versicherungswissenschaft 163–183, 170; *Peter Koch*, Geschichte der Versicherung, in: Dieter Farny et al. (eds.), Handwörterbuch der Versicherung (1988), 223–232, 225; *Zedtwitz* (n. 5), 33 f.

[10] See, e.g., *Balthazard-Marie Émérigon*, Traité des assurances et des contrats à la grosse, vol. 1 (1827); *Joaquín Escriche*, Diccionario razonado de legislación y jurisprudencia (1852); *Enrico Bensa*, Il contratto di assicurazione nel Medio evo (1884); *Johan Petrus Van Niekerk*, The development of the principles of insurance law in the Netherlands from 1500 to 1800, vol. 1 (1998); *Harold Ernest Raynes*, A history of British insurance, vol. 1 (1948).

[11] *Phillip Hellwege*, Introduction, in: idem (ed.), A Comparative History of Insurance Law in Europe, A Research Agenda (2018), 9–26, 14; *idem*, Germany, in: ibid., 171–197, 185 f.

[12] E.g., the Comparative History of Insurance Law in Europe (CHILE) project launched at the University of Augsburg, funded by the European Research Council (ERC) within the framework of the European Union Research and Innovation Programme Horizon 2020.

analysis of the potential 'points of interaction' at the European level. In this reassessment, the following has been particularly highlighted:[13]

> 'Most fundamentally, a project which wants to lay open the development of insurance law needs to consider all institutions which have influenced this development regardless of whether the institution itself counts as insurance according to any modern definition.'

Therefore, the overall objective of this paper is to challenge the existing assumptions about the Roman maritime loan (*fenus nauticum*), to provide answers to the scope of its insurance function and subsequently to offer a modest contribution in identifying the potential common roots of the insurance contract.

In order to create the necessary preconditions for an easier and more comprehensive understanding of the central subject, in the first section, the legal nature of *fenus nauticum* – its origin, function and relationship with the regular loan (*mutuum*) – will be analysed based on legal sources. The central part will focus on a systematic comparison of the structural elements of insurance with the essential features of maritime loans. Finally, relying on the previous findings, through critical assessment, the main conclusions derived from the study will be highlighted.

B. Legal nature of maritime loan

Since antiquity, the loan has been one of the fundamental institutes of maritime law and an integral part of *ius gentium*. Due to a lack of original documents, its development is still largely unexplored. Hypotheses on the origin of the institute reach to Babylonian (the Code of Hammurabi § 100–103), Phoenician (RS 18.025 = KTU 4.338:10–18) and Hindu laws (*Mânava-dharma-çâstra* VIII.157; *Yâjnavalkya* II.37–38). While there is no dispute that the need to cover risk was common to many ancient societies, the earliest certain testimony of its existence can be found in Greek law, vividly described by Schuster, as a meteor that suddenly struck in the Greek sources, more specifically, in a court speech by Lysias (*Lysias kata Diogeitonos* 32.6) concerning a maritime loan originating from the fifth century B.C.[14] Further insights into Greek maritime loans are available to us thanks to court speeches delivered before commercial courts (*díkai emporikaí*) in the golden age of Greek maritime activity ascribed to Demosthenes (384–322 B.C.).[15]

---

[13] *Hellwege* (n. 11), 21, 26.

[14] 'Unvermittelt, einem Meteor gleich, taucht das Seedarlehen erstmals in den antiken griechischen Quellen auf.' *Schuster* (n. 3), 168.

[15] E.g., Dem. pros Zenothemin 32, Dem. kata Dionysodorou 56, Dem. pros Phormiona 34, Dem. pros Polyklea 50 and especially Dem. pros Lakriton 35.10–13. This last text is

Considering that *fenus nauticum*[16] is a contract developed in a foreign legal regime and taken over from Greek law,[17] the issue of legal nature was probably raised between Roman jurists who used their pragmatic approach to satisfy the needs of growing maritime trade by adopting the foreign institute into the Roman legal architecture. The Greek version of maritime loan was an independent legal transaction with an informal money transfer. Another distinctive feature was the principle of subrogation, under which the lender retained ownership over the merchandise that was acquired with borrowed money as its surrogate.[18] The freedom of parties to arbitrarily determine the interest rate as its essential characteristic was probably initially problematized among Roman lawyers, particularly in terms of whether it complied with strict Roman regulations about interest rates and the gratuitous character of loans.[19] The controversy of the legal nature may seem redundant since the terminology *mutuum dare* or *mutuum accipere*[20] suggests that the contract was viewed as a form of loan. However, the legal sources do not regulate it within the general doctrine of loans but according to its economic dimension within the subject matter *de rebus creditis* (D. 22.2; C. 4.32; PS. 2.14.3). The question as to its legal enforceability also depends largely on the classification of the legal relationship itself.

---

of great importance, since it includes a detailed maritime loan agreement drawn up as syngraphé. For more detailed studies on the Greek maritime loan and the aforementioned speeches, see *Sieveking* (n. 1), 9–30; *Fritz Pringsheim*, Der Kauf mit fremdem Geld. Studien über die Bedeutung der Preiszahlung für den Eigentumserwerb nach griechischem und römischem Recht (1916), 10 ff.; *Schuster* (n. 3), 19–174.

[16] Although the term fenus nauticum appears only in post-classical sources as a translation of the Greek ναυτικὸς τόκος, legal science accepted it as a terminus technicus. However, terminology in the legal sources is inconsistent. In classical Roman law, maritime loans were referred to as pecunia traiecticia (Paul D. 3.5.12; Ulp. D. 13.4.2.8; Ulp. D. 15.1.3.8; Pomp. D. 22.2.2; Pap. D. 22.2.4.1; Paul D. 22.2.6; Ulp. D. 22.2.8; Lab. D. 22.2.9; Afr. D. 44.7.23; PS. 2.14.3), nautica pecunia (Ulp. D. 4.9.1.7; Mod. D. 22.2.3; Scaev. D. 45.1.122.1), traiectitius contractus (Iust. C. 4.32.26.2) and pecuniam usuris maritimis (Paul D. 22.2.6).

[17] If we take into account the level of development of Roman marine navigation, the risk distribution practices of Cato the Elder as described by the Greek historian and philosopher Plutarch (Cato maior 21.6) and the oldest legal source coming from Servius Sulpicius Rufus (Ulp. D. 22.2.8), we can assume that the institute was adopted in the first half of the second century B.C. through practice.

[18] *Pringsheim* (n. 15), 50 ff., 143 ff.; *Sieveking* (n. 1), 26.

[19] Cf. *Schuster* (n. 3), 186 ff.

[20] Cf. Paul D. 22.2.6: ‘Faenerator pecuniam usuris maritimis mutuam dando […]’; Scaev. D. 45.1.122.1: ‘Callimachus mutuam pecuniam nauticam accepit […]’; C. 4.33.5: ‘Traiecticiae quidem pecuniae, quae periculo creditoris mutuo datur.’

According to some Romanists, maritime loans had an autonomous character just like their Greek forerunners.[21] It is difficult to imagine that the commercial practice in Rome was contrary to the existing contract system and that *fenus nauticum* would be incorporated into it as an independent agreement ignoring, at the same time, the specific contract typology. While studies of the German Historical School of Jurisprudence in the nineteenth century concluded that the arrangement should be treated as an innominate contract,[22] the majority of Romanists hold that it is only a specific type of regular loan (*mutuum*).[23]

Maritime loan is indeed a specific institute that is much easier to describe than to qualify. Essentially, it is a conditional loan that was handed over to the merchant before the maritime venture and returned at substantial interest only if the trip was successful and forgiven if the ship suffered an accident in the case of *force majeure*. The contract is not a pure loan (*mutuum*), because the lender takes over the risk instead of the borrower. Moreover, it cannot be qualified as a partnership (*societas*), because the lender receives a pre-agreed fixed amount and does not engage in profits of the venture. Finally, it is not insurance in its contemporary meaning, as the lender's risk in undertaking is not his or her exclusive and primary obligation. Perhaps it would be most appropriate to say that the lender has invested in a chance to make a profit.[24]

---

[21] Cf. *Pringsheim* (n. 15), 146. *María Salazar Revuelta*, La gratuidad del mutuum en el derecho romano (1999), 184, holds that it is a contract sui generis taken from Greek law through international trade practices.

[22] The forerunner of this idea was *Friedrich Carl von Savigny,* System des heutigen Römischen Rechts, vol. 6 (1847), 131 n. m, who held that the external scheme of the loan was only a form, not the nature of the contract. He suggested that it should be seen as an innominate agreement: 'ein Geschäft nach der Form do ut des', where the creditor would be granted an actio praescriptis verbis to simultaneously pursue all claims from the legal relationship. See also *Kleinschmidt* (n. 1), 45 ff.; *Sieveking* (n. 1), 32. We cannot agree with the offered thesis, primarily because actiones in factum initially appear in classical law and in full scope in post-classical law. On the contrary, maritime loan was already known in the late Republic, and its name was sufficiently individualized. Furthermore, the issue of the legal nature was not discussed in the Digest, and the sources do not contain any indications that would lead us to conclude that the compilers included the arrangement to innominate contracts.

[23] *Matthiass* (n. 1), 10 f.; *Klingmüller* (n. 6), 2201; *Heinrich Siber*, Interpellatio und Mora, (1908) 29 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Romanistische Abteilung), 47–113, 96; *Huvelin* (n. 3), 204 f.; *Philipp Eduard Huschke*, Die Lehre des römischen Rechts vom Darlehn und den dazu gehörigen Materien – eine civilistische Monographie (1965), 223; *Stanojević* (n. 1), 129; *Visky* (n. 1), 395; *Litewski* (n. 1), 138; *Biscardi* (n. 1), 6; *De Martino* (n. 6), 153.

[24] *Michael Kaplan* and *Ellen Kaplan*, Chances Are …: Adventures in Probability (2006), 94, draw an interesting comparison with futures contract explaining that 'the insurer has bought an option on the venture's final value'.

Due to an aversion to strict definitions, an indicative description of the concept can be found only in Modestine's fragment, which emphasizes some of the fundamental features of the contract – mandatory exposure to the risk of the borrowed capital, respectively, the bought goods, and the transfer of risk to the lender:

> Modestinus D. 22.2.1: 'Traiecticia ea pecunia est quae trans mare vehitur: ceterum si eodem loci consumatur, non erit traiecticia. Sed videndum, an merces ex ea pecunia comparatae in ea causa habentur? Et interest, utrum etiam ipsae periculo creditoris navigent: tunc enim traiecticia pecunia fit.'
>
> 'Maritime loan is the money that is carried across the sea. If it is spent in the same place where it was lent, it cannot be considered as transported. We need to see, however, whether goods purchased with this money will have the same position. It depends whether the merchandise are carried at the risk of the creditor, for then it can be designated as maritime [loan].'

This 'definition' contains more than the etymological explanation of the institute, but it offers no trace of the legal nature of the contract. In order to outline the concept, we must take into account further characteristics visible from available legal sources. Unlike the conventional loan – which, due to its gratuitous character, required a separate *stipulatio* for interest – already in classical law, a simple pact was sufficient for the borrower to assume the obligation to pay interest.[25] Since maritime loans mostly funded overseas trade, and the contracting parties that participated in such transactions were often *peregrines*, this type of agreement surely benefited commerce. We consider, however, that if the main contract was concluded in the form of a stipulation, for convenience reasons in the business practice, contracting interest, as an informal pact, would not make much sense.[26] An additional argument for the use of *stipulatio* was primarily in

---

[25] Scaev. D. 22.2.5.1: 'In his autem omnibus et pactum sine stipulatione ad augendam obligationem prodest' ('In all these cases, a pact can increase the obligation without a stipulation'). Because of the stricti iuris character of the condictio certae pecuniae, by including an informal pactum adiectum to the real contract of loan, a particular obstacle of the enforceability of legal action would occur. However, in his third book on the Edict, Paul therefore specifically affirmed that in some cases, the interest agreement can produce effects without special stipulations. After giving the general formulation, he adds a concrete example relating to maritime loans that clearly indicates that the interest does not necessarily arise from the stipulation, Paul D. 22.2.7: 'In quibusdam contractibus etiam usurae debentur quemadmodum per stipulationem. Nam si dedero decem traiecticia, ut salva nave sortem cum certis usuris recipiam, dicendum est posse me sortem cum usuris recipere.' ('In some contracts, interest is due, just as in the case of a stipulation. Thus, if I lend ten as a maritime loan on condition that if the ship arrives safely, I can sue for the capital and certain amount of interest, [even if I have not taken a stipulation].') Cf. also *Huvelin* (n. 3), 209; *Matthiass* (n. 1), 33; *Hans Ankum*, Some Aspects of Maritime Loans in Old-Greek and Roman Law, in: Ant. N. Sakkoula (ed.), Timai Iōannou Triantaphyllopoulou (2000), 293–306, 301, 304.

[26] This is also supported by Scaevola's description of Callimachus maritime loan, which was also concluded in the form of stipulation: D. 45.1.122.1: '[...] eaque sic recte

the provability of the document (*cautio, scriptura*), which could, modelled on the Greek practice, contain detailed clauses that specified the itinerary and risk limitations.[27] Unfortunately, due to the lack of preserved documents, which would allow a direct insight into the practice, it is difficult to assure with certainty how such an arrangement was concluded, in particular the agreement about the interest rate.[28] Furthermore, the contract was entered into upon a specific condition. The borrower was released from the obligation to repay the capital and interests if the ship was destroyed before returning to port due to the realization of maritime risk.[29] For this reason, as a risk-bearing fee, the lender could demand interest (*usurae maritimae*) at a value exceeding the legal interest rate.[30] As a security,

---

dari fieri fide roganti Sticho servo Lucii Titii promisit Callimachus.'('Callimachus promised Stichus, the slave of Lucius Titius, as stipulator, to pay and perform all this faithfully.')

[27] E.g., the agreement in Dem. pros Lakriton 35.10–13.

[28] TPSulp. 78, the only preserved document that is considered a maritime loan, has something in common with all the other loan contracts excavated near Pompeii after the eruption of Mount Vesuvius in 79. Namely, none of the contracts contains a clause that stipulates interest rates because it has presumably been previously calculated and included in the total amount of the loan. Cf. *Hans Ankum*, Minima de Tabula Pompeiana 13, (1988) 33 Cahiers d'histoire 271–289, 282; *idem* (n. 25), 301. Gröschler agrees that the interest rate is probably pre-calculated in the nominal value of the capital as disagio. From this amount, interest would have been deducted and, ultimately, only the principal would be paid to the borrower: *Peter Gröschler*, Die tabellae-Urkunden aus den pompejanischen und herkulanensischen Urkundenfunden (1997), 160 f.; *idem*, Die Konzeption des mutuum cum stipulatione, (2006) 74 The Legal History Review 261–287, 267. In Verboven's view, the absence of interest stipulations is the consequence of the practice where the borrower obtained the entire capital of his loan, after which he willingly repaid part of this amount as interest ex pacto nudo. Although Verboven does not rule out the prospect that in some circumstances interest was in reality deducted from the capital, he finally concludes that there is no reason to suppose that this was inevitably always the case: *Koenraad Verboven*, The Sulpicii from Puteoli and Usury in the Early Roman Empire, (2003) 71 The Legal History Review 7–28, 17–19. A possible example would be the well-known maritime loan of Callimachus in which Scaevola mentions universa pecunia as the amount of capital together with the interest for the entire trip (Scaev. D. 45.1.122.1). However, such continuity, which would confirm the rule, is unfortunately not found in all legal sources because other jurists distinguish between capital and interest (e.g., Paul D. 22.2.7 mentions the obligation of the borrower to return sors and certae usurae in the event of the successful outcome of the journey).

[29] C 4.33.5: 'Traiecticiae quidem pecuniae, quae periculo creditoris mutuo datur, casus, antequam, ad destinatum locum navis perveniat, ad debitorem non pertinet, sine huiusmodi vero conventione infortunio naufragii non liberabitur.' ('The loss of money, given as a maritime loan at the risk of the creditor, does not fall on the debtor before the ship arrives at its destination. But without an agreement of that kind, the debtor will not be released by the misfortune of shipwreck.')

[30] Unlike the pre-Justinian period, when no interest rate restrictions for the fenus nauticum existed (PS. 2.14.3; Pap. D. 22.2.4), under the influence of Christianity, they were later limited to 12% p.a. (C. 4.32.26), which was, despite the limitations, still the highest maximum rate compared to other contexts. The provision was repealed by Justinian's Novel 106 but soon re-established with Novel 110. See *Wilhelm Theodor Streuber*, Der

he was granted a pledge on the merchandise.[31] After the cessation of navigation risk, the maritime loan was *ipso iure* converted into an ordinary loan,[32] which could in fact be a decisive argument in favour of the thesis that we are dealing with a form of loan. Since these principles are only valid *quamdiu navigat navis*,[33] the same happens if, due to coincidence or the debtor's withdrawal from the trip, the maritime venture fails and the ship remains in port.

However, such an arrangement had various functions. From the perspective of the lender, it was a form of financial investment, and from the viewpoint of the borrower, it was a way to finance the maritime trade. The borrower certainly could have taken out a *mutuum*; nevertheless, in that situation, he would be forced to bear the losses in case of damage and still repay the entire loan. Since the probability of shipwrecking was high in antiquity, the borrower's interest was not solely limited to capital acquisition but also extended to financial risk mitigation. We can assume that this specific function of insurance provided by *fenus nauticum* was enough for a merchant to take out a maritime rather than an ordinary loan, even though it implied accepting a significantly higher interest rate.

Regarding the controversies about the legal nature of the institute, this short analysis of the existing theories and sources led us to conclude that Roman law treated *fenus nauticum* as an interest-based form of conditional loan with a somewhat specific economic purpose.

C. Insurance elements

From the perspective of the modern-day developed insurance system, researching the historical aspect of this institute may seem superfluous. Nowadays, even more criticism has been articulated towards the hermeneutic approach to historical contracts, which implies researching the manifesting forms of an institute, starting from its present definition and features. However, insurance, more so than other legal institutes, is closely related to its historical background, since the entire risk assessment science relies on experiences and insights from the

---

Zinsfuss bei den Römern (1857), 122; *Gustav Billeter*, Geschichte des Zinsfusses im griechisch-römischen Altertum bis auf Justinian (1898), 243; *Klingmüller* (n. 6), 2203; *Huvelin* (n. 3), 197; *Litewsky* (n. 1), 153; *Zimmermann* (n. 3), 182; *Schlösser* (n. 3), 66; *Lohsse* (n. 4), 373.

[31] Cf. Paul D. 22.2.6; Scaev. D. 45.1.122.1; P. Vindob. G 19 792; P. Vindob. G 40822; P. Berl. 5 883, 5 85

[32] Cf. *Chevreau* (n. 3), 46. Citing Pap. D. 22.2.4, *Sieveking* (n. 1), 40, believes that the conversion did not occur *ipso iure* but according to *stipulatio fenoris*, which the parties concluded beforehand.

[33] Pap. D. 22.2.3.

past.[34] Considering, in that respect, history as a backbone for shaping the future, starting from the constituting elements of insurance (contractual parties, insured object, risk, premium, coverage period, and compensation), a comparative approach will be used to analyse the extent to which *fenus nauticum* performed the function of insurance in the classical Roman law period.

The abovementioned reluctance of Roman jurisprudence to develop abstract definitions has been overcome in the course of history. Consequently, today there are numerous attempts to conceptualize insurance. However, it has proven problematic to establish a single insurance definition that covers all present day, extremely diverse forms of the institute. After all, insurance, as a synthesis of economic, legal and mathematical elements, has to be defined in various disciplines. Another obstacle for a comprehensive definition of insurance is the division into indemnity and non-indemnity insurance, existing as a consequence of the diverging legal nature of the insurer's obligation to pay compensation in case an insured event occurs. For this reason, it seems appropriate to repeat the old mantra: *omnis definitio claudicat*!

A common current feature of insurance is the cover of losses in the case of a hazardous event based on a sum of accumulated premiums, which, on the side of the insurer, assumes modern forms of organization that calculate and cover a certain number of identical risks by using the law of large numbers. Nonetheless, as Karin Nehlsen-von Stryk correctly highlights, there is no need for a more detailed analysis of the insurance practices of medieval individual insurers to determine that the described principle of equivalence did not even exist in fourteenth-century medieval business practice at the time of the formation of the insurance contract.[35] Such a form of organization, in spite of the relatively advanced risk dispersion communities (as the one described in *Cato maior* 21.6 which will be discussed more precisely), did not exist in ancient times either.

As a basis for the purposes of this research, we have therefore opted for the legal definition of an 'insurance contract' as an agreement by which one party assumes another person's risk in return for remuneration and takes on the obligation to pay a defined sum in the event of a foreseen accident.

---

[34] The historical background is nowadays seen as a very important first step of risk management, which ensures that the lessons from the past are not overlooked: 'Survey of previous accidents' are considered as 'one of the easiest (and most frequently overlooked) ways of identifying hazards. It provides a simple intuitive warning of the types of accidents that may occur, although it cannot be comprehensive, especially for new types of installation.' *Det Norske Veritas*, Marine risk assessment, Offshore technology report 2001/063 (2002), 18.

[35] *Karin Nehlsen-von Stryk*, Die venezianische Seeversicherung im 15. Jahrhundert (1986), 5.

I. Contracting parties

The eligible parties to a maritime loan were determined according to the general principles of the law of obligations. Therefore, anyone who possessed the business capacity and the interest in the ship and goods exposed to maritime risks to arrive safe at their destination was able to enter into a contract and take out a maritime loan.

The role of the borrower could thus be assumed by the merchant (*mercator, negotiator*) as well as the shipowner (*dominus navis*), ship operator (*exercitor*) or captain (*magister navis*). In the early, undeveloped phase of Roman seafaring, the borrower was, at the same time, the shipowner, who would simultaneously sail on board and personally manage all business. The development of maritime commerce, however, required a distribution of tasks.[36] Such practice was also encouraged by the legal regulations that prohibited senators from participating directly in the maritime transport of a larger scale. According to the *plebiscitum Claudianum* (219–218 B.C.), the Senators or their sons were not allowed to possess naval ships with a capacity of more than 300 amphorae (about 800 tons).[37] However, this did not prevent the members of the upper class from indirectly participating in maritime trade through an intermediary whose visibility was generally inversely proportional to the profit share. Since this 'concept of indirect involvement', as it was named by John H. D'Arms,[38] indicates that affluent Romans also took out maritime loans, we can conclude that they did not acquire the capital only to purchase goods but primarily to cover maritime risks.

An entrepreneur who needed a maritime loan could contact a banker or a capital holder directly. However, available legal documents indicate that the bankers

---

[36] Part of the duties were transferred to a son, slave or freedmen who would take on the maritime venture as the representative of a wealthy merchant based in the domestic port. In order to protect the interests of third parties who entered into a contract with such authorized agents and to allow unrestricted maritime transactions, the praetor introduced a special legal remedy, the actio exercitoria (EP 8.101, Ulp. D. 14.1.1 pr.), according to which the responsibility of the exercitor navis (Gai. Inst. 4.71, Ulp. D. 14.1.1.15), for the contracts that his agents were authorized to conclude (within the terms of praepositio cf. Ulp. D. 14.3.5.11), was established. See *Klaus Wiesmüller*, Exercitor in: Georg Wissowa et al. (ed.), Paulys Realencyclopädie der classischen Altertumswissenschaft, Supplementband 12 (1970), 365–372; *Mirela Šarac*, Zastupanje u pravnim poslovima u rimskom pravu (2008), 86; *Schlösser* (n. 3), 13.

[37] For more details on the Lex Claudia de nave senatorum, see *De Martino* (n. 6), 147 ff.; *El Nadja Becheiri*, Die lex claudia de nave senatorum, (2001) 48 Revue internationale des droits de l'antiquité 57–64, 63; *Stefan Sandmeier*, Die lex Claudia de nave senatorum. Zu den wirtschaftlichen, sozialen und politischen Folgen und Hintergründen eines Gesetzes in der römischen Republik (Seminar 'Kulturtransfer im republikanischen Rom', 2004), 26; *John H. D'Arms*, Commerce and social standing in ancient Rome (1981), 5 f.

[38] *D'Arms* (n. 37), 45.

(*argentarii*) were entrepreneurs who engaged in monetary affairs and, in the case of maritime loans, usually acted as intermediaries who assisted the contract conclusion and archived the legal documents.[39] The role of the lender was typically assumed by wealthy individuals who owned the capital. Although the Roman elite focused on agriculture, while maritime trade was considered risky and inappropriate, practice shows that the profitability of maritime trade did not go unnoticed among the members of the highest social classes. Inherent to every social environment, there is always a gap between theory and practice, and non-legal sources often reveal the actual situation in commercial organization. While Marcus Porcius Cato, in his iconic work *De Agricultura*, condemned the high-interest loans as a dishonourable practice of Roman society,[40] his biographer, Plutarch, informs us about the organization of business agreements for the purpose of establishing risk-pooling associations that were organized through his freedmen in the following manner:

> Plutarch, Cato maior 21.6: 'ἐχρήσατο δὲ καὶ τῷ διαβεβλημένῳ μάλιστα τῶν δανεισμῶν ἐπὶ ναυτικοῖς τὸν τρόπον τοῦτον, ἐκέλευε τοὺς δανειζομένους ἐπὶ κοινωνίᾳ πολλοὺς παρακαλεῖν, γενομένων δὲ πεντήκοντα καὶ πλοίων τοσούτων αὐτὸς εἶχε μίαν μερίδα διὰ Κουϊντίωνος ἀπελευθέρου τοῖς δανειζομένοις συμπραγ ματ ευ ο μὲν ου καὶ συμπλέοντος. ἦν δ᾽ οὖν οὐκ εἰς ἅπαν ὁ κίνδυνος, ἀλλ᾽ εἰς μέρος μικρὸν ἐπὶ κέρδεσι μεγάλοις'
>
> 'He required his borrowers to form a large company, and when there were fifty partners and as many ships for his security, he took one share in the company himself, and was represented by Quintio, a freedman of his, who accompanied his clients in all their ventures.'

First, this points to multiple aspects of financial participation by Cato the Elder, since he simultaneously acted as the lender to an undefined number of borrowers, but he also participated in the partnership with a certain share. Given that

---

[39] From the document P. Vindob. G 19 792, which mentions the Alexandrian banker Marcus Claudius Sabinus, it is evident that the banker served as a broker and not a lender. According to the collection of documents from Murécine (TPSulp. 78), bankers of the Sulpicii family had the same role. Cf. *Rougé* (n. 3), 355; *Raymond W. Goldsmith*, Premodern Financial Systems: A Historical Comparative Study (1987), 44; *Jean Andreau*, Banking and business in the Roman world (1999), 30 ff.; *Sitta von Reden*, Money in Classical Antiquity (2010), 116, 121; *Frank Tenney*, An economic history of Rome (1962), 307; *Jean Andreau*, Seedarlehen, in: Hubert Cancik and Helmut Schneider (eds.), Der Neue Pauly, vol. 11 (2001), 321; *Peter Temin*, Financial intermediation in the early Roman Empire, (2004) 64 The journal of economic history, 705–733, 719–728.

[40] Already in the introduction of his work on agriculture, Marcus Porcius Cato the Elder suggests that the lending of money was frequent (*Cato Maior*, De agricultura, praef. 1: 'Est interdum praestare mercaturis rem quaerere, nisi tam periculosum sit, et item fenerari, si tam honestum sit'). Furthermore, according to Cicero, the moral boundaries were often very vague and arbitrary. In his work De Officiis 1.151, he expressed his famous classification of trade and occupations according to the moral criterion by pointing out that the trade is not considered dishonourable (non est admodum vituperanda), immediately adding the substantial qualification that it applies only to wholesale trade (magna et capiosa).

this took place in the second century B.C., the convoy size of 50 ship operators and the apparently large profits realized from such trading expeditions are quite impressive because loans for maritime ventures on this scale required large assets. Considering that partners jointly participated in profits and losses, the partnership constituted a risk-pooling community. The risk was distributed in such a manner that if one of the 50 ships sank, each one of them would bear the loss at a 1/50 proportion.

It is quite certain that a hierarchical society such as Rome represented a complex system with several levels of financial activity involving members of different statuses. Along with the covert Roman elite, another category of private professional who invested money in maritime commerce was the 'freedmen'. They often engaged on the basis of their own experience, given that they had been dealing with maritime trade for a long time and were well-acquainted with the circumstances of the market. Those who did not have the necessary knowledge operated via mediators.[41] The role of the lender was sometimes assumed by several persons, which contributed to the allocation of risks and thus to the reduction of the possible loss of invested capital.[42]

In ancient maritime ventures, such as the one organized by Cato the Elder, the principle of risk dispersion can indeed be identified. The existence of that element, nevertheless, did not necessarily mean that all the prerequisites for the concept of insurance had been met. Namely, that would have required for Cato not to be directly involved in maritime trading but to act as a third party who assumed

---

[41] Although he is a fictitious character, one of the most famous freedmen traders is Trimalchio, the hero of Petronius's satirical novel Satyricon from the first century, who appears only in the section Trimalchio's feast (Cena Trimalchionis) and who, as an arrogant ex-servant, ideally depicts members of a newly rich lower class of Roman society. During the dinner, Trimalchio brags about the newly acquired property inherited by the deceased master and, inter alia, describes his involvement in the ultimate profitable business – giving a maritime loan to other freedmen (*Petronius*, Satyricon XV.76). As their role in maritime commerce has often been emphasized on tombstones, epigraphic inscriptions indicate that libertines indeed constituted a dominant group in the conduct of maritime affairs (e.g., CIL XIII 1942 = ILS 7029). Such investors could have been members of the collegium navicularіorum even though they did not own a ship or carry transport (Cal. D. 50.6.6.6).

[42] Documents from Roman Egypt (e.g., P. Vindob. G 19 792) give evidence that it was common practice that more persons on the side of the lender invested capital in maritime loans through an intermediary banker. At the same time, the reverse situation was possible, in which multiple borrowers would take up on a loan for a venture. According to the testimony from the documents P. Berl. 5 883, 5 853 around 150 B.C. a group of five merchants took a 50 mines silver maritime loan from the Greek lender Archippos and his business partners for a voyage on one or more ships that made up the fleet across the Red Sea to the land of Punt, probably located on the east coast of Africa in Somalia to import luxury products. Since the borrowers, two of whom (Demetrios and Hipparchos) co-owners of the ship(s), together with other three partners, were organized into a partnership the concept is analogous to the venture organized by Cato the Elder.

sole risk of the entire venture because the transfer of risk to the other party in a legal relation does not in itself constitute insurance. Parties could, in compliance with the principle of autonomy, stipulate a clause by which the risk was transferred to the other party, whose obligation, according to the standard regulation, did not assume risk bearing. Thus, unlike an ordinary loan (*mutuum*), in which risk is borne by the borrower, in the case of *fenus nauticum*, risk is relocated to the counterparty: the lender. The assumption of risk by a party who is already a participant in the contractual relation represents a mere modification to the existing legal transaction. Wilhelm Endemann was the first to draw attention to the important fact that insurance should be considered an autonomous legal transaction only when a third party, who does not participate in the venture as such, assumes risk for the loss as its main contractual obligation:[43]

> 'Zu einem eigenem Rechtsgeschäft würde diese Garantieleißtung erst dann werden, wenn sie ein Dritter, an dem sonstigen Rechtsverhältniß ganz unbetheiligt, zum besondern Gegenstande gerade nur die betreffenden Vereinbarung machte. Darauf aber war der römische Verkehr nicht zugeschnitten.'
>
> 'The guarantee would only then have been transformed into an independent contract, if it had been made the subject of a special agreement with a third party who is not involved in any way with the other aspects of the legal relationship. However, Roman commerce never adopted such practice.'

Furthermore, maritime loan also diverges from the modern insurance system in the absence of the principle of professionalism. In a modern insurance relationship, the role of the insurer is most frequently assumed by an insurance company who professionally and exclusively operates in the field of risk coverage. However, the insurance practice in the very beginnings of insurance contracts in the fourteenth century had no notion of insurers or companies in the modern sense; therefore, we hold that even though the requirement of professionalism was one of the key economic prerequisites for the development of insurance as such, it was not an indispensable element for entering into a contract. This is also supported by the specific practice of Lloyd's, which diverges from the usual insurance providers, transferring the risk pooling activity to its members, including corporations but also private capital owners ('Names'), who just like the ancient lenders engage in speculative business. An additional and probably larger problem was the organization of people and the accumulation of capital in amounts that would be sufficient to cover maritime risks on a larger scale.

II. Insured object

With regard to the insured object, the doctrine has accepted the commonly named theory of insurable interest, according to which the object of insurance is

[43] *Endemann* (n. 4), 287.

not considered an item but a person's justified interest for the insured event not to take place as otherwise they would suffer material loss.[44] The insured is entitled to indemnification if he suffered loss or damage to the ship and cargo plus the amount of freight, which affected him financially, provided that they existed at the time of loss. Thereby, the principle of indemnity was consistently applied. The justification for this fundamental principle of property insurance arose from the public interest for insurance to protect against loss rather than create an opportunity for wagering and gambling, as well as to safeguard against misconduct commonly associated with intentionally caused damage for the purpose of securing the insurance compensation. By taking over maritime loan, the borrower was not seeking gain. It is obvious that his motive was focused on avoiding a possible future loss as otherwise, for crediting the maritime venture, he would prefer the regular loan (*mutuum*) under considerably better condition – completely free of interest.

In that respect, we can argue that the presence of the indemnity principle is yet another difference between contemporary insurance and the Roman concept of *fenus nauticum*. Namely, the existence of damage is the basic prerequisite for exercising the right to compensation from insurance, which means that a person

---

[44] As one of the essential features of an insurance contract and as a fundamental requirement for its validity, insurable interest originated in eighteenth-century English statutes and was adopted (or, as *Vadim Mantrov*, Perception of Insurable Interest in European Insurance Law, (2017) 10 Juridiskā zinātne 248–267, 249, 253–254, suggests, possibly developed simultaneously) in continental European legal tradition. For comparative studies on insurable interest including different European countries, see *Malcom Clarke*, Policies and Perceptions of Insurance: An Introduction to Insurance Law (1997), 20–32; *Emeric Fischer*, The rule of insurable interest and the principle of indemnity: are they measures of damages in property insurance?, (1981) 56 Indiana Law Journal, 445–471; *Wilhelm Kisch*, Handbuch des Privatversicherungsrechts: Die Lehre von dem Versicherungsinteresse, vol. 3 (1922); *Victor Ehrenberg*, Das Interesse im Versicherungsrecht (1915), 1 ff.; *Otto Hagen*, Der versicherungsrechtliche Interessenbegriff, (1907) 7 Zeitschrift für die gesamte Versicherungswissenschaft 15–30, 15; *Wilhelm Blanck,* Interesse; versichertes Interesse; Motiv, (1929) Zeitschrift für die gesamte Versicherungswissenschaft 393–404. At the same time, the doctrine is increasingly exposed to more prominent criticisms: 'Diese Lehre vom Erfordernis eines Interesses hat vielfach Verwirrung geschaffen und unnötige Schwierigkeiten bereitet. Sie kann als überflüssige theoretische Konstruktion ohne Bedenken fallengelassen werden.' *Willy Koenig*, Schweizerisches Privatversicherungsrecht, System des Versicherungsvertrages und der einzelnen Versicherungsarten (1967), 212. The critics point out that the concept of insurable interest has lost its original significance and legal function and serves only for scientific purposes and systematization. In their opinion, the doctrine has led to unnatural constructions because the interest serves only as a motive and does not appear in a legal sense at the conclusion of the contract. Moreover, in the case of indemnity insurances, the insurer's liability is limited to the amount of damage without the need for a concept of interest. Such an insurer does not owe 'id quod interest', but only the coverage of the losses incurred as a result of certain risks. Cf. *Rudolf Gärtner*, Die Entwicklung der Lehre vom versicherungsrechtlichen Interesse von den Anfängen bis zum Ende des 19. Jahrhunderts, (1963) 52 Zeitschrift für die gesamte Versicherungswissenschaft 337–375, 337.

claiming for insurance payment must suffer a material loss. Being an aleatory contract, the insurer needs to perform only if damage arises from the realization of an agreed risk. The compensation is in such case paid up to the amount of actual, suffered loss. In maritime loans, on the other hand, the borrower is paid money in advance as an anticipated compensation for damage even before it occurred and irrespective of whether maritime risk would be realized at all. Whether the amount of the loan was ultimately high enough to cover the loss of the ship and goods could not be determined with certainty and depended upon a specific case.[45]

III. Risk

The common feature of all the institutions to whom the insurance function is attributed is the assumption of risk for those who are unable or unwilling to bear it and its transfer to another person or risk community. Contemporary marine insurance, in line with the universal coverage principle,[46] aims to cover the insured against all uncertain events threatening the ship or goods. By granting a maritime loan, the lender took upon himself the obligation towards the borrower to assume risks inherent to marine navigation (*incertum periculum quod ex navigatione maris metui solet*: C. 4.33.3) and bear responsibility for the ship's demise in case a future and uncertain event occurs.[47] The scope of maritime risks covered

---

[45] Although there are no available original documents that could enable us to determine the exact amount of maritime loans raised for financing maritime ventures, we can assume that these were large-scale commercial transactions. A ship that was able to carry tons of cargo for miles across the open sea in the Mediterranean had to be purchased or leased. According to the information provided by historians dealing with economic aspects of navigation, the value of a 300-ton ship during the Republic was about 250,000 sesterces, which was the equivalent of a solid agricultural estate in Italy. Cf. *Dominic W. Rathbone*, The financing of maritime commerce in the Roman empire, I–II AD, in: Elio Lo Cascio (ed.), Credito e moneta nel mondo romano (2003), 197–229. Since the value of the ship probably exceeded the height of the individual maritime loan, it is possible to argue that the loan was not high enough to offer security and full coverage in case of loss. As there were usually more merchants on board using its capacity to carry their merchandise, the situation has been significantly different, as each of them would take a separate loan. It should be also noted that the value of acquired merchandise could be very high and, in the case of the import of luxury items, sometimes even exceed the value of the vessel. Cf. *David Francis Jones*, The Bankers of Puteoli: Finance, Trade and Industry in the Roman World (2006), 180.

[46] On the principle of universal coverage (Universalität der Deckung), cf. *Manes* (n. 5), 1399.

[47] Unlike Greek law, where the creditor's liability was regarded as an essential component of maritime loan, because of incoherent sources from the classical period, especially due to different interpretations of the fragment Pap. D. 22.2.4 pr., the question of periculum creditoris in Roman law is considered controversial. With regard to the lender's obligation, most of the Romanists hold periculum creditoris as an essential element of the

by *fenus nauticum* were not exhaustively listed anywhere, but were casuistically approached in certain documents (e.g., P. Köln III 147) and legal sources as sea storm (*marina tempestas*: C. 4.33.4); shipwreck (*naufragium*: C. 4.33.5); ship's demise (*si navis perisset*: Paul D. 22.2.6); pirates (*vis, insidiae piratorum*: Ulp. D. 4.9.3.1; Gai. D. 13.6.18); and perils of the sea (*maris periculum*: Nov. 106, Interpr. ad PS. 2.14.3). In relation to the borrower, the risks were mostly external (pirates, wars and perils of the sea). Although technological advances have significantly reduced the aforementioned dangers, nowadays, we are facing a variety of new risks that are less the result of external influences and more internal in terms of the insured as technological, organizational or even psychological failures. At the same time, the vast majority of risks increased not only because of the constantly rising values of the ships and cargo exposed to the dangers of sea navigation but also because of the harmful potential of large, modern vessels transporting oil, liquid gas or chemicals that pose a real threat to the environment. A latent defect or a human error could trigger a chain reaction that would lead to an accident causing damage that far exceeded the financial capability of the insurer.[48]

As in modern insurance, the most common risk limitation method was restricting the spectrum of covered risks. Liability was excluded for the depreciation of value of the ship and cargo caused by wear and tear that was not a consequence of an extraneous accident, as well as losses that were caused by the borrower's own conduct, like non-compliance with the agreed route and time, the import of prohibited goods, etc. (*quod non ex marinae tempestatis discrimine, sed ex praecipiti avaritia et incivili debitoris audacia accidisse adseveratur*: C. 4.33.4). The lender's responsibility is of a significantly lesser extent than that of the insurers, which is understandable given that business development and the growth of marine transport costs led to a need to cover additional maritime risks (nuclear marine propulsion, terrorism, etc.). Furthermore, since the borrower was exempted from loan repayment only in the event of a complete loss of the 'insured' object, he was not protected in the event of partial damage.[49]

---

contract: *Kleinschmidt* (n. 1), 3, 10; *Matthiass* (n. 1), 36; *Sieveking* (n. 1), 33; *Pringsheim* (n. 15), 143, *Klingmüller* (n. 6), s. 2202; *Huvelin* (n. 3), 207 ff.; *Zimmermann* (n. 3), 181. On the contrary, for the incidental element pleaded: *Litewsky* (n. 1), 128; *Kupiszewski* (n. 3), 378; *Francesco De Martino*, Foenus nauticum, (1959) 7 Novissimo digesto italiano 421–425, 423. As a natural element, the creditor's risk is perceived by *Biscardi* (n. 1), 119 ff.

[48] Cf. *Jan Lopuski*, Liability for Damage in Maritime Shipping under the Aspect of Risk Allocation, (1980) 10 Polish Yearbook of International Law 177–192, 183.

[49] The notification on suffered damage had to be submitted within a year before the competent judge in the province by the commander of the ship (magister navis) as a person who was entrusted with the care of the whole ship. Data on damage claims and the manner

Risk assessment plays an important role in modern risk management because it provides a structured basis for identifying hazards and ensuring that risks have been minimized as far as possible.[50] Unlike contemporary approaches in which the risk is calculated, ancient risk assessment was based on predictions of potential hazardous events and the implementation of risk-reducing measures. Safeguards that were used to prevent or reduce negative consequences of hazardous events were achieved through detailed contractual clauses in which the parties would predefine the naval routes, times of departure and ship type.[51] Further, the creditor would, at the debtor's cost, send his slave on the journey as a controller, who would monitor the course of the journey and sometimes represent the only security against intentional shipwrecking (Pap. D. 22.2.4.1; Scaev. D. 45.1.122.1). Although there were no strict bans of navigation, during the 'closed sea' period (*mare clausum*), which lasted from 11 November to 10 March, navigation would cease almost completely (*Vegetius*, Epitoma Rei Militaris 4,39).

Albert Schug argues that the capacity for risk assessment in antiquity, based on weather conditions and the technical equipment of the ship, should not be

---

in which the maritime accident investigation was conducted are found in the imperial constitutions that govern the consequences of shipwreck consolidated under common title C. 11.6 De naufragiis.

[50] Cf. *Det Norske Veritas* (n. 34), 1; *Floris Goerlandt* and *Jakub Montewka*, Maritime transportation risk analysis: Review and analysis in light of some foundational issues, (2015) 138 Reliability Engineering and System Safety 115–134.

[51] The most detailed testimony about the complexity of such clauses is found within syngraphé preserved in the Demosthenes speech against Lacritus (Dem. pros Lakriton 35.10–13), according to which Artemo and Apollodorus took a loan of 3,000 silver drachmas for the trip from Athens to Mendê or Scionê with the possibility of navigation through the Bosporus or even as far as the Borysthenes back to Athens on a 20-oared ship in ownership of Hyblesius. The borrowers had to undertake the trip until a certain date and to complete it by the beginning of the autumn storms. In case they failed to comply with the agreement, they would not be covered in the case of loss and had to repay the loan with interest or even pay the penalty. The parties in the Demosthenes example agreed on a regular interest rate of 22.5%, which would increase to 30% if they would not embark on the return journey after 14 September. Further, in the Demosthenes speech against Formion (Dem. pros Phormiona 34.6), a maritime loan of 2,000 drachmas for a trip to Pontos and back to Athens was approved. At the moment the borrower Dionisodor violated the agreement and departed from the contract clauses by sailing around the island of Rhodes instead of returning straight to Athens, liability for maritime risk was transferred from the creditor to him. In the maritime loan of Callimachus (Scaev. D. 45.1.122.1), a maximum duration of 200 days for a round trip from Berytus to Brentesium and back had been stipulated. In addition, the return journey had to begin before 13 September, as otherwise the loan would be due with interest.

underestimated as it can be compared to the present-day lack of experience surrounding risk assessments in fields such as nuclear energy, genetics, etc.[52] According to Jackie Macdonald, it is a common misconception that risk assessment is an invention of the late twentieth century created to resolve concerns about new sources of danger and environmental pollution, as people literally from the earliest organized civilizations used risk assessment to overcome new and difficult situations.[53] Frank C. Spooner points out that, unlike fire and life insurance, in which the analysis of information over a number of years has led to the development of actuarial science and the calculation of probability of risk occurrence, it seems that maritime insurance over centuries has kept a very personal nature driven by reasonableness and based on the concept of *caveat assecurator*.[54] Goldschmidt also believes that without the help of mathematical calculations of probability and statistics, it was not difficult to evaluate risk and to calculate the average amount of the premium.[55] All these decisions, however, primarily relied on intuition and experience, not science.

Since each contract in Roman law was essentially an exchange of performances, much more important for the formation of a new contract was the idea that liability for risk could be sold or purchased as a commodity. By isolating the risk into separate obligations, the lender subsequently developed into the insurer providing the risk-absorbing capacity (i.e., offering security for uncertain events of dangerous maritime navigation in exchange for a premium).

IV. Premium

An insurance premium is the cash equivalent for providing the risk coverage, the amount of which depends on the degree of probability of the occurrence of the insured risk and the possible amount of damage. If we consider the interest payable by the borrower in the case of a successful completion of a naval venture as the fee for the risk assumption, we may compare it to a certain kind of premium. The most distinguished advocate of such an interpretation that has been largely accepted in Roman law studies[56] was von Jhering, who claimed that

---

[52] *Schug* (n. 3), 119 f.

[53] *Jackie Macdonald*, Unexploded ordnance: a critical review of risk assessment methods (2004), 21.

[54] *Frank C. Spooner*, Risks at Sea: Amsterdam Insurance and Maritime Europe, 1766–1780 (2002), 3.

[55] *Goldschmidt* (n. 4), 367.

[56] *Von Lübtow* (n. 1), 184: 'Die Zinsen stellten nicht nur ein Entgelt für die Überlassung des Kapitalgebrauchs dar, sondern waren in erster Linie eine Risikoprämie, bildeten das Äquivalent (pretium periculi) für die Übernahme der Seegefahr durch den Gläubiger.' See, furthermore, *idem* (n. 1), 168. The same approach is represented by other authors: *Savigny* (n. 2), 295; *Jhering* (n. 2), 20; *Sieveking* (n. 1), 17; *Huvelin* (n. 3), 207; *Büchner*

usurae maritimae had a dual function: a fee for using another's capital (ordinary interest function) and a fee for risk assumption (insurance premium function).[57] Since the compilers, in Codex 4.32 and 4.33, as well as in Digest 22.1 and 22.2, placed both types of interest under different titles, *de usuris* and *de nautico fenore*, we consider that they agreed with the generally accepted opinion of Roman jurists that the interest rate of *fenus nauticum* was not a usual interest but a reimbursement for creditors' risk liability (*periculi pretium*).

The interest rate in the pre-Justinian period was not limited (*infinitae usurae*), and the parties were free to agree upon its amount but only for the duration of maritime risk.[58] Before or after the journey, the creditor could claim only the regular interest (*centesimae usurae*) of 12% p.a. It was not agreed upon a specific time frame but rather based on the entire journey (*donec naves revertantur*) as a fixed sum. Just as the premium price depends on numerous factors, so was the interest rate of maritime loan determined according to the circumstances of a specific maritime venture, the decisive factors being the length of the journey, one-way or round trip; the season of the year; danger from pirate attacks; ship and equipment quality; captain and crew experience; naval route difficulty; and potential dangers. Based on the information on Greek maritime loan, Gustav Billeter proposed the calculation principle, which consisted of adding the percentage of the average annual loss of capital to the usual interest rate.[59] Although Roman sources are silent with regard to the exact amount of interest rates, we can assume the commercial practice in the Mediterranean was relatively unified (22.5% to 30.5% according to the Greek sources) and based on a similar calculation method.

The fact that the maritime loan interest rate was determined as a total amount and not directly related to the duration of a journey but rather to the existence of separate criteria based on risk evaluation makes it indeed comparable to the premium charged by the insurer for liability coverage. The difference between those two legal institutes, however, must not be overlooked. The premium is the prerequisite for the insurer's liability. It is paid right after contract conclusion, unconditionally and regardless of whether any loss occurs. Thereby, irrespective of the realization of an insured event, the insurer always receives at least a portion of the coverage in the form of a paid premium. In maritime loan, *pretium periculi* is not paid unconditionally but only if the hazardous event does not occur. As we

---

(n. 5), 2299; *Purpura* (n. 1), 225; *Heinrich Honsell*, *Theo Mayer-Maly* and *Walter Selb*, Römisches Recht (1987), 278; *Zimmermann* (n. 3), 182; *Alfons Bürge*, Der Witz im antiken Seefrachtvertrag. Beobachtungen zur Vertragspraxis im antiken Mittelmeerraum, (1994) 22 Index 389; *Schuster* (n. 3), 189; *Schlösser* (n. 3), 66.

[57] *Jhering* (n. 2), 4 ff., 20.

[58] See the text corresponding to, and the references in, n. 31.

[59] *Billeter* (n. 30), 329.

can see, the lender's financial risk was much greater than that of the insurer as, even in case of a ship's successful return, the debtor's insolvency or breach of contract could jeopardize the realization of his claim. If the loss from the insured peril occurred, the lender had no right to a fee for the assumed risk and would thereby bear the consequences of the harmful event completely free of charge. In that regard, for the lender, the premium in itself constituted a risk. The fact that the premium was not paid in advance represented an obstacle in the formation of a monetary fund, which would allow an individual insurer to accumulate enough capital and become a professional undertaker.

V. Coverage period

In order for the insurer to be responsible and bear the losses from perils stipulated in the contract, the designated hazardous event had to occur during the coverage period. The lender, just like the insurer, assumed the risk only for a predetermined and agreed marine navigation period:

> Paul. D. 22.2.6: '[...] traiecticia pecunia ita datur, ut non alias petitio eius creditori competat, quam si salva navis intra statuta tempora pervenerit […].'
>
> '[...] since maritime loan is granted on terms that the creditor will have no claim unless the vessel arrives safely at its destination within the specified time [...].'

The contractual clause on the time limitation of a lender's risk was not an essential element of the contract but was obviously its common ingredient. Since the duration of contract and risk did not necessarily need to match, it was important to precisely determine the time during which the maritime navigation risk would be on the side of the lender, because if the hazardous event took place before or after that period, the loss would be fully borne by the borrower.

Modern marine insurance contracts are concluded for a particular voyage (voyage policy), a fixed period of time (time policy), or a joint form (mixed policy). *Fenus nauticum* was often a combination of these forms, usually concluded for one seagoing season as a contract in one or both directions. The maritime loan of Callimachus (Scaev. D. 45.1.122.1) was granted for a maximum period of 200 days, within which both the outward trip to Brentesium as well as the return journey back to Berytus had to be completed. Moreover, the departure date for the return to Syria was set before 13 September, as otherwise the borrower would run into the 'closed sea' season and unnecessarily be exposed to risks inherent to winter sailing. In Codex 4.33.4, we even find a specific situation in which a maritime loan was granted for a round trip that was supposed to end in the port of Salona, but the parties agreed that the *periculum creditoris* applied only to the outward journey in the direction of Africa.

Although the loan usually did not have to be repaid immediately but rather 20 days after the return of the ship and sale of merchandise,[60] the lender's liability was related only to the period that the ship was sailing from the port of departure to the port of destination. If a maritime loan were provided for a return journey, the lender would not bear the risk during the stay at the foreign port for the sale and acquisition of merchandise. To avoid difficulties in the event of a potential dispute, the borrower would ensure sufficient witnesses when leaving the port of departure to document the moment the risk shifted to the lender. If the borrower, due to his fault, did not comply with the contractual provisions and, for instance, sailed a route not provided by the agreement and arrived late to the destination port, the liability for loss would switch to him. After a certain date (*dies praestitus*), *periculum maris* would pass over to the borrower, and the marine perils would no longer be covered by the lender. In case the ship sank due to *force majeure* after the specified date, the borrower would be in a difficult situation. He would not only be affected by the loss of the ship and merchandise but would still be obliged to return the entire capital plus interest.

VI. Compensation

In indemnity insurance, the insurer's liability depends on the scope of damage and the insured sum (i.e., the market value of the insured item at the start of insurance). The request for the coverage of loss can be made only after the damage is actually caused through the realization of maritime risk. Since *fenus nauticum* was primarily a credit operation, the amount that would correspond to damage compensation was paid in advance, before any damage occurred and even before the risk itself commenced. The same amount was not calculated according to the potential risks but to the merchant's needs for the acquisition of goods and undertaking the venture. The prepaid sum was to be returned only if there was no damage at all, which is a completely opposite concept from insurance, in which compensation is paid only in case of damage or loss of the insured item.

The difference between the modern concept of insurance and maritime loan lies therefore in the subsidiarity of the insurance element. Maritime loans were, continually until the Middle Ages, a credit operation. The lender was primarily a capital owner and investor, his role as an insurer being only collateral. If insurance had been the primary goal of maritime loan, the prepaid compensation could

[60] Sources indicate that this additional time of 20 days after the completion of the maritime venture, which served the borrower for sale of goods and return of the capital, was a maritime custom (cf. Dem. pros Lakriton 35.10–13; Nov. 106). If such a deadline were not closely specified, before the delay occurred, it was necessary to notify the debtor (interpellatio) or to draw a document in front of the witnesses in case of his absence (Pomp. D. 22.2.2).

not have been used for speculative investment. On the contrary, the insured would have had to save it so that he could return it if no risk were realized. Since the borrower used the loan for purchasing goods or other speculative purposes, the primary economic goal of this legal transaction was not insurance but crediting. For insurance to develop from maritime loan, it was necessary to break the link between insurance and credit operation and pay the premium in advance.[61] Such changes in the maritime loan structure and the isolation of the obligation to assume maritime risk as an autonomous contractual action did not occur until the Middle Ages, when favourable economic preconditions were met.[62] Until then, the existing maritime loan structure of antiquity satisfied the needs of insuring maritime ventures.

Contrary to insurance, in which the loss is compensated according to the estimated amount of damage and within the framework of the insured sum, partial damages in case of maritime loan were not covered if the condition *salva nave* was fulfilled. When the ship arrived at the final destination on time but with damaged or lost goods, the lender did not lose his claim against the borrower, nor was his request reduced in any way. The partial damage affected only the value of pledged goods and thus the subsidiary, the lender's real security in case he was forced to execute the seizure of goods to obtain payments.

D. Conclusion

Although *fenus nauticum* was one of the fundamental contracts of ancient *lex mercatoria*, due to the scarcely preserved material, it is difficult to determine the course of its development. Concerning the cultural heritages of different nations, a clear boundary between the adoption and original creation of an institute can

[61] After the reception of Roman law, notaries drafted agreements by using the existing contract formulas in order to allow the parties to pursue claims, while the corresponding economic purpose of the contract was achieved by adding clauses. Due to its versatile character and capacity to adapt to changes, maritime loans served as a fundamental tool for the development of new contractual forms. Modifications through contractual clauses (e.g., nullity clause, risk distribution clause) slowly assisted the transition from loans into an abstract obligation. The analysis of the transitional period from antiquity to the Middle Ages would require a separate research paper and a detailed investigation of the individual steps of maritime loan's development towards insurance. Within the scope of this article, there is unfortunately no room to undertake this research and address all the necessary issues.

[62] The emergence of insurance contracts is closely linked to the development of other institutes of commercial transactions, which arose from Italy's trading hubs of the thirteenth and fourteenth centuries, such as bill of exchange, banking, and double-entry bookkeeping. Professionalization, however, had a central role, enabling a higher degree of legal certainty and transfer of risk to independent third parties. Still, for professional insurance activity, the accumulation of larger amounts of capital was necessary.

rarely be identified, especially because, in different periods, surprising congruities between certain legal achievements appear. The earliest written testimonies on the application of the institute are found in fifth century B.C., when Greek maritime law flourished, and we can assume that the Romans accepted the Greek institute *dáneion nautikón* through practice around the first half of the second century B.C. Although participation in Mediterranean economic activities has become a necessity, Romans have not taken over the foreign maritime custom without respecting their own legal architecture and prior critical assessment. With no intention to create an abstract and systematic corpus of commercial or maritime law, as casuists, they accepted the concept and tried to incorporate it into the existing contract system in the most natural way possible, allowing the parties to enforce claims. Regarding the controversy over the legal nature of the institute, taking into account the existing theories, we found that Roman law treated *fenus nauticum* as an interest-based form of a conditional loan with a specific economic purpose.

Since maritime navigation was exposed to numerous hazards, underwriting had to be conducted via some of the existing institutes. Because of the mentioned characteristics, adaptability and international acceptance as a custom, *fenus nauticum* was considered the 'insurance business of antiquity'. Based on the concept of indemnity insurance and legal definitions of the contract, a comparative analysis of basic insurance elements in the central part of the article indicated that certain common features, as well as major differences between those two institutes, exist.

The fact that wealthy Romans acquired capital not only to finance the maritime venture but also to cover the eventual loss supports the insurance function of *fenus nauticum*. However, the relocation of risk liability to the lender did not make him an insurer but represented a mere modification to the existing legal transaction. Even though the creditor's liability for risk was essential to the formation of the Roman *fenus nauticum*, the obligation of risk assumption had to become the exclusive element of the contract freed from the crediting obligation. The hazards of marine navigation for which the lender assumed responsibility, just like the insurers did, were limited only to navigation perils. The borrower was expected to conduct his maritime venture with the care of a good mariner and trader so that damages resulting from his fault were not covered within the lender's liability. Contrary to the insured, the borrower was not protected in the event of partial loss and was freed from the obligation to repay the loan only if the entire ship was lost. Such elementary protection was probably sufficient and satisfied the needs of the economic practice as hazardous events mostly caused the loss of the entire vessel. The antique contracts contained surprisingly elaborate contractual provisions on the time period for which the lender assumed risk because the duration of the contract, just like in modern insurance, did not nec-

essarily have to coincide with the period of risk coverage. Compared to the insurance, in which the request for compensation of suffered material loss can only be made after the damage is actually caused through a designated hazardous event, the amount that would correspond to such damage compensation was paid in advance to the borrower, even before the risk itself commenced and irrespective of the occurrence of loss because *fenus nauticum* was primarily a credit operation. Considering that the interest rate was determined as a total amount based on rudimentary risk assessment makes it indeed comparable to the fee charged by the insurer for liability coverage. Nevertheless, *pretium periculi* was not paid unconditionally in advance but only if the risk was not realized, which could leave the lender without any compensation for his liability. Without a prepaid premium, the lender was not able to accumulate enough capital to form a monetary fund, and instead of professional undertaking, he stayed in the domain of speculative business. Risk pooling communities that combined *fenus nauticum* with partnership, as the one organized by Cato, managed to achieve risk dispersion, but the economic basis of insurance – which presupposes the establishment of a monetary fund intended for compensation to those who suffer damage and thus disperse the harmful consequences arising from insured events among a wide circle of people – was not fully satisfied.

Finally, we can conclude that in the hazardous conditions of ancient navigation and in the absence of a developed insurance contract, *fenus nauticum* assumed the function of maritime risk coverage in a subsidiary manner. While it did lack the *animus assecurationis* and the transfer of risk to a third party who was not a direct participant in the maritime venture, the function of risk distribution cannot be denied. As a forerunner of insurance, it might be more important to highlight another Roman concept according to which each contract is essentially an exchange of performances. Assumption of risk for damage caused by a fortuitous event has created a new kind of commodity. The idea that liability for someone else's loss can be excluded into a separate obligation changed the whole nature of the contract. By isolating the risk, the lender could evolve into an insurer, who would take over the risk-absorbing capacity in exchange for compensation in the form of a prepaid insurance premium. Such changes in the maritime loan structure and the isolation of the risk assumption performance from a subsidiary into an autonomous contractual obligation and *causa* of the contract did not occur until the Middle Ages, when favourable economic preconditions were met.

Maritime Risk Management Instruments in Medieval Castile (Thirteenth to Sixteenth Centuries)

By *Ana María Rivera Medina*[*]

During the late Middle Ages, maritime transport became one of the riskiest economic activities given the nature of the element where it was pursued and of the activity itself. Mercantile communities employed diverse instruments to lower the expenses caused by risks at sea, one of which is maritime insurance. From Antiquity onwards, the uses and customs of those involved in maritime trade were progressively codified both for Mediterranean and Atlantic navigation, leading in the Modern Age to the emergence of a distinct body of maritime law. In this chapter I will analyse the development of maritime insurance practice in Castile from the end of the Middle Ages to the early modern age. Although there are already excellent studies for later periods, paucity of sources for the medieval period has severely limited the possibility of analysis.

The aim of this chapter is to provide an overview of the historical development of the concept of maritime insurance in Castile, its evolution within maritime law and its contribution to the organisation of maritime traffic within a system moving from its ancient structures towards the creation of commercial capitalist and market economies. More specifically, it will analyse the relationship between the concepts of risk, damage and contribution as applied to navigation, and it will

[*] The research for this essay was conducted thanks to funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation program, ERC grant agreement No. 724544: Avetransrisk. Average – Transaction Costs and Risk Management during the First Globalization (Sixteenth–Eighteenth Centuries).

then identify those insurance techniques that developed between the fourteenth and fifteenth centuries in Castile, and which led to the refinement of maritime insurance through the sixteenth-century ordinances of the Castilian mercantile consulates. The fact that this development was carried out by the commercial communities themselves with little intervention from the State attests to the increasing professionalisation of the sector.

A. Risk, damage and contribution in maritime transport

According to Sebastián Covarrubias, the term 'risk' (*risgo* in Spanish) derives from *risco* or stems from the Latin *rigor* or, as it appears in Castilian sources, *risgo*.[1] Risk is associated with the very essence of seafaring, the nature of the element where it takes place, and from the agency of man at sea. More specifically, risks range from shipwreck caused by storms and rough seas to loss caused by war and piracy; from damage caused by malicious or negligent behaviour of the shipmaster to damage resulting from the mishandling of the cargo in the lading or unlading operations.

All damage causes a detriment, that is, an economic loss – whether full destruction or partial damage – and for any such loss the question arises whether it must be made good. This question was already addressed by the thirteenth-century *Leyes de Layrón*, the Castilian translation of the *Rôles d'Oléron*,[2] and by the *Partidas* regulating the manner in which damage sustained by the ships in the hands of the pirates was to be distributed (*Partida* V, Tit. IX, *Leyes* III); how to proceed in case stolen merchandise were to be recovered later on in full or in part (*Partida* V, Tit. IX, *Ley* XIII); how to share damage to the mast when due to fortuitous events (*Partida* V, Tit. IX, *Leyes* IV and V); how to distribute the loss

[1] *Sebastián Covarrubias*, Tesoro de la lengua castellana o española (Madrid 1611; reprint, 1995), 866. Cf. the Ordinances of the Consulate of Burgos of 1538.

[2] Cf. *Manuel Flores Diaz*, Hombres, barcos e intercambios: el derecho marítimo-mercantil del siglo XIII en Castilla y Aragón (1998); *Margarita Serna Vallejo*, La historiografía sobre los Róles d'Oléron (siglos XV a XX), (2000) 70 Anuario de historia del derecho español 1–48; *ead*., Los 'Rôles d'Oléron': el 'coutumier' marítimo del Atlántico y del Báltico de época medieval y moderna (2004); *Pedro Andrés Porras Arboleda*, La práctica mercantil marítima en el Cantábrico Oriental (siglos XV–XIX). Primera parte, (2000) 7 Cuadernos de Historia del Derecho 13–128; *idem*, La práctica mercantil marítima en el Cantábrico Oriental (siglos XV–XIX). Segunda parte, (2001) 8 Cuadernos de Historia del Derecho 141–254; *idem*, El Derecho Marítimo en el Cantábrico durante la Baja Edad Media: Partidas y Rôles d'Oléron, in: Beatriz Arízaga Bolumburu and Jesús Ángel Solórzano Telechea (eds.), Ciudades y villas portuarias del Atlántico en la Edad Media (2005), 231–256; *Michel Bochaca* and *Pierre Prétou*, Rôles d'Oléron et usages maritimes dans l'Europe atlantique à travers l'exemple de Bordeaux, Libourne et Bayonne aux XIVe et XVe siècles, in: Jesús Ángel Solórzano Telechea et al. (eds.), Las sociedades portuarias de la Europa atlántica en la Edad Media (2016), 25–46.

due to jettison (*Partida* V, Tit. IX, *Ley* III); and how to proceed for other partial losses of cargo (*Partida* V, Tit. IX, *Leyes* IV and VIII). Such damages sustained during navigation were called *averías* (averages).[3] This is not the only situation in which the term *avería* was employed. In the commercial lexicon of medieval and early modern Castile, *avería* was used in a number of different contexts, with a variety of different meanings: contribution, duty, levy, exaction, tariff, tax, tribute or imposition, leading to a considerable confusion.[4] When referred to damage suffered during navigation, *avería* should be understood as the 'damage sustained by the vessel or any of its parts or that sustained by the cargo on board'.[5]

Maritime risks encompass all kinds of mishap to which navigation is exposed. There exist, however, different types of risk depending on their origin and nature, which can be either fortuitous or intentional. Marta Milagros del Vas Mingo and Concepción Navarro Azcúe divided risks into three large groups: those deriving from nature (e.g., fire, tides, shallows, hurricanes and typhoons), called ordinary risks;[6] those caused by third parties (e.g., pirates or privateers), defined as extraordinary risk; and finally those caused by the crew and/or the shipmaster, whether intentionally (in bad faith) or fortuitously (by incompetence or negligence), defined as malicious and negligent risks.[7]

When analysing the concepts of risk and damage, mention must be made of the need for protection required by vessels when setting sail and the manner in which this common venture was financed, since ships sailed in convoys.[8] The

---

[3] *Timoteo O'Scanlan*, Diccionario Marítimo Español, que además de las definiciones de las voces con sus equivalentes en francés, inglés e italiano, contiene tres vocabularios de estos idiomas con las correspondencias castellanas, redactado por orden del Rey Nuestro Señor (1831), 68.

[4] Such definitions are used especially by authors of the sixteenth, seventeenth and eighteenth centuries, such as Juan de Solórzano Pereira, Diego de Encinas, R. Aguilar de Acuña, José de Acosta, Cieza de Leon and Veitia y Linaje. On the medieval use of these terms, see *Legado Gual Camarena*, www.um.es/lexico-comercio-medieval/index.php/v/lexico/ (last accessed 2 May 2020). For the seventeenth century, see *Sebastián Covarrubias*, Tesoro de la lengua castellana o española (Madrid 1611; reprint, 1995). For the eighteenth century, see the first edition of the Diccionario de la Lengua Castellana (Madrid 1732). This variety – and ambiguity – is due to the fact that no single source defines the whole subject. The discussion on the nature of the term avería has continued to the twentieth century.

[5] *O'Scanlan* (n. 5), 68.

[6] Cf. Partida V, Tit. IX; Ley XI.

[7] *Marta Milagros del Vas Mingo* and *Concepción Navarro Azcue*, El riesgo del transporte marítimo del siglo XVI. Congreso de Historia del Descubrimiento: 1492–1556, vol. 3 (1992), 579–614, 613 f.

[8] In Castile, this system is defined as 'navegar en conserva'. *O'Scanlan* (n. 5), 170: 'Era una de las condiciones de la conserva que la embarcación que la ofrecía, había de dar cabo a la que la pedía (que siempre sería la menor, la más indefensa o la más pesada o cargada) y así es que por este auxilio cobraba del auxiliado cierto alquiler, sin duda por la

attempt to avoid or mitigate losses and accidents dominated long-distance trade from early on. The different measures – from co-ownership of vessels by several partners, who provided funds for its building and equipment, to armed convoys escorting commercial fleets – can be interpreted as attempts to avert fortuitous or intentional mishaps. These measures, however, proved insufficient. On the one hand, 'co-ownership' only guaranteed the vessel, never the cargo. On the other hand, the use of convoys as a risk-mitigation mechanism was often questioned, since convoys would easily disperse due to the different sailing speeds of the ships. Besides, shipmasters would sometimes abandon the convoy intentionally as soon as the vessels left the coast behind.[9] Many shipmasters favoured sailing on their own, as it allowed for greater speed in navigation.

In Burgos and Bilbao, merchant associations (*universitates mercatorum*) sought to elaborate mutualist measures to share the cost of maritime ventures through contributions – that is, solidarity contributions based on the participation of each merchant, as a distribution of costs. In Castile, this contribution was also called *avería*, and was collected to defray the expenses arising from protecting the fleet and for the preservation of the ships and their cargo. This kind of contribution originated in the commerce with northern Europe through the Castilian *Consulados de Nación* (Consulates of the Nation),[10] which enjoyed exclusive jurisdiction on commercial disputes.[11] With reference to the concept of damage, the term *avería* was used in three different cases: *avería ordinaria* (ordinary average);[12] *avería gruesa* (common average); and *avería general* or *de echazon*

---

responsabilidad a que aquel se sujetaba, de resarcir los daños, aunque fuesen casos fortuitos' ('One of the conditions of convoy navigation was that vessels were to provide rope haulage if another ship requested it. This would always be the smallest and the most vulnerable or the heaviest or the most loaded of the ships within the convoy. The ship providing haulage would charge for this service, certainly as coverage for the responsibility over any damage, even if this was fortuitous.')

[9] *Betsabé Caunedo del Potro*, El desarrollo del comercio medieval y su repercusión en las técnicas mercantiles. Ejemplos castellanos, (2012) 15 Pecvnia 201–220, 211.

[10] The Castilian nation established in Bruges enjoyed exclusive jurisdiction from 1447: *Louis Gilliodts Van Severen*, Cartulaire de l'ancien consulat d'Espagne à Bruges: recueil de documents concernant le commerce maritime et intérieur, le droit des gens public et privé, et l'histoire économique de la Flandre, vol. 1 (1901), 29.

[11] Chapters of the ordinances of the nation of Castile in Bruges approved by its members on 23 April 1441 and confirmed on 1 December 1467, dealing with the jurisdiction of the consuls: *Gilliodts Van Severen* (n. 10), 97–102.

[12] These were destined to the sustenance of trade associations, the protection of the fleet and its members, which sometimes involved special monetary collections, and to defray devotional and welfare practices: *Guillermo Céspedes del Castillo*, La avería en el comercio de Indias (1945), 12–15; *Manuel Basas Fernández,* El Consulado de Burgos en el siglo XVI (1963), 167 f.

(general average or average due to jettison).[13] Later on, with the *Carrera de Indias*, the same term would also be used for the *derecho de avería* (right of average).[14]

B. Maritime trade and royal safeguards

As the Crown was acutely aware of the importance of maritime traffic for the economy, it implemented measures of protection of the traffic, especially regarding foreign merchants operating in Castilian markets. Such measures undoubtedly encouraged the arrival of merchants from abroad, but the special protection that they enjoyed was easily infringed in practice, and recourse to legal suits was always lengthy and costly.

During the thirteenth, fourteenth and fifteenth centuries, warfare and rampant piracy led to permanent instability in the European seas. Consequently, risks that could befall vessels and merchandise, whether by shipwreck, boarding, robbery or pillaging, became accepted as habitual occurrences. By the fourteenth century the situation became untenable. For this reason, royal legislation – namely the Ordinances of Alcala and the Royal Ordinances – prohibited seizing ships bringing goods to the kingdom.[15] Thus was established a firm commitment to safeguard, if only in writing, the stability of imports, and hence of the national market. Later on, the same commitment would be reaffirmed towards individuals or groups granting individual and collective letters of safeguards.[16] General safeguards would grant protection for a specific period of time. In the ports of the

---

[13] Ordenanzas Reales de Castilla, Book VI, Tit. XII, Ley IV. These correspond to the contributions destined to defray damage sustained by vessels and cargoes in case of mishap or jettison. It is not until the sixteenth century that Castilian sources include the terms of risgo (later riesgo) – identified as maritime risk – and of general average, developed in the ordinances of the consulates of Bilbao and Burgos, as a predecessor of maritime insurance of the Modern Age: *Juan Antonio Arias Bonet*, El derecho marítimo en Las Partidas, (1966) 99 Revista de Derecho Mercantil 91–108.

[14] The right of average was exacted proportionally on all the items shipped to or from America and was allocated to defray expenses of escort ships to protect vessels against pirate or corsair attacks: *Céspedes del Castillo* (n. 12), 4.

[15] Ordenamiento de Alcalá, Tit. XXXII, Ley LI ('De los navíos que vinieren de otras tierras'); Ordenanzas Reales de Castilla, Book VI, Tit. XII, Ley II ('Que los mercaderes que traen mercaderías en sus navíos por la mar no sean prendados').

[16] The works of Childs and Caunedo del Potro on the practices between English and Castilian merchants on the basis of sources in the General Archive of Simancas, as well as in English archives, confirm the use of these letters of safeguard linked to peace treaties and alliances signed by the monarchs as a means of providing a certain stability for the development of commercial activities. These letters, representing a special protection from the Crown, granted freedom of movement and provided guarantees in commercial traffics, safeguarding ships and merchandise from the risk of seizure or embargo. In exchange for such royal protection, the beneficiary and his factors were bound by a series of obligations in

south of Castile the most important general safeguards were those issued to the Genoese, no doubt given the significance of their colony.[17] On occasion other nations, such as the Venetians, the Aragonese and other friendly countries, were granted safeguards too.[18] General safeguards were usually rather generic, although on occasion they could include specific details.[19]

Individual safeguards could be granted to citizens or, more often, to foreigners. They could be granted, for example, for specific periods of time, for certain commercial operations and to claim restitution of assets.[20] Or they could be employed to safeguard a Castilian port from attacks within the kingdom. The letter would usually specify the limits of such safeguards. They could, for example, exclude the commerce of banned products; or limit trade during war time with the Moors or with specific countries (e.g., Portugal or France) or towards certain areas (e.g., Guinea, Americas, Canary Islands).[21]

Among the routes of the northern ports of the Iberian Peninsula, the highest rate of mishaps was for those crossing the English Channel. This was due to sea-perils and high frequency of shipwrecks as a result of adverse climate conditions on the one hand, and war and piratical or corsair activity on the other. The Crown granted letters of safeguard to individuals offering liberties and guarantees in

---

favour of the Castilian kingdom, such as refraining from shipping prohibited goods outside Castile or trading with the kingdom of Granada. Group letters covered all merchants attending the various fairs throughout the kingdom: *Betsabé Caunedo del Potro*, Mercaderes castellanos en el Golfo de Vizcaya (1475–1492) (1983), 221–233; *Wendy R. Childs*, Anglo–Castilian trade in the later Middle Ages (1978), 178–202.

[17] For an excellent analysis of the Genoese colony, see *David Igual Luis* and *Germán Navarro Espinach*, Los genoveses en España en el tránsito del siglo XV al XVI, (1997) 24 Historia. Instituciones. Documentos 261–332; *Juan Manuel Bello León*, Mercaderes extranjeros en Sevilla en tiempos de los Reyes Católicos, (1993) 20 Historia. Instituciones. Documentos 47–84.

[18] *Raúl González Arévalo*, Presencia diferencial italiana en el sur de la Península Ibérica en la Baja Edad Media. Estado de la cuestión y propuestas de investigación, (2013) 23 Medievalismo: Boletín de la Sociedad Española de Estudios Medievales 175–208; *Luis Suárez Fernández*, Política Internacional de Isabel la Católica, vol. 5 (1972).

[19] Valladolid, 12 February 1326: two-year safe conduct petitioned by the council of Seville. 15 June 1327: safe conduct petitioned by Genoese merchants requesting immunity from reprisals for acts by Genoese pirates. Burgos, 20 March 1369: privilege granting the Genoese immunity from the seizure of merchandise to settle debts with the almojarifazgo. Simancas, 29 April 1382: safe conduct banning the seizure of Genoese ships. This policy of the Crown persisted throughout the fifteenth century: *Isidoro González Gallego*, El Libro de los privilegios de la nación genovesa, (1974) 1 Historia. Instituciones. Documentos 275–358.

[20] Charter granted to Juan de Pinedo, a Portuguese merchant, to recover a vessel and cloths seized in Ribadeo (12 November 1489): *Eduardo Aznar Vallejo*, El mar: fuente de conflictos y exigencia de paz, (2010) 11 Edad Media, Revista de Historia 63–89, 79.

[21] *Suárez Fernández* (n. 18), 78–80.

commercial traffic. This offered a possibility of trading freely in the country under the protection of the monarch, and exempted beneficiaries from, for example, pledges and seizures. These general or individual safeguards issued by the Crown would apply in addition to the guarantees covering all merchants attending fairs – whether they were of a specific nationality or came from the provinces, cities or towns in Castile[22] – a traditional form of royal protection dating back to Alfonso X the Wise. Hence, during the fifteenth century, English merchants benefitted from these instruments.[23]

C. The development of insurance practice in medieval Castile

The regulations governing commercial activities emerged within the sphere of corporations and mercantile consulates, a complex process that would eventually lead to the formation of modern maritime commercial law. The commercial capital of Castile was soon established in Burgos, from which – together with Bilbao – traffic with Flanders was organised. The development of associations and guilds in addition to mercantile consulates, and the charter granted by the Catholic monarchs to the mercantile consulate of Burgos in 1494 (which envisaged a different jurisdiction for mercantile law from the general private law one), allowed the consulate to have its own ordinances regulating matters regarding maritime commerce.[24] Until then, merchants would mutually insure each other without the intervention of any form of insurance broker.

I. Bottomry

During the late Middle Ages, one of the earliest insurance-like instruments to emerge was the bottomry loan (*préstamo a la gruesa*).[25] Attested from the twelfth

---

[22] Cf. the examples of the burgh of Guipúzcoa and of the town of Lequeitio, printed in *José Ángel García de Cortázar*, Vizcaya en el siglo XV: Aspectos Económicos y Sociales (1966), 152.

[23] *Caunedo del Potro* (n. 16), 222, 231 f. See also *eadem*, La actividad de los mercaderes ingleses en Castilla, 1475–1492 (1984), 13 n. 17 (recording 31 such letters issued in favour of the English). Cf. *Childs* (n. 16), ch. VI, including a list of such letters granted to Castilians in England between 1400–1473 (ibid., 49).

[24] *Ana María Rivera Medina*, The mutualisation of maritime risk in the Crown of Castile, 1300–1550, forthcoming.

[25] 'Contract in which a certain interest or premium is paid to receive an amount in money or products calculated on the value of the vessels themselves and their purveyance and tackles for the journey, upon condition that once arrived at the ports of destination, the lenders must be freed from the risk and allowed to collect the amounts together with the premium at the agreed time', *O'Scanlan* (n. 5), 66.

century, it consisted in the loan of a sum of money against the ship itself as collateral. It was first and foremost a loan for the purveyance and maintenance of the vessel; a shipmaster would resort to this instrument when his financial situation did not allow him to defray expenses caused by the venture. At the same time, the bottomry loan was also a risk-shifting operation: the repayment of the loaned sum plus interest depended on the successful arrival in port of the vessel on which the loan was given. As this instrument would typically cover small amounts, it seldom reveals the total cost of the operation, which often consisted of a number of such loans.

The coverage of the risk started the moment that the ship set sail and lasted up to 24 hours after its arrival at port. Recourse to bottomry loans thus allowed shipmasters to face financial difficulties while preserving their vessel. Bottomry loans were above all monetary advances to equip and maintain the ships concluded by shipmasters when they were unable to do so by their own means. But bottomry was also a system of risk coverage to avert financial ruin in the case of loss. However, it must be borne in mind that once the ship arrived in the port of destination safely, the shipmaster had a limited time to repay the loan, one month at most. If he failed to do so, the lender could lay claim to the hypothecated ship and the shipmaster's assets (in cases where he also acted as borrower).[26] The interest for the loan operation, together with the premium charged for the insurance of the risk, was hidden in an inflated amount of the sum actually lent. This was done to evade the prohibition of usury, as the loan itself was justified with the need to furnish and supply the vessel. In the text of the contracts, the loan was described as 'a pure and true loan', and was made 'gratis et amore', 'to please and do good works'.[27]

Although bottomry loan was widespread across Mediterranean as well as Atlantic ports,[28] it was not the only system of risk insurance known to Spanish late-

---

[26] *María Teresa López Beltrán*, Financiación de los viajes y cobertura de los riesgos en el tráfico marítimo malagueño en época de los Reyes Católicos. I: Cambios y préstamos marítimos, (1997) 19 Baetica. Estudios de arte, geografía e historia 51–65, 55–57. The author describes certain cases where the shipmaster also acted as lender in Basque shipping ventures in the Mediterranean.

[27] On this point, see *Ana María Rivera Medina*, Navegación, comercio y negocio: los intereses vascos en los puertos flamencos en los siglos XV y XV, in: Jesús Ángel Solórzano Telechea et al. (eds.), Las sociedades portuarias de la Europa Atlántica en la Edad Media (2016), 165–196, 189. See also *López Beltrán* (n. 26).

[28] On early insurance practice in the Mediterranean, see *Arcadi García Sanz* and *María Teresa Ferrer i Mallol*, Assegurances i canvis marítims medievals a Barcelona (1983); *Manuel J. Peláez*, Cambios y seguros marítimos en derecho catalán y balear (1984); *Alberto Tenenti*, L'assicurazione nel commercio marittimo del Mediterraneo occidentale (1440 c.–1600), in: Eliseo Serrano Martín and Esteban Sarasa Sánchez (eds.), La Corona de Aragón y el Mediterráneo: siglos XV–XVI (1997), 127–144; *idem*, El seguro marítimo

medieval maritime traffic. From the end of the fifteenth century, merchants trading abroad began to make use of maritime insurance also in Castile, so as to avoid unnecessary losses in larger commercial transactions. In essence, this instrument was similar to the bottomry loan, albeit with different legal provisions.[29] Insurance, however, did not replace bottomry loan, which remained in use for a long time.[30]

II. Premium insurance

In the fourteenth century, sedentary merchants developed a new contractual form when they realised the need for suitable means to transfer and distribute risk. This was the premium insurance or insurance proper, which represents a step further in the rationalisation of commercial risk, as it was a more specific instrument. It was possible to insure the ship, the cargo or both. It was customary for the risk on the ship to include the hull but to exclude tackle, rigging and apparel. It was also possible to insure the freight. The premium amount was contingent on the distance to travel (since the greater the distance, the greater the risk) and on other variables such as the time of year (*mare clausum – mare liberum*), type of vessel, news of war or piracy.

The reception of insurance in Castile was likely facilitated by contracts concluded in foreign ports for trade with Castile, the presence of foreign insurers in Castilian ports, and insurance transacted in foreign lands to cover transport between Castile and a third country.[31] Local customs varied with respect to the particulars, such as the kinds of perils included in the policy and the proof of dam-

---

en la Europa de los siglos XV y XVI, in: Floriano Ballesteros Caballero et al. (eds.), Actas del V Centenario del Consulado de Burgos (1494–1994), vol. 1 (1994), 421–442.

[29] *María Teresa López Beltrán*, Financiación de los viajes y cobertura de los riesgos en el tráfico marítimo malagueño en época de los Reyes Católicos. II: seguros marítimos, (1999) 21 Baetica. Estudios de arte, geografía e historia 281–300, 283. See also for the Mediterranean *Manuel J. Peláez* and *Miriam Seghiri*, Notas sobre seguros y cambios marítimos bajomedievales y premodernos en Cataluña, (2018) 35 Revista europea de derecho de la navegación marítima y aeronáutica, available online: www.eumed.net/rev/rednma/35/pelaez-seguiri.html (last accessed 3 May 2020).

[30] *Rivera Medina* (n. 27), 165–196. Despite the paucity of extant contracts, their use is confirmed through obligatory letters. An identical situation is confirmed in the activities of the Basque seamen in the port of Málaga between 1500 and 1516. Bottomry loans and maritime insurance coexisted during the sixteenth century and beyond: *López Beltrán* (n. 26), 63–65.

[31] *Eduardo Aznar Vallejo*, Norma y conflicto en la navegación castellana bajomedieval, (2018) 31 Espacio Tiempo y Forma. Serie III, Historia Medieval 45–67, 54.

age. But those different customs fed a common pool of experience that culminated in the early sixteenth century with the appearance of the insurance policy.[32] The element displaying the greatest variability was of course that of the premium, as its amounts would depend on factors such as the destination, the political circumstances (e.g., war, privateering) or the type of vessel.

In the early sixteenth century, driven by the increase in frequency and distance of maritime trade, the consulates of Bilbao and Burgos hastened to clarify and adjust the legal formulation of maritime insurance based on their specific practice. Merchants would insure each other, although none of them acted exclusively as insurer. This system gave rise to numerous disputes that were difficult to settle and also fostered illegal behaviour among the merchants who would take up two or three insurances on the same merchandise, sometimes with an unregistered (or 'in faith') policy, which meant that in case of mishap the insured could end up overcompensated. Thus, the purpose of insurance as a risk-avoidance technique was sometimes twisted into a profit-seeking activity.

Although the regulation of insurance in the Castilian sphere came later than in other parts of Europe, there was not total dearth of provisions during the late Middle Ages and the beginning of the early modern period. The thriving economy of the kingdom led to a sustained growth in the number of maritime insurance policies taken out for the Iberian maritime trade, whether done within the kingdom (mostly following the 'models' of Burgos and Seville) or abroad (especially in insurance markets such as Barcelona, Genoa and Florence).[33] From 1483 onwards, it is possible to find also references to insurance made 'after the use of Seville'.[34] Although the earliest examples of insurance in Burgos date from 1481,[35] it is likely to suppose that its practice started earlier. The accounts of the merchant Juan de Castro, for instance, refer to no fewer than 207 maritime insurance policies taken up by Burgos citizens up to the year 1511: it is unlikely that this practice had spread in the space of just a few years. Until that period, insurance practice was a private matter concerning solely the contractual parties: an individual merchant would simply take up the risk of another merchant willing

[32] On the operation of insurance in the Canarian area and its relation with international circuits, see *Antonio M. Macías Hernández*, Aseguración marítima y comercio exterior, 1500–1560, (2017) 63 Anuario de Estudios Atlánticos 1–17.

[33] *Hilario Casado Alonso,* Comercio internacional y seguros marítimos en Burgos en la época de los Reyes Católicos, in: Congresso Internacional Bartolomeu Dias e a sua época. Actas, vol. 3 (1989), 585–608.

[34] *José Bono y Huerta* and *Carmen Unguetti-Bono*, Los protocolos sevillanos de la época del Descubrimiento (1986), Book 19, document n. 4: 'seguro por 300 doblas de 34 botas de romanía enviadas a Londres (23-X-1483)'.

[35] *Hilario Casado Alonso*, El mercado Internacional de seguros de Burgos en el siglo XVI, (1992) 78 Boletín de la Institución Fernán González 277–306.

to pay for this service on the basis of mutual trust.[36] These private and unregulated contracts display similarities with later examples with regard to premium payment and the insurance price.[37]

The earliest model of insurance policy made in Burgos dates to 1509.[38] Its Consulate, more receptive to the needs of the insurance business than that of Bilbao, adopted the same text as the standard policy model in 1514. The example of Burgos was pivotal to the success of maritime insurance. Its market was robust enough to cover the risks of insurance, and many of its merchants were willing to take out insurance for their merchandise before shipping it. Natives of Burgos were active across all main European markets, and would provide their fellow citizens with a constant flow of information, from dangers in the routes to the characteristics of the vessels and cargos, as well as about mishaps occurring abroad. The court of the Consulate had authority to settle disputes arising between insurers and insured.[39] According to the abovementioned policy of 1509, it was possible to jettison some part of the cargo and to change the itinerary for the protection of the merchandise. These specific features would seem to suggest that there was more than one single type of policy in use at the time,[40] since other policies were drafted with provisions that would not appear in the consular regulations until 1514.

The 1509 policy consists of two parts. The first is a form, with the general conditions common to any policy. It includes blank spaces, to be filled with the specific details of the contract: the name of the merchant and of the shipmaster; the specific cargo; the ports of origin and destination; and the date of the ship's departure. The second part includes the individual undertaking of each insurer. Each party would sign in his name or on behalf of another, specifying the amount of his undertaking. The document ends with the signature of a notary. This was only a cargo policy, which therefore did not cover the hull. As the policy omits the quantity of merchandise to be transported, it is possible that the merchandise

---

[36] These policies did not follow the policy model proposed by the merchant association (universitas mercatorum). This meant that they remained outside consular jurisdiction and were not subject to the payment of registrar fees. When presented before the consular court, these policies were declared void and not legally binding. This type of insurance was forbidden by the Ordinances of the Consulate of Burgos of 1538: *Manuel Basas Fernández*, Contribución al estudio del seguro marítimo en el siglo XVI, (1958) 143 Boletín de la Institución Fernán González 157–177, 164 f.

[37] *Casado Alonso* (n. 35), 280.

[38] *Floriano Ballesteros Caballero*, El seguro marítimo en Burgos. Una póliza de 1509, (2003) 207 Boletín de la Institución Fernán González 207–217, 207–209. The earliest documentary evidence of insurance contracts dates to 1481, but (apart from the 1509 policy) there are no other known policies prior to the Declaration of 1514: *Casado Alonso* (n. 35).

[39] *Hilario Casado Alonso*, Los seguros marítimos de Burgos. Observatorio del comercio internacional portugués en el siglo XVI, (2003) 4 Revista da Facultade de Letras 213–242.

[40] *Casado Alonso* (n. 39), 221–238.

represented the tonnage of the vessel. Perhaps the discretion displayed in this document would explain why the premium rate, 4.5%, is not stated in the main text of the policy but on the reverse side of the document.[41]

D. Maritime insurance in the consulate ordinances

I. The model policy of Burgos

The *Declaración de póliza de seguros hecha por el Consulado de Burgos* of 26 January 1514 hails the beginning of the regulations of maritime insurance in Burgos. It gives clear guidance on to how to draft insurance contracts and what provisions to include. The *Declaración* provides, for example, for prohibited merchandise, the obligations of the parties, the payment of premium and the notification of damage.[42] No doubt the growing number of lawsuits, the rampant frauds and the general level of malpractice prompted the Consulate of Burgos to intervene and regulate the insurance practice, although the prologue of the *Declaración* states that the occasion when these provisions were redacted was just one of the frequent meetings held to deal with insurance and, more specifically, to review the current insurance practice. As a result of long discussions between merchants, carriers and shipowners, it was decided to provide for 'some things which are necessary to […] clarify when dealing with insurances'.[43] The *Declaración* is divided in two, clearly different parts. The first part contains provisions of corrective and explicative nature, allowing us to imagine the content of the policies drawn in the consulate of Burgos until then. The second part contains provisions resembling more an insurance ordinance. Those provisions cluster around an official model policy. In summary, the *Declaración* is the first known regulation on the maritime insurance business in Burgos. It included provisions that could well be defined as innovative, such as the right of the Consulate itself to 'intervene' in all policies 'from now on'. The crucial novelty of the provisions contained in this *Declaración* lies in their application to all policies without any exception.[44]

---

[41] *Ballesteros Caballero* (n. 38).

[42] *Santos M. Coronas González*, Derecho mercantil castellano: dos estudios históricos (1979), 217–221: Appendix, transcription of the 'Declaración de póliza de seguros hecha por el Consulado de Burgos'.

[43] 'algunas cosas que son necesarias de […] aclarar en esta negoçiaçion e trato de los seguros', *Coronas González* (n. 42), 218.

[44] *Ballesteros Caballero* (n. 38), 210.

II. The Ordinances of Bilbao

Given the close relationship between the merchants' *universidades* of Burgos and Bilbao, it would be tempting to imagine a parallel development of their maritime insurance regulations, but this is not the case. In Bilbao, they were highly dependent on the particular commercial and maritime tradition of its consulate. This led to a distinct normative framework from that of Burgos. A few years after the Burgos *Declaración* of 1514, in 1520, the Bilbao consulate issued its Maritime Insurance Ordinances,[45] probably because at that time Bilbao was becoming an important insurance market in its own right. Its business was not limited to maritime transport, but it extended to providing security to the parties involved in it. The provisions of the 1520 Bilbao Ordinances make the insurer liable 'should any risk befall the insured vessel or merchandise or part of these, to pay and indemnify in the form and manner prescribed by the policy of the said insurance'.[46] They also required that any person taking up insurance 'whether on merchandise, on the vessel, the freight and the tackle on board, ought to bear ten percent of the risk on the said vessel, freight or tackle or on the merchandise on which insurance was made, following the will of the insured, upon condition that he contribute no less than the said ten percent'.[47] Compensation on the tackle and rigging was to be paid only if these 'are cut or jettisoned to save the said vessel and merchandise'.[48] Should an accident befall when the ship is sailing without cargo 'it is to be understood as *avería gruesa*', and so the insurer had to indemnify the insured.[49] In case of 'displacement [*corrizon*],[50] collision or damage to

---

[45] Edited in *Javier Enríquez Fernández*, *Concepción Hidalgo De Cisneros*, *Adela Martinez Lahidalga*, Archivo Foral de Bizkaia. Sección Notarial (1459–1520). Consulado de Bilbao (1512–1520) (2007), 171–176.

[46] '[S]i algun risgo de la dicha nao o mercaderias o de parte dellas ansi aseguradas conteçiere, de pagar e de desenbolçar segun e de la forma e manera que se resare la poliça del dicho seguro', *Enríquez Fernández*/*Hidalgo De Cisneros*/*Martinez Lahidalga* (n. 45), 172.

[47] '[S]ea sobre mercaderias como sobre nao, fleytes e aparejos della como sobre qualesquier mercaderias que se hiziere el dicho seguro, aya de correr dies por çiento de risgo sobre la dicha nao, fleyte o aparejos della o sobre las mercaderias sobre que se hiziere el dicho seguro, e dendearriba lo que la voluntad del dicho asegurado quisiere, con tal/ que non corra menos de los dichos dies por çiento', *Enríquez Fernández/Hidalgo De Cisneros/Martinez Lahidalga* (n. 45), 173.

[48] '[S]e cortaren o echaren de la dicha nao por salbar la dicha nao e las mercaderías', *Enríquez Fernández/Hidalgo De Cisneros/Martinez Lahidalga* (n. 45), 174.

[49] '[S]e entendiere ser avería gruesa', *Enríquez Fernández/Hidalgo De Cisneros/Martinez Lahidalga* (n. 45), 175.

[50] 'Corrizón' is understood as displacement of the cargo. 'Correrse la estiva: irse o caer a un lado en algún temporal y por efecto de los grandes balances, cuyo accidente traería fatales consecuencias', *O'Scanlan* (n. 8), 265 f.

said merchandise due to fortuitous mishap',[51] the insurer did not have to pay unless the insurer could prove that the damage was caused by a fortuitous mishap.[52] The 1520 Bilbao Ordinances also provided for specific requirements, conditions and terms of payment of policies.[53]

By comparison, the Ordinances of Burgos did not include the compulsory 10% underinsurance. They did not make any mention of the parties' contractual freedom but rather kept the whole negotiation process under close control. They did not provide for *avería gruesa* nor for the insurance of freight and tackle. The only thing they have in common with the Bilbao provisions is the eight-month period given to the insurers to pay the amounts underwritten.[54]

It is well known that the ordinances of the consulate of Bilbao were not promulgated until 1737. However, there are at least two further earlier versions of the Ordinances (1531 and 1554), together with some subsequent changes. In its second part starting with Chapter XX, the Ordinances of 1531 focus on a number of issues concerning insurance:[55] (a) The bill of lading is described as an indispensable probatory instrument to settle disputes in case of loss, shipwreck and other fortuitous mishaps (Chapter XXII). (b) The insurers are liable to make good the loss once they receive news of it. The payment is to be distributed 'the half to the insurers, and of the other half a third to the university, a third to the poor of the hospital and to the judges'[56] (Chapter XXIII). (c) The insurers were not required to 'pay […] for any ropes or tackle, unless the damage was an *avería gruesa*'. '[S]uch damage or jettison or cutting' could be considered '*avería gruesa* if […] any tackle, masts or yards sustained damage and broke apart, or if the vessel suffered damaged when hitting rocks (or when entering or leaving the port, ropes, masts or yards are affected) because of a fortuitous and sudden event, as nothing else could be done'[57] (Chapter XXIV). (d) The insurers were not required to pay

---

[51] '[C]orrizon, arrimazon o dapno ser venido en las tales mercaderías por caso fortituto', *Enríquez Fernández/Hidalgo De Cisneros/Martinez Lahidalga* (n. 45), 173.

[52] *Enríquez Fernández/Hidalgo De Cisneros/Martinez Lahidalga* (n. 45), 174.

[53] *Enríquez Fernández/Hidalgo De Cisneros/Martinez Lahidalga* (n. 45), 173 f.

[54] *Declaración de póliza de seguros hecha por el Consulado de Burgos*, Chapters I, III, V, VIII and IX, in *Coronas González* (n. 42), 217–221.

[55] *Ordenanzas del Consulado de Bilbao de* 1531; the chapters cited in the text are reproduced in *Teófilo Guiard y Larrauri*, Historia del Consulado y Casa de Contratación de Bilbao y del Comercio de la Villa, vol. 1 (1913), 588–591.

[56] '[L]a mitad para los aseguradores y de la otra mitad la tercia parte para la universidad, la tercia parte para los pobres del hospital y para los jueces.'

[57] 'pagar […] ningún cables ni aparejos, a no ser que fuese avería gruesa. […] [E]l tal daño o echazón o cortado' lo que era 'avería gruesa de todo […] si por ventura algunos aparejos o mastes o vergas recibían daño asy de romper como de quebrar como del daño que recibiera el cuerpo de la nao en dar roca (o al entrar o salir de puerto y se vieran afectados los cables, mastes o vergas) siendo por caso fortuito e con temporal y no pudiendo hacer otra cosa.'

beyond the value of the vessel plus half the freight, deducting 10% from the total value, as a deterrence against the shipmaster's fraud (Chapter XXV).

III. The Ordinances of Burgos

The Ordinances of the Consulate of Burgos[58] were enacted in 1538. They had great influence on later legislation, both in Spain and in the Americas. They received the official sanction of Charles V, in an attempt (albeit of little success) to respond to frauds and abuses. With these Ordinances, Burgos became the most important market for insurance of Castile, with the power to regulate the subject, to fix official premium rates, and with the jurisdiction to settle insurance disputes. A number of further factors made the insurance market of Burgos more secure and thus more attractive than other places, such as the presence of an official model policy prescribed by the Consulate, the registration of all policies before the secretary of the *universidad* of merchants, the possibility of payment of premiums at the fairs of the close by Medina del Campo and the requirement to the insured to provide sureties to the insurers before receiving any payment from them.[59]

When drafting its Ordinances, the Consulate of Burgos relied on 'wise and expert persons with much experience in dealing with merchandise, risk, travel and navigation'.[60] This led to the inclusion of important novelties, such as the obligation to use the model policy and a series of requirements to be added to any insurance policy (Chapter XLVII). According to Chapter LI, all policies had to specify the kind and condition of the insured merchandise, 'because there are greater inconveniences with merchandise that look similar [with each other], as we have seen by experience'.[61] This exempted the insurer from undertaking any risk not declared in the policy. The same chapter also provided for the standard of care required of the carrier when transporting the insured goods. The Ordinances also provided for the case of loss or damage of the merchandise due to *avería gruesa* (Chapter LXII). In case of jettison 'the said damage shall be cast in an *avería gruesa general*, to which all those who carried any merchandise would contribute […], taking into account the value of each thing as recorded in the bill of lading signed by the scribe of the vessel, also including the value of any merchandise the shipmaster or the scribe or any other person might have

---

[58] *Eloy García de Quevedo y Concellón*, Ordenanzas del Consulado de Burgos de 1538 (1905), 145–295. The chapters cited further below are reproduced ibid., 226–285.

[59] *Basas Fernández* (n. 36), 163.

[60] '[P]ersonas sabias e espertas e de mucha experiencia en el trato de mercadería y cosas del risgo e viajes e navegaciones.'

[61] '[P]orque sobre semejantes mercaderías traen mayores ynconvenientes, como por esperiencia hemos visto.'

secretly received or loaded onto the said vessel, as well as of the freight, as it is customary that all contribute to the said *averías*' (Chapter XXXVIII).[62] Chapter LXIII further specified how to distribute the loss between the participants.

Because of the high number of frauds suffered by the *universidad*, freight and tackle were excluded from the insurable things (Chapter LII). For the same reason, barratry (i.e., fraud) of the shipmaster could not be covered (LXXXVII). Insurance payments would take place following the calendar of the Castilian fairs (Chapter LIII). The Burgos Ordinances sought to regulate with precision the payment of premiums and insurance money. They also included provision concerning the insured with the aim to prevent the fraudulent overinsurance of the same object with a number of different policies. Chapter LVII, for example, required to state the identity of the merchant insured or of the main partner in a joint venture. Often the policy holder acted as a commission agent who signed the policy in the name of another person, an operation called 'encomienda' (Chapter LXI). In Chapters LVIII and LXII, the Ordinances further provided for the case of abandonment of the ship, shipwreck, and for the insurers' liability in case of damages or loss due to war or pirates, as well as for the case of damaged merchandise (where the insurers were exempted from liability).

Examining the Burgos Ordinances, one might well conclude that sixteenth-century Spanish maritime insurance retained the same structure as in the Middle Ages. Insurers and insureds were still merchants who joined forces to protect their trade. Insurance remained a guild-like activity rather than a capitalist endeavour – there were no specialised insurance companies yet. The same conclusion may be drawn for the Ordinances of the Consulate of Seville of 1556. They made explicit that they followed ancient mercantile practices. The risks insured against were identical in the Seville and the Burgos Ordinances, suggesting that they both drew from a shared pool of Mediterranean and Atlantic customs.

IV. The Ordinances of Bruges

After the Ordinances of Burgos, Bilbao and Seville had been enacted, it remained an open issue to regulate the insurance business covering the important trade with Flanders. This trade was driven by long-standing commercial links

[62] '[S]e haga la dicha avería gruesa general, o contribuyan los cargadores, todos cuantos hubieren cargado cualquier mercadería […], tasando é moderando el valor de cada cosa, así las que parecieren en el padrón de 'saiborne' por el escribano de cada nao, como si por caso el maestre o escribano u otro cualquier de la nao hubiese secretamente recibido o cargado en la dicha nao de cualquier mercadería que sea, ó si el dicho maestre ó su compaña, y estimando su valor y el del flete como es costumbre de heredar todos en las tales averías, sea tasado todo contado.'

and the presence of a strong Spanish mercantile community in Bruges.[63] One of the most notable aspects of the Ordinance on Maritime Insurance of the Consulate of the Spanish Nation in Bruges[64] is certainly the thoroughness of its provisions. Drawing on a detailed knowledge of the insurance practices within the Hispano-Flemish commercial sphere and building especially on the Burgos ordinances of 1538 and, to a lesser extent, the Caroline Ordinances of 1549 for the Spanish Netherlands,[65] the Consulate of the Spanish nation in Bruges issued an extensive set of provisions on insurance.[66] These were designed to give transparency to a system that was thought to be riddled with uncertainty and to put an end to alleged abuses arising from the references in insurance contracts to 'the use and custom of the street of London [i.e. Lombard Street] and the bourse of *Enveres* [Antwerp], whose usages and customs were never seen in writing', consequently giving rise to many disputes.[67] Thus, it was the lack of a clear normative framework for the insurance market that made it necessary to define it for the Spanish merchants operating in Bruges and Antwerp. The Consulate of Bruges offered a clear alternative to the traditional insurance formulas with all their ambiguities, 'stating in the policy that they ought to be insured after the use and custom of the ordinances of our Nation of Spain'.[68] In issuing its own insurance Ordinances, the Consulate also solved the problem of the lack of familiarity

---

[63] *Hilario Casado Alonso*, La colonie des marchands castillans de Bruges au milieu du XVe siècle, Diplomates, voyageurs, pèlerins, marchands entre pays bourguignons et Espagne aux XVe et XVIe siècles, (2011) 51 Publication du Centre Européen d'Etudes Bourguignonnes (XVe et XVIe siècles) 233–251.

[64] A copy entitled Las Hordenanzas echas por los cónsules de la nation de Espanna residentes en la ciudad de Brujas dating 1569 is covered by the archivist at the State Archives in Brugge *Emile van den Bussche*, Un fibre rare, Code d'assurance maritime a 1'usage des Espagnols residant à Bruges, (1880) 11 La Flandre: revue des monuments d'histoire et d'antiquités 66–68. Another copy held in the Brussels Royal Library was published *Charles Verlinden* (ed.), Código de seguros marítimos según la costumbre de Amberes, promulgado por el consulado español de Brujas en 1569, (1947) 7 Cuadernos de Historia de España 146–193; see *Santos M. Coronas González*, La Ordenanza de seguros marítimos del Consulado de la Nación de España en Brujas, (1984) 54 Anuario de historia del derecho español 385–408, 385 n. 1. Yet another copy in Spanish is kept in the National Library in Madrid: Ordenanzas echas por los consules de la nation de Espana residentes en esta ciudad de Brujas para los sotopuestos de dicha nacion sobre los seguros y polizas de seguridad (1568); see *Jules Finot*, Etude historique sur les relations commerciales entre la Flandre et 1'Espagne en Moyen Âge (1899), 256 f.

[65] For which, see *Jean-Marie Pardessus*, Collection de lois maritimes antérieures au XVIIIè siècle, vol. 4 (1828; reprint, 1968), 38–44.

[66] *Coronas González* (n. 64), 389 f.

[67] '[A]l uso y costumbre de la estrada de Londres y de la bolsa de Enveres, el qual uso y costumbre nunca se ha visto por escrito', Ordenanzas de seguros de la nación de España en Brujas, prologue, cited in *Coronas González* (n. 64), 387.

[68] '[P]oniendo en la póliza que se hacen asegurar al use y costumbre de las ordenanzas de esta dicha nuestra Nación de España', *Coronas González* (n. 64), 389 f.

of some of its members with the Antwerp customs, while strengthening its own jurisdiction over insurance disputes.[69] Approved unanimously on 11 September 1568, these Ordinances were addressed to the community of the Spanish merchants in Bruges and those trading with them. By that time, the community established in Bruges was already familiar with the Burgos Ordinances on maritime insurance of 1538, which they took as a model in many respects. As to the trade with the Americas, however, the Bruges Ordinances looked more at the 1556 Ordinances of Seville,[70] 'because […] they have more news about this type of navigation' (Tit. III, Ord. I).[71]

Often, goods had first to be transported on a river before they could be loaded onto the vessel anchored in the port named in the policy. In such cases, to avoid any doubt as to the moment in which the risk would start accruing, the Bruges Ordinances declared that the risk was undertaken from the moment the transport would commence on the small lighters from the city of Seville to San Lucar, or from Puerto de Santa María and Cadiz on the coast. Conversely, when the merchandise was coming from the ocean and had to be transported through inland waterways, the Ordinances mentioned expressly the route from Cadiz and San Lucar to Seville, from Cascais to Lisbon, from Abra de Gragia to Rouen and other ports on the French and English coast, both for the loading and unloading operations (Tit. III, Ord. I). The Bruges Ordinances also highlighted the importance of convoy navigation, the obligation to specify the origin, amount and quality of the merchandise, and it even prescribed certain goods that had to be specifically declared (Tit. II, Ord. I–II). They spelled out the risks to be borne by the carrier and the owners of the merchandise (Tit. XI, Ord. I). To avoid problems arising from the use of different currencies, as well as from their constant fluctuation, the Ordinances provided for fixed exchange rates (Tit. IV, Ord. III). Further, they required that the name of the vessel had to be included in the policy (Tit. V, Ord. I), although they also allowed the possibility to include reference to 'unnamed ships', provided that the policy included the ports of departure and destination, whether layovers were allowed, the names of the carriers of the insured goods and of consignees (Tit. VI). In case of dispute, the parties were required to sue before the consular court (Tit. I, Ord. I). To curb fraud, a 10% compulsory underinsurance was established (Tit. XI).

Contrary to the ordinances of the Iberian Peninsula, the barratry of the shipmaster could be included in the policy (Tit. XI, containing ten ordinances on the barratry of the shipmaster). Given the large number of frauds committed in hull

[69] *Coronas González* (n. 64), 392.

[70] The following provisions are reproduced in *Verlinden* (n. 64), 160–186.

[71] '[P]or […] que tienen más noticia de aquellas navegaciones', *Verlinden* (n. 64), 186.

policies, freight and tackle were excluded, but shipmaster or shipowner were allowed to insure the value of the hull, as well as artillery and other weapons carried for its protection (Tit. XVIII, containing nine ordinances on insurance of hull, freights, tackle, artillery and ammunition). This insurance, however, had to be made in a different policy from that of the merchandise, and it could be made for specific journeys, not for set periods of time (so-called time policies).[72] The prohibition to insure the freight was lifted for ships sailing to the Americas and the Eastern Indies: in such cases, the freight could be insured to a maximum of three quarters of its value (Tit. XVIII, Ord. 3). The Ordinances of Bruges also regulated in detail the main obligation of the insurer, the payment of the indemnity. In order to receive the indemnity, the insured had to provide proof of his claim. When the loss was public knowledge, in the absence of news of the vessel for over a year, the insured could demand to be compensated by the insurers, who had to pay within two months following the request. The ordinances included the obligation of the insured to pay the premium (Tit. XII, containing four ordinances dealing with shipwreck and other fortuitous cases, leading to the loss of the cargo) and of the insurers to refund the premium in the case of changes in the terms of the insurance (Tit. IX, containing 13 ordinances on the procedures for the refund of the premium).

General average and abandonment of the vessel are minutely regulated in Titles XIII and XIV, on the basis of the general principle of attributing the damage to the merchandise to the shipmaster if the mishap was due to his fault. The period granted to the insured to request compensation for loss or damage to the merchandise insured amounted to one-and-a-half years from the day the last insurer had signed the policy. If during this period the insured was unable to gather all the documentation required to be paid, he had to notify the majority of the insurers and file his claim before the Secretary of the Nation once the documentation was complete. This period was extended by a further year if the insurance covered a particularly long voyage, such as those to the Americas and the Eastern Indies. Furthermore, the Bruges Ordinances provided for the abandonment of the insured property, establishing the periods within which abandonment had to be done depending on the location of the port of departure. They also provided for premium refunds – that is, the part of the premium that the insurer had to return to the insured because of variations in the terms covered by the policy. If the insurer had already collected the premium, he was to refund the sum withholding 2% of the total. If the premium did not exceed 3% of the insured value, the insurer was to retain 1% (Tit. IX, Ord. II).

[72] The Ordinances regulated several types of policy: hull policies, cargo policies for round voyages; general cargo policy for outward journeys to the Americas; general cargo policies for return journeys from the Americas; return policies on ship hulls; and life insurance. *Verlinden* (n. 64), 161.

The last title of the Ordinances regulated life insurance (Tit. XX), which was later prohibited by the royal Ordinance of 1570[73] in view of the number of frauds and abuses committed with life insurances.

In conclusion, it is fair to say that the kind of risks that maritime insurance covered during the sixteenth century were mainly those caused by natural events, war and piracy. The emergence of a new type of 'stateless piracy' favoured the search for new instruments to mitigate the enormous losses that it caused.[74]

E. Conclusion

Throughout the late Middle Ages and the early modern period, Castilian mercantile communities had to address the risks of navigation. This spurred them to devise various ways to preserve their investments in maritime ventures. Endemic warfare led the Crown to issue letters of safeguard in order to stabilise imports that supplied the national market. Such letters especially benefitted foreign merchant communities operating in Castilian ports. The need to preserve and encourage maritime transport led to the development of further forms of protection, such as the bottomry loan. The repayment of the loan and the agreed premium was contingent on the safe arrival of the insured assets at the port of destination. This system became widespread in both Mediterranean and Atlantic ports, but it was not the only one used to transfer risks in late medieval maritime trade.

Another form of risk transfer was mutual private insurance developed by the Castilian community involved in international trade. It emerged from a range of practices in use at the time, and later it had an impact on premium insurance, progressively shaping its content. At the same time, the regulations imposed on the insurance business gradually introduced the jurisdiction of the mercantile community. Until then, insurance was an unregulated practice among merchants, lacking legal formalities. A first model insurance policy was probably used during the late fifteenth century, although the first evidence of such policy appears only in 1509, which served as a common template.

The absence of a single and common insurance instrument, the use of different insurance policies, and the ensuing frauds, drove the consulates of Burgos and Bilbao to intervene for three main reasons: imposing a single standard model policy to curb fraud and avoid conflicting interpretations; asserting their jurisdiction so as to intervene in case of disputes; and controlling the transactions done within their institution, while charging contributions for their service. With the

[73] *Pardessus* (n. 65), 103–119.

[74] *Milagros del Vas Mingo*/*Navarro Azcue* (n. 7), 579–614.

1509 policy serving as a blueprint, the consulates of Burgos and Bilbao formalised their model policy in 1514 and 1520, respectively. With their ordinances, insurance practice gained uniformity, formal structure and specificity, granting greater security to the parties involved.

The consulates largely consolidated pre-existing practices, securing minimal state intervention. Consequently, maritime insurance ultimately maintained the same structure as in the late Middle Ages. However, even when referred to the Americas, insurance had to be regulated: this was done with the Ordinances of Consulate of Seville in the mid-sixteenth century, shaped after those of Burgos. Lastly, to prevent conflicts on insurance among the Castilian merchant community established in the Flanders, the Ordinances on maritime insurance of the Consulate of the nation of Spain in Bruges (shaped after those of Burgos and Seville) were promulgated. With these Ordinances, Castilian merchants reinforced their privative jurisdiction beyond the Spanish borders. While the Ordinances of Burgos were the most relevant in practice, they did not serve as a universal model. The Ordinances of Bruges, too, introduced significant innovations, such as the model policy for hull insurance, and even later, the Ordinances approved by Felipe II on 1 August 1572 included a model policy for slave insurance.[75]

In conclusion, as argued by Gabriel Tortella Casares, maritime insurance contributed to the allocation of the risks, and thus also to the distribution of wealth. Its economic function lies in that 'it gives strength to carry out great ventures' – that is, it makes it possible to engage in large investments. Therefore, the two great contributions of maritime insurance are the distribution of risk and the encouragement of investments.[76]

---

[75] *Eugenio Larruaga Boneto*, Memorias políticas y económicas sobre los frutos, comercio, fábricas y minas de España: con inclusión de los reales decretos, órdenes, cédulas, aranceles y ordenanzas expedidas para su gobierno y fomento (Madrid 1787–1800), vol. 28, 197–297 and vol. 29, 1–84.

[76] Tortella quotes a memorandum written in the eighteenth century by the Cadiz merchant Juan Mora y Morales and submitted to the Board of Directors of Insurance Companies, Carriers and Shipowners of Cadiz in 1786: *Gabriel Tortella Casares*, Introducción, in: idem (ed.), Historia del seguro en España (2014), 21–45, 21.

Managing Shipping Risk: General Average and Marine Insurance in Early Modern Genoa

By *Luisa Piccinno* and *Antonio Iodice*[*]

A. Insurance and general average in Genoa's regulations: two parallel approaches to shipping risk management

The concept of risk acquires different meanings depending on the context and it tends to change over time. In Western culture, it is associated with some sort of 'philosophy of the limit' linked to reaching or bringing under control certain conditions likely to cause difficulties and problems.[1] In ancient times, it was identified with fate, mysterious destiny, and natural danger; in other words, no circumstance that human action could actually challenge. Only in the late medieval age, with the growth of trade, did *risicum* – intended as a fortuitous event – become an element that businessmen would take into account and protect themselves against, in order to preserve the profitability of their investments. It is in this framework, and more specifically in maritime transport, that insurance was first developed, as a tool transferring voyage risk, in part or in full, to third parties against payment of a premium.[2]

---

[*] Luisa Piccinno wrote sections A and B, Antonio Iodice wrote section C, while both authors wrote sections D and E jointly. The research for this essay was conducted thanks to the funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme, ERC Grant agreement No. 724544: AveTransRisk. Average – Transaction Costs and Risk Management during the First Globalization (Sixteenth–Eighteenth Centuries).

[1] *Luca Proietti*, Il rischio nel governo delle organizzazioni imprenditoriali tra calcolo e arte (2008), 57.

[2] See *Vito Piergiovanni*, Le assicurazioni marittime, in: idem, Norme, scienza e pratica giuridica tra Genova e l'Occidente medievale e moderno, vol. 2 (2012), 869–882; *idem*, L'Italia e le assicurazioni nel secolo XIX, in: ibid., 827–868. Some of the classic references on this topic are *Enrico Bensa*, Il contratto di assicurazione nel medio evo (1884); *Louis-*

However, within maritime commerce, there is another institution, general average, with much older origins, and designed to better cope with the perils involved with maritime adventure. Its function could be defined as complementary to insurance. As illustrated later, its general principles date back to Roman times. Its objective is to share the risks associated with sea transport proportionally among all the stakeholders in the adventure, in certain circumstances. In proportion to the capital that they have invested, the stakeholders in the maritime adventure will share any losses resulting from a voluntary action by the ship's master aimed at saving the whole ship.

This work aims to investigate the evolution of general average and insurance regulations and procedures in Genoa, as well as the ways in which they intersected, with a view to fully understanding the mechanisms for managing maritime trade risks from the late Middle Ages to the early modern age. To this end, by using two complementary sources – that is, general average claims and insurance policies – and by cross-referencing some available data sets dating to the period between the end of the sixteenth century and the beginning of the seventeenth century, we will attempt to determine how dangerous the routes connecting the port of Genoa used to be. Finally, we will give some examples to demonstrate how both institutions available to maritime merchants were actually working and complementing each other. From this point of view, Genoa offers a unique vantage point, due to the important role played by its port and its highly dynamic and resourceful businessmen, who succeeded in developing cutting-edge financial instruments, the use of which would quickly spread from Genoa to all the other European markets.[3]

Marine insurance first spread across Tyrrhenian coast cities in the late Middle Ages, and then to the rest of the Mediterranean, following a remarkable growth in trade and financial activities. As to marine insurance regulations, Genoa was one of the most active and innovative cities.[4] Indeed, the local State Archives hold the very first insurance policy known to date: it was drawn up by notary Tommaso Casanova in Genoa on 18 March 1343, although it includes a prior agreement drawn up in Pisa on 20 February. The insurance contract covers, up to 680 gold florins, a cargo of ten bales of cloth, to be carried on the galley 'Santa Catalina', led by Captain Valentino Pinello, from Porto Pisano to an unspecified port of call in Sicily.[5] Conversely, the first marine insurance regulations date back to 1369. They were established by a decree issued by Gabriele Adorno, then

---

Augustin Boiteux, La fortune de mer, le besoin de sécurité et les débuts de l'assurance maritime (1968). On the economic evaluation of the insurance contract, see *Federigo Melis*, Origini e sviluppo dell'assicurazione in Italia (secoli XIV–XVI), vol. 1 (1975).

[3] *Giuseppe Felloni*, Genova e la storia della finanza: una serie di primati? (2005).

[4] See *Vito Piergiovanni*, Assicurazione e finzione, in: idem (n. 2), 1167–1171.

[5] *Giulio Giacchero*, Storia delle assicurazioni marittime (1984), 23, 215.

Doge of the Republic of Genoa, aimed at limiting litigations arising out of bottomry, loan agreements and insurance policies.[6] These disputes were generally provoked by people who would take advantage of the cryptic clauses – actually necessary to avoid the ban on usury imposed by the Church – contained in these agreements, in order to avoid paying up or to carry out frauds. With this decree, any policies underwritten after the accident and those covering foreign ships were declared null and void.[7]

During the fifteenth century, marine insurance became increasingly regulated in all the main European markets. This process went hand in hand with market expansion and continued in the following century. In Genoa, marine insurance developed along two parallel lines. On the one hand, the industry was properly regulated, through the implementation of rules contained in the Barcelona Ordinances (issued between 1435 and 1484), and attached as an Annex to the *Consolato del Mare* (known as the Customs of the Sea). They governed the forms and effects of insurance policies, while establishing specific procedures to settle disputes.[8] On the other hand, in order to cope with traffic expansion and a parallel growth in insurance demand, the industry was being liberalised, responding to the demands of shipowners, merchants and brokers. The ban on the insurance of foreign vessels and cargoes was formally lifted in Genoa in January 1408 – more than thirty years before Florence – while the prohibition to insure vessels bound for the Strait of Gibraltar still remained in force. However, even the latter ban was lifted only a few years later, most probably around 1420.[9]

Sometime in the mid-fifteenth century – this time following Florence's lead – the use of brokers and *apodisie* became popular practice in Genoa too, although notaries were still employed in some cases. Also, as early as at the end of the fourteenth century, insurance contracts had to be recorded in a public register and a tax amounting to 0.5% of the insured value was levied on them. The insured had to pay for this tax and, according to a law enacted in 1434, the broker was directly responsible for fulfilling this obligation on behalf of the insured. It was

---

[6] 'Contra allegantes quod cambia et assecuramenta facta quovicumque coum scriptura, vel sine, sint illicita et usuraia', issued on 22 October 1369, reproduced in *Bensa* (n. 2), 149–151.

[7] *Luisa Piccinno*, Genoa, 1340–1620: early development of marine insurance, in: Adrian B. Leonard (ed.), Marine insurance. Origins and institutions, 1300–1850 (2016), 25–46, 33 f.

[8] *Andrea Addobbati*, Italy 1500–1800: cooperation and competition, in: Leonard (n. 7), 47–78, 49.

[9] However, this ban did not seem to have a protectionist aim. It was intended to protect Genoese businessmen from the risks linked to the difficulties of finding information about sailing in such distant areas, which at the time were still poorly connected with the Mediterranean basin, see *Melis* (n. 2), 166; *Giacchero* (n. 5), 33 f., 218 f.

a modest tax, which, however, kept rising over time up to 1.5% in 1490. About a century later, it was calculated on the paid premium.[10]

Further, in the same period, standard forms with set wordings were gradually developed for insurance contracts, where the blank spaces had to be filled in with key information: name of the insured; name and type of vessel; quantity or value of the goods; port of loading and unloading; and insurance premium due. The insurance policy would also specify the names of the insurers with the amounts they had underwritten, and the premium percentage due to each of them. It was then endorsed by the broker – who had put the parties in contact, and would also sign the contract – and by payment of a *gabella* (a fixed duty). As to the risks covered by the policy, the common practice of adding the *ad florentinam* clause would indicate the maximum possible extent of cover, which essentially included every possible event, beyond the traditional cases of shipwreck or capture by pirates.[11] For example, a deed drawn up by Notary Damiano Pastine on 5 November 1459 concerning a shipment of alum from Genoa to Barcelona specified the following:[12]

> 'Et intelligatur assecurantes currere rixicum ad florentinam, ita quod teneantur de guasto, marcido, furto, manchamento, ribaldaria patroni, etiam si mutasset viagium et de represaliis et in omnibus et per omnia pro ut obligentur assecuratores ad florentinam.'
>
> 'And it is established that the insurers run the risk after the Florentine [way], so that they are liable for damages, rotting, theft, disappearance, the patron's ribaldry, also if he changed voyage, and for reprisals. And the insurers are obliged in all things and through all things after the Florentine [way].'

For the first time ever, in this policy, the premium to be paid was clearly mentioned: it amounted to 4% of the insured value of 1,223.5 *fiorini*. The policy was underwritten by as many as 22 insurers: they were mostly members of Genoa's aristocracy – Spinola, Grimaldi, Doria, Imperiale, Negrone, Cattaneo – but also businessmen for whom insurance was a way to employ their capital and diversify their investments. In fact, they were not only working as insurers, but also as merchants and shipowners. They were thus involved in different business sectors, through which they managed to accumulate huge fortunes and become leading players in the following century, when they ended up being the main financiers of the Spanish Crown.[13] At this point, however, it should be pointed out that the rules in force failed to mention any insurance coverage in case of general average. No evidence found so far has succeeded in shedding light upon this

[10] *Giacchero* (n. 5), 119 f.
[11] *Giacchero* (n. 5), 33 f.
[12] *Melis* (n. 2), 14.
[13] *Giacchero* (n. 5), 36, 74.

matter. However, based on regulations that were enforced in the following century, it is fair to assume that the parties were left free to add general average to the list of risks covered by the policy.

General average, as is well known, has much older origins than marine insurance.[14] Since the late Middle Ages, general average was being increasingly regulated in Genoa, well beyond the mere acceptance of its tenets as set out in the aforementioned *Consolato del Mare*.[15] The first rules governing general average found so far date back to 1316. They are included in the Statutes for the Colony of Pera, a small Genoese possession on the Black Sea, and they are one of the oldest body of laws of the Republic of Genoa[16]. In the fifth book, setting the rules of maritime commerce, there are also two chapters on this topic: one contains the provisions for loading any 'goods' that were not suitable for being stacked on the upper deck; the other, in case of danger to the ship, covers the jettison of the cargo, which could be undertaken provided that all the merchants on board have authorised it.[17] The same chapters, partially reworded but with unchanged content, are found about a century later in the Statutes of the *Officium Gazariae*, the Court of Genoa with specific jurisdiction on maritime issues.[18]

---

[14] The Rhodians were the first to formulate and apply the principles of general average, presumably already known by the Greeks. These principles were later accepted by Roman law, albeit partially, in the Lex Rodia de jactu. For a detailed analysis of the origins of this institution, see *Alfredo Antonini*, Atto d'avaria comune e contribuzione alle avarie comuni dall'antico diritto dei Rodii, al Libro del Consolato del Mare, all'età moderna, in: Paolo Alberini et al. (eds.), Tradizione giuridico-marittima del Mediterraneo tra storia e attualità (2006), 245–276.

[15] In many editions of the Book of the Consulate, both manuscripts and printed, there is an appendix reported also by the jurist Giuseppe Lorenzo Maria Casaregi, according to which the chapters of the Consulate were accepted in Genoa in 1186 – that is, more than three centuries before its actual publication. Such a circumstance makes this statement unreliable. It should also be noted that the first Italian edition of the Consulate dates back to 1479. See *Giuseppe Maria Casaregi*, Il Consolato del Mare, in: idem, Discursus Legales de Commercio, vol. 3 (Venice 1740), 59; *Lorenzo Tanzini*, Le prime edizioni a stampa in italiano del libro del consolato del mare, in: Rossana Martorelli (ed.), Itinerando. Senza confini dalla preistoria ad oggi. Studi in ricordo di Roberto Coroneo (2015), 965–976, 967.

[16] On the administration of the Genoese territories in this area see *Carlo Taviani*, The Genoese Casa di San Giorgio as a micro-economic and territorial nodal system, in: Wim Blockmans et al. (eds.), The Routledge Handbook of Maritime Trade around Europe 1300–1600: Commercial Networks and Urban Autonomy (2017), 177–191, 185. On the first Genoese statutes, see *Vito Piergiovanni*, Gli statuti civili e criminali di Genova nel Medioevo. La tradizione manoscritta e le edizioni (1980).

[17] CCXV. De Rebus Positis in Navi Super Cohpertam Emendandis; CCXXXI. De iactu emendando facto de voluntate maioris partis mercatorum. These statutes are published in *Vincenzo Promis*, Statuti della Colonia Genovese di Pera, (1870) 11 Miscellanea di Storia Italiana 513–780, 752.

[18] These chapters appear in both the 1403 and the 1441 editions. VIII. De non carrigando in coperta, nisi ut supra; XCVIII. De jactis et avariis factis de voluntate majoris

B. The need for consistent regulations and the 1589 Civil Statutes

In the late Middle Ages, the regulations enforced for marine insurance and general average – both key institutions for risk management in maritime trade – seem to follow two parallel paths, with no apparent points of contact. However, the situation changed in the sixteenth century. Since the beginning of the early modern age, maritime traffic was growing significantly in terms of both route expansion and increasing shipment volumes, coupled, since the end of the sixteenth century, with an increasing number of foreign carriers calling at Mediterranean ports. This is most probably the reason why Genoese authorities decided to restrict customary practices and enforce rules governing the relationship between insurance and general average.

Indeed, the great freedom afforded to contracting parties and the lack of any specific regulation were at the root of some disputes that erupted around the middle of the sixteenth century. They were reported in the treatise *De Mercatura decisiones et tractatus varii*, published in 1622 containing some judgments by the Civil Rota of Genoa, which had jurisdiction on all civil cases worth more than 100 Genoese *lire*.[19] One of these judgments, for example, concerned the acceptance of the appeal filed by the insurers Agostino Lomellino, Stefano Pinelli and partners against Captain Lorenzo Riccio following the jettison of some goods, hence a claim that can be classified as general average (*decisio* CXXIX). The decision stated explicitly that, in the event of jettison, the insurers were not to be held liable for damage to the ship's equipment, the crew's property or the cargo on board. Therefore, they were obliged to pay for any type of damage covered by the policy *excepto iactu et avaria*. Further, this ruling was not aligned with those issued by the Rota in the previous years, which it clearly overturned. Obviously enough, because of ambiguous regulations on this issue, the judges were allowed a wide margin of discretion.[20]

---

partis mercatorum, see *Jean-Marie Pardessus*, Collection des lois maritimes antérieures au XVIII siècle, vol. 4 (1837), 458–524. On the Statutes, see *Mario Chiaudano*, Manoscritti ed edizioni degli statuti dell''Officium Gazarie civitatis Ianue', in: Studi di storia e diritto in onore di Arrigo Solmi, vol. 2 (1941), 443–464. Following the reforms promoted by Andrea Doria in 1528, this magistracy was replaced by the Conservatori del Mare. On this institution and its functioning, see *Manlio Calegari*, Patroni di mare e magistrature marittime: i Conservatores Navium, (1970) 2(1) Miscellanea Storica Ligure 57–91, 60; *Luisa Piccinno*, Economia marittima e operatività portuale, Genova, secc. XVII–XIX (2000), 75–76.

[19] De mercatura decisiones et tractatus varii (Cologne 1622). This book contained also three treatises by Benvenuto Stracca and his name appears on the cover. On Stracca, see *Gilberto Piccinini et al.* (eds.), Benvenuto Straccha. Ex antiquitate renascor (2013); *Luigi Franchi*, Benvenuto Stracca giureconsulto anconitano del secolo XVI (1975).

[20] The first point in this judgment's argumentation declares that 'Ad remotionem antecedentis sequitur remotio subsequentu', in: De mercatura (n. 19), 245. This judgment

By the beginning of the early modern age, marine insurance was already fully established. The rules governing its application, while based on common tenets, tended to vary from place to place and follow mercantile practice. From a legal point of view, Genoa was characterised by considerable freedom left to insurance parties, and by streamlined procedures. However, throughout the sixteenth century, there was consistent development of case law which, with its opinions and interpretations, contributed to a more unitary view of the principles and rules governing marine insurance.[21] In this period, an administrative and institutional reorganisation of the Republic of Genoa took place. Promoted by Andrea Doria, it culminated in 1528 with the *Reformationes novae* and the *Leges novae* in 1576. The long preparatory phase of the new Civil Statutes began in 1551 and ended only in December 1588, with their promulgation decree and subsequent publication and entry into force in June of the following year.[22] In general, the Republic's new body of laws contained many references to the preceding reforms by Andrea Doria. However, in the maritime and commercial field it builds on much older rules, dating back to the 1413 Statutes,[23] with a clear view to ensuring continuity in an area traditionally important to the economic interests of the Genoese ruling class – the businessmen who invested their capital in maritime commerce and in its many related businesses.

The new Statutes, as well as their subsequent editions translated into Italian and published without significant changes in the following century, devoted a great deal of space to both general average and marine insurance.[24] More exactly,

---

is also included in the collection of decisions of the Rota published in 1582: Decisiones Rotae Genuae De Mercatura et Pertinentibus ad eam (Venice 1582), dec. CXXVIIII f. 194r–194v (Assecurator non obligatus ad iactum teneturramen ad naula rerum iactarum). On the decisive role played by the judgments of the courts of the states of the Ancien Régime as a primary source of regulation of legal disputes, see *Gino Gorla*, Civilian judicial decisions: an historical account of Italian style, (1970) 44 Tulane Law Review 740–749; *Mario Sbriccoli* and *Antonella Bettoni* (eds.), Grandi tribunali e rote nell'Italia dell'Antico Regime (1993); *Cesare Maria Moschetti*, Caso fortuito, trasporto marittimo e assicurazione nella giurisprudenza napoletana del Seicento (1994); *Italo Birocchi*, Alla ricerca dell'ordine: fonti e cultura giuridica nell'età moderna (2002); *Annamaria Monti*, Iudicare tamquam deus: I modi della giustizia senatoria nel ducato di Milano tra Cinque e Seicento (2003); *Alain Wijffels* and *Remco van Rhee* (eds.), European supreme courts: a portrait through history (2013).

[21] See *Vito Piergiovanni*, The Rise of the Genoese Civil Rota in the XVIth Century: The 'Decisiones de Mercatura' Concerning Insurance, in: idem (n. 2), 915–932.

[22] Biblioteca Universitaria Genova (BUG), ms. C. III. 13, Statutorum civilium Reipublicae Genuensis, 1589.

[23] Attached to these statutes was also the Liber Gazariae, one of the few collections of laws preceding the sixteenth-century statutes, see *Rodolfo Savelli*, Statuti e amministrazione della giustizia a Genova nel Cinquecento, (2002) 110 Quaderni Storici 347–377, 362 f.

[24] As Savelli points out, 'a Genova si stampavano e si ristampavano gli Statuti mentre sembra esservi stata una minore attenzione per le leggi' ('in Genoa, the Statutes were

as far as general average is concerned, Chapter 9 of the first Book regulates the work of the *Ufficio dei Calcolatori*: like modern-day average adjusters, they were in charge of calculating how the expenses and damages accepted during the average procedure had to be shared among all the stakeholders in the maritime adventure. This office belonged to the Magistracy of the *Conservatori del Mare*, established in 1528 with specific jurisdiction over any maritime issue, and therefore also on general average. Additional rules were included in the fourth Book at Chapter 16, dedicated to the rules governing jettison: namely, the procedure a shipmaster or *patronus* was required to follow so that the cargo sacrificed for the common salvation could be classified as general average and the shipmaster relieved of any liability.[25] The following chapter was dedicated to insurance, thus confirming the very close connection between these two institutions[26] – a connection still visible today.

The statutory rules governing insurance in Genoa were essentially an organic collection of previously issued laws, similar to what happened to the *Statuti di Sicurtà* enacted in Florence in 1524,[27] and which shared some fundamental principles with the Genoese laws. While not particularly innovative, the Florentine *Statuti di Sicurtà* were the first systematic body of laws on this specific matter. This way, they became a model for all the other laws enacted on this subject in all major European markets. First, they required all parties to the insurance contract to use a standard form with blank fields to be filed with all variable elements, that is: the name of the insured; all the information necessary to identify the assets exposed to danger and assess their value; the voyage; and the name of the ship and of the shipmaster. It was also possible to include an *in quovis* clause,[28] whereby the name of the vessel employed could be omitted, as well as to employ the generic term 'merchandise' to avoid providing specific description

printed and reprinted while the government seemed to pay less attention to the laws'). Save for minor changes, the Civil Statutes remained substantially unchanged until the end of the eighteenth century. The last edition was published in 1787, see *Rodolfo Savelli* (ed.), Repertorio degli statuti della Liguria (XII–XVIII secc.) (2003), 145, 150.

[25] Book I, Chapter 11. De' calcolatori e ufficio loro; Book IV, Chapter 16. Del getto, e forme che si devono tenere in quello, in BUG, ms. C. III. 13, Statutorum civilium Reipublicae Genuensis, 1589, 19 f., 154–160.

[26] Book IV, Chapter XVII. De Securitatibus, in BUG, ms. C. III. 13, Statutorum civilium Reipublicae Genuensis, 1589, 158–160.

[27] The text of the Florentine Statutes can be found in *Ascanio Baldasseroni*, Trattato delle assicurazioni marittime, vol. 3 (Florence 1786), 500–515; see also, by the same author, the second edition of his work and, in particular, *idem*, Collezione delle leggi costituzioni ed usi delle principali piazze di commercio d'Europa per il regolamento delle assicurazioni cambi ed avarie, vol. 5 (1804), 238–248. See *Addobbati* (n. 8), 47–78.

[28] On the application of this clause, already in use at the beginning of the sixteenth century, see *Gian Savino Pene Vidari*, Il contratto d'assicurazione nell'età moderna (1975), 255–257.

of the insured cargo.[29] As already stated, the use of standard insurance forms was already common in Genoa at that time. Yet, they were not included in the Chapter on *Sigortà*, neither in the 1589 Civil Statutes of the Republic of Genoa, nor in its subsequent 1613 Italian edition.[30] As shown below, both the use of the *in quovis* clause and the practice of insuring cargoes without specifying their composition were commonplace. This freedom left to the contracting parties allowed them to operate in remote places, as well as in situations where it would have been difficult to have all the information on the type of shipment and, consequently, on the specific object of the insurance.

As to the scope of the insurance cover, the Florentine Statutes listed the events that would entitle the insured to be indemnified, i.e., 'risks that may occur from all sea-going hazards: fire, jettison, confiscation, plunder by friends or foes, as well as any other conceivable chance, danger, fortune, disaster, impediment or accident, which may befall including barratry on the part of the shipmaster'. Regarding its duration, the cover was valid until all cargo was fully unloaded.[31] The insurer was required to pay within two months following a claim, or in any case after six months had passed without any information on the outcome of the voyage.[32] Conversely, in the Genoese Statutes there was no list of insured risks: instead, they focused on the distribution of damages arising from general average. In this regard, Chapter 17 *Delle Sigortà* states:[33]

> 'Se gli assicuratori con l'assicurato, sopra l'infrascritte cose, non havranno fatto alcun patto lecito, siano tenuti del getto fatto, e provato secondo la forma degli statuti, ancora siano tenuti per l'avaria, la qual è tutto il danno, il quale segue per caso fortuito, ò accade nel naviglio, con l'inventario, ò nelle cose assicurate, oltre le spese, che possono

---

[29] However, the non-disclosure of particularly risky goods, such as perishable goods or goods of high unit value, was a sufficient reason to invalidate the contract. See *Pardessus* (n. 18), 602 f.; *Addobbati* (n. 8), 54.

[30] Archivio di Stato di Genova (ASG), 84.L.IX. 2, Degli statuti civili della serenissima repubblica di Genova, 1613. In his commented edition of the Civil Statutes of the Republic of 1610, Baldasseroni reports a model of the 'Polizza di Sicurtà marittima in Genova'. This model, however, contains references to rules of 1780, which therefore excludes an earlier origin. See *Baldasseroni*, Collezione, vol. 5 (n. 27), 309. This is not the only mistake reported in good faith by Baldasseroni. In the chapter on the jettison, for example, he attributed the quote 'Ed io in anni sessanta di pratiche marittime ho veduti gran quantità di consolati, ma non mi ricordo di averne veduti, che quattro, o cinque fatti per gettito notato giuridicamente alla forma prenarrata, ed in ognun di questi vi è stato da criticare per essere paruti troppo premeditati' to Casaregi, see *Ascanio Baldasseroni*, Trattato delle assicurazioni marittime, vol. 4 (2nd edn., 1803), 60. This passage, however, comes from *Carlo Targa*, Ponderationi sopra la contrattazione marittima (Genoa 1692), 253.

[31] *Baldasseroni*, Collezione, vol. 5 (n. 27), 240.

[32] As pointed out by *Addobbati* (n. 8), 52, in case of litigation there 'was the fundamental mechanism of solve et repete [pay first, fight later]', i.e., insurers could not challenge the claim if they did not settle the amount due beforehand.

[33] ASG, 84.L.IX. 2, Degli statuti civili della serenissima repubblica di Genova, 1613, 142 f.

occorrere ancorché egli non segua; talmente, che si possa dire di caso sinistro esser seguito sopra il tutto; e ciò per la rata, ò del getto, o dell'avaria che spetta alla cosa assicurata.'

'Unless otherwise legitimately agreed between the insurers and the assured, the insurers are responsible for jettison, proved according to the Statutes. The insurers will also be responsible for average, which is any damage arising from a fortuitous mishap, which may involve the ship with its equipment, or the insured things, as well as the expenses which may occur even if no damage ensued, so long as it can be said that the mishap occurred over the whole. Payment will be done pro rata, whether of the jettison or of the average, which is due on the insured thing.'

Their contents, even if more detailed, are quite similar to the statutory chapter mentioned by Ascanio Baldasseroni, and dating back to a – most probably lost – 1610 edition:[34]

'Se gli assicuratori non vengono ad un accomodamento con gli assicurati, conforme alla pratica accordata, saranno obbligati a bonificare a seconda degli Statuti, il getto che è stato fatto, e che può provarsi, come anche l'avaria (nella quale sono inclusi tutti i danni provenienti da qualunque sinistro, che accada al bastimento, sue appartenenze, o alle mercanzie assicurate) oltre le spese, che appariranno cagionate da tale sinistro, se può dimostrarsi che le medesime furono sopra l'intiero in generale, qual proporzione che cade sulla parte delle robe assicurate, sia di getto di mare, o di avaria.'

'Unless the insurers will find a composition with the insured, after the agreed practice, they will be bound to make good, on the basis of the Statutes, the jettison effected and which can be proved, as well as the average (in which all damages arising from any mishap befalling the ship, its appurtenances, or the insured merchandise are included) and the expenses caused by such mishap, if it can be proved that such expenses were done on the whole, as the proportion falling on the insured things, both for jettison and for average.'

Therefore, for the first time, it was expressly provided that, unless otherwise agreed, the insurance would cover any loss and costs arising from general average and that the insurer would then be liable to indemnify the insured for his insurance share, properly calculated. It should be pointed out that the *Conservatori del Mare*, with jurisdiction on this matter, had first to approve the general average claim report. They would then issue instructions to adjust the average only if the jettison had been carried out in compliance with the applicable regulations. The same rule would apply to any other loss or expenses deriving from actions by the shipmaster or by the shipowner aimed at ensuring that the shipment could be successfully delivered. Therefore, under the new laws of the Republic of Genoa, insurance and general average were finally formalised as two mutually complementary instruments to manage maritime shipping risks.

[34] *Baldasseroni*, Collezione, vol. 5 (n. 27), 307. No trace of this edition of the Civil Statutes actually appears in the repertories, either because it was lost in the course of time or, most likely, because of a wrong date reported by Baldasseroni. See *Savelli* (n. 24), 304 f.

C. Routes and navigation risks: the general average claim reports

To better understand the great attention devoted by the Genoese government to institutional instruments aimed at transferring or sharing maritime risk, it is worth analysing the main factors determining the risk itself. By cross-checking data from two important and, in part, complementary documentary sources, it is possible to reconstruct the level of danger involved in some maritime routes and the key features of traffic from/to the port of Genoa between the sixteenth and seventeenth centuries. These sources are the general average claim reports, called *consolati/testimoniali* (for simplicity's sake, henceforth they will be called *consolati*), and the documents relating to insurance operations by some Genoese businessmen. In particular, as far as the *consolati* are concerned, the analysis is based on the processed information from the database produced under the ERC AveTransRisk project. The period under examination stretches from 1598 to 1600, for which there are 127 *consolati* filed with the Magistrate of the *Conservatori del Mare* in Genoa.[35]

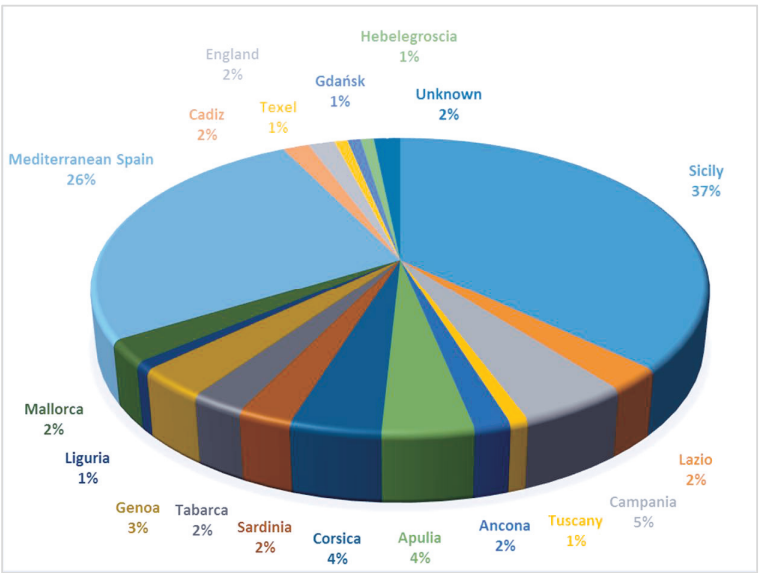
A general average procedure could be initiated by reporting the event in a special form – the *consolato* – to a magistrate.[36] Under the provisions enforced by the *Consolato del Mare* and applicable in Genoa, when a vessel suffered a loss or made a jettison, the shipmaster had to call at the port closest to the place where the mishap occurred, report about the events that had taken place during the voyage and have them formally recorded. Based on the data available from the *consolati*, it is possible to gather detailed information about several variables in the voyages where Genoa was a port of transit or, more frequently, its final destination: namely, the port of origin; the route followed and the site where the general average had occurred; the port where the claim report (*consolato*) had been submitted; and any seasonality in reported casualties along the various trade routes. This analysis also provides useful information about the actual danger of specific trade routes followed by the ships calling at Genoa and the risks that they were willing to run. As indicated below, evidence of this is collected by analysing insurance premium trends in the period under examination based on some accounting books of Genoese underwriters operating between 1575 and 1624.

---

[35] ASG, Notai Giudiziari, 634–636. In these documents, there are both general averages, which allocate the damage between the ship's hull, freight and goods, and particular averages, concerning only the owners of any damaged or lost goods.

[36] *Gerolamo Boccardo*, Dizionario universale di economia politica e di commercio, vol. 1 (2nd edn., 1875), 559. In other ports, such as Venice, for example, this document was more simply called Prova di Fortuna (sea protest), see *Walter Panciera*, Testimoniali veneziani di avaria marittima (1735–1764), (2016) 38 Mediterranea, ricerche storiche 517–568.

Chart 1. Ports of departure, 1598–1600[37]



First, to have an idea of the routes to and from the port of Genoa, it is possible to analyse the ports of departure of the ships that filed general average claim reports with the Genoese authorities in the period from 1598 to 1600. During this period, on average, there were approximately 76 vessels with a capacity of more than 300 *salme* calling at the port of Genoa every year. Thus, it can be inferred that the ships reporting general average losses accounted for a significant share of the total number of ships arriving in Genoa.[38]

Although there were many ports of origin, two main routes can be identified from Chart 1. The first one – the Sicily-Genoa route – accounted for almost one-third of all the ships calling at Genoa at the end of the sixteenth century. The itinerary from Sicily to Liguria seems to have been quite fraught with dangers – both along the coasts and in the open sea – that did not strictly depend on the type of vessel. The ships would normally sail along the eastern coast of the Tyrrhenian Sea carrying wheat, oil, wine and raw silk. They might have called at Naples, Gaeta or Civitavecchia. Ships from Sicily would seldom sail along the

[37] Source: ASG, Notai Giudiziari, 634–636. Processing based on the documents present in 'Voyages Datasets 1598–1600', preliminary version of the AveTransRisk database.

[38] *Edoardo Grendi*, I nordici e il traffico del porto di Genova: 1590–1666, (1971) 83 Rivista Storica Italiana 23–71, 55. One salma in the sixteenth century was equal to two mine and four cantari, about 275 litres. On units of measurement and capacity of ships, see *Luciana Gatti*, Navi e cantieri della repubblica di Genova (secoli XVI–XVIII) (1999), 75–86.

coasts of Sardinia or Corsica, or call at their ports. Quite a wide range of vessels were employed – such as *pinchi*, *tartane*, galleons, *leudi*, as well as other types of craft with a tonnage between 30 and 300 tons. Based on the claim adjustments attached to some of the *consolati* with detailed cargo information, we learn that Palermo and Messina specialised in the silk trade, while Sciacca and Girgenti traded mainly in wheat.[39] In particular, wheat was consistently transported on board the vessels that we have analysed because of a chronic scarcity of grain in Liguria.[40] Ships loaded with grain or other foodstuffs calling at the port of Genoa accounted for a significant percentage of its total traffic.[41] Accordingly, the manufacturing and processing industries in the Republic of Genoa also depended on the trends of port traffic and maritime commerce.[42]

During the years under review, apart from the North-South Tyrrhenian routes, maritime routes with Spain – accounting for 26% of all traffic – ranked second in terms of traffic flow. Here, too, there were all types of craft: ships; galleons; boats; and polacres. Mostly wool, wine, salt and leather were shipped along these routes. In some cases, the ships sailing along the routes from Spain were coming from places farther away, even from Atlantic ports beyond Gibraltar. Usually, they loaded their cargoes in the ports of south-eastern Spain, mainly Alicante, Cartagena, Cadaquez and Barcelona. They would then sail along the Languedoc coast or head for the Balearic Islands, where they could load more goods in Ibiza or Mallorca, before continuing their journey to the islands of Hyères, and sailing along the Provençal and Ligurian coast to Genoa. The latter port was not always their final destination: in some cases, according to information contained in the bills of lading for the goods on board, the ships would continue their voyage to Leghorn, or as far down to Messina.

---

[39] On the need for grain and raw materials in Genoa for local production, see *Paola Massa Piergiovanni*, Lineamenti di organizzazione economica in uno stato preindustriale. La repubblica di Genova (1995), 27; *Geltrude Macrì*, Il grano di Palermo fra '500 e '600: prerogative e reti d'interesse, (2010) 7 Mediterranea, ricerche storiche 87–110.

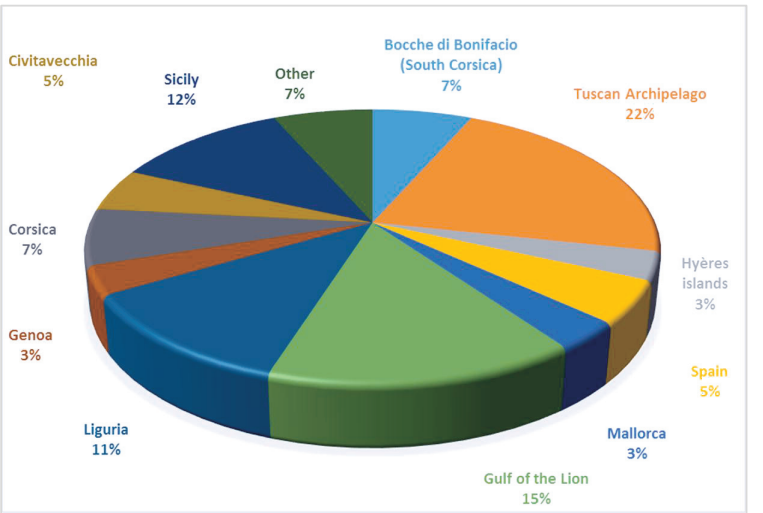
[40] Giuseppe Felloni hypothesised the presence of about 51,150 inhabitants in Genoa in 1531, rising to 60,529 in 1597 and 66,903 in 1608, see *Giuseppe Felloni*, Popolazione e case a Genova nel 1531–1535, in: idem (ed.), Scritto di storia economica (1998), 1199–1215. The local production was insufficient for the city of Genoa and it was in deficit for about 60% of the total in the rest of the republic, see *Edoardo Grendi*, Genova alla metà del Cinquecento: una politica del grano?, (1970) 5/13 Quaderni Storici 106–160, 113. According to an estimate by Grendi on the period before the 'Nordic invasion', for example for the year 1535, 95.9% of wheat imported to Genoa came from Sicily, see *idem*, La repubblica aristocratica dei Genovesi. Politica, carità e commercio fra Cinque e Seicento (1987), 186.

[41] Cf. *Brigitte Marin* and *Catherine Virlouvet* (eds.), Nourrir les cités de Méditerranée, Antiquité-Temps modernes (2004); *Caroline Le Mao* and *Philippe Meyzie* (eds.), L'approvisionnement des villes portuaires en Europe du XVIe siècle à nos jours (2011).

[42] *Massa Piergiovanni* (n. 39), 27.

The routes and the places where the mishaps took place are described in the *consolati*, often with their exact date and description of any adverse weather conditions that had caused them. With the information provided in the shipmaster's reports – alas, not always sufficiently accurate and detailed – we have been able to geo-locate about 60% of the sites where the maritime casualties had occurred, corresponding to 69 out of 127 reports (Chart 2).

Chart 2. Sites of accidents, 1598–1600[43]



Out of five ships coming from beyond Gibraltar, four were damaged by bad weather in the Mediterranean, while one was attacked by enemies just off the strait. This confirms that these waters were highly dangerous, something that is often underestimated when compared to the Atlantic Ocean navigation. As a matter of fact, according to some statistical investigations carried out by Marcello Berti, strong winds and sudden tides and currents could pose unpredictable risks and hazards in the Mediterranean, perhaps even greater than those encountered during coastal navigation in the Atlantic Ocean to and from Northern Europe.[44] Storm winds were, irrespective of the season, the Mistral and, sometimes, the Scirocco. The Mistral, for example, can blow at more than 120 kilometres per hour, is dry and deemed to be a stormy wind, especially in Sardinia and Corsica.

[43] Source: ASG, Notai Giudiziari, 634–636. Processing based on the documents present in 'Voyages Datasets 1598–1600', preliminary version of the AveTransRisk database.

[44] *Marcello Berti*, Il rischio nella navigazione commerciale mediterranea nel Seicento: aspetti tecnici e aspetti economici: prime ricerche, in: Salvatore Di Bella (ed.), La rivolta di Messina (1674–1678) e il mondo mediterraneo nella seconda metà del Seicento (1979), 271–332, 285.

Originating from the Rhone valleys and the Gulf of Lion, the Mistral blows on the upper Tyrrhenian Sea and the Ligurian Sea. General average data analysed in Chart 2 also show that events occurring along the coast and near islands and archipelagos – which often have unpredictable effects on currents and winds – accounted for a significant proportion of all losses. According to Marcello Berti's statistical analysis, the places where mishaps occurred were almost always reported along the Mediterranean coasts: depending on wind and sea conditions, every peninsula, every small island and every beach, could pose sudden and unpredictable hazards.[45] In particular, the Tuscan archipelago, the Ligurian Sea and the Sicilian coasts, together with the Gulf of Lion between Spain and southern France, were the most dangerous zones. The Gulf of Lion was considered by contemporaries much bigger than today, in both size and geographic borders: depending on the source, it would extend across the whole area between the Balearic Islands, Corsica and part of Sardinia.

Strong or unforeseen storms were the most common hazard at sea. Bad weather was the cause of 90% of the claim reports filed by shipmasters between 1598 and 1600 (the remaining 10% were due to issues occurring in port or to pirate or enemy attacks).[46] Furthermore, even general average claims relating to accidents occurred to the ship when in port, although generally attributable to inadequate harbour protection facilities, were primarily caused by extraordinary weather conditions and fires on board, or due to collisions with other ships.[47] The situation is much more ambiguous in cases of pirate or enemy attacks. Goods robbed by pirates were not specified in the general average forms. Thus, for all these cases, there were only the shipmasters' reports.[48] Even then, however, shipmasters often tried to put down the facts in such a way as to underline, as much as possible, the 'voluntary' nature of the loss, for example by reporting that they had sacrificed part of the cargo by giving it 'voluntarily' to the pirates in order to save the rest of the goods.

Another element worth analysing is the place where the *consolati* were written down. Theoretically, in case of general average, the shipmaster was supposed to file a report in the first port that his vessel would call at after the mishap. The document would then be sealed by the authorities in charge and delivered to the

[45] *Berti* (n. 44), 285

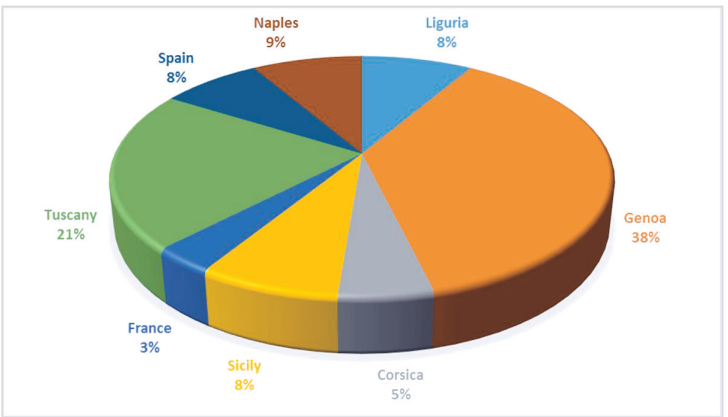
[46] ASG, Notai Giudiziari, 634–636. Processing based on the documents in 'Voyages Datasets 1598–1600', preliminary version of the AveTransRisk database.

[47] These in turn could give rise to complex and multiple cases of damage between different ships, see *Casaregi*, vol. 1 (n. 15), 163.

[48] ASG, Testimoniali all'estero segreti, 277–301 (1635–1796). These folders were largely drawn up to record pirate attacks, shipwrecks and other types of accident not necessarily related to general average. The term 'segreti', in fact, as well as the absence of calculations, probably indicates that all these reports were rejected by the magistracy and the dossiers were never opened.

shipmaster. If the voyage was scheduled to continue to Genoa, the shipmaster would then file the report with the Magistracy of the *Conservatori del Mare*. Under the general average laws in force in the Republic of Genoa, the shipmaster could not stop anywhere else or unload or load any other goods before filing the *consolato* with the *Conservatori del Mare* in Genoa. However, intermediate stops might have been required to repair the ship or to wait out the storm, thus extending the voyage time. In addition, when having to stop at smaller ports, finding a notary or officer to write down the general average report as required could have led to further delays. This may perhaps explain why, as can be seen from Chart 3, more than a third of the *consolati* examined were written directly in Genoa, although in many cases the general average itself had occurred far away from Ligurian waters. Indeed, if we match these data with what is observed in Chart 2, only 14% of the events concern mishaps occurring in the waters of the Republic of Genoa – excluding Corsica, which at the time was ruled by the Genoese but was more than 150 miles from the port of Genoa, the capital city.

Chart 3. Places where the *consolati* were drafted, 1598–1600[49]



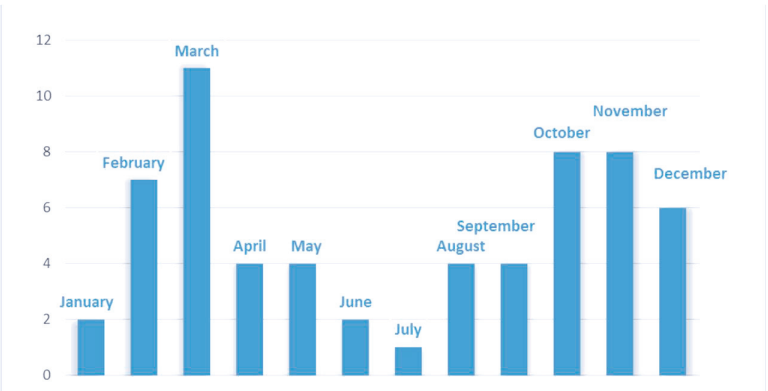
On the other hand, the great number of *consolati* drawn up in Tuscany (21%), particularly in Leghorn, can be explained by two other factors: the highly dangerous Tuscan archipelago, as already observed, given the high proportion of mishaps that occurred in these waters; and the similarities in both regulations and the way that averages were dealt with between Leghorn and Genoa. Moreover, in Leghorn there was a Genoese ambassador, who would help Ligurian shipmasters write the *consolati* and send a copy to the capital. Any differences

[49] Source: ASG, Notai Giudiziari, 634–636. Processing based on the documents present in 'Voyages Datasets 1598–1600', preliminary version of the AveTransRisk database.

between Genoa and Leghorn in terms of efficiency, costs and speed in handling the formalities and settling the claims will be assessed in forthcoming works.[50]

The investigations currently underway on the procedures applied in Leghorn have so far confirmed that there was substantial uniformity between the two cities, except for some aspects relating to the way that damages were apportioned. The *consolati* filed with the magistracies in both cities were quite similar in form and content. By analysing available data, is it possible to assume any seasonal trends in navigation hazards? As already pointed out by Fernand Braudel and confirmed by Berti, winter navigation was frequently carried out, despite its many hazards and challenges.[51] As observed in the examined documents, shipmasters would often decide to sail off even under adverse weather conditions. It would also happen that, after only a few miles, bad weather would force them to return to the port of departure or seek shelter in the nearest bay.

Chart 4. Accidents per month, 1598–1600[52]



As can be seen in Chart 4, maritime accidents occurred more or less throughout the whole year, although they were more frequent in autumn and late winter. This trend would coincide with what Giovanni Ceccarelli demonstrated for the sixteenth and eighteenth centuries, namely with an increase in insurance business

[50] Documents from both Genoa and Leghorn are being included in the database produced under the AveTransRisk project. Common sample years will allow for an appropriate comparison.

[51] *Fernand Braudel*, Il Mediterraneo: lo spazio, gli uomini e le tradizioni (2nd edn., 1997), 41–43; *Berti* (n. 44), 290. Studies are underway on the practice of general average in Leghorn, conducted by Andrea Addobbati and Jake Dyble, in essays soon to be published.

[52] Source: ASG, Notai Giudiziari, 634–636. Processing based on the documents present in 'Voyages Datasets 1598–1600', preliminary version of the AveTransRisk database.

in the winter season.[53] As mentioned above, insurance policies underwritten in Genoa could cover general average losses. Therefore, the small increase in the number of events involving general average during winter should also be reflected in a higher number of policies underwritten during this season.[54] On the basis of the analysis of some Genoese underwriters' businesses between the end of the sixteenth and the beginning of the seventeenth centuries, it would seem that policies and claim settlements were evenly distributed throughout the year, without any significant seasonal differences.[55]

As can be seen in Table 1 below, there was a slight peak in the number of departures between October and April, except for November. This is due to the fact that the sample in question only includes boats that reported general average, and that mishaps would occur more frequently during the winter months. Even so, the data reported show a constant traffic flow across the entire western Mediterranean, in particular the Tyrrhenian Sea, throughout the year. Seasonal variations were generally due to different production rates and to the seasonal nature of certain types of goods, rather than to a voluntary reduction in maritime traffic with a view to reducing the challenges of adverse weather conditions. As mentioned above, Genoa imported food and raw materials for manufacturing all year round. For this reason, its economy could not afford to restrict trade to favourable seasons. What businessmen really needed were the appropriate regulations and contract clauses to cope with the risk.

The various routes followed by the ships calling at the port of Genoa can also be seen from the figures reported in Table 1. The routes from Sicily and Spain (i.e., the two main flows identified so far), reflect the distribution of departures reported in Chart 1. If we consider all the other routes as well, no conclusions can be drawn due to the low number of cases. There are no clear trends as to departures per month, which are spread across most of the year. For example, ships from England would sail in the summer, probably to avoid bad weather

[53] *Giovanni Ceccarelli*, Stime senza probabilità: assicurazione e rischio nella Firenze rinascimentale, (2010) 45/135 Quaderni Storici 651–701, 668 f.; *idem*, Un mercato del rischio. Assicurare e farsi assicurare nella Firenze rinascimentale (2012), 128.

[54] Cfr. *Giovanni Ceccarelli*, The price for risk-taking: marine insurance and probability calculus in the Late Middle Ages, (2007) 3 Journal Électronique des Probabilités et des Statistiques 1–26, 11. See also *Mario Del Treppo*, I mercanti catalani e l'espansione della corona d'Aragona nel secolo XV (1972); *Frank C. Spooner*, Risk at Sea: Amsterdam Insurance and Maritime Europe, 1776–1780 (1983), 200–246.

[55] ASG, Fondo Famiglie, Spinola, 292, 1575–1578, cc. 100–108. In the Adriatic Sea, during the sixteenth century, Venetian law expressly prohibited sailing between 15 November and 20 January. Nevertheless, although referring to the following century, Walter Panciera has shown that 18% of shipmasters heading for Venice sailed from November to April during the years 1735–1764: *Panciera* (n. 36), 549.

conditions across the English Channel. Ships coming from the North could bypass it, usually by sailing off the coast of Scotland across the Irish Channel. The greatest hazard for ships from Northern Europe was the likely presence of ice in the Channel.[56] In this regard, the larger quantity of data currently collected and processed will soon yield more evidence, also from a long-term perspective.[57]

Table 1. Ports of departure per month, 1598–1600[58]

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Sicily	7	7	7	4	3	2	1	2	4	2	2	5
Lazio	-	-	-	1	-	-	1	-	-	-	-	-
Campania	-	-	-	2	2	1	-	-	-	-	1	-
Tuscany	-	1	-	-	-	-	-	-	-	-	-	1
Ancona	1	-	-	-	-	-	-	-	-	1	-	-
Apulia	-	-	1	1	1	1	-	1	-	-	-	-
Corsica	-	2	1	-	-	-	-	-	-	-	2	-
Sardinia	-	1	-	1	-	-	-	-	1	1	-	-
Tabarca	-	-	-	-	-	-	-	-	-	1	-	1
Genoa	-	-	-	1	-	-	-	-	-	1	-	1
Other Ligurian ports	1	-	-	-	-	-	-	-	-	-	-	-
Mallorca	-	-	2	2	-	-	-	-	2	1	-	-
Mediterranean Spain	3	2	1	1	-	-	1	2	2	5	1	3
Cadiz	-	2	-	-	-	-	-	-	-	-	-	-
England	-	-	-	-	-	1	1	-	-	-	-	-
Texel	1	-	-	-	-	-	-	-	-	-	-	-
Gdańsk	-	-	-	-	-	-	-	-	-	1	-	-
Hebelegroscia	-	-	1	-	-	-	-	-	-	-	-	-
Total	13	15	13	13	6	5	4	5	9	13	6	11

D. Routes and navigation hazards: policies of *Sigortá Marittima*

General average allowed the stakeholders in a voyage to share the risks amongst themselves, thus limiting their individual losses in case of accident. Conversely, the insurance market allowed them to transfer the risk to external parties against payment of a premium. However, insurance contracts did not

[56] See *Marcello Berti*, I rischi nella circolazione marittima tra Europa nordica ed Europa mediterranea nel primo trentennio del Seicento ed il caso della seconda guerra anglo-olandese (1665–67), in: Simonetta Cavaciocchi (ed.), Ricchezza del mare ricchezza dal mare: secc.13–18 (2006), 809–839, 811.

[57] For ship arrivals and departures year by year, see *Grendi* (n. 38), 23–71.

[58] Source: ASG, Notai Giudiziari, 634–636. Processing based on the documents present in 'Voyages Datasets 1598–1600', preliminary version of the AveTransRisk database.

cover all journeys, nor all goods carried by sea. Investors in the undertaking would decide whether they should take out an insurance policy after having carefully assessed transport risks, depending on the type of cargo, its value, type of vessel employed and the planned route. They would also consider whether to insure the entire cargo value or only part of it, in order to limit their premium costs and ensure the overall profitability of their shipment.

In the period between the last decades of the sixteenth century and the 1620s, Genoa was still one of the most active insurance markets. Its gradual decline began to manifest itself in 1626–1627, concurrently with the duke of Savoy's military aggression. It then continued in the following decades, due to both a slowdown in merchant activity following a general slump in the Italian economy and increasing competition from nearby Leghorn.[59]

Based on data contained in some accounting books of Genoese businessmen working as insurers in addition to commerce, finance and the manufacturing sector, further information can be obtained on the way that risks used to be assessed and on the dangerous nature of the routes to and from the port of Genoa.[60] More precisely, we have investigated the insurance business operated by Agostino Spinola during the period from 1575 to 1578,[61] by Ottavio Solimano from 1607 to 1609,[62] and by Filippo Sanmichele from 1622 to 1624.[63]

Agostino Spinola's firm diversified its business by investing in trade – especially in wheat – foreign exchange and insurance. In the three-year period that

[59] This slight decline can also be seen in the lower income of the gabella di sicurtà, which dropped from more than 88,000 lire in 1627 to less than 52,000 lire in 1629. It then continued to decline and settled at a lower figure, between 20,000 and 30,000 lire, in the following years. See *Giacchero* (n. 5), 125. On the rise of Leghorn as a thriving commercial and insurance business centre, see *Addobbati* (n. 8), 63.

[60] Starting from the fourteenth century, there was a growing interest in the manufacturing sector followed by an increased production of wool, iron, paper and silk. See *Massa Piergiovanni* (n. 39), 43–69.

[61] ASG, Famiglie, Spinola, 292, 1575–1578. Agostino Spinola is a member of one of the oldest and noblest families in Genoa, actively involved in the political events of the Republic. Agostino was the son of Cristoforo and Tommasina Spinola and married Emilia Grimaldi, who also belonged to another important aristocratic family in Genoa. See *Giovanni Forcheri*, Gli Spinola (1992), 49.

[62] Archivio Storico del Comune di Genova (ASCG), Albergo dei Poveri, 675, 1607–1609. Ottavio Solimano belonged to an ancient Genoese family, which originated from Albenga. Son of Geronimo Solimano and brother of Gio. Giacomo and Gio. Piero, he married Geronima Riccio around 1607. See *Angelo Scorza*, Le famiglie nobili genovesi (1996), 233.

[63] ASCG, Albergo dei Poveri, 670, 1622–1624. Filippo Sanmichele belonged to an ancient and noble family originally from Chiavari. Filippo was the only male son of Bartolomeo Sanmichele. Between 1616 and 1617, he married the noblewoman Placida Frugone. Her father, Pietro Frugone, was Filippo's business partner. See again *Scorza* (n. 62), 219.

we have investigated, he would systematically and constantly carry out his insurance business, underwriting 172 policies in total, typically through brokers. In 79% of cases, they were hull insurance policies; in 3% of cases, hull and freight insurance; and in the remaining 18% of cases, cargo insurance. Some of these policies contained the *in quovis* clause (which, as mentioned above, meant that the name of the ship on which the insured goods travelled was not specified). Of the policies, 74% were underwritten on a voyage basis, while the remainder were time policies, with premiums ranging from a minimum of 1% for one month, to a maximum of 14% for a full year's coverage.

The company's insurance business was quite risky and affected by strong fluctuations, with losses reported at the end of some financial years.[64] The premiums collected in the three-year period totalled 5,202 Genoese *lire*. This amount was fully offset by claim settlement costs, amounting to 6,591 *lire*. Agostino Spinola tried to spread his risk by exclusively underwriting policies for fixed and relatively modest amounts: 400 *lire* in 62% of cases; 800 *lire* in 30% of cases. Larger shares (up to 4,000 *lire*) were underwritten in the remaining 8% of cases. They would generally concern shipments on ships generally deemed to be safer, such as galleys, which accounted for 4% of all policies. Since galleys where military vessels, they were better able to defend themselves or even simply discourage pirate attacks. However, as pointed out by Alberto Tenenti, the risks at sea were by no means lower on galleys than on other ships or galleons.[65] Beyond this basic difference as to the ability of the vessel to fend off attacks, no other risk assessment criteria seem to have been used for different kinds of vessel. Generally speaking, at the time, almost any type of medium-sized vessel could bring its

[64] In early sixteenth-century Florence as well, the profits of the insurers seem to have been modest. A particularly diligent underwriter could not hope to make more than 80 fiorini, at best, in his annual business. If we compare these economic results to those achieved by some trading companies during the same period, which ranged annually between 1,500 and 4,500 fiorini, we could hardly wonder why businessmen did not make insurance their core business at the time. The low profitability of the insurance sector may perhaps help explain its failure to emerge as an activity independent from the much more lucrative commercial, banking and manufacturing ones. See *Ceccarelli* (n. 54), 298. On the profits of trading companies, see *Richard A. Goldthwaite*, The economy of Renaissance Florence (2011), 59 f.

[65] The number of policies covering galleys is small, and the data about these policies cannot be compared with the previous ones on general average (there were no galleys among the ships that submitted a general average claim). Therefore, we decided not to include these cases in our statistical survey, aimed at reconstructing the danger level for the various routes in relation to the premiums.

cargo across the Mediterranean in relatively safe conditions.[66] However, a slight increase in premiums can be seen for smaller boats and ships.

In Agostino Spinola's ledger, 65% of recorded insurance policies referred to journeys to or from Genoa of which 36% of them covered Tyrrhenian routes, thus confirming the figures collected by analysing the ports of origin of the ships reporting general average (see Chart 1). The second main flow, with a 27% share, came from the west. The insurance premiums related to the voyages to and from Genoa (see Table 2 below), as the port of departure or, more frequently, as the final shipment destination, would range between a minimum of 1.25% for the connection route to Leghorn and a maximum of 15% for the roundtrip to Alexandria. Insurance premiums for the routes from Leghorn to Sicily or from Messina towards the Mediterranean Spain were very similar to those that had Genoa as port of departure.[67] In general, premiums for round trips were lower. Further, neither the season nor the type of vessel employed seem to have affected them, except for a slight premium increase in the case of shipments on small vessels. Routes seem to be the main risk factor: not so much distance, but rather the actual course, especially if it involved sailing across stretches of sea, such as those indicated in Chart 2, which were known to be dangerous. For the western routes, premiums were relatively constant with an average of 3% to 4% premium in case of hull insurance. Premium rates in the Tyrrhenian area were more variable and depended on several factors. For example, the average premiums applied for the routes from Sardinia and Corsica were pretty high, between 4% and 6%, perhaps due to the higher risk of piracy and strong currents characterising some sea stretches, such as off the coast of Tuscany or the Strait of Bonifacio. Some outliers are probably due to bad economic conditions, as in the case of some journeys from Sciacca (in southern Sicily), Messina or Cadiz. In the case of Sciacca, premiums averaged 4%, a figure consistent with the premium rates applicable for western routes. It can thus be deemed to be an 'average' premium on the main routes to and from Genoa. On the other hand, much higher average premiums were applied on the Atlantic routes.

---

[66] *Alberto Tenenti*, Assicurazioni genovesi tra Atlantico e Mediterraneo nel decennio 1564–1572, in: Jürgen Schneider (ed.), Wirtschaftskräfte und Wirtschaftswege. Festschrift für Hermann Kellenbenz, vol. 2 (1978), 9–36, 13 f.

[67] For the sake of simplicity, Table 2 shows only the routes to and from Genoa. For further information on other routes covered by Agostino Spinola's insurance business, see ASG, Famiglie, Spinola, 292, 1575–1578.

Table 2. Insurance premium rates for routes from and to Genoa, 1575–1578[68]

Route	Ship		Boat		Other[69]	
Western routes	No.	premium	No.	premium	No.	premium
Palamos	1	4%				
Tortosa	1	3%				
Valencia			1	5%		
Alicante	5	2.75–4%			1	4%
Cartagena	5	3–4%	1	5%		
Algiers			2	5–6%		
Tabarca	1	4%			2	5%
Tabarca – roundtrip	2	8%				
Thyrrhenian routes						
Cagliari					1	4%
Bonifacio					1	6%
Leghorn					1	1.25%
Montalto			1	3%		
Naples			3	4%	1	4%
Sicily	1	3%	1	7%	1	7%
Sciacca	11	3–6%				
Palermo	9	2.5–6%				
Trapani	1	3%				
Messina	7	2–9%				
Eastern routes						
Alexandria	1	8%				
Alexandria roundtrip	2	14–15%	1	14%		
Alexandria-Messina	1	12%				
Atlantic routes						
Canaries			1	12%	1	11%
Cadiz	4	5–9%	1	6%		
Lisbon	1	8%				
England	1	10%				
Antwerp	1	10%				
Mixed routes						
Cadiz-Leghorn-Genoa	2	5–7%	1	8%		
Genoa-Cadiz-Sicily	1	6%				

Of all the policies underwritten by Spinola, general averages account for quite a significant percentage; namely, 27% of the claims followed by average adjustment and settlement. The percentage of settled claims against the total sum insured is highly variable, ranging between 2% and 26%. It depended on the amount of incurred loss, as well as, above all, the general average share adjusted for each assured. In seven out of eight cases examined where payment was made

[68] Source: ASG, Famiglie, Spinola, 292, cc. 100–108.

[69] Galleon, saetta, caravel, ship, in quovis, unknown.

on the basis of a general average, the insurance was made on the hull. Only one policy covered the cargo, for a shipment of sugar from Santo Domingo.

Ottavio Solimano was an insurer working between May 1607 and February 1609. Useful information can be gathered from his ledger, to compare his business with Spinola's, to have an idea about the situation thirty years later. His business is much smaller than Spinola's. Only 11 policies were recorded in his accounting books, covering individual voyages, with either departure from or arrival at the port of Genoa. The risks covered were highly variable, with insured sums ranging between 257 and 6,000 Genoese *lire*. In 73% of the policies the object of the insurance were less than 1,200 *lire* worth. Of the policies (corresponding to six contracts), 55% covered the cargo alone. No general average adjustment was made.

Table 3. Insurance premium rates for routes from and to Genoa, 1607–1609[70]

Route	**Ship**		**Boat**		**Galleon**	
Western routes	No.	premium	No.	premium	No.	premium
Alicante	2	4–6%				
Cartagena	2	6–6.5%				
Cartagena roundtrip	2	8%				
Motril (Spain)					1	10%
Tunis roundtrip			2	8–9%		
Atlantic routes						
Arcipelago (Aegean Sea)	1	13%				
Atlantic routes						
Sanlúcar de Barrameda	1	7.25%				

As shown in Table 3, premiums were slightly higher than those examined in the previous case. This may be partly due to general market trends, but it could also be related to the company's organisation and the type of risk underwritten. In this case, the two years of business basically reported break-even results: collected premiums amounted to 1,002 Genoese *lire*, while settled damages totalled 1,000 *lire*.[71] The lowest premiums were those applied for either hull or cargo separately, although no details are provided about its specific object. So, for example, a 4% rate was applied on 'robe et merci' ('sundries and goods') from Alicante. When the premium for the same route was particularly high, this was due to the higher value of the cargo. For example, for the insurance of cash carried from Tunis to Genoa, a 9% premium was applied, and for a shipment of

[70] Source: ASCG, Albergo dei Poveri, 675, c. 57.

[71] There is a single loss, equal to 100% of the insured value, due to shipwreck.

sugar transported on a galleon from Motril (Spain) to Genoa, the premium paid amounted to 10%.

Comparing these figures with the insurance business of Filippo Sanmichele yields even more interesting results. Sanmichele worked in the insurance business in partnership with his father-in-law Pietro Frugone and the latter's brother, Gio. Andrea Frugone.[72] In the company's insurance ledgers (*cartulario di sicurtà*) there is an account entitled *sigurtà*, which started on 3 January 1622 with a profit of 106,958 *lire*: all the policies underwritten until 23 February 1624 are recorded here.[73] In this period, the company underwrote 49 marine insurance policies, evenly distributed over the two-year period, thus suggesting that there was no particular seasonal trend in marine insurance underwriting.

The company invested significantly in its insurance business: in 57% of cases, underwritten policies yielded premiums under 5,000 *lire*, while the remaining 43% were even higher. The insured assets ranged between values of 780 *lire* and 226,000 *lire*. All underwritten policies were made for specific journeys. Even the *Magistratura dell'Abbondanza* was among the insured parties for several shipments of wheat carried on the routes from Sicily and from Amsterdam, which might prove the reliability of these underwriters. Other types of cargo and hull insurance policy were underwritten in about 51% of cases. Of the voyages, 70% were routes to or from Genoa, but there were also policies covering routes from Naples and Venice to other Mediterranean ports. The premiums applied on the Naples and Venice routes, however, had very high rates, which might point to a particular market situation, or to the difficulty for business operators to assess risks accurately on far away markets.

Based on the routes to and from Genoa it is possible to make some interesting comparisons with what has already been said about the periods examined above. The Tyrrhenian and western routes are those for which the largest number of policies were underwritten, covering journeys in the Tyrrhenian Sea in 31% of cases, or to and from the Spanish and southern French ports in the remainder 35% of instances.

---

[72] ASCG, Albergo dei Poveri, 670, cc. 23, 29, 31.

[73] The final balance is not included in the document. Indications regarding the profitability can be inferred from what is reported in the ledger. In 1626, there was a loss of 2,744 *lire* in the insurance section, see ASCG, Albergo dei Poveri, 671, c. 80.

Table 4. Insurance premium rates for routes from and to Genoa, 1622–1624[74]

Route	Ship		Boat		Others[75]	
Thyrrhenian routes	No.	premium	No.	premium	No.	Premium
Naples					1	2%
Sicily					3	7%
Messina					1	3%
Palermo					3	2.5%
Western routes						
Alicante	5	3.5–5%			2	3.75–4.5%
Narbona					3	3.5%
Seville[76]			1	8%	1	6%
Cartagena	1	4,5%			1	10%
Atlantic routes						
Cadiz	5	8–9%			1	5.5%
Lisbon					1	10%
Amsterdam	1	14%			2	12%

Premiums ranged from 2% for routes to and from Naples, to 14% for routes from Amsterdam. The value of insured goods does not seem to have a particular impact on premium rates, which rather depended on the route and, to a lesser extent, on the type of insured vessel. Of particular interest are the policies from Seville, which in fact covered a 'mixed' route: by land from Seville to Catalonia, by sea from Catalonia (Barcelona is clearly mentioned in one case) to Genoa. This is the 'new silver route' used to transport this precious metal from the American continent to Europe.[77] From Genoa, then, silver was distributed to England, the United Provinces, and beyond.[78]

During the two years of insurance business, the company settled 27 claims, evenly distributed over the period. Of these payments, 56% referred to general averages. Just as with Agostino Spinola's business, the percentage of settled claims would vary significantly, ranging from a minimum of 0.3% to a maximum

[74] Source: ASCG, Albergo dei Poveri, 670, cc. 23, 29, 31. Policies on galleys, significantly different from those on the other types of ship, are not considered in this table.

[75] Lembo, frigate, brig, felucca, in quovis, unknown.

[76] Insurance policies covering the risks on both the land leg of the voyage from Seville to Catalonia and on the sea leg, from Catalonia to Genoa.

[77] On this definition, see *Claudio Costantini*, La Repubblica di Genova nell'Età Moderna (1978), 151 f.

[78] Transport of precious metals was usually entrusted to the private galleys of the asentists. Given the high value of the cargo, the risk was very high. See *Claudio Marsilio*, The Genoese and Portuguese financial operators' control of the Spanish Silver Market (1627–1657), (2012) 3 Journal of European Economic History 69–89, 77 f.

of 43.75% of the sum insured. Conversely, ship total loss due to bad weather or pirates accounted for 33% of all claims. In these cases, the amount paid corresponded to the sum insured.

E. Conclusion

The insurance business of the three companies here examined highlights that profitability for those working in this sector was practically zero. On the other hand, it confirms that insurance was key for proper commercial operations and traffic flows to and from the port of Genoa. At the same time, it shows that Genoese businessmen were skilfully differentiating their investments in different areas, not necessarily linked to maritime commerce, also through a wide network of economic relations and fiduciary connections. By analysing the types of risk covered by insurance policies, the perils of the routes to and from the port of Genoa, premium rate trends, as well as the type of claims settled, and then by cross-referencing these data with those emerging from the study of the *consolati di avaria*, we have been able to shed light on the structural features of the risks involved in sea trade. Merchants engaged in maritime commerce could not simply rely on fate or good fortune to deal with these risks. It became necessary to take up insurance to cover them. Unlike Venice,[79] in other ports such as Genoa, insurance policies could also include general average clauses. This gave merchants operating in Genoa an additional and better way to protect their investments in the event of a loss.

The port of Genoa was able to maintain its leading role in the Mediterranean Sea even in times characterised by growing globalisation of trade and traffic, as well as by the emergence of new players[80]. If this was possible, it was also due to a highly dynamic local insurance market, its relatively flexible rules, and the extensive use of general average as a way to share losses. The extensive legislation on insurance and general average, as well as the link between these two institutions, highlights the primary role of Genoa in the development of maritime law. The rulings of the local *Rota Civile* and the writings of the jurists who worked there, such as Carlo Targa and Giuseppe Casaregi, constituted an important legal and cultural reference in the following centuries and in different contexts.

---

[79] Insurance policies in Venice and Trieste, for example, usually excluded both general and particular average. See *Guglielmo Benecke*, Sistema delle assicurazioni e del cambio marittimo, vol. 4 (1828), 60.

[80] As amply demonstrated by the high number of claims of general average filed with the city authorities and the relative rapidity of the procedure.

General Average in Scotland during the Sixteenth Century

By *J.D. Ford*

Although the expression 'general average' does not appear to have been used in Scotland during the sixteenth century, a significant amount of evidence survives of losses sustained at sea being distributed among people involved in maritime ventures.[1] The evidence is of two main types. First, there are entries in the surviving records of burghs situated on the coasts in which reference is made to the practice.[2] Secondly, there are treatises written towards the end of the century in which the law governing maritime trade is discussed. Bringing these two types of evidence together is not entirely straightforward, for they reflect the rather different perspectives of mariners and merchants on the one hand, who were recognised as experts in commercial practice, and of professional lawyers on the other hand, who were more expert in the legal theory of the universities. As the legal treatises were written towards the end of the century, and the relevant entries in the burgh records were mostly made in earlier decades, attention will focus to begin with on the thinking of mariners and merchants.[3] In the first of three sections a descriptive account of the material found in the burgh records will be presented. In the second section attention will shift to the legal treatises, and an attempt will be made to trace connections between the practice outlined in the first section and the theory known to the lawyers. If an obvious problem

[1] Of course, that no use of the expression in the modern meaning has so far been found in contemporary evidence does not mean that it was never used. The word 'average' was certainly in use, meaning a charge, cost or expense.

[2] The survival of these records has inevitably been uneven, and generalisation from them is accordingly unwise. For many burghs, court books covering just a few years have survived, while for others, no books have survived at all. Moreover, of the surviving books, some are more detailed and informative than others. The most valuable records happen to be those in Aberdeen, which not only cover the entire century but are also more elaborate than most of those found elsewhere.

[3] A treatise on maritime law was apparently written around the middle of the century, and by a writer who had not been instructed in legal theory at a university, but unfortunately it has not survived, and what the writer may have said about general average is not made clear by the references to his treatise found in the others, which all appear to have been written in the 1580s or at the beginning of the 1590s.

will be to understand how far the mariners and merchants involved in practice may have been influenced in their thinking by the theory with which the lawyers were familiar, understanding how far the lawyers may have been familiar with the practice outlined in the first section will also be problematic. The evidence examined there will be drawn mostly from the records of bailie courts operated by the coastal burghs, yet by the time the legal treatises were being written an exclusive jurisdiction over seafaring causes had been claimed for admiralty courts sitting around the country, from which scarcely any records happen to have survived.[4] In the third section tangential evidence of the handling of general average cases in the admiralty courts will be considered, and the relationship between the practice of the burghs and the theory of the schools will be reassessed. In conclusion, it will be asked whether the Scottish experience may shed any light on the development of general average and insurance elsewhere.

A. Scotting and lotting in the practice of maritime communities

On 27 July 1527 Alexander Rutherford appeared before the bailie court of Aberdeen, in his own interest and on behalf of several other merchants whose goods had been put in the hold of Guillaume Roquette's vessel for a voyage to France.[5] He complained that 'for gret stowag' further goods were being put 'on the ourloft', protesting that if goods needed to be jettisoned from the ship during the voyage, 'the gudes under the ourloft sall nocht scot nor lot with the gudes abuf the ourloft that happinnis to be castin'. Similar protestations were entered on half a dozen other occasions, often prompting the skipper of the vessel to add a protestation of his own, warning merchants whose goods were 'aboun the ourloft' either to remove them or else 'tak the aventour thairof'.[6] It is clear both from these entries and from other records that the word 'ourloft', though sometimes written as 'overlope', did not have the same meaning as the English term 'orlop'.[7] It did not mean the deck forming the floor of the cargo hold but rather a deck above the cargo hold, on which goods were sometimes stowed

[4] The only surviving record is from the central court sitting in Edinburgh or Leith, and has been printed as *Thomas C. Wade*, Acta curiae admirallatus Scotiae, 1557–62 (1937). Not all the entries in the burgh records related to court actions, and some actions were heard in the bailie courts even after the admiralty courts assumed their exclusive jurisdiction, especially (as will be seen) in Dundee.

[5] Aberdeen City Archives (ACA), council register of Aberdeen, CA1/1/9, 732.

[6] ACA, CA1/1/8, 1029 f, CA1/1/12/1, 407 f., CA1/1/12/2, 529, CA1/1/15, 89 f., 94, 96, and 278, and CA1/1/16, 784.

[7] *John H. Burton* and *David Masson*, The Register of the Privy Council of Scotland, 1st ser., 14 vols. (1877–1898), vol. 1, 281; *Joseph Bain et al.*, Calendar of the State Papers Relating to Scotland and Mary, Queen of Scots, 1547–1603, 13 vols. (1898–1969), vol. 10, 352–354; *John Stuart*, Extracts from the Council Register of the Burgh of Aberdeen, 1st ser., 2 vols. (1844–1848), vol. 1, 331–333; ACA, CA1/1/14, 12 f.; St Andrews University Library (SAUL), burgh court book of St Andrews, B65/8/1, f. 116r.

beyond 'the sufficient laidinge of the schip'.[8] The word 'aventour' was used to signify a 'risk' or 'hazard', but also an unfortunate occurrence – as in the phrase 'gif ony aventour hapins to cum upoun ony gudis aboun the ourloft' – or a risky enterprise – ships were sometimes called the *Aventour* or the *Ventourer*.[9] The expression 'scot and lot' was widely used in the Scottish burghs, as well as some English boroughs.[10] Deriving from Old Norse or Old English words meaning 'tribute' or 'tax' (in the case of 'scot' – as in 'he got off scot free') and 'share' or 'part' (in the case of 'lot' – as in 'he tended his allotment'), the expression as a whole was used when members of a community were required to contribute towards common burdens.[11] Indeed, a willingness to 'scot and lot' was frequently identified as a condition of admission to burgh membership.[12] While the expression had the predominantly negative significance of an obligation to make payments, it also had the more positive connotation of participation in a project of mutual benefit to those involved.[13] When used with reference to mariners and merchants who embarked on a voyage together, the expectation was that they would share the burdens as well as the benefits of the enterprise, although the point of the recurring protestations found in Aberdeen was that this would not be the case if goods were placed above the overloft of a ship.[14]

---

[8] ACA, CA1/1/22, 261 f. Cf. *Peter Kemp*, The Oxford Companion to Ships and the Sea (1976), 618.

[9] *William Craigie et al.*, A Dictionary of the Older Scottish Tongue, from the Twelfth Century to the End of the Seventeenth, 12 vols. (1931–2002), vol. 1, 149 f.

[10] *Craigie et al.* (n. 9), vol. 3, 878 f.; *John A. Simpson* and *Edmund S.C. Weiner*, The Oxford English Dictionary, 20 vols. (1993), vol. 14, 685 f.

[11] *William Mackay et al.*, Records of Inverness, 2 vols. (1911–1924), vol. 1, 189–191 and 273 f.; *Stuart* (n. 7), vol. 1, 87 and 252 f.; ACA, CA1/1/9, 293, CA1/1/12/1, 310, and CA1/1/33/1, 135 f.

[12] *James D. Marwick*, Extracts from the Records of the Burgh of Edinburgh, 1st ser., 5 vols. (1869–1892), vol. 1, xxxiv and 172; *Robert Renwick*, Extracts from the Records of the Royal Burgh of Lanark, 1150–1722 (1893), 72; *Mary Bruce Johnston* and *C.M. Armet*, Kirkcudbright Town Council Records, 1576–1604 (1939), 94, 172 f., 181 f., 194 f., 212, 222–224, 232 f., 243, 253 f., 303 f., 317–320, 333, 336, 343 f., 358 f., 363 and 367–369; *William Cramond*, The Records of Elgin, 1234–1800, 2 vols. (1903–1908), vol. 1, 160; ACA, CA1/1/33/1, 350; National Records of Scotland (NRS), burgh court book of Wigtown, B72/5, ff. 63v, 78v and 89r, and burgh court book of Dysart, B21/8/2, f. 38v; Dumfries Archives Centre (DAC), burgh court book of Dumfries, WC4/8, f. 146v, WC4/10/2, p. 431, WC4/11/1, 154, 283 f., 289 and 296, WC4/11/2, 564, and WC4/11/3, 626, 769, 822, 837 and 857; SAUL, burgh court book of Crail, B10/8/7, 442.

[13] As is observed at http://users.trytel.com/tristan/towns/glossary.html, the expression was not purely repetitive, though 'lot' no doubt did serve to some extent to reinforce 'scot'. On the widespread use of 'binomials' in burgh discourse see *Joanna Kopaczyk*, The Legal Language of Scottish Burghs: Standardization and Lexical Bundles, 1380–1560 (2013).

[14] For an example of a maritime nature that does not relate to general average see ACA, CA1/1/19, 216, 262, 267 and 410.

There is only one known occasion on which merchants whose goods had been placed above the overloft, after their goods were 'cassin for saifety of the haill schip and guidis', claimed contributions from those whose goods were placed in the hold.[15] Five of those whose goods were in the hold complained that an agreement to contribute made by the others should 'hurt nocht thame, nor yit the commond lawis concerning se fair causis', since 'thai consentit nocht thairto'.[16] Nonetheless, the five merchants were required 'to scot and lott witht the remanent of the merchandis'.[17] The reasoning behind the court's ruling was not recorded, but it could be that those who participated in the voyage were taken to be bound by a majority agreement of the whole company. If so, it may be surmised that the outcome would have been different if the five merchants had protested against the placing of the goods on the overloft before the voyage.[18] In any case, implicit in the protestations made in preparation for a voyage was an acceptance that merchants whose goods were placed in the hold ought to scot and lot with each other if any of their goods had to be jettisoned. When the skipper of another ship sought contributions from merchants whose goods had been preserved by the jettison of goods taken from the hold, and one immediately declared his willingness to pay, a procurator appearing for the others insisted that 'his confessioun hurt nocht the said merchands'.[19] Shortly afterwards, however, all the parties consented to the appointment of arbiters to decide whether 'the schip and guds suld lotte and pay thair part of the said kassin guds or nocht, and gif thai suld pay and lot, to sett the said lott'. The arbiters' calculation of the contributions due was later recorded, and will be returned to below, but there is no sign that they ever saw any need to address directly the more fundamental question raised.[20] On another occasion goods were held in storage by the same skipper while he sought contributions from their owners.[21] 'The law of the see and use was', the skipper advised the court, 'that the haill guidis quhilks beand in ane schipe the tyme of cassing of any guidis, togidder witht the schipe or fraucht, suld scot and lott'. It was at once made clear that the merchants 'wer content to scot and lot, and to gif the inventour of thair guidis witht the availl thairof, for payment of the said scat'. It is notable that the inventories they submitted were referred to two university graduates, who presented the judges with their 'calculatioune' a month later, for graduates were rarely involved in the

[15] ACA, CA1/1/24, 400 and 407.

[16] ACA, CA1/1/24, 404 and 417.

[17] ACA, CA1/1/24, 474, and CA1/1/25, 412, 431 and 568.

[18] In other words, one purpose of entering protestations of the type considered in the last paragraph may have been to avoid being bound by agreements of the type made in this case.

[19] ACA, CA1/1/17, 128 and 132.

[20] ACA, CA1/1/17, 163.

[21] ACA, CA1/1/25, 31 and 68.

court's proceedings, and were scarcely ever involved as mariners or merchants.[22] As will be seen, the calculation of contributions was a complicated business. Another skipper wanted merchants to pay 'thair part of the lote' after goods were jettisoned from his ship 'for sanite of the self and the guds'.[23] A further action was raised against the 'frauchter' of a ship by three merchants whose goods had been 'castin furth of the said schip throw apperans of dangeir', but it failed after testimony was received from the skipper and a member of the crew that 'the merchands forsaid keist the saidis geir and guidis withtout consent or command of the skipper and marenaris being in the schip'.[24]

The records of other burghs confirm that 'scotting and lotting' in cases of jettison was not confined to Aberdeen. In the court book of Inverness a merchant undertook to reimburse someone who guaranteed performance of his obligation to contribute to a loss sustained when another merchant's goods were 'cassin ower buyrd be occasioun of storme and weddir'.[25] In the court book of Dumfries mariners had it formally recorded that they had thrown goods out of a boat 'for saiffin of thair awin lyfis, and the bot and the layf of the guds beand in it for the tym'.[26] The obvious implication is that they would not be held liable for the loss of the goods jettisoned, but whether contributions to the loss were expected from the owners of either the boat or the goods preserved is not made clear. In the court book of Dundee, on the other hand, the skipper of a boat not only had it recorded that he, 'with consent of the rest of his equipage', had jettisoned goods during a storm 'for saftie of thair lyvis', but also arranged for arbiters to calculate the contributions due from everyone involved in the voyage.[27] Other entries in the same book reveal readiness on the part of both merchants and shipowners to 'scot and lot' when goods were 'cassine', the former in proportion to the value of the 'geir and guds' they had shipped, the latter in proportion to the value of either their 'schip' or the amount of the 'fraucht' payments due to them.[28] In the court book of Edinburgh 'personis appoyntet to sett the skat' for goods jettisoned from a boat were told that 'na guids quhilk payet nather fraucht nor custome suld

---

[22] The procurator who appeared for most of the merchants in the previous case was one of the rare exceptions.

[23] ACA, CA1/1/12/2, 751 f.

[24] ACA, CA1/1/25, 302 f. A 'frauchter' was a person who 'put a ship out to fraucht' by invited merchants to pay freight to have their goods transported in it. He might have been a shipowner, and was more often a skipper or clerk authorised to deal on the owner's behalf, but he could instead have been a merchant who had chartered a ship, which is what the unusual use of the word 'frauchter' here would seem to suggest.

[25] *Mackay et al*. (n. 11), 267 f.

[26] DAC, WC4/8, f. 58r. The word 'layf' meant 'remainder' or 'rest', or more literally what was 'left'.

[27] Dundee City Archives (DCA), minute book of the burgh court of Dundee (BCMB), mostly unpaginated, vol. 11, 7 December 1569.

[28] DCA, BCMB, vol. 3, 30 October 1550 and 16 December 1551, and vol. 11, 24 February 1570.

skat or lott witht the rest, except the samyn had bene speciallie convenit upoun amangis the merchandis'.[29] Further entries in the court book of Dundee concern cases in which equipment was lost. In one case arbiters were appointed 'to set the scot and lot' of both goods and equipment jettisoned from a ship during a storm.[30] In another case the clerk of a ship raised an action for 'the scatt of ane ancker and tow tynt be the schip', alleging that merchants on board at the time had given their 'consent' to the cutting of the cable and had 'promittit the guds being in the said schip suld scatt thairanent'.[31] The court in Aberdeen similarly found that 'the haill geir and guidis' transported in a French ship 'suld scott and lott witht the schip or fraucht thairof' after several of its masts and sails were 'cuttit and tyntt for saifty of the schip and guidis'.[32]

A third expedient, distinct from the casting of cargo or the ejection of equipment, lay behind protracted litigation in the bailie court of Aberdeen in 1532. A Flemish ship, carrying merchants and merchandise from Veere to Edinburgh and Aberdeen, had put in at Newcastle, where it had been arrested, apparently until custom duties unexpectedly imposed there were satisfied.[33] In order to secure the ship's release, goods were taken from its hold and sold. The skipper, who blamed the Edinburgh merchants for the arrest, then sailed directly to Aberdeen, without turning in at Leith (the port of Edinburgh). It was found by an assize of mariners and merchants that the skipper ought to remit part of the freight owed to him to pay for the transfer of goods to Leith, and that the merchants whose goods were still in the ship ought to contribute towards the loss of the goods sold in Newcastle.[34] Perhaps surprisingly, there was no dispute about the liability to contribute, or about the amount of the contributions that were calculated by arbiters, but four of the Aberdeen merchants, who had been travelling without merchandise, objected to a further finding of the assize that 'all kind of mony, baitht gold and silver, cunzeit and uncunzeit, and als rings, being in ane schip, suld lott and scott witht the uther guds of the said schip'.[35] They objected to the 'skait and lott' set by the arbiters on the procedural ground that they, 'nor nane of thame, consentit never thairto', and to the finding behind

[29] Edinburgh City Archives (ECA), council register of Edinburgh, SL1/1/8, f. 65v.

[30] DCA, BCMB, vol. 1, ff. 20, 22, 39v–40r, 77r, 79r and 116v. A brief account of this case can also be found in *Alexander Maxwell*, Old Dundee, Ecclesiastical, Burghal and Social, prior to the Reformation (1891), 318.

[31] DCA, BCMB, vol. 6, 14, 21 and 26 January 1562. The word 'tynt' meant 'lost', and was related to the noun 'tinsall', meaning 'loss', which is used in one of the quotations in the next paragraph.

[32] ACA, CA1/1/24, pp. 24 f. and 27. A brief account of this case can also be found in *William Kennedy*, Annals of Aberdeen, from the Reign of King William the Lion, to the End of the Year 1818, 2 vols. (1818), vol. 2, 486.

[33] ACA, CA1/1/13, 403 f.

[34] ACA, CA1/1/13, 410.

[35] ACA, CA1/1/13, 410 f., 422 and 508 f.

it on the substantive ground that their 'mony was never in nay dangar nor aventour of tinsall'. It was agreed that advice should be requested from the burgh council of Edinburgh, but one of the merchants instead procured royal letters there, directing the court in Aberdeen to proceed to its own decision.[36] A new assize found that there was indeed a problem with the 'decreit arbitrall', since it was not based on a 'compromit of the merchandis gangang afor', and since the Aberdeen merchants had not been summoned 'to heir and se the said decreit ratifiet or nocht'.[37] Nevertheless, they adhered to the finding that the Aberdeen merchants should contribute to the loss sustained in England, 'ilk man corispondene to the mone he fetchit hayme'. After the Edinburgh merchant who had procured the royal letters undertook to indemnify the skipper against any claims made against him by the merchants whose goods had been sold, he was allowed, in his capacity as 'ressaver of the skat and lott', to pursue the Aberdeen merchants who remained reluctant to contribute.[38]

A fourth expedient considered in Aberdeen was the surrender of goods from a ship to armed raiders, who then left the ship to proceed on its way with its remaining cargo. In 1515, after goods were taken from a ship by 'thair auld innimeis of Ingland', three local merchants whose goods had remained in the hold declared themselves willing to make any contributions due from them, 'gif it war sa fandin, other be law or pretik of siclik caisis obefor'.[39] No such finding was recorded, nor has any other instance come to light of contributions being made to merchants whose goods were seized by enemies in wartime.[40] A case raised in 1538 was concerned with a seizure made in peacetime. A vessel from Kinghorn was transporting goods from Flanders to Scotland when it was 'pilzeit be certane Frenschemen, se revars', and one of the merchants had a pack taken away.[41] 'The ald lovable use and consuetud of this nobill burght hes bene past memor of man, and yit is', he advised the court, 'that ony schip beying pilzeit in the streme be men of war or se revars, or ony gudds cassin be storme of wedder, the remanent of the gudds and money beying in the said schip for the tym, and als the sayd schip and profytt thairof, aucht to scot and lott witht the gudds pilzeit

[36] ACA, CA1/1/13, 425, 465 and 506 f. Whether the Edinburgh council received or considered the request is unknown, because its register for this period has not survived. There is certainly no mention in the Aberdeen register of advice being returned, and no mention of the episode has been found in National Library of Scotland, Adv. MS 31.4.9, a collection of notes on the business of the Edinburgh council composed at some stage during the late sixteenth century, before the loss of the register in question. It remains possible, though, that the writer of the notes passed over something significant.

[37] ACA, CA1/1/13, 511–513.

[38] ACA, CA1/1/14, 130, 175, 180, 360 f., 364 and 368.

[39] ACA, CA1/1/9, 391, 393, 396 and 399.

[40] The burgh court in Dundee decided that contributions should be made after goods were seized during a civil war (DCA, BCMB, vol. 8, 17 January and 1 May 1564), but that was a different situation.

[41] ACA, CA1/1/15, 708 and 711 f.

or cassin'.[42] In significantly different terms, an assize found that 'all the said gudds and money, togidder witht the sayd schip, or the haill fraucht of the same, at the wil of the merchands, aucht to skot and lott' for the goods taken, 'conforme to the ald lovabill consuetude of this burght'.[43] Arbiters were appointed to calculate the contributions due from the other merchants and the shipowner, who was to pay in proportion to either his 'schip or fraucht'.[44] In 1554 another merchant recounted that while a ship was beginning its voyage from Aberdeen towards Danzig (Gdańsk), 'thair come ane Inglis schip upoun us, and pilleit and rubit our said schip'.[45] Several merchants whose goods had been left on board immediately 'promest to scat and lott thair haill gudis and geir', and they repeated their promise 'eftir that we come to Danskin'. There were other victims of the robbery 'witht quhome thai scottit and lottit and payt', but for some reason the defenders would not pay the pursuer, who had himself contributed to the losses sustained by the other victims, in proportion to the value of goods he had carried for someone else.[46] In 1574, after goods were pillaged on another Danzig voyage, merchants put it on record in the burgh court book of Dundee that they were ready to 'scott and lott' for the 'skaytht and loise' sustained by others, 'conforme to the lawis and daylie pretik'.[47] Brief entries in the council register of Edinburgh mention the appointment of merchants 'to sett the scatt of the schip callit the *Sie Catt*, quhairof Androw Ridpeth wes maister, quhilk wes laitley pilleit in hir voyage from Londoun'.[48]

More elaborate entries in the same council register shed light on how contributions were calculated. In 1580 a ship carrying wine and woad from Bordeaux to Leith 'wes pilleit and reft in the said vayage be certane Inglis pirats', who made off with some but not all of the cargo.[49] The skipper (who evidently owned the ship, and was carrying goods of his own), the merchants (who owned most of the wine and woad), and the crew (who also had goods in the hold) all

[42] If the mention of 'money' as well as 'gudds' suggests awareness of the decision made six years earlier, and if the mention of 'men of war' as well as 'se revars' suggests that contributions may after all have been paid when seizures were made in wartime, it is hard to be certain on either count. In the quotation, a redundant use of 'that' before 'the remanent' has been omitted.

[43] ACA, CA1/1/15, 716.

[44] ACA, CA1/1/15, 717, 719 f., 723, 728 and 733.

[45] ACA, CA1/1/21, 733, 798 f., 803 f. and 814.

[46] ACA, CA1/1/22, 438, 440, 444, 446, 509, 512, 516 f. and 556.

[47] DCA, BCMB, vol. 12, 27 January 1574, and vol. 13, 5 March 1574. The balancing of the phrases 'scott and lott' and 'skaytht and loise' seems to have been deliberate, and was reflected here and elsewhere in the Dundee records (vol. 14, 16 May 1576) in use of the word 'skaytht', meaning 'harm' or 'loss', as a synonym for 'scott'. For further piracy cases in the Dundee records see vol. 11, 15 April 1570, and vol. 21, 21 December 1599.

[48] ECA, SL1/1/8, ff. 74v and 77v; *Marwick* (n. 12), vol. 4, 486 f.

[49] ECA, SL1/1/6, ff. 51v–52r. In the quotation, the word 'the' has been inserted before 'said vayage'.

lost part of their belongings. On reaching Scotland they declared themselves content that 'ane generall scatt and extent wer sett upoun the haill guids foirsaid and schip quhilks ar saif, for the releif of the guids pilleit'. Six merchants were appointed to make the calculation, but they found it challenging.[50] Two months later they asked whether the 'scatt suld be sett upoun the wairing onely, withtout respect of the fraucht and chairgis, or gif the said fraucht and chairges suld be deduceit and comptit in the wayring'.[51] The court found that the costs of transportation should not be taken into account, adding that their ruling was to be 'observet in all uther scatts as ane perpetual law in all tymes hereafter'.[52] The merchants were still unable to complete the calculation, however, and eventually the court assumed the responsibility itself. After receiving evidence of the amounts spent on purchasing goods in France, of the exchange rate between French and Scottish currency at the time, of the quantities of goods lost, and of the value of the ship, the court calculated that the total value of the ship and goods at the start of the voyage had been just under £3,500, and that the total value of the goods despoiled had been just under £1,400.[53] It therefore concluded that every £100 of the original value ought to 'lose and tyne' £40, and proceeded to work out precisely how much each person ought to pay or be paid.[54] The same method of calculation was adopted two years later after mariners on a ship sailing from Dieppe to Leith were 'compellit throw storme of wedder, and for safetie of mennis lyfes, schip and guides, to cast ane pairt of hir laidyng of lychtning thairof'.[55] As in the earlier case – though this time those appointed to make the calculation managed to do so – the provost, bailies and council of Edinburgh ordained the 'scatt roll' to be 'registrat in thair buikis' and invested with 'thair authoritie', so that it could be executed like a court order.[56] In one of the Aberdeen cases mentioned earlier, a broadly similar method of calculation appears to have been adopted.[57] After working out the exchange rate between Flemish and

[50] ECA, SL1/1/6, ff. 53r and 64v.

[51] ECA, SL1/1/6, f. 69r. The word 'wairing' signified the buying of wares, or more specifically (as here) the expense incurred in the buying of wares.

[52] As will become apparent in the third section of this essay, it is of some significance that the entries quoted were made in the council register of the burgh, not in the court books that were being kept separately. It seems clear that the burgh council of the capital city of Scotland was seeking to lay down the law on the calculation of contributions, even though the bailie court there did not normally have jurisdiction over seafaring causes.

[53] ECA, SL1/1/6, ff. 71v and 86–87r.

[54] The further complication arose that by this stage the six merchants appointed had managed to complete their calculation (ECA, SL1/1/6, ff. 89v and 92v–93r), but how they did so is not known.

[55] ECA, SL1/1/6, ff. 195–197.

[56] A lengthier account of the two cases can be found in *David Robertson* and *Marguerite Wood*, Castle and Town: Chapters in the History of the Royal Burgh of Edinburgh (1928), 297–301.

[57] ACA, CA1/1/17, 163. A complication with this case will be returned to later.

Scottish currency, the arbiters appointed set the value of jettisoned goods ('at the first bying') against the value of the ship and goods to see how much loss needed to be borne for each unit of currency in the latter figure.

From the evidence examined so far, it seems clear that mariners and merchants were expected in sixteenth century Scotland to contribute to losses sustained when either cargo or equipment was jettisoned from a ship, when pirates were content to remove only some of the goods on a ship, perhaps also when enemies took part of a cargo, and when a penalty was paid to secure a ship's release from arrestment. In every instance, the expectation was expressed in terms of an obligation to 'scot and lot', which was indicative of an assumption that those involved in a common enterprise should share its burdens along with its benefits. If the records of three cases can be relied on, losses were distributed in proportion to the total value of the ship and goods at the beginning of the voyage, except that many records provide for the amount of freight payable being used in the calculation as an alternative to the value of the ship.[58] The evaluation of goods was based on what was paid for them before they were shipped, not on what they might have been sold for after arriving at their destination, and it was consistent with this emphasis on purchase price rather than potential profit that no account was taken of the costs of transportation.[59] That the shipowner, despite a suggestion made by one litigant, was not liable in proportion to both the value of the ship and the amount of freight payable was again consistent with an emphasis on the extent of each party's investment in the enterprise, instead of the benefit each party might have hoped to gain from it. The amount of freight payable was presumably treated as an alternative to the value of the ship because sometimes the 'frauchter' had hired the ship provided from its owner, who was not directly involved in the enterprise. Freight was usually owed by the merchants to the skipper, who in most cases was the key figure in the collection of contributions.[60] When merchants had contracted for transportation with the skipper, he was the obvious person for them to pursue if their goods were not delivered, and when shipowners had employed a skipper, he was the obvious person for them to pursue if the equipment of the ship was lost. The skipper thus had a special interest in ensuring that losses were distributed, although occasionally merchants seem to have made claims directly against one another, or to have agreed directly with each other that losses should be distributed. The consensual nature of the process is a recurring theme of the records, yet so too is a belief that it was governed in some sense by law. In what sense needs further consideration.

---

[58] Although the method of calculation is elaborated on in the records of just three cases, no other record has been found to cast doubt on the reliability of these three.

[59] To judge from the Aberdeen case, the ruling delivered in Edinburgh reflected existing practice.

[60] Significantly, when freight was owed to the clerk of a ship, he became the key figure in the collection. For a further example, in which the clerk of a ship was ordered 'to set and mak the skat of this last Burdeaux veage', see DCA, BCMB, vol. 11, 5 March 1571.

B. Marrying practice with theory in books composed by lawyers

On 5 March 1575 the three estates assembled in the Scottish parliament, 'understanding the harme quhilk this commoune weill sustenis throw want of a perfyte writtin law, quhairupoun all jugeis may knaw how to proceid and decerne', charged nine commissioners with the task of examining 'the bukis of the law, actis of parliament and decisionis befoir the sessioun', forming out of them 'the body of oure lawis', and bringing this *corpus iuris* back to the estates for ratification, 'quhairthrow thair may be ane certain writtin law to all oure soverane lordis jugeis and ministeris of law to juge and decyde be'.[61] Although the burghs constituted one of the three estates, and three of the commissioners appointed were identified as burgh representatives, there was no suggestion that the 'pretik' or 'consuetude' followed in the bailie courts should be investigated. Indeed, although the 1575 act was one of a long series of measures introduced during the fifteenth, sixteenth and seventeenth centuries with a view to providing a written restatement of the law – prompting comparisons with the contemporary codification of customary laws in other countries, particularly in France, where Scots lawyers often went to study – at no point were the commissioners instructed to consult the recognised remembrancers of local customs.[62] The only way in which local customs might have been taken into account was if they had already been turned into customary laws by first being proved to exist before the lords of session, the judges of the supreme civil court of Scotland, and then being approved of as reasonable in one of the decisions delivered by those judges.[63] If the aim of the parliamentary commissions was to produce an authoritative restatement of the law, the law restated was to be found in statements already made by people who were regarded by lawyers as having authority to issue declarations of the law. In fact, none of the commissions ever resulted in the enactment of a legislative code, but the 1575 act does appear to have resulted in the production of a survey of maritime law. One of the lords of session, Sir James Balfour of Pittendreich, took up the instruction to examine the old books of law, the acts of parliament and the decisions of the session, and brought material found there together in a compilation that came to be called his 'practicks' (partly because the decisions of the session were known as 'practicks', and partly because the focus was on the law put into 'practick' as opposed to the 'theorick' taught in the

[61] *Thomas Thomson* and *Cosmo Innes*, The Acts of the Parliaments of Scotland, 12 vols. (1814–1875), vol. 3, 89.

[62] *John W. Cairns*, *T. David Fergus* and *Hector L. MacQueen*, Legal Humanism and the History of Scots Law: John Skene and Thomas Craig, in: John MacQueen (ed.), Humanism in Renaissance Scotland (1990), 48–74, at 50–52.

[63] The process of turning legal customs (Rechtsgewohnheiten) into customary laws (Gewohnheitsrecht) in the following century is briefly outlined in *John D. Ford*, Law and Opinion in Scotland during the Seventeenth Century (2007), 291–299.

schools).[64] At some stage Balfour extracted the material relating to maritime affairs from his general account of Scots law and dealt with it separately, in conjunction with material drawn from other sources.[65] Yet even at that stage he made no reference to the decisions of the bailie courts, with which he may not have had much acquaintance.[66] For their part, the bailies who presided over litigation in the coastal burghs may not have had much acquaintance with the written sources Balfour had consulted.[67] It cannot simply be presumed that the 'lawis and daylie pretik' referred to in the burgh records were the laws and decisions assembled in the survey of maritime law appended to Balfour's practicks.

The survey contained just three paragraphs concerned with general average.[68] The first reproduced in Scots translation an article from 'the sea lawis of Oleron', of which copies were often included in the manuscript collections of medieval texts referred to in 1575 as 'the bukis of the law'.[69] It provided that if a skipper felt the need to jettison cargo during a crisis ('la gettesone par aventure') he should seek to secure the consent of any merchants present but could proceed anyway provided he and other members of the crew swore an oath on reaching land that their purpose had been to preserve their lives, the ship and other cargo ('pour sauver le corps, la nef, les denrees et les vins').[70] In calculating contributions, the goods jettisoned were to be evaluated according to the prices obtained for those preserved after completion of the voyage ('ceulx qui seront gettes hors doivent estre aprisez aux feur de ceulx qui seront venuz a sauvete'), with the skipper contributing according to the value of the ship or the amount of freight owed to him, as he preferred ('la nef ou son frett, a son choys'). Another article in the same code, also reproduced in translation by Balfour, required a skipper to seek consent when he felt the need to cut a mast ('coupe son mast par force de tempeste'), and confirmed that merchants were to contribute when a

[64] *Athol L. Murray*, Sinclair's Practicks', in: Alan Harding (ed.), Law-Making and Law-Makers in British History (1980), 90–104, 90 and 102.

[65] *John D. Ford*, Alexander King's Treatise on Maritime Law (2018), lxxv–vii.

[66] As well as being a lord of session – indeed the president of the court – Balfour was also a judge in one of the commissary courts that took over some of the responsibilities of the courts of the Catholic church in Scotland – in which he had also served – after the Reformation in the early 1560s (*Thomas M. Green*, The Spiritual Jurisdiction in Reformation Scotland: A Legal History (2019), 30, 62, 114 f. and 125). He may conceivably have appeared as a procurator before the bailies of Edinburgh or another burgh in his earlier years, but it was not usual for successful practitioners in the central courts to spend much time there.

[67] A preliminary treatment of this topic will appear in *John D. Ford*, Telling Tales: Maritime Law in Aberdeen in the Early Sixteenth Century, in: Jackson Armstrong and Edda Frankot (eds.), Cultures of Law in Urban Europe (in press/2020).

[68] *Peter G.B. McNeill*, The Practicks of Sir James Balfour of Pittendreich, 2 vols. (1962–1963), vol. 2, 622 f.

[69] *Edda Frankot*, 'Of Laws of Ships and Shipmen': Medieval Maritime Law and Its Practice in Urban Northern Europe (2012), 81–88 and 110–120.

[70] *Travers Twiss*, The Black Book of the Admiralty, 4 vols. (1871–1876), vol. 1, 96–99.

skipper lost equipment in the same way as they would if cargo were lost ('comme get').[71] The other relevant paragraph in Balfour's survey reproduced an article from 'the sea lawis of Wisbie', which he had not found in the old books of law. Here a distinction was drawn between the deliberate loss of equipment for the purpose of preserving a ship, its cargo and crew, and the accidental damage of equipment in a storm.[72] As Balfour's translation put it, merchants were not required 'to scat and lot' in the latter situation, although they were in the former.[73] If goods were jettisoned at the same time, the translation added, contributions were to be made 'like as the saidis gudis, be gude estimatioun, micht have gevin and thay had cum to the mercat', with the skipper contributing 'at the ships price, or the fraucht of the ship'. This choice, it has been seen, was often granted to skippers in the bailie courts, but no evidence has been found of contributions from merchants being assessed in accordance with what jettisoned goods might have been sold for had they reached the markets for which they were intended.[74] Likewise, while two examples have been found of skippers testifying after reaching land that they had only thrown cargo overboard as a means of saving other cargo, the ship and its crew, only two have been found, and on one occasion the skipper merely reported that he had the consent of his crew.[75] It does not seem to have been a standard practice for groups of mariners to swear oaths after reaching land, nor does it seem to have been a strict requirement that merchants be consulted before goods or equipment were cast away. Although it was sometimes reported that consent had been given, no complaints have been found of lack of consent, whereas in one case it was complained that merchants had jettisoned goods without the consent of the mariners.[76]

The laws of Oléron and Wisby were consulted in the composition of another survey of maritime law later in the sixteenth century.[77] William Welwod may have heard about Simon Schard's unfulfilled promise to produce a compendium of sea laws while he was studying in Germany, before he returned to Scotland in

---

[71] *Twiss* (n. 70), vol. 1, 98–101.

[72] *Twiss* (n. 70), vol. 4, 268.

[73] The phrase 'scot and lot' was not used in the translation of the articles from the laws of Oléron, perhaps because the compilers of the old books had been unfamiliar with burgh practice.

[74] DCA, BCMB, vol. 3, 30 October 1550 and 16 December 1551, and vol. 11, 24 February 1570.

[75] DAC, WC4/8, f. 58r and DCA, BCMB, vol. 11, 7 December 1569.

[76] ACA, CA1/1/25, pp. 302 f.

[77] As is pointed out in *John D. Ford*, William Welwod's Treatises on Maritime Law', (2013) 34 Journal of Legal History 172–210, Welwod made use of provisions from the laws of Wisby as well as the laws of Oléron but believed for some reason that they all belonged to the laws of Oléron. Balfour cited these sources separately, although he may also have been confused about the relationship between them.

1577 to take up a teaching post at the University of St Andrews.[78] About a decade later he pulled the materials he had been gathering together in a compendium of his own, which survives in a single manuscript, but of which an abridged version was put into print in 1590.[79] Instead of methodically assembling extracts from his sources, as Balfour had done, Welwod summarised selected provisions in his own terms in chapters devoted to different topics, a series of which were concerned with general average. The printed version of his treatise differed from the manuscript version in two main respects. In the first place, whereas the manuscript version had been supportive of the admiral's claim to an exclusive jurisdiction over seafaring causes, the printed version was more supportive of the claims of the burghs, which made a concerted effort around 1590 to recover their former jurisdiction over disputes involving mariners and merchants.[80] In the second place, in revising his treatise for the press, Welwod excised a large number of references he had originally made to the *Nomos Rhodion nautikos* and the *Consolato del mare*. As he later revealed, when a longer version of his treatise was finally printed in 1613, he had been frustrated to learn that mariners and merchants in Scotland were less familiar with the written sources he had been accumulating than he had anticipated.[81] In a preface attached to the 1590 version of his treatise he observed that maritime disputes were governed in part by 'the reulis of Olon receavit be our cuntrey men', but added that these provisions were only adhered to 'sa far as they are commonly knawin be peiple'.[82] It might therefore have been expected that in publishing his treatise 'for the reddy use of all seafairing men' he would not only have abandoned his references to the *Nomos Rhodion nautikos* and the *Consolato del mare*, but would also have made more selective use of the laws of Oléron and Wisby, concentrating on provisions that seemed consistent with the practice of the bailie courts. Yet he left the passages based on those sources largely as they had been written. He believed that 'all men be bound to ken the law, namely thair awne common lawe', and maintained that there was no excuse for ignorance of the sources copied in the manuscript collections of the books of law, to which he referred as 'wrets authorizit be our nation'. Aware that the laws of Oléron and Wisby were not followed closely in

[78] *Simon Schard*, De varia temporum in iure civili observatione, Eustathii olim Constantinopolitani antecessoris libellus; item, Leges Rhodiorum navales, militares et georgicae Iustiniani (Basle 1561), 271.

[79] Pepys Library at Magdalene College, Cambridge, PL 2208; The Sea-Law of Scotland (Edinburgh 1590).

[80] *James D. Marwick* and *Thomas Hunter*, Records of the Convention of the Royal Burghs of Scotland, 8 vols. (1870–1918), vol. 1, 339–341; *Marwick* (n. 12), vol. 4, 528 and 530 f.; *Marguerite Wood* and *Helen Armet*, Extracts from the Records of the Burgh of Edinburgh, 2nd ser., 9 vols. (1927–1967), vol. 1, 13; *Thomson/Innes* (n. 61), vol. 3, 580.

[81] An Abridgement of All Sea-Lawes (London 1613), 7. The treatise was repackaged for a British audience, but was substantially the same as most of the original manuscript version.

[82] Sea-Law of Scotland, sig. A3.

commercial practice, because they were not 'commonly knawin be peiple', he tried to encourage more exact use of the provisions incorporated into the books of law, because they had in this way been 'receavit be our cuntrey men'.

Welwod was inclined to go further. Although he believed people were only obliged to know their own common law – paradoxically, the *ius commune proprium* of Scotland – he also believed he should use his expertise as a teacher of the civil law – the *ius commune* of Europe – in expounding the law of the sea.[83] He associated the first of the two articles reproduced by Balfour from the laws of Oléron with the opening texts of the Digest title on the *lex Rhodia de iactu* (which he associated further in the manuscript version of his treatise with the *Nomos Rhodion nautikos*).[84] It seemed to him that if the general practice of scotting and lotting for jettisoned goods could be connected with an article in the laws of Oléron, that article could in turn be connected with a general principle enunciated in the Digest that when 'wares are jettisoned for the sake of lightening a ship, what is given up for everyone ought to be made up by the contribution of everyone'.[85] By the same token, he believed that the other article reproduced by Balfour could be connected with a principle twice enunciated in the Digest that when 'a mast or other equipment of a ship is cast out for the sake of removing a shared danger, contribution ought to happen'.[86] Welwod pointed out that the Roman jurists had not only distinguished this situation from the accidental damage of equipment in a storm, but had also explained why contributions were not required in the latter situation.[87] If a smith was paid to work on something, they had remarked, and his hammer was broken during the process, the customer would hardly have been expected to pay for a new hammer.[88] Drawing these connections enabled Welwod to bring into his discussion questions that do not appear to have been raised in practice, but to which the Roman jurists had provided answers, such as what would happen if goods transferred to a lighter to enable a ship to enter a shallow harbour were then lost, or if some goods were harmed while others were being jettisoned.[89] It was not possible, however, to reconcile everything found in the laws of Oléron and Wisby with the texts in the Digest. The Roman jurists, for example, had maintained that while jettisoned goods should be evaluated according to their purchase price before a ship began

[83] On Welwod's competing conceptions of common law see *Ford* (n. 65), ci f.

[84] Sea-Law of Scotland, sig. C1; *Ford* (n. 65), 366.

[85] Paul D. 14.2.1. Welwod used the phrase 'skatt and lott' in summarising these sources in Scots.

[86] Pap. D. 14.2.3 and Herm. D. 14.2.5.1.

[87] Sea-Law of Scotland, sigg. C1v–2r; *Ford* (n. 65), 367.

[88] Paul D. 14.2.2.1 and Jul. D. 14.2.6.

[89] Sea-Law of Scotland, sigg. C2v–3r; *Ford* (n. 65), 367 f.

its voyage, preserved goods should be evaluated according to their sale price after it reached its destination.[90]

Further engagement with the civil law can be found in a third survey of maritime law written around the same time, in which Alexander King, an advocate before the lords of session as well as a judge of the central admiralty court, which also sat in Edinburgh, combined occasional references to the laws of Oléron and Wisby with more extensive use of civil law sources.[91] In dedicating his treatise to the admiral of Scotland, King recalled that when he had returned from several years of legal study at universities in France and the Netherlands, he had been eager to marry (*coniungere*) the academic theory he had mastered there with the forensic practice in which he was immersing himself.[92] He had decided to write a treatise on maritime law after presiding over disputes in the admiralty court, where he found discussions of the law between litigants to be constantly confused, 'for some cited one custom, others another'.[93] The solution might have been to assume the role of a commissioner appointed to codify the local customs referred to, and he did claim to have sought advice when writing his treatise from experts in maritime affairs (*in re nautica versatissimos exercitores*), as he had done when hearing cases in court.[94] He also claimed, however, to have consulted expert lawyers (*expertissimos fori togatos*), as both a writer and a judge. His professed aim had been to combine the customs and legislation followed around Scotland (*consuetudines et statuta locorum*) with the learned laws in a *iuris marini concordia*. As he put it in a preface addressed to his readers, his aim had been to use his learning to reduce 'the admiral's laws, which the statute or custom of the land had introduced', into a volume that might serve in effect as a complete body (*quasi perfectum corpus*).[95] He would thus have produced something like 'the body of oure lawis' envisaged by the estates in 1575, although in a different way. He believed that by establishing his credentials as a learned author, using his learned authority in writing about the law, and generating a consensus among his learned colleagues, he could 'leave to posterity, out of unwritten laws or vague custom, clearly defined laws to be read'.[96] If the legal customs known to

[90] Paul D. 14.2.2.4.

[91] *Ford* (n. 65), 78 f. and 160 f. It is far from clear how King understood the relationship between the laws of Oléron and Wisby, for his treatise, at least in the form in which it has survived, does not contain explicit citations from these sources. It does seem clear, however, that both sources were used.

[92] *Ford* (n. 65), 4 f.

[93] *Ford* (n. 65), 6–9.

[94] *Ford* (n. 65), 74 f.

[95] *Ford* (n. 65), 20-1 (cf. 154-5).

[96] For a fuller discussion of this point see *Ford* (n. 65), xc–ciii. This process of marrying theory with practice was of course widespread at the time, and is what Welwod was also engaged in. Why Balfour eschewed all reference to learned sources needs further consideration elsewhere.

mariners and merchants (*inveteratae patriae consuetudines*) were appraised in the light of the expertise acquired at continental universities by lawyers like him (*doctiorum prudentia*), there was some prospect of a coherent and concordant understanding of the law being established.[97]

King's *iuris marini concordia* would have been easier to achieve if the 'law of the see' referred to by mariners and merchants had actually been founded on the legal theory studied by advocates. It would of course be facile to surmise from similarities between the practice of general average and the writings of the Roman jurists that the former must have been based on the latter, but nor can it safely be supposed that similar thinking was bound to emerge whenever a maritime community confronted the legal issues arising from crises in navigation.[98] For instance, it is by no means obvious that the loss sustained by a skipper when his ship was damaged in a storm should not be distributed among the participants in the venture. If merchants were expected to share the risk of equipment being deliberately cast away, then why not the risk of equipment being accidentally damaged through the same eventuality? It seemed to the Roman jurists that contributions should only be made when losses were sustained in order to preserve persons or property, but was it inevitable that anyone who thought about the problem would see it in this way? Surely not, yet it is a feature of the cases recorded in the burgh court books that when merchants were required to scot and lot for equipment lost at sea, the equipment was said to have been lost 'for saifty of the schip and guidis'.[99] In contrast, while it was recorded in another case that a ship seeking shelter from a storm in a harbour 'wantit ankers, cabillis and towis and uthers necessars quhilkis war lost and tynt be ressoun of the said storme', it was not suggested that the merchants whose goods were being carried ought to scot and lot with the skipper.[100] Similarly, while goods were often salvaged from wrecked ships, there was never any suggestion that those whose property was recovered ought to contribute towards the losses suffered by others.[101] Salvors expected to be reimbursed for their services, and the use of salvaged goods to meet their expectations was customary, but the language of scotting and lotting was never used in the court books when relations between the victims of ship-

[97] *Ford* (n. 65), 20 f.

[98] Compare *Reinhard Zimmermann*, The Law of Obligations: Roman Foundations of the Civilian Tradition (1990), 411 f., with *Olivia R. Constable*, The Problem of Jettison in Medieval Mediterranean Maritime Law, (1994) 20 Journal of Medieval History 207–220, 220.

[99] ACA, CA1/1/24, 27.

[100] ACA, CA1/1/21, 71.

[101] The evidence is discussed in *John D. Ford*, The Law and Economy of Shipwreck in Scotland during the Sixteenth Century, forthcoming in a collection of essays edited by Andrew R.C. Simpson and Jørn Ø. Sunde.

wreck were dealt with.[102] Was it a coincidence that the Roman jurists had explicitly ruled out the making of contributions not only when ships were damaged but also when they were destroyed in storms?[103] There are admittedly entries in the court books that mention scotting and lotting without identifying the type of crisis to which it was a response, but the fact remains that scotting and lotting is not mentioned in the entries in which the damage or destruction of a ship was identified as a problem in need of a response.[104]

Another question that ought to be asked is why those who benefited from the loss of property in a storm were required to contribute in proportion to the value of the property that was preserved. As a recurring justification for the deliberate loss of property was a desire to preserve the lives of persons on board ships, why were those persons not required to contribute something for the preservation of their lives? No doubt the focus on property in the Digest texts reflected the Roman aversion to evaluating free people, which would have been to treat them as if they were slaves, but why was property focused on in places where slaves were not owned?[105] In fact, the Roman jurists had qualified the point by accepting that even passengers who were carrying nothing but items too light to weigh down a ship ought to contribute to the extent that they had anything of value with them, such as jewels and pearls (*gemmas et margaritas*) or clothes and rings (*vestimenta et anuli*).[106] This last example may seem familiar. When the question was raised in Aberdeen whether merchants who were only carrying money should contribute to a loss, the answer initially provided was that 'all kind of mony, baitht gold and silver, cunzeit and uncunzeit, and als rings, being in ane schip, suld lott and scott witht the uther guds of the said schip'.[107] No further mention was made of rings, nor is there any indication anywhere in the extensive records of the case that anything other than money was at stake. It is possible that the Edinburgh merchants involved had spoken at some time to lawyers familiar with the Digest, or even that someone who had studied the civil law had been found in Aberdeen. It is considerably less likely that the mariners and merchants who formed the assize responsible for the ruling were directly acquainted with the text, or for that matter minded to adhere to the reasoning of the jurists. After

---

[102] *Cf. Andrew R.C. Simpson*, Spuilzie and Shipwreck in the Burgh Records, (2018) 9 Journal of Irish and Scottish Studies 70–92, 87 f.

[103] Call. D. 14.2.4.1 and Paul D. 14.2.7.

[104] ACA, CA1/1/10, 123; DCA, BCMB, vol. 3, 9 October 1550, vol. 6, 2 March 1562, vol. 10, 20 September and 8 and 22 October 1568, vol. 11, 24 January, 1 June and 13 July 1571, vol. 12, 17 June and 5 November 1572, vol. 14, 19 March and 16 May 1576, and vol. 20, 25 October 1598 and 12 February 1599.

[105] *Emmanuelle Chevreau*, La Lex Rhodia de iactu: Un exemple de la réception d'une institution étrangère dans le droit romain, (2005) 73 Tijdschrift voor Rechtsgeschiedenis 67–80, 75.

[106] Paul D. 14.2.2.2.

[107] ACA, CA1/1/13, 410.

all, their ruling was that merchants with money alone should contribute towards the payment of a penalty, which was not one of the situations in which the jurists had written about contributions being made. The jurists had not explicitly denied that contributions should be made if penalties were imposed, and the opinions they did express do seem to have informed other aspects of the handling of general average cases in the bailie courts, but at a considerable distance.[108] Neither the Digest nor the laws of Oléron and Wisby were ever mentioned in the entries examined here.[109] In one of the protestations against the loading of goods on the overloft of a ship it was pointed out that scotting and lotting when goods placed there were jettisoned had been ruled out by legislation, but in only one protestation among many, and the legislation did not prevent scotting and lotting from taking place on the only known occasion on which it became an issue.[110] It may be concluded that while the written sources consulted by the lawyers had a distant influence on the practice of the bailie courts, it was 'pretik' itself – the customary way of doing things, whether or not consistent with a written source – that was regarded in these courts as the law of the sea.[111]

C. Reconfiguring maritime practice in the courts of the admiral

It would be a mistake to conclude further that the burghs attached no importance to legislation. On 27 January 1576 their own representatives, meeting in Edinburgh, passed 'ane generale law to be keipit in all tymes cuming'.[112] They declared that 'incais ony schippis be pilleitt, the gudes saiff sall contribute scatt and loitt for the relief of the personis dampnefeit, bayth schip and gudes according to thair wairing', then added that in each case a 'scatt' was to be set and put to execution by 'the magistratis of the poirtis within this realme quhair the saidis schippis sall happin to aryve', and that 'the samyn ordour' was to be observed

[108] Another, very tentative, step towards extending general average beyond the situations envisaged in the Digest (the only situations discussed by Welwod and King) can be found in DCA, BCMB, vol. 12, 9 January 1572.

[109] On the use of written sources like the laws of Oléron in the fifteenth century see *Edda Frankot*, Maritime Law and Practice in Late Medieval Aberdeen, (2010) 89 Scottish Historical Review 136–152, and for the significance of her findings for the nature of maritime law in general see *idem* (n. 69).

[110] ACA, CA1/1/16, 784; *Brown et al*. (n. 61), 1467/1/4 and 1487/10/19; *Thomson*/*Innes* (n. 61), vol. 2, 87 and 178. Legislation on the point was also enacted by both the king's council (NRS, register of acts and decreets of the lords of council and session, CS5/19, f. 170) and the burgh council of Aberdeen (ACA, CA1/1/9, 398).

[111] The acts of parliament just mentioned were cited by Balfour and Welwod, though not by King.

[112] *Marwick*/*Hunter* (n.80), vol. 1, 44 f., and vol. 2, 494. In the year in which the second act of parliament touching on scotting and lotting was passed, another act was passed authorising the burghs to assemble and legislate on the affairs of merchants (*Thomson*/*Innes* (n. 61), vol. 2, 179).

'anent the gudes casten for saiftie of lyfe and gudes upoun commoun consent'. Four years later representatives of the burghs meeting in Stirling declared that the act passed in 1576 should be 'observit inviolablie in all tyme cuming', with the further additions that contributions were not to be made for any 'cloithis nor uther geir' kept in 'sey kistis', nor for 'gudis imput in the schip' anywhere apart from its 'ladinning port'.[113] The 'scatt' set in Edinburgh later in 1580 was drawn up explicitly 'according to the acts of burrowes'.[114] In the following year representatives from Dundee tried unsuccessfully to have further additions 'eikit to the acts of burrowes maid anent the scatting and lotting for pilleit and cassin guids', and a year after that the proposed additions were given effect in an act passed in Dundee to govern its own procedures.[115] The reason for this repeated resort to legislation begins to appear from two complaints made to the privy council in 1580.[116] In the first the admiral protested that the assertion in the act just passed by the burghs of a responsibility for the distribution of losses should not be allowed to 'prejudge him in his office and jurisdictioun'. The burghs were seeking to recover control of a process over which they had lost jurisdiction, although they were not yet seeking to recover their lost jurisdiction generally, as they would do ten years later. The second complaint was made by a number of shipowners, skippers and sailors, who questioned the authority of the burghs to pass their legislation on general average, which they considered unduly favourable to the merchants with whom they contracted.[117] A division was therefore emerging between the maritime and mercantile communities, apparently because the admiralty courts were handling general average cases in a way that seemed satisfactory to mariners but not to merchants. The admiralty courts seem to have adopted an approach to the distribution of losses that differed from the approach taken in the bailie courts, which is what the burgh authorities were seeking to revive with their legislation. So how did the practice of the admiralty courts differ?

Sadly, the surviving records of the admiralty courts shed scarcely any light on the subject. One case was noted in which a merchant was required to pay freight for the transportation of wine from Bordeaux to Leith, notwithstanding the loss of several barrels of fish on the outward voyage, 'sen the samyn wer cassin for

---

[113] *Marwick*/*Hunter* (n. 80), vol. 1, 99 f.

[114] ECA, SL1/1/6, ff. 52r, 64v, 69r and 71v. This is the only other case in which legislation was cited.

[115] *Marwick*/*Hunter* (n. 80), vol. 1, 117 f.; DCA, BCMB, vol. 2, p. 72; also *Alex J. Warden*, Burgh Laws of Dundee, with the History, Statutes and Proceedings of the Guild of Merchants and Fraternities of Craftsmen (1872), 121. The 1576 act may conceivably have been inspired by the handling of a piracy case in Dundee in 1574 (n. 47 above). The admiral's claim to jurisdiction over contribution cases had actually been resisted in another case heard there (n. 31 above).

[116] *Burton*/*Masson* (n. 7), vol. 3, 308 f.

[117] See too *Thomson*/*Innes* (n. 61), vol. 3, 214.

sauftie of lyve and gudis'.[118] Although the point was not discussed, the other participants in the voyage were probably expected to contribute towards the loss, for the record of a case brought before the lords of session confirms that the admiralty courts did hear actions 'for contributioun, skatting and loitting'.[119] Part of a cargo of wine had been confiscated in Bordeaux before a ship returned to Leith, where the skipper claimed before an admiralty court that sailors in his employment, who had been permitted to carry goods of their own (a right known as 'portage'), should help to defray the loss. The sailors objected that 'the lyk wes nevir hard within this realme nor na uther land of befor', and argued that any such imposition would be unjust, 'seing the merchand be his traffik reporits greit gaine and commoditie be the aventour of his guids, and the mariner ressavis na thing, bot his simple fie and hyre', together with the 'portage' of anything be bought with his 'pure fie'. The sailors might have cited in support of their objection several articles of the *Consolato del mare*, but there is no indication in the record that they did so.[120] For his part, the skipper might have cited an article of the laws of Oléron, though again there is no indication that he did so.[121] Whatever was actually argued in the admiralty court, judgment was given in the skipper's favour. The sailors then sought to have the action 'advocated' before the lords of session, who alone had the authority 'to juge and decyde in the said like maters of novelitie as this is, to the effect the same may remane as ane commoun practike fra thynce furth to all inferiour jugis'. The lords of session, however, instructed the judges of the admiralty court to reconsider the question themselves, in conjunction with four advocates experienced in maritime causes, and how the issue was ultimately resolved is not known.[122] A record of the court's deliberations would of course be interesting, but whether it would explain why mariners found the handling of disputes over general average in the admiralty courts preferable to their handling in the bailie courts is doubtful. It has been seen that a bailie court in Aberdeen had required contributions to be made after goods were removed to secure a ship's release in Newcastle, and that a court in Edinburgh had required sailors to contribute to a loss when some of the goods left on a ship belonged to them.[123] There is no reason to think that a decision delivered in a bailie court would have been different from the one originally delivered in the admiralty court, which in any case favoured the merchants involved more than the mariners.

---

[118] *Wade* (n. 4), 129 f. and 132 f.

[119] NRS, register of acts and decreets of the lords of council and session, CS7/139, ff. 1–2.

[120] *Jean-Marie Pardessus*, Collection de lois maritimes antérieures au XVIIIe siècle, 6 vols. (1828–1845), vol. 2, 71–73; *Stanley S. Jados*, Consulate of the Sea and Related Documents (1975), 125–128.

[121] *Twiss* (n. 70), vol. 1, 98 f.

[122] One of the advocates was Alexander King, who had ceased to sit as a judge of the central admiralty court in the previous year.

[123] ACA, CA1/1/13, 403 f. and 410; ECA, SL1/1/6, ff. 195–197.

However, a possible difference between the handling of disputes over general average in the admiralty and bailie courts is suggested by the stress placed in the legislation passed by the burghs on the need for scotting and lotting whenever 'ony schippis be pilleitt'.[124] The Roman jurists had considered it appropriate for contributions to be made when a ship was redeemed from pirates (*a piratis redempta sit*), but they had distinguished the situation where the property of some merchants was carried off by brigands (*praedones abstulerint*).[125] Their reasoning was accepted by King, who observed in his treatise that in the latter situation there was not usually any 'intention on the part of the person confronting the danger to yield reluctantly to the brigands for the sake of the common benefit', although he did concede that it would be different if brigands were 'content with the wares of one of the shippers, which they professed to seize for the common liberation'.[126] King had appropriated this part of his treatise from an earlier treatise on maritime law written by Petrus Peckius, a professor at one of the universities he had attended in the Netherlands, and Peckius had in turn followed the example of a commentary on the Digest by the fifteenth-century jurist Raphael Fulgosius.[127] It could be, however, that King's aim at this point was not so much to move the practice of the admiralty courts into line with civilian thinking as to support a move that was already under way. Welwod also rehearsed the civilian thinking in his treatise, observing that if a ship were redeemed, 'contributioun salbe maid for all, becaus the redemptioun is for the saiftie of all', whereas if only some of the cargo were removed, 'then na skat salbe maid thairfoir, becaus it cannot be allegit in this cais that the rest of the geir is saif thairby'.[128] As a member of a family of merchants in a coastal burgh, he appreciated that this thinking was inconsistent with local practice, adding immediately that 'nowadayes, becaus that this chance is found to be common to the rest, thairfoir it is aggriet that the upsett be also commoun to all to quhome the chance is come'.[129] In revising his treatise for the press he deleted this sentence, remarking that losses of this kind could not be attributed to 'any common necessity, for oftentimes pirats takis nothing'.[130] Given that Welwod tended at this stage to favour the claims of the burghs, the alteration he made may seem surprising, but it could be that he had only just become aware of a different approach being taken in the admiralty courts, and that as a teacher of the civil law he found it congenial. It

[124] *Marwick/Hunter* (n. 80), vol. 1, 44 and 99.

[125] Paul D. 14.2.2.3.

[126] *Ford* (n. 65), 174–177.

[127] *Petrus Peckius*, Commentaria in omnes pene iuris civilis titulos ad rem nauticam pertinentes (Louvain 1556), 179 f.; *Raphael Fulgosius*, In primam Pandectarum partem commentariorum libri duo, 2 vols. (Lyons 1554), vol. 2, f. 95r.

[128] *Ford* (n. 65), 367.

[129] *John W. Cairns*, Academic Feud, Bloodfeud, and William Welwood: Legal Education in St Andrews, (1998) 2 Edinburgh Law Review 158–179 and 255–287.

[130] Sea-Law of Scotland, sig. C2.

would certainly help to explain the legislative intervention of the burghs, and the support the admiral received from shipowners, skippers and sailors, if the admiralty courts were restricting general average to cases in which ships were redeemed from pirates. As contracts for the carriage of goods were not understood to transfer the 'aventour' of 'invasioun of pirattis' from merchants to mariners, it would have suited mariners if the admiralty courts had moved away from distributing all losses inflicted by pirates among everyone involved in a maritime enterprise.[131]

If Welwod was correct about mariners and merchants expecting contributions to be made in all cases of piracy because 'this chance is found to be common', and not only where losses were found to have been sustained for what King called 'the common benefit', then their thinking would have been consistent with the approach taken in the bailie courts to the calculation of contributions, for it has been seen that scotting and lotting was arranged there in proportion to the investment each participant risked in an enterprise. In a chapter of his treatise devoted to the calculation of contributions, Welwod started by summarising an article of the *Consolato del mare*, according to which goods jettisoned in the first half of a voyage were to be evaluated on the basis of what they had cost before departure, whereas goods jettisoned in the second half were to be evaluated on the basis of what they could be sold for on arrival.[132] When he removed his references to the Mediterranean laws in revising his treatise for the press, Welwod could have reverted to the articles of the laws of Oléron and Wisby requiring all evaluations to be based on prices after arrival, or he could have turned instead to the practice followed in the bailie courts of basing all evaluations on prices before departure.[133] Instead, he adhered to the Digest text requiring jettisoned goods to be evaluated on the basis of their purchase price and preserved goods on the basis of their resale value.[134] King also took the Roman line that the profit jettisoned goods might have yielded was irrelevant, since what needed to be distributed was the loss sustained, while the profit actually made on preserved goods was relevant, since payments were due to the extent that other mariners and merchants had benefited from the jettison.[135] He mentioned too that the person who owned or chartered the ship could contribute on the basis of either the value of the ship or the amount of freight due to him.[136] While support for this point could have

[131] *Ford* (n. 65), 290.

[132] *Ford* (n. 65), 368 f; *Pardessus* (n. 120), vol. 2, 102; *Jados* (n. 120), 55.

[133] An example of the sort of error that can easily be made if the burgh records are viewed through a civilian lens will be found in *Ford* (n. 65), 305. In making the calculation detailed in ACA, CA1/1/17, 163, the arbiters based their evaluations on the cost of goods in Flanders. Though they did also ask about sale prices in Scotland, they did so as a means of working out the exchange rate between the currencies of the two countries.

[134] Sea-Law of Scotland, sig. C4v; Paul D. 14.2.2.4.

[135] *Ford* (n. 65), 165–167.

[136] *Ford* (n. 65), 182–185.

been drawn from the laws of Oléron and Wisby, King actually attributed it to local custom (*consuetudine nostra nauta introductum est*). He clearly had no difficulty with local usage, or with treating it as such (*nostris moribus obtinet*), provided it was compatible with legal theory.[137]

To suppose that the lawyers simply found some aspects of practice inconsistent with theory but not others would be to miss something important. In the law schools, the Roman texts on general average were taken to reflect a broader principle that *damnum pro communi utilitate acceptum, commune esse debeat*.[138] Those who suffered losses at sea for the benefit of others, it was explained, deserved to be reimbursed by the others, just as when buildings were demolished to prevent the spread of fire.[139] Peckius, for example, with reference again to the commentary on the Digest by Fulgosius, observed that a more obvious remedy for a merchant whose goods were jettisoned to use was the *actio negotiorum gestorum*.[140] The civilian doctors accepted that the contractual arrangements entered into when mariners and merchants engaged in an enterprise provided a convenient mechanism for the recovery of contributions, but the obligation to contribute was itself viewed in more quasi contractual terms. Essentially, losses were distributed because and to the extent that benefits were gained from them. In the bailie courts, in contrast, losses were distributed to the extent that risks materialised, not to the extent that benefits were gained. Anyone engaged in an enterprise risked losing whatever he had invested in it. If it was a joint enterprise, as voyages typically were, then the risks undertaken by all those involved were understood to be shared between them in proportion to their investments. It was in keeping with this notion of risk sharing that those whose goods were placed 'aboun the ourloft' of a ship were taken to bear their own 'aventour', along with those who 'payet nather fraucht nor custome' and those whose goods were 'imput in the schip at ony uther port uther nor at hir ladinning port'.[141] It was only those who embarked on an enterprise together who were taken to underwrite each other's risks. The mariners and merchants who regulated their own affairs in the bailie courts did expect losses to be distributed among them, and their thinking does appear to have been influenced in some respects (albeit at a deep and distant level) by the theory of the civil law, which also provided for the distribution of

[137] The view might have been taken that freight payments were the gain the skipper might make, but the jurists had not actually said as much.

[138] *Digestum vetus* (Paris 1559), col. 1460 (gl. 'Aequissimum', ad D. 14.2.2.pr.).

[139] *Bartosz Zalewski*, Creative Interpretation of Lex Rhodia de iactu in the Legal Doctrine of Ius commune, (2016) 8 Krytyka Prawa 173–191.

[140] *Peckius*, (n. 127), 166 f.; *Fulgosius*, (n. 127), vol. 2, f. 94v. It was being assumed, of course, that the merchant was not present to give his consent.

[141] ECA, SL1/1/8, f. 65v; *Marwick*/*Hunter* (n. 80), vol. 1, 100. Ironically, the thinking of merchants and mariners was more consistent with the reasoning behind the Nomos Rhodion nautikos, of which they professed ignorance (*Nevenka Bogojevic-Gluscevic*, The Law and Practice of Average in Medieval Towns of the Eastern Adriatic, (2005) 36 Journal of Maritime Law and Commerce 21–59, 28 f).

losses, but the practice of the bailie courts differed from the theory of the law schools not only in certain details but in its fundamental rationale. Behind the distribution of losses in the bailie courts was an assumption that risks had already been shared, and it may be that this assumption did not underpin the handling of general average cases in the admiralty courts. It may be that practitioners in the admiralty courts, some of whom were learned lawyers like King, had adopted the vocabulary of scotting and lotting but not the presuppositions behind its original usage.

As well as helping to explain the legislative intervention of the burghs in the last quarter of the sixteenth century, a move away from risk sharing in the admiralty courts would also help to explain another development that seems to have taken place around the same time. In 1574 it was placed on record in the burgh court book of Dundee that a sum of money was to be paid following the return of a ship and crew from abroad, with an additional sum if the voyage was extended, and that the creditors were 'to beir the aventour of the saids money quhill the saids schippis or persones arriving in Scotland'.[142] In 1580 it was placed on record in the burgh court book of Aberdeen that a merchant, 'purposand to saill to France', had borrowed a sum of money and promised to repay it with interest on his return, with the creditor again 'bering the aventour thairof be the see and piracy'.[143] Nearly twenty years later the actual terms of a contract were registered in Dundee.[144] A skipper from Anstruther promised to pay a French creditor 'the soume of twelf hundretht punds money usuall of Scotland, witht twentie punds money as for the profeit of ilk hundreth thairof', as soon as his ship returned safely from the Canary Islands, taking care to explain that the creditor had lent him the principal sum 'upon his adventour, sa that he salbe ane warrand of the samin fra schipwrak and pirat, the quhilk God avoid, untill the said schippis arryvall and returning fra the saids iles'.[145] In the longer version of his treatise Welwod remarked that there were important differences 'twixt that money quhilk is lent amangis men to uses on land and that quhilk is lent for the sea'.[146] One difference was that money was lent for use on land 'upone the perrell of the borrower', whereas it was lent for use at sea 'upon the hazard of the lender'. Another was that charging interest on a loan for use on land was 'odiouslie callit *usura* in generall', whereas charging interest on a loan for use at sea was 'callit *usura maritima* or *foenus nauticum*, and is the pryce not of the len bot of the hazard

[142] DCA, BCMB, vol. 13, 3 April 1574. The word 'quhill' meant 'until'.

[143] ACA, CA1/1/30, 219.

[144] DCA, BCMB, vol. 20, 5 March 1599.

[145] The word 'pirat' is not clearly written, but it is not easy to see what else could have been intended.

[146] *Ford* (n. 65), 364. Neither King nor Balfour dealt with the topic.

and danger quhilk the lender takkis upon him duiring the len'.[147] Both distinctions were backed up in Welwod's treatise with references to Digest texts.[148] Whether the borrowers who recorded their obligations in the burgh court books were familiar with these texts may be doubtful, but the notary public who drafted the document registered in 1599 may have known them, or have followed an exemplar drafted by someone else who knew them, and there may also have been notarised documents behind the earlier entries. It seems fairly likely that other loans of the same type were made of which no trace has been found, and it is entirely possible that some were made before the mid-1570s, yet it would make sense for this type of loan to have come into vogue only then. If general average cases were not being handled in the admiralty courts on the basis of the assumptions once made in the bailie courts about risk sharing among the participants in maritime ventures, then those embarking on such ventures would have had reason to look for ways of shifting the risks involved onto other people.

The evidence of maritime loans from the closing decades of the century is the only evidence that has come to light of anything remotely resembling marine insurance being used in the period under review.[149] It is possible that mariners and merchants from Scotland were paying premiums to insurers overseas in exchange for promises to indemnify them against specified risks.[150] Although no trace of any such contract has been found in the sources examined here, the adoption of a civilian approach to general average, whether it was already under way in the admiralty courts or was merely being recommended by lawyers, would have increased the attraction of any available form of risk shifting.[151] Conversely, as long as general average continued to be conceived of as a form of risk sharing, the attraction of insurance contracts would have been reduced, for the obvious reason that general average would have been a more efficient mechanism. When a loss is generalised among the participants in a venture, only the loss has to be covered, whereas people who are persuaded to bear the risk of a venture in which they have no personal interest will normally require to be paid for their trouble, through interest on loans, insurance premiums or something of the sort. The extra payment might always have seemed worthwhile when situations were envisaged in which it was not considered appropriate to talk about scotting and lotting, such

[147] Cf. *Burton/Masson* (n. 7), vol. 2, 329 f.

[148] Mod. D.22.2.1 and Scaev. D. 22.2.5.

[149] *Cf. Angelo D.M. Forte*, Marine Insurance and Risk Distribution in Scotland before 1800, (1987) 6 Law and History Review 393–412.

[150] The original move from maritime loans to marine insurance is outlined in *Luisa Piccinno*, Genoa, 1340–1620: Early Development of Marine Insurance, in: Adrian B. Leonard (ed.), Marine Insurance: Origins and Institutions, 1300–1850 (2016), 25–45, 27–35. The recourse taken to maritime loans in Scotland suggests that marine insurance was not readily available there.

[151] *Cf. Scott C. Styles*, Scottish Marine Insurance before the Mid-Eighteenth Century, in: Andrew R.C. Simpson et al. (eds.), Continuity, Change and Pragmatism in the Law: Essays in Memory of Professor Angelo Forte (2016), 237–279.

as the damage or destruction of a ship in a storm, and perhaps the seizure of a ship or cargo by enemies in wartime.[152] The extra payment might also have started to seem worthwhile when piracy was envisaged, if it came to be considered appropriate to talk about scotting and lotting only in the exceptional circumstances specified by the Roman jurists. The extra payment may again have started to seem more worthwhile if contributions came to be calculated on the basis of the benefits merchants gained when their goods were preserved. Quite apart from any incentive to insure against their own losses, merchants might have found the payment of premiums preferable to the generalising of everyone's losses in accordance with the gains they might make rather than the sums they invested. In these ways, what might be termed the increasing Romanisation of general average may have driven mariners and merchants in Scotland towards the use of insurance, when it became available. It may be wondered whether a change in the understanding of general average played a similar part in the rise of insurance elsewhere.

[152] It should be emphasised again that while there are extensive records on prize taking, which will be examined elsewhere, general average is rarely mentioned. Insurance is never mentioned, either in these records or in those on shipwreck.

The *Ordonnance sur la marine* on General Average

Comparative Methods, Legal Transplants, and a European *droit commun*

By *David Deroussin*

A. Introduction

The *Ordonnance sur la marine* of 1681 is the single most important piece of legislation of the French *Ancien Régime*. Book III, Tit. 7 deals with special and general average. Title 7 immediately follows the *Ordonnance*'s coverage of insurance in Tit. 6 and precedes Tit. 8 on jettison. Obviously, Tit. 7 and Tit. 8 must be read together as they apply the same mechanism of sharing loss. Accordingly, loss will, if the requirements set out in the titles are met, be borne by the ship and all goods on board.

René-Josué Valin (1695–1765) asserted in the first half of the eighteenth century that French legislation and literature on general average were simply superior compared to that of other nations: they were the most consistent with equity and 'droite raison'.[1] The importance of the 1681 *Ordonnance* is, however, not

[1] *René-Josué Valin*, Nouveau commentaire sur l'ordonnance de la marine, vol. 2 (La Rochelle 1766), 158. Valin was a lawyer and later in his career attorney for the Admiralty: *Patrick Arabeyre*, *Jean-Louis Halpérin* and *Jacques Krynen* (eds.), Dictionnaire historique des juristes français XIIe–XXe siècle (2007), 784 f.; *Fondazione Mansutti*, Quaderni di sicurtà. Documents de l'histoire de l'assurance (2011), 328 f.

limited to the *Ancien Régime*. In the first half of the nineteenth century, Jean-Marie Pardessus (1772–1853) claimed that it still constituted the common law of Europe.[2] Yet, the drafters of the *Ordonnance* were themselves inspired by several historical sources, especially by Roman law and the many medieval and early modern compilations of maritime law such as the French *Guidon de la mer*.[3] From the latter, the drafters of the *Ordonnance*, for example, took over the distinction between particular and general average; a distinction which the 1807 *Code de commerce* still recognized.

The observation that the drafters of the *Ordonnance* were inspired by several historical sources raises the question as to its originality; a question which has thus far not been posed by French legal historians. They have, in general, paid only little attention to the history of insurance and general average. In order to answer this question, it will be necessary to compare the *Ordonnance* with Roman law and the many medieval and early modern compilations of maritime law and to analyse the reception of Roman law in France. In order to assess the lasting impact of these traditions on the *Code de commerce*, it will be necessary to analyse how French jurists interpreted the rules on general average of the *Ordonnance* and thereby contributed to rooting these traditions in France, so that the Napoleonic legislator had no more to do than to compile them in the 1807 *Code*.

In addressing these research questions, the present contribution will move forward on different levels of abstraction. On a technical level, it will analyse the details of the *Ordonnance*'s title on general average, how the contributions of the owners of the goods and the ship were calculated, and how they were settled and paid. Beyond the reconstruction of doctrinal details, theoretical problems will be addressed: on which (French or foreign; legislative, doctrinal,[4] or judicial) authorities did French jurists rely when developing their interpretation of French

---

[2] *Jean-Marie Pardessus*, Collection de lois maritimes antérieures au XVIIIè siècle, vol. 1 (1831), 371.

[3] *Valin* (n. 1), vol. 1, V, asserted that he had discovered in the library of the Duke of Penthièvre a collection of almost all historical maritime laws, from the Lex Rhodia, the Jugements d'Oléron to the ordinances of the Hanse. He claimed that these texts had been used when drafting the Ordonnance. On the preparation of the Ordonnance and on a journey made by the French jurist Legras at the request of Jean-Baptiste Colbert to the United Provinces of the Netherlands, see *René Warlomont*, Les sources néerlandaises de l'Ordonnance maritime de Colbert (1681), (1955) 33 Revue belge de philologie et d'histoire 333–344; *Arthur Desjardins*, Introduction historique au droit maritime (1890), 131 (who pointed out that Legras came in contact with a Dutch merchant named Verwer).

[4] It is difficult to distinguish between legislative and doctrinal authorities. The Guidon de la mer was written probably during the last decades of the sixteenth century, see *Pardessus* (n. 2), vol. 2, 372. It was authored by a private individual and was never officially promulgated. However, Valin attributed authorship to Cleirac, yet Cleirac was clear that he simply printed a corrected edition of the Guidon, even complaining that he was not able to name its author: *Estienne Cleirac*, Us et coutumes de la mer (Bordeaux 1647), 179.

law? What was the exact function of these authorities? Were they invoked to clarify the meaning of French law? Were they invoked in an ornamental fashion only because it was thought that French law had to be interpreted autonomously? Were these authorities used to fill gaps? What effect did the use of non-state and foreign authorities have on their theoretical status within the French legal system? Were they integrated into the national legal order, in line with the opinion formulated by Robert-Joseph Pothier (1699–1772) that studying Roman law was necessary to understand French law?[5] In other words, the present contribution will analyse the history of general average in France in terms of legal transplants and comparative methods,[6] focusing both on its first legislative recognition and its subsequent interpretation. The overall conclusion will be that the 1681 *Ordonnance* on general average borrowed heavily from many sources and that its subsequent interpretation did not take a purely autonomous approach.

B. The *Ordonnance sur la marine* of 1681 on general average

The 1681 *Ordonnance* deals with general average in Book III, Tit. 7. General average is treated as a risk in maritime transport. At the same time, the *Ordonnance* defines a mechanism how the loss resulting from rescue measures taken in the common interest of a ship and the goods on board will be apportioned, reflecting a general idea of solidarity.

I. Distinguishing *avaries*, *avaries simples et particulières*, *avaries grosses et communes*, and *menues avaries*

The *Ordonnance* describes losses in maritime transport by reference to different concepts: *avarie*, *avarie simple et particulière*, *avarie grosse et commune*, and *menues avaries*. The concept of *avarie* is used in a broader and a narrower sense. In its broader sense, *avarie* refers to all damage suffered by a ship and the goods on board from the time of loading and departure, until arrival and unloading, as well as to all extraordinary expenses made during the voyage in the interest of the ship and/or the goods (Book III, Tit. 7, Art. 1).

In a narrower sense, a loss (*avarie*) is considered to be a case of general average (*avarie grosse et commune*) when it consists of extraordinary expenses or damage suffered for the common safety of the goods and the ship. Book III,

---

[5] *Robert-Joseph Pothier*, Pandectae Justinianeae in novum ordinem digestae, vol. 1 (1818), 280. On Pothier, see *Arabeyre*/*Halpérin*/*Krynen* (n. 1), 636–638.

[6] See *Alan Watson*, Legal Transplants: An Approach to Comparative Law (2nd edn., 1993). For an opposite point of view, see *Pierre Legrand*, The Impossibility of 'Legal Transplants', (1997) Maastricht Journal of European and Comparative Law, 111–124.

Tit. 7, Art. 6 lists examples of general average: (1) goods given as settlement to pirates; (2) jettisoned goods, broken or cut hawsers and masts, anchors, and other things abandoned; (3) damage caused to goods that remained on board, but which were damaged when other goods were jettisoned; (4) the costs of care and support for sailors who were injured while defending the ship; and (5) the costs of unloading if these costs were incurred to refloat the ship.

This enumeration raised a number of problems and questions. Concerning the first case, there existed, for example, the obvious risk of complicity between the pirates and the captain or one of the owners of the goods. Furthermore, the French term *pirates* was understood in a wide sense.[7] Finally, literature refused to apply the provision to the case in which pirates looted goods without claiming any money for letting the ship go. Literature argued that this was not a case of common loss, so that the loss was on the owner whose goods were so looted: *res perit domino*. The fact that the pirates may have chosen the looted goods at random was irrelevant. A case of general average always required that a loss had been suffered for the common safety.[8] Concerning the fourth case, it was clear that it was not a case of general average if a sailor was not involved in defending the ship, but if he was injured while performing ordinary services.[9]

Book III, Tit. 7, Art. 7 adds a further case: if a ship is arrested by a sovereign's order, the sailors' wages and their subsistence costs counted as a case of general average. Usually, such wages did not even qualify as loss, except in the case of a ship's redemption after it had fallen into the hands of pirates (Book III, Tit. 4, Art. 20). However, Book III, Tit. 7, Art. 7 applied only if the ship had been rented by the month, not if it had been rented for a journey – a case which is unlikely to have arisen very often. Balthazard-Marie Émérigon (1716–1784) and Valin stressed that it was uncommon in eighteenth-century France to rent ships by the month.[10] Furthermore, Valin was surprised by the distinction as it is not made in Book III, Tit. 3, Art. 16.[11] According to Art. 16, freight was not due for the time that the ship was arrested, but the sailors' wages and their subsistence costs were classified as loss irrespective of the ship being rented by the month or for a journey. However, Art. 16 does not answer the question whether this was a case of *avaries* or *avaries communes*.

---

[7] *Valin* (n. 1), vol. 2, 165.

[8] *Valin* (n. 1), vol. 2, 166.

[9] *Valin* (n. 1), vol. 2, 167.

[10] *Balthazard-Marie Émérigon*, Nouveau commentaire sur l'ordonnance de la marine, vol. 2 (Marseille 1780), 158; *Valin* (n. 1), vol. 2, 170. On Émérigon, see *Alfred Jauffret*, Un comparatiste au XVIII[e] siècle: Balthazard-Maris Émérigon, (1972) 24 Revue internationale de droit comparé 265–277.

[11] *Valin* (n. 1), vol. 2, 170.

The *Ordonnance* thus distinguishes between two kinds of loss, even if this distinction is not made explicit. Both may be classified as *avaries* in the wide sense, and both kinds of loss may be apportioned according to the principles of *avarie grosse et commune*. On the one hand, there are expenses. According to the rules on *avarie grosse et commune*, they will be apportioned if they have been incurred for the common safety of the ship and the goods on board. On the other hand, there is damage. According to the rules on *avarie grosse et commune*, damage will be apportioned if it has been necessary for the common safety of the ship and the goods on board. This distinction is still acknowledged today: modern French law distinguishes between *avaries-frais* and *avarie-dommage*.[12]

Moreover, the criterion of common safety seems to be sufficient for the rules on *avarie grosse et commune* to apply.[13] This finding is confirmed by Pothier, who requires only that losses 'ont été souffertes pour le salut commun'.[14] In principle, it is not necessary that the loss that has been suffered for the common safety has eventually saved the ship and the goods on board. Consequently, if something has been given as settlement to pirates or if goods have been jettisoned in order to save the ship and the goods on board, Book III, Tit. 7, Art. 6 applies even if the ship will not arrive in a safe port or even if it subsequently shipwrecks. It should follow that everything that will be saved from the shipwreck will have to contribute to the loss suffered for the common safety. However, Book III, Tit. 8, Art. 15 makes an exception to this rule in the case of jettison:[15] 'Si le Jet ne sauve le Navire, il n'y aura lieu à aucune contribution', and Pothier consequently discusses that in the case of jettison the loss must have prevented the shipwreck: 'Il faut en second lieu […] qu'il ait effectivement empêché le naufrage ou le pillage du vaisseau.'[16]

The concept of general average contrasts to that of particular average (*avarie simple et particulière*). Book III, Tit. 7, Art. 2 states:

> 'Les dépenses extraordinaires pour le Bâtiment seul, ou pour les Marchandises seulement, & le dommage qui leur arrive en particulier, sont Avaries simples & particulières […].'
>
> 'Extraordinary expenses made for the benefit of the ship only or the goods only as well as loss that happens specifically to them, are cases of simple and special average.'

---

[12] See Art. L. 5133-4 and L. 5133-6 of the Code des transports.

[13] See, however, the text corresponding to n. 36 and n. 56, below.

[14] *Robert-Joseph Pothier*, Traité des contrats de louage maritimes (Paris 1765), para. 106.

[15] The following edition has been used: Ordonnance de la marine, Du mois d'Aoust 1681. Commentée & conférée avec les anciennes Ordonnances, & le Droit Écrit (Paris 1714).

[16] *Pothier* (n. 14), para. 113.

Article 4 adds that the loss of hawsers, masts, and anchors due to a storm or other sea risks (*fortune de mer*), as well as damage caused to goods by the fault of the captain or the crew are cases of particular average. They have, for example, not properly closed the hatches, have not provided good hawser, or have moored the vessel badly. Valin, quoting Benvenuto Stracca (1509–1578) and case law, added that damage caused to the goods by the vice and bad condition of the ship is simple damage.[17] Furthermore, it appears that the *Ordonnance* referred to material damage to, and loss of, goods during transit, as well as loss of weight or quantity suffered by the goods as *avaries simples et particulières*. Such *avaries* may have resulted from *force majeure*, they may have occurred during transport, they may have affected both the means of transport and the process of loading, they may have affected only the goods during handling (loading, handling in the hold, unloading, transshipment), during their passage from one means of transport to another, or while on the dock or in a warehouse.

Finally, the *Ordonnance* recognizes a further kind of damage: *menues avaries* (minor damage). Book III, Tit. 7, Art. 8 states:

> 'Les Lamanages, Toüages & Pilotages pour entrer dans les Havres ou Rivières, ou pour en sortir, sont menuës Avaries, qui se payeront un tiers par le Navire, & les deux autres tiers par les Marchandises.'
>
> 'The moorings, tows, and pilotings to enter or leave harbours or rivers are minor damage, a third of which will be paid by the ship and the other two thirds by the goods.'

This category of *avarie* is often overlooked by the literature, probably because it has little economic importance. Pothier, for example, distinguished only between *avarie simple et particulière* and *avarie grosse et commune*.[18] Émérigon added that the corresponding loss had to be borne by insurers, if they had been caused by the fear of shipwreck.[19]

II. *Avaries simples et particulières* and *avaries grosses et communes*: similarities and differences

Of these different concepts, *avarie grosse et commune* and *avarie simple et particulière* were the most important. (1) The former included jettisoned goods,

---

[17] *Valin* (n. 1), vol. 2, 164 refers to *Benvenuto Stracca*, De mercatura, Tractatus de nautis, part. 3, num. 11, and to a judgment of the Admiralty of Marseille, 28 October 1749.

[18] *Pothier* (n. 14), para. 106. By contrast *Joseph-Nicolas Guyot*, Répertoire universel et raisonné de jurisprudence, vol. 3 (Paris 1775), s.v. avaries, 422–424, clearly distinguished between avaries communes, avaries simples, and menues avaries and specified that the practice has long been established that a certain amount is added to the freight, in order to compensate the owners of ships in the event of *menues avaries*.

[19] *Émérigon* (n. 10), 158.

certain costs and payments, and cut hawsers, sails or masts, all done for the purpose of saving both the ship and the goods. The term *avarie commune* derives from the fact that both the ship and the goods were burdened with these losses. (2) The latter included extraordinary expenses made for the ship alone or for the goods only. The similarities and differences of both forms of *avarie* call for further discussion.

(1) With the exception of *menues avaries*,[20] all types of *avarie* share their exceptional nature. This is the reason why the duties and taxes referred to in Book III, Tit. 7, Art. 9 were not deemed to be forms of *avarie* – except if they were caused by a storm, and then they took on an extraordinary character and were classified as *avarie*. Furthermore, they constituted a case of *avarie grosse et commune* if the ship entered the harbour for the common safety of the ship and the goods.[21] Contemporary literature insisted that a loss would only count as *avarie* if it was of an extraordinary nature: expenditures had been made out of necessity in unforeseen circumstances, or damage had been caused by *force majeure*.[22] However, when was a loss of an extraordinary nature? Literature offered only a very general (and, one might say, unhelpful) definition: everything that did not happen in the natural course of events was said to be extraordinary. If a captain, for example, entered without necessity a port where duties or fees were required, the corresponding expenses did not constitute an *avarie* and consequently these expenses did not have to be borne by the ship and all goods on board according to the principles of *avarie grosse et commune*. The same applied to the costs caused by the journey taking longer than anticipated; for example, the costs of buying additional food, if this was not due to an accident.[23]

(2) The twofold distinction between *avaries grosses et communes* and *avaries simples et particulières* was all but new: it had already been adopted by Chapter 5, Art. 1, 3, 24 f. of the *Guidon de la mer*.[24] The drafters of the 1681 *Ordonnance* preferred it over competing classifications that were discussed by contemporary literature, such as *avarie propre et impropre*, *avarie ordinaire et extraordinaire*, and the further division of *avarie extraordinaire* into *avarie volontaire*,

---

[20] According to *Valin* (n. 1), vol. 2, 171, Art. 8 does not require menues avaries to consist of extraordinary expenses. Thus, they need not be caused by the fear of being shipwrecked or being caught by pirates. Instead, Art. 8 must be applied in all cases where the corresponding expenses have been incurred. This interpretation is in accordance with Chapter 5, Art. 12 of the Guidon de la mer. However, the question whether such expenses were ordinary or extraordinary is important with respect to insurance coverage, as insurers covered only extraordinary expenses.

[21] *Valin* (n. 1), vol. 1, 172.

[22] See, e.g., *Balthazard Émérigon*, Traité des assurances et des contrats à la grosse, vol. 1 (Marseille 1783), 152.

[23] *Valin* (n. 1), vol. 2, 158.

[24] Reproduced in *Pardessus* (n. 2), vol. 2, 387–393.

fortuite, and *mixte*. Valin stressed that these alternative classifications are, indeed, obscure.[25]

(3) Literature emphasized that *avarie simple* was not 'simple' in the sense that it referred to small loss only. It was only the editor of the 1714 edition of the *Ordonnance* who claimed that the amount of *avarie simple et particulière* did not usually exceed 10% of the value of the ship or goods: 'parce qu'elle se fait par rapport aux dépenses extraordinaires faites pour le Bâtiment seul, ou pour les Marchandises seulement, & elle n'excede pas ordinairement dix pour cent.'[26] By contrast, Valin pointed out that the sums involved in *avarie simple* are often greater than those involved in *avarie grosse et commune*.[27] Thus, *avarie simple* and *avarie grosse et commune* were not distinguished by reference to the amount of loss. Nor were they distinguished by reference to the nature of the damaging event. Rather, it was the intended purpose of causing the loss. The captain and the crew must have acted for the common safety of the ship and the goods on board, with the intention to preserve them. This explains why the same damaging event and the same type of loss appeared sometimes under the heading of *avarie simple* and sometimes under that of *avarie grosse et commune*. If, for example, an anchor was lost due to a storm or other *fortune de mer*, this was a case of *avarie simple*.[28] Even if the same storm caused damage to both the ship and the goods, it was nevertheless not a case of *avarie commune* as long as the loss was not suffered for their common safety.[29] Moreover, literature pointed out that loss resulting from a collision mentioned in Book III, Tit. 7, Art. 10 did not qualify as *avarie grosse et commune* if the collision was fortuitous because then it could not be said that loss was suffered for the common safety. The principles on *avarie grosse et commune* were applicable only if goods were sacrificed in order to avoid a collision.[30]

(4) Furthermore, the *Ordonnance* spoke of *avarie simple et particulière* and thus referred to the respective loss as being *particulière*: it had to be borne by the specific goods that had suffered it. Book III, Tit. 7, Art. 3 stated: 'Les Avaries simples seront supportées & payées par la chose qui aura souffert le dommage, ou causé la dépense' ('*Avarie simple* will be shouldered and paid for by the goods that suffered it, or that caused the expense'). Examples are damage to specific goods, expenses that had to be incurred to save them, and duties paid specifically for them. These losses may, for example, have been caused by inherent defects,

---

[25] *Valin* (n. 1), vol. 2, 159.
[26] Ordonnance de la marine (n. 15), 302.
[27] *Valin* (n. 1), vol. 2, 159.
[28] See Book III, Tit. 7, Art. 4 of the 1681 Ordonnance.
[29] *Valin* (n. 1), vol. 2, 161.
[30] *Valin* (n. 1), vol. 2, 180.

a storm, a collision, or a shipwreck, as Art. 5 clarified.[31] If they have been caused by the fault of the master of the ship – examples were given in Art. 4: the master has not correctly closed the hatches or has provided bad ropes – they had to be shouldered by the master and the owner of the ship. Insurers covered such loss only if they had insured the barratry of the master, but they may, of course, have taken recourse against the wrongdoer.[32] Thus, the merchant who loaded the goods so damaged on board seems to have had two options, but in fact he had three. (a) As the damage fell on the master if it had been caused by his fault or that of a member of the crew, he may have asked the master for compensation. (b) The loss fell also on the ship, so that the merchant may have claimed damages also from its owner. This finding is confirmed by Book II, Tit. 8, Art. 2 acknowledging a kind of vicarious liability. However, the shipowner could escape personal liability by abandoning the ship and the goods ('Les Propriétaires de Navires seront responsables des faits du Maître; mais ils en demeureront déchargez, en abandonnant leur Bâtiment & le Fret'), because he was liable only up to the value of the ship and the freight. Nevertheless, if the merchant was insured, he was obviously entitled to full compensation from his insurer.[33] (c) Literature pointed to a third option that a damaged party had: he may have turned to the party who was at fault in selecting a ship master or a crew based on *culpa in eligendo*.[34]

Thus, it was only in cases of *avarie grosse et commune* that both the shipowner and the owners of the goods on board or the merchants who had loaded such goods had to contribute to the loss in proportion to the value of the ship and the goods. For that purpose, the *Ordonnance* did not distinguish between those who had insured their goods and those who had not. However, things became complicated if the master of the ship had entered into a bottomry loan (*prêt à la grosse aventure*). Book III, Tit. 5, Art. 16 clarified that in that case the creditor also had to contribute.[35] Moreover, literature stressed that even if goods had been jettisoned for the common safety, there was no case of *avaries grosses et communes* if this did not prevent the ship from sinking.[36]

---

[31] On the words 'le vice proper de la chose' in this article, see *Guyot* (n. 18), 422.
[32] *Valin* (n. 1), vol. 2, 160.
[33] *Valin* (n. 1), vol. 2, 568.
[34] Ordonnance de la marine (n. 15), 304.
[35] On the details, see: Ordonnance de la marine (n. 15), 246.
[36] See, e.g., *Valin* (n. 1), vol. 2, 165.

III. Details on the procedure of contribution under *avaries grosses et communes*

Book III, Tit. 7 defined *avaries grosses et communes*, and it identified those liable to contribute. However, it failed to specify any practical details on the mechanism of contribution. It simply formulated the rule that the loss was divided into two parts. One part was on the owner of the ship and the other on the owners of the goods. Yet, it did not mention, for instance, whether and under what circumstance a general average adjuster had to be appointed. It is only Tit. 8 on jettison that defined more specific modalities. Consequently, the rules of Tit. 8 had to be applied by way of analogy to the case of *avaries grosses et communes*. Book III, Tit. 8, Art. 1 required the master to seek the advice of the merchants on board and the principal crew members before jettisoning goods, cutting a mast, or abandoning the anchors in the event of a storm or acts of piracy. If they were in agreement, then it constituted a case of *avaries grosses et communes*. Article 2 added that in case they were not in agreement, the position of the master of the ship and the crew prevailed. Article 3 determined the order in which goods had to be jettisoned: first the utensils and the least necessary things that weigh heaviest and have the least value, then the goods located on the first deck – all according to the decision of the captain at the advice of the crew.

According to Art. 4, a list of everything that had been jettisoned had to be prepared, and everybody who had given his consent had to sign the list. If anybody refused to sign it, the reason for the refusal had to be indicated. Upon arrival at the first port, the master of the ship had to appear in front of the Registry of the Admiralty (*Juge de l'Amirauté*) or a French consul if the ship had entered a foreign port. The master had to declare the reasons for the action taken, and his declaration had to be verified by the majority of the crew. Furthermore, he had to prepare with diligence a statement of all loss and estimate the value of both the jettisoned and saved goods according to their current price at the port of destination (Art. 6).

These rules were to a large extent in accordance with the Art. 8 of the *Rôles d'Oléron* as well as D. 14.2.2, and according to literature they were a manifestation of principles of equity and justice: it was the value of the jettisoned goods at the port of destination that was relevant for calculating the contributions; consequently, those merchants whose goods had been saved were, literature claimed, unable to take advantage of their luck.[37] For assessing the value of the goods, it was necessary to know their quality, and the quality was determined by reference to the bills of lading and, if available, invoices (Art. 8). If the bill of lading had

[37] *Jean Domat*, Les loix civiles dans leur ordre naturel (Paris 1689), Book 2, Tit. 9, Sect. 2, n. 6.

been fraudulently drafted, then the contributions were calculated on the basis of the true value of the goods (Art. 9).

The *Ordonnance* added two further important points. First, the master of the ship had a right of retention over the goods of those who refused to pay their contribution, as well as a right to sell them in order to cover the owed contribution (Art. 21). Secondly, if the owner of the jettisoned goods managed to recover them, he had to return any compensation that he had received (Art. 22). The jettisoned goods did not have to contribute to damage that subsequently occurred to goods that had been saved, even if the jettisoned goods were recovered later (Art. 17).

It is unnecessary to add further details. Instead I will follow up on the observation that the fundamental distinction adopted by the *Ordonnance* – between *avarie grosse et commune* and *avarie simple et particulière* – was not invented by its drafters. In fact, the drafters of the *Ordonnance* relied to a large extent on earlier and also foreign maritime laws. The theoretical and methodological implication deserve closer analysis.

C. Comparative methods, legal transplants, and a European *droit commun*

Prior to the 1681 *Ordonnance*, French maritime law was fragmented with numerous sources of disparate origins and status: Roman law, the *Rôles d'Oléron* (whose origins have been unclear for centuries), the *Consulat de la mer* (written in Catalan), the *Guidon de la mer* (a compilation made for Rouen merchants, the content of which relies on foreign regulations that had developed since the sixteenth century),[38] and the Barcelona ordinances (which were known especially in Marseille). These sources were well known by French jurists of the time. In 1577, François Maysonni, a lawyer in Marseille, translated the *Consulat de la mer* into French.[39] In 1647, Etienne Cleirac (1583–1657), a lawyer in Bordeaux, printed under the title *Us et coutumes de la mer* the *Rôles d'Oléron*, the Wisby Sea Laws, and the *Guidon de la mer*.[40] Most of these sources were collections that, although widely used, had never received the sanction of any public authority – neither in the countries where they had been written, nor in those where they

[38] This may be the reason why the *Guidon de la mer* was not perceived as innovative, worthy of being translated into other languages, see *Pardessus* (n. 2), vol. 2, 373.

[39] There are two editions of this translation, one published in Marseille in 1577, the other published in Aix-en-Provence in 1635.

[40] The volume also included passages, translated into French, from the 1563 Dutch Ordinance of Philippe II, and a translation of the 1598 Amsterdam Ordinance on Insurance.

were used. In the time before 1681, French maritime law had seen only a small number of Royal decrees and edicts, such as those of 1400, 1549, and 1584.

Comparable to modern codifications,[41] the 1681 *Ordonnance* had the effect of creating in form and status a new law, repealing any older rules that ran contrary to it. This is what Émérigon referred to when he asserted that the *Consulat de la mer* was still applicable in eighteenth-century Marseille insofar its provisions did not contradict Royal ordinances[42]. The observation that French jurists compared the *Ordonnance* with older and foreign sources calls for further discussion. Beyond the general interest still driving comparative studies in law today, different objectives can be identified explaining what exactly the French jurists tried to achieve.

I. The *Ordonnace sur la marine* of 1681 and the European *droit commun* on maritime law

First and foremost, French literature aimed at proving that the provisions of the 1681 *Ordonnance* were in accordance with Roman law. Roman law had furnished French doctrine with a set of concepts, categories, distinctions, and classifications – in other words, with an essential intellectual framework. Pothier, for example, linked the question on what basis the parties were obliged to contribute to loss in the case of *avaries grosses et communes* to charter party contracts. He argued that the reciprocal obligation of the ship master and the freighters to contribute to losses in the case of *avaries grosses et communes* followed from the charter party contract,[43] and he concluded that the applicable action to claim such contributions was the *actio ex locato*.[44] Furthermore, the rule of Book III, Tit. 7, Art. 4 that in the case of *avaries simples* losses had to be shouldered by the master of the ship if he had caused them by his own fault was explained by reference to Ulp. D. 19.2.19.[45] The rule that damage caused to goods by their inherent defects must be borne by their owner was linked to Ulp. D. 19.2.15.2 and D. 18.6.1 pr.;[46] and Pothier linked Book III, Tit. 8, Art. 17 to Call. D. 14.2.4.1.[47] The rule that goods given as settlement to pirates to safe the ship and the other goods counted as a case of *avaries grosses et communes* was justified by reference to Paul

[41] Such as, for instance, the French Code civil of 1804.
[42] *Émérigon*, (n. 22), X.
[43] *Pothier* (n. 14), para. 104.
[44] *Pothier* (n. 14), para. 127.
[45] Ordonnance de la marine (n. 15), 304.
[46] Ordonnance de la marine (n. 15), 304.
[47] *Pothier* (n. 14), para. 124.

D. 14.2.2.3.[48] The general rule that losses suffered by the owners of goods which had been jettisoned for the common safety of the ship and the other goods counted as a case of *avaries grosses et communes* was linked to the Digest title on the *Lex Rhodia*.[49] References to Roman law were so numerous in the literature on the 1681 *Ordonnance* that it would be tedious to mention them all. Most references were made to the Digest titles on the *locatio conductio* and the *Lex Rhodia*.[50]

These references to Roman law all served a specific purpose; they legitimated the provisions of the 1681 *Ordonnance* and supported its interpretation adopted by the different authors. The many references to the aforementioned medieval and early modern compilations of maritime law served the same function. Indeed, the provisions of the *Ordonnance* were as much in line with these compilations of maritime law as they were with Roman law, and this was the case even with respect to foreign sources such as the Wisby Sea Laws or the opinion of foreign literature. In fact, the literature cited by authors writing on the 1681 *Ordonnance* was predominantly foreign, with Stracca's *Tractatus de nautis* being a frequent reference.[51] In fact, Jean Domat (1625–1696) was the only French author who was, for example, cited by Valin.[52]

The rule that damage caused to the ship alone, even if it resulted from a storm, was a case *avaries simples*, which had to be shouldered by the owner of the ship (or his insurer), was linked to Art. 12 of the Wisby Sea Laws and reference was also made to Johannes Loccenius (1598–1677).[53] Book III, Tit. 7, Art. 4 was in

---

[48] Ordonnance de la marine (n. 15), 305; *Émérigon* (n. 10), 156.

[49] Ordonnance de la marine (n. 15), 305.

[50] On the latter see, e.g., *Wacław Osuchowski*, Appunti sul problema del 'iactus' in diritto romano, (1950) 1 Ivra. Rivista internazionale di diritto romano e antico 291–299; *Francesco Maria de Robertis*, Lex Rhodia. Critica e anticritica su D.14.2.6, in: Studi in onore di Vincenzo Arangio Ruiz nel XLV anno del suo insegnamento, vol. 3 (1953), 155–174; *Franz Wieacker*, Iactus in tributum nave salva venit (D. 14, 2, 4 pr.). Exegesen zur Lex Rhodia de iactu, in: Studi in memoria di Emilio Albertario, vol. 1 (1953), 513–532; *Kathleen Mary Tyrer Atkinson*, Rome and the Rhodian Sea Law, (1974) 25 Ivra. Rivista internazionale di diritto romano e antico 46–98; *Joseph A.C. Thomas*, Juridical Aspects of Carriage by Sea and Warehousing in Roman Law, (1974) 32 Recueil de la Société Jean Bodin pour l'Histoire Comparative des Institutions 117–160; *Herbert Wagner*, Die lex Rhodia de iactu, (1997) 44 RIDA. Revue Internationale des droits de l'antiquité 357–380; *Emmanuelle Chevreau*, La lex Rhodia de iactu: un exemple de réception d'une institution étrangère dans le droit romain, (2005) 73 Tijdschrift voor Rechtsgeschiedenis 67–80; *Bartosz Zalewski*, Creative interpretation of the lex Rhodia de iactu in the legal doctrine of ius commune, (2016) 8/2 Krytyka Prawa 173–191.

[51] See, e.g., Ordonnance de la marine (n. 15), 305.

[52] On Domat, see *Franco Todescan*, Le radici teologiche del giusnaturalismo laico, vol. 2: Il problema della secolarizzazione nel pensiero giuridico di Jean Domat (1987).

[53] *Valin* (n. 1), vol. 2, 161 referring to *Johannes Loccenius*, De iure maritime (Stockholm 1651), 202.

accordance with Art. 36 of the Wisby Sea Laws. The rule that damage to both the ship and the goods did not necessarily constitute a case of *avaries grosses et communes*, even if it had been caused simultaneously by the same event, corresponded to Chapter 5, Art. 20, 24 f. of the *Guidon de la mer*. Book III, Tit. 8, Art. 3 contained the same provision as Chapter 5, Art. 34 of the *Guidon*. Book III, Tit. 8, Art. 22, stating that the owner of jettisoned goods could turn to those whose goods had been saved, conformed to Chapter 5, Art. 28 and 32 of the *Guidon* and to Paul D. 14.2.2.8. Another example is Book III, Tit. 8, Art. 19. It equated the special case of goods being placed on smaller boats in order to lighten the ship when it entered a port or a river – an act that was thus carried out for the common safety of the ship and the goods on board – with the general cases of jettison, if the goods on the smaller boats were subsequently lost. It thereby followed the solutions found in Herm. D. 12.4.2 and Chapter 5, Art. 28 of the *Guidon*, and Valin added that this solution was in line with principles of fairness.[54] The same texts were also followed by Book III, Tit. 8, Art. 20, which further provided that in the opposite case the owners of the goods placed on the smaller boats did not have to contribute to the loss, even if they survived and the ship was lost.[55] Similarly, Book III, Tit. 8, Art. 14 is in line with Chapter 5, Art. 23 of the *Guidon* and Paul D. 14.2.2.1. Goods had to be jettisoned for the common safety of the ship and the other goods on board. And the ship must have been saved. Only then had the owner of the jettisoned goods a claim to have his loss shared. These two requirements to such claim were already recognized by Call. D. 14.2.4, as well as early modern authors such as Franciscus Duarenus (1509–1559)[56], Petrus Peckius (1529–1589) and Arnold Vinnius (1588–1657).[57] However, Book III, Tit. 8, Art. 16 clarifies that it did not affect the claim if the ship was subsequently lost, and this again correlates to Call. D. 14.2.4 and the aforementioned authors. Article 12 provided that owners of goods for which there was no bill of lading were not entitled to compensation, a position that had already been adopted by the *Rôles d'Oléron* and the *Consulat de la mer*.[58] Finally, Art. 21 allowed the goods of those who refused to contribute to *avaries grosses et communes* to be sold – a recourse to Art. 9 of the *Rôles d'Oléron*.

Numerous further examples could be added. They all illustrate a simple and unsurprising point: the drafters of the 1681 *Ordonnance* did not simply resort back to ancient Roman law. Rather, the *Ordonnance* reflected a European *droit commun* of maritime law. However, why did literature include these references

[54] *Valin* (n. 1), vol. 2, 210.

[55] See, further, the explanation of this rule by *Valin* (n. 1), vol. 2, 210.

[56] *Franciscus Duarenus*, Opera omnia, vol. 3 (Lucca 1766), 443–448.

[57] *Arnold Vinnius*, V. Cl. Petri Peckii In Titt. Dig. & Cod. Ad Rem Nauticam Pertinentes, Commentarii (Leiden 1647), leg. 2, fol. 206 f.

[58] Rôles d'Oléron, Art. 8, note 22; Consulat de la mer, cap. 92, 112.

to Roman law as well as to medieval and early modern compilations of maritime law when commenting on the *Ordonnance*? It was, of course, not that literature believed that these references were needed to explain the legal force of the *Ordonnance* – after all, it was a piece of Royal legislation – but rather that the commentators on the *Ordonnance* wanted to demonstrate that it formulated a common set of rules and practices that were commendable to all merchant nations because it formulated these in a particularly clear and precise way. The *Ordonnance* was thus presented as a codification able to replace all earlier compilations. This was why Valin referred to Book III, Tit. 7, Art. 4 as being in accordance 'absolument de droit commun'.[59] Indeed, the solution offered in Art. 4 was also in line with Call. D. 14.2.4.2 and Chapter 5, Art. 22 of the *Guidon de la mer*.

II. A comparative interpretation

The references to Roman law, medieval and early modern compilations of maritime law and international literature also served a second purpose. As the *Ordonnance* reflected the *droit commun*, the latter could be used to interpret the former. In some instances, technical terms used in the *Ordonnance* were clarified by references to earlier texts. Roman law was, for example, invoked in order to explain the meaning of the phrase 'les droits, impositions et coutumes' ('duties, fiscal charges and customs'). According to Book III, Tit. 7, Art. 5, these were on the owner of the goods only. On the basis of Labeo D. 19.2.60 pr., literature claimed that Art. 5 applied only if two requirements were met. First, the levies must have been legitimately due either to the King, to the Admiralty, or to any other *seigneurs* who had an indisputable title. Secondly, they must have been attached to the ship itself or the goods themselves.[60]

For interpreting the words 'lamenage' and 'touage' in Book III, Tit. 7, Art. 8, Valin referred to the *Guidon de la mer*.[61] According to its Chapter 5, Art. 14, *lamenage* was the service rendered by the boats that helped a ship to enter a port. According to Chapter 5, Art. 16, *touage* referred to the cost of the hauling of the ship in rivers. Book III, Tit. 8, Art. 11 clarified that the clothing of the seamen did not have to contribute to the loss caused by jettison. The word 'hardes' was interpreted to mean only those clothes that were worn every day, as well as ornaments that seamen usually wore on them. In support of this interpretation, Valin referred to Tit. 5, Art. 26 of the *Guidon de la mer*, Art. 41–43 of the Wisby Sea Laws, and numerous early modern authors such as Loccenius, Vinnius and

[59] *Valin* (n. 1), vol. 2, 167.

[60] Ordonnance de la marine (n. 15), 304, referring to 'Mornac sur cette Loy, & Stracha en son Traité de Nautis, Part. 3. Nomb. 9'. These levies also had to be distinguished from ordinary duties such as preclearance or anchor fees, see ibid., 307.

[61] *Valin* (n. 1), vol. 2, 171 f.

Peckius, Quintin Weytsen (1518–1565), Reinhold Kuricke (1610–1667), and Giuseppe Lorenzo Maria de Casaregi (1670–1737).[62]

Furthermore, references to Roman law, medieval and early modern compilations of maritime law and literature were made to resolve ambiguities in the *Ordonnance*. Book III, Tit. 7, Art. 10, for example, provided that in the case of a collision 'le dommage sera payé également par les navires' ('the damage will also be paid by the ships'). The provision raised the question as to the exact meaning of the word 'également'. Should both ships, which were involved in the collision, simply be burdened with half of the costs of repair? Or should these costs be apportioned according to the value of the ships? For developing an answer to these questions, Valin did not resort to a literal or grammatical interpretation of the *Ordonnance*. Rather, he consulted earlier compilations of maritime law that had already settled the issue, such as Art. 14 of the *Rôles d'Oléron*: both ships involved in the collision had to contribute half of the costs of repair.[63]

In addition, when there were ambiguities in the text of the *Ordonnance*, literature preferred to understand words used as technical terms, the meaning of which had to be explained on the basis of older authorities. Literature thus did not reflect on the meaning such terms in ordinary French. Book III, Tit. 8, Art. 11 spoke without further explanation of 'Munitions […] de bouche'. Literature relied on Paul D. 14.2.2.2 and argued that the phrase included not only the food for the crew, but also the food that was distributed daily to the passengers.[64]

Finally, the references to Roman law, medieval and early modern compilations of maritime law and literature served the purpose of filling gaps in the text of the 1681 *Ordonnance*. The *Ordonnance* left, for example, some questions unanswered as to the exact requirements of *avaries grosses et communes*. Modern French law (Art. L. 5133-3 ff. of the *Code des transports*) formulates three requirements: (a) the costs must have been incurred in the common interest; (b) the

---

[62] *Valin* (n. 1), vol. 2, 200, referring to *Loccenius* (n. 53), Book II, Chapter 8, § 4 (149 f.) and § 21 (204); *Vinnius* (n. 57), 213; *Quintin Weytsen*, Treaté des avaries (Amsterdam 1703), 16; *Reinhold Kuricke*, Ius maritimum hanseaticum. Commentarivs ad inscriptionem iuris maritime hanseatici, in: Scriptorum De Iure Nautico Et Maritimo Fasciculus Jo. Franc. Stypmanni Ius Maritimum Et Nauticum Reinoldi Kuricke De Adsecurationibus Diatriben Et Jo. Loccenii Ius Maritimum Complexus (Halle an der Salle 1740), 778 f.; *Giuseppe Lorenzo Maria de Casaregi*, Discursus legales de commercio, vol. 1 (Venice 1740), discursus 46, § 4 (161).

[63] *Valin* (n. 1), vol. 2, 179. See, in addition, Ordonnance de la marine (n. 15), 307. According to the commentators, the damage referred to in this article applies only to the ship, and it must be borne by the ships in question in equal portions between their owners. This is Mornac's interpretation on D.19.2.30, see *Antoine Mornacii*, Observationes in 24 priores Libros Digestorum (Paris 1616), 839. His reading corresponds to the general law, see *Vinnius* (n. 57), leg. 5, fol. 263.

[64] Ordonnance de la marine (n. 15), 316.

costs must have been incurred voluntarily; and (c) the expenditures must be justified by a dangerous situation caused by the voyage. According to modern French law, it is sufficient if the master reasonably believed that there was a danger to which he had to react. The *Ordonnance* made explicit only the first of these requirements. Yet, it was generally accepted that despite the urgency of acting, an act of will was required. And while one may require that the danger be imminent, Valin advocated the view that it is unwise to wait until the last possible moment to act.[65] Furthermore, the *Ordonnance* mentioned that jettisoned goods, as well as the goods saved, were to be assessed for apportioning the loss. It was, however, silent on those goods which, although saved, had been damaged in the same situation. The *Ordonnance* did not address any damage suffered by the ship in this situation. Literature was of the view that these losses had to be assessed by experts and that the value so estimated would be apportioned too.[66] Literature thus filled these and other gaps by applying the solutions that had already been developed by the so-called *droit commun*. The approach to such gaps was, therefore, similar compared to the interpretation of the *Ordonnance*. Émérigon and Valin, for example, pointed out that it did not constitute a case of *avaries grosses et communes* if pirates had stolen or looted goods, as nothing had been given voluntarily to them for the common safety of the ship or the goods. They referred to Paul D. 14.2.2.3, Chapter 6, Art. 1 of the *Guidon de la mer*, and a judgment of the Parliament of Paris of 8 April 1515.[67] Finally, Book III, Tit. 7, Art. 10 stated that the damage to ships resulting from collision had to be paid by all ships involved.[68] Literature added that Art. 10 was only applicable if the collision had not been caused by the fault of one of the parties. Art. 10 was thereby reduced to situations where a collision occurred at night or in fog or when the collision could not have been avoided due to rough weather, wind, or currents.[69] If the master of one of the ships was at fault, he alone had to bear the loss.[70]

III. Adaptations and innovations

It would be an oversimplification to conclude that literature on the *Ordonnance* was everything but innovative. It would also be an oversimplification to

---

[65] *Valin* (n. 1), vol. 2, 167, with a reference to the Statut de Lubeck, cap. 3, n. 3.

[66] See, for instance, *Valin* (n. 1), vol. 2, 193.

[67] *Émérigon* (n. 10), 157; *Valin* (n. 1), vol. 2, 166, citing the judgment from *Mornac* (n. 63), 651.

[68] On the ratio of the provision, see Ordonnance de la marine (n. 15), 307; *Valin* (n. 1), vol. 2, 179.

[69] See Ordonnance de la marine (n. 15), 307 f.

[70] See Book III, Tit. 7, Art. 11 of the 1681 Ordonnance; Ordonnance de la marine (n. 15), 309; Ulp. D. 9.2.29.2.

conclude that the 1681 *Ordonnance* never departed from the legal positions taken by Roman law, as well as medieval and early modern compilations of maritime law. Indeed, three different reasons may be identified for such innovations and adaptations.

First, there was the desire to simplify solutions that were deemed to be too complex, to reduce uncertainty caused by the great number of, at times, conflicting sources of maritime law, and to avoid rules that were at odds with French law. Valin, for example, pointed out that before 1681, when solving a legal problem, one had to consult maritime compilations of different nations, which were fragmented, at times contradictory, and often incomplete.[71] Book III, Tit. 7, Art. 4, for example, did not implement the provision of Art. 10 of the *Rôles d'Oléron*. According to Art. 10, the master of the ship had to show those ropes to the merchants, which were used to hoist their goods, and he had to ask them if they found them sufficient. Furthermore, the master had to replace those ropes that the merchants considered to be insufficient, otherwise he had to shoulder the loss resulting from the ropes being bad. If the merchants had not asked for better rope, even though they were bad, the master was not held responsible for any resulting loss. The *Ordonnance* did not introduce such special liability. Instead the general rules on fault-based liability applied. Accordingly, the merchants had to prove the master's fault. If the merchants were successful in proving the master's fault, then he was not able to rely on any sort of special exceptions to liability but must revert to the general principles of the law of torts.[72]

Secondly, the drafters of the *Ordonnance* may have introduced adaptations and innovations for the simple reason that they wanted to establish a rule that was, to their eyes, more reasonable. Book III, Tit. 8, Art. 1 may serve as an example: the master of the ship had to seek the advice of the merchants on board and the principal crew members before jettisoning goods, cutting a mast or abandoning the anchors in the event of a storm or acts of piracy. According to Art. 8 f. of the *Rôles d'Oléron* and Art. 20 f., 38 of the Wisby Sea Laws, the consent of a third of the crew was required. The drafters of the *Ordonnance*, thus, preferred to entrust the decision to the senior crew members, not necessarily petty officers, but experienced seamen, and French doctrine literature was in agreement with this rule.[73]

Thirdly, the drafters of the *Ordonnance* had at times simply to make a choice between conflicting rules found in Roman law and medieval and early modern compilations of maritime law. The most important example relates to Book III,

---

[71] *Valin* (n. 1), vol. 1, IV.

[72] *Valin* (n. 1), vol. 2, 162, was in favour of this solution opted for by the drafter of the Ordonnance.

[73] See, e.g., *Valin* (n. 1), vol. 2, 188.

Tit. 8, Art. 7. It adopted a simple and unique rule: the loss had to be borne, on the one hand, by the saved and jettisoned goods and, on the other hand, half the value of the ship and half the value of the freight.[74] The detail that both the ship and the freight are put to contribution, but in the limit of half of their value, departed from Paul D. 14.2.2.2, according to which the master had to contribute on the basis of the value of his ship, but not the freight. Furthermore, Art. 7 departed from Art. 8 of the *Rôles d'Oléron* and Chapter 5, Art. 21 of the *Guidon de la mer*. According to them, the master had the choice whether to contribute on the basis of the value of the ship or the freight. In contrast, according to Art. 40 of the Wisby Sea Laws, the choice was on the merchants. On the whole, it seems that the drafters of the *Ordonnance* had no preference for any of the compilations when they had to make such choice. Instead, they were aiming to find a rule that was most reasonable.

IV. From *droit commun* to a nationalized maritime law

Consequently, the 1681 *Ordonnance*, at least in the title on general average, seems to have borrowed from many older laws and compilations, or in the words of Émérigon: 'l'Ordonnance de 1681 est un composé de toutes ces anciennes lois'.[75] Literature pointed out, whenever possible, that its rules were in accordance with Roman law as well as medieval and early modern compilations of maritime law, reflecting what they considered as *droit commun*. Again, literature did not believe that these references were necessary to support the legal force of the *Ordonnance*: it was a piece of Royal legislation. Literature rather pointed to a common understanding among merchant nations. Despite all the variances that these different compilations may have exhibited, the reason for these common principles was simple: the seafaring nations were in constant contact with each other.[76] Thus, the 1681 *Ordonnance* perfectly exemplifies the contemporary idea of a *droit commun*. However, the *Ordonnance* had, as Antonio Scialoja highlighted, at the same time a Janus-faced character: on the one hand, it had an international imprint; on the other hand, national laws and codifications helped to turn maritime law into national law.[77] Nevertheless, the 1681 *Ordonnance* did not break with the past. The drafters of the *Ordonnance* drew their inspiration

[74] For further details, see *Valin* (n. 1), vol. 2, 194.

[75] *Émérigon* (n. 22), XV.

[76] *Thomas Pierre Adrien Groult*, Discours sur le droit maritime ancien, moderne, français, étranger, civil et militaire, et sur la manière de l'étudier (Paris 1786), 2.

[77] *Antonio Scialoja*, Corso dì diritto della navigazione (1943), 22 f.

from historical maritime laws.[78] Even though there are no traces of the preparatory work for the 1681 *Ordonnance*,[79] a memoir printed for the Paris Insurance Chamber in 1761 clearly proves that the *Ordonnance* was based on European maritime practices and laws: 'à l'effet de quoi il fut fait, dans tous les ports de notre continent, des informations qui ont coûté des trésors immenses'.[80] Whoever wants to understand the principles underlying the *Ordonnance* today, thus, must have perfect knowledge of these practices and laws which were, as pointed out by Émérigon,[81] part of the *ius gentium*.[82] Jurists of the seventeenth and eighteenth centuries, too, were clear that one must refer to the *droit commun* when interpreting it. Consequently, the *Ordonnance* was continually put in perspective of Roman law and older compilations of maritime law. In a similar vein, Cleirac explained that for preparing his edition of the *Guidon de la mer* he had used several foreign ordinances and compilations in order to restore, correct, and explain the text.[83] Émérigon added:[84]

> 'Chez les Nations commerçants, les Loix maritimes sont à peu près les mêmes, attendu la réciprocité des intérêts. On doit donc avoir recours aux Loix des autres Peuples, soit pour mieux connaître l'esprit des Ordonnances du Royaume, soit pour décider les cas qu'elles n'ont pas prévus.'
>
> 'Among the trading nations, the maritime laws are almost identical due to their mutual interests. Thus, one has to have recourse to the laws of other nations, either in order to better understand the spirit of our Royal ordinances or to decide cases which they did not foresee.'

Pothier's *Traité des contrats de louage maritimes* even include more references to the *Lex Rhodia* than to the 1681 *Ordonnance*. All of this proves, once again, that the French legal method of that era did not disregard foreign sources and that it did not engage in any form of self-referential interpretation. Quite the contrary, commentators presented the *Ordonnance* as constituting the best synthesis of the *droit commun*.[85] It corresponded to a natural law conception of a codification and, accordingly, it primarily offered principles. It was a unique text,

---

[78] *Jean-Marie Pardessus*, Us et coutumes de la mer (1847), 5.

[79] See *Émérigon*, (n. 22), II. See, further, *Warlomont* (n. 3), 333–344; *Jean Chadelat*, L'élaboration de l'Ordonnance de la Marine, (1954) 3 Revue historique de droit français et étranger 74–98, 228–253.

[80] *Valin* (n. 1), vol. 1, IV.

[81] *Émérigon*, (n. 22), II.

[82] *Valin* (n. 1), vol. 1, VII.

[83] *Cleirac* (n. 4), 219 f.

[84] *Émérigon* (n. 22), 21.

[85] *Valin* (n. 1), vol. 1, III.

able to replace all older sources of maritime law and to influence legal developments beyond France.[86] It heavily influenced the subsequent legislative developments in France too; Book 2 of the *Code de commerce* was an almost complete reproduction of the 1681 Ordonnance. And the 1807 *Code* again inspired most continental legislation on commercial law. Furthermore, the *Ordonnance* was seen as in instrument to strengthen French domination in Europe.[87] After all, the *Ordonnance* was enacted when France built a large commercial fleet, likely to compete with the great European maritime powers. Nevertheless, the analysis of the text of, and literature on, the *Ordonnance* show that the development of maritime law, at least as far as general average is concerned, did not strictly follow a national logic but was rather part of a pluralistic process. However, even though the *Ordonnance* also borrowed from foreign medieval and early modern compilation of maritime law, this should not be described as a reception as understood by Paul Koschaker (1879–1951). According to Koschaker, a *reception* of a legal system is based not on quality, but on power or cultural authority.[88] What the drafters of the *Ordonnance* did is closer to the concept of reception as formulated by Franz Wieacker (1908–1994). Wieacker described a reception as a process of assimilation and adaptation representing one of the various forms of cultural transfers.[89] In the French case, there was a direct reception of legal norms of foreign origin and a legal literature that openly referred to these foreign sources. However, the universities were not the intermediaries of this reception. At the time, maritime law was not taught in French universities. The reception's catalyst was the interests of the community of merchants in the maritime sector, and the reception or legal transplants went along with a method of interpretation that openly accepted the different foreign elements found in the *Ordonnance*. The *Ordonnance* was thus part of a legal culture[90] that was not purely national. This aspect contrasts to the 1807 *Code de commerce*. The literature on the 1681 *Ordonnance* adopted a true comparatist approach to interpretation. The 1807 *Code*, which to a large extent simply reproduced the 1681 *Ordonnance*, was coined by what could be termed 'a nationalization' of French maritime law. Literature on the 1807 *Code* was limited to a simple exegesis of the text.[91]

---

[86] *Valin* (n. 1), vol. 1, III f.

[87] See *Valin* (n. 1), vol. 1, III.

[88] *Paul Koschaker*, Europa und das römische Recht (2nd edn., 1958), 137.

[89] *Franz Wieacker*, Privatrechtsgeschichte der Neuzeit (2nd edn., 1967), 125.

[90] On the concept of legal culture, see, from a French perspective, e.g., *Jean-Louis Halpérin* and *Frédéric Audren*, La culture juridique française (2013).

[91] See *Jauffret* (n. 10), 268.

D. Conclusion

The present contribution has adopted three modern concepts from legal methodology, comparative law, and legal history, in order to describe the *Ordonnance sur la marine* of 1681 and the literature on the *Ordonnance*: comparative interpretation, legal transplants, and reception. But is it methodologically correct to analyse historical phenomena in terms of present-day concepts? The *Ordonnance* itself was deeply rooted in the *droit commun*, and maritime law was seen by contemporary literature as being part of the *ius gentium*, not as a part of any national law. A contemporary jurist would thus have been puzzled if one talked of legal transplants, a reception, and a comparative interpretation. However, the 1681 *Ordonnance* may also be looked upon as the first step towards the nationalization of maritime law, a process that was completed only with the enactment of the 1807 *Code de commerce*. Against this background, the use of these concepts is permissible, and it has proven how deeply rooted the 1681 *Ordonnance* was in the *droit commun* and how the latter was used to interpret and further develop the former. More specifically, the example of general average illustrated two methodological aspects of this process: (1) it demonstrated what continued impact the *droit commun* had, how its rules were circulated, how these rules were interpreted, and how all of this slowly led to the formulation of a national legal doctrine; and (2) the example of general average illustrates that – despite codification and a gradual process of nationalization – the forms of reasoning remained deeply rooted in the *droit commun*, suggesting that a comparative interpretation is possible even in a nationalized legal system.

War, Risks, and Speculation: The Accounts of a Small Livorno Insurer (1743–1748)

By *Andrea Addobbati*[*]

A. The firm

In 1774, a young court clerk, Pietro Ubaldo Boasi, died from illness in Pisa, leaving all his possessions to the city hospital of Santa Chiara. The meagre legacy consisted of a suburban vegetable garden in the plain of Livorno, which the Boasi family leased from the Cathedral of Pisa.[1] Its income of just a dozen pieces of eight a month had not spared Pietro Ubaldo, perhaps unable to work, the humiliation of beseeching the Grand Duke for a subsidy.[2] As usual, the hospital on that occasion also acquired the family papers. This way, the accounts and correspondence of the commercial activity of Pietro Ubaldo's father have come down to us. The father, Captain Jacopo Antonio, died in 1759, also in a state of indigence because of his 'many maritime misfortunes'. In order to pay his debts, 'several of his stuff and his home furniture have been sold'.[3]

---

[*] The research for this essay was conducted thanks to funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation program, ERC grant agreement No. 724544: Avetransrisk. Average – Transaction Costs and Risk Management during the First Globalization (Sixteenth–Eighteenth Centuries).

[1] Moreover, it was a right encumbered by a mortgage. In 1737 Pietro Ubaldo's uncle, Giovanbattista, had tied a third of the garden in guaranteeing the dowry credit of his wife Teresa Amelio, a credit that later passed on to Francesca, the couple's only daughter and a cousin of Pietro Ubaldo: State Archives of Pisa (ASPi), Ospedali Riuniti di S. Chiara, Boasi, 1872.

[2] *Pietro Leopoldo d'Asburgo Lorena*, Relazioni sul governo della Toscana, vol. 2 (ed. Arnaldo Salvestrini, 1969), 299.

[3] In 1752 Jacopo Antonio Boasi was brought to trial at the Florentine court of the Pupilli by his niece Francesca, who complained about the non-payment of the mother's

The papers acquired by the hospital document the activity of the Boasi firm from 1726 to 1751. These have already been investigated by Marcello Berti, who a few years ago published a study on the nature of the commercial transactions and the network of correspondents of Jacopo Antonio, defined on the occasion as a 'French merchant',[4] although his affiliation with the French nation of Livorno is not so obvious. The family's original surname may have been Boissy, but the Italian surname Boasi, although rare, exists and is attested in east Liguria.[5] In any case, Jacopo Antonio lived for a very long time away from Livorno, having started his career at sea while still young, in accordance with the family tradition. He sailed under the French flag and became a captain in 1717, having purchased eight shares of *Le Mercure Volant* for 1,500 piastres.[6] Registered in the maritime compartment of Marseille, he sailed until the last years of the War of the Polish Succession, during which he was involved in the wheat trade between the Baltic and the Mediterranean. When he had passed the milestone of 50 years, having spent 'about thirty-six […] crossing the sea eastward and westward', the good captain decided to settle down in Livorno and spend his last years with his wife, who soon thereafter gave him a son, baptized Pietro Ubaldo like his grandfather.[7] He could not retire, however, since his resources would not have permitted it. So, although he lacked sufficient funds, he opened his own firm and devoted himself mainly to trading on behalf of thirds, and to profit from the network of relationships he had woven together over years of sailing on all the sea routes of Europe and the Levant.

---

dowry income. The 'more than seventy-year-old' Jacopo Antonio (born in 1680) had to plead with the Grand Duke so that the case could be transferred to the court of Livorno, for the avoidance of expenses, with the backing of the auditor of that court, Donato Redi, who certified 'the pitiable state' to which the supplicant had been reduced: State Archives of Livorno (ASLi), Governatore e Auditore, 958, n. 390, J.A. Boasi v. F. Boasi, Report 24 July 1752.

[4] *Marcello Berti*, Iacopo Antonio Boasi, un mercante francese nella Livorno della prima metà del Settecento, in: idem, Nel Mediterraneo ed oltre: temi di storia e storiografia marittima toscana (secoli XIII–XVIII) (2000), 309–333.

[5] In any case, Jacopo Antonio's mother was Tuscan, a circumstance that according to a sovereign edict of 1716 should have resulted in her son's loss of French nationality: *Jean Pierre Filippini*, Il porto di Livorno e la Toscana (1676–1814), vol. 2 (1998), 408. His uncle, also named Jacopo Antonio, had acquired the citizenship of Livorno in 1657, and the same applies to his brother Giovanbattista, who became a citizen in 1692: ASLi, Comunità, 1684. Jacopo Antonio was born on 12 May 1680, 'at one o'clock at night', to Pietro Ubaldo Boasi and Maria Maddalena of a Lorenzo Romoli. Already a widow of a certain Luigi Ubaldi, Maria Maddalena married Pietro Ubaldo in the 1670s. She was born around 1649, and died on 6 January 1719 '70 years of age': Baptism and death certificates in ASLi, Governatore e Auditore, 948, n. 899, J.A. Boasi v. J. Attias.

[6] ASPi, Ospedali Riuniti di S. Chiara, Boasi, 1872.

[7] ASLi, Governatore e Auditore, 948, n. 899, J.A. Boasi v. J. Attias.

As is well-known, the port of Livorno arose in the second half of the sixteenth century at the behest of the Medici, who at the time intended to provide a maritime outlet for Tuscan products. Over the time, however, the Florentine manufacturing system ended up succumbing to Northern European competition, while the port discovered its true vocation. Due to its fortunate geographical position, halfway between Northern Europe and the Ottoman Levant, and thanks to its famous exemptions and privileges, Livorno essentially became a service node for foreign trade, a warehouse and sorting port, specialized in import and re-export traffic.[8] Therefore, the positioning of Boasi on the Livorno market was hardly original. He was a new operator joining the already large number of city commercial firms, about 200, most of which were undercapitalized and dependent on foreign orders.[9]

Like the majority of his Livorno colleagues, Boasi's main activity was commission trade. Without a marked specialization, Captain Boasi invested his funds in speculative buying and selling, and was also a shipowner, dispatcher, foreign-exchange agent, insurer, and an intermediary for all kinds of business. As Berti notes, his was an old and very traditional merchant profile, whose strengths lay in a particularly dense network of correspondence throughout the Italian peninsula, from Genoa to Sicily, from Venice to the manufacturing centres of the Po Valley area, and in his links with three different merchant supply chains for long-distance trade. The first was a Florentine supply chain, centred on a solid business relationship with the exporter Zanobi Ubaldini, and with Alessandro Quaratesi, who, operating from Cadiz, provided Boasi with a bridgehead for American trade. The second, a French chain, consisted of the Marseille firms of Etienne L'Espiau, and Jean Louis Ploiar, but also the Villet brothers of Tunis. Finally, the last important chain was made up of Dutch and German partners: Willem van Inghen in Amsterdam, David Klugh in Hamburg and Frederick Hibsch in Constantinople. Boasi had more casual collaborative relationships with the London firm Sanderson & Toivors, with the Meratti of Smyrna, and with the two Jewish houses Dias and Sacchi of Thessaloniki.

---

[8] On the port of Livorno there is a vast bibliography. Beyond the classic *Fernand Braduel* and *Ruggiero Romano*, Navires et Marchandises à l'entrée du Port de Livourne (1547–1611) (1951), see, in general, *Filippini* (n. 5); *Adriano Prosperi* (ed.), Livorno, 1606–1806: luogo di incontro tra popoli e culture (2009); and *Lucia Frattarelli Fischer*, L'Arcano del mare. Un porto nella prima età globale (2018).

[9] *Massimo Sanacore*, La relazione del governatore Filippo Bourbon del Monte nel 1765, in: Lucia Frattarelli Fischer and Carlo Mangio (eds.), Fonti per la storia di Livorno fra Seicento e Settecento (2006), 45–71. According to the Governor, in Livorno there were between 150 and 180 active trading houses, to which at least 50 wholesale stores should be added.

B. Facing the insurance market

For an analytical description of all the firm's business, I unreservedly refer the reader to the work of Marcello Berti.[10] What I want to focus on in this contribution is Boasi's role as an insurer. The documentation kept today at the State Archives of Pisa, in addition to the ledger, the journals, the accounts, the letter book and several series of receipts, also includes three registers and some loose papers related to the insurance activity that Boasi started in 1738, first occasionally and without conviction, but later, from 1743, more regularly and apparently with method.[11] His growing commitment to the insurance sector is immediately evident from the very nature of the records, which over time become more and more accurate and ordered. In fact, for the first few years of his insurance activity only a few double-entry current accounts have survived: they were on loose papers drawn up by the brokers and handed over to their customers at the time of the balance settlement. But in 1743 Boasi realized that continuing to leave the accounting to intermediaries could be dangerous, and therefore he began to draw up his own register, which structurally looks like the collation of various current accounts, even if here it is open accounting, meaning that the recording is done daily. Indeed, the register for the years 1743–1746 bears the title of *Giornaletto delle sicurtà che si tocono* ('the Journal of the insurances underwritten'). In correct Italian it would be *tòccano*, from the noun *tòcco*, that is, 'stock' or 'piece'. Therefore, *tòccare le sicurtà* essentially means breaking up the risk, dividing it into small portions so that a large number of underwriters can guarantee them. Keeping the accounts himself in order to have an instrument of feedback and control over the work of the brokers was a very wise decision, all the more so given the circumstances, which saw threatening clouds gathering on the horizon: the War of the Austrian Succession was upsetting the lazy routine of the insurance market, not only in Livorno, but all over Europe. The dangers to navigation increased exponentially, and so did premium rates. This meant that the maritime insurance business was definitely tempting, with a promise of rapid enrichment, but at the same time it became an extremely dangerous path. In 1747, while on the Livorno risk market, there was a paroxysmal surge in underwritings, Boasi's accounting took another leap in quality, in order as much as in clarity. Our insurer decided to keep not one, but two registers. The first is a journal in which he diligently took notes until 1748, detailing the underwritten portions or quotas and the insurance premiums of which he was the creditor, while the second was the usual register of current accounts with brokers, which in the 'giving' section records the credit of the premiums, and in the 'having' section the debts for damage and expenses.

---

[10] *Berti* (n. 4).

[11] ASPi, Ospedali Riuniti di S. Chiara, Boasi, 1881, 1882, 1883.

It is important to point out that such accounting documentation has rarely been preserved, and that the three Boasi registers are also of interest because they refer to a crucial phase in the evolution of the insurance market, whose traditional structures could not withstand the turbulences of the war-time situation, highlighting a rigidity that could be circumvented at that moment only by manoeuvres of pure speculation, and of doubtful legality. The limitations that emerged during that difficult transition led to a radical restructuring of the post-war risk market, with the widespread appearance at continental level of large joint-stock companies, and the overcoming of the traditional model, based on informal networks of independent underwriters, coordinated at the technical and managerial level by brokers.

At this point, it would be appropriate to say a few words about both the Livorno market, which had peculiar characteristics, and the figure of the independent underwriter, as Boasi was in his own small way. First, it should be noted that, on the demand side, the Livorno risk market largely reflected the traffic structure of a free port, which, as mentioned above, was mainly an emporium enlivened by foreign orders.[12] Commissioners received purchase and shipping orders, or sale mandates, most of the time being asked to anticipate expenses (including insurance coverage costs) in exchange for a commission fee. In the same way, the first time Boasi was forced to put his signature at the bottom of a policy it was in order to fulfil a commission received from Carlo Fossati, one of his Genoese correspondents, who asked him to provide a cover of 1,300 pieces on a load of grain that had to be brought from Ancona to Genoa. In such cases, Boasi would simply place the risk on the market through a broker, vouching for the solvency of the underwriters; a form of co-insurance known as the *star del credere* (to stand in the place of the creditor).[13] This allowed the commissioner to earn a 1% commission on the sum insured. However, on that occasion, the broker only found underwriters for 1,000 pieces. The market was weak, and therefore Boasi had to personally ensure the uncovered quota of risk 'having set the premium at 4.5%, a very meagre premium for the risk one runs in this period,' Boasi wrote to Fossati, 'there was no one who wanted to finish filling the said policy'.[14]

The policies to be filled in were printed forms, which reproduced the model prescribed by the Florentine *Statuti di Sicurtà* ('Insurance Statutes') of 1523–1529, the main Tuscan legislation on insurance.[15] From 1685 these forms were distributed to the various brokers who had applied for them through a special

[12] *Andrea Addobbati*, Commercio rischio guerra. Il mercato delle assicurazioni marittime di Livorno (1694–1795) (2007), 113–146.

[13] *Pompeo Baldasseroni*, Leggi e costume del cambio (Firenze 1786), 93–97.

[14] *Berti* (n. 4), 317.

[15] *Giovanni Ceccarelli*, Un mercato del rischio: assicurare e farsi assicurare nella Firenze rinascimentale (2012).

office in charge of the public register of policies and the related tax collection.[16] Having received a request, the broker would get a form, and then had eight days to fill in the blank parts, indicating every element relevant to the risk assessment (the insured good(s), the person asking to be insured, the journey, the ship, the flag, the identity of the master, etc.). He had to go around the merchants' desks to ask for signatures and return to the office to register the contract. Usually, there were many signatures at the bottom of the policies, each of which guaranteed for a quota (i.e., a *tòcco*) of the total risk. Sometimes eight days were not enough to complete the form, so the risk was divided into more policies. There was a bargaining custom typical of the market of Livorno, and more in general of European markets with a lively bargaining culture. In contravention of the law, it was customary to delegate the collection of the premiums to the broker, and to postpone this until the final settlement. In practice, the broker operated as a clearing bank, keeping current accounts with each of his clients, who could use his services both as an insured who owed the premium and as an insurer who was owed it. This way, the whole deal was managed with the minimum use of specie, and periodically the broker would proceed to set off debts and credits, liquidating the surplus once having deducted what was owed to him for his brokerage. It was a system based on account money that suited the structure of the traditional insurance market, whose actors never played a fixed role. None of them was solely an insurer, but rather they dealt in various mercantile affairs without any particular specializations. They could therefore play both parts; sometimes insured, sometimes insurers. Entrusting the broker with collecting the premiums and, if necessary, with the adjustment of averages or even the settlement of claims, made it easier to bargain – but entailed risks. The broker who carried out the function of cashier, earning a 3% commission fee for the cash flow, could be tempted to take on a co-interest, contravening the deontological imperative of impartiality. Moreover, he remained exposed to the risk of bankruptcy, with serious repercussions for the clients.[17]

On the other hand, the old-fashioned merchants were more than happy to delegate the administration of the premium cash to the brokers, limiting themselves to keeping an eye on their work, partly because none of them seriously thought of becoming rich by underwriting policies. The profits of the insurance business were usually very low; if there were profits at all. Only during wartime spells, which pushed the rate up to anomalous levels, up to 30%, 40% and 50%, was it possible to make significant profits, provided that one was lucky and avoided the

[16] *Addobbati* (n. 12), 146–154.
[17] *Addobbati* (n. 12), 134–146, 195–208.

most ruinous losses.[18] But it was, after all, a question of phases – if not exceptional, at least transitory – during which new operators would burst on to the market. While in times of peace such operators would have been careful not to get involved, when the market turned into a sort of gambling house, they were ready to improvise as insurers.[19]

The traditional merchant, on the other hand, was usually much more cautious. For him, insurance was above all a 'handmaiden' for trade, a guarantee for the future and at the same time a lubricant that facilitated traffic, spreading trust among all operators. The main purpose for his participation in the insurance market was to be able to pass his personal risk onto others, and to take up a share of collective risk that was comparable to the risk given. Therefore, rather than the remuneration of a risk voluntarily assumed, the premium fulfilled – at least originally – a compensatory function, since nothing could guarantee that an exchange would take place between equivalent quantities: there would always be a difference, in one way or another, between the entire personal risk that was transferred and the fractionalized collective risk of which liability was accepted. It would therefore be wrong to imagine the traditional insurance market as a sum of bilateral relations; in its original functioning it was more like a chain of circular solidarity, managed by intermediaries and which included all the recognized members of the same mercantile community. It was a model built on the paradigm of reciprocity, and we can still see its features, almost intact, in early sixteenth-century Florence.[20] It was, however, a model that incubated the contradictory germs of its own dissolution, and that would not have been able to withstand the development of trade on commission, easy market access for outsiders, and the integration of the insurance market at a continental level on a competitive basis.

At the time of Captain Boasi the opening of the market to foreign demand was an undisputed fact. No one could doubt that most of the risk placed on the Livorno market was on behalf of foreigners. After all, there were very few local firms that traded with their own funds (or, as Tuscan merchants would have it,

---

[18] *Frank Spooner*, Risks at sea: Amsterdam insurance and maritime Europe, 1766–1780 (1980), 3–13.

[19] *Spooner* (n. 18), 19, 25; *Christopher Kingston*, Marine Insurance in Britain and America, 1720–1844: A Comparative Institutional Analysis, (2007) 67 The Journal of Economic History 379–409, 386.

[20] *Giovanni Ceccarelli*, Dalla Compagnia medievale alle Compagnie assicuratrici: famiglie mercantili e mercati assicurativi in una prospettiva europea (secc. XV–XVIII), in: Simonetta Cavaciocchi (ed.), La famiglia nell'economia europea, secoli XIII–XVIII. The economic role of the family in the European economy from the 13th to the 18th centuries (2009), 389–408; *idem*, Tutti gli assicuratori sono uguali, ma alcuni sono più uguali degli altri: Cittadinanza e mercato nella Firenze rinascimentale, (2013) 125 Mélanges de l'École française de Rome – Moyen Âge, https://doi.org/10.4000/mefrm.1356 (last accessed 24 May 2020).

'in arbitrio e speculazione'). Nevertheless, the institutional architecture of the market remained the traditional one, and the dynamics of underwriting could continue to function on the community assumption, that is, on closed-circuit trust thanks to the legal constraint that made the merchant agent co-holder of the commitments undertaken for the foreign principal, and so responsible towards his colleagues in Livorno.[21] The growth of demand for insurance, which in the long run would have highlighted the structural limits of the traditional model and led to the revolution of the joint-stock companies, had not changed the approach of the operators like Captain Boasi. If anything, it had raised awareness of the advantages that could arise from an active foreign insurance balance. The first and foremost of such advantages was providing new payment instruments to the operators, making up for the structural shortage of specie. Since the end of the seventeenth century the *Stanze dei cassieri* had sprung up in Livorno, a permanent exchange that allowed debts and mutual credits to be settled by clearing, with a stroke of the pen, reserving the metal for the settlement of the surplus.[22] The same happened on the side of the insurance business run by the brokers, to whom – as already said – a credit line for the premiums was granted, and who by acting as cashiers were able to issue warrants of payment, with local circulation, on the order of the their clients. Thus, beyond actual gain (which, deducting payments and expenses, was rather limited), what prompted the Livorno merchants to increase their insurance underwriting was also the possibility of creating money to be used occasionally when payments were due.

C. The dangers of an open market

Before examining the registers, it would be appropriate to specify their documentary limits. As has been said, for a general trading house the insurance commitment was a branch of collateral activity and complementary to the core business, with its own separate accounting. One would expect, however, that revenue and expenditure of the separate account would flow into – and find at least a summary confirmation in – the general accounts, that is, in the firm's ledger, as was usually the case for the buying and selling journal, or for the shipping accounts. Boasi's ledger instead records at most the periodic collections of the premiums, and any disbursements as compensation, without bothering to put the outstanding accounts with the brokers on the balance sheet, of which the only remaining evidence is in the appropriate registers. Moreover, despite the efforts

[21] In addition, the anonymity was usually guaranteed to foreign policyholder by the 'to whomsoever it may belong' clause (in Italian, 'per conto di chi spetta').

[22] *Angelo Albani*, Le stanze dei pubblici pagamenti (1921); *Luigi Lang*, Le origini a Livorno delle Stanze di compensazione (unpublished PhD dissertation, Università L. Bocconi, Milano, 1963–1964, available in the Biblioteca Labronica F.D. Guerrazzi, Livorno).

made over time to keep the accounts in order, Captain Boasi's insurance accounting remains rather confused when compared to the general accounts. The impression is that for Boasi insurance underwriting, although gaining importance and consistency, remained in the end a subsidiary and complementary activity, one of secondary importance, as if that account did not have the same significance or status as the others, at least until it was liquidated. Something similar has been observed by Alberto and Branislava Tenenti in their study of Ragusa insurances in the second half of the sixteenth century. The premium credit does not seem to have been perceived by the Ragusa insurers as a solid purchase to rely on. After all, the undertaking of risk was felt as a temporary transfer of ownership, which a loss would have made permanent with the transfer of the asset and of the damage. It is understandable how the same shadow of precariousness was projected onto the premium which, until earned, remained only a conditional and uncertain credit: 'a two-faced pledge, a salary of the mutual fear of the insured and of the insurers in the face of the unknown dangers of the journey'.[23] On the other hand, it should also be noted that this feeling of precariousness with regard to the premium did not prevent, at least in Boasi's days, payment orders being issued and accepted on that 'two-faced pledge'.

Above and beyond feelings and perceptions, the fact remains that it is not easy to integrate the insurance accounting into the general accounting, and therefore to understand what exactly the importance of the insurance business for the performance of Boasi's firm was. The first thing to note is that there is no discernable ratio between the purchase and the sale of insurance coverage. In the exchange between entire personal risk and fractioned collective risk, which represented the main reason for the original and localized formation of the market, the balance broke down. This was driven by the growth and internationalization of demand, but also by the financial needs of the traditional trading firm. While they were certainly exceptional years, between 1743 and 1748 Boasi, as insured, spent in premiums just 3.4% of what he obtained as an insurer of others' risks. When Berti states that Boasi was 'a medieval and Renaissance merchant', he is right – but only to a certain extent. It is not possible to see in his activity any marked specialization, but such an unbalanced commitment to underwriting foreshadowed the moment when the insurance business would end up breaking the institutional framework of the local market and emancipating itself from its ancillary role with respect to commercial investment. The war situation only accelerated

[23] *Alberto* and *Branislava Tenenti*, Il prezzo del rischio. L'assicurazione mediterranea vista da Ragusa (1563–1591) (1985), 124. On feelings and subjective perceptions, see *Jean Halpérin*, La notion de sécurité dans l'histoire économique et sociale, (1952) 30 Revue d'histoire économique et sociale 7–25, *Lucien Fabvre*, Pour l'histoire d'un sentiment: le besoin de sécurité, (1956) 11 Annales ESC 244–247, *Louis-Augustin Boiteaux*, La fortune de mer, le besoin de sécurité et les débuts de l'assurance maritime (1968).

the effects of a long-term process, which went beyond the case in question, and which had started at least two centuries earlier.

The appearance, as early as in the sixteenth century, of the first laws on insurance indicate that something was beginning to destabilize the mutualistic chain founded on the bonds of kinship, proximity, and citizenship.[24] A Tuscan government official, commenting in 1785 on a proposal to reform the old Statutes of 1524–1529, observed that no law would have been necessary if the merchants had not changed their customs at some point, disavowing their ancient 'mercantile candour'. According to Giuliano de Ricci, who at the end of the sixteenth century was one of the magistrates liable for settling insurance disputes in Florence, that regrettable change occurred at the very moment when foreigners burst onto the insurance market: the promulgation of the Statutes was undertaken 'to overcome the fraudulent offences committed by foreigners and particularly the Genoese'.[25] It was the opening up of the market that weakened mutual trust and exacerbated some crucial problems in the insurance business, the same problems that Boasi had to face. In the first place, the problem of informational asymmetries: all the particular circumstances of a given maritime enterprise were much better known by the insured than by Boasi. Boasi could, where possible, use other sources of information to assess the risk factors, in addition to the statements of the insured, but he could never be sure that his client was not hiding from him some prejudicial element which, if known, would have increased the amount of the premium.[26] In a closed market, characterized by relationships of familiarity, mutual dependence and interchangeability of roles, information asymmetry is a relatively minor problem. It becomes crucial with the opening of the market to foreign demand: if Boasi and his colleagues who underwrote policies were not careful, they could fall victim of adverse selection. Indeed, guaranteeing the damage lent itself to an infinite series of moral hazards, from the overestimation of the assets insured to the use of insecure vessels, from the insurance of a ship already lost to the multiplication of insurance policies on the same risk. Here, the

[24] *Christopher Kingston*, Governance and institutional change in marine insurance, 1350–1850, (2014) 71 European Review of Economic History 1–18. On the emergence of courts specifically responsible for settling insurance disputes: *Ceccarelli* (n. 15); *Dave De ruysscher* and *Jeroen Puttevils*, The Art of Compromise. Legislative Talks for Marine Insurance Institutions in Antwerp (c. 1550–c. 1570), (2015) 130 Low Countries Historical Review 25–49, *Sabine Go*, The Amsterdam Chamber of Insurance and Average: A New Phase in Formal Contract Enforcement (Late Sixteenth and Seventeenth Centuries), (2013) 14 Enterprise and Society 511–543.

[25] *Giuliano De Ricci*, Cronaca (1532–1606) (ed. Giuliana Sapori, 1972), 441.

[26] *Kingston* (n. 19), 379–409.

inventiveness of swindlers knew no limits.[27] On the other hand, the policyholders could not be sure that the insurers would fulfil the agreements, liquidating damages without resorting to any form of resistance, such as delaying payments or trying to renegotiate the damages. Basically, the problem was structural: individual underwriters, like Captain Boasi, had rather limited resources, and being merchants themselves they were exposed to the normal setbacks of trade.

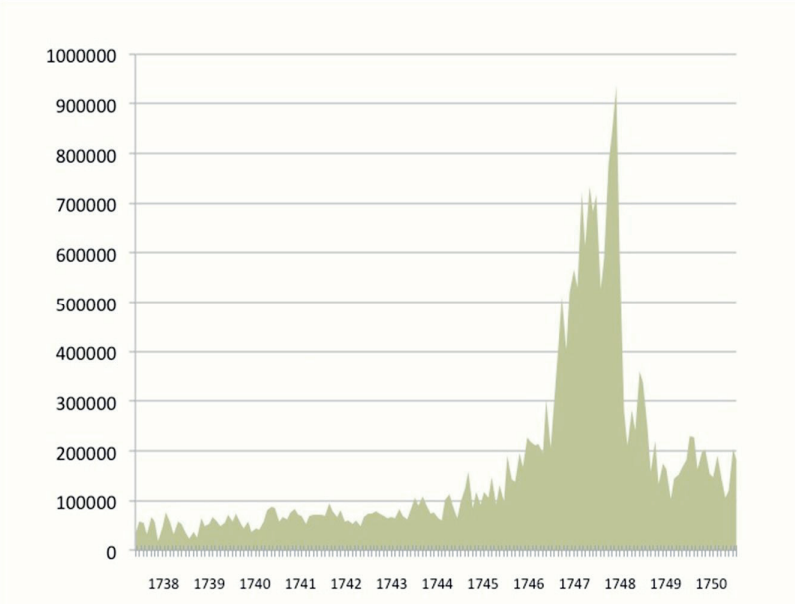
All the critical aspects of the insurance business – the asymmetry of information, the moral hazard, and the financial fragility of the firm – were exacerbated during wartime, when the demand for security grew excessively, despite the contraction of trade. The upward trend of insurance rates meant that they were three, four or five times higher than the ordinary rate in peacetime, attracting to the market many makeshift insurers willing to underwrite any policy to earn the premium.[28] Boasi himself, an occasional underwriter until 1742, was apparently seduced by the siren of speculation. The Livorno insurance market, which was not very active while Europe remained at peace, suddenly became a rather attractive investment. The annual volume of insured risks rose from an average of 500,000 pieces of eight in 1739–1740, to 800,000 pieces in the three-year period 1741–1743, and soared dramatically after France entered the war. The market exceeded 1 million pieces in 1744, became 1.3 million in 1745, finally reaching 2.4 million in 1746, 6.4 million in 1747, and 5.7 million in the last

[27] *Robin Pearson*, Moral Hazard and the Assessment of Insurance Risk in Eighteenth- and Early-Nineteenth-Century Britain, (2002) 76 The Business History Review 1–35; *David Rowell* and *Luke B. Connelly*, A History of the Term 'Moral Hazard', (2012) 79 The Journal of Risk and Insurance 1–25.

[28] The lack of technical know-how among the many improvised insurers was long felt, even in London: 'many Persons,' wrote John Weskett, 'become Underwriters and Insurance Brokers, especially in Time of War, or Hostilities, without any previous Knowledge whatever of the Kind that is requisite to qualify them […]. We see not a few Instances even of Tradesmen, Shopkeepers, &c. lured by the golden, but delusive Bait of Premiums, especially in Time of War, drawn like Gudgeons, into the Vortex of this perilous Abyss, Insurance; from which they can, rarely, afterwards extricate themselves; for, engaging as Underwriters, with an intire Deprivation of that Sort of Skill, and general Intelligence of commercial and maritime Affairs which, besides what peculiarly belongs to Insurance, are requisite to form a judicious Insurer; They, in particular, must at all Times be, inevitably, exposed to every Danger, every Artifice, and every Imposition; if not devoted to certain Destruction. To such of them, however, who are already engaged, and who are resolved to persist in Underwriting, the instructing themselves in the general Principles of Insurance must be serviceable: – to those who are not, it is adviseable, by all Means, to keep out of the Way of almost infallible Hurt to themselves and Families.' *John Weskett*, A Complete Digest of Theory, Laws and Practice of Insurance (London 1781), xxii–xxxiii.

year of the war.[29] Despite being a neophyte, between 1743 and 1745 Boasi underwrote an average of 70,000 pieces a year, corresponding to about 6–7% of all the risks traded on the market. This was not an insignificant share, especially bearing in mind that at the time there were approximately 40 underwriters active on the Livorno market. In the following two years, on the other hand, the activity of our insurer recorded a marked slowdown (52,000 and 26,000 pieces a year respectively), in contrast with the general trend of the market, to return to the levels of his first period of activity (67,000 pieces) in 1748.[30]

Graph 1. Monthly underwriting in the Livorno market (1738–1750)[31]



D. Navigating without a compass

It is difficult to say whether our insurer had a method in choosing which risks to underwrite. Throughout the period considered, Boasi used 13 different brokers, some of whom were specialists. Insurance brokerage was not yet reserved

[29] For a quantitative analysis of the Livorno market from 1694 to 1795, based on the records of the Ufficio di Sicurtà (Insurance Office) and on other complementary sources, cf. *Addobbati* (n. 12).

[30] ASPi, Ospedali Riuniti di S. Chiara, Boasi, 1881, 1882, 1883.

[31] Source: ASLi, Governatore e Auditore, 2311, n. 103. Currency: pieces of eight.

by law to a limited number of authorized operators, as it would be from 1759 onwards.[32] In theory, each of the 200 or so trading brokers could handle any kind of business, including insurance. On the other hand, in the years under examination, the public registry office of policies attests the insurance activity of just under 30 brokers, most of whom, however, also dealt with other things, such as the brothers Moisè and Graziadio Leone, who imported batches of tobacco from Thessaloniki. In fact, there were very few real specialists in the field, and it was these who did most of the insurance business. Boasi kept his accounts open with the Jewish brokers, Raffael Munis and Joseph Sacchi, the Christians Giovan Pietro Baudowin and the company Lorenzo Sorbi & Matteo Salvini;[33] he would at times deal with one and sometimes with another. If anything, the accounts show a certain progressive disengagement with the most accredited brokers, offset by the entry onto the scene of more marginal ones. In any case, for Boasi it was a matter of spreading the risk over different sea routes, limiting the amount for each ship. In general, we can say that until 1746 our insurer, most willingly, underwrote risk shares that ranged between 200 and 300 pieces, deciding then to halve his participation in each policy in 1747, when the market experienced the greatest increase, driven by an average premium rate on all destinations which had risen from 6% to 10%. Finally, in 1748, although there was no significant decrease in the average rate, Captain Boasi returned to underwriting quotas of 200 pieces, at a pace similar to that of his first years of activity.

At the time, refined statistical tools to assess risk factors and establish a safe course of action did not exist.[34] For Jacques Accarias de Serionne, the author of the famous *Les intérêts des nations de l'Europe*, the only sure method was trying to select risks as equivalent with each other as possible. In his opinion, it was legitimate to suppose that there was a loss for every 100 ships insured, including damages due to averages in this ratio. 'Starting from this principle,' he wrote, 'an insurer who manages to obtain a hundred risks of 4,000 *livres* at 4% each, is morally sure to earn three quarters of his premiums'. On such optimistic assumptions, it could be argued that the key to the insurer's success only consisted in maintaining the 'equality of risks': 'only the diversity and inequality of risks,' stated Accarias, 'can make the insurance business unprofitable for insurers'.[35]

---

[32] *Andrea Addobbati*, Le molte teste dell'Idra: i sensali livornesi nell'età delle riforme, (2015) 127 Mélanges de l'École française de Rome – Italie et Méditerranée modernes et contemporaines: https://doi.org/10.4000/mefrim.2181 (last accessed 24 May 2020).

[33] *Addobbati* (n. 12), 146.

[34] *Lorraine Daston*, Classical Probability in the Enlightenment (1988); *Steven Haberman* and *Trevor A. Sibbett*, History of actuarial science (1995); *Pierre Charles Pradier*, L'actuariat au siècle des Lumières. Risque et décision économiques et statistiques, (2003) 54 Revue économique 139–156.

[35] *Jacques Accarias de Serionne*, Les intérêts des nations de l'Europe, dévélopés relativement au commerce, vol. 2 (Leiden 1766), 40. Forbonnais, who was writing in 1754,

Unfortunately, maritime business was still too disorganized to be mastered with any statistical model. Some improvements had been made in foreseeing certain risks: the international treaties and the discipline imposed on armed conflicts during the eighteenth century had contributed to making war risks less unpredictable. There had also been progress in shipbuilding, in nautical skill, and in the dissemination of information, but the level of abstraction of the probabilistic calculation and the scarce statistical series available at the time did not permit the development of any really effective actuarial method. Nicholas Magens, who, unlike the French publicist mentioned above, had a practical knowledge of the insurance business, doubted that one could profit from the calculation of the probabilities: 'all that can be known is, that those alone have reason to promise themselves advantage from insurance, who, in proportion as the premiums rise and fall, and the circumstances are more or less dangerous, underwrite, or do not underwrite, greater or lesser sums.'[36] But the analysis of the circumstances, and the discretionary assessment of the many risk factors looming over each maritime enterprise were never particularly accurate, and in themselves were blunt weapons in the face of the reticence and the bad faith of the insured. All in all, it seemed obvious that the insurer would still have to rely on the strength of large numbers, rather than on the premium, especially in a context of international competition. We find some interesting indications about best practice from a memorandum of the merchants of the English nation of Livorno, a practice that Boasi should have been familiar with and observed himself. This memorandum was drawn up in 1748, when even the Tuscan government began to entertain the idea of authorizing the foundation a great monopolistic company to try to restore order in the insurance market.[37] The merchants of the 'British Factory' of Livorno opposed the plan with the same arguments that in 1720 had been employed – to no effect – to counter the incorporation of the Royal Exchange and the London Assurance, the two leading London companies.[38] In their view, the individual enterprise had numerous advantages over a joint-stock company, the

---

agreed: it should not have been very difficult to identify the frequency of maritime accidents, at least in peacetime: 'Par un dépouillement des registres de la marine, on a évalué pendant dix-huit années de paix, la perte par an à un vaisseau sur chaque nombre de cent quatre-vingt. On peut évaluer les avaries à deux pertes sur ce nombre, et le risque général de notre navigation à 1 $^{2}/_{3}$ % en tems de paix.' *François Véron Duverger de Forbonnais*, Elémens du Commerce, vol. 2 (Leiden 1754), 10.

[36] *Nicolas Magens*, An Essay on Insurances, vol. 1 (London 1755), vii.

[37] *Addobbati* (n. 12), 170–176.

[38] *Kingston* (n. 19). For a more general overview of the two companies and the London market: *Frederick Martin*, The History of Lloyd's and of Marine Insurances in Great-Britain (1876; new edn., 2004); *David Eric Wilson Gibb*, Lloyd's of London: A Study in Individualism (1957); *Arthur H. John*, The London Assurance Company and the Marine Insurance Market of the Eighteenth Century, (1958) 25 Economica 126–141, *Barry Supple*, The Royal Exchange Assurance. A History of British Insurance (1970).

most significant of which derived from its specific management criteria, which did not require the, probably unproductive, immobilization of share capital. Instead of keeping:

> 'any of their capital employed in this business, [the individual underwriters] all have more or less considerable sums in their premiums account, which are daily taken in proportion to their signatures and it is certain in this time of war in which the aforementioned premiums are high, that they will often have in this respect in their account 1,000 pieces in proportion to each 100 piece that they underwrite; if therefore this calculation is right, as in fact it is judged to be and can be proved; each one whose signature gives, and assures 1,000 pieces, comparing different times, will have 10,000 pieces in his account, of which sum combined with the capital it is clear that it can also be used for other cases which might occur.'[39]

Thus, individual firms did not set up guarantee funds. The whole ability of the good insurer consisted in trying to maintain a balance between the extent of the risks underwritten and the total amount of premiums receivable on the brokers' current accounts. In their memorandum, the English merchants recommended to maintain a 1:10 ratio – at least in time of war. Instead, for Ascanio Baldasseroni, a maritime lawyer and the author of a famous treatise on insurance, there was no fixed ratio. By inviting the insurers to reckon a reasonable proportion of the underwritings for averages, the Livorno lawyer insisted on the danger of partial damages which, however small, if too numerous could threaten the 'right proportion that any considerate trader can find between the collection of premiums and the payment of claims […] and once the balance has been lost […] it is very difficult to find it again'.[40] In short, the undertaking of the individual underwriter was a balancing act. Baldasseroni introduced the other two fundamental variables that should be taken into account: claims and averages. And Boasi? How considerate was our insurer? Is there a balancing act in his accounting that gives stability to the whole house of cards?

E. Boasi's insurance accounts

Before putting Boasi's current accounts under the microscope in order to identify his *modus operandi*, it should be pointed out that some fundamental parameters elude us, mainly regarding the outgoings. Boasi could use the brokers as liquidators, but he was not obliged to do so. Therefore, it is possible, and indeed very probable, that various damages, mostly the major claims, were settled with the commercial firm's funds. Moreover, the current accounts were not closed: the firm's activity ceased (after a protracted struggle), without a formal bankruptcy procedure, which could have given us more precise indications on the debt

[39] ASFi, Segreteria di Finanze ant. 1788, 800, Memoria della nazione Brittanica.

[40] *Ascanio Baldasseroni*, Trattato delle assicurazioni marittime, vol. 3 (Firenze 1786), 116.

position. The creditors, considering the depth of his insolvency, agreed to renegotiate the debt and to liquidate it in full settlement and discharge of all claims. Thus, it is not possible to know how many pending risks turned into losses. A rough sketch of the available data gives the impression of an extremely lucrative business. In his first four years of activity, the outgoings for compensation, write-offs and transaction costs decreased the income from the premiums by between 29% and 46%.[41] The best years would seem to have been the last two, with losses that decreased revenues by just 13% and 19%, respectively. Nevertheless, 1747 and 1748 were the years of the market explosion, due partly to a speculative bubble which, as we shall see, ended up exposing the great difficulties faced by the operators. In the above-mentioned memorandum, the English nation put forward the tendentious thesis that in 'no other Market' were claims settled so rapidly and the insurers were in a very solid position, as demonstrated by the fact that during the past 40 years, 'no insurer has become insolvent; and if there has been any mishap, that person has not failed as insurer, but he has been subject to other causes and misfortunes'.[42] Indeed, Berti's study showed that there were some ill-advised purchases and the closure of the outlet markets that created difficulties for Boasi. However, there remains the strong suspicion, supported by many clues, that the current accounts of the brokers do not give us an exact representation of Boasi's losses.

Table 1. Boasi's insurance losses[43]

	1743		**1744**		**1745**	
Claims	1	237.15.06[44]	2	244.00.00	6	1164.00.00
Averages	23	258.04.09	22	523.08.10	28	412.14.03
Returns and Write off	17	128.10.00	15	212.07.00	20	253.15.00
Gifts		2.06.06		46.10.05		38.15.10
Losses		626.16.09		1026.06.03		1869.05.01

[41] ASPi, Ospedali Riuniti di S. Chiara, Boasi, 1881, 1882, 1883.

[42] ASFi, Segreteria di Finanze ant. 1788, 800. Memoria della nazione Brittanica.

[43] Source: ASPi, Ospedali Riuniti di S.Chiara, Boasi, 1881, 1882, 1883. Currency: pieces of eight, schillings, and dinars.

[44] Deduction of 53.4.6 for rescue at sea.

	1746		1747		1748	
Claims	2	685.00.00			3	776.00.00
Averages	7	120.01.01	11	94.18.02	14	175.16.11
Returns and Write off	6	136.00.00	6	199.00.00	10	157.00.00
Gifts		19.05.03		33.02.10		30.12.05
Losses		960.06.04		327.01.00		1139.09.04

In the entire period under consideration, the claims settled by the brokers were 14 and the averages 105, for a respective cost of 3,100, and 1,600 pieces. The worst year was 1745, with six claims and 28 averages, which could partly explain the decrease in underwritings in the following two years: in 1745 Boasi signed 286 policies, but only 172 and 101 in 1746 and 1747, respectively. It should be borne in mind that all the claims, except for one renegotiated at 25%, were liquidated with a 3% discount, that is obtaining the rebate that was granted by the policyholder for prompt payment, and it is definitely very strange that Captain Boasi never countered the claims of an insured party in court. From 1746 onwards there was also a noticeable reduction in averages, which suggests a more prudent negotiation, with a more extensive use of the exemption clauses.

There are not so many doubts on the revenue side – which, even detracting the losses paid out by the brokers, would still yield significant margins of profit every year. Boasi could issue warrants of payment on the brokers' accounts, which he used to buy a consignment of tobacco and one of cotton, to insure his own trade, and also to pay the fees of lawyers and attorneys, a clear sign that at least sometimes he had to go to court. Furthermore, every year Boasi was able to collect part of his revenues; the brokers paid him in gold *zecchini*, sometimes they transferred to him the promissory notes of their debtors, but always at irregular intervals and, if we give credence to the most common complaints about them, not before Boasi had claimed payment with some insistence.[45] In any case, insurance underwriting represented a source of finance for the commercial firm that on average brought 1,200 pieces a year in cash. The collection, relatively large (perhaps even too high), never exhausted the credit, because at the end of each year Boasi left an amount to the brokers that over time should have accumulated, since the uncollected sums passed from 231 pieces in 1743, to 6,332 in 1748. I say it should, because the failure to close the accounts leads to uncertainty even on this point. According to what the British Factory in Livorno maintained in its memorandum, it was normal to give the brokers credit, and make sure to increase it, for that credit was needed to keep on underwriting on the risk market. Rather, in

[45] *Baldasseroni*, vol. 1 (n. 40), 44, 73 f. He had the same kind of problems with London brokers: *Weskett* (n. 28), 61–68.

the case of Boasi, the inadequacy of the amount of such credit is noteworthy. The Englishmen claimed that in wartime proper management should have a ratio of 1:10, and that for every 100 pieces of risk there should be 1,000 in the premium account. It is understood that the right proportion depends on time ('given a time commensurate with another', wrote the Englishmen), and that only the pending risks should be placed in the numerator. Nevertheless, even though it is impossible to make such a delimitation in the current accounts, because Boasi never notes the termination of the risks (which at the most could be deduced from the payment mandates and collections), the highest level of credit he was able to reserve, in 1748, remained very far from providing the desired guarantee: with 6,000 pieces in his reserve, Boasi could only have guaranteed 600 pieces at sea. Certainly, the Englishmen exaggerated; and they necessarily did so since they had to demonstrate the superiority of the individual enterprise over the joint-stock company. However, it seems quite clear to me that the bases on which Boasi started his insurance activity were too fragile, and that instead of consolidating them, he drew more than he should have from his accounts to meet the firm's liquidity requirements.

Table 2. Boasi's current accounts balance[46]

	1743	**1744**	**1745**
Premiums	1340.01.04	3281.18.06	4797.11.03
Losses	626.16.09	1026.06.03	1869.05.01
Payments	205.04.02	67.04.00	708.18.06
Collections	602.07.09	1423.03.09	1579.00.07
Reserves	[47]231.15.02	996.19.08	1637.07.07

	1746	**1747**	**1748**
Premiums	3296.03.06	2463.02.00	5760.14.10
Losses	960.06.04	327.01.00	1139.09.04
Payments	301.07.06	232.00.00	43.06.00
Collections	863.15.01	1371.01.02	1596.13.00
Reserves	2807.14.02	3340.14.00	6322.00.06

In 1746 and 1747, which coincided with the violent expansion of the market, Boasi's accounts show a decided reduction in his underwriting activity, and one

[46] Source: ASPi, Ospedali Riuniti di S.Chiara, Boasi, 1881, 1882, 1883. Currency: pieces of eight, schillings, and dinars.

[47] Previous reserves of 326.2.6 included.

might think that our insurer, frightened by the increase in losses in 1745, had rethought his approach to the insurance business, perhaps considering a progressive disengagement – but it is not so. Boasi reduced the number and the size of shares but increased the risk. In 1747 Boasi underwrote just 101 policies, but 41 of these, for almost a third of the risk, at a rate higher than 10%. Above all, Boasi accepted a large number of cross-risks, that is to say, he insured ships that did not depart from Livorno, nor arrived there, and of which he could not have direct knowledge: he underwrote returns from Fort St George (Madras) to London, *in quovis*,[48] at 10%, presumably on vessels of the East India Company; several Atlantic passages, from Rotterdam to Newfoundland at 19%, from Cadiz to Vera Cruz at 24%, returning from Havana at 25%, and from June 1747 up to the entire spring of the following year, he insured many French ships on the Caribbean routes: the *Roi David*, the *Diligent* of Captain Clemenceau, the *St Dominique* of Captain Maije, the *Comtesse of Valemille* of Captain Louis Curet, the *Grand Alexandre* of Captain Beltran, the *St Pierre* of Captain Pierre Touron, and so on. The overall risk on the French Caribbean trade was 8,400 pieces, divided into 41 policies (including two reinsurances at 40%), obtaining, at least on paper, an average premium of 27.4%.

The decrease in the number of underwritings is not a symptom of discouragement. On the contrary, Captain Boasi accepts high, even reckless, risks, because most of the policies on the Franco-Caribbean trade bear the *interest or not interest* clause since April 1747: that is to say they are wager policies, sheer wagers.[49] The clause, in fact, has the effect of waiving any proof about the interest of the insured in the safety of the thing at risk. Therefore, the policyholder is no longer required to show the bill of lading or any other title that ascertains his interest in the insured ship; now he solely commits himself to paying the premium on a presumed risk, which more often than not is a fictitious risk. The first foreign client to propose a similar contract in Livorno was the Bordeaux shipowner and dealer Jean Baptiste La Mothe, who used the commissioner Robert Perryman to place 4,000 pieces of risk, 'fund or not fund in the form of a bet on the ship *Galliard*', of Captain Vigaud, departing from Bordeaux bound for Louisiana and Cap Français.[50] Boasi underwrote a policy of this kind for the first time in June

[48] The 'in quovis' clause allowed the ship name to be omitted on the contract, and therefore to insure the wares on whatever ship was despatched: *Johan Petrus Van Niekerk*, The Development of Principles of Insurance Law in Netherlands from 1500 to 1800, vol. 1 (1998), 514–520.

[49] *Andrea Addobbati*, Assicurazioni e gioco d'azzardo tra Bordeaux, Londra e Livorno. Le polizze speculative sul commercio Franco-caraibico durante la guerra di Successione austriaca (2013), 48, 441–465.

[50] Sommario per gli signori Roberto Perryman e Compagni e signori Francesco Della Rive e Rilliet ne NN. etc. contro gli signori assicuratori (Pisa 1749), 1 f. and 13, in: ASLi, Raccolta giurisprudenziale Pachò, 13/02.

of the same year (400 pieces on the *Roi David* from Guadeloupe bound for Bordeaux at 17%).[51] The underwriting was proposed to Boasi through the broker Giovanni Boudowin, by the firm François De La Rive & Rilliet, the Livorno branch of the powerful Geneva Bank De La Rive, which acted on behalf of Peyre L'Ainé, another Bordeaux merchant.[52] Subsequently, Boasi underwrote another 18 shares for De La Rive on the Franco-Caribbean trade, all the others were proposed by various other Livorno merchants, who did not necessarily have to have correspondents in France's Atlantic ports, because from August 1747 they found a way to wage freely, even without commission, both on the safe arrival and on the mishap: the broker Giacomo Jaume introduced into the policies a second derogation clause, which exempted the insured from presenting the order letter.[53]

F. The *interest or not interest* clause and the Bubble of 1747

The wager policies fever was overflowing from London, where, since 1744, public opinion and Parliament were heatedly discussing their validity. In 1746, Parliament finally passed a new law, 'the most important and most extensive,' James Allan Park would write, 'in the whole code of statute law, with regard to

---

[51] The average premium paid by the Bordeaux shipowners in peacetime was around 3.25% to 3.5% for the straight crossing to Martinique, and around 7.25% to 7.5% for a voyage stopping at Guinea to take on board slaves. See *Éric Saugera*, Bordeaux port négrier: chronologie, économie, idéologie XVIIe–XIXe siècles (1995), 270. Until recently, Perryman had been operating in Genoa, but was forced to move to the Tuscan port when the imperial troops occupied the Ligurian city, bringing to a halt its economic life. The military occupation of Genoa contributed significantly to the economic growth of Livorno, and the attempt by the Grand Duchy to retain the Genoese merchant fleet (which had moved to the Tuscan port) was the source of a fierce trade war in the subsequent decade of peace. *Carlo Mangio*, Commercio marittimo e Reggenza lorenese in Toscana (provvedimenti legislativi e dibattiti), (1978) 90 Rivista Storica Italiana 898–937, *Daniele Edigati*, The Tuscan Edict of 1748 and ancien régime maritime legislation, in: Antonella Alimento (ed.), War, Trade and Neutrality. Europe and the Mediterranean in Seventeenth and Eighteenth Centuries (2001), 68–81; *Danilo Pedemonte*, 'Operando in pregiudizio della piazza di Livorno'. Pubblica salute e privati interessi nella guerra sanitaria degli Stati italiani alle paci imperiali con i barbareschi, in: Andrea Addobbati and Marcella Aglietti (eds.), La città delle nazioni: Livorno e i limiti del cosmopolitismo (1566–1834) (2016), 293–308.

[52] *Herbert Lüthy*, La banque protestante en France de la révocation de l'édit de Nantes à la Révolution, 2 vols. (1959). On the Livorno firm in particular: ibid., vol. 2, 285. The firm consisted of François de La Rive-André and the brothers Louis, François-Robert and Jean Jacques Rilliet, the sons of Jean François, previously a banker in Paris who later retired in Geneva. He anticipated substantial sums, in a limited partnership, for launching the business in Livorno. After the death of de La Rive, the company name became Louis et Jean Jacques Rilliet.

[53] *Addobbati* (n. 49), 458.

insurances'.[54] The prohibition of wager policies, however, was limited to national trade. The insurance lobbies were allowed to continue insuring all trade of foreign countries, privateers, and British goods destined to all the Iberian markets, whether in Europe or in America, without proof of risk. The logic in providing such sweeping exceptions to the rule was not very clear, and the controversy continued.[55] Geoffrey W. Clark has suggested that the decision to allow bets on foreign ships must have been purely for military reasons. The *interest or not interest* clause had potentially destructive effects: it increased adverse selection and encouraged frauds. Therefore, it was reasonable to ban it on national trade, while it could be convenient to allow it on enemy trade, so as to push the latter to destroy his merchant fleet. In the dire situation of French shipping, frustrated by overwhelming British naval superiority, wager policies could be an opportunity for French shipowners, and an advantage for the British military.[56] I believe that this is only a partial explanation, because it does not take into account the pressure exerted by insurance circles to obtain such exemptions, and the great difficulties that worried the whole sector. As we have seen, the insurance business as a whole, especially with regard to individual operators, represented a fragile set of account currency, and its solvency was highly dependent upon a skilful balancing of risk underwritings and the amount of premium to collect, according to a ratio that could never be established with certainty, and that in any case remained exposed to the sudden changes in the international situation. The outbreak of a conflict and all its unpredictable consequences imposed continuous changes of pace in establishing both the premium rates and the extent and frequency of the underwritings, in order to avoid a cash-flow fall and the ensuing bankruptcy. Of the two levers on which to act, the first, the rate variation, offered limited room for manoeuvre: the premium became part of the goods' price, and if it was too high with respect to the markets' absorption capacity, it ended up eroding, and even nullifying, the commercial profit, with the result of discouraging navigation and stopping trade. Moreover, in a context of international integration, it was necessary to keep the rates' trend under control in order not to give in to foreign competition. Thus, once the compensatory capacity of the rate variation had been exhausted, all that remained was to act on the other lever, that

---

[54] *James Allan Park*, A system of the law of marine insurances (London 1787), 299.

[55] See, for example, the pamphlets by *Corbyn Morris*, and in particular: An Essay towards deciding the Important Question, whether it be a national advantage to Britain to insure the Ships of her Enemies? (London 1747). The second edition (London 1758) is reprinted in: David Jenkins and Takau Yoneyama (eds.), History of Insurance, vol. 7 (2000), 207–282. Magens also discussed the question at length in his famous treatise: *Magens* (n. 36), i–xv, 24–31.

[56] *Geoffrey Clark*, Insurance as an Instrument of War in the 18th Century, (2004) 29 The Geneva Papers on Risk 247–257; *idem*, Waging War with Insurance in Eighteenth-Century Britain, in: Christian Thomann and Johann-Matthias Graf von der Schulenburg (eds.), War, Terrorism and Insurance in Europe after September 11, vol 1 (2004), 7–32.

of broadening the allocation base: relatively moderate rates, but frequent underwritings; and the involvement in the market of a series of new underwriters, in order to increase their overall number. But, even so, it was not possible to expand the amount of premiums underwritten at will: an adequate expansion of the number of risks would have been necessary; instead, in wartime the risk increased but maritime traffic contracted. However, there was a last resort in broadening the allocation base, keeping up the cash flow, and to thus withstand the impact of the war situation: the fuel of speculation. Creating fictitious risks made it possible to inflate the number of premiums on the accounting ledgers, increasing the solvency of the insurers in the short term.

Whatever the considerations behind the exemptions, it did not take long for their negative effects to emerge. In 1747, the London insurers opposed the compensation of the *Heureux*, a French ship that had set sail from Bayonne towards Martinique, which was captured by English corsairs on the second day of navigation. The commission agent Mendes da Costa, who was acting on behalf of the shipowners, had insured it with the *interest or not interest* clause in various policies for a total value of £3,340 – more than four times its real value. It did not take long to realize that the law, by authorizing the wager policies on the trade of foreign nations, left a door open for the fraudulent designs of the French, and that the case of the *Heureux* was only the tip of the iceberg: the many pending risks insured in London, with the *interest or not interest* clause, amounted to a total that according to some estimates had to be around £100,000.[57] After all, there were not many possibilities left to the French shipowners: the fleet was in danger of rotting in the ports, and domestic insurers were all but bankrupt, so they had to look for insurance coverage in the foreign markets, starting from London, where they had discovered that a loophole in the law would have allowed them to get out of trouble and to launch the entire fleet on the ocean routes in a desperate way. The French Minister of the Navy, Count de Maurepas, denounced the abuses without being able to do anything about them, while the Parliament of London fixed the shortcomings of the law, prohibiting any insurance on enemy's assets in January 1748.

Towards the end of 1747 the Livorno insurers were also informed of the dangers of the wager policies. There had already been the first notifications of mishaps, concerning four ships on the Caribbean routes, the *Marie Immacolate*, the *Alexandre*, the *Concorde*, and the *Royal Dauphine*. Some insurers had begun to liquidate the shares, when the Jackson & Hurt firm was warned by the head of the firm in London: 'these risks are a bad business. Not long ago,' wrote George Hurt, '5 or 7 ships, according to the information I have been given, were sent

[57] *Clark*, Instrument of War (n. 56), 255–257. On Benjamin Mendes da Costa (1704–1764), one of the most eminent merchants of the Sephardic community of London, see the biographical entry by *Todd M. Endelman*, Oxford Dictionary of National Biography (2004).

from a French port with bricks, on purpose, to go and perish, and a considerable sum was underwritten here for these vessels'. The French had insured 'the weakest ships […] as it is […] their custom to put themselves in the hands of their enemy […] as well as to insure a ship for twice its value. You cannot conceive,' concluded the Londoner, 'the deceits which the insurers have suffered here'.[58] Jackson & Hurt, who had 800 pieces of eight on the *Royal Dauphine*, refused to pay, being soon imitated by other insurers, including Captain Boasi who had 300 pieces on the same ship.[59] It was the beginning of a long and intricate legal dispute, which would only be concluded in 1753, after having passed through various appeals and degrees of judgment. The different lawsuits before the Livorno court were all brought together in a single proceeding and were brought to the *Consulta*, the highest court of the state, which began drawing up a financial report of all disputes. In the second half of 1747, at least 48 policies were underwritten with the ill-famed clause, relating to 27 different French ships on the routes of the West Indies, for a total risk of 204,750 pieces. The premiums had been agreed at 18%, 20% and 25%, for a total premium of 44,226 pieces. Of the 27 ships, 13 were captured by the British or wrecked.[60] In order to refuse payment, the insurers pretended not to have understood the nature of their obligation and accused the policyholders of ambiguity. The latter replied that it was impossible to misunderstand in cases where the omission of the risk's proof was stipulated, and they were right: everyone was aware that those contracts were not real insurances, but wagers. It was a comedy in which all the players were involved as interchangeable characters, both as insured, when they had wagered on a mishap, and as insurers, when instead they had bet on the ships' safe arrival. In the end, all of them decided to take sides after having properly checked their accounts. However, they had the foresight never to accuse their counterparties of fraud in order not to risk criminal charges. Thus, the whole discussion focused on the effects of the *interest or not interest* clause. The *Consulta* eventually recognized its lawfulness but limited its effects to the drawing up of the contract. In other words, the clause was intended to relieve the insured party from the burden of proof when asking for the insurer's signature, in order to facilitate the negotiation, but if a mishap occurred, the clause could not exempt him from proving his interest in insuring during the ensuing claim. The consequence was that all

[58] Sommario per gli assicuratori contro gli signori Roberto Perryman e compagni e signori Francesco Della Rive e Rilliet assicurati coll'osservazioni (Pisa 1749), in: ASLi, Raccolta giurisprudenziale Pachò, 13/07.

[59] Sommario per gli signori Roberto Perryman e Compagni (n. 50).

[60] *Addobbati* (n. 49), 455 f. The insurers involved were 46, including many Jews and English firms, like Jackson & Hurt and John Becher, who appeared to be the most exposed, having underwritten 1,000 and more pieces on each ship; ASLi, Governatore e Auditore, 894, nn. 79–81, 93–95; 896, nn. 312, 418, 455; 2311, n. 103.

the wagers were avoided.[61] A different verdict would probably have had devastating effects. The contracts brought to court, as can be seen from Boasi's current accounts, were only part of all the wager policies negotiated in Livorno.[62]

G. Conclusion: from individuals to companies

The 'famous case of American insurance' – as formulated in a polemical dialogue printed in 1750[63] – had the effect of freezing the insurers' position (as to both credits and debts) up to the final sentence, a circumstance that may explain why Boasi did not close his accounts. He continued underwriting until the end of the war, without refraining from putting his signature on some other high-risk policies relating to Franco-Caribbean trade. In his last year of activity, our insurer even increased the volume of underwritings, perhaps envisaging that part of his premiums would have been uncollectible. The signing of the peace preliminaries in April 1748, according to Boasi's correspondence, opened up a phase of uncertainty and an unnerving wait for political developments. Boasi, who hoped to 'see the poor trade to take a deep breath after a long distress' to get rid of his warehouse's unsold stock by selling it to South America, was soon disappointed. After the war, trading could not resume its ordinary course at once: 'This sudden peace,' Captain Boasi wrote to his friend Quaratesi at the beginning of 1749, 'brought about endless confusion on trade and I, in my own small way, have suffered no small damage'. And, some time later, once again to Quaratesi: 'everything remains stranded and nothing is sold, and I […] find myself with

[61] Decisione degl'illustrissimi signori Pier Francesco Mormorai primo auditore di Consulta e Ferdinando Soldani Benzi auditore di Ruota, nella causa liburnensis assecurationum. Del dì 16 maggio 1753 (Firenze 1754). One of the three judges disagreed in part with his colleagues, by issuing a minority report: Voto decisivo dell'illustrissimo Signor Giuseppe Bizzarrini auditore della Ruota Fiorentina, nella causa liburnensis assecurationum seu sponsionum. Del dì 16 maggio 1753 (Firenze 1753), in: ASLi, Raccolta giurisprudenziale Pachò, 21/f, 24/c respectively.

[62] Several discrepancies emerge from the comparison between the trial papers and the documentation of the public policy register. Furthermore, from a quick examination of the claims filed in the court of Livorno by François De La Rive & Louis Rilliet, we learn that this firm alone, albeit an important one, in the two-year period 1747–1748 asked for compensation of 107,800 pieces (32,380 for reinsurances). The Geneva-based firm was acting on behalf of clients in Bordeaux and Marseille, and the 36 ships involved were all French. Only two were captured on the routes of the Levant, all the others while they were sailing in the Atlantic, between the sugar islands and France, but of these only seven appear in the dispute debated before the Consulta: ASLi, Governatore e Auditore, 882, nn. 564, 565; 883, nn. 653–655; 887, nn. 799, 802, 804, 864–869; 888, nn. 1020–1027, 1032; 889, nn. 1152–1154; 890, nn. 1181, 1209–1211, 1214; 892, nn. 1503–1509; 894, nn. 12, 13; 897, nn. 509, 556, 563, 562; 898, n. 605; 901, nn. 1002, 1003, 1050–1052; 902, nn. 1157, 1157 bis, 1158, 1164.

[63] Dialogo nella celebre causa delle sicurtà d'America fra un dottor di legge ed un mercante (Pisa 1750), in: ASLi, Raccolta giurisprudenziale Pachò, 18/m.

many kinds of stock and always new ones arriving from the Levant, without being able to sell any garment for lack of demand, so now I am trying to do my best as I wait for business to improve'.[64] The insurance market, after the deflation of the speculative bubble, also grew weak, and was even unable to keep up with the demand. Boasi, who had a batch of incense to ship to Cadiz, could not find any Livornese willing to take the risk, so he had to call on his Amsterdam correspondent Van Inghen: 'after the news of peace the number of insurers in this market has decreased a great deal and as each one of them has his full quota on this ship, it is better for me […] to turn to you for this insurance'.[65] In a short time, the network of correspondents that he could so far rely upon ceased to provide the usual support. A bill of exchange issued on his friend David Klugh of Hamburg, payable in Amsterdam, was not accepted by the drawee,[66] and even Etienne Lespiau of Marseille, who was in debt to Boasi, refused to pay him.[67] Finally, when in July 1749 he learned that his Florentine silk goods sent to Cadiz simply could not find a buyer,[68] Captain Boasi decided to withdraw from business and pay his outstanding accounts with the creditors before being forced to file for insolvency.[69] Boasi's disengagement from the insurance market preceded his withdrawal from business by nine months, and coincided with the ratification of the Treaty of Aachen. In the meantime, premiums had returned to ordinary levels. Our insurer placed his signature for the last time on a policy on 30 October 1748: 300 pieces on wheat from Ancona to Livorno on the polacre *Madonna del Lauro* of the Neapolitan Captain Giacarino at 8%.[70]

Along with Jacopo Antonio Boasi, many other underwriters left the market, and it was at this juncture that discussions began in Livorno, as well as elsewhere, as to the need to give the insurance business a new framework. The war had exposed the serious limitations of the traditional insurance business: the underwriters' lack of professionalism, aggravated by the habit of delegating the technical functions and the management of funds to the brokers (who, at least in Livorno, were prevented by the law from having a business interest in partnership with their clients), and the inelastic structure of the offer (that is to say, the market's inability to adapt beyond a certain limit to the continuous fluctuations in

[64] *Berti* (n. 4), 324.

[65] *Berti* (n. 4), 330 f.

[66] ASPi, Ospedali Riuniti di S.Chiara, Boasi, 1880 (15 November 1748). The promissory note, worth 640.17 pieces, was issued in favour of Jackson Hurt & Rocherford.

[67] Ibid. (25 April 1749). Two promissory notes of 380 and 160 pieces, in favour of Luigi de Lamar, came back.

[68] Ibid. (8 July 1749).

[69] Ibid. The settlement with the creditors begins on 13 August 1749, with the lawyers, and goes on with the apothecary and the correspondents Van Inghen and Etienne Lespiau (April 1750), Quaratesi (November 1750) and Ubaldini (January 1750/December 1751).

[70] ASPi, Ospedali Riuniti di S. Chiara, Boasi, 1883.

demand). A traditional market made up of individual underwriters could only try to make up for its shortcomings by entrusting the brokers with the task of recruiting new forces, usually inexperienced people who were more easily persuaded in time of war, when the high rate of premiums dangled extraordinary speculative opportunities, and who after experiencing the thrill of gambling, quickly returned from where they had come, sometimes a little richer, but more often to escape from creditors.[71] The instrument that would have given more stability and reactivity to the market was the joint-stock company; not an occasional working relationship of individual underwriters coordinated by the brokers, but a concentration of capital managed by an expert management co-interested in the company's objectives. There were few such companies before the war of 1744–1748: a couple in London, and one in Copenhagen, Rotterdam and Genoa respectively.[72] It was the experience of war that led governments to sponsor the creation of consortia and companies, whether in a monopolistic or in a free competition system. In 1750 the *Chambre d'Assurances Générales et Grosses Aventures* of

[71] The edict that established the Neapolitan Real Company in 1751 insisted in the preamble on the disorders and scandals that the company would have remedied. Those who had made themselves responsible 'in all the markets of Europe' were those 'many Particular persons, even non-traders, and those without capital lured by the prospect of making a profit with a simple signature on the known insurance sheets, [which] undermine this branch of business, and upset good faith, and the flow of trade, while when an accident happens, and they fail to satisfy their clients, they raise affected pretexts, and exceptions to give rise to expensive and very long quarrels, and with this tyranny of the poor insured clients they try either not to pay, or after months, and years to extract from them certain dishonest adjustments'. Cited in *Baldasseroni*, vol. 3 (n. 40), 639.

[72] It should be pointed out that the results of these first incorporations were not always satisfactory. In Great Britain, the Bubble Act of 1720 prevented the creation of new companies beyond the two approved ones, which, moreover, could not exclude from the market the individual underwriters organized by Lloyd's. Kingston believes that the London Assurance and the Royal Exchange remained more exposed to the problem of information asymmetry, while Aldous and Condorelli blame their failure on the lack of limitation of shareholders liability and the excessively prudent conduct imposed on directors. *Kingston* (n. 19); *Michael Aldous* and *Stefano Condorelli*, An Incomplete Revolution: Corporate Governance Challenges of the London Assurance Company and the Limitations of the Joint-Stock Form, 1720–1725, (2019) 20 Enterprise and Society 239–270. On the Maatschappij van Assurantie of Rotterdam: *Sabine Go*, Marine insurance in the Netherlands 1600–1870: A Comparative Institutional approach (2009), 216–223. On the first Danish company: *Christian Thorsen*, Det Kongelig Oktroierede Sø-Assurance Kompagni, 1726–1926 (1926). On the Genoese company, founded in 1742: *Giulio Giacchero*, Storia delle assicurazioni marittime: l'esperienza genovese dal Medioevo all'età Contemporanea (1984), 139–156. On the wave of stock market speculation in 1720 the Assecuranz-Compagnie of Hamburg was founded, which, however, had a very short life, and it took until 1763 to be able to successfully replicate the initiative: *Caesar Amsinck*, Die ersten Hamburgischen Assekuranz-Compagnien und der Aktienhandel im Jahre 1720, (1894) 9 Zeitschrift des Vereins für hamburgische Geschichte 465–494; *Marcus A. Denzel*, The Price of Minimalizing the Risks at Sea: The Hamburg Marine Insurance Rates in the 18th and Early 19th Century, in: Giampiero Nigro (ed.), I prezzi delle cose nell'età preindustriale: selezione di ricerche (2017), 367–383.

Paris was created,[73] and consortia of this kind arose in all the most important French ports, beginning with Saint Malò. 'Rouen has seven of them, Nantes three; Bordeaux, Dunkirk, La Rochelle have some too; but it was only since the last peace,' noted Forbonnais, 'that they were formed'.[74] Many Italian port cities followed the same path. A company was founded in Naples in 1751, one in Ancona in 1754, another one in Trieste in 1764.[75] Livorno, on the other hand, remained faithful to the traditional model until 1787. The Tuscan government was invited to consider at least two company projects, in 1748 and 1751, but neither was approved, because the British Factory of Livorno made it known that it would not welcome any changes.[76] In the opinion of the English merchants, everything was going in the best way, as it was 'well known to everyone that in no other Market, accidents, averages etc. are more easily recovered and paid, and so soon adjusted and remedied as in Livorno'. The insurers were solid, very solid in fact, because 'not only during the course of the present war, but also during the last long peace and the war that preceded it, in all for about forty years, no insurer has become insolvent in this place; and if an accident has happened, that person has not failed as insurer, but he had fall by other causes and misfortunes – an excellence that perhaps cannot be found in any other Market in Europe'.[77] And it should be borne in mind that while the British expressed such a flattering opinion, the threat of the wager policies was still hanging over the head of the insurers. Had the courts failed to freeze the problem first, and then defuse it, it would have been very difficult to remain so optimistic.

---

[73] *John F. Bosher*, The Paris Business World and the Seaports Under Louis XV. Speculators in Marine Insurance, Naval Finances and Trade, (1979) 12 Histoire sociale/ Social history 281–297.

[74] *Forbonnais* (n. 35), 70 f. Despite the strengthening of the supply capacity, the joint-stock companies of the second half of the eighteenth century could not yet act in a framework of impersonal relations. Shareholders generally consisted of pre-existing relational networks, as has rightly been pointed out by *Arnaud Bartolomei*, Les compagnies par actions à Cadix: les limites d'une exploitation rationnelle du risque maritime (1778–1808), in: Gérard Chastagneret et al. (eds.), Les sociétés méditerranéennes face au risque (2012), 75–96.

[75] *Franca Assante*, Il mercato delle assicurazioni marittime a Napoli nel Settecento: Storia della 'Real Compagnia' 1751–1802 (1976), *Alberto Caracciolo*, Le port franc d'Ancône: croissance et impasse d'un milieu marchand au XVIIIe siècle (1965), 256–258; *Loredana Panariti*, Assicurazione e banca. Il sistema finanziario triestino (secc. XVIII–XIX), in: Roberto Finzi et al. (eds.), Storia economica e sociale di Trieste, vol. 2 (1719–1918) (2003).

[76] *Addobbati* (n. 12), 170–175.

[77] ASFi, Segreteria di Finanze ant. 1788, 800: Memoria della nazione Brittanica.

The Transformation of the Marine Insurance Market in the Seventeenth and Eighteenth Centuries in Spain

From Individual Insurers to Insurance Companies

By *Jerònia Pons Pons*

One of the most recent debates on the development of modern insurance focuses on the changes in the forms of organisation of insurance. From its medieval origins, the insurance industry was in the hands of individual insurers, mainly financiers and merchants who applied the strategy of risk sharing to their activities.[1] Also included under the concept of 'individual insurer' prior to the seventeenth century are what Giovanni Ceccarelli refers to as 'co-insurers': the amount underwritten was insured by multiple insurers, acting on their own account and liable only for a small part of the total amount insured.[2] The individual insurer was the predominant form of insurance until sometime in the modern age. To date, historiography has placed the development from individual insurers to insurance companies in the eighteenth century, and has linked this transformation to the emergence of joint-stock insurance companies. In theory, these companies flourished because they adopted mechanisms to reduce transaction costs, which

[1] The idea of sharing risk in small operations and in different policies is explained for the medieval period by *Louis-Augustin Boiteux*, La Fortune de Mer. Le besoin de sécurité et les débuts de l'assurance maritime (1968), 157; *Mario Del Treppo*, Els mercaders catalans i l'expansió de la Corona Catalana-aragonesa al segle XV (1976), 373–393; *Alberto Tenenti* and *Branislava Tenenti*, Il prezzo del rischio. L'assicurazione mediterranea vista da Ragusa (1563–1591) (1985), 179 f. More recently *Andrea Addobbati*, Italy 1500–1800: Cooperation and Competition, in: Adrian B. Leonard (ed.), Marine Insurance. Origins and Institutions, 1300–1850 (2016), 46–77, 66.

[2] *Giovanni Ceccarelli*, La gestione dei rischi nel mercato assicurativo della Firenze Rinascimentale, in: Carlos Barciela López et al. (eds.), Le Assicurazioni. Sicurezza e gestione dei rischi in Italia e Spagna tra età moderna e contemporanea (2016), 45–61.

were very high at a time when agency problems and difficulties caused by asymmetric information predominated.[3] Nevertheless, some authors focusing on the British market point to factors that favoured institutions drawing together individual insurers such as Lloyd's offering both insured and insurers great security for the continued operation of this form of insurance up to the present. Christopher Kingston, for example, comments that the Bubble Act of 1720 temporarily barred the operation of marine insurance by joint-stock companies and partnerships, with the exception of two authorised corporations. This enabled Lloyd's to develop into a centre for private underwriters, gathering and sharing information. In his view, the British historical and institutional context thus strengthened the system of private underwriting so that it dominated the British insurance market even after the repeal of the Act. In the United States, however, the preference of private underwriting under this Act had been removed by Independence. This enabled joint-stock companies to prevail over private underwriting. Both systems had their pros and cons in terms of reducing transaction costs, especially with regard to agency problems and adverse selection.[4] Robin Pearson and Helen Doe focus on another factor. They analyse how the British marine insurance market sought solutions to the problem of adverse selection through different corporate forms.[5] According to them, the persistence of private or mutual insurers, such as the P&I clubs, can be linked to institutional elements, entrepreneurial qualities, risk taking and to innovation introduced by individual managers who played an important role in the success or failure of these clubs or associations of private insurers.

Apart from these contributions, it appears that little account has been taken in international debates of southern European insurance markets. This is largely because the non-English historiography has not been widely read. Fortunately, recent studies in the English language, such as those of Luisa Piccinno, Andrea Addobbati and Jeremy Baskes, include southern European countries. Thereby, they bring these markets into the focus of international studies, enabling a

[3] The theory on the role of companies in the coordination of economic activity and a more efficient allocation of resources in substitution of the market starts with *Ronald H. Coase*, The Nature of the Firm, (1937) 4/16 Economica 886–905 and has been amplified in the current institutionalist historiography by *Douglass C. North*, Institutions, Institutional Change and Economic Performance (1990). *Robin Pearson* and *David Richardson*, Business networking in the industrial revolution, (2001) 54/4 Economic History Review 657–679, highlight the role of networks in the insurance world as a mechanism for reducing these high costs.

[4] *Christopher Kingston*, Marine Insurance in Britain and America, 1720–1844: A Comparative Institutional Analysis, (2007) 67/2 The Journal of Economic History, 379–409, 405 f.

[5] *Robin Pearson* and *Helen Doe*, Organisational Choice in UK Marine Insurance, in: Robin Pearson and Takau Yoneyama (eds.), Corporate Forms and Organizational Choice in International Insurance (2015), 47–67, 64–67.

broader and more diverse study of the evolution of insurance practices and the organisational forms of insurance.[6] In this overall context, a series of important questions arise that are linked to the transformation of the mechanisms under which the different early modern insurance markets operated. Insurance business – especially the calculation of the premium – is determined by a variety of factors, including scattered information, the ascertainment of which led to high transaction costs. Agency and transaction cost theories determine the existence of market institutions that make it possible to reduce costs.

In the light of this broader context, the objective of the present article is to contribute to the debate on the institutional changes in the insurance market during the seventeenth and eighteenth centuries. It will answer various questions with a special focus on the different insurance markets in peninsular Spain. In a first step, it will establish when the change from a market dominated by individual insurers to collective forms of insurance occurred. What types of companies were responsible for this change? Was there a transition phase before arriving at the predominance of joint-stock insurance companies? What advantages did collective forms of insurance bring to the industry? How were these companies organised? Archival materials make it possible to develop fresh answers to these questions, at least in the case of Spain.

However, before going any further, it is important to point out that there are no homogeneous rules governing the Spanish insurance market during the modern period. This observation relates to the historical origin of the modern Spanish state based on the union of the Crown of Aragon and the Crown of Castile, which led to distinct maritime laws.[7] The regulatory framework for insurance under

---

[6] *Luisa Piccinno*, Genoa, 1340–1620: Early Development of Marine Insurance, in: Leonard (n. 1), 25–45; *Jeremy Baskes*, Cadiz 1780–1808: A corporate Experiment, in: ibid., 228–247; *Addobbati* (n. 1).

[7] *Jean-Marie Pardessus*, Collection de lois maritimes, vol. 5 (1839), vol. 6 (1845). On the basis of this division into two crowns, Spanish research has developed two different foci. Studies on Castilian law dealing with insurance include *Manuel Basas Fernández*, Contribución al estudio del seguro marítimo en el siglo XVI, (1957) 24 Revista de Derecho Mercantil 307–346, who was especially interested in the ordinances of the merchant guild (Consulado) of Burgos; this research was followed by *Santos M. Coronas González*, Derecho Mercantil castellano. Dos estudios históricos (1979); *idem*, Orígenes de la regulación consular burgalesa sobre el seguro marítimo, (1981) 2 Revista de Historia del Derecho 269–318; *Bruno Aguilera Barchet*, Un formulario de contrato de seguro de 1546. Contribución del derecho marítimo burgalés, in: Manuel J. Peláez (ed.), Derecho Marítimo Europeo. Homenaje a F. Valls Taberner (1987), 1135–1165. These authors were interested in examining the different ordinances, as well as investigating the influences and similarities between the different insurance markets. Again, with a focus on Castilian law, *Antonio-Miguel Bernal*, La Financiación de la Carrera de Indias (1492–1824). Dinero y crédito en el comercio colonial español con América (1992), studied the peculiarities of insurance for the Carrera de Indias; *Carlos Petit*, La compañía mercantil bajo el régimen de las Ordenanzas del Consulado de Bilbao, 1737–1829 (1980), focused on the ordinances

both crowns was created in the late fifteenth and sixteenth centuries, and was not modified except in practice. These differences determined divergent practices in insurance markets in the modern period, which can be synthesised as follows.

Castilian marine insurance was consolidated in the Burgos insurance market during the sixteenth century, where model policies and general ordinances were published.[8] Insurance for the route to the Indies, the so-called *Carrera de Indias*, was regulated in the ordinances of the Merchant Guild (*Consulado*) in Seville, which included provisions of how policies should be worded.[9] In particular, two requirements were established in Seville ordinances: (a) the agreement between the insurer and the insured had to be in writing; and (b) the deed had to be formalised before a market broker, known as a *corredor de Lonja*.[10] In Cadiz, it was compulsory for the *Carrera de Indias* to conclude the contract before a market broker, and even in the late eighteenth century it was still customary not to collect the premium before the contract entered into force. The form of payment, however, could vary depending on what had been agreed between the two parties, and it had to be recorded in the document. For voyages to America, the insured was normally allowed a period of six months, counting from the date of the policy, to pay the premium. In some cases, the premium was demanded when the risk had expired, and thus in the case of accident it was deducted from the total amount of compensation. In voyages to European ports, however, the premium had to be paid up front.[11] The subsequent payment of premiums for the *Carrera de Indias*, contrary to the custom in most European insurance markets of collecting payment in advance, must have caused conflicts in Cadiz. Indeed, a group of

---

of Bilbao. The legislative development concerning insurance within the sphere of the Crown of Aragon were analysed by *Angel García Sanz* and *María Teresa Ferrer Mallol*, Assegurances i canvis marítims medievals a Barcelona (1983); *Manuel J. Peláez*, Tres estudios de historia del Derecho marítimo catalán en su proyección italiana (1980); *idem*, Cambios y seguros marítimos en Derecho catalán y balear (1984).

[8] Burgos was at the centre of the insurance market during the sixteenth century, as demonstrated by *Hilario Casado Alonso*, El mercado internacional de seguros de Burgos en el siglo XVI, (1999) 219 Boletín de la Institución Fernán González 277–306; *idem*, Los seguros marítimos de Burgos. Observatorio del Comercio internacional portugués en el siglo XVI, (2003) 4 Revista de Facultade de Letras. Historia 213–242. Casado's focus, however, is on using insurance as a source for analysing trade in general rather than analysing the specific dynamics of the insurance market itself.

[9] *Guillermo Céspedes del Castillo*, Seguros marítimos en la Carrera de Índias, (1948–1949) 19 Anuario de Historia del Derecho Español 57–102.

[10] *Manuel Ravina*, Participación extranjera en el comercio indiano: el seguro marítimo a finales del siglo XVII, (1983) 43 Revista de Indias 481–513, 487.

[11] *María Guadalupe Carrasco*, El negocio de los seguros marítimos en Cádiz a finales del siglo XVIII, (1999) 59 Hispania: Revista Española de Historia 269–304, 281.

foreign insurers established in Cadiz in 1688, as part of a broader agreement, undertook not to issue any policies unless the premium was paid in advance.[12]

Under the Crown of Aragon, the 1432 Ordinances of Barcelona first included the main provisions on insurance.[13] The fifteenth-century ordinances in areas of Catalan influence then all required payment of the premium at the time of signing the contract and the contract had to be concluded before a notary.[14]

A. From individual insurers to a system of specialised insurance companies in the seventeenth century

The key questions regarding the institutional change in the insurance industry are when and how individual underwriting ceased to be predominant in a market where other forms, such as specialised companies, emerged while individual forms persisted in the form of institutions such as Lloyd's. The existence of companies specialised in underwriting insurance organised as general partnerships is sufficiently documented since the medieval period in most important Mediterranean ports. For Genoa, Giulio Giacchero refers to three companies established in 1424, 1431 and 1433, respectively.[15] He also mentions a company located in Naples that was founded in 1569. Bianchini identifies a company founded in 1558 in the same city.[16] As regards Venice, Alberto Tenenti detected the existence of three insurance companies comprising 20, 13 and 8 partners of Genoese origin respectively.[17] In Spain, such companies were located in different areas, and they existed at different periods. For Valencia, Jacqueline Hadziiossif refers to examples in the fifteenth century.[18] For Barcelona, Angel García Sanz and María Teresa Ferrer Mallol mention a company founded on 11 September

---

[12] *Ravina* (n. 10), 481–513.

[13] They were subsequently modified in 1435, 1452, 1458 and, finally, in 1484. The 1484 ordinances had an important international impact, especially in areas of Catalan influence, including Naples, Sicily and Messina: *Peláez*, Cambios y seguros marítimos (n. 7), 138. In the case of Majorca, the ordinances on insurance were passed in 1492. The Majorcan wording is in most of the chapters a literal copy of the Catalan legislation of 1484; only three chapters have original content: *Jerònia Pons Pons*, La normativa asseguradora mallorquina de 1482 i la influència de les ordinacions barcelonines, (1999) 55 Bolletí de la Societat Arqueològica Lul.liana 145–162.

[14] *Jerònia Pons Pons*, Companyies i mercat asegurador a Mallorca (1650–1715) (1996).

[15] *Giulio Giacchero*, Storia delle assicurazioni marittime. L'esperienza Genovese dal Medioevo all'età contemporanea (1984), 81.

[16] Nel primo centenario della Riunione Adriatica di Sicurtà, 1838–1938 (1939) 43.

[17] *Alberto Tenenti*, Naufrages, corsaires et assurances maritimes à Venise: 1592–1609 (1959), 62.

[18] *Jacqueline Hadziiossif*, Assureurs et assurances à Valence à l'époque des rois catholiques in: Henri Dubois et al. (ed.), Horizons marins, itinéraires spirituels (Ve–XVIIIe siècles) (1987), 155–166.

1500,[19] and Emili Giralt documents the existence of two insurance companies in the first half of the seventeenth century.[20] The first was founded in 1636 and comprised three partners, one of them a broker. The second dates to 1645 and is made up of three partners belonging to the French merchant colony in Barcelona. Towards the end of the century, Isabel Lobato refers to five insurance companies in the same city that were created by social groups linked to the trading business.[21] Two were created in 1689, a further two in 1707 and 1709 and the last in 1711. Despite the presence of these specialised companies, their representation in the insurance market was marginal, although Lobato observes a significant presence of insurers who represent general trading companies. The information on collective insurance companies (general partnerships specialising in insurance) in Barcelona is completed with information provided by Fidel Córdoba de Hita and Carlos Martínez Shaw on insurance companies in the early eighteenth century.[22]

Despite the fact that such companies had been documented since medieval times, the organisation of the insurance market during these centuries remained in the hands of individual insurers coordinated by brokers and notaries.[23] Studies on the insurance industry in the main Spanish trading ports, Barcelona and Cadiz, seem to demonstrate that an organisation based on individual insurers was prolonged, regardless of whether some commercial companies participated or whether a company specialised in insurance was created sporadically. The practice of writing insurance via a market broker or notary who brought together mainly private insurers continued. These studies, therefore, confirmed the idea that the transformation took place in the eighteenth century.

However, the discovery of notarial and commercial documentation of private insurance companies in a small Mediterranean port on the island of Majorca suggests that the process of transformation may have begun in the mid-seventeenth

---

[19] *García Sanz*/*Ferrer Mallol* (n. 7), 166.

[20] *Emili Giralt*, La colonia mercantil francesa de Barcelona a mediados del siglo XVII, (1956–1959) 4 Estudios de Historia Moderna 271–318; *idem*, Família, afers i patrimoni de Jaume Cortada, mercader de Barcelona, baró de Maldà, (1986) 6 Estudis d'Història Agrària, 215–278.

[21] *Isabel Lobato*, Capital mercantil y actividad económica en la Cataluña preindustrial: compañías y negocios en Barcelona en la segunda mitad del siglo XVII (1995).

[22] *Fidel Córdoba de Hita*, Seguros marítimos de 1707 a 1709, (1962) Circular del Archivo Histórico y Museo Fidel Fita 14; *Carlos Martínez Shaw*, La compañía de seguros de Salvador Feliu de la Penya (1707–1709), in: II Congreso Internacional del 'Estrecho de Gibraltar' (1995), 405–413.

[23] The role of brokers in the coordination of supply and demand in the insurance market has been analysed for mid-sixteenth-century Antwerp by *Jeroen Puttevils* and *Marc Deloof*, Marketing and Pricing Risk in Marine Insurance in Sixteenth-Century Antwerp, (2017) 77 The Journal of Economic History 796–837.

century.[24] It was a small market based on marine insurance operations for vessels that participated in regional trade in the Mediterranean. As was the case with all other Spanish ports, large operations were insured in the insurance markets of the main European ports.[25] Under the influence of the laws of the Crown of Aragon, insurance policies had to be written before a notary. From 1650 to 1700, there were no specific books, but rather the notary incorporated insurance contracts into his protocols or archives, which makes their location and study difficult. The only special feature of the Majorcan market was possibly the existence of a community of converts to Christianity (*chuetas*) who controlled the insurance business and who were organised through insurance companies in the form of general partnerships. The first reference to such a company (*caixa de seguretats*) can be found in an insurance policy from 1645. In a sample of 1,000 insurance policies, it has been possible to observe that the percentage of capital insured by them increased after 1650. From 1650 to 1660 they underwrote 38.7% of the insured capital and collected 33.16% of the premiums (Table 1). This percentage kept rising until the final decade of the seventeenth century, when the representatives these companies underwrote 71.66% of the insured capital and collected 75.6% of the premiums.[26]

These companies had a number of common characteristics: (a) their specialisation in writing insurance; (b) the joint, several and unlimited liability of their partners; (c) the lack of initial share capital; (d) the uncertain duration of the company; (e) the setting of a limit to the coverage of each insured object, established on the basis of the partners' experience; (f) the company's religious name; and

---

[24] The sample was prepared on the basis of 933 insurance policies included in the notarial protocols of 17 notaries whose registers are conserved in the Archive of the Kingdom of Majorca (Archivo del Reino de Mallorca; ARM). A total of 121 notarial registers were consulted. The insurance contracts were scattered among them and notaries rarely had registers dedicated exclusively to insurance. In most cases the registers did not have a subject index. The list of notaries with the years of the notarial protocols consulted is the following: Antoni Amengual (1690–1692), Joan Armengol (1669), Jordi Barceló (1650–1659), Llorenç Busquets (1651–1679), Joan Antoni Campaner (1682–1708), Francesc Cassador (1674–1677), Francesc Femenia (1650–1653), Macià Ferrer (1650–1653), Jaume Antoni Fiol (1642–1654), Jaume Gibert (1662–1665), Antoni Joaneda (1653–1657), Antoni Moll (1662–1681), Joan Ribes (1655–1659), Joan Rotger (1675–1680), Nicolau Rubert (1664–1699), Joan Servera (1659–1690) and Gabriel Vaquer (1650–1652).

[25] For the sixteenth century, the insurance market has been analysed by *Potito Quercia*, Strategie d'impresa nell'assicurazione mediterranea della prima età moderna, in: Barciela López et al. (n. 2), 63–109. See especially *idem*, Le assicurazioni marittime maiorchine a metà Cinquecento come fattore di socializzazione del rischio (2014). Both studies reveal no sign of any changes that are described below. This reinforces the finding that they were introduced in Majorca only in the mid-seventeenth century. Quercia points to the lack of insurance companies as a common element of the Ragusa insurance market, citing *Tenenti*/*Tenenti* (n. 1), 177.

[26] *Jerònia Pons Pons*, Compañías de seguro marítimo en España (1650–1800), (2007) 67 Hispania. Revista Española de Historia 271–294, 276.

(g) the establishment of certain administrative posts, specifically the person responsible for negotiating a contract with the insured party (*prenador*) and the cashier, who in larger companies was complemented by other positions, such as a position for accounting control (*llibrer* or *oïdor de comptes*). These positions were paid in kind (wax) or cash limited to one pound a year, which makes it clear that these posts were not filled as an exclusive activity.

The appearance of these companies and their increasing control of insurance business enabled a structural change in the activity of Majorcan insurers. The growth in the number of companies was reflected in a reduction in the number of insurers per policy and an increase in the amount underwritten by each insurer. This change was also influential in the progressive disappearance of intermediaries, that is of brokers and notaries who had been obligatory under the old medieval ordinances still in force in the seventeenth century. It was now the *prenador* or company representative who performed their function. The disappearance of notaries and brokers also led to greater agility in the underwriting of insurance. Transaction costs and the length of contracts were reduced. Moreover, these companies had the capacity to cumulate and cover larger sums. In practice, some companies reached informal agreements to share out the more important policies, acting in a coordinated fashion, thus effectively practising co-insurance. To date, it is only in this market that it has been possible to verify the change in the organisation of insurers, the gradual domination of companies that were specialised but still organised as general partnerships, and which in the eighteenth century adopted the form of joint-stock companies.

Table 1. Change from the predominance of individual insurers to insurance companies in the Majorcan market (1650–1700)[27]

	Insured by insurance company			Insured by converts			
	Percentage of			Percentage of total insurers		Insured covered by insurance company	
	Total insurers	Amount insured	Premiums collected	Capital insured	Premiums collected	Capital insured	Premiums collected
1650–1660	25.49	38.70	33.16	46.59	44.47	74.53	64.86
1661–1670	36.07	51.10	49.62	45.58	45.70	71.49	65.56
1671–1680	37.31	59.90	58.39	36.17	50.22	79.71	78.25
1681–1690	48.37	68.95	64.53	36.79	33.61	55.34	42.38
1691–1699	58.22	71.66	75.61	56.41	54.56	57.63	51.72

[27] Sources: ARM, Notarial Protocols by Antoni Amengual (1690–1692), Joan Armengol (1669), Jordi Barceló (1650–1659), Llorenç Busquets (1651–1679), Joan Antoni Campaner (1682–1708), Francesc Cassador (1674–1677), Francesc Femenia (1650–1653), Macià Ferrer (1650–1653), Jaume Antoni Fiol (1642–1654), Jaume Gibert (1662–1665), Antoni Joaneda (1653–1657), Antoni Moll (1662–1681), Joan Ribes (1655–1659), Joan Rotger (1675–1680), Nicolau Rubert (1664–1699), Joan Servera (1659–1690) and Gabriel Vaquer (1650–1652).

The transformation of the Majorcan insurance market from the predominance of private insurers to the system of general partnerships in a little under three decades, between 1650 and 1678 (before the first great inquisitorial persecution), was carried out by Majorcan converts. They created a complex network of different-sized companies, where the larger companies (*caixes majors de seguretat*) averaging between 17 and 38 partners and a maximum insurable amount per policy of 600 Majorcan pounds were differentiated from smaller ones (*caixó de seguretat*) with no more than 10 partners and a limit of 50 pounds per policy (Table 2).

Table 2. Insurance policies in Majorca in which insurance companies participate[28]

Name	Years	Number of policies	Policies per year	Premiums per year	Premiums per policy	Total amount insured	Amount insured per policy
Caixa de 1652	1652–1665	883	63	8,321.2	9.4	144,624.6	163.7
Caixó d'Antoni Martí	1660–1663	218	54	869.1	3.9	15,581.6	71.4
Caixa de Sant Sebastià	1661–1678	932	52	5,136.3	5.5	93,599.8	100.4
Caixó de Miquel Cortès de Josep	1665–1677	260	20	445.3	1.7	8,274.7	31.8
Caixó de Rafel Baltasar Martí	1667	27	27	52.8	1.9	969.2	35.8
Caixó d'Agustí Cortès de Rafel	1670–1678	398	44	482.0	1.2	9,184.0	23.0
Caixa de Sant Antoni	1672–1678	236	40	311.6	1.4	29,015.2	122.9
Caixa de Cristòfol Seguí	1678–1682	82	16	1,044.2	12.7	17,262.7	210.5
Companyia de Tomàs Llinàs	1711–1715	275	55	4,147.6	15.0	57,848.2	210.3

The network was established when partners of the *Caixa Major*, created *caixons* with other partners of other *caixes majors*. The numerous examples documented include the case of *Caixa de Sant Antoni* (1672–1678) comprising 17 partners,[29] who were also partners in four smaller general partnerships (*caixons*). One of these was the *caixó* of 1670 (1670–1678). It was made up of two partners of *Caixa Major de Sant Antoni*, Miquel Andreu Cortès and Agustí Alfons Cortès, three partners of *Caixa de Sant Sebastià* (1661–1678), Rafael

[28] Sources: ARM, Inquisició C-5336; ARM, Hisenda, número provisional 1586; ARM, Inquisició C-5337; ARM, Inquisició C-5338; ARM, Hisenda, número provisional 816; ARM, Hisenda, número provisional 865; ARM, Hisenda, número provisional 824; ARM, Inqusició C-5376; ARM, A.H. (=Arxiu Històric), 4277 f.; ARM, Hisenda, número provisional 1076. Amounts in Majorcan pounds.

[29] *Pons Pons* (n. 26), 292.

Cortès d'Agustí, Agustí Cortès de Gabriel and Rafael Cortès de Gabriel, and two further partners whose large companies have not been identified, Miquel Jeroni Tarongí and Pere Joan Aguiló.

This complex network allowed the *chuetas* insurers to stop using the notary public as intermediary. The notary's function was taken over by the managers of the larger companies, which bore most of the risk covered and shared out the rest of the value of the policy among the linked smaller companies. The direct intervention of the manager of the large company made it possible in practice to eliminate the cost of the notary, thereby reducing transaction costs. Despite the fact that the old Majorcan ordinances made it obligatory to conclude the insurance contract before a notary, a different practice was becoming accepted at the time that insurance through companies started to spread. In the founding chapters of the *Caixa de Cristòfol Seguí*, the *prenador* was required to make a record of the notary in the event of a notarial deed: of 82 insurance contracts, a deed was signed in the presence of a notary on only 25 occasions. And in the case of the *Caixa de Sant Sebastià*, of the 28 insurance policies recorded in its accounts in 1673, 71.42% were underwritten without the intervention of a notary.[30]

The introduction of insurance companies in the form of a general partnerships also made it possible to reduce transaction costs due to the increase in each company's coverage capacity compared with individual insurers. The person responsible for opening the policy as representative of a company saved time in obtaining total coverage of the value of the policy to be written. In the case of the network of *chueta* insurance companies, there were possibly agreements to distribute the same percentages among the component companies that belonged to the same network. All of this provided greater agility for operating in the market. Likewise, in cases of accident or shipwreck, the costs of recovery of the wreck and the lawsuits that could arise and be prolonged *sine die*, were sped up with the appointment of a single procurator to represent all the insured. This process has been documented in the case of the insurers of the vessel *El Beato Cayetano* (*El Caçador*), which sank off the coast of Almería in 1667. The lawsuit for the recovery of the wreck, brought by the insurers, who had already paid for the claim, continued until 1687. On 26 June 1670, the insurers 'some in their own name and others on behalf of the company (Caxa)' appointed a sole procurator.[31] This model persisted in Majorca for most of the eighteenth century, and then towards the end of the century it was adapted to the new model of joint-stock companies. Furthermore, these general partnerships had a great capacity to adapt

[30] More cases are documented in *Pons Pons* (n. 14).

[31] ARM, protocolos notariales, Llorenç Busquets B-718, f. 105v. *Jerònia Pons Pons*, Legislación y práctica en el seguro marítimo. Las contradicciones de la segunda mitad del seiscientos en Mallorca, in: Carlos Martínez Shaw (ed.), El derecho y el mar en la España Moderna (1995), 39–58.

to the needs of the small scale of the Majorcan market. The collection of insurance premiums in advance enabled these companies to operate without an initial capital injection from partners and provided them with a small profit on an annual basis. Close control by the managers prevented a serious accumulation of claims. As soon as these started to increase, especially due to a wartime situation, insurance claims were paid, and the insurance company was liquidated. Nevertheless, the dense network created among small companies made it possible to cover policies of greater value, and with fewer costs, than the previous system of individual coverage.

B. The predominance of insurance companies in Spanish trading ports in the eighteenth century

Despite dealing with a small regional insurance market, the previous case study allows one to sense that the process of transformation of insurance markets did not actually take place in such a linear fashion as the literature has tended to suggest.[32] Insurance companies in form of general partnerships may have preceded joint-stock companies. Certainly, local institutions and the participation of certain social or religious groups or different nationalities may have influenced the changes in the way of organising insurance in different European markets. What seems to be confirmed by the historiography is that, over the course of the eighteenth century, joint-stock companies entered some insurance markets and were predominant by the end of the century in some trading ports.[33] The main local merchants in each market participated in the activity of these companies with the aim of obtaining favourable premiums and guaranteeing the facility of taking out insurance for their own trading operations, as well as obtaining a modest profit. In fact, they were companies with a 'semi-captive' market since a significant part of the insurance was written for shareholders' own commercial transactions, and which at times received preferential treatment.[34]

---

[32] The origin of some of the ideas presented in this paper may be inferred from Chapter 2 of *Gabriel Tortella et al*., Historia del Seguro en España (2014).

[33] In England, the Bubble Act of June 1720 prevented the creation of new joint-stock insurance companies until the final decades of the eighteenth century: *Charles P. Kindleberger*, Historia Financiera de Europa (1988), 249–251. In Amsterdam, the entry of joint-stock insurance companies is dated at around 1770: *Frank C. Spooner*, Risks at sea. Amsterdam insurance and maritime Europe, 1766–1780 (1983), 40–47. The first Italian company was created in Genoa in 1742: *Addobbati* (n. 1) 68. We also know that an important joint-stock insurance company developed in Naples in the second half of the eighteenth century, Real Compagnia: *Franca Assante*, Il mercato delle assicurazioni marittime a Napoli nel Settecento. Storia della 'Real Compagnia' 1751–1802 (1979).

[34] *Mario Sala*, Un siglo de seguros marítimos barceloneses en el comercio con América (1770–1870) (2012), 122.

Before studying this activity in Spanish ports, it should be noted that these markets were reliant on a wider international network. In fact, the largest ships sailing out of Spanish ports, linked to the most important commercial transactions, were usually insured in the Amsterdam and London insurance markets.[35] For the London market, A.H. John suggests that during the eighteenth century English insurers paid out more readily and more generously, and thus most insurance was taken out in England.[36] On the basis of information from contemporaries, this author calculates that the insurable risks of English foreign trade were valued at 20.3 million pounds in 1720. In 1810, the value of insured risks increased to 140 million pounds. The maximum value of insurance was reached during wartime, and then fell after the return to peace. Most of this business was conducted in London. John, again using data from the London Assurance Company, one of the two joint-stock insurance companies created in this port in 1720, highlights the role of the English insurance market in the insurance of peninsular trade. Of all the direct risks covered by this company, 12.1% were with Spanish and Portuguese ports in 1730–1731; 20.8% in 1769–1770; and 17.89% in 1789. On top of this percentage, there was also the traffic of insured ships that did not sail into or out of English ports, but which did touch ports in Spain or were part of Spanish colonial traffic.[37]

Despite this situation, increased demand in the second half of the eighteenth century stimulated the growth of insurance markets in Spanish ports, especially in Cadiz, where insurance companies were predominant.[38] Different authors have indicated the existence of joint-stock insurance companies around 1760, such as Antonio García-Baquero and Antonio-Miguel Bernal for Cadiz.[39] García-Baquero conducted a study on colonial trade involving Cadiz from 1717 to 1778 on the basis of a sample of 100 deeds of all types of company and verified that 90% were general partnerships and 10% joint-stock companies. The most interesting aspect of his conclusions is that all the joint-stock companies had marine

---

[35] See *Spooner* (n. 33) and more recently *Sabine Go*, Amsterdam 1585–1790: Emergence, Dominance, and Decline, in: Leonard (n. 1), 106–129. This practice was also common for many vessels of other countries, such as France. *John G. Clark*, Marine Insurance in Eighteenth-Century La Rochelle, (1978) 10 French Historical Studies 572–598, 575, affirms this for French ships, and not only for those setting off from the port of La Rochelle, the subject of his study, but also for a significant number of the ships sailing out of France.

[36] *A.H. John*, The London Assurance Company and the Marine Insurance Market of the Eighteenth Century, (1958) 98 Economica, 126–141, 131

[37] *John* (n. 36), 132.

[38] *Arnaud Bartolomei*, Les marchands français de Cadix et la crise de la Carrera de Indias (1778–1828) (2017), 123–129. He explains how between 1878 and 1890 Cadiz became an international market with large-scale operations, and not only insurance operations related to the Indies.

[39] *Antonio García-Baquero*, Cádiz y el Atlántico (1717–1778) (1976), 413; *Bernal* (n. 7), 471.

insurance operations as their corporate purpose. Most of these Cadiz-based companies were created with a share capital of between 400,000 and 500,000 pesos. Shareholders were not obliged to pay up all the share capital or to deposit it immediately in the company coffers. The duration of these companies was on average five years and was renewable. The most active period of these Cadiz-based companies was the last third of the eighteenth century, especially from 1790 to 1800.[40]

In general, in most Spanish ports, full advantage was taken of the opportunities afforded by the Free Trade Decree (1778), which opened up the possibility of commercial traffic with America from other ports as well as from Cadiz, which had enjoyed a monopoly for decades. In these new centres, therefore, the increase in commercial activity was the driving force behind the local insurance market and the creation of new insurance companies. In Barcelona, an important Mediterranean commercial port, researchers set the appearance of the first private joint-stock companies of a capitalist nature which, as in the port of Cadiz, were linked to marine insurance, in the 1770s.[41] In this port, companies were founded via notarial deeds, and after the subscription of all the shares they were entered in the Mortgage Registry of the City and the Captain General of Catalonia publicly proclaimed their foundation. On many occasions, once the company's period of validity had expired, it was renewed two or three times. In the case of Barcelona, Mario Sala documents the functioning of five companies created in the 1770s: *La Sagrada Familia* founded in 1771 and active until 1807 after successive renewals; *La Inmaculada Concepción* founded in 1772 and documented until 1806; *Nuestra Señora de la Merced* operational from 1771 to 1790; *Nuestra Señora de la Esperanza* founded in 1777 and active until 1802; and *Nuestra Señora del Rosario* with documented activity from 1777 to 1779, at least. In 1783, these were joined by a company named *Jesús, María y José*.[42] These companies

[40] The articles of association of the insurance companies created in Cadiz from 1790 to 1814 are included in *Tortella et al.* (n. 32; table 2.4). Archivo General de Indias (AGI), Consulados, 78, numbers 1–92. This source was also used by *Baskes* (n. 6). All the merchant communities present in this port participated in these companies, although *Victoria Eugenia Martínez del Cerro*, Una comunidad de comerciantes: navarros y vascos en Cádiz (Segunda mitad del siglo XVIII) (2006), 178, highlights the Navarrese and Basques, who held shares in 57 insurance companies. The Irish colony was the most important foreign presence: *María del Carmen Lario*, La colonia mercantil británica e irlandesa en Cádiz a finales del siglo XVIII (2001), 129; for further information on the French colony, see *Bartolomei* (n. 38).

[41] *Josep María Delgado*, Cataluña y el sistema del Libre comercio, 1778–1818 (doctoral thesis, 1981), 293–307; *Sala* (n. 34).

[42] *Sala* (n. 34).

did not only operate in Barcelona but, according to Sala, also had agents (factors) in other ports such as Marseille, Cadiz and Alicante.[43]

Taking advantage of the situation created by the Free Trade Decree, joint-stock insurance companies developed in other small ports such as Palma de Mallorca and La Coruña.[44] In the case of Palma de Mallorca, the companies were a prolongation of the previous century's model. Five companies were created that operated in Palma between 1765 and 1793, but all had insufficient capacity to insure large amounts of capital. At least this is how they were described by contemporary enlightened Majorcans, who complained that these *caixes* were severely limited, given that their maximum insurable capital did not exceed 4,000 Majorcan pounds[45] – a small amount if compared with the 12,000 pounds that four companies in Cadiz usually mustered.[46] One of the main characteristics of the first new joint-stock companies was their hybrid character during a transition period, as they maintained some characteristics of general partnerships. María Jesús Matilla affirms that until the 1770s most of the companies in Barcelona continued to have unlimited joint and several liability, like the general partnerships of the seventeenth century, and therefore partners were liable for the company's debts with their own assets.[47] The first case of limited liability, according to Matilla, was found in the Barcelona insurance company *Nuestra Señora de la Esperanza* (1777). These companies did have some modern traits, however, such as the change of the name of the people running the companies, who were now directors, deputy directors, accountants, etc., and moreover the position of director became more professionalised, as they received a share of the premiums.[48]

Meanwhile, with most companies in Cadiz, shareholders were not obliged to pay up all the share capital or to deposit it immediately in the company coffers. This was one trait of seventeenth-century insurance companies that persisted in the eighteenth century and, furthermore, the liability of partners continued to be unlimited. The only exception was the *Compañía Española de Seguros María Santísima Nuestra Señora de la Merced*, founded in 1777, where it was stipulated

---

[43] *Sala* (n. 34), 114. *Pierre Vilar*, La Catalogne dans l'Espagne moderne. Recherches sur les fondements économiques des structures nationales (1962), 480, had already documented the joint-stock insurance company La Sagrada Familia in 1771 and La Compañía Barcelonesa de Seguros Marítimos in 1776.

[44] *Luís Alonso*, Comercio Colonial y Crisis del Antiguo Régimen en Galicia (1778–1818) (1986).

[45] *Ignacio Sarrá,* Memorias de la Real Sociedad Económicas Mallorquina de Amigos del País, vol. 1 (Palma de Mallorca 1784), 44–46.

[46] *Carrasco* (n. 11), 295.

[47] *María Jesús Matilla*, Los comienzos de la compañía mercantil por acciones en Barcelona (1770–80) (1984), 742.

[48] *Delgado* (n. 41), 293–307.

that shareholder liability be limited to the share capital.[49] Joint-stock companies' belated incorporation of the obligation to pay up all share capital and the limitation of shareholder liability seem to be the keys to the high level of business mortality that occurred at the end of the century. Using the references published in the yearbook *Almanak Mercantil*, Manuel Reina was able to quantify the number of insurance companies in Spain between 1794 and 1805.[50] The greatest growth took place in the last decade of the century, especially in Cadiz. The wartime situation in the early nineteenth century provoked a market crash and led to the bankruptcy and closure of the majority of companies.[51]

Table 3. Spanish insurance companies, 1794–1805[52]

Year	Cadiz	Barcelona	Malaga	Coruña	Seville	Santander	Alicante	Total
1794	75	3	-	2	3	1	-	84
1795	75	3	2	2	3	1	2	88
1796	77	3	3	2	3	1	2	91
1797	84	3	3	2	3	1	2	98
1798	87	3	3	2	3	1	2	101
1799	87	3	3	2	3	1	2	101
1800	87	3	3	2	3	1	2	101
1801	n.d.a.	3	3	2	n.d.a.	n.d.a.	2	-
1802	21	3	-	2	-	-	-	26
1803	21	2	-	2	-	-	-	25
1804	21	2	-	2	-	-	-	25
1805	21	2	-	2	-	-	-	25

The data compiled by Reina seems to confirm that the greatest collapse took place in the port of Cadiz, which went from 87 companies in 1799 to 21 in 1802.[53] Baskes affirms that in the 1790s the insurance market in Cadiz seemed to be a great success, and notes the words of the lawyer Juan de Mora y Morales in 1786 when he boasted that the Cadiz insurance market had won the respect of foreign

[49] *García-Baquero* (n. 39), 420.

[50] *Manuel Reina*, Compañías de seguros en España. El nacimiento del modesto sector asegurador en España, 1830–1910 (doctoral thesis, 1999), 9.

[51] *Bartolomei* (n. 38), 376, asserts that the chronology of the decline of the Cadiz market was not linear, but rather it was determined by significant political rifts from 1793 to 1808, rather than as a result of the British blockade or the final break-up of the Carrera de Indias.

[52] Source: *Reina* (n. 50), 9. Note: n.d.a. = no data available.

[53] *Reina* (n. 50), 9.

traders and that the insurance companies were able to meet their obligations without any bankruptcies occurring.[54] However, 15 years later a large number of Cadiz companies collapsed. It is true that the wartime period increased accident rates, but another factor that helps to explain the majority of bankruptcies in the case of Cadiz is related to the characteristics of the companies themselves, as they did not have all their share capital paid up, which in turn determined that the limitation of shareholder liability had not been established. In practice, therefore, the companies functioned as general partnerships, with the same characteristics as those of the seventeenth century, where the partners, now called shareholders, did not pay up capital except in the case of losses. Thus, there was no ready source of funds, and the shareholders had to cover their liability with their own assets. In fact, Baskes provides evidence of the situation that led to the bankruptcies of numerous Cadiz companies as from 1799 with declarations from the time, which illustrate that company shareholders never expected to have to come up with all the capital they had subscribed.[55] The bankruptcies led to controversy and arguments among those involved, and between the merchant guild and shareholders, over contentious issues such as the obligation to pay up all the capital, or whether shareholders had joint and several liability with all other shareholders or only their own share of the liability.

The specific practice in Cadiz that allowed policies to be written for voyages to America without prior payment of the premium aggravated the situation. Insurance companies in most other ports, especially those that followed the regulatory tradition of the Crown of Aragon, always collected the premium at the time of writing the policy and before the vessel set out. This made it possible to have more available cash for paying claims and also avoided a greater outlay for shareholders, and above all it enabled greater speed in the case of liquidation of the company. For Cadiz companies in a state of bankruptcy, however, the need to collect money for unfinished voyages hindered the payment of debts and prolonged the time required to wind down the company. One example of this concerned the company of Antonio Ramirez under the direction of Juan Pedro Jaureguiberry, which operated from 4 May 1788 to 2 August 1795. According to the company accounting ledger, the company signed 1,451 insurance policies between 1788 and 1793. The insurer was writing insurance until 30 January 1793. Business was thriving and profitable until 1792, a year when there was a significant increase in the number of claims in relation to policies written in America (Table 4).

[54] *Baskes* (n. 6), 241.
[55] *Baskes* (n. 6).

Table 4. Value of capital insured by the company of Antonio Ramirez (1790–1793) and losses in each area[56]

	Value insured policies in pesos		Losses in reales	
	in Europe	in America	in Europe	in America
1790	439,866	209,598	68,213	0
1791	866,04	448,710	16,000	47,200
1792	668,86	598,788	68,624	333,160
1793	40,402	12,407		
Total	2,015,180	1,269,504	152,837	380,360

The high accident rate in this year for policies covering trade to America forced the company to liquidate in January 1793. Subsequently, however, entries in the company's accounting ledger continued until 12 August 1795. According to the accountant, at this time the company owed 521,799 reales. Of this amount, company shareholders paid only 30% of the debt during this period, and not all of them are recorded as having paid this debt.[57] Perhaps the most serious problems registered in the accounts were the existence of outstanding premiums on voyages not yet completed and especially premiums receivable (Table 5). This practice in Cadiz for colonial trade led to higher transaction costs as it increased the expense of collecting premiums and controlling the premiums receivable once the company's normal activity had ended.

Table 5. Balance sheet of the company of Antonio Ramirez in 1793[58]

Revenue in reales: 539,484			Expenditure in reales: 776,100		
Premiums due	465,383	539,483	Damages, losses paid and commission	291,197	776,100
Outstanding premiums on voyages not yet completed	74,100				
Premiums received	316,830	539,483	Damages to pay and losses	484,903	
Premiums receivable	222,653				
Result revenue-expenditure	- 236,617				

[56] Source: AGI, Consulados, L444B, fs. 31v–32.

[57] The collection of the sum of 10,906 reales from the following shareholders is recorded for one share: Dieo Loustaud, Pedro Antonio O'Cruley, Bernabé Murphy, Francisco Bordas, Sres Whit Hemin y Barron, Linche y Bellen, Joaquín de Necoechea; Sres. Strange Dowel y Cª., José Saavedra Carvajal, Vico y Conti, Manuel Guitierrez Palacios, Sres Campaña y Cia, Juan de Miramon and Juan Segalas. Pedro Ignacio de Ansa and Esteban Sanz Pardo paid 21,812 for two shares. Finally, there is record of a vale real (public debt security) for the value of 8,472 reales from Vicente Marticorena and 1,669 that the merchant guild returned on the part of D.J.W. Vizca: AGI, Consulados, L444B, f. 33.

[58] Source: AGI, Consulados, L444B, fs. 31v–32

The bankruptcy of the company of Antonio Ramirez occurred in a period of expansion of the Cadiz insurance market, as demonstrated by the fact that the number of companies kept rising until 1798. This is simply an example of what happened to almost all insurance companies in the modern period, in that the coincidence of several losses led to the closure of the company and the liquidation of the same. However, in 1800, war and the ensuing adverse economic situation led to the successive bankruptcy of 66 insurance companies in Cadiz in the same year, if we accept the data from Reina, or of 54 according to Baskes.[59] From the 1770s, in connection with the revitalisation of colonial trade, the insurance market in the main Spanish ports, especially in Cadiz, had responded to the increased demand for insurance policies. Companies proliferated, as did the participation of merchants in them, with cases such as Vicente Marticorena, who participated in up to 14 different companies, acting as both insurer and insured.[60] However, these companies operated in a similar fashion to the old insurance companies and the guarantee mechanisms of the joint-stock insurance companies, such as paid-up capital and the limitation of liability to this capital, had not taken hold. This contributed to widespread bankruptcy that in turn led to the collapse of the Cadiz insurance market, as very few shareholders met their liabilities.

C. Conclusions

The analysis of the transformation of insurance markets in the peninsular territories of the Spanish monarchy corroborates the fact that the transition from markets managed by individual insurers to markets dominated by insurance companies initially took place early in the second half of the seventeenth century. In the small regional Majorcan market, maybe because of its control by *chuetas* (converted Jews), individual insurers were replaced by insurance companies (*caixes de seguretat*) within a few decades. Not only this, but they created networks of larger and smaller companies, which made it possible to reduce transaction costs by eliminating intermediaries and managing to cover greater sums with fewer participants. These were effectively general partnerships without paid-up capital and with unlimited liability.

It has not been possible, however, to determine when this change occurred in Spain's most important trading port at this time, Cadiz. Ample historiography documents the presence of insurance companies in the 1760s, and especially from the last third of the century onwards. They have also been documented as contemporaneously present in the port of Barcelona. The novelty is that nominally this type of company had the modern forms of joint-stock companies, al-

[59] *Reina* (n. 50), 9; *Baskes* (n. 6), 240–243.
[60] *Baskes* (n. 6), 240–243.

though in fact, save a few exceptions, they did not have paid-up capital and shareholders did not have limited liability. They were therefore hybrid companies that in form adopted the modern concept of stock company, and which now referred to shares and shareholders, but their owners continued not to pay in their capital and in most cases they still responded with their own assets in the event of accumulation of losses or bankruptcy. Furthermore, the traditional practice in the port of Cadiz of collecting the premiums for American voyages *a posteriori* did not contribute to the liquidity of these companies.

These were decades of some confusion, as demonstrated by the fact that at no time did shareowners feel responsible for the large sums that they assumed with the purchase of shares. Consequently, they did not want to comply with the verdicts of judges, or the decisions of administrators, who in some cases ruled that shareholders were jointly and severally liable with insolvent fellow shareholders. Forms were adopted, but not responsibilities, and when there was widespread bankruptcy affecting more than half of Cadiz companies, this led to the collapse of the insurance market and practically to its subsequent disappearance. Modern joint-stock insurance companies were able to cut transaction costs but, nevertheless, the lack of paid-up capital prolonged their financial fragility, just as in the case of general partnerships specialising in insurance. This factor of weakness was perpetuated for over a century, until governments started to demand deposits and reserves and paid-in capital in the first legislation on private insurance, now in the contemporary period.

Commercial Networks, Maritime Law, and Translation in a Spanish Insurance Claim on Trial in France, 1783–1791

By *Mallory Hope**

In 1783, three Basque partners sent their frigate on an ill-fated voyage from San Sebastián to La Guaira, a South American port. The ship's captain Francisco Antonio de Plauden and merchants Juan Fermin de Galain and Michel Fermin de Laquidain each owned a one-third share in the 400-ton *Nuestra Señora del Rosario*. They used their far-flung connections to back their investments by insuring the body (*corps*) of the vessel in Cádiz and Marseille.[1] On its return voyage, the

* The author would like to acknowledge the Council on Latin American and Iberian Studies of the Whitney and Betty MacMillan Center for generously funding the research for this project. Alberto Campillo provided practical guidance and comradery in the Archivo General de Indias. Sincere thanks to the Early Modern Interdisciplinary Workshop at Yale University for discussing the first results of this research, and to the organizers of the Conference on Risk and the Insurance Business in History, Jerònia Pons Pons and Robin Pearson, who stimulated discussions that re-shaped the project. Many thanks to Francesca Trivellato, Rebecca Spang, Marcela Echeverri, Lewis Wade, Juan José Rivas Moreno, and Victor Tiribás for carefully reading early drafts, and finally, to the editors of this volume and the anonymous reviewer, whose comments greatly improved the chapter. All errors are solely my own.

[1] Letter to 'S. Payan padre hijos' from 'Francisco Antonio de Plauden' (5 September 1783): Archivo General de Indias (AGI), Consulados, 502. Many archival documents referenced in this essay are unnumbered loose leaves. 'Consulados, 502,' for example, is one dossier or 'legajo' in which a variety of manuscript and printed documents are filed together. Citations of archival sources will thus indicate the type of document, the author

Nuestra Señora experienced a series of accidents that eventually led to a fiercely contested insurance claim in France. Following stage-by-stage the negotiation and litigation of insurance policies covering the voyage provides a means of exploring an unexpected financial axis that connected Spanish Basque territory, the Venezuelan coast, Cádiz, and Marseille.

The case study exposes merchants' practices of arranging insurance coverage over long distances and compares these observed details of their trade to normative sources. Two sets of questions come into focus in the following essay that have not been at the forefront of the literature on marine insurance: How did merchants decide where to purchase insurance? What were the advantages and the risks of arranging coverage in a larger but more distant market? Second, when it came to enforcing insurance contracts, what did the claims process look like in practice? Since the insurance claim at the center of this chapter brought a Spanish subject, Captain Plauden, before a French court, the case opens the question, how would a native of one 'national' legal landscape seek satisfaction of his insurance claim in a different legal landscape? Correspondence between the plaintiff Plauden and his agents and lawyers in Marseille permits a private glimpse into the foreign plaintiff's experience. The deposition of judicial acts produced in overseas jurisdictions allows us to ask how easily the 'Usages & Customs' of foreign ports translated for French magistrates and attorneys.[2]

In anglophone scholarship of the 1980s and 1990s, an old argument was revived that during the medieval period, as merchants continued to trade in a fragmented political context, they came to agree on a single body of customary law, the Law Merchant or *Lex mercatoria*. This Law Merchant supposedly derived from the practices of private traders and not from statutory law, although it was later encoded into the statutes of many states.[3] Legal historians have attacked the thesis on multiple grounds, arguing that merchants neither had nor needed a distinct body of law, picking apart the 'mercatorist' definition of custom, showing that fair wardens and judges of merchants' disputes were not privately appointed

---

and intended recipient, the date, and the page inside the document whenever this information is available. All archives are identified by their abbreviations after the first mention. Direct quotations of archival documents preserve their original spelling.

[2] 'Us & Coutumes du lieu.' Émérigon, 'À Monsieur le Lieutenant-Général en L'Amirauté' (27 October 1786), 7: AGI, Consulados, 502.

[3] See for example, *Leon Trakman*, The Evolution of the Law Merchant: Our Commercial Heritage, Part I: Ancient and Medieval Law Merchant, (1980) 12/1 Journal of Maritime Law and Commerce 1–24; *Bruce Benson*, The Spontaneous Evolution of Commercial Law, (1989) 55/3 Southern Economic Journal 644–661; *Paul Milgrom*, *Douglass North* and *Barry Weingast*, The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs, (1990) 2/1 Economics and Politics 1–23; *Robert Cooter*, Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant, (1996) 144/5 University of Pennsylvania Law Review 1643–1696.

but operated under Church, state, or seigneurial sanction, and raising other objections.[4] Yet in recent literature on the history of insurance, particularly in Adrian Leonard's studies of the London market, the Law Merchant evokes a common, shared understanding of the content and interpretation of marine insurance contracts that spanned early-modern Europe and later, European overseas empires.[5]

Few would deny that merchants across Europe agreed on broad principles, but I argue using the *Nuestra Señora* case that specific conventions of maritime law and procedural rules varied from one jurisdiction to another. These divergences could have a meaningful impact on the outcomes of merchants' lawsuits. The *Nuestra Señora* trial was a drawn-out battle, in part, because Spanish and French statutes included different specifications for distinguishing gross and particular averages (*avaries*) and justifying insurance claims. Though intricate, such rules were essential in the claims process. Individuals who entered into foreign jurisdictions to secure insurance coverage without being familiar with local laws and languages were thus at a disadvantage. Outsiders could compensate by employing experienced agents to contract on their behalf and to represent them in any eventual dispute, but as this case will show, they still faced added costs in monitoring their agents and in submitting evidence and arguments to foreign courts.

While an abundant literature exists concerning the origins of the insurance contract and the development of specific legal doctrines related to it, surprisingly

---

[4] On the sources of maritime and commercial law in Europe: *Charles Donahue*, Medieval and Early Modern Lex Mercatoria: An Attempt at the Probatio Diabolica, (2004) 5/1 Chicago Journal of International Law 21–38. For a discussion of custom: *Emily Kadens*, The Myth of the Customary Law Merchant, (2012) 90/5 Texas Law Review 1153–1206. On the judges of merchants' lawsuits: *Stephen E. Sachs*, From St. Ives to Cyberspace: The Modern Distortion of the Medieval Law Merchant, (2006) 21/5 American University International Law Review 685–812; *Jeremy Edwards* and *Sheilagh Ogilvie*, What Lessons for Economic Development Can We Draw from the Champagne Fairs? (2011) CESIFO Working Paper No. 3438. See also *Lucy Stuart Sutherland*, The Law Merchant in England in the Seventeenth and Eighteenth Centuries, (1934) 17 Transactions of the Royal Historical Society 149–176; *John H. Baker*, The Law Merchant and the Common Law before 1700, (1979) 38/2 Cambridge Law Journal 295–322; *Amalia Kessler*, A Revolution in Commerce: The Parisian Merchant Court and the Rise of Commercial Society in Eighteenth-Century France (2007).

[5] *Adrian B. Leonard*, Contingent commitment: The development of English marine insurance in the context of New Institutional Economics, 1577–1720, in: D'Maris Coffman et al. (ed.), Questioning Credible Commitment: Perspectives on the Rise of Financial Capitalism (2013), 48–75; *idem*, London 1426–1601: Marine Insurance and the Law Merchant, in: idem (ed.), Marine Insurance: Origins and Institutions, 1300–1850 (2016), 151–176.

little scholarship has sought to understand how insurance contracts were enforced.[6] In French historiography, the omission is particularly felt because of the richness of the judicial records of the Admiralty Courts, special tribunals that were dotted across France in major ports and took cases related to insurance, bottomry loans (*prêts-à-la-grosse*), and a wide range of maritime rights and contracts, pertaining to prizes, ship construction, general average, fret contracts, sailors' wages and employment, and a miscellany of other matters.[7] Only recently are specialists opening up these sources and bringing them to bear on the history of fishing rights, rights to salvage flotsam and jetsam, and labor disputes in the maritime economy.[8] There is a wide avenue open for new research in the history of long-distance trade and commercial contracts to use these courts' records.

To this point, scholars have not presented many models for how an insurance lawsuit progressed through an Admiralty Court in France. Yet the potential rewards to come from close analyses of trials are clear in works by Guillaume

---

[6] Classic starting points on the question of the contract's origins include: *Violet Barbour*, Marine Risks and Insurance in the Seventeenth Century, (1929) 1/4 Journal of Economic and Business History 561–596; *Florence Elder de Roover*, Early Examples of Marine Insurance, (1945) 5/2 Journal of Economic History 172–200; *Guillermo Céspedes del Castillo*, Seguros marítimos en la carrera de Indias, (1948–1949) 19 Anuario de historia del derecho español 57–102; *Louis-Augustin Boiteux*, La Fortune de mer, le besoin de sécurité et les débuts de l'assurance maritime (1968). Concerning legal doctrine, on definitions of barratry: *Guido Rossi*, The barratry of the shipmaster in early-modern law: polysemy and mos Italicus, (2019) 87 Tijdschrift Voor Rechtsgeschiedenis 65–85. On distinctions made between insurance and usury: *Giovanni Ceccarelli*, Risky Business: Theological and Canonical Thought on Insurance from the Thirteenth to the Seventeenth Century, (2001) 31/3 Journal of Medieval and Early Modern Studies 607–658. On inherent vice: *Anita Rupprecht*, 'Inherent vice': marine insurance, slave ship rebellion and the law, (2016) 57/3 Institute of Race Relations 31–44. For the enforcement of insurance contracts in the Chambers of Assurances of Paris and of Amsterdam: *Louis-Augustin Boiteux*, L'Assurance maritime à Paris sous le règne de Louis XIV (1945); *Sabine Go*, On governance structures and maritime conflict resolution in early-modern Amsterdam: the case of the Chamber of Insurance and Average (sixteenth to eighteenth centuries), (2017) 5/1 Comparative Legal History 107–124.

[7] Ordonnance de la Marine (1681), Book I, Tit. 2.

[8] *Pierrick Pourchasse*, Le naufrage, un événement conflictuel au XVIIIe siècle: L'exemple de l'Amirauté de Cornouaille, in: Albrecht Cordes and Serge Dauchy (eds.), Une frontière mouvante: Justice privée et justice publique en matières commerciales et maritimes (2013), 141–154; *Bernard Allaire*, Between Oléron and Colbert: The Evolution of French Maritime Law until the Seventeenth Century, in: Maria Fusaro et al. (eds.), Law, Labour and Empire: Comparative Perspectives on Seafarers, c. 1500–1800 (2015), 79–99; *Romain Grancher*, Les sièges d'amirauté comme juridictions de proximité: Réflexions à partir du monde de la pêche dieppois au XVIIIe siècle, in: Marie Houllemare and Diane Roussel (eds.), Les justices locales et les justiciables: La proximité judiciaire en France, du Moyen Âge à l'époque moderne (2015), 83–93; *Romain Grancher*, Le tribunal de l'amirauté et les usages du métier. Une histoire 'par en bas' du monde de la pêche (Dieppe, XVIIIe siècle), (2018) 65/3 Revue d'histoire moderne et contemporaine 33–58.

Calafat and Francesca Trivellato.[9] Studying single controversies in maritime law can be an entry into questions of legal pluralism, cross-cultural or cross-confessional trade, or the role the law played for royal authorities seeking to extend their power.[10] This chapter focuses the analysis on a single suit and foregrounds private and extra-legal sources, taking advantage of these documents' long form and looser rules to give a fuller depiction of the dispute. The structure of the insurance coverage of *Nuestra Señora* and the frigate's voyage are well documented in private letters and in legal factums, to a remarkable degree given that this was no *cause célèbre*. Letters and factums, narrative and sometimes emotional texts, depart from the terse, formulaic language of court hearings and insurance policies. As this essay shows, they refer to practices that may have been too obvious to the world of trade at that time to be worth making explicit in a brief contract or merchant manual. Normative sources, contracts and legal actions amenable to quantitative study, private letters, and persuasive *mémoires* illuminate different aspects of the history of insurance law, and as much as possible in a short piece each type of source is brought in to shed light on the case.

The main thrust of the present volume is to compare the development of insurance law across political borders. The present contribution complements the comparative method in employing an alternative strategy of following a single object through traces in archives that cross borders and genres.[11] The essay experiments with what can be gained from constantly looking between laws and the law in practice, and its goal is to pose new questions rather than to cast this case as an exceptional or a representative example.

A. Commercial choices in a multicentric Atlantic world

As is the case with many subaltern actors in early-modern economic history, the frustrating reality is that there is a limit to what we can know about the choices of Plauden, Galain, and Laquidain. It is not possible to know these partners' full range of options for where to take their joint enterprise or how to protect

[9] *Guillaume Calafat*, Ramadan Fatet v. John Jucker: Trials and Forgery in Egypt, Syria, and Tuscany, (2013) 143/2 Quaderni Storici 419–439; *Francesca Trivellato*, The 'Big Diamond Affair': Merchants on Trial, in: The Familiarity of Strangers: The Sephardic Diaspora, Livorno, and Cross-cultural Trade in the Early Modern Period (2009), 251–270.

[10] *Francesca Trivellato*, 'Amphibious Power': The Law of Wreck, Maritime Customs, and Sovereignty in Richelieu's France, (2015) 33 Law and History Review 915–944.

[11] Bertrand and Calafat define the historical method of 'suivre' ('following') and provide a thorough discussion of the goals of this technique in their introductory essay: *Romain Bertrand* and *Guillaume Calafat*, La microhistoire globale: affaire(s) à suivre, (2018) 73/1 Annales. Histoire, Sciences Sociales 1–18, 12–15.

their investments. But knowing what choices they did make, it is possible to recover some of the reasons why opportunities became available to them. The first sections of the chapter show which parts of their network Plauden and his partners mobilized as they planned their venture and secured insurance.

I. Surviving monopoly: the Basque presence on the Venezuelan coast

The backdrop for *Nuestra Señora*'s voyage to La Guaira was a political and commercial alliance between Spain and France, which began with the ascension of a Bourbon king, Felipe V, to the Spanish throne in 1700. Many goods exported from the peninsula to Spanish America under the auspices of this Bourbon compact were of French manufacture. And French mercantile capital was also pledged to insure the flows of goods from Spain, producing a tighter link between the two empires.

The most surprising element in the story of the three part-owners of *Nuestra Señora* planning a South American voyage may be Plauden's decision to purchase insurance in Marseille. In arming a ship bound for La Guaira, on the Venezuelan coast, the partners followed a well-trodden path from the perspective of a group of Basque merchants. The link between the two regions can be traced to the War of Spanish Succession (1701–1713), when Spain suffered naval defeats and its state-protected convoys (*flotas*) were interrupted. During the war, the Spanish Crown had had no choice but to tolerate trade between its subjects on the coast of South America and its enemies. But once he secured the throne, Felipe V determined to cut down on illicit trade. At first, the Bourbon reforms were protectionist. Advisors such as the Marquis Jerónimo de Ustáriz made new efforts to reform Spain's empire and channel flows of specie and low-cost products to peninsular Spain.[12] This policy meant staunching the spillage of these benefits into the hands of rivals.

The Venezuelan coast, where *Nuestra Señora* was bound in 1783, became an important point for royal reformers to strengthen the *guarda costa* and chase away interlopers. Along this coastline, illicit trade did not only emerge in times of war. It was structural. Many inlets protected smugglers, and stiff winds frequently blew against ships sailing towards Riohacha and Caracas from the main

[12] *Carlos Murgueitio*, La Compañía Guipuzcoana de Caracas: defensas comerciales y estrategias hemisféricas coloniales, (2006) 38 Montalbán. Universidad Católica Andrés Bello 1–17, 2.

Spanish port of Cartagena.[13] Territories within easy striking distance for smugglers escaped Spanish sovereignty: Dutch Curaçao[14] and the Guajira peninsula, where the Guajiro or Wayu Indians were not subject to Spain and purchased arms and trade goods from the British.[15]

In 1728, to reinforce control over trade in this landscape and increase cacao imports to the peninsula, the Spanish Crown granted a charter to the *Compañía Guipuzcoana de Caracas*, invested primarily with Basque capital.[16] The company had the privilege of sailing directly to Caracas, La Guaira, or Puerto Cabello without stopping in Cádiz. This was a significant advantage, since normally all Spanish merchant ships had to depart for the Americas from Cádiz (or before 1717, from Seville), having obtained a license to trade from the *Casa de Contratación* (House of Trade) in the port.[17] In 1732, it gained the additional privilege of exclusive trading rights in the coastal region from Riohacha to the island of Orinoco, becoming the single licit importer of European goods in the area. In return, the company's ships were armed and swept the coast for interlopers.[18] The trading company had mixed success. While it raised imports of cacao, growers complained that prices fell after the company's intervention, and that supplies imported from the *Compañía Guipuzcoana* cost more than contraband goods. Discontent grew into outright revolt in 1751, forcing Spain to dispatch troops to defend the company's privileges. The *Compañía Guipuzcoana* had to cede the monopoly on trade in Venezuela following the insurrection, and it was forced to sell some of its stock to local elites.[19]

The interruption of its trade and the capture of some company ships during the Seven Years' War and the American Revolution finally reduced the *Compañía Guipuzcoana* to bankruptcy in the 1780s.[20] The 'Free Trade' decree of 1778 erased the company's last privileges by extending to thirteen Spanish ports the right to trade directly with Spanish America.[21] Officially stripped of its charter

---

[13] *Lance Grahn*, The Political Economy of Smuggling: Regional Informal Economies in Early Bourbon New Granada (1997), 34 f.

[14] *Jonathan Israel*, Curaçao, Amsterdam, and the Rise of the Sephardi Trade System in the Caribbean, 1630–1700, in: Jane S. Gerber (ed.), The Jews in the Caribbean (2013), 29–43.

[15] *Grahn* (n. 14), 40 f.

[16] *Murgueitio* (n. 13), 4.

[17] *Jeremy Baskes*, Staying Afloat: Risk and Uncertainty in Spanish Atlantic World Trade, 1760–1820 (2013), 45–47, 54–57.

[18] *Murgueitio* (n. 13), 7 f.

[19] *Murgueitio* (n. 13), 10.

[20] *Murgueitio* (n. 13), 12.

[21] *John Fisher*, The Imperial Response to 'Free Trade': Spanish Imports from Spanish American, 1778–1796, (1985) 17/1 Journal of Latin American Studies 35–78, note 2; *Baskes* (n. 18), 70.

in 1784 or 1785, the company was liquidated, and some shareholders moved their investments into a new project, the *Real Compañía de Filipinas*.[22]

Plauden's correspondence and the documents produced by his pursuit of the Marseille insurers do not mention any financial interest linking the nearly defunct *Compañía Guipuzcoana* to the captain and his partners' enterprise. Their voyage was not organized under the eaves of any royal company, but in the new 'Free Trade' regime. It built nonetheless upon a groundwork of relationships that the *Compañía Guipuzcoana* had laid through the decades between traders in San Sebastián and cacao producers along the Venezuelan coast. Plauden, Galain, and Laquidain planned to exchange precisely the same products that the company traded: Basque produce, mainly textiles, for cacao and a variety of American goods.[23]

II. A Cádiz-Marseille financial axis

Plauden alone of the three co-owners (*dueños* or *propietarios*) of *Nuestra Señora* was elected to travel with the ship as its captain.[24] He plotted a course from Puerto de Pasajes, a harbor just next to San Sebastián, to La Coruña, on Spain's extreme northwest corner, and to the final destination of La Guaira, a port serving Caracas. He intended to return by a similar route. Galain and Laquidain wrote to Cádiz to find insurance coverage on this voyage for their two shares in the ship. Plauden instead sent a message to the partnership *Payan and Sons*, in Marseille.

The father in the Payan partnership, though not identified in these documents by first name, was probably Jean or Juan Payan, a native of Provence who had learned his trade in the 1760s and 1770s in Cádiz as an associate of one of the main French merchant houses in the port, *Verduc Vincent and Company*.[25] In the

---

[22] *Jean-Charles Roman d'Amat* s.v. François Cabarrus, in: Michel Prevost and Jean-Charles Roman d'Amat (eds.), Dictionnaire de Biographie Française, vol. 7 (1956), 757.

[23] 'Autos a instancia de Dn Michel Fermin de Laquidain y Dn Felipe Ventura Moxo Con Dn Francisco Antonio Plauden' (1786): AGI, Consulados, 502. Various records of prêts-à-la-grosse, which the three partners took out to purchase the ship's cargo and were jointly obligated to repay, identify some of the products going to South America: 'brettañas,' 'varias lenzenias,' and 'una Caxa de Estopillas' refer to varieties of textiles (in three contracts dated 12 September 1783). The interest rate was 14% on these prêts-à-la-grosse, which were contracted in San Sebastián.

[24] 'José Ventura de Aranalde contra Miguel F. Laquidain y otros': 'Pa 3a' [Prueba tercera] (27 October 1790), 9r: Archivo Histórico Nacional (AHN), Consejos, 20172, Exp. 1. Reproduction of an agreement dated 6 September 1783, which assigned Plauden the function of captain.

[25] *Arnaud Bartolomei*, La formation de la compagnie d'assurances maritimes 'cadicienne' établie à Marseille, in: Christian Borde and Éric Roulet (eds.), L'Assurance Maritime XIVe–XXIe siècle (2017), 113–124, 120.

late eighteenth century, Jean Payan was a linchpin of financial connections between Marseille, Cádiz, and Spanish America. In the mature years of his career, he took up residence in Marseille again, and in 1782, he founded a marine insurance company of sixty shares. Arnaud Bartolomei has recently published the complete corporate charter of this *Compagnie Cadicienne*.[26] It is interesting to note that the charter forbade Jean Payan, as company director, from underwriting round trips for the Americas or the West Indies.[27] This was exactly the kind of risk that Plauden wanted *Payan and Sons* to secure coverage for in Marseille, yet Payan's shareholders considered such voyages, and the long stays in warm-water ports that they entailed, dangerous liabilities.

The letters passing between Plauden and the Payans offer rare insight into how a 'foreigner,' writing in Spanish, accessed the insurance market in Marseille. We have a copy, dated 5 September 1783, of what appears to be their first communication.[28] In this letter of introduction, in an effort to make father and sons his allies, Plauden invoked the name of a mutual friend he and the Payans shared, Antonio Betbeder, and the good opinions he had heard of the Payans' character. Having received a tip from Betbeder, who had paid a premium of 6% to insure a voyage going to and from Buenos Aires, Plauden already had an idea of what insurance should cost for a voyage to South America with a return. The captain wrote that he considered 6% the upper limit of what he was willing to pay for insurance, and he expressed confidence that *Payan and Sons* would regard his interests as their own. Domingo or Dominque Béhic was another shared acquaintance who probably made this relationship possible. Béhic was a very prominent member of the French nation in Cádiz, a shareholder in the *Compagnie Cadicienne*, and also at the head of his own specialized insurance company since the late 1770s.[29] *Dominque Béhic and Company* would eventually underwrite 13,500 piastres on *Nuestra Señora*'s hull for this voyage.[30]

The Payans moved surprisingly quickly to fulfill Plauden's request, even considering how their network overlapped with the captain's. Liking the look of

---

[26] *Bartolomei* (n. 26), 120–124. Original source: Archives du ministère des Affaires étrangères, Nantes, Cadix (consulat), 136PO/1/238, Enregistrement de l'établissement d'une compagne d'assurances, 24 May 1782.

[27] 'Nota Bene' in the document: *Bartolomei* (n. 26), 124.

[28] Letter to 'S. Payan padre hijos' from 'Francisco Antonio de Plauden' (5 September 1783): AGI, Consulados, 502.

[29] *Bartolomei* (n. 26), 123; *idem*, Les marchands français de Cadix et la crise de la Carrera de Indias, 1778–1828 (2017), 124; *Antonio-Miguel Bernal,* La financiación de la carrera de Indias (1492–1824): Dinero y crédito en el comercio colonial español con América (1992), Table 6.53 at 471.

[30] Émérigon, 'À Monsieur le Lieutenant-Général en L'Amirauté' (27 October 1786), 6, 4: AGI, Consulados, 502.

Plauden's first missive, *Payan and Sons* wrote a response within twelve days.[31] They must have taken little time to carry out further 'credit checks' on Francisco Antonio de Plauden or on the merchants in Marseille who were beginning to sign their names to insurance policies for the ship. The Payans' eagerness to enter into this agency relationship with Plauden agrees with Bartolomei's suggestion that a personal recommendation could function as an initial credit check. Although a merchant could forge a link with another house without being connected through a third party, generally he chose to work within the circle of individuals and houses that his allies recommended to him.[32]

In this case, *Payan and Sons* made a quick assessment of the Basque captain and the risks associated with his upcoming voyage. By the time that they responded to Plauden on 17 September, they had already collected enough subscribers to cover 12,000 *livres* at an insurance premium of 4.5% out of the 45,000 *livres* that Plauden had requested. The French financiers, probably without having met Plauden, were offering to take on even more of his business and to find insurance coverage for the other thirds of the bottom and for the cargo as well. Their letter shows how lax the usual process may have been for determining the value of property that was the object of an insurance contract. Captain Plauden's request for help procuring insurance described *Nuestra Señora del Rosario* and its tonnage. Plauden wrote that he needed coverage for 45,000 *livres tournois*. The Payans neither questioned this figure nor requested any other proof of the frigate's value, but wrote back informing the captain that under French maritime law he would be required to bear one tenth of the risk of the venture (*le dixième*).[33] In other words, he could insure only up to 90% of *Nuestra Señora*'s value. If the epistolary negotiation between Plauden and *Payan and Sons* indeed reflects common practices, the spirit of this law was not enforced in Marseille during this period. Rather than starting with an accurate appraisal of the frigate, dividing that value into three equal shares, and subtracting the *dixième*, the Payans accepted Plauden's number and worked backwards to arrive at a valuation for the frigate: 150,000 *livres*.

---

[31] Letter to 'Francisco Antonio de Plauden' from 'S. Payan padre hijos' (17 September 1783): AGI, Consulados, 502.

[32] *Arnaud Bartolomei*, Les réseaux négociants de trois maisons huguenotes de Cadix, à la fin du XVIIIe siècle: des réseaux languedociens, protestants ou français? (2012) 25 Liame: https://journals.openedition.org/liame/250 (last accessed 3 March 2020) paras. 36 f.

[33] Article 18 of the title on insurance in the Ordonnance de la Marine allowed the purchaser to insure up to the full value of the property, including the dixième, if this was explicitly stated in the insurance policy. However, Captain Plauden was still was required to bear 10% of the risk under Art. 19: the owner of the insured property who traveled with his property on board the ship always had to bear the dixième. Ordonnance de la Marine, Book III, Tit. 6, Art. 18 f.

If Plauden's requested insurance coverage was one third of the market price of the frigate while it was at anchor near San Sebastián, then in the insurance contracts in Marseille it was intentionally overvalued. French statutes concerning the *dixième* were supposed to solve a moral hazard problem: the danger that a merchant or captain who was insured up to the hilt might make overly aggressive and dangerous decisions. The Payans enabled Plauden to circumvent that check on his behavior.

III. Underwriting Atlantic risks from the Mediterranean

The French merchants Dominque Béhic and Jean Payan, insurers of repute in Cádiz, were probably two of the vectors that connected Captain Plauden to Marseille. If Béhic had decided to back *Nuestra Señora*'s voyage, it made sense that the captain would ask *Payan and Sons* to find coverage for another part of the risk. But surely Plauden and his partners' acquaintances could have introduced their requests for coverage in another insurance plaza. Why would Plauden not have chosen to follow Galain and Laquidain and insure his share of the frigate in Cádiz? If the entire risk could not be placed there, why not some third option within Spain's borders, such as nearby Bilbao? What was attractive about Marseille's market? And did the captain hesitate before trusting underwriters in France, knowing that they were subject to a foreign set of laws? There is no knowing whether Plauden wrote to *Payan and Sons* first while searching for insurance coverage, or if Marseille was his second choice after he applied to correspondents in a third market for help. The partial answer to these questions concerning Plauden's decision is that Marseille's insurers were widely known to underwrite not only Mediterranean but also Atlantic voyages, including foreigners'. The premiums that the Payans secured for their new client seem very attractive – Marseille underwriters may have been able to undersell insurers elsewhere in this circumstance. The total risk on all three shares, valued at 150,000 *livres tournois*, may have been large enough to overwhelm the underwriters in one plaza, even an active hub of long-distance trade like Cádiz or Marseille. And Spanish ordinances published in the sixteenth and seventeenth centuries allowed merchants to insure only up to two-thirds of the value of a ship's hull for Atlantic voyages.

In the eighteenth century, Marseille had a reputation as an 'international' insurance market. The geographical breath of the risks underwritten in Marseille is obvious in the well-known treatise on insurance by Balthazard-Marie Émérigon (1716–1784), *avocat* of the *Parlement* of Aix and *conseiller* in the Admiralty Court of Marseille. Émérigon turned his long career in law and his extensive first-hand knowledge of insurance contracts and litigation into the *Traité des assurances et des prêts-à-la-grosse* (1783), which is a fundamental historical

source on insurance markets during the eighteenth century.[34] Its pages are full of references to 'cross risks' underwritten in Marseille, such as a voyage from Cádiz to Buenos Aires[35] and one from Martinique to Bordeaux,[36] and to insurance policies for the benefit of merchants based in Cádiz,[37] La Rochelle,[38] and Bayonne.[39] A career in such a milieu shaped the jurist's perspective on the law. He understood, in his words, that:

> 'Le commerce maritime est du droit des gens. Il se fait principalement avec les Etrangers. Si l'on veut que les Etrangers nous soient utiles, il faut les traiter comme Concitoyens, & user de réciprocité à leur égard.'[40]
>
> 'maritime commerce belongs to the *droit des gens* [*ius gentium*]. It is conducted principally with Foreigners. If we want Foreigners to be useful to us, it is necessary to treat them as Fellow Citizens, & to use reciprocity with regard to them.'

Émérigon believed in the study of other countries' maritime customs and legal codes, 'in order to better understand the spirit of the Ordinances of the Kingdom,' France's own laws, 'or to decide the cases which they have not foreseen.'[41] In Marseille, it would seem that an *avocat* would need this broader knowledge just to get through a week that could have him receiving clients, or at least legal documents, from abroad.

A cross-section of the insurance market in Marseille between 1720 and 1793 shows that cross-risks and transactions with foreigners consistently made up a small part of the insurance business in the port.[42] Insurance policies signed in

---

[34] *Éric Roulet*, Les traités sur l'assurance maritime en France à l'époque moderne, in: Christian Borde and Éric Roulet (eds.), L'Assurance Maritime XIVe–XXIe siècle (2017), 125–142, 135.

[35] Chapter and section will be cited in addition to page number. *Balthazard-Marie Émérigon*, Traité des assurances et des contrats à la grosse, vol. 2 (Marseille 1783), Chapter 14, Section 3, 102.

[36] *Émérigon* (n. 35), vol. 2, Chapter 19, Section 8, 296.

[37] *Émérigon* (n. 35), vol. 2, Chapter 13, Section 2, 16.

[38] *Émérigon* (n. 35), vol. 2, Chapter 13, Section 15, 58 f.

[39] *Émérigon* (n. 35), vol. 1, Chapter 12, Section 20, 458.

[40] *Émérigon* (n. 35), vol. 1, Chapter 4, Section 8, 121.

[41] 'On doit donc avoir recours aux Loix des autres Peuples, soit pour mieux connoître l'esprit des Ordonnances du Royaume, soit pour décider les cas qu'elles n'ont pas prévu.' *Émérigon* (n. 35), Chapter 1, Section 6, 21.

[42] In a separate study of notarized insurance contracts in Marseille, I am building a growing database that includes 2,419 observations to date. I constructed a sample from all contracts signed in May and in November for 1720 to 1793 using the official registers of notaries and brokers (courtiers or censaux), who served as intermediaries in the insurance business. To date, I have tabulated material from Archives départementales des Bouches-du-Rhône (ADBR), 9 B 22–35, 393 E 261–267. The figures quoted throughout this section were calculated from this sample.

Marseille included few identifiers for the purchasers, and their names are unreliable guides to their provenance and networks. With these caveats, 12.3% of purchasers in the contracts sampled were resident in cities other than Marseille; of these, 7.8%, or 188 purchasers, were living in cities outside France. Insurance policies for cross risks, or voyages that did not include a planned stop in the port of Marseille, made up 8.9% of all observations. For the most part, insurers in Marseille were asked to underwrite voyages between Marseille and the Levant, its traditional overseas market, where its merchants had special advantages over other French subjects. Increasingly throughout the eighteenth century, they were underwriting voyages to and from the French Antilles, and other trajectories and foreign clients were mixed in.

Few insurance policies were registered in Marseille for voyages to Spanish America, however. To date, insurance contracts for just eleven journeys to Spanish-controlled colonies can be confirmed. These include voyages to Campeche, Cartagena, Louisiana (then under Spanish rule), Tabasco, and Veracruz (or returns from these ports). The premiums paid in Marseille on these voyages were high, ranging between 14% and 30% for a one-way passage, although most were charged during the War of Austrian Succession. The insurance structure for Plauden's voyage appears to have been especially unusual in the Marseille market because the policies in the captain's name covered both the first Atlantic crossing and the return to Europe. A similar contract covering a round-trip for New Spain has not yet been found in the notarial records. This is consistent with the fact that most beneficiaries of insurance contracts in Marseille were French subjects, and the long-standing goal of Spanish trade policy was to allow only ships leaving from Cádiz to enter American ports. The 1778 Decree freed commerce for Spanish subjects, but it did not open opportunities to foreigners, who in theory still had to sell products through a Spanish merchant to access colonial markets. In Marseille, the premiums for Spanish American voyages were high because insurers knew that French subjects who planned to trade in the Spanish Empire were engaging in contraband and thus exposed to confiscation. There are contracts that address this risk specifically with clauses in which the insurer acknowledges that he will pay compensation in case of a loss even though the policy holder will not be constrained to provide any written evidence that an accident occurred.[43]

In late October, *Payan and Sons* wrote to San Sebastián with their final report on the multiple policies they were able to patch together to cover 45,000 *livres*.

[43] '[…] sans que les d[its] s[ieu]rs assurés soient obligés de faire aparoir d'aucune sorte d'ecriture en cas de sinistre ou perte que dieu Garde attendu qu'il n'est pas permis aux françois de negocier a lamerique espagnolle.' Insurance policy for 'Nuestra Señora del Buen Fuerte Alias La Concorde' (11 July 1743): ADBR, 9 B 35.

The Payan partners themselves signed on to insure 700 *livres*.[44] The insurance premiums they asked were very modest compared to the observed premiums for other Spanish American voyages insured through Marseille's market. Across the five insurance policies on the hull in Plauden's name, rates ranged from 4.5% to 6%.[45] These rates were competitive with the premiums Marseille's insurers demanded on round-trips between French ports and Saint-Domingue, risks they underwrote frequently. The peaceful political situation – the Treaty of Paris (3 September 1783) having just brought the American Revolution to official conclusion – reduced the risk to the *Nuestra Señora*. That the ship's shareholder was a Spanish subject licensed to trade in America also undoubtedly helped the Payans negotiate a lower price for Captain Plauden.

Maria Martina de Chegoyen, Captain Plauden's wife, received the final communication from Marseille of the structure of the insurance coverage, since her husband by this time had already made sail. She calculated the amounts that *Payan and Sons* were due, and she wrote the bill of exchange crediting the Payans so that they could pay the insurers. Chegoyen's letter confirming these payments demonstrates both her literacy and her familiarity with credit instruments.[46]

Insurance coverage for Plauden's share of *Nuestra Señora* was broken out into five separate policies because it was a sizable risk by Marseille's standards. The median value of the property insured through a single insurance contract in Marseille was around 3,000 *livres*. We are aware of only sixteen policies that covered cargoes or the bodies of ships worth over 50,000 *livres*. If underwriters in other port cities were as wary of betting too much on a single voyage as their peers in Marseille, then this market data suggests one reason that the Plauden, Galain, and Laquidain did not go with the simpler solution of securing coverage for all three shares of the ship in the same market. The stated value of their three shares combined, 150,000 *livres tournois*, may have exceeded the appetite for risks on a single voyage in most plazas. Underwriters lived by the principle of diversification of risks. Perhaps 150,000 *livres*, plus the value of the cargo, added up to more risk than merchants in Cádiz or Marseille alone wanted to assume. The

[44] Émérigon, 'À Monsieur le Lieutenant-Général en L'Amirauté' (27 October 1786), 9: AGI, Consulados, 502.

[45] Three policies dated 15 September 1783 at the insurance rate of 4.5%; one dated 11 October 1783 at 5%; and the fifth dated 10 March 1784 at 6%. Letter to 'Francisco Antonio de Plauden' from 'S. Payan padre hijos' (20 October 1783) and Émérigon, 'À Monsieur le Lieutenant-Général en L'Amirauté' (27 October 1786), 1 f.; AGI, Consulados, 502.

[46] Letter to 'S. Payan padre hijos' from 'Maria Martina de Chegoyen, Esposa de Francisco Antoinio Plauden' (3 September 1783): AGI, Consulados, 502. Judging from the context and from another copy of the letter, Chegoyen probably made an error while writing the date, and actually sent this letter on 3 November.

solution that the Basque partners found was to split their insurance coverage between two markets, which allowed them to contact enough willing underwriters to cover the entire risk while perhaps benefiting from lower insurance rates.

A final reason why the partners may have split up their risk is that originally in Spain, for any voyage to and from the Americas, just two thirds of the value of the hull of a ship could be insured. Ordinances promulgated in 1552 and 1556 and re-published in the *Recopilación de leyes de los reinos de las Indias* (1680) established this rule, which is the first divergence between Spanish and French maritime law that we have uncovered in this case study.[47] In the second half of the eighteenth century, the Spanish Crown relaxed the provision and permitted shipowners to insure up to 100% of the hull's value.[48] Perhaps even after the two-thirds rule became obsolete, some Spanish merchants in an abundance of caution still preferred to insure only two thirds of their ships in Spain and to seek additional coverage elsewhere, – in France for instance, where marine ordinances allowed insurance of up to 90%, and even allowed most purchasers to insure their entire capital if this was explicitly stated in the policy.

B. Contract enforcement in a foreign legal forum

If hesitation on the part of insurers to stake large amounts on the *Nuestra Señora* played a part in how Plauden ended up insuring his interest in the ship in France, then the misfortunes that the frigate experienced the following year on its homebound crossing would soon show that caution had indeed been warranted. The following sections summarize the accidents and explain where these facts are recorded. Then, a short description of the legal procedure in the French Admiralty Courts will lay the foundation for discussion of the points of law that were at stake as Plauden's insurance claim went on trial.

---

[47] Ordenanzas Reales para la Casa de la Contratación de Sevilla (1552), Ord. 162; Ordenanzas del Consulado de Sevilla (1556), Ord. 32; Recopilación de leyes de los reinos de las Indias (1680), Book IX, Tit. 39, Art. 5. Compare with the French Ordonnance de la Marine, Book III, Tit. 6, Art. 18 f. (n. 33). For an introduction to insurance law in Spain, see *Guillermo Céspedes del Castillo*, Seguros marítimos en la carrera de Indias, (1948–1949) 19 Anuario de historia del derecho español, 57–102.

[48] R.C. (Real Cédula) de 27 June 1765, discussed in *Céspedes* (n. 49), 73. For a summary of a series of legal reforms in the areas of sea loans and insurance policies between 1765 and 1768, see *Bernal* (n. 30), 338–344.

I. Facts and factums

The following description of the voyage *Nuestra Señora del Rosario* draws on two legal *mémoires* or factums that were printed in Marseille, one on 17 October 1786, the same date that the Payans began their pursuit of the insurers in court; and the other, three months later on 18 January 1788. The legal factum was a peculiar genre. Authorship by legal professionals gave these documents a quasi-official character that allowed them to escape *a priori* censorship.[49] This waiver from censorship, very unusual in the *Ancien Régime*, has attracted historians of France to study legal *mémoires* for how they promoted 'public opinion' as a legitimate factor in politics and for their insights into the debts and dynastic ambitions of the nobility.[50]

Mémoires or factums purported to be internal court documents and seem on the surface like pieces of legal procedure. The two examples written about the *Nuestra Señora* affair thus addressed 'Monsieur le Lieutenant-Général en l'Amirauté,' the judge who was deciding the case. But factums' printed form and their circulation beyond legal officers and the parties directly interested in the cases they summarized spoke otherwise. As mentioned, they had to be written by *procureurs* or *avocats* to be exempt from censorship.[51] The two factums about the *Nuestra Señora*, accordingly, are signed 'Émérigon, procureur,' Captain Plauden's representation in the Admiralty Court.[52] This Émérigon was likely a relative of the eminent treatise author: a nephew or possibly a younger brother, since Balthazard-Marie had five brothers, all of whom had careers in the law, but no children.[53]

---

[49] *David Bell*, Lawyers and Citizens: The Making of a Political Elite in Old Regime France (1994), 31.

[50] *Sarah Maza*, Le tribunal de la nation: les mémoires judiciaires et l'opinion publique à la fin de l'Ancien Régime, (1987) 42/1 Annales. Économies, Sociétés, Civilisations 73–90; *Lise Lavoir*, Factums et mémoires d'avocats aux XVIIe et XVIIIe siècles: un regard sur une société (env. 1620–1760), (1988) 7 Histoire, économie et société, 181–193.

[51] The possible English translations for these two types of legal professionals (respectively, barrister, and solicitor) are not exact equivalents. In the division of labor in French courts, a procureur represented each of the parties in a civil suit in court. He questioned witnesses, investigated facts, and submitted motions to move a case forward in court. A procureur would hire an avocat to write arguments on behalf of a client, especially in cases that came down to complex questions about how to interpret the law: *Bell* (n. 51), 30.

[52] Émérigon, 'À Monsieur le Lieutenant-Général en L'Amirauté' (18 January 1788), 13: AGI, Consulados, 502.

[53] *S.-J. Delmont* s.v. 'Balthazard-Marie Émérigon', in: Michel Prevost and Jean-Charles Roman d'Amat (eds.), Dictionnaire de Biographie Française, vol. 12 (1970), 1242; *Alfred Jauffret*, Un comparatiste au XVIIIe siècle: Balthazard-Marie Émérigon, (1972) 24/2 Revue internationale de droit comparé 265–277, 266.

When read with careful awareness of their genre and purpose, legal *mémoires* can be reliable historical sources because their authors' professional credibility depended on accurate reporting of facts and listing of evidence submitted. The authors' presentations of those facts, however, were argumentative and were chosen to condemn the opposing side.[54] Émérigon's two *mémoires*, today preserved in Spain, allow us to reconstitute the facts of Plauden's case, even though almost all the records of the Admiralty Court in Marseille for the second half of the eighteenth century are lost, and records of the hearings concerning this suit and the final sentence could not be traced among the material that does survive.[55] Émérigon's factums sometimes quote pieces of procedure, and some of their content can be corroborated in surviving letters. They allow us to pick up the story after Francisco Plauden's arrival in La Guaira.

The first *mémoire* from the *procureur* Émérigon signaled that the *Nuestra Señora*'s outbound voyage and Plauden's trading along the Venezuelan coast were successful. Laquidain, one of the Basque partners who remained behind, ordered an insurance policy for the ship's returning cargo. Signed in Marseille on 4 August 1784, the policy covered 100,000 *livres tournois* 'on Faculties, consisting in gold, silver, or produce, of the said Frigate, departing from La Guaira until Puerto de Pasajes.'[56] Copies of the various accounts maintained during the voyage show that the return cargo was mostly cacao and indigo.[57] These goods were not all to be converted to revenue for Plauden, Laquidain, and Galain, since dozens of merchants, mostly local to their region, had provided goods on commission or indirectly through *prêts-à-la-grosse* to complete the cargo of *Nuestra Señora*, and the shipowners owed each of these creditors their returns. Still, this large figure suggests their venture had prospered.

---

[54] See Aslanian's discussion of the factum genre and strategies for employing this type of source in historical research: *Sebouh David Aslanian*, Une vie sur plusieurs continents: Mictrohistoire globale d'un agent arménien de la Compagnie des Indes orientales, 1666–1688, (2018) 73/1 Annales. Histoire, Sciences Sociales 19–55, 31–35. The article showcases the trial of an Armenian merchant, a former factor of the Compagnie des Indes. Aslanian makes the most of his good fortune in having factums written by the two opposing sides, showing how each party described the career of the individual under investigation either to condemn or to vindicate him.

[55] Unfortunately, most of the judicial records of the Admiralty Court of Marseille are missing from 1739 until the end of the century. For this project, I was able to consult records of the court's hearings in 1787, in ADBR, 9 B 262–263, and records of the sentences in May to November 1791, in ADBR, 9 B 269–270. I was unable to see the 'audiences: sentences, ordonnances, et appointements' for 1788, in ADBR, 9 B 122, as these documents will be incommunicable for many months while they are being restored.

[56] '[…] sur Facultés, consistant en or, argent, ou fruits, de ladite Frégate, de sortie de la Guaira jusqu'au Port du Passage.' Émérigon, 'À Monsieur le Lieutenant-Général en L'Amirauté' (27 October 1786), 1: AGI, Consulados, 502.

[57] Manuscript booklet of various accounts (1786 and 1787): AGI, Consulados, 502.

Prosperity would not last. *Nuestra Señora* departed La Guaira on 25 October 1784 but encountered a violent storm near Cape Finisterre on 23 December. The rising water level on the ship and a damaged rudder forced Captain Plauden to jettison (*jeter à la mer*) the ship's launch and guns. The ship and the crew barely reached the nearest port, which was Setúbal, Portugal, on 4 January 1785. According to Plauden's *consulat* (report upon port entry) in Setúbal, the cargo had to be discharged in order to make repairs to the frigate that took months.[58] Even after these efforts, *Nuestra Señora* was never able to regain course, because 'a considerable leak' allowed water to flood the frigate almost as soon as it departed Setúbal on 30 June 1785.[59] Plauden decided to seek safety again in Cádiz and to call the voyage over.[60]

II. Starting the pursuit in two ports

As bills for the careening of the ship, for carpentry work, for provisions for the crew in Setúbal and Cádiz began to arrive, there was no question that Francisco Antonio de Plauden and his partners would begin demanding indemnification for the ship's two accidents. In Cádiz, Laquidain and Galain were able to settle quickly with their insurers. Laquidain brought a copy of the expense accounts to the three Cádiz houses who had underwritten two-thirds of *Nuestra Señora*'s hull, including Domingo Béhic's company.[61] The total came to 328,184 *reales de vellón*. The insurers immediately agreed that three quarters of these expenses were legitimate, and the parties went before the *Real Tribunal del Consulado* (Cádiz's merchant guild court) to reach a settlement on the expenses that the insurers at first refused. Within the year, on 6 May 1786, everything was settled: the three Cádiz insurance companies confirmed payment of the approximately 185,000 *reales* that they owed Laquidain and Galain.[62]

---

[58] Émérigon, 'À Monsieur le Lieutenant-Général en L'Amirauté' (18 January 1788), 5: AGI, Consulados, 502.

[59] '[…] une voie d'eau considérable.' Émérigon, 'À Monsieur le Lieutenant-Général en L'Amirauté' (27 October 1786), 2: AGI, Consulados, 502.

[60] Spanish port authorities confirmed that the frigate entered the bay of Cádiz on 7 June 1785. Juan Moreno and Simon Haedo, 'Contadores por S.M. del Comercio Libre à Indias en la Real Aduana de esta Cuidad' (1 September 1788): AGI, Consulados, 502.

[61] The names of these insurers are reported, 'Carassa y Sta. Maria, pere & fils; Dominique Behic & Compagnie; Jean-François de Alzuelta', in: Émérigon, 'À Monsieur le Lieutenant-Général en L'Amirauté' (27 October 1786), 4: AGI, Consulados, 502. These three names match the three Spanish insurance companies mentioned in: Letter to 'Timon David hermanos' from unknown sender (30 November 1787): AGI, Consulados, 502.

[62] Émérigon, 'À Monsieur le Lieutenant-Général en L'Amirauté' (27 October 1786), 3 f.: AGI, Consulados, 502.

In July 1786, Plauden visited the French Consul in Cádiz to present these same accounts with the signatures of the local insurance companies showing how much of the value had already been redeemed. He paid 255 *reales de vellón* in the Consul's chancellery to have these important proofs and the *Tribunal del Consulado*'s 6 May sentence translated from Spanish into French.[63] This visit to the Consulate strictly conformed to an article of the French *Ordonnance de la Marine* (1681) that reads, 'All Acts concluded in Foreign Countries where there will be Consuls will have no validity in France, if they are not legalized by them,' that is, by the Consuls of the French nation.[64] In Marseille the Payans tried to confront the insurers with these documents proving Plauden's claim, but they encountered resistance. On 27 October 1786 they filed a request with the Admiralty Court in Marseille through the *procureur* Émérigon, stepping up their pursuit of the underwriters on Captain Plauden's behalf.[65]

III. Rules of engagement in the Admiralty's eighteenth-century courtroom

A written request, like the one that the Payans submitted in October 1786, was usually the necessary first step to initiate a suit. Once the defendants had been served with the complaint against them, the parties were given a date to appear in court. Particularly in a straightforward matter, the defendants and their *procureur* might not appear at the first audience, and the Lieutenant-General of the Admiralty who sat as judge would issue a ruling in favor of the plaintiffs by default. Determined defendants could oppose this initial order, and if there seemed to be points of fact or of law that the court needed more time to consider, the parties would be invited to present written evidence supporting their cause and then adjourn; they would 'leave their pieces on the desk' ('laisser leurs pièces sur le bureau'), in the typical formulation. The judge might then be ready to come to a decision in view of this evidence at a later hearing. Alternatively, this step could be skipped over, and the parties could be sent to arbitrators chosen by themselves or appointed by the judge. The results of arbitration were then ratified (*homologués*) by the Admiralty if both parties submitted to them. Insurance policies could include a clause through which the contracting parties promised to submit any disagreements to arbitration.[66] Model policies for Bordeaux and Nantes provided by the commentator Émérigon in his famous treatise included

[63] Ibid., 4 f.

[64] 'Tous Actes expédiez dans les Pays Etrangers ou il y aura des Consuls ne feront aucune foy en France, s'ils ne sont par eux legalisez.' Ordonnance de la Marine, Book I, Tit. 11, Art. 23.

[65] Émérigon, 'À Monsieur le Lieutenant-Général en L'Amirauté' (18 January 1788), 8: AGI, Consulados, 502.

[66] Ordonnance de la Marine, Book III, Tit. 6, Art. 3.

this promise to convene arbiters to resolve conflicts, though this language was not common in policies signed in Marseille.[67]

In addition to arbiters, the Lieutenant-General also relied heavily on 'experts' to instruct him further on technical questions. These were often ship captains, shipbuilders, carpenters, and rope makers, but could also be insurance brokers[68] or, in a suit over spoiled wheat, master bakers.[69] When an equitable solution depended on accurately estimating the extent of damage or careful auditing of accounts, expert opinions carried weight, and without calling on experts to participate, a local Admiralty Court could not have continued to function for long with only a dozen to a few dozen officers.[70] Apart from appointing experts to compose a report, the Lieutenant-General could order interrogations of witnesses, summon someone key to the proceedings to swear to certain facts, or instruct the parties to deposit further pieces of evidence if necessary to inform his sentence. In the later stages of cases that dragged on, the balance shifted from hearings and oral arguments to written procedure. The Lieutenant General would pronounce in a hearing, 'we have appointed the trial to the legal counsel' ('nous avons appointé le procès au conseil en droit'), which meant that the court would be collecting all pieces of evidence, reports, and both sides' written arguments in a fat dossier or bag (*sac à procès*) to consider at greater length.

Admiralty sentences were not motivated, which is to say that they did not provide reasons supporting a verdict in favor of the plaintiff or the defendant. This is one reason the legal *mémoire* or factum can be such an important document

---

[67] We are not yet able to determine how accurately the model policies that Émérigon appended to his discussion of insurance reflect the actual language of contracts: *Émérigon* (n. 35), vol. 1, Chapter 2, Section 3, 34–39. Take the example of an insurance policy from Marseille, the market that Émérigon knew best, such as the original policy dated 29 January 1779 in ADBR, 41 E 16: there is a printed portion of the contract, which Émérigon reproduced faithfully in the treatise, but half a page of contract terms were added by hand above the printed paragraph. The tailored, handwritten first half of insurance policies was routinely either notarized or recorded with a broker or courtier in Marseille, so we are able to verify that it was invariably many lines long and had its own conventional language. My colleague Lewis Wade and I are currently working on a project that will compare insurance policies from Paris and Marseille, as well as other ports, and show how their language could differ from one place of trade to another and across decades.

[68] Archives Départementales de la Gironde (ADG), 6 B 846, f. 64v.

[69] 'La Benne, Allard & Consrts, Négocians à Dunkerque, Assureurs' v. 'Woestyn frères, & autres Assurés,' (1785) 35 Gazette des Tribunaux 130.

[70] Experts would also be nominated to value property or verify the extent of damage in contexts other than civil litigation. They investigated the claims of French subjects that their ships or goods had been captured: Ordonnance de la Marine, Book III, Tit. 10, Art. 1. By royal edict, after 1779 all ships departing from French ports had to be inspected by three 'experts' nominated by Admiralty officials: Déclaration du Roi concernant les assurances, Donnée à Versailles le 17 août 1779, Art. 1. For a description of 'expert' reports and their place in Admiralty proceedings, see *Grancher*, Le tribunal de l'amirauté (n. 8), 49 f.

for historians trying to understand the decisions of these courts. Should the Admiralty's decision agree with the conclusions in a relevant factum, we can infer what reasoning might have been convincing to the judge. The Lieutenant-General's verdict could be appealed to the regional *Parlement*, the sovereign court within the province; thus, decisions of the Admiralty Court of Paris (*Table de Marbre*) could be escalated to the *Parlement* of Paris, and sentences of the Admiralty Court in Marseille were appealed to the *Parlement* of Aix-en-Provence.[71]

This summary of the steps in the Admiralty Court from initial request to appeal should not be taken as the standard course of a trial. Instead, each motion was a testimony to the will of both parties to take the legal process one step further rather than settle. Many of the conflicts that came under the purview of the Admiralty were not resolved in court but through a range of legal settlement options that could occur in a notary's office or in private – a realm that French scholars generally refer to as *infrajustice* or *infrajudiciaire*.[72] A suit could end with the filing of the first request, which might have always been a ploy to intimidate an adversary. Or the legal process might come to a halt with the experts' report. Romain Grancher argues that, during the fishing season, 'recourse to expertise seems to serve the purpose of provisionally freezing the circumstances of an accident to put off repairing the wrongs that it has caused until later.'[73] For populations unable to afford a notary's services and for whom time was of the essence, like fishermen, engaging the officers of the Admiralty in this way made sense. Not all disputes among top-tier international merchants (*négociants*) were carried through to sentencing. Looking at 1785, a single year in the Admiralty Court of Bordeaux – whose records from the second half of the eighteenth century are preserved – the Lieutenant-General held 2,667 hearings but passed only 54 sentences.[74] The question deserves study beyond this small indication, yet it seems clear that there was such an imbalance between hearings and judgments not only because a single lawsuit could result in many hearings, but also because many cases were discontinued before reaching the point of a final sentence, as was true in many early-modern courts of first instance.

---

[71] *Roland Mousnier*, Les institutions de la France sous la monarchie absolue, 1598–1789, vol. 2 (2nd edn., 1992), 293.

[72] *Benoît Garnot*, Justice, infra justice, parajustice et extrajustice dans la France d'Ancien Régime, (2000) 4/1 Crime, histoire & sociétés 103–120.

[73] 'Le recours à l'expertise semble avoir vocation à geler provisoirement les circonstances d'un accident pour remettre à plus tard la réparation des torts qu'il a causés.' *Grancher*, Le tribunal de l'amirauté (n. 8), 49.

[74] ADG, 6 B 846–848, 660–661.

IV. Timing, evidence, depreciation

Both sides in the affair of *Nuestra Señora* – the captain and the twenty-five insurers opposing him – were committed enough to see the case through to a final sentence. Complex legal questions and delays in the expedition of evidence from Spain to France kept a resolution out of reach, however, for over four years. We can discern some of the important obstacles in the *procureur* Émérigon's printed *mémoires* and in the private correspondence exchanged during these years between Captain Plauden, his representatives in Marseille, and the agent in Cádiz who was soon handling the case.

The defendants' *procureur*, Arnaud, first argued that Plauden had waited too long to act, so his claim was invalid. This opening argument drew on the *Ordonnance de la Marine*, Title 'On Insurance,' Art. 48: 'délaissements,' through which an insured party ceded to the insurers his rights over property lost in a shipwreck or in detention in a foreign port, '& all demands in execution of the policy, will be submitted to the insurers' with a maximum delay of one year 'after the news of losses occurring on the Coasts […] of Spain, Italy, Portugal, Barbary, Muscovy, or Norway.'[75] Arnaud cited the *Ordonnance* to show that Plauden and his agents had had one year to act, and they had missed the cutoff. Payan, father and son, should have taken legal action by February 1786 at the latest, since word of *Nuestra Señora*'s first accident off Cape Finisterre had reached Marseille by 25 January 1785.[76] They had notified the insurers of the event and reserved their right to demand damages, but this notification was a piffling document, an 'extrajudiciary act […] without effect.'[77] The plaintiffs did not truly begin to pursue their claim until they made a request in the Admiralty Court on 27 October 1786. Thus, argued Arnaud for the defense, his clients should not have to pay for the damage to the vessel, even if this would have been covered if the plaintiffs had demanded compensation on time.

Émérigon responded to Arnaud in his second factum, pointing readers following the case to his relative's discussion of the issue in the *Traité des assurances*.[78] Arnaud's argument would be a proper defense if *Nuestra Señora* had gone down in the storm off the coast of Spain, but the vessel was only battered and damaged.

---

[75] 'Les délaissement & toutes demandes en execution de la Police, seront faites aux Assureurs […] après la nouvelle des pertes aux Côtes […] d'Espagne, Italie, Portugal, Barbarie, Moscovie ou Norvègue.'

[76] Émérigon, 'À Monsieur le Lieutenant-Général en L'Amirauté' (27 October 1786), 2: AGI, Consulados, 502.

[77] 'acte extrajudiciaire […] aucun effet.' Émérigon, 'À Monsieur le Lieutenant-Général en L'Amirauté' (18 January 1788): 9, AGI, Consulados, 502.

[78] Ibid., 10. A footnote on this page references *Émérigon* (n. 35), vol. 2, Chapter 19, Section 15, 300–302.

The plaintiffs were not claiming a total loss; they were claiming damages or averages (*avaries*). Émérigon argued that *avaries* claims were not subject to time limitations, here proposing an interpretation of Art. 48 that would establish a general rule about the procedures for claiming insurance after a partial loss.

Spanish insurance law left little room for debate over the filing period for insurance claims. The *Recopilación* established a period of two years following the signature of an insurance policy for merchants to approach their insurers and claim a total loss. For partial losses ('perdida de avería') the term was extended to four years.[79] French jurists did not agree on whether there was a time limit that insured merchants had to respect in suing underwriters for *avaries*.

Article 48 of the French *Ordonnance* was ambiguous: it was clear that there were expiration dates by which insured merchants had to declare *délaissement* and cede their property rights in order to claim insurance, but the phrase 'all demands in execution of the policy' created confusion.[80] Was this a synonym for *délaissement* or did it apply to claims following partial losses as well? If the cause was a synonym, then there was no statutory limit on insurance claims for *avaries* since owners would not cede all rights to property that was merely damaged, and were explicitly forbidden from doing so.[81] By some lights, applying the limit for total losses to partial losses would be unjust to the bearers of insurance policies because – contrary to our expectations, perhaps – it took longer to pull together value estimates of *avaries* than it did to prove that a ship or cargo had simply perished. Accordingly, the established filing period for partial losses was longer than for total losses in Spain.

In the *Ordonnance de la Marine*, an entire section parsed the differences between general averages (*grosses avaries*) and particular averages (*avaries simples et particulières*). In French ports, a complex averages case was the exact situation in which the court would deputize experts, who would eventually produce a document known as the *règlement d'avaries*. Due to these normally long delays before the parties received the *règlement*, the commentator Émérigon's opinion was that there was no expiry date on suits for *avaries*.[82] Not every Admiralty judge agreed with him. In 1752, and in the jurisdiction where Émérigon practiced no less, the Admiralty Court of Marseille ruled that the time limits in

[79] Recopilación de leyes de los reinos de las Indias, Book IX, Tit. 39, Art. 18.

[80] *Émérigon* (n. 35), vol 2., Chapter 19, Section 2, 265–267 and Section 15, 301.

[81] Article 44 forbid délaissement except after a total loss. Such a rule was in the interest of commerce because it reinforced the incentives for merchants with insurance to repair, recover, or dry out their damaged property: Ordonnance de la Marine, Book III, Tit. 6, Art. 44.

[82] *Émérigon* (n. 35), vol 2, Chapter 19, Section 15, 302.

Art. 48 went into effect for partial losses after the communication of a *règlement d'avaries*. The *Parlement* of Aix confirmed the sentence.[83]

Whether in 1786 the Lieutenant-General would have followed the ruling from 1752 or would have been convinced by the elder Émérigon's recently-published commentary, it looked like Plauden's side could claim to be well within their timeframe. When they submitted their request to the Admiralty Court, reports from Setúbal on the extent of damage had not even been received, so the plaintiffs did not have a complete account of which losses would be marked gross averages versus particular averages in both accidents. This delay may have bought Plauden and the Payans time, but it raised a second issue: irregularities in the documents remitted from and Spain, from the perspective of the underwriters and lawyers in Marseille.

The Marseille insurers were not being asked to cover modest amounts. The expenses for repairing *Nuestra Señora* seemed suspiciously high. To support the claim that such thoroughgoing work on the ship was necessary to make it seaworthy again, the plaintiffs required airtight proofs. But when the Payans and Émérigon submitted their plea in 1786, they had to excuse glaring omissions in the documentation of the damages that *Nuestra Señora del Rosario* suffered. To begin with, they had no proofs to show for the repairs in Portugal. Émérigon admitted in his first factum, 'We have not yet received any of the Acts that were made in Setúbal following this first accident.'[84] These acts included the *consulat* that Captain Plauden recorded in Setúbal describing the terrible storm, the boat and guns that he threw overboard, and the reports from local experts who assessed the damages and prescribed certain fixes. This whole dossier, however, was released to the President of the *Real Tribunal del Consulado* while Laquidain and Galain were suing their own insurers.[85] All that Plauden's side could do was promise to send these acts on to Marseille for review as soon as the President agreed to release them.[86]

As the months drew on in this suit, the Payans' letters to Plauden – and even to the captain's father – became frantic in their requests for these documents from

[83] *Émérigon* (n. 35), vol 2, Chapter 19, Section 15, 301.

[84] 'On n'a point encore reçu les Actes qui ont été faits à Setúbal à la suite de ce premier Sinistre.' Émérigon, 'À Monsieur le Lieutenant-Général en L'Amirauté' (27 October 1786), 7: AGI, Consulados, 502.

[85] Émérigon, 'À Monsieur le Lieutenant-Général en L'Amirauté' (18 January 1788), 6: AGI, Consulados, 502.

[86] Ibid., 8.

Setúbal: 'We need above all, a Judicial Copy of the *Consulat* as it is the fundamental Document without which nothing can be started or finished.'[87] They began to despair of the success of Plauden's suit without the support of such evidence: 'This is an arduous lawsuit, and its outcome cannot be favorable unless you remit to us the *Consulat* from Setúbal, the visit and report of the experts, and in sum all of the documents that are necessary to initiate your claim with some foundation.'[88] The example proves the general rule that 'though the *Consulat* may not be an absolute necessity to prove the loss, in practice, people regard it as the most regular and the most sure way of fulfilling this goal […] Every Captain who, able to make his *Consulat*, skips it, makes his conduct very suspicious.'[89] Eventually, by January 1788 when procureur Émérigon was composing his second *mémoire*, the *consulat* from Setúbal had arrived from Spain, and the plaintiffs could join their claims for damages following the second accident with the first.[90]

The insurers found reasons to reject the evidence remitted from Cádiz as well. The Spanish documents were apparently constructed without the third-party experts who normally intervened in French ports in *avaries* cases, and this created a major obstacle for the plaintiffs. Plauden did what he could to cloak the proofs he brought to his French insurers with the legitimacy of their Consul's signature. But the captain's accounts and the compact signed in court by Galain and Laquidain and the Cádiz insurers were not prepared with the same checks and balances as the *règlements d'avaries* that underwriters in Marseille were used to seeing. Addressing the insurers in a translated letter on 1 August 1786, Plauden tried convincing them that this way of proceeding was perfectly legitimate:

> 'Pour ce qui concerne les réparations faites à la Frégate dans ce Port (de Cadix), il n'a pas été dressé aucun autre document juridique, soit parce que sont trop connus & notoires les dommages soufferts & le mauvais état de ladite Frégate, d'autant plus que le Tribunal de la Contratation ordonna qu'elle acheveroit son Registre en cette Ville, pour être incapable de continuer le voyage à sa destination. Les Assureurs de cette Ville qui

---

[87] 'Necesitamos Sobre todo, Copia Judicial del Consulado siendo el Documento fundamental sin el que nada se puede provocar ni efectuar.' Letter to 'Vicente Ferrer de Plauden' from 'Payan padre hijos' (4 July 1786): AGI, Consulados, 502.

[88] 'Este es un pleito arduo, y su éxito no puede ser favorable a menos que v[uestra] m[erced] nos remita el Consulado de Setuval, la visita y razón de los peritos, y en suma todos los documentos que se necesita para entablar con fundamento la pretencia de v[uestra] m[erced].' Letter to 'Francisco Antonio de Plauden' from 'Payan padre hijos' (20 December 1786): AGI, Consulados, 502.

[89] 'Quoique le Consulat ne soit pas d'une nécessité absolue pour prouver la perte, on le regarde dans l'usage comme le moyen le plus régulier & le plus sûr de remplir cet objet […] Tout Capitaine qui pouvant faire son Consulat en due forme, y manque, rend sa conduite très-suspecte.' *Émérigon* (n. 35), vol. 2, Chapter 14, Section 3, 100.

[90] Émérigon, 'À Monsieur le Lieutenant-Général en L'Amirauté' (18 January 1788), 13: AGI, Consulados, 502.

> se trouvoient présens, & qui virent par eux-mêmes le Navire & tout ce qui se fit à ce sujet, n'exigerent point aucune autre formalité de Justice, & se conformerent à l'usage de la Place du Commerce, étant convenu verbalement qu'on mettroit en usage tout ce qui seroit nécessaire pour la réparer.'[91]
>
> 'Concerning the repairs made to the Frigate in this Port (of Cádiz), no legal document was drawn up, perhaps because the damages suffered and the bad state of the said Frigate are only too well known and notorious, in addition the Casa de Contratación ordered that she complete her Register in this City, being incapable of continuing the voyage to her destination. The Insurers of this City who were found to be present, & who saw for themselves the Ship and all that was done to it, did not demand any other formality of Justice, & conformed to the customs of the Place of Commerce, verbally agreeing that we make use of all that was necessary to repair her.'

Plauden's insistence that the kinds of proofs he could provide were necessarily drawn up according to the local commercial customs had weight. Émérigon (the treatise author) himself agreed that 'investigations undertaken and other proofs duly authenticated by the foreign Judge are admissible among us in civil trials concerning commerce.'[92] In fact, Admiralty Courts did often issue rulings based on *règlements d'avaries* drawn up in foreign ports. Only considering the hearings of the Admiralty Court in Marseille, which are preserved exceptionally for 1787, the court ordered underwriters to contribute to general averages according to a *règlement* drawn up in Barcelona,[93] and in a second case, in Calcutta or Île de France.[94] Because of the nature of long-distance trade, magistrates could not demand that all evidence of *avaries* conform to a single model. 'We often content ourselves with public notoriety' as evidence of a loss 'since, in the area of Insurance, we content ourselves with the proofs that it is possible to obtain.'[95]

Therefore, Émérigon and Plauden asked that the Admiralty Court ratify the decision of the *Tribunal del Consulado*. Insurers in Cádiz had considered the claim valid and in good faith and had been able to come to an agreement with Plauden's partners. 'The Acts made & approved by these Insurers, unsuspicious parties & very interested, can & must serve as a claim for the Supplicants against

---

[91] Émérigon, 'À Monsieur le Lieutenant-Général en L'Amirauté' (27 October 1786), 5 f.: AGI, Consulados, 502.

[92] 'Enquêtes prises & autres preuves duement authentiquées par le Juge étranger, sont admises parmi nous dans les affaires civiles concernant le commerce.' *Émérigon* (n. 35), vol. 1, Chapter 4, Section 8, 126 f.

[93] 'Romagnau frères et Lavou' v. 'Leurs assureurs sur facultés dud. Navire Les Deux Amis' (16 November 1787): ADBR, 9 B 263.

[94] 'Sindics des assureurs sur corps du navire Le Baron Borrekeuf' v. 'Jean Jacques Kick' (7 August 1787): ADBR, 9 B 263.

[95] 'On se contente souvent de la notoriété publique […] Car, en matiere d'Assurance, on se contente des preuves qu'il est possible d'avoir.' *Émérigon* (n. 35), vol. 2, Chapter 14, Section 3, 103.

the Insurers of Marseille.'[96] The insurers in Spain shared the interests of the insurers in Marseille, and since they were individually responsible for paying the Basque merchants very large amounts, and were on the ground to make their own inquiries, their decision not to dispute Galain and Laquidain's insurance claims should be accepted in Marseille. Plauden himself made the point: 'The Insurers of Cádiz have not signed for 1,000 *livres* nor for 1,500 *livres*, but Béhic for 13,500 piastres, Caraffa for 10,000 & Alzueta for 2,500. These sums are considerable,' so the Spanish insurers would have certainly refused the settlement with Galain and Laquidain if it was not fair.[97] The defendants hotly contested this argument 'that the manner of proceeding with the Insurers of Cádiz should be imposed on the Insurers of Marseille.'[98]

The settlement between the insurers of Cádiz and Plauden's partners was not only unpalatable to the Marseille underwriters because it had been drafted in a foreign jurisdiction according to another set of customs. There was also a complex set of interests to balance in this case to determine which expenses should accrue to the account of the owners and insurers of the vessel on the one hand, and to the owners and insurers of the cargo on the other. The insurers in Cádiz and their counterparts in Marseille might have had overlapping interests, but they also might have been working with different definitions of gross averages.

French maritime law tended to promote a broader definition of gross averages. Gross averages are first cited in broad terms in the *Ordonnance de la Marine*: 'the extraordinary expenses made, and the damage suffered for the common good and safety of the Merchandise and the Vessel.'[99] Then a list made explicit what extraordinary expenses could fall under such a heading: the ransom given to corsairs to release a ship, the value of jettisoned goods, the value of rigging, masts, and anchors sacrificed for the common benefit (to facilitate jettison), damage occurring during a jettison even to merchandise that remained in a ship, pensions for sailors injured while defending a ship, and the expenses of unloading goods

---

[96] 'Les Actes faits & approuvés par ces Assureurs, parties non suspectes & très intéressées, peuvent & doivent servir de titre aux Supplians contre les Assureurs de Marseille.' Émérigon, 'À Monsieur le Lieutenant-Général en L'Amirauté' (27 October 1786), 7: AGI, Consulados, 502.

[97] 'Les Assureurs de Cadix n'avoient pas signé pour 1000 liv. ni pour 1500 liv., mais pour 13500 piastres Behic, pour 10000 Caraffa & pour 2500 Alzueta. Ces sommes sont assez considérables.' Émérigon quoted this letter from Plauden dated 1 August 1786, ibid., 5.

[98] '[…] que la manière de procéder avec les Assureurs de Cadix doive en imposer aux Assureurs de Marseille.' Émérigon, 'À Monsieur le Lieutenant-Général en L'Amirauté' (18 January 1788), 9: AGI, Consulados, 502.

[99] '[L]es dépenses extraordinaires faites, & le dommage souffert pour le bien & salut commun des Marchandises & du Vaisseau.' Ordonnance de la Marine, Book III, Tit. 7, Art. 2.

to enter a harbor or river.[100] We can only be sure that jettisoned goods and the expenses of unloading cargo to pass through a river or shallows were considered gross averages under Spanish law. The Spanish statute contained a blanket clause that slotted 'all other common risks' ('los demás riesgos comunes') into the category of gross averages, but this created a weak protection compared to the French list that clarified the definition.[101]

The original trial documents from Marseille are not available to review how gross and particular averages were accounted, but an unidentified legal advisor to Plauden in Cádiz alerted the captain that the Admiralty officials in Marseille were not likely to agree with the *Consulado*'s division of the damages. Under French law, first the jettison of the guns and dinghy (*chaloupe*) belonging to *Nuestra Señora* should be considered gross averages. In the storm off Cape Finisterre, Captain Plauden had jettisoned the heaviest equipment on board to save the ship and cargo as a whole; therefore, the insurers of the frigate's hull should not be solely responsible for this loss. The owners of the cargo that survived the voyage should also contribute to cover the cost of the jettisoned guns and boat, and the *avaries* falling to the insurers should be adjusted accordingly.[102] Plauden's advisor argued that secondary expenses related to the jettison and the storm would also be considered gross averages in France: 'All the damages suffered by the forced rigging, for the conservation of the Ship, the expenses of arrival [in Sebtúbal], of the unloading, reloading, the maintenance […] of the crew during its stay.'[103] The settlement that the Cádiz *Consulado* enforced on the insurers in the Spanish port did not confirm to the French ordinances, this legal advisor argued, because many expenses that the owners and insurers of the cargo should contribute to were borne solely by the insurers of the frigate.

In the same memorandum, Plauden's advisor raised another impediment to his insurance claim that the captain should prepare for. Some expenses entered into the list of *avaries* in the settlement with the insurers of Cádiz were arguably normal depreciation costs – uninsurable – not exceptional damages to the frigate caused by storms and unforeseeable bad fortune. Insurers could not be asked to pay for normal depreciation, or in the case of insured merchandise 'vice propre du bien assuré,' or 'inherent vice of the insured good.' The insurers in Cádiz, however, had allowed Plauden to claim some of these excludable expenses, including repairs to *Nuestra Señora* in Puerto Cabello, following the frigate's first Atlantic crossing. The underwriters in Marseille could justify leaving these items

[100] Ibid., Art. 6.

[101] Recopilación de leyes de los reinos de las Indias, Book IX, Tit. 39, Art. 10.

[102] Unsigned, undated legal memorandum, AGI, Consulados, 502.

[103] 'Todos los daños sufridos por el aparejo forzado, la conservación del Navio, los gastos del arribo, de la descarga, recarga, la manutención […] de la tripulación durante su estad.' Ibid.

out of what they would agree to pay since the work in Puerto Cabello seemed to be 'for the restoration of a Ship deteriorated through the abuses of time, rather than for the precise repair of damage caused by the sea.'[104] Captain Plauden's Spanish counsel anticipated that the underwriters would also object to some of the costs of repairs in Cádiz. Could the frigate really need another reconstruction, after having just spent six months in the dockyards in Setúbal?

> 'Los aseguradores gritaran sin duda sobre este punto, y diran que no haviendo sufrido el Navio siniestro alguno de mar después de la salida de Setúbal capaz de exigir una carena tan considerable, los propietarios del buque le han querido renovar del todo a su costa.'[105]
>
> 'The insurers will scream without a doubt on this point, and will say that, without the Ship having suffered any accident at sea after the departure from Setúbal which could have required such considerable repairs, the owners of the vessel asked them to renovate everything at their cost.'

These are some of the grounds we may be sure the affair of *Nuestra Señora* was fought upon. It is no surprise that the case remained at an impasse in the Admiralty Court for many months, prompting Captain Plauden to begin to question whether the Payans were neglecting his interests.[106] The legal difficulties raised by the case were especially fraught. In summary, we have seen that one of the procedural questions – whether insurance purchasers had to submit claims within a certain window of time – had multiple interpretations based in French maritime law. It was a point of active debate among jurists. The plaintiff Captain Plauden's foreign status brought a number of disadvantages. He and his lawyers faced practical problems, such as delays in the remittance of evidence. The proofs they could eventually provide were open to criticism as they were not controlled by third-party experts who enjoyed name recognition and good reputation in Marseille. The tribunal in Cádiz, which had presided over a settlement between Plauden's partners and their insurers, permitted Galain and Laquidain to seek reimbursement for some expenses that French maritime law considered general averages or uninsurable. This forced Plauden, through the *procureur* Émérigon, to argue a difficult position: that a French court should sustain a foreign court's decision, even if the settlement used different accounting rules and a different definition of general average than merchants and experts applied in Marseille.

---

[104] '[…] para el restablecimiento de un Navio deteriorado por la injuria del tiempo, que para la precisa reparación de un daño originado por la mar.' Ibid.

[105] Ibid.

[106] Letter to 'Francisco Antonio de Plauden' from 'Aubin Fruchard & Co' (22 January 1787): AGI, Consulados, 502.

V. Absurd geographies

By the end of 1787, Francisco Antonio de Plauden had new representation appointed for him. In Cádiz, Gerónimo Quintanilla Pérez took charge of remitting documents and following the progress of the suit.[107] Quintanilla was serving in the role of *contador* (accountant), designated by the *Real Tribunal del Consulado* in Cádiz to sort out the accounts of the three partners, Plauden, Galain, and Laquidain, because Laquidain had declared bankruptcy following *Nuestra Señora*'s misfortunes. If Plauden had any outstanding debts to his former partner, Quintanilla was to find them and funnel some of the insurance money Plauden was awarded to Laquidain's creditors, thus canceling a few of both of their debts.[108] In Marseille, *Timon David Brothers*, merchants in the Levantine trade, took over Plauden's case. While advertising their own precision and zeal, these new agents were not hopeful of reaching a conclusion quickly. 'This is not business to be handled in one day. The obstinacy of the insurers will only cede to the irrevocability of a judgment of *Parlement*.'[109] That is, *Timon David Brothers* foresaw an appeal and believed that, due to the complexity of the case and the irregularity of its documentation, only the decision of the regional *Parlement* could put an end to the affair.

As the correspondence concerning the affair of *Nuestra Señora del Rosario* shifted from communication between Francisco Antonio de Plauden and the Payans to letters passing between Quintanilla and *Timon David Brothers*, new frictions became apparent that had in fact been at work all along. These frictions came into the foreground because unlike Plauden and the Payans, Quintanilla and the Timon David partners had no common language. The French merchants called attention to this obstacle in their first letter to their new correspondent, citing the language barrier as a reason for their delay: 'We did not respond right away. The Spanish language being unfamiliar to us, we have been obliged to resort to an interpreter, who explained to us the contents' of Quintanilla's introductory letter.[110] They offered to correspond with Quintanilla in Italian instead

---

[107] Letter to 'Jerome Quintanilla Perez' from 'Timon David frères' (23 December 1787): AGI, Consulados, 502. The spelling of Quintanilla's name in the body of the text is taken from this official document: Juan Moreno and Simon Haedo, 'Contadores por S.M. del Comercio Libre à Indias en la Real Aduana de esta Cuidad' (1 September 1788): AGI, Consulados, 502.

[108] Letter to 'Timon David hermanos' from 'Yturralde, Yturbe, y Galain' (27 January 1792): AGI, Consulados, 502.

[109] 'Ceci n'est point l'affaire d'un jour. L'opiniatreté des assureurs ne le cedera qu'à l'irrevocabilité d'un arret du Parlement.' Letter to 'Jerome Quintanilla Perez' from 'Timon David frères' (23 December 1787): AGI, Consulados, 502.

[110] 'Nous n'avons pas repondu sur le champ attendu que l'idiome espagnol ne nous étant pas familier nous avons été oblige de recourir à un interprete qui nous en a expliqué

and would repeat this offer several times, reminding him that his client was paying for their translation fees.[111] Quintanilla apparently never accepted this solution. Certain letters from *Timon David Brothers* are copied and translated into Spanish, suggesting that their native language was not one Quintanilla felt comfortable reading or writing.

Translation between Spanish and French imposed concrete, quantifiable costs – translation fees and taxes paid in the consular office in Cádiz to have Plauden's packet of legal documents translated into French and properly initialed. It also brought less tangible disadvantages. From late 1787, Plauden's messages to his agents in Marseille were mediated by Quintanilla as well as an interpreter, a situation that demonstrably delayed communications and increased the risk that the French agents would mistake his orders. It may have limited their ability to keep their legal strategy secret. Whether *Timon David Brothers* used the services of a court interpreter (*interprète-juré*) – one of several that the Admiralty retained – or used a regular clerk or merchant, whoever translated Quintanilla's letters from Castilian could have leaked information, alerting the underwriters' representatives to the next piece of evidence or argument their adversaries were likely to present.

At this moment, as the work of collecting evidence had been handed off to Quintanilla and *Timon David Brothers*, the case took a surprising turn. Quintanilla's letters in 1788 and 1789 show him realizing that Captain Plauden did not know about all of the insurance policies that *Payan and Sons* had signed in his name. Five years previously, in 1783, Plauden had left San Sebastián before the Payans' final letter arrived. As a result, the captain knew about four of the insurance policies closed in Marseille, but not about the fifth, which obliged him to pay a higher premium and included terms that differed in small but essential ways from the other four contracts. The contracts signed before Plauden's departure read:

> 'D'ordre et pour compte du Capitaine François-Antoine de Plauden […] sur son tiers d'intérêt sur Corps, Armement, Avituaillement, salaires à l'Équipage, dernieres expéditions & entiere mise hors de la Frégate […] de sortie du Port du Passage, passant à la Corogne, jusqu'à la Guaira, & de retour en tel Port d'Espagne où le Navire accompliroit son Registre.'[112]

---

le contenu.' Letter to 'Jerome Quintanilla Perez' from 'Timon David frères' (23 December 1787): AGI, Consulados, 502.

[111] Letter to 'M. Gerome Quintanilla Pere à Cadise' from 'MM. Timon David frères' (17 November 1790): AGI, Consulados, 502.

[112] Émérigon, 'À Monsieur le Lieutenant-Général en L'Amirauté' (27 October 1786), 1: AGI, Consulados, 502.

> 'By order and for the account of Captain Francisco Antonio de Plauden […] on his third of the interest in the Body, Armament, Provisions, Salaries of the Crew, last shipments & all expenses to outfit the Frigate […] departing from Puerto de Pasajes, passing by La Coruña, until La Guaira, & returning to whichever Port in Spain where the Ship may complete its Register.'

The fifth policy, covering the final 8,200 *livres tournois*, contained a mistake. It said that the ship was covered 'departing from La Guaira or any other Port of the Province of La Coruña, until Pasajes or another Port of Spain.'[113] La Guaira was not in 'the Province of La Coruña,' Spain, but in South America. This policy said that the underwriters were responsible to cover any accident that *Nuestra Señora* experienced after leaving La Guaira or any other port in a Spanish province, until the ship's return to a port in Spain. The clause is absurd, but the danger to Plauden was that it could be interpreted as coverage only on the return voyage, which would give some of the insurers more reasons to deflate the repair expenses he claimed, particularly the careening of the ship in Porto Cabello that followed the outbound voyage. Even worse for the captain, the judge could decide that the policy, as written, covered a voyage between two Spanish ports, and since Plauden departed completely from this trajectory, the contract could be nullified. We can reason that the French brokers and underwriters understood the fifth policy as insurance for a round trip, since the 6% rate was higher than the rate on the other four policies signed just months previously for round trips. But this conclusion then calls into question whether some or most of the underwriters could find La Guaira on a map!

It is hard to imagine such a miscommunication and misunderstanding occurring had Francisco Plauden not been purchasing insurance at long distance in a port that did not underwrite many ships heading to South American destinations. There are recorded mix-ups of place names that were more familiar to merchants in Marseille. For example, in 1777, the Admiralty Court of Marseille passed a sentence in a dispute over an insurance policy that should have covered a voyage from Stockholm to Tunis, with permission to stop in Mahon, but actually said, 'departing from Stockholm, until Mahon, permission to touch at Tunis.'[114] It does not seem likely that factual errors would be common in such important and relatively brief documents as insurance policies. Plauden was evidently shocked to learn of the slip, which 'comes from some irregular operation of Payan's.'[115] He complained that his agents' actions did not match his instructions or the information they were feeding back. This was not strictly true. The letter from *Payan*

---

[113] '[…] de sortie de la Guaira ou tout autre Port de la Province de Corogne, jusqu'au Passage ou tel autre Port d'Espagne.' Ibid.

[114] '[…] de sortie de Stokholm, jusqu'à Mahon, permis de toucher à Tunis.' *Émérigon* (n. 35), vol. 2, Chapter 13, Section 12, 52.

[115] This document is annotated by Captain Plauden: '[…] proviene de algúna operación irregular de Payan.' Unsigned, undated legal memorandum, AGI, Consulados, 502.

and Sons that reached San Sebastián after Plauden made sail mentioned this overlooked fifth policy, and Maria Martina de Chegoyen repeated her understanding of the insurance coverage in her response to the Payans, citing the 8,200 *livres* at 6% that were missing in her husband's accounting.[116] The information contained in the Payans' final letter had simply not caught up to Captain Plauden until some time after he reached Cádiz. (Perhaps he should have been in better contact with his wife.)

Although they were not solely responsible for the faulty translation of Plauden's need for insurance into contract terms, given Jean Payan's career in trade within the Spanish Empire, he was the most likely of all the actors involved in Marseille to catch such a mistake. It is difficult to know how this equivocal contract term affected the trial, since it was a risk that Plauden and his legal advisors discussed in private letters, but not a point that Émérigon the *procureur* responded to in his published factums. Perceived by Captain Plauden as a serious breach of trust, the error seems to have broken up his relationship with *Payan and Sons*. Quintanilla slighted the French partners' honor and praised Plauden's repeated demonstrations of 'good faith' (*la buena fe*) in contrast to their duplicitousness.[117]

VI. Expectations halfway met

All through 1789 and 1790 there was little progress in the case. Letters exchanged between *Timon David Brothers* and Quintanilla became repetitive and frustrated: the Spanish agent denying that the captain had knowledge of the final insurance policy in his name, asserting his sole right to claim the money, contrasting how speedily the *Real Tribunal del Consulado* in Cádiz wrapped up the affair of *Nuestra Señora* with how things dragged on and on in Marseille; and the French merchants demanding more documents from Setúbal and Cádiz, always in French translation. Political events in France, astonishingly, barely leaked into their correspondence.

Finally, 6 April 1791: an outcome. At last, *Timon David Brothers* were finally able to report that the Admiralty Court had reached a decision on the reimbursable damages to *Nuestra Señora*. Captain Plauden was due much less than the 45,000 *livres tournois* he claimed. According to the final sentence, the insurers were responsible to pay about 45% of the value they had underwritten, and

[116] Letter to 'S. Payan padre hijos' from 'Maria Martina de Chegoyen, Esposa de Francisco Antoinio Plauden' (3 September or 3 November 1783): AGI, Consulados, 502.

[117] Letter to 'Timon David Hermanos' from unknown sender, probably Quintanilla, (18 September 1788): AGI, Consulados, 502.

in total Captain Plauden was entitled to about 20,500 *livres*.[118] *Timon David Brothers* would delay trying to collect until they knew whether Plauden wanted to appeal, but they advised him to take the settlement:

> 'Nous vous observons que depuis le temps que cette affaire dure, une grande partie des assureurs, ou sont Morts ou ont été derangés dans leurs affaires […] si vous appellies de ce Jugement il se pourroit qu'avant sa Conclusion les assureurs qui restent encore ou Mourissoit ou devinssent insolvables ainsi si vous voules nous en croire vous adereries a ce reglement qui vous mettrez a meme de toucher une somme qui est encore Consequante.'[119]

> 'We observe to you that during the time that this affair has been going on, a large part of the insurers have either died or their affairs have been interrupted […] if you were to appeal this Judgment it could be that before its Conclusion the insurers who are still left might die or might become insolvent. Thus, if you want to trust in us, you would adhere to this judgment, which will place in your hands a sum that is still Consequential.'

A tone of defeated compliance, 'in view of everything' (*en vista de todo*), hung over Quintanilla's order to go ahead with collection: 'In view of everything, I must alert you that I am satisfied and I agree to the aforementioned ruling, and as a consequence you may make use of it to proceed with the receipt and collection from these Insurers the amounts that you indicate to me in the aforementioned regulation.'[120] A small marginal note written and signed by Plauden on this copy of Quintanilla's letter shows that he was alive in the spring of 1791 and aware of the verdict on his case.

Perhaps in the high rate of attrition among the insurers – one dead, two 'absent,' and two 'insolvent,' who together owed Plauden more than 5,500 *livres* – we perceive the impact of the French Revolution.[121] One of the few hints of the changing times in *Timon David Brothers*' letters are references to how the circulation of *assignats* in France was affecting how they would remit Plauden's insurance money to Spain.[122] Inflation remained moderate, but notarial records indicate that creditors were demanding the repayment of long-term loans: lenders

---

[118] Letter to 'M. Gerome Quintanilla Pere à Cadise' from 'MM. Timon David frères' (16 January 1792): AGI, Consulados, 502.

[119] Letter to 'M. Gerome Quintanilla Perez à Cadise' from 'MM. Timon David frères' (6 April 1791): AGI, Consulados, 502.

[120] 'En vista de todo devo prevenir a v[uestras] m[ercede]s me conformo y passo por la citada providencia, y en su consecuencia se servirán v[uestras] m[ercede]s proceder al recivo y cobra de essos S[eño]res. Aseguradores de las cantidades que me señalan en el citado reglamento.' Letter to 'Timon David l'ainé' from 'Geronimo Quintanilla' (13 May 1791): AGI, Consulados, 502.

[121] Letter to 'M. Gerome Quintanilla Pere à Cadise' from 'MM. Timon David frères' (16 January 1792): AGI, Consulados, 502.

[122] The assignats were bills or commercial paper introduced during the French Revolution. Originally, they were backed by confiscated Church properties. Citizens could exchange them for goods or services, or for hard currency, at a discount that increasing cut

expected future inflation, and financial markets were already reacting to a political situation that looked highly unstable.[123] *Timon David Brothers*' conservative advice to Quintanilla to accept the Admiralty's decision without appeal may have been touched by the same fear for the future. The dissolution of the *Parlement* of Aix in September 1790 had also closed off the normal option to make an appeal. Even the powers of the tribunal where the case of *Nuestra Señora* had been tried were about to be dissolved. The Admiralty Court ruled on the *Nuestra Señora* affair in April 1791, and not long after, in September 1791, the Constituent Assembly abolished the Admiralty and redistributed its judicial competencies among district-level Tribunals of Commerce.

C. Conclusions

Spain's decree of 'Free Trade' set the stage for three Basque partners' commercial venture, and the French Revolution brought the suit that settled scores following the voyage to an abrupt close. Although the Admiralty Court's tenure had ended, Francisco Antonio de Plauden's did not. On 22 December 1792, the Consulado licensed him as a supercargo on the polacre *Jesús María y José*, bound for Veracruz.[124] In 1793, in the new Tribunal of Commerce, Émérigon was again representing *Payan and Sons*.[125] He was matched against the *procureur* Arnaud for a second time as the Payans sued underwriters in Marseille for insured losses on another Spanish ship.[126] The policy in question was a reinsurance the Payans had negotiated on behalf of Dominique Béhic. Some careers and professional friendships evidently survived past the end of the exhausting affair of *Nuestra Señora.*

On 2 September 1791, *Payan and Sons* as well as several of the insurers of *Nuestra Señora* signed a petition warning the French National Assembly not to declare the equality of people of color, not to apply the Revolutionary constitution of France to the colonies, and above all, not to abolish slavery. These representatives of Marseille's commercial interests lamented their 'business enterprises suspended, [their] credits lost, and [their] fortunes reduced to nothing' by

---

into the assignats' face value. *Rebecca Spang*, Stuff and Money in the Time of the French Revolution (2017), 154–159.

[123] *Philip Hoffman*, *Gilles Postel-Vinay* and *Jean-Laurent Rosenthal*, Priceless Markets: The Political Economy of Credit in Paris, 1660–1870 (2000), 189, Figure 8.1 at 187.

[124] A supercargo represented the owner of shipment of merchandise. He traveled with the ship to oversee the sale of his employer's goods. 'Licencia de embarque' (22 December 1792): AGI, Indiferente, 2116, N.70.

[125] Émérigon, 'Aux citoyens juges du Tribunal de Commerce' (4 March 1793/Year 2), 1, ADBR, 140 J 201.

[126] Ibid., 5.

growing fears that such revolutionary legislation could be in the offing.[127] Meant to be rhetorical, their complaints were actually prophetic. Only days earlier, African slaves on the island of Saint Domingue began a massive uprising that, years later, would strip away France's richest colony.

This essay has focused on a financial connection between Marseille, Cádiz, and Spanish America that is not often emphasized in the history of France's most important Mediterranean port. Among the lines of business of underwriters in Marseille, insurance coverage on voyages to South America was very marginal. The peregrinations of *Nuestra Señora* were even at the margins of the insurers' geographic knowledge. To find Payan and his sons standing shoulder-to-shoulder with the 'commerce' of Marseille (the city's foremost merchants) shows that they and the insurers of the frigate in this case study were not minor characters in the economy of the port. Marseille's smaller financial interests complemented the major sources of its commercial wealth, the Caribbean and the Levant.

In the litigation of a Spanish insurance claim in France, we have seen that a complex set of relationships linked Marseille to predominantly French houses in Cádiz, and to merchants in Basque Country. Although the negotiation of insurance coverage for a voyage to La Guaira was an outlier in Marseille's insurance market, the pre-existing personal connections that Captain Plauden underlined in his initial request for coverage meant that agents in Marseille had just enough information to execute an insurance transaction on his behalf at a distance. Only when Plauden was compelled to launch an insurance claim after a series of accidents did we perceive that making a financial connection across distances in the early-modern world added many complications and transaction costs.

Comparing the speed with which Plauden's partners' claim was settled in Spain with the lengthy process in France, the conclusion comes to the fore that while there were broad similarities between each 'national' system of maritime law, rules of procedure differed from jurisdiction to jurisdiction, as did some insurance statutes, even in essential areas. During the trial, Plauden and his lawyers were simply worn out with requests from Marseille for more evidence and with requests to have the existing proofs redressed in a different form. Translated documents were common and acceptable, but had to be authenticated by a state-appointed authority: in this case, by the French Consul in Cádiz. The case of *Nuestra Señora* shows that some questions very basic to long-distance trade had different solutions in French and in Spanish maritime law and could be the sub-

[127] 'Nous croyons nos entreprises suspendues, nos créances perdues et nos fortunes anéanties.' 'Adresse du commerce de Marseille à l'Assemblée nationale' (Marseille 1791), 2. This copy is located in: Bibliothèque nationale de France, département Philosophie, histoire, sciences de l'homme, 8-LK9-171 (A). A digital copy is available on Gallica BNF.

ject of ongoing debate within merchant communities. These fraught issues included the portion of the risk of a venture an insured merchant had to bear himself, the claims filing period in cases of partial loss (*avaries*), and the definition of gross as opposed to particular averages. Viewed from inside this case, insurance law in early-modern Europe could not be characterized as a streamlined, homogenous set of rules. Subtle divergences in the law loomed very large in merchant litigation and created friction for merchants moving between languages and legal environments to complete complex financial transactions.

Governance of General Average in the Netherlands in the Nineteenth Century: A Backward Development?

By *Sabine Go*[*]

A. Introduction

General average refers to situations where a master or his crew deliberately jettison cargo or damage a ship in order to salvage the remainder of the cargo and the ship. The damages thus incurred will then be borne by all those benefitting from the action, not just by the individual owner of the merchandise or the ship. Generally, in the Low Countries, if a master decided to jettison cargo to lighten the ship in order to outrun pirates, the costs of the jettisoned cargo would be considered general average and all parties to the voyage would then contribute to the costs. Another well-known example of general average was when a master ordered the mast to be cut during a storm. If the action was deliberate and with the express intention to prevent further damage to the ship, cargo and crew, the damages would be distributed among merchants and the shipowner.[1]

---

[*] The research for this essay was conducted thanks to funding from the European Research Council. ERC Grant agreement No. 724544: AveTransRisk. Average – Transaction Costs and Risk Management during the First Globalization (Sixteenth–Eighteenth Centuries). I am indebted to Maria Fusaro, Gijs Dreijer, Guido Rossi and participants of the workshop 'Governance of Average – Transaction Costs and Risk Management during the First Globalization (Sixteenth–Eighteenth Centuries)' on 13 December 2019 at the University of Exeter for very insightful comments on earlier versions of this paper.

[1] See *Ivo Schöffer*, De vonnissen in de avarij-grosse van de Kamer van Assurantie en Avarij te Amsterdam in de 19e eeuw, (1956) 26 Economisch-Historisch Jaarboek 72–132; *Johan P. van Niekerk*, The development of the principles of insurance law in the Netherlands from 1500–1800, 2 vols. (1998); *Sabine C.P.J. Go*, General Average Adjustments in Amsterdam: Reinforcing Authority through Transparency and Accountability (late sixteenth–early seventeenth century), in: Maria Fusaro (ed.), Sharing Risk: General Average, 6th–21st Centuries (forthcoming, 2020).

General average has long been neglected by academics or at times even mixed up or lumped together with marine insurance, and although they both relate to maritime trade, they are distinctly different concepts.[2] Marine insurance is taken out by an individual merchant on his merchandise or by shipowners on the hull of a specific ship. A contract, the insurance policy, is drawn up in advance, a premium is paid by the insured to the underwriter and, in case of an accident, the insured can claim up to the amount of the insured merchandise or hull. With general average, no contract was agreed upon or signed beforehand. General average was a default rule, based on mutuality and generally accepted by merchants, shipowners and authorities. General average was only relevant in case more parties were involved. When a ship and cargo were owned by the same party, general average was, of course, not applicable. This was, for example, the case with the Dutch East India Company in the early modern period and the *Nederlandsche Handel-Maatschappij* in the nineteenth century.[3] At the other end of the spectrum, with the smallest of enterprises, general average was most probably not, or hardly ever, used, as here the ship and the (usually very modest) amount and value of cargo would be owned by the master/shipowner.[4] General average was most relevant for the 'middle section' of the industry, all those who were dependent on other parties in conducting their daily business: shipowners who needed cargo from independent merchants and merchants seeking space in a cargo hold of a ship to transport their goods.

Although general average was a generally accepted concept in the northern Low Countries, conflicts and disputes as to whether the incident was in fact general average, or whether certain damages should be accepted as general average costs, or what the correct value of the merchandise or ship were, continued for a long time. Prior to the seventeenth century, disputes regarding general average would be adjudicated by 'wise men'.[5] At the end of the sixteenth century, the Amsterdam authorities established the Chamber of Insurance and Average. From then on, this subsidiary court would deal with all marine insurance and general

---

[2] For example, Spooner, mixed up marine insurance and general average cases of the Amsterdam Chamber of Insurance, *Frank C. Spooner*, Risks at Sea. Amsterdam Insurance and Maritime Europe, 1766–1780 (1983), 59 f.; *Karel Davids*, Zekerheidsregelingen in de scheepvaart en het landtransport, 1500–1800, in: Jacques van Gerwen and Marco H. van Leeuwen (eds.), Studies over zekerheidsarrangementen, risico's, risicobestrijding en verzekeringen in Nederland vanaf de Middeleeuwen (1998), 183–202, 199; *Schöffer* (n. 1).

[3] *Chris van Eeghen*, Over zalf- en hoeden-, over slaven- over kunst- en boekhandel in het Amsterdam der 18de eeuw, (1944) 40 Amstelodamum 171–196; *Willem M.F. Mansvelt*, Geschiedenis van de Nederlandsche Handelmaatschappij 1824–1924, 2 vols. (1924).

[4] In the peat colonies in the Northern Low Countries, shipowners would participate in mutual contracts to cover (part of) the financial consequences of misfortunes: *Sabine C.P.J. Go*, Mutual Marine Insurance in the province of Groningen, (2005) 17 International Journal of Maritime History 123–149.

[5] *Van Niekerk* (n. 1), vol. 1, 60–79.

average cases.[6] Thus, governance of these two distinctly different methods of risk management converged, only to go their separate ways in a peculiar manner two centuries later. In the nineteenth century, marine insurance was incorporated in the newly instated *Wetboek van Koophandel* of 1838 (Dutch Commercial Code) and for the most part of the nineteenth century and beyond, conflicts were handled by the District Court (*Arrondissementsrechtbank*). In Amsterdam – still then the dominant port of the Netherlands – the governance of general average was in effect dealt with outside the scope of the Dutch Commercial Code. The final report of a general average case (the so-called *dispach*) would be composed by an average adjuster (*dispacheur*), based on a standardized format (the *Amsterdamsch Compromis*, the Amsterdam Agreement)[7] and then ratified by the Average-Committee of Amsterdam. This Committee would also deal with conflicts regarding a *dispach*.[8] Only in cases where the Committee was unable to settle the matter between the parties involved did the Commercial Code come into play and the case would go to the District Court.[9] In effect, this construction meant that the governance of general average went back to the judgment of 'wise men' – a form of self-governance. This seems like an anomaly, considering conventional institutional theories regarding institutional developments; a backward institutional development – but was it?

Institutional development is, like institutions themselves, the focus of many heated debates among scholars of various disciplines. Generally, scholars agree that institutions affect economic choices, both on an individual and aggregate level and thus they affect economic development. However, it is still debated how and why institutions develop the way they do, which institutions advance economic growth and which tend to impede growth and development. An im-

[6] Initially, the Chamber was called the Chamber of Insurance. Within its first year of existence, the court's responsibilities were expanded to include general average cases and hence its name was changed. For more on the Chamber of Insurance and Average in Amsterdam: *Schöffer* (n. 1); *Sabine C.P.J. Go*, On Governance Structures and Maritime Conflict Resolution in Early Modern Amsterdam: The Case of the Chamber of Insurance and Average (Sixteenth to Eighteenth Centuries), (2017) 5 Comparative Legal History 107–124.

[7] Hereafter: Compromis or Amsterdam Agreement.

[8] Also spelled dispatch and dispache.

[9] Stadsarchief Amsterdam (SAA): Archief van de Avarij Commissie Amsterdam, Toegang 1508 (Avarij Commissie, T1508), L. Hardenberg, De Avarij-Commissie te Amsterdam (1811–1982); *Ernst J. Asser*, Het Amsterdamsch Compromis voor de regeling der Avarij Grosse en Avarij Particulier op de lading (1879); *Carel D. Asser*, *Willem E.J. Berg van Dussen Muilkerk*, *Michael H. Godefroi*, *Jan W. Tydeman* and *Jeronimo de Vries Jz.*, Wetboek van Koophandel met aantekeningen van (1845).

portant issue, that has been explained by Avner Greif in his article on the eleventh-century Maghribi traders, relates to contract enforcement mechanisms.[10] Without some sort of contract enforcement mechanism, a merchant could not be certain that his counterpart to a transaction would honour his obligations, and the merchant would then not agree to a transaction. It was thus vital to create mechanisms that would create this trust and thus enable trade and commerce.[11] There are several kinds of enforcement mechanism: informal, quasi-formal and formal. Doing business within a trusted circle without external enforcement is an example of an informal enforcement mechanism. Arbitration can be considered a quasi-formal type of mechanism.[12] Having a conflict settled by a law court is an example of a formal enforcement mechanism, the opposite of informal enforcement on the continuum of enforcement mechanisms.[13] Most scholars will agree that, in general, these enforcement institutions develop from informal to more formal in time.[14] Therefore, following, for example, Douglass C. North, Greif and Sheilagh Ogilvie, one would expect the enforcement of general average to become more regulated with laws, regulations and formalized procedures. That does not seem to have been the case – the Commercial Code, the formal law, was in effect avoided by the combination of the Amsterdam Agreement and the Average-Committee of Amsterdam.[15] However, as is often the case with general average, the issue is a bit more complicated.

Whereas marine insurance was highly and formally regulated in early modern Amsterdam with ordinances and a great number of additions and alterations, general average was not.[16] The Amsterdam authorities stated that general average was not regulated by means of an ordinance as general average cases were so

---

[10] *Avner Greif*, Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition, (1993) 83 The American Economic Review 525–548; *idem*, The Maghribi Traders: A Reappraisal?, (2012) 65 The Economic History Review 445–469.

[11] *Avner Greif*, The Fundamental Problem of Exchange: A Research Agenda in Historical Institutional Analysis, (2000) 4 European Review of Economic History 251–284.

[12] Although this is debated. See *Sheilagh Ogilvie*, Institutions and European Trade: Merchant Guilds, 1000–1800 (2011), 299.

[13] *Greif*, Contract Enforceability (n. 10); *idem*, Cultural Beliefs and the Organization of Society: A Historical and Theoretical Reflection on Collectivist and Individualist Societies, (1994) 102 Journal of Political Economy 912–950; *idem*, The Maghribi Traders (n. 10).

[14] *Douglass C. North*, Institutions, Institutional Change, and Economic Performance. The Political Economy of Institutions and Decisions (1990); *idem*, Structure and Change in Economic History (1981); *Avner Greif*, Institutions and the Path to the Modern Economy. Lessons from Medieval Trade (2006); *idem*, Contract Enforceability (n. 10).

[15] SAA, Avarij Commissie, T1508, L. Hardenberg, De Avarij-Commissie; *Asser et al.* (n. 9).

[16] *Hermanus Noordkerk*, Handvesten ofte privilegiën ende octroyen mitsgaders willekeuren, costuimen, ordonnantiën en handelingen der stad Amsterdam, 5 vols. (Amsterdam 1748), vol. 2, 667; *Schöffer* (n. 1), 73.

varied and too complex that the assessment was left to the expertise of the Commissioners of the Chamber of Insurance and Average.[17] Although both the insurance and general average verdicts were formally enforceable and could be appealed at the city's principal court, the *Schepenbank* (Eschevin Court), it would seem that the general average verdicts had a different status than the Chamber's verdicts regarding marine insurance.[18] The insurance cases that were dealt with by the Chamber always related to conflicts: Underwriters refusing to pay out a claim, insureds who had not paid the premium that was due, etc. General average cases on the other hand, were not *per se* related to conflicts or disputes – they were *ex post* settlements between parties that had been part of an unfortunate journey. There is a similar situation in contemporary Tokyo. In a study regarding the Tuna Court in Tokyo, Eric A. Feldman concluded that even though the Tuna Court has a formal set-up, with regulations, a judge and official verdicts, it is not considered as a formal court by those involved, but rather as an *ex post* price correction. This concurs with the setting of the institution: The Tokyo Tuna Market can be characterized as a close-knit community and trading in a repeated game setting.[19] Greif has emphasized the importance of informal enforcement mechanisms within this type of setting.[20] The enforcement mechanism of the Tuna Court, although it may appear as formal, is in fact perceived as an informal one by those involved in it. Going back to our early modern Chamber of Insurance, the same may well have been valid for the general average rulings of the Chamber of Insurance too: merchants and shipowners relied on the Chamber for an *ex post* handling or settlement of an informal, generally accepted rule. Lisa Bernstein has argued that, based on her research concerning the contemporary cotton industry, informal mechanisms may accomplish results that are not always possible with formal enforcement mechanisms.[21] I shall argue that the institutional development of the governance of general average in the nineteenth century is not the anomaly that it may at first seem. It is not only the formal structure

[17] *Noordkerk* (n. 16), vol. 1, 667; *Marinus. Th. Goudsmit*, Geschiedenis van het Nederlandsche (1882), 292; *Jan Wagenaar*, Amsterdam in zijne opkomst, aanwas, geschiedenissen, voorregten, koophandel, gebouwen, kerkenstaat, schoolen, schutterij, gilden en regeringen, vol. 2 (Amsterdam 1765), 439; *Van Niekerk* (n. 1), vol. 1, 208–211; *Schöffer* (n. 1); *Sabine C.P.J. Go*, Marine Insurance in the Netherlands 1600–1870: A Comparative Institutional Approach (2009); *idem*, The Chamber of Insurance and Average: A New Phase in Formal Contract Enforcement (Late Sixteenth and Seventeenth Centuries), (2013) 3 Enterprise and Society 511–543; *idem* (n. 6).

[18] Nederlands Economisch-Historisch Archief (NEHA), Bijzondere Collecties (BC) 277, Archief College van de Commissarissen van Assurantie (1598–1621) (Archief Commissarissen), f. 29r; *Van Niekerk* (n. 1), vol. 1, 218–230; *Wagenaar* (n. 17), vol. 2, 439.

[19] *Eric A. Feldman*, The Tuna Court Law and Norms in the World's Premier Fish Market, (2006) 94 California Law Review 313–369.

[20] *Greif*, Contract Enforceability (n. 10).

[21] *Lisa Bernstein*, Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions, (2001) 99 Michigan Law Review 1724–1790.

of an enforcement mechanism that is relevant, but also the way the institution is perceived by those who are affected by its enforcement.[22] Before turning to general average in the nineteenth century, I will first explain the background, guidelines and procedures of general average, and continue with governance structures in the seventeenth and eighteenth centuries. I will then focus on the governance of general average in the Netherlands during the nineteenth century before concluding.

B. The background and mechanisms of general average in the Low Countries

General average has an impressive lineage, dating back to antiquity, even though the term itself was not in use until early modern times. In parts of medieval Europe, the concept of mutuality and contributions following an intentional act leading to loss was codified in a number of laws. While the concept of general average was already known in the Low Countries as present in the Corpus Iuris Civilis, the first significant description in the Low Countries came in 1551 with an Ordinance of Charles V.[23] It was then first described as '*Groote Avarye*', specifying that these types of damages were to be borne by the owners of the ship and cargo 'in accordance with maritime custom'.[24] A little over a decade later, another Ordinance promulgated by Philip II extended the regulations on general average, providing guidelines for those directly involved. It stated, for example, that the master was obliged to first jettison the goods that were heaviest and lowest in price.[25] This *Placcaat* (1563) formed the basis for one of the most well-known Dutch treatises on general average, the *Tractaet van Avarien*, by Quintijn Weytsen.[26] Weytsen provided a clear definition of general average, making a

---

[22] *Go* (n. 17), 513.

[23] *Van Niekerk* (n. 1), vol. 1, 60; *Edda Frankot*, Of Laws of Ships and Shipmen, Medieval Maritime Law and its Practice in Urban Northern Europe (2012); *Gijs Dreijer*, Maritime Averages and the complexity of risk management in sixteenth-century Antwerp, (2020) 17/2 Tijdschrift voor Sociale en Economische Geschiedenis – Low Countries Journal of Economic History 31–53.

[24] 1551 Ordonnance, Arts. 1 and 42, edited in *Jules Lameere*, Recueil des ordonnances des Pays-Bas. Deuxième série, 1506–1700, vol. 6 (1922), 163–177. See also *Van Niekerk* (n. 1), vol. 1, 61; *Jolien A. Kruit*, General average – general principle plus varying practical application equals uniformity?, (2015) 21 Journal of International Maritime Law 190–202.

[25] *Schöffer* (n. 1), 77.

[26] Van Schip-breecking, Zee-werpinge, ende Avaryen of the Placcaat of 1563, in: Jean-Marie Pardessus (ed.), Collection de lois maritimes antérieures au XVIIIe siècle, vol. 4 (1828), 64–102*; Cornelis van Nieuwstadt*, Curiae Hollandiae Zlandiae Dicisiones (Leiden 1617), which includes *Quintijn Weytsen*, Een Tractaet van Avarien, 201–230; *G. Dreijer* and *O. Vervaart*, Een Tractaet van Avarien 1617 Quityn Weytsen (1517–1564), (2019) 21/2 Pro Memorie 38–41.

distinction between general average and other forms of average, and describing procedural standards. He defined general average as 'the communal contribution of goods, present in the ship, to help carry the loss of some merchants or of the shipper's goods, voluntarily sacrificed to salvage life, ship and goods' ('Avarie is ghemeene contributie, van goeden inden scheepe bevonden, om te helpen draghen t' verlies van eenige Coop-lieden ofte Schippers goeden ghewillichlijck gebuert, om lijf, schip ende goet te salveren').[27] This definition was in general use throughout the seventeenth and eighteenth centuries. Weytsen also listed which conditions had to be met in order to file a general average claim, for example, entering the bill of lading as evidence.[28]

However, Weytsen's primary contribution to the development of general average and its legal setting was identifying situations in which general average most frequently occurred. By the time Weytsen wrote his *Tractaet*, general average incorporated far more than the Rhodian concept of jettison. The most common occurrences of general average of course still included the jettison of goods (*werpen*), for example to outrun pirates and the cutting of the mast (*kerven*) during a storm. Other less obvious situations were now also acknowledged, such as the costs of pilotage exceeding a certain amount, negotiations with pirates or privateers or the financial consequences of deliberately beaching a ship. In spite of Weytsen's efforts, there were debates about whether certain damages should be accepted 'into general average' – for example, if a pirate stole flasks of wine, could that be considered general average or should this be considered as particular average (borne by the owner of the wine) because the pirate forcibly took the wine rather than having it given to him voluntarily by the master? Was a rope deliberately cut or did it break during a storm? Merchants were known to blame the incident on deficiencies of the ship or the lack of skills of the master in order to shift the damages to the shipowner.[29] And of course, there were debates about the value of the merchandise and the ship.[30]

A statement describing the incident, usually made by the ship's master and corroborated by members of his crew, was the basis of the general average procedure and calculations. The master was obliged to present this statement to the authorities in the first port he entered after the incident. He would describe the situation and invariably he had had to deal with the most vicious pirates or had been caught up in the fiercest of storms. The statement needed to confirm that there had indeed been immediate and unforeseeable danger. The statement often

[27] *Weytsen*, in: *Van Nieustadt* (n. 26), 204; *Schöffer* (n. 1), 74.
[28] *Dreijer/Vervaart* (n. 26).
[29] *Van Niekerk* (n. 1), vol. 1, 68.
[30] NEHA, BC 277, Archief Commissarissen, fos. 58r–69r.

included phrases that the master had convened with the crew and they had decided that, in order to salvage goods, ship and life, they had to cut the mast or jettison cargo or take whichever action they deemed necessary. The consultation of the crew was an essential part. In case merchants were accompanying their merchandise, they would be consulted as well, but this had become rare by the seventeenth century.[31]

It was crucial that the actions that were taken were not to preserve either cargo or ship: the objective had to have been to salvage both the ship and the cargo.[32] Although many statements made by the masters would include 'life, body, or persons', preserving 'life' was not always included as a specific objective in ordinances or regulations.[33] However, if a crewmember had been injured or lost his life while defending the ship, the compensation such as his pay and the funeral expenses would be included as general average damages.[34] Finally, the jettison, cutting or other actions taken by the master and crew had to have been successful in order to be accepted as general average. This was the case in Amsterdam and also in the second major port of the Republic, Rotterdam, as well as in various ports in Spain and Sweden. In some ports, general average could also be claimed if the deliberate actions had not had the desired effect.[35]

C. General average adjustment in Amsterdam in the seventeenth and eighteenth centuries

Until the end of the sixteenth century, general average was handled informally, by 'wise men', of whom we know very little.[36] This would change in 1598, when the Amsterdam municipal authorities were urged by 'numerous merchants'

---

[31] *Frankot* (n. 23), 8; *P. van der Hoeven*, Handleiding voor het opmaken van de Averijen (1854); *G. Dreijer*, Risk Management, Protection Costs and the Development of General Average in Sixteenth-Century Antwerp (forthcoming); NEHA, BC 277, Archief Commissarissen, fos. 47r–49r.

[32] NEHA, BC 277, Archief Commissarissen, fos. 47r, 48r, 56r, 58r.

[33] Weytsen does specifically include salvage of life, but in the Ordinance of 1551 and the 'guidelines' for the Commissioners of the Chamber of Insurance and Average of 1598, only ship and cargo are mentioned, NEHA, BC 277, Archief Commissarissen, fos. 47r–49r; *Van der Hoeven* (n. 31).

[34] NEHA, BC 277, Archief Commissarissen, f. 47r.

[35] In some ports the actions did not have to be successful. For example, the 1737 Ordonnances of Bilbao (Chapter 20, Art. 16) states that even in case a ship is lost, general average is applicable, *Johannes A. Molster*, Handboek voor de leer der avarijen voor die der Avarij-Grosse (1858) 17.

[36] These 'wise men' may have been Burgomasters or merchants, but we have no information regarding their background, their selection or whether they worked according to a set procedure or custom: *Van Niekerk* (n. 1), vol. 1, 70; SAA, Avarij Commissie, T1508, L. Hardenberg, De Avarij-Commissie.

to establish a specialized court to adjudicate conflicts regarding marine insurance. Marine insurance was most probably introduced in Amsterdam in the mid-sixteenth century by Mediterranean merchants who were familiar with the concept. As Amsterdam's trade and commerce experienced exceptional growth, so did the insurance market.[37] However, the authorities soon realized that insurance – a complex service and based on trust rather than a tangible product – led to numerous conflicts and disputes and was also prone to fraud. Thus, at the request of a number of merchants, they promulgated the city's first Insurance Ordinance and founded the Chamber of Insurance to enforce it.[38] The Commissioners of this Chamber from then on adjudicated all insurance cases that related to the trade and transport of Amsterdam. The municipality was apparently content with the Chamber's performance, as a few months after its foundation, general average adjustments were added to the Commissioners' responsibilities.[39] Although the Commissioners of the Chamber dealt with both insurance and general average cases, there were entirely separate administrations for general average and insurance cases.[40]

As mentioned before, the municipality did not issue an ordinance to regulate general average as, so it was stated, all general average cases were too diverse to regulate. The assessment of the incidents, the incurred damages, and the values of the various assets was thus left to the judgement and expertise of the Chamber's Commissioners. These Commissioners were usually prominent Amsterdam merchants, rather than legally educated professionals. It would seem that the position as Commissioner was considered honourable as the remuneration was rather modest.[41] The Chamber was an important part of the city's institutional infrastructure and its status was reiterated by the eminence of its Commissioners, as well as by its prominent location in the City Hall.[42]

The Commissioners based their judgements on a number of guidelines and rules. In addition, they used a table with standard amounts of rope per type of

---

[37] *Davids* (n. 2); *Go*, Marine Insurance (n. 17); *Van Niekerk* (n. 1); *Johannes P. Vergouwen*, De geschiedenis der Makelaardij in Assurantiën hier te lande tot 1813 (1945); *Violet Barbour*, Marine risks and insurance in the seventeenth century, (1928/1929) 1 Journal of Economic and Business History 561–596; *Wagenaar* (n. 17), vol. 2, 439; *Henry L.V. de Groote*, De zeeverzekering, in: Gustaaf Asaert et al. (eds.), Maritieme Geschiedenis der Nederlanden, vol. 1 (1976), 206–219.

[38] *Van Niekerk* (n. 1), vol. 1, 207–218; *Go* (n. 6), 95–117; *Schöffer* (n. 1).

[39] Subsequently, the name was altered to: Chamber of Insurance and Average, first used in 1606, Alteration, 20 June 1606, *Noordkerk* (n. 16), vol. 1, 656.

[40] *Schöffer* (n. 1); *Go*, Marine Insurance (n. 17), 111 f.

[41] *Go*, Marine Insurance (n. 17), 100–104.

[42] *Willem F.H. Oldewelt*, Amsterdams oudste Raadhuis, (1931) 28 Jaarboek Amstelodamum 13–29; *Adriaan W. Weissman*, Het Stadhuis te Amsterdam, (1923) 10 Maandblad Amstelodamum 117–119.

ship, and had guidelines for exchange rates.[43] The Commissioner's handling of a general average case would result in a *dispach*: a 'verdict' with all the relevant information about the incident, the parties involved and the final apportioning of the general average damages between merchant(s) and shipowner(s). This *dispach* had the legal standing of a formal verdict and was enforced by the city's Sheriff.[44]

The Commissioners worked according to a straightforward procedure: after a case had been put before the Chamber, all relevant documents would be collected. This included the aforementioned statement by the ship's master about the incident, confirmed by a number of his crew or others that had been present. Next, the values of the merchandise and the ship would be assessed. There were two sides to this coin: in case of the jettison of goods, merchants were prone to increase the value of their damages. To prevent shipowners to add the costs of 'normal' wear and tear of the ship to general average damages, the Commissioners could rely, for example, on the aforementioned table regarding the quantities and value of rope per type of ship.[45] The Commissioners would assess all the damages as stated by the shipowners and merchants and it was not uncommon for Commissioners to decrease the amounts given, or even to refuse certain items into the general average claim.[46]

As for the other side of the coin: when determining the value of the salvaged goods and the ship, merchants and shipowners would do the opposite and state the lowest possible value, as the final individual general average contribution depended on the value of the assets. The higher the value of the salvaged goods or the ship, the higher the individual general average contribution. Merchants were obliged to give a 'correct value' of their merchandise and needed to corroborate the stated value with invoices, the bill of lading and the insurance policy (if applicable). In Amsterdam, it was common to take the prevailing sales prices of the goods in the port of destination if the incident had taken place after the halfway mark of the journey. If the incident had taken place closer to the port of departure, the purchase price of the goods would be used.[47] The combination of the three types of document mentioned above (i.e., invoice, bill of lading and insurance policy) made fraudulent behaviour not impossible but very difficult.[48]

---

[43] NEHA, BC 277, Archief Commissarissen, f. 55r.

[44] Ordinance of 31 January 1598, Art. 36, *Noordkerk* (n. 16), vol. 1, 656; *Van Niekerk* (n. 1) vol. 1, 209, 218, 230.

[45] NEHA, BC 277, Archief Commissarissen, fos. 55r, 57r; *Schöffer* (n. 1).

[46] For example, see NEHA, BC 277, Archief Commissarissen, f. 62r.

[47] *Schöffer* (n. 1), 80.

[48] According to Schöffer, this meant that the values of the various goods in the records of the Chamber of Insurance are reliable sources regarding the prevailing values of the goods that were traded in Amsterdam: *Schöffer* (n. 1), 79 f.

If the Commissioners were in doubt, they could demand the merchant ratify the value under oath. If a merchant refused (by simply not showing up in court), the Commissioners could alter the value as they saw fit. In a case from 1764/1765, a merchant repeatedly ignored the court's summons, and then refused to swear under oath, after which the Commissioners decided to increase the value of his salvaged goods from 5,260 guilders to 20,000 guilders, thereby significantly increasing the merchant's contribution to the general average damages.[49]

Shipowners were obliged to state the value of their ship, in the state it arrived, as well as the amount of the freight that they should have been paid by the merchants. It was up to the merchants to choose between these two values – value of the ship or amount of freight – which would then be used for the calculation of the general average contribution for the shipowner. The value of the ship usually exceeded the value of the freight and therefore the Commissioners would generally use the ship's value for their calculations. This procedure was not as described by Weytsen, as he stated that both the value of the ship and the freight had to be taken into account to determine the contribution of the shipowner.[50] This meant, however, that the values of the merchandise had to be corrected for the freight fees. The freight fees would be deducted from the value of the goods, but they had to make additional adjustments in case freight was pre-paid and for freight for jettisoned goods. According to Ivo Schöffer, this was too complex and so the freight was usually entirely discounted.[51]

After having determined the damages and the total values, the fees for the Chamber's services were added. The fees were 10 cents per 100 guilders (i.e., 0.1%). This was lower than the fees for insurance cases, which were 0.3%.[52] This may well be an indication that general average cases had a different status than insurance disputes. Finally, a contribution to the poor of the city was added to round figures and so to make calculations easier.[53]

The general average contribution was determined by dividing the total damages by the total value of the assets of the journey. If, for example, the total damages were 1,569 guilders, 3 nickels and 15 pennies, and the value of the merchandise and the ship totalled 8,346 guilders and 16 nickels, the general average-contribution would be 18 guilders and 16 nickels per 100 guilders of value. In the *dispach* this would be stated as: 'every hundred guilders is to contribute

[49] Values that were adjusted by the Commissioners were threefold their (suspected) value. *Schöffer* (n. 1), 79; *J.G. Nanninga*, Bronnen tot de Levantsche Handel (1968), vol. 4, 534.

[50] *Weytsen* (n. 26).

[51] *Schöffer* (n. 1), 80.

[52] NEHA, BC 277, Archief Commissarissen, fos. 21r, 161r. Also, in the case of insurance cases, the fee for the servant was generally higher than in general average cases.

[53] For example, NEHA, BC 277, Archief Commissarissen, f. 58r; *Schöffer* (n. 1).

guilders 18–16' ('yeder hondert daerinne compt te dragen gul. 18–16'), followed by the names of the merchants and shipowner and their respective contribution.[54] Appeals were possible, before the Eschevin Court, at a cost of twelve guilders. Further appeals were to be directed at the *Hof van Holland* (High Court of Holland) and final appeals were possible at the *Hooge Raad* (Supreme Court).[55] There are numerous known cases of insurance disputes that were appealed at the *Hooge Raad*, for example when underwriters tried to avoid paying an insurance claim by delaying the process.[56] There is as yet no proof that general average cases were regularly appealed, but more research is necessary to determine if the Chamber's general average cases were often brought before higher courts.

D. The governance of general average in the nineteenth century

The invasion of French forces at the end of the eighteenth century ultimately led to the demise of the Dutch Republic and its intricate, fragmented institutional structure. In 1809, when the area that is now the Netherlands was part of the French Empire, the *Code Napoleon* was instated, which dealt the final blow to the various municipal regulations that had governed both marine insurance and general average.[57] By this time the Amsterdam Chamber of Insurance and Average, which had for two centuries adjudicated on general average and marine insurance matters, had formally ceased to exist. In practice, the Commissioners were requested by the municipal authorities to continue their adjudications as they were accustomed to do. So, in spite of the fact that the formal, regulatory framework was no longer valid, the Commissioners simply carried on as they had for almost 200 years. Even though the Chamber and the regulatory structure from the *Ancien Régime* were no longer active, there were no provisions in the *Code Napoleon*, or its successor, the *Code civil*, regarding general average. This would leave a regulatory and legal void.[58] In this period, from 1811 until 1838, marine insurance was adjudicated by the *Rechtbank van Koophandel* (Court of Commerce). The state of general average adjudications was far less clear. Two prominent lawyers, Mozes Salomon Asser and his son Tobias Asser, who were active as average adjusters, feared the regulatory vacuum and took the initiative to draft the so-called *Amsterdamsch Compromis* (Amsterdam Agreement) in

[54] This example from NEHA, BC 277, Archief Commissarissen, f. 61r.

[55] *Van Niekerk* (n. 1), vol. 1, 209, 218, 230; *Schöffer* (n. 1).

[56] To prevent this delaying tactic, the Chamber ruled that, regardless of an appeal, the claim had to be paid to the insured: *Van Niekerk* (n. 1), vol. 1, 217 f.; *Vergouwen* (n. 37).

[57] There were municipal ordonnances, not only in Amsterdam, but also, for example, in Middelburg (1600) and Rotterdam (1604). The Code Napoleon was supplanted by the Code civil in 1811. *Vergouwen* (n. 37); *Goudsmit* (n. 17), 315; *Asser* (n. 9).

[58] SAA, Avarij Commissie, T 1508, L. Hardenberg, *De Avarij-Commissie*; *Asser* (n. 9), 3 f.

1811. By signing this *Compromis* all parties agreed to commission an average adjuster, to hand over all relevant documents, and to cooperate with the adjusters during the process of adjusting. The *Amsterdamsch Compromis* did not follow the Dutch customs as practised during the *Ancien Régime* – that is, the practices that were known in Amsterdam. Rather, it complied with contemporary international customs and procedures – meaning those that were used in London, which by then had become the leading financial and insurance market.[59] The original version of the Amsterdam Agreement was published in 1811 and was soon endorsed by the Amsterdam Exchange, which meant that it was accepted practice.[60] This first version stated that the report composed by the average adjusters, the *dispach*, was a claim of the shipowner (*reder*) on the other parties involved (the owners of the cargo).[61]

Even though various parties lobbied for a specialized court to deal with the complex general average cases along the lines of the former Chamber of Insurance and Average, their pleas were to no avail.[62] It was again in Amsterdam that an initiative was taken by those dealing with general average adjustments in daily life: The *Avarij-Commissie te Amsterdam* (the Average-Committee of Amsterdam) was instated in the same year as the original version of the *Compromis* was drafted and endorsed.[63] The Committee was to homologate the *dispaches* that were composed by the average adjusters or, if applicable, adjudicate disputes regarding the apportionment among the various parties of the general average damages. As most of the archives of the Committee have unfortunately been lost, we have no information about the procedures, the number of cases dealt with or the general functioning of the *Avarij-Commissie*.[64]

When the French armies had marched south again, the newly formed Kingdom of the Netherlands was left to rebuild its economy, its trade position and, perhaps most importantly, its institutions. Although the French had initiated drafting a Commercial Code for the Netherlands, this was never officially put into force. Yet, it did influence and inspire those drafting the new Dutch Commercial Code. It was soon clear that marine insurance would be firmly incorporated in this new Code, the *Wetboek van Koophandel*, which came into force in

---

[59] *Asser* (n. 9).

[60] *Asser* (n. 9), 1.

[61] SAA, Avarij-Commissie, T1508, L. Hardenberg, De Avarij-Commissie; *Van der Hoeven* (n. 31).

[62] *R. van Boneval Faure*, Het Nederlandsch Burgerlijk Procesrecht, vol. 1 (1871), 123; SAA, Avarij-Commissie, T1508, L. Hardenberg, De Avarij-Commissie.

[63] In the first version of the Amsterdamsch Compromis, the Average-Committee is not yet mentioned.

[64] I have recently located part of the archives of the Average-Committee of Amsterdam, which has subsequently been acquired by the National Maritime Museum in Amsterdam.

1838. In case of a conflict relating to marine insurance, for example between a merchant and his underwriters, the first court of appeal was the *Arrondissementsrechtbank* (District Court), the successor of the Court of Commerce.[65]

General average was also formally regulated in Book 2, Title 11 of this Code. In one of the first relevant articles it is stated that if the parties had not made other contractual arrangements, then average – both general and particular – would be dealt with according to the Commercial Code.[66] The articles that followed stipulated the difference between general average (*Gemeene Averij* or *Avarij-Grosse*) and particular average, and that in case of general average, the value of the ship, the amount paid in freight fees and the value of the cargo were to contribute to the amount of general average.[67] In the following articles the various actions that could lead to general average damages were defined, including the most well-known forms, such as the jettison of cargo and the cutting of masts and ropes, to less common incidents as the wounding of crew men while defending the ship against enemies.[68] The Code reiterated that the actions had to have been intentional and in the interest of both the ship and the cargo. Other articles of Title 11 focused on whether certain costs were 'to be admitted into general average', for example, the circumstances under which fees for pilots or lighter ships were to be included as damages incurred for the common good.[69] The final articles (Arts. 722–740) related to the actual procedure, calculation and allocation of general average. According to Art. 722, the calculation and apportionment of the general average damages was handled in the port of destination, unless parties had agreed otherwise. In practice, it seems that average adjustment took place in the city where the cargo was originally destined. The reason was that, in case the incident had taken place in the second half of the journey and thus the selling price of the merchandise had to be used for the calculations, it was easier to determine the value of the goods in this port. If, however, general average was adjusted elsewhere, even abroad, Dutch authorities would honour the foreign laws and customs.[70] A clear example of this can be found in the *dispach* regarding the unfortunate journey of the *Jan Maria*, a three-mast schooner whose crew was forced during a storm, while *en route* from the Baltic to its home port in the Netherlands, to jettison cargo. The ship, heavily damaged, reached the nearest port in Germany, where the general average procedures were put in motion by

[65] SAA, Avarij Commissie, T1508, L. Hardenberg, De Avarij-Commissie; *Asser* (n. 9).

[66] Wetboek van Koophandel (Commercial Code).

[67] Particular average was to be borne by an individual shipowner or merchants. General average was to be carried by ship, freight and cargo: Wetboek van Koophandel 1838, Arts. 696 and 698.

[68] Wetboek van Koophandel 1838, Art. 699; *Asser* (n. 9).

[69] Wetboek van Koophandel 1838, Book 2, Title 11, among others Arts. 702, 704 f., 708.

[70] Wetboek van Koophandel 1838, Book 2, Title 11, Arts. 711, 722 and 724; *Lodewijk J.H. Bouman*, Waarom worden op Java slechts weinige dispaches opgemaakt? (1861), 4.

local average adjusters. Their report and findings regarding the incident, the damages and the value of the ship, formed the basis of the average calculations and the appropriation of the damages and were an integral part of the final report. This final *dispach* was composed in the original port of destination, Amsterdam, by the company of Mr. Kool and Eduard N. Rahusen, who often acted as average adjusters.[71]

So, formally, general average was governed by the Commercial Code as well, and parties could resort to the District Court. In practice, however, the *Amsterdamsch Compromis* rendered the Commercial Code inactive for run-of-the-mill general average cases. The text of the *Compromis* stated that parts of the Commercial Code were not applicable until the case had been concluded by the average adjusters. The *Amsterdamsch Compromis*, an agreement drafted not by the government but by private lawyers, would supersede the Commercial Code. If a party did not agree with the conclusions and calculations of the average adjusters, he could appeal first with the Average-Committee. Only if the Committee was unable to solve the conflict did the Commercial Code become relevant again when the litigant turned to the District Court for a more formal appeal. Although the members of the Average-Committee seem to have functioned as arbitrators, there was a formal air to the institution as the Committee held court at the Amsterdam Palace of Justice, on formal, predetermined court days. The interconnectedness of formal and informal structures became even more tangible when, in 1860, an international conference on general average was organized in Glasgow. The objective of the meeting was to unify the varying international regulations regarding general average. The Dutch were not represented by a government official, but by the previously mentioned Rahusen, a well-known lawyer and average adjuster.[72]

E. Conclusion

The governance of general average in Amsterdam in the nineteenth century seems to have consisted of several layers: at first sight it would seem that general average was formally regulated by the Commercial Code which was enforced by

---

[71] Findings based on research commissioned by the National Maritime Museum in Amsterdam for the Mr. Peter Rogaar Fellowship. Archives of the National Maritime Museum Amsterdam, inventory numbers 2009.0141-0143.

[72] The conference in Glasgow was the first of a series and led to the first version of the York-Antwerp Rules in 1890. The York-Antwerp Rules still govern general average up to the present day. *Justus G. Kist*, Het handelspapier, beginselen van het wisselregt en van het regt omtrent acceptatien, assignatien, papier aan toonder en cognossementen volgens de Nederlandsche wet, vol. 2 (1861); *Bouman* (n. 70), 4; Nieuwe Rotterdamsche Courant, 5–8 November 1860; *Eduard N. Rahusen*, Verslag van de vergaderingen over de Internationale Averij-Grosse regeling, gehouden te Antwerpen (1877).

the District Court, but the *Amsterdamsch Compromis*, a private order initiative, rendered the law inactive and added enforcement by arbitration as an extra layer to the setting. It would seem that the handling of general average cases was, in a way, returned to 'wise men' – enforcement was once again semi-formal by means of arbitrators.[73] This development would have been contrary to institutional theory regarding the path of development of enforcement mechanisms. However, the setting in the nineteenth century, whereby the semi-informal enforcement of general average – embodied by the *Amsterdamsch Compromis* and the Average-Committee – was layered with a formal coating of laws and a formal court, was not that much different from the situation in preceding centuries.

The Chamber of Insurance and Average adjudicated almost 2,000 litigation insurance cases over the course of the eighteenth century.[74] During this same period, the Chamber handled nearly 9,000 general average cases. As stated, these did not all relate to conflicts that needed to be resolved. In many, and probably the majority of the instances, it was merely the administrative handling of an unfortunate journey. The fact that the Commissioners were able to enforce the handing over of documents, adjust values and quantities may well have assisted the efficiency of the procedure. The verdicts of the insurance cases of the Amsterdam Chamber clearly had a different status from the general average *dispaches*. The former were considered formal verdicts, which could, and apparently were, often appealed, up to the highest possible court.[75] General average *dispaches* were perceived not so much as a verdict but rather as an administrative report (and calculation) of incidents that were inherent to long-distance trade.

It was perhaps not surprising that those handling general average cases in daily life – average adjusters – initiated both the *Amsterdamsch Compromis* and the Amsterdam Average-Committee. A crucial element of average adjustment was, according to Eduard Isaac Asser, the swiftness of the procedure. Especially in the case of perishable merchandise, merchants were eager to unload the goods as soon as possible. The shipowner on the other hand wanted a guarantee that all parties would ultimately pay their general average contribution. The set-up of the *Amsterdamsch Compromis* fulfilled both wishes: it was a relatively simple Agreement that bypassed legal courts and avoided slow processes. At the same

[73] SAA, Avarij Commissie, T1508, L. Hardenberg, De Avarij-Commissie; *Asser* (n. 9); *Bonefal Faure* (n. 62), vol. 1, 123.

[74] The records of the Chamber regarding the seventeenth century have nearly all been lost: *Go* (n. 6).

[75] *Van Niekerk* (n. 1), vol. 1, 217 f.; SAA, Avarij-Commissie, T1508, L. Hardenberg, De Avarij-Commissie.

time, it was legally binding to ensure that all parties would honour their obligations.[76] Thus, the composition and acknowledgement of the *Amsterdamsch Compromis*, followed closely by the establishment of the Average-Committee of Amsterdam, was not as inconsistent with institutional theory as it may seem at first sight.

A more formal regulation of general average (e.g., similar to the governance of insurance cases), would have led to objections from merchants, adjusters, shipping agents and shipowners as formal procedures would undoubtedly have taken up more time and money. Informal enforcement may at times, as argued by Greif, Feldman and Bernstein, achieve results that may not be accomplished by formal enforcement mechanisms.[77] Considering the way that general average was governed in preceding centuries, formal enforcement by a third party would have been an institutional step too far. Similar to the Tuna Court, the settings within which institutions function, are relevant. In spite of appearances, as in present-day Tokyo, the group for whom general average was relevant was a limited group of participants, bound by the necessity to cooperate as they were all too small to operate on their own. They needed one another, to provide cargo or space, for the future of their own enterprises.

The development of general average and the way that it was governed from the seventeenth until the late nineteenth century in Amsterdam, shows once again how complex institutions (and their development) are. Institutional theory must take into account not only that institutions have various functions that may have differing effects on various groups of actors, but also that the perception of an institution by those involved in it may not concur with its formal presentation.

---

[76] *Asser* (n. 9).

[77] *Greif*, Contract Enforceability (n. 10); *idem*, The Maghribi Traders (n. 10); *idem*, Institutions (n. 14); *Bernstein* (n. 21); *Feldman* (n. 19).

Unions and Networks in Nineteenth-Century Antwerp Marine Insurance Industry

By *Stephanie Plasschaert*

A. Introduction

It is a frequently asked question how social relationships influence the economic decision-making process.[1] The starting point of the contribution is that an entrepreneur is a rational agent whose actions are influenced by its social network, and this is also true while running a business.[2] Business connections are of crucial importance to entrepreneurs, and this was even more the case in times when the means of communication were slow and unsophisticated.[3] In this regard, the case of the marine insurance corporations in nineteenth-century Antwerp is of particular interest. Marine insurance business was a highly advanced sector: technical know-how and specialized insight were essential to assess the insurable risk. In addition, significant capital was at stake.

---

[1] *Robert Lee*, Commerce and culture, nineteenth-century business elites (2011); *Mark Granovetter*, Economic action and social structure: the problem of embeddedness, (1985) 91 American Journal of Sociology 481–510.

[2] *Hilde Greefs*, The role of women in the business networks of men, the business elite in Antwerp during the first half of the nineteenth century, paper presented at the XIV International economic history congress, Helsinki (2006), available at: www.helsinki.fi/iehc2006/papers2/Greefs.pdf (last accessed 11 August 2020), p. 2 of the typescript.

[3] *Greefs* (n. 2), 2.

Its political and historical contexts put Antwerp in a unique position. Antwerp was a city with much to offer, but without some fundamental requirements for a mercantile city. During the first decades of the nineteenth century the city had a very poor mercantile infrastructure. Consequently, experience and relationships were even more important for merchants and businessmen than in cities with such infrastructure.[4] In addition, the turbulent political climate caused many difficulties, as French, Netherlandish, and Belgian reigns alternated during a rather short time frame.[5] This caused social turmoil, accompanied by constitutional and institutional changes, such as questioning the freedom of the

[4] *Hilde Greefs*, Zakenlieden in Antwerpen tijdens de eerste helft van de negentiende eeuw (unpublished doctoral thesis, University of Antwerp, 2004), 21.

[5] *Greefs* (n. 4), 1. At the beginning of the nineteenth century, the Antwerp port infrastructure was outdated and in need of refurbishment. Antwerp did not possess the necessary financial institutions or its own fleet: there was need of a new commercial infrastructure. With the coup of 9 November 1799, Napoleon became First Consul in France and he enacted several measures to protect and encourage shipping. This led to the awakening of the Antwerp port from its slumber at the beginning of the nineteenth century. In 1803, Napoleon encouraged a series of impressive port modernization works. The same year, 166 vessels arrived in Antwerp, and in 1804 as many as 274, whereas in 1799 there was a complete standstill. From 1806 onward, mutual reprisals and blockades between warring France and England had a disastrous impact on maritime trade. The Antwerp port was again an inland port used for shipments from Dutch ports via inland waterways. Despite the problematic period, the Antwerp port infrastructure was still being expanded. After the defeat of Napoleon in 1813 and the collapse of the French empire, Art. 15 of the First Treaty of Paris declared the Antwerp port a free and commercial port. With the signing of the Eight Articles of London, Belgium was merged with the Northern Netherlands on 21 July 1814. A favorable commercial climate soon stimulated the development of a solid commercial infrastructure. The founding of the Dutch Trading Company (NHM) in 1824 greatly stimulated the Antwerp port activities and the shipping industry. NHM was founded to strengthen national trade and industry in the struggle against the powerful English competition for overseas markets, and opened the Dutch colonies to Antwerp trade. Antwerp was being supported by a reliable governmental organization. The NHM did not have its own fleet but chartered ships, so Antwerp merchants made use of this opportunity to build a new shipyard in 1825. With the Belgian Revolution of 1830 many merchants and shipowners no longer saw a future for Antwerp and emigrated to the Netherlands or to France. After the bombardment of the city on 27 October 1830, the river Scheldt was closed to all shipping by the Dutch navy. The Antwerp fleet was almost completely inactive. As a result of this difficult political situation and the collapse of commerce, the port of Antwerp went through a period of economic depression. The following years were rather gloomy for the maritime industry. Some insurance companies (temporarily) halted their marine insurance business, partly due to the terrible winter storms of 1834 and 1836. In 1837, the profitability of some industrial enterprises was threatened. The emigration of many merchants and shipowners had adverse consequences for the banking and insurance business too. In 1838 there was a massive withdrawal of bank deposits, bringing the Banque de Belgique to the brink of bankruptcy. For more details, see *Stephanie Plasschaert*, The Nautical Commission in the 19th Century Antwerp, (2019) 80 Studia Iuridica 283–308.

river Scheldt,[6] and economic consequences. In such times of great uncertainty, social networks could provide stability or at least a general feeling of support. On the other hand, cooperation could pose risks. Different opinions and incompatible ambitions could jeopardize the capital invested in a venture; in case of personal liability, the whole personal assets could be at stake.[7] Because of this risk, entrepreneurs were particularly cautious in their choice of business partners, with the result that the choice would typically fall within a small circle of acquaintances or relatives.[8] By relying on a trustworthy network for gathering and verifying information, transaction costs could be lowered.[9] This way, it was possible to deal with the many uncertainties of the economic life in a more efficient way.[10] The tendency toward cooperation and concentration is a salient trait of nineteenth-century industrial capitalism. Reliable relationships bring out innovation and create a healthy flow of trustworthy information of a practical, technical and commercial nature.[11] Family relations were key to this approach. Not only did they guarantee the transfer of capital and know-how, but they also helped reliable social networks to flourish, where information could be exchanged informally.[12]

This contribution will focus on the composition of 24 marine insurance corporations from 1818 to 1865,[13] analyzing them against the historical and economic background and the studies on nineteenth-century social networks. The *dies ad quem* is due to the fact that, from 1865 onward, many foreign insurance corporations entered the Antwerp market, yet sources on them are scarce and would shift the focus away from Antwerp. This study will focus especially on the identity of insurance corporations' managers (a term that will be used rather loosely, to encopass directors, administrators, and commissioners alike).

---

[6] *Anonymous*, De Schelde: eenige geschiedkundige aanteekeningen betreffende hare sluitingen en hare vrijmaking. Afkoop van het tolrecht (2019), 3–8; *Henri De Vos* and *Charles Bronne*, De Belgen en de zee (1951), 40–42; *Greefs* (n. 4), 1.

[7] *Greefs* (n. 4), 298.

[8] *Leonore Davidoff* and *Catherine Hall*, Family Fortunes: men and women of the English middle class, 1780–1850 (2002), 200 f.

[9] *Greefs* (n. 4), 21 f.

[10] *Mark Casson*, Entrepreneurial networks in international business, (1997) 26 Business and Economic History 811–823.

[11] Or in the words of *Casson* (n. 10), 813: '"Who you know" is often more important than "what you know" because the people that you know can plug the gaps in what you know.' See, furthermore, *Lee* (n. 1), 1.

[12] *Greefs* (n. 2), 3.

[13] *Anon.* (n. 6), 3–8. As the composition and functioning of Bureau Veritas is also taken into account, the number of corporations analyzed is in fact 25.

In an environement where numerous marine insurance corporations competed with each other, a communal insurance policy appeared in 1824, presumably created by the marine insurance company *Securitas* (*Compagnie d'Assurances d'Anvers Securitas*) and adopted as a standard policy by the competing marine insurers of the Antwerp market.[14] The way in which some of these marine insurance corporations operated has been already studied,[15] but not so the collaboration between the corporations. In 1911, such cooperation would eventually lead to the foundation of the *Association pour le Relèvement de l'industrie des assurances à Anvers*, the precursor to the still active Belgian association ABAM BVT.[16]

After a short introduction on nineteenth-century Antwerp, the Antwerp marine insurance policy and the insurance corporations, this study will seek to unveil some patterns in the structure, behavior and especially the cooperation of these corporations. Did marine insurance corporations cooperate with each other? If so, what were the main motives for this behavior? Did the corporations act in solid networking structures, or did their cooperation stretch even beyond the scope of these networks? What were the social and economic backgrounds of the managers of the corporations? Is it possible to discern any common feature as to the social background of these managers? What kind of interaction did individual corporations have? In answering these questions, the social status of the managers, their professions (merchants, members of the commercial court, shipowners, industrial entrepreneurs, lawyers), and family ties will be taken into consideration.[17] In addition to literature on the Antwerp Chamber of Commerce, nineteenth-century industrialism, banking, merchants, shipowners, and entrepreneurs, this study is based mainly on genealogical literature, family archives on the foundation of several insurance corporations, and marine insurance case law.[18]

---

[14] *Julienne Laureyssens*, De naamloze vennootschappen en de ontwikkeling van het kapitalisme in België (1819–1850) (unpublished doctoral thesis, University of Ghent, 1970), 19.

[15] See for instance *Juul Hannes*, Securitas: honderdvijftigste verjaardag 1819–1969 (1969).

[16] Its official name is Koninklijke Belgische Vereniging van Transportverzekeraars/ Royale Association Belge des Assureurs Maritimes ABAM BVT. I would like to thank Paul Buyl and Christoffel Cornette, who warmly welcomed me as the secretary of the organization and showed genuine interest in my research.

[17] *Floris Prims*, De Antwerpsche groothandel in 1830, (1929) 20 Bijdragen tot de geschiedenis 239–254; *R. De Bock*, De Belgische handelsvloot rond het midden van de XIXe eeuw, (1938–1939) 2 Mededelingen Marine Academie 150–176.

[18] See, e.g., Felixarchief Antwerpen, Exposé sur la situation administrative de la province d'Anvers, 1837–1860; Rijksarchief Beveren, Openbare instellingen L003 en L004, mappen 46, 56, 59, 62, 64, 67; Rijksarchief Antwerpen, Provincie Antwerpen reeksen J&K, nummers 3676, 3679, 3683, 3685, 3687, 3689; Felixarchief, MA#1037/1;

The majority shareholders attending the general meeting were able to steer the company in a certain direction.[19] To truly assess the scope of the connections between marine insurance corporations, knowledge of the identity of the shareholders seems indispensable. However, the available archival sources could provide only the identity of the shareholders of the companies *Securitas*, *Cie Anversoise* and *De Schelde*. Whenever information on the identity of the shareholders was available, it was taken into consideration while analyzing the structures of the networks and circuits. Finally, the present analysis is based on a detailed comparison between the composition of the existing unions of marine insurance corporations.

B. Antwerp as a center of commerce in the nineteenth century

After the reopening of the river Scheldt in 1796, the port city once again in its history enjoyed an excellent position. Antwerp had a safe and sound connection to the sea, yet and at the same time the port was situated inland, a feature that facilitated the further logistics and processing of merchandise.[20] Thus, the location of Antwerp was favorable for transit traffic to the Rhine area, northern France and Switzerland, while being a suitable port of entry for the Southern

---

Roland Baetens (ed.), Spiegels van Mercurius. Plouvier & Kreglinger. Tweehonderd jaar handel en maritiem transport te Antwerpen (1998), 17–209; *Adolphe Demeur* (ed.), Les Sociétés Anonymes de Belgique en 1857 (1857–1870); *Ginette Kurgan-van Hentenryk* and *Jean Puissant*, Dictionnaire des patrons de Belgique, les hommes, les entreprises, les réseaux (1996); *L'Académie Royale des Sciences, des Lettres et des Beaux-Arts de Belgique*, Biographie Nationale (1958). See also the notes, L'armorial Anversois. Donnet, (1949) De Schakel 100–101; Les Donnets, (1949) De Schakel 62–65; La famille Loos, (1959) De Schakel 2–20; Les Pauwels, (1957) De Schakel 30–33; Elsen, (1951) De Schakel 67–69; Les Cogels, (1959) De Schakel 1. For literature and sources on the identity of the shipowners, see, e.g., Courrier d'Anvers, 31 December 1847, Etat Général de la Marine Marchande Belge et des Bateaux Naviguant a l'Intérieur, 27; *Alex De Vos*, De Antwerpse Koopvaardijvloot omstreeks 1830 met vlootlijst der Belgische koopvaardijschepen 1829–1835, (1963) 15 Mededelingen Marine Academie 101–176, 120. On the banking system, see *Helma Houtman-De Smedt*, In de stroom van de tijd: beknopte geschiedenis van een meer dan honderdjarige, (2001) 84 Bijdragen geschiedenis hertogdom Brabant 109–120, 109–111; *Fernand Donnet*, Coup d'oeuil sur l'histoire financière d'anvers au cours des siecles (1926).

[19] *Evelyn Willemse*, Het ontstaan en de ontwikkeling van het Belgische verzekeringswezen 1819–1873 (unpublished doctoral thesis, Vrije Universiteit Brussel, 1974), 167.

[20] *Gustaaf Asaert*, Maritieme geschiedenis der Nederlanden, vol. 3 (1978), 88; *Karel Veraghtert*, From Inland Port to International Port, in: Fernand Suykens et al. (eds.), Antwerp: A Port for all Seasons (1986), 279–422, 310; *Karel Jeuninckx*, De verhouding van de haven van Antwerpen tegenover deze van Amsterdam en Rotterdam tijdens het Verenigd Koninkrijk, (1958–1959) 11 Mededelingen Marine Academie 147–181, 148.

Netherlands as well.[21] Under French and later Dutch control, the port of Antwerp provided an easy access to the respective colonial territories.[22]

With the dissolution in 1812 of the *Keyzerlijke en Koninklijke geoctroyeerde Compagnie van Assurantie* after about 60 years of activity, there was no longer a marine insurance company of significance in Antwerp.[23] However, from 1811, there were two insurance brokers appointed under Napoleon: P.J. Van de Wijngaert and J. Christriaensens.[24] As a result of the lack of a structured insurance and banking system, merchants had to rely on their creativity to secure their merchandise against adversities and misfortune.[25] Therefore, they relied on foreign companies or underwrote policies themselves.[26] From 1814 foreign companies dominated a large part of the Antwerp insurance market, with the *Compagnie d'Assurances Générales de Paris* as the main marine insurance company.[27] The merchant and banker Daniel Thuret acted as a broker for this company.[28] In addition, trading houses, such as the houses of J. Lemmé, P.J. Serruys and De Wael, and banking houses such as that of J.H. and A. Cogels and J. Legrelle, underwrote insurance policies.[29]

During the Dutch reign, King William I proved himself an enthusiastic supporter of commerce in the Northern and Southern Netherlands.[30] The foundation of the *Nederlandsche Handel-Maatschappij* (NHM) in 1824 benefited Antwerp's position as a modern commercial city, since the NHM was established to strengthen national commerce and industry through its competition with England in overseas trade.[31] The NHM opened the market of the northern Dutch colonies to Antwerp commerce, while also providing Antwerp with reliable government support. The increase in port traffic brought about an

---

[21] *Hilde Greefs*, Enkele zwaartepunten in het onderzoek naar ondernemerschap en ondernemersstrategieën te Antwerpen gedurende de periode 1794–1870, (1998) 76 Belgisch tijdschrift voor filologie en geschiedenis 419–442, 426.

[22] *Veraghtert* (n. 20), 291.

[23] *Greefs* (n. 4), 270.

[24] *Karel Veraghtert*, Zeeverzekeringen te Antwerpen (1814–1860), (1995) 14/3 Tijdschrift voor Zeegeschiedenis 1995, 9–22, 9 f.

[25] *Greefs* (n. 4), 270; *Gabriel De Lurcy*, Guide Général des assurances maritimes et fluviales (1855), 143.

[26] *Greefs* (n. 4), 270.

[27] *Juul Hannes* and *Julienne Laureyssens*, De verzekeringsmaatschappijen en hun beheerders te Antwerpen (1819–1873) (1966), 98; *Veraghtert* (n. 24), 10.

[28] *Greefs* (n. 4), 270.

[29] *Greefs* (n. 4), 270.

[30] *Natalis Brianvoinne*, De l'industrie en Belgique, causes de décadence et de prospérité, sa situation actuelle, vol 1 (1839), 150.

[31] *Ton De Graaf*, Voor handel en maatschappij: geschiedenis van de Nederlandsche Handel-Maatschappij, 1824–1964 (2012), 39.

expansion of the banking and insurance sector, industries, and overseas trade.[32] This happened alongside the progessing industrialization of the hinterland.[33] The Southern Netherlands grew into the first industrialized power on the continent, with the port of Antwerp as its main gateway.[34] In addition, with the establishment of the *Société Générale de Belgique* in 1822 (which established a branch in Antwerp in 1824), King William I invested in a solid financial and commercial infrastructure. The result was that instruments such as loans, commercial credit, and bills discounting, were heavily promoted and supported by the government.[35] In addition, logistics were faster and cheaper than in Amsterdam and Rotterdam, and the port infrastructure was modernized and expanded.[36] All this contributed to the popularity of the port of Antwerp: in 1829 no fewer than 279 ships entered the port, compared to a total of 221 for Amsterdam and Rotterdam.[37] Because of these numerous assets, Antwerp was an ideal location for marine insurance companies to conduct their business. As a result of the law of 28 January 1821 prohibiting foreign insurance companies to operate in Antwerp, six marine insurance corporations were established before 1830.[38] In 1858 there were 40 active agencies, corporations or private insurers.[39]

---

[32] See, for instance, *Karel Jeuninckx*, De havenbeweging in de Franse en Hollandse periode, in: Bouwstoffen voor de geschiedenis van Antwerpen in de XIXe eeuw (1964), 94–135; *Greefs* (n. 4), 1.

[33] *Greefs* (n. 4), 1.

[34] *Greefs* (n. 4), 1.

[35] *Brianvoinne* (n. 30), 156 f.; *Herman Van der Wee* and *Monique Verbreyt*, De Generale Bank 1822–1997, een permanente uitdaging (1997), 17–20; *Donnet* (n. 18), 267–271; *Julienne Laureyssens*, Willem I, de Société Générale en het economisch beleid, in: Coen Tamse and Els Witte (eds.), Staats-en natievorming in Willem I's koninkrijk (1815–1830) (1992), 207–214, 207; *idem*, The Société Générale and the origin of industrial investment banking, (1975) 6 Belgisch Tijdschrift voor Nieuwste Geschiedenis 93–115; *Herman Van der Wee*, De beleggingsstrategie van de Société Générale de Belgique, 1822–1913, in: Liber Amicorum professor Guillaume Dirckx (1977), 227–248, 227.

[36] *Greefs* (n. 21), 426.

[37] *Henri De Vos*, Leopold I en de scheepvaart 1831–1865, (1965) 17 Mededelingen Marine Academie 1–37, 7.

[38] *Juul Hannes*, Het verzekeringswezen in België 1819–1914, (1991) 5 NEHA-Bulletin. Tijdschrift voor de economische geschiedenis in Nederland 85–96, 87; *Veraghtert* (n. 24), 10; *Hannes/Laureyssens* (n. 27), 98–102; *Laureyssens* (n. 14), 16–23.

[39] Felixarchief Antwerpen, Exposé sur la situation administrative de la province d'Anvers, 1859, Annexe, 24; *Peter Borscheid*, Europe: Overview, in: Peter Borscheid and Niels Haueter (eds.), World insurance: the evolution of a global risk network (2012), 37–66, 39.

I. The Antwerp marine insurance policy of 1824

The Antwerp marine insurance policy of 1824 is the result of networking. Consequently, it is necessary to consider the origin and content of the policy. With the introduction of the French *Code de Commerce*, its provisions concerning marine insurance applied in Antwerp.[40] The content of these regulations was fairly general and almost identical to the seventeenth-century *Ordonnance de la marine* and to the Antwerp marine insurance practices that had developed since the sixteenth century.[41] Among other things, for instance, the *Code* also provided general coverage for all dangers and perils of sea adventures (Art. 350). This generic and outdated normative approach stimulated marine insurance corporations to develop their own communication structures and cooperate together. In 1819, three insurance policies were common in Antwerp.[42] One of these policies was an instrument created by *Securitas* (in particular, by its director A. Delehaye), the other two were used by agents of foreign companies.[43] The first policy would soon develop into the commonly used Antwerp marine insurance policy of 1824. As will be explained later on in this study, a first partnership between the marine insurance corporations *Securitas* and *De Schelde* was established in the early 1820s. Whether *De Schelde* took part in the early editing of the policy cannot be verified due to a lack of sources. But it is likely that the collaboration between *Securitas* and *De Schelde* was the cause of the widespread use of the policy by the Antwerp marine insurers. More details about the precise development of the policy are unfortunately unknown.

According to its first article, the policy covered all damage or loss resulting from tempest, shipwreck, stranding, accidental collision, stoppages, and compulsory change of route, voyage, or vessel, jettison, fire, plundering, war, reprisals, seizures, captures, injury from pirates, negligence of captain or crew, barratry of the master, and generally from all dangers and perils of the sea. Article 2 explicitly excluded any damage, detainment and confiscation caused by smuggling and illegal trade. The policy covered the merchandise and the hull, the keel, the rigging, and all the appurtenances of the vessel.[44] The exclusion of smuggling was a clarification of the *Code*, which did not touch on the point. The policy curtailed the very general provisions of the *Code*, such as the

[40] See Art. 332–396 Code de Commerce 1807.

[41] *Dave De ruysscher*, Belgium. Marine insurance, in: Phillip Hellwege (ed.), A Comparative History of Insurance Law in Europe. A Research Agenda (2018), 110–133, 127 f.

[42] *J. Timmermans*, *H. Jacob* and *E. Boonen*, De Antwerpsche zeeverzekeringspolis voor een Nederlandsche maritieme rechtswetenschap, (1941) Het Juristenblad 513–526, 515.

[43] *Timmermans/Jacob/Boonen* (n. 42), 515.

[44] Art. 3 of the Marine insurance policy Antwerp 1824, reproduced in: *J. Vaucher*, A guide to marine insurances, containing the policies of the principal commercial towns in the world (1834), 16–27.

abandonment clause.[45] It also differed from the provisions of the *Code*, among other things, on the 'good or bad tidings' ('sur bonnes ou mauvaises nouvelles') clause, which was an optional coverage in the *Code*.[46]

On 16 August 1844 the text of the policy was changed into a more modern one. The provision regarding the barratry of the master was modified, and the risk on inherent vice excluded.[47] The insurance industry, however, was not fond of these changes, and much discussion can be found in the case law on Art. 2 of the 1844 policy. In-depth analysis of such case law would unfortunately lead us beyond the scope and purpose of this study. It is, however, interesting to highlight that the abovementioned unions of Antwerp marine insurers acted as legal entities during these lawsuits. Except in the case of solitary agencies or foreign marine insurance corporations, the marine insurance corporations were represented by their union in nearly every court case.[48]

The 1844 insurance policy was nearly identical to that of 1 July 1859, with the exception of a provision on war risk. Due to major changes in the shipping

---

[45] Art. 4 of the 1824 Antwerp marine insurance policy, reproduced in: *Vaucher* (n. 44), 16–27. The abandonment clause provided that if an insured ship had sunk, the owner of the ship had the right to renounce the ownership (and thus the recovery or repair) of the ship in favor of the insurer in exchange for a fixed sum. The damage or losses had to be at least three-fourths of the value.

[46] *De ruysscher* (n. 41), 130. Via the 'on good or bad tidings' clause, the insurance policy avoided discussion if the damage already existed before the closing of the insurance contract. For more information on this practice, see *idem*, Normative Hybridity in Antwerp Marine Insurance (c. 1650–c. 1700), in: Seán Patrick Donlan and Dirk Heirbaut (eds.), The Law's Many Bodies. Studies in Legal Hybridity and Jurisdictional Complexity c1600–1900 (2015), 145–168, 158.

[47] Art. 2 states: 'The Underwriters are nevertheless not liable for loss or damage resulting from barratry of the master towards shipowners or their assigns if the captain is of their choice and that this barratry has the character of deceit or fraud. They are also not liable for damage and loss resulting from inherent vice of the object, for any difference of duties applicable at destination, for capture, confiscation and any event resulting from contraband, Illicit or clandestine commerce. Finally, they are not responsible for any costs of quarantine, wintering and demurrage.' Cited from *Gabriel Lafond De Lurcy*, Guide Général des assurances maritimes et fluviales (1855), 135–139.

[48] For the period between 1836 and 1870, no more than five cases were found where the marine insurance company acted solitary as a plaintiff or defendant and was not represented by a union. However, it must be noted that due to a fire in the Antwerp archives in 1858, a lot of maritime case law files dating from the first half of the nineteenth century have been destroyed. See, for instance, Jurisprudence du port d'Anvers et des autres villes commerciales et industrielles de la Belgique, vol. 1–15 (1856–1870); Pasicrisie ou recueil général des cours de la France et de la Belgique 1814–1830, vol 1, 5, 10 (1840, 1844, 1851); Pasicrisie, table générale alphabétique de la jurisprudence Belge de 1814–1833 (1835); Pasicrisie, table générale alphabétique de la jurisprudence du royaume de 1814–1840 (1854); Table décennale, alphabétique et chronologique, de la Pasicrisie Belge de 1851–1860 (1866).

industry, such as the arrival of steamships, line chartering,[49] and the use of the floating policy,[50] the 'Clauses 1900' were added to the 1859 policy in 1900.[51]

The 1824 policy reveals the first traces of cooperation between the Antwerp marine insurers. Why the insurers decided to use the same policy is unknown. It is possible that this decision was an expression of government aversion. The law of 28 January 1821, which excluded foreign companies that had been very active from the Antwerp market, resulted in the founding of the Antwerp corporations that dominated the insurance market. Due to their powerful position, these companies perhaps did not appreciate interference by the government. We will come back to this point. On the other hand, the continued joint use of this policy – which, incidentally, from a commercial point of view was not the most attractive policy available – was probably due to the great influence on the marine insurance market of Auguste Morel, whose importance for the marine insurance industry will be explained later on. Morel used a marine insurance policy that would have been more interesting for the insured than the Antwerp one. By forming a common front against Morel's network, the Antwerp insurance companies managed to keep their heads above water and prevented Morel from gaining the upper hand in the market.

This episode seems to strengthen the impression that when legislation no longer met the needs of the practice, the insurance companies took action by cooperating and standardizing the policy conditions, without intereference by the government. Ultimately, these policy terms hardly change in the following decades, and are incorporated into the national marine insurance policies. Nowadays, Belgian legislation[52] on marine insurance is still systematically sidelined in the daily practice of the transport insurance companies.[53] After all, this legislation is considered to be supplementary. While some scholars consider some provisions as imperative, marine insurance contracts often stipulate the exact opposite of what the law determines, or at least deviate from its provisions to a certain extent.[54] Such deviations concern, for example, the coverage of liability arising from the insured item (Art. 201 Zeewet[55]), the lapse of cover due to change of route, destination or vessel (Art. 205 Zeewet), the exclusion of damage

[49] Vessels sailing between specified ports on a regular basis.

[50] A floating or open policy covers several shipments under a single policy. A fixed sum is determined to cover multiple shipments, and the details of any shipments are declared afterwards.

[51] *Timmermans/Jacob/Boonen* (n. 42), 515.

[52] Art. 191–250 Wetboek van koophandel of 21 August 1879.

[53] *Commissie Maritiem Recht*, Over de herziening van het Belgisch Scheepvaartrecht – Proeve van Belgisch Scheepvaartwetboek: vervoersverzekering (2012), 34.

[54] *Commissie Maritiem Recht* (n. 53), 34.

[55] The Zeewet is a part of the Belgian Wetboek van koophandel of 21 August 1879.

resulting from a minor error (Art. 206 of the Zeewet), and abandonment without an option on behalf of the insurer (Art. 222 Zeewet).[56] To the present day, marine insurance corporations in Belgium still make extensive use of model policies and standard conditions.[57] This contradiction between the content of the law and common practice among marine insurers was one of the main arguments for the change of marine insurance legislation in the new Belgian Shipping Code.[58]

II. Presentation of the Antwerp marine insurance corporations

Below follows an overview of the 24 corporations investigated for the period from 1819 to 1865, with *Securitas* as the first limited company. An overview of foreign companies or foreign private insurers will be offered for certain periods, but they are not further analyzed to the same extent as the Antwerp companies due to lack of sources or because they were registered outside Antwerp. They are, however, referred to in the footnotes.[59] The following 24 companies and their managers are analyzed:[60]

1. Compagnie d'Assurances d'Anvers Securitas (1819; hereafter: Securitas);
2. Compagnie Commerciale d'Assurances Maritimes (1834–1838; 1° Cie);
3. Deuxième Compagnie Commerciale d'Assurances Maritimes (1834–1839; 2° Cie);
4. Cinquième d'Assurances (1838–1863; 5° Cie);
5. Compagnie d'Assurances Agriculture et Commerce d'Anvers (1829; Agriculture et Commerce);
6. Compagnie d'Assurances Antwerpia (1850; Antwerpia);

---

[56] *Commissie Maritiem Recht* (n. 53), 34.

[57] The commonly used and internationally famous 2004 Antwerp Cargo Insurance Policy is the continuation of the Antwerp Marine Insurance Policy of 1859, that was the current Antwerp marine insurance policy until 2004.

[58] *Commissie Maritiem Recht* (n. 53), 34. The new Belgian Shipping Code entered into force on 1 September 2020 (except for Book 4 on enforcement that has been in force since 24 April).

[59] The following foreign insurance companies or private insurers were active in Antwerp in 1856: Van Gend en Loos, La Compagnie d'Assurances Générales de Paris, La Compagnie d'Assurances Maritimes et Fluviales du Brabant Septentrional, La Compagnie d'assurances du Bas-Rhin, La Compagnie d'Assurances La Garonne de Bordeaux, MJF Flemmich (for the account of six Amsterdam insurance companies), Cercle Commercial d'Assurances Maritimes, La Compagnie d'Assurances Agrippina de Cologne, La Compagnie Azienda Assicuratrice de Trieste, La Compagnie d'Assurances Thuringia d'Erfurt, La Compagnie d'Assurance de Mayence, La Compagnie d'Assurance Catalane de Barcelone, La Compagnie Royale de Paris.

[60] Felixarchief Antwerpen, Exposé sur la situation administrative de la province d'Anvers, 1857, annexe, 37–39. For every corporation the starting date is noted. The year of liquidation is noted only if the liquidation occurred before the end of the research period.

7. Bureau Central des Assurances Maritimes (1830; Bureau Central);[61]
8. Compagnie Anversoise d'Assurances Maritimes (1829; Cie Anversoise);
9. Compagnie Liègoise d'Assurances Maritimes à Anvers (1828–1830; Cie Liègoise);
10. Le Comptoir Spécial d'Assurances Maritimes (1828; Comptoir Spécial);
11. Compagnie d'Assurances: L'Atlantique (1849; L'Atlantique);
12. La Meuse, Société d'Assurances Maritimes (1859; La Meuse);
13. Le Cercle d'Assurances (1854; Le Cercle);
14. Compagnie d'Assurances: Le Commerce d'Anvers (1853; Le Commerce d'Anvers);
15. Compagnie d'Assurances le Lloyd Belge (1856; Le Lloyd Belge);
16. Compagnie d'Assurances Maritimes: Le Neptune (1830–1840; Le Neptune);
17. Compagnie d'Assurances Le Phare (1855; Le Phare);
18. Compagnie d'Assurances Le Rhin (1855; Le Rhin, Compagnie);
19. Le Rhin, Société d'Assurances Maritimes (1845–1848; Le Rhin, Société);
20. Compagnie d'Assurances L'Escaut (1821; L'Escaut);
21. Compagnie d'Assurances L'Espérance (1846; L'Espérance);
22. L'Indemnité, Compagnie d'Assurances Maritimes (1857; L'Indemnité);
23. Compagnie d'Assurances L'Océan (1846; L'Océan);
24. Compagnie d'Assurances Minerva d'Anvers (1857; Minerva).

Nearly all corporations insured cargo and vessels against the perils of the sea, and also inland shipping. Some insurance companies covered fire damage as well, while others also insured risks of war or land transport risks. Certainly some marine insurance companies were used to reinsure risks, such as the Brussels marine insurance company *Société de Réassurances L'Alliance*, but there are few sources on the subject.[62]

It is worth mentioning that some marine insurance corporations, such as *Securitas* and *De Schelde*, gave up their branch of marine insurance temporarily in the 1830s due to the severe difficulties they faced, and focused completely on their fire insurance branch for the following years.[63] The aftermath of the Belgian Revolution, the winter storms of 1834 and 1836, the financial problems of the industrial sector, the problems of the *Banque de Belgique*, and the emigration of many merchants took their toll on the marine insurance industry.[64]

---

[61] Bureau Central would eventually become the classification society Bureau Integritas, see *Guillaume Beeteme*, Antwerpen, moederstad van handel en kunst, vol. 1 (1887), 136.

[62] *Willemse* (n. 19), 301.

[63] *Hannes* (n. 15), 31; *Willemse* (n. 19), 242.

[64] *Asaert* (n. 20), 127; *Veraghtert* (n. 24), 14–17; *idem*, De havenbeweging te Antwerpen tijdens de negentiende eeuw: een kwantitatieve benadering, vol. 2 (1977), 124; *Paul Janssens*, *Albert Tiberghien* and *Hilde Verboven*, Drie eeuwen Belgische belastingen: van contributies, controleurs en belastingsconsulenten (1990), 168 f., 172 f.; *Laureyssens*, The Société Générale and the origin of industrial investment banking (n. 35), 93–115; *Erik Buyst* and *Ivo Maes*, The regulation and Supervision of the Belgian Financial System (1830–2005) (2008), 8; *Ben Serge Chlepner*, Cent ans d'histoire sociale en Belgique (1956), 34 f.

C. Marine insurance cooperation structures

I. The marine insurance companies established by Auguste Morel: Bureau Veritas, Bureau Central, 1° Cie and 2° Cie

The harsh competition in the marine insurance sector in nineteenth-century Antwerp prompted the creation of networks, which developed in the form of unions handling the assessment and distribution of the insurable risks.[65] One of these networks was based around Auguste Morel. Morel, the son of a merchant and shipowner, joined the marine insurance company *Securitas* at the age of 15 in 1819.[66] Through the marriage of his sister, he had ties with Constant Delehaye, the brother of Alexander Delehaye, the first general agent of *Securitas* in the years 1819–1829 (and the man behind the insurance policy that eventually became the 1824 policy). In 1828 Morel applied for a vacant position as an insurance broker, with the support of nearly all members of the Chamber of Commerce and the Minister of the Interior Van Gobbelschrooy. Although Morel was an excellent candidate, it would ultimately be Werbrouck-Pieters who was sworn in as a broker. The latter, after all, had suffered some serious commercial blows due to his company's setbacks. The appointment as a broker was meant to support Werbrouck-Pieters in financially difficult times. Although the underlying reason for this decision seems curious, it shows a tendency that will be repeatedly confirmed throughout this research. It substantiates the hypothesis that Antwerp marine insurance business consisted of close networks, where competition often had to make way for calculated cooperation.

Morel's entrepreneurial spirit was not broken by this rejection. In the favorable Antwerp business climate of 1828, together with colleagues and family members Louis van den Broeck, Alexander Delehaye and Charles Lefèvre, Auguste Morel established the classification society *Bureau Veritas*,[67] presumably inspired by the ideas of the innovative Alexander Delehaye.[68] The *Bureau Veritas* provided both up-to-date information on the usual insurance premiums in various ports and up-to-date information on the condition of vessels seeking insurance, allowing shipowners and traders to decide at a single glance where which risk could be insured at the most advantageous rate.[69] *Bureau Veritas* was so popular that the NHM used the *Veritas* register when choosing

---

[65] *Willemse* (n. 19), 129.

[66] On what follows, *Willemse* (n. 19), 55 f.

[67] Originally under the name of 'Bureau des renseignements pour les assurances maritimes'.

[68] *Hannes* (n. 38), 88; *Laureyssens* (n. 14), 19.

[69] *Stephanie Plasschaert*, Over de negentiende-eeuwse Nautische Commissie, zeewaardigheidsinspecties en classificatiemaatschappijen te Antwerpen, (2018) 20 Pro Memorie 96–117, 104.

ships to charter.[70] Only one year later, Morel started his own specialized classification register, the *Régistre Veritas*, thanks to a personal loan from King Willem I.[71]

In 1830 Morel founded the *Bureau Central des Assurances Maritimes* in Antwerp. There, the *Bureau Veritas* acted as a classification society, only, and the *Bureau Central* acted as a commission insurer, omitting the franchise.[72] The *Bureau Central* insured a small value itself and the remaining amount was covered in reinsurance, preferably to companies from Antwerp and Amsterdam.[73] When damage occurred, compensation was paid immediately to the insured before it was paid by the reinsurance company. The disadvantage was that the insurance policies sold in Antwerp came immediately into effect with the signing of the contract, whereas the policies sold abroad had no effect until Morel had received an answer from the foreign companies, and such an answer was not always positive. To improve this system, in 1834 Morel established the *Compagnie Commerciale d'Assurances Maritimes* and the *Deuxième Compagnie d'Assurances Maritimes* (*1° Cie* and *2° Cie*) to facilitate reinsurance. Because foreign companies no longer intervened as frequently as before, the time gap between the conclusion of the contract and its entry into force was no longer an issue.

Addressing personal connections has always played a vital role in Morel's career. For example, his family members were among the most important shareholders of his companies. The establishment of the *2° Cie*, with the same director but other shareholders than the *1° Cie*, met with loud protest from the Chamber of Commerce.[74] Ultimately, the Chamber demanded that a clause be included in the statutes of Morel's fire insurance company *3° Compagnie Commerciale d'Assurances Maritimes*, as a result of which Morel's family members were forbidden to act on behalf of other shareholders at the general meetings.

As already said, Morel was particularly disliked by the other Antwerp marine insurance corporations because the insurance policy that he offered was more advantageous than the Antwerp policy in respect of both coverage and

---

[70] *Veraghtert* (n. 20), 313. The NHM did not possess a fleet of its own. It was obliged to appoint Dutch shipowners to transport Indian cultural goods. It guaranteed shipowners that it would make use of newly build vessels for at least two return journeys. By appointing the cargo to a certain vessel, it considered social motives and often chose small shipowners owning small or medium-sized vessels, even if these were less profitable than large vessels. This practice existed until 1868. See *Plasschaert* (n. 69), 105; *De Graaf* (n. 31), 52 f.; *Laureyssens* (n. 14), 19.

[71] *Veraghtert* (n. 20), 313; *Laureyssens* (n. 14), 19.

[72] *Beeteme* (n. 61), 131.

[73] On what follows, *Willemse* (n. 19), 64 f.

[74] On what follows, *Willemse* (n. 19), 57, 74.

conditions.[75] The other marine insurance corporations feared being sidelined. The fact that Morel's competitors continued to offer the 1824 policy was, as mentioned, perhaps to form a common front against Morel. In the end, around 1840, Morel moved his *Bureau Central* to Paris, under the name of *Bureau Central et Continental des Assurances Maritimes*, later renamed as the classification society *Bureau Integritas*.[76] The network developed by Morel and *Bureau Central*, in which the know-how and expertise of various companies were gathered, would later intensify and strengthen the cooperation in the marine insurance union, the *Première Réunion*, as we shall see shortly.

II. Marine insurance corporations form unions

1. Première Réunion

Documents dating from 1823 containing correspondence between *De Schelde* and *Securitas* show cooperation between the two competitors. For example, *Securitas* proposed to *De Schelde* to rent a communal storage space to store goods that were damaged and had to be examined or sold by the companies,[77] but *De Schelde* refused this proposal. In 1826 the two companies made use of the same agent in Vlissingen, to receive information about vessels entering Vlissingen. The agent's salary was paid by both companies. In any case, communication and the seeking of mutual solutions for business-related problems already existed before the drawing up of the Antwerp marine insurance policy of 1824, which, as mentioned, was adopted as a standard policy. In all likelihood, this was the case thanks to the reciprocal consultation structure that existed between these Antwerp marine insurers.

At a later date,[78] regarding *De Schelde*, Diercxsens would have taken the initiative to give the existing partnership a more permanent form. The partner companies – a larger number than the initial two – were referred to as *Réunion d'Assureurs* (later on called *Première Réunion*). Through more intense and concrete cooperation, the companies were able to cope with the many financial risks involved in the marine insurance business and with the wiles of fraudulent claims.[79] As already mentioned, one of the reasons for strengthening the partnership was the success of Auguste Morel and his companies. Traders and shipowners in Antwerp and other port cities received weekly information on

[75] *Willemse* (n. 19), 66.

[76] *Beeteme* (n. 61), 116.

[77] On what follows, *Willemse* (n. 19), 130–132.

[78] See the next paragraphs; there are too few sources available on the precise chronology and history of the Réunion.

[79] *Willemse* (n. 19), 131.

premium rates and special conditions of insurance policies, concluded by foreign insurance corporations, and consequently the most advantageous premium rates were immediately visible.[80] The Antwerp insurers' fear of being sidelined by the network of Morel turned out to be valid. In 1830 Morel founded the insurance company *Bureau Central*, and in 1834 the *1°* and *2° Cie Commerciale*. With these companies, he offered an insurance policy that was more advantageous for the insured than the current Antwerp policy.

Alexander Delehaye played a pivotal role in both *Securitas* and *Bureau Veritas*. His precise role in the process of drafting Morel's new insurance policy is unknown. Delehaye was active as a general agent at *Securitas* until 1829. Most likely, he remained on the board of *Bureau Veritas* even once Morel returned to Antwerp with his classification register *Bureau Integritas* in 1843.[81] In any case, it is certain that there was resentment between Morel and the other Antwerp insurers.[82] This explains why Morel's companies were completely excluded from the unions between the Antwerp marine insurers.

It is unknown when precisely the *Réunion* started its activities. It would seem that the union sold insurance policies as early as 1830 – acting as an insurance pool – to be dissolved for some time in 1837.[83] The dissolution was to be expected: after all, the insurance companies were facing a difficult time in the mid-1830s. From the signature of one of the letters written in the name of the *Réunion*, it can be concluded that the presidency changed each semester.[84] In 1840, the *Réunion* insisted for the estimation of the actual condition of the ships to be insured. At the initiative of the *Réunion*, a 'nautical agency' was set up, under the leadership of old long-haul captain Neurenbergh, who had to supervise the conditions of the vessels in Antwerp; he was appointed as a dispatcher and charged with estimating the damage of all vessels entering Belgian ports.[85] The Chamber of Commerce supported the request to make port servants available to the nautical agency, an initiative backed by the port captain.[86] In view of the existence of the Antwerp Nautical Commission, with its core task of guaranteeing the seaworthiness of vessels, the establishment of the nautical

[80] *Plasschaert* (n. 69), 105; *Veraghtert* (n. 24), 14–16.

[81] *Beeteme* (n. 61), 130; *Plasschaert* (n. 69), 114.

[82] For more information on the Morel boycott, see *Beeteme* (n. 61), 135.

[83] Felixarchief, MA#1037/1, stuk °13, list containing active marine insurance corporations in Antwerp in 1830 and 1837.

[84] Diercxsens, for example, signed the letter of 30 October 1840 as 'président du sémestre'. See Felixarchief, MA#1037/1, stuk °13, letter of 30 October 1840 from the Réunion to the mayor of Antwerp.

[85] Felixarchief, MA#1037/1, stuk °13, letter from Les Compagnies to the mayor of Antwerp.

[86] Felixarchief, MA#1037/1, stuk °13, letter of 30 October 1840 and letter of 21 November 1840.

agency is remarkable. The decrease in quality in the Commission's activities was one of the motives to establish this nautical agency. Since 1838, the Nautical Commission had to face various problems: the Commission was seen as a nuisance by Antwerp shipowners and underwent internal changes, which undermined its authority. Before 1838, the Commission consisted of an association of experts.[87] A change promoted by the judge and shipowner Van Cutsem in 1838, however, led to a different composition of the Commission: now, half of them were navigators and the other half were shipbuilders, each member being appointed for one year.[88] In addition, the fees of the experts were curtailed.[89] The commercial court also designated an expert carpenter, who did not cease his own job as a ship's carpenter while working for the Commission.[90] Such changes compromised the neutrality of the Commission. There were fewer captains among the experts and there was an increase in the number of traders and agents, which is not surprising, since during this period the Commission inspected more cargo than ships.[91]

Another reason for the undermining of the Nautical Commission by the marine insurance sector might be due to the fact that Nautical Commission was a governmental institution.[92] The insurers apparently were interested in the institution and its activities, but not in its existing capacity as a government body. By using the nautical agency, supported by the Chamber of Commerce, the government-driven Commission was put out of action. With this, the *Reunion* continued the trend set by the Antwerp policy of 1824 to counter government interference. Considering the abovementioned challenging times for the marine insurance industry, a government prone to meddling, acting through institutions such as the Nautical Commission – which, besides, did not provide services for

---

[87] Before 1838, the Nautical Commission consisted of, among others, an old captain and naval officer as unofficial chairman, two old long-haul captains, a marine engineer, a former naval officer, a shipbuilder, a stowage expert, a master navigator, a master carpenter, and master smith. See *Plasschaert* (n. 69), 113.

[88] *Plasschaert* (n. 69), 114.

[89] Mémoire à consulter sur la légalité de la visite des navires, et sur l'utilité d'une Commission Nautique libre dans un grand port de commerce (1841), 61.

[90] Mémoire (n.89), 69 f.

[91] See, for instance, Rijksarchief Beveren, RK Antwerpen 0000, reeks 26, nr. 40, 43; Mémoire (n. 89), 45.

[92] The Commission found its origin in the Déclaration du Roi conçernant les assurances van 17 August 1779 and the decree of 9–13 August 1791, applicable in Belgium since the annexation in 1795. The declaration provided that for each planned departure, before loading the ship, a visitation of the vessel was required to ensure that the ship was able to undertake the planned voyage ('en bon état de navigation'). The decree stated in Title III that in port cities, captains or lieutenants of the navy should be appointed to investigate the freedom and safety of trade routes and ports. Experienced experts, appointed after taking a successful exam, provided tonnage certificates, including a list of all required repairs or adjustments. See *Plasschaert* (n. 69), 100.

free – was perhaps one of the many annoyances of the companies of the *Première Réunion*, which desperately wanted to maintain their position in the insurance market. The fear of losing their strength and influence would eventually become reality. The *Premiere Réunion* would soon be confronted with new companies and foreign agencies, which would develop into new unions and partnerships.

2. From one to five unions

Around 1848, three other associations of private marine insurers existed: the association of private insurers *Van Gend* and *Loos*, the union around *Le Cercle* (directed by H. Flemmich), and the union around *Le Cercle commercial d'assurances maritimes* and *Lloyd Belge* (directed by H. Engels) with Bulens as a key figure.[93] No further information is available about the precise composition of these associations. Two of these unions dissolved in 1852, due to the new legislation on patents, providing that every company that was part of an association had to pay patent rights. Around 1855 there were four associations, namely the *Première Réunion*, the *Deuxième Réunion*, the *Réunion Flemmich*, and the *Assureurs Réunis*. A few years later a fifth union was established, the *Bureau d'Assurances Maritimes*.[94] It is certain that the fifth association of insurers acted as an insurance pool and distributed the risks among its members.[95] Why *L'Indemnité* and *Comptoir Spécial* moved from the *Première Réunion* to the *Bureau d'Assurances Maritimes* in 1863 is not entirely clear. A possible cause may be that the *Bureau d'Assurances Maritimes* functioned with a more integrated cooperation structure. Or perhaps the entry of some new companies in the *Première Réunion* in 1863 discouraged *L'Indemnité* and *Comptoir Spécial* to remain in it. It is striking that *Securitas* no longer belonged to the *Première Réunion* in 1863.

The trend toward the creation of unions among insurers was not unique to Belgium. From 1836 the marine insurers in Paris established the *Comité d'assureurs de Paris*, an institution that monitored the conditions of vessels and merchandise through agents and connections in international ports.[96] Perhaps not coincidentally, Auguste Morel conducted business from Paris during this period.[97]

---

[93] Erfgoedbibliotheek Hendrik Conscience, Felixarchief Antwerpen, Exposé sur la situation administrative de la province d'Anvers, 1849, annexe, 17–18.

[94] Felixarchief Antwerpen, Exposé sur la situation administrative de la province d'Anvers, 1857, annexe, 37–39.

[95] *Willemse* (n. 19), 133.

[96] *De Lurcy* (n. 25), 336.

[97] See *Auguste Morel*, Manuel de l'assureur, vol. 5 (1845–1846).

Below are lists of the unions and their members covering the time from 1855 onward. While some of these associations were established much earlier than that, no sources could be found on their foundation. New companies and agencies operating in Antwerp from 1858 were included in the scheme.[98] In 1865 there were no fewer than five unions and 48 marine insurance companies, agents of foreign companies, and private insurers.[99] When known, the name of the director is mentioned next to the company's name. Furthermore, the lists capture the changes within the unions' membership after 1855. Such changes were often due to the late emergence of some companies, the early dissolution or the cessation (whether temporary or permanent) of the maritime branch of an insurance company.[100]

First union, *Première réunion*:

1. Securitas (director M. Van Dongen), membership ended in 1863;
2. L'Escaut (director J. Diercxsens);
3. Cie Anversoise (director A. Aulit);
4. Comptoir Spécial (director L. Delehaye), membership ended in 1863;
5. Particuliere verzekeraars Van Gend en Loos;
6. Cie Générales (Paris) (director E. Cambier);
7. L'Océan (director J. Dineur);
8. La Cie d'assurances maritimmes et fluviales du Brabant septentional (director J. Dineur), membership ended in 1863;
9. La Compagnie d'assurances du Bas-Rhin (director E. Cambier);
10. L'Indemnité (director D. Bogaert), membership ended in 1863;
11. La Gironde (director Ch. Dineur), member since 1863;
12. La Réunion (director J. Dineur), member since 1865.

Second union, *Seconde Réunion*:

1. Cercle Commercial d'assurances maritimes (director D. Grenier and Fuchs);
2. La Garonne (Bordeaux) (director D. Grenier);
3. L'Espérance (director M. Gamain);
4. Les Cie d'assurances de Dusseldorf et Tiel (director J. Van den Bol);
5. Agriculture et Commerce (director J. Josson);
6. L'Atlantique (director J. Stappaerts);
7. Antwerpia (director J. De Bruyn);
8. Le Commerce d'Anvers (director J. Van Leemputte);
9. Le Rhin, Cie (director Le Brasseur);

[98] In 1858, Antwerp harbored no fewer than 40 active agencies, corporations, or private insurers. See Felixarchief Antwerpen, Exposé sur la situation administrative de la province d'Anvers, 1859, annexe, 24.

[99] Rijksarchief Beveren, L003, Map 59, jaarrapport Kamer van Koophandel Antwerpen 1865, 'Assurances maritimes (et contre l'incendie)', and annexe, 8.

[100] See Felixarchief Antwerpen, Exposé sur la situation administrative de la province d'Anvers, 1837–1860.

10. La Belgique Maritime de Bruxelles (director T. Callaerts), member from 1857 to 1863.[101]

Third union, *Réunion Flemmich*:[102]

1. 5° Cie (director F. Flemmich), membership ended in 1863;
2. F. Flemmich for the account of six Amsterdam marine insurance corporations;
3. Le Cercle (director H. Flemmich);
4. Agrippina de Cologne (director H. Engels);
5. Le Lloyd Belge (director H. Engels);
6. Providentia de Francfort-sur-Mein, member from 1856 to 1863;
7. Azienda Assuratrice di Trieste (director F. Flemmich), member since 1863;
8. Flemmich, assureurs particuliers (director F. Flemmich), member since 1863.

Fourth union, *Assureurs réunis*:[103]

1. Le Phare (director A. Bavais and J.Thielens), membership ended in 1858;
2. Cercle Particulier (director A. Bavais and J. Thielens), member since 1857, membership ended in 1858;
3. Azienda Assicuratrice di Trieste (director W. Lynen), membership ended in 1857;
4. La Cie de Thuringia d'Erfurt (director Schmitz and Muller), membership ended in 1857;
5. La Cie de Mayence (director Hardrodt), ended in 1857;
6. La Cie de Catalane de Barcelone (director A. Bavais), membership ended in 1858;
7. Minerva (director A. Bavais and J. Thielens);
8. La Meuse (director L. Vercken);
9. La Minerve de Paris (director L. Vercken), membership ended in 1858;
10. L'Helvetia de St-Gall (director J. Thielens);
11. La Bâloise (director W. Van Bomberghien), member since 1865;
12. Securitas d'Amsterdam, member from 1863 to 1865.

Fifth union, *Bureau d'Assurances Maritimes* (all listed companies were members since 1863):

1. Le Comptoir Spécial (director L. Delehaye);
2. L'Indemnité (director D. Bogaerts);
3. La Cie centrale d'assurances maritimes (Paris) (director L. Delehaye);
4. Cie Francaise d'assurances maritimes (Paris) (director D. Bogaerts);
5. Lloyd Suisse (Winterthur) (director D. Bogaerts).

---

[101] See Felixarchief Antwerpen, Exposé sur la situation administrative de la province d'Anvers, 1858, annexe, 7.

[102] All information is from Felixarchief Antwerpen, Exposé sur la situation administrative de la province d'Anvers, 1857, annexe, 39 and 1858, annexe, 7.

[103] All information is from Felixarchief Antwerpen, Exposé sur la situation administrative de la province d'Anvers, 1857, annexe, 39, 1858, annexe, 7 and 1860, annexe, 9.

Finally, there were a number of agencies of mostly foreign insurers active in the Antwerp market in the late 1850s and early 1860s that were not members of any union.[104] These were:

1. Thuringia (director Schmitz and Muller);
2. Compagnie de Mayence;
3. Cie d'assurances générales de Dresde contre incendie – agence maritime (director Kusenberg);
4. Cie d'assurances générales de Dusseldorf (director C. Rusenberg);
5. Providentia de Francfort sur Mein (director C. Rusenberg, Blanckarts);
6. Sourabayasche Zee-assurantie maatschappij (director Manifarges);
7. Nederlandsche zee- en brandverzekering compagnie (director Manifarges);
8. Astrea d'Amsterdam (director J. Van den Wijngaert);
9. Azienda Assicuratrice di Trieste (director W. Lynen);
10. La Union de Madrid (director J. Van Ruysseveld);
11. Caisse Maritime de Nantes (director H. Panis);
12. Reliance de Londres (director Smekens);
13. Compagnie de Dresde (director Blanckaerts);
14. La Marine (Paris, director Smekens);
15. La Garantie Maritime (Paris, director Smekens);
16. L'Afrique française (Algeria, director Soetens);
17. Deuxième Compagnie d'assurances (director van Leer);
18. L'Abeille (Dijon, director unknown);[105]
19. J.H. Lançon et Co (Bordeaux, director unknown);
20. Le Rhin (Société) (director J. Bulens);
21. Cie Liègoise (director F. Depouhon);
22. Le Neptune (director G. Van de Broeck).

Among the Antwerp companies, most of the older corporations were in the first union, with the exception of *L'Océan* (1846) and *L'Indemnité* (1857). The second union grouped younger companies, all established from 1849 to the mid-1850s, with the exception of *Agriculture et Commerce* (founded in 1829). The third union was mostly made up of the companies of Flemmich. Curiously, the *Réunion Flemmich* had the strongest connections with companies that did not belong to any of the five unions. The fourth union contained a striking number of foreign corporations. The Antwerp companies that were active in the fourth union were established from the late 1850s, and clustered in the network around *Le Phare*, *Minerva*, and *La Meuse*.

In 1863, some companies moved away from the first union, as *Comptoir Spécial* and *L'Indemnité* moved to the fifth union, together with some foreign companies. Also *Securitas* left the first union, possibly to join a new one. A much later newspaper article stated that *Securitas*, *L'Escaut*, and *Lloyd Belge* founded

[104] All information is from Felixarchief Antwerpen, Exposé sur la situation administrative de la province d'Anvers, 1859, annexe, 7 and 1860, annexe, 9, 48.

[105] On this and the following company, there were no records in the archives. *Beeteme* (n. 61), 219, does, however, mention them.

the *Comité des Assureurs Belges*, together with five other corporations in 1863.[106] According to the article, the *Comité des Assureurs Belges* met on a daily basis to discuss legal matters and policy conditions. The reason for this shift is unknown. *Comptoir Spécial* and *L'Indemnité* may have found it useful to work with foreign companies, once their attempt to push them out of the market with the *Première Réunion* had come to nothing. After all, from the mid-1850s a larger number of foreign companies joined the unions. Had their position on the Antwerp marine insurance market become of such importance that their exclusion from the unions was no longer an option?

The probable date of establishment of the other unions and the date of establishment of the corporations that composed them would suggest that the *Première Réunion* was created around a group of Antwerp companies with close ties. Later on, foreign or non-Antwerp insurance companies joined in, and then some of the original members moved from the *Première Réunion* for one of the new partnerships, namely the *Bureau d'Assurances Maritimes*. Initially, those other unions consisted of one or two Antwerp corporations and foreign companies, and other Antwerp companies joined in at a later date. The composition of the unions will be analyzed more in detail later on in the chapter.

As said, the unions represented their members in court. The associations *Assureurs d'Anvers*, *Assureurs d'Anvers* (*2me réunion*), *Réunion des assureurs d'Anvers*, *Lloyd belge & consorts*, *Les compagnies d'assurances*, and *Les assureurs réunis* were all active as plaintiffs or defendants in numerous court cases, while the verdict mentioned which marine insurance company concluded the policy.[107] There were various reasons for establishing unions and partnerships. Marine insurance corporations helped their members to save on their expenses, for example by sharing storage sites and experts. In addition, the unions provided an interesting communication platform, which perhaps led to the fine-tuning and the communal use of the Antwerp marine insurance policy of 1824. The content of this common marine insurance policy (and the fact that it deviated from the provisions of the *Code de Commerce*) and the choice for the use of a nautical agency instead of the government-made Nautical Commission (which had existed for many years), would suggest that the unions allowed for a common front against the interference of an overly eager government. At least some of the unions offered legal support as well.

Another incentive to cooperation was probably the exclusion of foreign or non-Antwerp corporations from the market. The insurance market of Antwerp at

[106] No other sources on this union were found, except for this article: Company archives Securitas (AG Insurance), newspaper article Le Metropole, Le progress des assurances, 14 February 1945.

[107] See, for example, *Joseph Conard*, Jurisprudence du port d'Anvers et des autres villes commerciales et industrielles de la Belgique, vol. 4 (1859), 62.

that time was perfectly suited for such a mechanism. The entire marine insurance sector had been renewed from 1821, and unwelcome newcomers and foreign companies could be excluded through the formation of unions. Such a system naturally has negative consequences for the market, as it is a fact that free and open competition leads to the lowest price for the best goods and services. Such a process, however, can take place only if competitors engage in fair and independent pricing for the provision of their services. After all, cooperation among competitors can lead to price manipulation and the exclusion of newcomers. Since the Antwerp marine insurers, with the exception of Morel's companies, all sold the same policy and conducted their business in fixed network structures, there was perhaps no longer a free market. It is not known why certain foreign companies were admitted to the unions. The reason probably lies in personal relationships or some other reasons, such as strategic connections, or shifting positions of power. Eventually, the *Première Réunion* developed in 1911 into the *Association pour le relèvement de l'industrie des assurances (branche transport) à Anvers*: a professional association that offered a meeting place to discuss price and market fixing.[108] This association is today still active as a member of International Union of Marine Insurers (IUMI).[109] IUMI is the successor of the *Internationaler Transport-Versicherungs-Verband* of Berlin, founded in 1874. The purpose of this initiative was to create an association 'where the members could discuss business matters of common interest with the purpose of agreeing upon principles concerning the management of marine insurance business.'[110] IUMI offered a platform to compile common regulations on customs, practices, and insurance conditions, and to express opinions on legal and other matters.[111] Thus, the need for a communication and cooperation structure among competing marine insurers in Antwerp was not the exception to the rule, but rather a common need.

---

[108] In fact, three associations were founded: the Comité Général des assureurs contre incendie à Anvers and the Syndicat de companies Assurant les risques automobiles shared the same infrastructure and secretary as the abovementioned association. Most insurers were members of the three associations and discussed such topics as governmental interaction, taxes, prices, and so on. See *Paul Buyl*, Van 'Association pour le relèvement de l'industrie des assurances (Branche Transport) à Anvers' tot 'Koninklijke Belgische Vereniging van Transportverzekeraars/Royale Association Belge des Assureurs Maritimes ABAM BVT'. 100 jaar dienstbaarheid van en aan maritieme verzekeraars in een veranderend tijdsbeeld (2019), 4 f.

[109] IUMI represents national and international marine insurers, considers issues of interest to the marine insurance industry, and offers a global communication structure.

[110] On the history of IUMI see https://iumi.com/about/history (last accessed 18 August 2020); *Peter Koch*, 125 years of the International Union of Marine Insurance (1999).

[111] *Subrina Mahmood* and *Roy Nersesian*, International Union of Marine Insurance, in: Christian Tietje and Alan Brouder (eds.), Handbook of Transnational Economic Governance Regimes (2009), 463–469.

D. Profile of the managers of the marine insurance corporations

After this overview of the existing networks, the question arises as to whether there were certain trends in the identity of the managers of the companies, not only within the composition of one maritime insurance corporation, but also beyond them. If we took a broad definition of entrepreneur, including both merchants and those active in the service sector, then a substantial part of nineteenth-century Antwerp entrepreneurs came from the eighteenth-century city elite.[112] These entrepreneurs came mainly from families that were active either in the mercantile sector or the textile industry, and these families had formed the financial elite in the eighteenth century.[113] They had a solid financial basis and sufficient connections with both the business elite and the nobility.[114] Marriages and friendly relationships within the same high social circle strengthened the ties between merchants and industrialists.[115] This common business culture, fostered by a social network based on shared values, was the result of social interaction and a complex development of social and geographical mobility of the elite and the development of economic and political power.[116] It was only slightly more than one-third of the Antwerp entrepreneurs that had no connections with the earlier financial and business environment of Antwerp.[117] Besides, around 1846, only 1% of the Antwerp population was active as wholesalers, exchange agents, or shipowners.[118]

The managers of the insurance companies came from the highest social circles in society.[119] For the present study, no differentiation was made between native and non-native entrepreneurs.[120] Professional reorientation often took place among the Antwerp businessmen.[121] On many occasions, the main activity also determined the secondary ones: the merchant who, for example, was in need of

---

[112] *Karel Degryse*, De Antwerpse fortuinen (unpublished doctoral thesis, University of Ghent, 1985), vol. 1, addendum Ia–Ib and vol. 2, 599.

[113] *Greefs* (n. 21), 425.

[114] *Greefs* (n. 21), 425.

[115] *Greefs* (n. 21), 425; *idem* (n. 2), 16. See also *Beeteme* (n. 61).

[116] *Lee* (n. 1), 1 f.

[117] *Greefs* (n. 21), 425.

[118] *Jaap Kruithof*, De sociale samenstelling van de bevolking te Antwerpen, Brussel, Gent en Luik in 1846–1847 (1957), 200.

[119] *Willemse* (n. 19), 179. See *Hannes/Laureyssens* (n. 27), 95–135; *Beeteme* (n. 61), 74.

[120] We can briefly mention that immigrants in Antwerp dominated overseas trade in the first half of the nineteenth century. They were also active in marine insurance, shipping companies, and the financial sector. Most of them showed no interest in industry. Native businessmen from Antwerp were for a long time less interested in overseas trade and specialized primarily in local sectors, such as the silk industry, sugar refineries, or the banking and insurance sector. See *Greefs* (n. 2), 4.

[121] *Greefs* (n. 4), 255.

capital to invest in buildings and other facilities could become active in the production sphere.[122]

The directors were mainly merchants, bankers, shipowners, and industrialists.[123] Merchants were by far the predominant group, followed by bankers and industrialists. If shipowners were not particularly numerous among directors in absolute terms, they were the second largest group (after merchants) in terms of number of corporations in which they were present. In 1829 Antwerp harbored 99 of the total number of 182 Belgian vessels. These vessels belonged to 51 different shipowners.[124] At least 15 of them were involved in marine insurance corporations.[125] Twenty-two of the Antwerp companies included shipowners among their board members. *L'Atlantique* took the lead with 30% shipowners among its managers.

It is not surprising that industrial entrepreneurs were active as managers of numerous insurance companies. During the period analyzed in this study, 25% of Antwerp businessmen were active in the industrial sector.[126] In eight marine insurance corporations the majority of the managerial tasks were entrusted to such businessmen. In 20 marine insurance companies, they sat on the management boards. *Le Cercle* in particular consisted of one-third of managers who were active as industrial entrepreneurs. Bankers appeared in six companies as the main professional category among the directors. Nineteen corporations included bankers among their business managers. One-fourth of the managers of the *Compagnie Anversoise* consisted of bankers.[127]

Since 1830, the main purpose of the Chambers of Commerce gradually evolved from advising to protecting the interests of entrepreneurs.[128] Despite the

---

[122] *Greefs* (n. 21), 432. As an example, we can quote Joseph and Gerard Legrelle. The Legrelles, descending from a family of silk traders and manufacturers, became active as financiers to support mercantile activities. This trend explains why so many of the managers were active in various other professional activities.

[123] *Greefs* (n. 2), 16. See also *Beeteme* (n. 61).

[124] *De Vos* (n. 18), 120. For the period between 1825 and 1847, 93 Antwerp shipowners were active. See *Plasschaert* (n. 69), 107.

[125] *Willemse* (n. 19), 179.

[126] *Greefs* (n. 21), 431.

[127] As related banks, we found, among others, the Société Générale, Banque Nationale, the Banque de Belgique, the Banque de Commerce, the Banque Belge du Commerce et de l'Industry, the Banque de l'Industry, the Banque du Crédit Commercial, and the Banque d'Anvers.

[128] *Raymond Doms*, *Luc François*, *Chantal Vancoppenolle*, Tussen beleid en belang, geschiedenis van de Kamers van Koophandel in België (17e–20e eeuw) (1995), 18; *Chantal Vancoppenolle*, De kamers van koophandel in België (1830 tot heden). Van officiële adviesorganen tot autonome dienstverlenende werkgeversorganisaties, (1996) 59 NEHA-Jaarboek voor economische, bedrijfs- en techniekgeschiedenis 75–94, 79.

constant tension between supporting the economic policy of the government on the one hand and defending the interests of its members on the other, the Chambers acted as a mouthpiece for local entrepreneurs.[129] Certain families and individuals, including foreign businessmen, dominated the Chambers: the Chambers were closed circles, where several members of one family became members, and where the various families often were related with each other. Sometimes the same individual kept a chair in a Chamber for a number of years.[130] The entrepreneurs with a seat in a Chamber of Commerce often had some other political or institutional position as well (e.g., in the commercial court), and kept strong ties with the Antwerp merchants.[131] Members of the Chamber of Commerce were active as managers in ten marine insurance corporations, and in one of them they made up most of the board. With *La Meuse*, for example, 20% of its directors were members of the Chamber of Commerce.

E. Connections between marine insurance corporations

Family members of Antwerp entrepreneurs were often involved in the running of companies, unless the activity was mainly a one-man business passing from one generation to the next.[132] Either way, family business was the dominant form of business activities: family ties meant reliable, loyal, and solidary ties.[133]

---

[129] *Vancoppenolle* (n. 128), 79. The Royal Decree of 10 September 1841 stipulated that the Chambers had both an advisory and an informative function and that they had to communicate their views to the government or parliament regarding measures that were intended to promote the country's industrial, commercial, and maritime growth. See *Guy Vanthemsche*, Intérêts patronaux entre sphère publique et sphère privée: la suppression des Chambres de Commerce officielles en Belgique (1875), (2004) 34 Belgisch tijdschrift voor nieuwste geschiedenis 5–47, 8 f.

[130] *Gerda Devos*, De Antwerpse kamer van koophandel als privaatrechtelijke instelling, 1871–2002, in: idem and Ilya Van Damme (eds.), In de ban van Mercurius, twee eeuwen kamer van koophandel en nijverheid van Antwerpen-Waasland (2002), 89–231; *Doms/François/Vancoppenolle*, (n. 128), 56.

[131] In 1815, members of the Chamber of Commerce were not always merchants or industrial entrepreneurs. More often they were mundane gentlemen, belonging to the socio-economic elite. The strong ties between the Chamber and merchants was demonstrated by the protest that came from the Antwerp business world when the Royal Decree of 1841 determined that the King would appoint the members of the Chambers. The composition of the Chambers was not representative. A direct election by the main merchants and industrials of the city chose the members. Due to the proposal of the Royal Decree of 1841, certain entrepreneurial branches were not represented, so there were no initiatives in favor of these branches. Little by little, the Chamber lost touch with the business world and consequently had less authority. See *Doms/François/Vancoppenolle* (n. 128), 85 f.; *Vanthemsche* (n. 129), 5–47.

[132] *Greefs* (n. 21), 439.

[133] *Greefs* (n. 21), 439. Immigrants, in turn, developed a new network of business relationships, because they often collaborated with third parties in their companies. There

Leadership in insurance corporations was normally transferred to relatives in the vertical line. As already said, close relatives often held positions in other marine insurance corporations. Certain companies were connected by marriage as well. Thus, marriages strengthened the solidity of a family's economic situation.[134] For example, the commissioner of *L'Espérance*, Grenier, was the son-in-law of Bischop-Basteyns, the commissioner of *De Schelde*. The director of *Securitas* Lemmé was the father-in-law of Osterrieth, who was the commissioner of *Le Neptune*. In turn, Osterrieth was the brother-in-law of Ellerman, the commissioner of *5° Cie*. Mund, director of *Le Neptune*, was the son-in-law of Engels, director of both *Lloyd Belge* and of *Le Cercle*. Despite these and similar cases, family connections played only a small part in the interaction between the corporations.

As already mentioned, it was not unusual for the same manager to take on various positions in different marine insurance corporations. Nevertheless, the statute of several corporations expressly forbade managers from taking on management positions in another marine insurance company.[135] Such a clause is all the more striking both because of the protest from the Chamber of Commerce on the structure of Morel's companies and given that members of the Chamber of Commerce were often active as managers in the Antwerp marine insurance corporations. To better appreciate the functioning of the nineteenth-century Antwerp marine insurance market, some further analysis on the the activity of the managers in the companies that prohibited a director from being employed in a competing firm has been conducted, examining both managers and shareholders, as well as family ties between companies.

If we were to cross-analyze personal connections in different unions, we might find some interesting data. Being part of a certain union did not apparently prevent the managers from having connections with marine insurance companies from other unions, for example by holding manager positions in companies belonging to a different union.[136] To conclude that the unions were useless because they were sidelined by multiple appointments of the companies'

---

was often cooperation with partners from the same region or partners who had received training in the same city. Heirs of the first generation of immigrants married men or women from prominent native families or the sons and daughters of other migrant entrepreneurs. See *Greefs* (n. 21), 439 f.

[134] On what follows, *Willemse* (n. 19), 169 f.

[135] *Willemse* (n. 19), 167.

[136] Looking at the highest quantitative connection (quantitive amount of connections) of the 24 companies analyzed, the connected companies belonged to the same union in only one in three cases. If we look at the strongest connection between companies in terms of quality (a connection based upon a management position was deemed higher in quality than stockholdership of family ties), we can note that the marine insurance corporations belonged to the same union in slightly less than half of the cases.

managers would of course be premature. The simple trend toward their creation over a period of more than 30 years seems to attest to the unions' utility. The quality of the services that they provided and the benefits for their members probably differed from union to union. It is likely that some of them functioned primarily as an institutionalized communication channel among companies, with regular meetings held on fixed dates, in a period where communication was much slower than it is today. Others unions acted as a party in court and discussed other legal matters.

The companies most connected with each other seem to have been those belonging to the *Première Réunion*.[137] This is not surprising, considering the early development of the partnerships between *Securitas* and *De Schelde* around the early 1820s. Of the five unions, the *Réunion Flemmich* had by far the strongest connections with companies that did not belong to any of them.[138]

Three of the marine insurance companies with the lowest amount of traceable connections did not belong to any union. These were the companies *Le Rhin (Société)*, *Cie Liègoise*, and *Le Neptune*.[139] Focusing on the identity of their managers yields no particular kind of connections either. *Bureau Central*, which of course centralized the knowledge and expertise of different companies, was not part of this. Although Morel himself had worked at *Securitas* and had further strengthened these ties through A. Delehaye, his companies were not in any of the unions, perhaps because it had been precisely those unions that forced Morel out of the market.

Looking at the identity of the directors with strong connections, no secondary profession emerges as predominant. A company with mostly industrial entrepreneurs could have, for example, very close connections with a company consisting mainly of shipowners. In other words, the personal connections between managers of diferent companies were due to their belonging to the same social elite. After all, just as in the *Ancien Régime*, the social elite consisted of merchants, industrialists, bankers, and rentiers.[140] The division between the

[137] In cases where the companies had the highest connection with each other, they belonged to the same union six times. In four of these six situations, these were companies from the Première Réunion.

[138] In the nine cases where a non-union corporation shared a connection with another company, the latter belonged to the Réunion Flemmich five times.

[139] Bureau Central was a part of these as well, but this corporation of course belonged to the network of Auguste Morel.

[140] *Karel Degryse*, Fortuin en sociaal prestige, (1977) 9 Tijdschrift voor sociale geschiedenis 283–293, 283. Seventeenth-century regents were often active in shipping, trade, and industry. See *Maarten G.J. Duijvendak* and *Jacob J. De Jong*, Eliteonderzoek: rijkdom, macht en status in het verleden (1993), 20. In the sixteenth century, for example, we often count merchants among the aldermen, or they descend from a family active in trade or industry. For example, a part of the administrative elite of 's-Hertogenbosch was

banking and maritime sectors was minimal: a merchant was just as much a banker, transporter, and insurer. Those who had extensive political and economic capital at their disposal could use it for social advancement by doing business with partners from high social strata or even from important (noble) families.[141] This mutual kinship between businessmen belonging to different elite groups created social and geographic mobility, and a national power elite.[142]

F. Conclusion

During the nineteenth-century, strong competition and high risks encouraged collaboration in the marine insurance business of Antwerp. Two of the earliest features of its market were cooperation and networking: the earliest sources about the cooperation between the companies *De Schelde* and *Securitas* date back to the year preceding the Antwerp marine insurance policy of 1824, and probably contributed to its use as a standard policy. During the following years, the innovative ideas and international view of the entrepreneur Auguste Morel and his extensive network of companies posed a threat to the other corporations; this challenge probably strengthened the already existing tendency among his competitors toward cooperation. There were also other reasons for the establishment of unions among insurance companies. The possibility to make savings, the creation and expansion of communication platforms in a time and sector with slow communication, and the establishment of a common front against government control all contributed to the creation of these unions. With them, unwelcome newcomers and foreign companies could be excluded from the market.

Over a period of 30 years, five unions of marine insurance corporations were created, each with its own specific features. The first and oldest union, the *Première Réunion*, was the most close-knit and sound: its companies showed the strongest and most frequent connections with each other. The second union grouped together younger companies, mostly dating from 1849 to the mid-1850s. The third union, *Réunion Flemmich*, characterized itself as an 'outsider network' by attracting companies that did not belong to the other unions. The fourth union

---

successfully active as businessmen and they confirmed their newly acquired elite position through marriages. See *Antonius Schuttelaars*, Heren van de raad, bestuurlijke elite van 's-Hertogenbosch in de stedelijke samenleving 1500–1580 (1998), 316.

[141] *Jan Dumolyn*, Investeren in sociaal kapitaal, netwerken en sociale transacties van bourgondische ambternaren, (2002) 28 Tijdschrift voor sociale geschiedenis 417–438, 437.

[142] *Dumolyn* (n. 141), 437. Among others, Pierre De Caters, Charles Havenith, Jean Bavais, Pierre Pilgrims-Hanegraeff, Jacques Thielens, Jules and Eugène Jossen, Bisschop-Basteyns, Nicolas De Cock, Prosper De Terwagne, Antoine Kien, the Legrelle family, Werbrouck-Pieters, Nicolas Van Cutsem, Louis Guichard, Constant Delehaye, and Jozef Pauwels-Gevers were directors of these companies.

contained a striking number of foreign companies. Its Antwerp-based corporations date from the late 1850s and show clearly the connections between *Le Phare*, *Minerva*, and *La Meuse*. The probable starting dates of all the unions save the first, and the date of establishment of their corporations, suggest that the first union arose around a very close network of older Antwerp companies. Only later did foreign or non-Antwerp insurance companies join in. The other four unions all started with foreign companies and just one or two corporations from Antwerp. Other Antwerp companies would join later. In 1863 a few companies left the first union for the fifth one. It is possible that this was due to the entry of new corporations in the *Première Réunion*, or that the structure of the fifth union – the *Bureau d'Assurances Maritimes* – was more enticing. It might also be that some corporations that were in the first union realized that foreign companies could no longer be kept out of the market. As a consequence, foreign marine insurance corporations soon became members of the fifth union. The first union had clearly lost the dominant position it previously enjoyed. Eventually, one of unions developed in 1911 into the *Association pour le relèvement de l'industrie des assurances (branche transport) à Anvers*, a professional association that offered a meeting place to discuss price and market fixing and (legal) issues.[143] This association is today still active under the name ABAM BVT and is a member of IUMI. IUMI offered a platform to coordinate regulations on customs, practices and insurance conditions and to discuss various other matters.[144] This would suggest that the need for a communication and cooperation structure among competing marine insurers was not only felt in Antwerp but was a necessity in other markets as well. The former president of ABAM BVT, Paul Buyl, was actively engaged as a member of the Commission for the revision of Belgian law with regards to marine insurance. One of the main reasons behind the pleas to change the current Belgian marine insurance legislation is the fact that marine insurance corporations still feel the need to sideline the law. They make frequent use of standard marine insurance policies (such as the 2004 Antwerp Cargo Insurance Policy, based on the Antwerp marine insurance policy of 1859) and often stipulate the opposite of what the law dictates. The fact that the Commission for the revision of the Belgian Shipping Code includes the former president of ABAM BVT and marine insurance expert and broker Jef Gorrebeeck, could be a sign that the legislator will from now on

[143] In fact, three associations were founded: the Comité Général des assureurs contre incendie à Anvers and the Syndicat de companies Assurant les risques automobiles shared the same infrastructure and secretary as the abovementioned association. Most insurers were members of the three associations and discussed topics such as governmental interaction, taxes, prices, and so on. See *Buyl* (n. 108), 5.

[144] *Mahmood/Nersesian* (n. 111), 463.

involve the marine insurance corporations and make use of their extended knowledge while drawing up legislation.[145]

The boundaries of the unions did not prevent personal links among corporations belonging to different unions, for example through the appointment of a same person in several corporations. Being part of a network was important: both the societies around the Morel boycott and those that did not belong to any union showed virtually no connection with other societies or unions. While lack of connections with other corporations did not *per se* affect the lifespan of a company, when this was coupled with the lack of membership to one of the five Antwerp unions it always resulted in a very brief existence. A corporation lacking a network could not thrive: no man is an island, and corporations are no different.

Merchants, shipowners, industrialists, and bankers were frequently active as managers of the marine insurance corporations. Given both the period and the region, this is unsurprising. Other directors included members of the Chamber of Commerce, noblemen, lawyers, magistrates of the commercial court, and politicians. Relatives of directors were regularly active in the same or other marine insurance corporations, but only in four cases were the connections between corporations predominantly family-based. The managers of the marine insurance corporations took advantage of the know-how and social relationships available in the network and communication structures that the unions offered. The business elite, which was actively engaged in nineteenth-century Antwerp marine insurance companies, consisted of prominent citizens, whose personal connections were crucial. When fierce competition and innovative ideas threatened their business, this social circle offered a safety net.

[145] The other experts in this commission were Kris Bernauw, Eric Van Hooydonck, Marc Huybrechts, legal expert Christian Dieryck, and legal expert and marine claims handler Jean-Pierre Vanhooff.

List of Contributors

Andrea Addobbati is Professor of Early Modern History at the University of Pisa, Italy.

David Deroussin is Professor of Legal History at the University of Lyon, France.

J.D. Ford is the Professor of Civil Law at the University of Aberdeen, Scotland.

Sabine Go is Assistant Professor in Accounting at the Vrije Universiteit Amsterdam, the Netherlands.

Phillip Hellwege is Professor of Private Law, Commercial Law, and Legal History at the University of Augsburg, Germany.

Antonio Iodice is a PhD Candidate in History at the University of Exeter, England, and in Economics at the University of Genoa, Italy.

Mallory Hope is a PhD Candidate in History at Yale University, USA.

Luisa Piccinno is Associate Professor of Economic History at the University of Genoa, Italy.

Stephanie Plasschaert is a PhD Candidate at the Vrije Universiteit Brussel, Belgium.

Jerònia Pons Pons is Professor of Economic History at the University of Seville, Spain.

Ana María Rivera Medina is Professor of Medieval History at the Universidad Nacional de Educación a Distancia (National University of Distance Education – UNED), Spain.

Guido Rossi is Reader in European Legal History at the University of Edinburgh, Scotland.

Grietjie Verhoef is Professor in Business, Economic and Accounting History at the University of Johannesburg, South Africa.

Nikol Žiha is Associate Professor of Roman Law at the Josip Juraj Strossmayer University of Osijek, Croatia.

Index