

**THE DEVELOPMENT OF THE PRINCIPLES OF INSURANCE LAW  
IN THE NETHERLANDS FROM 1500 TO 1800**

**VOLUME III**

*by*

**JOHAN PETRUS VAN NIEKERK**

*submitted in accordance with the requirements  
for the degree of*

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*at the*

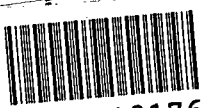
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## 1 The Insurance Contract as a Contract of Indemnity in Roman-Dutch Law

### 1.1 Introduction

In consequence of the insurer's bearing of the risk, he became liable, on the occurrence, notice and proof of a loss,<sup>1</sup> to make a payment to the insured in terms of the insurance contract. Such a payment was aimed, at least in the case of marine insurance, at compensating the insured for the loss he had suffered. Put differently, the insurer's payment was directed at indemnifying the insured against his loss.

The extent of the insurer's liability to pay or compensate the insured was restricted by one of the following two factors,<sup>2</sup> the amount for which the insurer had insured the risk or sum insured on the one hand,<sup>3</sup> and the amount of the insured's loss on the other hand. Therefore, the insurer was liable either for the sum insured or for the amount of the insured's loss, whichever was the smaller.

As regards the insured's loss, the insured had to quantify and prove the extent or amount of his loss. This involved, at least as a first step, that he had to prove the value of the object of risk. However, in those cases where the object was not totally lost, the insured's loss and the value of that object did not coincide, and in such a case of partial loss the extent of the depreciation in that value had to be determined as well. That was often done with reference to the cost of the repair of the damage in question.<sup>4</sup> Likewise, where the insured was not also the owner or the sole owner of the object of risk, the extent of his loss and the value of the object did not necessarily coincide, so that, strictly speaking, the insured had to prove the extent to which he had suffered loss as a result of the loss of or damage to that object.<sup>5</sup>

In this regard the law came to recognise a number of rules by which to determine, in cases of total and partial loss respectively and in the absence of a permissible agree-

<sup>1</sup> See again respectively ch XV, ch XVI § 2 and ch XVI § 3 *supra*.

<sup>2</sup> Or, in theory, both, if they happened to correspond.

<sup>3</sup> See § 2 *infra* as to the sum insured.

<sup>4</sup> Thus, whereas in the case of a total loss the amount of the insured owner's loss was equivalent to the value of the property insured, in the case of a partial loss the amount of his loss and the value of the property were two separate but related matters.

<sup>5</sup> This possibility did not feature greatly in the Roman-Dutch sources. See again ch II § 6 *supra* for an explanation of how interest and ownership were equated in early Dutch law.

ment on the matter (that is, in the case of unvalued policies), what may be termed the extent of the insurer's liability for the insured's loss. The rules to determine the extent of the insured's loss, or the measure of his indemnity as it is also referred to, included, where relevant, the way in which and the time when and the place where the relevant value of specific objects of risk for insurance purposes had to be determined. This value for insurance purposes is also known as the insurable value of the object of risk.<sup>6</sup>

However, these rules were not only not always acceptable in practice but they also did not relieve the insured of the often onerous burden of proving the extent of his loss and, in the process, the relevant insurable value of the property he had insured. A practice therefore arose and came to be recognised in law of concluding valued policies in terms of which parties agreed, before the occurrence of any loss, on the value of the object at risk.<sup>7</sup> Such agreed value was, for purposes of that insurance contract and specifically in determining the insured's measure of indemnity, the equivalent of the insurable value upon which that measure of indemnity was assessed.<sup>8</sup>

## 1.2 Recognition of the Insurance Contract as One of Indemnity

While there is no doubt that the principle of indemnity was fundamental to insurance law in general and to Roman-Dutch insurance law in particular, the recognition of this fact was not as explicit in the legal sources as may have been expected.

Thus, definitions of the insurance contract by Roman-Dutch authors<sup>9</sup> usually described the insurer's performance as the taking over and bearing of the insured's risk. Only occasionally did they add that that in turn implied that on the occurrence of the event insured against or the materialisation of the risk, the insurer had to compensate the insured for and indemnify him against the consequences of such materialisation. And only in later definitions was it specifically mentioned that the insurer's obligation entailed the compensation or indemnification of the insured for loss. The definitions and descriptions of the insurance contract seldom stressed, let alone explained in much detail, the ramifications of the principle of indemnity and why the insured was entitled only to an indemnity and why he was not permitted to make a profit from the fact that he was insured.

On a few occasions the indemnifying nature of the insurance was alluded to by the authors, most often in connection with over-insurance. Thus, Van Leeuwen<sup>10</sup> referred to the insurer's liability to the insured as one to make good to the latter, to the extent that he was insured, his lost and damaged property (*'syn verloren, en*

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<sup>6</sup> See § 3 *infra* for the insurable value.

<sup>7</sup> Note, in the case of a valued policy only the value of the object at risk was determined and not necessarily also the amount of the insured's loss. That was the case only where the loss in question was a total loss and where the insured was the owner of that object.

<sup>8</sup> See § 5 *infra* as to valued policies.

<sup>9</sup> For which see again ch III § 2 *supra*.

<sup>10</sup> *Rooms-Hollands regt* IV.9.10.

*verongelukte [moet] goed doen, so ver het selve was versekerd*). Schorer<sup>11</sup> explained that the reason why an insurer was never liable beyond the value of the insured goods was because the insurance contract was introduced solely to indemnify the insured and not to enrich him. Scheltinga<sup>12</sup> noted that the limitation of the insurer's liability by the value of the insured ship or goods appeared from the policy formulas appended to the various insurance laws, but in passing he alluded to the fact that it was the insured's loss (*'de waare geledene schade'*) rather than the value of the insured property which the insurer had to compensate in the first instance, a position he thought accorded with reason and met with the requirements of merchants.

Bynkershoek<sup>13</sup> too drew a distinction between the sum insured and the value of the insured property on the one hand, and the amount of the insured's loss on the other hand. The insured could not recover from his insurer under the policy more than the latter,<sup>14</sup> the aim of the action on the insurance contract being to indemnify the insured, not to provide him with a profit (*'[d]e geheele Actie van Assurantie strekt om bevryd te blijven van schade, en niet om winst te doen'*).<sup>15</sup>

Finally, in his definition of the insurance contract, Van der Linden<sup>16</sup> quoted the precise (*'naauwkeurige'*) definition of Pothier<sup>17</sup> which stressed that it was a contract by which one contracting party took upon himself the risk of the incidental misfortunes to which a certain thing was exposed and bound himself to the other contracting party to hold the latter harmless from or to indemnify him against (*'schadeloos te houden tegen'*) any losses caused by such misfortunes.

Other sources, too, especially the model policies prescribed or suggested by the various legislative promulgations,<sup>18</sup> gave recognition to the indemnifying nature of the

<sup>11</sup> *Aanteekeningen* 425 (ad III.24.6) n20.

<sup>12</sup> *Dictata ad III.24.7 sv 'boven de waarde?'*.

<sup>13</sup> *Quaestiones juris privati* IV.13, referring to a case before the *Hooge Raad* in 1726 (see *idem Observationes tumultuariae* obs 2242).

<sup>14</sup> And that was not necessarily the same as either the sum insured or as the value of the insured property.

<sup>15</sup> *Kersteman Academie* part XVIII (at 275), in his description of the insurance contract, referred to the insurer's *'expresse belofte en verband, om den Reeder, en Eygenaar van het geassureerde Schip en Lading, wegens alle schaden en nadeelen, resulterende uit alle de bovengemelde oorzaken, te zullen indemnifeeren, tot een zekere Pryze by het voorschreeve Contract van assurantie gespecificeert'*. See also *idem Woorden-boek* at 28 where he referred to the insurer's promise *'te zullen indemnifeeren, kost en schadeloos te houden, tot zulk een zekere somme als by de daar van gemaakte Police ... gestipuleert, bedongen, en uitgedrukt is'*.

<sup>16</sup> *Koopmans handboek* IV.6.1.

<sup>17</sup> *Assurance* I.1.1.2. It was probably true, as Van Nievelt XXXVI suggests, that the classification of the insurance contract as one of indemnity was more prominent in the works of French authors such as Pothier and Emerigon than it was in that of their Roman-Dutch counterparts.

<sup>18</sup> See generally as to the relevant stipulations in sixteenth-century Antwerp insurance policies, *De Grootte Zeeassurantie* 114-116.

insurance contract, even if only by implication. In this regard various terms and descriptions were used, of which a few examples will suffice.

In the policy form appended to s 2 of title VII of the *placcaat* of 1563 it was stipulated that the insurers underwrote and put themselves in the position of the insured so as to guarantee him against all loss and damage (*'Ende van als verseeckeren sy ende stellen henlieden inde eygen plaetse vande gheasseureerden, om hem te garantieren van alle verlies ende schade'*); and in the case of loss of or damage to the insured property (*'[e]nde oft den voorseyden goeden oft coopmanschepen yet anders toequame dan wel (dat Godt behoede)'*), the insurers undertook the obligation to pay the insured the sum each had underwritten or the loss the insured had suffered (*'de voorseyde Asseureurs verobligieren hen, den voorseyden gheasseureerden ... te betalen al 't geene dat een yegelick van henlieden onderteekent sal hebben, ofte de schade die de voorseyde geasseureerde gehadt sal hebben'*).

The policy form prescribed by s 35 of the *placcaat* of 1571 was equally extensive. It noted the insurers' undertaking to insure and indemnify (*'te verseeckeren ende indemneren'*) specified property for the insured, and later on referred to the fact that the insurers put themselves in the place of the insured so as to guarantee him against loss or damage (*'hem stellende inde eygen plaetse vanden geasseureerden ende verseeckerden, om den selven te garanderen van alle schade ende verlies'*) as well as to the fact that in the case of loss of the insured goods, the insurers were obliged to pay the insured for all the loss he may have suffered.<sup>19</sup>

In the Antwerp *Compilatae* of 1609<sup>20</sup> it was explained that the insured had two actions in connection with his insurance contract, one to claim a return of the premium and the other action to recover in respect of a loss of or damage to the insured property, whether by way of abandonment or as a partial loss (*'tot verhael, van verlies oft schade overt versekert goet oft schip gecomen, tsij bij abandonnement oft bij avarie'*).

Largely similar stipulations occurred in subsequent model policy forms, notably in the hull and cargo policies of the Amsterdam *keur* of 1598,<sup>21</sup> in those of the Amsterdam

<sup>19</sup> *'En geschiedende oft toekomende anders dan wel (t welck Godt verhoeden moet) aende voorseyde goeden ofte Coopmanschappen, den voorseyden Asseureur ofte Verseeckeraer verobligeert hem te betalen aen den voorseyden verseeckerden ... alle die schade die den voorseyden verseeckerden gehadt sal hebben'*. Thus, a distinction was drawn between the loss of the ship or goods and insured's loss or damage. The insurers did not undertake to pay the value of the property or the amount of the damage, but merely to indemnify the insured against the loss or damage he suffered as result of the loss of or damage to the property.

<sup>20</sup> In art 256 of par 8, title 11, part IV (see De Longé vol IV at 306).

<sup>21</sup> *'[S]tellende ons [the insurers] in allen sulcken gevallen in u plaetse, om u te garanteren van alle verlies ende schade' and 'verbinden wy ons by desen te betalen aen u ... alle de schade die ghy sult geleden hebben'*.



amending *keur* of 1688,<sup>22</sup> in those of the Rotterdam *keur* of 1721,<sup>23</sup> and in those of the Amsterdam *keur* of 1744 and amending *keur* of 1775.<sup>24</sup> In this respect English practice differed from that on the Continent. In the Lloyd's policy of 1779, the insurers' promise to pay the insured an indemnity and to do so in the case of a loss was implied, not expressed, the policy merely stipulating that the insurers 'hereby promise and bind ourselves ... to the assured ... for the true performance of the promises'.<sup>25</sup>

But while its fundamental role in insurance law was not always expressly acknowledged, and while a comprehensive interest theory had not been formulated, there was nevertheless no doubt about the application of the indemnity principle in Roman-Dutch insurance law. The recognition of its cardinal role appears not so much from express statements or provisions to that effect in the sources, but rather from the application of the principle in particular instances, notably in the case of over-insurance. The principle that an insured was entitled to an indemnity and no more most clearly underpinned much about what the law laid down as regards over-insurance.<sup>26</sup> However, the application of the indemnity principle was also implicit in other contexts, for example in the rules about the determination of insurable value,<sup>27</sup> in connection with abandonment,<sup>28</sup> the insurer's right of recourse against third parties,<sup>29</sup> and the rules which sought to

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<sup>22</sup> The hull policy provided: '*stellende ons ... in allen sulke gevalle, in u plaatse om te betalen aan u Geassureerde ... alle de schade, die gy zult geleden hebben*', while the goods policy read: '*stellende ons ... in allen sulke gevalle, in u plaatse, om u te garandeeren van alle verlies en schade, ende te betalen aen u Geassureerde ... alle de schade, die gy zult geleden hebben*'.

<sup>23</sup> The hull policy provided: '*stellende ons in alle zulke gevalle in U plaatse, om te betalen ... alle de schade die Gy zult geleden hebben*' and the goods policy: '*stellende ons in alle zulke gevalle in U plaatse, om U te garanderen van alle verlies ende schade, ende te betalen ... alle de schade die Gy zult geleden hebben*'.

<sup>24</sup> The hull policy read: '*stellende ons ... in alle zulke gevallen, in uwe plaatse, om te betalen aan u Geassureerde ... alle de schade, die gy zult geleden hebben*'; the goods policy provided: '*stellende ons in alle zulke gevalle in U plaatse, om U te garandeeren van alle verlies en schade, en te betalen ... alle de schade die gy zult geleden hebben*'.

<sup>25</sup> See Chalmers 2n3.

<sup>26</sup> The underlying principle was stated most clearly in s 3 of the *placcaat* of 1571, s 2 of the Amsterdam *keur* of 1598, s 3 of the Middelburg *keur* of 1600, s 19 of the Rotterdam *keur* of 1604, s 70 of the Rotterdam *keur* of 1721, and s 23 of the Amsterdam *keur* of 1744, all of which will be considered in detail in ch XVIII § 4 *infra* in connection with over-insurance.

<sup>27</sup> See § 3 *infra*.

<sup>28</sup> See ch XIX § 2.3.1 *infra*.

<sup>29</sup> See ch XIX § 1 *infra*.

prevent the insured from either intentionally causing the materialisation of the risk or not taking the necessary care to prevent the occurrence of a loss.<sup>30</sup>

In conclusion, therefore, it would appear that although the indemnity principle underlaid the whole Roman-Dutch law of insurance, the principle itself was not yet theoretically fully worked out by the jurists or, for that matter, by the legislatures. This was true not only of Roman-Dutch law but seemingly also of some other contemporary systems.<sup>31</sup>

The lack of any theoretical explanation, justification, analysis, and exposition of the indemnity principle in Roman-Dutch law also had an effect on the provisions in the *Wetboek van Koophandel*. It contains no express provision to the effect that the insurance contract is a contract of indemnity, or at least that some types of insurance contract are,<sup>32</sup> this being at most implicit in its regulation of a number of aspects or situations arising from that contract. A theoretical analysis of the indemnity principle was, like the interest theory,<sup>33</sup> a product of nineteenth-century legal science. It is not surprising, therefore, that possibly only by the time of the Marine Insurance Act of 1906 its s 1 could clearly provide that the contract of marine insurance is a contract in terms of which the insurer undertakes to indemnify the insured against marine losses in the manner and to the extent agreed.<sup>34</sup>

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<sup>30</sup> In the absence of the indemnity principle, it would have been possible for an insured to make a profit from his insurance; he would not have had any interest in protecting the insured property and in preventing the occurrence of a loss or damage but would rather have sought its occurrence from which he stood to gain financially. This would have given rise to large-scale fraud by insured upon their insurers. The indemnity principle was therefore in essence one of the measures the legislatures resorted to in curbing insurance fraud. See further Suermondt *Taxatie* 5-7, referring to the preamble of the *placcaat* of 1571 which shows how strong the legislatures of old held to the indemnity principle and alluding to the fact that the principle served primarily to prevent fraud and merely secondarily to discourage wagers.

<sup>31</sup> Also in English law specific aspects and applications of the indemnity principle in the context of insurance came to be recognised and formulated only in the time of Lord Mansfield (see eg Holdsworth *History* vol XII at 537) but the development was still fragmentary. English texts on insurance from the latter part of the eighteenth century too had not yet developed anything approaching a theory of indemnity. See eg Weskett *Digest* sv 'indemnity' who merely has cross-references to abandonment, average, double insurance, loss, wagers, and a few other headings, and no discussion at all of the principle itself. The position appears to have been different in French law: see n17 *supra*. Even by the mid-nineteenth century, the indemnity principle had not yet been identified as a central theme in English insurance law and there was, for example, no separate chapter on the topic in Park's *System* (8 ed).

<sup>32</sup> The suggestion by Van der Linden in his *Ontwerp* III.11.1.5 to the effect that it be provided expressly that insurance can never provide the insured with a profit, but only an indemnity, was not taken up in the final version of the *Wetboek*.

<sup>33</sup> See again ch II § 6 *supra*.

<sup>34</sup> But even the use of the phrase 'measure of indemnity' in the Marine Insurance Act, especially in ss 67-78, to indicate the measure of the insured's loss for which the insurer is liable, has been criticised as unfamiliar. See Chalmers 111n1.

## 2 The Sum Insured

It has already noted that the extent of the insurer's liability to make a payment to the insured in terms of the insurance contract was limited by two factors, the sum insured on the one hand and the amount of the insured's loss on the other hand. A brief explanation of the role of the sum insured is called for.<sup>35</sup>

In essence the insured could recover either the sum insured or the amount of his loss, whichever was the smaller. The sum insured was the amount for which the insurer, or the total of the amounts for which the several co-insurers, had underwritten the policy and subscribed to the risk.<sup>36</sup> It was the amount with reference to which the premium was calculated.<sup>37</sup> It was, furthermore, the maximum amount recoverable on the policy in question but it was not necessarily the amount actually recoverable. An insurer was not liable without any limitation for the insured's loss, but he fixed an upper limit to his liability by indicating the amount for which he insured the property in question.

Therefore, the sum insured was the maximum amount recoverable where it was smaller than the amount of the insured's loss, such as in the case of under-insurance,<sup>38</sup> whether such under-insurance was voluntary or compulsory.<sup>39</sup> The reason why the sum insured and not the greater amount of the insured's loss was the amount recoverable in this instance, was because the sum insured was the maximum amount with reference to which the insurer had fixed his premium; his assessment of the extent, in monetary terms, of the risk he had taken over.

However, in other cases the sum insured was not relevant and was not the amount recoverable from the insurer. Thus, a smaller amount than the sum insured was recoverable, for example, in the case of over-insurance.<sup>40</sup> That was so despite the

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<sup>35</sup> See generally as to the sum insured, Elink Schuurman *Brandschade* 65-77; and Dorhout Mees *Schadeverzekeringsrecht* 177-178. On the technical and actuarial aspects of calculating the sum insured, see generally Onnen.

<sup>36</sup> Although a single (total) sum insured could be stated on the policy, more often than not it happened, where the policy had been underwritten by several underwriters, that the policy merely reflected the amounts each of them had underwritten and not any total sum insured. That had to be determined by adding up all the sums individually underwritten by the participant insurers. See as to this practice eg Ebel 'Remlinckrade' 141.

<sup>37</sup> See again ch XI § 2.1 *supra* as to the amount of the premium.

<sup>38</sup> Thus, where a ship worth f2 000 and insured for f1 500 was totally lost, the insurer was liable for, and could not be liable for more than, the sum insured, ie, f1 500. See ch XVIII § 5 *infra* as to under-insurance.

<sup>39</sup> As will be explained in ch XVIII § 5 *infra*, the Dutch legislatures from early on imposed limitations on the amounts for which certain objects of risk could be insured, ie, they limited the sums insurable on certain objects by stating that a certain portion of the value such objects had to remain uninsured. See also Dorhout Mees *Schadeverzekeringsrecht* 178 who mentions compulsory under-insurance in connection with the sum insured.

<sup>40</sup> As to which see ch XVIII § 4 *infra*.

fact that the loss was a total loss; whether such over-insurance occurred through an insurance in excess of the value of the object in question,<sup>41</sup> or through an insurance in excess of the insured's interest in that object;<sup>42</sup> or in the case of a partial loss of the object of risk when only a proportion of the sum insured was recoverable.<sup>43</sup> The reason why the lesser amount of the insured's loss and not the sum insured was recoverable, despite the fact that the latter amount was that with reference to which the premium was calculated which the insured had paid, was simply because of the application and maintenance of the indemnity principle. The insured was not entitled, at least not in terms of a valid insurance contract, to recover more than his loss, despite the fact that the insurer was prepared to pay, and the fact that the insured had on his part actually paid the insurer for, a larger amount.

In only one instance was the insured entitled to recover from the insurer on the policy more than the sum insured on that policy. That was where, in addition to the sum insured becoming payable to the insured, for example in the case of a total loss, the insured had also incurred an expense in attempting, unsuccessfully, to avert and minimise that loss.<sup>44</sup> In such a case the insured could in appropriate circumstances in addition recover a compensation from the insurer for that expense.

These principles concerning the sum insured are apparent from a large number of divergent sources of Roman-Dutch insurance law. A few of them may be referred to briefly.

In the model policy form appended to s 2 of title VII of the *placcaat* of 1563, for example, the insurers undertook, in the case of any loss of or damage to the insured property, to pay the insured either the sum each had underwritten or the loss the insured had suffered (*'de voorseyde Asseureurs verobligieren hen, den voorseyden gheasseureerden ... te betalen al 't geene dat een yegelick van henlieden onderteekent sal hebben, ofte de schade die de voorseyde geasseureerde gehadt sal hebben'*). In this the Legislature probably merely followed existing practice in terms of which insurance policies without exception contained a mention of the sum or sums insured as the maximum of the insurer's liability or risk, just as the amount of the loan, plus interest, mentioned in the maritime-loan agreement, had earlier fixed the maximum amount of the lender's risk. In fact, the oldest insurance laws referred to the sum insured as an essential ingredient of the insurance contract,<sup>45</sup> and legislation in the seventeenth and eighteenth centuries continued to regard the sum insured as a natural element of the agreement.

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<sup>41</sup> Thus, where a ship worth f2 000 and insured for f2 500 was totally lost, the insured could not recover the sum insured (f2 500) but only f2 000.

<sup>42</sup> Thus, where a ship worth f2 000 was insured for f2 000 by the owner of half a share in her, such owner could, in the case of her total loss, not recover the sum insured (f2 000) but only f1 000.

<sup>43</sup> Thus, where a ship worth f2 000 and insured for f2 000 was damaged to extent of f1 000, the latter amount and not f2 000 was recoverable.

<sup>44</sup> As to the insured's duty to do so, see again ch XVI § 1 *supra*.

<sup>45</sup> See further Elink Schuurman *Brandschade* 66-69.

Van Leeuwen<sup>46</sup> referred to the insurer's liability to the insured to compensate him for the loss of or damage to his property but then only to the extent that he was insured ('*syn verloren, en verongelukte goed doen, so ver het selve was versekert*').

From an opinion delivered in 1715<sup>47</sup> it appears that in Roman-Dutch law the payment by an insurer of the full sum insured in the policy precluded any further claim by the insured on the policy, even if the insured voyage was not yet completed or the period for which he was insured had not yet expired.<sup>48</sup> And from an opinion delivered in 1721<sup>49</sup> it appears that in appropriate instances the sum insured played another role. The currency in which the sum insured was expressed also indicated the currency in which the value of the insured property had to be determined as well as the currency in which the insurers had to pay the insured on the policy,<sup>50</sup> a principle which was no doubt sound in times of fluctuating and often uncertain rates of exchange.

Bynkershoek referred to a case decided by the *Hooge Raad* in 1726<sup>51</sup> where the insured owner of goods was held liable for a general average contribution adjusted on his goods which were themselves not lost or damaged. The insured claimed from the insurers of the goods the full amount they had underwritten ('*de geheele schade van assurantie*'), or, alternatively, the amount of his loss or damage ('*de schade van d'avarije*'). The *Raad* held the insured not entitled to claim the full sum insured from the insurers. The insured goods themselves were not lost or even damaged and the insured merely suffered a general average loss. He could not claim from the insurers more than what he had actually lost and that was less than the sum insured. The insured's claim for the sum insured was therefore refused, the insurance serving only to indemnify and not to enrich him, and, Bynkershoek noted, the insured here would

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<sup>46</sup> *Rooms-Hollands regt* IV.9.10.

<sup>47</sup> See *Barels Advysen* vol I adv 23.

<sup>48</sup> Here there was an insurance on a ship and her cargo for a voyage from and back to Amsterdam. The ship was captured in Sweden and abandoned by the insured. He bought a new ship and goods there for the return voyage to Amsterdam. According to the opinion, the insurers were not liable for any loss on the return voyage, among other reasons because '*de schaede, op de heenreize gevallen, door middel van de vergoedinge* [which had already been paid by the insurers] *reeds ten vollen verstaen moet worden gereserveerd te zyn*'. Another reason was that there was no loss or damage on the return voyage and because the unprofitable adventure here was not a loss. The most obvious reason, although not pertinently mentioned in the opinion, was of course the fact that the new ship and goods were not insured by the policy in question. As to successive losses, see again ch XV § 4 n53 *supra*.

<sup>49</sup> See *Barels Advysen* vol I adv 90.

<sup>50</sup> It was trite in the case of insurance, the opinion noted, that in the event of a loss the value of the insured goods had to be paid without regard to the type of money it cost but in accordance with the sum insured at the place where the policy was underwritten ('*conform de getekende somme ter plaetse van de signature*'). Insurers were liable to pay according to the amounts they had underwritten, and could not convert the value of that amount to a foreign currency or rate of exchange ('*assurateurs zyn gehouden hunne signature te voldoen, en konnen het beloop van dien niet redigeeren naer eene vreemde Wisselcours*').

<sup>51</sup> *Observationes tumultuariae* obs 2242; *idem Quaestiones juris privati* IV.13.

certainly profit if he could claim the sum insured or the value of the goods where those goods were in fact not lost at all.<sup>52</sup>

Finally, according to Van der Linden,<sup>53</sup> the determination of the amount which the insurer bound himself to pay in the case of loss of or damage to the insured goods was an essential requirement for a valid insurance. This amount ('*somma*'), he explained, was usually determined in the policy.<sup>54</sup> In the case of a total loss of the insured goods, he continued,<sup>55</sup> the insurer was bound to pay the sum insured ('*de somme te betaalen, waar voor hij op de Polis geteekend heeft*'), while in the case of a partial loss of or damage to the insured goods merely a proportion of the sum insured was payable ('*naar evenredigheid van elks gedaane inteekening*'). The point that in the case of a partial loss only a proportion of the sum insured was recoverable, had already been made in an opinion in 1699.<sup>56</sup>

However, two remarks have to be made with regard to Van der Linden's exposition. First, although the earliest legislation may have regarded a mention of the sum insured as essential for a valid insurance contract, fixing as it did the maximum of the insurer's liability, that would appear no longer to have been the case in later Roman-Dutch insurance law. There was no mention in any of the insurance laws that the parties were required to mention the sum insured in their policy and that the insurance contract would in some or other way be defective if this was not done. In practice, though, insurance policies continued, as before, to mention the sum or rather the sums insured, if only primarily to fix the proportion in which each of the several insurers were

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<sup>52</sup> See § 1.2 *supra* for Bynkershoek's views on indemnity and for the distinction between the sum insured (and the value of the insured property) on the one hand and the amount of the insured's loss on the other hand.

<sup>53</sup> *Koopmans handboek* IV.6.5.

<sup>54</sup> He then noted that insurers could alternatively also bind themselves to the payment of the agreed value of the goods. However, the agreed value of the goods, like the actual or real (or insurable) value of the goods, should not be confused with the sum insured. The agreed value was merely an agreement on the value of the property in question with reference to which value (rather than to the actual value) the amount of the insured's loss had to be determined. The sum insured, in turn, was merely the maximum amount of the insurer's potential liability. The amount of the real or agreed value could or could not coincide with the amount insured.

<sup>55</sup> *Koopmans handboek* IV.6.9.

<sup>56</sup> See *Barels Advysen* vol I adv 64. Here the statement appeared that inasmuch as bottomry bonds were for the most part a type of insurance in that they shared many features ('*veelal een soort van Assurantie zyn, en die contracten ook met den anderen veelal worden vergeleken*'; see again ch I § 4.3 *supra*), therefore, in the case of bottomry, as in the case of insurance, damage (a partial loss) was borne proportionally by the insurers ('*en zulks dat gelyk in materie van Assurantie, zo ook in cas subject, de schaedē proportionaliter (nae evenredigheid) moet gedraegen werden*'). See also *Barels Advysen* vol I adv 67 (1706) (in the case of a partial loss, the lender was proportionally liable as was an insurer in the case of insurance). As to the application of the proportionality principle between co-insurers generally and in the case of under-insurance, see ch XVIII §§ 2.1 and 5.6 *infra* respectively.

liable among themselves for the insured's loss.<sup>57</sup> Secondly, as already explained, although true in most instances, the statement of Van der Linden that the sum insured or a proportion of it was payable in the case of a loss or damage, was not invariably correct. Put differently, although the sum insured was in most instances the amount (fully or proportionately) recoverable from the insured, in other instances it was merely the maximum amount and a smaller amount (or proportion) was in fact recoverable.<sup>58</sup>

Nevertheless, in the *Wetboek van Koophandel* the Legislature included a reference to the sum insured.<sup>59</sup> In terms of art 256-2 all policies must express the amount or the sum which is insured.<sup>60</sup>

The sum insured is the maximum amount for which an insurer can be liable, although that general principle is only expressly stated in respect of marine insurance contracts in art 718. This article, apparently in conformity with the earlier position,<sup>61</sup> provides that the insurer is not liable to pay anything more than the sum he had insured, even if successive partial losses requiring repairs and costing more than the sum insured, or a partial loss followed by a total loss, had occurred on a single insured voyage.<sup>62</sup>

The only exception to this general principle recognised in the *Wetboek* is for an expense the insured incurs in the prevention and limitation of a loss, such an expense being recoverable from the insurer on the insurance contract in addition to any indemnity for a loss. In consequence the insurer's liability can exceed the sum insured in an appropriate case.<sup>63</sup>

In English law, the codifying Marine Insurance Act of 1906 too assumes that the sum insured is the maximum of the insurer's liability for a single loss. Thus, s 28, in des-

<sup>57</sup> See further on this point Elink Schuurman *Brandschade* 68-70. He mentions that it was already accepted by Pothier *Assurance* LXXV and also by Emerigon *Assurances* II.7 and Casaregis *Discursus* X.63 that the sum insured was not an *essentiale* of the insurance agreement. It was later generally accepted that the sum insured was not essential, and that if no sum insured was mentioned, the insurance was simply for the full value of the insured object and then the indemnity principle alone still limited the insurer's liability.

<sup>58</sup> Thus, the sum insured was not payable in the case of a total loss where, eg, there was over-insured, or where the insured's loss did not equal the sum insured.

<sup>59</sup> See eg Dammers 21-22.

<sup>60</sup> See too art 304 (in the case of life insurance the policy must contain the sum for which there is insured) even though, in terms of art 305, '*de begrooting van de som [ie, the sum insured] staan geheel aan de goedvinden der partijen*'.

<sup>61</sup> See the opinion of 1715 discussed earlier at n47.

<sup>62</sup> That the maximum liability is established by the sum insured is also illustrated by the provisions of art 618 in the case of ransom insurance (see again ch VII § 3.2 *supra*). Such insurance is concluded for a specific amount. Should the amount of the ransom required to obtain the insured's release be less than the sum insured, the insurer need only pay the lesser amount; but should the ransom be more, the insurer need pay no more than the sum insured.

<sup>63</sup> See arts 283 (generally) and 655 (marine insurance) and again ch XVI § 1.5 *supra*.

cribing an unvalued policy, refers to the 'limit of the sum insured'. However, unlike Roman-Dutch and Dutch law, the sum insured is in English law not the maximum amount recoverable from the insurer in terms of the policy in respect of all losses occurring during its duration or even on the insured voyage; it is merely the maximum amount recoverable on the policy for every occurrence of loss.<sup>64</sup> Thus, s 77(1) provides that unless the policy provides otherwise and subject to the provisions of the Act, the insurer is liable for successive losses even though the total amount of such losses may exceed the sum insured. However, s 77(2) recognises two exceptions. The first is where under the same policy a partial loss which has not been repaired or otherwise been made good, is followed by a total loss, and in that case the insured can only recover for the total loss.<sup>65</sup> The second case is where the insurer incurs a supplementary liability in terms of the sue and labour clause.<sup>66</sup>

### 3 Unvalued Policies and the Insurable Value

#### 3.1 Introduction

In addition to the sum insured, the other main factor limiting the extent of the insurer's liability to compensate the insured was the extent or amount of the latter's loss.

In this regard the value of the object of risk played a crucial role. It was necessary, in order to determine the amount of the insured's loss, to determine the value of the insured property before the loss and, when appropriate, to compare that value to the value of the insured property after the loss. In the case of a total loss, the value prior to the loss had to be determined. If the loss was not total, it was furthermore necessary to determine the extent to which the value of the property had been depreciated by the loss, and therefore necessary also to determine the value of the object after the loss. If the insured's interest in the object of risk was limited, or if there was no such object, the amount of the insured's loss as a result of the loss of or damage to the object or as a result of the occurrence of the event insured against had also to be determined by comparing his financial position or the value of his estate before and after the loss.

In the absence of a valued policy, in terms of which the parties to the insurance

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<sup>64</sup> See Dorhout Mees *Schadeverzekeringsrecht* 667 on this point, and again ch XV §§ 4 and 5 *supra*.

<sup>65</sup> Where the partial loss has been repaired and is then followed by a total loss, the insured can recover not only the cost of the repairs but also compensation for the total loss and he may therefore obtain more from the insurer than the sum insured. In terms of s 69(1), where a ship is damaged but not totally lost, and she has been repaired, the insured is entitled to the reasonable cost of repairs, less any customary deductions, but not exceeding the sum insured in respect of any single casualty.

<sup>66</sup> See again ch XVI § 1.6 *supra*.



contract agreed on the value of the object at risk for purposes of their contract,<sup>67</sup> it was usually necessary to determine the value of the object of risk as a first step in determining the insured's measure of indemnity.

In this regard the law came to recognise and give effect to rules customarily followed in maritime practice in determining the insurable value of particular maritime objects and with reference to which the amount of loss of or damage to such objects could be assessed. In this sense, therefore, insurable value meant the value for which a particular object could have been insured; its value for purposes of insurance.<sup>68</sup>

The value of ships sailing from one port to another over a fairly lengthy period of time, as also that of commercial goods being carried from one place to another, by the very nature of such ships or goods and the circumstances under which they could be lost or damaged, fluctuated not only from time to time but also from place to place. These fluctuations give rise to particular problems in the context of insurance where the value of insured property had to be determined in the event of their loss or damage in order to facilitate the fixing of the measure of indemnity payable to the insured.

Theoretically several possibilities presented themselves. For example, the insurable value of a ship or cargo could in the first place have been taken to be represented by their market value, which could have been taken either as the price they could fetch on the market (the selling price) or their cost on the market (the buying price). Secondly, the insurable value could have been taken as their relative or subjective value to the insured, as opposed to their absolute or objective market value, although with the exclusion of any sentimental value (*pretium affectionis*) which was not capable of precise monetary valuation. Thirdly, the insurable value could have been linked to their value at the time they were acquired (the cost price), or at the time when the insurance contract was concluded, or at the time when they were first exposed to the risk (such as on their departure or shipment), or at the time of their loss, or at the time of their actual or expected arrival at the destination. In the fourth place, the insurable value could have been taken as their value at their place of departure on the insured voyage, or at the place of loss, or at the place of their destination.

The choice between these and other options<sup>69</sup> was exacerbated by the theoretical ideal of providing the insured with a complete indemnity and no more or no less on

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<sup>67</sup> Dorhout Mees *Schadeverzekeringsrecht* 164 notes that with the exception of the Frisian *Landrecht* of 1723 (art 1.28.4), there was no requirement in Roman-Dutch law that the value of the object to be insured had to be stated in the insurance policy. See again ch VIII § 4.2 *supra*. In the *Wetboek van Koophandel* the value of the object of risk is not one of the matters to be mentioned in the policy (the sum insured, though, is: see art 256-1), except the value of a ship in the case of marine insurance (see art 292-1) and the value of expected profit in an insurance on such profit (see art 615). As to valued policies, see further § 5 *infra*.

<sup>68</sup> See further Dorhout Mees *Schadeverzekeringsrecht* 163 for the distinction between insurable value, insured value, and sum insured.

<sup>69</sup> Further, the practical effect of applying any of these options varied, depending on whether or not the object of risk depreciated in the course of the adventure (as eg ships usually did because of wear and tear), or whether it appreciated in value (as eg cargo was at least expected to do; of course, whether it actually appreciated or not depended largely on the market).

the one hand, and the practical reality of actually being able satisfactorily and speedily to determine the appropriate value at the appropriate time and place on the other hand. And, as will become apparent, the compromise between this theoretical ideal and practical reality resulted in the insurance contract not always being one of a perfect indemnity.

For example, ideally an indemnity should have placed the insured in the exact financial position he was in immediately before the occurrence of the loss or damage so that the value of the ship or goods at the time and place of the loss would have been the most appropriate insurable value.<sup>70</sup> However, such loss or damage frequently occurred at some indeterminable time and place at sea which presented particular practical difficulties in ascertaining in advance or even afterwards the appropriate indemnity on that basis. In short, the projection of a future value at the time of the conclusion of the insurance contract, or the determination of a particular value at an unknown time and place, was impractical. Other options also existed. Thus, the insured could, on the one hand, be placed in the financial position he would have been in had the adventure never been undertaken, in which case the value at the time and place of the commencement of the adventure would have been relevant, or he could, on the other hand, be placed in the position he would have been in had the adventure been completed successfully, in which case the value at the time and place of the actual or expected completion of adventure would have been relevant. The latter option, it could be argued, would in fact best have reflected a true application of the indemnity principle in the case of an insurance of property against the risks of a particular voyage from its commencement until its completion.<sup>71</sup> Commerce and practice required from insurance a more liberal approach than that of putting the merchant back into the position he was at the time he had commenced his commercial venture. Insurance had to cover more than merely *damnum emergens*. There was a need for the merchant to be compensated for the unproductivity of his capital in the period after the commencement of a commercial venture which later turned out to be unsuccessful by reason of the loss of or damage to the insured property. There had also to be an insurance against *lucrum cessans*. However, on a strictly theoretical level, an unmitigated implementation of this notion would in many instances have caused a breach of the indemnity principle given the imprecision inherent in determining the merchant's fictional future financial position. There was therefore an inevitable gap between practical needs and theoretical justification and, not surprisingly, a divergence between insurance practice and the theory of strict indemnity.

The indemnity principle was accordingly, for reasons of practicality and pragmatism, often not strictly observed by the rules recognised in Roman-Dutch law to determine the insurable value of various maritime objects and also, as will be shown later, by the rules applied in the assessment of the measure of indemnity. There was nothing unique in this, for the same phenomenon was encountered also in other legal

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<sup>70</sup> See eg Dammsers 42, referring to this as the '*eigenlijke verzekerde waarde*'.

<sup>71</sup> See further eg Faber *Aanteekeningen* 33; Goudsmit *Kansovereenkomsten* 217.

systems<sup>72</sup> although it is difficult to say whether it was more prominent in Roman-Dutch law than in modern systems.

A further factor which should be borne in mind when considering the rules accepted and laid down in Roman-Dutch legislation to determine the insurable value of particular objects, is that these rules were not always formulated primarily to preserve the principle of indemnity. Rather they had an analogous aim, namely to determine the value of the particular object with reference to which the amount of compulsory under-insurance laid down for that object could be calculated.<sup>73</sup> To give effect to the prohibition on full-value insurance, it was necessary for legislatures to specify how such value had to be determined. These rules laid down, more specifically, what was included in the value of the particular object so that the insured could know how much of that value he could insure and how much he had to leave uninsured. Therefore, the basis of the indemnity in the case of unvalued policies earlier often appeared only indirectly from measures which provided which part of the insurable value of ships, goods and other maritime objects of risk had to remain uninsured. Further measures relevant in this regard are those which determined what was included and what was not included under the various objects of marine risk for purposes of insurance, that is, for purposes of determining their insurability. These measures also indirectly indicated what was to be included in determining the insurable value of the respective objects.<sup>74</sup>

Aside from these legislative measures, the main source of information on insurable value and the measure of indemnity in Roman-Dutch law was a number of decisions and opinions. The relevant sources will now be considered with reference to the insurable values of the main objects of marine risk, namely goods, ships and freight.

## 3.2 The Insurable Value of Goods

### 3.2.1 Introduction

The value of goods carried by sea fluctuated and depended on both time and place. A merchant usually bought specific goods, had them packed, insured and other-

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<sup>72</sup> Thus, Chalmers 23 explains that there are two possible views on the nature of an indemnity. These are that the insured is to be put in a financial position as if the adventure had never been undertaken, or in a position as if the adventure was successfully completed. English law, he notes, steers 'a halting course' between these two views with a tendency towards the former. See further generally Lowndes 5-6 who refers to the two conflicting considerations in marine insurance: on the one hand that of indemnity, namely putting the insured in precisely the same position, no better and no worse, than if the disaster had not taken place - the perfect aim of insurance - and calculating such indemnity accurately; and on the other hand that of paying such an indemnity promptly and certainly. In practice the latter consideration came to qualify the former. Commercial practice preferred speed and certainty of settlement even if at the expense of theoretical accuracy. A rough approximation of the measure of indemnity was acceptable, and also preferred by merchants, as long as payment was not delayed and could be obtained in time to replace the capital lost.

<sup>73</sup> As to under-insurance, see ch XVIII § 5.2 *infra*.

<sup>74</sup> These measures were considered in detail in ch V *supra*.

wise prepared for their shipment, paid for their carriage by sea, and hoped to sell them at a profit at their destination. The value of such goods therefore differed, depending on whether, for example, their cost price, their value upon shipment, or their value upon arrival at their destination was taken as the basis of calculation. Likewise, the measure of indemnity an insured would receive from his insurer would also differ, depending on which of these values was taken as the insurable value.

From a practical point of view, it was easier in early times,<sup>75</sup> when the communication of the loss of or damage to cargo often only occurred by ship, and very often only by the carrying ship herself, and when the risk of a total loss in the frequent periods of war was great, to determine and prove the cost price of goods than their value at any subsequent stage or place. It was difficult, if not occasionally virtually impossible, to determine and prove, for example, the value which they would have had, in an undamaged condition, at the destination they in fact never reached and at the time they could have been expected to reach it had it not been for the materialisation of the risk. In the event of the non-arrival of insured goods at their destination, it was uncertain and difficult not only to determine the estimated value of the goods there but also the time of their estimated arrival, itself a vital factor in determining the value. A merchant who insured his cargo knew and could prove with certainty only the amount he had invested in the adventure, but what its outcome would be, was regarded as too uncertain to serve as the basis of his indemnity.<sup>76</sup>

For these reasons Roman-Dutch law from early on accepted the cost price (*'inkoopsprijs'*) of insured goods as the starting point in determining their insurable value. However, it was no doubt soon realised that by the time the goods came to be at the risk of the insurer, their value may since their acquisition already have fluctuated and also that the insured had by that time usually spent a considerable further amount of money on those goods, an expenditure which he lost if the goods themselves were lost or damaged. The insured therefore had to be indemnified in such a way that he could replace the insured goods at the time and place of departure, and the original cost price of those goods was therefore nothing more than a point of departure. Eventually it was further realised in Roman-Dutch law that to meet the need of practice, which was for an indemnity to be paid to the insured which would enable him, in the case of a loss, to replace the insured goods at their destination, an insured merchant should in the case of the loss of his cargo be permitted to recover not only the capital he had invested but also the profit he expected on those goods. The insurance of profit, either *eo nomine* or as part of the insurable value of the goods, therefore came to be permitted, subject to certain safeguards.

There were also other potential problems which Roman-Dutch law had to address. For example, not all goods insured by a merchant were necessarily bought by him. The goods to be insured could have been manufactured by the insured himself, or they could have been bartered. In both these cases there was no readily ascertainable

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<sup>75</sup> See generally as to the early and the more modern practice, Dorhout Mees *Schadeverzekeringsrecht* 168-169.

<sup>76</sup> See again ch V § 5.2 *supra* as to the insurability of expected profit.

cost price. Also, insuring and determining the insurable value of return cargoes gave rise to particular practical problems, given the lack of proper communication between the sedentary merchant and his factor abroad.

### 3.2.2 Legislative Provisions in Roman-Dutch Law

One of the earliest indications of the basis of the indemnity in the case of insured cargo appears from the prohibition on full-value insurance in s 22 of the *placcaat* of 1550. This section compelled merchants to keep a particular portion of the value of their cargoes uninsured and laid down that this value had to be determined with reference to the cost price of the goods at their place of origin (*'der weerde van sijne Koopmanschepe, alsoo die gekocht es geweest ten eersten koope, ter plaetse van daer sy komende is'*).<sup>77</sup>

In s 11 of title VII of the *placcaat* of 1563, a measure likewise dealing with compulsory under-insurance, reference was also made to the cost price of the goods (*'ghekost hebbende t'heuren eersten innekoope'* and *'ten prijse ghelijck hy die heeft inne ghekocht'*) as being the relevant value, but now it was made clear that the cost of freight, duties, other expenses<sup>78</sup> and any anticipated profit on the goods had to be excluded from their insurable value.<sup>79</sup>

Therefore, the relevant value was the cost price of the goods, and any increase in their value or any expense incurred by the insured in respect of the goods after their acquisition and up to the time of their loss, or even just up to their actual shipment, was not included. This was no doubt not a very realistic and acceptable measure for merchants who, the compulsory under-insurance aside, could not have obtained anything approaching a complete indemnity against any loss of or damage to their goods if the measure of indemnity had to be calculated exclusively on the basis of the value of those goods when they were first acquired.

Earlier Italian writers on insurance law had already alluded to the fact that the while their value at their destination was not acceptable, neither was the cost price of insured goods. Santerna, for one, thought that the value at the time of the conclusion of the contract was the value of the goods relevant for insurance purposes.<sup>80</sup> The position

<sup>77</sup> Section 21 of the *placcaat* of 1551 was identical on this point.

<sup>78</sup> These expenses could take on various forms. For example, beaconage (*'paalgeld'*, earlier known as *'bakengeld'* or *'tonnengeld'*) was a duty or levy imposed on both ship and cargo (usually below 0,2 per cent of the value) to pay for the expense of erecting and maintaining beacons (*'tonnen'*) in and outside ports, the reference to a pole (*'paa'*) probably coming from the practice of hanging a lantern on a pole in the water as a beacon. To be distinguished from this form of beaconage (*'paalgeld'*) was another form referred to a *'vuurgeld'*, a levy for the maintenance of fire beacons (*'vuurbakens'*) on the coastal dunes (*'kustvuren'*). The amounts of these different levies were fixed from time to time: see eg *GPB* vol VI at 1368-1369. On beaconage generally, see Ter Gouw vol II at 345-346 and vol V at 414; Heeres; and Sigmond 83-84.

<sup>79</sup> See eg Goudsmit *Zeerecht* 245.

<sup>80</sup> *De assecurationibus* III.40-42. See too Elink Schuurman *Brandschade* 5-7.

was otherwise, he thought, where the undertaking of the person liable to the owner of lost or damaged goods was not merely to compensate for the value of those goods in the case of loss or damage, but for example to deliver the goods safely and in an undamaged condition at their destination. In that case the undamaged value of the goods at that destination, upon their actual or presumed arrival there, was the relevant value.<sup>81</sup> According to Straccha,<sup>82</sup> too, in the case of an unvalued policy the relevant value of goods was their value at the time of the contract and not when they were originally acquired. This was so because the contract of insurance was, in his view, but a contract for the purchase and sale of the risk. The value at the time of the execution of the contract, that is, when the risk was transferred, was therefore relevant with any subsequent increase in the value of the insured object not being taken into account. A similar position pertained in Italy at the time of Roccus.<sup>83</sup> The provision in the *placcaat* of 1563 was also not in accordance with the earlier position as it was provided for in Spanish insurance legislation.<sup>84</sup>

Not surprisingly, therefore, s 3 of the *placcaat* of 1571<sup>85</sup> referred, also in connection with the prohibition on full-value insurance, to the value of merchandise as determined in accordance with its cost price, including the cost of packing, duties, equipment, the insurance premium and all other expenses up to the loading of the cargo into the ship (*'der weerde vande ... Coopmanschap, nae advenant dat die*

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<sup>81</sup> Thus, a distinction was drawn between an insurance indemnity and damages, and between the liability of an insurer of goods and that of eg a carrier of those goods by sea.

<sup>82</sup> *De assecurationibus* VI.1-3. See too eg Scaccia *De commercijs* I.1.169.

<sup>83</sup> See Roccus *De assecurationibus* note 31 where he explained that in the case of loss of goods, their relevant value for purposes of insurance depended on the nature of the insurer's undertaking. Where the goods were on the conclusion of the insurance valued at certain price or value, then the value so expressed had to be paid. Where the insurance was concluded for the safe arrival of the goods at a specified destination, then their value had to be taken as that which the goods could have obtained at that destination. But where the insurer had simply undertaken to compensate the insured in the event of the loss of or damage to the goods, then their value had to be taken as that at the time of the conclusion of the contract and the insurer had to pay a compensation according to that value.

<sup>84</sup> In Barcelona (as to which see eg Reatz *Geschichte* 90-96; Seffen 31), the Ordinance of 1435 for practical reasons took the intrinsic value of the goods at the port of departure and at the time of the conclusion of the contract as the basis for calculating their insurable value. Subsequently there was a change in this approach. It was realised that if the insured was to be indemnified properly, the intrinsic value at the port of loading alone was insufficient and that all the expense incurred to bring the cargo on board and to insure it, had to be included and added to the prime cost. Such a calculation had the practical advantage that the value and added expense could be proved by invoices, accounts, and the like in the case of a dispute. This was provided for in the Ordinance of 1436 and was retained in the subsequent measures of 1458 and 1484. In the Burgos Ordinance of 1538 (as to which see Reatz *Geschichte* 212-213 and 254) the insurable value of goods was in some cases taken as the prime cost, and in others as the value of the goods at the destination, depending on the circumstances. Thus, in the case of longer voyages, the cost price was the relevant value in the event of a loss occurring in the first half of the voyage, and the value at the destination was the relevant value in the case of a loss in the second half of the voyage.

<sup>85</sup> As to which see eg Kieselbach 118.

*ghekost mach hebben, soo wel in koope, packinge, Tolrechten, slet oft toerustinge, gelt van verseeckeringe, als alle ander onkosten totter ladinge van dien inden schepe, inclusivelicken*'). These expenses were therefore now included in the insurable value of the goods.

It may be noted that since the insurance on goods covered both the consignor and the consignee,<sup>86</sup> it did not matter that the expense included in the value of the goods was not incurred and paid for by the insured consignor or seller but by the consignee or buyer.<sup>87</sup>

In the Antwerp compilation of customary law, the *Compilatae* of 1609, where provision was also made for the compulsory under-insurance of cargo,<sup>88</sup> art 3<sup>89</sup> determined that the value of insured goods included what they had cost in packaging, freight, duties, the fee of a factor, the insurance premium on the goods and also on the premium itself, and all other expenses incurred or to be incurred in respect of the goods until they were loaded.<sup>90</sup> However, this price and value of the goods had to be taken, in terms of art 5, as the common or overall price (*'gemeijnen loon ende prijs'*) of the consigned goods as a whole at the time and place of loading, as could be proved by the parties, and not as the price or value of the individual portions of the consignment as they were loaded.<sup>91</sup> It was therefore recognised in practice that the value of goods upon their loading was more relevant and realistic than the price the insured

<sup>86</sup> See again ch X § 2 *supra* for insurance for another in Roman-Dutch law.

<sup>87</sup> In the sixteenth century, the price of goods sold internationally either included all the expense incurred until delivery, such being paid by the seller (*'franco-vertoldprijs'*); or it included all the expense until the goods were placed on board, such being borne by the seller (*'vrij aen tschipsboot'*, *'costeloos binnen scepboot'*); or it included some and excluded other expenses (in the case of *'scipvracht, cost ende scaden'*, eg, freight, additional expense and insurance were for the account of the seller while import duties and landing costs were paid by the buyer). See generally Asaert 202.

<sup>88</sup> In art 2 of par 1, title 11, part IV (see De Longé vol IV at 198-200).

<sup>89</sup> Of par 1, title 11, part IV (see De Longé vol IV at 200). See further on the insurable value of goods in Antwerp, Mullens 88.

<sup>90</sup> *'[T]gene de selve gecost hebben in packinge, vrachten, tolrechten, provisie oft loon van den facteur, prijs oft loon van de versekering, mitsgaders tgene men heeft betaelt ofte soude moeten betaelen om den selven loon te versekeren, dwelck men in desen heet assurance, ende alle andere onkosten die men doocht oft gedoocht heeft, tot dat die t'schepe sijn gegaen'*. In art 280 of par 9, title 11, part IV (see De Longé vol IV at 316), the insurable value of goods was referred to as *'de weerde van de goeden, gelijk die bij den eersten incoop in contanten gelde, mitsgaders in packen, vrachten ende anderssints hebben gecost, volgende tcargasoen oft factuere'*.

<sup>91</sup> *'[M]oet niet gestelt oft genomen worden naer dat die op dach, oft allenskens stucxgewijse ingebrocht sijn, maer gelijk die naer den gemeijnen loon ende prijs souden hebben mogen gelden ter plaetse ende tijt van de laedinge, volgens t'bewijs d'welck daeraff ter weder sijden soude mogen worden gedaen'*. It appears that Kiesselbach 118 is incorrect in suggesting that art 5 differed from the provision in the *placcaat* of 1571 in that it regarded the value of the goods at the place of discharge as their insurable value. He is no doubt correct, though, in stating that already then the value of goods was usually fixed by a pre-shipment valuation.

may have paid for them when he had originally bought them.<sup>92</sup> Nevertheless, in terms of art 6, until the contrary appeared and was proved, that is, in the absence of proof of their value at the time and place of loading, the true value ('*oprechten prijs*') of the goods would taken as being their cost price ('*tgene de goeden ten eersten inkoop hebben gecocht [gecost]*'), whether they had been bought for cash or on credit.<sup>93</sup> This was therefore a measure introduced to facilitate the proof of the insurable value of goods. Lastly, art 9 of the *Compilatae*, in a legislative regulation in this context of the maxim *de minimis non curat lex*, provided that a minor difference between the cost price and the value of the goods upon shipment would be ignored.<sup>94</sup>

Section 2 of the Amsterdam *keur* of 1598<sup>95</sup> referred to the value of the goods, of which a portion had to remain uninsured, as having to be determined according to their cost price ('*naer advenant dat die ghekost mach hebben*'), with the cost of packing, duties, equipment, the insurance premium, as well as all other expenses up to the loading of the goods into a ship, being included.

The Rotterdam *keur* of 1604 did not lay down any prohibition on the full-value insurance of goods but merely provided in s 2 that consignors could insure everything they loaded into ships, including the cost incurred in respect of such goods which included the insurance premium on those goods,<sup>96</sup> but excluding any profit expected on those goods. Otherwise than in the Amsterdam *keur*, no clear indication was given of how the value of the goods had to be determined. It was probable, though, that the

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<sup>92</sup> Elsewhere it was further stressed that the relevant value was that at the time of shipment and not that at the time or at the place of the arrival of the insured goods. Thus, art 187 (of par 6, title 11, part IV: see De Longé vol IV at 278) provided that the value of insured goods had to be determined '*naer advenant vant gene tselve hadde mogen gelden ter plaetse ende tijde van de ladinge*' and not '*gelljck het goet soude mogen gelden ter plaetse van de ontlaedinge, al ist dat tselve int verdeijlen van de schade tusschen de cooplleden ende schippers, in cas van avarie*'.

<sup>93</sup> If bought on credit, interest could be deducted from the price at the rate of ten per cent per annum ('*t'sij met gereede penningen, oft affslaende den interest tegens thien ten hondert op tjaer, indien die op dach sijn gecocht*').

<sup>94</sup> It provided that it was not usual in the determination of the value or price ('*de priseringe*') to take note of minor discrepancies or fluctuations ('*een cleijn verschil*') which could occur due to an increase or decrease in such value or price. For such a fluctuation to be taken account of and to influence the calculation of the measure of indemnity as regards goods, it was necessary that it should amount to at least six or seven per cent ('*dat tselve verschil ten minsten sij van ses oft seven ten honderden, ende meerder*'), in which case it was taken into account fully ('*wort dearop int geheele geleth*').

<sup>95</sup> Section 3 of the Middelburg *keur* of 1600 was identical.

<sup>96</sup> '[A]lle 't geene sy in eenige Schepen laden met de kosten opte selve goederen vallende totte ladinge toe inclusive, waer inne oock begrepen wort de premie die sy over hunne ghedaene verseeckeringe betaelt ofte beloofd hebben'.



relevant value was the cost price together with all expenses incurred on the goods up to their loading.<sup>97</sup>

The position in Amsterdam<sup>98</sup> was again regulated in 1614 by an amending *keur* of 9 May of that year.<sup>99</sup> It was passed as a result of an enquiry and request for guidance by the Commissioners of the Insurance Chamber on the appropriate value which had to be given to goods which were imported from the island of St Michael ('*St Michiel en andere Vlaemsche eylanden*')<sup>100</sup> and which were not bought there (so that, presumably, their cost price could not be used as a basis) but which were bartered or exchanged ('*vermangeld*'). Until then, it was noted, the value of such goods were determined with reference to the (cost) price of the goods given in exchange.<sup>101</sup> But the Commissioners regarded this merely as a guideline because they noticed that the price of one of the imports in question, a dyestuff ('*pastel*'; '*kleurstof*'), fluctuated by almost 50 per cent ('*by na de volle helfte in de prijs is differerende*'), depending on whether such goods were exchanged or, which occurred less frequently, were bought with money. In the case of the dye the problem was solved arbitrarily ('*eigendunkelijk*') by a legislative determination of the value, for the time being, of a certain quantity of such dye,<sup>102</sup> subject to the right of the interested party of proving, within eight months, that he had bought the dye at a lower or higher price, free on board. As far as the value of other goods, including sugar, imported from those islands was concerned, the Legislature determined that such value had to be ascertained by the Commissioners as they thought equitable in each instance.

<sup>97</sup> Thus, Van Zurck *Codex Batavus* sv 'Assurantie' par 14 n1, referring to s 2 of the Rotterdam *keur* (and to s 3 of the Middelburg *keur*), explained that where an insurer successfully attacked an over-valuation (see § 5.2 *infra*; and the same would be the case where it was an over-insurance under an unvalued policy), profit or loss (and presumably any appreciation or depreciation in the value of the goods after the conclusion of the insurance policy) did not concern the insurer, '*maer die heeft slegts te zien op de koop-kosten, en de onkosten tot aen boord toe*'.

<sup>98</sup> As to which see generally Goudsmit *Zeerecht* 319-320.

<sup>99</sup> It should be noted that there were two Amsterdam amending insurance *keuren* on that date. The other one concerned the term 'goods' and amended s 17 of the *keur* of 1598. See again ch V § 4.3 *supra*.

<sup>100</sup> Possibly this referred to what later became known as the Netherlands Antilles.

<sup>101</sup> The matter was addressed somewhat differently in the Antwerp *Compilatae* of 1609 in arts 215-216 of par 6, title 11, part IV (see De Longé vol IV at 288). There it was provided that if insured goods were conveyed to a place where no sale but merely an exchange against other goods occurred, and the insurance was made '*op gaen ende wederkeeren, oft op wederom commen alleen*', in so far as a loss occurred on the return voyage one had to calculate the value of the bartered goods at twenty per cent above that of the goods sent out ('*soo rekent men den prijs vant gemangelt goet twintich ten honderden maer dan d'eerste cargasoen was vant gene derrewaerts ginck, daerop de mangeling is geschiet*'); but where loss occurred on the outward-bound voyage ('*int gaen*') to the named place, the value of the goods was not taken or calculated otherwise than according to the invoice value of the goods insured and sent there ('*derrewaerts*'), in the same way as with goods generally ('*gelijck hiervoore geseght is dat alle andere versekeringe van coopmanschappen geschiet*').

<sup>102</sup> A quintal ('*quintaal*'), or approximately 100 kg, of dyestuff was taken to be worth 800 'reez' (Spanish or Portuguese *real*?).

A question concerning the value of bartered insured goods was the subject of an opinion delivered in 1721.<sup>103</sup> It was stated in the opinion that it was trite in the case of insurance that the value of insured goods was always taken as their ordinary value, namely their cost price plus all expenses up to their loading (*'dat de waerdye der verzekerde goederen altyd genomen word volgens de gemeene waerdye, en zo als dezelve goederen in koop gekost hebben met bygevoegde onkosten van pachtinge, tol-rechten, sleet of toerusting van dien'*). But while the value at the time and place of loading was relevant, in the case of loss the value of the insured goods had to be paid without regard to the type of money (or currency) it cost but in accordance with the sum insured at the place of conclusion of the contract (*'conform de getekende somme ter plaetse van de signature'*)<sup>104</sup> and thus irrespective of the fact that the cost price was paid in a different currency at a time when a different rate of exchange applied (*'zonder regard of relatie tot het geld by den inkoop geemployeerd'*).<sup>105</sup> The opinion mentioned further that it was equally trite that when the insured came by his goods by way of barter (*'by troque of ruilinge'*) and had them insured, their value had to be determined with reference to their market value at the place where the exchange had occurred (*'de waerde der goederen geschied zynde na courante pryse van de plaetse, alwaer de troque gedaen, of ruilinge is voorgevallen'*).<sup>106</sup>

In s 25 of the Rotterdam *keur* of 1721 it was provided, now for the first time no longer in connection with compulsory under-insurance, that one could insure and have insured all types of goods, and include in such insurance all expense up to and including the loading of those goods (*'de onkosten tot de Ladinge toe inclusief'*) as well as the insurance premium. Again, as in 1604, there was no indication as to how the value of the goods themselves had to be determined.

Finally, in terms of s 22 of the Amsterdam *keur* of 1744, one could insure all goods fully, including all expense incurred in respect of them up to their loading, as well as the insurance premium (*'met alle onkosten tot aan boord met de Premie van Assurantie inclusive'*). Furthermore, if the cost price or real value (*'den reëlen inkoop of waarde'*) of the goods could be established by other documentation, a valuation of the goods in the policy was not permitted.<sup>107</sup>

<sup>103</sup> See Barels *Advysen* vol I adv 90.

<sup>104</sup> See again § 2 *supra* where the opinion was also mentioned in connection with the sum insured.

<sup>105</sup> Insurers were therefore not justified in calculating the amount of their compensation with reference to the currency employed at the time when the goods were acquired or loaded (*'hunne voldoeninge te reguleeren met de cours van Wisselgeld ... betrekkelijk tot de tijd dat de koop of laeding der geassureerde goederen is geschied'*) and could not convert the amount of their liability into a foreign currency (*'assurateurs zyn gehouden hunne signature te voldoen, en kunnen het beloop van dien niet redigeeren naer eene vreemde Wisselcours'*).

<sup>106</sup> Reference was made in this regard to the *keur* of 1614, although, clearly, this is not precisely what was provided there.

<sup>107</sup> See also Enschedé 119; Goudsmit *Zeerecht* 338. As to the prohibition on valued policies on goods in certain circumstances, and as to when a valuation of goods was required in terms of s 22, namely when the goods were of the insured's own manufacture or when they were bartered goods, see further § 5.4 *infra*.

### 3.2.3 The Insurable Value of Goods in the *Wetboek van Koophandel*

In terms of art 273 of the Dutch *Wetboek van Koophandel*, if the value of the insured object has not been expressed by the parties in the policy, it has to be determined by all methods of proof. No detailed rules are laid down in this regard, however.<sup>108</sup>

The *Wetboek* permits goods to be insured in different ways.<sup>109</sup>

Firstly, and as a point of departure, goods may in terms of art 612 be insured for the full value that they have at the time and place of their consignment, with all the expense incurred in respect of them until they have been placed on board, including the insurance premium, but without a separate amount being recoverable in respect of separate or separable parts of the object insured.

Secondly, in terms of art 613, the true value of insured goods (that is, their value on board) may be increased with the freight, import duties and other expenses which necessarily have to be paid upon their safe arrival (*'met de vracht, inkomende regten en ander onkosten, welke bij de behoudene aankomst noodzakelijk moeten worden betaald'*), as long as such expenses are specified in the policy. The insured must prove the value of these different elements and the fact that such freight and expenses were in fact paid.<sup>110</sup> Therefore, building on the historical foundation of Roman-Dutch law, the basis of compensation is recognised in the *Wetboek* as the value of the cargo at the commencement of the risk. An indemnity on that basis aims at putting the insured in the position he would have been had the adventure never been undertaken and at compensating him for the loss of the capital he had invested in that adventure. This means, of course, that in the case of a loss the insured will profit from a falling market and will under such circumstances have an interest in the loss of his goods, while, contrariwise, he will be under-compensated in the case of a rise in the price of the insured goods between the time and place of departure and that of arrival at their destination.

Thirdly, practical reality and the need of commerce for insurance of the value of goods at their destination are also acknowledged. A more modern approach is also possible so that the insured can be placed in the position in which he would have been had the loss or damage not occurred and had the adventure been completed successfully. As already in Roman-Dutch law, insurance is not limited to *damnum emergens*,

<sup>108</sup> As is the case, eg, in the English Marine Insurance Act: see § 3.2.4 *infra*.

<sup>109</sup> See generally Dorhout Mees *Schadeverzekeringsrecht* 165; Star Busmann 14-15; Suermondt *Taxatie* 43-48; and Van Veen 36-58.

<sup>110</sup> In the case of non-arrival, some of these expenses may not be payable and art 614-1 provides that the increase in terms of art 613 is not binding if the insured goods do not arrive at their destination and in so far as the payment of freight and any other expenses are as a result no longer payable at all or fully. In respect of advance freight, art 614-2 provides that the insurance remains valid despite the non-arrival of the insured goods, as long as the insured is able to prove the actual prepayment of the freight. Article 613 is derived from s 35 of the Amsterdam *keur* of 1744 but an equivalent of art 614-2 did not appear in that *keur*.

but it is permissible to insure against *lucrum cessans* as well. This is provided for in art 246 ('*gemis van verwacht voordeel*') and art 615 ('*verwacht wordende winst*') which allow the profit to be made on consigned goods to be insured by insuring the goods for their value at the time and place of their arrival at the destination, that is, for their value on board, plus freight and expenses incurred until their safe arrival, plus the profit expected to be made on them. However, the requirements laid down in this regard detract somewhat from this extension of the indemnity principle.<sup>111</sup> Thus, only the profit on the goods expected at the conclusion of the insurance at the time of the commencement of the voyage may be insured and that is not necessarily the same as the (increased) value of the insured goods in an undamaged condition at the destination at the time of their arrival. Further, the insured is required to prove the expected profit and that is in conflict with the requirements of commerce and practice where cargo insurance is usually concluded by a policy in which the value of the goods at the destination is estimated in a lump sum which includes the cost of their transportation and the profit expected on them, a practice which is therefore, strictly speaking, not lawful.

The *Wetboek* also provides for the case where goods to be insured are obtained by barter. In terms of art 620, if an insurance is made for a return voyage from a place where trade is conducted only by way of barter ('*ruiling*'), the value of the insured goods is to be calculated on the basis of the cost price, plus the cost of transport ('*transportkosten*'), of the goods given in exchange for them.<sup>112</sup>

### 3.2.4 The Insurable Value of Goods in English Law

In the case of an unvalued or open policy, which is one which does not expressly specify the value of the subject-matter insured,<sup>113</sup> the insurable value of such a subject-matter must in terms of s 28 of the English Marine Insurance Act of 1906 be ascertained subsequently in the manner specified in s 16.

<sup>111</sup> See again ch V § 5.2 *supra* as to the insurance of profit in the *Wetboek van Koophandel*.

<sup>112</sup> This was the position in Amsterdam prior to the *keur* of 1614. However, as Enschedé 117-118 remarks, this is not an acceptable method because when one buys, one gets much less than when one barter. Goudsmit *Zeerecht* 338 notes that the earlier provision in Amsterdam that the value of goods of own manufacture had to be estimated at the price for which such goods could be sold at the place of loading, was not taken over because it is contrary to the principle of indemnity.

<sup>113</sup> In modern practice, unvalued marine policies are rare, occurring only seldom in respect of goods and in respect of freight payable on arrival (see Chalmers 23 and 44). However, a floating policy will in certain circumstances be treated as an unvalued policy. A floating policy is one which describes the insurance in general terms and which leaves the name of the ship or ships and certain other particulars, such as the value of consignments, to be defined by subsequent declaration (see s 29(1) of the Marine Insurance Act). Where one of the particulars left to be subsequently defined is the value of the consignment and unless it is otherwise provided (as it usually is), it will be treated as an unvalued policy as regards that consignment in the case where the declaration of value is not made until after the insured has given notice of the loss or of the arrival of the consignment to the insurer (see s 29(4)).

As far as goods are concerned, s 16(3) provides that their insurable value is the prime cost of the goods insured plus the expenses of and incidental to their shipping and the charges of insurance upon the whole.<sup>114</sup>

This principle, despite it being a deviation from the principle of indemnity, has been adopted for the sake of the convenience of a speedy and certain settlement of cargo claims,<sup>115</sup> a fact already recognised in the eighteenth century. Weskett,<sup>116</sup> for example, explained that when a valuation is not inserted in the policy, it is the prime cost of those goods with all the charges on them, together with the insurance premium and such other charges and deductions as must unavoidably be paid and allowed by the insured (such as brokerage and commission), which make up the amount or value of what is called the interest.

In principle, therefore, as in Dutch law,<sup>117</sup> and also as in Hamburg in the eighteenth century,<sup>118</sup> the basis of the indemnity is the value of the cargo at the commencement of the voyage. The intention is to place the insured in the position in which he would have been had the adventure not been commenced rather than in the position in which he would have been had the loss not occurred but the adventure been completed successfully. In practice, though, cargo is invariably insured by valued policies in which their insurable value is largely irrelevant and in which the insured value agreed upon has as its foundation the value of the cargo upon the termination of the adventure at the destination and not its value at the commencement of the risk.<sup>119</sup>

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<sup>114</sup> Chalmers 23n6 explains that while the invoice price is *prima facie* evidence of the prime cost, the insurable value of goods is their value at the commencement of the risk. Therefore, if the value of the goods has altered since the insured has acquired them, the prime cost to the insured, as it is evidenced by the invoice price, does not necessarily represent their insurable value. The Court must then determine their value at the commencement of the risk, ie, their value on board at the place of loading.

<sup>115</sup> On this point, see further Lowndes 7-8 who notes that the rule is that the insured must be indemnified on the basis of what his goods had cost him at the place of their shipment, and not of what he may reasonably expect to sell them for at their intended market. He points out that although uncertainty initially existed among merchants as to which of these two methods of indemnification should be adopted, this uncertainty and the surrounding debate were terminated in Europe more than a century before the issue came before an English court for the first time. The less perfect mode of compensation was preferred to the other, presumably because of its superiority as regards certainty and dispatch.

<sup>116</sup> *Digest* 300 sv 'interest' par 1. See too *idem* at 300-309 pars 2-9 for various examples illustrating this point.

<sup>117</sup> See Buys 29 for a comparison.

<sup>118</sup> Thus, in terms of art XII-4 of the Hamburg *Assecuranz-Ordnung* of 1731, when a valuation was not inserted in the policy, the assessment of any loss had to be made on the basis of the cost price of the goods (as it appeared from the invoice), with the addition of all charges on them until they were loaded on board and also the insurance premium. No regard was paid to the market value of the goods or to the imaginary profit expected on them. See further Dreyer 160-162 and 193-194; and Magens *Essay* vol I at 37-38.

<sup>119</sup> As to valued policies in English law, see § 5.6 *infra*.

### 3.3 The Insurable Value of Ships

#### 3.3.1 Introduction

The value of ships employed on voyages at sea fluctuated greatly from place to place and even more from time to time. On the one hand a ship's value could increase if the cost of shipbuilding increased significantly over a relatively short period of time. More probably, though, being a wooden ship, her value would decrease fairly rapidly on even a single voyage on which she was engaged. And, of course, the longer the voyage and the greater the number of voyages she had performed, the greater the progressive deterioration in her condition and the depreciation in her value by wear and tear.<sup>120</sup>

On the other hand, however, as her condition deteriorated after successive voyages, so the expenditure required to fit her out for a next voyage, and outlay which was not always included in her insurable value, as will appear shortly, increased.<sup>121</sup> In fact, even after an uneventful and successful voyage, most ships in earlier times would often have required fairly extensive repairs before they could set sail on yet another voyage.<sup>122</sup> Obviously, the cost of outfitting ships may also have increased in the meantime.

There was therefore invariably a considerable difference between the value of a ship on her departure on an insured voyage and her presumed undamaged value after completing the voyage. Practically speaking, it was in earlier times more realistic to expect of the insured to prove the value of his ship at the time of her departure when the insurance was concluded than at any subsequent time, and that was the case despite the fact that her subsequent value, more particularly at the time (and place) of her loss, would have provided a more acceptable basis on which to determine the extent of the insured's loss and the amount of his indemnity.

For this reason, then, Roman-Dutch law accepted the value of a ship upon the commencement of the voyage as her insurable value,<sup>123</sup> although in some narrowly prescribed circumstances exceptions were recognised.

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<sup>120</sup> Thus, in 1636 an East Indiaman of 350 tons was assessed by the directors of the East India Company at f29 000 on her departure and on her return her value was found to have decreased by f7 380 because of wear and tear. In 1730 a ship destined for China was valued at f83 000 and on her return she was estimated to be worth no more than f60 196. See Bruijn, Gastra & Schöffer *Dutch-Asiatic Shipping* 27.

<sup>121</sup> See Spooner 156 who gives following example. A ship valued at f33 000 on her first voyage in 1764, depreciated after each voyage by f3 000. Her book value at the beginning of her eighth voyage in 1779 came to f12 000. By contrast, the costs of fitting her out rose from f15 120 in 1764 to f22 260 in 1779.

<sup>122</sup> Of course, the cost of such repairs could not ordinarily be recovered from the insurer. See ch VI § 3.3 *supra* as to inherent vice.

<sup>123</sup> In this it followed the example of earlier Spanish legislation where the insurable value of a ship was also based on her value at the time of the conclusion of the insurance, including the cost of equipping and insuring her, rather than eg on her building cost. A provision to this effect was contained in the Barcelona ordinances of 1435, 1458, and 1484. See generally Reatz *Geschichte* 90-96; Seffen 31.

Nevertheless, it must be stressed that unvalued policies on ships were seemingly rare in practice.<sup>124</sup> It would be a matter of some conjecture, though, to determine whether that was the result or the cause of the rather unsatisfactory basis for the determination of a ship's insurable value in the case of an unvalued policy.

### 3.3.2 Legislative Provisions in Roman-Dutch Law

Roman-Dutch legislative provisions are singularly unhelpful on the question how the insurable value of a ship had to be determined. This must probably be seen against the background of the widespread if not compulsory valuation of ships to be insured prior to the conclusion of an insurance contract on them. The first indication of how the insurable value of a ship had to be determined in the absence of such a valuation, is only encountered in Amsterdam legislation dating from the mid-eighteenth century.

A very early measure dealing with the prohibition on full-value insurance, s 20 of the *placcaat* of 1550, limited the extent to which a ship could be insured in certain cases, while in other instances it permitted the full-value insurance of her hull ('*bodem, kiel of't hol'*), including her guns, gunpowder and cannon balls, but not of her tackle or rigging, or equipment.<sup>125</sup> It was not stated how such value had to be determined.

The prohibition on full-value insurance of ships was retained in title VII of the *placcaat* of 1563, the owner himself or the co-owners not being permitted by s 8 to insure in excess of a specified portion of the value of the ship, including her equipment and tackle in certain instances, while in other instances her owner or master could fully insure her hull ('*den bodem Kiel, ofte hol'*) and also her guns, gunpowder and the shot on board, but not her rigging or equipment. Again there was no indication of the time and place with reference to which the relevant value of the ship had to be determined. However, in terms of s 10, the prior expert valuation of the ship was compulsory and there was therefore no need for the Legislature to lay down any specific rules with regard to the insurable value of a ship.<sup>126</sup>

In s 20 of the *placcaat* of 1571 it was provided that in the case of ships, guns, munitions or victuals, or similar things, no insurance was permissible except below a stated portion of the real value ('*oprechte waerde'*) of such ships and without it being possible to insure the rigging and equipment of such ships at all. Although it was now stated that it was the ship's real value which was at issue, it is not clear from the provision with reference to which time and place that real value had to be determined.

The matter was not clarified in s 10 of the Amsterdam *keur* of 1598 which<sup>127</sup> provided that no insurance could be concluded on ships, their guns or munitions of war

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<sup>124</sup> See Kiesselbach 118 who observes that in the case of hull insurance, pre-taxation was the rule.

<sup>125</sup> Likewise s 19 of the replacing *placcaat* of 1551.

<sup>126</sup> It seems that unvalued hull policies were not permitted or at least not employed in practice, and for that reason there was no clear indication in the *placcaat* (and also not eg in Van der Keessel *Praelectiones* 1453 (*ad* III.24.6)) on how the insurable value of a ship (as opposed to that of goods) had to be determined.

<sup>127</sup> Like s 4 of the Middelburg *keur* of 1600.

except below a specified portion of their real value ('*oprechte waerde*'), without it being permissible to insure the freight to be earned by or the equipment of such ships, or their gunpowder, cannon balls or victuals or any similar consumptibles.

The Rotterdam Legislature also introduced compulsory under-insurance in its *keur* of 1604 but it likewise gave no assistance on the determination of the relevant insurable value. In s 4 the master and owners of any ship could not insure more than a stated portion of her real value ('*rechte weerde*'), in which value could not be included the salary of her crew or victuals, gunpowder, gunshot and other goods to be consumed on the voyage.

In Antwerp, art 286<sup>128</sup> of the *Compilatae* of 1609 laid down that the insured always had to bear the risk for a specific portion of the value of the ship and her equipment. In terms of art 288, though, the valuation by experts of the ship with her equipment and guns prior to her departure, and not by the insured himself, was made compulsory.

In Amsterdam the position was addressed by an amending *keur* of 9 May 1614, which also concerned the insurable value of certain goods,<sup>129</sup> and which was passed as a result of a request by the Commissioners of the local Chamber of Insurance for guidance on the appropriate value which had to be given to ships in particular instances.<sup>130</sup> From the *keur* it may be deduced that the insurable value of a ship was her value at the time of her departure but that such value was not considered appropriate in all instances. The *keur* explained that it had been observed in the Chamber, in the first place, that when the hull ('*Caske ofte Corpus*') of a ship bound for the West Indies, Guinea, Cape Verde, the Strait or any other further location was insured for both an outward-bound and a home-bound voyage, the ship often in full or in part completed her trade successfully and profitably<sup>131</sup> but then consigned a part of her return cargo with another ship or ships, to the great advantage of the insured owner since she remained there and continued trading ('*voort negotierende*').<sup>132</sup> In consequence, with the passage of time ('*door langdurigheyt van den tijt*'), that same ship became unnavigable or was otherwise lost ('*wort innavigabel ofte andersints komt te pericliteren*'). The insured then sought to claim on his policy on the basis of her value at the time of the commencement of the voyage, despite the fact that her condition had deteriorated considerably after her departure and prior to her loss. The *keur* explained further that it had been observed in the Chamber, in the second place, that ships were often loaded monthly ('*by de Maent bevracht sijnde*')<sup>133</sup> and were later lost through

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<sup>128</sup> Of par 9, title 11, part IV (see De Longé vol IV at 318). See too Mullens 44-45 and 88.

<sup>129</sup> See again § 3.2.2 at n99 *supra*.

<sup>130</sup> See Goudsmit *Zeerecht* 319-320.

<sup>131</sup> That is, presumably, she sold her cargo and obtained a new return cargo.

<sup>132</sup> The owner no doubt hoped to acquire another more profitable return cargo.

<sup>133</sup> Presumably this must be taken to be a reference to the insurance of ships by a time policy. See again ch XII § 1.4 *supra*.



wear and tear or in storms (after their freight or profit had already been earned), their insurers being condemned to pay for what the ship was worth at the time of her departure (*'het uyt de Lande 't seyl is gegaen'*). Despite the fact that had she completed her voyage, she would not have been worth or would at a sale not have realised more than a third or a half the amount paid and made good by insurers. It is clear from these two examples, therefore, that the nature and the duration of insurances on hull in particular instances made her value at the time of her departure an unrealistic basis for the determination of the insured owner's indemnity.

The *keur* of 1614 accordingly provided that as regards ships which deteriorated in condition or were rendered unnavigable as a result of prolonged voyages (*'die deur de langdurige voyagien verslijten, opgegeten ende innavigabel worden'*), the Commissioners were authorised to treat and decide the matter as they saw fit and proper in the exercise of their discretion (*'om daer inne te mogen doen ende disponeren, soo syluyden na hare discretie sullen bevinden te behooren'*). Therefore, in these cases, the Chamber could take account of the depreciation in the value of the ship. Although it was not spelt out in so many words, one may assume that the Chamber was authorised to ignore the value<sup>134</sup> of the ship at the time of her departure and to assess her value and therefore the insured's loss on a different basis in cases where the duration of the voyage and the change in her condition were such as to render that value inappropriate and disadvantageous to the insurers. This was a less radical solution than that implemented some years before in the case of ships also employed to trade within, and not solely to carry cargo to and from, the East Indies when the insurer's liability for the loss of such a ship was simply excluded.<sup>135</sup>

Therefore, while the wording of the *keur* of 1614 tends to indicate that the principle was retained that the hull insurer compensated for the value of the ship at the commencement of her voyage, it created an exception to that principle in those cases where, as a result of that principle, the insured would profit too much from the loss of his ship. The Legislature was guided more by equitable notions here than by a proper understanding of the relevant insurance principles. The reason given for the reduction in the indemnity, in addition to the depreciation in the value of the ship, was that the insured had already earned his freight or had already made his profit from the employment of his ship. That factor, however, could not have had an influence on the measure of indemnity payable by a hull insurer, only on that due from an insurer on freight.<sup>136</sup> Although it is arguable that the depreciation in the value of the ship on her voyage was compensated by the freight she earned on that voyage, this ignores the fact that hull insurance did not cover any depreciation in the value of the ship through wear and tear.

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<sup>134</sup> Presumably either her insurable or her agreed value.

<sup>135</sup> The earlier Amsterdam amending *keur* of 20 June 1606 provided that the unnavigability of ships sailing to the East Indies (*'Oost-Indien'*) on outward or return voyages would be for the account of the insurers (*'d' innavigabiliteit der voorsz Oost-Indische Schepen op de uytwaert ofte wederkomste overkomende staen sal tot laste van de Asseuradeurs'*), unless the ship was employed to trade from one place to another in the East Indies itself.

<sup>136</sup> See § 3.4 *infra*.

Section 1 of the Amsterdam amending *keur* of 1693 amended s 10 of the *keur* of 1598 in that it decreased the portion of the real value of a ship which had to remain uninsured. The prohibition on the insurance of freight, powder, lead, victuals or similar consumables was retained. No precise indication was given of how the real value of a ship had to be determined.

Although the Middelburg Legislature in 1719 abolished the prohibition on full-value insurance, s 2 of the amending *keur* of that year simply provided that the insured could have themselves fully insured, including for the insurance premium (*'Geassureerdens hun ten vollen sullen moogen laten verseekeren tot de praemie van Assurantie incluys'*). There was no indication as to how the relevant value of an insured ship had to be determined.

In Rotterdam the prohibition on full-value insurance was retained. Section 25 of the *keur* of 1721 provided that one could insure and have insured all kinds of ships, goods, wares and merchandise, nothing excluded, and also the expenses up to and including loading as well as the insurance premiums. In s 31 it was laid down that ships could not be insured in excess of a specified portion of their real value.

Finally, the Amsterdam *keur* of 1744, in which compulsory under-insurance was abolished, provided in s 7 that the hull of a ship and all its appendages and equipment, nothing excluded, could be fully insured for (but not for more than) their value on proceeding to sea (*'zal ten vollen, en soo als het waarlyk tot in Zee kost, verseekerd mogen werden'*). Therefore, the relevant value of the hull and equipment of a ship was that which pertained on her departure to sea. It must be assumed, therefore, that her value at any earlier time (for example, when she was built or acquired, or at the time of the conclusion of the insurance) or at any later time (for example, at the time of her loss) was simply not relevant in this regard. Presumably her value at the place of departure on her voyage was deemed the appropriate value.

This meant, of course, that in those instances where, as was usually the case, the ship depreciated in value after her departure on the voyage and prior to her loss at sea, an indemnity calculated on the basis of her insurable value being her value at the commencement of the voyage, would have benefitted the insured to a greater or lesser degree. That was practically unavoidable, however, given the enormous difficulties, in the case of an unvalued policy, of determining her value at the time and place of her loss, both of which may have been unknown.

Again the Amsterdam Legislature realised that the value of a ship at the commencement of her voyage was not appropriate in all instances and that it resulted in the insured in certain cases being able to claim more than an indemnity on his policy. Section 33 of the *keur* of 1744 therefore simply repeated the relevant provisions of the earlier *keur* of 1614.<sup>137</sup>

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<sup>137</sup> See further Van der Keessel *Praelectiones* 1471 (*ad* III.24.13) (referring to s 33 as imposing a limitation on the ordinary rule applicable in the case of the loss of a ship); Coninck *Liefsting* 420-422; Dorhout Mees *Schadeverzekeringsrecht* 65; Goudsmit *Zeerecht* 337; and Suermondt *Taxatie* 19 and 69-72.

### 3.3.3 The Insurable Value of Ships in the *Wetboek van Koophandel* and in English Law

In the *Wetboek van Koophandel* art 602 provides that an insurance on the hull and keel ('*casco en kiel*') of a ship may be concluded for the full value of the ship, in addition to all her appurtenances and all the expenses incurred until her departure for sea ('*nevens al deszelfs toebehoren, en alle onkosten, tot in zee toe*'). In the absence of a valued policy, therefore, it would appear<sup>138</sup> that in the case of hull insurance the value of the ship at the time of her exposure to the risk at the commencement of the voyage is the basis of the measure of indemnity. Any subsequent increase, or, for that matter, any subsequent decrease, in her value prior to her loss is irrelevant, even if this means that the value of the ship at the time of her loss is no longer that which it was at the time of the conclusion of the insurance. Therefore, it would seem, the hull policy is often not one of strict indemnity.<sup>139</sup> A breach of the indemnity principle is probable in the case of a subsequent depreciation in the ship's value in that the insured may then receive a profit in the case of a loss because of the way in which the insurable value of a ship is determined, in the same way, in fact, as he may receive a profit in the case of a valued policy if the value agreed upon is that pertaining at the conclusion of the insurance contract.<sup>140</sup>

For that reason, no doubt, art 619, much like the Amsterdam *keur* of 1614 and s 33 of the Amsterdam *keur* of 1744 from which the notion underlying it was derived, recognises exceptions where the Court may reduce the relevant (insurable and also the agreed) value<sup>141</sup> of a ship because of the fact that the ship and her equipment necessarily depreciate in value due to wear and tear.<sup>142</sup> Again, the reason why the ship's

<sup>138</sup> Even if this is not expressly so provided in art 602, this appears at least to be the accepted position.

<sup>139</sup> Only in the case of a partial loss is the value at the time of loss relevant in that the cost of repairs and not the insurable value is then taken into account in calculating the measure of indemnity: see § 7.3 *infra*.

<sup>140</sup> See generally Star Busmann 11-12; Suermondt *Taxatie* 41-42.

<sup>141</sup> Article 619 is especially aimed at valued policies (see § 5.5 *infra*), although it is possible to apply it also in the case of an unvalued policy.

<sup>142</sup> Article 619 lays down that the Court may more precisely fix or reduce the (insurable or agreed) value of the hull or keel of a fully insured ship, firstly, if the ship is valued in the policy according to her cost price or building cost while she was already worth much less (the insurer has to prove this) because of her age or the performance of many voyages. This apparently refers not to a depreciation after the conclusion of the insurance, but merely to an initially excessive valuation. This provision is thus designed to find application in the situation where the ship is valued in the policy according to her purchase price or building cost although at the time of the conclusion of the insurance she is already worth less. Secondly, the Court may more precisely fix or reduce the relevant value if the ship is fully insured for several voyages and if, after the completion of one or more of them on which freight has already been earned, she is subsequently lost on one of the insured voyages. Remarkably the only really important reason for such judicial interference, namely a depreciation in the value of the ship, is not even mentioned here. What was in the Amsterdam *keuren* merely an example to show which cases of depreciation during the voyage the Commissioners had to bear in mind, here became a rigid exception. As far as the amount of any such reduction is concerned, it must generally be equivalent to the amount to which the value of the ship had depreciated through wear and tear. In the first instance the reduction is calculated with

value at the time of the loss is not taken as the insurable value in the case of hull insurance is because it is as a rule practically impossible to establish that value, at least historically so, given the earlier lack of the proper and efficient communication necessary for the insured to ascertain the value of his ship at the time of the loss in a far-off place. However, as has been pointed out,<sup>143</sup> art 619 is an exception and the fiction of the immutable value of a ship which applies as a rule is an historical anomaly which results in the insured being put in the position where he was before the commencement of the adventure.

In terms of the English law of marine insurance, in the rare case of an unvalued policy<sup>144</sup> on a ship, s 16(1) of the Marine Insurance Act of 1906 provides that the insurable value of a ship is her value at the commencement of the risk, including her outfit, provisions and stores for the officers and crew, the money advanced for seamen's wages, and other disbursements, if any, incurred to make the ship fit for the voyage contemplated by the policy, plus the charges of insurance upon the whole. The insurable value in the case of a steamship includes also her machinery, boilers, and coals and engine stores if owned by the insured, and, in the case of a ship engaged in a special trade, the ordinary fittings required for that trade. Again, therefore, as in Dutch law, the ship's value at the commencement of her voyage is, in the absence of an agreement to the contrary such as occurs with a valued policy, her insurable value.<sup>145</sup>

### 3.4 The Insurable Value of Freight

Freight was only admitted to be insurable in the course of the eighteenth century and at a fairly late stage of the development of Roman-Dutch insurance law.<sup>146</sup> That will account for the lack of any substantial evidence as to what may have been considered the insurable value of freight in the case of an unvalued policy.

When the insurance of freight was permitted, it was not required that it be insured by a valued policy, as was the condition on which the insurance of expected profit was permitted. But such valuation was not prohibited and it appears to have been common practice to insure freight by way of valued policies. Hence, even after the

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reference to the reduced real value of the ship at time of the loss, and this reduction will differ according to the circumstances, but in the second case the amount at which the shipowner must fix his freight for the reduction in value is calculated with reference to the average amount of wear and tear.

<sup>143</sup> See Star Busmann 11-14. See further as to art 619, Coninck Liefsting; Suermondt *Taxatie* 19, 41-42 and 68-76; and Van Veen 65.

<sup>144</sup> That is, a policy which does not specify the value of the subject-matter insured but which, subject to the limit of the sum insured, leaves the insurable value to be subsequently ascertained in the manner as specified in s 16 (see s 28 of the Marine Insurance Act).

<sup>145</sup> See as to the Dutch and English positions, Buys 29, who notes that in both systems as a rule practice and agreements between the parties alter this basic position considerably and that the sum insured on a ship seems to be the result of a compromise between the insured and the insurers in terms of which valuation factors are taken into account which differ from those mentioned in the applicable legislation.

<sup>146</sup> See again ch V § 5.4 *supra*.

insurance of freight was allowed, evidence as to its insurable value in Roman-Dutch law is rather inconclusive.

In terms of s 26 of the Rotterdam *keur* of 1721 and the later s 15 of the Amsterdam *keur* of 1744,<sup>147</sup> freight ('*vragtpenningen*') to be earned by the carrier of goods could be insured. Section 15 specifically provided that freight could be insured to the extent that it could reasonably be established, whether by the charterparty, manifest or bill of lading, that it could be earned or lost on the insured voyage ('*voor so verre men na billikheit bevind, dat op de reyse verdiend of verlooren kan worden, 't zy by Cherte party, Manifest of volgens de Cognossement te doceeren*').<sup>148</sup> And in terms of s 35 of the Amsterdam *keur* of 1744, as amended in 1756, the owner (whether the consignor or the consignee) of goods could separately insure the freight he had to pay for their carriage upon the arrival, even if in a damaged condition, of those goods. One of the conditions for such insurance was that the insurer was liable to compensate the insured only to the same extent as the extent of damage to the goods themselves.<sup>149</sup> However, it was not stated how the amount of the freight had to be determined if it could not be ascertained from the relevant shipping documents.

In the *Wetboek van Koophandel* the position as it appeared in Roman-Dutch law, with its absence of any clear indication as to how the insurable value of freight had to be determined, was largely taken over. In terms of art 623-1 the amount of freight ('*vrachtpenningen*') is proved by the charterparty or the bill of lading, and if such documents are absent or if the goods belong to the shipowners themselves, the amount of the freight is in terms of art 623-2 to be estimated by experts. There is no indication how the experts are to do this and which guidelines they are to follow.

In English law, the rules of practice found their way into the legislation. Section 16(2) of the Marine Insurance Act of 1906 provides that in the case of an unvalued policy on freight, which is somewhat more common than such policies on cargo and hull, whether the freight is paid in advance or otherwise, its insurable value is the gross amount of the freight at the risk of the insured, plus the charges of insurance. The amount of freight at risk is usually easily ascertainable and provable by reference to the contract of carriage, which explains the reduced need for a valued policies in freight insurances.<sup>150</sup>

### 3.5 The Insurable Value of Other Objects of Marine Risk and of the Objects of Risk in Fire Insurances

Neither Roman-Dutch nor modern Dutch law makes any provision for the way in which the insurable value of objects of risk in marine insurance, other than those already mentioned, had or has to be determined. In the English Marine Insurance Act

<sup>147</sup> See generally eg Van der Keessel *Praelectiones* 1435 (*ad* III.24.4).

<sup>148</sup> In the case where the ship was carrying cargo for the account of her owners ('*in gevallen een Schip voor eyge Meesters reekening Goederen geladen heeft*') and the freight was to be insured, this had to occur in a valued policy ('*zullen dezelve in de police moeten getaxeert werden*'). See § 5.4 *infra*.

<sup>149</sup> See further § 7.2.2.3 *infra* as to the measure of indemnity in the case of a loss of freight.

<sup>150</sup> See on this point, Lowndes 12.

of 1906, though, the principle underlying the matter, also in Roman-Dutch law, is specifically provided for. In terms of s 16(4) the insurable value on any other subject-matter is the amount at risk of the insured when the policy attaches, plus the charges of insurance.

As to the insurable value of the object of risk in fire insurance, Roman-Dutch law was a little more helpful. The fact that objects of risk in the case of fire insurances, such as houses and other buildings and their contents, were located and remained in one place, had an important influence on the basis employed to determine their insurable value. It was practically feasible to adopt a basis more consistent with providing the insured with a proper indemnity, namely the value of the insured property at the time and at the place of the loss, rather than at the time of the conclusion of the contract or when the insurer came on risk.

However, with the late recognition of fire insurance in Roman-Dutch insurance legislation, and also because of the fact that early fire policies were valued policies, there is no indication in the sources of the relevant insurable value of property insured against fire. By the time of codification, though, what had no doubt been practice before, came to be recognised in the *Wetboek van Koophandel*. Article 295-2 lays down that in the case of a fire policy, the damage has to be calculated according to the value of the property (that is, movable goods and merchandise in a house or warehouse) at the time of the fire. However, this value at the time of the loss applies only in the absence of an agreement, such as a valued policy, between the parties to the contrary.<sup>151</sup>

In English law, too, it would appear, early fire policies were as rule valued policies with the valuations being based on the replacement value (that is, the cost of replacement or of clearing and rebuilding, less the value of salvageable materials) rather than on the historic cost or even the current value of the insured property. The underlying assumption was that the goods or building would be replaced or repaired in the event of a fire.<sup>152</sup> Market value was only adopted in the mid-nineteenth century as the basis for the settlement of fire losses.<sup>153</sup>

## **4 Proof of the Insurable Value of the Object of Risk and the Amount of the Insured's Loss**

### **4.1 Introduction**

In addition to providing proof of the occurrence of the loss or damage by reason of a peril insured against,<sup>154</sup> the insured also had to prove the extent of that loss or

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<sup>151</sup> See further Elink Schuurman *Brandschade* 5-7 and 25 (referring to the '*ruitwaarde*' of the insured object immediately before the fire).

<sup>152</sup> See eg Cockerell & Green 29; Jenkins 28-29.

<sup>153</sup> See ILL *HR* 15 51.

<sup>154</sup> See again ch XVI § 3 *supra*.

damage and so had to quantify his claim against the insurer. This involved, as a first step, producing proof of the insurable value of the object of risk. This requirement was part of the earliest insurance law. Furthermore, although this was only required at a later stage when the interest theory began emerging, the insured also had to prove that he had suffered loss, and to what extent, by reason of the loss of or damage to the object of risk, that is, he had to prove the existence and also the extent and therefore the value of his interest in the object in question.<sup>155</sup>

The parties to the insurance contract tried to circumvent both these requirements and to relieve the insured of the attendant burdens of proof. This was done by inserting appropriate clauses into insurance policies. On the one hand, a valuation clause was included in which the parties attempted to fix the value of the object in question conclusively. On the other hand, they inserted a so-called policy-proof-of-interest clause in which they agreed that the production of the policy would suffice as proof of the existence of the insured's interest and that, accordingly, on proof of the occurrence of the loss and on the production of the policy, the agreed value would be paid out. In practice, because of their close relationship and application in similar circumstances and with related aims, valuation and policy-proof-of-interest clauses were often combined. Many valuation clauses were at the same time also policy-proof-of-interest clauses.

In this section the insured's burden of proof will be considered briefly, while the valuation and policy-proof-of-interest clauses will be treated separately later on.<sup>156</sup>

#### 4.2 Statutory and Customary Recognition of the Insured's Burden of Proof in the Seventeenth Century

It is evident that it was accepted from early on that the insured was the party to the insurance contract who had to provide the necessary proof to enable the insurer's obligation to compensate him to be quantified. That was so not only in the early Spanish measures but it also appears from early insurance practices in the Low Countries.<sup>157</sup>

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<sup>155</sup> It was only realised at a relatively late stage that an insured did not necessarily have to be the full owner of the object at risk and that the extent of the loss of or damage to the object was not necessarily also the extent of the loss or damage to his estate, ie, that the value of that object was not necessarily the same as the value of the insured's interest in that object. According to the indemnity principle, the smaller value of the two had to be used as the basis for any compensation. An insured may only have had a limited interest in an object, so that the extent of the loss to the insured was the relevant factor and not necessarily the extent of the loss to the object itself. Thus, it was only realised late on in Roman-Dutch law that proof of the value of the object of risk was not yet proof of the value of the insured's interest, if any, in that object. The insured also had to prove that, and to what extent, he had suffered loss by the loss of or damage to that object. As to the interest theory in Roman-Dutch law, see again ch II § 6.2 *supra*.

<sup>156</sup> See respectively §§ 5 and 6 *infra*.

<sup>157</sup> Thus, from a decision of the Bruges *Schepenen* Court in 1469 it appears that the insured had to prove that he had suffered loss or damage, and also what the amount of that damage and the value of the object of risk were. See *De Groote Zeeassurantie* 15.

In s 18 of title VII of the *placcaat* of 1563 it was specifically provided that the insurer would not be liable for any payment under the policy unless the insured's notice of loss<sup>158</sup> was accompanied by proper documentary evidence or testimony (*'deuchdelijcke certificatie ofte ghetuygenisse'*) as to the occurrence of the loss<sup>159</sup> as well as of the nature of the lost or damaged goods and their value (*'mitsgaders de specificatie vande gepericliteerde goederen ende Waren van dien'*). No indication was given of how this value<sup>160</sup> had to be proved, or what would be regarded as satisfactory proof. Obviously, though, given that proof of such value was required in many other fields of maritime law unconnected with the insurance contract, it was not regarded as necessary to give any further indication in that regard in insurance law.

After no further or similar provision was taken up in either the *placcaat* of 1571 or in the first round of municipal *keuren* at the end of the sixteenth and the beginning of the seventeenth centuries, an amendment of the Amsterdam insurance *keur* of 1598 did do so in 1606.

The amending *keur* of 20 June of that year laid down that to enable a proper adjustment of the average (*'om d'Avarien wel te mogen maken'*), merchants had to provide proof of or establish the real value of the goods they had shipped (*'de rechte waerde van hare ingescheepte goederen behooren aen te geven'*), and that to achieve this, the goods would be placed by the Commissioners of the Insurance Chamber at the disposal of (*'in handen gestelt'*) the parties concerned<sup>161</sup> to inspect them and to disprove the value relied upon (*'om daer tegens te mag seggen'*).<sup>162</sup>

Despite the lack of any further information in the various insurance laws, there was no doubt a large body of mercantile usage determining how an insured had to go about satisfactorily proving the value of the insured property. Evidence of this appears from numerous provisions in the Antwerp compilation of customary law, the *Compilatae* of 1609.<sup>163</sup>

Thus, in providing for the insurable value of goods, which was the cost price of the goods together with the cost of packing, freight and other expenses, it was added that the latter had to be proven by the loading receipt or invoices (*'dijenvolgende moet het cargasoen oft factuere gestelt ende overgegeven worden'*).<sup>164</sup> The value of the insured consignment of goods at the time of such consignment was determined with

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<sup>158</sup> See again ch XVI § 2.2 *supra*.

<sup>159</sup> See again ch XVI § 3.2 *supra*.

<sup>160</sup> That is, in terms of s 11, the cost price plus expense incurred in respect of the goods up to their shipment.

<sup>161</sup> Probably the Chamber permitted the insurers access to the goods.

<sup>162</sup> See further Enschedé 117; Goudsmit *Zeerecht* 319-320.

<sup>163</sup> See generally Mullens 94 and 96.

<sup>164</sup> See art 6 of par 1, title 11, part IV (see De Longé vol IV at 200).



reference to the relevant loading receipt ('*op den voet vant cargasoen*').<sup>165</sup> More specifically, art 260<sup>166</sup> laid down that in order to claim on any insurance, it was necessary for the insured to produce the policy ('*dat men overgeve de police oft brieff van versekeringe*'), presumably as proof of the conclusion and terms of the insurance; and also the relevant bill of lading ('*cognossement van den schipper*'), as proof of the loading; also the loading receipt or invoice of the shipment of the goods or a lawful valuation of those goods ('*t'cargasoen oft facture van de goeden, gelijck die geladen sijn, oft wettige priseringe van dijen*'), as proof of their insurable value; as well as a charterparty ('*charte-partije*'), if the goods were loaded in terms of one and it was requested by the insurers. Of these the loading receipt or '*cargasoen*' relating to the insured goods appears to have been the most important in practice<sup>167</sup> as it reflected the insurable value of the shipped goods and the expenses incurred in respect of them up to the time of their shipment.<sup>168</sup> As far as the details of insured goods were concerned which were required to be mentioned in insurance policies,<sup>169</sup> both the receipt and the bill of lading had to correspond with the policy as well as with one another, and in the case of an inexplicable difference or contradiction, the insured had no action on his policy.<sup>170</sup>

If the insured claimed on his policy, he had, in terms of art 266, to have the invoice or valuation ('*cargasoen oft priseringe*') authenticated under oath before a notary, swearing too that the goods indicated by the policy and the invoice were in fact shipped, and that he had borne such risk on them ('*ende dat hij tperijckel van alsulcken deel daerinne heeft gedraegen, als hij gehouden is geweest te loopen*') as

<sup>165</sup> Article 187 of par 6, title 11, part IV (see De Longé vol IV at 278).

<sup>166</sup> Of par 8, title 11, part IV (see De Longé vol IV at 308).

<sup>167</sup> See De Groote 'Zeeverzekering' 212.

<sup>168</sup> Article 262 defined '*cargasoen*' as '*de factuere oft specificatie van de gelaeden goeden*'. The receipt set out the quantity and/or quality of the merchandise; the name of the consignor and of the ship or ships on which it was loaded; the symbols and numbers with which it was marked in so far as it was customary to identify the relevant goods in that way; the name of the person to whom the goods had to be delivered; as well as (and this was important) the cost price of the goods and the expense incurred in respect of them ('*prijs dat die gecost hebben, soo van inkoop als van die te packen, laeden ende versekeren, daerinne begrepen de thollen, provisie van de coopers van de goeden ende van de gene dije de versekeringe [doet] ende [den] prijs der selver hebben voldaan*'). Article 261 defined a '*charte-partije*' as '*het contract van bevrachtinge vant geheel schip*'; and a '*cognossement*' as the acknowledgement or receipt ('*de bekentnisse oft beschreef*'), given by the master under his signature, of the goods received on board his ship as well as of the species, type, weight and measure of such goods.

<sup>169</sup> See again ch VIII § 4.2 *supra* as to content of insurance policies.

<sup>170</sup> See art 263. Likewise, in terms of art 264, if the policy contained any other matters which were customarily mentioned in policies of insurance, those same matters had also be mentioned in the receipt or the bill of lading and the details again had to correspond, or otherwise there was no action on the policy. However, in terms of art 265, if the receipt or bill evidenced a larger quantity of goods than was mentioned in the policy, the latter was not for that reason invalid, as long as the documentation otherwise corresponded ('*behoudelijck dat die anderssints in de principaelste ende nootelicxste punten metten cognossemente ende factuere accordeert ende overeen compt, sonder verschil*'). The reverse was obviously not true.

had been insured.<sup>171</sup> However, despite these notarial affidavits, it remained open to the insurers in terms of art 268 to disprove any of these matters. And if it appeared that any impropriety had occurred in the bill of lading, receipt or valuation (*'int cognossement, cargasoen or prisinge'*), the insured was not only deprived of his action but was also punished as the circumstances required.

### 4.3 The Position in the Eighteenth Century

It is clear from a number of judicial decisions in the first half of the eighteenth century, that the insured bore the burden of satisfactorily proving not only the occurrence of the loss but also the amount of that loss and of his interest in the object lost or damaged. A few examples may be referred to briefly.

In a decision of the *Hooge Raad* in 1723<sup>172</sup> the insurer refused to pay the insured who had insured goods for f5 000. He argued that the insured had not proved either that a loss had occurred<sup>173</sup> or that the goods belonging to him (*'de goederen hem toekomstende'*) were in fact worth f5 000 and that he had an interest in them to that extent (*'dat 'er voor 5000 gulden in belang had'*). Unfortunately the *Raad* decided the matter on other point and did not comment on this defence.

Likewise, in a decision in 1725,<sup>174</sup> the insurer had contended in the Court *a quo* that there was insufficient evidence of the loss the insured had suffered for it had not been shown which and how much goods or money the insured had on board. Although the question was raised before the *Hooge Raad* whether the insured had proved that he had loaded so much goods or cash on board that their value amounted to or exceeded the sum insured,<sup>175</sup> the decision again turned on another point.

In yet another decision in 1725,<sup>176</sup> the *Hooge Raad* refused a claim on a policy and held for the insurers. Bynkershoek remarked that there was also a further reason for the *Raad's* holding thus than the one formally provided, namely that the insured had not proved if and how much goods and what type of goods he had on board the lost ship, and that that lack of evidence alone would have been sufficient to refuse his claim (*'en dit alleen zou genoeg geweest zyn, om hem aftewysen'*).

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<sup>171</sup> It should be borne in mind that the term 'risk' was initially used in the same connection as the term 'interest' in later times. See again ch II § 6.1 *supra*. The insured was also required to declare under oath that no further or additional insurance had been concluded either at the place of the insurance or elsewhere, and that he was also not aware of any such other insurance. See ch XVIII §§ 3 and 4 *infra* as to double and over-insurance.

<sup>172</sup> See Bynkershoek *Observationes tumultuariae* obs 1916; *idem Quaestiones juris privati* IV.12.

<sup>173</sup> See again ch XVI § 3.2 *supra* where this aspect of the case was considered.

<sup>174</sup> See Bynkershoek *Observationes tumultuariae* obs 2124; *idem Quaestiones juris privati* IV.12.

<sup>175</sup> Bynkershoek remarked that there was a great lack of evidence in this case.

<sup>176</sup> See Bynkershoek *Observationes tumultuariae* obs 2493; *idem Quaestiones juris privati* IV.12.

Finally, a decision of the *Hooge Raad* in 1739<sup>177</sup> is referred to as authority for the principle that the burden of proving the amount of the real value of the thing insured rests on the insured, and that in the absence of any documentary evidence, such as invoices, to establish that value, a mere assertion of such value by the insured, even if confirmed by oath, would not suffice.<sup>178</sup> While no doubt correct in the sense that in the case of an unvalued policy the insured actually had to prove the value of the property insured, and that more was required from him than a mere declaration under oath of such value, the decision itself concerned a valued policy and its authority is therefore somewhat suspect.<sup>179</sup>

As far as legislative measures were concerned, the most pertinent provision was that in s 1 of the Middelburg amending *keur* of 1719. It stated that insured were at all times obliged to show and prove the existence and the extent of the risk or interest they had run in the insured ships or goods (*'aan te toonen ende bewysen, wat en hoeveel interest zy in de Scheepen en Goederen hebben geloopen'*). In this process, therefore, the insured would also have had to prove the insurable value of the ships or goods.

It is clear from this provision that the Middelburg Legislature realised that proof of the value of the object at risk was not necessarily all that was required. The insured also<sup>180</sup> had to prove that he had an interest in that object and what the extent of that interest was, for if he had but a limited interest, the amount of his loss would not have been the same as the amount of loss of or damage to the object itself.

The Hamburg *Assecuranz-Ordnung* of 1731 also contained measures concerned with the proof by the insured of his interest.<sup>181</sup> In the case of a loss, the claimant on the policy had to prove that he had suffered damage.<sup>182</sup> He was bound to prove not only the occurrence of the loss but also that he truly had an interest in the object of risk.<sup>183</sup>

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<sup>177</sup> See Bynkershoek *Observationes tumultuariae* obs 3148; *idem Quaestiones juris privati* IV.17. See too Enschedé 118.

<sup>178</sup> See Schorer *Aanteekeningen* 425 (ad III.24.6) n20.

<sup>179</sup> See § 5.4 *infra* for a further discussion of this important decision.

<sup>180</sup> Although there was no requirement in the provision that the insured had to prove both the existence and amount of his interest in, and also the value of the object at risk, that must be assumed to have been the case.

<sup>181</sup> See Dreyer 162-165; Hammacher 90-91.

<sup>182</sup> Article XIII-1.

<sup>183</sup> Article XIII-2. This was proved by his bill of lading or, if none was available, in another way, unless it was expressly agreed or stipulated in the policy that no bill of lading had to be shown (thus, the policy could dispense with proof by way of the bill of lading), in which case the insured nevertheless had to present such proofs and documents as were available. In terms of art XIII-3, if the master or any member of the crew carried any goods for his own account and had them insured without there being any bill of lading, then he had in the case of damage to confirm his ownership of the goods under oath and also the fact that the goods were actually on board and also how much of the goods were lost and how much of them had been salvaged.

Equally wide-ranging was the amendment in 1775 of s 18 of the Amsterdam *keur* of 1744. Section 18 and the first part of its amendment in 1775 concerned fire insurance and provided for the objects which could be insured against fire. The second part of the amendment then contained a further provision in general terms on what could be insured. It stated that one could insure anything in which one had a real interest, as long as the object in which there was such an interest was identified in the policy ('*men zal ook mogen laten verzekeren op al het gene, waar in iemand belang is hebbende, mits bestaande in een Reëel interest, en dat het zelve, mitsgaders welke daar op gelopen zal worden, in het Contract van Assurantie bepaald of uitgedrukt worde*').<sup>184</sup> Further, the amendment continued, in the case of a loss the interest specified by the insurance contract had to be proved as well as the amount of loss suffered in respect of it ('*in cas van schade het by Contract bepaalde Interest moeten worden bewezen, als mede de hoe-grootheid der daar op gevalle schade*'), failing which no claim on the policy would be justiciable while the premium would also be forfeited ('*op poene, dat anderzins daar op geen regt zal mogen worden gedaan; en zullen des niet tegenstaande de Assurateurs de praemie behouden*').<sup>185</sup> Thus, the insured had to prove the existence of his interest in the object of risk as well as the extent by which it was damaged.

Section 19 of the Amsterdam *keur* of 1744, which concerned insurances on bottomry, provided that in the case of a loss of the insured ship ('*in cas van Schaade, 't zy verongelukken, neemen, aanhouden van Vrienden of Vyanden, en het vermessen van 't Schip*'), the insured lender had to prove nothing more than the occurrence of the loss and, as for his interest, simply the existence or conclusion of the bottomry bond ('*geen ander bewys behoeven aantetoonen, als alleen 't ongeluk aan 't selve Schip overgekomen; en nopende zyn Interest enkelyk zyn Bodemarybrief*').

The only Roman-Dutch author in the eighteenth century to make a general statement concerning the insured's burden of proof, was Van der Linden. He remarked<sup>186</sup> that the insured was bound to prove by proper evidence both the value of the shipped and insured goods as well as the extent of the damage they had sustained. Elsewhere<sup>187</sup> he described over-insurance not with reference to the value of the object at risk but with reference to the value of the insured's interest in that object.<sup>188</sup>

As will appear shortly when the insured's measure of indemnity is considered, proving the extent of damage to insured goods involved proving their value not only upon shipment (that is, their insurable value), but also, in appropriate cases, their value in a sound as well as in a damaged condition at their destination. That the insured had to do so by bringing proof of the value of a consignment of such goods at that destina-

<sup>184</sup> See again on this aspect, ch II § 6.2.2 *supra*.

<sup>185</sup> See Van der Keessel *Praelectiones* 1434 (*ad* III.24.4).

<sup>186</sup> *Koopmans handboek* IV.6.8, with reference to Pothier.

<sup>187</sup> *Ibid* IV.6.10.

<sup>188</sup> See further ch XVIII § 4.5 *infra*.

tion or, more specifically, proof of what the sale of the cargo in question in a sound condition would have realised at a public sale there. He then also had to establish what a sale of the cargo in its damaged condition had or would have<sup>189</sup> realised at such a sale there. For this purpose the insured would have had to produce the actual bills of sale and/or price lists ('*prijscouranten*') reflecting the market price of goods such as those in question at the relevant time and place. As far as the insurance of hull was concerned, something Van der Linden did not touch on, proof of the ship's value at the commencement of her voyage had to be provided in the case of her total loss while in the case of a partial loss the cost of repairing her had to be proved. Also, in the case of the insurance of freight, the amount of the freight involved was most readily proved by a production of the relevant bills of lading or charterparties.

It is not surprising that the insured in many instances found it expensive and troublesome if not impossible to obtain such proof. Furthermore, it was not acceptable to merchants that such procedural difficulties and the many disputes to which they could give rise, should delay if not totally frustrate the protection the insurance was intended to provide. From early on, therefore, the parties to insurance contracts sought to alleviate the insured's burden of proof by an appropriate agreements in their policies. These will be considered shortly.<sup>190</sup>

#### 4.4 The Insured's Burden of Proof of Value and Interest in the *Wetboek van Koophandel* and in English Law

The *Wetboek van Koophandel* does not specifically address the insured's burden of proof and the way in which it may be discharged. The matter is governed by general principles. Nevertheless, there are a few provisions relevant to the topic.<sup>191</sup>

In art 273, in the case of an unvalued policy where the value of the insured object is not expressed by the parties in their policy, such value may be established by all possible methods of proof ('*kan ... door alle bewijsmiddelen worden gestaafd*').<sup>192</sup> Article 295-1 retains an evidentiary option known to and employed in Roman-Dutch law. It provides in respect of fire insurance that where proof of the value mentioned in art 273 is absent or insufficient ('*bij gebreke of onvolledigheid van de bewijsmiddelen*'), the Court may impose an oath upon the insured ('*den eed aan den verzekerde oplegen*').<sup>193</sup>

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<sup>189</sup> Depending on whether the damaged goods were in fact sold there or not.

<sup>190</sup> See §§ 5 and 6 *infra*.

<sup>191</sup> See generally Mees *De assecuratione* 8-18 as to the insured's burden of proving interest and damage.

<sup>192</sup> See Elink Schuurman *Brandschade* 49 and 51.

<sup>193</sup> *Idem* at 63.

In English law, while some authors in the eighteenth century did comment on the question of proof,<sup>194</sup> the Marine Insurance Act of 1906 does not contain any provisions on the topic, it being governed by the general principles, such as they are, pertaining to evidence and the incidence of the burden of proof.

## 5 Valued Policies

### 5.1 Introduction

It is not surprising that valued policies were the rule in marine insurance practice and that they were even made compulsory from time to time.<sup>195</sup> In the first place, practical realities necessitated, in the case of unvalued marine insurance policies, the adoption of insurable values which resulted in deductions from the pure indemnity principle. Furthermore, the option of having to establish such insurable values after the occurrence of a loss when the interests of the parties involved no longer coincided,<sup>196</sup> was clearly not preferable. Also, the burden on the insured of proving the value of the object lost or damaged was at times difficult if not impossible to meet. The interest and convenience of merchants were important and obvious factors in ensuring the prevalence of a prior valuation in marine insurance practice from early on.

A valued policy may be described as one in which the parties, prior to the conclusion of the insurance contract, or at least prior to the occurrence of a loss, agreed between themselves as to the value of the object at risk. Such an agreed value was then, for all practical purposes, the basis upon which the measure of indemnity between the parties was calculated. A valued policy, therefore, remained an indemnity policy, but the indemnity was one on the basis agreed upon by the parties. It must be emphasised that a valued policy was not one in terms of which the parties agreed beforehand on the amount payable by the insurer on the occurrence of a specified event irrespective of the amount of loss, if any, suffered by the insured. There was a fundamental difference, therefore, between a valued policy and a wager policy.<sup>197</sup> The fact that in the case of a total loss the agreed value may also have been the amount

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<sup>194</sup> Thus, *Magens Essay* vol I at 87-89 explained what proof insurers could require from the insured and noted that bills of sale and custom-house registers were often employed to establish ownership in the case of hull insurance, while bills of lading signed by the master proved an interest in goods.

<sup>195</sup> As to valued policies, see in particular Elink Schuurman *Brandschade* 77-100 and Suermondt *Taxatie* 10-29 for a detailed historical exposition with particular emphasis on Roman-Dutch law.

<sup>196</sup> It was in the insured's interest that that value be determined as high as possible, and in the insurer's interest that it be determined as low as possible.

<sup>197</sup> See further on this point eg Molengraaff 'Verzekering' 469 who distinguishes in this connection between the valuation clause and policy-proof-of-interest clause. He also notes that a valuation is not an indication that the parties intend to wager; rather, the fact that they chose a valued policy shows an intention to conclude a contract of indemnity for had they wanted to wager, a valuation would have been totally unnecessary as a mere statement of the amount due in the case of an occurrence of the uncertain event would have been sufficient. As to policy-proof-of-interest clauses, see further § 6 *infra*. As to wagering insurance, see again ch II § 6.3 *supra*.

payable by the insurer on the policy, should not lead to an equation of valued policies and wager policies, the incorrectness of which becomes immediately apparent when the position in the case of a partial loss in terms of a valued policy is considered.<sup>198</sup>

But not all valued policies were instances of agreed valuations being voluntarily inserted into policies by the parties themselves. The authorities realised from early on that the valued policy was one way in which legislative provisions imposing prohibitions on full-value insurance and over-insurance, and on the insurance of profit and of freight,<sup>199</sup> could be circumvented. The valuation could be used to conceal the insurance of that which it was not permissible to insure. They realised too that they could prevent this abuse of the valued policy<sup>200</sup> if they could control the valuation itself. For that reason the valuation of the object of risk by a third party, often an official of some description, supposedly expert in the valuation of maritime property, was sometimes made compulsory. In this way the authorities hoped to counter fraud and other practices, regarded as undesirable at the time, in yet another way.

However, even if valuations were initially made compulsory with the aim of ensuring compliance with, for example, the prohibition on full-value insurance, and were of no binding effect between parties themselves in determining the measure of indemnity,<sup>201</sup> there is no doubt that it was also realised from early on that a consensually founded valuation could be employed to overcome at least some of the difficulties inherent in applying the strict indemnity principle in the context of marine insurance. Convenience, if nothing more, ensured that valued policies would become and remain the norm in marine insurance practice.

Nevertheless, the crucial issues in Roman-Dutch law, as in other systems, were to what extent an agreement between the parties as to the value of the insured property was conclusive between them, and whether, and if so under what circumstances, a valuation could either be reopened or attacked by one of the parties themselves or by a court. A related issue was how the valuation affected the burden of proof. These questions also arose as to compulsory expert valuations which remained, even if decreasingly so, a feature of Roman-Dutch law up to the end of the eighteenth century.

Essentially a valuation voluntarily agreed upon between the parties was regarded as binding in Roman-Dutch law. Under-valuation was to the detriment of the insured but of no concern to the legislatures and the parties were consequently bound by their valuation. Over-valuation was to the detriment of the insurer but it was of concern to the legislatures because of the breach of the indemnity principle it involved and the incentive to fraud it created. As a result the insurer, despite his agreement to the

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<sup>198</sup> See ch XVIII § 7.2.2 *infra*.

<sup>199</sup> See ch XVIII § 4 *infra* for the meaning of over-insurance and ch XVIII § 5.2 *infra* for the prohibition on full-value insurance; and see ch V §§ 5.2 and 5.4 *supra* for the insurability of profit and freight respectively.

<sup>200</sup> That is, over-insurance both in the sense of an insurance in excess of the real value and in the sense of an insurance in excess of the permitted portion of the value, as well as the inclusion of expected profit or freight in the valuation on cargo and hull respectively.

<sup>201</sup> See on this point Molengraaff 'Verzekering' 434.

valuation, was allowed subsequently to dispute the valuation as excessive and to have it reduced to the real value, something which the insurer now had to prove though.

## 5.2 Early Views on Valued Policies and the Position in Antwerp

Because, as will appear from the discussion which follows, the available information on valued policies in Roman-Dutch law up to the end of the seventeenth century is scant, it is necessary, to put the issue in its proper context, to consider briefly the views of the earlier Italian authors on insurance law and also the position in the customary law of Antwerp.

The technique of a valuation for insurance purposes was known from relatively early on in insurance practice. It is possible that such valuations were introduced by way of an addition to the insurance agreement in an attempt to avoid disputes over the amount of indemnification the insurer had to pay the insured and, more specifically, because the ordinary measure of indemnity based on the cost price of goods gave rise to an insufficient compensation in respect of bartered goods. Whether or not that was the true origin of the valued policy, there is no doubt that insurance valuations were resorted to for those purposes.

Valuation in the insurance context was already regulated in some detail in the insurance legislation promulgated in Barcelona in the fifteenth century<sup>202</sup> and by the end of the sixteenth century valued policies occurred in the case of cargo insurance and were the rule in the case of hull insurances in the Low Countries.<sup>203</sup>

As far as the early Italian authors were concerned,<sup>204</sup> Santerna regarded a policy in which the value of the goods insured had been assessed by the owner, as providing binding proof of their real or insurable value, subject to the insurer's right to bring contrary proof that the real value was in fact lower than the agreed value, in which case the

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<sup>202</sup> After the Barcelona Insurance Ordinance of 1458 had provided for an official prior valuation by maritime consuls of the goods to be insured (apparently in an attempt to ensure compliance with the prohibition on full-value insurance), that system was later, with an increase in trade, abolished for practical reasons. In the case of hull insurance (as in the case of bottomry loans) though, the inclusion of a prior expert valuation in insurance policies was and remained compulsory in the ordinances of 1435 to 1484. Thus, in s 1 of the Ordinance of 1484 it was laid down that before undertaking to obtain cover for a ship, the broker should have the vessel assessed by a reliable consul or arbitrator and on the basis of this estimate, which had to be inserted into the policy, the compulsory under-insurance had to be calculated. In both cargo and hull insurances party valuations were not binding at all and even slightly excessive valuations were declared null and void, as was any specific agreement in the policy on the incontestability of such a consensual valuation. See Reatz *Geschichte* 90-96 and 105; and see generally eg Ellnk Schuurman *Brandschade* 45 and 46 (noting that compulsory expert valuation was also known elsewhere, eg in the Florentine Ordinance of 1538, and that the official approval and validation of prior party valuations were required in the Seville Ordinance of 1556); Enschedé 115; Molengraaff 'Verzekering' 434; and Suermondt *Taxatie* 13.

<sup>203</sup> See Kiesselbach 118. See generally on the history of insurance valuation, Argus 9-10; Buchwalter 79-80.

<sup>204</sup> See generally Gärtner 340-341; Van Houdt 21; and Molengraaff 'Verzekering' 431-432 and 436.



valuation and thus also the insurer's liability was reduced accordingly.<sup>205</sup> Even if there was fraud on the part of the insured, Santerna thought that the insurer remained liable to pay the real value of actually existing goods.<sup>206</sup> Accordingly, if the parties had agreed that the insurer would compensate the loss of goods and their value was agreed on at 1 000, then, in the case of a total loss, that amount had to be paid. But only the insured's actual loss had to be compensated, so that if the insurer could prove that the goods were actually worth only 500, the latter amount and no more was payable.<sup>207</sup> The reason why, despite the applicability of the indemnity principle and the dangers it involved, such a valuation was thought permissible and accorded binding effect by Santerna and the other early authors, was one of practicality. It relieved the insured of an onerous burden of proof. The insurer's right to overturn the valuation was again justified as the way in which to prevent abuses being perpetrated under the guise of freedom of contract.

While the Ancona policy which he analysed in his work was an unvalued one, Straccha noted as praiseworthy, because of the fact that they reduced disputes and litigation, insurances in Antwerp and Spain where a valuation of the insured goods in the policy relieved the insured of the burden of having to prove their value and left him merely to prove their loss.<sup>208</sup> Considering the effect of an express valuation should one be included in the Ancona policy, Straccha thought that it would relieve the insured of the burden of having to prove the value of the insured goods. The insurer would be permitted, though, to prove an over-valuation. Therefore, if the goods insured were stated to be worth 2 000, then that amount had to be paid (presumably in the case of a total loss), unless the insurer could prove that the valuation was incorrect, in which case he would be liable only for the real value of the goods.<sup>209</sup>

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<sup>205</sup> *De assecurationibus* III.43-46.

<sup>206</sup> *Idem* III.14-18 and III.44-45.

<sup>207</sup> Contrariwise, if the parties had agreed that in the case of a loss of the property the insurer would pay the merchant 1 000, and the value of the goods was left undetermined, that contract had to be performed strictly and that amount was payable even if it turned out that the goods were only worth 500. The insurer's obligation here was to pay without questioning the amount of the insured's loss or, by the same token, the value of the object in question. There was a difference, Santerna therefore recognised, between an agreement on the value of the object at risk and an agreement on the amount payable on the occurrence of a loss (see too § 5.1 at n 197 *supra* for the difference between a valuation clause and a policy-proof-of-interest clause). It has to be borne in mind that the latter type of agreement, which was nothing more than a wager, was regarded as perfectly valid by the early authors even if in their system it was not insurance.

<sup>208</sup> *De assecurationibus* gloss VI.1.

<sup>209</sup> *Idem* VI.4. Straccha too drew a distinction between a valuation and the case where the insurers agreed that in the case of a loss, a specific amount would be paid to the insurer. The latter type of undertaking was binding irrespective of the fact that the value of the object was lower than the amount agreed upon. See too Scaccia *De commerciis* I.1.69; Casaregis *Discursus* VII.11.

A very similar approach to valued policies appears from the exposition of the later Italian author Roccus. First of all<sup>210</sup> he distinguished between unvalued policies and the case where, at the time of the conclusion of the insurance (*tempore contractus assecurationis*'), the goods were valued at a specific price or value. Then he explained that in the latter case there was no doubt that the value so expressed in the policy had to be paid, presumably in the case of a total loss.<sup>211</sup> However, if the goods were valued at a specific amount and it subsequently appeared that they were in fact worth less, the question whether, in the case of a loss, the insurer was liable to pay the stated value (*assecurator teneatur ad pretium estimatum*'), depended on the nature of the insurer's undertaking. If he had promised to pay the value or price of the insured goods and it was added to the policy that they were worth 1 000, he was not liable to pay that amount if there appeared to have been an over-valuation on the part of the insured. By contrast, if the insurer undertook to pay 1 000 should the goods be lost, he would have to pay that amount irrespective of the fact that the goods were worth less.<sup>212</sup>

Roccus also recounted a decision on the effect of a valued policy delivered by a court in the city of Messina in 1628.<sup>213</sup> There the Court held that the insurer was liable to pay the agreed value even if the goods actually loaded and lost were of a lesser quantity. A cargo of grain, valued in the policy at 8 000 ducats and insured for that amount, was lost when the ship carrying it was captured by the French en route to Naples. One of the points raised by the insurers to justify their refusal to pay the sum insured, was that a lesser amount of grain had been loaded than had been insured and that it was worth less than 8 000 ducats. The insured in turn argued that when an insured himself valued his goods at a specified amount and insured them for that amount and paid a premium to the insurers in proportion to the sum insured, then, although a smaller quantity may have been at risk, the insurers were liable to pay the value mentioned in the policy.<sup>214</sup> The Court held in favour of the insured, presumably because the insurer could not prove any short-shipment and an over-valuation.

The first regulation of valued policies in the compilations of Antwerp customary law only appeared in the *Compilatae* of 1609.<sup>215</sup>

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<sup>210</sup> See *De assecurationibus* note 32.

<sup>211</sup> As to binding nature of a valuation, see too *idem* notes 31 and 53 (if the value was fixed at the conclusion of the contract, then that value must be paid).

<sup>212</sup> See further also *idem* note 10.

<sup>213</sup> See Roccus/*Feitama Decisien* decis VIII (*Vincentio de Medici v Assuradeurs van Messina*).

<sup>214</sup> It was further pointed out by the insured that the value of the grain actually loaded, had it arrived at Naples, would have exceeded the stated value and the sum insured. To the insurers' argument that the value at the place of departure was relevant for purposes of determining the indemnity, the insured responded that the valuation he had inserted in the policy took account of the profit he could make on the grain had it arrived at the destination, as well as of the expenses he had incurred on it.

<sup>215</sup> See generally Mullens 45 and 88.

In dealing with the measures concerning compulsory under-insurance, art 7<sup>216</sup> provided that it was not permissible to insure on a valuation (*'op priseringe ofte begrootinge'*) provided by the insured himself, even if that was customary in Antwerp and elsewhere, especially when use was made of an express valuation clause (*'al heeft men tselve somtijts alhier oft elders willen gebruiken, besonder als sulcx met vuytgedruckte woorden was besproken, d'welck de coopliden heeten pact express'*).<sup>217</sup> A consensual or party valuation, therefore, was not permitted.<sup>218</sup>

However, in terms of art 8, if the insured had the goods valued for purposes of the insurance (this was voluntary and not compulsory) at the place of packing or loading by a sworn valuer or someone lawfully authorised to do so (*'bij gesworen schatters, oft andere hun des verstaende, die daertoe wettelijck waeren beredicht [beedicht]'*), such insurance was valid to the extent of such valuation (*'totten selven prijse van weerde'*). Although the insurer was liable on that basis, it remained open to him nevertheless to prove the real value of the goods (*'blijvende desniettemin de versekeraers op hun geheel om 't contrarie van dijen te bewijzen'*). In the case of a professional valuation, therefore, the valued policy was *prima facie* binding, the burden being on the insurer to prove an over-valuation by establishing a lower real value. In the case of hull insurances, an expert valuation was made compulsory, as had already been the case in terms of s 10 of the *placcaat* of 1563. Thus, in terms of art 288,<sup>219</sup> it was specifically provided that ships to be insured could not be valued according to an estimation provided by the insured, but that anyone who wished to insure a ship with her equipment and guns had to have her valued before her departure by an expert who had to draw up a lawful notarial valuation to serve as proof of her value (*'die moet allent selve voor sijn vertreck doen priseren oft begrooten, bij lieden hun des verstaende, ende daarvan wettich oft notariael instrument doen maecken, om te dienen tot bewijs van de weerde'*). The insurer was nevertheless free in the event of a loss to prove a smaller value (*'de minder weerde te mogen bethoonen'*).

A practical matter was addressed in art 9, namely the situation where there was a minimal difference between the real and the agreed value. It was provided that no notice would be taken of a small difference (*'een cleijn verschil'*) which could occur due to an increase over or a decrease below the agreed value (*'den gestelden prijs'*). But if the difference amounted to at least six or seven per cent or more (*'tselve verschil ten minsten sij van ses oft seven ten honderden, ende meerder'*), it would not be disregarded but would be taken into account fully (*'wort daerop int geheele geleth'*) in the calculation of the indemnity.

<sup>216</sup> Of par 1, title 11, part IV (see De Longé vol IV at 200).

<sup>217</sup> That is, even with the express agreement of the insurer.

<sup>218</sup> See Wyffels 97 who refers to an Antwerp marine policy of 1557 on a cargo of 2 048 bales of dye (*'balen pastel'*) where in the policy the value or price per bale was expressly fixed *'par pact exprès'*.

<sup>219</sup> Of par 9, title 11, part IV (see De Longé vol IV at 318).

### 5.3 The Position Up to the Beginning of the Eighteenth Century

The earliest legislative reference to a pre-contractual valuation of an object of risk in the Low Countries occurred in s 10 of title VII of the *placcaat* of 1563. This section provided that anyone wishing to insure the hull of a ship, or also the guns, gunpowder and shot on board her, was obliged to have such ship or items valued ('*te doen estimeren*') by experts ('*by Lieden henlieden dies verstaende*') before her departure. Importantly, the section then provided that this valuation ('*estimatie*') would in the event of the occurrence of a loss ('*periclitatie*') nevertheless not prejudice the insurers in so far as they could show that the valuation was higher than it should have been ('*dan 't behoort*') as the result of some favouritism, simulation, collusion, or undesirable practice ('*faveur, simulatie, collusie oft andere quade practijcke*').

Section 10 therefore introduced a compulsory expert valuation in the case of hull insurance, apparently with a view to ensuring that the parties did not by over-valuation circumvent the prohibition on full-value insurance or even that on over-insurance generally. Furthermore, although this valuation also governed the assessment of the measure of indemnity between the parties, it was not absolutely conclusive between them but could be attacked by the insurer if he could show that it was excessive as a result of some sharp practice.<sup>220</sup> In effect, therefore, the valuation merely shifted the burden of proof from the insured to the insurer. Instead of the insured having to prove the value of the ship, that value was objectively determined by an expert and the insurer had to prove a lower value and fraud of some sort if he wanted to attack the valuation as excessive.

In section 12 of title VII of the *placcaat* of 1563 it was provided that nobody could value ('*tauxeren*') his insured goods or merchandise in excess of their real value ('*over de ghemeyne weerde ende valeur vanden selven*'), whether under the guise of their invoice ('*onder 't decksel van eenigen inne-koop*')<sup>221</sup> or otherwise. This prohibition on over-valuation was aimed at preventing the insured from circumventing the provisions on insurable value and on compulsory under-insurance<sup>222</sup> in the case of voluntarily agreed, consensual valuations. It probably meant no more, though, than that the insurer could attack any over-valuation, presumably even if no fraud could be established, and could have the measure of indemnity calculated with reference not to the agreed value but to the real insurable value. Over-valuation of goods, therefore, did not by itself entitle the insurer to attack the policy and to avoid liability but merely to have his liability established with reference to the insurable value rather than the excessive

<sup>220</sup> Presumably the mere over-valuation of the ship was insufficient. The insurer also had to establish that it occurred otherwise than by reason of an oversight or negligence on the part of the valuer (and/or the insured?). See eg Enschedé 30 who is of the opinion that the prior expert valuation was also binding on the insurers unless they could prove fraud. See further Van der Keessel *Praelectiones* 1453 (*ad* III.24.6); Dorhout Mees *Schadeverzekeringsrecht* 17; Jolles 63; and Kracht 18-19.

<sup>221</sup> That is, by way of an false and inflated invoice price.

<sup>222</sup> Section 11 concerned compulsory under-insurance.

agreed value.<sup>223</sup> At any rate, the valuation of cargo was voluntary and not compulsory<sup>224</sup> as it had been earlier in Barcelona, for example, the provisions of which as to valued policies generally set the clear example followed by the Legislature in 1563.<sup>225</sup>

After these initial provisions on valuation, Dutch legislatures ignored this technique for a very long time. The *placcaat* of 1571, although it contained even more strict provisions on compulsory under-insurance than that of 1563, no longer made any mention of valued policies. Possibly the compulsory prior expert valuation of ships was considered too onerous in practice, while it is further possible that the Legislature thought that it could prevent excessive party valuation by a general provision in s 2 that every agreement in contravention of the *placcaat* would be null and void.<sup>226</sup>

Both the *placcaat* of 1563 and that of 1571 remained in force in the Northern Netherlands, the former in so far as it was not repealed by the latter. As regards valued policies, therefore, the relevant provisions of the *placcaat* of 1563 remained important in the seventeenth century and were often referred to, especially since there was no municipal regulation of the topic during that period.<sup>227</sup>

Despite the fact that valued policies were certainly not unknown in Dutch insurance practice in the seventeenth century<sup>228</sup> there is little on the topic in other legal sources of that time. A few references may be mentioned briefly.

<sup>223</sup> Thus, Grotius *Inleidinge* III.24.6 observed that even if goods were over-valued in the policy, the insurer was not liable beyond the true value of those goods. See too Groenewegen *Aanteekeningen* n20 (*ad* III.24.6) (referring in this regard to s 10 of the *placcaat* of 1563 although that must probably be s 12); Van Leeuwen *Rooms-Hollands regt* IV.9.4 ('*versekerde goed [moet] na syn opregte waarde werden aangebragt*'; he also referred incorrectly to s 10); and further Jolles 65.

<sup>224</sup> See eg Goudsmit *Zeerecht* 245-246. However, Van Zurck *Codex Batavus* sv 'Assurantie' par 14 referred to ss 10 and 12, without any distinction, for the proposition that a person who wanted to insure goods '*moet die op zyn regte waarde laten schatten by den verzeker-brief* without any fraud. This does not seem justified for there was no compulsory valuation of goods, only of ships. He also referred in this regard to s 20 of the *placcaat* of 1571 which, however, was not concerned with valued policies at all but with the compulsory under-insurance of hull. See ch XVIII § 5.2 *infra*.

<sup>225</sup> As to the position in Barcelona, see again § 5.2 n202 *supra*.

<sup>226</sup> See Suermondt *Taxatie* 14. However, a similar provision was already included in the *placcaat* of 1563.

<sup>227</sup> Although providing for compulsory under-insurance and over-insurance in detail, the *keuren* of 1598 (Amsterdam), 1600 (Middelburg) and 1604 (Rotterdam) contained nothing on valued policies.

<sup>228</sup> Two examples of valued policies in the seventeenth century may be referred to. Both were Amsterdam fishing policies and both expressly insured the full value of the fishing vessels, their equipment and their cargoes or catches (see further Den Dooren de Jong 'Practijk' 8-9, 12 and 14).

The handwritten valuation clause in the first policy, from 1636, contained an unspecified, very crude and rather dangerous valuation of the ship and all the goods on board. It stipulated as follows: '*Bij pacto expres en naer believen van ons Asseuradeurs getaxeert op ses duysent achthondert car. guldens met welcke taxatie wy asseuradeurs wel te vreden seyn en beloven ons daer mede 't allen tyde te vreden te houden al waert dat naderhand het voorsz schip met als voren meerder ofte minder waardigh te wesen bevonden werden. Ende beloven oock volcomen gelove te geven de bewysen die geass.den als van schade ofte verlies sal exhiberen, sonder daerjegens te exciperen in eenlger maniere*'.

In the other policy, from 1672, on a vessel called the 'Witte Haes', the printed clause provided: '*By pacto expres en met believen van ons asseuradeurs getaxeert, en gepriseert, met welke taxatie en prisatie wy ons volkomen vermoeght en te vreden houden, 't zy of 't selve minder of meerder waardigh*

A valued policy did arise for consideration in an opinion delivered in 1602.<sup>229</sup> It concerned a Rotterdam hull and cargo policy of 1598, underwritten by various insurers resident in Middelburg, Amsterdam, and elsewhere. The question arising here was whether the insurers were free themselves to prove that the cargo, as well as the ship with her equipment, which were insured by them, were in fact not worth as much at the time of the conclusion of the contract as they were valued ('*begroot ofte geestimeert*') in the policy.

In a somewhat obscure and unsatisfactory opinion, the view was expressed that the insurers were in fact permitted to prove such an over-valuation.<sup>230</sup> The reason why this was so, it was thought, was because in this way all frauds which might be committed by the insured in the insurance could be uncovered and eliminated. If the insurers were not permitted to prove a lesser value, the valuation in the policy would result in the commission and concealment of many and large frauds.<sup>231</sup> It followed, the opinion continued, that although the policy provided (or presumably, because of the valuation, implied) that the insured was not obliged to prove the value of the property in question,<sup>232</sup> and, by implication, although the insurer could prove that the valuation was excessive, the insurance was still valid so that the insured was still in appropriate instances required to give a cession of his action against third parties to the insurer.<sup>233</sup>

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*soude mogen wesen of gekost hebben ... [ende] sal de geassureerde zich ten vollen en tot den lesten stuyver toe van deze taxatie en prisatie vermogen te doen versekeren*. See Appendix 24 *infra* where this policy is reproduced.

<sup>229</sup> See *Hollandse consultatien* vol I cons 187.

<sup>230</sup> Referring to the prohibitions in the *placcaat* of 1563 on over-valuation, Van Zurck *Codex Batavus* sv 'Assurantie' par 14 n1 remarked that those express provisions could not be renounced. He referred to the opinion of 1602 as authority for this statement.

<sup>231</sup> And if there was fraud or if the ship or goods were over-valued ('*te hoog zijn geestimeert*'), it was pointed out, the insurance would be void at the option of the insurer ('*indien 't de Versekerers gelleft*') if it amounted to an insurance in excess of the permitted portion of the value of the object. The correctness of this proposition is doubtful (see ch XVIII § 5.2 *infra* as to the consequences of a breach of the prohibition on full-value insurance). Alternatively, the opinion continued, if there was over-valuation, the insurers' liability would be limited to the real insurable value. This was not precisely so formulated in the opinion, though; there it was rather confusingly stated that where it was not a question of over-insurance in excess of the permitted proportion, the insurers were liable for no more than the amount they had underwritten ('*niet hooger ... dan na advenant van de somme van penningen, daar op syluyden versekert hebben*'). This, however, was always the position, not only in the case of an over-valuation (see § 2 *supra* as to the sum insured). These two possibilities were alluded to by La Leck *Index* sv 'insurance' (see also *idem Register* sv 'assurantie'), namely that the insurer who proves an over-valuation can regard the insurance as null or he can diminish the amount insured by the over-estimate.

<sup>232</sup> That is, he was not obliged to provide or produce '*specificatie, rekeninge, cargason, cognosscement, ofte nader bewijs*'.

<sup>233</sup> As to the insurer's right of recourse, see ch XIX § 1 *infra*.

An opinion in 1681<sup>234</sup> was concerned with a ship which became unnavigable and thus totally lost and which was sold by her master abroad. It appears that she had been insured under a valued policy. The opinion pointed out that the insurers could not rely on the price the ship could have obtained on her arrival at Dordrecht after her voyage from France because in terms of the usual insurance policy the valuation of the ship was left to the insured himself (*'de prijs ook gedefereert word aan de Geassureerde zelfs'*). The insured's valuation, the opinion pointed out, was binding upon the insurers, presumably because they had agreed to its insertion in the policy, irrespective of what was included in it, just as long as it was made in good faith (*'de Gesssureerde moet op zijn taxatien en prijseringe geloof worden, zoodanig als hy dat zelve in goede gemoede komt te taxeren'*).

In a decision of the *Hooge Raad* in 1708<sup>235</sup> the question of the burden of proof in the case of a valued policy came up for discussion. In this instance it was argued that the ship, insured for f24 000, was in fact worth less than that amount, that is, that she was over-insured. However, apart from the fact that the insured proved that the ship's real value exceeded the sum insured by far, he also relied on the fact that the policy included a valuation clause in which the ship was, with the consent of the insurers, valued at f36 000, irrespective of her real value (*'dat by pacto express, en met believe van de Assuradeurs, het schip was getaxeert op 36000 guldens, 't zy minder of meer waardig'*), the implication being that such valuation rendered the real value irrelevant.<sup>236</sup> Bynkershoek observed that although the insurer could overturn the valuation by proof of a lower real value, (*'dat die taxatie door een tegenstrydig bewys kan weêrlegt worden'*) as was provided for by s 10 of the *placcaat* of 1563, the insurers had adduced no such proof (*'geen bewys ter contrarie'*) in this instance.

#### 5.4 The Position in the Eighteenth Century

The first legislative provision dealing with valued policies in the eighteenth century appeared in s 1 of the Middelburg amending *keur* of 1719. After stating that the insured was required to show and prove the nature and the extent of the risk or interest he had in the ship or goods,<sup>237</sup> the section provided that because disputes could at times arise concerning the value of the hull of the ship and the like, the insured was permitted to agree on such a value (*'soo sal den Geassureerde over het selve vermoogen te pacteren'*), as well as on the value of the goods which had no cost price (*'waar van geen prys van den inkoop is gedaan of gereguleert'*). This remarkable provi-

<sup>234</sup> See *Nederlands advysboek* vol II adv 202.

<sup>235</sup> See Bynkershoek *Observationes tumultuariae* obs 380; *idem Quaestiones juris privati* IV.3.

<sup>236</sup> In effect, therefore, the ship, being insured for f24 000 with her agreed value being f36 000, was not over-insured but in fact under-insured. For the difference between over- and under-insurance, see ch XVIII § 1 *infra*.

<sup>237</sup> See § 4.3 *supra*.

sion was apparently the result of a compromise.<sup>238</sup> On the one hand insured merchants and their insurers wished for as great a freedom as possible, also in respect of valuations in insurance policies, while on the other hand the authorities still sought to control the practice of insurance. Hence the dualistic approach. As a general rule no effect was accorded to a valuation in the policy and the insured still had to prove the value of the object insured. This general rule was infused by the fear that an over-valuation could lead to over-insurance. However, in cases where proof of the relevant value after the loss was too burdensome for the insured, namely in the case of hull insurance and in the case of insurances on goods without a fixed or ascertainable market value or invoice price, an express consensual valuation was accorded binding effect on the parties themselves. The section did not mention whether and, if at all, under what circumstances, the insurer could in those cases attack the valuation.

The Rotterdam *keur* of 1721, somewhat surprisingly, made no mention of the legal validity and consequences of valued policies, despite the fact that such policies were in use there at the time.<sup>239</sup>

In 1739 a case which concerned a valued policy came before the *Hooge Raad*.<sup>240</sup> This decision, and Bynkershoek's approving version of it, were unfortunately accorded a place of importance in later Roman-Dutch sources completely disproportionate either to the true significance of the decision or, and this is more significant, to the correctness with which it reflected the position existing at the time. It must be considered in some detail.<sup>241</sup>

Rotterdam insurers had fully insured two parcels of trading stock ('*kramery-goederen*') which had to be conveyed in the Baltic from one port to another and the value of which was fixed ('*getaxeeert*') in the policy on f6 000. When the loss of the ship carrying the parcels was lost and a claim instituted against the insurers, the latter argued that there was no proof of the nature of the goods in the parcels or of their value. The Rotterdam Chamber made an interlocutory order to the effect that the insured had to provide further information ('*nader opening*') of the goods contained in the parcels and of their value. In complying with this order, the insured, who it appears had no invoices, bills of lading or other documentation, drew up a list of the goods involved from memory as best he could. He also indicated in this list the specific prices

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<sup>238</sup> At least according to Suermondt *Taxatie* 15-16 from which the following was taken. See further Goudsmit *Zeerecht* 453-454.

<sup>239</sup> That appears from a decision of the *Hooge Raad* in 1712 (see Bynkershoek *Observationes tumultuariae* obs 909; *idem Quaestiones juris privati* IV.5) which concerned a Rotterdam policy insuring goods valued in the policy at f2 000. The insurers argued that the valuation included expected profit while such profit was not insurable in terms of the Rotterdam *keur* of 1604. The decision concerned the prohibition on the insurance of profit and whether it could be renounced (see again ch V § 5.2 and ch VIII § 5.2.3 *supra* respectively) and nothing of consequence appears from Bynkershoek's account of the decision as far as valued policies were concerned.

<sup>240</sup> See Bynkershoek *Observationes tumultuariae* obs 3148; *idem Quaestiones juris privati* IV.17. See also Lybrechts *Koopmans handboek* V.94.

<sup>241</sup> See further Suermondt *Taxatie* 22-26.



of the various items of goods, again according to his own valuation ('*zyne eigen taxatie*') and without any further proof. He presented the insurers with this list, also undertaking to swear an oath that it had been drawn up in good faith. Because the total value stated in the list exceeded f6 000, the Chamber gave judgment for the insured, on condition that he swore the oath he had undertaken. The *Hof van Holland* confirmed this judgment.

On appeal to the *Hooge Raad*, however, the judgment *a quo* was overturned. The *Raad* pointed out that in terms of existing legislation<sup>242</sup> the insured could not claim compensation for his loss unless there was certainty or agreement about the real value of the insured goods ('*ten zy men het eens is omtrent de rechte waarde van de geas-sureerde goederen*'). With the list drawn up from memory, the *Raad*, including Bynker-shoek, held that the insured had not complied with the order of the Rotterdam Chamber. Furthermore, according to the *Raad*, the value of the goods was not proved by the insured's own valuation and oath of good faith. Accordingly, the insured's proof was rejected.

Nevertheless, because it appeared that the packages in question were valued ('*gewaardeert*') in the Sound, for purposes of the toll payable to the king of Denmark, at 1 200 Danish rixdollars ('*Deensche Ryksdaalders*'), and because there was nothing else available with reference to which their value could be determined, the *Raad*, in reversing the judgment *a quo*, valued the damage suffered by the loss of the packages at the same amount, and condemned the insurers to pay it to the insured.

The striking point about this judgment was that despite the fact that the parties had concluded a valued policy, all the courts involved acceded to the insurer's request that the insured be ordered to prove the value of the insured goods. In so doing they appeared to decide that no agreed value was acceptable and that valued policies were without any practical effect. In so doing they further ignored the fact that the validity of valued policies had never yet been questioned, as well as the underlying reason why valued policies were concluded, namely to relieve the insured of the burden of proving the value of insured goods and merely to place a burden on the insurer of establishing an excessive valuation if he so wished. Instead, it appeared from the approach of the *Hooge Raad*, an insurer merely had to dispute the valuation to which he had agreed not so long ago,<sup>243</sup> and request proof from the insured of the value, to emasculate the valuation completely. And even if the *Hooge Raad's* view may be explained by the particular circumstances of the case,<sup>244</sup> this view was unfortunately elevated to a general principle by subsequent authors, despite the fact that the Amsterdam legislation in 1744

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<sup>242</sup> It referred to ss 10, 12 and 18 of title VII of the *placcaat* of 1563, s 19 of the Rotterdam *keur* of 1604, and s 70 of the *keur* of 1721.

<sup>243</sup> And with reference to which, incidentally, his premium had been calculated, at least if the goods were fully insured to that value.

<sup>244</sup> No doubt the fact that the insured could produce no documentation at all as to the nature and the value of the goods in question, created a great deal of suspicion.

and practice and legislation elsewhere in the southern part of the Netherlands<sup>245</sup> and in Hamburg<sup>246</sup> showed that it was an incorrect view of the effect of a valued policy.

The Amsterdam *keur* of 1744 contained numerous provisions on the topic of valued policies, no doubt because the Legislature realised that valued insurance policies were the rule in practice<sup>247</sup> and had to be regulated in greater detail.<sup>248</sup>

<sup>245</sup> In terms of the policy form of the Antwerp Insurance Company of 1754, a valuation by the insured was, after the English example, taken as '*onbetwisbare basis voor de vergoeding*'. See Couvreur '*Zeeverzekeringpractijk*' 193.

<sup>246</sup> The Hamburg *Assecuranz-Ordnung* of 1731 in art V-1 recognised a party valuation as binding on the insured while the insurer remained free to prove the real value if he could. A party valuation therefore resulted in a reversal of the burden of proving the real value of the insured property. Further, the model policy forms on hull (policy I) and cargo (policy II) appended to the Ordinance both included a valuation clause. This suggests that party or consensual valuations, although not compulsory (as in the case of hull insurance in s 10 of the *placcaat* of 1563), were very common, so much so that the case of a hull insurance where the value was not fixed, was not even foreseen in the Ordinance, no provision being made for the insurable value of a ship.

In *Hettlins v Diverse Assecuradeure* (1753) the insured ship, valued at 16 000 marks in the policy on her, was lost. The insurer argued that the ship was 50 per cent over-valued but the Hamburg Admiralty Court, on an interpretation of the Ordinance, held him liable for the agreed value. It appears that the approach of the Court was to permit a reopening of a consensual valuation inserted into a policy (eg '*mit unserem, der Assecuradeurs, Consens ... taxiret auf ... Mk*') only in exceptional cases. The presumption was that there was no over-valuation and an insurer had to prove it if he alleged it. See generally as to the position in Hamburg, Dreyer 117; Frentz *Hamburgische Admiralitätsgericht* 148-151.

<sup>247</sup> Thus, Lybrechts *Koopmans handboek* V.75, in his definition of insurance, mentioned that the object against the loss of or damage to which an insurance was taken out, or rather its value, was commonly expressed in the policy ('*deze zaak, dat is de waarheid [ie, the value] van dien, in 't Contract, of Police gemeenlyk uitgedrukt*').

There are numerous examples of valuation clauses in policies from the latter part of the eighteenth century. A few may be referred to.

A 1765 Rotterdam insurance policy on goods, including slaves to be taken on board during a slave-trading voyage to the coast of Africa and thence to America (see Mees *Gedenkschrift* appendix 22; Kracht 72), contained the following clause on the slaves: '*Ingevall van opstand of ander onheijl onder de Slaven Yder Stukx Slaef Zo manlijk als vrouwelijk Jong of oud groot of kleijn getaxeerd & aengenomen voor f250.- schoon bij inkoop ruyling of verhandeling meerder of minder mogte gekost hebben of waerdig sijn*'. Later on in the policy it was added that this valuation was in all respects to be regarded as sufficient proof of the real value of the property ('*alle welke taxatien ten allen tijden & in alle gevalle voor voldoende sulle aanneemen & dese polis voor dat alles als reële waerde Eijgendom & taxatie*'). See too Mees *Gedenkschrift* appendix 23 for a Rotterdam transport insurance on slaves dating from the end of the eighteenth century which included the following clause: '*[E]n word met ons volkomen goedvinden ieder Slaaf of Slavin 't zy jong of oud getaxeerd met de premie inclus op f400.-*'.

In a 1770 Amsterdam fire policy on a plantation, buildings and slaves in Suriname (see Mees *Gedenkschrift* appendix 21) the valuation clause provided as follows: '*Mits deesen getaxeerd worden op een Somma van ..., welke Taxatie voor de opregte waarde, en dit Contract alleen tot voldoende bewijs van Interest & Eijgendom zal valideeren*'. The valuation clause and policy-proof-of-interest clause was therefore combined: see § 5.1 at n197 *supra* and § 6.1 *infra*.

The valuation clause in a Rotterdam fire policy of 1799 on grain (see Mees *Gedenkschrift* appendix 19 and Appendix 51 *infra*) stipulated as follows: '*[W]ordende de voorsz: graanen by deeze met wederzyts goedvinden getaxeert op een somma als voor ydere party afzonderlyk is gestelt [in a schedule added to the policy by hand]. Waar mede wy genoeg neemen; en zal in cas van ongeval, niets anders mogen worden geëischt dan alleen deze Police, nevens eene taxatie der schade van twee neutraale Persoonen, te committeeren bij den Rechter, ter plaatse daar het verzekerde is gelegen, 't geen voor voldoende zal worden gehouden, ...*'.

In an Amsterdam insurance on a one-eighth share in the hull and equipment of a whaler

In terms of s 7 of the Amsterdam *keur* of 1744, in the case of hull insurance, the owner or insured was free<sup>249</sup> to value the ship with all her equipment fully<sup>250</sup> or for his share only in the policy, as long as such valuation did not exceed her real value ('zal het aanden Eygenaer of Geassureerden vry staan, het Schip met al zyn toebehoren voor het geheel, of voor zyn portie, in de Police te taxeeren, dog niet boven de regte waarde'), presumably as such excess could subsequently be proved by the insurer. Where no such valuation was taken up in the policy and where the parties could in the event of loss or damage not agree on the appropriate value ('ingevalle geen taxatie in de Police is gesteld, en partyen in cas van schade ofte avarye, het over de waarde niet eens konden worden'), as also where there was over-valuation ('als mede, wanneer boven de geregte waarde mogte getaxeert zyn'), her proper value would have to be determined by the Commissioners, or her valuation, if such appeared in the policy, would stand, with the insurers being permitted to lead evidence in this regard to protect their interests ('zal de taxatie staan, aan 't onderzoek en ter decisie van Commissarissen, en de Assuradeurs haar belangen mogen inbrengen').<sup>251</sup>

Thus, the valuation of a ship was no longer compulsory as was the position under s 10 of the *placcaat* of 1563 but was now pertinently left to the agreement of the parties. But while providing (and relieving the insured of the burden of providing) evidence of the value of the ship for purposes of the assessment of the insured's loss and the determination of the measure of indemnity, a valuation could be attacked by the insurer on the grounds of it being excessive. Although it seems that s 7 suggested that in the absence of a valued policy the insured did not have to prove the real value but that the Court would do so, that would not appear to be correct. Further, seeing that the Court had to determine the real value also in the case of an over-valuation, the insurer in attacking the valuation presumably did not have to prove what the real value was but merely had to present *prima facie* proof of such over-valuation. Therefore, the burden of proving the value shifted from the insured, who otherwise had to prove that value conclusively, to the insurer, who now had to create a presumption of it being lower than the agreed value. The real or insurable value which the Court had to estab-

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concluded in 1779 (see Den Dooren de Jong & Lootsma 'Walvischvangst' 62-64) the handwritten valuation clause read 'dat in cas van Schade of Avarij, bij de Geassureerds getaxeert en geprieseert werd, bij pacto expres, en met believen van ons Assuradeurs op f ...: 't welk ons tot Reglement zal dienen, of schoon 't zelve meerder of minder mochte waardig weezen of te hebbe gekost, zonder dat de Geassureerdens eenig ander of nader bewijs van waarde Intrest of Eigendom zullen behoeven te toonen als alleen deese polis, die voor genoegsaam bewijs van waarde, Intrest en Eigendom zal dienen'. Again, therefore, a combined valuation and policy-proof-of-interest clause.

<sup>248</sup> As to the position in Amsterdam, see generally Suermondt *Taxatie* 17-19; and also Weskett *Digest* 568 sv 'valuation' par 7.

<sup>249</sup> But not compelled.

<sup>250</sup> Thus, compulsory under-insurance was abolished. See further ch XVIII § 5.5 *infra*.

<sup>251</sup> See further Van der Keessel *Praelectiones* 1440 (*ad* III.24.4); Enschedé 36; Goudsmit *Zeerecht* 337.

lish was, in terms of s 7, the value of the ship and her equipment on proceeding to sea.<sup>252</sup>

In terms of s 33 of the *keur* of 1744, in the case of an insurance on a ship in cases where the value of the ship depreciated on a long voyage, the Court was permitted to ignore her insurable value and also the agreed value, in the case where it was a valued policy.<sup>253</sup>

Valued cargo policies were addressed in s 22 of the Amsterdam *keur* of 1744. It appears to have provided that in the case of goods and effects of which the real cost price or value could be proved, no valuation was permitted.<sup>254</sup> The section itself was not that explicit, though. It stated that in such cases no valuation shall take place in the policy (*'en sal geen taxatie in de Police plaats hebben'*),<sup>255</sup> presumably because the relevant value was as a rule easily proved by the necessary documentation in the form of invoices (*'facturen'*) and published price lists (*'prijscouranten'*). However, goods of the insured owner's own production or manufacture, or goods obtained by barter or in other circumstances above or below the market price as reflected in the price lists and of which no proper invoices could therefore be produced to justify their value,<sup>256</sup> had to be valued in the policy together with all the expense incurred in respect of such goods until loaded, including the insurance premium paid on them (*'deselve zullen in de Police met alle onkosten tot aan boord, met de Premie van Assurantie inclusive getaxeert mogen werden'*). Otherwise than earlier, therefore, valued cargo policies were no longer permitted, the prohibition possibly being imposed because of the potential of fraud upon insurers. Valued cargo policies were now permitted and made compulsory only in those special cases where the absence of proper proof of the insurable value of the goods created a potential opportunity for the insurer to be defrauded.<sup>257</sup> If this is correct, the prohibition was rather ironic, given that in other instances valued policies were in fact made compulsory in an attempt to prevent fraud upon insurers. In the case of a failure so to value the cargo, the value would have to be determined by the Court with the insurers being permitted to lead evidence in this

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<sup>252</sup> See again § 3.3.2 *supra* as to the insurable value of ships.

<sup>253</sup> See again § 3.3.2 *supra* where s 33 and its predecessor, the *keur* of 1614, were discussed in detail.

<sup>254</sup> At least it is the general view that as a rule valued cargo policies were prohibited: see eg Dorhout Mees *Schadeverzekeringsrecht* 169 (noting, though, that the prohibition in s 22 applied only to goods the value of which could afterwards be proved indisputably); Suermondt *Taxatie* 17.

<sup>255</sup> However, the contrast between this provision and s 7 which explicitly permitted the insured to conclude a valued hull policy, probably supports the view that valued hull policies were in fact as rule prohibited and were not merely not compulsory or necessary.

<sup>256</sup> *'Goederen van eyge Producten en Fabriquen, of die by mangelingen en andere omstandigheeden, onder, ofte boven de Courantprys zyn verkreegen, of aangenomen, en waar van aldus geen behoortlyke factuur met Justificatie van Interest zal kunnen werden geproduceerd'*.

<sup>257</sup> For the very same reason a valuation was also compelled in the case of an insurance of freight and expected profit.

regard ('en by versuym van 't zelve, zal de taxatie aan 't onderzoek en ter Decisie van Commissarissen staan, en de Assuradeurs haar belangen mogen inbrengen').<sup>258</sup>

As far as the freight payable for carriage ('vragtpenningen') was concerned, s 15 of the Amsterdam *keur* of 1744 permitted its insurance by the carrier or shipowner and no valuation was required<sup>259</sup> but the insured could prove the relevant value afterwards by the production of the appropriate bill of lading or charterparty. An exception was recognised in the case where the shipowner carried his own goods and when a prior valuation was required ('en in gevallen een Schip voor eyge Meesters reekening Goederen geladen heeft, waar van mende Vragten wil laten verseecken, zullen dezelve in de police moeten getaxeert werden'),<sup>260</sup> since the appropriate documentation to determine the amount of freight involved did not exist in that case. In the event of a failure in such a case to insure the freight in a valued policy, the Court again had to assess the insurable value of such freight as it had to do in appropriate cases of insurance of hull and cargo in terms of ss 7 and 22.<sup>261</sup>

Likewise, the insurance of expected profit was permitted by s 17 of the Amsterdam *keur* of 1744 on condition that the expectation ('spes') was valued in the policy at a fixed amount and with a description of the goods from which it was expected.<sup>262</sup> The absence of such a valuation probably also resulted in the Court fixing the appropriate value as in terms of ss 7, 15 and 22 of the *keur*.

Finally, as far as fire insurance was concerned,<sup>263</sup> the model fire policy appended to the Amsterdam *keur* of 1744 was in the form of a valued policy. The agreed value of the building and/or contents or of other goods was stated to apply irrespective of any higher or lower value or cost price. The policy also stipulated that in the case of a loss, the insured did not have to present any further proof of the values in question, such production of proof not being practicable, and that the production of the (valued) policy itself would be sufficient proof of that value.<sup>264</sup> Similar stipulations

<sup>258</sup> See generally as to s 22, Enschedé 119; Goudsmit *Zeerecht* 338; and Magens vol II at 136.

<sup>259</sup> Again Suermondt *Taxatie* 17 is of the view that no valuation was permitted.

<sup>260</sup> Suermondt *Taxatie* 17 states that the insured was in such a case free (as opposed, apparently, to compelled) to conclude a valued policy. This is clearly wrong as appears from the wording ('moeten') of s 15.

<sup>261</sup> See further generally eg Van der Keessel *Praelectiones* 1435 (ad III.24.4); and also Goudsmit (*Zeerecht*) 339. In terms of s 26 of the Rotterdam *keur* of 1721 'de te verdienen Scheeps-vragten' was also insurable but there was no requirement of valuation. See again ch V § 5.4.2 *supra*.

<sup>262</sup> See eg Van der Keessel *Praelectiones* 1438 (ad III.24.4), Goudsmit *Zeerecht* 340; and see again ch V § 5.2 *supra*.

<sup>263</sup> See Goudsmit *Zeerecht* 346.

<sup>264</sup> The fire policy in terms of the *keur* of 1744 provided: 'Taxeerende wel Expresselyk en met ons believe, de voorsz. Opstal, Timmeragie, Huisinge &c. met alle desselfs Gereedschappen en Meubilen op een Somma van f ... en de goederen, waaren en Koopmanschappen op een Somma van f ... en dus te saamen op eenen Somma van f ... zullende niet prejudiceeren of dit alles meerder ofte minder mogte waardig wesen, ofte gekost hebben;... en sal de Geassureerde of die het anders soude mogen aangaan, in cas van schade of ongemak geen bewys nogte rekening van de waarde behoeven te doen, alsoo ons bewust is zulks niet doendelyk te zyn, maar kunnen volstaan met deeze Police te

appeared in the fire policy in the amending *keur* of 1775,<sup>265</sup> except that it was now made readily apparent that the policy itself served only as proof of the value of the relevant object of risk and not also of the amount of the damage or of the insured's loss as result of the loss of or damage to that object by fire.<sup>266</sup> The parcel policy in the Amsterdam *keuren* of 1744 and 1775 likewise contained a valuation clause.<sup>267</sup>

In their treatment of valued policies, Van der Keessel<sup>268</sup> and Van der Linden<sup>269</sup> referred simply to the decision of 1739 for the view that in the case of a loss, the valuation of the goods inserted in the policy still had to be proved not only by the oath of the insured<sup>270</sup> but also by other evidence. They ignored, for example, the earlier decision of 1708 which assigned a much different and more practical consequence to valued policies, and they also did not attempt to reconcile the unique view in the decision of 1739 with the clearly different and more traditional approach manifested in the *keur* of 1744. Even where Van der Keessel did discuss the provisions on valued policies in the *placcaat* of 1563 in detail<sup>271</sup> and where he noted that it was customary for a valuation to be inserted in insurance policies, he explained that proper proof of the value was

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*produceeren*'. Thus, the valued policy was by agreement between the parties to be regarded as providing sufficient proof of the value of the insured property, not of the amount of the loss or damage; this was therefore not also a policy-proof-of-interest clause.

<sup>265</sup> The fire policy in the *keur* of 1775 provided: 'Wordende de Opstal getaxeerd op een Somma van f ... de Gereedschappen op de Somma van f ... de Inboedel op de Somma van f ... en de Goederen, Waaren en Koopmanschappen op de Somma van f ... waar meede wy genoeg neemen .... En zal in cas van Schaade niet ander mogen worden geesicht, dan alleen deze Police nevens [apart from] een bewys van de schaade aan 't verzekerde door de Brand, en de gevolgen van dien (hier voor beschreven) veroorzaakt'. Then followed detailed provisions as to how the extent of the loss or damage had to be proved, ie, of what would be regarded as 'voldoend bewys'.

<sup>266</sup> See further Van der Keessel *Praelectiones* 1434 (ad III.24.4) for this difference.

<sup>267</sup> The parcel policy provided: '[E]n zal de geassureerde geen nader ofte ander bewys van Eigendom ofte waarde behoeven te vertoonen, dan alleen deze blote Police, waar mede wy in cas van avary ofte schaade volkomen genoeg zullen neemen, al waar het, dat de verzeekerde Waaren minder ofte meerder mogten waardig zyn ofte gekost hebben, als zynde het zelve de Pacto en Expresse/expresselyk met wederzyds genoeg getaxeerd en gepriseerd op een somma van f ... welke by alle voorvallen tot reglement zal dienen'. Here, it appears, the clause was also one providing for the policy to serve as proof of interest or ownership. See Goudsmit *Zerecht* 347.

<sup>268</sup> *Theses selectae* th 738 (ad III.24.6).

<sup>269</sup> *Koopmans handboek* IV.6.8.

<sup>270</sup> Of course, in the 1739 decision the oath was not offered to prove the value but merely to affirm the insured's goods faith in drawing up the list of the goods involved and their values.

<sup>271</sup> See *Praelectiones* 1453 (ad III.24.6).

nevertheless required, and that a mere assertion, even under the insured's oath, was not sufficient proof.<sup>272</sup>

Unfortunately the fact that both authors concentrated on the one instance where an aberrant view on the effect of the valued policy in Roman-Dutch law held sway, and ignored the overwhelming evidence of the eminently more practical provisions of, for example, the Amsterdam *keur* of 1744, had an influence on the process and final outcome of the codification of this part of Dutch insurance law.

### 5.5 Valued Policies in the *Wetboek van Koophandel*

The provisions on valued policies in the Dutch *Wetboek van Koophandel* clearly display their Roman-Dutch ancestry, more particularly the *Hooge Raad* decision of 1739 and its subsequent interpretation by Roman-Dutch authors.<sup>273</sup> The position in Dutch law also differs from those systems of insurance law, such as the French, where a party valuation conclusively establishes the value of the object at risk subject only to the actual proof of a different real value by the insurer.

The *Wetboek* distinguishes between two types of valuation, namely by the parties themselves and by an expert.

As far as a party valuation is concerned, art 274-1 provides that if the value of the insured object has been expressed in the policy,<sup>274</sup> the Court nevertheless has the power to order the insured to provide further proof of the value expressed there ('aan de verzekerde de nadere regtvaardiging der uitgedrukte waarde op te leggen'), in so far as the reasons advanced by the insurer give rise to a valid ground for suspecting an excessive valuation ('het bovenmatige der opgave'). Therefore, the insured is not necessarily finally relieved of the burden of proving the value by the fact that had concluded a valued policy,<sup>275</sup> an approach seemingly inspired by the *Hooge Raad* decision of 1739 and the subsequent views of authors such as Van der Keessel and Van der

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<sup>272</sup> Van der Linden *Koopmans handboek* IV.6.5 noted that insurers could bind themselves to the payment of the value which the goods may be found to have according to an evaluation that still had to be performed ('eene te doene begrooting'), but it is not clear whether he was referring to valued policies here.

<sup>273</sup> See generally Dorhout Mees *Schadeverzekeringsrecht* 169; Elink Schuurman *Brandschade* 100-105; Faber *Aanteekeningen* 55-56; Goudsmit *Kansovereenkomsten* 231-238; Star Busmann 16-22; and Suermondt *Taxatie* 30-76.

<sup>274</sup> Presumably by agreement between the parties and not eg unilaterally by one of them, but irrespective of whether the insurer had inspected the property or had simply accepted the value suggested by the insured.

<sup>275</sup> However, when the insurer has created a presumption of over-valuation, necessitating proof by the insured of the true value, the latter's burden of proof to the contrary is much lighter. This is so because the *prima facie* evidence of the insurer of an over-valuation would show how it may be dislodged, and also because that which is not attacked by the insurer, remains valid. On this point, see Noyon 47.

Linden.<sup>276</sup> It is thus not clear why the parties to an insurance contract would go to the trouble of concluding a valued policy if the insurer can, in terms of art 274-1, merely create a presumption (that is, establish a *prima facie* case) of over-insurance and so oblige the insured to provide conclusive proof of the correctness of the valuation. Obviously the insured's position in this case is less favourable than it was in Roman-Dutch law. An insurer can have a valuation to which he had agreed earlier and on the basis of which he had calculated and received the premium, reopened by merely establishing a *prima facie* case of over-valuation and without having to show any fraud on the part of the insured.

Nevertheless, art 274-2 provides for a second way in which an insurer can attack a valuation. It legislates that in all cases<sup>277</sup> the insurer has the power to prove<sup>278</sup> the excess of the expressed valuation. In this the *Wetboek* is in accordance with the position held in earlier Roman-Dutch law too, for example in s 10 of title VII of the *placcaat* of 1563, namely that a valuation was only binding in the absence of any proof of fraud.

Any renunciation of art 274, for example by a stipulation to the effect that the valuation will be binding on the parties except in the case of fraud or bad faith,<sup>279</sup> is regarded as invalid. This is so despite the obvious need in practice for incontestable valuations not generally open to attack by insurers. In effect, therefore, parties are not permitted in Dutch law to insure on the basis of an indemnity as agreed upon between themselves. Presumably the reason for this strict approach is the fear of allowing a breach of the principle of indemnity under the guise of valued policies. On the other hand, the burden on the insurer of establishing merely a *prima facie* case of over-valuation, even if it is easier to meet than the burden of proving fraud, cannot be that easily met in practice given that the insurer is not as intimately involved with the insured property as is the insured. Further, the *de minimis non curat lex* rule will apply to small over-valuations. Finally, it must be remembered that in the case where an over-valuation is proved or a presumed over-valuation not disproved, there is simply a reduction of the insured's claim to one corresponding to the real value in question and with a proportional return of the premium. There is no avoidance of the whole insurance contract; except in the case of fraudulent over-valuation when the premium is also forfeited.

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<sup>276</sup> One of Van der Linden's views on valued policies, viz that despite the valuation the insured nevertheless always still had to prove the value of the insured property, remained in drafts of the *Wetboek* until 1830. The reason why this view, based on an incorrect interpretation of the Roman-Dutch sources, continued to be supported, was the fear that a party valuation would lead to over-valuation. Early drafts of the *Wetboek* removed all differences between valued and unvalued policies: all policies had to contain a valuation (so that on appearance they were valued policies) which was of no binding effect (so that all policies were in effect unvalued policies).

<sup>277</sup> That is, presumably, in all cases of party valuation.

<sup>278</sup> Presumably conclusively.

<sup>279</sup> That is, as will become clear shortly, an agreement that the party valuation is to have the same effect as an expert valuation.



The *Wetboek van Koophandel* also recognises another type of valuation, namely an expert valuation, a uniquely Dutch creation although it had antecedents in early Roman-Dutch insurance legislation, including s 10 of title VII of the *placcaat* of 1563. As far as this form of valuation is concerned, art 275 contains a different approach than that to a party valuation. Where the insured object is valued beforehand<sup>280</sup> by a third-party expert appointed by the parties to the agreement and he is judicially confirmed in his appointment (*'des gevorderd, door den regter beeedigd'*), the insurer may not object to his valuation, except in the case of fraud. Therefore, since the possibility of over-valuation is sufficiently eliminated in the case of an expert valuation, the Legislature saw fit to render such valuation incontestable by the insurer. A mere suspicion or even, presumably, conclusive proof of an over-valuation is not sufficient for the insurer to attack the valuation if he cannot also prove fraud on the part of the insured and/or the expert. The possibility of a binding expert valuation was therefore a solution midway between not permitting valued policies at all and requiring proof of the value from the insured in all cases on the one hand, and allowing the parties themselves to conclude a binding and unimpeachable valuation without any restriction whatsoever on the other hand. However, the expert valuation has turned out to have little practical impact. It is too expensive and time-consuming for marine practice and is little used outside the field of fire insurance where its application is also limited to the insurance of particular objects such as factories and works of art.

Thus, while a valuation in principle relieves the insured of the burden of proving the real value of insured property, whether he is in fact so relieved depends on the type of valuation involved. A party valuation is proof of the value as long as the insurer can advance no grounds substantiating a sound presumption that the valuation is excessive (in which case the insured is to prove the real value), or until the insurer himself actually provides evidence to the contrary. An expert valuation, by contrast, is only disputable by the insurer in the case of fraud. The position of an insured in the case of a valued policy is therefore more favourable than it is in the case of an unvalued policy with its attendant problems of proof, although not as favourable as in the case of an expert valuation.

Article 619 applies to marine hull insurances and recognises exceptions where the Court may reduce the relevant insurable value or, if it be a valued policy, the agreed value of the ship because of the fact that a ship and her equipment necessarily depreciates in value due to use.<sup>281</sup> Article 619 is applicable to both party and expert valuations and provides another instance in which the insurer can attack the agreed value of a ship.

A valuation is not compulsory in terms of the *Wetboek*, the only two apparent exceptions being marine hull and fire policies which both have to contain an expression of value in the policy. In respect of marine policies, art 592-7 provides that such a policy

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<sup>280</sup> That is, before the conclusion of the insurance contract. A distinction must therefore be drawn between a prior expert valuation (which may or may not be included in the policy) and an *ex post facto* valuation after a loss or damage, eg by an assessor.

<sup>281</sup> See § 3.3.3 *supra* where this provision was treated in more detail in connection with the insurable value of ships.

must contain the value of the insured ship.<sup>282</sup> For fire policies, art 287-4 requires that the value of insured goods must be expressed in a fire policy.<sup>283</sup> Apparently fire policies in the first part of the nineteenth century, like those in the latter part of the eighteenth century, still contained valuation clauses, although these were no longer completed so that the object of risk remained unvalued.<sup>284</sup> Should the parties fail to conclude a valued fire policy, proof of the relevant value is required from the insured. In terms of art 295-1, in the case of a fire insurance on movable goods and merchandise in a house, warehouse or other place of safekeeping, the Court may in the case of an unvalued policy where there is insufficient proof of the relevant value, require an oath from the insured as to that value ('*den eed aan den verzekerde opleggen*'). However, there is also the view<sup>285</sup> that marine hull and fire insurances need not be concluded by way of valued policies. What is required for them by the relevant articles in the *Wetboek*, and then for no readily apparent reason,<sup>286</sup> is simply an expression of the value and not an agreement between the parties on such value which would have been necessary for the policy to qualify as a valued policy. This interpretation is strengthened by the fact that in practice fire policies are generally not concluded by way of valued policies and that no sanction is laid down in the *Wetboek* for the conclusion of unvalued fire, or for that matter marine hull, policies.

What then of practice? Clearly the legal position regarding valued policies as regulated in the *Wetboek van Koophandel* is unsatisfactory, much more so than would have been the case had the true principles of Roman-Dutch law been taken over as the

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<sup>282</sup> Apparently cargo and other marine policies need not contain such an expression of value.

In the case of marine hull insurance, the relevant real value is the value of the ship at the commencement of the voyage, so that any subsequent change in her value is irrelevant. Therefore, only if a valuation is initially excessive can the insurer attack it, and not where it becomes excessive due to a depreciation in the value of the insured ship after the commencement of the voyage. In the case of marine cargo insurance, whether or not there is over-valuation depends on the basis on which the cargo is insured. Thus, where the goods are insured for their value at the commencement of the voyage plus cost until on board, the insurer may attack the valuation only by establishing that it was initially excessive, any subsequent depreciation (which occurs in any case seldom in the case of value on board) being irrelevant. At the other extreme, goods may be insured for their value at their destination (ie, for their value on board plus freight plus expenses plus expected profit), in which case there is over-valuation if the agreed value is higher than the value of the goods upon their arrival at the destination, or higher, in the case of their non-arrival, than their value there less freight and expenses which no longer have to be paid.

<sup>283</sup> In the case of fire insurance, the relevant real insurable value is that at the time of the loss or damage. Thus, in the case of a valued fire policy, there is over-valuation where the value agreed upon at the time of the conclusion of the contract exceeds the value immediately before the loss or damage, even if it is the same as the value at the time of the conclusion of the contract. A valuation correct at the time of conclusion may accordingly become excessive at the time of the loss (eg, in the case of a depreciation in the value of the property concerned) and become open to attack by the insurer on that ground.

<sup>284</sup> See Elink Schuurman *Brandschade* 49 who notes that a valuation clause ('*wordende ... getaxeerd op f ...*'), if included in a fire policy, is seldom completed.

<sup>285</sup> See Suermondt *Taxatie* 34-36.

<sup>286</sup> Except possibly as part of the obligation on the insured to disclose the relevant value to the insurer in the policy.

basis of the codification. Not surprisingly, therefore, Dutch marine insurers act as if arts 274 and 615<sup>287</sup> had not been promulgated. They make no use of their right to produce proof to the contrary or to compel the insured to bring such proof, and often express their undertaking in this regard in a renunciatory clause which is in practice adhered to, despite the fact that it is strictly speaking invalid.<sup>288</sup>

## 5.6 Valued Policies in English Law

As far as valued policies are concerned, there are, at least in theory, some fundamental differences between Dutch law and English law. First of all, English law recognises only a party valuation and not also an expert valuation. Secondly, generally speaking it accords the same effect to a party valuation as does Dutch law to an expert valuation.<sup>289</sup>

Valued policies were known in English law from an early stage. The Chancery decision in *Le Pypre & Al v Farr* in 1716<sup>290</sup> concerned an insurance of goods valued by agreement at £600, and stipulating that the insured was not obliged to prove any interest,<sup>291</sup> and shows that the valuation was regarded as binding. The Court ordered the value of the goods saved to be determined and that value to be deducted 'out of the value or sum of £600 at which the goods were valued by the agreement'.

In 1748, when an attempt was made to codify the law of marine insurance, the House of Commons appointed a Committee to consider the better regulation of insurances on ships and goods. The Committee produced a Report containing ten resolutions, two of which referred to valued policies. In Resolution 1 it was provided that under a policy in which the interest of the insured in goods or freight was globally valued 'at a sum certain' or at the sum insured (that is, by way of a valued policy), or in which no particular value was set on the interest (that is, in an unvalued policy), the insured should recover only the actual amount of his loss.<sup>292</sup> Thus, the indemnity principle was to apply in both cases, at least as a rule. By way of proviso it was permissible, however, for a particular value to be specified upon the weight, measure or 'tale' (that is, the number), or cask, bale, parcel or package of the cargo, according to usage, and in the case of a loss such a specified value was then to be the basis of any settlement.

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<sup>287</sup> In terms of art 615-1 an insurance on expected profit must, on the penalty of nullity, be valued separately in the policy with an indication of the goods on which it is expected.

<sup>288</sup> See further Suermondt *Taxatie* 96-111.

<sup>289</sup> For the differences between Dutch and English law, see eg Buys 17 and 47-51; Dorhout Mees *Schadeverzekeringsrecht* 177 and 667; Goudsmit *Kansovereenkomsten* 198; Suermondt *Taxatie* 76-86; and Ulrich 218.

<sup>290</sup> (1716) 2 Vern 716, 23 ER 1070. See too Holdsworth *History* vol VIII at 293 who appears to have misread the report.

<sup>291</sup> Thus, a combined valuation and a policy-proof-of-interest clause.

<sup>292</sup> That is, the insurable or true value of the goods (their value at the place and time of shipment) together with the premium for such an insurance.

In terms of Resolution 2, in a policy on a ship, the insured had to specify, amongst other matters, the value of the ship. Marine hull policies, it would appear, therefore had to be valued policies, but, in spite of the value inserted in the policy, the insurer remained entitled in the case of a loss to call the value in question and the insured could recover only the true value up to the limit of the sum insured by the policy.

Clearly these resolutions had in respect of valued policies borrowed much from the position in other contemporary systems on the Continent, although they may equally well also have reflected the position in English insurance practice at the time.<sup>293</sup> Nevertheless, the position as set out in the Report did not prevail when valued policies came before the Courts in the latter half of the eighteenth century, and may therefore in fact not have accorded with established practice at the time.

In *George Fitz-Gerald v Charles Pole*<sup>294</sup> a privateering ship was valued at (and insured in a time policy for) £1 000 'without further account to be given by the assured for the same'.<sup>295</sup> The reported decision sheds no light on the effect of the valuation, but in the course of the reported argument of the insured's counsel,<sup>296</sup> a brief account was given of the origin and development of insurance in England.<sup>297</sup> It was explained that in the course of time numerous variations were made to the earlier unvalued or 'open' policy forms. One of these was the addition of a valuation clause by which, at a higher premium, the insurer agreed to estimate the insured's interest at a specified sum, 'it being troublesome to the trader to prove the value of his interest, and ascertain the amount of the loss'. To recover upon such a type of policy, the argument continued, 'the insured need only prove that he had an interest, without shewing the value'.<sup>298</sup>

In his treatment of insurance law in 1755, Magens<sup>299</sup> explained that when the goods insured are valued in the policy, no accounts are required, and that the insured

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<sup>293</sup> See further Magens *Essay* vol I at 36; Raynes (1 ed) 166, (2 ed) 161; and Wright & Fayle *Lloyd's* 162-163.

<sup>294</sup> (1754) 4 Brown 439, 2 ER 297, a decision confirming the Court of Exchequer Chamber's reversal of an earlier judgment of the King's Bench. The House of Lords too subsequently confirmed the judgment of reversal: see Magens *Essay* vol I at 533-562 for an appendix containing the House of Lords' decision in *George Fitz-Gerald v Charles Pole* (1754) on the difference between insuring a ship at 'interest or no interest' and insuring a ship at a certain sum without any account to be given of that value. As to this difference, see too eg Argyroudi 46-47 and 49.

<sup>295</sup> At 440, 298.

<sup>296</sup> Among whom was included one 'W Murray', in all probability William Murray (1705-1793), soon to be elevated to the King's Bench as Lord Mansfield.

<sup>297</sup> See at 444, 301.

<sup>298</sup> Counsel then distinguished another type of policy, where the insurer dispensed with any proof of the insured having any interest and where he insured 'interest or no interest'. It was noted, further, that s 1 of the Marine Insurance Act of 1746 (19 Geo II c 37), which prohibited and declared null and void insurances made 'Interest or no Interest, or without further Proof of Interest than the Policy, or by way of gaming and wagering, or without benefit of Salvage to the Assurer', in s 2 excepted from this prohibition insurances on privateering vessels.

<sup>299</sup> *Essay* vol I at 35-37.

need then prove only that the goods so valued were in fact put on board. He noted further that while some laws forbid the valuation of ships and goods above their real value,<sup>300</sup> insurers commonly abide by the valuation provided by the insured, and that it was only reasonable that they should be so bound by that valuation seeing that they receive a commensurate premium. However, when the insurer offers any evidence of the insured himself having damaged insured goods, a court, he further suggested, ought to insist upon the real value being proved, great over-valuation tending to corroborate testimony of such willful damage. Magens then gave some indication of the advantages of valued policies in practice.<sup>301</sup> Firstly it was absolutely necessary for the insured to conclude a valued policy in the case of goods with a rising value.<sup>302</sup> A policy on goods valued in the local currency was also advantageous in the case of an insurance on goods coming from a place where no rate of exchange was current and where there was no readily establishable market price for those goods, or where fluctuations in the value of the local currency at that place were possible. In the case of an insurance on hull, Magens advised further, the value of the interests or shares in that hull ought to be valued precisely in the policy in a case where the insurance was not for the ship's first voyage, since it might be difficult to prove that value in the case of a subsequent voyage or to prove what part of the reduction in her original value was really due to wear and tear.<sup>303</sup> Lastly, Magens<sup>304</sup> referred to the practice at Amsterdam of admitting in fire policies a fixed valuation for what was insured against fire. He thought that that practice 'may be of very bad consequence', that it ought not to be permitted by law, and that the unvalued London fire policies were altogether a better proposition.

The leading English decision on valued policies in the eighteenth century was no doubt that of Lord Mansfield in *Lewis v Rucker*.<sup>305</sup> It concerned an insurance policy on

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<sup>300</sup> He referred in this regard to ss 10 and 12 of title VII of the *placcaat* of 1563, s 3 of the *Middelburg keur* of 1600, ss 7 and 22 of the *Amsterdam keur* of 1744, and the relevant provisions of the French *Ordonnance de la marine* of 1681.

<sup>301</sup> Valued policies also had other advantages which made them preferable to unvalued policies in that they facilitated and ensured a speedy settlement; not only did they alleviate the insured's burden of proving the value by a production of documentation, but they enabled the insured to remedy the defectiveness of the old rule of indemnity which limited his compensation to one based on the cost price of the insured goods; the insured could include in the valuation the profit he reasonably expected to make on the insured goods at their destination over and above what they had cost him. A more complete indemnity could therefore be achieved with ease by making use of a valued policy. See further on this point Lowndes 8-9.

<sup>302</sup> That is, in the case of an insurance of goods the value or price of which would or was expected to rise from the time when they were bought and shipped or insured, because in the absence of a valuation, the cost price of those goods formed the basis for their indemnity. See also Magens *Essay* vol I at 40-41 (explaining the difference between goods coming to a losing market valued and unvalued) and at 38-40 (the difference between goods coming to a gaining market valued and unvalued).

<sup>303</sup> Magens also warned that despite the valued policy, under-insurance had to be avoided if the insured did not wish to bear a part of any loss or damage himself.

<sup>304</sup> *Idem* vol II at 153.

<sup>305</sup> (1761) 2 Burr 1167, 97 ER 769.

goods, the goods being valued at so many pounds per hogshead,<sup>306</sup> and also the calculation of the measure of indemnity in the case of a partial loss of the goods in question.<sup>307</sup> One of the objections raised in this connection was that a valued policy such as that before the Court here was, like a policy interest or no interest, a wager policy and thus avoided by the Marine Insurance Act of 1746.

On this point Lord Mansfield answered<sup>308</sup> that a valued policy was in fact not a wager policy or like a policy 'interest or no interest'. The only effect of the valuation was conclusively to fix the amount of the prime cost (that is, the insurable value) of the goods just as if the parties had admitted it at the time of the litigation. By concluding a valued policy, the insurer admitted the valuation stated in it and thus relieved the insured of the burden of proving that value as he had to do in the case of an unvalued or open policy. A valued policy was therefore perfectly valid and not void under the Marine Insurance Act of 1746, as long as the insured had to prove *some* interest.

However, his Lordship continued, despite the many conveniences of valued policies, it must be taken for all purposes that the valuation was fixed in such a manner that the insured meant to have no more than an indemnity. Accordingly, in the event of an excessive over-valuation (which the insurer had to prove), the valuation could not be allowed to stand for then it had to be accepted that the valuation was employed merely to conceal a wager in contravention of the Act of 1746 or even a fraudulent loss.<sup>309</sup>

In the Lloyd's policy, as it was settled in 1779, the valuation clause made it clear that the agreed valuation concerned the parties to the contract only.<sup>310</sup>

In his reference to the decision in *Lewis v Rucker*, Weskett<sup>311</sup> expressed the view in 1781 that any (and not only a large) over-valuation of an actual interest was an evasion of the Act of 1746 and was unquestionably speculating or wagering, more dangerous to an insurer than a mere wager where there was no interest: in the former case the insured was interested and involved in the voyage to some extent and thus able to practice and perpetrate a fraud with greater ease. He bemoaned the fact that while by general maritime law and continental insurance laws all insurances beyond the real value of an interest and by which the insured obtained a profit, have always been considered to be in breach of the indemnity principle, this was, after *Lewis v Rucker*, no

<sup>306</sup> A hogshead was a liquid or dry measure of about 50 imperial gallons, 1 (imperial) gallon being the equivalent of 4546cc. It was so called after casks known as 'hogsheads'.

<sup>307</sup> On this aspect, see § 7.4 *infra*.

<sup>308</sup> At 1171, 771-772.

<sup>309</sup> See further eg Dover 37; Holdsworth *History* vol XII at 539.

<sup>310</sup> 'The said Ship, &c., Goods and merchandises, &c., for so much as concerns the Assured by Agreement between the Assured and Assurers in this Policy, are and shall be valued at ...'. See also Hopkins 131-134.

<sup>311</sup> *Digest* 585-587 sv 'wager' par 6.

longer the case in English law. No policy, Weskett opined, ought to be supported by a court beyond the true value of the interest actually at risk.<sup>312</sup>

Elsewhere Weskett explained the legal position as regards valued policies. He noted that in the case of a valued policy the insured need no longer prove the value of the thing insured in the process of claiming for its loss, but merely that the goods valued were in fact shipped.<sup>313</sup> The insured need prove only some interest to take the policy out of the scope of the prohibition in the Act of 1746, but if it is proved that the valuation was merely a cover for a wager, or in the case of an excessive over-valuation, it would be considered an evasion of that Act.<sup>314</sup> In English law there was no settled rule as to the degree of over-valuation<sup>315</sup> but over-valuation was more easily discovered on goods than on a ship, the current price of goods being more generally known.<sup>316</sup> Finally Weskett, like Magens before him, disapproved of the Amsterdam practice of valued fire policies, noting that the London fire policies which merely stated the maximum amount for which the insurer would be liable to make good any loss or damage by fire (that is, the sum insured), were preferable.<sup>317</sup>

The earlier principles on valued policies were recognised and in essence retained in the Marine Insurance Act of 1906. A policy may, in terms of s 27(1), be either valued or unvalued. A valued policy, by s 27(2), is a policy which specifies the agreed value of the subject-matter insured.

In terms of s 27(3), the value fixed by a valued policy is, in the absence of fraud,<sup>318</sup> conclusive evidence as between the insurer and the insured of the insurable value of the subject intended to be insured, whether the loss be total or partial.<sup>319</sup> Thus, a party valuation is in principle binding on the parties and relieves the insured of the need to prove the real or insurable value of the property in question. The insurer may

<sup>312</sup> Irrespective, by implication, of whether or not any fraud was involved.

<sup>313</sup> *Idem* 564 sv 'valuation' par 1. See too at 227-228 for the distinction between an over-valuation of policies (ie, an over-insurance) and an over-valuation of ships in policies (ie, an over-valuation).

<sup>314</sup> *Idem* 568 par 5.

<sup>315</sup> In French law, eg, there was over-valuation where the agreed value exceeded the true value by half.

<sup>316</sup> *Idem* 571 par 10.

<sup>317</sup> *Idem* at 218-219 sv 'fire' par 7-9.

<sup>318</sup> And subject to the provisions of the Act, eg, s 29(4) (in terms of which a floating policy under which a declaration of value is not made until after the notice of loss or arrival, must, unless otherwise provided, be regarded as an unvalued policy as regards the subject-matter of that declaration); and s 75(2) (despite a valuation, an insurer may still prove double insurance, or a short or absence of interest, or the fact that the whole or a part of the subject-matter insured was not at risk).

<sup>319</sup> In terms of s 27(4), unless the policy otherwise provides, as it usually does in practice, the value fixed by the policy is not conclusive for purposes of determining whether there has been a constructive total loss. Further, the agreed value is not conclusive of the amount payable under policy, except in the case of total loss. In the case of a partial loss, evidence of the real value must still be given in order to fix the percentage of damage suffered by the subject-matter (see § 7.4 *infra* as to the measure of indemnity).

attack a valuation only on the grounds of fraud, and a mere over-valuation, even if proved by the insurer, is not a ground upon which either the valuation or the policy itself can be attacked.<sup>320</sup>

Therefore, in the absence of fraud, which the insurer will have to establish, a party valuation is conclusive and incontestable in English law and the insurer held bound to pay the loss according to the valuation he had accepted and with reference to which the sum insured and thus also the premium had been determined. This degree of untouchability of the valuation is the position in Dutch law only in the case of an expert valuation and English law therefore displays a far more liberal approach, more tolerant of even fairly significant breaches of the principle of a strict or perfect indemnity. English law recognises the insurance contract as one of an indemnity as agreed upon by the parties.<sup>321</sup> By contrast, in the case of Dutch law, fraud in respect of the (expert) valuation results in the valuation falling away or in it being reduced to the real value as proved by the insured, while in English law an insurer can attack the valuation, whether on the basis of fraud or non-disclosure, only by attacking the whole policy, a reopening of the valuation alone being impossible.

Despite the considerable theoretical differences between English law and Dutch law, therefore, there is, as has been pointed out, much less of a difference in practice given that in the Netherlands too party valuations are regarded as binding by the parties themselves.

## 6 Policy-proof-of-interest Clauses

### 6.1 Introduction

Just as parties to an insurance contract sought to relieve the insured of his burden of proving the value of the insured ship or goods by the conclusion of a policy containing a valuation clause, so too they sought to obviate the need for the insured having to prove the existence and value of his interest in that property. To this end they concluded a policy which contained an appropriate clause stating that the production of the policy itself would suffice as proof of the insured's (unlimited) interest which would be taken to be equivalent in value to the value of the object itself. Such a clause, conveniently known in English law as a 'ppi' or 'policy-proof-of-interest' clause, was often combined with a valuation clause, stating that the policy itself would provide sufficient

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<sup>320</sup> However, such an over-valuation, even if made in good faith, may be a ground for attacking the policy on the grounds of non-disclosure. And a gross over-valuation (gross being taken very broadly in practice and having to be enormously excessive) may be evidence of fraud (an over-valuation in bad faith) on the part of the insured upon the insurer. Also, an excessive valuation may indicate that no true insurance was intended but simply a wager, and that may be so even where the insurer knew of the over-valuation (in the first two cases, the insurer's ignorance of the over-valuation is required). See further Chalmers 43. See too ch XVIII § 4.7 *infra* and Chalmers 48 for the fact that the English rule that the subject-matter may be differently valued in different policies while such valuation is conclusive for purposes of each policy, gives rise to curious anomalies in the working out of the rules of double insurance under a valued policy in terms of s 32(2)(b) of the Marine Insurance Act.

<sup>321</sup> See again § 1.2 *supra*.



proof of the insured's interest in and/or ownership of, as well as of the value of the object in question.<sup>322</sup>

Initially the aim of the policy-proof-of-interest clause was merely to relieve the insured of his usual burden of proof, while retaining the right for the insurer himself to prove the absence of any or of a sufficient interest. There is no doubt that for the insured the clause was a welcome addition to the insurance contract in that it prevented insurers from relying on technical objections to the insured's proof of the risk or interest he had in the insured property and of the loss he had suffered by the occurrence of the event insured against. By its insertion, the parties could genuinely have had no intention other than to conclude a legally valid insurance. The only intended effect of the clause was to shift the insured's burden of proving the presence of an interest to the insurer who bore the burden of having to show the absence of an interest.

However, the clause soon gave rise to abuses. Thus, the parties additionally agreed that the insurer would not be permitted to prove the absence of an interest, and thus made wagering under the guise of insurance possible in that it facilitated the insurance of a ship by a non-owner of the ship who did not have to prove the existence or extent of any interest he may have had in that ship; he merely had to prove the non-arrival of the ship as a result of a total loss but did not have to prove that he suffered any loss by reason of such non-arrival of the insured vessel. It was then that the practice of insuring in this way attracted the attention of legislatures.

## 6.2 Examples of Policy-proof-of-interest Clauses in Roman-Dutch Law

Policy-proof-of-interest clauses are of an ancient origin and appeared from early on in insurance policies.<sup>323</sup> Also from early on legislative provisions appeared which sought to counter the abuses perpetrated in connection with these clauses.<sup>324</sup>

In Dutch insurance practice the clause was also not unknown and many examples of it exist. Policy-proof-of-interest clauses, that is, clauses in terms of which the production of the policy was regarded as sufficient proof of the existence and value of the insured's interest in the object at risk and thus of the amount of loss he had suffered in the case of a total loss of that object, appear to have been combined often in Dutch insurance practice, at least in the latter part of the eighteenth century, with valua-

<sup>322</sup> As to policy-proof-of-interest policies, see generally Dorhout Mees *Schadeverzekeringsrecht* 112; Mees *De assecuratione* 51-53.

<sup>323</sup> See eg Asser *Review* 483-484. In Venetian policies in the fifteenth century, clauses such as '*habeat vel non habeat*', '*partecipit vel non partecipit*', '*interesse vel non interesse*' and '*fondo o non fondo*' eliminated the interest requirement or reversed the burden of proof as to the existence of an interest (the insurer had to show that the insured had no interest). By contrast the clause '*valendo o non valendo*' merely provided an insured with the advantage of a partial relief of the burden of proof: he did not have to present exact but only global proof of the value of the insured goods. See further Nehlsen-Von Stryk *Seeversicherung* 136-150.

<sup>324</sup> See eg Hammacher 90-91, referring to the relevant provisions in the various Barcelona ordinances in the fifteenth century.

tion clauses. The policy which could be produced as proof of the interest was therefore almost invariably a valued policy. A few such clauses may be referred to by way of example.

The first example is unusual. It was a contractual arrangement between the parties concerning the insured's burden of proof, short, at least in theory, of shifting the burden on to insurer as was done by way of valuation clauses in valued policies. In an Amsterdam policy on a fishing boat concluded in 1637, the insurers undertook to accept the proofs offered by the insured of the loss or damage and not to object to it in any way (*'ende beloven oock volcomen gelove te geven de bewysen, die de geass.den als van schade ofte verlies sal exhiberen, sonder daerjegens te exciperen in eeniger manieren'*).<sup>325</sup> A number of matters are unclear. For example, did proof of the loss or damage refer to the occurrence, or to the extent of such loss or damage, or to both? Further, did this mean that the insured could present even totally inadequate proof of the loss or damage and that the insurer could not object, so that the insured had to prove practically nothing at all, except possibly the conclusion of contract?

In 1672 in an Amsterdam hull policy on the *'Witte Haes'*<sup>326</sup> there was a more usual policy-proof-of-interest clause which supplemented a valuation clause. The insurers undertook to pay the full sum insured promptly and to do so even merely on the strength of an informal and honest declaration by the insured, and to accept the policy valuation and the policy itself as sufficient proof, without requiring any further proof (*'en op dat des selfs simpele en sincere verklaringe, alsoo de voorsz taxatie voor reeckeningh, en dese Police voor vol bewys aennemem, sonder op eenigh ander of nader bewys te exciperen'*), presumably of the value and the loss of the ship and of the insured's interest in her.

In an opinion delivered in the same year,<sup>327</sup> the goods policy in question contained an undertaking by the insurers to pay the insured in the case of a loss without objecting to any accounts or documents, which, presumably, the latter could employ to substantiate his claim, but by accepting his informal declarations in good faith (*'belovende, in cas van schade, sonder kosten te betalen, sonder op enige Rekeninge of Documenten te excipieren, maar sullen sijn simpele Verklaringe geloof geven, en dat alles ter goeder trouwe'*). In the opinion there was mention of the fact that in the case of a loss, the insured's declarations had to be accepted in terms of the policy (*'aan wiens simpele Verklaringe, in cas van schade, geloof werd gedefereert in de Policen'*). The policy therefore provided that in the case of the occurrence of loss or damage (which the insured presumably still had to prove), a mere declaration by the insured would suffice and that the insurers would not require any further proof, presumably of the value the goods or of the extent of the insured's interest in, and the loss he suffered in respect of, those goods.

<sup>325</sup> See Den Dooren de Jong 'Practijk' 19.

<sup>326</sup> See Den Dooren de Jong 'Practijk' 21. See also Appendix 24 *infra* for a reproduction.

<sup>327</sup> See *Nederlands advysboek* vol I adv 288 (1672).

In an abbreviated informal Rotterdam cargo policy from 1746<sup>328</sup> the policy-proof-of-interest clause and the valuation were rolled into one. It provided that insured's interest was valued at a specified amount and that no further proof of the value or of the interest would be required in the case of loss (*'taxeerende des geassureerds intrest op f360.- waarvan in cas van schade geen reek: factuur cognosst brief van ordre nog eenig 't minste bewijs van de waarde of vant interest sullen vordre'*). In a Rotterdam policy of 1765 on slaves<sup>329</sup> it was stipulated that the sum insured would be payable without any proof of the insured's interest other than the policy itself, which would be taken as sufficient.

Finally, to an Amsterdam policy from 1779 on an eighth share in the hull and equipment of a whaler<sup>330</sup> was added a handwritten clause containing a valuation, which was declared binding although the hull and the equipment may be worth or have cost more or less, and also providing that the insured would not have to provide any further proof of his interest in or of his ownership of the objects than the policy itself, which was declared to provide sufficient proof of the value, interest and ownership (*'zonder dat de Geassureerdens eenig ander of nader bewijs van waarde Intrest of Eigendom zullen behoeven te toonen als alleen deese polis, die voor genoegzaam bewijs van waarde, Intrest en Eigendom zal dienen'*).<sup>331</sup>

However, otherwise than may be assumed from these examples, policy-proof-of-interest clauses did not only appear in exceptional policies. Even model policy forms appended to legislation contained such clauses.

The fire policy in terms of the Amsterdam *keur* of 1744 was a valued policy<sup>332</sup> and it stipulated that in the case of loss the insured did not have to present any closer proof of the relevant values, such production of proof not being practicable, and the production of the policy itself being sufficient proof of that value. Similar stipulations appeared in the fire policy in the amending *keur* of 1775, except that it was now made clear that the policy itself served only as proof of the value of the relevant object of risk and not also of the amount of the damage or of the insured's loss (that is, the extent of

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<sup>328</sup> See Mees *Gedenkschrift* appendix 18.

<sup>329</sup> See Kracht 72.

<sup>330</sup> See Den Dooren de Jong & Lootsma 'Walvischvangst' 62-64.

<sup>331</sup> Interestingly, the following further handwritten policy-proof-of-interest clause concerning total-loss-only cover was added at the end of the policy: *'De Geassureerdens doen haar nog verzeekeren, op 't behoude vaaren, van de kiel van 't voorsz Schip daarom sullen de Geassureerdens, in cas van Schade 't Voorn: Schip, op Een of andere wijze of maniere kwam te verongelukken of weg te Raaken, geen ander bewijs van Intrest hoe ook genaamt behoeven te toonen, als alleen deese Polis, die voor genoegzaam bewijs zal dienen, daarom deeze Assurantie ook met wederzijts genoegen zonder Restorno geschied, En neemen wij ondergesz. aan in alle gevallen in Cas van Schade Prompt en zonder eenige Exceptie te zullen voldoen en betaalen zonder eenige andere Papieren of documenten te zullen vorderen, Renuntieerende van alle wetten en ordonnantien die den Inhoud deeses zoude mogen Contrarieeren of wel verbieden'*.

<sup>332</sup> See again § 5.4 *supra*.

his interest) as a result of the loss of or damage to that object by fire.<sup>333</sup> By contrast, the parcel policy in the Amsterdam *keuren* of 1744 and 1775 likewise contained a valuation clause but one in conjunction with a policy-proof-of-interest clause. The clause provided that the insured would not have to present any further proof of ownership (that is, of his interest) or of the value apart from the policy itself.<sup>334</sup>

The validity and effect of the policy-proof-of-interest clause in Roman-Dutch law were never pertinently at issue. The clause was, it would seem, valid, except in so far as it may have amounted to a contravention of a legislative requirement. That was only possible in respect of the Middelburg *keur* of 1719 and the Amsterdam *keur* of 1744 where proof of the existence and the extent of the insured's interest was specifically mentioned.<sup>335</sup> But then, one of the policy forms in terms of latter *keur* contained a policy-proof-of-interest clause so that even that possibility is not clearly established.

By contrast, the Hamburg *Assecuranz-Ordnung* of 1731 had already pertinently curtailed the practice of inserting policy-proof-of-interest clauses in insurance policies.<sup>336</sup> In art XIII-2 it required that the insured prove not only the occurrence of the loss, but also his interest in the object at risk. And, the article continued, even where the parties had expressly agreed that the policy would be sufficient proof of that interest, the insured was not relieved of the proof required by the measure should the insurer require such proof. By this provision the abuses of insurance without interest perpetrated by way of policy-proof-of-interest clauses were prohibited while such clauses themselves were not prohibited and could still be employed to shift the incidence of the burden of proof onto the insurer.

Decisions of the Hamburg Admiralty Court earlier in the eighteenth century had already required proof of the existence and extent of his interest by the person who claimed payment on a policy. It held that the mere presentation of the policy did not suffice in this regard, probably because policies did not always indicate or identify the person for whose benefit they had been concluded.<sup>337</sup>

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<sup>333</sup> See further Van der Keessel *Praelectiones* 1434 (*ad* III.24.4) for this difference; and also Goudsmit *Zeerecht* 346.

<sup>334</sup> The clause read: '[E]n zal de geassureerde geen nader ofte ander bewys van Eigendom ofte waarde behoeven te vertoonen, dan alleen deze blote Police, waar mede wy in cas van avary ofte schaaide volkomen genoeg en getaxteerd en gepriseerd op een somma van f ... welke by alle voorvallen tot wederyds genoeg en getaxteerd en gepriseerd op een somma van f ... welke by alle voorvallen tot reglement zal dienen'. See also Dorhout Mees *Verzekering* 17; Goudsmit *Zeerecht* 347.

<sup>335</sup> See again ch II § 6.2 *supra* for the requirement of an interest in Roman-Dutch law.

<sup>336</sup> See eg Dreyer 162-165; Hammacher 90-91.

<sup>337</sup> Thus, in *Peinhorst v Meckhauser* (1723) the prohibition in the policy '*in cas van Schade ... enig ander Bewys ofte Document dann alleenigh dese Police te produceeren*' was not understood as a permissible contractual release of the insured from his obligation to prove his interest. In *Schack v Halsey* (1726) the Court was faced with a clause intending to relieve the insured of the need to prove his interest. In terms of the clause it was agreed that in the case of loss '*geen Reekning of Connossement*' need to be shown. The ship carrying the insured goods was lost and a claim instituted on the policy. The crew gave evidence that goods to the value claimed had been loaded but the Admiralty Court nevertheless required formal proof of the insured's interest, ie, of the insured's loss. See further Frenzt *Hamburgische Admiralitätsgericht* 195-200.

In Roman-Dutch law policy-proof-of-interest clauses had apparently not yet given rise to problems of such consequence that the municipal legislatures saw fit to interfere to prevent an abuse of such provisions. The absence of a fully worked out interest theory at the time may also have contributed to the absence of any legislative response to and interest in this practice.

### 6.3 Policy-proof-of-interest Clauses in the *Wetboek van Koophandel*

In Dutch law<sup>338</sup> a policy-proof-of-interest clause in terms of which the insured is relieved of the burden of proving the existence of his interest and by which the insurer bears the burden of proving the absence of that interest or the presence of a smaller interest than that insured,<sup>339</sup> is perfectly valid according to the Dutch courts. Put differently, where the intention with the clause is not to waive the requirement of an interest but merely to facilitate the proof of the interest, and by contractual arrangement to shift the burden of such proof, it is not objectionable.<sup>340</sup>

However, the position is different if the clause goes further and additionally declares that the insurer is not permitted to prove the absence of the interest, or that he waives any reliance on the absence of an interest,<sup>341</sup> and where it therefore appears that the parties intended that no interest would in fact be required.<sup>342</sup> The presence of

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<sup>338</sup> As to the policy-proof-of-interest clause in Dutch law, see eg Dorhout Mees *Schadeverzekeringsrecht* 546-547; Van Leeuwen *Behouden-varen* 1-3, 10, 23, 45 and 55; and Mees *Verzekering* 51-53 and 60-61.

<sup>339</sup> For example, a clause providing as follows: '*[Z]ullende tot bewijs van interest, waarde of eigendom verstrekken deze polis, en hetgeen men verder te goeder trouw zal kunnen produceeren*', or '*zonder verder bewijs van interest dan deze polis*' (see Mees *Verzekering* 51).

The policy-proof-of-interest clause must be distinguished from the clause in terms of which the insurer undertakes to pay whomever may be concerned, or the bearer of the policy (see ch X § 6 *supra*). Such an unnamed insured too must prove his interest in the object before he is able to recover on the policy, ie, he must be able to prove that the insured property in fact concerns him because he has an interest in it. The clause insuring 'for whom it may concern' or the bearer clause does not, like the policy-proof-of-interest clause, result in a reversal of the burden of proof as regards the existence or the absence of an interest. See further on this point Dorhout Mees *Schadeverzekeringsrecht* 157-158.

<sup>340</sup> The argument appears to be that such a policy-proof-of-interest clause does not mean that no interest is required, merely that the presentation of the policy by the insured will be sufficient proof of such interest in the absence of proof to the contrary by the insurer.

<sup>341</sup> Such as where it is provided as follows: '*[R]enunciërende wel voorbedachtelijk van al hetgeen in cas van schade mogt teret komen of geborgen worden, waarvan wij nimmer zullen profiteeren, maar dat uitdrukkelijk komen zal ten voordeele van den geassureerde alleen*'. See Mees *Verzekering* 52.

<sup>342</sup> An insurance on such terms is known as '*behouden varen verzekering*', ie, insurance in terms of which the insurer undertakes against payment of a premium to pay the sum insured to the insured should a particular ship as a result of a total loss not arrive at a specified destination without the insured having to prove, nor insurer being permitted to disprove, any interest or ownership otherwise than by presentation of the policy.

such a renunciation is null and void<sup>343</sup> in terms of the general principle laid down as regards renunciations in art 254,<sup>344</sup> given that the existence of an interest is required by art 250.<sup>345</sup> It is therefore a question of an interpretation of the relevant clause and, ultimately, of the intention of the parties in every instance. The actual presence or absence of an interest will no doubt play a role in this regard.

#### 6.4 Policy-proof-of-interest Clauses in English Law

English law adopted a completely different and much stricter approach to policy-proof-of-interest clauses than did Dutch law.<sup>346</sup> In essence, the mere presence of such a clause in a policy is fatal, irrespective of the intention of the parties; irrespective of whether or not it is merely intended to effect a shift in the burden of proof as regards the interest from insured to insurer; and irrespective of whether or not an interest in fact exists. And it is fatal not only in the sense that the clause itself is void but in the sense that the whole insurance is nullified. The reason for this difference becomes clear when the history of the clause in English insurance law is considered.

Originally in England, as elsewhere, policy-proof-of-interest clauses were inserted into insurance contracts in an honest attempt to overcome, for the insured, the problems attendant upon proving the existence and the extent of his interest in a ship or goods. Later, however, the aim with the clause changed. Although wagers were valid and enforceable at common law if the intention of the parties to wager was clear, the common-law courts regarded wagers in the form of insurance contracts differently. They thought the form belied any intention of wagering and thus declared such contracts invalid if there was no actual interest present to enable the insured to recover.<sup>347</sup> To counter this, parties to insurance contracts inserted policy-proof-of-interest clauses in their policies to make it clear that the intention was to wager, that is, to pay irrespective of interest (that is, as another version of the clause provided, 'interest or no interest') and of any loss by the insured or of the extent of such loss, and that the intention was not to insure, that is, not to indemnify against an actual loss.<sup>348</sup>

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<sup>343</sup> That is, the clause itself but not contract of insurance as a whole is null and void.

<sup>344</sup> Article 254 provides that all renunciations of what is required by law as essential for the insurance contract or of what is expressly prohibited, are invalid. See again ch VIII § 5.2.4 *supra*.

<sup>345</sup> See again ch II § 6.2.3 *supra*.

<sup>346</sup> See generally Dorhout Mees *Schadeverzekeringsrecht* 666.

<sup>347</sup> See again ch II §§ 5.2.5, 6.4.2 and 6.4.4 *supra* as to the English law of wagering.

<sup>348</sup> Thus, in *The Sadlers' Company v Badcock* (1743) 2 Atk 554, 26 ER 733, where the background to the policy-proof-of-interest clause was described, it was stated (at 556, 734) that '[in] insurance of ships ... interest or no interest is almost constantly inserted, and if not inserted, you cannot recover unless you prove a property.... The common law leant strongly against these [policy-proof-of-interest] policies for some time, but being found beneficial to merchants, they winked at it. New laws have been enacted, which make it a felony to destroy ships, and the temptation to it has arisen from *interest and no interest* inserted in policies' (the italics appear in the report). In the report of this case in (1743) 1 Wils KB 10, 95 ER 463 it was stated that '[I]nterest or no interest must be inserted in policies of insurance of ships, or the insured must prove he had interest on board'.

It was against such valid wagering insurances, the occurrence of which had become widespread in practice, not only among incidental part-time underwriters but even among insurance companies,<sup>349</sup> that the English Legislature acted in the middle of the eighteenth century.

The legislative response to policy-proof-of-interest clauses came in 1746. The Marine Insurance Act of that year<sup>350</sup> introduced a rather heavy-handed response. It did not simply declare invalid insurances concluded without an interest, but all insurances concluded irrespective of interest ('interest or no interest'), even if there was in fact an interest present sufficient to support the insurance. In short, it prohibited policies which bore on the face of them the *indicia* of wagering, whether they were in fact wagering policies or not. So seriously did it consider the abuses arising from the use of policy-proof-of-interest and similar clauses, that the Legislature ignored the fact that a policy-proof-of-interest policy was not necessarily a wager policy if the insured in fact had an interest.

Section 1 of the Act of 1746 prohibited and declared null and void 'Assurances ... on any [British] Ship or Ships ... or on any Goods, Merchandizes or Effects laden or to be laden on board of any such Ship or Ships, Interest or no Interest, or without any further Proof of Interest than the Policy, or by way of gaming or wagering, or without benefit of Salvage to the Assurer'. This it did because of the various abuses that flowed from the practice of inserting such terms in insurance policies. The aim with this prohibition was, according to the preamble of the Act, to prevent such abuses for the benefit of the maritime trade and the insurance business.<sup>351</sup>

That the Act was exclusively concerned with the welfare of trade and the insurance business and with safety at sea and that the discouragement of and opposition to wagers as such (which, it must be remembered, were still valid and not *per se* unlawful or immoral) generally played no role at all, appears convincingly from the exceptions in terms of ss 2 and 3 of the Act in terms of which wagering insurances were still permitted in certain instances.<sup>352</sup> It appears also from the fact that the Act did not

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<sup>349</sup> Thus, the London Assurance Corporation for many years accepted risks of a speculative nature, 'interest or no interest, and, in case of loss, without further proof of interest than the policy and without the benefit of salvage to the Assurer'. See Drew 42.

<sup>350</sup> 19 Geo II c 37. It has already been discussed in more detail in ch II § 6.4.4 *supra*.

<sup>351</sup> Namely, to paraphrase the preamble, to prevent the further fraudulent loss and destruction of ships with their cargoes insured and encouraged by such wagering policies and the many prohibited and clandestine trades which were concealed and insured by means of such insurances, and also the 'mischievous kind of gaming or wagering, under the Pretence of assuring the Risque on Ship' which had perverted the institution and laudable aims of insurance.

<sup>352</sup> Namely on foreign ships, because the Government had no interest in their preservation or in preventing frauds in respect of them; on goods to or from any Spanish or Portuguese ports in Europe or America, because the Government wanted to encourage smuggling to those ports; and on British privateering vessels, the activities of which the Government sought to encourage by allowing the conclusion of wagering insurances on them.

attempt to curb all forms of wagering insurance but only wagering marine insurances; wagering insurances on lives and other forms of property and events remained valid.<sup>353</sup>

The scope of the Marine Insurance Act of 1746 was further restricted by judicial interpretation. Thus, in *Lewis v Rucker*<sup>354</sup> it was held that a valued policy was not a wager policy within the Act. The former alleviated the insured's burden of proof in that he no longer had to prove the value or amount of his interest in the insured property but still had to show some interest, while a wager policy dispensed with all proof of the existence of an interest.<sup>355</sup>

The Marine Insurance Act of 1906 largely but not precisely reenacted the effect of the Act of 1746, which it repealed in s 92. Although slightly differently and probably less confusingly worded, s 4(1) declares void all contracts of marine insurance by way of gaming or wagering. A contract of marine insurance is deemed, by s 4(2), to be a gaming or wagering contract, firstly where the insured has no insurable interest as defined by the Act and the contract is entered into with no expectation of acquiring such an interest, or, secondly,<sup>356</sup> where the policy is made 'interest or no interest' or 'without further proof of interest than the policy itself' or subject to any other similar term.

Section 4 therefore voids marine insurance policies which contain a policy-proof-of-interest or similar clause, such clause being taken to indicate wagering, whether or not the policy in question is in fact an actual wager policy. The clause renders the contract void, irrespective of whether, at the time when the policy is issued, the insured in fact has an interest or an expectation of acquiring an interest.<sup>357</sup>

Unlike the Act of 1746, the Act of 1906 merely declares such contracts void but does not prohibit and therefore does not render them illegal. Section 4 was therefore supplemented by s 1 of the Marine Insurance (Gambling Policies) Act of 1909<sup>358</sup> which renders the conclusion of wagering policies of marine insurance an offence if it is done without any interest.<sup>359</sup> Thus, policy-proof-of-interest policies where there is in fact an interest remain merely void and are not also illegal.

<sup>353</sup> They were prohibited only by the Life Assurance Act of 1774 and the Gaming Act of 1845.

<sup>354</sup> (1761) 2 Burr 1167, 97 ER 769.

<sup>355</sup> See again § 5.6 *supra*.

<sup>356</sup> Even where there is such an interest.

<sup>357</sup> See further eg Argyroudi 87-90; Chalmers 9. Other relevant provisions on the topic of wagering insurances in the Act are s 75(2) (nothing in the provisions on the measure of indemnity will prohibit the insurer from disproving interest wholly or in part) and s 84(3)(c) (the premium is returnable where the insured has no insurable interest throughout the currency of the risk, provided that this rule does not apply to policies effected by way of gaming or wagering).

<sup>358</sup> 9 Edw c 12.

<sup>359</sup> In terms of s 1, if (a) any person effects a contract of marine insurance without having any *bona fide* interest, directly or indirectly, either in the safe arrival of the ship on which the contract was made or in the safety or preservation of the subject-matter insured, or a *bona fide* expectation of acquiring such an interest; or (b) if any person in the employment of the owner of a ship (not being a part owner) effects a contract of marine insurance on a ship and the contract is made 'interest or no interest' or 'without further proof of interest than the policy itself' or subject to any other similar term, such a contract will be deemed



## 7 The Measure of Indemnity

### 7.1 Introduction

Once the insured has proved the occurrence of the event insured against, the fact that he has suffered a loss as a result (that is, that he has an interest), and the insurable value of the object at risk if that value has not been agreed, it is possible to calculate the amount of compensation the insurer is liable to pay and the insured is entitled to claim under the policy. This amount is nowadays commonly and conveniently referred to as the measure of indemnity although the phrase was not in use in earlier times.

The extent of the insurer's liability or the measure of indemnity depended on and was limited by two factors, the sum insured<sup>360</sup> and the amount of the insured's loss. The latter factor, in turn, was determined with reference to the value of the object at risk (and then either its insurable value or its agreed value<sup>361</sup>), the type of loss,<sup>362</sup> and the extent of the insured's loss by the loss of or damage to that object.<sup>363</sup>

Depending on whether the policy was an unvalued or a valued policy, the insurable or agreed value was therefore an important element in the calculation of the measure of indemnity. The insured's loss was directly or indirectly calculated with reference to that value.

Furthermore, the measure of indemnity depended, among other matters, on the nature of the loss. Different measures were applied, depending on whether the loss was a total or a partial loss. In practice, too, different measures emerged in certain instances depending on the nature of the object at risk.

The calculation of the measure of indemnity and the settlement of losses fell, of course, in the realm of expertise of a specialist professional, the adjuster, and lawyers have over the centuries rightly expressed some trepidation if not reluctance to express any opinion on, let alone to become involved in, this highly intricate branch of marine insurance practice where much in any case depended on the usages and customs of the professionals involved. After perusing the numerous cases mentioned by Magens, and the calculations shown on how one arrived at the adjustment and settlement of general average and particular average losses, one can only agree with his following remark:

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to be a contract by way of gambling on a loss by maritime perils, and the person effecting it will be guilty of an offence. If proceedings are taken and the contract was made subject to such a term, it is deemed to be one by way of gambling unless the contrary is proved.

<sup>360</sup> See again § 2 *supra*.

<sup>361</sup> See again §§ 3 and 5 *supra*.

<sup>362</sup> See ch XV *supra*.

<sup>363</sup> That is, the extent to which the insured's interest in the object had been impaired by that loss or damage.

'And we are thoroughly persuaded that the Lawyers of most Eminence will allow, that such Matters as are contained in the foregoing Cases, may be much better decided by experienced Merchants, and good Accomptants, than by Persons who have studied the Law only.'<sup>364</sup>

What follows is therefore no more than a brief outline of the salient points as they appear from the relevant sources.

## 7.2 The Measure of Indemnity in Roman-Dutch Law

It appears that in general the earlier Dutch insurance legislation saw fit to leave the calculation and assessment of loss and indemnity to the insurance practice. Only in the latter part of the eighteenth century did the Amsterdam Legislature provide a rudimentary regulation by a statement of the applicable principles. Needless to say the topic attracted little attention from legal writers.<sup>365</sup>

### 7.2.1 Total Loss

In the case of a total loss of an insured ship, goods, or freight, or for that matter any other object of risk, the insured was in principle entitled to the agreed value of that property in the case of a valued policy, or to the insurable value of that property in the case of an unvalued policy. This was recognised in Antwerp customary law at the beginning of the seventeenth century<sup>366</sup> and also by Van der Keessel at the end of the eighteenth century.<sup>367</sup>

However, that was only true in so far as the sum insured for was not smaller than the insurable or agreed value of the insured object. It is more correct to state, therefore, that in the case of a total loss the insurable or agreed value, or the sum insured was payable, whichever was the smaller. Only a part of the insurable or agreed value was

<sup>364</sup> Essay vol I at 428.

<sup>365</sup> As to the settlement of losses ('*schaderegeling*'), see generally Mullens 89-93.

<sup>366</sup> Thus, art 280 of par 9, title 11, part IV of the Antwerp *Compilatae* of 1609 (see De Longé vol IV at 316) stated that the payment by the insurer always occurred with reference to the insurable value, unless there had been a prior valuation ('*de hantvullinge wort altyts genomen naer advenant van de weerde van de goeden, gelijk die bij den eersten inkoop in contanten gelde, mitsgaders in packen, vrachten ende anderssints hebben gecost, volgende tcargasoen oft factuere, ten waere de versekerde die van te voren hadde doen priseren*').

<sup>367</sup> Van der Keessel made a number of cryptic comments in this regard. He noted, eg, that in the case of a total loss of goods, the insurable value was recoverable (*Theses selectae* th 739 (*ad* III.24.6)); that the insurer must make good the entire loss - this, of course, was not unqualifiedly correct: eg it is patently wrong in the case of an under-insurance, a franchise, or a limited interest - and that in the case of a total loss the full sum insured was payable (*Theses selectae* th 757 (*ad* III.24.13)); and that in the case of a total loss the insurer had to pay the full amount he had underwritten and promised in the insurance contract, and in the case of a total loss of a ship the full estimated value of the ship had to be paid (*Praelectiones* 1471 (*ad* III.24.13)).

recoverable in the case of a smaller sum insured therefore.<sup>368</sup> Furthermore, other provisions of the policy<sup>369</sup> too could impose a further limitation on the insurer's liability, as could the fact that the insured's loss by reason of the loss of the object at risk was smaller than the relevant value of that object, that is, that the insured had a limited interest in that object. The most obvious example of a limitation on the insurer's liability to pay the insurable or agreed value, though, occurred in the case of a partial loss.

## 7.2.2 Partial Loss

In the case of a partial loss, a particular proportion of the insurable or agreed value was recoverable. The problem was to determine that proportion. As a rule it involved a comparison of the value of the object at risk at different times, the one some time before or at least assuming the absence of the loss, the other some time after or assuming the occurrence of the loss. This comparison showed the extent to which the object had depreciated in value or the extent to which it had been damaged. That extent was then applied to the insurable or agreed value to determine the measure of indemnity. However, this method was not adopted in all cases, as will be shown shortly.

### 7.2.2.1 Partial Loss of Goods

As far as goods or merchandise were concerned, s 35 of the Amsterdam *keur* of 1744 provided that in the case of a partial loss ('*Avary of Schaaden*') befalling the insured goods during a voyage by an external fortuity, the indemnity had to be apportioned over the gross value of the goods in an undamaged condition at their destination ('*sal gerepartieert*<sup>370</sup> *worden over het Bruto Capitaal, dat de Goederen gezond zijnde, ter plaatse hunner destinatie souden bedragen*'), and by implication that a proportion of the agreed or insurable value was recoverable from the insurer.

Section 35 was clarified by the Amsterdam amending *keur* of 1756. It now provided that in the case of a partial loss to the goods occurring during the voyage by an external fortuity, and in the case of such goods having arrived at their destination ('*als dezelve ter plaatse hunner destinatie zyn gearriveert*'), the value of the undamaged goods (their sound value) at the destination had to be apportioned over their actual gross value ('*zal gerepartieert worden over het Bruto Capitaal, dat de Goederen, gezond zynde, ter plaatse hunner destinatie zouden bedraagen*').<sup>371</sup>

The only Roman-Dutch authors to expand on the measure of indemnity in the case of a partial loss of goods were Van der Keessel and, in less detail, Van der Linden.

<sup>368</sup> As to the sum insured, see § 2 *supra*.

<sup>369</sup> For example, those concerning franchise. See again ch XV § 7 *supra*.

<sup>370</sup> The word '*repartieren*' means to divide ('*verdelen*') or apportion ('*na verhouding omslaan*').

<sup>371</sup> As to s 35, see also Goudsmit *Zeerecht* 338-339.

Van der Keessel<sup>372</sup> distinguished between three instances of partial loss, the one where a part only of the goods were lost and did not arrive at the destination, the other where all the goods arrived at the destination but in a damaged condition (this situation was the one provided for in s 35), and the third a combination of the first two.

The first case may be termed a total loss of a part of the goods. It occurred where a part of the insured goods did not arrive at the destination while the other part did arrive in an undamaged condition. In this case, Van der Keessel explained, the indemnity had to be calculated with reference to the cost price of the goods plus all the expense incurred in respect of them up to loading, that is, with reference to the insurable value of the goods.<sup>373</sup>

Although not explained in such detail by Van der Keessel, the assumption was that the insurable value of the part lost was recoverable in the case of an unvalued policy, or, in the case of a valued policy, such proportion of the agreed value as the insurable value of the part lost bore to the insurable value of the whole.<sup>374</sup>

By contrast, in the second case, where the insured goods arrived at their destination but in damaged condition and thus with a depreciated value,<sup>375</sup> a different and, incidentally, a more acceptable basis for the calculation of the measure of indemnity could be and was applied. The amount payable by the insurer was calculated with reference to the price at which the goods in question could have been sold at that destination had they arrived in a sound condition, with freight and other expenses not being taken into account. Thus, the net sound value of the goods at their destination was employed in this instance.<sup>376</sup>

Although again not explained by Van der Keessel in such detail, the underlying assumption was that with this form of partial loss, such proportion of the insurable

<sup>372</sup> *Theses selectae* th 739 (ad III.24.6); *Praelectiones* 1453-1454 (ad III.24.6).

<sup>373</sup> See again § 3.2 *supra*.

<sup>374</sup> This was suggested, albeit not conclusively or clearly, by Bynkershoek's account of a case before the *Hooge Raad* in 1711 (see *Observationes tumultuariae* obs 779, *Quaestiones juris privati* IV.4) which concerned a claim for compensation of the damage suffered when a part of the goods was lost when the ship conveying them sank. It appears that the goods were insured for f5 000, the cargo having cost the insured f4 776, to which amount she (this was the case of the female insured: see again ch IX § 1.1 n1 *supra*) added the insurance premium, and from which she then deducted the value of the goods salvaged from the wreck. Accordingly the insured estimated her loss at 81½ per cent, which she claimed from the insurers (she therefore claimed 81½ per cent of f5 000 from them). Unfortunately the parties reached a settlement on the '*begrooting der schade*' and this aspect was not considered further by the *Raad*.

<sup>375</sup> In this case, it must be stressed, there was no total loss of any part of the insured goods.

<sup>376</sup> It is important to note that while in the case of a total loss of insured goods or a total loss of a part of insured goods, the insurable value of goods (which was their value at the time and place of departure) played a role, in the case of a partial loss in the form of a safe but damaged arrival, their value at the time and place of that arrival (and not their insurable value) was relevant. This was most clearly brought out by Van der Linden *Koopmans handboek* IV.6.8 who noted that in the case of a (total) loss the value of goods was assessed ('*begroot*') in accordance with their invoice price ('*inkoopsprijs*'), and in the case of goods which arrived at their destination in a damaged condition, their value was assessed in accordance with the price they would have fetched there had they arrived in an undamaged condition.

value of the damaged goods in the case of an unvalued policy, or such proportion of their agreed value in the case of a valued policy, was recoverable as the difference between their damaged and their sound values at the place of arrival bore to their sound value there. Put differently, the proportion of depreciation on the gross sound value at the destination was determined and that proportion of the insurable or agreed value was recoverable. Put in yet another way, the real value of the damaged goods at the destination and their undamaged value there<sup>377</sup> were determined, the difference between both values was expressed as a percentage of their sound value, and that percentage represented the partial damage so that the insurer had to pay that percentage of the insurable or agreed value of the goods concerned.<sup>378</sup>

This approach was confirmed by an opinion delivered in Amsterdam in 1792<sup>379</sup> to which Van der Keessel did not refer. In this opinion the point was made that the appreciation or depreciation in the value of insured goods in the course of their voyage was of no concern to the insurers (*'Ryzing of daaling van verzekerde Goederen, welke geduurende de Reize plaats heeft, gaat de Assuradeurs in het minst niet aan'*). They were liable to compensate only the damage caused to insured goods by external accidents (*'uitwendig fortuin'*). The opinion also gave an indication of how the measure of indemnity in the case of a partial loss of goods was assessed in Amsterdam in accordance with custom and in conformity with s 35 of its *keur* of 1744.<sup>380</sup>

The third instance to which Van der Keessel referred<sup>381</sup> was the case where the all insured goods arrived at their destination, partly undamaged and partly damaged.

<sup>377</sup> That is, it had to be assumed that they did in fact arrived without any damage. That undamaged value was the market value of similar goods at the destination in question.

<sup>378</sup> Thus, in the case of goods valued at and insured for f1 200 and arriving damaged at their destination where their value in that condition amounted to f400 while their value there in an undamaged condition would have amounted to f1 000, 6/10ths (ie, 1 000 - 400 = 600; 600:1000 = 6/10ths) of f1 200 (= f720) would have been recoverable.

Another two examples. In the case of goods valued at (and insured for) f1 000 and arriving with a damaged value of f400 while their undamaged value would have been f800, the percentage of damage was 4:8 = ½ or 50 per cent, and 50 per cent of f1 000 = f500 would have been recoverable. In the case of goods valued at (and insured for) f1 000 and arriving with a damaged value of f600 while their undamaged value would have been f800, the percentage of damage was 6:8 = ¾ or 75 per cent, and per cent of f1 000 = f750 would have been recoverable.

See further Dorhout Mees *Schadeverzekeringsrecht* 351-352.

<sup>379</sup> See *Casus positien* vol II cas 38. The opinion was delivered on 31 October 1792 by Amsterdam merchants, insurers, brokers and agents (*'commissionairs'*) in insurance, as well as by legal practitioners *'postuleerende voor de kamer van Assurantie en Avaryen deezer Stede'*.

<sup>380</sup> It was explained that the assessment of the damage to 98 vats of sugar would be as follows. If the 98 vats had arrived undamaged they would have realised f8 3169:4:0. On being sold in their damaged state, they realised only f4 3173:5:3, so that the damage amounted to f3 9995:18:9, which, with the addition of the additional expense caused by the damage, had to be assessed against the gross value of f8 3169:4:0 (thus, the difference between the gross sound and the gross damaged value was assessed over the gross sound value), so that the insurers had to pay 48 per cent of the amounts they had each underwritten. As a result, the insured bore with them the fall in the value of his insured goods.

<sup>381</sup> *Theses selectae* th 740 (*ad* III.24.6). See also Van der Linden *Koopmans handboek* IV.6.8.

He stated that in the calculation of the measure of indemnity not only the spoilt goods but the sound portion of the goods too had to be taken into account. The indemnity was assessed at the proportion by which all the goods, taken together, had been diminished in value. Put differently, the percentage of depreciation or damage had to be calculated over the whole consignment, both its damaged and undamaged parts, and not merely over the damaged part. The profit on the sound goods were therefore set off against the damage or depreciation on the spoilt portion of the goods. Accordingly, the proportion or percentage of the insurable or agreed value of the insured goods recoverable had to be determined by calculating the proportion between the damage (that is, the undamaged value less the damaged value) and the sound value, and, more specifically, the sound (and damaged) value of the whole consignment of insured goods and not only of the damaged portion of it.<sup>382</sup>

This statement Van der Keessel was derived from an opinion delivered by way of *turbe* delivered by Amsterdam merchants in the last decade of the eighteenth century.<sup>383</sup> The view was expressed there, correctly according to Van der Keessel, that by virtue of s 35 of the Amsterdam *keur* of 1744 undamaged goods could not be separated from the damaged goods which were diminished in value as the undamaged goods (which may in fact have increased in value) would then extend to the insured's profit while the damage to the spoilt goods had to be borne by the insurer. Rather, the undamaged or saved goods had to be taken together with the damaged goods so that the profit on the undamaged goods could be set off against the loss on the damaged goods, and the obligation of the insurer thus be alleviated.<sup>384</sup> In their opinion<sup>385</sup> the

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<sup>382</sup> Put simply, if out of a consignment of ten identical items valued at (and insured for) f200 each and f2 000 in total, two are equally damaged, the amount of damaged is calculated by ascertaining the difference between what the consignment would have fetched in its undamaged and in its damaged condition respectively (say f2 000 - f1 800 = f200), and then proportioning that over the sound value of the whole consignment (ie, 200:2 000 = 10 per cent) and not only over the sound value of the damaged part (ie, 200:400 = 50 per cent). In this instance, therefore, f200 (10 per cent) and not f1 000 (50 per cent) of the agreed value and the sum insured would be recoverable.

<sup>383</sup> See *Casus positien* vol I cas 5. The opinion is undated.

<sup>384</sup> *'De schade op een gedeelte van een party verzekerde Goederen moet, uit kracht van de Ordonnantie der Assurantie-Kamer te Amsterdam, geslagen en gedragen worden over en door de waarde van het bruto Capitaal der geheele Party verzekerde en ter plaatse hunner destinatie gearriveerde Goederen, die dezelve, ingevolge behoortye taxatie, gezond zynde, ter zelve plaatze, ten tyde van het arrivement, waardig zouden geweest zyn'*. The word 'party' means a 'consignment'.

<sup>385</sup> The opinion concerned a Genoese Insurance policy dated 1782 which insured 231 bales (containing 7352 reams) of writing paper for (and apparently valuing it at) 30 000 lire. (For purposes of this summary, the actual figures involved have been rounded off.) Provision was made in the policy for a deductible of 5 per cent. Part of the consignment (944 reams) arrived at their destination (Lisbon) damaged by seawater, the rest (6 408 reams) arrived undamaged. A dispute arose between the insured and the insurers as to how the indemnity had to be determined. It appears that they were in agreement that the undamaged value of the consignment at the destination was 8 087 Portuguese real gross (roughly 1.1 real a ream) and that the value of the consignment as it in fact arrived was 7 652 real (or 435 real less).

The insured and insurers suggested different ways in which the amount payable by the latter had to be determined, the insurers' method not surprisingly leading to a smaller sum than that of the insured. For present purposes it is not necessary or possible to investigate these methods and their application in this case in any detail. Much of what appears from the opinion in this regard is of a highly technical and mathematical nature, and probably not meant to be comprehensible at all to innumerate lawyers. Matters

Amsterdam merchants, insurers, and consignors ('*cargadoors*') thought that it was clear, according to custom, law and reason, that the insured had to be indemnified but that he was not allowed to make a profit ('*dat de Geassureerde door zyn Assuradeurs wel schadeloos moet gehouden worden, maar dat hy, door de ramp niet moet profiteeren*'). In this case, although all the insured goods arrived at their destination, a part of the consignment was damaged by sea water, and the insurer had to compensate the insured for what, because of the damage, he received (or would receive) less for the whole consignment than he would have received for it had it arrived in an undamaged condition.

The practice that the insurable value (that is, the value at the commencement of the voyage) was relevant in the case of a total loss or a partial loss in the form of a total loss of a part, while the value at the destination was relevant in the case of the damaged but safe arrival of insured goods, may conceivably have had its origin in analogous practices customarily followed from antiquity in the adjustment of general average losses.<sup>386</sup> In calculating the contributory values of cargo in the case of a general average loss, different values were adopted depending on where the loss had occurred. If it occurred in the first half of the voyage, the goods were taken at their value upon the commencement of the voyage, while their value at their destination was relevant in the case of the loss occurring after the voyage had been more than half completed.

The same distinction was drawn and this method was also employed when determining the value of goods consigned by sea for purposes of determining and quantifying delictual damages. Thus, in an opinion in 1688<sup>387</sup> the point was made that the valuation of damaged goods had to be made with reference to their value at their destination (that is, at the price for which they could have been sold there had they arrived undamaged) in the case where the carrying ship had completed more than half of her voyage ('*begrootinge en aestimatie der verongelukte goederen, moet gedaan werden naar de waardering van de plaatse, daar na toe de goederen gevoert wierden, by aldien het Schip meerder als de halve Voyagie had gedaan*').<sup>388</sup> Interestingly

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are complicated and rendered even more obscure by the fact that the calculations are interchangeably in two different currencies, Genoese lire and Portuguese real.

Briefly, the opinion agreed with the insurers' argument that the lesser amount of 435 real which the consignment would have realised in its damaged condition had to be assessed over the undamaged value of the cargo of 8 087 real and that that proportion, less 5 per cent, of the amount of 30 000 lire was recoverable, ie, an amount of about 115 lire.

<sup>386</sup> See again ch I § 4.6.5 *supra*.

<sup>387</sup> See *Nederlands advysboek* vol I adv 243.

<sup>388</sup> In this case the goods on board the carrying ship were lost when the ship was involved in a collision with another ship. The contributorily liable owners of the latter vessel were condemned to pay the consignor of the damaged goods half of his damage. The question on which the opinion was requested was whether, in estimating the damages, the loaded and saved goods had to be valued '*soo als de selve den Bevrachter alhier te Lande komen te staan*', or whether '*de selve moeten getaxeert worden tot soodanigen prijs en somma, als de selve tot Lixboa [which was their destination] verkogt zijn, ofte verkogt soude hebben kunnen werden?*'. The answer was that the saved and damaged goods had to be valued and compensated '*tot soodanige somma, als de selve tot Lixboa verkogt zijn, ofte verkogt hadde kunnen werden, afgetrokken de vragten ende andere ongelden*'. The reason was that the ship had

enough, the authorities referred to for this view included some which set out the analogous position in the case of the adjustment of general average losses.<sup>389</sup> This would strengthen the assumption that the determination of value and the extent of damage was identical, whether for purposes of delictual damages, a general average contribution, or a claim on an insurance policy.

Along similar lines was an opinion delivered in 1674<sup>390</sup> where a cargo was damaged in a collision between the carrying ship and another vessel at a stage when the voyage from Bordeaux to Amsterdam around the British Isles had already been completed between two-thirds and three-quarters. The question arose whether the value of the goods for purposes of assessing delictual damages had to be calculated with reference to their purchase price (*'inkoop'*) plus the expense incurred in respect of them at their place of loading, or with reference to the price for which the goods could have been sold at in Amsterdam at the time the other ships in the same convoy had arrived there, with a deduction of the freight and the other expenses which no longer had to be paid. The view was expressed that the net value at the destination was appropriate in this instance. The reason was that the carrying ship had already proceeded beyond halfway on her voyage and was thus closer to the destination, Amsterdam, than to the place of departure, and with most of the perils of the voyage thus having been withstood, the closest place had to prevail. This method was founded on equity and fairness and was also that customarily applied in the case of average and shipping collisions, there being no distinction at all. The same considerations, it was pointed out, applied in making the estimation, *'het zy ten opsigte van Havery, door werpen, of door overseylen'*. There are several further authorities to the same effect.<sup>391</sup>

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completed more than half of her voyage, and in such cases there existed a long-standing custom (*'longo usu gerecipieert'*) and it was also in various cases held by the *Hooge Raad* that *'de taxatie van de verongelukte goederen gedaan moeten werden, ten prijse als de selve gegolden soude hebben, ter plaatse daar de selve gedestineert ende gemunt waren'*.

<sup>389</sup> See eg Neostadius *Decisiones* decis 48; Coren *Observationes* obs 41; Vinnius' note on Peckius *Ad rem nauticam* (ad II.4); and s 6 title IV of the *placcaat* of 1563.

<sup>390</sup> See *Nederlands advysboek* vol I adv 244.

<sup>391</sup> A few may be referred to briefly.

In an opinion delivered in 1674 (see *Nederlands advysboek* vol III adv 251) the point was made that marine damage, whether or not borne by way of average, *'altid sodanig werd voldaan, dat men het gene weg is, goed doet, naar de prijse die de goederen soude hebben gegolden, ter plaatse daar die gedestineert, en waar henen dat alrede tot over de helft van de reis gevaaren waren, mits afgetrokken werdende de vragten, tollen ende andere alle vordere onkosten, die op de goederen hadde moeten lopen, en die gedragen hadde moeten werden, al eer dat tot sodanige prijse ter gedestineerde plaatse stonde verkogt worden, .... derhalven ook van de prijs van de selve goederen moet afgetrokken werden, en ordinaris prijs van de Assurantie, die betaalt werd voor de versekeringe van de plaatse af, daar de goederen sijn geladen, tot de plaatse daar de selve sijn gedestineert geweest, [/] dewijlle dat de selve premie mede is onkosten, sonder dewelke dat de? goederen niet sekerlijk kunnen gebragt, en ter prijse als op de gedestineerde plaatse gelden, verkogt worden, [/] het sy dat men de risico daar van selfs wil lopen, of dat men sig ook door anderen wil laten versekeren'*. Thus, the cost of an insurance premium had to be deducted as well in determining the gross value, and that was so whether the owner in fact concluded an insurance or chose to bear the risk himself, in which case a value had to be placed on the risk he thus bore himself.

In another opinion, (see *Barels Advysen* vol I adv 34 (undated)), which was a note by the well-known Amsterdam advocate Van der Ende on the apportionment of loss in the case of shipping collisions



Support for the analogy between collision and general average cases on the one hand and insurance cases on the other hand appears further from a subsequent and unpublished decision of the *Hooge Raad* in 1675.<sup>392</sup> The question which arose here was whether the insured cargo of salt and wine, damaged in a collision between two ships, had to be valued according to its value at the place of loading or its price at the destination, Amsterdam. The *Raad* noted that in the case of both general average and shipping collisions this depended on whether or not the voyage in question had at the time of the damage been half completed. If more than half of the voyage still remained to be performed, it was unreasonable to calculate the value at the full price which the cargo would have realised at the place of discharge, less all expenses including the insurance premium, for, so the *Raad* reportedly thought, the insured goods should not be valued at more or less than the insured's interest.

### 7.2.2.2 Partial Loss of a Ship

It has already been explained that the insurable value of a ship was in principle taken to be her real value at the commencement of the insurance, subject to the exceptions created by the Amsterdam *keur* of 1614 and s 33 of its *keur* of 1744.<sup>393</sup> However, no direct Roman-Dutch authority could be traced on the way in which the measure of indemnity was calculated in the case of a partial loss of the insured ship. It is therefore uncertain whether, and if so, in what way, the ship's depreciation in her insurable value was employed in this regard or whether some other basis, such as the cost of her repairs, was used to determine what proportion of the insurable or agreed value was recoverable from the insurer.<sup>394</sup>

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and in the case of general average (*memorie of aentekening uit de Schriften van A van den Ende: hoe de verdeeling van schaele word gedaen, in geval van overzeilinge, en in geval van averye grosse*), a twofold distinction was drawn. On the one hand there was the case where the goods were lost (*verloorene goederen*). In both a collision and a general average loss the goods were in such a case estimated at the value they would have had at the destination if loss or jettisoning had occurred after the voyage had already been more than half completed, or, if the voyage had not yet advanced that far, at their cost price. On the other hand there was the case where the goods were merely damaged (*behoudene goederen*). In both a collision and a general average loss the goods were estimated according to their cost price if the voyage had not been more than half completed when the damage occurred, but if it had been more than half completed, the goods were estimated at the value they would have had at their destination.

Bynkershoek *Quaestiones juris privati* IV.21 also remarked that there was no difference whether the goods were damaged in a collision between ships or by jettison, so that in the case where goods were damaged in a collision regard was had to the value of the goods lost and that of the goods undamaged, *'als of het een ommeslag van Werping betrof'*.

<sup>392</sup> See Ockers *Decisien* part II, *decis kk*, at 328-329.

<sup>393</sup> See again § 3.3.2 *supra*.

<sup>394</sup> Possibly an analogy could again be drawn between insurance cases on the one hand and collision cases (of which there are many in the published sources) on the other hand.

### 7.2.2.3 Partial Loss of Freight

While in the case of a partial loss of cargo in the form of its damaged arrival where the relevant value of the cargo was the cargo's value at the place of arrival *without* the inclusion of freight and other expenses,<sup>395</sup> the owners of the cargo, whether they were consignors or consignees, were permitted by s 35 of the Amsterdam *keur* of 1744, as amended in 1756, to insure separately the freight which they had to pay on the safe arrival of the cargo (*'de vragten dier Goederen, die by behoudens Reys moeten betalen'*)<sup>396</sup> and which were not reduced or discounted even if such cargo arrived in a damaged condition.<sup>397</sup>

However, s 35 continued, the freight insurer was liable to pay no more compensation than in proportion to the extent of the partial loss to the goods in question. The loss was taken to have occurred to the freight in the same measure as to the goods themselves, and had to be made good in the same proportion as that which was applicable to those goods.<sup>398</sup> Presumably the proportion recoverable was either of the insurable value of the freight as it appeared from the relevant shipping documentation or of its agreed value as it appeared from the relevant insurance policy, depending upon whether the policy in question was an unvalued or a valued policy.

In the case of a total loss of the goods, when freight was no longer payable and the insurance of the freight became null and void, a return of the premium for the freight insurance was possible (*'en een Totale Schade voorvallende, sal van die op de Vragten verseekert heeft, restorno kunnen gevordert worden'*). The amending *keur* of 1756 correctly added to this that in the case of a total loss of a part of the goods where some of the goods did not arrive at their destination (*'ingevalle geen totaale schaade mogt voorvallen, en maar een gedeelte der ingeladene goederen werd uitgelost'*), and where freight was therefore payable only proportionally, the insurance of a similar proportion

<sup>395</sup> See again § 7.2.2.1 *supra*. As to the deduction of freight, see also the third question considered in the opinion of 1674 (see *Nederlands advysboek* vol III adv 251) which was referred to in n391 *supra*.

<sup>396</sup> The words *'behouden aankomst'* in s 35 referred to the fact of the arrival itself and not to the arrival in an undamaged condition.

<sup>397</sup> As to the insurability of freight, see again ch V § 5.4 *supra*. In short, because of the possibility that freight remained payable despite the fact that the goods on which the freight had to be paid arrived in a damaged condition, such freight could be insured, i.e. the merchant could insure the wasted freight payable on damaged goods. A claim arose on a freight policy only if and to extent that the freight remained due despite the loss of or damage to the relevant goods.

<sup>398</sup> *'[O]nder Conditie nochtans, dat de Assuradeurs daar op [i.e. on the freight] verseekert hebbende, alleen en niet verder sullen gehouden zijn te voldoen, als de begrooting der Avary op de Goederen gevallen'*. In the Amsterdam amending *keur* of 1756 this was changed to read as follows: *'zoodanig dat de Assuradeurs, daar op verseekerd hebbende, gehouden zullen zyn te voldoen gelyke percentoos van hunne getekende sommen, als over de schaade of avarye, op de Goederen zelve gevallen, moet worden betaald'*.

of the freight also became null and void and a proportional return of the premium was similarly possible.<sup>399</sup>

As far as the insurance of freight by the shipowner or carrier was concerned, that was insurable,<sup>400</sup> to the extent that it could reasonably be established, whether by the charterparty, manifest or bill of lading, that it could be earned or lost on the insured voyage. The appropriate measure of indemnity, therefore, was the amount of such freight as it appeared from those documents or the amount agreed upon in the policy, or a proportionate part of it in the case of a partial loss.<sup>401</sup>

### 7.2.3 The Measure of Indemnity in Other Instances

The model fire policy in the Amsterdam *keur* of 1744 gave some indication of the measure of indemnity in fire insurances. It distinguished between the case where there was a total loss or merely a partial loss by fire of the object insured (*'in 't geheel, of ten deele quamen te verbranden ofte uyt hoofde van dien schade te lyden'*). In the former case the insurers promised payment of the full sum insured by each of them (*'ieder zyne geteekende Somma in 't geheel'*) while in the latter case they promised payment in proportion to the damage (*'pro rato der Geleedene Schade'*).<sup>402</sup>

This calls for some comment. In the case of a total loss the sum insured was only payable in full, of course, in so far as it was not an instance of over-insurance. What the policy probably meant to say was that the full agreed value (or the full insurable value, in the case of a unvalued policy) would be payable in the case of a total loss. In the case of partial loss, only a proportion of the agreed (or the insurable) value was payable, although the policy did not elaborate on how that proportion had to be arrived at. In all likelihood, the same proportion of the agreed (or the insurable) value would have been payable as the proportion in which the damaged value stood to undamaged insurable value, that is, the value at the time and the place of the loss.<sup>403</sup>

### 7.3 The Measure of Indemnity in the *Wetboek van Koophandel*

There appears to be no direct and express indication in the Dutch *Wetboek van Koophandel* what the measure of indemnity is in the case of a total loss. There are

<sup>399</sup> See Van der Keessel *Theses selectae* th 739 (*ad* III.24.6); *idem Praelectiones* 1453-1454 (*ad* III.24.6); and Goudsmit *Zeerecht* 338-339.

<sup>400</sup> First in terms of s 26 of the Rotterdam *keur* of 1721 and later in terms of s 15 of the Amsterdam *keur* of 1744.

<sup>401</sup> See Goudsmit *Zeerecht* 339.

<sup>402</sup> In the fire policy in the *keur* of 1775 the insurers undertook that *'alle ... schade door ons, ieder pro rato onzer Signature, ... zal worden voldaan, nevens alle de kosten op de bereddering gevallende'*.

<sup>403</sup> Thus, if a house valued at f1 000 and insured for that amount was totally lost, f1 000 would have been payable; had there only been a partial loss, so that the house, which would have been worth f1 200 had she not been damaged, was worth only f600 after her loss (thus, a 50 per cent damage or depreciation), only f500 would have been recoverable.

some indirect indications, though,<sup>404</sup> which would tend to suggest that in the case of a total loss the insurer is liable to pay the sum insured to the insured. That can only be correct, as said before, if there is no over- or under-insurance. In reality, the measure of indemnity in the case of a total loss is the insurable or agreed value of the object at risk, subject to any smaller sum insured.

The measure of indemnity in the case of a partial loss of insured goods is provided for in art 709. Again the distinction already encountered in Roman-Dutch law is drawn.

First, where a part of the insured cargo is lost, robbed or sold en route (that is, where there is a total loss of a part of the goods which does not arrive at the destination), the assessment occurs (*'wordt begroot'*) according to the invoice value or, if that is lacking, according to the insurable value of those goods.<sup>405</sup>

Secondly, in the case of the damaged arrival of the insured goods (that is, where all the goods arrive, some or all of them in a damaged condition), an expert assessment determines what the value of the goods would have been had they arrived in an undamaged condition (*'hoe veel de goederen, indien dezelve gezond waren aangebragt, zouden zijn waard geweest'*) and also what their value is in their damaged condition (*'en voorts hoe veel zij nu waard zijn'*).<sup>406</sup> The insurer then pays the proportion of the sum insured (or, rather, of the insurable or agreed value) which is equivalent to the difference between those sound and damaged values (*'zoodanig aandeel van de geteekende som als in evenredigheid staat met het verschil tusschen de beide waarden'*), excluding the cost of such assessment (*'benevens de kosten op het doen van de begrooting der schade gevallen'*).<sup>407</sup> This method of assessing the measure of indemnity in the case of the insured goods arriving in a damaged condition is clearly derived from the provisions of s 35 of the Amsterdam *keur* of 1744.<sup>408</sup>

The *Wetboek* deals extensively with the measure of indemnity in the case of a partial loss of a ship. The basis upon which the measure is determined, is the cost of repairing her damage. This cost of repair is either that actually incurred when the

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<sup>404</sup> Such as in art 717 (see *infra* as to the partial loss of a ship).

<sup>405</sup> See art 709-2 (*'volgens de factuurs-waarde of, deze ontbrekende, naar de waarde, waarvoor de goederen, overeenkomstig de voorschriften van de wet [ie art 613], verzekerd zijn'*).

<sup>406</sup> Article 712 provides when this expert assessment is to take place. In terms of art 712-1, if the insured goods arrive damaged and the damage or depreciation is externally visible, then the inspection of the goods and the assessment of the damage must be performed by experts before the goods have come under the control of the insured; in terms of art 712-2, if the damage or depreciation is not visible on discharge, then the inspection may take place after the goods have come under the insured's control, on condition that it is performed within 3 times 24 hours (ie, 3 days) after such discharge.

<sup>407</sup> See art 709-3.

<sup>408</sup> See too Dorhout Mees *Schadeverzekeringsrecht* 351-352 who refers to it as the usual method.

repairs were effected,<sup>409</sup> or, where ship has not actually been repaired yet,<sup>410</sup> that cost which would have had to be incurred had the damage been repaired.<sup>411</sup>

The general principle is laid down in art 713. In the case of damage to an insured ship, the insurer bears only two-thirds of the cost needed for her repair, irrespective of whether or not such repair has been effected, and this he does further in proportion of the insured part of the ship to the uninsured part (*'naar everedigheid van het verzekerde tot het onverzekerde gedeelte'*). One-third of the cost of repairs remains for the account of the insured by reason of the presumed improvement resulting from the new parts replacing old parts in the process of such repair (*'wegens veronderstelde verbetering van oud tot nieuw'*). Put differently, and assuming full-value insurance, the insurer bears the actual or estimated cost of repairs less a deduction of a one-third betterment new for old, that is, he bears two-thirds of that cost. Accordingly, in the case of a partial loss of a ship, her insurable value or agreed value is irrelevant and the measure adopted more closely approximates a pure indemnity than in the case of a total loss of that ship.<sup>412</sup>

If it is established, if necessary after the hearing of experts, that by reason of the repairs (*'de gedane reparatie'*) the value of the insured ship has been increased by more than a third, then the insurer pays, in the same proportion as laid down in art 713, the full amount of the cost actually incurred, less the increase in the ship's value occasioned by the repair (*'naar evenredigheid als bij 713 vermeld, het volle beloop der gemaakte kosten, onder aftrek der door verbetering vermeerderde waarde'*).<sup>413</sup> However, if the insured proves that the repair of the ship did not result in any improvement or increase in her value at all, and specifically if a new ship is damaged on her first voyage or if new sails or equipment are damaged, there is to be no deduction of one-third new for old (*'heeft de aftrek van 1/3 geen plaats'*), and the insurer is liable to compensate the full cost of the repairs (*'het geheele beloop der reparatiekosten'*), in the proportion of the insured to the uninsured parts as is mentioned in art 713.<sup>414</sup>

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<sup>409</sup> In which case the amount of the cost is proved by accounts and all other methods of proof and, if necessary, by the estimation of experts (see art 714-1).

<sup>410</sup> The repair of a damaged insured ship is not compulsory. Further, although repair is usual in the case of marine insurance and the cost of repair is also relevant as regards the calculation of the measure of indemnity, an agreement by the insurer to pay a third party for the repair as an alternative to payment of the insured in cash is unusual.

<sup>411</sup> In which case the amount of the cost is to be estimated by experts (see art 714-2).

<sup>412</sup> See further Suermondt *Taxatie* 41-42; and generally Dammers 53-56; Star Busmann 11-14. The latter explains that because the cost of repairs reflects the depreciated value of the ship, the insured in the case of a partial loss receives compensation calculated with reference to the value of the ship at the time of the loss, so that any appreciation in her value is for the benefit of the insurer. This is therefore the opposite of what occurs in the case of a total loss where the insurable value is the value at the time of the conclusion of the contract. In the case of a partial loss of a ship, therefore, the same system applies than in the case of fire insurance where the value at the time of the loss is the relevant value.

<sup>413</sup> See art 715.

<sup>414</sup> See art 716.

Finally, in terms of art 717, if the cost of repairs will amount to more than three-quarters of the value of the insured ship,<sup>415</sup> then the ship must, as far as the insurer is concerned, be regarded as written off or irreparable (*'moet schip, ten aanzien van den verzekeraar, gehouden worden als afgekeurd'*). In such a case her repair is no longer regarded as worthwhile and the loss is regarded as a total loss in law. Then the insurer is liable to pay the agreed or the insurable value of the ship to the insured if she was fully insured, less a deduction for the value of the damaged ship or wreck, if any remained and was not abandoned to the insurer.<sup>416</sup>

In the case of the fire insurance of immovable property, art 288-1 permits the damage to be made good by a monetary payment or by the reinstatement or rebuilding, up to the amount of the sum insured, of the damaged building.

When the damage has to be compensated monetarily, the measure of indemnity is determined by comparing the value of the object insured immediately before the loss and the value of object or what remains of it immediately after the loss. That is provided for by art 288-2.<sup>417</sup> This amount of damage is the amount recoverable from the insurer in the case of a partial loss, a relatively simple calculation compared to that employed in partial marine losses.<sup>418</sup> In the case of a valued fire policy, though, the amount of damage, expressed as a proportion of the value at the time of the loss, provides the proportion of the agreed value recoverable from the insurer.

The *Wetboek van Koophandel* also provides for the measure of indemnity in the case where, by agreement between the parties, fire damage has to be compensated by a reinstatement of the damaged insured property.<sup>419</sup> This is an innovation and was not recognised in the earlier regulation of fire insurance in Amsterdam.

#### 7.4 The Measure of Indemnity in English Law

It is not totally surprising that much in English law on the topic of the measure of indemnity corresponds to that in Roman-Dutch and Dutch law. The later codification in

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<sup>415</sup> Presumably the relevant value for this purpose is her value after she has been repaired and not eg her value upon the conclusion of the contract or at the time of the loss. See *Star Busmann 12*, however, who suggests that here too the relevant value of the ship is her value at the time of the conclusion of the insurance so that a breach of the indemnity principle is again possible.

<sup>416</sup> See further ch XIX § 2.2 *infra* for the background to and the difference between the insured's right of abandonment and the insurer's right to salvage.

<sup>417</sup> See further *Elink Schuurman Brandschade* 5-7.

<sup>418</sup> The simplicity arises from the fact that it is not necessary to determine the proportion of the insurable value (ie, the value at the time of loss) recoverable from the insurer, given that the extent of damage is calculated with reference to that very value.

<sup>419</sup> In terms of art 288-3, the insured can in that case be compelled to reinstate or rebuild and the insurer can insist that any payment in terms of the policy be expended for that purpose within a specified time. In terms of art 289-3, though, the amount paid out by the insurer may never exceed three-quarters of the cost of reinstatement, a statutory provision for a deduction new for old. The insurance of the cost of reinstatement or insurance on the basis of reinstatement value is not recognised in the *Wetboek*. See further *Elink Schuurman Brandschade* 34-35.

the Marine Insurance Act of 1906 has the advantage, though, that a number of aspects not yet clarified or identified by the end of the eighteenth century or when the *Wetboek van Koophandel* came to be drafted, could be regulated. However, there are also some pertinent differences between these systems.

The measure of indemnity generally is described in the title of s 67 of the Marine Insurance Act as the extent of the insurer's liability for a loss and more fully in s 67(1) as the sum which an insured can recover in respect of a loss on a policy by which he is insured, in the case of an unvalued policy, to the full extent of the insurable value, or, in the case of a valued policy, to the full extent of the value fixed by the policy.

The measure of indemnity in the event of a total loss of whatever subject-matter is insured, is set out in s 68. Subject to the provisions of the Act,<sup>420</sup> and subject to any express provision in the policy itself, this measure is, in the event of a valued policy, the sum fixed by the policy,<sup>421</sup> and in the case of an unvalued policy, the insurable value of the subject-matter insured.

The measure of indemnity in the case of a partial loss of goods is treated and regulated in s 71, although the provision applies subject to any express provision in the policy to the contrary. Here too a distinction is drawn between the case where a part of the insured goods is totally lost, and the case where the whole or any part of the insured goods is damaged but nevertheless arrives at the destination.

In the case of the total loss of a part, the amount recoverable from the insurer is such proportion of the insurable value in the case of an unvalued policy, or of the agreed value in the case of a valued policy, as the insurable value of the part lost bears to the insurable value of the whole consignment.<sup>422</sup>

In the case of a damaged arrival, the measure of indemnity is such proportion of the insurable value in the case of an unvalued policy, or of the agreed value in the case of a valued policy, as the difference between the gross sound value and the gross damaged value of the goods at the place of arrival bears to their gross sound value.<sup>423</sup>

The provisions of s 71 were in essence already established by Lord Mansfield in 1761 in the decision in *Lewis v Rucker*.<sup>424</sup> In this case goods, insured in terms of a valued policy,<sup>425</sup> arrived damaged at their destination where they had to be sold. The question arose as to the correct method by which to ascertain the measure of indemnity in such a case. His Lordship<sup>426</sup> agreed with the insurer that the measure of

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<sup>420</sup> As regards, eg, successive losses and the sum insured.

<sup>421</sup> That is, the agreed value, not the sum insured which is usually also fixed by the policy.

<sup>422</sup> See s 71(1) and (2).

<sup>423</sup> See s 71(3). In terms of s 71(4), 'gross value' means the wholesale price or, if there is no such price, the estimated value, with in either case freight, landing charges and duty having been paid beforehand.

<sup>424</sup> (1761) 2 Burr 1167, 97 ER 769.

<sup>425</sup> See again § 5.6 *supra*.

<sup>426</sup> Having 'thought a good deal of the point, and [having] endeavoured to get what assistance I could by conversing with some gentlemen of experience in adjustments' (at 1172, 772).

indemnity was such proportion of the agreed value (and also the sum insured by the policy in this instance) as the difference between the price the consignment obtained at its destination in its damaged condition and the price it would have obtained there had it arrived and been sold undamaged, bore to the latter price. Stated differently, the insurer had to pay 'such proportion or aliquot part of the prime cost [that is, the insurable value] or value in the policy [that is, the agreed value], as corresponds with the proportion, or aliquot part of the diminution in value occasioned by the damage'.<sup>427</sup> Of necessity, in order to determine the proportion of depreciation, the value at the port of destination and not for example the prime cost had to be employed.<sup>428</sup> But, once determined, that proportion had to be applied to the value agreed upon in the policy at the time of the conclusion of the contract or to the insurable value. Just as in the case of a total loss of goods where the insurer paid the insurable value (prime cost) or the agreed value, he, in the case of a partial loss, therefore 'has nothing to do with the market; he has no concern with any profit or loss which may arise to the merchant from the goods'.<sup>429</sup>

In s 71, as in art 709 of the Dutch *Wetboek*, the so-called market risk is therefore eliminated as much as possible in determining the measure of indemnity.<sup>430</sup>

In the case of a partial loss of an insured ship, s 69 of the Marine Insurance Act provides how, unless there is an express provision in the policy on the matter, the measure of indemnity must be calculated. Unlike the *Wetboek van Koophandel*, where the measure of indemnity in all cases of a partial loss of an insured ship is calculated with reference to the cost of repairs, s 69 distinguishes between various situations, for each of which a different measure is to be applied.

Where the ship has been repaired completely, the insured is entitled to the reasonable cost of repairs, less any 'customary deductions', but not exceeding the sum insured in respect of any one casualty. Where the ship has not been repaired at all

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<sup>427</sup> At 173, 772. The Court rejected the insured's contention that he was entitled to claim the difference between the agreed value and the damaged value at the destination from the insurer.

<sup>428</sup> Lord Mansfield explained this as follows (at 1170, 771): '[N]o measure can be taken from the prime cost to ascertain the quantity of such damage: but if you can fix whether it be a 3d, 4th, or 5th worse, the damage is fixed to a mathematical certainty. How is this to be found out? not by any price at the outset port: but it must be at the port of delivery, where the voyage is completed, and the whole damage known. Whether the price there be high or low, in either case it equally shews whether the damaged goods are a third, a fourth or a fifth worse than if they had come sound; consequently, whether the injury sustained by a third, fourth or fifth of the value of the thing: and as the insurer pays the whole prime cost, if the thing be wholly lost: so, if it be only a 3d, 4th or 5th worse, he pays a 3d, 4th or 5th of the value of the goods so damaged.'

<sup>429</sup> At 1170, 771. For further explanations of these matters, see eg *Weskett Digest* 27 sv 'Average' who remarked that the insurer was not to be prejudiced or benefitted by any loss or gain of markets; a proportion had to be taken of the invoice price or the agreed value, not of the price at the destination: the latter was employed only to determine the proportion. See further Holdsworth *History* vol XII at 538; Mackinnon 43.

<sup>430</sup> See further Buys 121 (a comparison of the gross undamaged value with the gross damaged value must yield the same result as a proportion of damage whether the market value itself appreciated or depreciated).



and has not been sold in her damaged state during the risk, the insured is entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage. Where the ship has only been repaired partially, the insured is also entitled to the reasonable cost of such repairs less any 'customary deductions', as well as to be indemnified for the reasonable depreciation, if any, arising from the unrepaired damage, provided that the aggregate amount must not exceed the cost which would have been incurred had the whole damage been repaired.

Thus, otherwise than in Dutch law, the anticipated cost of repairs is not employed in English law in the case of an unrepaired or a partially repaired ship. Instead reference is made to the reasonable depreciation resulting from the unrepaired damage. In English law only the actual cost of repairs is recognised in the case of partially lost ships. Further, in English law, the cost of repairs employed is the reasonable cost of repairs while no such qualification is expressed in the *Wetboek*.

In English law, the amount of the deduction from the cost of repairs to account for any improvements brought about by such repairs and so to allow for the theoretical betterment of the insured ship brought about by new material and parts replacing old material and parts, is wisely not specified or statutorily fixed. Provision is merely made for such deduction of new for old 'as is customary'. In earlier times the arbitrary deduction of new for old customarily made in the case of wooden ships was one-third, except if the damage occurred on the ship's first voyage, in which case no deduction was made at all.<sup>431</sup>

In the case of a partial loss of freight, the measure of indemnity, subject to any express provision in the policy, is determined by s 70 to be such proportion of the agreed value in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the proportion of freight lost by the insured bears to the whole freight at his risk under the policy.

The Marine Insurance Act also contains further provisions relevant to the determination of the measure of indemnity which are not expressly provided for in the Dutch *Wetboek*. Section 73 concerns the measure of indemnity in the case of general average contributions<sup>432</sup> and salvage charges. Section 74 deals with the measure of indemnity in the case of a liability to third parties, the measure being, quite simply, the amount payable by the insured to such third party in respect of such liability. Finally, in terms of s 75(1), in the case of a loss occurring to any subject-matter not expressly provided for elsewhere, the measure of indemnity is to be ascertained as nearly as pos-

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<sup>431</sup> See further eg Magens *Essay* vol I at 52-55; *Weskett Digest* 30 sv 'average' (in the case of damage and repairs to ships, the general custom in England is for insurers to pay two-thirds thereof and for one-third to be borne by the insured, in consideration of new work and materials in the place of the old); *idem* 459 sv 'repair' par 1 (noting that the one-third rule is an arbitrary rule of convenience: one-third is too much if the ship is new, too little if the ship is old when the damage occurs); and *ILL HR* 3 65-67 (the customary deduction of one-third new for old was well established by the beginning of the nineteenth century).

<sup>432</sup> The measure is the full amount of such contribution if the subject-matter liable to contribute is insured for its full contributory value, or such proportional part of it if it is under-insured.

sible in accordance with the earlier provisions, in so far as they may be applicable to the particular case.

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## CHAPTER XVIII

# CO-INSURANCE, DOUBLE INSURANCE, OVER-INSURANCE AND UNDER-INSURANCE

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### 1 General Terminological Introduction and Distinction

Closely related and interacting but nevertheless distinguishable concepts of insurance law and practice will be discussed in this chapter. It is necessary to distinguish these concepts very carefully and for that reason an introductory description of co-insurance, double insurance, over-insurance, under-insurance, over-valuation and under-valuation is required.<sup>1</sup>

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<sup>1</sup> A more complete description, with reference to the necessary sources, will be attempted when each of these notions is considered in more detail below.

*Co-insurance* refers to the situation where several insurers or individual underwriters are liable *on the same policy*. The insurers or underwriters liable on the same policy are known as co-insurers and they constitute a single set of underwriters.<sup>2</sup>

*Double insurance* occurs where several different insurers - or in the case of co-insurance, several sets of co-insurers - are liable on *two or more different or successive policies* effected by or on behalf of the same insured on the same property and against the same or overlapping risks.<sup>3</sup> There is also double insurance, it should be noted, where more than two policies are involved in this way<sup>4</sup> and the term 'double' insurance should not be taken literally as referring only to two and no more separate policies.<sup>5</sup>

A distinction must therefore be drawn between, on the one hand, the liability as against the insured and among themselves of different underwriters on the same policy, that is, the liability of the different underwriters in a set, and, on the other hand, the liability as against the insured and among themselves of different underwriters or sets of underwriters on different policies.

There is *over-insurance* where the property in question is insured for an amount greater than the value of that property. This may be either the real or insurable value or the agreed value of the property, depending on whether the policy in question is an unvalued or a valued policy.<sup>6</sup> Over-insurance can but does not have to occur through double insurance, that is, a person may be insured excessively in terms of a single policy or in terms of several different policies taken together.<sup>7</sup> Even though he may be over-insured, it has always been a fundamental principle of insurance law that an insured can recover no more than a compensation for his actual loss. This principle affects and has a bearing on the liability (both towards the insured and among themselves) of the underwriters or, in the case of double insurance, the sets of underwriters involved in the over-insurance.

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<sup>2</sup> Thus, there is co-insurance where a ship is insured for f2 000 in terms of a policy underwritten, eg, by ten underwriters who each subscribe f200, or by four underwriters who subscribe f800, f600, f400 and f200 respectively.

<sup>3</sup> Thus, there is double insurance where a ship is insured for f1 000 in terms of policy A (underwritten by ten underwriters who each write f100) and for f1 000 in terms of policy B (underwritten by three underwriters, two of whom write f300 and one of whom writes f400 of the risk); or where a ship is insured for f1 500 in terms of policy A and for f500 in terms of policy B.

<sup>4</sup> Thus, the ship may be insured for f1 000 in terms of policy A, for f500 in terms of policy B, and for f500 in terms of policy C.

<sup>5</sup> 'Multiple' insurance would probably be a more correct phrase although the use of the term 'double' insurance in this context is inveterate.

<sup>6</sup> Thus, there is over-insurance where a ship, actually worth f2 500, is insured for f3 000; or where a ship, which the parties agreed to be worth f2 000, is insured for f2 500.

<sup>7</sup> Thus, a ship worth f2 500 which is insured for f2 000 in terms of policy A and for a further f1 000 in terms of policy B is over-insured, just as much as where she is insured for f3 000 in terms of single policy.

*Under-insurance* occurs where the property in question is insured for an amount smaller than its insurable or agreed value.<sup>8</sup>

Over-insurance and under-insurance should in turn respectively be distinguished from over-valuation and under-valuation, which is possible in the case of a valued policy.<sup>9</sup> This distinction becomes clear if it is realised that the same object of risk may at the same time, for example, be over-valued and under-insured, or under-valued and over-insured.<sup>10</sup>

## 2 Co-insurance

### 2.1 Introduction

In Roman-Dutch law co-insurance occurred where several insurers or individual underwriters were liable on the same policy and where there was therefore a single set of underwriters. Co-insurance may be contrasted with what may be termed 'individual insurance' where the risk in terms of the single policy was borne by a single individual underwriter or, more likely in later times, a single insurance company.<sup>11</sup>

Co-insurance offered many advantages, not only to individual underwriters but also to the insured. As a method of underwriting risks, it allowed each individual underwriter to take over only so much of the risk as he was willing and financially able to do, thereby reducing his exposure on a single risk and increasing his capacity to underwrite other risks. In this way the individual underwriter was himself enabled to spread the risks he took over from insured. The practice of co-insuring on single policies furthermore assisted inexperienced part-time underwriters in that they could

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<sup>8</sup> Thus, there is under-insurance where a ship actually worth f2 500 is insured for f2 000; or where a ship which has been agreed between the parties to the insurance contract to be worth f2 000, is insured for f1 500.

<sup>9</sup> See again ch XVII § 5 *supra*.

<sup>10</sup> Thus, if a ship actually worth f2 000 is valued (ie, agreed to be worth) in the policy at f1 500, she is under-valued, but she will only also be under-insured if she is insured for less than her agreed value, eg, for f1 200. Likewise, if a ship actually worth f2 000 is valued in the policy at f2 500, she is over-valued, but she will only also be over-insured if she is insured for more than f2 500, eg, for f3 000. A ship with a real value of f2 000 which is agreed to be worth f2 500 but which is insured for f2 000 is therefore over-valued but under-insured, while, conversely, a ship actually worth f2 000 with an agreed value of f1 500 which is insured for f2 000 is therefore under-valued but over-insured. See further in this regard eg *Weskett Digest* 227-228 for distinction between what he terms the over-valuation of policies (ie, over-insurance) and the over-valuation of ships *in* policies (ie, over-valuation of the object of risk in the policy).

<sup>11</sup> The term co-insurance could conceivably also have been and still be applied (but will not be used in that sense here) to the case where several insured were or are entitled to compensation in terms of the same policy. One example of co-insurance involving co-insured occurred in a case before the *Hooge Raad* in 1725 (see *Bynkershoek Observationes tumultuariae* obs 2191; *idem Quaestiones juris privati* IV.13). Two French merchants had insured their goods in Amsterdam by a single policy. The *Hooge Raad* rejected the insurers' argument concerning the proportion of their respective interests in the goods, namely that it had not been proved '*dat ieder Franschman daar voor [ie, for the goods] de helft eigenaar van was geweest, gelyk 'er voor de helft aan ieder geassureert was*'.

co-underwrite policies with and follow the lead of more experienced associates on their local market.<sup>12</sup> For insured co-insurance was advantageous in that it eliminated the risk of their not being able to recover anything at all in the case of underwriter insolvency.<sup>13</sup>

In antecedent contracts and possibly also in the earliest insurance contracts, separate but probably identical contracts were drafted for each person who, like or as an insurer, had agreed to take over and underwrite a share of the risk. There existed an individual contract between each co-bearer or co-insurer of the risk and the person whose risk he took over. No doubt the practice of drafting separate contracts soon proved cumbersome and expensive. It was further a potentially problematic practice because of the possibility of the various contracts not containing identical stipulations, if not also a dangerous one because of the possibility of over-insurance being less detectable where separate policies were employed to insure the same risk.<sup>14</sup> For these reasons, and despite the fact that notaries or brokers involved in insurance underwriting themselves probably stood to lose financially if underwriting practices were to be simplified too much, they came to draft only a single document or policy which they took around on the market and to which participating underwriters added their names and the amount for which they underwrote the risk in question. Apart from the reduced costs, the greatest advantage of this single-policy form of co-insurance was that the incidence of liability, as opposed to the extent of the liability, towards the insured of each of the underwriters involved was identical. Not surprisingly, in the earliest practice of insurance proper in Italy, risks were insured by several underwriters in a single policy and not by several underwriters each on his own policy.<sup>15</sup>

Single-policy co-insurance was the norm also in Dutch insurance practice throughout the period under consideration in cases where individual underwriters were

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<sup>12</sup> See again ch IX §§ 2.3 and 2.4 *supra* for the role of co-insurance as a way in which the individual underwriter restricted his exposure to, and increased his capacity to take over, risk. See also ch IX § 2.7 *supra* for underwriting partnerships. These were, in a sense, an extension of the notion of co-insurance. The fact that insurers joined together in insurance partnerships meant that the underlying idea of risk-spreading among insurers appeared in a different form, namely, no longer among several insurers who underwrote the same contract and who were thus incidentally joined together as co-contractors in an insurance contract, but also among several insurers who were joined together, if not on a more permanent basis (some partnerships, it must be remembered, were concluded for purpose of an individual insurance), then at least also outside the insurance contract itself by a partnership agreement.

<sup>13</sup> See generally eg Hammacher 77; Mossner 35-42 (who makes the point that co-insurance played a primary role and reinsurance a secondary role in the distribution of risk during the early period of insurance, and that in view of its advantages, it was not surprising that co-insurance developed more rapidly than reinsurance); and Seffen 34.

<sup>14</sup> See Reatz *Geschichte* 127-128 and further § 4.1 *infra* for the need to avoid the similar danger of over-insurance through double insurance.

<sup>15</sup> See further eg De Roover 'Early Examples' 187-188.

involved.<sup>16</sup> What happened in practice was that several different individual underwriters signed their names beneath the policy (they therefore actually 'underwrote' it), adding alongside the amount for which they insured the risk,<sup>17</sup> often also adding the date of the subscription<sup>18</sup> and occasionally also the rate of premium for which they insured in so far as that differed from the rate, if any, noted in body of the policy itself.<sup>19</sup> Even when insurance companies were established in the eighteenth century and began underwriting risks on Dutch insurance markets, they usually co-insured with individual underwriters or other companies, at least as far as marine risks were concerned.

It is also known from Dutch insurance practice that co-insurers agreed with and authorised one or more of them to settle the claims arising from a particular insurance policy on behalf of the others involved in that policy.<sup>20</sup>

Co-insurance gave rise to number of questions. The first was the extent to which each co-insurer was liable on the policy to the insured on the occurrence of a loss,<sup>21</sup> and whether and, if so, to what extent co-insurers incurred or could incur liability among themselves in this regard. The second issue was whether it made any difference that the underwriters had signed the policy in question at different times or at different premium rates. A third question was whether co-insurers were between themselves entitled to premiums or to recovered insurance payments in the same way as they were liable to make such insurance payments on the policy or to return premiums.

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<sup>16</sup> Thus, the well-known Van der Meulen policy concluded in Amsterdam in 1592 (see Appendix 19 *infra* for a reproduction) was signed by three underwriters. The one, Isaac le Maire (a well-known merchant and co-founder of the East India Company) subscribed the risk for Flemish £200, £150 being for himself and £50 on behalf of a mandatary identified only as FvP. The other underwriters involved were Reynier de Loecker & Compagnie for £150, and Emert Pellicrne for £100. See further IJzerman & Den Dooren de Jong 226. In the 1790's, in Amsterdam, insurers underwrote policies for sums between f400-f2 000, and an average of seven underwriters participated in a single risk. See Gales & Gerwen 50-51.

<sup>17</sup> That is, the amount for which they participated in the total sum insured by the policy. Like their counterparts elsewhere, Dutch individual underwriters each subscribed only a calculated or predetermined portion of the total risk, thus restricting their exposure on an individual contract and spreading the risk presented by the policy among a number of themselves.

<sup>18</sup> For the potential relevance of this, see § 2.4 *infra*.

<sup>19</sup> As to the rate, as opposed to the amount, of the premium, see again ch XI § 2.1 *supra*.

<sup>20</sup> One such example appears from a document in the *Archief van de Assurantiemeesteren* (*Archief* 5061 (RA)) which is housed in the *Gemeente-Archief* in Amsterdam. The document in question (contained in the first of several volumes entitled *Authorisatien van Assuradeuren* (inv 2925-3050) which cover the period 1701-1810) was an authorisation, dated 12 February 1701, by the insurers on a policy of two of their co-insurers to settle a claim on that policy. The insurers authorised '*onse mede Asseuradeurs omme wegensdeselve Schaade met de Geasseureerde in der minne te accordeeren ende af te maecken soodanigh als Sij oordelen Sullen te behooren. Beloovenwij ondergesz: als eerlijcke Liederen na te comen, en in gereede gelden te betalen alle het geene bij deselve ... Geauthoriseerdens wegens de Voorsz schaeden sal werden geaccordeert*'. It was therefore a separate agreement between the co-underwriters involved 'to follow as may be settled'.

<sup>21</sup> A distinction must be drawn between the amount to which the insured was in total entitled on his policy (ie, the total liability of all co-insurers on that policy), and the liability of each insurer towards the insured in respect of that total amount.

And fourthly, the substitution or release of one or more of the underwriters involved gave rise to some nice legal questions, as did the effect of underwriter insolvency on co-insurer liability. These and other related matters will now be investigated.

## 2.2 The Legislative Recognition and Regulation of Co-insurance

The generally accepted rule in Roman-Dutch insurance law was that those who had underwritten a single policy were all liable to compensate the insured for the loss, but that they were liable only in proportion to their subscriptions. A single co-insurer was liable neither for the total amount insured by the policy nor even for the sum he had underwritten if his proportional share of the loss came to a smaller amount. This may be referred to as the *proportionality principle*.<sup>22</sup> The fact that a particular insurer had underwritten the policy in question later than the others, did not result in his being able, in appropriate circumstances such as in the case of a partial loss, to escape liability for that loss. The *principle of priority* therefore did not apply in the ordinary instance<sup>23</sup> of co-insurance.<sup>24</sup>

In effect, therefore, even if not in reality and in law, there were several insurance contracts between the insured on the one hand and each of the underwriters in turn on the other hand, these several insurance contracts being embodied, for the sake of convenience, in a single insurance policy. Co-insurers on a single policy were therefore, strictly speaking, not co-debtors but at most co-contractors. In short, the co-insurers on a single policy were each severally liable to the insured only for his proportionate share of the latter's loss or damage, that is, for the sum he had underwritten in the case of a total loss, or for a proportionate part of it in the case of partial loss.

Not being jointly and severally liable, so that an insured could not claim from any one of the co-insurers more than his proportionate share, no question of any contribution between the co-insurers themselves arose. Furthermore, the co-insurers not being

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<sup>22</sup> Thus, where a ship, insured for f2 000 in terms of a policy underwritten by ten underwriters who each subscribed f200, was totally lost, each of the underwriters had to pay the insured f200. The insured could not claim from any one of them the full sum insured or even just more than the amount that that underwriter had subscribed. Likewise, where in this case the ship was damaged to extent of f1 000, each underwriter had to pay the insured only f100 and not only could the insured not claim the full f1 000 from any one of them but he could also not, eg, claim f200 each from any five of them.

<sup>23</sup> As to whether it applied to the instance where the co-insurance amounted to an over-insurance, see § 4 *infra*.

<sup>24</sup> Thus, where a ship, insured for f2 000 in terms of policy underwritten by ten underwriters who each subscribed f200, was damaged to the extent of f1 000, each of the underwriters had to pay the insured f100. The five who had underwritten the policy last could not argue that the earlier five were alone liable to pay their subscriptions in full, because the liability of co-insurers was proportional. Likewise, when a ship was insured for f2 000 in terms of a policy underwritten by three underwriters for f600, f600 and f800 respectively, and she suffered damage to the extent of f500 only, the insurers concerned were each liable for f150, f150 and f200 respectively, and the insured could not claim the full f500 from the first insurer, arguing that that insurer had underwritten the policy for more than that amount and that that insurer could seek recourse from the other co-insurers for the amount he had paid more than his proportionate share of the loss.



jointly liable, the insured could not and did not have to claim the full amount from all of them jointly, the co-insurers not being in the same position in this regard as partners who were jointly liable.<sup>25</sup>

These basic principles appear from both the model policy forms appended to Dutch insurance laws from the fifteenth century onwards, as well as from specific provisions in those laws. The principle of the several, proportionate liability of co-insurers on the same policy, irrespective of when each had underwritten that policy, was already provided for in earlier Spanish legislation<sup>26</sup> and was also recognised on the Antwerp insurance market.<sup>27</sup>

In the model policy form appended to s 2 of title VII of the *placcaat* of 1563 it was agreed that all the insurers, the first as well as the last, would participate in the insurance (*'is besproken dat in dese verseeckeringe sal participeren, soo wel den lesten als den eersten Asseureur'*), that is, that the underwriters would all contribute to the insured's loss, in proportion to their respective subscriptions (*'een yeghelyck naer advenant van zynder obligatie'*).

In s 13 of the *placcaat* of 1571 it was specifically provided that the insurer who had underwritten the policy last would participate or share in the insurance as much<sup>28</sup> as the first insurer, whether in loss (that is, in respect of any payment due on the policy) or in profit (that is, in respect of any premium received in terms of the policy) (*'[d]at den lesten Asseureur oft Verseeckeraer inde versekeringe ende assureantie, soo veel participeren sal als den eersten, 't zy verlies oft ghewin, soo men sey'*).<sup>29</sup> The policy

<sup>25</sup> For the position of co-debtors in Roman-Dutch law generally, see eg Lee *Introduction* 289-292.

<sup>26</sup> Thus, s 34 of the Burgos Insurance Ordinance of 1538 provided that all insurers who had insured one and the same object in the same common policy, even if they had done so at different times, were liable for the insured's loss in proportion to the sums underwritten by each of them, just as if they had signed the policy simultaneously, on the same day and at the same hour. See further Enschedé 13; and Reatz *Geschiede* 256-257 who notes that a different principle may have been followed in practice (presumably as a result of an agreement to that effect), namely that of priority in time, so that an insurer who had signed first was liable in full for his subscription first, and then second insurer, and so on until full amount of the loss was recovered, after which further insurers who had underwritten sums on the policy were not liable at all.

<sup>27</sup> See eg De Groote *Zeeassurantie* 114-118; *idem* 'Zeeverzekering' 212; and Mullens 80 and 89.

<sup>28</sup> Note, not for as much. All insurers were equally or principally (as opposed to sequentially) liable, but all were not liable for equal amounts unless, incidentally, they happened to have underwritten the risk for the same amounts.

<sup>29</sup> As to s 13, see eg Van Zurck *Codex Batavus* sv 'Assurantie' par 23; Scheltinga *Dictata ad* III.24.17; and Van der Keessel *Praelectiones* 1474a-c (*ad* III.24.17) who made the point that it appeared from the provisions in ss 14 and 15 of the *placcaat* of 1563 - which concerned over-insurance by double insurance - that s 13 of the *placcaat* of 1571 had to be understood as referring to the case where there was no over-insurance. For the position when there was over-insurance, see § 4.2 *infra*. See further also Goudsmit *Zeerecht* 265 (noting the correspondence of this provision with the stipulation in the policy formula in the *placcaat* of 1563); De Groote *Zeeassurantie* 40 (s 15 of the provisional *placcaat* of 1570 was identical terms to s 13); Jolles 66-67 (who is incorrect and confused in stating that in s 13 the principle of priority among several insurers of ss 14 and 15 of the *placcaat* of 1563 was not followed; the latter sections were specifically concerned with double insurance amounting to over-insurance, not with co-insurance); and Kracht 27.

form prescribed by s 35 of this *placcaat* added to this by stipulating that the insurer was liable to pay the insured all his loss in proportion to his subscription ('*na advenant van 't gene dat hy ondertekent sal hebben*').

In the Amsterdam *keur* of 1598, s 23 likewise provided for the equal participation in the loss and profit of the insurance contract by all the underwriters who had subscribed the policy ('*De leste Verseeckeraer sal inde Asseurantie soo vele participeren als de eerste, 't zy verlies ofte gewin*').<sup>30</sup> The model hull and cargo policy forms appended to the *keur* of 1598 accordingly stipulated that the insurers each bound themselves for the sums they had underwritten ('*Wy ondergeschreven belooven ende verbinden ons te verseeckeren ... elck een voor de somme by hem hier onder geteykent*'), each and every one of them undertaking to compensate the insured for his loss in accordance with their subscriptions ('*elck naer advenant vande somme die hy onderteyckent hebben sal, soo wel de eerste als de laetste Verseeckeraer*').<sup>31</sup> This was in accordance with the practice at the time in Antwerp.<sup>32</sup> The earlier policy provisions were repeated in the hull and cargo policies proposed by the Amsterdam amending *keur* of 1688.<sup>33</sup>

The position as it was provided for in the Rotterdam *keur* of 1604 was largely similar. In s 15, for example, in dealing with the insured's entitlement to and the insurers' obligation to pay compensation, it was noted that the former could claim from each of the insurers the amounts they had respectively underwritten on the insured goods ('*sullen sy van yeder der selver [ie, the insurers] mogen eysschen 't geene sy-lieden respectie opte ... goeden ... verseeckert ofte geteeckent hebben*'). And in s 19, which dealt with over-insurance and which limited the insurers' liability to the insured's actual loss or damage,<sup>34</sup> it was provided that the insurers would be proportionally liable in accordance with their subscriptions for such loss and no more ('*in welcke schade de*

<sup>30</sup> Section 25 of the Middelburg *keur* of 1600 was identical.

<sup>31</sup> See also Goudsmit *Zeerecht* 325; and Magens *Essay* vol I at 13 who described the proportional liability of insurers who had signed a single policy in terms of s 25 of the Middelburg *keur* as a liability to 'contribute share and share alike' to the insured's loss.

<sup>32</sup> The proportional liability of co-insurers was provided for in art 149 of par 4, title 11, part IV of the Antwerp *Compilatae* of 1609 (see De Longé vol IV at 262) which provided that if one insured with different persons (apparently in the same policy) and for no more than the amount of the goods loaded (thus, no over-insurance), it was irrelevant who had contracted or signed the policy first ('*wie dat eerst heeft gecontracteert oft geteeckent*'). The last insurer stood with the first on the same line ('*in eenen graet*') to bear the loss in proportion to and in accordance with the sum for which he had underwritten it ('*naer advenant ende bij concurrentie van de somme daervore sij geteeckent hebben*').

<sup>33</sup> In both policies the insurers stipulated that '[w]y ondergeschreven versekeren aan u ... [the name of the insured], te weten, elk een voor de somme by ons hier onder getekent, van ... [the amount insured]', and undertaking all of them to pay the compensation '*elck een naer advenant van de somme die hy ondergetekent sal hebben, soo wel de eerste als de leste Versekerer*'. The ransom policy in the amending *keur* of 1693 simply provided that '[w]y ondergeschreven versekeren aan U ... te weten, elk een voor de Somme, by ons hier onder getekent, van ...'.

<sup>34</sup> See further § 4.4 *infra*.

... *Verseeckeraers proportionelijcken nae hunne geteeckende somme sullen gelden, ende vorder niet*').<sup>35</sup>

The relevant principles applicable to co-insurers were most clearly spelt out in s 59 of the Rotterdam *keur* of 1721. This section provided that the insurers who had signed the same policy, even though at different times, would all of them, the first as well as the last, have the same right to the premium, without any distinction. They were further all equally ('*egalijk*') liable to compensate the loss or damage, as well as for any return of premium in the instances where such compensation or return had to take place. This equal liability, however, did not mean that each of the insurers was liable in the same equal amount, but merely that a several liability was imposed on all of them equally, each for his own proportionate share of the loss only.<sup>36</sup> The position was further made clear by the hull and cargo policies appended to the *keur* of 1721, both of which stipulated the insurers' individual liability in the amounts they had underwritten ('*elk een, voor de somme by ons hier onder geteykent*'), each to pay in accordance with his subscription, the first as well as the last ('*elk een na advenant van de somme die hy ondergeteykent zal hebben, zoo wel de eerste als de laatste Verzekeraar*').

Finally the Amsterdam *keur* of 1744 repeated these measures without any alteration in principle. Section 24 provided that in the return of the premium as well as in the payment of compensation for a loss or damage,<sup>37</sup> all the insurers who had subscribed a single policy,<sup>38</sup> even if they had done so on different dates, would participate equally ('*sullen de Assuradeurs, al was 't met onderscheyd van datums, die op een en deselve Police geteekend hebben, egaal participeeren*').<sup>39</sup> Again the hull and cargo policies in terms of both the *keur* of 1744 and also that of 1775 stipulated that the insurers' liability would be for and in proportion to the sum each had underwritten.<sup>40</sup> This proportional liability of co-insurers was extended by s 26 to their supplemental liability for the expenses incurred by the insured in averting or minimising a loss, or for transshipment. Such expenses had to be borne by the several insurers in proportion to their signed sub-

<sup>35</sup> See Goudsmit *Zeerecht* 401.

<sup>36</sup> See Goudsmit *Zeerecht* 401.

<sup>37</sup> But, significantly, no longer also in the equal sharing in the premium received. See § 2.3 *infra* where the comments of Voet and Van der Keessel on the equal sharing of the premium by co-insurers will be referred to.

<sup>38</sup> Section 24 also dealt with over-insurance on several policies. See § 4.5 *infra*.

<sup>39</sup> See also Enschedé 119; Goudsmit *Zeerecht* 351.

<sup>40</sup> '*Wy ondergeschreevene versakeren ... te weten elk voor de somma by ons hier ondergetekent, van ...*', and later on the insurers undertook to pay '*eik naar advenant van de somme, die hy ondergetekent zal hebben, zo wel de eerste als de laatste Verzekeraer*'. The ransom policy in terms of the *keuren* of 1744 and 1775 provided: '*Wy ondergeschreevenen verzeekeren ..., te weeten, elk voor de Somma by ons hier ondergetekent van ...*', and further on: '*beloven wy elk onze volle getekende Somma ... te betalen*'. Finally, the fire policy in the *keur* of 1744 read: '*Wy ondergeschreevene verzeekeren ... te weeten, elk voor de Somma by ons hier ondergetekent ...*', and further on the insurers undertook to pay '*ieder zyne geteekende Somma*' (this read '*ieder pro rato onzer Signatuere*' in the fire policy in the *keur* of 1775).

scription on the policy ('*sullen komen tot lasten van de Assurateurs, na rato van haare Signature*').<sup>41</sup>

### 2.3 The Views of the Authors on Co-insurance

Those Roman-Dutch authors who commented on the liability of co-insurers initially provided little explanation of the general principles set out in the legislation.

Grotius<sup>42</sup> merely noted that subsequent insurers shared in the profit and the loss from an insurance as much as did those who had underwritten the same policy earlier.<sup>43</sup>

The first author to set out the legal position in more detail was Voet<sup>44</sup> who sought to explain what was meant by the statement that all insurers shared equally in the profit and the loss. Firstly, he noted, the occurrence of any loss insured against resulted in all the insurers who had underwritten the policy incurring liability on it and in their being burdened in proportion to the respective amounts they had underwritten. There was no ranking of insurers with those underwriting earlier or later in time being liable only after those subscribing later or earlier had paid their subscriptions in full.<sup>45</sup> Secondly, Voet commented on the sharing by co-insurers of the premium, noting that they did not necessarily share so equally seeing that different rates could be agreed upon by different insurers.<sup>46</sup>

Scheltinga,<sup>47</sup> who noted that it was trite that '*indien veele op een en dezelve police hebben geteekend de winst en verlies alleen gemeen is*', stressed that this principle of the communality of loss and profit applied only in the case where several insurers had at different times underwritten the same insurance policy covering the

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<sup>41</sup> As to these expenses and the insurer's liability to compensate the insured for them in addition to paying him a compensation for his loss, see ch XVI § 1 *supra*, and as to transshipment, see ch XIII § 1.3 *supra*.

<sup>42</sup> *Inleidinge* III.24.17.

<sup>43</sup> See too Groenewegen *Aanteekeningen* n35 *ad* III.24.17, referring to s 23 of the Amsterdam *keur* of 1598 and s 25 of the Middelburg *keur* of 1600.

<sup>44</sup> *Observationes* n35 (*ad* III.24.17).

<sup>45</sup> Voet gave the following example. If cargo is insured for 10 000 by several insurers who each take over but a part of the risk (Voet - correctly - thought it irrelevant whether this occurred in terms of the same or different policies: see further § 3 *infra* as to double insurance), and arrives damaged to the extent of 4 000, the first insurer cannot say that he, being *prior tempore*, is not liable while 6 000 of the cargo still remained, for in truth the damage burdened all the insurers equally *pro rata*.

<sup>46</sup> And also - what he did not mention - seeing that even if they had subscribed the policy at the same rate, that rate was calculated on different amounts or portions of the risk subscribed by each of the insurers involved so that, unless the insurers had underwritten the same amounts at the same rate, they never shared equally (in the sense of 'in equal amounts') in the premium paid by the insured. See again ch XI § 2.1 *supra* as to the rate and the amount of the premium.

<sup>47</sup> *Dictata ad* III.24.17.

same ship or cargo ('*wanneer verscheide verzekeraers op verscheide tyden op een en dezelve police van asse. hebben geteekend ter verzekering van een en 't zelve schip of goed*'). Only then was it true that each of them participated proportionally in the profit or the loss ('*dat een yder na proportie van het deel waar voor hy verzeekerd in winst of verlies zal participeeren*'). The position was different where several insurers had at different times underwritten different policies, even if covering the same ship or goods.<sup>48</sup>

The several but proportional liability of co-insurers on the same policy also appears from a number of decisions and opinions. Thus, in an opinion delivered in 1666,<sup>49</sup> where a ship was insured by an Antwerp merchant together with six other local merchants, and where she was lost in a storm, the advice was that the insurers in question were liable to pay the insured the sums they had respectively underwritten ('*op te leggen ende te betalen hare respectie geteykende somme*'), the insured's loss having to be compensated by them in proportion to their respective subscriptions ('*pro rata van hare ondertekeninge*'). The same remark was made by Bynkershoek in respect of several decisions of the *Hooge Raad*.<sup>50</sup>

Van der Keessel likewise devoted considerable attention to the question of the liability of co-insurers. He noted, first of all,<sup>51</sup> that where different insurers had underwritten the same policy, albeit at different times, they were all equally held liable<sup>52</sup> to make good the loss and also to repay the premium where that had to be done. They were, therefore, in the same position as regards the loss and profit from that insurance. Such a loss had to be divided among the insurers in proportion to the sum each had underwritten on signing the policy and thus in what he termed 'a geometric proportion'.<sup>53</sup>

The reason for this rule, contained in s 13 of the *placcaat* of 1571 and then taken over in s 23 of the Amsterdam *keur* of 1598 and s 19 of the Rotterdam *keur* of 1604, Van der Keessel continued,<sup>54</sup> was to place all the insurers on an equal footing from the moment of the conclusion of the insurance contract and thus to render each of them

<sup>48</sup> See § 3 *infra* where the apparently opposing views of Voet and Scheltinga are considered again in the context of double insurance.

<sup>49</sup> See *Nederlands advysboek* vol I adv 135.

<sup>50</sup> See eg the *Hooge Raad* decision in 1708 (Bynkershoek *Observationes tumultuariae* obs 380; *idem Quaestiones juris privati* IV.3) where in the case of a total loss all the insurers on the policy in question were condemned '*om de som te betalen, waar voor ieder getekent had*'; and its decision in 1739 (Bynkershoek *Observationes tumultuariae* obs 3148; *idem Quaestiones juris privati* IV.137) where the insurers involved were held liable to pay the sum insured '*naar gelang hunner tekening*' and '*na rato van hare signature*'.

<sup>51</sup> *Theses selectae* th 763 (ad III.24.17); *idem Praelectiones* 1474a-c (ad III.24.17).

<sup>52</sup> Not, it must be stressed again, 'all held equally liable': see again n28 *supra*.

<sup>53</sup> He gave the following example. If insurers A and B had in a policy insuring a ship for f12 000 each underwritten f6 000, and she was damaged to the extent of f5 000, each insurer was liable for f2 500.

<sup>54</sup> *Theses selectae* th 764 (ad III.24.17); *idem Praelectiones* 1474c-d (ad III.24.17).

liable only in proportion to the sum for which he had engaged himself. It followed from this that the different insurers were not co-debtors (*'non esse correos debendi'*). Any one of them was not liable for the whole of the insured's loss<sup>55</sup> as there was, ordinarily and without anything more,<sup>56</sup> no joint and several obligation on any one of them.

Thirdly, though, Van der Keessel also pointed out<sup>57</sup> that the community of rights (as opposed to liabilities) among several insurers applied in the usual instance where all of them had underwritten the same policy at the same rate of premium, as was usually the case.<sup>58</sup> However, the principle under discussion did not prevent those who may have signed the same policy at different times from fixing different rates of premium. Although in such a case the various underwriters were all held proportionally liable on an equal footing for any loss or damage, their position was not the same when it came to a division of the insurance premium. Each would receive the premium he had stipulated for himself. Because there were, in effect, just as many insurance contracts as there were different insurers,<sup>59</sup> the legal equality introduced between them by law was specifically aimed at the compensation of loss or damage. The various legislative

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<sup>55</sup> Thus, to use Van der Keessel's example in n53 *supra*, insurer A was not liable for more than his proportion of the loss (ie, 50 per cent of it). And that was so not only where the loss in total amounted to more than the f6 000 he had underwritten on the policy but even if it amounted to less than that amount.

<sup>56</sup> Such joint and several liability arose only in two instances, Van der Keessel explained. The first was where that was what had been intended by the debtors in question. However, between two (or more) insurers who had signed the same policy on different occasions, where the first of them did not even know that a second or a third would sign, this could obviously not be intended. Accordingly, in the ordinary case there was no intention on the part of co-insurers to be jointly and severally liable co-debtors. (Note, however, that such a possibility was not completely excluded and could conceivably arise eg where the co-insurers had signed the same policy on the same occasion in each other's presence or (possibly?) with the knowledge of each other. It also seems possible to argue that an insurer who underwrote only a portion of the risk may be taken to have been aware of the involvement or possible involvement of other insurers and of a joint and several liability arising between them.) The second instance mentioned by Van der Keessel where joint and several liability could arise was where the law so provided. However, in the case of insurance there was no such legal prescription, as appeared from what was laid down in respect of over-insurance on a single policy, namely that the liability of the co-insurers (as opposed to double insurers) had to be reduced in proportion to what each had underwritten (see further § 4.5 *infra* for over-insurance), a position which was, so Van der Keessel argued, quite contrary to the nature of joint and several liability.

<sup>57</sup> *Theses selectae* th 765 (*ad* III.24.17); *idem Praelectiones* 1476-1477 (*ad* III.24.17).

<sup>58</sup> Usually insurers merely underwrote by signing their name and adding the amount for which they insured, a single common premium rate being stated only in the body of the policy itself.

<sup>59</sup> Van der Keessel therefore regarded a co-insured insurance policy not as an instance of joint liability (ie, a single obligation with several divisible performances) but as one of several liability (ie, several obligations). Put differently, where co-insurers had signed the same policy, that policy was not regarded as containing a single insurance contract between one insured on the one hand and several (jointly liable) co-insurers on the other hand, but as containing several independent insurance contracts between the insured on the one hand in each case and each of the co-insurers in turn on the other hand. That meant the co-insurers on the policy were severally liable. And that, in turn, meant that the insured was neither obliged nor entitled to claim the full amount of his loss from the different underwriters jointly, nor did he have the option of claiming it from one of them only.

measures mentioned profit in this regard merely because it was usually the same premium which was promised to all the insurers and because there was then also a geometrical relationship between them. But those laws did not prohibit different rates of premium being stipulated for different insurers, just as the amounts for which they insured could differ. In fact, Van der Keessel surmised, s 24 of the Amsterdam *keur* of 1744<sup>60</sup> may have had this in mind when it provided that all insurers were in the same position as regards any loss for which they might be liable but no longer mentioned anything about their thus sharing in the profit.

Finally, some further clarification is provided by Van der Linden. He observed<sup>61</sup> that a single insurance policy ('*eene polis*') could be signed or underwritten by different insurers, even at different times, and that all of them were equally ('*even zeer*') liable to compensate the insured's loss or damage in proportion to the sum which each had subscribed. They were not joint (or joint and several) debtors ('*mede-schuldigen*').<sup>62</sup> From this it followed, as Van der Linden explained elsewhere,<sup>63</sup> that if the insured goods were totally lost, each of the insurers was bound to pay the sum he had underwritten on the policy ('*om de somme te betalen, waar voor hij op de Polis geteekend heeft*'), while if the insured goods were not totally lost but merely damaged, the insurers were bound to compensate the damage in proportion to their respective subscriptions ('*naar evenredigheid van elks gedaane intekening*').

#### 2.4 The Effect of a Release or the Insolvency of a Co-insurer on the Liability of the Other Co-insurers

Although there therefore appears finally to have been little doubt in Roman-Dutch law that insurers who had underwritten the same policy were each severally liable to compensate the insured for his loss or damage in proportion to the sums they had respectively underwritten on the policy in question, there was a related question which gave rise to considerable debate and difference of opinion over a period of almost two centuries. It was a question which showed up the fact that the nature of co-insurers' liability was not unanimously accepted as involving a several liability. The question concerned the effect on the liability of such co-insurers towards the insured if one of them did not, did not have to, or could not pay his share of the insured's loss. The two instances of this which arose most frequently for consideration in practice, were where one of the co-insurers had been released by the insured, or where one of them had gone insolvent.

The problem first arose soon after the promulgation of the Amsterdam *keur* of 1598. At issue was the effect on the validity of the insurance contract where any one or

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<sup>60</sup> See again § 2.2 *supra*.

<sup>61</sup> *Koopmans handboek* IV.6.3.

<sup>62</sup> See too *idem* IV.6.5 where he noted that the liability of insurers (on the same policy) was in proportion to the sum each had subscribed ('*naar evenredigheid van ieders intekening*').

<sup>63</sup> *Idem* IV.6.9, with reference to Pothier.

more of the names of those who had underwritten a policy as insurers were deleted or altered. In essence it turned on the nature of the liability of co-insurers: several or joint and several?

In an Amsterdam merchants' *turbe* of 21 October 1599<sup>64</sup> evidence was presented to the Amsterdam *Schepenen* Court concerning this practice (*'re het gebruyck ende costume vande roveringe of veranderinge van eenigen name oft namen als Asseuradoors onder eenige Police van assurance geteyckent staende'*). The merchants testified that it was customary that as soon as one-third or more<sup>65</sup> of the policy had been underwritten by insurers, the names of those who had subscribed that third or more could no longer be altered, even with the consent of the underwriter or underwriters whose name was or names were to be altered and of the insured, unless the prior consent was obtained of all the others who had underwritten the policy.<sup>66</sup> The merchants argued that those who had signed the policy were all partners (*'t samen Compagnions zijnde'*), jointly liable for or entitled to any resulting loss or profit in proportion to their subscriptions (*'verbonden zijnde d' opcomende schade of bate t' samen (nae rate hunder onderteckeninge) te dragen oft genieten'*). Accordingly, nobody's name could be altered without the prior consent of all the subscribing insurers (*'niemants name mach werden geroveert, sonder voorgaande consent van alle de geonderteyckende ende Compagnie'*).<sup>67</sup>

The several liability of individual co-insurers had already been accepted in Antwerp in the beginning of the seventeenth century,<sup>68</sup> but there arts 151-152<sup>69</sup> of the *Compilatae* of 1609 had made it clear precisely what one had to understand by the practice which was the subject of the *turbe* of 1599. This was rather remarkable, for the uncertainty to which the interpretation of the practice in the *turbe* had given rise was not completely clarified in the formal Roman-Dutch law until the latter part of the eighteenth century. These articles of the *Compilatae* laid down that the insured could not, presumably for whatever reason, including underwriter insolvency, delete the name of one or more of the insurers who had underwritten a policy<sup>70</sup> to (and this was crucial) *the detriment of the other underwriters* who would, despite such release, and presumably in the absence of their consent, nevertheless remain liable (*'in den graet ende staet'*) as before but for no more. Thus, such a release, even if unauthorised by

<sup>64</sup> See *Amsterdam Handvesten* vol II at 541-542.

<sup>65</sup> Probably of the total sum to be insured on that policy.

<sup>66</sup> This could also be read to refer to the consent of prior underwriters. As will become apparent shortly, 'prior consent' appears correct, not 'prior underwriters'.

<sup>67</sup> See further eg *Rooseboom Recueil* cap XXX at 140.

<sup>68</sup> See § 2.2 n32 *supra*.

<sup>69</sup> Of par 4, title 11, part IV (see *De Longé* vol IV at 262-464).

<sup>70</sup> That is, the insured could not relieve such an underwriter from his obligation either to pay his share of the indemnity or to return the premium.



the other underwriters, was not prohibited but it could not increase the liability towards the insured of the remaining (and non-consenting) underwriters. Only if it could not be established which insurer the insured had released<sup>71</sup> did all the underwriters on the policy escape liability and was there was no action or recourse against them on the policy any longer.<sup>72</sup> An exception was where the insured could show that such deletion had occurred without his knowledge or could prove from his books or otherwise who and what the deleted names and amounts were.<sup>73</sup>

Voet,<sup>74</sup> without any further comment, explained the position as follows. An underwriter who had subscribed to a policy could not<sup>75</sup> delete his name or resile ('recedere') from the insurance contract, even with the consent of the insured unless he had obtained the consent of the first (that is, the prior) underwriters,<sup>76</sup> or unless the insured himself or some other third party took over the obligation of the removed underwriter and in effect substituted himself in the place of that underwriter.<sup>77</sup>

This view was maintained in an opinion delivered in 1706<sup>78</sup> where it was stressed that after an agreement had been reached between the parties, the contract was binding and that no alteration could be made to it, so much so that the insured himself could not relieve any of the underwriters from his liability.<sup>79</sup> The reason for this, the opinion explained with reference to both s 23 of the Amsterdam *keur* of 1598 and the *turbe* of 1599, was that each underwriter had to be understood to be liable not only with the others against the insured but also as against such other underwriters in a form of partnership.<sup>80</sup>

<sup>71</sup> Such as when the deletion could not be deciphered.

<sup>72</sup> That is, the policy became void.

<sup>73</sup> See generally Mullens 89.

<sup>74</sup> *Observationes* n42 (*ad* III.24.22).

<sup>75</sup> It seems that Voet meant the underwriter 'was prohibited'.

<sup>76</sup> Voet here clearly referred to the consent of the prior underwriters, not to the prior consent of all the underwriters.

<sup>77</sup> See too eg Decker *Aanteekeningen ad* IV.9.4 n(3)/(c) who referred to 'een oude gewoonte' that the names of subsequent insurers 'op een en dezelve Police' could not, without the consent of prior insurers on that policy, be deleted unless the insured himself or someone else was willing to stand in for the deleted insurer; Boey *Woorden-tolk sv 'Reassurantie'*. See also further Enschedé 97; and Goudsmit *Zerecht* 325 who notes that a deletion was permitted according to the merchants' *turbe* of 1599 only either when the insured or a third party put himself in the position of the insurer whose name was to be deleted, or when the remaining insurers gave their permission.

<sup>78</sup> See Barels *Advysen* vol I adv 12.

<sup>79</sup> Again, it seems that it was regarded that the insured was in fact prohibited from doing so.

<sup>80</sup> '[O]vermits de Tekenaar [ie, the underwriter] zich niet alleen ten behoeven van den Geassureerden, maer ook ten voordeele van zyne mede Tekenaers, verstaen word ingelaeten te hebben in een gemeenschap, zo door middel van het voorschreeve instrument, hoewel buiten handen van den voorige Tekenaers, en buiten hun toedoen omgedraegen zynde, egter geintroduceerd is geworden.'

The next author to comment on this issue was Bynkershoek.<sup>81</sup> His explanation of the legal position as set out in particular in the *turbe* of 1599, proceeded from the premiss, though, that co-insurers were, by way of exception to the general rule, jointly (or jointly and severally) liable towards the insured.<sup>82</sup> But, as will appear shortly, he was himself not fully convinced of the correctness of this view<sup>83</sup> and his explanation was, not surprisingly, subsequently rejected by Van der Keessel.

Bynkershoek explained that on general principles the liability of co-insurers should be several so that the insured should have had a choice from whom he wanted to claim his proportionate share (but no more) and from whom not, each being (severally) liable for or up to the amount he had subscribed. However, for purposes of maritime commerce it was better that the insured's loss be spread over and be borne (jointly) by many insurers and for this reason the merchants' *turbe* of 1599 had put forth that a later insurer could not be discharged without the consent of the earlier or prior insurers, all the insurers being jointly liable as partners in proportion to their subscription. The position in the case of co-insurance was therefore an exception and co-insurers were not simply severally liable but in fact jointly and severally liable.<sup>84</sup>

However, Bynkershoek did question the validity of the reason advanced for this position, namely that co-insurers were to be regarded as co-debtors by reason of their being partners ('*dat de gemeenschap van schade uit hoofde van Societeit haar oorsprong heeft*'). There was no contract of partnership ('*Contract van Compagnyschap*') concluded between co-insurers and such a contract could also not be based on any

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<sup>81</sup> *Quaestiones juris privati* IV.2. See too Enschedé 97.

<sup>82</sup> Bynkershoek also appears to have disregarded the crucial fact that in practice those who underwrote insurance policies, did so as a rule for a particular amount. They did not simply sign as insurers of the full loss of insured but specifically limited their liability to a particular sum or a proportionate part of a sum. This fact, more than any other, indicates the several liability of co-insurers on a single policy. This several liability further appeared from the undertaking in the policy to that effect, as well as from various procedural indications, such as that the insured gave a notice of loss to and claimed from each of the respective insurers individually the payment of the amounts they had respectively underwritten on the policy.

<sup>83</sup> It seems that unlike those after him, Bynkershoek accepted the correctness of the *turbe* of 1599 and merely sought to explain it against what he regarded as the applicable general principles.

<sup>84</sup> According to general legal principles, Bynkershoek explained further, it depended on the insured which of his debtors (ie, insurers) would have to pay their share and which would, as against him, be relieved of liability. But to ameliorate the application of this principle in the case of insurance, the custom, attested to in 1599, arose that a prior insurer could not be relieved of liability by the insured unless all the subsequent underwriters had consented to it, for such release worsened their position. However, subsequent insurers could always be relieved without the consent of any of the earlier underwriters, for none of them had known of or bargained on them but had signed, each for his own sum, for the whole loss. Thus, if Bynkershoek's argument has been interpreted correctly, the first insurer A may not be released against the wishes of the second insurer B since on the conclusion of the contract B took account of the fact that A had subscribed (but apparently not of the possibility that A could be released?), but B may be released against the wishes of A (so that A, who underwrote only a part of the risk, apparently did not similarly take account of the fact that another would subscribe the balance of the risk). All in all, Bynkershoek's arguments are not completely convincing.

tacit consent ('*een stilswygende toestemming*') between the contracting parties, at least not by prior underwriters as regards subsequent ones.<sup>85</sup>

Generally, Bynkershoek thought the *turbe* rather unsatisfactory, and it appeared to him to have been a case of the merchants in question not so much attesting to a custom but rather to what they wished the position to be or thought it might be.

Then Bynkershoek considered the position where one of the co-insurers went insolvent. He thought the same distinction could probably also be applied in such a case as well. Accordingly, the insolvency of a subsequent underwriter disadvantaged a prior underwriter but a subsequent one could not be disadvantaged by the insolvency of a prior one.<sup>86</sup> Nevertheless, he admitted that from a practical point of view this distinction was subtle and casuistic, and that for co-insuring merchants (who were, it must be remembered, jointly liable in his view) the insolvency of one of them affected the others of them detrimentally, irrespective of whether the insolvent had underwritten the policy earlier or later.

The most comprehensive treatment of the problem of co-insurer release or insolvency was that of Van der Keessel who explained the position and the principles against which the testimony ('*praejudicium*') of the Amsterdam merchants in 1599 had to be understood or, rather, had to be interpreted and amended.<sup>87</sup>

First, Van der Keessel remarked,<sup>88</sup> because co-insurers on the same policy were

<sup>85</sup> But why specifically not in this case? An underwriter who had subscribed only a part of the risk must surely have known that others would be sought and, if found, would subsequently subscribe the balance of the risk.

<sup>86</sup> The subsequent underwriter, he argued, had subscribed the risk on the supposition that the prior underwriter too would have to bear a part of the risk for which he had bound himself by his earlier subscription, but the same could not be said of a prior underwriter.

See too Scheltinga *Dictata ad* III.24.17 for an explanation of the position in the event of the insolvency of one of the co-insurers who had underwritten a particular policy ('*indien verscheide assuradeurs op een en dezelve police van asse. geteekend hebbende, [en] een van hun insolvent geworden is*'). He thought that whether the insured would be able to recover the loss (ie, the portion of the loss otherwise recoverable from the insolvent co-insurer) from the other insurers, or whether he would have to bear that loss himself, depended firstly upon local custom, and in the absence of any such custom, upon which insurer had gone insolvent. If the insolvent insurer had signed prior to the others, they did not have to bear the loss but only the insured had to; but if the insolvent insurer was a subsequent one, the prior insurers had to bear his loss. Scheltinga thus distinguishes between two cases, namely where the insurer who became insolvent signed before and where he signed after the other insurers. If he signed before, the insured had to bear that loss himself and could not shift it onto the other insurers. The reason, he explained, was that he who had signed first '*geoordeeld wordt niet gezien te hebben op dat deel van de schaafe 't welke andere na hem teekende zoude draagen, om dat het toen nog onverzeekerd* [it seems this should rather read: '*onzeeker*'] *was of er meerdere zoude teekenen, en dus zich voor de geheele schaafe verbonden te hebben*'. But if he signed after, the whole loss had to be borne (proportionally) by the other insurers.

<sup>87</sup> See generally Scheepers 94-95.

<sup>88</sup> *Theses selectae* th 764 (*ad* III.24.17); *idem Praelectiones* 1474d-1475a (*ad* III.24.16). See too Van der Linden *Koopmans handboek* IV.6.3, considering the effect of the '*onvermogen*' of one '*mede-assuradeur*' on the liability of the others.

not to be considered as co-debtors,<sup>89</sup> in the case of the insolvency of one of them his liability (for the proportion of the loss which he had underwritten) did not fall upon and increase the liability of the other co-insurers<sup>90</sup> but had to be borne by the insured.<sup>91</sup> Accordingly, he argued, Bynkershoek was wrong in thinking that the insolvency of a subsequent insurer was to the detriment of a prior insurer.<sup>92</sup>

Secondly,<sup>93</sup> it followed from the same principle that an insured could in fact freely release or discharge any of the insurers he chose, whether they had signed before or after the others, and that he could do so without the consent and even against the wishes of the other insurers involved. The liability of those remaining as against the insured was, however, not thereby increased beyond that for which they were originally liable and remained as if none of the co-insurers had been released. The insured himself, though, was bound by such discharge and dissolution of his contract with the released co-insurer. He lost any right of action against him, and had to bear that insurer's portion of the loss himself, just as if that insurer's risk had been transferred to himself.<sup>94</sup> And again he rejected Bynkershoek's view in this regard, based as it was on the premiss that the liability of co-insurers was joint and several,<sup>95</sup> as unacceptable<sup>96</sup>

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<sup>89</sup> And were thus not considered as jointly or jointly and severally liable.

<sup>90</sup> The position of a co-insurer, being liable only for a proportionate part of the insured's loss, was therefore different from that of co-sureties whose liability for the whole amount of the secured debt remained unreduced until the surety who had been summoned, raised the defence of *beneficium divisionis* against the creditor.

<sup>91</sup> It was for that very reason that the legislatures had come to the insured's aid and permitted in various ways (see again ch VII § 4.1 *supra*) the conclusion of a new or further insurance in such cases. It was abundantly clear from these measures, Van der Keessel took pains to point out, that the loss feared from the insolvency of one of the insurers fell upon the insured himself and not on any of the other insurers.

<sup>92</sup> Or more generally, it may be added, that the insolvency of any one of them could increase the liability of the others.

<sup>93</sup> See Van der Keessel *Theses selectae* th 764 (*ad* III.24.17); *idem Praelectiones* 1475a-1475e (*ad* III.24.16).

<sup>94</sup> See too Van der Linden *Koopmans handboek* IV.6.3 who observed that because co-insurers were not co-debtors, the insured had the power to release some of them while holding others liable, although in respect of the released part (ie, for the sum(s) underwritten by the released co-insurer(s)) he then bore the risk himself.

<sup>95</sup> According to Van der Keessel, Bynkershoek incorrectly regarded the separate co-insurers as sureties for indemnification who each bound themselves for the whole (*assecuratores singulos habere pro fideiussoribus indemnitis, in solidum obligatis*).

<sup>96</sup> Van der Keessel provided the following example to illustrate the difference. If it were correct that co-insurers were jointly and severally liable, the following position would pertain. If goods worth f10 000 were insured for f5 000 by A and by B for the balance of f5 000, and the goods were then damaged to the extent of f5 000, and B was released by the insured, then the latter could claim the full amount of his loss of f5 000 from insurer A. However, if it were accepted that co-insurers were severally liable, A and B would each be liable only for f2 500 of the insured's loss and no more, no matter that one of them may have been released. Therefore, although Bynkershoek was correct in that the insured could release any of the co-insurer he wished, whether a prior or subsequent one, and that he could do so even against the wishes of others, he was incorrect in his view that such a release occurred to the detriment of the remaining co-insurers. Any such release could only be to the detriment of the insured himself as the

and in direct conflict with legislative provisions on the matter such as that in s 13 of the *placcaat* of 1571 and subsequent measures which required all insurers to be treated equally as regards any loss and for them to be liable for any loss or damage only in proportion to the amounts they had respectively underwritten.

Therefore, Van der Keessel concluded, the evidence of merchants in 1599 to the effect that a later insurer could not be released against the wishes of the earlier insurers, unless the insured himself or another took over his risk,<sup>97</sup> was not acceptable, not least because, as Bynkershoek had already pointed out, their underlying assumption had incorrectly been that co-insurers were jointly and severally liable. The liability of co-insurers was several<sup>98</sup> and it was on that basis that the effect of any release of the insolvency of any one of them upon the liability of the others had to be determined.

## 2.5 Co-insurance in the *Wetboek van Koophandel* and in English Law

Co-insurance and the principle of the several liability of co-insurers were also recognised and regulated in the *Wetboek van Koophandel*, albeit only incidentally in connection with the case of over-insurance.

In terms of art 278-1, where one and the same policy has been underwritten by different insurers, even though on separate days, and more than the value is insured,<sup>99</sup> they are all liable, in proportion to the amount each had underwritten (*'te zamen naar evenredigheid van de som voor welke zij geteekend hebben'*), for no more than the true insured value. Therefore, there is a proportional liability of all the underwriters who had signed a single policy even if, as was bound to happen in practice, they had signed that policy at different times and even on different days.<sup>100</sup> But co-insurers are each severally liable only for their own portion, not also for that of others. The insolvency of one does therefore not increase the liability of the others.<sup>101</sup>

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remaining co-insurers were still only liable for their own proportion of the insured's loss.

<sup>97</sup> Thus, Van der Keessel added, although the merchants in 1599 were correct that the insured had to take the risk of a released insurer upon himself, that occurred *ex lege* and not only after an agreement with those insurers who had not been released.

<sup>98</sup> There was no common intention between co-insurers to conclude a partnership between themselves, Van der Keessel added. Co-insurers not only did not share the insurance premium (ie, the profit) which could in fact be different for each of them, but each insurer concluded his own contract with the insured.

<sup>99</sup> A case, therefore, of over-insurance by a single insurance. Art 277 deals with over-insurance through double insurance where the several policies are underwritten on different dates, while art 278-2 deals with over-insurance in the case of double insurance where those policies are underwritten on the same date. See further § 4.6 *infra*.

<sup>100</sup> And as a result of which some could be at risk earlier than others on the same policy.

<sup>101</sup> See generally Dorhout Mees *Schadeverzekeringsrecht* 43-44, noting that the principle that the last insurer participates equally or together with first is derived from s 13 of the *placcaat* of 1571.

The practice of the co-insurance of a single risk was also known from early on on the London insurance market,<sup>102</sup> it being accepted that co-insurers were each liable for the insured's loss in proportion to the sum each had underwritten on the policy in question.<sup>103</sup>

The several liability of co-insurers on a single policy was also reflected in the Lloyd's policy which stated, firstly, that the insurers involved bound themselves to the insured 'each one for his own part' (and not for that of the others) for the performance of their undertaking, and secondly, that in the event of the insured incurring any expenses to avert or minimise loss, they would contribute to such expenses 'each one according to the rate and quantity of his sum herein insured'.

One of the problems with the severally liable co-insurers and a disadvantage to the insured, was that at common law the insured had to sue each of the co-insurers separately, which was a costly inconvenience. It was one of the problems the Legislature sought to address in 1601<sup>104</sup> with the creation of the Court of Assurance before which the insured could join co-insurers in a single action.<sup>105</sup> With the demise of the Court, though, the problem of suing severally liable underwriters in the Common-law courts returned and was only overcome in the time of Lord Mansfield. It then became practice for underwriters themselves to apply to the King's Bench to stay proceedings in all actions but one against the co-insurers involved, upon an undertaking to pay the amount for which each of them might be held liable with costs should that case go against the underwriter concerned.<sup>106</sup>

Co-insurance is also recognised in the Marine Insurance Act of 1906 in s 24(2) which provides that where a policy is subscribed by or on behalf of two or more insurers, each subscription, unless the contrary be expressed, constitutes a distinct

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<sup>102</sup> Thus, Molloy *De jure maritimo* II.7.6 observed in 1676 that few if any underwriters insured a whole ship but that they subscribed for certain sums, eg £50 or £500. See too Clayton 31 who explains that co-insurance was customary in the sixteenth century; just as it was the custom of shipowners then not to own a single ship but rather shares in different ships, so too it was the custom of merchants to underwrite not one large risk but rather small parts of different risks.

<sup>103</sup> See eg Malynes *Consuetudo* I.24; and Magens *Essay* vol I at 91-92 who noted that in London, all who had insured a particular risk, whether in one or more policies (as to the case of double insurance, see § 4.7 *infra*), and whether they had underwritten earlier or later, had to contribute equally to any loss, or to the return of any premium in the case of an over-insurance.

<sup>104</sup> The Act of 1601 (An Act concerning Matters of Assurance amongst Merchants (43 Eliz c 12)) noted the reluctance of insurers to arbitrate and the fact that they 'have sought to draw the Parties assured to seek their Monies of every several Assurer, by Suits commenced in her Majesty's Courts, to their great Charges and Delays'.

<sup>105</sup> See Molloy *De jure maritimo* II.7.19 (noting that the Court could decree against 20 insurers at one time); Barbour 'Marine Risks' 582; and see again ch IV § 1.7 *supra* as to London Court of Assurance.

<sup>106</sup> See Raynes (1 ed) 163, (2 ed) 158-159, noting that despite the obvious advantages involved, insured did not always consent to such applications and that in such cases the King's Bench did not feel disposed to make the rule without such consent. Lord Mansfield pointed out the advantages of proceeding on a single action and a general rule (the Consolidation Rule) arose in the course of time. See too Hopkins 139-142.

contract with the insured.<sup>107</sup> In English law, therefore, each underwriter is liable only for the sum he had subscribed in the case of a total loss, or for a proportionate part of it in the case of a partial loss. This is made apparent by s 67(2) which provides that in the case of a loss recoverable under the policy, the insurer, or each insurer if there is more than one, is liable for such proportion of the measure of indemnity as the amount of his subscription bears to the agreed value in the case of a valued policy, or to the insurable value in the case of an unvalued policy.

### 3 Double Insurance

Distinguishable from the case of co-insurance which occurred where several insurers underwrote, whether at the same or at different times, a single policy, was the instance of double or multiple insurance, which occurred where two or more insurers, or two or more sets of co-insurers, underwrote separate policies covering the same insured<sup>108</sup> against loss arising in respect of the same object of risk by the same perils. Such policies may have been concluded at the same time or, more likely, at different times and thus have been successive policies.

Apart from the case of over-insurance, which will be considered shortly, there would appear to have been no difference in principle in Roman-Dutch law between co-insurance and double insurance. All the insurers or sets of insurers involved were simply severally liable for the insured loss in proportion to the amounts they had each underwritten on their respective policies.<sup>109</sup>

Put differently, in the case of double insurance the insurers or sets of co-insurers involved in terms of the respective policies were liable severally and proportionally, as they were liable in the case of co-insurance, and not successively according to the priority principle, as they were where the double insurance amounted to over-insurance.<sup>110</sup>

<sup>107</sup> See Buys 43; Chalmers 39.

<sup>108</sup> By which double insurance was distinguished from reinsurance proper (as to which see again ch VII § 4.2 *supra*). For the avoidance of double insurance in the case of solvency reinsurance, see ch VII § 4.1 *supra*.

<sup>109</sup> This several proportional liability may be illustrated by the following example (cf too the example referred to under co-insurance in § 2.1 in n22 and n 24 *supra*). Where a ship worth f2 000 was insured for f1 000 in terms of policy A (underwritten by ten underwriters who each wrote f100) and for f1 000 in terms of policy B (underwritten by two underwriters for f500 each), the insured could in the case of a total loss recover f1 000 on policy A (f100 from each of the underwriters) and f1 000 on policy B (f500 from each of the underwriters). In the case of a partial loss of say f1 000, the insured could have recovered f500 on policy A (f50 from each underwriter) and f500 on policy B (f250 from each underwriter).

<sup>110</sup> This paragraph, it must be stressed again, is concerned with double insurance which did *not also* amount to over-insurance as double insurance was in practice more often than not bound to do. If it did, completely different principles applied: see § 4 *infra*.

That double insurance need not have involved over-insurance is most graphically illustrated by the fact that under-insurance too could have occurred through double insurance. That would have been the case, eg, had the ship in the example referred to in the previous footnote, been insured for f1 000 in terms of policy A and for f500 in terms of policy B.

Little detail emerges from the Roman-Dutch sources on double insurance as such. Double insurance arose for consideration only in cases where, as was more often than not the case, such double insurance at the same time also amounted to over-insurance.<sup>111</sup> Further, the close connection between and the almost invariable simultaneous involvement of double insurance and over-insurance are reflected in the fact that the sources often refer simply to double insurance when speaking specifically of double insurance involving over-insurance: It was not always realised that double insurance which did not amount to over-insurance, although seldom occurring in practice, was also a theoretical possibility and one which involved different principles. A last reason why the liability of insurers in the case of what may be termed double insurance *simpliciter* may have attracted little attention, was because it would in the case of total loss not usually have made any difference whether such liability was based on proportionality or on the priority principle.<sup>112</sup>

However, some indication of the position in the case of double insurance *simpliciter*, that is, without the additional complication of over-insurance, does appear from the sources.

The earliest and a rather inconclusive indication<sup>113</sup> of the position in the case of double insurance appears from some comments made in passing in a decision of the *Hooge Raad* in 1729.<sup>114</sup> In this case the insurers against whom a claim had been instituted on a policy, argued that they were not liable because overlapping cover on another policy existed at the time of the loss.<sup>115</sup> They were not liable, they argued, because it was unheard of for one insured to be able to claim from several (sets of) insurers on separate policies for the same loss (*'om dat het eene ongehoorde zaak is,*

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<sup>111</sup> Thus, the statement by Gärtner 339 that the prohibition on double insurance was on occasion traced back to the principles of the law of sale (see eg Casaregis *Discursus* 1.89-90: the insurer buys the risk from the insured and the same object cannot at the same time be sold to different persons) can only apply to the instance where the double insurance amounted to over-insurance and where that analogy could be drawn. See further § 4.2 at n185 *infra*.

<sup>112</sup> Thus, where a ship worth f2 000 was insured for f1 000 by policy A and for f1 000 by policy B, it was irrelevant in the case of a total loss whether the insurers under policy A and those under policy B were all 'equally' liable for their own proportion of the loss, or whether the insurers on policy A were first liable and then those on policy B. It could only have made a difference had one or more of the insurers involved eg become insolvent.

However, it would have made a difference in the case of a partial loss. Assuming that the ship, worth f2 000 and insured for f1 000 by policy A and for f1 000 by policy B, was only damaged to the extent of f1 200, it was crucial whether the insurers on policy A and those on policy B were all 'equally' liable for their own proportion (ie, each set of insurers for f600), or whether the insurers on policy A were first liable (for the full f1000 they had subscribed) and then those on policy B (for the balance of f200). This difference will be investigated further in § 4 *infra* in connection with over-insurance.

<sup>113</sup> It was in fact a missed opportunity, if anything.

<sup>114</sup> See Bynkershoek *Observationes tumultuariae* obs 2554; *idem Quaestiones juris privati* IV.15.

<sup>115</sup> The cover in terms of their policy commenced on the arrival of the ship in port while and that on the other policy only terminated on her discharge or after fourteen days after her arrival there, whichever occurred first. The loss in question occurred one day after her arrival.



*dat een geassureerde verscheide Assuradeurs over eene en dezelfde schade ieder in solidum kan in Rechten betrekken*'). However, the *Hooge Raad* held that there was no overlapping double insurance in this case<sup>116</sup> and that even if there was, so that several sets of insurers were in fact involved and locked in a dispute over who of them were liable, the insured could merely await the outcome of that dispute and then claim from the liable insurers (*'en verscheide Assuradeurs met elkander over die schade geprocedeert hadden, had de geassureerde den uitslag van dat proces kunnen afwachten, en dan den genen, die het verloren had, aanspreken*'). It seems that the possibility was not foreseen that both sets of insurers could indeed have been liable for the same loss and the *Raad* therefore did not explain what the procedural position of the insured would have been in such a case.<sup>117</sup>

From an opinion dating from 1733<sup>118</sup> there appears to be some indirect support for the view that in terms of s 23 of the Amsterdam *keur* of 1598, s 25 of the Middelburg *keur* of 1600 as well as s 59 of the Rotterdam *keur* of 1721, insurers were, at least in the case of a total loss, liable proportionately in the case of both co-insurance and double insurance.<sup>119</sup>

Of the Roman-Dutch writers who treated the insurance contract, Van der Keesel discussed the notion of double insurance in the most detail.<sup>120</sup> He noted the common or equal but (geometrically) proportionate liability of the different insurers who had underwritten the same policy (that is, of co-insurers), and pointed out that the reason for the rule was to place all insurers on an equal footing from the moment of the conclusion of the insurance contract, irrespective of the time when or the order in which they

<sup>116</sup> The earlier policy did not cover the ship up to her arrival in the port in question, and if it did the risk terminated immediately upon her arrival there because she was in ballast (ie, had no cargo on board) so that any period allowed for her discharge - such as the period in this case, which was limited to fourteen days - did not apply.

<sup>117</sup> That is, more specifically, whether the sets of insurers were liable proportionally or in succession, that is, whether the insured could claim a rateable proportion from each set of insurers or whether he first had to claim the full sum insured from the first set and only the balance, if any, from the other set.

<sup>118</sup> See *Nieuw Nederlands advysboek* vol II adv 46.

<sup>119</sup> As the facts on which the opinion was requested, constituted a double insurance amounting to over-insurance, in which case different considerations apply, the opinion is more appropriately considered in detail in § 4.3 *infra*.

<sup>120</sup> *Theses selectae* th 763 (*ad* III.24.17); *idem Praelectiones* 1474a-c (*ad* III.24.17).

Earlier Voet *Observationes ad* III.24.17 (n35) had expressed the view that the proportional liability of insurers applied irrespective of whether there was a single or several policies, and from the example he used (see § 2.3 n45 *supra*) it is clear that had the instance in mind where there was no over-insurance and where the loss was partial.

Scheltinga *Dictata ad* III.24.17 noted that the principle of the communality of proportional sharing in loss and profit applied only in cases where several insurers had at different times underwritten the same insurance policy covering the same ship or cargo (ie, co-insurance) but that the position was different (he did not explain further) where several insurers had at different times underwritten different policies, even if covering the same ship or goods. It is not clear from this whether Scheltinga had in mind double insurance *simpliciter* or, which is the more likely, double insurance amounting to over-insurance where the position was indeed different.

had underwritten it, and thus to render each insurer liable only in proportion to the sum for which he had engaged himself.<sup>121</sup> This very reason made it equally applicable to the case where different insurers had signed different policies (that is, to double insurance)<sup>122</sup> and for that reason, he pointed out, the old legislative provisions<sup>123</sup> did in fact not distinguish between the case where the different insurers had insured the same property in a single policy or in separate policies.<sup>124</sup> There was therefore, according to Van der Keessel, no difference between the liability of insurers in the case of co-insurance and in the case of double insurance.

However, he continued, in the case of double insurance amounting to over-insurance, an exception to the rule applicable to co-insurance and to double insurance *simpliciter* was recognised. In that case there was a prior chronological liability of the insurers involved rather than an equal proportional liability.<sup>125</sup>

Elsewhere<sup>126</sup> Van der Keessel argued that it appeared from the provisions of ss 14 and 15 of the *placcaat* of 1563 (which dealt with over-insurance by double insurance) that s 13 of the *placcaat* of 1571 (which treated co-insurance) had to be understood as referring to the case where all the insurances, also if concluded in different documents, represented the value of the insured object, that is, where there was no over-insurance. According to the general wording of these provisions, the position of all insurers was in this case therefore always geometrically equal, whether the insurance was embodied in the same or in different written documents. Likewise, Van der Keessel continued, s 23 of the Amsterdam *keur* of 1598, which merely stated that all insurers, whether earlier or later, ought to be in the same position as regards profit and loss, also had to be read against the background of the *placcaaten* of 1563 and 1571 and had to be understood as being applicable irrespective of whether the same or different documents had been underwritten.<sup>127</sup> It was clear also, Van der Keessel con-

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<sup>121</sup> See Van der Keessel *Theses selectae* th 764 (*ad* III.24.17) and again § 2.3 *supra*.

<sup>122</sup> Thus, also in the case of double insurance, the insurers or sets of insurers involved on the respective policies were proportionally liable.

<sup>123</sup> Namely ss 13 of the *placcaat* of 1571, 23 of the Amsterdam *keur* of 1598, 25 of the Middelburg *keur* of 1600, and 19 of the Rotterdam *keur* of 1604.

<sup>124</sup> Van Zurck *Codex Batavus sv 'Assurantie'* par 23 referred to those legislative provisions (s 13 of the *placcaat* of 1571, and ss 23 of the Amsterdam and 25 of the Middelburg *keuren*) as concerning insurance 'in diverse plaetsen gedaen zynde', ie, as concerning double insurance and not, or at least not merely, co-insurance.

<sup>125</sup> See further § 4.5 *infra*.

<sup>126</sup> *Praelectiones* 1474a-c (*ad* III.24.17).

<sup>127</sup> He used the following example to illustrate the point. If goods worth f10 000 were insured by A for f5 000 and then by B also for f5 000, it apparently made no difference whether B had signed the same or a different policy. If the goods were totally lost, the insured could claim f5 000 from A and f5 000 from B also because the insurance by B in this case (where it did not amount to over-insurance) was perfectly valid. And if this was true in the case of a total loss, it was also true in the case of a partial loss. So, if half of the value of the goods had been lost, each insurer would have to pay f2 500.

cluded, that the rule applicable in the case of co-insurance and double insurance *simpliciter* was everywhere recognised by custom and accepted as certain and indisputable.

Finally, Van der Linden<sup>128</sup> confirmed this exposition by indicating that several policies could be underwritten for one and the same insurance (that is, that double insurance was permissible) and that legal problems only arose in this regard where such double insurance amounted to over-insurance.

## 4 Over-insurance

### 4.1 Introduction

Over-insurance occurred, most simply, where property was insured for more than the value of that property. Put differently, there was over-insurance where the sum insured exceeded the insurable or the agreed value of the property in question.

Even if the sum or sums insured on particular property did not exceed the value of that property, such insurance or, in the case of double insurance, such insurances could still amount to over-insurance, though. One example of that was where the property in question did not belong or did not belong fully to the insured.<sup>129</sup> Thus, in an opinion<sup>130</sup> delivered in 1622 on the correctness of a judgment of the Rotterdam Chamber of Insurance, the view was expressed that it was correct that where the insured had sold his share in a ship prior to the insurance of that share in the ship, he did not in the case of the loss of the ship have any claim against the insurer, and that the same would be the case if someone insured goods on a ship where he in fact did not have anything on that ship.<sup>131</sup> The same appears from a further opinion from 1669<sup>132</sup> to the effect that an insurance for a larger amount than the value of the insured's interest or, as it was also put, for more than the extent to which he was at risk, was<sup>133</sup> automatically invalid to

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<sup>128</sup> *Koopmans handboek* IV.6.7.

<sup>129</sup> Put differently (but in a way in which, because of the under-developed interest theory, it was not generally put at the time in the Roman-Dutch sources), where the sum or sums insured exceeded the value of the insured's interest in that property.

<sup>130</sup> See *Hollandse consultatien* vol I cons 234.

<sup>131</sup> See further as to the opinion eg Van Zurck *Codex Batavus* sv 'Assurantie' par 23 n1; La Leck *Register* sv 'assurantie' (insurance concluded for more than the insured has an interest is invalid as to the excess).

<sup>132</sup> See *Nederlands advysboek* vol II adv 120. The opinion has already been considered in detail in connection with insurance for another (see ch X § 2.4.3 *supra*) and will be mentioned again in § 4.3 at n191 *infra*.

<sup>133</sup> By reason of such over-insurance, although that was not expressly so stated.

the extent of such excess.<sup>134</sup> Bynkershoek<sup>135</sup> therefore declared with reference to this opinion that an insured could not insure for more than his interest ('*verder ... dan voor zo verre hy interest in 't schip heeft*').

Before considering the liability of insurers in the case of over-insurance in more detail, a number of ancillary matters, which are nevertheless germane to the topic, may be noted very briefly .

Over-insurance was one of the practices occurring in connection with insurance contracts which involved, more than virtually any other, a great potential for fraud on the part of the insured. It was a better proposition for the insured if the ship or goods he had insured in excess of the amount he stood to lose should they be lost, were in fact lost rather than that they should arrive safely at their destination. Frauds perpetrated by insured because they were over-insured on different policies concluded in different places or even in the same place were not uncommon in the sixteenth century.<sup>136</sup> Not surprisingly, over-insurance was from early on frowned upon by the courts<sup>137</sup> and it was one of the factors relied upon by Ferufini in support of his proposals in the 1550's for the compulsory registration of insurance policies.<sup>138</sup> It was also one of the matters which the various legislatures sought to regulate from early on, to the extent not merely of prohibiting over-insurance but in fact prohibiting full-value insurance and even on one occasion prohibiting the conclusion of any insurance at all.<sup>139</sup>

Furthermore, although not an instance of over-insurance in the true sense of the word,<sup>140</sup> the case where property was, in breach of the prohibition on full-value insurance, insured for more than the permitted proportion of its value,<sup>141</sup> was, for as

<sup>134</sup> '[A]sseurantie tot meerder zomme gedaan, als de Geasseureerde daar by interest heeft, is nopende het meerder invalide'. Also: '[D]at niemand zig verder kan doen verzekeren, als hy risqueert, en dat dien volgende de verdere verzekering nul is, en van zelve komt te vervallen, behoudens restorno van de premie, volgens de ordonnantie en het ordinaris gebruik in materie van Assurantie'.

<sup>135</sup> *Quaestiones juris privati* IV.1.

<sup>136</sup> See De Groote 'Zeeverzekering' 215 for an example of an insurance fraud in Antwerp in the sixteenth century which involved a merchant instructing four or five different brokers to have the same risk underwritten by merchants of the various nations (guilds) present in the city.

<sup>137</sup> Already in 1470 the Bruges *Schepenen Court* in *M Jeronème Vento v Pierre de Perandre & Rolland van der Vlaminpoorte* (see Gilliodts-van Severen *Cartulaire* vol II at 203-204) ruled against an insured who had, as the insurers alleged, insured goods for more than they were worth. See also De Groote *Zeeassurantie* 16; De Roover 'Early Examples' 199.

<sup>138</sup> See again ch IV § 1.3.2 *supra* and ch VIII § 3.3 *supra*.

<sup>139</sup> See further § 5.2 *infra* as to the prohibition on full-value insurance.

<sup>140</sup> As will become apparent, a fundamental distinction existed between the prohibition on full-value insurance and the prohibition on over-insurance.

<sup>141</sup> That is, in excess of the permissible amount of compulsory under-insurance, even if not in excess of either the value of the property or of the value of the insured's interest in that property.

long as that prohibition existed in Roman-Dutch insurance legislation, treated in the Roman-Dutch sources as being on a par with the case of over-insurance proper.<sup>142</sup>

The time when it had to be determined whether an insured was in fact over-insured was not the time when the insurance was or any of the insurances were concluded, but rather the time when the loss occurred. This was a crucial factor, given that the value of ships and goods fluctuated over time, as could the value of the insured's interest in such ships or goods.<sup>143</sup>

Over-insurance could occur in several forms. It could occur, as has already been stressed, on a single policy underwritten by one insurer or, more likely, by several co-insurers; or it could occur through double insurance, that is, on two or more policies each in turn underwritten by one or more insurers.<sup>144</sup>

In either of these forms, over-insurance could further occur innocently and in good faith or intentionally and in bad faith,<sup>145</sup> and different consequences resulted depending on which of these forms of over-insurance was present.<sup>146</sup> *Bona fide* over-insurance on a single policy occurred, for example, where the insured expected a consignment of a particular quantity of goods from abroad which he insured for the value of that quantity of goods, and where it then turned out that a lesser quantity of goods had been consigned to him. *Mala fide* over-insurance on a single policy occurred where the insured, knowing the value of his property at risk, intentionally insured such property in excess of that value. Likewise, *bona fide* over-insurance through double insurance most frequently (but not only) occurred in practice where a merchant, expecting goods from abroad, himself insured the consignment locally while, unbeknown to him, the consignor of the goods or his factor or partner abroad had also insured that consignment on his behalf. *Mala fide* over-insurance through double insurance occurred where a merchant insured his property knowing full well that it had already been insured against the same perils in terms of another policy, either by himself<sup>147</sup> or by someone else on his behalf.

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<sup>142</sup> See § 5.1 *infra* for more detail on this point.

<sup>143</sup> This appears from Bynkershoek's explanation (*Quaestiones juris privati* IV.1) of the opinion of 1669 (*Nederlands advysboek* vol II adv 120) as well as from a decision of the *Hooge Raad* in 1707 (see Bynkershoek *Observationes tumultuariae* obs 296; *idem Quaestiones juris privati* IV.3), both of which will be considered in more particulars in § 4.3 *infra*.

<sup>144</sup> For the difference, see generally eg Hammacher 95-98; Reatz *Geschichte* 129-132.

<sup>145</sup> The distinction was not always clearly drawn between, most properly, non-fraudulent (which includes negligent) and fraudulent over-insurance. More usually innocent and fraudulent over-insurance were simply juxtaposed as if they covered all the possible types of over-insurance.

<sup>146</sup> Intentional over-insurance was generally regarded as fraud, so that all the civil and criminal consequences of fraud (see again ch XIV *supra*) followed, including the nullity of the insurance contract. By contrast, in the case of non-fraudulent over-insurance, the insurance was void only in so far as the permissible limit had been exceeded. See further generally Hammacher 96-97.

<sup>147</sup> In which case his knowledge of the existence of the other insurance was easily established.

The underlying principle applicable in the case of over-insurance, and the one which, according to Van der Keessel, went to the root of insurance,<sup>148</sup> and which was generally recognised,<sup>149</sup> was that an insured was not to be permitted to obtain more than a mere indemnity of his loss by reason of any form of over-insurance or, as Van der Keessel put it, by reason of an insurance in excess of the insured's interest, whether that be by way of one or more policies. Further, because an insured could not, in the case of over-insurance, recover the amount or amounts on the policy or policies in question in full, but only so much as provided him with an indemnity, the amount or amounts insured on the policy or policies in question had to be reduced and with it the liability of insurers for those amounts. The crucial question was how the insurers' liability had to be reduced.<sup>150</sup>

Various possibilities presented themselves in this regard. Thus, the liability of all the insurers involved could simply be extinguished in the case of over-insurance; or their liability could be reduced proportionally;<sup>151</sup> or the liability of only one or some of the insurers involved could be reduced or, if necessary, extinguished. If the latter option had to apply, the further question was who of the insurers would have their liabilities reduced or extinguished and who not. In this regard the most obvious possibility in eliminating the over-insurance was to reduce or if necessary to extinguish the liability of the last insurer or set of insurers first, and that of the first insurer or set of insurers last.<sup>152</sup>

As will be explained in more detail shortly, as regards the reduction of insurer liability in the case of over-insurance, Roman-Dutch law drew a fundamental distinction between over-insurance occurring on a single policy and over-insurance occurring through double insurance. It drew a further equally crucial distinction between innocent

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<sup>148</sup> See Van der Keessel *Praelectiones* 1437 (*ad* III.24.4) explaining why, in the case of insurance anew in terms of s 25 of the Amsterdam *keur* of 1744 (see again ch VII § 4.1 *supra* as to solvency reinsurance), the first insurer had to be notified of the conclusion of the second insurance and why the action against the first insurer had to be ceded to the second insurer.

<sup>149</sup> Albeit not always explicitly by all the commentators or in all legislative measures. Hammacher 96 notes that the prohibition on over-insurance was a consequence of the prohibition in insurance law on the enrichment of the insured and that although the latter operated from the commencement of insurance in its modern form, it was prior to the nineteenth century only once expressly formulated in insurance legislation, namely in the Prussian *Allgemeines Landrecht* of 1794.

<sup>150</sup> Thus, whereas in the case of co-insurance and double insurance *simpliciter* the question was simply how the insurers were to be liable for the loss, the question in the case of over-insurance was not only how the insurers were to be liable for the insured's loss but at the same time also how their liability had to be reduced to ensure that the insured did not obtain more than only a compensation for his loss.

<sup>151</sup> That is, the reduction of liability could occur on the same basis as the imposition of liability in the case of co-insurance and double insurance *simpliciter*, namely, according to the proportionality principle, in the same proportion as their respective subscriptions.

<sup>152</sup> Put differently, the priority principle had to be applied so that the first insurer or insurers were liable to the extent that there was no over-insurance, and the last insurer or insurers were to be relieved of liability to the extent of any over-insurance. Insurances concluded earlier in time remained in existence while subsequent contracts were avoided first to the extent of any over-insurance.

or accidental (or non-fraudulent) over-insurance and intentional over-insurance in bad faith. In the process it offered three solutions for three different cases of over-insurance, namely *bona fide* over-insurance on a single policy; *bona fide* over-insurance through double insurance; and *mala fide* over-insurance, whether on a single policy or on several policies.

The solutions adopted by the formal Roman-Dutch law with regard to the different instances of over-insurance were, very briefly and by way of introduction, as follows.

First, in the case of *bona fide* over-insurance on a single policy, the policy in question remained valid to the extent of the insured's loss and the liability of the co-insurers involved,<sup>153</sup> all being severally and proportionally liable, were likewise all proportionally reduced. It did not matter in which order the insurers had signed the policy. Their liability being several, it was not possible for the insured to recover more from any one insurer than his proportionate part. Therefore, no question of contribution between co-insurers arose in Roman-Dutch law in the case of over-insurance since none arose between them where there was no over-insurance.

Secondly, in the case of *bona fide* over-insurance through double insurance, the proportionality rule was not recognised (that is, there was no proportional deduction of the liability of all the insurers or sets of insurers involved) but the priority principle governed. Accordingly, the first insurers or set of insurers were liable first while the last insurers or set of insurers were relieved of their liability first in so far as it was necessary to ensure that there was no over-compensation of the insured's loss. Thus, insurers on the policy earlier in time were liable in priority to those on a later policy or policies while the latter insurers were in turn relieved of their liability first to the extent that the earlier insurances sufficed to indemnify the insured.

As regards (non-fraudulent) over-insurance a distinction was therefore drawn in Roman-Dutch law<sup>154</sup> between the principle applicable as a rule in the case of co-insurance and double insurance *simpliciter*, and over-insurance on a single policy, namely that of equal proportionate liability, and the principle applicable, as an exception to the rule, in the case of *bona fide* over-insurance through double insurance, namely that of priority.<sup>155</sup> At the risk of overstatement, the following summary may be offered of the position. In the case of co-insurance and double insurance *simpliciter*, the insurers

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<sup>153</sup> In the case of a single insurer, of course, none of the problems mentioned here ever arose.

<sup>154</sup> This distinction most clearly appeared from the exposition by Van der Keessel *Theses selectae* th 763 and 764 (*ad* III.24.17); *idem Praelectiones* 1474a-c (*ad* III.24.17).

<sup>155</sup> Two examples may be used by way of illustration of the distinction between the first and second cases. (i) If a ship worth f2 400 was insured for f3 000 in terms of a single policy underwritten by a single insurer for f3 000, his liability was reduced to f2 400; if the single policy was underwritten by four insurers for f1 000, f1 000, f500 and f500 each, their liabilities were reduced to f800, f800, f400 and f400 respectively. (ii) If a ship worth f2 400 was insured for f2 000 in terms of policy A (by two insurers for f1 000 each) and for a further f1 000 in terms of policy B (by two insurers for f500 each), the liability of the insurers on policy A was not reduced at all (the two insurers therefore being liable for f1 000 each) while the liability of the insurers in terms of policy B was reduced to f400, and that of two insurers involved respectively to f200 each.

were all liable proportionately. Likewise, in the first case of over-insurance, namely of over-insurance on a single policy, there was a proportional reduction of the liability of all the co-insurers. By contrast, in the second case of over-insurance, namely of over-insurance through double insurance, there was no proportional reduction of the liability of all the insurers involved but rather a chronological reduction with later policies being in a preferred position.<sup>156</sup>

In the second case of over-insurance the dates of the policies involved<sup>157</sup> were crucially relevant. But again, as liability on the different policies arose sequentially, and as the liability for the insurers on each of these policies was a proportional and several liability, the insured could never recover from any one insurer or on any one policy more than was due by that insurer or in terms of that policy. Accordingly in the case of over-insurance through double insurance no question ever arose in Roman-Dutch law of any right of contribution between the insurers involved.

The third case was that of fraudulent over-insurance. In whatever form,<sup>158</sup> all insurances involved were declared void and all the insurers involved on the respective policies were relieved of their liability. While in the case of a *bona fide* over-insurance the main concern was to maintain the indemnity principle and to ensure that there was no recovery in excess of the amount of the insured's loss, different considerations were applicable in the case of *mala fide* over-insurance. There the elimination of fraud was the guiding concern and this resulted in the adoption of the most drastic of all the solutions, namely the vitiation of all the policies, irrespective of the order in which they were concluded. The insured did not simply have the total amount of his claims reduced in accordance with the extent of his loss but in fact lost all those claims and had none at all.

In a succinct but deceptively simple summary of the application of the above principles to the insured's claim, Van der Linden<sup>159</sup> merely explained that the insurer has a legal defence against the claim of the insured in the case of over-insurance, in consequence of which the sum or sums insured had to be reduced to the real value of the insured's interest. He did not begin to explain how this reduction influenced the liability of the insurers involved in the different possible instances, although he did state that the insured's action was lost if he had over-insured fraudulently.

The position in Roman-Dutch law of the insured and of the various insurers involved in the case of over-insurance may now be investigated in more detail with reference to the relevant sources.

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<sup>156</sup> Thus, the earlier policies bore the loss first while the reduction of liability commenced from the last policies. The policies were successively avoided to the extent of the over-insurance, beginning with the policy concluded last in time.

<sup>157</sup> As distinct from the dates on which the individual insurers had underwritten each of those policies. If the policy was not dated, as it usually was, it is uncertain which date was taken as the appropriate date in Roman-Dutch law, the date on which the first insurer subscribed to the policy, or the date on which the last one did, or even some other date.

<sup>158</sup> That is, whether on a single policy or by way of double insurance.

<sup>159</sup> *Koopmans handboek* IV.6.10.



## 4.2 The Early Legislative Regulation

The legal position of the parties to the insurance contract in the case of an over-insurance was first treated in ss 14 and 15 of title VII of the *placcaat* 1563 and then in surprising particularity. The sections dealt, respectively, with intentional or fraudulent and with accidental or non-fraudulent over-insurance.<sup>160</sup>

Section 14 concerned two situations. The first was where goods were or a ship was insured in different places (that is, double insurance) without any notice of that fact having been given to the later insurer but where it was intentionally concealed (*'willens ende wetens verswijgende'*) in order to claim more than once for a loss and to obtain more than the value of the insured goods or ship. Thus, this was the case of fraudulent over-insurance through double insurance. The second situation was where goods or a ship were insured for more than was permitted by the *placcaat*. This was therefore the case of over-insurance,<sup>161</sup> presumably on a single policy<sup>162</sup> and presumably also fraudulently concluded.<sup>163</sup> In these two situations, s 14 provided, the insured had no claim in respect of his loss on his insurances from any of the insurers involved (*'dat die selve ter saken van sijnder assureantien, vanden Assureerders, oft eenige van dien niet en sal mogen eysschen'*), nor any claim for the recovery of the premium of such insurances, which was forfeited to the authorities with a *bona fide* insurer being entitled to retain the customary half per cent.<sup>164</sup>

Therefore, in the case of fraudulent over-insurance, the policy or policies in question were avoided and all the insurers involved were relieved of liability. In addition the insured was not permitted to recover any of the premiums he had paid in respect of those insurances.<sup>165</sup> Section 14 was passed not only to prevent the insured obtaining

<sup>160</sup> Section 12 provided that no one could value (*'taxeren'*) his insured goods or merchandise in excess of their real value (*'over de ghemeyne weerde ende valeur vanden selven'*). This, it would appear, dealt not with over-insurance but with over-valuation (see again ch XVII § 5.2 *supra*) or possibly even, given the mention here of the valuation of 'insured' goods, with an excessive claim (see ch XVII § 4.2 *supra* as to proof of the amount of the loss).

<sup>161</sup> In the form, specifically, of insurance in excess of the permitted portion of the value and not merely (although that would no doubt also have been included) insurance in excess of the value of the ship or goods.

<sup>162</sup> This was presumably so because of the contrast with the first situation where insurances were concluded in different places.

<sup>163</sup> This was presumably so given that s 15 was specifically concerned with over-insurance where there was no fraud.

<sup>164</sup> As to the recovery and forfeiture of premiums in the case of over-insurance, see again ch XI §§ 6.2.2 and 6.3.1 *supra* respectively.

<sup>165</sup> As to s 14, see eg Van Zurck *Codex Batavus* sv 'Assurantie' par 23; Van der Keessel *Praelectiones* 1474a-c (*ad* III.24.17) (in s 14 it was provided that no over-insurance by different policies was permitted); Goudsmit *Zeerecht* 247-248; Jolles 66-67; Kracht 20; and Oelofse 289 (who seemingly did not realise that s 14 was concerned with *mala fide* over-insurance and that the position was differently regulated - by s 15 - in the case of *bona fide* over-insurance).

more than an indemnity because of his intentional over-insurance, but also to prevent the growing abuses in connection with the return of premiums. Especially in times of war, different premium rates could be obtained in different places, and insured shopped around for cheaper rates, hoping to cancel more expensive insurances concluded earlier and to claim a return of the premium paid on them when a cheaper insurance had been found. Section 14, it may be thought, was passed also if not primarily to prevent this evil.<sup>166</sup>

Section 15 concerned the situation where goods<sup>167</sup> were found to be insured in different places without any fraud on the part of the insured (*'sonder eenige fraude vanden geasseureerden'*), that is, with *bona fide* over-insurance through double insurance. In such cases, the section provided, the first insurance alone was liable if that insurance was sufficient to cover all the goods in so far as it was permitted to insure them, and if not the balance (*'reste'*) was borne by the next insurance which remained valid to that extent (*'naest volgende ... blyven staen'*), such further insurance, however, becoming null and void (*'dood ende te niete'*) in so far as it exceeded that balance. And where the next policy was so avoided, the premium had to be returned, the insurer<sup>168</sup> being entitled, however, to retain a half per cent of the premium as was the custom.<sup>169</sup>

Therefore, in the case of *bona fide* over-insurance through double insurance, the insurance concluded first remained valid and the insurer or insurers who had underwritten it remained liable to the extent that, taken alone, it did not amount to an over-insurance. To the extent that the first policy did not in fact amount to a full-value insurance, the second policy remained valid to the extent that it, taken with the first policy, did not amount to an over-insurance. The same applied to any further policies which may have been concluded on the same property.<sup>170</sup>

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<sup>166</sup> See Dreyer 142-143 for this point.

<sup>167</sup> But seemingly not, or at least not expressly, a ship.

<sup>168</sup> Presumably only if he was innocent, though. It was at least theoretically possible for the insured to have been *bona fide* (which was necessary for the over-insurance to have been a *bona fide* over-insurance) but for the insurer or one of them to have been aware of the fact of the over-insurance and therefore *mala fide*.

<sup>169</sup> As to s 15, see Van der Keessel *Theses selectae* th 763 (*ad* III.24.17); *idem Praelectiones* 1474a-c (*ad* III.24.17) who explained as follows what happened to the two policies in the case of over-insurance through double insurance. The policy prior in time alone remained valid up to the sum insured. The later policy (or policies, although Van der Keessel did not foresee such a possibility) was void at least to the extent to which the earlier policy had left nothing which might still be insured and the later insurance was thus only valid for the balance, if any, up to the amount still short of the value of the insured property, but null and void for any amount in excess of that. See also Goudsmit *Zeerecht* 247-248 and the other references in n165 *supra*.

<sup>170</sup> Various possibilities therefore existed. (i) If a ship worth f2 000 was insured for f1 500 by policy A and for f1 000 by policy B, the insured could in the case of a total loss recover in full f1 500 on policy A and only up to f500 on policy B. (ii) If a ship worth f2 000 was insured for f2 000 by policy A and for f1 000 by policy B, the insured could in the case of a total loss recover in full f2 000 on policy A and nothing at all on policy B. (iii) If a ship worth f2 000 was insured for f2 500 by policy A and for f1 000 by policy B, the insured could in the case of a total loss recover only f2 000 on policy A and nothing at all on policy B.

Section 15 therefore established a hierarchy of policies and applied the priority principle to establish the order in which liability was imposed upon (or, seen from the other side, the order in which the liability was reduced of) the insurers or sets of insurers involved in the case of an over-insurance by successive policies. In the case of a *bona fide* over-insurance the different insurers or sets of co-insurers in terms of the separate policies were therefore not treated as co-insurers which were all 'equally' liable, each for his own proportion. This point was stressed by the Roman-Dutch authors who referred to s 15 of the *placcaat* of 1563 and who specifically compared it to and contrasted it with the provisions on co-insurance contained in s 13 of the *placcaat* of 1571.<sup>171</sup>

While s 15 dealt in express terms with *bona fide* over-insurance through double insurance, it made no pertinent mention of the position where such over-insurance occurred on a single policy. However, the legal position in that case was implicit in its provisions and the solution analogous. Just as the first policy in the case of double insurance remained valid only up to amount of the insured's loss or the extent of the permitted insurance, so too the single policy. To the extent that it provided an over-insurance, it was void and a proportionate return of the premium was required, subject to the customary deduction of a half per cent. In effect, therefore, s 15 also embodied the underlying principle governing instances of over-insurance, namely the maintenance of the indemnity principle.<sup>172</sup>

The *placcaat* of 1571 was less expansive on the topic of over-insurance.<sup>173</sup> It merely stated the general principle in s 3, namely that no insurance could be concluded, whether with one or several insurers, in respect of imports or exports, except below the real value of the goods concerned (*'dan onder de oprechte ende ghemeene*

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<sup>171</sup> As to s 13, see again § 2.2 *supra*. See eg Van Zurck *Codex Batavus* sv 'Assurantie' par 23 who contrasted *mala fide* insurance in excess of what was permissible and (over-) insurance fraudulently concluded in different places (in terms of s 14 of the *placcaat* of 1563) not with *bona fide* over-insurance (in terms of s 15 of the *placcaat* of 1563) but rather with co-insurance in terms of s 13 of the *placcaat* of 1571. This may have lead Jolles 66-67 to state, quite incorrectly, that the principle (in s 15) that only the first insurance remained valid was not followed in s 13 of the *placcaat* of 1571, which provided that the last insurer was to participate in the loss or profit in the same way as the first insurer. These two sections were in fact concerned with distinguishable situations, namely with over-insurance through double insurance and with co-insurance respectively. Scheltinga *Dictata ad* III.24.17 first explained the position in the case of co-insurance and then noted that in terms of s 15 the position was otherwise when *'verscheide assuradeurs op verscheide tyden verscheide policen van asse. geteekend hebben'*.

<sup>172</sup> Thus, as already appeared from the earlier examples, if a ship worth f2 000 was insured for f2 500 on a single policy, the insured could in the case of a total loss recover only f2 000 on that policy and no more. And, remember, the co-insurers on that policy were liable proportionally for that amount and not successively in the order in which they had underwritten it.

<sup>173</sup> It treated co-insurance in more detail in s 13. See again § 2.2 *supra*.

weerde van dien').<sup>174</sup> However, it gave no indication of the consequences of any over-insurance.

In the Amsterdam *keur* of 1598 this general principle was again stated in s 2,<sup>175</sup> namely that no insurance could be made, whether with one or with more insurers, for imports or exports, otherwise that below the real value of the goods ('*dan onder de oprechte ende gemeene weerde van dien*').<sup>176</sup> Interestingly enough, ss 31 and 32 of the Middelburg *keur* of 1600, both of which had no counterparts in the otherwise virtually identical Amsterdam *keur* of 1598, repeated the provisions of ss 14 and 15 of title VII of the *placcaat* 1563 almost to the letter.<sup>177</sup> Obviously the Middelburg Legislature had realised that the omission of any regulation of over-insurance was serious enough to warrant a departure from its Amsterdam model. The Middelburg *keur* of 1600 was therefore the first Roman-Dutch insurance legislation to deal with both co-insurance (in s 25) and over-insurance (in ss 31 and 32).

Van der Keessel<sup>178</sup> commented on ss 31 and 32.<sup>179</sup> He noted the fundamental principle contained in s 31, namely that an insured could not obtain a profit by being over-insured. In fact, in the case of a intentional contravention of this principle, the insurers were not liable at all, and the premium was forfeited, subject to an ignorant 'insurer'<sup>180</sup> retaining a half per cent of it. However, in terms of s 32, in the case of different insurances being concluded *bona fide* in different places on the same goods, the first insurance was valid if it was appropriate;<sup>181</sup> if not, the second insurance too was effective for the balance but no further. In this case, though, presumably because of the absence of any fraud, the (partial) invalidity of the first and/or the second insurance

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<sup>174</sup> Likewise, in terms of s 29, the insurance of imports or exports over land or internal waters could not exceed the value of such insured goods and also had to remain uninsured to a further extent. And in terms of s 30, the insurance of goods being imported by sea, internal waters or over land from foreign countries and regions had to be below the value of such goods ('*welverstaende altijts dat de voorz verseeckeringe sal wesen onder de waerde vande voorz, Koopmanschappen*') and a specified part therefore had to remain uninsured. As to this compulsory under-insurance, see § 5.2 *Infra*.

<sup>175</sup> As it was also in s 3 of the Middelburg *keur* of 1600.

<sup>176</sup> In terms of s 15 of the Amsterdam *keur* and s 27 of the Middelburg *keur* this principle was restated in respect of goods carried over land or by internal waters.

<sup>177</sup> See Enschedé 32; Goudsmit *Zeerecht* 453; and Weskett *Digest* 187-188 sv 'double-insurance' par 2.

<sup>178</sup> *Praelectiones* 1437 (*ad* III.24.4) and 1474a-c (*ad* III.24.17).

<sup>179</sup> And therefore also indirectly on ss 14 and 15 of the *placcaat* of 1563.

<sup>180</sup> And not an ignorant insured ('*geasseureerde*') as is stated in the version of s 31 in *GPB* vol I at 872. Section 14 of the *placcaat* of 1563 had spoken of '*Asseureerder*'. An insured could hardly be unaware of an over-insurance he had himself intentionally concluded. See also n168 *supra*.

<sup>181</sup> By which Van der Keessel probably meant if it was sufficient in amount and not in itself already amounted to an over-insurance.

occurred with a proportionate return of the premium or premiums in question, subject again to the insurers retaining the customary half per cent.<sup>182</sup>

It appears clearly from the earlier writers on insurance that the application of the priority principle to over-insurance through double insurance and the invalidity of all policies in the case of *mala fide* over-insurance were not new principles. Straccha,<sup>183</sup> for one, considered the position of a person who had insured himself in different places (that is, had over-insured himself) in some detail. He distinguished three possibilities. First, if such insurances were *mala fide*, for example with a view to making a profit on an old ship by scuttling her and then claiming on the different policies, the insured was punishable for fraud. But there was no presumption of such fraud, for no one was presumed to have destroyed his own property even if it had been over-insured by several policies. Secondly, where such insurances in different places were concluded without bad faith but with a view to protect himself and without exceeding the value of the goods, they were not improper. This occurred daily, Straccha noted, because of the fact that insurance cover for the full value was not always available in one place. Thirdly, where different insurances were concluded in different places without any fraud but in good faith but each for the full value of the goods in question (thus, double insurance and over-insurance), such as where both the consignee and the consignor or the master insured a consignment of goods, the question arose which insurance was valid? Straccha stressed that the insured could not claim the sum insured<sup>184</sup> on both policies because he could not be enriched, and further because this was also not a case of a novation of the first insurance by the second insurance. That being the case, did each of the different insurers (or sets of insurers) have to pay half or did one of them have to pay the full sum insured? The solution, Straccha explained, was that the first insurance was valid and not the second.<sup>185</sup>

In Antwerp customary law,<sup>186</sup> where the proportional liability of all co-insurers on a single policy in the case where there was no over-insurance, irrespective of the order in which they had signed the policy, was provided for,<sup>187</sup> a different position pertained, though, where the single policy in question insured more than had been loaded, that is,

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<sup>182</sup> The liability of the insurers *inter se* on the first policy as of those on the second policy remained proportional in terms of s 25, of course (see again § 2.2 *supra* as to co-insurance). See eg Magens *Essay* vol I at 13 who explained with reference to s 25 that all the insurers who had signed upon the first policy bore the loss proportionally, those on the second policy contributing nothing to it.

<sup>183</sup> *De assecurationibus* II.3. See too eg Casaregis *Discursus* I.89-90.

<sup>184</sup> Rather, the amount of his loss.

<sup>185</sup> Again he used the analogy of the contract of sale to justify the application of the priority principle in this instance. The position was just as in the case of sale of the same object to two persons, when the general rule also was that the first sale was valid but not the second one. As to insurance and sale, see again ch I § 4.1 *supra*.

<sup>186</sup> As to which see generally Mullens 86-87.

<sup>187</sup> In art 149 of the *Compilatae* of 1609. See again § 2.2 n32 *supra*.

where there was over-insurance. In that case, art 150<sup>188</sup> of the *Compilatae* of 1609 provided for the chronological or priority principle to be applied. The loss was to be borne by those who had underwritten the policy in question first (*'alsdan wort de schade gedragen bij de gene die eerst geteeckent hebben'*), subject to the fact that those who had signed on the same day were liable proportionally (*'staen in eenen graet'*) as if they had signed together and simultaneously. Therefore, in the case of over-insurance on a single policy the rule was that in principle only the first insurers were liable, unless they had signed on the same day, in which case the proportionality principle applied as it did in the case of co-insurance not amounting to over-insurance. It was therefore not assumed and accepted in Antwerp practice, as it was in the case of the formal *placcaat* of 1571 and in the subsequent municipal *keuren*, that all co-insurers on a single policy had signed on the same day and that the liability of co-insurers in the case of over-insurance was accordingly invariably reduced proportionally. The fact that it may have been difficult to determine the order in which underwriters had subscribed a policy, given that they may not have dated their subscriptions, may be the explanation for the different position pertaining in the formal sources.

Equally, by art 153 of the *Compilatae*, in the case of over-insurance through double insurance (insurance *'in verscheijde policen oft [op] verscheijden plaetsen'*),<sup>189</sup> only the first insurance was effective in so far as it was sufficient to the extent for which one could insure. If it did not cover the whole permissible insurable amount, it was supplemented by the second insurance (*'soo blijft de reste staen op de navolgende ver-sekeringe'*) which was itself void to the extent that that amount was exceeded (*'meer dan de resterende ver-sekerde goeden'*).

Article 154 qualified this by making it clear that this was so when such insurances were concluded in good faith in different places or on different days. If someone had purposely (*'willens ende wetens'*) concluded such second or further insurance without having warned the earlier insurers in an attempt to make a profit (*'om*

<sup>188</sup> Of par 4, title 11, part IV (see De Longé vol IV at 262).

<sup>189</sup> On the conclusion of an insurance contract, the insured had in terms of art 44 (of par 2, title 11, part IV: see De Longé vol IV at 218) to give the insurer notice of (ie, he had to mention in the policy) the existence (and the date of and sum insured by) any other insurance on the same ship or goods, or of the fact that the conclusion elsewhere of such other insurance had been instructed. And if such other insurance was subsequently instructed or concluded, the insurer also had to be notified immediately. When the insured wished to claim a compensation or a return of premium, he had to present all the policies to the insurers so that the reduction of their liabilities could be worked out (*'moet de policen bijeen brengen om geconfereert ende d'een tegens d'ander gesien te worden, ten einde hiervoore [hieronder] verhaelt'*). In terms of art 86 (of par 3, title 11, part IV: see De Longé vol IV at 236), the premium was not due or was recoverable in the case of over-insurance. However, if the insured had known of the other insurance but had not notified the insurer, then, in terms of art 90, there was no return but the premium had to be paid in full as if the insurers had run the risk (*'al oft de ver-sekeraers metter daet t'perijckel geloopen hadden'*).

In the event of a claim on the policy, the insured had to notify the insurer of the fact that no further or additional insurance had been concluded either at the place of insurance or elsewhere and that he was unaware of any such insurance (see art 266). Despite this declaration, it remained open (in terms of art 268) to the insurers to prove the contrary and if it were found that any impropriety had occurred and that the insured had also insured elsewhere in bad faith, he was not only deprived of his action but also punished accordingly.

*bij dijen middele twee oft drijmaels oft meerderen prijs oft weerden van sijn versekerde goeden oft schepen te genieten*'), then not only would the insured have no action at all but he would also forfeit all the premiums.<sup>190</sup>

Although they differed as regards the position in the case of over-insurance on a single policy, in the case of over-insurance through double insurance customary law and formal law therefore agreed on which principle had to be applied, namely the priority principle.

### 4.3 Decisions and Opinions on Over-insurance

The first opinion to deal with the consequences of over-insurance, and more specifically with over-insurance in the form of insurance in an amount exceeding the value of the insured's interest, was delivered in 1669.<sup>191</sup> The owner of a one-sixth part in a ship had insured himself in Amsterdam for a one-third share of the ship in the amount of f20 000. He also insured his goods on the ship by the same policy for f1 200. Subsequently he took out another insurance on the goods loaded for his account on the ship in the amount of f600. When he claimed this latter amount on the second policy, the insurer refused payment on the ground that at the time the insured had concluded this insurance, he was already insured by his first policy for more than the value of his share in the ship and his goods (*'alrede meerder verzekert was, als zijn gedeelte in dat Schip en goederen quam te bedragen'*).

The advocate delivering the opinion thought that the second insurer was not liable. He noted that an insured was not permitted to insure for more than his actual interest (*'gerequireert dat de Geassureerde zig niet verder of meerder laat verzekeren als hy in der daad in de vojagie, daar op de Assurantie geschied, geinteresseert is'*) and that it was trite that where he insured in excess of his interest, the insurance was invalid to that extent (*'zoo is alom en genoegzaam eendragtelijk gerecipieert, dat iemand zig verder latende verzekeren als hy geinteresseert is, de Assurantie als dan niet gehouden is'*).<sup>192</sup> Because here the insured was already over-insured by his first policy, the second insurance was automatically invalid and of no effect (*'zonder effect en invalide'*).<sup>193</sup> It may be noted that the assumption was that the second insurance

<sup>190</sup> In terms of art 155, where the insured had acted in contravention of this and had succeeded in recovering a 'double' compensation, he risked having to give it all back together with twelve per cent interest (*'den selve wederomme te geven, metten interest van dijen tegens tweelff ten honderden'*) and being punished corporally.

<sup>191</sup> See *Nederlands advysboek* vol II adv 120.

<sup>192</sup> In this regard reference was made to s 2 of the Amsterdam *keur* of 1598; s 3 of the Middelburg *keur* of 1600; s 2 of the Rotterdam *keur* of 1604; Roccus *De assecurationibus* note; Straccha *De assecurationibus* X; Santema *De assecurationibus* III.12; and s 11 of the *placcaat* of 1571. Interestingly enough, there was no reference to ss 14 and 15 of the *placcaat* of 1563 which directly governed over-insurance.

<sup>193</sup> As to the insured's further argument that the second insurer was liable because at the time of the conclusion of the second insurance he had already transferred half of the first insurance to his partner (*'medestander'*) in the ship and goods, see again ch X § 5 *supra*.

was not totally invalid but only invalid to the extent that it and any earlier insurance put together amounted to an over-insurance ('*nopende het meerder*').<sup>194</sup>

This was the position, the opinion continued, even if the over-insurance occurred without the intervention of the insured and without his knowledge (that is, where the over-insurance was *bona fide*), such as when a merchant gave instructions at various places for the insurance of his goods and those instructions were all performed so that the situation arose where he was over-insured ('*datter meerder verzekert werd, as de Geassureerde risico hadde*'). The premium, though, had to be returned to the extent that the second insurance was invalid.<sup>195</sup>

From a decision of the *Hooge Raad* delivered in 1707<sup>196</sup> it appears that the relevant time to determine whether or not a person was over-insured through double insurance - and, it may be thought, to what extent he was over-insured - was at the time of the loss. Overlapping successive insurances did not necessarily amount to over-insurance through double insurance in the technical sense<sup>197</sup> if there was no overlap at the time of the loss.<sup>198</sup>

Here Hamburg merchants had insured their goods, which were worth f14 000 and which had to be carried from Genoa to Hamburg, at Genoa for a period of three months for an amount of f13 000. Later, fearing that the period of three months could expire before the arrival of the goods at Hamburg, they gave instructions for the insurance anew of the goods at Amsterdam in the amount of f12 000 and for their carriage from Alicante in Spain to Hamburg. At the time of the departure of the ship carrying the goods from Alicante, the insurance concluded in Genoa had not yet expired, but after the period of three months had expired, the ship was captured by pirates in the

<sup>194</sup> This much appeared also from the view of another advocate expressed in the same opinion. He confirmed '*dat niemand zig verder kan doen verzekeren, als hy risqueert, en dat dien volgende de verdere verzekering nul is, en van zelve komt te vervallen, behoudens restorno van de premie, volgens de ordonnantie en het ordinair gebruik in materie van Assurantie*'.

<sup>195</sup> The position was otherwise if the over-insurance was *mala fide*. In this regard the view expressed in an earlier opinion in *Hollandse consultatien* vol I cons 234 (c1622) was that in the case of over-insurance not only was the insurer not liable to the insured but the latter was in fact legally liable to pay the insurer the promised premium. That was only the case if there was fraud on the part of the insured for only in that case were all the insurances totally avoided and the premiums forfeited or a return of any of the premiums excluded.

<sup>196</sup> See Bynkershoek *Observationes tumultuariae* obs 296; *idem Quaestiones juris privati* IV.3.

<sup>197</sup> See further as to decision of 1707, Dorhout Mees *Schadeverzekeringsrecht* 184-185 who explains successive insurances as the conclusion, during the currency of a first insurance, of a second insurance for a period which was to commence after the termination of the first insurance, or for a period coinciding with but continuing after that of the first insurance.

<sup>198</sup> This much appears also from Bynkershoek's explanation (*Quaestiones juris privati* IV.1) of the opinion of 1669 (see *Nederlands advysboek* vol II adv 120). It is clear from Bynkershoek that whether or not over-insurance existed, had to be determined not at the time of the conclusion of the contract or at some other time before or after the loss, but only at the time of the loss. Therefore, a person who had insured for 100 although his risk (ie, his interest) in the ship was but 50 but whose interest had thereafter increased with 50 prior to the loss, could validly claim 100.



English channel. The Amsterdam insurers denied liability because of the fact that goods could not be insured in excess of their value<sup>199</sup> while here both insurances together had by far exceeded the value of the insured goods.

In 1702 the Amsterdam Chamber of Insurance and later the *Schepenen* Court had held for the Amsterdam insurers in deciding that the Amsterdam insurance was not valid further than to the extent that the value of the goods had exceeded the first insurance concluded in Genoa, that is, in effect, that it was valid only to the extent of f1 000. The insured was considered over-insured in this case because at the time of the conclusion of the second insurance in Amsterdam, the first Genoese insurance had still been in force and because the sums insured by both insurance, put together, had exceeded the value of the goods. In consequence the second insurance was invalid to the extent of the over-insurance. However, in 1706 the *Hof van Holland* overturned the decisions *a quo* and held that the Amsterdam insurers were in fact liable in full and, by implication, not only for f1 000. At the time of the loss the first insurance had already expired so that there was then no longer any over-insurance.<sup>200</sup> There was therefore no question of reviving the invalid Amsterdam policy, as had been argued. The Amsterdam policy had in this instance never been invalid<sup>201</sup> but had been valid throughout ('*zy heeft altyd stand gegrepen ten opzicht van de risico die de geassureerden konden loopen*').<sup>202</sup> It would only have been invalid had the loss occurred prior to the termination of the first insurance, and that was not what had happened here. The Amsterdam policy was therefore valid during the period of overlap, and after the expiry of the three month period there was no longer any possibility of over-insurance and of the Amsterdam policy becoming invalid on the occurrence of a loss.<sup>203</sup>

The *Hooge Raad* in 1707 by a large majority rejected the appeal, confirmed the decision of the *Hof van Holland*, and held the Amsterdam insurers liable.

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<sup>199</sup> They referred to ss 14 and 15 of the *placcaat* of 1563.

<sup>200</sup> Thus, the decisions *a quo* would only have been correct had the loss occurred after the conclusion of the Amsterdam insurance and at a time when the first Genoese insurance was still in force.

<sup>201</sup> That is, at least, it was never invalid to the extent that, when added to the first policy, it amounted to an over-insurance.

<sup>202</sup> The *Hof* alluded to the fact that the Amsterdam policy would have been invalid in terms of s 14 of the *placcaat* of 1563 had the insured acted *mala fide*, though, but that that was not the position here. The Hamburg insured in fact gave an instruction to their representative in Amsterdam that their Amsterdam insurance policy had to provide that it was only to commence on the expiry of the Genoese policy. However, s 3 of the Amsterdam *keur* of 1598 required a mention in the policy of the place from where the insurance was to commence (see again ch VIII § 4.2.3 *supra*), something it was not possible to determine in this instance since it was not known where the ship would be at the end of the three month period (thus, an overlap was unavoidable). As a result the representative in this case insured the goods from Alicante.

<sup>203</sup> After the expiry of the Genoese policy, the Amsterdam policy was fully valid ('*gold zy in 't geheel*').

In an opinion in 1717<sup>204</sup> the view was expressed in passing that the conclusion of a new and further insurance on the same ship against the same risk totally nullified the first insurance ('*door die nieuwe en nadere Assurantie op de voijagie na de Oostzee de eerste Assurantie geheel en al is gesteld geworden buiten allen effecte*') because good faith did not permit a double recovery ('*goede trouw niet duld dat men een zaek tweemaal vordert*') and because it was trite that a later insurance nullified a former insurance. No authority was referred to for this view and it appears not to be supported by any. It is in fact in conflict with the decision of 1707 and the position was therefore not as irrefutable as was made out in the opinion itself,<sup>205</sup> and the view was in any case not applicable to the facts of the present case.<sup>206</sup>

A decision of the *Hooge Raad* in 1722<sup>207</sup> showed that although there was uncertainty on the point, the prevailing view in Amsterdam was that in the case of *bona fide* over-insurance on a single policy, the excess only of such insurance was invalid and not the whole insurance.<sup>208</sup>

The scope of application of s 15 of the *placcaat* of 1563 and s 13 of the *placcaat* of 1571 came up for consideration in a decision of the *Hooge Raad* in 1725.<sup>209</sup> Unfortunately the decision itself is rather complex and not in all respects clear.

Two French merchants had insured their goods in Amsterdam by four successive policies for f5 000, f1 000, f5 000, and f2 000 respectively. The total amount insured on the goods was therefore f13 000. When the ship carrying their goods was lost and claims were instituted on the policies, all the underwriters involved paid out the

<sup>204</sup> See Barel's *Advysen* vol I adv 24. The opinion has already been considered in ch XII § 1.3.1 *supra* in connection with the duration of the risk in terms of a voyage policy.

<sup>205</sup> It would appear that in this instance the first insurance was terminated not by the mere conclusion of the second insurance, but because of the termination of the risk (ie, the arrival at the destination) and/or a change of voyage (ie, the decision to proceed further on and to insure for such further voyage) prior to the arrival at the destination.

<sup>206</sup> The view was in any event *obiter* because in this case the second insurance had in fact not yet been concluded. Furthermore, it would not appear to have been a case of double insurance (the first policy covered the ship on her voyage from A to B and second covered her from B to C). And even if there was double insurance, that was in itself not prohibited as appeared earlier (see § 3 *supra*). Also, the mere conclusion of a double insurance amounting at the time to over-insurance was similarly not prohibited: only double recovery was prohibited, ie, over-insurance at the time of the loss.

<sup>207</sup> See Bynkershoek *Observationes tumultuariae* obs 1873; *idem Quaestiones juris privati* IV.11.

<sup>208</sup> In this case there was an insurance at Amsterdam on freight (see again ch V § 5.4 *supra*). It appeared that the insured were not the owners of the goods on which the freight was expected to the extent of the amount of freight insured. Although three or four members of the *Raad* thought that the whole insurance was void (being a contravention of the Amsterdam *keur*), and only one member expressed himself in favour of its invalidity only as to the excess, the majority of the members held the insurer not liable on the policy on another ground not relevant for present purposes. Bynkershoek himself would void only the excess for only that was prohibited and because s 1 of the *keur* of 1598 avoided only that which was contrary to the law.

<sup>209</sup> See Bynkershoek *Observationes tumultuariae* obs 2191; *idem Quaestiones juris privati* IV.13. See also Enschedé 32n1.

sums they had underwritten on their respective policies, except for the two who had subscribed the last policy for *f*2 000. Although the insured established that their goods were worth at least *f*13 757,<sup>210</sup> it appeared that the insured had insured in excess of the amount permitted in terms of ss 2 and 15 of the Amsterdam *keur* of 1598 which required ten per cent of the value of goods to remain uninsured.<sup>211</sup> It was accepted in the judicial proceedings that *f*1 200 had to remain at the risk of the two insured in this case<sup>212</sup> so that the insured could not have insured for and recovered in total more than *f*12 557<sup>213</sup> and that since they were in fact insured for *f*13 000, they were over-insured by *f*443 more than was permitted by the Amsterdam *keur*.

While the two insurers were condemned to pay by the Chamber of Insurance, the Amsterdam *Schepenen* Court, the *Hof van Holland*, and eventually by the *Hooge Raad*, the crucial question which arose was to which insurers did the surplus of *f*443 belong in this instance. Properly formulated, the question was, given the over-insurance, from the which set of insurers' liability the excess of *f*443 had to be deducted. The case therefore concerned the liability of the insurers involved and their relationship *inter se*. There were two possibilities. Either the *f*443 belonged to the two insurers who had underwritten the final policy - as they contended - so that their liability had to be reduced by that amount while that of the earlier sets of insurers remained unchanged with the result that they were all liable in full.<sup>214</sup> Alternatively, the *f*443 belonged to all the insurers involved on the various policies proportionally so that the liability of all of them had to be reduced by the total amount of *f*443 in the proportion of 5:1:5:2 and that of the insurers on the last policy therefore by only *f*68,15.<sup>215</sup>

The *Hooge Raad* thought that while all the insurers were liable proportionally, the liability of all the insurers should in the case of over-insurance therefore be reduced proportionally by the sum of *f*443 in total. They accordingly held the two insurers liable

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<sup>210</sup> There was therefore no over-insurance in the sense of an insurance for an amount in excess of the value of the goods.

<sup>211</sup> See § 5 *infra* as to compulsory under-insurance.

<sup>212</sup> How that figure was arrived at, is not clear, unless it was accepted that the goods were worth *f*12 000. However, that is contradicted by the fact that the value of the goods was in fact specifically stated as *f*13 757.

<sup>213</sup> That is, *f*13 757 - *f*1 200.

<sup>214</sup> So that, the insured having already recovered *f*11 000 of the permitted *f*12 557 on the other three policies, the last two insurers were liable only for *f*1 557 (ie, *f*2 000 - *f*443 = *f*1 557).

<sup>215</sup> The four sets of underwriters were respectively therefore liable for *f*170,38, *f*34,07, *f*170,38, and *f*68,15 less than the amounts they had respectively insured, with the result that the two underwriters on the last policy were liable in total for *f*2 000 - *f*68,15 = *f*1 931,85.

'met de voorschreven correctie van f68'.<sup>216</sup>

Bynkershoek, the sole dissenting voice in the *Raad*, disagreed though. He thought that the last set of two insurers alone was entitled to the benefit of the surplus. This, he pointed out, was provided for in s 15 of the *placcaat* of 1563 and s 32 of the Middelburg *keur* of 1600, namely that in the case of several insurances being concluded *bona fide*, they were successively valid to the extent of the proper or legal value of the goods ('*verscheide Assurantien ... [grypen] stand tot de wettige waarde der zaken toe*'). But to the extent that that value was exceeded, as was the case here, the earlier insurances were liable in priority to the later ones until the full value had been reached, with the later insurances in turn being void in priority as far as such excess was concerned.

The view of the majority as to the proportional liability of all the insurers, Bynkershoek pointed out, was based on and deduced from s 13 of the *placcaat* 1571 which provided that the last as well as the first insurers were to share proportionally in all loss and profit. However, Bynkershoek stressed, this was only the case where less was insured than was permitted (that is, where there was no over-insurance), for otherwise s 13 was in direct contradiction of s 15 of the *placcaat* of 1563, unless one argued that s 13 of the measure of 1571 had repealed s 15 of that of 1563. This appears not to have been the case seeing that both s 13 and s 15 were respectively repeated in ss 25 and 32 of the Middelburg *keur* of 1600.<sup>217</sup>

#### 4.4 The Position in Rotterdam

The Rotterdam Legislature approached the question of over-insurance, as those of co-insurance and double insurance, in a rather lackadaisical fashion.

<sup>216</sup> This version is the one that as it appears from Bynkershoek *Observationes tumultuariae* obs 2191. However, it appears (although this is not absolutely clear) that this may have referred not to the insurer's liability to the insured but to their ultimate liability and that the *Hooge Raad* may in fact have held the two insurers in question liable as against the insured for the sum they had insured less f443. In Bynkershoek *Quaestiones juris privati* IV.13 it was noted, namely, that the two insurers were held liable '*alleen met de aftrek van 't geen meer geassureert was dan 't ... geoorlooft was*' (ie, f443), so that it was left to them to recover contributions from the other sets of insurers involved.

It is therefore uncertain how exactly the proportional liability (or the proportional reduction of liability in the case of over-insurance) was worked out in practice. Did this proportionality operate only *inter se* (so that each insured had to pay what was claimed, and then had to recover any excess by way of a contribution from the other insurers), or could it be raised against the insured too?

<sup>217</sup> Also, it may be added, s 13 was on face of it only concerned with co-insurance, not with double insurance (several policies), even if it would have made no difference (in the case where there was no over-insurance) because both the proportional and the chronological methods would have lead to the same result in both cases.

Another reason for the majority's view, Bynkershoek thought, was because the *Hooge Raad* regarded s 15 as concerning 'insurances concluded in different places' which was not the case here. However, as Bynkershoek pointed out, that was no more than a short-hand for 'several insurances' because in practice nobody was likely to have the same property insured twice in one and the same place. There could be no difference whether several insurances were concluded in one or in different places and for that reason also ss 13 of the *placcaat* of 1571 and s 25 of the *keur* of 1600 did not draw any distinction at all between insurances concluded in the same or in different places.

Section 19 of the Rotterdam *keur* of 1604 was concerned with the case where the same goods were insured in one or several places,<sup>218</sup> for more than the shipped goods were worth, and with or without the knowledge of the insured.<sup>219</sup> In that case, the section provided, all the insurers involved were not liable for more than the value of the goods or of the insured's loss (*'en sullen alle Verseeckeraers in cas van verlies oft schade aende Verseeckerde niet meer ghehouden zijn goet te doen als de rechte weerde vande gescheepte ende verlooren goederen, oft van de schade daer aen gheleden'*). Furthermore, the insurers would then be proportionally liable in accordance with their subscriptions for such loss and no more (*'in welcke schade de ... Verseeckeraers proportioneelijcken nae hunne geteeckende somme sullen gelden, ende vorder niet'*).

Therefore, s 19 first stated the underlying principle, namely that in the case of an over-insurance, whether by a single or by several policies, an insured could not recover more than an indemnity and that, in consequence, the liability of the insurers involved had to be reduced in the case of such over-insurance. In providing for a proportional reduction in the liability of the insurers, though, s 19 did not draw any distinction between over-insurance on a single and by several policies. It did not specifically provide a rule for over-insurance through double insurance which was different from the rule applicable in the case of co-insurance. It is therefore uncertain whether (although likely that) the proportionality principle also applied in Rotterdam to over-insurance through double insurance. Further, the Rotterdam Legislature drew no distinction between *bona fide* and *mala fide* over-insurance.<sup>220</sup>

In providing for the proportionate liability of insurers and for the proportionate reduction in their liability in the case of over-insurance, the Rotterdam Legislature confirmed the accepted principle in the case where such over-insurance occurred on a single policy, but<sup>221</sup> it deviated from the principle of successive or chronological liability laid down in the earlier statutory measures in the case where the over-insurance occurred through double insurance.

This approach was retained in the Rotterdam insurance *keur* of 1721 more than a century later. In terms of s 70, if it were found that the insured had insured for more than what the value of goods amounted to, the insurers would nevertheless not be

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<sup>218</sup> Presumably this referred to insurance by a single policy or by several policies.

<sup>219</sup> That is, *bona fide* and *mala fide* over-insurance.

<sup>220</sup> As to s 19, see eg Van der Keessel *Praelectiones* 1474a-c (*ad* III.24.17) who nevertheless thought that the position in s 19 of the Rotterdam *keur* of 1604 (although set out in fewer words) appeared to be the same as that in Middelburg, apart from the fact that in Rotterdam it was not expressly indicated that later insurers who had signed a second insurance contract elsewhere were held liable only for the balance (of the value). (On the contrary, the indications from s 19 are that the position in Rotterdam was different. Section 19 in effect combined the solution of s 13 of the *placcaat* of 1571 with the situations covered by both that section and s 15 of the *placcaat* of 1571.) See also Goudsmit *Zeerecht* 399; Jolles 66-67 (noting that the principle in s 15 of the *placcaat* of 1563 that only the first insurance remained valid, was not followed in s 19).

<sup>221</sup> At least in so far as it intended to cover and did also cover the case of over-insurance through double insurance.

liable to compensate for the real value of the shipped, perished or lost goods, or for the damage suffered in respect of it, further than in proportion to the amount each insurer had subscribed on the policy he had underwritten.<sup>222</sup>

All in all, therefore, there was no great measure of clarity in Rotterdam on the position of insurers in the case of over-insurance. Although there was an opinion from 1733 on the case of over-insurance through double insurance which considered the position in the city,<sup>223</sup> it, if anything, confounded the issue even more.

A merchant had taken out two policies in different places and at different times on the goods, worth f20 000, which he was expecting from abroad. The first policy was taken out in Amsterdam and was for f10 000, and the second one was for a further f5 000 and was subscribed at Rotterdam. After the total loss of the carrying ship and her cargo, including the insured's goods, it appeared that the goods which had been consigned to him on the ship were worth no more than f8 000 and that he was therefore over-insured. The question which arose was whether the loss had to be borne only by the Amsterdam insurers (the sum they had insured being more than the amount of the loss in question, with the Rotterdam insurers therefore being relieved of all liability), or whether the loss had to be borne proportionally ('*ponds-ponds-gelyke*') by the Amsterdam and the Rotterdam insurers.<sup>224</sup>

According to the opinion, the latter option was correct and in conformity with all the relevant provisions in Amsterdam, Rotterdam and Middelburg.

In s 23 of the Amsterdam *keur* of 1598,<sup>225</sup> the opinion noted, it was specifically provided that all insurers had to participate equally in the loss and the profit. No distinction was drawn there between whether a single or several policies were involved (that is, between co-insurance and double insurance). It was further true, the opinion continued, that s 59 of the Rotterdam *keur* of 1721 was concerned with the position *inter se* of insurers who had underwritten the same policy (that is, co-insurance) in providing for the application of the proportionality principle. Nevertheless, it did not follow, according to the opinion, that that principle was not also applicable where the insurers concerned had not bound themselves in the same policy but in successive policies. It could not be assumed that the Rotterdam Legislature had any intention of deviating in this regard from the other cities where the position was that the last insurer participated in the

<sup>222</sup> See Van der Linden *Koopmans handboek* IV.6.5 explaining with reference to s 70 that in the case of over-insurance, insurers were not liable, in proportion to the sum each subscribed ('*naar evenredigheid van leders inteekening*'), further than was necessary to compensate for the real value of lost goods or the amount of the insured's damage. See also Goudsmit *Zeerecht* 402.

<sup>223</sup> See *Nieuw Nederlands advysboek* vol II adv 46.

<sup>224</sup> La Leck *Index* sv 'insurance' (and also La Leck *Register* sv '*verzekering*') thought that '*ponds-ponds-gelyk*' here meant 'equally' and that the two sets of insurers here each had to bear half or f4 000 of the insured's loss. But that does not seem right. They had to bear the loss in proportion to their subscriptions, as the applicable legislative provisions made clear (at least in the case of co-insurance), and thus had to bear the loss of f8 000 in the proportion of 2:1 (ie, f10 000:f5 000) and not equally. Thus, the Amsterdam insurers had to pay f5 334 and the Rotterdam insurers f2 666.

<sup>225</sup> Like in s 25 of the Middelburg *keur* of 1600.

insurance as much as the first; whether in loss or profit, without any distinction as to whether it was a case of co-insurance or one of double insurance. While all this was no doubt true, though, it missed a crucial point. Sections 23 of the Amsterdam *keur*, 25 of the Middelburg *keur*, and s 59 of the Rotterdam *keur* were in fact not concerned with the case where the insurance in question amounted to an over-insurance and with a reduction of liability as was the case here.<sup>226</sup>

However, the opinion then considered s 70 of the Rotterdam *keur* of 1721. It pointed out that in that section too no distinction was drawn between whether a single policy or several policies were underwritten in the case where more was insured than the value of the goods (that is, in the case of an over-insurance) and where the insurers involved were not liable to compensate the insured's loss to an extent in excess of the proportion of the signature of each. Hence, also in the case of double insurance amounting to over-insurance, the opinion thought, the insurers (or sets of insurers) were liable proportionately. Despite the fact that the advocate delivering the opinion was at pains to point out that the position in Rotterdam was in this regard the same as elsewhere,<sup>227</sup> his view that the proportionality principle was applicable in Rotterdam in the case of an over-insurance through double insurance in fact rendered the position there different. This would have been readily apparent to him had he in the first instance realised that the case here was one of over-insurance, and secondly, that various other provisions (such as s 15 of the *placcaat* of 1563 and s 32 of the Middelburg *keur* of 1600) in fact applied the priority principle and not the proportionality principle to such a case.

#### 4.5 Amsterdam Legislation on Over-insurance in the Eighteenth Century

The Amsterdam Legislature made detailed provision in its insurance *keur* of 1744 for the topic it had so glaringly ignored in the *keur* of 1598 and for a century-and-a-half thereafter. It did not follow the Rotterdam approach.

First there was a statement of the general principle involved. In terms of s 23 of the *keur* of 1744, if, in the case of loss or damage, it was established by the production of evidence or otherwise that the sum insured exceeded the value of the insured goods ('*bevonden wierd, dat de verseekerde Somme meerder als de waarde van de Goederen quam te belooopen*'), the insurers would not be liable to compensate the insured further or for more than to the extent of the real value of the shipped goods ('*sullen de Assuradeurs niet gehouden zyn verder ofte meerder te vergoeden, dan de*

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<sup>226</sup> Thus far, therefore, the opinion provides at most indirect support for the view that in the case of both co-insurance and double insurance the insurers or sets of insurers were, at least in the case of a total loss, all proportionally liable. As to co-insurance, see again § 2.2 *supra* and as to double insurance *simpliciter*, see again § 3 *supra*.

<sup>227</sup> He stressed that in terms of s 10 of the Rotterdam *keur* of 1721 the Rotterdam Commissioners were under an oath to decide cases not specifically regulated in the *keur* in accordance with '*de Placaten van den Landen, regten en Costumen*' which they found to be applicable to the case. Therefore, because the *keur* of 1721 did not specifically regulate the issue, it had to be decided in accordance with the position elsewhere.

*regte waarde van de gescheepte Goederen*. In the case of a valuation, the agreed value had to be applied ('*zal de getaxeerde waarde gevolgt ... werden*'). Any excess he may have received, would have to be returned by the insured.<sup>228</sup>

Then s 24 dealt with the effect of the application of this principle to the liability of the insurers involved. This section, after setting out the equal proportional liability of insurers on the same policy,<sup>229</sup> addressed the position in the case of over-insurance on more than one policy, that is, over-insurance through double insurance. It provided that if more than one policy was issued and signed on the same property, the policy signed first would be applied, alone and without taking any subsequent policies into account, and to the extent of the sum insured by it,<sup>230</sup> to compensate the insured up to the value of the property in question, and any later policies would be reduced or even extinguished accordingly ('*zoo zal de eerste Police in datum, waar mede de Assurantie, die op Goederen begonnen is, sonder regard op de volgende Police te neemen, voor het montant van de verseekerde Somme standhouden voor de waarde van de gemelde Goederen of Effecten, en de reductie vallen op de Police in laater datum begonnen*'). There was therefore no equal proportional liability of all the insurers involved but a successive or chronological liability. And this applied, s 24 continued, not only to the compensation of a loss but also to any return of the premium.<sup>231</sup>

Van der Keessel<sup>232</sup> gave a detailed explanation to put s 24 (and its predecessors) in proper perspective. He explained that while the rule of equal proportional liability was applicable without exception in all cases where the insurers had signed a single policy,<sup>233</sup> that was not so in the case of different policies amounting to over-

<sup>228</sup> See eg Van der Linden *Koopmans handboek* IV.6.5 (In the case of over-insurance, insurers (co-insurers on the same policy) were not liable, in proportion to the sum each subscribed ('*naar evenredigheid van ieders inteekening*'), further than to compensate the real value of the goods lost or the amount of the damage); Goudsmit *Zeerecht* 355.

<sup>229</sup> See again § 2.2 *supra* as to co-insurance.

<sup>230</sup> Of course, if it alone already provided an over-insurance, s 23 would apply to it.

<sup>231</sup> As to s 24, see eg Lybrechts *Koopmans handboek* V.84; Van der Keessel *Theses selectae* th 763 (*ad* III.24.17) (those who have signed an earlier policy remain liable for the whole amount of their insurance - unless, of course, that already constituted an over-insurance - while the others were discharged from making good the loss only to the extent of the excess; s 24, he noted, was not very different from s 15 of the *placcaat* of 1563 which, it will be remembered, was specifically concerned with *bona fide* over-insurance); Van der Linden *Koopmans handboek* IV.6.7 (double insurance is permissible, but if taken together the sums underwritten on the several policies exceed the value of the thing insured, the oldest policy or policy prior in time remains valid and the liability to return the premium falls on the later policy). And see also Enschedé 119; Goudsmit *Zeerecht* 351.

<sup>232</sup> *Praelectiones* 1474a-c (*ad* III.24.17).

<sup>233</sup> Thus, even if there was over-insurance. The example he used here was the following. If goods worth f10 000 were insured in a single policy by A and B for f6 000 each, the liability of each was reduced by the law itself to an equivalent amount and each would thus incur liability for f5 000.



insurance.<sup>234</sup> That much, he observed, appeared from s 15 of the *placcaat* of 1563. Although s 19 of the Rotterdam *keur* of 1721 did not expressly take this rule over, it also did not repeal it. Section 24 of the Amsterdam *keur* of 1744, though, did approve it expressly. Accordingly, in the case of over-insurance through double insurance, the position of all the insurers involved was therefore not the same. But that fact did not prevent that as far as the amount was concerned for which each of them was liable<sup>235</sup> in respect of the compensation, a geometrical proportion still had to be taken into account in the case of a partial loss.<sup>236</sup> However, between those who had signed the same policy the proportionality rule was always and absolutely applicable, even in the case of over-insurance, and then the liabilities of the individual co-insurers were proportionally reduced, as s 70 of the Rotterdam *keur* of 1721 expressly provided.<sup>237</sup>

Put differently and, hopefully, more simply, in terms of s 24 of the Amsterdam *keur* of 1744 all insurers who underwrote the same policy, even if on different dates, shared equally and proportionally in any loss and profit. But if different policies were underwritten and thus different insurances concluded on the same property, the policy first signed was applied first to compensate the insured's loss while the later policy only remained valid in so far as the sum insured by the first policy was insufficient to cover the loss. It was not made certain in s 24, however, whether this applied only to over-insurance through double insurance concluded *bona fide*, although it was probable that that was indeed the case.

#### 4.6 Double Insurance and Over-insurance in the *Wetboek van Koophandel*

The general application of the indemnity principle in the case of over-insurance is repeated in the *Wetboek van Koophandel*. Article 253-1 provides that insurance which exceeds the value of or the actual interest ('*wezenlijk belang*') in the property insured, will be valid only up to the extent of such value or interest.<sup>238</sup> Similarly, the basic position in the case of *bona fide* double insurance amounting to over-insurance as it applied in Roman-Dutch law, or at least in Amsterdam and Middelburg, has been retained in the *Wetboek*.

Article 252 prohibits over-insurance through double insurance by laying down that no second or subsequent insurance may be made, for the same period and

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<sup>234</sup> The example he used was the following. If goods worth f10 000 were insured by A for f6 000 and in another policy by B also for f6 000, the law declared the insurance by B invalid for the amount of f2 000 which exceeded the value of the goods but held it valid up to f4 000, so that A would be liable for f6 000 and B for f4 000.

<sup>235</sup> That is, in his example, A for f6 000 and B for f4 000.

<sup>236</sup> So that if the damage was eg f5 000, A would have to pay f3 000 and B f2 000.

<sup>237</sup> Thus, if A and B had on separate occasions signed the same policy for f6 000 each and the damage amount to f5 000, each was liable for f2 500 only.

<sup>238</sup> See generally as to double insurance and over-insurance, Asser *NBW* 102-103; Caarten 124-125; Dorhout Mees *Schadeverzekeringsrecht* 43-44, 179-180 and 667-668; Faber *Aanteekeningen* 32 and 58-59; Goudsmit *Kansovereenkomsten* 210-214; and Voorduin vol IX at 160 and 242-243.

against the same risk, on objects already insured for their full value. Such second or further insurance is null and void.<sup>239</sup> This is expanded upon in art 277-1<sup>240</sup> which provides that if different insurances (that is, separate policies) are concluded in good faith on the same object, and its full value is insured by the first insurance, that insurance alone remains valid, and the insurers on subsequent policies are relieved of their liability. If the full value is not insured by the first insurance, then, in terms of art 277-2, subsequent insurers are liable for the excess value (*'meerdere waarde'*) according to the chronological sequence in which such subsequent insurances were concluded.<sup>241</sup>

The priority or chronological principle (*ancienniteitsbeginsel*) is therefore the governing principle. However, it should be stressed, this principle applies only to instances of over-insurance through double insurance, that is, where there are two or more (several) policies, and further only where those policies were concluded on different days. A different principle is applicable in the case of over-insurance on a single insurance policy or in the case of several insurance policies concluded on the same day.<sup>242</sup>

As far as over-insurance on a single policy is concerned, art 278-1 provides that where more than the value of an object is insured on one and the same policy by different insurers, even though on separate days,<sup>243</sup> those insurers are all collectively liable in proportion to the sum each had insured (*'te zamen naar evenredigheid van de som voor welke zij geteekend hebben'*), but for no more than the true insured value of

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<sup>239</sup> It is possible to determine the sequence in which the insurances were concluded because in terms of art 256-1 policies must mention the day on which they were concluded.

<sup>240</sup> Article 277 is derived from Roman-Dutch *keuren* as well as from arts 358 and 359 of the French *Code de commerce*.

<sup>241</sup> Although the principle they apply is identical, art 277-1 is not a mere repetition of art 252. The two articles concern over-insurance through double insurance arising in different factual circumstances. Article 252 has in mind the further insurance of an object already insured while art 277 is directed at the situation where an instruction is given to different brokers or correspondents to insure a then uninsured property and such different insurances in different policies are concluded on different days (see Faber *Aanteekeningen* 32).

To be distinguished from double insurance in terms of arts 252 and 277-279, are instances of reinsurance proper, replacing insurance or solvency reinsurance, and insurance against insurer solvency which are regulated in arts 271, 272 and 280 respectively. See again ch VII § 4 *supra*.

<sup>242</sup> In the case of double insurance not amounting to over-insurance, the proportionality principle applies as well, although there will be no different result if the chronological principle is applied since none of the insurances need to be avoided to preserve the indemnity principle. See Dorhout Mees *Schadeverzekeringsrecht* 179 who explains that if the same interest is covered for the same time and against the same risk by more than one insurance, and there is no over-insurance, the loss is shared proportionally to the amounts for which the insurances are concluded.

<sup>243</sup> That is, whether the single policy is subscribed by the insurers involved on the same or on different days. That may be difficult to establish though, given that the policy is required to be dated, not the individual subscriptions on it.

the object. Thus, later insurers are not relieved of their liability to the extent that their subscription of the risk amounts to an over-insurance.<sup>244</sup>

The proportionality principle which applies in the case of over-insurance on a single policy is also made applicable by art 278-2 to over-insurance by double insurance where such several insurances were concluded on the same day, a situation not specifically foreseen in the Roman-Dutch regulation of the topic.<sup>245</sup> Because the application of the chronological principle in that case could be problematical, the several policies concluded on the same day are treated as a single policy. They all remain valid and the different insurers or sets of insurers are liable in proportion to the sums underwritten by each policy.

Article 279-1 makes it clear that in the case of both art 277 and art 278 the insured cannot nullify an earlier insurance (for example, release earlier insurers) and so bind the later insurers. Should the insured relieve the first insurer or insurers, he is himself regarded, in terms of art 279-2, as being placed in his or their place as an insurer for the same sum and in the same order. Thus, in the case of over-insurance through double insurance, the insured cannot by his own conduct exclude the application of the chronological principle and cause an insurer otherwise not liable to become liable or to incur an increased liability. Because they are not sureties for one another nor liable in full, the insured cannot claim from later insurers what he could only have recovered from an earlier insurer.

However, it is possible for the parties to agree in the insurance contract that the proportionality principle will apply and that insurers will not be relieved on the ground of the chronological principle should the insurance turn out to be a further insurance resulting in over-insurance.<sup>246</sup>

The application of the chronological principle to cases of over-insurance through double insurance is not exclusive to Roman-Dutch<sup>247</sup> and Dutch insurance law and it is

<sup>244</sup> See Dorhout Mees *Schadeverzekeringsrecht* 43-44, explaining that the proportionality principle, applicable in the case of co-insurance, also applies where such co-insurance amounts to over-insurance. All co-insurers are treated equally so that each is liable for the same proportion of the loss as the proportion of the sum he had underwritten to the total sum insured. There is no question of the first insurer being liable in full and of later ones being relieved of liability, as is the general rule in terms of art 277 in the case of over-insurance on several separate policies.

<sup>245</sup> See Goudsmit *Zeerecht* 351.

<sup>246</sup> See Voorduin vol IX at 243 who notes that it may be agreed that the loss will be assessed '*alsdan lopende verzekeringen, zonder onderscheid van vroeger of later kontrakt*'.

<sup>247</sup> It applied also in Hamburg in the eighteenth century. In terms of art VI-3 of the Hamburg *Assecuranz-Ordnung* of 1731, in connection with the return of premiums, the priority principle was followed in the case of over-insurance through double insurance (different policies in different places). In consequence, the insured was not free to decide which premiums he wanted to have returned. The oldest policy according to the date when the first insurer signed (irrespective of whether for a higher or a lower premium rate) remained valid, and the liability of the insurers on the later policy was reduced while they had to return the premium accordingly. This measure was derived from s 15 of the *placcaat* of 1563 and s 32 of the *Middelburg keur* of 1600. In this regard the *Königlich Preussisches Seerecht* of 1727 was an exception in that in the case of double insurance it did not follow the priority principle and declared the youngest insurance invalid in so far as the insurable value was exceeded, but provided that all the contracts remained valid and that the liability of all the insurers involved was reduced proportionally. By contrast, in the case of over-insurance on one and the same policy underwritten by different underwriters

found in one form or another in most other continental systems too.<sup>248</sup>

#### 4.7 Double Insurance and Over-insurance in English Law

In stark contrast to the position on the Continent stands English law where a totally different system is followed. Although the indemnity principle is also applied in the case of over-insurance so that an insured is not entitled to more than an indemnity, the effect of its application on the liability of the insurers involved among themselves is radically different. In English law, in all cases of over-insurance, whether through double insurance (even if the policies in question were concluded on different dates), or in an instance of co-insurance,<sup>249</sup> all the different insurers are jointly liable in proportion to the amounts they had underwritten. However, a provision in an individual policy may provide otherwise.

It would appear that in the seventeenth century the Continental priority principle was also followed in English law in the case of over-insurance, even in the case where this had occurred on a single policy. Interestingly enough, that was the position at the time in Antwerp too.<sup>250</sup> Malynes, writing in 1629,<sup>251</sup> noted that in the case of over-insurance the observed custom was that those insurers were liable who first underwrote, and 'that those Assurors that have last subscribed to the Policie of Assurance, beare not any adventure at all' and had to make a restitution of the premiums received by them, deducting the usual half per cent for their subscription.<sup>252</sup> This custom was followed, he noted, in preference to the civil law<sup>253</sup> which provided for

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(even if at different times), there was proportional liability on the policy and for the return of any premium. See generally Dreyer 142-143; Hammacher 98.

<sup>248</sup> Weskett *Digest* 189 sv 'double-insurance' par 6 observed that the doctrine established by the laws he referred to (ie, those of Middelburg, Bilbao, Stockholm, and France) was that of the civilians in general, and in this regard he referred to eg Straccha *De assecurationibus* III.3 and VI.9.

<sup>249</sup> See again § 2.5 *supra*.

<sup>250</sup> See again § 4.2 *supra*.

<sup>251</sup> *Consuetudo* vol I at 25, and speaking of the case where a merchant insured his goods for more than they were worth or insured a larger amount of goods than had in fact been consigned to him.

<sup>252</sup> See too Malynes *Consuetudo* vol I at 28, explaining that in the case of over-insurance the insurers who had subscribed the policy last would enjoy the benefit of it, '[f]or by the Custome of Assurances it is intended, that to avoid cavillations, every Assuror shall be bound *ipso facto* to the said assurance'.

<sup>253</sup> '[A] Law not observed [being] inferior to a Custome well observed', he remarked (*Consuetudo* vol I at 25).

the proportional liability of co-insurers in such a case.<sup>254</sup> Molloy<sup>255</sup> also alluded to the possibility of two different approaches. He explained that 'by the Law Marine'<sup>256</sup> where an insured over-insured, all the insurers were liable proportionally in the case of loss. But, he noted, there was some support for the priority principle.<sup>257</sup>

By the latter part of the eighteenth century, though, a change had occurred and it had come to be the accepted practice in London that all insurers who had insured the same goods, whether on one or more policies and irrespective of the date on which they had subscribed, had to contribute equally to any loss or to the return of any premiums in the case of over-insurance.<sup>258</sup> Magens<sup>259</sup> explained that the position in the laws of France, Holland and Hamburg was in this respect 'less subject to contrariety' in that they provided that only the persons who underwrote one and the same policy would stand on an equal footing and that the first-signed policy would first stand good. However, he remarked, even that approach was not without its problems and peculiarities.<sup>260</sup>

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<sup>254</sup> He explained the civil-law position as follows (*Consuetudo* vol I at 28). All the insurers are liable *pro rata* in the case of loss as they have insured according to the part of the goods laden, and the premium is returnable in part. He observed also that in this regard '[t]he Civillians therefore have noted, That in Assurances the customes of the sea-lawes and use among merchants is chiefly regarded and observed'.

<sup>255</sup> *De jure maritimo* II.7.12.

<sup>256</sup> In the margin there appears an obscure reference to 'Grotius *Introd* 212.23', and the statement that this position was indeed more the customs of merchants than the law. Interestingly enough, whereas Malynes regarded the priority principle as customary, Molloy considered the proportionality principle as the customary one.

<sup>257</sup> By the opinion of some, he noted, those insurers who had underwritten first for so much as the real adventure amounted to, were liable, and the rest were, on returning their premiums, to be relieved from their liability.

<sup>258</sup> See Magens *Essay* vol I at 91-92 according to whom, as far as the return of premiums was concerned, this was not considered equitable though, where the later insurers underwrote the policy only after the goods had already been at risk and they therefore bore a lesser risk. See too Weskett *Digest* 409-412 sv 'prior insurance', referring to the priority principle as the 'duly observed custom' in the case of over-insurance (409 par 1) but then explaining (410 par 2) that in London it was commonly insisted that all those who had insured the goods, whether in one or more policies, had to be liable proportionally.

<sup>259</sup> *Essay* vol I at 25.

<sup>260</sup> In order to illustrate the position in civil law, he gave the following example of insurers who had signed later in time on a first policy and who were liable before insurers who signed earlier in time on a second policy. A intended to insure his goods for 200 and instructed brokers B and C each to obtain insurance for 100. B opened his policy and obtained subscriptions of 40 on 1 January, 30 on 6 January and 30 on 7 January. C obtained subscriptions on his policy of 50 on 2 January, 20 on 3 January and 30 on 4 January. Although there were two policies and B's policy was opened first, the insurers on both ought to be liable (not according to the opening date of the policy on which they happened to sign) but according to the dates on which they signed. Thus, if on 3 January goods worth 120 had been shipped and the carrying ship was lost that night, only 40 on B's policy and 70 on C's policy should be recoverable in respect of the loss. See too Magens *Essay* vol I at 92-93 for an exposition on how to determine which policy was first and which last, especially when one was made locally and the other on instructions abroad.

The judicial explanation of the proportionate liability of double insurers in the case of over-insurance came from Lord Mansfield and it appeared that they were only proportionally liable *inter se*, but jointly and severally liable to the insured.<sup>261</sup>

In *Godin & Others v London Exchange Assurance Co*,<sup>262</sup> Lord Mansfield justified the proportional liability of insurers, for which there was no judicial precedent in English law, as follows. 'If the insured is to receive but one satisfaction, natural justice says that the several insurers shall all of them contribute pro rata, to satisfy that loss against which they have all insured';<sup>263</sup> and as between the insurers themselves, 'if the whole should be recovered from one, he ought to stand in the place of the insured, to receive contribution from the others, who were equally liable to pay the whole'.<sup>264</sup>

In *Newby v Reed*<sup>265</sup> Lord Mansfield held pertinently that the proper course of practice, which had been implicit in the earlier decision in *Godin v London Exchange Assurance*, was that although in the case of double insurance an insured could not recover more than his loss, he could by his first action recover the full amount of his loss. He could recover the whole sum insured against any of the insurers involved, they being like sureties jointly and severally liable, and leave it to that insurer to recover a rateable satisfaction or contribution from the others involved.

In the case of fire insurance, the notion of the insured being fully covered and not bearing a part of the risk was not commonplace. Early English fire offices as a rule insured only up to a certain sum on a single property and did therefore not cover the full value of such property.<sup>266</sup> That practice and a fear of possible over-insurance resulted in policies initially prohibiting double insurance. Fire policies were stated to be

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<sup>261</sup> See generally eg Holdsworth *History* vol XII at 537; Walford *Cyclopaedia* vol II at 394-398 sv 'double insurance'. The latter observes that while the practice in various countries differed considerably, the principle remained the same in all Continental countries but that the practice in England was different from that in civil law. He refers to the relevant provisions in the Middelburg *keur* of 1600 and in s 24 of the Amsterdam *keur* of 1744 as 'curious'. Early in the nineteenth century, Vaucher 100 explained that the priority of the dates in policies was not recognised by London insurers as regards the return of premiums as it was by those on the Continent. Goudsmit *Kansovereenkomsten* 210-214 explains that in English law the system as regards double insurance for a long time followed was the same as that in French law (articles 358 and 359 of the *Code de commerce* were also similar to and the example for provisions in the Dutch *Wetboek*: see again § 4.6 n240 *supra*), but that Lord Mansfield supported a different doctrine better suited to the insured and that his view was taken over in English law. That view was that solidarity existed in a certain sense between different insurers, and that the insured could claim proportionally from each or the whole from one, in which case that insurer had a recourse against the other insurers involved. In English law, Goudsmit noted, all the insurers involved came to be regarded as one another's sureties.

<sup>262</sup> (1758) 1 Burr 489, 97 ER 419. The remarks referred to here do not appear in any of the other reports of this case.

<sup>263</sup> At 492, 420.

<sup>264</sup> At 492, 421.

<sup>265</sup> (1763) 1 Black W 416, 96 ER 237.

<sup>266</sup> Thus, the Sun Fire Office had a limit of £500 on common household risks in 1710 (and similar limits on other types of risks). This had increased to £3 000 in 1727, and to £10 000 in 1808. See Cockerell & Green 28. As to under-insurance on English fire policies, see further § 5.7 *infra*.

avoided by the mere existence of another insurance on the same property.<sup>267</sup> By the early eighteenth century double insurance was permitted, especially with regard to larger commercial fire risks which the offices realised had to be shared or spread amongst different offices in view of their practice of limiting the sums for which they insured on individual policies.<sup>268</sup> The existence of another insurance had to be noted on the policy, though, and if it was discovered that this had not been done, the insurer was entitled to avoid liability. It was provided in policies that in the case of double insurance the insurer would be liable only for a rateable proportion of the insured's loss.<sup>269</sup>

It has already been explained that in English law a co-insurer is liable only for the sum he had subscribed in the case of total loss, or for a proportionate part of it in the case of a partial loss.<sup>270</sup> It has been suggested that the same proportionality applies in the case of double insurance, that is, where there are several policies and sets of insurers.<sup>271</sup> Where the double insurance amounts to over-insurance, though, the position is different.

The Marine Insurance Act of 1906 provides in s 32(1) that an insured is over-insured by double insurance where two or more policies have been effected by or on behalf of that insured on the same adventure and interest or any part of it<sup>272</sup> and the sums insured exceed the indemnity allowed by the Act.

<sup>267</sup> Thus, the relevant rule in the regulations of the Hand-in-Hand Fire Office (established in 1696) provided that 'if any house or houses, chambers or roomes secured or insured ... shall appeare or happen at the same time to be secured or insured in any other Office or Society then the insurance ... in this Contributorship shall be null and void'. See Cato Carter 15-16.

<sup>268</sup> A further factor encouraging the conclusion of several policies may have been the fact that the duty imposed on fire policies was raised by an Act (17 Geo III c 50) in 1777 in the case of a town policy, if over £1 000, from 3s 8d to 8s 2d. See Walford *Cyclopaedia* vol III at 484 sv 'history of fire insurance'.

<sup>269</sup> In London in the eighteenth century, fire risks in respect of larger properties were often shared jointly between insurers and joint insurances between the three major London companies, the Sun, the Royal Exchange, and the Phoenix, were common. See further eg Chapman 15; Cockerell & Green 20; Dickson 383-384; Jenkins 30; Ryan 'Fire Insurance' 62; and Schwarz & Jones 368.

<sup>270</sup> See § 2.5 *supra* where s 67(2) of the Marine Insurance Act was referred to.

<sup>271</sup> According to Chalmers 111n1 the word 'policy' is employed in s 67(2) to denote not merely a single instrument, but also an entire insurance on the same subject-matter even though it is contained in two or more policies, ie, not only in the case of co-insurance but also in the case of double insurance.

<sup>272</sup> See generally Chalmers 48-49, explaining that there is no double insurance where the insurances are not for the same insured but for different persons with the same interest. The notion of double insurance was already explained in this way by Lord Mansfield in *Godin & Others v London Exchange Assurance Co* ((1758) 1 Black W 103, 96 ER 58; 2 Keny 254, 96 ER 1173; 1 Burr 489, 97 ER 419). A factor, who had a lien on the goods of his principal and therefore an interest of his own in them, had in this case insured the goods for his own account. There was no double insurance, but simply two insurances of different interests in the same property, where the principal had them insured as well. Double insurance was described in various passages in the report in the following terms: 'a double insurance is, where a full value of interest is insured on different policies, by the same man' (at 104, 58); 'by a double insurance, must be meant, two insurances by the same person, each for the whole value of the thing insured', ie, double insurance amounting to over-insurance (at 259, 1175); there is double insurance if both insurances are for the account of one man, even if both are not in his name (see at 492, 421); 'though here be two insurances, yet it is not a double insurance' (at 495, 422); 'a double insurance is where the same man is to receive two sums instead of one, or the same sum twice over, for the same loss, by

As far as the liability of the insurers as against the insured is concerned in that case, s 32(2)(a) provides that the insured may, unless the policy provides otherwise, claim payment from the insurers in such order as he thinks fit,<sup>273</sup> provided that he is not entitled to receive any sum in excess of the indemnity permitted by the Act.<sup>274</sup> On claiming from an insurer, the insured must give that insurer credit as against the valuation, in the case of valued policy (and without regard to the actual value of the subject-matter insured) or as against the full insurable value, in the case of an unvalued policy, for any sums he had received under any other policy.<sup>275</sup>

As far as the return of premiums in the case of over-insurance is concerned, the position is provided for by s 84(3) of the Act.<sup>276</sup> In terms of s 84(3)(e) a proportionate part of the premium is returnable where the insured has over-insured under an unvalued policy.<sup>277</sup> And where he has over-insured by double insurance, s 84(3)(f) provides that a proportionate part of the several premiums is returnable. There are two provisos though, both of which show a correspondence with and a possible ancestry in the Continental system. First, if the policies were effected at different times and any earlier policy has at any time borne the entire risk, or if a claim has been paid in terms of the policy in respect of the full sum insured by it, no premium is returnable as regards that policy but, by implication, only as regards any later policy. Secondly, when double insurance is effected knowingly by insured, no premium is returnable.<sup>278</sup>

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reason of his having made two insurances upon the same goods or the same ship' (at 455, 422).

<sup>273</sup> He may also claim only from those insurers he thinks fit, and may, therefore claim the full amount insured by the policy from any one of them because of the fact that the insurers are liable jointly and severally.

<sup>274</sup> In terms of s 32(2)(d), where the insured receives any sum in excess of the permissible indemnity, he is deemed to hold such sum in trust for the insurers, according to their right of contribution among themselves.

<sup>275</sup> Section 32(2)(b) and (c). This provision, curiously, may result in the insured being able to recover more or less, depending on the order in which he claims on his policies. Consider the following example provided by Buys 60. A ship is insured in terms of policy A for 10 (in which policy she is valued at 20) and in terms of policy B for 10 (in which she is valued at 15). On the total loss of the ship, if the insured claims first on policy A, he can recover 10, while the liability on policy B is 5 (ie,  $15 - 10 = 5$ ; the insured has to give credit as against the valuation in policy B for the amount received on policy A), and in total he therefore receives 15. If the insured claims first on policy B, he can recover 10, while the liability on policy A is 10 ( $20 - 10 = 10$ ), an in total he therefore receives 20.

<sup>276</sup> Remember, there is no return of premium in terms of s 84(1) if there is fraud or illegality on the part of the insured or his agents. See again ch XI § 6.7 *supra*.

<sup>277</sup> It seems that while s 84(3)(f) deals with over-insurance by double insurance, s 84(3)(e) deals with over-insurance without such double insurance. It is not clear what the position is in the case of an over-insurance under a valued policy.

<sup>278</sup> Both provisos are qualifications on the rule as to the return of the premium and are in fact deductions from s 84(3)(a). See Chalmers 135-136, who notes that it has been suggested that to avoid this problem and to discourage over-insurance, the premium should in the case of double insurance not be returnable at all. Section 84(3)(f), though, stops somewhat short of this. Further, there is in English law no avoidance of all the insurances in the case of a *mala fide* over-insurance.



The position of insurers *inter se* in the case of over-insurance by double insurance is provided for in s 80. In terms of s 80(1), where the insured is over-insured by double insurance, each insurer is bound, as between himself and the other insurers,<sup>279</sup> to contribute rateably to the loss in proportion to the amount for which he is liable under his contract. In terms of s 80(2), if any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and is entitled to the same remedies as a surety who has paid more than his proportion of the debt.

Therefore, in the case of over-insurance through double insurance in English law, all the policies remain valid and the insured has a choice on which policy he wants to recover an indemnity and from which insurers he wants to recover a proportional return of the premium. He cannot recover more than an indemnity although he is entitled to recover more from an insurer than that insurer's proportional liability for the loss. Among themselves, though, insurers are liable only proportionally, both for the loss and for any return of premium, so that where one insurer or one set of insurers has paid the insured more than his proportional share of the indemnity, that insurer has the right of contribution against the others. Thus, insurers, having settled with the insured, must then proceed to re-adjust the entire claim among themselves so that each insurer ultimately bears his proportionate part of the loss and of any return of the premium.

English law therefore differs in numerous cardinal respects from Dutch law and other European systems as far as the position in the case of over-insurance is concerned. A number of the differences may briefly be mentioned by way of a concluding summary.<sup>280</sup>

First, there is no general distinction in English law between over-insurance through a single policy and over-insurance through double insurance,<sup>281</sup> nor between policies concluded on the same or on different dates,<sup>282</sup> nor between *bona fide* and *mala fide* over-insurance.<sup>283</sup>

Secondly, the liability of the insurers involved in an over-insurance as against the insured is not simply proportional nor subject to the principle of priority so that later insurances are void to the extent of the over-insurance.<sup>284</sup> Each insurer (or set of insurers) is liable jointly and severally, in full and subject only to the sum for which each

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<sup>279</sup> But not as against the insured, given that his liability is joint and several.

<sup>280</sup> See generally Buys 59-61 (where he makes the point that there is no mention in either English law or Dutch law of the position where there is double insurance by policies governed by different legal systems) and 137; Dorhout Mees *Schadeverzekeringsrecht* 181 and 667-668; Idelson 357-358; and Ulrich 218-219.

<sup>281</sup> More specifically, no provision is made for the former case; possibly the ordinary proportionality principle will be applicable as it is in the case of co-insurance.

<sup>282</sup> Except in terms of s 84(3)(f) for purposes of repayment of the premium.

<sup>283</sup> Except, again, in terms of s 84(3)(f).

<sup>284</sup> However, an insurance may in English law conceivably be avoided through the non-disclosure, at the time of the conclusion of that insurance, of the existence of another insurance on the same property.

had insured, for the insured's loss, irrespective of the fact that another insurer or other insurers may also be liable in respect of that same loss. The insured has a choice as to which insurer or insurers he wants to claim from and in which order. The insurers are liable in any order to the insured according to his choice, as long as he does not receive more than an indemnity. This is ensured because the insured must give credit against an insurer for the sums he has already received from another insurer or other insurers.

Thirdly, while the liability of insurers as against the insured is not proportional, their liability *inter se* is. The result of this is that a right of recourse based on the principle of contribution is required to adjust the settlement of the insured's claim among themselves and to ensure that all the insurers involved ultimately bear the loss and any return of premium (that is, any reduction of liability) equitably and proportionally among themselves. Thus, the proportionality principle does not apply as between the insurers and the insured but only as between insurers themselves.

Further, although the English system in the case of over-insurance through double insurance may in practice result in a less speedy final settlement and conclusion of the claims arising from and in respect of an insurance contract, it is at least advantageous for the insured. Firstly, the insured does not have to claim from each of the severally liable insurers. Secondly, it is the co-insurers or double insurers and not the insured himself who bear the risk of one or more of the insurers involved not being able to pay the insured.<sup>285</sup> This arrangement of the position in the case of over-insurance through double insurance results in a great advantage for the English insured in the case of the insolvency of one of the insurers concerned compared to the position of his Dutch counterpart.<sup>286</sup>

However, despite these differences, it may be noted that the position in English law, as in Dutch law, may be altered by an agreement to the contrary between the parties in their relevant contracts, so that ultimately the difference may be negligible in practice.

## 5 Under-insurance

### 5.1 Introduction

Any historical treatment of the topic of under-insurance must, as far as occurrence but not effect is concerned, draw a fundamental distinction between voluntary under-insurance and compulsory under-insurance.

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<sup>285</sup> On this point, see Goudsmit *Kansovereenkomsten* 214.

<sup>286</sup> As a result of the English system in terms of which the insurers involved in effect guarantee each other's liability, there is little need for solvency reinsurance or solvency insurance (see Goudsmit *Kansovereenkomsten* 216-217).

Also, the choice conferred upon the insured by English law and the order in which he as a result claims on the policies and from the insurers involved, may, as has been pointed out earlier, in appropriate circumstances make a difference to the amount he ultimately recovers. See again n275 *supra*.

One of earliest methods by which legislatures in the Low Countries sought to prevent the abuses which occurred in connection with insurance, and one which continued to be applied for many centuries, was that of compulsory under-insurance. Less drastic than the absolute prohibition on any insurance, which was nevertheless once resorted to in 1569,<sup>287</sup> the prohibition on full-value insurance<sup>288</sup> was a way in which, by way of a limitation of their freedom of contract, the complete reliance of merchants upon insurance cover could be prevented, and the negative consequences which were perceived to flow from this, could be countered.

If an insured merchant could only less than completely rely on the insurance contract he had concluded to protect himself against loss or damage, so the argument ran, he would be more inclined to take care of the property insured and to take the necessary steps to avoid the occurrence of loss or damage or at least to limit the extent of such damage.<sup>289</sup> Put differently, the ability to insure without any limitation whatsoever was considered to have been the major cause of the carelessness of merchants and shipowners in taking precautions against maritime losses.

Further, such compulsory under-insurance would at the same time prevent over-insurance and the many frauds in turn associated with that phenomenon, not the least of which was the causation of loss by the insured himself or by someone on his behalf.<sup>290</sup>

As will appear shortly, different legislatures at various stages imposed different levels of compulsory under-insurance<sup>291</sup> for hull, cargo, and non-marine insurances and the treatment of the topic will have to take account of that. Furthermore, the prohibition on full-value insurance was usually accompanied by further prohibitions on what could be insured in hull and cargo insurance policies. These matters have already been considered elsewhere in connection with the objects of risk in marine insurances<sup>292</sup> and will not be commented on again specifically. Also, the prohibition on

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<sup>287</sup> The *placcaat* of 31 March 1569 (1568 os) temporarily prohibited the conclusion of insurances in large parts of the Low Countries until a proper regulation of the practice could be passed. The prohibition lasted for almost nineteen months, from 1 April 1569 to 27 October 1570, when it was repealed. The prohibition was applicable to, amongst other regions, Holland, Zeeland, Friesland, Overijssel, Groningen, Flanders and Brabant. For the reasons for the prohibition, see further eg Goudsmit *Zeerecht* 251-254 and also ch XIII § 2.2 *supra* on the regulation of the seaworthiness of ships. See too § 5.2 *infra* where the *placcaat* of 1569 is again referred to.

<sup>288</sup> The prohibition on full-value insurance resulted in compulsory under-insurance.

<sup>289</sup> See eg Dorhout Mees *Schadeverzekeringsrecht* 178; Hammacher 92.

<sup>290</sup> See again § 4.1 *supra*.

<sup>291</sup> Thus, Decker *Aanteekeningen ad* IV.9.4 n(3)/(c) noted that '*[i]n hoe verre wyders de verzekering mag gaan is by de Schryvers even als by afzonderlyke wetten onderscheidelyk bepaald*'. See too eg Scheltinga *Dictata ad* III.24.4 sv '*onder twee derde-deelen, etc*' and Bynkershoek *Quaestiones juris privati* IV.6, both referring to the widely different positions in different Dutch cities.

<sup>292</sup> See again ch V *supra*.

full-value insurance of necessity contained various indications as to how such value had to be calculated, a matter again already considered in a different context.<sup>293</sup>

In the course of time the realisation gradually came to the authorities that compulsory under-insurance was not the most practical method to ensure the exercise of care on the part of an insured for the safety of his insured ship or cargo, or to prevent the perpetration of other frauds upon insurers. This realisation was no doubt enhanced by the fact that the prohibition on full-value insurance was widely ignored in practice. At first the legislatures merely decreased the amount or proportion of compelled under-insurance but later the prohibition on full-value insurance was abolished completely.

However, under-insurance did not in consequence disappear from insurance practice. Under-insurance, being an insurance in an amount less than the real or agreed value, at the time of the loss or damage, of the property at risk, was in practice difficult to avoid in the case of property with an increasing value. Such property would in most cases be insured, at the time of the conclusion of the contract, for an amount which would turn out to be, at the time of the loss or damage, less than the insurable value. Only very seldom, and then probably only by accident, would these amounts correspond. To some extent, though, the practice of agreeing on the value of the property insured in a valued policy<sup>294</sup> reduced this problem.

Apart from such unintended under-insurance, merchants had from early on realised that they could save on premiums by insuring for less than the full-value of their property at risk and so applying the insurance technique in a subsidiary role as part of a scheme of self-insurance.<sup>295</sup> This section will therefore first deal with compulsory under-insurance and then briefly consider some aspects of voluntary under-insurance.

In Roman-Dutch law under-insurance had a close relationship with double insurance and co-insurance<sup>296</sup> and in this regard a few comments are called for. Under-insurance occurred where property was insured for an amount less than its real or agreed value.<sup>297</sup> It included the case where property was insured for less than the proportion of its value in excess of which that property could not be insured, that is, where the amount of the under-insurance exceeded the amount of the compulsory under-insurance for that property.<sup>298</sup> Under-insurance occurred most commonly on a

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<sup>293</sup> See ch XVII § 3 *supra* as to the insurable value of different objects of risk.

<sup>294</sup> See again ch XVII § 5 *supra*.

<sup>295</sup> As to self-insurance, see again ch IX § 2.2 *supra*.

<sup>296</sup> See again § 1 *supra* where the various concepts were defined and distinguished.

<sup>297</sup> Thus, there was under-insurance where a ship actually worth f2 500 was insured for f2 000, or where a ship which had been agreed between the parties to the insurance contract to be worth f2 000, was insured for f1 500.

<sup>298</sup> Thus, there was also under-insurance where ten per cent of a ship (worth f2 500) had to remain uninsured, and she was in fact insured for less than f2 500 - f250 = f2 250.

single policy but could theoretically also occur in the case of double insurance.<sup>299</sup>

Because of its effect, under-insurance also had a close relationship with co-insurance. If under-insured, an insured was regarded as his own insurer to the extent of such under-insurance and he was therefore a co-insurer of the risk in question.

Two final points of clarification. Firstly, Roman-Dutch legislative provisions commonly stated that a particular object of risk (a ship or cargo) could only be insured up to a certain part or percentage of its value. This meant that the insured actually had to retain and bear the risk as regards the balance himself and that he could not insure that balance with another insurer under a different contract. To have allowed that, would have defeated the purpose of such compulsory under-insurance, which was to ensure that owners were not by insurance completely relieved of all loss or damage but retained some interest in the welfare and safety of their insured property. Compulsory under-insurance therefore meant that insured had to be under-insured or partly un-insured generally and not only as regards a particular insurance contract.<sup>300</sup> Secondly, compulsory under-insurance meant that the liability of the insurer or insurers involved was in consequence restricted to a certain portion or percentage of the value of the property insured.<sup>301</sup> But the liability of an insurer could also be restricted in other ways, for example with reference to a particular portion or percentage of the insured's loss.<sup>302</sup>

## 5.2 The Prohibition of Full-value Insurance and Provisions on Under-insurance in the Sixteenth Century

Following earlier measures in Spain, specifically in Barcelona<sup>303</sup> and Burgos,<sup>304</sup> and in Italy<sup>305</sup> where compulsory under-insurance was a recurring and central theme in

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<sup>299</sup> For example, where a ship worth f2 500 was insured for f1 000 in terms of policy A and for f1 200 in terms of policy B. This shows, therefore, that double insurance was not synonymous with over-insurance. See again § 3 *supra*.

<sup>300</sup> See eg Jolles 61-62 for a similar explanation.

<sup>301</sup> Note, though, that in the case of insurance in excess of the permitted portion or percentage, the insurance was not wholly null and void (unless it amounted to a *mala fide* over-insurance) but only to the extent of such excess. See again § 4.2 *supra*.

<sup>302</sup> In terms of Amsterdam amending *keur* of 1733 and s 8 of its *keur* of 1744, eg, the liability of insurers was limited to 50 per cent of the loss of fir-wood ships. Also, a different method to ensure that the insured did not obtain a full indemnity was to provide legislatively or stipulate contractually that the insurer was not to be liable for the first portion or percentage of any loss (see again ch XV § 7 *supra* for the description of risk with reference to loss). The close relationship, as methods by which to limit the insurer's liability, of compulsory under-insurance and franchise, is illustrated by the fact that these topics were treated together by eg Van der Keessel *Theses selectae* th 720 (*ad* III.24.4); *idem Praelectiones* 1440 (*ad* III.24.4).

<sup>303</sup> In s 1 of the Barcelona Ordinance of 1484, following earlier similar measures there, a distinction was drawn as far as compulsory under-insurance was concerned between the insurable property of local subjects, insurable up to seven-eighths of its value, and that of foreigners, insurable only up to three-quarters of its value. (In 1435 these proportions were respectively three-quarters and a half, so that the amount of compulsory under-insurance was reduced in the course of time.) This meant that the local insured had to bear one-eighth and the foreign insured one-quarter of his own risk. In terms of s 6 of the Ordinance of 1484, any insurance in excess of the permitted proportion was void to the extent of such excess. However, in terms of s 18, certain perishable foodstuffs destined for Barcelona could be insured

the regulation of the insurance contract, the first legislative measure in the Low Countries to prohibit the insurance of the full value of a ship and the cargo was the provisional *placcaat* on shipping of Charles V of 29 January 1550 (os 1549).<sup>306</sup> The reasons for its provisions and for the prohibition of what appears to have been customary on the Antwerp Bourse at the time,<sup>307</sup> were set out in detail in the preamble to the *placcaat*. They included the losses suffered by the action of Scottish privateers or pirates as the Dutch considered them; the unseaworthiness of ships because of their negligent equipping and manning; the reliance by merchants on full protection from their insurance and bottomry contracts; and frauds such as the over-insurance of unseaworthy ships which were captured by the enemy and then later bought back from them. The relevant measures prohibiting full-value insurance were accompanied by measures to improve the seaworthiness of ships, and by a prohibition on the insurance of wages and expected profit.

Section 20 of the *placcaat* of 1550 placed a prohibition on the insurance, against Scottish or other pirates, of any ship, with her equipment and rigging, in excess of half of her value when she sailed on an outward-bound or a homeward-bound voyage in ballast<sup>308</sup> or when she was loaded at less than half her capacity. When she was loaded to more than half her capacity, there was no such limit and full-value insurance was permitted of her hull ('*bodem, kiel of't hol*'), including her guns, gunpowder and cannon balls, but not of her rigging or equipment. Presumably the reason why there was no compulsory under-insurance in the latter case was because the involvement of cargo

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there for the full amount of their value, a classic example of self-interest overruling public interest. See further Elink Schuurman *Taxatie* 45; Enschedé 27-28 (commenting on the fact that these laws favoured local merchants, carriers and trade over foreign competition); Goudsmit *Zeerecht* 246n1 and 264; Hammacher 93; Seffen 30-31; and Reatz *Geschichte* 81-90 and 104-105.

<sup>304</sup> Where by eg s 2 of its Ordinance of 1538 a ship and her cargo could be insured only up to nine-tenths of the value. See Enschedé 28-29; Reatz *Geschichte* 213-215.

<sup>305</sup> See eg Bensa *Assicurazione* 159-160; Sanborn 258.

<sup>306</sup> See generally Dorhout Mees *Schadeverzekeringsrecht* 16; Enschedé 28-29 (suggesting that the *placcaat* of 1550 in all probability merely followed the example of the Burgos Ordinance of 1538); Goudsmit *Zeerecht* 212-213; Hammacher 42-43; Kracht 12, 14 and 15; and Mullens 23-24 (noting that compulsory under-insurance was used in conjunction with other methods in the *placcaaten* of 1550 and 1551).

<sup>307</sup> See eg Sneller 106-107.

<sup>308</sup> Ballast was any heavy material, other than cargo carried for reward, which was placed in a ship to ensure her stability. Ships of necessity often had to sail between ports or on particular legs of a voyage without any or at least with an insufficient cargo. It was often a considerable problem for masters to find materials to be used as ballast. Ships of the East India Company, eg, often took along more coal and stones as ballast than were required in Batavia. They also used old unserviceable guns for this purpose, or bags of sand, iron or lead balls, or they carried more drinking water than the Company's regulations required, or their masters were instructed to fill empty water containers with seawater during the voyage. All these were ways of ballasting ships, ie, of lowering their centrifugal point to a safe depth for the voyage. See further Bruijn, Gaastra & Schöffers *Dutch-Asiatic Shipping* 33.

owners on the voyage was perceived to have made the scuttling of the ship or other similar frauds upon the hull insurer a little more difficult. In the equivalent s 19 of the replacing *placcaat* of Charles V of 19 July 1551, precisely the same measure was taken up, except that now the prohibition on full-value insurance was against pirates generally ('*Zee-roovers, oft andere de navigatie en coopvaerdye van herwaerds overe willen verhinderen*').

As far as cargo insurance was concerned, s 22 of the *placcaat* of 1550 obliged merchants to keep uninsured, against the capture by Scottish or other pirates, one-tenth of the value of their merchandise, which value was to be calculated with reference to the prime cost at their place of origin. This prohibition was stated to be in force until such time as was otherwise provided for in an insurance *placcaat* ('*tot der tijd toe dat wy op't stick van der Assurancien ende verseeckerijng anders sullen geordonnert hebben*'). Section 21 of the *placcaat* of 1551 was identical, except that the prohibition was now merely against pirates generally.

The prohibition on full-value insurance was retained in title VII of the *placcaat* of 1563.<sup>309</sup> Section 8 prohibited the insurance of ships against the perils of water, fire, enemy, piracy or other perils, none excluded, by the owner himself or his co-owners ('*mede-Reeders*'), in excess of half the value of the ship, including her equipment and rigging, in the case of a ship sailing in ballast or loaded below half her capacity. When she had a load of more than half her capacity, though, her master could fully insure the hull of the ship, and also the guns, gunpowder and shot on board, but not her rigging or equipment. There was therefore no change from 1551 as to the proportion to be kept uninsured, except that the prohibition now extended to insurance against all risks and not merely to war-risks insurance.<sup>310</sup>

In respect of cargo insurance, there was a break with the earlier provisions. Section 11 of title VII of the *placcaat* of 1563 laid down that for goods or merchandise originally costing less than Flemish £1 000 ('*niet ghekost hebbende t'heuren eersten innekoope duysent ponden Vlaems*'), the insured had to leave one-tenth part of such goods uninsured, without including in that value the cost of duties, freight, or any other expense, or the anticipated profit. Goods costing more than Flemish £1 000 pounds could be insured for their full value at their cost price ('*den geheelen prijs ... ten prijse ghelijck hy die heeft inne ghekocht*'), the insured having to leave uninsured and having to bear himself the risk and peril of only £100 pounds, and also the cost of duties, freight and other expense. Thus, s 11 provided for a ten per cent under-insurance with a maximum of £100 and thus ameliorated the insured's position somewhat, even

<sup>309</sup> See generally Goudsmit *Zeerecht* 245; Kracht 18.

<sup>310</sup> See Jolles 61-62 noting that compulsory under-insurance in the *placcaat* of 1550 was only against Scottish and other pirates, in the *placcaat* of 1551 against pirates and others who wanted to deter navigation and trade from the Netherlands, and in the *placcaat* of 1563 against all perils. As to s 8, see Groenewegen *Aanteekeningen* n7 (*ad* III.24.4); Van Leeuwen *Rooms-Hollands regt* IV.9.4; and Van Zurck *Codex Batavus sv 'Assurantie'* par 6 n1 (who was not very clear in this regard).

though providing that the various expenses incurred on the goods could not be included in their value in this regard.<sup>311</sup>

When these measures proved ineffective in preventing the abuses which the Legislature perceived to be occurring in connection with shipping and navigation because of the availability of insurance cover, it completely prohibited the conclusion of insurance contracts in the Low Countries in March 1569.<sup>312</sup> After a period of almost nineteen months, the prohibition was repealed and insurance regulated anew, first in a provisional *placcaat* of 27 October 1570 and shortly afterwards in the *placcaat* of 20 January 1571 (1570 os). Both these measures again contained provisions on compulsory under-insurance.<sup>313</sup>

Section 20 of the *placcaat* of 1571 provided that in the case of ships, guns, munitions, victuals or similar things, no insurance was permissible, and no money could be taken or given on bottomry loans on the voyages of such ships, as was done before, except for below half of the real value of such ships, and without it being possible to insure the rigging or equipment of such ships at all.<sup>314</sup> If an insurance was concluded in excess of half of her value, s 20 continued, it would be null and void and of no value by reason of this current prohibition, and further the money advanced, paid out or promised in respect of it would be forfeited.<sup>315</sup> Section 21 of the provisional *placcaat* of 1570 had been in identical terms.

In respect of cargo insurance, s 3 of the *placcaat* of 1571 determined that in the case of goods, incoming or outgoing (that is, imports or exports), at least ten per cent

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<sup>311</sup> As to s 11, see Groenewegen *Aantekeningen* n8 ad III.24.4; Van Leeuwen *Rooms-Hollands regt* IV.9.4.

<sup>312</sup> See generally Van Niekerk *Sources* 43-45 for further background and also § 5.1 *supra*. See too Kracht 21-24 who points out (at 23) that the *placcaat* of 1569, which prohibited the conclusion of any insurance, took the notion underlying compulsory under-insurance (ie, that by increasing the interest of owners in their insured property, such owners would be less careless as a result of the existence of the insurance cover) to its absolute extremity. See too Kiesselbach 111 who mentions the prohibition on insurance in 1569 in the same breath and almost as an extension of the provisions requiring compulsory under-insurance.

<sup>313</sup> See generally Enschedé 30-31; Kracht 26.

<sup>314</sup> Thus, whereas the *placcaat* of 1563 had permitted the full-value insurance of ship laden more than half, the *placcaat* of 1571 permitted no more than an insurance of half of her value. See Goudsmit *Zeerecht* 269.

<sup>315</sup> It seems that to the extent that this sanction was applicable to a breach of the prohibition of full-value insurance, the insurance was wholly null and void and not only to the extent to which it insured in excess of what was permissible. However, in an opinion delivered in 1602 (see *Hollandse consultatien* vol I cons 187), which is admittedly not too clear on this point as no ready distinction was drawn there between over-valuation and 'over-insurance' (in the sense of an insurance in excess of the permitted proportion), it was noted that if it were found that the insured did not leave so much uninsured as was provided for by the *placcaat* (this may have referred to the *placcaat* of 1563), then the whole insurance was only null and void if the insurers so wished ('*indien 't de Versekeraars gelieft*'). The correctness of this is doubtful and the position appears to have been different in the case of cargo insurance, as will be shown shortly.

As to s 20, see eg Scheltinga *Dictata* ad III.24.4 sv '*onder twee derde-deelen, etc*'; Goudsmit *Zeerecht* 263-264.



of their value had to remain at the risk and peril of the insured (*'tot resicq, perijckel ende avontuere vanden genen die hem sal doen verseeckeren'*), such value being the cost price, including the cost of packing, duties, equipment, the insurance premium and all other expenses up to the loading of the goods into ships.<sup>316</sup> There was a proviso, though. Where one person had loaded into a single ship goods to the value of more than £2 000, that part of its value which exceeded that amount could be fully insured (*'gheheelicken mogen verseeckeren'*), leaving uninsured only £200 (that is, one-tenth of £2 000). In effect, therefore, s 3 provided for the insured to bear ten per cent of the risk himself with a maximum of £200. It is uncertain what was the consequence of a transgression of this prohibition, but, as will be shown shortly, it appears not to have been the same as in the case of a breach of the prohibition imposed by s 20 in respect of hull insurance.<sup>317</sup> Scheltinga<sup>318</sup> pointed out that, in requiring a tenth part of the goods loaded into a ship to remain uninsured for the account of the owner, s 3 (and all the later provisions of the same nature) had to be understood as referring to the goods on board which the owner had insured, not necessarily to all his goods on board, some of which may not have been insured. Accordingly, a tenth of the value of his goods on board and which were insured, and not necessarily a tenth of the value of all his goods on board, had to remain uninsured. By the same token, though, only the value of the insured goods could be taken into account to determine whether their value exceeded £2 000 and whether the amount of under-insurance was thus capped.<sup>319</sup>

The equivalent s 3 of the provisional *placcaat* of 1570 had imposed a fifteen per cent compulsory under-insurance on cargo and it had also not imposed any maximum amount which an insured had to bear himself. It had instead determined that any breach of the prohibition would result in the nullity of the whole contract and in the forfeiture of the amounts in question.<sup>320</sup> Presumably the limit of fifteen per cent was too high and the consequences of a breach of the prohibition too severe for merchants who no doubt complained about it to authorities. As a result there was an amelioration

<sup>316</sup> These expenses were now included, having been excluded in terms of the *placcaat* of 1563.

<sup>317</sup> See Wassenaer *Practyk notariael* VIII.3 (where he was apparently concerned with s 3 although that was not expressly stated); Van Zurck *Codex Batavus* sv '*Assurantie*' par 7.

<sup>318</sup> *Dictata ad* III.24.4 sv '*het thiende deel, etc twee duizent ponden, etc*'.

<sup>319</sup> Scheltinga referred to the following example. If a merchant loaded a consignment of cloth and consignment of other goods on the same ship but insured only the cloth, then only a tenth part of the value of the cloth had to remain uninsured. It could not be argued that his other goods on board were not insured and that he had therefore complied with the compulsory under-insurance requirement. Likewise, only when the value of the cloth by itself exceeded £2 000, did the merchant have to bear no more than £200 of the risk on that cloth himself.

<sup>320</sup> '*[E]nde dat op pene van nulliteyt ende onweerde vanden selven contracte, ende verlies vande penningen die men sal gegeven hebben, oft beloeft te geven, voir de selve versekeringe oft assurance, deen helft tonsen proffyte, ende dander helft vanden ghenen die de selve ontfangen sal hebben*'.

of these measures in the *placcaat* of 1571,<sup>321</sup> the percentage having to be kept uninsured being reduced and, it would appear, a breach now merely resulting in the excess being null and void, not the insurance as a whole.

Another innovation introduced by the *placcaat* of 1571 was that the prohibition on full-value insurance was also extended to non-marine insurances. Section 29 provided that carriers ('*Voerlieden*') could not insure their wagons, carts or horses ('*Wagenen, Karten oft Paerden*') otherwise than for below half their value. It further provided that the insurance of imports or exports being conveyed by internal waters or over land could not exceed the value of such goods but that a tenth had to remain at the risk of the merchant who had loaded it ('*maer sal een tienste blyven tot perijckel van den Koopman, die geladen sal hebben*'). Section 30 determined that the insurance of foreign imported goods being carried by sea, internal waters or over land ('*Waren ende Koopmanschappen, komende ter Zee, over soete Wateren, oft te Landeuyt vremde Landen ende contreyen, inde Landen van herwaerts overe, oft in andere Coninckrijken ende Landen*'), could not exceed the value of such goods but that a tenth had to remain at the risk of the merchant who had loaded it ('*blyvende 't voorsz tienste deel tot resiqc, perijckel ende avonture vanden Koopman die ladende is*'), subject to the maximum of £200 as in the case of cargo generally ('*mette moderatie vande voorsz twee duysent ponden grooten als vooren*').<sup>322</sup>

### 5.3 Under-insurance in Antwerp Customary Law

Although compulsory under-insurance was no doubt opposed and ignored in practice by the local merchants,<sup>323</sup> the Antwerp compilations of customary insurance law at first recognised and later contained several measures on compulsory under-insurance of hull, cargo, land-transport vehicles and ransom.<sup>324</sup>

The first mention of the topic occurred in the *Impressae* of 1582 which, however, merely referred in art 6<sup>325</sup> to the applicable legislation (that is, to the *placcaat* of 1571) for details on what and for how much one could insure. By the time of the *Compilatae* of 1609, though, the topic was treated in detail in the compilation itself.

In terms of art 2<sup>326</sup> of the *Compilatae*, in the case of an insurance on goods or merchandise, the insured had to retain and bear a part of the risk himself ('*moet ... daervan een deel tsijnen laste ende perijckel houden*'), namely a tenth part of the value

<sup>321</sup> See further as to s 3 of the provisional *placcaat* of 1570, *De Groote Zeeassurantie* 38; and also *Goudsmit Zeerecht* 263-264.

<sup>322</sup> See *Van Zurck Codex Batavus* sv '*Assurantie*' par 3 (referring to '*wage-voer-vragtluiden*'); and also *Goudsmit Zeerecht* 268.

<sup>323</sup> See *De Groote Zeeassurantie* 120n1.

<sup>324</sup> See generally *Couvreur 'Zeeverzekeringspractijk'* 192-193.

<sup>325</sup> Of title LIV (see *De Longé* vol II at 402).

<sup>326</sup> Of par 1, title 11, part IV (see *De Longé* vol IV at 198-200).

of such goods, without the possibility of any agreement to the contrary ('sonder dat ter contrarien van dijen oft vuytjsluitinge eenich bespreeck, voorwaerde, renontiatie ofte vertijdenisse wordt toegelaeten').<sup>327</sup> This provision was apparently frequently ignored in Antwerp.<sup>328</sup> Article 4 placed an upper limit on the amount of under-insurance by providing that if the value of the insured goods with their expenses amounted to more than f12 000, one could then insure such excess value in full ('de meerdere weerde van de gelaeden goeden int geheel'), as long as the insured bore the risk of a tenth part of such f12 000 and without that part being insured at all in whatever way ('sonder dat men tselve thienste deel int besonder of anderssints mach doen verseeckeren, in wat maniere dattet waere').

In terms of art 266, in the case of a claim on his policy, the insured had to prove not only that the goods insured had in fact been shipped and what their value was, but also that he had borne such part of the risk as he was required to do ('dat hij tperijckel van alsulcken deel daerinne heeft gedraegen, als hij gehouden is geweest te loopen'), as well as that no further or additional insurance had been concluded either at the place of his insurance or elsewhere, and that he was unaware of any such insurance.

As far as the insurance on hull was concerned, art 286<sup>329</sup> laid down that the insured always had to bear a third<sup>330</sup> of the value of the ship and her equipment.<sup>331</sup>

In the case of the insurance of wagons, carts and horses, art 313<sup>332</sup> provided that the insured had to retain for his own account the risk of half of their real value without insuring that part elsewhere ('sonder dat men ... dijen anderssints doen versekere'). Finally, art 318<sup>333</sup> contained a provision for compulsory under-insurance in the case of ransom policies, requiring the insured to bear a third part of the amount of

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<sup>327</sup> In terms of art 3, the value of goods included their cost price, and also the cost of their packaging, freight, duties, the cost of a factor and the insurance premium paid or yet to be paid on them ('prijjs oft loon van de versekering, mitsgaders tgene men heeft betaelt ofte soude moeten betaelen om den selven loon te versekere, dwelck men in desen heet assurance') and all other expense incurred on the goods until they were loaded.

<sup>328</sup> In practice the provision for a tenth part compulsory under-insurance in the case of goods was in the seventeenth century no longer always observed, as appears from the 1621 Antwerp case of *JA Balbi v Goyvaertszoon vanden Graeff*. Already in the sixteenth century Antwerp policies regularly had the following handwritten clause added to the printed text: 'sonder dat den bovenscr geassureerden ghehouden sal sijn te loopen de tien ten hondert'. See further Couvreur 'Zeeverzekeringspractijk' 192-193; and also Mullens 47-48.

<sup>329</sup> Of par 9, title 11, part IV (see De Longé vol IV at 318). See too Mullens 44-45.

<sup>330</sup> Less, therefore, than the half in terms of the *placcaat* of 1571.

<sup>331</sup> Article 289 limited voluntary bottomry loans on hull to two-thirds of the value of the ship, art 302 limited the insurance of a bottomry loan by the lender to four-fifths of the amount of the loan, while art 308 required confirmation under oath from the insured lender who claimed on his policy that he had borne a fifth of the risk and that he had not insured his share of the risk elsewhere.

<sup>332</sup> Of par 9, title 11, part IV (see De Longé vol IV at 328-330).

<sup>333</sup> Of par 9, title, 11 part IV (see De Longé vol IV at 330-332).

the ransom ('*een oprecht derden deel*') so as to ensure his care in not being taken captive and in being ransomed as cheaply as possible ('*opdat hij oorsaecke hebbe on voor hem te sien ten eijnde hij niet gevangen en worde, ende, gevangen sijn, hem ten minsten coste daervan vrij maecken*').

#### 5.4 The Gradual Relaxation of the Prohibition of Full-value Insurance in the Seventeenth Century

The provisions in the municipal insurance *keuren* of the seventeenth century introduced a gradual relaxation of the requirements of compulsory under-insurance, reflected in the decreasing portion of the value of the insured ship or goods which had to remain uninsured.

For hull insurance, s 10 of the Amsterdam *keur* of 1598 provided that no insurance could be concluded on ships, and their guns and munitions of war, except for below a two-thirds part of their real value, without it being permissible to insure the freight or equipment of such ships, nor gunpowder, cannon balls, victuals or any similar things consumed in any way on her.<sup>334</sup> Section 4 of the Middelburg *keur* of 1600 was in similar terms, except that it still provided for a greater portion of the value to remain uninsured, namely a half rather than a third.<sup>335</sup>

Section 2 of the *keur* of 1598 dealt with cargo insurance and provided that in the case of the insurance of merchandise, whether imports or exports, at least ten per cent of their value had to remain at the risk ('*tot risicq, perijkel ende avonture*') of the insured, such value being the cost price of the goods together with expenses incurred in respect of them prior to loading on board. The proviso was that in so far as one person had in one single ship goods to the value of more than £2 000, he could be fully insured for the excess of that value, only a tenth part of that sum of £2 000 having to remain at the risk of the insured. Thus, there was a ten per cent under-insurance on goods with a maximum of £200.<sup>336</sup>

Section 3 of the Middelburg *keur* of 1600 was in identical terms. However, in s 5 of its *keur*, the Middelburg Legislature did introduce one of the few innovations not

<sup>334</sup> See Grotius *Inleidinge* III.24.4; Groenewegen *Aanteekeningen* n7 (*ad* III.24.4); Van Leeuwen *Rooms-Hollands regt* IV.9.4 (noting the increase by the *keuren* - not the 'customs' as translated by Kotze 74 - from the limit of half the value in the *placcaat* of 1563); Van Zurck *Codex Batavus* sv 'Assurantie' par 5; and Lybreghts *Koopmans handboek* V.83 (also noting the increase in the portion of the value which could now be insured).

<sup>335</sup> See Groenewegen *Aanteekeningen* n7 (*ad* III.24.4); Van Zurck *Codex Batavus* sv 'Assurantie' par 6; Scheltinga *Dictata ad* III.24.4 sv '*onder twee derde-deelen, etc*'; Boey *Woorden-tolk*, sv 'Assurantie'; and also Enschedé 32; Goudsmit *Zeerecht* 320-321 and 452.

<sup>336</sup> See further Grotius *Inleidinge* III.24.4 (also repeated in III.24.6) (a tenth part of the value of goods had to remain uninsured '*tot laste van den eighenaer*'); Groenewegen *Aanteekeningen* n8 (*ad* III.24.4); Van Leeuwen *Rooms-Hollands regt* IV.9.4; Van Zurck *Codex Batavus* sv 'Assurantie' par 7 and par 7 n(d); Scheltinga *Dictata ad* III.24.4 sv '*het thiende deel, etc twee duizent ponden, etc*'; and Schorer *Aanteekeningen* 419 (*ad* III.24.4) n8. See also Enschedé 31-32 (noting that s 2 of the *keur* of 1598 differed from s 3 of the *placcaat* of 1571 in the calculation of the tenth of the value of the goods); Goudsmit *Zeerecht* 319-320.

found in the Amsterdam *keur* of 1598 which had served as its model. In the interest of trade on the East Indies, it created an exception on the under-insurance on goods. When a person who had insured (that is, presumably, up to 90 per cent of) his a cargo on an outward-bound voyage ('*op de uyt-reyse*'), received reliable and correct information ('*seeckere ende waerachtige tydinge*') of the arrival of the carrying ship at her destination and the return shipment of his goods from there, he was permitted to insure on the return cargo ('*op de wederkomst der selver*') twice the amount which he could ordinarily have insured on the outward-bound voyage. Accordingly, the section explained somewhat superfluously, a person who could on an outward-bound voyage have insured for Flemish £100, was permitted, if the necessary news had been received ('*soodanige goede waerachtige tydinge ontfangen hebbende*'), to insure himself on the return voyage for £200. Presumably this was irrespective of whether or not an insurance for that amount would still have amounted to an insurance of only 90 per cent of the value of the return cargo.

Section 15 of the Amsterdam *keur* of 1598<sup>337</sup> provided firstly, that carriers could not insure their wagons, carts, or horses otherwise than for below half their value, and secondly, that goods carried over land or on internal waters could not be insured otherwise than for below their value (as calculated in terms of s 2) with a tenth part of such value having to remain at the risk of the merchant who had loaded it.<sup>338</sup>

The Rotterdam Legislature also introduced compulsory under-insurance in its *keur* of 1604 which contained some further innovations. In terms of s 4, the masters and owners of any ship could not insure for more than a two-thirds part of her real value, in which value could not be included the salary of her crew, victuals, gunpowder, gunshot and other goods to be consumed on her voyage. This was the case where the ship in question remained this side of the equinoctial line ('*de Linie Equinoctiae*'), that is, the terrestrial Equator. But on ships going past or trading below (that is, south of) this line, one could not insure more than for half of such value.<sup>339</sup> Presumably the longer the voyage, the greater the need for the insured to exercise care and hence the larger the portion of compulsory under-insurance. As far as cargo insurance was concerned, the Rotterdam *keur* apparently abolished compulsory-under-insurance. Section

<sup>337</sup> Section 27 of the Middelburg *keur* of 1600 was in identical terms.

<sup>338</sup> See Grotius *Inleidinge* III.24.3 (wagons) and III.24.4 (repeated in III.24.6) (cargo; in the Lund edition there is an additional reference to all other goods '*te lande, op de zoete wateren ende op de zee*'); Groenewegen *Aanteekeningen* n4 (ad III.24.3); Voet *Observationes ad III.24.3* (n4) (noting that the reason for this prohibition was so that carriers would not collude with robbers and share the loot and thereafter claim the value of their wagons from the insurers); Van Zurck *Codex Batavus sv 'Assurantie'* par 3; and Van der Keessel *Praelectiones* 1432-1433 (ad III.24.3) (noting that the aim with the prohibition in s 15 apparently was so that carriers would, because of the risk of at least some damage falling on themselves, act with greater diligence and defend their cargoes or passengers against robbers with greater fortitude). See also Goudsmit *Zeerecht* 329.

<sup>339</sup> See Groenewegen *Aanteekeningen* n7 (ad III.24.4); Van Zurck *Codex Batavus sv 'Assurantie'* par 6; Scheltinga *Dictata ad III.24.4 sv 'onder twee derde-deelen, etc'*; Boey *Woorden-toek sv 'Assurantie'*.

2 simply provided that all goods shipped on board, including all the expense incurred in respect of them up to their shipment, could be insured.<sup>340</sup>

## 5.5 The Abolition of the Prohibition on Full-value Insurance in the Eighteenth Century

It was already clear by the end of the seventeenth century that the Dutch legislatures had to a greater extent come to realise not only that the prohibition on full-value insurance was irksome to trade and commerce, but also that it was widely ignored in insurance practice.<sup>341</sup> It should be pointed out that compulsory under-insurance was not only unacceptable to the insured who wanted full protection against loss or damage, but also to insurers who earned a reduced premium income when a less than full-value insurance was concluded. The fact that both parties to the insurance contract were in principle opposed to the prohibition, goes some way towards explaining its widespread transgression in practice.

Many examples exist of insurances for full value in contravention of existing prohibitions, the parties often employing a valuation clause and an over-valuation to circumvent the relevant provisions and/or contracting out of the applicable legislation. Often they also made the laws or customs of other places, such as London, where no compulsory under-insurance measures were in force at the time, applicable to the policy in question.<sup>342</sup>

<sup>340</sup> See Groenewegen *Aanteekeningen* n8 (ad III.24.4) (who thought that while there was compulsory under-insurance on goods in Amsterdam and Middelburg, at Rotterdam the merchant or consignor could insure the goods in full); Scheltinga *Dictata ad III.24.4 sv 'het thiende deel, etc twee dulzent ponden, etc'* (the position in Rotterdam differed '*toto caelo*' from that in Amsterdam & Middelburg). Kracht 32 is incorrect in stating that in terms of the Rotterdam *keur* of 1604 the full value of a ship could be insured; that was apparently true only for cargo, as he points out later at 37. See further as to the position in Rotterdam, Goudsmit *Zeerecht* 397-398.

<sup>341</sup> The earliest recognition, of course, was that in the Rotterdam *keur* of 1604, an example emulated in the French *Ordonnance de la marine* of 1681. In terms of its provisions (art III.6.8), an insured always had to bear the risk of a tenth part of the goods laden, except if there was an express clause in his policy declaring that he intended insuring the full value. Contracting out was therefore permitted. In another provision (art III.6.9), though, the *Ordonnance* determined that if the insured was himself on board the ship or if he was the owners of the carrying ship too, such contracting out was prohibited. See further eg Hammacher 94; Lowndes 102 (who is incorrect, though, in his statement that the French took the lead in relaxing the severity of compulsory under-insurance in the *Ordonnance*); and Magens *Essay* vol I at 5 (referring to this as a judicious distinction between persons with and those without any control over the way in which the voyage was conducted, but noting that even so, the prohibition in the case of hull insurance was commonly renounced in insurance policies, even though such renunciation would probably not be valid).

<sup>342</sup> A few examples will suffice.

(i) The valuation clause in an Antwerp policy of 1566 (see Den Dooren de Jong 'Lombard Street' 16 where it is quoted) was in direct contravention of s 11 of the *placcaat* 1563, and probably for this reason there was a reference in the policy to and an incorporation of the customs of London.

(ii) In an Amsterdam fishing policy of 1636 the valuation clause, added by hand (see Den Dooren de Jong 'Practijk' 8-9) provided that the insurers were bound to the valuation and that '*U [insurers] oock consenteerende dat ghy opt voorsz schip met als voren suyt mogen doen versekeren soo veel als 't U versekert al waert de volle waarde van dien*'.

(iii) An Amsterdam policy of 1672 on the 'Witte Haas' (see Den Dooren de Jong 'Practijk' 8-9 and

In s 1 of the Amsterdam amending *keur* of 1693, s 10 of the earlier *keur* of 1598 was amended after requests from various prominent merchants in the city. It was now provided that insurances on the hull of ships could in future be made to the extent of a seven-eighths part of the real value of such ship, but that one could still not insure freight, gunpowder, lead, victuals or similar consumptibles. The condition remained that the insured himself had to bear the risk (*'selve sal hebben te resiqueren'*) of the other one-eighth part (that is, he could not insure that part with another insurer), and that was so whether the ship was worth above or below Flemish £2 000. It was therefore made clear that otherwise than in the case of cargo insurance, no maximum amount of under-insurance applied in the case of hull insurance.<sup>343</sup>

The Middelburg Legislature appears to have taken a conscious decision in 1719 to break away from its adherence to the position in Amsterdam when it abolished the prohibition on full-value insurance. Section 2 of the *keur* of that year provided that insured could have themselves fully insured, including the premium of insurance (*'Geassureerdens hun ten vollen sullen moogen laten verseecken tot de praemie van Assurantie incluys'*). This apparently repealed the prohibitions in the *keur* of 1600 on full-value insurance in both hull and cargo insurance.<sup>344</sup>

Despite the fact that its insurance *keur* of 1721 was generally advanced for its time and took full account of the needs of practice, the Rotterdam Legislature retained the prohibition on full-value hull insurance - it was in fact the last of the municipal *keuren*

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Appendix 24 *infra* for a reproduction) expressly insured the full value of the ship and her cargo. It also contained a (printed) valuation clause which provided that the insurers were bound to the valuation and *'sal de geassureerde zich ten vollen en tot den lesten stuyver toe van deze taxatie en pristatie vermogen te doen versekeren, sonder gehouden te zyn een derde, thiende of andersins in 't minst yets selfs te resiqueren, renuntierende tot dien eynde d'ordre van de Asseurantie-Kamer deser stede'*.

(iv) In an Amsterdam goods policy of 1687 (see Gehlen 144-149 and Appendix 26 *infra* for a reproduction) cargo was insured for its full value, and the insured declared himself not bound to bear any part of the risk of the value and the insurers on their part renounced the *'ordre van de assurantie-kamer'* at Amsterdam and all other laws. Thus, according to Gehlen 151, the policy in this case expressly stipulated that the Insurance took place *'ten vollen en tot den lesten stuyver'*.

(v) An Amsterdam policy of 10 August 1712 (see Vergouwen 39-40) contained a hand-written clause by which the insured was permitted to insure the goods, including the premium, without keeping a tenth part of it uninsured as was required by the Amsterdam *keur* of 1598, *'want deze assurantie geschiet wederzyts zonder Restorno; also wij daervan volkoomen renuntieren, alsmeede van de Camer van Asseurantie en alle Wetten, Placaten en Ordinantie deze contrarie'*. Interestingly enough, this policy was sanctioned by the signature of the Secretary of the Insurance Chamber.

<sup>343</sup> See generally Goudsmit *Zeerecht* 321.

<sup>344</sup> See eg Schorer *Aanteekeningen* 427 (ad III.24.8) n22 (who incorrectly stated that at Middelburg only half of the value of a ship could be insured in terms of s 4 of the Middelburg *keur* of 1719); Van Zurck *Codex Batavus sv 'Assurantie'* par 7 n(e); Decker *Aanteekeningen ad IV.9.4 n(3)/(c)* (who remarked that it was clear that the compulsory under-insurance of merchandise mentioned in the Amsterdam *keur* of 1589 could *'hedendaagsch op veelen Plaatsen worden verzekert'*, among other places in Middelburg, where *'hebbende contrarie costume de anterleure Wetten geabrogeert of eene renunciatie daar van ingevoerd'*); Van der Keessel *Theses selectae* th 719 and 720 (ad III.24.4); *idem Praelectiones* 1440 (ad III.24.4). See also Goudsmit *Zeerecht* 453.

still to contain the prohibition - although it did relax the earlier limits somewhat.<sup>345</sup> In s 31 of the Rotterdam *keur* of 1721 it was laid down that ships, which could be insured in terms of s 25, could not be insured for in excess of a seven-eighths part of their real value, without any distinction as to the length of their voyage ('zonder onderscheid of de voorgenomene Reyse is aan deze zyde of voor-by de Linie'). This was a less restrictive measure than in s 4 of the earlier *keur* of 1604, in terms of which a ship could not be insured in excess of two-thirds her value, and it applied to all voyages, even the longer ones in respect of which the even stricter limitation of a half no longer applied.<sup>346</sup> In s 25 of the *keur* of 1721, it was provided that one could insure and have insured all kinds of ships, goods, wares and merchandise, nothing excluded, and also the expenses up to and including loading, as well as the insurance premiums. As was already the position in the *keur* of 1604, therefore, no compulsory under-insurance was expressly provided for as regards the insurance of cargo. The fact that full-value cargo insurance was permitted by implication, may be deduced from the absence of any express prohibition as in the case of hull insurance.<sup>347</sup>

The changing attitudes as regards the prohibition on full-value insurance were also reflected in a split decision of the *Hooge Raad* in 1716.<sup>348</sup> The decision also shed some light on the effect of a breach of this prohibition. In this case there was an almost complete loss of a ship and her cargo when she collided in a storm with another ship. The defences of the Amsterdam insurers of the ship were rejected by the *Raad* but another matter required its attention, namely the extent to which insurance on ships was permissible. In this case the ship was insured for an amount exceeding two-thirds of her value, a breach, therefore, of s 10 of the Amsterdam *keur* of 1598.

Several ('*verscheide*') of the members of the *Hooge Raad*, apparently the majority, were of the view that the excess of the amount insured was null and void in terms of s 10, read with s 1 of the *keur* of 1598. The insured's claim against the insurers was therefore allowed up to two-thirds of the real value of the insured ship, with a

<sup>345</sup> See generally Goudsmit *Zeerecht* 397-398; *Kracht* 37.

<sup>346</sup> See Scheltinga *Dictata ad III.24.4 sv 'onder twee derde-deelen, etc'* (noting that the earlier distinction between voyages to the one or the other side of the Equator appeared to have been abrogated as not was not repeated in s 25); Schorer *Aanteekeningen* 427 (*ad III.24.8*) n22; Van der Keessel *Theses selectae* the 719 (*ad III.24.4*); *idem Praelectiones* 1440 (*ad III.24.4*); and Van der Linden *Koopmans handboek* IV.6.2. See also Enschedé 35.

<sup>347</sup> That was the point made by Van der Keessel *Praelectiones* 1440 (*ad III.24.4*) (full-value insurance is the rule and s 31 created a special exception in the case of hull insurance). See also *idem Theses selectae* th 720 (*ad III.24.4*) (merchandise may also now be insured for its full value at Rotterdam). It appears that Schorer *Aanteekeningen* 415 (*ad III.24.3*) n4 was incorrect in stating (although only in the Dutch translation by Austin) that although one could insure houses against fire in Rotterdam, one could in terms of s 4 of the Rotterdam *keur* of 1721 not do so for more than three-quarters of the value of the building. Section 4 concerned the jurisdiction of the local Chamber of Maritime Affairs and not fire insurance which was in fact not mentioned in that *keur* at all.

<sup>348</sup> See Bynkershoek *Observationes tumultuariae* obs 1290; *idem Quaestiones juris privati* IV.6. See also eg Suermondt *Taxatie* 22 (who regards the case as an example of over-insurance through over-valuation); and Lichtenauer *Geschiedenis* 154.



proportionate return of the premium being ordered as regards the balance.<sup>349</sup> The minority of the members argued that the custom received among merchants had abolished s 10, and that proof of this was to be found in the fact that policies sold everywhere contained a clause in terms of which the parties renounced the contrary provisions of the insurance *keuren*, and also in the fact that even the Commissioners of Insurance at Amsterdam in their judgment *a quo* had ignored the provisions thus renounced by the parties.

Bynkershoek, speaking for the majority of which he was one, noted the various legislative provisions on under-insurance on hull<sup>350</sup> and the fact that the rationale for such compulsory under-insurance was readily apparent if the insured shipowner himself commanded or equipped the ship. However, if the shipowner was not in command of her navigation or in control of her equipment, there appeared to him to be no reason why he should not be able to insure his ship fully.<sup>351</sup> Maybe for this reason, Bynkershoek speculated, s 4 of the Rotterdam *keur* of 1604, where it mentioned the extent to which one could insure a ship, referred specifically to masters and owners ('*spreeken als van Schippers en Reeders*').<sup>352</sup> But because ships were commanded mostly by their masters who were in those days seldom also the owners of the ships, the prohibition on full-value insurance was widely ignored ('*word 'er nu weinig acht op diergelyk verbod geslage*') and it was for that reason, Bynkershoek thought, that s 25 of the *keur* of 1721 simply permitted the full-value insurance of ships.<sup>353</sup> However, according to Bynkershoek the minority was not correct in their argument. The prohibition in question was a *lex perfecta* ('*een volstreckte Wet*') so that any agreement in contravention of it was null and void<sup>354</sup> and the proof of the customary conclusion of such agreements was therefore irrelevant.

However, the decision of the majority of the *Hooge Raad* and Bynkershoek's justification of it were clearly out of feeling with the position in and the requirements of practice. The *Raad's* decision was also in stark contrast with its approach earlier in

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<sup>349</sup> Thus, an insurance in excess of the permitted proportion was not (or, rather, no longer) in fact regarded as totally null and void but only to the extent of the excess. See also Dorhout Mees *Schadeverzekeringsrecht* 178.

<sup>350</sup> That is, ss 8 of the *placcaat* of 1563; 20 of the *placcaat* of 1571; 10 of the Amsterdam *keur* of 1598; 4 of the Middelburg *keur* of 1600; and 4 of the Rotterdam *keur* of 1604.

<sup>351</sup> That is, if the insured is not in control of the insured ship, under-insurance would not ensure his care and attention in her navigation. Of course, what Bynkershoek did not consider, even then such under-insurance would still have ensured that the shipowner chose a competent master to command his (under-insured) ship.

<sup>352</sup> See also Dorhout Mees *Schadeverzekeringsrecht* 178.

<sup>353</sup> In this, of course, Bynkershoek was wrong. Section 25 dealt with ships, cargo and merchandise generally and permitted their insurance in principle, but s 31 still limited the extent of insurances of ships and retained a compulsory under-insurance on hull.

<sup>354</sup> See again ch VIII § 5.2 *supra* as to the renunciation of insurance laws in Roman-Dutch law.

1712 as regards the prohibition on the insurance of expected profit.<sup>355</sup> That much appears, for example, from Feitama's comments and argument on the topic<sup>356</sup> as well as from the views of Lybreghts<sup>357</sup> who noted that while the compulsory under-insurance of goods was earlier required by the insurance *keuren*, one was now permitted to deviate from and contract out of the prohibition on full-value insurance '*daar het Gemenebest geen nadeel door bekomt*'. There was no reason to prohibit such contracting out, he thought, because the prohibition was not a *lex perfecta* ('*want wat voordeel kan het den Assuradeur doen, dat den geassureerden mede risico voor een tiende loopt, integendeel zo is hem nadeelig doordien zyn premie daar door kleinder is*'). Compulsory under-insurance was against the underlying notion of insurance, detrimental to trade,<sup>358</sup> and capable of ruining a merchant who traded heavily and suffered misfortune at sea. For this reason, Lybreghts noted, the Hamburg

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<sup>355</sup> See again ch V § 5.2 *supra* and generally Dorhout Mees *Schadeverzekeringsrecht* 22. Interestingly enough, in 1643, in a case before the Supreme Court of Naples in *Odoardus & Gulielmus Micco [Englishmen] v Emanuel Vaez* (see Roccus/Feitama *Decisien* decis VI.14), one of the defences raised by the insurers was that the insurance was null because the insured had not participated for one-eighth part as was statutorily required, and that it was irrelevant that in the policy that prohibition on full-value insurance had been renounced because such renunciation was in terms of that same statute not permissible and valid. The Supreme Court held that the decision of the Maritime Court *a quo* had to be suspended and postponed and that the insurers had to be given time to provide further proof of their allegations.

<sup>356</sup> Roccus *De assecurationibus* note 81 remarked that the compulsory participation by an insured in a part of the risk was usually renounced in contemporary insurance policies and that insurers, ignoring the participation, bound themselves fully in favour of the insured. In 1737 Feitama remarked in this regard that it was a daily occurrence also in the Netherlands that insurers insured fully, even including the insurance premium, with a renunciation of the statutory provisions to the effect that the insured had to bear a specified part of the risk. He thought it better that insured be permitted to insure fully without having to retain a specified share, for there appeared to be little advantage to be gained from such small compulsory under-insurance and because it was in fact detrimental for the insurer himself because he in consequence received a smaller premium. Further, Feitama suggested, the purpose of insurance was the advancement of trade and to ensure that merchants suffered no loss in the process. Compelled under-insurance was clearly not compatible with this aim. It was arguable that it was for the benefit of trade, the insured and also the insurer if full-value insurance were permitted, as was the position in Hamburg (see n359 *infra*).

<sup>357</sup> *Koopmans handboek* V.77 n 1. See too Lichtenauer *Geschiedenis* 103 on the difference in this regard between the formal law (where the prohibition on full-value insurance was stated not to be renounceable) and practice (where property was as rule insured for its full value); *Weskett Digest* 291-292 sv 'insurance' par 9 (compulsory under-insurance is nowhere observed and everywhere evaded). Magens *Essay* vol I at 5 commented that although all ancient and some modern laws explicitly required the insured to run some part of the risk, such injunctions were commonly evaded and seldom complied with for long. Contrary customs had evolved, he noted, and unless fraud was involved, the courts could not do otherwise in the case of disputes than to oblige the merchants to adhere to their contracts and not to rely on technicalities and abrogated laws.

<sup>358</sup> In the sense, no doubt, that insurance business would not be placed in the Netherlands but elsewhere where full-value insurance was permitted.

*Assecuranz-Ordnung* of 1731 permitted insurance in full.<sup>359</sup>

By the time Amsterdam revised its insurance legislation in 1744, it too brought the position there in line with the obvious demands of practice. This it did by abolishing the crude device of compulsory under-insurance as a method to control insurance frauds and the conduct of insured.<sup>360</sup> In terms of s 7 of the Amsterdam *keur* of 1744, the hull of a ship and all her appendages and equipment, nothing excluded, could be fully insured for (but not be insured for more than) their value on proceeding to sea ('*zal ten vollen, en soo als het waarlyk tot in Zee kost, verseekerd mogen werden*').<sup>361</sup> And in terms of s 22, all goods, wares and merchandise, none excluded, as well as valuables, could be fully insured with all expenses incurred in respect of them until their loading, as well as the insurance premium paid on them ('*sullen ... ten vollen verzekerd mogen werden met alle onkosten tot aan boord met de Premie van Assurantie inclusive*').<sup>362</sup>

Therefore, the gradual relaxation and eventual abolition of the prohibition on full-value insurance was a significant development in the way in which the law and the legislatures regarded the role of insurance. Insurance was no longer merely an aid to assist a merchant to overcome the consequences of loss or damage, but it came to be acknowledged that insurance could and should in fact be permitted to eliminate those consequences completely, even if they were caused by the insured's own (non-intentional) conduct. Insurance had in practice evolved from being a mere aid to business to being an indispensable part of it, and this evolution had at last come to be fully understood and recognised by the formal Roman-Dutch law as well.

## 5.6 The Effect of Under-insurance on the Insurer's Liability

After the abolition of the prohibition on the insurance of the full value of property, merchants no doubt continued, as they had done before, to under-insure voluntarily.

<sup>359</sup> Article III.3 of the Hamburg measure expressly stated that the insured did not have to bear any part of the risk and it therefore permitted '*Vollversicherung*'. See further Dreyer 122-123; Goudsmit *Zeerecht* 359n1; and Hammacher 94.

<sup>360</sup> See generally Enschedé 35; Goudsmit *Zeerecht* 337-338.

<sup>361</sup> See Lybreghts *Koopmans handboek* V.83 n1; Van der Keessel *Theses selectae* th 719 (*ad* III.24.4); *idem Praelectiones* 1440 (*ad* III.24.4); (noting that that was the position also at Dordrecht); and Van der Linden *Koopmans handboek* IV.6.2.

As far as the insurance by land-carriers of their carts, wagons and horses was concerned, the prohibition contained in s 15 of the Amsterdam *keur* of 1598 may still have been effective. As Van der Keessel *Praelectiones* 1432-1433 (*ad* III.24.3) observed, there was no provision on this matter in s 9 of the *keur* of 1744 (which was otherwise the equivalent of s 15 of the *keur* of 1598), and further at the end of s 9, masters (who sailed on internal waters, for s 9 - as s 15 before - was concerned with them too) were expressly permitted to have their ships insured, because in their case there was less danger that they would be less diligent in protecting their ships, seeing that they themselves were also in danger, being on board the ship.

<sup>362</sup> See Decker *Aanteekeningen ad* IV.9.4 n(3)/(c) who remarked that it was clear that the tenth part of the value of merchandise mentioned by the Amsterdam *keur* of 1589 could '*hedendaagsch op veelen Plaatsen worden verzekert*', also in Amsterdam itself where '*hebbende contrarie costume de anterieure Wetten geabrogeert of eene renunciatie daar van ingevoerd*'; Van der Keessel *Theses selectae* th 720 (*ad* III.24.4); and *idem Praelectiones* 1440 (*ad* III.24.4).

In fact, in the early stages of the evolution of insurance, under-insurance was the rule rather than the exception, merchants using insurance merely as a supplementary measure to protect themselves partially against loss or damage. Initially many merchants either did not insure at all<sup>363</sup> or did not insure their ship or goods fully. Insurance was a way of mitigating rather than avoiding the consequences of loss or damage. But while this may have been true of the seventeenth century and before,<sup>364</sup> that was increasingly no longer the case thereafter. The legislative use of under-insurance as a method to control insurance frauds and the conduct of insured was an increasing hindrance not only to practice, where merchants now recognised the worth of insurance and required such cover to the full extent of their exposure, but also to the expansion of the notion of insurance itself.<sup>365</sup>

Nevertheless, in later times too under-insurance continued to occur in practice, even after the abolition of the prohibition on merchants' obtaining full insurance cover. Now, however, it was no longer made compulsory by legislative prescript. It occurred, as it had done before, either on a voluntary basis in order for the insured to save on premiums, or because, given the unavailability of insurance cover, they had no other option.<sup>366</sup> Alternatively, it may still have occurred because insurers themselves, rather than the legislatures, retained it in the form of a contractual stipulation<sup>367</sup> as a measure to ensure that the insured looked after the insured property.

The question arises what the effect was of under-insurance, whether in a compulsory or voluntary form, on the liability of the insurer or insurers<sup>368</sup> involved.

There is little direct authority on this matter in Roman-Dutch law but it appears that in the case of under-insurance the insured was regarded as a co-insurer with the

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<sup>363</sup> See again ch IX § 2.2 *supra* as to self-insurance.

<sup>364</sup> See eg Barbour 'Marine Risks' 590; Clayton 26; and Postan, Rich & Miller 99 who suggest that since medieval times merchants were used to assuming risks and that shipments were rarely insured for more than half their value or even sometimes less. That voluntary under-insurance was by no means an uncommon practice, appears from a description of Amsterdam by Pontanus *Beschrijvinge* in 1614 (III.4, at 298-299), where he commented on the Insurance Chamber and on the practice of merchants of often not insuring the whole ship or the whole consignment but only a part, retaining the balance for their own risk.

<sup>365</sup> See eg Faber 'Studien I' 93 and 95.

<sup>366</sup> For example, the well-known Van der Meulen policies concluded in Amsterdam in 1592 (see Sneller 118 and Appendix *infra*) insured the cargo on three ships for only about one-sixth of their value. This was therefore not simply an example of a case where the compulsory under-insurance provisions were complied with (cargo could at the time be insured for 90 per cent of its value) but it may have been that for the risk in question, cover could not be obtained in Amsterdam for the greater part of the value of the cargo. At least IJzerman & Den Dooren de Jong 226 are wrong where they state that the insurance here was for the full value of the cargo and in contravention of the governing provisions on compulsory under-insurance.

<sup>367</sup> Such as in the form of a clause stating 'x per cent to remain un-insured'. No clause of this nature was encountered in any of the published sources of Roman-Dutch law.

<sup>368</sup> Or even the sets of insurers, in the case of double insurance.

other insurer or insurers involved, and that as between the insured and the other co-insurers, the general principle of several proportional liability between co-insurers<sup>369</sup> also applied.<sup>370</sup> Should the insured have been under-insured although there were several policies on the ship (that is, under-insurance through double insurance), the same principle would have applied with the insured being regarded as a co-insurer on each of the policies in question.<sup>371</sup>

The most important source of information on the practice regarding under-insurance in the Low Countries was the compilation of Antwerp customary law, the *Compilatae* of 1609. The applicable rule in the case of (then compulsory) under-insurance was that any loss was borne proportionally by the insurer or insurers and the insured, with the latter himself being regarded as an insurer as regards the uninsured part.<sup>372</sup> Thus, art 219<sup>373</sup> provided that the loss was shared between the insurers and the insured equally in accordance with the amount of risk subscribed or borne by each (*'soo wort tverlies gelijkelijck verdeijlt tusschen den versekerde ende [de] versekerers, naer advenant dat elck van hun onderteeckent oft tsijnen laste genomen/last gehouden heeft'*).<sup>374</sup> In terms of art 209,<sup>375</sup> the same applied where only a part of a consignment was insured, that is, in the case of voluntary under-insurance. The insured could not then argue, as against the insurers, that the part of the consignment which had been lost was the insured part while the uninsured part had been saved and that

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<sup>369</sup> See again § 2 *supra*.

<sup>370</sup> Thus, where a ship worth f2 500 was insured for f2 000 in terms of a policy underwritten by four insurers for f1 000, f500, f300 and f200 each, each of the insurers and also the insured himself, as if he had underwritten the ship for f500 (the amount under-insured), would be liable to bear her loss in proportion to the sums each of the insurers had underwritten on the one hand and the insured had left un-insured on the other hand. If the ship was totally lost, therefore, the insured would have to bear f500 of that loss. The application of the proportionality principle was most vividly illustrated, though, in the case of a partial loss. If the ship was damaged to the extent of f1 250 (ie, 50 per cent), the insured had to bear 50 per cent of his share of the risk (ie, f250) and the insurers each 50 per cent of sums they had underwritten (ie f500, f250, f150 & f100) so that the insured could only recover f1 000 on his policy for the loss of f1 250. The insured could not have argued that his insurers should in terms of a principle of priority, bear the full loss of f1 250 first and that he was in fact able to recover all (partial) losses up to f2 000. Nor, of course, could he have argued that only the first (fully) and the second (up to f250) insurers should bear that partial loss alone.

<sup>371</sup> See again § 3 *supra* for the application of the proportionality principle in the case of double insurance *simpliciter* (ie, double insurance not amounting to over-insurance).

<sup>372</sup> See generally Mullens 87.

<sup>373</sup> Of par 6, title 11, part IV (see De Longé vol IV at 292).

<sup>374</sup> The example provided in this regard was that if the value of goods was f13 036-16 and the loss was f1 303-13½, the insured had to bear ten per cent of the loss (the compulsory under-insurance being ten per cent at the time).

<sup>375</sup> Of par 6, title 11, part IV (see De Longé vol IV at 286).

the insurers were in consequence alone liable for the loss.<sup>376</sup> The proportionality principle was applicable also where, in the case of under-insured property, an abandonment had to take place or the insurer had to be given credit for salvage or the reduction of the loss.<sup>377</sup> Lastly, it applied also to the moneys to be advanced or paid to the insured in connection with the avoidance or minimisation of a loss.<sup>378</sup>

An opinion in 1715 confirmed that the proportionality principle applicable in the case of under-insurance extended not only to the liability of the insured and his insurers for the loss, but also to the way in which they shared in any reduction of that loss, for example by way of an indemnification *aliunde* or a recovery of salvage or abandonment.<sup>379</sup> Accordingly, in the case of under-insurance, there was a proportional abandonment, a proportional right to salvage and a proportional entitlement to any other diminution of the insured's loss received from an extraneous source.<sup>380</sup>

The only Roman-Dutch author to comment on the effect of under-insurance and to explain that the insured himself had to be regarded as a co-insurer, was Van der Keessel.<sup>381</sup> He noted that it followed from the rule set out in s 13 of the *placcaat* of 1571 as to the proportional liability of co-insurers who had insured property in question to its full value,<sup>382</sup> that a single insurer<sup>383</sup> who had signed for a smaller amount than the value of the property could not be held liable for more than he would have been liable for had

<sup>376</sup> 'Als de coopmanschappe maer voor een deel en is versekert, ende datter verlies oft beschadicheijt valt ter saecken van compositie, lossinge, bederfenisse van de goeden of anderssints, soo moet de schade over alle de versekerde coopmanschappen verdeijlt worden [bij] ponts ende schellincx gewijse, sonder dat men de versekerers daarmede alleen mach belasten.'

<sup>377</sup> Thus, art 248 of par 7, title 11, part IV of the *Compilatae* (see De Longé vol IV at 302) provided that if after their abandonment as lost, a ship or goods nevertheless appeared ('te voorschijn quame'), 'soo soude tselve, ende t'gewin dwelck daerop soude mogen vallen, sijn tot behoefve van de versekerers, sonder dat de versekerde daertoe voordere soude mogen pretenderen, dan alleen voor sijn thienste oft andere gedeelte, d'welck niet versekert en is'.

<sup>378</sup> In terms of art 252, insurers were obliged to advance to the insured the cost to be incurred, or to pay him the cost already incurred, in this regard, less that part of it which the insured was compelled to bear himself. As to these costs, see again ch XVI § 1 *supra*.

<sup>379</sup> See Barels *Advysen* vol I adv 16 where it was noted in passing and without any further explanation that while in the case of full-value insurance and a total loss, the insured had to account to the insurer for the insured ship and the amount realised at the sale of the goods, that was not the case where there was under-insurance, ie, where the insurance '*niet in 't geheel of ten vollen mogte zyn gedaen, of ook niet in 't geheel en ten vollen, of zodanig gedaen had mogen worden na de wetten of costumen van de plaetse*'. In such a case the insured only had to give the benefit of such recovery or indemnification to insurers proportionally ('*de Geassureerde de voorsz afstand en verantwoordinge alleen proportionelyk na maete van de gedaene of gepermitteerde Assurantie zal hebben of behoeven te doen geschieden*').

<sup>380</sup> Abandonment, and the insurer's right to salvage and to an indemnification *aliunde* are treated in ch XIX *infra*.

<sup>381</sup> *Praelectiones* 1475b-c (ad III.24.17).

<sup>382</sup> See again § 2.2 *supra* where s 13 was considered in detail.

<sup>383</sup> Or, for that matter, several co-insurers.

another insurer or other insurers also bound himself or themselves up to the full value of the property. Logically, he pointed out, the position of such (first) insurer, taken alone, could not improve or deteriorate as result of the insured adding or not adding other insurers.<sup>384</sup>

Van der Keessel used the following example to illustrate this point. If goods worth f10 000 were insured for f1 000 by A but the insured could find no other insurers willing to underwrite the balance of f9 000, and if then a partial loss occurred of ten per cent (that is, damage amounting to f1 000); equity did not permit that insurer A to be liable for the full amount of that damage. Although he had signed for the amount of f1 000, A would have been liable only for one-tenth of that amount of damage had the other f9 000 also been insured. It was also ridiculous to say that A should be liable for the same amount (f1 000) whether the loss was a total loss or a partial loss of ten per cent.<sup>385</sup> Therefore, Van der Keessel continued, it was more correct to say that insurer A in this case insured not a specific sum but a part of the damage in proportion to a specific sum, that is, that he had insured *up to* f1 000<sup>386</sup> and that the other f9 000 thus remained for the risk of insured himself or, presumably, such other insurers as he could find. In this instance, therefore, A was not liable for more than f100.<sup>387</sup>

Further, the fact that the insured had to be regarded as a co-insurer of the risk, Van der Keessel pointed out, also appeared from the older laws in terms of which under-insurance was made compulsory and where the intention was that the insured himself had to bear a part of the risk and therefore a proportionate part of every loss.<sup>388</sup>

In conclusion, Van der Keessel summarised the position in the case of under-insurance as follows. An insurer who underwrote a policy for a smaller amount than the value of the property in question, was liable only for a proportional part (*'tantum pro rata'*), whether he was the sole insurer and the risk was therefore shared between himself and the insured, or whether there were several other insurers and the risk was therefore shared between the co-insurers. And this rule, he noted, was recognised by usage and custom not only in Dutch law but also elsewhere, namely in England.<sup>389</sup>

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<sup>384</sup> Or, for that matter, releasing them. See again § 2.4 *supra* for the effect of a release of a co-insurer on the liability of the other co-insurers.

<sup>385</sup> If this was the case, Van der Keessel noted, no insurer would have been prepared to underwrite a policy first, given that in the case of partial losses, which were much more common than total losses, he would always be liable fully, irrespective of whether other insurers had signed the policy or whether the insured had been unable or unwilling to obtain other insurers.

<sup>386</sup> See again ch XVII § 2 *supra* for the point that the sum he had insured represented the maximum amount payable by an insurer, not in all cases the amount he necessarily actually had to pay out.

<sup>387</sup> See Van der Keessel *Praelectiones* 1475e (*ad* III.24.17) for further examples of the liability of insurers in the case of under-insurance, including the case where such under-insurance was the result of a release of one of the co-insurers by the insured.

<sup>388</sup> And, by implication, not only of total losses.

<sup>389</sup> In this regard Van der Keessel referred to *Park System* (1800) ch 6.

## 5.7 Under-insurance in the *Wetboek van Koophandel* and In English Law

In the *Wetboek van Koophandel* a number of provisions make it clear that compulsory under-insurance no longer exists and that full-value insurance is permissible.<sup>390</sup>

If property is not insured for its full value, though, art 253-2,<sup>391</sup> which applies to insurance generally and not only to marine insurance, despite the lack of Roman-Dutch authority on the point, in essence follows the solution suggested earlier by Van der Keessel and which was also followed elsewhere. It lays down that in the case of loss or damage the insurer is liable only in proportion (*'in evenredigheid'*) of the insured to the uninsured part.<sup>392</sup> In terms of art 253-3 parties are free to agree expressly that, despite the larger value of the insured object (that is, despite the under-insurance), the damage that does occur will be compensated to the full extent of the sum insured and, therefore, that the insured will not be regarded as a co-insurer and will not have to bear a proportionate part of that damage himself.<sup>393</sup>

The effect of under-insurance and the proportionality principle upon an abandonment is regulated in art 677-2<sup>394</sup> and upon the insurer's liability for general average in art 720.<sup>395</sup>

As already noted by Van der Keessel, the proportionality principle was applicable in the case of under-insurance not only in terms of Dutch law but also in terms of other systems, including English law.

<sup>390</sup> See eg art 289-1 (fire insurance may be made for the full value of the insured goods); art 594 (marine insurance may be made on the whole or a part of the object of risk); art 602 (hull insurance may be made for the full value of the ship); and art 612 (goods may be insured for their full value). However, in one case of fire insurance something of the earlier notion remains in art 289-3 which provides that in the case of a reinstatement clause (*'beding van weder-opbouw'*, in terms of which the insurer undertakes to pay the cost of the reinstatement of the building destroyed by fire), the insurance may not exceed three-quarters of such costs (*'nimmer drie vieren dier kosten mogen te boven gaan'*). While the aim with this provision is to reduce the temptation of causing the loss for the insured, most modern policies contract out of this measure. See further eg Dammers 27-41; Heemskerk 103.

<sup>391</sup> Article 253-1 concerns over-insurance and it too (implicitly) permitted full-value insurance by declaring invalid only an insurance in excess of the value.

<sup>392</sup> Mathematically this is an incorrect statement and it should have read: in proportion of the insured part to the full value of the object. See generally Dammers 19-20 and 23; Voorduin vol IX at 170-171 and 175-176.

<sup>393</sup> Such an exclusion of the proportionality principle may be necessary and desirable in the case where an accidental under-insurance is possible, eg where a consignment of an unknown quantity of goods is insured. See Asser *NBW* 104.

<sup>394</sup> If ships or goods are not insured for their full value, and the insured therefore bears a part of the risk himself, abandonment extends no further than *'tot het beloop van de verzekerde voorwerp, in evenredigheid van het niet verzekerde gedeelte'*. See further ch XIX § 2.3 *infra* as to abandonment.

<sup>395</sup> The insurer is liable for any general average loss of or general average contribution in respect of under-insured property *'in evenredigheid van het verzekerde tot het niet verzekerde gedeelte'*.



In the late sixteenth century, the London insurance market too was familiar with the notion of compulsory under-insurance, at least as regards goods of which ten per cent had to remain uninsured with a maximum of £200,<sup>396</sup> a position corresponding with that applicable at the time in Antwerp.<sup>397</sup> No doubt local merchants found this as bothersome as their Dutch counterparts and it would not surprise if the practice in this regard was changed and if full-value insurance became available and was permitted in London as was also eventually the case in the Netherlands.

The effect of under-insurance on the liability of the insurer in English law was also understood as it was in Dutch law. In the case of under-insurance the insured, it was accepted, had to be regarded as an insurer and he had to share equally in any loss in the proportion which the amount left uninsured bore to the full value of the property. Malynes explained in 1629 that in the case of loss, the insured 'shall come in as an assurator, for so much as shall appear that he hath himselfe borne adventure of'.<sup>398</sup> That remained the position and in the mid-eighteenth century Magens<sup>399</sup> warned that merchants had to insure to the full value of their goods and pay the premiums on the sum insured (and not under-insure in an attempt to save on premiums) if they wished not to bear a part of the loss themselves, for if they insured only a part of the value they would be regarded as their own insurer for the uninsured balance.

It appears that there was at first some uncertainty as to whether the proportionality principle would apply also to fire insurances. A clause was inserted into company fire policies from early in the eighteenth century by which the proportionality or average principle<sup>400</sup> was made applicable to them too. Despite the limited scope of

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<sup>396</sup> See Kepler 'London Marine Insurance' 49, referring to evidence from the draft *Booke of Orders* as to the degree of insurance protection available in London in the 1570's. It appears that 90 per cent of goods up to the value of £1 000 could be insured, and 100 per cent of anything valued above that, with the insured having to bear an additional £100 of any loss. The hull and the armaments of a ship could be insured for their full value, and a ship's freight could be insured for its full value unless it exceeded £4 per ton, in which case only 75 per cent of it was insurable.

<sup>397</sup> See again § 5.3 *supra* and Kepler 'London Marine Insurance' 52. Note, though, that in Antwerp a compulsory under-insurance of 50 per cent existed on ships too, so that the position in London was less restrictive. Kepler suggests (at 55n37) that the liberal attitude of the London market towards insuring ships developed concurrently with an increase in the growth of the English shipping industry from 1571-1576.

<sup>398</sup> *Consuetudo* vol I at 28. He noted that the proportionality principle applied to abandonment too and that the merchant relinquishing the goods to the insurer, 'reserveth always his part therein which he hath not assured, which he detains in the nature of an insurer'. See too Molloy *De jure maritimo* II.7.15 (the insured 'comes in himself in the nature of an Ensurer, for so much as shall appear he hath born the Adventure of beyond the value Ensured').

<sup>399</sup> *Essay* vol I at 36-37.

<sup>400</sup> Given the numerous other meanings of the term 'average', it was indeed unfortunate that the proportionality principle and the clause employed to introduce it in fire insurance policies came to be known in English law as the 'average principle' and the 'average clause' or the 'pro rata condition of average'.

the application of this clause initially,<sup>401</sup> and even its withdrawal at times, the use of an average clause rendering the proportionality principle applicable to the policy in question had by the end of the eighteenth century become rather more common in fire policies<sup>402</sup> as also in floating warehouse-policies on goods.<sup>403</sup> Even then it was not invariably inserted in fire policies by the mid-nineteenth century, some fire offices in fact permitting under-insurance to reduce the premiums of their insured and make their own rates more competitive than those of the other companies.

The clause in question sought to ensure that if the sum insured by the policy was less than the value of the property insured, any payment of a claim would be reduced proportionally.<sup>404</sup> The assumption was that in the absence of this clause, the insured himself would not have to bear any part of his loss until the insurer or insurers had paid out the sums he or they had underwritten.<sup>405</sup> The reason why the inclusion of the clause in fire policies was regarded as advantageous by insurers, was that it discouraged any deliberate under-insurance by the insured in an attempt to save on premiums in the hope that only a more common partial loss and not a total loss would occur.

Under-insurance is also recognised in the Marine Insurance Act of 1906 and although it is not compulsory at all,<sup>406</sup> its effect is provided for in the case of marine policies. In terms of s 81 under-insurance is described as insurance for an amount less than the insurable or agreed value of the subject-matter in question. In the case of

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<sup>401</sup> Until the end of the eighteenth century some fire offices in fact insisted on under-insurance in an attempt to ensure that the insured bore a part of the risk himself and took proper care of his property to protect it against fire. There was no fixed percentage of under-insurance required by such clauses, the amount varying depending on individual cases. See further eg Trebilcock 367-368, 370 and 379.

<sup>402</sup> The first recorded reference to the use of an average clause in English fire policies was in January 1723 when the Royal Exchange Assurance Corporation decided to add the following note to all fire policies for £500 or more: 'If in case of loss or damage it appears that there was a greater value than the sum hereby insured and part thereof saved, then this loss or damage shall be taken and borne in average'. For ten years the Corporation debated the note, converted it into a permanent clause in its fire policies which had to be deleted when required, and regularly changed its views on its application, obviously uncertain how the use of the clause in its policies would affect its standing in the market. In 1737 it decided to omit the clause from all its policies and in 1750 its use was again ordered for foreign risks. See generally Blackstock 81; *ILL HR* 15 15 and 36-38; Jenkins 30-33; and *Supple* 83-84.

<sup>403</sup> See eg Dickson 79-80.

<sup>404</sup> See eg Walford *Cyclopaedia* vol I at 224 sv 'average clause' (in terms of the average clause the principle of an average contribution is introduced into fire insurance policies) and vol III at 595 sv 'salvage in fire insurance' (where he explains the application of the proportionality principle to salvage).

<sup>405</sup> See Walford *Cyclopaedia* vol I at 232-235 sv 'average policies (fire)' (noting that the provision of average or pro rata was also common on the Continent).

<sup>406</sup> An insurer, however, could insist on under-insurance, eg by the insertion of an 'express warranty' in the policy to the effect that the insured remain uninsured for a certain percentage. See Chalmers 53. Furthermore, the notion underlying compulsory under-insurance survives even today on a broader scale in practice, eg, in that collision damage is as a rule not insured fully but only to the extent of three-quarters.

under-insurance, the insured is deemed to be his own insurer in respect of the uninsured balance. Accordingly, the liability of the insurers in the case of under-insurance is determined as if the object is fully insured, with the insured himself being regarded as a co-insurer of a part of the value.<sup>407</sup> This also appears from other provisions in the Act.<sup>408</sup>

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<sup>407</sup> See Chalmers 132-133 who notes that the measure of indemnity rests on the hypothesis that the subject-matter insured is to be regarded as fully insured. Buys 137 too notes that s 81 is based '*op een 100 percents verzekeringsstandpunt*'.

<sup>408</sup> For example in s 67 (the co-insurer's proportional liability for loss: see Chalmers 110-111 and § 2.5); s 73(1) (the insurer's liability for a general average contribution payable by the insured is reduced proportionally in the case of under-insurance - ie, in the case of insurance for less than the contributory value - of the interest of object liable to pay the contribution: see Chalmers 118). Although in terms of s 78 the average rule applicable in the case of under-insurance also applies to the liability of an insurer to pay sue and labour expenses (see Chalmers 124n4), and although in terms of s 79, in the case of under-insurance, average affects also the insurer's right of subrogation (see Chalmers 128-129), that is not the case with the liability of a liability insurer in terms of s 74. Chalmers 118 explains that insurance against third-party liability is said to be a quasi-exception in that no average applies. Whatever the extent of the insurance on goods, the insurer is liable in full for the amount of the insured's liability to a third party arising in connection with those goods.

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## CHAPTER XIX

# THE INSURER'S RIGHT OF RECOURSE AND THE DOCTRINE OF ABANDONMENT

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## 1 Claims Against Third Parties and the Insurer's Right of Recourse

### 1.1 Introduction

It has already been explained<sup>1</sup> that in Roman-Dutch law the insurer was in principle liable to the insured on an insurance contract for loss or damage caused by the

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<sup>1</sup> See ch VI § 4.2 *supra*.

conduct of a third party. One important exception occurred where the insured was legally responsible for the actions of the third party involved, such as where the third party had acted on the instructions or with the authority of the insured himself.

As regards the insurer's liability it did not matter whether or not the third party in the process also incurred liability towards the insured for the loss or damage his conduct had caused.<sup>2</sup> Put differently, the fact that a third party was liable or was not liable towards the insured for the loss or damage in question, did not burden the insurer with or relieve him of liability in terms of the insurance contract for that same loss or damage. The insurer was primarily liable to the insured on the insurance contract and could not compel the latter to claim first from the third party before he claimed on his policy. The insured had a choice in this regard. It should be noted, though, that the insured's choice of whether to claim first from the third party or from the insurer was apparently not always recognised and that the Antwerp *Compilatae* of 1609, for example, made provision for some instances where the insured first had to proceed against the third party concerned before he could turn to the insurer for compensation.<sup>3</sup>

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<sup>2</sup> That may be deduced from a decision of the *Hooge Raad* in 1716 (see Bynkershoek *Observationes tumultuariae* obs 1290; *idem Quaestiones juris privati* IV.6) which was considered in detail in ch VI § 4.2 n158 *supra*. The *Raad* rejected the insurer's argument that because the third party who had caused the loss was not legally liable to the insured, he too incurred no liability towards the insured in terms of the insurance contract. In this case the third party was absolved from liability by a court at Cadiz for the serious damage caused by a collision in a storm between the insured ship and his own vessel. It may have been that the insured first attempted to claim from the third party and that he then, having been unsuccessful, claimed from the insurer on the policy. But other possibilities also exist, eg that the claim against the third party in Cadiz was instituted after proceedings against the insurer had commenced in the Court *a quo* and that the insurer's defence was only added later on. However, if the latter possibility is correct, the claim against the third party was probably instituted not long after the claim against the insurer, given that it took almost 30 years for the proceedings to reach the *Hooge Raad* (the policy was concluded in 1687, the claim on the policy came before the Amsterdam Insurance Chamber in 1689, before the Schepenen Court in 1692, before the *Hof van Holland* in 1702, and reached the *Hooge Raad* only in 1716!).

<sup>3</sup> Thus according to arts 178-179 (of par 6, title 11, part IV (see De Longé vol IV at 274)) of the *Compilatae*, an insured cargo owner was not entitled to claim from his insurer without first claiming from the third party. He first of all had to claim compensation for any accidental loss of, or damage to, or an expense incurred in respect of his cargo (also known as '*averie simpele*') from the master of the ship in question ('*ende hem tot dijen eijnde in rechte betrecken, om te weten oft de schade door sijn toedoën, versuljmenisse oft gebreck van den schepe is gecommen*') and recover from him if possible. Only if the master was not liable or if an action against him was not possible (eg because he was a fugitive, '*voortvluchtich*'), could the insured proceed against the insurer. See Mullens 84. A similar position was also recognised in other specific instances, namely in the case where the insurer was liable for loss or damage caused by the barratry of the master and crew, in which case the insured was not permitted to claim immediately ('*terstont*') from the insurer but first of all ('*eerst ende voor al*') had to have recourse against the master or sailor in question (see art 112 of par 4, title 11, part IV (see De Longé vol IV at 246)). However, in terms of art 114, where it was not possible for the insured to proceed against the master (eg where the latter had joined the enemy or a band of pirates), the insured could claim from his insurer immediately as long as he transferred or ceded the relevant action against the master to that insurer ('*midts hun overgevende oft cederende sijne actie*'). See further Mullens 69. Likewise, in the case where damaged insured goods were sold en route and where the buyer had not yet paid the purchase price, the insured could not proceed against the insurers before he himself had claimed payment from the third-party buyer (see art 185).

Although the insurer was primarily liable to compensate the insured for the loss or damage caused by a third party, it was clear, both from the explanations of the earlier authors, to which reference will be made shortly, as well as from the many examples of what happened when the insured received compensation for his loss from a source other than the insurer (that is, when he received what may be termed indemnification *aliunde*), that the fact that such a third party had already compensated the insured for that loss or damage, relieved the insurer of his liability towards the insured. The liability of that third party towards the insured was not affected by the existence of insurance cover but, and this is where the third party and the insurer differed as regards their respective liabilities towards the insured, the third party remained liable even if the insurer had already compensated the insured for the loss or damage in question. Whereas the insurer was relieved of liability if the third party had paid the insured, the reverse was not true. As against the insurer, therefore, the third party who had caused or was otherwise liable to the insured for the loss or damage in question, was the one ultimately liable for the insured's loss or damage

Indemnification *aliunde* took the form not only of a payment by the liable third party, but there were in fact many other ways in which, as far as the insurer was concerned, the extent of the insured's loss or damage could be reduced and with it also his liability on the insurance contract to compensate the insured for it. The clearest example of an indemnification *aliunde* was in fact not one where a third party had paid compensation to the insured for an insured loss or damage. Thus, the sale by the owner of pieces of equipment from an insured ship after her shipwreck, was taken into account by the *Hooge Raad* in 1728 in determining the extent of the insurer's liability.<sup>4</sup> In an earlier opinion<sup>5</sup> the point had already been made that while in the case of a full-value insurance and a total loss, the insured had to account to his insurer in full for the value of the remains of the insured ship and the amount realised at the sale of the insured goods, this occurred only proportionally in the case of under-insurance and a partial loss.<sup>6</sup>

But if the third party concerned had not or not yet compensated the insured, the insurer remained liable and had to pay. In that case the insurer, having paid the insured in terms of the insurance contract, had a right of recourse against the third party

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<sup>4</sup> See Bynkershoek *Observationes tumultuariae* obs 2449; *idem Quaestiones juris privati* IV.14 6. In this case the insured claimed the sum insured (ƒ1 300) from the insurer and the *Raad* allowed his claim in the amount of ƒ1 040, after deducting, from the sum insured due by the insurer, the amount the insured had obtained by the sale of the equipment in question.

<sup>5</sup> See Barel's *Advysen* vol I adv 16 (1715).

<sup>6</sup> In so far as the insurance '*niet in 't geheel of ten vollen mogte zyn gedaen, of ook niet in 't geheel en ten vollen, of zodanig gedaen had mogen worden na de wetten of costumen* [i.e. in the case of under-insurance], *de Geassureerde de voorsz afstand en verantwoordinge alleen proportioneelyk na maete van de gedaene of gepermitteerde Assurantie zal hebben of behoeven te doen geschieden*'. As to the application of the proportionality principle, see again ch XVIII § 5.6 *supra*. As to the insurer's right to salvage, see § 2.1 *infra*.

involved.<sup>7</sup> Although subsequently referred to in Dutch law, as in other legal systems, as the insurer's right of subrogation, that term was never in Roman-Dutch law applied to the insurer's right of recourse.

As far as this right of recourse was concerned, Roman-Dutch insurance law pertinently recognised the right of an insurer to exercise a recourse against a liable third party only in narrowly circumscribed cases. More specifically such recourse was provided for in three instances, namely in the case of an insurance of a bottomry loan; in the case of the insolvency of the insurer; and where a change of voyage or course had occurred through the fault of the master and without his being instructed by the insured. These factual situations in which a right of recourse arose for the insurer have already been considered in detail elsewhere.<sup>8</sup> It remains now to consider the nature of the insurer's right of recourse in each of them in more detail.

It must also be considered whether a liable insurer who had paid the insured a compensation for loss or damage in the case where a third party was liable for the same loss or damage, was entitled to exercise a right of recourse only in the three situations pertinently recognised and provided for in the Roman-Dutch sources, or whether such right was generally accorded to insurers in appropriate circumstances where a third party was so liable.

However, before turning to these specific aspects of the insurer's right of recourse in Roman-Dutch law, it should be mentioned that the principles just set out<sup>9</sup> were already elucidated with surprising particularity by some of the Italian authors who described the principles involved in much more detail than any Roman-Dutch author ever did. For that reason their views deserve to be referred to in some detail.

Santerna,<sup>10</sup> in particular, and after him Roccus,<sup>11</sup> explained, for example, that the insured could claim compensation from a third party who had caused and was

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<sup>7</sup> It is clear, therefore, that the existence of the insurer's right of recourse was founded upon a number of related assumptions. These were, eg, that when both the insurer and the third party were liable to the insured in respect of the same loss, the insured had a choice whether he wanted to claim from the one or the other; that if he claimed from and was fully compensated by the third party, he no longer had any claim against the insurer (and which case, therefore, no right of recourse against the third party arose for the insurer); that the insurer's right of recourse only arose once he had compensated the insured, ie, if he had already paid the insured the compensation he sought to recover from the third party; and that the third party remained liable to the insured despite the fact that the latter had already received compensation from the insurer.

<sup>8</sup> See again ch V § 5.5 *supra* for the insurance of a bottomry loan; ch VII § 4.1 *supra* for solvency reinsurance; and ch XIII § 1.2 *supra* for the change of the voyage or of the course of the voyage.

<sup>9</sup> Notably the primary liability of the insurer towards the insured but the subsidiarity of that liability as against the third party's liability to the insured; the effect of an indemnification *aliunde* on the insurer's liability; and the insurer's right of recourse against the third party.

<sup>10</sup> *De assecurationibus* IV.18-19 where he explained that while the insurer was not liable if the loss or damage was caused by the fault of the insured himself, he was liable for the fault of a third person which was one of risks he took over on an insurance contract; the insurer should bring an action against the third party who was liable for the loss for which the insurer has had to compensate the insured because it was he (the insurer) who suffered the damage in question. Santerna also noted (*idem* IV.20) that the insurer was not relieved of his liability if the third party could not pay, because that then did not result in any profit for the insured owner; furthermore, since the owner had paid a premium to the insurer, the insurer was not, like a surety, liable only when the third party could not pay. He noted further (*idem* IV.22)

responsible for his loss or damage, but that if the insured did not want to claim from the third party (but, presumably, rather from the insurer),<sup>12</sup> the insurer could act against the third party as the latter ultimately had to bear the loss or damage. If the insured did claim from the third party, though, he would not have prejudiced his claim against the insurer should it appear that the third party was not able (or, presumably, not liable) to pay. The insured would still be able to claim payment from the insurer. The underlying assumption here was that if the third party could and did pay, the insured had, to the extent of such payment, no further claim against the insurer. Therefore, the insurer was not merely secondarily liable to the insured, that is, liable only when compensation could not be recovered from the third party. In fact, because the insured had paid the insurer a premium to bear the risk of loss or damage, and because the insurer had not undertaken that liability gratuitously, the insurer's liability towards the insured on the insurance contract was not a subsidiary liability (*in subsidium*) but a principal liability (*principaliter*).

## 1.2 The Insurer's Right of Recourse in Roman-Dutch Law

The first instance where a right of recourse against a third party arose for the insurer in Roman-Dutch law, was in the case of an insurance on a bottomry loan. Where the lender or creditor on bottomry insured the bottomry loan, the insurer undertook to compensate that lender - who bore the maritime risk in terms of the bottomry loan - in the case of a loss of the secured property, because then the loan was no longer repayable with interest.<sup>13</sup>

The topic was most extensively regulated in ss 19 to 21 of the Amsterdam *keur* of 1744.<sup>14</sup> Section 19 specifically stated that there was an obligation on the insured lender to transfer his action on the bottomry deed against the borrower to the insurer upon receiving payment from the latter in terms of the policy (*'mits de gessureerde neffens de betaling [that is, on receiving payment on the policy] aan den Assuradeur overgeeft Cessie van Actie ten laste van de Opneemer [the borrower] met extraditie van den*

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that in the majority of such cases the loss or damage was caused by third parties - seamen or pilots - who could not pay, so that if the insurer was then not liable, insurance contracts would be much less valuable and would only be effective where loss or damage had been caused fortuitously and without any human intervention. Finally he remarked (*idem* IV.23) that the insured owner did not gain any profit at all from the conduct of the third party, which conduct harmed only the insurer who was liable for the loss or damage; but the position was otherwise if the insured had connived with the third party or was a party to the latter's fault. See further Van Houdt 24-25.

<sup>11</sup> *De assecurationibus* note 27 who referred to Santerna's exposition. See further Weskett *Digest* 161 sv 'damage' par 7.

<sup>12</sup> Feitama in his note on Roccus stressed in this regard that the insured could, but was not compelled to, claim from the third party. He could claim directly from the insurer who had to compensate the loss or damage, presumably despite the third party's liability, because he had bound himself to do so.

<sup>13</sup> See again ch V § 5.5 *supra*.

<sup>14</sup> See again ch V § 5.5.3 *supra*.



*verscheyde daar toe behoorende*').<sup>15</sup> The insurer was therefore entitled, as cessionary of the insured lender's claim, to have a recourse on the bottomry loan against the borrower, should anything in fact turn out to be recoverable from the latter.<sup>16</sup>

The second instance where an insurer had a right of recourse against a third party in Roman-Dutch law, arose in the case of the actual or imminent insolvency of an insurer.<sup>17</sup> In such a case the insured was at first permitted, in terms of the Amsterdam *keur* of 1726, to cancel his insurance with such an insurer and to conclude another insurance with a second insurer. This solution was retained in s 25 of the Amsterdam *keur* of 1744. In the amendment of s 25 in 1756, a new system was adopted. In the case of the actual or suspected insolvency of an insurer, the insured was free to insure anew. However, the first insurance was no longer cancelled but the insured now had to cede any right of action he may have had against the first insurer in the case of loss of damage, to the second insurer after the latter had paid him.<sup>18</sup> Not only could the insured not claim against both insurers, but the first insurer, being primarily liable to the insured, was also not relieved of his liability against the second insurer who had, in effect, taken over his liability against the insured. The reason why the insured had to cede his action against the first insurer to the second insurer, was because it was not lawful and permitted for him to make a profit from his own insurances.<sup>19</sup>

The third and by far the most completely worked out instance where Roman-Dutch insurance law provided for an insurer to exercise a right of recourse against a third party, was the case where that right arose against the master of the insured ship, or of the ship carrying the insured goods, who had changed the voyage or the course of the voyage as a result of which the insured suffered a loss or damage which the

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<sup>15</sup> As to this aspect of s 19, see Dorhout Mees *Schadeverzekeringsrecht* 392-393; Enschedé 38-40 (noting that the insured lender could obtain compensation from the insurer '*tegen afstand van actie die hij tegen den geldnemer heeft*'); and Goudsmit *Zeerecht* 341.

<sup>16</sup> Another type of cession provided for in this context was that mentioned in s 21 of the *keur* of 1744. This provided that where an insurance had been concluded on goods on which a bottomry loan was subsequently taken up, the insured borrower was obliged to transfer or cede his right under that policy of insurance to the holder of the bottomry bond, ie, to the lender. If he failed to do so, he not only lost his claim against the insurer but he also lost all entitlement to the premiums already paid. This, of course, was not a cession in the instance under consideration here, namely one by the insured to the insurer of an action against a third party. Section 21 was subsequently abolished and such an insurance was simply declared invalid. See further Goudsmit *Zeerecht* 342-343 and 343-344.

<sup>17</sup> As to which see in detail ch VII § 4.1 *supra*.

<sup>18</sup> See eg Den Dooren de Jong 'Reassurantie' 95; Goudsmit *Zeerecht* 351-352. Van Asch van Wijck 52 refers to s 25 as an example of the recognition in Roman-Dutch law of subrogation *ex lege*.

<sup>19</sup> See eg Van der Keessel *Theses selectae* th 717 (*ad* III.24.4) ('*ex assecurationibus sibi factis lucrum captare non licet*'); also *idem Praelectiones* 1437 (*ad* III.24.4) and 1474d-1475a (*ad* III.24.16).

insurer had to compensate.<sup>20</sup>

The right in question was at first merely referred to as the right of a recourse against the third party or master which the insurer had after having paid the insured. Thus, the applicable legislation simply referred to the insurer's recourse against the master (*'den Verseeckeraer sijn verhael op den [aenden] Schipper'*).<sup>21</sup> The references which occurred in the numerous opinions and decisions on the topic of a change of voyage or course,<sup>22</sup> were similarly merely to the insurer's right of recourse, although it was made clear, for example, that only an insurer who was liable to the insured on the policy could (but did not necessarily have to) exercise a right of recourse against the master.<sup>23</sup>

It was, however, not always made clear whether the insurer exercised his own right against the third party,<sup>24</sup> and if so, what the basis and nature of that right was, or whether he merely enforced the insured's right against such third party<sup>25</sup> and if so, in what capacity.

Only in one instance, namely in s 52 of the Rotterdam insurance *keur* of 1721, was it later specifically and expressly stated that the insured, having been compensated by

<sup>20</sup> See further ch XIII § 1.2 *supra* where this matter was considered in detail. Briefly, the master incurred liability for such a change if it were performed otherwise than in necessity and without the instruction of the insured. If the change by the master was authorised by the insured, the insurer was relieved of liability; if it were unauthorised by the insured, the hull insurer was relieved of liability (it was not a case where he was liable to the insured but then had a recourse upon the master, for that would have resulted in a circuitry of actions), but the cargo insurer remained liable to the insured and had a right of recourse upon the master. The master was also not liable - and there was therefore no possibility of any recourse - if he was not at fault, although the insurer of course remained liable to the insured (ie, the insurer's liability to the insured did not depend on the liability of the master and on the possibility of any recourse against him).

<sup>21</sup> See ss 7 of the Amsterdam *keur* of 1598; 14 of the Middelburg *keur* of 1600; 11 of the Rotterdam *keur* of 1604; and 6 of the Amsterdam *keur* of 1744. See also art 12 title LIV of the Antwerp *Impressae* of 1582 (see De Longé vol II at 404) and art 129 of par 4, title 11, part IV of the *Compilatae* of 1609.

<sup>22</sup> See again ch XIII § 1.2.4.4 *supra* and eg *Nederlands advysboek* vol I adv 130 (1667).

<sup>23</sup> Put differently, the possibility of a recourse against the master (ie, the liability of the master) was not required for liability to be imposed upon the insurer, but the liability of the insurer was required before he could exercise a recourse upon the master. This appears most clearly from Bynkershoek's discussion of a case before the *Hooge Raad* in 1719 (see *Observationes tumultuariae* obs 1542; *Quaestiones juris privati* IV.9) and from the provision for the insurer's recourse in s 7 of the Amsterdam *keur* of 1598.

<sup>24</sup> A view held earlier by Santerna *De assecurationibus* IV.18-19, who appears to have been of the opinion that the insurer had a direct action against the third party in that he could bring an action against the third party who was liable for the loss which he (the insurer) had had to compensate the insured because, in so doing, it was he (the insurer) who had suffered the loss or damage in question.

<sup>25</sup> The insured's right against the master would have been based on breach of contract or on delict, depending upon the context in which the third party incurred liability. Thus, the third-party master could have been liable to the insured owner of his ship on the grounds of a contract of employment, or against the insured owner of cargo on board his ship on the grounds of a contract of carriage, or against the owner of another ship with which his ship had collided, or of the owner of cargo on board that ship, on the ground of delict. The latter possibility was of course not included in the third instance where a right of recourse was recognised in Roman-Dutch law which is currently being considered.

the insurer for a loss (*'werdende by de Asseuradeurs voldaan van de schade'*) caused by the change of course of the master, was obliged to cede to the latter all his rights against that third-party master in respect of the loss in question (*'zullen gehouden zijn daar benevens aan de Asseuradeurs te cederen alle het Regt het welke zy uyt dien hoofde op de Schippers zullen hebben gehad'*). Only there was it made apparent that the insurer claimed from the third party as a cessionary. The insurer who had paid the insured was therefore entitled to institute the insured's action against the third party by way of a compulsory cession by the insured. The insurer was entitled as against the insured to, and the insured was obliged as against the insurer for, a cession of his action against the third party.

Whether that was what in effect happened in Amsterdam and elsewhere was not made clear in subsequent legislation.<sup>26</sup>

In their discussion of the insurer's right of recourse in the case of an unauthorised change of voyage by the master, the Roman-Dutch authors too added little by way of explanation on the nature of the insurer's right of recourse,<sup>27</sup> or, where they did recognise it, of his right to obtain a cession from the insured.<sup>28</sup> It may have been that the authors understood that the insurer exercised his right of recourse against the third party by being entitled as against the insured to a compulsory cession of the insured's action against that third party even where such cession was not expressly prescribed, as it was in Rotterdam.<sup>29</sup>

The notion of a compelled cession also came to the fore at an early stage in connection with abandonment in Amsterdam. Thus, in an opinion delivered there in 1602<sup>30</sup> the point was made that in the case of an abandonment of the insured property to the insurer, there was an obligation on the insured to give the insurer a cession of action (*'actionem cessam'*) against third parties from whom any recovery was possible (*'van*

<sup>26</sup> In s 6 of the Amsterdam *keur* of 1744 the Legislature still simply referred to the insurer's right of recourse (*'den Verseekeraar zyn verhael op den Schipper'*) without giving any further particulars.

<sup>27</sup> See eg Grotius *Inleidinge* III.24.11 (noting that the insurer who is liable to and has paid the insured, *'hebben sijn verhael op de schipper'*); Groenewegen *Aanteekeningen* n26 (*ad* III.24.11); Scheltinga *Dictata ad* III.24.11 sv *'maer dede den, etc'*; and Van der Keessel *Praelectiones* 1464 (*ad* III.24.11) (the liable insurer has a recourse (*'regressus'*) against the master).

<sup>28</sup> See eg Van der Keessel *Theses selectae* 750 (*ad* III.24.11) (the right against the master must be ceded (*'cedenda est'*) to the liable insurer); Van der Linden *Koopmans handboek* IV.6.10 (the cargo insurer is not relieved of liability, and the master always remains liable, but the insurer, having paid, is entitled to obtain a cession of the action against the master from the insured (*'kan cessie van actie tegen denzelven vorderen'*)).

<sup>29</sup> See eg Van der Keessel *Praelectiones* 1464-1465 (*ad* III.24.11) where he referred in the same breath to the insured cargo owner's obligation to cede his right (*'ex contractu locationis'*) against the master to the insurer (ie, the insurer's right to obtain a cession), and to the insurer's right of recourse against the master.

<sup>30</sup> See *Hollandse consultatien* vol I cons 187.

wie eenig recouvre soude te verwachten zijn') at law.<sup>31</sup> What was clear, further, was at least that both the insurer's right to a cession from the insured or his direct right of recourse against a third party, if that was the nature of his right, could arise only after he had compensated the insured.

There are further indications, though, that Grotius thought that the insurer's right of action against the master arose automatically and by operation of law.<sup>32</sup> This was subsequently explained by Van der Keessel to mean that the insurer's right of recourse against the master, and the latter's legal liability to the insured, arose automatically and by operation of law because there was no legal bond between the insurer and the master.<sup>33</sup> But even this explanation did not clarify the matter completely.<sup>34</sup>

On the one hand it was possible that Grotius' statement that the insurer's right of action against the master arose automatically and by operation of law was intended to mean that the master's liability to the insurer and the latter's right against the master arose *ex lege*, without the need for any cession to the insurer of the insured's right against the master, and without any obligation existing between the master and the insurer, that is, that a new obligation was by law imposed upon the master towards the insurer and that the latter's entitlement was not derived in any way from the insured by way of, for instance, a cession. However, apart from the fact that the basis of the master's liability would in that case have been uncertain, and apart from the fact that in this construction it would have to be assumed that the original obligation between the insured and the master was in some way extinguished,<sup>35</sup> this possibility would appear to have ignored the requirement and effect of a cession of the insured's action in such instances. In the case of a cession, the insurer did not enforce his own right of action against the master but, as cessionary, that of the insured. This interpretation in terms of

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<sup>31</sup> See further § 2.3.7 at n287 *infra* for a further discussion of this opinion in connection with abandonment.

<sup>32</sup> See eg Grotius *Inleidinge* III.29.18 who, speaking in the context here of rights and obligations arising by the operation of law, such as in the case of general average, referred to a further example, namely where the insurer had by the operation or force of law a right of action against the master ('*fejen verseeckeraer heeft oock door wetduidinghe recht jegens den schipper*'). See also Lybreghts *Koopmans handboek* V.97 n 1 ('*den Assuradeur heeft in zulk een geval, door Wetduiding, recht op den Schipper*'). See also Fischer 608.

<sup>33</sup> See Van der Keessel *Praelectiones* 1540 (*ad* III.29.18) (the insurer has a right of recourse ('*regressus*') against the master and the latter's legal obligation arises by legal dispensation ('*obligatio ex legis dispositione oritur*'), because there is in reality no legal transaction concluded between the master and the insurer ('*inter magistrum at assecuratorem nullem negotium gestum sit*'). Thus, Van der Keessel tried to explain the basis for the action by the insurer against the master (or, rather, the basis of the latter's liability) in the absence of any agreement or dealings between them.

<sup>34</sup> It remained uncertain to what the '*ex lege dispositione*' referred, to the master's liability towards the insurer, or to the latter's entitlement against the master, or even to the insurer's entitlement (eg to a cession) as against the insured.

<sup>35</sup> Seeing that the insured, having received payment from the insurer, was no longer entitled also to claim from the master. However, as noted earlier, Santerna already thought the insured retained his action against the third party despite the fact that the insurer gained his own direct action.

which the insurer had by operation of law his own direct action against the third party, an action not in any way derived from the insured, must therefore be considered of doubtful validity, especially as regards Rotterdam where the Legislature had pertinently rendered such cession compulsory, but also in respect of the position elsewhere where legislation did not make the nature and basis of the right of recourse that clear.<sup>36</sup>

On the other hand it is possible and at least a more attractive construction that Grotius could have meant that the cession or transfer by which the insurer obtained a right of action against the master, arose automatically and *ex lege*, that is, that there was no need for any agreement between the insured and the insurer in this regard before the latter could proceed against the master. In consequence of such an automatic and *ex lege* transfer of right, the insurer enforced against the master the right earlier belonging to and therefore derived from the insured, and not any new and independent right against the master to which he became entitled by operation of law. Seen from the master's point of view, his liability (whether delictual or contractual) remained one towards the insured, or to those obtaining their entitlement from him. The master did not, in terms of this construction, by the operation of law incur a fresh and separate liability against the insurer.

Put simply, whereas in Rotterdam provision was made for a duty upon the insured to cede his right of action against the master to the insurer, it could well more generally have been understood by Grotius and Van der Keessel that such a transfer of the insured's right to the insurer took place automatically and without the need for the cooperation by the insured in the form of an actual agreement for, and an act of, cession. At least such an automatic and *ex lege* transfer of rights, or substitution of one person for another as a creditor and his subrogation to the creditor's rights, was not unknown in Roman-Dutch law. It occurred, for example and interestingly enough, in connection with the bottomry loan.<sup>37</sup>

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<sup>36</sup> There is at least very little to support the view of Ledeboer 46 who refers to s 14 of the Middelburg *keur* of 1600 (which was identical to s 7 of the Amsterdam *keur* of 1598) as an example of the right of the insurer against a third party which was not derived from the insured but which was an independent action granted *ex lege* to the insurer against the master.

<sup>37</sup> The debts incurred for the preservation of a ship already earlier burdened with a bottomry loan (such as the expense of salvaging the cargo in the case of shipwreck, crew's wages, and general average) were preferred to that loan itself because they were incurred for the benefit of the bottomry lenders. The creditors involved therefore had a preference on the ship over the bottomry lender (see eg Verwer *Bodemerye* pars 22 and 23) and where the shipowner or master had paid such debts, he could sue the lender for them even without a cession from those creditors (see eg Van der Keessel *Theses selectae* 565 (ad III.11.2); *idem Praelectiones* 1191 (ad III.11.2) who explained that if such debts were more preferent than the loan, the owner could obtain a preference over the bottomry lender and succeed in his place if he paid those debts, even if the action was not ceded to that owner ('*si talia sint credita adhuc magis privilegata, potest domini creditori qui bodemeriam habet, praeferrri et in eius locum succedere, si ipsa debita solvat, licet forte actio domino non fuerit cessa*').

At any rate, the reason why the third-party master rather than the insurer ultimately had to bear the insured's loss was simply one of equity.<sup>38</sup>

One final point concerns the insured's capacity to release the third party who was liable for the loss or damage in question. This was one of the issues considered in an opinion in 1707.<sup>39</sup> The opinion also strengthened the possibility that the insurer's right of recourse was based on a cession of the insured's action against the third party.

In the opinion it was thought that the insurer was not liable on the policy because the loss in this case had occurred through the master's fault.<sup>40</sup> However, the opinion continued, even if the insurer was liable, the insured could even then not, as he did in this case, effect any change in the liability of the third party (the master) or absolve him from liability (*'de Geassureerde dan nogthans niet zoude hebben vermogen eenige veranderinge in den schuld met den Schipper te maeken, of aen denzelven eenige remisie van dezelve schuld te doen'*), namely by settling (*'accordeeren'*) with him for a noticeably smaller amount than that for which he was in fact liable. The implication, therefore, was that in this instance the insured had settled with the liable third party to the detriment of the insurer. Should the latter have been liable on the policy, he would have been entitled to a recourse against such third party.<sup>41</sup> But now, because of this settlement, that recourse was excluded or reduced and for that reason, it would appear, the insurer's liability on the policy was similarly excluded or reduced.

The insured's incapacity (*'onbevoegdheid'*) to release the third party, the opinion explained, arose from the general principle of law that one could not without the knowledge and consent of the person who was concerned with a particular situation, effect any change in his rights in respect of that situation and even less release his debtor (*'daer van kwytsheldinge doen'*). In particular this incapacity arose, in the case of

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<sup>38</sup> See Scheltinga *Dictata ad* III.29.18 who noted that it was more equitable that the master, who had acted without authority and not in an emergency, should bear the loss caused by his actions than that it should be borne by the insurer. Generally, therefore, it was felt that the master, liable because of his breach of contract (and the same would be the case where the third party was delictually liable), should not receive preferent treatment over the insurer, whose liability arose not out of a breach of contract, even if the latter did receive a premium in return for the risk of having to meet that liability. There is not surprisingly no evidence of the fact that insurers at the time took account of recoveries upon third parties in determining their premiums.

<sup>39</sup> See Barel's *Advysen* vol I adv 20.

<sup>40</sup> The insurance here was of a bottomry loan and was concluded by the lender. The loss occurred (ie, the ship did not arrive at her destination) because her master had refused to enter the port. The insurers of the loan were not liable. They were not sureties but guaranteed only that no external casualty would prevent an action to recover the money lent on the bottomry loan from existing; they did not stand in for any unwillingness or incapability on the part of those with whom the holders of the bottomry bond had transacted. The insured could not argue that in terms of his policy, barratry and other conduct of the master were included in the cover, and that the unwillingness of the master in this case to proceed into port was also covered. The master in this case was not the insured lender's master, but that of a third party.

<sup>41</sup> More generally, it would appear from this opinion that insurers may have had a recourse against masters not only in the well-known case of an unauthorised change of voyage or of course, but also in the case of other actions by the master which had caused the risk to materialise.

insurance, from the fact that the insured, if he wanted to claim on the policy, had to abandon the property insured<sup>42</sup> and also transfer his right of action against third parties to the insurer (*'dat men gehouden is alles aen de assuradeurs na rato van hunne signature te abandonneeren en af te staen'*). The insured's position was the same, the opinion thought, as that of a secured creditor who was bound, before he could obtain payment from his surety, to effect a cession of action in the latter's favour (*'cessie van actie ten behoeven van de Borgen heeft te doen'*), such action having to be enforceable and undiminished (*'met volkoomen effect, en wel zodanig dat alles word bevonden ongepraedjudiceerd, en in zyn geheel'*). The position of the insurer was therefore compared to that of a surety who was entitled to the benefit of a cession of actions (*beneficium cedendarum actionum*) and who could raise the fact that those actions had been extinguished or diminished by the conduct of the creditor as a defence against a claim by the creditor.<sup>43</sup>

The opinion also made one final and important point, namely that the insured's inability to release the third party was not changed by the clause in the policy permitting him to take the necessary steps to preserve the insured property and to avert or minimise any loss.<sup>44</sup> This clause did not authorise the insured to release a liable third party. It related, it was thought, only to the insured property itself and not to any incorporeal action relating to it. Further, the settlement of claims in respect of that property could not be taken as a preservation or salvaging (*'een salveringe of berginge'*) but as a release of a right against the third party which was otherwise indisputable (*'maer voor een kwytsceldinge, van een regt het welk anderzins incontestabel was'*).

### 1.3 The Possible Deduction of a General Principle

It is clear from the preceding exposition that Roman-Dutch law recognised the insurer's right of recourse against a third party who had caused or who was otherwise, compared to the insurer, ultimately liable for the loss or damage of the insured which he, the insurer, has had to compensate in terms of the insurance contract. However, it was regulated rather casuistically. The question arises whether such a right of recourse also arose generally, that is, in all those instances where the insurer had compensated the insured and where such a liable third party was involved.

There were a few other instances where the insurer's right of recourse was alluded to apart from the three instances just discussed. This would tend to indicate at least that the exercise of such a right of recourse was not prohibited outside those instances, even if it did not occur so frequently as to have resulted in some form of statutory regulation and to have given rise to the recognition and formulation of a general principle by the Roman-Dutch authors.

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<sup>42</sup> See further § 2 *infra*.

<sup>43</sup> For the position of the surety in Roman-Dutch law as regards the cession of the creditor's actions to him, see further eg Grotius *Inleidinge* III.3.31, Van Leeuwen *Rooms-Hollands regt* IV.4.13, Van der Linden *Koopmans handboek* I.14.10; and Caney 127-141.

<sup>44</sup> As to this preservation clause, see ch XVI § 1.4 *supra*.

One pertinent example from an opinion delivered in 1674<sup>45</sup> serves to illustrate this point. The opinion considered the valuation of a ship and her cargo where they had been damaged in a collision at sea which had been caused by a third party, the owner of the other ship involved in the collision. More specifically at issue was whether the insurance premium had to be deducted from such value. The view expressed was that the premium had in fact to be deducted from the value. The advocate delivering the opinion proffered an explanation in support of this in the course of which he suggested that in order to be covered by insurance, an insured of necessity had to pay a premium, and that in exchange for the compensation by the insurer of loss suffered by the insured, the insurer was in turn entitled to recover the loss from any third party responsible and liable for it. This, he noted, was possible by way of a cession of action.<sup>46</sup> What is significant for present purposes is that the notion of a cession of action was mentioned here in connection with the insurer's right of recourse even though the situation in question was not covered by legislation and such cession was therefore not prescribed as was sometimes the case where such legislation did exist.<sup>47</sup>

Further, the Antwerp compilation of customary law, the *Compilatae* of 1609, recognised the insurer's right of recourse also in other circumstances, such as where he was liable to the insured for the loss or damage caused by someone acting on the strength of a letter of mart,<sup>48</sup> recourse being against those, including the master, whose actions had given rise to such a letter being granted ('*die t'onrechte oorsake mogen gegeven hebben tot verleeninge van alsulcke brieven*').<sup>49</sup> There was also a recourse for the insurer against the master for the loss or damage caused to insured cargo by reason of his bad stowage or other actions,<sup>50</sup> and detailed provision was made for a recourse against the buyer of insured goods which had been detained in the course of a voyage, where such buyer had not paid the purchase price to the insured seller.<sup>51</sup>

<sup>45</sup> See *Nederlands advysboek* vol III adv 251.

<sup>46</sup> '[W]ant so men sig door andere doet versekeren, so moet noodwendig dese premie werden betaalt, ... en dewijle dat men daar tegens dan ook van den Assuradeur geniet, tot alle vergoedinge van de gelede schaden, en suiks den Assuradeur by cessione van actie de ... schade wederom kan eïsschen'.

<sup>47</sup> Notably, in the case of s 52 of the Rotterdam *keur* of 1721.

<sup>48</sup> The insurer, if he had also covered war risks, was liable unless the insured himself was the cause of the issue of such a letter. See again ch VI § 5.2.2 *supra* where the role of such letters in the practice of privateering was considered in more detail.

<sup>49</sup> See art 104 of par 4, title 11, part IV of the *Compilatae* (see De Longé vol IV at 244).

<sup>50</sup> See art 148 of par 4, title 11, part IV (see De Longé vol IV at 262) ('*verhael tegens de schippers indijen tselve door quade stouwinge oft dat andersints door henne versuijmerisse waere toegecommen*').

<sup>51</sup> In the case of the detention of the carrying ship in the course of her voyage, the insured cargo-owner was obliged in terms of art 143 (of par 4, title 11, part IV of the *Compilatae* (see De Longé vol IV at 260)), where that was possible, to sell them for their value. He did not have a claim under his policy where that could be done, except if the purchase price was not paid by the buyer of those goods. If the detained goods could be sold only for less than they were worth, the insurers were, in terms of art 144, liable for the difference and the insured was not entitled to abandon or relinquish the goods in such case. In the case where the purchase price had not been paid, the insured had in terms of art 145 to wait six months, during which time he had to seek payment, before he could claim the amount or shortfall from the



However, these examples are isolated and no general picture emerges from them. There could be many reasons for the underdeveloped state of Roman-Dutch insurance law on the topic of the insurer's right of recourse.<sup>52</sup>

Thus, it appears from the sources of both marine insurance law and maritime law more generally that, prior to the nineteenth century, such third-party liability as did arise was based in the main on contract or its breach. The possibility and financial potential of delictual actions against third parties who had caused loss or damage were not yet fully realised by the owners of maritime property nor, if they were insured, by their insurers. Nor, it may be added, did the earlier law of collisions at sea, for example, result in claims for delictual damages being a matter of great practical import.<sup>53</sup> As a result, the owners of maritime property did not as a rule claim damages from, and their insurers did not as a matter of course seek to exercise any rights of recourse against such third parties. The great era of maritime litigation specifically, and in fact of litigation in respect of insured loss generally, was only to come in the nineteenth century. Only then was the insurer's right of recourse more fully developed and regulated.

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insurers, on condition that he then ceded his claim for the purchase price to them (*'mits hun doende cessie van de selve schulden'*). In terms of art 146, the insurers were entitled to the full amount recovered by the enforcement of this ceded action, even if it were more than the sum insured (ie, the insurers *'ter contrarien ...blijven ... genietende den geheelen prijs, tsij dat van de vercochte goeden soo vele meer oft min is gemaect als de weerde bedraecht'*).

<sup>52</sup> See generally Dorhout Mees *Schadeverzekeringsrecht* 387.

<sup>53</sup> As to the rules applicable in determining liability for collision damage in Roman-Dutch law, the following brief summary will suffice to show under what circumstances the owner of a ship could recover damages from the owner of another ship where the two ships had been in a collision at sea. The exposition will illustrate, furthermore, that the law at the time was not conducive to third-party actions.

In essence, all accidental collision damage (ie, to both ships) was borne half-half by each of the ships involved. The owner of each ship paid half of the other ship's damage, but this liability was capped by the value of his own ship. (This limitation of the shipowner's liability is touched on again in § 2.1.3 *infra* in connection with abandonment.) Thus, the liability for half of the other ship's damage extended no further than the (undamaged) value of the liable owner's own ship. Accordingly, as explained by Magens *Essay* vol I at 78-81, 'if half the damage done to one of them should exceed the value of what the other can make good, no claim shall extend further than the produce of the whole, so that owners, giving up what was theirs, are freed from any further liability'.

In the case of collision damage caused by the fault of both parties, each owner had to bear his own loss. And in the case of an intentionally caused collision, the owner of the guilty ship was liable in full for the damage to the innocent ship and her cargo (again, though, only up to the value of his own ship), and in addition he had to bear his own damage alone.

Variations on these rules applied in the case of collisions between vessels where one or both of them were at anchor at the time of the collision. The same principles essentially also applied to the compensation of any damage to cargo on board the ships involved, as well as to any loss of freight.

See further eg ss 46-49 of the *placcaat* of 1551, ss 1-5 of title V of the *placcaat* of 1563; ss 255-268 of the Rotterdam *keur* of 1721; Grotius *Inleidinge* III.37.7-8 and III.38.15-18; *idem De jure belli ac pacis* II.17.21; Neostadius *Decisiones* decis 48 and 49; Bynkershoek *Quaestiones juris privati* IV.18-23 (who preferred a division of damages according to the value of the ships involved (ie, in geometrical proportions) rather than one in two equal shares (ie, in arithmetical proportions)); Van der Keessel *Theses selectae* th 804-806 (*ad* III.37.7-8) and th 812-821 (*ad* III.38.15-18). See too Kohler 594-595; Lichtenauer *Geschiedenis* 192-193; and Weskett *Digest* 479-486 sv 'running foul' whose exposition is based largely on Bynkershoek and the Dutch legislative provisions.

Another possible reason was that in Roman-Dutch law the doctrine of abandonment and its correlative principles had been developed in detail. Concomitant with abandonment was the insurer's right to whatever remained of the insured property. This right to salvage and the insurer's right of recourse (or his right to subrogation as it was to become known later) both concerned the same legal relationship, arose in largely similar circumstances, and were in any case not yet clearly distinguished. In particular it was not realised or conceptualised that the insurer's right of recourse or subrogation concerned a personal right of the insured, while his abandonment-derived or abandonment-related right to salvage concerned a real right of the insured.<sup>54</sup> It was also not perceived that the latter right only arose in the case of payment for a total loss, while the former operated after a payment for a total loss or a partial loss. As far as Roman-Dutch law was concerned, in those cases where the insurer exercised his rights to abandoned property against a third party, that included an exercise not only of the insured's rights to the property (that is, his real rights) but also of the insured's rights in respect of that property (that is, his relevant personal rights). Largely the same result was achieved by the insurer in that way as by the exercise simply of his right of recourse, which involved only an enforcement of the insured's rights against the third party in respect of the property (that is, his personal rights). Consequently, in most instances the insurer's right to the abandoned insured property alone was relied upon and was regarded as sufficient to achieve what was in later and more sophisticated times achieved by way of abandonment and his right of salvage on the one hand *and* his right of subrogation on the other hand.<sup>55</sup> These matters will be touched on again when the insurer's rights to abandoned property are considered in more detail below.

#### 1.4 The Insurer's Right of Recourse in the *Wetboek van Koophandel*

In modern Dutch law, as in Roman-Dutch law, the fact that a third party is liable for the loss or damage does not relieve the insurer of his liability in terms of the insurance contract to compensate the insured for that loss or damage. The notion of indemnification *aliunde* and its effect upon insurer liability are also implicit in the regulation of insurance in the Dutch *Wetboek van Koophandel*.<sup>56</sup>

<sup>54</sup> It was also not yet clearly recognised that abandonment was the right of the insured which, if exercised, entitled the insured to payment in full on his policy and that such payment, in turn, gave rise to the insurer's right to salvage. See eg Gualthérie van Weezel 1-2 and further § 2.3.1 *infra*.

<sup>55</sup> See eg the opinion in *Nederlands advysboek* vol III adv 248 (1674) where it was remarked as regards the position of the insurer where the insured goods had been captured by the enemy and abandoned to the insurer by the insured, that after such abandonment '*de Assuradeurs in de plaatse van de bevrachters komen, endesy sodanige regt tegens den Schipper hebben, als den bevrachter buiten doen van abandonnement soude gehad hebben*'. In short, the transfer of the ownership in the insured property to the insurer by reason of the abandonment was regarded as also enabling the insurer, as the new owner, to proceed against third parties in respect of any loss or damage to that property.

<sup>56</sup> Thus, art 617 provides that if the insured ship perishes or strands, the amount payable in terms of the insurance is reduced to the extent that the master or owner of the ship will have to pay less by way of expenses than they would have had to pay had the ship arrived safely at her destination ('*wordt de verzekering ingekort voor zoo veel het beloop betreft van hetgeen de schipper of de eigenaar van het schip door dat ongeval voor onkosten van de reis minder heeft te betalen dan bij behouden aankomst het geval zou zijn geweest*').

The insurer's right of recourse is recognised and regulated in art 284. This article provides that the insurer, having paid for the loss of or damage to an insured object, succeeds in all the rights which the insured may have against third parties in respect of that loss or damage (*'treed in alle de regten welke de verzekerde, ter zake van die schade, tegen derden mogt hebben'*). At the same time the insured is liable for every action which may detrimentally affect the insurer's right against the third party. In 1992, art 284 was amended to read that if the insured has, otherwise than in terms of an insurance, a claim against a third party for damages in respect of a loss he has suffered, that claim passes to the insurer by way of subrogation to the extent that the insurer has compensated him for that loss (*'[i]ndien de verzekerde ter zake van door hem geleden schade vorderingen tot schadevergoeding op derden heeft, anders dan uit verzekering, gaan die vorderingen bij wijze van subrogatie over op de verzekeraar voor zover deze die schade vergoedt'*). This amendment made clear, among other matters, that only the insured's rights against third parties to claim damages are transferred in this way and not also, for example, any real rights.

Article 284 is no more than an application in the insurance context of the principle of subrogation which was generally recognised in Dutch codified law in art 1438-3 of its *Burgerlijk Wetboek* of 1838.<sup>57</sup> Such subrogation by operation of law (*subrogatie uit kracht der wet*) involves that the rights of a creditor against a primarily liable debtor in connection with and for the reduction of a debt, are automatically transferred by operation of law to a third party on and to the extent of the latter's payment of that debt.<sup>58</sup>

Much has been written about the origin of the notion of an automatic transfer of a legal right by way of subrogation.<sup>59</sup> This notion was unknown to Roman law, adhering

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<sup>57</sup> Another example of such subrogation in the insurance context, although not involving the transfer of the insured's right against a third party to the insurer but rather that of the insured's right against the insurer to a third party, is recognised by art 610 of the *Wetboek van Koophandel* in the case of a bottomry loan on insured goods. This was also recognised earlier in Roman-Dutch law in s 21 of the *Amsterdam keur* of 1744 (see § 1.2 n15 *supra*). But whereas in terms of s 21 the insured borrower on bottomry had to cede his rights in terms of the earlier policy to the bottomry lender, in terms of art 610 (which was repealed in 1924) the money lender was subrogated to the rights of the borrower against the insurer (*'treed de geldschieder in de rechten die de geldopnemer jegens den verzekeraar zoude hebben gehad'*).

<sup>58</sup> Care must be exercised in this regard because the term 'third party' is frequently used in a different sense in the general context of subrogation, where the focus is on the relationship between the debtor and the creditor, than it is in the insurance context, where the focus is on the relationship between the insurer and the insured and not that between the insured as creditor and the third party as debtor. In the general context the third party is, on payment of the debt, subrogated to the rights of the creditor against the debtor, whereas in the insurance context the insurer is, on payment of the debt, subrogated to the insured's rights against the third party; in the latter instance the insurer is the 'third party' (in the general context) who pays the debt of the debtor (the 'third party' in the insurance context) and who is subrogated to position of the insured (creditor) as against that debtor.

<sup>59</sup> See eg Van Asch van Wijck *passim*; Marasinghe; and Pierson 5-12. No authority is provided and none was encountered for the statement of Dover 22 that in the development of the customary law of Bruges by the mid-fifteenth century, the earliest reference may be found to the principle of subrogation.

as it did to the concept of the strict personal character of obligations.<sup>60</sup> However, a number of other institutions did exist by which the strict law could be circumvented and by which the desired result could be achieved, that is, by which a third person who had paid the debt of another, could be placed in the position of the creditor as against that debtor. These included, for example, the *procuratio in rem suam*,<sup>61</sup> the *beneficium actionum cedendarum*,<sup>62</sup> and *successio in locum creditoris*.<sup>63</sup>

Subrogation as provided for in the *Wetboek van Koophandel* is derived from medieval French law where the concept had evolved earlier through a fusion of the *beneficium actionum cedendarum* and the *successio in locum*. This fusion occurred when the Roman-law notion of the strict personal nature of obligations came to be watered down and eventually abandoned and when the transfer of rights from an obligation was openly permitted. The term 'subrogation' only became common in the sixteenth century and was possibly derived from canon law.<sup>64</sup> Various forms of subrogation were recognised in French law, including legal subrogation which involved the automatic transfer of rights.<sup>65</sup> These came to be provided for in arts 1249-1252 of the

<sup>60</sup> One consequence of this personal relationship between the parties to an obligation and of the fact that an obligation was seen as being able to exist only between the original contracting parties, was that if one of the parties was replaced by someone else, the obligation was terminated. Novation, which, of course, also terminated the original obligation, was a possibility but it required a circuitous process and the consent and concurrence of the debtor.

<sup>61</sup> By which the creditor authorised the third party, by way of a contract of mandate, to enforce his (the creditor's) rights and to institute a legal claim against the debtor. The third party enforced the creditor's claim against the debtor in the creditor's name but became *dominus litis* after *litis contestatio*.

<sup>62</sup> Through this *beneficium* the third party who was compelled to and who had paid the creditor that which was owed to him by another debtor, became entitled, on such payment, to claim a cession of the creditor's actions against the debtor. Examples of instances where a payer was entitled to such a cession included jointly liable co-debtors and sureties. Such a transfer of actions (*cessio actionum*) was regarded in Roman law as a sale, and not as the automatic *ex lege* result of payment as is the case in modern Dutch law.

<sup>63</sup> This was the substitution *ex lege*, in specific limited cases, of a third party to the hypothecary rank or position (but not in any other rights attached to the debt he had paid) of the creditor whose claim he had paid.

<sup>64</sup> It appears that in old French law 'subrogation' had a wide meaning, and included all the instances where one person stepped into the place of another and substituted in his rights and claims, and not only where he had paid another's debt and for that reason stepped into the latter's place as regards a third party. It even occurred outside the law of obligations where one thing (*res*) was substituted in the place of another thing. See Van Asch van Wijck 1.

<sup>65</sup> There were, in essence, four types of subrogation: legal subrogation (*wettelijke subrogatie*), the equivalent of art 1438-1 of the *Burgelijk Wetboek*; subrogation on request (*requisitoriale subrogatie*) as opposed to automatic subrogation, which included the cases of the *beneficium actionum cedendarum* of Roman law; conventional subrogation which occurred through the cooperation of the creditor (the equivalent of a cession, which involved an agreement between the creditor and the third party who paid the debt); and subrogation through the cooperation of the debtor and without the consent of the creditor (the equivalent of a novation and which involved an agreement between the debtor and the third party who paid his debt for him). These types of subrogation were described by Pothier *Coutume d'Orleans* (XX.5.70 *et seq*), as referred to in the *Quebec Fire Assurance* case (to which reference will be made in § 1.5 n72 *infra*) at 303, 898.

French *Code civil* and arts 1436-1439 of the Dutch *Burgerlijk Wetboek* were in turn mere translations of the French provisions.

It is clear, nevertheless, that the earlier *ex lege* cession in Roman-Dutch law came to be replaced in the *Wetboek van Koophandel* by a more sophisticated but principally identical notion of subrogation. In essence, though, Roman-Dutch law already recognised the notion of an *ex lege* transfer, later labelled as occurring by way of subrogation, of the insured's action against a third party primarily and ultimately liable for his loss or damage to the insurer who had compensated that loss or damage. Developments in Roman-Dutch law had clearly presaged the recognition of legal subrogation in the *Wetboek*.<sup>66</sup>

### 1.5 The Insurer's Right of Subrogation in English Law

There are probably very few other areas of insurance law where English law differs so much from civilian systems as in respect of the doctrine of subrogation. In essence the difference lies in the fact that whereas the Continental notion of subrogation implies an automatic or *ex lege* transfer of the insured's right against a third party to the insurer, no transfer of any right at all occurs in the case of the English doctrine. It, rather, involves at most an *ex lege* entitlement on the part of the insurer to the fruits of the insured's action against the third party, a succession to or a right to obtain the eventual benefit of the insured's right against a third party, coupled with an entitlement to the procedural control of the enforcement of that action.

The reason for this stark difference is, simply, because the English doctrine of subrogation was developed independently of any antecedent Roman-law concept and of the adaptation of those concepts in French law. It was developed by the English courts of equity in the course of the eighteenth century as an indigenous doctrine in cases involving contributions and tripartite relationships of indemnity, such as insurance and suretyship.<sup>67</sup> By the late eighteenth century, the Common-law courts too

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<sup>66</sup> It is interesting, as Ledeboer 50 points out, that the notion embodied in the concept of subrogation, namely the transfer of rights and more particularly the consequence of such transfer, which was the putting of one person in the place of another, were already recognised from early on in another context in Roman-Dutch insurance law. The idea of substitution or replacement (*plaatswisseling*) was used in the model policy forms prescribed by the *placcaat* of 1563 and again in those prescribed by the *placcaat* of 1571 to express the consequence of the conclusion of a contract of insurance, namely that the insurer was placed in the position of the insured as far as the loss or damage was concerned (*[e]nde van als verseekeren sy ende stellen henlieden inde eygen plaetse van de gheasseureerden, om hem te garantieren van alle verlies ende schade*). However, this replacement of the insured by the insurer occurred figuratively not as regards a third party specifically but as regards the insured's loss generally. It was, as appears from the phrase in the policies, simply another way of expressing the fact that the insurer stood in for and undertook to indemnify the insured against loss.

<sup>67</sup> Whereas in French law subrogation evolved first in the general law of contract and was then introduced into and applied to insurance and indemnity law, in English law by contrast subrogation first arose in the context of insurance and indemnity law and only subsequently became recognised as a part of the general Common Law. See Khoury 8-9.

had come to recognise the doctrine and its equitable foundation, and used it as if it had always been part of the Common Law.

In *Mason v Sainsbury & Another*<sup>68</sup> the principle was recognised that where insurers had paid the amount of the insured's loss caused by third parties,<sup>69</sup> they could maintain an action in the name of the insured - a unique feature of English subrogation and closely tied up with the fact that it did not involve any transfer of the insured's rights to the insurer - against those third parties for their own benefit. The third parties, being primarily liable,<sup>70</sup> could not claim the benefit of the insurance and raise the fact that the insured, in whose name they were being sued, had been indemnified by his insurer, as a defence. It is apparent from the judgment that this was not an unfamiliar situation. It also appeared, though, that the principle involved had at that time not yet clearly come to be distinguished from the comparable doctrine of abandonment.<sup>71</sup>

The further development of the doctrine of subrogation in English law occurred in the nineteenth century, mainly in the Common-law courts but with the assistance of the courts of equity which had jurisdiction to compel the insured to consent to the use of his name in an action by the insurer against a third party. This development included the greater but not yet complete separation of the doctrine of subrogation from that of abandonment.

However, until the mid-nineteenth century, the principles involved were not yet identified as those of subrogation. The term 'subrogation' was first used in English insurance law in *The Quebec Fire Assurance Company v Augustin St Louis & John Molson*,<sup>72</sup> a Privy Council appeal from the Court of Appeals for the Province of Lower

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<sup>68</sup> (1782) 3 Dougl 61, 99 ER 538.

<sup>69</sup> In this case the Hand-in-Hand Fire Office had paid the insured out after his house had been demolished by a mob.

<sup>70</sup> The acquisition of the right of subrogation by the insurer did not result from any express agreement with the insured and was, as in the case of Continental subrogation, acquired when payment was made to a person to whom the debtor was principally and primarily liable.

<sup>71</sup> Thus Lord Mansfield stated (at 64, 540): 'Every day the insurer is put in the place of the insured. In every abandonment it is so. The insurer uses the name of the insured.... [I]t is to be considered as if the insurers had not paid a farthing'. Ashurst J too stated (at 64, 540) that 'I agree ... that it is like the case of an abandonment'.

The principle involved (and also its confusion with abandonment) dates from much earlier. Thus in eg *Randal v Cockran* (1748) 1 Ves Sen 98, 27 ER 916 it was regarded as 'the plainest equity' that after payment of the insured, the insurers stood in the place of the insured as to the property insured, any salvage of them, or any compensation paid for them, the insured then being no more than a (constructive) trustee for the insurers. See too eg *Blaauwpot v Da Costa* (1758) 1 Eden 129, 28 ER 633 where the following was remarked (at 131, 634): '[U]pon the policy, and the peril happening, and the payment of the money by the underwriters, the whole of the rights of the assured vested in them'.

<sup>72</sup> (1851) 7 Moore 286, 13 ER 891.

Canada on a point of French insurance law.<sup>73</sup> Thereafter the term was erroneously applied to the comparable but nevertheless fundamentally different English doctrine.<sup>74</sup>

By the time the English law of marine insurance came to be codified in the Marine Insurance Act of 1906, the doctrine of subrogation had been worked out in some detail. However, the link with abandonment had not been severed completely. The insurer is not only subrogated to the personal rights of the insured against third parties concerning the property insured, but he is also 'subrogated' to his real rights over that property insured or whatever may remain of it. There is accordingly no clear distinction between the insurer's right of subrogation and the insurer's right to salvage, which latter right is, in appropriate cases, but a consequence of an abandonment by the insured.

In terms of s 79(1) of the Marine Insurance Act, where the insurer pays for a total loss of the subject-matter insured, he becomes entitled to take over the interest of the insured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and the remedies of the insured in and in respect of that subject-matter as from the time of the casualty causing the loss. By s 79(2), where the insurer pays for a partial loss, he acquires no title to the subject-matter insured or such part of it as may remain, but he is upon such payment subrogated to all the rights and the remedies of the insured in and in respect of subject-matter insured as from the time of the casualty causing the loss, in so far as the insured has been indemnified in accordance with the Act by such payment for his loss.

Clearly this right of subrogation, including as it does the right to salvage, is much wider than the Dutch equivalent in art 284 of the *Wetboek*. The latter is restricted to the insured's rights against third parties in respect of the loss or damage compensated by the insurer, as opposed to his rights in and in respect of the property insured itself.<sup>75</sup> The Dutch art 284 does not differentiate between the consequences of payment for a total loss and for a partial loss, and also makes it clear that subrogation involves a transfer of rights to the insurer.<sup>76</sup>

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<sup>73</sup> Here the insured, after being in part compensated by his insurers in terms of an insurance policy for the loss they had suffered, by notarial deed transferred to those insurers the right to sue and claim the amount they had paid out, from the third parties who had caused the loss. The Council held that this constituted a valid subrogation (ie, a subrogation by request: see again § 1.4 n65 *supra*) of the debt to the insurers according to the French law prevailing in that part of Canada. Insurers, it was pointed out, had a right to require a subrogation by the insured at the time of their payment of the loss (on this point the Council referred, among others, to Pothier and Emerigon). As is apparent, the insurers here claimed in their own name against the third parties, and they enforced a proportional part of the right of the insured which had been transferred to them by the subrogation.

<sup>74</sup> Marasinghe 288 quite correctly observes that '[t]he contemporary [English] doctrine of subrogation appears, therefore, to have had its birth in equity, to have been nurtured by both equity and the common law, and to have been named after a French doctrine'.

<sup>75</sup> See Dorhout Mees *Schadeverzekeringsrecht* 670, noting that that is the reason why there is in English law no express abandonment in the case of an actual total loss. See further on this point § 2.5.3 *infra*.

<sup>76</sup> See generally as to the differences between subrogation in art 284 and in s 79, Buys 133-135.

## 2 The Doctrine of Abandonment

### 2.1 Introduction: Abandonment in Context

One of the most complicated aspects of Roman-Dutch insurance law was the doctrine of abandonment.

The term 'abandonment', as also the notion it conveys, was already known to Roman law and is therefore not peculiar to insurance law. The term is older than insurance itself although it was adopted in the context of insurance from early on. Abandonment was in the first instance encountered in the law of things. Secondly, it was also familiar to maritime law generally and in the law relating to the carriage of goods and the limitation of shipowner liability more particularly.<sup>77</sup> But the term 'abandonment' meant different things in different branches of the law, at different times, and in different legal systems.

It is necessary, therefore, in order to put the role of abandonment in the context of the insurance contract in its proper perspective, very briefly to sketch the application of the doctrine outside the realm of insurance.

#### 2.1.1 Abandonment in the Law of Things

Abandonment is intimately connected to the loss and acquisition of ownership. It may be stressed at the outset that the loss of ownership in a thing by one person could, but did not have to, coincide with the acquisition of ownership in that thing by another person.

In the Roman-Dutch law of things, which was directly descended from Roman law, ownership could be lost in various ways.<sup>78</sup> Some of them involved the consent or will of the owner;<sup>79</sup> others occurred without his consent.<sup>80</sup> Abandonment or dereliction was a way in which the owner of a corporeal thing could divest himself of his ownership in that thing. It was, furthermore, a unilateral way of doing so.

Whether or not an abandonment had taken place, depended upon the intention of the owner. In the case of an abandonment the owner clearly intended no longer to be owner of the thing abandoned.<sup>81</sup> An abandonment could be made expressly or tacitly and the owner's intention to abandon ownership had to be deduced from the

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<sup>77</sup> See generally Lichtenauer *Geschiedenis* 183-184 as to the legal sources regarding abandonment.

<sup>78</sup> For what follows, see generally Lee *Introduction* 137-140 and 153; Maasdorp *Things* 36, 40-41 and 61; Van der Merwe *Sakereg* 29, 215, 217, 223, 224-227 and 374-377.

<sup>79</sup> Such as tradition or delivery; abandonment.

<sup>80</sup> Such as prescription; expropriation; accession.

<sup>81</sup> See eg Grotius *Inleidinge* II.1.52 (referring to '*verlaten oft verworpe goederen [res pro derelicto habitae] 't welck zulcks werd verworpen dat de eighenaer 't selve niet meer onder 't sijne en wil reekenen'*') and II.32.3 (where '*verlatinge*' was described as '*wanneer iemand niet en wil dat iet langher zy onder sijne goederen*'); Voet *Commentarius* XLJ.1.10; Van der Linden *Koopmans handboek* I.7.4.



surrounding circumstances,<sup>82</sup> one of which was the fact that the owner had given up (or, confusingly, 'abandoned') physical possession of the property in question. The more valuable the goods, the less likely that it would be assumed that the owner had intended to abandon them, even to extent that it may possibly never have been presumed that an owner would have intended abandoning a particularly valuable thing.

In this regard, a careful but invariably fine distinction was drawn between abandoned property (*res derelicta*) and lost property (*res deperdita*). In the case of lost property there was no intention on the part of the owner to divest himself of his ownership in the thing in question. The same was true of jettisoned goods, at least where such goods had been thrown overboard in an emergency in order to lighten the ship, or of a ship 'abandoned' at sea in an emergency. Such goods or such a ship were at most merely lost, and not abandoned in the technical sense in which the term is used here, by the owner without any intention of returning to it (*sine animo revertendi*) or without any hope of recovering it (*sine spe recuperandi*). The owner retained his ownership in such lost property (the jettisoned goods or the 'abandoned' ship) even if he did not know where the goods or the ship were and even if another had in the meantime taken possession of that property.<sup>83</sup>

Naturally the intention of the owner of lost or jettisoned property could have changed in the course of time and he could be taken later to have given up any hope and desire of ever re-acquiring his property again and thus to have abandoned it. Lost or jettisoned property could accordingly become abandoned property by a lapse of time. However, even in earlier times when the chances of a successful salvage of sunken vessels or recovery of lost cargo were much smaller, that was the case only in exceptional circumstances. The mere fact that the owner had given up actively looking for lost or jettisoned property of which the whereabouts was unknown, or that he had for a period of time not actively attempted to retrieve captured or arrested property from a known capturer or arresting authority, or to salvage sunken property, was generally insufficient proof of his intention to abandon the property in question.

In Roman-Dutch law ownership could be acquired in only a limited number of ways, the most important of which were occupation, tradition, accession, and prescrip-

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<sup>82</sup> See eg Grotius *Inleidinge* II.1.52, noting that the intention '*uit waerschijnelicke teekenen afghenomen moet werden*'.

<sup>83</sup> See eg the opinion taken up in the *Rechtsgeleerde observatien* obs 23 (*ad* II.1.52) where the view was expressed that goods jettisoned in an emergency were not to be regarded as '*verlaten*' or as '*res derelictae*'. That would only be the case if the owner no longer wanted to be owner of those goods ('*de eigenaar dezelve niet meer onder de zyne en wil rekenen*'). Whether that was so had to be deduced from the surrounding circumstances. In the case, therefore, where a ship was caught in the ice and left behind by her master and crew for the duration of the winter, it appeared that the mere fact that the crew had left her behind ('abandoned' her in the non-technical sense) did not mean that the owner had relinquished and lost his ownership in her ('*die Lieden door zoodanig eene derelictie van hunne Schepen, welke niet is geschied animo abjiciendi, der zelve eigendom niet verloren hebben*'). See too La Leck *Index* sv 'abandoned property' who referred further to the case of the East Indiaman '*De Witte Haes*' (amazingly, it would seem, the same ship which was insured in 1672 by the policy reproduced in Appendix 24 *infra*) where a treasure from the ship, which was wrecked in 1674, was held in 1710 not to have been a *res derelictae* and to have been recoverable by the owner. Therefore, if another took possession of it, that could have amounted to theft.

tion.<sup>84</sup> Occupation (*occupatio*) was an original way of acquiring ownership<sup>85</sup> and was the unilateral occupation of a thing not belonging to anybody, a *res nullius*.

An abandoned thing (*res derelicta*) could have been or have become an ownerless or vacant thing (*res nullius*), which was the case where the abandonment in question was a divesting abandonment,<sup>86</sup> but that, as will be explained shortly, was not necessarily the case.

If a *res nullius*,<sup>87</sup> ownership of the abandoned property could be acquired by way of occupation by the finder of such property. There was an acquisition of ownership of an unowned corporeal thing by occupation when the thing in question was lawfully taken with the intention of becoming owner of it, even if the finder was unaware

<sup>84</sup> There was a *numerus clausus* of ways in which ownership could be acquired and parties could not by agreement between them create another way. Thus, a mere agreement to compensate another for a thing did not pass ownership in that thing (see again ch I § 4.1 *supra* for the differences between insurance and sale). Thus, Van der Merwe *Sakereg* 215 explains that where a person by an agreement compensated the owner for the loss of a thing (eg, because he had borrowed it or, equally, because he had insured it in return for a premium), the compensator would not have been able to argue, if the thing were found, that he had become owner of it by virtue of the compensation he had paid its owner. Because a recognised way of acquiring ownership was lacking, the compensator could not have acquired ownership. He would, however, in appropriate cases have the right to recover the amount of the compensation from the owner or the latter may be under an obligation to abandon the thing in question to him. But ownership did not pass merely by virtue of their arrangement to pay a compensation.

<sup>85</sup> By contrast, tradition or delivery (*traditio*) was a derived way of acquiring ownership. Tradition as a mode of acquiring ownership implied, as a rule, the physical transfer of possession of a thing from one person to another (*traditio vera*), but fictitious delivery (*traditio ficta*) was also recognised as possible.

Examples of fictitious delivery included the following. (i) *Traditio brevi manu* where tradition preceded acquisition, ie, where the transferee was already in possession of the thing when ownership was transferred to him by way of *traditio*. (ii) *Constitutum possessorium* where acquisition preceded tradition, ie, where the transferee obtained ownership without possession. In this case ownership passed by a declaration of the will of the transferee and without any physical transfer of the thing itself. The transferor was the owner possessor and he retained possession but then no longer holding it in his own name but for the transferee. There further had to be a new legal basis (*causa detentionis*) for the transferee retaining possession (or, rather, for his obtaining new possession). *Constitutum possessorium* as a form of delivery was received in Roman-Dutch law and in particular in the province of Holland, although in not in some other provinces where, in order to prevent fraud, legislation required that the transfer of ownership of movables with a reservation of possession be published by registration. (iii) *Traditio longa manu* where there was no actual physical handing-over - often because it was not possible, eg because of the size of the thing or because of its location or condition - but where the transferor allowed the transferee access to and enabled him to acquire physical possession of the identified thing. (iv) *Traditio symbolica (clavium traditio)* or delivery by symbol which enabled the transferee to exercise physical control over the thing). (v) *Cessio iuris vindicationis* (cession of ownership) or attornment. See further generally Lee *Introduction* 144-146; Van der Merwe *Sakereg* 314-332.

<sup>86</sup> That was the case where there was no transfer nor any intention of transfer by the earlier owner who simply abandoned the property in question to the whole world, not caring who, by way of occupation, became the new owner of the property after him.

<sup>87</sup> As opposed to a *res alicuius* (a thing belonging to someone), a *res nullius* did not belong to anyone. It could have been a thing which had never yet been appropriated or had never yet belonged to anyone, or a thing which had ceased to belong to someone, such as abandoned property.

that the thing in question had been abandoned and was vacant property.<sup>88</sup> Apart from abandoned property (*res derelicta*), other examples of *res nullius* which could be acquired by occupation were enemy goods (*res hostiles*) and treasure.<sup>89</sup>

Unlike an abandoned thing which was a *res nullius*, a lost thing remained the property of its owner and could therefore not be acquired by occupation.<sup>90</sup> The occupation or taking of such a thing by the finder with the intention of acquiring ownership of it, therefore could amount to theft. The finder had to hand the thing over to the authorities. The owner could recover lost property if he paid a finding fee ('*vindloon*') and compensated the finder's expenses. If after a reasonable enquiry and the expiry of a reasonable time, the owner of lost property could not be found and did not turn up, there was a difference of opinion as regards the legal position. According to some, such property could be retained by the finder;<sup>91</sup> according to the other view such property went, on payment of the finder's fee, to the *fiscus* as *bona vacantia*.<sup>92</sup>

In this regard marine wreckage<sup>93</sup> occupied a special position. By ancient privilege, wreckage was from time immemorial regarded as the private property of the Count or, later, the State, on whose land it was found. Later, by numerous enactments and laws, it was decreed in Roman-Dutch law that every owner might recover his shipwrecked and lost property.<sup>94</sup> This shows that in the case of such wreckage there was no abandonment in the technical sense and that it was merely regarded as lost property. Some authors stressed the fact that the shipwrecked property in fact never ceased to belong to the original owner.<sup>95</sup> It was also clear that the wreckage did not

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<sup>88</sup> See eg Grotius *Inleidinge* II.1.52; Van Leeuwen *Rooms-Hollands regt* I.2.3.14; Voet *Commentarius* XLI.1.10; Van der Linden *Koopmans handboek* I.7.2(d).

<sup>89</sup> Roman-Dutch law accepted the Roman-law rule that *res hostiles* were *res nullius* and could be acquired by occupation. The general rule was that immovable property belonged to the victorious state while movables belonged to the captor. However, numerous legislative provisions and restrictions existed, especially in respect of the division of prize. See eg Grotius *Inleidinge* II.4.34; Voet *Commentarius* XLI.1.2.8; Van Leeuwen *Rooms-Hollands regt* I.2.3.3-4; Van der Keessel *Theses selectae* th 191-192 (*ad* II.4.34); and Van der Linden *Koopmans handboek* I.7.2(e). See again ch VI §§ 5.2.2 (as to the law of prize) and 5.4.2 (as to enemy capture) *supra*.

<sup>90</sup> See eg Voet *Commentarius* XLI.1.9; Van der Linden *Koopmans handboek* I.7.2(d).

<sup>91</sup> The thing was in such circumstances regarded as a treasure and divided according to the rules applicable in such a case. See eg Voet *Commentarius* XLI.1.9; Van der Keessel *Theses selectae* th 189 (*ad* II.4.32).

<sup>92</sup> See eg Van Leeuwen *Rooms-Hollands regt* I.2.3.16.

<sup>93</sup> That is, a ship or a cargo which was lost - as opposed to abandoned in the technical sense - at sea. Such wreckage could either have sunk to the bottom of the sea, have washed up on land, or have remained floating on the sea.

<sup>94</sup> See eg Grotius *Inleidinge* II.4.36; Van Leeuwen *Rooms-Hollands regt* II.3.9; Van der Linden *Koopmans handboek* I.7.2(d).

<sup>95</sup> See eg Voet *Commentarius* XLI.1.9.

become the property of the finder or salvor.<sup>96</sup> A claim had to be made by the owner within one year and six weeks and such owner had to bear the cost and the reward of salvage (*'bergloon'*).<sup>97</sup> However, if the wreckage remained unclaimed after this period, it belonged to the *fiscus*, not to the finder or salvor, but could still easily be redeemed by the owner against the payment of salvage.<sup>98</sup>

However, abandonment did not have to be a divesting abandonment, that is, one by which the owner gave up his ownership to the whole world. An abandoned thing (*res derelicta*) did not necessarily become a vacant thing (*res nullius*). There also existed, at least in Roman law, another type of abandonment distinguishable in principle and in consequences from the type of abandonment just described.

It was generally accepted in Roman law that abandonment resulted in the owner immediately being divested of his ownership and in the thing abandoned becoming a *res nullius*. The owner simply gave up his ownership, and did not transfer or have any intention of transferring that property to any particular person. He relinquished ownership to the whole world, not caring who became the owner of the property by occupation after him. Ownership of the *res nullius* was then acquired independently by whoever found it first and took possession of it with the required intention to appropriate it to himself (*animo occupandi*), irrespective of whether he knew or believed the thing to have been abandoned. In this case the acquisition of ownership over the abandoned property (*res derelicta*) was a question of a direct *derelictio cum occupatione*.

That, however, was not the only possibility recognised in Roman law. There was also an alternative construction to divesting abandonment or abandonment in the sense of a dereliction.<sup>99</sup> An owner could namely have abandoned his property otherwise than to the whole world and not caring what would happen to the thing abandoned. He may have abandoned it only to one or more persons or a group of persons<sup>100</sup> and by his abandonment have 'offered' it to them for acquisition by occupation. Prior to their acceptance, however, the thing in question never became a *res nullius* (or at least not a *res nullius* to allcomers). It could not be acquired in ownership by way of occupation by simply anyone, but remained the property of the owner until 'accepted' by the specific person or persons to whom it had been abandoned. Should the offeree or any of the offerees have 'accepted' the owner's offer, something which would have occurred, for example, had such person or persons occupied the property, he or they

<sup>96</sup> See eg Grotius *Inleidinge* II.4.37; Voet *Commentarius* XLI.1.9.

<sup>97</sup> See eg Van der Linden *Koopmans handboek* I.7.2.

<sup>98</sup> See eg Van der Keessel *Theses selectae* th 197 (*ad* II.4.36). The view of Lee that the finder or salvor became the owner after the expiry of the period of prescription of 30 years has no support in the sources.

<sup>99</sup> On this, see in particular Van der Merwe 'Animus Occupandi' 331-332 and 334.

<sup>100</sup> While the owner did not in this case abandon it to the whole world, he could but did not have to have had a particular successor in mind. It could, therefore, have been an abandonment to uncertain persons (*incertae personae*). There was therefore some, although not necessarily precise, exclusivity attached to this type of abandonment.

became the new owner or owners of the abandoned thing. In this case the acquisition of ownership over the abandoned thing may be construed as a form of *traditio incertae personae*, the transfer (*traditio*) occurring between the offering owner and the accepting offeree.

If the offeree or offerees decided not to become the owner or owners of the abandoned property by occupation, the abandoning owner, it would seem, simply remained the owner, his offer possibly having to be regarded as having been withdrawn. It was then, of course, possible for the owner to have a change of mind and to abandon his property to the whole world so that it became a *res nullius*. Alternatively, the offeree may have been obliged, by virtue of a collateral contract between himself and the owner, to take over the ownership of the abandoned property. In such a case he, having become owner by occupation with the required intention, may in turn in appropriate cases immediately have abandoned the object in question, and then in the traditional and accepted sense of an abandonment resulting in the thing becoming a *res nullius*.

In this alternative construction, therefore, the owner did not have the intention that his abandonment of the thing in question should result in it becoming *res nullius*. His intention was simply to abandon his ownership in the thing so that the specific person he had in mind could take possession of it. At the time the latter occupied it, therefore, the abandoned thing was not a *res nullius* in the sense that anyone could have acquired ownership over it.<sup>101</sup>

Otherwise than in the case of a *derelictio cum occupatione*, the acquisition of ownership was, according to this construction, possible only if the offeree had the knowledge or at least the belief that the thing he occupied had been abandoned. Knowledge that the object was a *res derelicta* was accordingly required before the necessary intention for acquiring by occupation (*animus occupandi*) was present.

This alternative construction of the acquisition of ownership of abandoned property, involving as it did in effect a different type of abandonment, had particular practical advantages. It permitted an owner to relinquish ownership unilaterally to a particular or closed circle of persons and to exclude others from obtaining ownership in it simply by being able and in a position to occupy it. Here the intention of the owner was not simply to abandon the thing and to relinquish his ownership over it, but to do so with a particular purpose, namely to allow another to decide whether or not he wanted to become the new owner. Furthermore, at no stage did the property become ownerless, at least not in the sense that it was available to be occupied by just any one. The abandoning owner could therefore have ensured that the ownership in the property either went to a specific person or group of persons, or that he otherwise remained the owner if none of those persons wanted it.

This type of abandonment, which may also be termed *transferring abandonment* to distinguish it from the usual *divesting abandonment* described earlier, was therefore ideally suited to instances where the transfer of ownership had to take place between

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<sup>101</sup> It seems conceptually incorrect, though, that in this instance the *res* was merely lost (*deperdita*) at the time when it was taken into possession by the other person and only thereafter became abandoned (*res derelicta*) as is suggested by Van der Merwe 'Acquisition' 334.

the owner of property and a person with whom such owner had some collateral contractual relationship. As will be argued later, it was the type of abandonment which ideally explained what took place between the insured and the insurer when the former abandoned the insured property to the latter. Interestingly enough, the instances where an owner may be said to have had the intention that his abandoned thing should not become a *res nullius* occurred in Roman-law texts dealing with losses occurring at sea.<sup>102</sup>

Controversy existed in Roman law on which one of these constructions of the occupation of abandoned property was the correct one. The Sabinians favoured the view that it involved a direct *derelictio cum occupatione* while the Proculians supported the alternative construction of a *traditio incertae personae*. Ultimately the latter construction was not favoured by the majority of Roman jurists and may for that reason not have attracted any attention from Roman-Dutch lawyers who simply regarded *occupatio* as a direct *derelictio cum occupatione*.

In English Common Law this controversy has even today not yet been settled and doubt still exists.<sup>103</sup> Initially the possibility of an abandonment of movables in the Roman-law sense of *derelictio* was accepted by Bracton as a part of English law. Later, in the sixteenth and seventeenth centuries, the general possibility of the abandonment of chattels so as to make them *res nullius* and available to the first taker, was denied. Later, in the nineteenth century, Blackstone returned to the original view of Bracton and accepted the possibility in principle of a dereliction. English cases in the mid-nineteenth century held that an owner could cease to have possession and control of his ship, although she had not been transferred to another. Put differently, the original owner could abandon the ship and so put an end to his liabilities. This view was strengthened by various *dicta* in the twentieth century that divesting abandonment was part of English law.

### 2.1.2 Abandonment in the Law of Carriage

Abandonment also featured prominently in the law relating to the carriage of goods by sea in connection with the payment of freight.

The owner of goods carried by sea, whether he was the consignor or consignee, was liable in terms of the contract of carriage to pay the carrier freight for the conveyance of his goods. As a general principle, freight was payable upon the safe arrival and the commencement of the discharge of the goods at their destination. The carrier had a right of retention or lien over the cargo for his claim against the owner of the cargo for the payment of the freight due to him. If, in the case of a shipwreck, the goods were totally lost in the course of the voyage and did not arrive safely at their destination, no freight was payable and due. However, 'safe' arrival did not mean 'undamaged arrival' but rather 'non-delivery', so that even if the goods arrived in a

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<sup>102</sup> See Van der Merwe 'Acquisition' 334.

<sup>103</sup> See generally Hudson 'Abandonment'.

damaged state, freight was still due to the carrier.<sup>104</sup> Accordingly, if the shipwreck goods were saved and taken to their destination by the carrier, the full amount of freight was payable, even if the goods were damaged in the process, at least in so far as the carrier himself was not liable in terms of the contract of carriage to compensate the owner for such damage.<sup>105</sup>

The owner therefore had to pay freight for the carriage of his goods when they arrived in a damaged state. More specifically, it could happen that the value of his goods in their damaged state was less than the amount of freight which had to be paid to the carrier, and therefore that the damage was so severe that for all practical purposes it amounted to a total loss of the goods.

One solution to this predicament of the cargo owner was to make the freight payable proportionally. However, this gave rise to serious problems of calculation which, and this was important, delayed the speedy settlement of claims for freight.

The law, and specifically the medieval maritime codes, accordingly came to the aid of the carrier and the cargo owner by giving the latter a choice whether to pay the freight in full or whether to abandon the damaged goods to the carrier in lieu of such freight. He would obviously seriously consider the latter option where the value of the damaged goods was less than the amount of freight he still had to pay the carrier.

By abandoning his damaged goods to the carrier, the cargo owner in effect turned his partial loss into a total loss of those goods with the result that no freight was payable on them any longer. The abandonment in this connection was therefore merely a method by which the process of the settlement of freight claims was simplified by avoiding any calculation of *pro rata* freight. It is important to bear in mind also that the abandonment in this connection was a natural and simple process, seeing that the carrier was already in possession of the cargo when it was abandoned to him.

In the Netherlands, as elsewhere,<sup>106</sup> this principle was taken over from antecedent maritime codes and was recognised from early on in local legislation.<sup>107</sup>

<sup>104</sup> As to the payment of freight, see again ch V § 5.4 *supra*.

<sup>105</sup> In so far as the carrier was liable for that damage, the owner may have had a claim (or counterclaim) against the carrier.

<sup>106</sup> See eg Landwehr 'Hanseatischen Seerechte' 98. See further generally Schook *De derelictione* 100-107.

<sup>107</sup> Provisions to this effect appeared as early as the fourteenth century in the maritime law of Kampen of 1372 (see Goudsmit *Zeerecht* 304-305). In this law, the right to abandon goods damaged by *vis maior* in lieu of freight was given only to those who '*ghuet vervoert aan enighen Sciphern mijs enen godspenninghe*', i.e. the right of abandonment was restricted to the case where the consignor had paid an earnest (a *godspenning* or *arrha*), for then at least the master had that amount in addition to the abandoned goods and did not sail for nothing. The consignor had to exercise his choice within fourteen days after the arrival of the damaged goods and had to notify the master of his choice.

The principle was also recognised in Antwerp customary law. Thus art 11 of title XXIX of the *Antiquae* of 1570 (see De Longé vol I at 602) provided that '*ende een coopman, wesende de coopmanschap in een schip geladen soo verargert, quaet oft van soo cleyen pryse, dat hem nyet proflytelyck en dunckt tselfde taenveerden, mach het selfde abandonneren ende den schipper laten voor die [den] vrachtloon, die hem daermede moet te vreden houden*'. Likewise, in art 16 of title LIV of the *Impressae* of 1582 (see De Longé vol II at 406), when the merchandise conveyed by the master in his ship deteriorated or depreciated to such an extent ('*soo verargert, quaedt oft van soo cleyen prijse is oft wordt*') that the merchant '*niet profijtelijck en dunct de selve taenveerden*', he was entitled

In s 44 of the shipping *placcaat* of 1551 it was provided that if goods were damaged<sup>108</sup> without the fault of the master ('*sonder schult des Schippers*'),<sup>109</sup> such damage had to be borne by the merchant or owner of the goods himself, and on the arrival and discharge of the goods at their destination, the owner either had to pay the full freight in respect of those goods or abandon them to the carrier in lieu of the freight ('*sal de Coopman ... de volle vracht daer af betalen, ofte de selve den Schipper voor die vracht laten*').<sup>110</sup>

Likewise, in terms of s 9 of title II of the *placcaat* of 1563, if goods arrived damaged without the fault of the master or the crew ('*sonder schult vanden Schipper ofte Schiplieden*'), such loss was solely for the account of the owner who had to pay the full freight in respect of those goods or abandon them to the carrier ('*de welcke Koopman ... sal ... de volle vracht daer af betalen, ofte de selve den Schipper voor de vracht laten*').<sup>111</sup>

Thereafter the principle appears to have fallen into disuse. Although still mentioned by Grotius,<sup>112</sup> for example, it was no longer as a rule provided for in the maritime *keuren*.<sup>113</sup> Van der Keessel,<sup>114</sup> for one, considered it doubtful whether under the law of his time merchants could relinquish or cede any other goods also, apart from the goods packed in cases, to the master in lieu of freight. He pointed out that Verwer<sup>115</sup>

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'*abandonneren ende den schippere laeten voor den vracht-loon, die hem daer mede moet te vreden houden*'.

<sup>108</sup> The section spoke of the goods being spilt, melted, destroyed, denigrated or otherwise depreciated or perished.

<sup>109</sup> The master, that is, of the carrying ship, ie, the carrier.

<sup>110</sup> See generally Goudsmit *Zeerecht* 222-224 and 227. Various other further possibilities existed. If the damage was due to the fault of the master or the crew, the carrier was liable to the owner for damages. If the damage was a general average loss, a contribution was recoverable from the other interests involved.

<sup>111</sup> See Goudsmit *Zeerecht* 232.

<sup>112</sup> *Inleidinge* III.20.17 ('*een bevrachter [mag] volstaen met afstand te doen van 't ingeladene goed, sonder dat hy voort in de bedongen vracht is gehouden*'). There it was mentioned by contrast to the master's right of retention over the goods for any unpaid freight (see III.10.16). Elsewhere Grotius (III.20.17) mentioned that the master who had sold cargo in an emergency could likewise '*volstaen met afstand van het schip* [to the consignors]'

<sup>113</sup> Thus, it was not mentioned in the Rotterdam *keur* of 1721. Interestingly enough, in s 152 of the Dordrecht *keur* of 1775, which was otherwise virtually identical to the Rotterdam *keur* of 1721, the old usage was again provided for. It was stated, namely, that in respect of vats that ran or leaked completely dry, the consignee did not have to pay freight as long as he abandoned the packing or '*fustage*' to the master. See Goudsmit *Zeerecht* 467.

<sup>114</sup> *Theses selectae* th 684 (ad III.20.17).

<sup>115</sup> See *rechten ad s 9 title II of the placcaat of 1563*.



already, as also a number of Amsterdam lawyers,<sup>116</sup> had thought it not or no longer possible.<sup>117</sup>

In the *Wetboek van Koophandel* the possibility of an abandonment of damaged goods in lieu of freight was retained in art 497-2, although with a much restricted field of application. It was possible, namely, only in the case of a loss of fluids and not, as earlier, in the event of the partial loss of any goods whatsoever.<sup>118</sup>

In French law, too, there was no unanimity on the notion of an abandonment of damaged goods in lieu of freight, and on the scope of its application.<sup>119</sup>

In English law the notion of an abandonment of damaged goods by the owner of those goods to the carrier in exchange for being relieved of his obligation to pay freight, was also not unknown. However, it was rejected from early on.<sup>120</sup>

The leading case on this point, *Dakin v Oxley*,<sup>121</sup> is notable, further, for the civilian authority referred to, both in argument<sup>122</sup> and by the Court itself. The Court held

<sup>116</sup> *Adviesen over den Koophandel* cons 8.

<sup>117</sup> Likewise, Van der Keessel pointed out, it was unsettled whether the master who had sold goods on board his ship in an emergency, could discharge himself by ceding the ship to the consignors as Grotius had stated. However, he noted, such a right was expressly granted by s 159 of the Rotterdam *keur* of 1721 but not by the largely identical Dordrecht *keur* of 1775.

<sup>118</sup> See Goudsmit *Zeerecht* 227.

<sup>119</sup> Thus, Pothier *Louage* l.3.2.59 thought that it was consistent with the principles of the contract of letting and hiring that when the goods of a freighter arrived at the port of discharge, the whole freight was due, however much they may have been accidentally damaged, even if they were not worth the freight. The master had performed in terms of the contract and the accidental damage to the goods was none of his concern. The freighter could therefore not abandon them for the freight. He noted, though, that Valin held the opposite view, namely that severe damage to the goods was equivalent to their total loss so that no freight was due to the carrier as long as those goods were abandoned to him. The position was otherwise, though, when the goods were damaged by the fault of the master or the crew, and then an abandonment was in fact possible.

<sup>120</sup> Thus, in *Shields v Davis* (1815) 6 Taunt 65, 128 ER 957 it was held that it was no defence against a claim for freight that the goods had arrived damaged, even if the damage was caused by the master, and even if the damage exceeded the amount of the freight. The principle was clear: the carrier was not entitled to freight only in the case of the arrival and the delivery of the goods in a sound and undamaged condition.

<sup>121</sup> (1864) 15 CB (NS) 646, 143 ER 938.

<sup>122</sup> In the absence of any English case on the point, reference was made *in arguendo* (at 649-652, 940-941) to French authority, including the *Ordonnance de la marine* of 1681. It was observed that the rule was probably introduced in earlier times to prevent disputes and litigation. Elsewhere (at 653, 941) it was noted, with reference to Kent's *Commentaries*, that Valin was in favour and Pothier against the right of an owner to abandon deteriorated or damaged goods in discharge of freight. The latter opinion, Kent thought, was the better one and it also agreed with the law of Rotterdam. Nevertheless, where the damage was caused by the fault of the master, the owner had a counterclaim although he remained liable for the freight.

On behalf of the defendant carrier, counsel sought to draw a distinction between damaged goods arriving *in specie* (in which case freight was due but a counterclaim arose if the damage was caused by the fault of the master) and damaged goods being either utterly worthless or being in a commercial sense of no value, i.e. if the adventure had become worthless, such as where the value of the goods on their arrival was less than the freight due. In the latter case, if such damage was caused by the

that the cargo owner was not entitled to raise, as a valid defence against a claim by the carrier to recover freight due for the carriage of his cargo, the fact that that cargo, damaged by the fault of the master or crew, had been abandoned<sup>123</sup> to the carrier in lieu of the freight due and in order to be discharged and excused from the payment of that freight. In this case the cargo was damaged to such an extent that upon its arrival at the port of discharge, it was worth less there than the amount of freight due on it, hence the owner's wish rather to abandon it than to pay the freight. According to the Court, the carrier had by his delivery of the cargo at the destination, substantially performed the contract<sup>124</sup> and was therefore entitled to his freight.<sup>125</sup> But while the owner of damaged but arrived cargo had no valid defence against a claim for freight, he was entitled to a right of cross-action or to counterclaim for damages, at least in those cases where the master or crew were at fault and the carrier liable for the damage to the goods.<sup>126</sup> The Court pertinently rejected the Continental view (which was in any case not held unanimously) that an abandonment was in satisfaction of freight,<sup>127</sup> and thought it 'unjust, and almost absurd that, without regard to the comparative value of

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fault of the master, freight was not due if the goods in question were abandoned to the carrier.

<sup>123</sup> At 665, 946 the Court pointed out that 'abandonment, in maritime law, involves a giving up of property'.

<sup>124</sup> This was essentially a question of fact but one which depended also on usage and the terms of the particular contract. Thus, if goods were actually lost or damaged to such an extent that no substantial part of it remained, it could possibly be argued that practically speaking no part of the cargo contracted to be carried, had arrived. Also distinguishable was the case where the goods (of the same quantity as shipped) arrived damaged (ie, a change in quality, not a loss in quantity). In both these cases the entitlement to freight depended on the terms of the contract of carriage as construed by mercantile usage regarding the carriage of that for which the freight was to be paid, and also on the factual question of whether and how much of the goods substantially arrived (see at 666-667, 946-947).

<sup>125</sup> At 665, 946 the Court explained that in English law freight was as a rule earned by the carriage to and the arrival of the goods at their destination, even if they did arrive damaged. If the goods were not carried to their destination, no freight was earned; if a part but not all of the goods was carried to the destination, no freight was earned in respect of the part not carried but freight was earned in respect of the part carried, unless the contract of carriage made the carriage of the whole consignment a condition precedent to the earning of any freight, something which, the Court noted, had not yet occurred in practice.

<sup>126</sup> Unlike American law, the Court noted, in English law no set-off or deduction was possible of the amount of damage from the amount of freight. Distinct proceedings had to be brought against the carrier, seemingly to allow for the speedy settlement of the liquidated demand for freight.

<sup>127</sup> See at 662-664, 945. This Continental view, it was explained, was based upon several notions. Firstly, that the cargo was the carrier's sole and exclusive security for freight and that, in the case of fortuitous damage, the owner ought to be allowed to free himself from any responsibility by abandoning the cargo. Secondly, that in the case of culpable damage, the freight was forfeited, something which was not considered consistent with the English law of contracts. The Court further noted that it was not a condition in Continental laws that the cargo should be worth less than the freight, although practically it was only in such a case, or where he wished to get rid of a troublesome adventure, that the cargo owner

the freight and cargo when uninjured,<sup>128</sup> the risk of a mercantile adventure should be thrown upon the ship-owner by the accident of the value of the cargo being a little more than the freight'.<sup>129</sup>

The rejection in principle of an abandonment of damaged goods in lieu of freight in *Dakin v Oxley* is entrenched in English law, at least in cases where there has been a substantial performance of the contract of carriage.<sup>130</sup> However, it has been held that the arrival of the goods in an unmerchantable condition was the equivalent of a total loss and of non-arrival of the goods, with the result that freight was not payable in respect of those goods.<sup>131</sup>

### 2.1.3 Abandonment and the Limitation of Shipowner Liability

A medieval principle of maritime law, introduced and justified in the public interest and for the advancement of trade, was that a shipowner could not lose more on an adventure than he had entrusted to or ventured on it. Accordingly, the shipowner's liability towards third parties for debts incurred or damage caused by the master of his ship, acting within the scope of his duties, was limited to the value of that ship. Judgment against the shipowner could be levied only against the ship, which was arrested for that purpose. By relinquishing or 'abandoning' his ship for that purpose and not appearing to defend the action personally, the owner in effect limited his liability to the value of his ship. He would adopt this course of action if the liability or the judgment in question was for an amount larger than what the ship was worth. If not he would, if he could, appear personally and pay the debt necessary to prevent his ship being sold in execution and to obtain her release.

Thus, the limitation of the shipowner's liability was achieved by a personalisation of his ship. The ship was, as it were, considered liable for the actions of and the debts incurred by her master in the prosecution of her voyage. But because it was impossible to institute an action against the ship, the action was directed at the person or persons who would be affected by her execution, that is, her owner or owners. Such an owner

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would exercise the right to abandon.

<sup>128</sup> But, of course, freight is determined with reference, to, among other factors, the value of the cargo.

<sup>129</sup> At 667-668, 947. It pointed out further (*ibid*) that 'a trifling damage, much less than the freight, would reduce the value to less than the freight; whilst, if the cargo had been much more valuable and the damage greater, or the cargo worth a little less than the freight and the damage the same, so as to bear a greater proportion to the whole value, the freight would have been payable, and the merchant have been put to his cross-action'.

<sup>130</sup> See eg *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267 (QBD) at 291 (the carrier is entitled to receive freight without the deduction (but subject to a counterclaim) if the goods are delivered in substantially the same condition as when they were loaded); *Henriksens Rederi A/S v THZ Rolimpex (The Brede)* [1972] 2 Lloyd's Rep 511 (QBD).

<sup>131</sup> See *Asfar & Co v Blundell & Another* [1896] 1 QB 123 (CA) at 132 where it was stated that in accordance with the principle in *Dakin v Oxley*, the total destruction of the goods was not necessary; the destruction of the merchantable character of the goods was sufficient to disallow a claim for freight. However, there was no mention in this case of any abandonment of such unmerchantable goods to the

was given a choice. By abandoning the ship, or by simply not appearing in the proceedings in which the ship was arrested, his personal and unlimited liability, to the extent of his estate, was terminated and a real limited liability, to the value of the ship in question only, was substituted.

This principle was also recognised in Roman-Dutch law.<sup>132</sup> Grotius,<sup>133</sup> for example, explained that shipowners (that is, those who enjoyed the freight of a ship) were liable to consignors for all the negligent acts and omissions of the master in the course of his duties. They were also liable to pay all bottomry and other debts or liabilities incurred by the master within his mandate.<sup>134</sup> But in all these cases, the owners could merely abandon their share in the shipowning (*'in alle de voorzeide ghevalen moghen de reders volstaen met afstand te doen van haer aendeel in de reedinghe'*) and so be relieved of their personal liability.<sup>135</sup>

Likewise, in the context of general average liability, Van der Keessel<sup>136</sup> observed that the master (that is, the owners) of a ship as well as the owners of saved goods could be relieved of (presumably any personal) liability to contribute in general average by abandoning and relinquishing (*'derelinquendo et cedendo'*) their ship or their goods.<sup>137</sup>

In other instances, though, the point of departure was that there was an automatic, *ex lege* limited liability of a shipowner without any actual or formal abandonment being relevant or required. There was no need for and no need to mention any abandonment. Thus, the limitation of a shipowner's liability did not occur by way of an actual abandonment of the value of the ship but rather merely with reference to that

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carrier.

<sup>132</sup> See in particular S'Jacob *passim* for a full treatment of what he refers to as 'afstand' or 'abandon' in Roman-Dutch and Dutch law and which he distinguishes from 'abandonment' in insurance law. See also eg Burger 24-30.

<sup>133</sup> *Inleidinge* III.1.32.

<sup>134</sup> More about this aspect shortly when the role of abandonment in connection with the bottomry loan is described. See § 2.1.4 *infra*.

<sup>135</sup> See also eg Grotius *De jure belli ac pacis* II.11.13; Schorer *Aanteekeningen* 410 (*ad* III.1.32); Voet *Commentarius* XIV.1.5 (it was possible for shipowners to free themselves, '*si totam partem suam totumque jus quod in nave eiusque apparatu habent, dereliquere ac creditoribus cedere parati sint*'); Van Leeuwen *Rooms-Hollands regt* IV.2.9; Groenewegen *De legibus abrogatis* XIV.11; Huber *Heedendaegse rechtsgeleertheit* III.25.20, Coren *Observationes* obs XL no 26; Bynkershoek *Quaestiones juris publici* I.19; *idem* *Quaestiones juris privati* IV.20. See too eg Fockema *Andreae Aanteekeningen* 247-248 (*ad* III.1.32) who added that shipowners were also liable for a delict of their master committed against persons other than consignors in so far as it involved an act committed by the master in the execution of his duties.

<sup>136</sup> *Theses selectae* th 794 (*ad* III.29.16); *idem* *Praelectiones* 1539 (*ad* III.29.16).

<sup>137</sup> This was provided for in s 119 of the Rotterdam *keur* of 1721 in the following terms: '*[d]og zal niemant, uyt hoofde van Avarye, verder aensprekelijk zijn als voor het Schip ende Goed, dat daar in moet dragen, zulx dat een ygelyk, met afstand van het zelve, zal mogen volstaan*'. See too Van der Linden *Koopmans handboek* IV.5.5, explaining that no owner was liable to contribute more in general average than the value of his ship or goods which were liable to contribute, because of the principle that everyone

value and without the need for any abandonment. Put differently, the actual abandonment of earlier times was replaced by a fictional abandonment. Thus, Grotius<sup>138</sup> noted that shipowners were not liable to the master (under the contract of employment) further than their share in the ship ('[r]eeders ... zijn aen de schipper niet verder gehouden als tot haar deel des scheeps').<sup>139</sup> This form of *ex lege* limited liability was also reflected, for example, in art 167 of the Rotterdam *keur* of 1721 where it was simply provided that shipowners would not be liable for the actions of their master any further than their share in the ship ('De Reeders zullen door geene daad van den Schipper buyten haar ordre geschied, verder kunnen werden verbonden als tot haar aanpart Scheeps').<sup>140</sup>

The link between the limitation of shipowner liability and the abandonment of the ship (or the share in the ship) as the means by which to achieve it, was retained in the *Wetboek van Koophandel*.<sup>141</sup> In terms of art 321, the owner of a ship, and co-owners proportionally to the extent of their shares, are liable for the acts of and the obligations incurred by the master in respect of that ship. This liability ceases upon the abandonment ('afstand') of the ship together with the freight earned and still to be earned on the voyage to which the acts and obligations relate. This abandonment takes place, according to the article, by way of a declaration in a notarial deed. Therefore, by abandoning the ship and her freight, the owner is released of all further liability arising from the master's actions performed and obligations incurred in connection with the ship. Effectively his liability is thus limited to the value of the ship and the freight. The shipowner therefore has a choice: whether to pay in full or whether to abandon the ship and freight.<sup>142</sup>

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was released from liability by abandoning such a ship or goods.

<sup>138</sup> *Inleidinge* III.20.48.

<sup>139</sup> See too Van der Keessel *Theses selectae* th 697 (*ad* III.20.48).

<sup>140</sup> Surprisingly, Amsterdam maritime law in the seventeenth and eighteenth centuries contained no provisions on the liability of the shipowner for the acts of the master and therefore also nothing on any possible abandonment in this connection.

<sup>141</sup> The system adopted by the *Wetboek* was one of an unlimited liability of the shipowner with a right of abandonment. Some of the earlier drafts had adopted a system of limited liability *per se* without any formal abandonment being necessary. The choice was therefore between an *ex lege* limited liability and an unlimited liability with a limitation only upon an abandonment. There was clearly a close link between the limitation of liability and abandonment, but abandonment was only relevant where the point of departure was one of an unlimited liability with a limitation of such liability, at the choice of the debtor, being achieved by way of abandonment. No abandonment was considered necessary where the point of departure was a limited liability.

<sup>142</sup> The third-party creditor has no such choice. In a sense art 321 creates a facultative as opposed to an alternative obligation between the liable shipowner and the third party, and the drafting of a deed of abandonment is the formality required by law from the debtor to signify the facultative choice. For a

## 2.1.4 Abandonment in the Case of Bottomry

The application of the notion of abandonment in the case of the bottomry loan was but an illustration of the general principle of the limitation of shipowner liability just described. Because of the close relationship between bottomry and insurance, though, a few further remarks may be apposite.

There was some uncertainty in Roman-Dutch law as to whether abandonment or at least a principle akin to it could apply in the case of a bottomry loan. In an opinion in 1607<sup>143</sup> the view was expressed that there was no evidence of a notorious and general custom that in the case of loss of the secured ship, the owner or master, who was relieved of the liability to repay the loan, had to abandon her or what remained of her and her equipment to the profit of the holder of a bottomry bond over her so as to afford a preference to the latter. Two years later, in 1609, it was thought in another opinion<sup>144</sup> that the lender on bottomry on a ship's hull and equipment had no right to the remains of the ship and her equipment or to the proceeds of a sale of such property. Therefore, a lender on bottomry had no right equivalent to the insurer's right to salvage, and there was no duty on the bottomry borrower to abandon secured property to the lender.

However, in an opinion in 1663<sup>145</sup> a contrary view was expressed, namely that the bottomry lender was in fact entitled to salvaged equipment belonging to the secured but lost ship (*'een Schip komende te verongelukken, waar van eenige Scheepsgereedschap is gebergt, werd verstaan een Bodemer geregtigt te zyn op de afkomste van het Scheep-gereedschap, of ter concurrentie van het zelve zyne Bodemerye'*). The reason for this view was that the lender bore the risk or perils of the sea and in exchange obtained the ship and her equipment as security, as a result of which anything recovered or salvaged of her had to accrue to his benefit (*'omdat het Schip en Scheepsgereedschap aan hem is verbonden, en dat dienvolgende alles dat gebergt word, moet komen tot profijte van den Bodemer'*).

The latter view was the one endorsed by Bynkershoek<sup>146</sup> who explained that the earlier opinions of 1607 and 1609<sup>147</sup> had incorrectly assumed that the security provided by the ship was lost simply because a part of the ship was lost. The ship and any part of her secured the debt and was and remained available to the lender in the event of the debt not having to be or not being repaid.

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detailed analysis of the meaning of the term *'afstand'* in art 321, see Nijkerk.

<sup>143</sup> See *Hollandse consultatien* vol IV cons 124.

<sup>144</sup> See *Hollandse consultatien* vol IV cons 111.

<sup>145</sup> See *Nederlands advysboek* vol II adv 13.

<sup>146</sup> *Quaestiones juris privati* III.16.

<sup>147</sup> Which had held that the bottomry lender was not entitled to the recovered or salvaged ship or any part of her or her equipment in the absence of an established custom that the shipowners were obliged to abandon the hull and equipment (*'dat Reeders gehouden waren het hol en gereedschap te*

It also came to be accepted that while the shipowner was bound by a bottomry loan contracted by his master abroad within the scope of his authority, he could relieve himself of the obligation in terms of a bottomry loan by relinquishing his share in the ship to the bottomry lender.<sup>148</sup> Presumably this occurred by way of abandonment by the owner to the lender. While the latter thus lost the right to claim a repayment of the loan plus interest, he could recoup his loss out of whatever could be recovered of the secured property.

The same principle applied where in an emergency the master was unable to obtain a loan abroad, and where he sold some of the cargo there, as he was permitted to do as long as he recompensed the owner of the cargo in question for the amount that cargo would have obtained at its destination. It could happen that so much of the cargo was sold that its value exceeded the then current value of the ship which could, for example, have been damaged by a storm. The master could then abandon the ship to the owner or owners of the cargo concerned.<sup>149</sup>

## 2.2 Abandonment by the Insured to the Insurer: Background

The legislative provisions in Roman-Dutch law with regard to the insured's abandonment to his insurer are numerous and detailed. But while abandonment was known from early on in insurance practice, more precise details of its nature and operation only emerged and only came to be so extensively regulated in the first round of municipal *keuren* at the end of the sixteenth and the beginning of the seventeenth centuries. The system established by that initial regulation remained in place until the end of the eighteenth century and was also, by and large, taken over in the *Wetboek van Koophandel*.

For a proper appreciation of the particulars of the doctrine of abandonment, it is important to understand something of the background against and the aim with which it was introduced in insurance law.<sup>150</sup>

It was of the utmost importance to merchants who insured their ships and cargoes that, in the case of a loss, they should be paid out by the insurer as soon as possible so that the capital lost but reimbursed could be reemployed in their

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*abandonneeren*).

<sup>148</sup> See eg Grotius *Inleidinge* III.1.32; Van der Keessel *Praelectiones* 1029 (*ad* III.1.32). Likewise, if the secured ship was stranded or otherwise lost on land (so that something of her remained), there was a total loss (which, of course, freed the borrower of his obligation to repay the loan) and the preservation and control of the ship fell to the bottomry lender and not to the borrower. See further Van der Keessel *Praelectiones* 1192 (*ad* III.11.2).

<sup>149</sup> See eg Grotius *Inleidinge* III.20.17. Van der Keessel (*Praelectiones* 1394 (*ad* III.20.17) thought that there was no authority for any abandonment in this instance, but only eg where the ship had damaged another ship and when the owners could abandon her to the owners of other vessel involved (ie, only, it would appear, in the case of delictual liability and not in the case of contractual liability). However, the saved or salvaged ship could have been given up in Rotterdam where the abandonment of the ship was specifically sanctioned in such an instance by s 159 of the *keur* of 1721 which provided that '*[d]en Schipper eenig Goed, ter nood, hebbende verkogt, zal mogen volstaan met afstand van het schip*'.

<sup>150</sup> On the background to and details of insurance abandonment, see generally the significant

businesses. Ordinarily that was quite possible. As soon as the loss and the extent of the loss could be established and the insurer notified, the insured could expect to be paid. However, situations did arise in practice where a speedy payment was not possible because the conditions for such payment, namely, more specifically, certainty about the occurrence and the extent of the loss, did not yet exist and could in fact never even come to exist.<sup>151</sup> The occurrence, nature and extent of losses were not always final and irreversible. They could, for the time being, be at most likely, possible or probable, or they could even be reversible, both as regards their occurrence and as regards their extent and nature. The prevalence of such circumstances was obviously enhanced when the insured and his lost or damaged goods were separated geographically, a separation aggravated if anything by the lack of proper channels of communication to enable him to ascertain the fact and the extent of his loss with speed and certainty.<sup>152</sup>

It would have been unacceptable in practice if the insurer were to pay only for a real or actual total loss, about the occurrence and nature of which there was certainty, and if the insured had to wait until there was certainty as to such occurrence and the extent of his loss and, importantly, until he could meet the burden of proof resting on him in this regard. This was especially so in view of the fact that in appropriate circumstances such certainty could never be arrived at. For the insured, for example, to be deprived of the use and possession of insured property for an indefinite or indeterminate period of time while he was, in the meantime, also not able to obtain compensation from his insurer because he was unable to prove the occurrence and extent of his loss satisfactorily, was tantamount, in an economic sense, to a total loss of that property. The commercial disadvantages of the system and requirements of proof by the insured had to be alleviated.

The merchant had to be enabled by his insurance to be placed in the position where he could, in one form or another, recover the capital he had invested in the maritime venture in question as soon as was reasonably possible. If insurance could not achieve this, it would in many instances have had little if any benefit for and attraction to merchants. An undue delay in the settlement of losses could have defeated the purpose of insurance. Clearly the law had to provide a solution for insurance to retain its aim in such circumstances. An outcome was eventually provided by the adoption of the doctrine of abandonment.<sup>153</sup>

An early solution to the problem just sketched, was to make payment by the insurer for a loss provisional. As soon as certainty as to the occurrence and/or extent

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contributions of Aschenheim; Bewer; Halberg; Schook *De derelictione*; and Smeding.

<sup>151</sup> Smeding 28-29 notes that abandonment was intended, first, to bring certainty in specific cases where it was uncertain whether or not a loss or a total loss would in fact occur or had in fact occurred, and secondly, to eliminate the need for the calculation of the precise extent of a loss in cases where, as far as the insured was concerned, the loss was economically a total loss even if not factually one.

<sup>152</sup> Thus, losses far from the port of departure or the place of insurance made the calculation and proof of the extent of the loss difficult if not impossible and at least unpractical, both as regards the cost and the time involved.

<sup>153</sup> See further on the basis of insurance abandonment eg Dorhout Mees *Schadeverzekeringsrecht*



of the loss then emerged, the insured had to make the necessary correction in the earlier assumption of the occurrence and nature of the loss by way of a repayment, in full or in part, of the amount he had provisionally received from the insurer. He also had to provide security to the insurer for such possible repayment. However, this solution was clearly not satisfactory. Until certainty could be established, the settlement of the claim between the parties could not be finalised, and it was possible that that could never happen. This solution was not acceptable because the insured merchant was not placed by the insurance payment in a position where he could commit the capital received from the insurer to a fresh maritime venture. This arrangement, clearly, could do no more than perpetuate, albeit in another form, the uncertainty which it was sought to avoid. The payment by the insurer had to be made final in some way or another. This was made possible by the abandonment of the insured property to the insurer in return for a final payment for a total loss. Put differently, at first the loss was only rebuttably presumed to have occurred and to have been a total loss. A subsequent change in the circumstances then reversed the parties' position fully or in part. Only when, through an abandonment, the loss could irrebuttably be regarded as having occurred and as being a total loss, was the required finality obtained. If it subsequently appeared that there had in fact been no loss, or that the loss which had occurred was not total, the insured did not have to return the insurance payment because in exchange for the payment of the full sum insured, the insurer had obtained the insured property by way of abandonment. In exchange for receiving a final payment from the insurer, the latter was entitled to the rights of the insured over the insured property. The insurer was entitled to ownership of the insured object in exchange for giving up the right to recover the sum insured if it later appeared not to have been due at all or not in the amount paid out.<sup>154</sup> In consequence, changed circumstances did not result in a breach of the indemnity principle which would have favoured the insured at the expense of the insurer.

However, abandonment was only permitted to have this salutary effect upon the claims process in specific circumstances. Broadly speaking, the law accepted a total loss to have occurred, so that final payment was due in terms of the insurance contract, in circumstances where the occurrence of a loss was probable but not yet certain, or where it was probable but not yet certain that the loss which had occurred, would amount to a total loss. In such cases, although there may not yet have been an actual total loss, the probability of such a loss already sufficiently established a loss in an economic sense for the insured, and justified the law treating it in the same way as if a total loss had actually occurred. Therefore, even if there was no certainty yet as to the actual total loss of insured property, the fact that the commercial purpose of an insured voyage was frustrated, was in appropriate instances sufficient for the property to be regarded as having been totally lost. The degree of probability of the occurrence of the

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637-638.

<sup>154</sup> The law in appropriate cases therefore presumed a total loss even if, as it subsequently appeared, there was in fact no loss at all or at least no total loss. In the case of an insurance contract, therefore, a total loss occurred not only when the thing insured was absolutely lost and destroyed and nothing was left of it. A total loss also occurred in instances when the insured property was actually undamaged or only partly damaged. The word 'abandonment' in fact conveys the notion that it was to apply where the insured property was not wholly lost, for it was impossible to abandon that which did not exist or which

loss, or of the loss being or becoming a total loss, in turn generally determined the time when the insured could obtain the provisional payment, or could abandon and obtain a final payment. Abandonment was possible either immediately or only after a specified period of time. In some cases the probability was so strong that there was no need to wait for a change in the circumstances, while in other cases he insured was required to wait because some possibility still existed of there appearing not to have been any loss at all, or of it appearing only to have been a partial loss.

While there is no doubt that abandonment was in an economic sense a very necessary doctrine to ensure the viability and efficacy of the insurance contract, it was also not only open to abuse, against which the law had to guard, but its scope also had to be kept within strict limits.<sup>155</sup> For instance, the insured could not be permitted to abandon insured property to the insurer whenever his venture turned out to be less profitable than he had hoped. But the insurer had to be protected more generally too. Not being in the business of shipowning and trading,<sup>156</sup> the insurer was obviously more interested in paying the insured the precise amount of his actual loss rather than the full sum insured in exchange for an abandonment of the insured property. By such abandonment he would be burdened with the ownership of the property which he had insured and which, even had he wanted to own it, was probably of little practical use in the condition in which it was, if it were not in fact a financial liability. The law therefore had to ensure that insurers were not burdened with the ownership of insured property any more than was absolutely necessary to give effect to the aim of abandonment.

For these reasons Roman-Dutch law, like other contemporary systems, prescribed in precise detail the circumstances under which an abandonment by the insured was justified, the time within which it could occur, and the way in which the insured had to abandon.

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no longer existed. As to the different types of total loss, see again ch XV § 3 *supra*.

<sup>155</sup> See eg Asser *NBW* 246; Voorduin vol X at 396-397.

<sup>156</sup> Although this may have been less the case in earlier times when insurers were not specialist professionals but general merchants who also happened to insure. See again ch IX § 2.3.2 *supra* as to

## 2.3 Insurance Abandonment in Roman-Dutch Law

### 2.3.1 Introduction

In Roman-Dutch insurance law the question of abandonment arose in two types of situation. In the one situation there was no loss or at least no certainty that a loss had in fact occurred. After the expiry of specified period of time, a legal presumption arose that a loss had in fact occurred. By reason of the circumstances under which this presumption arose, namely the disappearance without trace of the insured ship and her cargo, the presumed loss was a total loss and the full sum insured had to be paid out. Before the insured could claim for that loss, though, he had to abandon the insured property to the insurer so that if the ship or the cargo subsequently reappeared, she or it belonged to the insurer. This situation, where the insured ship or goods had gone missing and where a presumption of loss arose, has already been considered in detail earlier<sup>157</sup> and will be referred to in this chapter only in passing.

In the second type of situation there was a loss. However, it was factually not a total loss but merely a total loss in an economic sense.<sup>158</sup> In this situation the insured was permitted to abandon and to claim for a total loss despite the absence of an actual total loss. He was permitted to do so, depending on the nature of the loss in question, either immediately (namely when the total loss was unavoidable or its eventual occurrence certain), or after a specified period of time, it being regarded that if the situation had not been reversed during that time and the nature of the loss had not altered in the insured's favour,<sup>159</sup> the loss had to be regarded as a total loss in an economic sense.

The two types of situation therefore have in common that the insured had to abandon the insured property before he could claim from the insurer. In both cases there was an uncertainty, either as to whether a loss had occurred at all, or as to what type of loss had occurred. For the sake of legal certainty and the benefit of insurance

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the incidental part-time underwriter.

<sup>157</sup> See again ch XV § 6 *supra*. Mullens 70 is of the view that the problems arising in the case of such '*tijdingloosheid*' were the true origin of abandonment in the context of insurance. Van Asch van Wijck 18-21 likewise remarks that abandonment was derived initially from the case where no news had been received of the insured ship and where a presumption of loss thus arose. This may well be correct. The need for abandonment to bring an end to the uncertainty was most pressing in that case. Where the insured property had simply disappeared without any trace, the alternative for the insured would have been to await the reappearance of the property in question, or the emergence of certainty as to its loss, something which would very possibly never happen.

<sup>158</sup> In the course of time, cases were added in which the loss or damage of the insured ship or cargo had occurred but where the extent of such loss was uncertain and where it was legally presumed to have been a total loss. From the seventeenth century onwards, insurance laws as a rule all provided for abandonment in such cases.

<sup>159</sup> The insured, it must be remembered, was under a duty and insurer was possibly even entitled to avert

practice generally,<sup>160</sup> a legal presumption arose either as to the fact or occurrence of the loss or as to the nature of the loss. On the basis of that presumption, the insurer paid out and did do finally and without any obligation on the insured to return the payment if the presumption later turned out to have been false.

However, in another sense the two types of situation also differed fundamentally. In the first there was a presumption about the occurrence of the loss. In the latter there was a presumption about the nature of the loss which had occurred.

In Roman-Dutch law the insured usually had to wait a specified period of time after the occurrence of the event or the circumstances justifying an abandonment, before he could actually abandon the insured property to the insurer and claim payment on his policy as for a total loss. This period of time was allowed in order to see whether the circumstances<sup>161</sup> which justified the abandonment did not change in such a way as either to exclude the claim on the policy totally,<sup>162</sup> or to permit only a claim for a partial loss,<sup>163</sup> or to render the claim one for an actual total loss.<sup>164</sup> If upon the expiry of the period in question, the factual situation had not changed and there was no greater certainty about the nature of the loss, the insured had the option of regarding it as a total loss, to abandon the insured ship or goods to the insurer, and to claim on that basis for a total loss.

The period of time which the insured had to wait was statutorily fixed in Roman-Dutch law with reference to the length (the location of the destination) of the voyage in question. It was no more than the period which the legislatures regarded as a reasonable period of time in the circumstances for the parties to wait for the situation to resolve itself, and before the law brought certainty and finality to their relationship if the situation did not resolve itself in one way or another.

Only in certain cases did either the nature of the loss or the circumstances under which it had occurred,<sup>165</sup> or the nature of the insured property involved,<sup>166</sup> render a waiting period unpractical, and could the insured abandon and claim for a total loss immediately upon the occurrence of the event or circumstances justifying the abandonment.

There was no doubt in Roman-Dutch law that the abandonment of insured property transferred the ownership in that property to the insurer. The insured abandoned

<sup>160</sup> The aim was to eliminate disputes about whether there was a loss, what type of loss it was, and when it had occurred; to finalise the claims procedure once and for all and in the process to ensure the payment of losses within a reasonable time so that the insured was enabled to continue his business.

<sup>161</sup> Such as an arrest of the insured property by the authorities.

<sup>162</sup> Such as when the arrested ship was released during that period of time.

<sup>163</sup> Such as when the arrested ship was released in a damaged condition.

<sup>164</sup> Such as when the arrested ship was declared forfeited.

<sup>165</sup> For example, where a total loss was almost certainly to follow, as in the case of a capture of the insured property by pirates.

<sup>166</sup> For example, perishable goods.

the property not to the whole world; so that it became *res nullius* and susceptible to occupation by any finder, but only to and for the benefit and profit of the insurer or insurers of that property. Possibly for this reason the abandonment was accompanied by some outward formality by which the insured's intention to abandon the property to the insurer and to the insurer only had to be manifested. But while there was no doubt on this point, Roman-Dutch authors did not venture any theoretical explanation as to how, by this abandonment, the transfer of ownership from the insured to the insurer could be explained and how that fitted into the received law of things. At any rate, they did not investigate the earlier Roman law on this point to ascertain, for example, whether or not insurance abandonment could be construed as a form of *traditio incertae personae*.<sup>167</sup>

Before proceeding to an investigation of the particulars of insurance abandonment in Roman-Dutch law, it is necessary to stress one aspect often conceptually and terminologically confounded in the sources. The right of abandonment or, better, the right to abandon insured property, was a right - and not an obligation - accruing in appropriate circumstances to the insured, and not to insurer. It was the insured's right, in appropriate cases, by abandoning the insured property to the insurer, to claim from the latter as if a total loss had occurred. The insured had the choice of abandoning the insured property but did not have to abandon in such circumstances. The insurer himself, therefore, had no right to demand an abandonment from the insured in those circumstances. Where, however, the insurer had paid out for a total loss, whether or not in circumstances justifying an abandonment, whether or not there had been an abandonment, and whether or not there was in fact an actual total loss, and the insured had claimed and/or accepted such a payment; the insurer was entitled, as against the insured, to whatever remained of the insured property which was or would later come into the latter's possession. This was the insurer's right to the remains of the property insured, also referred as his right to salvage.<sup>168</sup> It was also on occasion referred to as his right to abandoned property which then, confusingly, became abbreviated to his right to abandonment.<sup>169</sup> This right to salvage was a right which he had as against the insured, and the aim of which was to ensure that the principle of indemnity was not breached. The insurer's right to salvage served to maintain the indemnity principle in

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<sup>167</sup> See again § 2.1.1 *supra*.

<sup>168</sup> As already explained (see ch XV § 3 *supra*), a total loss did not necessarily involve the total destruction of the insured property so that nothing whatsoever of it remained. Apart from the case where the insured was irrevocably deprived of the property, such as in the case of a capture by the enemy, and in which case the ship may not have been damaged at all, there was also a total loss where, eg, a ship was reduced to nothing more than a wreck (a pile of planks) and could not be called a ship any more. Her remains, however, were often worth at least something and for this reason the insurer had a right to those remains or what could be salvaged of the insured property.

<sup>169</sup> Of course, the insurer's right to salvage may have been exercised or given effect to by the insured abandoning the property in question to the insurer and could in appropriate circumstances have been a right to abandoned property which, after it had been abandoned to the insurer, came into the hands of the insured, such as when captured insured property, abandoned to and paid for by the insurer, was returned to the insured.

insurance law and could, like the insurer's right of recourse,<sup>170</sup> but unlike the insured's right of abandonment, not be excluded without affecting the nature of the contract as one of indemnity.

The doctrine of abandonment in Roman-Dutch law will be discussed with reference to the various legislative provisions and, where possible, with reference to the matters just mentioned, namely the circumstances under which an abandonment was justified; the time when the insured was entitled to abandon; the method of abandonment; and the effect of an abandonment.

### 2.3.2 Insurance Abandonment in Early Insurance Law

It is possible that the origin and legal basis of the notion of abandonment in the insurance context may be sought in the close relationship between the early insurance contract and the contract of sale and in the view that the insurance contract was in fact a form of sale.<sup>171</sup>

More specifically insurance was regarded as a form of simulated sale of the insured property by the insured to the insurer against the payment by the latter of the sum insured. This sale was regarded as being subject to the resolute condition of a safe arrival of the property in question. The sale was accordingly effective from its conclusion, the property in question being at the risk of the insurer from that moment. Only if the property arrived safely at the destination, did the sale fall through. Otherwise the insurer remained owner of it, and he, and not the insured, was entitled to claim and retain the property in question. On the occurrence of a total loss, and on the insured claiming the sum insured, the insured on his part had to transfer the actual property in question to the insurer. The way in which this occurred was by an abandonment by the insured to the insurer of all his rights in the property, the insured himself usually not being in possession of the property at the time of its loss. Abandonment therefore fitted comfortably into this insurance-sale analogy, even more so at the time when insurance contracts were still disguised as sales.<sup>172</sup>

However, as already illustrated, the notion of abandonment was not peculiar to the insurance contract and to its law. It was not unknown in maritime law generally and in the law relating to the carriage of goods in particular, and may well have been adopted from there into the insurance law where it served the same purpose, namely to simplify the settlement procedure.<sup>173</sup> Just as the cargo-owner or consignor was legally assisted and accommodated in the case where there was uncertainty as to the occur-

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<sup>170</sup> See again § 1 *supra*.

<sup>171</sup> See again ch I § 4.1 *supra*.

<sup>172</sup> See further on this point eg Holdsworth *History* vol VIII at 278; Nehlsen-Von Stryk *Seeversicherung* 332-333; De Roover 'Early Examples' 186; and Sanborn 247.

<sup>173</sup> See in particular the comments and arguments in this regard of Landwehr *Review* 420-422. The fact that the carrier was at times also the insurer of the cargo he carried, may also have facilitated such an analogous application.

rence or extent of the loss, so too was the position of the insured enhanced in similar circumstances. The uncertainty was simply replaced by a presumed certainty on the basis of which the insured's claim was settled and the parties' relationship was terminated. Abandonment was employed to correct any imbalance between the insured and the insurer resulting from the presumption later turning out to have been false, in the same way as it was used for the same purpose between the cargo owner and the carrier. The application of abandonment in the law of carriage avoided the need to calculate proportional freight because, by the cargo owner's abandonment of the goods to the carrier, the loss, even if not actually a total loss, was turned into a total loss so that no freight at all was payable. Likewise, in the case of an insurance, abandonment avoided the need to calculate a proportional part of the sum insured. By the insured's abandonment of the insured property to the insurer, a total loss was presumed, irrespective of the fact that there may not have been any loss at all or that the loss which did occur, may have been merely a partial loss. As a result the settlement of the claim was straightforward: the full sum insured was payable. The only important difference between abandonment in the context of carriage and abandonment in the context of insurance,<sup>174</sup> was the fact that unlike the carrier, the insurer was ordinarily not in possession of the property abandoned to him, a difference which subsequently resulted in some considerable difficulty in satisfactorily explaining the ownership-transferring effect of an abandonment in the absence of any actual delivery of the property by the insured to the insurer. Nevertheless, the fact that abandonment found application only in certain circumstances and not whenever there was a loss, would tend to discount the fact that it was derived from the nature of the insurance contract itself, or that the ownership of the abandoned insured property passed solely by virtue of the nature of the insurance contract as one of an insurance-sale.

It would appear, therefore, that abandonment was not in any way clearly linked to the sale or insurance-sale agreements of the fourteenth century. It was merely the method by which the process of the payment of sums of money, be it freight or an indemnification, was simplified in the maritime trade. It was an integral part of a process by which a loss which was uncertain as to either its occurrence or its extent, was by legal presumption converted into a total loss, so that a simplified settlement of the maritime claim could take place on that basis without further delay. Abandonment in the insurance context is therefore no more than an analogous application of abandonment as it occurred in other areas of maritime trade. It was an ancient legal institution which was applied, at first only sparingly, to a newly evolved legal relationship to which the insurance contract gave rise.

The reason why the role of abandonment in early insurance law was relatively moderate and its application relatively restricted, was because compulsory and customary under-insurance<sup>175</sup> impeded the application of the notion of abandonment to

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<sup>174</sup> Terminologically the instances are not always clearly distinguished. In English the term 'abandonment' is used for both. A little better is Dutch which distinguishes between insurance '*abandonnement*' and carriage '*abandon*'. Most clearly is French which employs the term '*délaissement*' for insurance abandonment while retaining the word '*abandon*' for the carriage situation.

<sup>175</sup> See again ch XVIII § 5.1 *supra*.

achieve a simplified payment for a total loss. In the case of under-insurance, which was more often than not compulsory, the abandonment, if any, also had to be proportional. If that was to be the case, its application did not result in any simplification of the claims settlement, seeing that the calculation of the proportion in question involved the precise determination of the extent of insured's loss, something it was sought to avoid. Only when compulsory under-insurance gradually came to be ignored in practice from the seventeenth century onwards,<sup>176</sup> could the doctrine of abandonment begin to have its full effect in insurance law and did its principles come to be established and worked out in more detail.

As already alluded to earlier, abandonment was not applied to the insurance contract right from the start. At first, in circumstances where the occurrence or the extent of a loss was uncertain, the insured was paid out as for a total loss but had to return the insurance payment or part of it to the insurer if it subsequently appeared that there had been no loss or something less than a total loss. The payment was therefore merely provisional.<sup>177</sup> There was as yet no application of the notion of abandonment to terminate any uncertainty regarding the occurrence or extent of the loss. This appears to have been a fairly general position throughout Europe and to have been part of early customary insurance law.<sup>178</sup>

In the course of time, the advantages of abandonment were no doubt realised and it came to be implemented in appropriate circumstances in the insurance context as in other instances of maritime losses. However, the development of the legal principles relating to insurance abandonment was slow.

The early authors on the insurance contract had not yet worked out all details of abandonment. Santerna,<sup>179</sup> for example, considered the question to whom lost insured goods belonged if they were subsequently found or recovered: to the insured owner or to the liable insurer? He answered that if insurer had not yet paid out on the policy, the goods belonged to the insured and the insurer was, by reason of the recovery of the goods, released from his liability to pay for them. The insurer's obligation on the policy was conditional on the goods being lost, and if they were afterwards<sup>180</sup> recovered, they

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<sup>176</sup> See ch XVIII § 5.4 *supra*.

<sup>177</sup> See eg De Roover 'Early Examples' 189.

<sup>178</sup> Thus, Lopez & Raymond 261-263 provide a translation of an insurance claim settlement from Marseilles dated 1438. It appears from it that a consignment of wine was insured by a Genoese underwriter in the name of a Florentine merchant residing in Avignon on a voyage from Marseilles to Flanders. The ship and her cargo, including the wine, were captured and detained by the Portuguese. A claim was instituted on the policy, with the claimant promising and pledging that if he managed to recover the wine afterwards, he would be liable to return to the insurer twice the amount claimed and received by him under the insurance.

<sup>179</sup> *De assecurationibus* IV.45.

<sup>180</sup> That is, presumably, after their loss, but before payment for them had been made.



could not be said to be lost.<sup>181</sup> By contrast, he explained,<sup>182</sup> if the insured goods were recovered only after the insurer had paid their estimated value to the insured, the insurer could not, by returning the goods to the insured, demand a repayment of the sum paid out to the latter; and neither could the insured refuse to pay the premium until the goods had been returned to him. The implication, therefore, was that the insured goods belonged to the insurer, no doubt by reason of their abandonment, although Santerna did not say so.

The same distinction between the recovery of insured goods before and after payment by the insurer in terms of the policy was later also drawn by Roccus.<sup>183</sup> The insurer was liable to pay in terms of the policy for a total loss of goods which had been arrested by foreign authorities after the insured owner had given him a cession of action to enable him (the insurer) to recover the goods or their value from the arresting powers (*'facta prius per dominos mercium cessione ad beneficium assecuratorum pro recuperandis illis mercibus vel pretio ipsorum'*).<sup>184</sup>

The recognition of the application of abandonment in the context of the insurance contract occurred in Italy and elsewhere. Thus, Venetian law in the fifteenth century was familiar with the abandonment of the insured property or whatever remained of it in appropriate instances of loss, in exchange for the final payment of the full sum insured by the insurer.<sup>185</sup> Abandonment was primarily the way in which the insured could be enabled to obtain a speedy payment on his policy. The rule applied in Venice that after the expiry of a period of two months from the receipt of news of a casualty, the insured could claim payment in terms of the insurance contract. At that time this period was usually too short to determine the extent of the loss precisely, and only by the application of abandonment was it possible for the process to be finalised sooner than would otherwise have been possible. Abandonment was generally permitted only when a total loss was not yet certain while a partial saving of the goods was not excluded, or when a partial loss could not be ascertained accurately because

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<sup>181</sup> He disagreed with the view that in such a case they belonged to the insurer on the basis that the insured, by the payment of the premium, had bought the estimated value of the goods from the insurer so that when the risk materialised, ownership in the goods immediately passed to the insurer.

<sup>182</sup> *Idem* IV.47-48. See too Casaregis *Discursus* I.151; and Gärtner 339-340.

<sup>183</sup> *De Assecurationibus* note 50, where he explained that in the case of a recovery before payment, the insurer was entitled to be relieved of the obligation to pay and could compel the insured to accept the goods, subject to the insurer having to compensate the insured for any damage to (ie, partial loss of) those goods. In the case of a recovery after payment, the insured, according to Roccus, had a choice whether he wanted to receive the goods back against a repayment of the amount he had received from the insurer, or whether he wanted to retain the amount paid out to him in which case the insurer became or remained the owner of the goods. Presumably the insurer could not delay payment to the insured in anticipation of a possible recovery of the lost goods and in an attempt to avoid having to make any payment under the policy.

<sup>184</sup> *Idem* note 54. Feitama's comment on this later explained that this cession of action was in Holland referred to as '*abandonnement*', and that it had to be notified properly to the insurers.

<sup>185</sup> See generally Nehlsen-Von Stryk *Seeversicherung* 297-343; and also Asser *Review* 484; Koch *Review* 337; and Landwehr *Review* 420-422.

the saved goods were in a foreign port and not in their port of departure or destination. In hull insurance the same principles applied and abandonment was also possible in the case of shipwreck or of enemy capture. In the case of under-insurance, which was the rule, any abandonment was proportional. The transfer of the right of ownership in the case of abandonment did not occur automatically but required a formal declaration by the insured, although no judicial or official intervention or order was deemed necessary.

After the earlier insurance laws of Barcelona in the fifteenth century contained nothing on it,<sup>186</sup> abandonment in the sense of a relinquishment of lost or damaged insured property by the insured to the insurer against payment of the sum insured by the latter, was legislatively recognised for the first time in the Burgos Ordinance of 1538 under the name '*dexacion*'.<sup>187</sup> Already in that measure the exercise of the right of abandonment was linked to specified periods (which depended on the destination of the voyage on which the accident had occurred) after the occurrence of a loss or a casualty within which the insured had to abandon the insured property or lose the right to do so.<sup>188</sup> Abandonment not only took place when the insured property was completely lost to the insured, such as in the case of enemy capture or a shipwreck, but also in some cases where the goods were merely damaged. A partial abandonment, possible in the case of earlier Burgos laws, was later abolished and then only the abandonment of a whole cargo was possible. It seems, though, that the principle of the indivisibility of the abandonment was not yet fully accepted, for later, again, a median solution was followed. If the cargo consisted of only one type of goods, only a complete abandonment was possible, but if the consignment was made up of different species of good, the abandonment of all the goods of the same sort only was possible. The insured's formal declaration of abandonment had to take place through the secretary of a merchants' guild in Burgos.

### 2.3.3 The Position in the Low Countries in the Sixteenth Century

At first, it would seem, the abandonment of insured property to the insurer in return for the payment of a total loss by the latter was not recognised, or at least not fully recognised, in the Low Countries.

Thus, some sixteenth-century policies contained a stipulation for the repayment of the sum received in terms of the policy for a loss of the insured property should such property be recovered within a particular period of time. The insured may have had to

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<sup>186</sup> It seems that abandonment played no role in the early insurance law in Barcelona. In the case of loss or damage, the insured simply had to prove the occurrence and the extent of the loss, however difficult that may have been. There was no provision even for a provisional payment on the (reversible) presumption of the occurrence and nature or extent of the loss. The same was true when the insured ship or goods went missing, even if for a prolonged period of time.

<sup>187</sup> See generally Beyer 393-396; Reatz *Geschichte* 263-265; and Smeding 12-13.

<sup>188</sup> Reatz is probably correct in the view that the right of abandonment was known long before any fixed periods was determined for it by way of legislation. The prescription of such periods became necessary only when abuses occurring in connection with abandonment had to be countered.

provide a guarantee of some sort that he would repay the sum insured if necessary. For this solution, reference was made to the customs on the London insurance market.<sup>189</sup>

However, there are many instances of the early recognition in the Low Countries of the alternative solution offered by the doctrine of abandonment.<sup>190</sup> A few may briefly be referred to.

In a case before the *Schepenen* Court at Bruges in 1459,<sup>191</sup> the insurers of goods on board a ship captured by the enemy argued that, according to generally accepted custom, the insured had to transfer to them the rights he had in the insured goods. The Court held the insured entitled to recover on the policy on condition that he relinquish those rights to the insurers so that the latter could obtain possession of whatever could be recovered or salvaged of the insured goods. In another case, in 1469,<sup>192</sup> the same Court accepted the principle that an insurer who had paid for the loss of an insured cargo, became the rightful owner of any goods subsequently salvaged.

An Antwerp notarial deed from 1540, drafted on the instructions of an insured, gives an indication of the process of claim and abandonment as it then occurred in practice. A notary, accompanied by a representative of the insured, went to the house of the insurer and gave him notice of the loss on a particular voyage of a particular ship, on which the insured cargo was loaded. Apparently the ship had disappeared without any trace. The insured at the same time as claiming payment of the sum insured, completely relinquished the cargo in favour of the insurer. In this case the insurer answered that he would reply to the notice of loss and of abandonment after he had received an authentic certification stating how and when the ship had been lost. He requested that his answer be added to the notarial deed containing the insured's notice.<sup>193</sup>

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<sup>189</sup> Thus, a clause in the oldest Antwerp insurance policy, dating from 1531 (see Appendix 17 *infra*), made provision for such a repayment in the event of the recovery of the ship within one year after her departure ('*Ym valle, dat me warhafftige tydynghe erföre, eyn Yar na der tydt, alss dyt vörgescgreeuen Schip van Lübeck gelopen ys, vnde veellichte yn eyne ander Hauen gekamen, vnde süst mit den güderen noch geborgen weer, so schal ... [the insured] vnde de synen gehalten syn, vns wedderümme tho geuen, was se van vns entfangen hebben, vnd dat na dem Seerechte, Vsantie vnde Costume der Stadt Lunden ijn Engelandt* .) See further De Grootte *Zeeassurantie* 112-113; Kiesselbach 6; and Mullens 70-71. On the position in London, see § 2.5.1 *infra*.

This solution was applied in early Italian and Spanish insurance practices too. Thus, a similar clause appeared in a Florentine policy from 1397. See Bensa *Assicurazione* 217.

<sup>190</sup> That is, where, in return for the payment for a total loss, the insured relinquished the insured property completely to the insurer so that there was no need for any repayment of the insurance payment to insurer (nor any need for the insured to guarantee such repayment) in the event of the insured property being recovered, the insurer being in such event entitled to the property.

<sup>191</sup> *Marc Gentil* [a Genoese merchant] v *M Arnulphi* [from Lucca], *C Lommelini* [from Genoa] & *A Tany* [from Florence]. See De Grootte *Zeeassurantie* 14-15; De Grootte 'Zeeverzekering' 207; and Raynes (1 ed) 12-13, (2 ed) 20-21.

<sup>192</sup> *Jeronème Vento v Jean Baptiste de Laignello*. See generally Gilliodts-van Severen *Cartulaire* vol II at 181-182; De Roover 'Early Examples' 199.

<sup>193</sup> See De Grootte *Zeeassurantie* 20; Mullens 70-71.

Finally, a judgment of the Bruges *Schepenen* Court in 1569 confirmed the ruling of an arbitrator, for which the advice of merchants had been obtained, that an insured who had received payment under an insurance policy for the loss of the insured goods by enemy capture, did not have to return that payment to the insurer when the goods were eventually recovered. But while the insured did not have to repay the insurer, he did have to assist the latter by transferring to him his (the insured's) right against those who had recovered the goods or their value from the capturers.<sup>194</sup>

There was no regulation of the insured's right of abandonment in any of the provisions of the *placcaat* of 1563,<sup>195</sup> the first extensive regulation of insurance in the Low Countries, nor any mention of abandonment in the model policy it prescribed,<sup>196</sup> despite the fact that abandonment was no doubt applied in practice. The topic was for the first time addressed in detail although not with absolute clarity in the *placcaat* of 1571.<sup>197</sup> While the *placcaat* did not mention abandonment as such, a number of its provisions assumed its application.

In terms of s 15, in the case where, apparently before proceeding on the voyage, any ship had been taken or arrested (*'name'*) by any king, prince or potentate in his country, or in the case of her becoming incapable (*'onnut oft onbequaem'*) of prosecuting her voyage, those who had consigned goods on her were obliged, in the case of valuable goods (*'kostelijcke, precieuse ende dierbare Waren'*), to wait six months before they could claim on the insurance policy for the loss of those goods (*'al eer sy daer van vervolch sullen mogen doen'*). During this time they had to look out for another ship on which to place those goods for the completion of their voyage to their destination, and if they did not do so, the insurer himself could do so, in both cases such transshipment being for the account of the insurer.<sup>198</sup> In the case of perishable goods (*'grove bederffelijcke Koopmanschappen'*), such as wine, fruit, grain, and the like, the insured did not have to wait for six months but could, in terms of s 16 of the *placcaat* of 1571, bring his action as he saw fit (*'sal sijn actie ofte hantlichtinge mogen*

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<sup>194</sup> See *De Grootte Zeeassurantie* 15-16.

<sup>195</sup> There was not even a mention of the principle in s 5 which dealt with the case where the insured ship and goods had gone missing. See again ch XV § 6.2 *supra*.

<sup>196</sup> There was equally no provision in that model policy form for the insured to return the insurance payment he had received for the loss of the insured property, should it be recovered subsequently. It would appear that Van Asch van Wijck 20 is mistaken in seeing an example of the principle of abandonment in the policy formula of 1563 in the stipulation which provided that the insurer placed himself in the position of the insured (*'ende stellen henlieden inde eygen plaetse vande gheasseureerden'*). As appears from the words immediately following (ie, *'om hem te garantieren van alle verlies ende schade'*), the insurers merely indicated by those words the extent to which they were to bear the insured's losses. There would not appear to be any specific connotation here with the idea of an abandonment. See again § 1.4 n65 *supra*.

<sup>197</sup> See generally Goudsmit *Zeerecht* 266-267.

<sup>198</sup> This section, therefore concerned transshipment. See again ch XIII § 1.3 *supra*.

*vervolgen soo hy 't selve bevinden sal te behooren*'), therefore also immediately upon the occurrence of the eventualities foreseen in s. 15.<sup>199</sup>

Section 23 of the *placcaat* of 1571 provided that in the case of the arrest, capture or detainment (*'gearresteert, genomen oft op-ghehouden'*) of any ship on the orders of a king, prince or potentate,<sup>200</sup> presumably during her voyage, when a chance existed that she could be recovered (*'daer van men hoopen mach die te recouvreren oft weder te ghekrijgen'*), the insured had to wait for six months (*'een half Jaer patientie hebben'*) from the day of such capture or arrest before he could take any steps to claim a payment on his policy. The six-month period applied to an arrest, capture or detainment in Europe or Barbary. But if the insurance was on merchandise consigned for the Indies (*'[m]aer indien dattet zy om Koopmanschappen op Indien verseekert'*), and the eventuality had occurred outside the limits of Europe or Barbary, a period of one year was allowed before a payment could be claimed, in order to allow a recovery of the goods to be attempted in the meantime (*'om middeler-tijd daer van 't vervolch te mogen doen'*) by those who were interested in the goods (*'by den geenen dien de saecke aengaen sal'*). During the period of waiting, the insured was not prohibited from obtaining security (*'verseeckerheyt te nemen'*) from the insurers as he saw fit, whether by way of personal or real security or otherwise (*'t zy by borch-tocht, panden oft andersints'*).

If read together, it appears that the effect of ss 5, 16 and 23 of the *placcaat* of 1571 was as follows.<sup>201</sup> Where the carrying ship was arrested or detained, or became incapable of completing her voyage, the insured cargo owner had to wait six months in the case of non-perishable goods before he could claim under his policy for a loss of his goods in the case where such an arrest occurred within Europe, or twelve months in the case of an arrest outside Europe. During this period of waiting, the insured was entitled to claim security from the insurer for the fulfillment of the latter's obligation in terms of the insurance contract. The reason for the period which the insured had to wait, was to see whether or not the ship and the goods could not be released or repaired so that the insured voyage could be completed, that is, to see whether a loss was not averted by the passage of time. If, after that period of waiting, the ship and the goods on board were still arrested or the ship still incapable of completing her voyage and no transshipment could be effected, the insured goods had for practical and eco-

<sup>199</sup> As to ss 15 and 16, see also eg Van Zurck *Codex Batavus* sv 'Assurantie' par 20 (distinguishing between perishable and non-perishable goods). De Groote *Zeeassurantie* 41 notes that s 17 of the provisional *placcaat* of 1570 had drawn no distinction between valuables and perishables and had also prescribed no period of time during which the insured had to wait before he could claim on his policy.

<sup>200</sup> Section 24 of the provisional *placcaat* of 1570 had not referred to the arrest by princes but to ships which were captured or plundered. See De Groote *Zeeassurantie* 41.

<sup>201</sup> The overlap which existed may be explained by the fact that whereas ss 15 and 16 dealt with an arrest in the port of loading prior to the commencement of the voyage, s 23 was concerned with an arrest en route. See eg De Groote *Zeeassurantie* 41; Kracht 27. However, that is not readily apparent from the provisions themselves. If compared to the provisions in the subsequent municipal *keuren*, it appears that the Legislature may in 1571 in fact have become horribly and confusingly entangled in the different possible situations which it sought to regulate.

conomic purposes to be taken to have become lost, even if that was not actually the case. As a result the insured then became entitled to claim on his policy for such a loss. In the case of perishable goods, the nature of the goods did not permit any period of waiting. The insured could therefore claim immediately upon the arrest or incapacity of the carrying ship and did not have to wait at all or even attempt to transship those goods.

However, the *placcaat* of 1571 did not mention anywhere that the insured had to abandon the insured goods to the insurer once he had become entitled to claim payment of the full sum insured on his policy.<sup>202</sup> It accordingly did not provide how such abandonment had to take place. That, no doubt, continued to be governed by customary law.

### 2.3.4 Insurance Abandonment in Antwerp Customary Law

In the various compilations of Antwerp customary law, abandonment was more clearly and specifically by that name linked to cases similar to those provided for in the *placcaat* of 1571.<sup>203</sup>

In art 9<sup>204</sup> of the *Antiquae* of 1570 it was provided that if the insured received news that the insured ship or cargo had been arrested, captured or detained, or was by accident lost or damaged ('*gearresteert, aengenomen, aengehouden, oft door ongeval bedorven oft verargert is*'), he could abandon the insured ship or cargo for the benefit of the insurer ('*tot behoeff vanden asseureur*'). If he had so abandoned and notified the insurer, the latter was liable to pay him the sum insured. Article 10 made it clear that the insurer was not liable for, and that there was no possibility of any abandonment for the benefit of the insurer, in the case of any loss of or damage to the goods through an inherent vice.<sup>205</sup>

It was therefore made clear that in the case of certain losses, and (surprisingly and inexplicably) also in the case of accidental loss or damage generally, both the insured ship and goods could be abandoned to the insurer. No period of waiting was prescribed. The insurer had to be notified of the abandonment and it was also made clear that the abandonment of the insured property was for the benefit of the insurer.

In the *Impressae* of 1582, art 14<sup>206</sup> concerned cases where the insured had received news that the insured ship had become unnavigable ('*innavigabel*'), or that the ship or goods had been detained or captured or taken ('*aengehouden oft gerooft*')

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<sup>202</sup> See Couvreur 'Zeeverzekeringspractijk' 199 who notes that there was no mention of '*overlating*' of the insured goods in the *placcaat*.

<sup>203</sup> See generally eg Mullens 64-68 and 89-93.

<sup>204</sup> Of title XXIX (see De Longé vol I at 602).

<sup>205</sup> Article 11, interestingly and significantly enough, concerned the abandonment of damaged cargo in lieu of freight. See § 2.1.2 *supra*. This would tend to confirm the close relationship between insurance abandonment and abandonment in other areas of maritime law referred to in § 2.3.2 *supra*.

<sup>206</sup> Of title LIV (see De Longé vol II at 404-406). See further Bewer 404-406; Couvreur 'Zeeverzekeringspractijk' 199.

oft genomen') by the enemy or by virtue of reprisals ('*represalien*'). It was provided that in those and in similar cases ('*in dese ende gelijcke ghevalen*') the insured was entitled, by notice to the insurer, to abandon the insured ship or goods for the benefit of that insurer ('*tot behoef van den versekerer*'). As a result the latter became liable to pay on the policy within the specified period after the notice of loss permitted for such payment.<sup>207</sup> Article 15 excluded the insurer's liability in the case of loss or damage occurring through inherent vice but no longer referred to abandonment in that connection.<sup>208</sup>

Abandonment was therefore no longer possible in the case of an ordinary loss of or damage to the ship or goods, but unnavigability of the ship was added as ground for such abandonment while the possibility of abandonment in analogous cases was also held out, including, therefore, arrest or detention by non-enemy authorities. Still no periods of waiting were prescribed nor was it made clear how the abandonment had to take place.

The provisions on abandonment and related matters in the *Antwerp Compilatae* of 1609 were extremely detailed. The *Compilatae* in fact devoted a separate heading to this topic: '*Van verhael van schade bij abandonnement oft verlaetinge van de goeden*'. The relevant measures can be referred to here only in broad outline.

The *Compilatae* distinguished three different sets of circumstances under which an abandonment could be justified. These were what may be termed the unseaworthiness of the insured or carrying ship; the arrest of the insured ship and/or goods by authorities or their capture by the enemy or pirates; and the case where the insured ship or goods went missing.

As far as the first set of circumstances was concerned, art 223<sup>209</sup> provided that if the ship was stranded en route and in consequence or otherwise became incapable ('*onbequaem geworden is*') of continuing her voyage or to be refloated and again be made navigable ('*seilbaer*') within one month, the insured could abandon the insured ship or the insured goods<sup>210</sup> in favour of the insurers ('*ten behoeve van de versekeraers*') and claim from them for his loss as if it were a total loss ('*bij manier van geheel verlies*').<sup>211</sup> This was known as '*perte entière délaissée oft por via d'extairon*'.<sup>212</sup>

However, according to art 225, if the ship could within the period of one month be made navigable and capable of completing her voyage ('*seilbaer ende bequaem*'), or if her master could obtain another ship within that time with which he was prepared

<sup>207</sup> As to s 14, see Groenewegen *Aanteekeningen* n29 (*ad* III.24.13).

<sup>208</sup> Article 16 concerned the abandonment of damaged goods by the cargo owner in lieu of freight, retaining the close systematic link between insurance abandonment and that other instance of abandonment.

<sup>209</sup> Of par 7, title 11, part IV (see De Longé vol IV at 292).

<sup>210</sup> It was pertinently stated that no distinction was drawn between perishable and other goods.

<sup>211</sup> As opposed to '*bij manier van avarie*'.

<sup>212</sup> Also referred to elsewhere in the *Compilatae* as '*por via dexacaon*' or '*por via de dejacion*'.

to continue the voyage,<sup>213</sup> the insured cargo-owner could not abandon ('*abandonneren oft verlaeten*') the goods on board, even if they were largely ('*voor een groot deel*') spoilt, although, of course, in such a case<sup>214</sup> the insured could recover for a partial loss ('*bij wegen van avarie*').

When entitled to abandon in this first case, the insured could in terms of art 226 not retain the undamaged goods and abandon only the damaged goods, even if such goods were for example packed separately.<sup>215</sup> He had to abandon the insured property as a whole ('*maer willende verlaetinge doen, moet die van alles tot alles doen*').<sup>216</sup>

The second set of circumstances in which the insured could abandon and claim on his policy for a total loss was provided for in art 228<sup>217</sup> of the *Compilatae*. An abandonment was permitted if any ship or goods were captured or detained by pirates or by the enemy,<sup>218</sup> and if the release of such a ship or goods could not by legal process, compromise or ransoming ('*rechtelijck oft bij compositie oft rantsoen*') be obtained within one month.<sup>219</sup>

The third set of circumstances justifying an abandonment and a claim for a total loss, despite the possible absence of an actual total destruction of the insured property, was in the case of the disappearance without any news ('*tijdingloosheid*') of the insured ship or goods. This has already been treated in detail earlier.<sup>220</sup>

Even if circumstances were present which justified an abandonment, the insured did not have to abandon. Within six weeks after having notified the insurer of the occurrence of an event justifying an abandonment, the insured, if so requested by the insurer, had to make a declaration and state whether he claimed compensation by way

<sup>213</sup> If he was not prepared to continue voyage with his ship, which was repairable ('*hermaeckelijck waere*'), within the month, the insured could in terms of art 224 also still abandon and claim on the policy ('*sij abandonnement en verlaetinge doen, ende daerop sijn verhael neem*') and the insured was also not obliged to hire another ship ('*sonder dat men hem can bedwingen ... andere schepen te hueren*').

<sup>214</sup> That is, if the insured goods were in any way damaged.

<sup>215</sup> Thus, a partial abandonment was not permissible.

<sup>216</sup> However, if separable, the insured was entitled in terms of art 227 to continue the voyage with the undamaged goods and to sell the damaged goods, claiming for a partial loss in respect of the latter ('*t'bedorven te vercoopē ende daerop sijn verhael te hebben by wegen van avarie*').

<sup>217</sup> Of par 7, title 11, part IV (see De Longé vol IV at 294).

<sup>218</sup> And presumably also if they were arrested or detained by authorities generally: see *infra*.

<sup>219</sup> No abandonment was possible if the ship and goods were arrested or detained in the port of loading, although the insured could in appropriate cases - ie, if insurer was already at risk: see again ch XII § 1 *supra* for the duration of the risk - claim for a partial loss (see art 229). Likewise, if the ship and goods remained intact and the voyage was prosecuted (presumably within one month) or if the ship and goods had already arrived at the destination when arrested or detained, the insured could also not abandon the insured goods in whole or in part but could at most claim for a partial loss (art 230). See further Mullens 64-65 for the system provided for in the *Compilatae* in the case of the arrest or detention of an insured ship and/or goods.

<sup>220</sup> See ch XV § 6.2 *supra*.



of abandonment or by way of average. And if within this prescribed time, having been requested to do so, he had not made his declaration, the insurers themselves could choose (*'souden de versekeraers selver den keuse hebben'*).<sup>221</sup> It is clear, therefore, that the insured could always claim his actual loss or damage in the usual way (that is, by way of average), whether or not he had the right to abandon the insured property, and that he would then be indemnified depending upon whether, according to the usual principles, his loss was a total or a partial loss<sup>222</sup> and on his proof of such loss.<sup>223</sup>

Article 186<sup>224</sup> of the *Compilatae* made it clear, though, that if circumstances justifying an abandonment were not present, there was no possibility of the insured completely or partially abandoning the insured ship or goods (*'soo en mogen die int geheel oft in deel niet geabandonneert oft verlaet worden'*), even if such ship or goods arrived damaged. He could then claim for a partial loss (*'bij maniere van avarie'*) only.

The period of waiting was clarified in a number of articles from which it appears that the one-month period referred to in arts 223 and 228 was part of the circumstances justifying an abandonment, not actually the period which had to pass before an abandonment would become effective. Thus, the ship had to be incapacitated and the ship or goods detained for a month before the insured was entitled to abandon and before such an abandonment was justified.<sup>225</sup> In terms of art 232, if the insured received news of either the first or the second set of circumstances justifying an abandonment,<sup>226</sup> six months had to pass before the insured could claim and recover in terms of his policy (*'soo moeten sij evenwel sesse maenden verbreiden, als sij [aleer sij] ter saecken van dijen eenigen heijsch oft vervolch vermogen te doen'*). That, at least, was the position in the case of a voyage in Europe or Barbary.<sup>227</sup> Where, however, the

<sup>221</sup> See art 258. According to Mullens 93 the insured had to choose between two different possible '*schaderegelingen*', namely the '*averijregeling*' and the '*abandonnementsregeling*'.

<sup>222</sup> See again ch XV § 2 *supra* for the difference between a total and a partial loss.

<sup>223</sup> See again ch XVI § 3.2 *supra*.

<sup>224</sup> Of par 6, title 11, part IV (see De Longé vol IV at 278).

<sup>225</sup> See further Mullens 66-67.

<sup>226</sup> That is, that the ship was incapable of completing her voyage (and was not repairable within one month), or that the ship or goods had been captured, arrested or detained by the authorities or the enemy (and that a release could not be obtained within one month) (*'dattet versekert schip onbequaem is geworden om de aengenomen reijse te volvueren, oft dat het schip bij hooger hant oft vijanden gehouden, gerooft of genomen is'*), and that the insured had declared such insured ship or goods abandoned (*'ende dat de gene die tselve schip oft goet hebben doen versekeren, hebben verclaert daervan abandonnement te doen'*).

<sup>227</sup> In terms of art 142, where the insurer was liable in the case of the arrest or detention of a ship by a sovereign in a foreign port, the insured had to wait six months to see if he could obtain her release from arrest before he could abandon that ship. Even where the insurer was liable to compensate for a loss by arrest, the insured cargo-owner had to take steps to obtain the release of the goods and could not abandon or relinquish them (to the capturers, it would seem) until they had legally been declared forfeited to the capturers (*'dies moet de versekerde sijn vervolch doen om de goeden los te krijgen, sonder die te abandonneren oft verlaeten totdat bij justitie, oft wille van den prince, verclaert is dat die verbeurt sijn'*). See again ch XVI § 1 *supra* for the insured's duty to avert and minimise loss. Alternatively the insured had to wait six months to see if he could transship the insured goods (where they were not

voyage was to a place further afield and the justifying circumstances arose outside those limits (*'ende dat de bederfenisse, beroovinge oft arrest buiten de selve paelen waere geschiet'*),<sup>228</sup> the insured had in terms of art 233 to wait for a period of one year before he could claim and proceed on the policy (*'ter saecken van dijen geen en heijlsch oft vervolg mogen doen dan ten eijnde ende naer den overstrijck van den jaere'*). These periods of six months or one year commenced to run as soon as those insurers resident in the place where the insurance had been concluded, were notified of the relevant circumstances by notaries or other lawful persons (*'naerdien de verseeckeraers, hunne tegenwoordich vindende ter plaetsen daer de versekeringe is geschiet, door notarissen ende [ofte] andere wettige persoonen, van de voorscreve bederfenisse, aenhoudinge oft arrest sijn gewaerschout'*).<sup>229</sup>

In terms of art 240, however, the prescribed period of six months or one year which the insured had to wait in case the insured property should be released or in case it should arrive at the destination, applied only when there was still some hope left that the incapacitated or arrested and detained ship could again be released and only when the cargo was not perishable (*'heeft alleen plaetse soo wanneer datter alnoch eenige hope is, dat men de verdorven, geroofde oft aengehoude schepen wederom bequaem oft vrij soude [mogen] maken, ende dat de goeden daerop geladen geen bederffelijcke, maer duerbaer, vaste goeden sijn, die hun connen bewaeren'*). According to art 241, if there was no hope of obtaining a release and the insured property would certainly be lost (*'sekerlijck soud en sijn bedorven oft verloren, sonder hope van te connen bevrijden oft bequaem maecken'*), or if the cargo was perishable (*'soo wanneer de bedorven oft verloren goeden, die sijn hebben doen versekeren, bederffelijck waeren ende coopmanschappen sijn, als fruit, graen ende diergelijcke'*), the insured did not have to wait for the prescribed period but could immediately abandon and claim on his policy (*'soo en soud en de versekerde cooplieden den voorschreven tijt van sesse ende twaelf maenden niet derven verwachten, maer soud en daer op terstont hun vervolch mogen doen naer behooren'*).

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detained, but only the ship), unless the goods in question were perishables (*'moet de versekerde toeven den tijt van sesse maenden tot affdoeninge van den arreste, ofte de coopmanschappen in andere schepen te herladen, ten waere dattet smiltbaere oft bederffelijcke goederen waeren'*).

Similarly, in the case of the arrest or detention of the goods themselves (with or without the carrying ship), or where the insured was compelled to sell them, the insurer being liable for the shortage (the difference between the price obtained by such sale and their value) or the non-payment of the purchase price. In such a case the insured, in terms of art 145, had to wait six months before he could claim from the insurer, during which time he had to seek payment from the buyer (*'moet de versekerde sesse maenden vervolch doen om totte betalinge te commen'*). If he then claimed from the insurer, he had to cede his action against the buyer to the insurer (see again § 1 *supra* for the insurer's right of recourse).

<sup>228</sup> Therefore, it would appear that the justifying circumstances must also have occurred outside those limits. It is not certain what the position was in the case of a voyage to a place outside Europe where the ship was for example arrested inside Europe.

<sup>229</sup> See art 234.

Also, in the case of an immediate abandonment, the insured had to notify the insurers notarially or formally after which the insurers had to pay his claim within the prescribed period after that notice.<sup>230</sup>

It also appears from the *Compilatae* that the parties could, by an agreement between them, agree on an immediate abandonment and so obviate the need for the insured to wait for the usual period of time before such abandonment would be effective. The Antwerp customary law was in this regard adapted in the seventeenth century by way of an appropriate (handwritten) clause which was appended to insurance policies.<sup>231</sup>

In the case of the third set of circumstances justifying an abandonment, the waiting periods of six months and one year did, for obvious reasons, not apply. Because it was not known what, if anything, had happened to the insured property, a longer waiting period of between one and three years, depending again on the length of the voyage involved, was required before a total loss would be presumed and before the insured could abandon and claim on that ground.<sup>232</sup>

Further as to the method of abandonment, art 245 added that if the insured declared that he abandoned the insured property, he had to authorise or give a procuration to the majority of insurers and hand over to them all the documentation necessary for them to obtain or recover the property and to deal with it as they saw fit (*'ende met eenen leveren allen behoorlijck bescheet [documentation] om tselve goet te moghen aenveerden, te vervolgen, te beneficiëren, oft ter behoorelijcker plaetse te brengen, soo tselve hun best geraeden ende oirboorelijck sal duncken'*). Provision was made also for the position of several co-insurers in the case of an abandonment and for the appointment of a mandatary to act on their collective behalf.<sup>233</sup>

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<sup>230</sup> See art 243, which further required a notification to the insurers who were resident at the place where the insurance was concluded, of the loss or the arrest *'door de notarissen oft andere publicque personen'*. As to the notice of loss, see again ch XVI § 2.2 *supra*.

<sup>231</sup> This clause stipulated that *'in cas van verlies, arrest, aanhouden oft eenighe detentie sal den bovenscr. geassureerden tallen tijden nae sijn geliven moghen abandonneeren in welck cas wij geloven onse geteekende somme te betalen oock in contant wisselgeldt'*. See Couvreur *'Zeeverzekeringspractijk'* 199.

<sup>232</sup> See again ch XV § 6.2 *supra*.

<sup>233</sup> It was possible, in order not to incur any further expense (*'om geen enen voorderen cost te doen'*), that some insurers would refuse to accept the abandonment and then the insured was obliged to authorise and give a power of attorney to one or more of those (or a nominee) who did want the property to be abandoned to them (see art 250). Such insurers, to ensure that they would retain any benefit which could be derived from the abandoned property, had to request from the other insurers whether or not they were willing to share in any cost incurred in connection with that property (*'om hun te versekeren dat naederhant hun de penningen, die hun daeraff souden mogen commen, sullen blijven, de andere versekerers bij proteste aensoecken, oft sij daer mede cost ende vervolch begeiren te doene, oft niet'*) (see art 251). Those insurers who accepted the obligation *'om t'verlaeten goet te vervolgen'*, could appoint a factor or mandatary in their place *'te gemeijnen coste'*, to attempt to recover the property (see art 252). Provision was also made for the position of the factor and for his powers where there was disagreement among those involved as to how the abandoned property had to be dealt with (see art 254).

Provision was further made for the insurer to provide the insured with security during this period of waiting.<sup>234</sup>

During the period of waiting, the insurers themselves were entitled to transship insured goods from an incapacitated or arrested and detained ship,<sup>235</sup> and if, in consequence of such attempts - or, indeed of any attempts the insured was himself compelled to make - the goods arrived at their destination within the prescribed time, the insured had to accept the goods, despite the earlier abandonment (*'sijn de versekerde gehouden de selve goeden wederom naer hen te nemen ende [te] aenveerden, niet-tegenstaende d'abandonnement dar sij daervan hebben gedaen'*),<sup>236</sup> and the insurers were liable for no more than any damage to the goods and the cost of such transshipment.<sup>237</sup>

Once property had been validly abandoned (*'naerdijen de goeden eens tot henne behoeve sijn geabandonneert oft verlaeten,'*), the insurers were in terms of art 238 not obliged to transfer the insured property back to the insured for the latter's profit, even if they had not publicly or expressly accepted the abandonment (*'die wederom aen de versekerde over te geven, om daermede gewin oft profijt te doen, alwaert dat sij het abandonnement niet openlijck en hadden aenveert oft geaccepteert'*). Nevertheless, such abandoned property remained available to the insured to ensure payment in terms of the insurance contract (*'verbant ende verbonden tot voldoeninge van de versekeringe'*) and remained so available until such payment had in fact effectively and satisfactorily been made to the insured. By the same token, as provided by art 248, if after their abandonment, the ship or goods nevertheless again appeared (*'te voorschijn quame'*), such ship or goods, as well as any profit made on it, belonged to the insurers and the insured had no claim to it except to the extent that he was under-insured (*'soo soude tselve, ende t'gewin dwelck daerop soude mogen vallen, sijn tot behoeve van de versekerders, sonder dat de versekerde daertoe voorder soude mogen pretenderen, dan alleen voor sijn thienste oft andere gedeelte, d'welck niet versekert en is'*).

Just as the insurer was not obliged to return abandoned property to the insured, so too was the insured in terms of art 239 not obliged, if he did not want to, to take the property back should it arrive at the destination after six months or one year, as the case may have been. He could claim under the policy as if the lost or detained property

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<sup>234</sup> If the insured had any reasonable grounds of suspicion regarding the (financial) position or the ability of the insurers during this time, the latter had to provide him with *'borchtchte, pant oft andere versekeringe, gelljck sij dat best geraeden sullen vinden, ten goetduncken van den rechter'* (see art 235).

<sup>235</sup> The insured himself was obliged to transship if possible. See again ch XIII § 1.3 *supra*.

<sup>236</sup> See art 236.

<sup>237</sup> See art 237. Likewise, in terms of art 244, when insured perishables (of which an immediate abandonment was of course possible) arrived at the destination in the season or during the time when they were usually sold there (*'duerende het saisoen oft [de] gewoonelijcke gelegenheit ende tijt van de aldaer te vercoopen'*), the insured had to accept them on condition that he was paid for the damage to and expense incurred in respect of such goods.

had not arrived and had not been recovered (*'al oft het al verloren nijet wederomme ter hant gecommen waeren'*).

Antwerp customary law therefore recognised the same circumstances justifying an abandonment as did the *placcaat* of 1571. It equally prescribed a waiting period of six months or one year before the insured could claim on his policy. It also recognised that an abandonment was justified in the case of the disappearance of the insured property. The *Compilatae* also stressed the insured's duty (and the insurer's right) to try, during those periods of waiting, to avert or minimise the eventual loss of the insured ship or goods.

However, a number of other matters which had not been mentioned before were now made clear in the Antwerp customs. These included the fact that the insured was not compelled to abandon if he did not want to do so but that he could claim for a partial loss, obviously running the risk that it could be some time before the extent of that loss could be established. It was further made clear that if the circumstances justifying the abandonment were reversed within the period of waiting, the insured could only claim for a partial loss, if any, while a reversal after that period was irrelevant and did not nullify the abandonment and the insured's claim for a total loss. In the case of a valid abandonment, and despite any such subsequent reversal, the insured was not entitled nor the insurer obliged to take and give back the abandoned property, and neither did the insured have a right to the abandoned property in such a case. In effect, the only way in which the consequences of the abandonment could be cancelled was by way of an agreement between the parties. It was clear, furthermore, that the abandonment of insured property was one in favour of the insurers and not of anybody else. The abandonment had to be notified and made formally. Finally, the insured had, by the delivery of the appropriate documentation, to place the insurers, as new owners of the abandoned property, in a position to exercise their control and rights of ownership over the property and any profits, such as freight in the case of an insured ship or profit in the case of an insured cargo, arising or derived from it.

### 2.3.5 Provisions on Abandonment In the First *Keuren* Early in the Seventeenth Century

Given the extensive practical regulation of the doctrine of abandonment in the Antwerp customary law, it is not surprising that when the legislatures in the northern part of the Netherlands came to regulate the insurance contract by way of municipal *keuren* at the end of the sixteenth century, their approach was both more detailed than that of that the earlier *placcaaten* and also largely identical to the way in which abandonment was regulated in customary law.

The Amsterdam *keur* of 1598 contained several provisions on the topic.<sup>238</sup> In terms of its s 25,<sup>239</sup> in the event of the insured ship becoming unnavigable (*'innavigabel'*), or in the case of the insured ship or goods being captured or taken by

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<sup>238</sup> See generally Enschedé 137; Goudsmit *Zeerecht* 327-332; Smeding 15-16; and Vergouwen 44-45.

<sup>239</sup> And also the identical s 26 of the *Middelburg keur* of 1600.

the enemy, or where otherwise circumstances were such that the insured ship or goods would certainly have perished or been lost without any hope of recovery ('*off sonder hope van de selfde recouvreren*'), the insured was entitled to abandon such ship and goods in favour of the insurers ('*tot behoeve vande verseeckeraars*') and to claim payment on his policy. The implication was that the insured could in these cases abandon immediately. If the insured had notified the loss and had abandoned properly, the section continued, the insurers had the specified period of three months to pay the sums for which they had insured, that is, they had to pay for a total loss.

Section 8 of the Amsterdam *keur* of 1598<sup>240</sup> concerned the case where a ship engaged on any voyage was captured, detained or arrested by any king, prince, potentate or government in his country,<sup>241</sup> irrespective of whether there existed any hope of recovering the same ship again ('*t zy datter hope ware om 't selfde Schip weder te krijgen ofte niet*'),<sup>242</sup> or where a ship became incapable of completing the intended voyage ('*onnut ende onbequaem werde om de ghedestineerde reyse te doen*'). In such cases the insured shipowner or the owners of insured cargo on board, irrespective of whether the cargo was arrested with the ship or not ('*t zy dat de selfde Waren mede bekommert zijn ofte niet*'), were obliged to wait six months before they could abandon such ship or goods. This six-month period commenced from the time when, through brokers or other public persons, the majority of insurers at the place where the insurance was concluded, were advised and notified of the occurrence of those circumstances. The period of six months was further applicable only where the capture, detention or arrest took place in Europe or Barbary. If it occurred outside those limits, such arrested ship or goods could not be abandoned except after the expiry of one year, such period to commence after the giving of the notice as in the case of the shorter period.

In the meantime, the insured was not prevented from demanding security from his insurers ('*verseeckerheyt te nemen vande asseureurs, met borch-tochten, panden ofte andersints*'), as was proper in the circumstances. This was no doubt to protect the insured against insurer insolvency occurring during the period he had to wait before he could abandon and claim for a total loss.

Section 8 also stressed the insured's duty and the insurers' right in the meantime to transship the insured goods.<sup>243</sup>

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<sup>240</sup> And s 15 of the Middelburg *keur* of 1600.

<sup>241</sup> That is, a capture, detention or arrest abroad by a foreign authority. It seems that based on the idea that the imperilment of the insured property had to be sufficiently serious to justify an abandonment, the Amsterdam *keur*, like later *keuren*, did not permit a detention by the insured's own authorities as a ground for an immediate abandonment.

<sup>242</sup> Section 8 was therefore in this respect in direct contrast with s 25.

<sup>243</sup> See again ch XIII § 1.3 *supra*.

By contrast to the cases with which s 8 was concerned, in the case of perishable goods, such as wine, fruit, grain and the others mentioned in s 15,<sup>244</sup> the insured was, in terms of s 9,<sup>245</sup> not bound to wait for a period of six months or one year, as the case may have been, but he could proceed with his claim and action as he saw fit (therefore, even immediately), although he remained obliged to notify the majority of the insurers of the location (*'gelegenheit'*) of the goods in question, no doubt so that they could attempt to recover it.

Section 12 of the *keur* of 1598<sup>246</sup> concerned the case where a ship or goods were arrested or detained by any king, prince, potentate or government within Europe, Barbary, the Canary Islands or other more closely situated places (*'andere naeder gelegen'*) under circumstances where there was in fact some hope of obtaining the release of the ship or goods in question (*'sulcks datter eenige hope ware omme de selve te recouvreren'*). In such a case the goods could not be abandoned otherwise than six months after the majority of insurers had been notified of that occurrence through a public person (*'een publijck Persoon'*). If that arrest or detention took place outside Europe, Barbary or those islands, the insured had to wait one whole year after such notification (*'insinuatie'*) before he could abandon.

Again, in the meantime (*'middelertijt'*), the insured could demand security (*'cautie of Borch-tochte'*) from his insurers to ensure their payment in terms of the insurance contract (*'waer mede sy van hunne Asseurantie mogen zijn verseekert'*). And again, no such period of waiting was required in the case of perishables and such perishables could, if arrested or detained as described, be abandoned immediately and in all respects treated as if they had been totally lost (*'terstont geabandonneert sullen mogen werden, in allen schijn oft de selve in 't geheel verloren waren'*).

It is not immediately apparent what exactly the difference was between the provisions contained in ss 8 and 9 of the *keur* of 1598 on the one hand, and those in s 12 on the other hand. One difference appears to be the fact that the former sections referred to arrests by foreign authorities abroad and permitted an abandonment irrespective of whether there was any hope of recovery, while the latter section referred to an arrest by more locally situated authorities when there was some hope of recovery. Additionally the former sections mentioned the incapability of the ship to complete her voyage as a ground justifying an abandonment, something s 12 did not do.

Section 5 of the Amsterdam *keur* of 1598<sup>247</sup> also recognised the possibility of the insured ship or goods having gone missing, and permitted the insured in such a case to claim on his policy and, presumably, although this was not stated in so many words, to abandon and thus to claim for a total loss,<sup>248</sup> after one or two years, depending on

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<sup>244</sup> As to which goods were considered perishables and therefore had to be specified in the policy in terms of s 15, see again ch VIII § 4.2.2 *supra*.

<sup>245</sup> And s 16 of the Middelburg *keur* of 1600.

<sup>246</sup> And its equivalent s 17 in the Middelburg *keur* of 1600.

<sup>247</sup> And its equivalent, s 12 of the Middelburg *keur* of 1600.

<sup>248</sup> *Contra Bewer* 409-410.

the length or destination of the voyage on which the ship had disappeared, if no news had been received of the ship or her cargo during that period.<sup>249</sup>

The Amsterdam *keur* of 1598 therefore distinguished between three broad categories where an abandonment was justified. In the case of the ship becoming (permanently) unnavigable or of the ship and goods being arrested by the enemy, or generally where the circumstances were such that the loss was certain or where at least there was no hope of any recovery, the insured could abandon immediately. In the case of a ship and/or her cargo merely being arrested or detained by the authorities, irrespective of any hope of recovery,<sup>250</sup> or where the ship was merely incapable of completing her current voyage, the insured had to wait six months or a year before he could abandon, although he could in the meantime demand security from the insurers. The only exception in this latter case was where the goods insured were of perishable nature, in which case an immediate abandonment was also possible. The third instance was where the insured ship or goods had disappeared without trace, and then the insured had to wait one or two years before he could abandon and claim.

The Rotterdam *keur* of 1604 closely followed the Amsterdam example in its regulation of abandonment and, if anything, contrasted the various possibilities even more sharply.<sup>251</sup>

First, s 12 of the *keur* of 1604, like s 25 of the Amsterdam *keur* of 1598, provided for the immediate abandonment ('*terstont abandonneren*') of the insured property in favour of the insurers ('*ten behoeve vande Verseeckeraers*') in cases where the insured ship became unnavigable ('*innavigabel*'), or where the insured ship or goods were captured by the enemy or by pirates,<sup>252</sup> or where the insured property was otherwise certainly lost or destroyed and where there was no hope of recovery ('*sonder hope vande selve te recouvreren*').

Secondly, s 12 of the *keur* of 1604, like s 12 of the one of 1598, provided for the case where the insured ship or goods were arrested or detained by the authorities in Europe, Barbary or the Canary Islands or at a place more closely situated, in such a way that there was some hope of a release ('*sulcks datter eenige hope ware omme de selve te recouvreren*'). In such cases the goods could not be abandoned otherwise than after six months from the time when the majority of the insurers at the place of conclusion of the contract had been notified through a public person. And if the accident occurred outside Europe, Barbary or those islands, the prescribed period for which the insured had to wait was one year. The insured was entitled to security from the insurers during these periods when he had to wait. Also, as in Amsterdam, an exception was made in respect of perishables for which no such period of waiting

<sup>249</sup> See again ch XV § 6.2 *supra*.

<sup>250</sup> That is, the law assumed that in the case of such an arrest there remained hope of a release and that a loss could not immediately be regarded as a finality.

<sup>251</sup> See generally Enschedé 137; Goudsmit *Zeerecht* 401-402; and Smeding 18-20.

<sup>252</sup> Pirates were not specifically mentioned in the Amsterdam measure although they were probably included in the term 'enemy'.



would be applied (*'dat 't voorsz dilay geen plaets en sal hebben'*) and of which an immediate abandonment was possible as if such goods had been totally lost.

The Rotterdam *keur* contained no provision equivalent to ss 8 and 9 of the Amsterdam *keur* of 1598. But in s 15, again, it contained a measure not found in the Amsterdam law. This section laid down that insured who were entitled and wished to abandon (*'die hunnen goeden mogen ende willen abandonneren'*) in favour of their insurers, had to give written notice of such abandonment to their insurers through a public official (*'door een publijcq Persoon'*).

In s 14 the Rotterdam Legislature also made provision for the case where the insured ship and goods had gone missing. Unlike s 5 of the Amsterdam *keur*, though, it did specifically mention abandonment in this connection. The insured was permitted to abandon the missing ship or cargo for the benefit of the insurers (*'de verseeckerde ... mogen abandonneren ten profijte vande Verseeckeraers'*) after one or two years, depending on the destination of the voyage on which such ship and cargo had gone missing.<sup>253</sup>

### 2.3.6 The Explanation of and Amendments to the Early Legislative Provisions in the Course of the Seventeenth Century

While the first round of municipal *keuren* were much clearer in both the system and in the content of their provisions on abandonment than the earlier *placcaat* of 1571, there was no absolute clarity in all respects. This came to be reflected in the number of amendments to the relevant provisions of the Amsterdam insurance *keur* of 1598 in the course of the seventeenth century, and also in the extensive explanation required of the Roman-Dutch authors.

The Amsterdam amending *keur* of 20 June 1606 concerned one of the grounds justifying an abandonment of an insured ship in s 25 of the *keur* of 1598, namely un navigability. It provided that in view of the disputes concerning insured ships sailing from Amsterdam to the East Indies which at times became un navigable (*'innavigabel'*), insurers would in future be liable for such un navigability of East Indiamen on outward-bound and on homeward-bound voyages (*'d' innavigabiliteit der voorsz Oost-Indische Schepen op de uytwaert ofte wederkomste overkomende staen sal tot laste van de Assuradeurs'*), except where the ship in question had not merely been employed on a voyage to and from the East Indies but also for trading from one place to another within the East Indies itself.<sup>254</sup> The reason why the insurer's liability was excluded in that case, it would appear, was because of the increased likelihood of the ship becoming un navigable should she be employed on a further trading venture.

Section 4 of the Amsterdam amending *keur* of 26 January 1610 clarified s 25 of the *keur* of 1598.<sup>255</sup> It provided that in accordance with s 25 no assessment of a total

<sup>253</sup> See again ch XV § 6.2 *supra*.

<sup>254</sup> See again ch XIII § 2.2 *supra* where the seaworthiness of ships was considered in more detail.

<sup>255</sup> See Goudsmit *Zeerecht* 329; Smeding 16-17.

loss ('*geene repartitie van totaël verlies*') could be made and granted before the expiry of three months after the abandonment. Thus, although an immediate abandonment and claim was possible in the case of the justifying circumstances provided for in s 25, the insurer still had the usual period of three months after notification and claim within which to pay the insured.<sup>256</sup> Obviously some confusion had arisen between the period within which the insured could abandon and claim in terms of the policy, and the different period within which the insurer had to pay such claim.

The method of abandonment, together with the notice of loss,<sup>257</sup> was addressed in the Amsterdam amending *keur* of 25 January 1640.<sup>258</sup> The well-known problem, the *keur* explained, was that many notaries and brokers, by reason of their inexperience in insurance matters, made serious mistakes and often committed abuses in the notification of an abandonment ('*op 't instellen van Abandonnementen*'). They contravened the applicable *keur* in this regard when giving the notice of abandonment.<sup>259</sup> Another problem was that some of them, instructed by their principals to abandon and give notice to the insurers ('*gelast sijnde van hare Meesters omme Abandonnementen ende Insinuatien aen de Versekeraers te doen*'), failed to do so at all or to do so properly, for example, within the permitted time. It seems that one of the reasons for this was that the notaries and brokers were afraid to convey the bad news of a loss to the insurers whom they had but a short while earlier convinced to underwrite the policy in question. The result was that many insured merchants in many important cases, and without any fault on their part, were overdue with their notices of abandonment and loss and suffered large losses as a result.

For these reasons the *keur* of 1640 prescribed a formal method in which the insured had to give his insurer a notice of abandonment. It provided that in future all abandonments, notifications and authorisations in matters of insurance ('*alle Abandonnement, Insinuatien ende Authorisatien, rakende 't stuck van Asseurantie*') had to be made, processed or executed ('*gedaen, gepasseert ofte geexploicteert*') only through the Secretary and Messenger of the Insurance Chamber ('*alleen by den Secretaris ende Bode van de Kamer van Asseurantie*') whom the *keur* fully authorised in this regard. It then expressly prohibited all notaries, brokers and other persons from permitting themselves to be employed in that regard, on penalty that all their deeds or contracts ('*Acten*') would be held null and void.

The provisions of the *keur* of 1640 were repeated in 1701 by the amending *keur* of 24 January of that year. It noted that the measure of 1640 was not observed as it should have been, and that it was for that reason promulgated anew. In addition provision was now made for a fine of f25 to be imposed on transgressors for every voyage

<sup>256</sup> See again ch XVI § 2 *supra* and ch XX § 2 *infra* as to the notice and payment of a loss respectively.

<sup>257</sup> This aspect was dealt with in ch XVI § 2.3 *supra*.

<sup>258</sup> See Enschedé 137 and 154; Goudsmit *Zeerecht* 328; and Vergouwen 44-45.

<sup>259</sup> And also in giving notice of loss and in obtaining authorisation for the insured to take the necessary steps and to incur expenses in the aversion or minimisation of a loss.

or insurance in respect of which a transgression occurred ('by *Contraventeurs, van dien t'elken reyse te verbeuren*').

In Rotterdam the notice of abandonment continued to be given through public persons or officials (that is, notaries and brokers) and in Middelburg, as earlier in Amsterdam, notaries and other public persons too remained entrusted with this task.<sup>260</sup>

The Roman-Dutch authors also provided a great deal of commentary on and explanation of the earlier provisions on the principle of abandonment.

As far as the circumstances justifying an abandonment were concerned, they broadly distinguished between two cases, namely where an immediate abandonment was permissible and where an abandonment was permissible only after a specified period of time.

An immediate abandonment of the insured property was permitted when the insured ship had become unnavigable ('*onzeilbaar*'), or if the insured ship or goods had been captured by the enemy or by pirates, as provided for in ss 25 of the Amsterdam *keur* of 1598, 26 of the Middelburg *keur* of 1600, and 12 of the Rotterdam *keur* of 1604.<sup>261</sup> The analogous but broader and open-ended category of circumstances provided for in these sections and in fact already alluded to earlier in art 14 of the Antwerp *Impressae* of 1582, namely the case where a total loss appeared unavoidable or certain, or where there was no hope of a reversal of the situation, was not mentioned by the authors.

A delayed abandonment of the insured property was permitted in the event of the insured ship becoming incapable of completing her voyage, or if the insured ship or goods had been arrested and detained by the authorities, as provided for in ss 8 and 12 of the Amsterdam *keur* of 1598, 15 and 17 of the Middelburg *keur* of 1600, and 12 of the Rotterdam *keur* of 1604.<sup>262</sup>

Most of the authors also referred to the insured's duty (and the insurer's right) in the meantime to transship and to take the necessary steps to avert and minimise any loss.<sup>263</sup> They also noted the exception created (in ss 9 and 12 of the Amsterdam *keur*, 16 and 17 of the Middelburg *keur*, and 12 of the Rotterdam *keur* 1604) with regard to perishable goods of which an immediate abandonment was permitted in circumstances

<sup>260</sup> See Scholten *Makelaars* 32.

<sup>261</sup> See eg Grotius *Inleidinge* III.24.13; Groenewegen *Aanteekeningen* n29 (ad III.24.13) (referring incorrectly in this regard to ss 36 of the Middelburg and 15 of the Rotterdam *keuren*); Van Zurck *Codex Batavus* sv 'Assurantie' par 21; and Verwer *See-rechten* ad s 4 of title VII of the *placcaat* of 1563 (who explained - at 134 - that in all cases of theft or robbery ('*Dieverye, Rooverije, en verder geweld van woeste Boosdoeners*') for which an insurer was liable, the insured, '*van bewijs voorsien, vermag van stonden aen abandonnement te doen*'; the same was true in the case of '*neming van den Turk, en van andere Barbaren; want dese gehooren onder Roovers*').

<sup>262</sup> See eg Grotius *Inleidinge* III.24.12 (the insured had to wait a specified period of time '*voor ende aleeer t'voorsz schip ofte goederen te verlaten*'); Groenewegen *Aanteekeningen* n27 and n28 (ad III.24.12); Van Zurck *Codex Batavus* sv 'Assurantie' par 20 (the insured had to wait a specified period of time '*na dat ... de weet is gedaen, voor en al eer t'voorschreve ship of goed te verlaten*'); and Scheltinga *Dictata* ad III.24.12 sv '[e]jen schip, etc'.

<sup>263</sup> See again respectively ch XIII § 1.3 and ch XVI § 1.3 *supra*.

otherwise justifying only a delayed abandonment. Furthermore, the writers also commented on the insured's right, in the period during which he had to wait before he could abandon, to obtain security from the insurer.<sup>264</sup>

However, the distinction between the circumstances giving rise to an immediate and to a delayed abandonment respectively was not always readily apparent and that attracted the attention of several commentators.

So, for example, the difference was not clear between unnavigable ('*onzeilbaar*' or '*innavigabel*') in s 25 of the Amsterdam *keur*, which made an immediate abandonment possible, and incapable ('*onnut*' or '*onbequaem*') of completing the voyage in s 8, which only permitted an abandonment after a period of time. Scheltinga,<sup>265</sup> for one, thought there was not too much difference between the two notions ('*zoo moet by gevolg de bewoording onzeilbaar nich veel verschillen van onnut om de reis te volbrengen*'). However, given their different consequences, it appears that a difference had to be drawn in Roman-Dutch law, even if only on a theoretical level, between the unnavigability and the less serious incapability of a ship. The problem, however, was only properly addressed and satisfactorily explained by Van der Keessele<sup>266</sup> at the end of the eighteenth century.

Another issue addressed by the authors was the effect of an abandonment of insured property by the insured.

Firstly, it was already apparent from the legislative provisions that at issue was an abandonment specifically to and for the benefit of the insurers only. The insured did not simply aim to be rid of the property by abandoning it to the whole world so that it became *res nullus*. He in fact abandoned it specifically to the insurer or insurers of the property in return for their payment of the sum insured, that is, their payment of a total loss. Voet,<sup>267</sup> for example, referred to the insured relinquishing and making the insured property over to the insurer ('*derelinquere et Assecuranti cedere*').

Secondly, it was clear that by this abandonment the ownership in the abandoned property was taken to have been transferred to the insurer or insurers in question. On this point Bynkershoek, for example, made an illuminating remark in connection with the effect of an enemy capture (one of the grounds justifying an abandonment) of insured property. The remark concerned the objections he had against Dutch insurers being permitted to insure enemy property.<sup>268</sup> His objection was that if captured by Dutch forces, such property could then lawfully be claimed from the Dutch capturers by the Dutch insurers to whom the property had been abandoned, since they were

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<sup>264</sup> Thus, Schorer *Aanteekeningen* 429 (*ad* III.24.12) *sv* '*Borg of pand te stellen*' noted that such surety or pledge for the payment of the insurance money could be claimed by the insured from the insurer not only in this instance of a delayed abandonment but also where, prior to payment, one or more of the insurers were suspected of not being solvent. See again ch IX § 2.9.2 *supra* as to underwriter insolvency.

<sup>265</sup> *Dictata ad* III.24.13 *sv* '*onzeilbaar*'.

<sup>266</sup> See further § 2.3.9 *infra*.

<sup>267</sup> *Observationes ad* III.24.22 (n42).

<sup>268</sup> As to which see again ch VIII § 5.3 *supra*.

considered to be the owners of the abandoned insured property as far as third parties were concerned.<sup>269</sup> This, Bynkershoek pointed out, would discourage Dutch privateers from capturing enemy property.

Thirdly, having become the owners of the insured and abandoned property, insurers became entitled not only to the property itself but also to any fruits it may have produced, such as profit in the case of goods or freight in the case of a ship.<sup>270</sup>

Finally, the authors considered a practical matter, namely the way in which the insured abandoned the insured property. It is clear from the provisions in the *keuren*, especially those of the Amsterdam *keur* of 1640, that an abandonment was made by the insured by way of a formal notification to the insurer. From early on this appears to have been a notarial notice or at least a notice given through a broker. Later, in Amsterdam, the intercession of the Insurance Chamber was ordered in an attempt to eliminate the problems which had arisen with the giving of notifications in the context of the insurance contract. In cases where an immediate abandonment was permissible, the notice of abandonment accompanied the notice of the occurrence of the event,<sup>271</sup> and so too the insured's request for permission from the insurer to take steps and, if necessary, to incur expenses in averting or minimising the loss.<sup>272</sup> Insurers could accept or reject the notice of abandonment, thus accepting the insured's claim for a total loss or rejecting his claim and denying liability, if not on the policy then at least for such a loss.

Due to the formality required for notices of abandonment, there are many extant examples of such notices from the seventeenth and eighteenth centuries. A few may briefly be referred to.

In the case of two Antwerp policies on goods concluded in 1594,<sup>273</sup> goods were detained (and later declared forfeited) by the Spanish authorities. The insured appeared before an Antwerp notary to give notice of that detention to the insurers and to request from them if they wanted to send a representative to oppose the detention and attempt to obtain the release of the goods. Alternatively he offered to pursue the release of the goods for his own account and that of those who might have been interested in the goods. The insurers unanimously declared that they were not interested in accepting the notice nor did they want to answer it (*'de intimatie niet willen aanhoren, noch er op te antwoorden'*). Some four months later the insured again appeared before the same notary and declared that the insurers had failed to appoint a representative as

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<sup>269</sup> *Quaestiones juris publici* 1.21 (*'eorum enim quodammodo sunt, qui illorum securitatem sponponderunt, & quod ad naves mercesque, dominos eosque fidejussores pro iisdem esse habendos'*).

<sup>270</sup> Thus, Pontanus *Beschrijvinge* III.4 (at 298-299), in a work first published in 1614 in which he described commercial Amsterdam and also its insurance practices, explained that in the case of a loss, insurers had to pay the insured the amount of his loss in full, *'met die conditie nochtans dat den Coopman gehouden zy den Asseureerders teenemael over te laten het schip ende de plancken van de Schipbreucke, ende al het profijit dat tot de Asseureerders noch soude moghen comen'*.

<sup>271</sup> See again ch XVI § 2 *supra*.

<sup>272</sup> See again ch XVI § 1 *supra*.

<sup>273</sup> See further De Grootte 'Polissen' 160-161.

he had requested and that the prosecution of the matter in Spain had not been undertaken. The insured therefore declared the insured goods abandoned to the insurers (*'de verzekerde goederen aan de assureurs over te laten, zoals hij ze aan hen overlaat a rato van hun verzekering'*). He also indicated that he would at the appropriate time claim the sum insured from them. The notary then notified the insurers of this.

An abandonment on the grounds of a total loss of a ship (*'abandonnement wegens totaal verlies van een schip'*) and the insurers' acceptance of it were the subject of a Rotterdam notarial protocol of 1651.<sup>274</sup> The protocol contained a statement by the notary that at the request of merchant P, the insured, he had gone to the residences of merchants VBV and B, the insurers (*'coopluiden in compagnie'*), and had given them notice (*'geinsinueert'*) of the insured's unconditional abandonment of the ship insured by their policy. The protocol then also noted the insurers' response, namely that they accepted the abandonment in question.<sup>275</sup>

Notices of abandonment also appear from the archives of the Amsterdam Chamber of Insurance, through which, after 1640, all such notices had to be given.<sup>276</sup> These notices were in effect declarations of abandonment to named insurers and they appear in different forms. One example, dated 11 January 1701,<sup>277</sup> gives a brief exposition of the background of the loss and then a note by the Messenger of the Chamber that the insured had through him abandoned the insured property described in the notice to the insurers who had signed the policy on that property.<sup>278</sup> Then follows a list of the persons to whom the notice had been given and in whose favour the abandonment had been made. Another example, from 25 February 1702, declares that the abandonment of the hull of the ship in question had been made in favour of named

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<sup>274</sup> See Appendix 13 *infra* for a reproduction and transcription of this notice and acceptance of abandonment.

<sup>275</sup> The statement read *'dat den insinuant [ie, P] mits desen verklaert absolutelijcken te abandonneren het schip genaemt Ste Pieter daer schipper op was Pieter Jacobsz Nanninghs pro rato off voor soo veel de geinsinueerde en compagnie hen insinuant daerop hebben geassureert over de voyage van ... tot ... volgens de police daervan zijnde dato 24en Martij lestleden, waerop den geinsinueerde mij notaris tot antwoord gaff 't is wel ick neme het abandonniement aen'*.

<sup>276</sup> The *Archief van de Assurantiemeesteren* is taken up in the Amsterdam *Gemeente Archief (Archief 5061 (RA))*. The notices in question, dating from 1701-1810, are contained in volumes entitled *Authorisatien van Assuradeuren benevens abandonment & insinuatien* (inv 2925-3050).

<sup>277</sup> In inv 2925.

<sup>278</sup> *'[O]ndergenoemde Assuradeurs door mijn onderget. Boode van de Kamer van Assurantie deser Steede doet abandoneeren ... [the insured property described supra] met presentatie (voor soo veel noot sij) van aen dieselve Assuradeur a dato van idere geteekende tegesen [tegen en?] Actionem Cessam'*.

insurers in proportion to the amounts they had underwritten on that ship, and that that abandonment was made because that ship had become unnavigable.<sup>279</sup>

Finally, a notice of abandonment was also reproduced in the *Amsterdamsche Secretary*<sup>280</sup> which first appeared at the beginning of the eighteenth century. The notice of the abandonment of the insured merchandise (*Abandonnement van verzekerde Koopmanschappen*), stated to have been drafted in conformity with the *keuren* and signed by the Secretary of the Insurance Chamber, stipulated that the insured abandoned proportionally to the insurer (*'A doet u B pro rato uwe signature abandonneren de ...'*) the ship or cargo described in the notice which the insurer had insured because that ship or cargo had been captured, or detained, as the case may have been. Also reproduced<sup>281</sup> was the deed of abandonment (*Relatie of Acte van Abandonnement van Schip en Goed*) which was drawn up after the abandonment had been made or notified to the respective insurers. It stipulated that on such and such a date, at the request of the insured, the specified ship or cargo had proportionally been abandoned to the named insurers, each according to the amount he had underwritten (*'[o]p ... is ten verzoeken van ... ten behoeve van de naargenoemde Verzekeraars, pro rato een yder zyne Signature, geabandonneert ...'*), because that ship or goods had been lost in such and such circumstances, which abandonment had been done to the insurers then listed in the deed (*'welk Abandonnement gedaan is aan ... &c. &c.'*).

### 2.3.7 Decisions and Opinions on Abandonment in the Seventeenth Century

Further explanation and illustration of the legal principles surrounding the doctrine of abandonment and its practical ramifications in Roman-Dutch law in the course of the seventeenth and in the first quarter of the eighteenth centuries, appear from the opinions and decisions which dealt with the topic. There were quite a few of those. Apart from interpreting and illustrating the application of some of the legislative provisions referred to earlier, these opinions established and confirmed quite a number of points of importance. These included the view that an abandonment involved the transfer of the ownership in the insured property from the insured to the insurer; that this transfer of ownership occurred with the consent of the two parties (or sets of parties) involved; that a valid abandonment was not reversed by a subsequent change in the circumstances which justified it in the first place; that the insured was under a duty to take the necessary steps to avert and minimise a loss only in the case of a delayed abandonment and not in the case of an immediate abandonment; that in the case of under-insurance there was only a proportional abandonment to the insurers; and,

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<sup>279</sup> '[T]en behoeve van de naargenoemde Verseeckeraers asso rato een ijder Sijne signaturije geabandonneer 't Caske ofte Corpus van 't Schip ... waer op dat Sij aen haer geteekent ende Verseekert hebben, Vermogens de Police; alsoo 't voorsz. Schip ... innavigabel geworden is, welcke abandonnement gedaan is aen ...'.

<sup>280</sup> At 383. See Appendix 9 *infra* for a reproduction.

<sup>281</sup> At 384. See Appendix 10 *infra* for a reproduction.

finally, that an abandonment was also justified if a ship could not be repaired or if her repairs would have cost more than she would have been worth in her repaired state.

An opinion delivered in 1602<sup>282</sup> made two pertinent points about abandonment. The first was that in the event of a partial loss<sup>283</sup> the insurers incurred no liability other than to make good that damage (*'anders als by somme van avarije'*). As a result there was no ground for the insured abandoning the insured ship to the insurers and claiming for a total loss (*'ende consequentelijk dat het abandonneren van 't selve schip ende goederen ... tot laste van da Versekeraars geen fundament en heeft'*). The second point was that in the case of an abandonment, the insured was required to give the insurers both a cession of action (*'actionem cessam'*) against third parties<sup>284</sup> and of necessity (*'per necessarium antecedens'*) also a description or specification of the abandoned goods, so as to enable the insurers to recover those goods through legal channels, by way of a letter of reprisal, or otherwise.<sup>285</sup>

The effect of an abandonment was again mentioned in an opinion delivered in 1674.<sup>286</sup> The insured consignor of a cargo of salt on board a ship which had been captured by the enemy, it was said, was entitled to abandon that cargo to the insurers, in proportion to the amounts they had underwritten, for them to deal with it as they saw fit (*'naar advenant henliedder signature, om naar haar goedvinden daar mede te handelen'*). After such abandonment the insurers had to pay the insured in full (that is, as for a total loss) according to their subscriptions. The effect of such an abandonment was that the insurers stood in the place of the insured consignor and had such rights against the carrier of the cargo as the consignor himself would have had were it not for the abandonment (*'de Assuradeurs in de plaatse van de bevracters komen, ende in sodanige regt tegens den Schipper hebben als den bevracter buiten doen van abandonnement soude gehad hebben'*). Therefore, it would seem, the insurers could, for example, claim delivery of the cargo from the carrier who had succeeded in recovering the cargo from the enemy.<sup>287</sup> Furthermore, the opinion continued, it was irrelevant

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<sup>282</sup> See *Hollandse consultatien* vol I cons 187.

<sup>283</sup> In this case the insured ship arrived at her destination undamaged apart from her anchors and ropes having been cut.

<sup>284</sup> See again § 1.2 *supra* where this point was considered.

<sup>285</sup> Possibly, in the case of insured cargo, the insured would have had to deliver the bill of lading covering those goods to the Insurers.

<sup>286</sup> See *Nederlands advysboek* vol III adv 248. See too *La Leck Index* sv 'ship'.

<sup>287</sup> The other question posed in this opinion, namely whether the carrier here had any right against the insurers, was, as far as could be ascertained from the published opinion, unfortunately not answered. It is in any event not certain to which right of the carrier this referred. If it referred eg to the carrier's right in terms of the contract of carriage to claim freight from the insurers, it may well have been that the carrier would have been able to claim that from the insurers as the new owners of the cargo, just as he would in appropriate cases have been able to claim it from the consignee of the cargo to whom ownership in the cargo had passed by virtue of the delivery by the consignor of the bill of lading covering that cargo. But it seems that the question could rather have concerned whether the carrier, having recovered the goods by buying it from the capturers, could compel the insured or the insurer to buy it from him.



that in terms of s 8 of the Amsterdam *keur* of 1598, the insured had to wait six months or one year before he could abandon, for that section was concerned not with enemy capture (*van Vyanden genomen*) but with an arrest by the authorities. In any event, s 9 provided that perishables goods, such as the salt here, could be abandoned immediately. Surprisingly, the advocate here had overlooked and therefore failed to refer to s 25 of the *keur* of 1598 where there was mention of an immediate abandonment being permissible specifically when the insured ship or goods had been captured by the enemy (*by den Vyanden gerooft*).

In an opinion dated 1678<sup>288</sup> the question arose to what extent the general principles of cargo insurance also applied to a ransom insurance policy.<sup>289</sup> One of the principles referred to in this regard was that of an immediate abandonment in the case of specific losses in terms of s 25 of the *keur* of 1598. That could not apply in this case, the opinion suggested, given that the ransom of the captured insured (or, for that matter, the insured himself) could not be abandoned (*het Randzoen van een Slaaf die niet geabandonneert kan worden*).<sup>290</sup> In any event, s 25 specifically mentioned only an insured ship and goods in this connection.

As already alluded to, a close relationship existed between abandonment and the insured's duty to prevent and minimise a loss. While the insured may have been entitled to abandon the insured property either immediately or after a specified period of time, as the case may have been, he was in the latter case at the same time under an obligation to take steps to avert and minimise any loss of that property. In 1681 an opinion<sup>291</sup> was requested on the legal position where an insured ship had become incapable of completing her voyage to Holland (*zoo onbequaam was geworden, dat het incapabel was om daar mede de reyse naar Holland te kunnen doen*) in the Spanish province of Galicia (*Galicien*). The view was expressed in the opinion that the master was entitled to sell the ship there, presumably in an attempt to minimise the loss, just as he was entitled to abandon the ship to her insurers (*het zelve Schip, ten behoeve van de Assurateurs te abandonneren*), as was expressly provided for in s 25 of the

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<sup>288</sup> See *Nederlands advysboek* vol II adv 170.

<sup>289</sup> See again ch VII § 3.2 *supra*.

<sup>290</sup> Note though, that in the case of a policy on slaves, such slaves, being the equivalent of goods, could, at least in theory, have been abandoned. In practice, however, the parties may well have come to a different arrangement, as appears from a Rotterdam fire policy concluded in 1770 on property situated in Surinam, including the insured's slaves. See Kracht 71; Mees *Gedenkschrift* appendix 21. As far as the slaves were concerned, the insured owner was covered against a number of perils, including desertion (*afloopen*) and revolt (*Revolteeren*). It was specifically agreed, though, that if a run-away slave was recaptured, the insured had to return the insurance payment to the insurer (*en in gevalle van onverhoopte Revolte of wegloopen van Negers of Slaaven dezelve weder op de voorsch: Plantagiën ... quamen te retourneeren zal de Geassureerden gehouden zijn die Schade die door ons dieswegens mogte betaald zijn, Weeder aan ons te vergoeden*). Quite possibly this arrangement was more suitable in the circumstances than abandoning such slaves in Surinam to the insurers who were in Rotterdam. As to the insurance of slaves, see again ch VII § 3.1 *supra*.

<sup>291</sup> See *Nederlands advysboek* vol II adv 202.

Amsterdam *keur* of 1598.<sup>292</sup> Presumably the master could do this on behalf of the insured shipowner. The insurers could not argue, the opinion thought, that the ship's master should have written for assistance ('*adsistentie*'). Not only was there no direct postal service between Galicia and Holland,<sup>293</sup> but he was in any case not bound or compelled to do so.<sup>294</sup>

In an opinion from 1706<sup>295</sup> the facts to be considered were that the insured had given a notarial notice of abandonment to his insurers when the carrying ship and her cargo of wine, insured on a voyage from Bordeaux to Middelburg, were captured by the English and taken to Guernsey. The opinion advised that under these circumstances the insured was entitled, immediately on the capture and detention of the ship and the wine at Guernsey, to abandon and to institute his action against the insurers without having to await the outcome of the matter, and that this was so irrespective of whether or not there was any hope of a recovery of the cargo. For this it referred to ss 15 and 17 of the Middelburg *keur* of 1600, which were the equivalent of ss 8 and 12 of the Amsterdam *keur* of 1598 and which permitted such an immediate abandonment in the case of perishables, such as wine.<sup>296</sup> Ironically, in this case, after having been detained for three months at Guernsey, the ship and her cargo were released and arrived in Middelburg. But having been lawfully abandoned, the released cargo of wine remained abandoned and belonged to the insurers ('*aen dezelve Assuradeurs zouden*

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<sup>292</sup> This reference would appear to be incorrect, though. Section 25 concerned the case where the ship had become unnavigable ('*innavigabel*') and where an immediate abandonment was possible. Section 8 of the *keur* of 1598, by contrast, concerned the case where the ship had become incapable ('*onnut ende onbequaem*') of completing her voyage and where an abandonment was only permissible after a specified period of time.

<sup>293</sup> It would have taken some time, therefore, before the news of the ship's condition ('*van de desolate staat van het gemelte Schip*') would have been received in Holland, and longer still before the master would have received a reply. In the meantime he would have had to buy victuals, and continue paying the sailors their wages, and that while no repair of the ship was foreseeable, while her condition continued to depreciate, and while the master was unable to obtain any bottomry loan there ('*dat geen apparentie van herstellinge van het Schip voor handen zoude zijn, en het Schip voorts t'enemaal geconsumeert, en opgegeten zoude werden, te meer, om dat de Schipper aldaar geen credit ... dat hy verklaart, wist te vinden, om eenige gelden op Bodemery te kunnen bekomen*'). No doubt all these matters were factors indicating that the ship had become incapable of completing her voyage so that an abandonment was in this case considered permissible and justified.

<sup>294</sup> And, the opinion continued, even if the master had not complied with his duty properly and had abandoned the ship - now apparently in the sense of leaving her behind as opposed to abandoning her to the insurers - in bad faith ('*en het zelve Schip malitieuuselijk verlaten en geabandonneert*'), the insurers would still have been liable to pay in terms of the policy, given that by its terms they had taken over the risk of any negligent and intentional acts of the master and crew as well. As to this risk, see again ch VI § 4.3 *supra*.

<sup>295</sup> See Barel's *Advysen* vol I adv 14.

<sup>296</sup> It may be thought that such an immediate abandonment was also permissible in terms of s 26 of the *keur* of 1600 (or s 25 of that of 1598), given that there had been a capture by the enemy, although then, it would appear, there had to be no hope or reasonable expectation of the ship and the cargo being recovered.

*zyn en blyven in effecte geabandonneerd*) in proportion to the amounts they had underwritten on the policy, as long only as the insured was paid the sum insured plus interest (*'mits alleen, dat de Geassureerde van zyne verzekerde somme zoude worden voldaan, met wat dies aenkleef'*). The release of the insured goods in this case did not change this position and the abandonment remained effective (*'in welk regt van abandonnement, of afstand van den Geassureerden, de opgevolgde vrygeving niet heeft kunnen maecten eenige veranderinge'*). Therefore, once an insured had validly abandoned the insured property, any subsequent change in the circumstances affecting that property, such as when it became clear that there was either no loss at all or at least no total loss, was simply irrelevant, even if at that stage the insurer had not yet paid out on the policy or even if legal action on the policy had not yet been commenced at that time.<sup>297</sup> Put differently, the validity of any abandonment was determined at the time it was made.

In another opinion requested some years later on a similar matter,<sup>298</sup> the point was stressed that a distinction had to be drawn between an arrest by the authorities and a capture by the enemy at sea (*'de ... distinctie tusschen het Arrest van koningen en princen, en tusschen het aenhaelen en opbrengen in of uit de zee'*), a distinction recognised in the Amsterdam *keur* of 1598<sup>299</sup> and also by Grotius. In this case the insured ship and goods were not arrested by the King or government of Sweden (*'niet een polityck Arrest of aenhouding door en Koning of Prins, in zyn Ryk gedaen'*) but had been captured at sea by Swedish privateers as enemy property (*'in zee door Zweedsche schepen of Commissievaerders is gerecontreerd, opgebracht en, als gedestineerd na een vyandyke haven, en tot onderstand van de vyand van Zweeden ... en also dan als een vyandyk schip is gebracht ter judicatuure van de Rechter'*). Accordingly, the insured in this case did not have to wait six months before he could abandon but he was entitled to do so immediately at the same time as he gave notice of the loss to the insurers.

The effect of the insured's release of a third party upon the insurers' entitlement to abandoned property and upon the insured's right under the policy, was one of the issues considered in passing in an opinion in 1707.<sup>300</sup> In this opinion the view was expressed that the insurer was not liable under the policy because the loss had occurred through the master's fault. However, the argument continued, even if the

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<sup>297</sup> Of course, had the goods in this case not been perishable, and had it not been a case of an enemy capture with no hope of recovery (both factors justifying an immediate abandonment), any abandonment may well have been delayed for six months so that there would then have been no valid abandonment at all but at most a claim for a partial loss.

<sup>298</sup> See Barel's *Advysen* vol I adv 23 (1715).

<sup>299</sup> Although the advocate delivering the opinion referred to ss 7 and 8 of the *keur* of 1598 in this regard, that was incorrect. Enemy capture was treated in s 25 and arrest by the authorities in ss 8 and 12. This reference was in any event only in passing and by way of comparison, as it appears that the French *Ordonnance de la marine* of 1681 was thought to have been applicable in this matter.

<sup>300</sup> See Barel's *Advysen* vol I adv 20. The opinion was also considered in more detail in § 1.2 *supra* in connection with the insurer's right of recourse against such third party.

insurer were liable, the insured could then not, as he had done in this case, effect any change in the liability of the third party by coming to a settlement with him to the detriment of the insurer. If he had, the insurer escaped liability under the policy to the extent that his position had been adversely affected as a result. The impermissibility for the insured to settle with a third party arose in the case of insurance in particular from the fact that, if he wanted to claim under his policy, the insured had to abandon the property insured and also transfer his right of action against third parties to the insurer (*'dat men gehouden is alles aen de assuradeurs na rato van hunne signature te abandonneeren en af te staen'*).<sup>301</sup> Importantly in the present context, furthermore, this impermissibility was not altered by either the insured's duty to take the necessary steps to avert or minimise a loss nor by a clause in the policy permitting him do so.

An opinion in 1713<sup>302</sup> noted in passing that an insured remained under a duty to take the required steps to avert and minimise a loss for as long as he did not abandon or had not abandoned the insured property, seeing that he remained owner and in control of it (*'als kennelyk zynde dat de Geassureerden zo lang hy niet abandonneerd, van alles altoos meester is en meester blyft, en dat hy mitsdien blyvende in continue van beheeringe'*). This had several implications. Firstly, it confirmed that by validly abandoning insured property to the insurer, the insured relinquished his ownership in it. Secondly, the insured was relieved of his duty to preserve the insured property by validly abandoning it to the insurer. And thirdly, the duty to preserve was only relevant in the case of a delayed abandonment,<sup>303</sup> or where the insured did not abandon immediately although he was entitled to do so.

Another very important opinion on the topic of abandonment was delivered in 1715.<sup>304</sup> It concerned the effect of an abandonment and made a number of crucial points. In the first instance it confirmed the basic principle that in the case of a total loss of the insured ship and goods, such property could be abandoned and relinquished by the insured for the benefit of the insurers (*'door de Verzekerde mogen werden geabandoneerd en gelaeten aen en voor rekening van de Verzekeraers'*). Secondly, in the case of full-value insurance, the whole property had to be abandoned and the insurer in turn had to pay the full sum insured after having received a notice of loss and of abandonment (*'en dat vervolgens ook door de Verzekeraers weder conform hunne signature moet worden gedaen voldoen de geassureerde sommen, na dat daer van alvorens behoorlyke kondschap [notice] en van het geassureerde ook Abandonne-*

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<sup>301</sup> Therefore, if the insured had released or settled with a liable third party, the insurer could have been disadvantaged when he tried to enforce his right of recourse against the third party as cessionary of the insured's personal right against that third party, or when he tried, as owner of the abandoned property, to enforce his real right over that property. Where the insured eg abandoned a captured ship to the capturers or an arrested ship to the arresting authorities, or for that matter to whole world or to anyone other than the insurer, the latter's rights were prejudiced and his liability under the policy excluded or reduced accordingly.

<sup>302</sup> See *Barels Advysen* vol I adv 21.

<sup>303</sup> As was also illustrated by the opinion in 1681 (see *supra*).

<sup>304</sup> See *Barels Advysen* vol I adv 16.

ment zal zyn gedaen').<sup>305</sup> In the case of under-insurance, whether voluntary or compulsory,<sup>306</sup> again, the insured need only have abandoned proportionally ('de Geassureerde de voorsz afstand en verantwoordinge alleen proportionelyk na maete van de gedaene of gepermitteerde Assurantie zal hebben of behoeven te doen geschieden'). Thirdly, the opinion confirmed the point already made earlier in the opinion of 1706, namely that any subsequent release of the insured ship and cargo could not make any difference to and could not reverse an earlier valid abandonment by the insured to the insurer ('in het Abandonnement en den afstand ... aen en ten behoeven van zyn Assuradeur'). The reason for this was simply because the insurer had already by such abandonment obtained ownership of the property in question ('overmits door middel van dat Abandonnement en van dien afstand [zyn] Assuradeur en ontwyffelbaer regt van eigendom heeft verkreegen'). After the valid abandonment, the insured property belonged to the insurer ('zullen de geassureerde goederen toebehooren aen den Assuradeur') and he remained owner of it ('eigenaer blyft van 't geen hem door en mits het voorsz Abandonnement in eigendom is verkregen'). He could not be relieved of his liability to pay the sum insured under the pretext that the property had in the meantime been recovered. If the property remained lost, the insurer bore that loss, but if it was recovered or released, it accrued to his benefit and profit.

Abandonment was therefore a way in which the insured transferred and the insurer acquired ownership in the insured property, and the opinion stressed that, as with all other transactions by which ownership was transferred, the intention of the parties involved had to agree.<sup>307</sup>

Finally, reference must be made to a case coming before the *Hooge Raad* in 1728.<sup>308</sup> The case is important for in it the *Raad*, if not acknowledging a new circumstance justifying an abandonment, at least formulated a different test - and quite possibly one applied in practice - to determine whether an existing statutorily recognised ground for abandonment was present, namely whether the ship was unnavigable.

Here the owner-master of a ship had insured her for f1 300 on a particular voyage. The ship with her equipment had been acquired by the insured for f2 600. The ship was stranded on her voyage. After having sold some of her equipment at the place

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<sup>305</sup> Reference was made in this regard to ss 8 of the Amsterdam *keur* of 1598, 15 of the Middelburg *keur* of 1600, 12 and 13 of the Rotterdam *keur* of 1604, arts 42-44 of the *Ordonnance de la marine* of 1681, and Grotius *Inleidinge* III.22[?].27-28.

<sup>306</sup> See again ch XVIII § 5 *supra*.

<sup>307</sup> The way in which the insurer acquired ownership was accordingly not by way of an original method of acquiring ownership (as it would have been had the property been *res nullius*, which it clearly was not). It may be thought that the insured's notice of abandonment could be regarded as an offer and the insurer's acceptance of the notice of abandonment as an acceptance of that offer. However, that was not apparent from this opinion. Further, it would appear that the insurer was in any case not entitled to reject a valid 'offer' of abandonment. Possibly the insurer's consent had to be implied from the insurance contract itself, ie, an anticipatory consent to accept any valid abandonment of the insured property. Such consent had to be implied unless it was expressly excluded by the parties to that contract.

<sup>308</sup> See Bynkershoek *Observationes tumultuariae* obs 2449; *idem* *Quaestiones juris privati* IV.14. See also Van der Keessel *Theses selectae* th 746 (*ad* III.24.7).

where the shipwreck occurred, the insured owner abandoned the wreck and claimed compensation from the insurers for the balance of his loss ('voor de overige schade'). The Amsterdam Insurance Chamber allowed his claim in the amount of f1 040, arrived at by deducting the proceeds of the sale of the equipment from the sum insured. This judgment was confirmed by the *Schepenen* Court and by the *Hof van Holland*. On appeal to the *Hooge Raad*, the insurer argued that after the ship had been stranded, the owner had failed to repair her and that she was in fact repairable and could have been taken to sea again. The insured denied this and the *Raad* accepted his evidence that the ship was in fact not repairable. Furthermore, the insured argued that even if the ship could have been repaired, the cost of such a repair would by far have exceeded value of the whole (that is, of the repaired) ship. Although it does not appear from Bynkershoek's account what the *Hooge Raad* thought of this argument, it held in favour of the insured.

It would appear that the case supports the view<sup>309</sup> that in this instance the abandonment was justified and valid either because the ship was not repairable or because, even if repairable, the cost of repairing her would have exceeded her repaired value. Whether this constituted a new ground justifying an abandonment, or whether it was but an instance where it could be said that the ship had become unnavigable so that an immediate abandonment was permissible, is not clear, and it probably matters little from a practical point of view.

### 2.3.8 Legislative Measures on Abandonment in the Eighteenth Century

As far as abandonment was concerned, the Rotterdam Legislature retained the earlier system in 1721. If anything, though, its regulation was more comprehensive than before.<sup>310</sup>

Section 60 of the *keur* of 1721 stated the broad principle, namely that in the event of the insured ship or goods being destroyed, captured, perished or arrested ('vergaan, genomen, bedorven, of gearresteert'), the insured was obliged, before being entitled to claim any compensation ('alvorens vergoedinge te eyschen'), to abandon that ship or goods in favour of the insurers ('het Goed of Schip te abandonneren ten behoeven van de Asseuradeurs').<sup>311</sup> Section 61 added that for it to be effective, such an abandonment had to take place through the Messenger of the Chamber of Maritime Affairs ('den Bode van het Zee-regt'), and by way of a written notification ('schriftelijke Intimatie'). In this Rotterdam therefore followed the example of the Amsterdam *keuren* of 1640 and of 1701.

<sup>309</sup> Van der Keessel *Praelectiones* 1456 (ad III.24.7) observed with reference to this decision and in respect of insurance against the negligence of the master, that it was not negligent of a master to abandon a ship which had been stranded on a coast and was so damaged that she could not be repaired without a greater expense than the value of the ship. Such an abandonment was therefore justified.

<sup>310</sup> See generally Enschedé 137; Goudsmit *Zeerecht* 401-402; and Kracht 39.

<sup>311</sup> See Van der Keessel *Praelectiones* 1470 (ad III.24.13); Van der Linden *Koopmans handboek* IV.6.8.

The Rotterdam *keur* of 1721 then distinguished between the traditional two types of abandonment.

In terms of s 62, where a ship had been lost or had become unnavigable (*'vergaan, of innavigabel geworden'*), or where goods had been lost, had become perished or had been captured (*'vergaan, bedorven, ofte genomen'*), or were otherwise certainly lost without hope of any recovery (*'of andersints zekerlijk verloren, zonder hoop van te kunnen werden weder bekomen'*), an immediate abandonment was possible.<sup>312</sup> The position was the same, in terms of s 63, in the case of an arrest of perishable goods by the authorities (*'wanneer Goederen, die haast bederven of verspillen, van hoogere Hand zullen zijn gearresteert'*). Therefore, abandonment was now also specifically permitted in the case of a factual total loss of the insured ship or goods, as well as in the usual cases of unnavigability, enemy arrest, and, generally, in cases where the total loss was a certainty. An immediate abandonment was also possible in the case of perishables, but now seemingly only in the case of their arrest.<sup>313</sup>

The instances where only a delayed abandonment was permitted were provided for in s 64. This section laid down that where there was still hope of obtaining the release of an arrested ship or goods (*'als 'er nog hoop zal zijn van het gearresteerde Schip of Goed vry te bekomen'*), the insured had to wait for some time after he had formally notified the insurer of the arrest before he could abandon. In the event of an arrest in Europe and further in Barbary and the Canary Islands and thereabouts (*'ende andere daar ontrent incluys, ende ontrent op die Limiten'*), the period he had to wait was six months, and in the case of an occurrence further afield, one whole year.<sup>314</sup> In the meantime, though, in terms of s 65, the insurer was obliged to provide sufficient security (*'sufficiente Cautie'*) at the request of the insured.<sup>315</sup> In terms of s 66 the insured on his part was obliged, at the request and with the authorisation of the insurer, to attempt with letters and correspondence to facilitate the release of the arrested ship or goods as far as was possible (*'de relaxatie zoo veel mogelijk te bevorderen'*).<sup>316</sup>

Section 67 of the Rotterdam *keur* of 1721 concerned a missing ship or goods.<sup>317</sup> After one year and six weeks, or two years, depending on the destination of the voyage, a total loss was presumed and the insured became entitled to abandon (*'en zullen de Geassureerdens bevoegt zijn het abandonnement te doen'*).

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<sup>312</sup> See Van der Keessel *Theses selectae* th 755 (ad III.24.12); *idem Praelectiones* 1470 (ad III.24.13); Van der Linden *Koopmans handboek* IV.6.8.

<sup>313</sup> See Van der Keessel *Theses selectae* th 754 (ad III.24.12).

<sup>314</sup> See Van der Keessel *Theses selectae* th 754 (ad III.24.12); *idem Praelectiones* 1465-1466 (ad III.24.12); and Van der Linden *Koopmans handboek* IV.6.8.

<sup>315</sup> See Van der Keessel *Theses selectae* th 756 (ad III.24.13); *idem Praelectiones* 1465-1466 (ad III.24.12); and Van der Linden *Koopmans handboek* IV.6.8.

<sup>316</sup> See Van der Keessel *Theses selectae* th 756 (ad III.24.13); *idem Praelectiones* 1465-1466 (ad III.24.12); and Van der Linden *Koopmans handboek* IV.6.8.

<sup>317</sup> See again ch XV § 6.2 *supra*.

Therefore, although the circumstances justifying an immediate and a delayed abandonment respectively were not identical with those recognised in the earlier Rotterdam *keur*, it clearly emerged from these provisions that the underlying principle was that an immediate abandonment could occur where there was no reasonable expectation or hope of the insured recovering the insured property or of it not being a total loss, while if, despite some uncertainty, there was such an expectation, the abandonment was delayed for a specified period of time. Of course, whether or not there was such an expectation depended upon the facts of every case.

Not surprisingly, the Amsterdam Legislature did not deviate from the established pattern in 1744.<sup>318</sup>

Provision was made for an immediate abandonment in s 28. In the case of the insured ship becoming unnavigable (*'innavigabel'*), or in the case of the insured ship or goods being captured by the enemy (*'by Vyanden gerooft, genoomen'*), or being otherwise certainly lost or perished without hope of recovery (*'of andersints sekerlyk sullen zyn bedorven, verlooren, of sonder hoope van deselve te recouvreeren'*), the insured could abandon such ships or goods in favour of the insurers (*'ten behoeve van den Verseekeraars'*). If this had been done properly, the insurers had three months after such notice of loss and abandonment in which to pay the sum insured for.<sup>319</sup>

Section 26 concerned a delayed abandonment.<sup>320</sup> Such an abandonment was permitted in the event of the arrest or detention of the insured ship by authorities abroad, if it was uncertain whether or not the property could be recovered (*'met onzekerheit, of het zelve weder zoude zyn te krygen ofte niet'*). It was also permitted when the insured ship had become incapable of performing her intended voyage (*'buyten staat souden kunnen geraaken omme de gedestineerde reyse te doen'*). In such circumstances insured shipowners and consignors were obliged to wait six months before they could abandon the arrested ships or cargo, irrespective of whether or not such cargo was also under arrest (*'het zy deselve [goods] mede belemmers zyn of niet'*) or whether only the ship was affected. This period of six months commenced from the time when notice of the relevant circumstances was given through the Messenger of the Insurance Chamber to the majority of the insurers resident in the place where the contract had been concluded (*'door den Bode van de Assurantie Kamer, die het exploit sal doen, het meerendeel van de Assuradeurs, die in loco zyn, van den toestand sullen hebben geadverteert'*).

This period of six months applied where the casualty (loss) had occurred within Europe and the range provided for in s 29 (*'binnen Europa, en de Limiten'*).<sup>321</sup> If it occurred outside those limits, the abandonment could take place only after the expiry of twelve months, commencing on the day of the notice. In the meantime, an insured

<sup>318</sup> See eg Enschedé 139; Goudsmit *Zeerecht* 355-356; and Smeding 17-18.

<sup>319</sup> See Van der Keessel *Praelectiones* 1470 (*ad* III.24.13).

<sup>320</sup> See Van der Keessel *Theses selectae* th 754 (*ad* III.24.12) and th 756 (*ad* III.24.13); *idem* *Praelectiones* 1465-1466 (*ad* III.24.12); and Van der Linden *Koopmans handboek* IV.6.8.

<sup>321</sup> See *infra*.



was not prohibited from obtaining security from his insurers in a form the Commissioners saw fit (*'eenige verseekertheyt te neemen van de Asseuradeurs met Borgtogten, Panden, als andersints na het goedvinden van Commissarissen'*). However, in that meantime the insured nevertheless remained liable to take the necessary steps to avert and minimise any loss at the cost of his insurers.<sup>322</sup>

Section 27 of the *keur* of 1744 repeated the exception in the case of perishables (*'de grove en bederffelijke Waaren en Koopmanschappen'*) of which there was no delayed abandonment. The insured did not have to wait six months or one year but could act with the goods in his own interest as he saw fit in the circumstances (*'maar zullen haar belang mogen vervolgen naar occurentie van saaken en gelegenthey van haare goederen'*) and he could thus also abandon and press his claim immediately, although he still had to give the majority of the insurers a notice of such an abandonment.<sup>323</sup>

The case of the missing ship or goods was provided for in s 29 but no mention was made there of any abandonment.<sup>324</sup> There was only a reference to the period of one or two years, depending on the destination, the insured had to wait before he could claim although, presumably, he had to abandon if he wanted to claim.<sup>325</sup>

Therefore, as far as the statutory regulation of abandonment was concerned, ss 26, 27, 28 and 29 of the Amsterdam *keur* of 1744 were for all practical purposes identical to the equivalent ss 8, 9, 25 and 5 of its *keur* of 1598, as amended by the *keur* 1640. However, the *keur* of 1744 did contain some innovation.

The fire policy in the measure of 1744 provided for payment by the insurers of the amount they had underwritten (in the event of a total loss) or a proportion of that amount (in the case of a partial loss), on condition though that in the case where there was no actual total loss, whatever was saved and salvaged had to be credited to the insurer after the deduction of the expenses of such saving and salvage. In this regard the insured had to be believed, probably as to the value of such remains, on his oath (*'mits dat in cas van geene totale Schaade tot afslag zal aftrekken alle het geene naar aftrek van onkosten tot beredderinge en berginge gedaan, sal bevonden werden, gesalveerd en geborgen te zyn, en waar omtrent den Geassureerde geloofd zal werden op zyne eed, zonder iets teegen te zeggen'*). So, it appears that the insured was not entitled in a given case to abandon whatever remained of the insured property to his insurer and to claim for a total loss.<sup>326</sup>

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<sup>322</sup> As to this duty, see again ch XVI § 1.3 *supra*. There was no reference to this duty in s 8 of the earlier Amsterdam *keur* of 1598. By contrast, there was no mention here in s 26 of the insurer's right to transship. These differences between the provisions of the Amsterdam *keuren* of 1598 and 1744 were the result of the influence of the Rotterdam *keur* of 1721.

<sup>323</sup> See Van der Keessel *Praelectiones* 1465-1466 (*ad* III.24.12).

<sup>324</sup> Nor was any mention made of abandonment in the amendment of s 29 in the amending *keur* of 1756.

<sup>325</sup> See again ch XV § 6.2 *supra*.

<sup>326</sup> See Goudsmit *Zeerecht* 346.

The fire policy in the amending *keur* of 1775 made the position even more patent by specifically excluding any abandonment in the case of fire insurance (*'zullende in deeze Verzekeringen geen ... Abandonnement plaats hebben'*). Presumably the nature of the insured property and of the risks involved made an abandonment in this case unnecessary. There was hardly likely to be uncertainty as to whether or not an insured house had burnt down or what the nature of the loss and extent of the damage were. The insurer was not prohibited, though, in appropriate circumstances from paying the insured out as for a total loss, in which case he would no doubt have been entitled to any salvage.

Finally, in the amendment in 1756 of s 35 of the *keur* of 1744, it was thought necessary to repeat the earlier provisions of the *keuren* of 1640 and 1701, the essence but not the detail of which had been provided for, as far as abandonment specifically was concerned, in s 26 of the *keur* of 1744. In future all abandonments, insinuations and authorisations in respect of matters of insurance had to be made, signed or executed only by the Secretary and the Messenger of the Chamber of Insurance and by no one else. All notaries, brokers and other persons were again expressly prohibited from allowing themselves to be employed for this purpose.<sup>327</sup>

### 2.3.9 The Views of the Authors in the Eighteenth Century

Van der Keessel commented extensively on the doctrine of abandonment.<sup>328</sup> In addition to setting out the relevant legislative provisions,<sup>329</sup> he also provided some further explanations on the nature and effect of insurance abandonment. These may briefly be recounted here.

First of all Van der Keessel paid attention to the different sets of circumstances justifying an abandonment and, more particularly, to the difference between them.

As far as arrest and capture were concerned,<sup>330</sup> an arrest by the authorities (*'hooger hand'*), such as a king, prince or other lawful ruler, merely gave rise to a delayed abandonment seeing that there was usually hope that the release of the arrested ship or goods could be obtained, for example by the payment of the fine levied by such an authority. In the case of an enemy capture, by contrast, the chance of obtaining a release was much smaller, if it existed at all, hence the entitlement to an immediate abandonment. This was especially so given the fact that negotiations with the enemy were frowned upon if not prohibited outright.<sup>331</sup> It did not matter when such arrest or capture took place, that is, in the port of departure, during the voyage, or

<sup>327</sup> See Van der Keessel *Praelectiones* 1472 (*ad* III.24.14).

<sup>328</sup> *Theses selectae* th 754-755 (*ad* III.24.12) and th 756 (*ad* III.24.13); *Praelectiones* 1465-1470 (*ad* III.24.12) and 1470-1472 (*ad* III.24.13).

<sup>329</sup> These have already been noted in the preceding sections.

<sup>330</sup> See Van der Keessel *Praelectiones* 1466 (*ad* III.24.12).

<sup>331</sup> See again ch VI § 5.4.6 *supra*.

upon arrival at the destination, as long as the insurer was at risk at the time. In this regard Van der Keessel<sup>332</sup> did on one point disagree with the earlier view<sup>333</sup> that when the ship was captured by an enemy privateer (*'praediatoria'*), as opposed to a pirate, she and her cargo could be abandoned immediately. He thought it reasonable for the insured to await the outcome of the decision of a prize court to see whether or not the ship and her cargo were in fact declared forfeited. It could well be, he noted, that the privateer had taken the ship unlawfully and that she and her cargo were subsequently released. He therefore did not consider a capture by enemy privateers as justifying an immediate abandonment simply because it was not a case where there was no hope of recovering the ship and cargo, but rather as one where there was a substantial prospect of that occurring.

More difficult was the distinction between the two different cases where the ship was damaged and could be abandoned for that reason, namely where the ship was un navigable and where she was merely incapable of completing her voyage.<sup>334</sup> He considered it somewhat problematic to reconcile the various statutory provisions permitting an abandonment, either immediate or delayed, on these grounds. It appeared to him that despite the different and confusing terminology used in this connection, in both cases the ship was required to have become unfit to sail (*'navis inepta fit ad navigandum'*). The difference, he pointed out, could be thought to lie between a major and a minor degree of unfitness to sail, the respective terms used in this regard by Grotius being un navigable (*'onzeilbaar'*) and incapable (*'onnut'*). However, both terms, as employed in the various laws, indicated a serious problem which could justify an abandonment<sup>335</sup> and there was probably no real difference between them.<sup>336</sup> After a lengthy argument about how to interpret and reconcile the various provisions, an argument based on the fact that the problems started when the Amsterdam and Rotterdam legislatures sought to treat in one section matters treated separately in the *placcaat* of 1571, Van der Keessel came to the conclusion that whenever a ship was seriously and irreparably damaged, such as when she was un navigable or unable to complete her voyage, she could, in both cases, be abandoned immediately. If her damage was less serious, and she could be repaired at a small cost, she could not be abandoned at all

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<sup>332</sup> *Praelectiones* 1470-1471 (*ad* III.24.13).

<sup>333</sup> Or, rather, he drew a sharper distinction than had been done earlier.

<sup>334</sup> See Van der Keessel *Praelectiones* 1466-1467 (*ad* III.24.12).

<sup>335</sup> That is, 'totally' un navigable and 'totally' incapable of completing her voyage.

<sup>336</sup> See too the earlier view of Scheltinga in this regard (§ 2.3.6 at n265 *supra*). The alternative suggestion by Goudsmit *Zeerecht* 328 that the incapability referred to the frustration of the adventure by reason of the incapability of the ship of performing her intended voyage as a result of the fact that she had been arrested (ie, that incapability was not a separate ground but merely an example of the possible consequence of an arrest in the course of that voyage), would appear a little ingenious and is not supported by the clear differentiation drawn in the sources between the two sets of circumstances.

but had to be repaired. In no case could there be a delayed abandonment in the case of a damaged ship.<sup>337</sup>

In the second place Van der Keessel summarised the different types of abandonment. He noted at the outset<sup>338</sup> that Grotius dealt with two situations,<sup>339</sup> namely where a measure of hope still existed that the insured property would not be a total loss, and where all such hope was lost. In the first instance, an immediate abandonment was not permitted but the insured had to wait for a period of time laid down by law before he could abandon and claim for a total loss. In the latter case an immediate abandonment and claim were possible.

Then he referred to the various circumstances justifying an abandonment of each of these types,<sup>340</sup> observing, though, that in all these cases an abandonment was necessary before the insured could claim the sum insured from the insurer.<sup>341</sup>

An immediate abandonment (*'statim derelinqui'*) to the insurer was permitted in the case of a ship being rendered totally unfit for navigation (*'ad navigandum prorsus inepta'*) by reason of some serious accident. Where, however, the damage was not serious enough to justify an immediate abandonment and the ship was capable of being repaired (presumably within a reasonable time) at a small cost (and, presumably, not at a cost which would exceed the value of the ship when repaired), the insured should repair her and claim for a partial loss. Presumably, if the ship could not be repaired or only at an excessive cost, the insured could abandon and claim for a total loss.

Likewise, an immediate abandonment was permissible if the insured ship was captured by the enemy or by pirates, the owner not being obliged to wait for an opportunity of ransoming them or recovering them by legal proceedings, though he ought to render assistance for this purpose. When the captured property was eventually redeemed, the insured was not obliged to take it back and return the insurance payment to the insurer.<sup>342</sup>

However, if the insured ship was merely detained under arrest by the authorities, the insured could abandon after six months or one year, as the case may have been.

As far as insured cargo on board the ship was concerned, such cargo had to be transhipped where the ship was unfit for her voyage and could not be repaired within a reasonable time.<sup>343</sup> The same applied when the ship but not the cargo itself was cap-

<sup>337</sup> Only, therefore, in the case of an arrested ship.

<sup>338</sup> *Praelectiones* 1465-1466 (*ad* III.24.12).

<sup>339</sup> *Inleidinge* III.24.12 and III.24.13 respectively.

<sup>340</sup> This is most conveniently set out in *Theses selectae* th 754-755 (*ad* III.24.12) and th 756 (*ad* III.24.13). See also *idem Praelectiones* 1469-1470 (*ad* III.24.12) and 1470-1471 (*ad* III.24.13).

<sup>341</sup> See *Praelectiones* 1470 (*ad* III.24.13).

<sup>342</sup> Reference was made in this regard to the earlier opinions of 1706 and 1715 (see again § 2.3.7 *supra*).

<sup>343</sup> If she could be so repaired, the goods could remain on board, unless they were perishable. See again ch XIII § 1.3 *supra* as to transshipment.

tured or arrested. But if the cargo was captured or arrested as well, or if transshipment was not possible, the insured owner could abandon immediately (in the case of a capture, or in the case of perishables) or after the specified period of time (in the case of an arrest, or if no transshipment was possible) as the case may have been.

The third aspect Van der Keessel addressed was the method of abandonment. He observed<sup>344</sup> that an abandonment had to take place formally (*'sollemniter'*) and that a written notice of abandonment had to be given in Rotterdam through a public person,<sup>345</sup> in Amsterdam through the Messenger of the Insurance Chamber, and in Middelburg through a notary or like public person. The notice of abandonment, it would appear, had to be given in all cases where the insured was entitled and wished to abandon and claim for a total loss.

Fourthly, Van der Keessel observed<sup>346</sup> that in the case of a delayed abandonment, the insurer could be requested to provide real or personal security for the payment of the loss. This was justifiable in this instance, he thought,<sup>347</sup> because of the fact that the position of the insured was in this case analogous to that of a buyer in the case of a sale. The insured was threatened with the total loss of the insured property, the risk of which was borne by the insurers; a buyer, when faced with a threatening eviction of the *merx* by a third party, could refuse to pay the purchase price until the seller, who bore the risk of that eventuality, had provided security against its occurrence. He pointed out that the various laws were not unanimous as to what form this security had to take and how it had to be provided.<sup>348</sup> Also, in this interim period, the insured had to take steps to avert or minimise any loss.

Van der Linden too commented briefly on abandonment and added a few further angles. He stated, firstly,<sup>349</sup> that in all cases where the insured ship or goods were totally lost (*'geheel en al vergaan'*), or where they were lost or damaged to such an extent that the insurer was liable for the payment of the full sum insured (*'geheele geteekende somme'*), the insured was compelled, before he could claim that amount, to abandon the insured ship and goods, and to relinquish it, in favour of the insurer (*'schip en goed te abandonneeren, en daar van afstand te doen, ten behoeve van den*

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<sup>344</sup> *Praelectiones* 1468 (ad III.24.12) and 1470 (ad III.24.13).

<sup>345</sup> This was not correct. In Rotterdam the notice had to be given through the Messenger of the Chamber of Maritime Affairs.

<sup>346</sup> *Theses selectae* th 756 (ad III.24.13).

<sup>347</sup> *Praelectiones* 1469 (ad III.24.12).

<sup>348</sup> In s 26 of the Amsterdam *keur* of 1744 and s 15 of the Middelburg *keur* of 1600 real or personal security was foreseen, although in the former city the Commissioners had an unfettered discretion in this regard. Section 65 of the Rotterdam *keur* of 1721 merely required appropriate security.

<sup>349</sup> *Koopmans handboek* IV.6.8.

assuradeur').<sup>350</sup> It would seem, therefore, that there was an abandonment not only in those cases where the circumstances justified an abandonment and a claim as if there were a total loss, but also where there was in fact a destruction of the property either totally or in its nature, the insured in that case having to abandon any remains to the insurer.<sup>351</sup> Elsewhere<sup>352</sup> Van der Linden made this point even more clearly when he stated that where goods were totally lost, or could be regarded as lost (*'geheel verloren is, of als verloren beschouwd kan worden'*), the insurer was bound, as against an abandonment of those goods, to pay the sum he had underwritten on the policy.

Secondly, he distinguished between the two well-known types of abandonment.<sup>353</sup> On the one hand an immediate abandonment was permitted when the ship had been destroyed or had become un navigable (*'vergaan of onzeilbaar'*) or when goods were destroyed, or had become spoilt or been captured (*'vergaan, bedorven of genomen'*), or were otherwise certainly lost without any expectation of being recovered (*'of anderzins met zekerheid verloren zijnde, zonder hoop van weder bekomen te kunnen worden'*). On the other hand the abandonment was delayed for at least<sup>354</sup> a specified period of time if there was still an expectation of recovering the property (*'as 'er nog hoop [is], om het gearresteerde schip of goed weder vrij te bekomen'*), during which time the insurer was bound to provide proper security at the request of the insured.

If the insured failed to abandon within the proper time (*'het abandonnement niet binnen den behoorlijken tijd is gedaan'*),<sup>355</sup> the insurer had a lawful defence against the insured's claim.<sup>356</sup>

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<sup>350</sup> It would appear from this that the suggestion was that the property should not only be physically abandoned (ie, possession of it given up), but also that the rights in it be renounced (ie, ownership given up), both in favour of the insurer.

<sup>351</sup> In this regard Van der Linden referred to s 60 of the Rotterdam *keur* of 1721 where mention was made of the insured property being destroyed (actually totally lost) or captured, perished or arrested (*'vergaan, genomen, bedorven, of gearresteert'*). Reference was made in this regard to Pothier.

<sup>352</sup> *Koopmans handboek* IV.6.9, again with reference to Pothier.

<sup>353</sup> *Koopmans handboek* IV.6.8. See too Enschedé 140.

<sup>354</sup> That is, for a minimum period of such time.

<sup>355</sup> That is, too early, or too late in that the insurer's obligation had already become prescribed (see ch.XX § 3 *infra*).

<sup>356</sup> *Koopmans handboek* IV.6.10.

## 2.4 Insurance Abandonment in the *Wetboek van Koophandel*

The Roman-Dutch system of abandonment in the context of insurance was taken over in broad detail by the Dutch Legislature in 1838 although other influences are also recognisable. The topic is treated in great detail in arts 663 to 680 of the *Wetboek van Koophandel*.<sup>357</sup>

As a point of departure the *Wetboek* lists the circumstances under which an abandonment of the insured ship or goods by the insured to his insurer is justified. This list, in art 633, differs somewhat from the circumstances recognised in Roman-Dutch law,<sup>358</sup> and not only because the old terminology was now no longer employed. Subject to the provisions of the *Wetboek*, and, it would appear, subject to an agreement to the contrary, the following occurrences permit, but do not oblige,<sup>359</sup> the insured to abandon: a shipwreck; a stranding with the ship breaking up ('*stranding met verbrijzeling*'); the unserviceability of the ship due to marine damage ('*onbruikbaarheid door zeeschade*') unless<sup>360</sup> the damaged or stranded ship can again be floated, repaired or put in a condition to prosecute her voyage to the destination and if that can be done at a cost not exceeding three-quarters of her value at the time of the conclusion of the contract;<sup>361</sup> decay or deterioration due to a marine casualty ('*vergaan of bederf door zeeramp*'), as long as<sup>362</sup> the loss or damage exceeds three-quarters of the insured value of the ship; the arrest or detention by a foreign power ('*opbrenging of aanhoud-*

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<sup>357</sup> See generally eg Dorhout Mees *Schadeverzekeringsrecht* 638-649; Ten Kate 38-41; Lipman 243; Prinsen Geerligs 164-165; Schook *De derelictione passim*; Smeding 36-46; and Voorduin vol X at 396-397 and 406-409.

<sup>358</sup> The instances recognised by the *Wetboek* are roughly the same as those recognised by art 369 of the French *Code de commerce*. Earlier drafts may also to an undetermined and undeterminable extent have been influenced by English law (see eg Van Nievelt XXXVII-XXXVIII as to the possible influence of English law by way of Park's *System*, the 4th edition of which was translated by Van der Linden into Dutch in 1814).

<sup>359</sup> Despite the presence of these circumstances entitling him to abandon and to claim for a total loss, the insured may still decide rather to claim for a partial loss, even though he may in consequence receive payment from the insurer only much later because of the need to determine the precise extent of his loss. He would do that, eg, in the case of an insured cargo which is increasing in price at the place of loss or at the destination, given that the sum insured was determined with reference to the value at the place of departure. See further Smeding 45-46.

<sup>360</sup> By virtue of art 664.

<sup>361</sup> Not, it should be noted, her value after she had been repaired. In terms of art 717, should the cost of her repairs be more than three-quarters of her value, the ship must, as far as the insurer is concerned, be regarded as condemned ('*afgekeurd*') and, in so far as no abandonment has taken place, the insurer is then obliged to pay the sum insured to the insured, less the value of the damaged ship or wreck. Therefore, akin to Roman-Dutch law, when the cost of repairs amounts to more than three-quarters of the value of the ship, such repairs are no longer regarded as worthwhile and the damaged ship is considered as totally lost with the insured being entitled to abandon her and the insurer obliged to pay for her total loss. See eg Star Busmann 11 referring to a '*wettelijk*' total loss in this regard.

<sup>362</sup> In terms of art 666.

*ing door eene vreemde mogenheid*"); and the detention by the Dutch government after the commencement of the voyage (*'aanhouding door de Nederlandsche regeering na het begin der reis'*).<sup>363</sup>

In the absence of circumstances justifying an abandonment,<sup>364</sup> the insured is not entitled to abandon the insured property to the insurer and to claim for a total loss. The parties are free, though, by agreement between them, to permit the insured to abandon in circumstances not provided for in the *Wetboek*. Contrariwise, while the *Wetboek* recognises several sets of circumstances justifying an abandonment by the insured, it would appear that the parties are also free to cut down on the scope of the insured's right to abandon and that in practice they often do so, limiting it to cases where there is little or no doubt about the occurrence of a total loss or where there is no reasonable hope of a recovery of the insured property.<sup>365</sup>

An immediate abandonment is permitted in two instances. Firstly, where the ship or goods are stranded, arrested or detained, as soon as the insurer refuses or fails to advance to the insured a sufficient sum to cover the cost of salvaging or recovering that property.<sup>366</sup> And secondly, where the arrested or detained ship or goods are declared forfeited (*'verbeurtverklaring'*).<sup>367</sup> Specific provision is no longer made for an immediate abandonment in the case of a casualty befalling perishable goods, as was the case in Roman-Dutch law.

A delayed abandonment is allowed within specified periods of time, depending on the nature of the justifying circumstances involved,<sup>368</sup> in three instances. Firstly, if in the case of an arrest or detention, the arrested or detained property is not returned or released within specified periods of time, which depend on the place of the arrest or detention and on the day on which the insured receives information of it.<sup>369</sup> Secondly, in the case of the absence of any news of the ship for a period of six, twelve or eighteen months after her departure or the last news, depending on the destination of the

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<sup>363</sup> Presumably, in the case of such a detention before the commencement of the voyage (but after the insurer has come on risk), there is no abandonment but merely a claim for a partial loss, if any.

<sup>364</sup> The insured has to prove the presence of one of those circumstances. See Dorhout Mees *Schadeverzekeringsrecht* 331.

<sup>365</sup> See Dorhout Mees *Schadeverzekeringsrecht* 644; Lipman 243.

<sup>366</sup> Article 665-1.

<sup>367</sup> Article 668-2.

<sup>368</sup> Voorduin vol X at 408 quite correctly points out that with the improvement in communication and navigation, these periods will probably have to become shorter. It may be thought, furthermore, that there is in fact no need at all to determine fixed periods for these cases as it may have been left to the Court in every case to determine what is reasonable on the facts of that case. Then again, the legal certainty brought about by the arbitrary determination of specified periods may well be preferable.

<sup>369</sup> Article 668-1. Voorduin vol X at 409 notes that earlier drafts had, after the Roman-Dutch example in s 62 of the *keur* of 1721 and s 28 of the *keur* of 1744, allowed an immediate abandonment in cases where the arrested ship was declared forfeited so that all reasonable hope of her being recovered had disappeared.



voyage on which the ship went missing.<sup>370</sup> Thirdly, in the case of perished goods or a condemned ship having been sold en route ('[b]edorvene goederen of afgekeurde schepen onderweg zijnde verkocht'), if despite the insured's attempts, the purchase price has not been paid to him within six, twelve or eighteen months, depending on the place of the sale, and reckoned from the day on which the insured has received news of that sale.<sup>371</sup>

The *Wetboek van Koophandel* now also lays down periods within which the insured has to abandon the insured property to the insurer. Accordingly, the insured has to decide within a specified period of time, well within the period of prescription which would otherwise govern his action, whether or not he wants to claim for a total loss by abandoning the insured property in cases where he is entitled to do so. One should therefore distinguish between the periods after the expiry of which a total loss must be presumed to have occurred and after which an abandonment is permissible, and the periods after the expiry of which such abandonment cannot be permitted any more.<sup>372</sup> In the cases of a delayed abandonment (that is, where abandonment is only permitted after the expiry of a specified period), a notice of abandonment has to be served on the insurer within three months after the expiry of that period.<sup>373</sup> In all other cases, the service of the notice must take place within six, twelve or eighteen months from the day on which the insured received news of the occurrence of the casualty, depending on where it has occurred.<sup>374</sup> Outside these periods the insured is no longer entitled to abandon.<sup>375</sup>

The *Wetboek* no longer specifically prescribes the form which the notice of abandonment has to take, but by stating that it has to be served ('beteken') on the insurer, it is clear that a written notice of abandonment is required and that a formal notarial notice will also be in order. Thus, even if no formality is pertinently prescribed for the notice of abandonment, a written notice at least may well be required by implication.<sup>376</sup>

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<sup>370</sup> Article 667-1. See again ch XV § 6.3 *supra* as to the presumption of loss for more details.

<sup>371</sup> Article 669. In this case the insured abandoned not the property but his rights ('zijne rechten'). On this point, see further § 1.4 *supra* on the insurer's right of recourse.

<sup>372</sup> That is, a distinction exists between, on the one hand, the period after the last news, in the case of a missing ship, or after the first news of the occurrence, in the case of a detained or captured ship, which must expire before the probability of a loss or of a total loss is such that an abandonment is justified, and, on the other hand, the period within which the insured, after his right of abandonment has arisen, must exercise that right.

<sup>373</sup> Article 670. The periods in question are those mentioned in arts 667, 668 and 669.

<sup>374</sup> Article 671.

<sup>375</sup> Article 672.

<sup>376</sup> See Asser NBW 248-9 ('eene geregtelijke akte' is required for the 'beteekening'); Dorhout Mees *Schadeverzekeringsrecht* 641 (noting that the *Wetboek* requires a 'beteekening' of the abandonment to the insurer, ie, a 'aanzegging bij deurwaardersexploit' or summons, although in practice that is usually done informally without any summons). In Van der Linden's *Ontwerp* III.11.1.82, abandonment was described as occurring when the insured relinquishes all his right and interest in lost, perished or damaged goods to the insurer, and gives notice of it to the insurer together with a delivery of a copy of

During the period while the insured is not yet entitled to abandon, or, if he is so entitled, during the period while he has not yet abandoned, the insured is under a duty to take steps to avert and minimise the loss.<sup>377</sup>

In those cases where the insured is entitled to abandon, he is obliged to notify the insurer of all news received by him within five days of such receipt, on penalty of having to compensate the insurer's cost, damages and interest.<sup>378</sup> On abandoning his property, the insured not only has to advise the insurer of any other insurances or bottomry loans existing on that property,<sup>379</sup> but also has to indicate to him the details of what he has done to save or to obtain the release of the insured property.<sup>380</sup>

An abandonment is validly made by a unilateral declaration of the insured only, and an acceptance by the insurer or the approval of a court is not required to give effect to it.

An abandonment cannot be either partial ('*gedeeltelijk*')<sup>381</sup> or conditional ('*voorwaardelijk*'),<sup>382</sup> but in the case of under-insurance there is only an abandonment in the same proportion as that between the insured and the uninsured part of the property ('*tot het beloop van het verzekerde in evenredigheid van het niet verzekerde gedeelte*').<sup>383</sup> Co-insurers, including an under-insured insured, become co-owners of the abandoned property.

The effect of an abandonment is set out in art 678 which provides that in the case of a valid abandonment, the insured property belongs to the insurer, subject to any share of the insured in the case of an under-insurance, as from the day when the notice of the abandonment is served on him.

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the notarial deed of abandonment ('*overlevering van Kopij der Acte*).

<sup>377</sup> Article 655. If the insured does not advance the expenses involved to the insurer, an immediate abandonment becomes possible, as already indicated earlier. This instance of abandonment was not recognised in either Roman-Dutch law or in the *Code de commerce*. As to the insured's duty in this regard, see ch XVI § 1.6 *supra*.

<sup>378</sup> Article 673.

<sup>379</sup> Article 675-1. A failure to do so results in the insurer's duty to pay within a specified period of time after abandonment being suspended until the insured so advises him, but without the period within which the insured has to abandon being extended. The reason for this notification is that, in terms of art 601 (repealed in 1924), property, part of which secures a bottomry loan and the remainder of which is insured, is in the case of an abandonment to the insurer shared proportionally ('*in verhouding van hun wederzijdsch belang*') between the insurer and bottomry lender. However, in the case of a bottomry concluded in an emergency, the bottomry lender has precedence over the insurer ('*gaat de bodemerij vóór de verzekering*').

<sup>380</sup> Article 676.

<sup>381</sup> Thus, when different objects are covered by same insurance, all the insured property has to be abandoned and not only the damaged parts.

<sup>382</sup> Article 677-1.

<sup>383</sup> Article 677-2. As to under-insurance, see again ch XVIII § 5.7 *supra*.

The irreversibility of a valid abandonment is recognised in art 679, according to which the insurer is not permitted, under the pretext that the insured ship has or the insured goods have been released after their abandonment, to be relieved of his obligation to pay the sum insured.<sup>384</sup> Thus, the validity of an abandonment is determined according to the circumstances existing at the time it is made, and while a change in those circumstances prior to the declaration of abandonment may affect its validity, any subsequent alteration in those circumstances is irrelevant, even if the insurer has at that time not yet paid the insured.<sup>385</sup> An abandonment can only be annulled retrospectively when it is subsequently established that the presumed loss in the case of a missing ship in fact occurred after the period for which the ship or goods were insured.<sup>386</sup>

In terms of art 680, the insurer is liable for the payment of the sum insured as well as the cost of the abandonment, and has to make that payment within the specified period of time after the notice of loss and the notice of abandonment, which may be contained in the same notice.<sup>387</sup> The abandoned property serves as security for this payment.

Finally, art 694 provides that the measures laid down in respect of abandonment are also applicable to an insurance against the perils of transportation over land or on internal waters. After some of its earlier drafts had provided for abandonment in the case of fire insurance,<sup>388</sup> the *Wetboek van Koophandel* contains no indication whether abandonment also applies in the case of non-marine insurance, for example in the case of fire insurance. Presumably the fact that abandonment was considered an exceptional measure (*ultimum remedium*), carried the day. It was realised that an abandonment can be justified and is in fact necessitated only by the unique circumstances arising in the course of a marine voyage which result in a loss in a foreign port. Abandonment was simply not considered appropriate in respect of property situated, at least for the duration of the insurance, in one place on land and the value of which (as also the extent of damage to it) is easily determinable. Further, to apply abandonment in the case of immovables would be highly inconvenient. Put simply, the same economic

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<sup>384</sup> However, the parties can come to some alternative arrangement in this regard.

<sup>385</sup> Thus, if an arrested ship is released before abandonment, no abandonment is possible any more; but if an arrested and abandoned ship is released, the abandonment is not nullified. A similar position pertains in French law in terms of art 385 of the *Code de commerce*, and the same is true of German law (see Helberg 39-40). As will be shown shortly, the position in English law is different.

<sup>386</sup> See art 674-2.

<sup>387</sup> For the notice of loss, see again ch XVI § 2.5 *supra*, and as to when the insurer must pay, see ch XX § 2.2 *infra*.

<sup>388</sup> Thus, the drafts of 1815 and 1822 had provided that in the case of a fire loss, an abandonment was possible in the case of immovable property when the damage exceeded a half, and in the case of movable goods or merchandise when the damage was two-thirds or more of the insured value. As to abandonment in the case of non-marine insurance, see generally Dammers 70-72; Dorhout Mees *Schadeverzekeringsrecht* 643; Nolst Trenité *Brandverzekering* 244; and Voorduin vol IX at 253-254 and vol X at 396.

reasons do not apply in the case of fire insurance as apply in the case of marine insurance so as to justify the application of the doctrine of abandonment outside the sphere of marine insurances.<sup>389</sup>

But while the fire insured is not entitled to abandon the insured property, the parties to a fire insurance contract are presumably free to agree on the application of that doctrine in their contract and to confer such a right upon the insured in specified circumstances.<sup>390</sup> However, in practice Dutch fire policies expressly exclude the application of abandonment.<sup>391</sup>

Among Dutch commentators there is broad agreement with regard to the fact that by the insured's abandonment of insured property, the insurer becomes the owner of it and obtains a real right in that property.<sup>392</sup> One of the consequences of abandonment<sup>393</sup> is the total, unconditional and irrevocable transfer of ownership in the insured and abandoned property from the insured to the insurer, without the need for any delivery to the latter, acceptance by him, or any formality other than the declaration or notice of abandonment itself.<sup>394</sup>

Some commentators, however, also regard abandonment as transferring the insured's personal rights in respect of the insured and abandoned property to the insurer, so that in this sense the insurer obtains a right of recourse against third parties in respect of the property in question.<sup>395</sup> This would appear to confuse the insurer's right to the insured property or its remains (his right to salvage) with his right of recourse against third parties. The former is a right which accrues to the insurer only in the case of a payment for a total loss and possibly, but not necessarily, through the insured abandoning the property to him; the latter is a right sometimes but not always respecting the insured property, and accrues to the insurer whenever he has paid out on the policy, even if not for a total loss.<sup>396</sup> However, this confusion<sup>397</sup> is not unique to Dutch law and occurs also in other systems.<sup>398</sup>

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<sup>389</sup> See too art 663, where there is reference to the circumstances arising from marine damage or a marine casualty.

<sup>390</sup> See Asser *NBW* 125.

<sup>391</sup> See Enschedé 155, noting that this occurs also in some marine policies.

<sup>392</sup> See eg Dorhout Mees *Schadeverzekeringsrecht* 641 who regards insurance abandonment as an independent method of transferring ownership ('*een zelfstandige wijze van eigendomsoverdracht*') for which delivery is, as a rule, not required.

<sup>393</sup> Another is that the insurer must pay the sum insured to the insured.

<sup>394</sup> See eg Smeding 107-108.

<sup>395</sup> See eg Voorduin vol X at 396-397, stating that the insurer '*treed in al de rechten, welke de verzekerde, ter zake van die schade, hebben mogt*'.

<sup>396</sup> See further eg Van Asch van Wijck 25-28 for a discussion of the question whether, if abandonment is the way in which ownership passes, the insurer in addition to such ownership also obtains, by way of the abandonment, the rights in respect of the property in question, such rights being *accessoria* of ownership, or whether he is subrogated to such rights independently of any abandonment. As to the difference between abandonment and subrogation, see also eg Ledeboer 143; Smeding 110.

Of course, from the insurer's ownership in the abandoned property may also flow other personal rights accruing in respect of that property after such abandonment. Prime examples of this are the fruits of such property materialising or becoming claimable after the abandonment, or the right to claim the payment of freight earned by the insured ship after her abandonment.<sup>399</sup>

By the same token, though, and despite having paid the full amount underwritten on the policy, the insurer may as owner also incur and have to bear certain liabilities already incurred or incurred subsequent to the abandonment by the owner of that abandoned property. For example, he may incur liability for damage caused by the insured and abandoned ship, or liability for the removal of her wreck, or liability to pay freight on abandoned cargo should it arrive at the destination.<sup>400</sup> The insurer cannot avoid such liabilities by refusing to accept a valid abandonment by the insured, or simply by in turn abandoning<sup>401</sup> the property himself.

Unfortunately Dutch commentators do not provide any detailed theoretical explanation for the transfer of ownership by way of abandonment. The reason for this, it would appear, is because of the statutory regulation of insurance abandonment in Dutch law. Accordingly, they do not consider in any depth how ownership passes from the insured to the insurer in the absence of any actual delivery of the insured goods, or the registration of the insured ship, which is ordinarily required for the transfer of such ownership. The only justification of and explanation for the passing of ownership in the case of an insurance abandonment is that a statutory exception has been created, specifically in art 678, to the common-law requirements for the transfer of ownership. There is simply no need for the precise nature and effect of an insurance abandonment in the codified Dutch system to be analysed in any detail. Consequently a number of questions, which would otherwise arise in an uncodified system, remain unconsidered and unanswered. These include whether and how the notice or declaration of abandonment serves to transfer real rights from the insured to the insurer; how it is possible that the insurer can become owner against his will and whether abandonment in effect involves the compulsory transfer of ownership; whether the insured's abandonment of the insured property ever directly renders the insured property *res nullius* (that is, whether

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<sup>397</sup> A trace of which is also apparent in art 669 (see *supra*) where there is reference to the abandonment of the insured's rights to the insurer in the case of property already sold en route. But even there it seems that the insurer's capacity to enforce the insured's rights is based on the latter's previous ownership and that this abandonment of rights is nothing but an instance of the insurer's right of recourse (subrogation) in another guise. See further Noyon 74.

<sup>398</sup> Notably also in the English Marine Insurance Act, as will be illustrated shortly.

<sup>399</sup> The insured retains the right to any freight earned prior to the abandonment and may in fact abandon that to the insurer on freight. An apportionment of prior and subsequent freight *pro rata itineris* is also possible. See further eg Aschenheim 33.

<sup>400</sup> In which case the insurer may of course in appropriate circumstances 'abandon' such cargo to the carrier to be relieved of the obligation to pay that freight. See Aschenheim 41 and again § 2.1.2 *supra*.

<sup>401</sup> In the sense, that is, of a divesting abandonment.

the insured's abandonment is a dereliction) - so that a finder could in the interim become the owner of that property - or whether that could only be the result of a notionally distinguishable and subsequent act of abandonment on the part of the insurer.

In terms of the *Wetboek van Koophandel*, the transfer of ownership in the abandoned property is the consequence following upon the service of a valid notice of abandonment, that is, of a mere declaration of abandonment to the insurer without any delivery or other act being required from the insured. In this sense insurance abandonment is unique and therefore somewhat controversial.<sup>402</sup> Otherwise than usual, the notice or declaration of abandonment results in the passing of ownership over insured property *ipso iure*, without any delivery, cession or any other formality except such declaration being required. Possibly the declaration of abandonment may be considered as a form of delivery unique to and recognised as sufficient by the commercial law,<sup>403</sup> but otherwise delivery in the ordinary sense is not required.<sup>404</sup> Also, the insurer's acceptance of the abandonment is not necessary for ownership to pass. Insurance abandonment therefore does not involve the passing of ownership by reason of an agreement<sup>405</sup> but it is a unilateral juristic act of transfer. The insurer is incapable of preventing a valid abandonment and the consequential passing of ownership. A valid declaration of abandonment is further not an offer which can or has to be accepted by the insurer; it is not a declaration by the insured that he wishes to abandon but one that he has in fact abandoned. Consequently, abandonment and the declaration of abandonment are identical concepts in Dutch law and an abandonment already becomes irrevocable with its unilateral declaration by the insured.

It is possible, of course, that the fact or effect of an abandonment may be nullified by an agreement between the parties. Thus, the insured may take the abandoned property back if the insurer does not want it, but in the absence of an agreement or understanding to that effect, the insurer is not entitled to insist on returning the property to the insured if the abandonment is valid, and neither is the insured obliged to take abandoned property back if he does not wish to do so.<sup>406</sup>

An insurance abandonment (*'abandonnement'*) is distinguished in Dutch law from the more general abandonment (*'abandon'*) occurring in the law of carriage and

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<sup>402</sup> Thus, Aschenheim 5 notes that the institution of an insurance abandonment is unique, if controversial, because of the fact that one of its consequences is the compulsory transfer of ownership of the insured property to the insurer.

<sup>403</sup> That is, the formality of a notice of abandonment serves as the 'formality' for the passing of ownership.

<sup>404</sup> See eg Van Asch van Wijck 24 who notes further that there seems to be agreement that abandonment is a method by which ownership is acquired (*'eene wijze van eigendomsverkrijging'*) and not merely a method by which ownership is transferred (*'een rechtstitel van eigendomsovergang'*).

<sup>405</sup> Unless the underlying insurance contract is regarded as such an agreement, something which would at first blush appear fanciful.

<sup>406</sup> See further as to the legal nature of abandonment, eg Helberg 17-25 and 130-142 (setting out the position in German law).

elsewhere in the maritime law. It involves that the owner of maritime property may be relieved of his liability in respect of that property by abandoning it to a creditor. Such maritime abandonment is made by a debtor to his creditor and involves the transfer of ownership from the former to the latter and also the termination of the personal obligation between them.<sup>407</sup> An insurance abandonment, by contrast, is made by a creditor (the insured) to his debtor (the insurer) and in itself such an abandonment does not (at least not directly) result in the termination of the obligation between them. That is the result of the insurer's payment of the sum insured for a total loss. A maritime abandonment is not possible after an earlier insurance abandonment (the abandoned property no longer being in the estate of the insured owner) but the reverse is possible, although in that case the insurance abandonment revokes the earlier maritime abandonment.<sup>408</sup>

## 2.5 Insurance Abandonment in English Law

### 2.5.1 The Early Position

Indications are that English insurance practice in the sixteenth century was familiar with the notion of an abandonment of the insured property by the insured to his insurer.

In the oldest known insurance case in England, *Broke v Maynard*, which concerned an insurance policy dated 1547, the underwriter refused to pay the insured more than £10 although he had insured the cargo for £25, the reason being that he had not received any notice of the abandonment of that part of the insured cargo which had been salvaged.<sup>409</sup>

In 1548 the Admiralty Court decided in *Cavalchant v Maynard* that if the insured wanted to claim for a total loss of the insured goods (that is, if he wanted to claim the

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<sup>407</sup> See again §§ 2.1.2 and 2.1.3 *supra*.

<sup>408</sup> See further on these matters Dorhout Mees *Schadeverzekeringsrecht* 644; S'Jacob 48-49; and Smeding 120-127.

A further distinction may be drawn between an abandonment of insured property by the insured and what is referred to in German law as an abandonment by the insurer of the insurance contract ('*Abandon des Versicherten*'). The latter involves the right of the insurer, by paying the sum insured, to be free of any further liability on the policy. In German law, eg, but seemingly not in Dutch law (see again ch XVII § 2 *supra* as to the sum insured, and also ch XVI § 1.4 n89 *supra* as regards the avoidance and minimisation of loss), an insurer wishing to relieve himself of the potential liability of paying more than the sum insured for (which is possible should the insured incur expenses to avert and minimise a loss, or should several successive losses occur during the currency of policy), can simply pay the sum insured and declare that he rescinds from the insurance contract. As a result of this 'abandonment', the insurer is relieved of any further liability under that contract. It is necessary for such an abandonment by the insurer that an accident or damage should have occurred and that he exercises his right (by a unilateral declaration to that effect) within five days of such occurrence. The insurer cannot escape liability for expenses incurred prior to his declaration of the abandonment or for losses in excess of the sum insured which had occurred prior to it. Although the insurer pays the full sum insured, the insured object is not as a result transferred to him, which is a further basic difference between the insurer's abandonment and that of the insured. See further Helberg 147-149 for this 'abandonment' by the insurer.

<sup>409</sup> See Blackstock 16-17.

full sum insured), such goods had to be made over to - in the pleadings the terms used were 'certified unto' - the insurers, so that where a part of those goods was subsequently saved, it belonged to the insurers concerned in the proportion in which they had underwritten the policy in question.<sup>410</sup> In 1573 the Admiralty Court held that an insurer who had paid the insured for a total loss was entitled to whatever may be saved, recovered, or recaptured of the insured property, after he had paid a salvage reward to the salvor or recapturer in respect of those goods. This, of course, was a recognition of the insurer's right to salvage, a right based on the fact that the insurance contract was regarded as one of indemnity.<sup>411</sup> Another case in the same year concerned an action for freight on wine brought to London by the insurers after the carrying ship had been wrecked, and from which it appears that the insurers claimed such freight as owners of the ship they had insured and which had been abandoned to them.<sup>412</sup>

Abandonment of the insured property by the insured to his insurer when claiming a (final) payment for a total loss in circumstances where such loss was not a certainty, may well at that time have been a relatively new practice in London. Earlier in the sixteenth century a provision in insurance policies was apparently in use on the London market that where the insured ship had gone missing and the insurer had paid out, such payment had to be returned if the ship and her cargo arrived safely at their destination within the next year. The insurance payment was therefore merely provisional in such a case and ownership in the ship was not abandoned to the insurer.<sup>413</sup>

More details about the insured's right of abandonment in English law appear from discussions of the topic in textbooks of the seventeenth century.

Thus Malynes, writing in 1629, explained<sup>414</sup> that where an embargo was placed on a carrying ship at her port of departure or elsewhere in the course of her voyage, and the owner of the insured cargo thought that his goods would perish or become spoilt if left on board for two or three months (which was especially the case with perishables), he could 'renounce these goods or wares to the assurors, and thereby bring a great losse upon them'. Presumably, having 'renounced' them, the insured was entitled to claim the sum for which the insurers had insured those goods. Contrarily, in the event of an arrest of the ship or her cargo in a legal action at the behest of a particu-

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<sup>410</sup> In this case the suit was defended on the ground that in the case of the recovery or salvage of the insured goods 'that parte or porcion of the saved goods, wares, and merchandises, which shulde be so saved and rescued shulde and oughte to be devyded equallie betwene the thassurers of the same rateably accordinge to every assurers proporcion, or at the leastwyse accountyde for and by summe meance certified unto the assurers before any assurance can be demanded of them'. See Blackstock 20; and also Holdsworth *History* vol VIII at 290.

<sup>411</sup> See Marsden vol II at 149; Holdsworth *History* vol VIII at 290.

<sup>412</sup> See Marsden vol II at lxx; Holdsworth *History* vol VIII at 290.

<sup>413</sup> See Den Dooren de Jong 'Lombard Street' 13. See too § 2.3.4 *supra* for the comparable position at the time in Antwerp.

<sup>414</sup> *Consuetudo* l.25.



lar individual (presumably as opposed to an arrest by authorities), the insured could 'make no renunciation to charge the Assurors with any losse either in the totall or part', because by giving security, the immediate release of ship could be obtained. Elsewhere Malynes<sup>415</sup> observed that in the event of a loss, when there was still some hope of the insured property being recovered, the insured could, if he so wished,<sup>416</sup> 'make renunciation of all the goods to the assurors; and this renunciation [like the intimation of loss] is also recorded in the Office of Assurance'. Furthermore, if the goods so abandoned to and paid for by the insurers were subsequently found or recovered, the insurers were not entitled to restore the goods to the insured and to claim a repayment of the insurance money.<sup>417</sup> The insured was entitled to abandon even if he had, at the expense of the insurers, taken steps to avert or minimise the loss. Further, there was a proportionate abandonment in the case of an under-insurance, for the merchant, relinquishing the goods to the insurer, 'reserveth always his part therein which he hath not assured, which he detains in nature of an insurer'.

However, the practice of abandoning the insured property to the insurer in exchange for the payment of a total loss may even then not have been general. It appears from claims records of the London Assurance Corporation in the first half of the eighteenth century that in cases where an insured ship went missing and did not return from her insured voyage, claims were paid with a warranty that should the ship come safely to port after all, a restitution would be made by the insured to the Corporation.<sup>418</sup>

## 2.5.2 Further Developments in the Eighteenth Century

A number of further developments occurred in the eighteenth century by which the doctrine of insurance abandonment was further expanded.

The Marine Insurance Act of 1746 in s 1 rendered void all insurances on British ships or goods which were concluded 'interest or no interest', or by way of gaming or wagering, or 'without benefit of salvage'.<sup>419</sup> This meant that the insurer was not entitled to waive, at least not beforehand, the right, accruing to him on the payment of the sum insured as for a total loss, to whatever remained of the insured property.

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<sup>415</sup> *Consuetudo* 1.28. See too Molloy *De jure maritimo* II.7.15 who referred to Loccenius for the statement that the insured could in appropriate cases 'make a Renunciation of the Lading to the Assurers'.

<sup>416</sup> That is, 'if the assured doth think it convenient, either for that hee hath almost assured all the value of his goods, or that hee would haue the assistance of the assurors, when there is hope of recoverie of any part thereof, or any other cause which may mooué him'.

<sup>417</sup> It was a different proposition, though, Malynes noted, if in such a case the insured wanted to buy the goods from the insurer.

<sup>418</sup> See Drew 40.

<sup>419</sup> Section 5 provided that money lent on bottomry on ships trading to the East Indies could be lent only on ships or cargo; that the lender was to have the 'benefit of salvage'; and that he alone was allowed to insure the money he had lent. See further Holdsworth *History* vol XI at 448 and again ch XVII § 6.4 *supra* as to insurance 'interest or no interest' in English law.

In 1748, when an attempt was made to codify the law of marine insurance, the Committee appointed by the House of Commons to make proposals in this regard, suggested<sup>420</sup> that in the case of a partial loss of the insured ship or goods the insured should be prohibited from abandoning his interests to the insurer and should be permitted to claim only for his actual loss.<sup>421</sup> Quite possibly the practice of abandonment had given rise to abuses, and that in turn may well have been because, as appeared from Malynes, for example, its application was seemingly not confined to narrowly circumscribed circumstances.

Abandonment was not contractually regulated or even mentioned, and the Lloyd's SG policy of 1779 made no reference to it. Only in 1874 was the so-called Waiver Clause added in which it was 'especially declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered as a waiver, or acceptance of abandonment'.

The main developments in respect of abandonment in the eighteenth century occurred by way of a series of judicial decisions, especially in the latter half of that century.<sup>422</sup>

In *Randal v Cockran*<sup>423</sup> the Court of Chancery held that it was 'the plainest equity' that after he had paid the insured in terms of the policy, an insurer was entitled, as against the insured and in the proportion which his payment bore to the insured's loss, to whatever the insured received by way of a return of the goods, a salvage of them, or a compensation paid for their loss.<sup>424</sup> It is clear from this that the insurer's right to salvage was considered on a par with what later emerged as his right to subrogation.<sup>425</sup>

The insured's right of abandonment was considered extensively by Lord Mansfield in *Goss & Another v Withers*.<sup>426</sup> Here the insured ship and her cargo of fish were captured by the enemy and remained in their hands for eight days. Thereafter she was recaptured by a British privateer and taken to a British port. Part of her perishable cargo was lost in a storm at sea and the rest became spoilt while the ship was lying in the safe port. The insured gave notice to the insurers, offering 'to abandon the ship and

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<sup>420</sup> In resolution 10.

<sup>421</sup> See Raynes (1 ed) 167, (2 ed) 162; Wright & Fayle *Lloyd's* 162-163.

<sup>422</sup> See Holdsworth *History* vol XII at 537; Park *System* 8 ed ch IX at 332-402; Rodgers 174-176; and Weskett *Digest* 1-7 sv 'abandonment'.

<sup>423</sup> (1748) 1 Ves Sen 98, 27 ER 916.

<sup>424</sup> The Court pointed out that as soon as the insurer had paid, 'as to the goods themselves, if restored *in specie*, or compensation made for them, the assured stands as trustee for the insurer, in proportion for what he paid'.

<sup>425</sup> See again § 1.5 *supra*.

<sup>426</sup> (1758) 2 Burr 683, 97 ER 511.

the cargo to the insurers, for them to make what advantage of salvage they could'.<sup>427</sup> The questions for decision was, first, whether there was a loss in this case which rendered the insurers liable, and secondly, whether the insured was entitled to abandon the insured property in these circumstances. Extensive reference to civilian authorities was made by counsel in their arguments.<sup>428</sup>

As to the first question, Lord Mansfield held that an enemy capture - and also capture by a pirate or by a privateer - was a loss covered by the policy for which the insurer had to compensate, even if the ship was at that time, or at any subsequent time ever, not condemned as a prize.<sup>429</sup>

On the second question, his Lordship pointed out that at the time when the loss occurred (and for eight days thereafter), the insured's loss was a total loss and that he was entitled to be paid by the insurer on that basis, and that in the case of any recovery or recapture, 'the insurer would have stood in his place'. Her subsequent recapture did not alter the fact that, as far as the adventure was concerned, the insured had suffered the equivalent of a total loss: half of her value had to be paid by way of salvage to the British privateer who had recaptured her, and no freight could be earned on that voyage. It was clear that it was not worth the expense it would require to save the adventure, something which obviously resulted in the insured's decision to abandon her despite her recovery. The general principle, Lord Mansfield pointed out, was clear. In the case of an enemy capture the insured was entitled to abandon and claim for a total loss, something he could do even in the case of a mere arrest by friendly authorities.<sup>430</sup>

Precisely the same applied in this case to the insured cargo which was perishable. The possibility of recovering the captured (or arrested) property, which always existed, did not alter this principle: '[t]his chance does not suspend the demand, for a total loss, upon the insurer: but justice is done, by putting him in the place of the insured in case of a recapture'.<sup>431</sup> In any case, the insured could in all cases choose not to abandon.

<sup>427</sup> At 693, 517.

<sup>428</sup> In particular to Bynkershoek *Quaestiones juris publici*.

<sup>429</sup> See at 694, 518: 'The ship is lost, by the capture; though she be never condemned at all, nor carried into any port of fleet of the enemy; and the insurer must pay the value.' It was irrelevant as between the insured and the insurer, his Lordship held further, whether or not the enemy capturer had acquired ownership in the insured property by reason of the capture.

<sup>430</sup> His Lordship explained as follows (at 696, 519): 'I cannot find a single book, ancient or modern, which does not say, "that in case of the ship being taken, the insured may demand as for a total loss, and abandon." And what proves the proposition most strongly, is, that by the general law, he may abandon in the case merely of an arrest, on an embargo, by a prince not an enemy. Positive regulations in different countries have fixed a precise time before the insured should be at liberty to abandon in that case. The fixing a precise time proves the general principle'.

<sup>431</sup> At 697, 519. Lord Mansfield referred with apparent approval to the description of abandonment in the French code of customary maritime law, the *Guidon de la mer* VII.1, as the right of the insured to abandon upon a capture 'or any other such disturbance as defeats the voyage, or makes it not worth while, or worth the freight, to pursue it'.

Lastly, his Lordship noted out that 'in late times, the privilege of abandoning has been restrained for fear of letting in frauds'.<sup>432</sup> A merchant could not elect to turn a partial loss into a total loss by abandoning. But if, on the facts, the loss was total at the time when it happened (as it was in this case by reason of the capture), and continued to be a total loss 'as to the destruction of the voyage' (which could be saved only by an exorbitant expense) and not merely a temporary obstruction in completing the voyage, there was no chance of such fraud.

Shortly after his decision in *Goss v Withers*, another opportunity arose for Lord Mansfield to consider abandonment and to elaborate on and more clearly qualify the principles laid down in that case. In *Hamilton v Mendes*<sup>433</sup> a ship and her cargo, insured on a voyage from Virginia to London, was captured by a French privateer. Seventeen days later, while en route to France, she was recaptured by an English man-of-war and taken to Plymouth where she arrived in safety and without any damage to her or her cargo. On hearing what had happened to his ship, the insured then abandoned her and her cargo to the insurer. The latter refused to accept the abandonment and offered to pay the insured any loss and expense, such as salvage, he might have incurred by reason of the capture.

The question which arose here was whether the insured had a right to abandon and to claim for a total loss. In the course of argument, counsel again referred extensively to authors on the civil law.

Lord Mansfield held that the insured who abandons can only recover for the actual loss existing at the time of his abandonment. He again confirmed that it was irrelevant for purposes of an insurance claim whether the capturer had become the owner of the insured property: the mere capture itself was a loss for purposes of the insurance. In this case, though, the loss was merely temporary. As soon as she was recaptured, the ship and her cargo were safe and the voyage not at all lost. The capture was no more than 'a short temporary obstruction'. In effect, by the time of her abandonment, the loss had ceased to be total and the only reason why the insured might still have wanted to claim for a total loss in this case, his Lordship thought, was because of a falling market or because he had over-insured the ship and her cargo.

The principle laid down in this case, was, it would appear, even more strict, namely that the validity of the insured's abandonment had to be determined not at the time it was made, nor at the time of the occurrence of the loss or casualty upon which it was predicated, but at the time the insured brought the action against his insurer. The reason for this was sought in the application of the indemnity principle to the insurance contract.<sup>434</sup> Lord Mansfield found support for this view in a note on the matter by

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<sup>432</sup> At 697, 520.

<sup>433</sup> (1761) 2 Burr 1198, 97 ER 787.

<sup>434</sup> 'The plaintiff's demand is for an indemnity. His action then, must be founded upon the nature of his damnification, as it really is, at the time the action is brought. It is repugnant, upon a contract of indemnity, to recover for a total loss, when the final event has decided that the damnification, in truth, is average, or perhaps no loss at all' (at 1210, 793). This statement is incorrect, though. By reason of an abandonment to the insurer, the indemnity principle was not breached even if by the time the action was brought there was no or no longer any loss.

Roccus.<sup>435</sup>

The principle laid down in *Goss v Withers*, namely that 'in case of the ship being taken, the insured may demand as for a total loss, and abandon', therefore had to be qualified by adding that this was so 'provided the capture, or the total loss occasioned thereby, continue to the time of abandoning and bringing the action'.<sup>436</sup> Although it may appear from this that the cut-off time Lord Mansfield opted for to determine the validity of the abandonment was, therefore, not the time when it was made, but a later stage when the action was brought, remarks he made later on in his judgment<sup>437</sup> cast some doubt on this. He stressed, namely, that he was not concerned here with the case where the insured property was safely restored between the offer to abandon and the time when the action was brought, or between the commencement of the action and the verdict. *Hamilton v Mendes* may therefore equally be taken to be authority for the view that the validity of an abandonment had to be determined at the time when it was made. It did not establish, though, as his Lordship also pointed out, that if the property was returned after the insurer had paid out for a total loss, he could compel the insured to take it back and to refund the insurance money.

A last decision on the topic by Lord Mansfield which may be referred to, was that in *Milles v Fletcher*.<sup>438</sup> Here his Lordship stressed the importance of the factual difference between *Goss v Withers* and *Hamilton v Mendes*, two cases from which, he opined, 'the whole law between insurers and insured as to the consequences of capture and recapture may be collected'.<sup>439</sup> In the first case, he pointed out, the capture had, despite the recapture, 'occasioned a total obstruction of the voyage', while in the latter case it had caused 'only a partial stoppage'.<sup>440</sup> Both cases stressed the situation of the insured property at the time when the insured had notice of the capture, at the time of the offer to abandon, and at the time when the action was brought. In the pre-

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<sup>435</sup> *De assecurationibus* note 50. However, Roccus' views should be understood against the background of the Continental notion of abandonment, which was not necessarily immediate as it apparently was in English law at the time. The cut-off point referred to there was one to determine whether or not the insurer could compel the insured to take the abandoned property back and for him thus to be relieved of the obligation to pay the insurance money (ie, whether the abandonment could be undone), not to determine whether the abandonment was valid. Also, the cut-off there was not the time when the insured brought his action for payment, but the time when the insurer paid or should have paid after a valid abandonment.

<sup>436</sup> At 1212, 794. Therefore, had the insured in *Hamilton v Mendes* abandoned and brought his action at the time when the insured property was still captured, the abandonment would have been valid. And *Goss v Withers* was different because there, although the ship had been released at the time of the abandonment (and thus also at the later time when the action was brought), the voyage was (and remained) economically lost as a result of the earlier capture and was not merely temporarily obstructed as was the case here.

<sup>437</sup> See at 1214, 795-796.

<sup>438</sup> (1779) 1 Dougl 231, 99 ER 151.

<sup>439</sup> At 232, 152.

<sup>440</sup> At 233, 152.

sent case, the total loss occasioned by the capture remained so from the time when the insured first received news of the capture until the action was brought.<sup>441</sup>

While these cases dealt only with the possibility of an abandonment in the case of an enemy capture of the insured property, it appears that English law did recognise the possibility of an abandonment in other cases as well. Thus Weskett<sup>442</sup> explained in 1781 that apart from the instance of a total loss where the insured property was entirely and irrevocably gone or perished, an insured could also claim for a total loss where, by reason of perils insured against such as capture, shipwreck, stranding, and detention, the property 'had fallen in such a situation' as to permit the insured to give up or abandon his right or interest in the property to the insurer and to recover the full value insured for, as for a total loss. In such a case, the insured was then under an obligation towards the insurer to give up to the latter the property he had abandoned, or anything saved of it or the fruits flowing from it, should such thereafter come into his possession.<sup>443</sup> It appears further from Weskett<sup>444</sup> that the effect of an abandonment, at least if accepted by the insurer, was that the insurer took the place of the insured and became the owner of the abandoned property.

The correspondence, in broad terms, between the notion underlying abandonment in Roman-Dutch law and in English law is readily apparent. However, despite the fact that Lord Mansfield equally clearly relied heavily on the Continental (and especially the French) application of abandonment in the insurance context, there were by the end of the eighteenth century already some cardinal differences.<sup>445</sup>

The most evident of these was that there was no indication that English law drew any distinction between an immediate and a delayed abandonment. Whether the insured could abandon was determined upon the occurrence of the loss and the insured did not, in certain circumstances, have to wait for a period of time before he could abandon. But, possibly in order to compensate for the fact that abandonment was in all instances allowed immediately upon the occurrence of the loss, the validity of an insured's abandonment was determined at the time he brought his action against the insurer. Thus, in Roman-Dutch law and in Dutch law the insured could in certain instances abandon immediately<sup>446</sup> while in others he had to wait for a period of time

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<sup>441</sup> The case therefore does not clarify the uncertainty in *Hamilton v Mendes*.

<sup>442</sup> *Digest* 545-548 sv 'total loss' at 545 par 1.

<sup>443</sup> This nicely illustrated the relationship between the insured's right of abandonment and the insurer's right to salvage. See too Walford *Cyclopaedia* vol I at 446 sv 'capture' who explains that the insured owner of captured property may abandon it to the insurer and claim for a total loss, and if the abandonment is accepted by the insurer, the insured is entitled to a full indemnity from him while all the rights to salvage again pass to the latter.

<sup>444</sup> *Digest* 296 sv 'insurer' par 8, referring to the French author Valin.

<sup>445</sup> See further Raynes (1 ed) 173-175, (2 ed) 168-169.

<sup>446</sup> In Roman-Dutch law, circumstances such as those in *Goss v Withers* and *Hamilton v Mendes*, ie, enemy capture, would have justified an immediate abandonment and any subsequent recapture, at whatever stage and whether or not the voyage itself was frustrated as a result of the capture, would have been irrelevant.

before he could abandon, and could in fact then abandon only if the circumstances justifying the abandonment remained unchanged<sup>447</sup> during that period of time, that is, until such abandonment. In English law, by contrast, the insured was always entitled to abandon immediately. However, the validity of the abandonment was determined not with reference to the time when he became entitled to abandon or even<sup>448</sup> when he in fact abandoned, but with reference to a later point in time, namely when he brought his action, any positive change in the meantime affecting his right to do so.

Further differences included the fact that it appears that English law did not require the insured to abandon within a specified period after the occurrence (or after the receipt of news of the occurrence) of the loss, but at most required his abandonment to be made within a reasonable time.<sup>449</sup> Further, it was apparently not recognised in English law that the insured could abandon and claim for a total loss if his partial loss exceeded a particular percentage of the value of the property in question. Additionally, it seems that abandonment, which may in earlier times have been required to be given through the Office of Assurance, could later be given without any formality. Lastly, it appears that because the insured made the insurer an offer of abandonment, the underlying assumption may have been that the insurer had a choice whether or not to accept the (otherwise valid) abandonment.

The difference between the right to abandonment and the right to salvage also became apparent in the case of fire insurance. While in the course of the nineteenth century abandonment was taken not to apply to fire insurances, the latter right, as first clearly set out in the marine insurance decision in *Randal v Cockran*,<sup>450</sup> most certainly did.<sup>451</sup> Thus, even in the absence of a term to that effect, when an owner, insured to the full value of his property, had his claim admitted as a total loss, any salvage or remains of that property belonged to the insurer. This was so even if the salvage turned out to be worth more than the amount paid out.<sup>452</sup> In the case of an under-insurance, and if there was a *pro rata* condition of average in the policy,<sup>453</sup> the insured and the insurer shared proportionally in any salvage as would co-insurers. If in such a case there was no average clause in the policy, the insured retained the salvage to the extent that,

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<sup>447</sup> Or, more precisely, did not change for the better.

<sup>448</sup> If this was the effect of *Hamilton v Mendes*.

<sup>449</sup> See eg *Weskett Digest* 1-7 sv 'abandonment' par 20, noting that in England there was no fixed time limit for the making of an abandonment.

<sup>450</sup> See again n423 *supra*.

<sup>451</sup> See generally *Walford Cyclopaedia* vol I at 17 sv 'abandonment' and vol III at 595 sv 'salvage in fire insurance'.

<sup>452</sup> For example, the damaged property may on a sale afterwards have realised more than the undamaged property was worth earlier.

<sup>453</sup> See again ch XVIII § 5.7 *supra*.

when its value was added to the amount paid out, he was not in a better position than before the fire.

### 2.5.3 Abandonment in the Marine Insurance Act

The main development and refinement of the English law relating to insurance abandonment occurred in the nineteenth century. By the time of the Marine Insurance Act of 1906, an intricate set of principles had evolved. In the process, though, the English position had grown even further apart from that in civil-law systems.<sup>454</sup> Generally speaking, as far as the consequences of abandonment are concerned, English law favours the insurer to a much greater extent than does civil-law systems such as Dutch law. In the latter systems the insurer can achieve the same measure of protection only by the insertion of appropriate clauses in the insurance contract.

It has already been noted that apart from the traditional difference between a total and a partial loss, the Marine Insurance Act also came to distinguish between an actual total loss and a constructive total loss.<sup>455</sup>

In the case of an actual total loss,<sup>456</sup> in terms of s 57(2) no notice of abandonment need be given to the insurer. However, in practice such a notice is invariably given whenever the insured intends to claim for a total loss, even if only to prevent any objections being raised by the insurer when the loss turns out not to have been an actual total loss as the insured had thought but rather a constructive total loss. Further, while there may be no abandonment or no need for one in the case of an actual total loss, the insurer still has his right to salvage.<sup>457</sup> If a policy is concluded 'without benefit of salvage to the insurer', it will, except where there is no possibility of any salvage, be deemed to be a contract of gaming and wagering<sup>458</sup> and will as a result be void.<sup>459</sup> Therefore, the insurer's right to salvage may not be excluded while, as will appear shortly, the insured's right to abandonment may be excluded.<sup>460</sup>

A constructive total loss occurs, generally and subject to any express provision in the policy, where the subject-matter insured is reasonably abandoned because its actual total loss appears to be unavoidable, or because it cannot be saved from an

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<sup>454</sup> See generally as to the differences Buys 103-105; Dorhout Mees *Schadeverzekeringsrecht* 647-649.

<sup>455</sup> See ch XV § 5 *supra*.

<sup>456</sup> Described in s 57(1) as occurring where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the insured is irretrievably deprived of it.

<sup>457</sup> See further *infra* as to s 79.

<sup>458</sup> Section 4(2)(b). There will be no possibility of salvage in the case where the total loss in question involves the complete destruction of the subject-matter insured, where there is no physical subject-matter capable of being salvaged, or where the insured is not the owner of the subject-matter insured.

<sup>459</sup> Section 4(1).

<sup>460</sup> See further at n470 *infra*.



actual total loss without an expenditure which would exceed its value after the expenditure had been incurred.<sup>461</sup>

There are also specific statutory examples of what will constitute a constructive total loss. Thus, there is such a total loss where the insured is, by a peril insured against, deprived of the possession of his ship or goods and it is either unlikely that he can recover it, or the cost of recovering it would exceed its value when recovered.<sup>462</sup> There is such a loss, furthermore, in the case of damage to a ship where she is so damaged by a peril insured against that the cost of repairing the damage would exceed her value when repaired.<sup>463</sup> Finally, there is also a constructive total loss in the case of damage to goods where the cost of repairing the damage and forwarding the goods to their destination would exceed their value upon arrival.<sup>464</sup>

Thus, as opposed to the rather rigid Dutch system where the seven types of circumstance or occurrence justifying an abandonment are specified, the English approach is more flexible. A general rule is laid down which may be applied in every instance. English law, furthermore, does not distinguish between an immediate and a delayed abandonment and therefore does not have to distinguish between the time after which the right to abandon accrues to the insured, something which is unknown in English law,<sup>465</sup> and the time within which that right has to be exercised, which is known, as will be shown shortly.<sup>466</sup>

In English law a missing ship does not constitute a constructive total loss but rather a (or an irrebuttably) presumed actual total loss.<sup>467</sup> Accordingly, otherwise than in civil-law systems, including Dutch law, there is no abandonment in this case. If the

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<sup>461</sup> Section 60(1).

<sup>462</sup> Section 60(2)(i).

<sup>463</sup> Section 60(2)(ii) which also adds how the cost of repairs is to be estimated. The actual repaired value is relevant here and not the insured or the agreed value nor the value immediately before the loss. Further, the cost of repairs must exceed that value and not merely exceed, as in most other systems, a stated proportion of that value.

<sup>464</sup> Section 60(2)(iii).

<sup>465</sup> No such period of time is known because abandonment in English law is always immediate.

<sup>466</sup> Likewise the two distinctions drawn, in Dutch law, between an immediate and a delayed abandonment, and, in English law, between an actual and a constructive total loss are on different levels, are drawn for different purposes, and should not be not regarded as comparable. In Dutch law the distinction is, as it were, between two different types of constructive total loss, an irreversible one which permits an immediate abandonment, and a potentially reversible one which permits only a delayed abandonment. In English law the distinction is between a total loss in fact, in which case no notice of abandonment is necessary, and a total loss in an economic sense, in which case a notice of abandonment is required. The distinctions are drawn for different purposes: in Dutch law to determine the time when the right to abandon accrues and becomes enforceable; in English law to determine whether or not the formalities of an abandonment are required. But despite the generally incomparable distinctions between the different types of total loss, it would appear that, broadly speaking, a total loss in Roman-Dutch and Dutch law corresponds with a total loss (in all its forms) in English law.

<sup>467</sup> Section 58. See again ch XV § 6.3 *supra*.

ship is subsequently recovered and returned to the insured, the insurer has a right to salvage in respect of the ship or her remains. Also, in English law there are no fixed periods of disappearance before the insured can claim in this instance but merely a reasonable time which will depend on the circumstances of each case.

Yet another difference lies in the application in English law in this regard of a doctrine already referred to earlier in connection with the decision in *Hamilton v Mendes*, namely the doctrine of the ademption or reversal of loss. It is a notion peculiar to English law and is unknown to civilian systems as well as to Scots and American law.<sup>468</sup> Although the Marine Insurance Act itself is silent on this matter, several earlier cases had decided that a constructive total loss would be deemed or reversed in the event of an appropriate change in the circumstances which justify the abandonment. It is required in English law that circumstances justifying the abandonment must exist not only at the time of the loss or when the notice of abandonment is given, as is the case in most other systems, but that it must still exist also at the moment when the claim is instituted against the insurer for the payment of the sum insured on the basis of that abandonment, that is, at the date of the writ or at the date which the parties agree can be taken as the date of the writ. Therefore, if during the period of time between the notice of abandonment and the commencement of legal proceedings (the issue of the writ) matters change to such an extent that the loss may be regarded as having been reduced from a constructive total loss to a partial loss, the insured can merely claim for the latter. The return of a captured ship, for example, would ordinarily preclude a recovery for a total loss as such a loss would be deemed. In practice, where insurers invariably refuse to accept the notice of abandonment, they nevertheless, in order to counter the effect of the doctrine of the ademption of loss, undertake to place the insured in the same position as if he had issued the writ. This they do by agreeing that the date of the notice of abandonment will be deemed to be the date of the writ. As a result the validity of the abandonment is determined with reference to the time when it was made and not when the writ is in reality subsequently issued.

In the case of a constructive total loss, the insured has a choice. He may either treat the loss as a partial loss (retaining ownership of the subject-matter and claiming only for a partial loss), or he may abandon the subject-matter insured to the insurer, treat the loss as if it were an actual total loss, and claim the full sum insured.<sup>469</sup> Therefore, as in Dutch law, the insured has, in appropriate circumstances, a right but not an obligation to abandon. This right of abandonment and the election it entails may be excluded by agreement, such as where the policy specifically only covers an actual total loss.<sup>470</sup>

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<sup>468</sup> See generally eg Barry 354-355; Chalmers 98 (referring to this difference as a negligible difference in practice); Cohen 'Bill' 381; and *idem* 'Law' 30-31.

<sup>469</sup> Section 61. See also eg Buys 101.

<sup>470</sup> Otherwise an insurance against a total loss includes a constructive as well as an actual total loss. See s 58(3) and Chalmers 95.

While there is no definition of abandonment in the Marine Insurance Act,<sup>471</sup> the way in which an abandonment is made receives full treatment in s 62.

An insured electing to abandon the subject-matter insured to the insurer and to treat the constructive total loss as an actual total loss, must give the insurer a notice of abandonment. If he fails to do so (and, by implication, thus fails to abandon), the loss can only be treated as a partial loss.<sup>472</sup> A notice of abandonment may be given in writing or orally, or partly in writing and partly orally, in any terms which indicate the intention of the insured to abandon his insured interest in the subject-matter insured unconditionally to the insurer.<sup>473</sup> It must be given, not as in Dutch law within fixed periods, but with reasonable diligence after the receipt of reliable information regarding a loss, but where that information is of a doubtful character, the insured is allowed a reasonable time to make the necessary enquiries.<sup>474</sup>

Apart from the case where the loss is an actual total loss or where the parties have so agreed, a notice of abandonment is unnecessary where, at the time when the insured receives information of the loss, there is no possibility of any benefit to the insurer if notice were given to him,<sup>475</sup> where it has been waived by the insurer,<sup>476</sup> and in the case of a reinsurance contract.<sup>477</sup>

In English law a notice of abandonment is regarded as an offer or tender, which may be accepted or rejected by the insurer, and which remains revocable until accepted. Such acceptance of an abandonment may be either express or implied from the conduct of the insurer, but mere silence of the insurer after a notice is not an acceptance.<sup>478</sup> Where the notice is accepted, the abandonment is irrevocable and by accepting it, the insurer conclusively admits liability for the loss and the sufficiency of

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<sup>471</sup> Chalmers 95 notes the various meanings of the word 'abandonment'. First and strictly, in the case of a constructive total loss, it means the voluntary cession by the insured to the insurer of the subject-matter insured or whatever may remain of it, together with all the proprietary rights and remedies in respect of it. This is the meaning in which the word is employed in the Act. Secondly and incorrectly, it is used as the equivalent of the notice (or offer or tender) of abandonment which, however, is no more than the act by which the insured makes known to the insurer his election to abandon and to treat the constructive total loss as an actual total loss. Thirdly, the word is also used as a corollary of the doctrine of subrogation, to indicate the cession or transfer of the remains, if any, of the subject-matter insured which takes place, by operation of law, when the insurer pays for a total loss, that is, the insurer's right to salvage.

<sup>472</sup> Section 62(1).

<sup>473</sup> Section 62(2). Thus, a conditional notice suggesting a compromise is insufficient. See Chalmers 99n2.

<sup>474</sup> Section 62(3).

<sup>475</sup> Section 62(7).

<sup>476</sup> Section 62(8).

<sup>477</sup> Section 62(9).

<sup>478</sup> Section 62(5). Presumably, the mere payment for a total loss is also not an acceptance of the abandonment. There is therefore no requirement, as in Dutch law, for a formal declaration of abandonment, the reason being that the notice itself has no proprietary effect in English law as it has in Dutch law.

the notice.<sup>479</sup> Where the insurer refuses to accept the abandonment, the rights of the insured<sup>480</sup> are not prejudiced by such a refusal, as long as the notice was given properly.<sup>481</sup> Thus, while the giving of a proper notice of abandonment is a requirement for a valid abandonment, the acceptance of such a notice is not. If the abandonment is valid, the usual effect of a valid abandonment follows, even if the notice is not accepted.<sup>482</sup>

The effect of a valid abandonment (and notice of abandonment), in terms of s 63, is that, generally, the insurer is entitled to take over the interest of the insured in whatever may remain of the subject-matter insured, and all proprietary rights incidental to it.<sup>483</sup> Additionally, on the abandonment of a ship, the insurer of the ship is entitled to any freight in the course of being earned and which is earned after the event or casualty causing the loss, less the expense of earning it incurred after the casualty.<sup>484</sup> If the insurer does take over the insured's interests in the subject-matter or its remains, he also acquires any liabilities attaching to the subject-matter, such as the obligation to pay the wages of a ship's crew, or to remove the ship or her wreck causing an obstruction.

A valid abandonment in turn entitles the insured to claim for a total loss.

Section 79, which deals with the insurer's right of subrogation,<sup>485</sup> also makes reference to his analogous right to salvage. Where an insurer pays for a total loss of the subject-matter insured, 'he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for', and he is thereby also subrogated to all the rights and remedies of the insured in and in respect of the subject-matter as from the time of the casualty causing the loss.<sup>486</sup> There is no similar right to salvage where the insurer pays only for a partial loss, although there is a right of

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<sup>479</sup> Section 62(6).

<sup>480</sup> Presumably as against the insurer, but it is uncertain whether also in respect of the insured property.

<sup>481</sup> Section 62(4). Also, presumably, as long as the notice is not revoked. Seemingly the insurer need not either accept or reject within a reasonable time. Silence is not acceptance but could it amount to a rejection?

<sup>482</sup> See Chalmers 97-98.

<sup>483</sup> Section 63(1).

<sup>484</sup> Section 63(2). Where the ship is carrying her owner's goods, the insurer is entitled to a reasonable remuneration for their carriage subsequent to the casualty. This right to freight is not a proprietary right, hence the need for this additional provision. Other (personal) rights against third parties are dealt with in s 79 in terms of the doctrine of subrogation, as is the insurer's right to salvage upon payment for a total loss.

<sup>485</sup> See again § 1.5 *supra*.

<sup>486</sup> Section 79(1).

subrogation.<sup>487</sup> Subrogation in English law is therefore wider than in Dutch law since it incorporates, at least in s 79, the insurer's right to salvage, a very necessary right in English law given the fact that there is no abandonment in the case of an actual total loss.<sup>488</sup>

Section 63, it would appear, changed the previous legal position. Prior to the Marine Insurance Act the prevailing rule in English law was that a valid abandonment automatically transferred to the insurer the insured property or whatever of it remained, as well as all rights, and not only proprietary rights (that is, rights to salvage), incidental to it, from the time of the accident.<sup>489</sup> Now s 63(1) merely *entitles* the insurer to take over the insured's rights. The change in favour of the insurer was probably to enable him not to become involved as an owner in cases where onerous liabilities would be incurred in respect of abandoned property.<sup>490</sup> In practice hull insurers usually do not accept an insured's notice of abandonment because of the possibility that the hull may be of little value and could involve extensive liabilities. It is otherwise in the case of the abandonment of valuable cargo. It seems further that insurers need not specifically decline to take over the proprietary rights offered to them, mere silence after the notice of abandonment not being regarded as an acceptance of such abandonment.

Thus, in English law an abandonment or notice of abandonment does not pass the ownership in the abandoned property to the insurer. The insurer is merely entitled to take over the ownership of and the proprietary rights in that property. Apparently this is so even if the insurer pays the insured for a total loss.<sup>491</sup> By contrast, in Dutch law, in the case of a proper abandonment, the property belongs to the insurer from the day of the unilateral declaration by the insured, with the insurer having no choice in the matter

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<sup>487</sup> Section 79(2). Thus, in the case of a payment for a partial loss, the insurer 'acquires no title to the subject-matter insured, or such part of it as may remain', but he is, to the extent of his payment, still subrogated to all rights and remedies of the insured in and in respect of the subject-matter insured.

<sup>488</sup> See on this point Dorhout Mees *Schadeverzekeringsrecht* 670.

<sup>489</sup> See eg *Simpson & Company v Thompson, Burrell* (1877) 3 App Cas 279 (HL).

<sup>490</sup> This approach would appear overly protective of the insurer. Apart from the fact that he may in any event protect himself with an appropriate clause in this regard as he does in so many other areas of the law of marine insurance, it would appear that the risk of the abandoned property in its 'lost' state being more onerous than the insurer had anticipated or may have wished, is but part of the risk he had taken over in terms of the insurance contract, no different from the risk that the property may become lost in the first place. It seems difficult to justify the rule that the same factors, such as the onerous liabilities attached to the insured property, which factually and legally justify the insured's abandonment, should at the same time justify the insurer's not accepting liability in respect of such property. Just as the insurer is entitled to the fruits of the abandoned property, so should he bear the liabilities attached to it. Further, as the owner, the insurer may well be entitled in turn to abandon the insured property so as to limit his personal liability. And finally, it would not be without precedent if the insurer incurred a liability in respect of the insured property in excess of the sum insured which had already been paid out to the insured.

<sup>491</sup> As to the effect of abandonment in English law, see eg Chalmers 101-102; Gauchi 106-111; Hudson 'Constructive Total Loss' 4-6; and Sarlis 94-96 and 111.

and not having to accept or reject the abandonment. In the one system abandonment is a bilateral juristic act, in the other a unilateral one.<sup>492</sup>

If the insurer takes over the abandoned property by accepting the notice of abandonment, there is little difficulty. He becomes the owner of and acquires legal title to the property,<sup>493</sup> acquiring all the proprietary rights in and in respect of it and also incurring all liabilities attaching to it. The insurer can, in turn, of course abandon it with the aim of limiting his liability<sup>494</sup> and so cause it to become *res nullius*. Then, obviously, it becomes *res nullius* as a result of the insurer's divesting abandonment and not as result of insured's transferring abandonment to the insurer.<sup>495</sup>

It remains uncertain in English law, though, what the position of abandoned property is where there has been a valid abandonment but where, as usually happens, the insurer has refused to accept or has simply not reacted. The precise effect of the insurer's refusal to accept a notice of abandonment has not been resolved.<sup>496</sup> There are divergent views. The one view holds that the property becomes *res nullius*,<sup>497</sup> on

<sup>492</sup> See on this difference Buys 107-108; Helberg 17-25. The position is the same in German law where abandonment is also '*ein einseitiges Rechtsgeschäft*' (see Helberg 130-142).

<sup>493</sup> See eg *The Lusitania* [1986] 1 Lloyd's Rep 132 (QBD) at 133. However, despite this *dictum*, the Court then decided (at 135) that the ship had become a derelict (*res nullius*) because she had been abandoned by her owners without any intention of returning to her. Surely it was the intention of the new owners, the insurers, not or no longer that of the previous owners, which was relevant here.

<sup>494</sup> This option, which also exists in Dutch law, therefore largely eliminates the apparent disadvantages for the insurer of the automatic transfer of ownership by an insurance abandonment in the latter system. See in general as to the utility of abandonment, Lanier, who explains that an owner (and therefore also the insurer who has become the owner) could abandon his vessel, even if sunken, and isolate himself from any personal liability for the removal of the wreck, the vessel itself (to the extent of its value) remaining liable *in rem* for the cost of such removal.

<sup>495</sup> In *The Egypt* (1932) 44 Ll LR 21 (Adm) the view was expressed (at 31) that in the case of insured and sunken goods having been abandoned by the insured to the underwriters, such goods did not become *res nullius* but remained their property so long as they had not abandoned it. This recognises that property may become *res nullius* if the underwriters manifestly abandon it.

<sup>496</sup> See eg Dromgoole & Gaskell 366-375; Hudson 'Abandonment'.

<sup>497</sup> In *The Arrow Shipping Company, Limited v The Tyne Improvement Commissioners (The Crystal)* [1894] AC 508 (HL) a ship was wrecked in the open sea and notice of abandonment was given to the underwriters (who presumably did not accept the abandonment although they did pay for a total loss). The House of Lords thought that by abandoning the ship as a derelict at sea without the intention of returning to her, the insured owners had ceased to be the 'owners' statutorily liable for the cost of wreck removal or destruction. Although some of the Law Lords stressed that no pertinent view was expressed on whether the underwriters had become the owners (see at 519, 532), the majority seems to have accepted that there had been a divesting abandonment and that the property had become derelict.

Further support for this view is to be found in *Mayor and Corporation of Boston v France, Fenwick & Co, Ltd* (1923) 15 Ll L Rep 85 (KBD) where the insured ship had validly been abandoned to the underwriters who declined to accept it. The Court refrained from expressing an opinion on whether a valid notice of abandonment not accepted by underwriters, whilst divesting the owner of his property in the wreck, at the same time automatically transferred the property to the underwriters (see at 91). The Court merely noted that there was a great deal to be said in favour of the wreck in such circumstances becoming *res nullius*. It seems the influencing factors here may have been views expressed in the decision in *The Crystal*, and s 63(1), which gives underwriters a choice in the matter which did not exist prior to the Act.

the basis that either the insured or the insurer has relinquished his rights to the whole world.<sup>498</sup> The other view holds that ownership in such a case remains with the insured,<sup>499</sup> both because the notice of abandonment is not an abandonment to the whole world with the result that, if it is not accepted, it remains but an executory offer which does not deprive the insured owner of his rights, and also because in this case<sup>500</sup> the possibility is excluded of the insurer on his part accepting and then abandoning the property to the whole world.

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<sup>498</sup> It would seem difficult to ascribe such an intention to the insured on the basis merely of an offer of abandonment directed to the insurer. It would seem further, though, that where property has been abandoned by the insured to the insurer, the latter may in turn abandon it to the whole world so that it does become *res nullius*. But such an abandonment by the insurer is obviously not possible in the case where he had not accepted the insured's abandonment to him in the first place.

<sup>499</sup> In *Pesquerias y Secaderos de Bacalao de Espana, SA v Beer* (1946) 79 LI LR 417 (KBD) the insured had given notice of abandonment to the insurers which was not accepted. The Court pointed out (at 433-434) that the notice of abandonment was merely an offer which remained executory and revocable unless and until accepted, and that until it was accepted, the insured remained entitled to change his election and merely to claim for a partial loss. The implication of this is that ownership in the insured property remained with the insured.

In *Oceanic Steam Navigation Company, Ltd v Evans* (1934) 50 LI LR 1 (CA) notice of abandonment of the insured sunken vessel was given to the underwriters but not accepted by them. The Court thought (at 3) that the abandonment by the insured to the insurer was not also an abandonment 'to all the world' so that the property in question became *res nullius*. It rejected the argument that there had been a divesting abandonment by the owners by noting that because a notice of abandonment had been given to the insurers, it did not follow that the vessel was abandoned to the whole world so that it became *res nullius*. There was no abandonment in that sense in this instance.

In *Blane Steamships, Limited v Minister of Transport* [1951] 2 LI LR 155 (CA), where the notice of abandonment was also not accepted by the insurers although they did pay for a total loss, doubt was expressed (at 163) about the correctness of the view in *France, Fenwick* that in the case of an unaccepted abandonment, the property becomes *res nullius*. That view was thought difficult to reconcile both with the insured's option in terms of s 61 to treat the constructive total loss as a partial loss, and with the doctrine of ademption. The Court expressed a preference for the view in *Evans*.

<sup>500</sup> Where the insurer did not accept the abandonment.

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## CHAPTER XX

# TERMINATION OF THE INSURANCE CONTRACT: PAYMENT AND PRESCRIPTION

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### 1 General Introduction

As was the case with other contracts, the insurance contract, or rather the obligations arising from it, could be terminated in various ways. Some of these have already been considered in other contexts.<sup>1</sup> Other ways were not specifically considered by the sources in the context of the insurance contract, very often because in practice they either seldom arose in connection with that contract or gave rise to no discernibly different principles.<sup>2</sup> Those remaining to be dealt with here are discharge, which in the context of the insurance contract meant payment by the insurer, and prescription.

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<sup>1</sup> For settlement, see ch IV § 2.2 *supra*; for novation and delegation, see ch X § 5 *supra*; for set-off, see ch X § 2.4.4 *supra*; for termination upon the effluxion of time, see ch XII § 1 *supra* for the duration of the risk; and for insurer insolvency, see ch VII § 4.1 and ch IX § 2.9 *supra*.

<sup>2</sup> These include merger, the impossibility of performance, judgment, breach of contract (rescission) or agreement (eg release, cancellation clauses). It may be thought that there may have been a frequent need for the cancellation of insurance contracts. Thus, the facts in *Casus positien* vol II cas 32 (treated in detail in ch X § 2.4.1 n34 and ch XV § 7.2 n135 *supra*) show that because the instructions and requests for instructions between principals and their representatives crossed in lengthy postal delays, it resulted in unnecessary insurance cover frequently having to be cancelled later. Cancellation clauses in insurance contracts, though, were only commonly inserted in time policies which were concluded less frequently in Roman-Dutch law than were voyage policies. See again ch XII § 1.4 *supra*.



## 2 Discharge of the Insurance Contract: Payment

### 2.1 The Nature of the Insurer's Liability to Pay on the Insurance Policy

It has already been explained<sup>3</sup> that according to Roman-Dutch law the bilateral insurance contract gave rise to two actions, a direct action (*actio directa*) for the insured against the insurer to recover compensation for his loss, and a reverse action (*actio contraria*) for the insurer against the insured to enforce the payment of the agreed premium. More specifically, the insured's action involved a right to claim compensation from the insurer for a loss or damage as undertaken by the insurer in exchange for the payment of the premium, as well as interest on such compensation, or the furnishing of security for the payment of such compensation and interest.<sup>4</sup>

In the insurance policies prescribed by or appended to the different insurance laws, insurers' liability was variously described. Thus, in the Ancona policy of 1567<sup>5</sup> the insurers solemnly promised under oath and bound themselves and all their heirs and movable and immovable goods, present and future, in all the ways in which they could be held liable (*'se ipsos & omnes suos haeredes & bona mobilia & immobilia, praesentia & futura omni meliori modo quo se obligare possent'*). Antwerp policies in the sixteenth century also contained undertakings by the insurers to pay compensation in which they bound themselves personally together with all their present and future assets.<sup>6</sup>

The policies contained in the various insurance laws in the Low Countries likewise generally declared the insurer to be personally liable on the insurance contract for its performance, together with all his assets, present and future. The policy in terms of s 35 of the *placcaat* of 1571 contained a declaration of liability by the insurer '*onder verbintnisse van alle sijne goederen*'. The hull and cargo policies in terms of the Amsterdam *keur* of 1598 referred to '*ende verbinden hier voor onse Persoonen ende*

<sup>3</sup> See ch XI § 5.1 *supra* where the nature of the insurer's claim for the premium was considered.

<sup>4</sup> See eg Schorer *Aantekeningen* 412 ad III.24.1 sv '*het onzeker gevaar*'; Decker *Aantekeningen* ad IV.9.10 n(4)/(d) (the insured's action is for the compensation of the loss suffered, or for the furnishing of security, or for the restitution of the premium); Van der Keessel *Praelectiones* 1478 (ad III.24.18) (the *actio directa* is granted to the insured to have his loss compensated (or sometimes for the recovery of the premium) and for everything which was *ex bono et aequo* due on the insurance contract); Van Ghesel *De assecuratione* I.3.24 (the *actio directa* is the action by the insured or his heir against the insurer or his heir to obtain an indemnity with interest).

<sup>5</sup> Discussed by Straccha *De assecurationibus* XXXV.

<sup>6</sup> Thus, an Antwerp policy of 1531 provided '*Vns vorbyndende mit hyue vnde gude, yeegenwardich vnde tokamende*, and one of 1591: '*Ende dartoe verbinden wie alle vnse goedenn*'. See De Groote *Zeeassurantie* 114-118; *idem* '*Zeeverzekering*' 212 (insurers put themselves '*met lijf en goederen*' in the position of the insured).

*goederen, present ende toekomstende*',<sup>7</sup> while the hull, cargo and fire policies in terms of the Amsterdam *keuren* of 1744 and 1775 included the clause '*[o]nder verband en submissie van onze Persoonen en Goederen, presente en toekomstende*'.<sup>8</sup>

Wordings of this nature made it apparent and also underlined the fact that the insurer's liability was personal and that the insured could take the appropriate action against the insurer's whole estate<sup>9</sup> to enforce his personal right and to obtain payment in terms of the policy. Such action included, in the event of the insurer's insolvency, the steps necessary to have his assets liquidated. Further, the insured's action was not extinguished by the death of the insurer and could be brought against his estate.<sup>10</sup> However, reference to the insurer's property did not mean that the insured had a real right upon all or any of the assets in the insurer's estate.

A similar wording occurred in the Lloyd's SG policy as it was fixed in 1779. It provided as follows: 'And so we, the assurers, are contented, and do hereby promise, and *bind ourselves*, each one for his own part, our heirs, executors, and goods to the assured, their executors, administrators, and assigns, for the true performance of the promises'.

## 2.2 The Time for Payment: Provisional Payment and Interest

### 2.2.1 Introduction

Apart from the issue of fraud, mainly on the part of the insured,<sup>11</sup> one of the more problematic aspects of insurance law, and one not surprisingly addressed right from the start in insurance legislation in the Low Countries, was the issue of the reluctance if not the blatant refusal on the part of insurers to meet their undertakings in terms of insurance contracts. For this insurers have, not surprisingly, elicited some acerbic comments from the writers on insurance law.<sup>12</sup>

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<sup>7</sup> Subsequent policies there followed this example, such as the hull and cargo policies in terms of the Amsterdam amending *keur* of 1688 ('*onder verband en submissie van onze Persoonen en Goederen, present en toekomstend*'); and the ransom policy in terms of the Amsterdam amending *keur* of 1693 ('*[t]ot naarkominge van het gene voorschreven is, verbinden wy onze Persoonen en Goederen, present en toekomst, die stellende ten bedwank van alle Regten en Regteren*').

<sup>8</sup> Likewise the ransom policy in terms of the Amsterdam *keur* of 1744 ('*[t]ot naarkominge van 't gene voorsz. is, verbinden wy onze Persoonen en Goederen, presente en toekomstende*') and the fire policy in terms of the Amsterdam *keur* of 1775 ('*[v]erbindinge voor de naarkominge deezes onzes Persoonen en Goederen, praesente en toekomstende*').

<sup>9</sup> See Mullens 40.

<sup>10</sup> As to insurer death and insolvency, see again ch IX § 2.9 *supra*.

<sup>11</sup> As to which see again ch XIV *supra*.

<sup>12</sup> Thus, Malynes *Consuetudo* I.24 noted the very wide range of risks which could be insured but remarked that 'herein must be noted, that Assurors are verie fitly compared unto Orphanes, because they may endure much wrong, but cannot commit any'. Bynkershoek *Quaestiones juris privati* IV.3 observed that '*de Assuradeurs [zyn] veel gretiger om premie te ontfangen, dan om schade te betalen, en [zyn] om dit te vermyden doorgaans zeer vernuftig*'. And even a modern author like Van Barneveld *Inleiding tot de Algemene Assurantiekennis* (1978) 25 still makes the now rather sexist comment that '*[d]e*

Insurers regularly resorted to various devices, if not to avoid actual payment on insurance policies completely, then at least to postpone such payment for as long as they possibly could. A common pretext was that they required time to investigate the occurrence, nature, and extent of the loss or damage and thus the validity of insured's claim, and to formulate their defences to such a claim if necessary. They further abused existing civil procedures by firstly simply refusing to pay voluntarily, and if judicially condemned to pay, by repeatedly appealing against or requesting a further review of such decisions until all legal remedies and avenues had been exhausted. In so doing they delayed payment for as long as possible, in the meantime holding on to and drawing interest on the amount in question.

The insured's position was exacerbated by the fact that, as with civil claims generally, there were extremely long delays in the prosecution of insurance claims from the local Chamber of Insurance, to the *Schepenen* Court, to the *Hof van Holland*, and finally to the *Hooge Raad*. Apart from the fact that the insured was for a period of time unreasonably deprived of the money to which he was entitled, his risk of not being able to recover anything at all due to the insurer becoming insolvent was greatly increased by such stalling tactics on the part of insurers and by the delays inherent in the judicial process generally.

The compromise generally adopted in insurance laws from early on between the insurer's need for time to investigate the insured's claim on the insurance contract, and the insured's need for a prompt settlement of his claim, was the device of provisional sentence. As will appear, a complex body of rules of civil procedure developed in this regard as this device came to be applied rather extensively to claims on and proceedings concerning insurance contracts.

## 2.2.2 The Position in the Sixteenth Century

The problem of delayed insurance payments was already addressed in a *placcaat* of duke Philip the Good of Burgundy of 15 February 1459 (1458 os), a piece of legislation concerned with the speedier and more informal adjudication of mercantile and maritime disputes generally. In the first legislative reference to insurance in the Low Countries, the *placcaat* included in the ambit of its regulation also disputes arising from '*des assurances que les marchands font les ungs aux autres aventures et perilz de la mer*'. It confirmed the application to such insurances of an existing practice in commercial disputes.<sup>13</sup> In terms of this practice a defendant, found liable in a summary (and therefore in a simplified, less dilatory, and more expeditious) procedure, had to make an immediate provisional payment against the provision of security by the claimant. No appeal was permitted against such a provisional sentence unless the appellant's posi-

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*verzekeringsmaatschappijen zijn als de vrouwen; zij ontvangen in vreugde en baren met smart*'.

<sup>13</sup> See further § 2.2.3 *infra*.

tion was such that any detriment he might suffer could not be made good by an award of interest in the final sentence.<sup>14</sup>

The next legislative measure dealing with insurance in the Low Countries was promulgated only almost eight decades after the first, but it too prominently addressed and sought better to resolve the problem of compliance by insurers with their insurance contracts. In a *placcaat* of Charles V of 25 May 1537, which was concerned with bills of exchange and insurance policies (*'de wissel-brieven ende brieven van assureantie ende versekerheyt'*).<sup>15</sup> An obligation was imposed on the insurers of any ship or goods on water or on land (*'eenighe ship oft Coopmanschap te water oft te lande'*) to pay the insured in terms of the policy within two months of the occurrence of the loss of or damage to such insured ship or goods. Failing a payment within that time, during which the insurer was ostensibly allowed to investigate the nature and validity of the insured's claim, the insured could institute an action by way of a summary process against the insurer. The *placcaat* provided further that on evidence of the fact of the insurance and of the loss of or damage to the insured ship or goods appearing from the face of the policy and from *prima facie* proof presented by the insured,<sup>16</sup> the insurer was obliged to make an immediate provisional payment (*'schuldich zijn te nantiseren'*). He was not entitled at that stage to raise any defences or to produce any evidence to the contrary (*'al eer hy eenighe exceptien ten principalen sal moghen proponeren oft alleheren'*). The insured could obtain such payment if he provided security for the repayment of the amount in question, should the insurer be successful in establishing a proper defence in subsequent proceedings (*'de welcke ghenantiseerde somme den heyschere sal mogen lichten ende ontvangen onder goede deuchdelijck borghtochte ende cautie om dan 't voors. recht ten principalen ghedaen worden alst behooren sal'*).<sup>17</sup>

Elsewhere similar practices were also known in the form of contractual stipulations by which insurers accepted the possibility of a provisional sentence.<sup>18</sup> Legislative

<sup>14</sup> As to the *placcaat* of 1459, see Dorhout Mees *Schadeverzekeringsrecht* 13; Goudsmit *Zeerecht* 204-205; De Grootte *Zeeassurantie* 33; Hammacher 40-41; Kracht 9-10; and Mullens 16-17.

<sup>15</sup> The *placcaat* referred to the *'vele quaede betaelders dagheelijckx hun vervoorderen vele manieren van processen te sustineren om eenighe dilaijen ende yutstellen die goede Cooplieden heuren goeden schuldich voor te gaene ende frustrerende tot grooten achterdeele vanden selve Coopmanschappen ende negotatie'*.

<sup>16</sup> *'[S]oo verre den rechter sommerlijck blijkt vander voorsz. brieven van versekerheyt oft assureantie ende by deugdlijcke certificatie oft depositie van 2 wettighe ghetuyghen dat schip Coopmanschap oft goet inde voorsz. brieven begrepen geperickliteert oft bedorven is.'*

<sup>17</sup> See further Couvreur *'Zeeverzekeringspractijk'* 199-200; Goudsmit *Zeerecht* 204-205; De Grootte *Zeeassurantie* 33; Hammacher 41-42; Kracht 9-10; Mullens 23; and Plass 28-29.

<sup>18</sup> Thus, the earliest Italian insurance contracts, such as the Florentine policy of 1523, stipulated that the insurer had to pay the sum insured within two months of the notice of loss. See De Roover *'Early Examples'* 189. Early Italian notarially executed insurance contracts - and also later Spanish insurance contracts - conforming to the legislatively prescribed policy form, were considered liquid documents, so that if the insured could establish the occurrence of the event insured against by a policy conforming with the applicable legislation, the insurer with an illiquid defence was not heard but had to make a provisional payment of the amount claimed, as long as the insured provided him with security for its repayment. See eg Rothbart 13 (referring to the *'Eksekutivkraft'* of insurance policies); Sanborn 258.

The sixteenth century Ancona policy of 1567, discussed by Straccha *De assecurationibus* XXVIII,

provisions containing measures for provisional sentence on insurance contracts also existed in other jurisdictions.<sup>19</sup> The legislative measures in the Low Countries appear merely to have confirmed existing customs and practices in respect of insurances there.<sup>20</sup>

The basic position just described was retained in the provisions on insurance in title VII of the *placcaat* of 1563. Thus, in the model policy form contained in the *placcaat*, insurers undertook to pay within two months of having been notified of the loss or damage (*'binnen twee Maenden eerst volgende, nae dat sy behoorlijck gheadverteert sullen wesen van't verlies oft schade'*). That the practice of a provisional payment on insurance policies was still recognised, appears from s 5 of the *placcaat*. It referred to the customs of the Antwerp Bourse which required that in the circumstances dealt with in that section,<sup>21</sup> the insurer had to make a provisional or a final payment of the sum insured to the insured (*'dat die Asseureur den gheasseureerden moet namptiseren, ofte betalen de penningen by hem inde police onderschreven'*).<sup>22</sup> Section 18 of the *plac-*

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stipulated that the insurers were liable to pay the insured within two months from the day on which a proper notice of loss had been received in Ancona (*'intra duos menses ex eo die, quo Anconae istius rei vera nova habebuntur'*). This policy was further exceptional in that it in fact stipulated that the insurer first had to make a provisional payment before he could raise any defence against the insured's claim in a court of law. In this regard the policy read: *'et si praeteriderent ratione aliqua contradicere, non possint audiri ab aliquo Judice, aut ullo Magistratu, nisi prius re ipsa persolverint numeratam illam pecuniam'*. The insertion of such a clause was common, Straccha explained (XXIX), because insurers often, for the sake of delaying payment, raised particular unfounded defences. In terms of this clause insurers were not heard before they had made a provisional payment (XXIX.1). Only defences apparent from the face of the document (ie, the policy) itself could be raised by an insurer in such provisional proceedings for payment (XXIX.3, 8 and 10).

<sup>19</sup> For example, in terms of ss 19-24 of the Barcelona Insurance Ordinance of 1484, insurers had to pay within specified periods of the time after the notice of a loss, and thereafter provisionally had to pay claims upon demand, regardless of any defences, well-founded or not, which they may have wished to raise. If such defences were proved by the insurers to be valid before the date on which they had to make the provisional payment, no such payment was required. The insured had to provide security for the repayment of the sums provisionally paid by the insurers. If the insured was unable to obtain a final judgment against the insurer, he was obliged to repay the amount provisionally paid by insurers together with interest. If the insured failed to provide security, the insurers were not obliged to make a provisional payment but if the insurers were then held liable in the final proceedings, they had to pay interest on the amount due. Finally, if the insurers' defences turned out to be unfounded, they had to pay the insured his expenses incurred in order to obtain judgment and also any damage he had suffered, for, as it was put, it was not permissible for anyone who had concluded an insurance and who had paid his premium, thinking that he would be paid the amount of the insurance he had purchased without any additional expense, to have to suffer due to some unfounded accusations made by the underwriters.

Similar if less extensive provisions were contained in the earlier versions of the Barcelona Insurance laws. See further Reatz *Geschichte* 137-140 and 165-169. As to the position in terms of the Burgos Insurance Ordinance of 1538, see Reatz *Geschichte* 258-260; and Verlinden 'Zeeverzekeringen' 198. See generally Dorhout Mees *Schadeverzekeringsrecht* 16.

<sup>20</sup> See further § 2.2.3 *infra* for the Antwerp customary law in this regard.

<sup>21</sup> Namely where an insured ship or goods had gone missing. See again ch XV § 6.2 *supra*.

<sup>22</sup> See further De Groote *Zeeassurantie* 34-35.

caat referred to the period of two months after which an insured was permitted to claim payment (*'[d]en tijdt van twee Maenden den gheasseureerden gegeven, omme naer teneur van dese jegenwoordige Ordonnantie, ende achtervolgende die voorseyde Police sijne assureantie te mogen eysschen'*). The two-month period now commenced from the time when the notice of loss was given to the insurer and no longer, as earlier in terms of the *placcaat* of 1537, as from the occurrence of the loss. Section 18 further referred to the fact that unless properly notified of the loss or damage, the insurer was not liable to make any provisional or final payment (*'sal den Asseureurs niet loopen te effecte, omme tot eenige namptisatie ofte betalinge ghehouden te zijn'*).<sup>23</sup>

The *placcaat* of 1571 did not alter this position in any significant way. Again the model forms of the policies added to the *placcaat* stipulated that the insurers undertook to pay within the now slightly longer period of three months after the notice of loss or damage (*'te betalen ende op brengen binnen drie maenden achter een volgende, nae dien hy vande schade oft verlies behoorlijk geadverteert sal zijn'*). The obligation to pay within three months of notification was also provided for in s 23 (*'die Asseureurs oft verseeckeraers sullen hebben drie maenden, tot furnissemte vande betalinge'*).<sup>24</sup>

The question of provisional sentence and payment was dealt with in s 33 of the *placcaat* of 1571. It appeared to seek to redress the balance in favour of insurers by reducing the instances of insured being overly litigious and abusing the provisional sentence procedure. The section noted that provisional sentence on some insurance policies was too readily obtained (*'op eenige instrumenten van assureantien, lichtelijcken verkrijgen namptissement by provisie'*), as a result of which the plaintiff had to provide security (*'daer van sy mainlevee oft hantlichtinge hebben op cautie ende borch-tocht'*) without proper consideration of the defences and exceptions of the other party which were often legal and valid (*'sonder aenschouw te nemen, op de defensien ende exceptien van de tegenparty, die dickmael wettich ende rechtveerdich zijn'*). Furthermore, even the provisional procedure on occasion required a protracted enquiry and proceedings. Accordingly, the section continued, if in the case of insurance someone obtained a provisional sentence against the other party (*'indien yemandt in dese saecken ende materien van assureantien sijn parthye doet namptiseren'*) and he then failed to succeed in the main action (*'ende hy in 't principael succumbeert ende vervalt'*), he would, because of his reckless and inconsiderate litigation (*'temeraire ende lichtveerdich vervolgt'*) and as a punishment for the calumny (*'voor pene van calumnie'*), be condemned to pay the other party interest at twelve per cent

<sup>23</sup> As to s 18, see Groenewegen *Aanteekeningen* n42 ad III.24.22. And also Enschedé 117; Goudsmit *Zeerecht* 248; De Groote *Zeeassurantie* 36; Jolles 69; Kracht 20-21; and Mullens 94. It should be noted that the insurer had to pay within two months of notification of the loss and that such notification in turn had (in terms of s 17) to be given within a specified period after the conclusion of the contract. See again ch XVI § 2.2 *supra*.

<sup>24</sup> As to s 23, see Van Zurck *Codex Batavus* sv 'Assurantie' par 17; and also De Groote *Zeeassurantie* 41 (s 24 of the provisional *placcaat* of 1570 was identical) and 111-112; De Groote *Zeeverzekering* 212; Jolles 69 (who states that payment had to be made within three months, unless the policy provided otherwise provided, although nothing of the latter option appears from s 23 itself); and Mullens 94.

per annum.<sup>25</sup>

### 2.2.3 The Position in Antwerp Customary Law

It appears from various sources that the position as set out in the insurance laws in the latter part of the sixteenth century as regards payment by the insurer and the possibility of the insured obtaining a provisional sentence against him,<sup>26</sup> was in accordance with existing and earlier insurance practices in the Low Countries.<sup>27</sup>

In 1457, and thus two years before the first legislative measure on the topic in the Low Countries, the *Schepenen* Court of Bruges condemned an insurer on the *prima facie* evidence of the insured to make a provisional payment to the latter in terms of an insurance contract. This payment was subject to the insured providing security for the repayment of the amount involved, in the event of his failure in the principal case should his evidence be refuted there by the insurer.<sup>28</sup>

A number of other decisions from this period suggest that the practice of provisional payment against security ('*namptiseren tegen borgstelling*') was commonplace. From a judgment of 1459 it appears that if the insured was eventually held to be entitled to payment on the policy, the sum provisionally paid to him, remained in his hands and the security he had put up, fell away.<sup>29</sup> And in case in 1478 case the

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<sup>25</sup> Presumably this interest was on the amount of the security the plaintiff had to put up for the provisional sentence. Section 34 of the provisional *placcaat* of 1570 was identical, except that there the determination of the amount of interest was left to the discretion of the Court.

As to s 33, see Van Zurck *Codex Batavus* sv 'Assurantie' par 26; See further Dorhout Mees *Schadeverzekeringsrecht* 16; Enschedé 117 (who refers to the interest on the security as a '*poena temere litigantium*'); Goudsmit *Zeerecht* 268; and Kracht 28.

<sup>26</sup> As Mullens 94 explains, the period within which the insurer had to pay and the period after which the insured could obtain a provisional sentence were identical and in practice no great distinction was drawn between a voluntary final payment and a compulsory provisional payment by the insurer.

<sup>27</sup> See generally Plass 28-29; Trenerry 270 and 272.

<sup>28</sup> See Gilliodts van Severen *Cartulaire* vol II at 62-63; De Groote *Zeeassurantie* 13. Raynes (1 ed) 13 refers to the case of *Gerard Plouvier* [of Bruges] & *Saldonne Ferrier* [a Catalan merchant] v '*la Compagnie de George Spingle*' which came before the *Schepenen* Court of Bruges in 1456. The latter was ordered to pay on condition that the insured plaintiffs should provide security, but had the right to prove within a year and a day that the master of the insured had committed a barratry on the voyage as was alleged, in which case (the insurers not being liable on policy) the sums paid out had to be returned to them.

<sup>29</sup> See De Groote *Zeeassurantie* 13. Raynes (1 ed) 12-13, (2 ed) 20-21 refers to the case before the *Schepenen* at Bruges in 1459 of *Marc Gentil* [a Genoese merchant] v *M Arnulphi* [of Lucca], *C Lommelin* [of Genoa] & *A Tany* [of Florence]. After the loss of the ship on which his goods had been loaded, the plaintiff claimed the sums underwritten by the defendants on those goods. Although the defendants admitted having underwritten the sums claimed, they argued that according to custom the insured should first transfer to them the rights he had in the goods in case they should be recovered or salvaged. The insured argued that an immediate payment should be made and that the insurers could raise their defence at a later stage. It was held that the occurrence of the loss having been proved, no delay in the payment by the insurers of the sums they had underwritten could be permitted.

privileges of Flanders were relied upon by the insured to obtain a provisional payment before the insurer could rely on his defence.<sup>30</sup>

There is also later evidence of this practice being followed in Antwerp. Thus, in a judgment delivered there in 1540, the written declaration of witnesses confirming the loss of the insured goods in an accident at sea was sufficient to permit the immediate payment in terms of the insurance contract.<sup>31</sup> From an Antwerp notarial deed of 1592 it is clear that in the event of a loss of the insured ship or goods, if the insured had three months before given a notice of such loss, a provisional sentence was granted subject to the provision of security ('*namptisatie onder borg*').<sup>32</sup>

The practice of provisional payment was also confirmed by the various compilations of Antwerp customary law, the relevant provisions of which also provide further clarification on the application of provisional sentence procedure in claims on insurance contracts.<sup>33</sup>

In the *Antiquae* of 1570 it was first determined in art 9<sup>34</sup> that the insurer was liable to pay the sum he had underwritten within two months after the notification of the loss or of an abandonment to him. Then art 2 provided further that if it appeared<sup>35</sup> that the claimant was insured against a particular peril and if it appeared that he had given the required notice of the loss, a provisional sentence was possible on the basis of his policy as it was possible in the case of any other liquid document ('*policien van assurantien ... staen tot namptisatie, gelyck ander liquide obligatien*'). Consequently, the party liable in terms of the policy had to make a provisional payment of the sum he had insured ('*moet de somme by hem geassureert namptiseren*').

The two topics of the period for payment by the insurer and the possibility of a provisional sentence in the case of a non-payment were again regulated in the *Impressae* of 1582.

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<sup>30</sup> See De Groote Zeeassurantie 18. Raynes (1 ed) 13 refers to the case of *Jean Vasques v Jacques Dorie & Partners* in 1468. A cargo of sugar had been insured. The ship carrying the cargo was wrecked on the coast and the insured claimed the sum insured. The Bruges *Schepenen* Court ordered the payment of that sum. It also ordered that security be provided for the repayment of the whole or a part of that sum in the event of the insurers proving within six months that the cargo or a part of it had in fact been salvaged or sold by the master of ship, the barratry by the master not being covered by the insurers in this instance.

<sup>31</sup> See De Groote 'Zeeverzekering' 207-208.

<sup>32</sup> See De Groote Zeeassurantie 24-25.

<sup>33</sup> See generally Mullens 94-95 and 96.

<sup>34</sup> Of title XXIX (see De Longé vol I at 602).

<sup>35</sup> Presumably in the proceedings which followed on a non-payment by the insurer when the insured instituted a claim against the insurer.



In terms of art 14,<sup>36</sup> the insurer was liable to pay within three months after a valid notification of loss or abandonment. By art 4,<sup>37</sup> if it appeared<sup>38</sup> that the policy had been signed (*'onderteekenen'*), that the claimant was insured against the perils concerned in respect of ships or merchandise,<sup>39</sup> and that the insurer had been notified of the loss at least three months earlier, a provisional sentence subject to the provision of security was possible on the basis of that policy (*'policen van assureantien ... staen tot namtizatie onder cautie'*).<sup>40</sup> Article 5 stated that in cases of provisional sentence in insurances, notarial certificates of the loss of or damage to the insured ship or goods were customarily permitted in law as a sufficient basis for such a sentence.<sup>41</sup>

The most extensive treatment of the insured's right to obtain a provisional sentence and to demand a provisional payment in terms of his insurance contract appeared in the *Antwerp Compilatae* of 1609.<sup>42</sup>

It was made clear that all insurance claims were susceptible of provisional sentence (*'alle saecken van versekeringe staen tot namptisatie oft handvulling'*) so that the insured could obtain a provisional payment as soon as there was proof of a properly underwritten policy and the relevant bill of lading, consignment note or invoice (*'cognossement, cargasoen or prisinge'*), and if the loss, damage or depreciation of the insured ship or goods was readily apparent (*'promptelijck blijck van den verliese, schade oft verminderinge van de schepen oft goeden daerop vervoich wort gedaen'*).<sup>43</sup>

<sup>36</sup> Of title LIV (see De Longé vol II at 402).

<sup>37</sup> From the 1621 Antwerp case of *JA Balbi v Goyvaertszoon vanden Graeff* it appears that s 33 of the *placcaat* of 1571 was no longer followed on all points but that reference was instead made to the more detailed art 4 of the *Impressae* of 1582. See Couvreur 'Zeeverzekeringspractijk' 189.

<sup>38</sup> Presumably in proceedings following on a non-payment by the insurer.

<sup>39</sup> As to which the bill of lading and the consignment note had to be produced (*'met oock d'exhibitie van t'cognossement ende cargazon'*).

<sup>40</sup> On the first day of the provisional hearing the insurer was provided with a copy of all documents and given a day in which he could reply, without prejudice to the provisional sentence (*'des wort den verweerder ten eersten daghe van regte copie van als ghegunt ende dach om daerom t'antwoorden, sonder prejudicie vande provisie'*).

<sup>41</sup> '[I]n welcke saecke van namtizatie in materie van assureantien, sijn certificatie van het verlies oft periclitatie van t'geasseureert schip oft goeden, voor Notaris ende getuyghen gepasseert, van allen ouden tijden alhier in rechte gheadmitteert, ende is recht daerop ghedaen gheweest.' As to arts 4 and 5, see Groenewegen *Aanteekeningen* n42 ad III.24.22.

<sup>42</sup> The topics were treated in arts 274-282 of par 8, title 11, part IV (see De Longé vol IV at 312-316).

<sup>43</sup> Article 274. In terms of art 275, the defendant was at his request to be provided with copies of this documentation and given a day to prepare himself to reply to the claim, without such a reply prejudicing the award of a provisional payment though (*'sonder prejudicie oft achterdeel van de selve provisie'*).

*Prima facie* proof was sufficient to establish grounds for a provisional sentence,<sup>44</sup> but such proof could be tested and countered by the insurer in subsequent principal proceedings.<sup>45</sup> Less strict proof of the value and thus of the amount claimed was required in provisional proceedings in that the value or the cost price of insured goods, as reflected in their consignment notes or invoices, was accepted as the basis of compensation,<sup>46</sup> on the understanding, though, that either party could bring further proof of and thus contest such value in the principal case.<sup>47</sup>

If, after a provisional sentence and payment, it was found that the insured's claim was unfounded and if he therefore failed in his claim in the principal case (*'ende dat sij oversulcx ten principaelen bij eijndelijcken vonnisse de nederlage krijgen'*), the insured had to return the provisional payment (*'de genamptiseerde penningen wederkeeren'*) with interest at twelve per cent per annum as a penalty for his frivolous litigation (*'lichtveerdich vervolch'*).<sup>48</sup>

#### 2.2.4 Developments in the Seventeenth Century

The practice of obtaining a provisional condemnation to the payment of the insurance money by the insurer, failing his voluntary payment within the period legally permitted, continued to be a topic which attracted the attention of the municipal legislatures in the seventeenth century.

In the Amsterdam *keur* of 1598 both the model cargo and hull policies stipulated that the insurers undertook to make payment within three months after having been notified of the loss or damage (*'binnen drie eerstvolgende Maenden, naer dat wy behoerlick geadverteert sullen zijn van 't verlies ofte schade'*). This was confirmed by s

<sup>44</sup> Article 276, which stated that the insured was to be believed on the submission of legally valid documentation (*'op wettelijcke certificatie'*) which was not tested (*'al ist dat de partije daerop niet en is gedacht'*), even if such proof would be insufficient in the principal proceedings (*'soude t'selve niet genoegh sijn als men commen ten principaele'*).

<sup>45</sup> By art 277, the proof offered in the provisional proceedings was of necessity tested in the principal proceedings (*'ten principaele soude van noode sijn dat partije daerop worde gedaecht, de welke alsdan oock intendit mach overgeven van de feijten ende punten daerop hij begeirt getuljgen ondervraecht ende gehoort te worden'*). Provision was also made for evidence on commission (art 278), which evidence too could be tested and contradicted in the principal proceedings (art 279).

<sup>46</sup> See art 280 (*'de hantvullinge wort altijs genomen naer advenant van de weerde van de goeden, gelijk die bij den eersten incoop in contanten gelde, mitsgaders in packen, vrachten ende anderssints hebben gecost, volgende tcargasoen oft factuere'*). As to the insured's burden of proof of the insurable value of insured property, see again ch XVII § 4.2 *supra*.

<sup>47</sup> Art 281 (the insured and the insurer both remained entitled, notwithstanding the provisional sentence, *'ten principaele te bewijsen dat ten tijde van de ladinge de weerde sesse oft seven ten hondert naer meer oft min heeft bedragen dan die bij de factuere is begroot'*, but had to produce sufficient documentary evidence of this, failing which *'soude de hantvullinge voor betaelinghe oft voldoeninge strecken'*).

<sup>48</sup> See art 282.

5, which dealt with the presumption of loss in the case of a missing ship or goods,<sup>49</sup> and from which it appears that the insured was entitled to claim payment from his insurers three months after having given them notice of the presumed loss.<sup>50</sup> Likewise, in terms of s 25, which dealt with the abandonment of the insured ship and goods,<sup>51</sup> the insurer had three months after the notice of abandonment to pay the sum for which he had insured.<sup>52</sup>

The possibility of a provisional sentence in the insurance context was addressed in s 33 of the Amsterdam *keur* of 1598.<sup>53</sup> Such a procedure was permissible, in terms of this section, if by presentation of the relevant policies, bills of lading, consignment notes, proper certificates or other reliable affidavits or documentation (*'deuchdelijck bescheyt'*), it appeared to the Commissioners of the Chamber of Insurance that the policies in question had been underwritten, that the ship had been lost or that the goods had perished,<sup>54</sup> and that at least three months earlier the insurers had been notified of that loss. Once those conditions had been met, the Commissioners could order that the amount claimed be deposited provisionally in full or in part (*'dat de geeyachte penningen in 't geheel ofte deel by provisie genamptiseert werden'*), the insured being permitted to take up the sum in question on his providing security for its repayment together with interest at twelve per cent should it subsequently appear that the sum, or a part of it, in fact had to be repaid (*'met toelatinge vande genamptiseerde penningen te mogen lichten onder suffisante Borch-tochte, van de selve penningen te restitueren metten interesse van dien tegens twaelf ten hondert: indien naemaels verstaen wort sulcks te behooren'*). Such an order for provisional payment was permissible on condition that the defendant-insurer had always first been provided with copies of the relevant documentation and been granted a day in which to respond before the

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<sup>49</sup> See again ch XV § 6.2 *supra*.

<sup>50</sup> '[E]nde mach men daer af doen inthimatiën den Asseureurs, ende drie Maenden daer nae betalinge eysschen'. Section 12 of the Middelburg *keur* of 1600 was in identical terms.

<sup>51</sup> See again ch XIX § 2.3.5 *supra*.

<sup>52</sup> 'Ende ... sullen d'Asseureurs nae de inthimatie van dien [ie, the abandonment] hebben drie Maenden tot furnissement vande betalinge der somme by hun verseeckert.' Section 26 of the Middelburg *keur* of 1600 was identical.

As to the period within which the insurer had to pay, see eg Grotius *Inleidinge* III.24.13; Van Zurck *Codex Batavus* sv 'Assurantie' par 17 (as to s 5) and par 21 (as to s 25); Van der Keessel *Praelectiones* 1471 (*ad* III.24.13); and also Vergouwen 44.

<sup>53</sup> See too s 34 of the Middelburg *keur* of 1600.

<sup>54</sup> From this it would appear that only a claim for a total loss (ie, a claim for the full sum insured) could be dealt with by way of provisional proceedings.

Commissioners decided on the provisional payment ('voor dat by de Commissarissen op de provisie van namptissement gedisponeert werde').<sup>55</sup>

A closer explanation of how a provisional sentence was granted, was offered by Van Zurck.<sup>56</sup> He noted that provisional payment was everywhere granted if it was established that the insurance in question had been concluded ('als de assurantie gedaen is'), if no exception appeared from the face of the policy on which the action was based ('en geene exceptie uit de police, daer uit de actie geboren word, gemaekt word'), and if it appeared that the policy had been complied with ('en als de police blykt voldae te zyn') and that the ship or goods had been lost or damaged ('als 't gevaer, en schâ op schepen, of op goederen komen'). He referred for authority on this matter to Roccus<sup>57</sup> who had made numerous references to the application of the provisional sentence procedure ('in iudicio exequitivo') in the context of the insurance contract.<sup>58</sup>

<sup>55</sup> As to s 33, see eg Grotius *Inleidinge* III.24.22 (on receipt of the required proof of the insurance and of the loss or damage, the insurer was required to make a provisional payment, with an undertaking of repayment by the insured ('onder belofte van weder-gheving'), to which the Lund edition added 'ende voor de winninge twaelf ten hondert'); Groenewegen *Aanteekeningen* n42 ad III.24.22; Van Leeuwen *Rooms-Hollands regt* IV.9.10 (confusing voluntary payment within three months with a condemnation to provisional payment against the provision of security which was compulsory in terms of an appropriate sentence or order of a court); Voet *Observationes ad* III.24.22 (n 42) (noting that the high rate of interest of twelve per cent deterred insured from frivolously claiming such provisional payment); Van Zurck *Codex Batavus* sv 'Assurantie' par 26 ('de ten principalen gecondemneerde gehouden is de genamptiseerde, en by provisie toegewezen som, te restitueren met 12%'); Van der Keessel *Praelectiones* 1485 (ad III.24.22) (the Court may condemn the insurer to provisional payment ('iudex ad fiduciarium solutionem eum damnare potest'), but the insured had to provide a suitable security ('idoneis fideiusseribus') for the repayment of that amount plus interest on losing the principal case ('causa principalis'). See also Dorhout Mees *Schadeverzekeringsrecht* 16; Goudsmit *Zeerecht* 330.

<sup>56</sup> *Codex Batavus* sv 'Assurantie' par 29 n1.

<sup>57</sup> *De assecurationibus*.

<sup>58</sup> The following brief exposition will have to suffice.

In note 57, Roccus made mention of the insured, having claimed that his loss be paid provisionally, being ordered in the principal action to repay the provisional payment because the loss had occurred prior to the conclusion of the insurance. Igersoll in his translation of this note thought it worthy of comment that a short and summary mode of proceeding in insurance matters and other mercantile contracts apparently existed in Italy in which judgment was given '*velo levato et sine figura iudicii*'. This is a somewhat surprising comment, given Roccus's note 100 (see *infra*).

Note 58 concerned the burden of proof in provisional and principal proceedings. The *prima facie* proof adduced by the insured in a provisional hearing was insufficient and merited no value in the principal proceedings, in which the insured had to prove anew that the loss had occurred.

In note 85 reference was made to the insurer's obligation to make a provisional payment in Naples where, at the time, the Barcelona Insurance Ordinance was applicable. In note 86 it was stated that the contract of insurance ('*scriptura assecurationis*') permitted a summary execution against insurers ('*exequitionem paratam contra assecutores*'), and that this could not be prevented by whatever exception was raised after the expiry of the period within which the insurer had to pay the insured. Also, a summary judgment was not appealable.

Note 87 explained that the principle set out in note 86 was subject to an exception (Feitama in his comment on this note explained that this referred to a defence which the insurer could lawfully raise) appearing from the face of the policy. Such an exception would prevent a summary execution, notwithstanding the stipulation usually inserted in insurance policies that the insurer renounced all defences or would not be permitted to raise any defences until he had made the provisional payment in cash.

Note 97 gave a practical example of one of the requirements for a provisional sentence, namely

He also referred to two Italian decisions on the matter.<sup>59</sup>

Also helpful was Scheltinga's exposition of the position in Amsterdam in the seventeenth century.<sup>60</sup> Firstly he pointed out that no absolute proof but merely a probable or *prima facie* proof ('*geen volkomen zeeker maar een probabel bewys*') was required for a provisional sentence. Then he explained that the principle involved had to be understood as follows. An insurer could be condemned to a provisional payment only if the existence of the insurance and the occurrence of the loss appeared from *prima facie* proof ('*probabel bewyzen*'), and further if at least three months had expired since a proper notification of the loss. Furthermore, the insured was only entitled to lift or obtain the sum insured ('*het lichten der geassureerde penningen dan eerst gepraesteerd worden*') after he had provided sufficient security for its repayment together with interest at twelve per cent ('*sufficient borge de restituendo cum usuris*') should the decision eventually go against him ('*indien hy naderhand in ongelyk gesteld mogt worden*'). If the insured could not provide such security, the money remained in court ('*geconsigneerd*').

In an opinion delivered in 1675<sup>61</sup> the advice was offered that a provisional sentence could not prejudice the principal case, but when the case was heard and adjudged finally, it had to be done as if there had been no earlier proceedings ('*als of 'er in de sake te voren noyt enige provisionele sententie gedecerneert ware geweest*').

Rotterdam by and large followed the Amsterdam example. Section 15 of its *keur* of 1604 provided that insurers had to pay within three months of having been given notice of an abandonment, after which (but not before) the insured could claim the

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proof of the loading of the insured goods.

Note 100 explained that insurances made abroad were also provisionally executable in Naples because it was a principle of general maritime law that one could proceed against insurers by way of summary proceedings.

<sup>59</sup> The first decision, *Odoardus & Gulielmus Micco [Englishmen] v Emanuel Vaez* (1643) (see Roccus/Feitama *Decisien* decis 6), held that in provisional proceedings against him on the insurance policy, the insurer could raise the *exceptio non numeratae pecuniae* if the insured had not paid the premium. The insurer had argued here that this exception was integral to the existence and acknowledgement of the debt and that, if raised, it prevented the policy from being liquid. He also argued that non-payment of the premium in any event resulted in the nullity of the insurance contract.

The other decision, *Joan Baptista Ghirardini & Other Insured v Stephanus Thieri & Galeatius Nale & Other Insurers* (1646) (see Roccus/Feitama *Decisien* decis 11), held insurers liable to deposit the money in court. The insurers raised the defence of barratry and although it was true that that exception appeared from the face of the policy, the fact that the ship was here lost through a barratrous act of her master did not so appear and had to be proved by additional evidence. Accordingly, provisional execution of policy could not be prevented by the insurers. Examples of exceptions appearing from the face of the contract or in respect of which no further evidence was required so that the Court could give an immediate sentence, included a minor contracting without the assistance of his parent; the exception of usury; the *exceptio non adimpleti contractus*; the *exceptio cedendarum actionum* in the case of a suretyship; a woman surety's exception based on the *Senatusconsultum Velleianum*; and the exception of prescription.

<sup>60</sup> *Dictata ad* III.24.22 sv '*eenighen toon, etc*'.

<sup>61</sup> See *Nederlands advysboek* vol. III adv 17.

amount they had underwritten on the property from the insurers. Section 16 provided the same in the event of damage to (as opposed to a loss of) the insured property.<sup>62</sup> Unlike its Amsterdam counterpart, though, the Rotterdam *keur* appears not to have made any express provision allowing an insured to obtain a provisional sentence against an insurer who had not voluntarily paid within the three months allowed. However, as Van der Keessel explained,<sup>63</sup> because a provisional payment ('*namptissement*') could be requested in most causes where an action was instituted on a liquid document ('*ex liquidis instrumentis*'), and because the Legislature had earlier in 1563 and 1571 recognised that this common-law procedure also applied to insurance contracts, there was little doubt that such a provisional sentence ('*provisie van namptissement*') could also be requested in Rotterdam.

Although it appears that the provisional sentence procedure was a familiar one in insurance cases,<sup>64</sup> the Amsterdam provisions concerning the insurers' payment in terms of their contracts were not in all respects acceptable. They were amended on several occasions in the course of the seventeenth century.

Firstly, s 3 of the Amsterdam amending *keur* of 26 January 1610 added a new dimension to the insurer's obligation by compelling him to pay interest to the insured in the event of a late payment of any amount due on an insurance contract. The *keur* noted that because of the great irregularity encountered in the payment of losses on insurance contracts ('*de groote ongeregeltheit bevonden wort ... inde betalinge vande schade daerop vallende*'), it provided that insurers were bound, when the Chamber of Insurance had made and issued any assessment of loss ('*eenige repartitie van schade sullen zijn gemaect ende uyt gegeven*'), to make good and pay such a loss immediately ('*terstont*'). Failing such immediate payment, the insurer had to pay the insured interest on that amount at twelve per cent annually from the time that this assessment had been made and issued ('*de repartitien sullen zijn gedepescheert ende uyt gegeven*') until the actual payment of the amount to which the insurer may have been condemned by the Chamber.<sup>65</sup>

Thus, as Van Zurck made clear,<sup>66</sup> in terms of this s 3, interest was levied on an insurer who failed to pay after the assessment of a loss ('*na gemaekte verdeling van schâ, in gebreke van betaling blyvende*'), just as the insured himself was liable in terms

<sup>62</sup> See Van Zurck *Codex Batavus* sv 'Assurantie' par 17 and par 21; Van der Keessel *Praelectiones* 1471 (ad III.24.13).

<sup>63</sup> *Praelectiones* 1485 (ad III.24.22).

<sup>64</sup> Thus, in an opinion delivered in 1666 (see *Nederlands advysboek* vol I adv 135) the point was made that at law and in practice it was certain and notorious '*dat de Assuradeur moet betalen ofte by provisie namptiseren de waarde van de geledene schade, soo wanneer maar blijkt van de onderteykeninge der Police van Assurantie, mitsgaders van het verlies ofte bederf der Schepen off Goederen*'.

<sup>65</sup> See Grotius *Inleidinge* III.24.19 (the insurer is liable to the insured for *mora* interest ('*winst-derving*') at a rate of 12 per cent for failing to pay '*nae dat de verdelinge van de schade is ghemaect*'); Groenewegen *Aanteekeningen* n37 ad III.24.19; Schorer *Aanteekeningen* 431 (ad III.24.19) n37; and Van der Keessel *Praelectiones* 1479 (ad III.24.19).

<sup>66</sup> *Codex Batavus* sv 'Assurantie' par 26.

of s 2 of this amending *keur* for interest for failing to pay the premium,<sup>67</sup> and just as the insured was also liable, in terms of s 33 of the Amsterdam *keur* of 1598, to pay the insurer interest if the amount provisionally paid by the latter had to be repaid (*'den principalen gecondemneerde gehouden is de genamptiseerde, en by provisie toegeweze som, te restitueren met 12%'*).

In the *Amsterdamsche Secretary*, published early in the eighteenth century, appeared<sup>68</sup> an example of a judgment (*'despache'*) condemning the insurer to pay the sum underwritten plus the expenses of the Chamber<sup>69</sup> and also<sup>70</sup> one of a judgment absolving the insurer from any liability.

In the second place, however, s 4 of the Amsterdam amending *keur* of 1610 clarified that the Chamber would not make and issue any assessment of a total loss (*'geene repartitie van totaël verlies'*) before the expiry of three months after the notice of abandonment had been given, in accordance with s 25 of the *keur* of 1598.<sup>71</sup>

Thirdly, in terms of the hull policy appended to the Amsterdam amending *keur* of 29 January 1688, insurers undertook to pay within one month after the notice of the loss or damage (*'binnen een Maant, na dat wy behoorlijk geadverteert sullen zijn van 't verlies of schade'*), and in the cargo policy they likewise undertook payment within one month (*'binnen een maend precijs, na dat wy behoorlijk geadverteert sullen zijn van 't verlies of schade'*). In the ransom policy prescribed by the *keur* of 1693, the insurers undertook to pay promptly as soon as they were notified and as it appeared to them that the insured had been released from captivity or that a bill for such release had been accepted (*'belooven wy ... prompt ... te betalen, en dat soo haast als hier Advijs gekomen, en ons gebleken sal zyn, dat hy gelost is, of wel dat de Penningen tot dien einde getrokken, en de Wissel-brieven geaccepteert sullen zijn'*).<sup>72</sup>

Fourthly, because s 33 of the *keur* of 1598 was not in all respects observed in practice, to the noticeable detriment of commerce, the Amsterdam Legislature (*'Heeren van den Gerechte'*) decided and announced in the amending *keur* of 18 January 1697 that that section was in future to be enforced in all respects and that no appeal would be permitted against any provisional sentence or any assessment of the Chamber (*'het voorsz 33. Artikul ... in alle sijn deelen na desen te doen opvolgen, sonder te gedogen,*

<sup>67</sup> See again ch XI § 3.2.2.1 *supra*. See too Wassenaer *Praktyk notariael* VIII.12; Vergouwen 47.

<sup>68</sup> At 373-374. It is reproduced in Appendix 2 *infra*.

<sup>69</sup> In a footnote there was mention of the possibility that the judgment could be made subject to the swearing of an oath by the insured as regards his ignorance of any loss or damage having occurred prior to the insurance, and also of the possibility of costs being awarded against the one or the other of the parties involved.

<sup>70</sup> At 374-375. It is reproduced in Appendix 3 *infra*.

<sup>71</sup> See again ch XIX § 2.3.5 *supra*. See generally as to the *keur* of 1610, Goudsmit *Zeerecht* 329.

<sup>72</sup> In the ransom policy considered in an opinion in 1678 (see *Nederlands advysboek* vol II adv 170), the insurers undertook *'promptelijk te betalen, een maand precijs naar dat het haar geinsinueert of bekend gemaakt zoude zijn'*.

dat van eenige provisionele vonnissen of despaches ter Kamer voorsz gewesen, sal werden geappelleert').<sup>73</sup>

### 2.2.5 Provisional Sentence in Roman-Dutch Law: Some General Remarks

At this stage it may be opportune to describe generally the procedure known as provisional sentence<sup>74</sup> in Roman-Dutch law so as to provide some background against which its application in the context of the insurance contract may be seen.<sup>75</sup>

As has already been intimated, provisional sentence was an extraordinary judicial procedure by which, in appropriate circumstances, a defendant was provisionally condemned by an interlocutory judgment to the payment of an amount of money to the plaintiff, subject to the provision of security by the latter for the repayment of the amount in question or part of it.

The reason for the introduction of the procedure in the Netherlands, as elsewhere, was to prevent the reliance by debtors on and their abuse of the judicial processes in preventing and postponing the payment of lawful claims as long as possible by forcing them to make an early provisional payment of those claims.<sup>76</sup> In consequence the plaintiff could obtain the amount of the claim apparently due to him immediately and was not out of pocket for a disastrously long period of time.

Roman-Dutch law had adopted the provisional sentence procedure from French law which had in turn received it from an earlier Romano-Canonical executory procedure known in Italian law. This procedure was unknown to Roman law. By the early part of the sixteenth century, it was already widely applied under the guise of usage and custom and as a well-known feature of Roman-Dutch procedural law, it was extensively commented upon by a number of Dutch legal authors,<sup>77</sup> and was also the subject of

<sup>73</sup> See Dorhout Mees *Schadeverzekeringsrecht* 16; Goudsmit *Zeerecht* 330.

<sup>74</sup> Various terms were used in this regard, such as '*namptissement*' and '*namptiseren*' (from the French '*nantir*' and the Latin '*namtire*'); and '*handvulling*' and '*handvulling doen*' (from the French '*garnissement de main*'). The phrase '*namptiseren tegen borgstelling*' referred to the provision of security by the claimant against a provisional payment by the defendant for the repayment of that amount should it be found in subsequent proceedings not to have been due. Later the technical terms '*namptissement*' or '*handvulling*' were dropped in favour of '*provisie*' or '*provisie van namptissement*'.

<sup>75</sup> See generally Asser *NBW* 109-110; Van Zyl *Judicial Practice* 65-68; and (1828) 1 *Menzies Reports* 5-9 ('Prefatory Remarks on Provisional Sentence').

<sup>76</sup> As it was aptly put by Lybreghts *Redenerend verhoog* II.42.1, '*een quaadaardige schuldenaar [word] daar door beteugelt van de deugdelyke pretentie zyner tegenpartye, door onordentyke proceduren, tot den einde toe te quellen, en de penningen onder zich te behouden*'.

<sup>77</sup> See eg Grotius *Inleidinge* III.13.6 and III.45.10; Van Leeuwen *Censura forensis* I.4.14.6 and I.4.18.4; Lybreghts *Redenerend verhoog* II.42.1-9; La Leck *Register sv 'namptissement'*; Van der Keessel *Theses selectae* th 526-527 (*ad* III.6.7); and Van der Linden *Judicieele practijcq* II.6.13-14.



early legislative enactment.<sup>78</sup>

Provisional sentence was granted on liquid documents. These were written instruments from which it appeared that the debtor had unconditionally undertaken by his signature to pay to the plaintiff a specified sum of money,<sup>79</sup> or had unconditionally acknowledged a particular debt to the plaintiff.<sup>80</sup> In short, a liquid document was one which could, by its terms alone and without the need for any extrinsic evidence, *prima facie* and for the time being satisfy the Court that the plaintiff would succeed in a principal action, apparently even if there was no absolute certainty yet as to the exact amount to which he was entitled. If the document in question did not display a cause of action, no provisional sentence would be granted.<sup>81</sup> No distinction in principle was

<sup>78</sup> Legislation on the topic included the following.

Section 119 of the *Instructie vanden Hove van Hollant, Zeefant, &c.* of 20 August 1531 (GPB vol II at 730), which concerned the procedure '*in saecken daer yemant gedachvaert wort om te kennen of te ontkennen sijn hant-teycken, gheschrift ofte Zegel, voor't profijit van d'eerste deffault, sal dat hant-teycken, geschrift of zegel ghehouden worden voor bekend, ende de dessaillant ghecondemneert de penningen te namptisseren, ende verleent een ander Mandament, by den welcken de voorsz dessaillant gheroepen sal zyn tegens den voorsz Impetrant, om hem te sien delivieren 't nampt op cautie: ende indien de dessaillant niet en compareert, sal voor 't profijit van 't tweede deffault den Impetrant 't nampt ghedelivreert worden op sussifante cautie'*.

Sections 7, 10 and 11 of the *Ordonnantie ende Instructie, gemaect op de vordernisse van de Justitie, voor den Hove van Hollandt, in kleyne saecken* of 21 December 1579 (GPB vol II at 761-764), and also ss 8 and 11 of the *Nieuwe Ordonnantie oft Ampliatie, vande Instructie vanden Hove van Hollandt* of the same date (GPB vol II at 767-770).

The *Ordonnantie, vande lustitie, binnen den Steden ende ten platten Lande van Hollandt* of 1 April 1580 (GPB vol I at 695), which in s 3 provided for provisional sentence in the case of a claim on particular documents when '*default de geeyschte penninghen ... te namptisseren, in handen vanden Eysscher onder cautie restituendo*', and which in s 10 provided that '*provisie van namptissement*' could be claimed in particular instances.

<sup>79</sup> That is, a fixed, ascertained, or determinate sum of money. The sum insured by an insurance policy was considered in Roman-Dutch law to qualify in this regard.

<sup>80</sup> See eg Lybreghts *Redenerend verhoog* II.42.2 (provisional sentence may be given '*op alle liquide obligatoire Handschriften, mitsgaders Contracten, of andere Instrumenten, waar van de handtekening word erkend, of mits zyn default voor bekend word gehouden*'. In an opinion delivered in 1629 (see *Hollandse consultatien* vol I cons 237) it was noted that a '*provisie van Namptissement*' was regularly obtained '*op het kennen van parthijen, die de publijcque Instrumenten ofte Obligatien onder de hand ende andere documenten daar uyt geageert werd, gepasseert hebben*'). And an opinion in 1630 (see *Hollandse consultatien* vol I cons 236) explained that a '*provisie by Namptissement*' was not granted otherwise '*dan op publijcque ofte prive Instrumenten ende andere Geschriften, by den Verweerder in Rechte gerecognosceert ende bekend, ofte mits sijn default voor bekend gehouden*'. In addition to such acknowledgement, '*soo moet ook de schult in de voorsz Instrumenten ende Geschriften begrepen, t'eenemaal liquide wesen*', and such that the liquidity could be seen '*ad oculum*' on the inspection of those instruments. Accordingly, in the case of an undertaking to pay any costs, damages or something else which had to be taxed ('*dat getaxeert moet werden*'), no provisional sentence was possible but the matter had to be decided '*ten principale by sententie definitive*'.

<sup>81</sup> See eg the opinion delivered in 1615 (see *Hollandse consultatien* vol I cons 303 where it was explained that no provisional sentence would be granted '*alsoo de voorschreve Obligatie egeene oorsaake van schuld inhoudende is ...; in materie van Rekeninghe, [werd] nimmermeer by provisie Namptissement gedecerneert, so lang niet liquide bevonden is*'.

recognised in Roman-Dutch law,<sup>82</sup> as was in French law, between private and public documents as involving distinct procedural features. Examples of liquid documents included bills of exchange; the account books or ledgers of merchants (*koopmans-registers*) which were regarded as sufficiently liquid if they showed the debt due with the debtor's signature; deeds of suretyship; bottomry bonds; bills of lading; and also insurance policies. The rather extensive range of documents earlier regarded as liquid gradually shrunk as time went by and as the requirements for liquidity were tightened.

After a plaintiff had applied to the Court for a provisional sentence ('*verzoek van Provisie*'),<sup>83</sup> the defendant was duly summoned and provided with a copy of the liquid document in question. If he did not appear on the return day, or if he appeared but did not deny his signature on the relevant document or the existence of the debt, the plaintiff's prayer for a provisional sentence generally succeeded. In the case where the defendant appeared and denied the validity of the signature or of the document itself, there was a difference of opinion in Roman-Dutch law as to the weight of evidence required from him before the Court would deny the plaintiff's application for a provisional sentence.<sup>84</sup> But penalties were imposed for a bad faith denial by the defendant. In his application, the plaintiff had to produce the original of the document on which he relied in court,<sup>85</sup> and such an original was presumed to be genuine and legally valid and to provide sufficient *prima facie* evidence of the debt in question. Accordingly, no further evidence of his entitlement was required or in fact permitted from the plaintiff before the Court would grant a provisional sentence.

<sup>82</sup> Although the earlier authors still nominally referred to it.

<sup>83</sup> According to Van der Linden *Judicieele practijcq* II.6.14, the prayer for a provisional sentence, usually added at end of the claim, was in the following form: '*En dat eindelijk de Gedaagde zal worden gecondemneert de voorsz somme van f ... bij provisie te namptisseren*', or, '*En dat de Gedaagde bij provisie zal worden gecondemneert aan de Impetrant te leveren den Inventaris en Rekening, hier vooren gemelt*'. See too *idem Koopmans handboek* III.1.2 generally as to the civil procedure in first instance.

<sup>84</sup> See generally Van der Linden *Judicieele practijcq* II.6.13.

On the one side some required proof equally liquid from the defendant (eg, a receipt as against the plaintiff's signed liquid document) and regarded any extraneous evidence at this stage as inadmissible. See eg Van Leeuwen *Censura forensis* I.4.14.6 (provisional sentence was only prevented by an exception which was probable on the face of it); Lybreghts *Redenerend verhoog* II.42.9 (for a provisional sentence to be denied the defendant must '*t Instrument van dezelve liquiditeit en klaarheid wezen, als waar uit de provisie geeischt word; of wel dat d' exceptie peremptoir is*'). According to this view a provisional sentence was therefore easily granted.

On the other side there was the opinion that any (even a trivial) allegation made by the defendant which challenged and cast doubt over the liquidity of the document on which the plaintiff relied, was sufficient for a provisional sentence to be refused. Therefore, it was relatively easily denied.

A third and intermediary view (advanced by eg Van der Linden *Judicieele practijcq* II.6.13 (see also *idem Koopmans handboek* III.1.2.11) rejected both these views as respectively too strict and too arbitrary and admitting of the possibility of chicanes. It thought that while the plaintiff had to have liquid proof of the defendant's indebtedness, the latter, if he wished to oppose the application for a provisional sentence, had to furnish counterproof of whatever nature but of such a weight as to convince the Court that the probabilities of success in the principal case were against the plaintiff. Depending on the weight of proof, a defence of *exceptio doli* or *exceptio non numeratae pecuniae* could be sufficient.

<sup>85</sup> Thus, provisional sentence could not be obtained on copies or extracts of lost documents.

If either the document was not liquid or if the defendant had satisfactorily established that the probability of success was not in the plaintiff's favour, the latter had no other option but to proceed with the principal case if he wanted to obtain payment from the defendant.<sup>86</sup>

The defendant only needed to comply with a provisional sentence<sup>87</sup> if the plaintiff provided adequate security that he would repay the amount in question (*cautio de restituenda*; *Borgtochte*), either fully or in part, together with interest, if in the principal proceedings it was determined on the merits of the case that the debt was in fact not legally due. The defendant could waive the need for such security, and could also consent to a provisional sentence.

## 2.2.6 Interest in Roman-Dutch Law: Some General Remarks

To appreciate the significance of the imposition of an interest rate of twelve per cent *per annum* on late payments on or in connection with insurance contracts, some general comments on interest in Roman-Dutch law may be apposite. The legal rate of interest on debts in Roman-Dutch law was a matter of some complexity, not least because the position varied from time to time, from place to place, and between different groups of persons. The position may briefly be summarised as follows.<sup>88</sup>

As a rule, interest was not due except in terms of an agreement or after *litis contestatio* on the ground of a failure to pay a debt as agreed by the parties or as ordered by a court, that is, damage interest.<sup>89</sup>

Initially the legal rate of interest varied, but later a rate of between four and six per cent *per annum* was generally permitted on the capital amount due. Slightly higher rates may have applied to unsecured debts than to secured debts.<sup>90</sup> However, there was no general law in Holland or indeed any principle of Roman law which fixed a maximum or a minimum percentage rate of interest and at most a customary rate applied. Nevertheless, as a rule, no interest higher than the usual and current rate, as

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<sup>86</sup> See eg the opinion of 1613 (see *Hollandse consultatien* vol II cons 137) which concerned a request by the plaintiff that the defendant be 'gecondemneert de somme, in de obligatie geroert, te namptiseren'. The opinion was that '*nademaal de zake ... tegenwoordig is in state van bewijzen*', the plaintiff could not proceed otherwise than for a final judgment.

<sup>87</sup> Or, as it alternatively appears from some sources, the plaintiff would only have been able to obtain the defendant's provisional payment into court.

<sup>88</sup> See further Grotius *Inleidinge* III.10.10; Loenius-Boel *Decisien* casus 21 (note); Voet *Observationes ad* III.10.9 (n29 & n30); *idem Commentarius ad* XXII.1.3; Schorer *Aantekeningen ad* III.10.10; Van der Keessel *Theses selectae* th 547 (*ad* III.10.9 & 10); *idem Praelectiones* 1171-1178 (*ad* III.10.9 & 10); and Lee *Introduction* 242-243.

<sup>89</sup> As to interest on loans, see ch I § 4.2.2 *supra*.

<sup>90</sup> Thus, the ordinary interest on a debt unsupported by a pledge went up to 7 or 8 per cent *per annum*.

determined by the law of the place where the contract had to be performed, was permitted in the case of malperformance,<sup>91</sup> except if the parties had otherwise agreed.

From early on dealings between merchants (initially primarily bankers or money-changers) were treated differently and were not subject to or limited by the customary rate of interest. Section 8 of the *placcaat* of Charles V of 4 October 1540,<sup>92</sup> for example, expressly permitted merchants to stipulate a rate of twelve per cent on short-term loans, while s 9 expressly prohibited non-merchants from levying any interest. However, it appears that these provisions had fallen into disuse by the end of the sixteenth century and in a decision by the *Hof van Holland* in 1590, merchants, like ordinary citizens, were permitted only the then customary rate of six and a quarter per cent interest. In a merchants' opinion of 1658, evidence was presented that the customary rate of interest was five or even as low as four per cent.

Nevertheless, exceptions to the customary rate as it was from time to time continued to be recognised. One of these concerned, as has been noted, claims on insurance contracts. A higher rate of interest was legislatively recognised in Amsterdam, for example, in three instances. Firstly, where the insurer was late with his payment to the insured on the insurance contract; secondly, where the insured was late with his payment of the insurance premium;<sup>93</sup> and thirdly, where the insured had to repay a provisional payment which the insurers were condemned to make in terms of the insurance contract. The latter happened when the insured lost the principal case and the insurer obtained an absolution from the instance. It was therefore not a case of interest being levied for a late payment at all but merely because the insured had had the use of the provisionally paid amount in question.<sup>94</sup> In all these three instances, the rate of interest levied on the amounts in question was twelve per cent, a rate later reduced to eight per cent but still higher than the customary interest rate.

Details about the application in practice of this legislatively recognised exception in the case of insurance contracts, appear from numerous decisions and opinions.

At the beginning of the eighteenth century, it would appear, the *Hooge Raad* did not consider itself bound by the prescribed rate of interest. In a case before it in 1707,<sup>95</sup> judgment was given against the insurer who was condemned to pay interest at the rate of four per cent from the commencement of the proceedings (*'in vier per cent interest, sedert den aanvang van het process'*).

In a contentious decision the very next year, in 1708,<sup>96</sup> judgment was again given against the insurers and they were condemned to pay the sum insured with inter-

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<sup>91</sup> See eg Stockmans *Decisionum* decis 77n4.

<sup>92</sup> *GPB* vol I at 317.

<sup>93</sup> As to the late payment of the premium and the interest then due, see again ch XI § 5.3 *supra*.

<sup>94</sup> Of course, if the insured was late with his repayment of the amount provisionally paid out by the insurer, further interest could be levied on such late repayment.

<sup>95</sup> See Bynkershoek *Observationes tumultuariae* obs 296; *idem Quaestiones juris privati* IV.3.

<sup>96</sup> See Bynkershoek *Observationes tumultuariae* obs 380; *idem Quaestiones juris privati* IV.3.

est on it from the due date ('*met de Interesten van het verzuim af*'). The *Raad* noted that the *Hof van Holland* had merely awarded interest, not specifying what type or rate of interest. Apparently the insured had understood the interest to be at a rate of one per cent per month (that is, twelve per cent *per annum*), and that, in accordance with s 3 of the Amsterdam *keur* of 1610, the insurers had to pay the judgment of the Chamber of Insurance immediately, failing which interest had to be levied at that rate until payment. However, in view of the onerous imposition of interest at a greater than normal rate, the *Raad* preferred a restrictive interpretation of the *keur* and held it not applicable in this case. Here the Chamber of Insurance and also the *Schepenen* Court had held in favour of the insurers. This was only overturned by the *Hof* on appeal. It was therefore not a case of a judgment of the Chamber against the insurer, as the *keur* of 1610 appeared to have required. Therefore, in accordance with the usual practice ('*ordinaire gebruik*'), the *Raad* awarded interest only at the then customary rate of four per cent and specified so in its judgment to avoid any problems.

As to the question from when that interest should run,<sup>97</sup> the insurers in this case argued that they were *in mora* only after the judgment against them by the *Hof*, and that the *keur* of 1610 only levied interest if the insurer did not immediately pay a judgment against it. However, because the judgment *a quo* in favour of the insurers was overturned on appeal by the *Hof*, the *Hooge Raad* held on this point that the failure or *mora* had to be reckoned back,<sup>98</sup> but not, as was usually the case, back to the commencement of the process but (and on this point it therefore disapproved of its earlier decision in 1707, which Bynkershoek explained as an oversight) back to the expiry of the period of three months after the notification of the loss or abandonment to the insurers, for it was then that payment on an insurance contract was due in terms of s 25 of the 25 Amsterdam *keur* of 1598.

Thus, in deviating from the *keur* of 1610, the decision favoured the insurers as regards the rate of interest and the insured as regards the time from when such interest had to run.<sup>99</sup>

Subsequent decisions of the *Hooge Raad* in insurance cases generally followed this approach, and then apparently not only in cases where the Chamber of Insurance had held for the insurers and where judgment was only given against them on appeal.<sup>100</sup>

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<sup>97</sup> It ran, of course, until actual payment by the insurers.

<sup>98</sup> The judgment of the *Hof* on appeal was in effect considered to have had a retrospective effect, confirming the debt in question.

<sup>99</sup> See further as to this decision, eg Scheltinga *Dictata ad* III.24.19 sv '*nae dat de verdeelinge, etc*' who observed that according to Bynkershoek the rate of interest permitted by the *keur* of 1610 was '*zeer hard*', and that it was for that reason that the *Raad* did not wish to apply it in the case where the insurer was not condemned by a court *a quo* but only on appeal.

<sup>100</sup> See eg its decision in 1711 (see Bynkershoek *Observationes tumultuariae* obs 779; *idem Quaestiones juris privati* IV.4), where the *Raad* unanimously awarded ordinary interest at four per cent; its decision in 1712 (see Bynkershoek *Observationes tumultuariae* obs 883; *idem Quaestiones juris privati* IV.4), where usual interest was awarded against the insurers, calculated from three months after the insured had abandoned the ship); and its decision in 1720 (see Bynkershoek *Observationes tumultuariae* obs 1641; *idem Quaestiones juris privati* IV.10), where interest was awarded at four per cent, calculated from three months after the notice of abandonment.

The *Hooge Raad's* deviation from the *keur* of 1610 was not generally accepted as correct and as justified by the Roman-Dutch authors,<sup>101</sup> nor by the Amsterdam Legislature, which in s 50 of the Amsterdam *keur* of 1744 retained interest at a higher than normal rate of eight per cent and also specified that it was to run no earlier than from the date of the Chamber's judgment against the insurer.

Even the *Hooge Raad* itself appears subsequently to have handed down judgments which were distinguishable from, or in apparent conflict with, or at least expansions on its earlier decision of 1708. It is possible, though, that the intricacies of civil procedure may have played a role in this regard, something which is not readily apparent from Bynkershoek's bare reports of those cases.

Conflicting decisions concerned both the rate of interest<sup>102</sup> and the time from when it ran. In respect of the latter issue, some cases involved instances where the insured had claimed interest not from the start but only on a subsequent appeal, often after requesting special permission to do so.<sup>103</sup> In this regard Van der Keessel<sup>104</sup>

<sup>101</sup> Thus, Van der Keessel *Theses selectae* th 767 (ad III.24.19) thought Bynkershoek's contrary opinion was refutable and that an insurer was liable for the exceptional rate of interest, if the insured had claimed it, and if he had been held liable on appeal, even if earlier he had been absolved by a court *a quo*. Elsewhere Van der Keessel *Praelectiones* 1479-1481 (ad III.24.19) refuted the *Raad's* decision of 1708 at great length. He pointed out that the result of a successful appeal was that the overturned decision *a quo* no longer had any legal force and that the court of appeal took over the function of the court of first instance. The implication of this was that the judgment against the insurer on appeal was in effect a judgment against him *a quo*. For that reason the provision for a higher rate of interest in the *keur* of 1610 should find application in such a case too. Further, as to the time from when interest had to be calculated, it was unclear to Van der Keessel how the *Raad* could have calculated the interest not from the time of the judgment of the *Hof* but from the expiry of the three-month period. This approach was in any event contradicted by the first point, namely that the insurers were not *in mora* since they had been absolved *a quo*. The retrospectivity had to be applied in the same way, Van der Keessel argued, whether one had to determine from when interest had to run or what rate of interest had to apply. At any rate, the mention in the *keur* of the rate to which insurers may be condemned by the Chamber did not indicate by implication that that rate of interest could not be claimed if they were condemned only by a higher court. It merely served as an indication and to stress that the interest levied was not on the whole amount claimed by the insured but only on the amount to which the insurers had been condemned by whatever court.

<sup>102</sup> In a decision in 1725 (see Bynkershoek *Observationes tumultuariae* obs 2191; *idem Quaestiones juris privati* IV.13) the majority of the *Raad* thought that the insurer which it (like all the courts *a quo*, including the Chamber of Insurance) held liable, had to pay interest at one per cent per month, seeing that the Amsterdam *keur* of 1610 provided for interest at that rate in the event of the insurer failing to comply with the Chamber's judgment immediately. It was a different matter, Bynkershoek pointed out, if the insurer had not been condemned by the Chamber but only on appeal. Thus, the earlier decision of 1708 was distinguished and in this case there was no deviation from the *keur* of 1610.

<sup>103</sup> In a case in 1712 (see Bynkershoek *Observationes tumultuariae* obs 883; *idem Quaestiones juris privati* IV.4) interest had not been claimed by the insured as from the start of proceedings, but by a 'Request Civil' the consent of the *Raad* was obtained to add a claim for the interest at a later stage.

In a decision in 1717 (see Bynkershoek *Observationes tumultuariae* obs 1374; *idem Quaestiones juris privati* IV.8) the insurer was held liable and condemned to interest at four per cent calculated from the day that proceedings had commenced before the Chamber of Insurance (not, it should be noted, from the expiry of the three-month period), for in this case the insured had only claimed such interest 'by een nieuw Request' before the *Raad* after he had obtained permission to do so.

In 1719 the *Hooge Raad* heard a case (see Bynkershoek *Observationes tumultuariae* obs 1542; *idem Quaestiones juris privati* IV.9) in which the insured's claim had been refused by the Chamber and the *Schepenen* (in 1706 and 1708 respectively) but allowed by the *Hof* (in 1712). On appeal by the insurer to the *Raad*, the insured, fearing protracted proceedings and having obtained the necessary leave

explained that interest commenced to run from the day when the period within which the insurer was permitted to pay, had expired, but only if the insured had claimed the interest in his summons from that time. If the insured did not rely on his right and claimed interest simply from *litis contestatio*, it was trite that interest could not be awarded to him from an earlier moment.

### 2.2.7 The Position in the Eighteenth Century

The continuous legislative attention paid to the topic in the course of the eighteenth century, attests to the fact that the provisional sentence procedure, even if widely employed, remained contentious in Roman-Dutch insurance law.

In the Rotterdam *keur* of 1721, the cargo and hull policies provided for payment by the insurers within precisely one month after having been given notice of the loss ('*binnen een maand precys, na dat wy behoorlyk geadvertteert zullen zyn van het verlies of schade*'). Section 68 of that *keur* confirmed that compensation for the loss could not be claimed from the insurers before the expiry of that month, and that this period had to be calculated from the notification of the abandonment ('*de Insinuatie van het abandonnement*').

Not only was the period allowed for payment by the insurer in Rotterdam reduced from three months to one month,<sup>105</sup> but the Rotterdam insurance *keur* made

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therefor, for the first time ('*door een nieuwen Eisch*') also claimed interest on the sum insured as from the expiry of the period of three months after he had originally given notice of loss. (Thus, the insured increased his claim with the interest.) The *Raad* confirmed the decision of the *Hof* and awarded interest from the time when the claim was originally instituted. Bynkershoek thought the decision incorrect, seeing that s 25 of the Amsterdam *keur* of 1598 determined that the insurer had three months after the institution of the claim in which to pay.

In another case in 1719 (see Bynkershoek *Observationes tumultuariae* obs 1579; *idem Quaestiones juris privati* IV.9), the *Hof* had given judgment for the insured with interest from the time the proceedings were first commenced before the Chamber, even though interest was not claimed in those early proceedings before the Chamber but only on appeal in proceedings before the *Schepenen*. On appeal the *Hooge Raad* confirmed the judgment and the award of interest. The reason for doing so was that, because proceedings before the Chamber were not '*by geschrifte*', it was practice for an insured appealing to the *Schepenen* to claim his interest there without any special request to that effect ('*zonder eens Request Civil ingelevert te hebben*'). Bynkershoek thought this decision of the *Raad* correct if the three-month period had expired before the proceedings were commenced ('*indien 'er voor dat het process gemoveert was, toen drie maanden verlopen waren, sedert dat de geassureerde de goederen voor geabandonneert had gehouden*').

<sup>104</sup> *Praelectiones* 1481 (ad III.24.19).

<sup>105</sup> It remained three months in Amsterdam and Middelburg, although Dordrecht followed the example of Rotterdam. See Van der Keessel *Theses selectae* th 757 (ad III.24.13); *idem Praelectiones* 1471 (ad III.24.13); Van der Linden *Koopmans handboek* IV.6.11; and Kracht 38.

no mention of any interest to be paid by the insurer.<sup>106</sup> It also still made no express provision for any provisional payment by the insurer in terms of an insurance contract, although that procedure was no doubt available there as it had always been.<sup>107</sup>

In Hamburg, too, the insurance policy was in a judicial insurance process regarded as an '*instrumentum liquidum*' with '*Eksekutivkraft*', so that a defendant could raise a defence (other than one immediately provable) against a claim on such a policy only after he had paid the amount claimed into court.<sup>108</sup> Although the Hamburg *Assecuranz-Ordnung* of 1731 made provision for the period within which the insurer had to pay a claim on the policy,<sup>109</sup> it apparently made no specific provision for provisional sentence in insurance litigation. It may have been that that procedure had fallen into disuse and had come to be replaced by alternative practices there.<sup>110</sup>

The Amsterdam *keur* of 1744 and its amendments made extensive provision both for the period within which the insurer had to pay, as well as for the possibility of a provisional payment by the insurer. These matters may conveniently be considered separately.

As far as the time was concerned within which the insurer had to pay, the hull policy in the *keuren* of 1744 and 1775 provided for payment by the insurers within three months of the notification of the loss or damage ('*binnen drie Maanden, na dat wy behoorlyk geadverteert zullen zyn van 't verlies of schaade*'). The cargo policy in terms of those *keuren* stipulated that the insurers should pay within three months exactly of that notification ('*binnen drie maanden precys, na dat wy behoorlyk geadverteert zullen zyn, van 't verlies of schade*'). In the ransom policy in the *keuren* of 1744 and 1775, the

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<sup>106</sup> In a case before the *Hooge Raad* in 1729 (see Bynkershoek *Observationes tumultuariae* obs 2492; *idem Quaestiones juris privati* IV.14), the question of interest in a Rotterdam insurance was mentioned. The Rotterdam Chamber had rejected the insurers' defence of prescription and had condemned them to pay the sum insured within one month (apparently not the same month as that after the notice of loss and institution of the action) with the customary interest if payment was postponed beyond that month. The insurers then appealed directly to the *Hof*. There the insured argued that the Chamber had not awarded him interest from the expiry of the one month from when the notice of abandonment had been given, but rather from one month after its judgment. The *Hof* confirmed the decision *a quo* against the insurers and awarded the insured the interest from the expiry of one month after the notification of abandonment. On further appeal, the *Hooge Raad* confirmed that the *Hof* had judged correctly on the question of interest, not only according to the contract but also according to s 68 of the Rotterdam *keur* of 1721.

Later Van der Keessel *Praelectiones* 1481 (*ad* III.24.19) noted that there was no provision in the Rotterdam *keur* of 1721 for the amount of interest payable by the insurer. It appeared to him that the current ordinary rate of interest, ie, four per cent, was applicable.

<sup>107</sup> See again § 2.2.4 *supra*.

<sup>108</sup> See generally Frentz 'Seerechtsprechung' 145-146; *idem Admiralitätsgericht* 89-91; and Hammacher 138-139.

<sup>109</sup> A period of two months after the notification of loss was permitted. See s XVI-1 and Dreyer 170-171.

<sup>110</sup> Thus, in the case of *Boué v Stenglin*, which came before the Hamburg Admiralty Court in 1760, the plaintiff claimed the sum insured in the form of a '*caution de nantissement*'. His alternative claim was for the provision of security and not an actual payment but a payment into court in terms of earlier Hamburg legislation of 1603. The Court held the plaintiff entitled only to the alternative relief sought. See Frentz *Admiralitätsgericht* 134.



insurers undertook prompt payment as soon as news of the release of the insured from captivity or of the acceptance of the bill drawn to obtain such release, had been received, or on the insured's earlier arrival in a Christian country (*'soo haast als hier advijs gekomen, en ons gebleeken zal zyn, dat hy gelost is, ofte wel, dat de Penningen ten dien einde getrokken en de Wisselbrieven geaccepteert zullen zyn, of eerder, zo het blykt dat de geloste Persoon vroeger in Christen lande zal zyn aangekom'*). Finally, the fire policy in terms of the Amsterdam *keur* of 1744 provided for the insurers to pay within the period of three months after the occurrence of the fire and a proper notice to that effect (*'binnen den tyd van drie maanden, naar dat de Brand sal zyn voorgevallen, en ons behoorlyk zal zyn geadverteerd'*), but in the fire policy appended to the amending *keur* of 1775 this was reduced to one month after notification of the accident (*'binnen een maand na dat aan ons advertentie van het ongeluk zal zyn gegeven'*).

Section 28 of the *keur* of 1744 provided that where an abandonment had been properly made,<sup>111</sup> the insurers would have three months after the notification of it to provide the payment of the sum they had insured (*'zullen de Assuradeurs na de Intimatie van dien, hebben drie maanden tot fournissement van de betaalinge der somme by hun verseekerd'*).<sup>112</sup>

By s 29, the loss of a missing insured ship or goods was presumed after a period of one or two years from the ship's departure or the last news of her, depending on the duration of the voyage in question.<sup>113</sup> The insured could then give notice of the presumed loss and three months later claim payment from the insurers (*'ende drie maanden daar na betalinge eyschen'*).

As far as a provisional sentence against an insurer was concerned, s 47 of the Amsterdam *keur* of 1744, which differed but very little from s 33 of the *keur* of 1598, laid down that a provisional payment was possible if three matters appeared to the Commissioners from a presentation by the insured of the relevant policies, bills of lading, consignment notes, proper certificates or other acceptable affidavits (*'by Exhibitie van Policen, Cognossementen, Cargasoenen, behoorlijke Certificatien, ofte ander deugdelijk bescheyt'*). These matters were, firstly, the subscription of the policies (*'de onderteekeninge der Policen'*); secondly, the loss of the ships or the goods (*'Periclitatien van de Scheepen ofte verderffnissen der Goederen'*); and thirdly, that the insured had three months before given a notification of the loss. If these matters were apparent, the Commissioners could order that the amount claimed by the insured had to be paid in full or in part in advance (*'by provisie Genamptiseert werden'*). The amount in question could be paid out if sufficient security was provided for its restitution (*'met toelatinge van de Genamptiseerde Penningen te mogen ligten onder suffisante borgtogten van de zelve te restitueeren'*), with interest on it at eight (and no longer twelve) per cent should it afterwards appear that such restitution was proper. Presumably, if the insured did not provide the required security, the Court retained the

<sup>111</sup> An abandonment could be made either immediately or after a particular period of time from the occurrence of the loss, depending on the type of loss involved. See again ch XIX § 2.3.8 *supra*.

<sup>112</sup> See Van der Keessel *Praelectiones* 1471 (*ad* III.24.13); Van der Linden *Koopmans handboek* IV.6.11.

<sup>113</sup> See again ch XV § 6.2 *supra*.

amount paid over by the insurer.<sup>114</sup> Again, before such a provisional payment could be ordered by the Commissioners, it was necessary that the defendant insurer who so requested, first had to be provided with a copy of all the relevant documentation and be granted a day in which to answer the claim.<sup>115</sup>

Section 50 of the *keur* of 1744 followed the Amsterdam amending *keur* of 1610 and provided that all insurers were obliged, when the local Commissioners of the Insurance Chamber had calculated and issued any adjustment of loss ('*gemaakt ende uytgegeeven eenige Repartitien van Schaden*'),<sup>116</sup> to make good and pay such loss immediately ('*terstond*'), failing which such insurer had to pay the insured interest at eight (and no longer twelve) per cent *per annum* from the time that the adjudgment was fixed and issued ('*repartitien zyn Gedepescheerd end uytgegeeven*') until the actual

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<sup>114</sup> This appears from the archive of the Amsterdam Insurance Chamber (*Archief van de Assurantiemeesteren*) in the *Gemeente-Archief* in that city. The archive (*Archief 5061 (RA)*) contains a Register of provisionally paid amounts ('*namptissementen*') received by the Chamber in terms of provisional sentences handed down by it between 6 July 1773 and 23 September 1811 (inv no 2790). The volume contains infrequent inscriptions (eg 2 for 1773, 3 for 1774, 3 for 1775, 7 for 1776, 10 for 1781, and 7 for 1782). It reflects, on the left-hand page, the payments into court by the insurer after a provisional sentence (and more specifically the relevant dates, amounts paid, and from whom and in whose favour they were paid), and on the right-hand page details of the withdrawal of the amount in question by the insured either on the provision of security before the final judgment, or after such final judgment.

Three examples from page 2 of the Register may be referred to:

(i) On 6 July 1773 there was '*Ontvangen van Traber d' Anjoh ... ingevolgen 't vonnis van Namptissement in dato 29 Juny 1773 ten behoeven van Everhardus Tegenus de Somma van f44*'. On the opposite page there was noted on 29 March 1774 that '*Geligt door Everhardus Tegenus in gevolgen 't Vonnis in dato ... de Somma van f44*'.

(ii) On 6 July '*Ontvangen van Pieter ... ingevolgen 't vonnis Van namptissement in dato van 29 July 1773 ten behoeven van Drisen Cramer de Somma van f184-4*', and on the opposite page it was inscribed that on 7 September '*Geligt door Drise Cramer onder Borgtogt van Willem van Wyk & Jan van der Wey de Somma van f184-4*'.

(iii) On 14 July '*Ontf. van Paulus Blandam ingevolgen 't vonnis van Namptissement in dato 13 July 1773 ten behoeven van Anthony Johannes Knobhout de Somma van f310-16*', and on the opposite page it was noted on 26 October that '*Deese neevenstaande penningen geligt door AJ Knobhout tegens gefoumeerde borgtogrequest no 2 f310-16*'.

On occasion the insured may have signed an acknowledgement of receipt from the Chamber of the sum in question. The Register in the back contains some separate acknowledgements of the receipt of such provisional payments dating from 1811. For example, in one dated 23 September 1811, the undersigned '*bekenne ontvangen te hebben van den Heer TC Helder Griffier van de Recht bank ter eerster Instantie, zitting houdende te Amsterdam, waarnemende de zaken van den Regtbank van Koophandel en geauthoriseerd tot de Administratie der zaken van de gesupprimeerde Regtbank van Assurantie, Avaryen & Zeezaken de Somma van Vyf hondert Een en vyftig Gulden Zeventien stuivers, welke Somma Johannes van Hemert & Zoon koopliden ... ingeolge Provisioneel Vonnis van Namptissement van voorn. Commissarissen van Assurantie, Avaryen & Zeezaken in dato van ... 1811 ten begoeve van ... genamptiseerd is, ..., zynde deze zaak door de Partijen met wederzijds goedvinden getermineerd en ingeolge daar van deze Gelden met Consent van de gen. J van Hemert & Zoon aan my ondergetekende qq afgegeeven*'.

<sup>115</sup> As to s 47, see Boey *Woorden-tolk* sv '*Despache*'; Van der Keessel *Praelectiones* 1485 (ad III.24.22); Van der Linden *Koopmans handboek* IV.6.11; and also Dorhout Mees *Schadeverzekeringsrecht* 16; Enschedé 125; and Goudsmit *Zeerecht* 331 and 357.

<sup>116</sup> That is, had given judgment against them.

payment of the sum to which the insurers had been condemned by the Commissioners.<sup>117</sup>

The amendment in 1756 of s 29 of the *keur* of 1744 made provision for a provisional payment by the insurer in the case of the presumed loss of a missing insured ship or goods. It added to the original s 29 that after an insured ship or goods had been missing for six months or one year, depending on the duration of the voyage in question, the insured could request that the insurers deposit with the Chamber the sums for which they had insured ('*van de Assurateurs te vraagen Consignatie van de geteekende sommen ter Assurantie Kamer*'). The deposited amount ('*geconsigneerde penningen*') had to be returned to them on news being received of the safe arrival of the ship or the goods.<sup>118</sup> In such event, the insured was obliged to pay the insurer interest on the deposited sum at four per cent *per annum*, which interest was to commence on the day of the payment into court and to continue up to the time when the deposited amount was paid out to the insurers or could have been requested to be paid out by them. However, should the ship or goods happen to have arrived after the expiry of the period after which a presumption of loss arose (that is, one or two years, as the case may have been), the interest would cease on the expiry of that period and the further three-month period provided for in s 29 ('*nevens de drie Maanden by dit Artikel gemeld*'). The cost of the payment into court was in all cases (that is, whether or not it was repaid) for the account of the insured, but it could not amount to more than a quarter per cent.<sup>119</sup>

### 2.2.8 Payment on the Insurance Contract in the *Wetboek van Koophandel* and in English Law

The question of the payment by an insurer in terms of an insurance contract is also regulated in the Dutch *Wetboek van Koophandel*. In art 680-1 it is provided that if a time for such payment has not been determined by the agreement itself (as it usually is), the insurer must pay the sum insured within six weeks after the notification of an abandonment. According to art 680-2, after this time the insurer is liable for legal interest. A similar provision is made in art 721 in respect of the payment of general and particular average, the insurer being liable to pay the amount due within six weeks after the adjustment ('*de schaderekening*'), and for legal interest ('*moratore rente*') on that amount for a late payment.<sup>120</sup>

<sup>117</sup> See Van der Keessel *Theses selectae* th 767 (*ad* III.24.19); *idem Praelectiones* 1479 (*ad* III.24.19) (noting that although the rate of interest was changed by s 50, the time from when the interest commenced to run remained unchanged); Van der Linden *Koopmans handboek* IV.6.11; and Goudsmit *Zeerecht* 356.

<sup>118</sup> That is, if such news was received before the presumption of loss arose, which happened after the expiry of one or two years from the departure. Once the presumption had validly arisen, the safe arrival no longer entitled the insurer to a repayment. See further § 2.3 *infra*.

<sup>119</sup> See generally Van der Keessel *Praelectiones* 1461 (*ad* III.24.10).

<sup>120</sup> See generally Dorhout Mees *Schadeverzekeringsrecht* 365 and 662.

The *Wetboek* does not contain any specific provision on the question of a provisional sentence procedure in insurance disputes. Provisional sentence (*provisionele vordering*) was upon codification regulated only generally in a number of provisions of the Dutch *Wetboek van Burgerlijke Rechtsvordering* and in the *Burgerlijk Wetboek*.<sup>121</sup> It would appear that it is no longer possible to obtain a provisional sentence on an insurance policy. Possibly this is because stricter requirements regarding the liquidity of the document on which such a sentence could be granted, were no longer met by insurance policies in their usual form.<sup>122</sup>

English sources are remarkably reticent on the various aspects of the insurer's performance, at least compared to Roman-Dutch law.

In the early part of the seventeenth century, Malynes<sup>123</sup> explained that the insurer, having been condemned to pay by the Court of Assurance and failing to do so, would be committed to prison, upon a certificate made of his refusal by the Commissioners involved to the Lord Mayor. The insurer was to be detained in prison until the judgment was paid, something, Malynes thought, which no man of any credit would endure, '[a]nd thus is this laudable custome established in England'.

It appears that by the beginning of the next century, the prospect of insurers attempting to avoid or postpone payment was still enough of a reality to result in legislative enactment. In the Bubble Act of 1720,<sup>124</sup> s 4 provided that if the two monopoly corporations it established wrongfully refused to pay any 'just Demands upon their Policies of Assurance' for the payment of compensation for a loss to the insured, the latter could institute a claim against the corporation in question and could recover from it 'double Damages' in addition to the cost of the litigation. However, this liability for a form of punitive damages was very shortly afterwards removed.<sup>125</sup>

In the mid-eighteenth century Magens noted that the time within which the insurer had to pay, was expressed in most policies, and that the custom in London was for insurance companies to pay within eight days of the adjustment of the loss and for

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<sup>121</sup> See further eg *Star Busmann Rechtsvordering* pars 161-162 and 309.

<sup>122</sup> Marine and other indemnity policies, for instance, do not contain an acknowledgment of indebtedness by the insurer in a specific amount but merely an undertaking to be liable up to a specific maximum. In this sense the indemnity policy can be regarded as a liquid document only in the case of the total loss of property fully insured by a valued policy, for only then is the amount recoverable from the insurer determined or determinable *ex facie* the policy itself. The position may be different in the case of non-indemnity policies, where the insurer undertakes payment of a specific amount on the occurrence of a particular event.

<sup>123</sup> *Consuetudo* l.28.

<sup>124</sup> 6 Geo I c 8. This Act created the two monopoly marine insurance companies, the Royal Exchange and London Assurance Corporation. See again ch IX § 2.11.4 *supra*.

<sup>125</sup> By s 25 of Act 8 Geo I c 15 (1721). See further Holdsworth *History* vol XI at 447.

private insurers to pay within a month.<sup>126</sup> However, the Lloyd's policy of 1779 merely contained an undertaking by the insurers to pay (rather, they promised and bound themselves 'for the true Performance of the Promises') without any stipulation as to when exactly such payment would be made.

Not surprisingly the Marine Insurance Act of 1906 contains nothing on the insurer's obligation to pay and the time within which that has to occur. Unlike Dutch policies, therefore, which contain an express promise to pay within a specified number of days after the notice of loss, the English insurer's promise to pay for a loss and to do so within a reasonable time is merely implied.<sup>127</sup>

Prior to 1833, no interest could be recovered in English law on a principal sum claimed under an insurance policy.<sup>128</sup>

In line with contemporary Italian insurance policies,<sup>129</sup> the earliest policies in use in London too contained a stipulation providing for the provisional payment of the compensation even before the exact amount had been determined, with a proviso for the restitution of the whole or a part of the amount if necessary.<sup>130</sup> However, it appears that the provisional sentence procedure, if at all applied in English law, had fallen into disuse and was at least never generally applicable, if at all, in respect of claims on insurance policies.<sup>131</sup> Currently an action on a marine insurance policy is accepted to be one for unliquidated damages.<sup>132</sup>

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<sup>126</sup> *Essay* vol I at 89-90, noting that in terms of the Amsterdam policy form of 1744 the period was three months from notification. See too *Weskett Digest* 344-345 sv 'loss' par 4.

Early fire claims were paid once a quarter and in 1782 the Phoenix Fire Office's conditions of insurance provided that when any loss or damage was proved as required, the insured was to receive satisfaction immediately. See *Cato Carter* 21 and 36.

<sup>127</sup> See *Chalmers* 2n3.

<sup>128</sup> Section 29 of Act 3 & 4 Wm IV c 42 permitted the jury in their discretion to add interest after the time stipulated in the policy for payment, had passed. See *Walford Cyclopaedia* vol I at 18 sv 'actions'.

<sup>129</sup> See § 2.2.2 *supra*.

<sup>130</sup> See eg *Blackstock* 16-17, referring to the policy dated 1547 on which the oldest insurance suit in the Admiralty Court, that in *Broke v Maynard*, was brought.

<sup>131</sup> Thus *Mees Gedenkschrift* 16 notes that the provisional payment by insurers in terms of Roman-Dutch law was exceptional and surprising to English merchants. *Lowndes* 6 explains that one of the methods introduced to ensure prompt and certain payment was the provision in older legislation (presumably Continental and not English, of which there appears to have been none) which obliged underwriters, before raising any objection to the claim, to pay first and to go to law only afterwards, the insured providing security to refund the amount in case the underwriter's objections should be sustained in court. He mentions that this had long fallen into disuse, but that merchants may well wish for its return.

<sup>132</sup> See *Chalmers* 37.

### 2.3 Recovery of the Amount Paid on the Insurance Contract

Just as insurers were tardy and reluctant to pay out on their policies, so too, no doubt, were they quick to recover any payment from the insured if that was at all possible.<sup>133</sup> Apart from the recovery of a provisional payment on the policy, it could happen that a final payment made by an insurer on a policy was in fact not due, or not due in full, and that the insurer was entitled to recover it or a part of it from the insured or the other person to whom payment had been made.<sup>134</sup>

The circumstances under which such an erroneous payment could occur, were manifold. Most commonly, though, it happened that the insurer only after payment discovered the existence, at the time of such payment, of a fact or facts which would have permitted him, had he known of it, successfully to resist the claim on the contract.

The remedy available to the insurer under such circumstances was the *condictio indebiti*. With this *condictio*, an undue performance, such as a payment of money, made to a creditor could be recovered. The payment had to be one which the debtor had erroneously but reasonably thought was in fact owing and due and which he therefore paid, while in fact no such debt existed and nothing was due at the time of the payment.<sup>135</sup>

The same applied where a greater amount was paid out than was owing and due, in which case a part of the amount paid over could be recovered. Thus, an opinion in 1704<sup>136</sup> concerned a claim before the Chamber of Insurance in Flushing<sup>137</sup> for the return of an amount of money erroneously overpaid in terms of an insurance contract ('*by erreur, ter cause van assurance te veel betaald*').

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<sup>133</sup> Obviously payments by insurers for losses for which they were not liable were not a common occurrence in Roman-Dutch law. Probably not insignificantly the first recorded evidence of an *ex gratia* payment by a Dutch insurer involved a corporate insurer, the Rotterdam Insurance Company of 1720, the oldest insurance company in the Netherlands (see ch IX § 2.10.3 *supra*). In 1735 it paid a percentage of the amount it would have had to pay had it been liable, in order to protect the Company's good name. The case involved insurances on two ships bound from Middelburg to Batavia. The Company's Middelburg correspondent notified it on 2 February 1735 of the application for the two insurances. His letter was received in Rotterdam on 6 February and the Company's secretary immediately prepared the policies for signature by the directors and for forwarding to Middelburg. Before the policies could be signed, though, the secretary received another letter from the correspondent, dated 5 February, in which he was notified that one of ships in question had sunk. As a result only the policy on the other ship was signed. When the correspondent expressed displeasure about this, the directors decided to pay 65 per cent of the amount for which they would have insured but did in fact not insure on the lost ship. See Van Rijn 48-49.

<sup>134</sup> See ch X § 4 *supra* as to order and bearer policies.

<sup>135</sup> Thus, a payment *per errorem facti* and even, according to some but not all Roman-Dutch authors, *per errorem iuris*, as long as it was an *error iustus*.

<sup>136</sup> See *Nieuw Nederlands advysboek* vol II adv 58.

<sup>137</sup> This is one of very few indications in the published legal sources of the existence of such a chamber there.

The same would also have applied where the insurer had erroneously authorised the insured to incur expenses to avert and minimise a loss. Thus, in the case on which an opinion was delivered by Grotius in 1632,<sup>138</sup> notice was given to the insurer of the loss of insured goods. Under the impression that he was liable on the policy, the insurer authorised the insured to attempt to recover the goods. It subsequently appeared that the goods in question were contraband so that the insurer was not in fact liable for their loss or damage.<sup>139</sup> Grotius advised the insurer to seek relief from the Court, relying on the fact that at the time of the notification of the loss he had authorised the insured in ignorance of the true cause of the loss.

Although, according to Van der Keessel,<sup>140</sup> the recovery of the premium by the insured, or of the amount paid out on the insurance contract by the insurer, were both known in the *keuren* as '*restorno*', that is not borne out by the sources and such usage appears not to have been inveterate. Only the recovery of the premium was generally referred to by that term.<sup>141</sup>

The recovery of a payment from the insured occurred not only in the case of a final payment on the insurance contract but also and especially in the case of a provisional payment to which the insurer was compelled and which the insured had to repay if it subsequently appeared that his claim was in fact unfounded.<sup>142</sup> However, in this case the appropriate *condictio* was not the *condictio indebiti*, seeing that there in fact existed a debt, confirmed by the provisional judgment, at the time of payment. Such payment was therefore not made *indebite* and thus also not *per errorem*. However, the payment subsequently became undue and was for that reason recoverable from the insured on the ground of unjust enrichment, more specifically with the *condictio sine causa specialis* (also known as the *condictio ob finitam causam*). This *condictio* found application where property was transferred or money paid on the ground of an existing *causa* which thereafter fell away. Of course, the amount of interest which the insurer could claim in such case on the amount recoverable, was provided for legislatively.<sup>143</sup>

Many examples of the recovery of the amount paid on an insurance contract appear from the Roman-Dutch sources. Most fertile for legislative references to the

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<sup>138</sup> See *Hollandse consultatien* vol III/2 cons 175.

<sup>139</sup> See again ch VIII § 5.4 *supra*.

<sup>140</sup> *Praelectiones* 1473 (*ad* III.24.16).

<sup>141</sup> As to the recovery of the premium, see again ch XI § 6 *supra*.

<sup>142</sup> See again § 2.2 *supra*.

<sup>143</sup> Where the provisional payment had merely been paid into court and had not been taken up, against the provision of security, by the insured, the insurer's claim for a repayment was of course not directed against the insured himself. That would therefore strictly speaking not appear to have been an instance of the application of either the *condictio indebiti* or the *condictio sine causa*, no transfer of ownership or payment of money to the insured having occurred or having been made and accordingly no question arising of any enrichment on the part of the latter by reason of such payment being or becoming *indebite*.

insurer's right to a repayment of the insurance money by the insured was the Amsterdam *keur* of 1744 and its amendments.

Thus, in the 1775 amendment of s 3 of the *keur*, it was provided that in the event of an insured concluding an insurance after the departure of a ship or goods of which he was aware, there was no action against the insurers on the policy.<sup>144</sup> If they had already paid, it was specifically provided, a restitution had to take place (*'en indien de schade reets mogt zyn betaalt, zal die geen, door wie dezelve van de Assuradeurs is ontfangen, de betaalde schade aan de Assuradeurs moeten restitueeren'*).<sup>145</sup> The same would have applied where in the case of an insurance concluded after the loss had occurred, the insurer had paid out to the insured thinking that he was liable for that loss.<sup>146</sup>

In s 11 of the Amsterdam *keur* of 1744 it was laid down that in the case of ransom insurance<sup>147</sup> the insurers had to pay the sums respectively insured by them, on the understanding that the full sum insured would be spent on ransoming the captured person. Accordingly, if that person was in fact ransomed for less, the balance had to be returned (*'het overige gerestorneert sal worden'*).<sup>148</sup>

In terms of s 23 of the Amsterdam *keur* of 1744, if it was established that property had been over-insured,<sup>149</sup> the insurer was not liable further or for more than the real or the agreed value of the property, any excess having to be returned by the insured (*'en het meerder verseeckerde gerestorneert werden'*).<sup>150</sup>

Where the insurer had paid out in the case of an insured ship or insured goods which had gone missing and which were lost or were later presumed to have been lost,<sup>151</sup> the insured did not have to return such payment with interest if the ship or

<sup>144</sup> See again ch XII § 2.2.7 *supra*.

<sup>145</sup> See Van der Keessel *Praelectiones* 1445 (*ad* III.24.5).

<sup>146</sup> See the example mentioned by Roccus *De assecurationibus* note 57. Of course, that was only the case where the insurance was not concluded 'on good and bad tidings'. See again ch XII § 2 *supra*.

<sup>147</sup> See again ch VII § 3.2 *supra*.

<sup>148</sup> The ransom policies in terms of the Amsterdam *keuren* of 1744 and 1775 both stipulated the circumstances under and the way in which insurers were to pay the sums they had underwritten, but both contained following proviso: *'edog met dien verstande, dat het gene de rantzoenering minder mogte hebben gekost, aan de Assuradeurs gerestorneert zal worden; des [dus] dat de Penningen van onze tekening alleen zullen dienen tot zyne Rantzoeneringe, en Vrykopinge, en alle dependentien van dien, en verder niet'*. See further eg Van der Keessel *Praelectiones* 1437 (*ad* III.24.4). In an opinion on a ransom policy in 1678 (see *Nederlands advysboek* vol II adv 170), the view was expressed that the insurers were liable but reference was made of the need to ensure that if the sum paid out by them was not expended on the ransom, it had to be returned (*'de sorge die daar gedragen werden, dat indien het uytgeschote geld tot waar Rantzoen niet besteed kan werden, het gerestitueert werde'*).

<sup>149</sup> See ch XVIII § 4.5 *supra*.

<sup>150</sup> See eg Van der Keessel *Praelectiones* 1473 (*ad* III.24.16).

<sup>151</sup> As to this presumption of loss, see again ch XV § 6 *supra*.



goods in question subsequently reappeared. Such a return had to be made only in the case where, unbeknown to the parties, at the time when the presumption of loss arose, the ship or goods had in fact arrived at a safe port and were therefore not lost as was supposed, or where it was subsequently established that the loss had in fact occurred on a voyage not covered by the policy in question or after the expiry of that policy.<sup>152</sup> Thus, whereas the presumption of loss, once it had arisen, was not reversible by subsequent events so that the insurer could become entitled to a return of the insurance payment, it was a different matter altogether if it subsequently appeared that the payment had been made on the incorrect assumption that a presumption of loss had in fact arisen.

The fact that these and other legislative measures specifically provided for the return of the insurance payment in particular cases, was seemingly neither here nor there. They do not indicate that a repayment was recognised and permitted only in those cases. These provisions, it would appear, do not detract from the fact that a recovery by the insurer was in principle possible in all cases where he was not liable on the policy but where payment was nevertheless made, or where more was paid out than he was liable for, as long as the general requirements for such a recovery were met.

## 2.4 Reinstatement

There is no evidence in the Roman-Dutch sources of the recognition of the practice and the possibility of the insurer rendering performance in terms of the insurance contract not by way of payment of a sum of money to the insured, but by repairing or reinstating the lost or damaged property insured or by having such property repaired or reinstated.<sup>153</sup>

By the time of the *Wetboek van Koophandel*, though, this had come to be recognised in respect of fire insurances.<sup>154</sup> In terms of art 288-1 it is permissible, in the case of a fire insurance of buildings ('*gebouwde eigendommen*'), for the insurer to stipulate either that the damage occurring to the premises will be compensated, or that it will be rebuilt or repaired up to the maximum of the sum insured.<sup>155</sup> In the latter case, the insured is in terms of art 288-3 obliged to rebuild or repair, and the insurer has the right to ensure that the money he has paid or has to pay, is, within a period to be determined, if necessary by a court, actually spent to that end. Where grounds exist,

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<sup>152</sup> This is most clearly provided for in art 674-2 of the *Wetboek van Koophandel*. See ch XV § 6.3 *supra*.

<sup>153</sup> See Elink Schuurman *Brandschade* 35.

<sup>154</sup> See generally Dammers 5, 53 and 75. A distinction should be drawn between performance of the insurance contract by way of reinstatement, and payment in terms of an insurance contract on the basis of reinstatement value or cost, something which is not pertinently recognised in the *Wetboek*.

<sup>155</sup> In the case of fire insurance, payment in cash remains the most common form of indemnification. In the case of marine hull insurance, repair is usual but not compulsory, but even if not repaired, the damage to be indemnified by the insurer is calculated as if the ship had been repaired. See Dammers 53-56 and again ch XVII § 3.3 *supra* as to the insurable value of ships.

the Court may even instruct the insured, when he claims from the insurer, to provide sufficient security in this regard.<sup>156</sup>

It seems that this alternative method of performance in fire insurances may first have become practice in England at the end of the seventeenth century.<sup>157</sup> In the eighteenth century, fire insurance claims could commonly either be paid in cash or by the reinstatement or rebuilding of the insured property.<sup>158</sup> Shortly after the middle of that century, London fire insurers acquired a statutory right to compel the insured to apply the money he had received to rebuilding his property.<sup>159</sup>

<sup>156</sup> In terms of art 289-2, in the case of a reinstatement provision (*'beding van weder-opbouw'*), the insurer stipulates that he will compensate the cost required for reinstatement or rebuilding. By art 289-3, the insurance may in such a case never exceed three-quarters of such costs. Thus (see Asser NBW 120 for examples), the insured can recover the sum insured, if such is not more than three-quarters of the cost of reinstatement, or, alternatively, he can recover three-quarters of that cost but no more than the sum insured. The reason for the three-quarters limit is to prevent the insured from making a profit by the replacement of new for old. An arbitrary quarter of the cost of reinstatement is therefore deducted for the betterment. See Dammers 76.

<sup>157</sup> From Barbon's original proposal for fire insurances in 1680's (see again ch VII § 2.2 *supra*), it appears that the primary undertaking was in fact to rebuild properties damaged or destroyed by fire at the expense of the Fire Office, the payment of a monetary satisfaction merely being a secondary alternative. This should probably not surprise, given that Barbon was a builder by profession. This way of performing the fire insurance contract sought to avoid disputes about the extent of the damage where a building was not totally destroyed. Originally Barbon undertook that if the insured house was not repaired within two months after the occurrence of the fire, the insured would be entitled to the sum insured as if the house had in fact been totally destroyed.

However, it appears that by the end of the seventeenth century, a payment in money had already proved to be a necessary alternative to repair by the Fire Office. By 1682, in Barbon's 'Instrument or Policy of Insurance', the alternative undertakings had become reversed. The primary undertaking then was to pay the sum insured within two months if the insured house, or any new house built in its place, was during a term of 31 years 'Burnt down, Demolished or Damnified by or by Reason or Means of Fire'. If the house was only 'damnified', it had to be repaired and put in so good a condition as before at the expense of Barbon and his partners.

<sup>158</sup> See eg Dickson 80 (referring to claims against the Sun Fire Office); Jenkins 29.

<sup>159</sup> See 4 Geo III c 14 (1763). The aim of this Act was to prevent fraud, cash-strapped insured being tempted to set fire to their own buildings to obtain a cash payment of the insurance money. In terms of the Act, insurers settled losses subject to their being provided with sufficient security that the sum paid out would be expended in reinstating the premises according to the Act. The Act of 1763 was subsequently repealed in this respect by the Fires Prevention (Metropolis) Act of 1774 (14 Geo III c 78). Section 83 of the latter Act makes (it is still in force in England) provision for the way in which the money insured on houses destroyed or damaged by fire, has to be applied. Insurers are authorised to cause the insurance money to be laid out and expended, as far as it will go, towards rebuilding, reinstating or repairing such house or building, unless the party claiming the insurance money gives security to the insurer that the money will be spent in that way. They are also required to do so upon the request of any person interested in any house or building which may burn down or be damaged by fire, or upon any grounds of suspicion that the owner, occupier or other person who has insured house or building, has been guilty of fraud or of wilfully setting the house or building on fire.

### 3 Prescription of Actions on Insurance Contracts

#### 3.1 Introduction

The last remaining way in which insurance contracts could be terminated and which was specifically dealt with in the sources, was prescription. It may be considered in some detail.

After the occurrence of a loss, the notice of that loss and, if appropriate, the notice of abandonment, all of which had to occur within particular (different) periods of time, the insurer had to pay the insured's claim on the insurance contract. Failure to do so, or to do so within the applicable period of time, could result in the insured instituting an action on his policy to obtain judgment against the insurer.

However, for legal-political considerations, an action on an insurance contract, like all other actions generally, including actions on other types of contract, had to be brought within a specific time, failing which the action became prescribed and the obligations created by the insurance contract were extinguished.<sup>160</sup>

Otherwise than may be expected, the period or rather periods of extinctive prescription for actions on insurance contracts were specifically regulated in various insurance laws and were not governed by the periods applicable to contractual actions generally. In fact, the periods fixed by Roman-Dutch law for the prescription ('*verjaring*') of actions varied greatly from time to time, from place to place, and from one type of action to another.<sup>161</sup> The periods of prescription of actions on insurance contracts were generally shorter than the periods which were generally applicable.<sup>162</sup> This may have been because of the nature of the insured's claim and the proof required, because of the possibility of a change in the financial position of the parties, and also because of the potential of fraud being concealed by the passage of time. Shorter periods of prescription served to protect the insurer.

As a general principle, the period of prescription of contractual actions in Roman-Dutch law commenced from the time when the debt became due. That was, at least eventually, also the position in the case of the insurance contract where prescription ran from the time when the loss or damage occurred for which the insurer could be held liable.

#### 3.2 The Early Position

In terms of s 17 of title VII of the *placcaat* of 1563, the insured was obliged to bring a legal action ('*eysschen ... rechtelick te doen*') within four years from the sub-

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<sup>160</sup> Thus, a distinction must be drawn between the period within which the insured had to give notice and institute a claim for payment, the period within which the insurer had to pay, and the period within which the insured had to institute an action to enforce such payment.

<sup>161</sup> See generally Grotius *Inleidinge* III.46; Voet *Commentarius* XLIV.3.6; and Krause.

<sup>162</sup> See Van der Keessel *Praelectiones* 1676 (*ad* II.46.8).

scription ('*subscriptie*') or signing of the insurance policy,<sup>163</sup> this on penalty of his not being able to claim anything afterwards. No distinction was yet drawn as to the location or type of loss, or the type of insurance involved.<sup>164</sup> This regulation was clearly unsatisfactory both for the insurer, in the case where the insurance was concluded after the departure of the ship or goods, and for the insured, in the case where the property was only exposed to risk long after the conclusion of the insurance contract. Furthermore, it may have been impractical in the case of longer return voyages to and from the East Indies where a large part of the period of four years may have expired before the ship returned and where the insured may have been left with relatively little time to bring his action. It may also have been in conflict with existing custom at the time.<sup>165</sup>

By the time of the *placcaat* of 1571, the topic came to be regulated in greater detail. In terms of s 24, in the event of damage to or a reduction in the value of merchandise, referred to as average ('*schade oft verminderinge van Koopmanschap, die geheeten wort avarye*'),<sup>166</sup> the action had to be instituted ('*geintenteert*') within one-and-a-half years in the case of the damage occurring within Europe or Barbary, and otherwise<sup>167</sup> within three years, after the arrival of the ship in her port of destination.<sup>168</sup> In the case of all other insurance actions generally,<sup>169</sup> s 26 provided that in order to put an end to the uncertainty surrounding the insolvency of merchants ('*om een eynde te maecken van twijffelen der insolventien vande Kooplieden*'), such actions had to be instituted ('*intenteert*') within one-and-a-half years after the completion of the voyage, or the capture, perishing or loss of the merchandise, where such loss had occurred inside Europe or Barbary. In the event of the loss occurring elsewhere, the period was three years.<sup>170</sup>

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<sup>163</sup> In fixing the commencement of prescription thus, the *placcaat* followed earlier Spanish legislation. See eg Reatz *Geschiede* 265-268 as to the position in terms of the Burgos Ordinance of 1538.

<sup>164</sup> See Groenewegen *Aanteekeningen* n41 (*ad* III.24.21); Kersteman *Academie* part XVIII (at 276). See too Dorhout Mees *Schadeverzekeringsrecht* 575 and 663; Enschedé 117; Goudsmit *Zeerecht* 248; Jolles 68; Kracht 21; and Mullens 96-97.

<sup>165</sup> As appears from Kersteman *Academie* part XVIII (at 276); see also *idem* *Woorden-boek* at 29-30.

<sup>166</sup> That is, in the case of a partial loss, including, presumably, a general average loss.

<sup>167</sup> That is, in the case of damage on voyages further afield. The section spoke of '*ende op Indien*'.

<sup>168</sup> In terms of s 25 of the provisional *placcaat* of 1570, the periods were one and two years respectively.

<sup>169</sup> Thus, presumably, in the case of a total loss of the insured property.

<sup>170</sup> In terms of s 27 of the provisional *placcaat* of 1570, the periods were one and two years respectively. As to ss 24 and 26, see Van Zurck *Codex Batavus* sv '*Assurantie*' par 28; Scheltinga *Dictata ad* III.24.21. See generally Dorhout Mees *Schadeverzekeringsrecht* 575 and 663; Enschedé 117 (incorrectly stating that prescription ran from the signing of the policy); Goudsmit *Zeerecht* 267-268 (noting that the periods depended on where the loss or damage had occurred, and that they ran either from the date of the loss or from the arrival of the insured property in port); Jolles 68; and Kracht 28.

The period of prescription therefore no longer ran from the time when the insurance was underwritten but commenced running at a later stage, namely, in the case of a partial loss, from the arrival at the destination (when the partial loss could presumably first be discovered by the insured) or, in the case of a total loss, from the arrival at the destination or from the (earlier) loss, although it was not specifically stated that the insured should have been aware of the (earlier) loss for the period of prescription to commence running. Different periods were also now prescribed depending on where the loss occurred.<sup>171</sup> Although the *placcaat* only mentioned cargo insurance in this regard, the principles possibly applied equally to hull insurances.

### 3.3 Prescription in the Seventeenth Century

In the Amsterdam *keur* of 1598, the earlier differentiations of 1571 as regards the prescription of actions on insurance contracts were maintained.

In s 12,<sup>172</sup> in the case of damage to or a reduction in the value of the insured ships or goods, the action had to be instituted within at most<sup>173</sup> one-and-a-half years where the damage occurred within the limits of Europe or Barbary,<sup>174</sup> and if outside those limits, within a period of three years, the respective periods to commence after the ships had been discharged completely.

In the case of the loss, capture, spoiling or destruction of the insured ship or goods in another way ('*ofte andersints beschadiching*'),<sup>175</sup> the insured was bound in terms of s 13 of the Amsterdam *keur* of 1598<sup>176</sup> to institute the action for compensation ('*actie van schade*') against insurers at most within one-and-a-half years (in the case of a loss in Europe or Barbary) or three years (in the case of a loss further afield) after such loss had occurred ('*nae dat alsulcke schade geschiet sal wesen*').<sup>177</sup>

<sup>171</sup> In terms of s 26 (total losses) clearly so, less clearly so in terms of s 24 (partial losses). Commentators often thought or stated that the period depended on the destination and thus on the duration of the voyage for which the property in question was insured, but that was not expressly so provided. Obviously, in the case of a voyage to an intra-European port, no question could arise of the longer period applying. But in the case of a voyage to a further destination, it is uncertain whether the longer period applied even if the loss occurred inside Europe.

<sup>172</sup> And also in s 17 of the Middelburg *keur* of 1600.

<sup>173</sup> That is, no later than, so that the insured could have instituted his action earlier.

<sup>174</sup> Referred to by Van der Keessel *Praelectiones* 1484 (*ad* III.24.21) as in Europe or along the coasts of the Turkish territory (in the Mediterranean).

<sup>175</sup> This should probably be taken to refer to a total loss as opposed to a partial loss of which there was mention in s 12.

<sup>176</sup> And also in terms of s 19 of the Middelburg *keur* of 1600.

<sup>177</sup> See Grotius *Inleidinge* III.24.21 (noting the different times of commencement, depending on whether the loss was total or partial); Groenewegen *Aanteekeningen* n39 and n40 (*ad* III.24.21); Van Zurck *Codex Batavus* sv 'Assurantie' par 28; Van der Keessel *Praelectiones* 1484-1485 (*ad* III.24.21) (also noting the different times from when prescription ran). See further Dorhout Mees *Schadeverzekeringsrecht* 575 and 663; Enschedé 119; and Goudsmit *Zeerecht* 329.

The Amsterdam *keur* therefore now also mentioned hull insurance; made it clear that the length of the prescriptive period depended on where the loss had occurred although it remained uncertain what the position was if that fact was not known; and provided that the running of prescription in the case of a partial loss no longer commenced after the arrival but after the complete discharge of the ship, and that in the case of a total loss it no longer commenced either on arrival or on the occurrence of the loss but only at the earlier stage, namely on the occurrence of the loss.

The *keur* of 1598 added another innovation by providing for the prescription of actions on land-transit policies. In terms of s 16,<sup>178</sup> where goods were carried by land or on inland waters, the action for the compensation of damage to it ('*actie vande averye daer op gevallen*') had to be instituted at most within one year after such damage, while a similar action for other losses ('*d'actie vanden anderen schaden*') likewise had to be brought at most within one year after the occurrence of such loss. The same period of prescription therefore applied, irrespective of the duration of voyage, and it ran from the same moment, irrespective of the type of loss.<sup>179</sup>

The issue of prescription in terms of s 12 of the Amsterdam *keur* of 1598 arose but was not pertinently decided in a case before the *Hooge Raad* in 1726.<sup>180</sup> A claim was instituted against the insured's Amsterdam correspondent, who had effected the insurance policy and who had stood surety ('*del credere*') for the insurers,<sup>181</sup> for compensation in respect of a contribution due by the insured cargo in respect of general average loss suffered when the carrying ship was delayed. The insurers had refused to pay for the contribution because the loss in question had been adjusted abroad, as a result of which the action was brought against the correspondent. The *Hooge Raad* rejected the claim. One of the grounds for doing so was the fact that the *Raad* doubted whether one could lawfully claim against a surety (the correspondent) while the action against the principal debtors (the insurers) may have become prescribed in terms of s 12. That section required that the action against the insurer in respect of an average ('*de Actie over Avarye*') had to be instituted within one-and-a-half years, and in this instance many years had passed before the action was instituted. However, this point was not finally decided, for in this case the failure to institute the action against the insurer could be ascribed to the correspondent himself.<sup>182</sup>

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<sup>178</sup> And in terms of s 27 of the Middelburg *keur* of 1600.

<sup>179</sup> See Grotius *Inleiding* III.24.21; Groenewegen *Aanteekening* n41 ad III.24.21 (incorrectly referring to s 15); Van Zurck *Codex Batavus* sv 'Assurantie' par 28; Scheltinga *Dictata* ad III.24.21 sv 'binnen een jaar' (explaining how the provisions of the Amsterdam *keur* of 1598 had to be interpreted if the provisions on this topic of the *placcaat* of 1563 could not be regarded as having been repealed or abrogated by disuse but as still being generally applicable ('*een generaele landswet gebleeven was*')); and Van der Keessel *Praelectiones* 1485 (ad III.24.21). See also Goudsmit *Zeerecht* 329.

<sup>180</sup> See Bynkershoek *Observationes tumultuariae* obs 2242; *idem Quaestiones juris privati* IV.13.

<sup>181</sup> See again ch IX § 2.9.2.2 *supra*.

<sup>182</sup> Therefore, the correspondent, as surety, could not raise the prescription of the action against the insurer as principal debtor if it was due to him that no action had been instituted against the insurer in the first place.

The Antwerp *Compilatae* of 1609 reflected the periods of prescription laid down in the *placcaat* of 1571 and in the Amsterdam *keur* of 1598, that is, one-and-a-half or three years, depending on where the loss occurred. Rather than having the period run from the occurrence of loss, or the arrival or discharge of the ship, the *Compilatae* more equitably determined that for all claims on the insurance contract, whether for a total, a partial or a general average loss, prescription was to commence from the moment when the insured received news of the loss, or from the moment when he could be presumed to have known of the loss, or from the moment when the insured could have known of a presumed loss.<sup>183</sup> It was also specifically provided that no excuse, reason or innocence would be permitted to condone any prescription in this regard.<sup>184</sup>

In an opinion delivered in 1678,<sup>185</sup> the main issue was whether or not the general principles applicable to established forms of insurance, could also be extended to newly emerging forms, in this case to ransom insurance.<sup>186</sup> One of the aspects specifically addressed in this regard was whether the period of three years permitted for the institution of an action against an insurer, which s 13 of the Amsterdam *keur* of 1598 laid down for actions on contracts insuring ship or goods, was also applicable to actions on ransom policies. The opinion was that this was not the case. There was no weighty reason, as there was in the case of hull and cargo insurances, the explanation went, why such an action should be brought before a court as soon as possible. On the contrary, the longer the insured waited, the better the chance that the captured person might in the meantime be released from or die in captivity so that the insurer might be absolved of his obligation of having to pay the ransom.<sup>187</sup>

In an opinion in 1713<sup>188</sup> the view was expressed that the insurer in the case under consideration there, was not liable because no legal claim had been instituted ('*gerechtelyk niet is geëischt geworden*') on the contract for a period in excess of six years, with the result that the action, otherwise well-founded and effective, had through

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<sup>183</sup> See arts 283-284 of par 8, title 11, part IV (see De Longé vol IV at 316), providing respectively for the action to be brought '*binnen ander halff jaer naer dat men tgeweten heeft, oft bij verloop van tijde gehouden heeft [wordt] datter schade gevallen oft goet verloren ist*', and '*binnen den tijt van drie jaeren naer dat men tverlies oft schade geweten heeft, oft dat men, bij verloop van tijde, tship voor verloren hout, als vore*'. See also Mullens 96-97. As to the distinction between a presumed loss and a presumption of knowledge of a loss, see again ch XV § 6.1 *supra*.

<sup>184</sup> See art 285.

<sup>185</sup> See *Nederlands advysboek* vol II adv 170.

<sup>186</sup> See ch VII § 3.2.2 *supra*.

<sup>187</sup> '[G]elijk daar ook geen reden te bedenken is ten regarde van het Randzoen die de aangaande Schepen en Waren wel wigtiger zijn datter een Assurateur aan gelegen kan zijn, dat de actie juist in het korte voor den Rechter werde geïnstituert, integendeel hoe lange daar mede gewacht werde, hoe meerder kans voor hem is dat de Slaaf ondertusschen sterven mogte, en hy zoo ontlast zijn van te betalen het geen hy tot des zelfs Randzoen hadde beloofd.'

<sup>188</sup> See *Barels Advysen* vol I adv 21.

the effluxion of that period of time expired ('*door dat verloop van tyd zoude wezen geperimeerd*') and had become an action rendered ineffective in that way ('*door den laps van tyd ... gesteld geworden buiten alle effect*').<sup>189</sup>

The Rotterdam *keur* of 1604, while broadly following the existing model, added innovations of its own. Section 16 provided that the insured had to institute ('*institueren*') action against the insurers, whether in respect of average or damage ('*avarye of schade*'),<sup>190</sup> or in respect of goods totally lost or spoilt,<sup>191</sup> within one-and-a-half years ('*anderhalf Jaer*') after such average had been adjusted or such loss had taken place ('*na dat de voorsz averye ende verlies respectie ... sal zijn gemaekt ende gevallen*'), if the loss occurred within Europe, Barbary, the Canary Islands or their surrounds. But where the adjustment or occurrence took place outside those limits, the insured had to institute action within three years. If he failed to do so, the action was lost ('*actien verstreecken*'), on the understanding, nevertheless, that such expiration could be condoned on lawful grounds ('*dat sy van 't selve versteck om wettige redenen gereleveert sullen mogen worden*').<sup>192</sup>

Therefore, all losses in terms of an insurance policy, including clearly now general average losses, were treated on a par. Action had to be brought within specified periods after the adjustment or occurrence of the loss and no longer either after the arrival or after discharge, as was the case earlier and also in Amsterdam. But, as in Amsterdam, the periods of prescription depended on where the adjustment had been made or where the loss had occurred. Also, provision was now specifically made that the running of prescription could be suspended or interrupted for lawful reasons, such as<sup>193</sup> minority, absence from the country, or any other factor which prevented the insured from instituting the action including, presumably, his being unaware of the loss under circumstances where he could not reasonably have been expected to have known of the loss.<sup>194</sup>

<sup>189</sup> This was so, the advocate explained, whatever period of prescription was applicable in this case, four years in terms of s 17 of the *placcaat* of 1563, or the period in terms of s 26 of the *placcaat* of 1571, or the shorter period of merely one-and-a-half years in terms of the general customs of the mercantile cities in Zeeland and Holland (as appeared from ss 17 of the Middelburg, 13 of the Amsterdam, and 16 of the Rotterdam *keuren*).

<sup>190</sup> That is, a general average or a particular average loss.

<sup>191</sup> That is, a total loss.

<sup>192</sup> See Groenewegen *Aanteekeningen* n39 and n40 (*ad* III.24.21); Scheltinga *Dictata ad* III.24.21 (noting that in Rotterdam it was provided that after the expiry of the specified period of time, relief could still be obtained for '*gewichtige redenen*'). See also Dorhout Mees *Schadeverzekeringsrecht* 575 and 663; Enschedé 119; Goudsmit *Zeerecht* 402; and Jolles 68.

<sup>193</sup> See eg Grotius *Inleidinge* III.46.4.

<sup>194</sup> A presumption of loss arose, in the case of a missing ship or goods, after specified periods of time (see ch XV § 6 *supra*), and presumably in such a case prescription ran only from the time when the presumption arose, not earlier.



### 3.4 Prescription in the Eighteenth Century

Section 69 of the Rotterdam *keur* of 1721 repeated the earlier measure contained in s 16 of the *keur* of 1604. An action against insurers had to be instituted within one-and-a-half or three years after the occurrence of the loss or damage, depending on where it had occurred, on the penalty of forfeiture (*'alles op poene van verstek'*). Provision was again made for the possibility that, for lawful reasons, relief from such forfeiture could be granted.<sup>195</sup> There was nothing on the prescription of actions on non-marine insurances in any of the Rotterdam *keuren*.

The question of the suspension or interruption of prescription came up for consideration in a decision of the *Hooge Raad* in 1729 which showed that relief was not readily granted to the insured.<sup>196</sup> Here Rotterdam insurers argued on appeal to the *Raad* that the action instituted against them by the insured owner of goods taken capture by a Spanish privateer and condemned as prize in May 1720, a condemnation confirmed by the King of Spain in July of that year, had become prescribed since the action against them was only instituted in October 1723 (*'dat de Actie van weêromeis-ching van schade reeds lang verjaart was'*). In this case both ss 16 of the *keur* of 1604 and s 69 of the *keur* of 1721<sup>197</sup> provided that an action for the compensation of damage had to be instituted within eighteen months after such damage was suffered within Europe, failing which it became prescribed. Here many more months had passed before the action was instituted, not only from the time the loss had occurred but even after the first condemnation (*'Vonnis van Confiscatie'*). The *Raad* took note of its earlier decision in 1725 to the effect that the periods of prescription in these matters had to be observed strictly. While both sections did allow relief against a prescription, that was only to be granted where sufficient reason existed. In this instance the insured claimed relief for no other reason than that he had often demanded payment from the insurers and that the latter had under various pretexts postponed such payment. However, the *Raad* noted, there was no evidence of any such demands and it was in any case doubtful if such demands (*'maanen'*)<sup>198</sup> were enough to interrupt and prevent prescription, for, as the two sections stated, the action itself had to be instituted within the

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<sup>195</sup> Van der Keessel *Theses selectae* th 769 (ad III.24.21) noted that no relief was granted from the running of prescription to anyone (other than a minor) except at Rotterdam (and Dordrecht), where it was permitted on a just cause being shown. See too *idem Praelectiones* 1484-1485 (ad III.24.21) (no distinction in the Rotterdam *keuren* of 1604 and 1721 between a total and a partial loss as regards the time from when prescription ran); Van der Linden *Koopmans handboek* IV.6.11. See too Goudsmit *Zeerecht* 402; Kracht 38.

<sup>196</sup> See Bynkershoek *Observationes tumultuariae* obs 2492; *idem Quaestiones juris privati* IV.14. See too Van der Keessel *Theses selectae* th 769 (ad III.24.21); *idem Praelectiones* 1484 (ad III.24.21); and Van der Linden *Koopmans handboek* IV.6.11.

<sup>197</sup> Fortunately both provided the same, and it was therefore not necessary for the *Raad* to make out which of the two governed this particular case.

<sup>198</sup> Presumably as opposed to the issue of service by which an action was instituted.

required period.<sup>199</sup> If, in addition to the insured's demands, the insurers had requested time to consult with one another, or had claimed that the documentation in respect of the claim be supplied, or had suggested that in the meantime an offer of settlement was being prepared, relief may have been permissible, but there was no evidence of any of these factors in this instance. Accordingly the *Hooge Raad* held that if the insurers were prepared to confirm that none of this had occurred, the insured's claim would be rejected on the grounds of prescription, but if they did not want to swear such an oath, the judgment *a quo* in favour of the insured would be affirmed.<sup>200</sup>

In terms of s 30 of the Amsterdam *keur* of 1744, the shorter periods of prescription for actions on insurance contracts remained.<sup>201</sup> All actions for the compensation of damage and general average (*'alle Actien van Schaaden en Avaryen Grosse'*) to or in respect of ships and goods had to be instituted (*'geintenteert'*) at the latest within a period of one-and-a-half years (*'een en een half Jaar'*) from the time when the casualty and damage had occurred within the limits of Europe, Barbary, the Canary islands, the whole of the Mediterranean, the Levant and the Aegean Sea (*'d'Archipel'*) or surrounding places.<sup>202</sup> If it had occurred outside those limits and further afield, the action had to be instituted within three years and judicially prosecuted and continued (*'en gerechtiglyk vervolgt en voortgeset'*), on penalty of it being barred.<sup>203</sup>

In s 31, the Amsterdam *keur* of 1744 made provision for the prescription of actions on non-marine insurance contracts. Also on penalty of forfeiture, the actions for damage and general average in respect of insured goods coming or going over land or internal waters, had to be brought, instituted and continued (*'geinsinueerd, geintenteert*

<sup>199</sup> Thus, the suggestion was that only the institution of the action, not merely an extrajudicial demand or interpellation for payment, could interrupt or prevent the running of prescription.

<sup>200</sup> Bynkershoek later heard that the insurers did not in fact swear the oath but that the parties had reached a settlement on the matter.

<sup>201</sup> In terms of s XVII-2 of the Hamburg *Assecuranz-Ordnung* of 1731, by contrast, insurance claims had to be instituted and the action brought within ten years after the notification of loss (which, in turn had to be given within a specified period after its occurrence), the insurer being relieved of liability after that period. The period in question was taken over from Roman law and was not, as in other systems, linked to the usual duration of voyages. See further Dreyer 171-173.

<sup>202</sup> As provided in s 29 of the *keur* in respect of the presumption of loss. See ch XV § 6.2 *supra*.

<sup>203</sup> See Van der Keessel *Theses selectae* th 769 (*ad* III.24.21); *idem Praelectiones* 1484 (*ad* III.24.21) (*'op poene van verstek'*) and 1484-1485 (*ad* III.24.21) (noting that the earlier distinction between a total and a partial loss as regards the time from when prescription ran, was no longer observed but that s 30 at the same time also did not pertinently identify the moment from when prescription ran, so that that distinction may inadvertently have been maintained); and Van der Linden *Koopmans handboek* IV.6.11 (who, with reference to s 69 of the Rotterdam *keur* of 1721 and s 30 of the Amsterdam *keur* of 1744, simply declared that the period was calculated from the day that the accident occurred). See also Dorhout Mees *Schadeverzekeringsrecht* 563, 569, 571 (noting that s 30 was the first to mention general average pertinently), and 575; and Goudsmit *Zeerecht* 356.

*en voortgeset'*)<sup>204</sup> against the insurers within half the periods mentioned in s 30, that is, within nine months or eighteen months, as the case may have been.<sup>205</sup>

One final point, made by Van der Keessel,<sup>206</sup> merits specific attention. He thought that the legislative measures considered above concerned actions on insurance contracts against insurers for the payment of compensation for loss or damage (average), which included, most clearly in s 30 of the *keur* of 1744, a general average loss. However, actions for a general average contribution against the other interests involved in a particular adventure were not included in the scope of these measures. The prescription of such actions was governed by general principles and was not subject to the shorter periods of prescription applicable to insurance claims.<sup>207</sup>

Probably because premiums were in principle payable immediately<sup>208</sup> and because of the procedural measures provided to facilitate the insurer's speedy enforcement of his right to the payment of the premium, there is no authority with regards to the period after which the insurer's action for the payment of the premium became prescribed. Nevertheless, the insurer's right to claim the premium arose from the insurance contract and was correlative to the insured's right to claim payment from the insurer in terms of that contract, they giving rise, respectively, to the indirect and direct actions on that contract.<sup>209</sup> Although not made clear in the sources, the assumption must therefore be that both actions in terms of the insurance contract became prescribed after the same periods of time, namely one-and-a-half or three years, depending on the nature of the voyage insured against. Presumably prescription of the insurer's action commenced to run from the time when the premium was due, that is, either immediately upon conclusion of the contract or on expiration of the period for which the insured was granted credit.

### 3.5 The Position in the *Wetboek van Koophandel*

The relatively short periods of prescription for actions on the insurance contract were not acceptable to the Dutch Legislature at the beginning of the nineteenth century. Neither was the moment from when prescription ran in Roman-Dutch law,

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<sup>204</sup> It is uncertain whether but unlikely that this meant that the action not only had to be instituted in that period but also finally prosecuted. It probably meant no more than that the action had to have been instituted with a serious view to its actual prosecution.

<sup>205</sup> See Van der Keessel *Praelectiones* 1485 (*ad* III.24.21); Goudsmit *Zeerecht* 356.

<sup>206</sup> *Theses selectae* th 795 (*ad* III.29.16).

<sup>207</sup> Thus, Voet *Commentarius* XIV.2.11 *in fin* was incorrect in this respect. But see Van der Linden *Koopmans handboek* IV.5.5 who appears to have sided with Voet on this point.

<sup>208</sup> See again ch XI § 3.2 *supra*.

<sup>209</sup> See ch XI § 5.1 *supra*.

because part of the period of prescription may already have expired before the insured had even received news of the loss or damage.<sup>210</sup>

Upon codification, insurance contracts generally came, even if apparently accidentally and not designedly so, to be governed by the general principles of prescription in the *Burgerlijk Wetboek*. Actions on insurance contracts become prescribed after 30 years. Only in the case of marine insurance and the insurance of goods on inland waters, was this period specifically reduced to five years by arts 743 and 687 of the *Wetboek van Koophandel*. Prescription runs, however, from the conclusion of the contract; a return, under the influence of the French *Code de commerce*, to the unacceptable position in terms of the *placcaat* of 1563. This was only remedied in 1927, after which prescription runs, in terms of art 744, from the time that the claim becomes enforceable and the debt due.<sup>211</sup>

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<sup>210</sup> See Van Nievelt XXXV.

<sup>211</sup> See Dorhout Mees *Schadeverzekeringsrecht* 366 and 663-664.

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# APPENDICES

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## General Note

The following appendices contain reproductions of a selection of the documentary and other materials consulted for this thesis. Of necessity the selection had to be small. There exists a veritable multitude of documents pertaining to insurance law and practice in the Netherlands in the period from 1500 to 1800, both in a published and in an unpublished (and largely archival) form. The selection was guided by various factors, the most important of which was what I regarded as the representative and the illustrative capability of the document in question. Obviously other factors such as accessibility in other publications, legibility, and ease of reproduction also played a role.

The documents reproduced fall into two main groups. First, some general documents and forms pertaining to insurance practice and secondly, insurance policies. I have arranged the reproductions thus rather than according to the order in which they are either discussed or referred to in the text. References in the text to the relevant appendix will, where relevant, link the various topics treated in the thesis to the reproductions taken up in these appendices.

In the following Table of Appendices I have, by way of footnotes, identified the sources from which the relevant documents were obtained and reproduced.

## Table of Appendices

1	Floorplan of the Amsterdam Bourse ( <i>Platte Grond van de Beurs te Amsterdam</i> ) (1801) <sup>1</sup> .....	1539
2	Judgment condemning insurers to pay the sum they had insured ( <i>Despache, of Vonnis ... waar by de Assuradeurs gecondemneerd worden hunne geteekende somme te betalen</i> ) <sup>2</sup> .....	1540
3	Judgment absolving the insurer from liability for not having run any risk ( <i>Vonnis ... waar by den Verzekeraar geabsolveert word, als geen risico gelopen hebbende</i> ) <sup>3</sup> .....	1541
4	Judgment condemning the insured to the payment of the premium ( <i>Vonnis ... wegens Premie</i> ) <sup>4</sup> .....	1542

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<sup>1</sup> Reproduced from Asaert et al *MGN* vol II at 113. A slightly different version is reproduced in Spooner at 20. The original is in the *Gemeente Archief*, Amsterdam.

<sup>2</sup> Reproduced from the *Amsterdamsche Secretary* at 373-374. This and the following judgments and notices were those in use by and before the Amsterdam Chamber of Insurance in the mid-eighteenth century. I have retained the annotations to the judgments and forms by the compiler of the *Secretary*.

<sup>3</sup> *Idem* at 374-375.

<sup>4</sup> *Idem* at 375-376.

5	Judgment condemning the insured to the provisional payment of the premium ( <i>Vonnis ... van Namptissement van Premie</i> ) <sup>5</sup> .....	1543
6	Judgment in another form condemning the insured to the provisional payment of the premium ( <i>Vonnis ... van Namptissement van Premie, op een ander manier</i> ) <sup>6</sup> .....	1544
7	Judgments for the return of the premium by the insurer ( <i>Vonnisse van Restorno</i> ) <sup>7</sup> .....	1545
8	General average adjustment ( <i>Vonnis over Avarye grosse</i> ) <sup>8</sup> .....	1546
9	Notice of abandonment ( <i>Abandonnement van verzekerde Koopmanschappen</i> ) <sup>9</sup> .....	1547
10	Deed of abandonment ( <i>Relatie of Acte van Abandonnement van Schip en Goed</i> ) <sup>10</sup> .....	1548
11	Notice by the insured of the cancellation of his insurance to the curator of the insolvent estate of an insurer ( <i>Insinuatie, of Opzegginge van de Verzekerde aan des Verzekeraars Curateur</i> ) <sup>11</sup> .....	1549
12	Summonses in use in the Amsterdam Chamber of Insurance ( <i>Citatie ter Assurantie-Kamer in gebruik</i> ) <sup>12</sup> .....	1550
13	Rotterdam notarial notice of abandonment (1651) <sup>13</sup> .....	1551

<sup>5</sup> *Idem* at 376-377.

<sup>6</sup> *Idem* at 377-378.

<sup>7</sup> *Idem* at 378-379.

<sup>8</sup> *Idem* at 379-382.

<sup>9</sup> *Idem* at 383.

<sup>10</sup> *Idem* at 384.

<sup>11</sup> *Idem* at 384-385.

<sup>12</sup> *Idem* at 386-387. The summonses reproduced are of the insurer by the insured, of the insured by the insurer, and of the consignor of goods on board a ship by the master of that ship in connection with a general average adjustment.

<sup>13</sup> Reproduced from Witkop at 10. The original is from the protocol of the Rotterdam notary Vitus Mustelius Woutersz and is housed in the *Gemeente-Archief (Oud Notarieel Archief, prot 502 reg no 5 p 667)*, Rotterdam.

14	Accord of Rotterdam underwriters of 1719 <sup>14</sup> .....	1552
15	First page of the underwriting register of the Rotterdam Insurance Company of 1720 <sup>15</sup> .....	1553
16	Agreement of Amsterdam underwriters and brokers on commission of 1746 <sup>16</sup> .....	1554-1555
17	Antwerp hull policy of 1531 <sup>17</sup> .....	1556-1558
18	English translation of the cargo policy contained in the <i>placcaat</i> of 1563 <sup>18</sup> .....	1559
19	Amsterdam policy on ship ('den Zeehondt') and goods of 1592 ('Van der Meulen' policy) <sup>19</sup> .....	1560-1562
20	Amsterdam cargo policy of 1644 <sup>20</sup> .....	1563
21	Amsterdam cargo policy of 1645 <sup>21</sup> .....	1564

<sup>14</sup> Reproduced from the original in the *Gemeente-Archief* (Bibl XIV E 67), Rotterdam. The document is contained with various others in a folder with the printed title *Roterodamiana XII Handel* to which had been added in handwriting 'Assurantie'.

<sup>15</sup> Reproduced from the original register (*Joernaal van Assurantie, boek A*) which is housed in the *Gemeente-Archief* (Mpij v Assur, prot 209 pp 1-4), Rotterdam. The first four pages reproduced here show the policies concluded by the Company during the first three weeks of its existence in September 1720. Interestingly the third policy it concluded, on 3 September, was a ransom policy.

<sup>16</sup> Reproduced from the original which is taken up in the *Gemeente-Archief* (arch 336 (*Gilden Archieven*) inv no 1296 fol 40 & appendix) in Amsterdam.

<sup>17</sup> Reproduction of a transcription of the oldest extant policy concluded in the Netherlands on a ship ('de Swaen' of Hamburg merchant Godschaick Remlynckraden), taken from Ebel 'Remlinckrade' at 152-153 which was the best copy available. The policy was first transcribed by Hofmeister at 171-177 and his transcription also appears in other sources, eg in Schuddebeurs 'Oudste polissen' at 198-203. The original policy is in the Library of the University of Rostock.

<sup>18</sup> Reproduced from Magens *Essay* vol II at 23-25. The Dutch original is reproduced in Van Niekerk *Sources* 105-106.

<sup>19</sup> Reproduced from IJzerman & Den Dooren de Jong at 222-225 (their transcription of the policy is at 222-224 and their reproduction of the original is interleaved between 224 and 225). The original policy is in the *Gemeente-Archief* (*Archief van de Wees- en Boedelkamer*) in Leiden

<sup>20</sup> Reproduced from the original in the *Nederlandsch Economisch-Historisch Archief* (EHA 7688) in Amsterdam. The NEHA has a holding of 123 original Dutch policies from the seventeenth and eighteenth centuries (see further (1927) 13 *Economisch-Historisch Jaarboek* xxxvi at xlix-lviii for a complete list).

<sup>21</sup> Reproduced from the original in the *Nederlandsch Economisch-Historisch Archief* (EHA 7687) in Amsterdam.

22	Amsterdam cargo policy (short form) of 1655 <sup>22</sup> .....	1565
23	Amsterdam hull policy of 1662 <sup>23</sup> .....	1566
24	Amsterdam policy on the ship ('de Witte Haes') of 1672 <sup>24</sup> .....	1567-1568
25	Antwerp hull policy of 1681 <sup>25</sup> .....	1569
26	Amsterdam notarial policy on money of 1687 <sup>26</sup> .....	1570-1575
27	Amsterdam hull policy of 1691 <sup>27</sup> .....	1576
28	Amsterdam ransom policy of 1692 <sup>28</sup> .....	1577
29	Amsterdam hull policy of 1694 <sup>29</sup> .....	1578
30	Rotterdam cargo policy of 1706 <sup>30</sup> .....	1579
31	London (Sun Fire Office) fire policy of 1719 <sup>31</sup> .....	1580

<sup>22</sup> Reproduced from the original in the *Nederlandsch Economisch-Historisch Archief* (EHA 7675) in Amsterdam.

<sup>23</sup> Reproduced from the original in the *Nederlandsch Economisch-Historisch Archief* (EHA 7691) in Amsterdam.

<sup>24</sup> Reproduced from the transcription of this policy by Den Dooren de Jong 'Practijk' at 21-22. The original is in the Archives of the firm Bicker Caarten & Obreen, Rotterdam.

<sup>25</sup> Reproduced from the original in the *Nederlandsch Economisch-Historisch Archief* (EHA 7768) in Amsterdam.

<sup>26</sup> Reproduced from Gehlen at 145, 149 (transcription) and 144, 146-148 (reproduction of original). The original policy is in the *Gemeente-Archief (Notarieel Archief, inv no 4708-4750)* in Amsterdam.

<sup>27</sup> Reproduced from the original in the *Nederlandsch Economisch-Historisch Archief* (EHA 7694) in Amsterdam.

<sup>28</sup> Reproduced from the original in the *Nederlandsch Economisch-Historisch Archief* (EHA 7347) in Amsterdam.

<sup>29</sup> Reproduced from the original in the *Nederlandsch Economisch-Historisch Archief* (EHA 7689) in Amsterdam.

<sup>30</sup> Reproduced from the original in the *Nederlandsch Economisch-Historisch Archief* (EHA 7792) in Amsterdam.

<sup>31</sup> Reproduced from the original in the collection of old policies held by the Library of the Chartered Insurance Institute in London.



32	Rotterdam Insurance Company fire policy of 1720 <sup>32</sup> .....	1581
33	London marine insurance policy of 1720 <sup>33</sup> .....	1582
34	London (Sun Fire Office) fire policy of 1727 <sup>34</sup> .....	1583
35	Rotterdam cargo policy of 1730 <sup>35</sup> .....	1584
36	London policy on ship and/or goods of 1733 <sup>36</sup> .....	1585-1586
37	Amsterdam cargo policy of 1742 <sup>37</sup> .....	1587
38	English translation of the hull policy appended to the Amsterdam <i>keur</i> of 1744 <sup>38</sup> .....	1588
39	English translation of the cargo policy appended to the Amsterdam <i>keur</i> of 1744 <sup>39</sup> ..	1589-1590
40	English translation of the ransom policy appended to the Amsterdam <i>keur</i> of 1744 <sup>40</sup> .....	1591
41	English translation of the fire policy appended to the Amsterdam <i>keur</i> of 1744 <sup>41</sup> .....	1592

<sup>32</sup> Reproduced from Witkop 12. The policy was issued by the Rotterdam Insurance Company established in that year and the original is in that company's archives. It is also reproduced in the *Gedenkboek 200-jarig Bestaan van de Maatschappij van Assurantie, Discontering en Beleening der Stad Rotterdam 1720* at 4.

<sup>33</sup> Reproduced from Drew opposite p 34. The original is in the archives of the London Assurance Corporation.

<sup>34</sup> Reproduced from the original in the collection of old policies held by the Library of the Chartered Insurance Institute in London.

<sup>35</sup> Reproduced from Mees *Gedenkschrift* opposite 16 (it is also reproduced in Witkop 11. The original is in private possession.

<sup>36</sup> Reproduced from the original in the collection of old policies held by the Library of the Chartered Insurance Institute in London.

<sup>37</sup> Reproduced from the original in the *Nederlandsch Economisch-Historisch Archief* (EHA 7690) in Amsterdam.

<sup>38</sup> Reproduced from Magens *Essay* vol II at 147-148. The Dutch original is reproduced in Van Niekerk *Sources* 187-188.

<sup>39</sup> Reproduced from Magens *Essay* vol II at 149-150. The Dutch original is reproduced in Van Niekerk *Sources* 188.

<sup>40</sup> Reproduced from Magens *Essay* vol II at 150-151. The Dutch original is reproduced in Van Niekerk *Sources* 188-189.

<sup>41</sup> Reproduced from Magens *Essay* vol II at 151-153. The Dutch original is reproduced in Van Niekerk *Sources* 189.

42	Amsterdam cargo policy of 1750 <sup>42</sup> .....	1593
43	Amsterdam cargo policy of 1752 <sup>43</sup> .....	1594
44	Rotterdam cargo policy of 1757 <sup>44</sup> .....	1595
45	Amsterdam cargo policy of 1760 <sup>45</sup> .....	1596
46	English translation of an Amsterdam policy on a ship (late-eighteenth century) <sup>46</sup> .....	1597
47	Lloyd's SG policy as adopted in 1779 <sup>47</sup> .....	1598-1599
48	Lloyd's SG policy on hull of 1780 <sup>48</sup> .....	1600
49	English translation of an Amsterdam fire policy (late-eighteenth century) <sup>49</sup> .....	1601
50	London (Royal Exchange Assurance) fire policy of 1782 <sup>50</sup> .....	1602
51	Rotterdam fire policy of 1799 <sup>51</sup> .....	1603

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<sup>42</sup> Reproduced from the original in the *Nederlandsch Economisch-Historisch Archief* (EHA 7806) in Amsterdam.

<sup>43</sup> Reproduced from the original in the *Nederlandsch Economisch-Historisch Archief* (EHA 7789) in Amsterdam.

<sup>44</sup> Reproduced from the original in the *Nederlandsch Economisch-Historisch Archief* (EHA 7793) in Amsterdam.

<sup>45</sup> Reproduced from the original in the *Nederlandsch Economisch-Historisch Archief* (EHA 8776) in Amsterdam.

<sup>46</sup> Reproduced from *Weskett Digest* sv 'Amsterdam' at 18-19.

<sup>47</sup> Reproduced from a transcription in *Martin* 158-159.

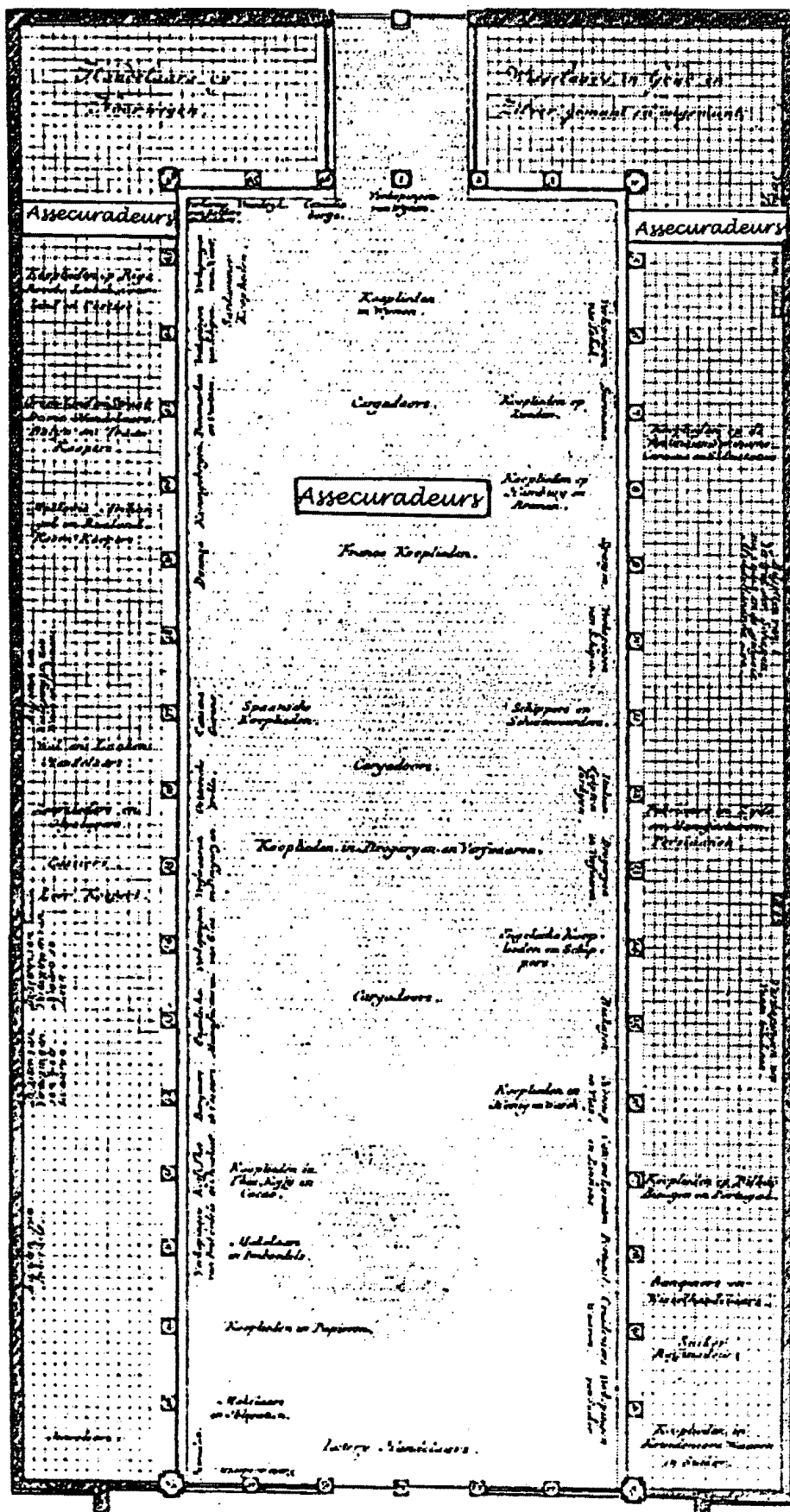
<sup>48</sup> Reproduced from R Flower & M Wynn-Jones *Lloyd's of London. An Illustrated History* 2 ed (1981) at 61.

<sup>49</sup> Reproduced from *Weskett Digest* sv 'fire' at 218-219.

<sup>50</sup> Reproduced from the original in the collection of old policies held by the Library of the Chartered Insurance Institute in London.

<sup>51</sup> Reproduction of a transcription taken from *Mees Gedenkschrift* appendix 19. The original is in the archives of the broking firm R Mees & Zoonen, Rotterdam.

Appendix 1 Floorplan of the Amsterdam Bourse (1801)



• Leden van de Bourse



## Appendix 2 Judgment condemning insurers to pay the sum insured

*Despache, of Vonnisse, waar by de Assuradeurs gecondemneert worden bunne getekende somme te betalen, nevens a' Onkosten van de Kamer.*

**C**ommissarissen van de Kamer van Assurantie en Avaryen binnen Amsterdamb, gezien hebbende een Police, gedaan teekenen door A. hem of iemand anders aangaaude, van L. tot M. . . op 't Caske van 't Schip, genaamt &c. Schipper B. jegens &c. pr. Cto. Verzekert den &c. ter somme van . . . . . f

Mitsgaders alle de yordere geëxhibeerde munimenten, uit krachte van de welke de Geassureerde van C. over 't verzekeren van f . . . D. f &c. zyne verzekeraars in dezen voor schade eischt de somma van f . . . . volgens hare tekeninge.

Zo is 't: dat Commissarissen, partyen geciteert en gehoort, 't geproduceerde geëxamineert, en op alles ter materie dienende gelet, de voornoemde Verzekeraars gecondemneert hebben, gelyk zy condemnieren by dezen, aan de voornoemde Eischer te betalen de voorgeëischte f . . pro rato yders tekeninge; mitsgaders de Onkosten van de Kamer, hier onder gedeclareert \*.

des komt by den Eischer te † verschieten, over 't recht van de Commissarissen . . . f  
 Voor de Bode van de Kamer . . . f  
 Voor 't Zegel . . . . . f  
 Voor de Aalmoesseniers Armen . . . f

f  
 Actum by den voorn. Commissarissen,  
 den &c.

\* Zomtyds worden de Verzekeraars gecondemneert onder Eede van den Geassureerden: te weten, als 't Schip voor dato van de tekening of Verzekering, of tyd by de Ordonnantie gestelt, verongelukt of genomen is, en de Verzekeringe op goede en quade tydinge is gedaan; en dan moet 'er dit volgende bygevoegd worden: *mits dat hy (eischer) zweert, dat by ten tyde der verzekeringe geen kennisse van 's verongelukken of nemen van 's Schip gehad heeft: En, by refus van den eed, ontzeggen den Eischer zynen eisch met de kosten.*

† Werden ook de Assuradeurs wel gecondemneert hunne getekende somme te betalen, zonder de kosten, of dat van de kosten gesproken werd:

Als dan luit het Vonnis: *des komt by den Eischer te betalen, &c.*

## Appendix 3 Judgment absolving the insurer from liability

*Een ander, waar by den Verzekeraar geabsolveert word, als geen risico gelopen hebbende.*

Commissarissen van de Kamer van Assurantiën en Avaryen binnen Amsterdam, gezien hebbende een Police, gedaan tekenen door A. hem of iemand aangaande van L. tot M. en van daar wederom tot L. op goederen, geladen in 't Schip, genaamt &c. Schipper B. jegens &c. pr. Cto. verzekert den &c. Ao. &c. ter somme van f. . . .

Midsgaders al de verdere geëxhibeerde munimenten, uit krachte van dewelke de Geassureerde van C. zyne Verzekeraar in dezen voor schade eischt de somme van f. . . . volgens zyne tekeninge.

Zo is 't, Dat Commissarissen, partyen geciteert en gehoord, 't geproduceerde geëxamineert, en op alles ter materie dienende gelet, de voornoemde Verzekeraar geabsolveert hebben, gelyk zy absolveren by dezen, van den Eisch en Conclusie, hier voren jegens hem gedaan en genomen: mits dat de Verzekeraar gehouden is aan de Geassureerde te \* restitueren zyne Premie, ingevalle die by hem ontfangen is, mits daar aan kortende een half pr. Cto. voor signature.

Des komt by den Eisscher te betalen &c.

*Aktam by de voorn. Commissarissen,  
den &c. As. &c.*

\* Als de Assuradeurs geabsolveert worden uit hoofde van quade trouwe, of wanter zy risico gelopen hebben, 't zy uit een gedeelte van begonne reize, of dat tweeledig verzekert is: dat is, als by Exempel, uit de Oostzee op hier te vertrekken met Convoy uit de Zond, welk laatste den Schipper niet doet &c. dan werd niet verstaan, dat de restitutie van Premie plaats heeft.

## Appendix 4 Judgment condemning the insured to pay the premium

*Een ander wegens Premie.*

Commissarissen van de Kamer van Assurantie en Avaryen binnen Amsterdam, gezien hebbende een Reekeninge van A. waar by geëischt word van B. de somme van f . . . . voor premie van f . . a &c. pr. Cto verzekert den &c. op 't Caske van 't Schip &c. van L. na M.

Hier op de voorn. B. geciteert en gehoord, bekende de voornoemde Premie schuldig te zyn.

Zo is 't, dat Commissarissen de voornoemde B. gecondemneert hebben, gelyk zy condemneren by dezen, aan de voornoemde Eischer te betalen de voorgeëischte f . . . mitsgaders de Onkosten van de Kamer, hier onder gedeclareert.

Des komt by den Eischer te \* verschieten &c.

*Actum by de voorn. Commissarissen,  
den &c.*

\* Is het dat den Gedagden gecondemneert werd in de betalinge der Premie, zonder dat van de kosten gemeld word, zo luiden de woorden;

*Des komt by den Eischer te betalen &c.*

## Appendix 5 Judgment condemning the insured to pay the premium provisionally

*Een ander van Namptissement van Premie.*

Commissarissen van de Kamer van Assurantie en Avaryen binnen Amsterdam, gezien hebbende een Reekeninge van A. waar by geëischt werd van B. de somme van *f . . .* voor premie van *f . . .* a &c. pr. Cto. verzekert den &c. op &c. van hier tot N.

Hier op de voorn. B. tot twee verscheide malen geciteert, en egter niet gecompareert is.

Zo is 't, dat Commissarissen den voorn. B. gecondemneert hebben, gelyk zy condemnieren by dezen, ten behoeve van den voorn. Eischer, te namptiseren de voorgeëischte *f . . .*

Des komt by den Eischer te betalen &c.

Welke *f . .* de voorn. Eischer zal mogen ligten, onder Cautie *de Restituendo*, indien namaals verstaan mogte worden te behooren.

*Actum by de voorn. Commissarissen,  
den &c.*

## Appendix 6 Judgment condemning the insured to pay the premium provisionally

*Een dito van Premie, op een ander manier.*

Commissarissen van de Kamer van Assurantie en Avaryen binnen Amsterdamb, gezien hebbende een Reekeninge van A. waar by geëischt werd van B. de somme van f . . . voor Premie van f . . . a &c. pr. Cto verzeekert den &c. op 't Schip &c. Schipper C. van L. na dezer Stede.

Hier beneffens de gewoonlyke ondertekeninge van D. geswoore Makelaar dezer Stede, daar by de gedane verzekeringe, als opregt gedaan, door hem is geconfirmeert.

Hier op de voorn. B. geciteert en gehoort zynde, bekende de voorstaande geëischte Premie wel schuldig te zyn, by zo verre zyn Verzekeraar by eede wil verklaren, dat hy niet geweten heeft 't arrivement van 't voorsz. Schip van L. in deze Landen.

Zo is 't dat de Commissarissen den voorn B gecondemneert hebben, gelyk zy condemneren by dezen, aan de voorsz. Eischer te betalen de voor-geëischte f . . .

Des komt by den Eischer te betalen &c.

Des is A. Eischer gehouden met Eede te verklaren, dat hy ten tyde van zyne gedane tekeninge in 't minste geen tydinge geweten, of gehoort heeft van 't voorsz Schip, &c. daar Schipper op is C. van zyn arrivement van L. in deze Landen. En by refuus van den Eed, ontzeggen den Eischer zyn eisch.

*Actum by de voorn. Commissarissen,  
den &c.*



## Appendix 7 Judgments for the return of the premium by the insurer

*Vonnisse van Restorno.*

Commissarissen van de Kamer van Assurantie en Avaryen binnen Amsterdam, gezien hebbende een Police, gedaan tekenen door A. hem, of iemand anders aangaande, van L. tot M. op 't Caske van 't Schip genaamd &c. Schipper B. jegens &c. pr. Cto. verzekert den &c. ter somme van f... waar van de Geassureerde van C. en D. zyne Verzekeraars in dezen over 't verzekeren van f... Restorno eischt.

Hier op de voornoemde C. en D. geciteert en N. N. uyt haare name behoort.

Zo is 't dat Commissarissen de voorn. C. en D. gecondemneert hebben, gelyk zy condemnieren by dezen, aan de voornoemde Eischer te restitueren hare Premie, ingevalle die by haar ontfangen is, mits daar aan kortende een half pr Cto. voor hare signature.

Des komt by de Eischer te betalen &c.

*Actum by voorn: Commissarissen,  
den &c.*

## Appendix 8 General average adjustment

*Vonnis over Avarye groffe.*

Gezien by Commissarissen van de Kamer van Assurantie en Avaryen binnen Amsterdam, een Attestatie gepasseert voor den Notaris N. N. in dato den &c. en ten zelve dage gebracht onder 't zegel dezer Stede, daar inne op 't verzoek van Schipper A. by eede deposeren, B. Stuurman, en C. Hoogbootsman, dat zy in de voorn. bedieninge met den voorn. Schipper, en op zyn Schip, genaamd &c. van B. zyn vertrokken, en gekomen tot binnen 't Vlie, alwaar zy luiden genoodzaakt wierden, om van den ysgang bevryd te wesen, haar Schip op 't Piervelt te halen, daar zy hebben gelegen tot den &c. als wanneer zy eindelijk van daar in 't diep geraakten, deden haar devoir om haar dagelyks anker en touw (dat in zee stond) in te halen, om haar reize voort te zetten; doch konden het zelve niet machtig warden, waar door zy genoodzaakt waren, tot belte van 't schip en goederen, het tou te kappen (wezende het gekapte touw zo goed als half gesleten, en het anker omtrent acht hondert pond swaar) vervolgende toen hare reize met een extraöndinaris Lootsman, waar mede zy hare reize hebben volbracht.

Hier beneffens een Rekening by de voorn. Schipper ondertekent, vervattende alle de schaden en onkosten ter zake voorsz. gedaan en geleden, bedragende als volgt:

Aan Lootsmans geld betaalt . . .	f
Voor schade van het gekapte Touw	f
Voor 't dagelyks Anker . . . . .	f
Voor de Bocyreep en Ankerstok . . .	f
Voor extra Lootsman geld . . . . .	f
Voor de Verklaaring . . . . .	f
Voor het nalopen van deze Avarye	f

f

\* Welke schaden en onkosten de voorn. Schipper en Inlander verzochten, dat by forme

van Avarye groffe over 't Schip en ingeladen Goederen zouden mogen worden verdeelt.

Exhiberende tot dien einde verscheidene cedulen, innehoudende de qualiteit, quantiteit, en de waardye van de ingeladene Goederen, mitsgaders de estimatie van 't Schip als volgt:

N. N. diverse goederen by hem op . . .	f
en Commissarissen . . . . .	f
N. N. &c. . . . .	f
't Schip word gestelt op f . . . . .	f
En de * Vragt is . . . . .	f

f

Omme nu te komen tot het afmaken van deze voorn. Avarye Groffe, hebben Commissarissen de posten in de Rekening van de schade en onkosten geëxamineert, en daar van geaprobeert de somme van . . . . . f

Voegende hier by voor 't recht van de Commissarissen . . . . .	f
Voor de Bode van de Kamer . . . . .	f
Voor 't Zegel . . . . .	f
Voor de Aelmoesseniers Armen . . . .	f
Tot liquidatie voor den Armen . . . .	f

f

De voorn. f . . . verdeelt over f . . . bevinden Commissarissen, dat yder hondert daar inne komt te dragen f

Dien volgende condemaeren Commissarissen, dat de voorn. schade door de naargenoemde Inlanders, en den Schipper voor 't schip betaalt en voldaan zal worden als volgt:

N. N. met . . . . .	f	betaalt f
N. N. . . . .	f	. . . . . f
De Schipp. voor 't schip (of vragt) f . . . .	f	. . . . . f

f

betalen f

Actum by de voorn. Commissarissen, den &c.

\* Deze periode werd gebruikt, al is het dat d'Inlanders Schipper, of Assurateurs tegens de presente Avarye Groffe doen disputeren.

\* Commissarissen nemen de Vrachten, voor en in plaetse van het Schip f

NB. Men neemt ter Assurantie-Kamer, dat het hoogste in prys is, of Schip, of Vragt.

## Appendix 9 Notice of abandonment

*Abandonnement van verzekerde Koopmanschappen.*

A doet u B. pro rato uwe signature abandonneren de † Koopmanschappen, geladen in 't Schip, genaamt de &c. Schipper C. komende van L. na M. waar op gy aan hem verzekert hebt, vermogens de Police, alzo 't voorsz. Schip, in 't profsequeren van de voyagie, met de ingeladene goederen, is ‡ gebleven en verongelukt.

† In 't *Abandonnement van een Schip*, moet, in plaats van Koopmanschappen, gestelt worden: *het Caske of Corps van 't Schip met zyn geschat, Manitie, Gereedschappen, en aankleven van dien.*

‡ Of anders: *Van een Kaper is genomen en veroverd, en te B. opgebracht. Of aldus: Van de Turken genoom-*  
En zoo roept *mutatis mutandis.*

## Appendix 10 Deed of abandonment

*Relatie of Acte van Abandonnement van  
Schip en Goed.*

Op den &c. Ao. &c. is ten verzoeke van Sr. A. ten behoeve van de naargenoemde Verzekeraars, pro rata een yder zyne Signature, geabandonneert † de Goederen, en 't Caske, of Corpus van 't Schip, genaamd de &c. Schipper B. gaande van L. naar M. en van daar wederom tot L. waar op datzy aan hem (of haar) getekent en verzekert hebben vermogens de Police, alzo 't voorn. Schip. in 't profsequeren van de voyagie, met de ingeladene Goederen is gebleven en verongelukt: welk Abandonnement gedaán is aan N. &c. &c.

*Actum in Amsterdam, den &c.*

† Ingevalle het Schip, dat verzekert was, alleen geabandonneert is, moet'er staan: *Geäbandonners het Caske en Corpus van 't Schip*: Maar indien alleen de Goederen, die verzekert waren, geabandonneert worden: moet men stellen: *Geäbandonneerde Goederen in het Caske &c.*

## Appendix 11 Notice of cancellation of insurance to insolvent insurer

*Insinuatie, of Opzegginge van de Verzekerde  
aan des Verzekeraars Curateur.*

Op den &c. is, ten verzoeke van Sr. A. ten hui-  
ze van Sr. B. \* als Curateur over den Boedel van  
C. schriftelijk geïnfinueert, en voorts geprotesteert  
't gene volgt: &c. &c.

Alzo † Sr. C. getekent en verzekert heeft aan Sr.  
A. &c. &c. Alles vermogens de Police; en ge-  
merkt hy Geassureerde (overmits ‡ uwe insolven-  
tie) met uwe tekening en verzekering niet is ver-  
zekert, of bewaart; zo doet hy Geassureerde u  
mitsdezen § insinueren, dat hy dezelve verzekering  
aan hem behoud, en u daar van ontlast; en een an-  
der in uw plaats zal nemen; of anderszins daar inne-  
doen, zo 't hem belt geraden en goed dunken zal;  
protelterenpe derhalven tot nulliteit van dezelve  
tekening en verzekering, by u aan hem gedaan:  
en voorts van alle kolten; schaden, en Intressen, die  
hy Insinuant in tijden en wijlen daar door zoude  
komen te lyden. Actum in Amsterdam, den &c.

\* De Verzekeraar absenterende, of latiterende, en zyn  
Boedel niet aan de Desolate Goedels-kamer zynde, moet in  
plaats, als Curateur enz. gestelt worden, zyn Verzekeraar.

† In 't voorsz. geval, moet dit aldus verandert worden;  
*Alzo gy Sr. C. verzekert hebt.*

‡ In 't zelve geval, moet in plaats van de woorden;  
*overmits uwe insolventie*, gestelt werden, *overmits uw  
absenteren, of latiteren.*

§ Dese Insinuatie is te verstaan als de geheele reidse op-  
geleegt word.

## Appendix 12 Summonses in use in the Amsterdam Chamber of Insurance

De Citatien, ter Assurantie-Kamer in gebruik, zijn van de volgende inhoud.

*Citatie eens Assurateurs, gedagvaard werdende van den Geassureerden, zo wanneer die zijn stukken en bescheiden ter Assurantie-Kamer gsfourneert heeft.*

Memorie voor de Assurateurs, die verzekert hebben aan Sr. A. op 't Schip &c. Schipper B. om te visiteren de Police, en vordere Documenten ter Kamer van Assurantie, by den voorsz. Geassureerde aldaar over geleid of geëxhibeert, ten fiene dezelve Assurateurs haar consideratie en belang daar over mogen inbrengen. Sr. C. tegen morgen ten 10 uren precijs, zynde den &c. voor eisch van &c. op pene van &c. defaut.

*Citatie als de Assurateurs den Geassureerden roepen over Premie, of over Restorno.*

A. word ter Kamer van Assurantie geciteert tegen morgen ten negen uren, zijnde den &c. van wegen B. over eisch van &c.

*Citatie, wanneer een Inlader geroepen word, om te zien maken Avarye grosse, voorgevallen binnen de helfte der voyagie.*

Sr. A. word ter Kamer van Assurantie geciteert, tegens mogen ten tien unren precys, zijnde den &c. van wegen B. Schipper op 't Schip, genaamt &c. om te maken Avarye grosse, mits opstellende, en mede brengende de quantiteit, qualiteit, en regte waardye van uw goederen, zo die ter Scheppinge tot aan boord toe gekolt hebben, op pene van de &c. defaut.

*Dito, als de Inlader geroepen ward om te zien maken Avarye Grosse, voorgevallen over de helfte der voyagie.*

Sr. A. word ter Kamer van Assurantie geciteert, tegen morgen ten tien uren, zijnde den &c. van wegen B. Schipper op 't Schip genaamt &c. om te maken Avarye grosse, mits opstellende en mede brengende de quantiteit, qualiteit, stuks, gewicht, en rechte waardye van uw goederen &c. ontfangen uit de voorsz. Schipper zijn Schip, zoo die hier ter steele waardig zijn; afstreckende de Vracht, Convoy, Veilgeld, en andere kleine ongelden, specificerende in 't byzonder de waardye van yder Koopmanschappen apart, op pene van de &c. defaut.

Appendix 13 Rotterdam notarial notice of abandonment (1651)

Op huyden den 5en Junij anno 1651 hebbe ick Vitus Mustelius notaris publicy bij den Hove van Holland ge- admittiert residerende binnen Rotterdam mij ten versoucke van Sr. Isaacq Pauwels coopman alhier getransporteert ter woonplaets van Srs. Isaacq van Buiren en Pieter Bisschop coopluijden in compagne bij den anderen wonende binnen deser stede voornoemt ende mits denselven Sr. van Buiren niet thuis was hebbe ick notaris van wegen als boven Sr. Pieter Bisschop voornoemt geinsinueert en aengedient dat den insinuant mits desen verclaert absolutelijcken te abandonneren het schip genaemt Ste. Pieter daer schipper op was Pieter Jacobsz Nanninghs pro rato off voor soo veel de geinsinueerde en compagne hem insinuant dacrop hebben geassureert over de voyagie van Hennebon in Bretangie tot Havel de Grace volgens de police daervan zijnde dato den 24ten Martij lestleden, waerop den geinsinueerde mij notario tot antwoord gaff  
 t is wel ick neme het abandonnement aen.  
 Aldus gedaen en geinsinueert bij mij notaris voornoemt ten dage, maende ende jare als boven.

(Get.) V. MUSTELIUS  
 Nots. pub.  
 1651 5-6

Op huyden den 5en Juny anno 1651 hebbe ick Vitus Mustelius notaris publicy bij den Hove van Holland ge- admittiert residerende binnen Rotterdam mij ten versoucke van Sr. Isaacq Pauwels coopman alhier getransporteert ter woonplaets van Srs. Isaacq van Buiren en Pieter Bisschop coopluijden in compagne bij den anderen wonende binnen deser stede voornoemt ende mits denselven Sr. van Buiren niet thuis was hebbe ick notaris van wegen als boven Sr. Pieter Bisschop voornoemt geinsinueert en aengedient dat den insinuant mits desen verclaert absolutelijcken te abandonneren het schip genaemt Ste. Pieter daer schipper op was Pieter Jacobsz Nanninghs pro rato off voor soo veel

de geinsinueerde en compagne hem insinuant dacrop hebben geassureert over de voyagie van Hennebon in Bretangie tot Havel de Grace volgens de police daervan zijnde dato den 24ten Martij lestleden, waerop den geinsinueerde mij notario tot antwoord gaff  
 t is wel ick neme het abandonnement aen.  
 Aldus gedaen en geinsinueert bij mij notaris voornoemt ten dage, maende ende jare als boven.

(Get.) V. MUSTELIUS  
 Nots. pub.  
 1651 5-6

## Appendix 14 Accord of Rotterdam underwriters of 1719

Op huyden den 22 February 1719, hebben de ondergeschreeven Kooplieden, en te gelyk Assurateurs, met den anderen, ten gemeenen nutte goedgevonden en beslooten, als volgt: en wel

**E**rstelyk: Geen verzeekering te zullen doen, of Policen te tekenen, by welke diverse premien werden geconditioneert, als met het ontfangen der hoogste Cours in de respectieve Policen bedongen, en zulks by de onderteekening uyt te drukken, zonder te können volstaen met de simpele expressie van de Præmie ontfangen of voldaan.

Ten Tweeden: Dat in de Policen, alwaer het plaets kan hebben, zal moeten werden gestelt, vry van Legdagen, en Avarye, en schade onder drie ten honderd; doch als de risico werd geloopen op Wolle, Hennip, en Vlas, in plaets van drie ten honderd, vry van beschadigtheyd niet te bovengaende tien ten honderd.

Ten Derden: Zal menst voor alle Reyzen, die niet reël heen en weder werden verzeekert, niet meerder als een enkelde Courtage aen de Makelaers vermóogen te voldoen, alwaer het dat 'er tweederley, of meerder Premien in de Policen stonden uytgedrukt, als by voorbeeld, van St. Ubes hier a 4 percento, en van hier voort zeylende 6 1/2 percento: Ja zelfs al waeren 'er noch soo veel conditien van aenzeylingen, Verzeylingen, en aenloopingen, en onderscheyd van Premien, wanneer zulks geen reële heen en weer Voyages zyn, mits dat een ieder zig in Cas van Calange zelf zal moeten purgeren of hy zulks gedaen heeft of niet.

Ten Vierden: Verbinden wy ons voortaan geen Policen te zullen tekenen van Voyages heen en weer, of wel met onderscheydene Premien, als daer voor ontfangende de geheele Premie, so wel voor de uyt, t'huys, als tusschen-reys, exempt Groenland alleen daer niet onder begreepen.

Ten Vyften: Dat wy alle Scheepen van Hamburg na Spanjen of Portugal gaende, tot het Nacuw van de Straet incluyt, niet minder zullen tekenen als 4 percento, t'zy komende of gaende.

Ten Sefden: Verbinden Wy ons met de Makelaers ofte die met Policen omgaen van drie Maenden tot drie Maenden af te rekenen, en in de vierde Maend reël van haer voldaan en betaelt te zyn, belovende Wy als Luyden van Eere by faute van dien niet weder aen haer te zullen verzeekeren tot de tyd dat zy het zelve nagekomen hebben, begin genoomen hebbende Primo January deezes Jaers.

En Eyndelyk: Geen Conditien of Clausulen te mogen onderteekenen, waer door een of meer der voorgemelde punten kragteloos zouden können werden gemackt, belovende wyders den anderen onderling, al het hier ter needer gestelde te zullen nakomen, en gestand te doen, of by contraventie van het een of het ander, voor ieder reyze als zulks komt te gebeuren, ten gemeene voordeele, te zullen opschieten een somma van tien guldens, gelyk wy alle en een ieder in het byzonder aenneemen en promitteren, so wanneer ons een of meer gepleegde mislagen, door dees of geene, in een der boven aengeroerde Condiuen begaen, mogten ter kennisse komen, daer van aenstonds, zonder eenige versooning of dissimulatie, notificatie te geeven aen den Heer PHILIPPUS SERRURIER, die by dezen geauthoriseert werd tot den ontfang der verbeurde gelden, en zal in dezen geen exceptie of voorwendinge van Error, plaets hebben, also wy ondergeteekende daer van wel expresselyk renuncieren, en beloven, drie dagen na onze gedanc misgreepen, t'elkens onze verbeurde boetens aen welgemelde Heer te zullen opschieten, of by nalatigheyd van dien, in plaets van tien guldens, ieder reyze te zullen verbeuren vyf en twintig guldens. En in cas (buyten vermoeden) eenige verschillen, deezen aengaende, mogren ontstaan, so werden tot besliffinge derzelven by deezen geauthoriseert, de Heeren GEORGE BRUYN, HENRIK VERRYN, WILLEM VAN LAER, en NICOLAUS BLAAUFOT, aen welkers decisie en uytbrack wy ondergeschreeven, als luyden van eeren, zonder eenige exceptie, ons zelfs beloven te onderwerpen; zullende van de verbeurde gelden by meerderheyd van stemmen gecomponeert werden; en al het voor en omme staende zyn begin neemen van primo Maert af, en provisioneel gecontinueert werden tot primo Maert 1720. Aldus gedaen binnen Amsteldam, in dato als boven.



Appendix 15 Underwriting register of the Rotterdam Insurance Company of 1720

1720		Rotterdam	
2. Kezems.			
de volgende aan Assurantie op goederen & scheepen			
1795.10. - voor de reizen van n. 948/50. - verzekerde de reizen van de in de Assurantie boek 573/2. Gedee id o'ykende de meeren.			
1	Janicl. O'v'ert. Maackel	voor 5 Pr. Premie van	237 10
	4750. - op goederen in 2 scheepen van adijp naar La Vera Cruz		
3	Coriel. de Vrijs. & Mees	premio van	27600. -
	6250. - op goederen in 5 scheepen, verzekerde aan Mesehior de Bruijscheu & 50 lb. Tran adijp. Verp. Cruz, te. . . 1812.10.		
	9250. - op goederen in 4 sch. als vroer, aan Jan. & J. Slom. . . 462.10.		
	2400. - 23 1/2 Pr. op 7 Pr. mede van me. te samen 16 1/2 op goederen in 10 sch. van adijp naar de Archipel. . . 220.10.		1495 10
4	Jacob. Beverman!	voor 2 1/2 Pr. Premie van	62 10
	2500. - op Indies schepen. . .		
3 Kezems.			
de volgende aan Assurantie op goederen & scheepen			
voor de reizen van n. 13500. - verzekerde de reizen van de in de Assurantie boek 573 & 2 id o'ykende, te meeren!			
4	Jacob. Beverman!	voor 1 1/2 Pr. Premie van	31 5
	2500. - op granen in Thom. Land, aan Jan. & J. Slom. . .		
5	Coriel. de Vrijs. & Mees	voor 2 Pr. Premie van	20
	1000. - op Brand. Ind. van n. 1000, schip. . .		
6	Gabriel. Coville!	voor Premie van	16 15
	400. - 1 1/2 Pr. op Ind. van n. 1000, schip. . .		
	300. - 23 1/2 Pr. op Ind. van n. 1000, schip. . .		
3	Coriel. de Vrijs. & Mees	voor Premie van	113 5
	6900. - 1 1/2 Pr. op 6 sch. van n. 1000, schip. . .		
	1200. - 1 1/2 Pr. op Ind. van n. 1000, schip. . .		
	1200. - 1 1/2 Pr. op Ind. van n. 1000, schip. . .		
3 Kezems.			
de volgende aan Assurantie op Ind. van n. 110. - verzekerde de reizen van de in de Assurantie boek 573, te meeren			
3	Coriel. de Vrijs. & Mees	voor 1 Pr. Premie van	50
	2500. - op den schip. . .		
	2500. - op den schip. . .		
	5000. - 1 Pr. . .		
6	Gabriel. Coville!	voor 3 Pr. Premie van	60
	1000. - op Ind. van n. 1000, schip. . .		
	1000. - op Ind. van n. 1000, schip. . .		
4 Kezems.			
Coriel. de Vrijs. & Mees aan Assur. op Ind. van n. 10000. - verzekerde de reizen van de in de Assurantie boek 573, te meeren			
3	Coriel. de Vrijs. & Mees	voor 3 Pr. Premie van	300
	6000. - op Ind. van n. 10000, schip. . .		
	4000. - op Ind. van n. 10000, schip. . .		
	10000. - 3 Pr. van hier naar Ind. van n. 10000, schip. . .		
5 Kezems.			
Coriel. de Vrijs. & Mees aan Assur. op Ind. van n. 428. - verzekerde de reizen van de in de Assurantie boek 573, te meeren			
3	Coriel. de Vrijs. & Mees	voor 3 Pr. Premie van	428
	6000. - op Ind. van n. 428, schip. . .		
	10000. - 3 Pr. op Ind. van n. 428, schip. . .		
	400. - 2 Pr. op Ind. van n. 428, schip. . .		

## Appendix 16 Agreement of Amsterdam underwriters and brokers on commission of 1746

T. 11. 40

Wij Onderget-kooplieden A. Kienradeus, Verklaaren nield oeten,  
 dat de Constatie van A. Kienradie (Welleke volgen Prachtijk  
 Van Veelen Jaaren alleen door de A. Kienradie) Wordt betaalt  
 Voor yder Voyagie 1/2, Ein Vierde per cento, en dat voor a. f. m. a. l. i. n. g.  
 Van alle Schaadten en Avarijen door de Gea. Kienradie voor  
 Constatie twee Ein Vierde per cento Wordt betaald  
 Gevende voor weder Van Weetenschap Duly magelyk  
 Van ons Wordt gepraktiseert, actum Amsterdam april 1746

Waar Getekent

W. Van Keerlattel Jonge	Georg. Cliffoorderson
Reley Hooren	Andrius Selz & bonon
M. B. de Kler	Wilhem Jan Willink
Jacob A. de Wijn Gijzen	J. C. de V. van der Boorden
Jacob Trauyt	Henrich de W. van der Boorden
David & Andrius van Gent	de W. van der Boorden
Philip. defflines	Jochim. Wietman
Abelver & G. m. f.	Genelid. de W. van der Boorden
Genelid. de W. van der Boorden	Stad. raad
Jan Van Eijck	J. V. de W. van der Boorden
Jan Van Vollenhoven	Ed. P. Vogel
H. B. laeijpot	
J. Van Jever	

- N<sup>o</sup> 38 Kennip, Leu; Pils Ex—  
 Cornelij Vanderbürg  
 Matthijs Ijkingh
- 
- N<sup>o</sup> 39 Liex Gaasen  
 Daniel de Kuelley-Zoon
- 
- N<sup>o</sup> 40. Alkmaar  
 David Schobinger  
 Abraham Byng  
 Diak Oram  
 Andrius vanden ende,  
 Willem Van Steijningen
- 
- N<sup>o</sup> 41 Guayanae, Suriname, & Essequip, St. Thomas Ex—  
 Jan de Jongh  
 Jacob de Gaze  
 Joseph de Lima
- 
- N<sup>o</sup> 42 Engeltche Manijfactuur Ex—  
 Raath Cornij Sijghenroest—  
 Willem de Vries
- 
- N<sup>o</sup> 43 Stabats  
 Cornelis Sloof  
 Hendrik vanden Hoogen  
 Kijlaas Ent  
 Willem Schelk ...
- 
- N<sup>o</sup> 44 Neurenburger Waaren  
 Anthony Craickaan Muller  
 Johannes Gommene

## Appendix 17 Antwerp hull policy of 1531

In Gades namen, Amen. Wy Koeplude, Assurors, hyr undergeschréven, bekennen unde bestan, dórch desse yegenwardyge schrift, dat wy entfangen hebben so véle geldes unde gudes van Godschalck Remlynckraden, Kopman yn Oestlant, dar vór wy ém assureren efft vorwissen de Summe van gelde hyr under geschréven mit unsen egenen handen, up de gúder kopenß unde Schip, genómet de Swaen, mit aller tobehóringe und geschütte, bynnen unde buten, nictes uthgeslaten, dem genomden Godschalck offte yemande anders tobehórende, ydt sy denne watterleye wár effte gúder ydt syn, dórch ém effte eynen anderen up dat vórgeschreven Schip (nu tho Lübeck yn Ostlandt vorschreúven lyggende) geschépet, up welckére Schip Mathias Kuntze van Lubeck effte eyn ander de Schipper ys, van der tydt an, dat dyt Schyp mit den vórgeschreúven gúdern und kopenschop begúnt afftholopende, effte aflopt uth der Haven van Lübeck, und yn de Haven tho Armúye yn Zelandt gekamen ys. So neme wy up uns de móye, last, sorge und éventúr dússes vórgeschreven Schepes unde gúder, beth tho der vórgeschreven Haven tho Armúye, dar van wy ydt éventúr stan so wol der See, des waters, alse des Fúrs, Frúnde, Vyende, breve edder breuen, van kopenschop unde mercken, ock van aller thosage Keyßer, Koningen, Princen unde heren, Ock vor gewalt unde deverie edder súß yenniges schaden unde ynvalß halven, Welck men bedencken unde nicht bedencken kan unde mach, dat dem Schépe unde gúdern mach schédelick syn und tokamen, nictes buten bescheden, beth so lange, dat dyt vórgeschreven Schip mit den gúdern yn de vórgeschreven have gekamen ys, dar vor dem Ancker licht, unde de vórgeschreven kopenschop unde gúder up geschepet unde an landt gebracht unde altosamende yn gudem beholde geborgen sin, unde ym valle, dat ydt sick na dem willen Gades begeve (welck nicht geschen móte), dat hyr yennich gebreck ynvelle, anders dan gudt, So belaven, obligeren unde vorbynden wy uns deme vórgeschreven Gotschalcke, effte brynger dússer yégenwardigen Zedulen, effte lave Zedulen, erliken unde vullenkameliken, bynnen twe Mánte dar na (alß uns effte den unßen súlckens vorwytliket ys) wol tho betalen, So véle unde all dat wy mit unßen egen handen hyr under geschréven unde vorwilkórt hebben, sínder alle wedderseggent, uprúckelse edder vortoch. Dem geliken gelaven unde vorbynden wy uns ock, all den schaden, de uns móchte tokamen effte dar van entstan, ock wol tho betalen.

Unde ym valle, dat me warhafftige tydinge erfórc, eyn Yar na der tydt, alß dyt vórgeschreven Schip van Lübeck gelopen ys, unde véllichte yn eyne ander Haven gekamen, unde súst mit den gúderen noch geborgen weer, so schal Godtschalck unde de synen gehalten syn, uns wedderúmme tho geven, wes se van uns entfangen hebben, und dat na dem Seerechte, Usantie unde Costume der Stadt Lunden yn Engelandt. Nichte myn so consenteren unde beleven wy, yn dem vórgeschreven valle, dat Godtschalck effte eyn ander van synent wégen de handt up sodane Schip unde gúder mach leggen, unde de antasten, yne unse vorlóff unde consent, unde se bryngen yn de vórgeschreven Haven, ydoch up unse unkost unde térynge der assurantien unschédelick, so dat de gelikewol blyve yn érer vullenkamen macht, uns vorbyndende mit lyve unde gude, yégenwardich unde tokamende, Renunciierende und vorsakende alle behelpe unde exemptien der Rechte, der dádt, unde alle des yennen, dat uns móchte hyr entyégen behúlplick unde báthlick syn, sínder alle bedroch, argelyst unde quade fúnde.

Thor túchnisse der warheyt hebbe wy dysse tosage unde belevinge laten schriven dórch eynen andern, yn súlcker krafft, so alße offte se eyn yder van

uns mit syner egen handt sülven geschreuen hadde, ock thor tydt, dat eyn yder mit syner egen handt hyr under geschreven hefft, unde up de sülvesten tydt gegeven tho Antwerpen, XIII. Julij. Yn dem yare unde geborth unses Heren, vörgeschreven 1531. Godt de Here wylt ynt ende wol bewaren, aldúß under geschreven,

Jhesus, Wy Paschael Pawel de Negro unde de geselschop, synt tho fréden, oor Vófftich Pundt grote Flamsz, hüten am XXVIII. dage Juli 1531 tho Antwerpe, Godt wylt bewaren.

Ick Jürgen van Barros segge, dat ick tho fréden byn, de vaer und éventúr tho stande up dat Schip, welck Godt beware, de Summa van Vertich pundt grote, am XXVIII. Julij MDXXXI. Ick segge ydt Schip unde gudt, darynne befrachtet.

Ick Juergen Lopes segge, dat ick tho freeden byn, vnde de vaer ydt eeventuer tho staende, van xvy. Pundt grote Flaemaz, vp dat voergeschreuen Schyp vnde gueder dar yne geladen, alle tohoerend dem voergeschreuen Godtschalecke, welck Godt behoede, den XXVII. July. Anno M.D.XXXI.

Ick Ruys Fernandes segge, dat ick tho freede byn yn dyt Schyp, welck Godt behoede, vor de Summa van Voefflich Pundt Flamsz, tho Antwerpe, am XXVIII. July. Anno M.D.XXXI.

Ick Johan Symon byn tho freede, ynt voergeschreuen Schyp, welck Godt beware, vor Vófftich Pundt grote Flamsz, Ick segge Vófftich pundt, geschen tho Antwerpe, am XXVIII. July. Yn yare M.D.XXXI.

Wy Bernhardinus cenani, Johan Balhani vnde vuse geselschop, syn tho freede van dysser vorwysunge, vor de Summa van Vófftich Pundt grote Flamsz, Des xxvij July. Anno M.D.XXXI. Tho Antwerpe, Godt wylt bewaren.

Wy Franciscus vnde Steffen Bourlamachij, vnde vuse geselschop, syn tho freede mit dysser assurantien, vor de Summa van Hundert Pundt grote Flamsz, des xxix. July. Anno M.D.XXXI. Tho Antwerpe, Welck Godt bescherme.

Wy Jaspas Ducey, vnde vuse geselschop, vorwysen tho Hundert Pundt grote Flamsz, halff vor my vnde de geselschop, vnde halff vor Hinrick van Reesz, des xxix. July. Anno M.D.XXXI. Welck Godt beware.

Ick Johan Carli Delhaffaitadi, byn tho freede, mit duesser Vorwysunge, vor de Summa van twe Hundert Pundt grote Flamsz, Hueten am lesten dage July. Anno M.D.XXXI. Tho Antwerpe, Godt wylt bewaren.

Wy Bonaventura Michelsz, Jeronimus Arnolpini vnde vuse geselschop, syn tho freede mit duesser vorwysunge, vor de Summa van Tachtich Pundt grote Flamsz Des xxx. July. Anno M.D.XXXI. Tho Antwerpe.

Ick Jeronimus Spinula q. d. Steffani, byn tho freede, des yennen dat voergeschreuen ys, angaende de Summa van Voeffteyn Pundt grote Flamsz, Hueten am andern dage Augusti. Anno M.D.XXXI. Tho Antwerpe. Godt wylt auer all bewaren.

Ick Seboll Kueneyzel, yinne namen Johans vnde Jacobs Welzer, byn tho freede, van dysser voergeschreuen vorwysunge, mit Doertich

Pundt grote Flamsz, Amme druedden Augusti. Anno M.D.XXXI. Tho Antwerpe. Godt wylt ydt tho der beholdy(nge voeren?).

Wy Franciscus de Grimaldi vnde Augustin de Aurea, syn tho freede, dyss(e voerschreuen) angandes, De Summa van Voefflich Pundt grote Flamsz, Hueten amme druedden Augusti. Anno M.D.XXXI. Tho Antwerpe. Godt wylt all (bew)aren.

Wy Symon Pecory, vnde de geselschop, syn tho freede vor de Summa, van Hundert Pundt grote Flamsz, Amme IIII. Augusti. Anno M.D.XXXI. tho Antwerpe.

Ick Fernandus Daza, byn tho freede yn dyt Schyp, welck Godt behoede, vor de Summa van Voefflich Pundt grote, tho Antwerpe IIII. Augusti. Anno M.D.XXXI.

Ick Symon spinula q. d. Benedicti, byn tho freede des voergeschreuen, angaende de Summa van 18. Pundt grote Flamsz. IIII. Augusti. Anno M.D.XXXI. Tho Antwerpe. Godt wylt ydt bewaren.

Wy Arnolt de Plano vnde Johan Sadorine, syn up gewisse reekenschop apenbar tho freede, vp dyt Schyp tho 20. Pundt grote. Des IX. Augusti. Anno M.D.XXXI.

Ick Diego de sancto Dominico, byn tho freede yn dysser Schepe, tho Voefflich Pundt grote Flamsz. amme V. Augusti. Anno M.D.XXXI. Tho Antwerpe.

Ick Johan Baptista Gwyccardini, byn tho freede, yn de voerschreuen Assurantie, vor de Summa van Voefflich Pundt grote Flamsz, des V. Augusti. Anno M.D.XXXI. Tho Antwerpe, Welck Godt aeral bescherme.

Wy Johan Paulet vnde Johan Decolodi, syn yn dysser Assurantie tho freede, vor de Summa van XXX. Pundt grote Flamsz, Welck Godt beware, am V. Augusti, Anno M.D.XXXI. Tho Antwerpe.

Ick Alonso de sancto Victore maluenda, byn tho freede ynt voergeschreue Schip, welck Godt behoede, vor Hundert vnde Voefflich Pundt grote Flamsz, tho Antwerpe des V. Augusti. Anno M.D.XXXI.

Ick de voergeschreuen alonse de sancto Victore maluenda, byn tho freede ynt voergeschreue Schip, noch vor X. punt grote, vp de reekenschop Juliani de medina to antwerpe. V. Austi.

Ick Gregorius Cattaneus, byn tho freede, vor achliendoertich Pundt grote Flamsz.

Ick Frederick de Muijn, byn tho freede mit duesser yegenwardigen vorwysunge vor Voeffteyn Pundt grote Flamsz, des 17. Augusti

Anno 1531. Tho Antwerpe. Godt late ydt kamen, yn beholdene hende.

Ick Alonse Fernandes de spinosa, byn tho freede yn dyt Schip, welck Godt beware, vor Voeffteyn Pundt grote, Tho Antwerpe. VII. Augusti. Anno M.D.XXXI.

Ick Andreas Mauriques byn tho frede yn dyssem schepe, welck Godt behoede, vor Twyntich Pundt grote Flamsz, amme VII Augusti Anno M.D.XXXI.

Ick Aluarus de Maluenda, byn tho frede yn dyt schyp. Welck Godt bescherimen moete, vor Hundert Pundt grote Flamsz. amme 14. Augusti. Anno 1531.

Ick Franciscus de Gaona, byn tho freede vp dyssem Schepe, Welck Godt behoeden moete, vor Doertich Pundt grote Flaemsz. amme 14. Augusti. Anno M.D.XXXI.

Ick Jeronimus de Carion, byn tho freede yn dyssem Schepe, Welck Godt behoede, vor Vyff vnde tachtentich Pundt grote. Tho Bruegge, amme 14. Augusti. Anno 1531.

Ick Johan de Mendieta, byn tho frede yn dyssem Schepe, Welck Godt behoeden moete, vor Voeffteyn Pundt grote. amme 14. August Anno M.D.XXXI.

Ick Fernandus de Mogica, byn tho frede yn dyssem Schepe, Welck Godt beware, vor Voefftich Pundt grote. amme 14. Augusti. Anno M.D.XXXI.

Ick Peter de Marquina, ymme namen myns Mesters hier Jolian de Paredes byn tho frede yn dyssem schepe, welck Godt bescherime, vor xxv. pundt grote. 14. August. 1531.

Ick Franciscus de Sisucros, byn tho freede vor Teyn Pundt grote, yn dyssem schepe, Hueten 14. Augusti. Anno M.D.XXXI.

Ick Alonseus de Ona, byn tho frede, in dyssem schepe, Welck Godt salueren wil, vor x. Pundt grote, de Franciscus de Rio, vnde ick lopen 14. Augusti. Anno 1531.

Ick Diego de sancto Dominico, byn tho frede yn dyssem Schepe, Welck vnse Here bescherimen wil, Voefftyn Pundt grote. Tho Bruegge. des 14. Augusti. Anno 1531.

Ick Diego Ortega van Bourgos, byn tho frede, yn dyssem Scheepe, Welck vnse Here beware, vor Twyntich Pundt grote Des 14. Augusti. Anno M.D.XXXI.

Ick Marten de salinas retes, byn tho frede yn dyssem Scheepe, Welck Godt bewar, vor Voeffteyn Pundt grote. Tho Bruegge, amme 14. Augusti. Anno M.D.XXXI.

Ick Diego de auila, byn tho frede yn dyssem Schepe, Welck Godt bewar, vor Voeffteyn Pundt grote Flamsz. Tho Bruegge, des 14. Augusti. Anno 1531.

Ick Lodewych de Cuellar, byn tho freede yn dyssem Schepe, welck Godt bewar, vor Teyn Pundt grote. Amme 14. Augusti. Anno M.D.XXXI.

Ick Franciscus de la terre, byn tho vrede yn dyssem schepe, Welck Godt bescherime, vor Voeffteyn Pundt grote, des 14. Augusti. Anno M.D.XXXI.

Ick Gregorius de sancto Vincente, byn tho vrede yn dyssem schepe, Welck vnse Here salueren wyl, vor Teyn Pundt grote, de Vyue vor Laurens de spinosa, vnde de andern Vyue vor my. Des 14. Augusti. Anno M.D.XXXI.

Ick Anthonius de Cuellar, byn tho vrede yn dyssem Schepe, Welck Godt bescherime, vor Teyn Pundt grote. Des 14. Augusti. Anno M.D.XXXI.

Ick Marten sans de Thona, byn tho vrede yn dyssem Schepe, Welck Godt behoeden moete, vor Vyff vnde twyntich Pundt grote, amme 14. Augusti. Anno 1531.

Ick Johan de Castro, byn tho vrede yn dyssem schepe, Welck Godt bewaren wy, vor XXV. Pundt grote, Tho Bruegge amme 14. Augusti. Anno M.D.XXXI.

Appendix 18 Cargo policy in the *placcaat* of 1563 (English translation)

NICOLAS VAN EEMEREN, dwelling in *Antwerp*, causes himself to be insured, according to the Usage and Custom of the Exchange at *Antwerp*, and the Ordinance of the King's Majesty, upon Merchandize or Goods shipped or to be shipped by him, or others for him and in his Name, upon the Ship called the *St. Jacob*, whereof *Pieter Heerinck*, of *Amsterdam*, is Master, or any other, from the Port, Harbour, or Road of *Sevill*, till and unto the afore'said City of *Antwerp*, against all Risks, Dangers, or Accidents, that may happen; which shall run at the Risk of the Assurers here underwritten, from the Hour and Date that the said Goods and Merchandize shall be brought to the abovementioned Port, Harbour, or Road, in order to be shipped on board the said Vessel, or to put them into Boats, Lighters, or Hoys, to be carried to this Ship, and be laden on board of the same, to make the Voyage aforesaid. And this abovementioned Assurance is to continue until the said Goods shall be arrived at *Antwerp*, and be there brought ashore in good Condition, without any Loss or Damage: and it is agreed that the last as well as the first Underwriters shall take Part in this Assurance, and that the said Ship may sail backwards or forwards, to the right or left hand, and on every Side, and to steer any Course or Degree, and there to abide and remain, whether by Force, Necessity, or Choice, as the Commander of the said Ship shall think proper. And the said Assurers insure the Assured from the Sea, Fire, Winds, Friends, Enemies, Letters of Marque, and Counter-marque, from Arrests and Detainments of Kings, Princes, and Lords, whoever they be, and from all Perils and Accidents whatever that may happen, let it be in what Manner it will, or one could imagine it might be, and they insure the Assured from every Thing, and put themselves in his Place, to secure him from all Loss and Damage; and in Case any Misfortune should befall the said Goods or Merchandize (which God prevent) the said Assurers oblige themselves to pay to the said Assured, or the Bearer of these Presents, the full Sum which every one has underwrote, or the Loss which the said Assured may have suffered, each in Proportion to their Obligation, within two Months next ensuing, after they shall be duly advertised of the Loss and Damage. And in Case of such unfortunate Accident as aforesaid, the Assurers beforementioned have given and do give to the said *Nicolas van Eemeren*, the Assured and his Agents, Power to use the necessary Means for preserving the said Goods and Merchandize, for the Benefit or Loss of the said Assurers, promising to pay all the Charges that shall accrue for the Preservation thereof, whether any thing be recovered or not, and to give entire Credit to the Accounts of such Charges, as made up by the Persons who disbursed them, and made Oath to them. And the said Assurers acknowledge to have been paid for the Consideration and Price of this Assurance, by the Hands of *John Enriques*, at the Rate of Seven per Cent. and the said Assurers agree and consent, that this Policy of Assurance shall be of as much Force as if the same had been made or passed before any Magistrate, Publick Notary, or otherwise; all without Fraud or Deceit.

San 7 de 11 de dit 1592 may... van de dode dinnuy... San 7 de 11 de dit 1592 may... van de dode dinnuy...

Wij gelyckelijc te liden... Wij gelyckelijc te liden... Wij gelyckelijc te liden... Wij gelyckelijc te liden... Wij gelyckelijc te liden...

- 1200 - Jan Isaac... 
150 - ... 
100 - ...



Hans de Weertt, coopman, residerende binnen deser stede van Amstelredam, doett hem versekeren volghende d'usantiën ende coustumen van der straten van Lonnen ende der borsen van Antwerpen, te weten op ghoede ende quade tydinghe ende datt op alsulcken rogghe als hier by hem ofte yemandt anders gheladen is, toecomende den vors. Hans de Weertt ofte yemandt anders, in een schip ofte boott, datt Godt beware, ghenaeamt den Zeehondt, groot ontrent hondertt last, daer schipper op is eenen Piter Pitzsz. van Monnickendam ofte yemandt anders, zoo wie daer vor schipper ofte schippers souden moghen varen, uytgheseyldt. weseude uyt Zeelant naer Genua ofte Liorno.

Welcke voorsz. resycque, pericule ende avontuere wy, onderges. verseeckeraers, hebben ghenomen ende nemen midts desen tot onsen laste te loopen van der eerster uyr ende dach aff dat de voorsz. coopmanschappen sijn ofte sullen gescheyden wesen uyt handen van u, *Hans de Wertt*, oft uwen commis, om met schuyten, schepen ofte lichters geconduceert ende gevoert te werden aen het boort van 't voorsz. schip ende daerin geladen sullen sijn.

Ende sal ghedueren ter tijt toe de voorschreven goeden sonder eenighe schaede ofte verlies aenghecomen sullen wesen ter plaetsen voornoemt, ende aldaer op 't landt vredelycken ende vryelycken ontladen in 't vermoghen van u, *Hans de Weertt* voorsz. ofte yemandt anders, commissie daervan hebbende. Ende zijn tevreden, dat in dese verseeckerighe participere ende deelachtich sy soowel d'eerste als de laetste verseeckeraer pro rata eens yegelijck onderteyckeninghe: sullende 't voorsz. schip moghen vaeren voorwaerts, achterwaerts, wenden ende keeren ter rechter, ter sijncker ende aen allen zyden ende door noot ofte met wille aennemen hoedanighe havens ende reën als den schipper oft schipperen believen sal. Maer oft door noot ofte met wille de voorsz. goeden ontladen werden ende herladen in eenige andere schip oft schepen, cleyn ofte groot, 't selve sy doen sullen moghen uyt haer selfs autoriteyt sonder ons consent ofte toedracht te verwachten. Ende sullen loopen de voorsz. resycke ende avontuere als oft die voorsz. goeden noyt ontladen en waren geweest, u oock verseeckerende van der zee, onweder, vier ende windt, voor vrienden, vyanden, van arresten ende detentiën van coninghen, coninginnen, princen, heeren ende ghemeenten, van brieven van marquen ende contremarquen, schemerye ende onachtsaemheyte van schippers, bootgesellen ende alle andere periculen ende avontueren, die de voorsz. goeden eenichsins souden moghen aencomen, bedacht ofte onbedacht, gheenen uytghesondert. Wy verseeckeren u van alles ende stellen ons in u plaetse om u te guarenteren van allen verlies ende schade, ende

de voorsz. goeden yet anders overcommende, als wel ('t welck Godt verhoeden wil) verbinden wy ons by desen te betalen allen 'tghene dat een yegelijck van ons onderteyckent sal hebben, binnen twee eerstvolgende maenden, naerdatt wy behoorlycken gheadverteert sullen sijn van 't verlies ofte schade. Ende in alsulcke geval geven wy u, *Hans de Weertt*, ende allen anderen volcomen macht by desen die hant te mogen reycken in 't salveren van de voorsz. goeden ende deselfde te vercoopen ende distribueren, indien 't van noode is, sonder ons consent ofte oorloff te vraghen. Ende sullen betaelen 't principael ende d'oncosten, die daeromme gedaen sullen wesen, 'tsy datter yes gesalveert wert oft niet. Ende op d'oncosten van dien sal men ghelooff gheven denghenen, die dit sal ghedaen hebben op synen eedt, sonder yet daerjghens te segghen, wel verstaende soo eenighe questie ter sake van desen soude moghen comen, sijn partyen hinc inde tevreden deselfde te submitteren aen ghoede mannen, hen dies verstaende. Ende houden ons betaelt te wesen van den prijs deser assuerantie by handen van *Bertholomeus Jacquesz.* jeghens zesthien ten hondert. Ende omme alle prolixiteyt t'eviteren, wy mainteneren dese politie van assuerantie van alsoo grooter waerden als oft daerinne gheinceereert waren alle die clausulen, die men soude moghen ymagineren t'uwen profyte ende tot onsen schade ofte nadeel, ende oft dit ghemaect ende ghepasseert ware voor schepenen ende openbaer notarissen. Aldus ghedaen binnen deser vorsz. stede van *Amsterdam* desen 20 *Januarius* anno 1592.

£ 200.— *Ich, Isaac le Maire, ben tevreden in dese assureantie, die Godt bewaere, voor de somme van tweehondert <sup>1)</sup> ponden Vlams, te wetten hondert vijftich ponden voor mijn rekeninge ende vijftich pondt voor rekeninge van F. v. P., desen 20en Januario 1592 in Amsterdam. —*

£ 150.— *Ich, Reynier de Loeker & Compangie, ben tevreden in deese assureantie, die Godt beware, voor de somme van een hondert ende vijftich ponden Vlams. Actum den 21 Januario a<sup>o</sup>. 1592 Amsterdam.*

£ 100.— *Ich, Emert Pellicorne, ben tevrede in dese assureantie, die Godt beware, de somme van honder pont Vl. 1592, den 20 Gennaio in Amsterdam. —*

\* \* \*

Appendix 20 Amsterdam cargo policy of 1644

Wij onderprijven hiermee te verlijken ons in verlijken, onoverlijken met de hande...
Wij onderprijven hiermee te verlijken ons in verlijken, onoverlijken met de hande...
Wij onderprijven hiermee te verlijken ons in verlijken, onoverlijken met de hande...

Wat van wy de Restique, prijckel ende vromeren min desen te enen lisse nemen te loopen, van der vyve ende dach of dat de voorschree Coorpmischapen, by s oft
vromeren min desen te enen lisse nemen te loopen, van der vyve ende dach of dat de voorschree Coorpmischapen, by s oft
vromeren min desen te enen lisse nemen te loopen, van der vyve ende dach of dat de voorschree Coorpmischapen, by s oft



(Dit Policie worden verlijkt by Y...
Lijst van alle...
Over...

Handwritten signatures and dates at the bottom of the document, including names like 'L. van...' and dates like '1644'.

Appendix 21 Amsterdam cargo policy of 1645

*[Handwritten text in Dutch, likely a transcription of the original policy document. The text is dense and difficult to read due to the cursive script and some fading. It appears to be a detailed description of the cargo and the terms of the insurance policy.]*



De Notte Amsterdamsche Janus. Boeck van de Hoock van de Notte.

Wanneer wy in de Schip, perichel te overvaren, pacht desy te waken, alle pachten te loopen, vanden dat de wach of dat de wach. Coommanichappij by oft over  
 Coommanichappij pacht wy op de wach of over vach, wy dare geladen te waken, dat wach. Schip oft in Schip, Coommanichappij oft in Schip, wy dare pacht  
 gemaet te waken wy het wach wy het wach. Schip, wy het wach wy het wach. Schip, wy het wach wy het wach. Schip, wy het wach wy het wach.  
 In de pacht te waken op de wach geladen te waken, dat wach. Schip, wy het wach wy het wach. Schip, wy het wach wy het wach. Schip, wy het wach wy het wach.  
 Coommanichappij pacht wy op de wach of over vach, wy dare geladen te waken, dat wach. Schip oft in Schip, Coommanichappij oft in Schip, wy dare pacht  
 gemaet te waken wy het wach wy het wach. Schip, wy het wach wy het wach. Schip, wy het wach wy het wach. Schip, wy het wach wy het wach.  
 In de pacht te waken op de wach geladen te waken, dat wach. Schip, wy het wach wy het wach. Schip, wy het wach wy het wach. Schip, wy het wach wy het wach.  
 Coommanichappij pacht wy op de wach of over vach, wy dare geladen te waken, dat wach. Schip oft in Schip, Coommanichappij oft in Schip, wy dare pacht  
 gemaet te waken wy het wach wy het wach. Schip, wy het wach wy het wach. Schip, wy het wach wy het wach. Schip, wy het wach wy het wach.  
 In de pacht te waken op de wach geladen te waken, dat wach. Schip, wy het wach wy het wach. Schip, wy het wach wy het wach. Schip, wy het wach wy het wach.  
 Coommanichappij pacht wy op de wach of over vach, wy dare geladen te waken, dat wach. Schip oft in Schip, Coommanichappij oft in Schip, wy dare pacht  
 gemaet te waken wy het wach wy het wach. Schip, wy het wach wy het wach. Schip, wy het wach wy het wach. Schip, wy het wach wy het wach.

De Notte Amsterdamsche Janus. Boeck van de Hoock van de Notte.  
 De Notte Amsterdamsche Janus. Boeck van de Hoock van de Notte.  
 De Notte Amsterdamsche Janus. Boeck van de Hoock van de Notte.

Ick onder geschreven Assureere aen u *Jan Zilly* —  
 van *Dijnbesch.* — tot *Madix & S. Lucas* —

op goederen per 't Schip genaemt *S. Jans* ~~*Isifabou*~~ daer  
 Schipper op is *Jaguis Bollart*. — neemende tot  
 mijne laste alle perijckelen als in een welgestelde Police, beloovende  
 in Cas van schade, des Godt genadighst gelieve te verhoeden, mijne  
 geteekende Somma aen u geassureerde, of trouwen houder van desen,  
 te betalen drie maenden naer gedaen abandonnement, onder 't ver-  
 band van mijn Persoon en goed'ren, als naer Rechten, ende dat voor  
 de Somma van *vijsfondert twintig* — guldens, mits dat ick  
 voor Premie genieten sal *soon* — ten honderden, is

*ge 29: 8 fl* guldens, *als sjaeds sonder roeking wate*

In Amsterdam den *30 July 1655*

*Joan vanden velde*

*420* —

Appendix 23 Amsterdam hull policy of 1662

Wij den ondergeteyden behouwen ende verhoeden ons te verhoeden; verhoeden niet den deure van 't jaer 1662...
Wij den ondergeteyden behouwen ende verhoeden ons te verhoeden; verhoeden niet den deure van 't jaer 1662...
Wij den ondergeteyden behouwen ende verhoeden ons te verhoeden; verhoeden niet den deure van 't jaer 1662...

op schip gaderde te... Cede oen Corpus van 't Schip... met voo Gede, Mania...
op schip gaderde te... Cede oen Corpus van 't Schip... met voo Gede, Mania...
op schip gaderde te... Cede oen Corpus van 't Schip... met voo Gede, Mania...



Wij den ondergeteyden behouwen ende verhoeden ons te verhoeden; verhoeden niet den deure van 't jaer 1662...
Wij den ondergeteyden behouwen ende verhoeden ons te verhoeden; verhoeden niet den deure van 't jaer 1662...
Wij den ondergeteyden behouwen ende verhoeden ons te verhoeden; verhoeden niet den deure van 't jaer 1662...

## Appendix 24 Amsterdam policy on the ship ('de Witte Haes') of 1672

WY Ondergeschreven, beloven ende verbinden ons te verseeckeren mits desen aen *U Jan Bapt<sup>a</sup> van Renselaer Coopman* alhier of *Jemd anders int geheel of deel aengaende niemd exemt* te weten elck een voor de somme by hem hier ondergeteyckent van *deser Stede Amsterdam* ende de circumstantiën van dien al tot aent *casteel d'Elmina op de cust van Africa* gelegen toe, *achter Schotland en Jerlant om te zeylen. Mits niet alleen aende voornomde cust van Africa, maer oock onderwegen over al en alomme op alle plaetsen ende Landen te mogen escaleren, aenloopen, zeylen, verzeylen, leggen, lossen, laden, herladen ende handelen, alles tot Schippers* believen, 't zy met ofte sonder weten van de geasseureerde ofte *Commis, ende dat* . . . . .  
 op . . . caske ofte corpus van 't Schip dat Godt beware . . . met syn Geschut, Munitie, gereetschappen en aenkleven van dien, den voorsz. geasseureerde ofte yemant anders toebehoorende genaemt *De Witte Haes* groot omtrent . . . . Lasten, daer Schipper op is *Minne Jansz* of wie in syn plaetse voor Schipper of Schippers soude mogen varen oock op 't *consumabel mede goederen en coopmanschappen bederfelycke of onbederfelycke* geene exemt.

By pacto exprex en niet believen van ons Assureurs getaxeert, en geprisceert op . . . met welke taxatie en prisatie wy ons volkomen vernoeght en te vreden houden, 't zy of 't selve minder of meerder waerdigh soude mogen wesen, of gekost hebben, en sal de geasseureerde zich ten vollen en tot den lesten stuyver toe, van deze taxatie en prisatie vermogen te doen versekeren, sonder gehouden te zyn een darde, thiende of andersins in 't minste yets selfs te resiqueren, renuntierende tot dien eynde d'ordre van de Assurantiekamer deser stede, en voorts alle andere Ordonnantie, Placaten en Observantie, voor soo veel deselve tegen den inhoudt deses, eenighsins zyn strydende: Belovende als luyden niet ceren, ons daer mede in contrarie deses niet te sullen behelpen, noch doen behelpen in rechten, noch daer buyten, in geenderley manieren, maer in cas van schade (des Godt verhoeden) elck ons volle geteekende somme promptelyck en realyck sonder eenige kortinge *een maent* naer 't abandonnement precijs te voldoen en betalen, aen den geassureerde synen *Commis* of thoonder deses, en op dat des selfs simpele en sincere verklaringe, alsoo de voorsz. taxatie voor reeckeningh, en dese Police voor vol bewys aennemen, sonder op eenigh ander of naer bewys te excipieren, ende in cas van differentie of haverye, submitteren ons in d'uytsprake van goede Mannen, by den geassureerde of *Commis* daer over te verkiesen, met belofte van de selve uyt-sprake promptelyck naer te komen en voldoen; alles ter goeder trouwen, en op alle goede en quade tydinge, *nemende tot onse Laste alle periculen en Swarigheden in den druck deses verhuelt mede in conformité van ordinaris gedruckte police op goederen.*

Waer van wy de Resicque, perijckel, ende avontueren mits dese tot onsen laste nemen te loopen, van de ure en dagh af dat 't *Schip van de Stadt* is gezeylt en zal dueren ter tydt toe dat het voorschreven schip Met Geschut, Munitie, gereetschap ende toebehooren van dien gekomen sal wesen tot *als boven* en gelost toe, sullende 't voorsz. schip mogen varen voorwaerts, achterwaerts, weynden ende keeren, ter rechter, ter sliicker, ende aen alle zyden, ende door noot, oft met wille, aennemen alsulcke Havens en Reden als den Schipper en Schipperen believen ofte goet duncken sal. U oock verseeckeren van alle perijckelen ter Zee, onweder, vyer ende wint, voor Vrienden, Vyanden van Arresten ende Detentien van Koningen, Coninginnen, Princen Heeren ende Gemeenten, van Brieven van Marquen ende Contremarquen, schelmerye ende onachtsaemheyte van Schippers ende Boots-gesellen, ende alle andere perijcke-

len ende avontueren die dit voorsz. Schip . . . eenigsints souden mogen aen-  
 komen, bedacht ofte onbedacht, gewoon ofte ongewoon, geen uytgesondert,  
 stellende ons in allen sulcke gevalle, in u plaetse, om U te guaranderen van  
 alle verlies en schade, oock 't voorsz. Schip . . . yet anders overkoinende als  
 wel ('t welck Godt verhoeden wil) verbinden wy ons by desen te betalen aen  
 u geass<sup>e</sup>. ofte uwen Commis, alle de schade die ghy sult geleden hebben, te weten :  
 elck een naer advenant van de somme die hy ondergeleket sal hebben, so wel  
 de eerste als de leste versekeraer, ende dat binnen drie eerst volgende Maenden :  
 nae dat wy behoorlyck geadverteert sullen zyn van 't verlies ofte schade, ende  
 in al sulcken gevalle geven wy u geass<sup>e</sup>. ende alle anderen volkomen macht,  
 om soo tot onsen schade als t'onsen profijt, de handt te mogen reycken in 't  
 salveren en benificeren van 't voorsz. schip . . . ende den aenkleven van dien,  
 om 't selve te gaan helpen wat het van noode soude mogen hebben, oock te  
 verkoopen ende de Penningen te distribuieren so de sake sulcx vereyscht, sonder  
 ons consent of oorlof te vragen, sullen oock betalen de onkosten daeromme ge-  
 daen : Mitsgaders de schade daer op gevallen, 't zy datter yets gesalveert wert  
 ofte niet, en op de kosten van dien salmen geloof geven den genen die de selve  
 gedaen sal hebben op synen Eer, sonder yet daer tegen te seggen : zyn mede te  
 vreden, dat *de geass<sup>e</sup>*. (gelyck ly beloofst by dese) ons betalen sal den prys deser  
 Assurantie in gereden gelde, jegens 15 ten hondert. Ende om alle prolixiteyt te  
 eviteren, Wy maintineren dese Police van Assurantie van also grooter weer-  
 den, als of dit genaeckt ende gepasseert ware voor Schepenen, ende soo bon-  
 digh, als of alle de Clauselen in desen verhaelt, soo waere gestelt als mense  
 soude konnen imagineren, t'uwen profijte ende tot onsen schade. Alles sonder  
 argelist, ende volgens d'Ordonantie van de Kamer van Assurantie der Stadt  
 Amsterdam. Submitterende ons ten weder-zyden onder 't Recht gebruyck,  
 ende Judicature der selver Kamere. Ende verbinden hier voor onse Persoonen  
 ende goederen, present ende toekomende, renuncierende als luyden van eeren  
 allen cavilatiën ende exceptiën, die desen souden mogen contrarieren.

Aldus gedaen in *Amsterd.* Ady 20 April 1672.

f 1000.— *Paulus en Frans Verrijn zyn te vreden in dese assur. die godt bewaere  
 voor een duysent gl. verr.*

f 500.— *Jan van Vreelandt is te vreden in deese assurantie voor vyfhondert guld  
 ady dito.*

f 800.— *Ick Jacques Thierry ben te vreden in deese assurantie die godt beware  
 voor acht hondert gl. Ay 21 April 1672 April Amsterdam.*

f 700.— *Jozee Gonsalvo Dozevedo, sans contentes, \*\*\*\**

(Verso) : *J. B. Renselaer A° 1672.*

*20 April opt schip de witte haes schipper Minne Jansz. uytgaende na de Kust  
 van Africa tot aent Casteel Elmina mij verseeckert door*

<i>Paulus en Frans Verrijn</i>	<i>. . . . .</i>	<i>f 1000</i>
<i>Jan van Vreelant</i>	<i>. . . . .</i>	<i>f 500</i>
<i>Jaques Thierry</i>	<i>. . . . .</i>	<i>f 800</i>
<i>Josef gonsalves dussevedo</i>	<i>. . . . .</i>	<i>f 700</i>





**Appendix 26 Amsterdam notarial policy on money of 1687**

[Op huyden den 23 en 24 april 1687] compareerden voor mij, Jacob Lansman, openbaer not[ariu]s etc., seigneur Joseph Mendes D'Acosta, Manuel Mendes Flores, Diego Ximenes, Manuel Davega, alle kooplieden van de joodsche natic, wonende binnen dese stadt.

Ende verklaerde haer te verbinden, gelijk sij haer verbinden mijs desen, te verseeckeren, elcke een voor de somma bij hem hieronder geteeckent, aen de heer Mr. Bernardus Muykens, advocaat, mede wonende binnen de voorsz. stadt, als last en procuratie hebbende van Cornelis van Quaelbergen, extraordinaris raedt van Indiën, residerende op Batavia, en dienvolgende voor des voorn. Quaelbergens reeckeninge, elf sachjes met ducats, sijnde den somme van sesduysent negenhondertentachtigh guldens, die de voorn. Bernardus Muykens heeft gebracht op het Oostindische huys alhier, omme door de heeren bewinthebberen van de Oostindische compaghnie ter kamere alhier of door derselver bedienden ingescheept te werden int schip, genaemt De Leck, ofte in de andre schepen, genaemt 't Waterlant off 't Radt van avonturen, of anderen hoeclanigh deselve mochten sij genaemt als die maer de voorn. compaghnie mochten toekomen of van deselve gehuyt sij, int geheel of ten deele hoedanigh 't selve alhier ofte onderwegen mochten komen te geschieden, sulcx dat de voorn. assuradeurs in geen ander geval gelibereert sullen wesen als wanneer de voorn. penningen int geheel aen de voorn. Quaelbergen sullen sij behandicht en bij hem ontfangen, en dat van hier na Batavia.

Verklaerende mede de voorn. assuradeurs aen te nemen, dat de resieque en avontuyren van de gemelte penningen tot hare lasten sal lopen van der uyre en daaraf aen dat de voorn. penningen van hier sullen werden afgescheept en uyt voorn. schip De Leck ofte de andre voorn. schepen uytgescheept totter tijt toe dat deselve bij voorn. Quaelbergen ontfangen sullen sij.

Sullende 't voorsz. schip of schepen daerinne 't voorn. gelt mochte geladen wesen mogen varen voorwaerts, achterwaerts, wenden en keeren ter rechter ter slincker en aen alle zijden, en door noot ofte met wille aennenen al sulcke havens en reden als de schipper off schipperen ofte andere bediendens van de voorn. compaghnie believen of goedcluncken sullen.

Verklaerden verders de voorn. Bernardus Muykens te verseeckeren van alle peryckelen ter zee, onweder, vuyr en wint, voor vrienden, vijanden, van arresten en detentiën, van koningen, koninginnen, heeren en gemeenten, van brieven van marcken en contramarcken, schelmerijen en onachsaeemheyd van schipper, bedienders en bootgesellen en alle andre peryckelen en avontuyren die 't voorn. gelt cenighsints mogen aenkomen, bedacht ofte onbedacht, gewoon ofte ongewoon, geen uytgesondert.

Stellende hierin allen sulcken gevallen in de plaetse van de voorn. Bernardus Muykens om te guaranderen van alle verlies en schade.

Verbindende de voorsz. comparanten haer selven aen de voorn. Muykens of Quaelbergen te betalen alle de schaden die sij sullen geleden hebben aen 't voorsz. gelt, te weten elck een naer advenant van de somme die hij onderteeckent sal hebben, soowel de eerste als de laeste verseeckeraer, dat soo ras

alsser eenige tijdinge aen de gemelte compaghnie of de voorsz. Muykens gekomen mochten wesen dat het voorsz. gelt ofte eenigh gedeelte vanden aen de voorn. Quaelbergen niet en mochte sijn behandicht en ontfangen, gelijk mede de voorsz. Muykens belooff bij desen aen de voorn. assuradeurs te betalen de prijs en premie deser assurantie in gereden gelde jegens vier en een half ten hondert, te ontfangen naer de onderteyckeningh deses.

Is mede bij de voorsz. Muykens wel expresselijk bedongen, dat hij sich ten vollen en tot den lesten stuyver toe sal vermogen bij de comparanten te doen versceekeren sonder gehouden te sijn een derde, tiende of andersints int minste iets selfs van de voorsz. penningen te risicqueeren, renunciierende de voorn. comparanten als assuradeurs desnoots tot dien eynde de ordre van de assurantie-kamer deser stadt ende voorts alle andre ordonnantiën, placaten en observantiën voorsooveel deselve tegen den inhoud deses eenighsints sijn strijdende, belovende als luyden met eere haer daermede in contrarie deses niet te sullen behelpen noch doen behelpen in rechten noch daerbuyten in geenderlyc manieren, maer in cas van schade (des Godt behoede) elck haer volle geteckende somme promptelijck en realijck, sonder eenige kortinge in maniere voorsz. te voldoen en betalen aen de voorn. Muykens, Quaelbergen of toonder deses.

Ende om alle prolixiteyt te eviteren verclaerden sij, comparanten, eyndelijck te sullen maintineren den police van assurantie van alsoo grooter waerde als of die gemaect en gepasseert ware voor de heeren schepenen en soo bondigh alsof alle clausulen in desen verhaelt soo waren gestelt als men se soude kunnen magineren ten profijte van de voorn. Muykens en schade van haar comparanten, alles sonder arg of list.

Verbinden hiervoor de voorn. comparanten hare personen en goederen. present en toekomende, die submitterende ten bedwangh en executie van alle en sodanige rechten en rechteren, geene uytgesondert, als den houder of thoonder deses sal gelieven, renunciierende als luyden van eeren alle cavillatiën en exceptiën, die desen souden mogen contrariëren.

Aldus gedaen in Amsterdam ter presentie van Herman Lijnslager en Jacob Jansz. als getuygen

f. 1700 Eu Diego Ximenes por florins mill y settecentos, Amsterdam a 23 april 1687.

f. 1700 Ick Joseph Mendes Da Cõsta ben t'vrede in desen assurantie die goodt bewart voor seventhienhondert guldens, Amsterdam, 23 april 1687.

f. 1700 Eu Manoel Mendes Flores per florins mil e sete centos, Amsterdam, ditto dio.

fls. 1830 Yo Manuel de Vega aseguro en nombre de Dios por encima de fls. mil y ocho sientos y trenta. Amsterdam, y 24 abril 1687.

(Was geteckend:). J. Lansman, not[ariu]s.





Coandig a d r d v o n n e : q u a l l e d o n g e  
 C o n d i c t i o n e n m o e t t e s i j n l a d r a n d i c h t 165  
 d e o u t f a n g e , g e l i j k e m e d t d e v o o r t e  
 C o n d i c t i o n e n b e l o o f t e i j d e , a n d e v o o r t e :  
 1. a f f i r a d i e n t t e b e t a l e d e r v o o r t e , d e  
 c o n d i c t i o n e n a f f i r a d i e n t i n g e d e d e  
 g e e d t f i j n e n v i e r , d e e n d e r h a l f t e n  
 h o n d e r t t e o u t f a n g e m a d e d o n d e r ,  
 t e i j d e n i j g e d e e t i s m e d t e i j d e v o o r t e :  
 C o n d i c t i o n e n w e l d e g e n e f f l i c h t e o d o n g e  
 d a t e i j f i e l t e g e w e l l e i n t e t e d e l e f t e  
 f t r i p e n t e t o d f a l v e r o n g e e i j d e c o m p t e  
 t e d e n v e r f t e h e d e , f o n d e r g e l o o d e n  
 t e i j d e e n d e d e d e , t i e d e o f a n d e r f i n t e  
 n i t m i n f t e f e t e f e l t v a n d e v o o r t e  
 g e r i n g e t e r i f i c a t i o n e n , r e m i n d e r e n d e  
 d e v o o r t e : c o m p t e a l l e a f f i r a d i e n t  
 d e m o e t t e t o d i e n e i j d e d e v o o r t e v a n d e  
 a f f i r a d i e n t h a n d e d e r v o o r t e , d e d e  
 v o o r t e a l l e a n d e o n d e r m a n t e n , g e l a c a t e  
 d e o o f t e v a n t e , v o o r f o o r d e d e f t e l e d  
 t e g e n d e v i t a n t d e d e e n r i g t f i n t e d i j n  
 f t r i p e n t e , a l l e w e d t a l l e l i n d e m e t d e n  
 h a d e d a d e m e d t i n c o n t r a c t d e d e  
 m i t t e t e f e l l y a l l e l y n g v o o r d e d e a l l e l y n g  
 i n d e l t e , v o o r d e r e b r i n t e n , i j g e d e n d e  
 l i j t m a n d e n n e d e r i n c a l v a n d e l a d e  
 ( d e d e g o d t o d e d e ) a l l e h a d e v o l l e  
 g e t t e d e h e n d e f o n n e g e r o m p t e l i j k e d e  
 v e a l i j k e f o n d e r e d e n i g e h o o t i n g e i n m a n d e  
 v o o r t e : t e v o l d e , d e b e t a l e a d r d v o n n e :  
 C o n d i c t i o n e n , q u a l l e d o n g e o f h o n d e r d e d e  
 d e d e o m a l l e p o o k i j d e t e d e v o o r t e , v e r l a d e  
 d e f i c o m p t e d e n d e l i j k e t e f e l l y m a n t e n  
 m e d e n d e n p o l i e d v a n a f f i r a d i e n t v a n a l l e  
 g r o o t e r e w e d t a l l e o f d e i j g e m a d e h t d e  
 g e g r a f f e e t w a r d v o o r d e t o d e r d e d e l e p e n  
 d e f o o b o n d i g e a l l e o f a l l e c l a u f u l e i n d e l y  
 v e r l a d t , f o o w a r d e g e f t e l t , a l l e m e d t e  
 f o i d e h o m e n m a g i n d e n , t e p o o f i t e v a n d e

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Coorn. Complic. de solad van de  
 Coorn. alle soude arg of list  
 vordende rids vordt voren; comparand  
 hard grolong, de godderij, puffed, de  
 sothoudend die fubmittendend ter  
 bedwangl in deventid van alle, de foun  
 redtde, in redtde, gend  
 alle de roudde of troude deeb sal  
 gelidde, voren... vordend alle linder van  
 voren, alle cavillatie in de goudde,  
 die de vordde moog contcaridde  
 aldus goudde in amsterdam ter  
 goudde van Haerle de de plain  
 de geman Inflagor, de faros goud  
 alle goudde

1700, cu Diego Ximenez per florin Mell y seccentor, Anla  
 215 Abril 1687

1700: Jett Joseph Mendes Calofa ben t. Vax de Joudde  
 A supantia die goode bewant vore souwthe in hon  
 guldein Amst 23 april 1687

1700: Lu Manuel nez flores per florin mil edet  
 Cento estru teban lito na

1830: Jo Manuel de vega ad fero en de de Jett per  
 cimo de fto mil judas lictor y centos Amst. y 24: 1830

J. J. J. J. J.  
 1687

Appendix 27 Amsterdam hull policy of 1691

Wandergefeve van verfeeren een u... of die anders in 't geheel of een deel soude mogen vangen. Vriend en vyand, niemant excent, te weten, als een voor de fomme by ons hier ondergeteekent, van alle na en Cruijdenjaeren vanden naar Leden

*D. Heeren Cornelis Bloem & Comp.*

op 't Verfeeren... Schippen en op 't leven van dien, den voorft. *graaflichsche Raad van Rotterdam*... *van Rotterdam*... die Schipper op de *Geleerde Wever*... *van Rotterdam*... *van Rotterdam*... *van Rotterdam*...

Waar van wy de Reffeque, perijkel, ende avonturen min defen tot onfen hite namen te loopen, van de wure en dagh si dat... *van Rotterdam*... *van Rotterdam*... *van Rotterdam*... *van Rotterdam*...

- 1500 *Van der*
- 1500 *Van der*
- 1500 *Van der*
- 1500 *Van der*
- 1500 *Van der*
- 1500 *Van der*



Appendix 28 Amsterdam ransom policy of 1692



De werchte  
Poliers zijn te  
koop by Mar-  
tin Steenick,  
Boekverkooper  
op de Vygen-  
dam.

WY ondergeschreven beloven ende verbinden ons te verseeckeren aen u. *De Wed. Jhr. van Horiaen van der Burgh* ende *son*  
ofte die het anders soude mogen aengaan, van *ofte wyf de Hase* ende *in uin jaertien Vandwer. of tot (deix in Kispagnien)*

mits overal ende al-omme de gantsche Reyse gedurende, op alle plaatsen ende Landen te mogen aen-loopen, zeylen ende verzeylen, voorwiens ofte  
achterwaerts, roock liggen, lossen ende laden, tot Schippers believen, 't zy met ofte sonder weten van de Geasseureerde ofte Commis, ende dat op het  
Lijf van *Jhr. Jhr. van der Burgh* varende voor *Schipper* op het Schip (dat Godt beware)  
gemeint *Jesús Maria* daer Schipper op is *Gillis van der Burgh* ende indien het selve  
Schip mocht komen te verongelücken, ofte de reyse niet en vervorderde, soo sullen wy den Risico blijven lopen op alsulke ander Schip ofte Schepen, daer den voor-  
schreven *Gillis van der Burgh* sich in soude mogen embarkeren, om de boven-genoemde reyse te volvoeren, ende sullen wy den Risico alleen  
lopen voor het nemen van alsulcke natie als het soude mogen wesen, het zy Turcksche, Moorlsche, of andere Roovers; Waer door den selven  
*Gillis van der Burgh* soude mogen gevangenelijck wech-gevoert ende in slaverny gebracht worden in enige Havens van Africa, ofte waer  
het anders soude mogen wesen. Ende indien sulcks gebeurde (dat God verhode) beloven wy elck onse volle geteckende somme tot sijne verlossinge ofte  
Rantioen-gede prout sonder eenige exceptie ofte uysstel aen den geasseureerde ofte thoonder des te betalen, ende dat soo baecil alhier advijs gekomen ende ons  
gebleecken sul zijn hy geloft is, ofte wel dat de Penningen tot dien eynde getrocken sullen wesen, doch sullen de Penningen van onse teeckeninge alleen dienen tot  
sijne vrykoopinge ende alle de dependentie van dien ende verder niet. Ende alsoo gefullineert word, dat dese verseeckering is strijdende tegens de ordonnantie  
van de Kamer van Aiscurantie, soo renuntieren wy voorbedachtelijck van deselve Ordonnantie, ende alle Wetten ende Placcaten die den Inhoud deses loutde  
mogen contrarieren: Belovende als Luyden met teeren ons daer mede niet te behelpen nochte doen behelpen, tot naerkominge van het geene voorschreven is.  
verbinden wy onse persoonen ende goederen, die liellende ten bedwanck van alle Rechten ende Rechteren, alles tot keuse ende opse van den geasseureerde  
ofte den thoonder deses. Alles ten goeder trouwe, sonder arg ofte list: Lando hebben wy voor premie bedongen *1300* dit scrijft met *Conny* bou *essig* daga  
In Amsterdam, ady *16* November *1691* *van der Burgh*

*1500* — *inot* *David* *W.* *van der Burgh* *van* *uyf* *van der Burgh* *van* *der* *Burgh*  
*1500* *van der Burgh* *van der Burgh* *van der Burgh* *van der Burgh* *van der Burgh*



Appendix 30 Rotterdam cargo policy of 1706

23<sup>e</sup> Febr. 1706

Wij, de Wierden, Rotterdam, toe, en geachtste Assurantie van Schippen, die Schipper op is Abraham Jan. sijn

of wie in sijn plaats daar op voor Schippen of Schippenren soude mogen varph, met expresse conditie dat de Geassurerde den ten volle

na 't aandoonement byten defessit van de Kamer van Assurantie voorts te betalen, sonder enige kortingen, oock niet voor prompte betalinge of iets

Judaxo ... de Kamer van Assurantie voorts te betalen, sonder enige kortingen, oock niet voor prompte betalinge of iets



Dit is op aete Policen van de Republiec der Verenigde Provincien, op de Haag Straet, in den Jaer 1706

J. Cordelot, Notaris

Waar van wy de Restique perijel en avoorturen mirt defes tot onsen laden nemen te loopen, van de 1ere en dag af tot de 24ste Kommanlichappen, by u of

en vrydelijk op 't Land gebracht salken wesen, in 't vermogen van u g'altreide,

voorts of iemaet anders Commissie daar van hebbende, sal om 't voorst Schip mogen varen voorwaerts, achterwaerts, wenden en keeren ter

Van van Leyden, die Heer van ... 400 Richard Davy vier hondert g. premie ontfang.

Appendix 31 London (Sun Fire Office) fire policy of 1719

N<sup>o</sup> 13776

**This present Instrument or Policy witnesseth,**

That whereas *John Moore* of the *Middle Temple London* Gent.

hath hereby agreed to pay, or cause to be paid, to the Company of the *Sun Fire-Office* in *London*, the Sum of Two Shillings within fifteen Days after every Quarter-Day, for the Insurance of *his House Only in Southgate in the Parish of Edmonton in the County of Midd.* in Occupation of *Thomas Transhant Esq*

from Loss and Damage by Fire. **Now know ye,** That so long as the said *John Moore*

shall duly pay, or cause to be paid, the Sum of Two Shillings a Quarter, at the Times and Place aforesaid, the Company of the *Sun-Fire-Office* do, in Consideration thereof, bind themselves, their Heirs, Executors, Administrators, and Assigns, by these Presents, to pay and satisfy to the said *John Moore*

*his* Heirs, Executors, Administrators, and Assigns, within fifteen Days after every Quarter-Day, in which *he* shall suffer by Fire, *his* Loss not exceeding the Sum of *Five* Hundred Pounds. **In**

**Witness,** we the Members of the said Company, have hereunto set our Hands and common Seal, the *thirteenth* Day of *April* in the Year of our Lord 1719

Seal'd and deliver'd (being stamp according to Act of Parliament.) in the Presence of us,

*John Latham*  
*Jas: Stocker*



*Wm Stanley*  
*Charles Langley*

## Appendix 32 Rotterdam Insurance Company fire policy of 1720

WY ondergeschreven Directeuren der Assurantie-Maatschappye  
dezer Stad. Verzekeren (in voorschrevene qualiteyt) een en  
ten behoeve van *de heer Schalkius van Breestring*

de Rifco van Brand-schade ( die God genadig gelieve te verhoeden )  
van den Opstal van *Leentje, en Smeedkuisen*

staende en gelegen *aan de Lijdsijde vande Nieuwe haven, op de  
Nertshoek van de Priortstraat*

en toebehoorende *totten heer van Breestring*

geregistreert ten Protocolle *duzen* *ten*, op  
N<sup>o</sup>. 4344 & *en* 4345 *en* voorlz Opstal (Exempt Behangfels en alle  
Meubilaire Goederen, waer op by deze geen Assurantie geschiet) is met  
wederzyds genoegens gewaardeerd op *twintig* *duizend*  
guldens. En dus zyn wy te vreden te verzekeren voor een loopend jaer,  
(ingaeude op heden) een somma van *\_\_\_\_\_*

*twintig* *duizend* guldens, en zulks voor een premie  
van *een* *Agte* *duizend* die bekenne te hebben ontfangen.  
Belovende de Directeuren in hare qualiteyt de Brandschade, die den opge-  
melden Opstal overkomen mogte, na rato van de geteckende somma  
promptlyk te voldoen: En in cas deswegen eenig verschil ontstond, zul-  
len dezelve met wederzydsche bewilliginge getaxeert werden, door  
Neutrale Persoonen, naar de Gebouwen verstaande, ofte wël door den  
Ordinaris Rechter.

Ingevallye den Geassureerden prolongatie begeerde, zal den zelven een  
Maend voor den Verschyndag gehouden zyn het te doen agreëren op  
deze Police, en de premie voor twaelf Maanden weder prompt en nevens  
de teekeninge voldoen. Des ten oirkonde is deze Aste door twee der  
Directeuren, daer toe gecommitteert, onderteekent. In Rotterdam den

*Off. Heugende* *May 1720* *Heugende* *namt* *ten* *Vier* *Uuren*  
*Off. van der* *houwen* *Joh* *van* *Ver* *de* *W*

Appendix 33 London marine insurance policy of 1720

By the GOVERNOR and COMPANY of the  
LONDON ASSURANCE

In the Name of God, Amen *M. Fran. Perina*

No. 507

I, *M. Fran. Perina* in well known Name, as for and in the Name and Names of all and every other Person or Persons to whom the same duty, may, or shall appertain, in Paris; or in All; Doth make Assurance, and causeth himself and them, and every of them, to be assured, left or not left, *and from what place*

upon any kind of Goods and Merchandizes whatsoever, and also upon the Body, Tackle, Apparel, Ordnance, Ammunition, Artillery, Boat, and other Furniture, of and in the good Ship or Vessel called, the *Monarca*

Rarthen *Ton*  
Guns, and *Men, as Gunboats; Whereof is Master (under*  
GOD) for the present Voyage *on the North Sea* or whosoever else shall go for Master in the said Ship or Vessel, or by whatsoever other Name or Names the said Ship or Vessel, or the Master thereof, is or shall be named or called: Beginning the Adventure upon the said Goods and Merchandizes from and immediately following the Loading thereof on Board the said Ship or Vessel *at the said place*

And upon the said Ship or Vessel, &c. *from sea to sea* and so shall continue and endure during her Abode there, upon the said Ship or Vessel, &c. And further, until the said Ship or Vessel, with all her Ordnance, Tackle, Apparel, &c. and Goods and Merchandizes whatsoever, shall be arrived at any Place *in China*

And upon the said Ship or Vessel, &c. until she hath moored at Anchor Twenty four Hours in good Safety, and upon the Goods and Merchandizes, until the same be there safely discharged and landed. And it shall be lawful for the said Ship or Vessel, &c. in the Voyage to proceed and sail to, and touch and stop at any Ports or Places whatsoever


without Prejudice to this Assurance. The said Ship or Vessel, &c. Goods and Merchandizes, &c. for so much as concerns the Assured (by Agreement made between the Assureds and the said Governor and Company of the LONDON ASSURANCE) are and shall be rated and valued at *the sum of*

Without further or other account to be given by the Assureds for the same. Touching the Adventures and Perils which the said Governor and Company are contented to bear, and do take upon them in this Voyage; they are, Of the Seas, Men of War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprizes, Takings at Sea, Arrests, Restraints, and Detainments of all Kings, Princes and People, of what Nation, Condition, or Quality soever, Betrayal of the Master and Mariners; and of all other Perils, Losses, and Misfortunes, that have or shall come to the Hurt, Detriment, or Damage of the said Goods, Merchandizes, and Ship or Vessel, &c. or any Part thereof. And in Case of any Loss or Misfortune, it shall be lawful to the Assureds, their Factors, Servants, and Assigns, to sue, labour, and travel for, in, and about the Defence, Safeguard, and Recovery of the said Goods, Merchandizes, and Ship or Vessel, &c. or any Part thereof, without Prejudice to this Assurance: To the Charges whereof the said Governor and Company will contribute, according to the Rate and Quantity of the Sum herein assured. And to the said Governor and Company are contented, and do here by promise and bind themselves and their Successors, to the Assureds, their Executors, Administrators, and Assigns, for the true Performance of the Premises expending themselves paid the Consideration due unto them for this Assurance, by the Assureds, and in Case of a Loss, *to pay*

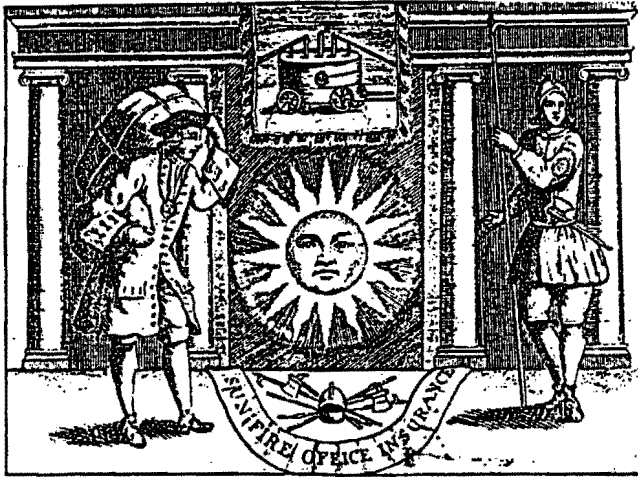
IN WITNESS whereof, The said Governor and Company have caused their Common Seal to be hereunto affixed, and the Sum or Sums by them assured, to be hereunder written, at their Office *the 10th Day of*

our Sovereign Lord *George* by the Grace of God of Great Britain, France, and Ireland, King, Defender of the Faith, &c. Anno, Domini One Thousand Seven Hundred and Twenty

£300 The said Governor and Company  
as insured of the said Assurance  
Three hundred pounds  
Witness  
*M. Fran. Perina*



Appendix 34 London (Sun Fire Office)-fire policy of 1727



N<sup>o</sup> 43109

Whereas *Wm. Knight of Cranbrook in the County of Kent. Merchant*

hath paid the Sum of *Nine Shillings and Nine pence* to the Company of the *Sun Fire-Office in London*, and has agreed to pay or cause to be paid to them at their said Office, the Sum of *Nine Shillings* on the *Twenty fifth* of *December* 1728 and the like Sum of *Nine Shillings* yearly on the *Twenty fifth* of the *December* during the Continuance of this Policy, for Insurance from Loss or Damage by Fire:

*on his said Goods in his new Dwellinghouse situate in the Parish of St. Andrew's, and also in Cranbrook aforesaid not exceeding One Hundred pounds and also in the several Occupations of his said Son, ~~and also in the several Occupations of his said Son~~ *Christopher and his Son in the several Occupations of his said Son* and the said *Christopher* not exceeding One Hundred pounds in each*

Now know ye, That from the Date of these Presents, and so long as the said *Wm. Knight* shall duly pay, or cause to be paid, the said Sum of *Nine Shillings*

at the Times and Place aforesaid; and the Trustees or Acting Members for the Time being, shall agree to accept the same, the Stock and Fund of the said Company shall be subject and liable to pay to the said *Wm. Knight* his Executors, Administrators and Assigns, all such Damage and Loss which the said *Wm. Knight* shall suffer by Fire, not exceeding the Sum of *Nine Hundred* Pounds, according to the exact Tenor of their Printed *Articles* dated *July the Eighth* 1727.

In Witness whereof, we (Three of the Trustees or Acting Members for the said Company) have hereunto set our Hands, and affixed the Seal of the SUN, the *Eighteenth* Day of *November* 1727

Sign'd and Seal'd (being stamps according to Act of Parliament) in the Presence of us,

*Wm. Water*  
*John Lloyd*  
*The Sturthers*

*John Todd*  
*John Pinner*



Appendix 35 Rotterdam cargo policy of 1730

*Handwritten signatures and notes at the top of the document.*

**W** ondergeschreeven verzoekende van *Handwritten name*, Vriend of Vriend, is over een rok, voor de  
 forme by ons hier onder geschreeven *Handwritten name* van Rotterdam, die hijschepers mede af  
 op de Goederen, van wat soort of soort deze; te zamen mogen wren, bederfich, of onbederfich, metten goederen, gelijck  
 of nog te laden, in het schip (het welck God bevaert) genaemt *Handwritten name*  
 door Schepers op de *Handwritten name* of we daar op voor Schepers in een plaats zoud  
 mogen varen, ende dat den naam van den Schipper of het schip anders zoudt mogen gelijck of gespecht worden, om te varen  
 van *Handwritten name* naar *Handwritten name* van de Circumstances van den *Handwritten name* van het schip  
*Handwritten text*  
*Handwritten text*  
*Handwritten text*  
*Handwritten text*  
*Handwritten text*

Wat van wy de risique, pericul ende voonturen, miss deren tot onzer laste nemen, te loopen van de dag ende ure af, dat al  
 voorts Goederen by U of ure Gemagtigde gebracht zuden op de de Kasse of Wal, en van daar geladen te worden in het voorts  
 Schip, om Schepers of Logers, om dat sijn gheport te wijzen van het Boord van het voorts Schip. Ende al geschreyen  
 ten tijt toe dat het voorts Schip tot *Handwritten name* of in de Circumstances van den  
 zal gelooft wesen, en de voorts Goederen op het Land gebracht zullen wesen in het voornemen van de Commissarissen of ure Go-  
 magtigde.  
 Zoudende het voorts Schip mogen varen voorwaert, achterwaert, wenden ende keeren ter rechter, ter linker hand, ende van  
 allen yden, ende door wind, of niet wille, zoudende ziele Meevaren ende Bieden an den Schipper, om meer te vorderen van  
 de remsel Reuse, bevaeren of gelyc wonden, ende de door sijn de voorts Goederen omliden, ende behouden in een  
 onder Schip of schepen, hier of groot (het welck an doen zullen mogen, wat hier ziele om berouwen, zoudende ons conde of te wren-  
 ten) zuden wy loopen de voorts risique ende voonturen, als in de voorts Goederen niet omliden wren geword.  
 Waerom wy en wy onder de voorgeselde risique, alle periculen van Wind ende alle andere te Water, van Vort, van Aerevort  
 ende Dierenen van Hooger hand, zo wel van Vrienden als van Vanden, en Breven van marke ende conremanque, van schel-  
 mure ende ongetrouwen van Schepers ende Boontgevelen, ende alle andere periculen ende voonturen die de voorts Goederen  
 vrenten zoudt mogen overloopen, bodagt of onbodagt, geyuen of ongetrouwen, geyen ongetrouwen, die liende ons in alle ziele  
 geveuen te U plaese, om U te goederen van alle vrenten te schade, ende te betalen van U Commissarissen, in ure Gemagtigde,  
 die de schade die U ziele gelijck hebben, te wren gelyc om te schenken van de vrenten die de ondergeschreeven zal hebben, ziele  
 wat de schade die U ziele gelijck hebben, ende die schade korting, kunnen om Mennel geveuen, om dat wy te bevaeren gebruyken  
 zuden van van het verlies of schade. En in al zulke gevallen geveuen wy U Commissarissen, ende alle andere, zoudende magt, om  
 wat het onse schade an schenken geveuen, de hand te mogen vreden in het talereen ende bevaeren van de voorts Goederen,  
 te se, te vercoopen, ende de Permissien te distribueren, zuden het van onsen te, zoudende ons om te onse te vrenten. Wy  
 zullen ook betalen de onkosten datromen geveuen, zoudende de schade die geveuen, het de dat het geveuen wordt of niet,  
 ende zal om van de Rekening te onkosten gelijck geveuen, op den End van de gelyc geveuen geveuen te hebben, zoudende van daar  
 te wren te vrenten.  
 Als het is, te we bevaeren ende zoudende van geveuen, ende zoudende om te betalen, te zuden voldaan, zoudende ons in  
 geveuen gelijc zal betalen wreden, voor de geveuen van de vrenten: *Handwritten text*

Tot nalegung van alle het geveuen voorts te, verbaeren van de geveuen van de geveuen, zoudende tot te vrenten, als in Regula  
 die geveuen in ROTTERDAM, den *Handwritten date*

*Handwritten signatures and notes at the bottom of the document.*



Deze openge Poicen sijn te bevaeren by de Wed. ADAM SCHADEE op de Hantgraaf, in i Klein Zegel.

*Handwritten signature: Pieter duynreunis*

*Handwritten notes and signatures at the bottom of the page, including names like 'Grooten bo...' and '1000... 1000... 3000...'*



Appendix 36 London policy on ship and/or goods of 1733

In the Name of God, Amen, *Wm. Stokely* of *London* Merchant  
 as well in his own Name, as for and in the Name and Names of all and every other Person,  
 or Persons to whom the same doth, may, or shall appertain, in Part or in All, doth make Assur-  
 surance, and causeth himself and them, and every of them, to be insured, lost, or not lost, *at & from*  
*New England to Jamaica* but *from thence to London*

upon any Kind of Goods and Merchandize, and also upon the Body, Tackle, Apparel,  
 Ordnance, Munition, Artillery, Boat, and other Furniture, of and in the good Ship or Vessel called the

*Mabitzell*  
 whereof is Master under God, for this present Voyage, *Joseph Hudson*  
 or whosoever else shall go for Master in the said Ship, or by whatsover other Name or Names the  
 same Ship, or the Master thereof is or shall be named or called; beginning the Adventure upon the said  
 Goods and Merchandizes from the Loading thereof aboard the said Ship, at *New England*  
 or *Eluwhing*

Upon the said Ship, &c. *from her beginning to load at New England*  
 and so shall continue and endure,  
 during her abode there, upon the said Ship, &c. And further, until the said Ship, with all her Ordnance,  
 Tackle, Apparel, &c. and Goods and Merchandizes whatsoever shall be arrived *at Anty*

upon the Ship, &c. until she hath moored at Anchor Twenty four Hours in good Safety; and upon the Goods  
 and Merchandizes, until the same be there discharged, and safely landed. And it shall be lawful for the  
 said Ship, &c. in this Voyage, to proceed and sail to, and touch and stay at any Ports or Places what-  
 soever

without Prejudice to this Insurance. The said Ship, &c. Goods and Merchandizes, &c. for so much  
 as concerns the Assureds, by Agreement between the Assureds and Assurers in this Policy are and shall  
 be valued at

*On Ship & Goods both or either*

without further Account to be given by the Assureds  
 for the same. Touching the Adventures and Perils which we the Assurers are contented to bear, and  
 do take upon us in this Voyage; they are of the Seas, Men of War, Fire, Enemies, Pirates, Rovers,  
 Thieves, Jettizons, Letters of Mart and Counter Mart, Surprisals, Takings at Sea, Arrests, Restraints  
 and Detainments of all Kings, Princes and People, of what Nation, Condition or Quality soever; Bar-  
 trary of the Master and Mariners, and of all other Perils, Losses and Misfortunes that have, or shall come  
 to the Hurt, Detriment, or Damage of the said Goods, Merchandizes and Ship, &c. or any Part thereof.  
 And in Case of any Loss or Misfortune, it shall be lawful to the Assureds, their Factors, Servants and  
 Assigns, to sue, labour and travel for, in and about the Defence, Safeguard and Recovery of the said  
 Goods, Merchandizes and Ship, &c. or any Part thereof, without prejudice to this Insurance; to the  
 Charges whereof we the Assurers will contribute each one according to the Rate and Quantity of his  
 Sum herein Assured. And it is agreed by us the Insurers, that this Writing or Policy of Assurance shall  
 be of as much Force and Effect as the surest Writing or Policy of Assurance heretofore made in *Lombard-  
 Street*, or in the *Royal-Exchange*, or elsewhere in *London*. And so we the Assurers are contented, and  
 do hereby promise and bind our selves, each one for his own Part, our Heirs, Executors and Goods,  
 to the Assureds, their Executors, Administrators and Assigns, for the true Performance of the Premises,  
 confessing our selves paid the Consideration due unto us for this Assurance by the Assured

at and after the Rate of *Eight p Cent.* and in

case of Loss (which God forbid) the Assureds to abate *Ten p Cent.*

In Witness whereof, we the Assurers have subscribed our Names and Sums Assured in *London*.

- £50. Cornyeen fifty pounds paid 20 Feb 1734*
- £50. John Small fifty pounds paid 28 Feb 1733*
- £50. Tho. James fifty pounds paid 1 March 1733*
- £50. Day Watoo fifty pounds paid 1 March 1733*
- £50. Bought for fifty pounds paid 7 March 1734*
- £50. Roger Mainwaring fifty pounds paid 1 March 1733*

£50 Richard Acland fifty pounds p<sup>re</sup> rec<sup>d</sup>: 1<sup>st</sup> March 1733  
 £50 Tho: Thorpe fifty pounds p<sup>re</sup> rec<sup>d</sup>: 2<sup>nd</sup> March 1733  
 £50 James Randall fifty pounds p<sup>re</sup> rec<sup>d</sup>: 6<sup>th</sup> March 1733  
 £50 Mr. Emmott fifty pounds p<sup>re</sup> rec<sup>d</sup>: 6<sup>th</sup> March 1733

I declare that the first Two Hundred pound Insurance mentioned in the  
 within Policy is for acc<sup>t</sup>. of John Henderson the next One hundred & fifty is  
 for acc<sup>t</sup>. of Bill & Small & the other One hundred & fifty pounds for acc<sup>t</sup>.  
 of Capt Joseph Henderson all of Boston

Witness My hand & seal  
 at the City of London  
 the 7<sup>th</sup> day of March 1733



We do hereby Agree that the within mentioned Ship  
 Merchants may proceed from Jamaica either to London or Bristol

Tho James  
 Gilmour  
 James Randall  
 Mr. Emmott  
 Paul Watoo  
 Richard Acland  
 Tho: Thorpe  
 Roger Mannering  
 Byroochon  
 John Small



Appendix 38 Hull policy in the Amsterdam *keur* of 1744 (English translation)

**WE** underwritten do insure you  
 or whom it else may concern, wholly, or partly, Friend,  
 or Foe, none excepted, *viz.* each for the Sum here by us un-  
 derwritten, from \_\_\_\_\_ on  
 the Hull, or Body of the Ship, which God preserve, with all  
 her Guns, Ammunition, Utensils, and Appurtenances of the  
 same, belonging to the said \_\_\_\_\_ or any Body else,  
 called \_\_\_\_\_ whereof the Master is  
 or who in his Stead as Master, or Masters, may na-  
 vigate \_\_\_\_\_ of which  
 we hereby take the Risks, Perils, and Adventures to run for  
 our Account, from the Hour and Day that the said Ship has  
 made a Beginning to lade Merchandize, or shall have taken on  
 board her Ballast for the said Voyage, and end Twenty-One  
 Days after the said Ship shall be arrived at the last destined Place of  
 unlading, or so much sooner as she shall be intirely unladed. The  
 said Ship shall be permitted to sail forwards, and backwards, to  
 turn and wind to the Right, Left, and to all Sides, as the Master, or  
 Masters shall please, and think proper for the Service and Bene-  
 fit of the said Voyage: The aforementioned Dangers consisting of  
 all Perils at Sea, Strefs of Weather, Fire, and Wind, Arrests  
 by Friends and Enemies, Detentions by Kings, and Queens,  
 Princes, Lords, and Republicks, Letters of Mart and Contra-  
 Mart, Carelesness of Masters and Sailors, Villainies of the said  
 Sailors, and all other Perils and Adventures which any wise may  
 happen to the Ship without means of the Insured, thought of,  
 or not thought of; putting ourselves, in all such Cases, in your  
 Place, to pay to you the Insured, or your Factor, all the Da-  
 mage which you shall have suffered, *viz.* each in proportion  
 to the Sum which he shall have underwrote, the first as well as  
 the last Insurer, within three Months after we shall have Notice  
 given us of the Loss, or Damage. And in such Case we do  
 grant you the Insured, and all others, full Power to lend an  
 Hand, as well to our Loss, as to our Benefit, in the saving and  
 benefiting of the said Ship \_\_\_\_\_ and the  
 Appurtenances of the same, also to sell the same, and to distri-  
 bute the Money, in case the Matter doth require it, without  
 asking our Consent, or Leave: and we shall also pay the Charges  
 attending the same, besides the Damages fallen thereon, whether  
 any thing be saved, or not: and Faith shall be given to the Ac-  
 count of Charges on the Oath of him who has taken the same,  
 without alledging any thing against it; provided in ready Cash  
 be paid us for the Consideration of the Insurance  
*per Hundred*, under Obligation and Submis-  
 sion of our Persons and Goods present and to come; renoun-  
 cing, as Persons of Honour, all Cavils and Exceptions that may  
 be contrary to these Presents; reciprocally submitting all Diffe-  
 rences which may arise concerning Damages and Premiums, to  
 the Decision of the Chamber of Insurance; chusing in case of  
 our dwelling beyond their Jurisdiction, for *Domicilium citandi*  
 and *executandi*, the House of the Secretary of the said Cham-  
 ber for the Time being. Done at *Amsterdam*, &c.

Appendix 39 Cargo policy in the Amsterdam *keur* of 1744 (English translation)

**W**E underwritten do insure you  
 or whom else it may concern, wholly, or partly, Friend,  
 or Foe, *viz.* each for the Sum here underwritten by us, from  
 on Goods, Wares, and Merchandizes, of  
 what Sort or Sorts they may be, perishable, or not perishable,  
 nothing excepted, laden, or to be laden in the Ship (which God  
 preserve) called \_\_\_\_\_ whereof the Master is  
 \_\_\_\_\_ or who in his Stead as Master, or  
 Masters, may be appointed or write his Name  
 \_\_\_\_\_ of which we hereby take the Risks,  
 Perils, and Adventures, to run for our Account from the Hour  
 and Day that the said Merchandizes shall by you, or your Factor, be  
 brought on the Key, or Shore, to be laden from thence in the  
 said Ship, or in Boats, Barks, or Lighters, to be conveyed on  
 board of the said Ship; and shall continue, till the said Goods  
 and Merchandizes shall be arrived, and there unloaded, with-  
 out any Damage, or Loss, freely, and peaceably, and brought on  
 Shore in the Possession of you the Insured aforesaid, or of any  
 body else having a Commission for it; provided that the said  
 Unlading be made within Fifteen Days after the Arrivel of the  
 Ship at the destined Place, except by lawful Hindrance, or Ob-  
 stacles, the Unlading could not have been made within that  
 Space; which, in case of Disasters, or Damage, must be prov-  
 ed. The said Ship shall be permitted to sail forwards, back-  
 wards, turn and wind to the Right, Left, and to all Sides;  
 and in case of Distress, or of Choice, make all such Havens  
 and Ports as the Master or Masters shall please, or think proper  
 for the Benefit and Advancement of the said Voyage. And though  
 by Distress the said Goods should be unladed, and reladed in any  
 other Ship, or Ships, small or large (which they shall have Li-  
 berty to do by their own Authority, without staying for our Con-  
 sent and Approbation,) we shall run the said Risks and Advent-  
 ures, as if the said Goods had never been unladed: The afore-  
 said Risks consisting further of all Perils at Sea, Strefs of  
 Weather, Fire, and Wind, Arrests by Friends, and Enemies,  
 Detentions by Kings and Queens, Princes, Lords, and Repu-  
 blics, Letters of Mart, and Contra-Mart, Villainies, and Care-

lessness of Masters, or Sailors, and all other Perils and Adventures which any Ways may happen to the said Goods, thought of and unthought of, usual and unusual, none excepted; putting us, in all such Cases, in your Place, to indemnify you for all Loss and Damage, and to pay you the Insured, or your Factor, all the Damage which you shall have suffered, viz. each in Proportion to the Sum which he shall have underwrote, the first as well as the last Insurer, without Deduction, within three Months precisely after we shall have had proper Notice given us of the Loss, or Damage: and in such Cases we do give you the Insured, and all others, full Power to lend a Hand, as well to our Loss, as to our Benefit, in the saving and benefiting of the aforesaid Goods; and to sell the same, and to distribute the Money, in case of Need, without asking our Consent, or Leave; we shall also pay the Charges attending the same, and the Damage fallen thereon, whether any thing be saved, or not; and Credit shall be given to the Account of Charges on the Oath of him who has taken the same, without alledging any thing against it, provided in ready Cash be paid us for the Consideration of this Insurance *per Hundred,* under Obligation and Submission of our Persons and Goods present and to come; renouncing as Persons of Honour all Cavils and Exceptions that might be contrary to these Presents, reciprocally submitting all Differences concerning Damages and Premiums to the Decision of the Chamber of Insurance and Averages of this City; choosing, in case of our dwelling beyond their Jurisdiction, for *Domicilium citandi* and *executandi*, the Habitation of the Secretary of the said Chamber for the Time being. Done at *Amsterdam, &c.*

Appendix 40 Ransom policy in the Amsterdam *keur* of 1744 (English translation)

**W**E the underwritten do insure you  
 or whom it else may concern, *viz.* each  
 for the Sum by us here underwritten, from  
 to touch every where, and all round, and at  
 all Places and Lands, during the whole Voyage, to sail and re-  
 sail, forwards and backwards, also to lie, lade, and relade, at  
 the Master's and Factor's Pleasure, either with, or without,  
 the Knowledge of the Insured, or Factor, on the Body of the  
 Person of  
 navigating as  
 on the Ship (which God preserve) called  
 whereof the Master is and if the  
 said Ship happen to be lost, or shall not proceed on the Voyage,  
 then we shall continue to run the Risk on such other Ship, or  
 Ships, as the said shall be embark on,  
 to accomplish the aforesaid Voyage, either by Water, or by  
 Land; and we shall run the Risk of being taken by any Nation  
 whatsoever, either *Turkish, Moorish, Barbarian*, or other infidel  
 Pirates by which the said  
 may be taken, made Captive, carried away, or ransomed; that  
 in case this happen we will pay, each punctually, our full un-  
 derwritten Sum for his Redemption, or Ransom Money, with  
 the further Charges accrued thereon, to the Insured, or the Bearer  
 of these Presents, without any Deduction, as soon as Advice is  
 come here, and to us it shall have appeared that he is redeemed,  
 or that the Money to that End are drawn, and the Bills of Ex-  
 change shall be accepted; or sooner, in case it shall appear that  
 the redeemed Person is arrived on Christian Ground; provided  
 nevertheless, that what the Ransom might have cost less, shall  
 be returned to the Insurers; so that the Money of our Under-  
 writing shall only serve for his Ransom, and Redemption, and all  
 Dependencies of the same, and no farther. For the accom-  
 plishing of what is aforesaid, we bind our Persons and Goods,  
 present and to come; reciprocally submitting all Differences as  
 well concerning Damages, as Premiums, to the Decision of the  
 Chamber of Insurances and Averages of this City; chusing, in  
 case of our dwelling out of the Jurisdiction of the same, for *Do-*  
*micihum citandi* and *executandi*, the Habitation of the Secretary  
 of the said Chamber for the Time being: all in good Faith with-  
 out Fraud, or Deceit, and we have received for the Premium  
 Done at *Amsterdam, &c.*

Appendix 41 Fire policy in the Amsterdam *keur* of 1744 (English translation)

WE the underwritten do insure you  
or whom else it may concern, wholly, or  
partly, Friend, or Foe, *viz.* each for the Sum here by us un-  
derwritten, on the Structure, Building, &c. called the  
standing and situated  
with the House and Utensils, moreover the Household Furniture,  
Goods, Wares, and Merchandizes, of whatsoever Quality or Nature  
they may be, none excepted, as already are in, or on the aforesaid  
or during the whole Space of this Insurance shall  
be brought therein (and the Insured shall be at Liberty at any  
Time to house so many Goods, and to deliver them out again  
as he shall please) against Fire, and all Danger of Fire; more-  
over against all Damage which on Account of Fire may happen,  
either by Tempest, Fire, Wind, own Fire, Negligence and  
Fault of own Servants, or of Neighbours, whether those nearest,  
or further off; all external Accidents and Misfortunes, thought  
of and not thought of, in what Manner soever the Damage by  
Fire might happen; for the Space of Twelve Months, com-  
mencing with the and ending the  
both at Twelve of the Clock at Noon: valuing specially  
and voluntarily the said Structure, Building, House, &c. with  
all its Utensils, and Household Furniture, at the Sum of  
and the Goods, Wares, and Merchandizes, at the  
Sum of and thus together at the Sum  
of and it shall not prejudice whether all this  
be worth, or has cost more, or less. And the Insured, or whom  
else it may concern, in case of Damage, or Hurt, shall need to  
give no Proof nor Account of the Value, as we know it is impos-  
sible to be done; but the producing this Policy shall suffice. And  
in case it should happen that the said Structure, Building, House,  
Utensils, and Household Furniture, and the Goods, Wares, and  
Merchandizes, the whole, or part, are burnt, or suffer Damage,  
on that Account, we do hereby promise punctually to pay and  
satisfy, without any Exception, within the Space of Three  
Months after the Fire shall have happened, due Notice having  
been given to us, each his whole Sum underwritten, or else in  
proportion to the Damages suffered, without Deduction: pro-  
vided that in case of a partial Loss all that shall be found to  
be saved and preserved shall be deducted, after the Deduc-  
tion of the Charges paid for the saving, and preserving; and  
concerning which the Insured shall be believed on his Oath with-  
out our alledging any thing against it, provided there be paid  
to us, in ready Cash, for the Consideration of this Insurance  
*per Hundred*, under Obligation and  
Submission of our Person and Goods present and to come; re-  
nouncing, as Persons of Honour, all Cavils and Exceptions con-  
trary to these Presents; reciprocally submitting all Differences, as  
well concerning the Damages, as Premiums, to the Decision of the  
Chamber of Insurances and Averages of this City; and chuf-  
ing, in case of our dwelling without the Jurisdiction of the said  
City, for *Domicilium citandi et executandi*, the Habitation of  
the Secretary of the said Chamber for the Time being. Done  
at *Amsterdam, &c.*



Appendix 42 Amsterdam cargo policy of 1750

felton

Wij ondergeteekende verzekeren aan Hoijvrouw Isabella van Leinsvaerden of die het ankers in 't gebiet of deel soude mogen brengen, s'rijck of Vrand, te wesen elk voor de somma by ons hierondergeteekend, van

Suracao ende alle de liden jaeren hieromdient off als - Amsterdam te

En dat op Goederen, Waaren en Koopmanschappen, van wat soort of soorten deselve souden mogen wesen, betaerlijck of betaerlijck uitsen wesen; veldelijck of niet veldelijck in 't Schip, des seker Gode beware, genaamt de Anna & Elisabeth door Schipper of is J. P. Boer - Adriaan de of voor Schipper of Schippers in sijn plaats soude mogen wesen, of hoe den naam van den Schipper of Schippo anders soude mogen gewest of wesen, gelyck of onghelyck worden; als in de sijnant lie geschied op koopmanschappen, ontrent Ongevaert goet off Sijlen, off Bodemaligen off op den eer gaderen dat elck gaderen, s' deont Inconten - Streden souden bedraeven en pennisen van best gaderen van Bjar - Bonten mag laeszen tot de 2000 stivers van de best gaderen velle veldelijck, pennisen van veldelijck mag de gaderen van Bodemaligen In - Gelyck, die gaderen van best gaderen velle veldelijck van Bjar - Bonten van Bjar - Bonten, dat op alle gaderen en gaderen veldelijck.

Wij onze Avrij Spruytende dijft den dagen en vromdienting te Amrij & Johanna den 9 of 10

Wien van wy de Risico, perykel en avonturen, misdieden tot onkosten nemen te hoopen, van heden en dag af de de portz. Koopmanschappen by Uet U. L. Comissie gebreyt sijn op de Rysse of Wal, om van daar geladen te worden in 't vooriz. Schip of Schippen, Barquet of Lichten; en dat men gevoert te worden aan boord van het vooriz. Schip, en sal geladen ter tijt toe, dat het vooriz. Schip tot als Corren sal aangekomen wesen, en de vooriz. Goederen en Koopen sijn sappen sijn ter eenige schade of verlies akter geloff, vryelijck en vryelijck op 't Land gebracht sullen sijn, in 't vermogen van 't Geassureerde vooriz., of van den anders Commissie daar toe hebben, mit dat de vooriz. onloslinge geschiede binnen 15 dagen naar 't arriveeren van 't Schip ter gabellin - rike plaats, ten waere, dat door watter veranderinge of obstrukcie de liffinge in dien tyd niet hadde konnen geschieden, het welck in gevalle van rampen of schade bewesen sal moeten warden; sulende 't vooriz. Schip mogen varen voorwaerts, achterwaerts, warden en liden, ter rechter, ter linker, en aan alle syden, on door noot of met wille sijnen alwieke Ilden en Refen, als den Schipper of Schippers, ten nutte en vromdienting van de vooriz. Rysse behoven of moet liden sal; en of door noot de vooriz. Goederen ontladen warden, en overluden in eenig ander Schip of Schepen, klein of groot; (het welck zy doen zullen mogen uit h'ar selve authoriteit sijn ter ons content of toedragt te warden) sulen wy hoopen de vooriz. Risico en avonturen, als of de vooriz. Goederen noyt ontladen warden geweest; het van de wylers de vromdienting Risicoen in alle perykelen ter Zee, on weder, voor en windt, arrets: van Vrianden en Vyanden, Dissentien van Konningen en Koningslieden, Princken, Heeren en Gemeenten, briefven van Marquen en Contremarquen, scheidreynen en onghelyckheden van Schippers en Koopmanschappen, en alle andere perykelen en avonturen, die de vooriz. Goederen eeniglyck souden mogen aankomen, bedragt of onbedragt, gewoen of ongewoen, geene onghelyckheden, sellende om in alle sulde gevallen in 't plaats, om u te gaderen van alle verlies en schade, ea te betalen aan u Geassureerde of U. L. Comissie, alle de schade die sy sijn geleiden hebben; te wesen; elk na u sijn vromdienting van de somme die by on - lerepactent sal hebben, so wel de eerste als de selve Verrijcker sijn, en dat sulde korting binnen drie maanden p'oceys, na dat wy behoortlyck te s' d'verteert sullen sijn van 't verlies of schade, en in sulde gevallen geven wy u Geassureerde en alle anderen volkomen magt, om soo wel tot onse schade als te onken profite de hand te mogen reiken in 't liden en in beschouven van de vooriz. Goederen, deselve te verkoopen en de penningen te distribueren, inson 't van noden sijn, kon her ons content, of oorick te vragen, sulen ook betalen de onkosten daarom geleden, mits daters de schade daar op gevallen, 't of dat 't selve gescheveert word of niet, en sal men de rekening van onkosten gekooft geven op den end van den geveerde de selve geallien sal hebben, sulde kan daar tegen te leggen; mit dat ons in gaderen geallie betaalt van de vromdienting van u, te verrijckeren 8 ten hondert. Onder verband en submitte van onse Persoonen en Goederen, present en toekomstende, renassiteerende als Liden van eenen, alle cavallaten, en excusiden, die deselve sullen contravieren. Sal sijnkeerende onsen wederzijden en alle quaden van wege de Schaden, als pennisen en verrijckeren van den, welke tot honden vromdienting sijn te vromdienting van de Justitie der Kamer van Assisade en Avare der Steke, en h'elck, voor soo verre wy beyden de Jurisdictie van de selve mogen vromdienting sijn, donkillum citandi & executandi ten huyde van de Secretaris der selve Kamer in der tyd. Alden geallien in Amsterdam. Ady 16 february 1750



West oprechte Kolren wozden Berchocht tot Amsterdam.

St 1750: 18 febr. 1750. 1632 = 1696

1750-18 february

Op goederen in 't Schip de Anna  
& Elisabeth Schip - Broer Adriaan  
van Suracao na Amsterdam.  
/ 1800 - a 2 of C. Houd. looyman  
depolis 144 -  
2 -  
/ 146 -

Appendix 43 Amsterdam cargo policy of 1752

*Handwritten signature/initials*

**W**Y ondergeschreven verzekeren een *U* *Konink Herman*  
 ofte wie het anders in het geheel of ten deele goede mogen seagen. *Vriend of Vyand*, te weten elk een, voor de Somme  
 by ons hier onder geteikent *Van 't Hollandsen*  
 op de Goederen, van was soort of soorten dezelve zoudten mogen wesen, bederfelyk, of onbederfelyk, niets uitgezonderd, geladen  
 of nog te luden, in het Schip, welk God bewaren wy want *Hollandsen Welvaren*  
 daer Schipper op is *Stalen Sijpke*, of wie daer voor Schipper in zyn plaats zoudt  
 mogen varen, ende hoe de naem van den Schipper of het Schip anders zoudten mogen geteikt of gepeikt worden, om te varen  
 tot *Wien loe* of de Circumjacentien van dien

*Handwritten text in Dutch, likely a continuation of the policy or a related document, mentioning 'Wien loe' and 'Circumjacentien'.*



Dene opregte Pollicen sijn te beko-  
 men by DANIEL VANDER  
 MEER, op de Hoogstraet, in  
 't Hollands Klein Zegel.

Waer van wy de resque, pericul ende avonturen, mits dezen tot onzen lasten nemen, te loopen van de dag ende ure af, dat  
 de voorst. Goederen by U of uwen Gemagtigden gebracht zullen sijn op de Maeye of Wal, om van daer geladen te worden in het voorst.  
 Schip, of in schryft of Lijers, om daer naede gevooert te worden ten Boord van het voorst. Schip. Ende alle gelijcken,  
 ter tyt toe dat het voorst. Schip tot *Wien loe* of in de Circumjacentien van dien:  
 zal gekomen wesen, ende de voorst. Goederen op het Land gebracht zullen wesen in het vermogen van de Quasiwerden of uwe  
 Gemagtigden:  
 Zullende het voorst. Schip mogen varen voorwaerts, agterwaerts wchdende en keerende ter regter ter linkerhand, ende sen  
 allen syde, ende door mud, of met wille, aencomende zulke Havens ende Reedden als den Schipper, ten nutte ende vorderinge  
 van de voorst. Reize, believen of goetduncken zal: Ende of door mud de voorst. Goederen ontsien werden, ende herladen in  
 eenig ander Schip of Schepen, kien of groot (het welk sy doen zullen mogen, uyt haer zelfe autoriteyt, zonder ons consent af te  
 wagen) zullen wy kopen de voorst. resque ende avonturen, als of de voorst. Goederen niet ontsien waren geweest.  
 Wyders begrypen wy onder de voorgeselde resque, alle pericole van Wind ende alle andere te Water, van Vuur, van Ar-  
 resten ende Detentien van Hooghehand, so wel van Vrienden als van Vyanden, van Brieven van Marque edoe contremarque,  
 van schelmeren ende ongezindheit van Schippers en Bootgezellen, ende alle andere pericole ende avonturen die te voorst.  
 Goederen ongezindt zoudt mogen overkomen, bedagt of onbedagt, gewoon of ongewoon, geen uitgezonderd: stellende ons in alle  
 zulke gevallen in U plaats, om U te garanderen van al e verlies en schade, ende te betalen een U Quasiwerde, of uwe Gemag-  
 tigde: alle de schade die Gy zult geleden hebben, te weten elk een naar advaent van de Somme die hy ondereikeint zal hebben,  
 zoo wel de eerste als de laatste Verzekeraer, ende dat zonder korting, binnen een Maend precies na dat wy behoortlyk geadvocuerd  
 zullen sijn van het verlies of schade. En in al zulke gevallen geven wy U Quasiwerde, ende alle anderen volkomen magt, om,  
 zoo wel tot onze schade als tot onzen profyte, de hand te maken reiken in het salveren, ende bene ficieren van de voorst. Goederen,  
 de zelve te verkoopen, en de Penningen te distribueren, indien het van noden is, zonder ons consent of oorlof te vragen. Wy  
 zullen ook betalen de onkosten daeromme gedaen, metgaders de schade daer op gevallen, het zy daer yen gefalveert werde of  
 niet, ende zal men een de Rekening van onkosten gekouf geven, op den Eyd van de gene die dezelve gekouf zal hebben zonder  
 yet daer tegen te zeggen.

Mits dat ons in gereede Gelde betaalt werde, voor de prijs van deze verzekering *een guldens d'ijfentien* ten hondert:  
 Onder verband en Submissie van onze Persoonen en Goederen present en toekomende, Reputierende als miden van eer van al-  
 le cavillien, en exceptien, die d'zen zoudten contrarieren; en submitterende ons specialik ook volgens haer Eyd groot Mog.  
 Resolucie van den 12 July 1736, ten weerspreken de Judicature der Kamer van het Zeerem d'eyr Stad, en kiefende; voor  
 sin vore wy layten de Jurisdictie van de zelve magten wootzichtig sijn, *Doanijna Cap: 12, articulo ten huylt van den*  
 Ede: der seiver Kamer in d'yr tyt. *Alles gekouf binnen ROTTERDAM, den 17<sup>den</sup> Junij 1752, 1752.*

1000. ... *Jan Vander Hoop* voor een duysend guldens: *premie* outf.  $\frac{1}{12}$

Appendix 44 Rotterdam cargo policy of 1757

*Copie*

W Y ondergeteekten verzekeren aan U *Ed. v. d. heer Dapper & Kindom* ofte wie het anders in het geheel of ten deele zoudt mogen aenspan, Vriend of Vyand, te weten elk een, voor de somme by ons hier onder geteikent *van Havre de Grace* op de *Goedern*, van wat soort of soorten dezelve zoudt mogen wesen, beiderfelyk of onbeiderfelyk, niets uitgezondert, geladen of nog te laden, in het Schip (het welk Gods beware) genaemt *de Anna Teela* of wie daer op voor Schipper in syn plaats zoudt daer Schipper op is mogen varen, en hoe den naem van de Schipper of het Schip anders zoudt mogen gestelt of gespelt worden, om te varen met *Havre de Grace* of de Circumjacenten van dien

*Wij hebben ons diens voor alle gewaam geveren gesehandert met de schippen in de op Zee, volgens brief van de order van de Compagnie in data 24 dezer vande gemelde, dat wij brief van Havre de Grace in data 8 dezer het Convooy dat gewaam wint, reeds tot Catalogne was die ter goete trouwe op alle gade's gieschelding*

*Van onkosten d'ruynder van Logdagen als meeren van Ruym onder 3 p/*

Waer van wy de resque, pericul ende avonturen, mit dezen tot onze lasten nemen, te loopen van den dag en ure af, dat de voorz. *Goedern* by U of uwen Gemagtigden gebracht zullen syn op de Kaey of Wal, om van daer geladen te worden in het Schip of in schuyten of Ligters, om daer mede gevoert te worden en het loord van het voorz. Schip. En zal geduyren, tot dien tyd toe dat het voorschreeve Schip zal gekomen wesen, en de voorz. *Goedern* op het Land gebracht zullen syn in het vermogen van den Geassureerden of uwen Gemagtigden; Zullende het voorz. Schip mogen varen voorwaerts, agterwaerts, wendende en keerende ter regher of ter linkerhand, en aen allen zyden, en door hood, of met wille, aenattende zulke Havens en Reden als den Schipper, ten nutte en vorderinge van de voorz. Reize, believen of goed dunken zal; en of door nood de voorz. *Goedern* ontladen wierden, en berladen in eenig ander Schip of Schepen, klein of groot (het welk zy deen zullen mogen, uyt laer zelfs autoriteyt, zonder ons consent af te wagen) zullen wy loopen de voorz. resque en avonturen als of de voorz. *Goedern* niet ontladen waren geweest. Wyders begrypen wy onder de voorgesemde resque, alle periculen van Wind, en alle andere te Water, van Vuur, van Arresten en Detensien van Hoogerhand, zoo wel van Vrienden als van Vyanden, van Drieven van marque, en contramarque, van schelmerye en ongezamenheid van Schippers en Bootsgezellen, en alle andere periculen en avonturen die de voorz. *Goedern* eenigzins zoud. n mogen overkomen, bedagt of onbedagt, gewoon of ongewoon, geen uitgezondert, stellende ons in alle zulke gevallen in U plaetse, om U te gaaranderen van alle verlies en schade, en te betalen aen U Geassureerden, of uwen Gemagtigde alle de schade die Gy zult geleden hebben, te weten elk een na advenant van de somme die hy ondergetyckent zal hebben, zoo wel de eerste als de laatste Verzekeraer, en dat zonder kortinge, binnen ten Maent precys, na dat wy behoorlyk geadvrteert zullen syn van het verlies of schade. En in al zulke gevallen geven wy U Geassureerden, en alle anderen, volkomen magt, om zoo wel tot onze schade als ten onzen profyte, de hand te mogen reiken in het silveren en benutten van de voorz. *Goedern*, de zelve te verkoopen, en de Penningen te distribueren, indien het van noden is, zonder ons consent of oorlof te vragen. Wy zullen ook betalen de onkosten daer omme gedaan, misgaders de schade daer op gevallen, het zy dat 'er yet gesalveert worde of niet, en zal men aen de Rekening van onkosten gelouf geven, op den Eed van den genaen die dezelve gedaan zal hebben, zonder yet daar tegen te zeggen.

Mits dat ons in gerede Golde zal betaelt werde, voor de pry van deze verzekering *Alids onder Convooy van ons Logdage of de Logdage van de Zeevaren. Hier Guldens* ten hondert: Onder verband en Subscitie van onze Verbonen en *Goedern* present en toekomstende, Revalidemals als luiden van eer van al'e cavallation, en exceptie, die daten zoudt contrarcten; en submittreende ons specyalyk ook volgens haar Ed. Groot Mog. Resolutie van den 18 July 1756, ten wederzyden de Jodicture van bus Zeyrege daer Stad, en kiefende, voos zoo verre wy buiten de Juridictie van de zelve mogen wromagtig syn. *Dumstellum Civendi & civitatis ten busje van den Bode der selver Kamer in der tyd. Aldus gedaen binnen ROTTERDAM, den 22 July 1757*

- Van gelovende*
- 3000 — *Joan Olyl. Soons* *1757*
  - 2000 — *Pompjura N Soons* *1757*
  - 1000 — *Jan de Landen Gijlbertson* *1757*
  - 1500 — *Josie valicq Soons* *1757*
  - 1850 — *Arion Bruyne* *1757*

Appendix 45 Amsterdam cargo policy of 1760

*Handwritten initials*

**W**i ondergeschreeven verzekerers aan *De Heeren Solan, Lemens & Toon.* of die het anders in 't geheel of deel zoude mogen aangaan, Vriend of Vyand, te wisten elk door de sojus by ons hier ondergetekend, van Copennagen en alle redimiringsreizen van dien of tot Dantzic. met laadde op een nieuw Copennagen waer dit Schip nu niet verankerd, verandert alle Goederen & goederen sijn.

En dat op Goederen, Waren en Koopmanschappen, van wat soort of sorten deselve souden mogen wesen, bedersfelck of onbedersfelck, niets uitgezonderd; gelaaden of weg te laaden in 't Schip, het welke Gods bewaere, genaemd de *Marynarde de witte d'Armen* door den Schipper op is *de anderen de redimiringsreizen.* of wie voor Schipper of Schippers in sijn plaats zoude mogen varen, of het den naam van den Schipper of Schip, andere zonde mogen geortbroeggherd, gesels of gespels worden? *De re a Summe Gode hier van alle Gemaen & dat by 10 Gulden vrom sijn den Schip*

*De van onkosten van Lijdingen door onschikking sijn en dat van Godde sijn anders jst*



Waar van wy de Risico, perykel en avonturen, mit desen tot onsen lasten neemen te loopen, van het uur en dag af dat de voorz. Koopmanschappen by U of U.E. Commis gebracht sulken zyn op de Kaye of Wal, om van daar geladen te worden in 't voorz. Schip of Schuyten, Barquen of Lichters, om daar mede gevoert te worden aan boord van het voorz. Schip, en sal geduren ter tijd toe, dat het voorz. Schip tot als boven sal aangekomen wesen, en de voorz. Goederen en Koopmanschappen sonder eenige schade of verlies aldaar geloft, vrijelijck en vreedelijck op 't Land gebracht sulken zyn, in 't vermogen van u Geassureerde voorz., of yemant anders Commissie daer toe hebbende, vrijelijck en vreedelijck op 't Land gebracht sulken zyn, in 't vermogen van u Geassureerde voorz., of yemant anders Commissie daer toe hebbende, mit dat de voorz. ontlossinge geschiede binnen 15 dagen naar 't arrivement van 't Schip ter gedelineerde plaats, ten waare, dat door wettige verhindefinge of obstacule de lossinge in dien tyd niet hadde kunnen geschieden, het welke in gevalle van rampen of schade bewesen sal moeten worden; sulijnde 't voorz. Schip mogen varen voorwaerts, agterwaerts, wenden en keeren, ter rechter, ter linker, en aan alle zyden, en door noodt of met wille aannemen alsulke 1. Laven en Reën, als den Schipper of Schippers, mit wille en verboring van de voorz. Ulyke bedriven of sijn danks sal. en of d'over d'overse, L'overse onkosten wieden, en beraden in eenig ander Schip of Schepen, klein of groot; (het welk zy doen zullen mogen uit haar zelfs autoriteit sonder ons consent of toedragt te wagen) sulken wy loopen de voorz. Risico en avonturen, als of de voorz. Goederen noyt ontladen waren geweest; bestaende vyders de voorenstaende Risicoen in alle perykelen ter Zee, onweerd, vuur en windt, arresien van Vrienden en Vyanden, Detentien van Koningen en Koninginnen, Princen, Heeren en Gemeenten, Brixven van Marquen en Contremarquen, schelmeryen en onagtsamheden van Schippers en Bootgesellen, en alle andere perykelen en avonturen, die de voorz. Goederen eenigints souden mogen aankomen, bedagt of onbedagt, gewoon of ongewoon, geene uytgefondert, stellende ons in alle sulke gevallen in u plaats, om u te geranderen van alle verlies en schade, en te betalen aan u Geassureerde of U.E. Commis, alle de schelde die gy sulc geleden hebben, te weten; elk naar advenant van de somme die hy ondergetekent sal hebben, so wel de eerste als de lesse Verzekeraar, en dat sonder korting binnen drie maanden precys, na dat wy behoortlyk geadvertort sulken zyn van 't verlies of schade, en in sulke gevallen geven wy u Geassureerde en alle anderen volkomen magt, om soo wel tot onse schade als t'oncen profyte de hand te mogen reiken in 't silveeren en beneficiereen van de voorz. Goederen, deselve te verkopen en de penningen te distribuereen, indien 't van noodt is, sonder ons consent, of oorlof te vragen, sulken ook betalen de onkosten daarom gedaen, misgaders de schade daar op gevallen, 't sy dat 'er iets gesalveert werd of niet, en sal men de rekening van onkosten geloof geven op den Fed van den genen die de selve gedaen sal hebben, sonder iets daer tegen te seggen; mit dat ons in gerekten gelde betaakt werde voor den prijs van dese verzekering

*Schip R.*  
Dese overrechte Policen worden verkocht tot Amsterdam.  
*J. Keeser, Bruin, Carbon, Aelian.*

submissie van onse Persoonen en Goederen, present en toekomstende, renunciereende als Layden van eeren, alle cavillationen, en exceptien, die desen souden contrariereren. Submitteerende ons ten wederzyden om alle quallien zoo wegens de schadens, als premien en verbeteringe van dien, welke uyt hoofden voorz. zouden mogen ontstaen, aan de Judicature der Kamere van Assurance en Avryve deser Stede, en kistende, voor soo verne wy beyden de Jurisdictie van deselve mogen vromsagig sijn, domiciliem citandi & executandi ten huyse van de Secretaris derelieve Kamere in der tyd, Aldus gedaen in Amsterdam. *Aby 20. febr. 1760.*

*1760 Sept 24 9000*  
*2. 1800. 13/2 177*  
*2000*  
*Androna Hank*  
*R. Socquett mor Troca*  
*1260*  
*De re a Summe Gode hier van alle Gemaen & dat by 10 Gulden vrom sijn den Schip*  
*De van onkosten van Lijdingen door onschikking sijn en dat van Godde sijn anders jst*

## Appendix 46 Amsterdam policy on a ship (English translation)

POLICY, on *Ship*\*, at Amsterdam.

WE underwritten do assure you or whom it else may concern, wholly, or partly, friend, or foe, none excepted, viz. each for the sum here by us underwritten, from on the hull, or body of the ship, which God preserve, with all her guns, ammunition, utensils, and appurtenances of the same, belonging to the said or any body else, called whereof the master is or who in his stead as master, or masters, may navigate of which we hereby take the risques, perils, and adventures to run for our account, from the hour and day that the said ship has made a beginning to lade the merchandize, or shall have taken on board her ballast for the said voyage, and end twenty-one days after the said ship shall be arrived at the last destined place of unlading, or so much sooner as she shall be entirely unladed. The said ship shall be permitted to sail forwards, and backwards, to turn and wind to the right, left, and to all sides, as the master, or masters shall please, and think proper for the service and benefit of the said voyage: the afore-mentioned dangers consisting of all perils at sea, strefs of weather, fire, and wind, arrests by friends and enemies, detentions by kings, and queens, princes, lords, and republicks, letters of mart and contra-mart, *carelessness of masters and sailors*, villainies of the said sailors, and all other perils and adventures which any wise may happen to the ship without means of the insured, thought of, or not thought of: putting ourselves, in all such cases, in your place to pay to you the insured, or your factor, all the damage which you shall have suffered, viz. each in proportion to the sum which he shall have underwrote, the first as well as the last insurer, within three months after we shall have notice given us of the loss, or damage. And in such case we do grant you the insured, and all others, full power to lend an hand, as well to our loss, as to our benefit, in the saving and benefiting of the said ship and the appurtenances of the same; also to sell the same, and to distribute the money, in case the matter doth require it, without asking our consent, or leave: and we shall also pay the charges attending the same, besides the damages fallen thereon, *whether any thing be saved, or not*: and faith shall be given to the account of charges on the oath of him who has taken the same, without alleging any thing against it: provided in ready cash be paid us for the consideration of the insurance per hundred, under obligation and submission of our persons and goods present and to come; renouncing, as persons of honour, all cavils and exceptions that may be contrary to these presents; *reciprocally submitting all differences which may arise concerning damage and premiums, to the Decision of the chamber of insurance*; chusing in case of our dwelling beyond their jurisdiction, for *domicilium citandi and executandi*, the house of the secretary of the said chamber for the time being. Done at Amsterdam, &c.

\* That on Goods is nearly similar.

Appendix 47 Lloyd's SG policy as adopted in 1779

IN THE NAME OF GOD, *Amen.*

S. G.

Printed according to the Form revised and confirmed at New Lloyd's, on the 12th of January, 1779.

Stamps.

as weil in own Name, as forand inthe Name and Names of all and every other Person or Persons to whom the same doth, may, or shall appertain, in Part or in All, doth make Assurance and cause and them and every of them to be Insured, lost or not lost, at and from

Upon any Kind of Goods and Merchandises, and also upon the Body, Tackle, Apparel, Ordnance, Munition, Artillery, Boat and other Furniture, of and in the good Ship or Vessel called the

whereof is Master, under God for this present Voyage, or whosoever else shall go for Master in the said Ship, or by whatsoever other Name or Names the same Ship or the Master thereof, is or shall be named or called, beginning the Adventure upon the said Goods and Merchandises from the loading thereof aboard the said Ship

upon the said Ship, &c.

and shall so continue and endure, during her Abode there, upon the said Ship, &c. And further, until the said Ship, with all her Ordnance, Tackle, Apparel, &c., and Goods and Merchandises whatsoever, shall be arrived at

upon the said Ship, &c., until she hath moored at Anchor Twenty-four Hours in good Safety, and upon the Goods and Merchandises, until the same be there discharged and safely landed. And it shall be lawful for the said Ship, &c., in this Voyage to proceed and sail to and touch and stay at any Ports or Places whatsoever

without Prejudice to this Insurance: The said Ship, &c., Goods and Merchandises, &c., for so much as concerns the Assured, by Agreement between the Assured and Assurers in this Policy, are and shall be valued at

Touching the Adventures and Perils which we the Assurers are contented to bear and do take upon us in this Voyage, they are, of the Seas, Men-of-War, Fire, Encemics, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes, and People, of what Nation, Condition, or Quality soever, Barretry of the Master and Mariners, and of all other Perils, Losses, and Misfortunes that have or shall come to the Hurt, Detriment, or Damage of the said Goods and Merchandises and Ship, &c., or any Part thereof. And in case of any Loss or Misfortune it shall be lawful to the Assured, their Factors, Servants, and Assigns, to sue, labour, and travel for, in, and about the Defence, Safeguard, and Recovery of the said Goods and Merchandises and Ship, &c., or any Part thereof, without Prejudice to this Insurance; to the Charges whereof we, the Assurers, will contribute each one according to the Rate and Quantity of his Sum herein assured. And it is agreed by us, the Insurers, that this Writing or Policy of Assurance shall be of as much Force and Effect as the surest Writing or Policy of Assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we the Assurers are contented, and do hereby promise and bind ourselves, each one for his own Part, our Heirs, Executors, and Goods, to the Assured, their Executors, Administrators, and Assigns, for the true Performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance by the Assured at and after the Rate of \_\_\_\_\_ per cent.

IN WITNESS whereof, we the Assurers have subscribed our Names and Sums assured in London.

N.B.—Corn, Fish, Salt, Fruit, Flour, and Seed are warranted free from Average, unless General, or the Ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides, and Skins are warranted free from Average under Five Pounds per Cent; and all other Goods, also the Ship and Freight, are warranted free from Average under Three Pounds per Cent, unless general, or the Ship be stranded.

Appendix 48 Lloyd's SG policy on hull of 1780

S. G.

Printed according to the Form revised and corrected at New Lloyd's, on the 11th Jan. 1772. By W. Mudge, Printer.

In the Name of God, Amen. Messrs. Langston & Dixon as well in their own Names, as far and in the Name and Names of all and every other Person or Persons to whom the same duty, may, or shall appertain, in Part or in All, doth make Assurance, and cause Assurance to be made, and every of them to be Insured, left or not left at and from

*Lyonsmouth to Guernsey*

Upon any Kind of Goods and Merchandizes, and also upon the Body, Tackle, Apparel, Ordnance, Munition, Artillery, Boat, and other Furniture, of and in the good Ship or Vessel called the *Richard*

whereof is Master, under God, for this present Voyage, *James Bennett* or whatsoever else shall go for Master in the said Ship, or by whatsoever other Name or Names the same Ship, or the Master thereof, is or shall be named or called; beginning the Adventure upon the said Goods and Merchandizes from the Loading thereof aboard the said Ship, *Richard*

upon the said Ship, &c. Commencing the Risk at *Lyonsmouth* the 4th Nov. 1780 and so shall continue and endure, during her Abode there, upon the said Ship, &c. And further, until the said Ship, with all her Ordnance, Tackle, Apparel, &c. and Goods and Merchandizes whatsoever shall be arrived at *Guernsey*

upon the said Ship, &c. until she hath moored at Anchor Twenty-four Hours in good Safety; and upon the Goods and Merchandizes, until the same be there discharged and safely landed. And it shall be lawful for the said Ship, &c. in this Voyage, to proceed and sail to and touch and stay at any Ports or Places whatsoever

without being deemed any deviation without Prejudice to this Insurance. The said Ship, &c. Goods and Merchandizes, &c. for so much as concerns the Assureds, by Agreement between the Assureds and Assurers in this Policy are and shall be valued at

*Three Hundred Pounds upon the Ship*

Touching the Adventures and Perils which we the Assurers are contented to bear, and do take upon us in this Voyage, they are of the Seas, Men of War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter Mart, Surprizals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People, of what Nation, Condition or Quality soever; Barraty of the Master and Mariners, and of all other Perils, Losses and Misfortunes, that have or shall come to the Hurt, Detriment or Damage of the said Goods and Merchandizes and Ship, &c. or any Part thereof. And in case of any Loss or Misfortune, it shall be lawful to the Assureds, their Factors, Servants and Assigns, to sue, labour and travel for, in and about the Defence, Safeguard and Recovery of the said Goods and Merchandizes and Ship, &c. or any Part thereof, without Prejudice to this Insurance; to the Charges whereof we the Assurers will contribute each one according to the Rate and Quantity of his Sum herein Assured. And it is agreed by us the Insurers, that this Writing or Policy of Assurance shall be of as much Force and Effect as the best Writing or Policy of Assurance heretofore made in *Lombard-street*, or in the *Royal-Exchange*, or elsewhere in *London*. And so we the Assurers are contented, and do hereby promise and bind ourselves, each one for his own Part, our Heirs, Executors, and Goods, to the Assureds, their Executors, Administrators, and Assigns, for the true Performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance: by the Assured

the Rate of *Two Guineas of a half to return 25th Nov. 1780* if it departs with Convey for the Voyage, & arrives

In Witness whereof we the Assurers have subscribed our Names and Sums Assured in *London*.

N. B. Corn, Fish, Salt, Freck, Flour and Seed, are warranted free from Average, unless General, or the Ship be Stranded, Sugar, Tobacco, Hemp, Flax, Hides and Skins, are warranted free from Average, unless Five Pounds per Cent. and all other Goods, also the Ship and Freight are warranted free of Average unless Three Pounds per Cent. unless General, or the Ship be Stranded.

The following Insurance is upon the *Brig Richard* valued at *£500*  
*Wm. R. Nicholson* for *£100* *Wm. Hugginson* one hundred Pounds *£100* 17 Nov. 1780  
*£100* *Wm. Dargy* one hundred pounds *£100* 17 Nov. 1780  
*£100* *J. Dickson* one hundred Pounds *£100* 17 Nov. 1780  
*£100* *James Cook* of *N. Manton* one hundred Pounds *£100* 17 Nov. 1780



## Appendix 49 Amsterdam fire policy (English translation)

POLICY, on *Fire*, at *Amsterdam*.

WE the underwritten do insure you \_\_\_\_\_ or whom else it may concern, wholly, or partly, friend, or foe, viz. each for the sum here by us underwritten, on the structure, building, &c. called the \_\_\_\_\_ standing and situated with the house and utensils, moreover the household furniture, goods, wares, and merchandises, of whatsoever quality or nature they may be, none excepted, as already are in, or on the aforesaid \_\_\_\_\_ or during the whole space of this insurance shall be brought therein (and the insured shall be at liberty at any time to house as many goods, and to deliver them out again, as he shall please) against fire, and all dangers of fire; moreover against all damage which on account of fire may happen, either by tempest, fire, wind, own fire, negligence and fault of own servants, or of neighbours, whether those nearest or further off; all external accidents and misfortunes, thought of and not thought of, in what manner soever the damage by fire might happen; for the space of twelve months, commencing with the \_\_\_\_\_ and ending the \_\_\_\_\_ both at twelve of the clock at noon: valuing specially and voluntarily the said structure, building, house, &c. with all it's utensils, and household furniture, at the sum of \_\_\_\_\_ and the goods, wares, and merchandises. at the sum of \_\_\_\_\_ and thus together

at the sum of \_\_\_\_\_ and it shall not prejudice whether all this be worth, or has cost more or less. And the insured; or whom else it may concern, in case of damage, or hurt, shall need to give no proof nor account of the value, as we know it is impossible to be done; but the producing this policy shall suffice. And in case it should happen that the said structure, building, house, utensils, and household furniture, and the goods, wares, and merchandises, the whole, or part, are burnt and suffer damage, on that account, we do hereby promise punctually to pay and satisfy, without any exception, within the space of three months after the fire shall have happened, due notice having been given to us, each his whole sum underwritten, or else in proportion to the damages suffered, without deduction: provided that in case of a *partial loss* all that shall be found to be saved and preserved shall be deducted, after the deducting of the charges paid for the saving, and preserving; and concerning which the insured shall be believed on his oath without our alleging any thing against it, provided there be paid to us, in ready cash, for the consideration of this insurance \_\_\_\_\_ per hundred, under obligation and submission of our person and goods present and to come, renouncing, as persons of honour, all cavils and exceptions contrary to these presents; reciprocally submitting all differences, as well concerning the damages, as premiums, to the decision of the chamber of insurances and averages of this city; and chusing, in case of our dwelling without the jurisdiction of the said city, for domicilium citandi et executandi, the habitation of the secretary of the said chamber for the time being. Done at Amsterdam, &c.

Appendix 50 London (Royal Exchange Assurance) fire policy of 1782

HOUSE and GOODS.

N<sup>o</sup>. P3422



By the CORPORATION of the ROYAL-EXCHANGE ASSURANCE of HOUSES and GOODS from FIRE.

*L 100*  
 THIS present Instrument or Policy of Assurance Witnesseth, That *Mr. William Mawes* of *Lynn Regis in the County of Norfolk* *buried* agreed to pay into the Treasury of the Corporation of the Royal-Exchange Assurance at their Office in the Royal-Exchange, London, the Sum of *Three Hundred and fifty Pounds* for the Assurance of *Three Hundred and fifty Pounds on a House and Office adjoining situat in High Street in Lynn Regis aforesaid in the occupation of himself and others Eighty Pounds on Household Furniture therein Ten Thousand and twenty Pounds on Wines and Stock in Trade in the same and One Hundred and fifty Pounds on a workshop and Office adjoining situat in the yard belonging to the said Buildings being brick and timber framed with brick and tiled*

(except such Goods as Hemp, Flax, Tallow, Pitch, Tar, Turpentine, Glass, China and Earthen Wares, Writings, Books of Account, Notes, Bills, Bonds, Tallies, ready Money, Jewels, Plate, Pictures, Gunpowder, Hay, Straw, and Corn unthreshed) from Loss or Damage by Fire. Now know all Men by their Presents, That the Capital Stock, Estate, and Securities of the said Corporation shall be subject and liable to pay, make good, and satisfy unto the said Assured *his* Heirs, Executors, or Administrators, any Loss or Damage which shall or may happen to the said *Buildings* or Goods by Fire within the Space of Twelve Calendar Months from the Day of the Date of this Instrument or Policy of Assurance, not exceeding the respective Sums as aforesaid, or *Eight Hundred Pounds in the whole*

(except as before excepted) and shall so continue, remain, and be subject and liable, as aforesaid, from Year to Year, to be computed from the *fourth* Day of *April* in every Year, for so long Time as the said Assured, shall well and truly pay, or cause to be paid the Sum of *Three Hundred and fifty Pounds* into the Treasury of the said Corporation, on or before the *fourth* Day of *April*

which shall be in each succeeding Year, and the said Corporation shall agree thereto by accepting and receiving the same, which said Loss or Damage shall be paid in Money immediately after the same shall be settled and adjusted, deducting only Three Points per Cent. or otherwise if the said Loss or Damage shall not be adjusted, settled and paid (making such Deduction as aforesaid) within Sixty Days after Notice thereof shall be given to the said Corporation by the said Assured, that then the said Corporation, their Officers, Workmen, or Assigns, shall, at the Charge of the said Corporation, immediately after the Expiration of the said Sixty Days, begin to rebuild or repair the said *Buildings* so burnt or damaged by Fire, and within a reasonable Time put the same into as good a Condition as it was in at the Time when such Fire happened, the Waincoat, Sculpture or Carving Work thereunto belonging (if any) being, in Case of an Adjustment of the said Loss or Damage, to be rated and valued at no more than Three Shillings per Yard; and in Case of rebuilding or repairing by the said Corporation, it be made good according to that Rate and Value, and not otherwise. And the said Corporation shall likewise, immediately after the Expiration of the said Sixty Days, in Case the Loss or Damage of the said Goods shall not be adjusted and paid, as aforesaid, provide and supply the said Assured with the like Quantity of Goods of the same Sort and Kind, and of equal Value and Goodness with those burnt or damaged by Fire. Provided always nevertheless, and it is hereby declared to, be the true Intent and Meaning of this Deed or Policy, that the said Stock, Estate and Securities of the said Corporation, shall not be subject or liable to pay, or make good to the Assured any Loss or Damage by Fire, which shall happen by any Invasion, Foreign Enemy, or any Military or Usurped Power whatsoever. Provided also, That this Deed or Policy shall not take Place or be binding to the said Corporation until the Premium for One Year is paid, or in Case the said Assured hath already made, or shall hereafter make any other Assurance upon the *Buildings* or Goods aforesaid, unless the same shall be allowed of and specified upon the Back of this Policy. Or if the said *Buildings* at the Time when any such Fire shall happen, shall be in the Possession of, or Lett to any Person who shall use or exercise therein the Trade of a Sugar-Baker, Apothecary, Chemist, Coloursman, Distiller, Bread or Biscuit-Baker, Ship or Tallow-Chandler, Stable-keeper, Innholder or Malster, or shall be made Use of for the storing or keeping of Hemp, Flax, Tallow, Pitch, Tar, or Turpentine, but that in all or any of the said Cases these Presents, and every Clause, Article and Thing herein contained, shall cease, determine, and be utterly void and of none Effect, or otherwise shall remain in full Force and Virtue. In Witness whereof the said Corporation have caused their Common Seal to be hereunto affixed, the *fourth* Day of *April* in the *fourth* Year of the Reign of our Sovereign Lord *George the Third* by the Grace of God of Great-Britain, France and Ireland, King, Defender of the Faith, &c. and in the Year of our Lord One Thousand Seven Hundred and Eighty *1782*

Appendix 51 Rotterdam fire policy of 1799

Dese Policen van Assu-  
rantie sijn te bekomen  
by Ca. Rd. Verwyk  
op de Leuvehaven, in  
't Hollandsch Klein  
Zegel.  
(get.)  
R. MEESG ZONEN  
Mak.

Wij ondergeschreven verzekeren aan *D' heeren Cornelis van der Hoeven & Zoon* of die het anders in het geheel of ten deele zoude mogen aangaan, *Vriend of Vijand*, voor de somme bij ons hier ondergetekend op graanen liggende op diverse plaatsen binne deeze stad hieromme breeder omschreeven zullende het aan de geassureerdens vry staan, indien de partijen graanen door aflevering verminderen andere graanen van wat natuur die ook zoude moogen zijn in derzelver plaats op te leggen, waar op wij de risico op dezelve conditie zullen loopen mits van zoodanige verwisseling opgaave gedaan werden aan de eerst ondergetekende assuradeur.

En zulks voor brand, en alle periculen van brand, mitsgaders voor de schade, die uit hoofde van brand zoude kunnen ontstaan, het zy door Onweër, Vuur, Wind, eigen Vuur, Onagzaamheid, Schuld van eigen Bedienden, van Buuren en Belendenden, van Vyanden, Roovers, en alle anderen, hoe genaamd, op wat wyze de brand zoude mogen zyn ontstaan, en de schade aan het verzekerde wezen veroorzaakt, mitsgaders voor de schade, welke als een gevolg van den brand moet worden genomen, aangemerkt, of gehouden als bederf of vermindering van het verzekerde, zoo door het water, ter brandblussching, of ter beveiliging van het verzekerde, gebruikt, als door het geene verder tot conservatie van het zelve zal worden aangewend, en voorts voor alle uiterlijke toevallen en ongevallen, bedagt of onbedagt, gewoon of ongewoon, geene uitgezonderd, door brand ontstaande.

En zulks voor den tijd van zes maanden  
aanvang neemende met den twee & twintigsten Mey 1799  
en zullende eindigen den twee & twintigsten November 1799  
beide des namiddags ten twee uren

wordende de voorsz: graanen by deeze met wederzyts goedvinden getaxeert op een somma als voor ydere party afzonderlyk is gestelt. Waar mede wy genoeg en nemen; en zal, in cas van ongeval, niets anders mogen worden geëischt dan alleen deze Police, nevens eene taxatie der schade van twee neutrale Persoonen, te committeeren bij den Rechter, ter plaatse daar het verzekerde is gelegen, 't geen voor voldoende zal worden gehouden, en de gevallene schade door ons, zonder eenige exceptie, worden voldaan, nevens alle kosten op de beredding gevallen, ééne maand na dat aan ons advertentie van het ongeluk zal zijn gegeven, zonder eenige korting, mits dat ons in gereeden gelde betaald worde, voor den prys van deze verzekering  $f^{\frac{3}{16}}$  per Cto. Vry van schade onder drie per Cent.

Aldus ter goeder trouwe, onder verband en bedwang als naar Rechten.  
Getekend binnen Rotterdam 22 Mey 1799.

De voorenstaande assurantie geschied yder afzonderlyk voor

f 17400.—.—	op 41 Last 13 zak Rogge op den Zolder Brabant . . N. 4	} Scheepmakershaven.
.. 15100.—.—	.. 36 do. 2 do. do. .. .. do. . . N. 6	
.. 7500.—.—	.. 17 do. 23 do. do. .. .. Bak . . . . BN. 1	} Leuvehaven.
.. 14700.—.—	.. 35 do. — do. .. .. Pott . . . . N. 1	
.. 13600.—.—	.. 32 do. 13 do. do. .. .. do. . . . . N. 2	} Scheepmakershaven.
.. 29400.—.—	.. 70 do. — do. .. .. Termons . AN. 3	
.. 8400.—.—	.. 20 do. — do. .. .. Compagnie . N. 7	} Boompjes. de Punt.
.. 14700.—.—	.. 34 do. 24 do. do. .. .. Suykerbrood N. 1	
f 120800.—.—		

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## BIBLIOGRAPHY

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### General Note

This bibliography consists of a list, alphabetically according to the author, of the works or contributions consulted for this study. The left-hand column contains the abbreviated reference used in the footnotes to the text. The full bibliographical details of each reference are provided in the right-hand column as that appeared from the actual title pages of the works or from the other materials consulted. Where available and relevant, I have added, in square brackets, the date or dates of the first, earlier or other editions in those cases where I had made use of a different edition. To assist with the chronological placing of the pre-nineteenth century sources, I have likewise added in square brackets the dates of birth and death of the authors where those dates could be ascertained.

### \*A\*

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Wyffels

Carlos Wyffels 'Een Antwerpse zeeverzekeringsspolis uit het jaar 1557' (1948) 113 *Bulletin de la commission royale d'histoire de Belgique* 95-103

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Zee-rechten

*Zee-rechten, inhoudende dat oudste en hoogste water-Recht dat de gemeene kooplieden en schippers hebben gemaekt in Wisbuy. De zeerechten gemaekt bij Keyser Karel, ...* [1648] (1695) Amsterdam

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- Zyphaeus Notitia** Franciscus Zypaeus [c1578-1650] *Notitia iuris Belgici* [1635 Antwerp], 3 ed (1642) Arnhem

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## TABLE OF LEGISLATIVE MEASURES

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The following is a list of the legislative measures referred to in this thesis which concern insurance directly in some way or another. I have arranged them chronologically according to country or city and have indicated, where necessary, where reproductions of the relevant measures may be found. Most of the legislative materials not directly concerned with insurance (but, for example, with matters such as bottomry, gaming and wagering, lotteries, maritime and shipping law, stamp duties, brokers, the manning and equipment of ships, interest, and provisional sentence and other procedural matters) which were referred to in this study, have not been included in this table but are referenced in the footnotes where they were mentioned.

### The Netherlands

- Placcaat of 1459* 15 February 1459 (os 1458); reproduced in *Vlaenderen Placcaet-Bouck* vol I at 72-74, *Gilliodts van Severen Cartulaire* vol II at 88-90
- Placcaat of 1537* 'Nopende de Wissel-brieven ende Asseurantien' 25 May 1537; reproduced in *Placcaeten van Brabandt* vol I at 511-512, *Pardessus* vol IV at 37-38
- Placcaat of 1550* 'Ordonnantie, Statut en Edict, op 't faict der Zeevaert, Equipagie en toerustinghe van Schepen, ...' 29 January 1550 (os 1549); reproduced in *Van Niekerk Sources* appendix A at 101 (ss 20-24), *GPB* vol IV at 1219-1224, *Vlaenderen Placcaet-Bouck* vol I at 360, *Pardessus* vol IV at 38-39
- Placcaat of 1551* 'Ordonnantie, Statut en Nieuw Edict, op het faict der Zee-vaert ...' 19 July 1551; *Vlaenderen Placcaet-Bouck* vol I at 375-396; *GPB* vol I at 782-795 (incomplete); *Placcaeten van Brabandt* vol III at 216; the French version with notes appears in *Verswyvel 'Placards'* 5-10
- Placcaat of 1563* 'Ordonnantie, Statuyt ende eeuwich Edict 's Conincks ... op 't faict vander Zee-vaert ... Midtsgaders vande Zee-Rechten, alsoo wel onder de Schippers als den Kooplleden. Ende de Ordonnantie op 't faict vander verseeckeringe oft Asseurantie, Met meer andere saecken der Zee-vaert aengaende' 31 October 1563; reproduced in *GPB* vol I at 796-829; *Vlaenderen Placcaet-Bouck* vol II at 307-334, *Pardessus* vol IV at 64-102; title VII ('Ordonnantie op de Verseeckeringe oft Asseurantie') only is reproduced in *Van Niekerk Sources* appendix B at 104-108; an English translation of portions of the *placcaat* of 1563 ['Extract from the Ordinance of King Philip the Second ... at Antwerp, concerning Navigation'] appears in *Magens Essay* vol II at 14-30; the French version is reproduced in *Verswyvel 'Placards'* 37-40
- Placcaat of 1569* 31 March 1569 (os 1568); the French text is reproduced in *Reatz 'Ordonnances'* 81-89, *Goudsmit Zeerecht* 273-280



<i>Placcaat of 1570</i>	27 October 1570; the Dutch text is reproduced in Reatz 'Ordonnances' 89-105
<i>Placcaat of 1571</i>	' <i>Ordonnantie, Statuyt ende Policie ... op 't feyt vande Contracten vande Asseurantien ende verseeckerings in dese Nederlanden</i> ' 20 January 1571 (os 1570); reproduced in Van Niekerk <i>Sources</i> appendix C at 112-118, <i>GPB</i> vol I at 828-841, <i>Vlaenderen Placaet-Bouck</i> vol II at 335-343, <i>Pardessus</i> vol IV at 103-119, Reatz 'Ordonnances' 106-118 (French text) ' <i>Placaaet ... interpreterende 't Placaet van Asseurantien vanden selve date ...</i> ' 20 January 1571 (os 1570); reproduced in <i>GPB</i> vol II at 2115-2116, Van Niekerk <i>Sources</i> appendix C at 121;]
Resolution of the Estates of Holland 1736	' <i>Extract uit de Resolutien van de Heeren Staten van Holland en West-Vriesland ... [op de Propositie van ... der Stad Amsterdam]</i> ' 12 July 1736; reproduced in Van Niekerk <i>Sources</i> appendix E(25) at 166, <i>Amsterdam handvesten</i> vol II at 662; <i>GPB</i> vol VI at 643-644 (better copy)
<b>Amsterdam</b>	
<i>Amsterdam keur of 1598</i>	' <i>Ordonnantie ... der Stadt Amstelredamme gemaect op 't stuck vande Asseurantie</i> ' 31 January 1598; reproduced in Van Niekerk <i>Sources</i> appendix D(1) at 122-129; <i>GPB</i> vol I at 846-859; <i>Amsterdam handvesten</i> vol II at 653-656; <i>Amsterdam recueil</i> cap XXX at 131-144
<i>Amsterdam amending keur of 1598</i>	4 December 1598; reproduced in Van Niekerk <i>Sources</i> appendix E(1) at 137, <i>Amsterdam handvesten</i> vol II at 656
<i>Amsterdam turbe of 1599</i>	21 October 1599; reproduced in Van Niekerk <i>Sources</i> appendix E(2) at 138, <i>Amsterdam handvesten</i> vol II at 541-542
<i>Amsterdam amending keuren of 1600 and 1601</i>	February 1600 and June 1601; reproduced in Van Niekerk <i>Sources</i> appendix E(3) at 139, <i>Amsterdam handvesten</i> vol II at 656; <i>GPB</i> vol I at 852-853
<i>Amsterdam keur of 1601 on wagers</i>	8 December 1601; reproduced in Van Niekerk <i>Sources</i> appendix E(4) at 140, <i>Amsterdam handvesten</i> vol II at 507
<i>Amsterdam amending keur of 1606</i>	20 June 1606; reproduced in Van Niekerk <i>Sources</i> appendix E(5) at 141, <i>Amsterdam handvesten</i> vol II at 656-657, <i>Pardessus</i> vol IV at 136
<i>Amsterdam amending keur of 1607</i>	14 June 1607; reproduced in Van Niekerk <i>Sources</i> appendix E(6) at 142, <i>Amsterdam handvesten</i> vol II at 657, <i>Pardessus</i> vol IV at 137
<i>Amsterdam amending</i>	26 January 1610; reproduced in Van Niekerk <i>Sources</i> appendix E(7) at

- keur* of 1610 143, *Amsterdam handvesten* vol II at 657, *GPB* vol I at 857, *Pardessus* vol IV at 139
- Amsterdam *keur* of 1612 on brokers 'Ordonnantie van de Makelaers' 27 January 1612; s 6 reproduced in reproduced in *Van Niekerk Sources* appendix E(8) at 144, *Scholten Makelaars (bijlage A)*, *Amsterdam handvesten* vol IV at 1060-1061
- Amsterdam charter of 1612 'Octroy voor die van Amsterdam, tot oprichting vande Kamere van Asseurantie ...' 17 July 1612; reproduced in *Van Niekerk Sources* appendix D(2) at 133-135, *GPB* vol I at 842-847; *Amsterdam handvesten* vol II at 652-653
- Amsterdam amending *keur* of 1613 on brokers 17 January 1613; reproduced in *Van Niekerk Sources* appendix E(9) at 145, *Amsterdam handvesten* vol IV at 1062-1063
- Amsterdam amending *keur* of 1614 9 May 1614; reproduced in *Van Niekerk Sources* appendix E(10) at 146, *Amsterdam handvesten* vol II at 657, *GPB* vol I at 850-851, *Pardessus* vol IV at 40-141
- Reply to Amsterdam query in 1614 9 May 1614; reproduced in *Van Niekerk Sources* appendix E(11) at 147-148, *Amsterdam handvesten* vol II at 657-658
- Amsterdam amending *keur* of 1620 5 December 1620; reproduced in *Van Niekerk Sources* appendix E(12) at 149, *Amsterdam handvesten* vol II at 658, *GPB* vol I at 858, *Scholten Makelaars (bijlage A)*, *Pardessus* vol IV at 141
- Amsterdam amending *keur* of 1621 September 1621; reproduced in *Van Niekerk Sources* appendix E(13) at 150, *Amsterdam handvesten* vol II at 658, *Pardessus* vol IV at 143
- Amsterdam amending *keur* of 1626 30 January 1626; reproduced in *Van Niekerk Sources* appendix E(14) at 151, *Amsterdam handvesten* vol II at 658, *Pardessus* vol IV at 144
- Amsterdam amending *keur* of 1640 25 January 1640; reproduced in *Van Niekerk Sources* appendix E(15) at 152, *Amsterdam handvesten* vol II at 658-659
- First Amsterdam amending *keur* of 1688 29 January 1688; reproduced in *Van Niekerk Sources* appendix E(16) at 153, *Amsterdam handvesten* vol II at 659
- Second Amsterdam amending *keur* of 1688 29 January 1688; reproduced in *Van Niekerk Sources* appendix E(17) at 154-155, *Amsterdam handvesten* vol II at 659-660, *Pardessus* vol IV at 146
- Amsterdam amending *keur* of 1693 26 January 1693; reproduced in *Van Niekerk Sources* appendix E(18) at 156-157, *Amsterdam handvesten* vol II at 660-661, *Pardessus* vol IV at 147

Amsterdam amending <i>keur</i> of 1697	18 January 1697; reproduced in Van Niekerk <i>Sources</i> appendix E(19) at 158, <i>Amsterdam handvesten</i> vol II at 661
Amsterdam amending <i>keur</i> of 1699	23 January 1699; reproduced in Van Niekerk <i>Sources</i> appendix E(20) at 159-160, <i>Amsterdam handvesten</i> vol II at 661, Pardessus vol IV at 148
Amsterdam amending <i>keur</i> of 1701	24 January 1701; reproduced in Van Niekerk <i>Sources</i> appendix E(21) at 161, <i>Amsterdam handvesten</i> vol II at 661
Amsterdam amending <i>keur</i> of 1707	25 January 1707; reproduced in Van Niekerk <i>Sources</i> appendix E(22) at 162, <i>Amsterdam handvesten</i> vol II at 661
Amsterdam amending <i>keur</i> of 1721	27 January 1721; reproduced in Van Niekerk <i>Sources</i> appendix E(23) at 163-164, <i>Amsterdam handvesten</i> vol II at 661-662
Amsterdam amending <i>keur</i> of 1733	27 January 1733; reproduced in Van Niekerk <i>Sources</i> appendix E(24) at 165, <i>Amsterdam handvesten</i> vol II at 662
Amsterdam <i>keur</i> of 1744	' <i>Nieuwe Ordonnantie van Assurantie, en Avaryen</i> ' 10 March 1744; reproduced in Van Niekerk <i>Sources</i> appendix F at 169-190, <i>Amsterdam handvesten</i> vol II at 662-671; an English translation ['Ordinance of Insurance and Averages of the City of Amsterdam'] appears in Magens <i>Essay</i> vol II at 128-154
Amsterdam amending <i>keur</i> of 1745	27 April 1745; reproduced in Van Niekerk <i>Sources</i> appendix G(1) at 196-197, <i>Amsterdam handvesten aanhangzel</i> vol II at 1666, Scholten <i>Makelaars (bijlage B)</i> ; an English translation appears in Magens <i>Essay</i> vol II at 155-156
Amsterdam amending <i>keur</i> of 1756	30 January 1756; reproduced in Van Niekerk <i>Sources</i> appendix G(2) at 198-203, <i>Amsterdam handvesten 2e vervolg</i> at 89-91
Amsterdam amending <i>keur</i> of 1775	31 January 1775; reproduced in Van Niekerk <i>Sources</i> appendix G(3) at 204-210, <i>Amsterdam handvesten 2e vervolg</i> at 91-95
<b>Antwerp</b>	
Antwerp <i>Antiquae</i> 1570	Title XXIX (' <i>Contracten van Assurantien</i> ') reproduced in De Longé vol I at 598-604
Antwerp <i>Impressae</i> 1582	Title LIV (' <i>Van Contracten van Assurantien, van Weddinghe ende Spel</i> ') reproduced in <i>Antwerp Costumen</i> 75-76, De Longé vol II at 400-407, Pardessus vol II at 182
Antwerp <i>Compilatae</i> 1609	Part 4 (' <i>Van Contracten ende Verbintenissen ende des daeraen cleefft</i> ') Title XI (' <i>van Versekeringe oft Assurantie</i> ') reproduced in De Longé vol IV at 198-334

## Middelburg

- Middelburg *keur* of 1600 'Ordonnantie op 't [Assurantie] van Middelburgh' 30 September 1600; reproduced in Van Niekerk *Sources* appendix J at 251-256, *GPB* vol I at 866-875, Pardessus vol IV at 167; an English translation of a later promulgation of this *keur* ['Ordinance in Regard to Assurances in the City of Middelburg in Zeeland, the 10th of December 1689'] appears in Magens *Essay* vol II at 68-79
- Middelburg amending *keur* of 1719 '*Ampliatie op de Kaamer van Assurantie binnen deese Stadt Middelburgh in Zeeland*' 4 February 1719; reproduced in Van Niekerk *Sources* appendix K at 260-261, *GPB* vol V at 1287; an English translation of the *keur* ['Explanation concerning the Chamber of Assurances, in this City of Middelburg in Zeeland'] appears in Magens *Essay* vol II at 79-80

## Rotterdam

- Rotterdam *keur* of 1604 '*Ordonnantie opte Asseurantien van Rotterdam*' 12 March 1604; reproduced in Van Niekerk *Sources* appendix H at 212-216, *GPB* vol I at 858-865, Pardessus vol IV at 52
- Rotterdam *keur* of 1721 '*Ordonnantie op het stuk van Assurantie ende van Avarye: mitsgaders Zee-zaken*' 28 January 1721; ss 1 and 23-82 reproduced in Van Niekerk *Sources* appendix I at 219-246 (from a separate reprint of the *keur* published in Rotterdam in 1748), *Rotterdam keure* vol II at 126; an English translation of the whole *keur* ['Ordinance concerning Assurances and Averages for the City of Rotterdam'] appears in Magens *Essay* vol II at 81-126

## Spain

- Barcelona Insurance Ordinances  
of 2 November 1435: reproduced with a French translation in Pardessus vol V at 493-502;  
of 14 August 1436: reproduced with a French translation in Pardessus vol V at 502-506;  
of 17 November 1458: reproduced with a French translation in Pardessus vol V at 507-523;  
of 31 October 1461: reproduced with a French translation in Pardessus vol V at 521-523; and of 3 June 1484: reproduced with a French translation in Pardessus vol V at 523-543, English translation in Jados 287-302
- Burgos Insurance Ordinance of 1538 reproduced with a French translation in Pardessus vol VI at 135-194

## France

- Guidon de la mer* reproduced in Pardessus vol II at 377-432; an English translation appears in Lowndes 50-56
- Ordonance de la marine* 1861 reproduced in Pardessus vol IV at 370; an English translation [of the Marine Ordinances of Louis XIV] appears in 30 *Federal Cases* 1203-1216 (1897); and also [as the 'Ordinances of France Made in 1681'] in *Magens Essay* vol II at 157-186

## Hamburg

- Hamburg *Assecuranz-Ordnung* 1731 '*Assecuranz- und Haverey-Ordnung der Stadt Hamburg*', 10 September 1731; reproduced in Dreyer 267-343; a Dutch translation is appended to Feitama's translation of *Roccus De assecurationibus*; an English translation [of the 'Order of the City of Hamburg concerning Insurance and Average, 1731'] appears in *Magens Essay* vol II at 210-252

## England

British statutes are reprinted in several collections. Most useful for the older measures, are three multi-volumed series entitled *Statutes of the Realm* (covering the period 1225-1713), *Statutes at Large* (covering 1225-1806), and *Statutes of the United Kingdom* (covering 1807-1869). Earlier statutory measures were, as a rule, not provided with a short title, that being done either by the editors of the collection in which the statute was taken up or, in some cases, by way of legislative enactment (eg the Short Titles Act of 1896). Many of the older laws were repealed by a series of Statute Law Revision Acts (SLRA) passed in the latter part of the nineteenth century.

- 43 Eliz II c 12 'An Act concerning Matters of Assurance amongst Merchants' [An Act establishing the Court of Arbitration or Assurances] 1601; amended 1662; repealed by the SLRA 1863; reproduced with a French translation in Pardessus vol IV at 210-214
- 14 Car II c 23 'An Addiconal Act concerning matters of Assurance used amongst Merchants' 1662; repealed by the SLRA 1863
- 16 Car II c 6 'An Act to prevent the delivering up of Merchant Ships' 1664; reproduced with a French translation in Pardessus vol IV at 214-216
- 16 Car II c 7 'An Act against deceitful, disorderly, and excessive Gaming' 1664
- 4 Gul & Mar c 15 'An Act for continuing certain Acts therein mentioned [including a prohibition on the insurance of enemy property], and for charging several Joint Stocks' 1692
- 7 Anne c 16 'An Act to prevent the laying of Wagers relating to the Publick' 1708

- 9 Anne c 6 'An Act prohibiting insurances on marriages, births, christenings, etc'  
1710
- 9 Anne c 14 'An Act for the better preventing of excessive and deceitful Gaming'  
1710
- 12 Anne c 18 'An Act for the preserving all such Ships and Goods thereof, which shall  
happen to be forced on Shore or stranded, upon the Coasts of the King-  
dom, or any other of Her Majesty's Dominions' 1713
- 4 Geo I c 12 'An Act for inforcing and making perpetual [12 Anne II c 18] ... and for  
inflicting the Punishment of death on such as shall wilfully burn or  
destroy Ships' 1717; explained 1724; repealed 1803
- 6 Geo I c 18 'An Act for better securing certain Powers and Privileges intended to be  
granted by His Majesty by Two Charters for Assurance of Ships and  
Merchandizes at Sea; and for lending Money upon Bottomry; and for  
restraining several extravagant and unwarrantable practices therein  
mentioned [the Monopoly Act; the Bubble Act] 1720; also reproduced in  
Magens Essay vol II at 367-371; repealed in 1824
- 8 Geo I c 15 'An Act ... that the Two Corporations of Assurance on any Suits brought  
on their Policies, shall be liable only to single Damages and Costs of  
Suit' 1721
- 11 Geo I c 29 'An Act ... for explaining and amending [4 Geo I c 12] 1724
- 6 Geo II c 35 'An Act ... for enforcing the Laws made against foreign Lotteries ...' 1733
- 7 Geo II c 8 'An Act to prevent the infamous Practice of Stock-jobbing' 1734
- 12 Geo II c 28 'An Act for the more effectual preventing of excessive and deceitful  
Gaming' 1739
- 18 Geo II c 34 'An Act to explain, amend and make more effectual the Laws in being, to  
prevent excessive and deceitful Gaming; and to restrain and prevent the  
excessive Increase of Horse Races' 1745
- 19 Geo II c 32 'An Act for amending the Laws relating to Bankrupts' 1746 (see too  
Magens Essay vol II at 352-353)
- 19 Geo II c 37 'An Act to regulate Insurance on Ships belonging to the Subjects of  
Great Britain, and on Merchandizes or Effects laden thereon [the Marine  
Insurance Act; the Gambling Act] 1746 (see too Magens Essay vol II at  
341-345); repealed by the Marine Insurance Act 1906

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- 21 Geo II c 4 'An Act to prohibit Assurance on Ships belonging to France, and on Merchandizes or Effects laden thereon, during the present War with France' 1748; repealed by the SLRA 1867
- 25 Geo II c 26 'An Act to restrain the making Insurances on foreign Ships bound to or from the East Indies 1752 (see *Magens Essay* vol II at 345-347); repealed 1758
- 31 Geo II c 27 'An Act for repealing [25 Geo II c 26]' 1758
- 14 Geo III c 48 'An Act for regulating Insurances upon Lives, and for prohibiting all such Insurances, except in Cases where the Persons insuring shall have an Interest in the Life or Death of the Persons insured' [the Life Assurance Act, the Gambling Act] 1774
- 14 Geo III c 78 'An Act ... for the more effectually preventing Mischiefs by Fire within the Cities of London and Westminster ...' [the Fires Prevention (Metropolis) Act] 1774
- 22 Geo III c 48 'An Act for charging a Duty on Persons whose Property shall be insured against Loss by Fire' 1782
- 25 Geo III c 44 'An Act for Regulating Insurances on Ships, and on Goods, Merchandizes, or Effects [the Insurance on Ships Act] 1785; repealed in 1788
- 28 Geo III c 56 'An Act to repeal [25 Geo III c 44]; and for substituting other Provisions, for the like Purpose, in lieu thereof [the Marine Insurance Act] 1788; repealed in respect of marine insurance by the Marine Insurance Act of 1906
- 33 Geo III c 27 'An Act more effectually to prevent, during the present War between Great Britain and France, all Traitorous Correspondence with, or Aid or Assistance being given to His Majesty's Enemies 1793; repealed by the SLRA 1871
- 35 Geo III c 63 'An Act for granting to His Majesty certain Stamp Duties on Sea Insurances' 1795; repealed 1867
- 43 Geo III c 113 'An Act for the more effectually providing for the Punishment of Offences in wilfully casting away, burning, or Destroying Ships and vessels; ...' 1803; repealed by the SLRA 1861
- 47 Geo III c 36 'An Act for the Abolition of the Slave Trade' 1806

- 5 Geo IV c 64 'An Act to repeal so much of [6 Geo I c 18] as restrains any other Corporations than those in the Act named, and any Societies or Partnerships, from effecting Marine Assurances, and lending Money on Bottomry' [the Marine Insurance (Amendment) Act] 1824; repealed by the SLRA 1873
- 9 Geo IV c 13 'An Act for further regulating the Payment of Duties under the Management of the Commissioners of Stamps on Insurances from Loss or Damage by Fire' [Stamps on Fire Insurances Act] 1828
- 8 & 9 Vict c 109 The Gaming Act 1845
- 30 & 31 Vict c 144 The Policies of [Life] Assurance Act 1867
- 31 & 32 Vict c 86 Policies of Marine Insurance Act 1868; repealed by the Marine Insurance Act 1906
- 39 Vict c 6 Sea Insurances (Stamping of Policies) Amendment Act 1876
- 55 & 56 Vict c 9 The Gaming Act 1892
- 6 Edw VII c 41 The Marine Insurance Act 1906
- 9 Edw VII c 12 The Marine Insurance (Gambling Policies) Act 1909

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