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

VOLUME II

by

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1 The Capacity to Conclude Insurance Contracts

1.1 Introduction

A further requirement for the conclusion of a valid insurance contract in Roman-Dutch law was that the parties had to have the capacity to act and thus to conclude contracts. Although in the law of contract generally the position of women and minors were especially important in this regard, it was no doubt of lesser importance as far as insurance contracts were concerned: in practice women and minors did not frequently conclude insurance contracts. Accordingly there is very little information in the sources on the relevance in the insurance context of the general capacity to contract.

The most pertinent comment came from Decker who briefly considered whether a minor could conclude an insurance contract, either as insurer or as insured. He noted that the capacity of minors to contract was a difficult and much discussed question and thought that the application of the general principles in the insurance context would cause the least difficulty. Thus, Decker continued, where a guardian as such contracted an insurance in the name of a minor, such guardian had to perform the contract in that capacity; and a minor who negotiated and conducted business by himself; had to be considered to be emancipated and could therefore conclude valid insurance contracts.

It has already been mentioned that the privilege of minors, widows, orphans and others to bypass the lower courts and to take their claims directly to the Hof van Holland, were not available in the case of claims on insurance contracts.

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1 One of surely very few instances where a woman had insured or was otherwise involved in an insurance contract, appears from a case before the Hooge Raad in 1711 (see Bynkershoek Observationes tumultuariae obs 779; idem Quaestiones juris privati IV.4). Bynkershoek referred to her as 'Sempronia' but otherwise it does not appear from his account of the case that her status as a female had any effect either upon her rights under the insurance contract or as regards the prosecution of her claim before the courts.

2 Aanteekeningen ad IV.9.4 n(3)/(c).

3 See also eg Faber Aanteekeningen 25. By contrast the position of women and minors were in some respects specifically dealt with in other systems. Thus, the Ordinance de la marine of 1681 (in arts 12 and 14 of title VI) concerned the capacity of married women and minors to conclude valid and binding ransom insurance contracts for the release of their husbands or fathers from captivity (see again ch VII § 3.2 supra for ransom insurance). And the Hamburg Assecuranz-Ordnung of 1731 (art 1 of title II) provided that every major person (ie, a person who had reached 22 years of age, or who had been declared a major) who wanted to, could act as an insurer (see Dreyer 120).

4 See again ch IV § 1.4.3 n80 supra.
1.2 The Legislative Prohibition on the Conclusion of Insurance Contracts by Certain Persons

In addition to parties' contractual capacity generally, Roman-Dutch insurance law was in particular concerned with their capacity to conclude insurance contracts. Not all those who had the capacity to conclude contracts generally, were permitted to conclude insurance contracts. Some persons were specifically prohibited by way of legislation from insuring themselves or from insuring others. But the number of those prohibited in this way was limited and, as Van der Keessel explained, everyone who was not prohibited could both insure and be insured ('et assecurare possint et assecurationem recipere').

Unfortunately there was, especially at first, not always clarity as to whether the prohibition concerned the conclusion of an insurance contract as insured (insuring himself or having himself insured) or as insurer (himself insuring or providing insurance cover). The prohibitions in Dutch, as would be the case in English, often merely stated that certain persons were prohibited from insuring and the legislatures were not always alert to the ambiguity contained in and the unspecific nature of the word 'insure'. The precise scope of each prohibition therefore had to be deduced from the surrounding circumstances and the presumed intention of the Legislature in question. Furthermore, the legal position was not in all respects identical in the different jurisdictions and in successive legislative measures within each of them, and this gave rise to some nice and fine distinctions by the Dutch commentators.

The first Dutch insurance measure to address the capacity to insure was the placcaat of 1571. Three sections dealt with the topic. Section 17 determined that to ensure the better observance of the placcaat, none of those charged with overseeing the armament and equipment of ocean-going ships could be involved with insurance contracts, whether by accepting or providing insurance or by intervening for others. Likewise, by s 19, no public officials such as customs officers ('Tollenaers'), those in charge of ports, bridges or passages ('Officiers van Havenen, Bruggen oft Passagien'), or similar persons who oversaw shipping or the conveyance of merchandise ('Zeevaert oft Conduyte vander Koopmanschap') were allowed to be involved in insurance at

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5 Praelectiones 1433 (ad III.24.3). In earlier times Straccha De assecurationibus III.1 still considered whether an insurance contract could be concluded between eg Christians and Jews.

6 Unlike some other contracts (eg purchase and sale), in the case of the insurance contract the name of the contract did not identify and distinguish the respective performances undertaken by the parties involved.

7 Such measures were not new. Thus, in Barcelona insurance brokers could not insure on penalty of a fine and withdrawal of their permission to operate as broker. See Reatz Geschichte 76. Generally, however, the older Italian and Spanish insurance laws did not limit the freedom to act as insurer and did not specify persons and occupational groups who were restricted in their participation in insurance. See Hammacher 69.
all. If any of the above-mentioned persons did so, he forfeited everything promised or received in terms of the insurance contract, and the contracts he concluded would be null and void. Closer to home, s 18 provided that the Commissioner of the Registration Bureau, his substitutes, deputies, clerks, scribes ('Commis Generael, zijne Substitute, Gedeputeerde, Clerken, Schrijvers') or others under his control could not be involved with insurance directly or indirectly, that is, as insured, insurers or intermediaries. Lastly, in the context of non-marine insurance, wagoners, carriers, freight forwarders, and customs and other officials ('Wagenlieden, Voer-lieden, Vracht-lieden, Tollenaers ende Officiers') could in terms of s 29 not conclude any insurances.

The pattern set by the placcaat of 1571 was subsequently followed by the municipal legislatures. In terms of s 30 of the Amsterdam keur of 1598, officers and Commissioners of the Chamber of Insurance ('d' Officiers, de Gecommitteerde vande Kamere van Asseurantie'), its Secretary and clerk, customs officials ('Tollenaers') or insurance brokers ('Makelaers van Asseurantie') could not, directly or indirectly, act as insurers or have themselves insured ('geene verseeckeringe mogen doen, ofte laten doen'). Section 15 concerned non-marine carriers ('wagen-voer-vracht-luieden') who too could not conclude any insurances. It was no doubt not immediately apparent why these persons should not be allowed to take out policies to insure themselves and s 30 was clarified shortly after the promulgation of the keur of 1598. In terms of the amending keuren of February 1600 and June 1601, the Commissioners and the Secretary of the Chamber were permitted to have themselves insured ('Commissarisen ende den Secretaris mogen hun wel doen [laten] versekeren') but remained prohibited from providing insurance cover. Others, such as brokers and customs officials, could neither insure nor be insured.

In terms of s 22 of the Rotterdam keur of 1604, the Commissioners of the Chamber, who had to decide insurance disputes, as well their Secretary or sworn clerk, and

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8 Presumably this reference in s 19 included also the persons mentioned earlier in ss 17 and 18.

9 Additionally, the Commissioner's instructions ('Memorie ende Instructie') noted that he or any of his deputies were not to involve themselves, directly or indirectly, with any insurance contracts ('hen niet en sullen mogen onderwenden [bemoeien], directelick noch indirectelick, met eneige Contracten van verseeckeringen').

10 As to these provisions of the placcaat of 1571, see generally Van Zurck Codex Batavus sv 'Assurantie' par 1; Scheltinga Dictata ad III.24.3 sv 'als oock tollenaers ende makelaers'; Van der Keessela Praelectiones 1431-1433 (ad III.24.3); Goudsmit Zeerecht 263; and Kracht 26.

11 Virtually identical too were the measures taken up in art 25 of title 11, par IV of the Antwerp Compilatae of 1609 (see De Longé vol IV at 208).

12 In identical terms was s 29 of the Middelburg keur of 1600.

13 In identical terms was s 27 of the Middelburg keur of 1600. See generally Goudsmit Zeerecht 329.

14 As to the position in Amsterdam, see generally Goudsmit Zeerecht 319; Vergouwen 48; and Weskett Digest 61-68 sv 'broker' at 66 par 12 (as to the Middelburg keur) and at 67 par 14 (as to the Amsterdam keur).
also insurance brokers, could not themselves or through others insure someone directly or indirectly ('niemandt mogen versieckeren'). Rotterdam thus followed the Amsterdam amendment and went further, prohibiting Commissioners, the Secretary and insurance brokers from acting as insurers but not prohibiting them from being insured.\textsuperscript{15} And although there was no mention in the Rotterdam \textit{keur} as in that of Amsterdam of the capacity of terrestrial carriers to act as insurers, the position was the same in both cities by virtue of the relevant provision in the \textit{placcaat} of 1571 which continued to apply in Rotterdam.\textsuperscript{16} The Rotterdam \textit{keur} made no mention of officers and customs officials though.

Writing on the legislative position in the seventeenth century, Roman-Dutch authors substantiated that although as a rule anyone could conclude insurance contracts as insurer or as insured, certain legislative exceptions did exist. It was noted, for example, that generally the Commissioners of the various insurance chambers, their employees, customs officials and insurance brokers could not insure.\textsuperscript{17} In doing so they provided some clarification as to particular matters. Thus, Scheltinga made it clear that the references to ‘Commissioners’ did not include judges of higher courts who may also have heard appeals in insurance cases.\textsuperscript{18} In addition to the Commissioners and their servants not being permitted to insure, in Amsterdam, but not in Rotterdam, officers (‘officiers’) were likewise prohibited. According to Bynkershoek\textsuperscript{19} it seemed that such officers did not include the servants of the Commissioners since they were mentioned before the Commissioners in s 30 of the Amsterdam \textit{keur} of 1598 and since such servants were in any case specifically mentioned there. Furthermore, they were not military officers. He thought that they could only be bailiffs (‘de Bailluwen’) but remarked that it was unclear why they and not others in authority were thus prohibited. Had those prohibited been identified as officers of ports, bridges and passages, the prohibition would have made sense because such officers had been prohibited earlier by the \textit{placcaat} of 1571. Nevertheless, it appeared to Bynkershoek that such an interpretation was probably the best and that ‘officers’ had to be taken to refer to those in

\textsuperscript{15} See eg Goudsmit \textit{Zeerecht} 397, noting that the prohibition was only on acting as insurers, not also on insuring themselves; and Vergouwen 81, noting that in Rotterdam brokers were right from the start permitted to insure their own goods, something which in Amsterdam continued to be prohibited until 1744.

\textsuperscript{16} See Scheltinga \textit{Dictata ad} III.24.3 sv ‘voorts wagenluiden etc’.

\textsuperscript{17} See eg Grotius \textit{Inleidinge} III.24.3; Groenewegen Aanteekeningen n3 (ad III.24.3); Scheltinga \textit{Dictata ad} III.24.3 sv ‘hare dienaers’.

\textsuperscript{18} See Scheltinga \textit{Dictata ad} III.24.3 sv ‘uitghenomen de rechters etc’, referring to Grotius’ use of the word ‘judges’ (‘rechters’) in this regard.

\textsuperscript{19} See \textit{Quaestiones juris privati} IV.26.
charge of ports, bridges and waterways. Van der Keessel, in turn, thought the 'officers' in s 30 could mean either, as Bynkershoek had suggested, the officials in charge of ports, bridges or waterways, or, which he considered more likely, the bailiffs whose job it was to ensure that those who committed any fraud in connection with insurance contracts, were punished.

The terms 'customs officials' and 'brokers' (tollenaers; makelaers) also elicited some discussion. Scheltinga remarked that in Amsterdam and Middelburg both were mentioned while in Rotterdam there was no mention of the former but merely of the latter. The question was whether 'tollenaers' were different from 'makelaers van assurantie' or whether the latter included the former. He could find no reason why 'tollenaers' had to be included in the term 'makelaers' and thought 'tollenaers' to refer to such officers overseeing trade at sea ('zoodanige officiers op de zeewaters op conditie van den koophandel toezig houdende').

The writers further stressed that carriers could not act as insurers.

Several writers did not notice that the Amsterdam keur of 1600 had removed the prohibition on some persons (Commissioners, the Secretary) of concluding insurance contracts as insured and that the Rotterdam keur of 1604 had reflected that shift. Some, though, did. Lybrechts, for example, in considering who could not be insurers, noted that there was no reason why such persons could not insure themselves if they wished and that they were not prohibited from doing so by the keuren. In fact, he

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20 See too Scheltinga Dictata ad III.24.3 sv 'als oock tollenaers ende makelaers' who also considered the further question whether those mentioned in the placcaat of 1571 but not in the subsequent municipal keuren, still had to be taken to be prohibited from insuring others or having themselves insured ('aan wien het assureeren of zich te laaten assureeren, verbooden is'). One could argue, he thought, that the placcaat of 1571 had been abrogated on this point in those places where new keuren had been promulgated or that it must be taken as never having been in force there. But, he opined, it appeared that the placcaat of 1571, being a promulgated ('gepubliceerde wet') and general law ('generaele landswet'), was applicable and still applied there and that the persons mentioned in it had to be added to those for whom insurance was expressly prohibited by the keuren, at least in so far as the persons described in the placcaat still existed ('voor zoo verre diergelyke personen of qualiteiten noch in weesen zijn').

21 See Van der Keessel Praelectiones 1435-1433 (ad III.24.3), referring to s 31 in fin of the Amsterdam keur of 1598. See further ch XIV infra as to fraud.

22 Dictata ad III.24.3 sv 'als oock tollenaers ende makelaers'.

23 He thought that the Amsterdam and Middelburg keuren probably mentioned 'tollenaers' merely after the example of s 19 of the placcaat of 1571 where they were certainly distinguished from brokers.

24 See Grotius Inleidinge III.24.3; Van Zurck Codex Batavus sv 'Assurantie' par 3.

25 See eg Voet Observationes ad III.24.3 (n3); Van Zurck Codex Batavus sv 'Assurantie' par 2 (Commissioners and Secretary could not insure, 'doch zy mogen voor zich wel doen verzekeren') and par 2 n1 (they 'mogen voor zich volgens gebruik doen verzekeren'); and Rooseboom Amsterdam Costumen c 30 s 30 in marg where, in referring to the amendments of 1600 and 1601, it was noted that 'by den Heeren van den Gherechte' it was understood that those persons 'hun wel moghen doen verseeckeren'.

pointed out, the Amsterdam amending *keuren* of 1600 and 1601 expressly declared that they could.\(^{26}\)

In the eighteenth century, s 4 of the Middelburg amending *keur* of 1719 permitted the Commissioners, the Secretary and other employees of its Insurance Chamber both to act as insurers and to be insured ('Commissarissen ... meede sullen vermoogen te Assureeren en de voorschreve Assurantien te doen'). In this respect, therefore, it went further than its Amsterdam counterpart had done.\(^{27}\)

In terms of s 82 of the Rotterdam *keur* of 1721, the Commissioners and Secretary of the Chamber could not themselves directly or indirectly insure others, while in terms of s 80 brokers likewise could not directly or indirectly through others act as insurers, on penalty of a fine of f100 and dismissal from their office.\(^{28}\)

In the Amsterdam *keur* of 1744 there appeared a prohibition not as comprehensive as that in Rotterdam although very clear in its limited scope. Section 39 provided that brokers or others who acted as intermediaries in insurances, could themselves not act as insurers ('zelfs geen Assuradeurs mogen zijn').\(^{29}\) It was now also recognised that there were other intermediaries too, apart from insurance brokers, who had to be prohibited from acting as insurers.\(^{30}\) The prohibition in the *keur* of 1598 on brokers insuring themselves, unaffected as it was by the amendments of 1600 and 1601, was not repeated.\(^{31}\)

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\(^{26}\) Lybrechts *Koopmans handboek* V.96 ('daar is geen reden waaromzy voor zich zelven niet zouden mogen laten Assureeren (zo als enige willen) en zuks word in de gemelde Ordonnantien niet verboden'). See also Bynkershoek *Quaestiones juris privatii* IV.26 (noting that Commissioners and their servants could not act as insurers, and that there were many reasons for that prohibition; but, under the impression that Commissioners could not be insured, pointing out that there was no reason why they should not be permitted to have themselves insured ('zy voor zich zelven niet mogen laten assureeren')); Schorer *Aanteekeningen* 414 (ad III.24.3) n3; La Leck *Index* sv 'insurance'; Scheltinga *Dictata* ad III.24.3 sv 'uitgenomen de rechters etc' (who thought it was not unlikely that Grotius had read the provision as stating that 'zy niet zouden nog ook zich zelven laten verassureeren'); *idem* ad III.24.3 sv 'hare dieners' (noting that 'hen alleen maar verboden is zelfs of door anderen te assureren, maar geensins goederen door andere te laatzen assurereren'); Decker *Aanteekeningen* (ad IV.9.4) n(3)/(c) ('wel verstaande dat alle de gemeide personen zif mogen laten verzekeren'); and Van der Keessel *Praelectiones* 1431-1433 (ad III.24.3) (noting Bynkershoek's incorrect assumption).

\(^{27}\) Thus, s 4 repealed s 29 of the earlier *keur* of 1600, which was the equivalent of the unamended s 30 of the Amsterdam *keur* of 1598, and promulgated a measure which went further than the amended s 30. As to the position in Middelburg, see further eg *Van Zurek* *Codex Batavus* sv 'Assurantie' par 2 n(a); Schorer *Aanteekeningen* 414 (ad III.24.3) n3; *Van der Keessels Praelectiones* 1431-1433 (ad III.24.3) (noting that the prohibition on brokers acting as insurers had not similarly been repealed and therefore continued in force); and Goudsmit *Zeerecht* 454.

\(^{28}\) See further Goudsmit *Zeerecht* 397; *Kracht* 35 and 37; and *Vergouwen* 95.

\(^{29}\) Van der Linden *Koopmans handboek* IV.6.3, referring to s 80 of the Rotterdam *keur* of 1721 and s 39 of the Amsterdam *keur* of 1744, stated that insurance brokers could neither personally nor through others bind themselves as insurers.

\(^{30}\) As to brokers and other intermediaries, see further ch X § 7 *infra*.

\(^{31}\) See further Goudsmit *Zeerecht* 354; *Vergouwen* 67.
Van der Keessel noted the discrepancy between the Amsterdam and the Rotterdam positions.\(^{32}\) While insurance brokers ('proxenetae assecurationis') everywhere were prohibited from entering into insurance contracts in their own name, presumably as insurers, the Commissioners and Secretary of the local chambers were only thus prohibited in Rotterdam but not in Middelburg nor, in all probability, in Amsterdam.\(^{33}\)

It is uncertain what the consequences of a transgression of these prohibitions were. Although the placcaat of 1571 stated that insurance contracts concluded by those who were prohibited from doing so, would be null and void, that was never repeated. And even if that was the implication, there is no indication what the position would have been in Roman-Dutch law had the other party to the insurance contract been acting in good faith and been unaware of the status of the insurer (or insured, as the case may have been) and of the fact that he was prohibited from entering into insurance contracts. Only in s 80 of the Rotterdam keur of 1721 was a fine imposed on a broker concluding an insurance as an insurer, but whether that meant that the contract otherwise remained valid is not immediately apparent.

1.3 The Rationale for Restricting the Capacity to Insure

The persons who at some time or another or in some way were not permitted to conclude insurance contracts in the Netherlands fell into three groups: officials, brokers, and carriers.

The reason for prohibiting Commissioners of the various insurance chambers as well as other officials from insuring\(^{34}\) was no doubt not only to create the appearance of uninvolved impartiality on the part of those entrusted with the enforcement of insurance laws in particular and of other relevant laws concerning shipping, duties and the like in general, but also to eliminate any possible temptation, malpractice and conflict of interest in this regard. The legislatures thought that by placing such restrictions on certain occupational groups, the possibility of transgressions of the insurance laws and of

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\(^{32}\) Van der Keessel Theses selectae th 714 (ad III.24.3); idem Praelectiones 1431-1433 (ad III.24.3).

\(^{33}\) In Amsterdam, he noted, the keur of 1744 said nothing about the position of the Commissioners so that the position as it was in 1601, still pertained, i.e., the Commissioners were still prohibited from acting as insurers. Nevertheless, this was not beyond any doubt, for s 39 provided only in respect of brokers that they could not insure others so that one could validly deduce that brokers could be insured, and similarly that the Commissioners could both insure and be insured for they were no longer expressly prohibited from doing so. This was the more acceptable view because the Amsterdam keur of 1744 was of a more general nature and concerned fire insurance too, so that it was not likely that the Commissioners or employees of the Chamber would be excluded from such forms of insurance. The position was different in Rotterdam, for in both s 22 of the keur of 1604 and in s 82 of that of 1721, Commissioners and the Secretary were prohibited from insuring themselves or through others ('prohibentur ... assecurare vel per se vel per alios').

\(^{34}\) See eg Hammacher 72; Magens Essay vol I at 2-3.
fraud in the insurance business could be reduced. 35 In their oath of office, the three Commissioners of the Rotterdam Chamber had to promise not to insure and to adhere strictly to the provisions of the *keur* without favouring anyone. 36

While most of the Commissioners of the Amsterdam Insurance Chamber were merchants, bankers or shipowners, 37 only three of them were identified as being insurers. They were Jacob van Neck (a Commissioner from 1648 to 1668, and from 1669 to 1673) who was known as a merchant and insurer; 38 Joan Hult (Commissioner from 1652 to 1654) who was a merchant, shipowner and insurer, and Matthijs Ooster (Commissioner from 1785 to 1787) who was a merchant and insurer. This is not surprising, given that until 1744, when the prohibition was not repeated, Commissioners could not conclude insurance contracts as insurers.

The reason why brokers were prohibited from insuring was also commented upon. The prohibition applied specifically to insurance brokers, not to brokers generally. 39 Scherer sought to distinguish in this regard between instances of brokers acting in their capacity as such and where that was not the case. 40 When acting as brokers, they could not also act as insurers but they could do so freely in their private capacity ("als bijzondere leden, wanneer zulks hun volkomen vrijlaat"). Thus, when a person was not also the broker who acted as intermediary in the conclusion of an insurance contract, he could insure or, for that matter, be insured, presumably because in that case there was no conflict of interest. For practical purposes, therefore, a broker was only prohibited from insuring his client, the insured.

35 In this Dutch legislatures were not alone. In England a Commissioner of the Elizabethan Court of Assurance could act as an insurer (ie, be 'a party Assurer') in an insurance contract but could not then by virtue of his Commission determine a dispute on that contract (see Molloy *De jure maritimo* II.7.16), while in France the *Ordinance de la marine* of 1681 (in s 68 of title VI) forbade all makers of policies, clerks of chambers of insurance and others from drawing up any policies in which they themselves were directly or indirectly concerned, or from taking any cession of action from an insured.

36 See Kracht 33 ('niet te zullen verzekeren en zonder iemand gunst of afgunst zich striptelyk te houden aan de bepalingen der Ordonnantie').

37 See further § 2.8 infra.

38 See Elias 478. Van Neck in his youth was a successful merchant in Italy and later settled in Amsterdam where he took up underwriting. He went insolvent in 1673 and as result had to step down from the Amsterdam Council on which he had served from 1652. On becoming a Commissioner, he was instructed to cease his underwriting activities (see Elias 478n(a) sv 'J van Neck': 'Oock is Jacob van Neck, Raed, gecomen sijnde, gelijck men syt, uyt te droogen, gefailleert. Had in zijn jonckeyt goede negotie in Italien gedaen en hier te lande sich begeaven tot assurantie, ende commissaris van assurantie geworden sijnde, heeft, volgend instructie, niet meer mogen assureeren. Heeft naederhant cessie [ie, beneficie van cessie or voluntary surrender of his estate] gedaen'). In all likelihood Van Neck’s insurance business was not all that profitable and for that reason he was prepared to give it up, as he had to do, so that he could become a Commissioner of the Insurance Chamber.

39 See Lybrechts *Koopmans handboek* V.96 who explained that only brokers ‘doende in Assurantien’ were prohibited from acting as insurers.

40 See Schorer *Aanteekeningen* 414 (ad III.24.3) n3.
According to Bynkershoek\(^1\) the reason for the prohibition on the insurance broker was because his duties were very similar to those of the erstwhile Commissioner of the Registration Office, that is, both had supervisory duties.\(^2\) But apart from his official duties,\(^3\) there was also another reason which concerned the relationship between the broker and the insured.\(^4\)

On instructing his broker to obtain insurance cover, an insured no doubt did not intend nor consent to the broker retaining the premium for himself and acting as insurer by personally standing in for any loss or damage in terms of the insurance contract.\(^5\) The legislatures too did not want that to happen and may for that reason and in order to avoid any resulting conflict of interest,\(^6\) have prohibited insurance brokers from taking over risks as insurers. No doubt, for this reason one would, as Schorer suggested, have interpreted the prohibition restrictively and have taken brokers to have been prohibited from acting as insurers only in cases where they were involved also as brokers. The prohibition on insurance brokers acting as insurers was in line with prohibitions on brokers generally, and even on their wives or children, preventing them from participating for their own account in the trade in which they were broking.\(^7\)

While in most other countries there was some form of legislative prohibition on brokers themselves acting as underwriters or offering policies to other brokers without the knowledge of the insured,\(^8\) it was only in England, as Weskett pointed out in the late eighteenth century,\(^9\) that insurance brokers were permitted to insure as princi-

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\(^{1}\) *Quaestiones juris privati* IV.26.

\(^2\) See too Scheltinga *Dicta ad* III.24.3 sv 'als oock tollenaers ende makelaers' who noted that while the office of Commissioner of the Registration Office in terms of the *placcaat* of 1571 had long since disappeared, his supervisory duties had come to be assigned to insurance brokers as a result of which they too, like the Commissioner of earlier, were prohibited from insuring ('welke z/ch nu by gevolg zich niet zullen moogen laaten assureeren, noch zelfs assureeren').

\(^3\) As to which see further ch X § 7.3.1 infra.

\(^4\) See generally Fromberg 7-14 and 26-28; Scholten *Makelaars* 12-16.

\(^5\) This was clearly the case when the broker was instructed to obtain insurance cover from a particular insurer or insurers (in which case the broker's assumption of the risk himself would have amounted to an improper performance of his mandate) but presumably also applied where the instruction to obtain insurance was not that specific.

\(^6\) Such conflict would obviously arise where the broker was both a representative of the one party to the insurance contract and also at the same time the other party to that contract.

\(^7\) See further eg Vergouwen 82 and 88-89.

\(^8\) In France, eg, the *Ordinance de la marine* of 1681 (in art 68 title VI) prohibited brokers and notaries from drawing up any policies in which they themselves were directly or indirectly concerned (see Enschedé 102) and in Hamburg the *Assecuranz-Ordnung* of 1731 (in art 2 title II) prohibited brokers and assessors from acting as insurers (see Dreyer 120; Hammacher 70).

\(^9\) See *Digest* 61-68 sv 'broker' at 65 par 7. See too Wright & Fayle *Lloyd's* 160.
Parties to the Insurance Contract

Despite the prohibition in the Netherlands on insurance brokers acting as insurers or even being insured, it appears that it was not an uncommon occurrence. There are a number of examples where brokers were insured, where they acted as insurers, and even where they acted as brokers and insurers in respect of the same contract. But, given that few underwriters initially acted full-time, it probably raised few eyebrows at the time when a merchant acted as underwriter or as insurance broker as circumstances dictated, and even in both capacities on the same contract if necessary.

The notion underlying the prohibition on carriers of goods acting as insurers in respect of the goods they were to convey, was that those to whom cargo had been

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50 Two examples of this will suffice. A sixteenth-century Chancery case concerned a policy concluded in September 1573 in which the broker, together with members of his family and other merchants, was also one of the underwriters of the policy he, as broker, had drawn up on behalf of the insured (see Jones 'Elizabethan Marine Insurance' 61-62 as to the case of Jackman v Calthropp). At Lloyd's too, members fulfilled the roles of both brokers and underwriters. For example, Julius Angerstein, one of leading figures in the establishment of the Lloyd's Committee (see § 2.11.3 infra), was a broker and also an underwriter (see Cockerell 'Agency' 67). Sutherland London Merchant 58 notes that it was common for insurance brokers in the second half of the eighteenth century to arrange that underwriters should write on their (the brokers') behalf on their own policies, considering it as a simple means of supplementing their brokerage.

51 The temptation for a broker was no doubt great, if he could not get a large risk fully subscribed, to either underwrite a portion of the risk himself or to insert a fictitious name on the policy so as to ensure that he would earn his commission. One well-known instance of this occurred early in the eighteenth century in London when, on the loss of an insured ship, the 'Vansittart', it appeared that two of the underwriters' names which appeared on the policy were fictitious, the broker in question (who was apparently not an insurance broker but a discount broker) forging the signatures and pocketing the portion of the premium due to them. See further Cockerell 'Agency' 67; Gibb 21-23.

52 See § 2.3 infra.

53 The following three instances may be referred to. Firstly, there was Juan Henriquez, the prominent sixteenth-century Antwerp insurance broker (see ch X § 7.2 infra) who was mentioned as the broker on the model policy prescribed in the placcaat of 1563, from which it may be deduced that that was probably his principal occupation. On occasion he underwrote risks himself. He was also a merchant trading in particular goods so that he no doubt had his consignments insured as well. See further De Groote Zeeassurantie 154, 155 and 157. Of course, at the time Henriquez acted quite lawfully as broker and insurer in the same contract (see Mullens 42) for in Antwerp, unlike elsewhere such as in Spain, there was as yet no prohibition on brokers concluding insurance contracts. Secondly, there was the case of Roemer Visscher which will be dealt with in more detail below (see § 2.7.3 n159 and § 2.9.2.2 n270 infra). And lastly, there was the Rotterdam broker, Franco Cordelols, who was also one of the twelve directors of the Rotterdam Insurance Company on its formation in 1720. No doubt, as Vergouwen 101 suggests, the relationship between Cordelols' broking firm and his company was close to say the least. Possibly this was not regarded as a transgression of the relevant prohibition in the Rotterdam keur of 1721 because, technically, the director of an insurance company was not the same as an individual underwriter.

54 For an example of a land carrier apparently insuring the postal article he had to carry, see again ch VII § 1 n3 supra where reference was made to an Antwerp policy of 1587. Van Zuerk Codex Batavus sv 'Assurantie' par 19 n1 referred to an example of where the insurer was the owner of the ship carrying the insured goods and where he prevented his ship from proceeding on her voyage, with the result that he could not claim or retain the premium on the insurance involved (see ch XI § 6 infra as to the return of premium).
entrusted should not also be the insurers of that cargo, even if for an additional premium, because that would lessen the diligence and fortitude with which they would defend the merchandise against robbers and other perils. However, it appears that only non-marine carriers were thus prohibited and then only in the placcaat of 1571 and the Amsterdam keur of 1598. Not only was the prohibition not repeated later or elsewhere but marine carriers, who similarly had control over the risks involved which they would have had to bear had they also acted as insurers, were never for that reason prohibited from so acting and from concluding valid insurance contracts with such.

2 The Status of the Insurer: From Individual Underwriter to Insurance Company

2.1 Introduction

The insurance contract involved, in essence, the transfer of risks from the one party to the contract to the other. In this sense the insurer was the person who took over the risk of another, the insured. However, as will appear in the next few sections, in the course of time the profile and characteristics of the insurer changed and the methods of insuring in general and of insurers’ risk-bearing in particular became more sophisticated.

As far as the status of the insurer was concerned, various stages of development may be distinguished despite the fact that the changes reflected in this distinction occurred gradually and that the lines of distinction were not always that clearly defined. Initially insurers were individuals who were incidental underwriters only. Soon, however, there emerged insurers who underwrote risks, if not yet on a full-time basis, at least as a subsidiary part of their other businesses and more than incidentally. They later overtook the incidental underwriters as principal players in Dutch insurance markets. From these merchant-underwriters emerged, in the course of the eighteenth century, a group of specialist, full-time underwriters whose main if not only business was marine underwriting. Until the eighteenth century, Dutch insurers were exclusively and in the course of that century, with the emergence of insurance companies, mainly individual underwriters. It is therefore true to say that in Roman-Dutch law the insurance contract was generally a contract between two individuals and that more often than not both were in the first place merchants, one merchant being insured by another merchant or merchants. Thus Grotius referred to the parties to the insurance contract as

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55 See Van der Keessel Praelectiones 1431-1433 (ad III.24.3) who, however, links this reason to the concomitant prohibition on full-value insurance by such carriers of their carts, wagons or horses, to which prohibition the reason seem to him more apposite. In fact, a carrier, because he was also the insurer and thus bore a greater risk, would arguably have exercised greater care, not less.

56 Thus, Van der Linden Koopmans handboek IV.6.1 described the insurer as the person who took over the risk ("die het gevaar op zig neemt"). See too eg Roccus De assecrationibus note 2.

57 Inleidinge III.24.6.
'merchants' ("de handelaers"), both insured and insurer being merchants in the first place and only insured and, at least initially, only insurer incidentally.  

But the fact that risks were borne by individual underwriters presented various problems and involved numerous disadvantages which necessitated, in the course of time, a transmutation in the nature of the risk-bearer and of risk-bearing in terms of insurance contracts. The most important of the disadvantages inherent in individuals acting as insurers, included their limited underwriting capacity, their small and relatively unstable financial basis, and the absence of the security which could be offered when a more enduring legal entity acted as insurer. As a result these and no doubt other drawbacks, the status and nature of insurers inevitably had to change. At first individual underwriters made themselves in various ways more accessible and acceptable as the bearers of risk. From the start they did not subscribe any single risk fully but underwrote only portions of individual risks, thereby reducing their exposure on single contracts, increasing their risk-bearing capacity, and reducing the risk for their insured inherent in their insolvency or death. At the same time they also underwrote different risks, further spreading and averaging their exposure. In essence, individual underwriters were co-insurers of different individual risks. But this presented a practical problem for an insured to get his policy fully subscribed by several underwriters. From early on, therefore, individual underwriters gathered together in one place where they could conveniently be approached by insured and their brokers.

Individual underwriters also co-operated with another in other ways apart from co-insuring risks. In addition to agreements between insurers themselves on various matters, they also formed associations in various forms, notably in the form of partnerships.

Ultimately, though, it was realised that the financial stability, capacity, permanence, accessibility and convenience offered by the various emerging forms of business enterprise could be adapted to insurance underwriting as well and that such business entities were in fact indispensable as the bearers of risks in terms of long-term insurance contracts. In the course of the eighteenth century, the insurance company came to the fore as an increasingly important, but not yet the largest, player in the Dutch insurance market.

Before these different classes of insurer are investigated in more detail, though, a brief comment may be made on the possibility of the insured being his own insurer.

2.2 Self-insurance: The Insured as His Own Insurer

Like merchants elsewhere and, importantly, like merchants in earlier times before the emergence of insurance in its modern form, Dutch merchants exposed to the perils of maritime commerce were well aware of the techniques involved in bearing and spreading their own risks without the conclusion of an insurance contract in any form.  

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58 See also eg s 21 of the Rotterdam keur of 1604 where the broker was referred to as someone who negotiated insurance between merchants ('die asseurantie tusschen Kooplieden vorderen').

59 Or without, for that matter, concluding any of the antecedent forms of contract such as the maritime loan which could be employed to transfer risk.
They were more familiar, in fact, with the techniques of self-insurance than with those of insurance itself. In the marine context, self-insurance occurred where a merchant, whether the owner of a ship or a cargo of goods, did not either transfer the risk of loss of or damage to that ship or goods to another against a premium (insurance for profit) nor shared it mutually with others exposed to a similar risk (mutual insurance). It occurred when the merchant instead deliberately bore or spread that risk himself or, as it was often put, was his own 'insurer'. It also occurred when he transferred it to another or spread it amongst others otherwise than by way of an insurance contract. Because of the absence of a transfer of risk or at least of a pooled sharing of risks, or, if risk was transferred, because of the fact that that occurred otherwise than by way of an insurance contract, self-'insurance' is actually a misnomer. It is not insurance in any form at all.

Until well into the seventeenth century, insurance contracts were concluded only sporadically and exceptionally. The majority of merchants engaged in the maritime trade, regarded an insurance premium as an unnecessary if not exorbitant expense and either did not as a matter of course insure their ships or cargoes at all, or did not insure them fully, or did not insure them except in exceptional circumstances. Furthermore, the fact that, in general, marine insurance was invoked only in exceptional circumstances when insurance cover was at its costliest, goes a long way to explain why merchants did not particularly favour insurance and insurers. At first, therefore, the insurance technique was resorted to and employed by merchants only in a subsidiary or complimentary role to other risk-managing devices. Only in the latter part of the seventeenth century and thereafter did marine insurance gradually develop and did it become known to such an extent that it generally became practice, and came to be considered a convenient and economic alternative to self-insurance, to shift a marine risk to underwriters by way of an insurance contract. In all probability this occurred first in respect of larger and more valuable consignments and ships destined for distant

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60 Barbour 'Marine Risks' 588 notes that it has been estimated that for the Dutch export and import trade as a whole in the seventeenth century, only one per cent of the shipping and ten per cent of the merchandise carried went insured. The same was probably true (and for longer) of the English trade. See eg John 'London Assurance' 127 who notes that in the first quarter of the eighteenth century, a large part of English coastal and foreign-bound shipping proceeded without cover; and Clayton 80 who notes that that was the case outside London even during and up to end of the eighteenth century.

61 See De Groote 'Zeeverzekering' 212. As to such voluntary, as opposed to compulsory, underinsurance, see further ch XVIII § 5.1 infra.

62 Such as in time of war or when a suspicion of loss or damage had arisen and when insurance was taken out 'on good or bad tidings'. As to the latter, see further ch XII § 2 infra.

63 For this point, see Barbour 'Marine Risks' 595.

64 That aspirant merchants were by then familiar with insurance and instructed in the techniques involved appears, eg, from their seventeenth-century instruction manuals. Thus, in the Leerboek (1643) of the Antwerp firm of Van Colen-De Groot, insurance, which included bottomry, was one of the more important topics to be studied by the apprentices. They were taught the rudiments of insurance and also, eg, how to enter the expense of insurance (ie, the premium) in account books. See further Denucé Koopmansleerboeken 14-15.
ports, and only later for smaller and less valuable cargoes and vessels on short coastal voyages.

But although the average merchant participated in the maritime trade without any insurance cover at all, or at least with insufficient cover, he did, in addition to taking preventative steps to reduce the risk of loss or damage to his ship or goods, 65 purposely resort to other cheaper techniques to transfer or spread his risk and in so doing to reduce the extent of loss or damage which might, despite such preventative measures, nevertheless occur. The more important of these techniques may be described briefly. 66

Firstly, there was the divided ownership of ships in the form of parts or shares in a ship, by which form of shipping partnership not only the cost but also the risk of owning and operating ships were spread amongst those owning shares in them. 67

Secondly, it was common practice for merchants to spread their cargoes over several different ships, fleets 68 and voyages or destinations, in so doing limiting the amount of cargo on a single ship and voyage and reducing the risk of a single catastrophic loss. 69

Thirdly, there was the possibility of risk-spreading agreements between the interests involved in a particular maritime venture, such as contractual average or agermanament. 70

65 Such as arming his ship, sailing in convoy or consortship, sailing in season and not to enemy ports, carefully selecting seaworthy ships to carry his goods, and ensuring proper packing and stowage of cargoes.

66 On the relationship between insurance and self-insurance, and the various methods of risk-spreading, see eg Barbour 'Marine Risks' 569-571 who, though, lists mutual insurance with these other techniques as an alternative to spreading risk through policies underwritten by persons not otherwise interested in the adventure (ie, insurance for profit); Dreyer 27 (noting the reasons for the relatively late adoption of the practice of insurance in Hamburg); Elink Schuurman 'Aanteekeningen' 108; Faber 'Studien I' 83; Forte 403; Klesselbach 8-8 who points out that the earliest example of 'Insurance' by a Hamburg merchant occurred in a situation where the merchant 'Insured' his own cargo on his own ship and where resort to other traditional risk-spreading techniques was accordingly not feasible; Postan, Rich & Miller 45-46, noting that the main way in which the medieval merchant protected himself against the numerous risks to which he was exposed, was by sharing it with others; diversification was the rule rather than the exception; Riemersma 331-337; De Roover 'Early Examples' 174-175 and 194; and Sneller 106.

67 See again ch V § 3.1 supra.

68 Ships in the same fleet were exposed to the same perils of storm and enemy attack.

69 Thus, when Antonio, a merchant of Venice, denied that his sadness was caused by a preoccupation with and fear for the success of his maritime trading ventures, he did not explain that that was so because he was insured. Rather, he said, that was because

'My ventures are not in one bottom trusted, Nor to one place; nor is my whole estate Upon the fortune of this present year: Therefore my merchandise makes me not sad.'

(William Shakespeare The Merchant of Venice Act I Sc I lines 42-45).

70 See again ch I § 4.6.3 supra.
Fourthly, there were various forms of business enterprise, such as trading partnerships which were akin to shipowning partnerships, by which particular risk-bearing and risk-spreading arrangements were possible. Thus, in the case of the factor-partnership, the investing, non-travelling partner bore the risk while his itinerant partner did the trading and shared in the profit only to a predetermined amount.

Like the individual merchant operating in the maritime trade, the larger Dutch maritime concerns also did not as a rule insure. Thus, in principle the Dutch East India Company, which was established in 1602, did not insure outgoing and returning fleets, and did not make provision in its financial arrangements for the expense of any form of insurance, at least not in the seventeenth century. After 1700, however, it seems that the practice changed and that some of the Chambers of the Company may on exceptional occasions have insured their ships and valuable cargoes in particular. Apart from the fact that self-insurance made economic sense to such large concerns which were financially quite capable of bearing their own losses, the underwriting capacity of the local insurance market at the time may in any event have been too small to provide the necessary cover should they have decided to insure. For example, it appears from a legal opinion that in 1667 the sum of £40 000 was only underwritten with some difficulty.

As to which see further § 2.7.1 infra.

See generally Den Dooren de Jong & Stapel; Gaastra 24; Vergouwen 52. This was the more noticeable because the forerunner of the Dutch East India Company ('DEIC'), the so-called Oude Oostindische Compagnie, did in fact insure a ship in 1600 and even a fleet of six ships in 1604. It appears that the DEIC purposely did not follow this practice when it decided not to insure. Because of its size, the DEIC was in a position to 'internalise' the cost of protecting it shipping (see generally Spooner 143-144). It losses were relatively low (for details, see Brujin, Gaastra & Schöffer Dutch-Asiatic Shipping 75-76 and 90-92). Thus, less than three per cent of its ships on outward-bound voyages were shipwrecked or captured, a percentage slightly higher - four per cent - on homeward-bound voyages when the ships were in a worse condition, over-loaded and under-manned. The Company also took other measures to reduce not only the occurrence but also the extent of its losses. Thus, in 1786 it decided to limit the value of single consignments of specie to £500 000 on its own and to £300 000 on chartered ships. Its practices may generally have been influenced by the English EIC which, at least initially, also did not insure. It is possible that the Company left insurance to the participants themselves.

The English EIC in the first 30 years of its existence did not insure its ships and cargoes at all but bore its own losses as a self-insurer. Thereafter it did occasionally insure, the earliest reference to such insurance being to a contract concluded in 1629 on cargoes on return voyages. In 1653, during the First Anglo-Dutch Naval War (1652-1654), the Company decided not to make any insurances in future but to leave each shareholder to insure his own proportion separately if he saw fit to do so. The well-known 'Three Brothers' policy of 1656 (see Anon 'Policy' for a discussion) was not in fact a policy taken out by or on behalf of the Company but rather on behalf of supercargoes (officers in charge of the cargo on board) own goods on a Company ship destined for the Indies as part of their own private venture. Interestingly, the Company's policies were largely underwritten by its own members who were active also as part-time underwriters and who were given preference by the Company in this regard over outsiders, the advantage being that such an underwriter's stock could be held as security for payment in the event of a loss and that he was only paid his premiums upon the safe arrival of the insured vessel. See further Cockerell & Green 16; Den Dooren de Jong & Stapel 87 (and see the extracts from the resolution books of the English EIC in appendix IV at 102-105 for references to insurance policies concluded by the Company); Fayle 40; Foster 185-187; and Furber 38-39.
difficulty on the Amsterdam market and that two brokers had to be employed to obtain the necessary cover from reputable underwriters ('goede Assuradeurs').

2.3 Individual Underwriters

The principal type of insurer in Roman-Dutch law was the individual underwriter, all extant Dutch policies from the fifteenth to the seventeenth centuries, and most of those from the eighteenth century, being underwritten and signed by individuals in their own names.

These individual insurers were referred to as 'underwriters' because they 'underwrote' insurance policies by adding their signatures and the amount for which they insured at the bottom of the documents. This they continued doing in their own hand (they actually 'wrote') even after the appearance of printed policy forms.

2.3.1 The Incidental Part-time Underwriter

The earliest individual underwriters were merchants who, on an incidental, irregular and therefore part-time basis, took over and bore the risk of others for financial reward. They did this as a sideline and in addition to their main business activities which generally included trading (importing and exporting), shipowning, moneymaking and banking, or, most likely, a combination of these. Underwriters were

73 See Nederlands advysboek vol iii adv 17 (1675); also Den Dooren de Jong & Stapel 93.

74 On the individual underwriter, see generally the following sources on which this section is based: Barbour 'Marine Risks' 571, 580-581, 591 and 596; Den Dooren de Jong 'Practijk' 13-15; Dorhout Mees Schadeverzekeringsrecht 6 and 25-26; Dorhout Mees Handelsrecht 106; De Groote 'Zeeverzekering' 212, 215 and 216; Elink Schuurman 110-114; Gales & Gerwen 50-53; Molengraaff 'Verzekering' 420-424; Mullens 21-22; Plass 89-96; Rich & Wilson CEHE V at 331-332; De Roover 'Early Examples' 180, 194, 196 and 197; Schuddebeurs 'Verzekeringsbedrijf' 15-16; Sneller 113; Suermondt 'Rotterdam' 212; Tesdorpf 184; Trenerry 273-274; and Vergouwen 58.

75 See eg Mullens 40.

76 In the placaat of Philip the Good of Burgundy of 1459 which contained the first legislative reference to insurance in the Netherlands, they were referred to as 'des assurances que les marchans font les uns aux autres'.

77 Including the lending of money on bottomry. In the sixteenth century many merchants made money by concluding such loans (see eg Van Gelder 347-348). Just as, in terms of the maritime or bottomry loan, the lender was a capitalist who loaned money out at high risk (the risk of not being able to recover the loan) in exchange for a high return, so too the early individual insurer was a capitalist who undertook the risk of having to pay out a sum of money in exchange for a price.

78 It is possible that bankers were the natural forerunners of insurers in the Netherlands. In medieval Bruges, for example, Lombards (merchants from Lombardy or even from Tuscany or any other part of Italy) who were merchant-bankers and who, as representatives of Italian banking and trading firms there, combined foreign trade with dealings in bills of exchange, were also engaged in insurance underwriting because they saw it as an avenue for the investment of their capital. See further De Roover Money, Banking and Credit passim, especially at 345-348.

79 In the Middle Ages there was in any event a lack of specialisation on the part of the sedentary
generally the more prominent and affluent capitalist merchants who saw in insurance a new and lucrative investment opportunity for their surplus capital or savings. See Kernkamp 'Patriciërs' 31 for the different investment opportunities open to Amsterdam capitalists in the seventeenth century. One of these was investing in insurances ('geld in assurantiën steken'). They could also eg buy shares in the Dutch India Companies, buy shares in ships, make deposits in the Wisselbank, grant loans, invest abroad, speculate on the Bourse, and invest in government obligations and in annuities.

81 An interesting paradox, pointed out by Den Dooren de Jong 'Lombard Street' 14, was that initially marine insurance developed not so much because of the need for insured to obtain cover as because of the need of capitalist merchants to employ their accumulated funds profitably. Insurance was in the first place a new investment opportunity for financiers rather than a new way of averting marine risks.
to the speculative insurance business in the hope of salvaging their desperate financial position by turning an easy profit without having to part with any money at all.\textsuperscript{82}

Obviously, at other times, the merchant-insurer in turn required one of his ships or consignments of goods to be insured, and he would then, through his broker, approach another merchant or other merchants on the local market to underwrite and take over his risk. Thus it came that merchants insured one another on an individual basis, being involved in different insurance contracts alternatively as insured and as insurers.\textsuperscript{83}

Obviously, the fact that merchants insured and were in turn insured by their competitors had some interesting consequences for their legal relationship in terms of the insurance contracts they concluded.\textsuperscript{84} Another result was that in early insurance practice the capacities of various participants on the insurance market,\textsuperscript{85} such as that of

\textsuperscript{82} In this regard De Roover 'Early Examples' 197 refers to the example of Guigielmo Barberi, an impecunious Italian merchant resident in Bruges who for this purpose dabbled in insurance in 1400, with an unfortunate outcome for the owners of the insured goods which were captured by pirates on a voyage to Barcelona.

\textsuperscript{83} One of the earliest known instances of merchants insuring each other's ships and cargoes in the Low Countries occurred in the mid-fifteenth century in Bruges. From the records of cases which came before the Bruges Schepenen Court, it appears that in one case in 1453 Marc Gentil, a Genoese merchant resident there, was involved in litigation as a merchant underwriter on a policy, while in a later case in 1459, he again claimed as the insured merchant on insurance policy concluded with other local merchant-insurers. See further Raynes (1 ed) 12-14, (2 ed) 20-21; Trenerry 273-274.

\textsuperscript{84} One such consequence was referred to in ch VIII § 4.2 supra when the insured's duty of disclosure in Roman-Dutch law was considered. But the alternating capacities of the parties to insurance contracts obviously also had other consequences (see eg Landwehr Review 419). One concerned the payment of premiums and role of set-off between merchants not only of claims for premiums against claims for insurance payments, but also of both merchants' premium claims themselves. Thus, not only were A's claims for premiums set off against B's claims for payment of compensation in terms of policies but, more frequently, A's premium claims were set off against B's premium claims. On the payment of premiums, see further ch XI § 3 infra.

\textsuperscript{85} As opposed to their capacities in respect of individual contracts. But even there things were not always neatly delineated. Thus, in an Antwerp marine policy of 1557 the insured, one Gillis Hoftman (or Hooftman), also underwrote his own policy together with other underwriters, although he did not do so in his capacity as the (an) insurer of his own risk but rather underwrote for and in the name of another ('pour et au nome de ...'). See further Wyffels 97 and 103.

There are also other such instances. In 1574 a ship load of wool bound for Bruges in Flanders from Spain was detained by Dutch privateers at Middelburg where it was warehoused and where the wool was subsequently confiscated (The story is recounted in greater detail by Phillips & Phillips.) The various consignments were insured at Burgos in Spain by different policies, each covering a different consignor and his wool and the risk being shared amongst a number of insurers. A dispute arose between the insured consignors and the various insurers as to the duration of the insurance cover and the termination of the insured voyage. Not all the consignors filed claims (see idem 317n28): some had consignments just too small to justify litigation while others (15 in fact: see idem 324) were consignor-insurers who would lose more if the case was decided against them as insurers than in favour of them as insured consignors. Thus, some of the merchants who had consigned wool on the ship in question had in turn, not very wisely, insured the consignments of other merchants on the same ship. Presumably none of them underwrote the policy on his own consignment!
insured and insurer and even of broker,\textsuperscript{86} were intermingled and not clearly demarcated because all the individual participants were, first and foremost, merchants and were insured or insurer possibly only incidentally and in any event only subsidiarily.\textsuperscript{87}

Thus, at first, marine insurance underwriting was an incidental, unplanned activity and not a separate vocation nor even an important part of the incidental underwriter's main business enterprise. And the fact that the insurance business was a speculative activity of individual capitalists and not a full-time occupation, probably explains why, right from the start, the need was realised to employ specialist insurance brokers to seek out those merchants who were willing to underwrite insurance policies.\textsuperscript{88}

\textbf{2.3.2 The Part-time Professional Underwriter}

As the demand for the protection offered by the insurance contract grew, the insurance business offered increasingly attractive opportunities for investment and profit, and the full-time, professional underwriter who specialised in the underwriting of marine risks was not long in emerging. This no doubt occurred first in the larger commercial centres where there was a concentration of such demand for insurance cover and an opportunity for underwriting on a larger scale, and where the example of greater professionalism was set by the foreign merchant-underwriters resident and active there. The first signs of a gradual process of specialisation and distinction between insurers on the one hand and merchants who had themselves insured on the other hand, already appeared in Antwerp in the latter part of the sixteenth century and prior to its fall in 1585,\textsuperscript{89} and was subsequently continued in centres such as Amsterdam and Rotterdam.\textsuperscript{90}

At first, in the course of the seventeenth century, insurance no doubt merely became some merchant-underwriters' main business activity.\textsuperscript{91} At that time those merchants who showed a preference for insurance business came to refer to themselves as 'insurers'.\textsuperscript{92} Only later, by the late seventeenth century and thereafter, did insurance

\footnotesize{\textsuperscript{86} See again § 1.3 n53 supra for instances of brokers acting as insurers.}

\footnotesize{\textsuperscript{87} Although individual merchants were thus insured by other merchants and (even simultaneously) insurers for such other merchants, and the factual situation was therefore not far removed from a mutual insurance arrangement, there was obviously no legal and thus no obligatory basis for what was no more than an incidental reciprocity. As to mutual insurance, see § 3 infra.}

\footnotesize{\textsuperscript{88} As to insurance brokers, see ch X § 7 infra.}

\footnotesize{\textsuperscript{89} See De Groote Zeeassurantie 158.}

\footnotesize{\textsuperscript{90} See eg Van Houtte 161-162.}

\footnotesize{\textsuperscript{91} The signatures of some merchants more regularly appeared on policies than others, indicating that for them insurance was already much more than an incidental business activity.}

\footnotesize{\textsuperscript{92} Thus, in 1719, in an agreement between Rotterdam insurers (about which more § 2.6 infra; see too Appendix 14 infra where the accord is reproduced) on a number of insurance matters, the signatories were in the heading to the agreement described as 'Kooplieden, en te gelyk Assuradeurs'. See Goudsmit Zeerecht 443 for a reproduction of the agreement.
become the only occupation of some of them who specialised, full-time, in insurance underwriting. But even by the end of the eighteenth century, the process of specialisation was probably not yet completed for even then the majority of individual underwriters were not full-time professionals exclusively engaged in underwriting and in no other business at all.93 Furthermore, even among the specialist underwriters no further specialisation appears to have occurred and, at least on the Amsterdam market, individual underwriters underwrote, for example, both cargo and hull risks.94

The status of individual underwriters and the nature of their involvement in the Dutch insurance business therefore went through various identifiable stages as insurers appeared in different guises: first those who were incidentally insurers; then those who were insurers on a planned basis, either subsidiarily to other businesses or as their main business, and finally those who were exclusively insurers.

Alongside this development, there occurred also an important corresponding development in the way in which these underwriters bore the risk of their insured, a development characterised by an increasing professionalisation and specialisation of the underwriting business. It was an evolution, in effect, from the incidental and occasional speculator-underwriter to the regular if not yet full-time specialist underwriting professional.95 This development must now be considered in more detail.

2.4 Marine Insurance Underwriting: From Pure Speculation to Calculated Assessment

It may be thought that, as far as the way in which individual underwriters bore the risks they had taken over, was concerned,96 marine insurance conducted by private individuals was nothing more than gambling and that it was only in the eighteenth century, when insurance companies were established whose representatives had no direct personal interest in the outcome of individual contracts, that insurance became, at least for the insurer, something more than a purely speculative business.97 In short, were individual underwriters ever more than mere speculators?

No doubt the earliest underwriting of insurance risks was closely bound up with speculation and for the pioneering incidental individual underwriters, insurance was a

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93 The timing of this emergence of professional underwriters may be linked to a more general trend in the Dutch economy which saw Dutch merchants gradually turning away from the actual trade in goods and becoming financiers, with insurance being one of the fields of investment. See eg Wilson Anglo-Dutch Commerce 66.

94 See Spooner 35.

95 Seffen 129 refers to it as a development from 'nebenberuflichen Gelegenheitsversicherer' to 'hauptberuflichen Versicherer'.

96 As to the speculative nature of individual underwriting, see generally, in addition to sources referred to in n74 supra, also Goudsmit Kansovereenkomsten 38-47; Nehlsen-Von Stryk KalküI und Hazard 199-203; De Roover 'Early Examples' 180; and Seffen 129-130.

97 See eg Vallebona 30.
highly speculative venture. They were practically no more than speculators. Many merchants, including those with less than a substantial financial backing, participated in marine insurance, and, by taking over the risk of another merchant on a one-off basis, speculating on making a profit by pocketing a premium without having to make any payment under the insurance contract to the insured. In effect the incidental underwriter staked his liability in return for a premium: if the insured ship arrived safely, he 'won' to the extent of the premium he had received; if ship was lost, he too 'lost' to the extent that the sum he had insured exceeded the premium he had received. In its early days, insurer and insured both therefore used, or could have used, insurance for speculative purposes. \(^9\)

Evidence of the speculative nature of the early underwriting business may be found in a number of factors. These include, firstly, the fact that there was no limitation of exposure on single risks: the individual underwriter insured the whole risk just as the maritime or bottomry lender had in earlier times borne the whole risk himself by lending up to the value of the secured ship or goods. Secondly, there was no spreading of his exposure over several contracts: the individual underwriter took over the whole risk of one insured and stood or fell with the fortune of the insurance he had underwritten. And thirdly, even if he had concluded several contracts at any given time, that was not done systematically and in all probability involved if not continuous then at least occasional over-exposure: the private underwriter's capital reserves (that is, the total value of his personal assets) were usually insufficient at any given stage to cover even a very small percentage of the total of potential liabilities he had contracted. Of course, the early individual underwriter was mainly interested in a quick and large profit resulting from his underwriting activities, and that was more likely if he was over-exposed. By reason of his incidental and part-time involvement, the early underwriter was too infrequently and too unsystematically involved in underwriting. For him each insurance contract was a separate and isolated undertaking and not an integrated part of a continuous or ongoing business, the success of which depended not on the outcome of one adventure but on averages so that losses suffered in respect of one contract could be offset against gains on other contracts. As a result, very often individual underwriters were not concerned with their reputation, and had no second thoughts about relying on technical defences to ensure a profitable outcome on an individual contract. In this connection Bynkershoek remarked that insurers were much more desirous of receiving premiums than they were of paying for losses and that they resorted to ingenious defences to avoid having to do the latter. \(^9\)

As far as underwriting methodology was concerned, there was no, or at least no calculated, systematic spreading of the risk or risks the individual underwriter had taken over from his insured. Such spreading of risk could have involved two distinct but quite

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\(^9\) The speculative nature of the insurance business for the individual merchant-underwriter appears from an entry in the diary of the German merchant Lucas Rem (1494-1541) when he wrote that he had won a lot of money through insurance ('Hab mit Seguriem etlich fill gelt gewonnen'). See Seffen 'Seguriem' 186. As to the speculative intent of insured, see again ch II supra.

\(^9\) See Quaestiones juris privati IV.3 ('[D]e Assuradeurs [zyn] veel gretiger ... om premie te ontvangen, dan om schade te betalen, en [zyn] om dit te vermyden doorgaans zeer vernuftig').
compatible possibilities. The one was for the risk of a single insured to be spread or pooled amongst a community of similarly exposed underwriters. This occurred most prominently when a single risk was co-insured by several underwriters, each limiting the extent of his liability for that risk by underwriting only a portion of it. The insured's risk was therefore transferred to and spread among several underwriters. But a spreading of risk in this sense was not yet a spreading of the portion of the risk the individual underwriter had taken over. This further possibility of spreading or averaging of risk involved a distribution of the risk, by the underwriter, over a community of similarly exposed insured, a *communio periculis*. And that could be achieved by the individual underwriter concluding several insurance contracts at the same time.

Therefore, because of the absence if not of a community of similarly exposed insurers, then at least of a community of similarly exposed insured over which risk could be spread, the early underwriting business had an essentially unscientific, speculative character. In short, it was not insurance in an economic sense.

Non-speculative underwriting only emerged when underwriters themselves realised, as they no doubt very soon did, that by a spreading of the risk they had taken over from their insured they too could reduce the element of chance and increase the possibility of profit, and that this could be achieved by distributing or spreading their risk not only over several insurers by way of co-insurance, but also over several individual contracts or risks and thus over the community of the similarly exposed insured involved. The realisation, if only intuitive, that the probability of occurrence of all the risks taken over by an insurer decreased with an increase in the

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100 Co-'Insurance' occurred even before insurance contract appeared in an undisguised form. Thus, in a Genoese insurance-sale from 1393, several merchant-'underwriters' bought goods to be carried from one place to another, on condition that on the safe arrival of the goods at their destination the sale would be cancelled and the portion of the purchase price each had to pay, would no longer be payable. See Lopez & Raymond 257 and 259-260 (document 135). As to insurance-sales, see again ch I § 4.1 supra, and as to co-insurance, see ch XVIII § 2 *infra*.

101 See generally eg Büchner 'Gefahrengeinschaft' who points out that the real insurer in this case is the community of risk, *die sich untereinander versicherende Gesellschaft*. The insurer is the spreader of risk, but not among himself and other insurers. He links up individual risks he had taken over to create a larger, common risk and at the same time joins together the various individual insured involved to create a pool of insured: an 'association' of insured in an insurance-technical sense. The community of similarly exposed persons (*Gefahrengeinschaft*) was also the notion underlying the concept of general average where, however, it arose automatically and *ex lege*. See again ch I § 4.6.2 supra.

102 Goldschmidt *Universalgeschichte* 355 refers to insurance on a profit basis in the early period, and before it took over *aus der Gegenseitigkeit genossenschaftliche Elemente*, as the 'isolierte Spekulationsgeschäft der Prämienversicherung'.

103 Being themselves merchants and having their own risks insured on occasion, they were not unfamiliar with the ways in which an insured himself could spread his risk apart from entering into insurance contracts. As to self-insurance, see again § 2.2 *supra*.

104 For example, instead of underwriter A insuring B for a sum insured of 1 000 at a premium of 50, he could rather and more prudently have insured 10 Bs each for 100 at a premium of 5 each. Although in both cases A's total potential liability was 1 000 and his total premium income 50, the risk or probability of his having to pay out 1 000 in total was much reduced in the second case where the risk was spread.
number of contracts he concluded, was the first step in the direction of a more rational approach to insurance underwriting. Only by spreading his risks in this way could the individual underwriter ensure that a single loss no longer resulted in an equivalent 'loss' to himself. Of course, a sufficiently large number of insurance contracts was required to make such a spreading of risk effective and they had to be concluded selectively so as not to undermine the effectiveness of the spreading it was hoped to achieve. Only when the individual underwriter had underwritten a sufficient number of homogeneous risks, was the averaging of loss over several contracts possible and could underwriting results more accurately be estimated. And only then did a calculated profit-motive rather than a purely speculative motive guide the underwriter's decisions and methods.

Naturally the spreading of risks could not, or at least not effectively, be achieved by the incidental underwriter, even if he no longer insured individual risks in full but only in part as a co-insurer. It required the regular conclusion in any given period of at least a sufficiently large number of insurance contracts.

Specialised insurance underwriting was therefore characterised by the individual underwriter no longer taking over the whole risk of a single insured on an irregular basis, but portions of risks of a sufficiently large number of different insured on a regular and planned basis; that is, by the individual underwriter concluding a number of similar and largely coterminous insurance contracts. It was not the status of the insurer or the way in which individual contracts were concluded and underwritten but rather the frequency of underwriting and the scope and extent of the individual underwriter's business which lead to greater measure of professionalisation, and which, by the same token, determined whether the underwriting involved insurance in an economic sense or a merely speculative business.

Although individual insurers could and did spread risks, that was not always done scientifically. Even after the appearance of broadly-based, continuous, non-incidental underwriting, the estimation of risk did not yet take place on a sound statistical and actuarial basis but was mainly guided by experience, even if that had become more extensive than before. Put simply, the individual marine underwriter did not actuarially assess the individual risk involved in a given case or even marine risks generally. Actuarially based underwriting only appeared in connection with life insurance in England in the latter part of the eighteenth century. Until that time, at least, there was no statistical foundation for or probabilistic approach to risks and the computation of insurance premium rates. Premium rates, including those for marine insurance, reacted directly to supply and demand and to prevailing conditions impacting on the particular

105 If the number of insurances concluded by a single insurer was too small, it was possible that the total amount of compensation he may have had to pay out in a given period of time, could by pure accident have deviated by so much from the average on which his premium rates were calculated, that he was unable to meet his liabilities in full. Only where the number of insurances entered into was sufficiently large, could unexpected bad fortune be countered. Thus, not only did risks have to be spread but that spread had to be sufficiently wide.

106 Thus, the conclusion of several insurances on ships and cargoes all sailing to the same destination in the same fleet negatived the averaging an underwriter may have hoped for. A prudent spreading of risks ensured that losses due to localised factors did not affect the underwriter's whole portfolio. See Palmer 85.
contract rather than being averaged out by long-term statistics. Like gambling stakes and annuity rates, premium rates presented no more than rough quantifications of risk, even if reflecting past experience. These quantifications were not necessarily based on probabilistic or statistical intuitions, much less founded upon calculations and data.\(^{107}\)

There would appear to be two rather divergent views about how, prior to the emergence of statistical and actuarial assessment of risks and the calculation of premiums towards the end of the eighteenth century, underwriters calculated premium rates and, in consequence, about whether or not their businesses were in essence still speculative.

According to one view, the underwriting process was nothing more than speculation. Although in regard to the limiting and spreading of risks (that is, the extent and frequency of underwriting), individual underwriters may no doubt often have had their own rules (even if only rules of thumb) guiding their underwriting business generally,\(^{108}\) underwriting by individual insurers, despite the employment of various techniques of spreading risk, in essence continued to be conducted on the basis of individual contracts. Like the decision whether to insure and on what terms, the determination of the premium rate largely depended on the personal intuition and experience of the individual underwriter rather than on actuarial statistics and calculated probabilities accumulated over a long period. The premium on any single adventure was arrived at by haggling and guessing between the insurer and the insured or, more probably, the latter’s broker. The assessment of risk and, in tangible terms, the determination of the required premium rate for a particular risk, were nothing more than an experienced ‘calculation’ of odds. For this reason the transaction did not differ much from a wager on the safe return of the ship or cargo concerned, with the odds in favour of the insured and insurers only being prepared to participate because it was possible to limit their liabilities on single risks and to spreading their exposure over several contracts. For this reason, this view holds out, marine insurance remained, for much longer so than fire and life insurance, a highly personal business, guided by prudence: caveat assecutor.\(^{109}\)

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\(^{107}\) On the impact of probability theories on the insurance business, see eg Daston 239, 240 and 244-245. At 246 she points out that prior to the late eighteenth century not only merchant-underwriters but also lawyers took almost no account of how the theory of aleatory contracts had been modified by mathematical probability. For example, Pothier’s treatise on aleatory contracts (Contrats aléatoires (1775)) characteristically declined to go into details about the fixing of premiums, aside from noting that they should be equitable, which was regarded simply as that which the parties had agreed among themselves. As to the calculation and amount of premium, see further ch XI § 2.1 infra.

\(^{108}\) For example, an underwriter may have laid down for himself not to insure more than a certain amount or more than a certain percentage of the sum insured on any individual contracts, and to have at least a certain minimum number of lines underwritten at any given stage, and to ensure that the different risks he had underwritten were sufficiently diverse.

\(^{109}\) See further Spooner 3, 31-33 and 38-40; and see too eg Barbour ‘Marine Risks’ 591. According to some, the shaky foundation upon which individual underwriting remained based, was particularly exposed in the event of catastrophic losses, and especially in time of war (see eg Spooner 78 108). Although premium rates generally increased in time of war and if cover was provided against the perils of war, the increased frequency and extent of losses drastically reduced and often wiped out profit margins and generally played havoc with averages upon which underwriting was established. Even full-time professional underwriters then reverted to a large measure of gambling and speculation.
But there is another and, at least as far as the growing number of merchants involved in marine underwriting on a more than an incidental, discontinuous basis was concerned, a more realistic view. That is that the average marine insurer who underwrote marine risks as the principal part of his business, and hence otherwise than in a one-off or incidental fashion, could not afford to speculate on individual risks but had to assess his exposure with reference to the portfolio of risks he had taken over and underwritten. For individual underwriters who turned, even part-time, to underwriting as a part of their businesses, the average premium had to be sufficient to compensate for losses, to cover expenses and to afford a profit comparable to that which could have been drawn from normal capital investment in ordinary commercial ventures.  

In practical terms, according to this view, those who had aspirations to be underwriters had to have some sound financial basis, at least in the initial period. Insurance premiums, unlike for example the purchase price for goods, were paid prospectively, the practice being that underwriters granted brokers extended credit for the payment of the premiums the latter had received or would receive from the insured. By contrast, the underwriter might have had to pay out on some of his insurance policies relatively soon after they had been underwritten. Therefore, the system of payment of premiums involving insurance brokers necessitated that underwriters just starting out, had to have at least quite a few months' working capital to cover losses during the period when they received no premium income. In this way the credit system operating between underwriters and brokers served as a type of means test for serious underwriters on the market. But even if he had the means to enter the market, an underwriter of necessity had to approach his involvement as a business if he intended it to be of a long-term nature and was not to fail very soon. The odds were simply against succeeding in the long-term by way of speculation only. He had to insure risks on a fairly continuous and broad basis, and was bound, in the process, to gain experience which, over time, came to be honed to such an extent that his underwriting decisions were no longer purely speculative guesswork but came to be based on planned and rational if not always economically sound principles. It was therefore possible on the

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110 See eg Jones 'Elizabethan Marine Insurance' 54, emphasising the business-like nature of the insurance transaction.

111 As to the payment of premiums through brokers, see further ch XI § 4 infra.

112 Even in the case of a disputed claim, underwriters had to make a provisional payment within a relatively short period of time. As to the time for provisional or final payment on insurance contracts in Roman-Dutch law, see further ch XX § 2.2 infra.

113 See further Gibb 55-57, referring to position at Lloyd's.

114 No doubt the more serious specialised underwriters kept close record of their transactions. Evidence of this appears eg from the ledger, taken up in the Nederlandsch Economisch-Historisch Archief in Amsterdam (NEHA 279), of an anonymous Amsterdam underwriter (Assuradeur). The account book contains a chronological list of the insurances concluded by him during the period from 25 January 1725 to 17 September 1729 and specifies in each case the name of the insured, the voyage involved, the sum insured, the premium rate, the amount of the premium (the income), the commissions paid, the return of premiums, the losses and averages paid out (with an indication of the nature of each loss). See also Boorsma & Lucassen 120 for a brief description.
basis of experience to guesstimate if not estimate risk with a fair degree of accuracy. Full-time individual underwriters managed their risks, even if only in a crude sense, and regarded marine insurance as a regular investment opportunity rather than simply as an opportunity for gaming. In any event, according to this alternative view, marine insurance could never possess the actuarial stability associated with life insurance. It involved less actuarial skill and foundation but required more personal experience from an underwriter to be successful and profitable at marine underwriting than at any of the other branches where risks were more uniform or at least more readily classifiable.\textsuperscript{115} By contrast, life and fire underwriting demanded continuity and were more specialised than marine insurance.

Many factors in fact support this alternative view and discount the notion that marine insurance was, generally speaking, regarded as a speculative gambling business by the majority of underwriters seriously active in it. Thus, from early on most markets had a core of individual underwriters who regularly, if not yet full-time, concluded insurance contracts and whose names repeatedly appeared on policies and who appear to have enjoyed a significant share of the local insurance market. Although very few of them probably became wealthy on the income from underwriting alone, a number no doubt derived quite a comfortable and steady if unspectacular income from their prudent underwriting practices.\textsuperscript{116} Most underwriters co-insured for roughly similar and conservatively limited amounts. Only rarely did a single underwriter in later times take over the whole risk of an insured, which would have been the gambling speculator’s most preferred method of making a quick profit.

A more important factor indicating the non-speculative character of full-time underwriting, however, was the process by which premium rates were determined in individual cases. Underwriters were in touch with one another in the larger centres and, aided by the specialisation of brokers which no doubt made up for whatever experience a particular underwriter may have lacked, they succeeded in stabilising the underwriting market and in establishing rates which approximated market rates. Not only did co-insurers on the same policy appear as a rule to have charged the same rate but rates of comparable insurances were very similar. Furthermore, at least for ordinary and

English underwriters too from early in the eighteenth century kept annual ‘risk books’ in which they recorded insurances by way of tabular summaries of every voyage or time risk in which they were involved. The summaries indicate the sum insured, the name of the insured, the ship and her master, a description of the voyage, the premium rate, the percentage insured. Later further information was also reflected, such as the name of the placing broker and a general description of the cargo. See further Cockerell & Green 9. The corporate equivalent of these risk books were the ‘policy registers’ of the fire insurance companies (\textit{idem} 26).

\textsuperscript{115} Life risks (mortality risks) were more readily classified according to the age, gender or disposition of the life insured, while in the case of fire risks too the location, age and nature of the structure involved made for relatively simple risk classification.

\textsuperscript{116} It has been estimated that in the mid-sixteenth century, Antwerp underwriters made a profit of no more than three per cent on the total sums they underwrote. See De Groote \textit{Zeeassurantie} 149-151.
better-known risks, the rates were very reasonable,\textsuperscript{117} discounting the idea of insurance presenting lucrative speculative opportunities. In addition, premium rates were differentiated according to the nature of the risk involved and show signs of rather precise and even sophisticated estimations of risk. And with premium rates being established within a certain range for any individual risk, any haggling about the premium between the underwriter and the insured, which was in any event probably the exception rather than the rule, no doubt had the notional market rate as a point of departure.

In short, elaborate statistical information was not necessary for the type of risk insured - marine - and for the type of insurance - short-term - concluded at the time. Not surprisingly, marine insurance distanced itself from purely speculative enterprises and became a serious and scientific enterprise long before actuarial science gave the same standing to life insurance. The individual full-time marine underwriter, at least in the seventeenth and eighteenth centuries, generally did not conduct his underwriting business as a speculative high-risk, high-profit activity but in a calculated, sober and professional way. Speculation on the part of insurers by way of insurance contracts was the exception, not the rule.\textsuperscript{118}

Despite the fact that there is some difference of opinion on whether insurance in an economic sense can be said to exist and to have existed in the past when a spreading of risk is or was present but when it is or was not based on a mathematical calculation of probabilities, it would appear that a scientific, rational calculation of risk was not and should not be required for insurance in the legal sense. Whether the insurer had scientifically predetermined the number and extent of risks which would materialise in a given period of time, had no influence on and was not an element of the legal definition of the insurance contract. A valid insurance contract could be concluded even by underwriter with bad business practices.\textsuperscript{119}

But there is support for the view that some elementary calculation of risk on which the insurer’s expectation of profit is based, should be required in this regard, however unscientific or uneconomical such calculation might be. Such calculation on the part of the underwriter, it is said, serves to identify an intention to insure as opposed to an intention to speculate. If there is no intention to make a profit which is founded upon a calculated expectation, there can be no insurance contract. And, it is pointed out further, such elementary calculation of risk, reflected in the calculation of insurance premiums and based on a mixture of personal experience and market rates and the cir-

\textsuperscript{117} They had to be. Not only were individual underwriters in competition with one another, but the insurance cover they provided was also in competition with other risk-spreading options open, readily accessible and familiar to merchants.

\textsuperscript{118} See eg De Roover ‘Early Examples’ 180 and generally Nehlsen-Von Stryk ‘Kalkül und Hasard’ from which some of the points made here, were taken.

\textsuperscript{119} Insurance in the legal sense is present when an independently remunerated and separate risk-transfer agreement exists. The legality of such an agreement is not affected by the absence of any risk-spreading over a community of similarly exposed insured, nor by the fact that any spreading of risk which does occur, is not extensive and systematic. Insurance in the economic sense, by contrast, is present only when the risk insured is spread through the creation of a commutio periculis or Gefahrengemeinschaft, and, according to some, when this is guided by the scientific theory of probability.
cumstances of and nature of risk presented by individual contract, already occurred soon after the emergence of insurance in its modern guise. This would mean, of course, that when the early underwriters took over the risks of other merchants on an incidental and individual basis and with a primarily speculative motive, the contracts they concluded were not legally insurance contracts.

Against this it may be postulated, though, that the underwriter's motive with the conclusion of a particular contract or type of contract did not and should not have a bearing on the nature of that contract. Just as a contract of sale was not less a sale because the buyer might have been speculating on an upswing in the market when he concluded it, so an insurance contract was not any less one of insurance because the insurer employed it as a means of speculation. The underwriter's intention to conclude an insurance contract should be distinguished, it would seem, from his motive for concluding it. And the absence of a speculative motive on the part of insurer for concluding an insurance contract, was not and should not be required for the legal validity of that contract. And further, of course, the fact that risks and probabilities came to be scientifically and rationally calculated by insurers did not and could not affect the legal nature of individual insurance contracts which remained aleatory.

2.5 Bourses and the Centralisation of Underwriting Activities

The fact that insurance underwriting was being conducted by individuals, and in particular their practice of underwriting only a portion of a single risk, obliged the insured to obtain the subscriptions of several individual underwriters in order to have his risk fully insured. The inconvenience for the merchant who required insurance cover having to seek out individual merchants prepared to underwrite a portion of his risk at various places in the city is obvious, a problem exacerbated when a large risk had to be subscribed on a small market. For this reason the prospective insured employed a broker. But soon, no doubt, those merchants who underwrote risks more than incidentally, set themselves up at a fixed central venue and at fixed hours where they would be more accessible to those requiring cover and their brokers.

In the Netherlands underwriters were most commonly to be found at the central market square or, later, at a purposely built central exchange or bourse where merchants and bankers gathered to transact their businesses. Evidence of the presence of underwriters at such bourses (beursen) in the Low Countries date from the fifteenth

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120 See eg Van der Merwe Versekeringsbegrip 45-46 and 103-104 (or idem 'Winsbejag' 43 and 228) and the sources referred to there.

121 See Goudsmit Kansovereenkomsten 40-43.

122 For example, in one of the oldest extant insurance policies concluded in the Low Countries, an Antwerp policy from 1531, the cargo in question was insured for Flemish £1 883 by no fewer than 42 different underwriters. See Mullens 22 and Appendix 17 infra where this policy is reproduced.

123 In erecting such buildings, the Dutch of course merely followed the example of other cities which had built such exchanges before, eg Venice, Genoa, Lisbon, and Seville.
In Antwerp, the first Bourse (the Oude Beurs) was built in 1515 and a new Bourse opened there in 1531. It served as the model for other European exchanges, including those of Amsterdam and London.

In Amsterdam, where commercial dealings in the last decade of the sixteenth century had already in range and volume surpassed those in Antwerp and London, the building of the Bourse on the Dam was completed in 1611. Dealers and brokers of different nationalities and in various commodities and services, and later also in the stocks and shares of the East and West India Companies (making it the first true 'stock exchange') and in futures and options, had their customary locations under the arcades or near one of the 46 numbered pillars or, if the weather was good, in the central courtyard of the Bourse itself. The importance of marine underwriters appears from the fact that on seventeenth-century floor plans it was specifically indicated that underwriters ('Heeren Assuradeurs') congregated at at least three very central and prime locations on the Bourse: in the north-east arcade between pillars 4 and 5, alongside dealers in bullion, tobacco and the West Indies trade; in the centre courtyard on the one side of pillar 8 and on the other side of pillar 40, close to one of the groups of shipbrokers and merchants on France, Germany (Hamburg, Bremen) and Russia (Arcangel); and in the north-west arcade between pillars 43 and 44, next to merchants on Norway and other parts of the Baltic.

From an insurance and underwriting point of view, it is important to note that these central exchanges were not simply the venues where merchants met to trade in and exchange tangible wares, where financial business was conducted in bills of exchange, and where loans were raised and credit guaranteed. They were also information exchanges where news of commodity prices and rates of exchange, of ship and cargo movements, of wars and rumours of war, and, importantly, of losses and rumoured losses circulated and could be obtained. For that reason alone the presence

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124 One of the first (international) bourses to be established was that of Bruges, the earliest reference to which dates from 1453. See further Ehrenberg 'Makler' 445-456; Marechal 173-179.

125 As to the Amsterdam Bourse and the activities there, see eg Barbour Capitalism 17; Francken 259-262; Israel Dutch Primacy 74 (mentioning that a separate exchange for grain dealings was built in 1617); Ricard vol I at 198-204 (a general description of insurance business in Amsterdam in the latter part of the eighteenth century); Sneller 114 (noting that from 1585 and until the new building was erected, there was a 'Bourse' in Amsterdam in 'de Oude Kerk') Spooner 18-19; and Wilson Anglo-Dutch Commerce 13-16. In the eighteenth century, the Amsterdam Bourse traded Sunday through Friday, whereas that in London operated from Monday to Saturday (see Neal 100n11).

In Rotterdam, too, a meeting place for merchants ('eene beurse ofte plaetse, daer de coopluyden heure vergaderinge souden mogen hebben', according to Krans 13) was already established by 1595.

126 See again ch II § 4 supra.

127 One such a plan is reproduced in Appendix 1 infra.

128 See Spooner 19.
of underwriters there was advantageous in times when other channels of communica-
tion were singularly unreliable if not non-existent.129

2.6 Underwriter Co-operation on the Insurance Markets.

Having become identified as underwriters and meeting regularly on the Bourse, 
merchant-insurers naturally sought some measure of co-operation. Quite possibly this 
occurred informally from early on, with some underwriters having authority from their 
counterparts to underwrite portions of risks on their behalf.

There are also indications of underwriters on certain markets acting in consort or 
reaching accords on insurance-related matters, necessitated no doubt by the lack of 
any formal organisation on insurance markets. An early example was the accord 
between Amsterdam insurers in 1615 on the minimum rates of insurance premium at 
which they would, for a limited period, underwrite marine risks, an accord which, it 
would seem, never came into force.130 Another example of underwriter co-operation in 
the seventeenth century occurred in Amsterdam in 1688 when local underwriters com-
plained to the authorities about the lack of uniformity in the wording of policies which 
they did not have the time to scrutinize in every case.131

A better example of underwriter co-operation is provided by an agreement 
reached between eighteen prominent Rotterdam underwriters on 6-8 January 1698 
concerning the payment of premiums.132 The accord also contained the first signs of a 
form of association of underwriters, for the signatories bound themselves to meet 
monthly in a local tavern ('op de eerste Saturday van yder maand bij malkanderen te 
komen ende vergaderen in de herberge daer uit hangt de Bastille op de boete telkens 
van een schelling'). Later, on 22 February 1719, Rotterdam underwriters again con-
cluded and agreement (Reglement) on a number of insurance-related matters, namely 
uniform rates of premium between co-insurers on the same policy; franchise; a limita-
tion on the amount of brokers' commission; the immediate payment of the full premium 
in the case of a return voyage; minimum premiums for certain risks; and the period of 
settlement in account with brokers. They further determined not to underwrite and sign 
any policies containing provisions in which one or more of these points were circum-
vented and rendered null, and agreed on penalties to be imposed on those signatories

129 See further Smith 'Information Exchange'.

130 See further on this accord, ch XI § 2.1 infra where it discussed in more detail.

131 See the preamble to the Amsterdam amending keur of 1698 where there was reference to a complaint 
('bericht') by the merchant-underwriters ('de Koopluyden en Assuradeurs'). See too Barbour 'Marine 
Risks' 580-581, and again ch VIII § 4.1.2 supra as to the prescribed policy forms.

132 For details, see eg Vergouwen 96. The accord is to be found in the notarial archive of the Rotterdam 
notary Johan van Loddenstein (Gemeente Archiet, Rotterdam, ONA no 1612, folio 4). For its stipulations 
on the payment of premiums, see ch XI § 3.2.2.2 infra.
of the accord who did not comply with its stipulations. The agreement was stated to commence on 1 March 1719 and to continue until 1 March 1720.

Even more co-operatively minded were the underwriters operating in Hamburg. Between 1677 and 1708 they concluded a series of accords ("Vergleichen der Hamburgischen Assekuradeure") on a variety of insurance-related matters, each accord operating for a limited period of time, and successive ones often merely or also extending the duration of earlier ones. Although these accords were obviously only binding between the signatories, they covered a wide range of matters and no doubt had some impact on insurance practices in Hamburg at the time. The need for such accords, and the fact that there were so many on such a variety of topics; must be seen in the light of the fact that, unlike in the Netherlands, there was no statutory regulation of insurance law in Hamburg until the promulgation of its Assecuranz-Ordnung in 1731. These accords were thus a way in which underwriters themselves could regulate particular legal issues and address some of the problems they experienced in their insurance business and hopefully ensure uniform practices on the local market. By concluding them, they attempted also to update the customary insurance law applicable in Hamburg as insurance legislation had done in the Netherlands. It would appear that no

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133 In case of every non-compliance by any signatory to the Reglement, a fine of £10 was payable within three days to one Philippus Serrurier to whom notice of non-compliance also had to be given. The signatories expressly waived any exceptions to non-compliance. Should any of them fail to pay the fine of £10 as agreed, a further amount of £25 would be levied. In the event of any disputes arising on the agreement, such had to be referred to the decision and judgment of a panel of four (George Bruyn, Henrick Verryn, Willem van Laer and Nicolaus Blaaupot) which was to determine the matter by a majority decision.

134 See further Goudsmit (Zeerecht) 443-445. The accord is reproduced in Appendix 14 infra.

135 Such agreements were concluded on 29 December 1677, 15 December 1679, 15 May 1683, 3 January 1687, 9 February 1693, 17 March 1697, and 22 December 1708. They are reproduced in Dreyer 253-263. For further details, see eg Dreyer 52-66 who calls them 'pacta privatorum' and points out that such an agreement may already have been concluded on 27 February 1623 on the premium rates to be charged from various places; Frentz 'Seerechtsprechung' 153 who refers to these accords as 'pacta inter privatos' and who also mentions a 'Hamburgischen Reglement des Dispacheurs' of 1705; and Klesselbach 34-35, 124 and 132. On the pre-history of the Association of Hamburg Insurers (Verein Hamburger Assecuradeure), see Stritzky 9-19.

136 The topics covered include the standardisation of the contents of insurance policies; a reduction in competition between underwriters; an increase in the obligations of insured and in their duty to disclose certain facts; the payment of premiums in cash and by bank transfer; the amount of franchise on particular goods; the amount of brokers' commission; the time within which payment had to be made on policies; the periods for notice of loss; the assessment of cargo damage; the arbitration of disputes on insurance contracts; and insurances for the account of another.

The content of these accords will be dealt with in more detail, where necessary, when the different matters on which the underwriters agreed, arise for consideration.

137 Interestingly, in the accord of 17 March 1697 it was agreed in art 1 that, as was customary in Holland ('gleich es in Holland gebrauchlich ist'), a person taking out insurance had to inform the insurer comprehensively about the ship and goods, and if the goods were not specified but merely described in policy as 'merchandise', insurers could treat such as perishables. See again ch V § 4.3 supra as to perishables.
organisation of Hamburg insurers existed at this time to advance their common interests and under the auspices of which these accords were promoted. For that reason, it would seem, these agreements had to be renewed periodically as changes in the composition of the Hamburg underwriting fraternity occurred.

2.7 Underwriting Partnerships

2.7.1 Introduction: Partnerships in Roman-Dutch Law

Of course, the earliest individual underwriters did co-operate more formally with other individual merchants than merely by way of such general accords. The culmination of their contractual arrangements was the formation of a variety of legal relationships or partnerships, both with merchants generally and with other merchant-underwriters specifically. Underwriters joined in such associations either for general trading or business purposes or specifically with the aim of insurance underwriting.

Of medieval refinement although based on the Roman law concept of societas and the medieval commenda (a form of limited partnership common in the maritime trade), the partnership as a contractually-based form of co-operation was well known to Roman-Dutch law. Various forms existed at various times and places. They were in legal and other sources referred to as a vennootschap, societeit or compagnie, irrespective of which type of partnership was involved, and the members were referred to as compagnons or, less frequently, as participanten.

Preceded by earlier prototypes, the ordinary private partnership or vennootschap onder firma became the typical partnership form in the Netherlands in the seventeenth century. It developed from the medieval Italian compagnia as a form of legally binding co-operation without any legal personality (persona). Two or more persons (compagnons) bound themselves to achieve a common purpose by means of the contribution specifically of labour and, occasionally, of capital. Unlike in earlier forms, all the partners were equally entitled to and had a say in the management of the business with no one of them being in a subsidiary position. Characteristic was the common estate of the partners (societas omnium bonorum) made up of contributed assets and undivided profit. Members shared in the partnership’s profit in the proportion in which they originally contributed to it and to the expenses of the business.

As a rule the names of all the partners were mentioned when business was done on behalf of the partnership although partnerships also functioned under a firm name.

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138 On the different types of partnership in Roman-Dutch law, see eg Van Brakel Compagnieën passim; idem ‘Vennootschappen’ 3-30, 145-167 and 182; Hahlo 139-148; Hollandsche Societeit 8-9; Kohler ‘Handelsrecht’ 293-300 and 374-380; Lichtenauer Geschiedenis 164-173; Riemersma 332-337; and De Smidt Compendium 12-15 and 150-152.

139 The most important of these earlier forms of partnership was the factor-partnership (factorij-vennootschap), a medieval relationship in which a single sedentary capitalist merchant provided a travelling merchant such as a master with money and/or goods with which to trade, the latter receiving a fixed sum or a share in the profit as his payment. Although not unknown in the Netherlands in the seventeenth century, this was not regarded as a true partnership by Roman-Dutch law, except where the trader or factor himself also contributed some of the money or goods.
consisting of the names of active or founding partners followed by 'and Company' ("& Cie" or "et socii"). Unlike in earlier partnership forms in which the duration of the partnership was ordinarily determined with reference to the type of common undertaking involved, for example the duration of a particular trading venture or voyage, the duration of the private partnership depended in the first instance on the will of the participating partners. When there was no pertinent provision in the partnership agreements as to its duration, it merely meant that the partnership was to continue until terminated by one of the members.  

Underwriting partnerships too were temporary or permanent, that is, they were concluded either for a particular and limited period or time (or even for the duration of a limited number of insurance contracts or even for a single insurance contract), or for an undetermined and unlimited period of time.

Other forms of partnership known to but less common in Roman-Dutch law prior to the nineteenth century, included the anonymous partnership (naamloze vennootschap) or limited-liability company. This was a partnership with a legal persona, put differently, a legal person established on the basis of a partnership agreement, with or without a charter from the state, and governed solely by the agreement itself. It is uncertain whether in the seventeenth century it had yet been accepted in Roman-Dutch law that the trading company was a juristic person, and it is often difficult to know whether one has to do with a large private partnership (vennootschap onder firma) or a small anonymous partnership or company (naamloze vennootschap).

The anonymous partnership fulfilled a particular need in that it permitted silent or undisclosed participants in the partnership form and, with it, the spreading of the risk of large capital over many participants. Such participants were capitalist investors and not, or no longer, active merchants who contributed their labour. They had no interest in the partnership business other than in a healthy return on their investment in it. The common property of the anonymous partnership was divided into shares and every partner participated for one or more shares. These shares were transferable and often share deeds were issued. The partnership was managed by elected participants (also known as ‘bewindhebbers’) who acted for and in the name of the partnership. The anonymous partnership was characteristically a terminal partnership, established for a limited period of time (20-25 years) after which a renegotiation of the partnership agreement by the participants was possible. Rudimentary forms of anonymous partnerships appeared by the end of the sixteenth century and although it did occur in practice in the seventeenth century, it was not yet recognised as such by jurists of the time. It only became prominent and recognised as a separate form of partnership in the nineteenth century.

To prevent such termination, it was possible to agree, for example, that the partnership was to continue for a particular period during which no termination would be possible and after which it was to continue until terminated by any one partner. It was also possible to provide for the partnership to continue for a particular period subject to earlier termination.

One early example of an anonymous partnership or compagnie was the incorporated Dutch East India Company (EiC), established in 1602. In essence it was no more than a form of co-operation between various existing forms of partnerships (compagnien), including private partnerships (vennootschappen onder firma). The EiC was preceded by a number of unincorporated partnerships (voorcompagnien), the earliest of these having been established in 1594 by nine Amsterdam merchants for the purpose of a single trading voyage and subsequently continued for general trading ventures. The prototypes represented the intermediate stage between the older shipping associations (partnerships ad
2.7.2 Early Examples of Underwriting Partnerships

The earliest references to the existence of partnerships specialising in insurance underwriting date from the late fourteenth century, soon after the emergence of the insurance contract in its modern form.

One such example, which illustrates how insurance was conducted as a regular business by such a partnership, appears from the archives of the famous Pisan firm of Francesco di Marco Datini (c1335-1410), a merchant-banker of Prato in Tuscany. Datini’s firm not only insured its own consignments but also underwrote the risk of other merchants. In an insurance account book of the firm dating from 1384, it was entered on appropriate days what goods were insured by Datini’s compagnia, on behalf of whom and for what amount, against which risks, and on what voyage, and for what amount of premium. At a subsequent date it was recorded in a further column alongside that the ship had arrived safely at the agreed destination and that ‘we are free from said risk’.

There are also other such early Italian examples of underwriting associations. Similar examples are extant from the Low Countries. In 1456 a case came before the Schepenen Court of Bruges in which Gerard Plouvier, a citizen of that city, and Saldonne Ferrier, a Catalan merchant, had effected an insurance with ‘la Compagnie de George Spingle’. Underwriting partnerships existed and operated in Antwerp.

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rem, eg for a specific voyage or undertaking) and the EIC. Existing partnerships for trade on the East Indies were associated by a charter of the Estates-General in 1602.

142 Rather, each of the partners of the firm insured his interest in such consignments.

143 The Archivio Datini in Prato contains, amongst a treasure-house of other business documents, some 400 insurance policies or memoranda regarding them, in some of which Datini’s compagnia were the underwriters, and in others in which they were the insured. On Datini and the archive, see eg Nelli ‘Spotlight’; and Origo 138-139 and 347.

144 On the book’s cover there is written: ‘This is the book of Francesco of Prato and his partners living in Pisa, and we shall write in it all insurances we make on behalf of others. May God grant us profit, and protect us from dangers’ (see Origo 139).

145 See Lopez & Raymond 257 and 263-265 (document 138, which is an extract from this book).

146 Thus Seffen Versicherung 41 refers to a Genoese example where, in 1424, three merchants (the brothers Galeotto and Tobia Scipioni and one Giuliano Dondi) concluded an agreement for a period of two years ‘de faciendis assecurreationibus in quacumque maneria que dicit vel excogitari possit, tam in mari quam in terra et ubique locorum et terrarum mundi partum’. But, as he points out, this was probably nothing more than a co-operation agreement and not a partnership because no separate partnership property was provided for.

147 See Raynes (1 ed) 13.
too. The largely identical underhand deeds, in French, of two Antwerp firms established to conclude insurances on goods and merchandises sent by sea, internal waters or land, are extant. In both partnerships, profit or loss was to be divided according to the amount of capital contributed by each member. The one firm, referred to as a 'company of 70 shares' ('compagnie des septante perceros'), was established in 1559 with capital of Flemish £700, and the other one, known as a 'company of 80 shares' ('compagnie des huitante perceros'), was formed in 1563 with capital of Flemish £800. Both were established for a period of three years and both were under the management and control of an Antwerp merchant, one Christoffel Pruenen who, it appears, may have been involved in earlier and later underwriting firms as well. Both firms suffered a loss.

2.7.3 Insurance Partnerships in the Seventeenth and Eighteenth Centuries

In the Northern Provinces such underwriting firms continued to be established, whether for trading generally, including the provision of insurance cover, or whether...
for insurance underwriting specifically.\textsuperscript{154} Underwriting partnerships were initially nothing more than a temporary, occasional joining together of resources, expertise and underwriting capacity, if not for the purpose of insuring an individual risk,\textsuperscript{155} then at least only for a short period of time of one or two years. They were usually limited to two or three participants. The reason why they joined together was to facilitate each individual merchant and/or underwriter's participation in the insurance business: his involvement in insurance was taken over by a specialist on behalf of the partnership and no longer required his often unspecialised attention.\textsuperscript{156}

There are numerous examples of such partnerships early in the seventeenth century.\textsuperscript{157} A few may be referred to here.

First, there was the firm of one Roemer Visscher. In terms of an Amsterdam notarial deed of 1595, Visscher undertook, on behalf of himself and others, after the insolvency of the insurer involved, to be liable on the latter's policy as if he and his partners were the insurers.\textsuperscript{158} He accepted liability on the policy for his own account and that of his partnership ('\textit{tot sijnen and sijns compagnie taste}'), and it would appear that he had taken over the liability of an insurer under an existing policy for the joint account of a number of associated merchants ('\textit{voor gemeene rekening van eenige vrienden en kooplieden tezamen}').\textsuperscript{159}

Another example was an insurance partnership ('\textit{compangie, in materie van assurantie}') which was concluded between ten Amsterdam merchants on 15 December 1601. The partnership was concluded for twelve months (and may have been a continuation of an existing agreement); the members were liable each for an equal share, with a right to retire from the partnership at any time; and they were entitled to underwrite in their private capacities ('\textit{prive}') as long as they gave notice to the others. One of the partners was appointed as the bookkeeper and was generally authorised to sign policies on behalf of the partnership ('\textit{op verscheydene polycen, zonder gehouden te zijn yemandt van zijne andere compagnions daervan eerste te advyseren, ende sonder regardt te nemen op wat plaetsen ende hoedanich die versekeringe wert gedaen}') up to a maximum of Flemish £400.

\textsuperscript{154} That is, a partnership of underwriters or an underwriting syndicate.

\textsuperscript{155} In effect, therefore, a co-insurance achieved outside the insurance contract itself.

\textsuperscript{156} See generally Schuddebeurs 'Verzekeringsbedrijf' 15-16. Kernkamp 'Betrekkingen' 224 notes that while at the beginning of the seventeenth century there were no professional underwriters ('\textit{beroepsverzekeraars}') in Amsterdam, underwriting partnerships ('\textit{assurantiecompagnien}') did occur, the partners sharing equally in loss and profit and one of them taking care of the underwriting part of the business ('\textit{de compagnions deelden gelyk in verlies en winst; één van hen voerde tegen een vergoeding de boekhouding}').

\textsuperscript{157} See eg Sneller 113n2 as to such 'assurantie-compagnien'.

\textsuperscript{158} See further § 2.9.2 \textit{infra} where this case is considered in more detail in connection with the insolvency of insurers.

\textsuperscript{159} See Den Dooren de Jong 'Reassurantie' 85.
A similar partnership was concluded on 12 October 1607 for an unspecified period of time between three Amsterdam merchants who each had the right to cancel the partnership at any time. The partners shared equally in loss and profit, and were equally liable under partnership contracts. One of them acted as bookkeeper and was entitled to sign policies up to a certain amount.

Another such Amsterdam underwriting partnership ('compagnie van assurantie') was established on 9 March 1612, while on 21 November 1614 two Amsterdammers formed a partnership for the insurance of ships. Such underwriting partnerships were also established elsewhere. In Rotterdam in 1635 two merchants by notarial deed agreed to the establishment of a partnership (that is, they concluded a 'contract van compaingie') to underwrite insurances. The partnership business was described as the underwriting of risks of ships on voyages to and from certain areas only, up to certain amount (f1 200) and no more. Policies were to be underwritten in the names of both partners. For other voyages or for greater amounts, the partnership could only be bound if both partners specifically agreed, but in the absence of such consent one of them could insure for his own account at his own risk. The partnership could be terminated by notice.

As many members of the Dutch underwriting fraternity were also members of well-known trading partnerships, it is usually not clear whether and, if so, which of those partnerships were exclusively concerned with insurance underwriting. It would appear, though, that most of the firms in which one or more of the partners can be identified as underwriters merely provided insurance underwriting as another of the services such as shipping, warehousing, bill-broking, and the like which they offered to their customers.

From the start of the nineteenth century, partnerships en commandite (commanditaire societeriten; commanditaire vennootschappen), a variation on the anonymous partnership, were established in which a small number of persons (usually between six and twelve) brought together capital and authorised one of them to underwrite insurance policies on their behalf. A number of them were converted into anonymous partnerships after 1840. In fact, most of the anonymous partnership estab-

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160 See Barbour Capitalism 33-34.

161 See Elink Schuurman 'Aanteekeningen' 112 and 122-123 (where the deed is reproduced).

162 For a description of an insurance syndication established in the Zaan area (Zaandam and Zaandijk) in 1694, the 16 founding members referring to it as a 'Contract van teekeningen en assurantie soo op schip, goederen, als lijf van persoonen', see Den Dooren de Jong & Lootsma 'Walvishvangst' 26-27. The partnership was only finally terminated in 1758, at which time it had 15 participants.

163 See generally Spooner 16, 19, 59, 61 and 77.

164 As in the case of an anonymous partnership, the partnership en commandite involved sleeping partners and one or more active partners in whose name or names business was conducted. Although the sleeping partners in the case of an en commandite partnership were also not liable to third parties but only to the disclosed partner or partners, their liability was, unlike that of sleeping partners in an anonymous partnership, limited to the extent of their contributions to the partnership.
lished in the Netherlands before 1860 had insurance underwriting as their principal business.\textsuperscript{165}

Some of the underwriting firms existing prior to the end of the eighteenth century may best further be commented on when biographical details on the individual Dutch underwriters in the seventeenth and eighteenth centuries are provided in the next section. It may just be mentioned here that underwriting partnerships were well-known also elsewhere in Europe, for example in France\textsuperscript{166} and in England.\textsuperscript{167}

\subsection*{2.8 Excursus: Potted Biographical Details of Some Individual Underwriters and Underwriting Firms in the Netherlands in the Seventeenth and Eighteenth Centuries}

The earliest underwriters in the Low Countries, and specifically in centres such as Bruges and Antwerp, were foreigners, mainly Italians, Spaniards and Portuguese.\textsuperscript{168} At first they insured their own consignments going to or from the Low Countries. In the process they also introduced local merchants to the technique and benefits of insurance. These locals insured their own cargoes with the foreigners and no doubt soon took to insuring cargoes themselves.\textsuperscript{169}

The number of underwriters and underwriting partnerships active in the Netherlands in the seventeenth and eighteenth centuries fluctuated continuously but was never large. It is obviously difficult to establish which merchants also dabbled in insurance occasionally for they did not necessarily describe themselves as being also

\textsuperscript{165}See further Schuddebeurs 'Verzekeringsbedrijf' 25; Krans 13.

\textsuperscript{166}For details of a marine underwriting society (a \textit{Compagnie d'Assurance}; also referred to in the sources as a \textit{société} and a \textit{chambre d'assurance}) of twelve associate members which existed at Rouen from 1727 to 1742, see Dawson; and Den Dooren de Jong & Lootsma 'Walvischvangst' 27. The members were all merchants at Rouen or Le Havre. The structure and functions of this society were very similar to the later organisation of underwriters at Lloyd's. Two-thirds of its members were appointed to act as underwriters or underwriting agents for the society. The articles of association (\textit{Acte de Société}), which were valid for and regularly renewed every three years, governed its operations. It seems that at least four other such syndicates transacted marine insurance business at Rouen, and that they were on occasion co-insurers. On one known occasion they were co-insurers also with Dutch underwriters.

\textsuperscript{167}See further § 2.11.1 \textit{infra}.

\textsuperscript{168}Bernardo Gambi, a fifteenth-century Florentine merchant who resided in Bruges from 1435 to 1450, was active as an underwriter both there and in Florence after his return. His account books provide many details on the insurance conditions and rates of his time. He was not a specialised underwriter but combined his underwriting activities with foreign banking and investment in mercantile ventures. Even after his return to Florence, underwriting continued to be done on his behalf in Bruges by his representatives there. It appears that in the 1470's his underwriting business in Florence had become more important as separate and more detailed records were then kept of his transactions as an underwriter. See De Roover 'Early Examples' 190-194.

\textsuperscript{169}Thus, it appears from the \textit{Leerboek} (1594) of the Antwerp merchant Balthasar Adrea, who was principally a trader in goods there, that, like his compatriots, he too was occasionally involved in speculative dealings with Italian merchants, in his case monetary loans and marine insurances. See further Denucé \textit{Koopmansleerboeken} 10.
'insurers'. That happened only more regularly with the emergence of the specialist underwriter for whom insurance was his main if not his sole business. Precise information on the number of underwriters in the Netherlands is unfortunately lacking, but the few indications in this regard that were uncovered may give some indication of the extent of the underwriting business there at various times.

In Antwerp in 1564, it has been said, in excess of 600 persons were active in the insurance business, which seems a rather exorbitant figure and which obviously included many more that just underwriters.\(^{170}\)

By 1720, 43 individual insurers were active in Amsterdam,\(^{171}\) and in 1780 around 100 underwriters operated there, the most ever. In 1790 there were not very many more than 50. Earlier numbers varied between 60 and 80.\(^{172}\) Amsterdam underwriters were by far the most influential, insuring not only local risks but, through representatives, also risks from Rotterdam, Middelburg and elsewhere in the Netherlands and, of course, also foreign risks.\(^{173}\)

The Rotterdam market was much smaller, and individual underwriters there were the first of all Dutch underwriters to experience competition from a corporate underwriting institution in the form of the Rotterdam Insurance Company which was established in the city in 1720.\(^{174}\) The underwriting capacity there was small and less than 20 underwriters were active around 1780.\(^{175}\) The number of underwriters in other Dutch towns was negligible. They were important only for specialist cover, such as the whaling trade, and even that influence declined in the latter half of the eighteenth century.\(^{176}\)

In the nineteenth century, numbers at first did not go down noticeably. Thus, by 1851, despite the fact that 100 insurance companies were then operating in the Netherlands, 97 active individual insurers, mainly in Amsterdam, still had the greater share of...

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\(^{170}\) See Mossner 40.

\(^{171}\) See Schuddebeurs 'Verzekeringbedrijf' 17.

\(^{172}\) See Gales & Gerwin 50-51; Witkop 19. Spooner 29 gives the following fluctuating number of active individual underwriters in Amsterdam according to a contemporary local directory: 77 in 1757, 66 in 1771, 91 in 1782, 57 in 1787, and 52 in 1792.

\(^{173}\) See Spooner 28-29. It appears that in the latter part of the eighteenth century some measure of liaison existed between the different Dutch insurance centres. It was common for risks to be underwritten by individual as well as corporate insurers from different centres such as Amsterdam, Rotterdam and Middelburg. Although Amsterdam was the larger market where it was easier to obtain cover, Rotterdam and Middelburg insurance companies or underwriters often acted as lead underwriters. See further Spooner 36-40.

\(^{174}\) See further § 2.10 *infra* as to Dutch insurance companies.

\(^{175}\) See eg Kracht 70 (around 1770 only four full-time underwriters in Rotterdam); Suermondt 'Rotterdam' 212 (17 in 1771-1780 with only seven left by the last decade of the century); Witkop 19 (fourteen underwriters in Rotterdam in 1779). See also Krans 13 (the insurance firm of Van Alphen, Dedel & Van de Wall was established in Rotterdam in 1767); Spooner 25 and 26 (one of the better known Rotterdam underwriting firms in the latter half of the eighteenth century was the firm of Joan Ozy & Zoon).

the marine insurance market. However, thereafter the number of individual underwriters in Nether-lands was on the decline and the power of corporate insuring in the form both of local companies and of foreign companies represented by local agents, became so strong that by the end of the nineteenth century they had all but disappeared from the Dutch insurance market.

As far as the names and further biographical details of Amsterdam underwriters in the seventeenth and eighteenth centuries are concerned, several sources may be consulted. The most accessible of these is the two-volumed De vroedschap van Amsterdam 1578-1795 by Elias, a genealogical treasure-house of Amsterdam society in the seventeenth and eighteenth centuries. Using this work as a point of departure, I have compiled an alphabetical list of those Amsterdam merchants who were identified or who identified themselves as 'underwriters'. It is noticeable that most of the just more than 50 Amsterdammers identifiable as insurers, are described by Elias as both merchants (such as bankers or shipowners) and insurers. Only three of them are referred to only as insurers but it would not seem possible to deduce from that that they were in fact specialist underwriters or, even if they were, that they were the only ones. Furthermore, the majority of those who practised as underwriters were also at one time or another in their careers involved in one of the many Amsterdam tribunals such as the Schepenen Court or the Chambers of Maritime Affairs (Zeezaken), Small Claims (Kleine Zaken) and Marital Affairs (Huwelijksche Zaken); the Bank of Exchange (Wisselbank) or the Lending Bank (Bank van Leening); the Insolvency Chamber (Desolate Boedelkamer); or the Admiralty (Admiraliteit). Only three of them ever

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177 See Broeze 126 and the table on 127.

178 By contrast, in England the establishment of Lloyd's and an earlier restriction on competition from corporate underwriting had ensured the survival of individual underwriting: see further § 2.11 infra.

179 See Kracht 71; Witkop 19.

180 Unfortunately the directories of Dutch (Amsterdam, Rotterdam & Middelburg and elsewhere) underwriters published periodically from 1757 onwards in Amsterdam by Hendrik Slijtgenhorst as Naamen en Woonplaatsen van de Heeren Assuradeurs zo binnen als buiten deze Stad, and later, from 1767, by his successors Erve Hendrik Slijtgenhorst and Pieter van Rees, incomplete as they apparently are, were not available to me. See further Spooner 19.

181 As Elias contains no subject index, I cannot claim that all those who may be identified as insurers, have been uncovered. Elias no doubt mentions as insurers only those merchants who insured frequently and possibly reasonably continuously. Many other merchants may have underwritten on an occasional basis without gaining notoriety as insurers.

182 Fontaine, Grootenhuys, Neercassel.

183 See again ch IV § 1.4.5 supra.

184 Hult, Neck and Ooster. Dirck van der Meer may have been another.
became a Commissioner of the local Chamber of Insurance, probably because that meant having to cease their activities as insurers. A large number of those described or identifiable as underwriters practised their trades (as merchants and as insurers) in partnerships with other merchants and insurers, but an equally large number apparently did not insure in association with others. Although many firms had one or more partners who were underwriters, it is not possible to state with certainty whether any of these firms were specialist underwriting partnerships, and such specialisation appears to have been the exception rather than the rule. From Elias, at least, it appears that only one firm, the Compagnie van Negotiën van Assurantie of Abraham Muysart and Philippe de La Fontaine, which was in existence from 1710 to 1719, was clearly an underwriting partnership. But, as will appear shortly, quite a number of others were, if not exclusively established for purposes of and involved in insurance underwriting, at least prominent in that field.

Also noticeable is the complicated business and familial relationship which existed at times between the underwriters themselves, the firms or partnerships of which some of them were members, and the Amsterdam underwriting and shipping community specifically and its merchant community generally.

The following alphabetical list, which obviously cannot claim to be complete, at least gives an indication of some of the more important Amsterdam underwriters and of the commercial firms which were involved in underwriting in the seventeenth and eighteenth centuries:

185 See again ch IV § 1.4.2 supra.
186 See § 1 supra.
187 See Elias 686.
188 These include, in no particular order, Cornelis Hartsinck Jansz & Comp; De la Court & Wynants; De la Court, Wynants & Zoon; Wynants & Coeymans; Jeremias van de Meer & Zoon; Luden & Speciaal; Luden & Comp; Isaàc van Alphen & Abraham Dedel; Van Alphen, Dedel & Van de Wal; Dedel & Rocquette; Rocquette & Van de Poll; Gerard & Valerius Röver; Valckenier & Du Quesne; Hendrick Reael, Jacques Thierry & Pieter van Rijn; Guilliam & Jean Pels; Jean Pels & Soonen; Jean Pels, Cornelis Graaffland & Comp; Andries Pels & Soonen; Harman van de Poll; Harman van de Poll & Comp; and Jan van de Poll & Comp.
189 Thus, some of the legal and commercial opinions on insurance matters contained in the Verzameling van casus positien which appeared at the end of the eighteenth century, were delivered by Amsterdam insurers whose names appear underneath the opinions. From these names it is possible to get an idea of the leading lights amongst the practising insurers there at the time. Some well-known names (also noted in Elias) occur but also some less familiar ones: Dirck Luden & Zoon; Mullman & Soonen; Joh Luden Hendriksz; Dirck Luden; Hendrik Luden Johsz; Christiaan van Orsoy; Jacob Dull & Soonen; Rocquette & Van de Poll; A Scharff; W Scharff; Abraham Bruyn; Willem Bruyn; Severyn & Bruyn; Bardon & Jansz; Dirk Offerman; Chr Cruys & Zoon; Lubberts & Comp; Jacob Speciaal; Dk van Bosse; Lespinasse & Cartier; Wm van den Berghem; Hope & Comp. Also giving an opinion on insurance was Jan de Bosch Jeronimus, a director of the Amsterdamsche Assurantie Maatschappy.
Boddens, Abraham (1628-1679); merchant (in English manufacture) and underwriter; married to an Englishwoman, Abigail Man of Plymouth.\textsuperscript{190}

Capelle, Nicolaes Rochus van (1609-1695); merchant, rope-maker ('lijnslagier'), shipowner and underwriter; a member of the Schepenen Bench in 1660, 1662, 1664, 1667, 1668 and 1670; his son Rochus was a Commissioner of the Chamber of Insurance in 1674.\textsuperscript{191}

Coeymans, Hendrik (1698-?); merchant and underwriter; member of the firm [Jan jnr] Wynants (who was also an underwriter) & Coeymans; married the sister of Jan Wynants Jnr in 1730.\textsuperscript{192}

Clifford Gerar (1738-1770); merchant and underwriter ('groot koopman en assuradeur'); a member of George Clifford & Zoonen (his grandfather's firm, later Clifford & Zoonen) which went spectacularly insolvent in 1772; the brother of George Clifford who was Secretary of the Insurance Chamber in 1776, and son-in-law of Jacobus van der Pol who was also an insurer.\textsuperscript{193}

Corcellis, Seger (?-?); merchant ('koopman op Engeland') and underwriter.\textsuperscript{194}

Court, Daniel de la (?-?); merchant and underwriter; member of the firm De la Court & Wynantz (& Zoon) and possibly related to Abraham de la Court, Commissioner of the Insurance Chamber in 1755.\textsuperscript{195}

Dedel, Abraham (1732-1798); merchant, banker and underwriter; Commissioner of the Chamber of Maritime Affairs in 1760-1761 and 1763-1764, member of the Schepenen Bench in 1762; at first a member of the firm Isaac van Alphen & Abraham Dedel in 1753-1763, then of the firm Van Alphen, Dedel & Van de Wall in 1763-1770, and then of the firm Dedel & Rocquette (the latter was also an underwriter) in 1771-1782.\textsuperscript{196}

Dibbetz, Frederik (?-?); merchant, banker and underwriter; first in 1757 in junior partnership with Sappius, later in 1764 alone, from 1767 in partnership with Schorer,\textsuperscript{197} and by the end 1688 in partnership with his son in the firm Dibbetz & Zoon; from 1769 he was no longer listed as an underwriter but from that time acted as a broker for the Middelburg Commercie Compagnie in obtaining insurance cover on the Amsterdam market.\textsuperscript{198}

Duysent, Dirk (?-?); merchant, shipowner and underwriter.\textsuperscript{199}

\textsuperscript{190} See Elias 628.

\textsuperscript{191} Idem 514.

\textsuperscript{192} Idem 1041.

\textsuperscript{193} Idem 881 and 1045-1046.

\textsuperscript{194} Idem 850.

\textsuperscript{195} Idem 1041.

\textsuperscript{196} Idem 682.

\textsuperscript{197} It is uncertain whether this Schorer was the jurist Willem Schorer but not impossible, given that both Dibbetz and Schorer had Middelburg connections. See again ch VII § 3.1 n77 supra.

\textsuperscript{198} The firm of Dibbetz & Zoon was also heavily involved in freight and forwarding and also in financial transactions, financing cargoes from the East Indies, dealing in bills of exchange, and lending on the money market. See Spooner 19-21.

\textsuperscript{199} See Elias 730.
Flinns, Philips de (1695-1771); merchant and underwriter; Commissioner of the Chamber of Maritime Affairs in 1749-1768.  

Fontaine, Philippe de la (?-?); underwriter; member of the firm (Abraham) Mussy-sant & De la Fontaine in 1710-1719.  

Grootenhuys, Jacob ten (1648-1689); underwriter; Schepen in 1680, 1684, 1687, 1689; Commissioner of the Chamber of Maritime Affairs in 1682; described as 'assuradeur op den Fluweelenburgwal, over de Bank van Leening'.  

Hartsinck, Cornelis Jansz (1749-1797); merchant and underwriter; Schepen in 1776 and 1779; Commissioner of the Chamber of Maritime Affairs in 1783; member of the firm Cornelis Hartsinck & Comp.  

Haze, Jeronimus de (1578-c 1638); merchant and underwriter; born in Antwerp and subsequently immigrated to Amsterdam in 1586; member of the firm Jeronimus de Haze & Juliaen de Haruiijn, and later of the firm Jan van der Straten & Jeronimus de Haze.  

Haze, Jeronimus de (1613-1681); eminent merchant and underwriter; son of Jeronimus senior; member of the firm Jeronimus de Haze & Hendrick Schuyt and later of the firm Jeronimus de Haze & Pieter van Alten.  

Hocheplied, Isaac (1627-?); merchant and underwriter; went insolvent in 1680 and left for the East Indies in 1682.  

Hoven, Gillis van (1660-1722); wine merchant, manufacturer and underwriter.  

Hulft, Joan (1610-1677); merchant on Sweden, rope-maker, shipowner and underwriter; Commissioner of the Chamber of Insurance in 1652-1654; member of the Schepenen Court in 1655, 1657, 1663, 1668; Commissioner of the Chamber of Maritime Affairs in 1641-1645 and 1656.  

Lijn, Cornelis Jacob van den (1730-1799); merchant and underwriter; accountant of the Bank of Exchange in 1745-1749; nephew of Pieter Six who was also an underwriter.  

Ludin, Johannes Hendrikz (1739-1794; merchant, shipowner and underwriter; partner in the firm Luden & Speciaal (the latter being his father-in-law and also an insurer), and later in Luden & Comp.  

Meer, Jeremias van der (1649-1729); merchant and underwriter; eventually an insurer in the firm Jeremias van der Meer & Zoon; the son referred to here
was Dirk van der Meer, who was a Commissioner of the Insurance Chamber in 1736-1738.\textsuperscript{211}

Muylman, Willem (1590-1670); merchant and underwriter.\textsuperscript{212}

Muyssart, Abraham (1605-1675); merchant and underwriter.\textsuperscript{213}

Muyssart, Isaac (1637-1697); merchant (on England, France and Italy), wholesaler in silk, shipowner, banker and underwriter; son of Abraham and a partner in the latter’s business house, Muyssart.\textsuperscript{214}

Muyssart, Abraham (1676-1724); merchant, banker and underwriter; son of Isaac; Schepen in 1702 and Commissioner of the Chamber of Maritime Affairs in 1703; insurer in partnership with De la Fontaine in the firm Muyssart & De la Fontaine in 1710-1719.\textsuperscript{215}

Neercassel, Wessel van (?-?); underwriter.\textsuperscript{216}

Neck, Jacob van (1602-?); merchant and underwriter; also Commissioner of the Insurance Chamber in 1648-1668 and in 1669-1673, and Schepen in 1668.\textsuperscript{217}

Nooten, Sebastiaan Jansz van (1748-?); merchant and underwriter; Schepen in 1779 and Commissioner of the Chamber of Maritime Affairs in 1782-1797.\textsuperscript{218}

Ooster, Matthijs (1747-1842); prominent merchant and underwriter; Commissioner of the Chamber of Insurance in 1785-1787; his father (Matthijs Snr) was also a prominent Amsterdam merchant and underwriter.\textsuperscript{219}

Orsoy, Christiaan Christiaansz van (?-?); prominent merchant, banker and underwriter.\textsuperscript{220}

Peyrou, Daniel Jacob du (1709-1748); master, shipowner (of whalers) and underwriter; member of the Schepenen Bench in 1737, 1742, 1743, 1745 and 1746.\textsuperscript{221}

Pels, Jean Lucasz (1628-1699); merchant, shipowner, banker and underwriter; from 1654 a member of the firm Guilelmo Pels & Jean Lucasz Pels, which became Jean Pels & Soonen in 1680; Guilelmo Pels was a Commissioner of the Chamber of Insurance in 1700-1703.\textsuperscript{222}

Pels, Andries (1655-1731); merchant, shipowner, banker and underwriter; one of the most prominent and wealthy of his time in Amsterdam; member first of

\textsuperscript{211} Idem 784.

\textsuperscript{212} Idem 864.

\textsuperscript{213} Idem 685.

\textsuperscript{214} Idem 686.

\textsuperscript{215} Idem 684.

\textsuperscript{216} Idem 395.

\textsuperscript{217} Idem 478.

\textsuperscript{218} Idem 1027.

\textsuperscript{219} Idem 727.

\textsuperscript{220} Idem 1041.

\textsuperscript{221} Idem 830.

\textsuperscript{222} Idem 813.
the firm Jean Pels & Soonen although he later traded under his own name; established Andries Pels & Soonen in 1707, a firm which continued in business until 1774.\textsuperscript{223}

Poll, Jan van de (1721-1801); merchant, banker and underwriter; in business with his brother Harman in the firm Harman van de Poll & Comp and took it over after Harman's death after which he traded as Jan van de Poll & Comp; a Schepen in 1747.\textsuperscript{224}

Poll, Jacobus van de (1724-1807); became a merchant and underwriter in 1761; father-in-law of Gerard Clifford who was also an underwriter.\textsuperscript{225}

Poll, Harman van de (1728-1751); merchant, banker and underwriter; founder of firm Harman van de Poll & Comp and brother of Jan.\textsuperscript{226}

Poll, Jan van de, Jr (1759-1822); merchant, banker and underwriter; Schepen in 1786, Commissioner of the Chamber of Maritime Affairs in 1787-1791; son of Jan Snr; partner in a firm with Pieter Rocquette in 1782.\textsuperscript{227}

Quesne, Gilles du (1747-1820); merchant and underwriter; Schepen in 1788 and 1791-1792; partner in the firm Valckenier & (Gebroeders) Du Quesne which was established in 1769.\textsuperscript{228}

Quesne, Jan Philippe du (1746-1795); merchant and underwriter; Commissioner of the Chamber of Maritime Affairs in 1784-1787; partner in a firm with his brother Gilles and Jan Valckenier.\textsuperscript{229}

Romswinkel, Matthijs, 1695-1747; merchant and trader in Spanish wool and underwriter.\textsuperscript{230}

Rocquette, Pieter (1737-1809); merchant and underwriter, first in Rotterdam, but moved to Amsterdam in 1770; partner in the firm Dedel & Rocquette with Abraham Dedel (the latter was also described as an underwriter) from 1771-1782, and then with Dedel's nephew Jan van de Poll Jnr in 1782.\textsuperscript{231}

Röver, Gerard (1643-1711); merchant, shipowner, banker and underwriter; member of the firm Gerard & Valerius Röver; married Balichje, the daughter of Joan Huft who was also an underwriter.\textsuperscript{232}

Schuyt, Albert (or Elbert Gisbertsz?) (1576-1632); merchant and underwriter.\textsuperscript{233}

Six, Pieter (1686-1755); merchant and underwriter; uncle of Cornelis Jacobus van der Lijn who was also an underwriter.\textsuperscript{234}

\textsuperscript{223} Idem 813-814; Kernkamp ‘Patriciërs’ 36.

\textsuperscript{224} See Elias 752.

\textsuperscript{225} Idem 754.

\textsuperscript{226} Idem 964.

\textsuperscript{227} See Kernkamp ‘Patriciërs’ 16.

\textsuperscript{228} See Elias 1016.

\textsuperscript{229} Idem 991.

\textsuperscript{230} Idem 803.

\textsuperscript{231} Idem 1038.

\textsuperscript{232} Idem 534.

\textsuperscript{233} Idem 1017.

\textsuperscript{234} Idem 747.
Speciaal, Hendrik (?-?); merchant and underwriter in the firm Luden & Speciaal; father-in-law of Johannes Luden. 235
Staphorst, Nicolaas (?-?); underwriter in partnership from 1768 with Arend van Staphorst. 236
Thierry, Jacques (1604-1677); shipowner and underwriter; born in London and traded on England after he had settled in Amsterdam; partner in the firm Hendrick Reael, Jacques Thierry & Pieter van Rijn. 237
Valckenier, Jan Wouter (1716-1785); merchant and underwriter; member of the firm Valckenier & (Gebroeders) Du Quesne; the uncle of the Du Quesnes. 238
Velters, Abraham (1603-1690); merchant and underwriter. 239
Versteegh, Dirk (?-?); underwriter in the firm Dirk Versteegh & Zoon. 240
Warin, Antoine (1619-1691); merchant (in whaling) and underwriter; he had several notable descendants: Arend van de Wayen Warin was a Commissioner of the Chamber of Insurance in 1790-1795 and of the Chamber of Maritime Affairs in 1777-1780, Nicolaas Warin Jnr was a Commissioner of the Chamber of Insurance in 1751-1754 and 1756-1776, and Nicolaas Antonisz Warin was a Commissioner of the Chamber of Insurance in 1789. 241
Wynants, Jan (1672-1745); merchant and underwriter; originally in Lisbon until he returned to Amsterdam in 1717 where he continued trading and underwriting in the firm De la Court & Wynants. 242
Wynants, Jan Jnr (1715-1773); merchant and underwriter; Schepen in 1758 and Commissioner of the Chamber of Maritime Affairs in 1751-1757; joined his father's firm in 1740 when it became De la Court, Wynants & Zoon; later a partner in the firm Wynants & (Hendrik) Coeymans; the latter also being an underwriter and also his brother-in-law. 243

2.9 Underwriter Insolvency and Death

2.9.1 Introduction

The fact that private individuals were the main insurers of risk in the Netherlands, presented two problems in particular for insured, that of financial stability because of the insurer's limited and relatively unstable financial capacity, and that of continuity because of the risk-bearer's lack of a permanent legal status. There was too often an

235 Idem 1037.
236 See Spooner 33.
237 See Elias 572.
238 Idem 615; Spooner 33.
239 See Elias 669.
240 See Spooner 33.
241 See Elias 906.
242 Idem 1041.
243 Idem 1041.
insufficient guarantee either of the insurer's ability to meet the potential obligations he
had undertaken in terms of the insurance contracts he had underwritten, or of his
permanent or continuing participation in the market.

Underwriter insolvency or death was an ever present possibility, and an addi­
tional risk in fact facing the insured, on occasion as great as the risk of loss from perils
of the sea or of war. Furthermore, due to the considerable delay often experienced
between loss and the institution and payment of a claim under an insurance policy, and
the even longer period until the eventual judicial settlement of a disputed claim, the risk
of the recalcitrant underwriter becoming insolvent or dying in the meantime was in
numerous instances increased manifold.

There were alleviating factors, though. The fact that individual underwriters as a
rule co-insured a single risk, of course helped to limit the loss of an insured in the event
of an underwriter's insolvency or death. The fact that there was an amount to the credit
of the underwriter held by a broker in the form of premiums received but not yet paid
over, also worked to the benefit of the insured in that it constituted a reserve from which
losses could be paid in the event of such insolvency.\textsuperscript{244} Although the risk was further
slightly alleviated by the fact that some underwriters were partners in various firms, it
was not completely removed.\textsuperscript{245} Finally, it must be remembered that the underwriters
most likely to fail, were those who participated on the market only occasionally and
incidentally, and who were, as a result of inexperience and an imperfect calculation and
estimation of risks, most likely to suffer heavy losses and go insolvent. They, of course,
were the ones least likely to be involved in usual circumstances when full-time
underwriters had sufficient capacity to meet the demand and would in the first instance
be approached by prudent brokers as the ones who were financially stable and unlikely
to fail.

\subsection{2.9.2 Underwriter Insolvency}

\subsubsection{2.9.2.1 General Background}

The potential incapability of underwriters to pay claims on their policies was an
important factor in earlier insurance practices. The peril of underwriter insolvency was
no doubt uppermost in the minds of all those who sought to spread their risks by way
of insurance contracts. This was especially so in times of war when catastrophic losses
were the order of the day. Then, more than at any other time, the insolvency of their
insurers was as great a risk for merchants as the risks against which those insurers
covered them.

\textsuperscript{244} See Gibb 56-57, pointing out that the accounting system at Lloyd's which had grown up for the
convenience of brokers and their clients, was at the same time a safeguard for any merchant who
discovered that he had a defaulting underwriter on his policy. See also Raynes (1 ed) 179-180, (2 ed) 173.
As to the payment of premiums through brokers, see ch XI § 4 infra.

\textsuperscript{245} Either because the partnership itself was of a temporal nature, or because the underwriter did not bind
the partnership to the insurance contract but merely himself.
Like, but probably no more than, the insolvency of Dutch merchants generally,\textsuperscript{246} individual underwriter insolvency was not uncommon in the Netherlands, whether for reasons inherent in the practice of individual underwriting, or because of the way in which the particular underwriter concerned had conducted his business (for example, because of over-exposure or an insufficient spreading of risk), or because of external and temporarily unfavourable circumstances, or, most probably, because of a combination of these and other factors.\textsuperscript{247}

One famous insolvency in the Antwerp insurance business was that of the prolific insurance broker Juan Henriquez. His insolvency, it has been speculated, was not so much the result of his brokerage but rather of the insurances he had underwritten himself.\textsuperscript{248} Another famous or infamous underwriter insolvency, this time in Amsterdam, was that of Jacob van Neck, one of very few underwriters who became a Commissioner of the local Insurance Chamber (from 1648 to 1668, and again from 1669 to 1673). In his youth, Van Neck was a successful merchant in Italy. Thereafter he settled in Amsterdam and took up underwriting. He went insolvent in 1673 and as a result had to step down from the Amsterdam Municipal Council on which he had been serving since 1652.\textsuperscript{249}

No doubt, just as underwriter insolvency in the Netherlands was more prevalent and likely amongst occasional or inexperienced insurers, so too it was more common at certain times than others. Periods of war, it seems, were also the times when failures were most likely. One particular such period occurred towards the end of the seventeenth century during the War of the League of Augsburg (1688-1697) which pitted England, the Netherlands and other European allies against Louis XIV of France. In May 1693, for example, a convoy of about 400 English and Dutch merchantmen (the so-called Smyrna fleet), protected by 20 English men-of-war under the command of Admiral Sir George Rooke, was attacked by the French navy off Cape St Vincent. About 100 of them were either captured or destroyed. The ships and cargoes lost were valued at £6 000 000. Even though the Dutch losses were possibly even greater than that of the English, many London underwriters, and even more part-time speculator-underwriters including Daniel Defoe, fell onto financial hardship or failed as a result of this catastrophe. In 1693 a Merchants-Insurer’s Bill was brought before the English House of Commons and sought both to provide a subsidy to heavily hit underwriters and to impose some composition with their creditors on the merchants who had large

\textsuperscript{246} Because that is, after all, what the majority of underwriters still were in the first place. See Den Dooren de Jong ‘Reassurantie’ 88 who points out that both insurance and other non-insurance activities were heavily influenced by eg the perils of war and the frequent total (catastrophic) losses which accompanied it.

\textsuperscript{247} See too Barbour ‘Marine Risks’ 592.

\textsuperscript{248} See De Groote Zeeassurantie 167. Henriquez’s insolvency had at least one positive outcome, though. As a result his ledger for a fourteen-month period in 1562-1563 ended up in the Antwerp Insolvency Chamber (Desolate Boedelkamer) where it remained preserved for posterity. On Henriquez as broker, see further ch X § 7.2 infra, and as to his underwriting activities, see again § 1.3 n53 supra.

\textsuperscript{249} See Elias 478 and again § 2.9.2.1 n248 supra.
claims under insurance contracts so as 'to enable Merchant Insurers that have sustained great losses by the present war with France the better to satisfy their creditors'. The Bill received three readings in the House of Commons but, being opposed by the creditors, was later rejected by the House of Lords and never became law.\(^\text{250}\)

The failures of Dutch and English underwriters at the end of the seventeenth century no doubt played some part in the movement towards and the eventual establishment of insurance companies in the first quarter of the next century.\(^\text{251}\) But even in the next century insolvencies were not uncommon. Quite a number of Dutch underwriters for example failed during the Fourth Anglo-Dutch War (1780-1784) and the subsequent War with France (1793-1795).\(^\text{252}\) During the War with England, the majority of Amsterdam insurers in 1781 (unsuccessfully, it would appear) requested the Estates of Holland for a temporary suspension (surceance) of their obligations to pay on their policies, and shortly thereafter for permission to surrender their estates voluntarily.\(^\text{253}\) Perhaps, as Schama notes,\(^\text{254}\) it was no mere coincidence that the Amsterdam Chamber of Insurance was but a few doors down from the Insolvency Chamber (Desolate Boedelkamer) in the south gallery of the Town Hall. The latter Chamber was established in 1643 as another of the special Colleges van Commissarissen to which the Amsterdam municipal government had delegated certain functions.\(^\text{255}\)

What, then, was the position of an insured in the event of the insolvency or impending insolvency of his underwriter?\(^\text{256}\) In this regard there were two possibilities, action by the insured himself and legislative intervention.

### 2.9.2.2 Solvency and Performance Guarantees by Brokers and Underwriters; Novation

The insured himself could take various steps to avoid loss as a result of the insolvency of his insurer. In this he was often assisted by the law. It has already been considered how an insured could ameliorate his position in the case of one of his insurers going insolvent by concluding a solvency reinsurance

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\(^\text{250}\) See further Clayton 53-54; Den Dooren de Jong 'Reassurantie' 90; Fayle 37 and 42-43; and Raynes (1 ed) 98-99.

\(^\text{251}\) See Holdsworth History vol XI at 447n5, referring to Adam Smith who noted in his Wealth of Nations that in the few years before the establishment of the monopoly companies of 1720, at least 150 private insurers in London had failed.

\(^\text{252}\) See eg Den Dooren de Jong 'Reassurantie' 88-90; Vergouwen 77.

\(^\text{253}\) See Heemskerk 93.

\(^\text{254}\) At 345.

\(^\text{255}\) See further Oldewelt 'Failissements'; and further § 2.9.2.4 infra.

\(^\text{256}\) The position of co-insurers is treated in ch XVIII § 2.4 infra.
contract and how the conclusion of such insurances was regulated in Roman-Dutch law. There were also other possibilities open to the insured.

One such was for the insured to obtain some sort of surety or guarantee for the performance by a liable insurer in terms of an insurance contract. It appears to have been commonly accepted in Antwerp from the mid-sixteenth century onwards that where a foreign insured, who was unfamiliar with the financial position of individual underwriters, had instructed a local correspondent, representative or broker to take out insurance for him, he had no recourse against the latter in the event of the insurer or one of them subsequently not being able to pay under the policy. The intermediary did not stand surety for those who had underwritten the policy but the instruction and mandate (opdrag en commissie) was in such a case regarded as having been performed when he had concluded a valid insurance contract and had handed over the policy to the insured. Of course, the instructing insured could require, and apparently not infrequently in fact required, of the local intermediary to stand surety for the continued financial capacity of the insurers he got to underwrite the risk. Local intermediaries were willing, for a small commission or 'premium', to guarantee to the foreign insured the financial ability of the underwriters with whom the insurance was placed.

One example of what was referred to in Roman-Dutch law as an assuradeur-delcredere appears from a case which came before the Hooge Raad in 1726. Two merchants from Augsburg had sent goods to their Amsterdam correspondents with a request that the goods be sent for their account to a Spanish merchant in Cadiz after it had been insured at Amsterdam. They also requested that, for a fee, the correspondents stand surety for the underwriters ('dat ze voor de versekeraars wilden staan del credere ... onder genot van zekere provisie'). The insured goods suffered a general average loss which the underwriters refused to pay because the adjustment had been made up abroad. The Augsburgers thereupon ceded their action to the plaintiff in this case who, without further ado, claimed from the Amsterdam correspondents...

257 See ch VII § 4.1 supra.

258 See De Groote Zeeassurantie 22, idem 'Zeeverzekering' 208, referring to the evidence of brokers recounted in an Antwerp notarial deed of 1567; Mullens 41 (the intermediary did not guarantee the solvency of the insurer).

259 Bynkershoek Quaestiones juris privatil IV.13 noted that this was also customary amongst merchants ('ook onder de Kooplieden costumier').

260 Vergouwen 77 notes in this regard that whereas initially brokers only stood in as against the underwriter for the financial capacity of their client, the insured, to pay the premium (see further ch XI § 4.2 infra), it became more and more customary for them to guarantee the solvency of the underwriter to the insured. For this security brokers were accustomed to charge the insured a commission which, at times, was as high as the commission they received from the underwriters.

261 See Bynkershoek Observationes tumultuariae obs 2242; idem Quaestiones juris privatil IV.13.

262 See again ch IV § 3.2 supra.

263 As to the cession of actions on insurance policies, see ch X § 5 infra.
who had stood *delcredere*. The latter refused to pay, arguing that their standing *delcredere* was equivalent to suretyship. And, they said, because as sureties they had not waived their benefit of excussion (*voorrecht van uitwining*), they were not primarily (*'hoofdelijk'*) liable. The *Hooge Raad* held against the cessionary and for the correspondents. It held that because the Amsterdam insurers were not liable on a foreign general average adjustment, those who had stood *delcredere* for them were also not liable. In addition the *Raad* also accepted the main defence of the Amsterdam correspondents, namely that they were not primarily liable but only after the principal debtors, the underwriters, had been proceeded against and excused.264

Obviously, the factual position of a broker or other intermediary who for a fee or premium had guaranteed payment by the liable insurer in the event of a loss, was not dissimilar to that of a broker who had himself insured the risk involved.265 But, equally obviously, the legal position of a subsidiarily liable surety differed fundamentally from that of principally liable insurer.266 Such a guarantee on the part of an intermediary was for the same reason in essence different from a solvency reinsurance concluded by the insured, the intermediary's liability as surety being, it would appear, subsidiary and not primary as that of the insurer or reinsurer.267

Such a guarantee of underwriter solvency by the intermediary who acted as the local correspondent or placing broker for foreign insured, was also known in London. Towards the end of the eighteenth century this practice also appeared, although not commonly so and although not generally favoured in the London market, in instances where the insured was not resident abroad.268

Another possibility open to the insured to protect himself against the consequences of his underwriter going insolvent, was to require and obtain security from

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264 Bynkershoek, in his comment on the decision, noted that unlike the *Raad* and the *Hof van Holland*, he himself regarded an undertaking to stand *delcredere* as an acceptance of primary liability for payment, ie, *'als eige Schuld'*. He relied for his view on Verwer who had earlier declared that *'het Staen del Credere niet is een simpele adpromissie subsidiare, edoch eene expromissie als of daer gerenunciert waer van alle auxillum Juris'*. It would appear that there was some legal uncertainty on this point which, for present purposes, it is not necessary to consider further.

265 This, of course, was generally prohibited. See again § 1 supra.

266 As to insurance and suretyship, see again ch I § 4.8 supra.

267 See eg Den Dooren de Jong 'Reassurantie' 94 who points out that an insured who wanted to have the security of a solvency reinsurance already at the time he had concluded the first insurance, ie, before the insurer had fallen in financial difficulty or had gone insolvent, would have had to obtain it by way of such a guarantee.

268 See eg Den Dooren de Jong 'Reassurantie' 92-94 and 97-98; John 'London Assurance' 129; Raynes (1 ed) 180-181, (2 ed) 173-174; and Sutherland 51 and 55-56.

A particular reason why such guarantees may have been desirable in English law, was because an insured was not entitled to claim as a concurrent creditor for a loss which had occurred after the underwriter had become insolvent, a situation only remedied by s 2 of the Bankruptcy Act of 1746 (19 Geo II c 32). See again the discussion in ch VII § 4.3 supra.
the underwriter himself which guaranteed the latter’s performance under the insurance contract, or to get the underwriter to obtain a surety to stand in on his behalf.\textsuperscript{269}

A final method by which the insured could protect himself was by replacing the first (insolvent) insurer with a second insurer by way of an agreement between the two insurers themselves, that is, by way of a novation. One such instance appears to have taken place in Amsterdam in 1595 when one Roemer Visscher took over the risks underwritten by the underwriter Jacob Bruynsen Smallinck when the latter became insolvent.\textsuperscript{270} It seems that Visscher was originally the broker who had negotiated those insurances between the various insured and Smallinck. The reason why he was prepared to take over the insolvent underwriter’s liabilities and incur primary liability under the policies, apart from the obvious advantage to his clients,\textsuperscript{271} was because the premiums had not yet been paid over to the insolvent underwriter. He saw the opportunity of pocketing those premiums\textsuperscript{272} in full for himself by stepping in as underwriter and bearing the risks concerned, those having already partly been borne by the underwriter and no losses having yet occurred.\textsuperscript{273} This was not a case of reinsurance proper because the insured in question was not unaware of this arrange-

\textsuperscript{269} See eg Schorer Aanteekeningen 429 (ad III.24.12) sv ‘Borg of pand te stellen’.

An example of this appears from a wagering insurance on the life of a third person in 1676 (see Wagenvoort ‘Risicoverzekering’). The contract contained the following undertaking by a surety on behalf of the underwriter: ‘voorts soo verclare ick Bernardino Moens aengenomen ende belooft te hebben sultx doende bij desen te sullen presteren dat bij overlijden van de H[eer] Orn/a [the insurer] hier ondergetekent desselts ergenamen sullen naercomen ende voldoen tgeene sijn E[dele] hier vooren heeft beloof te gebreecke van dien beloove lok onderges[chrevene] als mijn eigen schult ende sake tselve zelfs te sullen doen sonder eenige exceptie in rechte noch daer buiten te sullen gebruijcken, renunterende tot dien iijnde de benefiten ordinis et excussions van welcker effecte ick mij wel onderrecht houde onder gelijke verbant ende subjectie als boven’. The surety’s signature appeared just below that of insurer. The reason for this guarantee may have been because recourse to law was excluded as a result of a renunciation of the applicable insurance laws. See again ch VIII § 5.2.3 supra.

\textsuperscript{270} See Den Dooren de Jong ‘Reassurantie’ 94-95 for an analysis and Appendix II at 108 where the notarial deed in question is reproduced.

In terms of this deed, Visscher declared that he had underwritten certain insurance policies (identified in an appended list by reference to the objects insured) insured in the name and for the account of a certain insurer because the latter had become insolvent after the signing of policies in question and would not be able to pay the sums insured by those policies in case of loss or damage. The deed continued: ‘soe is dat die voors comparant [Visscher] (alsoe tegenwoordiglijk noch goede oft quade tijdinge van de selve schepen en is)’ die selve verseeckeringen op hem ende tot sijnen en sijns compagnia taste is nemende. Begerende ‘t profyt daer van te genieten ende alle schade te dragen geelik oft die selve verseeckeringen voer hem geschiet waren’.

\textsuperscript{271} Possibly Visscher may also mistakenly have thought that as broker he would incur subsidiary liability towards the insured in the event of underwriter insolvency (that was not the general rule in Roman-Dutch law in the absence of such an undertaking by the broker), or he may have felt himself morally bound in this regard.

\textsuperscript{272} In terms of one of the policies the premium rate was an enticing 34 per cent!

\textsuperscript{273} It was a different matter, of course, whether Visscher was legally entitled, as against the other creditors of the insolvent estate, to collect the premiums in this way.
ment and because the insured did have a direct claim upon the second insurer involved.\textsuperscript{274} It was also not a case of solvency reinsurance where the insured had concluded a new insurance contract with a second insurer and had either cancelled the first insurance contract or transferred the rights in terms of it to the second insurer.\textsuperscript{275}

\subsection*{2.9.2.3 Legislative Measures Aimed at Protecting the Insured}

Various other insurance measures were introduced by insurance legislation which, if not aimed at then at least resulting in some measure of statutory protection of insured against the consequences of underwriter insolvency and even underwriter death. That insurer insolvency was a problem in practice and one recognised by the legislatures appears not only from the detailed regulation of solvency reinsurance but also from other measures. These included provisions made for the provisional payment of compensation in terms of the insurance contract,\textsuperscript{276} and for the provision of security by the insurer for such payment where the insured had to wait before he could abandon and claim under his contract.\textsuperscript{277}

A further way in which it was sought to protect insured in the case of insurer insolvency, and also in the case of his death, was to make it clear in the policy that the liability of the underwriter extended to his person as well as to all his current and future property. Dutch model policies, for example, as a rule made some or other reference to the liability of underwriters personally and to that of their current and future estates,\textsuperscript{278} and, although not pertinently,\textsuperscript{279} by implication to the liability of their executors and heirs.

\textsuperscript{274} See Golding 26; Mossner 42-43.

\textsuperscript{275} As he was permitted to do under Amsterdam legislation: see again ch VII § 4.1 supra.

\textsuperscript{276} See ch XX § 2.2 infra.

\textsuperscript{277} See ch XIX § 2.3 infra.

\textsuperscript{278} Thus, the model policy in the \textit{placcaat} of 1571 stated that the insurer was liable to pay as he had undertaken in the policy 'onder verbintenisse van alle zijne goederen'. In the policies appended to the Amsterdam \textit{keur} of 1598 the insurer declared 'ende verbinden hier voor onse Persoenen ende goederen, present ende toekomende'. Similar wordings also appeared in other official policies, eg in the hull and goods policies of the Amsterdam \textit{keur} of 1688 ('\textit{onder verband en submissie van onze Persoone en Goederen, present en toekomende}'); in the ransom policy of the Amsterdam \textit{keur} of 1693 ('\textit{Tot naarkominge van het gene voorschreven is, verbinden wy onse Persoone en Goederen, present en toekomende}'); in the hull, goods, fire and parcel policies of the Amsterdam \textit{keuren} of 1744 and 1775 ('\textit{Onder verband en submissie van onze Personen en Goederen, present en toekomende}'); in the goods policy appended to the Rotterdam \textit{keur} of 1721 ('\textit{Tot nakominge van alle het geen voorsz is, verbinden wy onse Personen ende Goederen, present en toekomende, als na Regten}') as well as in its hull policy ('\textit{Tot nakominge van alle het gene hier voren gemelt is verbinden wy onse Personen ende Goederen, present en toekomende, als na Regten}').

\textsuperscript{279} As eg did the Lloyd's policy of 1779 which declared: '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'.
2.9.2.4 The Effect of Underwriter Insolvency on the Insurance Contract

The insolvency of an underwriter did not result in the automatic termination of the insurance contract and in the insurer concerned being relieved of liability, even if he was a sole and not merely a co-insurer. Initially, in the Amsterdam keuren of 1626 and 1744, the insolvency of the insurer merely entitled the insured to cancel the insurance contract concerned, at first also forfeiting the premium, and to conclude another. In terms of the Amsterdam keur of 1756, the insured was free, upon the insolvency of the underwriter, to insure anew on notice to the curator of the insolvent estate, with that estate remaining liable, however, to the new substituting insurer to whom the insured had to cede his rights under the first policy.\(^\text{280}\)

For the insured who had failed to take the necessary steps to protect himself against potential or imminent underwriter insolvency, the law of insolvency was the last resort. This branch of the law aimed to regulate the position of the parties in the event of a debtor, such as an underwriter, going insolvent. In the course of time, insolvency law more specifically sought to protect creditors if not against the consequences of an insolvency itself, then at least against any exploitation by the debtor and fellow-creditors.\(^\text{281}\)

Apart from the principles relating to the voluntary surrender of an insolvent estate (cessio bonorum) which were received from Roman law,\(^\text{282}\) no uniform Roman-Dutch law of insolvency as such existed but only a municipal regulation of insolvent and abandoned estates (insolvente en desolate boedels).\(^\text{283}\) In the larger cities separate insolvency chambers (Desolate Boedelkamers) were established to deal with and oversee the administration of such estates, the one in Amsterdam having been established in 1643. But the various local regulations did follow certain main principles.

Custom had established and local legislatures had sanctioned provisions to protect the creditor in the event of his debtor's insolvency. The creditor could apply to the

\(^{280}\) See again ch VII § 4.1 supra as to solvency reinsurance.

\(^{281}\) On Roman-Dutch insolvency law and its sources, see eg Kohler 'Handelsrecht' 618-623; Lichtenauer Geschiedenis 194-199; Oldewelt 'Failissementen'; De Villiers passim; and Wessels History 661-669.

\(^{282}\) See eg Rechtsgeleerde observatien vol II obs 100. The procedure involved in such a surrender was first fixed in 1531. The debtor applied to court for letters of cession (Brieven van cessie) which, if granted, led to the appointment of a curator to take possession of the debtor's property, realise it, and divide it amongst his creditors. In this way the debtor avoided civil imprisonment (siviele gijzeling, gevangenis). From 1643, the Amsterdam Insolvency Chamber was also entrusted with the liquidation of estates voluntarily surrendered ('wat onder "beneficie" van cessie afgestaan was'). See further eg Van der Linden Koopmans handboek l.18.11.

\(^{283}\) For example, the Amsterdam 'Instructie voor de Commissarissen van de Desolate Boedels' of 6 November 1643 (the same year in which the Chamber was established), as amplified on 25 March 1644 and again on 19 April 1647; and the 'Instructie ende Ordonnantie voor Commissarissen van de Desolate Boedels' of 7 October 1659 which was replaced in 1777 by the Amsterdam Insolvency Ordinance which consolidated and restated the procedures in insolvencies before the Chamber and dealt with matters such as sequestration, accord, insolvency and rehabilitation.
Schepenen Court to appoint a curator to administer the estate of a debtor who could not pay his debts. The debtor himself too could, after 1643, do so, and could (always) in the usual way have voluntarily surrendered his estate. Where the debtor could temporarily not pay his debts while his estate was probably solvent, it was also possible to postpone all procedures and executions against him for a particular period of time against the provision of security.

2.9.3 The Death of an Underwriter

Although the death of an individual underwriter did not extinguish the insurance contract, it obviously caused the insured whose risk the underwriter had underwritten some inconvenience and problems in that claims could then no longer be instituted against the underwriter himself. It appears that an insured could proceed against the heirs of a deceased underwriter or against the deceased estate itself. This was in conformity with the general principle that, except in the case of personal contracts, which insurance was not, the contractual rights and obligations of a deceased party passed to his representatives who could sue and be sued on the contract.

2.10 Insurance Companies

2.10.1 Introduction

The predominance of individual underwriting obviously had many other disadvantages for insured in the Netherlands apart from the risk of the insolvency or death of an insurer. Individual underwriters, and especially those who were not acting full-time, entered and departed from the underwriting scene with remarkable fre-

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284 For example because of a lack of liquidity, which was quite possible in the case of an underwriter where premiums were not paid in advance (see further ch XI § 3.2 infra). As to the effect on underwriter solvency and capacity of the prospectivity of insurance premium payments, see Supple 'Insurance' 2.

285 This occurred by way of Brieven van Atterminatie of Respijt or, if the consent of the majority of creditors could be obtained, by a request of Mandament van Inductie.

286 In a case before the Hooge Raad in 1712 (see Bynkershoek Observationes tumultuariae obs 909; idem Quaestiones juris privati IV.5) the insurer had died and the insured claimed on the policy from his children and heirs ('De Assuradeur overladen zynde, dagvaart de geassureerde deszelfs Kinderen en Erfgenamen voor den Hooge Raad').

287 Den Dooren & Lootsma 'Walvischvangst' 25-26 refer to a Haarlem notarial protocol of 1680 (idem Appendix VI at 62) containing a claim by the insured owners of shares in a ship lost three years before who had not yet received payment from the insurer. There is mention in the document of the abandoned estate ('den geabandonneerden boedel') of the insurer, from which it appears that the insurer had in the meantime died and that his heirs had rejected their inheritance. As a result the insured attempted, probably unsuccessfully, to retrieve something from the estate and claimed from it a certain amount ('somme van een duysent ca : guldens michts afslaande acht pr cento voort yutbelooffde premie', from which it appears that the premium had not yet been paid).

288 See eg Lee Introduction 235.
frequency and rapidity. Unusual circumstances, such as war in particular, resulted in a volatility on the insurance market. Increased premium rates enticed speculators to try their luck with insurance underwriting while increased losses and reduced profit margins in turn caused others to cease their underwriting activities and to withdraw from the market or at least no longer to insure particular risks. Obviously, a large turnover in active individual underwriters and in the underwriting members of partnerships, and the effect this in turn had on the capacity of the underwriting fraternity to bear the risks offered to it, were not conducive to the smooth functioning of the market and the stability of premium rates. And it also did not inspire confidence in those who insured their risks there. 289

Given its inherent weaknesses and the influence this had on the insurance market in general, it was a question of time before the system of individual underwriting would be challenged. That challenge would come from a system by which insurance cover was provided by a corporate structure in which the financial resources of numerous individual shareholders were combined. Such a structure would be able to provide guarantees that its capital would be available sufficiently and continuously to meet the obligations it had undertaken under insurance contracts.

The first signs of such a transformation appeared throughout Europe from the end of the second decade of the eighteenth century. That it appeared when it did, was probably the result of many factors. Notable amongst them were, firstly, the more prominent emergence in the seventeenth century of forms of insurance other than marine insurance, forms which often required a different type of risk-bearer. Thus, in the case of life and fire insurance, both of which in essence turned out to be long-term contracts, the insured was better protected by a corporate underwriter where the fate of his contract and the protection it provided were not dependent upon an individual person's wealth or the span of his life. 290 The establishment of insurance companies was a necessary and inevitable result of the diversification and growth of insurance. Secondly, the catastrophic losses which occurred in the last decade of the seventeenth century exposed the insufficiency of the system of private insurers to withstand such losses and underlined the need for an alternative system. And thirdly, the appearance of corporate underwriting was inextricably linked to the occurrence, in the first two decades of the eighteenth century, of a speculative mania which involved the establishment of companies and the speculation in their shares. Most of these companies were in one way or another connected with insurance schemes.

2.10.2 Failed Attempts at Compulsory Corporate Underwriting in the Seventeenth Century

2.10.2.1 The Proposal of 1628

Almost a century before the establishment of the first insurance company in the Netherlands, moves were afoot to create an insurance company of sorts to provide

289 On the volatility of the Amsterdam insurance market in the latter part of the eighteenth century, see eg Spooner 29-33.

290 See eg Mossner 78-81.
compulsory insurance against marine risks.  

From the 1580's onwards, the Dunkirk privateers, under Spanish protection, attacked the Dutch merchant fleet. By 1600 this privateering or, seen from the Dutch point of view, this piracy was a growing threat to the Dutch shipping and fishing industry in general. Matters grew even worse. In 1628, one-third of all outgoing Dutch ships was lost to enemy action. Various measures taken by the Admiralty to protect Dutch shipping against the pirates, such as a Dutch naval blockade of Flanders and the provision of naval escorts to merchantmen sailing in convoy, were largely unsuccessful due to a lack of funds. At the same time the numerous legislative measures concerning the seaworthiness of ships, consortships, convoys, and the like proved insufficient and were generally ignored by shipowners and their masters. One consequence of the enormous losses suffered by Dutch shipping was a drastic increase in insurance premium rates.

Accordingly, in November 1628, four Amsterdam merchants proposed to the Estates-General the establishment of an insurance company ('Generale Compagnie van Assurantie'). The main thrust of their proposal was that while all cautious merchants were already accustomed to insure their ships and cargoes, the proposed company would do so cheaper and with less chance of failure or refusal. The company would, furthermore, in exchange for a somewhat higher premium, also provide additional physical protection against enemy attack. What they proposed was, in essence, a type of obligatory, state war-risks insurance scheme.

The company they proposed was to have a charter for 24 years to insure, up to the maximum permitted by law, all local and foreign ships and all imports and exports

291 The topic is covered in great detail by Blok 'Plan' and idem 'Adviesen'. See also eg Barbour 'Capitalism' 34 and 128; Barbour 'Marine Risks' 576-578; Van Brakel 'Compagnieën' 36-40; Den Dooren de Jong 'Practijk' 5-7; Jolles 48-52; Kracht 40-49; Plass 34; Raynes (1 ed) 100; Slechte 'Maatschappij' 254-255; and Witkop 19. L'Espine/Le Long Koophandel 743-746 appears incorrectly to have assumed that the proposed company was in fact established.

292 See eg Israel 'Hispanic World' 192-193 for further details.

293 The four, all members of the same Amsterdam trading firm, were Dr Albert Coenraetsz Burg, Elias Trip, and Godin and Hans van Loon. Burg was a Commissioner of the local Insurance Chamber in 1626. By 1634, however, Burg had had a change of mind and opposed the plan he had earlier proposed. See further Elias 327-328.

294 It is often confusingly referred to as a Chamber (Kamer) and must therefore be distinguished from the municipal insurance chambers existing at the time.

295 Already in 1617 Melchior de Moucheron had unsuccessfully proposed to the Estates-General and (later) to the Estates of Holland the establishment of a 'Camers van Assurantie (te water en te lande)'. The details of his proposal are not in all respects clear from extant materials. See further Blok 'Plan' 14-15; Witkop 19.

296 See ch XVIII § 5.2 infra for compulsory under-insurance.
against the perils of the sea and of war. It would insure against the cash payment of a predetermined premium.297

The insurance it was to provide was to be compulsory, and all cargoes and ships not insured would be liable to forfeiture to the company. It was not to provide cover for any arrest and detention by neutral or allied potentates. It was also to provide cover only for voyages within certain geographical ranges and not beyond, nor for voyages to enemy ports. Excluded too was cover for goods in port, on internal waters and after they had been landed. Further not to be covered were ships not sailing with the convoy which the company would arrange and which would sail under the protection of warships which the company was to provide and maintain in conjunction with the Estates-General for the protection of insured ships and their cargoes.298 Ships of the East and West India Companies and outward-bound cargoes on them, as well as privateering vessels, were exempt from the obligation to insure. Fishing vessels had to insure but their premiums were payable in arrears and were calculated with reference to the size of their catches. In addition the company would be entitled to inspect ships and goods, and losses below ten per cent of the full value at risk would not be paid.

The company itself was to be structured and controlled along the lines of other chartered trading companies such as the India Company.

Furthermore, it was proposed that the company was, for the duration of its charter, to have a monopoly on trade and related activities on the African coast in the Mediterranean and down to the Tropic of Cancer, including the trade on the Levant.299 This part of the proposed charter was largely similar to the charter of the West India Company. It was to be a monopoly company with only the profit from its trading activities having to be paid out by way of dividend, the profit from the insurance part of its business as well as the profit from any privateering it may be engaged in having to be ploughed back into the company. This aspect of the proposal, together with the compulsory nature of the proposed insurance cover, more than anything else caused its eventual rejection.

In short, what was proposed was the establishment of an insurance company, a trading company and a private admiralty, all in one.

297 The fixed premium rates proposed, varied on average between 1½ per cent and 5½ per cent, depending on the destination and time of year. Thus, the premium for voyages to the Mediterranean was between 10 per cent and 13 per cent. No ship was entitled to join the convoys which the company would provide (see infra) unless it could produce evidence of the payment of the applicable premium. To avoid frauds, no return of premium would be permitted. In addition, for the first three years, an additional premium of a half per cent would be payable to establish the company on a sound basis.

298 The Estates-General was to make available 20 warships and the company itself was to provide and maintain a minimum of 60 warships permanently at sea.

299 Elias Trip, one of the original proposers of the charter, was heavily involved in the Mediterranean and especially in the Levant.
2.10.2.2 The Fate of the Proposal and the Arguments Against It

Initially the proposal for the establishment of a Company or General Chamber of Insurance was favourably received by the Estates-General. It was in fact prepared to subscribe f4 000 000, two-thirds of the proposed capital. From that body the proposal was referred as a matter of urgency to the various provinces for discussion and, hopefully, for their approval.

Most of the largely agricultural provinces reacted favourably and speedily. However, no reply was forthcoming from Holland and Zeeland where shipowning and commercial interests carried more weight. Influential Amsterdam capitalists who were involved in and responsible for the insurance business as individual underwriters, were concerned that they would lose out to a government-privileged insurance company. Not surprisingly the Amsterdam municipality rejected the proposal. In a meeting of the Estates of Holland in March 1629 to consider the proposal, there was disagreement, and even after one of the proponents had explained the plan and answered certain questions, opposition to it remained. The proposal was repeatedly rejected by Amsterdam and in 1631 the Estates of Holland also rejected it.

Various objections were raised against the proposal, especially by the Amsterdam merchants. Generally these objections were of an economic nature and were directed against the monopolistic features of the proposal.

More important for present purposes, there were also numerous objections specifically aimed at the insurance aspects of the proposal. These may be mentioned briefly as they provide some interesting perspectives on how Dutch merchants at the end of the third decade of the seventeenth century regarded the insurance contract in particular and the insurance business generally.

Firstly the merchants argued that insurance was in fact not common and that the expense of insurance was not part of the prudent merchant’s usual expenses. In practice insurance was considered only as a last resort, and it was this uncommon practice which the proposal now sought to make compulsory.

Secondly, they thought the proposed premium rates too high and considered that in any event provision should have been made in the proposal for a reduction in the rate should the company be successful and the war risks be reduced.

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300 See Blok ‘Adviezen’ passim; idem ‘Plan’ 18-24.

301 Matters raised in this connection were the disadvantages of the proposed system of convoys (the uneconomical waiting for a convoy to form, the flooding of markets by the simultaneous arrival of trading ships); the loss of secrecy by reason of the disclosure of the nature and value of consignments to the company for purposes of the insurance; and the high cost of the proposed insurance (including the initial additional premium) which would result in foreign trade bypassing the Netherlands and in a decline in its importance as a staple market and also in increase of freight rates on Dutch ships which would further reduce Dutch competitiveness.

302 They also objected to the prepayment of premiums (see eg Blok ‘Adviezen’ 29) and to the exclusion of the possibility of any return of premium (idem 29, 55 and 90).
Thirdly, they disapproved of the proposed franchise of ten per cent, exorbitantly high given that the customary franchise was only one per cent.303

Next the merchants considered there to be too many gaps in the insurance cover the company was to provide.304 In many respects, they pointed out, the company would as insurer not be put in the place of the insured as insurance policies ordinarily declared was to be the case.305

Fifthly, they were concerned that in the event of claims being disputed, it would be more difficult to settle with the insurance company and its directors than with individual insurers with whom they contracted on an equal footing.306 Individual underwriters, they pointed out, settled claims amicably ('gewoon zijn mette geassureerde int vriendelijk te accorderen') as long as there was no fraud involved. They did not take technical points, something the merchants feared the company would resort to in order to delay if not to avoid payment on its policies.307

Finally, the merchants generally considered it inappropriate and unacceptable to burden their trade with the imposition of a compulsory insurance aimed at funding a naval fleet. They realised, no doubt, that the insurance proposals were merely a guise to conceal what was nothing but a levy on shipping to be used for the funding of convoys and naval vessels, and, more significantly, a guise to conceal and divert attention from the company's trading monopoly.

At the end of 1633 the original proposal of 1628 was reactivated in an amended form to counter some of these and other objections308 and the amended proposal was again referred to the provinces by the Estates-General. Again the majority of them accepted it while Holland, under the influence of Amsterdam, took the whole of 1634 to

303 To this the proposers countered (see idem 68-69) that if it were to be liable for the numerous smaller losses, the company would not be profitable at the proposed rates of premium. They did concede, though, that if it later appeared that the company was successful, it could be considered to reduce the franchise to below ten per cent.

304 Thus, there was to be no cover beyond certain geographical limits (see Blok 'Adviezen' 56) and no cover for arrests and detentions by neutral authorities (idem 28, 50, 69 and 90).

305 Thus, they wrote, 'het ontwerp [maakt] allerlei bepalingen ... om de Compagnie haren voet niet in de verassureerde schoenen [te doen] steecken, gelijk alle policen van asseurantie vermelden' (see Blok 'Plan' 18).

306 They argued 'dat de assurantie tot allerlei kwestiën aanleiding pleegt te geven, die door particuliere asseuradeurs veel gemakkelijker kunnen worden opgelost dan door de bewindhebbers eenen het voordeel der participanten behartigende Compagnie' (see Blok 'Plan' 21).

307 See Blok 'Adviezen' 51. To this the proposers replied that the company would in the case of a loss be able to pay promptly, something which could not be said of individual insurers ('hetwelcke eene groote differentie is met de hedendaechsche asseuradeurs') (see Blok 'Adviezen' 88).

308 Thus, the charter was to be only for sixteen years (see Blok 'Adviezen' 98-99); provision was made for the renegotiation of the fixed premium tariff should hostilities cease (idem 63 and 102-103); the initial additional premium was scrapped and the franchise reduced to five per cent (idem 68-69 and 106); provision was made for the settlement of disputes concerning the amount of premium payable in individual cases (idem 114-115); and, as far as the trade monopoly was concerned, Christian ports such as Venice were excluded from the company's proposed area of exclusive operations.
consider it. It was clearly still opposed to the proposal and delayed it as long as possible. Significantly, even one of the original proposers had in the meantime been convinced of the disadvantages of the plan and now opposed it.309

Until 1643 the proposal was raised at various times in the Estates-General, and was consistently opposed by Amsterdam merchants and the province of Holland. More than anything else, the element of compulsory insurance and the monopolistic character of the proposal resulted in its continued rejection. In the meantime, conditions at sea had improved greatly with a reorganised navy providing safer conditions for shipping. Dunkirk was eventually captured in 1646 and piracy in the Channel as a consequence practically eliminated. But even then the proposal was not yet quite dead, for it briefly surfaced again in 1653, towards the end of the First Anglo-Dutch Naval War (1652-1654).

A similar project for the establishment of a local joint-stock company was proposed in Rotterdam in 1635 when the municipal authorities were requested to establish an insurance company which would equip a navy and contain the Dunkirk privateers from its premium profit. Although the municipal government agreed to it, the project was not realised.310

Therefore, despite these attempts in the seventeenth century, marine insurance in the Netherlands remained exclusively in the hands of private and individual underwriters, a position which was to change only in the next century.

2.10.3 The Establishment of Insurance Companies in the Eighteenth Century

In the first two decades of the eighteenth century, in Netherlands as elsewhere in Europe, there occurred a great deal of speculation by way of the investment of capital in the shares of spurious, patently fanciful and even downright fraudulent joint-stock companies or anonymous partnerships. In England especially, a large number of these schemes or 'bubbles' involved companies which were concerned with insurance in one form or another,311 no doubt because of the need for corporate insurance at the time and the speculative opportunities the insurance business not only suggested but in fact presented.312

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309 See n293 supra.

310 See further Kracht 50-54 on the fate of the draft for the establishment of an insurance company in Rotterdam in 1634-1640.

311 According to one estimate 30 out of the 185 such projects put forward in 1719-1720 concerned insurance.

312 The names and aims of the schemes to be floated in England during this time already indicated the unlikelihood of their ever succeeding. A few examples: 'Insurance office for horses dying natural deaths, stolen or disabled'; 'Assurance from Lying'; 'Assurance from Highwaymen'; 'Insurance from death by drinking Geneva' (i.e., jenever, gin); 'Rum Assurance'; 'Assurance of Female Chastity'; 'Insurance of maidenheads'; 'Insurance against the Pox'; and 'Insurance against venereal disease, and of marriages from divorce'. Some had more realistic aims but were probably just as unlikely to succeed: marine insurance on ships and goods (four such schemes were put forward); insurance for preventing and suppressing thieves and robbers; insurance of seamen's wages; insurance of debts; insurance of masters and mistresses against theft by their servants; mutual insurance on ships; insurance of lives; and insurance
Likewise, in the Netherlands, at least 27 projects were proposed in 1720 which were concerned, at least mainly, with insurance. Only four of these were ever realised.

One of them, the Rotterdam Insurance Company, although established in 1720 with speculative intentions after English examples (English specialists in insurance flotations came to Holland to advise the promoters), unlike so many others, survived the era, successfully continued thereafter, and is still in existence today as the oldest Dutch insurance company.

After an earlier rejection of a similar scheme in Amsterdam, this insurance company was proposed in Rotterdam in 1720 by two London merchants. An important angle of their proposal was the pooling of capital so as to provide a greater capacity for the bearing of risks. The proposal was approved and actively supported by the Rotter-

from housebreakers. See generally on these and other insurance projects, eg Lay 27-28; Walford *Cyclopaedia* vol I at 398-400 sv 'Bubble Insurance Projects'.

Although not an insurance scheme, the one probably best typifying these bubbles was the company to be established 'for carrying on an undertaking of great advantage, but nobody to know what it is!' On the Bubble Era generally, see eg Carswell; Drew 22-27; and Supple *Royal Exchange* 22-44.

The insurance schemes, like the others, attracted fierce criticism, nicely illustrated by the doggerel verse which appeared on playing cards issued in 1720 (see Golding 19 and appendix C). As far as marine insurance was concerned, the verse ran:

'In vain are all Insurances, for still
The Raging Winds, must answer Heaven's Will,
To what wise purpose do we then insure,
Since some must loose what e'er the sea devour.'

And the one on fire insurance:

'Projecting sure must be a gainful trade
Since all the elements are bubbles made, They're right
that gull us with ye dread of Fire,
For fear makes greater fools, than fond desire.'

The one on life insurance is particularly neat:

'Come all ye gen'rous husbands with your wives
Insure round sums on your precious lives,
That to your comfort when you're dead and rotten
Your widows may be rich when you're forgotten.'

One of the many pamphlets and tracts written to warn against these speculative enterprises was entitled *'Het groote tafereel der dwaasheid, Vertoonende de opkomst, voortgang en ondergang der Actie, Bubbel en Windnegotie, in Vrankryk, Engelant, en de Nederlanden, gepleegd in den Jaare MDCCXX. Zynde een Verzameling van alle de condition en projecten Van de opgeregte Companien van Assurantie, Navigatie, Commercie etc. in Nederland'. See Van Rijn 3.

As to the Rotterdam Insurance Company, see eg Brouwer; Elink Schuurman 'Aanteekeningen' 114-118; Gales & Gerwen 51-53; Kracht 55-60; Krans 9 and 13; Van Rijn; Slechte *Windhandel*; Slechte 'Maatschappij'; and Witkop 22. Archival materials of the Rotterdam Insurance Company is housed in the Rotterdam Gemeente Archief, in its Archief Maatschappij van Assurantie (MvA). The first page of its underwriting register is reproduced in Appendix 15 infra.
The fact that half of the original directorate of the Company was made up of members of the Municipal Council no doubt played a role in its decision and support.

The Rotterdam Insurance Company (Maastrichtspijj van Assurantie, Discontering en Beleening der Stad Rotterdam) was in structure and form somewhere between the old trading companies (such as the chartered India Companies with their public-law character) and contemporary English insurance companies. It was a company with share capital, established by private individuals, but with a semi-official character in that it was financially supported and, to an extent, controlled by the local government. The Company spread risks by bringing together capital from a wide range of local resources. It had the form of an anonymous partnership and was the first insurance share-company in Europe with an essentially private-law character, aimed purely at the making of profit for its shareholders.

Very much as was the case with the individual underwriters with whom it competed, the Company's activities were not confined to insurance. It was also active as a commercial bank or finance house, it discounted bills of exchange, and it advanced credit on goods stored in warehouses. Nevertheless, its insurance activities were always more important and profitable than these other branches. As far as its underwriting business was concerned, the Company concluded not only marine insurances but also fire and life contracts. In 1721, it extended its business to include...
the underwriting of Amsterdam risks. Interestingly, the Company’s employees were permitted, for an additional income, to act as intermediaries and to canvass proposals.\textsuperscript{321}

The Rotterdam Insurance Company played an important role as the leading underwriter in the city. Brokers no doubt found it convenient to approach the Company first before other private underwriters were sought out. The reason for its success while other contemporary companies failed, was the need on the local insurance market for an institution with a greater underwriting capacity than was offered by the small number of individual local insurers. It was followed by other insurance companies which were established in the city in the course of the eighteenth century.\textsuperscript{322}

The other three Dutch insurance companies successfully established in 1720 were the \textit{Middelburg Assurantie Compagnie} which remained in existence until 1814; one in Gouda which continued in business for only a few years, and one in Utrecht which folded in 1750.

Although insurance companies were also formed elsewhere in Europe in the first half of the eighteenth century,\textsuperscript{323} an early development of corporate underwriting was

\textsuperscript{321} Also appointed on a part-time basis, in 1720, was a legal adviser, one Van Bertel who was a notary. For \textsterling{750} per annum plus expenses, he had to provide the Company with legal advice in appropriate cases and had to make sworn translations of documents and foreign correspondence when required. After him, advocates were instructed on an \textit{ad hoc} basis. See further Slechte ‘Maatschappij’ 257-258.

\textsuperscript{322} The second Rotterdam insurance company, the \textit{Societeit van Assurantie}, was formed in 1770 with a share capital of \textsterling{400,000}. It offered cover from \textsterling{5} to \textsterling{10,000} on ships’ cargoes against fire. An agent was appointed in Amsterdam and the Society proposed to underwrite in conjunction with companies in Antwerp and Amsterdam. It experienced competition and opposition from both the Rotterdam individual underwriters and from the Rotterdam Insurance Company and existed until 1864 when it was liquidated. See further eg Kracht 61-68; Krans 13; and Witkop 24.

\textsuperscript{323} As to the insurance companies created in England, see § 2.11.4 \textit{infra}.

A scheme for an insurance company was put forward in Hamburg in 1720 but was not realised. See Amsinck \textit{passim} for further details. The first Hamburg \textit{Assecuranz-Kompagnie} was eventually only created in 1756 for marine and fire (goods) insurance. Private underwriters continued to underwrite policies. By 1800, there were eight local insurance companies active in the city. See further eg Hammacher 73-75; Plass 35 and 156-168.

After earlier projects had failed in Antwerp (see eg Verswyvel \textit{Extrait} 16-43 for information on the proposals for an Antwerp insurance company in 1658), the first insurance company successfully established there was the chartered public share-company, the \textit{Chambre Impériale et Royale d’Assurance aux Pays-Bas} (the Company referred to itself in its policies as the ‘\textit{Chambre Impériale et Royale d’Assurance d’Anvers}’). It was floated in 1754 by the English merchant banker James Dormer. The prime reason for its formation was the inability of Antwerp individual underwriters to provide the necessary insurance cover to meet the local demand as well as the need to put an end to the outflow of capital in the form of insurance premiums to foreign underwriters and insurance companies. The Company was granted a 25-year monopoly on corporate marine insurance in Brabant (it co-underwrote marine policies with local underwriters as well as with foreign insurers) and on fire insurance generally in the Austrian Netherlands as a whole. Although its charter was renewed in 1779 for a further 25 years, the Company was liquidated c1793. A second Antwerp insurance company was established in 1770. For further details, see eg Couvreur ‘Verzekeringsscompagnie’; \textit{idem} ‘Zeeverzekeringsspractijk’ 185; \textit{idem} ‘Zeeverzekeringssmarkt’ 59-60 and 61-82; and De Groote \textit{Zeeassurantie} 169.

In Copenhagen the \textit{Kangelig Oktroierede Sö-Assurance Kompani} was chartered in 1726. See Thorsen \textit{passim} for further information.
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conspicuously absent in Amsterdam. Otherwise than in Rotterdam and other smaller centres, the insurance market in Amsterdam continued to rely on a relatively large number of well established and financially sound private marine underwriters. Corporate underwriting by local concerns appeared on the Amsterdam market only late in the eighteenth century alongside family firms and partnerships, and then mainly in the growing business of fire and life insurance, the latter lines of business being naturally susceptible to actuarial valuations more precise than those prevailing in marine insurance. The Assurantie Compagnie voor Brand was set up in 1771, followed in the next year by the Nederlandse Assurantie Compagnie te Amsterdam voor Brand. By 1786 four local companies were active in non-marine insurance in Amsterdam together with eight agencies for foreign (non-Amsterdam) companies. Marine insurance companies appeared on the Amsterdam market only in the nineteenth century.

By the end of the eighteenth century, there were eighteen insurance companies in the Netherlands, six in marine and transport insurance, four in marine and fire insurance, and eight in fire insurance only. The first insurance company specialising exclusively in life insurance was founded in 1807.

Although there were therefore signs of greater participation by corporate underwriters in the insurance market in the Netherlands, which no doubt increased its capacity and assisted in the spreading of risk, the impact of the insurance companies, on marine insurance in particular, was at first not significant. The companies also suffered heavy losses in times of political uncertainty. The Rotterdam Insurance Company, for example, returned a deficit of f82 350 on underwriting in the disastrous year between July 1780 and June 1781, its general trading picking up however as result of the Fourth Anglo-Dutch Naval War from 1780 to 1784. Nevertheless, despite the numerous failures of newly-established insurance companies, once properly organised and operational, they tended to survive crises and this continuity, in addition to their financial capacity and stability, ensured them a continuing and growing share of insurance underwriting on the Dutch market. This was ultimately also the case in the

324 A proposal for the establishment of an insurance company was first launched in Amsterdam by English promoters in 1720. The proposal was rejected by the Municipal Council because of a fear of further stimulating speculative trading in shares and also because it wanted to protect the interests of individual underwriters. See further Slechte 'Maatschappij' 255-256. Virtually the same proposal was launched a fortnight later in Rotterdam with great success, as has just been recounted.

325 See eg Jolles 12 who notes that in Amsterdam marine insurance remained exclusively the 'bedrijf van particulieren'.

326 See Spooner 40-42.

327 See the list in Schuddebeurs 'Verzekeringsbedrijf' 62-63.

328 The growth of insurance companies was in part due to changed investment patterns on the Amsterdam Bourse. Whereas, before, capitalists had invested in the insurance business directly by participating as individual underwriters, in the course of the eighteenth century they increasingly invested indirectly in it by buying shares in insurance companies. See further Rich & Wilson CEHE V 355.

329 See Spooner 31, the graph no 3 on 41, and 55 for further details.
field of marine insurance where unorganised individual underwriters could in the long run not survive their vigorous and efficient competition.

The fact that his insurer was a corporate entity and not a private individual, had little effect on the insured's legal position and on his insurance contract. First of all, insurers did not in Roman-Dutch law require any special authorisation to act as such and insurance companies did not have to meet any financial or other requirements.\textsuperscript{330} Even after the establishment of insurance companies, the Dutch insurance market remained largely unregulated and unsupervised by the State. Also, the insurance contract remained one voluntarily entered into by the parties, and, in practice, most frequently still between private individuals.\textsuperscript{331} Furthermore, although insurance companies had the capacity to take over whole risks and often did so, marine insurance risks in particular continued to be co-insured by both insurance companies and private underwriters.\textsuperscript{332} There were also other relations between the companies and the individual underwriters. For example, the managers of companies and their agents were often also individual insurers who were to a limited extent permitted by their companies to insure, for their own account, a part of the risks underwritten by the company itself.

But although in Roman-Dutch law it was irrelevant for the legal position of the insured whether the other party to the contract was a corporate entity or a private insurer, it was no doubt even then realised\textsuperscript{333} that the factual relationship was not the same and that the coming of corporate underwriting in more senses than one placed the individual insured at a disadvantage.

2.11 Excursus: Private and Corporate Underwriting in London and the Formation of Lloyd’s

Individual underwriters were also the main bearers of insured risks in England. But unlike their counterparts elsewhere, including their Dutch brethren, their number did not start gradually diminishing from the end of the eighteenth century. The reason for this was, in part, due to the formation of two insurance companies with a monopoly on corporate as opposed to individual marine underwriting in England, as well as the establishment of that uniquely English underwriting institution, Lloyd’s of London.

\textsuperscript{330} See Heemskerk 92.

\textsuperscript{331} Thus, as Bynkershoek Quaestiones juris privati IV.1 remarked, although the insurance contract was so frequently in use (he was wrong in this assumption, of course) that it had often been deliberated (in the second quarter of the seventeenth century) to found an insurance company to provide compulsory insurance cover ('sene Compagnie ... die de Assurantien, die men zelfs genootzaakt zou worden te doen, zou diregeren en bezorgen'), this never materialised. And therefore, as before, insurance remained a voluntary arrangement between merchants ('ook nu noch vrywillig buiten last van hoogerhant geschieden, en een handel zyn van private luiden').

\textsuperscript{332} In the eighteenth century, after insurance companies had commenced business, policies on Dutch markets were often underwritten in part by a company and in part by individual underwriters. For a case where a broker settled on behalf of the insured with a company on a policy partly underwritten by that company, see Vergouwen 89-90.

\textsuperscript{333} See again the objections raised in this regard to the proposal of 1628 (at n306 supra).
2.11.1 Individual Underwriters and Underwriting Partnerships

The earliest underwriters of insurance policies in London in the sixteenth century were the foreign merchants resident there who underwrote risks on a part-time and individual basis. They were soon joined by local merchants and it is estimated that in 1719 there were some 150 underwriters in London.\textsuperscript{334} Being part-time incidental insurers of risk, most were no doubt attracted by the speculative possibilities offered by this business. Numerous merchants, even small ones, speculated on making a profit by pocketing a part of the insurance premium paid for the insurance of a certain ship or her cargo. On occasion the premium rates were highly lucrative, and rates of between 20 and 40 per cent on insurances 'lost or not lost' were not uncommon.\textsuperscript{335} And most probably these merchants were encouraged in their participation in the business of insurance underwriting by the availability in London of reinsurance cover on the sums they had underwritten.\textsuperscript{336} For most of these part-time participants there was little difference between insurance underwriting and gambling.\textsuperscript{337}

As in the Netherlands, these merchant-underwriters not only insured the risks of their fellow merchants but also had their own risks insured in turn. As a result the capacities of insured and insurer were not always clearly distinguished.\textsuperscript{338}

Although part-time insurers underwrote policies as individuals, and generally not as partners in a firm 'each for his own part', there is evidence of the early existence of private partnerships either of underwriters or at least of members of which one or more also underwrote insurances. Thus, a London policy of 1557 was underwritten by ten underwriters, two of whom were identified by the name of a firm, George Smith & Co and Donato de Saganani & Co.\textsuperscript{339} And in an Elizabethan insurance dispute heard by the Chancery Court in 1561, the dispute was between the insured, Emmanuel Calderaand and Benedicte Roderiges, on the one hand, and two London 'companies'

\textsuperscript{334} Cockerell & Green 5. Other sources put the number even higher, ie, at almost 200 regular marine underwriters by 1720 (see Supple Royal Exchange Assurance 11). On the life, times and business of the London underwriter and merchant William Braund (1695-1774), see Sutherland London Merchant, and especially at 42-60 on marine insurance and the emergence of the specialist individual underwriter in the mid-eighteenth century.

\textsuperscript{335} On insurance 'lost or not lost', the English equivalent of insurance 'on good or bad tidings, see further ch XII § 2.2.9 infra.

\textsuperscript{336} See Kepler 'London Marine Insurance' 52-53.

\textsuperscript{337} Probably not unexceptional in this regard was eg George Stoddard, an Elizabethan grocer by trade and also an occasional usurer, underwriter and gambler. He noted in his diary that a certain person owed him money 'for a wager layde wth hee upon a boye or girle, the wych I have won' (see Blackstock 23).

\textsuperscript{338} See eg Jones 'Elizabethan Marine Insurance' 59-60 who refers to a cause in Chancery where one of the underwriters in dispute with the owner of the insured cargo was also one of the factors who had aided the insured in suing the underwriters on his policy in the Admiralty Court!

\textsuperscript{339} See Raynes (2 ed) 29.
or firms of underwriters, the Company of Bonaventures (composed primarily of English merchants) and the Company of Fifteen Assurers (actually nineteen, primarily foreign merchants resident in London) on the other hand. It is quite possible that these firms may have been formed specifically to cover the risk in question.\footnote{340 See further Jones 'Elizabethan Marine Insurance' 58.}

As elsewhere, marine underwriting in England at the end of the eighteenth century was largely in the hands of individual underwriters. Although in the course of that century more and more full-time specialist underwriters began to appear, that was still exceptional. Most underwriters continued to be merchants with sufficient financial backing to permit and support their regular and continued indulgence in marine underwriting as a sideline to their regular businesses. Of course, even then, although to a lesser extent, the incidental underwriter who generally saw marine underwriting as a speculative one-off opportunity, also featured from time to time.\footnote{341 Two such occasional underwriters in the late seventeenth and early eighteenth centuries were the diarist Samuel Pepys and the journalist Daniel Defoe (see Gibb 20).}

\section*{2.11.2 The Exchange and Coffee-houses in London}

In London a central commercial exchange was erected in 1570 on the initiative of Sir Thomas Gresham (1519-1579), English merchant, Royal Agent, and long-time resident of Antwerp. It was designed and built by a Flemish architect and contractor after the example of the Bourse in Antwerp. As a result of a visit by Queen Elizabeth in 1571, it came to be called the Royal Exchange.\footnote{342 See generally Cockerell 9-10; Raynes (1 ed) 42-43; and Saunders. The Royal Exchange was destroyed by the Great Fire of London in 1666. It was rebuilt in 1669, more or less according to the plans of the first building. In the Exchange each nation and each trade or commodity had its own particular position along the walks or on the floor (see Saunders 22 for a floor plan). The Royal Exchange Assurance Corporation, founded in 1720 as the first marine insurance company (see \S\ 2.11.4 infra), had its main office on the first floor of the Exchange. Lloyd’s moved there in 1744 (see \S\ 2.11.3 infra) and remained a tenant until 1928 when it moved to new premises in Leadenhall Street. The Royal Exchange was again destroyed by fire in 1838 (the fire started in the rooms occupied by Lloyd’s) and the third Exchange was built and opened in 1844.}

Marine insurance, hitherto carried on among merchants in Lombard Street, eventually became centered in the Exchange. For the sake of convenience, merchants, brokers and others met there to transact their businesses. Merchant-underwriters may have done so too by the end of the sixteenth century, given that Chandler’s Insurance Office was situated there.\footnote{343 See again ch IV \S\ 1.7 supra. See too ch IV \S\ 4.3.2 supra as to the insurance customs of London which were referred to in early insurance policies. Thus, in the earliest surviving life insurance policy made in England and drawn up in the Royal Exchange on 18 June 1583 on the life of William Gibbons, it was stated that the contract was made 'according to the customs and usage of Lombard Street and the Riall exchange'.} Still, by the late seventeenth century, despite the relative uniformity of marine insurance customs on the London market, there was little in the way of specialisation by London merchants in insurance underwriting. No specialist
body of marine underwriters, no organisation of the underwriting market itself, and no centralisation of marine underwriting apart from the activities at the Royal Exchange existed in London at the time.

From the mid-seventeenth century, London merchants generally, and also those involved in shipping and marine underwriting specifically, frequently gathered in the numerous coffee-houses which had sprung up in the city. These were better suited to the meeting of merchants than existing inns and taverns, or than the Exchange with its rather austere facilities. Usually named after their proprietors or location, the coffee-houses attracted merchants because, socialising and the reputed medicinal effect of the newly introduced beverage, coffee, aside, they were the best places to meet other merchants and to conduct formal business in a convivial atmosphere. Different coffee-houses soon attracted merchants with a common interest or nationality, such as brokers, traders, Jews, Frenchmen and the like.

One such establishment was the coffee-house of Edward Lloyd which opened in Tower Street, near Tower Wharf and Customs House, around 1687. Because of its location, it soon attracted as clientele those involved with shipping. It also soon became known, especially after it relocation to Lombard Street in 1691, as a prime venue for sales or auctions of ships and cargoes 'by inch of candle'. Importantly, given the expensive and inefficient channels of communication existing at the time, this coffee-house also became known as the place to obtain and exchange information about the movement of ships and cargoes, both informally and formally. This no doubt later attracted the underwriting fraternity to Lloyd's Coffee-house. However, in its early days no underwriting was done there and there is no reason to believe that there was any marine underwriting at Lloyd's before 1710, or on any significant scale before

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344 The first one opened c1652 and by 1688 there were already more than 300 of them.

345 The most useful sources on the establishment of Lloyd’s are the works of Martin and Wright & Fayle Lloyd’s. Other works on Lloyd’s include Beeman; Brown; Cockerell Lloyd’s; Flower & Wynn-Jones; and Gibb. See further eg Clayton 31 and 49-62; Dover 34-40; Fayle; Raynes (1 ed) 109-116 (2 ed) 171-178; and Sohr ‘Grande-Bretagne’. What follows is no more than the barest of outlines noting only some of the more salient events in the history of Lloyd’s.

346 Such sales involved placing a pin in a candle one inch below the flame. The candle was lit when the auction commenced and the last bid before the pin dropped, was the successful one. Alternatively a candle one inch long was lit, the last bid before the flame went out being the successful one. Apparently experienced bidders knew that smoke spiralled just before the flame went out and they timed their bids accordingly.

347 Edward Lloyd in 1696 published a news-sheet called the Lloyd’s News. Although it appeared only for four months, the idea of a newspaper containing information on shipping-related matters was resuscitated at Lloyd’s in 1734 when Lloyd’s List, a shipping newspaper still published today, began appearing, at first weekly and, from 1737, twice weekly. It disseminated information obtained as a result of an earlier arrangement made with the Postmaster-General for the cheaper (and somewhat faster) postal delivery of shipping news to Lloyd’s from its various correspondents.
1720. Ironically Lloyd's only gained its marine insurance connotation after the death of its founder, Edward Lloyd, in 1713.

Even after Lloyd's Coffee-house had by the 1730's become known also as one of the venues in the city where marine underwriters could be found, it was not the only or even the main venue for having risks underwritten. Only from the middle of the eighteenth century did Lloyd's become increasingly and prominently associated with marine underwriting and known as the prime rendezvous for this activity in London, although a few private underwriters still gathered and continued to gather at other venues in the city or operated from their own offices. By the end of the eighteenth century, most of the marine underwriting in London was done at Lloyd's. But although there was gradually a greater concentration of underwriters at Lloyd's, there was still no close association of marine underwriters in London nor any official relationship between the brokers and underwriters who did operate at Lloyd's Coffee-house.

2.11.3 Lloyd's of London

Apart from the growing body of reputable and specialist underwriters and insurance brokers gathering and meeting there, Lloyd's Coffee-house in the course of the eighteenth century also attracted a large number of speculators and gamblers. Often using insurance contracts as a disguise for their speculative dealings, their presence was not conducive to the serious and proper activities merchant-underwriters were engaged in nor beneficial to the image they wished to project. It soon became clear to them that either the undesirable speculators had to go or they themselves had to find new accommodation.

The decision to break away was taken by a group of underwriters and insurance brokers in 1769. It resulted in the opening of the New Lloyd's Coffee-house in Pope's

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348 Thus, there was no mention of Lloyd's in the various proposals to establish marine insurance companies during the period 1717-1720.

349 Marine underwriters also met at other coffee-houses (e.g. the Jamaica and the Jerusalem Coffee-houses), and some of them in fact did a daily round of these establishments in the hope of picking up additional business.

350 And, to put it in perspective, at a time when the Dutch had already had their second round of statutory insurance laws in the form of the Rotterdam keur of 1721 and the Amsterdam keur of 1744.

351 Already in the latter part of the seventeenth century, coffee-houses, being centres for the distribution of news and for the discussion of political events, became hotbeds of sedition and the origin of many a false and malicious rumour. Not surprisingly they were disliked by the Government. In 1675 Charles II ordered the closing of all coffee-houses (for a reprint of the Proclamation of Charles II suppressing coffee-houses in the Kingdom, see Browning 482-483), a restriction withdrawn sixteen days after its promulgation on condition that the masters (i.e., proprietors) 'prevent all scandalous papers, books and libels from being read in them, and hinder every person from declaring, uttering or divulging all manner of false and scandalous reports against the Government or the Ministers thereof' (see Lay 21).

352 Sutherland London Merchant 63 notes that an additional reason for their dissatisfaction with and decision to secede from Lloyd's Coffee-house may have been because few of the established older broker firms were represented there. The split may in fact have been part of a breach in the ranks of the London insurance broking fraternity.
Head Alley. Only members were admitted to this new establishment. The new premises proved inadequate and in 1771, 79 merchants, brokers and underwriters who operated there, signed an agreement to establish a committee. Each subscribed a sum for the committee to obtain new and larger premises to operate their coffee-house. In 1773 the Lloyd’s Committee negotiated the lease of two rooms in the Royal Exchange. By 1774 the number of subscribing brokers and underwriters had already increased to 179. Although it continued to attract a large clientele, the old Lloyd’s soon experienced a drop in business and by 1785 it had disappeared.

The leading figures in the establishment of the new Lloyd’s in the Royal Exchange were John Julius Angerstein, a St Petersburg-born merchant of German extraction, and Mr Martin Kuyck van Mierop, a Dutch merchant. The latter became the first chairman of the Lloyd’s Committee.

Lloyd’s, as an organised society of merchants, brokers and underwriters on a subscription basis, existed only from 1771. The Lloyd’s Coffee-house, located in the Royal Exchange, was more than a rendezvous for insurance underwriters and brokers. The rooms were rented in the name of the subscribers, and control over them was supplemented by the more continuous supervision of the Lloyd’s Committee which controlled various matters such as admission to the rooms. Soon its influence extended to the practices of the members there. In 1779, for example, the Lloyd’s Committee approved the compulsory use by its subscribers of a form of marine insurance policy based on the customary form in use in London. Lloyd’s therefore not merely provided facilities for the underwriting of marine insurances but also regulated its processes. Not surprisingly, from that time Lloyd’s became the predominant force in the London marine insurance market and influential in the formation and implementation of changes and usages on the market.

In 1779 there were 179 subscribers at Lloyd’s. By 1793, encouraged by the underwriting opportunities offered by the Napoleonic Wars, Lloyd’s had several hundred subscribers. In 1800 it was resolved that new members would only be admitted on the recommendation of existing subscribers and that only subscribing merchants, bankers, underwriters and insurance brokers would be admitted to its already overcrowded premises. In 1802 a large new room was rented at the Royal Exchange. The Committee also imposed some qualification test for the admission of new subscribers. By 1810, there were between 1 400-1 500 subscribers, of whom about two-thirds were regular or occasional underwriters, the others being brokers or inactive or retired underwriters. Of the underwriting members, probably about 500 were specialised insurers with no or little other business interests.

But despite the growth in its membership, by 1850 Lloyd’s was little more than a club which offered facilities for the transaction of marine insurance on its rented premises and had some collective influence on the marine insurance market in London.

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353 Their names are listed by Martin 147-149.

354 See again ch VII § 4.1.1 supra. This policy form is reproduced in Appendix 47 infra.

355 At the height of the War, 2 000 underwriters were subscribed there.
It accepted no responsibility for its members' business or behaviour. There was as yet no provision for deposits under the control of the Committee to serve as a guarantee to insured. The wealth and integrity of the leading underwriters at the time were regarded as, and were in fact by and large, sufficient. Lloyd's was only incorporated as a statutory entity in 1871 when the first Lloyd's Act was passed.

It is an important point, therefore, that Lloyd's was not an insurance company nor even a partnership of marine underwriters. It was an organisation of individual underwriters and, at same time, of the London marine insurance market. Insurance underwriting at Lloyd's remained a private transaction between individuals. In England, therefore, the emergence and specialisation of the full-time marine underwriter were accompanied not only by a concentration of the underwriting activities in the market in one location, but also by a rudimentary organisation of the market itself.

2.11.4 The Role of the Marine Insurance Companies of 1720 and Their Monopoly

There were also other factors which played a role in establishing the dominance in the eighteenth century of individual, specialist underwriters in the English marine insurance market, and in facilitating the greater sophistication of marine underwriting techniques and practices there generally. Thus, the expansion of British trade and shipping as well as a series of commercial and maritime wars in the first half of the eighteenth century no doubt led to a greater demand for insurance cover and the expansion of the lucrative marine insurance market. More than anything else, though, the individual marine underwriters of London were benefitted and their position on the market strengthened and consolidated in the course of that century by the establishment of two insurance companies.

356 (34 & 35 Vict c 21).

357 Of course, an individual underwriter could sign policies on behalf of and in name of those (or syndicates of those) who were willing to venture their capital without personally participating in underwriting. Raynes (1 ed) 186, (2 ed) 179-180 speculates that the practice of some underwriters, when absent from Lloyd's, to leave a deputy to underwrite for them, may have been the origin of the practice of professional underwriters writing for a syndicate of names.

358 Palmer 75. At 90 he notes that insurance companies were barred from underwriting at Lloyd's, but that such companies often became subscribers there to have access to its intelligence services.

359 Holdsworth History vol XIII at 331-332 considers Lloyd's an example of the voluntary commercial associations formed to supervise and control certain industries in the latter part of the eighteenth century. Another example was the Stock Exchange in the trade of stockbrokers and stockjobbers. It originated in a club of dealers in stock which was formed in 1752 at Jonathan's Coffee-house and which acquired its own Exchange in 1773.

360 Sutherland London Merchant 69-72 refers to the mixing of risks as an indication of the specialisation of individual underwriters. Underwriters increasingly underwrote different risks to different destinations on different types of goods and trades: coastwise risks and cross risks, and some time risks and some life insurance, and they did so for both local and foreign insured.
Incorporated in 1720\textsuperscript{361} as joint-stock insurance companies, the London Assurance Corporation\textsuperscript{362} and the Royal Exchange Assurance Corporation\textsuperscript{363} were the first examples of corporate marine insurance in Europe. Of great importance was the fact that they were given a monopoly on corporate, as opposed to individual, marine underwriting in Britain. In terms of s 12 of the Bubble Act, no corporation, society or partnership, other than the London Assurance or the Royal Exchange Assurance, could insure ships or merchandise at sea or lend money on bottomry.\textsuperscript{364} In 1721 they acquired authority to transact fire and life business as well. It is interesting to note that in addition to other advantages and privileges, disputes involving the two monopoly companies were to be heard in the Common Law Courts at Westminster and not by the Elizabethan Insurance Court.\textsuperscript{365}

\textsuperscript{361} By the Bubble Act (6 Geo I c 18) of that year. The Act mainly sought to put an end to speculative projects and to prevent the raising of capital stock by means of transferable shares. But the Bill aimed at controlling speculative practices (bubbles) and the joint-stock boom associated with the South Sea Company, became amalgamated with another Bill to give effect to a decision to grant Letters Patent of Incorporation to two legitimate schemes, first proposed in 1717, to establish insurance companies. The resulting Act became known as the Bubble Act although ss 1-17 of it dealt with the establishment by incorporation of the two insurance companies and only ss 18-22 attempted to suppress bubble companies.

\textsuperscript{362} On the London Assurance specifically, see Drew. Nicolas Magens, author of \textit{An Essay on Insurances} (1755), was a director of the corporation from 1741 to 1753 and much of the material for his book was in fact taken from the practices of the London Assurance itself (see Drew 43).

\textsuperscript{363} On the Royal Exchange Assurance specifically, see Supple \textit{Royal Exchange Assurance}.

\textsuperscript{364} By s 26, the East India Company and the South Sea Company continued to be empowered, by special exemption, to advance money on bottomry. See Walford \textit{Cyclopaedia} vol I at 342-343 sv 'bottomry'.

See generally on the establishment of the two companies in 1720, Blackstock 45-47; Clayton 101; Dickson 41; Dover 40-45; Glibb 31-32; Holdsworth \textit{History} vol XI at 447; John 'London Assurance' 133, 134 and 137; Magens \textit{Essay} vol II at 366-378; Martin 86-103; Nelli 'England' 84-85; Raynes (1 ed) 100-109, 141-160, 164-165 and 190-225; and Weskett \textit{Digest} 108-113 sv 'company'. For details of the investments, including advances on bottomry bonds, by British insurance companies in the eighteenth century, see John 'Insurance Investment', especially at 151-152.

For an earlier and unsuccessful attempt in London in 1660 to establish a Marine Insurance Corporation (or a Corporation of Insurers) under Royal Charter with a monopoly on all insurances of ships and cargoes, see Blackstock 37; Dickson 3; Wright & Fayle \textit{Lloyd's} 40-41. Very possibly the proposal for a similar type of company first raised in the Netherlands in 1628 served as example in this instance (see again § 2.10.2.1 supra).

Holdsworth \textit{History} vol VIII at 293n6 refers to Luttrell's \textit{Diary} for the period 1693-1694 where there is mention of a project 'to make his majestie sole insurer of all ships at a moderate rate, which should lye in bank at the custome house, to answer the merchants losses'. The project never materialised.

\textsuperscript{365} As to which, see again ch IV § 1. 7 supra.

In terms of s 4 of the Bubble Act, if the corporations wrongfully refused to pay their insured, they were made liable to pay double damages. This liability for punitive damages was soon abolished in 1721 by 8 Geo I c 15 s 25.

Other privileges to which the corporations were entitled, included being able to sue and to be sued under the titles of 'London Assurance' and 'Royal Exchange Assurance'; the right of signature by seal; that of pleading 'not guilty' to civil actions for damages; and some immunities under stamp-duty legislation. See generally Hopkins 34.
While prohibiting any corporate marine underwriting by any other concerns but the two monopoly companies, the Act also prohibited marine insurance by partnerships. Individual marine underwriting was not within the purview of the Bubble Act which did not restrict the operations of individual underwriters. The only competition individual marine underwriters therefore had, was from the two monopoly companies and, early in the nineteenth century, from the then probably still illegal mutual marine insurance associations or hull clubs. But the involvement of the London Assurance and the Royal Exchange Assurance in marine as opposed to non-marine insurance, remained very small in the eighteenth century. This was so because of their cautious and conservative underwriting approach especially to extreme and unusual risks which they tended to avoid; because of their lesser ability to spread risks; their higher premium rates and less favourable policy conditions; and because of their requirement of a deposit from insurance brokers as security for their accounts, as a result of which brokers tended to take their business elsewhere. The individual underwriters at Lloyd's, in turn, stuck to marine underwriting.

366 In terms of s 25, any particular person was at liberty to underwrite insurance policies or lend money by way of bottomry on ships or goods at or going to sea, as long as he did not do so in partnerships or societies, or on account or at the risk of a corporation or persons acting in partnerships or societies. (Thus, companies and partnerships could carry on non-marine insurance business.) But, as Weskett Digest 386 sv 'partnership' noted, notwithstanding this provision nothing was more common than for one partner of a commercial firm to underwrite on account and at the risk of the other partners and himself, although he subscribed the policies in his own name only. Individual underwriters who were personally responsible for their own share underwritten on each policy and not each for the other, could still underwrite, as could partners individually. See too eg Walford 'History Life Assurance' 13.

367 As to mutual marine insurance, see § 3.3 infra.

368 In the field of non-marine (especially fire) insurance, unincorporated companies, which were in effect large voluntary proprietary common-law partnerships (joint-stock ventures without limited liability, created by deeds of settlement), and mutual insurance associations continued to operate and to be established. See again ch VII § 2.2 supra as to the emergence of fire insurance in England. As to the different insurance undertakings established in England between 1680 and 1720, see eg Trebilcock 4-5, and as to the possible forms of insurance company in England in the eighteenth and early nineteenth centuries, see eg Ryan 'Fire Insurance' 47-49; Trebilcock 67-69. As to the different forms of business enterprises possible in English law at the end of the eighteenth century, see eg Girvin, especially at 63-87; and Hahlo 148-160.

369 The corporations themselves had less than 5 per cent of the total marine business in 1809 (see Cockerell & Green 6). According to Supple Royal Exchange Assurance 53, 188-191 and 200, the companies' share of London marine insurance in the eighteenth century never exceeded 10 per cent, and in 1810 they insured less than 4 per cent of the total sums insured there. See too Palmer 76.

Even corporate marine underwriting in the eighteenth century remained very much a personal and individual activity, just as it was pre-eminently so at Lloyd's. Both corporations entrusted the responsibility for marine underwriting to a single underwriter and not, as in the case of their life and fire businesses, to a department. See Supple Royal Exchange Assurance 200.

370 Although the underwriters at Lloyd's had dabbled in fire and life insurance during the eighteenth century, they had entirely withdrawn from that field and were for the greater part of the eighteenth and nineteenth centuries solely involved in marine underwriting. Only by the end of the nineteenth century did non-marine risks come to be underwritten at Lloyd's. See ILL HR 15 46.
The monopoly on corporate marine underwriting, paradoxically therefore, until its eventual repeal in 1824, strengthened the position of English underwriters, and protected them, unlike their Dutch counterparts, from competition from other insurance companies. As a result of the moderate competition presented by the monopoly companies, conditions were favourable for the emergence of a class of specialised English marine underwriters. That, in turn, hastened the emergence of an organised marine market under the control of the professional individual underwriters themselves and with Lloyd’s as the central location and institution for marine underwriting in London. The establishment of these two insurance companies in 1720, with their greater capital resources and capacity to underwrite single risks, made the underwriters and brokers active in the London insurance market aware of the need to provide, and, which is more important, encouraged them in fact to provide, centralised and specialised facilities for individual marine underwriting at least equal to those offered, or capable of being offered, by the corporations.

3 Mutual Marine Insurance

3.1 Introduction; An Early Portuguese Example of Mutual Marine Insurance

According to the famous nineteenth century German commercial law historian, Levin Goldschmidt, modern insurance law has two distinguishable but intertwined roots: mutual, cooperative or non-profit insurance and commercial or profit insurance. The notion underlying the older root, insurance on the basis of mutuality, was known in a primitive form in antiquity and subsequently, in the Middle Ages, underwent a Germanic application and refinement. By contrast, Italian commercial

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371 After some unsuccessful attacks on the corporate marine insurance monopoly of the chartered companies towards the end of the eighteenth century (eg by the Globe Fire & Life Company in 1798), and earlier in the nineteenth century (eg in 1810 when, as a result of a petition before the House of Commons to establish a new marine insurance company and a recommendation by a Select Committee on Marine Insurance that the monopoly be repealed, a Bill to that effect, despite opposition from Lloyd’s, came before Parliament where it was rejected by a narrow margin), the monopoly of the London Assurance and the Royal Exchange Assurance was only repealed in 1824 after 104 years. In that year a successful application was made for Rothschild’s Alliance British & Foreign Fire & Life Assurance Company also to conduct marine insurance. As a result the Bubble Act of 1720 was first amended in 1824 by the repeal of ss 1-17 and then, in the next year, the rest of the Act, which imposed constraints upon joint-stock enterprises with transferable shares, was repealed.

372 See Goldschmidt Universalgeschichte 40 and 355. See also eg Büchner ‘Gegenseitigkeit’ 437-441; Helmer ‘Geschichte’ 65-67; and Seffen 1 (distinguishing between ‘genossenschaftliche Gegenseitigkeitsversicherung’ and ‘unternehmerische Erwerbsversicherung’). After Goldschmidt, German scholars have added a third root, public-law, statutory, official or social insurance (see eg Koch ‘Kodifikation’), again intertwined with the others. Both mutual and profit insurance can be either private-law (or contractual) insurance or public-law (or statutory) insurance. See too Nelli ‘Personal Insurance’ 46 who distinguishes, historically, between proprietary, mutual and governmental insurers, with proprietary insurance involving profit and a capitalistic private-enterprise motive, mutual insurance being non-profit and based on a charitable motive, and governmental insurance having a public, paternalistic motive.
practices produced insurance for profit.\textsuperscript{373} Mutual insurance only subsequently derived its insurance-technical refinement from the younger insurance for profit. That occurred when the presence of a legally enforceable contractual liability for, and entitlement to, payment on the occurrence of the event insured against, replaced the voluntariness of the contribution and the absence of any entitlement to compensation inherent in earlier arrangements based on mutuality. In turn, insurance on the basis of profit only at a later stage, after its emergence, derived from mutual insurance the notion of a community of similarly exposed persons,\textsuperscript{374} a notion the existence of which is presupposed in the case of legally valid mutual insurance in the proper sense of the word.\textsuperscript{375}

Whereas insurance for profit was from early on statutorily regulated, mutual insurance remained largely based on customary law. For that reason it was, until the nineteenth century, not the object of any serious jurisprudential investigation. Only then was it realised, especially by German insurance lawyers, that despite the differences in their origin and operation, both profit and mutual insurance shared common principles and features, such as their binding legal nature and the notion of the spreading of risk over a community of similarly exposed persons.

In essence mutual insurance occurred when a number of persons undertook to insure one another mutually and reciprocally, either in a single agreement or in a series of interlinked agreements. For example, A, B and C agreed to insure one another by undertaking to share any, or a specified, loss befalling any one of them by indemnifying that one in full or in part.\textsuperscript{376} By such a contract or contractual arrangement, such persons were informally joined together to form a community of similarly exposed persons. Each of them was at the same time both insured by the other members of the community and an insurer,\textsuperscript{3} or a member of the body which acted as insurer, of the other members. In the case of mutual insurance, the losses of members were borne mutually and the loss or profit of the members or body acting as insurer, was for the account of the various insured. Put differently, participants were both members of the body which

\textsuperscript{373} See again ch I § 2 supra. Although insurance on a profit basis is often referred to as premium insurance, that appellation is incorrect, the payment of a premium in one form or another being a distinguishing feature of all forms of insurance, also of mutual insurance. See further ch XI § 1.3 \textit{infra}.

\textsuperscript{374} See again § 2.4 supra as to the speculative nature of early insurance business and the underwriting of risk. Although profit-based insurance was and is quite valid in the absence of such a community, it is then not necessarily insurance in an economic sense.

\textsuperscript{375} In both cases, though, the community of interested and similarly exposed persons (\textit{communio periculis}) was created by a prior agreement between the parties involved. In the case of general average, eg, the community was a natural one, established automatically and without any agreement between the parties involved. See again ch I § 4.6.7 supra for the differences between insurance and general average.

\textsuperscript{376} For a Dutch perspective on mutual insurance, see generally eg Guépin. The situation, frequent in earlier insurance practice, where merchants interchangeably acted as insurers and insured in terms of different and unrelated contracts (eg where A insured B in terms of one contract and B later happened, but was not obliged, to insure A under a separate contract), was not mutual insurance. See again § 2.3.1 n83 supra.

\textsuperscript{377} Or, in truth, a co-insurer.
provided the insurance (and which may have had or, more probably in Roman-Dutch law, did not have legal personality) and also the insured who concluded contracts of insurance with the body or with every other member of it. In the case of mutual insurance there was, in addition to a contractual relationship, therefore also a associative relationship between the members and/or between the association and its members.

Quite naturally the aim of a group of mutually insured persons was not to show a profit but in the first place to provide mutual assistance. As a result, mutual insurance involved the payment of comparatively lower premiums or contributions (also known as 'calls' or 'omstag') by members. They were paid to compensate the loss or losses, if any, occurring to one or more of them and were in principle estimated or calculated to cover merely those losses and expenses, any excess of such contributions paid in advance either being repaid or being used to reduce future contributions. Mutual insurance thus differed from insurance for profit in that the latter was devised and practised from its emergence by merchants with a profit-motive, whereas, especially in its earlier forms, mutual insurance was participated in by ordinary people with the humanitarian aim of providing aid and assistance to those members of a particular community in need.

But there were obviously further and more technical differences. Whereas, in the case of profit insurance, the insurer stood outside the community of persons exposed to risk, with mutual insurance the insurer, that is, the group or, rather, all its members, was part of that community, all members being at the same time insurers and insured. In the case of insurance for profit, the insurer organised the community, for which he

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378 See eg Dorhout Mees Schadeverzekeringsrecht 50-51 and 59.

379 Lower both because of the absence of a profit margin and because of the ex post facto final determination of the amount of the premium or contribution. Contributions may have been payable in advance of loss, or may have been payable in arrears after the final determination of the amount of the premium. See ch XI § 3.2 infra as to the time of payment of the premium.

380 In the case of mutual insurance, the liability for contributions was finally determined on the expiry of the period of insurance with reference to actual losses, if any, which had occurred. The contribution was a payment for losses already suffered and was thus determined. This was so irrespective of whether, as in more sophisticated forms of mutual insurance, a provisional contribution was paid in advance (based on an estimated amount of the final contribution) or was paid periodically into a fund, or, as in the earlier and more crude forms, was paid only after the amount of a single loss and thus the amount of contribution to that loss (or after losses occurring during a particular period of time and the contributions to those losses) had been determined. By contrast, in the case of insurance on a profit basis, the amount of premium was finally determined in advance, based on an estimate of expected losses. Whereas in profit insurance the premium was the equivalent for the bearing of risk, in mutual insurance the contribution was the equivalent of the losses in fact occurring in a particular period. In theory, if the mutual insurance group had suffered no losses at all during a period of time (and had also incurred no expenses), no contributions would have been payable by the members for that period.

But despite the fact that it was lower, the fact that the mutual-insurance contribution was only finally determined in arrears, was considered detrimental by merchants because of the prolonged uncertainty as to the precise extent of their liability. This may have been one of the reasons why insurance on a profit basis became and remained more popular in the commercial field (see Jolles 9-10).
got paid and stood to make a profit, while with mutual insurance the members themselves directly joined together to form a community of exposed insured.

In a sense, mutual insurance was a form of self-insurance, but then not by an individual but by the individual members of the group concerned collectively, that is, it was pooled self-insurance.\(^{381}\)

Given its general non-profit aim, the earliest mutual insurances occurred especially in the non-commercial field, namely that of life, accident, and burial insurance, and of the fire insurance of domestic and personal property. This was true also of the Netherlands.\(^{382}\) By contrast to non-marine insurance, marine insurance on a mutual basis occurred in the Middle Ages only in isolated instances.\(^{383}\) The reason, no doubt, was the emergence of marine insurance on a profit basis and the fact that in the maritime trade other methods of spreading risks and of self-insuring existed. But although mutual insurance was of lesser import in the origin and development of marine insurance, the technique was not totally foreign in the marine context.

One of the earliest examples of marine insurance on the formal basis of mutuality occurred in Portugal in the fourteenth century when, in the time of King Ferdinand (Fernando) I of Portugal (1367-1383), a compulsory state marine 'insurance' scheme for shipowners was established.\(^{384}\) All Portuguese shipowners were compelled to participate in a state-controlled general fund to which each had to contribute a certain percentage of his profit. If one of them suffered a loss from storms, enemies or other perils at sea, that loss was compensated by a contribution from the fund. If the fund was insufficient or became exhausted, a further levy was imposed on all participants, based on an expert valuation of their vessels. Only losses of ships and then only in excess of a specified proportion were compensated,\(^{385}\) and only if not caused by the fault of the

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\(^{381}\) The following illustration, taken from Faber Review 349, will explain. While the owner of a single ship may insure that ship, the owner of a large number of ships (such as the Dutch East India Company; see again § 2.2 supra) would not insure but prefer the cheaper option of bearing the risk of the loss of any one or more of those ships himself, employing the premiums saved by doing so either to build up his own reserve or contingency fund and/or employing it in reducing the risk of such loss in other ways. Similarly, if a large number of owners of one ship each came together and agreed to bear each other’s losses, that pooling of risks was a form of self-'insurance’ by the group using a particular insurance technique, namely that of mutual insurance. According to Jolles 9, mutual insurance is form of self-insurance by different insured.

\(^{382}\) As to early Dutch mutual life insurance, see eg Roeleveld Lewensverzekeringreg 235-239. During the eighteenth century, fire insurance in the Netherlands was conducted mainly by way of mutual insurance. See Krans 14 and again ch VII § 2.1 supra.

\(^{383}\) See Büchner ‘Entwicklung’ 28n20.

\(^{384}\) See further eg Arié & Pledade 155-156; Dorhout Mees Verzekering 2 and 6; Goldschmidt Universalgeschichte 356-357; Gratama 6; and Reatz Geschichete 40-55 (who sees the origin of marine insurance in the Portuguese mutual insurance scheme). Schuddebeurs ‘Alleroudste polis’ 59-63 contains a Dutch translation from the Chronicles of King Ferdinand by Fernando Lopez (written c1434), ch 41, which concerned this insurance scheme. For a Portuguese and French version, see Pardessus vol VI at 301-302.

\(^{385}\) For example, partial losses were compensated only if the cost of repairs was equal to or more than the value of the ship after her repair.
shipowner or his crew. The compensation was paid on the basis of the value of the ship at the time of loss with a deduction for whatever had been saved. For a ship to be covered by the scheme, she had to be officially inspected for seaworthiness before her departure, for which purpose the owner received a document entitled a 'seguramca'. It is clear that although it was insurance on a mutual basis, this Portuguese scheme of marine insurance already contained many of the characteristic features of the then emerging and developing marine insurance for profit.

3.2 Dutch Examples of Mutual Marine Insurance: The Insurance of Whalers

It has already been noted that mutual insurance played an important role in the private, mutual funds established in the Netherlands to ransom seamen and others who had been captured by the enemy as slaves. It has also been noted that fire insurance was at first conducted in the Netherlands on a mutual basis after the example of German Feuerkontrakte, especially amongst the owners of oil-mills in the Zaan region in the seventeenth and eighteenth centuries.

The Zaan region in the North of Holland also produced another form of mutual insurance more relevant for present purposes, namely the mutual insurance of fishing vessels generally and of whalers in particular.

The trade in whale oil formed an important subsidiary part of fishing and shipping in the Netherlands. The blubber, obtained from harpooned whales, was boiled or tried out for use as fuel and in soap.

In the seventeenth and eighteenth centuries, Dutch whalers plied the sea north of Scandinavia, especially the waters around Spitzbergen and Greenland. The Dutch Nordic Company (Vereenigde Noorsche Compagnie), established in 1614 after the example of the English Moscovy Company, had a monopoly in the Netherlands over whaling in the North Sea. During the existence of the Company, a fleet of on average 40 ships left on a whaling expedition (Groenlandvaart) every year in April. After the demise of the Nordic Company and the lifting of its monopoly in 1642, whaling and the whaling industry in the Netherlands expanded quickly and significantly, especially in the Zaan region which soon came to dominate the Dutch whaling. By the 1660’s the whaling fleet

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386 See again ch VII § 3.2.1 at n105 supra.

387 See again ch VII § 2.1 supra.

388 As to the remarkable tendency in the Zaan region towards economic group-forming aimed at spreading the risks of marine and fire losses by way of self-insurance or insurance proper, see Vergouwen 111-112.

389 On the Dutch whaling industry, see generally eg Van Dillen Rijkdom 248-255, 431-438 and 539-540; and De Jong (as to Dutch whaling and whaling voyages 1612-1642).

390 The verb, ‘to try out’, means to extract oil from fat by heating.

391 The oil derived from the blubber was cheaper than other oils used for lighting.
had grown to between 150 and 170 ships. At the apex of Dutch whaling, in the vicinity of 2,000 whales were shot in a good season.

Not surprisingly, by the early eighteenth century, whales had become scarce as stocks were depleted in the traditional hunting waters, and they had to be sought further afield in Arctic waters. Around this time too, the fat was no longer only cooked out at Spitzbergen and on Jan Mayen Island where the Nordic Company had earlier established whaling stations and installations for the processing, boiling and vatting of blubber (traankokerijen), but unprocessed blubber was shipped back to the Netherlands for further treatment there. Competition from other nations, especially from the English and the Norwegians, resulted in the decline of the Dutch whaling industry by the mid-eighteenth century.

Whaling ships and their crews were in danger not only of the elements, in particular storms and ice (IJsgevaar), but also of enemy capture (molestgevaar). Following the example of the mutual insurance of oil mills in the Zaan region against fire, and also that of the mutual seamen's funds established there and elsewhere in the sixteenth century, the idea of mutual insurance came to be applied also to the insurance of whaling ships.

Dutch whalers were generally insured on a mutual basis only from the latter part of the seventeenth century although insurances underwritten by individual insurers, in particular on the Amsterdam Bourse, were also then still occasionally concluded.

392 Up to 10 per cent of all outgoing whalers were lost when they got stuck in ice after delaying their return voyages too long into the approaching winter.

393 During the seventeenth century, for example, the English regarded the Dutch involvement in North Sea whaling as act of aggression. As to the perils to which whalers were exposed, see generally Den Dooren de Jong & Lootsma 10-14.

394 On the importance of mutual insurance in the whaling industry, see especially Den Dooren de Jong & Lootsma; and also eg Gales & Gerwen 50-51.

395 During the reign of the Nordic Company (1614-1642), insurance was generally not concluded in the whaling industry on the open insurance market. Such insurance was concluded only incidentally and for special reasons in special circumstances. The different chambers of the Nordic Company were generally uninsured and each was liable for and bore its own losses from marine and war risks, although they later also agreed to bear certain losses mutually. Only after the Company's monopoly was lifted, and especially after the Zaan region became involved in whaling, did the well-known and favoured method of protection there, mutual insurance, come to be applied to whaling too. See further Den Dooren de Jong & Lootsma 14.

396 A policy of this type, dating from 1758, is extant. It was negotiated by the unsworn brokers Baerlman & De Vos and covered an eighth part of the hull and of the equipment ('in de vleet of het walvischvangers-gereedschap') of a whaler, valued respectively at £1,500 and £500, at a premium of 4 per cent. It insured the vessel on her voyage from Amsterdam to the North Sea, where the ship could sail where her master saw fit, and from there back to Amsterdam, and further 'op alle goede en Quade Tijdingen, Vrij van Avarie, spruytende utt Leg daagen en van Avarie Grosse en Schade onder 3%'. See Vergouwen 74-75.

In another case an Amsterdam policy of 1779 covered a whaler ('Zeeger en Cornelis') sailing on a whaling expedition. It insured an eighth share in her hull and equipment. The description of her voyage, added in handwriting to the printed policy, read as follows: 'van Amsterdam en alle de Circumjacentien van die at tot in Groenland, om aidaar te gaan vissen, ten dien die tot deelte 1e sloop te leven ... en na gedaane Visserij wederom te keeren tot deezte Steede Amsterdam toe'. See Den Dooren de Jong & Lootsma 26 and appendix VII at 62-64.
In the Zaan region such mutual insurances occurred by way of individual contractual arrangements between the owners of ships participating in whaling.

The oldest extant mutual whaling insurance contract dates from 1677. The contract, in the form of a notarial deed, was concluded between 27 shipowners (reeders) from the Zaan region and concerned 38 of their ships. In it the parties undertook to insure one another ('verklaren ende bekennen bij desen met den anderen tot malcanders verseeckeringe ende securiteit verdragen ende gecontracteert te wesen') against the perils of the sea and of war and all other perils ('Avonture vande Zee door vyanden vriende off anders off op eenige andere maniere bedagt off onbedagt gewoon of ongewoon'). Cover was restricted to total losses only of the ships concerned. For the loss of every single ship, the owners of ships returning safely from the whaling expedition had to pay f100 on the termination of the period for which the agreement was to remain in force. In this case the duration of the contract was agreed to be from 1 April 1677 until 15 December of that year, or until the earlier return and discharge of the fleet of ships insured. Missing ships, that is, those which had not returned by 15 December, were in terms of the agreement to be taken as lost. But if they subsequently arrived safely, there had to be a restitution of the amount paid out to the owner, failing which the other parties could have the vessel sold to recoup their contributions. Disputes arising from the agreement had to be submitted to arbitration with no possibility of any further recourse to litigation.

It appears that losses in the period covered by this mutual insurance contract were rather severe, which may explain the long time which elapsed between this contract and second extant example which dates from 1745. Entitled 'Contract van assurantie', this agreement, also notarially executed, was more detailed and sophisticated than its predecessor. It covered 49 participating shipowners, not all of whom were from the Zaan region. These shipowners were declared to insure one another and to be insured and insurers at the same time ('alle te gelijk asseuradeurs en geas-
seureerders, en malcanderen gesamentlijk asseureerende'). In the event of the loss of
one of their ships, all the other participants were to be liable for such loss in propor-
tion to the insured value of their respective ships ('dat voorts alle de andere Com-
paranten te samen aangemerkt werden als asseuradeurs, en dat ieder prorato ...
staat gestelt'). The perils insured against included perils of the sea, fire, war and
ice. Ships could be insured for a maximum amount of f5 000.

The third extant mutual insurance contract for whalers dates from 1746 and was
a somewhat expanded version of the one the year before. In effect the agreement of
1745 was simply renewed in 1746 and then again in subsequent years. The form of
1745, it would appear, was definitive. No mutual whaling insurance contract has been
uncovered dated after 1782, no doubt as result of the decline in the Dutch whaling
industry generally.

In the Wetboek van Koophandel mutual insurance is recognised but not regu-
lated in any detail. Article 286 simply determined that mutual insurance associations
('wederkeerige verzekering- of waarborgmaatschappijen') were governed in the first
place by their agreements and rules and only thereafter ('bij onvolledigheid') according
to general principles.

3.3 Mutual Marine Insurance in England: Protection and Indemnity Clubs

Mutual marine insurance in England dates from the end of the eighteenth
century when a number of small associations of shipowners, especially in the North
of England and especially in the coal transport trade, offered mutual insurance of mem-

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403 The agreement of 1745 was one of mutual hull insurance only and the cargo or equipment of the
vessels (eg, the fishing gear, equipment for whaling, inventory, vats, etc) was not covered. There is an
example of a mutual insurance contract from 1751 on such equipment ('Vleeten of Walvisvangergerechtsapphen'): see Den Dooren de Jong & Lootsma 23-24 and appendix V at 59-61. This
contract covered only the total loss of the insured equipment caused by the loss of the ship to which
such equipment belonged. The loss of nets, harpoons and the like was therefore not covered if there was
no loss of the whaler too.

404 In principle only total losses caused by perils of the sea were covered but partial losses too were
included if they exceeded 25 per cent of the ship's insured value, ie, there was a franchise of 25 per cent.

405 However caused, also if the fire occurred on the ship before her departure and resulted in her not
being able to sail at all.

406 There was no cover for the cost of recovery from enemy capture if such did not exceed 25 per cent of
the vessel's insured value.

407 A ship left behind, stuck in the ice, was regarded as a loss to be compensated. If she was recovered
the next season, that was for the profit of her owners alone.

408 See Den Dooren de Jong & Lootsma 19-20 and appendix IV at 50-58.

409 It was repealed in 1976.

410 See further eg Buys 145; Dorhout Mees Schadeverzekeringsrecht 56-57; and Faber 63-67.

411 See generally eg Birch Reynardson; Cockerell & Green 8; Hazelwood 1-9; Palmer 78; and Tilley.
bers' ships more cheaply than was possible on the London market. Although probably strictly illegal because of the limitations on corporate or associative marine underwriting imposed in 1720, by the end of that century these mutual hull insurance associations or clubs had also become operative in London. There they gained a foothold in the underwriting market not only because of their cheaper rates but also because of the reluctance of the two monopoly corporations to become involved on a large scale in marine insurance, and because of the small capacity of individual underwriters and the prevalent risk of their going insolvent. The greater security offered by such clubs, the fact that the system of contributions payable only in arrears amounted to insurance on credit or by instalments, and the fact that some offered cover for risks not, or not easily or cheaply available on the London market, ensured their continued existence, at least until the repeal of the corporate marine insurance monopoly in 1824. Then new marine insurance companies were formed, resulting in greater competition on the marine market, also for those mutual insurance clubs.

However, marine insurance on a mutual basis was soon to regain an important and permanent place in the English insurance market. The main reason for this revival was the increasing number of third-party liabilities which could be, and in practice came to be, imposed upon shipowners in the course of the nineteenth century and against which the traditional market could not or would not provide any or full cover. The idea of the old hull clubs was revived and from the mid-nineteenth century so-called Protection and Indemnity (P & I) Clubs were established for the mutual insurance of shipowner liabilities. The first P & I Club, the Shipowners Mutual Protecting Society, was formed in 1855 with the aim of providing insurance cover against risks 'not covered by the ordinary Marine Policies'.

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412 See again § 2.11.4 supra.

413 Such liabilities were at first unlimited as the limitation of shipowner liability was only introduced by the Merchant Shipping Act of 1854 (17 & 18 Vict c 104).

414 The need for additional cover came to fore when it was held in De Vaux v Salvador (1836) 4 A & E 420, 111 ER 845 that a shipowner could not recover from his hull underwriter in respect of the liability he had incurred for damage done by his insured vessel in a collision with another ship. As result of this decision, the traditional market, by way of a so-called running-down or collision clause which was added to the customary policy, provided cover but did so only for three-quarters of such liability up to the insured value of the vessel. The shipowner therefore remained uncovered in respect of the other quarter (this being covered by some of the surviving hull clubs) and in respect of any liability in excess of the value of the insured vessel. Shipowners remained uninsured also against liabilities incurred in respect of the injury to and death of crew and passengers on their insured ships (the Fatal Accidents Act of 1846 (9 & 10 Vict c 93) gave a right action for damages to the dependants of persons killed), and in respect of damage to objects other than other vessels, such as cargoes (claims in respect of which were increasingly enforced by cargo owners or their subrogated insurers) and harbour installations. See again ch VI § 4.1 supra for insurance against the insured's own conduct where the issue of insurance against the imposition of liability in the marine context was canvassed in a little more detail.
The notion of mutual insurance is recognised in the Marine Insurance Act of 1906, s 84(1) describing it as occurring where two or more persons mutually agree to insure each other against marine losses.\textsuperscript{415} Chalmers 137 notes that this definition is technically inaccurate for in practice all mutual insurance associations are required to be incorporated (if they have more than 20 members) or are in any event incorporated, so that the insured is covered not by the other members of the association but by the association itself.

The Marine Insurance Act applies to mutual insurance (s 84(4)) except for its provisions concerning premiums (s 84(2), which does however permit a guarantee or such other arrangement as may be agreed upon to be substituted for a premium) and except in so far as those of its provisions which may be modified by agreement between the parties, are in fact modified by the terms of the policy issued by the mutual insurance association or by its rules and regulations (s 84(3)).
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1 General Introduction

The legal position of third parties to an insurance contract in Roman-Dutch law was clouded in uncertainty. The reason for this unfortunately lies not only in the complexities inevitably accompanying tripartite legal and factual relationships but also in numerous other factors. Thus, the sources characteristically employed a rather loose
terminology and generally failed to distinguish between the various possible parties which might be involved in the conclusion of an insurance contract.\(^1\)

In addition, prior to the nineteenth century there was a crucial absence of a clear distinction between fundamentally different legal concepts which underpin the involvement of third parties with contracts generally and with the insurance contract in particular. Thus, on one hand, agency, although recognised, was regarded as no more than an outflow of the contract of mandate,\(^2\) while, on the other hand, the agreement or stipulation in favour of a third party (stipulatio alteri), although recognised in principle, was in turn not clearly distinguished from agency. If one adds to this the possible application of the principles relating to the unauthorised administration of the affairs of another (negotiorum gestio) and then attempts to analyse often highly involved instances of multiple insurances, the legal position becomes explicable only with the greatest difficulty and diffidence. A further exacerbating factor was that the main source of authority for the controverted points of law encountered in this connection were the opinions of lawyers and merchants. These, unfortunately, are not always a model of clarity and are occasionally even patently wrong. The upshot of all of this is that any treatment of the role and involvement of third parties in insurance contracts in Roman-Dutch law will, of necessity, be rather casuistic and unsatisfactory.

2 Insurance for Another: Agency and Mandate in Roman-Dutch Insurance Law

2.1 Introduction

Very often a person concluding an insurance contract with an insurer did not do so, or at least did not do so only, for his own account and benefit but solely or also for that of another. The latter may have been the owner of or otherwise interested in the property to be insured. Put differently, the owner of a ship or cargo was often not the person who insured that ship or cargo. To appreciate the need for and occurrence in practice of insurances on behalf of another, it is necessary briefly to explain the way in which Dutch merchants and their international trade partners conducted their business prior to the nineteenth century.

Firstly, goods and merchandise imported into and exported from the Netherlands in Dutch ships were not only those destined for local consumption or, as raw materials, to be used in local fabrication on the one hand, or locally manufactured products

\(^1\) It is unclear, for example, whether or not it was always realised in Roman-Dutch law that the insured (being the person whose loss was to be compensated) and person taking out the insurance (being the person who was a party to and concluded the contract with the insurer) were not necessarily the same person. The latter was often referred to as the insured, which, of course, he could have been but did not necessarily have to be. It was not clearly recognised in Roman-Dutch law, it would appear, that the insured could be a party to the contract and/or that he could be a third party, ie, that in terms of the insurance contract an insurer could insure the other party to the contract and/or a third party.

\(^2\) Hence the equation, for present purposes, of the terms 'representative' or 'agent' and 'mandatary' for the person authorised, instructed or mandated to insure (the Committent) and of the terms 'principal' and 'mandator' for the person on whose instruction and behalf the insurance was concluded (the Commissionaris, Meester).
destined for foreign markets on the other hand. In the seventeenth century the Nether­
lands, and Amsterdam in particular, played an important role as the prime staple
market of Europe. Goods and merchandise, both in finished form or in the form of raw
materials, and of both European and colonial origin, were imported there, warehoused,
and then exported or distributed again without any alteration in form or addition in value
apart from the cost incurred in carriage, importing, warehousing, exporting and insur­
ing those goods. Sometimes the goods were not even landed and warehoused in the
Netherlands but just shipped from one port (either one inside or, more often, outside,
Europe) to another port by way of a Dutch port such as Amsterdam. The Dutch were
able to fulfill this role not only because of their central geographical location in Europe,
but also because of their preeminence and specialisation in the shipping, financing and
insurance of consignments of goods. It was simply cheaper and more convenient for a
merchant in, say, Sweden to ship goods from or to Italy via Amsterdam in Dutch ships,
than to do so directly in Swedish, Italian or any other ships, and that despite the fact
that in the process additional costs may have had to be incurred in the Netherlands
itself. Clearly, in this process the end-consignors and end-consignees were not Dutch
nationals and of necessity they had to make use of local, Dutch representatives if they
wanted to insure such consignments on the Dutch insurance market and if they
wanted, in so doing, to take advantage of the more competitive local premium rates.
And often, on being instructed by a principal in one place to insure a consignment
destined to another place by way of Amsterdam, neither the principal or consignor nor
the representative knew at the time who the eventual consignee would be in whose
favour such insurance was also to be concluded.

But, of course, by reason of its relatively advanced industrialisation at the time, the
Netherlands was also an important manufacturer and consumer of goods and mer­
chandise. As a result insurances were concluded on the local market not only of goods
consigned by local Dutch merchants who, for the sake of convenience, employed local
representatives to insure such cargoes, but also of consignments by merchants resi­
dent elsewhere which were destined for the Netherlands. Such foreign consignors
insured their cargoes destined for the Netherlands not only to obtain the benefit of
cheaper local premium rates, but also to ensure the speedier payment to a local con­
signee by local insurers in the event of a loss of or damage to such a consignment.

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3 See eg Kunst 115-117; Spooner 50-53; and Wilson Anglo-Dutch Commerce 11-12 and 24-28.

4 Nevertheless, Dutch merchants were intimately involved in one of two ways in an intermediate role in
the distribution of goods through the Dutch staple market. They either bought goods on a foreign market
for their own account, imported it into Netherlands and, possibly after a sale locally to another Dutch
merchant, exported the goods again to a foreign buyer. Alternatively the Dutch merchant acted as a
commission agent and found customers for a foreign producer on a commission basis, the merchant
never actually buying the goods but merely functioning as intermediary between the foreign seller and a
foreign buyer and the goods being transferred between them through his agency and by way of the
Netherlands. Often such a commission agent, on receipt of the goods, advanced a part of the likely or
agreed price in cash to the seller before payment had in fact been received from the buyer (if one had in
fact yet been found), the agent charging an interest on his advance in addition to his commission.

5 As they did with their consignments which were neither sent to nor by way of Dutch ports.
In short, a varying but nevertheless significant number of insurances concluded on the Dutch insurance market were concluded on behalf of foreigners by their local representatives. The reasons why insurances were concluded on the Dutch insurance market by foreigners were manifold. It could have been that locally there was no or insufficient insurance cover available or that it was too expensive. Then again the consignor may have had no faith in the financial standing of local insurers, or he may have wished not to make known to local merchants and insurers the transactions he was involved in. Or he may have concluded the insurance in the Netherlands for the convenience of a Dutch consignee. Of course, the capacity, competitive rates, favourable terms, and reputation of the Dutch insurance market may by themselves have been sufficient reasons for him to insure there.

The local representative concerned with the conclusion of such insurances could have been specifically instructed to insure a particular consignment, and his relationship with the principal would then have been of a temporary nature. Or he could have been a general representative who was authorised to look after the principal's interests in the Netherlands, including the insurance of cargoes when the need arose. In that case he may, in turn, have instructed a local broker to effect the actual insurance contract. Such representatives had a more permanent relationship with their principals and they included correspondents, commission agents, factors, or even partners. On

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6 Thus, of the total number of 1,488 insurances recorded in a fourteen-month period in 1562-1563 by the Antwerp broker Henriquez, very close on one-third of the insured involved were resident outside the city and had their insurances concluded by local representatives on their behalf. See De Groote Zeeassurantie 160-161. According to the evidence of local brokers taken up in a notarial deed dated 1567 (see De Groote Zeeassurantie 22), it was a daily custom on the Antwerp Bourse for a person to receive an order and instruction ("opdrag en commissie") from a foreign place to conclude an insurance locally and to have a policy underwritten by one or more insurers. As soon as the mandatary had handed over to his mandator a valid and effective policy, he was considered as having complied with his mandate. See again ch VIII § 5.3 supra for the insurance of foreign and enemy property.

7 This was the case with insurance brokers, for example. See further § 7 infra.

8 As to the different possible representatives, see eg Fromberg 1-2; Van Gelder 352-356 (merchants' relationships in the sixteenth century); Lee 194 (the tacit hypothec of the factor or commission agent); Lichtenauer Geschiedenis 157-158 (the factor in Roman-Dutch law); and Mullens 41.

9 The factor could have been either a partner contributing to and sharing in the profit of the partnership, or merely the employee of an individual partner or of the partnership. Although in the factor-partnership, the factor could not as a rule require from the sedentary partners (socil stantes) to perform any of his functions, he may on occasion have asked them to insure on the Dutch insurance market the goods he had taken or acquired abroad. Thus, Van Brakel 'Vennootschappen' 157 points out that sometimes 'worder op twee socil stantes een beroep gedaan om de goederen, waarmede de factoren op reis zijn, te laten assurereren', and (idem 165n6) that the sedentary partners were instructed 'de goederen der Cle. en de retouren zoo veel mogelijk hier of elders te doen verzekeren'. As to the factor-partnership, see again ch IX § 2.7.1 supra.

10 In the private partnership (vennootschap onder firna), unless otherwise agreed, each partner was regarded as being authorised to act on behalf of and to bind the other participants in the partnership business. Particular functions were also specifically entrusted to a particular partner or partners.

The nature of transactions connected to the partnership business which a partner could conduct on behalf of the others were, as rule, not mentioned in partnership agreements. But marine insurance was on occasion mentioned when one or more of the partners were specifically instructed to insure partnership goods for their carriage by sea. On occasion too it was left to each of the partners to insure
occasion even lawyers acted in this capacity.  

2.2 Legislative Recognition of Insurance for Another

Roman-Dutch legislatures recognised that insurances were in practice concluded on behalf of others and there are a number of oblique examples of such recognition. Thus, to mention but one early one, s 8 of title VII of the placcaat of 1563 prohibited the insurance of a ship to its full value by anyone for himself or for the co-shareholders in that ship (‘voor hem ofte sijne mede-Reeders’).  

A more pertinent recognition of the practice of insuring for another occurred in s 2 of the Amsterdam amending keur of 1699 which interpreted s 21 of the Amsterdam keur of 1598 (which, in turn, concerned the knowledge of an insured in the case of an insurance after loss) and the Amsterdam amending keur of 1688 (which concerned the knowledge of an insured in the case of an insurance after departure). On the one hand s 2 provided that the words ‘the insured or the person who wanted to insure himself’ (‘verseeckerde, of die hem will laten verseeckeren’) would in future be understood to mean ‘the person who insures for the account of another’ (‘de Persoon van die geen, die de Asseurantie voor een anders Rekening komt te besorgen’), that is, the person taking out the insurance. On the other hand it also mentioned ‘those for whose account or on whose order the insurance was concluded’ (‘die geen, voor wiens rekening, of op wiens ordre de voorsz asseurantie sal zijn bezorgt worden’).

In the same context an even more detailed recognition occurred in the Amsterdam keur of 1744 and its amendments. In terms of s 11 of the keur of 1744, in connection with insurance after loss, mention was made of the knowledge of various persons involved in the conclusion of an insurance, namely, firstly, the principal who has himself insured (‘den Principaal, die het doet Assureeren’), presumably directly with underwriters; secondly, those who instruct such insurance (‘den geenen die de aanschryving doet’), presumably the principal or mandator instructing another; and thirdly,  

his own interest in such a consignment for his own account. See Van Brakel 'Vennootschappen' 165-166. An example of a general trading partnership in which provision was made for the insurance of its goods appears from a partnership agreement concluded in Amsterdam on 10 July 1601 (see Van Brakel 'Vennootschapsrecht' 161-163 and 181-183). The main activity of the partnership was trading in goods and provision was made for two of the partners (the socii stantes) to be responsible for obtaining insurance for those goods, a clause in the partnership agreement providing in this regard for the latter to be empowered ‘alle de goederen van de voorsz compagnie met allen den retouren vandien, zoveele het mogelijk is, athier ofte elders doen verasseureren tot laste van deseelve compagnie, van welcke voorsz asseurantie die premie oock getrocken zal werden van den winste, eer ende a/voren de voorn hare salaris zullen genieten’.

11 Thus, it appears from an Amsterdam goods policy of 1687 (reproduced in Gehlen 144-149) that the insured was resident in Batavia and that he was represented at the conclusion of the insurance contract by the Amsterdam advocate Bernardus Muykens who had authority from him to conclude the insurance for him and on his account.

12 Van Leeuwen Rooms-Hollands regt IV.9.4 noted this provision without any further comment.

13 See further ch XII § 2.2 infra as to insurance after departure and after loss.
the correspondent, broker or another who procures the insurance ('den Correspondent, Makelaar, of andere, die dezelve Assurantie besorgt hebben'). Likewise, in the same context, s 12 of the keur of 1744 mentioned the presumption of knowledge on the part of the person who concluded the insurance or of the insured and also of those who procured the insurance for him ('den Persoon, die doet Assureeren, ... of de verseekerde en ook die geene, die de Assurantie voor hem hebben besorgt').

Most detailed was the amendment in 1775 of s 3 of the Amsterdam keur of 1744. This section, which concerned insurance after departure, had mentioned in that regard only the knowledge of the insured ('den Geassureerden'). The amendment recognised that the knowledge of the following persons could also possibly be relevant: first, the original insured if he had given instructions for the conclusion of the insurance ('de origineele Geassureerde, indien dezelve de order tot het doen verzekeren heeft gegeven'); secondly, the person by whom the order to insure had been given ('de geen, door wien de order tot de Assurantie ... is gegeven'), presumably on behalf of the insured; as well as, thirdly, the person who actually procured and concluded the insurance, whether for his own account or as a representative ('de genen, dewelke de Assurantie, het zy voor eige Rekening of in Commissie, alhier hebben doen bezorgen, en die dezelve hebben besolliciteert of gesloten').

As is apparent, the terminology employed was not precise, but it would seem that the legislatures recognised that the insured and the person concluding the insurance with the insurers were not necessarily the same person and that, between them on the one hand and the insurers on the other hand, there may in fact have been yet another person involved as an intermediary.

The practice of insuring for another was also known elsewhere.

In England it appears to have been well recognised in the sixteenth century that one could insure for another without naming him. Coverage was available in London in the 1570's on goods declared to be for the account of unspecified persons in order to facilitate trade between the merchants of countries at war. And in pleadings pertaining to the Admiralty case of Ridolphye v Nunez in 1562, reference was made to the ancient custom in the city of London, as in Antwerp, of making insurances through factors and other agents who themselves were not the owners of the property insured. It was argued that the person taking out the insurance or in whose name the policy was made, did not have to specify whether the goods were his or that of another ('the partie, in whose name the bill of assurance is made, ys not bounde to specifie in the same, whether the goods assured are for his owne or for any other man's

\[14\] In the amendment in 1775 of ss 59-61 of the Amsterdam keur of 1744 there was mention of 'the insured and the persons who concluded the insurance on their behalf' ('de Geassureerden, en die genen, die de assurantie voor hun hebben bezorgd').

\[15\] See Kepler 'London Marine Insurance' 49.
Also in Hamburg it was recognised that insurance was more often than not concluded for the account of another.\(^{17}\)

While recognising the conclusion of insurances on behalf of others, Roman-Dutch insurance legislation did not specifically regulate this phenomenon but, presumably, left it to be governed by the general principles applicable to the conclusion of contracts by one person on behalf of another.

### 2.3 The Roman-Dutch Law of Agency

The under-development of the Roman-Dutch law of agency was the result of a lack of any general concept of agency (in the sense of direct representation in the name of a principal) in Roman law as well as the prohibition, in that system, on a third party directly obtaining any benefit from a contract to which he was not a party.\(^{18}\) For this reason Roman-Dutch law made copious use of another concept, which was known to Roman law, to explain the relationship between a principal and his representative. That was the contract of mandate.\(^{19}\)

In Roman law a mandatary could conclude a contract in his own name, demand performance to himself, and then transfer it to his principal, the mandator. By this

\(^{16}\) See Holdsworth History vol VIII at 283-284.

Likewise, in a dispute heard in Chancery in 1561 (Emmanuell Calderaand v Company of Assurers), the claimant and one Benedicte Roderiges had in 1552 instructed their London broker, Lewys Lobo, to insure goods, which he did by concluding insurance contracts with two groups of London insurers. On holding for the claimant, the Court directed the insurers to pay the broker the money for the use of the insured. See Jones 'Elizabethan Marine Insurance' 58.

\(^{17}\) See eg Dreyer 63-64 (noting that the insurers’ accord of 22 December 1704 (reproduced at 258-263) in art II permitted insurance ‘vor des Geassecurirten oder jemandes anders Rechnung’); and Frentz Hamburgische Admiralitätsgericht 124 (in the Hamburg Assecuranz-Ordnung of 1731 an earlier proposed restriction on insurance for the account of another was purposely not taken over) and 136 (it appears from cases before the Hamburg Admiralty Court that often the insurance was not concluded for own account but that in the majority of cases the person concluding the insurance did so as representative for another).

\(^{18}\) On the Roman and Roman-Dutch law of agency, see generally eg Joubert Verteenwoordigingsreg 13-18; Lee introduction 434-436; Morice 208-219; and Zimmermann 45-58 (agency), 421 (agency and mandate), and 433-434 (negotiorum gestio and mandate). As to the stipulation in favour of a third party, see § 3 infra.

\(^{19}\) Thus, as Lee introduction 313-314 points out, in Roman-Dutch law the word ‘mandate’ points principally to the internal relationship between the principal and the agent, while the words ‘agency’ and ‘authority’ refer rather to the external relationship established by the agent between his principal and third parties.

The contract of mandate was, of course, well-known in Roman-Dutch law (see generally eg Grotius Inleidinge III.6; Van Leeuwen Rooms-Hollands regt IV.28; Voet Commentarius XVII.1; and Van der Linden Koopmans handboek I.15.14) and was based on the principles derived from Roman law (see eg Zimmermann 413-432 for further background). Despite the fact that in Roman-Dutch law the general principle of gratuitousness of the mandate was adhered to, exceptions were recognised, amongst others as regards factors and other commercial representatives (commissionaris) (see eg Joubert Verteenwoordigingsreg 172n31), and, no doubt, as regards brokers too. See eg Vijn 11 (a commissionaris, such as a broker, is a mandatory of the person to be insured).
indirect representation, the same practical results were achieved as could be obtained by a direct representation, even though it was more cumbersome in that two transactions were involved and more risky in that the mandatary could go insolvent.\footnote{There were also other ways by which representation could be achieved in Roman law, eg by the use of a nuntius or a procurator. An example of the latter was the master of a ship. He was not a proper agent in that, although persons with whom he contracted could sue his principal directly, he himself also remained liable to the third party (thus, the latter had an election as to who to sue: the agent or the principal), and the principal, although liable directly to the third party, could himself not sue such third party.}

Although in Roman-Dutch law the Roman-law rule against agency was abandoned and the notion of direct agency was accepted in practice as a necessary and expedient concept in commercial transactions, the concept itself was still theoretically insufficiently recognised and explained. Apart from the close relationship between agency and mandate, agency was further not properly distinguished by Roman-Dutch authors from the stipulation in favour of a third party. This was only to come about with the refinement of the law of agency in the nineteenth century.

However, the rudiments of the law of agency were known in Roman-Dutch law. Thus, it was familiar with and applied the publicity principle (which involved that an agent had to act in the name of the principal) and did not recognise unauthorised agency. It was accepted that a principal was directly bound as debtor to and entitled as creditor against the third party by the acts of his agent who, himself, was not or no longer personally liable on the contracts he had concluded for his principal. And it was recognised that a principal could subsequently ratify unauthorised acts of a representative concluded in the name of the principal and thereby retrospectively clothe such acts with authority. In cases where the ‘agent’, although acting in the name of the ‘principal’ and thus professing to act as an agent, was unauthorised and there was no ratification, such ‘agent’ incurred personal liability. Likewise an agent was personally liable where he acted for his own account and in his own name\footnote{Being ignorant of his status as an agent, the third person dealt with him and could hold him liable as principal.} and the ‘principal’ could then obtain rights only indirectly if, for example, a contractual relationship of mandate existed between himself and the ‘agent’, or where such ‘agent’ had acted as a gestor in managing affairs of the ‘principal’ or dominus as result of which an ex lege relationship arose between them. In this context, too, where the ‘agent’ acted in his own name but for the (manifest) benefit of a third party who may also have been his principal or mandator, the stipulation in favour of a third party could come into play.\footnote{See § 3 infra.}

2.4 Agency in Roman-Dutch Insurance Law

The person concluding an insurance for another could have had authority or a mandate from the latter or no such authority or mandate. And in the latter case it made a further difference whether he intended to benefit the other party or not. The various practical situations which arose in the insurance context may now be considered in more detail with reference to the primary sources of Roman-Dutch law.
2.4.1 The Authorised Agent

A person could conclude an insurance for another with the authority (volmag) of or a mandate from the latter to do so.

This authority could, but did not have to be a special authority to effect an insurance.23 A general authority to act on behalf of the principal or mandator could be sufficient and even a factor instructed to buy and ship goods could thus in appropriate circumstances effect an insurance on behalf of the owner of the goods bought and shipped.24 However, while general authority to act on behalf of a principal in appropriate circumstances included special authority to insure on his behalf, a failure to insure in the absence of a specific instruction did not necessarily amount to a breach of duty by a generally authorised representative. Thus, according to an Amsterdam opinion delivered in 1793,25 where a mandatary in Bordeaux was instructed to buy and ship certain goods for his mandator in Magdeburg, and nothing was said about the insurance of those goods, the mandatary, who did not in fact insure them,26 incurred no liability as against his mandator where the goods were subsequently lost during their carriage. In the absence of a specific instruction to insure, the mandatary in this case, who had otherwise complied with all his other instructions, incurred no liability as he was not obliged to have the goods insured.27

For various purposes, the authorised representative or mandatary and the authorising principal or mandator were regarded as the same person. This was already so in early customary insurance law.28 Thus, the knowledge of a prior loss by the representative or mandatory who concluded the insurance had the same effect on the validity of

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23 A broker, eg, would have had a special authority to insure.

24 Thus Bynkershoek Quaestiones juris privati IV.1 noted that mandataries and general representatives ("toezieners") who simply had general authority to look after the interests of a principal or mandator did not have to prove special authority to insure. This was true even of factors. See also eg Van der Linden Koopmans handboek IV.6.3 who distinguished between special authority to conclude an insurance ('bijzondere volmagt tot het bezorgen van assurantien') and the general authority ('algemeene volmagt') of a factor.

25 Casus positien vol II cas 45.

26 Or who, as had happened in this case, failed to get the goods insured in time, the mandatary's letter from Bordeaux to Amsterdam requesting the insurance of the cargo for the account of the mandator being delayed in the post so that the insurance could not be effected before the loss had occurred.

27 Even if the mandator had in this case specifically been instructed to insure the goods, he would, on the facts, still not have been in breach of his duty towards the mandator. According to the opinion he had in good time and at the first opportunity made the necessary arrangements for the goods to be insured in Amsterdam, something which the Amsterdam lawyers apparently and probably not surprisingly regarded as quite in order, despite the fact that the cargo could no doubt have been insured, if not in Bordeaux, then at least somewhere closer than in Amsterdam. See further infra for other illustrations of the duty of a mandatary in the insurance context.

28 See eg art 267 of par 8, title 11, part IV of the Antwerp Compilatae of 1609 (see De Longé vol IV at 310).
the insurance as if it were the knowledge of the owner on whose behalf the insurance was concluded. And the same would apply with regard to the insured’s duty to disclose certain material facts by mentioning them on the policy: such duty would mutatis mutandis fall upon the representative or mandatary who concluded the insurance on his behalf.

Furthermore, on general principles, a person with general or special authority from another to conclude an insurance contract on his behalf, was taken at the same time to have authority in the event of loss to claim and receive compensation under the contract for his principal or mandator. For this purpose the agent or mandatary retained the policy until such time as the insured voyage had been completed, the period of insurance had expired, or an earlier loss had occurred. To succeed though, the representative or mandatary had to prove that his principal or mandator had suffered a loss.

The rights, duties and liabilities of a person instructed to obtain insurance for another was governed by the general principles of mandate. Thus, where he was simply instructed to obtain insurance without any additional or further instructions of

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29 See eg the decision of the Hooge Raad in 1717 (see Bynkershoek Observationes tumultuariae obs 1375; idem Quaestiones juris privati IV.8) where it was held that the insurer who denied liability under the policy had not discharged the burden of proving knowledge of the loss on the part of the insured. The Raad held for the insured on condition that he and his representative both provided the required oath in this regard, the reason being, according to Bynkershoek, that in matters of insurance the person giving the instruction (Committent) and the person being instructed (Commissionaris) were considered to be one and the same person as far as their knowledge was concerned. Likewise, in another Hooge Raad case in 1722 (see Bynkershoek Observationes tumultuariae obs 1873; idem Quaestiones juris privati IV.11), it was held that the presumption of knowledge of loss on the part of the insured (Committent) extended also to the representative (Commissionaris) where the insurance was concluded by the latter. This application could have different results where, as was usually the case, the representative concluded the insurance elsewhere than where the insured was resident, given that the presumption depended on the distance between the place of loss and the place where the insurance was concluded. As to the effect of knowledge of prior loss upon the validity of the insurance, the presumptions, the burden of proof and oaths required in this case, see ch XII § 2.2 infra.

30 As to an insured’s duty to mention certain facts in his policy, see again ch VIII § 4.2 supra.

31 In an opinion in 1699 (see Barels Advysen vol I adv 18), which will be discussed in more detail shortly, it was said in this regard that a ‘factor, ordere hebbende om de Assurantie te laaten doen, met eene verstaen word ordere te hebben om in cas van schaede de verzekerde somme van de Assuradeurs te ontfangen en te eisschen’. Where, however, the principal or mandator requested the policy from the agent or mandatory, the intention probably was that their relationship was thereby terminated, at least as far as that insurance was concerned, and that the latter, having concluded the insurance, had no further authority or duties as regards claims under that policy.

32 That is, that he had an interest (see again ch II § 6.2.2 supra as to interest as a measure of indemnity). Or, as it was put in the opinion in 1699 (see Barels Advysen vol I adv 18), the representative or mandatary had ‘den rechten genoeg zynde bewyst, het interest van zyn principael’. This, the opinion pointed out, was not possible without the original documents and proof of such interest (‘de stukken en bewyzen van het interest van zyn principael’), such as bills of lading and invoices which he, of necessity, had to obtain or receive from his principal or mandator himself.
qualifications, he had to obtain such insurance as was customary in the circumstances.\textsuperscript{33}

But, by the same token, where he had taken out an insurance on such terms as were customary and had notified his principal accordingly, he could not be held to have breached his duty where this insurance was less comprehensive than his principal may have wished or intended. This appears from an opinion delivered in Amsterdam in 1792.\textsuperscript{34} An Amsterdam mandatary (mandataris), on being instructed to insure goods consigned from Petersburg to Marseilles as comprehensively (including, specifically, cover against war risks) and as cheaply as possible, insured the goods in Amsterdam against all risks but with the addition, as was customary there, of a clause excluding the insurers' liability should the goods arrive safely but in a damaged condition ('vry van beschadigheid by behouden arrivement').\textsuperscript{35} He notified his mandator of the scope of the insurance he had concluded and the latter complained about other matters, which the mandatary then rectified, but did not complain about the presence of the clause in the policy. Some of the insured goods arrived damaged at their destination but, because of the clause, the insurers could not be held liable for that partial loss. The mandator argued that the mandatary had failed to carry out his instructions to insure the goods comprehensively and that he was accordingly liable to compensate him for the loss he had suffered by reason of the damage to the goods. In delivering their opinion, the Amsterdam lawyers, both doctors and advocates,\textsuperscript{36} after noting the declarations by various insurers, brokers an others concerned in insurance, thought that the mandatary was not liable to compensate his mandator (mandant; committent) because he had carried out his instructions properly in all respects. He had, for example, concluded the insurance as soon as he had received news of the loading of the goods. The fact that the insurance he had procured, covered his mandator against total loss only, did not amount to an improper performance of his mandate because the insertion of such a clause in policies on perishable goods such as those insured here was customary on the Amsterdam market. Local insurers in fact refused to insure

\textsuperscript{33} See Roccus De assecurationibus note 72 from which it is clear that difficult questions could arise where the principal or mandator did in fact give specific instructions. Roccus referred to the case where a mandatary was instructed to buy and ship certain goods on a particular ship and on no other, and also to obtain insurance on those goods on that ship at a particular rate of premium of 7 per cent, at which the mandator believed it was possible to obtain the insurance. However, the mandatary shipped the goods on another ship because it was not possible to obtain insurance on those goods on the particular ship the mandator had instructed except at a much higher rate of premium (15 per cent). The ship with goods was subsequently lost, and Roccus thought that the mandatary was not liable. He noted though, that Straccha De mercatura had earlier held a contrary opinion on the ground that the mandatary had not performed his mandate as instructed.

\textsuperscript{34} Casus positien vol II cas 32.

\textsuperscript{35} See ch XV § 7.2 intra as to total-loss-only policies.

\textsuperscript{36} Their opinion was supported by another merchants' opinion as being in complete consonance with the local insurance laws and customs ('geheel overeenkomstig, met de Wetten en Usantien in cas van Assurantie, alhier ter Stede gerecepteerd en by ons bekend').
The Involvement of Third Parties

perishables otherwise because of the possibility of fraud.\(^{37}\) Even if he had been instructed to obtain cover against (a partial loss caused by) the peril of inherent vice, the mandatary would still not have been liable, because it was absolutely impossible to obtain insurance otherwise than with the attached clause, and, the lawyers argued, he was not obliged to perform the impossible. A last point in the mandatary’s favour was that he had given the mandator sufficient notice to enable him to obtain such cover elsewhere, if it were in fact possible to obtain such cover anywhere else.

2.4.2 The Unauthorised Agent With the Intention to Insure for Another

Even a person without any authority or mandate could validly effect an insurance on behalf of another. This could occur in various ways.\(^{38}\) Thus, as Van der Keessel pointed out, there was no reason why the administration of the affairs of another without any mandate (\textit{negotiorum gestio}) was not possible also in the case of the insurance contract. This could be the case where someone had no specific mandate to insure but merely, as was the case with factors, a general mandate to look after the mandator’s affairs. It was also possible where such person had no authority or mandate at all and where it was a clear-cut situation of \textit{negotiorum gestio}.\(^{39}\) That this was possible, Van der Keessel continued, appeared from the common wording of

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\(^{37}\) Thus, the lawyers declared, ‘\textit{volgens een constant gebruik, athier ter Stede vigeerende, de Asssurantien op goederen, die aan inwendig bederf onderhevig zyn ..., nimmer anders dan onder deeze conditie worden gedaan, en de Assuradeurs athier volstrekt weigerig zyn, om het pericul van inwendig bederf der goederen op zich te neemen, als waar door aanleiding tot menigvuldighe bedriegeryen en differenten wordt gegeeven, gelyk algemeen bekend is’}. As to the insurance of perishables, see ch V § 4.3 supra, and as to inherent vice, see again ch VI § 3.3 supra.

\(^{38}\) See generally Van der Keessel \textit{Theses selectae} th 715 (ad III.24.3); \textit{idem Praelectiones} 1433 (ad III.24.3). Stracca \textit{De assecurationibus} X.7 already made it clear that if a person who had concluded insurance, had authority or a mandate from the owner of the goods to obtain that insurance, the insurance was quite valid. But that was also the case if he did not have a mandate but acted as \textit{negotiorum gestor} and the approval of the owner was subsequently obtained. Likewise, if one partner concluded an insurance under his own name and that of his partners and the latter confirmed the insurance, it was fully valid and the insurers were liable (\textit{idem} X.15). It was also possible for one person to conclude an insurance for another as a \textit{negotiorum gestor} (\textit{idem} X.16).

\(^{39}\) Bynkershoek \textit{Quaestiones juris privati} IV.1 explained that not only those with authority could conclude an insurance for another, but even a \textit{gestor} (‘\textit{een persoon, die eens anders zaken waarnemt}’). In a case in 1722 (see Bynkershoek \textit{Observationes tumultuariae} obs 1819; \textit{idem Quaestiones juris privati} IV.11), the \textit{Hooge Raad} rejected the insurer’s denial of liability on the ground that the insured (rather, the person concluding the insurance) had not proved that the others also interested in the insured goods (‘\textit{medegeintresseerden}’) had instructed and authorised him to insure the goods. That was in fact fully proved in this case. In the light of Bynkershoek’s earlier statement, it must accordingly be assumed that the absence of any proof as to the existence of authority would not necessarily have been fatal to the insured’s claim.
insurance policies by which the named insured and ‘whomever it may concern’ or ‘whoever may be interested in the insured property’ (‘assecurati et eius cuius interest’) were insured.\textsuperscript{40}

That the unauthorised actions by a representative were also on other grounds not without effect in the context of the insurance contract, was clearly illustrated by a lengthy and important legal opinion delivered in Amsterdam in 1675.\textsuperscript{41}

P, an Amsterdam representative or mandatory (commissionaris) to whom goods had been consigned, had them insured there by various policies in his own name and ‘for whom it may concern’. En route to Amsterdam, the carrying ship and her insured cargo were captured and were later confiscated in Scotland. Claims were instituted before the local Chamber of Insurance in reliance on those policies as well as on bills of lading covering the goods. From these documents it appeared that the goods had been loaded for the account of T, P’s principal or mandator, who resided in Denmark.\textsuperscript{42}

The Chamber refused the claims until P could present sworn statements by his principal T to the effect that he (P) had been instructed beforehand (that is, had been granted a prior authority or a ‘praecedente order’) to conclude the insurance on his (T’s) behalf, and until P could prove that he had insured the goods for the account of T.

The question on which the opinion was requested, was whether the Chamber was correct and whether, if P could not establish that T had instructed and authorised him to conclude the insurances (‘voor het tekenen van de Polizen van Assurantie, last ende ordre heeft gegeven had, omme de ge-eischte somme te laten tekenen of versekeren’), he in consequence had to be denied any claim under those policies for the loss in question. Put differently, was insurance for another without prior authority valid? The opinion thought yes, because the prior instruction or mandate from the owner of insured property was not essential and necessary for the existence and validity of an insurance contract.\textsuperscript{43}

Such a contract could validly be concluded not only by the actual owner of the insured property, but also by his factors, correspondents and good friends, without the validity and effect of such an insurance being in any way diminished by, or open to attack because of the fact that the insured goods did not belong to the insured (‘den Geassureerden niet toebehoren, nogte eigen sijn’), that is, to the person

\textsuperscript{40} The clause insuring ‘for whom it may concern’ is treated in more detail in § 3 infra.

\textsuperscript{41} Nederlands advysboek vol III adv 17.

\textsuperscript{42} It is not clear, but is in any case of no material consequence, whether the goods were consigned to P in Amsterdam by T in Denmark or by another person resident elsewhere, in which case they may ultimately have been destined for T.

\textsuperscript{43} ‘[P]raecedente ordre, van den Eigenaar der versekerde goederen, of de voor af gaande last, van den originelen Geassureerden, so essentieel ende noodsakelijk niet en is, voor de subsistentie ende validiteit van het contract van Assurantie’.

In any case, even if a prior instruction or mandate (‘praecedente ordre of voorgaande last’) was required, it had in this case been proved, the opinion thought, that such had been given, i.e., it was in fact proved that there was an instruction and mandate by T for the conclusion of the insurances for his account which had been given prior to the conclusion of those insurances.
concluding the insurance. Likewise, the insured (that is, the person concluding the insurance) could not, on the safe arrival of the insured property, deny liability for the payment of the premium or recover the premium already paid on the basis that he was not the owner of the insured goods or that he had no authority from the owner to conclude insurance on those goods.

The validity of an insurance for another concluded without any authority was especially apparent, the opinion continued, where it could be shown that there in fact existed a person for whose account the insurance was concluded (‘een persoon voor wiens rekening de voorsz Assurantie en quaezie is gedaan’), as was the case here with T. A further reason and consideration why P was in this case compelled to conclude the insurance even if it had not been done on the instruction or even for the account of T, was his own considerable interest (‘het groot agterwesen ende het considerabele interest’) in obtaining payment on the policy in respect of the goods consigned to him. The fact that he insured his own interest (‘sig voor zijn particuliere interest, heeft mogen doen versekeren’) in these circumstances was a prudent and common practice (‘prijselijk, geraden, en volgens de stijle mercantile gebruikelijk’). Furthermore, the insurance here was not concluded for one person only (‘niet ... limitatief of in het werk gestelt voor een persoon alleen’), but was expressly concluded for whomever it may concern (that is, with a clause in the policies insuring P ‘en voor die het anders soude mogen aangaan’).

Yet another factor strengthening P’s claim in this case was the fact that he had established that T had in any event subsequently ratified the insurance he (P) had concluded. Such ratification, the opinion noted, was generally accepted to have the same

44 On this point reference was made to Santerna De assecrationibus 1.47 et seq; Straccha De assecrationibus X; Rotae Genuae Decisiones V.11; and Roccus De assecrationibus note 46. See further § 3.2 infra where the early authorities will be considered in connection with insurance ‘for whom it may concern’.

It was noted in the opinion that it was a common occurrence for a person to insure property of which he was not the owner but in which he was merely otherwise interested: ‘Bodemers, Assuradeurs en anderen, die geen eigendom aan Schip of goed hebben, maar wel daar by geinteresseert, of daar aan geraakt zijn, hem dagelijks laten verserkeren, ende reassureren respective, ende dat met volkomen effect, sonder dat daar jegens enigsints in consideratie kan komen, de voorsz allegatiet ofte exceptie, van dat sy in geen eigendom aan het Schip of goed waren hebbende’. See too eg Decker Aanteekeningen ad IV.9.4 n(3)/(c) whose explanation did not include any need for the person concluding the insurance to be interested at all. He thought that insurance could be concluded by a person instructed to do so or whose actions had been ratified (‘door de Factoors, correspondenten en goede vrienden van de eigenaars der Goederen of Schepen, daar toe ordre of ratihabitie hebbende, zonder dat obsteeren kan de exceptie, dat de verzekerde Goederen den geassureerde niet toebehoren’) or even, if there was no authority or ratification, if he had the required intention to insure for another.

See further on the fact that it was no defence that the insured (i.e, the person concluding the insurance) was not the owner, the Hooge Raad decisions of 1708 (see Bynkershoek Observationes tumultuariae obs 380; idem Quaestiones juris privati IV.3) and of 1711 (see Bynkershoek Observationes tumultuariae obs 779; idem Quaestiones juris privati IV.4), both of which will be treated in detail in § 4.3.5 infra.

45 As to the effect of this clause, see further § 3.4 infra.
effect as an express prior authorisation by him. It was irrelevant that T had ratified the insurances only after the occurrence of the loss. A ratification after loss had the same effect as one prior to the loss because, at law and in practice, a ratification always validated and confirmed an earlier conduct and was understood to operate as a prior authorisation irrespective of whether the matter, prior to being ratified, was advantageous or disadvantageous to the ratifier. Thus, the opinion stressed, where a person concluding an insurance had no authority or mandate to do so but had done so simply under a general authority or even as a negotiorum gestor (that is, where he had done so with the intention to benefit such other person), a subsequent ratification by the principal or mandator, being the person for whom the insurance had been concluded, removed any doubt as to the validity of the insurance.

Accordingly, the opinion concluded, the insurers in this case ought to have been held liable to compensate the loss and damage suffered by the insured P (‘omme te vergoeden de schade ende verlies, by den geassureerden geleden’).

To summarise the opinion of 1675. An insurance for another could validly be concluded without the person concluding the insurance being the owner of the property to be insured or even without his having any specific or even any general authority from the owner. Apart from the fact that the person for whom such insurance was concluded could subsequently, and even after the loss, ratify the insurance, the person concluding the insurance could validly do so as a negotiorum gestor, as long as his intention to act for another was apparent. Additional factors establishing the validity of an insurance concluded by an unauthorised representative were the existence of a third party at the time the insurance was concluded, and the fact that the insurance

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46 This point was made as follows: ‘[E]ene opgevolgde ratihabitie ofte approbatie, van ... T, waar by hy van waarden houd, ende ratificeert de voorsz assurantie, op de ladinge in het Schip ..., voor zijn rekening gedaan, welke ratihabitie even so veel is, als of 'er een voorgaande last ende ordre, van ... T gegeven was geweest’.

47 ‘[N]iettegenstaande de sake, voor de ratihabitie voordelig ofte oirbaarlijk quame te zijn, voor den gene, die de verrigte sake komt te approberen’. As to ratification, see further § 2.4.4 infra.

48 ‘[I]ndien die geen, welke de Assurantie heeft laten doen, geen last nog ordre daartoe heeft gehad, nemaar als een correspondent, of als een negotiorum gestor sulks heeft in werk gesteld, en t’ enigen tijde daar op komt te volgen, de ratihabitie van den principa/e, dat als geen twijfel en heeft, nogte in controversie getrokken en mag worden, de validiteit van de selve Assurantie’.

49 La Leck Index sv ‘insurance’; idem Register sv ‘assurantie’; and idem Register sv ‘verzekering’ neatly summarised the effect of this opinion as establishing that where a factor or correspondent dispatched goods to his principal abroad, or where goods had been consigned to him, he was entitled and able validly to insure such goods even though not instructed to do so by, and thus even without the knowledge or consent of his principal who was the owner of those goods.

50 It seems that the position may earlier have been different. For example, Straccha De assecurationibus X.15 thought ratification after loss not possible and that only a ratification prior to the occurrence of loss conferred the necessary authority. However, it is the position also in English law where in terms of s 86 of the Marine Insurance Act 1906 the insured may ratify an insurance contract effected in good faith (but without authority) on his behalf after the occurrence of the loss and even after he had become aware of the loss. See Chalmers 138-139.
itself was expressed to cover also interests of such third parties so that the insurer
could not dispute the identity, interest or authority of the person concluding the
insurance.\textsuperscript{51}

But while it is clear that in Roman-Dutch law a person could insure without being
the owner of or otherwise interested in the property he insured, or without having any
instructions from the actual owner to insure, that did not mean that insurers would
invariably pay out to such named or contracting insured upon the loss of or damage to
the insured property. The latter would have to prove that he, or the person for whom
the insurance had been concluded, had suffered a loss as a result. Because of the
absence of any clearly formulated interest principle in Roman-Dutch insurance law,\textsuperscript{52}
this point was never very clear stressed in the context of insurance for another.\textsuperscript{53} It
appeared, most clearly, from the compilation of Antwerp customary law, the \textit{Com­
pilatae}, in 1609. There it was declared that a person could not (conclude a contract to)
insure ships, goods or effects unless such property belonged to him, or unless he had
authority from the owner to insure, or (and this is the important part) unless he or,
presumably, whoever was actually insured, had an interest in the property. If one of
these requirements was not met, the person concluding the contract would have to
repay anything he had received from the insurer and would be liable to be punished.\textsuperscript{54}

\textbf{2.4.3 The Unauthorised Agent Without the Intention to Insure for Another}

However, a person taking out an insurance without authority had to have the
intention to conclude the insurance for another. Put differently, he must, at the time of
concluding the insurance, have intended to manage the affairs of such other person

\textsuperscript{51} Bynkershoek \textit{Quaestiones juris privati} IV.1 stressed the import of the clause in this regard. Because it
clearly expressed the intention in the policy that the insurance was to provide cover not only to the
person concluding the insurance but to whomever the insured property concerned ('\textit{niet alleen aan den
\begin{itemize}
\item genen die de assurantie bezorgt maar ook aan allen die de zaak aangaat'}), authorisation was clearly not
required for an insurance for another to be valid when the clause was present.

\textit{Scharer Aanteekeningen} 413 (ad III.24.2) n2 noted that an express mandate or authorisation was
not required to insure property for another but that it was sufficient if such contract was later ratified by
the owner ('\textit{naderhand door den eigenlijken verzekerden wordt bekrachtig}'). and as long as he could
prove his interest in the insured goods ('\textit{de verzekerde bewijze, dat hij daar bij zoo veel belang hadt, als
het goed verzekerd is'}'). Furthermore, business managers and other administrators ('\textit{bewindhebbers}"

\textsuperscript{52} See again ch II § 6.2 supra.

\textsuperscript{53} But see again the allusions in the explanation of Schor er and in the legal opinion of 1699 referred to
earlier (see n51 supra and n31 supra respectively) and also ch XVI § 3 \textit{infra} as to proof of loss.

\textsuperscript{54} Article 24 of par 1, title 11, part IV of the \textit{Complilatae} (see De Longé vol IV at 208) provided as follows:
'\textit{Men en mach geene versekeringe doen van schepen, goeden ofte actien, die hem niet toe en
behooren, oft datmen [daermen] geenen last oft commissie en heeft gehadt, noch bij t'verlies oft
bewaermisse van dijen geen prooffijt oft achterdeel en can hebben; ende oft ijsmant ter contrarien hadde
gedaen, ende vuist crachte van dijen bij hem iet waarde ontangen, soude tseelve moeten wederkeeren,
ende totten dijen gestraft worden als eenen dieff}'. See again ch II § 6.2.2 supra for the particular
formulation of the interest required here, and further Mullens 39-40.
and thus to have effected the insurance for such other. He must not simply throughout have managed his own affairs without any regard to the interests of a third person and merely have concluded the insurance for himself. In short, the person concluding the insurance contract must have intended to act as negotiorum gestor. An intention to manage another’s affairs (animo alterius utilitatem curandi) could appear from the fact that the person for whom insurance was concluded, was named, or that it was indicated that ‘a’ third party was intended to benefit from the insurance.

In the absence of an intention to act and thus to insure for another, the person contracting the insurance could not acquire any rights under the contract for a third person and, furthermore, the insurance he concluded could not subsequently be transferred, in full or in part, to another person. Put simply, in Roman-Dutch law the insurance contract was not per se automatically transferable to another.

Thus, if a co-owner of property, such as a partner, insured that property on his own behalf and solely for his own benefit and for a larger amount than the value of his share in that property, he could not afterwards transfer such insurance proportionally to another co-owner so as to give the latter a claim against the insurer. In an opinion delivered in Amsterdam in 1669, it was noted that although it was true that where insurance was concluded by a person for himself and his partners, such insurance would be valid in full if the partners accepted or ratified the concluded insurance, that was only the case where the person concluding the insurance (the named insured) did so for himself as well as his partner and with the intention to include the latter in the insurance. That was not the case where the co-owning partner had insured simply

55 Without, eg the insertion of as clause insuring ‘for whom it may concern’: see § 3 infra.

56 See Nederlands advysboek vol II adv 120. See also Bynkershoek Quaestiones juris privati IV.1.

57 In this regard reference was made to Straccha De assecurationibus IX.15.

Santerna De assecurationibus III.58-61 thought that where a person insured property as his own (‘the goods of X’) and it subsequently appeared that the property in fact belonged to himself and another as co-owners (in partnership), the part of the property belonging to the latter was not insured, the insurer being liable only for the property belonging to the person who had concluded the insurance, on the assumption that such part was divisible. If the insurer was willing to accept the greater risk, being under the impression that the property as a whole belonged to the named insured, he should also be liable only for such lesser part as in actual fact belonged to him. See also the explanation of Straccha De assecurationibus X.9 on this particular problem. Roccus De assecurationibus note 39 thought that this was so unless the contrary was expressly provided for in the insurance policy or unless such contrary intention could be deduced from the policy (as would be the case with an insurance ‘for whom it may concern’). See too Feitama’s note on Roccus note 94, which explained that Roccus’ view in note 39 (stating that where a partner had insured goods as his own while the goods were in fact commonly owned by partners, the insurance was only valid as to the named insured’s portion and no further) concerned a case where the clause ‘for whom it may concern’ was not included in the policy but where it was simply in the name of the contracting partner.

58 ‘[D]e Assurantie gedaan is, by de Geassureerde voor hem en zijn Compagnon, en alsulx met de intentie om zijn Compagnon in die Assurantie te besluiten’.

59 ‘D]e Assurantie gedaan is, by de Geassureerde voor hem en zijn Compagnon, en alsulx met de intentie om zijn Compagnon in die Assurantie te besluiten’.
for himself without mentioning his fellow partner in the policy\textsuperscript{60} and without any intention to benefit his partner by that insurance.\textsuperscript{61} In that case the excess could not be transferred to the fellow partner and, being over-insurance, was null and void.\textsuperscript{62}

Therefore, where one person insured for himself and with no intention of benefitting another, the insurance he concluded could not fully or proportionally be transferred to another so as to cover the latter also against loss or damage, even loss of or

\textsuperscript{60} Here one B, the owner of a one-third part of a ship and the goods loaded in her, had insured himself in Amsterdam for his share in the ship and the cargo ('\textit{op zijn partie Scheeps, en zijn goederen}') for f20 000 and f1 200 respectively. In fact, though, B only owed a half of the one-third share insured (ie, he was co-owner of the one-third share), the other half belonging to GK, B's partner ('medestander'). This policy was concluded for the benefit of B and whomever it may concern ('ten behoeve van B of die geene die zulx zoude mogen aangaan'). Subsequently B had taken out another insurance simply for his own account ('\textit{nog simpelij ... verzeekeren}') with insurer FK on the cargo in an amount of f600.

When partner GK heard that B had insured for such sums, he requested that B transfer half of the insurance to him ('\textit{dat hy ham de heelft in die Asseurantie wil overdoen}'), which B refused. Subsequently B changed his mind (apparently in the belief that the ship had arrived safely) and transferred half of the insurance to GK ('\textit{ende laat de heelft van de Assurantie over aan GK}').

It turned out that the ship had been captured en route by Turkish pirates and B summoned insurer FK before arbitrators for the payment of the sum of f600 for which FK had insured. FK had steadfastly refused to make such payment on the ground that at the time B had concluded this insurance, he was already over-insured ('\textit{alrede meerder verzekert was, als zijn gedeelte in dat Schip en goederen quam te bedragen}'), and that the position was not changed by the subsequent transfer ('\textit{overdoening}') B had without his knowledge made to GK. For his part B argued that insurer FK was liable because, although at the time of the insurance of f600 he (B) was insured for more than his share, that insurance was nevertheless effective since he had later transferred ('\textit{overgedaan}') half of his insurance to GK. The issue, therefore, was whether or not a co-owner who had insured for more than his share in the property, could transfer such excess to the other co-owner.

\textsuperscript{61} Here he had concluded the insurance with FK merely for himself, not mentioning his partner GK or anyone else in the policy and with no intention ('\textit{geen intentie}') of including GK in it. This was confirmed by the fact that B had at first refused to transfer a portion of the insurance to GK. For this reason, the opinion thought, the insurance did not also cover GK but merely B. Thus, it concluded, an insurance concluded by a person in partnership with another who insured simply himself without mentioning his partner, did not include anyone but the person who took out the insurance himself ('\textit{ymand met een ander Compagnie hebbende, en latende daar op simpelij verzekeren, zonder mentie te maken van zijn Compagnon, dat daar onder niemand anders, als die geene, die hem heeft laten verzekeren, begreepen is}').

\textsuperscript{62} The opinion advised that insurer FK was not liable under the policy for the f600. Over-insurance was \textit{ab initio} void and invalid, and as B was already over-insured by the first policy he had concluded, the second policy concluded with FK was null and void.

The view on this point was that over-insurance was null and void and that it was irrelevant that it was innocent over-insurance, that fact affecting only the return of premium ('\textit{niemand zig verder kan doen verzekeren, als hy risueert, en dat dien volgende de verdere verzekering nul is, en van zalven komt te vervallen, behoudens restorno van de premie}'). As to the recoverability of the premium in the case of over-insurance, see ch XI § 6.2.2 \textit{infra}, and as to the nullity of over-insurance, see ch XVIII § 4 \textit{infra}.

Furthermore, the invalid insurance was not revived by any transfer of the insurance to GK and it was irrelevant that GK was a co-owner of the ship and the goods on which the first insurance had been made, as it was also irrelevant that when the insurance was transferred, the property insured was still intact.
damage to the same property insured. This was so not only where\(^{63}\) the person insur­
ing had over-insured and sought to transfer the excess to another person,\(^{64}\) but also where the insured had not in fact over-insured and sought to transfer the insurance to another.\(^{65}\)

It must be stressed, though, that insurance simply for the person concluding the insurance was rare in practice. As will appear shortly, it was possible and in fact cus­tomary to insure for another and the necessary intention to do so was ordinarily expressed in insurance contracts.\(^{66}\)

### 2.4.4 Some Further Practical Illustrations Relating to Agency in the Context of Insurance

A merchants' opinion\(^{67}\) and a legal opinion,\(^{68}\) both delivered in 1721 on the same set of facts, showed, however, that the various principles involved in the case of an insurance for another were not yet clearly understood.

A in Malaga, Spain, wrote to his partner ("Medeparticipant") B in Amsterdam that B was to ship three separate consignments of goods for their business to him (A), one month apart, the first consignment to be sent to Malaga and the next two to Alicante. A did not mention anything about insurance in his initial letter or subsequently ("niet het allerminste aenroerdt van zyn Interest te doen verzekeren"). B fully insured the first con­signment, together with the insurance premium involved, for \(f10\ 000\), without mention­ing in the insurance policy that anyone other than himself was to be insured by it.\(^{69}\) Nei­ther was it mentioned in the policy that B had no specific authority or mandate to insure A's half as well. One month after the conclusion of this insurance, the carrying ship was lost with all hands on board ("met man en muis verongelukt"). B claimed the sum insured from the insurers who refused to pay the full amount. They offered to pay only

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\(^{63}\) As in the opinion just considered.

\(^{64}\) Because no valid transfer of the excess was possible, such excessive insurance was and remained over-insurance proper and thus invalid. That is, the excess could be enforced neither by the insured nor by another.

\(^{65}\) For example, to the buyer of the insured property. In the case of a loss after such transfer, neither the insured seller could claim on the policy (because he had not suffered any loss by the loss of or damage to the property) nor the buyer (because he was not insured by the policy).

\(^{66}\) See further § 3 infra as to the customary clause insuring the named insured and 'whomever it may concern'. See too the Hooge Raad decision of 1725 (Bynkershoek Observationes tumultuaria e obs 2185; idem Quaestiones juris privati IV.12) on the transfer of insurance where this clause was present and where there was the required intention to insure for another. This case will be considered § 4.3.5 infra.

\(^{67}\) See Barels Advysen vol I adv 26.

\(^{68}\) See Barels Advysen vol I adv 27.

\(^{69}\) 'Bedingende voile verzekeringe met praemie incluis: Zonder by Police in het met de hand geschrevene, iemand anders te noemem, waer aen de verzekering zoude geschieten, dan aen B'. Thus, the policy did not contain a clause 'for whom it may concern'.

Of f5,000, which represented B's half share in the consignment, because B could not produce any authorisation from A to insure his share as well.70

The merchants in their opinion thought that the insurers were correct in refusing payment for more than the f5,000 for B's share in the shipment, seeing that A had not given B any order to insure and seeing that A must be taken to have borne his risk himself or to have insured his interest elsewhere through someone other than B.

The lawyers agreed. B could not insure and claim for more than his share of the consignment.71 He could not claim for or on behalf of his partner A in respect of the other half because it did not appear that A wanted to be insured, that A had given any instructions for such insurance, or that he had even ratified the concluded insurance prior to occurrence of the loss as far as his share was concerned. For this the lawyers referred to the earlier opinion of 1669.72

It seems, as Van der Keessel pointed out later,73 that this opinion was wrong in several respects and that the lawyers had, in the process, misinterpreted the opinion of 1669. Firstly, B had a general authorisation from A which, as already indicated earlier,74 included specific authority to conclude insurance. But even if B had no such authority, he could still have insured A's share in the cargo if he had done so with the required intention to manage A's affairs. The possibility was therefore overlooked that, although not authorised,75 B may have insured as a negotiorum gestor for A. Clearly, Van der Keessel continued, the opinion of 1669 provided no support. In the case under consideration there, the insured, as appeared undoubtedly from the facts, did not have the required intention ('animus negotio alienum gerendi'). The reason why the insured in the present instance was considered not to have had any such intention (if that possibility was in fact ever recognised), was because there was no express mention of his partner in the policy. But this, too, was wrong. One partner could be insured by his fel-

70 'Dewyl B by geproduceerde rekening van het Interest zegt A vyfduizend guldens voor de helft in de gansche laedinge gedebitied heeft, en geene ordere kan toonen, om helft van A ook te doen verzekeren'.

71 'B, die de Assurantie laten doen, niet verder in de laedinge van 't Cargasoen in quaestie, dan alleen voor de helfte is geinteresseerd, en gevolgelyk ook voor zich zelven niet meer dan de helfte van de gedaene Assurantie kan eischen'.

72 Nederlands advysboek vol II adv 120. See again at n56 supra.

73 Theses selectae th 715 (ad III.24.3); idem Praelectiones 1433 (ad III.24.3).

74 See § 2.4.1 supra.

75 The opinion was also incorrect in requiring ratification (which, though, did in any event not take place in this case) of the unauthorised insurance to take place prior to any loss. The view of Kahn 'Extension Clauses' 67 that the opinion of 1721 indicated that ratification before loss may not have been necessary in Roman-Dutch marine insurance, is not supported by the opinion itself. The opinion of 1721 is furthermore in any event contradicted by the earlier opinion of 1675 (Nederlands advysboek vol III adv 17), discussed in § 4.2.4 supra.
low partner if the required intention was present, even if the former’s name was not expressed in the policy.\textsuperscript{76} So much, then, for the opinions of 1721.

It must be stressed, however, that the absence or presence in the policy of the name of the principal, mandator or other person in whose favour the insurance was concluded, was not without importance. This appears from the approach in Roman-Dutch law to the question whether an insurer could set off a debt owed to him by the person concluding the insurance for another (by the representative) against a claim under an insurance contract by the person for whom the insurance was concluded (by the principal). This depended upon the question whether it appeared to the insurer that the person concluding the insurance acted on his own behalf or on that of another.\textsuperscript{77}

Therefore, where an insurance was concluded by one person (A) on behalf and on the instruction of another person (B) with an insurer (C), and B’s name was expressly mentioned on the policy, a set-off \textit{(compensatio)} of the debt due by A to insurer C could not be pleaded by the latter when he was sued on the policy by B for a loss he had suffered. In such a case the principle was that where a person acted not simply in his own name but expressly in the name of another, he subsequently fell away and acquired no action on the contract he had concluded. Only the person he represented and on whose instructions he had insured, could claim under the policy.\textsuperscript{78}

But where it did not appear from the policy that the insurance was concluded on behalf of another, such as where the insurance was concluded in the name of the contracting party and the name of the principal was not specifically mentioned on the policy, the insurer could in fact raise a set-off of the debt owed to him by the named insured, who had concluded the insurance, against the claim on the policy on behalf of the principal whom he did not know existed. Such unnamed and undisclosed third person.

\textsuperscript{76} It seems that Van der Keessel was suggesting here that the expression of the name of a specific person for whom the insurance was concluded, as opposed to a mere indication of the fact that the insurance was for or on behalf of another, was not a requirement for the existence of such an intention.

\textsuperscript{77} See eg Van Zurck \textit{Codex Batavus} sv ‘Assurantie’ par 25 n2; Van der Keessel \textit{Theses selectae} th 826 (ad III.40.6); \textit{idem Praelectiones} 1624 (ad III.40.5).

\textsuperscript{78} This appears from an opinion delivered in 1640 (\textit{Hollandsche consultatien} vol III/1 cons 80 (1640); also taken up in \textit{Hollandsche consultatien} vol III/2 cons 80 n1-2 (1641)). Here an insurance was concluded ‘in favour of [WL], or and in the name of [CJ] or whomever it may concern’ (‘\textit{ten behoeve van [WL] voor ende uyt den name van [CJ] ofte die ‘t selve soude mogen aengaen}’). According to the opinion, this insurance was not specifically in favour of the named insured WL or whom it may concern (‘\textit{ten behoeven van [WL] particulier ofte die het anders soude mogen aengaen}’), but in favour of WL and CJ or whomever it may concern (‘\textit{maer ten behoeven van de voorsz [WL] voor ende uyt den name van [CJ] ofte die ‘t soude mogen aengaen}’). Here the premium was paid by CJ through WL and it was understood by the insurer that the insurance was contracted for the account of CJ who had a right of action against those who signed as insurers, just as if the name of WJ had not been mentioned on the policy at all and as if the insurance had in fact been concluded merely in favour of CJ.

For that reason the debt owed by WL to the insurer and not paid by reason of latter’s insolvency (could it have been that the premium was not paid over before WL had gone insolvent?; see further ch XI § 4 \textit{infra} as to the payment of premiums through agents), could not be set off against the claim by CJ but had to be claimed from WL himself. There was no obligation on CJ to pay the debt of his representative or mandatory.
party himself had no claim on the policy, only the named insured did, hence the possibility of a set-off.79

This position was not altered, it was thought at first, by the fact that the representative or mandatary had insured in his own name and on his own behalf as well as, in terms of the usual clause, ‘for whomever it may concern’ and if such other person was not specifically named in the policy.80 But this view did not prevail for long and a subsequent opinion held that where the representative or mandatary had insured in his own name and on behalf of whomever else the insured property concerned, such third party, even if he had not been specified by name in the policy, and not the representative or mandatary, was the party to the insurance contract. Accordingly, no set-off was possible between a debt owed to such a third party by the insurer and a debt owed to the insurer by the representative or mandatary.81 The position was also not altered by

79 This was the gist of an opinion delivered in 1698 (see Barels Advysen vol I adv 17). A, resident in Riga, Russia, had written to B, a merchant in Amsterdam, with the instruction to insure the hull of a ship and the goods loaded in her for a voyage from Bordeaux to Bruges. B concluded such insurance in Amsterdam on the usual terms, the insurers declaring to insure B ‘or whom it may concern’ (‘of dien het anders in geheel of ten deele zoude mogen aengaen’). The insured ship and goods were subsequently lost and one of the insurers claimed a certain liquidated amount from B in the latter’s personal capacity and sought to set that amount off against the sum he was liable to pay B under the policy. The question on which the opinion was requested, was whether or not such a set-off (‘Rescontre’) was legally and practically permissible?

According to the opinion, A, the Russian, had no action on the policy, only B, and a set-off was therefore not impermissible on the grounds that B was not a party to the contract and that the debts were not reciprocal. Although B had concluded the insurance on the instructions of A, he had done so in his own name and accordingly only he acquired an action on the policy (‘bygevolg de actie daer uit gesprooten hem [B] alleenlyk heeft gecompeteerd gehad, en niet A, die tot het doen van Assurantie ordere had gegeven’). It was irrelevant that, according to law and practice, a factor acquired an action for his principal even if the latter had not been disclosed at the time of the conclusion of the contract (‘zelfs zonder hem te hebben gemeld tyde van het aangaen van den Contracte’). That action was not the direct and true action, which remained with the factor, but only the utilis actio per fictionem juris which passed to the principal and then only in such cases where a cession of action by the factor was not possible by reason of his insolvency or incapacity.

80 Thus, the opinion of 1698 continued, it was irrelevant that the insurance was not simply in favour of B alone (‘ten behoeven van B’) but that it was concluded also in favour of whomever it may concern (‘of die het anders in ’t geheel of ten deele mogen aengaen’), because such other interested party was not named and his capacity not disclosed to the insurers in the policy. It would have been otherwise, according to the opinion, had the original principal been mentioned and had it been understood that B contracted directly for him and that it was he who was to obtain a right against the insurers.

81 This issue was addressed in a lengthy and wide-ranging opinion in 1699 (see Barels Advysen vol I adv 18).

In this case insurance on a ship was concluded by B in Amsterdam on the instructions of A, the owner of the ship. B had concluded the insurance for himself and whomever it may concern (‘aen B voor hem of die het anders in het geheel of ten deele zoude mogen aengaen, niemand exempt’). The ship was subsequently lost on the insured voyage and it was not in dispute that the insurers were liable. In the meantime B, who owed the insurers other debts too, went insolvent. The question arose whether the insurers were entitled to set off the amount due to them from B against the compensation A claimed from them.

The advocate delivering the opinion thought that the insurers were not entitled to set off what was owed to them by B in his private capacity and unconnected to the insurance against what they were liable to pay under the policy. Here B had received specific instructions from A to insure and, acting on those instruction, he had done so. As a result there was no doubt that A had acquired an action against the insurers (‘daer door zekerlyk regt en actie is geacquireerd aen, en ten behoeven van A, dewelke de
the fact that, as was usually the case, the representative had authority from his principal to receive payment from the insurer.\textsuperscript{82}

In sum, where the fact that the insurance was concluded on behalf of another was not made known to the insurer, the representative or mandatary was considered the actual party to the insurance contract. A set-off was therefore possible between them because they were, or were deemed to be, parties to same reciprocal obligation.\textsuperscript{83} But where the insurance was in fact to the knowledge of the insurer concluded on behalf of another, irrespective of whether such other's identity appeared from policy and had been disclosed to the insurer, the representative or mandatary fell away and was not a party to the contract, and no set-off was therefore possible.

The absence or presence in the policy of the name of the principal, mandator or other person in whose favour the insurance was concluded, also had a bearing on the liability for the premium.

In the case of an undisclosed representation in the name of the representative, or where the identity of the principal was undisclosed at the time when the insurance was

ordre tot dezelve Assurantie gegeeven heeft'). This was so particularly because B had not concluded the insurance only for himself but also for whomever else it might concern (‘niet ... voor of ten behoeve van hem [B], maer aen hem [B], voor hem of die 't anders in het geheel of ten deele zoude mogen aengaen, niemand exempt’). The insurers therefore clearly did not intend merely to insure and to contract with B in his private capacity or for his own account, but to contract with B for the account of such other person or persons as the insured property might concern, and thus also for such persons as might have instructed B to insure (‘aen B voor rekening van zodanige andere persoon of persoonen als het in het geheel of ten deele zoude mogen aengaen, niemand exempt, en mitsdien ook voor rekening en ten behoeven van zodanige Geinteresseerden in het schip, waer van B ordre van dezezee Assurantie zoude hebben’).

This being the case, the opinion continued, A was a party to the insurance, there being no doubt that by a contract concluded on the authority and mandate of a third person, the obligation and action flowing from that contract were acquired not for the authorised or mandated person but for the principal or mandator. It was trite that the action flowing from a contract concluded by a representative for his principal, was a direct action and not 'de utile actie'. The principal further did not require any cession of action from the representative to be able to claim from the insurers on the policy.

Other opinions (no doubt the one delivered the year before), it was thought, were incorrect in holding that the principal only acquired a utilis actio from a contract concluded by his representative, in nature the same as a ceded action and against which a set-off was possible. And this was so not only where the name of the principal had been disclosed, but also where, although his name was not mentioned, the contract was concluded in favour of unnamed third parties.

Therefore, here A had acquired a direct action against the insurers and what was owing to him could therefore not be set off against what was due to the insurers from B in his private capacity.

\textsuperscript{82} As the opinion of 1699 put it, 'die geen, die last heeft om betaelingte te ontvangen, kan niet rescontreeren, het geene hy zelfs schuldig is, met dat geene het welk hy aen zyn Meester verschuldigd is'. Authority to conclude an insurance in principle included authority to claim on that insurance: see again § 2.4.1 supra.

\textsuperscript{83} Van der Keessel Praelectiones 1623 (ad III.40.6) explained that there could be a set-off when there existed similar, valid and liquidated debts between two persons on both sides of an agreement to which each of them was the creditor and the debtor of the other. As noted in the opinion of 1699, the general requirement of the reciprocality of the debt (‘dezelve persoon moet in de schuld en tegenschuld gerepresenteerd worden’) was also applicable in insurance cases, as had already appeared from the earlier opinion in 1640 (Hollandsche consultatie vol III/1 cons 80).
concluded, the named insured who had concluded the contract (whether as representative of the undisclosed principal or whether without any authority at all) remained primarily liable under the policy for the payment of the premium and the insurer could look to the latter for its payment. The reason for this was because the actual insured owner or interested party was unknown to the insurer at the time the contract was concluded. An analogous but even wider principle was already recognised in the early customary law.

Clearly, in the case where the representative insured for and on the instructions of another without mentioning the latter’s name or, presumably, without the insurance being ‘for whomever it may concern’, the representative would in all instances have been liable for the premium. But even where the name of the principal or mandator was mentioned on the policy, or where the insurance was specifically in favour of a named third party, it appears that one could not necessarily argue that because in such a case the third party-principal acquired a direct action on the policy, he alone was liable for the payment of the premium and not also the contracting insured. In insurance practice the premium was in fact claimable from the factor or other representative or mandatory such as a broker, and this was by way of an exception to the general principle of law governing such situations.

However, premiums were payable in cash so that, at least in theory, problems should seldom have arisen in this regard. But that was in theory only, for in practice the immediate payment of the premium was not the rule. Nevertheless, where the insurer

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84 As was the case where the insurance was simply ‘for whom it may concern’.

85 See art 65 of par 3, title 11, part IV of the Antwerp Compilatae of 1609 (see De Longé vol IV at 228) where it was determined that a person who insured on the authority or mandate of another, even if he used the name of the principal or mandator, nevertheless was himself also liable for the premium. If he was a foreigner, or if he departed from the city, he would at the request of the insurer have to provide security for such payment, retaining his recourse against his principal or mandator if he made any payment. See also Mullens 41.

86 Or, as it was put in the opinion of 1699 (Barels Advysen vol I adv 18), ‘in de practyque verstaen word zich voor de betalinge van de praemie ten behoeven van de Assuradeur geinterponeerd te hebben’.

87 Again from the opinion of 1699.

88 See generally Vijn 28-52 for an investigation of whether, as in the case of the broker, a mandatory (commissionaris) generally incurs personal liability for the payment of the premium to the insurer and whether the insurer has any preference in the event of the mandatory’s insolvency. His conclusion is that the broker in marine insurance is an exception to the general rule applicable in the case of mandate in that the broker acquires a personal liability towards the insurer for the premium. But the mandatory is not such an exception and he incurs no such liability to the insurer, unless there was a specific agreement between them to that effect. But then such a agreement is usually concluded so that mandatesaries generally are liable for the premium. See at 53-96 as to the clause to this effect in insurance policies (the clause providing ‘en zulks tegen genot van eene premie van ... ten honderd, voor dewelke wij ondergetekende den heer NN (Commissionair in Assurantien) in rekening-courant hebben belast en alzo den geassureerde quiteren bideze’). This clause, Vijn notes, is more than a mere acknowledgement of the receipt of the premium.

89 See ch XI § 3.2 infra.
did not immediately demand and receive the premium from the representative with whom the insurance was concluded, it had to be assumed that he had given the latter credit for it and would look only to the representative for the payment of the premium and not to his principal, at least not where the latter had paid the premium over to his representative.90

3 Insurance ‘for whom it may concern’: The Stipulation in Favour of a Third Party in Roman-Dutch Insurance Law

3.1 Introduction: The Need for Insurance ‘for whom it may concern’

As has already appeared from the preceding discussion of insurances concluded by someone for another, whether as an authorised representative or mandatary or as an unauthorised negotiorum gestor, a clause insuring the named insured and whomever else the insured property may concern was commonly inserted into insurance contracts. The precise reason for such insertion and the legal effect of insurance ‘for whom it may concern’ in terms of this clause must now be considered in more detail.

When a merchant instructed another to obtain insurance cover for him, such insurance, to be effective as far as the instructing merchant was concerned, had to be concluded in his name.91 If the person concluding the insurance contract did not conclude it in the name of his principal or mandator, the latter could not directly obtain any rights from nor become a party to the contract, even if the property insured belonged to him or was transferred to him by the person who had taken out the insurance on it.92 Furthermore, if the contract was concluded without his authority and in the name of the contracting insured, the principal could not purport to ratify the contract. The fact that the contract was concluded solely in the name of the person taking out the insurance also contradicted any intention he may have had of acting as a negotiorum gestor. From this it follows that it was not possible to conclude an insurance for another where it was uncertain to the person concluding the insurance, who was or would be the party in whose favour the insurance should be concluded. And, lastly, when one concluded an insurance for another, whether by authority or without any authority, any interest which the person concluding the insurance himself may have had in property insured, could not be covered as well.

The fact that the interested merchant’s name had to be disclosed on the policy both when he concluded an insurance himself and when an insurance was concluded on his behalf, could be a serious disadvantage and one to be avoided in certain circumstances. A disclosure of the merchant’s identity, and of information regarding the

90 See further ch XI § 4 infra where the payment of the premium through a broker is considered in more detail.

91 See again § 2.4 supra for the application of the publicity principle in this regard and for the absence of any doctrine of undisclosed principal in Roman-Dutch law.

92 See again § 2.4.3 supra.
insured property and where and when it would be consigned, put him at a tactical dis­advantage as far as his competitors were concerned. Even if the insurance policy was not a public document, and even if the insurers who underwrote the policy were themselves not competing merchants, they might have passed on such information to other merchants who were. For this reason merchants often preferred not to have insurances concluded in their names.

There were also other reasons why merchants did not wish to disclose their involvement with a particular consignment of goods. Once their identity or name was disclosed, other facts about them could also appear or be deduced from the insurance documents, for example their nationality, religion, and the like. And such matters could affect not only the safety of the insured consignment at sea and the validity of his insurance contract at the place where it was concluded but also, for any one of a number of reasons, land him in hot water with his own or other authorities and even lead to the confiscation of the insured goods.

To overcome these problems, a clause was inserted into the insurance contract which made a disclosure of the identity of the interested party unnecessary. The clause provided that the insurers covered the named contracting party personally as well as whomever the insured property may, in full or in part, have concerned, that is, whoever may have been interested in the property insured and suffer damage as a result of its loss or of damage to it. The clause thus made it possible for a representa­tive or local factor to conclude an insurance for another, his principal, in his own name and without having to disclose the latter's identity, so that a claim could still validly be instituted under the insurance contract for a loss such principal had suffered.

As will appear shortly, this general wording of the clause had a further result, probably not originally intended and in fact at first opposed by insurers. By insuring for another it was not possible to cover also the interest, if any, of the person concluding the insurance, nor that of a third party whose identity was not yet established and was thus unknown to the contracting party. This was overcome by insuring 'for whom it may concern'. It was possible, for instance, for a consignor to insure his own interest in consigned goods as well as that of a subsequent but as yet unidentified consignee.

93 See again ch VIII § 5.3 supra as to the insurance of foreign and enemy property.

94 For general background on this clause and the context in which it operated, see eg Burgers 33-34; Dorhout Mees Verzekering 3-5; idem Schadeverzekeringsrecht 125; Gätter 341; Hammacher 160-165; Mees De assecuratione 15; Sieveking 10-11; Sneller 109-110; and Voorduin vol X at 293. On the clause generally, see Dorhout Mees Verzekering passim; idem Schadeverzekeringsrecht 124-159; and Stoop 1-26.

95 Insurance ‘for whom it may concern’ made the transfer of the insurance possible whereas an insurance simply in the contracting insured’s own name and without the (expressed) intention to benefit another meant that the insurance cover could not be transferred to another. See again § 2.4.3 supra. Of course, such a transfer was of the utmost importance in the international trade where goods consigned by sea were invariably sold and transferred by means of the delivery of bills of lading representing those goods. (On the practice of transferring ownership in goods afloat by way of the delivery and endorsement of bills of lading or receipts (cognossement or adviesbrief) in Roman-Dutch law, see generally Kohler ‘Handelsrecht’ 321-326; and Lichtenauer Geschiedenis 187 for further references.) If insurance cover could not be transferred or in another way be extended to the buyer of goods consigned by sea, it would mean that the latter would not be able to claim on the policy, and neither would the insured seller, if the loss occurred after ownership of and the risk in the goods had already passed to the buyer.
Likewise, by this clause, was not only a person who had actually given instructions to another to insure on his behalf without disclosing his identity, enabled to claim under such an insurance for a loss he may have suffered as regards the insured property, but even a person who was not at the time of the insurance interested in the goods and who, obviously, did not mandate the insurance, was by the clause enabled to claim for such a loss. Accordingly, where an original insured, who had instructed insurance to be concluded on his behalf or who had in fact concluded the insurance himself, subsequently sold the insured goods to another, as frequently happened with insured cargoes carried by sea, the consignee was able to claim under that insurance.

Furthermore, because the identity of the true owner or interested party could be concealed at the time of the conclusion of the insurance contract, the clause also served to disarm insurers of the technical defence of disputing the interest or authority of the person taking out the insurance.

In effect, therefore, the presence of the clause insuring 'for whom it may concern' resulted in the insurance no longer being linked to a particular insured but merely to the particular property it covered. The clause came to be used, or could be used, not only where the person instructing the insurance wished his identity to remain undisclosed, but also in cases where the identity of the (eventual) insured owner was not yet known to the person concluding the insurance, whether or not he himself was the (or an) interested party, at time the insurance was concluded.96

By the insertion of this clause, insurers in effect said that, as far as they were concerned, it did not matter whether the insurance was for the account of a specific third party (and whether it was authorised or unauthorised), or for the account of an unspecified third party who might be interested in the insured goods.97 The identity of the insured did not matter to them and it was irrelevant to them to whom they may have to pay the sum insured in the event of loss of or damage to the insured goods.

Despite the increased possibility of fraud in such a case because of the insurers being unaware of whether they were insuring the person who concluded the insurance

96 Thus, apart from the insurer, there could in effect be up to three different persons involved: the person concluding the insurance; the merchant who, as consignor, had instructed the conclusion of the insurance; and the consignee who was entitled to claim on the policy in the case of any loss of or damage to the goods during their carriage at sea. The insurance policy could identify the first one or two of these, ie, it was possible in terms of the clause insuring 'for whom it may concern' to conclude an insurance in favour of named and identified and/or in favour of unnamed and unidentified third persons.

97 In the case of an insurance for another, the person concluding the insurance was not covered, ie, his own interest was not covered, while in the case of an insurance for whom it may concern, both the interest of the contracting or named insured as well as that of the third-party insured could be covered. Put differently, insurance for the account of for whom it may concern was an insurance in favour of the person contracting the insurance or in favour of a third party, or even in favour of both the contracting insured and a third party. See further on this point Stoop 14-15.
contract and who was obviously known to them, or in fact an unknown third party, they were increasingly prepared to insure on such terms. Apart from the fact that it was obviously advantageous to insured merchants who could keep the true identity of an interested party secret, there were two important underlying reasons for the willingness of insurers to insure on such terms.

First, the identity of the insured was not a factor in the calculation of the marine risk. After merchants had become sedentary and no longer accompanied their ships and cargoes on sea voyages, the identity and other characteristics of the insured owner himself no longer had any significant bearing on the perils insured against by the marine policy since he no longer had any prolonged possession of or control over that property. The clause insuring 'for whom it may concern' therefore came to be used especially in circumstances where there was no or little moral hazard from the identity of the insured, such as in case of the insurance of goods in transit. Of much greater relevance was the identity of the carrier (that is, the name of the ship and her master), the voyage in question, and the nature of the property (cargo) to be insured.

Secondly, the identity of the insured was likewise not a factor in the credit risk to which the insurer might have been exposed since the premium was either paid immediately in cash upon the conclusion of the contract by the person concluding the contract, or, if the contract was concluded through a broker as was almost invariably the case, because it was to the latter and not to the named insured that the insurer looked for payment of the premium.

The true nature of the relationship between the parties involved in the conclusion of an insurance ‘for whom it may concern’ in Roman-Dutch law will now be inspected

98 One possible abuse of the clause was the conclusion of insurance on goods by a person not at all interested in those goods (eg by a broker) and/or with no authority from the owner of the goods, with the speculative intention of making a profit by later, after the departure of the goods or even after a loss, transferring the insurance to the interested party at an inflated price in excess of the amount of premium such person had paid the insurer for the insurance. Obviously, this would most likely occur where the person taking out the insurance had some prior or inside knowledge of, or even some control over, the occurrence of loss or damage affecting the goods. See also eg Jolles 68. The likelihood of this practice occurring was of course enhanced by the practice of insuring unspecified goods: see again ch VIII § 4.2.67 supra as to insurance of cargo 'in ship or ships' or 'in quovis'.

99 And in fact prepared, very soon, to do so not only in individual cases upon being informed that the insurance did not concern the contracting party, but generally by way of the invariable insertion into insurance policies of a clause insuring cargoes 'for whom it may concern'.

100 For this reason the presence of the clause in non-marine insurance policies, although not unknown (see the model fire policy in the Amsterdam keuren of 1744 and 1775), was not common in practice. It may be thought that in the case of hull insurance, the clause was also not inappropriate since the owner was not (or, in later times at least, no longer) in physical control of his ship, even if his management of the ship remained an important factor influencing the risk.

101 See again ch VIII § 4.2.2 supra for the different matters which the insured had to mention in his insurance policy.

102 See ch XI § 3.2 infra as to the immediate payment of the premium and ch XI § 4 infra as to its payment through a broker.
more closely. The recognition of the clause insuring 'for whom it may concern' by the various Dutch legislatures and in its insurance practice will be noted. Then the effect accorded the clause in Roman-Dutch jurisprudence will be considered. First, though, the early recognition of the clause.

3.2 The Early Recognition of and Views on the Clause Insuring 'for whom it may concern'

Insurance 'for whom it may concern' was recognised from early on\textsuperscript{103} in Barcelona\textsuperscript{104} and elsewhere in Spain\textsuperscript{105} and soon also in Italy. For example, in the model policy form in the Florentine Insurance Ordinance of 1523 the following clause appeared: 'X has made Insurance to N for ..., on such and such Goods, belonging to him or other Friends of his, or whomsoever else they may belong to, marked by N or under whatever other Name, or not at all marked, loaded or still to be loaded'.\textsuperscript{106}

Of the early authors on insurance law, Straccha's treatment of the topic\textsuperscript{107} appears the most informative. He discussed the Ancona model policy of 1567 in his treatise and was aware of the presence of a clause in that policy permitting the insurance by one person of goods belonging either to another named person or to whomsoever the goods may have concerned as it may have appeared from the bill of lading.\textsuperscript{108} He noted that the person whom the insured property could have concerned was the person who was interested in the property in that he had a real right in it or a

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\textsuperscript{103} See eg Dorhout Mees Verzekering 6-13; \textit{idem} Schadeverzekeringsrecht 143-144; and Sieveking 10-14.

\textsuperscript{104} After the recognition in earlier Barcelona marine insurance ordinances of insurance for another upon an oral or written order, or by way of subsequent ratification by the owner, the Ordinance of 1458 provided for insurance for the account of a co-owner and that of 1484 for insurance for the account of a person interested in the property insured even if he were not then the owner or a co-owner. See further Reatz \textit{Geschichte} 74-75.

\textsuperscript{105} Such as in the Burgos Insurance Ordinance of 1538 and its model policy form, and in the policy form prescribed by the Insurance Ordinance of Seville of 1556.

\textsuperscript{106} The translation is from Magens \textit{Essay} vol II at 4.

\textsuperscript{107} Santema was not familiar with the clause. Nevertheless, he thought that the ownership of the person taking out the insurance on the property being insured, was irrelevant (unless the property belonged to the enemy or to pirates) and that an insurer could not raise as a defence the fact that the person taking out the insurance, had defective ownership, for, should goods arrive safely, the insurer obviously did not inquire whether it was the owner who had paid him the premium. But by the nature of the contract, one could enter into insurances which concerned goods belonging to another, good faith not permitting that objections based on actual ownership be raised. However, it was a different matter should fraud on the part of the contracting party be proved. See generally Santema \textit{De assecurationibus} IV.47-48 and V.10-14.

\textsuperscript{108} The Ancona model policy of 1567 stated that the insurance was concluded with Y (the mandatary) or whatever other person (\textit{\textquotesingle\textquotesingle sive quamlibet aliam personam\textquotesingle\textquotesingle}) (see Straccha \textit{De assecurationibus} VII) and that it was for the benefit of insured X who gave the order to insure or whomever else the insured property may have concerned (\textit{\textquotesingle\textquotesingle sive alius quem ea res spectat\textquotesingle\textquotesingle}) (\textit{idem} \textit{De assecurationibus} X).
personal right in respect of it.\textsuperscript{109} Thus, a consignee of the goods, as it appeared from
the bill of lading on those goods, was covered by such insurance in respect of the
goods consigned to him.\textsuperscript{110} The insurer could not object that the person concluding the
insurance for another ("agenti ex contractu") was not the owner of the property, but
such other person was the owner. It was in fact to prevent insurers from taking a tech­
nical point in this regard, something which they apparently frequently did ("ad
removendum controversias & cavillationes, quas plerumque solent Assecuratores
excogitare"), that the clause in question was inserted into insurance policies.\textsuperscript{111}
Likewise, the person taking out the insurance could not argue, presumably when the
insurer claimed the premium from him, that he was not the owner of the property
insured by the contract.\textsuperscript{112} As far as the clause itself was concerned, Straccha
explained that if an insurance was concluded by T with a mandate from M on goods
pertaining to M and all others who may be interested in the goods, T himself was
included in the latter description so that such insurance covered the goods also if they
belonged to him.\textsuperscript{113} And where insurance was concluded by a person for himself on his
own behalf and on that of his partners to cover certain goods belonging to them or
whomsoever else the goods may have concerned ("pro omnibus ad quos pertinere
merces"), such insurance was completely valid, by implication irrespective of who was
the owner of the goods.\textsuperscript{114}

The effect of a clause insuring goods of the named insured and whomsoever else
the goods may have concerned was also noted in some detail by Roccus. He
explained that the person actually interested in the goods would be covered by such
insurance on those goods, even if that person was not named in the policy.\textsuperscript{115} In this
regard he remarked that although, according to general legal principles, only the per­
son named in a contract\textsuperscript{116} could be included in it and derive a direct benefit from it,
that was not the position with contracts such as those of insurance where every person
was included who had an interest or any share in the insured goods ("omnes
personae, quae interesse habent in mercibus assecurationis"). Therefore, he continued, although
generally the law did not recognise a contract in favour of a third party, at least not if he
was unnamed, the position was different in the case of an insurance contract. He noted

\textsuperscript{109} Idem X.1.

\textsuperscript{110} Idem X.2.

\textsuperscript{111} Idem X.5 & 6.

\textsuperscript{112} Idem X.6.

\textsuperscript{113} Idem X.8.

\textsuperscript{114} Idem X.17.

\textsuperscript{115} Roccus De assecrerationibus note 45.

\textsuperscript{116} Or, as explained in Feitama's note on this point, only the person whose name was mentioned or
expressed in the contract and not a person in whose name the contract had not been made.
that although some authors were of a different opinion, \(^{117}\) his was the view generally followed in practice. \(^{118}\)

Then Roccus also reiterated the point already made by earlier Italian authors, namely that neither insurers nor insured could raise as a defence the fact that the person in whose name the insurance was concluded, was not the owner of the goods insured because it was possible to insure another's goods. \(^{119}\) This, he noted, was the position even if the true ownership of the goods was concealed in the policy by the actual pretence that the insured was not the owner or that the goods belonged to another, or even where the identity of the owner was concealed by concluding the insurance in the name of another. The only exception where the insurance was not valid, was where this pretence occurred with the intention to defraud the insurer.

It is therefore clear that from early on it was recognised that it was possible, by including a clause insuring 'for whom it may concern' in the insurance policy, to insure for the benefit of another, and that such insurances were valid even if such other person was not named in policy, and even if the contracting insured was himself not the owner of the property he insured.

### 3.3 The Clause in Dutch Insurance Legislation and Practice

The recognition of the practice and, by implication, of the validity, of inserting a clause insuring property 'for whom it may concern' into insurance contracts appeared clearly from Roman-Dutch insurance legislation. \(^{120}\) However, this recognition did not come immediately.

In the model policy form provided by title VII of the *placcaat* of 1563, there was a named insured and the underwriters undertook to pay him or the bearer of the policy: 'Nicolaes van Eemeren ... doet hem versékeren ... op Coopmanschappen ende

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\(^{117}\) That is, they applied the principle generally accepted at the time, also to insurance contracts and thought that no one could ever be included in the insurance, even if he was the owner of the goods insured, unless such person was expressly mentioned by name, because a stranger ('persona extrínseca') to a contract was not included in it and could not benefit from it.

\(^{118}\) Later Roccus *De assecurationibus* note 94 returned to the position where the insurance contract insured goods for the benefit of a named insured 'as well as in his own name, as for and in the name of all and every other person or persons whom it may concern, in whole or in part' ('of iemand anders wie het zoude mogen zyn, die de Goederen kwamen toe te behoren, of die op dezelve te pretenderen had, of die daar interest zoude in mogen hebben'), and where it subsequently appeared from the bill of lading that not the named insured but someone else, who was not named in policy, was the owner of the goods. He noted his earlier view (in note 45) that insurers were nevertheless liable in such a case. But, he pointed out, there were a number of conflicting Italian decisions on this matter. Some held for the insurer (eg the Florentine Court in 1613 in the case of *Braccus & Tovaglio* and the Messina Court in *Pirrus Caponi v Johannis del Corro*), while others held against them (eg the case of *Tadei & Petrus Vinci*, which pointed out that when insurers take upon themselves the risk of goods loaded in certain ship, it was irrelevant to them whether the goods belonged to one person or another, and for that reason there was added to the policy the clause 'for whom it may concern').

\(^{119}\) *Idem* note 46.

\(^{120}\) See Dorhout Mees *Verzekering* 13-20; *idem Schadeverzekeringsrecht* 144-145.
goederen by hem oft andere voor hem ende in sijnen name geladen oft te laden ... ende den voorseyden gheasseureerden, ofte den Brenger van dese tegenwoordige, te betalen'.

Likewise in the model policy form in the placcaat of 1571, where the insurers undertook to insure and indemnify the named insured ('such merchant or merchants') on the identified merchandise loaded or to be loaded by him or others for him in his name ('te versekeren ende indemneren eenen zuiken oft zulcke coopmanscpepen ende goeden by hem oft anderen voir hem in zijnen name geladen, of te laden'). They further bound themselves to pay that insured or the bearer of the policy ('te betalen aan den voorseyden verseekerden, ofte den Brenger van dese tegenwoordige').

Insurance was therefore permitted by these early measures only for a named insured on goods which had to be loaded in his name, that is, the name of the insured had to appear as consignor on the bill of lading covering the insured goods. And although this policy was also payable to bearer, that apparently did not indicate that it was permitted to transfer the insurance cover to another interested party. The bearer could only claim for a loss suffered by the named insured. Therefore, insurance for a named insured 'or whom it may concern' was not formally recognised in the earliest insurance legislation in the Netherlands. It may be speculated that insurance for an unnamed and hence an unidentified insured was in the sixteenth century regarded by the authorities as too open to abuse\(^\text{121}\) and was for that reason not permitted.

In practice, though, it appears that a less restrictive approach was followed. In the sixteenth-century Antwerp insurance policies investigated and compared by De Groote\(^\text{122}\), the earlier ones (dating from 1531, 1535 and 1540) did not identify the goods insured otherwise than by reference to the named insured or whomever else the goods may have concerned\(^\text{123}\). And although the insured goods were in later policies described with more particularity, the clause insuring 'whom it may concern' remained. Thus, in an Antwerp policy from 1591 the goods were described as 'rye, belonging to ... [named insured] or whomever it may belong to' ('Rogge, thobehorende de vorss ..., oft den Jennen, diet soude mogen ofte too te behoren'). And in the well-known Amsterdam policy of 1592 on the cargo of Daniel van der Meulen\(^\text{124}\), it was stipulated that the policy insured the local merchant De Weertt on a consignment of rye which he or

\(^{121}\) Especially the measures aimed at preventing over-insurance, including insurance of the amount which the insured was obliged to keep uninsured, could too easily be circumvented if the name of the actual insured was not apparent from the policy and could be concealed.

\(^{122}\) See De Groote Zeeassurantie 99.

\(^{123}\) See also the 1555 Antwerp case referred to in § 3.4 infra.

According to Dorhout Mees Verzekering 13, older Antwerp policies contained a qualified clause insuring the person whom the goods concerned as owner, irrespective of whether he became owner before or after the conclusion of the insurance ('wien het ... als eigenaar aangaat, onverschillig of hij voor of na het sluiten der overeenkomst eigenaar werd').

\(^{124}\) See Ijzerman & Dan Dooren de Jong 222 and Appendix 19 infra.
another had loaded and which belonged to De Weert or another.\textsuperscript{125} It appears that De Weert was the representative in Amsterdam of Daniel van der Meulen, a merchant at Leiden, and his partners.\textsuperscript{126}

By the time insurance came to be regulated in the Netherlands by way of municipal legislation, the practical realities appear to have held, or at least to have begun to hold sway over the strict measures aimed at preventing fraud and abuses. The possibility of keeping the identity of the insured owner or interested party secret, was again recognised. The custom of insuring for an unnamed and unidentified insured came to be recognised legislatively in that, from the official printed policy forms, it could no longer be deduced from the names appearing on them whether the insurance was taken out by the party concluding the contract for his own account or for that of another, nor who was the owner of the property to be insured.

In the Amsterdam \textit{keur} of 1598, the goods policy covered the named insured on goods loaded or to be loaded,\textsuperscript{127} and the insurers undertook payment to the named insured or his representative ('ofte uwen Commis'). The hull policy covered the named insured on a specific ship belonging to the named insured or to another ('den voorsz ... ofte yemant ander toe behoorende'), and the insurers undertook to pay the named insured or his representative. Therefore, the named insured, at least in the hull policy, need no longer have been the owner so that it was again possible to conceal the identity of the owner of the insured ship. Both policies were payable to order.\textsuperscript{128}

It appears that the clause insuring 'for whom it may concern' became fixed and in common use in Amsterdam in the course of the seventeenth century.\textsuperscript{129} It also appears that these earlier descriptions were not in all respects satisfactory. Thus, in the hull and goods policies provided by the Amsterdam amending \textit{keur} of 1688, the underwriters pertinently undertook to insure the named insured 'or whomever else the insurance may in whole or in part concern, friend or enemy, none excluded' ('versekeren aan u, ... of die het anders, in 't geheel of ten deele soude mogen aangaan, Vriend of Vyand, niemant exempt').\textsuperscript{130} In terms of the ransom policy provided by the amending \textit{keur} of 1693, the underwriters insured the named insured or whomever else it may concern ('versekeren aan U ... of die het anders soude mogen aangaan'). As before, the hull and goods policies of 1688 were order policies, payment

\textsuperscript{125} 'Hans de Weert, coopman, residerende binnen deser stede van Amsterdam, doett hem versekeren ... op alsulcken rogghe als hier by hem ofte yemandt anders gheladen is, toecomende den vors. Hans de Weert otte yemandt anders'.

\textsuperscript{126} See Sneller 102 and 117.

\textsuperscript{127} It was no longer stated that the goods had to be loaded by the insured or someone for him in his name.

\textsuperscript{128} Order and bearer policies are treated in § 4 \textit{infra}.

\textsuperscript{129} See also the opinions from that period referred to in § 3.4 \textit{infra}.

\textsuperscript{130} The hull policy additionally stated that the insurance was on the named ship belonging to the named insured or someone else ('op 't ... Schip ... den voorsz ... of iemant anders toebehorende').
having to be made to the named insured or his representative (‘aan u Geassureerde of uwen Commis’), but the ransom policy of 1693 in this regard provided for payment to the insured or bearer (‘aan den Geassureerde, of Thoonder deses’).

The same recognition of the use of this clause in practice appeared in the model policies of the Rotterdam keur of 1721. Both the goods and the hull policy forms provided that they insured the named insured or whomever else the insured property may in whole or in part concerned, friend or enemy (‘versekeren aan U ... [name of insured] of die het anders in het geheel of ten deele zoude mogen aangaan, Vrund of Vyand’). By both policies payment was promised to the insured or his authorised representative (‘aan U Geassureerde, of uwe Gemagtigde’). In terms of s 71 of the keur of 1721, where the name of the ship and that of her master were not known and could not be stated in the policy as was required, the notices advising the insured of the shipment had to be mentioned in the policy together with the name of the person who had given them.

Finally, the same appeared to be the case in all the model policies of the Amsterdam keuren of 1744 and 1775. The hull policy provided for insurance to the named insured or whomever it might have concerned, in full or in part, friend or enemy, none excepted (‘aan u ... of die het anders in 't geheel of ten deele zoude mogen aangaan, Vriend of Vyand, niemant exempt’). The goods policy, the newly recognised fire policy, and also the land-transit policy provided for insurance of the named insured or whomever it might have concerned, in full or in part, friend or enemy (‘aan U ... of die het anders in 't geheel of ten deel zoude mogen aangaan, Vriend of Vyand’). And the ransom policy provided for insurance of the named insured or whomever it might have concerned (‘aan u ... of die het anders zoude mogen aangaan’). The presence of the clause ‘for whom it may concern’ in non-marine policies was uncommon in subsequent practice. But that it did occur earlier appears not only from the model policies but also eg from a 1770 Amsterdam fire policy on a plantation, buildings and slaves in Suriname where the clause insured ‘aan UEd, toonder deeser ofte die het anders in 't geheel of ten deele zoude mogen aangaan Vriend of Vyand’ (see Mees Gedenkschrift appendix 21). It also appears from a 1799 Rotterdam fire policy on grain which covered the named insured of die het anders in het geheel of ten deele zoude mogen aangaan, Vriend of Vyand’ (idem appendix 19 and also Appendix 51 infra).

The Amsterdam Legislature therefore recognised the possibility of insuring on behalf of an unnamed person. There was one limitation, though. In terms of s 2 of the keur of 1744, where the name of the ship or of her master was not known, the name of the

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131 The hull policy additionally insured the named ship belonging to the named insured or to another (‘aan U ... of yemant anders toebehorende’).

132 See again ch VIII § 4.2.6 supra as to the content of policies.

133 And on the ship belonging to the named insured or someone else (‘den voorsz. ... of iemant anders toebehorende’).

134 The presence of the clause Insuring ‘for whom it may concern’ in non-marine policies was uncommon in subsequent practice. But that it did occur earlier appears not only from the model policies but also eg from a 1770 Amsterdam fire policy on a plantation, buildings and slaves in Suriname where the clause insured ‘aan UEd, toonder deeser ofte die het anders in 't geheel of ten deele zoude mogen aangaan Vriend of Vyand’ (see Mees Gedenkschrift appendix 21). It also appears from a 1799 Rotterdam fire policy on grain which covered the named insured of die het anders in het geheel of ten deele zoude mogen aangaan, Vriend of Vyand’ (idem appendix 19 and also Appendix 51 infra).

135 The land-transit policy provided for payment ‘aan den Geassureerde of aan zyn gemagtigden’.
the person giving the instruction to insure or the notice of shipment ("de naam van die geene, die d' order of advys gegeeven heeft"), as well as the date of such instruction or notice, had to be mentioned on policy, on penalty of nullity. Also, in such a case, no return of premium was possible unless the consignor's name or that of his principal ("die er bewind van heett"), as well as that of the consignee, were expressed in the policy. 138

The clause insuring 'for whom it may concern' was also known in other legal systems.

In English law, where insurance for another was not unknown, the practice of insuring for the account of whom it may concern was employed in marine insurances to provide cover to those other persons, apart from the named insured, who could be interested in the venture but whose names were unknown to the person effecting the insurance. 137 The Lloyd's policy, as it was settled in 1779, contained the clause 138 but it did not appear in fire policies. In Hamburg the practice of insuring for another or insuring for whom it may concern was recognised by the customary insertion of a clause in insurance policies insuring 'für eigene oder fremde Rechnung' or 'für Rechnung wen es angeht', 139 and in France, too, the clause was well known. There it was referred to as insurance 'pro persona nominanda' and as long as the actual insured was named, irrespective of when that occurred, the insurance was valid as if he had been named at the conclusion of the insurance and had then been identified in the policy. 140

But while the practice of including the clause insuring 'for whom it may concern' in insurance policies was officially recognised, Roman-Dutch legislation gave no indication of the effect and consequences of such inclusion. For that one has to turn to other sources. What then did Roman-Dutch lawyers and the courts make of the clause and, more particularly, what legal effect did they ascribe to it?

3.4 The Clause in Roman-Dutch Jurisprudence in the Seventeenth Century

As to the meaning of the clause insuring 'for whom it may concern', Roman-Dutch authors were singularly unhelpful, very few of them even mentioning the clause by name. 141

136 See again ch VIII § 4.2.6 supra as to the content of policies, and ch XI § 6.3.2.1 infra as to the recoverability of the premium.

137 See eg Molloy De jure maritimo II.7.9; Walford Digest vol V at 239-240 sv 'for whom it may concern'.

138 It provided as follows: 'Be it known that [X, or X as agent] as well as 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 assurance and cause [himself] and them, and every of them to be insured'.

139 See eg Frantz Hamburgische Admiralitätsgericht 136.

140 See Stoop 2-3.

141 Those who did (eg Voet Observationes ad III.24.4 n6), did so in connection with the opinion of 1594, which will be considered shortly, but without any explanation of its aim and consequences.
The clause featured more prominently in legal decisions and opinions, although these sources, as will become apparent, do not necessarily provide clear and final answers to all the questions arising in this connection.  

The earliest indication of judicial recognition of the practice of insuring 'for whom it may concern' dates from the mid-sixteenth century. It appears from an Antwerp deed of 1555 that in that year a local court held that an insurance policy on goods, insuring a particular insured or 'whomever else the goods concerned' ('aan hem ... of aan welk ander toebehorend') could be transferred by that named insured to a third party who, as bearer of the policy, could claim on it for a loss he himself had suffered. An opinion delivered in Middelburg in 1594 concerned an insurance contract by which A had insured goods belonging to himself as named insured or to whomever else, without any exception or qualification ('op 't goed hem ... toekomende, of iemand anders, wie dat’ et zij'). According to the opinion, the aim of the clause and the reason why it was so generally inserted in insurance policies was to avoid the need to disclose the names of the merchants who were the owners of the goods to be insured, such merchants for various reasons wishing to remain anonymous. The particular clause in the policy was, by its terms, however, not thought wide enough to extend also to goods belonging to enemy subjects.

The clause was also referred to in the Amsterdam opinion of 1669 already referred to where the point was made that a person who insured without any instructions from or any intention to benefit another in excess of any interest that he himself had, could not subsequently transfer such excess of cover to another person, even if the latter had an interest in the property insured. This, it was thought, was not changed by the fact that the insurance was for the named insured, who had concluded insurance, and 'for whomever the property may concern' ('voor hem ..., en die zuiz zoude mogen aangaar'). Even if the effect of the clause was that the insurance covered not only the person named in the policy but others as well ('niet alleen de persoon in de Police genomineert, maar ook andere'), as was the view of Roccus, the clause nevertheless did not extend the insurance to all those who were interested in the insured voyage but only to those who had actually given instructions for the insurance.

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142 See generally eg Dorhout Mees Schadeverzekeringsrecht 129-130 and 144-145; idem Verzekering 20-25.

143 See De Groote 'Zeeverzekerings' 208; idem Zeeassurantie 20.

144 See Hollandsche consultatien vol II cons 322.

145 The point was also made that in this case it was through the fault and bad care of A, the named insured (ie, the person taking out the insurance) that the names of the actual owners of the goods for whom the insurance was concluded, had come to light, and that they could not blame the insurers for that.

146 See again ch VIII § 5.3.3 supra.

147 See Nederlands advysboek vol II adv 120. See § 2.4.3 supra.

148 See Roccus De assecurationibus note 45. See § 3.2 at n115 supra.
to be effected. Therefore, according to the opinion, for a person to be able to claim on a policy he had to prove that he had instructed the named insured to conclude that insurance. The inclusion of the clause did not displace the need to establish that the insurance was concluded on the authority of the owner. According to this restrictive view, the clause did not make it possible to cover unnamed third parties who did not instruct the insurance, such as consignees who had only bought the insured goods while afloat.

Advocating an opposite view was an Amsterdam opinion of 1672. Here goods were insured in the name of the owner (A) for himself or for someone else, friend or enemy ("de Assurantie geschied aan A, ofte ymand anders, het zy virnd ofte vyand"). Subsequently it appeared that, unbeknown to the owner, the goods had been burdened by a bottomry loan to the value of the goods. When subsequently the ship and her cargo were captured and confiscated by the English, the question arose whether A could succeed in his claim on the policy. The opinion thought yes.

The insurers were liable to pay A the sum insured, it was argued, despite the fact that A had not disclosed to them that the goods were burdened by a bottomry loan. A was not aware of that fact and had acted in good faith. In any case, the opinion continued, A could validly insure the goods in question from which he was to derive a profit upon their arrival ('waar uyt hy s/Jne betalinge naar arrivement moste vorderen') even if they were burdened by bottomry. Because he had insured the consignment as his goods or as that of someone else, the insurers could not object to having to make a

149 'Z]oo is nogtans die zelwe clausule niet te extenderen tot alle zoodanige, die in de Volegie, daar op de Assurantie dan is geschied, geinteresseert zijn, maar geeft alleen dan regt aan die geene, de welke als dan last om te laten verzekeren gegeven hebben, in hoedanige cas zulx by die geene, die de verzekering heeft laten doen, verklaart wordende, of zulx consterende, zoodanige dan ook uit de Assurantie ageren kunnen'.

150 Presumably in addition to the loss he had suffered from the loss of or damage to the insured property.

151 See Nederlands advysboek vol I adv 288.

152 The facts were briefly as follows: An Amsterdam merchant A, a partner in an undertaking ("mede Participant in een Negoti ofte Compagnie") conducting business in the name of B, was notified by B that he (B) had received word from his factor C on the Canary Islands that certain goods worth 2,500 pesos were to be bought and shipped for the account of the firm ("voor rekening van de Compagnie") on a certain ship bound for Holland. A thereupon decided to insure the goods for his own account ("de party te doen verzekeren voor sijn rekening") but since he had no knowledge of the quantity and quality of the goods that the factor would ship, he had inserted in his policy a stipulation that the insurance was for himself or someone else, on all types of goods, the insurers to make payment without the need to produce any documents or accounts but on declarations in good faith only. Subsequently C wrote to B that he would load on that ship some 110 pipes of wine for the account of D who had advanced, by way of bottomry, the amount of 2,500 pesos in question. B did not tell A of this development involving the bottomry loan apart from mentioning that they were expecting wine on the ship in question.

153 See again ch V § 5.5.2 supra as to the insurance of bottomed goods.
payment to the bottomry lender as an interested party.\textsuperscript{154} It would seem, therefore, that the policy in this instance was taken to cover the interests of the bottomry lender in the insured goods who became interested in such goods after their insurance by A 'for whom it may concern'.\textsuperscript{155}

Thus, this opinion of 1672, unlike the earlier one of 1669, thought that in terms and by reason of the clause insuring 'for whom it may concern', a third party who subsequently became interested in the goods was covered by it, even if he had not instructed or authorised the insurance.\textsuperscript{156}

In the opinion of 1675, already considered in connection with insurance for another,\textsuperscript{157} the effect of the clause insuring goods 'for whom it may concern' was also referred to and some of the points made earlier were confirmed and some uncertainties clarified. As long as an interest in the insured goods appeared on which the insurance could be founded, the opinion thought, the insurer could not dispute the person in whose name the insurance was concluded (that is, the named insured), whether or not such person was the owner, or whether or not he had received instructions for the insurance.\textsuperscript{158}

It appears that the right and legal position of a third party in terms of the clause, a matter with which the earlier opinions of 1669 and 1672 were concerned, was not yet clear, for at the end of the seventeenth century two conflicting opinions were delivered in short succession.\textsuperscript{159}

\textsuperscript{154} ‘By aildien de Assuradeurs daar op aan wilde expliceren, so soude sy egter dan niet kunnen ongaan de selve schade aan D, als eygenaar, te voldoen’.

The point was made that the insurers were in no worse position because of it. It could not be disputed that ‘de risico van Bodemery ... groter ofte van erger conditie is, als op de effecten zelfs, maar ten contrarie in veel delen avantage’. They had to pay in full for the loss of the goods, irrespective of who the interested party or owner was, that is, irrespective of whether the insurance was for the owner/borrower or for the lender.

\textsuperscript{155} Because the borrower, at least to extent of the bottomry loan, no longer bore the risk of any loss of the secured goods, he could to that extent not insure those goods. But the lender, of course, could have insured the goods securing his loan. See again ch V § 5.5.1 supra.

\textsuperscript{156} However, if, as may have been the case here, it was not the third-party lender’s interest in the insured goods themselves but rather his interest in the bottomry loan which was taken to have been covered by the insurance in consequence of the clause 'for whom it may concern', the correctness of this opinion may be in doubt in view of the subsequent decision of the Hooge Raad in 1725. This decision will be considered shortly.

\textsuperscript{157} See Nederlands advysboek vol III adv 17. See § 2.4.2 supra.

\textsuperscript{158} ‘Als ‘er maar constere [blyken] van de goederen ofte interest, op de welke de Assurantie kan en mag slaan, wijders geen disputen by den Assuradeur mogen gemaakt te werden, ontrent de personen, voor de welke die Assurantie is gedaan, ofte de welke Eigenaars van de goederen soude mogen zijn, en mits dien kan ook niet in consideratie komen, nogte peremptoir zijn, de ordre, tot het doen van de Assurantie gegeven’.

\textsuperscript{159} Both were referred to in detail in § 2.4.4 supra. Here only the views expressed in them on the effect of the clause will be considered.
In terms of an opinion of 1698 an unnamed third party had no claim on the insurance but only the named insured who had concluded the insurance on his instructions as representative. The insurer could therefore set off a claim he had against latter against a claim on the policy. The third party, being unnamed, did not obtain any direct action against the insurers and was not actually a party to the contract, despite the fact that the insurance was ‘for whomever it may concern’ (‘of die het anders in ’t geheel of ten deele mogen aengaen’). Similarly, such third party was not liable for the premium on the policy but only the named insured, and even if the latter failed, the insurer could not claim the premium from the third party. While only the named insured had an action on the policy, he did not have to prove that he was the one interested in the goods and suffering the loss. Because of the presence of the clause in question, the opinion continued, to be able to claim on the policy it was sufficient for him to show that there was another, by whom he was instructed to insure, who had an interest and who bore a risk as far as the insured goods were concerned.

So, while it was irrelevant to the insurers insuring goods ‘for whom it may concern’ whose interest in those goods was covered and whose damage resulting from the loss or damage to the goods they had to compensate, only the named insured who had concluded the contract had an action on the policy. Any third party would have had to claim through him, not a very practical solution and one which, not surprisingly, did not go unchallenged for long.

In the very next year, 1699, another opinion expressed a different view. According to this opinion, in terms of an insurance ‘for whom it may concern’ an interested third party, even if not named in the policy, was a party to the insurance contract. No set-off was therefore possible between a debt owed to the third party by the insurer and a debt owed to the insurer by the named insured who had concluded the contract had an action on the policy. Any third party would have had to claim through him, not a very practical solution and one which, not surprisingly, did not go unchallenged for long.

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Apart from the fact, the opinion noted, that it was possible for a person acting on the instruction and with the authority of another to acquire rights and duties for such

160 See Barels Advysen vol 1 adv 17.

161 'B als Geassureerde [named insured] zou niet geadstringeerd wezen, om te bewyzen, dat hy juist praecise, zelfs in zyn privé risico moeste hebben gelopen en schade geleden [ie that he himself had an interest], maer dat het genoeg zoude zyn, om hem regt te geeven tot vordering, indien daer iemand anders, van wen hy was verzagt geworden, interest en risico zoude hebben gehad, het welk anders zo zeker niet zou hebben doorgegaen, indien daer van geene expresse stipulatie of gewag was gemaakt geweest'.

162 See Barels Advysen vol 1 adv 18.

163 '[A]lsso aan B [named insured] voor rekening van zodanige andere persoon of persoenen als het in het geheel of ten deele zoude mogen aengaen, niemand exempt, en mitsdien ook voor rekening en ten behoeve van zodanige Geinteresseerdens in het schip, waer van B ordre van deeze Assurantie zoude hebben'.
other as his principal,\textsuperscript{164} it was further also possible by a stipulation in a contract to procure an obligation in favour of a third party (‘\textit{dat men door beding te maeken een verbintenis ten behoeven van een derde kan verkregen}’). And the action the third party thus obtained, was a direct action.

The fact that the third party was unnamed also presented no obstacle, because it had become possible, the opinion explained, to stipulate for an unnamed and uncertain third party. Here the policy had insured the named insured (B) and whomever the insured ship may have concerned, and in so doing it covered not only the owner who had instructed the insurance but also uncertain persons who were or subsequently became interested in it.\textsuperscript{165} And this uncertainty did not vitiate the insurance, for in insurances such as this the insurers were not concerned with and did not rely on the identity of the insured,\textsuperscript{165} as long as they received their premium, which, the opinion pointed out, in Amsterdam had to be paid immediately in cash.

\subsection*{3.5 The Clause in Roman-Dutch Jurisprudence in the Eighteenth Century}

In the course of the eighteenth century, a number of decisions of the \textit{Hooge Raad} directly or indirectly touched on the clause insuring ‘for whom it may concern’ and shed further, albeit fragmented, light on its perceived legal effect.

In 1708 the defence raised by the insurer in a case before the \textit{Raad}\textsuperscript{167} was that the insured ship which had been lost did not belong to the named insured. Although the insured proved otherwise, the \textit{Raad} noted that even if he could not, it would have made no difference because of the presence in the insurance policy of the customary clause insuring not only the person concluding the insurance but all others whom the insured ship concerned.\textsuperscript{168}

\footnotesize{\textsuperscript{164} See again § 2.4.4 supra.}

\footnotesize{\textsuperscript{165} ‘\textit{D}aar mede in effecte geassureerd is geworden ten behoeven van den Reeder en Eigenaer van hetzelve schip, die aan B ordere zou hebben gegeeven, en alzo incertae personae, sed ex certis personis incertae, sub certa demonstratione’.

\textsuperscript{166} ‘\textit{D}e versekeringe niet dependeerd van de praeclise kennisse, welke de Assuradeur zoude hebben van den persoon, die verzekerd word’.

\textsuperscript{167} See Bynkershoek Observationes tumultuariae obs 380; \textit{idem Quaestiones juris privatil IV.3.}

\textsuperscript{168} ‘\textit{D}e Assurantie was geschied, gelyk die altyd gedaan word, niet alleen aan hem, die de Assurantie had laten doen, maar ook aan den genen, dien den zaak aangong’.

A similar defence was unsuccessfully relied on in another case three years later in 1711 (see Bynkershoek Observationes tumultuariae obs 779; \textit{idem Quaestiones juris privatil IV.4}). It appeared that the goods insured by the person named on the policy did in fact belong to her (this was the case of the female insured: see again ch IX § 1 n1 supra), but, even if it did not, the \textit{Raad} pointed out, the insurance was in every event for the named insured ‘of die het anders zou aangaan’. From this incidental remark it would appear that the view was that the clause obviated the need to prove that the person taking out the insurance and named on the policy as the insured, was the owner of the goods, ie, had an interest in the goods.
In 1717, though, the majority of the Raad appears to have accepted the defence that the named insured was not owner of the insured goods. The insurer argued that the insured goods did not belong to the named insured (M) but to his brother, 'zo wel van begin af, als door een transport, naderhand geschiedt', and the majority held in favour of the insurer. Bynkershoek disagreed. The brother, it appeared, had instructed M to conduct the proceedings against the insurer if and to the extent necessary. Although it was true that M had not commenced proceedings against the insurer in the name of his brother but in his own name, M had simply done so ex abundanti cautela. At any rate it was irrelevant, Bynkershoek stressed, whether M or his brother was the owner of the insured goods, because of the insurance being in favour of M or 'whom it may concern' ("want de Assurantie was ten behoeve van M geschied, of van hem dien het aangong").

It appears, though, that the view, although not yet unanimously accepted, tended towards accepting that the presence of the clause put it beyond doubt that the fact that the person concluding the insurance was not the owner of the goods insured, could not be relied upon by insurers.

In a case heard by the Hooge Raad in 1725, T had insured his goods in Middelburg for their carriage from Dublin in Ireland to Veer in Zeeland. He had concluded two policies and did not insert his name as insured in the clause insuring the goods 'for whom it may concern' ("ten behoeve van ..."). After receiving news that half of the goods that he was expecting had in fact not been consigned, T, at the request of M who also had goods in the same ship, gave or transferred ('geeft over') to the latter one of the policies on which the name of M was then inserted. The ship carrying the goods was captured by the enemy and M claimed from the insurers, eventually having to proceed against them before the Hooge Raad.

It was common cause between the parties that although the name of T did not appear on the policies, the insurances, as a whole and from their inception, concerned him and his goods. But M argued that since the goods were not specified but the insurance was merely on consigned goods, irrespective of their nature ('op ingeladen Koopmanschappen, sonder onderscheid van wat natuur daeelve zoude mogen wezen'), the insurance could be transferred ('getransporteert') to him because it was a policy in blank. Furthermore, he argued that by permitting the insertion of the clause, the insurers had indicated that it was irrelevant to them whether the insured goods belonged to T or to himself. The insurers, in turn, argued that there was legally a difference between the obligation in blank ('een Obligatie op een open naam') here and a policy in blank ('een police op een open naam') because in the former case it was

169 See Bynkershoek Observationes tumultuariae obs 1353; idem Quaestiones juris privati IV.7.

170 The same point had, of course, already been made much earlier without any reliance on the clause. See again the views of the Italian insurance lawyers referred to § 3.2 supra.

171 See Bynkershoek Observationes tumultuariae obs 2185; idem Quaestiones juris privati IV.12.

172 This space was left blank.
merely not stated whom the debtor (insurer) was to pay although the insurance did (unlike in the case of the latter type of insurance) insure certain goods only, namely those of the person for whom the insurance was concluded. Without their knowledge, they said, the insurance could not be transferred to other goods not contemplated at the conclusion of the contract. Further, they argued, although it was common practice for such policies to be transferred ('het wel gebruiklik is, dat diergelyke Policen getransporteert worden'), it always involved a transfer of the right of the person in whose favour the goods were insured and not the substitution of a new person (and, it may be added, of a new object of risk) which would cause too many irregularities.

Although the Raad held for insurers, its views on the particular points taken by them were not noted in Bynkershoek's account of the decision.

It would appear, though, that the decision implied the following. Although the clause meant that the insurance covered also others, apart from the named insured, who had, or who acquired before loss, an interest in the insured goods, it did not mean that the insurance was transferable to other goods, even if such transfer was apparently possible because such other goods came within the description (if any) of the insured goods in the policy, even if they were goods on the same ship and even if, as a result, it involved no increase in the risk of the insurers. For such a transfer, the specific consent of the insurers was required, and such consent was not included in the consent which was contained in the clause. Of course, on a close reading of the clause, this result appears justifiable. Insurance 'for whom it may concern' included only those who were in fact concerned by it, that is, by the insured property, and not those concerned by other property.

From the mid-eighteenth century there was a series of decisions of the Hooge Raad relevant to the clause which were reported by Pauw. They may briefly be referred to here.

In the first decision, from 1745, an insurer under a policy covering a named insured and 'whom it may concern' sought to recover from the named insured the

\[\text{173} \text{ Thus, had T here transferred his goods to M, or had the goods in any event belonged to M, the latter would have succeeded with his claim because of the presence of the clause. See again the opinion of 1669 (Nederlands advysboek vol II adv 120) discussed in § 2.4.3 at n56 supra for the position in such a case where the policy did not contain the clause in question.}

\text{Schorer Aantekeningen 425 (ad III.24.6) n20 appears to have confused the case where a person in T's position insured goods for more than his share in them and then transferred the insurance to the co-owner of those goods, and the case here where T transferred the excess of insurance on his goods to the owner of other goods. Likewise eg Weskett Digest 432 sv 'property and proprietor', who neither drew this distinction nor recognised or referred to the effect of the clause itself.}

\[\text{174} \text{ Thus, the clause did not contain any consent to the transfer of the insurance to a different interest or property.}

\[\text{175} \text{ See further also Dorhout Mees Verzekering 23-25.}

\[\text{176} \text{ See Pauw Observationes vol I obs 148.}
compensation he had paid to the latter on the ground that it was not due.\textsuperscript{177} The named insured argued that the payment had to be recovered from his principal who had instructed him to insure because he had received the payment from the insurer simply as a representative, a fact of which the insurer himself was aware at the time. The insurance, although for himself and ‘for whom it may concern’, was in actual fact only ‘for whom it may concern’. In reply the insurer pointed out that the status of the named insured was not described on the policy as being merely a representative.

The Raad, by a majority, held for the insurer. The clause, it thought, was merely intended to relieve a claimant on the policy from having to prove that the named insured himself had suffered a loss by the loss of or damage to the insured property. Pauw himself thought that the decision was only fair: just as the insurer could not refuse payment to the named insured because he was merely a representative, so too the latter could not on that ground refuse to return the payment he had received. Thus, being the named party to the contract and, as would later be said,\textsuperscript{178} the insured in the first place, the named insured remained liable to the insurer for the return of any undue payment on the policy.

In the second decision, delivered in 1748,\textsuperscript{179} the interest of the claimant and named insured in the insured ship was disputed but in fact found by the Raad to have been proven. Pauw then discussed what the position would have been if this had in fact not been proven. He thought, with reference to his father-in-law,\textsuperscript{180} that even then the insurers would still have been liable because the insurance was in fact, as was the common practice (‘ut semper tieri solet’), not only for the person who had concluded it but also for whomever the insured property may have concerned (‘non tantum ei qui assecurationem curaverat, sed et ei ad quem ea res pertineret’).

In 1760 the clause insuring ‘for whom it may concern’ again received attention from the Hooge Raad,\textsuperscript{181} this time in connection with the insurance of enemy property.\textsuperscript{182} At issue was whether a qualification of neutrality added to the policy applied to the named insured, to unnamed third parties, or to both. The Raad held it applied only to unnamed third parties. As to the clause itself, it thought that the named insured was merely the person insured in the first place. The clause merely meant that in the case of

\textsuperscript{177} On the instructions of C, a French merchant and the consignor of brandy (‘230 groote oxhoofden brandewijn’) destined for Amsterdam who had also endorsed and sent the bills of lading on the brandy to him, S insured the consignment in Amsterdam ‘aan S, of die ’t anders in ’t geheel of ten deele zoude moogen aangaan’. When the ship on which the brandy had been loaded, did not arrive, S claimed for a loss and was paid out by the insurer. Subsequently it appeared, though, that the brandy had in fact never been shipped and one of the insurers sought to recover the amount he had paid out with the condicio indebiti.

\textsuperscript{178} In the Hooge Raad decision of 1760 which will be considered shortly.

\textsuperscript{179} See Pauw Observationes vol I obs 251.

\textsuperscript{180} See Bynkershoek Quaestiones juris privati IV.1.

\textsuperscript{181} See Pauw Observationes vol II obs 750.

\textsuperscript{182} See again ch VIII § 5.3.3 supra where this and the next decision were discussed in that context.
loss or damage it was sufficient if that was proved in general and it was not necessary, as was already apparent from the earlier decision in 1745, to prove that the named insured had in fact suffered loss ('si forte damnum factum sit, sufficit illud in genera probari, nec necesse sit probari passum illud cui nominatim assecuratio facta est') before the insurer could be held liable.

In a decision in 1763 the named insured who had concluded the insurance was Dutch but the actual owners were French. The majority of the Raad thought that insurers insuring property 'for whom it may concern' could not subsequently refuse a claim by arguing that they would not have concluded the insurance had they known who the actual owners or parties interested in the insured property were.

Finally, an Amsterdam opinion delivered in the last decade of the eighteenth century shed some further light on the effect of the clause and the practices surrounding it. In the opinion, dating from 1790, lawyers, merchants and bankers were of the view that a consignee of goods who refused to accept delivery and to pay for goods upon their arrival, could not be taken, as against the consignor, to have accepted or approved of those goods simply because he had insured them earlier. He had insured the goods on the understanding that they were of the type and quality he had ordered, and he did so to cover himself against loss should they be of that type and quality but be damaged or lost in their carriage. It was not necessary for a person insuring goods to be the owner of those goods and neither did someone who insured them, hold himself out as the owner. One could insure goods, the opinion went on, not only for oneself but also for another, whether as the latter's representative or mandatary or even as a negotiorum gestor. For this reason insurance policies commonly insured in favour of the person concluding the insurance or of whomever it may concern ('ten behoeve van de persoon, welke de assurantie laat doen, of wie het anders mogt aangaan'). By this clause one could in effect insure for whomever it turned out the insured property concerned, whether that be the named insured who had taken out the policy himself or someone else. Therefore, the fact that a person insured goods was not conclusive proof of the fact that he did so for his own benefit or account, nor of any intention that such person considered or held himself out as the owner of the goods. Such a person was accordingly not bound to accept those goods for that reason alone. The prudent step of insuring goods was not in conflict but perfectly compatible with the consignee's right to reject the goods.

To conclude. Although the clause insuring 'for whom it may concern' was recognised in Roman-Dutch insurance legislation and was considered on numerous occasions by the courts and in legal opinions, it is readily apparent that its theoretical basis was never pertinently identified and analysed. The reason for this was that the legal

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183 See Pauw Observationes vol II obs 867.

184 Casus positien vol I cas 16.

185 Thus, a consignee could insure goods for the consignor, in so far as it should turn out that the consignment only concerned the latter. This would be the case, it may be added, where the consignee could validly reject the goods for not being in accordance with the agreed contract (of sale) between himself and the consignor.
notion by which it could most properly be explained, the stipulation in favour of a third party, was not yet sufficiently familiar to Dutch lawyers to have permitted such identification and analysis.

3.6 Conclusion: The Stipulation in Favour of a Third Party in the Insurance Law

The legal status in Roman-Dutch law of the stipulation in favour of a third party (stipulatio alteri) was under-developed and uncertain, again as a result of the received Roman law. In the latter system the rule was that a person could not obtain direct benefits from, nor be bound by a contract to which he was not a party: alteri stipulari nemo potest, or nemo promittere potest pro altero. It was the same rule, in fact, which also prevented the recognition of direct representation in Roman law. Although from classical times and thereafter an increasing number of exceptions to this rule came to be recognised, at the beginning of the seventeenth century it was still in principle adhered to in Roman-Dutch law. The validity of a stipulation in favour of a third party was not generally recognised, at least not where the third party had not authorised or mandated the conclusion of the contract in his favour.

Because of the needs and usages of commerce, though, Roman-Dutch lawyers began to recognise the validity of such stipulations, and recognised that a third party could acquire rights from a stipulation between a promissee (stipulans) and a promissor (promitens) by accepting, expressly or tacitly, the promise (promissio) from the latter. The third party could accept the promise and thus acquire the right unless the promissor revoked the promise before such acceptance. The third party therefore did not directly and automatically acquire rights from or become a party to the agreement between the stipulator and the promissor, but his legal right arose from a legal relationship created between himself and the promissor, something which was in turn made possible by the agreement between the latter and the promissee.

The proximity of this legal figure to both authorised agency and unauthorised agency is obvious. They were, not surprisingly, not clearly and in principle distinguished in the Roman-Dutch sources, also not in insurance-related materials, even

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186 See generally eg Lee Introduction 249-251; Wessels History 583-585; and Zimmermann 34-45.

187 See again § 2.3 supra.

188 Where the principal, who was in a position comparable to that of the third party in the case of the stipulation in favour of a third party, became a party to the contract concluded by the agent on his behalf with a third party (who was the equivalent of the promissor in the stipulation in favour of a third party) and with the agent then dropping out of the picture.

189 Or negotiorum gestio, where the third party could have claimed from the dominus or ‘principal’ any benefit the latter may have received by reason of the contract concluded between himself and the gestor.
after the validity of genuine contracts or stipulations in favour of a third party came to be recognised in that system.190

It is not surprising, therefore, that the link between the clause insuring ‘for whom it may concern’ and the stipulation in favour of a third party was never pertinently accepted nor comprehensively and coherently explained in the Roman-Dutch sources. Although the clause was widely used in practice and obviously regarded as beneficial to the parties to an insurance contract, and that despite the fact that many uncertainties existed which on occasion gave rise to legal disputes, legal theory for all intents and purposes ignored it and made no attempt to explain it in terms of general principles.

As should be apparent from the preceding discussion of the effect of the clause ‘for whom it may concern’, its legal effect in Roman-Dutch law was characterised by a large measure of casuistry and very little by way of identification of general principles. That this was so should not surprise, given that the legal figure most appropriate to explaining the effect and basis of the clause, the stipulation in favour of the third party, was itself not yet fully analysed in the sources. For that reason, too, the clause was more often than not considered against the background of the contract of mandate.

For this reason it would appear, for example, that the right of a third party to proceed on the insurance contract in his own name directly against the insurer was not yet recognised. Only the named insured as the contracting party could claim on the policy.191

At most the sources established a number of isolated points192. It was recognised, firstly, that the clause made it possible for an insurance to be effected in the name of the authorised representative without having to disclose the name or identity of the third-party principal and owner of the property, that it made a valid insurance possible by a person not authorised by such an owner, and that it made insurance possible for future interested parties whose identity was not known even to the named insured at time of the conclusion of the insurance.193 Secondly, it was recognised that the clause

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190 As Lee Introduction 343-345 notes, Roman-Dutch law authors generally failed to distinguish between the case where A contracted with B in the name of C intending to constitute a contractual relation between B and C (ie, agency and ratification), and the separate case where A and B by a contract between themselves conferred some benefit on C (the stipulation for the benefit of a third party). Also, it may be added, they failed to distinguished the further case where A, without the authority of C, contracted with B with the intention of managing the affairs of C.

191 And, in turn, the named insured was and remained liable on the contract as against the insurer for the payment of the premium as well as for any return of an insurance payment which may have turned out not to have been due. See Dorhout Mees Verzekering 68-69 for a discussion of the procedural point that ‘de contractant-verzekerde was outlijds de eenige persoon die mocht procedeer en, immers hij had het contract gesloten’. The relationships between mandatary-insured, mandator-insured and the insurer are discussed in detail by eg Fromberg 14-26.

192 See also the conclusions of Dorhout Mees Verzekering 25-29.

193 Where, in the latter case, the named insured was not also the owner but had concluded the insurance without authority, it was conceivable that there was strictly no adherence to the duty to mention in the policy and prove the instructions to insure as was required by eg s 2 of the Amsterdam keur of 1744 in cases where the name of the carrying ship and her master were not known (see again ch VIII § 4.2.6 supra). This would often have been the case where the goods were insured for an unnamed third party whose identity was not yet known to the contracting party at the time of the conclusion of the contract. Thus, while the insurance laws required an indication of the name of the true insured only in the case of
made insurance possible not only where the named insured who concluded the insurance was the owner but also where he was not the owner, the reason being that the named insured did not have to be or have to prove that he was the owner of or even otherwise interested in the property insured. This was facilitated by the fact that policies were expressly made payable to order. Lastly, it was recognised that the clause made possible the extension of insurance cover not only to others who were interested in the insured property at the time of the insurance but also to those to whom such property was subsequently transferred, even, it would appear, after a loss.

But how, then, could insurance ‘for whom it may concern’ most appropriately have been explained in Roman-Dutch law with reference to the legal notion of a stipulation in favour of a third party? A few remark on this in passing will have to suffice.

Insurance ‘for whom it may concern’ was insurance in the name of the person who concluded the contract in favour of himself as well as, or only in favour of a third party who was either then interested in the property insured or, if not, who would later become so interested. Insurance ‘for whom it may concern’ amounted to an agreement in terms of which the insurer promised to pay either the named and con-

an insurance on goods to be carried on unnamed ships, it seems that the clause may in such cases have undermined that duty.

194 It seems that although in Roman-Dutch law the practical effect of this may have been to relieve the claimant of the burden of having to prove that he or the person for whom he claimed had any interest in the insured property, this effect was not recognised by the law which still required proof of the existence of an interest, whether of the named or of an (any) unnamed insured. It still had to be proved that someone had suffered loss as a result of the loss of or damage to the property insured: see again art 24 of the Antwerp Compilatae referred to in § 2.4.2 n56 supra, and see further Dorhout Mees Schadeverzekeringsrecht 144.

195 See § 4 infra.

196 That is, insurance ‘for whom it may concern’ covered every interest coming within the description of the risk (such being described eg with reference to particular goods, loaded on a named ship, for a specified voyage, etc). Put differently, insurance ‘for whom it may concern’ followed the interest. However, it did not make possible the transfer of insurance cover to other property, ie, the insurance could not as a result of the clause be transferred to another interest than that insured.

197 See further eg Dorhout Mees Schadeverzekeringsrecht 124-125, 127-128 and 143-160: idem Verzekering 67 (the clause insuring ‘for whom it may concern’ is an example of the stipulation in favour of a third party in the context of insurance; ‘het beding ten behoeve van een derde [is] de enige bekende rechtsvorm ... waarmee de verzekering voor wien het aangaat kan worden vergeleken en waarvan deze een toepassing is te noemen’).

198 No other party would then be interested, at least not as owner, if, at time of conclusion of the contract, the property insured belonged to the person taking out the insurance. Therefore, the person concluding the insurance may (also) have been (an) interested party or he may not. The latter may have been the case either because he acted for another (and never had any interest) or because he transferred his interest (to such other) at the time of the loss.
tracting insured himself or a third party who was then already interested in the property insured, as well as whosoever would later become an interested party.  

Because it occurred in the name of the person taking out the insurance, insurance in favour of a third party was distinguishable from insurance concluded by a representative or mandatary in the name of his principal or mandator. And because the third party obtained rights against and obligations towards the insurer without the agreement having been contracted in his name, his position as against the insurer could not have been explained with reference to agency or mandate. Nevertheless, such insurance could have come into existence with or without the authority or mandate of the third party. The relationship between the person taking out the insurance and the third party insured was either one of authorised agency or mandate or one of unauthorised negotiorum gestio. The nature of the legal relationship arising between the third party insured and the insurer was one of insurance, and it arose by virtue of the stipulation in favour of that third party in the insurance contract, concluded between the named insured or person taking out the (original) insurance and the insurer. The presence of a clause insuring 'for whom it may concern' in an insurance contract established the intention of the parties to that contract to provide a benefit, and more specifically insurance cover, to named or even unnamed third parties coming within the description in the clause, that is, third parties having an interest in the property being insured.  

4 \hspace{1cm} \textbf{Order and Bearer Policies in Roman-Dutch Law}

It has already been indicated\textsuperscript{200} that the model policy forms prescribed by or appended to the various Roman-Dutch insurance laws provided for insurers in the event of loss to make payment on the insurance contract either to the insured or to the bearer of the policy, or to the insured or his order. Apparently Antwerp policies in the sixteenth century were typically made payable to order so as to facilitate the payment of the insured through his representative. It was even possible for the policy to have been endorsed and delivered to a creditor of the insured as security for a debt, possibly owed in connection with the insured property.\textsuperscript{201} Policies were even made payable to bearer, despite the problems that gave rise to

\textsuperscript{199} According to Dorhout Mees Verzekering 68, the clause was thus 'een beding hetzij ten behoeve van den contractant, hetzij ten behoeve van een anderen tegenwoordigen of toekomstigen belanghebbende'. It therefore conferred an entitlement to compensation on anyone who could prove an interest in the insured goods, including a person to whom the interest had only been transferred after the loss of or damage to those goods.  

\textsuperscript{200} See § 3.3 supra.  

\textsuperscript{201} See generally eg Mullens 33-34; Trenery 270 (in the fifteenth century in Flanders, Insurance policies could be made payable to order or not, as was required).
where the policy was lost.\textsuperscript{202}

But generally bearer policies were the exception. Only the earliest policies in terms of the \textit{placcaat} of 1563 and that of 1571, and the ransom policies in terms of the Amsterdam \textit{keuren} of 1688, 1744 and 1775, were payable to the insured or to bearer.\textsuperscript{203} All the other model policies provided for payment to the insured or his representative.\textsuperscript{204}

The legislative recognition of insurance policies as order policies occurred, at least in later times, in addition to the fact that those policies insured 'for whom it may concern'. The question now arises what the effect was in Roman-Dutch law of an insurance policy being an order policy, or for that matter a bearer policy.

Unfortunately the Roman-Dutch sources provide not a single hint in this regard. For an elucidation one has, of necessity, to turn to secondary sources.\textsuperscript{205}

The fact that a policy insuring a named insured or one 'whom it may concern' was payable to the named insured or order, meant that the insurer had to make payment either to the named insured, or to another interested party, or to the person who, by endorsement of the policy in his name and subsequent delivery of it to him, was indicated as the order of insured, or (in the case of a bearer policy) to the person who, as a result of mere delivery of the policy, was the bearer.

It seems that the fact that the policy was made payable to order or bearer had no influence upon the question whether the insurance was for the named insured's own account or for that of another. In terms of such a payment clause in the policy, the insured, whether he was the named contracting insured or an unnamed third-party insured, was permitted either to receive payment himself or to have another receive it. Such other person was indicated by way of an endorsement together with delivery (in the case of a policy made payable to order) or merely by way of delivery (in the case of a policy made payable to bearer). To be able to claim, such order or bearer, however, still had to prove not only the occurrence of loss or damage but also that the insured, named or unnamed, had suffered loss and thus had an interest at the time of the loss.

\textsuperscript{202} See De Groote \textit{Zeeverzekering} 208; \textit{idem} \textit{Zeeassurantie} 114-118.

The practice of insuring policies in blank (ie, of omitting the name of the insured effecting the insurance or of the person on whose account or for whose benefit the insurance was effected) was specifically prohibited in England by legislation in 1785 and 1788 (see again ch VIII § 4.2.9 supra) which required that the name of the person 'interested' in the insured property, or, 'instead thereof', the name of the consignor or consignee of the goods to be insured, the name of the person residing in Great Britain who had received the order to effect the insurance, or the name of the person who gave such order, be inserted in insurance policies. As to the position in Roman-Dutch law, see again ch VII § 4.2.7 supra as well as the insurer's argument in the 1725 \textit{Hooge Raad} case referred to in § 3.5 supra.

\textsuperscript{203} Presumably ransom policies were bearer policies because the insured, being held captive, was not in a position to endorse it.

\textsuperscript{204} Thus, the hull and goods policies in terms of the Amsterdam \textit{keuren} of 1598, 1688, 1744 and 1775, and those in terms of the Rotterdam \textit{keur} of 1721. Also in terms of the Ancona policy of 1567, discussed by Straccha \textit{De assecurationibus} XXIII and XXXII, insurers were liable to pay the insured '\textit{vel mandatario eius} or '\textit{sive cul illae mandaverit}'.

\textsuperscript{205} In particular Stoop 27-73.
or damage. This could but did not necessarily have to mean that the order or bearer had to prove his own loss or interest. That was the case only when the insurance was concluded for the account of ‘whom it may concern’ and it appeared that the order or bearer was also the insured at the time of loss or damage.

Therefore, the insurer undertook to pay the sum owed to the insured to his order or to the bearer, that is, to indemnify the insured, by a payment to order or bearer, for a loss the insured had suffered and not, it must be stressed, for a loss the order or bearer had suffered, unless he also happened to be the insured. It is therefore clear that the order or bearer clauses only operated after the insured has suffered loss or damage and that they had no effect on the identity of the insured. The person indicated to receive payment did not thereby become the insured.\footnote{206}

But what then was the relationship between insurance for the account of whom it may concern and insurance payable to order or bearer?\footnote{207}

Insurance ‘for whom it may concern’ permitted the named insured, when he transferred his interest in insured property to another, to substitute the latter as insured.\footnote{208} But a clause providing for payment to order or bearer, which in Roman-Dutch insurance practice occurred in an insurance policy together with the clause insuring ‘for whom it may concern’, did not serve to indicate or identify the insured

\footnote{206}{The payment clause must therefore be distinguished from a clause in terms of which the insurer in effect undertook to insure or indemnify the named insured or his order or bearer, or simply the bearer (in the case of a pure bearer policy with no name at all on the policy) of the policy, against the loss such insured or such order or bearer may have suffered. In the latter case, by endorsement and delivery, or by delivery alone, the order or bearer became the insured and could claim on the policy. Such a clause could have served to permit the appointment of another person in the place of the named insured as a new insured and was intended to operate prior to the occurrence of the loss or damage. However, for the order or bearer then to claim on the policy, such order or bearer must have suffered loss or damage, ie, must have had an interest in the property insured by the policy. Accordingly, the order could claim as insured only if the policy had been endorsed and delivered to him and if he had an interest in the property covered by the policy. And the bearer could claim as insured only if he had the policy in his possession and if he had such an interest in the property concerned. As to these clauses, see also Dorhout Mees Schadeverzekeringsrecht 157-158. It would appear that clauses of this nature were not known to Roman-Dutch law.}

\footnote{207}{See Stoop 74-85.}

\footnote{208}{This was possible also where the insurance covered the insured or order or where it covered the bearer. Thus, a policy with a clause insuring ‘X or whom it may concern’ had the same effect as one insuring (as opposed to one merely providing for payment to) ‘X or order’, or ‘X or bearer’, or ‘bearer’. Like the interested party in the case of the clause insuring ‘for whom it may concern’, the order or bearer had to prove his own interest in order to be able to claim on the policy. Of course, in the case of an insurance ‘for whom it may concern’, the transfer of the insurance cover to another interested party occurred automatically while in the case of an insurance of an (interested) order or bearer, delivery and endorsement of the policy were also required. Another difference was that the bearer of a policy was not defeated by defences (eg non-disclosure or fraud) aimed at the person taking out the insurance or others. See further Dorhout Mees Verzekering 75-77 and also Burgers 33-34 for the similarities and differences between a bearer policy and a policy insuring ‘for whom it may concern’. Possibly it was because they would have had the same practical effect as a policy with a clause insuring ‘for whom it may concern’, but required an additional action on the part of the original contracting party, that these clauses insuring an order or bearer appear to have been unknown in Roman-Dutch insurance practice.}
whose loss was to be compensated but merely the person entitled to receive the payment due to the insured. This clause made it possible for an insured to achieve the same result as he could have achieved by a transfer of his right of action on the policy to another, that is, by a cession of his claim against the insurer.


Another way in which a third party could in appropriate circumstances obtain rights in terms of an insurance contract was by the transfer or cession of the insured's right or rights in terms of such contract. Again hampered by the confusing state of the received Roman law of cession, the cession of rights in Roman-Dutch law was not always theoretically clearly understood or explained.\(^{209}\)

Nevertheless, the needs of practice resulted in the recognition of cession as involving a transfer of rights which were regarded as incorporeal things, akin to a transfer of the ownership of a corporeal thing. The person to whom the right had been transferred (the cessionary) was regarded as the only person having the right to sue the debtor and to do so solely by virtue of his agreement with the cedent-creditor who had transferred that right to him.

Also in the insurance context it was recognised in Roman-Dutch law that rights arising from the insurance contract, most commonly those of the insured, could be transferred by way of cession to a third party, giving the latter a right of action against the insurer. Unfortunately, as will appear from sources which will be referred to shortly, the transfer of rights under insurance contracts was not always clearly distinguished from the 'transfer' of the insurance contract\(^ {210}\) itself\(^ {211}\) where the consent of the insurer concerned was required for the transfer to be effective.

The cession of a right in terms of an insurance contract was on occasion statutorily recognised and even compelled in the insurance context. For example, in terms of the amendment in 1756 of s 25 of the Amsterdam kaur of 1744 which concerned solvency reinsurance,\(^ {212}\) the insured was permitted to conclude a new insurance on giving notice to the first insurer and further on ceding to the second or new insurer his right and action against the first insurer ('en wyders aan den tweede Verzekeraar te cedeeren zodanig regt en Actis, als hem [ie, the insured] ten laste van den eerste Assuradeur ... zal worden bevonden daugdelyk te competeren').

However, this was not the classic cession situation where the insured's right against the insurer was transferred to a third party. In this case the noticeable aspect was that it was a cession of the insured's right against a third party to the insurer, and it was merely incidental that the third party was (also) an insurer and that the ceded right

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\(^{209}\) See generally eg Zimmermann 58-67.

\(^{210}\) Or, the transfer of the insurance cover in terms of the insurance contract.

\(^{211}\) That is, the transfer of the rights and obligations in terms of the contract by way of novation.

\(^{212}\) See again ch VII § 4.1 supra.
was therefore against an insurer. There are many other examples in Roman-Dutch law of the compulsory cession of the insured’s right against third parties to his insurer.213

The cession of the insured’s right against his insurer to a third party was also on occasion recognised, though. For example, in the case of an insurance of goods which were subsequently burdened by a bottomry loan, the borrowing owner was by s 21 of the Amsterdam keur of 1744 obliged to transfer or cede his right in terms of the policy to the lender or holder of the bottomry bond (‘sal den Opneemer van ‘t geld het regt van deselve Police, ofte verseekeringe aan de houder der Bodemerye, by overwysinge moeten transporteeren’).214

Apart from such legislatively compelled cession, it seems that an insured was free to transfer his rights against his insurers as he saw fit. Such transfer or cession occurred validly by way of an agreement between the cedent (insured) and the cessionary (third party), without either the consent or the knowledge of the insurer. Although most commonly occurring after the occurrence of loss, a cession of action could also validly be made before the occurrence of loss.

However, the right so being transferred was that of the cedent-insured to be compensated by the insurer for the loss he, and not the cessionary, had suffered, so that the cessionary could obtain no greater rights against the insurer than the cedent in fact had. In consequence, if the cedent had, or acquired, no unconditional rights to such compensation against the insurer,215 the cessionary himself had no claim against the insurer. Likewise, if the cedent’s insurance contract was invalid, no rights could by cession be transferred to a cessionary.216

The transfer of insured property, accompanied by a cession of the rights in terms of the insurance contract covering that property, was also considered in Roman-Dutch law.

In a case where insured property was transferred, the Hooge Raad decided in 1605 that an insurance contract conferred no real right to the insured property upon the insurer which could be enforced as against either the insured transferor or the trans-

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213 Such a compulsory cession was the Roman-Dutch equivalent of subrogation. See further ch XIX § 1 infra where the matter is dealt with in further detail.

214 See again ch V § 5.5.3 supra.

215 Such as where the cedent never suffered any loss because the property insured had not in fact been lost or damaged at all, or because, if it did, the cedent had prior to the occurrence of such loss or damage transferred the property to another, such as to the cessionary.

216 This appears also from the opinion of 1669 (Nederlands advysboek vol II adv 120) already referred to in § 2.4.3 supra. There the insured sought to transfer the excess of his insurance to another (it is unclear whether there was a cession of action strictly speaking or a transfer of his contract, although the application of the principle currently under discussion remains the same). The opinion made the point that such insurance, invalid as to the excess by reason of over-insurance, was not by such transfer alone (ie, without the consent of the insurer) rendered valid so as to give the transferee any rights, even if the latter was an interested person (‘soo blijft het evenwel zeker en ontwijfelbaar dat deze Assurantie die eens invalide, van geender waarde, en t’eenemaal zonder effect was, by succes van tijl, of de zelve overdoening, en dat buiten consent van de [insurer] niet valide of bestendig worden zoude’).
feree for the payment of the premium. The insurance contract merely gave rise to a personal action for payment of the premium, but whether that was enforceable by the insurer against the insured transferor or against the transferee, depended, according to Bynkershoek on the following threefold distinction which, unfortunately, is not in all respects easily explicable.

First, if the insured had made a simple transfer of the insured property ('een eenvoudig Transport gedaan') to the third party, such transfer rendered the insurance invalid ('de assurantie door dat transport vernietigt zyn') because not only could the third party transferee not claim ('ageer') on the contract to which he was not a party, but the insured transferor himself could not claim because after the transfer he too had no further interest ('geen interest meer heeft') in the insured property. But while the insurance contract was regarded by Bynkershoek as a purely personal contract and while the transfer of the insured property alone did not also transfer the insurance cover on that property, it appears, though, that where the insured property passed by operation of law, the insurance cover too automatically passed to the transferee.

Secondly, however, if the insured had transferred the insured property together with all the rights that he had in respect of it ('met al het Recht dat hy 'er op heeft'), and thus also with his right of action against the insurers, then, according to Bynkershoek, the transferee could in the case of loss claim from the insurer.

217 See Hollandsche consulta
tien vol I cons 282 and ch XI § 5.1 infra as to the nature of the claim for payment of the premium.

218 Quaestiones juris privati IV.2.

219 See also the opinion of 1669 (Nederlands advysboek vol II adv 120, discussed in § 2.4.3 supra) from which it appears that in the absence of an intention to act and thus to insure for another, a person contracting insurance in his own name and for his own benefit could not have acquired any rights on the contract for a third person and the insurance he had concluded could, for example, not subsequently in full or in part be transferred to another person. Put simply, the insurance contract was not automatically transferable to another. The transfer of the invalid excess of an over-insurance was not revived nor validated by the transfer of the insurance. And even the transfer of a valid insurance was void. For that reason, too, there was also no personal action against or by the transferee in the opinion of 1605 just referred to.

220 See Enschedé 36.

221 That, at least, was the view of Roccus De assecurationibus note 61 who thought that the insured's right of action on his insurance policy on general legal principles passed to his heirs, who could claim from the insurers, even if no mention had been made in the insurance policy of such heirs.

222 That is, if he transferred the property insured and also ceded the right under the relevant insurance contract.

223 However, this would not seem correct, at least not if, as would appear to have been the case, Bynkershoek had in mind the case where the insured transferred his right in terms of the insurance policy (ie, a cession). In such a case the insured, having transferred the property, would no longer have suffered any loss by the subsequent loss of or damage to that property and would therefore no longer have had any enforceable action against the insurer which he could have transferred to the third party. It would only be correct, it would seem, if the insured had transferred the insurance contract itself (ie, an
Thirdly, Bynkershoek thought that the transferee also\(^{224}\) had a right of action if, before he transferred the insured property, he had insured such property for the benefit of the transferee too ("zelf het Schip en de Lading aan G\(^{225}\) geassureert heeft"), for then the insured held the insurers bound to himself and he remained liable for the payment of the premium.

A final matter. It was also possible for an insured to cede to a third party his rights against his representative concerning the insurance contract as opposed to his rights against the insurer on the contract.

Thus, in a case before the Hooge Raad in 1726,\(^{226}\) Amsterdam merchants who had acted as correspondents and who had been instructed to conclude insurances on behalf of Augsburg merchants and had stood surety for the financial ability of the underwriters,\(^{227}\) refused to claim on the policies after the occurrence of a loss. The Augsburgers thereupon transferred their action against their representatives based on the latter’s undertaking of suretyship to another Amsterdam merchant, T ("transporteeren aan T, ook een Amsterdammer, hunne Actie tegen de Commis­sionarissen"). The latter then instituted action against the correspondents before the Amsterdam Schepenen Bench where he was unsuccessful as he was also in the Hof van Holland, resulting in a further appeal to the Hooge Raad. There an objection was raised to T’s locus standi ("eenige qualiteiten ... die zich T aanmatigde").\(^{228}\) The Raad dismissed those objections and held that T, as cessionary, had the necessary right and locus standi to bring the action ("dewyl hy [T], als hebbende Actionem cessam, te recht ageerde en die qualiteit alleen genoeg was").

6 The Involvement of Third Parties in the Insurance Contract in Terms of the Wetboek van Koophandel

The regulation of insurance for another in the Dutch Wetboek van Koophandel\(^{229}\) gives a clear indication of the ancestry of its relevant provisions.

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\(^{224}\) This should probably be ‘only’ and not ‘also’.

\(^{225}\) The third-party transferee.

\(^{226}\) See Bynkershoek Observationes tumultuariae obs 2242; idem Quaestiones juris privati IV.13.

\(^{227}\) See again ch IX § 2.9.2.2 n261 supra as to the assuradeur-delcredere.

\(^{228}\) Apparently it was uncertain whether he had a cession of action or merely a simple procuration, which was relevant in the light of the fact that the Augsburg merchants had in the meantime gone insolvent.

\(^{229}\) See generally Caarten 72-74; Dorthout Mees Schadeverzekeringsrecht 124-125 and 147-148; idem Verzekering 51-82; Faber Aanteekeningen 45-48; and Vijn 15-18.
There is no mention of insurance ‘for whom it may concern’ in the Wetboek but it does provide for insurance for a third party (in arts 264-267) and for the transfer of insurance (in art 263).

Firstly, then, insurance for another or for a third party.

Article 264 provides that an insurance may be concluded not only for one’s own account but also for that of a third party, either by virtue of a general or a specific mandate or authority, or even without the knowledge of the interested party. Such insurance is, however, subject to certain provisions.

Article 266, in recognising the need in practice for confidentiality, provides that all policies must contain either the name of the person concluding the insurance for his own account, or the name of the person concluding the insurance for the account of a third person. But while the name of the third party need therefore not be mentioned, the name of the person concluding the insurance must be mentioned. Put differently, the parties to contract must be known.

Also, in terms of art 267, if no mention is made in the policy of the fact that the insurance is concluded for the account of a third party, the insured (that is, the person concluding the contract) is regarded as having concluded the insurance for himself. Such mention occurs by the insertion of a clause in the policy insuring ‘for whom it may concern’. Further, where insurance is concluded in favour of a third party, art 265 requires that it must further be mentioned expressly in the policy (so that the insurer will be aware of it) whether the insurance occurs by virtue of a mandate (‘lastgeving’) or without the knowledge of the interested party.

230 In art 657 there is mention of insurance ‘for unspecified account’ (‘voor onbepaside rekening’) which would appear to be same as insurance ‘for the account of whom it may concern’.

231 The person who insures for himself or the person for whose account an insurance is concluded (‘voor wiens rekening door een ander is verzekerd’) must have the required interest at the time of the insurance (art 250).

232 In terms of art 262, a person who receives a mandate from another to have insurance effected and retains such insurance for his own account (ie, he does not insure with another but bears the risk himself), is taken to be an insurer on the terms on which he was instructed to insure (‘die aan hem opgegevene voorwaarden’), and failing such instructed terms, on such terms upon which he could have concluded the insurance at the place where he had to perform the mandate, and if this place is not indicated, at his place of residence or on the nearest Bourse.

233 However, if the person who has concluded an insurance for another does so without expressing such other’s name on the policy (as is entitled to do), art 662-2 provides that he cannot recover the premium on the ground that the interested party did not consign the goods or consigned a lesser amount. As to the recoverability of premiums, see ch XI § 6 infra.

234 Thus, a clause not insuring ‘X or whom it may concern’ but merely insuring ‘whom it may concern’ is not permissible.

235 So that if he has no interest, the insurance is void and cannot cover the interest of a third party.
third party.\textsuperscript{236} Again the presence of the clause insuring ‘for whom it may concern’ obviates the need for such information because, by inserting the clause, the insurers in fact indicate that that fact is irrelevant to them. Lastly, in terms of art 266, an insurance without a mandate and without the knowledge of the interested party is void if and to the extent that the same object was insured by such interested party, or by another on his instruction, before the time when he received notice of the insurance concluded without his knowledge.

In summary, the Wetboek van Koophandel recognises insurance for the account of another or for the benefit of a third party as valid,\textsuperscript{237} as long as the insurer can ascertain from the policy, and is thus apprised of the fact, that the interested party is not the contracting party and as long as it is indicated whether or not the insurance is concluded on the instruction of the third party. By the insertion of a clause insuring ‘for whom it may concern’, the insurer waives his right to be informed of these matters and specific compliance with arts 256-2, 265, and 267 is therefore rendered unnecessary.

In this regard the clause insuring ‘for whom it may concern’ was but an application of the general principle of a stipulation in favour of a third party provided for in art 1353 of the now repealed Dutch Civil Code of 1838, that is, a stipulation in an insurance contract of cover either for the contracting insured or for an interested third party.

Secondly, the Wetboek also makes provision for the transfer of the insured property or object of risk.

Article 263-1 provides that in the event of a sale (by which risk is transferred) or any transfer of the ownership in insured objects ('verzekerde voorwerpen'), the

\textsuperscript{236} It should be noted that it is not a requirement that the name of the person on whose mandate the insurance is concluded, or for whom it is concluded without any mandate, be mentioned on the policy. Failure so to mention the nature of the insurance will, it seems, as in the case of art 267, result in the insurance being regarded as having been concluded for the named insured himself. And if the latter has no interest, the insurance will be void in terms of art 250.

\textsuperscript{237} English law too recognises insurance for another. Thus, in terms of s 14(2) of the Marine Insurance Act of 1906, a person having a limited interest in the subject-matter insured may insure on behalf and for the benefit of other persons interested in the subject-matter as well as for his own benefit. This is usually done in terms of the standard policy insuring the named insured and 'all and every other person to whom the same doth, may or shall appertain'. However, only the interests of such persons are covered as the person concluding the insurance intended should be covered, ie, only those he had in mind or had foreseen. In terms of the clause everyone who during the currency of the risk and at the time of loss has an interest in the insured property, and for whose account the insurance was in good faith intended, can claim the benefit of the insurance. In this connection the intention of the person who concludes the insurance is determinant, and an intention to insure an interest other than his own is never presumed. But in the absence of the clause, proof of such intention is not even permissible, for then only the contracting party can be the insured.

Although it is also possible that the interested person may insure only for his own benefit, s 14 does not concern the case where an uninterested person insures for another. That occurs in English law on the ordinary principles of agency. And even where the person concluding the insurance is not authorised, ratification is possible. Thus, s 86 of the Marine Insurance Act provides that where the contract of marine insurance is concluded in good faith by one person on behalf of another, the person on whose behalf it is affected may ratify the contract even after he has become aware of the loss.

In terms of s 23(1), a marine policy must specify either the name of the insured or of some person who effects the insurance on his behalf. As to the prohibition on policies in blank or to bearer policies in English law, see again ch VIII § 4.2.9 supra. The nature of the interest need not be specified (see s 26(2)).
insurance continues for the benefit and account of the buyer or new owner, even without any transfer of the insurance in question, in respect of loss or damage occurring after the passing of risk to the buyer or new owner, unless the contrary was agreed upon between the insurer and the original insured. Interest and insurance therefore now follow the object insured, and unless otherwise agreed between the insurer and the insured, a transfer of the insured object results in a transfer of the insurance cover existing on that object.\textsuperscript{238} Such transfer occurs automatically and no act of transfer or intention to transfer on the part of any of the parties is necessary, nor the consent or concurrence of the transferee,\textsuperscript{239} nor the consent of the insurer, the conclusion of a new insurance contract, or the issue of new insurance policy. It must be noted, though, that the automatic transfer of the insurance cover in terms of art 263 occurs only where, prior to the loss, the risk in the object insured is transferred, for example by virtue of a sale. There is no transfer of cover if the risk is not transferred and also no such transfer after loss. Then a cession of action is required.

Article 263 and the principle that the insurance follows the interest in the object insured, was a break with the earlier system and had no antecedent in Roman-Dutch law, the notion first appearing in the draft Wetboek of 1825. In Roman-Dutch law insurance was regarded as not transferable without the consent of the insurer. But the same end result could and was in Roman-Dutch practice achieved by the insertion of an appropriate clause (insuring ‘for whom it may concern’) in the insurance contract by which the insurance cover was stipulated, with the consent of the insurer,\textsuperscript{240} for the benefit also of interested third parties generally. In effect, art 263 embodies a statutory stipulation in favour of a third party and is merely an application of the general provisions in this regard in the then art 1353 of the Dutch Civil Code of the time.\textsuperscript{241} Article 263 provides what the parties to the insurance contract expressly had to agree to earlier in Roman-Dutch law, and the presence in the contract now of such a clause (insur-

\textsuperscript{238} See generally eg Burgers 2-3, 35, 43 (where he explains that the automatic transfer in terms of art 263 is not subrogation (which is the stepping in the place of another in respect of latter’s claim against a third party), nor cession (which is based on agreement)) and 45; Dorhout Mees Schadeverzekeringsrecht 133-134, 142-143; idem Verzekering 53-56; Enschedé 109; and Faber Aanteekeningen 43-44.

\textsuperscript{239} However, the transferee is entitled to refuse or to reject the insurance cover. In terms of art 263-2, if at the time of the sale or transfer of ownership the buyer or new owner refuses to take over the insurance (as he entitled to do, because it occurs automatically), and the original insured still retains an interest in the insured object, the insurance continues in his favour to that extent (‘blijft ... in ... zijn voordeel loopen’).

\textsuperscript{240} This consent was a blanket consent - all or unnamed third parties - and anticipatory - granted in the contract prior to any transfer - rather than individual and \textit{ex post facto} consent.

\textsuperscript{241} Whereas in the context of arts 265 and 267 the clause insuring ‘for whom it may concern’ is a stipulation either for the contracting insured or for an interested third party, in the context of art 263 it is a stipulation for both the contracting insured and of possible third-party successors to his interest. See Dorhout Mees Verzekering 67.
The Involvement of Third Parties

The automatic transfer of insurance cover, as well as the view that the insurance contract is not a personal contract, are typical of Dutch insurance law. In terms of English law, for example, an express or implied agreement between transferor and transferee is required, and the endorsement or delivery of the policy is customary.

However, in terms of the clause the parties can achieve more than occurs automatically in terms of art 263. For example, it seems that the clause extends insurance to non-owner transferees and also transfers occurring after a loss; art 263 does so only to certain transferees (in case of a sale) and operates only before a loss.

In practice such automatic transfer will be excluded by an insurer in instances where the identity of the insured is still considered relevant to the risk because of the fact that the insured is physically in control of the insured property, e.g., in fire insurances (see further e.g., Dorhout Mees Verzekering 76). But in the case of the insurance of goods carried by sea, where the identity of the insured is irrelevant since he is not in actual or at least not in continuous possession and control of the goods, the automatic transfer will not be excluded, just as in Roman-Dutch law it was in those instances that a clause insuring for whom it may concern was inserted.

In terms of s 15 of the Marine Insurance Act of 1906, where the insured assigns or otherwise parts with his interest in the subject-matter insured, he does not thereby transfer to the assignee his rights under the contract of insurance, unless there is an express or implied agreement with the assignee to that effect (e.g., in the contract of sale for the subject-matter insured, the clause insuring for whom it may concern being insufficient). Thus, the mere transfer of the insured interest is insufficient to transfer the rights under the insurance policy on that interest. In fact, the interest having been transferred, the policy is taken to lapse.

The automatic transfer of insurance occurs only (and this is retained and recognised by s 15) when the interest is transferred by the operation of law, e.g., on the death or insolvency of the insured. See generally e.g., Buys 27; Chalmers 21.

But English law does recognise the possibility of assigning the marine insurance policy itself so as to confer the benefit of the insurance upon a person subsequently interested in the subject-matter insured. In terms of the Marine Insurance Act a marine policy, unlike a non-marine policy, is in principle assignable without the insurer's consent unless, as usually occurs in the case of hull and freight policies, it contains express terms prohibiting such assignment. And being a thing of personal or choses in action, the policy may be assigned before or after loss (see s 50(1)). As a result, the clause insuring 'for whom it may concern' has, as far as the transfer of an interest during the currency of the insurance is concerned, lost all its relevance. The presence of a clause insuring 'for whom it may concern' is therefore not required for the insurance cover to be transferred to another. English texts in fact pay little attention to the clause and obviously do not consider it in terms of the stipulation in favour of a third party which is unknown to the Common Law.

The marine policy is in English law assigned by endorsement or in any other customary manner, such as by mere delivery (s 50(2)), but the parties must be able to establish that the delivery of the policy was intended to be an assignment. And while the assignee may sue in his own name on the assigned policy, the insurer is entitled to raise against him any defence arising out of contract which he would have been able to raise had the action been brought in the name of the person by whom or on whose behalf the contract was concluded.

In terms of s 51, however, an insured who has no interest in the subject-matter insured or who has lost (otherwise than by a loss of the subject-matter) his interest at the time he agreed to assign the policy (e.g., where he assigned his interest without earlier or at the same time assigning the policy), cannot validly thereafter assign the policy on that subject-matter. But differently, the assignee of the policy must be a simultaneous or prior assignee of the subject-matter which that policy insures.
7 Insurance Brokers

7.1 Introduction

Although not a party to the insurance contract, the insurance broker, of all those involved as specialists in the insurance business generally and with insurance contracts specifically, played such a cardinal intermediary role between insured and insurer that his legal position deserves separate consideration.

By the nature of the broker's involvement, a number of topics in which he featured have already been covered or will still be discussed at a later stage. Those topics will therefore not be treated here but some may, for the sake of convenience, just be mentioned again. They include the role of the broker as insurer and as guarantor of another specialist involved in the insurance business was the loss or average adjuster or dispacheur. Already in the sixteenth century in Antwerp, adjusters were employed in the event of a shipwreck or other marine losses to determine the nature (general or particular: see again ch I § 4.6.3 supra) and extent or quantum of the loss or damage suffered and expense incurred, to ascertain the value of the interests involved in the maritime adventure, and to apportion loss and expenditure over those interests by drawing up an average adjustment or dispache. The earliest adjusters there were notaries while the local consuls of foreign nations in Antwerp made up apportionments in certain cases involving their nationals, eg in the case of goods originating in their country. The oldest extant example of an Antwerp average adjustment is one in Spanish (rotulo de averias) dating from 1535. From the mid-sixteenth century, persons were appointed by merchants with as their main task the drawing up of adjustments and the assisting of inexperienced (part-time) and often innumerate if not illiterate underwriters in apportioning and assessing losses. From 1566 the Antwerp city magistrate permitted adjusters appointed by Antwerp merchants to act as such on the local boruse. In later times the adjuster was increasingly involved only when some form of dispute arose between the parties involved. However, the adjustment of average was not required by law for an insured to succeed in his claim on an insurance policy and adjusters did not in this regard exercise any official judicial function but acted in terms of and derived their powers purely from an agreement between the interests involved. With the establishment of Insurance chambers in the various centres, the functions of the adjuster were taken over by the Commissioners and their deputies who adjusted averages and settled disputes arising from them. See generally De Groote 'Zeeverzekerlng' 216; idem Zeeassurantie 1311 and 143-148.

In England too adjusters (or calculators) came at a later stage to be employed more regularly to assess marine losses, settle insurance claims and claims for the return of premiums, and salvage issues. In Lewis v Rucker (1761) 2 Burr 1167, 97 ER 769 (at 1172, 772), eg, Lord Mansfield referred to the assistance he had obtained 'by conversing with some gentlemen of experience in adjustments'. The early adjusters probably only acted as such on a part-time basis. Two of the earliest professional marine average adjusters, it would appear, were William (Wilhelm) Benecke (a German born merchant-underwriter and author of System des See-Asseskuranz- und Bodmerei-wesens 5 vols (1807-1821), English translation (1824)), and Robert Stevens (author of An Essay on Average and on Other Subjects Connected with the Contract of Marine Insurance (1813)), both of whom practised in London at the beginning of the nineteenth century. See further Cato Carter 2-4. Adjusters were also employed in the fire business where they were known as loss adjusters.

As opposed to adjusters, surveyors or assessors carried out physical inspections to determine the value and the extent of damage of insured property on behalf of (in particular fire) insurers. See eg Cockerell & Green 20; Cato Carter 4, 16 and 28; and Jenkins 27.

245 Another specialist involved in the insurance business was the loss or average adjuster or dispacheur. Already in the sixteenth century in Antwerp, adjusters were employed in the event of a shipwreck or other marine losses to determine the nature (general or particular: see again ch I § 4.6.3 supra) and extent or quantum of the loss or damage suffered and expense incurred, to ascertain the value of the interests involved in the maritime adventure, and to apportion loss and expenditure over those interests by drawing up an average adjustment or dispache. The earliest adjusters there were notaries while the local consuls of foreign nations in Antwerp made up apportionments in certain cases involving their nationals, eg in the case of goods originating in their country. The oldest extant example of an Antwerp average adjustment is one in Spanish (rotulo de averias) dating from 1535. From the mid-sixteenth century, persons were appointed by merchants with as their main task the drawing up of adjustments and the assisting of inexperienced (part-time) and often innumerate if not illiterate underwriters in apportioning and assessing losses. From 1566 the Antwerp city magistrate permitted adjusters appointed by Antwerp merchants to act as such on the local Bourse. In later times the adjuster was increasingly involved only when some form of dispute arose between the parties involved. However, the adjustment of average was not required by law for an insured to succeed in his claim on an insurance policy and adjusters did not in this regard exercise any official judicial function but acted in terms of and derived their powers purely from an agreement between the interests involved. With the establishment of Insurance chambers in the various centres, the functions of the adjuster were taken over by the Commissioners and their deputies who adjusted averages and settled disputes arising from them. See generally De Groote 'Zeeverzekerlng' 216; idem Zeeassurantie 1311 and 143-148.

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246 The main sources on the position of the insurance broker in Roman-Dutch law are Scholten; Vergouwen; and Vijn. On the history of Amsterdam brokerage generally, see Stuart.

247 See ch IX § 1 supra.
the insurer,248 and the role of the broker in the payment of the premium.249 In this section particular attention will be paid to the role of the broker in the conclusion of the insurance contract,250 as well as to his role in the performance of that contract.251

Like those of the underwriter, the nature and status of the insurance broker too underwent a gradual change in the course of time. In essence this involved a process of increasing specialisation culminating in the emergence of the professional insurance broker. This development went accompanied by the regulation of the broking profession and by a distinction between official and unofficial brokers.

In one sense the insurance broker became more important as time went by and as the insurance contract became more sophisticated. Brokers became the instruments through which the authorities sought to exercise control over the content of insurance contracts and to ensure compliance with insurance laws generally. At first they attempted to do so through public officials such as the Commissioners of the Insurance Registration Office.252 Later private insurance brokers in many respects replaced and took over the functions of these official institutions of control which, as has been shown, largely failed. Bynkershoek,253 for example, noted in respect of brokers that 'hun werk nu byna eenerley is, met dat van den Commis Generaal der Assurantien in vroegere tyden'.

In a different respect, though, the insurance broker's role diminished in the course of time as the nature and status of the underwriter changed. With the emergence of the professional underwriter, and the greater sophistication in insurance underwriting practices and in insurance law, the broker and his specialised knowledge, as opposed to his intermediating services, became less important. As more specialised and, in London especially, more organised underwriters emerged and replaced the incidental, ignorant and broker-dependent merchant-underwriter, the personal power and unofficial dominance of the insurance broker on the market were quietly eclipsed.254 The emergence of standardised insurance contracts and underwriting pro-

248 See ch IX § 2.9.2.2 supra.

249 See ch XI § 4 infra.

250 Some of these matters have already been touched on in ch VIII § 3 supra when the formalities pertaining to (ie, the drafting, registration and stamping of) insurance policies were discussed.

251 Some of the matters relevant in this regard (eg the giving of notices of loss and abandonment and the rendering of payment in terms of the insurance contract) will be considered in greater detail in § 7.4 infra.

252 See ch IV § 1.3.2 and ch VIII § 3.3 supra. For example, Ferufini's proposal for the establishment of a registration bureau for insurance policies in Antwerp involved the exclusion of private insurance brokers (who, according to him, aided and abetted the insured in defrauding insurers) and their replacement by four official brokers. See Couvreur 'Zeeverzeekeringstraject' 206.

253 Quaestiones juris privatl IV.26.

254 See Sutherland 58 and 62 who notes, though, that neither the underwriters nor the brokers were sufficiently specialised or exclusive to be in opposing camps and to have done without the other.
casures no doubt had a similar effect on the relationship between underwriter and broker.

But, of course, the broker never lost his importance for the insured. With the gradual disappearance of the incidental merchant-underwriter, merchants became even more unfamiliar with the technicalities of insurance generally and, especially but not only if they were foreigners, with the practices and conditions on the local insurance market more specifically.\textsuperscript{255} Insured continued, not only for reasons of convenience but also as a sound business practice, to make use of the services of and to instruct intermediaries and representatives, including brokers, to act on their behalf. The insurance broker was, as has been indicated, legally regarded as a type of mandatory \textit{(lasthebber)} of the insured.\textsuperscript{258} Brokers were employed both to facilitate the conclusion of the insurance contract with several co-underwriters\textsuperscript{257} and also in the process to select those underwriters whose reputation and financial position were sound. As time went by and insurance practices became more sophisticated, underwriters more specialised, and corporate underwriting more prevalent, merchants increasingly trusted and relied upon their brokers in this regard. Not surprisingly, merchants who required insurance for their ships and cargoes were advised to obtain the services of a well-known and competent broker to ensure not only the validity of their insurance contract but also to avoid disputes with their underwriters.\textsuperscript{258}

The legal position of insurance and other brokers in the Netherlands was governed by the relevant general principles of law as well as, more specifically, by the provisions contained in various legislative promulgations.\textsuperscript{259} The Roman-Dutch authors in their treatment of insurance also mentioned the broker, although mostly in passing and without any great detail.\textsuperscript{260}

As far as legislation was concerned, there was, in the first place, insurance legislation which contained measures directly or indirectly concerning and referring to

\textsuperscript{255} See eg Vijn 6-8.

\textsuperscript{256} See eg Mullens 42; Vijn 11 and again § 2.3 n19 supra. In English law the relationship between broker and insured was less precisely described by Westkett \textit{Digest} 61-68 sv 'broker' at 65 par 8 as that the broker was employed by the insured and dealt with the insurer as attorney for his principal.

\textsuperscript{257} That is, to seek out merchant-underwriters who were willing to underwrite the risk, which was quite a task in an uncentralised market, and especially difficult if a large risk had to be underwritten on a small market.

\textsuperscript{258} See eg L'Espine/Le Long \textit{Koophandel} 41 who noted the importance of the policy being drafted correctly so as to avoid disputes with insurers in the event of loss: "\textit{Dierhalve doet de geene, die iets wil laatien verzekeren, best, daartoe een bekendt en welbedreven maakelaar te gebruiken, die de saaken in den grondt verstaar, vermits de Ordonnantie van Assurantie niet ayt, en in allen deelen na de Letter worden opgevolgt, maar veele Costuymen plaats hebben}".

\textsuperscript{259} See generally as to the sources and materials, Kohler 'Handelsrecht' 289-292; Lichtenauer \textit{Geschiedenis} 158-160; Scholten 1-8; and Vergouwen 32-38.

\textsuperscript{260} See eg Van der Keessel \textit{Theses selectae} th 728 (ad III.24.6); idem \textit{Praelectiones} 1446-1447 (ad III.24.6) as to the duties of the insurance broker or '\textit{officium proxenetae ad procurandam assecurationem}'.
insurance brokers. The earliest insurance measures in the Netherlands, unlike earlier ones in Barcelona for example, did not specifically mention brokers although it is apparent from the model policy form provided in title VII of the plackaat of 1563 that their role was recognised. The plackaat of 1571 contained but one section, s B, in which the broker was specifically mentioned. In the later municipal keuren, though, brokers were more frequently referred to as more and more official duties came to be imposed upon them.

In the second place there was also decentralised, municipal legislation concerning brokers generally which, although of little direct relevance to the rights and duties of the broker in the context of insurance as such, on occasion also mentioned insurance brokers or brokers and insurance specifically. The first to do so was the Amsterdam keur of 27 January 1612, the Ordonnantie van de Makelaers,261 a general measure regulating the position of brokers in Amsterdam which was frequently amended in subsequent years.262 But there were also many others, in Amsterdam and elsewhere.263 Although all the provisions of such legislation were also applicable to brokers in insurance, a few did make specific mention of insurance brokers. These provisions will be mentioned where relevant in the discussion which follows but the general provisions will not be considered here pertinently.

In the Wetboek van Koophandel too, the position of insurance brokers continued to be governed both by the provisions dealing with brokers generally264 and by those dealing with insurance brokers specifically.265

7.2 Authorised and Unauthorised Brokers: Regulation and General Background on Insurance Brokers in the Netherlands

As with many other professions, the various legislatures in the Netherlands also sought to regulate the broking profession in an attempt not only to eliminate fraud and other undesirable practices, but also to ensure that brokers to whom various public functions were entrusted, were capable and trustworthy. In this regard a distinction came to be drawn between sworn or authorised brokers on the one hand, and, on the other hand, unauthorised brokers (beunhase; bijloopers). Only authorised brokers, who had to meet particular requirements as to for example citizenship and experience, could lawfully function and be employed as brokers, while unsworn, unauthorised brokers were continuously prohibited from acting as such in certain specified branches

261 See Amsterdam Handvesten vol IV at 1060.

262 For example by the keur of 17 January 1613 (see Amsterdam Handvesten vol IV at 1062).

263 See eg the Amsterdam keuren on brokers of 16 March 1530, 22 August 1531, 5 May 1533, 19 November 1539, 15 December 1563, 28 October 1578, 26 January 1579, 25 October 1580, 31 January 1581, 31 January 1587, 31 January 1746. In Rotterdam there were keuren on the topic in 1504, 1632, 1643, 1662, 1719 and 1780. See generally Vergouwen 77-78, 84-85, 88-89 and 94.

264 Articles 65-71.

265 Articles 681-685. On the Wetboek and brokers, see generally eg Van Renays 372-375.
of commerce. Only authorised brokers, including authorised insurance brokers, could lawfully fulfil the dual role as private intermediaries between merchants and as public officials. Nevertheless, it appears that the authorities waged a fairly hopeless war upon unauthorised broking (beunhazerij) which flourished for the very reason that unauthorised brokers were not subject to the numerous, onerous and expensive obligations legislatively imposed upon authorised brokers. Furthermore, it appears that there were never enough authorised brokers to meet the demand for broking services on the various markets.266

After having prohibited broking earlier, the Amsterdam keuren on brokers of 1530 and 1531 respectively permitted and regulated the activities of sworn brokers. They contained no reference to insurance broking yet. In the keur of 1539 various measures were taken to discourage the employment of unauthorised brokers. The brokers’ keur of 1580, amongst other matters, repeated the prohibition on brokers participating in the trade directly or indirectly connected to the branch in which they were involved as brokers, and the keur of 1581 prohibited brokers from forming associations with other brokers.

The Amsterdam brokers’ keur of 1612 provided in s 1 that no one could in any way conduct any brokerage in the city, in any one of a large number of activities then listed, including insurance (‘Assuurantie’), without being a local citizen and without being permitted to act as such.267 Even stronger were the provisions in s 26 of the Amsterdam brokers’ keur of 1678 which determined that all contracts, including all insurance policies (‘alle Polissen van Assuurantie’), concluded through an unauthorised broker would be null and void.

Similarly, s 38 of the Amsterdam brokers’ keur of 1746 expressly prohibited persons not sworn in as brokers from doing any brokering, in whatever merchandise or in respect of whatever matters, nothing excluded. Section 22 of this keur ordered brokers to conclude contracts personally and not to use their employees, but an exception was made in this regard in the case of insurance contracts.268

In the Wetboek van Koophandel, too, following the earlier Roman-Dutch example, recognition was only given to authorised brokers in art 64.269

266 See Scholten 9-10 for details of the legislative measures mentioned below. See also further Enschedé 167; Spooner 22; Stuart passim; and Vergouwen 52-53 and 84.

267 ‘[N]iemand hem sal vervorderen eenige Makelaardye binnen deser Stede oft hare Vryheyt te onderwinden, doen ofte exerceren in eeniger manieren, ’t zij in Koopmanschap, Wissel, Assuurantie, Depositio, ... sonder eerst ende al voren te zyn Poorter ende Burger deser Stede, ende daer toe by den Burgemeesteren geadmitteert ende bedeédight te zyn’. A monopoly was therefore granted to authorised brokers and unauthorised persons were prohibited from acting as brokers, including as brokers in insurance. In terms of s 9, brokers were not permitted to form associations (‘compagnie’) but had to act for their own account. And in terms of s 12 brokers were, in certain cases, specifically prohibited from broking bottomry loans.


Brokers were involved as intermediaries from the appearance of the first insurance contracts in the modern form in Italy in the fourteenth century. The oldest Italian insurance contracts were concluded through brokers. The broker drafted the provisional deed of the contract as proof of its conclusion while the final deed or policy was drafted by a notary. In 1434, in Genoa, there were already six firms of insurance brokers. The earliest insurance legislation also recognised and regulated the position and role of the insurance broker, and in the Florentine Insurance Ordinance of 1523 the use of an insurance broker was even made compulsory.  

Brokers were also from early on involved in the insurances concluded in the Low Countries. In an insurance dispute before the Schepenen Court of Bruges in 1469, reference was made to the insurance broker who had drafted the policy.  

In the sixteenth century in Antwerp, brokers rather than for example notaries acted as intermediaries in the conclusion of insurance contracts. But the broking profession was largely unregulated, with commercial customs prevailing. Apart from the fact that brokers were frequently inexperienced, many of their practices were considered unacceptable by Ferufini in his proposals for the establishment of a policy registration office in 1557. These included the fact that brokers concluded insurances which did not comply with legislative prescripts; that they amended, under the pretext of usages, the text of the customary policy by adding unusual clauses to meet their own requirements and those of the insured, insurers then underwriting such policies in good faith, thinking they had been drafted in the usual and customary form; that they retained insurance premiums received from the insured; and that they underwrote insurance policies in their own names as insurers or, even worse, that they falsified the signatures of others as underwriters. Ferufini proposed the compulsory registration of insurance policies (something which the authorities acceded to) and also sought to limit the number of insurance brokers by limiting insurance broking in Antwerp to four authorised ('gedeputeerde') brokers. This proposed monopoly was strongly opposed by the Antwerp merchant and broking community in 1557. They were in favour of freedom of trade and also thought the proposal would be to the detriment of confidentiality and secrecy on the Bourse. They also pointed out that the broker’s function was primarily one of obtaining subscriptions and not one of drafting the policy and that the majority of Antwerp brokers as a general practice merely accepted the policies prepared by the merchants seeking insurance which they then took around to have them underwritten on the Bourse. This part of Ferufini’s proposal was not accepted by the authorities.  

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270 See generally Möller. On the early history of the law of brokerage, see also eg Goldschmidt *Universalgeschichte* 250-254; Vergouwen 14-19.  
272 See Mullens 42; Vergouwen 22-24.  
273 See generally Couvreur ‘Zeeverzekeringspractijk’ 206; De Groote ‘Zeeverzekering’ 215; *idem* *Zeeassurantie* 66, 69 and 72. And see again ch IV § 1.3.2 and ch VIII § 3.3 *supra* for Ferufini’s proposals.
Probably one of most prolific insurance brokers in sixteenth century Antwerp was Juan Henriquez.\textsuperscript{274} He was so well known as an insurance broker that his name appeared as that of the person from whom the underwriters had received the premium on the model policy form prescribed in terms of the \textit{placcaat} of 1563, promulgated a little more than a month after his death. This was in fact the first allusion to a broker in insurance legislation in the Netherlands, the rest of title VII of the \textit{placcaat} of 1563 being silent on brokers. During the period 1 August 1562 to 24 September 1563, Henriquez was involved in the conclusion in Antwerp of 1,488 insurance policies for a gross amount of Flemish £568,185, an average of more than a 100 insurances per month.\textsuperscript{275}

In the seventeenth century the position of insurance brokers was increasingly recognised and hence secured in municipal legislation in the Northern Netherlands, as will be shown shortly. Amsterdam, being the largest commercial centre, also had the largest concentration of brokers of all kinds, including insurance brokers. Eleven brokers took the oath of office in 1531.\textsuperscript{276} Soon after the opening of the Bourse in 1611, their duties were set out in an \textit{Instructie voor de Makelaars} of 31 January 1613. At that time there were some 300 brokers active in the city, presumably both authorised and unauthorised ones. By 1645 there were 430 sworn brokers, 500 in 1657, and around 1720 the number of sworn brokers active had dropped to about 395 with between 700 and 800 unsworn brokers operating there. Of the total number of brokers active around 1720, 100 were engaged in the insurance business, with 250 to 300 being bill-brokers, 80 wine and brandy brokers, 100 stockbrokers and many shipping brokers. The number of authorised insurance brokers in Amsterdam gradually declined in the eighteenth century: there were only 30 of them in 1784 and in 1794 only 8.\textsuperscript{277}

From 1682 the number of sworn brokers in Rotterdam was statutorily limited to 38. The limitation was removed in 1719 but there was nevertheless no great increase and by the end of the eighteenth century there were only around 60 brokers in Rotterdam. Throughout that century there were never more than about a dozen of them active in insurance.\textsuperscript{278} Not surprisingly, the position of Rotterdam brokers was much less regulated legislatively than that of their Amsterdam counterparts, as will appear shortly.\textsuperscript{279}

\textsuperscript{274} Jan Enryques, b Bruges c1511, d Antwerp in September 1563. He moved to Antwerp in 1540.

\textsuperscript{275} As to Henriquez, see further De Grote Zeeassurantie 46n2 and 152-154; \textit{idem} 'Zeeverzekering' 216 and 217; and Vergouwen 24-25.. The work of Wastiels was unfortunately not available to me. Henriquez occasionally also acted as underwriter (see ch IX § 1.3 n53 \textit{supra}) and also went insolvent (see ch IX § 2.9.2.1 n248 \textit{supra}).

\textsuperscript{276} See generally Ter Gouw vol V at 420-422 on brokerange in Amsterdam in the mid-sixteenth century.

\textsuperscript{277} These figures were taken from Bloom 183; Klesselbach 44; Spooner 22-23; and Vergouwen 52.

\textsuperscript{278} See Gales & Gerwen 51; Vergouwen 96. The oldest Dutch firm of insurance brokers, R Mees & Zoonen, was established in Rotterdam in 1720 when it was known as Cordelois, De Vrijer & Mees. Other firms established there in the eighteenth century included those of Jan Havelaar & Zoon, Gebr Chabot & Co, and F & W van Dam.

\textsuperscript{279} See Vergouwen 82 and 94-95.
Although some Dutch brokers were probably mainly involved in insurance contracts, it seems that prior to the end of the eighteenth century very few were exclusively involved in insurances. Just as the early insurers were merchants who were involved in insurance but incidentally and part-time, so too the early brokers were insurance brokers only incidentally. Even those individuals or firms which were later known for their insurance broking, started out and continued to act also in other specialist fields and were brokers in property, ships, bills and commodities in addition to insurances. Thus, in 1784 of the 30 brokers active in insurance in Amsterdam only one was exclusively an insurance broker.

In London too brokers (broggars, brocars) were involved from the time when insurances were first concluded there. They were initially not specialist insurance brokers but general intermediaries in any one of a number of commercial and financial transactions. In 1574, there were 30 sworn brokers active in the city in negotiating insurances and other transactions between merchants. At that time they, together with the notaries, vehemently protested against the establishment of Candler’s proposed Insurance Registration Office which was to have a monopoly on the drafting, broking and registering of insurance policies. Despite the establishment of this Office in 1576 and the fact that its Clerk acted as a broker in getting insurances underwritten, private insurances continued to be concluded in London, no doubt through those brokers whose services and expertise were but one of the advantages of such private insurances over public insurances concluded through the Office. Nevertheless, it does appear that at the time London brokers were not involved in insurances to the extent of their counterparts on the Continent.

In the course of the next century this changed and by the beginning of the eighteenth century, brokers, commonly known as ‘office-keepers’, were involved and specialised to a greater extent in the English insurance business. Unlike underwriters at the time, they had offices from where they conducted their business and they became specialised much sooner than did the underwriters themselves, as a result of which many of them also on occasion readily acted as the underwriters of risks. In 1742 there were nearly 40 insurance brokers active in London. Still, like the underwriters, the brokers too did not as a rule specialise exclusively in insurance and continued to

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280 See Krans 13 ('kassier en makelaar in assurantiën en wissels en effecten') and also Hammacher 78.

281 Vergouwen 75.

282 On the history of insurance brokers in England, see eg Chapman 'Broker' 172; Cockerell 'Agency' 65-67; Gibb 18-19; Green; Holdsworth History vol VIII at 224-225 and 287n2; John 'London Assurance' 127, 129 and 131; Jones 'Elizabethan Marine Insurance' 62-63; and Sutherland 47-48, 55-64.

283 See again ch IV § 1.7 supra.

284 According to Green 1, surviving examples of insurances and insurance disputes in Admiralty and Chancery before the 1570’s show no sign of the involvement of brokers. Compared to French and Flemish policies throughout the sixteenth century, English policies were markedly informal agreements between merchants negotiated and concluded without the intervention of intermediaries.

285 See again ch IX § 1.3 supra.
negotiate other transactions as well. Insurance brokers were as a rule also shipbrokers, bottomry brokers and stockbrokers at the same time. Further, brokers had no monopoly on the placement of insurance business on the London market, and in 1810 it was estimated that more than half of all the marine business was in fact placed directly by merchants themselves. Nevertheless, brokers fulfilled an important function in what was then not yet a fully centralised and organised insurance market, not only in the placing of insurances but also in the settlement of claims. Brokers were at the height of their powers on the London market by the end of the eighteenth century, but their influence, if not their numbers, declined somewhat during the next century with the emergence of specialist underwriters and underwriting syndicates, corporate underwriting and agency. They remained, for the time being, exclusively involved in the marine business.

7.3 The Broker and the Conclusion of the Insurance Contract

It has already been explained how brokers played a cardinal role in the drafting and conclusion of insurance contracts. The system of the co-insurance of single risks by individual underwriters ensured that the services of brokers remained convenient if not indispensable in getting insurance policies underwritten. This remained the position even after underwriters came to congregate in a central location or locations. However, there was never any legal compulsion in Roman-Dutch law to employ a broker and parties were free to conclude their insurance contract directly without the intervention of one.

Brokers received instructions from merchants to insure ships and/or cargoes. For this purpose they may have drafted or at least have completed appropriate printed insurance contracts before taking them around the market for subscription. This central role in the conclusion of insurances made brokers eminently suitable as instruments of control through which the authorities could ensure compliance on the market with legislative prescriptions concerning the content and form of insurance contracts.

Firstly they were roped in to ensure the registration of insurance policies. In terms of s 8 of the Placcaat of 1571 certain duties were imposed on brokers in this regard. It was provided that all brokers and others who promoted or solicited insurances ('Maeckelaers ende andere de versectione vorderende oft soliciterende') were bound, within six days after the conclusion, execution or signing of the contract of insurance by the first underwriter, to present it for registration (in terms of s 7) at the Registration Office. In the event of a broker failing to have a policy registered, he was to pay a penalty three times the registration fee payable by the insured, of which one third each would go to the authorities, to the person bringing the failure to the attention of the authorities (the 'Aenbrenger'), and to the Commissioner of the Registration Office.

In 1836 there were 89 insurance brokers in London.

See again ch VIII § 3.3 supra.

See e.g. Goudsmit Zeerecht 26; De Groote Zeeassurantie 39; Kracht 26; and Vergouwen 26.
7.3 The Involvement of Third Parties

When it became apparent that the registration of insurance policies as a measure of control was not successful, it was dropped in the subsequent municipal keuren. Instead, a heavier duty was placed on brokers as far as the content of policies and their compliance with the various legislative measures were concerned.

7.3.1 The Broker’s Duty to Ensure Compliance with Insurance Legislation

Numerous municipal insurance keuren imposed a duty on the broker to ensure that the insurance contract he brokered complied with the provisions of that enactment. It is interesting to note, furthermore, that these legislative measures did not consider the (authorised) broker as the only possible person involved in the conclusion of insurance contracts. Mention was usually made of the broker and of other persons who facilitated and solicited the conclusion of the insurance contract. Possibly, at first, the intention was to make it clear that the provisions applied not only to those who were and could be called brokers by reason of their status and authority, but also to unauthorised intermediaries. In the eighteenth century, this wide description may have been retained to make it clear that the agents increasingly then in the employ of the newly formed insurance companies to canvass insurance applications, were also included in the relevant measures.

Section 19 of the Amsterdam keur of 1598 obliged all brokers and others encouraging or soliciting insurances to draft all policies in conformity with the keur, and to keep a verbatim (‘van woorde tot woorde’) record of everything written on the printed policy form by hand (‘mater hant of handen in der Police geschreven sal worden’). Any failure in this regard resulted in a forfeiture of his commission (‘verdiende salaris’), in a fine of four times that amount which was to go to the poor, and on top of that in a suspension or dismissal from office, depending on the circumstances. A related provision in s 6 of the Amsterdam brokers’ keur of 1612 provided that brokers were not permitted to take around or to have underwritten any policy (‘eenige Police om te dragen oft laten teekenen’) by which the jurisdiction of the Chamber of Insurance was excluded (‘waer mede de Camer van Asseurantie gesecludeert werd’). In the amendment of the keur in 1613, this prohibition was repeated, but it was now also prohibited

289 Except, apparently, in Middelburg where it was retained by s 10 of the keur of 1600: see again ch VIII § 3.3 supra.

290 See again ch VIII § 4.1.2 supra as to the prescribed form and content of insurance policies and see generally eg Van der Keessel Praelectiones 1446-1447 (ad III.24.6).

291 But more commonly only in the nineteenth century when non-commercial insurances came to be concluded on a larger scale.

292 See eg Enschedé 169; Scholten 10-11; and Vijn 25-26 who notes that the provisions in the Amsterdam insurance keuren were in this regard difficult to reconcile with the brokers’ keuren in force there which clearly prohibited unauthorised brokers from operating at all.

293 And also s 10 of the Middelburg keur of 1600.

294 See Goudsmit Zerecht 313; Vergouwen 38-46.
to take around or to have underwritten any policy in which any stipulation or renunciation was inserted in contravention of the insurance _keur_ of 1598. Additionally the earlier _lex imperfecta_ was remedied by the imposition of a fine of £25 for every non-compliance in this regard.\(^{295}\)

In terms of s 21 of the Rotterdam _keur_ of 1604, insurance brokers and others facilitating insurances between merchants ('_die de selve tusschen Kooplieden vor­deren_') had to draft all policies in conformity with the _keur_ and had to keep a complete ('_perfeckt_') register of all the insurances they were involved in. In that register they had to enter everything that the insured or insurers respectively added to the insurance policy. Failure in this duty resulted in a forfeiture of the broker's commission ('_salaris_') in favour of the insured, in a fine of four times that amount which was to be given to the poor, and also in their suspension or dismissal from office ('_suspensie ofte privatie van hunlieder Officie_') as the circumstances demanded.\(^{296}\)

In Amsterdam the earlier measures to ensure compliance with the provisions of the insurance laws through brokers proved to be insufficient. As a result the amending _keur_ of 1688 increased the duties of brokers in this regard because, as the Legislature noted, it was a frequent occurrence that brokers added their own innovations to printed policies ('by _na yder Makelaer iets nieuws is voor den dach brengende_') as a result of which merchants and insurers were obliged to read the printed as well as the written portions of every policy. But by the nature of things (or, as the _keur_ put it, 'de _menigvuldigheid der affaires ter Beurse_') this was hardly possible so that many frauds were committed and many contraventions of the insurance laws occurred. The use of certain prescribed policy forms was accordingly made compulsory, and it was provided that brokers who offered any different policies for underwriting would be punished by a fine of £50 for each such policy.\(^{297}\)

The Rotterdam _keur_ of 1721 too involved brokers in ensuring that insurance policies complied with its provisions.\(^{298}\) Section 76 prohibited brokers from employing any insurance policies other than those officially printed in accordance with the forms appended to the _keur_. Section 77 obliged them to sign the policies\(^{299}\) and s 78 com-

\(^{295}\) See Goudsmit _Zeerecht_ 314; Vergouwen 53-55.

\(^{296}\) See Vergouwen 78.

\(^{297}\) See _eg_ Goudsmit _Zeerecht_ 314; Vergouwen 41.

\(^{298}\) See generally _eg_ Mees _Gedenkschrift_ 16. The Middelburg amending _keur_ of 1719 did likewise by providing that the insurance _keur_ (of 1600) had to be observed by the local Chamber as well as by brokers in the conclusion of insurances and the drafting of policies ('_in het doen van Assurant/en en het dresseren harer pollcen_').

\(^{299}\) Although there was no similar provision in the Amsterdam insurance _keuren_, such signature was prescribed by s 26 of the Amsterdam brokers' _keur_ of 1678 and again by s 26 of the brokers' _keur_ of 1746. See Scholten 31. In Rotterdam the signatures of brokers were uniformly added (as appears from extant eighteenth-century policies) in the left-hand margin.

Although, according to De Groote 'Zeeverzekering' 212, the name of the broker was seldom mentioned in sixteenth-century Antwerp insurance policies, according to Antwerp customary law (art 59 of par 2, title 11, part IV of the _Compilatae_ of 1609: see De Longé vol IV at 224) brokers were required to properly verify, at the bottom of the policy underneath their signatures, each of the insurers whom they had seen underwriting the policy, on the day specified, and further had to confirm this under oath if so
 compelled them to keep a register ('een pertinent Register'), consisting of the full text of the printed policies, as well as the amendments and additions to each. Section 79 concerned brokers' failure to comply with the preceding three sections. It provided for a forfeiture of commission, for a fine of four times that amount, and, in the event of gross negligence and a suspicion of involvement in any fraud ('grove negligentie ende suspicie van participatie in eenig bedrog'), for the broker to be suspended or dismissed from his office or otherwise dealt with as with the circumstances of the case required.

In similar veins of the Amsterdam keur of 1744 compelled all brokers and others who facilitated or solicited ('vorderende, of besolliciteerende') insurances, to employ only official policy forms signed by the Secretary of the local Chamber, and to make a copy of everything they wrote on or added to such a policy, on penalty of forfeiting the commission they had earned, a fine of four times that amount and in addition such other penalty as the Court might find proper in the circumstances of the case. Section 39 expanded on brokers' duty to keep a register. They were obliged, at any time, to bring that register of the handwritten additions to policies to the Chamber when requested to do so and there to provide the interested parties with an authentic copy of the relevant entry, on penalty of incurring liability as against those parties for any losses suffered by them as a result of their failure to keep such a register.

In view of brokers' obligation to keep registers of the policies that they had brokered, it would appear that in Roman-Dutch law some evidentiary value was attached to the documents, registers and other books of authorised as opposed to unauthorised brokers. Although brokers' documents, unlike those of notaries, were not authenticated instruments or records which provided conclusive evidence, they nevertheless appear to have had greater evidentiary value than merchants' books (koopmansboeken) for example. However, it is not readily apparent to what extent this required. See Mullens 42 as to this verification by the broker of the signatures of the insurers and the dates of subscription.

Thus, as in terms of the keur of 1604, the register had to reflect verbatim whatever was added in handwriting to the prescribed printed policies. But now the full text of the printed policy as issued also had to appear there. According to Vergouwen 95, this extension of the original obligation may appear strange in the light of the fact that the keur contained a model policy form. But a record only of what had been added in writing to the printed form did not give a proper picture of the content of the policy, for certain stipulations in the printed form could have been deleted and that would not have been reflected in the register had the duty not been thus expanded.

See Goudsmite Zeerdecht 394; Kracht 35; and Weskett Digest 61-68 sv 'broker' at 66-67 par 13.

'Then allen tyde des gerequireerd zynde te Exhieeren te Kamer van Assurantie, om daar Copien authentieq ten behoeven van de Gaintresseerdaens te kunnen geeven'.

See Goudsmite Zeerdecht 353-356; Vergouwen 60; and Weskett Digest 61-68 sv 'broker' at 67 par 14.

And, as will be shown shortly, also of notices and other transactions performed in terms of such policies.
may have been the case with the documents of insurance brokers. Nevertheless, it would appear from the duties imposed on brokers to keep records in their registers, that the intention was that such registers were to have at least some evidentiary value of the transactions and the matters so recorded.

Article 681 of the Wetboek van Koophandel imposes very similar duties upon marine insurance brokers. Thus, in terms of sub-art 3, a broker is obliged to keep carefully in a special register a copy of the policies concluded by his intercession, and in terms of sub-art 6 he is obliged to give to the insured or the insurers, as often as requested by them at their expense, authenticated copies of the policies, notices, letters and notes mentioned in his register.

7.3.2 The Broker's Duty as Regards the Content of the Policy

Legislative measures prescribing the content of insurance policies and providing for the duty of the insured to mention certain matters in the policy usually declared a policy not containing the appropriate information void and the insurer relieved of any liability on it. But then, in some instances, it was specifically added that where the failure to disclose to the insurer, and to state the required information on the policy, was not

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305 There are conflicting views on this matter, referred to by Vergouwen 55-56, which would suggest that the position may well have depended on the circumstances of each case.

For example, in a decision before the Hoge Raad (see Bynkershoek Observationes tumultuariae obs 1950), a merchant claimed the purchase price of shares in the West India Company allegedly sold by him to a sworn broker. He applied for judgment, relying on the books of the broker. The latter denied the sale and relied on Voet Commentarius XXII.4.12 for the view that the books of a merchant could only prove the details of the sale and not the fact of the sale itself and that the books of a broker had no greater evidentiary value than those of merchants. The Raad agreed with the broker's argument. By contrast, Van Leeuwen Rooms-Holland's regt V.20.12, in a summary of those documents which provided complete proof, listed alongside public documents executed by the authorities or by notaries also the books of churches, those of merchants if supported by a judicial oath or the death of the author, and also the notes of sworn brokers. Van der Linden Koopmans handboek I.17.2 noted that merchants' books constituted perfect evidence against but not in favour of the author if properly kept and confirmed by the merchant under oath.

306 A more general duty upon brokers to keep records and to provide extracts from them is provided for in art 66 and 67 of the Wetboek. See further eg Schoiten 17-18 and 25-33 who notes that in terms of Roman-Dutch law a copy had to be kept only of the handwritten additions to printed, prescribed policies. (That, however, was only the position in Amsterdam, and not in Rotterdam in terms of the keur of 1721: see again n300 supra.) Van der Hovev 'Aanteekening' 74n1 states that some brokers had requested from the drafters of the Wetboek that they be required, as in the past, to note in their register merely what had been written in hand on the printed policy. But since the Wetboek does not provide any policy form and it is thus permissible to have a policy printed according to what the insured or insurer saw fit, such notes would have proved very little, and the Legislature therefore refused the request.

307 See again ch VIII §§ 4.2.3 and 4.2.4 supra.
the fault of the insured but that of the person drafting the policy, the insured would have a recourse against the latter in so far as the defect was his fault.308

Therefore, although it was not necessary that the policy be drafted or completed by a broker, if that was done, such broker incurred liability for any omissions and errors in the policy which defeated the insured’s claim against the insurer. Such liability was also provided for in respect of a failure by the broker in his duty to keep a register of the hand-written additions to printed policies.309

Although there appears to be no pertinent authority in this regard, these provisions may merely have been a statutory confirmation of the liability which the broker may in any case have incurred for a breach of his duty towards the insured in a case where, as result of his failure, the insured had no valid claim against the insurer on the insurance policy arranged by that broker.310

In one case before the *Hooge Raad* in 1711,311 where the insurer denied liability because a change had, strictly speaking, occurred from the voyage described in the policy,312 the insured argued that the particular description of the destination in the policy had been added through the fault or ignorance of the broker (‘door de schuld of onkunde van den Makelaar’). However, this point was not considered by the *Raad*, possibly because, even if the incorrect or defective description could be ascribed to the

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308 See eg s 5 of the placcaat of 1571; s 3 of the Amsterdam keur of 1598; and s 2 of the Amsterdam keur of 1744.

Wassenaer *Praktijk notariael* VIII.6 noted the nullity of the insurance and the absence of any claim by the insured against the insurer subject to the former’s recourse against the drafter of the contract (‘behouden den versekerde zijn verhaal op die gene het Instrument geschreven heeft, indien het by zijn schuid also geschreven is’); Van Zurck Codex Batavus sv ‘Assurantie’ par 13 (‘doch heeft de verzekerde verhaal op den insteller van ’t Schrift, zo ’t zijn verzuim is’). See too Vergouwen 42.

309 See s 39 of the Amsterdam keur of 1744.

310 Van der Keessel *Praelectiones* 1452-1453 (ad III.24.6), for example, noted that although the Rotterdam keuren did not contain similar provisions, it was only logical that the position there was the same as in Amsterdam. The measures in Rotterdam generally indicated, he pointed out, that an insured merchant could rely upon the greater experience and skill of the broker, and the latter’s inexperience had to be taken as a fault on his part in this regard. More pertinently, Scheltinga *Aanteekeningen ad* III.24.14 sv ‘verzekerers, etc’ noted that the broker was under an obligation to keep record of any handwritten additions and also of notices given to the Insurer (see § 7.4 infra), and that if he failed to do so, he would be liable in damages to the insured (‘zouden zij gehouden zijn tot vergoeding wegens pligt verzuim in haar ampt gepleegd’).

In terms of art 58 of par 2, title 11, part IV of the Antwerp Compilatae of 1609 (see De Longé vol IV at 224), brokers, notaries and all others ‘hun de verzekerende onderwindende’ had to draft policies or other documents according to legislative precepts, failing which they were to be fined f25 and incurred liability towards the parties who employed them to compensate such parties for any loss and interest ‘van dat zij den effect van de selve verzekerende niet en soude moeten [mogen] genleten’.

See Weskett Digest 61-68 sv ‘broker’ at 62 par 3 for a list of examples of improper and unskillful conduct by insurance brokers.

311 See Bynkershoeck *Observationes tumultuariae* obs 781; idem *Quaestiones juris privat* IV.4.

312 See ch XIII § 1.2 infra as to a change of voyage; see too ch VIII § 2 supra where the case was noted as an instance where there was no consent between the parties.
broker, that would not have assisted the insured in his claim against the insurer, but would at most have had a bearing on a possible claim against the broker.

Also in terms of art 681-2 of the Wetboek van Koophandel the marine insurance broker is obliged to mention clearly in the policy the terms, declarations and information of the insurance, including all the matters which are by law prescribed to be included in the insurance policy. A failure in this obligation renders the broker liable for the expenses incurred and damage suffered by the insured.

On occasion brokers were also involved in ensuring compliance with the legislative provisions regarding the stamping of insurance policies. In this regard the measures contained in the Amsterdam amending keur of 1721, s 61 of the Amsterdam keur of 1744, the placcaat of the Estates of Holland of 1773 concerning stamp duties, and the Amsterdam amending keur of 1775 and their impact on the responsibilities of brokers have already been noted in detail.313

7.4 The Broker and The Performance of the Insurance Contract

The insurance broker was, of course, involved not only in the conclusion of the insurance contract but also subsequently, during its currency, in various aspects of its performance. Of the areas where the broker in this regard played an important role in Roman-Dutch law were the claims process, in the giving of notices of various forms to insurers, and in transferring payment in terms of the contract from the insurer to the insured.314

The insured had to give his insurer a formal notification of loss through a broker or other public official (such as a notary) and the broker or official thus involved had to keep a record of such notice in terms of s 28 of the Amsterdam keur of 1598.315 The same applied to the formal notice of abandonment.316

However, the widespread ignorance of brokers and notaries in insurance matters resulted in serious errors and abuses in regard to the drafting and service of such notices in direct contravention of applicable legislation.317 Furthermore, some brokers...
instructed to do so also failed to give any notice at all or to do so properly. Also, notaries and brokers were reluctant and scared to report the bad news of losses to the underwriters whom they had shortly before convinced to underwrite the policy ('de voorschreven Notarissen ende Makelaers bevreest zijn soodanige quade tijdingen aan de Versekerers te brengen, die sy weynich tiits te voren tot onderteckeninge der Police hebben gescilliciteert'). For these reasons many innocent insured merchants were prejudiced in their insurance claims and suffered damage as a result.

Accordingly, in 1640, the Amsterdam Legislature, after having explained the problems in this way, made additional provision with regard to notices of loss and abandonment. It provided that in future all abandonments and notices and authorisations concerning insurance ('alle Abandonnement, Insinuatien ende Authorisatien rakende 't stuck van Asseurantie') would be done, processed or executed ('gedaen, gepasseert ofte geexploicteert') through and by the Secretary and Messenger of the Chamber of Insurance alone. Notaries, brokers and others were specifically prohibited from involving themselves with such matters, on penalty of the nullity and unjusticiability of all their actions in this regard. But these prescriptions were not followed and they were repeated by the Amsterdam *keur* of 1701 when a fine of f25 upon the contracting parties was also introduced.

In 1756 in the amendment of s 36 of the Amsterdam *keur* of 1744, the earlier provisions on this topic of 1640 and 1701, which were omitted from the *keur* of 1744, were added without any alteration.

Whereas, in terms of s 15 of the Rotterdam *keur* of 1604, a written notice of abandonment had to be given only through a public person such as a notary or broker, this was changed by s 62 of the Rotterdam *keur* of 1721. Such notice had from then onwards to be given through the Messenger of the local Chamber.

Apart from handling notices of loss and abandonment, it appears that brokers on occasion also acted for insured in disputes with insurers. Thus, there is evidence of a Rotterdam broker in 1734 having appeared for the insured before the Chamber of Maritime Affairs in a dispute with the Rotterdam Insurance Company and of having eventually accepted the Company's offer of 60 per cent of the amount claimed in settlement.

In terms of sub-art 4 of art 681 of the *Wetboek van Koophandel*, the marine insurance broker is obliged to take up and mention briefly in his register the notes, papers and information that he had passed on to the insurers in the claims process ('bij

318 See Goudsmit *Zeerecht* 328.
319 See Vergouwen 80-81.
320 See Vergouwen 89 who also refers to an earlier controversy between the Rotterdam Insurance Company and the broker Jan de Vrijer. The latter had drafted policies which, in the Company's view, favoured the insured too much. The Company refused to sign them, as a result of which De Vrijer apparently made some rather scathing remarks about it. At a meeting of directors on 7 April 1723, it was decided not to accept any policy from this broker in future. Two months later, De Vrijer appeared before a meeting and offered his apologies as a result which it was resolved to accept his policies again.
321 As he was not, or at least not clearly, in Roman-Dutch law.
de invordering van schade’), and also the notices and letters which may through his intervention have been sent to insurers in the name of the insured during the currency of the contract or afterwards.\footnote{See Scholten 32.}

7.5 Brokers’ Commission

For his services, the insurance broker earned a commission, payable according to custom by the insurer. The amount of this commission was later determined legislatively. As brokers became entrusted with more and more functions on behalf of the authorities, one of the ways (in addition to a fine, suspension or disqualification) of punishing a failure on the part of a broker in his statutory duties, was to provide for the forfeiture of his commission in appropriate cases.

In the sixteenth century, Antwerp brokers’ commission was throughout a quarter per cent of the sum insured, to which was added a shilling (‘schelling’) if the broker had also drawn up the policy.\footnote{See De Groote Zeeassurantie 152; Mullens 42.}

The first legislative regulation of brokers’ commission occurred in s 5 of the Amsterdam amending keur of 1610 which was also concerned with the payment of premiums by the insured and the payment of compensation for loss or damage by insurers. Because of the fact that brokers were receiving excessive commissions (‘at te excessive loon voor ’t maecken van Asseurantie ghenomen wort’), the Amsterdam Legislature provided that a maximum commission (‘Maeckelaerdyegelt van d’ Asseurantien’) of a quarter per cent of the sum insured could be paid irrespective of whether the insurance was for single or return voyage, that is, whether it was for an outward and homebound voyage (‘gaen ende komen’) or for an outward or homebound voyage only (‘gaen of komen alleen’).\footnote{See eg Van Zurck Codex Batavus sv ‘Assurantie’ par 24. See also Enscheded 167; Goudsmit Zeerecht 315; and Vergouwen 50-52.} One half of this commission was payable by the insurers, the other half by the insured. It is to be noted that the commission was not calculated as a percentage of the premium, but of the sum insured.\footnote{It was not as large an amount as may superficially appear to be the case. Vergouwen 52 gives the following example: on a ship of f40 000, the shipowner had to bear a part of the risk himself (eg, a quarter) and therefore insured it for f30 000, so that the commission of ¼ per cent on that amount was f75.}

Section 10 of the Amsterdam brokers’ keur of 1612 emphasised that brokers had to be content with their commission (‘loon’) as determined, and that they were not directly or indirectly to receive more. In the list of commissions appended to this keur, provision was made in the case of insurance for a commission of five pennies (‘stuivers’) per f100, that is, a quarter per cent.\footnote{20 stuivers being f1.} By the amending Amsterdam
brokers' *keur* of 1613, the amount of commission was increased to seven pennies per £100, that is, a third per cent, still to be paid equally by the insurer and the insured.

But although the maximum amount of the commission was fixed by legislation, it appears that insurers and brokers paid little attention to it and repeatedly by agreement between themselves came to a different arrangement, both as regards the amount of the commission and as regards who was to pay it.

In terms of s 39 of the Amsterdam *keur* of 1744, brokerage ('*Makelaardy of Courtagie van Assurantie*') was again regulated, this time linked to the reforms as regards the payment of the premium.\(^{327}\) It appears from this provision that according to longstanding custom ('*volgens de practijk van veele Jaaren herwaards*'), this commission was paid by the insurers only.\(^{328}\) This practice was now recognised and sanctioned. The section provided that the commission for every single voyage ('*voor yder Voyage*')\(^{329}\) would be a quarter per cent of the sum insured, in return for which brokers would be bound as against the insurers for the premium.\(^{330}\)

Section 39 proved unsatisfactory as far as the payment of the premium was concerned and it was amended in 1745. However, the commission, payable according to practice by the insurers alone, remained at a quarter per cent for every voyage.

It would appear that the maximum percentage of commission laid down was again not observed in practice, for 24 Amsterdam insurers in 1746 thought it necessary jointly to declare that they would pay a quarter per cent commission for the conclusion of an insurance contract and that a further quarter per cent commission would be payable by the insured for the settlement of a claim on the policy.\(^{331}\) The agreement therefore drew a distinction between the commission payable for the conclusion of the contract and the commission payable for the settlement of a claim on that contract.

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\(^{327}\) See further ch XI § 3.2.2.3 infra.

\(^{328}\) Thus, the Legislature recognised that the earlier provision for insurer and insured to share in the commission was not followed in practice. According to Vergouwen 65, it is unclear why insurers, in contravention of the legislative prescripts, came (or, rather, continued) to pay the full commission themselves while, in the case of other types of brokers, the parties involved in the brokered transaction continued to share the burden of the broker's commission. Generally, for instance, brokerage was shared equally by buyer and seller. Scholten 53 is of the view that the sharing of the commission between insurer and insured is more rational given that both have an interest in the result of the services.

\(^{329}\) And no longer for every insurance as earlier.

\(^{330}\) That is, they would stand surety for the premium ('*voor welk proffijt zy Makelaars gehouden zullen zijn in te staan voor de Premie*'). Van der Keessel *Praelationes* 1446-1447 (ad III.24.6) incorrectly thought that s 39 fixed the commission at one four-hundredth part (ie. ¼ per cent) of the premium. See also Goudsmit *Zeerecht* 353; Scholten 52; and Vergouwen 65-66.

\(^{331}\) The insurers' agreement, confirmed by five Amsterdam brokers, provided as follows: 'Wij onderget. kooplieden, assuradeurs, verclaren mits dezen dat de courtage van asseurantie welcke volgens Practijk van veele jaaren alleen door de assuradeurs wordt betaald, voor yder voyagie is een vierde per cento en dat voor afmaking van alle schaadens en avarijen door de geassuradeers voor courtage meede een vierde per cento wordt voldaan. Gevende voor reden van wetenschap zulx daagelykx van ons wordt gepractiseert. Actum Amsterdam, April 1746'. See Vergouwen 65-66. The agreement is reproduced in Appendix 16 infra.
(afsuitingscourtage and afmakingscourtage), payable respectively by the insurers and the insured.\textsuperscript{332}

Despite the statutory regulation of brokers' commission in Amsterdam in 1744 and 1745, and despite the agreement on the matter in 1746, the amount of the commission was soon thereafter again increased by a brokers' keur of 1747 to a half per cent.\textsuperscript{333} But that was not yet the end of the matter. By an Amsterdam brokers' agreement of 15 July 1786 it was confirmed that the commission for a single voyage was a quarter per cent and a half per cent for a return voyage, and that the brokers would deduct that from the premium due to the underwriters.\textsuperscript{334}

In Rotterdam brokerage was dealt with in the brokers' keur of 1632. Brokers and merchants were prohibited from asking or giving more by way of commission than the approved tariff. In terms of a list added to the keur, the insurance commission was seven pennies per f100 insured value, more or less a third per cent. In general brokers' commission was regulated in more detail in Rotterdam than in Amsterdam.\textsuperscript{335}

The Rotterdam brokers' keur of 1682 fixed the commission anew. For insurance it was fixed at three and a half pennies per f100, payable by the insurer alone ('drie en een halve stuiver van 100 guldens, bij den Assuradeur alleen te betalen'), a practice which was, as has already been indicated, only much later legislatively recognised in Amsterdam.\textsuperscript{336} In the accord reached between Rotterdam insurers in 1719,\textsuperscript{337} clause 3 contained an agreement on brokers' commission. The insurers agreed that for single voyages brokers were not to receive more than a single commission, even if the policy

\textsuperscript{332} The settlement commission in Rotterdam was also customarily paid by the insured. It is uncertain over what the ¼ per cent settlement commission was calculated. It would appear that a different practice existed in Rotterdam in this regard than in Amsterdam. In Rotterdam the percentage was not fixed as in Amsterdam but fluctuated and was not calculated over the amount of the claim but over the sum insured. See further Vergouwen 66-67 for details.

\textsuperscript{333} The reason was probably alluded to in the keur itself where it was stated that 'het loon van de Makelaers ofte Courtage seer sterck heeft gefluctueert en groote misbruycpen daar omntren zijn ingestopen'. In a different imprint of the keur of 1747, however, the percentage was merely confirmed as ¼ per cent.

\textsuperscript{334} The agreement provided as follows: 'Wij ondergeteekende makelaars en andere doenende in Assurantiën binnen deze stad Amsterdam certificeeren ter Liede de Waarheid, dat de Courtage van Assurantie der Zeerisico volgens ordonnante en wat onzer assurantiekamer articel 39 [of the Amsterdam keur of 1744] is een quart pro century over de geteeekte ende verzekerde somme, voor leder voyagie die een verzekerd schip komt te doen en vervolgens van dubbele voyagien, een half procent, van drie dubbele voyagien 3/4% en soo voorts, aaltoos van iedere voyagie ¼% courtage. En betaalen wij onze debet zijnde premien aan den Heeren Assuradeurs, na aftrek van gemelde onze Courtage en Schaden, Avarijen en Restorno's, die wij goedvinden te laten afschriven en ons bij deelse te doen creditieren alle vierendeel Jaars per saldo soo als wij dan schuldig zijn'. See Vergouwen 66-67.

\textsuperscript{335} As to the commission in Rotterdam, see Vergouwen 83.

\textsuperscript{336} Because the 3½ pennies payable by insurers was half of the earlier 7 pennies, it may have been that the insured too had to pay 3½ pennies.

\textsuperscript{337} See again ch IX § 2.6 supra.
in question specified several premiums for different parts of what was, in reality, not a return but merely a single voyage.\textsuperscript{338}

A further and important regulation of brokers’ commission occurred in the Rotterdam brokers’ \textit{keur} of the same year, 1719.\textsuperscript{339} This \textit{keur} determined the commission for insurance brokers, payable by insurers, at three and a half pennies for every £100 of the sum insured (‘3 stuivers 8 penningen per 100 gulden verzekerde som’). In addition, for receiving and counting the premium and standing surety for it, the broker received a further commission of one and a half pennies (‘1 stuiver 8 penningen’), also on every £100 of the sum insured.\textsuperscript{340} In total, therefore, the broker received five pennies\textsuperscript{341} per £100 of sum insured, which was a quarter per cent of the sum insured.\textsuperscript{342}

The calculation of brokers’ commission on the basis of the sum insured apparently gave rise to complaints, namely where property of a large value was insured but the risk and thus the premium were relatively small, in which case the insurer received a small premium but had to pay a large commission, something which no doubt reduced his profit margin. In 1764, therefore, Rotterdam insurers proposed to

\textsuperscript{338} The clause read: ‘Zal men voor alle Reyzen, die niet reëel heen en weder verseekert, niet meerder als een enkelde Courtage aan de Makelaers vermogen te voldoen, alwaer het dat er tweederley, of meerder Premien in de Policen stonden uitgedrukt, als by voorbeeld, van St. Ubes hier a vier percento, en van hier voort zeylende 6½ percento: Ja zelfs al waeren er noch soo veel conditien van aenzeylingen, verzeylingen en aanloopingen, en onderscheid van Premien, wanneer zuiks geen reève heen en weer Voyages zyn, mits dat een leder zig in Cas van Calange zelf zal moeten purgeeren of hy zuiks gedaen heeft of niet’. See Goudsmit \textit{Zeerecht} 443-444.

\textsuperscript{339} See Vergouwen 92-94; Witkop 30.

\textsuperscript{340} There was thus a further refinement in the type of commission payable: commission for the conclusion of the contract and commission for the receipt, counting and guaranteeing of the premium. The latter was paid separately, and the intention was that if the insurer did not instruct the broker to collect the premium, he was also liable for a lesser commission. In practice, though, this seemingly did not occur often and the regular commission was invariably the full amount.

The \textit{keur} made no separate mention of the settlement commission as the measures in Amsterdam had done. Nevertheless, it appears that that commission was in fact levied in Rotterdam, at least after 1750. It appears further that the settlement commission in Rotterdam was levied not on the amount of the claim (‘schadepenningen’) but, like the conclusion commission, on the sum insured (‘verzekerde som’), but that the percentage in question depended upon the extent of the loss; if the loss was more than 50 per cent, then the settlement commission was ½ per cent of the sum insured, and if the loss was less than 50 per cent, then the commission was ¼ per cent of the sum insured. For examples, see Vergouwen 93. As in Amsterdam, the settlement commission was paid by the insured. Where the insurer had participated in the assessment of the loss (i.e., where the sum insured had made it worth his while to do so), he and the broker shared the settlement commission.

\textsuperscript{341} That is, $3\frac{1}{2} + 1\frac{1}{2} = 5$.

\textsuperscript{342} It is not likely that apart from the 5 pennies that the insurer had to pay, the insured paid a further 3½ pennies as may have been the position earlier. The commission would then have been too high and in contrast to position in Amsterdam where in 1744 the commission was reduced to a ¼ per cent, payable by the insurer only, according to custom. Rotterdam invariably followed the Amsterdam practice, and one may accept that the \textit{keur} of 1719 wanted to give legislative effect and recognition to an existing practice, namely that the brokers’ commission was in total a ¼ per cent and that it was payable only by the insurer. Thus, between 1682 and 1719 the practice must have arisen that the commission was no longer shared by both parties but was borne by the insurer alone.
suggest to the municipal government that in the case of a premium of less than two per cent, the commission should be reduced to an eight per cent of the sum insured, and in the case of a premium of two per cent or more, the commission of a quarter per cent was to be retained. But nothing ever came of this proposal and the commission remained at a quarter per cent in all cases.

In England, at the end of the eighteenth century, marine insurance brokers' customary commission on insurance policies was five per cent of the original premiums, which premiums were in any event retained by him in credit for up to three years, irrespective of the amount involved. The commission was paid by the insurer. The broker received a further remuneration of twelve per cent on the net balance of premiums when, after the expiry of the period of credit, his account with the insurer was finally settled. Put together, the two commissions were estimated by some brokers at approximately a quarter of the total underwriting profit.

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343 See Vergouwen 93 for this resolution. It seems that they may have got the idea from Hamburg where, in terms of art XXIII-5 of the Hamburg Assecuranz-Ordnung of 1731, the insured paid a maximum of \( \frac{1}{4} \) per cent commission on the sum insured and the insurer a maximum of \( \frac{1}{8} \) per cent, but if the premium was below 2 per cent, the insurer himself was not liable for any commission at all. See Dreyer 197-199; Scholten 52-53; Witkop 30. This provision was, in turn, derived from earlier accords between Hamburg insurers (see again ch IX § 2.6 supra), namely art IV of the Vergleich of 1677 art IV (see Dreyer 54 and 56-57) and the Vergleich of 1683 (see Dreyer 58 who notes that the insurer's absolution from liability to pay a commission in the case of a small premium was linked to a change in banking practice. Banks no longer handled small amounts and smaller premium payments could be accumulated by the broker who therefore no longer had any trouble with the payment of a small amount of premium which could justify a commission).

344 See generally Weskett Digest 61-68 sv 'broker' at 68 par 19 who noted that in several other countries commission was settled by legislation at \( \frac{1}{4} \), more or less, on the sum insured. See too eg Cockerell 'Agency' 67; Wright & Fayle Lloyd's 161; Gibb 53; and Raynes (1 ed) 177-178, (2 ed) 171.

In the eighteenth century, agents of the fire offices who were not full-time employees, received 5 per cent commission plus a policy fee plus expenses (postage). See Cockerell 'Agency' 68-69.

Although s 13 of the Marine Insurance Act of 1906 recognises that the insured has an insurable interest in the charges of any insurance which he may effect (such charges including the insurance premium and the brokerage, if paid by the insured), Chalmers 20 points out that in practice broker's commission is paid, or rather allowed in account, by the insurer.
CHAPTER XI
THE PREMIUM

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1 The Description, Function and Nature of the Insurance Premium

1.1 Introduction: From Interest and Risk Premium to Insurance Premium

Just as historically there was a close relationship between insurance on the one hand and loan and sale on the other hand, so too there was a close analogy between premium on the one hand and interest and price on the other hand.1

In terms of the maritime loan, the risk premium (pretium periculi or the price for the risk) was built into the separately stated and calculated maritime interest which was repayable together with the capital amount only in the absence of any loss, that is, on the safe arrival of the ship securing the loan.2 So too in the case of the bottomry loan, the bottomry premium, which consisted of the interest on the loan together with the risk premium, was payable only upon the safe arrival of the ship in question.3

In both these contracts the risk premium was characterised by the following three features.

First of all the risk premium was not payable inevitably and unconditionally but only if the capital amount of the loan and the interest on it had to be repaid and paid respectively to the risk transferee or the lender. And that was only the case in the absence of any loss. So, if a loss coming within the description of the risk in the contract in fact occurred, no risk premium was payable. In that case, then, the borrower’s risk was borne gratuitously by the lender. Put differently, the risk premium itself was at risk for it was not payable in any event and irrespective of the materialisation of the uncertain event upon which the contract was predicated. The risk transferee bore the risk4 not in exchange for any compensation but merely in the hope of realising a profit by receiving the compensation for having borne the risk of the loan not being repayable.

1 On the historical background to the obligation to pay a separate and identified or identifiable premium, and on the role of this premium in the evolution of the insurance contract from the maritime loan, see generally the important contribution of Adler. See also Sanborn 256; Van Veen 12-13.

2 For the general characteristics of the maritime loan, see again ch I § 4.2.1 supra, and for the differences between the maritime loan and insurance, see ch I § 4.2.3.2 supra.

3 See again ch I § 4.3.3 supra for the differences between insurance and bottomry.

4 The transference of risk was in any event not the main aim of the maritime or bottomry loan but rather a consequence of the condition upon which the loan was granted.
Secondly, because of the fact that the risk premium was payable only conditionally, that is, in the absence of loss, it was a necessary consequence of the contract of maritime or bottomry loan that the risk premium was payable, or at least finally payable, only in arrears or subsequently, that is, after the completion of the voyage and after the risk had been borne by the lender. Only then was it possible to determine that no loss had occurred and that the risk premium, together with the interest and the loan itself, was in fact due.

Thirdly, the risk premium was an integral part of the (maritime) interest on the loan and was paid, if at all, by the borrower to the lender together with the capital amount of the loan. If paid, the interest, incorporating the risk premium as it did, therefore compensated the lender both for the monetary loan and for the risk he bore because of the condition upon which it was lent.

The transmutation from maritime loan to insurance in its modern form involved numerous changes to the nature and content of the parties' obligations, one and, it may be added, a relatively less noticeable one, of which concerned the obligation to pay a premium.

In the case of the so-called interest-free maritime loan (the maritime loan gratis et amore), the interest on the loan, which had the risk premium built into it, was in turn built into the amount stated to be repayable to the lender in the absence of a loss. The risk premium, therefore, continued to be characterised by the conditionality of its payment, by the fact that it was payable in arrears, and by the fact that it formed an inseparable part of the now unexpressed interest on the loan. An alternative arrangement to the concealment of the risk premium in the amount of the loan, was to deal with it, as well as with the interest of which it continued to form an inseparable part, in a separate agreement between the parties. But even then it probably remained payable conditionally, only in the absence of a loss and thus only in arrears.

In the case of the insurance-loan, the transferee of the risk, now the borrower, promised to 'repay' the fictitious 'loan' on the occurrence of a loss, that is, if the ship did not arrive safely. Here the transfer of risk was an independent and in fact the main purpose of the contract, and the payment of the risk or 'insurance' premium was no longer linked either to the interest on an actual loan or to the capital sum of such a loan which was repayable only conditionally. The risk premium was not part of the interest on a loan nor was it mentioned as such in the 'loan' agreement itself. The 'loan', after all, purported to be interest-free so that there was no interest of which the risk premium could form a part. The risk premium was formally dealt with, if at all, in a separate agreement, and having become the compensation for the borrower’s having agreed,

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5 See again ch I § 4.2.3.4 supra for the different stages of the development from maritime loan to insurance contract.

6 Which amount was more than that actually lent in the first place because of the fact that it concealed the interest, including the risk premium.
under the guise of a fictitious loan, to bear the lender's risk, the risk premium now probably became payable unconditionally and in advance. If the premium in terms of the insurance contract in its modern and undisguised form is compared with the risk premium payable in terms of the maritime loan, it appears that they differed on at least three points and that these three aspects may be regarded as characteristic of the premium payable in terms of the insurance contract proper. In short, these three features involved that the insurance premium was payable to the insurer unconditionally, either in advance or in arrears, and that it constituted a separately identifiable obligation.

Firstly, the insurance premium was payable inevitably and unconditionally, that is, irrespective of whether or not any loss had occurred. The insurer, unlike the lender in terms of the maritime or bottomry loan, bore the insured's risk in exchange for an agreed compensation, not merely in the hope of earning such compensation. Put differently, the insurance premium was paid and earned for the bearing of risk, irrespective of whether or not that risk ever materialised. The premium was not due only in the absence of loss, as was the risk premium and the interest in terms of the maritime loan, nor only, it may be added, on the occurrence of loss. The insurer's obligation in terms of the insurance contract to pay the premium was unconditional, just as the insurer's obligation to bear the risk was unconditional. This point was also of importance in distinguishing insurance from those wagers in terms of which the performance of both parties were conditional. However, whereas the insurance premium was payable irrespective of whether any loss occurred, it was not payable irrespective of whether the insurer bore any risk. Accordingly, where the insurer did not bear any risk, the

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7 The same happened in the case of insurance-sales where a separate arrangement was also made for the payment of the risk or 'Insurance' premium. See again ch I § 4.1 supra.

8 The reason for its probable payment in advance was that nothing in the loan agreement itself would have permitted the risk transferee (the borrower or 'insurer') to claim a payment of the risk premium at a later stage. Likewise, the risk transferor or 'insured' required no receipt because nothing stated in the loan agreement would have permitted the transferee to claim the premium at all. The 'insurer' had the premium in his pocket and the 'insured' required no evidence of its payment. See further De Hoover 'Early Examples' 185.

9 Roccus De assecuratisbus note 6 explained that the insurer receives the premium for bearing the risk of loss of another's property. If the insured's property is lost, he is liable to pay the owner its value out of his own property, while, if the insured's property remains safe, the insurer is not bound to repay the sum he received for assuming the risk. The premium, therefore, is earned even in the absence of any loss.

10 However, the consequence of the latter obligation, namely the obligation to compensate the insured for a loss, was conditional and dependent upon the occurrence of the uncertain event in question.

11 For example, if A wins, B pays, and if B wins, A pays. This may have been the reason why the wagering insurance on the life of a third person concluded in 1676 (see Wagenvoort 'Risicoverzekering') specifically provided that the insurer was to retain the premium he had received, even if the persons insured did not in fact die during the stipulated period of Insurance ('Ende dat voor een premie van 4 p[ie]ér c[ent]to ... waar van ick voldoen ben ende welcke ick sal blijven behouden niet tegenstaende niet een van de voors persoon binnen de voors tijt quam te sterven').
insurance premium was in principle returnable or, if not yet paid, no longer due.\textsuperscript{12} And the parties to the insurance contract could not validly agree otherwise.\textsuperscript{13}

In the second place, because of its unconditionality, the insurance premium was earned on the conclusion of the contract or at least when the insurer had taken over the risk. It could thus be payable finally and irrevocably even immediately upon the conclusion of the contract. There was no need to wait until after the termination of the period for which the risk was transferred because the obligation to pay the premium was not dependent upon the absence or occurrence of loss during that period. Final payment of the premium prior to the insurer having run the risk was therefore possible and preferable from the insurer's point of view, although not necessary.\textsuperscript{14}

Thirdly, the insurance premium was agreed upon and paid as a separately identifiable amount, and not, for example, as an inseparable part of the interest on a loan, or of the purchase price in terms of a contract of sale between the parties. The premium was paid solely to compensate the insurer as risk transferee for bearing the risk of the insured as risk transferor.

1.2 The Description of the Insurance Premium

At first no specific term was employed to describe the remuneration the insurer received for bearing the insured's risk. The word most commonly used in this regard

\textsuperscript{12} See § 6.4 \textit{infra} as to the repayment of the premium.

\textsuperscript{13} In an opinion in 1697 (see Barels \textit{Advysen} vol I adv 19) on the recoverability of the premium and the divisibility of the contract (see further § 6.4 \textit{infra}), the view was expressed that the parties could not validly agree in terms of an insurance contract that the premium agreed upon for the risk was earned by the insurer, and was accordingly not repayable to the insured, whether or not he in fact ran any risk. Such an agreement, the opinion thought, contradicted the nature and substance of the insurance contract ('contra naturam & substantiam contractus'). That contract involved nothing but the bearing of a risk ('susceptio periculi') and there could be no insurance where no risk was run ('waar geen risico zou gelopen worden, ook geen Assurantie zyn kan of bestaan') because insurance was concerned with and concluded with reference to a real and actual risk ('een reële en waer risico'). As to the need for risk, see further ch VI § 1 \textit{supra}.

\textsuperscript{14} Thus, whereas the insurer earned the premium by the conclusion of an insurance contract and the taking over of the risk in terms of that contract, actual payment could take place either immediately in cash, or the insurer could give the insured credit for the amount of the premium which would then be paid later. The actual payment of the premium at any particular time was not prescribed by the nature of the insurance contract, although the fact that a premium had to be paid at some or other time, whether in advance or in arrears, was in fact an essential, distinguishing element of insurance contract. See further § 1.3 \textit{infra}.

The development which occurred as regards the time of payment of the premium may be summarised as follows. At first, in terms of the maritime loan, the agreement was to pay the premium only when the loss did not occur, so that the premium was earned and could finally be paid only once the period for which the lender was to bear the risk, had expired. Later the insurer earned the premium for bearing the risk, and irrespective of whether it materialised. In this case the premium could therefore finally be paid immediately upon the conclusion of the contract (in the case of prepayment, the premium was a \textit{traditio}) or it could be paid at a later stage and even after the insured had borne the risk for the full period agreed upon (in the case of postpayment, the premium was a \textit{promissio}). See further § 3.2 \textit{infra} as to the time of payment of the premium.
was 'money' (*pecunia*). In the course of time the word 'premium' came to be employed and by the seventeenth century it had come generally to be taken to refer to the obligation of the insured in the context of an insurance contract. The word may conceivably have been derived from words such as *primo* (advance payment, pre-payment), *pretium* (price), and/or *praemium* (reward, benefit or advantage).15

Quite possibly because of the relatively recent emergence of the insurance contract, Roman-Dutch sources frequently described the premium with reference to the analogous performance in terms of any one of the other types of contract in terms of which the insurance contract was generally sought to be explained. Most frequently the insurance premium was described as the ‘price’ in exchange for which the insurer took over and bore the insured’s risk, that is, the price of the bearing of the risk of loss or the *pretium periculi*.16 In the policy form appended to title VII of the *placcaat* of 1563, the premium was referred to as the ‘cost or price of the insurance’ (*kost of prijs van deser asseurantie*) and in s 14 as ‘the price of the insurance’ (*‘den prijs vander asseurantie’*).

Some Roman-Dutch authors did likewise. Thus Van der Keessel, in his definition of the insurance contract17 and elsewhere in his treatment of the topic referred to it as the price (*pretium*). But not all described it as such. Grotius referred to the insurance premium as the payment or reward (*‘loon’*)18 or as the reward for the insurance (*‘verzeecker-loon’*).19 Van der Linden described it simply as the amount paid for the value of the insurer’s undertaking of the risk (*‘de somme, die voor de waarde van het gevaar betaald wordt’*).20

1.3 The Premium as an Essential of the Insurance Contract

It is readily apparent that Roman-Dutch law recognised that the premium played an important and central role in the insurance contract. Van der Linden, for example, thought the premium to be one of the requirements necessary for insurance.21

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15 See eg Faber Review 350; Koch ‘Begriffe’ 6; and Reatz *Geschichte* 135 who notes that in the Barcelona marine insurance ordinances in the fifteenth century, the premium was still called *‘los preus de las seguretats’* and not yet by the Italian ‘premio’ or any of its derivatives.

16 The premium was regarded as the price at which the insurer sold certainty. See again ch I § 4.1 *supra* as to the contracts of insurance and sale and for attempts in Roman-Dutch law to explain the insurance contract generally with reference to the contract of sale.

17 *Theses selectae* th 712 (ad III.24.1). See also eg Voet *Commentarius* XXII.2.3 (the price of the risk).

18 *Inleidinge* III.24.1.

19 *Idem* III.24.16 and 17.

20 Koopmans *handboek* IV.6.1. Such analogous descriptions of the insurance premium were widespread. Thus, Roccus *De assecuratibus* note 6 described insurance as involving the transfer of the risk of loss on a voyage to another against the payment of a price. And Malynes *Consuetudo* referred to the premium as ‘the price of Assurances or Premio (as the Spaniards call it)’ (I.24) and as the insurer’s ‘premio or salary’ (I.28).

21 Koopmans *handboek* IV.6.6.
The insurance contract was recognised as a bilateral contract, that is, both parties were under an obligation to perform.\textsuperscript{22} It was therefore not a gratuitous contract. Bynkershoek, for example, described insurance as an engagement for the security of another’s property by which the owner is liberated from the risk, this risk being assumed by the insurer in consideration of a certain price ('\textit{pro certo pretio}').\textsuperscript{23} He then referred to an example from Roman law, where the risk was taken over not for a certain price but gratuitously ('\textit{non certo pretio sed gratis}'), as not being an example of true insurance.\textsuperscript{24}

The agreement on the payment of a premium was not an incidental term (an \textit{incidentale}) of the insurance contract in that a premium only had to be paid in terms of such a contract if it was so agreed by the parties. Nor was it a term flowing naturally from the insurance contract by reason of its nature (a \textit{naturale}) in that it could be excluded from the contract without thereby affecting its nature. It was an essential term (an \textit{essentiale}) and a characteristic feature of the insurance contract. In the absence of an agreement to pay a premium, the contract was not one of insurance. An agreement to bear another’s risk for free, that is, to provide free 'insurance', was accordingly not an insurance contract in the proper sense of word although it was not for that reason alone invalid and may have been classifiable as another type of contract.\textsuperscript{25}

Similarly, even if the premium was notionally agreed upon, if the parties intended for the insurer never to demand it, the contract was not one of insurance. The premium, like the purchase price in the case of a sale,\textsuperscript{26} had to be seriously meant (\textit{verum}). It had to be a real and not a fictitious premium.\textsuperscript{27}

But whereas it is clear that there was no valid insurance contract in Roman-Dutch law in the absence of an agreement to pay a premium, that is, no such thing as free

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\begin{itemize}
\item \textsuperscript{22} See again ch III § 1.3.4 \textit{supra}. It was also a reciprocal contract, that is, the parties' performances were undertaken in exchange for one another. This reciprocality related to the time of performance and will be considered in § 3.1 \textit{infra}.
\item \textsuperscript{23} \textit{Quaestiones Juris publici} I.21. See further § 2.2 \textit{infra} as to the requirement of certainty.
\item \textsuperscript{24} See too eg Van Ghesel \textit{De assecuratione} I.3.18 who remarked that in the same way as there could be no sale without a price, and no lease without rent, so too there could be no insurance without a premium. If one took over the risk of another for free, the contract was unilateral and thus not an insurance contract. Because of the presence of an obligation on the part of the insured to pay a premium and to do so in exchange for a performance by the insurer, insurance differed from donation (which was a unilateral contract) and from a loan (which was a bilateral but non-reciprocal contract).
\item \textsuperscript{25} It may, eg, if all essentials were present, have been a gratuitous contract of indemnity or one of a conditional donation of an indemnity disguised as an insurance contract. See also Goudsmit \textit{Kansovereenkomsten} 187.
\item \textsuperscript{26} See eg Zimmermann 252.
\item \textsuperscript{27} Thus, Van Ghesel \textit{De assecuratione} I.3.2 spoke of '\textit{vera, justa et certa merces}' as being as essential for an insurance as price or rent was for a sale or a lease. If there was no agreement for a premium, the contract was not an insurance contract but a unilateral contract, eg, a gratuitous loan for use (\textit{commodatum}), a loan for consumption (\textit{mutuum}), or a donation (\textit{donatio}). The premium, Van Ghesel stressed, had to be real, not imaginary (see too I.3.19 where there is reference to a real, not a fictitious premium).
\end{itemize}
'insurance', the question arises whether it was possible for the parties to have agreed that the premium would be payable only conditionally. Could they have agreed, for example, that the insured would have to pay the premium only in the absence of a loss, that is, that no premium would be payable should the insured in fact suffer a loss? In effect, the same could be achieved by an insurance of the premium, either separately or by it being included in the value of the object for the insurance of which the premium was paid. An insurance in this form, if valid, would thus have had the same effect as that of a maritime or bottomry loan on analogous terms, which may have been one of the motivations for concluding insurances on such terms in practice. The insured would namely by an insurance on such terms have been in a better position (and the insurer in a worse one) because in the event of a loss no premium would have had to be paid or would have been payable. Obviously, such an arrangement would have cost the insured more than a comparable arrangement in the form of a traditional insurance contract.

Unfortunately the Roman-Dutch sources provide little guidance on the matter, the closest example being of an agreement that half of the premium paid would be returned by the insurer in the case of a loss. Such a term in a contract was no doubt quite lawful, as was also the insurance of premiums in Roman-Dutch practice, at least if the premium was included with other expenses in the value of the physical object insured. It is a different question, though, whether a contract containing such a term would still have been regarded as an insurance contract in the proper sense of the word. It may be thought that in Roman-Dutch law that would not have been the case, simply

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28 Free 'insurance' may mean just that, ie. insurance cover without any premium for a stated period, or it may mean Insurance cover at a reduced charge. Thus, in the eighteenth century fire insurance companies in England customarily imposed an additional once-off charge for the issuing of the fire policy and the fire mark (which identified insured houses and facilitated the rendering of fire-fighting services provided by the company concerned) in addition to the annual premium. To attract business, they began issuing a so-called 'free policy' to anyone transferring his insurance in excess of a certain amount to it from another office, in which the additional charge imposed on the conclusion of the policy was waived. See Supple Royal Exchange Assurance 93-94.

29 See again ch V § 5.7 supra for a discussion of the premium as an object of risk.

30 Or, for that matter, for insuring the premium itself: see again ch V § 5.7, especially n369 supra.

31 That is, the premium, if payable, would have been larger than a premium unconditionally payable for a similar risk.

32 In a 1779 Amsterdam policy on a share in the hull and equipment of a whaler on a fishing voyage to Greenland, for the duration of fishing there and for her return voyage, a premium of 5 per cent was agreed upon. In a handwritten clause added to the policy it was agreed by the Insurers that they would return half of that premium in the event of the loss of the vessel on her voyage ('En in cas 't bovengem: Schip op zijn uit Reize kwam te verongelukken neeme aan 2½pCto te Restitueeren, waarmede wij ondergez. genoegte neemen'). See Den Dooren de Jong & Lootsma 62-64.

33 See eg Enschedé 83 who refers to Pothier for the practice of concluding an insurance with the condition that the insured was to pay the premium only on the safe arrival of the ship in port. No premium was due in the event of a loss and, by analogy, a return of premium could be claimed in the event of the insured voyage not being completed due to a loss.
because there was not an undertaking to pay a premium unconditionally and in all cases but only to do so in the absence of loss. Only in that case could the insurer have been said to have borne the risk of the insured for a compensation; if there was a loss, the insurer in fact bore the risk of loss gratuitously, and that would not have been proper insurance.\footnote{34}

In passing it may be mentioned that on the opposite possibility, namely whether the parties could agree that a premium was earned irrespective of whether the insurer in fact bore any risk, there was some authority in Roman-Dutch law. In an opinion in 1697\footnote{35} the view was expressed that the parties could not in terms of an insurance contract validly agree that the premium agreed upon for the risk would be earned by insurer, and was accordingly not repayable, whether or not he in fact ran any risk.

But the bland statement that the insurance premium was an essential of the insurance contract must, it would appear, be circumscribed more closely.

It has been noted that the insurance contract was recognised in Roman-Dutch law as being, like all other contracts in fact, a consensual contract\footnote{37} and that it was frequently pointed out that, as a consequence of this consensuality, the actual payment of the premium was not necessary for the creation or conclusion of a valid contract of insurance. Thus, as Scheltinga explained,\footnote{38} the insurance contract was a consensual contract (\textit{contractus consensualis}) and had to be taken as binding and complete (\textit{perfecta}) even though payment of the premium to the insurer had not yet taken place.\footnote{39}

It is clear from the definition of the insurance contract provided by Grotius,\footnote{40} for example, that an undertaking to pay such a premium was an essential requirement for a valid insurance contract. Just as it was necessary, in the case of a sale, for the purchase price to have been determined, so it was necessary in the case of an insurance contract...
for the premium to have been determined, that is, for the parties to have agreed on the payment of a premium. Therefore, what was essential was not the actual payment of a premium but an agreement between the parties that a premium would be paid or, put differently, an undertaking to pay a premium.

Accordingly, Van Leeuwen, for example, defined insurance as an act by which one person assumed the risk of another for a certain monetary profit which was determined (and, it may be added, not necessarily paid) on the conclusion of the contract. And Van der Keessl noted that in the case of the insurance contract there was an undertaking to pay the insurer a certain price, while Van der Linden quoted with approval Pothier's neat ('naauwkeurige') definition of the insurance contract as a contract by which the insurer undertook certain obligations on the condition of receiving a certain sum of money which the other contracting party promised to give him for the value of the risks he took upon himself.

Therefore, while it was not necessary for the insured to have paid the insurance premium before a valid insurance contract could be concluded, an undertaking by him to pay a premium was necessary. The statement that the premium is an essential of the insurance contract accordingly meant that an agreement on or an undertaking to pay a premium was the essential element and not the actual payment itself.

This is the supposition too in the Wetboek van Koophandel, for example, in article 246 where it is specifically mentioned in the definition of insurance that the insurer undertakes his obligations in exchange for a premium ('tegen genot eenier premie'), in art 256-7 which requires all policies to state the premium of insurance, and in art 257-1 where there is mention of the reciprocal rights and obligations of the insured and the insurer.

1.4 The Nature of the Premium: Money

In the ordinary case, also in Roman-Dutch law, the premium, although expressed as a percentage, when paid consisted of a monetary payment by the insured to the insurer. This was generally assumed to be the case in the sources, no doubt because it was in line with the fact that in the case of a sale the purchase price generally had to

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41 Rooms-Hollands regt IV.9.3, stating that 'een handeling daar by iemand voor sekere geld-winst, welk met het aangaan van de handeling werd aangestelt t'synen lasten neemt het gevaar ...'. The verb 'aentellen' means 'tellen', 'een som opmaken, or determined, and not 'paid' as translated by Kotze 70.

42 Praelectiones 1428 (ad III.24.1).

43 Koopmans handboek IV.6.1, referring to Pothier Assurance I.1.1 n2.

44 See eg Scholten 33-34.

45 See § 2 infra as to the amount of the premium.

46 See eg Van der Keessel Praelectiones 1428 (ad III.24.1) (in the case of the insurance contract there is an undertaking to pay the insurer a certain price ('premium') in cash ('In pecunia numerata'); Van Ghesel De assecuratioi:e I.3.20 (It appears customary that the premium may consist only of money).
The Premium consist of money in order to distinguish the actionable sale from the analogous but not always actionable contract of exchange.\textsuperscript{47}

However, there is at least one indication that the premium did not have to consist of money. Van der Keessel pertinently expressed the view that it was possible that an insurance premium could consist of something else ("in specie alia") besides ready money (coins, penningen),\textsuperscript{48} such as unwrought gold, silver or even merchandise.\textsuperscript{49} He reasoned as follows. In the case of the inominate contract do ut facias (I give that you may do), with which the nominate insurance contract was taken as showing the most correspondence,\textsuperscript{50} something other than ready money or cash could be given. Although from the references to the premium in the legislation it appeared that only the possibility of a monetary premium was conceived, he thought that one could not safely deduce from that fact alone that an insurer who had (without prior agreement) voluntarily accepted a premium in another form, could not be held liable. Likewise, an agreement in advance that the premium could consist of something other than a monetary payment would bind the consenting insurer with the same legal validity as the payment of ready money would, for there was no law that specifically prohibited a non-

\textsuperscript{47} See eg Zimmermann 250-252.

\textsuperscript{48} Although by the eighteenth century the Dutch currency had become standardised with the guilder (gulden) as its basic unit (with 1 guilder (f1, the f standing for florin (florijn)) consisting of 20 pennies or stivers (stuivers), and with 1 rix-dollar equaling f2.5 or 50 pennies), a large number of different monetary units were in use in the Netherlands in earlier times.

\textsuperscript{49} Van der Keessel Theses selectae th 712 (ad III.24.1); Idem Praelectiones 1429 (ad III.24.1).

\textsuperscript{50} See again ch III § 1.3.2 supra.
monetary insurance premium. It must be emphasised, though, that even where the premium did consist of something other than money, it obviously still sounded in money, that is, it still had a monetary value.

An example of such a non-monetary premium occurred in the case of mutual insurance. There, in effect and at least in earlier, crude mutual-insurance arrangements, an insured did not undertake to pay a monetary premium to an insurer but rather undertook to be liable as an insurer (or, more realistically, as a co-insurer) towards such insurer (or co-insurer). Members of a group of exposed persons reciprocally undertook against one another the obligations of an insurer, that is, to bear each other's risks. But although not a monetary performance, such an undertaking of risk-bearing was nevertheless a premium and mutual insurance was therefore not disqualified as insurance proper because of the absence of an undertaking to pay a 'premium'. And it was plainly not gratuitous insurance.

2 The Amount of the Premium

2.1 Determination of the Amount of the Premium

By custom the insurance premium was always determined and expressed as a particular percentage of the sum insured, which sum was, in turn, fixed with reference to the value of the object of risk. Thus, in the case of a ship valued at and insured for £1,000 at a premium of 4 per cent, it meant that a premium of £40 was payable by the insured for the insurance. Strictly, therefore, there was a distinction between the amount of the premium and the rate of premium. The former ultimately depended both on the amount insured (and thus on the value of the property insured) and on the rate of premium, the amount of the premium being determined by applying the rate of premium to the sum insured. The rate of premium, again, depended on the factors influencing the extent of the risk. Therefore, the premium rate remained the same but the amount of premium differed for identical insurances (for example, against the same

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51 By implication, it seems, Van der Keessel thought that the premium had to consist of money, unless otherwise agreed. That is, an insurer could not be compelled to accept something else in absence of an agreement on his part. But where there was an agreement to that effect between the parties, the premium could consist of a performance other than the payment of money, for such an agreement to pay and accept a non-monetary premium was not invalid.

52 See again ch IX § 3 supra as to mutual marine insurance. In the case of a mutual-insurance arrangement where a monetary contribution was in fact actually paid (provisionally in advance, or finally in arrears) into a central fund, such payment was no more than a consequence of the particular member's undertaking to bear other members' risks. See also eg Goudsmit Kansovereenkomsten 187-188.

53 See eg Van der Keessel Praelectiones 1428 (ad III.24.1); and generally Dorhout Mees Schadeverzekeringsrecht 5.
perils and on the same terms) on goods of different values. Contrarily, the rate of premium increased as the risk increased.

The rate, and therefore also the amount, of the premium was a matter for agreement between the parties to the insurance contract in every case. Thus Grotius wrote that the insurance premium or price of the peril had to be determined by mutual agreement or assessment ("periculi ... pretium ex communi aessmente petendum est"). Likewise, Van der Keessel noted that the premium was fixed by the consent of both parties in proportion to the extent of the risk undertaken ("pro ratione periculi").

Generally there was freedom of contract as far as the rate or amount of the premium was concerned, and no fixed premium, statutorily prescribed rate of premium, nor any minimum or maximum premium was ever laid down by way of legislation in the Netherlands. Bynkershoek remarked that some foreign authors (Marquardus, Locconius) appeared to have assumed that the Dutch premium rate was customarily and legally fixed at seven per cent. Although one could possibly incorrectly so deduce from the legislative provisions, such as the policy added to title VII of the placcaat of 1563, that was not the case. The variety of risks which could be insured, he remarked, did not permit such a statutory determination of a fixed premium rate and the matter was left exclusively to an agreement between the parties. The rate of seven per cent mentioned in the model policy of 1563 was therefore merely an example, and subsequent model policies in fact did not even mention a particular rate by way of example.

It would seem, though, that the possibility of such an official regulation of premium rates was foreseen, at least in the compilation of Antwerp customary law in 1609. Article 60 of the Compilatae laid down that the price of insurance was not uniform but variable, depending upon different factors, and that the parties had to reach a mutual agreement on the premium, unless by statutory promulgation ("bij gemeijne overdracht...".

54 In the earliest legislative reference in this regard, that occurring in the policy appended to title VII of the placcaat of 1563, the insurance cover provided was stated to be at a premium rate of 7 per cent ("ten prijse van seven ten honderf").

55 De jure belli ac pacis II.12.23.

56 Theses selectae th 712 (ad III.24.1).

57 In fact, legislative intervention by authorities in the free determination of insurance premium rates was relatively rare in the history of insurance. One of probably very few instances occurred in Florence in 1523 when officials were authorised to fix the premium rate for all individual insurances concluded there. The aim was to prevent local merchants from insuring elsewhere because Florentine rates were too high as a result of the lack of competition on the local market. See further Hammacher 139-140.

58 Quaestiones juris privati IV.2.

59 'De verscheidenheid van de gevaren, en de lengte van de reis, laten niet toe, dat hier omtrent iets zekers kan gestateert worden'.

60 But see Dorhout Mees Schadeverzekeringsrecht 17 who regards the 7 per cent premium mentioned in that placcaat as being the prescribed rate.

61 Article 60 of par 3, title 11, part IV (see De Longé vol IV at 225).
van coöplieden bij de weth te ordonneren") a minimum rate had been determined, in which case one could not go beyond that.

A few authors did make the point that just as maritime interest was, because of the risk taken over by the lender in terms of the maritime or bottomry loan, not subject to the statutory maximum rate laid down for interest on loans generally, there similarly was no restriction on the amount or rate of the premium which an insurer could demand for the risk he was to bear in terms of the insurance contract.62

On occasion, though, insurers themselves attempted to fix the rates against which they would insure on the market.

One such example dates from 1615.63 In an unsigned and possibly merely a draft accord ("Accoord van Asseurantie"), Amsterdam underwriters agreed to fix minimum rates of premium for a limited period of time. The document mentioned as a reason for this step the increasing perils of the sea, including the perils of pirates and of the Dunkirk privateers. Another reason was the fact that many foreigners insured on the Amsterdam market because of the relatively low premiums which were available there ("de cleine premie, die men bedinght"), something which was to the detriment of the local underwriting fraternity ("[die] haer met asseurantie generende") and the local citizenry generally and to the benefit only of those foreigners who insured locally. In terms of the agreement the underwriters therefore undertook not to insure directly or indirectly below the rates of premium appended to the agreement ("tot minderen prise als hiernaer verclaert staet").64 They were free, though, to stipulate a higher premium ("naer advenant wat meer bodyingen, naerdat hi sulx geraden sal vinden"). That the underwriters did not want to give too much prominence to their price-fixing collusion, appears from the fact that the accord stated that it had to be shown only to potential signatories who would be given a copy only after they had in fact signed it. Furthermore, the signatories were not to give brokers or other intermediaries ("ofte anderen die politien van asseurantie ommecirghen om te doen teekenen") a copy of the accord,

62 See eg Voet Commentarius XX11.2.3; and Schorer Aanteekeningen 412 (ad III.24.1 sv 'het onzeker gevaar' (and see too idem 339 (ad III.11.1) n2: (insurance premiums, like bottomry interest, could exceed the permitted rate of interest). Roccus De assecurationsibus note 47 contrasted insurance, where any premium rate was valid - 5, 6, 10 per cent or more or less - because the contract was the purchase and sale of the risk involved, with a bill of exchange ('cambio'), where the creditor could not demand interest in excess of the customary or legal rate, notwithstanding the risk that he ran of the debtor not being able to repay his debt. As to maritime interest, see again ch I § 4.2.2 supra.


64 In the list added to the bottom of the agreement, different minimum premiums for different voyages in different directions were listed. These included voyages to or from ports in England, Norway, France, the Strait of Gibraltar ("Jupbraltar"), Germany ("Oostland"), Muscovy, and other foreign regions ("vremde quartiereren"). It was noted at the head of the list that the rate of premium for a voyage from one port to another would apply also to voyages in the opposite direction ("Daer den prijs gestelt werd in 't gaen ende [niet] in 't comme, ofte in 't commen ende niet in 't gaen, verstaet hem d'een so veul als d'ander"). It was also noted there that a smaller premium would apply in the case of insurances on bottomry loans than in the case of insurances on goods and ships ("op bodemriebrievan voecht hem de versekeringen een seste part minder als op schepen ofte coopmanschappen, weloverstaende midts dat men voor d'insolventie van der schipper ofte het verbodemen van sijn schip niet is gehauden").
nor disclose to them the premium rates it contained. The agreement was stated to commence on 15 January 1615 and to terminate on 31 August of that year, unless all the signatories remained silent on the matter and did not renounce it before the latter date. In that case it would continue in force until 15 January 1616. It is probable that the accord never came into force; at least the minimum rates it proposed seemed not to have had any influence on published market rates at the time.

Another example appears in the Accord (Reglement) concluded between Rotterdam underwriters in 1719. In article 5 the signatories agreed not to insure a particular risk for less than a minimum rate of premium.

But while premium rates were determined by agreement and not in any way legislatively fixed, the rate of premium charged for a particular risk was to some extent standardised. Although the marine insurance premium was not actuarially calculated, there was a usual, market or Bourse rate (standpremie) with reference to which the premium for an individual risk was determined in the larger commercial centres. Obviously market rates in different places varied. But this market rate was no more than a guideline and in itself had no binding force nor did it impose any upper or lower limit on the premium which, in the final instance and in strict legal terms, remained a matter for agreement between the parties involved in every case.

Premium rates, as also the prices of other commodities and services, were in the major centres taken up in various published price-lists. In Amsterdam the dissemination of such information in the form of a periodic publication (or prijscourant) of official price-lists, known as 'Coursen van Negotie' (from 1683 called 'Coursen van Koopmanschappen'), was prescribed in the earliest regulation of its Bourse. The first published price-list or prijscourant in Amsterdam appeared in 1585, but it was only accurate and reliable from 1613 onwards. It continued to be published until 1813. Drawn up by sworn

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65 Penalties were to be imposed in the event of any contravention of the agreement.
66 See again ch IX § 2.6 supra. The Accord is reproduced in Appendix 14 infra.
67 They agreed 'dat wy alle Scheepen van Hamburg na Spanyen of Portugal gaende, tot het Naeuw van de Straet incluys, niet minder zullen teekene als 4 percento, tzy komende of gaende'. See further Goudsmit Zeerecht 443-444.
68 See again ch IX § 2.4 supra.
69 See eg Faber Review 350. Mossner 38 speaks in this regard of 'consensus premium rates', the fixing of which was facilitated by the congregation of a number of underwriters on bourses and by the system of the co-insurance of single risks by individual insurers.
70 Thus, according to Barbour 'Marine Risks' 581, premium rates in Amsterdam were nominally higher than in London during the seventeenth century. This was compensated for by the integrity of Dutch underwriters and of the local Chamber of Insurance. There were obviously also other factors why this may have been the position, not the least of which was the fact that Dutch policies provided wider cover than their English counterparts. See again ch VI § 3.1 supra.
71 Thus, Van der Keessel Theses selectae th 712 (ad III.24.1) noted that considering the nature of the contract, the premium did not depend solely on custom (but, by implication, also on agreement between the parties).
brokers on the Bourse, these double-sided weekly lists of prices included those in the commodities trade, rates of exchange and also the rates of insurance premiums to the more frequent destinations of Dutch trade. The section in the price-list on ‘Assurantien’ listed premium rates for voyages to and from various destinations in Europe and the West Indies. Occasionally the lists made further differentiations. For example, in times of war separate rates were quoted for insurances on ships sailing with and without convoy, or for insurances including or excluding the perils of war.

The market rate, and hence also the rate of premium in every individual case, was determined with reference to a number of factors affecting the extent of the marine risks to be taken over by underwriters. Such factors were taken into account, singly and cumulatively, by underwriters, and their presence or absence directly influenced the rate of premium at which the latter were prepared to underwrite risks. By way of example, some of the more common factors, or types of factor, may briefly be mentioned.

72 In 1760 20 destinations in Europe and two in the West Indies were listed.

73 See further Barbour Capitalism 34; Spooner 3-4, 7, 163 and the plate on 164; and Vergouwen 48-49. The role of the Bourse in determining market rates was still recognised in the Wetboek van Koophandel which provides, in art 60-1, that ‘uit de handelingen en afspraken, ter beurze gesloten, worden opgemaakt... de prijs... der assurantien’. In terms of art 59, the ‘beurs van koophandel is de zamekomst van kooplieden, schippers, makelaars, kassiers en andere personen tot den koophandel in betrekking staande’.

74 Of course, premium rates for the same perils also differed at various times. Rates generally came down as time went by and as insurance became more common, underwriting and risk assessment more sophisticated, rates more competitive, and perils such as piracy and shipwreck relatively more controlled and avoidable. By the end of the sixteenth century, insurance was not yet generally in use and insurance premiums were very high. They generally decreased, however, over the course of the next two centuries. See eg Van Dillen Rijkdom 44; De Roover ‘Early Examples’ 189. Referring to the decreasing rates, Magens Essay vol I at 84 pointed out in the mid-eighteenth century ‘that our Insurers, by the increase of Business, have learnt to find their Account in carrying it on, though at less Premiums’.

75 See in particular the work of Spooner which considers in (graphic) detail the influence of what he terms ‘event uncertainties’ and ‘structural risks’ on the Amsterdam insurance market, including the premium rates (as apparent from the Amsterdam prijscouranten), the financial position of insurers, and the availability of insurance cover, in the 1760s and 1770s. Event uncertainties were wars and political decisions, financial crises and bankruptcies, and they affected mainly the supply side of insurance and the functioning of the market itself (see in detail at 77-115). Structural risks included the alternation of the seasons and the duration and destination of insured voyages, and they were implicit in the demand side of and shaped the demand curve for insurance (see in detail at 116-161).

See also eg Jolles 73 (appendix B contains the premium rates and ‘beursconditien van assurantie’ at Amsterdam in 1799, the information having been taken from Ricard Traité general du commerce vol I at 200; Vergouwen 48-50 (examples of premium rates from the Amsterdam prijscourant in May 1650 and in July 1703); Magens Essay vol I at 83 (a table showing the difference in premium rates in London in 1620 and in 1753). See further generally also De Groote ‘Zeeverzekering’ 214; idem Zeeassurantie 135-140 (factors influencing premium rates in Antwerp in the sixteenth century as they appeared from a work published in Amsterdam in 1590 entitled Trescrid vande Maten, van Gewichten, van Coorn Lande vande eile in which the author was concerned with the Antwerp practice at that time); Kracht 73 (a table of the insurance premiums in 1775 on voyages from the Baltic to Rotterdam); Malynes Consuewdo 124; Mullens 79; De Roover ‘Early Examples’ 189-191; Sellen ‘Segurieren’ 187; and idem Versicherung 28.
In the first place, insurance in time of actual or anticipated war, or even when there were just rumours doing the rounds of enemy activity in a particular area, was more expensive than in time of peace. War was probably the single most important factor affecting premium rates.  

Secondly, the length (distance and duration) of the insured voyage and the actual geographical location of the destination were important factors, with higher rates being charged for longer voyages because of the increased exposure to risks which was involved. It was one of the more visible factors in that in the official price-lists different premium rates were quoted for different destinations to which ships or cargoes could be insured.  

In the third instance the particular season involved played an important role, with higher rates being charged in winter. This may have been one of the reasons why some underwriters may have preferred not to insure round trips (out and return voyages), at least not without special precautions. Obviously, on longer voyages, the increased risk posed by winter at home may have been discounted by a more favourable season at or en route to the destination.

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76 In Rotterdam, in the summer of 1750, two years after the end of the Austrian War of Succession (1740-1748), the premium rate for a voyage from Rotterdam to Barcelona and for one to London was respectively 2 per cent and 1 per cent. In the winter of 1781, shortly after the outbreak of the Fourth Anglo-Dutch War (1780-1784), the rates for voyages to Barcelona and to London were respectively 25 per cent and 6 per cent. See Vergouwen 102. See also eg Vrijman 160 and 162.

77 On long voyages the risk was increased by the lack of proper and reliable communication and the greater need for ships’ stores or victuals and for repairs.

78 The premium rate in Amsterdam in 1592 for an insurance on a ship destined to Genoa or Livorno was 16 per cent, while in the case of a longer voyage, eg from the Baltic to Italy, the rate was 20 per cent. See Kernkamp ‘Betrekkinge’ 224. In 1629, the Amsterdam rate was 10 per cent for a consignment of goods to Marseilles, Livorno and Genoa; 13 per cent to Venice; and 16 per cent to the Levant. See Van Dillen Rijkdom 84 and 86.

79 Premium rates in Antwerp in the sixteenth century, for example, varied considerably depending on the season: on voyages to northern Europe between 4 per cent and 8 per cent; to northern France between 2 per cent and 6 per cent; to the French Atlantic coast between 6 per cent and 8 per cent; to northern Spain between 4 per cent and 9 per cent; and to Italy between 17 per cent and 22 per cent. See De Groote ‘Zeeverzekering’ 214.

On voyages to countries to the north and north-east of Amsterdam, the premium doubled at the end of July, and tripled by mid-September. The rate for voyages to France, England, Spain and other countries to the west of Amsterdam doubled after August, and in the case of particularly severe winters sometimes tripled. See Jolles 73.

In the case of an insurance on a round trip, the time of the commencement of the return voyage was particularly important for the premium rate to be levied by the insurer. Different times resulted in
Another group of factors related to the type, tonnage, age and condition, manning and armaments, speed, and nationality of the insured or carrying ship and to the type, nature and value of the insured goods. Thus, insurance was generally more expensive for perishable and valuable goods and also when foreign and cheaper ships were involved.\footnote{However, at the beginning of the seventeenth century, rates were twice as high for goods conveyed on Dutch ships than on English ships, the reason being the badly equipped Dutch ships and the greater risk of their being attacked by the enemy at that time. See Van Dillen \textit{Rijkdom} 87.}

Fifthly, the range of perils insured against had a direct bearing on the rate of premium which would be charged for a particular insurance. Thus, an insurance against all risks was more expensive than one against named perils only, while insurance which included cover against the perils of war was likewise dearer than one against marine perils only.\footnote{In an opinion in 1706 (see Barels \textit{Advysen} vol I adv 14) the ship and perishable goods (wine) were insured for a voyage from Bordeaux to Middelburg against all risks ("voor alie perykel bedagt of onbedagt"), for the extraordinary premium of 20 per cent to 25 per cent. As far as the interpretation of the contract and the scope of the perils clause were concerned, the opinion noted that the insurers must specifically have contemplated as an included peril the possibility of capture and detention by the enemy (which was in fact the cause of the loss here) and for that reason have charged the excessive rate of premium which they did; they would not have charged that rate for the voyage in question had the insurance only been against perils of the sea.}

In the sixth place premium rates also varied depending upon the insertion of those individual terms and clauses into the standard or customary policy which tended to increase or decrease the risk of loss or damage. For example,\footnote{Ordinarily, though, voyages with foreign and especially with enemy ships were much more expensive than those with neutral ships or with ships which could be taken as neutral because of the possession of a passport issued by the ruler of a neutral country. For example, in 1783, for a voyage from Rotterdam to Suriname with a neutral bottom, the premium was 12 per cent as opposed to 25 per cent otherwise. See Vergouwen 103. Likewise, in principle insurance on cheaper and thus less well built ships was more expensive. See De Roover \textit{Early Examples} 191.} an insurance 'on good or bad tidings' was more expensive than an insurance against future loss only.\footnote{It seems that in Amsterdam in the eighteenth century the different designs and tonnages of insured or carrying ships were irrelevant to premium rates. That sophistication only came with the classification of ships in the early part of the nineteenth century. See Spooner 139 and 197.}

Also more expensive was an insurance with the liberty to deviate from the direct or cus-
temporary route between the port of departure and the destination.\textsuperscript{84} Cheaper, again, was an insurance with an undertaking by the insured to sail with a convoy.\textsuperscript{85}

Another factor which, more so in earlier times than later, had an influence (probably indeterminable) on premium rates,\textsuperscript{86} was the circulation of bad news or of rumours, or even the absence of any news, on the local market not only of conditions relating to the voyage to be undertaken and at the destination, but also of the fate of a ship or cargo already en route but which had not yet been insured. Premium rates were generally very sensitive to such news and rumours and could easily be manipulated.\textsuperscript{87}

2.2 Certainty of Premium: Determined and Determinable Premiums and Additional Premiums

In the case of the contract of sale, the purchase price had to be certain (certum), or at least ascertainable, that is, objectively certain\textsuperscript{88} if not yet certain to the parties themselves. But there had to be a price and not for example merely a chance (spes). Thus, while one could buy a chance, one could not pay with a chance. In Roman law the price was not certain if it had to be fixed by a third party, nor if it had to be determined by the buyer. Roman-Dutch law was less conservative in this regard and an agreement of sale at a reasonable price was recognised as valid and enforceable, the Court having in such a case to fix the price according to the judgment of the reasonable man (arbitrio boni viri).\textsuperscript{89} Analogous rules applied to the rent (merces locationis) in the case of leases,\textsuperscript{90} and one would have expected the same to have been true of the insurance premium or merces assecurationis.

Indeed, it was commonly declared by Roman-Dutch authors that the insurance premium had to be certain, or such certainty was at least alluded to in the definitions or

\textsuperscript{84} See ch XIII § 1.2.4.6 infra.

\textsuperscript{85} See ch XIII § 2.3.2 infra.

\textsuperscript{86} If not on the availability of insurance cover itself.

\textsuperscript{87} For example, uninterested persons, such as brokers, could insure ships 'for whom it may concern' with a view to selling the insurance at profit to the owners after having spread rumours on the market about the possible loss of the vessels in question. Unable to confirm their veracity because of the lack of proper means of communication, such rumours almost inevitably resulted in the owners being unable to obtain any insurance cover, 'on good or bad tidings', on the market or in being unable to do so at reasonable rates from the usual underwriters.

\textsuperscript{88} For example, in the absence of a certain or determined price, there had to be a customary or a market price, or the parties had to have agreed on a method by which the price, which they did not determine, could in fact be determined.

\textsuperscript{89} See generally as to the certainty of the purchase price, Zimmermann 253-255.

\textsuperscript{90} See idem 353-354 as to the requirement that the rent had to be vera et certa.
descriptions of the insurance contract or the premium. But there are no practical examples in the published sources of instances where the principles applicable in respect of the contract of sale in this regard, were analogously applied to the insurance contract. It seems that it was not the practice at the time on the Dutch markets for insurances to be concluded either at a reasonable premium or, for that matter, at a premium to be subsequently arranged. In English law, in terms of s 31(1) of the Marine Insurance Act 1906, where insurance is effected at a premium to be arranged, and no arrangement is made, a reasonable premium is payable. Although there were no decisions at common law to this effect, this provision is taken to correspond with mercantile understanding and to follow the analogy of a 'reasonable price' in the case of the contract of sale.

The question arises whether, on a change of circumstances for the worse and a resulting increase in the risk taken over by the insurer subsequent to the conclusion of the insurance contract, the latter could demand an increased or additional premium from the insured, or, even, whether the insured could demand a return of a portion of the premium paid or a reduction in the amount of the premium still to be paid if circumstances changed for the better. In principle, of course, the parties were bound by the premium they had agreed upon. Thus, if an insurance was concluded in a time of peace for a moderate premium and war then broke out while the insurance was still in force, the view was that the insurer could not demand an increased or additional premium. Likewise the insured would not be able to demand a rebate or decrease in the converse case.

But, of course, it was possible for the parties to agree in advance in the insurance contract, or even in a separate agreement thereafter, to a subsequent increase or reduction of the premium in appropriate circumstances. The possibility of an agreement for an additional premium was recognised in legislation in at least one case. In terms of s 19 of the Amsterdam keur of 1744, in an insurance on a bottomry loan in the event of a change of voyage by the master (who was also the borrower) on the instructions of his shipowner, the insured had to give notice of such change of voyage.

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91 See eg Huber Hedendaegsche rechtsgesleenthedt XXI.75 (referring to the insurer undertaking an uncertain risk for a certain price ('voor seekeren prijs')); Van der Keessel Theses selectae th 712 (ad III.24.1); idem Praelectiones 1428 (ad III.24.1) ('pro certo pretio'); and Van Ghesel De assecuratione 1.3.20 (although it is irrelevant whether the premium is single or periodical, it must be certain and fixed).

92 But the possibility was foreseen of insurance at an additional premium to be arranged and of the position where none was then arranged. See infra.

93 See Chalmers 47.

94 See eg Van der Linden Koopmans handboek IV.6.6, referring in this regard to the French authors Pothier and Emerigon.

95 This was foreseen by Van der Linden Koopmans handboek IV.6.6, noting that it was possible for the insurer to add a clause to the contract providing for what was to happen in the event of an outbreak of war.

96 See further ch XIII § 1.2.5 infra.
to the insurer and had to negotiate an additional premium with him, failing which an additional premium had to be determined by the local Chamber of Insurance.\textsuperscript{97} Thus, not only was the possibility of an additional premium foreseen but also the possibility that the Chamber could determine such additional premium if none could be agreed upon by the parties themselves, presumably either in the insurance contract itself or subsequently.

There is at least one example where provision was made for the payment of such an additional premium,\textsuperscript{98} but it seems not to have been as common a practice in Roman-Dutch law as it apparently was in other systems such as in French law.\textsuperscript{99}

In the \textit{Wetboek van Koophandel} this type of situation was anticipated and provided for more generally than was the case in Roman-Dutch law. In terms of art 661, where an increased premium has been agreed upon in the case of the occurrence of a particular event, such as the outbreak of war, such increase, where the amount of it was not expressed in the policy, or, by implication, subsequently agreed upon by the parties, has of necessity to be determined by the Court. Such determination has to take place after the hearing of experts, and with due regard to the risk, the circumstances and the terms of the policy.\textsuperscript{100}

To be distinguished from an additional premium in the case of an increase in the risk, was the penalty on occasion imposed upon the insured, and payable to the insurer, of so many times the amount of the premium payable in terms of the insurance contract. In a number of legislative measures in Roman-Dutch law, provision was made for the insured to pay what was usually termed a ‘double premium’ (as well as certain expenses) in specified circumstances. This occurred, for example, where the insurance was concluded by the insured with knowledge of an earlier loss or even just of an earlier departure.\textsuperscript{101} In such a case not only was the insurer not liable but in addition the insured had to pay him a ‘double premium’.\textsuperscript{102} Despite the fact that it was payable to

\textsuperscript{97} ‘E[...]n [sal den Verseekerde] wegens ... de verbetering der Premie met den andere [ie, the insurers] [moeten] accordeeren, ofte deselve verbetering stellen ter Arbitragie van Commissarissen’.

\textsuperscript{98} See eg Mees Gedenkschrift appendix 20 which contains a Rotterdam hull policy of 1803 in which an increased premium was stipulated for in the event of departure before a certain date. The term provided as follows: ‘den prijs van deze verzekering f3 ten honderd, dog indien ‘t Schip voor primo Februarij mogt vertrokken zijn, zullen wy 1 pC augmentatie van Premie genieten’.

\textsuperscript{99} See Enschedé 84 and 85n1.

\textsuperscript{100} See eg Geerilgs 75-76. Article 661 was taken over from art 343 of the French \textit{Code de commerce}. Likewise, in English law, in terms of s 31(2) of the Marine Insurance Act of 1906, where insurance is effected on terms that an additional premium is to be arranged on the occurrence of a given event (eg on the breach of a warranty, or a change of voyage), and that event happens but no arrangement is made, a reasonable additional premium is payable.

\textsuperscript{101} See ch XII § 2.2 \textit{infra} as to insurance after loss or after departure.

\textsuperscript{102} See eg s 9 of the Rotterdam \textit{keur} of 1604 (‘maer sal ter contrarie de Geassureerde aan zijne Verseecckeraers betalen dubbelde premie’); s 39 of the Rotterdam \textit{keur} of 1721 (‘ook schuldig zijn aan dezelve dubbele praemie te betalen’); s 3 of the Amsterdam \textit{keur} of 1744 (‘dubbelse praemie’); and the amendment in 1775 of s 3 of the Amsterdam \textit{keur} of 1744 (‘noch eens gelyke praemie’). See too eg Vergouwen 80.
the insurer, this, it would seem, was not in fact a double or additional premium which was payable as such in terms of the insurance contract, or for that matter even in terms of the relevant legislation, as compensation for the insurer bearing an additional or increased risk. It was rather a fine or penalty imposed upon a guilty insured in those circumstances, the amount of which was simply expressed or determined in every case with reference to the insurance premium in question, that is, it was a fine or penalty equivalent to double the amount of the premium.

Related to the issue of the certainty of the premium was the possibility that there could be different premium rates for the portions of a single risk taken over by insurers in terms of a single contract. Insurance contracts were generally underwritten by several individual insurers who, as co-insurers, normally underwrote the risk at a single premium rate, namely the rate agreed upon by the first or leading underwriter to subscribe a portion of the particular risk. But just as each underwrote the risk for the sum he saw fit, it was also possible for the various underwriters to charge different premium rates. This would occur, most commonly, if new factors affecting the estimation of the risk came to the underwriters’ attention between the time the first of them had underwritten the risk and the time when the policy came to be offered to the others for their subscription. Obviously the chances of this happening were greater at a time when and in places where there was no great centralisation of individual underwriters and when and where it was not possible for the insured or his broker to have the single risk underwritten in a short space of time.

This possibility was foreseen by Voet, for example. In his comments on Grotius, he noted that every underwriter could agree to insure the insured concerned at a different premium rate. Van der Keessell too agreed that the usual relationship which existed between several co-insurers who underwrote the same policy at different times did not prevent them from asking and agreeing with the insured on different premium.

103 The insurer was, after all, stated not to be liable at all in these circumstances.

104 See further ch XVIII § 2 infra as to co-insurance.

105 For example, underwriter A could insure the ship valued at f1 000 for f400 at a rate of 3 per cent, and underwriters B, C and D could each insure a sum of f200 at a rate of 4 per cent.

106 Observationes ad ill.24.17 n35. He referred to an example where the first of the several underwriters ("primus ex pluribus assecurantibus") was content with 8 per cent or 10 per cent; the second, on being appraised of further information which had become available after the signature of the first insurer (eg, that the enemy fleet had left its home port), agreed for his part of the risk to be insured at 29 per cent; but the third insurer, with yet further information at his disposal (eg, that that fleet was approaching the Dutch coast) at the time when he was asked to underwrite, was only prepared to accept the risk at a premium of 50 per cent.

107 That is, the community of loss and profit.
rates for the portions of the risk they each underwrote. Although co-insurers were all held liable on an equal footing for loss or damage, Van der Keessel explained that their position in a case of differentiated premiums was not the same when it came to the division of the insurance premium, but that each would receive the premium he had stipulated for himself. This was so because there were just as many insurance contracts as there were different co-insurers, and also because the legal equality introduced between them by law was especially aimed at their liability to pay the compensation for the insured's loss.

But, it must be stressed, this was an unusual and infrequent occurrence and one probably not favoured by the insurers themselves. Ordinarily, a single premium rate was specified by hand in the body of the printed policy form with the various individual underwriters then merely adding alongside their signatures at the bottom of the policy, the sums for which each insured the risk at that rate of premium.

2.3 Equality of Premium: Laesio Enormis and the Insurance Contract

In terms of the Roman law of sale, the purchase price as a matter of general principle did not have to be just or fair (justum). Parties were free to agree on any price, even one manifestly exorbitant or deficient, as long as their agreement itself was valid and not, for example, induced by fraud on the part of one of the parties. This principle applied not only to sales but to all bilateral contracts where the performance of one of the parties consisted of a monetary payment. Subsequent to Roman law, though,

108 Theses selectae th 765 (ad ill.24.17); idem Praelectiones 1476-1477 (ad ill.24.17). His example was more realistic than that of Voet: the first insurer insures for £3 000 at a rate of 5 per cent, and on the following day the second one insures for £2 000 at 7 per cent, and thereafter a third insurer insures for a further £2 000 at a rate of 10 per cent. He noted that such different rates could on occasion be justified, eg, if as a result of a declaration of war or reprisals or the receipt of unfavourable news, the risk had increased.

109 Van der Keessel noted further that the laws regulating the position of co-insurers inter se (see ch XVIII § 2.3 infra) mentioned a community of loss and of profit (see eg s 23 of the Amsterdam keur of 1598: 'verlies ofte gewin') in this regard because it was usually the same premium rate that was promised to all of them and because there was then also a geometrical relationship between them. But those laws did not prohibit that different rates of premium be promised for different insurers, just as the amounts for which they insured could differ. Some legislative provisions (eg s 24 of the Amsterdam keur of 1744) may have had this in mind when it was provided that all insurers shared equally in the loss for which they were liable without mentioning anything about an equal sharing in the profit or premium.

110 Thus in the Accord between Rotterdam Insurers in 1719 (see again ch IX § 2.6 supra and Appendix 14 infra), the signatories in art 1 in fact agreed not to underwrite any insurances for different premium rates ('Geen verzekering te zullen doen of Polilce te tekenen, by welke diverse premien werden geconditioneert, als met het ontangen der hoogste Cours in de respective Policen bedongen, en zulks by de ondertekening uyt te drukken, zonder te konnen volstaen met de simpele expressie van de paemie ontangen of voldaen'). See further Goudsmit Zeerecht 443-444.

111 See generally as to the fairness of the purchase price, Zimmermann 255-259.

112 One exception, in this regard, was the limitation on the interest rates which could be stipulated for in terms of an agreement of monetary loan. See again ch I § 4.2.2 supra.
different considerations came to be applied as a result of the emergence of the doctrine of enorm lesion or *laesio enormis*.\(^{113}\)

Initially, in Roman times, there existed a very narrow rule which permitted the seller of land specifically to cancel the contract of sale if the purchase price agreed upon was less than half the true value (*iustum pretium*) of the land, the buyer being permitted to avoid such cancellation by supplementing the price. In medieval times and largely under the influence of the medieval *aequalitas contractuum* doctrine,\(^{114}\) the doctrine of enorm lesion was greatly expanded. It came to be extended, on the one hand, to the sale of buildings and movables also, and, on the other hand, to give not only the seller but also the buyer a right of cancellation.\(^{115}\) Furthermore, despite the many theoretical controversies still continuing to surround it,\(^{116}\) the doctrine also came to apply to transactions other than sales, mainly on the ground of their perceived similarities to that contract. Thus it came to be applied to leases, exchanges, compromises, *dationes in solutum* and even, ingeniously, to donations. Although there was no absolute unanimity amongst the various Roman-Dutch authorities on this point, this was in essence the position in Roman-Dutch law as well. In that system the doctrine was at first extended to all contracts of good faith resembling sale or to bilateral contracts, and later, in principle, to all contracts.\(^{117}\)

There were exceptions to the application of the doctrine, though. It was not applied, for example, to sales or other contracts where the object was of such an uncertain nature that it was impossible to fix a fair price or value, such as when, at the time of the contract, its value could not yet be ascertained or where it was of a fluctuat-

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\(^{113}\) As to this doctrine, see generally Dias; Feenstra & Ahsmann 26-30; Wessels *History* 607-611; and Zimmermann 259-270.

\(^{114}\) Like the doctrine of *rebus sic stantibus*, the doctrine of *laesio enormis* was an exception in canon law to the principle of the sanctity of contracts (*pacta sunt servanda*). Other exceptions were illegal and immoral contracts.

\(^{115}\) Its extension to the buyer occurred by parity of reasoning and on the grounds of equity, but in this regard there was considerable uncertainty as to the extent to which the price should be excessive, that is, whether, given that the seller was traditionally assisted where the price was below half the value of the res, it was necessary, before buyer could be assisted, that the price had to be more than twice the value (the geometrical method, supported by eg Grotius *Inleidinge* III.52.2), or whether it merely had to be more than the true value plus half (the arithmetical method, supported by eg Voet *Commentarius* XVII.5.5). The former was generally the preferred view in canon law, and also in Roman-Dutch law.

\(^{116}\) There was eg no unanimity as to the mathematical limit of the unfairness or the enormity necessary for the doctrine to be applied (although in practice a deviation in excess of half from the just price continued to be required; the *laesio* was further said to be *enormissima* if there was a two-thirds disparity between the contract price and the true value of the res), nor as to the case where there was no determinable true and fair price for the res (or, given its extension to other contracts, for the performance) in question.

\(^{117}\) See eg Grotius *Inleidinge* III.52.2 ('alle ander handelingen' excluding judicial sales and donations); Van Leeuwen *Censura forensis* I.4.44.2 (the doctrine extends to every transaction in which either of the contracting parties has been disadvantaged to a greater extent than half the price); Voet *Commentarius* XVIII.5.13 and 14 (it extends to all contracts *bonae fidei* akin to sale, such as lease and barter, and also to all contracts *stricti iuris*, except compromise).
The main examples in this regard were speculative sales of various types.\textsuperscript{119}

What about the insurance contract then? Did the doctrine of \textit{laesio enormis} apply to it by reason of the perceived analogy between insurance and sale, or did its aleatory character prevent such an application?

Regarding the insurance premium as the price against which the insurer, by taking over the risk from the insured, sold security to him, some early authors on insurance law were of the opinion that such premium or price (\textit{pretium periculi}) also had to be just (\textit{iustum pretium}). It had to bear some relationship to the probability of the risk as expressed in monetary terms. And if this was not so to the required extent, the insurance contract could in appropriate circumstances be rescinded on the grounds of \textit{laesio enormis}.\textsuperscript{120} By the time of Roman-Dutch law, though, not only had the view of the

\textsuperscript{118} Fair value was ascertained at the time and place of contract and the value at the time of the action or at any other time was irrelevant. Market value was \textit{prima facie} the equitable value and sentimental value was disregarded in this regard.

\textsuperscript{119} Sales of a chance or of future property (\textit{emptio spei} or \textit{emptio rei speratae}) such as of a future crop or catch, of an annuity upon a person's life, of an inheritance, or of a usufruct. According to Voet \textit{Commentarius} XVIII.5.15 the reason was that the element of uncertainty or chance barred the application of the remedy. According to Van Leeuwen \textit{Censura forensis} I.4.44.3 the doctrine did not extend to public sales by auction, the price there being \textit{prima lacie} a just price.

\textsuperscript{120} See eg Santerna \textit{De assecurationibus} V.1-6; Scaccia \textit{De commerciis} I.1.132 ('\textit{laesio, ideoque rescissio habent locum etiam in sponsione, & assecuratione}') III.3.51 ('\textit{contractus assecurationis requiritur aequalitas inter prenum, quod datur assecuranti, & obligationem, quam in se suscipit}', as was the case with sale); Stracca \textit{De assecurationibus} note 48; \textit{idem De sponsionibus} num IV.

Santerna in particular dealt with the issue in great detail (see too Faber Review 350; Van Houdt 22; and Molengraaff 'Verzekering' 427-429). He thought the insurance contract could be rescinded on the grounds of \textit{laesio enormis}, whether it was regarded as a nominate contract (ie, a contract of sale, with the insured selling the risk) or as an innominate contract.

If it was found that one of the parties, whether insurer or insured, was deceived by more than half of the just price, the contract could be cancelled. The just price or premium, Santerna thought, was the usual or customary price or premium. Therefore, only when there was an inequality between the usual premium required and the risk run by the insurer, was the doctrine breached.

He stressed the point that the just premium was to be calculated not with reference to the value of the object insured (at the time and in the case of loss), but with reference to the value of the risk of loss of that object. Insurance was not a sale of the object insured but a sale of the chance or risk of the loss of that object. (By implication, an equivalence was required to exist not between the premium and the sum insured, which corresponded, at least in the case of full-value insurance, to the value of the object at risk, but between the premium and the value of the insurer's bearing of the risk in respect of that object. Thus, even where the premium asked for the insurance of a ship worth and insured for £ 1 000 was £ 30, there may still have been equivalence if the value of the insurer's bearing of the risk for the duration of the contract was equivalent to £ 30.)

Therefore, Santerna explained, one first had to calculate what percentage of premium insurers normally received for the acceptance of a risk such as that in question. Then it could be established whether or not the insurer concerned received less than the just premium and whether or not the insured had paid more than half. He then provided the following example (see too Roccus \textit{De assecurationibus} note 8). If for a risk on goods worth 150 ducats it was usual to pay 30 aurei, and the insurer received only 10 aurei, it was possible that he had been deceived in this insurance to the extent of more than half of the just price of the risk. The same could occur in respect of the insured if in this case he had paid a premium of 60 aurei, and he could then bring an action to recover the amount paid over and above what he should have paid (according to Roccus he could rescind the contract) and he could do this without waiting for the occurrence of the risk.
true nature of the insurance contract changed but also the application of the doctrine of *laesio enormis* itself. There appears to have been unanimity amongst those Roman-Dutch authors who addressed the matter, that the application of the doctrine of *laesio enormis* did in fact not extend to insurance contracts.

Thus Voet explained that, just as the doctrine did not apply to speculative sales, so too it was not applicable where the risk of merchandise had been taken over by way of insurance.\(^{121}\) Van Zurck pertinently stated that the doctrine of *laesio enormis* did not apply to the insurance contract ('dit contract sluit uit lesie boven de helft en rescissie anders naer rechten competente'), the rather obscure reason being because it was such an invaluable contract ('een gepriviligierde, nuttige, en ten besten van 't gemeen geïntroduceerde handel').\(^{122}\)

In a case before the *Hooge Raad* in 1715,\(^{123}\) the insurer, in denying liability on the insurance contract, relied on a particular restrictive interpretation of the policy in question as to the precise voyage on which the insured ship was permitted to sail. He argued that the policy had to be understood in that way as he had in fact so understood it, for if it were otherwise he would, in the light of the more extensive risk, not have insured the vessel for even two or three times the premium he had contracted for. On this basis, he argued further, he was in any event disadvantaged or defrauded by more than half ('hy [was] in dit geval derhalven boven de helft bedrogen'). The *Raad*

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\(^{121}\) *Commentarius* XVIII.5.15, referring in this regard to Zoeslus *Commentarius* XVIII.5.23. Earlier Roccus *De assecurationibus* note 7 (and see too Feitama's note in this regard) had explained more fully that the insurance contract could for two reasons not be rescinded on the basis of the *laesio enormis* someone had suffered. Firstly, because the doctrine was not applicable and the remedy it provided not available *inter scientes*, and when an insurer agreed to run a risk of 100 for 10 he must certainly have known that 100 was more valuable, and he was therefore not entitled to rescind the contract on the basis of *laesio enormis*. Secondly, even if the insurer was not aware of this, there was no such inequality in this case because the price or premium was fixed with reference to the *spes* or uncertainty that something could occur, and not with reference to the value of the goods. The insurer merely sold the *spes* of a future outcome; and because of the uncertainty, that *spes* could not be valued at a specific amount so that it could be said that half of the value had been exceeded.

\(^{122}\) *Codex Batavus* sv 'Assurantie' par 7 n1. He did think, though, that it could apply in extreme cases ('ob enormissimam laesionem'), and referred to Roccus *De assecurationibus* note 8 and the authority quoted there to the effect that the insurance contract could not be rescinded because of *laesio enormis* but only because of an excessive lesion (*laesio enormissima*) which the one party had suffered. See too in this regard eg Schorer *Aanteekenlingen* 427 (ad III.24.8) n22, who in turn referred to Van Zurck for the statement that insurances were not voided on grounds of *laesio enormis* but only in case of *laesio enormissima*. Presumably the reason why the insurance contract could be rescinded in the case of an excessive lesion was because that would invariably have been a case where fraud could be deducted from it. The fraud, rather than the *laesio* itself, was the reason for holding the contract avoidable. See further Enschedé 125 who refers to the French author Emerigon for an explanation along these lines.

\(^{123}\) See Bynkershoek *Observationes tumultuariae* obs 1168; *idem quaestiones juris privati* IV.5.
rejected the insurer's defence, unfortunately without any specific reference to this point. 124

Finally, Van der Keessel too agreed that the doctrine of *laesio enormis* did not apply to insurance contracts. He noted that the premium was fixed by agreement between the parties with reference to the extent of the risk taken over by the insurer (*pro ratione periculi*). And because the outcome of the insurance contract was so highly uncertain, there could be no question of any *laesio enormis* in terms of that contract. Insurance, he noted, was not a sale, and even if it were nevertheless to be regarded as similar to it, it would be akin to the sale of a chance (*emptio spei*) and, accordingly, the application of *laesio enormis* would for that reason be excluded. 125

In conclusion, therefore, the remedy of *laesio enormis* was not available in Roman-Dutch law 126 to the parties to insurance contracts as it was not available to the parties to aleatory contracts in general. 127 Therefore, an equivalence, within the frame-

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124 Lybrechts *Koopmans handboek* V.82 was therefore not correct, in noting that the cancellation of the insurance contract for enorm lesion was not practical, when he stated that no insurer had yet been brave enough to attempt to rescind it on that basis (*relief of ofheffing in een Contract van Assurantie is geensints practicabel, ... en geen braaf Assuradeur heeft het ooit getenteert*). The reason for the non-application of the doctrine, according to Lybrechts, was because the conclusion of the insurance contract and the determination of the amount of the premium occurred voluntarily and knowingly by the Insurer (*om dat men van te voren weet wat de zaak is en 't in de vrye keur staat of men het wil doen*). The rules applied in the case of sale were not applicable in the case of insurance because, presumably by reason of the uncertainty involved, the parties must be taken as having renounced any rights in this regard (*want die iets van te voren heeft geweten word niet bedrogen, en word gehouden als daar van te hebben gerenuncieert*).

125 See Van der Keessel *Theses selectae* th 712 (ad III.24.1); *idem Praelectiones* 1428 (ad III.24.1). Van Ghesel *De assecuratione* I.3.19 explained that the uncertainty of the risk taken over by the insurer itself resulted in the impossibility of determining the adequacy of the premium to the risk precisely, and as a result the doctrine of *laesio enormis* was not applicable. Van der Linden *Koopmans handboek* IV.6.6 thought that although the premium had to be in proportion (*geevenredigd*) to the extent of the risk taken over by the insurer (ie, although equivalence was the ideal), the agreement on the premium in the contract of insurance created such a binding obligation (*vaste verbintenis*) between the parties that it was not permissible for the insurer or the insured to complain in this regard that the premium was respectively too small or too excessive.

126 For similar sentiments in English law, see eg Magens *Essay* vol I at 81 who noted that in the case of the agreed premium rate being in excess of the common premium rate for the type of risk in question, the assumption was that there were extraordinary circumstances of which underwriters were aware, with the result that allegations of the insured having concealed those circumstances would not carry much weight. French authors such as Valin, Pothier and Emerlgon shared this view. See Enschdè 125. See also generally Coing *Privatrecht* 535.

127 See Faber *Aanteekeningen* 19. For example, Molengraaf *Verzekering* 17-20 explained that an inequality of performances was characteristic of aleatory contracts in that the performance by one party was given in exchange for the chance of a smaller or larger (ie, uncertain) performance by the other party, depending on the outcome of an uncertain event. In the case of aleatory contracts, equality was found not in the value of the performances themselves but in the chance upon which one or both of the performances were dependent. Insurance was an aleatory contract and the equivalence here was between the premium and the chance of the insurer having to pay a larger sum (whether the full sum insured or not) or nothing at all. The insurer received a certain premium from the insured and in return his performance was the bearing of the risk of the outcome of a chance.
work of and as required to exclude the application of the doctrine of *laesio enormis*,
between the premium and the risk-bearing was not necessary. But, it must be stressed,
that did not mean that there was no need for any premium at all. It simply meant that
the contract could not be attacked merely on the basis of a *laesio enormis* or unfair
equivalence. An undertaking to pay a premium was still an essential term of the
insurance contract and, as pointed out earlier, that premium had to be a real as
opposed to an imaginary premium. No insurance was possible without a premium and
only in this sense was an equivalence thus required, that is, there had to be a counter-
performance on the part of the insured.

3 Payment of the Premium

3.1 Reciprocality

A vexed question in Roman-Dutch law concerned the time when the insurance
premium had to be paid.

When considering the time of payment of the premium, the fact that the
insurance contract was a reciprocal bilateral contract was of crucial importance. This
meant that both parties to the contract were creditor and debtor of one another and
that their respective performances were rendered in exchange for one another. One
consequence of the reciprocal nature of the insurance contract was that one party to it
had the right to withhold his performance until the other party had rendered or tendered
his performance in full. This right gave rise to the *exceptio non adimpleti contractus*, a
defence which found application except where the parties had by their agreement
expressly or by implication excluded such application.

But what were the consequences of the application of this *exceptio* in the con-
text of the insurance contract?

It has already been explained that the payment of the premium was not neces-
sary for the creation and conclusion of a valid insurance contract. It was a con-
sensual contract, perfected by mere consent alone and was therefore mutually binding
even though the premium may not yet have been paid.

From this it followed that the payment and receipt of the premium was not
necessary to bind the insurer. He was liable on the contract for a loss even if at the time

\[128\] See again ch III § 1.3.4 supra.

\[129\] For example, the defence was not available where the performances were not to be rendered
simultaneously or where the performance of the plaintiff was not to be rendered before that of the
defendant. In the case of a sale, eg, the *exceptio* was ordinarily available to the seller in case of a cash
sale but not available to him in case of a credit sale. For further details on the *exceptio*, see eg
Zimmermann in 133.

\[130\] See § 1.3 supra.

\[131\] See eg Schorer Aanteekeningen 413 (ad III.24.2) n2; Schettinga Dictata ad III.24.2; Van der Keessel
Theses selectae th 713 (ad III.24.2); and idem Praelectiones 1430-1431 (ad III.24.2). See also eg Dorhout
Mees Schadeverzekeringsrecht 41 and see again ch III § 1.3.1 supra.
of such loss, the premium had not yet been paid and received. And, by the same
token, the insured remained liable to pay the premium even if the insured ship or goods
had arrived safely at their destination before it had been paid.\(^\text{132}\) The reason was that
the contract was binding and unconditional and the insurer's liability not suspended
subject to the payment of the premium.\(^\text{133}\) Put differently, although the premium may
have been due on the conclusion of contract,\(^\text{134}\) actual payment was not necessary to
render the insurer liable. The insurer had only himself to blame if, at the time of the loss,
the premium had not yet been claimed from the insured or if he had agreed to a pay­
ment in arrears.\(^\text{135}\)

However, it was possible for the parties to agree that their contract would be
conditional upon the payment of the premium and that such payment was a require­
ment for the insurer to incur any liability on it. It was also possible for the prepayment
of the premium to be made a requirement for the validity of the contract or for the enforce­
ability of a claim by way of a statutory enactment. This was done in Amsterdam in 1610
and, most clearly, in 1620 when an insurance contract in terms of which the premium
had not been paid in advance, was declared null and void. In such cases the insurer to

\(^{132}\) The fact that both insurer and insured were bound by the contract (the one to bear the risk of and pay
for a loss, the other to pay the premium) even if the premium had not yet been paid or if the risk had been
terminated, was assumed and alluded to in passing in an opinion delivered in 1675 (see Nederlands
advysboek vol III adv 17). It was remarked in that opinion that insurers were entitled to the premium even
if it had not yet been paid on the safe arrival of the insured goods, without the insured being able to
escape by saying that he was not the owner of the insured goods or that he did not have authority to
conclude the insurance. And likewise the insured was in case of a loss entitled to claim from the insurer
the compensation the latter had promised in exchange for the promise of the premium.

\(^{133}\) See eg Decker Aanteekeningen ad IV.9.10 n(4)/(d) who explained that if the premium was not paid
immediately and the insured property was then lost, the insurer could not withdraw from the insurance
contract ('poeniteeren van dit Contract'), as was the case in terms of Roman law in the case of an
innominate contract. See too Schorer Aanteekeningen 413 (ad III.24.2) n2.

\(^{134}\) See eg Van Ghesel De assecuratlon 1.3.20 (in the absence of an agreement to the contrary, the
obligation to pay the premium is unconditional and the premium is due immediately); and Weskett Digest
407 sv 'premium' par 1 and 2 (it is called premium because by right it ought to be paid beforehand).

\(^{135}\) Thus Lybrechts Koopmans handboek V.81 noted that if the premium had not been paid immediately,
the insurance was not as a result avoided, for if the insurer had wanted the premium to be paid first, he
could have compelled the insured to make such payment ('hy had den geassureerdan tot de betaling
konnen constringen'). See too Bynkeshoek Quesfiones juris privatI IV.2 (noting that doubts as to
whether an insured could claim if at the time of loss the premium had not yet been paid, were
unsupportable, for it was the fault of the insurer who had not claimed the premium, presumably as
legislation entitled him: see § 3.2 infra); Scheltinga Dictata ad III.24.2 (equity appears to demand that the
insurer also has to take the loss for his account as long as the other party did not refuse to pay the
premium).

This was the position in English law too. Weskett Digest 407 sv 'premium' par 1 and 2 explained
that, according to current custom, the payment or non-payment of the premium before the occurrence
of the loss was irrelevant, since insurers could insist upon being paid at the time of their underwriting if they
were not prepared to give credit for it. See also Magens Essay vol I at 81-82.
whom actual payment of the premium had not yet been made, was not liable in respect of a loss occurring before the date of the payment of the premium.\textsuperscript{136}

Nevertheless, payment, or an offer of payment, of the premium was necessary before the payment of compensation could be claimed from the insurer. This was so even if there was no agreement to that effect. The reason, quite simply, was the reciprocal nature of the insurance contract and the application, unless otherwise agreed, of the \textit{exceptio non adimpleti contractus}. Therefore, where the premium was payable immediately,\textsuperscript{137} the insurer could raise the exception against the insured when the latter claimed on the contract. But, it would seem, he could not do so where the insured had been granted credit for the payment of the premium, because then the insured’s performance was not due simultaneously with or earlier than that of the insurer. It seems that for purposes of the \textit{exceptio}, the insurer’s performance was not regarded as the bearing of the risk\textsuperscript{138} but as the payment of compensation for the loss.\textsuperscript{139}

\section*{3.2 The Time of Payment of the Premium}

\subsection*{3.2.1 Early Practice}

In terms of the Barcelona Marine Insurance Ordinance of 1435, the insurance policy had to contain an acknowledgement of the payment and receipt of the premium and it appears that the prior payment of the premium was required. No similar provision occurred in the Ordinance of 1458 where it was provided, however, that insurers only

\footnote{136 On the effect of the legislative provisions on these general principles, see eg Scheltinga \textit{Dictata ad} III.24.2; Van der Keessel \textit{Theses selectae} \textit{713 (ad III.24.2)}; \textit{idem Praelectiones} \textit{1430-1431 (ad III.24.2)} and \textit{1477-1478 (ad III.24.18)). See further § 3.2 \textit{infra} where the various legislative measures are discussed in more detail.}

\footnote{137 See § 3.2 \textit{infra} as to when that was the case.}

\footnote{138 For then no risk would be borne and no liability incurred prior to the payment of the premium.}

\footnote{139 Interestingly enough, the best exposition of this point comes from a lesser authority, Kersteman \textit{Woorden-boek} at 29. He distinguished the question whether insurance was null if the agreed premium had not been paid immediately on the signing of the policy (answer: no) from the separate issue whether the insurer could claim on the (valid) policy if the premium had not yet been paid. It was clear, he thought, that the insurer was not liable to compensate loss if the agreed premium had not been paid at the time of the loss (rather: at the time of the action) because the insurance contract was reciprocal ('wederzydsch obligatio ..., \textit{en de Contraheriten over en weder tot prestatie verbinden'}). The insurer was not liable to pay if the insured had not performed his part of the contract (if the contract 'aan de andere zyde daar door ongepresteert en onvervult gelaten is'). The principle, Kersteman explained, was 'dat leemden aegerende uit een reciproqueylyk verbindent Contract, welke gesustineerd word aan de eene zyde der Contractanten ongepresteerd en onvoldaan te zyn, in allen gevallen aan die zynde aan welke de non prestatie kan worden geimputeert tot geen Provisie van Namptissement kan geconcludeert worden'; the well-known axiom was '\textit{nemo anim ex Contractu mutuo agere potest, nisi quis prius a sua parte Conditionem impleverit}'.}
incurred liability after the payment of the premium, and from which it appears that the prior payment of the premium was in effect still required.¹⁴⁰

There is also other evidence that in earlier insurance theory, when the insurance contract was not yet clearly recognised as a consensual contract, premiums may always have been payable in advance as a requirement for the conclusion of a valid contract.¹⁴¹

Unlike earlier Spanish examples, the placcaat of 1563 contained no specific provision that the premium had to be paid in advance or, for that matter, at any particular time. It would appear from the wording of the model policy, though, that it may customarily have been paid in advance, for the insurers acknowledged in the policy having been paid the price of the insurance.¹⁴² The same is true of the policy provided by the placcaat of 1571.¹⁴³

The view has been expressed that the absence of a specific provision in these placcaaten was presumably because the premium was in fact always paid in advance according to the custom on the Antwerp Bourse which governed insurance contracts

¹⁴⁰ See eg Enschedé 73-75; Hammacher 140; Mullens 79; Reatt Geschichte 123-125 and 135; and Seffen Versicherung 31-32. This was not the position everywhere, though. By ancient custom the premium in Burgos was not paid immediately upon the conclusion of the insurance contract or within a short period thereafter, but only on the day of the first subsequent town market. Thus, in terms of s 5 of the Burgos Ordinance of 1538, the premium for insurances concluded between October and April had to be paid on the market in May, and the premium for insurances concluded between May and September had to be paid during the fair in October. But insurance frauds were encouraged by this practice, and it appears to have been realised in Burgos that it was desirable that there should ideally be an immediate and not a delayed payment of the premium. Section 6 of the Ordinance of 1538 accordingly made provision that the insured had to pay the premium on any date as agreed and could (subject to few exceptions, such as when the insurers financial position was in doubt, in which case the latter had to provide security) be summarily condemned to pay it. See further Reatt Geschichte 243-245.

¹⁴¹ See eg Santerna De assecurationibus III.22. Malß 365-366 explains that in terms of the old jurisprudence, the existence of the insurance contract was dependent upon the payment of the premium. Risk and its price (the premium) were seen as correlatives so that if the premium had not been paid, no risk could pass to the insurer, and if there was no risk to be borne, no premium was earned. Increasingly, though, the insurance contract came to be regarded as a consensual agreement which was dependent upon the consent of the parties and on what they had agreed as regards the nature and the time of payment of the premium. See too Faber Aanwijzingen 18-19. According to Holdsworth History vol VIII at 280, the practice of the advance payment of the premium may have originated when the insurance contract took the form of a fictitious sale (see again ch I § 4.1 supra). Under this form the insurer declared that he had received the sum for which the property was insured, and that sum included the premium. Later this custom passed into enacted law. See also again § 1.1 supra.

¹⁴² This acknowledgement read as follows: ’ende kennen de voorseyde Assuradeurs betaelt te wesen vanden kost of prijs van deser asseurantie, by handen van Jan Enryques [the broker]’. De Groote Zeeassurantie 102-103 notes that all the sixteenth-century policies he investigated contained an acknowledgement in some form or another by the insurers of the receipt of the premium from the insured.

¹⁴³ The acknowledgement there provided: ‘ende bekent den voorseyden Verseecckeraer betaelt te zijn vanden kost of prijs van deser verseckeringe ende asseurantie, by handen van sulcken [name of broker] nse advenant van soo veel ten hondert’.
at the time. Therefore, the immediate or advance payment of the premium was customary, and that that was so appeared from the presence in insurance policies of a form of receipt, something in itself consistent with a separate cash transaction.\textsuperscript{144} Even if this view was true, that does not appear to have been the position any longer early in the seventeenth century. Article 61 of the Antwerp \textit{Compilatae} of 1609\textsuperscript{145} determined that the premium had to be paid at the latest within three months after the signing of the policy, failing which the insurer would not be liable on the policy for any loss or damage but could nevertheless claim and retain the agreed premium.\textsuperscript{146} Therefore, immediate payment of the premium appears not to have been customary in Antwerp.

### 3.2.2 The Position in Amsterdam

#### 3.2.2.1 The \textit{Keuren} of 1610 and 1620

As appears to have been customary in Antwerp, so too in Amsterdam insurers may well customarily have granted their insured credit for a period of three months after the signing of the policy to pay their premiums.\textsuperscript{147} That this was in fact the position in Amsterdam is confirmed by the model policy form taken up in the Amsterdam \textit{keur} of

\textsuperscript{144} See eg Bynkershoek \textit{Quaestiones juris privati} IV.2 (the policy forms in the \textit{placcaaten} of 1563 and 1571 contain 'een quittantie voor de betaalde premie', from which may be deduced that then the premium was paid 'aanstonds'; that is, the acknowledgement was seen as confirming an actual immediate payment). See also Hopkins 57 (also 142-143); Scholten 34-35; and Vijn 55 who sees the acknowledgement of receipt of the premium in the policy formula as evidence of this). Later, however, as will be shown shortly, the acknowledgement appears to have been used to renounce and circumvent the legislation requiring an immediate payment.

\textsuperscript{145} Article 61 of par 3, title 11, part IV (see De Longé vol IV at 226). See further eg Hammacher 140; Mullens 79.

\textsuperscript{146} In view of this, a special effect was assigned to the customary acknowledgement of the receipt of premium. In terms of art 64 of the \textit{Compilatae} (see De Longé vol IV at 226-228) it was provided that although policies commonly stated that the insurers acknowledge of having received the premium, that nevertheless did not prove the payment, and the insurer was not 'schuldhem aan de makelaers te houden, al hadden zij den prijs ontvangen, maar mach de verzekeraer, dijenniettegende, hem van den versekerde doen betaalen', unless it properly appeared 'bij quittantie' or otherwise 'dat hij daerait voldaan waere'. Therefore, as Vergouwen 25 explains, 'van een kwitering van verzekeraer en een belasting van den makelaar voor volle premie ... is dus geen sprake'.

\textsuperscript{147} Thus, in 1592 a difference of opinion arose there between an insured and his insurers as to the time of the payment of his premium. The insurers wished to receive the premium of 10 per cent immediately upon signing, whereas the owner of the goods to be insured declared in a notarial statement of 24 April 1592 that that was not customary: 'dat niet gebruyckelick en was de prime van der asseurancle In comptant te betalen, dan drie maenten naer de teyckenyghe'. It would appear, from this dispute, that the Antwerp customary law on this point prior to its codification in the Amsterdam \textit{keur} of 1598 was somewhat uncertain or at least that its application in Amsterdam may not have been generally accepted. See further Sneller 114 and 117-118. Vergouwen 46 notes that there was no fixed rule as to when the premium had to be paid by the insured and that there appears to have been various practices in this regard.
It appears from this policy that the position was that insurers were considered to have given credit to their insured for the payment of the premium. Both the model goods and hull policies no longer contained the acknowledgement of receipt of the premium included in the earlier sixteenth-century statutory policies. Instead they declared that the insurers were content that the insured should pay the agreed premium within the next three months ('sijn made te vreden, dat ... [insured] (gelijck hy belooft mits desen) ons sal betalen den prijs deser Asseurantie over drie eerst-komende Maenden, jegens ... ten honert').

It seems, however, that insured abused this privilege. Obviously an insured was less inclined and eager to pay the insurance premium after the insurer had already borne the risk for the three months' period of credit, and the more so if the insured ship or goods had in the meantime arrived safely at their destination. Especially in the latter case insurers had their work cut out to persuade the insured to pay the premium. Insured regularly sought to escape liability for the payment of the premium, often resorting to fraud in the process. And, in cases where the insurance was not by and for a named insured, the insurer would no doubt have experienced particular difficulties to obtain a payment of the premium at a later stage.

In terms of s 1 of the Amsterdam amending keur of 26 January 1610 the position was therefore changed because, as it was stated, of the great irregularities ('groote ongeregeltheyt') experienced with the payment of premiums. It was provided that in

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148 The keur itself contained only one provision (s 22) on premiums, and that concerned the return of the premium: see § 6.2.1 infra.

149 See eg Bynkershoek Quaestiones juris privati IV.2 who said that it was 'een zeer gemeene Conventie' that the premium had to be paid only within three months, as appeared from the old insurance policies in the Amsterdam and Middelburg keuren. See also Scholten 36-37; Vlijn 55.

150 If a loss had occurred, the insurer could, if not set off the amount of the unpaid premium against the compensation claimed, then at least (unless the three months had not yet expired) raise the exceptio non adimpleti contractus against the insured's claim and in that way obtain payment of the premium. But if no loss had occurred, the insurer had to take the initiative to obtain payment of the premium from the insured.

151 For example, the insured would postpone payment of the premium until after the period for which the insurer had borne the risk had expired or an earlier loss had occurred. Whereas in the case of a loss he would no doubt promptly pay or offer to pay the premium to be able to claim on his policy, he would in the case of the safe arrival deny that the insured ship had ever sailed on her voyage or that the insured goods were ever sent by or to him. He would argue in that case that because the insurer was never at risk, the premium was not in fact due (in which case not the full premium but only ½ per cent administration fee would be payable: see § 6.1 infra as to the return of premium). See eg Dorhout Mees Verzekeringsrecht 19. Barbour 'Marine Risks' 586 ascribes the fact that insured delayed payment of the premium until after the insurer had borne the risk, to the latter's dilatoriness in paying out in the event of a loss. As to this, see ch XX § 2.2.1 infra.

152 On the necessity for the cash payment of the premium in the case of an insurance for an (unnamed) third party, see eg Dorhout Mees Schadeverzekeringrecht 193-194.

153 Or, more likely, the great irregularity in the payment of premiums.
future all insurance premiums not exceeding seven per cent had to be paid immediately (presumably on the conclusion of the contract) in cash ("datelick in contant gelt"). It was provided further that because it had to be taken as already paid, the premium could no longer in the assessment ('depeschen') drawn up by the Chamber be deducted or set off against any payment due by the insurer to the insured on the policy. Therefore, the legal consequence attached to s 1 of the keur of 1610 was a legal presumption that the payment had been made and received, so that the insurer could not subsequently have an outstanding premium set off against any assessed loss which he had to pay in terms of the policy.

Section 2 of the keur of 1610 provided that premiums exceeding seven per cent had to be paid within ('binnen') six months after the day on which the policy was underwritten ('teeckeninge'). The proviso was that when the premium was for a round voyage ('gaen ende komen') and was more than seven per cent and up to and including fourteen per cent, one half of it had to be paid immediately ('gerreet') and the other half after ('na') six months as before, with interest of twelve per cent being levied after the expiry of such six months until the actual ('effectuele') payment.

The provisions of the Amsterdam amending keur of 1610 were noted and commented on by Roman-Dutch authors, although not always precisely and correctly.

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154 Note, premiums up to and including 7 per cent and not premiums below 7 per cent as was often stated by those who later commented on this provision.

155 Although payment in cash may be taken to refer to the method of payment (in coined or ready money, as opposed to in kind or by services or goods; see again § 1.4 supra) as well as to the time of payment (cash payment signified immediate payment as opposed to credit payment which signified postponed payment), it would appear that in the Roman-Dutch sources it bore the latter meaning. The fact that postponed payment could likewise be made in cash was seemingly not realised or not regarded as relevant in the present context.

156 Six months was therefore the maximum period of credit permitted in that case.

157 Despite this 'after' (rather than the earlier 'within'), it would seem (especially in view of the very next part of the section) that this was still a maximum period and not now a minimum period of credit.

158 On the keur of 1610, see eg Dorhout Mees Verzekering 16 (who confuses the payment of premiums exceeding 7 per cent with the payments of premiums for round voyages); Enschedé 76 (who incorrectly thought s 1 concerned premiums 'below' 7 per cent); Goudsmit Zeerecht 323 (who also incorrectly referred to premiums below 7 per cent and those exceeding 7 per cent); Scholten 36-37; Sneller 114 (who makes the same mistake as Dorhout Mees supra when he states that half of a premium between 8 per cent and 14 per cent had to be paid immediately and the other half after six months); Vergouwen 46-47; and Vijn 55.

159 Thus Grotius Inleidinge III.24.18 stated that if the premium (which he did not qualify had to be 'for a round voyage') was between 700 and 1400 guilders ('tusschen de zeven ende de veerthien honderd gulden'), which was changed in later editions to between 7 per cent and 14 per cent ('tusschen de zeven ende de veerthien [ten] honderd'), half was payable immediately, and the other half after ('nae': translated by Maasdorp 288 as 'at expiration of') six months. Likewise Wassenaar Praktyk notariaal II.12 incorrectly referred to the premium below 7 per cent, and made no mention of the fact that the provision dealing with premiums between 7 per cent and 14 per cent concerned only those paid for a round voyage. Bynkershoek Quaestiones juris privatil IV.2 regarded the provisions as applying only to premiums for round voyages which exceeded 14 per cent. Better was Scheltinga Dicata ad III.24.18 sv 'waer tusschen de zeven ende de veerthien [ten], etc' who did notice the distinction between an insurance for a round (outward and homeward) voyage and one for a single (outward or homeward) voyage.
Most pertinently Van der Keessel\textsuperscript{160} pointed out that the \textit{keur} of 1610 did not alter the general principle that the payment of the premium was not required for the validity of the insurance contract nor for the liability of the insurer on it (that is, the \textit{keur} did not concern the form of the insurance contract but its execution), as appeared from the fact that not all premiums had to be paid immediately.

Because premiums not exceeding seven per cent were made payable immediately in cash, the Amsterdam Legislature no doubt hoped that insured would at least in run-of-the-mill cases be discouraged from committing the same frauds as before, for example alleging, after the safe arrival of the insured goods, that none had in fact ever been sent. To commit the same fraud now, an insured would have to claim his premium back, having paid it in advance, at least if it were below seven per cent. The insured would therefore have to prove the nullity of the insurance and the insurer would no longer bear the burden, in order to obtain payment of the premium, of having to prove that the insurance was in fact valid, that is, that the goods had in fact been consigned and that he had in fact borne the risk.\textsuperscript{161}

The measures of 1610 were strengthened by the provisions of the Amsterdam brokers' \textit{keur} of 1612,\textsuperscript{162} as amplified by an amending \textit{keur} in 1613, which provided in s 6 that brokers were, on a fine of £25, not permitted to leave unpaid those premiums that had to be paid (immediately) in cash ('\textit{de premien, die contant moeten betaelt zijn, onbetaelt te laten}').\textsuperscript{163}

But, it seems, these measures still did not have the desired effect and further amendments were required. This occurred by way of the Amsterdam amending \textit{keur} of 5 December 1620. It was noted in this \textit{keur} that although the payment of insurance premiums had been regulated by the \textit{keur} of 1610, it was understood from the complaints from a variety of merchants concerned with insurance ('verscheyden Coop/uyden hen met Asseurantien generende') that the measure was disliked and not observed, to the great loss and detriment of insurers who underwrote policies of insurance. Accordingly the \textit{keur} of 1610 was in part renewed and in part amplified.

It was provided that in future all insurance premiums, of whatever nature and at whatever rate ('\textit{hoedanich die souden mogen wesen, ende tot hoe veel ten hondet de selve oock souden mogen bedragen}'), had to be paid simultaneously with the underwriting of policy in cash ('\textit{beneftens de teckeninge van Policen van Asseurantie contant sullen moeten werden betaelt}'). Now the penalty was specifically added that in future all policies would be held null and void if it were found that anyone had done anything to the contrary ('\textit{indien imant yet ter contrarie bevonden mochte werden gedaen te hebben}').

\textsuperscript{160} Praelectiones 1430-1431 (ad III.24.2). See too \textit{idem} Praelectiones 1479 (ad III.24.19) as to the interest due on the late payment of the premium. As to interest generally, see ch XX § 2.2 infra.

\textsuperscript{161} See Dorhout Mees Verzekering 19 for this point.

\textsuperscript{162} See again ch X § 7.2 supra.

\textsuperscript{163} See eg Goudsmit Zeerecht 314.
There was a proviso, though. In the case of insurance concluded for a round voyage ('voor gaan ende komen'), the premium for the outward voyage had to be paid immediately in cash ('mede contant'), and that for the homebound voyage upon the arrival ('ten arrivements') of the ship. And in the case of time policies or monthly insurances ('assurantien die by de Maent gheschieden'), the premium had to be paid immediately in cash ('mede contant') for so many months as had been stipulated by the insured in the policy.

In the very next year, this amendment was in turn further clarified. It was not clear, in the case of an insurance of a ship or cargo for a round voyage, when exactly the premium for the return or homebound voyage had to be paid: when the ship arrived at the destination of the outbound voyage, or when she arrived at the destination of the return voyage. By an interpretation in the Amsterdam amending keur in September 1621, it was determined that the premium for the return voyage had to be paid when the ship again arrived at her destination and had completed her voyage ('wanneer de Schepen weder ter gedestlneerde plaetse sullen zijn gecom, ende hare reyse volbracht sullen hebben'), that is, the premium for the return voyage was payable immediately upon the arrival of the insured or carrying ship at the final destination upon completion of the return voyage.

The keur of 1620 and its clarification were also noted by the Roman-Dutch authors, again not always with great precision. It was observed that the provisions in the keur of 1620 did in fact now alter the general principle that, because of its consensual nature, payment of the premium was not necessary for the conclusion of a valid insurance contract nor for the liability of the insurer for a loss in terms of such contract. Bynkershoek thought that the provision for the immediate payment of the premium in cash on penalty of nullity was surely a novelty ('een nieuwlgheit') and had to be understood as meaning that should an insured postpone payment of the premium until after the loss had occurred, he would have no action against the

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164 As to which see ch XII § 1.4 infra.

165 That is, at the turning point, so that the premium had to be paid prior to the commencement of the return voyage, as was the case with the premium for the outward voyage, which was payable prior to the commencement of that voyage.

166 That is, after the completion of the return voyage upon her arrival at the port of her original departure.

167 On the keur of 1620 and its clarification in 1621, see eg Dorhout Mees Verzekering 16-17; Enschede 78; Goudsmit Zeerecht 323; Scholten 37; Vergouwen 50; and Vijn 56.

168 See eg Groeneveld Aanteekeningen n36 (ad III.24.18) who stated that in the case of an insurance for a round voyage where only a single premium was payable, it had to be paid, like the premium for the return voyage, upon the arrival of the ship; Van Zurek Codex Batavus sv 'Assurantie' par 24.

169 Quaestiones juris privatii IV.2.
Van der Keessel explained that although the general principle was that the insurance contract was consensual and that the payment of the premium was not necessary for its validity, the wording of the Amsterdam keur of 1620 seemed to require the contrary by providing that an insurance would be void if the premium was not paid immediately on the signing of the policy.

3.2.2.2 The Practice in the Seventeenth Century

In practice, though, the largely unworkable system provided for in the keur of 1620 and requiring the immediate payment of the premium on penalty of nullity, even if not unique, was not obeyed. Because various objections existed against insurance transactions in cash and because there was consequently a clear need for credit to be given for the payment of the premium, it was necessary to circumvent the strict legislative requirement of the immediate cash payment of the premium as contained in the keur of 1620.

170 Schorer Aanteekeningen 413 (ad III.24.2) n2 remarked that in Naples too an insurance was null and void if the premium had not been paid. Scheltinga Dictata ad III.24.18 sv 'waer tusschen de zeven ende de veerthien [ten], etc' explained that the provision for and the penalty of nullity meant that the insured would have no action against the insurer if he postponed payment of the premium until such time as he had obtained knowledge that a loss had befallen the insured property.

171 Theses selectae th 713 (ad III.24.2); idem Praelectiones 1430-1431 (ad III.24.2). See too idem Praelectiones 1477-1478 (ad III.24.18).

172 Scholten 40-41 explains that the essence of the keur of 1620 was not isolated but was found in most old insurance laws. It was based on the principle that the nature of the insurance contract did not permit the insurer to be held liable for something as long as he had not yet received the premium.

173 Scholten 41 notes that, in early times, when insurance was not yet frequently concluded by and between the same merchants, the cash payment of the premium provided no problem, but that later it was no longer actually possible or, if possible, simply not practical. According to Hammacher 140 in many instances an exact and final determination of the amount of the premium (and therefore also its final payment) was not yet possible on the conclusion of the contract because of the fact that the insurable value of the property to be insured then still had to be determined. The payment of a provisional premium with a subsequent adjustment by way of a further payment by the insured or a refund by the underwriters involved was just not viable. De Groote Zeeassurantie 162 makes the point that in the sixteenth century complicated financial dealings resulted from the shortage of coined money and from objections against payment in foreign coins because of fluctuating rates of exchange. See too Hopkins 57 who observes that changes in the methods by which commerce was carried on, required facilities which were inconsistent with the tendering and paying down of the premium to the underwriter at the time of executing the insurance.

174 In this regard, of course, the intercession of the broker was crucial, as will appear shortly. But it may be thought that even where no broker was involved, or where, as happened, the broker himself was an insured or insurer, the cash payment of premiums may have come to be regarded as irksome and insurance on credit preferable at an early stage. In early insurance practice, when individual merchants interchangeably acted as insured and insurers, insuring the goods of other merchants and being insured by them in turn, insurance payments (in the form of both premiums and compensation) may well have flowed to and fro between the same merchants to such an extent that a system of accounting would have been introduced in terms of which payments were settled only periodically and no longer immediately in cash.
The solution was sought in the declaration by insurers on the policy, well-known in earlier times,\(^\text{175}\) that the premium had been received in cash, although that was in fact not the case.\(^\text{178}\) However, the effect of and the aim with this acknowledgement of the receipt of the premium was now completely different. Whereas earlier it may have been inserted in the policy in confirmation of the practice of actual immediate payment, it now came to be employed to circumvent and exclude any reliance on legislation requiring the immediate prepayment of the premium for the validity of the insurance contract. It did so by feigning compliance with the legislation in question.

But, having acknowledged in the insurance contract\(^\text{177}\) that he had received the premium from the insured when that was in fact not the case, it meant that the insurer thereby lost his claim against the insured for the payment of the premium. The insurer therefore had to protect himself against the disadvantage inherent in this declaration in some or other way. And the solution to this problem was to render the broker liable for the premium by giving credit for the payment of the premium not to the insured but to the broker.\(^\text{178}\)

Because a significant proportion of insurance contracts was concluded through the intercession of brokers, and because those brokers were professionals and well known to the merchants acting as insurers on the insurance market, a different practice could be adopted as regards the payment of insurance premiums. This practice could

\(^{175}\) See § 3.2.1 n142 supra.

\(^{176}\) See Scholten 42.

\(^{177}\) And having done so in order to validate that insurance.

\(^{178}\) See Scholten 45-46; Vijn 58 ('met de quiteitering ontstond de gewoonte om den makelaar voor de bedrag van de premie aansprakelijk te stellen').
be as advantageous to insurers as the one involving the immediate payment of the premium by the insured in cash. Insurers were willing to grant brokers credit for the payment of premiums, something which they may not have been willing to do for an insured whose creditworthiness was not known to them. More particularly, they gave this credit to brokers with whom they had a running account.\textsuperscript{179}

It was to be more than a century, though, before the Amsterdam Legislature belatedly, in 1744, recognised the prevalence of a custom different to that provided for in the \textit{keur} of 1620.\textsuperscript{180}

The fact that the provisions of the \textit{keur} of 1620 were a dead letter in practice already appeared from a decision of the \textit{Hof van Holland} in 1639.\textsuperscript{181} Here the insurers had refused payment of compensation for a loss on the policy because the insured had not paid the premium in cash and because, in consequence, the contract was void in terms of the \textit{keur} 1620. The insured admitted that the premium had not been paid immediately but argued that since the insurers had acknowledged receipt of the premium in the policy, they had to be taken as having received security for its payment which was equivalent to actual payment itself ("fidem gehad te hebben de solvendo praemio, en sulx aequivalerende solutioni").

The \textit{Hof}, by a majority, held for the insured, thereby in effect holding that the \textit{keur} of 1620, less than 20 years after its promulgation, no longer had any effect or, rather, that its provisions could be abrogated by an agreement to the contrary in the form of an acknowledgement of the receipt of the premium. The result was that the insurance contract remained valid and binding although the premium had not been paid in cash immediately upon the conclusion of the contract, the insurer in fact having given credit for the payment of the premium but nevertheless declaring that it had been paid.\textsuperscript{182} In his comments on the case, Boel pointed out that at the time virtually no insurance premium was paid on the signing of the policy. Insurers underwrote policies which they returned to the insured or his broker without having received the premium from any one of them. The premium was usually only paid at a later date. It was common practice, Boel explained, for insurers who had given credit to the broker ("de Maekklaars met een voor hun Kassiers gebruyken"), either to be given by the broker a signed acknowledgement of debt in the amount of the premium, or to debit the broker for that amount in their account ("by den Assuradeur op zyn Boek den Maekklaar voor de Praemie werd gedebiteerd").

The decision of the \textit{Hof van Holland} in 1639 was therefore in accordance with the general mercantile usage of not requiring an immediate payment of the premium in cash.

\begin{itemize}
\item \textsuperscript{179} See eg Vijn 8-9 and 58-59 and further § 4.1 \textit{infra}.
\item \textsuperscript{180} See § 3.2.2.3 \textit{infra}.
\item \textsuperscript{181} See Loenlus/Boel \textit{Decisien cas} 93. Also Scholten 37-38.
\item \textsuperscript{182} According to Van der Keesselt \textit{Praelectiones} 1430-1431 (\textit{ad} III.24.2), the \textit{Hof} held that the insurance contract was valid without any payment of the premium although such payment was acknowledged in the policy, on the ground that the insurer had apparently given the insured credit for the premium.
\end{itemize}
That an insurer could expressly or impliedly renounce the *keur* of 1620 was the view also expressed in an opinion delivered in 1640, which proceeded on the unexpressed assumption that that *keur* was in fact still in force. One of the defences raised by the insurer in the case considered in the opinion, was that the premium had not been received in cash as was required by the Amsterdam *keuren* and that the insurance was null and void as a result. However, the advocate delivering the opinion thought that the provisions of the *keur* were not applicable to this case in view of the acknowledgement in the policy of the receipt of the premium in cash. They would apply only to a case where such a declaration of the receipt of the premium was absent. Those provisions, it was thought, concerned a private matter and could accordingly validly and lawfully be renounced, expressly or by implication, by the parties to the contract. Such a renunciation was not prohibited but legally permissible. The acknowledgement was nothing but such a renunciation ("*sulcx dat de bekentenissen van premie contant ontfangen, in effecte een renunciatie is van de voorz keuren*.") Accordingly, in this case, the insurance contract was not a nullity by reason of the fact that the premium had not been paid immediately in cash.

The opinion also pointed out that an insurance contract in terms of which no premium had been paid in cash, was in any event regarded by the courts as a valid insurance contract, as long as such premium was still due ("*midts deselve als noch cortende*"). In the present case it appeared that the insurers had a specific current account ("*particuliere loopende reeckeninge*") with the broker and had in fact debited the latter. The fact that they could look to the broker for payment of the premium was the reason why they had seen fit to acknowledge the receipt of the premium from the insured in the policy itself ("*ende deselve gecrediteert hebben op 't geen sy aen hem weder schuldhich waren, ende sulcks nopende de premie contant te ontvangen vertragen zijn, dat die op zijne particuliere reeckeninge gestalt soude worden, ende sulcx deselve hem vertrouwt hebben*.")

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183 See *Hollandsche consultatien* vol III(1) cons 80 (1640). This opinion was also taken up in *Hollandsche consultatien* vol III(2) cons 80 n4 and n5 (1641).

184 As to the renunciation of insurance laws, see again ch VIII § 5.2 supra.

185 With reference to this opinion, Van Zurck *Codex Batavus* sv 'Assurantie' par 24 n1 declared 'dat van deze Keur [ie, the one of 1620] zoude kunnen gerenuncieert worden, met te bekennen, dat premie ontfangen is, zonder dat die waarlyk is ontangen'.

See further Roccus *De assecurationibus* note 83 who remarked that an insured who had not yet paid the agreed premium, could not claim on the policy even though the insurer had signed it, because when the premium was not paid in full, the insurance was null and void. See too Roccus/Feltama *Gewifdsens* decis 6 (Odoardus & Guilelmu Micco [Englishmen] v Emanuel Vaez (1643) in which the question arose whether an argument by the insurers that the premium had not been received although it was promised, and a reliance on the *exceptio non numeratae pecuniae*, could prevent the summary execution of the policy: see further ch XX § 2.2.2 *infra*). But later on Roccus *De assecurationibus* note 69 explained that when Insurers have signed a policy in which they acknowledge having received the premium (eg 'I Insure you for 1 000 ducats and have received 100 ducats by way of premium'), then the insurance was valid despite the fact that the premium had not in fact been paid. The insurers could not then rely upon and raise against the insured's claim on the policy the exception that the premium had not been paid (*exceptio non numeratae pecuniae*).

Scholten 42-44 seeks to draw a distinction in this regard. He points out that while both the opinion of 1640 and Roccus's conclusion were to the effect that by the insertion of an acknowledgement that the premium had been received in cash, the contract was rendered valid, they differed as to the value
There are also numerous other indications that in the practice on the Amsterdam Bourse and elsewhere during the seventeenth century, insurance premiums were not paid in advance.\textsuperscript{165}

A number of Roman-Dutch writers accepted that the legislative measures contained in the \textit{keur} of 1620, and specifically the penalty of nullity it provided for the non-immediate payment of the premium, had either become abrogated by a contrary custom or could be renounced by an agreement between the parties in the form of an acknowledgement of the receipt of the premium.\textsuperscript{167}

But while it was certain that the merchants themselves thought it lawful to ignore the \textit{keur} 1620 and that the courts and some advocates supported their view, not all the jurists in fact accepted that this was a clear-cut case of an abrogation of a legislative provision by a contrary custom or, which was a different matter altogether, that a

to be attached to the acknowledgement. According to the opinion the insurer was permitted to waive the right to be paid in cash. According to Roccus the insurer was merely prevented by good faith from raising the exception that he had not in fact been paid.

\textsuperscript{165} Four such instances may be referred to briefly.

One of the objections raised by Amsterdam merchants against the establishment of a monopoly company for the compulsory insurance of ships and goods in the Netherlands in 1628 (see again ch IX § 2.10.2.1 supra) was the fact that it was proposed, contrary to accepted custom, that premiums would have to be paid in cash on the conclusion of an insurance with no possibility of any return of the premium if it subsequently appeared that the insurer had never been at risk (see Blok 'Plan' 8; \textit{idem 'Advlezen'} 29).

In commenting on Amsterdam insurance legislation in the mid-seventeenth century, Rooseboom \textit{Amsterdam Recueil} cap 30 \textit{inter ss} 36 and 37 remarked that the \textit{keur} of 1620 was even \textit{in judicilis} no longer observed.

Further support for the abrogation of the \textit{keur} of 1620, or at least for a restrictive interpretation of its provisions, appears from an opinion delivered in 1678 (see \textit{Nederlands advysboek} vol II adv 170) on the application of general principles (see ch V § 1 supra) to ransom policies (see ch VII § 3.2.2 supra). As far as specific instances of the application of general principles or rules to ransom policies were concerned, a number of examples were referred to, including the provision in the Amsterdam \textit{keur} of 1620 for the cash payment of the premium. The opinion noted that already in 1656 Rooseboom had thought that that provision was to such an extent abrogated '\textit{generali desuetudine} ' that even \textit{in judicilis} it was no longer observed. But, the opinion ventured, if it were still in force, it would not have been applicable to ransom policies for there was mention in the \textit{keur} only of ships and goods.

Lastly, it appears from a Haarlem notarial protocol of 1680 which contains a claim (against the estate of a deceased underwriter) by the insured owners of a share in a ship lost three years before, that the premium for the insurance had at that stage not yet been paid, despite the fact that the insured had (presumably on the policy) undertaken to pay the premium in advance. The insured here namely claimed the '\textit{somme van een duysent ca : guldens mids afslaanande acht pr cento voor yutbelooffde premie}'. See Den Dooren de Jong & Lootsma 25-26 (the protocol is reproduced in appendix VI at 62).

\textsuperscript{167} See eg Voet \textit{Observationes} \textit{ad} III.24.18 n36 (by the general custom of merchants the need for an immediate payment was abrogated ('\textit{sed generali mercatorum desuetudine ista praesentis solutionis necessitas abrogata fu})'; Van Zurck \textit{Codex Batavus} sv '\textit{Assurantie'} par 24 n1 (a renunciation of the \textit{keur} was possible '\textit{met te bekennen, dat premie ontfangen is, zonder dat die waerlyk is ontanger}') and this is supported by the opinion of 1640); Scheltinga \textit{Dictata} \textit{ad} III.24.18 sv '\textit{waer tusschen de zeven ende de veerthien [ten], etc}' (referring to Bynkershoek \textit{Quaestiones juris privatii} IV.2 for the view that nullity in terms of the \textit{keur} of 1620 would never occur ('\textit{nuimmenmeer plaats hebben zal}') if the insurer had credited the premium to the insured, which was the case if there was an acknowledgement of payment without actual payment); Van der Keessel \textit{Theses selectae} th 713 (\textit{ad} III.24.2); and \textit{idem Praelectiones} 1430-1431 (\textit{ad} III.24.2). See also eg Lichtenauser \textit{Geschiedenis} 153; Vlijn 56.
renunciation was possible in this case as the majority of the Hof had decided in 1639 and as the opinion in 1640 had suggested.\textsuperscript{188}

Bynkershoek,\textsuperscript{188} for one, stated that if the general view that the keur of 1620 had fallen into disuse by contrary practice was true, something which Bynkershoek appears to have accepted, it was unnecessary to question whether one could renunciate that keur or whether it was tacitly renunciated where payment of the premium was postponed. But if it was still in force, Bynkershoek thought one could in fact not renunciate it. Although he gave no reason for this view, it may be that he thought the measure to have been passed in the public interest and therefore not to have been renounceable.\textsuperscript{190}

Van der Keessel,\textsuperscript{191} in turn, noted that although the requirement of immediate payment of the premium on penalty of nullity in terms of the keur of 1620 may have been abolished by a contrary custom, there was an exception to this. If, after an unsuccessful claim for payment of the premium, the insurer noted a protest about the non-payment, he could not be compelled to compensate any loss occurring thereafter.\textsuperscript{192}

The fact that according to the unrepealed legislation of 1620 premiums had as a rule to be paid in cash upon the conclusion of contract, also came to be reflected, at least nominally, in the model policies appended to the Amsterdam amending keur of 1688. These policies now contained the insurers' undertaking to indemnify the insured on condition that they were paid the premium in cash (‘mits dat ons in gereeden (gereden) gelden betaelt werde voor den prijs van dese verseekering ... ten hondert’).\textsuperscript{193} The fact that s 4 of the amending keur of 1693 contained a provision to facilitate and speed up the insurer's proceedings against an insured for the payment of the premium,\textsuperscript{194} may however be taken as an indication that even the Amsterdam

\textsuperscript{188} As to the abrogation of law, including legislation, by a contrary custom, see again ch IV § 4.5 supra. As to the renunciation of insurance laws, see again ch VIII § 5.2 supra.

\textsuperscript{189} Quaestiones juris privati IV.2.

\textsuperscript{190} See also eg Scholten 39-40; Vijn 56-57.

\textsuperscript{191} Praelectiones 1477-1478 (ad III.24.18).

\textsuperscript{192} This was apparently decided, Van der Keessel pointed out, by the Chamber of Insurance and on appeal by the Amsterdam Schepenen Bench on 5 April 1658 in the case of Franciscus Teroni v Isacq Foucquier. The assumption of the exception was, nevertheless, that the contract remained valid despite the non-payment of the premium.

\textsuperscript{193} This could be interpreted, though, that insurers merely required the payment of the premium as a condition for the enforceability of a claim, that is, not upon underwriting. However, if the premium was not paid in cash upon the conclusion of the contract, it was null and void in terms of the keur of 1620, in so far as that was still the governing law.

The ransom policy in terms of the keur of 1693 stated the insurers' undertaking and then continued that the premium had been agreed upon at a stated amount (‘en hebben wy voor premie bedongen ...[amount of the premium]’), not that it had in fact been paid.

\textsuperscript{194} See § 5.2 infra.
Legislature recognised that the *keur* of 1620 was no longer in force: if it were, the non-payment of the premium upon the conclusion of the contract would have rendered it void and any subsequent proceedings to recover unpaid premiums would have been impossible.\footnote{Bynkershoek *Quaestiones juris privatil* IV.2 explained that the reason why the *keur* of 1693 sought to establish a speedier judicial recovery of the premium from the insured was because, contrary to what was intended by the *keur* of 1620, otherwise the continued validity of the contract would have depended on the insured’s payment or refusal to pay premium. That is, the insured would wait until a loss before he paid the premium, and if there was no loss he wouldn’t pay as a result of which the insurance would then be null and void. Along similar lines, Enschedé 77 explained in this regard that the *keur* of 1693, read with that of 1620, resulted in the nullity of the contract for the insured, but no longer for the insurer, where the premium had not been paid. Van der Keessel *Praelectiones* 1430-1431 (ad III.24.2), however, thought the abolition of the *keur* of 1620 by desuetude was abundantly proved by the *keur* of 1693 which provided a procedure for claiming the insurance premium. See further eg Scholten 39; Vlijn 56 (noting that by implication the sanction of nullity had already fallen away in 1693).}

3.2.2.3 The Position in the Eighteenth Century

Early in the eighteenth century, in 1713, an opinion by 20 Amsterdam merchants and insurers\footnote{See Barles *Advysen* vol I adv 22.} gave further details about the practice on the Amsterdam Bourse as regards the payment of premiums. It confirmed that the *keur* of 1620 was roundly ignored.

According to the opinion, although insurers on the basis of established practice always declared in a note added to insurance policies that the premium had been paid and received in full, it was in fact almost never paid on the signing of the policy. The note or acknowledgement was added to the policy solely to comply with the formal legislative requirement, in the *keur* of 1620, of the immediate payment of the premium. It was inserted in the policy in exchange for a written acknowledgement of debt by the broker ("têgens de intrekkinge van een renvers") for the unpaid premium, or also often merely against the debiting of the broker in his account with the insurers in the amount of that premium. And such acknowledgement by or debiting of ("renvers of debet") the broker, so the opinion thought, at the same time served and was accepted as sufficient proof of the fact that, as between insurer and broker, that premium had not yet been paid by the insured and that the broker was bound to arrange for and ensure the payment of the premium by the insured. The acknowledgement of receipt of the premium therefore did not result in the insured being able to escape liability to pay the premium. The "erkentenis wegens ontvangst der praemien by Police", the opinion ventured, "is geene quitantie deswegens". And it did not imply that the broker was personally liable to pay the premium out of his own pocket but merely that he was obliged to ensure that the insured in fact did so.\footnote{See for explanations of the opinion of 1713 eg Van der Keessel *Praelectiones* 1477-1478 (ad III.24.18); Scholten 47-49.}
became insolvent before the insured had paid the premium to the broker, was in fact not pertinently addressed, it being (wrongly) thought that in such a case the insured was not liable for any premium.\textsuperscript{198} Secondly, the argument that the acknowledgement of debt by or the debiting in the account of the broker did not mean that the latter was personally liable for the premium but merely that he was obliged to ensure that the insured paid it, seems rather artificial, even if it may have been based on longstanding custom.\textsuperscript{199} It is not surprising, therefore, that when the custom explained in the opinion was eventually recognised by the Amsterdam legislature in 1744, this interpretation was not sanctioned and the broker's personal liability was pertinently provided for.\textsuperscript{200}

But still the \textit{keur} of 1620 remained on the statute books and continued in force, if only in name, until 1744.

The requirement of the immediate payment of the premium in cash was not abandoned by the Amsterdam Legislature in its provision for the payment of the premium in s 37 of the \textit{keur} of 1744.\textsuperscript{201} But, taking account of and recognising, at least in part, existing practices involving the role of the broker in the payment of the premium and the debiting of such a broker by the insurers, and expressly providing that the insurer could grant credit for the payment of the premium,\textsuperscript{202} the requirement of immediate cash payment was by necessary implication applied only in the less common cases where either no broker was involved or the broker was not given credit for the payment of the premium.\textsuperscript{203} Thus, the immediate payment of the premium was now only statutorily required in the case where the insured and insurer dealt directly with

\textsuperscript{198} If the insured in such case cancelled the insurance, the premium was in fact forfeited: see again ch VII § 4.1 \textit{supra} for the legal position as regards solvency insurance, and ch IX § 2.9 \textit{supra} for underwriter insolvency.

\textsuperscript{199} It appears that a century earlier in Antwerp the custom was that an acknowledgement in the policy of a receipt of the premium likewise did not prevent the insurer from claiming the premium from the insured, unless the latter could prove that he had in fact paid the broker. See again § 3.2.1 \textit{supra} where the effect of such an acknowledgement in Antwerp customary law was referred to.

\textsuperscript{200} See \textit{infra}.

\textsuperscript{201} In fact, the principle was in a sense extended because the proviso in the \textit{keur} of 1620 (as to which see again § 3.2.2.1 at n164 \textit{supra}) was not taken over or repeated.

\textsuperscript{202} See § 4.2 \textit{infra} as to this part of s 37.

\textsuperscript{203} Thus eg Lybrechts \textit{Koopmans handboek} V.81 noted that s 37 'bepaalt het ook niet volstrekt' that the premium must be paid immediately. Likewise, Van der Keessel \textit{Theses selectae} th 713 (ad III.24.2) stated that the abolition of the \textit{keur} of 1620 was now made certain by s 37, and elsewhere (\textit{Praelectiones} 1430-1431 (ad III.24.2)) he explained that it was absolutely certain that in terms of s 37 the voidness of the contract as result of a failure to pay the premium immediately was not only not approved of, but also that it was expressly provided that credit could be granted for the payment of the premium, and that it followed that the payment of the premium did not concern the form of the contract. See further on the effect of s 37 \textit{idem Theses selectae} th 766 (ad III.24.18) (immediate payment was not required if the insurer gave the broker credit); \textit{idem Praelectiones} 1477-1478 (ad III.24.18) and 1479 (ad III.24.19) (the provision in the \textit{keur} of 1610 for interest on the late payment of the premium could no longer find application by virtue of the rule of s 37 that, whatever the amount, the premium had to be paid immediately, unless the insurer gave credit to the broker). See too eg Scholten 50; Vijn 59-60.
one another or where the broker, if one were involved, was not given credit by the insurer for the payment of the premium. Only the former case will be dealt with here.204

In terms of the first two paragraphs of s 37 of the Amsterdam keur of 1744, all insurance premiums, whether on an outward voyage only or on an outward and homebound voyage ('het zy gaande alleen, 't zy gaande of komende te zaamen'), and whatever the rate of the premium, had to be paid in full upon the signature of the policy in cash ('neffens de teekenling van de Police contant').205 In the case of monthly insurances (literally: insurances by the month; 'Assurantien, die by de maand geschieden'), the insurance premium had to be paid in cash for as many months as may have been stipulated in the policy, and for further months on such conditions as may have been agreed (that is, on the day or days stipulated in the contract) and at the latest at the end of the voyage and on the arrival of the ship at her destination, that is, the last premium on the monthly insurance had to be paid upon termination of the contract.206

Read with the rest (the third paragraph) of s 37, which concerned the insurers' giving credit to the broker for the payment of the premium, the implication of this part of s 37 was that the insurer had no claim against the insured for a premium not paid immediately upon the conclusion of the insurance contract.207

The model goods and fire policies in terms of the Amsterdam keuren of 1744 and 1775 contained the insurers' undertaking to indemnify the insured on condition that

204 As to the position where a broker was involved and where he was given credit, see § 4 infra. In brief the position in that case was that if the premium was not paid immediately in cash, the insurer could subsequently claim the premium only from the broker, not from the insured.

205 As to s 37, see Van der Keessel Praelectiones 1477-1478 (ad III.24.18); Van der Linden Koopmans handboek IV.6.6; Dorhout Mees Verzekering 18; Enschede 78; Goudsmit Zeerecht 353; Vergouwen 63 (noting that the earlier proviso in respect of premiums for round voyages was no longer provided for: whereas in 1620 nearly all insurances were concluded for voyages from and to Amsterdam, now voyages were also insured at Amsterdam from and to other places in the Netherlands or elsewhere, so that it had become difficult to determine when a voyage was an out or a return voyage).

206 The provisions for time policies in 1744 were clearer than those on that topic in the keur of 1620. It appears that in the case of a policy for a particular time (eg, twelve months), the parties could stipulate that the premiums for a certain number of months had to be paid in advance on the conclusion of the insurance contract (quaere: could the parties stipulate that no premiums be payable in advance?; it would seems so) and that the balance, if any, had to be paid on an agreed date no later than the end of the period of risk on the ship's arrival at her destination.

207 For if the insurer gave the broker or other intermediary credit for the payment of the premium, only the broker or such intermediary could be sued afterwards ('in posterum') (by implication, no immediate payment was required in such a case and the insured could not then be held liable), unless the broker had become insolvent and the insured could not prove that he had already paid the premium to the broker. See Van der Keessel Praelectiones 1477-1478 (ad III.24.18) and further § 4 infra where the role of the broker in the payment of the premium will be considered in detail.
the agreed premium be paid in cash ("mits dat ons in gereden gelde betaald worde voor den pryts van deze verzekering ... ten hondert"). 208

Nevertheless, the prevailing practice in the last half of the eighteenth century remained that insurance premiums were not paid by the insured to the insurer immediately upon conclusion of the contract in cash. 209 Rather, premiums were paid through a broker and, as will shortly be shown, this was fully recognised by s 37 of the Amsterdam keur of 1744.

3.2.3 The Position in Rotterdam

In Rotterdam, it seems, the principle of the immediate cash payment of the premium was not embraced with the same fervour as in Amsterdam, and in view of the experience there, probably wisely so. A possible reason may have been that the Rotterdam Legislature realised much sooner than its Amsterdam counterpart that in practice the system of insurers giving credit for the payment of the premium to the broker was much more prevalent than that of the immediate payment of the premium by the insured. Alternatively, the Rotterdam Legislature simply did not realise that the time of the payment of the premium gave rise to any problems worthy of legislative intervention. Whatever the reason, there were no general provisions on the payment of the premium in the Rotterdam keur of 1604. 210 Provision was made only for one particular and isolated instance and in other cases, it would appear, the premium was by custom due only after the conclusion of the contract. 211

Section 7 of the Rotterdam keur of 1604 provided for the cash payment of the premium (presumably immediately upon the conclusion of the contract, although that was not pertinently stated) only in the case where it was not possible for the insured owner of the goods to mention the name of the carrying ship or her master in his policy because he was not in possession of that information. 212 In such a case he had to men-

208 Again this could be interpreted to mean that in the policy the insurers merely required the payment of the premium as a condition for the enforceability of a claim, and not upon underwriting. That, however, would have been in conflict with the provisions of s 37. More clearly the ransom policy in terms of the keuren of 1744 and 1775 now stated that the premium had already been received ("ontvangen"), as was required by law, and not (merely) stipulated for ("bedongen") as it had done in terms of the keur of 1693 (see again n193 supra).

209 Thus, Lybrechts Koopmans handboek V.81 noted that it was not a fixed usage in his time "de premie terstond te betalen".

210 See Vergauwen 80.

In Middelburg, where subsequent amendments effected to the otherwise identical Amsterdam keur of 1598 were never passed in respect of its keur of 1600, the time of the payment of the premium remained totally unregulated by statute. The topic was also not addressed in the Middelburg amending keur of 1719.

211 See Kracht 32 who suggests that the premium was due only three months after the conclusion of the contract. That, at least, was the practice at the time in Antwerp and seemingly also in Amsterdam.

212 See again ch VIII § 4.2.3 supra.
tion the fact of his ignorance at the conclusion of the insurance and annex to the policy or show to the underwriter the receipt he had received for the loading of the goods. Also in such a case the premium had to be paid in cash ('gereet betalen') and was, by way of exception to the general principle, not recoverable, even though the insured may thereafter have claimed that the goods had not been sent to him or not in the same quantity as had been insured.

It seems that the Rotterdam Legislature saw fit to restrict the requirement of the immediate cash payment of the premium to the case where the commission of fraud by insured was most prevalent, namely where the consignment of goods insured could not be identified and thus made the pretence possible, after the safe arrival of the goods, that none or a lesser amount had in fact been consigned. In this way it was made more difficult for the insured to commit such a fraud.

In all other instances, it would appear, the immediate cash prepayment of the premium was not statutorily required in Rotterdam. This is confirmed by the provisions of s 19 of the keur of 1604 which would otherwise not have been necessary. Section 19 laid down that insured were obliged in all cases to pay their insurers the premium promised in full ('in 't geheel'), even though the insured goods may have arrived at their destination prior to the date or the underwriting of the insurance ('voor date vande Asseurantie ofte teeckeninge'), and even though the insured may have wanted to say that he or his representatives ('Commissen') had in one or more places, with or without his knowledge, insured for more than the value of the consigned goods.

But the lack of legislative regulation and protection for insurers in Rotterdam was not acceptable to all, especially not to the insurers themselves. In an agreement concluded between eighteen prominent Rotterdam insurers in 1698, they agreed not to conclude any insurance if the premium was not paid in cash. They also agreed to accept insurances for a single voyage only, and, by implication, not to insure round voyages nor by way of time policies. And in 1719 Rotterdam insurers again agreed

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213 See further § 6.3.2.1 infra.

214 See eg Jolles 46, noting the contrast between position in Rotterdam and that in Amsterdam. But see Vlijn 55 who suggests that the Rotterdam keur of 1604 compelled the immediate payment of the premium, as did Bynkershoek Quaestiones juris privati IV.2, with reference to s 7. True, s 7 did require immediate payment, but only in an exceptional case and not as a general rule.

215 Except those dealt with in s 18 which concerned the return of the premium: see § 6.2.1 infra.

216 That is, even in the case of an allegation of over-insurance by double or multiple insurance, as to which see § 6.2.2 infra. As to s 19, see generally Goudsmit Zeerecht 399.

217 See again ch IX § 2.6 supra on insurer co-operation.

218 See Krans 24; and Vergouwen 96 who states that it is unclear why the conclusion of time policies was stopped, except possibly because the payment of the premium in the case of such policies gave rise to specific problems in practice.
not to insure round voyages except if the full premium was paid in cash. In concluding such agreements the Rotterdam insurers were not alone. Hamburg insurers, for example, also concluded agreements to regulate the payment of the insurance premium on the local market.

The largely under-regulated position in Rotterdam and the fact that the prepayment of the premium in cash was not legislatively required there, was by and large retained by the keur of 1721. Section 55 merely provided that the insured was liable to pay the agreed premium in full even where the insured goods or ship may have arrived at the destination before the signing of the policy, the unexpressed reason being because the insurer had borne the risk in question. As Van der Keessel pointed out, s 55 did not concern the time of payment but the fact of payment itself, and it in fact confirmed the basic principle that payment of the premium was not required for the conclusion of a valid contract of insurance.

219 They agreed as follows in art 4 of their Reglement of that year: 'Verbinden wy ons voortaen geen Policen te zullen tekenen van Voyages heen en weer, of wel met onderscheydene premien, als dar voor ontangende de geheele premie, so wel voor de uyt, thys als tusschen-reys, exempt Groenland alleen daer niet onder begrepen'. See further Goudsmit Zeerecht 443-444 and Appendix 14 infra.

220 In Hamburg insurance premiums were also by custom paid only after three months or on the completion of the voyage (see e.g. Klesselbach 126), and it was recognised there that the insurance contract was valid even if no premium had yet been paid (see Frenz 'Kauffmännische Gutachten' 166-167, referring to the decision of the Hamburg Admiralty Court in Hübner v Paulsen in 1668 where, in accordance with a merchants' opinion, it was recognised that the parties could agree that the insurer would only be at risk some time after the conclusion of the contract on the payment of the premium. Local insurers also concluded agreements regarding the payment of premiums. Thus, in terms of an accord or Vergleich of 1677, insurers undertook for a period of two years to underwrite policies only against the cash pre-payment of the premium (art 1). According to Dreyer 54-55, this not so much followed custom elsewhere as it was the result of many existing uncertainties regarding the payment and recovery of the premium which could be avoided by the cash prepayment of the premium without any exception. See too Hammacher 142.

But it appears that art I was soon no longer regarded as binding, probably because of the inconvenience and the risk of insured (or their brokers) having to carry large amounts of cash with them when seeking out insurers to subscribe insurance policies. Probably as a result, by an accord of 1704 (see Dreyer 63-64), art 1-2 provided for the payment of the premium by bank transfer or remittance, in which case the policy had to state 'Premie In Banco', which transfer had to take place between two and three days after the signing of the policy.

221 Vergouwen 96 states that the Rotterdam keur of 1721 was silent on the payment of the premium and the role of the broker and apparently allowed the parties freedom to regulate the matter themselves.

222 It was possible to insure after the safe arrival of the insured ship or cargo: see ch XII § 2.3 infra. As to the return of the premium for an absence of risk, see § 6.2.1 infra.

In terms of the goods and hull policies appended to the Rotterdam keur of 1721, however, insurers were stated to be liable on condition that they were paid the agreed premium in cash ('mits dat ons in gereeden gelde zal betaalt werden, voor de pry's van deze verzekerings ... ten hondert'). This was the closest Rotterdam came to requiring the immediate payment of premiums.

223 Praelectiones 1477-1478 (ad III.24.18). See also on s 55, Vergouwen 95-96.
4 The Role of the Broker in the Payment of the Premium

4.1 Accounting Between Brokers and Insurers

The insurance broker was not only an intermediary between the insured and the insurer for the conclusion of the insurance contract, the giving of notices and the transfer of documents, but also acted conveniently as the conduit through whom monetary payments were made between those parties. In the main there were three such payments, namely the payment of the premium by the insured to the insurer, the return by the insurer of the paid premium to the insured, and the payment by the insurer to the insured for the loss or damage covered by and claimed under the policy. The broker's role in the transfer of these various payments was quite complicated and, not surprisingly, gave rise to numerous problems, as always exacerbated by the insolvency of any one of the three parties involved. And, especially later, it also gave rise to detailed legislative intervention and regulation.

Because insurance brokers were, much sooner than underwriters, full-time professionals operating on the insurance market, they and, more importantly, their financial standing, were well known not only to those who wanted insurance cover for their ships and goods, but also to those merchants who were prepared to grant such cover. Underwriters soon conducted their business regularly with one or more such brokers. This familiarity, coupled with the obvious convenience involved, gave rise to a course of business between the broker and the insurer by which payments were no longer made in cash but by way of a system of credits and debits in account. Thus, payments due to the insurer from the broker or from the broker to the insurer were credited to the insurer or the broker or debited to the broker or the insurer respectively in the account between them. Periodic settlements, by which often the premiums due to the insurer were set-off against outstanding payments by the latter due to the broker, resulted in a single cash payment having to be made by one of them to the other, depending on whose credit was the greater, only occasionally rather than in respect of every separate transaction.

As far as the payment of the premium specifically was concerned, it was obviously more convenient and secure for the insurer to look for the premium to the broker, with whom he had direct contact and of whose creditworthiness he was more than likely fully apprised, than to the insured. When the security offered by the system of immediate cash payment of the premium was lost because of the inconvenience involved, it was to the broker, rather than to the insured, that the insurer granted credit. Even if the broker did receive the premium from the insured in advance, he did not actually pay it over to the insurer but simply credited it to the latter's account, actual payments only being made on the periodic settlement of their account. And obviously,

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224 For the role of the brokers as regards these and other matters, see ch X § 7 supra.

225 See eg Hammacher 140-141.
if the broker did not collect the premiums so credited from the insured, that was ordinarily of no concern to the insurer. Evidence of such accounts existing between brokers and insurers in the Netherlands dates from the sixteenth century and the eighteenth-century examples referred to here were therefore very likely mere confirmations of or adaptations to existing systems of such accounting.

In the Accord (Reglement) concluded between Rotterdam insurers in 1719, the signatories agreed in art 6 to balance their accounts with brokers and other intermediaries on a quarterly basis, to settle and obtain payment from them within the month thereafter, and not to conclude any further insurances with brokers who defaulted on their payments.

In terms of an agreement between Amsterdam brokers dated 15 July 1786 concerning their commission, it was also agreed that they would pay any debit for premiums due to underwriters on a quarterly basis after a deduction or set-off of their brokerage, and any such (possibly outstanding) insurance payments and returned

228 That is, where the broker was not insolvent.

227 Whereas the insurer gave the broker credit for the payment of the premium (a credit which the broker in all probability passed on to the insured), the insured did not give the broker or the insurer any credit for payments due by the insurer (compensation or return premiums) and the broker did not, in turn, give the insurer credit for such payments. Any such payments, if made through a broker, were immediately passed on by the latter to the insured, possibly after a deduction of any outstanding premiums.

228 Thus, the sixteenth-century treatises of Valentin Mennher on accounting contain information and instruction on insurance bookkeeping. Thus, in one of them, which appeared in 1563, a 'winst- en verliesrekening van de betaalde premie' was included, and in one from 1565 there was also a 'winst- en verliesrekening aan Kas van de betaalde premie'. The work of John Waddington, A Breffe Instruction, published in Antwerp in 1567, showed that an intermediary (such as a factor) who had concluded an insurance for another, advanced the premium on the latter's behalf and debited his account for the amount involved. In the case of a loss, he entered in his account book the following: 'Verzekarde aan Kas, bij uitbetalig van het verzekerde risico. Winst en verliesrekening aan verzekerde, van de verzekerde som minus de premie'. It is clear that a fairly sophisticated system of crediting and debiting between parties to and involved with insurance contracts (insured owners and factors or brokers; insured and insurers; insurers and brokers) was well known in Antwerp in the sixteenth century and that insurance and insurance-related transactions were not necessarily conducted by way of immediate cash payments. See further De Groote Zeeassurantie 141-142.

As to the system of credit and debit entries in the ledger of the Antwerp broker Juan Henriquez, see De Groote Zeeassurantie 162-163. See also eg Boel's explanation of the decision of the Hof van Holland in 1639 in § 3.2.2.2 supra.

229 See again ch IX § 2.6 supra.

230 The clause read as follows: 'Verbinden wy ons met de Makelaers ofte die met Policen omgaen van drie maanden tot drie maanden af te rekenen, en in de vierde maend reêel van haar voldaan en betaalt te zyn, belovende wy als Luyden van Eere by fautes van dien niet weder aan haer te zullen verzeckeren tot de tyd dat Zy het zelve nagekomen hebben'. See generally Goudsmit Zeerecht 443-444; Kracht 37-38; Witkop 23 (noting that the agreement for 'de driemaandelijksche verrekening van premies en schade' was concluded after the example of the practice in Amsterdam) and 30 (speculating that at the beginning of the eighteenth century the settlement between brokers and insurers still occurred annually). The Accord of 1719 is reproduced in Appendix 14 infra.
premiums which they considered necessary, and that they would equally in the same way credit themselves on a quarterly basis.231

Also in England, as elsewhere,232 such accounting between underwriters and brokers in the eighteenth century and before that appears to have been an accepted and widespread practice.233 Whereas losses were paid by underwriters within one month of the claim being settled, premiums were payable in arrears. And because any settlement in account between brokers and insurers by custom occurred only annually, underwriters collected their premiums at the earliest only on the expiration of the year while brokers held it for up to that period. This method of settlement and the brokers' accounting procedures involved were disapproved of by Weskett in 1781234 as too complex and as favouring the broker too much. It appears that the customary period for the collection of the premiums of any particular year was from May to September in the next year. Weskett's main objection to the system was that in practice the annual balances were not paid until six, nine or twelve months, and sometimes as long as three years, after they became due. That was disadvantageous to underwriters in that the brokers received indefinite and unlimited credit from them.235

4.2 The Broker's Liability for the Payment of the Premium

The credit the insurer by custom gave to the broker for the payment of the premium impacted on the legal relationship between them, at least in so far as the liability for the payment of the premium was concerned.

231 The agreement provided as follows: 'En betaalen wij onze debet zijnde premien aan den Heeren Assuradeurs, na aftrek van gemelde onze Courtagien en Schaden, Avariën en Restomo's, die wij goedvinden te /aaten afschrijven en ons blijk deselve te doen crediteeren alle vierendee Jaars per saldo soo als wij dan schuldig zijn'. See further Vergouwen 67 who remarks that the brokers and the insurers stood 'in rekening-courant-verhouding'.

232 It was still customary in Hamburg in the eighteenth century: see Hammacher 143-144.

233 See eg Raynes (1 ed) 179-181, (2 ed) 173; and Wright & Fayle Lloyd's 65 and 161. Sutherland London Merchant 69 points out that it is not possible to deduce from the books of the eighteenth-century London underwriter William Braund the number of his losses and of claims against him, since these were only recorded in his cash book in the relatively rare instances when he dealt directly with the insured merchant without the intervention of a broker, or when the balance in the hands of the broker was insufficient to cover a claim.

234 Digest 61-68 sv 'broker', especially at 63-64 par 5.

235 It seems the problem of the dilatory settling of their accounts by brokers increased in the eighteenth century. See Sutherland London Merchant 44.

Nevertheless, it must be remembered that whatever the insurers lost by way of interest on their premiums they more than gained in other respects. The retention of premiums by brokers gave a measure of security to the insured against underwriter insolvency at a time when none other existed (eg, no deposit was yet exacted from underwriters at Lloyd's). As to the role of insurance brokers as the providers of credit facilities to merchants for the payment of premiums and as guarantors to underwriters of the premiums due to them from the insured, see eg Gibb 55-57; Sutherland London Merchant 55-56. In the process brokers were also guarantors to the insured of the solvency of the underwriter. See again ch IX § 2.9.2.2 supra.
Although the legislatures were clearly aware that the insurance premium was in a large and increasing number of cases not paid directly by the insured to the insurer, but rather indirectly through the intervention of a broker,\footnote{Thus, the model policies in the placcaar of 1563 as well as in that of 1571 already stated that the insurers had received the premium from the broker rather than from the insured.} this usage was, during the seventeenth and for the first half of the eighteenth century, strictly speaking in contravention of existing legislative measures. These measures included the Amsterdam brokers' keuren of 1612 and 1613 and the Amsterdam insurance keur of 1620 which enjoined brokers and insured respectively to pay premiums to the insurer immediately on the signing of the insurance contract.\footnote{See again § 3.2.2.2 supra.} Despite the fact that by the mid-seventeenth century the keur of 1620 in particular was generally accepted as having been abrogated by the contrary usage just described,\footnote{See in particular the decision of the Hof van Holland in 1639 and the Amsterdam opinion of 1713 where the practices of the time were described. See again § 3.2.2.2 supra.} it was to be another century before this usage was legislatively recognised and regulated.

In terms of the third paragraph of s 37 of the Amsterdam keur of 1744 it was provided that where the insurer gave credit to the broker or another intermediary for the payment of the premium, such insurer had recourse only against such broker or intermediary and, by implication, not against the insured.\footnote{Put differently, where the premium was not paid immediately in cash, the insurer had a claim for the payment of the premium only against the broker.} The only exception allowed was where the broker or other intermediary went insolvent, in which case, should the insured not yet have paid the broker, the insured was (presumably also) liable to pay it to the insurer.\footnote{As to this part of s 37, see eg Van der Keessel Theses selectae th 766 (ad III.24.18) (noting that in the case of the broker's insolvency, the insured had to prove that he had paid the premium to the broker in order to avoid liability for it against the insurer); idem Praelectiones 1477-1478 (ad III.24.18) (here he apparently thought that the insurer could in all cases where the insured had not yet paid the premium to the broker, claim it from the insured, whereas that was only possible in the case of the broker's insolvency); and Van der Linden Koopmans handboek IV.6.6 (who similarly failed to qualify the insurer's recourse against the insured). See too Goudsmit Zeerecht 353.} Thus, whereas s 37 recognised the custom of the insurer being credited in account by the amount of the premium, and permitted the practice of the insurer giving the broker credit for the payment of the premium, it did not confirm the further aspect alluded to in the earlier sources,\footnote{More specifically, Boel's explanation of the decision of 1639 and the opinion of 1713. See again § 3.2.2.2 supra.} namely that the broker did not then incur any personal liability as against the insurer for the payment of the premium.\footnote{See Van der Keessel Praelectiones 1477-1478 (ad III.24.18) where this was explained.}
To recapitulate, if the insurer gave the broker credit for the payment of the premium, the insurer could claim the premium only from the broker and not from the insured. In recognising and regulating this existing custom as to the payment of insurance premiums, the Amsterdam Legislature deprived the insurer of his claim for the payment of the premium against the insured. Payment of the premium to the broker was therefore, as far as the insured was concerned, payment to the insurer. Put differently, as far as the payment and receipt of the premium was concerned, the broker was the mandatory or representative of the insurer, not of the insured.243

As far as the broker was concerned, he had, possibly as mandatary or agent of the insurer, a claim against the insured for the payment of the premium which the insured had not yet paid but which he, the broker, had advanced on the latter’s behalf. This was so even if the insurer had not actually yet received the premium from the broker, the reason being that the insured could as result of the credit arrangement between the broker and the insurer no longer be held liable for the premium by the latter.244

In terms of s 37, the broker was not the surety nor a co-debtor of the insured, but his liability towards the insurer was the consequence of a statutory novation as a result of which he, the broker, became the insurer’s debtor for the payment of the premium in the place of the insured.245 Only when the broker went insolvent and when the insured had not yet paid the premium to him, the broker, or could not in fact prove such payment, could the insurer proceed directly against the insured.246 But if the insured had in fact paid the premium to the broker who then went insolvent, the insurer had no recourse against the insured and he thus bore the risk of the broker’s insolvency in such a case. In short, the insured was not concerned with failure by the broker to whom credit had been given by insurer, whether the broker was actually insolvent or not, to pay over to the insurer any premium he had received from the insured.247

In regulating the position of brokers as regards their commission,248 s 39 of the Amsterdam keur of 1744 stated that in exchange for the statutorily fixed commission which, by custom, was payable by the insurers only, brokers were bound towards them to stand in for the premium (‘voor welk profijt zij Makelaars gehouden zullen zijn in te

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243 If no such credit was given, the insured had to pay the premium immediately in cash. See again § 3.2.2.3 supra.

244 See Scholten 51 for this explanation.

245 See Scholten 51-52; Vijn 79 for this explanation.

246 According to Scholten the 51, the insurer in this case did not claim in his own right from the insured but enforced the right of the broker against the insured to which he was subrogated.

247 See generally on this aspect of s 37, Scholten 49-52; Vergouwen 63-64 (‘de makelaar llee p derhalve tegenover den verzekeraar voor de premie delcredere, dat in het courtage-bedrag was verdisconteerd’); and Vijn 59-60.

248 See ch X § 7.5 supra.
staan voor de Premie'). This was, of course, the effect of the part of s 37 dealing with the situation where credit was given to the broker. But, it would seem, that was apparently now also the position where no credit was given. The broker was thus liable to the insurer for the payment of the premium and his brokerage was, at least in part, a compensation for that liability.

Furthermore, by the same s 39, brokers and other intermediaries were permitted to summon their principals, the insured, before the local Chamber of Insurance should such insured refuse payment of the premiums they, the brokers, had advanced on their behalf to the insurers ('wegens de uytgeschoote Premie, in cas van geweygerde voldoeninge').249 In this regard a right of hypothec on the policy was also conferred on the broker.250 Therefore, a broker, to whom credit had been given by the insurer for the payment of the premium, could in turn extend that credit to the insured, and if he was uncertain of the latter's financial position and ability to pay the premium, he could retain the policy as security.

In the very next year s 39 was amended by the Amsterdam amending keur of 1745. The amendment was prolix and not in all respects a model of clarity. It was noted that s 39 had given rise to many justified complaints from brokers and others involved in insurance ('de Makelaars en andere doende in Assurantie'). Presumably the brokers complained about their being liable to the insurers for the payment of the premiums in all cases, including the cases when they had no credit arrangement with the insurers. Furthermore, the provisions of s 39 appeared to be in conflict with that part of s 37 which provided for the immediate payment of the premium, something which, it was pointed out in the amendment, had for long been the foundation of transactions in insurance ('welke van alle oude tyden af is aangesien als de Basis van alle goede ordre in het stuk van Assurantie').251

Section 39 was thus amended as follows:252 the commission, payable according to practice by insurers alone, would remain at the amount fixed in 1744, but in exchange brokers would now be obliged in every case to pay the agreed premium over

249 See also Goudsmit Zeerecht 353.

250 These matters are considered in more detail shortly. See § 4.3 infra.

251 What may conceivably have happened was that the provision in s 39 which stated that in exchange for his commission, the broker stood in as against the insurer for the payment of the premium, was in conflict with s 37 which, as rule, still required the cash payment of the premium and which only by way of exception recognised the custom that the insurer granted the broker credit for the payment of the premium.

252 On the 1745 amendment of s 39, see eg Lybrechts Koopmans handboek V.81 n1: Goudsmits Zeerecht 354; Scholten 54-56; and Vergouwen 64-65. It will become apparent, as Scholten 54n2 observes, that the amended s 39 deviated even further from s 37.
to the insurer on the signing of the policy, on the penalty that both the broker and the insured would be liable for the payment of the premium.\textsuperscript{253}

But the broker’s liability to the insurer for the payment of the premium was not absolute and fell away if the insurer failed, before the expiry of the second week following on the week in which the insurance was concluded, to claim the owed premium from the broker (‘by adsignatie de gecrediteerde Praemie van de Makelaar te vorderen’). Therefore, the insurer was in effect permitted to give the broker credit for the payment of the premium for no longer than fourteen days. Not only did the insurer lose his claim against the broker should he not have claimed the premium within that time, but he was also fined in an amount of a quarter of the agreed premium.\textsuperscript{254}

If the insurer did claim the premium from the broker, though, as he would in practice no doubt be expected to do, two possibilities could arise and were provided for in the amended s 39. First, the broker could comply with the obligation imposed on him by the \textit{keur} in this regard, namely within the week next following, issue summons and thereby commence proceedings against the insured before the Chamber of Insurance for the payment of the premium due to the insurer.\textsuperscript{255} Secondly, the broker could fail in his duty to summon the insured within the week following on the week in which the insurer claimed the premium from him. In that case he, the broker, would in addition to his liability for the premium (’boven de gehoudenisse van voor de Praemie in te staan’) forfeit, in favour of the insurer, half of his earned brokerage.\textsuperscript{256}

\textsuperscript{253} ‘[E]n zullen de Makelaars daar en tegen gehouden zijn telkens by het tekenen der Police aan de Assuradeur ter hand te stellen de Praemie dewelke dezalve heett bedongen, op poene, dat de Makelaar daarvoor zoo wel als de geassureerde aansprakelijk zal zijn’. The Legislature appears to have argued as follows in imposing liability on the broker for the actual payment of the premium, rather than, as appeared to have been the custom, liability merely to ensure that the insured paid the premium. The insurer must be taken to have accepted the policy offered by the broker to underwrite the particular insured’s risk on the implied condition that the broker would at the same time, on the signature of the policy, pay over to him, the insurer, the premium he, the broker, had received from the insured. If on presenting the policy, the premium was not thus paid, the broker did not meet his obligation and was therefore liable for any damage that could flow from his failure, hence his personal liability towards the insurer. See Scholten 61 who regards this as the only plausible explanation.

\textsuperscript{254} In effect, therefore, the principle of payment in cash, which was still essentially adhered to in s 37 of the \textit{keur} of 1744 (which was not amended), was by implication relinquished in the amended s 39, if only for the maximum period of fourteen days. See Scholten 56; Vijn 60.

\textsuperscript{255} Provision was made for the procedure to be followed in case such proceedings were commenced by the broker against the insured. The Chamber had to adjudicate the matter in accordance with s 55 of the \textit{keur} of 1744 (this section permitted the Chamber to give judgment on a second default), and the insured would be condemned in \textit{favour of the insurer} to immediate payment with interest (of 8 per cent, calculated \textit{a tempore sententiae}), any judgment in this regard conferring on the \textit{insurer} a right of summary execution (‘parate \textit{executie}’), and, in the case of an appeal, of execution against security (‘\textit{executie onder cautie}’). At the same time, should the broker have advanced the premium on behalf of the insured (ie, the usual case), proceedings against the insured (now, obviously on the broker’s own behalf and not that of the insurer) would confer on the broker the right of summary execution against the insured in addition to his right of hypothec over the policy.

\textsuperscript{256} Scholten 55 notes that a peculiarity of the \textit{keur} of 1745 was that although the insurer enforced payment of the premium through the broker, the insured remained the debtor of the insurer, which was patently not the case in terms of s 37 of the \textit{keur} of 1744.
In 1756 the amending *keur* of 1745 was repealed but nothing promulgated in the place of the amended s 39. In principle, therefore, the measures contained in ss 37 and 39 of the *keur* of 1744 were again applicable, at least in so far as they were not amended by the *keur* of 1756 itself. That much appears clearly from the preamble and the postamble of the latter *keur*.

Although it was uncertain whether the custom, sanctioned only in part by the *keur* of 1744, continued to exist thereafter, that appears likely. Early in the nineteenth century, however, the acknowledgement of the receipt of the premium which was taken up in insurance policies took on a different wording. The insured specifically came to be relieved of liability for the premium with which the broker was now expressly declared to be debited in account. Practice had thus come to recognise the broker's personal liability to the insurer for the payment of the premium for which he had received credit from the latter.

The regime eventually provided for in the *Wetboek van Koophandel* shows some similarities to aspects of the earlier Roman-Dutch law.

In terms of art 682-1, if the insurance premium is not paid on the signing of a marine policy, the broker through whose intervention the insurance was concluded, is personally liable ('eigen schuld') for the payment of the premium, provided that the insurer retains a recourse against the insured himself in so far as the latter cannot prove that he had paid the premium to the broker. In all instances, however, the (direct) liability of the insurer as against the insured remains valid. However, in terms of art 682-2, if it is agreed in the policy that the premium need not be paid immediately, that is, if an extension is granted for its payment, the broker is not liable for its payment.

After the provisions concerning the broker's liability for the premium in earlier drafts of the *Wetboek* had corresponded to the provisions in the Amsterdam *keur* of 1744, art 682-1 in its final form deviates from s 37 of the *keur* of 1744 but has the same effect as the amendment of 1745. The insured remains a debtor of the insurer for the premium, and the broker in claiming the premium from the insured does so merely as

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257 The *keur* of 1756 amended only ss 21, 25, 29, 34, 35, 36 and 55 of the *keur* of 1744.

258 Referred to by Boel in his comments on the decision of 1639 and in the opinion of 1713. See again § 3.2.2.2 supra.

259 See Scholten 57-58 who was not able to fix the date any closer. According to Witkop though, the clause in its new form (i.e., a 'schuldbemoeuwingsclausule') came to be taken up only from 1811.

260 The clause now read: 'En zulks tegen genot van eene premie van ... ten honderd, voor dewelke wij ondergeteekende [de makelaar] in rekeningcourant hebben belast en alzo den gaassureerde quiteeren by deze'. See further Scholten 57-58; Vlijn 61 (noting that in this wording the Dutch practice differed from that elsewhere, despite the fact that the broker was there given credit for the premium).

261 See eg Dorhout Mees *Schadeverzekeringsrecht* 77-78; Scholten 58-66; and Vlijn 27-42.

262 And, by implication, where no extension is granted for the payment of the premium. Article 682 therefore presupposes that a valid insurance contract exists without the payment of the premium, something which was also provided for in art 257.
mandatory of the insurer. Once the insured has paid the broker, he is relieved of liability towards the insurer, at least in so far as he can prove such payment. The equivalent of art 682-2 did not appear in the Amsterdam keur of 1745, because what had there been a statutory obligation of the broker to pay the premium immediately, now became merely an implied contractual term as between the insurer and the broker so that an expression of a contrary intention was now possible.

The position in the case of the broker going insolvent is provided for in art 683. If the insured has paid the premium to the broker and the latter goes insolvent within one month of such payment, the insurer has a right of preference for the amount in question over all other creditors of the broker. This provision had no antecedent in the earlier Amsterdam legislation and is not in accordance with s 37 of the keur of 1744 which concerned a different situation and provided that in the case of the insolvency of a broker who had not yet received the premium, the insured was liable to pay it to the insurer.

The position in English law both contrasts on some points and corresponds on other points with that in the Wetboek.

Firstly, prepayment or an offer of prepayment of the premium by the insured or his agent is, in the absence of an agreement to the contrary, regarded as necessary and as a concurrent duty to that of the insurer to issue the policy. Payment in this sense includes crediting in account though, so that the practical difference is not that great.

Secondly, where the marine insurance contract is concluded on behalf of the insured by a broker, the broker is, in the absence of an agreement to the contrary, directly responsible to the insurer for the premium, but the insurer, in turn, remains directly responsible to the insured for payments in terms of the policy as well as for any return of the premium.

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263 From this it follows, although it is not expressly so provided, that when the broker goes insolvent (so that his mandate is terminated), the insured, in order to be relieved of liability, must not pay the broker but only the insurer directly.

264 See s 52 of the Marine Insurance Act of 1906.

265 See Chalmers 73.

266 See s 53(1) of the Marine Insurance Act. This was already settled law in the eighteenth century. Thus, both Magens Essay vol 1 at 61-62 and Weskett Digest 407 sv ‘premium’ par 2 noted that when an insurer underwrote policies for brokers and office-keepers, they alone, and not the insured, were debtors to him for the premium.

This was also the position in Hamburg. In terms of art XXIII-8 of the Hamburg Assecuranz-Ordnung of 1731, if the insurer in good faith did not collect the premium from the broker (eg because of a current account between them, which was the custom), the insurer had a recourse against the broker alone, except if the broker became insolvent and the insured had not yet paid the premium to that broker, in which case the insured was liable to pay it directly to the insurer. See further Dreyer 197-199.

Buys 85 notes that in terms of the Wetboek (together with the acknowledgement or ‘kwijting’ which ‘belast den makelaar in rekening-kourant en kwiteert den geassureerde’) as well as in terms of the Marine Insurance Act, the broker (and not the insured) is the debtor against the insurer for the payment of the premium while the insurer is the debtor against the insured for any payment on the policy. There is a small difference as regards any restitution of the premium by the insurer. In terms of English law it is seen as a debt against the insured (the assumption being that the insured had paid the premium to the broker) while in terms of Dutch law it is regarded as a debt against the broker.
Lastly, in the case where a broker is involved, where the insurer acknowledges receipt of the premium in the policy, such acknowledgement is, in the absence of fraud, conclusive between the insurer and the insured but not between the insurer and the broker. Such a receipt does therefore not relieve the broker of liability for the premium.267

4.3 The Broker's Claim for the Payment of the Premium Against the Insured and His Right of Retention and Hypothec

In terms of s 81 of the Rotterdam keur of 1721, a broker who had advanced the premium ("de Praemie verschoten hebbende") to the insurer on behalf of the insured, that is, who had paid the premium to the insurer before he had received it from the insured, had a right of hypothec and retention over the policy ("zullen op de Police hebben Regt van Hypotheecq ende van Retentie").268

Likewise, s 39 of the Amsterdam keur of 1744 permitted not only brokers but also other intermediaries ("anderen, die eenige Assurantie zyn vorderende") to summon their principals, the insured, before the local Chamber of Insurance.269 Should such an insured refuse to pay the premium the broker had advanced on his behalf ("wegens de uitgeschoote Premie, in cas van geweygerde voldoeninge"), the broker or such other intermediary was not obliged to deliver the policy up to insured ("de Police eerder te Extradeeren") but could retain it as a hypothec ("maar dezelve als een Hypotheek onder haar mogen houden"). In the amendment of s 39 in 1745, the broker's summary right ("paraat recht") to sue the insured for the premium under such circumstances, as well as his right of hypothec over the policy, were retained.270

Therefore, in terms of the Rotterdam legislation the broker was expressly accorded a right of hypothec as well as a right of retention,271 while in terms of the

267 See s 54 of the Marine Insurance Act. Chalmers 75 notes that where the policy was directly concluded between the insurer and the insured, the acknowledgement is probably also not conclusive between the insurer and the insured but it ought to be conclusive in favour of an assignee for value without notice.

268 See Enschedé 168; Goudsmit Zeerecht 394; Kracht 35; and Vergouwen 95 ("recht van retentie en zelfs van hypotheek").

269 See Van der Keessel Praelectiones 1479 (ad III.24.19). Thus, brokers' claims were within the Chamber's jurisdiction. See again ch IV § 1.4.3 supra.

270 See eg Van der Keessel Theses selectae th 766 (ad III.24.18) ("ius retentionis"); idem Praelectiones 1447 (ad III.24.6) ("ius pignoris"); Van der Linden Koopmans handboek IV.6.6 ("regt van retentie"). See too Mees Gedenkschrift 16 ("regt van hypotheecq ende van retentie"); Scholten 9; and Vergouwen 64.

271 The right of tacit hypothec (ius pignoris) and the right of retention (ius retentionis) both arose by operation of law. But whereas the right of retention (or lien) was lost when possession of the property was lost and could not be transferred to third parties, the right of tacit hypothec, like other hypothecs, did not depend upon possession and could be ceded to third parties. The lien provided a defence against the claim by the owner of property with the rei vindicatio. See further eg Lee Commentary 197-199; idem Introduction 182.
Amsterdam legislation his position was less clear but probably similar. The right of hypothec on movable property meant, in terms of Roman-Dutch law, that the creditor could attach such property and realise it. In the present context, therefore, the broker could either use the policy to claim the amount of compensation on the policy in the case of a loss ("de recht om de schadepenningen te incasseeren") or with it sell the potential claim against the insurer if no loss had yet occurred ("de recht ... de vordering op assuradeuren te verkoopen"). The right of hypothec, of limited value though it may have been, was of a different nature than the mere right as against the insured to retain possession of policy and would be exercised especially where the debtor went insolvent. But even the right of retention was not without value, at least where the insured was not insolvent, for if not legally, then at least in practice the insured required the policy, being the written evidence of the conclusion and content of the insurance contract, to enable him successfully to claim from the insurer.

The rationale behind the right of hypothec (and of retention) being conferred upon the broker appears to have been as follows. While, in return for his commission, the broker was personally liable for the payment of the unpaid premium to the insurer, he himself had, by way of security against the insured to whom the broker was in effect compelled to grant credit for the premium, a right of hypothec over the policy.

The broker's right of hypothec and retention extended only to the policy in respect of which the premium was advanced and not to any other policy, nor to the property insured by that policy, nor to any other property of the insured.

The broker's right of hypothec and retention was exceptional and the insurer had no similar security for his claim for the premium against the insured but merely an unsecured personal action.

272 Section 39 somewhat confusingly referred to a right to retain the policy as hypothec.

273 See Vergouwen 64-65 for this explanation.

274 See again ch VIII § 3.2.1 supra.

275 This liability being in any case imposed by law and not voluntarily undertaken.

276 See Van der Keessel Praelectiones 1447 (ad III.24.6).

277 There is an undated opinion (see Barels Advysen vol I adv 15) to the effect that where a factor and the consignee of goods concluded an insurance on those goods on behalf and on the instruction of the consignor-owner and paid the premium to the insurer, the consignee had the right to claim compensation from the insurer in the event of the loss of or damage to the goods. Further, the opinion thought, he had a right of retention on those goods against other creditors of the consignor, if insolvent, for any expenses incurred in respect of the goods, such as the premium of insurance paid in this instance. This right of retention on the goods was probably the result of the fact that a bill of lading on the goods had been delivered to the consignee (therefore at least transferring possession of the goods to him) and not because of any right of retention on the policy, possession of the policy over the goods not being the equivalent of possession of the insured goods themselves. See Scholten 75-76 for an explanation of this opinion.

278 See § 5.1 infra.
In the *Wetboek van Koophandel* the broker's right of retention over the policy is retained but a right akin to the right of hypothec is reserved for cases where the insured is insolvent. Additionally, the broker who is not in possession of the policy, is given a right of preference to the insurance payment due on the policy in the case of the insured's insolvency.\(^\text{279}\)

Article 684-1 confers on the broker who has paid the premium to the insurer, a right to retain the policy in his hands from the insured for as long as the latter has not yet paid him the premium he has advanced.\(^\text{280}\) In such cases the broker is therefore relieved of the obligation of delivering the policy to the insured. The broker has this right also where he has not actually paid the premium but has merely credited the insurer's account, for by such crediting the insured is relieved of his liability to the insurer for the premium.

In such cases the broker is therefore relieved of the obligation of delivering the policy to the insured. The broker has this right also where he has not actually paid the premium but has merely credited the insurer's account, for by such crediting the insured is relieved of his liability to the insurer for the premium.

In terms of art 684-2, in the case of the insolvency of the insured, a broker exercising a right of retention over a policy\(^\text{281}\) may claim from the insurer payment of the compensation due to the insured on that policy. He may then out of that payment retain the amount of such premium, subject to his obligation of accounting for any balance to the insolvent estate.\(^\text{282}\) The right in terms of art 684-2 is more than a mere right of retention and may be regarded as a right of hypothec ('pandrecht op eene voorwaardelijke schuld').

In terms of art 685, where the policy is issued to the insured (so that the broker is not in possession and has no right of retention), the broker who has advanced the premium has, in the case of the insured's insolvency, a right of preference upon any payment then still due from the insurer to the insured, irrespective of whether or not the loss in question occurred before or after such insolvency.

The broker's right to retain the policy as security for the payment by the insured of the premium, commission and other charges relating to that policy, is also recognised in English law.\(^\text{283}\)

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\(^\text{279}\) See in detail Scholten 72-84.

\(^\text{280}\) See eg Buys 85 who notes that this right is only available to the sworn broker.

\(^\text{281}\) That is, a broker in possession of the policy and entitled as against the insured to retain possession because he has paid the premium to the insurer but has not yet received it from the insured.

\(^\text{282}\) That is, in the case of such insolvency, the broker is subrogated to the position of the insured as against the insurer. This has the same effect as had the right of hypothec in Roman-Dutch law.

\(^\text{283}\) By s 53(2) of the Marine Insurance Act the broker has a lien upon the policy as against the insured for that purpose. This section also provides that where the broker has dealt with the person who employs him as a principal, he has also a lien on the policy in respect of any balance on any insurance account which may be due to him from such person, unless, when the debt was incurred, the broker had reason to believe that such person was only an agent. Thus, the lien may be in respect of the policy in question or for a general balance. See Chalmers 74.
5

Non-payment of the Premium

5.1 The Nature of the Insurer's Claim for the Payment of the Premium

In Roman-Dutch law the insurer had a right to claim payment of the premium from the insured, or, when appropriate, to claim such payment from the broker. Whereas his claim against the insured arose from the insurance contract itself, that against the broker did not but was based on another contractual arrangement between himself and the broker. Roman-Dutch sources considered the nature of the insurer's claim against the insured in some detail but did not, at least not in the context of insurance law, consider the nature of his claim against the broker nor, for that matter, the nature of any claim the broker himself may have had against the insured for the payment of the premium.

Firstly, it was realised that by reason of its bilateral nature, the insurance contract gave rise to a right and an action for both the parties to the contract, a so called direct action (actio directa) for the insured against the insurer to recover compensation for any loss or damage, and a reverse action (actio contraria) for the insurer against the insured to compel the payment of the premium agreed upon between them. These actions were described in more detail as involving, in the case of the insured's action, the right to claim from the insurer compensation of loss or damage, or the furnishing of security for the payment of such compensation, or the restitution of the premium, and for everything which was equitably (ex bono et aequo) due from this contract. The insurer's action, in turn, was described as involving the right to claim payment of the agreed premium and interest.

Secondly, it was generally accepted that the insurance contract gave rise to personal rights only. Consequently the insurer had a personal right and action against the insured for the payment of the premium, and no real right over the insured property itself.

This was already settled early in the seventeenth century by a decision of the Hooge Raad holding that the insurance contract merely gave rise to a personal right ('Obligatie personae') against the insured and not to a real right ('Recht van realisatie').

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284 See eg Schorer Aanteekeningen 412 ad III.24.1 (insurance contract gives rise to 'eene tweeledige aansprake'); Bynkershoek Quaestiones juris privati IV.2 (noting that the insured has 'eene directe ... Actie' and the insurer 'eene ... contrarie Actie').

285 See Decker Aanteekeningen ad IV.9.10 n(4)/(d); Van der Keesselaar Praelectiones 1478 (ad III.24.18). See too arts 255 and 256 of par 8, title 11, part IV of the Antwerp Complatae of 1609 (see De Longé vol IV at 306) which held that two actions arose for the insurer by virtue of the insurance contract (the one to claim the insurance premium and the other to claim the ½ per cent customary compensation in the case of a return of the premium: see § 6.1 infra), and that two actions likewise arose for the insured (the one to claim compensation for loss or damage, and the other to claim a return of the premium).

287 See Hollandsche consultatien vol I cons 282 (1605).
over the insured property. One Moucheron\textsuperscript{286} had equipped a ship for a voyage and insured her together with her cargo in terms of policies stating the premium to be paid by him within three months after the date of signing.\textsuperscript{287} Moucheron thereafter transferred the ship with her cargo to P and subsequently went insolvent. On the ship's safe arrival, she and her cargo were arrested by their respective insurers who argued that P was liable to pay them the premium still due under the insurances. P in turn argued that the insurance contracts gave rise to nothing but a personal obligation without any right to realise the insured property.\textsuperscript{289} An insurance contract was a type of promise (\textit{sponsio}), P continued, which gave rise to a personal right only. The insurers here had contracted with Moucheron who had been given credit for three months and a day and they had to claim the premium from him. The insured property, which had lawfully been transferred to him (P) and had become his, was not subject to any pledge nor affected by any general or special mortgage ('\textit{generaal of speciaal verband}').

The \textit{Raad} agreed with this argument of P and, overturning the decision of the Middelburg \textit{Schepenen} Bench, decided that the insurers had no claim for the premium in respect of the insured ship or goods. Although not pertinently so decided, this result would imply that the insurers would not have been able to claim the premium from the original insured himself by the attachment or arrest of the insured property. However, the decision did not mean and, as Bynkershoek quite correctly later pointed out, the \textit{Hooge Raad} did not in fact decide that P could not be held personally liable for the payment of the premium.\textsuperscript{291}

Subsequently it was generally declared by the institutional writers that the insurer, unlike the broker who had advanced and paid the premium to the insurer, had no secured real right over the insured property,\textsuperscript{292} nor over any other property of the

\textsuperscript{286} Probably Balthasar de Moucheron, a Zeeland merchant who had moved from Antwerp to Middelburg in 1585 and then in 1598 to Veere. He was director of the \textit{Veerse Compagnie}, one of the pre-companies of the Dutch East India Company (EIC). Although he was one of the fourteen governors (\textit{bewindhebbers}) of the Zeeland Chamber of the EIC, he ran into financial difficulties around 1600 after which he played no further role in the establishment of the EIC in 1602. See Gaastra 29-31.

\textsuperscript{287} This was the usual stipulation at the time, and also appeared in the model policy taken up in the Amsterdam \textit{keur} of 1598. See § 3.2.2.1 supra.

\textsuperscript{289} Support for this was sought in the fact that insurances were commonly and daily concluded (and, by implication, credit given for premiums due on them) on exports (i.e., goods which were to be sold) only, without such insurances being concluded also on or extended to any return cargo ('\textit{wederkomste ofte retour}') which, by implication, could serve as security for the payment of the premiums. Such insurances were nevertheless not worded any different from policies on both exports and return cargoes ('\textit{op gaande ende komende}').

\textsuperscript{291} \textit{Quaestiones juris privat\textit{i}} IV.2. It would depend on the nature of the transfer from the insured to the third party (i.e., from Moucheron to P in this instance) which one of them could claim and from which one the insurer could in turn claim payment of the premium. See again ch X § 5 supra. See further Goudsmit \textit{Zeerecht} 353.

\textsuperscript{292} The broker, of course, did not have a real right over the insured property but merely over the policy. See again § 4.3 supra.
insured, for the payment of the premium. He merely had an unsecured personal right against the insured himself.\textsuperscript{293}

The position in French law at the end of the eighteenth century was apparently different. There the premium was regarded as being in the nature of an expense incurred for the preservation of the property insured and as conferring upon the insurer a privileged maritime claim on that property.\textsuperscript{294}

5.2 The Enforcement of the Claim for the Payment of the Premium

It appears that the laxity of insured regarding the payment of their premiums was a persistent problem in Roman-Dutch law. In addition to the measures already referred to which sought to compel the immediate payment of the insurance premium, several procedural measures were also introduced to facilitate the insurer's enforcement of his right to obtain payment of the premium.

In this regard Amsterdam legislation made provision for special procedural rules in the case of a claim for the insurance premium which made the proceedings and final adjudication even more expeditious than was the case with other insurance claims, which were themselves in any case much less dilatory than other civil claims. To enable insurers to claim or collect ('invorder') insurance premiums speedily, s 4 of the Amster-

\textsuperscript{293} See eg Voet Observationes ad III.24.22 (n42) (the insurer has no 'hypotheca'); Van Zurck Codex Batavus sv 'Assurantie' par 25 n1; Schorer Aanteekeningen 413 (ad III.24.2) n2 who explained that the right to the premium did not affect the property insured; the insurer had no conventional or legal hypothec ('geen stilzwijgend of uitdrukkelijk verband') over that property, and it therefore followed that possession of the insured property remained with the insured 'zonder dat de verzekeraars daar aan eenig recht van eigendom hebben'; Bynkershoek Quaestiones juris privati IV.2 ('geen hypothek, noch by conventie, noch uit hoofde van de Wet'); Van der Keessel Theses selectae th 766 (ad III.24.18) (no lien or right of pledge); idem Praelectiones 1478 (ad III.24.18) (the insurer may not bring an action against the insured property because neither ex lege nor ex contractu is any right of pledge conferred upon him); and Van der Linden Koopmans handboek IV.6.6 (the insurer has for the premium no 'regt van hypothek').

Elsewhere Van der Keessel Theses selectae th 558 (ad III.11.2), in noting the differences between insurance and bottomry (see again ch I § 4.3.3 supra), explained that whereas bottomry was impossible without a mortgage of the ship or goods, in the case of insurance, if the premium had been paid, there was no right of mortgage in favour of the insurer. It may be added, though, that this was so even where the premium had not yet been paid.

\textsuperscript{294} This right was subsequently recognised in respect of insured ships (but not insured goods) in art 191 of the French Code de commerce. See further Enschedé 82, who is at 76 incorrectly of the opinion that in terms of the Rotterdam keur of 1604 and that of 1721 it was provided that (in the latter case, unless otherwise agreed) the insured goods served as security for the payment of the premium. Provisions to this effect do not appear from these keuren.

Different also was Prussian law in the late eighteenth century. There the insurer had a statutory 'Pfand- und Vorzugsrecht' over the insured ship and goods to secure his claim for the premium. See Hammacher 144.

According to Magens Essay vol I at 82, in terms of Hamburg law the insurer had, in respect of the payment of the premium by the insured with whom he had a current account (but presumably not otherwise) and in the case of the latter's insolvency, a similar preferent right over the insured goods, the insurance of the goods being regarded as a prior advantage to the goods for the benefit of other creditors.
dam amending keur of 1693 authorised the Chamber of Insurance to entertain pro-
cceedings for the payment of the premium on two successive days and to give judgment
on the second non-appearance (‘daar over voor haar te procederen by ‘t eerste en
tweede defaut, te weten van dag tot dag, en vervolgens om op ‘t tweede defaut regt te
doen’).295

In terms of s 55 of the Amsterdam keur of 1744, these measures were extended.
Aimed at the speedy recovery of all insurance premiums for which the insurer had
given credit to a broker or others (including, presumably, the insured), the Chamber of
Insurance was authorised and empowered to hear such claims on successive days296
and to grant judgment on the second default. To this the Amsterdam amending keur of
1756 added that all orders (‘Condemnatien’) for the payment of credited or paid
premiums (‘gefideerde ofte uitgeschotene Praemien’) of which there was mention in ss
37 and 39 of the keur of 1744, were to be taken as liquid judgments giving the right to
summary execution against the defendant.297

Of course, the claim for the payment of the premium could take various forms,
involve a number of legal and procedural matters, and result in a number of different
judgments. An illustration in this regard was provided by the Amsterdamsche Secretary
in which were reproduced, for the illumination of merchants, lawyers and others, a
number of procedural forms and judgments which had a bearing on the claim for the
payment of the insurance premium.298

295 See further Goudsmit Zeerecht 323. In the case of other insurance claims, s 5 determined that the
defendant had to be summoned three times, every alternative day, before default judgment could be
granted against him (‘van twee dagen tot twee dagen by ‘t eerst, tweede, en derde defaut, en op het
varieende derde defaut, regt te doen als voren’).

296 That is, the defendant could be summoned to appear on successive days.

297 ‘Als Condemnatien in gereeden gelde, zonder dat de gecondemneerde zal behoeven te worden
geloos- en eiligen-pand’. That is, the insurer had a right of summary execution (regt van parate
executie) and did not have to comply with the formality of approaching the defendant debtor twice (the
first time being referred to as ‘loos-panding’ and the second as ‘eigen-panding’) to get an indication from
him as to which goods he wanted to be sold in execution. See further Goudsmit Zeerecht 357-358.

298 These included a notice by the insurer to the curator of the insolvent estate of the insured concerning
the payment of the premium (see at 385-386); a summons of the insured by the insurer to appear before
the Chamber of Insurance (at 386-387); a judgment (‘despache’) which, after referring to his liability for
the amount of the premium, condemned the insured to pay it plus the insurer’s costs (at 375-376, and see
also Appendix 4 infra); a summary judgment for the payment of the premium (‘despache van
nampissement van premie’) in which reference was made to his liability for the premium and to the fact
that the insured had been summoned twice and on both occasions failed to appear, and which
condemned him summarily to pay the amount of the premium to the claimant insurer subject to the
provision of security for any possible subsequent restitution (‘cautie de restitueende’) (at 376-377, and see
also Appendix 5 infra); and a judgment in which there was reference to the liability for the premium, and
the summons of and acknowledgement by the insured that the premium was due in so far as the insurer
declared under oath that he was ignorant of the arrival of the ship at the time the contract was concluded
- the judgment condemned the insured to pay the premium and ordered the insurer to declare under oath
that he was so ignorant, and in the case of his refusal to so declare, denied his claim for the premium (at
377-378, and see also Appendix 6 infra).
The action for the payment of the premium, like that for the payment of compensation, was subject to the general periods of prescription laid down for the institution of actions arising from the insurance contract.299

5.3 The Late Payment of the Premium and Interest

Apart from the measures already referred to which were taken to ensure that insured paid their premiums in full and without delay, Roman-Dutch insurance legislation also imposed interest at a special rate on the insured for the late payment of the premium.300 Late payment was the failure to pay on the agreed or, in the case of a legislative prescript, on the determined date, or to so within the agreed or determined period.301

In respect of those premiums which did not have to be paid immediately but only within six months,302 s 2 of the Amsterdam amending keur 26 of 1610 provided for mora interest ('winst-derving') on any late payment to be levied at twelve per cent per annum from the expiry of the six-month period until eventual payment.303 This rate of interest was higher than the customary rate permitted between merchants304 which was, at the beginning of the eighteenth century, four per cent. In fact, the higher rate of interest permitted in the case of the various insurance-related claims appears to have been the only exceptions in this regard aside from that made in respect of interest based on agreements between merchants themselves.305

299 As to prescription, see ch XX § 3 infra.

300 Special interest rates were similarly imposed on insurers for the late repayment of returned premiums (see § 6.5 infra) and for the late payment of compensation in terms of the insurance contract (see ch XX § 2.2 infra), and on the insured for the late repayment of a provisional payment by the insurer on the insurance contract (see also ch XX § 2.2.2 infra).

301 This was Boel’s explanation in his note on Loenius Decisien cas 21: interest is payable by the insured ‘indien op de beloofde en gestelde termyn de praeemie niet voldoet’.

302 See again § 3.2.2.1 supra.

303 See eg Grotius inleidinge III.24.19; Groenewegen Aanteekeningen n37 ad III.24.19; Van Zurck Codex Batavus sv ‘Assurantia’ par 26; Wassenaar Praktijk notariaal VIII.12; and Scheltinga Dictata ad III.24.19 sv ‘den wettelicken tijd, etc’ (noting that the interest ‘eerst beginnen te loopen na expiratie van die 6 maanden’).

304 By custom the ordinary rate of interest per annum could in the Netherlands not exceed 7 per cent or 8 per cent in the case of unsecured debts. But exceptions, mainly involving merchants, were recognised. Bankers’ interest was privileged and not limited to the common-law rate, provided the contract was between money-changers. Also, by s 8 of the placcaar of Charles V of 4 October 1540 (see GPB vol I at 317) all merchants were permitted to collect interest at 12 per cent per annum in the case of an express agreement between themselves. See further Voet Commentarius XXII.1.3; Loenius/Boel Decisien cas 21; and ch XX § 2.2.6 infra where the issue of interest in Roman-Dutch law is considered further.

305 See eg Voet Commentarius XXII.1.3; idem Observationes ad III.10.9 (n29 and n30); Schorer Aanteekeningen 338 (ad III.10.10) and 431 (ad III.24.19) n37.
After the promulgation of the Amsterdam *keur* of 1620, when all premiums had to be paid in cash immediately on the signing of the policy on the penalty of nullity of the contract, this of course no longer applied, and that *keur* accordingly made no provision for the payment of any interest by the insured.\(^{306}\)

As far as the late payment of the premium owed by the broker was concerned, it appears that the ordinary rate of interest applied even in terms of the *keur* of 1610 where no reference was made to the broker's liability for the premium. This position, it appears further, was changed in 1744 when the liability of the broker for the payment of the premium for which he had been given credit, was explicitly recognised. Likewise, it seems that the extraordinary rate of interest was also not applicable to any late payment of the premium by the insured to the broker, despite the fact that it was specifically provided in s 39 of the Amsterdam *keur* of 1744 that the broker could sue the insured in this regard.\(^{307}\) Apparently, in these cases, interest at the ordinary rate was due from the time of default (a *tempore morae*).\(^{308}\)

### 6 Return, Recovery and Forfeiture of the Premium

#### 6.1 Introduction

A topic of some considerable significance in earlier insurance law was the issue of the return and recovery of the insurance premium. A return of premium was not uncommon in the sixteenth century, particularly because the circumstances under which insurances were annulled and which gave rise to grounds for such return, were often present, given the lack of proper channels of communication between merchants who wished to insure themselves and their factors abroad. Thus, a merchant often insured a cargo which he merely thought and suspected had been consigned to him without the actual shipment of such consignments having in fact been confirmed. He would have preferred to insure under such circumstances rather than to await confirmation of the actual shipment, for such confirmation may in fact only arrive with the goods themselves or arrive even after news of the loss of the goods, in which case, of course, he could no longer insure. When it later turned out that no goods had in fact been consigned on the ship and voyage on which the insurance had been concluded, as was often the case, the merchant then sought to recover the premium he had paid for the insurance.

The Antwerp broker Juan Henriquez noted 115 cancellations out of the 1488 insurances concluded through his intercession during a fourteen-month period in 1562-1563, an avoidance rate in excess of five per cent.\(^{309}\) And even in later centuries, the

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\(^{306}\) See Van der Keessel *Theses selectae* th 767 (ad III.24.19); *idem Praelectiones* 1479 (ad III.24.19).

\(^{307}\) See again §§ 3.2.2.3 and 4.3 supra.

\(^{308}\) See Van der Keessel *Praelectiones* 1479 (ad III.24.19) who explained the various arguments in this regard; and Van der Linden *Koopmans handboek* IV,6.11.

\(^{309}\) See De Groote *Zeeverzekering* 214; *idem Zeeassurantie* 157.
return of insurance premiums remained an important issue which retained a central place in the legislative regulation of the insurance contract.

Of course, the possibility of a return of the premium also presented the unscrupulous insured with a fertile avenue for fraud upon his insurer. In the same way, although possibly with greater difficulty and therefore less success, as insured sought to avoid the payment of insurance premiums, they also sought to recover premiums already paid. And just as the various legislatures sought to prevent fraud in the payment of the premium by requiring prepayment, so too, as will be shown shortly, they sought to circumscribe and limit the instances where the premium was recoverable.

The grounds for the recovery by the insured of the premium already paid to the insurer were at the same time also the grounds for the insured refusing to pay the premium to the insurer in the first place. Conversely, the return, by the insurer, of the paid premium or the retention, by the insured, of the unpaid premium were possible in the same circumstances and on the same grounds. By the same token, the grounds for the forfeiture of the premium to the insurer were the same as the grounds upon which the premium, if already paid to insurer, could not be recovered by the insured.

Thus, it was explained in detail to aspirant merchants in the Leerboek (1643) of the Antwerp firm of Van Colen-De Groot. See Denucé Koopmansleerboeken 200.

The extent to which the topic was treated was probably nowhere illustrated better than by the multitude of provisions in the Antwerp compilation of customary law, the Compilatae of 1609, which touched on it. Some, but by no means all, of these provisions will be referred to where relevant in the discussion which follows.

Thus, after the safe arrival of insured goods the insured sought to recover the premium he had paid by alleging that those goods were in fact already insured elsewhere, or were in fact never shipped at all. It was cheaper for him in such case to pay the insurer the customary penalty (which will be explained shortly) than the full premium.

In the proposal for the establishment of an insurance company for the compulsory insurance of ships and goods in 1628 (see again ch IX § 2.10.2.1 supra), it was not only proposed that the premium be paid in cash on the conclusion of the insurance, but also that in order to avoid fraud against it, no return of the premium paid to the company would be permitted ('ten eynde de compagnie met soweynige cavilatie en sinistere pACTYQuien gekwelt worde, als mogelyk is'). See Blok 'Plan' 9; Goudsmit Zeerecht 359n1. Not surprisingly, one of the objections against the proposal was the requirement of the prior payment of the premium before any goods had been shipped, which was exacerbated, it was pointed out, if then no goods were in fact shipped because then there was no return of the premium. Merchants objected in this regard because 'dat ommers onrecht waer, naerdien de costume van de asseurantie Is, dat men met een half pr(ro) cento magh gestaen'. See Blok 'Adviezen' 29 and also 55.

These different possibilities were not always expressed in Roman-Dutch insurance legislation although they possibly had to be regarded as having been recognised by implication. The reason may have been either because the legislatures simply never thought that far or because, theoretically, they were not relevant due to a requirement (as in the Amsterdam keur of 1620) of an immediate, prepayment of the premium. At any rate, these possibilities were conceived of in customary law. Thus, the Antwerp Compilatae of 1609, in art 94 of par 3, title 11, part IV (see De Longé vol IV at 240) provided that insurers always had to return ('retourneren oft wederkeren') a premium they had received if they were not entitled to claim it. Section 18 of the Rotterdam keur of 1604 and s 56 of its keur of 1721 were amongst the few laws pertinent to provide not only for the return of the premium already paid under certain conditions, but also for the exclusion of the liability to pay such a premium where, under those same conditions, it had not yet been paid. See further eg Dorhout Mees Schadeverzekeringsrecht 196-197.
A further preliminary point to be made at this stage is that in the case of a return of the premium, the insurer was by longstanding custom\textsuperscript{315} entitled to retain or, if the premium had not yet been paid, to receive from the insured, an amount equivalent to a premium at a rate of one-half per cent, that is, one-half per cent of the sum insured. Thus, where a ship worth f2,000 was insured at a rate of five per cent, the premium amounted to f100. In the case of a return of that premium, the insurer was entitled to retain f10.\textsuperscript{316} This customary payment or entitlement, to which the insurer was entitled even if no risk had been run at all, was to compensate him for his trouble, effort and expense in the conclusion of the contract and for the loss of the opportunity of earning a full premium.\textsuperscript{317}

A return of the premium occurred in those instances as determined by law, even if there was no provision therefor in the insurance contract, as there sometimes was.\textsuperscript{316} However, even if a ground for the return of the premium existed, such a return could not be claimed if the policy expressly provided that no return was to take place either generally or in that particular case. This was in accordance with customary law.\textsuperscript{319}

The return or restitution of the premium was often referred to in the older sources by the word 'restorno', said to be derived from the medieval Italian for premium namely 'storno', so that 'restorno' literally meant 'return premium'.\textsuperscript{320}

Characteristic of the legislative measures on the return of the premium was the increasing sophistication with which the topic was regulated. Whereas the earliest measures tackled the issue piecemeal, leaving many obvious gaps and situations unaccounted for, later legislation increasingly showed signs of a principled, systematic and more thorough approach. However, a clear statement of the underlying principles involved occurred only on codification and even then the earlier fragmentary approach was not completely abandoned.

\textsuperscript{315} Statements to the effect that the insurer was to retain a ½ per cent premium if the insurance was not effective (eg, if the goods had not been shipped) already occurred in the earliest policies. See De Roover 'Early Examples' 188.

\textsuperscript{316} Note, the amount he was entitled to retain was ½ per cent of the sum insured, that is, a premium of ½ per cent, and not ¼ per cent of the premium. Very often the sources merely stated that the insurer was entitled to retain ½ per cent, without any indication of which amount was to form the basis of the calculation involved.

\textsuperscript{317} Or, as art 255 of par 8, title 11, part IV of the Antwerp Compilatae (see De Longé vol IV at 306) put it, the insurer was entitled to retain ½ per cent 'al en geschiet er geene lading voor, ende ter saecken van den contracten [contractuit] ende opteeckeninge van de selve versekeringe'.

\textsuperscript{318} See Holdsworth History vol VIII at 280-281.

\textsuperscript{319} See art 95 of par 3, title 11, part IV of the Antwerp Compilatae (see De Longé vol IV at 240) from which it is apparent that while the return of the premium was not dependent upon any contractual arrangement, such an arrangement could exclude it.

\textsuperscript{320} See Van der Keessel Praelectiones 1473-1474 (ad ill.24.16); Koch Review 333.
6.2 The Grounds for the Recovery of the Premium

The recovery of the insurance premium in Roman-Dutch law was governed by two overriding principles. First, the premium was recoverable if and, as long as the contract and the risk were apportionable, to the extent that the insurer bore no risk. Linked to this was the proposition that where the insurance was null and void from its inception (ab initio), the insurer did not bear any risk. Obviously also, to the extent that the insurer bore no risk, he incurred no liability for any loss or damage. The second principle was that fraud on the part of one of the parties resulted in a reversal of the rules governing recoverability in so far as that party was concerned. For example, in the case of fraud on the part of the insured, an otherwise recoverable premium, was forfeited.

However, in many cases the legislative provisions are not to be reconciled with these basic premises. The reason for that must be seen against the fact that the recoverability or forfeiture of the premium was used to achieve other purposes too, namely to punish one of the parties for his fraudulent conduct or, and this was especially the case where inexplicably errant instances occurred which were particularly out of step with the points of departure just referred to, simply to discourage such conduct.

Many of the more specific grounds of instances where an insurer bore no or a lesser risk than he was compensated for or had to be compensated for by the payment of premium, concerned matters which are dealt with in detail elsewhere. For present purposes these grounds will merely be identified and explained to the extent to which it may be necessary to illustrate why a recovery of the premium was permitted or not permitted in that instance.

6.2.1 The Absence of Risk

It was generally accepted in Roman-Dutch law that if there was no risk, the insurance contract was void. The premium was the compensation paid by the insured for the insurer’s bearing of the risk. In the absence of any risk, or if no risk was actually transferred to and borne by the insurer, the premium was therefore not earned and due and, if paid to the insurer, could be recovered from him.

There were two main examples in practice of instances where there was either no or merely a reduced risk and where the premium was thus recoverable in full or, if there was divisibility, in part. The first was where the voyage on which the ship or goods were insured, was not undertaken or not completed. The second was where none or a smaller quantity of the goods which were insured for a particular voyage was in fact consigned on that voyage.

The fundamental principle that an absence of risk resulted in the nullity of the insurance and in a return of the premium, was first legislatively expressed in the Law

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321 See further § 6.4 infra.

322 See again ch VI § 1 supra.
Countries in s 16 of the placcaat of 1563. This section provided that where an insurance was concluded on any goods or ship on any intended voyage ('ghedestorneerde reyse') which the insured assumed his factors or masters intended undertaking, but which was in fact not undertaken, with the result that the insurers ran no risk or peril ('soo dat de Asseureurs egeen perikel ofte risicq en loopen'), then the insured could claim and recover the premium ('eysschen ende repeteren den prijs vander asseurantie') from the insurers, leaving to them, as was customary, a half-per cent premium for their trouble and expenses ('latende den Asseureur onder een half ten honderde, voor't maecken van sijnen Boecke als vooren'). There was a condition to such recovery, however. Within four months of the date of the conclusion of the insurance the insurers had to be notified of the fact that the voyage had not been undertaken.323 There was therefore no provision here for the situation where the insurer did in fact bear some risk (for example, where a lesser quantity of goods was sent or where the voyage was commenced but not completed) so that the premium was not returnable in full but at most proportionally.

It seems this provision was not acceptable for it was not repeated in the placcaat of 1571 which, in fact, contained nothing on the return of the premium.324 However, these same principles were extensively reflected in the Antwerp compilations of customary law in the late sixteenth and early seventeenth centuries325 and they resurfaced in the municipal keuren.

323 See Groenewegen Aanteekeningen ad III.24.16 (n33 and n34); Van Zurck Codex Batavus sv 'Assurantie' par 19 (referring to the recoverability of the premium by the insured 'zo de reys niet is aengenomen, gelyk hy meinde'; his further reference to s 14 of the placcaat of 1571 in this regard was incorrect since a change of voyage, and not an abandonment of voyage and the return of the premium, was at issue there); Scheltinga Dictata ad III.24.16 sv 'mag t verzeeker-loon weder-eischen' (no recovery of the premium in the absence of a declaration within four months); Van der Keessel Praelectiones 1473-1474 (ad III.24.16) (noting that the requirement of a notice to the Insurers in s 16 of the placcaat of 1570 (incorrect: the placcaat of 1563) was not mentioned in later keuren). See also Enschedé 75; Goudsmit Zeerecht 248; Jollès 67-68; and Kracht 20.

324 There was a provision on the topic in the provisional placcaat of 1570 (see Goudsmit Zeerecht 269) but it was not taken over in the measure of 1571.

325 Thus, art 6 of title XXIX of the Antiquae of 1570 (see De Longé vol I at 600-601) laid down that if a person insured on goods 'die hy naemaels nyet en zaynt oft en laeyt, oft hem nyet gesonden en worden, oft oock min geladen is geweest dan hy heeft doen versekerent', he could claim the return of the price of the Insurance, on condition that he left ½ per cent to the insurers. Article 11 of title LIV of the Impressae of 1582 (see De Longé vol II at 404) provided that if a person insured goods which he subsequently did not send or ship, or which were not sent to him, or if a smaller amount was shipped than he had insured ('die hy naemaels niet en seynct oft en laedt, oft hem niet gesonden en worden, oft oock min geladen is geweest dan hy heeft doen versekerent'), he could claim the return of the premium on condition that he left ½ per cent to the insurers ('mach den prijs van d'asseurantie wederom haysschen, midis latande den asseureurs een half ten honderf').

The Complilatae of 1609 also addressed the issue. Article 66 of par 3, title 11, part IV (see De Longé vol IV at 228-230) stated that when all or some of the goods intended to have been loaded on the ship were in fact not loaded, whether they arrived too late or because the ship was fully laden or otherwise, the insured was not liable for the price of the insurance in the proportion to what he did not load, but nevertheless always had to pay the insurer a ¼ per cent 'voort opteeckeninge [opteeckenen] van de versekerent'. Articles 67-69 concerned the periods within which notice had to be given to the insurer of such non-loading or short-loading. They varied from three working days in the case of local consignments, to one month after the departure of the ship in the case of consignments from elsewhere in the Netherlands, two months in the case of shipments from England, Scotland or France, and three
Section 22 of the Amsterdam keur of 1598 determined that where an insurance was concluded on goods which were subsequently not consigned or shipped by the insured or not consigned to him, or when a lesser quantity was shipped (presumably also to or by the insured) than was insured, the premium could be recovered (‘mach den prijs van d’Asseurantie wederom eyschen’), presumably either fully or proportionally, as long as a half-per cent premium was left to the insurer.  

A very similar provision was that in s 18 of the Rotterdam keur of 1604. It laid down that where an insurance was concluded on goods which the insured subsequently did not ship or which were not consigned to him, or when a lesser quantity was shipped or consigned than was insured, the insured was not liable to pay a premium in respect of the goods not shipped (‘is ongehouden van ’t geene hy niet geladen en heeft, enige premie te betalen’), and if he had already paid a premium, he could recover it, as long as he left or gave (‘mits latende ofte gevende’) the insurer a half-per cent premium. However, there was a proviso here. Such return of the premium or absolution from the liability to pay the premium only occurred when the insured had in his policy expressed the name of the ship in which the insured goods were loaded or to be loaded and that of her master. If that was not the case, s 7 of the keur applied and the premium was not recoverable but forfeited or, presumably, if it had not yet been paid, still due.

In terms of s 19 of the Rotterdam keur of 1604, in all other cases (that is, in all cases other than where there was an absence of risk or a lesser risk, cases which were months in the case of shipments from Spain, Italy and further afield. Failure to give such notice within the prescribed time resulted, in terms of art 70, in the forfeiture of the premium. Articles 74-75 (see De Longé vol IV at 230-232) concerned the proof which the insured had to produce if he wanted to claim the return of the premium for, respectively, non-loading of the goods (certification by the master that on the voyage which had been insured that ‘geene goeden en zijn geweest die totte police oft brleff van de versekeringe applicabel zijn’) and short-loading of goods (‘t cognossement van den schipper met het cargasoen oft cargasoenen [cognossement] van de ladinge’ and a declaration by the master that he did not load more). See further Mullens 78-90 (discussing the insurer’s ‘restornoplicht’) and 95.

326 Precisely the same provision appeared in s 24 of the Middelburg keur of 1600. See generally eg Grotius Inleidinge III.24.16 (referring to the ‘weder-eisschen’ of the premium); Groenewegen Aanteekeningen ad III.24.16 (n33 and n34); Wassenaer Praktijk notariael VIII.12. Enschedé 76 incorrectly thought the claim for the return of the premium still had to be instituted within four months. But see ch XX § 3 infra as to the prescription of the claim for the return of the premium. See also Goudsmit Zeerecht 323.

327 This section, it may be noted, was one of the first pertinently to provide not only for the return of the premium already paid but also for the release from or a decrease in the liability to pay it where it had not yet been paid. See also s 56 of the Rotterdam keur of 1721 which is considered below.

328 See Groenewegen Aanteekeningen ad III.24.16 (n33 and n34); Scheltinga Dictata ad III.24.16 sv ‘mids latende, etc’ explaining that where the insured had not yet paid the premium, he was nevertheless, although relieved of the liability to do so, still obliged to pay the insurer a ½ per cent premium.

329 See § 6.3.2.1 infra.

330 See eg Scheltinga Dictata ad III.24.16 sv ‘mag ‘t verzeeker-loon weder-eisschen’.
treated in s 18), the agreed premium had to be paid in full to the insurers and, by implication, if paid, was not recoverable. This was so even if the insured goods had arrived safely at their destination before the date or signing of the insurance,331 or even if the insured could argue that he or his representative (‘Commisen’) had, with or without his knowledge, insured on one or more places for more than the value of the goods shipped.332

Akin to the case where the insured goods had never been shipped and where the premium was recoverable, was the situation where an outward-bound cargo and a return cargo (retouren), which were to be carried on a particular ship, were insured in the same policy but where no return cargo was then in fact shipped. In such a case the premium paid in respect of the return cargo could be recovered from the insurer, at least in so far as the policy was divisible and covered two separate risks.333

A largely similar regulation of the position in the case of an absence of or a lesser risk occurred in s 56 of the Rotterdam keur of 1721.334 It provided that where an insured cargo or any part of it was not consigned or shipped (‘niet afgezonden of geladen’), or (and this was new) where the voyage of the insured ship was terminated (‘de Reyse van het geassureerde Schip zal zijn gestaakt’), the insured did not, for so much of the goods as was not consigned or sent (‘niet af of toegezonden zullen zijn’), or for so much as was relinquished of the ship’s voyage (‘of zoo veel het Schip aangaat waar van de Reyse zal zijn gestaakt’), have to pay the premium except for the customary half-per cent premium. And if the insured had already paid the premium, then the insurer was liable to return it (‘die te restorneren’), retaining only a half-per cent premium.

In terms of s 55 of the Rotterdam keur of 1721, following the earlier provision in s 19 of the keur of 1604, the insured remained liable to pay the agreed premium even if the insured goods or ship had arrived at their destination before the signing of the policy.

Lastly, s 58 provided that it was to be understood that whatever was agreed otherwise335 in the policy on this topic (‘dit subject’), would be given effect to. It is not clear whether ‘this topic’ referred to the immediately preceding s 57 or to the topic of the premium in general which was, under a separate heading (‘Van het betalen der Praemien, by arrivement, voor de Asseurantie, mitsgaders by het staken van de Reyse of verzendinge’), dealt with in ss 55-58 of the keur. It would appear, though, that it was the latter, given that s 57 pertinently permitted such contractual regulation of the topic

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331 See ch XII § 2.2 infra as to insurance after departure or after loss.

332 This second instance, one of over-insurance, will be treated in the next section.

333 See the two opinions in Barels Advysen vol I adv 19 (1697) and vol I adv 23 (1715); and Van der Keessel Theses selectae 761 (ad III.24.16); idem Praelectiones 1473-1474 (ad III.24.16). See § 6.4 infra as to the question of divisibility.

334 See eg Goudsmit Zeerecht 399; Kracht 37.

335 Presumably otherwise than was provided in the keur itself.
covered by it.\footnote{336} If this is correct, the issue of the return of the premium as regulated by the Rotterdam \textit{keur} of 1721 was in every case subject to an agreement by the parties to the contrary.

The general position was again provided for in s 23 of the Amsterdam \textit{keur} of 1744.\footnote{337}

The first paragraph of s 23 provided that if someone had concluded an insurance on goods which he subsequently did not consign or ship, or which was not consigned to him, and also when goods of a lesser value were shipped than he had insured, he was entitled to recover the premium or so much of it as pertained to the excessive insurance ("zo vermag hy de Premie van de Assurantie, ofte van het te veel verseeekerde te rugge eyschen"), on condition that he left a half-per cent premium to the insurer.\footnote{336} But (and this was new), the first paragraph of s 23 provided further that if the goods had already been loaded from the quay or bank onto barques, boats or lighters to be brought to (ocean-going) ships on which those goods were to be transported, and they were then returned to the quay or bank, the discount was to be a one-per cent premium. The assumption here was therefore that the premium was recoverable in this instance.\footnote{339} It is not quite clear at precisely which moment the premium was no longer returnable in this case. Presumably, once the goods had been loaded on the carrying ship, a return of the premium was no longer possible, even if the goods were unloaded before the departure of the ship. But it is equally possible to interpret the section as meaning that a return became impossible only once the carrying ship had departed on her voyage,\footnote{340} or as meaning that the premium was no longer returnable once the lighters had left the quayside. The point was not taken up in the sources. It was clear, nevertheless, that although the risk had already commenced for the insurer,\footnote{341} (so that if a loss occurred en route to the carrying ship, the insurer could...
have been held liable for a loss of or damage to the insured goods) and, for that reason, that the premium ought not to have been recoverable or, if the risk was divisible, at least not recoverable in full, that was not the case. The Amsterdam Legislature, on grounds of equity and to prevent any hardship to the insured in this case, chose to ignore the underlying principle involved and provided that the premium would in fact be returnable in full, the only concession to the insurer being an increased amount for his expense and trouble.

The second paragraph of s 23 of the keur of 1744, following s 56 of the Rotterdam keur of 1721, further provided that a return of the premium would also take place in the case of an insurance on the hull of a ship when the insured voyage was discontinued ('indien de verseekerde reyse magt warden gestaakt'). In that case, for the return of the premium and, significantly, for the risk that he had in fact borne ('voor de Restorno en gelopene Risico'), the insurer would be paid a one-per cent premium as opposed to the customary half-per cent premium. The discontinuation of the voyage referred to here was, as the provision made clear, one which occurred after the insurer had already been at risk (hence the increased compensation allowed to the insurer in the case of the return of the premium) as opposed to the situation when the voyage and the risk had never been undertaken and borne at all. It seems, therefore, that, as in the case of an insurance on cargo, two instances may be distinguished in this regard, namely when the insured ship never proceeded on her voyage at all so that the insurer never ran any risk at all, in which case the full premium was returnable (less a half-per cent premium), or when, soon after its actual commencement, the voyage was discontinued so that the insurer was at risk only for a small period of time.342

The provision made in paragraphs 1 and 2 of s 23 for the return of the premium in the cases mentioned there despite the fact that the insurer had already been at risk, was certainly an exception to the general principle legislatively accepted elsewhere and earlier in the Netherlands. That principle was namely that once at risk, the insurer had earned the premium which was then not returnable, except if the risk was divisible. The Amsterdam Legislature no doubt recognised that a strict application of that principle could give rise to hardship in certain cases, namely where although the risk had commenced, it was terminated so shortly afterwards and possibly by circumstances

342 See Van der Keessel Theses selectae th 761 (ad III.24.16); idem Praelectiones 1473-1474 (ad III.24.16). It seems that the discontinuation of the voyage envisaged here was one occurring soon after the commencement of the risk, possibly before the voyage was practically proceeded on, such as when the ship never actually left the port. At least Van der Keessel appears to have thought so, for he noted that the same consideration which applied in the case of goods (loaded on lighters but never onto the carrying ship) appear also to be applicable in the case of the insured ship herself where the insured abandoned the voyage. The consideration, of course, was that the insurer only bore an insignificant portion of the risk he ought to have borne.

It would appear, at any rate, that it was not intended here that the full premium would be recoverable whenever and in all cases where the voyage was discontinued after having been commenced, with only the increased compensation being allowed to the insurer. In such a case there was at most a proportional return of the premium and then only if the risk was apportionable (see further § 6.4.3 infra as to the divisibility of risk in the case of a discontinued voyage). See eg the opinion of 1790 (Casus positien vol I cas 20, discussed in § 6.4.3 m456 infra) from which it appears that ordinarily (eg once the ship had commenced her voyage) there was no return of the premium after the commencement of the risk if that risk was not apportionable.
beyond the control of the insured, and that an exception had to be created and that the
premium ought to be recoverable. The fact that it was recognised that the insurer had
in fact borne some risk, was reflected in the greater amount of compensation awarded
to him.343

The exceptions provided for in s 23 of the keur of 1744 were not new, also
occurred outside of the Netherlands, and, as will be shown later, were retained in the
Wetboek van Koophandel.344

Although the measures contained in s 23 were already preceded in an
abbreviated form by s 56 of the Rotterdam keur of 1721, their ancestry goes back even
further. There were in fact numerous provisions on the matter in the Antwerp compila-
tion of customary law, the Compilatae of 1609, which show that the topic was well
known to the early insurance custom and practice and that it was in fact regulated in
remarkable detail. In terms of art 76345 of the Compilatae, if loaded goods were
voluntarily discharged before the departure of the ship, the insured was not liable for
the premium (or, presumably, it had to be returned) except that the insurers had to be
compensated reasonably for the risk which they had borne ('vant perijckel d'we/wck [sij]
int laeden oft daenery, duerende den tijt dat de goederen gelaeijt geweest hebben,
[hebben] gelopen, ten seggen, van de goede lieden hun des verstaende').346 In the
Amsterdam keur of 1744, this reasonable premium had become a one-per cent
premium.347 In terms of art 79, if the ship, her named master, or her voyage was
voluntarily and without necessity changed at the place of loading (and therefore,
presumably, before the commencement of the voyage) and if within the proper time
notice was given of such change to the insurers without their having borne any risk
('sonder dat de versekeraers eenich perijckel hebben gelopen'), the insured was not
liable for, or was entitled to a return of, the agreed premium although he had to pay or

343 There is one possible explanation of the exceptions provided for in s 23 which would render them
particular applications of, rather than exceptions proper to, the general principle. That is that the
Legislature in these two cases proceeded from the argument that the risk there was divisible (or ought to
be regarded as divisible) and that a proportional return of the premium should be permitted. To avoid
disputes on the matter, though, that proportion had to be fixed statutorily. The portion of the risk borne by
the insurer in these cases was so negligible (the premium was considered returnable virtually in full) that
the premium (for it was a premium for the bearing of risk rather than the customary compensation for not
being able to bear premium) was fixed at one per cent.

344 In art 636. See further § 6.6 infra.

345 Of par 3, title 11, part IV (see De Longé vol IV at 232).

346 In terms of art 77, the insured had to notify the insurers of such offloading in the manner and within
the specific periods provided for in the case of a non- or short-shipment in terms of arts 66-70 (see again
n325 supra), failing which the insured remained liable for the whole premium whether or not any
discharge took place, without there being any return of the premium. Article 78 provided for the case
where the goods were only partly laden or discharged and the voyage then commenced: the full premium
in respect of the laden goods and a half-per cent premium in respect of the goods not loaded were then
due.

347 See again the explanation in n343 supra.
allow the insurers to retain a half-per cent premium.\textsuperscript{348} But, in terms of art 80, if during the loading and while the laden ship was lying in port the insurers had already borne any part of the risk (‘alrede eenich deel vant perièckel hebben gedraegen’), such notice was of no avail and they were entitled to receive or to retain such part of the premium as was reasonably equivalent to the risk borne (‘als tottet geloopen perièckel is staende, ten seggen van de goede iede’).\textsuperscript{349} And, in terms of art 82, if the change of ship, her master, voyage or of the discharge of the goods (presumably, after the insurer was at risk) was compelled by the circumstances (‘bij bedwanck van hooger hant oft anderen noot’), then the insured was not liable to the insurers for more than a half-per cent premium, even if the insurer had borne some risk.\textsuperscript{350}

Interestingly enough, the same exceptions as were provided for in s 23 of the Amsterdam keur of 1744, also appear to have been recognised and adopted already in the seventeenth century in Hamburg.\textsuperscript{351}

As has been pointed out and explained,\textsuperscript{352} all the instances where a return of premium was provided for in paragraphs 1 and 2 of s 23\textsuperscript{353} were in fact contrary to the general principles of the law of contract. Firstly, if the insured unilaterally and voluntarily discontinued the adventure (for example prevented the insured ship from sailing on her

\textsuperscript{348} And see too art 118 (if the ship was voluntarily and without necessity changed by the insured whilst still in the port of loading, the insurer incurred no liability for any risk run on another ship except by express declaration and consent, mere silence imposing no obligation on him, even if proper notice was given to him of the change, such notice serving only to permit a claim for the return of the premium); and art 122 (where, before the commencement of the voyage, the insured changed the voyage by agreement with the master, his insurance was terminated, but nevertheless the insurer was entitled to retain the premium, except in cases or for the reasons mentioned in art 79 et seq).

\textsuperscript{349} In such a case too, though, notice in terms of art 81 had to be given as before, otherwise the insured remained liable for the premium in full or was not entitled to any return at all.

\textsuperscript{350} In this case too the insured had to give notice of ‘de veranderinge bij bedwange gedaen’.

\textsuperscript{351} In conflict with and by way of exception to the principle that once the insurer was at risk, the premium was earned and was, in the absence of divisibility, not returnable, the premium was nevertheless in Hamburg regarded as returnable in full in appropriate circumstances in the case of a discontinuation of the voyage after the commencement of the risk. According to the Hamburg Admiralty Court in Hübner v Paulsen in 1658, in the case of a termination of the voyage after the commencement of the risk (here it was an insurance on goods - so that the risk commenced when goods came alongside to be loaded or at the latest when they were actually loaded - which had already been loaded on the carrying ship), a return of the premium was still possible, subject to a deduction of a half-per cent premium in favour of the insurer, when the risk borne by the insurer was in both extent and time not very extensive so that an equation with the case where the risk had not yet commenced at all was equitable. In this case, the risk borne by the insurer was insignificant in both extent (the ship had not yet left her mooring when the insured goods were taken off) and time (the voyage was called off soon after the insurer had come on risk). See further Frentz ‘Kaufmännische Gutachten’ 169; \textit{idem} Hamburgische Admiralitätsgericht 187-189.

\textsuperscript{352} See Ten Kate 16-21.

\textsuperscript{353} That is, the case of the non-shipment or short-shipment of goods, the discharge of goods, and the discontinuation of the voyage before its commencement; and both where the insurer was not yet or already at risk.
voyage or the insured goods from being loaded) after the conclusion of the contract but before the voyage was commenced and before the insurer was at risk, such conduct was nothing but an anticipatory repudiation and hence a breach of the insurance contract.\textsuperscript{354} And secondly, if the insured terminated the voyage only after it had commenced and the insurer has been at risk, the whole premium has been earned by the insurer (unless contract and risk were divisible) even though he may only have borne a small (but indivisible) part of the agreed risk, so that no return of premium should, in principle, have been possible.

Nevertheless, as has been shown, in Roman-Dutch marine insurance law, different principles applied in some instances in the interest of trade.\textsuperscript{355}

A discontinuation or termination of the voyage for any reason was accepted, and, on the basis of the principle 'no risk, no premium', a return of the premium was permitted, on the vital assumption, though, that the insured had acted in good faith.\textsuperscript{356} The insurer was only compensated by way of a small percentage premium for the loss of the opportunity to earn the full premium, and for his expenses, including brokerage, and efforts in concluding the contract.\textsuperscript{357}

Likewise, where strictly speaking the risk had commenced but not yet the voyage proper, the position was considered as if no risk had yet commenced. The premium was therefore returnable, although again subject to an increased compensa-

\textsuperscript{354} Ten Kate 17 refers to it as 'een éénzijdige terugtreding en derhalve ook ... contrakt-schennis'.

\textsuperscript{355} No such exception was recognised in English law. In French law, too, once the risk had commenced, the whole premium was due without exception. There was therefore no return of premium because of a shortened voyage, unless otherwise agreed, as was by implication the case if the contract was divisible. See further Enschedé 84.

\textsuperscript{356} Hence it was irrelevant whether or not the departure or shipment was prevented by circumstances beyond the insured's control or by his own negligent conduct. Only where the insured's fault amounted to fraudulent conduct did his actions prevent a recovery of the premium. See further § 6.3.1 \textit{infra} where the point will again be made and further elaborated on that fraud, and not the insured's conduct itself, excluded a claim for the return of the premium in Roman-Dutch law.

\textsuperscript{357} Thus, the insured was not obliged to expose the property insured to the peril or perils insured against so that the insurer could earn the premium.

The position was otherwise in Hamburg. It was accepted there, otherwise than in Roman-Dutch and English law, that just as the insurer had bound himself to bear the insured's risk, so too the insured had bound himself unconditionally to pay the premium. Thus, in terms of art V-4 of the Hamburg Assuranz-Ordnung of 1731, there could be no return of the premium in respect of an insurance once concluded merely because the insured had found cheaper insurance elsewhere. Where the obligation to pay the premium was made impossible due to the conduct of the insured himself (which included any conduct, not only fraud as in Roman-Dutch and English law) as opposed to objective impossibility, the premium remained due and was not returnable. See eg Ulrich 224 for the different points of departure in this regard in English and German law.

In terms of art V-16 of the Hamburg Assuranz-Ordnung, if the ship was prevented from undertaking her voyage by necessity (\textit{vis maior}), or if for that reason insured goods could no longer be loaded on the ship, the insurance terminated and the premium, less the customary deduction, was returned. And in terms of art V-17, if the ship had already departed but a contrary wind or similar circumstance caused her to return to her port of departure as a result of which her voyage had to be abandoned, the insurance was likewise terminated and a return of the premium in proportion to the amount of risk run was permitted. See further Dreyer 141.
tion to the insurer for his trouble. Only in the latter regard was a distinction drawn between the case where no risk at all had been run (because none had commenced) and the case where the risk had commenced but not yet the voyage.

One last point. The principle relating to the return of the premium in the case of an absence of risk applied also to a separate insurance of freight by the owner of the goods carried by sea.\(^{358}\) This was provided for by s 35 of the Amsterdam *keur* of 1744 as subsequently amended in 1756.\(^{359}\) When the goods did not arrive at their destination with the result that no freight was payable on them, such insurance became void and the premium, less the customary half-per cent premium, had to be returned by the insurer. And if only a part of the goods were consigned, or if there was only a partial loss so that the freight was only payable in part, a proportional part of the premium had to be returned.\(^{360}\)

### 6.2.2 Over-insurance

Another broad category of cases where the possibility of the return of the premium featured prominently in Roman-Dutch law, was that of over-insurance. Over-insurance\(^ {361}\) was insurance, whether by one or more policies, that is, whether by a single insurance or by double insurance, in an amount in excess of the value of the object at risk.\(^ {362}\) Over-insurance was null and void to the extent of the over-insurance. Thus, where there was over-insurance by double insurance, the first insurance was valid to the extent that it was not over-insurance; second and further insurances were valid only if the first insurance was insufficient and then only to the extent that they were required to provide the insured with insurance to the full or permitted portion of the value of the object at risk. If the first insurance therefore already provided the insured with full or over-insurance, such second and further insurances were completely null and void.

To the extent that an insurance was void by reason of over-insurance, the insurer concerned bore either no risk or a lesser risk than was or would be compensated for by the agreed premium paid or payable in terms of the contract.\(^ {363}\)

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358 As to the insurance of freight, see again ch V § 5.4 *supra*.

359 See again ch V § 5.4.3 *supra*.

360 See eg Van der Keessel *Praelectiones* 1453-1454 (ad III.24.6).

361 Which will be treated in detail in ch XVIII § 4 *infra*.

362 Or, because of compulsory under-insurance, in excess of the permitted proportion of the value of the object at risk. As to compulsory under-insurance, see ch XVIII § 5.2 *infra*.

363 The returnability of the premium in the case of over-insurance, it would seem, was, or at least ought to have been, nothing more than an application of the principles governing the return of the premium in the case of an absence of risk. There appears to be little difference in principle between the case where goods of a lesser value were consigned than was insured and the case where the goods in fact consigned were insured for more than their value. Some Roman-Dutch writers, eg Van der Linden *Koopmans handboek* IV.6.6, treat the two cases in one breath.
such an extent, therefore, the premium ought in principle to have been returnable. However, in Roman-Dutch law other considerations, not the least of which was the desire to eliminate fraud and other abuses occurring in connection with over-insurance, played a role here so that the rules governing the recoverability of the premium in cases of over-insurance were not always that clear.

In terms of s 15 of title VII of the placcaat of 1563, innocent over-insurance364 through double insurance365 was, to the extent of such over-insurance, null and void,366 but the insurers of such void insurance were according to ancient custom entitled to retain a half-per cent premium for their trouble (such as the keeping of accounts) and expenses ('inhouden een half ten honderde naer oude costuyme, van't houden van sijnen Boeck ende andersints'). The assumption367 was that the balance of the premium or premiums had to be returned to the insured.

In terms of s 14 of the placcaat of 1563, in the case of fraudulent over-insurance by way of double insurance, by contrast, the insured could neither claim at all on his policy nor recover the premium or premiums ('noch oock repeteren den prijs van der selver assurantie') which were forfeited ('welke gecon/isceert sal zijn') in a proportion of one-third to the authorities, and two-thirds to the public officer (of the Registration Office?) and the informer ('Officier ende Denunciateur') respectively, subject to the insurer being allowed to deduct a half-per cent premium according to the ancient custom if he was ignorant of the over-insurance, otherwise nothing.368

The principle that in the case of over-insurance (in good faith) through double insurance only the first insurance remained valid while the others were avoided, was not mentioned in the placcaat of 1571. Section 13 of that placcaat merely provided that all insurers involved in an insurance would be liable equally, the last insurer to participate in the loss or profit in the same way as the first insurer. Therefore, the liability of co-insurers on a policy was in the same proportion as their entitlement to the premium and, consequently, as their liability for the return of the premium.

The recoverability of the premium in the case of over-insurance through double insurance, it appears, was a 'universal custom' in early insurance law.369 It was also

364 Or, rather, bona-fide or non-fraudulent over-insurance.
365 Insurances in different places on the same goods, as the section put it.
366 That is, only the first insurance was valid in so far as it was not over-insurance and further insurances were only valid in so far as the first insurance fell short of being full-value insurance.
367 It may in fact be deduced from s 14.
368 See eg Van Zurck Codex Batavus sv 'Assurantie' par 23 (no profit from over-insurance nor any recovery of the premiums ('ook niet repeteren den prys der assurantie, als zynde gecon/isceert'). See further also Benecke Risatomo 31 (noting that the forfeiture of the premium in the case of fraudulent over-insurance in s 14 was derived from s 162 of the Seville Ordinance of 1552, and that the customary return of the premium was retained in s 15 in the case of over-insurance in good faith); Enschedé 75; Goudsmit Zeerecht 247-248; and Jolles 66-67.
369 Magens Essay vol I at 90-91 referred in those terms to the provision on over-insurance through double insurance and the return of the premium in such a case in s 16 (rather: s 14) of the placcaat of 1563.
recognised in English law in the sixteenth century. Evidence of this appears from the
draft marine insurance code (the London Orders of Assurances) of the 1570's.\textsuperscript{370} In
terms of order 40, an insured could demand a return of the premium paid to the insurer
if it appeared on arrival of the carrying ship that the cargo had already been insured at
the port of departure before he had concluded his insurance locally. In order to claim
such return, the insured had to notify the insurer,\textsuperscript{371} within certain periods of time after
the departure of the ship, of such earlier insurance and of his intention to claim a return
of the premium. These periods of time depended upon the distance between the place
of departure and London.\textsuperscript{372}

The Amsterdam keur of 1598 failed to provide for over-insurance generally and
for the return of the premium in that case specifically. But the Middelburg Legislature, in
its keur of 1600, did rectify the omission, resulting in one of the very few differences
between it and the Amsterdam keur. However, it showed little imagination and simply
took over in ss 31 and 32 respectively the provisions contained in ss 14 and 15 of the
\textit{placcaat} of 1563.\textsuperscript{373}

In terms of s 19 of the Rotterdam keur of 1604, in all other cases, that is, all
cases other than where there was an absence of risk, which traditional cases were

\textsuperscript{370} See Kepler 'Trading Voyages' 265.

\textsuperscript{371} Or the 'Register', that is, the Insurance Office of Richard Candler. See again ch IV § 1.7 \textit{supra}.

\textsuperscript{372} Thus, on voyages from Holland, the period was one month, from the Baltic three months, and from
Cape Verde five months. See further Kepler 'Trading Voyages' for details of these durations.

\textsuperscript{373} Van der Keessel \textit{Praelectiones} 1437 (ad III.24.4) noted in respect of s 31 that it was the insurer, and
not the insured as was stated in the reprint of the keur in \textit{GPB} vol I at 872, who was entitled to retain the
½ per cent premium. See also n381 \textit{infra}.
The Premium

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treated in s 18, the agreed premium had to be paid to the insurers in full and, by implication, if paid, was not recoverable. This was the case even if the insured goods arrived safely at their destination before the date or signing of the insurance, or even if the insured could contend that he or his representatives ('Commisen') had, with or without knowledge, insured on one or more places for more than the value of the goods shipped. Thus, no return of the premium was provided for in the case of an over-insurance by double insurance. In terms of the Rotterdam keur of 1604, therefore, no recovery of the premium was permitted in any case of over-insurance, irrespective of whether it was fraudulent or non-fraudulent. Now, though, the premium was retained by the insurer (at least, it may be assumed, if he was bona fide) and no longer forfeited to the authorities.

In Amsterdam, however, it appears that either on the basis of the earlier paccaten or by reason of practice, the insurance premium continued to be regarded as returnable in the case of over-insurance, at least where it was not fraudulently concluded.

In terms of s 59 of the Rotterdam keur of 1721, it was provided that co-insurers (that is, insurers who had underwritten the same policy) had an identical entitlement to the premium and that they were all equally liable to compensate any loss and similarly liable for the return of the premium ('gelyk made in het restorno in de gevallen als het plaatse heeft'). Section 70 provided for the application of the indemnity principle in

374 See again § 6.2.1 n327 supra.

375 See ch XII § 2.2 infra as to insurance after loss or after departure.

376 The Rotterdam keur therefore drew a distinction between the case in s 18 where a lesser quantity of goods was consigned than was insured (ie, over-insurance in terms of single policy), and the case in terms of s 19 where, because of double insurance, there was more insurance than the value of the goods actually sent. But see again n363 supra.

377 This may be deduced from a remark made in passing in an additional opinion delivered in 1669 (see Nederlands advysboek vol II adv 120). This second opinion approved the view expressed in the main opinion, namely that one could not insure in excess of the value of the goods at risk and that any insurance was to the extent of such excess null and automatically void, subject to a return of the premium, according to legislation and practice ('behoudens restorno van de premie, volgens de ordonnantie en het ordinaris gebruik in materie van Assurantie'). The return of the premium was not at issue here and was not mentioned in the main opinion.

378 See Van der Keessel Theses selectae th 763 (ad III.24.17).

In English law co-insurers were, at least in seventeenth century when Malynes commented on the position, not liable equally according to their subscriptions, but successively, so that in the case of over-insurance (by a single policy) those insurers who first underwrote were liable first, and the latter ones did not bear any part of the loss and were relieved of liability on the policy to the extent of the over-insurance. They, too, had to return in full the premiums they had received although they were entitled to retain a ½ per cent premium for their subscription. See Malynes Consuetudo vol 1 at 25, referring to the duly observed custom 'that those Assurors that have last subscribed to the Policie of Assurance, bear not any adventure at all', and at 29, noting that civil law by contrast rendered all the insurers liable pro rata in the case of loss. As to co-insurance, see further ch XVIII § 2 infra.
the case of over-insurance\textsuperscript{379} but made no provision for the position where such over-insurance occurred though double insurance. Apparently the insurers involved remained liable but there was still no return of the premium in such a case in Rotterdam. The non-returnability or forfeiture of premiums in the case of an over-insurance in good faith (as in Rotterdam but, it would appear, not in Amsterdam), was patently in conflict with the principle underlying the return of the premium generally and it was on occasion criticised.\textsuperscript{380}

In the Hamburg Assecuranz-Ordnung of 1731 provision was made, in art V-1, for a return of the premium less the customary deduction in the case of a proven over-insurance and, in terms of art V-2, for the proportional return of the premium by all the co-insurers involved according to the sums they had insured. Article V-3 provided that in the case of over-insurance by double insurance in different places and, presumably, on different policies, at the same or different premiums, 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, and irrespective of whether it had been signed for a higher or lower premium rate than the other policy or policies, remained valid, and in respect of the other policy there was a return of the premium.\textsuperscript{381}

Finally we come to the provisions on the return of the premium in the case of over-insurance in the Amsterdam \textit{keur} of 1744. In terms of paragraph 3 of s 23 of that \textit{keur}, if it was found in the case of loss or damage that the sum insured was more than the value of the insured goods ('dat de verseekerde Somme meerder als de waarde van de Goederen quam te beloopen'), the insurers' liability would not exceed the true value of the goods, and the excess insurance, by which was presumably meant the excess insurance premium, would be returned ('en het meerder verseekerde gerestorneert werden').\textsuperscript{382}

Section 24 of the \textit{keur} of 1744 dealt with the liability of co-insurers\textsuperscript{383} and provided that their liability to repay the premium was identical to their liability to compensate the insured for a loss ('in Restorno als ook in de Avarye en Schadens, sullen

\textsuperscript{379} That is, insurers were not liable for more than the insured's actual loss.

\textsuperscript{380} Thus Magens \textit{Essay} vol I at 7-8, in giving an example of mercantile customs which were inconsistent with reason (ie, unreasonable) and justice, and which according to him ought to bear no weight in courts of law, referred to the custom that in the case of a double insurance in good faith, the premium was not to be returned.

\textsuperscript{381} The origin of this measure was s 15 of the placcaat of 1563. According to Dreyer 142, a hierarchy of policies was established to prevent the growing abuse of the possibility of a return of the premium. Especially in times of war, different premium rates could be obtained in different centres, and insured regularly shopped around for cheaper rates, hoping to cancel an earlier policy and to claim a return of the premium when a cheaper insurance was found. To prevent the same evil, s 32 of the Middelburg \textit{keur} of 1600 also took over the provisions of s 15. See again n373 supra.

\textsuperscript{382} Van der Keessel \textit{Theses selectae} th 761 (ad III.24.16); \textit{idem} \textit{Praelectiones} 1473-1474 (ad III.24.16).

\textsuperscript{383} See further ch XVIII § 2.2 infra.
But, s 24 continued, in the case of over-insurance through double insurance, the first insurance was valid (either fully or to the extent of the value of the goods) while a later insurance or insurances were to be reduced in part or, if necessary, fully, and this was to occur both in the case of a return of the premium or in the case of a payment for loss or damage ('so wel in cas van Restorno, als van Avarie en Schaaden').

6.2.3 Summary

The return of the premium in Roman-Dutch law was recognised in a number of separate instances which, it may be thought, were all applications of the underlying principle of 'no risk, no premium'. These instances were listed by Van der Keessel as follows. Where the goods insured were not shipped or consigned by or to the insured; where a lesser quantity of goods was shipped than was insured; where the goods shipped were insured for more than their value; when a return cargo was not shipped; when the insured voyage was not undertaken; and when individual or separate stages of the voyage were not performed.

6.3 The Grounds for the Forfeiture of the Premium

Those instances must now be investigated where the return of the premium was specifically excluded, that is, where the insured forfeited his premium to the insurer. These instances were those where the legislatures specifically prescribed that a return of the premium, which would otherwise have been possible either because of an absence of risk or because of over-insurance, would not be permitted. This section, therefore, concerns the exceptions to the principle that the premium was recoverable or not payable in the absence of risk or in the case of over-insurance.

6.3.1 Forfeiture of the Premium Because of Fraud

Fraudulent conduct on the part of the insured created an exception where the otherwise returnable premium was forfeited to the insurer.

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384 See Van der Keessel Theses selectae th 763 (ad III.24.17).
385 That is, where the insurers were liable on different policies and therefore not co-insurers.
386 Van der Keessel Theses selectae th 763 (ad III.24.17).
387 Theses selectae th 761 (ad III.24.16).
388 Or, alternatively, that a premium which would otherwise not have had to be paid (eg because of an absence of risk) now had to be paid.
Thus, in an opinion in 1665 it was accepted, with reference to earlier authorities, that because the insurers there had never run any risk, they would be liable to make a restitution of the premium if they had received any, after deducting a half-percent premium, except if it was found that in the dealings between the parties there was some fraud on the part of the insured, in which case no restitution or return of the premium would have to take place. Less clear was an earlier opinion c. 1622, requested on the correctness of a judgment of the Rotterdam Chamber of Maritime Affairs delivered in that year. The opinion expressed the view that it was correct that where a person had insured his quarter share in a ship and had sold it before the commencement of the insurance, the insurer not only incurred no liability on the policy in the case of a loss of the ship but was further also not liable to return the premium or, as was case here, if he had not yet received the premium, was entitled to claim the unpaid premium from the insured. Although there was no mention or indication in the opinion of any fraud on the part of the insured in this case, that is the only possible explanation why the premium would not have been recoverable under circumstances such as those relevant there.

The best example of fraud in this situation occurred where the insured was aware of the loss of the insured ship or goods at the time of the conclusion of the insurance. In the case of an insurance after the loss, on ‘good or bad tidings’, the insured was entitled to recover on his policy and the insurer entitled to the agreed premium, even if the goods had in fact already been lost at the time of the conclusion of the insurance contract. However, if the insured was aware at that time of the loss of or damage to the property insured, he had no claim upon the insurer. In addition, he

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389 Nederlands advysboek vol III adv 168.

390 Reference was made to Santerna De assecurationibus ill. 19 where it was stated that in the absence of any risk, the insurer was not liable on the policy but at the same time he was liable to repay the full or (in case of a lesser risk) a part of the premium. But, it was noted, in the case of fraud on the part of the insured, not only was the insurer not obliged to make a restitution of the premium if it had been paid, but he could even demand payment if it had not. The reason for this, Santerna explained, was that although the insurer was not liable for a loss if he did not bear the risk of that loss, nevertheless, a false insurance would in the final instance be for the advantage of the insured and to the detriment of the insurer. The opinion also referred to Straccha De assecurationibus VI. 9 who explained that if the insured had (fraudulently) caused the absence of the risk (e.g. caused the goods not to be loaded), it was regarded as if there was in fact a risk (i.e., as if goods had in fact been loaded).

See further Santerna De assecurationibus ill. 20-21. There it was explained that another reason why there was no return of the premium in the case of fraud was that if the non-earning of the premium (absence of risk) was caused by the fraud of the insured, he should nevertheless be held liable for the premium as if the risk had in fact been borne and the premium earned (the insurer himself not being responsible for the non-earning of the premium), such liability being imposed upon the person who lied and deceived the other contracting party. See too Roccus De assecurationibus note 11.

391 Hollandsche consultatien vol I cons 234.

392 This assumption is supported by the fact that the opinion referred in this regard for authority to Santerna De assecurationibus ill. 19-20 where the non-recoverability of the premium due to the insured’s fraud was considered. See again n390 supra.

393 As to insurance after loss, see further ch XII § 2.2 infra.
forfeited the premium to the latter or still had to pay the premium if he had not yet done so.

Likewise, the presence of fraud on the part of the insurer resulted in the premium, otherwise earned by the insurer, being returnable to the insured. Thus, where it subsequently appeared that the insured goods or ship had at the time of the conclusion of the insurance contract already arrived safely at the destination, the insurance premium agreed upon was nevertheless payable in full or, if already paid, was not recoverable at all but retainable in full by the insurer. This was specifically provided in for example s 19 of the Rotterdam keur 1604 and s 55 of its keur of 1721. However, it was realised in Roman-Dutch law that in this case one had to distinguish whether or not the insurer knew of that safe arrival at the time the insurance was concluded. If the insurer was aware of such safe arrival at that time, he did not earn the premium which therefore had to be returned to the insured, or which, if not yet paid, the insured did not have to pay.

The influence of the presence or absence of fraud on the part of the insured on the recoverability of the premium was also noted by Roman-Dutch authors more generally in respect of instances of an absence of risk. This was nothing new and was already part of the customary law at the beginning of the seventeenth century.

As far as the recoverability of the premium because of an absence of risk (such as in the case of a discontinuation of the voyage or a non-shipment of the goods) was

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394 It is uncertain whether a premium not earned by the insurer but rather forfeited to the insurer, also became returnable to the insured by reason of the insurer's fraud, and whether this was so even if the initial forfeiture was because of the insured's fraud. Put differently, did the effect of one party's fraud on the returnability of the premium cancel out the effect of the other party's earlier fraud on such returnability? See further § 6.6 n475 infra.

395 Presumably without the insurer even retaining the customary ½ per cent premium as compensation for his trouble and expenses.

396 See eg Bynkershoek Quaestiones juris privat/ IV.26 (referring to s 19 of the keur of 1604 and (incorrectly) to s 60 (rather than s 55) of that of 1721 and noting that these provisions applied only in the case where the insurer did not know of the safe arrival of the insured property at the destination, for if he did know but nevertheless insured, he acted fraudulently by concealing what he should not conceal); Scheltinga Dictata ad III.24.5 sv 'fmjaer waren de goederen, etc' where this aspect was discussed in detail; and Van der Keessel Praelectiones 1429 (ad III.24.1) who thought that the nullity of the contract and the recoverability of the premium in this instance flowed clearly from the nature of the contract itself and from the requirement of good faith.

397 In general it was accepted that fraud excluded a claim for the return of the premium and that such fraud could occur in respect of the non- or short-shipment of goods. In terms of art 97 of par 3, title 11, part IV of the Antwerp Complimata of 1609 (see De Longe vol IV at 240), when it was found that a person took up several bills of lading ('cognossementen van ladinge') on a shipment of goods on a ship and that he held back one or more of them in order to claim a return of the premium on the grounds of a short-shipment with it ('al oft hij niet soo veele en hadde gelaten als hij heeft doen versekeren'), he lost or forfeited his entitlement to a return of the premium in addition to being punished as a thief. See also art 98 for another example.
concerned, a few Roman-Dutch authors in the eighteenth century sought to draw a threefold distinction not encountered in the legislation.

The first case they noted was that where the absence of the risk occurred through the fault or fraud of the insured, for example where the insured voyage was prohibited because of a transgression by the insured, or where the goods insured were not shipped because of the fault of the insured. In such instances the premium was not recoverable despite the fact that the insurance was null and the premium not earned by the insurer. The second case was where the absence of risk was the result of fault or fraud on the part of the insurer. This was unlikely but, given the insurance practices at the time, not impossible. It could occur, for example, where the insurer was the owner of the ship carrying the insured goods and where he purposely prevented her from proceeding on her voyage. In that case the premium was returnable and could not be retained by the insurer. The third case was where the voyage was prohibited through no fault or fraud of either the insured or the insurer, in which case too the insurer could not retain but had to return the premium.

A similar distinction was drawn by the earlier authors on insurance law. The explanation given for these instances by the early authors was based on the principles surrounding the fictitious fulfilment of a suspensive condition. The insured's obligation to pay the premium, and in fact the insurance contract itself, was considered conditional on the presence of the risk existing, that is, on the existence and exposure to risk of an object of risk, at the time when the insurer had to bear the risk of loss or damage. Where the insured, whether wilfully or negligently, prevented the fulfilment of the condition (for example, by destroying the object of risk before the insurer came on risk, or by not exposing it to the risk at all), it was deemed to have been fulfilled (that is, the object was deemed to have been exposed to risk) and the contract considered to have become unconditional and binding so that the insurer bore the risk and the premium was earned.

398 See eg Van Zurck Codex Batavus sv 'Assurantie' par 19 n1, specifically with reference to s 16 of the placcaat of 1563 and the case of an discontinuation of the insured voyage prior to its commencement so that the insurer bore no risk (presumably the same applied to the case where none of the goods insured was in fact even consigned); Decker Aanteekeningen ad IV.9.4 n(3)/(c), referring to s 23 of the Amsterdam keur of 1744.

399 In the case of fraud on the part of the insured, the premium was not recoverable or remained payable. See again Straccha De assecuratlonibus VI.9 (who was referred to by Decker: see n390 supra) for the general principle in this regard: see n396 supra.

400 Their views were summarised as follows by Roccus De assecuratlonibus. If the voyage was abandoned or prevented or the goods not shipped so that the insurer ran no risk, the premium had to be returned (note 13); if the voyage was abandoned or prevented because of an act of the insurer, he could not claim the premium and it had to be returned, but if it was because of an act of the insured himself, the premium did not have to be returned (note 14); but where it was not caused by an act of any one of the parties and none of them was responsible for it and it could not be ascribed to one or the other of the parties (eg when the ship was destroyed by fire in port or confiscated for public use and for that reason the voyage was not undertaken), the premium had to be returned and could not be claimed by the insurer (note 15).
This distinction was not referred to by any other Roman-Dutch authors on insurance law nor in any legislative measure. Where the conduct of the insured was referred to at all, the legislation was concerned only with the case where there was fraud on the part of the insured and seems to have accepted, in fact, that the absence of fault of any kind on the part of the insured was not, or at least no longer, required for the recoverability of the premium. The position in Roman-Dutch law, it would seem, was therefore that if the absence of the risk was caused by the fraudulent conduct of the insured, the premium was not recoverable; but if it was caused by an accident (vis maior or any circumstance beyond the control of the insured) or even by the non-fraudulent conduct of the insured, the premium was still recoverable.\textsuperscript{401}

The influence of fraud on the recoverability of the premium was recognised by the legislature only, as was noted earlier,\textsuperscript{402} in the case of over-insurance in s 14 of the placcaat of 1563. But the distinction between fraudulent and non-fraudulent over-insurance was not maintained for in s 19 of the Rotterdam keur of 1604, for example, the premium was declared not recoverable in the case of all over-insurances, irrespective of fraud on the part of the insured.

One final matter as regards the influence of fraud on the recoverability of the premium. There were a few isolated instances in Roman-Dutch law where, despite the presence of fraud on the part of the insured, the premium was nevertheless recoverable or returnable. These instances are not easily explained in view of what appears to have been the general principle of the forfeiture of the premium in the case of fraud on the part of the insured.

One such instance was a case before the Hooge Raad in 1720.\textsuperscript{403} Insured goods were loaded at a place other than the place from where the risk was stated in the policy to commence. The place of loading in fact presented a greater risk for the insurer than loading at the place stated in the policy would have done. Accordingly the insurance contract was declared null in terms of s 3 of the Amsterdam keur of 1598 read with s 1 of the Amsterdam keur of 1699, the decision a quo allowing the insured’s claim was overturned, and the insurer’s appeal upheld. However, despite the fact that the Raad noted that the incorrect place of loading was fraudulently mentioned by the insured in his policy here so as to obtain a cheaper rate of premium, it ordered the insurer to

\textsuperscript{401} The earlier view, it would appear, could possibly be explained with reference to earlier views on the effect of the insured’s own conduct on the liability of the insurer and with reference to the general uninsurability of such conduct. See again ch VI § 4.2 supra. Just as earlier the insurer did not bear the risk of a loss occurring through both the insured’s negligence and his intentional (fraudulent) conduct but only the risk of a loss through accident, so too the insurer did not, as it were, bear the risk of an absence of the risk (and of his not being able to earn the premium) as a result of the insured’s conduct generally but only as a result of an accident. But in the same way as the insured’s negligent conduct became insurable as an accident, so too his negligent conduct in preventing the earning of the premium came to be equated with and regarded as an accidental cause.

\textsuperscript{402} See § 6.2.2 supra.

\textsuperscript{403} See Bynkershoek Observationes tumultuariae obs 1623; idem Quaestiones juris privati IV.10. See again ch VIII § 4.2.5 supra where this decision was considered in more detail.
return the premium to the insured after the customary deduction of a half-per cent premium to compensate him for his fruitless effort.404

Another such case concerned the recoverability of the premium in the case of an insurance after departure. In s 3 of the Amsterdam keur of 1744, as amended by the keur of 1775, it was provided that insurances could be concluded after the departure of the ship or goods in question from the place of loading. Such an insurance was valid as long as the time of departure was mentioned in the policy or, if the insured was ignorant of that fact, as long as the notice advising the shipment was mentioned in the policy. If these matters were not so mentioned and it appeared that there had been a prior departure, the insurance would be null and void405 although the insurer would have to return the premium less the customary half-per cent premium.406 This was nothing more than an application of the general principle in the case of an absence of risk. If the insurers could prove, however, that the insured had knowledge of the departure, the latter not only had no claim on the policy but also had to pay the insurers a double premium in addition to their expenses.407 It appears, though, that despite such knowledge of the departure, the premium remained returnable to the insured.408 In so far as such knowledge could be equated to fraud, the position is not easily explained.409

6.3.2 Other Instances of Forfeiture of the Premium

In addition to cases of fraud where the premium, possibly otherwise recoverable, was forfeited to the insurer, other instances of such forfeiture were also provided for in Dutch insurance legislation. These were mainly instances where such

404 The only possible explanation for this decision was that this was not a case where the return of the insurance premium was claimed by the insured, but one where the insurer denied liability on the ground of the insured's fraud'. But it is not clear whether that was considered to be a difference in principle in Roman-Dutch law and, if so, on what basis such a distinction could be maintained.

405 See again ch VII §4.2.6 supra as to the content of the policy in this regard; and ch XII § 2.2 infra as to insurance after the departure.

406 See Van der Keessel Praelectiones 1445 (ad III.24.5).

407 This double premium was in effect nothing but a penalty in an amount double that of the premium; see again § 2.2 supra as to this 'double premium'.

408 An earlier case before the Hooge Raad in 1717 (see Bynkeshoek Observationes tumultuariae obs 1357; idem Quaestiones juris privatj IV.7) concerned an insurance of a ship for £8,000 after her departure while the insured was aware of such departure. The insurance premium was 14 per cent (ie £1,200). The courts a quo had held the insurance void and had given judgment for the insured in the amount of £1,200 (ie, 15 per cent of the sum insured). It was not clear to the Raad on what ground the claim of 15 per cent was allowed, for if the insurance was null and void and the premium had to be returned, that would have been 14 per cent (ie, an amount of £1,200) from which the insurers would further have been able to deduct a ½ per cent premium (ie, £60) for their effort, so that if the insurance was to be voided, then there should have been no claim for a return of premium beyond 13½ per cent (ie, £1,080). But seeing that this was de minimis, the appeal was concerned with the issue whether or not the insurance was in fact void. See further ch XII § 2.2.6.2 infra.

409 It could be, though, that the penalty imposed on the insured in this connection had some influence.
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forfeiture was a precautionary measure to eliminate potential fraud. The forfeiture of the premium was therefore used as a measure or as an additional measure of control to discourage fraudulent conduct on the part of the insured in the case of insurances concluded in circumstances in which such a measure was considered necessary. Furthermore, the forfeiture of the premium was used as a form of penalty upon the insured, and had the same effect as the imposition of a penalty upon the insured in an amount equal to the amount of the premium.410

For present purposes, four broad instances may be distinguished where a return of the premium was not permitted in principle but where it was instead forfeited to the insurer.

6.3.2.1 Omissions in the Policy

The first instance where this happened was where, because of the absence of certain information otherwise required to be mentioned by the insured in his insurance policy,411 a possibility or even just a greater possibility existed that the insured could, on the safe arrival of the goods, attempt to avoid liability on the policy to pay the premium or, if already paid (as was often additionally required in these cases), attempt to recover the premium from the insurer. He would attempt this by alleging that the insured goods were in fact never shipped or that a lesser quantity was sent than was insured, something which it would be difficult for the insurer to verify because of the absence of the required information in the policy.

In terms of s 7 of the Rotterdam keur of 1604, the name of the ship on which the insured goods were to be consigned, and that of her master, had to be mentioned in the policy on those goods, except where the insured was ignorant of one or both of those facts. Then such ignorance had to be declared in the policy or the insurer had to be shown the receipt the insured had received for the shipment of the goods in question. But in such a case the premium had to be paid immediately412 and was, by way of exception to the general principle laid down in s 18 as to the recoverability of the premium in the case of a short- or non-consignment,413 not recoverable (or, presumably, still had to be paid by the insured where it had not been paid immediately as was required), even though the insured may thereafter have claimed that the goods

410 For instances of where, in Roman-Dutch law, the penalty imposed upon the insured was linked to the amount of the premium, see again § 2.2 supra.

411 As to the content of insurance policies, see again ch VII § 4.2 supra where this issue was canvassed in more detail.

412 See again § 3.2.3 supra.

413 See again § 6.2.1 supra.
were in fact not consigned to him.\footnote{414}

In the Rotterdam \textit{keur} of 1721 a precautionary exception was again made in the case where the name of the carrying ship or that of her master was not mentioned in the policy. Section 57 provided that if those names were not expressed in the policy on the goods,\footnote{415} and if it was not stipulated ('bedoengen') in the policy how the return of the premium was to take place ('hoedanig restorno, \textit{in dit geval zoude plaats hebben}'), then the full premium had to be paid, or, if paid, then no return could be claimed.\footnote{416} Otherwise than in terms of the earlier s 7 of the \textit{keur} of 1604, where the premium, payable immediately, was in this case inevitably forfeited, a return of the premium was now, in terms of s 57, possible in the case of the failure to specify the name of ship or her master in the policy if, but only if, it was so agreed by the insurer and the insured. If it was not so agreed, the premium was still forfeited to the insurer.

In s 2 of the Amsterdam \textit{keur} of 1744 the local Legislature took over the earlier provisions in Rotterdam. It was provided in that section that the name of the ship and of her master had to be mentioned in the policy unless the insured was ignorant of those facts, in which case such ignorance had to be mentioned together with the name of the person who had given the order to insure or the advice of the shipment of the goods and the date of such order or advice, all on the penalty of nullity.\footnote{417} And in such case no return of the premium would be permitted ('\textit{van dusdanige Assurantie [sal] geen Restorno van praemie kunnen werden gevorderd}'), unless the name of the consignor ('\textit{des Afladers naam}') or that of his principal, together with the name of the consignee ('\textit{des geconsigneerden naam}'), were stated in the policy. It should be noted, though, that the name of the carrying ship and that of her master were stated in the policy, but the insured goods were in fact loaded on a different ship, the insurers were relieved of any liability on the policy although, because they ran no risk, the premium they received then had to be returned to the insured.\footnote{418}

\footnote{414} See eg Schelinga \textit{Dictata ad} III.24.16 sv 'mag \textit{t verzeeko-loon weder-eischen}'; Van der Keessel \textit{Praelectiones} 1473-1474 (ad III.24.16). See too Vergouwen 80.

The forfeiture of premiums in the case of non-compliance with s 7 (but apparently not in the case of non-compliance with the related s 6) has already been referred to (see again ch VIII § 4.2.3 supra). This provision had no equivalent in s 3 of the Amsterdam \textit{keur} of 1598 which required similar matters to be mentioned in the policy. Voet \textit{Observaties ad} III.24.16 (n33 and n34) explained that Grotius' statements (with reference to the Amsterdam \textit{keur} of 1598) on the recoverability of the premium (in the absence of risk) were true, except for the case (which was provided for in s 7 of the \textit{keur} of 1604 but not in the \textit{keur} of 1598) where the insured, despite being unaware of the name of the ship on which goods had been loaded, nevertheless insured such goods, in which case the whole premium was forfeited.

\footnote{415} As was required by s 71 of the \textit{keur}. See again ch VIII § 4.2.6 supra.

\footnote{416} See Van der Keessel \textit{Theses selectae} th 762 (ad III.24.16); \textit{idem Praelectiones} 1473-1474 (ad III.24.16) who declared that in this case there was no return of the premium unless otherwise agreed; and Vergouwen 96.

\footnote{417} See again ch VIII § 4.2.6 supra.

\footnote{418} See again the opinion of 1792 (\textit{Casus positien} vol II cas 31), which was discussed in detail in ch VIII § 4.2.6 supra.
ch XI § 6.3.2.1

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There were also other analogous instances in the Amsterdam keur of 1744. In terms of s 17, which for the first time permitted the insurance of an expected profit\(^{419}\) on condition that the amount of such profit was expressly valued in the policy together with an indication of the goods on which it was expected, it was provided that no return of the premium would be permitted in the case of such an insurance ('waar van dan ook geen Restorno van Premie zal mogen gevorderd worden'), apparently irrespective of whether or not the conditions concerning the valuation and description had been met.\(^{420}\) Again the possibility of fraud in connection with the insurance of profit\(^{421}\) and attempts to discourage the frivolous conclusion of insurances of expected profit probably influenced the Amsterdam Legislature to include this measure:

6.3.2.2 The Absence of an Interest

Another instance where the premium was not returned, as could on general principles have been expected, but where it was forfeited to the insurer, occurred when there was what may generally be termed an absence of an interest on the part of the insured.\(^{422}\) In Roman-Dutch law only two references appear relevant in this regard, and they provide little by way of indication of any underlying general principle.

In 1756 a provision concerning the return of the premium in the case of an absence of an interest was promulgated in connection with the insurance of a bottomry loan. The premium was recoverable despite the absence of an interest, subject, however, to certain precautionary conditions.\(^{423}\) If someone, expecting a return cargo and being unaware of what would be the object of his interest ('waar in zyn Interest zal

\(^{419}\) See again ch V § 5.2 supra.

\(^{420}\) Van Zurck Codex Batavus sv 'Assurantie' par 7E n(h) in this regard referred to (but did not expand on) the question whether, if the insured in the case of an insurance on profit had no claim upon his insurer (which would have been the case in Van Zurck's time, the insurance of expected profit then still being prohibited), he could at least recover the premium he had paid to the insurer, whether with the conditio indebiti, the conditio causa data causa non secuta, the conditio ob inustam causam, or the conditio sine causa. Van der Keeses Praelectiones 1438 (ad III.24.4) stated that in the case of an insurance of an expectation ('spes') there was, because of the nature of the transaction, never any return of the premium.

\(^{421}\) That is, in the absence of any loss, the insured could easily attempt to recover the premium or to avoid having to pay it at all.

\(^{422}\) See generally eg Hammacher 89-90 as to the lack of an interest. He notes the absence of any comprehensive legislative regulation of the recoverability or otherwise of the premium in the case where an interest was not present at the conclusion of the contract, eg where it fell away before the commencement of the insurance. Although recoverability of the premium was generally dealt with in the case where an existing interest was not exposed to risk, that was not the case where no interest in fact existed. Similarly, the disappearance of an interest during the currency of the insurance or the non-appearance of an expected interest received no consideration.

\(^{423}\) See again ch V § 5.5.3 supra. In terms of the amendment in 1756 of s 21 of the Amsterdam keur of 1744, the insurance on a bottomry loan concluded by or on behalf of the lender of money on bottomry on goods had to specify that the insurance was on the bottomry bond ('Bodemarye-brieven'), as that would not be understood to be included in an insurance in general terms 'on goods, wares and merchandise, or in whatever the interest may be, nothing excepted'.

bestaan'), insured himself not only under the general terms ‘on goods, wares and merchandise, or in whatever there may be an interest, nothing excluded’, but also specifically on the bottomry bonds as well (‘mede op Bodemarye-brieven’), then such insurance would be valid also in respect of such bottomry interest (‘Bodemarye-Interest’). However, in that case no return of the premium would be possible (‘doch zal in zulk geval geen restorno plaats hebben’), unless the insured declared under oath that he in fact had no interest, directly or indirectly, either in the goods or in the bottomry loan on the named ship on the voyage of which the insurance had been concluded (‘ten zy de geassureerde onder Eede komt te verklaaren, geen Interest, het zy in Goederen, of in Bodemarye, direct oftte indirect in het genoemde Schip te hebben gehad’). Therefore, the premium was only recoverable if the insured confirmed under oath that his interest never consisted of a bottomry interest.

Probably by analogy to the exceptions created in certain ‘difficult’ cases as far as the recoverability of the premium in the case of an absence of risk was concerned, the position regarding the recoverability of the premium in the absence of an interest came to be altered in the Amsterdam keur of 1775. There the issue of the absence of an interest (which was seemingly regarded as equivalent to the absence of risk) was addressed more generally than in 1756 and no longer only in connection with an insurance on bottomry. A general prohibition came to be placed on the recoverability of the premium in the case of the absence of an interest and no exceptions were allowed.

In terms of the amendment in 1775 of s 18 of the Amsterdam keur of 1744, more specifically in the second paragraph of the amendment, it was provided that in the event of a loss the existence of the interest specified in the contract would have to be proved as well as the amount of the loss occurring to it (‘in cas van schade het by Contract bepaalde Interest moeten worden bewezen, als mede de hoe-grootheid der

424 See again ch V § 5.5.3 supra for further details.

425 Presumably on the basis of an absence of risk because of the absence of any interest.

426 Or had acquired?

427 See again ch V § 5.5.3 n309 supra.

428 That is, cases where the potential for fraud was increased because of the absence of the usual safeguards such as a description of the object of risk or of other required information in the policy.

429 That is, a declaration under oath would no longer result in the recovery of the premium in this case.

430 Section 18 provided that one could insure anything in which there was a real interest (see again ch II § 1.6.2.2 supra) as long as that interest and the risk run on it were specified and expressed in the insurance contract (see again ch VIII § 4.2.2 note 199 supra).
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daar op gevalle schade'), on the penalty that otherwise the contract would not be adjudicated on although the insurer would nevertheless retain the premium ('op poene, dat anderzins daar op geen regt zal mogen worden gedaan; en zullen des niet tegenstaande de Assuradeurs de praemie behouden'). Therefore, there was no repayment of the insurance premium because the insured could not meet the required burden of proof as regards the quantum of loss or damage. Or, to state what appears to have been the underlying principle more generally, there was no return but in fact a forfeiture of the premium because of the absence of proof of the occurrence or the quantum of the loss.

The same explanation, it would seem, may apply with regard to the exclusion of any return of the premium in the case of fire insurance in the Amsterdam keur of 1775. The model fire policy appended to the keur of that year stipulated that no return of premium was to take place in the case of fire insurance ('zullende in deeze Verzekeringen geen restorno ... plaats hebben'). The recoverability of the premium was excluded simply as a precaution to prevent any possible fraud in connection with the newly recognised and regulated contract of fire insurance.

6.3.2.3 Insurance on Bottomed Goods

A further instance of the forfeiture of the premium occurred in the case of the insurance of goods subject to a bottomy bond, the analogy here being with the irrecoverability of the premium in the case of over-insurance through double insurance.

In terms of s 21 of the Amsterdam keur of 1744 the insurance of goods burdened to their full value by a bottomy loan was declared null and void. Not only was the insured fined in such a case but he also forfeited the premium to the insurer ('met verbeurte van Premie voor den Assuradeur'). Presumably these consequences followed only where the insured was aware of the existence of the bottomy loan on the goods at the time when the insurance was concluded. Ordinarily, because the bottomy lender bore the risk in respect of the goods, the insurer would not have borne any risk

431 See further ch XVII § 4 infra as to the requirement of interest and indemnity.

432 It is not immediately apparent to what situation this referred: to the case where there was no specification of the interest, or where there was no proof of the existence or extent of the interest, or, indeed, to both? It seems, though, that the Legislature was concerned with the latter instance, that is, where there was no interest or where there was no proof of the extent of the loss suffered in respect of the interest.

433 See eg Van der Keessel Praelectiones 1434 (ad III.24.4) who explained that in the case of a loss, proof of the amount of the loss was required, on penalty of forfeiture of the right to claim in terms of the policy and with the insurer retaining the premium.

434 As to fire insurance, see again ch VII § 2.1 supra.

435 See again ch V § 5.5.3 supra where s 21 and its amendments in 1756 were treated in greater detail.

436 The 1756 amendment of s 21 has 'ten behoeve van den Assuradeur'. See generally Van der Keessel Praelectiones 1436 (ad III.24.4).
(or at least not the maritime risk) of the bottomed goods so that the insurance premium would for that reason on general principles have been recoverable. But if the insured was aware of the loan, the position was the same as in the case of fraudulent over-insurance.

However, where an instruction to insure a particular consignment of goods had been given by the consignor ('Aflaader', that is, the borrower) before the bottomry loan was taken up, or where such insurance had already been concluded at that time, the insurance was not avoided in terms of s 21. The borrower ('Opneemer van 't geld') nevertheless had to cede his rights under the insurance policy to the holder of the bottomry bond (that is, to the lender). If he failed to do that, the insured borrower was not only prevented from claiming on the policy but the premium he had paid could also be retained by the insurer ('maar syn uytgeschooten premie by de Assuradeurs werden behouden'). This was changed by the amendment of s 21 in 1756. Then the existing insurance became void to the extent that it did not solely concern the value of the ship or goods in question in excess of the amount of the loan. However, the premium now had to be returned to the insured borrower with the insurer merely being entitled to retain the customary half-per cent premium for his trouble and expenses ('en dienvolgens de Praemie gerestorneert moeten worden, mits den Assuradeur genietende een half per cento').

6.3.2.4 Solvency Reinsurance

A final instance where the recoverability of the insurance premium was specifically excluded, again presumably by analogy to the position in the case of over-insurance through double insurance, was in the case of solvency reinsurance.437

In terms of the Amsterdam amending keur of 1626, the insured could cancel his insurance should his insurer go insolvent or fall upon financial difficulties. And he could then insure himself anew. However, the premium already paid to the first insurer was not recoverable but went to the benefit of the estate and creditors of that insurer ('[w]eul verstaende dat de betaelde premien ten voordeele van den Boedel ende Creditereen van den Assuradeur komen sullen, soender dat de geasseureerde daer van eenige restitutie sal mogen eyschen ofte genieten').438

The reason for the forfeiture of the premium in this case is not readily apparent,439 and not surprisingly it was omitted from s 25 of the Amsterdam keur of 1744 which otherwise restated the earlier measure of 1626.440

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437 See again ch VII § 4.1 supra.

438 See eg Van Zurck Codex Batavus sv 'Assurantie' par 25 ('blyvende de betaelde premie aan den eersten assuradeur').

439 Thus, Bynkershoek Quaestiones juris privati IV.2 could not understand the forfeiture (or non-recoverability) of the premium in this case, seeing that it was due to the insurer and not the fault of the insured that the first insurance had become worthless. On this point, see again ch VII § 4.1 n162 supra.

440 See Van der Keessel Praelectiones 1474d-1475a (ad III.24.16). When a little more than a decade later, in 1756, a new system was introduced in terms of which the first insurance was no longer cancelled, the question of the return or otherwise of the premium no longer arose in this connection.
6.4 The Return of the Premium and the Divisibility of the Risk and the Contract

6.4.1 Introduction

One of the principles governing the return of the premium was that as soon as the risk had commenced (that is, when the insurance was not null and void ab initio), the insurer had already earned the premium in full and any return of the premium or a part of it was in principle excluded on the basis of the indivisibility of the risk. Thus, a proportional return of the premium in such a case was possible only if the contract and the risk was divisible.

The need to determine the divisibility or otherwise of the insurance contract and, more specifically, of the risk borne by the insurer in terms of that contract, arose, amongst other reasons, because of the need to determine the returnability of a proportion of the premium or, conversely, to determine the amount in fact due on the contract by way of a reduced premium.

The premium was not always returnable (or, for that matter, forfeited), or, if unpaid, payable, in full. It was possible in appropriate cases for the premium to be only returnable or payable proportionally or in part. A few examples of instances where this was the case may briefly be mentioned. Firstly, if none of the goods insured was in fact shipped, the full premium (less customary deduction for the insurers' trouble and expenses) was returnable to the insured. But if only a portion of the goods were shipped, only an equivalent portion of the premium was recoverable. Further, if the insured ship did not undertake the voyage for which she was insured at all, the premium was returnable in full. But if the voyage was discontinued after it had been commenced, at most only a part of premium would be recoverable. Likewise, if exports and imports (the out and the return cargo of a ship) were insured in a single policy, and no return cargo was consigned or the return voyage was abandoned, a part of the premium only would be recoverable. Fourthly, when in the case of over-insurance the (first or later) insurance was not totally null and void but only to the extent that it provided an over-insurance, a proportionate part of the premium would have been recoverable.

Such a proportionate recovery or return of the premium was alluded to in some of the legislative provisions on the return of the premium. It was also commented upon by some of the Roman-Dutch writers.

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441 Or, more correctly, the insurer's performance in terms of that contract.

442 For example, in respect of the absence of risk, in ss 22 of the Amsterdam keur of 1598, 19 of the Rotterdam keur of 1604, 56 of the Rotterdam keur of 1721, and 23 of the Amsterdam keur of 1744; and in respect of over-insurance, in ss 15 of the placcaat of 1563, 19 of the Rotterdam keur of 1604, and s 23 of the Amsterdam keur of 1744.

443 See eg Scheltinga Dictata ad III.24.16 sv 'mag 't verzeeker-loon weder-eischen' who stated that in certain cases not the whole premium but only a pro rata of the lesser (quantity of goods) consigned might be recoverable.
Despite the fact that the premium was in certain cases only proportionately recoverable, the amount left to the insurer for his trouble and expenses was apparently not similarly proportionately reduced in those instances. It remained at the customary a half-per cent premium.

Whether the premium was proportionately recoverable (or forfeited) depended in general, of course, on whether the risk and the insurance contract in terms of which it was transferred, were divisible, and as a result also whether and how the insurance premium paid or payable in terms of that contract could be divided. If the risk and hence the contract were not divisible, the premium was not recoverable at all or, if unpaid, still had to be paid in full. Whether risk and contract were divisible was a factual question which had to be determined in every case with reference to the nature of the parties' performance and the intention of the parties as expressed in the insurance policy. Thus, the insurance of a shipment of goods on a voyage from A to B at a premium of f100 was different from an insurance of the same goods on a voyage from A to B at a premium of f10 per unit of goods. And an insurance on a ship for a voyage from A to B at premium of f100 different from an insurance of a ship on a voyage from A to B at a premium of f10 per month.

Whether premiums were returnable proportionately thus to a large extent depended on the intention of and the agreement between the parties. And depending as it did largely on the intention of the parties, the question of the divisibility of the performances in terms of an insurance contract was essentially one of interpretation. For this purpose it may serve to investigate a few practical examples which appear from the sources. They dealt, in the main, with two situations, namely that of the return cargo and that of the discontinued or abandoned voyage.

6.4.2 Divisibility and the Return Cargo

Crisp issues of divisibility and the proportionate recovery of the premium presented themselves in Roman-Dutch law in the case of an insurance in a single policy on an out and a return voyage or for an export and a return cargo.

The matter was already provided for in the Antwerp compilation of customary law early in the seventeenth century. So it was provided in art 71 of the *Compilatae* of 1609 that if the policy was for a round voyage and at a single premium ('voor gaen ende commen, ende datter eenen generaelen doorgaenden prijs voor d'een ende d'ander gelijkelijk is gestelt'), the insured was liable for the premium in full and could not claim any return if, for whatever reason, the return voyage was not undertaken (for example, if there was a loss of the ship on the outward voyage) or if no cargo was

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444 See Magens Essay vol I at 106-110 for a case illustrating, with the necessary mathematical calculations, how the amount of the premium to be returned was to be calculated in the case of a short-shipment.

445 Thus, Straccha *De assecurationibus* X.14 thought that the insurance or the obligation was considered divisible or indivisible according to the subject-matter on which it was placed.

446 Of par 3, title IV (see De Longé vol IV at 230).
shipped on the return voyage. However, in terms of art 72, if differentiated premiums were stipulated for the outward voyage and for the return voyage (that is, when the premium 'sijn gescheiden'), then it was accepted that there were in fact two contracts. And if the ship was lost on the outward voyage, or if nothing was loaded for the return voyage, the insured was not liable for the premium stipulated for the return voyage ('voor de wedercompst') or, if it had been paid, could reclaim it.447

The issue first arose for practical consideration in an opinion in 1697448 which touched on the question of the divisibility of the risk and of the insurance contract where the insurance was on a round voyage.449 An insurance was concluded at Middelburg on shipped cargo destined abroad as well as on the return cargo ('retour') the ship would take on there. The ship in question discharged the cargo loaded in Rotterdam at the Canary Islands but did not ship any return cargo for the insured there or anywhere else. The question posed was whether any return of the premium ('Restorno') was possible in respect of the return voyage ('de wederom reize'). The opinion noted that it was clear in terms of s 22 of the Amsterdam keur of 1598 and s 24 of the Middelburg keur of 1600 that the insurance premium was recoverable or, if unpaid, could be retained by the insured if the insured goods were not consigned to him. Where therefore, as in this case, the ship returned without the insured's return cargo, the insurer had to return the premium ('om de voorsz Assurantie te doen restorneeren'), namely for as much as concerned the return voyage, this being calculated from the time that the ship had discharged the outward-bound cargo at the Canary Islands. The reason why this was possible was because the insurance here was concluded from Rotterdam and back to Rotterdam ('van Rotterdam uit en thuis'), and was in effect two particular and distinct insurances ('twee byzondere en disticte Assurantien'), the one for the outward voyage which terminated on the discharge of the outward-bound cargo, and the other for the return voyage which commenced from loading of the return cargo and until its safe arrival in Rotterdam.450 The insurance for the return voyage in this case in fact never commenced since no return goods were ever shipped for the insured.

447 In terms of art 73 the insured was obliged to notify the insurers of such a loss or non-loading within the periods prescribed in arts 66-70 (see again § 6.2.2 n372 supra). But those periods of time in these cases commenced only from the day on which the ship was lost or on which the first voyage was completed at the place of discharge. See further Mullens 74.

448 Barels Advysen vol I adv 19.

449 The opinion also thought it contrary to the nature of insurance to agree that the premium would be earned (and would thus not be repayable) whether or not insurer in fact ever ran any risk. See again ch VI § 1 supra and also § 1.3 n36 supra.

450 This distinction between 'de heen en wederom reize' was drawn in the policy itself for there was nominatim distinguished between, on the one hand, merchandise already loaded and, on the other hand, such return cargo as may be loaded later. It was not a problem that no specific place was mentioned in the policy where the outward-bound voyage was to terminate, it being sufficient that the out and return cargoes were properly distinguished in the policy. The place where the ship first discharged her cargo or a part of it was the place where the outward voyage terminated and from where the return voyage commenced, seemingly even if some of the outward-bound cargo was then still on board.
Virtually the same issue arose in a further opinion delivered in 1715. There the view was expressed that where an outward-bound and a return cargo was insured in the same policy but no return cargo was in fact ever consigned to the insured from abroad, the premium paid in respect of such return voyage ('de praemie van Assurantie ten opzichte tot de terugreize') could be recovered from the insurer. It would appear that the single contract and the risk borne by the insurer were also here regarded as divisible in one for the out and another the return voyage. It is possible even that two separate premiums may have been paid or have been payable in this case.

6.4.3 Divisibility and the Discontinued Voyage

If the insured ship did not perform the voyage on which she was insured in full, a part of the premium could be recoverable. This could be the case, for example, if the ship, without changing her voyage, did not enter all the ports she was bound for, but remained at an interim port and did not continue her voyage. That, however, was only possible if the risk and, more particularly, the voyage were divisible, for example, if a separate premium had been fixed for those separate stages of the voyage. But if the insured voyage was not so divisible and if one entire and undivided amount had been fixed for the insurance of the whole voyage, that entire amount could be retained by the insurer and no portion of the premium was repayable at all.

451 Bareis Advysen vol I adv 23. There the insurance was on a ship and her cargo apparently on a voyage from and back to Amsterdam. The ship was captured in Sweden and abandoned by the insured who then bought a new ship and goods there for the return voyage to Amsterdam. According to the opinion the insured had no claim for the return of the premium paid to the insurer, except possibly for the premium paid for the return voyage ('uitgezegd mogelyk dat de praemie van Assurantie ten opzichte tot de terugreize noch zoude kunnen worden gerekende'), if that return voyage was never undertaken (i.e., if the insurers never ran the risk of the return voyage), and then only after the customary deduction of a ½ per cent premium in favour of the insurers ('het voorsz recht om de praemie van de terugreize te repeteren door middel van de ordinair zogenoemde restorno, onder beneficie van een korting van een half per cento'). As far as the outward-bound voyage was concerned, though, the insurers had run the risk and had to be compensated for it so that the premium paid for it was not recoverable ('wegens de heen of uitleize de praemie aan de Assuradeurs moet worden gelaeten, om dat sy naemenlyk waerelyk daer van de risico gelopen hebben gehad, en daer voor ook vergoedinge zullen moeten doen').

452 Thus, Van der Keessel Praelectiones 1473-1474 (ad III.24.16) thought that the opinion was supported by the fact that it appears that two insurances were concluded for the dual risk in this case.

Such separated premiums were foreseen in the legislation applicable in Amsterdam at the time. The keur of 1620 provided that in respect of an insurance for a round voyage, the premium for the outward-bound voyage was payable immediately while that for the return voyage was payable on arrival at the final destination. However, if those provisions had been adhered to in this case, and on the assumption that the parties had not made some other arrangement as to the payment of the premiums, the question here would not have been if the insured could recover the premium but rather if he was liable to pay the premium for the return voyage.

453 See eg Van der Keessel Theses selectae th 761 (ad III.24.16); idem Praelectiones 1473-1474 (ad III.24.16). Van der Keessel explained that the premium was recoverable if separate premiums had been determined for the separate stages, for then there were in fact separate contracts.
Whether the voyage on which the ship was to proceed was, for purposes of her insurance, divisible, was a question of fact. The issues involved were illustrated in various legal opinions.

An earlier example of the divisibility of the risk appears from an opinion delivered in 1667 which concerned the insured’s obligation to pay the premium to the insurer. An insurance on a ship and goods had been concluded in two different policies, namely in one from London to Dronthem (in Norway) and from Dronthem to Dublin for a premium of eleven per cent for the whole voyage, and in the other policy only from Dronthem to Dublin for a premium of eight per cent. The ship had arrived at Dronthem, but then her master changed her voyage and sailed from there to London where the cargo was discharged, this deviation rendering the insurances void. Two theoretical questions were posed. Firstly, it was enquired whether the insurer would have been liable had the ship been lost on her voyage from Dronthem to London, and, concomitantly, whether the insured had to pay on the first policy only half of the promised premium for the voyage from London to Dronthem plus a further half-per cent premium for the return of the premium for the voyage from Dronthem to Dublin. And secondly it was asked whether, on the second policy from Dronthem to Dublin, the insured had to pay a half-per cent premium for the return of the premium in terms of that policy.

According to the opinion, the insurer would not have been liable in the case of a loss on the voyage from Dronthem to London. Further it was sufficient for the insured to pay on the first policy only half of the premium for the voyage from London to Dronthem (the first policy and the risk it covered were therefore regarded as divisible) as well as a half-per cent premium for the return of premium for the voyage from Dronthem to Dublin. On the second policy, he merely had to pay a half-per cent premium for the return of the premium.

As to the second policy, the opinion appears correct, for, as it was noted, the insured voyage from Dronthem to Dublin was not undertaken (but a voyage from Dronthem to London instead) so that the insurer bore and could have borne no risk, resulting in the premium being returnable less the customary deduction. As to the first policy, the opinion is more problematical and is in fact only explicable on the basis that the first policy was regarded as insuring a divisible risk, one, that is, from London to Dronthem and one from Dronthem to Dublin. But even then it is difficult to establish from the opinion why half of the premium was returnable, unless either the parties had in the policy agreed that the premium was payable in equal parts for the two stages, or two identical premiums were in fact payable in terms of it, or it could in some other way be established that the two stages posed an identical risk.

454 See Nederlands advysboek vol I adv 130.

455 See further ch XIII § 1.2.3 infra as to the effect of a change of voyage.

456 Unlike the case where half of the goods had not been sent and where a mathematical basis for the apportionment of the premium existed, that was not necessarily the case where a part of a voyage had not been performed. Even in the case of a return voyage, it could have been argued that the two legs did not necessarily pose an equal risk and were not necessarily worth an equal premium.
Another illustration of the principles involved appears from an opinion delivered in Amsterdam by local merchants, insurers and brokers at the end of the eighteenth century. The opinion expressed the view that in an insurance on the hull of a ship which on the same voyage had to touch several ports en route, a return of the premium was possible in appropriate circumstances if, in the policy in question, the risk was described as being (divisible) from port to port, and if a separate premium had been agreed for every separate stage of that voyage. If that was the case, it could be taken that the ship was insured for so many different voyages as the number of ports she would enter. And then the portion of the premium for the unperformed part or stage of the voyage could customarily be recovered from the insurer. But when the insurance was of a single, indivisible voyage, no return of the premium or any part of it was possible if the voyage was terminated en route. The opinion explained that where a voyage was to be performed in stages and where the risk was divisible, a higher total amount ("montant") was payable by way of premiums than if the voyage were not so divisible. Furthermore, it was noted that a return of the premium in respect of the unperformed portions of the voyage had to take place even if the insurers also had to compensate any loss or damage.

6.5 The Nature of the Insured’s Claim for the Return of the Premium

It has already been explained that in Roman-Dutch law the insurance contract gave rise to a direct action for the insured against the insurer (to claim compensation on the policy) and to a contrary action for the insurer against the insured (to claim payment of the premium). The actio directa was sometimes ("aliquando") also granted to

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457 Casus positional vol I cas 20 (1790).

458 That is, when the risk was to commence and run from port to port so that a new risk commenced from every place from where, en route, the ship sailed.

459 This was declared to be a constant custom uniformly observed in Amsterdam and not, as far as the merchants, insurers and brokers were aware, contrary to any law, custom or judgment.

460 That is, when the risk was to run as a whole from the commencement of the voyage until the ship’s arrival at the final destination.

461 ‘Assurantie gedaan op ‘t Casco van een Schip, ‘t welk op deszelfs Reize één of meerder Plaatsen moet aandoen, ondersteelt Restorno van premie, ingeval in de Polis de Risico van Plaats tot Plaats gestipuleer en voor elke Reize een aparte premie bedongen Is, en zulks pro rato van de niet volvoerde Reize. Doch, wanneer de Assurantie in ééns en zonder ophouding van Risico geschiedt, heeft de Restorno voor de gestaakte Reize geen plaats’.

462 See again § 5.1 supra.
the insured to enforce a restitution of the premium. However, it is difficult to see how, in those cases where, for example, the insurance contract was void because of an absence of risk or where there was an absence of risk because the contract was void, the insured's action to recover the premium could have been based on that contract itself. More probably this action was one for enrichment (the *conditio indebiti*, for example), but the Roman-Dutch sources give no support for this view, at least not in the context of the insurance contract.

The insured's action for the return of the premium, and probably also that of the insurer for the payment of the customary half-per cent premium, was subject to the periods of prescription laid down for actions in the insurance context.

As a rule, the return of the premium in Roman-Dutch law probably followed a claim for such a return by the insured who accordingly bore the burden of proving that a ground existed for such a return. It was no doubt also possible, though, that the premium could be ordered to be returned where there was no claim as such by the insured, namely when the insured claimed the sum insured on the policy but the insurer raised a defence, and possibly even offered a return of the premium. In such a case the insurer bore the burden of proving his defence. And, it appears, a return of premium may then have followed unless the insurer could then also have established a ground for the forfeiture of the premium.

This was reflected also in two judgments (despaches) reproduced in the Amsterdamsche Secretary pertaining to the return of the premium. The first was one absolving the insurer from liability on the policy, no risk having been run, and ordering the restitution of the premium. The second was one containing a finding that the insurers were liable to make a restitution of the premium they had received.

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463 See Van der Keassel *Praelectiones* 1478 (ad III.24.18).

According to the Antwerp *Compilatae* of 1609 (art 255 and 256 of par 8, title 11, part IV: see De Longé vol IV at 306), two actions arose for the insurer by virtue of the insurance contract. The one was to claim the insurance premium fully or in part, depending on whether there was any return of the premium ('naer datter restorno vaalt oft niet'), while the other was to claim the customary ½ per cent premium as compensation in case a return of the premium did occur. Likewise, two actions arose for the insured, the one to claim compensation for loss or damage, the other to claim a return of the premium ('alser [alsoo] niet oft min geladen wort, oft datter vuijt andere oorsaecken geen oft min perijcket gedraegen wort').

464 This was specifically provided for in art 257 of par 8, title 11, part IV of the Antwerp *Compilatae* (see De Longé vol IV at 306). As to prescription, see further ch XX § 3 *infra*.

465 At 374-375. See too Appendix 3 *infra*.

466 In a footnote the point was made that there was no restitution of the premium in the case of a *mala fide* insured, double insurance, or where the risk had in fact been run.

467 At 378-379. See further Appendix 7 *infra*. 
6.6 The Return of the Premium in the Wetboek van Koophandel

The regulation of the return of the insurance premium in the Wetboek van Koophandel was clearly derived from the antecedent Roman-Dutch law. What had changed, though, was the fact that the underlying principles had come to be identified (in arts 281 and 282), and consequently there is a smaller number of provisions in the rest of the Wetboek where the returnability of the premium is still specifically mentioned. For example, in numerous instances the insurance contract is declared null and void without it being specifically stated, as had still been done in the Roman-Dutch sources, that the premium is recoverable. In general there is just a more principled and systematic approach to the issue of the return of the premium.

The guiding principle governing the return of the premium in Roman-Dutch law is also central to the regulation of the topic in the Wetboek. In article 281 it is provided that in all cases where the agreement of insurance wholly or partly falls away ("verval") or becomes null ("nietig word"), and on condition that the insured has acted in good faith, the insurer must return the premium, whether in full or for that part for which the insurer has run no risk. Therefore, in principle the nullity or proportionate nullity of the contract results in the return or proportionate return of the premium. And in case of fraud on the part of the insured, there is no return of the premium at all.

The Wetboek contains numerous examples of instances where the premium is returnable. Firstly, there are those instances where the insurance agreement falls away and where that has an influence on the payment or the return of the premium. Then

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468 See generally eg Dorhout Mees Schadeverzekeringsrecht 196-203; Van Renays 250-252.

469 It would seem, though, that the intention was not to include the case and to permit a return of premium where, eg, the property insured for one year is destroyed after six months (see Dorhout Mees Schadeverzekeringsrecht 198-199), except, of course, if the contract is divisible as would be the case, eg, where the premiums are payable monthly (idem 200).

470 Applications of art 281 occur in eg arts 611, 635, 636, 652, 653, 660 and 662.

471 In the case of the termination of the voyage before the insurer has run any risk, the insurance falls away (art 635-1) and the premium is retained or recovered by the insured, subject to the insurer enjoying a ½ per cent of the sum insured or a ½ of the premium if it is less than 1 per cent (art 635-2). This provision was derived from s 56 of the Rotterdam keur of 1721. See Enschedé 86.

In the case of the termination of the voyage after the insurer has been at risk but before the final departure of the ship (ie, before the ship has lifted her anchor or dropped her ropes at the final place of departure), the insurer enjoys 1 per cent of the sum insured if the premium amounts to 1 per cent or more, but if it amounts to less, he enjoys the premium in full (art 636-1). But the full premium is always earned when the insured claims any compensation whatsoever (art 636-2). Article 636-1 has its origin in ss 56 of the Rotterdam keur of 1721 and 23 of the Amsterdam keur of 1744; art 636-2 is new. As to art 636, see further Dorhout Mees Schadeverzekeringsrecht 199-200 who regards it as an equitable exception to the rule that once the risk has been run, there is no return of the premium, seeing that the insurer only bore the risk of loss in port or on internal waters and not any marine perils.

In the case of differentiated insurance ("verzekering bij verdeling") in respect of merchandise to be loaded on several specified ships with an indication of the sum to be insured on each ship, if the whole consignment is loaded onto one ship or onto a lesser number of ships than specified in the agreement, the insurer is not liable for more than the amount insured on the ship or ships taking on cargo, notwithstanding that all the specified ships were lost. But the insurer will nevertheless enjoy a premium of ½ per cent or less (as determined in art 635) of the sum in respect of which the insurance is found to be
there are cases where the agreement becomes null and the payment or return of the premium is influenced.\(^{472}\) And then there are instances where the insurer incurs no liability and that has a bearing on the premium.\(^{473}\)

While it is already provided in art 281 that the return of the premium in the case of nullity of the agreement takes place only on condition that the insured has acted in good faith (art 281 in fact deals with the consequences of nullity in the case of good faith), a further qualification of this general principle occurs in art 282 (which deals with the position in the case of bad faith). It is provided in that article that in the case of the nullity ('nietigheid') of the agreement arising by reason of the fraud ('lilist, bedrog of schelmerij') of the insured, the insurer retains the premium which is forfeited to him ('geniet de verzekeraar de premie, onverminderd de openbare regtsvordering, zoo daartoe gronden zijn').\(^{474}\) Thus, a return of the premium occurs only if the insured acted in good faith. If he acted in bad faith, there is no return of the premium, even if the insurer has run no risk and the premium has not been earned.\(^{475}\)

without effect ('krachte/oos'). This provision, found in art 652, was derived from the French Ordonnance de la marine of 1681.

In all cases where either the insured goods were not shipped, or where a lesser amount was shipped, or where the goods were by mistake over-insured, and further in all cases foreseen by art 281, the insurer enjoys ½ per cent of the sum insured or ½ of the premium (and that in the same way as determined by art 635), except when, in a particular instance, by law or by the agreement, he is entitled to more (art 662-1). But the person who insured for another without mentioning the latter's name on the policy, cannot recover the premium on the ground that the interested person did not ship or shipped a smaller amount of the insured goods (art 662-2). Article 662 has its direct origin in s 56 of the Rotterdam keur of 1721 (see Enschedé 86) but was also preceded by the provisions in eg ss 16 of the placcaat of 1563, and 4 and 18 of the Rotterdam keur of 1604.

\(^{472}\) These cases include the following: no second insurance is permissible of objects already insured for their full value, such second insurance being null (art 252); insurance in excess of the value or interest is valid only up to that excess (art 253); insurance for another without authorisation is null if and to the extent that the same object has already been insured by the interested party or another on his instruction (art 266); all insurance after loss is null if at the time of the conclusion of the insurance, the insured was aware of such loss (art 269); and insurance on profit without any valuation and identification of the goods on which the profit is expected, is null (art 615).

\(^{473}\) Thus, in the absence of an interest, the insurer is not liable (art 250); and the insurer is not liable for a loss caused by insured's own fault and he may even ('zelfs') retain or claim the premium if he has already borne any risk before the occurrence of that loss (art 276).

\(^{474}\) One example of the nullity of the agreement due to the insured's fraud and where there is no return of the premium, is in the case of an insurance after loss of which the insured was aware (see art 269).

\(^{475}\) See Van Renays 30-31 who notes that this is not acceptable, since it punishes the mala-fide insured by giving the premium to the insurer who had not earned it. The premium should not be forfeited to the insurer in such a case but a public fine should rather be imposed upon the insured, as had been the case in the placcaat of 1563. Dorhout Mees Schadeverzekeringsrecht 201-202 too regards the punishment of the fraudulent insured by awarding the premium to the insurer as being in conflict with the general principle of restitution following upon an avoidance of the agreement, even if as a result of compulsion or fraud. However, he points out that even though not in accordance with general principle, the provision contained in art 282 is the correct one for the insurance contract. It is also, one may add, supported by historical precedent if by nothing else. Dorhout Mees suggests further that if the agreement is null because both parties had acted in bad faith (eg where they had concluded an insurance on a prohibited interest), art 282 would not apply because it would not be necessary to protect the insurer against the insured nor to punish the latter only.
6.7 The Return of the Premium in English Law

Despite the influence of the peculiarly English doctrine of consideration on the issue, the English law relating to the return of the premium is again not completely dissimilar to Roman-Dutch law.

The underlying principle, already accepted both at common law and in equity in the seventeenth century, was that if the risk had not been run by the insurer, the premium was not earned and had to be paid back to the insured. In 1748 an attempt was made to codify the law of marine insurance and the House of Commons appointed a Committee to consider the better regulation of insurances on ships and goods. The Committee’s report, which contained ten resolutions, also dealt, in resolution 7, with the return of a part of the premium paid to the insurer, less a customary percentage, in the case of a short-shipment of the insured goods, the return having to be in proportion to the amount of the deficiency.

In the eighteenth century this principle of ‘no risk, no premium’ was confirmed and fully explained. If the risk or an apportionable part of it was not borne by the insurer, the insured could recover the whole or a proportionable part of the premium. Conversely, as soon as the insurer has been at risk, and if such risk was not apportionable, the whole premium was earned and it, or any part of it, could not be recovered, irrespective of whether or not any loss had occurred. Interestingly enough, the customary allowance to the insurer of a small percentage premium in the case of a return of the premium was not mentioned again and appears to have fallen into disuse in English practice if, in fact, it was ever accepted there.

In Stevenson v Snow a ship was insured at a premium rate of five per cent on a voyage from London to Halifax in Nova Scotia, warranted to depart with a convoy from Portsmouth. She arrived in Portsmouth only after the convoy had already left and

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476 As to the operation of which in the insurance context, see eg Dorhout Mees Schadeverzekeringsrecht 35.

477 See eg Deguiler v Depeister (1684) 1 Vern 263, 23 ER 458 (if no risk has been run on the bottomry bond because the ship did not go on her voyage, she ‘lying all along safe in the Port of London’, the lender was entitled only to ordinary interest on his loan and not to his premium, ie, not to maritime or risk interest); and Martin v Sitwell (1691) 1 Show KB 156, 89 ER 509 (an action to recover the premium on a policy which was void because no goods had been shipped on board, could be brought by the person in whose name the policy was opened although the premium was paid to the underwriter by the agent who had opened the policy, the money having to be returned not only by the custom of merchants but because, by reason of the nullity of the policy, ‘the money was received without any reason, occasion, or consideration’). See too Holdsworth History vol VIII at 292.

478 See Raynes (1 ed) 167, (2 ed) 161; Wright & Fayle Lloyd’s 162-163.

479 See eg Holdsworth History vol XII at 538-539; Rodgers 177.

480 (1761) 3 Burr 1237, 97 ER 805.
the insured sought to recover a proportionate part of the premium paid to the insurer. It was found by the jury that it had been proven that the usual premium from London to Portsmouth was one and a half per cent and also that underwriters customarily returned a part of the premium in cases such as this one, but that it was uncertain what part since this depended on the circumstances of each case. Lord Mansfield, in holding for the insured, noted that insurance contracts were governed by equity and, rejecting the evidence of any custom in this regard, he applied the equitable principle that 'the insurer shall not receive the price of running a risque, if he runs none'.

Regarding the risk as divisible according to the intention of the parties, and the contract and hence the premium as apportionable into two parts pertaining to two voyages, his Lordship held that the insured had received no consideration for the portion of the premium paid for the insurance for the voyage from Portsmouth to Halifax and that, accordingly, he should succeed with the action for monies had and received by the insurer.

These principles came to be codified and systematised in the Marine Insurance Act of 1906.

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481 Wilmot J, in concurring with other the judgments, noted that the insurance contract was regarded by writers on insurance as being a *contractus innominatus* and that accordingly it had to be determined *secundum bonum et aequum*.

482 At 1240, 810. A little later (ibid) he described it as follows: 'If the risque is not run, though it is by the neglect or even the fault of the party insuring, yet the insurer shall not retain the premium'.

483 If the risk Is not apportionable but entire, the insured cannot recover back any part of the premium once the risk has commenced. That was the case in eg *Tyrie v Fletcher* (1777) 2 Cowp 666, 98 ER 1297 where the insurance was on a ship 'at and from London to any port or place where or whatsoever, for twelve months' at a premium of 9 per cent. Lord Mansfield held that the risk, being measured by time which was not divided at all (it would have been different had the parties eg insured from month to month), was entire and that the premium was not returnable at all.

In *Bermon v Woodbridge* (1781) 2 Dougl 781, 99 ER 497 an Insurance on a slave ship and her cargo of slaves and other merchandise on a round voyage ('at and from Honfleur [in France], to the coast of Angola, during her stay and trade there, and at from thence to her port or ports of discharge in St Domingo, and at and from St Domingo back to Honfleur'), at a premium of 11 per cent, was regarded as an entire contract (and not divisible into six separate risks as the insured had contended) so that no return of the premium was possible in the case of a loss at any time after the commencement of the risk.

484 According to the report of case in (1761) 1 Black W 315, 96 ER 176, Lord Mansfield noted (at 315, 177) that 'we can easily settle the proportion, by the quantum of the premium then payable in voyages from London to Portsmouth'. The verdict in the case was reportedly for £3 10s.

See further as to the position at the end of the eighteenth century eg Weskett Digest 407 sv 'premium' par 3 (noting that in the case of the return of the premium insurers were entitled to retain ½ per cent 'on such sum as the interest covered in risque, appears to be short of the sum insured', according to ancient custom); 524 sv 'short interest' par 1 (referring to Stracca); 525 sv 'short interest' par 2 (referring to the 'Ordinance of Antwerp' (??)); 544 sv 'time' par 1 (referring to the divisibility of risk in the case of a time policy where the premium was stipulated per month and advising insurers, in order to avoid sharp practices by the insured in this regard (eg after completion of the most hazardous part of the voyage, seeking to recover premiums under pretext of vessel being laid up), to fix the premium for the whole time (as for the entire voyage) in which case, as soon as risk has commenced, the whole premium may be retained without any return).

485 See eg Chalmers 135-136.
Firstly, the Act recognises that the return of a paid premium to the insured is equivalent to the retention of an unpaid premium by the insured. The Act further recognises that a return of the premium may occur by agreement or by law. The repayment of the premium occurs by law when the consideration for the payment of the premium totally fails and there is no fraud or illegality on the part of the insured or his agents. If such consideration is apportionable and there is a total failure of any apportionable part of the premium, a proportionate part of the premium is similarly returnable to the insured.

As is the case in the Dutch Wetboek van Koophandel, the Marine Insurance Act then provides a number of examples of instances where the premium will be returnable to the insured. These, not surprisingly, show a large measure of correspondence with the examples already encountered in Roman-Dutch law.

Thus, where the policy is void or is avoided by the insurer as from the commencement of the risk, the premium is returnable, provided there is no fraud or illegality on the part of the Insured. But if the risk is not apportionable and has once attached, the premium is not returnable at all.

Where the insured object of risk or any part of it has never been imperilled, the premium or a proportionate part of it is returnable.

Where there is over-insurance under an unvalued policy, a proportionate part of the premium is returnable, and where there is over-insurance by double insurance, a proportionate part of the several premiums is returnable.

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486 In s 82 it is provided that where the premium or a proportional part of the premium is by the Act declared to be returnable, it may be recovered by the insured from the insurer if already paid, or may be retained by the insured if not yet paid.

487 See s 83.

488 See s 84(1).

489 See s 84(2).

490 See s 84(3)(a).

491 See s 84(3)(b). A proviso here is that where the insurance was concluded ‘lost or not lost’ and the object has arrived in safety at the time when the contract was concluded, the premium is not returnable unless at such time the insurer knew of that safe arrival.

492 See s 84(3)(e). As to valued and unvalued policies in English law, see ch XVII § 5.6 infra.

493 See s 84(3)(f). The proviso here is, firstly, that if the several 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 on the policy in respect of the full sum insured by it, no premium is returnable in respect of that policy; and secondly, when the double insurance was effected knowingly by the insured, no premium is returnable. Although it has been suggested in English law that to avoid this problem and to discourage over-insurance, the premium should in the case of double insurance not be returnable at all (as was the case in eg Rotterdam), sub-s (3)(f) stops somewhat short of that. See Chalmers 136.
Lastly where the insured has no insurable interest throughout the currency of the risk, the premium is returnable,\textsuperscript{494} while where the insured has a defeasible interest which is terminated during the currency of risk, the premium is not returnable.\textsuperscript{495}

\textsuperscript{494} See s 84(3)(c). However, there is no return in the case of gaming or wagering policies because of the illegality involved.

\textsuperscript{495} See s 84(3)(d).
CHAPTER XII
THE DURATION OF THE RISK AND INSURANCE AFTER LOSS AND SAFE ARRIVAL

1 The Duration of the Risk

1.1 Introduction

In this chapter attention will firstly be paid to the question whether, in the event of the occurrence of a loss within the scope of the insurance contract, the risk of that loss has passed to and still remains with the insurer concerned. This involves determining the moment when, in terms of Roman-Dutch law, the risk commenced to run for the
insurer (that is, when the insurer came on risk) and the moment when it terminated (that is, when the insurer was no longer on risk).

In considering what may generally be termed the duration of the risk for the insurer or, seen from the other side, the duration of the insurance cover for the insured, it is important to distinguish from it the duration of the insurance contract as well as the duration of the voyage in question.\(^1\) Although it could be the case, the risk (or cover) and the contract, and the risk and the voyage of the insured or carrying ship in question, did not necessarily commence and terminate at the same time.\(^2\) In principle, therefore, the time, as well as the place, of both the commencement and the termination of the risk, the contract\(^3\) and the voyage must be distinguished very clearly.

Thus, a ship or goods could be insured in terms of a contract concluded on 1 May for a voyage to be undertaken by the insured or the carrying ship from A to B, which voyage was to commence on 1 June, and with the risk commencing in terms of that contract on 20 May. Likewise, the arrival of the insured or carrying ship at her destination did not necessarily coincide with termination of either the risk or the contract itself. Other permutations were also possible. Parties could, for example, conclude a contract on 1 May in respect of a voyage and a risk which had already commenced or even terminated at an earlier date. In such a case it was therefore possible that a loss may already have occurred at the time when the contract was concluded. The whole issue of insurances concluded after the departure, loss or arrival of the insured

\(^1\) The duration of voyages to and from the Netherlands varied and depended on a number of factors such as the direction in which and the time of year when the voyage was performed and, importantly, on the type and age of the ship performing it. Although, with the gradual improvement in both ships and navigational methods and aids, the duration of voyages progressively became shorter, they remained long by modern standards. A few examples will suffice.

In the seventeenth century, the average duration of a voyage from the Netherlands to the Cape of Good Hope by an East Indiaman was 142 days. At an average daily rate of a good sixty miles, an Indiaman would reach the Cape in four and a half months. Return voyages were somewhat shorter due to favourable winds and currents. The fastest voyages to the Cape were those undertaken in March and September with those commencing in October to December being the least favourable. The duration of ships' stay at the Cape averaged 24 days. The average duration of voyages from the Cape of Good Hope to Batavia by an East Indiaman in the seventeenth century was 79 days. Accordingly, in the seventeenth century, the average duration of voyages by sea from the Netherlands to Batavia, about 15,000 nautical miles, was 245 days. See further, in particular, Bruijn, Gaastra & Schöffer Dutch-Asian Shipping 55, 67-69, and 72-74; and also Boxer 'Dutch East-Indiamen' 89; and Gaastra 114.

See again ch XI § 6.2.2 n372 supra for the periods of notice laid down in the case of a claim for a return of the premium in the case of over-insurance, which periods were based on estimates of the duration of normal trading voyages in Europe.

\(^2\) See generally Ten Kate 64. The divergence was nicely illustrated by the series of legal opinions delivered in 1665 which will be considered in § 1.3.2 infra.

\(^3\) In addition to the distinction between the time of the commencement of the insurance contract and the time of the commencement of the risk in terms of that contract, a further distinction must also be drawn between the time of the commencement of the insurance contract (referred to in eg § 7 of the placcaat of 1571 as 'der uyren dat die verseeckeringe oft assieurantiestadt grijen') and the time of the conclusion of that contract.
property was of such importance in Roman-Dutch law, that it will be considered separately in the second part of this chapter.4

1.2 The Different Types of Insurance Policies

It has already been noted that insurance policies were classified in Roman-Dutch law either with reference to the type of risk insured against5 or with reference to the object of risk.6 A further classification relevant in the present context is that which distinguished between different types of marine policies on the basis of the factor with reference to which their duration was determined.

Marine insurance policies in Roman-Dutch law were concluded for a determined or determinable and limited period of time. They were short-term policies and ships were not, for example, insured when launched for the rest of their existence.7

The duration of marine insurance policies was generally determined or determinable with reference to one of two elements, and there were, in consequence, the main two types of marine insurance policy in Roman-Dutch law as far as duration was concerned. These were the voyage policy and, of later evolution, the time policy. A voyage policy was one in terms of which the duration of the risk was determined with reference to the voyage the insured ship, or the ship on which the insured cargo was loaded, was to undertake, for example, a voyage from Amsterdam to Lisbon.8 A time policy fixed the duration of the risk with reference to a specified period of time, for example, for twelve months from 1 April, or from 1 April to 30 September. Mixed policies, in terms of which the duration of the risk or cover was described with reference to both a voyage and a period of time, were, it would appear, not widely

4 See § 2 infra as to insurances after departure, loss or arrival.

5 For example, marine policy, fire policy, or ransom policy. See ch VI § 1 supra.

6 For example, goods policy, hull policy, or freight policy. See ch V § 2 supra.

7 See Scheepers 16 for this point.

8 See generally eg Ten Kate 1-5. In the case of the voyage policy the risk was described with reference to a named terminus a quo and a terminus ad quem. These termini were the limits between which the insured voyage had to be undertaken. Only losses occurring on that voyage were borne by the insurer. The description of the voyage was on occasion specifically used to circumscribe not only the duration but also the extent of the insurer's risk. Thus, in a policy concluded in 1672, at a time when the Netherlands was at war with both France and England, it was provided that the voyage from Amsterdam to the coast of Africa had to be performed around the British Isles ('achter Schotland en Ierland om te zeilen'). See Den Dooren de Jong 'Practijk' 7. As to the alteration of the risk by the insured and the control of the risk by the insurer by means of a description of the voyage, see further ch XIII infra.

But, it must be stressed again, even in the voyage policy the place and time of departure and arrival were not necessarily the same as the place and time of the commencement and termination of the risk.
known in Dutch insurance practice prior to the nineteenth century. For purposes of a discussion of the duration of the risk, it is proposed to deal first with voyage policies and then with time policies.

1.3 The Duration of the Risk in Terms of a Voyage Policy

Initially voyage policies were the only type of marine policies officially recognised by Roman-Dutch law. Insurances on both cargo and hull were concluded for the duration of a single voyage from one place to another or, less commonly and therefore also regulated in less detail in the sources, for an out and return voyage. In exceptional cases, as well as in certain trades such as those of fishing, whaling and slaving, special circumstances required a more detailed and complicated description of the voyage or voyages to be undertaken.

One of the reasons for the predominance of voyage policies in Dutch marine insurance practice until the nineteenth century, was in all probability the fact that the antecedent contract of maritime loan was specifically predicated upon and its risk described with reference to the safe completion of a circumscribed voyage. And, because the 'voyage' and its duration and description were relevant in other maritime contracts such as the maritime loan, the bottomry loan, the contract of affreightment and that of the lease of ships, an analogous application of the relevant principles to the voyage policy of insurance was possible. It is not surprising, therefore, that the relevant principles of insurance concerning the commencement, duration and termination of the risk were probably first developed by analogy to the equivalent principles applicable in the case of such contracts.

9 Thus, policies insuring a voyage from A to B for a period of six months were not common. Also uncommon were policies specifically insuring from A to B and for a number of days after arrival, although, as will appear shortly, that was the practical effect of many (model) voyage policies. Another variation, where the commencement or termination of the risk had to be determined with reference to an agreed time, and its termination or commencement with reference to a particular voyage (eg from 1 November until arrival at X) was known though. See eg the model hull policy in the Amsterdam keur of 1598 referred to in § 1.3.3 n112 infra, and the Hooge Raad case of 1740 referred to in § 1.4 infra under time policies. As to mixed policies, see further Ten Kate 65-66.

10 Or, more precisely, their duration was described with and linked to such a voyage.

11 See further eg Dorhout Mees Schadeverzekeringsrecht 9 and 539; Klesselbach 116 (observing that at the end of the sixteenth century in terms of Antwerp customs, insurances were concluded for a single voyage but also, in the case of a distant voyage with no opportunities for insurance at the destination, simultaneously for the return voyage); Mullens 55-58; and Spooner 126-127 (In the eighteenth century, marine insurance was principally concerned with the voyage and not with the calendar year, and the concept of distance as opposed to time remained deeply embedded in the system of marine insurance).

12 See eg Van der Kessel Praelectiones 1457 (ad III.24.8) who drew attention to the fact that nothing prevented references to Roman law on the commencement of the risk in the case of the maritime loan, from being applied to the insurance contract too. See also eg Van Leeuwen Rooms-Hollands regt IV.9.3 whose definition of insurance as the bearing of a risk until the completion of a particular voyage appears to have been influenced by the definition of bottomry, treated in the preceding chapter, especially as regards the duration of that risk-bearing.
The pre-eminence of the voyage policy in Dutch insurance law appears clearly from the fact that many of the provisions in the insurance laws were applicable only to voyage policies. Not only were there no prescribed or model policy forms which were not voyage policies, but the prescriptions as to the content of insurance policies, for example, were generally applicable to voyage policies only. Thus, matters which had to be mentioned in insurance policies such as the place of departure, the destination, and the place of loading and of discharge were appropriate only to voyage policies. One of the reasons why information of this nature was required to be stated in the policy was, as will be shown shortly, in order to determine the duration of the risk.

Roman-Dutch law laid down precise rules to determine the moment when the marine risk and hence the insurance cover commenced and terminated in the case of a voyage policy. These provisions depended on whether the policy was one on goods, on hull or on some other object of risk. It would seem, therefore, that if both the ship and her cargo were insured in the same policy, as did happen in practice, the duration of the risk for the insurer in respect of those objects of risk was not, or at least not necessarily, the same. Furthermore, these provisions applied only in the absence of an agreement between parties to the contrary as to when the risk was to commence and when it was to terminate. The aim with the legislative rules was therefore merely to ensure that the insurance contract would not fail for the absence of a contractual stipulation as to the duration of the risk. They were merely subsidiary or permissive rules of law.

It would appear to be most convenient to treat the duration of the risk in terms of the voyage policy first with reference to voyage policies on cargo. They were more common and therefore better worked out in Dutch insurance law than voyage policies on hull where the legal position was often determined by analogy and with reference to the position in the case of cargo policies.

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13 See again ch VIII § 4.1 supra.

14 As to the content of policies, see again ch VIII § 4.2 supra.

15 Thus, Bynkershoek Quaesiones juris privat 1 IV.1 explained that in terms of the applicable legislation, no insurance was valid unless the policy contained the name of the place from where and to which the voyage was to be undertaken, something required by the nature of the contract itself because it was imperative that the commencement and termination of the insurer's risk should be known ('en de natuur van de zaak zelf vereischt dit volkomen, want men moet kundig zyn, wanneer de risico van den Assuradeur begint, en wanneer zy ophoud'). See also Lybrechts Koopmans handboek V.78; Van der Keessel Praelectiones 1450-1451 (ad III.24.6).

16 See eg Kersteman Academie XVIII (at 276); Van der Keessel Praelectiones 1457 (ad III.24.8).

17 See § 1.3.2 infra.

18 Of all the policies concluded by the Antwerp broker Juan Henriquez in a fourteen-month period in 1562-1563, 97 per cent were cargo policies while only about 2 per cent (ie, 33 out of a total of 1 488) were hull policies. See De Groote Zeeassurantie 131-132.
1.3.1 The Duration of the Risk in Terms of a Voyage Policy on Cargo

The earliest practice in the Low Countries appears to have been to insure marine cargo from the time of departure of the carrying ship until the arrival and even the discharge and landing of that cargo at the destination. However, it was no doubt realised from early on that in practice the cargo owner required a more extensive insurance cover to protect him against losses prior to the departure and subsequent to the arrival of the carrying ship. The underlying assumption that insurance on cargo protected the insured only for the duration of the actual voyage, and thus only for losses occurring at sea, was not acceptable. The insured cargo owner gave up possession of and control over his goods to the carrier (the shipowner or charterer of the ship) before the commencement of the voyage and he or his consignee only again acquired such possession and control some time after the arrival of the carrying ship at her destination. It therefore came to be accepted that the period for which the carrier was in possession of the cargo, rather than the duration of the sea voyage, should be the relevant period for which the cargo policy should provide protection.

In terms of the model policy form prescribed by s 2 of title VII of the placcaat of 1563, the insurance on cargo was stated to be from the port, harbour or roadstead of Seville to the city of Antwerp ("vander Poort, Haven, oft Reede van Seville, tot oft na der ... Stadt van Antwerpen"). Both the terminus a quo and the terminus ad quem were therefore named, the two named here merely being examples. The policy then more specifically stated that the insurer was to bear the risk on the specified goods from the hour and day that those goods were brought to the named port, harbour or roadstead of the place of departure to be loaded in the named ship, or onto boats, skiffs or lighters to be taken to be loaded on that ship, for their carriage on the described voyage. The risk was to endure until the insured cargo arrived at the named place of destination and was there safely discharged on land in an undamaged condition.

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19 Thus, in terms of a policy dating from 1531, the risk ran from such time onwards as the ship started departing ("begint afftho /opende") with her cargo from the port of a named town, until she arrived in the port of her named destination and cast her anchor there and discharged her cargo on land in a good condition. See De Groote Zeeassurantie 121-123.

20 An early example of this extended cover appeared in the Burgos Insurance Ordinance of 1538 where the insurance commenced from loading until 24 hours after arrival at the destination. See further Rea\' Geschichte 239-241.

21 Which is a sheltered stretch of water outside the actual port, usually an inlet or at least close to shore, where ships can ride safely at anchor while waiting to enter or finally to depart from that port.

22 In many ports, including eg Amsterdam, larger ships were loaded and offloaded in the roadsteads, with the cargoes, crews and passengers being transported to and fro between the ships and the inner port by lighters. See eg Bruijn, Gaastra & Schöffer Dutch-Asiatic Shipping 33-34.

23 The policy provided for the risk to run 'vander ure ende dage dat de voorseyde goederen ende coopmanschappen ghebracht sullen zijn ter voorseyder [ie, in the example used in the policy, Seville] poort, haven oft reede, om te laden in't voorseyde Schip, ofte die te doen in Booten, Schuyten, oft Licht-Schepen, om gevoert ende geladen te wesen in't selve Schip, om de voorseyde reyse te doen, ende sal de voorseyde verseeckeringe oft Asseurantie duyren, tot dat de voorseyde goederen ende Koopmanschappen ghekommen sullen wesen tot Antwerp voorseyt, ende aidaar ontladen op het Landt, in
Therefore, the risk on insured cargo did not commence only once the carrying ship departed on her voyage, nor only once the cargo had been loaded on board the carrying ship, nor even only when the cargo had been loaded in smaller boats to be conveyed to where the carrying ship was lying at anchor. It in fact commenced at an earlier stage, namely when the cargo arrived at or was brought into the port for such loading or conveyance, and when the owner had relinquished possession of the insured cargo to the carrier for purposes of their conveyance by sea. The insurer therefore bore the risk of loss of or damage to the cargo in the course of its loading on board, and during the time after such loading and prior to the ship actually sailing on her voyage, such as when she waited at anchor for a favourable wind, a convoy, or further cargo. Likewise, the risk on insured cargo did not terminate immediately on or even within a particular period after the arrival of the carrying ship at the destination of that cargo but only at some later stage, namely when the cargo was landed, presumably again either directly from the carrying ship or from her onto smaller boats and from them on land. The insurer therefore bore the risk of any loss occurring to the cargo while the ship waited to enter the port or to discharge on land or onto lighters, as well as the risk of any loss occurring during such discharge.

In the latter regard, however, some precaution had to be taken to ensure that the insurer's risk terminated within a reasonable time after arrival and that he did not remain on risk indefinitely. For that purpose s 13 of title VII of the placcaat of 1563 laid down that the insured was obliged to have his goods and merchandise loaded from the ship with all diligence upon their arrival at the destination, and that such discharge had to occur at the latest within fifteen days, any losses occurring after that time being for his account ('tot synen pericule'), except in the case of a significant inconvenience or obstacle ('notable inconvenient oft obstacle') which he bore the burden of establishing. Therefore, the insurer's risk terminated fifteen days after arrival, irrespective of whether or not the goods had been discharged, or upon an earlier discharge.

24 Presumably as opposed to when the cargo merely arrived there for a further temporary warehousing until a ship could be found on which it could be loaded. Possibly the arrival of the cargo alongside the ship or the lighter, on the quayside, was required, for only then could the cargo be said to have arrived for loading on or for conveyance to the carrying ship.

25 Which, it must be remembered, was not necessarily the same as the carrying ship's own final destination.

26 As to s 13, see eg Grotius inleidinge III.24.9 (noting the insured's duty to discharge unless prevented by some serious cause ('ten waer door merckelick belet'), failing which he bore the risk of any loss ('anders komt het gevaer t'zijnen laste'); Groenewegen Aanteekeningen ad III.24.9 (n23); Van Leeuwen Rooms-Hollands regt IV.9.10 (who appears not only to have confused the duration of the risk on cargo with that on hull, but also failed to keep apart the two distinct situations regulated in s 13); Van Zurck Codex Batavus sv 'Assurantia' par 16; and Van der Keessl Praelectiones 1460 (ad III.24.9) (who noted that delayed discharge was acceptable in the case of a iusta causa). See also eg Enschede 92 (describing the duration of the cargo policy as being 'van wal tot war'); Goudsmit Zeerecht 247; De Groote Zeeassurantie 36; and Kracht 19.
Section 13 also provided for the instance where the parties derogated from this arrangement, as they could in fact do, by specifically insuring ‘from one port to another port’ without mentioning the landing or, for that matter, the loading of the cargo.\textsuperscript{28}

To conclude. Already in the \textit{placcaat} of 1563 an insurance on cargo did not merely provide cover during the sea carriage itself but included the risk of loading and discharge of the insured cargo as well as port risks generally. But not everything was quite settled yet and the topic was not identically regulated in the following \textit{placcaat} of 1571.

The model policy form referred to in s 35 of the \textit{placcaat} of 1571 stated that the insurer was to bear the risk from the hour and the day that the insured cargo was brought to the named harbour, roadstead or bank\textsuperscript{29} and was loaded\textsuperscript{30} on the named ship, or onto boats, skiffs or lighters to be conveyed to and loaded on that ship, for their carriage on the specified voyage. Further, the risk was to continue until that cargo had arrived in the harbour of the named destination and was there safely discharged and left on land.\textsuperscript{31}

Section 12 of the \textit{placcaat} of 1571 added that the insurance commenced at the earliest (‘eerst’) on the day that the insured cargo was loaded onto skiffs or barges to be transshipped to and loaded onto the carrying ship, and continued for as long as and until that cargo arrived in port and was freely and safely discharged on land. It may be noted that the commencement of the risk was now later than was the case in terms of the \textit{placcaat} of 1563. The risk now commenced only upon the actual loading and not as in terms of the \textit{placcaat} of 1563 upon the earlier arrival in the port for purposes of such loading. Also, a discharge within a specified time of arrival was no longer expressly required, although this may merely have been an omission as it was provided for in the equivalent section in the provisional \textit{placcaat} of 1570.\textsuperscript{32}

\textsuperscript{28} Insurance ‘from port to port’ is considered in § 1.3.2 infra.

\textsuperscript{29} ‘Bank’ (‘Plate’) probably referred to the sandbank (or shoal or bar) at the mouth of a harbour or estuary.

\textsuperscript{30} No longer ‘to be loaded’.

\textsuperscript{31} The policy provided for the risk to run ‘vander uyren ende dege dat de voorseyde goeden oft Coopmanschappen gebracht sullen zijn ter voorseyder Haven, Reede oft Plate, ende in’t voorseyde Schip gheladen, ofte in Booten, Schuyten, oft Licht-Schepen geleyt, om in’t selve Schip gevoert ende geladen te worden, om de voorseyde reys oft voyagie te doen. Ende sal die voorseyde verseekercinge oft Asseuranctie geduyren, tot dat de voorseyde goeden ende Coopmanschappen inde Haven vande voorseyde pleaste aan gekomen ende geammerte, ende aidaar op ‘t Landt ontladen ende ghelost sullen zijn, in goeder behoudenisse’.

\textsuperscript{32} As to s 12, see Van der Keessel \textit{Praellectiones} 1460 (ad III.24.9) (from which it appears that the unqualified statement in s 12 that the risk continues until the discharge and landing of the cargo could be supplemented by the proviso in terms of s 13 of the \textit{placcaat} of 1563). See also eg Couvreur ‘Zeeverzekeringspractijk’ 194; Enschédé 93 (in terms of s 13 of the provisional \textit{placcaat} of 1570 the risk terminated twelve days after the arrival of the cargo in port); Goudsmit \textit{Zeerecht} 265; De Groote \textit{Zeeassurantie} 40 (refering to s 13 of the \textit{placcaat} of 1570 and 121-124 (further differences between the \textit{placcaat} of 1570 and that of 1571); Jolles 65-66; Kracht 27 (who incorrectly states that the risk commenced in terms of s 12 as soon as the cargo was alongside).
In the Antwerp customary law, the voyage policy on cargo was stated to commence, as in the case of the placcaat of 1571, from the time and day such cargo was loaded on lighters to be taken to the ships, and to terminate upon its arrival and discharge on land at the destination, except if the parties had agreed otherwise ("van den beginne aan tusschen partijen anders of voorder waere ondersproken"). The discharge of the carrying ship had to commence within three days after her arrival at the destination and such discharge had to be completed without interruption, any failure in this regard without any proper reason or excuse resulting in the insurance being regarded as having been terminated ("soude de versekeeringe gehouden worden voldaen ende geeiindicht te wesen").

The cargo policy in terms of the Amsterdam keur of 1598 stated that the goods would be insured from the hour and day that they were brought alongside by the insured or his representative from where they were to be loaded in the named ship or, presumably, in lighters to be taken to that ship. And the cover continued until the arrival of that ship in the specified port and the free and safe discharge of those goods in an undamaged condition on land in the control of insured or his authorised representative.

In terms of s 4 of the Amsterdam keur of 1598, the insurance cover on cargo commenced from the time when the insured goods were brought alongside ("op de Kaye ofte Walle") from where they were to be loaded in the ships in which they were intended to be conveyed, or in boats or barges with which they were to be brought to

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33 See art 156 of par 5, title 11, part IV of the Antwerp Compilatae of 1609 (see De Longé vol IV at 264-266). Article 170 (Idem at 270-272) provided that despite any agreement extending the duration of the insurance (ie, of the cover), delivery into the hands of the insured or his agent, whether at the destination or elsewhere, resulted in the termination of the risk 24 hours after such delivery. And article 172 laid down that where in the policy several ships were mentioned in which the cargo was to be loaded, the insured could not, in loading or in discharging, place more cargo in a boat or lighter than the insurer wished to risk on one of the named ships. Thus, the risk which the insurer had spread over several ships could not be run on one lighter.

34 Article 159 of the Compilatae. See further generally Mullens 59-60.

35 The policy provided that the risk 'sal gheedyren ter tijdt toe dat het voorsz Schip tot ... [destination] sal gekomen wesen, ende den voorsz goeden ofte Koopmanschappen, sonder eenige schade oft verlies aldaer geist, ende vryelick ende vredelick op 't Land ghebracht sulien wesen in 't vermogen van u ... [insured] voorsz, oft yemant anders Commissie daer van hebbende'. Although the Amsterdam model policy therefore followed the earlier Antwerp examples, it may not necessarily have been the form employed in practice. In the well-known Van der Meulen cargo policy concluded there in 1592, the risk was stipulated to commence from the hour and day that the insured relinquished possession of the goods ("van der eerster uyr ende dach aff dat de voorsz coopmanschappen zijn ofte sulien gescheyden wesen uyt handen van u [the insured]"), presumably to the carrier. See Ijzerman & Den Dooren de Jong 227 and Appendix 19 Infra.

36 Section 11 of the Middelburg keur of 1600 was in identical terms.
such ships. The cover continued until such time as the goods arrived in port and were there freely and safely discharged and left on land without any loss or damage.\footnote{37} Thus, although the commencement of the risk was now identical in both the model policy and in s 4 of the \textit{keur} itself, the moment of the termination of the risk was not quite identically described.\footnote{38} Additionally, it may have been that the proviso in s 13 of the \textit{placcaat} of 1563, which required discharge within fifteen days after arrival, continued to be applied and qualified the termination of the risk in terms of s 4 of the \textit{keur} of 1598 in which there was no express provision to that effect.\footnote{39}

Also different, at least as far as the termination of the risk on cargo was concerned, were the rules laid down by s 11 of the Rotterdam \textit{keur} of 1604. It provided that in the absence of any provision on this matter in the policy itself,\footnote{40} the insurance cover on insured merchandise commenced from the time that such goods were brought alongside on the quay or wall ('de selve goederen gebrocht sullen zijn op de Kaeye otte Walle') from where they were to be loaded onto or taken to the ships with which they were intended to be conveyed abroad. And the risk continued until those goods had arrived in the harbour to which they were insured and were freely and safely discharged on land, unless the insured did not within four times 24 hours\footnote{41} after such arrival offload his goods ('niet en dede /assen'), except if he was prevented from doing so without his fault or conduct ('buyten sijn schult otte toe doen').\footnote{42} Therefore, the Rotterdam Legislature, unlike its Amsterdam counterpart, saw the need\footnote{43} expressly to impose some time

\footnote{37} See eg Grotius \textit{inleidinge} III.24.8; Groenewegen \textit{Aanteekeningen} ad III.24.8 (n22); Van Zurck \textit{Codex Batavus} sv 'Assurantie' par 16; Schelttinga \textit{Dictata} ad III.24.8 (noting that what was said here by Grotius was applicable only to the insurance of cargo and not to the insurance of ships); and Schorer \textit{Aanteekeningen} 427 (ad III.24.8) n22. See also Enschédé 93; and Goudsmit \textit{Zeerecht} 324.

\footnote{38} That appears to have been the view of Schelttinga \textit{Dictata} ad III.24.9 who apparently considered the proviso of fifteen days in terms of s 13 applicable in Amsterdam to s 4 which, unlike the equivalent provision in the Rotterdam \textit{keur} of 1604 (see infra), contained no express provision similarly limiting the time allowed for discharge. See too Van der Keessel \textit{Praelectiones} 1458 (ad III.24.8) (who unconvincingly sought to distinguish the identical provisions in the Amsterdam \textit{keur} of 1598 and in the Middelburg \textit{keur} of 1600 in this regard) and 1460 (ad III.24.9) (a somewhat clearer exposition to the effect that the proviso in s 13 was applicable to the termination of risk on cargo in terms of the \textit{placcaat} of 1571 as well as the \textit{keuren} of 1598 and 1600).

\footnote{40} See further § 1.3.2 infra.

\footnote{41} That is, within 96 hours, or four days.

\footnote{42} See eg Enschédé 93; Goudsmit \textit{Zeerecht} 400.

\footnote{43} Already realised in 1563 but overlooked in 1571.
limit on the duration of the insurance cover and to protect the insurer against any unreasonable prolongation of the risk.44

In terms of the cargo policy provided by the Amsterdam amending keur of 1688, the insured goods were at the risk of the insurer from the hour and day that they were brought alongside by the insured or his representative from where they were to be loaded on the named ship or onto lighters for their conveyance to the named ship. The insurer’s risk on them terminated upon the arrival of the ship at the specified destination and when the goods in question were freely and safely discharged on land in an undamaged condition in the control of the insured or his authorised representative.45 Thus, for all practical purposes this policy was identical to the equivalent model policy of 1598.

The most detailed regulation of the duration of the risk on cargo yet occurred in the Rotterdam keur of 1721.

The cargo policy provided by that keur had the insurers bear the risk from the hour and day that the insured goods were brought alongside on the quay from where they were to be loaded on the named ship, or on lighters to be taken to that ship. And the risk terminated upon the arrival of the ship at the specified destination or (and this was new) its surroundings, and after the discharge of the goods on land in the control of the insured or his authorised representative.46 It is noticeable that, unlike the earlier provisions concerning the termination of the risk, it was no longer confusingly stated that the risk terminated when the goods were safely discharged on land in an undamaged condition. It was never the intention that if the goods were, for example, damaged en route so that they were not discharged in an undamaged condition, the risk was not to terminate but to continue indefinitely so that the insurer would have been liable for further damage unconnected to the discharge. The nonsensical description, which was probably a relic from the earlier maritime loan which covered only total

44 See eg Groenewegen Aanteekeningen ad III.24.9 (n23) (contrasting the maximum period for discharge in s 13 of the placcaat of 1563 with that in s 4 (rather: s 11) of the Rotterdam keur of 1604); Van Zurck Codex Batavus sv 'Assurantie' par 16 (noting the different maximum periods allowed for discharge and stressing that any unexcused failure to discharge within those periods resulted in the insured having to bear the risk himself ('zonder merkelyk belet, of 't gevaer is tot laste van den Koopman').

45 The policy provided for cover 'van de uure en dag af, dat de voorsz Koopmanschap, by u of uwen Commis gebracht sullen zijn op de Kaye of Wal, om van daar geladen te worden in 't voorsz Schip of Schuiten, Barquin of Lichters, om daar mede gevoet te worden aan het boort van het voorsz Schip, en sal gedurende ter tijd toe, dat het voorsz Schip tot als boven sal gekomen wesen, en de voorsz Goederen en Koopmanschappen sonder eenige schade of verlies aldaer gelost, en vryelijck of vredelijck op 't Land gebracht sullen wesen in 't vermogen van U Geasseeurde voorsz of iemandt anders Commissie daervan hebbende'.

46 The policy provided cover 'van den dag ende uure af, dat de voorsz goederen by U of uwe Gemagtigde gebracht sullen zyn op de Kaeye of Wal, om van daar geladen te werden in het voorsz. Schip, of in Schuyten of Ljghters, om daar mede gevoet te werden aan het Boord van het voorsz. Schip. En zal geduren, ter tyd toe dat het voorsz. schip tot ... of in de Circumjacenten van dien, zal gekomen wesen, ende de voorsz. Goederen op het land gebracht wesen in het vermogen van de Geasseureerde of uwe Gemagtigde'.
losses, was now wisely omitted from the policy wording but, unfortunately, not completely from the applicable legislative measures themselves. Section 46 of the Rotterdam keur of 1721 confirmed that the risk on cargo commenced from the time that the goods were brought on the quayside from where they were to be loaded onto or carried to the ship ('Zeeschip') on which they were to be conveyed by sea. And in terms of s 47, cover on the insured goods continued until the ship, with her guns, munitions, equipment and appurtenances, arrived at the destination, and was there freely and safely discharged in full ('in het geheel'). Section 49 imposed a limitation on the duration of the cover by providing that insurers would remain liable for fourteen working days after the arrival of the ship at the destination, and no longer. However, when the ship was fully discharged earlier, the insurance contract terminated at such time ('verbintenisse van Asseurantie zal na die tijd ophouden'). Section 48 permitted the parties to arrange for cover to commence at an earlier or later time or for it to continue for a longer or shorter period.

Lastly, there were the provisions of the Amsterdam keur of 1744. The cargo policy in terms of the keur of 1744 and that of 1775 provided cover from the hour and day when the insured goods were brought alongside on the quay to be loaded onto the named ship or onto lighters for conveyance to that ship. The cover continued until the arrival of the ship at the specified destination and when the goods were freely and safely discharged on land there in an undamaged condition in the control of the insured or his authorised representative, on condition, though, that such discharge had to occur within fifteen days of the arrival of the ship, except if by lawful obstacle (which the insured would have to establish if necessary) such discharge was

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47 See again ch I § 4.2.3.2 supra.

48 In the Amsterdam keur of 1744 the opposite occurred. There was no reference to the undamaged condition of the insured goods in s 5 of the keur itself but the reference was retained in the model policy form. See infra.

49 The period of 14 working days was therefore the maximum permitted for the discharge of the vessel. Unlike earlier provisions and unlike the later equivalent s 5 of the Amsterdam keur of 1744, s 49 did not foresee any possibility of an extension of time in the case of any impossibility of timeous discharge. See Van der Keessel Praelectiones 1460 (ad III.24.9).

50 See eg Van der Keessel Praelectiones 1458 (ad III.24.8); Van der Linden Koopmans handboek IV.6.9 & 10 (also fourteen days at Dordrecht). See further Goudsmit Zeerecht 400 (noting that the period of four days in terms of s 11 of the keur of 1604 was regarded as too short and was extended to fourteen working days after arrival, or on earlier discharge); and Kracht 38.

51 See further § 1.3.2 infra.

52 This was a new proviso for Amsterdam and was probably taken over from the earlier Rotterdam keur of 1721.
This position was in broad terms confirmed by s 5 of the keur of 1744. The risk on cargo commenced for the insurers from the time that the insured goods were brought on the quay or bank from where they were to be loaded on boats, barks or lighters and to be brought on board the ships which were to convey those goods. And it lasted until such time as those ships arrived at the destination and the insured goods were again left or unloaded on the quay or bank. However, where the insured neglected to have the goods unloaded, or saw fit to use the ship instead of a warehouse for the storage of the goods ('ofte goet vonden het Schip in plaats van een Pakhuys te gebruyken'), the insurers' risk would terminate, at the outside, fifteen days after the arrival of the ship, unless necessity prevented the discharge during this time, which justification for the delayed discharge the insured would have to establish in the event of any claim on the policy ('het welke ingevalen van Rampen en Schaden sal moeten gedoeceert werden').

In conclusion, Roman-Dutch insurance legislation extended the cover on cargo in terms of a voyage policy beyond the general approach followed in determining the duration of the risk under the bottomry bond. Unlike the bottomry lender, the insurer was not liable in respect of the goods only for a loss on the voyage (that is, after their departure, and until 24 hours after their arrival), nor was he even liable only for a loss while the goods were on board the carrying ship (that is, from loading until their discharge). The period of risk and cover had been extended to a date and time prior to the loading and until after the discharge of the insured cargo. Not only carriage risks, and not only port risks, but also the risks of and incidental to loading were therefore cov-

53 The policy provided cover 'van de uur en dag af dat de voorsz. Koopmanschappen by U of UE Commis gebragt zullen zyn op de Kaye of Wal, om van daar geladen te worden in 't voorsz. Schip of Schuiten, Barquen of Lichters, om daar mede gevoerd te worden aan het boord van het voorsz. Schip, en sal geduren ter tyd toe, dat het voorsz. Schip tot als boven zal aangekomen wezen, en de voorsz. Goederen en Koopmanschappen zonder eenige schade of verlies aldaar gelost, vydyk en vredelyk op 't Land gebragt zullen zyn, in 't vermogen van u Geassureerde voorsz. of iemandt anders Commissie daar toe hebbende, mits dat de voorsz. ontlossinge geschiede binnen 15 dagen na 't arrivement van 't Schip, ter gedeesteerde staat, ten ware, dat door wettige verhinderinge of obstacule de lossinge in dien tyd niet hadde Konden geschieden, het welke in gevalle van ramp of schade bewezen zal moeten worden'.

54 See Van der Keessel Praelectiones 1458 (ad III.24.8) who observed that the reason for the proviso in s 5 was to prevent any tardiness on the part of the insured in taking his goods off the carrying ship. He noted further that apart from the difference in the period after arrival allowed for offloading (14 working days in Rotterdam as opposed to 15 days in Amsterdam), the effect of this proviso was also to fix a maximum permissible period, and that the insurance cover did not extend beyond an earlier discharge. Van der Linden Koopmans handboek IV.6.9 & 10 thought discharge in Amsterdam had to occur within 21 days as opposed to within 14 days as was the case in Rotterdam. Although the period of 21 days may have been the equivalent of 15 working days (but even that was unlikely, given that it would have assumed a five-day working week), s 5 did not speak of working days but merely of 15 days. As to s 5, see further Enschedé 96-97; Goudsmit Zeerecht 349.

Elsewhere the period permitted for discharge more sensibly depended on the size of the ship involved. Thus, art VI-18 of the Prussian Maritime Laws applicable at Königsberg drew a distinction and allowed six, ten or fourteen days according to the size of the carrying ship. See Magens Essay vol II at 191.

55 See further on this point, Bynkershoek Quaestiones juris privati IV.2.
1.3.2 Contractual Stipulations as to the Duration of the Risk in Terms of a Voyage Policy on Cargo

The regulation of the duration of voyage policies on cargo in the various Dutch legislative measures was, it would appear, always subject to an agreement to the contrary between the parties involved. As will be shown later, this freedom of contract existed also in the case of voyage policies on hull. It would appear, further, that the parties were free to deviate from the statutory rules even if the legislation in question did not specifically permit it.

The earliest indication of this appeared in s 13 of title VII of the *placcaat* of 1563. The first part of this section prescribed the duration of the risk in terms of a voyage policy on cargo. It appears to have assumed the absence of any agreement on the matter between the parties, for the second part of s 13 concerned the position where parties did in fact express themselves on the matter, even if only indirectly, by concluding an insurance 'from port to port' without mentioning, as did the model policy form in the *placcaat*, the discharge and landing (and, presumably, the loading) of the insured goods ('indien de asseurantie gedaen is vanden eenen Haven tot den anderen, sonder te spreecken vanden goeden te Lande te brengen'). Thus, Van der Keessel regarded insurance 'from port to port' ('de portu ad portum') as an exception to the rules for determining the termination (or, rather, the duration) of the risk because of the fact that in such a case it had to be assumed that the parties had expressed their intention to regulate matters differently.

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56 In this sense, according to Dorhout Mees *Schadeverzekeringsrecht* 558-560, marine insurance was in effect a form of transport insurance with the principal part of the transport being over the sea.

57 The present discussion will be concerned only with voyage policies on cargo. The principles apply equally to hull policies, though, and some examples of party autonomy as regards the duration of the risk in the case of such policies will be considered in § 1.3.3 infra.

58 See eg Van Zurck Codex Batavus sv 'Assurantie' par 16 who, in setting out the position in terms of the *placcaat* of 1563 and the Amsterdam keur of 1598 (both of which did not expressly allow any deviation) as well as the Rotterdam keur of 1604 (which did), remarked that the position as regards the duration of the risk in the case of marine insurance ('verzekering ter zee') applied unless otherwise agreed ('tenzy anders is geconditioneert'). Scheltinga Dicta ad 111.24.8 stated that the legislative provisions applied only if no other agreement was concluded by the parties concerned.

59 See again § 1.3.1 supra.

60 *Theses selectae* th 749 (ad III.24.8); *idem Praelectiones* 1458-1459 (ad III.24.8).

61 Insurance 'from port to port' will be treated shortly.
It appears to have been accepted in practice by the end of the sixteenth century that the legislative provisions as to the duration of the risk were applicable only in the absence of an alternative arrangement by the parties themselves.\textsuperscript{62}

More pertinently, s 11 of the Rotterdam keur of 1604 provided that the commencement and termination of the risk in terms of a voyage policy on cargo were governed by a stipulation in the policy on the topic ("volgens den text vande Police van asseurantie"), while the provisions it laid down in this regard were specifically stated to apply only in the absence of any such stipulation ("ende als de Police 't selve niet mede en brenght").\textsuperscript{63} Likewise, after ss 46 and 47 had provided for the duration (the commencement and termination respectively) of the risk on cargo and hull, s 48 of the Rotterdam keur of 1721 added the proviso that in policies on cargo or ships the parties were free to agree on an earlier or later commencement or termination of the risk ("tot eerder of later ingaan, of tot het langer of korter duuren van het risico, sal mogen worden gecontracteer").\textsuperscript{64}

Although there were no similar permissive provisions in the Amsterdam keuren, Van der Keessel\textsuperscript{65} thought it only logical that the same position would pertain there and that the same rule ought to be extended to Amsterdam. Contracting parties, he pointed out, ought to have a free choice in determining what risk the insurer took upon himself, and the legislative rules as to the duration of the risk applied only if it appeared that nothing else was intended by the parties.

There were numerous examples of instances where the parties had made their own arrangement as regards the duration of the risk. These were referred to by Van der Keessel as exceptions to the statutory rules.\textsuperscript{66} A few of these exceptional instances which occurred in practice in respect of voyage policies on both cargo and hull may be referred to here. As will become apparent from the cases referred to below, the main issue in many of them was the interpretation of the particular agreement reached between the parties on the duration of the risk.

The first and prime example of instances where the parties in fact agreed otherwise, occurred in the case of insurances simply 'from port to port' without any further indication of the duration of the risk.

\textsuperscript{62} Thus art 156 of par 5, title 11, part IV of the Antwerp Compilatae of 1609 (see De Longé vol IV at 264) declared that the specific provision it made for the commencement and termination of the risk was applicable unless the parties had right from the start made some other arrangement ("van den beginne aen tusschen partijen anders of voorder waere ondersproken"). See too Couvreur 'Zeeverzekeringspractijk' 194.

\textsuperscript{63} Bynkershoek Quaestiones juris privati IV.2 remarked that s 11 provided for the risk to run for the insurer as it was stipulated in the policy, and that the legislative rules were applicable only if there was nothing on the topic in the policy ("die 'er in de Polis staat uitgedrukt, en straks daar na beslist het, wat in Rechten gouden zal, wanneer 'er niets hier omtrent is uitgedrukt'").

\textsuperscript{64} See eg Van der Keessel Theses selectae th 747 (ad III.24.8); idem Praelectiones 1457 and 1459 (ad III.24.8).

\textsuperscript{65} Praelectiones 1457 (ad III.24.8).

\textsuperscript{66} Theses selectae th 749 (ad III.24.8); idem Praelectiones 1458 (ad III.24.8).
Insuring 'from port to port' appears to have been so prevalent in practice in the Low Countries in the sixteenth century, that it was already specifically provided for in s 13 of title VII of the placcaat of 1563. In the case of an insurance on such terms, the section stated, the risk commenced when the insured goods were on board the insured ship ('als die goeden in den geassureerden Schepe sullen zijn') and terminated when that same ship arrived in the destined port and was there moored in safety ('aldaer vast gelegen sal hebben in salvemente') for a period of 24 hours. Thus, in the case of an insurance on cargo 'from port to port', the insurer did not bear the risk of any loss occurring prior to the loading in the carrying ship and after arrival in the port of destination.

Despite the fact that this exceptional provision in the case of an insurance 'from port to port' was not specifically repeated in the placcaat of 1571, nor in any of the subsequent municipal keuren, the provision in s 13 was in a number of instances implicitly relied upon by the Hooge Raad in decisions, which will be considered shortly, regarding insurances concluded on such terms. From this it may be deduced that s 13 was still regarded as applicable in later centuries, or at least that the principle it contained was still recognised in insurance practice in the Netherlands.

67 As it was also elsewhere. Thus, in the Ancona cargo policy of 1567, discussed by Stracca De assecurationibus XII (commencement) and XIII (termination), the cover was stated to be 'ab portu Constantinopolitano ad portum usque Anconitanum'. Straccha thought (XII.2), eg, that the prepositions 'a' or 'ab' indicated a separation and that a loss at the place of loading was not covered. It is apparent from his discussion that much depended on the exact wording of the policy in each case as to precisely when the risk commenced and terminated. The importance of the wording of the policy in determining the duration of the risk also appears from Roccus De assecurationibus note 30.

68 And not, as ordinarily, from the moment when the goods were brought alongside. It would appear that the reference to 'insured' ship should have been to 'carrying' ship.

69 The risk terminated irrespective of the time when the cargo was discharged and in any event not at the latest only fifteen days after arrival.

70 See Goudsmit Zeerecht 247; Kracht 19 (who is of the opinion that s 13 permitted this variation of the printed clause in possible recognition of a settled usage in practice).

71 See generally eg Scheltinga Dictata ad III.24.8 who noted that the keuren mentioned only the insurance of cargo in general and not specifically their insurance 'van den een haven tot den anderen'. He thought that there was some contradiction between s 13 of the placcaat of 1563 and ss 12 and 35 of that of 1571 though since the latter appear to have provided differently for what was essentially also an insurance 'from port to port'. Scheltinga thought that s 13 and the measure provided for there would apply in the case of insurance 'from port to port' only where there was not any reference to the discharge or landing of the insured goods in the contract. If there was such a reference, the rule in s 13 did not apply (presumably because it was not a proper case of insurance 'from port to port') and the usual rules applied.

Van der Keessel Theses selectae 749 (ad III.24.8) explained that one of the exceptions to the rules (as to the termination of the risk on hull) was where the insurance was effected simply 'from port to port' and also (thus, the same qualification as was suggested by Scheltinga) where at the same time there was no insertion in the contract of any words designating the time of unloading of the vessel. As regards this exception, he thought, s 13 would appear still to be observed. See too idem Praelectiones 1458-1459 (ad III.24.8) where he noted that where the parties in Amsterdam eg expressly left out of their contract the words in the model policy of the keur of 1744 which referred to the commencement of the risk when the goods were placed alongside and the termination upon their discharge, and they simply concluded an insurance 'from port to port', a presumption existed that they had abandoned the rule of
Therefore, in the case of an agreement for insurance on cargo 'from port to port', the insurance cover on the cargo did not commence prior to the loading of the cargo on board the carrying ship and did not continue for longer than 24 hours after the ship's arrival, irrespective of whether or not the goods were then landed. The cover was accordingly of a more restrictive duration and clearly an insurance concluded on such terms was beneficial to the insurer.72

A practical illustration of insurance 'from port to port' (or 'from place to place') and of the meaning of 'arrival' in this connection73 appeared in a case before the Hooge Raad in 1722.74 Goods were insured from La Rochelle in France to the coast of the island of St Dominic at one or more places ('naar de Kust van St Dominico, op een of verscheide plaatsen'). The carrying ship arrived safely at the island, and discharged some of her cargo, but then continued sailing along the coast of the island when she and the insured cargo were taken by an English enemy ship and later declared prize. The insurer refused the claim on the policy and argued that he was relieved of the risk as soon as the ship had arrived safely at the island. However, the Raad rejected this defence. The wording of the policy contradicted this possibility, for it permitted the ship to touch at various places along the island's coast. And here it appeared that the ship had since her arrival at the island not yet departed from it, for the fleeing crew had reached the island's shore after the capture of their ship.

Another illustration appears from a Hooge Raad case in 1731.75 Goods were insured from Bruges to the river of the town of Nantes ('tot de Rivier van Nantes'), the Loire. The carrying ship arrived safely at the mouth of the river but due to the shallow water and sandbanks she could not approach the town itself, as in fact big ships never could. Her cargo was loaded onto two smaller vessels for conveyance to Nantes itself but the insured goods were damaged when they were shipwrecked between the mouth of the Loire and Nantes. The insurers denied liability, contending that they had taken over no risk other than that of a loss of the goods which could occur up to the mouth of the river and that here the ship had arrived safely at the river of Nantes where the risk

the keur. And nothing would then prevent the application of the regulation contained in s 13.

See also Enschedé 99 who confused the position in the case of an insurance 'from port to port' with the position in terms of the municipal keuren. The latter did not provide for insurance 'from port to port' but rather from quay to quay.

72 It may in fact have been cheaper too, although there is no direct evidence of that. Lybrechts Redenerend vertoog II.17.5 appears to have warned (presumably insured cargo owners) against this form of insurance. Included in the matters to be contained in an insurance policy, he noted, were the times when the insurance was to commence and to terminate, adding 'en niet van d'eene have tot d'andere te stellen; maar dat de goederen zullen moeten an land zyn gebragt'.

73 As to which see also the opinion of 1717 taken up in Barels Advysen vol I adv 24, discussed in § 1.3.2 infra.

74 See Bynkershoek Observationes tumultuariae obs 1819; Idem Quaestiones juris privati IV.11.

75 See Bynkershoek Observationes tumultuariae obs 2546; Idem Quaestiones juris privati IV.15. And see again ch VIII § 4.3 n372 supra where the decision was also considered in connection with the interpretation of the insurance policy.
had terminated. The Chamber of Insurance and the Schepenen Court of Middelburg held for the insured but the Hof van Holland held for the insurers. On appeal to the Hooge Raad, the minority inclined towards the insurers. They thought that although in terms of s 11 of the Middelburg keur of 1600 the insurers' risk continued until the goods were safely landed, this was not the position where the goods had been insured 'from port to port' ("van de eene haven tot de andere geassureert waren"), as was permissible in terms of s 13 of the placcaat of 1563. In such a case the risk terminated when the ship was 24 hours safely at anchor in the port or at the place to which she was destined. And in this case this had happened when the ship had arrived at the mouth of the Loire so that the risk had terminated.

That difficulties could also arise in determining when exactly a voyage had commenced, appeared from an unusual case which came before the Hooge Raad in 1740. At issue was the question when exactly an insured return voyage had commenced. When in 1728 the owner of a whaler received news that his ship had caught six whales in the Davis Strait, he took out an insurance on the blubber and whalebone ("op Walvis-spek en Baarden") at Amsterdam for the ship's return voyage from there to Amsterdam ("van de Straat Davis naar Amsterdam"). It turned out that the ship, having caught the whales, returned along a westerly route ("West-ys") to fish some more and that she later arrived at a bay to the east of the Strait ("Zuyd-baai") where she had her equipment repaired with the intention of sailing from there to fish some more. On leaving the bay, the whaler was lost, although part of her cargo was saved. The insurers refused payment of any compensation for the damage suffered. The courts a quo all held for the insurers. While it was common ground in the appeal before the Raad that where an insurance was on terms such as those here, the insurance provided cover only against risks which might materialise on the return voyage ("alleen geschied is voor de risico, die op de te rug komst mogt voorvallen"), there was a difference of opinion as to when the ship had to be taken as having commenced her return voyage.

76 Which was the equivalent of s 4 of the Amsterdam keur of 1598.

77 However, the majority of the Raad, on an interpretation of the policy, inclined in favour of the insured, taking the reference to the river here not as indicating any termination of the risk but merely as indicating the place beyond which the carrying ship could not proceed. They noted that there were many instances where a particular town was referred to not by name but by its port or river, and that, in any event, no distinction was drawn in the rate of premium between an insurance to a town and an insurance to its port or river. Bynkershoek Quaestiones juris privatii IV.15 thought this interpretation not very convincing. More persuasive, he thought, was the fact that in the case of an insurance on goods, the insurers always remained at risk until the goods had arrived at the town to which they were destined, and that that should also have been the case here. And Van der Keessel warned that one should be careful not to deduce any general rule from this decision as there was no ambiguity in the name of the place mentioned to where the insurance was expressly and specifically concluded (see Praelectiones 1462 (ad III.24.6)).

78 See Bynkershoek Observationes tumultuariae obs 3173; idem Quaestiones juris privatii IV.17.

79 Which was named after English explorer John Davis who had discovered it on an expedition to Greenland in 1585.
voyage. The majority of the Raad agreed with the view that a vessel must be taken as having commenced her return voyage when she had finished fishing and sailed directly for her home port. They held that if, on leaving the bay, the crew of the whaler in question had decided to sail directly for Amsterdam, it could have been said that her fishing had ended even though she may thereafter have caught any whales she happened to come across. But in this instance they had purposely decided to proceed by the indirect western route where whales could be caught in larger numbers. Accordingly she had not ended her fishing activities at the time of her loss, her return voyage had not yet commenced, and the loss did not concern the insurers.

A second example of a special arrangement as to the duration of the risk occurred in Dutch insurance practice where the parties agreed on the risk to commence at a different time and from a different place than where the cargo was loaded. This often occurred when the insured decided to insure his ship or cargo only after it had already departed on the voyage. He would then, to save on the premium, stipulate for the risk to run only from some intermediate port where, according to information he had received, the insured or carrying ship had arrived, the insurer being expressly absolved from liability for any earlier loss or damage.

Three opinions, all incidentally dating from 1665, may be referred to by way of illustration of this exception. They also show nicely that the duration of the risk, of the voyage and of the insurance contract did not always coincide but could be completely different, and also that the risk did not necessarily have to commence at the place let alone at the time of loading.

The issue, in each of these opinions, was whether, if the ship was not or had never been in the port from where the risk on the insured cargo was stipulated to commence, but for example merely sailed past that port, the insurance was in fact effective. Two of the opinions thought no.

Eighteen Amsterdam merchants gave evidence that a vessel’s return commenced when her fishing had ended, and also on this point the parties were in agreement. But the insured contended that in the present case the fishing had ended after the six whales were caught. Further, he suggested, after the repairs to the equipment had been effected, the crew had decided to return home, and that it was an accepted usage for ships returning from the Strait to proceed along the westerly route and to catch some fish there without actually intending to remain in the region for long. 24 merchants, commanders ('Kommandeurs') and others qualified in the fishing trade gave evidence of this usage. Nevertheless, the question remained whether this excursion for the purposes of fishing took place at the risk of the insurers. The eighteen merchants declared that the insurers were liable for any loss on the return voyage wherever such loss may have occurred, but they thought that the return voyage commenced only when the ship, destined for Amsterdam after the termination of her fishing, sailed directly for Amsterdam and not when, as here, she deviated for some further fishing.

In the case of an insurance on cargo, it will be remembered, the risk ordinarily, and in the absence of any agreement to the contrary, commenced in terms of the legislative prescripts at the time when and at the place where the insured goods were brought alongside for such loading.

As to insurance after departure, see § 2.2 infra.

See generally Van der Keessel Theses selectae th 734 (ad III.24.6); idem Praelectiones 1450-1451 (ad III.24.6).
The first of them advised that the insurers were not liable where the insured ship was never in the place from where (and when) the risk was stated to commence ('plaats, waar van de assurantie een aanvang soude nemen'), because then the risk never attached and the contract never came into operation. The second of them likewise held the insurers not liable where the carrying ship never arrived at and sailed from the place from where the risk was to commence because, as a result, the insurance and risk never commenced and attached ('de ... Assurantie ende het risico noyt eniger aanvang gehad, ofte begonnen te lopen'). Because, in this case, there was not a place from where nor a time from when the risk could be said to have commenced, it in fact never attached and there was consequently no risk or insurance at all ('er [kan] geen Assurantie ofte risico ... sijn, daar geen begin ofte aanvang van het selve en is'), the existence of such risk being essential to the insurance contract ('het

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84 See Nederlands advysboek vol III-168 (1665). It concerned an insurance on a ship (but the issue would have been no different had it been an insurance on goods) from Danzig (Gdansk) and surroundings to Amsterdam. A declaration had been added to the insurance that according to information, the insured ship was lying in fresh water ('het Soet water') at Danzig (probably the river Wisla which flows into the Baltic there) so that the insurers were only to bear the risk from her position there to Amsterdam and would incur no liability for any loss occurring before her arrival in the fresh water ('Werd nader verklaart, dat volgens advijs uit Vlekkeren, van den 25. October laatsleden, het Schip, by de voorsz. police geexpressere, in het soet water lag, so dat de Assuradeurs de risico maar lopen, van het soete water hier tot Amsterdam, ende indien enige Avarie op het voorz. Schip soude mogen gevallen hebben, voor de aankomste van het Schip, in het soete water, de Assuradeurs van de selvige vry sijn').

It subsequently appeared that the ship was never in the place at Danzig (ie, in the fresh water there) from where insurance was to commence but had in fact bypassed it after which she was lost on the voyage to Amsterdam.

85 Additional reasons why the opinion advised that the insurers were not liable were, firstly, because the stipulation in question additionally excluded any liability for loss or damage occurring prior to the ship's arrival at the place of departure ('voor en al eer, ja sonder dat het Schip in het soet water gearriveert ofte aangekomen is'). Here the ship never arrived there so that the insurers were not liable at all. Secondly, they were not liable because of the fact that the ship was insured not on a voyage from Danzig to Amsterdam but on one from the fresh water at Danzig to Amsterdam. The latter voyage was in fact never undertaken by the insured ship and in the case of insurance, the opinion noted, it was certain and beyond doubt that insurers incurred liability only for a loss occurring on the voyage agreed upon and described in the policy ('de Assuradeurs aan geen andere reizen schaden en ongeval gehouden sijn, dan in die alleen, dewelke in de police van assurantie voorgesteld ende gecomprehendeert sijn'). See further ch XIII § 1.2 infra as to the effect of a change of voyage in the case where the insured ship never sailed on the agreed voyage.

86 See Nederlands advysboek vol III adv 169 (1665). Here there was an insurance on a cargo of goods from the mentioned in the policy where the ship loaded that cargo. Subsequently the insured decided to take out a further insurance on the goods, but not wishing to pay another full premium and having received notice that the carrying ship had departed a long time ago and had almost completed her voyage, he had a clause inserted into this second policy that he had received notice to the effect that the carrying ship had arrived at a particular intermediate place and that the insurers were to run the risk 'from' that place only and were not to be liable for any loss which might have occurred prior to the arrival of the ship there.

It later appeared that the ship never arrived at but had bypassed the intermediary port mentioned in the second policy as the place from where the risk was stated to commence. The issue on which the opinion was requested was whether the insurers on the second policy were liable together with the earlier insurers for a loss which had occurred after the vessel had sailed past the intermediary port.
welke nogtans is van de essentie der Assurantie, die sonder de tijd of plaatse van haar begin of aanvang niet kunnen bestaan'). Accordingly, the opinion concluded, the insurance was null and void ('dat alhier geen Assurantie en is').

The third opinion, though, expressed a different view and followed an approach and interpretation more favourable to the insured. It thought the place indicated in the policy here was not the place where the goods would be loaded and where the ship of necessity had to be, but merely a place on the voyage with reference to which the commencement of the risk would be determined. By implication, the opinion appears to have suggested that only if the ship did not sail past that place so that the time of the

87 The opinion noted that on general principles (for which reference was made to Santerna De assecurationibus IV.56 and Roccus/Feitama Gewijsdens resp 2 and 29), the insurance here was indeterminate and therefore null and void ('is onbepaalt, ende indetermineert, also niet aangewesen konnende worden, hoe ofte wanneer de selve sijn aanvang genomen heeft gehad, daar nogtans in Regten kennelijk, ende volgens de style Mercature resoluit is, dat in de terminate stipulatien ende Assurantien sijn nul ende van geender waarden'), that is, void for vagueness.

It seems that a further reason why it was thought that the insurers here were not liable was because of the arrival of the ship at and, presumably more specifically, her departure from the intermediary place in question, was regarded as a suspensive condition ('een conditie, of ind/en") for the commencement of the insurance cover. If the condition was not met (and could, incidentally as result of a loss, no longer be met), the contract never came into operation.

88 See Nederlands advysboek vol I adv 43 (1665). Here the owners of goods loaded at Bilbao in Spain wanted to effect an insurance for their carriage from there to Hamburg. Having heard from their correspondent that the carrying ship had arrived at the island of St Martin, the owners had a clause inserted in the policy to the effect that according to advice they had received, the ship was at St Martin. The policy was offered around in Amsterdam to various insurers who refused to underwrite the risk because of rumours there that the ship had apparently suffered a loss at Bordeaux where she had touched en route to Hamburg. (The ship would have entered Bordeaux before she arrived at St Martin.) The owners therefore had added to this clause a further stipulation that the insurers were to bear the risk only from St Martin, and that if any loss had occurred before the arrival of the ship there, they would not be liable for it. In this form several Amsterdam insurers underwrote the risk for a large amount.

It subsequently appeared that the carrying ship had in fact not cast anchor at St Martin but had, because of a favourable wind, continued on her voyage, merely sailing close by the island. Subsequently, on entering Dunkirk, she was stranded, but the insured goods were salvaged and brought to Ostend in a damaged condition.

The insurers denied any liability for this damage because the carrying ship was never at anchor at St Martin as had been declared in policy. They argued that because she was never at St Martin from where the risk was to commence, they were in fact never at risk.

The insured argued for a different interpretation of the policy, though. They suggested that the clause was inserted merely to disclose to the insurers the information they had received regarding the whereabouts of the carrying vessel. The policy did not state for a fact that the ship was at St Martin but merely that that was so according to information they had received. Furthermore, the addition to the clause was inserted not to declare that the risk was only to run from St Martin but merely to relieve the insurers of liability for any loss (of which a rumour did the rounds) which might have been suffered earlier at Bordeaux. If, they pointed out, the risk commenced at St Martin, it would have been unnecessary to have relieved the insurers of liability for an earlier loss because, legally, insurers were not liable for a loss occurring before the arrival of the ship at the place where the insurance was to commence. See further § 2.4 infra as to this last point.

89 And which place, being the one from where the risk ordinarily commenced, the insured of necessity had to express in his policy in terms of s 3 of the Amsterdam keur of 1596 (see again ch VIII § 4.2.3 supra) and which had in fact been expressed in the policy here.
commencement of the risk could not be fixed, would the insurers not have been liable.
A further important factor here was the fact that there was no increase in the risk for the
insurers concerned.90

The latter view may have been preferable, especially in the case of an insurance
on cargo where the insured owner had little or no control over the actual movement of
the ship carrying the insured goods and the way in which she performed her voyage.

The application of the rules ordinarily applicable in determining the duration of the
risk could also be excluded otherwise than by an agreement between the parties. Spe­
cial circumstances, and more specifically the conduct of the insured, could also have
influenced the duration of the risk and have created an exception to the position
generally provided for by the applicable legislation.

One such example appears from an opinion delivered in 171791 which illustrated
that a ship and her cargo may in particular circumstances be taken as having arrived
and the risk as having been terminated even though there was in truth and fact not
actually any arrival as such.92 An insurance was concluded on a ship and goods for a
voyage from France to Amsterdam. The insured and carrying ship arrived safely out­
side the port of Amsterdam, in the roadstead at Texel (‘binnen Texel tot onder de
Vlieter’). While lying at anchor there, she and her cargo were redirected to a destination
in the Baltic Sea. As a result, the ship never entered her destination (and the place
specified as such in the various policies), the port of Amsterdam, nor discharged any
of her cargo there. After certain arrangements had already been made for her further
voyage,93 so that no doubt existed as to the intentions of the insured, but before she
could actually depart on it, a storm came up and the ship and her cargo sank.

According to the opinion, the first insurers were not liable on their respective
policies, despite the fact that the insured vessel had not yet actually arrived at her
destination so that, in terms of the maritime law (‘Zeerechten’) and according to the
provisions of the respective policies, the risk had strictly speaking not yet terminated.94
Other considerations applied in this case to absolve the insurers from liability.

The factor relevant for present purposes was the view expressed in the opinion
that, on general principles, this was an instance where the indisputable rule of the fic-

90 The loss had not occurred at or near St Martin but long after the ship had passed by the island en route
to Hamburg. It was irrelevant whether the carrying ship had in fact ever cast anchor at the island or
whether she had sailed past it because of a favourable wind. The risk which the insurers had taken over
was not increased and was, if anything, in fact probably reduced by virtue of the ship merely passing by
the island.

91 See Bareis Advysen vol I adv 24. See also Van der Keessel Praelectiones 1458-1459 (ad lll.24.8).

92 As to the meaning of ‘arrival’, see too Hooge Raad decision in 1722 (see Bynkershoek Observationes
tumultuarie obs 1819; idem Quaestiones juris privat IV.11) discussed at n74 supra.

93 For example, both the ship and the cargo were insured for the new voyage by further policies, and the
ship also took on a fresh crew.

94 As has already been explained in respect of cargo and as will be explained shortly in respect of hull,
the risk terminated in Amsterdam, as also generally elsewhere, only on ‘arrival’ and discharge of the
 carrying or insured ship.
tional fulfilment of a condition would apply. The actual arrival of the ship having been prevented by the insured, she had to be taken as having arrived from the time when such prevention had occurred. And that being the case, the ship here must be considered as having arrived and discharged her cargo so that the risk as regards both the ship and the goods terminated immediately. Obviously there were also other reasons why the insurers were not thought liable, namely that here a change of the voyage had been made by or had occurred with the consent of the insured, something which immediately relieved the insurers of liability.95

There was also the view that the risk had already commenced for the insurers of the voyage from Amsterdam to the Baltic96 and that, for that reason and because double insurance was not permitted, the later insurance must be taken to have annulled the overlapping earlier insurance.97 It may be mentioned in passing that similar considerations of overlapping, consecutive coverage or a gap in coverage could also have arisen in the case of an insurance for an out and return voyage because the one insurance did not necessarily terminate precisely when the next insurance commenced.98 It was pos-

95 As appears from the facts, such a change of voyage did not actually have to be made or the decision to do so implemented. The mere intention to do so was sufficient if that could clearly be established, as it could in this case where certain steps had already been taken to implement the decision. See further ch XIII § 1.2.4.2 infra where the effect of a change of voyage will be considered in more detail.

96 According to the ‘Costumen van de Zee’, the opinion thought, insurance commenced when the ship arrived or was at the place of departure and specifically when the cargo was already on board, as was the case here (reference was in this regard made to s 13 of the placaat of 1563, s 4 of the Amsterdam keur of 1598, and the opinion in Nederlands advysboek vol I adv 135 (1666)). While it may have true been as far as cargo was concerned (in respect of which the risk generally commenced prior to loading, namely when the cargo came alongside), the opinion was not necessarily correct as far as the risk on hull was concerned. That depended on the agreement between the parties, and if the insurance was concluded ‘from’ Amsterdam as here, the risk on the vessel only commenced from time when she departed from there (as appeared from the opinion in Nederland’s advysboek vol I adv 135 (1666). See § 1.3.3 infra.

97 The opinion thought it irrefutable ‘dat door die nieuwe en nadere Assurantie op de voijage na de Oostzee de eerste Assurantie geheel en al is gesteild geworden buiten allen effecte’. This point, too, seems doubtful on two grounds. First, on the principles relating to double insurance, if that was what the overlapping insurances in this case in fact amounted to. Over-insurance was null and void to the extent of such over-insurance and in the case of over-insurance by double insurance, the first insurance was valid to the extent that it was not over-insurance; second and further insurances were valid only if the first insurance was insufficient and then only to extent that they were required to provide the insured with insurance to the full value of the object of risk. See further as to over-insurance ch XVIII § 4 infra. Secondly, it is doubtful even on the facts of and the assumption made in this case. If the first insurance terminated immediately when the decision was taken to change the voyage, which decision was manifested by the conclusion of an insurance for a further voyage, it no longer existed at time when such further insurance was concluded and the risk in terms of it commenced. Accordingly no question of either double or even mere overlapping insurances could have arisen here.

98 Thus, in an opinion in 1697 (see Barels Advysen vol I adv 19) which concerned the return of the premium for the absence of risk (see again ch XI § 6.2.1 supra), it was thought that the risk on goods shipped on the outbound voyage continued until those goods were discharged while the risk on goods on the return voyage commenced from their loading and continued until their safe arrival at the home port. The opinion concerned an insurance concluded in Middelburg so that, strictly speaking, in terms of a 11 of the Middelburg keur of 1600, the risk on the cargo terminated when the cargo arrived and was discharged at the destination and commenced when the return cargo was brought alongside for loading on the return voyage. In this case the out and return voyage were regarded as two separate and divisible voyages and because no return cargo was loaded, the premium for the return voyage was considered to
sibly to avoid such questions that s 5 of the Amsterdam keur of 1744, at least in respect of insurances on hull, declared the out and return voyages to be treated as a single voyage for purposes of determining the duration of the risk.99

1.3.3 The Duration of the Risk in Terms of a Voyage Policy on Hull

Earlier sixteenth-century insurance placcaaten made no provision for the duration of the cover in the case of an insurance on hull.100 This may well have been because of the relatively lesser occurrence and thus importance of hull insurance and also because of the fact that the duration of the risk on ships may in practice commonly have been left for agreement between the parties and, in particular, to have been insured 'from port to port'.101

In Antwerp customary law, though, the situation was provided for. The risk on hull commenced when the ship weighed her anchor and set sail to commence her voyage ('aost schip sijnen ancker licht ende tsell optrecket om de reijse aen te nemen'), and terminated when the ship had arrived at her destination and had been there at anchor or in port for 24 hours102 without hindrance ('sonder be leth'),103 unless, as was usual, it be returnable. Strictly speaking, therefore, the insurer could be at risk in respect of both insurances at the same time, but such would not be over-insurance or double insurance because of the fact that different objects of risk were insured by the two policies.

99 See § 1.3.3 infra.

100 Thus, the placcaat of 1563, which provided for the duration of the risk on a cargo policy, contained nothing on the duration of risk on a hull policy. See Goudsmit Zeerecht 247.

101 Thus a court in Bruges in 1458 in Pierre Noël v Pierre de Rabata accepted the principle that an insurer was not liable if the ship sank in port before sailing. See Gilliodts-van Severen Cartulaire vol II at 74-75; De Roover 'Early Examples' 199.

De Groote Zeaassurantie 14 refers to an insurance case before the Bruges Schepenen Court in 1459 in which the insured argued that the ship had departed from the port of La Rochelle to Flanders and was then lost, so that the insurance had attached (was 'gevallen'). The insurers argued that ship did not depart from the port to commence on her voyage but did so to avoid being damaged in port by a storm which had arisen. She had, eg, not hoisted her mainsail, and at the time of that departure there was a contrary wind so that she could not have commenced on her voyage. On the evidence before it, though, the Court held that the insurance had in fact attached and held the insurers liable on the policy.

102 This period of 24 hours after her arrival was no doubt introduced in the customary insurance law in Antwerp, as elsewhere, properly to separate the actual arrival of the vessel from the termination of the risk and to avoid disputes both as to exactly when a ship had 'arrived' and as to losses which were inflicted at sea and only finally materialised in port, eg a leaking ship entering port and sinking there.

103 This appears to have meant the same as to reference to 'safe arrival' in the case of cargo policies. See again § 1.3.1 n47 supra.
was otherwise agreed.\textsuperscript{104}

Shortly after the promulgation of the first Amsterdam municipal regulation of insurance in 1598 and just before the virtually identical Middelburg \textit{keur} of 1600\textsuperscript{105} was promulgated, an opinion was requested on the duration of the risk on a hull policy concluded in Middelburg.\textsuperscript{106} The insurance, concluded in November 1598, was stated to be in terms of the Antwerp customary law and for a voyage from Middelburg to a named port in Spain. The view was expressed that the insurer was liable for a loss which had occurred some half an hour after the arrival of the insured ship in the roadstead at her destination and while she was still busy striking her sails and casting her anchors. Reliance was placed on the analogous position in terms of the \textit{placcaat} of 1563\textsuperscript{107} in the case of an insurance on cargo \textit{from port to port} where the risk did not terminate immediately upon but only some time after the ship’s arrival.\textsuperscript{108} Further sup-

\textsuperscript{104} See art 293 of par 9, title 11, part IV of the Antwerp \textit{Compilatae} of 1609 (see De Longé vol IV at 322. In terms of art 294, in the case of an insurance made on a round voyage (\textit{gaens ende keerens}), eg to India or the coast of Guinea, and from one port to another, the risk commenced for the account of the insurers from the time that the anchor was weighed and the sail hoisted, continued during the whole voyage, also while en route the ship loaded and discharged (thus, discharge and loading in the turn-around port was also covered), and terminated when she again arrived in the agreed (original) port and had there been at anchor for 24 hours, also in this case unless the parties had agreed otherwise. See further Mullens 58-59.

\textsuperscript{105} Which, though, appears not to have had any model policies appended to it.

\textsuperscript{106} See \textit{Hollandsche consultatlen} vol I cons 284 (c1598).

\textsuperscript{107} The position in terms of Antwerp customary law, although similar, was not mentioned.

\textsuperscript{108} This was apparently an important element of the insurance here. See again § 1.3.2 supra as to insurance on cargo \textit{from port to port} See too La Leck \textit{Index} sv ‘insurance’ who explained this opinion by stating that the period of validity of an insurance policy depended on the wording of the policy, but where a marine insurance covered the risk between two named ports and the ship was seized as she cast anchor at her destination, the policy was held to be still in force.

\textsuperscript{109} In the present case the ship was insured for a voyage from Middelburg to Santa Lucia in Spain, the latter being at the time an enemy port. The policy in question referred to the law of Antwerp ('de \textit{Police van Antwerpen}'). The insured ship arrived at the roadstead of Santa Lucia in December and as soon as she had cast her anchor, barely half an hour after her arrival and while the crew was still busy fixing the ship between two anchors ('\textit{te vertuyen}'), she was arrested and later confiscated.

The insurer argued that on the arrival of the ship in the roadstead of Santa Lucia, he was relieved of liability and that the subsequent loss therefore did not concern him. The insured argued that ship must first have been alongside a quay or at another usual berth for period of at least 24 hours before the risk terminated. That had not happened here so that the insurer was liable.

The opinion was based on the Antwerp law referred to in the policy. However, in the \textit{placcaat} (of both 1563 and 1571) and its customary model policy there was nothing on the duration of the risk on hull. Only the duration of the risk on cargo was treated. But, the opinion pointed out, in s 3 of the \textit{placcaat} of 1563 it was said that when one wanted to insure (presumably a ship), one could do so according to the form and substance of the model policy on cargo provided in s 2. And while nothing was specifically said of ships, one had to deem the insurer here to have been liable to bear the risk of the ship for as long as an insurer bore the risk in terms of that model policy on cargo. Accordingly, the argument continued, the duration of the risk on hull, as on cargo, terminated upon the arrival of the ship and (as prescribed by s 13 of the \textit{placcaat} of 1563 in the case of an insurance \textit{from port to port} (see again § 1.3.2 supra), as this insurance was because of there being no mention of any discharge of her goods), after she had been safely at anchor for 24 hours. And because in this case the insured ship had not been safely at anchor for 24 hours after her arrival, the insurer was liable. In effect, the opinion concluded, there was no safe, unhindered arrival here merely by reason of the fact that the cargo was brought to the destination; the
port for this view was found in the analogy with the position in the case of the bottomry bond.\footnote{110}

The hull policy in terms of the Amsterdam \textit{keur} of 1598 provided insurance for the ship from the hour and day specified until she had arrived with her guns, munitions, equipment and appurtenances at the specified place.\footnote{111} Interestingly enough this was not a pure voyage policy in that only the termination of the cover was linked to the voyage, the commencement on the face of it apparently being linked only to a specific agreed time, presumably that of sailing.\footnote{112} The Amsterdam \textit{keur} of 1598 contained no substantive provision on the matter, and dealt only with the duration of cargo policies.\footnote{113}

In 1666 a foursome of opinions were delivered in Amsterdam on the same set of facts concerning the duration or, more specifically, the commencement of the risk under a hull policy,\footnote{114} a matter seemingly left to the agreement of the parties by the Amsterdam Legislature. A ship was insured on 23 November 1665 against all risks on a voyage 'from' (\textit{van}) Amsterdam to Lisbon. She was lost in a storm on 5 December of the same year. The insurers argued that the insurance risk had not commenced because at the time of her loss, the ship was still lying in the roadstead outside Amsterdam, not having finally weighed her anchor and proceeded to sea. The risk on insured ships, they contended, commenced only after the anchor had been weighed and the vessel had proceeded to sea; the risk did not run on lay or loading days but only on sailing days.

This argument was rejected in the first of the four opinions as contrary to accepted law and as in any case not being in accordance with the clear wording of the insurance contract. Legally the risk on a ship commenced, apparently by analogy to position in the case of cargo, when the ship arrived in port or was lying at anchor in the

\footnote{110} The opinion noted that the contract here shared some of the characteristics of bottomry, as appeared also from the reference in s 20 of the \textit{placcaat} of 1563 to the insurance contract and the bottomry contract. In the case of bottomry the risk was for the account of the moneylender for as long as and until the secured ship had been at anchor alongside the quay or in port for at least 24 hours. This was in accordance with notorious mercantile usage. See too eg the bottomry bond considered in the opinion in \textit{Hollandsche consultatien} vol IV cons 111 (1809), which bond provided for repayment of the loan in the case of the safe arrival of the ship at Amsterdam if she had safely arrived there and had been at anchor for 24 hours.

\footnote{111} The relevant stipulation read: \textit{'vander uyre ende dach af dat ... [?] ter tijl toe 't voorsz Schip, met Geschut, Munittle, gereetschappen ende toebehooren van dien, gekomen sal wesen tot ... toe.'}

\footnote{112} It was therefore a mixed policy, from a specified certain time until the completion of a specified voyage. See again § 1.2 no supra as to mixed policies.

\footnote{113} Thus, Grotius \textit{Inleidinge} III.24.8 was concerned with cargo policies only, even though he did not say so.

\footnote{114} See \textit{Nederlands advysboek} vol I adv 135, 136, 137 and 138.
roadstead or at the place from and at the time when the insurance was concluded.\textsuperscript{115} Here the contract expressly and clearly provided that the insurance was concluded on 23 November and specifically from Amsterdam, thus providing conclusive evidence of the time when and also of the place from where the risk was to commence.\textsuperscript{116}

The second opinion agreed with this reasoning,\textsuperscript{117} merely adding that while the policy expressly provided that the insurance was on a named ship and ‘from’ Amsterdam to Lisbon, it could be controversial whether the insurers were liable for a loss if the ship was still at anchor in Amsterdam and was then lost.\textsuperscript{118} But in this case there was no dispute as to the day of the loss, since the ship clearly had departed from Amsterdam and had sailed some miles to the roadstead. The insurance was concluded from Amsterdam to Lisbon, and all losses occurring in between (‘alle periculen die soude voorvallen tusschen het zeylen van Amsterdam, en het arriveren tot Lissabon’) would be for the account of the insurers. It was trite that the insurers bore the risk from the time when the ship started sailing (‘van begin, dat het schip maar begint te navigeren, de periculen tot lasten van de Assuradeurs komen’), and therefore as soon as the ship departed from Amsterdam, even if she was not yet under sail or at sea, the insurers were at risk in this case.\textsuperscript{119}

Thus, while the commencement of the risk in the case of a ship was left to an agreement between the parties and while no legislative provision was apparently concerned with the case where no such agreement was reached, the opinions of 1666 show that when a ship was insured ‘from’ a particular place,\textsuperscript{120} the insurer was at risk when such ship commenced her voyage from that place, even if she was not yet at sea

\textsuperscript{115} Reference was made in this regard to s 3 of the \textit{placcaat} of 1563.

\textsuperscript{116} The opinion also rejected the argument that insurance on ships ‘soude gaan alleen over seylende ende niet over leggende of ladende dagen’. The reason was that a distinction had to be drawn between insurances on ships and insurances on cargo, even though in the \textit{placcaat} of 1563 and in the other laws no distinction was drawn between them according to their nature.

\textsuperscript{117} As did the third and fourth opinions which, though, added nothing of substance.

\textsuperscript{118} The reason being, it was said, that many argued (in this regard reference was made to Straccha \textit{De assecurationibus} XII.2 and the authors referred to there: see again § 1.3.2 n67 supra) that the word ‘from’ (‘van’, ‘ab’ in Latin) denoted some separation, and therefore that where the insurance was concluded ‘from’ any place, no risk was run (‘geen risico werd gelopen’) otherwise than after a separation and departure from that place.

\textsuperscript{119} The opinion referred to the insurers’ defence that they were not at risk before the time the ship was at sea (‘\textit{In Zee lopen}’) as a stupid subterfuge (‘\textit{die onnosele uitvlugt}’), as contrary to the written law and the \textit{placcaaten} and the \textit{costuymen} on the topic of insurance, and also as contrary to the contract here which provided cover not from Texel (in the roadstead of Amsterdam) or from the ship’s taking to sea (‘\textit{het gaan in zee}’), but from Amsterdam itself.

It was also irrelevant that the ship here did not ship any or all of her cargo at Amsterdam, for the insurance was on the ship and on the ship only, and such an insurance could commence even if at the time of such commencement all the goods had not yet been shipped.

\textsuperscript{120} As opposed to, eg, ‘at and from’ a particular place, in which case the risk would presumably have attached even prior to the departure, either at the time when the insurance was concluded (if the ship was already there) or on her subsequent arrival there.
and en route to her destination. Accordingly, a loss suffered on leaving the port, or while waiting in her roadstead for a favourable wind or a convoy, would have been covered.\footnote{La Leck Register sv 'Assurantie' patently misread these opinions when he referred to them as authority for the statement that an insurance on a ship commenced when the insured ship arrived or cast anchor in port or in the roadstead or in the place from where the insurance was to commence. It is against this background too that the view must be read of Boey (Woorden-tolk, sv 'Police van Assurantie') who stated that the insured ship was not taken as having left ('gehouden voor vertrokken') before she had proceeded beyond the estuaries or the beacons indicating the outer limits of the port ('het buiten Gaats is geraakt en de Tonnen of Baaken is gepasseert').}

In Amsterdam the duration of the risk on an insured ship was treated in the hull policy in terms of the amending keur of 1688 in a manner virtually identical to that in which it was treated in the keur of 1598. However, now the risk was stipulated to terminate upon the arrival as well as (and this was new) upon the complete discharge of the insured ship.\footnote{The relevant stipulation read: 'van de uure en dag af, dat ..., ter tyd toe, dat het voorsz Schip, met Geschut, Muntie, Gerestschappenen en toebehoren van dien, gekomen sal wesen tot als boven en geheel ontlad sal zijn'.} It is uncertain whether this discharge had to take place within any specified time, for example within the fifteen days provided for in s 13 of the placcaat of 1563 in the case of an insurance on cargo.

In the Rotterdam keur of 1721 the duration of the risk in terms of hull policies was specifically dealt with.\footnote{See eg Enschedé 94.}

In terms of s 47, the cover in the case of an insurance on a ship continued, as it did in the case of an insurance on cargo, until the ship with her guns, munitions, equipment and appurtenances had arrived at the destination, and had there freely and safely discharged her cargo in full ('en aldaar vry ende veylig in het geheel zal zijn ontladen'). In this regard, as also with insurances on cargo, s 49 permitted a maximum period of fourteen working days for the unloading of the ship, the cover terminating on an earlier discharge. And again as in the case of an insurance on cargo, s 48 permitted the parties the freedom to stipulate in their contract for an earlier or later commencement or termination of the risk on the ship.

Interestingly no provision was made in the Rotterdam keur of 1721 for the commencement of the risk on hull, s 46 specifically dealing in this connection with the risk on insured goods only. The hull policy provided by the keur of 1721, while confirming the moment of the termination of the risk provided for in s 47, appears to have left it to the parties to stipulate the time of the commencement of that risk.\footnote{The hull policy provided for Insurers to bear risk 'van de dag ende uure af, dat ..., ter tyd toe, dat het voorsz Ship ..., met Geschut, Munitie, Gerestschappen, en ende Toebehoren van dien gekomen zal wesen tot ..., ende Circumjacentien van dien, ende geheel ontladen zal zyn'.} It was uncertain therefore, in both Rotterdam and Amsterdam, what the position would have been had the parties neglected to come to some agreement on this matter or if they had failed to state their agreement in the policy.
In 1729 the Hooge Raad was confronted by a novel question concerning the commencement of the risk on an insurance on hull. An insurance was concluded at Rotterdam on 18 October 1721 on a ship and her cargo for a voyage from the Spanish town of Nerva and surrounding places to Amsterdam. As they were free to do, the parties added a stipulation to the policy that the risk was to commence from the time when a start was made to equip the ship for her voyage ('de risico zoude open van de uur en dag af, dat het schip zoude hebben beginnen te equipeeren'). Lying at Reval at the time, the ship in question sailed in ballast to Nerva where she was to ship her cargo. On her arrival at the river mouth ('de Zee-mund') of Nerva, some three miles from the town, she cast anchor and preparations commenced for the intake of her cargo. The very next day she was stranded in a storm. A claim was instituted against the insurers for the expenses incurred in refloating her.

On appeal against the decisions a quo which had gone against them, the insurers raised three arguments. Firstly they contended that the storm here had arisen before the ship had arrived at Nerva, and that they were at risk only 'from' Nerva. However, the Raad noted that it appeared that loaded with a cargo, the ship could not come close to nor depart from Nerva due to shallow waters, and that cargoes were therefore customarily ('een constant gebruik') loaded and discharged at the mouth of the river. And even if this was not the case, the insurance here was 'from' Nerva and her surrounds, ('en alle circumjacentien van dien'), and the mouth was to be taken as such a surrounding place. The second defence advanced by the insurers was that they bore the risk only from the time when the ship commenced loading. The Raad pointed out, though, that the policy here provided for the risk to commence as soon as the equipping of the ship started, and because in this case she arrived fully equipped at Nerva, the insurers were in fact at risk from her arrival there. Lastly the insurers relied on the fact that, because in terms of ss 47 and 49 of the Rotterdam keur of 1721 the risk continued until the arrival of the insured ship and her discharge within fourteen working days, it could be deduced that if the ship here had been insured from Reval to Nerva by another policy, the risk of her loss or damage would have been borne by such other insurers until at the latest fourteen days after her arrival or an earlier discharge. In consequence they themselves could not possibly be liable for a loss occurring within one day of her arrival. However, the Raad noted that ss 47 and 49 merely provided when the risk terminated, not when it commenced, and that that was the issue here. Further, those sections were concerned with the risk on the cargo itself, and even if they were concerned also with the risk on a ship loaded with a cargo, here the ship was not loaded ('een ledig schip'). In such a case the risk of the earlier insurers probably terminated immediately upon the vessel's arrival.

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125 See Bynkershoek Observationes tumultuariae obs 2554; idem Quaestiones juris privati IV.15.

126 However, the dispute in this case concerned only the commencement of the risk on the ship for the loss occurred before the cargo was loaded.

127 Thus, whereas the risk on a ship with a cargo terminated on arrival and discharge within the applicable period, or on an earlier discharge, in the case of a ship in ballast it was not necessary to provide for any further period after her arrival during which the insurers were to be at risk.
49 were applicable to this case, they applied only when nothing to the contrary was agreed upon by the parties, such contrary agreement being permitted by s 48. Here there was such an agreement as to the commencement of the risk, namely that it was to run from when, after her arrival, the ship commenced equipping, and thus from her arrival when she arrived fully equipped.

Various commentators noted the dearth of provisions in the earlier *keuren* on the duration of the risk on hull policies as opposed to that on cargo policies. Bynkershoek\(^{128}\) noted that only s 47 of the Rotterdam *keur* of 1721 provided for the termination of the risk on ships and that there was uncertainty as to when the risk on ships commenced and when, in places such as Amsterdam and Middelburg, it terminated.

He thought the general approach should be that insurers were liable for no loss other than that which occurred in the course of the voyage ("op de reis"), that is, after the departure of the ship and until her arrival at her destination. The insurers' risk should therefore not commence before the ship had departed and not continue after her arrival.\(^{129}\) Thus, Bynkershoek agreed, it was correct\(^{130}\) that insurers were not liable for a loss suffered by a ship before her departure from the place from where she was to depart. But as soon as she had departed, the insurers were at risk, even if she was not yet under sail or at sea.\(^{131}\) Equally, he thought, once the voyage was completed, the insurers were also to be relieved of any liability. However, it must be remembered that the legislative measures referred to earlier\(^{132}\) all indicated that the risk on a ship terminated on the arrival and after the discharge (within a certain time) of the insured vessel, so that Bynkershoek was correct only in the case of a ship in ballast,\(^{133}\) or if the parties had reached an agreement to that effect.\(^{134}\) However, if\(^{135}\) Bynkershoek had

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\(^{128}\) *Quaestiones juris privati* IV.2. See also eg Schorer Aanteekeningen 427 (ad III.24.8) n22; La Leck *Index* sv 'Insurance'.

\(^{129}\) This, Bynkerhoek thought, was confirmed by the duration of the risk in the case of bottomry. This general approach was not applicable to cargo by reason of legislative measures promulgated for that situation, but it continued to apply to insurances on ships. See too Leoninus *Centuria consiliorum* cons XXIII n8 where the point was made that the insured peril did not commence to run (for the insurer) before the ship commenced sailing and that it terminated when the voyage was completed ("assecurationis periculum non incipit antequam navis navigare incipit, & defensit navigatione perfecta").

\(^{130}\) As Straccha *De assecurationibus* XII.2 had explained.

\(^{131}\) As appeared from the opinions delivered in 1666 (see supra). What Bynkershoek did not note in this regard, was the possibility, in fact apparently recognised by the legislatures, that the parties could make their own arrangement on the matter, as appeared from the case before the *Hooge Raad* in 1729.

\(^{132}\) Including, in particular, the hull policy form and s 49 of the Rotterdam *keur* of 1721.

\(^{133}\) As was opined in passing in the decision in 1729.

\(^{134}\) For this reason Bynkershoek's criticism (for an explanation of which, see Van Hasselt's *Hollandsche consultatien aanteekeningen* at 194-195) of the opinion of 1598 (see § 1.3.3 n106 supra) is suspect. He thought the view expressed there that the risk on a ship terminated some time after her arrival, was incorrect and the analogy with cargo policies, as also the reference to s 13 of the *placcaat* of 1563, inappropriate. His opinion was that hull and cargo policies differed in this regard.

\(^{135}\) As Van der Keesell *Prælectiones* 1457 (ad III.24.8) suggested.
based his view on policies used in practice which usually stated that ships were insured ‘from port to port’, it was no doubt correct for an insurance on such terms because, in the case of an insurance ‘from’ one port ‘to’ another, cover commenced on the departure from the one and not at any earlier moment, and terminated upon arrival at the other and not at any subsequent moment.

Scheltinga too noted that the risk on hull was taken to commence when the insured ship set sail (‘t’zeil gaat’), and to continue until such time as the ship cast anchor at the place of her destination, a position he thought accorded well with the nature of the insurance (‘met de natuur de zaak’) and one which was, in the absence of any legislative regulation, the correct position unless the parties had agreed otherwise.

The Amsterdam keur of 1744 also specifically treated the duration of the risk in terms of voyage policies on hull and did so more fully than Rotterdam in that it also provided for the commencement of the risk in that situation. The keur pertinently did not follow the approach, suggested by Bynkershoek and Scheltinga for example, that the risk on hull commenced on departure and terminated upon arrival.

Section 5 provided that the insurers’ risk on the hull of a ship commenced from the time when the master (‘Schipper’) started loading the merchandise or taking on ballast for the insured voyage, and terminated 21 days after the arrival of the ship at the destined place of discharge (‘gedestineerde Losplaats’), or so much earlier as she was fully unloaded.

Section 5 also treated insurance on hull for a round voyage (‘voor gaan en komen, dat is voor uyt en ’t huys reyse’). It laid down that in the case of such an insurance there would be no suspension (‘ophoudinge’) of the risk for the insurers before the whole insured voyage had been completed. Therefore, both legs of the voyage were for purposes of the duration of the risk on hull treated as a single voyage so as to avoid the ship being uninsured after her arrival and discharge at the turnaround port and before her departure from there.

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136 See § 1.3.2 supra as to insurance on cargo ‘from port to port’.

137 Dictata ad III.24.8.

138 Which presumably was not the same as when the ship was ready to sail. Van Leeuwen Rooms-Hollands reyt IV.9.10 thought that the insurance commenced from the time when the ship was lying ready to sail to sea (‘dat het Schip Zeilre tegt’). There was but scant further support for this view. See eg Kersteman Academie XVIII (at 276) who wrote that in the case of the hull policy, the insurance began when the ship was ‘Zeilvaardig’ and terminated as soon as ‘het Schip behouden geretoumeert is’.

139 As to s 5, see eg Enschede 97; Goudsmit Zeerecht 349.

A possible reason why the period of 21 days was decided upon in this case may have been because fifteen days were allowed for her discharge (see § 1.3.1 at n53 supra) and a further six days for taking down the ship’s tackle and sails (‘6 overigdagen voor het onttakelen van het schip’). Also, in the case of an unladen ship, the risk presumably terminated as soon as the ship arrived; no maximum period of 21 days was applicable because that was allowed for the discharge of cargo, none of which was loaded in this case.

140 See again § 1.3.2 at n97 supra for the possibility of overlapping coverage on goods insured on an out and return voyage.
The model hull policy appended to the Amsterdam keuren of 1744 and 1775 provided for insurers to bear the risk from the hour and day that the insured ship started taking on cargo or ballast for her intended voyage, and until 21 days after she arrived at her final destined port of discharge or at such earlier time as she was completely unloaded there.

In explaining the position in Amsterdam, Van der Keessel made a number of interesting remarks and in essence summarised the position in Roman-Dutch law at the end of the eighteenth century.

As far as the commencement of the risk was concerned, he remarked that while in the time of Bynkershoek the risk commenced at the time on which it was agreed that the insured ship should sail, the Amsterdam keur of 1744 expressly enacted, and its model policy forms confirmed, that the risk on hull commenced with the commencement of the loading of her cargo on board. He thought that this may also, by analogy to the similar provision in the case of cargo insurance, have become the custom elsewhere where the laws were silent on the topic. There was also no doubt that it was possible for the parties to designate another time in their contract for the commencement of the risk, as was specifically provided for in s 48 of the Rotterdam keur of 1721. Logically such freedom should also pertain in Amsterdam in respect of the duration of the risk on hull, as it should in the case of cargo, despite the absence of an express permission that this could be the case.

As far as the termination of the risk on hull was concerned, Van der Keessel explained that this occurred, by analogy to the position in the case of cargo insurance, when the insured ship, having arrived in port, had discharged her cargo,

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141 The matter was therefore not left to the agreement of the parties as was the case in Rotterdam.

142 The policy provided cover 'van de uure en dag at het voorsz. Schip een begin met laden van koopmanschappen heeft gemaakt, of wel zyn ballast voor de voorsz. Voyagie sal hebben ingenomen, en eyndigen 21 dagen na dat het voorsz. Schip ter laaster gedestineerde losplaatse zal zyn aangekomen, ofte soo veel eerder als het zelve in 't geheel zal zyn ontlost'.

143 See Van der Keessel Theses selectae th 747 (ad III.24.8); idem Praelectiones 1457 (ad III.24.8).

144 Which was not necessarily the case, of course, as the day of her actual departure which Bynkershoek Quaestiones juris privati IV.2, more specifically, advanced as the time of the commencement of the risk.

145 If the analogy referred to in this regard concerned the commencement of the risk specifically, it was not quite correct. The risk on goods was generally stated to commence not when loading on board the ship started but when the goods were brought alongside for the purposes of such loading. However, it appears that the analogy Van der Keessel referred to was that which in fact existed in respect of the termination of the risk and that by reason of that analogy it was not unlikely that the same similarity was also recognised by custom in respect of the commencement of the risk between the insurance of ships and that of cargo.

146 For example in Middelburg where there was no provision for the duration of the risk on ships at all, and in Rotterdam where s 49 of the keur of 1721 dealt only with the termination of the risk on hull.

147 Theses selectae th 748 (ad III.24.8); idem Praelectiones 1458 (ad III.24.8).

148 See again his remarks in this regard § 1.3.1 n54 supra.
provided that this was done within 21 days at Amsterdam, or within fourteen working days at Rotterdam, which appeared to have been the rule also at Middelburg. Again the parties were free to extend or reduce the duration of the risk. Such freedom was exercised, it may be added, when the insurance was concluded 'from port to port' without any further reference to the departure or arrival of the ship or the discharge of her cargo, that is, when the duration of the 'port to port' policy on hull was independent from the loading and discharge of the ship's cargo. To no lesser extent than in the case of cargo policies, the 'port to port' hull policy presented the insurer with a much reduced risk, excluding as it did the significant chance of loss or damage occurring on leaving, entering and being in port with number of other equally unmanoeuvrable sailing ships.

1.3.4 ‘Surrounding places’ and the Interpretation of the Description of the Insured Voyage

Voyage policies described the duration of the insurance cover with reference to two or more places. Such places were named or described and, on occasion, the determination of the precise moment when the risk or cover commenced and when it terminated involved an interpretation of the particular description of the voyage in the policy. A well-known case in which this was required came before the Hooge Raad in 1731 where the insurance was from Bruges to ‘the river of Nantes’.  

149 Van der Keessel Prae/ectiones 1459-1460 (ad III.24.8) held the view that it was unlikely that in Middelburg, as Bynkershoek Quaestiones juris privati IV.2 had thought (see n129 supra), the risk on a ship terminated immediately after her safe arrival. That was doubtful, for in s 11 of the Middelburg keur of 1600 it was provided in general that the risk in the case of insurance was not terminated unless the goods had arrived safely and had been taken from the ship and placed on land. This provision in the first place related to the insurance of goods with which it was there concerned, but because no other prescribed period appeared for the insurance of ships and because the Middelburg keur everywhere treated the insurance of goods and that of ship together (eg in s 12), it appeared likely that that description could also be applied to ships. Also in terms of s 47 of the Rotterdam keur of 1721 the terminus ad quem was the same for insured cargo and an insured ship. The same argument could be advanced for the earlier position in Amsterdam and this also created the presumption that the position was similarly understood in the customary law, especially where a ship and her cargo were insured in the same contract.

150 Thus, as in the case of an insurance on cargo, an insurance on hull 'from port to port' also imposed a lesser risk on the insurer. For example, whereas in terms of the Amsterdam keur of 1744 the hull insurer was liable from the commencement of loading and until the arrival and discharge (within 21 days) of the ship, if an insurance on hull was concluded there on the terms 'from port to port', the insurer was liable only from the ship's departure and until 24 hours after her arrival.

151 As to the particular risks involved in leaving and entering port and in sailing close to land, see eg Spooner 8-9. It was said in Rotterdam that Brouwershaven, one of its outer ports, was halfway to Java (see MGN vol III at 72). As to port risks generally, see further Spooner 132-139.

152 See Bynkershoek Observationes tumultuariae obs 2648; idem Quaestiones juris privati IV.15.

153 See again Van der Keessel Prae/ectiones 1452 (ad III.24.6) and ch VIII § 4.3 supra (on the interpretation of insurance contracts) and § 3.2 supra (on insurance 'from port to port') for further related discussions of this decision.
In this regard Dutch policies often described the voyage not merely as being from one place to another but added that it was from a particular place and 'surrounding places' ('circumjacentien'). The same was possible in respect of the destination and intermediate ports. The meaning of this usage must briefly be investigated.

At first, in the Antwerp compilation of customary law in 1609, this usage was prohibited. Insurance from one place to another had to contain an express identification of the places and an addition of the words 'and from surrounding places' ('ende van oft op henne omliggende ende naerbuerige plaatsen') was not permitted. However, the practice continued and one of the few instances of legislative guidance on the interpretation of the terms of an insurance contract in fact concerned the term 'surrounding places' ('circumjacentien'). The relevant measures, two decisions, and the views of some of the Dutch authors on this point may be mentioned briefly.

By the Amsterdam amending keur of 1688 it was provided that where someone had insured on cargo or on a ship which had already departed from the place of loading, that fact as well as the time of such departure had to be declared on the policy. Section 3 of the Amsterdam amending keur of 1699 clarified the relevant provision in the keur of 1688 by providing that ships would not be taken as having departed from their places of loading except after they had advanced ('geavanceert') to the other side or the outside of the estuaries or sea-ports ('Zeegaten of Zeehavens') of the places from where the insurance was to commence, and had further also passed all other buoys and similar beacons ('Tonnen of diergelijke Tekenen'). Of importance for the present investigation, it also provided that all places surrounding the place (the term 'circumjacentien' was used in this regard) from where the insurance was to commence, including their estuaries or ports, would be understood to be included in the name of the place of loading expressed in the policy.

Early in the eighteenth century, two cases came before the Hooge Raad on the meaning of the term 'circumjacent' or 'surrounding places' ('circumjacentien').

In the first, in 1717, there was an insurance in Amsterdam on a ship and her cargo from Amsterdam and its surroundings ('van Amsterdam en de circumjacentien van dien') to the Spanish West Indies, the ship being permitted to touch all ports and harbours and islands, none excluded, and from there back to Amsterdam. The insured vessel traded to America and was lost off Jamaica, then an English possession, where,
on her way back to Amsterdam, she had entered to obtain victuals and equipment. The insurers refused payment for the loss because at the time of the signing of the policy, the ship was no longer at Amsterdam but lying in the roadstead of Texel ('op de reede van Tassel'). It was not expressed in the policy as was required in terms of the Amsterdam keur of 1688. The courts a quo had held in favour of the insurers, but the Hof van Holland had held for insured. This decision was upheld by the Hooge Raad, for Texel, being the roadstead for ships sailing from or returning to Amsterdam, was taken to be included in 'de circumjacentien' of Amsterdam. The keur of 1688 merely provided that in the case of an insurance on a ship or goods already departed, the insured had to state this fact and time of the departure in the policy. But in the present case, given that Texel was part of Amsterdam, there was no departure yet. In addition, the keur of 1699 provided expressly that under the name of cities from where ships and goods departed would also be understood their ports and roadsteads. This latter measure, the Raad pointed out, was promulgated after the insurance in the present case had been concluded, but it merely confirmed the common law ('het gemeene recht'),

160 From the port of Amsterdam narrow and hazardous channels wound through the Zuider Zee to the outports of Den Helder, Texel, and Vlieland, the latter two being islands. The outports served as reasonably protected advance-ports for the assembly of fleets and convoys departing from Amsterdam. Vessels also often offloaded at Texel and transferred most of their cargo there to smaller craft to lighten them. This precaution was taken because the Zuider Zee had many sandbanks and shallow waters at the entrance to the Amsterdam harbour which formed dangerous obstacles for fully-laden, deep-lying ships. Pilots were available to assist ships in negotiating the channels. At the start of the voyage at Amsterdam, there was a sandbank (called 'Het Pampus') at the entrance to the IJ. Sailing tugs were on hand to help ships over the bank. On the Amsterdam port, see further eg Bruijn, Gaastra & Schöfler Dutch-Asian Shipping 31-33 (at 30 there is a map showing the access to the sea from Amsterdam); Sigmond 83-84 (maps of the ports of Amsterdam and Rotterdam); and Spooner 134-136.

Of all the ships which came to grief on the sandbanks in the Zuider Zee, one of the most famous was the 'Lutine', a French frigate which had been taken as prize and which was wrecked at the entrance to the Zuider Zee in 1799. Her bell now hangs at Lloyd's in London where it is customarily rung to announce the occurrence of a disaster, while a table and chairs kept at Lloyd's were crafted out of her rudder. See further Martin 183-209; Wright & Fayle Lloyd's 387-389.

At London, in the mid-eighteenth century, it was permitted, in terms of a policy insuring a ship or goods 'to London', for the insured to land anywhere within the port of London along the Thames up to London Bridge at any of the customary landing places. See Magens Essay vol 1 at 48-50.

In case of an insurance 'from Hamburg', the nearby port of Glückstadt, downstream in the Elbe, was customarily understood to be included. This was decided by the Hamburg Admiralty Court in Burmester c Höckel in 1731, in the absence of any clarity on matter in the Hamburg Assecuranz-Ordnung Ordinance of that year and in reliance on the Amsterdam keur of 1699 in terms of which the place named in the policy included not only the harbour of that place but also other loca circumiacentia up to and including the mouth at the sea where ships were loaded or unloaded. See Frentz 'Seerechtsprechung' 149-149 and 58; idem Hamburgische Admiralitätsgericht 132 and 159-162 (who, however, thought it was a decision of an Amsterdam court in 1699 and not Amsterdam keur of that year which was followed in Hamburg).

161 See again ch VII § 4 supra.

162 Amazingly, therefore, the dispute on an insurance concluded prior to 1699 was only finally settled in 1717!
The insurers also refused payment because the loss had occurred off Jamaica, which was not part of the Spanish West Indies but an English possession. This argument was also rejected by the Hooge Raad. The 'Spanish West Indies' meant America, and Jamaica was situated in middle America. Also, the ship here was permitted to touch all islands, irrespective of whether they belonged to England or to another power.

164 See Bynkershoek Observationes tumultuariae obs 1621; idem Quaestiones juris privati IV.10.

165 See again ch VIII § 4.2.5 supra where this case was discussed in more detail. This reason was rather unconvincing, given that the distance between Copenhagen and Elsinore was smaller by ship than that between Amsterdam and Texel, which was at issue in the earlier decision of 1717. Possibly the difference arose because of the fact that there was no open sea between the latter and because Elsinore was not the roadstead for ships sailing from Copenhagen. See too n167 infra for a further difference between the two decisions.

166 Theses selectae th 735 (ad III.24.5); idem Praelectiones 1450 (ad III.24.6). See too Van der Linden Koopmans handboek IV.6.7; Dorhout Mees Schadeverzekeringsrecht 565-566; Enschedé 158-159; and Jolles Devlatie 79-82.

167 But, if the term 'surrounding' was not included and the insurance was only 'from' or 'to' a named place, an unnamed neighbouring port or place was not included in the named port or place, as appeared from the decision of 1717. See further Van der Keessel Theses selectae th 736 (ad III.24.6).
an indication of the duration of the risk in such other policies, and the issue was in gen-
eral left to be agreed upon between the parties in every instance. Even the earlier com-
pilations of Antwerp customary law, otherwise very complete and detailed, specified the
duration of the risk in only two such cases, namely in the case of land-transport
insurance and in the case of an insurance on a bottomry loan. 168

In terms of the ransom policy appended to the Amsterdam amending keur of
1693, the insured was stated to be covered from a named port, en route and
throughout his voyage, wherever the ship might sail, 169 and while he was sailing on the
named ship to the named destination. Presumably the risk terminated on his arrival
there. 170

The parcel policy in terms of the Amsterdam keuren of 1744 and 1775 covered
the insured parcel or package from the time of its delivery to the postal or other carrier,
until its arrival at the destination and delivery to the insured, to his representative, or at
his address. 171

In some instances, though, it was no doubt possible to ascertain the duration of
the risk with reference to either the cargo or the hull policy. Thus, it would appear that
the rules concerning the duration of the risk on the hull policy may by analogy have
been applicable to an insurance on chartered freight, 172 and to one on a bottomry loan
on a ship, 173 while insurances on expected profit and bill of lading freight 174 could well in
turn have been governed by the rules applying to insurances on cargo.

168 Article 175 of par 5, title 11, part IV of the Antwerp Compilatae of 1609 (see De Longé vol IV at 272)
provided that, subject to a further agreement to the contrary, an insurance on goods sent by land
 commenced from the time when the goods were loaded on the cart or wagon, and terminated when the
goods arrived at the agreed place and were there offloaded and delivered into the hands of those
authorised to receive the goods. And in terms of art 305 of par 9, title 11, part IV of the
Compilatae (see De Longé vol IV at 326), when an insurance was concluded on 'bodemmerije oft schult opt schip', such
insurance commenced and terminated in the same way as in the case of an insurance on a ship, unless
otherwise agreed in the policy.

169 The policy referred in this regard to 'van ... mits over-al, en alomme onderwegen, de geheele reysse
gedurende, op alle plaatse en Landen mogen aanloopen, seilen en verseilen, voorwaarts of
agterwaarts, ook leggen, lossen, laden, en herladen'.

170 The ransom policies in terms of the Rotterdam keur of 1721 and the Amsterdam keuren of 1744 and
1775 were in very similar terms.

171 The policy provided cover 'van 't uur en dag af, dat het voorsz. verzekerde zal besteld ofte gebragt
zyn aan het Post-Comptoir, Waagen, Schip ofte andere Plaatsen, daar men gewoon is de opgemelde
Goederen tot het verzekerde desseim te ontvangen, en ons daar van doe blyken; en zal deze onze risico
duuren, tot dat het verzekerde tot ... als boven zal zyn gearriveerd, en zonder eenig verlies of schade
vrelyk en vredelyk in 't vermogen van den geassureerden, deszelfs Commis, ofte ter zyners adresse zal
zyn afgeleverd'.

172 See again ch V § 5.4.2 supra.

173 See ch V § 5.5 supra.

174 See again ch V §§ 5.2 and 5.4.3 supra respectively.
1.3.6 The Duration of the Risk in Terms of Voyage Policies in the *Wetboek van Koophandel* and in English Law

The *Wetboek van Koophandel* contains a number of provisions dealing with the duration of insurance cover.\(^{175}\)

In terms of art 256-2 all policies must contain the date on which the insurance was concluded, and the time when the risk commences and terminates for the account of the insurer. The possibility of insuring for a single voyage, for a round voyage, or for a specified period of time, is recognised.\(^{176}\) As far as voyage policies are concerned, a distinction is also drawn between cargo and hull policies.

Article 627 provides that in the case of insured merchandise or goods, the risk commences to run for the account of the insurer as soon as the goods have been brought on the quay ("op de kade of de wal") from where they are to be loaded in the ship, or to be conveyed to the ship in which they are to be loaded. It terminates fifteen days after the ship has arrived at the place of her destination, or as much sooner as the insured goods may have been discharged there and placed on the quay. If, in terms of art 629, the master or the insured was prevented by lawful reasons from discharging within the period of fifteen days, without being guilty of any delay, the risk continues to run for the insurer until the goods are in fact discharged.\(^{177}\) Thus, the provisions in the *Wetboek* in this regard are for practical purposes identical to those in, for example, ss 46, 47 and 49 of the Rotterdam *keur* of 1721 and s 5 of the Amsterdam *keur* of 1744.\(^{178}\)

As far as voyage policies on hull are concerned, art 624 lays down that the risk commences to run for the insurer from the moment the master commences with the loading of merchandise, or, if the ship is to sail in ballast, as soon as he commences with the loading of ballast. Article 625 provides that the risk in this case terminates for the insurer 21 days after the insured ship has arrived at the place of her destination, or as much sooner as the last of the merchandise has been discharged. Otherwise than in the case of cargo insurance where art 629 creates an exception to 627 in the case of an impossibility to discharge within the permissible period, no similar exception is created or foreseen in respect of hull policies.\(^{179}\) Again these provisions are virtually identical to

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\(^{175}\) See generally Lipman 235-236.

\(^{176}\) See art 594 which states that marine insurance can be made 'voor de heen- en terugreis, voor een van beide; voor de geheele reis of voor een bepaalde tijd'.

\(^{177}\) Presumably, that is, for as long as such lawful reasons continue to exist.

\(^{178}\) See further eg Asser *NBW* 233; Ten Kate 74-88; and Van Renays 363-365.

\(^{179}\) In terms of art 626, in the case of an insurance on a ship for an outward and return voyage, or for more than one voyage, the insurer runs the risk without interruption ("zonder tusschenpoozing"), presumably during discharge and shipment at the port of destination on the outward voyage, as if it were merely an intermediary port, up to and including the 21st day after the completion of the last voyage, or up to as many days less as when the last merchandise or goods have been discharged. See further eg Ten Kate 11-18.
those in s 5 of the Amsterdam keur of 1744.\textsuperscript{180}

The Wetboek van Koophandel also provides in more detail for the duration of the risk in the case of other types of policies, both marine and non-marine. Thus, in terms of art 630-1, in the case of an insurance on freight ('vrachtpenningen'), the insurer commences to run the risk from the moment and to the extent that the freight-paying ('vracht betalende') goods are loaded onto the ship, and until fifteen days after the ship has arrived at the destined place of discharge, or as much sooner as the freight paying goods have been discharged. Thus, the duration of the risk is the same as in the case of a cargo policy.\textsuperscript{181} And in terms of art 631, which was repealed in 1926, in the case of an insurance on bottomry, the risk commenced and terminated for the insurer at the same time as it commenced and terminated for the bottomry lender, or as may have been agreed otherwise.\textsuperscript{182} Article 633 provides that the time of the commencement and termination of the risk on the profit expected from goods is identical with that for the goods themselves ('staat gelijk met den daartoe voor de goederen bepaalden tijd'). And lastly, in terms of art 688, in the case of the insurance of goods for their carriage by land or on internal waters, the risk commences to run for the insurer as soon as the goods are brought or delivered to the conveyance or the place where goods are customarily received for such carriage ('gebracht of besteld zijn aan het rij- of vaartuig, het kantoor of op zodanige ander plaats alwaar men gewoond is goed ter verzending te ontvangen'), and terminates when they have arrived at the place of their destination and have been delivered there to the insured or his representative.

In a general art 634 it is determined that in all insurances the respective parties are free to agree on different terms for the commencement and the termination of the risk. Therefore, the provisions mentioned earlier will find application only in so far as the parties have not agreed otherwise in the policy itself.

The position in English law is on some points markedly different from that in Dutch law while on others again some similarity is noticeable.\textsuperscript{183} A distinction was also drawn in English law between voyage policies\textsuperscript{184} and time policies, a distinction which came to be recognised in s 25(1) of the Marine Insurance

\textsuperscript{180} See further Ten Kate 66-74; Van Renays 361-363; and Voorduin vol X at 332.

\textsuperscript{181} See further Ten Kate 80-87.

\textsuperscript{182} ‘Op het oogenblik dat het gevaar des geldschieters begint en eindigt volgens de wet, of volgens een aan de verzekeraar bekend gemaakt beding’. See further Ten Kate 87-88; Voorduin vol X at 340.

\textsuperscript{183} See further for some comparisons between the Dutch and the English approaches, Dorhout Mees Schadeverzekeringsrecht 558-560.

\textsuperscript{184} In the early seventeenth century Malynes Consuetudo vol I at 24 distinguished between insurances for outward voyages, those for return voyages, and those for round voyage ('going and coming') which were one entire insurance until the ship returned home and the goods were discharged. It was also possible to insure on a voyage between two foreign places but he warned that this type of risk (a so-called cross risk) was very dangerous because the local insurer could not easily obtain reliable information as to when the voyage was performed. John 'London Assurance' 133 notes that the marine insurances concluded by the London Assurance Corporation in the eighteenth century were mainly on outward voyages. Less common were insurances on inward voyages while only a very small percentage of policies was for out and home (ie, round) voyages.
Act of 1906 which describes the voyage policy as one where the contract is to insure the subject-matter 'at and from' or 'from' one place to another place or other places.\textsuperscript{185}

The Lloyd's policy was such a voyage policy, insuring as it did the ship 'at and from' a named port and the cargo 'from the loading thereof aboard the said ship'.\textsuperscript{186} In terms of this policy, the risk on hull continued until the insured ship had arrived at her destination and 'until she hath moored at anchor twenty-four hours in good safety'; and upon cargo the risk continued 'until the same be there discharged and safely landed'.\textsuperscript{187}

Given that the Marine Insurance Act itself contains no particular rules to determine the duration of marine insurance cover, the *Rules of Construction of Policy*\textsuperscript{188} appended to the Act are of particular importance in this regard. Rule 2 provides that where the subject-matter is insured 'from' a particular place, the risk does not attach until the ship starts on the voyage insured. Rule 3 provides specifically in the case of hull insurance that where the ship is insured 'at and from' a particular place, and she is at that place in good safety when the contract is concluded, the risk attaches immediately; while if she is not at that place when the contract is concluded, the risk attaches as soon as she arrives there in good safety, and, unless the policy provides

\textsuperscript{185} It also recognises that a contract for both a voyage and a period of time may be included in the same policy, a so-called mixed policy.

\textsuperscript{186} Magens *Essay* vol I at 45-48 explained that in most countries the laws and policies provided that the risk on goods commenced from the moment the goods left the shore (in fact, in the Netherlands, the moment was even earlier than that), and continued until they were landed at the place of their destination. Insurers run the risk not only while the insured goods were in the named ship but also in all boats and lighter employed to carry the goods aboard and also to fetch them ashore. In this regard, he noted, London policies differed from all the foreign ones by expressly declaring that the adventure began from the loading of the goods on board the ship until the ship with the goods arrived at the destination and the goods were there safely landed. Thus, London insurers were not liable for losses to goods in lighters or boats, although the risk did continue until the arrival and landing of the goods at the destination. Therefore, in places where ships could not dock to unload, the cargo insurers had to run the risk of their conveyance ashore in boats and lighters.

As to the insurance on goods laden or to be laden for a voyage from one place to another, until ashore at the latter destination, see further Malynes *Consuetudo* vol I at 24 and 28.

\textsuperscript{187} As to the termination of the risk on cargo, see eg Molloy *De jure maritimo* II.7.13; and Malynes *Consuetudo* vol I at 25 who explained that the sale of the goods afloat at the destination, or the contracting there for their onward carriage to a further destination, without the goods ever having being discharged and landed (eg, to avoid having to pay duties), amounted to a discharge and landing and terminated the risk. Note that in English law there was apparently no fixed period within which insured cargo had to be discharged.

Magens *Essay* vol I at 45-48 again contrasted the position on the Continent with that in London. Whereas several laws stipulated the number of days in which the cargo had to be unloaded, at London the insured was not confined to any period of time but merely had to unload within a reasonable time. Nevertheless, he thought it best to specify in the policy the number of days which may be required to unload goods or the number of days they may lie before having to be unloaded. He further mentioned the possibility that in certain places no discharge may in fact be possible or customary, such as at Cadiz where goods were sold from the ship herself, with the unsold remainder being forwarded to the next port of call.

\textsuperscript{188} That is, the Lloyd's policy.
otherwise, it is immaterial that she is covered by another policy for a specific time after her arrival there. 189 This was already the accepted position in the seventeenth century. 190 In terms of rule 4, where goods or other movables are insured 'from the loading thereof', the risk does not attach until such goods or movables are actually on board, and the insurer is not liable for them while they are in transit from the shore to the ship. Rule 5 then provides that where the risk on goods or other movables continues until they are 'safely landed', they must be landed in the customary manner and within a reasonable time after their arrival at the port of discharge, and if they are not so landed, the risk ceases.

Thus, as far as cargo insurance in terms of the traditional Lloyd's policy was concerned, the insured goods were covered only from after their loading and the insurer did not bear the risk of any loss prior to and during their loading or during their transshipment to the carrying ship. In this respect the cover was therefore more restricted than that in terms of the usual Dutch policies in the eighteenth century. 191 It was and remains possible, though, expressly to agree to extend the cover in this regard by the addition of supplemental clauses. 192 The termination of the risk on goods occurred, as was the case in Dutch law, upon arrival and discharge, not within a legislatively determined period of time but within a reasonable time which had to be determined in every case.

As far as hull insurance was concerned, recognition was only given to insurance 'from port to port' and in that respect the position under the Lloyd's policy agreed with the customary position in Antwerp in the sixteenth century.

1.4 The Duration of the Risk in Terms of a Time Policy

As already noted, in the Netherlands policies on both cargo and hull were until the nineteenth century predominantly concluded in the form of voyage policies. However, policies on hull not for a particular voyage but for a particular agreed period of time were not unknown in Dutch marine insurance practice. 193 In fact, time policies

189 Rule 3 also provides for the commencement of the risk in the case of an insurance of both chartered and bill of lading freight 'at and from' a particular place.

190 See eg Molloy De jure maritimo II.7.10 who explained the difference between an insurance on a ship 'from' and 'at and from' London by noting that the former did not cover a loss occurring before the ship had commenced her voyage and had departed from the port of London, but did cover a loss occurring after the ship had been forced to return to port by a storm.

191 See eg ILL HR 15.2 where it is noted that there is no evidence that initially marine policies covered the warehousing of insured goods at either end of the voyage, although it is possible that underwriters may have extended the cover in individual instances.

192 In terms of s 2(1) of the Marine Insurance Act, the contract of marine insurance may be extended to protect the insured against losses on inland waters or land risks incidental to the sea voyage. See also eg Chalmers 152.

193 See generally eg Jolles Deviatie 4-5; Ten Kate 64 (who explains that with the time policy, the termini with reference to which the cover is described are not places but dates); and Mouthaan.
were known from soon after the emergence of the insurance contract in its modern form.\(^{194}\)

Although never common,\(^{195}\) time policies on hull were in fact recognised in the customary law of Antwerp. It was provided that in the case of such insurances, the risk commenced and terminated on the times agreed upon, irrespective of the departure or the arrival of the ship on or from any voyage.\(^{196}\) The risk commenced and terminated, therefore, whether the ship in fact sailed on a particular or in fact on any voyage, and irrespective of whether she had arrived yet after the completion of such a voyage. It was further also generally irrelevant what number of voyages were undertaken during the duration of the policy.\(^{197}\)

Nevertheless, although time policies were not unknown and in fact recognised in Roman-Dutch law too, the sources paid very little attention to them.

The first reference to a time policy in an official source occurred in the Amsterdam amending keur of 1620 where reference was made, in respect of the payment of the premium, to monthly insurances ("Asseurantien die by de Maent gheschieden").\(^{198}\) A similar reference occurred in s 37 of the Amsterdam keur of 1744 ("Assurantien, die by de maand geschieden").\(^{199}\) Apart from this, though, time policies were not regulated as such.

Bynkershoek mentioned time policies twice. In the first instance he mentioned one concluded in Genoa which was, exceptionally, on goods. At issue was the possible overlapping cover between that policy and a subsequent Amsterdam voyage policy covering the same goods.\(^{200}\) The second instance\(^{201}\) concerned what was in reality not

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\(^{194}\) See eg Holdsworth History vol VIII at 280 and Sanborn 254, both of whom note that time policies, which never exceeded one year, were introduced in Italy in the course of the fourteenth century.

\(^{195}\) Of the 1488 policies concluded by the Antwerp broker Juan Henriquez in a fourteen-month period in 1662-1663, 97 per cent were cargo policies, about 2 per cent (ie, 33) were hull policies, and of the latter only two were for the insurance of a ship for a particular period of time. One of them was an insurance for £100 on a named ship for three months, the other, concluded only four days later, was an insurance for £300 on the same ship for four months. See De Groote Zeeassurantie 131-132.

\(^{196}\) See art 295 of par 9, title 11, part IV of the Antwerp Compilatae of 1609 (see De Longe vol IV at 322) which referred to an insurance on ships 'voor sekere besproken tijt, tsij dat die van sekere reijse vermaent of niet, oft dat oock geseigt is dat tschip soude mogen vaeren naer beliefte'.

\(^{197}\) See further eg Kiesselbach 116; and Mullens 45 (time policies on hull were not possible in Spanish law), 55-56 and 59 (time policies on goods were unknown at the time because the description of the voyage was crucially important for the description of the cargo as the object of risk).

\(^{198}\) See again ch XI § 3.2.2.1 supra.

\(^{199}\) See ch XI § 3.2.2.3 supra; Goudsmit Zeerecht 353.

\(^{200}\) See Quaestiones juris privati IV.3. The Genoese policy was one for a period of three months on goods sent from there to Hamburg. Because of the fear that the voyage would not be completed before the expiry of the three months, with the result that the goods would be uninsured at sea, a further insurance was concluded at Amsterdam for the voyage from Alicante in Spain to Hamburg. The ship had passed Alicante before the expiry of the three months, so that from her departure from Alicante until the expiry of that period, overlapping cover existed. This, apparently, was unavoidable since s 3 of the Amsterdam keur of 1598 required the insurance policy to express the place from where the insurance was to commence, seemingly making it impossible for the Amsterdam insurance to commence on the expiry of
a time policy in the true sense of the word. The policy in question, a Rotterdam goods policy, came before the Hooge Raad in 1740. Exceptionally it contained a clause that the risk would commence on a particular date (3 November 1736, when it was thought the carrying ship would sail) and that the insurers would be satisfied whether or not that in fact happened, as long as the ship sailed a few days earlier or later. Some members of the Raad thought that the legislative requirement that the policy had to mention the time of the prior departure of the carrying ship or the insured’s ignorance of that fact, did not find application in a case such as this where the risk was agreed to commence on a specified date, irrespective of such departure.

Of all the authors, Van der Keessel was most instructive on the time policy. He recognised that the policy insuring a ship for a particular period of time (‘ad certum tempus’), like the voyage policy insuring ‘from port to port’, was an instance which constituted an exception to the rules laid down legislatively as to the commencement and termination of the risk. In the case of such an insurance, he pointed out, the insurer’s risk terminated when the period agreed upon came to an end, even if ship had already reached the port but had not yet discharged.

the Genoese time policy, for when the Amsterdam policy was concluded it was not known where the ship would then be. In fact, Bynkershoek thought, it seemed that a time policy was not possible in terms of the Amsterdam Insurance legislation, for it assumed insurance cover to commence at a certain place and not at a certain time. However, it may be that time policies were permissible (or were at any rate not prohibited) but not regulated in Amsterdam.

201 See Bynkershoek Observationes tumultuariae 3168; idem Quaestiones juris privati IV.17.

202 It was not a pure time policy in that the commencement and the termination did not both have to be determined exclusively with reference to a specified time. As to mixed policies, see again § 1.2 at n9 supra.

203 The insurers denied liability on the policy and argued that the insured or his representative had known of the departure of the ship at the date specified in the policy but had not clearly mentioned that on the policy as he was legislatively required to do. As a result, they contended, the policy was null and void. (In terms of ss 32-34 of the Rotterdam keur of 1721, goods already departed could validly be insured but only if the insured expressed the time of such departure, if he knew it, or his ignorance of that time. See again ch VIII § 4.2.5 supra and § 2.2.5 infra.

204 Other members thought that the insured here was not fully aware of but in doubt as to the departure and that for that reason he had inserted the provision in the policy to indicate his ignorance of the time of the departure, and that he had thus complied with the legislative requirements in question.

205 By reason of the contrary agreement between the parties which was specifically permitted, at least in Rotterdam. See again § 1.3.2 supra.

206 See Van der Keessel Theses selectae th 749 (ad III.24.8); idem Praelectiones 1458-1459 (ad III.24.8). Therefore, the duration of the risk under a time policy was an exception to the duration of the risk in the case of voyage policies.

207 And even, it may be added, if she had not yet reached her destination but was still at sea.
Finally, time policies were also recognised in Roman-Dutch law in connection with fire insurance.\(^{208}\) Section 18 of the Amsterdam *keur* of 1744 permitted fire insurances on immovable property such as factories, houses and warehouses for a period of no longer than one year ("by Police voor een Jaar").\(^{209}\) The amendment of s 18 in 1775 made no mention of any restriction on the period for which a fire (and other types of) insurance could be concluded.\(^{210}\)

Clearly, therefore, time policies were not common in Dutch insurance practice prior to the end of the eighteenth century and for that reason, no doubt, any formal regulation was not considered necessary. Nor did the legislation provide any model time policies. Their relatively infrequent occurrence in practice appears further from fact that time policies were usually concluded in the form of a basic voyage policy to which some amendments were affected.\(^{211}\)

The reason for the scarcity of marine time policies in earlier practice was probably because the circumstances in which such policies were particularly suitable, occurred fairly infrequently, or because their suitability in those situations was not realised. Time policies were especially appropriate where it was impossible to identify the carrying ship in advance, such as when that depended upon the availability of shipping space; when it was impossible to describe the voyage or voyages with certainty, as in the case of tramp shipping;\(^{212}\) when there was no voyage as such, for example in the case of a fishing or whaling expedition;\(^{213}\) or when voyage insurance was simply

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\(^{208}\) As to which see again ch VII § 2.1 *supra*.

\(^{209}\) Noting this limitation, Van der Keessel *Praelectiones* 1434 (ad III.24.4) mentioned that the understanding was that a new insurance could be concluded on the expiry of that year.

\(^{210}\) This change was reflected in the respective model fire policies. The fire policy in terms of the Amsterdam *keur* of 1744 provided cover *voor den tyd van twaalf maanden*, aanvang nemende met den *... en eindigen den ... beide des middags ten Twal Uuren*, while that in terms of the *keur* of 1775 provided cover *voor den tyd van ... Maanden, aanvang nemende ... en eindigende ... beide des middags ten twal uuren*.

\(^{211}\) For example, after the words 'from' and 'to', which were intended for an indication of the intended voyage, were inserted not the names of two places but two moments of time (eg 'from' 12 noon on 2 April 'to' 12 noon on 2 October). See further Dorhout Mees *Schadeverzekeringsrecht* 539.

\(^{212}\) That is, in the case of ships plying from port to port (rather than directly between two pre-determined ports on a predetermined voyage), as they would do when engaged in the coastal trade or in the bartering trade. See Spooner 7n21.

\(^{213}\) Apart from an insurance of a fishing vessel for a single voyage, it was also possible in Dutch insurance practice to insure such vessels for all voyages within a specified period of time. An example of a clause providing for this is referred to by Vergouwen 104. It provided as follows: *Van Massluys en alle circumiacenten van dien af voor een of meerder reysen naar en tot de visserij ter haring op alle plaats of plaatsen waar de ondergem. stuurman of bevelhebber zal geraaden te vissen ..., zullen de risico eindigen, wanneer 't schip na gedene visserij tot Massluys zal zijn geretoumeerd ... mits geen reys zal moogen worden ondernomen na ... deees Jaars'.

An insurance on a fishing vessel could also be concluded for the duration of the fishing season on a particular voyage or within particular geographic limits. Thus, an Amsterdam fishing policy of 1637 on the ship and her catch was concluded for the whole fishing season in 1637 after 25 September, while her voyage (it was therefore a mixed policy, not a pure time policy) was described as follows: *Van Vlaerdlngen of/8 d'aenlggende plaetse van dyen af tot in de Noor/see ter plaetse ofte plaetsen 't na beschreven schip sal komen te seylen, verseylen, soo dikwels en menighmael gins ende weder en van*
impractical, for example due to the repetitive nature of short but different voyages. Furthermore, because the risk, being described with reference to a period of time, rather than with reference to a voyage, was less precisely described, time policies continued to occur less frequently in practice than voyage policies.

Dutch underwriters too did not favour time policies, given that in terms of such policies they were generally taken to run a greater risk for an insufficiently larger premium. Accordingly, in 1698 eighteen Rotterdam insurers agreed not to conclude any time policies, the reason in this particular instance possibly being that the payment of premiums in terms of such policies gave rise to certain problems in practice.

Gradually, though, the need for time policies was recognised; especially in the case of hull insurances, and by time of the Wetboek van Koophandel there was a specific recognition if not a detailed regulation of such policies. The Wetboek in art 594 recognises the possibility of insuring for a specified period of time ("voor een bepaalde tijd"). In terms of art 595-2, in the case of an insurance on goods where it was not possible to state the name of the master or the ship carrying the goods, insurance 'in quovis' was permissible, but only for a specified period of time. Although no pertinent limitation was imposed in Dutch law upon the length of the period for which an insurance may be concluded by way of a time policy, such a limitation was practically imposed by the measures dealing with prescription which was said to run from the time of the conclusion of the insurance rather than from the time when the cause of action arose.

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214 As a result, specific exceptions had to be added to restrict the insurer's exposure on a time policy, eg, it had to be provided that there would be no cover or cover only at an increased premium in the case of the ship sailing to certain areas, or in certain months (winter) of the year.

215 Such as the risk of unspecified voyages, to unspecified destinations, and over different seasons.

216 The more so given the fact that at the time there was no legislative intervention in Rotterdam in this regard as there was in Amsterdam. See Krans 24; Vergouwen 95; and again ch IX § 2.6 supra.

217 See again ch VIII § 4.2.7 supra; also Caarten 31-34 and 46-48. In this regard art 650 determines that where the insurance is concluded 'voor eenen bepaalden tijd, in dier voege als zulks bij een 595 gemeld is', the insured must prove that the insured goods had been loaded within such time in the ship that had suffered a casualty or was lost.

218 See Dorhout Mees Schadeverzekeringsrecht 665.

219 According to Mouthaan, because art 743 provides for the prescription of claims after 5 years from the conclusion of the insurance, an insurance for longer than that period seems impossible.
Time policies were, of course, also known elsewhere. In English law, for example, ships were in the eighteenth century on occasion insured for specific periods of time rather than for specific voyages. However, this was not a common occurrence and the Lloyd’s policy as it was settled in 1779 was cast in the form of a voyage policy and had to be adapted to an insurance for a specific period of time by the addition of suitable clauses. By the time of the Stamp Act of 1795, though, provision was already made for time policies and it appears that time policies were not unusual in English practice at the end of the eighteenth century. However, they were not common until steamships, plying regular and scheduled voyages in the second half of the nineteenth century, ousted sailing ships, which navigated on distinct and different voyages every time, from the principal trade routes. In fact, one of the main contrasts between marine insurance practice at the beginning and at the end of the nineteenth century was the replacement of the voyage policy by the time policy as the typical form of insurance on ships. Time policies are recognised in s 25(1) of the Marine

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220 See also eg Roccus De assecurationibus note 57 where there is a reference to an insurance made on a ship and her equipment for a period of eight months. In terms of the Hamburg Assecuranz-Ordnung of 1731, art V-15, a time insurance terminated upon the expiry of a specified period of time, irrespective of the voyage not being completed, and the Insurer was not obliged to be liable any longer, unless there was an agreement to the contrary in the policy. See Dreyer 139-140.

221 Weskett Digest 544-545 sv ‘time’ par 1 noted that especially colliers and coasters were insured in this way. He advised Insurers to fix a single premium for the full period of cover, and not a premium per month, to avoid the problem of the insured seeking, after the completion of the most hazardous part of a voyage, to recover a part of the premium under the pretext of the vessel being laid up for unseaworthiness, or of her having been detained. In par 4 he stated that it was usual in policies on ships, lives, and the like which were insured for a stipulated time, to insert the words ‘the first and last days included’, and if the insurance was for a month or a number of months, to express ‘calendar months’, so as to avoid any argument that lunar months had been intended. See further Sutherland London Merchant 51 and 52 (In the eighteenth century it was realised that time policies were especially appropriate for packet boats and privateering vessels which might cruise sea-routes for many months in time of war); and Walford Cyclopaedia vol ii at 176 sv ‘days of grace’ (referring to Meretony v Dunlop (1783) where the insurers were held not liable in the case where the insured ship received damage before but was, because of pumping, lost only after the expiry the period of her insurance).

222 According to Drew 40, insurances of ships for periods of time were virtually unknown in the first half of the eighteenth century. The same was true of the seventeenth century. Thus, Molloy De jure maritimo II.7.4 remarked that insurances were either made to certain places or on return voyages, or else on ships going on trading voyages, the latter policies being general and dangerous, and seldom procuring subscriptions or being at least very expensive.

223 See further Wright & Fayle Lloyd’s 152.

224 This Act (35 Geo III c 63) limited the term of such policies to twelve months, to avoid the evasion of stamp duties by the conclusion of long-term marine policies. See Dover 47.

225 See ILL HR 3 94 and ILL HR 75 94 where it is explained that voyage policies were ideally suited to the long voyages undertaken by sailing ships, and that time policies on such ships were probably only issued in the cruising, coasting and fishing trades where it was impracticable or impossible to issue voyage policies.

226 See Palmer 86-88.
Insurance Act as occurring where the contract is one to insure the subject-matter for a definite period of time.\textsuperscript{227}

2 Insurance After Departure, Loss and Safe Arrival, and Insurance ‘on good and bad tidings’

2.1 Introduction and a General Background

One of the most vexed questions in earlier insurance law, and one conveniently dealt with in the chapter together with the duration of the risk, was that of insurances concluded on a ship after her departure on the insured voyage, or on cargo after the departure of the ship on which such goods were loaded, and, by the same token, of insurances which subsequently turned out to have been concluded after the occurrence of the loss of or damage to the insured ship or goods. An analogous issue was that of insurances concluded after the safe arrival of the insured ship or goods at their destination. Closely linked with these two matters was the practice of concluding insurances ‘on good and bad tidings’. These matters generated a considerable body of legislation and attracted continuous judicial and jurisprudential attention in the Netherlands as they also did elsewhere.

For a proper understanding of and perspective on insurances after departure and loss, some background information is necessary. A number of matters may be highlighted briefly.

The first point to be made and reiterated\textsuperscript{228} is that the insurance contract, being an aleatory contract, required for its validity the presence of a risk in the sense of an uncertainty as to the outcome of a particular event or events upon which the contract was predicated. This uncertainty, at least in the context of marine insurance, most commonly related to the occurrence or absence of loss or damage to the object of risk on a particular voyage. It had to be uncertain whether or not such a loss or damage would occur.

This uncertainty could take one of two forms. It could either be an objective and absolute uncertainty so that if the loss had already occurred or could, by reason of the safe arrival of the object of risk, no longer occur, the purported insurance contract would be void. According to this view, only future events, the outcome of which was objectively uncertain by the nature of the futurity involved, could be insured against. Alternatively, the uncertainty could merely be a subjective or relative uncertainty, so that the contract would be void only if the parties, or at least one of them, actually knew that the loss had already occurred or could no longer occur. According to this view, past or present events could also validly be insured against, even if, by reason of the absence

\textsuperscript{227} According to Chalmers 39, a definite period of time is a specified period of time, even if it is terminable on notice and irrespective of whether it is automatically renewed upon expiry. As to calculation of time, see \textit{idem} 143. In terms of the now repealed s 25(2), a time policy which was made for any time exceeding twelve months, was invalid.

\textsuperscript{228} See again ch VI § 1 \textit{supra}. 
of any futurity, their outcome was not or no longer objectively uncertain, as long as that outcome was still uncertain as far as the parties to the contract were concerned.

Although there was support, especially in earlier insurance law and jurisprudence, for the view that the nature of the insurance contract required an absolute uncertainty so that insurance after loss or safe arrival was totally impermissible, practical realities, which will be considered shortly, had come to prevail before the end of the sixteenth century.229

This was true also of Roman-Dutch insurance law. Thus, by the beginning of the seventeenth century it was settled in that system that in principle the uncertainty required for a valid insurance contract could either be objective (as in the case of a future loss) or subjective (as in the case of a past loss of which both parties were unaware at the time of the conclusion of the contract). The classic statement in this regard by Grotius230 was to the effect that the insurance contract would be deemed totally void ("omnino nullus") if the one party (the insurer) knew beforehand that the thing insured was already safe or had reached its destination or if the other party (the insured) knew that it had been lost. This was the case, Grotius explained, because an uncertainty as to the occurrence, and thus also the absence of loss ("damnum sub ratione incerti") was of the very essence of the insurance contract. The implication was clear: if the insurer or the insured did not respectively know of the safe arrival or of the occurrence of the loss, the contract was valid, such ignorance satisfying the requirement of uncertainty.231 It was therefore quite possible and valid in Roman-Dutch law in the appropriate circumstances to insure after departure and loss, and after safe arrival, as the case may have been. As will be explained shortly, the circumstances under which this was possible were regulated in great detail in Roman-Dutch insurance legislation.

Why then did the Dutch jurists justify the essentially statutory recognition in Roman-Dutch law of what was in effect an exception to the general principle regarding the nature of the uncertainty or risk required for purposes of a valid contract of

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229 See § 2.2.1 infra.

230 De jure belli ac pacis II.12.23.

231 See also eg Van der Keessel Praelectiones 1429 (ad III.24.1).

The Roman-Dutch sources recognised and paid attention to only two situations: where the insured knew of the loss or where the insurer knew of the safe arrival. See again the various possibilities in this regard mentioned in ch VI § 1 n21 supra and the further speculation on this point at n250-n251 infra.

Furthermore, the automatic effect of a valid insurance after a loss (ie, as will be explained shortly, of an insurance after loss without the actual knowledge of the insured or without any presumed knowledge or with the presumed knowledge being negatived by insurance 'on good or bad tidings') was to make insurance retrospective from the time of the conclusion of the insurance contract to the time when the ship or cargo was first exposed to the risk against which the contract in question provided cover. See eg Nehlsen-Von Stryk 'Kalkül und Hazard' 203-208 who refers to it as 'Rückwärtsversicherung'. The cover in terms of such an insurance in fact commenced at a moment prior to the conclusion of the contract itself. The same was the case where the insurance was concluded after a safe arrival. However, the Roman-Dutch sources did not recognise nor pay any attention to this retrospection. See further § 2 infra where the effect of insurance 'on good and bad tidings' is considered.
insurance? Put differently, what were the reasons why insurance after loss was recognised in Roman-Dutch law as valid, albeit subject to certain conditions and precautions introduced to prevent any fraudulent conduct on the part of either of the parties involved?

The clearest statement in this regard came from Van der Keessel. He explained, firstly and rather cryptically, that, in this situation, that the facts of which the parties were unaware had the same effect in law as those of which they could not be aware, that is, those which did not exist at all. Therefore, it was legally immaterial whether, on the one hand, a loss had in fact not yet occurred or, on the other hand, whether it had in fact occurred but the parties were ignorant of that occurrence. Secondly, he accentuated the commonplace nature of insurances after loss and the need in practice for such insurances to be regarded as valid.

This leads to the second point to be made as to insurances after loss, namely the practical realities. Insurance after departure, and hence also after a possible loss, was prevalent in early insurance practice either by design or by force of circumstance.

It has already been explained that until well into the eighteenth century, the practice of taking out insurance on ships and cargoes was not commonplace. Many merchants preferred to self-insure rather than to incur a further expense in the form of an insurance premium which could reduce their already narrow margin of profit. And if they did insure, the insurances they concluded were very often not concluded in advance as a precautionary measure but rather as an afterthought and, more particularly, when some circumstance indicated to them that if a loss had not already occurred, it was strongly suspected or imminent. Then, in the face of a greater likelihood of loss or damage than before, the expense of insuring the ship or goods concerned may well have become a worthwhile business proposition. Therefore, a merchant who at first had no intention of insuring his ship or cargo, trusting only in God, the staunchness of the ship and the experience of her master, may well later have had second thoughts about the matter when reports, or even just unconfirmed rumours, began doing the rounds; rumours of, for example, bad weather or enemy

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232 See eg Bynkershoek Quaestiones juris privatii IV.7. Enschedé 64 makes the point that insurance after loss was by the nature of the contract void and that the legal force of such an insurance was derived solely from statute.

233 Praelectiones 1443-1444 (ad III.24.5).

234 See in particular Nehlsen-Von Stryk 'Kalkül und Hazard' 203-208; and also eg De Groote 'Zeeverzekering' 213; Krans 11; Seffen 'Seguiren' 187; and Sneller 106-107.

235 See ch IX § 2.2 supra.

236 The following discussion between Solanio and Salerio, friends of Antonio, the Merchant of Venice, illustrates the role of rumour at the time:

Sol. Now what news on the Rialto?
Sal. Why yet it lives there uncheck'd, that Antonio hath a ship of rich lading wreck'd on the narrow seas; the Goodwins I think they call the place, a very dangerous flat, and fatal, where the carcasses of many a tall ship lie buried, as they say, – if my gossip Report
activity along the route the insured or carrying ship was to follow, or at the port to which she was destined. Likewise, if the ship or consignment he had been expecting, did not arrive when it should have done but was overdue, he may well belatedly have sought to obtain insurance cover. And such insurance cover, by the nature of things, was then concluded after the property he sought to insure had already been exposed to risk and even after it could already have been lost or damaged.

But just as insured often voluntarily and purposely insured only after the ship or goods to be covered had already departed on the voyage and could possibly already have been lost, there were other instances where, even if the insured had wanted to insure in advance, that was simply not possible. This was especially the case with the insurance of return cargoes and other imports. Thus, a merchant may have instructed his factor abroad to buy certain merchandise for him, to consign it to him by sea, and to advise him of what he had bought and when and by which ship it would be consigned. It then not infrequently happened that by the time the merchant received the advice from his factor, and was in a position to insure the consignment, those goods had already departed on the voyage and had already been exposed to risk.

They could even possibly already have been lost or damaged when sufficient information as regards the consignment to be insured came to his disposal for an insurance contract to be concluded. In fact, in some cases the ship arrived home at the same time as the news that the cargo had been put on board her. In such cases insurance after departure and possible loss was simply unavoidable because of the insured’s justifiable ignorance of the actual state of affairs, that is, his ignorance as to whether the insured ship or cargo had already departed and, if it had, as to whether or not it had already been lost or damaged.

Obviously, insurance after departure involved the possibility that it was also an insurance after loss and that, in turn, involved the possibility that the insured was in fact aware of that loss. Insurance after loss, whether by design or by necessity, was, probably more than any other insurance practice, prone to fraud on the part of the insured. It was very often a close thing whether it was a mere rumour of loss or an increased likelihood of loss which had moved the insured to conclude the insurance, or whether it was in fact actual knowledge of such a loss which had caused him to transfer the loss. Nevertheless, there was no doubt also a genuine need on the part of quite innocent merchants for insurances after departure and possible loss. As will become apparent from the discussion of the relevant principles below, the legal developments in Roman-Dutch law in this regard clearly illustrate the conflict between the need to permit insurances after departure and loss, on the one hand, and the need to protect

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237 See Spooner 127.

238 Being aware of the loss, of course, meant that it was no longer the risk of loss but an actual loss itself which the insured sought to transfer to the insurer.
insurers against fraud by their insured in the case of such insurances, on the other hand.\textsuperscript{239}

Not surprisingly, insurance after departure and after possible loss was more expensive because of the prevalence of improper practices in connection with such insurances. Insurers, rightly suspicious, were fully aware that they ran a great risk of the loss having occurred already, and that it would in practice be extremely difficult to establish, at a later stage when a claim was instituted, that the insured had in fact known of such loss at the time he had concluded the contract. Those who were willing to underwrite risks under such circumstances, made up for it by charging sharply increased premium rates. But another reason why an insurance after departure was more expensive, was because not all underwriters may have been prepared to become involved in this highly risky and speculative type of underwriting,\textsuperscript{240} even at an increased rate of premium, so that the few who were willing to do so could, because of the decreased competition, demand and obtain a higher premium for their participation.

It would appear that the extent to which insurances after departure and loss were more expensive, varied from time to time. In the sixteenth century, for example, Antwerp policies concluded in those situations were on average more than twice as expensive as those on ships or goods which had not yet departed.\textsuperscript{241} And, of course, they became more expensive the longer after the departure, and the more serious the rumours and speculation about a possible loss.

From the individual underwriter's point of view, the higher premiums earned by writing insurances after departure and possible loss may in particular have attracted

\textsuperscript{239} Of course, fraud on the part of the insurer in the case of an insurance after the safe arrival of the ship was also possible although, obviously, less prevalent in practice. See further § 2.3 infra.

\textsuperscript{240} See again Nehlsen-Von Stryk 'Kalkül und Hazard' 203-208 who regards an insurance after departure as pure speculation on the part of the insurer - a wager on whether or not the rumours or suspicions giving rise to the decision to insure, were true - as in such a case there was no possibility of any assessment of the risk on the basis of any (even rudimentary) experience. According to her, such retrospective insurances, although valid, posed the greatest challenge to the attempt of lawyers to control speculative practices in the context of the insurance contract. Insurance after departure and loss, rather than wagering insurance or disguised wagers, was the raw nerve of marine insurance law and practice in the Middle Ages, as is readily apparent from the great number of legislative measures on the topic. However, apart from the fact that not all insurances after departure and possible loss were by design concluded when they were, and apart from the further fact that there was a genuine need in practice for such insurances, this view may in any event be true only for the time when such insurances were concluded exceptionally and by way of the insertion of special clauses in policies. Later, when insurance 'on good and bad tidings' and the insertion of a clause to that effect became standard practice, the possibility of an earlier loss (of which the insured was unaware or with the insurer being unable to prove any knowledge on the part of the insured) became just a further part of the total risk (i.e., together with the possibility of a subsequent loss) taken over and assessed by the insurer. See again ch IX § 2.4 supra as to nature of early marine underwriting.

\textsuperscript{241} See De Groote Zeeassursurantie 130-131 who points out that in one exceptional case the premium charged was 50 per cent instead of the usual rate of 9 per cent on the voyage in question. See too eg Barbour 'Marine Risks' 593 (referring to premiums on insurances after departure soaring by 30 to 40 per cent); and Sneller 109n1 (even an offer of a premium of 50 per cent was not acceptable in London for an insurance on a ship which had not arrived when she was expected).
part-time and more speculatively inclined underwriters to participate in what was termed 'the overdue market'.\(^{242}\) It was not impossible, furthermore, that some underwriters themselves may have spread rumours on the fate of a particular fleet of ships in an attempt artificially to inflate local premium rates.

This leads to a third important point to be made on this topic, and a factor which played a vital role in creating the practical occurrence and need for both designed and unavoidable insurance after departure and loss. That was the availability or otherwise to merchants of information concerning their ships and cargoes and their knowledge, or rather the lack of it, concerning the whereabouts and status of the property to be insured. In this regard the state of earlier channels of communication was, of course, a vital element. The single most important factor which caused or forced an insured to conclude an insurance after departure, was the lack of proper, accessible, reliable and speedy channels of communication. News of the departure of a ship and her cargo often got to the destination and the place where the owner resided and wanted to conclude an insurance, only when the ship herself arrived there. And an owner could often not confirm or deny rumours and reports about the well-being and location of his interests. Of course, this factor in particular made this form of insurance open to fraudulent practices on the part of the insured and therefore highly dangerous for the insurer, the latter himself being unable to ascertain whether or not a loss had occurred at the time the contract was concluded and, equally crucially, whether or not the insured had in fact had a private communication and knew of any such loss.

The channels of communication generally, and postal services in particular, were in the Netherlands, as elsewhere, insufficient to support an increasingly sophisticated insurance business.\(^{243}\)

In the minute book of the Amsterdam Chamber of Commerce (Collegie van Commercie) for the years 1663 to 1665, for example, a complaint was noted about the irregularity of the postal service between Amsterdam and Texel as a result of which it frequently happened that a ship was insured in the city although she had already arrived at the outport of Texel and without the post having provided any news of her arrival in the city itself.\(^{244}\) About the same time, 1663, in Rotterdam, a daily maritime news-service ('zeetijdingendienst') was introduced between the Bourse and the mouth of the river Maas to speed up the delivery of information about shipping movements and casualties there.\(^{245}\) And if local channels of communication gave rise to complaints, intercity and international postal services were even more inadequate and unreliable. In

\(^{242}\) See again ch IX § 2.4 supra.

\(^{243}\) As to the role of bourses in the spread of information vital to the insurance market, see again ch IX § 2.5 supra. For the role of Lloyd's as a centre for the collection and dissemination of shipping information, see again ch IX § 2.11.3 supra.

\(^{244}\) See Vergouwen 43-44, remarking on the important role of the broker in obtaining information as to the whereabouts of a ship at the time of the insurance in the absence of any proper and organised news-gathering.

\(^{245}\) See Krans 11.
the sixteenth century long delays\textsuperscript{246} and the great risk of non-delivery resulted in merchants commonly sending the original correspondence as well as a copy along different routes to ensure that at least one of them reached the addressee. Although matters had improved markedly by the latter half of the seventeenth century, postal services still came with a hefty price tag and served mainly the business community.\textsuperscript{247}

Before turning to an exposition of the legal position in Roman-Dutch law, firstly, of insurances after departure and loss, and secondly, of insurances after safe arrival, a few final matters must be clarified and some further distinctions drawn.

The conclusion of an insurance contract after the property to be insured had already been exposed to the perils against which such insurance was to protect it, may, and was in the Roman-Dutch sources in the context of marine insurance, generally referred to as an insurance after departure on the voyage or as an insurance after imperilment. Because in the case of an insurance after departure it was possible that a loss or damage could have occurred prior to the conclusion of the insurance contract, a pertinent question in this regard was whether such an insurance after loss was valid and, if so, under what circumstances. Therefore, an insurance after loss was always a case of insurance after departure. But an insurance after departure was, of course, not necessarily also a case of an insurance after loss. As will become apparent below, the sources by and large distinguished the legal consequences of an insurance after departure from those of an insurance after loss.

A related issue was that of the insurance after the safe arrival of the property to be insured at the destination to which it was insured, that is, an insurance after the risk against which such an insurance sought to protect, had already terminated. Whereas in the case of an insurance after departure and loss it was the knowledge of the insured at the time of the conclusion of the contract which was relevant and his possible fraud upon the insurer which the law sought to prevent, in the case of an insurance after safe

\textsuperscript{246}See Van Gelder 359-360 who observes that while at the time a sea-voyage from Amsterdam to Lisbon took 44 days, a letter took 287 days to be delivered overland.

\textsuperscript{247}See generally Smith 'Information Exchange' 991, noting that the post between Amsterdam and Paris at the time took six days by regular service and two days by the more expensive express service. Between Amsterdam and London there were packet-boats twice weekly, although express communication could be obtained at a price.

Postal communication between the Netherlands and England (as to which see generally Brujin 'Postvervoer') until the mid-seventeenth century mainly took the form of private arrangements with letters and postal articles being conveyed by a ship's master pursuant to an individual agreement with the sender. Such ship's letters were handed over by the master on his arrival to the local postal authorities for further delivery. Other similar private arrangements were made between merchants, consignors of goods and diplomats. All posts from the Netherlands to England continued, until around 1660 and despite the Eighty Years' War, to be directed via Antwerp, and went from there to London by packet-boats (pakketboten). At the time a letter took six days or longer from Amsterdam to London and delivery was not always guaranteed. Only in 1661 was an official postal treaty concluded between the Amsterdam and the English authorities for the conveyance of not only all Dutch postal articles, but also of all articles posted between England and the rest of the Continent. The conveyance of post from Amsterdam was contracted out to private individuals, although the channel crossing had to be undertaken in English ships. Initially there was a weekly and later a bi-weekly service between the two cities. Despite opposition to the Amsterdam monopoly from other Dutch cities, this treaty was subsequently renewed in 1668 and in 1677, and the arrangement was finally terminated only in 1818.
arrival it was the knowledge of the insurer at the time of such conclusion and his possible fraud upon the insured which were the concern of the law. Insurance after safe arrival will accordingly be treated separately.\textsuperscript{248} A strictly speaking unrelated but possibly confusing issue was that of the conclusion of an insurance on a ship before her arrival at the place from where the risk was to commence, a topic which will also be treated separately, albeit cursorily.\textsuperscript{249}

It is clear that the knowledge, at time of the conclusion of the insurance contract, of the insured of an earlier loss, or of the insurer of an earlier safe arrival, rendered the insurance void, there not being the uncertainty required for the validity of the insurance contract. The Roman-Dutch sources did not expand upon the effect of the knowledge or ignorance of the other party in these two admittedly rather theoretical cases, that is, the effect of the knowledge or ignorance of the insurer in the case of an insurance after loss and that of the insured in the case of an insurance after safe arrival.\textsuperscript{250} However, the assumption appears to have been that for the insurance to have been invalid in each of these circumstances, the insurer and insured should respectively also not have been aware of the prior loss or the prior safe arrival. Put differently, the subjective uncertainty recognised by Roman-Dutch law for the validity of the insurance contract implied that both parties should have been unaware of the earlier loss or safe arrival. If both were not unaware of the earlier loss (or safe arrival, as the case may have been), the agreement would not have been one of insurance as both parties were not ignorant and the required uncertainty was absent.\textsuperscript{251}

One last distinction. In the case of an insurance after loss, the insured's knowledge of the loss was relevant. As will be shown shortly, it could have been his actual knowledge or his presumed knowledge. A legal presumption of knowledge was provided for. But Roman-Dutch law also provided for a presumption of loss in appropriate cases where an actual loss was impossible to prove, such as where the insured property had simply disappeared. In such cases a loss was presumed after the expiry of certain periods of time.\textsuperscript{252} Therefore, a distinction has to be drawn between the presumed knowledge of a loss and a presumed loss.\textsuperscript{253}

\textsuperscript{248} See § 2.3 \textit{infra}.

\textsuperscript{249} See § 2.4 \textit{infra}.

\textsuperscript{250} See also n231 supra.

\textsuperscript{251} Thus, in the case of an insurance after loss, there was only a valid contract of insurance if both the insured and the insurer were ignorant of the loss. If one or both of them were aware of the loss, the contract, if valid, could not have been one of insurance. However, only where the insured was aware and the insurer ignorant of the loss (and not also where both were aware, or where the insured was unaware and the insurer aware of the loss) could there have been any question of fraud. And it was only in this case that Roman-Dutch law paid any attention to this situation.

The same could be argued, \textit{mutatis mutandis}, as far as an insurance after safe arrival was concerned.

\textsuperscript{252} As to a presumed loss, see ch XV § 6 \textit{infra}.

\textsuperscript{253} This distinction, it would appear, was not properly maintained by eg Wassenaer \textit{Practyk notariael} VIII.4 who may possibly have had a presumed knowledge of a presumed loss in mind.
2.2 Insurance After Departure and Loss

2.2.1 The Early Position

As in the case of the contract of sale, the existence of an object of risk was one of "substantia contractus" of the insurance contract. If there was no such object at the time the insurance was effected, the contract was void, whether that was because the object never in fact existed or whether it was lost before the conclusion of the contract. Accordingly, in the early jurisprudence, an insurance concluded on a ship or cargo already lost was regarded as void. However, it appears that in the earliest insurance practice it was accepted that property could be insured whether or not it was lost, as long as any loss was unknown to the insured at the time of the insurance. This resulted in quite a discussion amongst the early authors as to the applicable principles.

The possibility of fraud upon the insurer in this case immediately resulted in strict legislative requirements. Typically, in the earliest legislative measures on the matter in the fourteenth century, an insurance after loss was void not only if the insured himself had actually heard of the loss, something which was difficult if not always impossible for the insurer to prove, but even if such knowledge could merely be assumed. This was taken to be the case if the loss was merely known at the place where and at the time

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254 See Coing Privatrecht 535.

255 See eg Bensa Assicurazione 71; Sanborn 254-255.

256 Thus, Straccha De assecurationibus XXVII discussed the Ancona policy of 1567 which insured goods 'et si dictis tellis undulatis (mercibus assecuratis) superveniat vel supervenerit infortunium aliquod', that is, whether misfortune still had to occur or had already occurred. He noted that the insurance contract could relate to the present or the past (num 1). In the case of an insurance concluded after the loss, where the insured did and could not have had knowledge of the loss and had acted in good faith, the insurance was valid and was, in essence, still an agreement de futuro (num 2). However, if the insured did have or could be presumed to have had knowledge of the loss and therefore acted or could be presumed to have acted in bad faith, the insurer could raise the exceptio doli mali, and the insured in addition committed a criminal offence. Lastly, he noted, it was a decision of fact by the Court whether circumstances were such that the insured could be presumed to have had such knowledge (num 6).

Scaccia De commerciis I.7.2.10.19-22 explained that there were two views on insurances (on ships, merchandise or human life) concluded after the occurrence of the misfortune. One view was that it was valid although there was a presumption of knowledge of such an occurrence. The other view was that such an insurance was void, even if the insured was unaware of the occurrence. The latter view drew on the analogy with the contract of sale and the principle that there was no valid sale in the absence of a res. However, he thought that the insurance contract was different by reason of its aleatory nature and could be concluded in respect of a 'res incerta & dubia', and in respect of a 'res futura' or a 'res praeterita' or 'praesentia', even though in respect of present and past matters fraud could be committed with greater ease than in the case of future matters. And although the res may have been lost, the contract was valid as long as an uncertainty as to the occurrence still existed: 'etiam assecuratio potest fieri de re praeterita; & ita servatur, quia sufficit, risicurn semel extitisse'.
when the insurance contract was concluded, and that was in turn taken to be the case if there was but a single witness who had heard the news there at that time.\textsuperscript{257}

In Barcelona, too, an insurance after loss was valid if the insured did not or could not be presumed to know of the loss. However, its fifteenth-century insurance legislation provided a more sophisticated regulation as to when the insured could be presumed to have had knowledge of the loss. In terms of s 14 of the Ordinance of 1458 and s 17 of the Ordinance of 1484,\textsuperscript{258} an insurance after loss was valid as long as news of the loss could not have reached Barcelona at the time of the conclusion of the contract. Knowledge was presumed after the expiry of a certain period of time after the occurrence of the loss, depending on the distance between the place of the loss and Barcelona. If enough time had elapsed for this information to have reached the insured before he signed the contract, the insurance contract was void. In order to avoid disputes as to whether or not such news could have been available in Barcelona upon such conclusion, a twofold distinction was drawn. If the loss had occurred 'on this side of the sea',\textsuperscript{259} so that the news could have reached the city overland without the necessity of having to cross the sea, the news was presumed to have been able to travel at a rate of one mile per hour.\textsuperscript{260} If the ship was lost on the other side of the sea, so that it was necessary to send the news of the loss by sea, a different method was applicable. Then the time it took the news to reach Barcelona was calculated from the time when the news had reached land on this side of the sea and from there at the rate of one mile per hour, but if the news had come directly to Barcelona over the sea, the relevant time was when the ship in question had moored in that city.\textsuperscript{261}

\textsuperscript{257} That was the position according to Genoese legislation of 1383 (which, incidentally, was the earliest legislative measure on the insurance contract) and 1420. See eg Bensa Assicurazione 86, 89, and appendix VI at 159-160; Goldschmidt Universalgeschichte 379; Holdsworth History vol VIII at 281; and Sanborn 257-258.

\textsuperscript{258} See Pardessus vol V at 514 and at 536-537 respectively.

\textsuperscript{259} As to the distinction between 'on this side of the sea' and 'on the other side of the sea ('aan deze en aan gene zijde der zee'), see further Goudsmit Zeerecht 110-111 and again ch I § 4.3.2.2 supra as to master's authority to conclude a bottomry bond on this and the other side of the sea.

\textsuperscript{260} Thus, it would have taken as many hours for the news to travel to Barcelona as there were miles separating the two places, ie, the place where the news of the loss first reached land and the city itself.

\textsuperscript{261} See further Magens Essay vol I at 86 (referring to one league per hour); and Sanborn 258. Reitz Geschichte 96-99 notes that the presumptions of knowledge were irrebuttable. The determination of the time/distance equation was based on practical experience of the rate at which news of a loss on land could be expected to reach Barcelona, but it appears to have ignored the particular problems connected to losses at sea and to have had some inequitable results in such cases. Thus, it was assumed that another ship was always in the vicinity of the ship which was lost or damaged at sea, which, of course, was not necessarily the case. Further, the fixed period after which knowledge of a loss was presumed resulted in unfairness to both the insurer (eg where actual knowledge was obtained by the insured before the conclusion of the contract and that in turn occurred before the knowledge could be presumed) and the insured (eg where he in fact had no knowledge and acted in good faith, especially since no proof of his ignorance was permissible). Seville initially prohibited insurance after loss, but later followed the Barcelona example. See Enschedé 60-61.
However, this presumption of knowledge on the part of the insured was not in vogue everywhere. It appears not to have been recognised, for example, in Naples in the first half of the seventeenth century. In that city there was a presumption of ignorance and good faith if the insurer could not prove either actual knowledge of the loss on the part of the insured or that the insured was likely to have had such knowledge.262

The principle that an insurance after loss was valid except if the insured had or could have had knowledge of that loss, was also recognised in the Low Countries from early on.

In the earliest extant record of a judgment in an insurance case, delivered by the Bruges Schepenen Court in 1444, the insurers had refused payment on a policy on the ground that the insurance had been concluded after the insured had obtained knowledge that the ship had sunk. The Court held that the insurers had to prove this knowledge on the part of the insured.263 And in a case heard there in 1456, the insurer alleged that within 24 hours after the insurance was concluded, everybody in Bruges knew that the insured ship had been captured by the English and that the insurance was therefore invalid. Unfortunately the decision in this instance is not known.264

2.2.2 Legislation in the Sixteenth Century

Remarkably and quite contrary to what appears to have been the practice at the time in the Netherlands, s 4 of title VII of the placcaat of 1563 declared every insurance invalid if, at the time the insurance was concluded, the object of risk was lost. It imposed a prohibition on the insurance of ships, goods, freight or anything else whatsoever which was already lost at the time of the conclusion of the insurance ('die ten

262 Roccus De assecurationibus note 51 explained that an insurance on a ship or goods which was already lost was valid in favour of the insured if, at the time of the conclusion of the insurance, he had no knowledge of the loss. Ignorance would be presumed if there was no proof of knowledge.

In a case between Joan Baptista Ghirardini & Other Insured v Stephanus Thier & Galeatus Nale & Other Insurers, decided in Florence in 1646 (see Roccus/Feitama Gewijsdens decisi 11), the insurance was concluded on 2 December 1644 on a cargo of com loaded in a ship which was to depart from Glurgente to Messina. According to a statement on 12 December, the ship with her cargo was captured by the French on 29 November. The insurers refused the claim, arguing that the loss had occurred three days prior to the conclusion of the insurance. The insured pointed out that at that time there was no knowledge yet in the city of the loss and that the insurers were therefore doubtlessly liable for the earlier loss. The Court agreed and held them liable.

263 See De Groote Zeeassurantie 13; idem 'Zeeverzekering' 207.

264 See Gilliodts-van Severen Cartulaire vol II at 43; De Groote Zeeassurantie 13; De Roover 'Early Examples' 199. In 1457 the local Court accepted the principle that the insurer was not liable if the ship had already been lost at the time of the contract and, presumably, if the insured was aware of that loss. See Gilliodts-van Severen Cartulaire vol II at 62-63; Raynes (1 ed) 14-15.
The Duration of the Risk and Insurance after Loss

265 This prohibition was absolute and invalidity followed inevitably in the case of an insurance after loss. It did not matter, for example, that the insured was actually unaware of the loss or could not reasonably have been aware of the occurrence of the loss. Therefore, not even the complete ignorance of the insured assisted him in such a case, for not his subjective knowledge but the objective view of the events were determinant of his rights. 266 The possibility was also not recognised yet of insuring 'on good or bad tidings'. 267 Thus, in terms of s 4 of the placcaat of 1563, absolute and objective uncertainty was required for the validity of the insurance contract.

In terms of s 5 of the placcaat of 1563, if one wanted to rely on the Antwerp customs in regard to missing ships and the presumption of loss, 268 the insured, if the wanted to recover, would be obliged to prove by lawful means that at the time of the insurance such ship and goods were still in existence ('dat ten tyde vander Asseurantie dusdanich schip ende goet noch was in wesen'). 270

However, the unqualified prohibition of insurance after loss in an attempt to counter the concomitant fraudulent practices, was too widely drawn. It simply did not take account of realities and the need for and important function in practice of insurance after departure and thus after a possible loss. Not surprisingly, a different and more specific approach was followed in the provisional placcaat of 1570 and then also in the placcaat of 1571. The matter was regulated in depth and, as will appear shortly, resulted in the legal position being rather involved.

265 The word 'pericliteeren', despite first impressions, did not simply mean imperiled or already at risk and thus possibly lost, but rather actually lost. This much appears not only if s 4 is read with s 5 (which permitted an insurance after departure or imperilment as long as the property was not yet lost), but also eg from s 18 (where it was provided that the insured had to give the insurer notice of and also prove 't perijckel ofte verlies'), and from the earlier placcaat of 25 May 1537 (which provided for the insurer to pay on the policy within a specific time after the ship or goods he had insured 'geperlckliteert oft bedorven sa/zijn'). See further as to the fact that the word 'ghepericleiteert' meant lost and that the placcaat of 1563 declared insurance after loss invalid, Enschedé 61; Goudsmit Zeerecht 246n2; Jolles 56; and Kracht 19. But see eg Van Zurck Codex Batavus sv 'Assurantie' par 9 who contrasted s 4 with later provisions concerning an insurance after loss on the basis that it referred not to the loss but to the imperilment of the insured property ('als sprekende van 't pericliteeren, en niet weg zijn van de geassureerde goederen'). Likewise also eg Oelofse 287.

266 See eg Groenewegen Aanteekeningen n10-n13 (ad III.24.5); Bynderkhoek Quaestiones juris privati IV.7 (insurance after loss was simply and without any distinction disapproved of, on the basis that if the loss had already occurred the insurer was not liable at all); Decker Aanteekeningen ad IV.9.4 n(3)/(c).

267 About which more infra.

268 See generally Van der Keessel Praelectrones 1443 (ad III.24.5) for an explanation along these lines.

269 The insured had the right to claim compensation when, for one year and a day after the signing of the policy, nothing had been heard of the insured or carrying ship. See further ch XV § 6 infra as to the presumption of loss.

270 See also eg Goudsmit Zeerecht 246-247; De Groota Zeeassurantie 34; Jolles 56 and 59; and Kracht 19.
Firstly, while the *placcaat* of 1571 in s 11 acknowledged the validity of an insurance after loss under certain conditions and with certain precautions, it by implication also permitted an insurance to be concluded after departure. However, this was not expressly so provided and no conditions were imposed upon the insured in that regard, for example that he had to mention to the insurer in the policy the fact of such departure or his ignorance of whether or not the ship had departed.

Secondly, s 11 of the *placcaat* provided for the position where it turned out that the insurance was concluded not only after departure but in fact after a loss. In terms of this section,\(^{271}\) no valid ('vailliabel') insurance contract could be concluded on goods, ships or anything else which was, on the day on which the contract was concluded, already lost or damaged ('verdorven oft verlooren sauden wesen') if, and only if, the insured knew or could have known of such loss ('so verre nochtdas dat den Assureerder 't setfde wiste, oft weten konde'). Thus, there was no longer an absolute prohibition on an insurance after loss. Now only an insurance after loss of which the insured had actual knowledge, or of which he could have had knowledge, was prohibited, such insurance being fraudulent.

Knowledge on the part of the insured of the loss was presumed if the news of the casualty was or could have been known at the place where the agreement was concluded. And whether it could have been known depended on the distance between the place of loss and that of the conclusion of the contract, as well as on the time which had elapsed between such loss and such conclusion, calculating the speed at which such news travelled at three miles\(^{273}\) in two hours.\(^{274}\) Put differently, knowledge was

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\(^{271}\) Section 11 of the *placcaat* of 1571 was, save for a few minor points which will be referred to below, identical to s 12 of the provisional *placcaat* of 1570. See Goudsmit *Zeerecht* 246-247.

\(^{272}\) Goudsmit *Zeerecht* 264 appears correct in his assumption that in the Dutch text of the *placcaat* of 1571 the word 'asseureerder' in s 11 was an error and that it should be read as 'geasseureerde'. The French text read 'asseuré'.

\(^{273}\) The 'mile' as a unit of measurement of distance referred to here was probably the Dutch mile. Although earlier of a variable length, the Dutch mile was in the seventeenth century usually taken as the equivalent of the league (3.18 nautical miles, usually rounded off to 3 nautical miles). The nautical or sea mile (*zeemijl*) was the measure of distance at sea on the earth's surface subtended by one minute of latitude. The arithmetical mean of the nautical mile, as measured at the Equator and as measured at the poles (because the earth is not exactly spherical but an oblate spheroid, i.e., flatter at the poles, the length of the nautical mile varies slightly with latitude, it being shortest at the Equator), was 6 077ft, rounded off to 6 080ft or 1 852m. This mean was also known as the 'standard' nautical mile and was sufficiently accurate to have become used in practice for navigation. See further Kemp sv 'nautical mile'.

A ship's speed through the water was measured in knots, 1 knot (knopen) being the equivalent of 1 nautical mile (or 6 080ft) per hour. The word 'knot' was derived from the divisions marked by knots on a log-line, which was the line to which a log of wood or float was attached and which was thrown into the sea astern. By counting the number of knots (50ft or 1/120th of a nautical mile apart) reeled out in a standard period of 30 seconds (1/120th of an hour), indicated by a sand-glass, the mariner could determine how many knots passed out in a fixed period of time.

Apparently the log-line was not used on Dutch ships. The method favoured by Dutch mariners in the seventeenth and eighteenth centuries to compute the speed of a ship was the 'Dutchman's log'. It involved measuring the time during which a chip of wood, dropped into the sea from the bow or front end of ship, travelled alongside towards the stern of the ship between two marks cut on the gunwale of the vessel. The distance between the two marks was standard so that it was a question of simple arithmetic to determine the rate of sailing. See further Kemp sv 'log'; (1972) 58 Mariner's Mirror 357-358 and 471; and Nicholson 15-16 and 207-208.
presumed if the moment the contract was concluded ("uyre van den Contracte") was within a certain period of time after the occurrence of the loss; this period depended on the distance between the place where the loss had occurred and the place where the contract was concluded, and it was calculation on the assumed speed (miles per hour) at which news travelled. The assumed speed of three miles in the period of two hours, was stated to apply whether the news was received by sea or by land. Section 11 noted that in this regard the earlier custom of taking one mile per one hour as the measure, was abolished because of the abuses it had occasioned ("t welck om die abuysen geabuleert is"). If the contract was concluded sufficiently long after the occurrence of the loss, it could be assumed that the insured did have or at least could have had knowledge of that loss at the time the contract was concluded.

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274 Or, the time which it took the news to cover the distance in question, that is, 2 hours for every 3 miles.

275 Or, rather, as Bynkershoek Quaestiones juris privatl IV.7 put it, the speed at which a messenger travelled with the news.

276 That is, 1½ miles per hour.

277 In s 12 of the provisional placcat of 1570, a faster rate of 2 miles per 1 hour had been provided for (see De Groote 'Zeeverzekering' 213, who is nevertheless incorrect in stating that in terms of the placcat of 1571 this was changed to 3 miles per 1 hour). Earlier the customary rate was 1 mile per 1 hour (or, rather, 1 hour per 1 mile: see further n284 infra). It is uncertain precisely what the abuses were which the placcat of 1571 sought to prevent by replacing the rate of 1 mile per hour with one of 1½ miles per hour. Possibly the periods calculated according to the customary rate and according to the provisional placcat 1570 were respectively too long and too short. Of course, the insurer wanted the rate to be as fast as possible to reduce the period after the loss during which an insurance could still validly be concluded. The insured merchant naturally desired the opposite. In s 11 the customary period after the occurrence of the loss and before the conclusion of the insurance was somewhat shortened to the detriment of the insured.

According to Magens Essay vol I at 86-87 It was not surprising, in view of the unfairness of the presumption of the knowledge of loss, that Dutch merchants had in 1571 opposed the designs of the Duke of Alva who strenuously insisted upon having such a law (based on the earlier Spanish example) introduced there. Magens then gives examples to illustrate the unfairness of the presumption, showing that even if the person insured on the same day as he had received advice of his goods being shipped, the insurance he then concluded could already have been null because of the operation of the presumption, namely when the passage of the ship involved was faster than that of the post between the two places. See also Weskett Digest 299 sv 'intelligence' par 10 who, after referring to the laws in which provision was made for a presumption of loss and of knowledge of loss after certain periods of time, depending on the distance between the place of the insurance and the place of the loss, said: 'I apprehend that, during [war, when intelligence is of much greater consequence than in time of peace], the calculation of miles and hours, as directed by the ordinances ..., would frequently prove fallacious, on account of the various causes of detention and delay which all ships are then particularly liable to, besides winds and weather, so that innocent insureds would often be exposed to a nullity of insurance'.

278 This may be explained by the following example: If the loss took place at 12 noon on a Monday at place X which was 72 miles from place Y where the contract was subsequently concluded, the insured could be assumed to have had knowledge of that loss there (i.e., it would have been assumed that knowledge could have reached the insured in place Y) after the expiry of 48 hours after the loss. Thus, if the contract had been concluded longer than 48 hours after the loss, i.e., after 12 noon on Wednesday, it would have been invalid. If it had in fact been concluded earlier, no knowledge of the loss was imputed to the insured and the insurance was, prima facie, valid.

De Groote Zeeassurantie 40 provides the following example: Suppose a ship with her cargo was lost or captured 108 miles from her port of departure where an insurance was concluded after her departure. In terms of s 11 of the placcat of 1571, this distance, expressed in time, would have been 72
of the passage of an insufficient period of time between the loss and the conclusion of the contract, no knowledge could be ascribed to the insured so that there was, as it were, a presumed ignorance on his part, the insurer was not precluded ('geforcludeerf') from establishing by lawful evidence that the insured in actual fact did know (that is, that he had actual knowledge) of the occurrence of the loss at the time when the contract was concluded. Put differently, the 'presumption' of ignorance was rebuttable. The position was otherwise, it would appear, where knowledge was ascribed to the insured after the passage of a sufficiently long period of time, for then the presumption of knowledge appears to have been irrebuttable.219 220

In short, whereas in terms of s 4 of the plcacaat of 1563 an objective uncertainty was required, a subjective uncertainty was sufficient for the purposes of a valid insurance contract in s 11 of the plcacaat of 1571; whereas in terms of s 4 all insurances after loss were void without distinction, in terms of s 11 an insurance after loss was void only if the insured had actual or presumed knowledge of that loss.221

2.2.3 The Position in Antwerp Customary Law

How, then, did the plcacaat of 1571 conform to the insurance practices and customs which were followed in the Low Countries at the time? For this one may usefully turn to the compilations of Antwerp customary law dating from late sixteenth and early seventeenth centuries.222

279 Section s 11 did not expressly provide that in those instances where knowledge was attributed to him, the insured was also free to prove (however difficult that may have been in practical terms, which may have been the reason for this possibility not being provided for) that he in fact did not have or, rather, could not have had such knowledge. There is no indication that (as Enschedé 61 thought) the presumption of knowledge could be overruled by an oath by the insured. According to Goudsmit Zeerecht 246-247, s 12 of the provisional plcacaat of 1570 provided for an irrebuttable presumption of knowledge, and that appears also to have been the position in the customary law (as to which see § 2.2.3 infra).

280 As to s 11, see generally eg Van Zurck Codex Batavus sv 'Assurantie' par 9. See also Dorhout Mees Schadeverzekeringsrecht 241; Enschedé 61; Goudsmit Zeerecht 264-265; De Groote Zeeassurantie 40; Kracht 27; and Oelofse 287-288.

281 For an explanation of this evolution, see further Bynkershoek Quaestiones juris privati IV.7; Van der Keesel Praelectiones 1443 (ad III.24.5); and De Groote Zeeassurantie 62.

282 As to the position in Antwerp, see generally Couvreur 'Zeeverzekeringspractijk' 195-198; and Mullens 51-55.
In terms of art 4 of title XXIX of the Antwerp Antiquae of 1570,\textsuperscript{283} one could insure ships or goods which were lost ("dat verdoncken, gerooft oft bedorven zyn"), even after such loss had occurred, as long as that loss had not come to the attention of the person who insured such ships or goods. But, in terms of art 5, if the ship or goods had been lost so long ago that knowledge of that loss could have come to the person who concluded the insurance, calculating the news of the loss to travel at one hour for every mile,\textsuperscript{284} whether by sea or over land ("tzy ter zee oft te lande, rekende een ure voor elcke myle"), such insurance was considered null and void. And this presumption of knowledge of the loss ("de perclitatie,\textsuperscript{285} roovinge oft bederve") was such that it was irrebuttable by any proof to the contrary ("datter egeenen thoon ter contrarien ontfangen en wordt").

Along similar lines, but now also providing for an insurance after departure, were the relevant provisions of title LIV of the Antwerp Impressae of 1582.\textsuperscript{286}

In terms of art 8, insurances concluded three months after the departure of the ships (presumably, from a port) in Europe, Barbary or surrounding places, and six months in the case of further places, would be regarded as null and void ("voor nul ende van onweerden"), unless the person who insured himself warned the insurer of that fact ("den versekerer daeraf waerschoude") or\textsuperscript{287} insured himself on good and bad tidings ("oft hem dede versekeren op goede ende quaede tidingehe"),\textsuperscript{288}

Article 9 of the Impressae was in terms the equivalent of art 4 of the Antiquae of 1570. One could insure ships or goods which had been lost ("die verdoncken, gherooft oft bedorven sijn") if knowledge of that loss had not come to the attention of the person who concluded that insurance ("die t'selve doet asseureren").

Article 10 of the Impressae, again, was the equivalent of art 5 of the Antiquae. It provided that a ship or goods lost so long ago that knowledge of that loss could have come to the person who concluded the insurance, calculating the news of the loss,

\textsuperscript{283} See De Longé vol I at 600.

\textsuperscript{284} Thus, there was a calculation of time (1 hour for every mile distance) rather than of distance or speed (ie, the rate of progress over a distance in time or miles per hour). Note, the rate of 1 hour per mile was also the accepted rate in Barcelona (see § 2.2.1 supra). See further De Groote Zeeassurantie 62 and again § 2.2.2 n277 supra for the abolition of this customary rate by the placcaat of 1571.

\textsuperscript{285} See again n265 supra.

\textsuperscript{286} See De Longé vol II at 402-404. See also the references to these provisions by Groenewegen Aanteekeningen n10-n13 (ad III.24.5); and Van Leeuwen Rooms-Hollands regt IV.9.7.8.

\textsuperscript{287} This 'or' appears to have been a mistake and, as will appear shortly, it should have been an 'and' as was the position in terms of art 23 of the Compliatae of 1609 and in s 21 of the Amsterdam keur of 1598.

\textsuperscript{288} It appears to have been implicit here that art 8 was concerned with an insurance after departure where the insured had no actual knowledge of any loss or damage which may have occurred. Article 8 was in any event contrasted to (ie, it commenced with the words 'wel verstaende') art 7 which concerned the presumption of loss (as to which see ch XV § 6 infra). In any event, it is clear that although they concerned theoretically different principles, an insurance after loss and the presumption of a knowledge of that loss on the one hand and an insurance after departure on the other hand were closely related in practice and could easily be confused.
whether it occurred at sea or on land, to travel at three miles in two hours, whether by sea or land ("t'zy ter zee oft te lande (rekenende dry mylen weeghs binnen den tijd van twee uren, t'zy ter zee oft te lande)"), such insurance would be regarded as null and void. And in such cases the insured would be taken as having had knowledge of the loss ("vande periclitatie oft inconvenient"). This presumption was irrebuttable by any proof to the contrary ("ende wordt ter contrarien gheenen thoon ontfangen"). Thus, this legal presumption relieved the insurer of liability even if the insured could and did prove that it was objectively impossible for news of the occurrence of the loss to have reached him at the place of the conclusion of the contract at the time of such conclusion.

The provisions of arts 9 and 10 of the Impressae were largely the equivalent of those of s 11 of the placcaat of 1571. On two points there was a difference though. In terms of s 11 of the latter the presumption of knowledge on the part of the insured was not pertinently stated to be irrebuttable. Further, s 11 pertinently stated what was possibly in any case assumed in practice, namely that where there was no presumption of any knowledge, the insurer was free to prove actual knowledge on the part of the insured, that is, the 'presumption' of ignorance was rebuttable.

Therefore, the practice as reflected in the Antwerp compilations of customary law in the sixteenth century and the legislative prescripts as they appeared from the placcaat of 1571 were largely in consonance. However, the final Antwerp compilation, the Complilatae of 1609, dealt with the issues of insurance after departure and after loss in such detail that it is readily apparent not only that these were topics of much practicality and ones fraught with potential problems and frauds, but also that the Legislature had in 1571 barely scratched the surface. In setting out the underlying practice, the provisions in the Complilatae filled a number of gaps which the legislatures, both then and in the subsequent municipal keuren, had either not realised existed or for which they had not seen fit to make provision. They also explain from where many of the later innovations in the municipal legislation were derived. The relevant provisions of the Antwerp Complilatae may be set out very briefly.

As far as insurances after departure were concerned, art 23 of the Complilatae in essence repeated the now familiar provisions. If any ship had departed three months ago from any port or place in Europe, Barbary or surrounding places, or six months ago.

289 And no longer 1 hour per mile as in the Antiquae of 1570, so that the earlier custom may have come to be altered, even possibly as a result of the provision of s 11 of the placcaat of 1571. See further De Groote Zeeassurantie 62.

290 Thus, the same rate or measure applied in the case of losses at sea and on land (ie, in the case of marine and non-marine insurance?), and the same measure applied furthermore whether the news was taken to have travelled by sea or over land.

291 And those of arts 4 and 5 of the Antiquae with which they in tum corresponded.

292 See again n279 supra.

293 They are contained in arts 12-23 of par 1, title 11, part IV of the Complilatae (see De Longё vol IV at 202-208).
ago from other more distant places, then no insurance could be concluded on such ship or on the goods loaded in her unless the insurers were warned of that time of departure and the insurance was concluded 'on good or bad tidings' as provided for in the preceding articles (which will be considered shortly). Therefore, the insertion of the clause insuring 'on good and bad tidings' was compulsory in certain cases of insurance after departure.

Articles 12-22 of the Compilatae dealt with insurances after loss. Article 12 laid down that no one could insure anything which was, on the day of the conclusion of the contract, already lost, if it could be proved that at that time he had known or could have known, the news coming by sea or over land along the shortest route ('soo verre men Kan bewijzen dat hij, ten tijde van de verzekeringe, ter see of te lande, naer den kortsten wech, heeft geweten oft connen weten'), that that loss had then already occurred, irrespective of whether the voyage was within or outside Europe or to India or elsewhere ('tsij dat de reijse gelegen is geweest binnen oft buijten de paelen van Europa, tsij op Indien ofte eiders').

Article 13 stated that the insured would be deemed to have had knowledge of the loss if it was found that so much time had elapsed between the loss and the conclusion of the contract that, at a rate of two hours for three miles, he could have acquired such knowledge ('als men bevinde dat sedert den tijt ende ure van den verlies totten dach van den contracte soo vele tijts is verloopen dat, rekenende two uren voor dri mijlen ter see oft te lande, hy daeraff tijdinge heeft connen hebben'). Article 14 concerned the way in which the distance (the number of miles) involved had to be calculated. It provided that one had to take a direct line between the place of the loss and that of the contract and reckon the distance at 23 miles for every degree ('soo rekent men voor eick ten graet van den hemel, rech eenen vogel vliegen can, drijentwintich mijlen'). Article 15 dealt with the not unlikely scenario that the time of the loss could not be known with certainty. If the loss had occurred at night, then it was to be accepted that it had occurred at midnight ('ter ha ver nacht'), and if the loss had occurred during the day, that it had occurred at midday ('op de noen ten tweelt ure'). Then the time was calculated from such midnight or midday until the time when the policy was underwritten, the latter always being assumed to have occurred at midday unless the contrary appeared.

It appears that in practice the legal presumption of knowledge on the part of the insured in many cases had unfair consequences for the parties to the insurance contract, resulting not from their own doing but from the unreliable, slow and inadequate

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294 Not 'or' as in art 8 of the Impressae.

295 Therefore, an insurance after departure was possible in principle, but an insurance after a certain time after such departure was only possible on notice to the insurer and on addition of the clause insuring 'on good and bad tidings'. Note that after a certain further time after such departure, there was a presumption of loss. See further ch XV § 6 intra.

296 No provision was made for the situation where it was unknown whether the loss had occurred during the day or during the night, nor for the case where the place and/or the actual day of the loss could not be ascertained.
postal services at the time. Thus, the presumption of knowledge, irrebuttable as it appears to have been, could work to the detriment of the insured. It could happen that the stated period had expired and that he was not entitled to claim for the loss, despite the fact that he had no actual knowledge of the accident and had concluded the insurance in good faith. Not surprisingly, attempts were made to exclude the operation of the legal presumption, something which insurers were at first willing to do in individual instances and at an increased premium.

One way in which this could be achieved was by an express agreement between the parties to that effect. A handwritten clause was regularly added to sixteenth-century Antwerp insurance contracts in terms of which both parties renounced the legal presumption of knowledge arising after the expiry of the statutorily fixed period of time.²⁹⁷

Another way was by insuring 'on good and bad tidings'. In terms of art 16 of the Compilatae it was made clear that despite the presumption of knowledge of loss, the insurance contract was regarded as valid when the person had insured 'on good and bad tidings' ('op goede ende quade tijdinge')²⁹⁸ and had himself declared under oath²⁹⁹

²⁹⁷ The clause read: ‘renuntierende daerenboven bij desen gelijck wij renuntieren d’ordonantie spreekende van twee uren voor drij mijlen en alie andere ordonantien, rechten ende excep’ten die daer eenichsins in ons faveur souden mogen wesen, dese asseurantie eenichsins contrariërende, met dewelcke wij beloven ons niet en sullen behelpen’. See Couvreur ‘Zeeverzekeringspraktijk’ 196-197. This clause continued to be inserted in Antwerp policies in later centuries. In an arbitral decision of 1756, it was decided that the policy was void (‘onbestaanbaar’) unless the presumption was expressly excluded (‘mits aan dit vermoeden niet expliciet was verzaakt’). Although absent in the first policies of the Antwerp Insurance Company which was established in 1754 (see again ch IX § 2.10.3 supra), the following clause was regularly added to its printed policy form from 1780 onwards: ‘renoncant de part et d’autre à l’Article 13 du Titre XI des coutumes complètes d’Anvers, & l’Article 11 du placcat de l’année 1570’.

²⁹⁸ Insurances on these terms were not mentioned in the Antiquae of 1570, were mentioned in the Impressae of 1582 only in connection with insurances after departure, and were in the Compilatae 1609 mentioned in respect of both insurances after departure (art 23) and insurances after loss (art 16). See further De Groote Zeeassurance 130-131. Note that insurances ‘on good and bad tidings’ were not mentioned at all in the placcat of 1571.

The origin of this special form of insurance is unknown. According to some it first appeared only at the end of the sixteenth or even at the beginning of the seventeenth century. However, it appears to be much older than that. Thus, the Antwerp broker Juan Henriquez concluded three such insurances in 1562-1563 and in an Antwerp deed of 1564 there is mention of an insurance ‘on good and bad tidings’. See De Groote Zeeassurance 21.

It seems, according to Mullens 55-58, that the origin of the clause insuring ‘on good or bad tidings’ may be related to three factors. Firstly, the clause was originally often used when, for one reason or another, it was feared that something had happened to the object of risk. Secondly, though, it was from early on customary to conclude insurances after the departure of the ship, and the intention with the clause was clearly to notify the insurer that the ship had departed (this appears from the reference to the clause in the Impressae). Thirdly, the clause was not foreign to and in contravention of the legal presumption of knowledge derived from earlier Spanish law. Whereas in Italy the position was still that an insurance after loss was null if it could be proved that the insured had knowledge of the loss, according to Antwerp customary law the insured was bound by the legal presumption, which could work to his disadvantage and against which he could not protect himself. In certain cases it was then better for him, on the payment of a higher premium, to have the insurer waive the legal presumption by agreeing to the insertion of the clause insuring ‘on good or bad tidings’.

²⁹⁹ In Roman-Dutch law, as part of the received Roman law, until the end of the eighteenth century, the oath played an important role in civil litigation, also, as will appear in the following sections, in court proceedings concerning insurance matters. One type of recognised proof, apart from eg documents and
that at the time of the insurance he was not aware that the insured property was lost, unless the insurer could establish that the insured had in fact known of the loss at that time. Note that the parties expressly had to declare in the policy that the insurance was 'on good and bad tidings' as a clause to that effect was never implied. In cases of insurance 'on good and bad tidings', according to art 17, the insured had to give reasons why he insured in that way and was obliged to declare at the bottom of the printed policy the special terms ('bij besonder voorwaarde') by which he insured himself thus. He also had to explain the reason which had moved him to insure after the departure of the ship, and what news ('quaede tidinge') he had received of the ship after her departure. Furthermore, if he was requested to do so, the insured was also obliged subsequently to declare under oath that he had no other motive or cause ('achterdencken oft oorsaecke') for concluding the contract than those he had declared on the policy. Again, the insurer was free to prove the contrary.

the evidence of witnesses, was the tender of an oath. Often used to render prima facie evidence conclusive, the oath was also employed by parties to rebut a legal presumption which existed against them. This oath was only open to a party to litigation after the Court had permitted him to take it. The facts sworn to under such an oath were then regarded as having been proved between the parties involved. See further eg Voet Commentarius XII.2; and Van der Linden Koopmans handboek I.17.4.

This was the case also if the policy was a time policy: see art 296 of par 9, title 11, part IV of the Compliatae (see De Longé vol IV at 322) which stated that despite the provisions concerning the duration of an insurance in the case of a time policy on hull, in so far the ship was at the time of the insurance already lost or had already suffered damage, the insurers were free to rely on 'costume van te rekenen uren voor mij/en' and so to escape liability on the policy, unless they had insured 'on good and bad tidings'.

Thus, while the consequence of the presumption of knowledge of loss on the part of the insured could be negatived by the conclusion of an insurance 'on good or bad tidings', the conclusion of an insurance on such terms neither prevented the insurer from proving actual knowledge on the part of the insured, nor negatived the consequences of such proven actual knowledge. The reason, it would appear, was simply that the conclusion of an insurance by an insured with actual knowledge of the loss constituted actual, as opposed to presumed fraud on his part and the consequences of such a fraud could not be excluded by agreement between the parties.

Thus, an insurance expressly concluded 'on good and bad tidings' equally resulted in the exclusion of the operation of the legal presumption of knowledge as was also the aim with and consequence of the clause expressly excluding the application of the presumption. In Antwerp in the seventeenth century, the clause insuring 'on good and bad tidings' was often included in policies alongside the contractual exclusion of the '3 miles per 2 hours' rule. The clause insuring 'on good and bad tidings' became more and more important because the premiss of the legal presumption of 1½ miles per hour was in the course of the eighteenth and especially the nineteenth centuries increasingly eroded by the improvement in the channels of communication.

It seems this provision was strictly complied with in the drafting of policies in the sixteenth and seventeenth centuries, as appears from the following clause: 'verclarende den geassureerden als dat hij overmits niet en wet oft het voors. schip voor desen vertrokken is oft niet, hij hem wel expresaelijken doet verseeckeren mits desen op goede ende quaede tidinge ende voor de schade die der alreede soude mogen geschiet zijn ende alnoch te geschieden'. In the policy of the Antwerp Insurance Company there was a similar albeit more concise handwritten clause stating 'sur bonnes ou mauvaises nouvelles'. See generally Couvreur Zeeverzekeringspractijk 197-198.

In terms of art 18, if the insured had not declared the news or cause of his fear of a loss ('de tidinge oft oorsaecke van de vreeze van verlies'), or had concealed any circumstances increasing the risk ('verswegen t'gene t'risico waere beswaeerende'), or if he subsequently did not want to confirm under
Articles 19-22 concerned insurances after the loss concluded by the insured through an intermediary, particularly relevant in the present context when the insured and his representative were not in the same place. As far as the insured or mandator was concerned ("ten aensiene van de gene die last heeft gegeven tote versekeringe"), the question was whether he had or could be presumed to have had knowledge of the loss at the time he instructed the conclusion of the insurance, while for the mandatary ("ten aensiene van de gene, die den last volbrenght") the relevant time was when the insurance was actually concluded. The insurance was invalid only if either the mandator had such knowledge at the time he gave the instruction to insure, or the mandatary had such knowledge at the time he concluded the insurance. Thus, even if the mandator instructing the insurance had known or could have known of the loss at the time of the conclusion of the insurance but the mandatary at that time did not have or could not be presumed to have had any knowledge, the insurance was valid. But the insurance was invalid when the mandator did not or could not have known of the loss at the time of the insurance but the mandatary ("bevelhebber oft mandataris") at that time did have or could have had such knowledge. And if the mandatary had insured 'on good and bad tidings' and had declared under oath that he did not know of any loss or damage, the insurance was valid even though the person who had given the instruction to insure had known of the loss at that time.

2.2.4 The Position in Amsterdam in the Seventeenth Century

An important indication of the Amsterdam insurance practice as regards insurances after departure and possible loss in the period prior to the keur of 1598, appears from the well-known Van der Meulen policy which dates from 1592. It insured cargo on a ship which was declared, in a handwritten clause added to the printed policy form, already to have sailed ('uytgheseyldt wesende'). For that reason the policy additionally also contained a clause, also added by hand, that the insurance oath that he had received no other information, such general insurance 'on good and bad tidings' ('generale versekeringe van goede ende quade tijdinghe') was without effect, although the insurance was regarded as if the prescribed clause had not been inserted in the policy. Thus, the policy remained valid unless the presumption of knowledge of the loss applied (i.e., if sufficient time had passed).

304 Article 19.

305 As could have happened if the mandator was on the ship or closer to the place of the loss than was the mandatary.

306 Article 20.

307 Article 21.

308 Article 22.

309 See generally Ijzerman & Den Dooren de Jong 227; Snelier 106-107. The policy is reproduced in Appendix 19 infra.
was 'on good and bad tidings' ('op ghoede ende quade tydinghe').

Whereas insurance after departure appears to have been prohibited in terms of s 4 of the *placcaat* of 1563, and permitted without any conditions by the *placcaat* of 1571, it was pertinently regulated in the Amsterdam *keur* of 1598, as it was also in later municipal *keuren*. Section 63 provided, apparently in conformity with accepted practices at the time, that an insurance made longer than three months after the departure of the ship (presumably from a port) within Europe, Barbary or thereabouts ('binnen Europa, Barbaryen, oft daer ontrent'), or longer than six months after a departure from further afield, would be held null and void, unless the person who insured himself had warned ('waerschouwe') the insurer of that fact and had also insured himself 'on good or bad tidings' ('ende hem dede verseeckeren op goede ende quade tydinge').

Thus, an insurance after departure was possible. But an insurance after a certain time after such departure was only possible on notice to the insurer and if it was concluded 'on good and bad tidings'. And after a certain further time after such departure, a presumption of loss arose, so that it then became a question not of an insurance after

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310 However, those bare facts from the face of the policy do not tell the full story (for which see Sneller 114-116). It appears that while the policy was in the process of being subscribed (21-22 January 1592), a rumour had been doing the rounds on the Amsterdam Bourse that the carrying ship, which had already departed, had in the meantime been lost. The addition of the clause 'on good or bad tidings' apparently did not satisfy the insurers who had already signed and by notarial protest (on 22 January) they rescinded their signatures and refused to recognise the validity of the policy, presumably because they thought that the insured's broker had actual knowledge of the loss. It also appears that the broker could not obtain any further cover on the market, so that the risk was not fully subscribed and the consignment remained under-insured (see Sneller 118). When the rumour could subsequently not be confirmed in Amsterdam, and the indications were in fact that the voyage had proceeded without incident, the underwriters again declared themselves satisfied with the validity of the insurance. When news arrived confirming that the rumoured loss had in fact not occurred, the insured instructed his broker (on 31 January) to conclude the insurance afresh. On being approached, the insurers declared themselves willing 'heure asseurancie, die sy te voren ghedaen hadden, voir goet te houden'. men soude een nieuwe police maecken; oft sy souden het protest, by huer lieden ghedaen by den notarius, wederoepen, alsoo het mij beliefe'. Before the matter could finally be settled, though, news came at the beginning of March of the safe arrival of the carrying ship at her destination, upon which the insured of the cargo on board and his broker promptly decided to hold the insurers to their previous position and to have the insurance declared null. The dispute was referred to arbitrators who, in late April, held against the insured and his broker. In consequence the premium, which had then not yet been paid, was declared payable to the insurers.

311 Section 13 of the Middelburg *keur* of 1600 was in identical terms.

312 See again art 8 of the Antwerp *impressae* of 1582 and art 23 of the Antwerp *Complilatae* of 1609 which contained a largely identical measure.

313 See Scheltinga *Dictata ad III.24.5 sv 'nae eenighe plaetzten van Europe ofte Barbarie' noted the uncertainty created by the indeterminate phrase 'thereabouts'. It was uncertain whether eg the Canary Islands were included. They and other islands in the vicinity were eg expressly mentioned alongside Europe and Barbary in ss 12 and 14 of the Rotterdam *keur* of 1604 (which dealt with the presumption of loss and which referred respectively to departures 'binnen Europa, Barbaryen, d'Eylanden van Canarien, ende andere naerder gelegen' and 'binnen Europa, Barbaryen, d'Eylanden van Canarien, ende andere daer ontrent').
departure but of an insurance after a presumed loss. Therefore, in the case of an
insurance being concluded after three or six months from the date on which the prop­
erty to be insured, had departed and become imperilled, the insured not only had to
appraise the insurer of that fact but was also obliged to insure ‘on good and bad
tidings’, failing which the insurance would be void.

The way in which the placcaat of 1571 had regulated an insurance after loss was
in principle followed in the Amsterdam keur of 1598. In terms of s 20 of this keur one
could insure ships, goods, wares and merchandise which had sunk, been cap­
tured or perished, even after this had happened, as long as the person who concluded
the insurance had no knowledge of such loss. But, in terms of s 21, where the loss
had occurred so long ago that the person who insured the property could have had
knowledge of the loss, whether by sea or land, calculating the news of the loss to

314 As will appear shortly, this duty to warn the insurer was subsequently in 1688 extended to all cases
of insurance after departure, irrespective of how long after the departure the insurance was concluded.

315 That is, of the long time which had expired rather than merely of the departure itself. As to the
insured’s duty to mention certain facts in the policy, see again ch VIII § 4.2.4 supra. This duty was
extended in 1688, as will be shown shortly, when the insured had to state in the policy in all cases
whether or not the ship had already departed from the place from where the insurance was to
commence, or that he was ignorant of that fact.

316 As to s 6, see eg Grotius Inleidinge III.24.5; Groenewegen Aanteekeningen n10-n13 (ad III.24.5); Van
Leeuwen Rooms-Hollands regt IV.9.3 (not very clear); Van Zurek Codex Batavus sv ‘Assurant/a’ par 10
(who incorrectly thought that in this case the insured had to warn the insurer of the fact that it was an
insurance after departure - rather than that such insurance was invalid - unless the insurance was ‘on
good and bad tidings’); Bynkershoek Quaestiones juris privati IV.7; Wassenater Praktijk notariaal VIII.4
(three or six months, depending on where the ship sailed ‘to’, not ‘from’ as appeared from s 6); and Van
der Keessel Praelectiones 1444-1445 (ad III.24.5). See also Enschedé 61-62; Goudsmit Zeerecht 321;
Oelofse 289-290; and Vergouwen 43.

317 Unlike earlier legislatures, the municipal legislatures saw the unfairness of permitting an insurance
during the voyage (ie, after departure) but then simply declaring such insurance null if it later appeared
that a loss had occurred at the time of the insurance. See Enschedé 67 for this point.

318 Section 22 of the Middelburg keur of 1600 was identical.

319 And s 23 of the Middelburg keur.

320 It is uncertain whether this referred to losses at sea or on land (as eg Grotius Inleidinge III.24.5
appears to have assumed), or whether (as appears to have been case in s 11 of the placcaat of 1571) it
referred to the calculation of the distance between the place of the loss and that of the conclusion of the
contract.

Roccus De assecurationibus note 84 explained that legislation often prescribed a fixed period of
time after which the insured would be presumed to have had knowledge of loss when such news came
over land, the period of time being calculated at a certain rate of so many miles per hour from the place
where the misfortune occurred up to the place where the insurance was contracted. And if the news
came over the sea, then this period of time was calculated from the moment that the news was received
at the place (on land) nearest to where the misfortune had occurred.

It would appear that in Dutch practice the calculation of the distance did not always occur from
the actual place of loss, as was apparently strictly required, but often from the nearest place on land. See
Enschedé 66 and § 2.2.1 supra for the position in Barcelona where this was specifically provided for.
travel at three miles per two hours,\(^{321}\) then such insurance would be null and void. In such cases the insured would be presumed to have known of the loss and accident, and no evidence to the contrary by the insured was permissible ("sonder dat ter contrarie eenich bewijs ontvangen sal worden").\(^{322}\) The insurance was null as provided for, s 21 continued, except where the insured had insured 'on good and bad tidings' ('op goede ende quade tydinge') or 'in all events' ('in omnem eventum'). Where that was the case, the insurance was to be regarded as valid, by implication irrespective of how long after the occurrence of the loss it had been concluded,\(^{323}\) as long as the insured denied any knowledge under oath and unless the insurer could prove that prior to the conclusion of the insurance, the insured actually knew of the loss or damage.\(^{324}\)

Therefore, a further refinement was introduced by the keur 1598. If the insurance was concluded 'on good and bad tidings' and if the insured confirmed his ignorance under oath, there was no presumption of knowledge of the loss on the part of the insured, that is, the legal presumption of knowledge did not apply against a person who insured himself 'on good and bad tidings'. In that case the insurer, if he wanted to avoid liability on the policy for a loss which had occurred prior to the conclusion of the contract, bore the burden of proving such actual knowledge on the part of the insured in all instances\(^{325}\) and not only when the insurance was confirmed so soon after the loss that no presumption of knowledge arose by the operation of law.\(^{326}\)

\(^{321}\) In the 1631 and again in the 1636 edition of Grotius Inleidinge III.24.5 it was stated that the rate was 3 miles per 1 hour. But in subsequent editions this was corrected to 3 miles per 2 hours in accordance with the provisions of s 21.

\(^{322}\) Thus, the presumption of knowledge was now specifically stated to be irrebuttable by the insured, something which had not been done in s 11 of the placcaat of 1571. See further eg Bynkershoek Quaestiones juris privati IV.7; Schorier Aanteekeningen 421 (ad III.24.5) n11.

\(^{323}\) It must be stressed that the effect of the clause Insuring 'on good and bad tidings' was to validate an insurance after loss in appropriate circumstances, namely where knowledge of such loss on the part of the insured was presumed. This the clause achieved by excluding any reliance by the insurer on such presumed knowledge. But the clause 'on good and bad tidings' did not cause the insurance to be retroactive. All valid insurances after loss, including therefore those where there was no actual nor any presumed knowledge on the part of the insured, operated retroactively, also those not concluded 'on good and bad tidings'. See again § 2.1 n231 supra as to retroactivity.

\(^{324}\) As to ss 20 and 21, see generally eg Grotius Inleidinge III.24.5; Groenewegen Aanteekeningen n10-n13 (ad III.24.5); Van Leeuwen Rooms-Hollands regt IV.9.7 (referring to the validity of Insurance 'on good and bad tidings' after loss unless the insurer could 'tegen de presentatie van eed van zuivering de kennis van den geassureerden te bewysen'); Bynkershoek Quaestiones juris privati IV.7; Schorier Aanteekeningen 421 (ad III.24.5) n10-n11); Wassenaar Praktijk notariael VIII.4 (requiring the insurance to have been expressly ('expresselij') concluded 'on good and bad tidings'). See too Enschedé 62; Goudsmit Zeerecht 322; and Oelofse 288.

\(^{325}\) Insuring 'on good and bad tidings' did not mean, as it appears Decker Aanteekeningen ad IV.9.4 n(3)/(c) thought, that all problems and differences of opinion as to how the knowledge on the part of the insured could be proved (as to which, see further § 2.2.6.2 infra) could be avoided. Such knowledge still had to be proved by the insurer and in fact such difficulties as there were, were exacerbated by insuring on such terms because proof of actual knowledge was now required in all cases, there no longer being a presumption of knowledge in at least some of them.

\(^{326}\) See Goudsmit Zeerecht 322 who explains that in the case of an insurance 'on good and bad tidings', the insurer was relieved only if he could prove the actual knowledge of the insured.
It appears that, even where the insurer could not prove such knowledge, confirmation of his ignorance by the insured under oath was in Amsterdam a precondition for judgment against the insurer.\textsuperscript{327} If the insured did not want to confirm his ignorance under oath, the insurer was not liable, even if he (the insurer) could not prove actual knowledge of the loss on the part of the insured.

In the course of the seventeenth century a number of amendments were effected in Amsterdam to the legislative provisions governing insurances after departure or after loss. Many of these were already part of the Antwerp customary law as set out in the \textit{Compilatae} of 1609.

In the Amsterdam amending \textit{keur} of 1626 it was provided that in the case of insurer insolvency,\textsuperscript{328} the insured could renounce and cancel the insurance and insure himself again anew with another insurer 'on good and bad tidings' ('\textit{op goede ende quade tijdinge}'). This was necessary because such further insurance could have been concluded after the departure and possible loss of the property insured.

By the Amsterdam amending \textit{keur} of 1688, the earlier measures of 1598 were expanded, as it was stated, for good reasons ('\textit{om goede redenen}'). It was provided that those who wished to insure goods or ships which had already departed from the place of loading, had to declare that fact and the time of such departure in the policy, unless they were ignorant of such time, in which case that ignorance had to be stated in the policy, in both instances on penalty of nullity.\textsuperscript{329} Therefore, no longer did the fact and time of departure have to be mentioned only if such departure had taken place longer that three or six months before\textsuperscript{330} but it now had to be disclosed in all instances.\textsuperscript{331}

The Amsterdam amending \textit{keur} of 1699 brought about a further refinement.

Section 2 of that \textit{keur} interpreted both s 21 of the \textit{keur} of 1598 (on insurances after loss) as well as the \textit{keur} of 1688 (on insurances after departure). It provided that any reference in this regard to the insured or the person concluding the insurance contract ('\textit{van verseeckerde, of die hem will laten verseeckeren}') would in future be

\textsuperscript{327} The \textit{Amsterdamsche Secretary} at 373-374 eg contained an judgment ('\textit{despache}') of the local Chamber of Insurance, condemning the insurer to pay the sum he had underwritten on a hull policy plus the expenses of the Chamber. The judgment set out the salient terms of the policy, the amount insured, the insured's claim, and the Chamber's provisional order which held the insurer liable to pay on the policy. There was the possibility of a final judgment, subject to an oath by the insured as regards his lack of any knowledge of the loss in the case of an insurance 'on good and bad tidings'. This judgment is reproduced in Appendix 2 \textit{Infra}.

\textsuperscript{328} See again ch VII § 4.1 \textit{supra}.

\textsuperscript{329} See eg Bynkershoek \textit{Quaestiones juris privati} IV.7; Goudsmit \textit{Zeerecht} 321. See again generally ch VIII § 4.2 \textit{supra} as to the content of insurance policies.

\textsuperscript{330} As was required by s 6 of the Amsterdam \textit{keur} of 1598.

\textsuperscript{331} In this regard the Amsterdam legislature in 1688 merely followed the example of s 8 of the Rotterdam \textit{keur} of 1604 (see § 2.2.5 \textit{infra}).
understood to include the person who concluded the insurance for the account of another ("de Persoon van die geen, die de Asseurantie voor een anders Rekening komt te besorgen"). This meant, the section continued, that it would suffice for the validity of the policy that the person who actually concluded the contract was unaware of any departure or loss at the time of the conclusion of the contract ("die geene, die de Asseurantie besorgt sal hebben gehad, ten tijde van de teneckening onkundig is geweest, van het vertrek en schade respectieeljlik"). Put differently, the knowledge or ignorance of the insured's representative of the departure or loss was equivalent to and had the same effect as if the insured himself had had that knowledge or had been ignorant at that time.\(^{332}\) Furthermore, although the represented insured's knowledge at the time of the conclusion of the insurance was no longer relevant, his knowledge or ignorance at the time he had instructed such insurance still was ("die geen, voor wiens rekening, of op wiens ordre de voorsz. Asseurantie sa/zij hebben bezorgt ten tijde van de laatste ordres").\(^{333}\) Thus, to give an example, the insurance concluded by a representative such as a broker on behalf of the insured was valid if, at the time the insured had instructed the broker, both were unaware of an earlier departure or loss and further also if, at the time the contract was actually concluded, the broker was still so ignorant.\(^{334}\) The fact that the insured himself may, after having given the instruction to insure and before the conclusion of the contract, have become aware of the departure or loss, it would seem, did not affect the validity of his contract nor amount to a breach of his duty to inform the insurer of the earlier departure.

Section 3 of the Amsterdam amending keur of 1699 made it clear when exactly ships were to be taken to have departed from their places of loading\(^{335}\) and that surrounding places were included in the name of the places themselves.\(^{336}\)

### 2.2.5 The Position in Rotterdam

The Rotterdam keur of 1604 dealt with the topic of insurance after departure and after loss along lines similar to the earlier Amsterdam legislation of 1598.

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332 For the equation of the position of the insured and his representative in this regard, see again ch X § 2.2 supra.

333 See Van der Keessel Praelectiones 1443 (ad III.24.5) who explained that the need for this clarification was the ambiguity of the words "de persoon die het zelve doet assureeren" in s 21 of the keur of 1598 which could refer to the person insuring himself or himself concluding an insurance contract for another. See also Goudsmit Zeerecht 322; and Vergouwen 43-44 who notes that it was unfair to the insurer if the insured was not aware of the loss but the broker who had negotiated the insurance was aware of it.

334 Presumably, if the insurance was not concluded 'on good and bad tidings', the expiry of an appropriate period of time between the loss and the giving of the instruction to insure would have given rise also to a presumption of knowledge of the loss on the part of the insured just as, in appropriate circumstances, the expiry of an appropriate period of time between the loss and the conclusion of the contract would have given rise also to a presumption of knowledge of the loss on the part of the broker.

335 See again ch VIII § 4.2.4 supra where this point was discussed in detail.

336 See again § 3.4 supra.
As far as insurance after departure was concerned, s 8 of the keur of 1604 provided that in the case of an insurance on goods or a ship which had already departed from the place of loading, that fact and the time of departure had to be declared in the policy, unless the insured was ignorant of it, in which case he had to declare such ignorance in the policy, in both instances on penalty of nullity. Therefore, insurance after departure (and possible loss) was permitted in principle. The mention of an earlier departure in the policy was obviously to alert the insurer to the fact that a loss may in the meantime have occurred. There was no requirement here, as there was in Amsterdam, that the insurance had to be 'on good and bad tidings'.

As far as insurance after loss was concerned, s 9 of the Rotterdam keur of 1604 laid down that if it appeared that the ship or goods on which insurance was taken out, had been lost, captured, arrested or had perished so long before the date of that insurance that such loss could have come to the knowledge of the insured, whether by water or by land, reckoning three miles per two hours, the insurance would be considered null and void. This was not to be the case, though, where the insured had insured 'on good and bad tidings' ('op goede ende quade tydinge'). If that had been done, the insurance would be regarded as valid on two conditions: if the insurer could not prove that before the date of the insurance the insured had obtained knowledge of the loss or damage, and also if the insured confirmed his ignorance of such loss or damage under oath. Therefore, the presumption of knowledge of the loss on the part of the insured, which otherwise arose if the insurance contract was concluded longer than a specific time after the loss, did not arise if the insurance was concluded 'on good and bad tidings', but the insured nevertheless had to confirm his ignorance under oath and the insurer was nevertheless entitled to prove that the insured did in fact possess actual knowledge of the loss at the time he contracted for the insurance. Furthermore, s 9 continued, if the insurer could establish that the insured knew of that loss or damage prior to the insurance, then not only would he, the insurer, not be held liable to pay for the loss or damage, but, on the contrary, the insured would have to pay the insurer a fine to the equivalent of double the premium, as well as all expenses the latter had incurred in obtaining the evidence, and the insured would in any case be punished as a defrauder ('Falsaris').

337 See eg Groenewegen Aanteekeningen n19 (ad III.24.6); Enschedé 62; Oelofse 290. See again ch VII § 4.2 supra for the content of insurance policies.

338 Note that any earlier departure, and not only, as in Amsterdam at the time, a departure more than three or six months before, had to be mentioned. See eg Van der Keessel Praeleotiones 1444-1445 (ad III.24.5) who contrasted the position in terms of s 8 of the Rotterdam keur of 1604 with that in s 6 of the Amsterdam keur of 1598, noting that former had a wider effect. As has just been pointed out, the position in Amsterdam was brought in line with that in Rotterdam in 1688.

339 And this was an innovation in Rotterdam, as Bynkershoek Quaestiones juris privati IV.7 noted.

340 As to 'double premiums', see again ch XI § 2.2 supra.

341 As to s 9, see eg Groenewegen Aanteekeningen n10-n13 (ad III.24.5); Van Zurek Codex Batavus sv 'Assurantie' par 9; Bynkershoek Quaestiones juris privati IV.7; and Scheltinca Dictata ad III.24.5 sv '[m]aer waren de goederen, etc'. See also Enschedé 62; and Oelofse 288.
The provisions in the Rotterdam keur of 1604 on the topics of insurance after departure and after loss were no doubt quite acceptable in practice and they were repeated in the Rotterdam keur of 1721 without any major amendment.

Sections 32-34 were the equivalent of the earlier s 8. It was provided that one could insure goods or ships already departed ('die reets afgevaren zijn'), on condition that that fact and the time of the departure were expressed in the policy, unless the insured was ignorant of those matters, in which case, though, such ignorance had to be expressed in the policy. Failure to mention the required facts or the insured's ignorance of them resulted in the invalidity of the insurance.

Sections 35-40 repeated the provisions of the earlier s 9 on insurances after loss. In terms of s 35, if it was found that the insured goods or ship had been lost, captured, arrested or had perished ('vergaan, beroof, bedorven of gearresteert') prior to the conclusion of the insurance contract, the time which had elapsed between the two occurrences had to be calculated, as had the distance between the two places where they had taken place, irrespective of whether the distance was taken by water or over land and assuming a speed of three miles per two hours ('stellende drie mylen weegs van vijtien in een graad tegens twee uren'). And if, according to this calculation, the news of the loss could have come to the knowledge of the insured, the insurance would be held to be invalid ('van onwaarde'). This was the position, s 36 provided, unless the insurance was clearly concluded 'on good and bad tidings' ('duydelijk was geschiet op goede ende quade tjdinge'), in which case the insurance remained valid despite the expiry of the period of time in question. However, the validity of the insurance in these circumstances was conditional on two matters provided for in ss 37 and 38, namely that the insured was bound to confirm his ignorance of the loss under oath ('met Eede') at the request of the insurers, and further also that the insurers would be permitted to prove the insured's knowledge of the loss at time of the insurance. If it appeared that the insured in fact had such knowledge, not only would he in terms of s 39 have no action against the insurers ('geen Actie hebben tot laste van de Asseuradeurs'), but he would also be liable to pay them a double premium, in addition to bearing their cost of obtaining the proof. Furthermore, by s 40, the insured could be prosecuted as a defrauder.

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342 Section 32.
343 Section 33.
344 Section 34. See generally eg Van der Keessel Theses selectae th 725 (ad Ill.24.5); Enschedé 62; Goudsmit Zeerecht 398; and Kracht 37.
345 This was new. The insured now had to confirm his ignorance in this way only when requested to do so by the insurer and no longer in all instances when he wished to recover on his policy.
346 See also Enschedé 62; Goudsmit Zeerecht 398.
2.2.6 Decisions in the First Half of the Eighteenth Century

From the fact that Bynkershoek recounted a large number of decisions on these topics which came before the Hooge Raad in the period from 1717 to 1740, it appears that insurances after departure and after loss occurred frequently in practice and often gave rise to legal uncertainty and disputes. These decisions also provide useful illustrations of the practical application and interpretation of the relevant legislative measures. They may be considered in two groups, first those concerning insurance after departure, and then those which dealt with insurance after loss.

2.2.6.1 Decisions on Insurances After Departure

In the third of the four cases on this topic decided by the in Hooge Raad in 1717, the Raad interpreted the Amsterdam keur of 1688 restrictively, holding that the insured was only obliged to notify the insurer of the departure and of the time of such departure if he had certain knowledge of the departure but was merely uncertain when precisely such departure had occurred. If the insured did not know that the ship had in fact left, he could logically not advise the insurer of his knowledge or ignorance of that fact. This is not in all respects clear. Obviously, if the insured was ignorant of the departure, he could not notify the insurer of the fact and time of the departure but he could nevertheless notify the insurer of his ignorance of any departure, that is, that he did not know whether or not the ship had in fact departed.

347 See Bynkershoek Observationes tumultuariae obs 1363; idem Quaestiones juris privati IV.7. See again ch VII § 4.2.5 supra where this case was also considered.

The first of these cases (see Bynkershoek Observationes tumultuariae obs 1332; idem Quaestiones juris privati IV.6) was considered in § 3.4 supra in connection with the Amsterdam amending keuren of 1688 and 1699; the second (see Bynkershoek Observationes tumultuariae obs 1357; idem Quaestiones juris privati IV.7) concerned an insurance after loss and will be considered in § 2.2.6.2 infra.

348 Here cargo was insured at Amsterdam from Cork and surroundings in Ireland to Rotterdam or Bruges, the policy adding that on 1 December 1696 the ship was still at Cork and that the insurance was 'on good and bad tidings'. The ship departed from Cork on 16 December and was subsequently captured and confiscated by the French. All but one of the insurers who had underwritten the policy, paid out. One of the refusing insurer's defences was that at the time of the conclusion of the contract, the ship had already departed from Cork but that nothing was mentioned of that fact in the policy nor was any indication given by the insured that he had no knowledge of any departure, as was required in terms of the Amsterdam keur of 1688. This defence was upheld in the Amsterdam Insurance Chamber and in the Schepenen Court but the Hof van Holland held him liable to pay.

The Hooge Raad, by a majority, upheld the appeal and gave judgment in favour of the insurer on another point. His defence relevant in the present connection was rejected, though. They understood the keur to concern the case where the insured had a certain knowledge ('zekere kennis') of the departure but was merely uncertain of the actual time of that departure. In the present case the insured knew nothing of the departure and could not have known anything of it, and he therefore merely made known on the policy what he did know, namely that on 1 December the ship was still at Cork and further insured 'on good and bad tidings'.

349 It would appear that the decision was later understood in this way. See the decisions of 1725 and 1728 referred to infra.
In the fourth of the decisions of 1717, the Hooge Raad held that the Amsterdam *keur* of 1688 concerned the case where the insured ship had already departed from the place or port from where the risk was to run for the insurer (the place of departure on the insured voyage) and not the case where she had merely already departed from an earlier port on her voyage to the place of her departure on the insured part of her voyage.

In 1723 the Hooge Raad decided that the Amsterdam *keur* of 1688 required mention of the fact and the time of the departure, or of the insured's ignorance of such time, and that it was unlikely that an insured, who was a resident of and present in the port from where his cargo had departed, would not have been aware of the time of its departure. In any event, even if he was unaware of that time, he had to declare his ignorance and a mere statement on the policy that the ship had departed and that the insured had received no news of her did not suffice in this regard.

350 See Bynkershoek *Observationes tumultuariae* obs 1374; *idem* *Quaestiones juris privatil* IV.8. See also Enschedé 64.

351 The insured, resident in Sweden, had given instructions for his ship and goods, which were to sail from Sweden through the Sound to Amsterdam, to be insured from the Sound to Amsterdam against perils of the sea only. The policy, concluded in Amsterdam, stated that the ship was to sail with a convoy from the Sound; that if the convoy proceeded to Norway, the ship was to sail directly to Amsterdam; that the ship had not yet departed from the Sound; and further that the insurance was 'on good and bad tidings'. When the insured ship arrived at the Sound, she sailed from there with a convoy to Norway where she was lost. Before the *Hooge Raad* the insurers (who had obtained a judgment in their favour in the Amsterdam Chamber of Insurance and in the Schepenen, and had it overturned on appeal to the Hof van Holland) argued that at the time of the insurance the ship had already sailed from a Swedish port and that they had not been notified of that fact, as a result of which the insurance was null in terms of the *keur* of 1688.

However, the *Raad* rejected this defence, holding that the *keur* of 1688 was not applicable to this case because the risk did not run for the insurer from the departure from the Swedish port but only from the departure from the Sound, and at the time of the conclusion of the insurance the ship was not there yet or had at least not yet departed from there.

352 See Bynkershoek *Observationes tumultuariae* obs 1916; *idem* *Quaestiones juris privatil* IV.12. See too eg Van der Keessel *Theses selectae* th 725 (ad III.24.5); Enschedé 64.

Here goods were insured at Amsterdam on 1 October 1710 from Dublin to Lisbon for £4 000. The carrying ship departed from Dublin on 11 October. The insured, resident at Dublin and not having heard any news of the ship, wrote to his representative in Amsterdam on 28 November, 48 days after the departure, instructing him to insure the same goods for a further £1 000. This insurance was effected on 30 December. None of these matters were mentioned in the second policy in which it was merely declared that the ship had departed, that the insured had received no news of her, and that the insurance was 'on good and bad tidings'. The ship was lost at an undetermined place and time. £4 000 was paid out in terms of the first insurance but the insurers refused to pay the claim for the further £1 000. They argued that in terms of the *keur* of 1688, it was the duty of the insured, if the ship had already departed and if he was aware of the fact of such departure, on the penalty of nullity of the insurance contract to mention that fact in his policy and also to mention the time of such departure. If he did not know those matters, he had to say so. In this instance nothing was mentioned in the policy except merely that the ship had departed. The insured, in turn, argued that he had complied with the *keur* for he had not known when the ship had departed, and had expressed this ignorance in his policy.

The *Raad*, like all the courts a quo, unanimously held for the insurers. It thought it unlikely that the insured, resident in Dublin and not alleging to have been absent at the time, would not have known when his goods had departed from there. And even if he did not know, he did not express in his policy that the time of departure was not known to him. He merely stated that he had received no news of her since her departure (not: of the time of her departure), ie, that it was unknown to him what had happened to her...
From a decision by the Raad in 1725\textsuperscript{353} it appears that where an insurer denied liability on the policy because of the fact that the insured had been aware of the departure of the ship at the time of the conclusion of the contract but had not mentioned that fact or his ignorance\textsuperscript{354} on the policy as was required by the keur of 1688, the insured could confirm his ignorance of the departure under oath,\textsuperscript{355} and that the insurer then had to adduce concrete proof to establish that the insured in fact knew of the departure of the ship. A mere suspicion that that was the case was not sufficient to displace the insured's oath in this regard.

In 1728 the Raad confirmed that an insurance after departure was fully valid, as long as the insured had either mentioned that departure or declared his ignorance as to that fact in his policy.\textsuperscript{356} And in 1739\textsuperscript{357} the Raad held that if, prior to underwriting the policy, the insurer had heard of the fact and/or the time of the departure of the ship which he had insured, or on which the goods which he had insured were loaded, from after her departure.

The Raad also in passing referred to the possibility that in this case there was an insurance after the loss. Here the ship had already departed 48 days earlier when the order for the second insurance was given. Given that a voyage from Dublin to Lisbon and back was possible in even half this time, there was a strong suspicion that the insured had in fact known that the ship did not arrive in Lisbon at the expected time. In any case, he could by an oath have absolved himself from the presumption of any knowledge of the loss in terms of s 21 of the keur of 1598, for the insurance was 'on good or bad tidings', but he did not do so. And even if he had done so, the insurance here was in any event already null and void in terms of the keur of 1688.

\textsuperscript{353} See Bynkershoek Observationes tumultuariae obs 2191; idem Quaestiones juris privati IV.13. On the facts of this case it was not merely an instance of an insurance after departure but also one of an insurance after loss. The latter aspect will be dealt with in § 2.2.6.2 infra.

On 22 January 1708 two French merchants instructed the insurance in Amsterdam for an amount of f5 000 on their goods which were to be sent from Lisbon to La Rochelle, 'op alle goede en quade tyding'. Later, on 29 January, they instructed a further insurance for f1 000, on 1 February another for f5 000, and on 12 February yet another for f2 000. The ship on which the goods were loaded, had already departed from Lisbon on 24 December 1707 and was lost on 1 January 1708. (This was therefore a case of insurance after departure and after loss.) All the insurers paid out the various claims instituted by the insured except for the two who had insured the cargo last for the amount of f2 000. They argued that at the time of the conclusion of the insurance, the insured knew the ship had departed and even that she had been lost. The French insured stated, though, that they were ignorant of both departure and loss and offered to confirm their ignorance under oath.

\textsuperscript{354} According to the Raad, the keur of 1688 laid down that no insurance was valid on a departed ships or goods unless the insured was ignorant of such departure and this ignorance (ie, of whether or not ship had departed) was mentioned in the policy. Cf the contrary view in the third decision of 1717 referred to earlier.

\textsuperscript{355} As he could, in terms of s 21 of the keur of 1598, confirm his ignorance of the loss in that way.

\textsuperscript{356} See Bynkershoek Observationes tumultuariae obs 2493; idem Quaestiones juris privati IV.14. Here the insured stated in the policy that he did not know whether the ship had already departed and that the insurance was accordingly 'on all good and bad tidings'. This was sufficient to validate the insurance.

\textsuperscript{357} See Bynkershoek Observationes tumultuariae obs 3121; idem Quaestiones juris privat\textsuperscript{1} IV.17. For the facts and a more detailed discussion of this decision, see again ch VIII § 4.2.5 supra. See also eg Lybrechts Koopmans handboek V.93; and Enschedé 64.
a source other than from a statement by the insured to that effect in the policy itself, he could not later rely on the insured’s failure to mention one or both of those matters in the policy.358 In such a case the contract was not vitiated, Van der Keessels explained, because the insurer was then aware of the time when ship had departed and was in no way misled or defrauded.359

A last decision in 1740360 made the point that where the insured or his representative was uncertain of the fact and the time of the departure, it was sufficient if the

358 See Van der Keessels Theses selectae th 726 (ad III.24.5); idem Praelectiones 1445 (ad III.24.5).

359 See Bynkershoek Observationes tumultuariae obs 3168; idem Quaestiones juris privati IV.17.

In this case the consignor of goods, resident in Quebec, wrote to T, his representative at La Rochelle in France, on 28 October 1736 and instructed him to insure for a specified amount the goods which he would soon send from Quebec to La Rochelle. T received the letter but because it was not possible to effect the insurance locally, he wrote to S, an Amsterdam correspondent, on 27 December 1736, instructing S to obtain the insurance in Holland and to disclose to the insurers concerned that the ship in which the goods had been loaded, had departed from Quebec on 3 November and that he had no further documents apart from the letter of instruction from the consignor. An insurance was duly concluded at Rotterdam on 10 and 12 January 1737. But while T had written that he possessed no relevant documentation other than the letter of 28 October, S wondered how T could then have known of the subsequent departure of the ship on 3 November. S therefore, by way of precaution, inserted in the policy a clause to the effect that the risk was to commence on 3 November when it was thought that the ship would sail, whether or not that had in fact happened, or a few days earlier or later, and that the insurers would be satisfied with that. Everything in good faith and the insurance to be ‘on good and bad tidings’. (Such clauses were later expressly prohibited by s 3 of the Amsterdam keur of 1744: see § 2.2.7 infra.) Although S did have reason to think that T may have erred in noting the date of the departure, he was unaware of the fact that T had in fact heard from the master of another ship arriving in La Rochelle from Quebec that the ship carrying the insured goods had departed from there on 3 November.

The carrying ship was lost on 13 November 1736 but the insurers refused payment on the policy. The Rotterdam Chamber and the Hof van Holland having held for the insured, they appealed to the Hooge Raad.

Firstly the insurers accused T of bad faith for having known of the loss of the goods on 27 December when he gave instructions to have them insured. However, they had insufficient proof to support their allegation and any suspicion which may have arisen in this regard was countered by T’s declaration under oath of his ignorance of the loss.

For their main defence and the one relevant here, however, the insurers relied on ss 32-34 of the Rotterdam keur of 1721, the provisions of which, it was noted, were largely identical to those of the Amsterdam keur of 1688. They argued that S in Amsterdam had known from the letter of 27 December that the ship had already departed on 3 November but that this was not clearly ('rond ult') declared in the policy as the keur required and that, accordingly, the insurance was null and void.

For his part, the insured argued that ss 32-34 were applicable only to the person who had given the instructions to insure and not to those who had concluded the insurance in terms of those instructions. In Rotterdam there was no measure like that in the Amsterdam keur of 1699 which held the mandator-insured ('committent') and his mandatary ('commissionarius') for the same person. Here the insured had made the departure of the ship known in so far as he knew of it, and S, as 'commissionarius', doubting that information, rather made his ignorance known to the insurers. In any event, he argued, both had acted in good faith.
policy merely expressed their uncertainty or ignorance of those facts. The point was also made that the legislative provisions requiring a mention of the fact and the time of the insured or carrying vessel's departure, may not be applicable to policies in terms of which the risk did not commence on such departure, or at a time determined with reference to such departure, but on an agreed date, that is, to time or mixed policies.\footnote{The Hooge Raad here held for insured. Some of the members thought that S was not fully aware but in doubt of the departure and for that reason had inserted the clause in the policy which he did and which stated that he was not fully aware of the time of the departure, which was true. Other members of the Raad added that where the risk commenced on a certain time as here, ie, on 3 November, the insured's knowledge or ignorance of the departure did not concern the insurers since in that case ss 32-34 did not apply. See again § 1.2 supra as to the difference between voyage and time (and mixed) policies and § 1.4 supra where this decision was discussed in connection with time policies.}

\subsection{Decisions on Insurance After Loss}

More important for present purposes, and therefore to be considered in somewhat more depth, were the decisions of the Hooge Raad which concerned instances of insurance after loss.

The first decision by the Raad on this topic in 1717\footnote{See Bynkershoek Observationes tumultuariae obs 1357; idem Questiones juris privati IV.7.} showed how an insurer could prove actual knowledge of the loss on the part of the insured. An Englishman had his ship and cargo insured in Amsterdam through a Dutch intermediary for a voyage from Surat in India to London at a premium of fourteen per cent. In a clause added to the policy by the insured, it was stated that according to the most recent reports, the ship in question was still at anchor at Surat, that the insured had no further knowledge of any departure, and that the insurance was accordingly concluded 'on good and bad tidings'. This insurance was concluded on 31 December 1711 after the ship had already departed from Surat on 9 February of that year and after she had in fact been captured by the French on 3 April.\footnote{Thus, the insurance was concluded more than six months after her departure and so long after her loss that the insured could be presumed to have had knowledge of that loss, were it not for the fact that the insurance was 'on good and bad tidings'. That being the case, the insurer therefore had to prove actual knowledge on the part of the insured.} The insured claimed the sum insured of \( f8000 \) and argued that according to his policy the insurance was made 'on good and bad tidings' and that his good faith was not in doubt. The Amsterdam Chamber of Insurance gave judgment for the insured in the amount of \( f1200\)\footnote{That is, 15 per cent of the sum insured. It is not quite clear how this amount was arrived at. See again ch XI § 6.3.1 n408 supra.} and the Hof van Holland confirmed that judgment on appeal.

On further appeal to the Hooge Raad, the insurers argued that the insured had made it known and that it was stated in the policy that, at time of the insurance, the latest news was that the ship was still at Surat. In the absence of this notification, they explained, they would not have concluded the contract at all since ships could not depart from Surat at any time other than between November and February when the
favourable winds ("Mousons"; monsoon) were blowing. But if the ship had already sailed in February and had by the end of December, at the time when the insurance was concluded, not yet arrived in London, there would have been no doubt that she had been lost or captured. The insured here had known otherwise than what he had stated in the policy and, the insurers contended, he was not ignorant of what was in fact common knowledge, namely that the ship could and did not depart after February. Such knowledge on the part of the insured was established and proven by the insurer from a letter dated 29 November 1711 in which the insured had instructed the conclusion of the insurance and in which it was stated that the ship should have arrived at London from Surat with the last convoy but did not. The insured had thus acted fraudulently, the insurers thought, and the insurance was accordingly null and void.

The majority of the Hooge Raad agreed that it was clear from the letter referred to that at the time of the conclusion of the insurance in December, the insured had known of the ship’s departure in the previous February and, by implication, of her probable loss seeing that she had not arrived by November. The judgments of the courts a quo was accordingly confirmed and the insurance held void.

The next case on the question of an insurance after loss reached the Hooge Raad in 1722. Here an insurance on the freight which a specified ship would earn on a voyage from Bordeaux to Amsterdam was concluded in Amsterdam through a representative on 8 January 1712. The policy stated that the ship had departed ("in Zee gelopen") on or around 17 December 1711 and that the insurance was ‘on good and bad tidings’. On 17 December, however, the ship was in fact already lost. In refusing payment on the policy, one of the defences raised by the insurers was that at the time of the conclusion of the contract, the ship had already been lost for 22 days, that the shipwreck had in fact already been known in Bordeaux by 28 December, and that letters in which there was mention of the shipwreck had been sent from Bordeaux to Amsterdam on 29 December and had arrived there within 10 days, that is, on 7 January 1712. Accordingly, news of the loss could have been known not only to the insured in Bordeaux but also to the representative in Amsterdam. As a result, the insurers maintained, the insurance was null and void because of the knowledge the insured could be presumed to have had of the loss.

The Raad unanimously held for the insurers but for a different reason than that which they had put forward in their defence. Because in this instance the insurance was concluded ‘on good or bad tidings’, in terms of ss 20 and 21 of the Amsterdam keur of 1598 it had to be regarded as valid despite the earlier loss, unless the insurers could prove that the insured had actual knowledge of that loss. However, the insurers had to adduce such proof only if the insured was prepared to declare under oath that at the

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365 Only one of the judges held a different view and was of the opinion that insured did not and could not have known.

366 See Bynkershoek Observationes tumultuariae obs 1873; idem Quaestiones juris privat i IV.11.
time of the conclusion of the contract, he had no knowledge of the loss in question. In the present case the representative ("Commissionaris"), who in terms of the *keur* of 1699 was to be taken as one and the same person as the insured ("Committent"), was not prepared to swear this oath and had in fact died while proceedings were still being entertained before the Schepenen Court. For this reason the insurers were absolved from liability and costs were furthermore awarded against the insured as if, by not swearing the oath, he had acted in bad faith.

In a case heard by the *Raad* in 1725 and already considered earlier in connection with insurance after departure, the point was made that the insured could, in terms of s 21 of the Amsterdam *keur* of 1598, confirm under oath his ignorance, at the time of contracting with the insurer, of the earlier loss. If he did that, the insurer had to adduce convincing evidence to prove that the insured actually knew of the loss of the ship. A mere suspicion that that was the case, was not sufficient to displace the insured's oath in this regard.

In a final decision, in 1731, the *Raad* had to consider the following facts. The insured, resident at Dordrecht, on 14 February 1723 sent a letter through his one son to his other son who was in Amsterdam, instructing the latter to insure the goods he was expecting in Dordrecht from Newport. This insurance was effected on 16 February and was concluded 'on good and bad tidings'. It turned out that the ship was already lost during the night of 9/10 February and the insurers alleged that when he gave the instruction to insure, the insured already knew of the loss of his goods. The latter denied any such knowledge and the Amsterdam Chamber held for the insured on condition that, because the insured father had died before the matter came to be heard, both sons had to swear under oath that at the time of the conclusion of the contract, they had no knowledge of the loss of the goods. This they did and the Chamber gave judgment against the insurers, a judgment subsequently confirmed by the Schepenen and by the Hof van Holland.

On appeal the *Raad* considered the legal position in Amsterdam in the case of an insurance after loss 'on good and bad tidings', also when such an insurance was

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367 This, however, was, as Van der Keessel *Theses selectae* th 723 (ad III.24.5) noted, not supported by the relevant provisions in the *keuren* of Amsterdam of 1598 and of Rotterdam of 1604 which held insurance after loss 'on good and bad tidings' valid not only if the insurer could not prove actual knowledge of the loss loss but also if the insured at the same time confirmed his ignorance under oath.

368 See Bynkershoek *Observationes tumultuariae* obs 2191; *idem* Quaestiones juris privati IV.13.

369 See § 2.2.6.1 supra. It must be remembered that an insurance after loss was of necessity also an insurance after departure and questions concerning both situations could and frequently did arise on the same set of facts and in the same case.

370 See Bynkershoek *Observationes tumultuariae* obs 2647; *idem* Quaestiones juris privati IV.16.
concluded through a representative as had happened here. Although one member gave judgment against the insured in this case because he had not, either before or during the proceedings, offered to confirm his ignorance under oath ('Eed van zuivering'), the other members considered that s 21 of the Amsterdam keur of 1598 did not require this. The insured had instituted action knowing that he had no chance of success unless he gave an oath that he had no knowledge of the loss of his goods, but his death prevented him from giving that oath. And in any case, they noted, why should he give the oath where, as here, the insurers themselves wanted to prove that he had knowledge of that loss. In such a case, it would appear, an oath by the insured was not required to compel the insurers to prove his actual knowledge. Further in such a case, the majority concluded, the Court first had to determine whether knowledge on the part of the insured was proved or not, and only if it was not proved was there any need for an oath.

It summarised the position as follows: In terms of ss 20 and 21 of the keur of 1598, the insurance was valid if the insured knew nothing of the loss or could not, through the passage of time, be regarded as knowing of the loss. But if the insurance was 'on good or bad tidings', the insurer was liable unless he could prove that the insured had known, on condition, though, that the insured was prepared to swear under oath that he had no knowledge of the loss of his goods. As interpreted by the keur of 1699, s 21 provided further that if anyone was instructed to insure, the mandator must have been unaware of the loss at the time of giving the instruction and the mandatory also unaware of it at the time of the signing of the policy.

This interpretation, it would appear, was contrary to the clear provisions of both the Amsterdam keur of 1598 and that of Rotterdam of 1604 and 1721 which provided that an insurance concluded after loss 'on good and bad tidings' would be valid only if the insurer could not prove actual knowledge, and if the insured affirmed his ignorance under oath. These were two distinct conditions, both of which had to be met independently for the insurance to be valid.

Feltama, in his comment on Roccus De assecurationibus note 84, explained that insurance after loss 'on good and bad tidings' was valid, if the insurer could not prove the insured's prior knowledge and if the insured confirmed his ignorance under oath. What, however, if the insurer could not prove knowledge although the insured knew of the loss? In such a case Feltama thought it advisable, to prevent any fraud at all, that the insured, at the request of the insurer who was only able to establish a prima facie case, should declare under oath that had no knowledge of any loss. For if he did not know, nothing was simpler than clearing himself in this way, and if he did know and the insurer could not prove his knowledge, it would be regrettable if the insurer had to pay for something already lost and if he was thus defrauded.

See too Lybrechts Koopmans handboek V.91. (and in n1 there) who considered this case (ie, the one here where the insured had died, although he apparently confused the reference to it by stating that it had been decided in 1717) and the underlying principle that the person who did not offer to affirm his ignorance under oath had to be taken to have acted in bad faith ('hy, wegens het niet aanbieden van den Eed, ter kwader trouw had te werk gegaan). However, he expressed some doubts about the equity of the Raad's approach in this case. If it were true that the insured was not compelled to purge himself with an oath if the insurer could not establish grounds of suspicion that the insured knew of the loss (a prima facie case?), he thought that it was unfair to the insurer who, having no proof of the insured's actual knowledge although the latter in fact had such knowledge, had to pay for what had already been lost. Lybrechts thought it better for the prevention of fraud, if not more equitable, that in such a case the insured, always at the request of the insurer (but without need for a prima facie case), should declare under oath that he had no knowledge of the loss. For if he did not know anything, nothing would be easier than to purge himself, but if he did know and the insurer could not prove it, payment was unreasonable.
On the issue of proof of the insured's knowledge of the loss, two members of the Raad thought such knowledge had been established in this case because one witness had testified that on the day the order to insure was given, he had told the insured that it was in his interest to insure the goods as soon as possible. Accordingly, those two members did not want to impose any oath on the insured's sons. The majority, however, held for the insured on this point as well. They pointed out that the witness had said that the Frisian master of another ship arriving at Dordrecht, who was also called as a witness in the proceedings, had told him that he had seen a shipwreck at Sluys of a ship of which he did not know the name. According to this testimony, therefore, the insured did not have certain knowledge of the loss of the ship carrying his goods as was required by the keuren. Mere rumour ('blote geruchten') of a shipwreck and loss was not sufficient. And the fear alone ('enkele vrees') of a loss was also insufficient, for that often causes merchants to insure. Both did not amount to any actual knowledge ('bewustheid') which was required in cases such as these. The insured in this case merely suspected that a loss might have occurred ('vermoeden van gevaar') and had for that reason decided to have his goods insured. But he did not at the time possess such actual knowledge as prevented him from validly insuring.

A last remark about the proof by the insurer of the prior knowledge of the loss on the part of the insured. The Hooge Raad in the last case accepted that the testimony of a single credible witness as to the insured's knowledge could suffice and that two corroborating witnesses were not required, whereas proof of a mere suspicion or fear of the loss on the part of the insured would not sufficiently establish the insurer's case. However, a number of Dutch authors noted that a different approach was favoured by Roccus, namely that the insurer should be taken as

373 Therefore suggesting, but not in fact stating, that a loss might have occurred.

374 In proving the fact that the insured had knowledge of the loss prior to the conclusion of the insurance contract, an insurer would at the same time also prove that the loss had occurred prior to the conclusion of the contract. See eg Scheltinga Dictata ad III.24.5 sv '[m]aar waren de goederen, etc' where this was alluded to. He noted that in terms of s 9 of the Rotterdam keur of 1604 an insured who had such knowledge would be liable to compensate the insurer for all the expenses the latter had incurred in obtaining the evidence that the goods had already been lost before the date of the insurance, and also in obtaining evidence that the insured had already known of that loss before that date.

375 This was apparently a moot point elsewhere too. Thus, in a sixteenth-century case where an insurance was concluded after the loss, the Genoese Rota noted that a decree was in force in that city which considered the testimony of even a single witness as sufficient to substantiate the news of the loss of the ship. In terms of the common law, at least two testimonies were required to prove a fact, but in order not to change the latter well-established principle too much, the Rota required that the single witness had to be above suspicion and it justified the deviation from the general principle by noting that the common law itself gave the courts power to assess the evidence and that in difficult matters (such as the loss of a ship or an accident) it was satisfied with lesser evidence. See Rotae Genuae Decisiones decis XXXVI; Plergiovanni 'Rota' 37-38.

376 See eg Van Zurck Codex Batavus sv 'Assurantie' par 9 n2; Schorer Aanteekeningen 421 (ad III.24.5) n12.

377 De assecurationibus notes 78 and 84.
having established such knowledge and the contract as being null and void even if only a suspicion of a loss on the part of the insured (such as when he had heard an unconfirmed rumour) was established.\footnote{Roccus De assecuratlonibus note 78 stated that the burden of proving knowledge of the loss on the part of insured rested on the insurer because the conclusion of an insurance with knowledge of an earlier loss amounted to fraud which was never presumed (see Straccha De assecurationibus XXVII.5). Another reason was because otherwise the burden would be on the insured to prove his ignorance of such a loss, something which, Roccus thought, the insured could but aver but which was not capable of proof. The insurer could prove this knowledge by the evidence of witnesses or from documents. Such knowledge could be proved also by conjectures, presumptions and indications, and in this regard \textit{prima facie} and inconclusive proof was sufficient. The evaluation of evidence of any knowledge of the loss was arbitrary and in the discretion of the Court. Indications relevant in this regard included the distance of the place where the loss had occurred, and whether rumours of the loss existed before the conclusion of the insurance, the existence of which rumours should nevertheless be proved. Elsewhere Roccus (note 84) explained that an insurance concluded by an insured simply because of a rumour of loss or misfortune he had heard, was not valid. And to obviate litigation and problems of proof in this regard, he pointed out, legislation often prescribed a fixed period of time after which the insured could be presumed to have had knowledge of the loss.

The apparent discrepancy between the statement that fraud was not presumed while knowledge of an earlier loss was presumed, was explained as follows by Straccha De assecurationibus XXVII.5, to which Roccus referred in his exposition. Knowledge of the loss was said to exist in two ways, actually and presumptively (ie, actual and presumed knowledge). The former existed when a person actually had such knowledge in his mind, the latter when the rule that ignorance was assumed unless knowledge is proved did not apply. It would seems, therefore, that in special circumstances this exceptional position was applicable and knowledge was presumed.} It is to be noted further that the insurer could apparently prove either actual or presumed knowledge on the part of the insured.\footnote{See eg Van der Keessel Theses selectae th 724 (ad III.24.5) (certain or positive as well as probable knowledge was acceptable); also \textit{idem} Praelectiones 1444 (ad 3 2 4 5).}

This differing approach between the Roman-Dutch authors and the view of Roccus appears to have been the result of different approaches, at different times, about the permissibility of insurance 'on good and bad tidings'. Those who regarded objective uncertainty as the essence of insurance sought to limit as far as possible the scope of insurance 'on good and bad tidings' which validated insurances where the uncertainty was merely subjective. They therefore sought as far as possible to alleviate the burden on the insurer of proving knowledge of the loss on the part of the insured. By contrast, those who accepted the practical realities and the need for insurance after departure and possible loss, realised that subjective uncertainty could not be regarded as in conflict with the essence of the insurance contract and that there was therefore no need to limit the scope of insurance 'on good and bad tidings'. For them nothing less than proof of the actual knowledge of the loss, and thus of actual fraud, on the part of the insured could invalidate such an insurance.
2.2.7 Legislation in Amsterdam in the Eighteenth Century

As far as insurance after departure was concerned, s 3 of the Amsterdam keur of 1744 provided that it was possible to insure goods and ships which had already departed from the place of loading, if the time of such departure was mentioned in the policy. And if at the time of the conclusion of the insurance contract the insured was unaware whether or not there had been a departure, he had to declare his ignorance in the policy along with the date of the letter or notice advising him of the shipment of the cargo and the place where it was written. Additionally, in the event of any loss (‘Rampen of Schaade’), the insured was bound to confirm his ignorance by an oath. Nonetheless (that is, despite the oath), the insurers would be permitted to prove knowledge on the part of the insured, and if they did, not only would the insured have no action against them but he would also be liable to pay them a penalty in the amount of a double premium, over and above the expenses incurred by them in obtaining that evidence, and he could also be prosecuted as a defrauder. The influence of the earlier Rotterdam provisions in this regard is readily apparent.

Section 3 was amended by the Amsterdam amending keur of 1775 in the following respects. Firstly, it was made clear that a departure from the place where the risk commenced was intended here. Secondly, an insured who had no knowledge of the departure (and who declared his ignorance) also had to state on the policy the last news he had received of the ship or goods. Thirdly, if it was established that the insured knew of the earlier departure but in good faith did not mention it and the time correctly on the policy, the insurers were not liable on the policy but the premium was returnable. Fourthly, in the case of a declaration of ignorance on the policy, if it was established that the ship had in fact departed earlier than when the instruction was given to insure, the original insured (if he had given the instruction to insure) or otherwise the person who had concluded

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380 Which was considered in detail in ch VIII § 4.2.6 supra in connection with the content of policies.

381 The section expressly prohibited any contracting out of this requirement, eg by the addition of the clause ‘doch vroeger of later vertrokken sal niet prejudiceeren’. This was so, it would seem, even if both parties had acted in good faith. It should be noted, further, that where both parties had acted in good faith, a clause expressing uncertainty about the time of departure which was inserted in the policy and which stipulated that the contract would remain valid although the ship may have sailed earlier or later than was mentioned, was not disapproved of in the decision of the Hooge Raad in 1740 (see again § 2.2.6.1 supra).

However, in the restatement of s 3 in 1775, this prohibition was not repeated and it was merely declared that if the ship had departed before the date on which the ship was stated to have departed (ie, if the date was stated incorrectly), the insurance was void and the insurer not liable. From this it may be deduced that a clause such as that in question was still regarded as ineffective. See further Van der Keessels Thees selectae th 727 (ad III.24.5); idem Praelectiones 1446 (ad III.24.5).

382 The words ‘de plaats harer ladinge’ were replaced by ‘de plaats, van waar men des Assuradeurs risico wil doen beginnen’ and in so doing a departure from the place of loading was replaced by a departure from the place from where the insurance was to commence. That much already appeared from the fourth decision of the Hooge Raad in 1717 (see again § 2.2.6.2 supra).

383 As to recoverability of the premium in these circumstances, see ch XI § 6.3.2.1 supra.
the contract for his own account or for another, had to confirm their ignorance under oath. Finally, if the insurer could prove bad faith, or could prove that the insured or the person for whose benefit the insurance was concluded or the person who had concluded the contract had knowledge of the departure, and if payment had already been made in terms of contract, the person (even if innocent) who had received such payment from the insurer had to return it to him3\textsuperscript{84} with the guilty party being liable for the costs and expenses and to be fined and prosecuted as before.\textsuperscript{3\textsuperscript{85}}

Insurance after loss was dealt with in two sections of the Amsterdam keur of 1744. Quite remarkably, the established system, created in the Amsterdam keur of 1598 and copied elsewhere, was now abandoned and in essence the Legislature reverted to the earlier system of the placcaat of 1571, the main difference being that it continued to recognise that the knowledge of someone other than the insured himself could be relevant.

Section 11 of the keur of 1744 permitted the insurance of a ship or cargo which had been lost or damaged ("verdronken, verdorven, geroott, genoomen of gearresteert") even after such loss, as long as no notice of such occurrence had come to the attention ("indien daar van geen kennisse gekomen is") of both the person who had himself insured at the time he gave the instruction for such insurance ("den Principaal, die het doet Assureeren, ten tyde van het geven van de laatste order"), as well as the person who actually concluded the insurance, at the time of such conclusion ("den geenen die de aanschryving doet, of ... den Correspondent, Makelaar, of andere, die dezelve Assurantie besorgt hebben, ten tyde van 't voltrekken der Assurantie").

However, s 12 continued, when the ship or cargo was lost or damaged so long ago that knowledge of the occurrence could have reached the person who concluded the insurance, calculating at a rate of three miles per two hours ("3 my/a weegs binnen den ty'dt van twee uuren"), whether by land or by sea, the insurance would be considered invalid. This was so unless the insured and those who concluded the insurance for him ("de verseekerde en ook die geene, die de Assurantie voor hem hebben bes­org't") were at the time of the conclusion of the insurance unaware of the loss and damage, and if all of them were prepared to confirm such ignorance under oath.\textsuperscript{3\textsuperscript{86}}

\textsuperscript{3\textsuperscript{84}} Obviously, although this was not mentioned, the insurer was not liable for payment in the first place and the premium was also not returnable because of the fraud involved.

\textsuperscript{3\textsuperscript{85}} As to Insurance after departure and the keur of 1744, see eg Van der Keessel Theses selectae th 725 (ad III.24.5); idem Praelectiones 1445-1446 (ad III.24.5) (noting that the declaration of ignorance was also required in eg ss 32-34 of the Rotterdam keur of 1721, but that in terms of s 3 the insured in such a case in addition also had to mention the day on which the instructions to effect the insurance were despatched, and the latest news he had received of the ship and the cargo); and Van der Linden Koopmans handboek IV.6.4. See too Enschedé 65; and Goudsmit Zeerecht 347-348.

\textsuperscript{3\textsuperscript{86}} See eg Van der Keessel Theses selectae th 722 (ad III.24.5) (noting that elsewhere, eg in terms of ss 35-37 of the Rotterdam keur of 1721, it was not even permitted that the insured take the oath, unless the insurance was effected 'in all events' ("in omnem eventum"), that is, 'on good and bad tidings', and not, as translated by Lorenz, against all risks or all events); idem Praelectiones 1443 (ad III.24.5) (noting that the references to and the differentiated provisions in respect of the insured-mandator and the mandatary had been taken over from the earlier keur of 1699); Van der Linden Koopmans handboek IV.6.4; and Goudsmit Zeerecht 348-349.
Thus, while the presumption of knowledge (and thus of bad faith) on the part of the insured still existed in appropriate cases to assist the insurer in proving knowledge on the part of insured, this presumption of knowledge could now be contradicted or 'rebutted' by a declaration of ignorance (and absence of bad faith) under oath. Of course, it was still open to the insurer to prove actual knowledge on the part of the insured. These sections no longer mentioned insurance 'on good and bad tidings' and therefore deviated in that respect from s 21 of the keur of 1598 which did. Van der Keessel made it clear that the earlier distinction between an insurance concluded 'on good or bad tidings' and one not concluded on those terms was no longer recognised in Amsterdam. In all cases of an insurance after loss, a presumption of knowledge of such loss on the part of the insured arose after the expiry of the appropriate period of time. In such a case the insurance was completely null and void and no evidence to the contrary was permitted unless the insurance was 'on good and bad tidings' ("in omnem eventum tam prosperum, quam sinistrum"). Thus, it would appear that in the Amsterdam keur of 1744 the presumption of knowledge of the loss arose in all appropriate cases and that it was irrebuttable except if the insurance was concluded 'on good and bad tidings', in which case the presumption was rebuttable. In the case of an insurance 'on good and bad tidings', Van der Keessel continued, the insurance was valid if, as in Rotterdam, his ignorance was confirmed under oath by the insured or the person concluding the insurance. He noted that there was uncertainty as to whether or not the insured always had to offer the oath in iudicio, but thought that the oath of ignorance did not have to be tendered by the insured except if the insurer requested it, while the insurer himself bore the burden of proving knowledge of the loss on the part of the insured.

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387 See also Magens Essay vol I at 86-87 who explained that in terms of the keur of 1744 it was in appropriate instances presumed that the insured knew of the loss when he concluded the insurance, though by swearing that he did not, the insurance remained valid.

388 Even though the keur in s 25 with reference to solvency reinsurance (see again ch VII § 4.1 supra) recognised that insurance on such terms was still in use.

389 Theses selectae th 723 (ad III.24.5); idem Praelectiones 1443-1444 (ad III.24.5).

390 Thus, insurance 'on good and bad tidings' no longer resulted in a shift of the burden of proof from the insured to the insurer but merely rendered the irrebuttable presumption rebuttable.

391 Van der Linden Koopmans handboek IV.6.4 (this oath was in Rotterdam permitted only in the case of an insurance concluded 'on good and bad tidings').

392 As in terms of s 37 of the Rotterdam keur of 1721. He noted, though, that the Hooge Raad in 1722 thought otherwise but that its decision was not sufficiently supported by the relevant provisions of the keuren of Amsterdam of 1598 and of Rotterdam of 1604.

393 See Van der Keessel Theses selectae th 724 (ad III.24.5); idem Praelectiones 1443-1444 (ad III.24.5).
2.2.8 Insurance After Departure and Loss in the Wetboek van Koophandel

The *Wetboek van Koophandel* deals with insurance after departure and after loss in a fashion which would have been readily recognisable by Roman-Dutch lawyers, even if the measures were no longer logically grouped together as was the case earlier.\(^{394}\)

As far as insurance after departure is concerned, the provisions of the *Wetboek* show great similarity to the earlier regulations on the topic in both the Rotterdam *keuren* and that of Amsterdam of 1744.

In terms of art 603-1, an insurance may be made on ships and goods which have already departed or been carried from the place from where the risk was to run for the insurer, on condition that either the true moment of the departure of the ship or the carriage of the goods, or the insured's ignorance of those matters, is to be expressed in the policy. Further, art 603-2 requires that in all cases there must be expressed in the policy, on the penalty of nullity, the latest news ('tijding') which the insured had received of the ship or the goods, and if the insurance is concluded for the account of a third party, also the date of the order or advice, or in the absence of such order or advice an express mention that the insurance is concluded without any instructions from the interested person.\(^{395}\) If the insured makes a declaration of ignorance in the policy, and it later appears that the insurance was made after the departure of the ship from the place from where the risk was to run for the insurer, art 604 requires the insured, in the case of loss or damage and at the request of the insurer, to confirm his declaration of ignorance under oath ('zijne verklaring van onwetendheid met eede bevestigen').\(^{396}\)

Article 605 now also provides for a case not dealt with in the earlier Roman-Dutch legislation, namely where there is no mention in the policy either of the departure of the ship or of the insured's ignorance of such departure. In such a case the insured is taken to have acknowledged that the ship was, at the last news ('bij het afgaan van den laatsten post die voor het sluiten der polis is aangekomen (of alwaar geene geregelde post zijn, bij de laatste bekwame gelegenheid om tijding over te brengen)'), still lying at the place from where she was to depart.

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\(^{394}\) Instead of following the logical scheme of ss 32-40 of the Rotterdam *keur* of 1721, the measures in the *Wetboek* appear in three groups, viz arts 269-270, 597-598, and 603-605. See generally Dorhout Mees *Schadeverzekeringsrecht* 241-242; and De Renays 353-357.

\(^{395}\) See Dorhout Mees *Schadeverzekeringsrecht* 242; Enschedé 71 (noting that art 603 is derived from ss 32-34 of the Rotterdam *keur* of 1721).

\(^{396}\) Asser *NBW* 228 explains that whereas in terms of the Amsterdam *keuren* of 1744 and 1755 the insurer had the power, notwithstanding the oath of the insured as to his ignorance, to prove the contrary (ie, to prove knowledge on the part of the insured), that is apparently not the position in terms of the *Wetboek van Koophandel*. Ordinarily the oath merely confirmed the denial of knowledge (ie, the ignorance) and did not exclude proof by the insurer to the contrary. But if the oath was given at the demand of the insurer, the latter was apparently taken to have abandoned any possibility of offering any proof to the contrary. See again s 37 of the Rotterdam *keur* of 1721 (oath at the request of the insurer to confirm the insured's ignorance of the loss).
As far as insurance after loss is concerned, the Wetboek first contains some general provisions.

Article 269 provides that an insurance made on any interest whatsoever, of which the loss or damage against which it is insured had already occurred at the time of the conclusion of the insurance, is void if the insured, or the person who insures with or without instruction, had actual knowledge of that prior loss or damage.\(^\text{397}\)

As before, there is also a legal presumption of knowledge on the part of the insured. In terms of art 270-1 it is presumed that a person had knowledge of the occurrence of such loss or damage if the Court, after taking account of the circumstances, is of the view that since the occurrence of the loss or damage so much time had elapsed that the insured could have had knowledge of it. If such knowledge is presumed, the insurance is equally void. It is noticeable that in the Wetboek the presumption of knowledge of the loss or damage at the time of the conclusion of the contract no longer depends, as was the case in the earlier Roman-Dutch legislation and even in earlier drafts of the Wetboek, on a statutorily fixed equation of time and distance. This was regarded as an arbitrary and unfair basis on which to presume the existence of knowledge and, therefore, of bad faith on the part of the insured.\(^\text{398}\) Whether knowledge might be presumed, is now a factual question depending on the circumstances of every case.\(^\text{399}\) Modern methods of communication had made the earlier rules for establishing a presumption of knowledge obsolete. In case of doubt, art 270-2 of the Wetboek allows the Court to order the insured and his representatives to swear an oath ('den eed op te leggen') to confirm that at the time of the conclusion of the agreement, they had no knowledge of the occurrence of the loss or damage. And in terms of art 270-3, if such an oath by one party is requested by the other party, the Court is obliged to impose it. In the case of doubt, therefore, the insurance remains valid as long as the ignorance or absence of knowledge is confirmed under oath.\(^\text{400}\)

As far as the conclusion of a marine insurance contract specifically after the loss is concerned, art 594 lays down that such an insurance may be made before or during

\(^{397}\) In this regard art 306 creates an interesting exception to the principle contained in art 269 as far as life insurance is concerned. It provides that if the person whose life is insured was already deceased at the time of the conclusion of the insurance, the agreement is void, even if the insured could have had no knowledge of his death, unless the parties agreed otherwise (ie, unless they agreed that the insurance was valid if the insured had had no knowledge). Of course, it is not possible to agree that the insurance will be valid if the insured did have knowledge. According to Goudsmit Kansovereenkomsten 207n1, there is no apparent reason for the exception in the case of life insurance and for not making use of the presumption of knowledge in that case too.

\(^{398}\) See Goudsmit Zeerecht 322 who notes that the earlier arrangement was so vehemently opposed and ridiculed by the Rotterdam Chamber of Commerce that its abolition was decided upon in the final version of the Wetboek. It should be realised, of course, that the presumption of knowledge after a certain fixed period of time protected the insurer less and less as the actual speed at which news of the loss could reach the insured, became faster and faster.

\(^{399}\) This, of course, was already the view of eg Stracca De assecrationibus XXVII.6. See again § 2.2.1 supra.

\(^{400}\) See further Voorduin vol IX at 224 (art 365 of the French Code de commerce served as model for arts 269-270).
the voyage of the ship and that it may be made ‘on good and bad tidings’ (‘op goede en kwade tijdinge’).

In terms of art 597, in the case of a marine insurance concluded after the occurrence of loss or damage, the provisions of arts 269 and 270 are applicable if it can be proved, or if the presumption exists, that the insured or his mandatary had knowledge of the occurrence of the loss or damage at the time of the conclusion of the agreement.401 However, in terms of art 598-1 the presumption mentioned in art 270 is not applicable to an insured if the insurance was made ‘on good and bad tidings’,402 as long as certain conditions are met.403 Article 598-2 then makes it clear that an insurance ‘on good and bad tidings’ can be avoided only if it is proved that the insured or his mandatary had actual knowledge of the loss suffered (‘geledene schade’) at the time of the conclusion of the insurance. Therefore, the effect of an insurance ‘on good and bad tidings’ is that an insurance can validly be concluded not only on the occurrence of an event which, at the time of such conclusion, is still in the future (and hence objectively uncertain) but also on the occurrence of a past event, just as long as that outcome is uncertain to the parties (that is, subjectively uncertain). Proof of the actual knowledge on the part of the insured of an earlier loss, which in these circumstances amounts to fraud, therefore renders the insurance void.404

2.2.9 Insurance After Departure and Loss in English Law

English insurance law too was familiar with insurance after departure and after loss and with insurance of property ‘on good or bad tidings’ or, as it was known in that system, insurance ‘lost or not lost’.

The practice of insuring after departure and after the possible occurrence of a loss was known in London from early on. In three sixteenth-century Chancery cases, the practice was relevant to the issues to be decided.405 In proceedings in 1559, the practice of concluding an insurance when the ship’s whereabouts were unknown or if she was already feared lost, was germane to the issue. Such insurance was possible, but custom also imposed a strict limitation on the period of time which could expire

401 See Voorduin vol X at 292.

402 Thus, a clause in a marine policy insuring ‘on good and bad tidings’ is a permitted (by art 598) method of contracting out of the presumption of knowledge of the loss. See further Enschedé 63 (an insurance ‘on good and bad tidings’ remains the way in which, in terms of arts 269 and 270, read with arts 597 and 598, the presumption of knowledge in the case of an insurance after loss can be excluded); Voorduin vol X at 292-293 (the presumption of knowledge does not apply in the case of an insurance ‘on good or bad tidings’).

403 These conditions are that in such a case the last news (‘berig’) which the insured had obtained of the insured object, is mentioned in the policy, and in the case of an insurance for the account of a third party, that in the case of loss or damage the last instruction which the mandatary had obtained to conclude the insurance clearly appears from the policy.

404 See generally Goudsmit Kansovereenkomsten 205-210; Voorduin vol X at 286.

405 See Jones ‘Elizabethan Marine Insurance’ 60-61 from which the following details have been taken.
between the loss and the conclusion of the insurance before knowledge of the loss on the part of the insured at the time of such conclusion would be presumed. The period of time was customarily computed by allowing one hour for every three miles of travel by sea or land between the place of the loss and the place of the insurance.\(^{406}\) In other proceedings in Chancery, in Carre v Brochoo and also in 1559, the underwriters, on being sued on the insurance policy, relied on this custom. They contended in papers that they would prove that there had been sufficient time for a (hypothetical or real) messenger with news of the loss to have arrived in Lombard Street between the time the carrying ship with the insured cargo were lost and the time the insurance was concluded.\(^{407}\) And in a third Chancery cause from 1573, Jackman v Calthropp, there was also an instance of insurance after departure and loss, although the dispute appears not to have turned specifically on that aspect.\(^{408}\)

Further details of the practice of insuring after loss appear from the draft London marine insurance code, the London Orders of Assurances dating from the 1570's.\(^{409}\) It appears that cover was available at the time in London, on terms 'lost or not lost', on a ship or goods overdue at the port of destination. It was recognised by brokers, scriveners and notaries, that such policies had to be made quickly upon the rumour of a loss before any certain news arrived to confirm the casualty. The need for getting a policy underwritten speedily in such a case was one of the factors which militated against the conclusion of public policies through, and their registration with, the Insurance Office.\(^{410}\) The delays inherent in such registration might prove fatal to the validity of the cover the insured sought to obtain.

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\(^{406}\) Thus, for a ship lost 600 miles from Lombard Street, any insurance concluded more than eight days and eight hours after the loss would be invalid, apparently whether or not the insured was aware of the loss. There was therefore, as in Antwerp, an irrebuttable presumption of knowledge.

\(^{407}\) Here the loss occurred on 29 May and the insurance was concluded on 14 June. The period of sixteen days would have meant that the insured would not have been presumed to have had knowledge of the loss only if the loss had occurred further than 1200 miles from London. It appears that the underwriters in this case may well have established the presumption of knowledge on the part of the insured, given that the latter was engaged in the relatively short-distance trade on Spain.

\(^{408}\) In September 1573 the London merchant adventurer John Jackman had goods, valued at £440, loaded on a ship in Hamburg by his factor there. When the ship was overdue at Sluys, the outer port of Antwerp, Jackman had an insurance policy drawn up by his broker Edmund Calthorpe. In the policy the goods specified were insured between Hamburg and Sluys against a loss both before and after 16 September. On 16 September Calthorpe had contracted with seven underwriters who were willing to subscribe and sign the policy at rate of 12 per cent, which was twice the normal rate for that voyage. A further six signed on 17 September.

\(^{409}\) See further Kepler 'London Marine Insurance' 49 and 54n22. Kepler 'Trading Voyages' 265 notes that it was stated in several of the orders that a ship could reasonably be expected to sail at 3 miles (or 1 Spanish league) per hour (see orders 93-95, 120).

\(^{410}\) See again ch IV § 1.7 supra (the London Registration Office) and ch VIII § 3.3 supra (the registration of insurance policies).
It appears that the earliest extant policy in which the words 'lost or not lost' appeared, was in the well-known 'Tiger' policy of 1614. Early in the seventeenth century, Malynes warned underwriters against the dangers of insurances concluded on those terms, pointing out that in such cases underwriters bore the risk of the insured in fact having known of the loss at the time he took out the policy, unless they could prove such knowledge and the fraud it involved.

The practice of insuring after departure and possible loss and on terms 'lost or not lost' continued into the eighteenth century. Thus the Lloyd's policy as settled in 1779 was in fact worded in such way that both insurance 'lost or not lost' and insurance after loss were envisaged and provided for. Still, though, insurers were warned about the dangers involved in insuring after a possible loss and on the terms 'lost or not lost'.

When English law came to be codified in the Marine Insurance Act of 1906 and the Lloyd's policy appended to that Act, rule 1 of the accompanying Rules of Construction of Policy provided that where a subject-matter is insured 'lost or not lost', and a

411 See Wright & Fayle Lloyd's 140. Their suggestion that those terms were peculiar to English policies (for which they refer to Park System) is doubtful, though. While obviously these English words appeared only in English policies, they had clear equivalents in other languages and legal systems (eg 'on good and bad tidings'), and the underlying notion conveyed by them was certainly not peculiar to English law. For the 'Tiger' policy, see eg Blackstock 31; Martin 46-48. And see eg Hopkins 152 for a discussion of the French equivalent of 'lost or not lost'.

412 Consuetudo 1.24.

413 He referred to a case of an insurance 'lost or not lost' dating from 1583. A ship expected from the East Indies with a cargo was long overdue. An insurance was made on her in Antwerp, Rouen, and elsewhere at a premium rate of 30 per cent. The dispute in this case (one of general average between the interests involved in this adventure) arose after the arrival, almost three years later, of a smaller ship (with the cargo in question) which had been constructed from the wreckage of the insured ship which had been cast ashore en route.

Elsewhere Malynes (Consuetudo 1.28) explained the giving of notice of a loss to underwriters through the Office of Assurance, which notice had to mention the time when it was given and, in the case of an insurance 'lost or not lost', 'the very hour of day is to be set down so that in the case of fraud it may sooner be detected'. See also Molloy De jure maritimo II.7.5.

414 See eg Magens Essay vol I at 86-87 who noted that in London all insurances after loss were valid, provided the insured was ignorant of the loss, and that insurers had to pay a loss if they could not prove that the insured knew of it and if by oath he maintained that he knew nothing of it.

415 'Be it known that [X] ... doth make assurance and cause [himself] ... to be insured lost or not lost, at and from ... to ...'.

416 '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 ..., and of all other perils, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods, and merchandises, and ship, etc'.

417 See eg Weskett Digest 113-123 sv 'concealment' (from which it appears that an insurance with knowledge of the loss was considered the most serious case of concealment), 164 sv 'date' (a discussion of concealments after the date of loss, noting the difficulties besetting insurers in these cases of proving fraud, ie, knowledge), and 295 sv 'insurer' par 3 (noting that '[a]n insurer ought to be constantly casting about for the earliest, the best, and the most circumstantial intelligence').
loss has occurred before the contract is concluded, the risk attaches unless, at such
time, the insured was aware of the loss and the insurer was not.\(^{418}\) In this regard s 18(1) of
the Act provides that an insured is presumed to know every material circumstance
which, in the ordinary course of business, ought to be known by him. The point of
departure and approach in English law, therefore, is different from that in Roman-Dutch
law. An insurance after loss is valid not only if the insured was ignorant of that loss, but
also if the insurance was concluded 'lost or not lost'. The latter terms therefore validate
an insurance after loss and do not merely serve, as in Roman-Dutch law, to exclude the
presumption of knowledge on the part of the insured.\(^{419}\)

The question of insuring 'lost or not lost' is further dealt with in the Act in connec-
tion with the requirement of an insurable interest. Section 6(1), in providing for the time
when the interest must attach, provides that the insured must have an interest in the
subject-matter insured at the time of the loss although he need not be so interested at
the time when the insurance is effected. However, in the case of an insurance of the
subject-matter 'lost or not lost', an exception is permitted and the insured may recover
although he may not have acquired his interest until after the loss, unless at the time of
effecting the insurance contract the insured was aware of the loss and insurer was not
so aware.

\textbf{2.3 Insurance After Safe Arrival}

Although enantiomorphic to insurance after loss,\(^{420}\) insurance after safe arrival
received noticeably less attention in Roman-Dutch law. In fact, the topic was not pro-
vided for at all in the insurance legislation and was mentioned by only a few authors.

Given the practical realities, this should probably not be too surprising. Insurance after safe arrival involved the relatively rare situation where the insured,
believing the ship to be overdue, took out insurance on her while being unaware but
the insurer being aware that the ship had in fact already arrived at her destination.
Whereas insurance after loss was concerned with the invalidity of, and the fraud upon
the insurer involved in an insurance concluded by an insured with knowledge of such
loss, insurance after safe arrival was concerned with the invalidity of, and the fraud
upon the insured involved in an insurance concluded by an insurer with knowledge of
such safe arrival. Whereas in the case of an insurance after loss the concern of the law
was with the insured attempting to transfer to the insurer not a risk of loss but an actual
loss, its concern in the case of an insurance after safe arrival was with the insurer
attempting to receive a premium from the insured not in exchange for his bearing of a
risk but without having to bear any risk at all, the risk in question (that is, the risk of loss

\(^{418}\) Clearly, if the insured was unaware the insurance is valid. Whether that is also the case if the insured
was unaware but the insurer aware of the loss, is not clear. Possibly in such a case the contract will not
be one of insurance.

\(^{419}\) See again § 2.2.4 supra for the effect of the terms 'on good and bad tidings' in Roman-Dutch law.

\(^{420}\) There was logically no possibility of questions of insurance after loss and after safe arrival arising in
respect of the same object of risk in terms of the same insurance contract.
The first author to allude to what was then clearly a topic of no great practical import, was Grotius\(^{421}\) who nevertheless gave at least equal attention to the knowledge of the insurer of a safe arrival as to the knowledge of the insured of a loss. He declared that an insurance contract would, for the identical reason, namely the requirement of uncertainty as to the loss,\(^{422}\) be totally void both if the one party (the insurer) knew beforehand that the thing insured was already safe or had reached its place of destination, and if the other party (the insured) knew beforehand that it had perished. The implication, therefore, was that in the case of an insurance after loss by an insured with knowledge of the loss, the contract was void because the insured knew that the loss for which the insurer was liable had already occurred, while in the case of an insurance after safe arrival by an insurer with knowledge of that arrival, the contract was void because the insurer knew that the loss for which he supposedly stood in and received a premium from insured, could no longer occur.

However, that the topic was not entirely unknown to insurance law and practice at the time appears from the Antwerp compilation of customary law, the Complatat\(\text{ae}\) of 1609.\(^{423}\) It in fact provided for a presumption of knowledge of the safe arrival on the part of the insurer in appropriate cases. After a statement of the principle involved in art 91,\(^{424}\) the case specifically envisaged in art 92 was where, en route from somewhere to Antwerp, the goods had in fact arrived at an intermediary port in Zeeland (Middelburg) when the insurance was concluded for a voyage from the original port of departure to Antwerp as if the goods were still en route. If this occurred after news of the arrival at the intermediary port could have reached Antwerp according to the rule that news travelled at three miles per two hours,\(^{425}\) the premium for such an insurance could not

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\(^{421}\) De iure bellici ac pacis II.12.23.

\(^{422}\) See again the introductory remarks in § 1 supra.

\(^{423}\) Articles 91-93 of par 3, title 11, part IV (see De Longé vol IV at 238). See generally Mullens 54-55.

\(^{424}\) This article referred to the situation where the goods, destined to an inland place ("op binnenlantsche [reeden en] geschickt"), had arrived in the seaport from where such goods were customarily forwarded by river to their final destination, and where they had been detained there for so long that the one party (ie, the insurer) could have known of their arrival (at the seaport) at the time when such goods were insured at that place (ie, the inland location) as if they were still en route. In such a case the premium was not due, except to the extent of the risk borne by the insurer for the transshipment from the seaport to the final destination ("dan naer advenant vant perijkel datter valt om de reijse van de plaetse van de aencompste te volbrengen").

\(^{425}\) The article referred to the principle simply as 'rekenende uren voor mijlen'.
amount to more than one per cent, which was the usual premium for a voyage from 
Zeeland to Antwerp ("dan naeradvenant t'perijckel datter valt van Seelant herrewaerts, 
d'welck begroot wort een ten honderden"). Additionally, in terms of art 93, if in such a 
case the goods were insured 'on good and bad tidings' and the insurer was prepared 
to declare under oath that at the time of the conclusion of the insurance he did not 
know of the arrival of the insured or carrying ship at the outer port, he could retain or 
claim the full premium as if he had borne the risk of the whole voyage ('al oft sj 
t'perijckel van de voel reijse hadden gedragen').

In appears that in the eighteenth century it was not an unknown occurrence in 
practice for an insurer to have to give an oath in this regard. That much appears from 
the Amsterdamsche Secretary where a judgment ('despache') was reproduced in 
proceedings where the insurer had claimed payment of the premium from the insured. 
The latter acknowledged that the premium was due in so far as the insurer declared 
under oath that he was ignorant of the arrival of the ship. The Chamber found against 
the insured on condition that the insurer took an oath to that effect, his claim for the 
payment of the premium being denied in the case of his refusal to do so.

Later Roman-Dutch authors shed little further light on the topic. Bynkershoek observed, in connection with the uncertainty required for a valid insurance, that 
although various legislative provisions dealt with the case where the insured had knowledge of a prior loss, there was strangely enough no mention of the case mentioned by Grotius, namely where the insurer knew of the prior safe arrival of the property insured.

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426 It seems that this was not a very neat example or even a sound application of the principle involved, given that arrival at an intermediary port was not necessarily safe arrival at the destination. Obviously, though, if the insured goods had already arrived at Antwerp, the presumption of knowledge on the part of an Antwerp insurer would have arisen at the same time as and immediately upon that arrival, given that there was no separation in distance between the place of arrival and the place where the insurance was concluded. In such a case no premium at all would have been payable. It was also possible, although not very likely, of course, for a local insurer to have known or to have been presumed to have known of the safe arrival of the insured ship or goods at some foreign port (either on a voyage from the local, home port or from another foreign port) at the time such ship or goods were insured locally.

427 At 377-378. See Appendix 6 infra.

428 Quaestiones juris privati IV.26.

429 Roman-Dutch insurance legislation (eg s 19 of the Rotterdam keur of 1604 and s 55 of the Rotterdam keur of 1721) did, however, provide that the insured would be liable to pay the promised premium even if the insured ship or goods had arrived at the destination prior to the date of signing of the insurance ('voor date vande Asseurantie ofte teckeninge' (s 19)) or prior to the signing of the policy ('voor de de teykeninge van de Police' (s 55)). However, because of the reference to the promised premium ('de beloofde Praemie') and to the signing rather than the conclusion of the insurance contract, these legislative measures were possibly concerned with the case where the insurance contract had already been concluded (although possibly not yet reduced to writing) prior to such safe arrival. See again ch XI § 3.2.3 supra.

But it is also possible, as Bynkershoek pointed out, that ss 19 and 60 (rather: 55) of the Rotterdam keuren of 1604 and 1721 respectively were concerned (or also concerned) with the case where the insurer did not know of the safe arrival of the insured goods, for if he did know and thus acted fraudulently, the premium was not due or could be recovered. See also Scheltinga Dictata ad III.24.5 sv 'kn/aer waren de goederen, etc'.
Van der Keessel\textsuperscript{430} too remarked on the absence of any legislative provisions for the case of an insurance after the safe arrival of the insured ship or goods where the insurer was aware of such arrival. Nevertheless, also in that case, he thought, the nature of the contract and the requirement of good faith clearly pointed to the fact that the contract was void and the premium recoverable.\textsuperscript{431}

In the Wetboek van Koophandel art 597 provides that if a marine insurance is concluded on ships or goods which have, at the time of such conclusion, already arrived safely at their destination ("reeds behouden ter plaatse hunner bestemming waren aangekomen"), the provisions of arts 269 and 270\textsuperscript{432} will be applicable to the case, if it can be proved, or if the presumption exists, that, at time of the conclusion of the agreement, the insurer had knowledge of the safe arrival. This, therefore, is an instance where bad faith on the part of the insurer can avoid the insurance contract.\textsuperscript{433}

In English law too in the eighteenth century\textsuperscript{434} it was realised by the authors, who referred to Bynkershoek in this regard, that an insurer’s knowledge, at the time of underwriting a policy, that the ship or goods had safely arrived, was as fraudulent as the insured’s knowledge at that time that a loss had occurred.\textsuperscript{435} A return of the premium is provided for in s 84(3)(b) of the Marine Insurance Act of 1906 where the subject-matter insured has never been imperilled, provided that where the subject-matter is insured ‘lost or not lost’ and has arrived in safety at the time when the contract is concluded, the premium is not returnable unless, at such time, the insurer knew of the safe arrival.

\textsuperscript{430} Praelectiones 1429 (ad III.24.1).

\textsuperscript{431} See too Van der Linden Koopmans handboek IV.6.4; Enschedé 67; and Oelofse 290.

\textsuperscript{432} See again § 2.2.8 supra.

\textsuperscript{433} See Asser NBW 102.

\textsuperscript{434} Earlier on the opportunities presented to underwriters by an insurance after a suspected but unconfirmed safe arrival were no doubt realised. Thus, Raynes (1 ed) 61-62 refers to Pepys Diary for 23 November 1663 where the diarist rued the opportunity he had had to make a profit by pocketing the premium which would have had to be paid on the insurance of an overdue ship which, it later appeared, had already arrived at her destination.

\textsuperscript{435} See eg Magens Essay vol I at 86-87 who stated that in London an insurance was valid, provided the insurer was ignorant of the arrival of the ships involved. There were many examples, he said, of ships having arrived in the river or even of people in the City having news of the arrival at the time when the policy was underwritten, without the insurers being obliged to return the premium. See too Weskett Digest 113-123 sv ‘concealment’ at 123 par 11; and Walford vol II at 29 sv ‘concealment’ (noting that the principles pertaining to concealment apply to both parties equally). See too Carter v Boehm (1766) 3 Burr 1905, 97 ER 1162 at 1909, 1164 where it was remarked that a policy was void and the premium recoverable in the case of an insurance after a safe arrival of which the insurer was aware.
2.4 Insurance of a Ship or Cargo not Yet Arrived or Ready at the Place From Where the Risk is to Commence

A brief mention must be made of an instance which was, in a sense, the opposite of an insurance after the departure of the ship or cargo to be insured from the place from where the risk was to run. That was the conclusion of an insurance on a ship which had either not yet arrived at the place from where the risk was to run or which, although there, was not yet ready to take on cargo or to depart on the voyage, or an insurance on goods which were not yet there ready to be loaded immediately on board the carrying ship.

The situation was regulated only fairly late in Roman-Dutch law. Section 13 of the Amsterdam keur of 1744 provided that no valid insurance could be made on a ship or goods before the insured or carrying ship had arrived at the place from where the insurance was to commence, unless it was expressly stated in the policy that the ship had not yet arrived there, that is, unless it was expressly agreed to the contrary. This fact, it would appear, was just another of the matters of which the insurer had to be appraised before he could be expected to be liable on the policy for the risk in question. The fact that the ship or cargo had not yet arrived or was not yet ready, it would seem, could involve not only a considerable delay before the actual departure of the ship on the voyage and thus before the commencement of the risk in terms of the policy, but also possible loss or damage which the insured might subsequently attempt to pass off onto the insurer as a loss or damage which had in fact occurred after the departure.

This measure was retained in Wetboek van Koophandel in art 606-1 in a little more detail. If an insurance is concluded on a ship not yet at the place from where the risk is to commence, or not yet ready for the commencement of the voyage or the loading of cargo, or on goods which cannot be loaded immediately, the insurance is void. This is so unless these circumstances are mentioned in the policy or unless it is mentioned there that the insured has no knowledge of them. In terms of art 606-2, the insured and his mandatary are obliged, in the case of loss or damage, to confirm, under oath and at the request of the insurer, their ignorance of the non-arrival or non-

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436 This place, it will be remembered, had to be mentioned in the policy. See again ch VIII § 4.2.6 especially at n270 supra. In terms of s 2 of the keur of 1744, the place of loading had to be mentioned on the penalty of nullity. But only if the goods would be loaded in a place other than the one from where the insurance was to commence.

437 See Van der Keessel Theses selectae th 717 (ad III.24.4); idem Praelectiones 1434-1435 (ad III.24.4); Enschede 37.

438 In addition the insured has to state in the policy the letter or advice he has received to conclude the insurance, or a declaration that none such existed, as well as a declaration of the last news he has received of the ship or the cargo in question.
readiness of the ship or cargo. It is possible for an insurer to renounce the operation of art 606 by permitting the insertion of an appropriate clause in the contract.

In English law, s 42 of the Marine Insurance Act of 1906 approximates this by providing that where the subject-matter is insured 'at and from' or 'from' a particular place, it is not necessary that the ship should be at that place when the contract is concluded, but that there is an implied condition in the contract that the adventure will be commenced within a reasonable time. In the case where the voyage is terminated by it not being commenced within a reasonable time, the insurer may avoid the contract.

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439 See further Dorhout Mees Schadeverzekeringsrecht 534-535 who explains that an uncertainty as to when the risk will commence (i.e., when the ship will depart) is regarded as of such importance that any non-disclosure or incorrect representation in this regard will avoid the insurance.

440 Such as a clause insuring the ship or goods on terms 'whether or not ready to sail' ("gereed of niet gereed") or 'laden or to be laden' ("geladen of nog te laden")..

441 See Buys 71.

442 Although, in terms of rule 3(b) of the Rules of Construction of Policy, in the case of an insurance on a ship 'at and from' a particular place, when the ship is not at that place when the contract is concluded, the risk attaches as soon as she arrives there in good safety.

443 See further Chalmers 62-63.
CHAPTER XIII
THE ALTERATION OF THE RISK AND STATUTORY AND CONTRACTUAL CONTROL OF THE RISK

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1 Alteration of the Risk

1.1 Introduction

An alteration and then especially an increase in the risk taken over by an insurer could conceivably occur in any one of a number of ways. Just as an insurer bore the risk of the materialisation of the peril insured against and of such materialisation causing the loss of or damage to the object of risk, so he generally bore the risk of an alteration or increase in the likelihood of such materialisation during the currency of the contract. However, just as the law made particular provision for the situation where the insured's own conduct caused the materialisation of the risk, so it also laid down specific rules for the case where the insured's conduct, or the conduct of someone for whom the insured was responsible, merely increased or at least altered that risk.

This chapter is concerned, firstly, with the consequences of an alteration, either by the insured himself or in another way, of the risk taken over by the insurer and of the circumstances affecting that risk. Secondly, it deals with attempts by the legislatures and insurers to control the risk after the conclusion of the insurance contract and to prevent or reduce the incidence and effect of an alteration and especially an increase in the risk resulting either from the conduct of the insured himself or from other factors.

An alteration of the risk taken over by the insurer usually concerned one of the matters which had to be mentioned and described in the policy not only to inform the insurer but also to describe the risk itself. Early insurance law in essence recognised that an alteration of the risk could occur in respect of the voyage to be performed, the course or route by which that voyage had to be performed, the ship with which it had to be performed, and the time within which it had to be performed. The alteration of the risk in respect of each of these matters may be described very briefly.

Firstly, there was the voyage (reis). In voyage policies the risk, and thus indirectly also the incidence of the insurer's liability, was described and determined with reference to a voyage between two places, the place from where the voyage had to commence (the terminus a quo) and the place where it had to terminate (the terminus ad quem). Of necessity both had to be mentioned in the policy and could in principle not be changed by the insured of his own accord and without the agreement of the insurer. The voyage thus described in the policy was known as the agreed or insured voyage (rels; viagium; Reise) and should be distinguished from the course followed by the ship in the prosecution of that voyage and to which reference will be made shortly.

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1 That is, after the commencement of the risk (as to which see ch XII § 1 supra) or at least after the conclusion of the contract (as to which see ch VII § 2 supra).

2 See again ch VI § 4.1 supra.

3 See again ch VIII § 4.2 supra as to the content of insurance policies.

4 See further eg Hammacher 126-132; Jolles passim; Ten Kate 21-33; and Mullens 61-61.
A change of voyage (mutazione di rota, changement de voyage) occurred either where the ship did not depart on any voyage at all or not on the one between the agreed places or termini. The latter again could occur either where the insured ship or the ship carrying the insured goods sailed from a terminus a quo different to that indicated in the policy and/or where she sailed to a terminus ad quem other than that agreed to in the policy. A change of voyage could involve a prolongation of the insured voyage, such as when the ship sailed past her agreed destination to another and further (unauthorised) port, or a curtailment of that voyage, such as when she terminated it at a port closer to the agreed port of departure. A change of voyage could further involve an increase or even a decrease in the risk taken over by the insurer.

Given that a change of voyage could occur either prior to the commencement of the agreed voyage or during its prosecution, such change could, if at all, have affected the validity of the insurance contract and the insurer's liability in one of two possible ways. It could have rendered the contract void either *ab initio* or *ex tunc*, in which case the insurer incurred no liability at all and the premium was in principle returnable; or it could have avoided the contract after it had been in force for some time or *ex nunc*, in which case the insurer could have incurred liability for a loss which had occurred prior to the change and in which case the premium was not returnable or at least not returnable in full.

Secondly, and to be distinguished from the agreed and insured voyage itself, there was the course or route (koers) which the ship followed on that voyage. Unlike the voyage itself, the course (iter viagii; iter navis; Fahrt) was not usually described in the policy, it being understood that the usual and least dangerous but not necessarily the shortest route would be followed.

A change of course or deviation from the route (mutazione di viaggio, changement de route) occurred where the voyage between the agreed termini was undertaken and performed and where there was accordingly no change of the agreed voyage, but where that agreed voyage was not performed in the proper way because of the ship deviating from the usual or, exceptionally, the agreed course between the agreed

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5 See further Jolles Deviatie 31-33.

6 But a prolongation of the voyage did not necessarily involve an increase in the risk and neither did a curtailment of the voyage automatically result in a decrease in the risk. Furthermore, although a change of the voyage usually involved a change of the course of the voyage, that was not necessarily the case.

7 In those cases where the change of the voyage therefore did affect the validity of the contract, the insurer was not liable for any loss suffered on the changed voyage and the contract was void either right from the start or from the moment such change occurred. Of course, where the voyage was changed only at the moment the ship sailed past the terminus ad quem, or when the voyage was terminated at an (authorised) earlier port, there could factually have been little change in the parties' position.

8 The agreed or insured voyage was a judicial concept which was determined with reference to the insurance contract while the course of the voyage was factual matter which had to be proved by evidence of the relevant custom and practices in every case. See further eg Jolles Deviatie 7-11 and 20-22; Ten Kate 1-5.
There were various possibilities. A deviation from the route on a voyage between two ports could have occurred when the ship concerned did not follow the customary route between them and did so without her entering any intermediate ports; or it could have occurred through her in fact entering intermediate ports on the customary route; or it could have occurred when she entered authorised intermediary ports otherwise than in the proper geographical or, again exceptionally, the agreed sequence on the route.\textsuperscript{10}

A change of course was only possible after the commencement of the voyage and once the ship was under way. Accordingly, if the insurance contract and the liability of the insurer was affected in any way by such a change, that occurred only \textit{ex nunc}. The insurer could therefore always have incurred liability for a loss which occurred prior to such change while the premium was in principle not returnable or not returnable in full.

The Roman-Dutch sources drew no clear distinction in principle between a change of voyage and a change of course,\textsuperscript{11} conceptions which were distinguishable on a theoretical level\textsuperscript{12} even though they were closely related in practice in terms of both occurrence and consequence. It should also be noted that the notion of a change of voyage and of the course of the voyage was not peculiar to the insurance contract. It also occurred in connection with other maritime contracts such as those of affreightment, maritime loan and bottomry, and the underlying principles involved in a change of voyage and course therefore predate the insurance contract itself.\textsuperscript{13}

In the third place there was the ship. An alteration of the risk occurred when the insured cargo was loaded from the ship named in the policy as the one to carry the cargo to the agreed destination, onto another ship. Such a change of ship or transshipment was of relevance in the case of cargo insurance, that is, where there was a change of the carrying ship.\textsuperscript{14} The identity of the carrying ship was one of the matters to be mentioned in the policy, and insurances without such a indication, that is,

\textsuperscript{9} See Jolles \textit{Deviatie} 14.

\textsuperscript{10} Thus, there was a change of course when a ship, insured on a voyage from A to E via first B and then C, sailed from A to B and then to C and then to E along an unauthorised route; or when she did so by entering D en route; or when she sailed first to C and then to B en route to E. If she did not leave from A, or terminated her voyage at one of the intermediate ports en route to E, or sailed past E to F, there was a change of voyage which may at the same time also have amounted to a change of course.

\textsuperscript{11} As will become apparent, the terminology employed in this regard was also neither clear nor consistent. The distinction was probably most clearly drawn in Roman-Dutch law in the contractual terms (liberty clauses) inserted into insurance policies which allowed the insured some freedom in the prosecution of the voyage. See § 1.2.4.6 \textit{infra}.

\textsuperscript{12} As will be shown shortly, this distinction was most clearly recognised in English law.

\textsuperscript{13} See generally Jolles \textit{Deviatie} 34-39.

\textsuperscript{14} The transfer of insurance cover from one ship to another in the context of an insurance on hull was considered in ch X § 5 \textit{supra}.
insurances *in quovis*, were permitted only by way of exception.\textsuperscript{15} Likewise, transshipment in principle relieved the insurer of liability from the time it occurred. In the Roman-Dutch sources, transshipment was not in any way clearly linked to a change of the voyage or the course as also involving an alteration of the risk.

Finally, there was the time within which the voyage had to be performed. Although a voyage policy differed from a time policy in the very fact that the duration of the risk was not described with reference to a period of time but with reference to a particular voyage,\textsuperscript{16} it was nevertheless implicit in a voyage policy that the voyage in question not only had to be commenced within the time within which such voyages were usually commenced, but also that it had to be prosecuted and completed within the period of time in which voyages of that nature were customarily performed. Any delay in this regard amounted to an alteration of the risk taken over by the insurer and could influence the insurance contract and the insurer’s liability in term of that contract. Unfortunately there is a dearth of authority in the Roman-Dutch sources on this form of alteration of the risk.

Before considering these matters individually in more detail, a few further remarks of a general nature.

The treatment in the sources of the central theme here, namely the alteration of the risk, remained fragmentary throughout the period under consideration. The underlying principle of the alteration of the risk was never extracted from the traditional situations in which it occurred and was not elevated to and regulated as a general principle regarding the alteration of risk *stante contractu*. The change of voyage and of course remained the focal point of the evolving rules pertaining to the alteration of the risk, although the other instances mentioned above were also recognised and, albeit to a lesser extent, regulated. The treatment, therefore, remained casuistic, not only in Roman-Dutch law up to end of the eighteenth century\textsuperscript{17} but also in the subsequent codification as well as in English law.\textsuperscript{18}

Further, the law was concerned with the effect of these individual instances of alteration of the risk\textsuperscript{19} on two matters. These were, on the one hand, the liability of the insurer to bear the risk and, if necessary, to compensate the insured in the event of a materialisation of that risk, as well as the liability of the insured to pay the premium, and

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\textsuperscript{15} See again ch VIII § 4.2.7 supra.

\textsuperscript{16} See again ch XII § 1.2 supra.

\textsuperscript{17} However, already in s 5 of title I of the Hamburg Asscuranz-Ordnung of 1731 there are recognisable the first signs of an abstractly formulated prohibition on the alteration of the risk, ie, a rule that every change to the risk circumstances described in the policy resulted in the nullity or at least the suspension of the insurance. Such a formulation only appeared clearly in German law by the end of the eighteenth century in the Prussian *Allgemeines Landrecht* of 1794. See further generally Hammacher 126-132.

\textsuperscript{18} In both the *Wetboek van Koophandel* and the Marine Insurance Act of 1906, the legal position continues to be regulated with reference to individual cases without any attempt to lay down general principles on the alteration of the risk after the conclusion of the contract. See eg Buys 35.

\textsuperscript{19} Or, as it has been put, with the effect of the alteration of one or more of the ‘elements’ of the insurance: see Mullens 72.
on the other hand and more generally, the validity and continued validity of the underly­
ing contract itself.\textsuperscript{20} The actual effect of the alteration of the risk on the matters men­
tioned in each of the instances considered relevant in practice, in turn depended upon
and was crucially influenced by a variety of further factors, as will become apparent
shortly. Thus, the effect of an alteration of the risk could conceivably depend on
whether it involved an increase or a decrease of the risk; whether or not it occurred as
a result of the insured’s own conduct and whether it occurred with or without his knowl­
dge and consent; whether, if the insured himself was not involved, it occurred as a
result of the conduct of someone for whose actions the insured was responsible;
whether it occurred in connection with a cargo or a hull policy; whether it occurred
voluntarily or as result of an emergency; whether the alteration was actually executed
or whether it was merely an intended but unexecuted alteration; whether or not it was
permitted by the insurance contract itself; and, finally, whether or not the alteration was
causally linked to the loss, if such in fact occurred, for which the insured sought to hold
the insurer liable.

Lastly, the first part of this chapter, concerning the alteration of the risk, provides a
nice illustration of how Roman-Dutch insurance law developed over a period of time.
The initial unsophisticated, undifferentiated and, following the Spanish example, strict
regulation of the topic gradually gave way to a more complex approach, more finely
attuned to the needs of practice. This development occurred as the influence of the var­
ious factors just listed carne to be recognised and taken account of in the legislation.\textsuperscript{21}

1.2 Change of the Voyage or of the Course of the Voyage

1.2.1 Early Legislative Regulation

Already in early insurance law it was accepted that a change of the voyage or of
the course of the voyage described in the policy rendered the insurance void\textsuperscript{22} unless
such change was permitted by an appropriate clause in the policy.\textsuperscript{23} Spanish insurance

\textsuperscript{20} Of necessity, therefore, this chapter is rather heavily cross-referenced to topics treated elsewhere,
including the content of the policy; the increase and return of the premium; the termination of the
insurance contract; and the effect of the insured’s own fault and that of the master and the crew.

\textsuperscript{21} See eg Iizerman & Den Dooren de Jong 227.

\textsuperscript{22} See eg Straccha De assecurationibus XIV.1 (judicial notice of the proper route ('iter') by sea and over
land was possible) and XIV.2-3 (the legal position if the course ('navigatio' in the summary; 'iter' in the
text) was changed on the Instruction of the consignor or merchant; the route could be changed for
necessary repairs to the ship, and a change caused by the force of the wind or a storm did not terminate
the insurance); and Santema De assecurationibus III.51-55 (change of voyage in case of an emergency).
See too Bensa Assicurazione 71 (the law relating to the change of voyage and of course was infused by
phrases derived from the maritime loan, ie 'navigante recto viaglo' or 'eundo et redeundo recto et
continuato viagio'); Holdsworth History vol VIII at 280; and Sanborn 255.

\textsuperscript{23} Clauses permitting the master of the insured ship or of the ship carrying insured goods to deviate from
the agreed or usual route or course of the voyage appeared from early on. Thus Straccha De
assicurationibus XIV discussed the following provision in the Ancona policy of 1587: 'potestatem habens
cum dicta nave & mercibus ei impositis intrandi in quenquinque portum & locum, & navigandi antrorsum
& retrorsum, a dextris & a sinistris pro placito & voluntate istius Magistri navis, itinere non mutato'. He
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legislation too recognised that the ship had to proceed from her port of departure to her port of destination along the stipulated or usual route without any deviation and without entering any unauthorised intermediary ports along the way.24

The earliest insurance laws in the Low Countries followed this example.25 In terms of s 6 of title VII of the placcaat of 1563, no one could to the prejudice of his insurers change ('veranderen') his specified voyage ('sijn ghedesteineerde voyagie'), whether he changed his route ('roete') or course ('weg') to a greater or lesser extent26 or changed it completely ('geheelicken').27 Thus, a change of voyage and of course was prohibited, although much about this prohibition was uncertain.

It would appear that s 6 referred to a voluntary28 change of voyage or of course from that provided for in the insurance policy itself. At least three possibilities were apparently foreseen by the Legislature: where the course of the voyage was changed by a prolongation of the course, where the course was shortened, or where the voyage itself was changed.29

Whereas s 6 contained the prohibition, s 7 of title VII of the placcaat of 1563 set out how such change was established and what the consequence of it was. It provided that a person would be taken as having changed his insured voyage ('sijn geas­seureerde voyagie') if that was evidenced by his charter parties ('Charte partye') or bills of lading ('bevracht Br/even'), or if it was otherwise established by lawful witnesses that he had changed his specified voyage ('sijn ghedesteineerde voyagie') which was described in his insurance contract ('in s/jne asseurantle verklaert'). If that was the case, he could not in terms of such an insurance claim for that which was caused by such change ('de welcke mits der selver veranderinge ter causen vande voorseyde asseurantien, niet en sal mogen eysschen')30 and the insurer was therefore relieved of

explained, though (in XIV.3), that the liberty provided by the clause (ie, to enter whichever ports or places) was restricted to places and ports which occurred on the same course ('navigatio'). See further § 1.2.4.6 infra where the use of such liberty clauses in Dutch Insurance practice will be considered in detail.

24 See eg Raatz Geschichtie 242-243 as to the relevant provisions of the Burgos Ordinance of 1538.

25 See generally Jolles Deviatie 39-46.

26 Possibly: whether the course was prolonged or curtailed.

27 Possibly: changed the route to such an extent that it involved a change of voyage.

28 This may be assumed, although the section was not expressly confined to such a change.

29 Thus, to take the example of a voyage from A to D via B: where the ship proceeded from A to D via B and C; where she proceeded from A directly to D; or where she sailed from A to E. In the first two instances the voyage itself remained one from A to D and was therefore unchanged with merely the (permitted) course being changed. In the third case, the voyage itself was changed. Clearly there was no recognition here of any fundamental distinction between a change of voyage and a change of the course followed on that voyage.

30 It is not clear whether a causal link was here required to exist between the change and the loss, that is, whether the change rendered the insurance void and the insurer not liable for any subsequent loss, or whether it only relieved him of liability for a subsequent loss caused or contributed to by such change.
any liability to compensate for a loss occurring after the change of the voyage or the course.31

The model cargo policy form in terms of s 2 of the placcaat of 1563 which insured the cargo on a voyage from, in the example provided in the policy this case, Seville to Antwerp, stated that it was agreed that the named ship was free to sail everywhere, to take any course or touch any ports of call, and to remain there, whether by necessity or voluntarily, as the commander of the ship saw fit.32 Such ‘liberty’ or ‘touch and stay’ clauses were common in Antwerp policies in the sixteenth century33 as it was presumably realised, also by the Legislature as appears from the model policy form it prescribed, that the strict provisions of ss 6 and 734 were not appropriate in the case of a cargo policy where the insured had little if any control over the way in which the carrying ship performed her voyage.35

In s 14 of the placcaat of 1571 it was laid down that insured merchants or masters could follow or plot (‘nemen’) whatever course (‘coursen oft schalen’) they wished or were compelled to take (‘by wille oft door bedwanck’), as long as that liberty was granted in the policy (‘t selve verklaren by ‘t instrument vanden Contract oft Police’), and if they did so without changing the voyage (‘sonder de reyse te mogen veranderen’) or entering other ports (‘noch in andere Plaetsen Haven nemen’) than those declared by policy,36 unless such change was caused by the perils of the sea.

31 As to ss 6 and 7 of the placcaat of 1563, see generally Enschedé 92; Goudsmit Zeerecht 247; De Groote Zeeassurantie 35; Jolles Deviatie 42-44; and Kracht 20.

32 The policy provided that the carrying ship ‘mogen varen voorwaerts, achterwaerts, ter rechter hant, ter slinker hant, ende aan allen zijden, ende nemen alle coursen ofte schalen, ende beyden ofte vertoeven, ‘tzy door bedwanck, noodtsaecke, ofte gewilliglick, soo den Gouverneur vanden selven Schepe goet duncken sal’. See Jolles Deviatie 63.

33 See further De Groote Zeeassurantie 106-107. Den Dooren de Jong ‘Lombard Street’ 16-17, referring to the liberty clause in an Antwerp cargo policy of 1566, appears incorrect in stating that such clauses were in contravention of ss 6 and 7. They certainly ameliorated the effect of those sections but appear to have been permitted by and not in contravention of the placcaat of 1563.

34 According to which a change of voyage or course by the carrying ship relieved the cargo insurer of liability, irrespective of whether or not such change occurred with the prior knowledge or authority of the insured consignor.

35 Whereas the shipowner had direct control, through his master, over the navigation of the ship, the owner of cargo on board was in a different position. After merchants no longer personally accompanied their cargoes on board (often their own ships), they appointed a representative on board to look after the cargo, its loading, stowage and carriage, and to ensure its proper discharge, sale and/or delivery at the destination. This representative was referred to as a ‘supercargo’ (‘supercarga’ in Dutch, from the Spanish ‘sobrecargo’, an overseer or superintendent of cargo). Often a single such supercargo looked after the interests of various consignors of cargo on board a particular ship, including those of the shipowner himself if he had shipped his own cargo. Of course, such a supercargo, especially in the case of a vessel chartered by the consignor or consignors, could have been able to direct her master as to where she should proceed. Thus, the Antwerp Compilatias of 1609 in art 129 of par 4, title 11, part IV (see De Longé vol IV at 254 and further § 1.2.2 infra) referred to the master entering unauthorised ports voluntarily and without the instructions of the insured or his supercargo (‘bevelhebber’ or ‘sobrecargo’).

36 That is, without changing the course of the voyage.
("fortuyne vander Zee"), unfavourable winds ("contrarie Winden") or emergencies ("nootelijcke corsaecke") occurring without their fault ("sonder hun schult toekomende"). If such a change occurred by the fault or conduct of the merchant himself ("indien 't selve procedeert van wegen des Koopmans"), he lost his action on the insurance contract against the insurer. And if it was caused by the master ("indien 't toe komt by den Schipper"), that master was liable to make good the loss, presumably to the insurer who was liable to the insured.

Thus, whereas the placcaat of 1563 did not permit a change of voyage or course at all, not even (at least not expressly) in the case of an emergency, a necessary change of voyage or course was permitted by the placcaat of 1571\(^37\) while recognition was now also expressly given to the freedom of the parties in this regard to permit any change they saw fit. Contravention of the prohibition and the effect of a change of voyage or of course now depended on whether or not it was the fault of the insured. If it was, the insurer was not liable; if not, the insurer remained liable but had a recourse against the master if the latter was at fault. Now, therefore, the actions of the insured cargo owner and no longer those of the master, over which the owner of cargo on board had little or no control, were determinative of the consequences of such change. Also for the first time it appeared that a distinction was impliedly recognised between a change of voyage and a change of the course of the voyage.\(^38\)

Again, in terms of the model policy referred to in s 35 of the placcaat of 1571, it was stipulated that the cargo was insured on a voyage from one place to another and also that the ship could sail everywhere and plot all courses or touch all ports where, voluntarily or in emergency, she could stay as the commander of the ship saw fit.\(^39\)

1.2.2 The Regulation in Antwerp Customary Law

The first compilation of Antwerp customary law, the Antiquae of 1570, provided\(^40\) that if the insured authorised the master to whom he entrusted his cargo to go to or enter other ports or change his voyage otherwise than to the destination to which that cargo was destined in terms of the policy, the insurance was null and void. But that was

\(^37\) See Jolles Deviatije 59-60.

\(^38\) As to s 14, see eg Couvreur 'Zeeverzekeringspractijk' 194-195; Enschedé 93 (a change of course other than in necessity was only allowed if permitted by the policy); Goudsmit Zeerecht 265; Jolles Deviatije 44-45; Kracht 27. De Groote Zeearvant 41 and 63 notes that s 16 of the provisional placcaat of 1570 provided that the insured or the master could not change the voyage, nor enter any port other than one mentioned in the policy, except in the case of storm damage (ie, in an emergency) or when otherwise agreed by the parties.

\(^39\) The stipulation in this regard was virtually identical to the equivalent one in the model policy of 1553 (the slight changes which did occur are not italicised): it provided that the ship "sal ... mogen varen voorwaerts, achterwaerts, ter rechter hant, ter slinkerhant ende aan allen zijden, ende namen alle coursen ende schalen, ende beyden oft vertoeven, 't zy door bedwanck, nootsaecke, oft gewillichlick, soo 't den Gouverneur oft Regeerders vanden selven Schepe goed duncken sal". See further Jolles Deviatije 63.

\(^40\) In art 7 of title XXIX (see De Longé vol i at 602).
not the case if the master was authorised to enter other ports in an emergency or if he considered it appropriate in the circumstances ("soo de noot eyscht oft hem goet dunckt"). It was not indicated what the position would be if the master changed the voyage without any instruction or authority and otherwise than in an emergency. That was only addressed in the next compilation.\(^{41}\)

The Impressae of 1582 provided\(^{42}\) that the insured could not authorise the master on whose ship his goods were loaded ("dien hy bevracht heeft") to enter or touch any other ports, or to change his voyage, otherwise than in accordance with the policy ("anders dan volgende de police"). If he did, the cargo insurance was null. But the master was authorised to touch other ports if and to the extent required in an emergency ("als ende soo den noot dat vereyscht"), in which case, presumably, the insurance remained valid. It was no longer also permitted for the master to change the voyage if he considered it appropriate, as was the case earlier. If the master did so otherwise (that is, presumably, without any emergency) and without the instruction ("last") of the insured, the insurance remained valid subject to the insurer's recourse upon the master ("behoudelijk den versekerer zijn verhael op den schipper"). Presumably, this recourse was available only in the case of an unauthorised change of voyage, not in the case of one made in an emergency.\(^{43}\)

Therefore, the insurer was relieved of liability in the case of a voluntary and authorised change but remained liable in the case of a change in an emergency. And in the case of an unauthorised change, he had a right of recourse upon the master. The regulation of the topic in the Impressae therefore explained s 14 of the placcaat 1571 nicely but clearly much uncertainty remained, for example as regards hull policies, what exactly was meant by a change of voyage, and whether the time when the change was made had any bearing on the matter. This was addressed to some extent by the very extensive regulation of the topic of the change of voyage and of course which was taken up in the Antwerp Compilatae of 1609. Some of the relevant measures may be noted briefly.\(^{44}\)

The departure of the insured or carrying ship on another voyage before departing on the insured voyage amounted to a change of voyage and resulted, in the absence of agreement between the parties to the contrary, in the termination of the insurance.\(^{45}\)

Concerning the change of the course of the stipulated voyage, it was provided that if the insurance contract named certain places to which the ship had to proceed

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\(^{41}\) See eg De Groote Zeeassurantie 63.

\(^{42}\) In art 12 of title LIV (see De Longé vol II at 404).

\(^{43}\) See further De Groote Zeeassurantie 63.

\(^{44}\) See generally Mullens 76-78 (change of voyage) and 78 (change of course).

\(^{45}\) See art 157 of par 5, title 11, part IV of the Compilatae (see De Longé vol IV at 264).
and where she was to discharge, without anything further being agreed upon, the insured and the master could not touch any port other than those mentioned in the policy, otherwise the insurance was invalid and the premium could be retained by the insurers. Nevertheless, the master could always in an emergency ('soo wanneer hij door onweder, vervolch van vijanden oft seeroovers, oft anderent nooit daer toe wort bedwongen') enter ports other than those for which the cargo was loaded, and he then incurred no liability, even if the insurers were obliged to compensate the insured for any loss or damage caused by such change of course. But where the master entered such ports voluntarily and without the instruction of the insured or his supercargo, the master did incur liability in that the insurers, who would have to compensate the insured for any loss or damage caused by such barratry ('bij manier van baatterie'), had a recourse against the master. Where the insured knew that other ports would be touched, he was obliged to declare in the policy whether that would be done solely for the loading or discharge of cargo, or only for the master to obtain instructions ('om advijs te nemen') on whether to load or discharge there or elsewhere, or whether to prosecute the voyage to the destination mentioned in the insurance policy. The insured

46 According to art 48 of par 2, title IV (see De Longé vol IV at 220), one could not insure with a clause permitting the ship to enter all ports whatever ('met bespreeck van alle havenen te mogen inmeaen oft inloopen'), presumably off the course; that is, it was not permitted to agree that the insured could change the voyage. However, if it was desired that the ship be permitted to touch all ports (presumably on the course and en route to the destination; that is, if it was desired that a change of course be permitted), it was necessary to express and declare this so that the insurer would be aware of the extent of the risk, and could fix the price of the insurance accordingly. If such a declaration was not made, the insurer was not liable on the policy in the event of any change of (presumably) course.

47 See art 123 of par 4, title IV of the Compilatae (see De Longé vol IV at 250).

Further distinctions were drawn in arts 124-127. In terms of art 124, if goods were carried under a charter party (ie, 'op een generaelen vrachtbrief van den geheele schepe') and it was agreed in it that the ship could touch various ports and roadsteads, then (it being assumed that the insured knew the intermediary ports) all such ports and places had to be expressed and declared in any policy on such goods. By art 125, where it was not so declared in the policy and where, by touching ports or places not mentioned in the policy, a loss of or damage to the insured goods occurred, the insurers were not liable, whether or not the insured knew that such ports would be touched. The insurers could also retain or claim the premium. In terms of art 126, if goods were loaded in terms of a bill of lading (ie, 'dat den schipper van verscheijde persooneen verscheijde goeden innempt, bij particulier ende besonder connossement oft vrachtbrief') it was sufficient for the insured to enquire from the master whether he would touch any ports en route, and if the latter said no (something which the insured had to confirm under oath), the insurers were in terms of an insurance on those goods liable for all types of barratry. By art 127, if the master declared that he would go to ports other than that where the cargo was to be discharged, the insured was obliged to mention such places in the insurance policy, failing which the insurers incurred no liability 'ter saacken van dijon'.

48 See art 128 (De Longé vol IV at 252-254).

49 Article 129. A voluntary and unauthorised change of course or deviation by the master could in appropriate circumstances amount to barratry. As to barratry, see again ch VI § 4.3 supra. As to insurers' right of recourse, see ch XIX § 1 infra.

50 In terms of art 130.
had to provide the reason why the ship would be touching other ports and had to do so to enable the insurer correctly to estimate and price the risk ('opdat de versekeraers mogen weten wat risico oft perijckel zij op hen zijn nemende, ende daernaer hennen prijs oft premio begrooten').

The Compilatae also provided for a change of course in the case of the insurance of a bottomry loan, while the effect of a change of voyage at various times upon the recoverability or claimability of the premium was also covered in detail.

The Compilatae also made provision for other cases not treated in subsequent Dutch legislation, for example the case where several possible ports of loading or discharge were mentioned in the insurance policy at the option of the insured ('ten keure van den versekerde'), or where the insurance was on a voyage not described in the policy but to be determined by the insured himself ('op raise die niet vuijtgedruckt en worden, oft die gelaten ende gestelt worden ter gelieve van den versekerde').

1.2.3 The Position in the Seventeenth Century

The municipal legislatures in the Northern Netherlands continued to regulate the legal position pertaining to a change of the voyage and the course of that voyage by the insured or the carrying ship. Section 7 of the Amsterdam keur of 1598, on penalty of nullity of the insurance, prohibited the insured from instructing the master on whose ship his goods were loaded ('den Shipper die hy bevracht') to enter or touch ports other than ('ander Haven doen ingaen ofte aennemen') in accordance with the policy.

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51 See arts 309-310 of par 9, title 11, part IV (see De Longé vol IV at 328) (a voluntary change of course by the master without notice to the insurer of the loan on the ship relieved the latter of liability even if the change was made en route and without the knowledge of the insured; but in the case of an unauthorised change, a proportional return of the premium was permitted).

52 See arts 79-85 and again ch XI § 6 supra as to the recovery and repayment of the premium. Thus, if the voyage was changed voluntarily at the place of loading prior to the vessel's departure and notice was given to the insurer, the premium was returnable in full or not due at all if the insurers had run no risk at all (art 79), or it was proportionally recoverable if they had run some risk (art 80). If the change occurred by necessity ('bij bedwanck van hooger hant oft anderen noot'), the premium was recoverable in full even if the insurers had run some risk (art 82). And if the ship was already under sail and because of storm, fear of arrest or pirates, or another casualty she had to return to her port of loading, the premium was proportionally recoverable upon notice to the insurer (art 83). If the change occurred while the ship was at sea without her returning to her port of loading, half of the premium was recoverable if such change had occurred before she had sailed half-way on her insured voyage and as long as no loss had occurred, but nothing of the premium was recoverable if the change had occurred after she had passed the half-way mark or if a loss had occurred (art 84).

53 See arts 160-163 of par 5, title 11, part IV (see De Longé vol IV at 266).

54 See arts 297-299 of par 9, title 11, par IV (De Longé vol IV at 322-324). Such an insurance did not include voyages to prohibited or dangerous places ('op eentje verboden oft sorgelijke statten'), had to be notified to the insurer once determined, and could not thereafter be changed unilaterally.

55 Section 14 of the Middelburg keur of 1600 was in identical terms.

56 That is, to change the course of the voyage.
or to change his voyage ('ofte zijn voyagie doen veranderen') otherwise than in accordance with the policy.

But where the master did touch other ports otherwise than was required by necessity, and without the instruction of the insured, the insurance remained valid, subject to the insurer's recourse against the master.\footnote{57}

Both the cargo and the hull policies appended to the Amsterdam keur of 1598 contained liberty clauses permitting the master the freedom to sail wherever he saw fit in the prosecution of the voyage, thereby creating and recognising the contractual exception to the rule contained in s 7, namely that in the case of a change of voyage or course, voluntarily made on the instruction of the insured, the insurance contract was avoided if such change was not permitted by the insurance policy.\footnote{58} Although it could have been argued\footnote{59} that the further development of such clauses in practice was prevented by s 1 of the keur which declared null and void all contracts in contravention of the keur itself, that appears not to have happened. As was shown by a decision of the Hooge Raad in 1715,\footnote{60} more extensive clauses did appear in practice and were not disapproved of by the Raad.\footnote{61}

\footnote{57} 'Mjaer vermach den Schipper wel andere Havenen aen te nemen, als, ende soo de noot dat vereyscht, ende anders doende sonder last vande geassureerde, blijft de verseeckeringe van waerden, behouden den verseeckeraer sifn verhael op den Schipper'.

\footnote{58} The policies read: '{T}voorsz schip mogen vaeren voorwaerts, achterwaerts, wenden ende keeren, ter rechter, ter slinker, ende aen alle zyden, ende door noot ofte met wil/e aen nemen sucie Havens ende Reeden, als den Schipper oft Schipperen believen oft goet duneen sal'. See further Jolles Deviatie 63-64.

\footnote{59} As stated by Enschede 156-157 after referring to clauses in Spanish policies and ordinances which permitted changes of course.

\footnote{60} See Bynkershoek Observationes tumultuariae obs 1168; idem Quaestiones juris privati IV.5. The decision is discussed in § 1.2.4.6 infra.

\footnote{61} Two further examples of such clauses in the seventeenth century appear from Amsterdam policies referred to by Den Dooren de Jong 'Practijk' 9. In a 1636 policy on a fishing vessel the following handwritten clause was inserted: '{S}ullende t'elkens soo in 't gaan als keeren en op alle plaatsen mogen escaleren en aanlopen, lossen, en laden tot den Stiermans believen met ofte sonder wete van geassden of commis'. An in an Amsterdam policy of 1672 on the ship the 'Witte Haas' (see Appendix 24 infra), the following printed clause appeared: '{M}its nie a/leen aan de voornome cust van Africa [where the ship was destined], maer oock onderwegen over ai en alomme en op alle plaatsen en landen te mogen escaleren, aanlopen, zeylen, verzeylen, leggen, lossen, laden, herladen ende handelen, alles tot Schippers believen. tzy met ofte sonder wetens van de geassureerden ofte Commis'.

It seems that these policies, the one on a fishing vessel and the other one on a trading vessel, both of which by their nature were required to sail where circumstances dictated and not to follow a predetermined voyage or course, did not contravene s 7 of the Amsterdam keur as De Jong suggests. That section presumably only regulated the position in the absence of an agreement to the contrary and the validity of a liberty to deviate was already recognised in the model policy form appended to the keur itself. See also Dorhout Mees Schadeverzekeringsrecht 22n55 and also the points made in this regard in ch XII § 1.2 supra as to time policies.
Similar clauses were retained in the cargo and hull policies prescribed by the Amsterdam amending keur of 1688\(^\text{62}\) as well as in the ransom policy in the Amsterdam amending keur of 1693.\(^\text{63}\) It may be noted at this stage that these liberty clauses permitted a change of course or deviation in the execution of the agreed voyage, but not a change of that voyage itself.\(^\text{64}\)

The provisions on this topic in the Rotterdam keur of 1604 closely followed those of Amsterdam. Section 11 provided that an insured, on pains of the nullity of his insurance, could not instruct the master of the ship in which his cargo was loaded, to change his voyage (‘sijne reyse niet mogen doen veranderen’) or to touch or enter (‘aenommen ofte ingaen’) any ports other than those declared in the policy. However, should the master in fact have touched other ports and have done so otherwise than was required by necessity and without the instruction of the insured, the insurance remained valid with the insurer retaining a recourse against the master.\(^\text{65}\) No model policy forms were appended to the Rotterdam keur of 1604 and the use of a liberty clause was therefore not pertinently sanctioned by the Legislature as was the case in Amsterdam.

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\(^\text{62}\) The cargo policy stated: ‘sullende ’t voorsz Schip mogen varen voorwaerts, achterwaerts, wendende en keerende, ter rechter, ter slinker, en aan alle zijden, en door noot of met wilie aenemen alsuike Haven en Reden, als den Schipper en Schippers tot nutte en vordering van voorsz Reise believen of goetdunken saf’. The hull policy in turn provided: ‘sullende ’t voorsz Schip mogen varen voorwaarts, achterwaarts, wendende en keerende, ter rechter, ter slinker, en aan alle zijden, als den Schipper ten dienste en nutte van voorsz Reise believen of goetdunken saf’. As appears from the unitalicised phrases in the cargo policy, the liberty clauses were not identical in the cargo and hull policies. While in case of both policies the ship could sail everywhere, in case of the hull policy the liberty compulsorily or voluntarily to touch all ports was omitted. The reason why it was also permitted in the case of the cargo policy to touch all ports appears, according to Jolles Deviatie 64-66, to have been that consignors were regarded as being reliant on the actions of the master to a greater extent than the shipowner himself. The shipowner instructed the master whereas the consignor was regarded as an outsider, largely ignorant of the instructions given to the master; he knew only the port of destination and insured his cargo for a voyage there, and was more often than not ignorant of the other ports, if any, the carrying ship was to touch en route. For that reason it appears to have been customary in the case of the cargo policy for the insurer to have taken over the greater risk arising from the ship touching ports en route.

\(^\text{63}\) It stated to cover the insured ‘van ... [port of departure?] mits over-al, en alomme onderwegen, de geheele reyse geduurende, op alle plaatse en Landen mogen aanloopen, seilen en verselen, voorwaarts of agterwaarts, ook leggen, lossen, laden, en herladen, tot Schippers of Commis believen, ’t zy met of zonder weten van ede Geassureerde of Commiss’. As Jolles Deviatie 66 points out, there was an even greater liberty to deviate here and the risk was even more extensive than in the case of the cargo policy. This was necessary because the passenger, whose liberty was the object of risk here, was passive and totally dependent on the actions of the master of the ship. He was therefore protected ‘overal en alomme’.

\(^\text{64}\) See further § 1.2.4.6 infra.

\(^\text{65}\) ‘Maer vermach den Schipper wel andere Havenen aan doen, als den noot sucks verayscht, ende anders doende, blijft de verseeckeringe van weerd, behouden den Verseeckererof zijn verhael aenden Schipper’.
Both s 7 of the Amsterdam keur and s 11 of the Rotterdam keur, virtually identical provisions as they were, were not models of legislative clarity nor were they complete regulations of the topic. It was uncertain, for example, when exactly a voyage or its course was changed; when precisely the insurer was not liable and when he was liable with and without a right of recourse; whether the rules laid down also applied to hull policies as they did to cargo policies, when the master would be considered to have acted under authority and when not; when the master was liable and to whom; when a change could be taken to have been made voluntarily and when in an emergency; and, finally, what exactly was the effect of contractual provisions in the form of a liberty clause. The mere fact that the model policies forms, at least those in the Amsterdam keur, contained a clause nullifying the legislative provisions, tended to show that even the authorities may have realised that its earlier approach was possibly too strict and unpractical.

The Roman-Dutch authors of the seventeenth century contributed little further on the topic and certainly did not address these uncertainties. Grotius, for example, simply noted that the insured could not order the master to put into any port other than those mentioned in the insurance policy, and that in case of an unauthorised and voluntary ('buiten last ende buiten nood') change of voyage or course by the master, the insurer (who, it was implied, remained liable on the policy) had a right of recourse against him. He therefore drew no distinction between cargo and hull insurances but simply held the insurer relieved from liability in the case of an authorised change but liable in the case of an unauthorised change.

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66 As to both of them, see Bynkershoek Quaestiones juris privati IV.3; and also Enschedé 93-94; Goudsmit Zeerecht 324-326 (who unjustifiably sees s 7 as an improvement over the s 14 of the placcaat of 1571 in that the actions of the insured and no longer those of the master - over which the insured owner of cargo on board had little or no control - were determinant of the consequences of any change of course; however, that was already the case in the placcaat of 1571 but not in terms of the earlier provisions in the placcaat of 1563) and 400-401; and Jolles Deviatie 60.

67 According to Jolles Deviatie 45, in the absence of any specific treatment of hull policies in this connection in the municipal measures, the position probably was that for hull insurance the basic principle applied without any qualification, namely that in every case of a change of voyage or course the insurer was relieved of liability, whether it occurred with or without the consent of the shipowner.

68 Inleidinge III.24.11.

69 Groenewegen Aanteekeningen n25 & n26 (ad III.24.11) explained that if the insured did order the master to put into another port, the insurance was null and void and the insurer not liable. He also supplied the references in this regard (ss 6 & 7 of the placcaat of 1563, art 12 of the Antwerp Impressae of 1582; s 7 of the Amsterdam keur of 1598; s 12 [rather: 14] of the Middelburg keur of 1600; and s 11 of the Rotterdam keur of 1604).

70 See further on this point, Jolles Deviatie 46-47. Later Scheltinga Dictata ad III.24.11 sv ‘[d]ie laat verzeeckeren mag, etc’ explained that the contract was null even if the insured had merely instructed the master to change the course of the voyage, ie, without entering any ports ('belast heeft aan den schipper om de route van de reis te veranderen'). He also noted (idem ad III.24.11 sv ‘maer dede den, etc’) that in the case of an unauthorised change made in an emergency, the insured not only had the right to claim compensation from the insurer but that the insurer then also had no recourse against the master. This case had to be distinguished from the case where the insurer incurred no liability (authorised, voluntary change) and from the case where the insurer was liable but had a right of recourse (unauthorised, voluntary change).
Van Leeuwen was not much more helpful.\textsuperscript{71} He stated that the insured could not let the master to whom he had entrusted his cargo, to enter or call at any other port or prolong or change the voyage expressed in the policy. If he did, his insurance was void. The insurance remained valid in the case of a change of voyage or course by the master only when that was made from necessity and without any instruction from the insured.\textsuperscript{72} Discussing the matter in the context of general average, Weytsen pointed out that in the case where the insurer was not liable for the loss because of an unauthorised change of the voyage by the master, the insured cargo owner would have a recourse against the master himself.\textsuperscript{73} The contemporary and influential Italian author Roccus provided much by way of casuistic examples and touched on matters of which his Dutch counterparts had never thought, but again there was little by way of a complete picture of the general principles involved in his treatment of the topic.\textsuperscript{74}

\textsuperscript{71} \textit{Rooms-Hollands regt} IV.9.9.

\textsuperscript{72} The text here reads ‘buiten last van den Versekeraar’, but should probably refer to the insured and not the insurer. See further also eg Van Zurck \textit{Codex Batavus} sv ‘Assurante’ par 18; Decker Aanteekeningen \textit{ad} IV.9.9 n(3)/(c) (the insurance was immediately avoided when the ship was prevented from completing her voyage (‘zyn Reyse te vovloeren’), or was compelled to prosecute another voyage (‘genoodzaakt is een andere Voyage te doen’)).

\textsuperscript{73} \textit{Tractaet} par 52 at 212 in the 1707 ed. In par 30 at 11-12 in the 1707 ed he also commented on a change of voyage and declared that the insurer was not liable for a loss (by jettison) occurring after the master had left the course of the voyage voluntarily and without being forced by a storm. The reason, he explained, was that the insurer did not take over the risk of perils on such a changed voyage, and therefore the insured merchant had his recourse against the master. See also De Vicq’s note on Weytsen (num 74 at 44-45 in the 1707 ed). As Jolles \textit{Deviatie} 41-42 notes, Weytsen’s view that a change of voyage or course in the case of cargo insurance relieved the insurer of liability, even when such change occurred totally without the consent of the insured consignor, and with the latter (and not a liable Insurer) having a recourse against the master, reflected the position prior to the \textit{placcaat} of 1563. (Weytsen died in 1565 although his \textit{Tractaet} was only first published in 1617.)

\textsuperscript{74} Thus, he explained (\textit{De assecurationibus} note 18) that insurers were liable only for the fortuitous damage which could occur on the voyage expressed in the policy, and were not liable when the ship in any way changed her voyage, the reason being that the agreement of the contracting parties should have no further effect than that intended, and especially also because the words inserted into the policy had to be given effect to (in this regard he referred to \textit{Rota Genuae Decisiones} decis XXV.2: ‘assecuratores non tenentur, nisi de viagio convento’). He further stated (note 19) that the insurance of a ship on a particular voyage included her first voyage and no other voyage (in this regard he referred to \textit{Rota Genuae Decisiones} decis LXIII.4: ‘assecuratio pro viagio intelligitur de primo’) and that the insurance of a ship for a particular voyage was taken to be an insurance for one such voyage only (see \textit{Rota Genuae Decisiones} decis XXV.3: ‘assecuratio facta pro viagio intelligitur pro primo’). A change of voyage or course, he explained further (note 20), relieved the insurer of liability from the time when such change was effected, and this to occur when the changed voyage or course was proceeded upon, even if it was not yet completed. And finally Roccus explained (note 52) that whereas the insurer was liable only in respect of the agreed voyage (‘itinere’) and no other, and was relieved of liability if the ship changed her voyage (‘mutaverit iter’) or diverted her voyage (‘iter’) from its proper course (‘via recta’) (in this regard he referred to \textit{Rota Genuae Decisiones} decis XLII.2: ‘mutatio viagii dissolvit contractu assecurationis mericum super navi factum’; see too decis LXIII), that was not the case if the change of the voyage (‘mutaverit iter’) was required for any just and necessary cause, such as to replace the ship or to avoid a storm at sea or to avoid encountering enemy ships. In such cases the insurer remained liable. Another example of a lawful and necessary deviation provided by Roccus was to pick up a compulsory pilot to approach and enter Venice in safety (see \textit{De assecurationibus} note 93). Peitama added in his note on this that a similar compulsory pilotage was in force for ships entering and leaving the port of Amsterdam from the island of Texel (see again ch XII § 1.3.4 n160 supra as to the port of Amsterdam), so
Not surprisingly, given the wide variety of possible situations which could arise in connection with a change of a voyage and of the course of a voyage and the relative brevity of the existing legislative enactments on the topic, the next century produced a mass of litigation. The decisions not only interpreted the legislation but also provided illustrations of the types of situation the legislatures may have had in mind. However, as the many split decisions and conflicting opinions indicated, and as Lybrechts noted, in this uncertain field where much depended on the facts of each case if not on who decided the matter, the outcome of any litigation was rather unpredictable.

1.2.4 Decisions and Opinions in the Early Part of the Eighteenth Century

1.2.4.1 Determining the Change of the Voyage or the Course of the Voyage

As was to be expected, in many instances the litigation involved a factual dispute as to whether or not an actual change of the voyage or of the course had occurred. This, in turn, involved an interpretation of the description of the voyage in question. A few of those decisions will be referred to here by way of illustration. The cases and opinions discussed later on in connection with some of the other principles involved, will further illustrate the interpretational issues involved in this regard.

In an opinion from 1665, already considered in connection with the commencement of the risk, a change of the place of departure and hence of the agreed voyage was also at issue. Apart from the fact that the opinion thought the insurers not liable because the risk had never commenced in this case, the advocate further advised that where the insured ship did not depart from the agreed place from where the

that if a master failed to have a pilot on board, he would himself have been liable for any resulting damage.

See further Piergiovanni 'Rota' 35 and 36. For a decision of the Maritime Court of Messina in Vincentio de Medici v Assuradeurs van Messina (1628) holding the Insurer liable in a case of a change of voyage on the instruction of the insured because he feared enemy capture if the insured voyage to Naples was performed (the insured instructed the master to remain in an intermediate port but despite this precaution the ship was still captured), see Roccus/Feitama Gewijds engris. decisi.XVIII.

75 Koopmans handboek V.92 ('die een proces begind weet niet wie zyn Rechters zullen zyn').

76 See again ch VIII § 4.3 supra on the interpretation of insurance contracts, and ch XII § 1.3.4 supra on the interpretation of the description of the insured voyage in the insurance contract.

77 See Nederlands advysboek vol III adv 168. See again ch XII § 1.3.2 supra.

78 Briefly, the matter involved an insurance on a ship from Danzig and surrounding places to Amsterdam. In terms of a clause added to the policy, the risk was to commence for the insurers from the river of Danzig ('het soet water') where the ship was said to be. After the subsequent loss of the ship en route to Amsterdam, it appeared that she was never in the river at Danzig but had sailed past it on her way to Amsterdam. According to the opinion, the insurers were not liable for the ship which was never at the place from where the risk was to commence: she never sailed on the insured voyage and the risk therefore never commenced.
The Alteration and Control of the Risk

insured voyage was to commence, but departed from another place, there was change of voyage. Accordingly the insurers were not liable for any loss occurring on that voyage, it being certain and beyond contradiction that they incurred liability only on the agreed voyage ('de Assuradeurs aan geen andere reis/en schaden en ongeval gehouden sijn, dan in die alleen, dewelke in de police van assurantie voorgesteld ende gecomprehendeert sijn').

An opinion delivered in 1667 showed that in the case of an insurance on a voyage from one port to another, the insured ship or the ship carrying the insured cargo was not permitted to sail between the two ports in any possible way but that the voyage had to be prosecuted as it was ordinarily prosecuted and as directly as possible.

In a case before the Hooge Raad in 1711 a ship and her cargo were insured on a voyage from Middelburg to Angola in Africa, no port being excepted on the whole coast, and from there to the island of St Thomas in Africa, and thence back to Middelburg. The ship arrived safely in Angola, and sailed from there to the island of St Thomas in America where she was captured by a French ship and subsequently confiscated. The insurer denied liability on the ground that in terms of §7 of the Amsterdam keur of 1598 the insurance was null and void because the ship's sailing to America constituted a change of voyage. Confirming the decisions a quo, the Raad held for the insurer.

From an opinion delivered in 1717 it appears that a change of voyage also occurred when the port of destination was changed prior to the vessel's arrival there, even though the course itself may not have been changed along the way. A ship insured on a voyage from France to Amsterdam was, upon arrival at Texel ('binnen Texel tot onder de Vleter'), redirected together with her cargo to the Baltic and she therefore proceeded no further nor discharged her cargo at Amsterdam, the destination specified in the policy. Another crew was taken on for the new voyage to the Baltic and the ship and her cargo were insured for that voyage. Before she could depart, though, the ship sank in a storm and was lost with her cargo. The opinion advised that the first insurers were not liable because, according to mercantile custom ('style mercantiel'), an insurer was relieved of liability in terms of a policy as soon as the insured or

79 Reference was made in this regard to the Rotae Genuae Decisiones decis XXI.1 (see again § 1.2.3 n74 supra).

80 See Nederlands advysboek vol I adv 130.

81 In this case the insured voyage was from Dronthen in Norway to Dublin in Ireland. The ship, however, sailed to London which, the opinion noted, was off the course from Dronthen to Dublin. It mattered not that here the ship could have sailed from London to Dublin, or that she could have sailed from Dronthen to Dublin via London. The customary and direct route had to be followed and in this case that was not via London.

82 See Bynkershoek Observationes tumultuariae obs 781; idem Quaestiones juris privati IV.4.

83 That is, she was permitted to enter all ports on that coast.

84 See Barel's Advysen vol I adv 24.
the master with his consent discontinued or changed the agreed voyage. Here there was no doubt that the discontinuation and change had been made by the shipowner and the owners of the goods on board and that, prior to the ship's actual arrival at Amsterdam, her voyage had been changed by the substitution of a new voyage and destination.

A case which came before the Raad in 1719 turned on the interpretation of the description of the insured voyage. Goods were insured at Amsterdam 'from Bremen to London, to depart with a Dutch convoy to the River Elbe or Holland, and from there with an English or Dutch convoy to London'. The carrying ship sailed with a Dutch convoy from Bremen to the Elbe, from there with the same convoy to Amsterdam, and from there with another convoy to London. On the last stage of her voyage she became separated from the convoy in a storm and was taken capture by a French privateer. The insurer refused to pay for the loss on the ground that there had been a change of course and a prolongation of the voyage which had increased the risk and relieved him of liability. That was so, the insurer contended, because the ship first went to the River Elbe and then to Amsterdam in Holland, instead of, as the policy required, either from the River Elbe or from Holland directly to London. The Hooge Raad, though, held for the insured cargo owner.

Although it could appear, on a strict reading of the policy, that there was a change of course, the Raad thought this not to be the case according to the intention of the parties. There was a mention of the River Elbe in the policy for no other reason than because Dutch convoys sailing from Bremen usually sailed directly to Holland if the wind was favourable but otherwise sailed first to the River Elbe and from there to Holland. Thus, according to the Raad, the wording of the policy had to be taken as if it had read 'from Bremen to Holland or from Bremen to the River Elbe and then to Holland, and from there with a different convoy to London', especially so since no convoy, English or Dutch, sailed directly from the Elbe to London. Accordingly, there was no change of course in this case.

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85 Reference was made in this regard to s 6 of the placcaat of 1563, art 12 of the Antwerp Compilatae, and s 7 of the Amsterdam keur of 1598.

86 See § 1.2.4.3 infra as to whether the voyage in this case was in fact actually changed or whether there was, at the time of the loss, merely an intention to do so.

87 See Bynkershoek Observationes tumultuariae obs 1579, idem Quaestiones juris privati IV.9.

88 'Van Bremen naar Londen, met Hollandsch Convoy te vertrekken naar d'Elve of deze Landen, en van daar met Engelsch of Hollandsch veranderung van Convoy per Londen.'

89 That this was the intention of the insured, the Raad pointed out, appeared readily from the latter instructing the insurance. But even the insurer could have had no other intention for if there was no such practice, a voyage to the Elbe, specifically permitted by the policy, would have been nonsensical.

90 'Van Bremen naar deze Landen, of van Bremen naar de Elve, en zoo naar deze Landen, en voorts met veranderung van Convoyage naar Londen.' It was therefore permissible, in terms of the policy, to sail either directly to Holland or to Holland via the river Elbe. It was not permissible, however, to sail directly to London from the Elbe.
In a decision in 1735, the Hooge Raad was unanimous in the view that ports not stipulated in the policy could not be touched without an emergency, even if they were situated in between the port from where and the port to where the voyage was destined, that is, even if there was no change of voyage involved. If this should occur without the permission of the insurers, the voyage, unchanged as it may be, could be prolonged unnecessarily, with the greatest risk to the insurers in the touching of such ports. For this reason a larger premium was stipulated when a ship was allowed to enter various ports en route. If no permission was expressed in the policy and ports in between were put into, then there was a change of the course of the voyage. In short, the Raad now clearly laid down that an insured ship or a ship carrying insured cargo could not put into ports along the route to her destination if they were not mentioned in the policy, except in an emergency or with the consent of the insurers.

1.2.4.2 The Effect of the Change of the Voyage or of the Course

Two opinions were delivered in 1667 on the topic of a change of voyage and course on the same set of facts.

The first made the point that according to both written law and daily practice, as well as in conformity with the position in Roman law in the case of a maritime loan, an insurance would be null and void when the insured had ordered the master to change the agreed voyage, and the insurer would not be liable for any loss occurring after such change. However, if the voyage was changed ab initio, such as when the ship sailed for an unauthorised destination, the premium was not earned and had to be returned, presumably otherwise than where the change of voyage only occurred later or otherwise than in the case of a change of the course of the voyage only.

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91 See Bynkershoek Observationes tumultuarie obs 2900; idem Quaestiones juris privati IV.16.

92 Otherwise than in its numerous earlier decisions on the subject of a change of voyage or course in 1708, 1712, 1714, 1717, 1719 and 1720, all of which will be referred to and discussed shortly.

93 Obviously, the insurers could not complain about a change to which they had consented, as in the case of a liberty clause. See further § 1.2.4.5 infra.

94 See § 1.2.4.5 infra.

95 See § 1.2.4.6 infra.

96 See Nederlands advysboek vol I adv 130. Both opinions have already been considered in connection with the return of premium and the divisibility of the insurance contract in ch XI § 6.4 supra.

97 The facts here were as follows. Insurances on hull and cargo were concluded in two different policies, viz in the one policy for a voyage from London to Dronthem (in Norway) and from Dronthem to Dublin at a premium of 11 per cent for the whole voyage, and in the other policy only for a voyage from Dronthem to Dublin at a premium of 8 per cent. The ship arrived at Dronthem, but then her master sailed back to London where her cargo was discharged. The questions which arose were whether, had the ship been lost on her voyage from Dronthem to London, the insurer would have been liable; whether the insured would have had to pay on the first policy only half of the agreed premium for the voyage from London to Dronthem plus a further ½ per cent for the return of the premium for the voyage from Dronthem to Dublin; and, finally, whether on the second policy for the voyage from Dronthem to Dublin the insured would have had to pay only ½ per cent for the return of the premium.
The second opinion confirmed that a change of the destination of the agreed voyage ('destinatio mutationis navigationis') terminated and invalidated an insurance.

1.2.4.3 Actual and Intended Change of the Voyage or of the Course

An early opinion on the alteration of the risk by a change of voyage or of course established that an intended but not yet actually implemented change of voyage or course was irrelevant, amongst other reasons because such intention itself did not increase the risk for the person who had taken over the risk. Here that person happened to be a bottomry lender. Bottomry lenders, and by the same token insurers as the bearers of the risk, were thus liable for a loss occurring prior to the implementation of the change of voyage (Le. after the destination had been changed). But because the first policy was regarded as divisible, the insured only had to pay a premium for the voyage from London to Dronthem; in respect of the voyage from Dronthem to Dublin the premium was returnable (less the usual ½ per cent deduction) because that voyage had never been commenced and undertaken and the premium not earned. The same applied to the second policy.

According to the opinions the insurers would not have been liable for any loss occurring after the change of voyage (Le, after the destination had been changed). But because the first policy was regarded as divisible, the insured only had to pay a premium for the voyage from London to Dronthem; in respect of the voyage from Dronthem to Dublin the premium was returnable (less the usual ½ per cent deduction) because that voyage had never been commenced and undertaken and the premium not earned. The same applied to the second policy.

Jolles Deviatie 47-49 appears to have misread the opinion on this point when he refers to it for the view that half of the premium had to be paid if more than half of the agreed voyage had been completed at the time when the change of voyage occurred. The insured here had to pay the insurer a ½ per cent premium, not half of the total premium.

According to the lawyer delivering the opinion, the borrowing shipowner here was not liable to repay the bottomry loan in the case of a loss of the ship which, in terms of the bond, had to sail on a voyage from La Rochelle to Danzig and then to Amsterdam, the loan being repayable after the arrival of the ship in Amsterdam. In Danzig cargo destined for London was loaded on the ship. She was then lost at sea on her way from Danzig to London via Amsterdam (and therefore before any change of the course of the voyage from Danzig to Amsterdam or before any change of the voyage by reason of her sailing to a destination other than Amsterdam).

From the published opinion it appears that in a subsequent decision in Amsterdam, the master in this case was absolved from any liability for his actions.

See also eg Decker Aanteekeningen ad IV.9.1 n(1)/(a); and La Leck Index sv 'ship' (who got the facts wrong, assuming an actual deviation had occurred and a loss on the voyage from England to Amsterdam, but who nevertheless saw nothing wrong with the opinion).
of a decision to change the voyage or its course that is, prior to the actual change, if any, but not for any loss occurring afterwards.\textsuperscript{100}

The mere intention to change the voyage was also held by the 
\textit{Hooge Raad} in 1708 to be irrelevant.\textsuperscript{101} An insurance was concluded in Amsterdam in 1692 on the hull of a ship for a voyage from Marseilles to the River Elbe near Hamburg. The ship was captured and completely burnt by pirates in the Mediterranean. The insured claimed on his policy but the insurers denied liability and put forward the argument, amongst others, that the ship had changed her voyage (‘\textit{reize verandert}’)\textsuperscript{102} or had at least intended to change it (‘\textit{voorgenomen te veranderen}’). This intention the insurers sought to prove from the bills of lading issued by the ship’s master, from which it appeared that he had shipped goods at Marseilles for conveyance to Dunkirk, and also that he had sailed from Marseilles to Alicante in Spain where he had shipped other goods which were to be carried to Le Havre. These places, the insurers pointed out, were not mentioned in the policy, and accordingly the master had intended two new voyages although they had not been completed at the time of the loss.

The Raad held, however, that at the time of the loss no actual change of the voyage had yet occurred and that the mere intention (‘\textit{enkel oogmerk}’) to effect such a change was irrelevant as it did not disadvantage the insurers.\textsuperscript{103}

In a case argued before the 
\textit{Hooge Raad} in 1714\textsuperscript{104} the Amsterdam insurer of cargo on a voyage from Lisbon to Hamburg denied liability when the carrying ship and her cargo were lost near England. His denial was based on the fact that it appeared from the bills of lading signed by the master at Lisbon that the intended voyage was from Lisbon to Tonningen in Holstein and that, in terms of s 6 of the \textit{placcaat} of 1563

\textsuperscript{100}See in particular Bynkershoek \textit{Quaestiones juris privati} III.16, fully equating the position of the insurer with that of the bottomry lender. He explained that in the opinion of 1602 the loss had occurred not after the change of the course of the voyage (‘\textit{van cours verandert}’) but while the ship, although destined for (‘\textit{geschikt naar}’) a port other than the one she was in terms of the contract permitted to proceed to, was still on the course bound for that agreed port (‘\textit{terwyl het noch den zelfden cours hield in de route naar de gedestinieerde plaats}’). He pointed out, however, that had a change of course actually been made (‘\textit{indien het van zyn begonnen streek was afgeweken}’) and the ship arrived safely (in the case of a bottomry loan) or was even lost (in the case of an insurance), the loan would have been repayable and the premium not recoverable respectively.

\textsuperscript{101}See Bynkershoek \textit{Observationes tumultuariae} obs 380; \textit{idem Quaestiones juris privati} IV.3.

\textsuperscript{102}More correctly, what was alleged to have occurred here was a change of the course of the voyage from Marseilles to the Elbe.

\textsuperscript{103}With reference to this decision, Lybrechts \textit{Koopmans handboek} V.92 n2 drew a distinction between the intention of and preparations for (‘\textit{het voornemen van zelfs de wezendlyke toeleg voorbereiding}’) a change of the voyage on the one hand, and the actual change itself (‘\textit{de dadelyke verandering}’) on the other hand. He noted that the Raad had held that the mere intention of changing the voyage did not harm the insurer although he thought it possible for the prospect of a changed voyage to cause damage (‘\textit{dat de uitzigt van de veranderde reis wel schade kan toebrengen}’). See too Van der Keessel \textit{Theses selectae} th 752 (ad III.24.11); \textit{idem Praelectiones} 1462-1463 (ad III.24.11).

\textsuperscript{104}See Bynkershoek \textit{Observationes tumultuariae} obs 1037; \textit{idem Quaestiones juris privati} IV.5. See also Van der Keessel \textit{Theses selectae} th 752 (ad III.24.11); \textit{idem Praelectiones} 1462-1463 (ad III.24.11); Enschede 98.
and s 7 of the Amsterdam *keur* of 1598, the insurance was therefore legally null and void.

The insured admitted that the bills were to that effect but argued that they were only *pro forma* (so-called ‘getingeerde cognoscementen’) and issued in that form to escape the risk of capture by French privateers, Tonning ten at the time being neutral but Hamburg not. Such a subterfuge (they referred to it as an ‘onnozel bedrog’), they pointed out, was often resorted to by merchants in an attempt to mislead the enemy. Furthermore, they argued that for there to be a change of voyage something had to have occurred to the detriment of the insurer as result of which he ran a greater risk than he would have run on the agreed voyage. In this case no actual change of the voyage had yet occurred at the time of the loss. It was therefore irrelevant that the ship was destined for Tonning ten or that the insured had given his instruction for such a voyage or had authorised it (something which was in any case not proved by the insurer) since the loss had not occurred on a voyage between Lisbon and Tonning ten but on one still between Lisbon and Hamburg.

The *Raad* held for the insured, according to Bynkershoek for the reasons advanced by the insured.

Therefore, the argument was that there was a change of voyage only in the case of an increase of risk, so that an intended change of voyage, or presumably also an actual change of voyage which did not increase the risk, was irrelevant. That, however, may well have been doubtful law at the time. Thus, e.g., Leoninus *Centuria consiliorum* cons XXIII n.7 thought that according to custom insurers were relieved of liability by a change of the destination (*obligatio assurationis dissolvitur ex mutatione destinationis*) irrespective of whether the new destination was less dangerous.

Therefore, the insurer in this case could not prove an actual change of the voyage but merely an intended change. The loss here occurred on the course of the voyage from London to Hamburg.

The practice of using fictitious shipping documents was not uncommon and it is clear from other sources too that cognisance of that practice may have been taken in the insurance policy in certain cases so as to avoid the problems which arose in this case.

De Groote ‘Polissen’ 158-159 refers to two Antwerp insurance policies from 1594 which insured goods consigned from Middelburg in Zeeland to San Sebastian or other ports in the Bay of Biscay, and which stated that that was the case despite the fact that in the bills of lading issued for those goods the destination was only stated as being San Sebastian (‘St. Sebastiaen, oft hoedanige andere havenen van Biscayen, oft eeniger der selver, nyetegenstaende dat in den cognoscementen als geen wel geseegg en wordt naer St. Sebastiaen’). The insurers in effect therefore agreed that they would not rely on the fictitious bills of lading, carried to avoid capture and confiscation by the enemy, to avoid liability on the policy for an alleged change of voyage.

In this case the ship apparently carried two sets of bills of lading, the one indicating the destination as the Spanish port of San Sebastian, the other indicating the French port of Bayonne as the destination. The vessel also carried an English passport (issued by the governor of Flushing, a port at the time friendly with England which was in turn then an ally of France). If stopped by an English ship, her master would have produced that passport and the bill of lading indicating Bayonne as the destination. Ironically it appears that the insured cargo was arrested and confiscated in San Sebastian as having been consigned from Middelburg, which was then enemy territory.

As to the use of fictitious shipping documents and identification papers in times of war, see again ch VI § 5.2.2 n284-n288 supra.
In an opinion delivered in 1717 a ship insured on a voyage from France to Amsterdam was, upon her arrival at Texel, together with her cargo redirected to the Baltic. She therefore did not enter the port of Amsterdam nor discharged her cargo there. A fresh crew was taken on for the new voyage and the ship and her cargo were insured anew for the voyage to the Baltic. However, before the ship could depart, she sank in a storm.

According to the opinion the first insurers were not liable because, firstly, the ship had to be taken as having arrived and the voyage and the risk as having terminated prior to the loss. Secondly, the first insurance was terminated because the new insurance had already commenced. Thirdly, and of more importance in the present context, the opinion advised that the insurers were relieved of liability because, according to mercantile custom ("style mercantiel"), an insurer was relieved of liability as soon as the insured, or the master on his instruction, had changed the voyage. In this case, the opinion continued, there was no doubt that the agreed voyage had been discontinued and changed by the owners of the ship and of her cargo. Prior to her actual arrival at Amsterdam, the agreed voyage had been terminated and changed by the substitution of a new voyage and destination. Furthermore, the opinion continued, the intention and resolve to change the voyage had actually been implemented by the steps taken by the insured.

However, the opinion is difficult to distinguish from or, for that matter, to reconcile on this point with the earlier views that an actual change of the voyage and even an accompanying increase in the risk was necessary before the insurer was relieved of liability and that a mere intention of and preparations for the change were themselves not sufficient. It does not seem possible, on the available evidence, to distinguish this opinion either on the basis that it dealt not with a mere intention but rather with a manifested intention to change, or on the basis that it dealt not with a change of

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108 See Bareis Advysen vol I adv 24.
109 See again ch XII § 1.3.2 at n91 supra.
110 See again ch XII § 1.3.2 at n96 supra for this point concerning overlapping coverages.
111 The agreed voyage, it was said, had to be taken to have been 'met er daad veranderd te zyn door met een simpele destinatie en resolutie van elders te navigeren, mits daer van alleen quovis mode of op de een of op de andere wyze komende te consteeren'.
112 Thus, such steps need not have involved the actual change of the voyage at sea, that is, a navigational change. They could, as here, take the form of steps taken to implement the decision to change the voyage.
113 Thus, one would distinguish between an actual or implemented change on the one hand, and an intended change on the other hand; and in respect of the latter between the case where the intention was formed and even manifested but where no steps had yet been taken to implement it on the one hand, and the case where the intention had actually been implemented but the change not yet effected on the other hand. However, the difference between the master issuing bills of lading to a place not on the ship's insured voyage and the shipowner insuring her for a replacement voyage prior to the termination of her insured voyage seems a very fine one indeed. Both, it may be argued, are manifestations of an intention and an implementation of that intention although not yet an implemented change of the voyage or course.
course but with a change of the insured voyage itself.\textsuperscript{114}

In a case before the Hooge Raad in 1720 it appeared that a change of voyage by substituting a different port of discharge may in fact have had little if any influence on the liability of the insurer if the ship still sailed to her agreed destination but did not discharge there. If insurance was effected up to a particular place, and the loss occurred before she had arrived there, the insurer was liable for the loss although the ship may thereafter have sailed past such place bound for some other destination.\textsuperscript{115} A ship was insured on a voyage to London. She was captured en route by the French but subsequently ransomed for a specified amount. Thereafter she continued her voyage to England and anchored at the mouth of the Thames. From there, though, she did not sail to the port of London but to Lynn Regis on the east coast of England and some 200 English miles distant from London. It also appeared from bills of lading issued by her master at the port of departure, that she was destined there right from the start. When the insured claimed the ransom money on his policy, the insurers refused to pay on the ground that the insured ship had never arrived in London, the port stated in the policy as her destination. They argued that at the time of her capture there was not only an intention to change the voyage but that it had in fact been changed, seeing that the ship did not sail to the destination expressed in the policy but to another destination. The insured replied that in the case of a change of voyage, the insurer remained liable for any loss until the ship had reached the place where the change was in fact effected and where the intended change was implemented and became an actual change. In this case, therefore, the insurer’s liability continued until the voyage was changed at the mouth of the Thames. The fact that the ship did not sail to London, did not increase but rather decreased the insurers’ risk, but the insured readily conceded that if his ship had been captured between the mouth of the Thames and Lynn Regis he would certainly have had no action against the insurers.

The Raad agreed with the insured’s arguments and held for him. Bynkershoek noted that the case was almost identical to the one decided by the Raad in 1708.\textsuperscript{116}

Therefore, it would appear that in Roman-Dutch law the mere intention to change the agreed voyage or the course of that voyage was irrelevant and did not terminate the insurance contract or, if formed prior to the ship’s departure, prevent the contract from coming into operation. The insured voyage and course remained unchanged and the intended change without any legal effect until such intention was

\textsuperscript{114} Thus, one could possibly argue that whereas, as in English law (see \textsection 1.2.8 infra), the mere intention to change the course of a voyage (ie, to deviate) was irrelevant, the same was not true of a change of the voyage itself and that such a change had to be taken to have occurred as soon as the intention or decision to change had been manifested, even if at that stage the ship had not yet left the course of her voyage.

\textsuperscript{115} See Bynkershoek Observationes tumultuariae obs 1641; idem Quaestiones juris privati IV.10. See also the explanation of Schorer Aanteekeningen 424 (ad III.24.6) sv 'met de plaats etc'; that of La Leck Index sv 'Insurance'; and Enschede 98.

\textsuperscript{116} See further Van der Keessel Theses selectae th 737 (ad III.24.6); idem Praelectiones 1452 (ad III.24.6).
implemented by an actual change of the voyage or course. Put differently, the insurer remained liable for losses occurring prior to the actual navigational change of the voyage or of its course.117

1.2.4.4 Authorised and Unauthorised Change of the Voyage or of the Course

As was already apparent from the early legislative measures, it made a difference whether or not the change of the voyage or of the course of the voyage by the master had been effected on the instruction and with the authority of the insured.

An opinion delivered in 1667118 concerning an insurance on hull and cargo in the same policy thought it irrelevant whether the master had changed the voyage on the special instruction and order of the insured or whether he had done so on his own initiative. It was noted, though, that in the case of a change of voyage without such order, the liable insurer would have a recourse against the master.119 The matter was taken further in a second opinion in that year on the same set of facts.120 The advocate responsible for the opinion explained that it was true that insurers stood in for the faults of the master, so that in case of a loss caused by the master the insurer would be liable. This, however, was irrelevant where the master was also appointed as a factor or mandatary of the insured and where he acted as such and not in his capacity as master. Therefore, one had to distinguish between the case where the change of the voyage had been made by the master as such and the one where the change had been made by him in his capacity as a factor ("de Schipper in qualityt als Factoor").121

In a case heard by the Hooge Raad in 1712122 the Amsterdam insurer of cargo denied liability on the policy because the ship carrying the cargo, rather than sail directly to the agreed destination, had entered a port not mentioned in the description of the insured voyage. The Raad, though, confirmed the decision of the Hof van Holland and held for the insured. Bynkershoek commented that this was correct for even if there was no liberty clause in the policy to enter such a port as in fact there was in this case, the master had done so voluntarily without any instruction from the insured consignor. The insurance was therefore valid in terms of s 7 of the Amsterdam keur of 1598 and the insurer was liable, although the latter in appropriate instances had an action against the master to recover what he had to pay out to the insured.

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117 See generally Jolles Deviatie 19-20 and 22-31 on the difference between earlier and modern Dutch practice in this regard.

118 See Nederlands advysboek vol I adv 130.

119 On this point reference was made to art 12 of the Antwerp Compilatae of 1582.

120 See Nederlands advysboek vol I adv 131.

121 That is, where the loss was caused 'door schuld van Factoor, en niet van Schipper'.

122 See Bynkershoek Observationes tumultuariae obs 883; idem Quaestiones juris privati IV.A.
In an opinion requested in 1713\textsuperscript{123} the master of the insured ship went on his own personal and unauthorised folly. Instead of proceeding to Bordeaux, he proceeded to Ramsgate under the flimsy pretext that his ship was not seaworthy and in need of repairs. Thereafter he sailed her to Newcastle and elsewhere, without the instruction of the insured owner of the ship to that effect. The advice was that the hull insurer was not liable because of the interruption and the change of the insured voyage. The advocate noted, firstly, that it was trite that a change of voyage or course terminated the insurance and relieved the insurer of liability ("door het veranderen van route en voljage de gedaene Assurantie gansch en al is koomen te vervallen, zonderd dat deswegen iets geëischt heeft kunnen worden"). Secondly, it was equally trite that the master and his employer, the shipowner, were considered as one so that the latter was responsible for the conduct of the former.\textsuperscript{124} The master’s fault was regarded as that of the insured shipowner. The opinion explained further that an exception was recognised in respect of cargo policies. It had come to be accepted that a master could not prejudice a consignor who was not also the shipowner, neither by an unauthorised change of voyage nor by the commission of any other form of barratry or fraud in respect of the cargo or otherwise. However, in respect of hull policies the earlier rule remained, and a shipowner could not insure himself against the master’s barratry or change of voyage or course ("tegens de schelmerye, of veranderinge van voijages, door den Schipper gedaen"). Therefore, a distinction was drawn between the effect of an unauthorised change of voyage or of course by the master upon the liability of the hull and the cargo insurer respectively. The hull insurer was relieved of liability in the event of an unauthorised change of voyage or of course by the master of the insured ship. The cargo insurer, by contrast, remained liable in the event of an unauthorised change of voyage by the master of the ship carrying the insured cargo.\textsuperscript{125}

In a 1714 Hooge Raad decision\textsuperscript{126} one of the reasons for holding in favour of the insured cargo owner was because the insurer had not proved that the change of course which had taken place here, had been on the instruction of the insured, something which the Raad thought was required by s 7 of the Amsterdam keur of 1598 if the insurer was to escape liability.

\textsuperscript{123} See Barels Advysen vol I adv 21.

\textsuperscript{124} On this point reference was made to Straccha De assecrationibus XIV.3; Decisiones Rotae Genuae decisi III.5 and XXV.4; Leoninus Centuria consiliorum cons XXIII. This principle, the opinion continued, was the basis of the prohibition on insurance (by the shipowner) against any barratry or thievery by the master.

\textsuperscript{125} See again ch VI § 4.1 supra for insurance against the consequences of the insured's own conduct and ch VI § 4.3 supra for insurance against the conduct of the master. See further eg Van der Keessel Theses selectae th 750 (ad III.24.11); idem Praelectiones 1464-1465 (ad III.24.11) (noting that the matter on which the opinion was requested was subsequently so decided by an Amsterdam Court).

\textsuperscript{126} See Bynkershoek Observationes tumultuariae obs 1037; idem Quaestiones juris privati IV.5.
In 1717 the Hooge Raad\textsuperscript{127} pointed out that even if the change of voyage was a voluntary one not necessitated by an emergency\textsuperscript{128} and was made without the instruction of the insured, the insurance on cargo was still valid subject to the insurer's recourse against the master.

A second decision on the topic in 1717\textsuperscript{129} concerning an insurance of goods elicited the remark from Bynkershoek that in terms of s 7 of the Amsterdam keur of 1598 the insurance remained valid in the case of a change of voyage by the master without an instruction from the insured, subject only to the insurer's recourse against the master. In this case there was no evidence of any instruction to touch the ports which the ship did and the burden to establish such instruction rested on the insurer. Bynkershoek thought it doubtful that evidence in the form of a bill of lading stating that the goods loaded on a ship were destined for a particular port was sufficient to establish that the ship did in fact go there.\textsuperscript{130}

A third case on the matter before the Hooge Raad in 1717 elucidated some important aspects about the effect which the actions of the master in changing the course of the voyage could have on the liability of the insurer and the validity of the insured's policy.\textsuperscript{131} A ship and her cargo were insured for a voyage from Sweden to the Sound and from there to Amsterdam. She had to sail with a convoy from the Sound but if the convoy sailed first for Norway, she had to proceed directly to Amsterdam. The insurance was against perils of the sea only and also against the fault of the master. In this case the insured ship sailed from the Sound to Norway with the convoy ("onder Convoyage van een Oorlogsschip") where she was lost. The insurers refused to pay, relying on a change of the course of the voyage by the master and the consequent nullity of the insurance by reason of s 7 of the Amsterdam keur of 1598.

However, the Raad by a majority held for the insured and confirmed the decision \textit{a quo}. A cardinal issue was the precise scope of s 7 and whether or not it protected the insured shipowner as well as the insured cargo owner. The majority understood s 7 as concerning the shipowner himself only, for it clearly referred to those whose duty it was to give the master instructions when he undertook the voyage, and only shipowners and not also consignors gave such orders to the master and were liable for his acts. The words '\textit{die hy bevraagt}', the majority thought, were apparently added so that the shipowner who had not loaded any goods on his ship himself, would not be presumed to have given an instruction to change the voyage since he would have no reason to do so. It would be otherwise if the shipowner had in fact loaded goods on the ship. Furthermore, although the shipowner did appoint the master and was liable for his acts in

\textsuperscript{127} See Bynkershoek Observationes tumultuariae obs 1332; \textit{Idem Quaestiones juris privati} IV.6.

\textsuperscript{128} Which, the Raad thought, was in fact the case here.

\textsuperscript{129} See Bynkershoek Observationes tumultuariae obs 1363; \textit{Idem Quaestiones juris privati} IV.7.

\textsuperscript{130} See also Van der Keessel \textit{Theses selectae} th 752 (\textit{ad} III.24.11) (the insurer bears the burden of proving authorisation for the change of the voyage).

\textsuperscript{131} See Bynkershoek Observationes tumultuariae obs 1374; \textit{Idem Quaestiones juris privati} IV.8. See further § 2.3.2 \textit{infra} as to convoying where this decision is considered further.
terms of Roman law, in terms of current law the shipowner could insure against the fault of the master but not against his barratry or fraud. And such was the insurance here. The master had changed the course of the voyage merely in order continuously to sail with the convoy and so to arrive in Amsterdam without being attacked by the enemy, the ship not being covered against war risks. Because the shipowner was insured against the fault of his master, and because it was through such fault (and not through any barratry or fraud) that the course was changed, the insurer remained liable. In short, this decision showed that an insured shipowner was covered against, and that the hull insurer remained liable in the case of, a change of the voyage or course by the master, as long as the conduct of the master did not amount to barratry and as long as the shipowner was insured against such conduct on the part of the master.\textsuperscript{132}

The \textit{Hooge Raad} addressed the issue of a change of voyage or course yet again two years later, in 1719.\textsuperscript{133} The majority of the \textit{Raad} here held for the insured, deciding that either no change of course had occurred or, if it had, that it was a change necessitated by an emergency, or if that was not the case, that the insurance was nevertheless still valid in terms of s 7 of the Amsterdam \textit{keur} of 1598 if the change was made by the master without the instruction of the insured, as was in fact the case here.

The two minority judgments in this case elicited comments from Bynkershoek on this point. In the first of them the members of the \textit{Raad} argued that the reference to an instruction ('last') in s 7 only referred to an instruction by the shipowner not by the consignor. Bynkershoek thought this was true but questioned why the minority would permit a shipowner to claim on his insurance if the master he had appointed himself, changed the course without his knowledge while refusing it to consignors who had merely loaded goods on the ship. In the other minority judgment a single member of the \textit{Raad} thought that there was only a change in terms of s 7 if there was fault ('schuld') on part of the master, which was not the case here.\textsuperscript{134} Bynkershoek explained that if the change of voyage or of course was caused by the fault of the master, the insurer remained liable in terms of s 7 but had a recourse against the

\textsuperscript{132} See further Van der Keessel Theses selectae th 751 (ad III.24.11).

\textsuperscript{133} See Bynkershoek Observationes tumultuariae obs 1542; \textit{idem} Quaestiones juris privati IV.9. The facts of this case will be recounted in § 1.2.4.5 \textit{infra}.

\textsuperscript{134} Surprisingly, that member nevertheless held against the insured.
master and against him only. Although not made clear in this connection, it was implicit in Bynkershoek's explanation that where the change had occurred without the master's fault, the insurer still remained liable but then, of course, had no recourse against the master. Therefore, the insurer's liability in this situation did not depend on whether or not he had a recourse against the master.

In 1719 the Hooge Raad held that in the case before it there had been no change of voyage or course, but that if there had been, the insurer would not have been relieved of liability by such a change unless the insured had instructed him to effect that change, something which did not happen in this instance and something which, given the fact that the insured here was a consignor and not the shipowner and was therefore not entitled to give the master such an instruction, was not possible in this case.

A case before the Raad in 1735 addressed the issue of proof of an instruction to the master to change the voyage or the course. Hull insurers here denied liability because of a change of voyage. The ship was insured for a voyage to Hamburg, with the liberty being granted to the master to proceed to other ports up to a particular point to obtain and load cargo for that destination ('dat de Schipper tot Faro zoude mogen aanloopen, om zyn verdere lading in te neemen'). On his departure, the master had found no cargo for Hamburg but he shipped cargo destined for Lisbon. He sailed there, discharged the cargo and was then captured by pirates on the voyage from Lisbon onwards. The insurers denied liability for the loss, relying on the fact that there had been a change of the course of the voyage by the master on the instruction of the shipowners. All the courts a quo held for the insured, the insurers, according to the judgment of the Hof van Holland, retaining their action against the master in so far as he may have changed the voyage of his own volition.

The earlier decisions were overturned on appeal before the Hooge Raad though. The Raad held that there was in fact a change of course here and that it was therefore clear that in terms of s 7 the insurers were liable only if the master had changed the course of the voyage without the instruction of the insured shipowner, although in such a case they retained their recourse against the master. The insurers were not liable, however, where the change was made on the instruction of the insured.

135 That is, in the case of an unauthorised change of course.

136 See Bynkershoek Observationes tumultuariae obs 1579; idem Quaestiones juris privati IV.9.

137 See Bynkershoek Observationes tumultuariae obs 2900; idem Quaestiones juris privati IV.16.

138 'Faro' was probably the island of Fårö in the Gotland Islands in the Baltic Sea off Sweden.

139 There was no mention of Lisbon in the policy and no emergency which necessitated the ship going there. Nor was there any consent on the part of the insurers for such a deviation, the ship being permitted to go to ports en route only to pick up cargo for Hamburg. In this case she deviated to Lisbon to deliver cargo there.

140 The point was made by Bynkershoek that a change of voyage or of course did not assist the insurers if it was made by the master without such instruction. Then, it may be added, they were liable to the insured while their recourse against the master, which was only available in any case if the latter had acted culpably, was in practice probably not worth much.
The Raad acknowledged that proof\textsuperscript{141} that the shipowner had instructed the master and the details of such an instruction would present serious difficulties for the insurer. Such instruction and details could not be known except from the instructions for the voyage ("reis-instructie") which the owner had given his master and from the letters containing such instructions, and the owner would obviously not disclose these if that were to his detriment. The Raad then addressed the question whether it could be presumed that the master had done, had been done with or without an instruction from the owner. Obviously only one of these possibilities could be presumed. Some members thought that the burden rested on the insurers to prove the instruction to change the route and that that was that. But because it was almost impossible for the insurers to have access to and to reproduce the instructions given by the shipowner to his master, the majority thought this to be unfair. They adopted a compromise, presumably to alleviate the insurer’s position somewhat, namely to confirm the judgment a quo for the insured shipowner on condition that he was prepared to declare and did in fact declare under oath that he did not instruct or permit the master to touch at Lisbon or to conclude contracts for the carriage of cargo, presumably otherwise than of cargo destined to Hamburg. Because in this case the insured shipowner did not want to confirm this under oath, judgment was handed down in favour of the insurers.\textsuperscript{142}

1.2.4.5 Voluntary Change of the Voyage or of the Course and Change in an Emergency

It has already been shown that the legislative regulation of the effect of a change of the voyage or of the course of the voyage drew a distinction between a change made in necessity and one voluntarily effected.\textsuperscript{143}

\textsuperscript{141} The burden of which rested upon the insurer, as appeared from the earlier decision in 1717: see Bynkershoek Observationes tumultuariae obs 1363; idem Quaestiones juris privati IV.7.

\textsuperscript{142} Van der Keessel Theses selectae th 752 (ad III.24.11) explained that while the burden was on the insurer to prove the insured’s instruction to the master, use of the oath of the insured confirming the absence of any such instruction was also admissible in practice. There is no support here for the view of Enschedé 99 that the insured bore the burden of proving that he had not given any instruction for the change of the course.

\textsuperscript{143} According to Jolles Deviatie 101-103 a change caused by an insured peril, like a change compelled in an emergency, did not relieve the insurer of liability. The same was true of a change voluntarily made by the master in an attempt to avoid loss or damage by an insured peril. However, if the change was caused by an excluded peril, such cause also had to qualify as an emergency before the insurer could be held liable despite the change. But if the change was voluntarily made by the master in an attempt to avoid loss or damage by an excluded peril, the position was different and the insurer was relieved of liability, the argument being that the insured then only has himself to blame for not insuring against such perils also. Examples of compelled or emergency changes of the voyage or of the course mentioned by Jolles include those necessitated to have damage to the ship repaired or to restore the ship to a seaworthy condition; those necessitated by the weather or in an attempt to avoid bad weather; those required to take on crew (in the case of members of the initial crew having died or deserted) or victuals (in the case of a prolongation of the voyage); or to save life at sea.
In 1717 the Hooge Raad remarked in passing that a change of voyage or of course was irrelevant in terms of s 7 of the Amsterdam keur of 1598 if it was the result of a necessity, as was the case in this instance where the ship had entered an unauthorised port to obtain victuals and equipment.

In reporting on another case before the Raad in that year, Bynkershoek made the point that where an emergency required it, the ship could in terms of s 7 touch any port and so change her course.

A change of the course of the voyage to wait at an intermediary port for a convoy to the final destination to which, in terms of the policy, the insured ship had to sail with a convoy, was a change necessitated by an emergency and did not avoid the insurance. That much appears from a case decided by the Hooge Raad in 1719. Cargo was insured in Amsterdam for a voyage from Riga to London, on condition that the ship on which it was loaded should sail with a convoy from the Baltic to London. When the ship arrived in the Sound, she sailed with a pilot to Göteborg in Sweden where a convoy was waiting which would accompany English ships to London. Shortly before her arrival in Göteborg, the ship was pushed past that port by a storm and she ended up in Norway. There the master waited for a passing Dutch fleet with its convoy and joined them to sail to Amsterdam, from where she was to sail with another convoy to London. While at anchor in the Amsterdam roadstead, though, another ship collided with her and she was lost together with the insured cargo. The insurer denied liability because of the change of course in that the ship had not sailed from Norway directly to London but had sailed to Amsterdam first.

The Raad noted that the ship was prevented from entering Göteborg and driven to Norway without any fault on the part of the master. That was not a change of course because it was caused by an emergency in the form of a storm. However, that she then proceeded from there to Amsterdam instead of directly to her destination, London, did amount to a change of course and the question was whether it rendered the insurance void. The majority of the Raad, including Bynkershoek himself, firstly doubted that it could be said that there had been a change of course if a ship destined for London under convoy touched the Amsterdam roadstead, seeing that it was virtually on the course from Norway to London and, even if this were not the case, seeing that there was a liberty clause in the policy in question. Secondly, the majority thought that even if a change of course had occurred, it had occurred through an emergency. It was agreed that the ship had to sail to London with a convoy and she of necessity had to wait for another convoy at Amsterdam. In terms of s 7 of the Amsterdam keur of

144 See Bynkershoek Observationes tumultuariae obs 1332; idem Quaestiones juris privati IV.6.

145 Presumably the shipowner or the master should not have created that emergency by sailing on the voyage with insufficient victuals or equipment in the first place.

146 See Bynkershoek Observationes tumultuariae obs 1363; idem Quaestiones juris privati IV.7.

147 See Bynkershoek Observationes tumultuariae obs 1542; idem Quaestiones juris privati IV.9. See too Enschede 98.

148 As to the obligation to sail with a convoy, see § 2.3.2 infra.
1598, it was permitted to change the voyage and the course in an emergency in which case the insurance remained valid.\footnote{1}

In another case before the Hooge Raad in 1719, the question of a change of course caused by necessity and sailing with a convoy was again relevant.\footnote{2} Although it was held that in this instance there was no change of the voyage in question,\footnote{3} the Raad did in passing refer to the situation where there was such a change and to the question whether the insurer would then have been relieved of liability. Again, it was noted, the principles of s 7 were applicable, so that any change of voyage was irrelevant if it occurred from a necessity. Here the ship had received from the Dutch convoy which she had joined, no other information than that it was to sail directly to her permitted destination. En route, though, the commander of the convoy had ordered the ships involved to set sail for an intermediary port off the course to that destination. It would appear, therefore, that a change of course on the instructions of the commander of the convoy which the insured or carrying ship had been compelled or even permitted to join, was a change occasioned by necessity.

\subsection*{1.2.4.6 Liberty Clauses and the Permission of the Insurers}

Because the legal rules pertaining to the change of voyage and of course often undermined the protection promised by an insurance contract by making its continued validity dependent upon matters not always within the control of either the insured shipowner or, especially, the insured cargo owner, clauses were employed from early on to ameliorate the strict legal position in favour of the insured.\footnote{4} The validity of such clauses was recognised from early on in the official legislatively prescribed model policy forms.\footnote{5}

\footnote{1}{In any event, even if in this instance the change had occurred without an emergency, the insurance was still valid in terms of s 7 if it was made by the master without any instruction by the insured, as was the case here: see again § 1.2.4.4 supra for this point.}

\footnote{2}{See Bynkershoek Observationes tumultuarie obs 1579; Idem Quaestiones juris privat 1V.9. See also Van der Keessell Theses selectae th 753 (ad III.24.11).}

\footnote{3}{See again § 1.2.4.1 supra.}

\footnote{4}{See generally Jolles Deviatie 59-61. The clauses continued to be inserted in Antwerp insurance policies in the seventeenth and eighteenth centuries. See Couvreur ‘Zeeverzekeringspractijk’ 194-195. Thus, in many seventeenth-century policies issued there, a handwritten clause was included in terms of which it was permitted to touch all ports lying between the port of departure and the destination. Such clauses usually provided as follows: ‘wel verstaende dat ‘t bovenschreven schip gedurende zijn geheele voyagie sal moghen doen alle esca/en, geen utgesondert in wat maniere het soude moghen wesen’. The printed policy of the Antwerp Insurance Company of 1754 contained a largely similar stipulation: ‘& accordons que ledit navire, faisant ledit voyage, pourra naviguer avant à arrière, à dextre et à senectre côte’.}

\footnote{5}{See again § 1.2.3 supra.}
A great variety of wordings were employed in such clauses in the course of time and in different places. Most of the clauses served to grant the shipowner and his master greater freedom in the prosecution of the prescribed voyage or to protect the insured cargo owner and others, such as passengers in the case of a ransom policy, from an unauthorised change of voyage or course where such protection was not legislatively conferred. It would appear that there were in essence two types of liberty clause, namely those which permitted the ship to enter intermediary ports en route to her destination and those which permitted the ship to deviate from the prescribed or usual course to the destination and which could also have included the liberty to enter ports en route. Thus, there were clauses which permitted the ship to touch intermediary ports ('aandoen van havens en reeden') only and those which permitted her to sail anywhere and along any course to her destination.

The effect of such clauses also arose for judicial and juridical consideration in Roman-Dutch law.

In an opinion in 1666 the point was made that where a ship was insured from Amsterdam to Lisbon and she entered a port en route where cargo was shipped, this was not a change of voyage and it was in any case permitted by the liberty clause which the policy contained. This clause, added in handwriting to the printed policy form, expressly provided that during her voyage from Amsterdam to Lisbon the ship could put into all ports of call, none excepted ('sal mogen doen alles "escales" gene uytgesondert'). Additionally the printed form also provided that the ship could sail everywhere and put into all ports of call ('sal mogen varen en zeylen voorwaarts ende agterwaarts, ook ter regter en ter slinker zijde, ende maaken alle "escales", het sy geforceert off gewilllge, tot welbehagen van den Schipper, etc'). Accordingly, in this case, the master was free to go to Medemblik and ship cargo there, and the insurer could not claim to be relieved of liability because of a change of voyage or of course.

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154 See Jolles Deviatie 61-69 for examples of liberty clauses in different policies.

155 Barbour 'Marine Risks' 592 points out that insurances of general trading voyages in which there were no specified ports of call were more expensive but avoided the problem of the insurance being invalidated in the case of a deviation.

156 Thus, they did not generally permit any change of the agreed or usual course apart from entering ports en route. The ship could merely enter ports past which she would otherwise have had to sail, but could not deviate from her course to touch any other ports.

157 See Jolles Deviatie 71-79 and 82-83 respectively.

158 See Nederlands advysboek vol I adv 135.

159 It may have been a change of course, though. The port in this case was Medemblik, a town on the IJsselmeer between Amsterdam and the Island of Texel.

160 The Dutch phrase 'schalen maken' was probably derived from the French 'faire echelles' or 'escales', a port of call or stopover. See Jolles Deviatie 71.
From an opinion delivered in 1667\textsuperscript{161} it appears that a change of voyage (that is, where a ship sailed for a different port of discharge) as opposed to a mere change of the course of the voyage was not excused by a liberty clause in the policy permitting the ship to put into all ports of call, none excluded ('sal mogen doen alle "escales", geen uytgesondert, in wat maniere dat het soude mogen wesen'). These general words, the opinion suggested, always had to be restricted to such places and ports as were situated on the agreed voyage (that is, as were entered en route from the port of departure to the destination) and which could be called at in an emergency ('als in de gestipuleerde Reysen voorvalen, ende bequamelijk in cas van nood off andersints kunnen en moeten aangedaan werden'); they could not be extended at all to include other places lying outside the route ('die uyt de weeg leggen') and where one could not enter without a change of voyage. The reason, simply, was to restrict the duration of the voyage and to limit the perils, for otherwise 'de Reysen ongetermineert, en de periculen oneyndig soude sijn'. The opinion confirmed, therefore, that the liberty clause permitted a deviation or change of course but not a change of destination and thus of the voyage itself.\textsuperscript{162}

In 1708 the Hooge Raad was faced with a policy containing a liberty clause but did not feel itself required to decide the issue before it with reference to that clause.\textsuperscript{163} The policy here contained a liberty clause in the usual form and when the insurer denied liability on the policy for a loss because of a change of course by the insured, the latter relied on the clause.\textsuperscript{164} He argued that he was insured for a voyage between two named ports, no other ports being excepted ('geen plaats exempt') and that in terms of the clause the ship could go to all such ports as her master saw fit. According to commercial usage, attested to here by a large number of merchants by way of a 'turba mercatorum et nautarum', the clause meant that even in the absence of an emergency, the ship could touch all ports lying on the route between the place from where and the place to where the insurance was made.\textsuperscript{165}

\textsuperscript{161} See Nederlands advysboek vol I adv 130.

\textsuperscript{162} See too Leoninus Centuria consiliorum cons XXIII,3 ("clausula libera navigationis a dextera ac sinistra, non continent alliam & diversam destinationem stipulatoris in lege assecurationis non expressam"). See further generally Jolles Deviatie 72.

\textsuperscript{163} See Bynkershoek Observationes tumultuariae obs 380; idem Quaestiones juris privatii IV,3.

\textsuperscript{164} The insurance was concluded in Amsterdam in 1692 on a ship for a voyage from Marseilles to the River Elbe near Hamburg, 'geen plaats exempt, mits te mogen escalaren op alle en zodanige plaatsen, als de schipper goedvinden sal'. It appeared from evidence produced by the insurer, that goods were shipped at Marseilles for conveyance to Dunkirk and also that the ship had sailed from Marseilles to Alicante in Spain where goods were shipped for delivery to Le Havre. The ship was captured and completely burnt by pirates in the Mediterranean and the insured claimed on the policy.

\textsuperscript{165} More specifically the insured argued that on the voyage from Marseilles to the Elbe one had to sail past Alicante, Le Havre and Dunkirk, so that it was permitted to enter them as they were along the route. He argued further that in this case the loss for which he was claiming had occurred at sea on the route from Marseilles to the Elbe and that the question whether the ship was entitled to go to other ports en route would only have been relevant if the loss had occurred at or in one of them.
Unfortunately the Raad did not decide the matter on this point, holding simply that at the time of the loss no actual change of the course of the voyage had yet occurred and that the mere intention in that regard was irrelevant. Bynkershoek\textsuperscript{167} remarked, though, that it appeared from a plain reading of the clause that it permitted the master in express words to touch all ports as he saw fit, and not merely to do so in the case of an emergency. The latter was already permitted by law so that an express clause allowing just that would have been unnecessary. Van der Keessel\textsuperscript{168} also referred to this decision as support for the statement that if an insurance was concluded from one place to another but on the understanding that other ports too could be touched, only such places as were \textit{in between} (but, presumably, no others) were included in the insurance.

The interpretation of a liberty clause was again at issue before the Hooge Raad in 1715.\textsuperscript{169} Its decision showed that a widely drawn clause could extend the insurers’ exposure beyond what they may have anticipated. A ship and her cargo were insured from Middelburg to the coasts of Africa and America for all risks, none excluded, with the ship being permitted to sail everywhere, to known or unknown, permitted or prohibited places, as the master saw fit (‘zoo dat het schip vermag overal te zeilen, zoo op bekende, als onbekende, gepermeerde als ongepermeerde plaatsen of havens, alles naar het goedvinden van den Commanderenden’). The ship was captured and confiscated by the French for trading (buying and selling slaves) in a region reserved for the French Senegal Company. The insurers denied liability but the Raad held for the insured. The wording of the policy did not specify that the ship could or could not trade in certain areas and in any event did not exclude trade on French colonies from its cover. The insurer was liable in case of a loss occurring even in a prohibited area and could not raise the exception in this regard that the voyage had been prosecuted to an area prohibited by law. It would seem, therefore, that the liberty clause in this case was sufficiently wide\textsuperscript{170} also to provide cover when the ship sailed to prohibited places, that

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{166} See again § 1.2.4.3 \textit{supra}.
\item\textsuperscript{167} \textit{Quaestiones juris privati} IV.3.
\item\textsuperscript{168} \textit{Praelectiones} 1452 (ad III.24.6).
\item\textsuperscript{169} See Bynkershoek \textit{Observationes tumultuariae} obs 1168; \textit{idem Quaestiones juris privati} IV.5.
\item\textsuperscript{170} The clause here permitted the master to sail everywhere (‘overal te zeilen’) and was much wider than one permitting him to touch other ports en route to the destination. Here no place at all was exempted, while in case of the other clauses all ports not on the route were exempted. See further Van der Keessel \textit{Praelectiones} 1452 (ad III.24.6).
\end{enumerate}
\end{footnotesize}
is, to places where it was unlawful for the ship to sail to or at least where she was not by
the policy permitted to sail to.\textsuperscript{171}

In 1717 the \textit{Hooge Raad}\textsuperscript{172} considered an instance where a ship was insured
from Amsterdam to the Spanish West Indies and from there back to Amsterdam. She
was permitted by the policy to touch all ports and harbours and islands, none
excluded. The ship traded to America and was lost off Jamaica, an English island at the
time, where she had entered to obtain victuals and equipment on her way back to
Amsterdam. The insurers refused payment because of a change of course, the loss
having occurred off Jamaica which was not part of the Spanish West Indies but an
English possession. However, this argument was rejected by the \textit{Raad}. It thought that
the reference to the Spanish West Indies had to be taken as one to the Americas, and
Jamaica was situated in the middle of the Americas. There was therefore no change of
course here. Also, the ship was in fact permitted to touch all islands on her voyage
without exception and irrespective of to whom they belonged. Therefore, because of
the liberty clause there was no change of the course of the voyage in this instance and
the insurers were accordingly held liable.\textsuperscript{173}

In a case argued before the \textit{Hooge Raad} in 1717\textsuperscript{174} goods were insured on a
voyage from Cork in Ireland to Rotterdam or Bruges. The carrying ship departed from
Cork to nearby Kinsale, and from there to various English ports (Milford, Plymouth,
Portsmouth), after which she was captured and confiscated by the French. One of the
insurers who had underwritten the policy, refused payment, arguing that there had
been a change of course since the ship had touched various places not specified in the
policy.

The majority of the \textit{Raad} overturned the decision of the \textit{Hof van Holland} and
held for the insurer on this point. But the minority, including Bynkershoek, thought
otherwise. All the ports she had entered, except possibly Milford, were on the route
from Cork to her destination. And where it had been stipulated, as in this case, that the
master could touch all ports, he could sail to all ports in between without fear of chang­
ing the route of his voyage and in so doing absolving the insurer from liability.

\textsuperscript{171} Enschedé 98 makes the valid point, though, that the clause could only lawfully and validly have
permitted the ship to sail to places prohibited by foreign law, but not to ones prohibited by Dutch law
itself.

\textsuperscript{172} See Bynkershoek \textit{Observationes tumultuariae} obs 1332; \textit{idem Quiestiones juris privati} IV.6.

\textsuperscript{173} But even if there was a change of course, it was irrelevant according to s 7 of the Amsterdam \textit{keur} of
1598 if it was made as a result of necessity as was the position here (see § 1.2.4.5 \textit{supra}). And even if the
course was changed voluntarily and without the insured’s instruction, the insurance was still valid, subject
to the insurer’s action against the master (see again § 1.2.4.4 \textit{supra}).

\textsuperscript{174} See Bynkershoek \textit{Observationes tumultuariae} obs 1363; \textit{idem Quiestiones juris privati} IV.7.
1.2.5 Legislation and Further Developments in the Eighteenth Century

The change of the agreed and insured voyage or the course of that voyage was addressed in three sections in the Rotterdam keur of 1721.\(^{175}\)

Section 50 provided that in the case of an insurance of a ship or goods or both, the insured was entitled to have the ship sail everywhere (‘voorwaarts, agterwaarts, wendende ende kerende, ter regter, ter linker, ende aller zyden’), whether through emergency or otherwise, to such ports and roadsteads (‘Havens and Reeden’) as the master might determine for the benefit and in the promotion of the voyage described in the policy.

Apart from the fact that in the Rotterdam keur of 1721 this liberty to change the route was for the first time contained in the legislation itself and not merely in the model policy form, the policies appended to the keur continued to contained appropriate liberty clauses.\(^{176}\) Again it should be noted that the clauses, and now also the legislation, permitted the master to change the course and to touch ports in the prosecution of the agreed voyage described in the policy, but not to change the voyage itself.

That much was made clear in s 51 where it was laid down that the insured was not allowed to instruct the master to change the voyage or to enter any ports not permitted\(^{177}\) by the policy. Further, the insured would lose his right against the insurer in the case of such a change of voyage or course on his instruction.\(^{178}\)

And in terms of s 52, in the case of the master changing the voyage or touching other ports or roadsteads without an emergency (‘buyten nood’) and without the instruction (‘zonder ordre’) of the insured, the insurance remained valid.\(^{179}\) But an

\(^{175}\) See generally eg Enschedé 94; Goudsmit Zeerecht 400-401.

\(^{176}\) Thus, the cargo policy provided: ‘zullende het voorsz. Schip mogen varen voorwaarts, agterwaarts, wendende ende keerende ter regter, ter slinker, ende aan alle zyden, ende door nood, of met wille, aannemen zulke Havens ende Reeden als den Schipper, tot nutte ende vorderinge van de voorsz. Reyse, beleeven of goed dunken zal’. The hull policy provided: ‘zullende het voorsz. Schip mogen varen voorwaarts, agterwaarts, wendende ende keeren ter regter, ter slinker hand, ende aan alle zyden, als den Schipper, ten nutte ende vorderinge van de voorsz. Reyse, beleeven of goed dunken zal’. Again, therefore, there was a difference between the cargo and hull policy in this regard. See again § 1.2.3 n62 supra where the difference was explained.

\(^{177}\) Either expressly prohibited by name or when a change of course was not permitted at all.

\(^{178}\) Note, the insured lost his action on the policy not when he gave such an instruction but when the master changed the voyage or course in carrying out the instruction.

\(^{179}\) And the insured remained entitled to recover if he had insured against the conduct of his master. The position was otherwise, of course, if the master’s conduct amounted to barratry, such conduct not being a risk against which the shipowner could insure.
insured, having been compensated ('voldaan werdende') by his insurers for a loss caused in this regard ('uyt dezen hoof'), would be liable also to cede to those insurers all the rights he had in this regard ('uyt dien hoofde') against the master. Thus, there was now a better regulation of the insurer's right of recourse by providing precisely how the insurer was to exercise his recourse against the master.\textsuperscript{180}

The Amsterdam keur of 1744 likewise regulated a change of the agreed voyage or the course of such a voyage.

In s 6 it was provided that an insured cargo owner could, on penalty of nullity of his insurance, not instruct the master to whom he entrusted his goods ('den Schipper, die hy bevragt heeft') to enter or call at any ports ('geen andere Haven doen ingaan, of aanneemen'), nor to change his voyage ('nogte zyn Voyagie doen veranderen'),\textsuperscript{181} otherwise than in accordance with the policy.\textsuperscript{182} This was so, the section continued, even if a liberty clause was included in the policy ('al was het dat ook in de Police gestelt was geworden, mits overal, en alomme te mogen aan-, en inlopen').\textsuperscript{183}

However, s 6 continued, the master could touch other ports if and to the extent that an emergency required. If the changes were effected otherwise, that is, not in an emergency but voluntarily, and without the instruction of the insured cargo owner, the insurance remained valid, subject to the insurer's recourse against the master.

But where the insurance was concluded for the benefit of the shipowners ('Reeders of Eigenaars van 't Schip') themselves, then such hull insurance would be null and void in such a case too, the reason being that the shipowner was regarded as responsible for the conduct of the master whom he had appointed so that that owner

\textsuperscript{180} See Van der Keessel Theses selectae th 750 (ad III.24.11); idem Praelectiones 1464-1465 (ad III.24.11) (the insured must cede his right against the master ex contractu locatlonis - arising from the contract of employment or carriage, depending on whether it was a hull or cargo policy - to the liable insurer). See also Jolles Deviatie 60-61 and further ch XIX § 1 infra as to the insurer's right of recourse against third parties.

\textsuperscript{181} That is, he could not instruct him either to change the course of the agreed voyage or to change the voyage itself.

\textsuperscript{182} Van der Keessel Praelectiones 1462 (ad III.24.11) argued that, as recognised in past legislative measures - eg ss 14 of the placcaat of 1571 and 7 of the Amsterdam keur of 1598 - both the insured cargo owner and the insured shipowner who instructed the master to change the course or the voyage would have no claim upon the insurer, and not only the insured cargo owner as may appear from the first part of s 6. It is unclear, he pointed out, why s 6 restricted the rule to those insured on goods ('de geassureerde op de ladinghe of goederen') given that, as appeared clearly from the Hooge Raad decision of 1735, the same considerations applied to both types of insured, namely to prevent either that the risk be increased for the insurer or that the risk be altered in contravention of what had been agreed upon in the contract.

\textsuperscript{183} This, it would appear, drastically cut down the effectiveness of such a liberty clause, at least for the insured cargo owner, and was in stark contrast to the approach in Rotterdam where the liberty to change course or deviate was granted without any restriction. It was further no doubt difficult to reconcile with the fact that the cargo policies prescribed by the keur of 1744 continued to contain liberty clauses permitting a change of course as the master saw fit in the prosecution of the insured voyage. Possibly, this provision may only have been intended to make it clear that a change of voyage, as opposed to change of course, was not permitted by any clause whatsoever. However, the correctness of such an interpretation is not beyond doubt.
had to bear the consequences of an unauthorised change in the same way as he had to bear that of an authorised one. Thus, if a voluntary change was authorised by the insured cargo owner, the insurance was null whereas if not the insured shipowner had authorised it. 184 Put differently, in the case of a voluntary and unauthorised change of voyage or of course by the master, the cargo insurer remained liable with a recourse against such master when appropriate, while the hull insurer was relieved of liability. 185

Again the prescribed policy forms in the Amsterdam keuren of 1744 and 1775 contained liberty clauses, not only in the hull and cargo policies186 and in the ransom policy187 as before, but now also in the parcel policy188 as well as in the fire policy where an analogous provision was made for an alteration in the risk because of changes in the nature or quantity of the goods or stock-in-trade housed in a particular building, such as a warehouse, at different times during the currency of the policy. 189

184 The distinction recognised in the Hooge Raad decision of 1717 (see Bynkershoek Observationes tumultuariæ obs 1374; idem Questiones juris privatī IV.8 and again § 1.2.4.4 supra) between a barratrous and a non-barratrous change was not legislated for and the hull insurer was apparently relieved of liability by all forms of change of course by the master.

185 As to s 6, see generally Van der Keessel Theses selectae th 750 (ad III.24.11); idem Praelectiones 1462 (ad III.24.11); idem Praelectiones 1464-1465 (ad III.24.11); Enschedé 96; Goudsmit Zeerecht 349-350; and Magens Essay vol I at 49-50.

186 The cargo policies declared: ‘zullende ‘t voorsz. Schip mogen varen voorwaarts, agterwaarts, wenden en keeren, ter rechte, ter slinke, en aan alle zyden, en door nood of met wille aannemen alzulke Havens en Reëns [Reden], als den Schipper of Schippers, tot nutte en vordering van voorsz. Reyse believeen of goeddunken zal’. The hull policies stipulated: ‘zullende ‘t voorsz. Schip mogen varen voorwaarts, agterwaarts, wenden ende keeren, ter regte, ter slinke, en aan alle zyden, als den Schipper of Schippers ten diensten en nutte van de voorsz. Reyse believeen of goeddunken zal’. See again § 1.2.3 n62 supra for the reason why the cargo policies’ wording differed somewhat from that of the hull policies.

187 It provided: ‘Mits overal en alomme onderweegen, de geheele reyse gedurende, op alle plaatsen en landen te mogen aanloopen, zeilen en verzeilen, voorwaarts of agterwaarts, ook leggen, lossen, laden en verladen, tot Schippers of Commis believen, het met of zonder weten van den Geassureerde of Commis’.

188 The parcel policy appended to the keuren of 1744 and 1775 provided as follows: ‘en zal men by alle Evenementen ofte accidenten tot vervolginge der Voyagien, met de verzekerde goederen, zodanige ander Routes, Voitures en Vaartuigen, mogen gebruiken en employeeren, als naar tyds omstandigheden, by den Geassureerden en alleanderen ten meesten nutte en veiligheid zal geoordeeld worden te behooren, dezelve daar toe expresselyk autoriseerende mits deeeze’.

189 The fire policy in terms of the keur of 1744 covered buildings and the goods already in that building or which would later be housed in that building, the insured being permitted to move goods to and from the building or place as he saw fit: ‘so reets in ofte op de voorsz ... zyn of geduurende den geheelen tyd van deze Verzekering zullen worden in ofte opgebragt, en zal het den Geassureerde vry staan, om telkens zoo veele Goederen in of op te slaan, en wederom af te leeveren, als het derzelven gelieven zal’. The fire policy in the keur of 1775 contained a similar provision in respect of the alteration of the risk and the liberty of the insured to alter the risk in this regard: ‘dwelcke reeds in of op de voorsz. ... zyn, of geduurende deze Verzekering, daar in, of op zullen worden gebragt. En zal het den Geassureerden vry staan, om telkens zoo veele Goederen, Waaren en koopmanschappen, in of op te slaan, en wederom af te leeveren, als het derzelven gelieven zal.’
In terms of s 19 of the keur of 1744 specific provision was made for the position where a change of the voyage or of the course occurred in an insurance on a bottomry loan. It was laid down that where the course ('Voyage') was changed during the voyage ('reys') by the master without the authority or the instruction of the borrower ('buiten toedoen van den Opneemer van 't geld'), the insurers would in the case of a loss nevertheless be liable in terms of the contract to pay the insured lender ('zyn verbinenisse te voldoen'). Thus, a change of the voyage or of the course by the master without the fault of the borrower had no influence on the lender's insurance. But where money was lent to the master and the voyage or course was changed on the instruction of his shipowners ('Raders'), the insured (lender) had to notify the insurers of this change as soon as he obtained or received knowledge of it, and he then had to agree with them on an additional premium or, presumably in case of a failure to reach such an agreement, had to submit the issue to arbitration ('en wegens de verbetering der Premie met den andere accordeeren, ofte deselve verbetering stellen ter Arbitragie van Commissarissen'). Failing this ('sonder dat') the insurers would not be liable in the case of a loss ('zyn de Assuradeurs in cas van schade ongehouden') and the insured would merely retain his action against the master as receiver (borrower) of the loan ('behoudende den Verseekerde alleen zyn Actie ten lasten van de Schipper, als Opnemer van 't geld').

In 1789 there was an Amsterdam opinion on the effect of a change of the voyage. The conclusion was that a cargo insurer was not liable when the insured voyage was changed on the instruction of the shipowner in the case where the latter could be regarded as the insured cargo owner's representative so that it was, in effect, a change of voyage authorised by the insured cargo owner himself.

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190 Although not absolutely clear from the wording, it may be assumed that both types of change were included.

191 It is not immediately clear to what this referred, an absence of notification, or of an agreement or arbitration on an additional premium. The latter seems the more likely.

192 See further eg Enschedé 38-40; Goudsmit Zeerecht 341-342.

Note that in terms of the bottomry contract itself, the lender had to bear only losses arising within the four corners of the contract, and if the master deviated from the agreed or customary course, the lender was relieved of liability and the borrower had to repay the loan with interest and seek recourse from the master.

193 See Casus position vol I cas 12.

194 The head-note reads: 'Een assuradeur is niet gehouden in de schade op Goederen, wanneer de verzekerde Reize veranderd is door toedoen van den Geassureerden, of deszelis Correspondent'. The facts, briefly, were as follows: A in Amsterdam consigned to B at Dunkirk, on the latter's instruction and for his account and risk, certain merchandise via Flushing with the instruction to his (A's) correspondent C there to send the goods onwards with the first available ship. A further insured the goods at Amsterdam, for the account of owner B, on a voyage from Amsterdam to Dunkirk via Flushing ('van Amsterdam over Vlissingen tot Duinkerken'). The goods arrived at Flushing and were loaded by C in his own ship. A bill of lading was sent to B in which no mention was made of any other destination than Dunkirk. It appeared, however, that the greater part of the cargo on C's ship (a cargo of gin ('Genever') incidentally) was in fact consigned to Boulogne. Accordingly, when the master arrived at the roadstead of Dunkirk he did not want to enter the port and have to pay duties on his cargo but enquired from the consignee of the insured goods in question (and also from the consignees of some other goods destined for Dunkirk) whether he could transship those goods in the roadstead onto barks and so avoid having to
two Amsterdam lawyers advised that the cargo insurer was not liable to compensate the insured for the damage caused to the insured goods after a change of voyage because the goods were not damaged on the voyage for which they were insured.\(^{195}\) The insurer's risk had ceased by the change of the voyage ('verandering van de reise'). It was irrelevant, in this particular case, that a cargo insurer was ordinarily liable for any change of the voyage by both the fault or the fraud of the master to whom the goods were entrusted. Here the change was not effected without the authority of the insured and, more particularly, of his correspondent, the shipowner, who had to be regarded as the representative of the insured cargo owner. That being the case, a change of the voyage by the master was not irrelevant to the insurance of the cargo as would normally be the case.\(^{196}\)

It would seem, though, that this opinion should not be taken as undermining the general principle applying where the voyage was changed by the master without any instruction by the insured cargo owner, and as indicating that an insurer would nevertheless be able to avoid liability if the change was not made by the master of his own accord but on the authority or the instruction of the shipowner. That would only be the case where, as here, a special relationship existed between the cargo owner and the shipowner apart from the contract of carriage between them.\(^{197}\)

### 1.2.6 Change of the Voyage or of the Course: A Summary

For a summary of the position pertaining to a change of the agreed or insured voyage or the course of that voyage in Roman-Dutch law at the end of the eighteenth century, enter the port. Because of the danger involved, the consignees refused. Thereupon the master sailed with a favourable wind to Boulogne without having entering the port at Dunkirk and with the goods destined there still on board. But, as luck would have it, his ship then had an accident en route when she was stranded on a sandbank near Calais. As a result some of her cargo, including the insured goods, were damaged.

\(^{195}\) More specifically, they explained. B's goods were insured from Amsterdam via Flushing to Dunkirk, and the accident did not occur on the voyage from Flushing to Dunkirk but in fact between Dunkirk and Boulogne and thus on a different voyage than that for which the insurer had taken the risk upon himself.

\(^{196}\) Here the change of the voyage was not an unauthorised act by the master of his own accord but rather the result of the fact that his employer, shipowner C, had at Flushing instructed him to sail to Boulogne by loading on the ship goods which were, for the most part, destined for Boulogne. Here C had to be regarded as the correspondent and representative of B as he was entrusted with the forwarding of the goods. The insurer was liable here because the loss was the result of an incorrect instruction by the insured himself to his correspondent 'wiens daaden ten dien opzichte als deszelfs eige daaden moeten worden geconsidereerd'.

In a second opinion requested on the matter, Amsterdam merchants and brokers agreed fully with the lawyers' opinion and thought the insurer not liable 'wanneer de reize veranderd is door toedoen van den verzekerde zelf, of deszelfs Correspondent, welke hem representeert'.

\(^{197}\) With reference to this opinion, Van der Keessel Praelectiones 1463 (ad III.24.11) noted that the instruction to change the voyage need not have been given by the insured himself but that it was sufficient if it was given by his correspondent ('mandatarius'), i.e., someone for whose actions he was responsible.
century, one may again usefully turn to Van der Keessell who expounded lengthily on
the topic and from whom the following exposition was derived.198

A change of course or of voyage (‘cursum’ or ‘iter mutare’), Van der Keessell
explained,199 occurred in (probably at least) three instances. Firstly when the ship pro­
ceeded in a different direction and thus to a different destination.200 Secondly, if she
sailed directly to the agreed destination but then passed it by without discharging her
cargo there201 and sailed for another port.202 And thirdly, if she sailed to the agreed
destination but en route touched other intermediary ports not expressly mentioned in
the policy without having been granted the liberty of doing so.203 In the lastmentioned
case the voyage would by reason of the change in the course be prolonged with a con­
comitant greater risk for the insurers, who would for that very reason usually stipulate a
higher premium.204

An alteration of the voyage or the course of the voyage resulted in the termina­
tion of the insurance contract and in the insurer not being liable for any subsequent
loss, irrespective of whether or not such alteration at the same time amounted to an
actual increase in the risk, and irrespective, furthermore, of whether or not such a loss
was the result of such a change of voyage or course or whether or not the likelihood of
its occurrence was increased by such a change.205 In consequence, any remedying of
the alteration of the risk (that is, in the present context, a return to the agreed or usual
voyage or course) was irrelevant and did not revive the contract so as to render the
insurer liable again for any further losses which could occur.

The mere intention or resolve to carry out a change in the voyage or the course,
not yet carried into execution at the time of the loss or damage, had no effect on the
liability of the insurer and the validity of the insurance contract.206

198 See also eg Dorhout Mees Schadeverzekeringsrecht 587-588.

199 See Theses selectae th 753 (ad III.24.11); idem Praelectiones 1463 (ad III.24.11). See also Van der
Linden Koopmans handboek IV.6.10 (referring merely to a ‘verandering van cours’).

200 That is, a change in the destination and in the voyage and also in the course of that voyage.

201 Without discharging her cargo, in the case of a cargo policy, or casting anchor, in the case of a hull
policy. See again ch XIII §§ 1.3.1 and 1.3.3 supra for the termination of the risk in the case of cargo and
hull policies respectively.

202 That is, a change in the destination and of the voyage without any change in the course.

203 That is, no change of the voyage but merely of the course of the voyage.

204 Van der Keessell’s three examples may be illustrated as follows if the agreed voyage was from A to C
to E: (i) A to X; (ii) A to C and then bypassing E to X; (iii) A to B to C to D to E.

205 It would appear that a causal link between the alteration of the risk and the loss was not required In
Roman-Dutch law. But see again s 7 of title VII of the placaat of 1563, discussed in § 1.2.1 supra.

206 See Van der Keessell Theses selectae th 752 (ad III.24.11); idem Praelectiones 1462-1463 (ad
III.24.11). It would appear, therefore, that the nullity of the insurance contract was not retrospective to its
conclusion but only from the time of the actual change. In the case of an alteration of the port of
departure or an immediate change of course from the port of departure, though, that would or could
practically be an avoidance ab initio.
A change of voyage or of course by the master of the ship by necessity ("ex necessitate") did not affect the position of the parties or absolve the insurer from liability.\(^{207}\)

The effect of a change of voyage or of course depended on whether the change was instructed or authorised by the insured or his representative or mandatary, or whether it was effected by the master of his own accord. A change of voyage or of course by the master which was authorised by the insured, discharged the insurer\(^{208}\) but the latter bore the burden of proving such authorisation or other involvement of the insured.\(^{209}\) An unauthorised change of the voyage or the course by the master himself without the knowledge or consent of the insured relieved the hull insurer of liability,\(^{210}\) the reason being that the insured shipowner was responsible for the appointment of and had to stand in for the consequences of all the actions of the master of his ship. But an unauthorised change by the master did not similarly relieve the cargo insurer of liability,\(^{211}\) except in the case where the insured cargo in fact belonged to the shipowner himself.\(^{212}\) However, such unauthorised change by the master rendered him liable to the insured cargo owner who, after having received compensation from the cargo insurer who remained liable despite the change, had to cede his action against the

\(^{207}\) See Van der Keessel Theses selectae th 753 (ad III.24.11); idem Praelectiones 1464 (ad III.24.11); idem Praelectiones 1464 (ad III.24.11); and Van der Linden Koopmans handboek IV.6.10.

\(^{208}\) See Van der Keessel Praelectiones 1462 (ad III.24.11) (noting that this was the case whether the instruction proceeded from the insured cargo owner or the insured shipowner); idem Praelectiones 1464 (ad III.24.11) (in principle the insurer was relieved of liability only for a change of voyage by the master through the fault or conduct - ie, the instruction - of the insured). A possible exception was where such authorised change was caused by necessity, for in the case of a necessary, involuntary change of the voyage or the course by the master on the instruction of the insured, the insurer probably remained liable, necessity overriding or justifying the insurer's instruction.

\(^{209}\) See Van der Keessel Theses selectae th 752 (ad III.24.11); idem Praelectiones 1464 (ad III.24.11), who wrote that logically the burden rested on the insurer of proving an instruction on the part of the insured. Such proof could be sought eg in bills of lading, bearing in mind that in times of war they often mentioned certain neutral places in order to deceive the enemy while the unexpressed intention, often to the knowledge of the insurer, was to sail to another port. In practice the oath of the insured was also admissible. In the absence of such proof (or, presumably, in the absence of such an oath), the insurance remained valid and the insurer liable. See also Van der Linden Koopmans handboek IV.6.10 (the instruction or knowledge of the insured had to be proved by the insurer, and the oath of the insured to purge himself was also permissible in this case).

\(^{210}\) See Van der Keessel Theses selectae th 750 (ad III.24.11); idem Praelectiones 1464-1465 (ad III.24.11) (there was no question here of the insurer remaining liable but with a right of recourse as in the case of a cargo insurance); and Van der Linden Koopmans handboek IV.6.10.

\(^{211}\) See Van der Keessel Theses selectae th 750 (ad III.24.11); Van der Linden Koopmans handboek IV.6.10.

\(^{212}\) That is, unless the insured goods owner was also the owner of the carrying ship. Thus, in the case of an unauthorised change of the voyage or course by the master, the insurer remained liable to the insured with a recourse against the master only where the insured was the cargo owner and not also the shipowner.
master to that insurer.213 An additional reason why the hull insurer was relieved of liability in the case of an unauthorised change of voyage or course by the master and why he did not, as did the cargo insurer, remain liable with a right of recourse against the master, was to prevent a circuitry of actions, that is, to prevent the insurer paying the shipowner on the policy and then recovering from the master for whose actions the shipowner was in turn responsible and liable.

Furthermore, in Amsterdam, such unauthorised change of voyage or course by the master relieved the hull insurer (or the insurer of cargo belonging to the shipowner) of liability even in the case of fault (culpa) and not only in case of fraud (dolus).214 Elsewhere, though, the distinction could have been recognised, as the Hooge Raad had earlier recognised, in respect of Amsterdam ironically, in its decision in 1717.215 Outside Amsterdam the insurer was therefore seemingly relieved of liability only if the unauthorised conduct of the master in changing the voyage or course was fraudulent, that is, barratrous. In the case of a non-barratrous change, the insurer was not relieved of liability if he had insured against such actions of the master. The contract was void and the insurer absolved from liability only in the case of a fraudulent change of the voyage or course by the master.216

213 See Van der Keessel Theses selectae th 750 (ad III.24.11) ('cedenda est'); Van der Linden Koopmans handboek IV.6.10 (the liable insurer who has paid 'kan cession van actie tegen denzelven [master] vorderen'). Presumably this was a cession of the insured's action against the master (or his employer, the shipowner) arising from the contract of carriage. This was the position in terms of s 52 of the Rotterdam keur of 1721.

There was no equivalent provision in the Amsterdam keur of 1744. Seemingly in connection with the position there, Van der Keessel Praelectiones 1464 (ad III.24.11) remarked that the liable insurer had a recourse ('regressus') against the master. However, in the case of a change of the voyage or course from necessity, not only was the insurer not relieved of liability but there was also no recourse against the master. Therefore, for a recourse against the master the change must have been voluntary and unauthorised.

Elsewhere Van der Keessel again sought to explain the insurer's right of recourse against the master who had voluntarily and without authority from the insured changed the voyage or course in view of the absence of any agreement ('negotium') between them (see Praelectiones 1540 (ad III.29.18)). He stated that this obligation of the master arose ex lege, and that that was true only in Amsterdam, for in Rotterdam there was a cession of action. See further ch XIX § 1 infra as to the insurer's right of recourse against third parties generally.

214 Section 6 of the keur of 1744 drew no distinction in this regard between the negligent and the intentional or fraudulent change of voyage or course by the master. In both cases the hull insurer was relieved of liability. In effect, therefore, because of the provision of s 6, the insured shipowner was not covered against the negligent conduct of the master which amounted to a change of voyage or course (see again ch VI § 4.3 supra).

215 See Bynkershoek Observationes tumultuariae obs 1374; idem Quaestiones juris privati IV.8. See again § 1.2.4.4 n131 supra.

216 See Van der Keessel Theses selectae th 751 (ad III.24.11) who referred to the Hooge Raad decision of 1717 in explaining the position in centres such as Rotterdam and Middelburg where the local legislation did not touch on this aspect. Elsewhere (Praelectiones 1464-1465 (ad III.24.11)) Van der Keessel explained the reason for the distinction in Rotterdam and Middelburg as follows: In the case of an intentional change the insurer was absolved, because the shipowner could not insur against the fraudulent conduct of the master he himself had appointed over his ship. In the case of a negligent change by the master, again, the insurer could be liable because it was possible and permissible for the shipowner himself to be insured against the negligent conduct of his master. See again eg Van der
A change of course could be excused by an appropriately worded liberty clause, as it also could, for example, by a clause compelling or permitting the ship to sail with a convoy or one permitting her to engage in privateering activities.

1.2.7 Change of the Voyage or of the Course in the Wetboek van Koophandel

The Wetboek van Koophandel refers to both the change of the agreed voyage and to the somewhat milder change of the course of that voyage.

A change of voyage is said to have occurred as soon as the master commences the voyage to another destination than the one to which the ship or the cargo on the ship was insured. Further, it is provided that a voluntary change of course does not consist of a minor deviation, but only occurs when the master, without recognised need or utility, and without sufficiently considering the interest of the ship and the cargo, enters a port off the route or follows a course other than that which he was obliged to follow.

In terms of art 637, the insurer is liable for all loss of and damage occurring to the insured object through a change of course or voyage by necessity. Therefore, an involuntary change is regarded as a peril insured against and this is so irrespective of the type of insurance

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217 See Van der Keessel Theses selectae th 753 (ad III.24.11); idem Praelectiones 1463 (ad III.24.11) (such clauses created an exception to the rules relating to the change of the course of the voyage). Two types of such clauses were known in Dutch insurance practice, namely those permitting the ship to touch ports en route to the destination other than those mentioned, and those permitting the ship to follow any course to her destination.

218 See § 2.3.2 infra.

219 See again ch VI § 5.4.3 n332 supra.

220 See generally Dorhout Mees Schadeverzekeringsrecht 586-587; Goudsmit Zeerecht 350; Jolles Deviatie 29 (noting that the system of the Wetboek on this topic was derived from Van der Keessel Theses selectae th 750) and 49-54; Ten Kate passim; Lipman 239; and Voorduin vol X at 353.

221 Thus, it seems that an actual execution is required, and that a mere intention is insufficient.

222 Destination presumably as opposed to a mere intermediary port of call, which will at most be a change of the course of the voyage and not of the voyage itself.

223 Article 638-3.

224 Article 639-1. In the event of any dispute in this regard, the Court is to decide the matter after hearing experts (art 639-2).
involved. Article 638 then deals with a voluntary change of course or voyage ('willekeurige verandering van koers, of van de reis'), and, as the earlier Roman-Dutch law, notably in s 6 of the Amsterdam keur of 1744, it distinguishes between hull (and freight) policies on the one hand and cargo policies on the other hand.

In the case of an insurance on hull, the insurer's obligation is terminated in terms of art 638-1 in the event of all voluntary changes of course or of voyage, whether such occurs through the fault of the master himself or on the instruction ('op last') of the shipowner, unless, in the case of an unauthorised change, the contrary was expressly stipulated in the policy.

In the case of an insurance on cargo, the insurer is relieved of liability in terms of art 638-2 if the voluntary change of voyage or of course took place on the instruction or with the express or implied consent ('op last of met uitdrukkelijke of met stilzwijgende toestemming') of the insured. The implication is that, as in the earlier Roman-Dutch law, the cargo insurer remains liable in the case of an unauthorised change of course or voyage by the master, but this, as also any possible recourse by the insurer against the master, are not specifically provided for by the Wetboek in this context. In the case of an insurance on cargo belonging to the owners of the ship in which the cargo is loaded, the insurer is in terms of art 641 also not liable for the barratry of the master ('niet aansprakelijk voor de schelmerij van den schipper'), or for loss or damage caused by his voluntary change of the course or of the voyage, even if this occurred without the fault or prior knowledge of the insured. 

225 It seems that the insurer remains liable in the case of a necessitated change only if the necessity was caused by a peril insured against; if not, the change is regarded as a voluntary one.

226 Or, presumably, if the change occurs before the insurer has come on risk, he never incurs any obligation. See too art 635-1 which will be mentioned shortly.

227 It is therefore irrelevant in this case whether or not the change was authorised; the hull insurer is never liable in the case of a voluntary change of voyage or of course.

228 Thus, the shipowner may be insured against the consequences of an unauthorised change of voyage or of course but not against an authorised change, for such protection would be in contravention of the principle embodied in art 276. See again ch VI § 4.1 supra for insurance against the consequences of the insured's own conduct.

229 In this case, therefore, it is relevant whether or not the change was authorised, for unlike the shipowner, the consignor of goods on board a ship has no control over her master and the way in which he prosecutes the voyage.

Noyon 69-71 remarks that the distinction in art 638 between hull and cargo policies is based simply on the difference in the control exercised over the master by the shipowner and the consignor. However, as he points out, a similar distinction is not drawn between hull policies taken out by the shipowner and those taken out by non-owners such as creditors. Such non-owners, although they have the same relationship with the master and as little control over him as does a consignor, are nevertheless and incorrectly treated in the same way as the shipowner.
voorkennis van den verzekerde gedaan'), unless it is otherwise provided in the policy.

In the case of a change of voyage ('verandering van reis') by a borrower on bottomry ('door den geldopnemer op bodemerij'), the insurance on the bottomry loan is terminated ('doet mede de verzekering op bodemerij ophouden'), unless it is otherwise agreed in the policy.

It should be noted that in all instances where the insurer's liability is by law excluded because of an unauthorised change of course or of voyage by the master, it is possible for the insurer to agree to be liable by the inclusion of an appropriate liberty clause in the policy. It should be noted further that in the case of a change of voyage or of course the insurer need not, or need no longer, prove that the risk was actually increased. It is also irrelevant that the insured is able to show that the risk was reduced as a result of the change. The mere fact that the voyage was changed or departed from is sufficient, and a later return to the agreed voyage or course without any loss does not reinstate the insurance contract and reimpose an obligation on the insurer. The rule, therefore, is that every change of voyage or of course is regarded as completed the moment it starts and that the insurance contract as a result becomes and remains void, relieving the insurer of liability for all subsequent loss or damage.

Further related situations are also provided for in the Wetboek van Koophandel.

Firstly it is laid down that in the case of an insurance of goods or merchandise the risk is borne without interruption, however much the master may have been necessitated to enter a port of emergency, there to discharge the cargo and repair the ship, until either the voyage is lawfully terminated ('wettig gestaakt'), or the insured gives an instruction not to reship the goods, or the voyage is completed.

Secondly, in the case of a termination of the voyage before the insurer has commenced to run any risk, the insurance falls away ('vervalt').

Thirdly, in the case of a termination of the voyage after the insurer has commenced to run the risk, the risk continues to run for fifteen days in case of an insurance

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230 Thus, as in the case of a hull insurance, the insurer's liability is excluded whether or not the change was authorised.

231 See art 660, following s 19 of the Amsterdam keur of 1744. See also Goudsmit Zeerecht 341-342 for the position in the case of a change of voyage in an insurance of goods carried over land or on internal waters. Article 689 in that case relieves the insurer of liability if another voyage was performed voluntarily ('buiten nood') along another course or in another way than is usual ('als de reis ... langs andere dan de gewone wegen en anders dan op de gewone wijze wordt afgelegd').

232 See eg Jolles Deviatie 17-19.

233 Article 628.

234 Article 635-1. As to the return of the premium in such a case, see art 635-2.
on cargo and for 21 days in the case of an insurance on hull after the termination of the voyage has taken place, or until an earlier discharge of the goods.\textsuperscript{235} A fourth situation catered for involves the prolongation of the voyage. In terms of art 653-1 the insurer is relieved of any further risk (\textquote{ontslagen van verder gevaar})\textsuperscript{236} and is entitled to the premium if the insured should send the ship to a more distant place than that mentioned in the policy (\textquote{indien de verzekerde het schip zendet naar eene meer afgelegene plaats dan bij de polis genoemd was}). It is not certain on what basis the drafters of the \textit{Wetboek} differentiated between a change of the voyage, which includes the case where there is a change of the destination, and a prolongation of the voyage, the latter inevitably involving a change of the destination.\textsuperscript{237} It was not encountered in this guise in Roman-Dutch law where it was treated merely as an instance of a change of the voyage.\textsuperscript{238}

Finally, in respect of fire insurance, art 293 provides that if the insured building itself acquires another function (\textquote{bestemming})\textsuperscript{239} and in consequence is exposed to a greater risk of fire, so that the insurer, if such greater risk had existed before the insurance, would not have insured it at all or not on the same terms, his liability ceases.

\subsection*{1.2.8 Change of the Voyage or of the Course (Deviation) in English Law}

In English law too the alteration of the risk, and more particularly a change of the voyage and of the course of the voyage agreed upon in the insurance contract, had an effect on that contract and on the insurer\textquoteright s liability in terms of it. Already in the sixteenth century a change of course or deviation was a defence to an action on an insurance policy in the Admiralty Court\textsuperscript{240} and the position was the

\textsuperscript{235} Article 629. Exceptionally, in the case of a termination of the voyage after the insurer has commenced to run the risk but before the ship has weighed anchor or dropped her ropes at the last place of departure (\textquote{het anker of de touwen heeft losgemaakt op de laatste uitklaringsplaats}), the insurance is also terminated and the premium returnable, except that then the Insurer is entitled to 1 per cent of the sum Insured (see art 636-1), the full premium being earned in such a case though if any loss has occurred for which the insured claims compensation (art 636-2).

\textsuperscript{236} Presumably this refers to the risk on the further voyage, i.e., after the actual change of the voyage or of the course of the voyage.

\textsuperscript{237} See further eg Dorhout Mees \textit{Schadeverzekeringsrecht} 587-588 who notes that the distinction in art 653 between a \textquote{reisverandering} and a \textquote{reisverlenging} is not clear.

By art 653-2, the insurance remains completely valid if the voyage is curtailed (\textquote{verzekering heeft volkomen gevolg indien de reis verkort is}). This, presumably, is the case only if such curtailment does not involve a change of voyage or of course, i.e., an alteration of the risk.

\textsuperscript{238} It was, however, separately provided for in eg the Hamburg \textit{Assecuranz-Ordnung} of 1731. See further Dreyer 144; and Frenz \textit{Hamburgische Admiralitätsgericht} 161-162.

\textsuperscript{239} In terms of art 287 the use to which the insured building is put, must be stated in the policy.

\textsuperscript{240} In \textit{Broke v Maynard}, the oldest known suit in Admiralty concerning the oldest known insurance policy concluded in England in 1547, deviation was alleged by the insurer who had refused full payment on the policy. See eg Blackstock 16-17; Holdsworth \textit{History} vol VIII at 291.
same in the Common-Law courts where a deviation absolved the insurer from liability for any subsequent loss.\(^{241}\)

In the eighteenth century it had been settled that whereas an usual, foreseen change of the voyage or one outside the direct or even the indirect control of the insured had to be borne by the insurer, a voluntary alteration of the risk, such as in the case of a change of the voyage or of the course to be followed on that voyage, by the fault of the insured or the master\(^{242}\) of the ship and not made from necessity in an emergency, discharged the insurer from liability.\(^{243}\)

The consequences of a change of voyage and of course were also mitigated from early on in English law. Thus, mid-eighteenth-century London policies, like their counterparts elsewhere, contained a printed clause to the effect that it would be lawful for the ship to proceed, sail to and touch and stay at any ports or places whatever on her voyage.\(^{244}\) It appears that attempts in the 1760s to introduce clauses which favoured the insured was one of the reasons for the revision and confirmation of a standard form of insurance policy by Lloyd's in 1779. One of these clauses sought to render the unseaworthiness of the ship and a deviation by the ship from her course without the knowledge of the insured irrelevant.\(^{245}\) In the approved Lloyd's policy of 1779, therefore, the reference to seaworthiness was omitted but the liberty clause was retained. It stipulated that 'it shall be lawful for the said Ship, et\&, in this voyage to proceed and sail to and touch and stay at any Ports or Places whatsoever without Prejudice to this Insurance'. It is noticeable that this liberty clause was less widely drawn than some of the clauses found elsewhere, including the Netherlands, which allowed the ship to sail everywhere and in effect to change and deviate from the pres-

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\(^{241}\) See Green v Young (1702) 2 Ld Raym 840, 92 ER 61 where it was said that 'though the policy is discharged from the time of the deviation, yet for the damages sustained before the deviation, the insurers shall make satisfaction to the insured'.

\(^{242}\) An unauthorised and unnecessary deviation by the master from the instructed or proper course on which he had to sail in the performance of the insured voyage, done with the intention of prejudicing the owners (eg for purposes of carrying and discharging contraband or smuggling for his own account) was a common example of barratry.

\(^{243}\) See eg Pelly the Younger v Governor & Company of the Royal Exchange Assurance (1757) 1 Burr 341, 97 ER 342, a case dealing with hull insurance, in which Lord Mansfield mentioned (at 346, 347) the rule, established by universally applicable mercantile law (counsel referred him eg to Loccenius, Marquardus and Roccus), that '[i]f the chance is varied or the voyage altered by the fault of the owner or master of the ship, the insurer ceases to be liable'. See further eg Holdsworth History vol XII at 537 (for references to other eighteenth-century cases on the topic); and Rodgers 178.

\(^{244}\) See eg Magens Essay vol I at 49-50.

\(^{245}\) The clause in question read: 'It is particularly agreed that any Insufficiency of the Ship, or Deviation of the Master, unknown to the Assured, shall not prejudice this Insurance'. It sought to negative the decision concerning the Mills Frigate in which it was held that unseaworthiness, even without the privity of the insured, rendered the whole policy void. See further eg John 'London Assurance' 140; Wright & Payle Lloyd's 148; and § 2.4.2 infra where the issue of seaworthiness is considered.
cribed or usual route to the destination. Weskett, for one, thought such expansive clauses too dangerous and conducive to frauds upon insurers.246

In the absence of such a liberty clause, though, it appears that English law may in principle and generally have dealt with changes of the voyage and of the course in a way rather similar to that followed in other contemporary European systems.247 It differed on at least one obvious point, though, namely in the fact that cargo and hull policies were treated on a par. The harsh consequence was that in terms of English law an innocent consignor of insured goods lost all the benefit of his insurance in the case of a voluntary deviation by the master, notwithstanding that in the case of loss neither the master nor the owners of the ship may have been liable to indemnify such a consignor, even in part.248

By time of the Marine Insurance Act of 1906, and with the benefit of more than a century of litigation on the topic, a fairly sophisticated regulation of the consequences of a change of voyage and of course had evolved. Despite the many intricacies of this regulation, though, it remained in principle very close to the regulation of the topic encountered elsewhere, including that in the Wetboek van Koophandel.

The Marine Insurance Act treats the change of voyage on one hand, and the change of the course of the voyage on the other hand, separately. In the Act the latter is referred to as a deviation.

In terms of s 45(1) a change of voyage occurs where, after the commencement of the risk, the ship’s destination is voluntarily changed from that contemplated in the policy. And, in terms of s 45(2), the insurer is discharged from liability, unless the policy provides otherwise, from the time when the determination to change the voyage is manifested, it being immaterial that the ship may not have left the course of the voyage contemplated by the policy when the loss occurred. Thus, an actual change of voyage is not required and the mere intention to do so is sufficient as long as it has been manifested.

A change of the port of departure (that is, sailing from a different port than the one specified in the policy), or a change of the port of destination prior to departure (that is, sailing for a different destination) are treated separately and are seemingly not

246 See Weskett Digest 168-180 sv ‘deviation’ at 179 par 15 who recognised, though, that despite their width, the Dutch clauses did not permit any change of the voyage but merely a deviation.

247 Roman-Dutch law may have had an influence, it would seem, on at least one Scottish decision on the topic in the eighteenth century, and that despite the extensive influence of English insurance law in Scotland at the time (as to which see further Forte ‘Opinions’). Weskett Digest 571-579 sv ‘voyage’ par 5 referred to a decision by the Scottish Court of Session in 1779 on a change of voyage in which copious reference was made to Dutch decisions as recounted by Bynkershoek, more specifically on the question whether an actual change was required or whether a mere intention was sufficient. See too idem 579-881 pars 6-8 for further references to Bynkershoek and the decisions of the Hooge Raad.

248 Weskett Digest 168-180 sv ‘deviation’ at 179-180 par 16 pointed out that the justification for this position was the fact that the cargo insurer was not concerned with the original contract of carriage between the insured consignor and the shipowner/carer, and the further factor that the consignor had to bear the responsibility for the carrier, ship and master he selected, and therefore had to bear the loss caused by the latter’s negligence. Also, if cargo insurers were liable in this case, it would give rise to collusion between masters and shipowners and also between them and consignors.
considered as changes of the agreed voyage in the strict sense of the word249 but rather as cases of proceeding on a different voyage altogether. In both cases the change occurs prior to departure so that the risk does not attach250 and the insurer incurs no liability at all.251

A change of course or deviation from the insured voyage, as opposed to a change of that voyage, occurs, according to s 46(2), either where the course of the voyage is specifically designated in the policy and that course is departed from, or where the course is not so designated but the usual and customary course is departed from.252 The presumption here is that both the terminus a quo and terminus ad quem remain unaltered so that it is not an instance of a change of the voyage. In terms of s 46(1), any deviation without a lawful excuse253 discharges the insurer from liability as from the time of the deviation, it being immaterial that the ship may have regained the designated or usual route before any loss occurred. In terms of s 46(3), an intention to deviate is immaterial and there must be an actual deviation discharge the insurer from liability.254

Section 49 concerns the excuses for a deviation.255 It lists in sub-s (1) the following lawful excuses for a deviation: where it is authorised by a special term in the policy; where it is caused by circumstances beyond the control of the master or his employer; where it is reasonably necessary in order to comply with an express or implied warranty;256 where it is reasonably necessary for the safety of the ship or the subject-matter insured; where it occurs for purposes of saving human life or aiding a ship in distress where human life may be in danger; where it is reasonably necessary for purposes of obtaining medical aid for any person on board; and where it is caused by the bar-

249 That is, they are not treated as a change of voyage in terms of s 45 which occurs when the agreed voyage is commenced and is then changed, something which is possible only by a change of the ship's destination.

250 In the case of a change of the voyage after the departure, the risk attaches but the insurance is terminated as from the time of such change.

251 See respectively ss 43 (alteration of the port of departure) and 44 (sailing for a different destination) of the Marine Insurance Act. There is no provision in the Wetboek which is the equivalent of s 43, but s 44 has its equivalent in art 653.

252 Section 47 deals with a deviation in the case where there are several ports of discharge specified in the policy, and it provides that the ship must, in the absence of a sufficient cause or usage to the contrary, proceed to them either in the order designated in the policy, or otherwise in geographical order, failing which there will be a deviation.

253 The possible such excuses are listed in s 49 and will be considered shortly.

254 Thus, in English law, whereas an actual or a manifestly intended change of voyage has legal consequences, that is true only of an actual deviation.

255 A change of voyage is excused, according to s 45, only where it is not voluntary or where the policy so provides (ie, where the policy provides for other consequence in the case of a change of voyage than does s 45). Both of these also apply to a deviation.

256 See further § 2.4.4 infra on this point.
ratrous conduct of the master or the crew, if barratry is one of perils insured against.\textsuperscript{257} In sub-s (2) it is provided that where the cause excusing the deviation ceases to operate, the ship must resume her course.

As far as an agreement to exclude the consequences of alteration of the risk is concerned,\textsuperscript{258} the policy may either grant the shipowner the liberty to touch ports en route, or it may create the possibility of negating the consequences of a deviation by providing for the insurance to remain in force at a premium to be agreed. As far as the former is concerned, the now abolished Lloyd's SG policy contained a specific clause permitting the master of the ship concerned the liberty "in this voyage to proceed and sail to and touch and stay at any ports or places whatsoever and wheresoever for all purposes without prejudice to this insurance".\textsuperscript{259} The reference to the voyage of the ship insured in the policy would appear to indicate that neither a deviation in the form of a change of the course of the voyage nor a change of voyage is permitted. This would appear to be confirmed by rule 6 of the \textit{Rules of Construction} of the policy appended to the Marine Insurance Act which provides that in the absence of any further license or usage, the liberty to touch and stay 'at any port or place whatsoever' does not authorise the ship to depart from the course of her voyage from the port of departure to the port of destination.\textsuperscript{260}

Significantly the Marine Insurance Act draws no distinction as far as the consequences of a change of voyage and a deviation are concerned between hull and cargo policies. Therefore, the insurance terminates also for the insured cargo owner/consignor in the case of an unexcused change despite the fact that he clearly finds himself in a different position to prevent it than does the shipowner. A special agreement is therefore required in practice to ameliorate the effect of such changes in voyage and course for the insured cargo owner.\textsuperscript{261}

\textsuperscript{257} In essence this list refers to instances where the deviation would not be voluntary or where it should not be regarded as such, so that there appears little difference in principle between a change of voyage and deviation on this point.

\textsuperscript{258} The insurer may, of course, also waive such consequences by his conduct.

\textsuperscript{259} The italicised words being additions to the original policy of 1779. The latter is reproduced in Appendix 47 \textit{infra}.

\textsuperscript{260} Therefore, it only permits deviation in the form of entering ports en route, not in the form of deviating from the agreed or usual course.

\textsuperscript{261} Such stipulations, added to cargo policies, usually provide for the insurance to remain in force during any (unexcused) deviation and during any variation in the adventure arising from an exercise of the liberty granted to the shipowner in terms of a contract of affreightment. See Dorhout Mees \textit{Schadeverzekeringsrecht} 592-593 on this difference between Dutch and English law. In the latter system such a clause is required to place the insured cargo owner in the same position as his Roman-Dutch counterpart. See generally on the (largely theoretical) differences in this regard between Dutch law and English law, Buys 73-77, and between German law and English law, Ulrich 220.
1.3 Transshipment

The possibility of a transshipment or change in the ship mentioned in the cargo policy as the one to convey the insured cargo, was recognised and regulated in the earliest Dutch insurance legislation. As will become apparent, the topic is closely linked to at least two other important matters, namely abandonment and the insurer's liability for expenses incurred by the insured in taking measures, such as transshipment, to prevent or to limit the extent of any loss or damage. It will therefore be referred to again when those matters are treated.262

The possibility of an enforced transshipment was foreseen and permitted in s 15 of the placcaat of 1571, albeit with no great and obvious measure of clarity.263 This section provided that in the event of a carrying ship becoming incapable of performing the agreed voyage, or of her being arrested by the enemy or the authorities, the insured owner of cargo on board had to wait a specified period of time before he could abandon his cargo to the insurer and claim on his policy.264 However, during that time such goods265 could be loaded onto another ship or other ships for the completion of their carriage to the agreed destination ('binnen welcken tijd sullen sy die voorseyde Koopmanschappen op een ander Schip oft Schepen mogen leggen, om hun reyse ende voyagie te volbrengen ter gedestineerde plaetse'). If the insured himself did not do so, the insurer could have the goods transshipped. The insurer would furthermore in all cases bear the cost of any such transshipment.266

This measure was repeated in s 8 of the Amsterdam keur of 1598.267 If the ship was detained or arrested, or if she became incapable of completing the agreed voyage, the insured cargo owner had to wait a specified period of time before he could abandon the cargo.268 Within that period the insured could transfer the goods to another ship or ships for the completion of their conveyance to the destination ('[e]nde

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262 See ch XIX § 2.2 infra as to abandonment, and ch XVI § 1 infra as to the aversion and minimisation of loss.

263 For some earlier Spanish measures, see eg Reatz Geschichte 238-239.

264 In terms of s 16 of this placcaat, there was no such period of waiting in the case of perishables: the insured could claim immediately. It is uncertain whether, in the case of perishables, there was also no need for transshipment or whether it was in fact permitted; presumably the latter, if such transshipment could be arranged sufficiently speedily.

265 Presumably, if not for example arrested together with the carrying ship.

266 As to s 15, see eg Goudsmit Zeerecht 266-267 who also points out that in terms of s 17 of the provisional placcaat of 1570 the cargo owner had to look for another ship, equally 'goet ende souffissan', on which to transship his goods, irrespective of whether or not such goods were perishable, any additional freight which the merchant would have to pay being for the account of the insurer.

267 Section 15 of the Middelburg keur of 1600 was identical.

268 Again perishables could be abandoned immediately (see s 9 of the keur of 1598).
sullen de Koopluyden opte voorsz Schepen geladen hebben ... de voorsz Koompmanschappen op een ander Schip ofte Schepen mogen leggen, om hun reyse ende voyage te volbrengen ter gheedestineerder plaetse'). If the insured did not do it, the insurer himself could. This possibility was not provided for in subsequent measures, no doubt because of the fact that it was difficult to justify the insurer being entitled to transship the goods before those goods had actually been abandoned to him. In the event of a transshipment, the insurer had to bear the cost of the transshipment, any loss or damage caused by it, and the increased freight involved.\textsuperscript{269} The model cargo policy appended to the \textit{keur} of 1598 contained permission so to transship, to do so on any other ship or ships, irrespective of size, and even to transship when there was no necessity therefor.\textsuperscript{270}

There was a similar provision in s 13 of the Rotterdam \textit{keur} of 1604 although it was more explicit. It concerned the case where the insured ship\textsuperscript{271} became un navigable or was arrested before she had reached the place of the eventual or final discharge designated in the insurance policy, and where the insured goods on board (‘daer inne zijnde’) had either not been arrested or had been released (‘niet en worden gearresteert, ofte gearresteert zijnde, wierden ontslagen’) with the ship remaining under arrest.\textsuperscript{272} The section provided that in such a case the insured or his representative could transship the insured goods to another ship with which such goods could be conveyed to the place of eventual discharge (‘soo sal de Verseeckerde ofte sijnen Commis, de verseeckerde goeden mogen over-schepen ofte laden in eenich ander Schip, om de selve daer mede ter plaetse vande voorsz uyterlijke ontladinge te voeren’). The insurer would bear the risk and peril involved as he would have done had the goods remained on the first ship (‘ende sullen de Asseuradeurs gelijcke perijckel ende resico loopen, als sy ghedaen souden hebben, in ghevalle de selve goederen in ’t eerste Schip ghebeleven waren’), and would furthermore have to compensate the insured for the cost of the transshipment (‘aende Verseeckerde moeten goet doen de kosten vande herladinge inden tweeden Schepe’), the loss or damage caused by it, and the additional freight involved in the onward carriage.\textsuperscript{273}

\textsuperscript{269} As to s 8, see eg Goudsmit \textit{Zeerecht} 327.

\textsuperscript{270} It stated to cover the insured ‘oft door noot, oft met wille, de voorschreve goeden ontladen werden, ende herladen in eenich ander Schip oft Schepen, kleyne oft groot, (’t welck sy doen sullen mogen uyt haer selvs authoriteyt, sonder ons consent oft toedracht te verwachten) sullen wy loopen den voorsz resicque ende avontueren, als oft de voorsz goeden noyt ontladen waren ghewest’. For further examples of similar transshipment clauses in sixteenth-century policies, see De Groote \textit{Zeeassurantie} 101-102.

\textsuperscript{271} And, presumably, also an uninsured ship on which insured cargo had been loaded, that is, a carrying ship.

\textsuperscript{272} Obviously, if the cargo was also arrested and not released, there was no possibility of transshipment but merely of an abandonment to and a claim against the insurer for the loss of that cargo. This distinction was not clearly drawn in the earlier measures.

\textsuperscript{273} As to s 13, see eg Goudsmit \textit{Zeerecht} 398 who notes that although s 13 had been derived from s 8 of the earlier Amsterdam measure, it no longer pertinently gave the insurer a right to transship the insured cargo.
These early measures appear to have been in conformity with the position in Antwerp customary law at the beginning of the seventeenth century, even though the position was there regulated in somewhat more detail. Article 136 of the Compilatae of 1609 concerned the case where the commencement or prosecution of the voyage was prevented by the arrest or detention of the ship or by her incapability of commencing with or further prosecuting the voyage. It laid down that an insured wishing in such circumstances to transship his cargo for the account of the insurers, had, in the case of a local transshipment, to notify the insurers beforehand, indicating the name of ship on which the insured goods were to be loaded. In the case of a transshipment elsewhere, art 137 required of the insured formally to declare his intention of doing so before a local court or a notary and then to send the deed made of his declaration to the insurers within a specified period of time. If the insured failed to do this and transshipped without such notice or declaration, the insurers were in terms of art 138 not liable for any loss or damage during or after the transshipment but could nevertheless retain or claim the promised premium. If such notice was given or such a declaration made, however, and the goods were sent with the ships named by the insured in

274 As to the position in Antwerp in the case of a change of ship or transshipment ('overslag'), see Mullens 61, 64-65 and 75-76. He points out that transshipment was permitted in an emergency only and that different consequences resulted depending on whether it occurred at the port of departure or en route. A voluntary transshipment in principle resulted in the termination of the insurance contract, being an alteration of an essential 'element' of the insurance concerned. At least that was the position if it occurred in the port of departure. The Antwerp compilations of customary law were silent on voluntary transshipments en route, presumably, according to Mullens, because transshipments en route may in practice have occurred only in emergencies.

275 See De Longe vol IV at 256-258.

276 It is notable that Roman-Dutch sources treated only the case of transshipment in the course of the voyage and not at the place of departure. But although not specifically mentioned, it is possible that a compelled transshipment of insured goods after the conclusion of the contract and loading but before the departure of the ship (eg where the ship was detained or incapable of departure at the place of loading) may have been treated on the same basis as any subsequent such transshipment, with the insured being entitled to transship and to hold the insurer liable under the insurance contract for the carriage of the goods on another vessel.

The view of Roccus De assecurationibus note 56 was that the insured was in such a case merely permitted to offload the goods and recover the premium from the insurer, and that he would then have to load his goods on another ship and conclude a new insurance contract. This possibility, clearly more onerous for the insured, may have applied where the insurer had not yet been at risk (and that, it will be remembered, was before the goods were brought alongside), but appears difficult to justify where that was not the case. Roccus’s view must probably be seen against the different moments when the risk commenced in Dutch and Italian law. See again ch XII § 1.3.1 supra.

277 It seems the insured was not obliged but merely entitled to transship for in terms of art 140, if the goods were retained by the insured and not sent or transshipped, the insurers were nevertheless entitled to a ½ per cent premium, without them being liable for any expenses of loading or discharge.

However, in certain cases transshipment was not permitted. Thus, in terms of art 143, where a ship was detained which had edibles or other similar (perishable) cargo on board which it was possible to sell locally for more than their insured value, there was no action against the insurers, except in the case where they could not be sold for an amount equal to their insured value.
that notice or declaration, art 139 provided that the insurance remained valid as if the goods had stayed on the first ship and the insurers could therefore incur liability in respect of those goods.

Article 118 of the Compilatae\(^{278}\) dealt with the liability of the insurer for a loss in the case of a voluntary, non-emergency change of ship in the port of departure and loading. The insurer was then not liable for any risk run on another ship, except by his express declaration and consent, mere silence not imposing any obligation on him. Even if a proper notice of the change had been given to him, that served only to permit a claim for the return of the premium.\(^{279}\) Articles 79-82\(^{280}\) dealt with the issue of the return of the premium in the case of both a voluntary and a compelled transshipment and the matter was regulated in line with the return of the premium in the case of a change of the voyage or the course.

In the cargo policy provided by the Amsterdam amending keur of 1688, the earlier permission to transship was retained, but now it was restricted to a transshipment in an emergency, and it confirmed the insurer's liability for the risk and cost involved.\(^{281}\) There was an equivalent provision in the model ransom policy in the Amsterdam amending keur of 1693.\(^{282}\)

Transshipment continued to be regulated along these established lines in the Rotterdam keur of 1721.

Section 53 mentioned the case of the ship becoming unnavigable before the completion of the voyage and of the cargo having to be discharged ('de Goederen moesten worden ontladen') as a result of that unnavigability or of another emergency ('of andere nood').\(^{283}\) In such a case the insured, his representative ('Commissionaris'), or the master was entitled to reload those goods onto another ship or ships, irrespective of size ('zal de Geasseureerde, desselfs Commissionaris, of Schipper, de magt hebben dezelve te doen herladen in een ander Schip of Schepen, kleyn of groot'). The insurers, in turn, firstly, remained at risk as if the goods had not been discharged ('ende zullen eger de Assuradeurs tot hunnen asten b/yven houden het risico, als of de Goederen niet ontladen waren geweest'), secondly, had to compensate the insured for

\(^{278}\) See De Longe vol IV at 248-450.

\(^{279}\) Articles 119-121 dealt with a change of the master of the ship.

\(^{280}\) See De Longe vol IV at 232-334.

\(^{281}\) The policy stated that the goods were insured 'of door nood de voorsz Goederen ontladen wierden, en herladen in eenig ander Schip of Schepen, kleyn of groot ('t welck sy doen sullen mogen uit haar zelfs authoriteit, sonder ons consent of toedracht te verwachten) sullen wy loopen de voorsz Risicque en avonturen, als of de voorsz Goederen noit ontladen en waren geweest'.

\(^{282}\) This policy stated that 'indien het selve Schip [ie, the one on which the insured was sailing] mogt komen te verongelukken, of de Reise niet en vervorderde, soo sullen wy de Risico blijven loopen op alsuik ander Schip of Schepen, daar den voorsz ... [name of the insured] sich in soude mogen embarqueeren, om de bovengenoemde Reise te volvoeren, 't zy te Water of te Lande'.

\(^{283}\) Therefore, now any emergency justified a transshipment, and no longer only those specifically mentioned, as was the case in the keur of 1604.
the cost of the reloading as well as the damage which may have been caused in the
process, and thirdly, had to compensate the insured for everything he had to pay more
by way of freight than he would have had to pay had the original ship been able to com-
plete the voyage.

Section 54 contained a novel measure. It determined that the insured was
obliged to give notice of the transshipment to the insurers as soon as it came to his
knowledge,\(^{284}\) failing which he had to pay the insurers so much compensation as was
determined by the Chamber with reference to the facts of the case ("als Com-
missionarissen, na de Constitutie van de zake, in regelmatigheyd zullen arbitreren").\(^{285}\)

Again the cargo policy in the Rotterdam keur of 1721 confirmed the liberty to
transship in an emergency and also the insurer's liability in such a case.\(^{286}\)

The Amsterdam keur of 1744 did not emulate the neat regulation of transship-
ment in Rotterdam but retained the old approach in s 26. Again the owner of insured
cargo on board the insured ship\(^{287}\) which was arrested, detained or captured, or which
became incapable of completing the agreed voyage, and irrespective of whether or not
the goods themselves were arrested ("het za deseelve mede belemmers zijn of niet")
had to wait a specified period of time before he could abandon the goods to and claim
compensation from the insurers.\(^{288}\) However, the insured remained obliged himself or
through his representatives ("Correspondenten") to preserve the goods and to obtain
their release (if arrested), and he had the liberty, during that period of time, to transship
the goods (if not arrested or if released) to another ship or ships ("met vryheyt om ook
binnen de voorsz. Termynen deseelve [goods] op andere Schip of Scheepen over te
laaden"). In such a case the cost, increased freight and damage to the goods during
the transshipment and on their further carriage were for the account of the insurers
("wanneer de onkosten, toereedings, meerder vragt, ook beschadigheyt en bederf van

\(^{284}\) This notice was required to reduce the possibility of fraud. On this point s 18 of title IV of the Hamburg
Assicuraz-Ordnung of 1731, unlike the Amsterdam keur of 1744, followed the Rotterdam provision. See
Dreyer 141-142 and further Frenzl Hamburgische Admiralitaltsgericht 109-193 as to the distinction in the
Hamburg Ordinance between a voluntary and a necessary transshipment.

\(^{285}\) As to ss 53 and 54, see eg Goudsmit Zeerecht 398; and Kracht 37; and as to the superiority of s 53
over comparable measures, including s 26 of the subsequent Amsterdam keur of 1744, see Van der
Keeszel Praelectiones 1469 (ad III.24.12).

\(^{286}\) The policy provided: "ende of door nood de voorsz. Goederen ontladen wierden, ende herladen in
eenig ander Schip of Schepen, kleyn of groot (het welk za doen zullen mogen, uyt haar zelst authorizeyt,
zonder ons consent at te wagten) zullen wy loopen de voorsz. risicque ende aventuren, als of de voorsz.
Goederen niet ontladen waren geweest". The ransom policy in the keur stated that "[g]elyk ook deze
verzekeringe zal blyven ende stant houden alsochoon het hier vorengemelde Schip [ie, the one on which
the insured was sailing] quame te verongelukken, of de Reyze niet vervorderde of uytvoerde, ende de
voorsz ... tragtende de Reyze te volvoeren op eenig ander Schip of Schepen, of ook te Lande".

\(^{287}\) Or, presumably, the carrying ship.

\(^{288}\) In such circumstances the insured shipowner too had to wait before he could abandon and claim.
The cargo policies in the Amsterdam keuren of 1744 and 1775 retained the appropriate stipulation in this regard, permitting transshipment in an emergency and providing for the insurer’s consequent liability. Their model ransom policies did likewise.

Roman-Dutch authors remarked on the possibility of an involuntary or necessary transshipment of insured goods as regulated in the legislative measures just mentioned, specifically in cases where the voyage could not be completed by reason of some emergency beyond the control of the insured, such as where the ship was arrested or became unnavigable. They mentioned the insured’s freedom to transship in an emergency and both the continued liability of the cargo insurer for loss or damage during the further carriage of the goods as well as his liability for the cost of the transshipment, the additional freight, and the loss or damage caused by the actual transshipment itself.

They made the point that the insured’s freedom to transship had to be reasonable in the circumstances and that he could for example not immediately transship if it appeared that the emergency was of a minor and of a temporary nature. Thus, Van der Keessel explained that the insured cargo owner could not, on the ground of a minor problem experienced by the ship en route as result of which she put into port, immediately transship those goods on another ship. He had to wait a while for the ship to be repaired, because the legislative measures permitted a transshipment at the expense of the insurer only if the ship was either totally unfit or unable to perform the agreed voyage or unnavigable. Obviously, if the insured goods themselves were arrested together with the ship, it was not a question of transshipment but of loss and abandonment of such goods and of a claim on the cargo policy itself.

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289 As to s 26, see eg Goudsmit Zeerecht 355-356 who notes that whereas the insured had the right to transship insured cargo, there was no mention in the keur of 1744, following maybe the Rotterdam example, of the insurer’s power to transship.

290 They provided that the goods were insured ‘of door nood de voorsz. Goederen ontladen wierden, en herladen in eenig ander Schip of Schepen, klein of groot; (het welk zo doen zullen mogen uit haar ze/f/autoriteit, zonder ons consent of toedragt te wachten) zullen wy loopen de voorsz. Risico en avanturen, als of de voorsz. Goederen nooit ontladen waren geweest’.

291 See Van der Keessel Praelectiones 1469 (ad III.24.12).

292 See eg Van der Keessel Theses selectae th 754 (ad III.24.12); idem Praelectiones 1467 (ad III.24.12); and also Van der Linden Koopmans handboek IV.6.8.

293 That is, ‘onnut oft onbequaem ... om de voorseyde reyse te doen’ (s 15 of the placcaat of 1571) or ‘onnut ende onbekwaam om de gedestineerde reyse te doen’ (s 8 of the Amsterdam keur of 1598).

294 That is, ‘buiten staat om de gedestineerde reise te doen’ (s 26 of the Amsterdam keur of 1744).

295 That is, ‘innavigabel’ (ss 13 and 53 of the Rotterdam keuren of 1604 and 1721 respectively).

296 See further eg Van der Keessel Theses selectae th 756 (ad III.24.13).
An involuntary or compelled transshipment was therefore in Roman-Dutch law an example of an alteration of the risk to which the insurer could not object and which did not terminate the insurance contract and relieve him of liability but which, instead, resulted in a continuation of the risk.\textsuperscript{297} A voluntary transshipment, in turn, was not specifically mentioned and regulated, but would presumably, by analogy to a change of voyage or of course, in appropriate circumstances have relieved the insurer of liability or otherwise, depending on whether such transshipment occurred with or without any instruction from the insured, and depending further on whether or not it was permitted by the policy.\textsuperscript{298}

Lastly, a change of the carrying ship has to be distinguished in this connection from a change of the name of the ship or of the master of the ship, both of which topics have already been treated elsewhere.\textsuperscript{299} A change of the name of the ship from that mentioned in the policy, for example, if it occurred in good faith, did not affect the insurance on the ship itself and also not the insurance on cargo on board that ship, provided the identity of the ship remained certain.\textsuperscript{300}

In the Wetboek van Koophandel transshipment is treated alongside a change of the voyage and of the course.\textsuperscript{301} In terms of art 637, the insurer is liable for all loss of and damage occurring to insured objects through a change of ship in necessity ("door ... gedwongene verandering ... van het schip").\textsuperscript{302} A voluntary change of ship ("willekeurige ... verwisseling van het schip") is treated in art 638 alongside a voluntary change of the voyage or of the course and a distinction is therefore drawn between hull policies\textsuperscript{303} and cargo policies\textsuperscript{304} while special provision is made for a voluntary change

\textsuperscript{297} See generally eg Dorhout Mees Schadeverzekeringrecht 563.

\textsuperscript{298} As to a voluntary transshipment en route, see eg Roccus De assecrationibus note 28 (a voluntary transshipment relieves the insurer of liability because there is no parity of risk in the case of goods in different vessels of different conditions and nationalities); idem note 90 (a voluntary transshipment on the instruction of the insured relieves the insurer of liability even if there was no fraud on the part of the Insured).

\textsuperscript{299} See again ch VIII § 4.2 supra as to the content of insurance policies.

\textsuperscript{300} See again the Hooge Raad decision of 1722 (Binkershoeck Observationes tumultuatoriae obs 1819; idem Quaestiones juris privati IV.11) referred to in detail in ch VIII § 4.2.4 supra; Lybrechts Koopmans handboek V.90; and Van der Linden Koopmans handboek IV.6.7.

\textsuperscript{301} See again § 1.2.7 supra and further Ten Kate 33-35.

\textsuperscript{302} Article 637 is, it would appear, concerned only with cargo insurance.

\textsuperscript{303} Article 638-1 lays down that in the case of a hull insurance where the ship is named in the policy, a change of ship without the consent of the insurer relieves him from liability as from the moment of such change. No transfer of the insurance to another object (ship) is possible without the consent of the insurer. This is so, it may be added, even in the case of an involuntary change of ship. See again ch X § 6 supra.

\textsuperscript{304} Article 638-2 provides that the insurer is relieved of liability by a voluntary transshipment if it occurred on the instruction or with the express or implied consent of the insured, otherwise, therefore, than in the case of an unauthorised transshipment.
of ship in the case of insurance of goods belonging to the owners of the ship in which such goods have been loaded.\textsuperscript{305}

Related to the transshipment of goods from one ship to another and also involving a potential increase in the risk for the insurer, is the situation which can arise in connection with an insurance concluded on goods to be loaded and carried to their destination in different specified ships ("verscheidene aangeduide schepen") with an indication of the sum to be insured on each ship. This is referred to as "verzekering bij verdeeling". In art 652 it is enacted that if in such a case the whole cargo is loaded on a single ship or in a smaller number of ships than was agreed upon, the insurer is not for more than the sum or sums he had insured on the ship or the ships which had in fact taken on cargo, notwithstanding that all the specified ships were in fact lost.\textsuperscript{306}

Transshipment is also provided for in English law. Although it was possible in exceptional circumstances, such as in time of war, for insurance policies to prohibit the transshipment of insured cargo,\textsuperscript{307} English policies in the seventeenth century were either silent on the matter with the understanding that the cargo insurer remained liable in the event of the cargo being transshipped for a good reason, or they expressly provided cover for the cargo in the named ship or any other ship.\textsuperscript{308}

In the Marine Insurance Act of 1906, s 59 now provides that in the case of a justified landing and reshipment or a justified transshipment of insured cargo at an intermediate port en route to the destination, the liability of the insurer continues despite such landing or transshipment.\textsuperscript{309}

\subsection{1.4 Delay}

The instances where the Roman-Dutch sources specifically recognised that a delay in the commencement, prosecution or completion of the voyage could also

\textsuperscript{305} See art 641. As to the transshipment of goods en route into other vessels ("op reis overgeladen in ander rijt- of vaartuigen") in the case of carriage over land or on internal waters, see arts 691 and 692.

\textsuperscript{306} The insurance is thus void in respect of such other ships and the (or a proportionable part of the) premium is returnable, less \( 1/2 \) per cent. This provision was taken over from art 361 of the French Code de commerce.

\textsuperscript{307} For example, to avoid the increased risk should goods be transshipped onto an enemy ship or a ship belonging to a nation engaged in a war.

\textsuperscript{308} See eg Malynes \textit{Essay} vol 1 at 28. Molloy \textit{De jure maritimo} II.7.11 distinguished between the case where the policy was silent on the topic and where the insured transferred cargo from one ship, which had become leaky 'and crazy', to another (he noted that the insurers were not liable for a subsequent loss, although a note in the margin stated that this position was much doubted, and that decisions of the courts on this point had generally gone against insurers), and the case where the policy contained a stipulation that '[t]he Goods Laden to be transported and delivered at such a place by the said Ship, or by any other Ship or Vessel until they be safely landed' (he noted that then the insurers were liable for such a loss). See too \textit{idem} II.7.15 (transshipment onto an enemy ship).

\textsuperscript{309} See further Chalmers 87, noting the unsettled state of English law in this regard and the absence of any clear duty, as in some Continental codes, on the master to transship whenever it is reasonable to do so.
amount to an alteration or increase in the risk with particular legal consequences, do occur but infrequently.\textsuperscript{310}

It has already been explained that a duty was imposed upon the insured to off-load his cargo within a specific number of days after the arrival of the ship in the port of destination, and that if the duty was not complied with, the insurer was relieved of liability for any subsequent loss of or damage to the goods.\textsuperscript{311} However, indications are that the duty to avoid any delay extended also to the commencement and the prosecution of the voyage. The Antwerp Complatae of 1609 contained at least two provisions which hinted at the insured's duty not to delay the commencement and prosecution of the insured voyage unduly. Article 158\textsuperscript{312} stated that if the ship was fully laden and equipped for the voyage, she had to depart with the first favourable wind and without delay ('sonder ... versuijmenissen') unless there was a material reason which persuaded the master or the consignor to delay otherwise to prevent a probable peril or loss. Article 13\textsuperscript{313} declared that if en route the ship touched other ports, she could not remain there longer than was permitted to discharge her cargo ('naer dat men bequamelijk tot lossinge can geraecken') and/or to ship further cargo.\textsuperscript{314}

Of course, a delay in the prosecution of the voyage could have involved a simultaneous alteration of the risk by one of the other more readily recognised and better regulated instances of such alteration or, alternatively, one of other recognised instances of alteration of the risk could also at the same time have amounted to a delay. Thus, a change of the voyage or of the course of the voyage could have involved a delay in the prosecution of the voyage.\textsuperscript{315} Again, if the delay was caused by a peril insured against (for example, an unfavourable wind or bad weather at sea), it would

\textsuperscript{310} The problem was not unknown to earlier authors, though they mentioned it in connection with the insured's undertaking to depart on a specific time. Thus Santerna De assecurationibus III.46-48 explained that the insurer was not liable if the shipowner, after having stated that he was ready to sail at a specific time when the adventure was not so risky, and the insurer had concluded the contract on that basis, deferred the voyage to a worse time weathewise, and the ship was then lost with her cargo. See also eg Roccus De asssecurationibus note 38 (if a person does not depart on the promised or agreed time, he departs at his own risk).

\textsuperscript{311} See again eg ss 46, 47 and 49 of the Rotterdam keur of 1721, s 5 of the Amsterdam keur of 1744, and ch XII § 1.3.1 supra.

\textsuperscript{312} Of par 5, title 11, part IV (see De Longe vol IV at 264).

\textsuperscript{313} Of par 4, title 11, part IV (see De Longe vol IV at 254).

\textsuperscript{314} Namely five days for discharging, ten days for loading, and fifteen days if the particular port was visited for both reasons. If she put into port to obtain instructions, and those turned out to be that he should discharge, she was also allowed fifteen days in port, while if the instruction was to proceed with the voyage without discharging there, she had to depart within three days after her arrival, if there was a favourable wind. As to the duty to discharge within a specific time after arrival, see again ch XII § 1.3.1 supra.

\textsuperscript{315} However, that was not necessarily so. A delay could merely have been the tardy prosecution of the agreed voyage along the agreed route. Or a change of the voyage or the course could have taken the form of a curtailment of the voyage.
appear that the insurer was not relieved of liability. It was otherwise, though, where the
delay was caused by the insured himself, such as when he had failed to make use of a
favourable wind, or had failed to load or discharge within a reasonable time under cir-
cumstances which did not excuse such failure.\textsuperscript{316} The position was the same if the
delay was caused by the fault of the master and/or the crew, if such conduct was not
or could not be insured against. The latter in particular appears to have been a com-
mon problem, with the attractions of especially wine and women tempting masters and
crews not only to delay unduly in port but even to change the course of their voyages
and to deviate to unauthorised ports to partake of such pleasures.\textsuperscript{317}

Occasionally, though, circumstances or other provisions in the insurance policy
excused or permitted such a delay by the insured and prevented the insurer from relying
on a delayed prosecution of the voyage. One example in this regard was an
undertaking by the insured to sail with a convoy or even when the ship was merely
permitted to sail with a convoy.\textsuperscript{318}

It may well be that the consequences of a delay would in Roman-Dutch law have
been treated by analogy to the position in the case of other types of alteration of the
risk, notably a change of the voyage or of the course of the voyage, and that the same
factors (such as emergency, or a liberty clause) would also have operated in favour of
the insured in the case of the occurrence of such a delay and of any loss or damage
resulting from or during such a delay.

In the \textit{Wetboek van Koophandel} too the question of loss or damage caused by a
delay is not treated systematically. Apart from the measures on the timeous discharge
of cargo at the destination,\textsuperscript{319} the topic was approached only indirectly in one other
provision. In terms of art 642 an insurer is not liable, in an insurance on freight, for any
damage occurring from the moment when the master, without lawful excuse and
having all the necessities for the voyage, let the opportunity to commence the voyage

\textsuperscript{316} See generally Ten Kate 10-11.

\textsuperscript{317} Santerna \textit{De assecrationibus} III.47 referred to a delay occurring through the fault of the master and
crew ‘\textit{qui quando detinentur in portum a mulierculis, vel dulcedine vini Capatiche de Ulisbona}’, and
Roccus \textit{De assecrationibus} note 38 in this regard mentioned (in Feltama’s translation) the master and
mariners being detained in port ‘\textit{door wyntje en trynje}’. Malynes \textit{Consuetudo} vol I at 28 likewise
mentioned sailors’ ‘love of women and wine [which] maketh them loose the opportunitie of time, so that by
contrarie windes their voyage is retarded’.

\textsuperscript{318} See eg the case before the \textit{Hooge Raad} in 1717 (see Bynkershoek \textit{Observationes tumultuariae} obs
1374; \textit{idem Quaestiones juris privati} IV.8) where the ship was permitted (and the position would have
been the same had she been compelled) to sail with a convoy. When the was lost, one of the insurers’
defences was that in order to sail with the convoy, she was detained for some days at her port of
departure at a time when, due to a favourable wind, she could have sailed and could possibly have
avoided the perils of the sea by which she was lost. The \textit{Raad}, in holding for the Insured, pointed out that
the insured was expressly permitted to sail with a convoy and that the insurers had not stipulated that she
was to sail as soon as possible and without a convoy if there was a favourable wind. As to the other
defence of deviation, see again § 1.2.4.4 \textit{supra}, and as to the undertaking and liberty to sail with a
convoy, see § 2.3. \textit{intra}.

\textsuperscript{319} See again ch XII § 1.3.6 \textit{supra} and eg arts 627 and 629 concerning the obligation to discharge within a
specific number of days, unless prevented from doing so by a lawful reason.
pass by ("de gelegenheid heeft verzuimd om de reis te vorderen"), unless the insurer had expressly insured against the consequences of such a delay.320

In English law it appears to have been accepted custom that the insured had to commence the voyage of the insured ship or the loading of the insured cargo within a reasonable time after the conclusion of the insurance contract. He further had to prosecute the voyage without unreasonable delay, time being a material factor in the extent of the risk taken over by insurer. Thus, it was well recognised that summer and winter risks were not equal and attracted different premiums. If there was unreasonable and unexcused delay, the insurer was relieved of liability.321

Delay is treated in two respects in the Marine Insurance Act of 1906.

In the first place the Act contains provisions on the effect of a delay in the commencement and prosecution of the voyage. In terms of s 42(1), where property is insured by a voyage policy 'at and from' or 'from' a particular place, it is not necessary for the ship to be at that place when the contract is concluded, but there is an implied condition that the adventure will be commenced within a reasonable time,322 and if it is not so commenced, the insurer may avoid the contract. Section 42(2) provides that this implied condition may be negatived by showing that the delay was caused by circumstances known to the insurer before he conclusion of the contract, or by showing that the insurer had waived compliance with the condition. In terms of s 48 the insured adventure in the case of a voyage policy must be prosecuted throughout its course with reasonable dispatch, and if it is without lawful excuse not so prosecuted, the insurer is discharged from liability as from the time when the delay becomes unreasonable.323 Section 49(1) provides the excuses for deviation and also for delay in the prosecution of the voyage.324 The fact that the same excuses apply both to deviation and to a delay in the prosecution of the voyage shows the close relationship between them, both being, in essence, instances of an alteration of the risk.325

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320 See further Dorhout Mees Schadeverzekeringsrecht 235 ("verzuim van vaargelegenheid"). Voorduin vol X at 359 explains that the insurer is relieved of liability in the case of an intentional 'windverlegging', i.e., when the master without a lawful excuse lets the opportunity to depart pass by. The reason for the insurer's release from liability is that the master in so doing exposes the insurer to a different risk than that agreed upon by the parties. The parties can specifically agree otherwise, though, or the insurer can generally agree to be liable for the conduct of the master.

321 See eg Malynes Consuetudo vol I at 28.

322 This is a question of fact (see s 88).

323 According to Chalmers 69, an unreasonable delay in the commencement and prosecution of the voyage may amount to an abandonment of the adventure by the insured which will terminate the insurance contract.

324 See again § 1.2.8 supra where these excuses were mentioned. Again, in terms of s 49(2), where the cause excusing the delay ceases to operate, the ship must again prosecute her voyage with reasonable dispatch. Note that the excuses listed in s 49 do not apply to any delay in the commencement of the adventure: 'lawful excuse' is not mentioned in s 42(2).

325 According to Chalmers 69, an unjustifiable delay in the prosecution of the voyage is usually classed under deviation, but that it seems clearer to distinguish between an alteration in time and one in location.
Secondly, the Marine Insurance Act deals with the insurer’s liability for a loss or damage caused by a delay. Section 55(2)(b) provides that, unless otherwise agreed, the insurer of a ship or of goods is not liable for any loss proximately caused by a delay, even though the delay be caused by a peril insured against. This provision, it should be noted, does not apply to policies on freight where the loss of freight by reason of a delay in the prosecution of the voyage is specifically covered.\textsuperscript{326}

2 Statutory and Contractual Control of the Risk

2.1 Introduction: Incidental Terms to Control the Risk and Their Breach

The second issue to be considered in this chapter is the attempts by insurers not only to circumscribe and delimit the risk they took over, but also to control it after the conclusion of the insurance contract and to prevent or reduce an increase in the risk, whether or not that was caused by the conduct of the insured. Closely related to this is the fact that from early on legislatures too sought to control, prevent and limit at least some of the risks which happened to be taken over by insurers, and their attempt had an effect, even if only indirectly, on insurers’ own efforts in this regard.

Given that the law did not grant any general protection to the insurer against an increase in the risk in the course of the insurance contract apart from the recognised instances encompassed within a change of voyage, course and ship, there was, on the face of it, a need for a contractual regulation of the matter. By way of express stipulations in the insurance contract, duties could be imposed upon the insured with the aim of reducing the likelihood of any materialisation of the risk.

As has been shown earlier, it generally came to be accepted in Roman-Dutch law that the parties were free to insert such terms into their insurance contract as they saw fit, and that by the eighteenth century, use of the statutory model policy forms was no longer compulsory and that other forms or deviations from the model policy forms were permitted.\textsuperscript{327} This was recognised also by the Roman-Dutch authors.\textsuperscript{328} Thus Grotius\textsuperscript{329} thought the parties could make an insurance contract on such terms as they pleased ("op zulcke voorwaerden als haer gelleft"), provided that it contained nothing contrary to good faith and provided further that none of its terms were prohibited by

\textsuperscript{326}See Chalmers 79.

\textsuperscript{327}See again ch VIII § 4.1.2 supra.

\textsuperscript{328}See again ch VIII § 4.1.3 supra for the views of Van Zurck and Van der Keessel on the prescribed or suggested model policy forms appended to the various insurance laws.

\textsuperscript{329}Inleidinge III.24.6.
However, prior to the nineteenth century Dutch insurers exercised this freedom relatively infrequently in attempting to control the conduct of the insured and, in the process, to restrict the extent of the risk to which they were exposed and the incidence of loss or damage for which they could be held liable.

The need to impose duties upon the insured to take particular steps which would reduce the risk and the incidence of loss, and also the use made in practice of contractual stipulations to that effect in Roman-Dutch law up to the end of the eighteenth century, must be seen against the background of the state of insurance law at that time. A number of factors are relevant in this regard. Firstly, insurers were protected, to a much greater extent than later, against increases in the risk and resulting losses by the fact that they were not liable for the consequences of the insured's own conduct, whether intentional or negligent. If a loss could be ascribed to the insured's own conduct, or, albeit to lesser and decreasing extent, to that of someone for whom he was responsible, the insurer incurred no liability on the policy. Secondly, and especially important in the present context as will appear in due course, the insurer incurred no liability for loss or damage which could be ascribed to a vice inherent in the object at risk. Thirdly, given that insurances were mainly concluded for a limited period of time, such as for the duration of a single voyage, there was no great need for insurers to be protected against or, for that matter, to be notified of any increase in the risk in the course of the contract, the increase being, as far as the insurer was concerned, of no more than a temporary nature and the insured not always having a great deal of control over such an increase in the risk and in the exposure of the insured property to that risk after the departure of the insured or carrying ship. Fourthly, the legislatures at the time took an active interest in the control and reduction of marine risks and losses and in this regard imposed numerous statutory duties on shipowners and cargo owners. Their compliance with those duties benefitted their insurers too.

330 See also eg Wassenaer Praktyk notariael VIII.5 ('op sulke voorwaarden ende condities als het haar belijft, mids dat die niet en stryden jegens de goeder trouwen, ende niet met bedroch gemengt zijn, ende niet bedongen word dat by de wetten als tegen het gemene beste strijd, ende verboden is'); Scheltinga Dictata ad III.24.6 sv 'mids niet stryden, etc'; Van der Keessel Theses selectae th 730 (ad III.24.6) (all such stipulations as are not prohibited by law may be inserted into an insurance contract, even if a precise formula has been prescribed); idem Praelectiones 1447 and 1448 (ad III.24.6); and Van der Linden Koopmans handboek IV.6.7.

331 Thus the Antwerp Compiatae of 1609 in art 1 of par 1, title IV (see De Longé vol IV at 198) provided that parties could insure at such price and on such terms as they could agree on and as were not prohibited ('als zij des eens kunnen worden, ten zij datter verbouth ter contrarien is'). Note, not such terms as were permitted but such terms as were not prohibited.

332 See again ch VI § 4.1 supra.

333 See ch VI § 4.3 supra.

334 See ch VI § 3.3 supra.
when they did insure and reduced the need for the contractual imposition of such duties.\textsuperscript{335}

Because of these factors, Dutch insurers made relatively little use of contractual terms to prohibit conduct on the part of the insured which could increase the risk and the incidence of loss, or to compel the insured to take particular steps to reduce such risk. Nevertheless, such terms, usually added in handwriting to printed policy forms in individual instances as and when the insurers saw fit, did occur in practice in a number of situations and they imposed a number of different duties upon insured.\textsuperscript{336} The terms under discussion here were inserted into insurance contracts in individual instances and after specific agreement between the parties. Given the fact that such terms were not generally regarded as of the essence of an insurance contract or as being natural consequences of such contracts in all instances in the absence of express agreement between the parties excluding such consequences,\textsuperscript{337} the nature of these terms, the extent and nature of the duties they imposed upon insured, when they were regarded as having been breached, and, importantly, what the legal consequences were of any such breach, were not matters provided for and regulated in insurance legislation.

Nevertheless, some indication of their nature and of the effect of their breach\textsuperscript{338} may be gained from the remarks by Van der Keessel, the only author who appears to have addressed the matter pertinently.

Van der Keessel noted\textsuperscript{339} that terms which the parties inserted into their insurance contract had to be strictly complied with but that if such terms had not been fulfilled (that is, in the event of their breach), the insurer was not relieved of liability unless such non-fulfillment (breach) had resulted in the loss or damage against which the insured was covered by the insurance and, by implication, which the insurer had to

\textsuperscript{335} I will return to this point shortly.

\textsuperscript{336} It is difficult to say whether Dutch insurance practices differed in this from contemporary practices elsewhere. Too much should probably not be read into the fact that English legal sources, for example, reflect a much greater use of such clauses than do the Dutch sources. As with a number of other developments in insurance law, the increasing use of such terms (known as ‘warranties’) by English underwriters appears to have occurred in the last half of the eighteenth century, at a time when Dutch insurance law and practice had already long passed its zenith and no longer played a leading role in Europe. As to the position in English law, see § 2.4 infra.

\textsuperscript{337} Therefore, they were neither essential terms (essentialia) nor natural terms (naturalia) but incidental terms (incidentalia) of the insurance contract.

\textsuperscript{338} It must be remembered, of course, that following Roman law and despite theoretical attempts in that direction, Roman-Dutch lawyers did not recognise a general right of unilateral withdrawal from a contract in the event of its breach, reliance still largely being placed on the application and effect in this context of the exceptio non adimpleti contractus. Even according to e.g. Grotius (De iure belli III.19.14) who advanced the notion of an implied resolutive condition in synallagmatic contracts being the basis and justification for a right of rescission in the case where the one party did not fulfill his undertaking, there was no resolution \textit{ex lege}. See further in particular Zimmermann 578-579, 801-802, 803 and 804-805.

\textsuperscript{339} Theses selectae the 730 (ad III.24.6); \textit{idem Praelectiones} 1448 (ad III.24.6).
Accordingly, he required a causal link between the breach of the insurance contract and the loss or damage the insurer was required to compensate in terms of that contract. Support for this statement Van der Keesss found in what he regarded as the excellent and correct decision of Hooge Raad in 1728 which will be considered in detail shortly.

Therefore, before an insurer could rely on the breach of a term in an insurance contract by the insured to avoid liability for loss or damage suffered by the latter, he had to establish a causal link between that breach and the occurrence of that loss or damage. The insurer was thus not automatically relieved of liability on the insurance contract in the event of a breach of that contract by the insured, but only where such breach had some bearing upon the loss or damage which had occurred. The precise nature of the causal link required between the breach and the loss requires some explanation. Although Van der Keesss did not expand on the issue, it would appear that the causal link required to exist in this regard must probably be understood in a rather loose sense, an assumption borne out by the factual situations which featured in the cases and examples which will be discussed later. Thus, an insurer was relieved of liability not only where the breach had actually caused the loss but if the breach could merely have contributed to the loss and even if it could merely have increased the likelihood of the occurrence of that loss. This will be the case, to put the matter the other way around, if the aim of the term in question was to decrease the likelihood of such occurrence. Put differently, the term and therefore also its breach must have been relevant or, in modern parlance, material not merely to the risk of loss or damage
in general which the insurer had taken over, but to the risk of the particular loss or damage which had actually occurred.

The precise effect of Van der Keessel's view will become more readily apparent shortly when the decision of 1728 and his explanation and illustration of it are considered. But it may already be noted that the requirement of a causal link between the insured's breach of an express term in the insurance contract and the occurrence of the loss or damage for the insurer's right to resile from that contract, does, of course, have numerous other consequences which Van der Keessel did not expressly mention. Firstly, it meant that mere non-compliance with or breach of the term did not by itself either terminate the contract or entitle the insurer to resile from it. Secondly, it meant that the term itself had to concern a material matter which was relevant to the risk and which could not only increase the risk of a loss generally but which could actually cause or at least contribute to the particular loss which had occurred.344 Further, a breach of any such express term in the insurance contract merely suspended the insurer's potential liability for any loss or damage causally linked to the breach for as long as the insured remained in breach; if the breach continued until the occurrence of a loss, it meant that the insurer could incur no liability on the policy if that loss was causally related to that breach; if not of a continuing nature, though,345 it meant that where the breach was remedied and the insured again complied with the contract at the time of any loss, the insurer could again incur liability for such loss, simply because then no causal link was possible between the earlier breach and that loss.346 Finally, it meant that a breach was irrelevant if no loss or damage in fact occurred.

Van der Keessel also did not consider the further possibility that the parties could, by an agreement to that effect, exclude one or more of these consequences and for example agree that a mere breach, per se and whenever it occurred and whether or not it was causally linked to a loss, would either automatically terminate the insurance contract347 or entitle the insurer to terminate it.

Roman-Dutch insurance legislation provided in detail which risks were insurable and which not, which objects were insurable and which not, and how much could be

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344 Breach of a term immaterial to the risk of loss in general therefore had no effect simply because its breach could have had no causal link to the occurrence of any loss covered by the insurance, including the particular loss for which the insured may have sought to hold the insurer liable on the contract.

345 The precise effect of the breach depended, of course, on the nature of the insured's undertaking and the duty imposed upon him by the term in question and on when exactly compliance was required. If the insured e.g. undertook that the ship would depart with a convoy or would be seaworthy at the commencement of the voyage, the fact that she did not or was not, constituted a final and irremediable breach. By contrast, if he had undertaken that the ship would sail to her destination with a convoy or that she would take on at intermediary ports such victuals and equipment as were required for the next stage of her voyage, partial compliance was possible and the breach remediable at any stage.

346 At least, that would appear to be the position in the majority of cases. It may be possible, though, that an earlier and remedied breach could, despite no longer occurring at the time of the loss, still have caused that loss or contributed to it.

347 As happened in the case of an alteration of the risk legislatively provided for in the event of a change of voyage, course or ship.
insured. Only in the latter part of the eighteenth century did insurance contracts begin to become more individualised and did insurers attempt to have and in fact appear to have had a greater say in what terms were included or excluded from their policies. It is probably true to say that initially, insurance legislation primarily sought to protect the insurer, being the weaker party of the two, from the frauds of the insured. There was little need for the insurer to protect himself in this regard. It was only during the nineteenth century, and no doubt because of the significant increase in the number of insurances which were then being concluded, that insurers generally sought to protect themselves by drafting their own contracts and by inserting specific terms into their contract for that purpose. Although isolated signs of this were apparent in the eighteenth century, insurance policy forms were until then by and large not yet the product of insurers themselves. Roman-Dutch law thus evidenced an absence, or at least an under-development in the methods, of contractual control of the risk and of insurance fraud by insurers themselves.

The lack of regulation in Roman-Dutch law of the insertion and effect of clauses written into insurance contract by insurers in an attempt to control the risk, was carried over into the Wetboek van Koophandel. Article 256-1 simply declared that all policies must express a number of matters there specified,* and all other terms agreed upon by the parties ('tusschen de partijen gemaakte bedingen'). Therefore, terms agreed upon between the parties have to be expressed in the insurance policy itself.

Some of the stipulations which were inserted into Dutch insurance policies prior to the end of the eighteenth century in an attempt on the part of insurers to control the insured's conduct and to prevent, as far as was possible, any alteration of the risk during the currency of the contract, may now briefly be investigated. For present purposes and for the sake of convenience, two topics with which the clauses appearing in marine policies were particularly concerned, may be distinguished. The same topics were also legislated for and that legislation had an influence on the position of the parties to insurance contracts. On the one hand there were clauses and contractual duties and, wider and more important and influential, statutory duties, relating to the condition of the ship and her ability to perform the voyage for which she was insured and to withstand the perils to which she would be exposed; that is, her seaworthiness. On the other hand there were those clauses and contractual but also some statutory duties which related to the prosecution of the voyage and which, more specifically, involved the ship's departing and sailing with a convoy. Ultimately, though, both imposed a duty on insured (respectively to have the ship in a proper and seaworthy state as to her equipment, manning, armaments, and the like, and to have her proceed on her voyage in the company of a convoy) in an attempt to reduce the risk of loss or damage by the perils taken over by the insurer.

* And in general all circumstances of which knowledge may be of material interest to the insurer. See again ch VIII § 4.2.8 supra as to the content of insurance policies.
2.2 Statutory and Contractual Regulation of the Seaworthiness of Ships

2.2.1 Legislation on the Seaworthiness of Ships in the Sixteenth Century

The condition of ships and their insurance or the insurance of cargoes loaded on them are matters intimately linked from the earliest regulation of insurance and insurance contracts in the Low Countries. A common perception, in earlier times, was that the fact that owners of ships could insure their ships, made them less careful in ensuring that their ships were properly equipped, manned and armed for the voyages they were to undertake. The same was thought to be true of cargo owners. The fact that they could insure not only made them less careful about the condition of their cargoes and how they packed them but also about the condition of the ship on which their cargoes were loaded and the way in which they were loaded and stowed on board that ship.

The provisional placcaat of Charles V on Maritime Affairs, the Equipment and Outfitting of Ships ("Zeevaert, Equipagie en toerustinge van Schepen") of 29 January 1550, for example, which dealt in four sections (ss 20-24) with insurance matters, was in the main concerned with what may generally be termed the seaworthiness of merchant ships. Section 1 imposed an obligation to employ only ships which met the requirements of the placcaat as to seaworthiness. Sections 2-7 then contained provisions on the seaworthiness of ships and addressed matters such as the size, construction, manning, equipment, arming, stowage and proper navigation of ocean-going merchant ships. Sections 8-17 made provision for the enforcement of the requirements as to seaworthiness and for the inspection of ships to ascertain their compliance with the placcaat.

Sections 20-22 then dealt with the compulsory under-insurance of ships, the prohibition on the insurance of wages, and the compulsory under-insurance of cargo.

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349 1549 os. See GPB vol IV at 1219-1227.
350 Provision was made, eg, for a minimum carrying capacity ("draagvermogen") of ocean-going ships of 40 tons, or 80 tons for voyages to Spain and further; for the minimum number of sailors in relation to the tonnage of the ship (thus, for a ship of 40 tons a minimum of eight seamen older than eighteen years was required); for the number and caliber of guns, again in relation to the size of the ship; for an obligation on ships to sail in convoy ("geselschap"); and for the manner of stowage of cargo so as not to hinder the defence of the ship in case of an attack. In terms of s 32, fishing vessels too had to be properly equipped, provided with guns, and manned.
351 In each port two officials ("Officiers") were appointed to inspect ships before and after loading but prior to their departure to ensure such compliance. They were also to take down an oath from the master and the crew that they would abandon the ship and her cargo only in the utmost emergency and that they would assist other ships in the convoy.

In determining the freight, masters had to take into account the expenses they were compelled to incur in complying with the terms of the placcaat, and if any dispute arose in this regard with consignors, it had in terms of s 17 to be referred to 'onse Officieren ende Wethouders'.

Merchants were not permitted to ship their cargoes on foreign ships in Dutch ports as long as there was shipping space available at the port of loading on a (seaworthy) Dutch ship. Foreign merchants were not subject to the placcaat, not even when they made use of Dutch or Spanish ships.
all measures aimed at reducing the effect that an insurance could have on the care
exercised by shipowners, mariners and cargo owners as regards the condition of their
ships or the ships they chose for the carriage of their goods. In terms of s 23, in the
event of any contravention of the placcaat\(^{352}\) where a ship and her cargo were lost en
route, the insurers of the unseaworthy ship or of goods loaded on that ship were stated
not to be liable in respect of such loss (\"niet gehouden zijn suike sjine versekerijinge te
vulkommene otte betafene\"), even if the policy in question contained a clause that they
would pay whether or not the ship complied with the requirements of the placcaat (\"\'t
Schip gereet wesende naer d'Ordonnancie, of niet geree\"). This clause and all other
clauses inserted to circumvent the placcaat (\"welcke clausule en alle andere, doende
ter praejudice van dese onse Ordonnancle\") were declared null, void and ineffective
(\"nul, van onweerden en magteloos\"). The section also prohibited all subjects or
inhabitants from directly or indirectly providing any insurance or bottomry in contraven­
tion of this provision (\"geen ander asseurancie ofta bomeria ta
gevene\"), and the insurer
who, presumably knowingly, concluded an insurance involving an unseaworthy ship
not only forfeited the premium (\"de verbeurte van den pennijngen\") but was also
punished.\(^{353}\)

It is readily apparent from s 23 generally and from the last of its provisions in par­
ticular that the aim was not to protect insurers against the possibility that they may
unknowingly have insured unseaworthy ships or goods loaded on such ships. The aim
of the placcaat was to ensure that Dutch ships proceeded to sea properly manned,
equipped, loaded and armed to reduce if not to prevent the losses of such ships and
their cargoes by the perils of the seas and, which was especially serious at the time, by
enemy and piratical action.\(^{354}\) Such losses were regarded as occurring to such an
extent as to be highly detrimental to Dutch shipping and trade generally. Insurance, as
also bottomry,\(^{355}\) was seen as an obstacle in the way of achieving this aim.\(^{356}\) A limi­
tation was therefore placed in ss 20-22 on the extent to which insurance was permitted
on the one hand, while s 23 on the other hand prohibited the insurance of unseaworthy

\(^{352}\) That is, by a master or shipowner not making the insured ship seaworthy as was required, or by a
cargo owner in loading insured cargo in a foreign ship or on an unseaworthy locally-owned ship.

\(^{353}\) As to the placcaat of 1550, see eg Asaert 204-205; Craeybeckx 189-195; Dorchout Mees
Schadeverzekeringsrecht 16; Enschedé 29-30; Goudsmit Zeerrecht 210 and 213-214; De Groote
Zeeassurantie 34; Hammacher 42-43; Hoogenberk 12-17; Kracht 12-14; and Mullens 23.

\(^{354}\) In particular by the Scots (supported by the French) with whom the Low Countries were at war at
time. Thus, ss 21-23 specifically prohibited full-value insurance and insurance of wages against the Scots
or other pirates (\"teghens de Schotten of andere Zee-rovers\").

\(^{355}\) Which was dealt with in s 19 of the placcaat. See again ch I § 4.3.2 supra.

\(^{356}\) It was considered that the possibility of insuring resulted in the carelessness of shipowners, seamen
and merchants regarding the condition of merchant ships. Thus, so it was perceived, the fact that
shipowners insured and often over-insured, reduced the amount of care with which they maintained their
ships, while the insurance by the master and the crew of their wages reduced their commitment to exert
themselves to save the ship and to complete the voyage so as to earn freight and their wages (the
earning of their wages depended upon the earning of such freight: see again ch V § 5.6 supra).
ships or of goods loaded in such ships. Section 23 sought to prevent the owners of ships and cargoes from failing in their duty to make their ships seaworthy or to select seaworthy ships for the carriage of their goods by reason of the fact that they had taken out insurance cover. Put simply, the Legislature did not want the practice of insurance to undermine the effect of its measures aimed at making Dutch ships seaworthy.

Despite complaints by Antwerp merchants that these measures were too strict and that compliance would increase freight rates\(^\text{357}\) and present an unfair advantage to foreign competitors who did not have to comply with the placcaat,\(^\text{358}\) these measures were in essence repeated in the first part of placcaat on Maritime Affairs ('Zee-vaert') of 19 July 1551,\(^\text{359}\) § 22 of which was the equivalent of § 23 of the placcaat of 1550.\(^\text{360}\)

These measures culminated in the comprehensive regulation of Maritime Affairs ('Zee-vaert') of Philip II of 31 October 1563\(^\text{361}\) which was, in essence, a codification of the maritime law of the time and which was based both on the earlier placcaaten and on the earlier codes of customary maritime law.\(^\text{362}\) The placcaat of 1563 consisted of seven titles. Title VII dealt with insurance ('Ordonnantie op de Verseeckeringe oft Assurantie') in 20 sections and was the first comprehensive statutory treatment of the insurance contract in the Low Countries. Title I contained 26 sections on the equipment of merchant ships ('Vande toerustinge van Schepen'),\(^\text{363}\) and was largely derived from

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\(^{357}\) For example, the shipping space was reduced because of the guns required to be on board; and smaller and cheaper ships were excluded from carrying cargoes on export routes.

\(^{358}\) And despite the fact that peace had in the meantime been concluded with Scotland. Piracy, however, was still a major threat.

\(^{359}\) See GPB vol I at 783-795. The placcaat of 1551 repeated the measures of 1550, except that now also foreigners living in the Netherlands or being represented there could load their goods only on ships equipped in accordance with the placcaat and could no longer make use of unseaworthy local ships or of foreign ships. See further Goudsmit Zeerecht 215-216; and Lichtenauer Geschiedenis 153 (who refers to the chapter on the equipment of ships in the placcaat of 1551 as an example of legislation which later fell into disuse).

\(^{360}\) Sections 18-21 of the placcaat of 1551 were the equivalent of ss 19-22 of its predecessor, except for the fact that the prohibition on the full-value insurance of ships and goods and on the insurance of wages were no longer aimed at the Scots and other pirates but now against pirates and enemies generally ('teghens de Zee-roovers, oft andere de navigatie en coopvaerderye van haerwaerdse overe willende verhinderen').

\(^{361}\) See GPB vol I at 796-829.

\(^{362}\) See generally on the placcaat of 1563, Goudsmit Zeerecht 231-232; Ter Gouw vol VI at 59-60; Mullens 24-25; De Smidt 'Seerecht'; and Tytens 'Seaworthiness'.

\(^{363}\) The other titles of the placcaat contained, for the most part, a restatement of earlier customary maritime law, derived from well-known codes such as the Sea-Laws of Visby. Title II had thirteen sections on the relationship between masters and merchants ('Vanden Schippers ende Koopluyden'); title III had 20 sections on the obligations of seamen ('Van den Schiplieden, ende haere Officien'); title IV thirteen sections on shipwreck, jettison and average ('Van Schip-breeckinge, Zee-werpinge, ende Avaryen'); title V had five sections on shipping collisions ('Van Schepen die malkanderen beschadigen'); and title VI contained ten sections on criminal and judicial matters ('Vanden Schips-keuren ende breucken, ende andere saecken der Justitle aengaende').
the earlier provisions of 1550 and 1551. 364

Section 1 of title VII prohibited the insurance of property ('goeden van prye ende importantie') when such property was not prepared or was laden on ships which were not equipped and of the size ('wanneer de selve niet en zijn toe gherust ofte gheladen op Schepen niet wesende gheequipeert ende van der grootten') or not sailing accompanied 365 as prescribed by the placcaat, in particular in title I ('gelijck dese tegenwoordige Ordonnantie vander Navigatien uyt wijst'). 366 Again, therefore, the aim was to ensure the seaworthiness of Dutch ships and, in the public interest, to reduce maritime losses resulting from ships not being maintained in a proper and seaworthy condition. The purpose was not to protect insurers against the unseaworthiness of insured ships or of ships on which insured cargoes were loaded, but merely to ensure that the availability of insurance cover did not detract from the effectiveness of the provisions concerning the condition of merchant ships. In addition to a variety of fines which were imposed for the contravention of the provisions on the equipment of ships, insurances of or involving unseaworthy ships were also declared null and void in the public interest. But, of course, insurers were indirectly also protected as a result, and they may, for that reason, never have thought it necessary to take any further steps to protect themselves directly by way of a contractual exclusion of liability in the event of loss or damage resulting from an insured ship or a ship on which insured goods were loaded not being in a proper and seaworthy condition. Seaworthiness was not regulated in title VIII of the placcaat of 1563 as a topic within the sphere of private law and as being a matter which primarily concerned the parties to the insurance contract themselves.

The measures contained in title I of the placcaat of 1563 were still not adhered to though. Unseaworthy ships continued to be sent to sea and to be used for the carriage of cargoes and the resulting losses continued unabatedly. In addition there was an increase in piracy and in English privateering and a greater unwillingness on the part of Elizabeth I of England to control and prevent these perils. Importantly, though, the fact that owners of ships and cargoes could conclude insurances to protect themselves against such losses, and the many other undesirable practices to which this in turn gave rise, most notably the over-insurance of property, were still seen as the single most important factor contributing to non-compliance with the various measures on the condition of merchant ships.

364 Title I prohibited in s 1 the exportation of specified valuable merchandise otherwise than on properly equipped ships ('Ten Zy met sulcke Schepen, ende alsoo toe gherust ende geëquipeert, als hier nae verklaert sal worden'). Other goods could be carried in any ships as the merchants saw fit but in a foreign ship only the goods of merchants of that nationality could be conveyed. The title further contained rules as to equipment (sails, tackle, armaments and manning) and distinguished in this regard between different ships according to size and the destination of the voyage in each case. By s 11 three experts were appointed in each port as officers ('Officiers ofte Visiteerders') to inspect ships and to ensure compliance with the prescriptions as to the equipment of vessels.

365 See § 2.3 infra as to the practice of convoying.

366 See further eg Barbour 'Marine Risks' 568-569; Goudsmit Zeerecht 244; De Groote Zeeassurantie 34; Jolles 53; and Kracht 17.
The solution now sought was far-reaching. In the placcaat of 31 March 1569\textsuperscript{367} it was prohibited, for the time being, to send any ship to sea unless she was equipped as prescribed by the Admiralty. And, the placcaat stated, because insurance contracts gave rise to abuses, such as insurances in excess of the value of the property insured, and to carelessness on the part of merchants as to the condition of the ships on which their cargo was loaded, the conclusion of all insurance contracts was, also for the time being and provisionally ("par maniere de provision"), prohibited. The placcaat also declared such contracts null and void in so far as they had been concluded earlier on ships or on goods which had not yet departed. Furthermore, and in response to a similar prohibition by the English, all trade with England and English subjects was prohibited, including the importation of goods from or the exportation of goods to England, on penalty of the forfeiture of the goods involved as well as the imposition of a fine.\textsuperscript{368}

The prohibition on the conclusion of insurance contracts in the Low Countries did not remain in place for long. Insurance was again permitted by the placcaat on insurance of 27 October 1570\textsuperscript{369}, on condition though that it was in conformity with the detailed although provisional regulation of the topic in that placcaat. Sections 4 and 5 made reference to the equipment of ships. For example, the owner and master of a ship were obliged to equip her according to the provisions of the earlier placcaaten and to sail in convoy, and the master was specifically prohibited from sailing before he had obtained permission from the port officials entrusted with controlling the equipment and condition of departing ships. The prescribed policy form too in its description of the ship referred to her as being armed, equipped and prepared, and to her having to sail as these matters were prescribed and after her condition had been approved by the appropriate officials in her port of departure.\textsuperscript{370}

A few months later, on 20 January 1571\textsuperscript{371} the provisional placcaat of 1570 was replaced by a final measure which was largely but not exactly the same as the earlier attempt. It too permitted the conclusion of insurances in the Low Countries as long as they were in conformity with the provisions of the placcaat. One of the points on which the placcaat of 1571 differed from that of 1570, was the omission of measures dealing with the seaworthiness of ships, both from the placcaat itself and from the policy form it prescribed. The new placcaat merely stated in s 17 that for the better observance of the placcaat, persons whose duty it was to oversee the equipment and outfitting of

\textsuperscript{367} 1569 os.

\textsuperscript{368} On the placcaat of 1569, see eg Goudsmit Zeerecht 254-255; Van Niekerk Sources 44 and the authorities referred to there in n102; and especially Reatz 'Ordonnances' which also contains a reprint of the French version of the placcaat.

\textsuperscript{369} On the placcaat of 1570, see Van Niekerk Sources 45 and the authorities referred to there in n104.

\textsuperscript{370} The description read: '[W]elck schip sal worden gewapent, toegerust ende versien, ende oick moeten varen naevolgende den regel ende orden by ons gestelt, ende nae dat die admirael, vice admirael, oft officier vander voirsheyder haven, daertoe gedeputeert, telse ordineren ende bevelen sal'.

\textsuperscript{371} 1570 os.
372 As to s 17, see again ch IX § 1.2 supra.

373 Whereas the placcaat of 1563 was concerned with maritime law in general, including insurance law, the placcaaten of 1570 and 1571 were solely concerned with insurance. As to this aspect of the placcaat of 1571, see further eg Goudsmit Zeerecht 260-261; and De Groote Zeeassurantie 38-39 and 113.

374 1570 os. See GPB vol ii at 2115-2116.

375 See De Groote Zeeassurantie 44.
future be prescribed; and further that ships had to depart in convoy according to the instructions of the Admiral or his deputies who had in that respect to take into account the time (that is, the season), the value of the cargoes and the perils of the sea.

Following the earlier example of Spanish legislation of the sixteenth century, the Estates-General published a number of measures in the first half of the seventeenth century on the topic of the equipment and manning of ships.

Thus, a *placcaat* of the Estates-General from 1603, which was periodically amended until 1643, contained measures on the proper arming, manning and equipping of both merchant ships and fishing vessels sailing from the Netherlands. It was aimed at reducing losses occasioned by the capture, ransoming and robbery of merchant and fishing vessels by the enemy and pirates. It does not appear to have contained any provision specifically referring to insurance.

However, a *placcaat* of the Estates-General from 1627, amended in 1641, 1646 and again in 1652, on the equipment, manning and convoying of ships proceeding through the Strait of Gibraltar to the Mediterranean Sea and the Levant did mention insurance. As before, the purpose of this measure was to ensure the seaworthiness of Dutch ships so as to reduce maritime losses in the interest of navigation and commerce. Section 4 laid down that if a ship was equipped, armed and manned ('*geequipeert, gemonteert ende gemant*') otherwise than was prescribed and undertook to sail through the Strait to the Mediterranean Sea, she could not validly be insured, and if she were insured, such insurance would be null and void and not justiciable. Section 5, though, provided that an insured who loaded his cargo on board

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376 Asaert 205 eg refers to a *placcaat* of 5 August 1579 which attempted to ensure compliance with these and similar prescriptions.

377 The final amended version was entitled 'Placaten vanden [9 April 1603, 23 February 1607, 22 July 1625, 16 January 1627, 17 March 1627, 20 October 1628, 19 March 1429, 24 December 1630, 11 March 1632, and] 1 September 1643. Behelsende ordere opte Wapeninge en Manninge van Schepen, soo ter Koopvaerdye als Visscherye, uytte Vereenighde Nederlanden over Zee varende, mitsgaders opte ordre van Admiraelschappen, ende 't beleyt van dien, mettet geene daer aan dependeert'. See GPB vol I at 876-885.

378 It was entitled 'Placaten vanden [10 October 1627, 27 November 1627, 14 October 1641, 22 September 1646 and] 28 April 1652. Behelsende nader ordre op de groote Equipage, Monture, manninge ende Admiraelschappen der Schepen, varende door de Straet van Gibraltar naer de Middelandtsche Zee ende op Levanten'. See GPB vol I at 906.

379 It concerned ships of a certain size proceeding on voyages directly or indirectly to the Mediterranean, and loaded with the cargoes of different merchants ('*stuck-goederen van verscheyden koopl/eden*'), or with grain and other specified wares. The freight earned by unseaworthy ships were declared to be forfeited. Provision was made for the minimum number of guns (called 'Gotellngen & Eters') of a specified size which had to be mounted on the ships and the number of men which had to be on board, and for the need to sail with at least two other similar ships 'in zijn Compagnie' to which she was to be liable 'in vast Admiraelschap'.

380 The section read: '[V]erstaen ende ordonneren Wy, dat op de selve geen assuerantie ofte versweteringe ghedaen sal mogen worden, ende indien eenige gedaen werde, verklaren Wy de selve van nu ende alsdan nul, egeen, ende van onwaerden, begeerende dat daer op geen recht sal werden gedaen'.
such a ship would have a claim against the insurers concerned if it had appeared to
him from the relevant documentation that the ship concerned was properly armed and
manned, while ss 5 and 6 created a similar exception in the case of ships carrying the
cargoes of different consignors, even if the master was at fault in properly equipping
and manning her, as long as the insured consignor concerned did all that was required
to ensure that the ship was seaworthy. Innocent consignors were therefore pro-
tected.

The municipal legislatures too were active in this regard. That of Amsterdam, for
example, found the *placcaaten* of the Estates-General unsatisfactory and promulgated
*keuren* on the seaworthiness of ships on 24 January 1651, 21 January 1656, 13 Febru-
ary 1681, 6 August 1698, and 26 January 1731. Some of these had a bearing on or
mentioned insurance.

Thus, the *keur* of 1651 on the outfitting and manning of ships sailing to the
Mediterranean provided in s 3 that to ensure compliance with the *keur*, charter
parties had to stipulate expressly that masters whose ships were captured by pirates as
result of their non-compliance ('wan-devo/r') but who were nevertheless paid their
freight, had to forfeit ('moeten laten komen') such freight to the owners of the cargo
loaded on their ships and to the insurers ('ende den Assuradeurs') concerned while
the crew would forfeit their wages. In s 10 it was provided that in a policy of insurance
made on the hull of a ship built from fir-wood, that fact had to be expressly mentioned
on the policy itself ('op 't casque ofte corpus van Schepen dat vuyrblasen sijn, sal 't

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381 *[D]och sullen de Gheasseureerders vande Goederen in particuliere bevrachte Schepen geladen,
tegens hare Asseuredeurs mogen bestaan, by aldien sy by Acte van visitatie doen blijcken, dat het Schip
naer behooren ghementeert ende gemant is bevonden*.

382 Both ss 5 and 6 were added to the *placcaat* on 27 November 1627.

383 *[E]n sal oock opte Schepen die publicquelick op stuck-goederen leggen, geen nulliteit van
asseurantie plaets hebben, al war 't dat by de Schippers eenige faute of naelatigheyt inde visite,
monture ende manninge werde ghepleegeht, alsoo den Coopluyden niet mogelick is daer voor sorge te
dragen, ende ghenoeghsaem daer inner voorsien wert, dat volgens dit Placaet geen schepen op stuck-
goederen mogen aen leggen, die niet naer behooren gemant ende gemonteert en zijn, ende dat de
Schipper daer van visite moeten versoecken*.

384 See Goudsmit *Zeerecht* 361-362.

385 Entitled the keur on the 'monture en manninge van de schepen varende na de Middelandse zee' (see
Amsterdam Handvesten vol VI at 1493). It contained measures additional to the *placcaaten* of 1627 and
1641.

386 It seems that in the case of a loss of insured cargo as a result of the unseaworthiness of the carrying
ship through the fault of her master, the consignors or (if they were insured and had been paid in terms of
their insurance contracts) their insurers were entitled to a return of any freight earned by and paid to the
shipowner.
selve expresselijck moeten verhaelt ende gestelt worden' on the penalty of forfeiture of half of the amount of compensation due for any loss or damage.\footnote{387}

The keur of 1698 on the same topic\footnote{388} imposed penalties on masters if it were found when their ships sailed past the Texel that they had fewer canon\footnote{389} or fewer men on board than they had announced or made known on the Bourse or elsewhere, the reason being that merchants and insurers were mislead and defrauded by such false announcements.\footnote{390}

### 2.2.3 The Relationship Between Seaworthiness and Insurance in Other Sources

Scant information only is to be gleaned from other Roman-Dutch legal sources on the influence of the unseaworthiness of a ship on the insurance of that ship or of cargo loaded on that ship.

Van Zurck\footnote{391} observed that ships or goods not properly equipped or conditioned ('schepen of goederen niet behoorlijk geëquipeert of uitgerust zijnde') and proceeding to sea without the required permission and in convoy ('en zonder licentie en behoorlijk convoy (zo 't waerde van 't goet of de gelegenheit vordert) 't zee gegaen'), could not be insured and that their loss or damage did not result in any liability for the insurer ('mogen niet geassureert worden, en is d'assureerder in geen verlies gehouden').\footnote{392}

Two insurance cases which came before the Hooge Raad early in the eighteenth century touched on the issue of seaworthiness.

The first of them, from 1711,\footnote{393} is rather inconclusive. The insurers of damaged cargo argued that the carrying ship was not properly equipped. But there was no proof of this, and in any case, the Raad thought, the insurers were liable to the insured

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\footnote{387} This measure was also contained in the applicable insurance laws. See again ch V § 3.2.1 supra and ch VIII §§ 4.2.4 and 4.2.5 supra as to the insurance of fir-wood ships and the need to mention that fact in the insurance policy.

\footnote{388} The keur on 'manninge en monture van schepen varende na de Middelandse zee'. See Amsterdam Handvesten vol VI at 1495.

\footnote{389} And, by virtue of the amending keur of 1731, also canon of the different calibers required.

\footnote{390} The keur stated that 'de Schippers ... abusivelijk hare Manninge en Monture, ahier ter Beurse en elders aanslaan, doen afroepen en bekent maken, en in Texel dikwels bevonden werd, dat aan hun aangeslagene Manninge en Monture, veel komt te gebreken, waar door de Koopluyden en Assuradeurs worden misleyt en bedrogen'.

\footnote{391} Codex Batavus sv 'Assurantie' par 11.

\footnote{392} He referred in this regard to the placcaat of 1550, that of 1551, and the interpretational placcaat of 1571 and noted that although these measures were not taken over in the municipal keuren, the principles they involved retained their application in the Netherlands, as appeared from the placcaat of the Estates-General of 1652 (which was the final amendment to that of 1627). See also idem sv 'Schepen' par 19; Enschedé 33.

\footnote{393} See Bynkershoek Observationes tumultuariae obs 779; idem Quaestiones juris privatI IV.4.
The Alteration and Control of the Risk

owners of the cargo since they had not equipped the ship. It is not clear whether this may be taken to imply that the unseaworthiness of the ship on which the insured cargo owner had loaded his goods could provide no defence against a claim of that owner on his insurance contract.

In the second case, dating from 1716, the insured ship and her cargo were almost completely lost in a collision with another ship in a storm. The Amsterdam insurer argued that the insured ship was old and not sufficiently capable of withstanding storms at sea ('oud ..., en niet bequaam genoeg, om zeestormen te weerstaan'). The Hooge Raad rejected this defence. It did so firstly because ships were insurable irrespective of their age, their age also not being a matter which the insured had to disclose in his policy. Secondly, and more important for present purposes, the Raad thought that the defence failed because the insured ship was not lost as a result of her own incapability ('het schip was niet door deszelfs onbequaamheid verongelukt') but as result of an external force, namely the storm which drove the ships against one another, a peril which could easily have caused the loss of even a brand new and staunch ship ('een nagel-nieuw en het sterkste schip'). Therefore, if a ship was unseaworthy and not capable of withstanding her intended voyage, the insurer was not for that reason alone inevitably relieved of liability if the ship was lost on that voyage. That was only the case when her loss was caused by, contributed to, or its likelihood increased by such unseaworthiness and thus when a causal link existed between the loss for which the insured sought to hold the insurer liable and such unseaworthiness.

In conclusion, it would thus appear that the conception of seaworthiness and the duty to make a ship seaworthy was in Roman-Dutch law solely given form by and enforced through legislation, and then with the aim to reduce losses of ships and cargoes at sea in the public interest. There is no clear evidence that Dutch insurers as a matter of general practice sought to control the risk they would take over by placing...
a contractual obligation on insured either to ensure that their ships were seaworthy at the commencement of an insured voyage, or to ensure that the ships on which they loaded their cargoes were seaworthy. At least one of the reasons for this may have been that in Roman-Dutch insurance law the principle was clearly established that an insurer was not liable for any loss resulting from an inherent vice in the property at risk nor for a loss resulting from the fault of the insured himself. Most losses which would be attributable to the unseaworthiness of the ship would probably have qualified as losses caused by either an inherent vice in that ship or by the fault of the insured shipowner, if not both.398

Not surprisingly, the Wetboek van Koophandel makes no specific mention of the notion of unseaworthiness as a factor which would or could exclude the liability of an insurer either for a loss causally linked to it specifically, or for any loss of or damage to the unseaworthy ship or to the cargo on such a ship generally.

The closest the Wetboek comes to it is in art 700 where it is provided that there is no general average loss where an expenditure was caused by an inherent vice ('inherenten gebreken') of the ship, her incapability of performing the voyage ('ondeugzaamheid tot doen der reize'), or the fault or negligence of the master or crew, even if the expense was incurred voluntarily and after the required consultation and for the benefit of the ship and her cargo. And if it is accepted that the nationality and more specifically the neutrality of a ship are closely related to her seaworthiness and capability of completing a voyage, art 658 is also relevant in this regard. It provides that where a ship or goods, insured as being neutral property (‘als bepaald onzijdig eigendom’), are found to be enemy property and declared prize by a foreign court, the insurer is not relieved of liability if the insured can prove that the insured property was in

398 The thesis that the (essentially English) conception of seaworthiness is explicable in Dutch law with reference to its principles relating to inherent vice, is fully expounded upon by Willeumier who regards unseaworthiness as equivalent to an inherent vice. See Willeumier 28-50 and 69-71 and further § 2.4.4 infra where the differences in this regard between English law and Dutch law are summarised.
fact neutral and that he had done all he could to prevent it being declared prize.\footnote{This would include having the ship carry the proper documentation and papers on board to establish her nationality and neutrality and to prevent her arrest. In all probability, the absence, especially in time of war, of such documentation would be regarded as an inherent vice. See Willeumier 68.} From this it is clear that the insurer remains liable not only if the loss of the ship was unconnected to the breach (such as where she is lost in a storm), but also if the insured can prove that there was in fact no such breach at all.\footnote{The finding and judgment of the foreign court that the property was not neutral and that there was therefore a breach is therefore not accepted as irrebuttable proof of the matter.}

### 2.3 Statutory and Contractual Regulation of the Duty to Sail With a Convoy

#### 2.3.1 Introduction: The Practice of Convoying

A fairly common example in Roman-Dutch law of an instance where, by way of a special term in the insurance contract, insurers sought to impose a duty upon their insured during the currency of the contract in an attempt to control and reduce the risks they had taken over, concerned the duty to sail with a convoy.\footnote{As to convoys and convoying generally, see Barbour ‘Marine Risks’ 563-568; Bijl passim; Brujin & Van Heslinga 7; Craeyebeckx passim; Degryse passim; Grapperhaus passim; Hoogenberk 9-12; Knittel 20-23; and Krans 10.} As will be shown shortly, although statutory duties also existed in respect of sailing with a convoy, usually as part of the shipowner’s obligation to make his ship seaworthy, Dutch insurers themselves were more active as far as the insertion of clauses in insurance contracts were concerned than they appeared to have been as regards the other aspects of the seaworthiness of insured or carrying ships.

Initially merchant vessels were armed and the distinction between an armed merchantman and a cargo-carrying man-of-war was not always clear.\footnote{See again ch VI § 5.2.2 supra as to privateers.} Such arming, however, was not only expensive but impractical as heavy armaments reduced the ship’s sailing speed and took up space in which freight-earning cargo could otherwise have been stowed. One of the ways in which the owners of unarmed or insufficiently armed merchant ships attempted to reduce the risk of enemy capture in time of war or of piratical attack, was to sail with a convoy, a group of ships sailing in company to the same destination or in the same general direction. Apart from the obvious safety in numbers, convoys of merchantmen (koopvaarders) were often accompanied by one or more armed escorts or convoyers (convooiers; convooischepen). Convoys were of two types, initially those arranged and maintained on the private initiative of shipowners themselves, and later, from the mid-sixteenth century onwards, those provided and organised by the Admiralty.

Agreements between a number of shipowners for their merchant ships to sail in convoy on the same voyage under the command of the captain of the best-armed ship amongst them or under the protection of a hired naval vessel, and for the ships
involved to provide mutual assistance to the other members of the fleet in the case of an emergency, date from medieval times. Such agreements of consortship (admirae/schap; conserva) were private, civil-law agreements, and an instance where general average was by way of an agreement made applicable to certain losses suffered on the voyage by one of the participants.

On occasion, especially in times of war, such private initiatives were deemed insufficient and were replaced by municipal and, from the late sixteenth century, by government-assisted convoy systems (‘convoooidienst’), the joining of which was usually made compulsory, with heavy penalties being imposed on vessels who deserted the fleet. Such official convoys were organised by and sailed under the protection of the Dutch Navy and were under the command of an admiral. They, as the various Dutch provincial Admiralties and the Navy generally, were funded by a variety of taxes which were levied on trade and shipping. In addition, individual ships had to pay a fee to join a convoy (‘convooigeld’). In the seventeenth century the East and West India Companies each had their own convoy or fleet system in addition to that

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403 As to consortship generally, see eg Grotius Inleidinge III.21.9 and III.22; idem De iure bellii II.12.4 & 25; Van der Keessel Praelectiones 1419-1423 (ad II.22). See too Fischer 607; Goudsmit Zeerecht 414 (consortship was treated in ss 252-254 of the Rotterdam keur of 1721); and Hart 124-125 (examples of such agreements). As to consortship as an example of the application of the notion of partnership in the maritime context (societas admiralitys or societas mutuae defensionis), see again ch I § 4.5.2 supra.

404 See again ch I § 4.6.3 supra as to conventional general average or agermanament.

405 The obligation to proceed in convoy very often appeared in the general regulations which imposed a duty on shipowners to maintain their ships in a seaworthy condition (see again § 2.2. supra where some of these were mentioned). A few examples will suffice.

Section 6 of the placcaat of 1550 compelled shipowners to do their utmost to sail in the company of ships and to remain there as long as possible (‘alle neerstighet doen sullen om geselschap te krijgen van Schepen ... en soo lange by een blijven al't mogelijk zijn zal’) and masters had to select an ‘adimaar’ amongst themselves and had to assist one another in case of any attack. A similar measure was contained in s 9 of title I of the placcaat of 1563. The interpreting placcaat of 1571 provided that ships had to depart in convoy or with a fleet (‘dat de salve Schepen vertrecken sullen met geselschap van Vloote’). Similar provisions were also included in the placcaaten of the Estates-General in the seventeenth century.

406 This often occurred towards the end of a voyage when a master would attempt to break away and sail ahead so as to arrive first at the destination and to obtain a better price for the cargo on board his ship. Owners or consignors frequently promised the master an additional compensation or primage (see again ch V § 5.6.1 supra) if he managed to get a specific type of cargo to the destination before others could deliver theirs there. In England the tendency of ships to break convoy with a view to forestalling the markets was in 1741 ascribed to the confidence engendered by marine insurance. See Wright & Fayle Lloyd’s 78.

407 Especially by duties called convooien and licenten which were, initially, duties levied respectively on imports into the Netherlands on the one hand and on exports from and staple goods passing through the Netherlands on the other hand. These duties were collected, and controlled, by the various Admiralty Colleges in the Netherlands on the authority and under the supervision of the Estates-General for the conduct of war at sea and for maritime services generally, eg conveying, piloting, and beaconage. In the course of time these taxes were transformed into import and export duties and were collected in this way until 1816, when the French ‘douane’ system was introduced. See especially Engelhard passim and further eg Israel 280.
maintained by the Admiralties for individual merchant ships,\textsuperscript{408} while convoys were also arranged for the annual whaling fleet. Occasionally the system of convoys and consortship even operated internationally.\textsuperscript{409}

Apart from the obvious advantages of mutual protection and being accompanied by an armed man-of-war, the convoy system had numerous disadvantages which made them unpopular with masters and ship-owning merchants alike. There were often long delays involved for a convoy to be assembled while the speed at which the fleet sailed was that of the slowest vessel in it, both factors which increased the expenses and reduced the profit margins of merchants and which often presented a problem if perishable cargo was carried. Furthermore, the fact that Dutch ships had to sail in convoy often resulted in merchants choosing foreign ships, which were not similarly compelled to join a convoy, for the carriage of their goods. In addition, a large number of richly-laden merchantmen sailing together often presented a more attractive and more readily traceable target for enemy and piratical attackers while naval convoyers often illegally participated in the merchant trade. Finally and most seriously, the simultaneous arrival of a large number of vessels in a small port tended to deflate the prices of specific commodities. These and other factors often caused merchants to avoid shipping cargoes on ships which had to sail in convoy and led shipowners and masters to devise means of not having to do so.

### 2.3.2 Convoying and Insurance Law and Practice

In Dutch law, as in other legal systems, the practice of having ships sail in convoy had a number of influences on insurance practices, policy wordings and premium rates. There too, in consequence numerous, legal problems arose which came to be addressed in legislation or by the courts.

At first there was merely an official recognition in insurance legislation of the practice of convoying. Thus, in terms of s 1 of title VII of the placcaat of 1563 valuable and important property ('goeden van pryse ende importantia') could not be insured except when loaded on ships equipped, of the size, and sailing in convoy ('ende gaende vergheselschap') as was required by the placcaat itself and in particular in title I which dealt with the equipment and manning of ships.\textsuperscript{410} Similarly ss 4 and 5 of the provisional placcaat of 1570 required insured ships or ships carrying insured cargo to sail in convoy. These measures were not taken over in the placcaat of 1571 probably because it was thought that it not was appropriate to deal with convoying, as also with seaworthiness generally, in a piece of legislation concerned exclusively with insurance

\textsuperscript{408} See Bruijn, Gaastra & Schöffer Dutch-Asiatic Shipping 35-36.

\textsuperscript{409} Thus, in terms of a treaty between Great Britain and Holland in 1667, warships or convoys of the one nation meeting or overtaking at sea any merchant ship or ships of the other nation holding the same course or going the same way, were bound, as long as they kept course together, to protect and defend such ship or ships against enemy attack. See Weskett Digest 143 sv 'convoy' par 16.

\textsuperscript{410} See Goudsmid Zeerecht 244; De Groote Zeeassurantie 34. As to the equipment and seaworthiness of ships, see again § 2.2.1 supra.
Early in the seventeenth century the convoy system and the provision of armed protection for merchantmen sailing as such formed an integral part of the proposals for the establishment of a company to provide compulsory insurance cover for Dutch ships. The proposed monopoly company would provide effective convoy services which were to be funded by its premium income.

In later times the influence of convoys and convoying on insurance law occurred exclusively by way of contractual stipulations on the topic. Insurance policies could either compel an insured ship or the ship carrying insured cargo to sail with a convoy, which would happen particularly where the policy provided cover against the perils of war, or it could merely permit the ship to sail with a convoy, which would happen where war risks were excluded. As will appear shortly and as already alluded to earlier, a clause compelling a ship to sail with a convoy under appropriate circumstances excused a change of voyage or of course or a delay, while a clause permitting it did not necessarily do so to the same extent. Variations of such convoy clauses occurred, with ships being compelled or permitted to depart with a convoy, or to sail with a convoy, or to seek a convoy, and the effect of such clauses was in the final instance a question of interpretation.

Furthermore, different premium rates could be charged, depending on whether or not the ship, being permitted to do so, sailed with a convoy. This was not an unusual practice, and in Amsterdam different premium rates were quoted in the prijscourant for the insurance of ships sailing with or without a convoy. Even if it was not compulsory by law or in terms of the insurance contract to do so, many shipowners may for this reason in any case as a rule have tried to sail with others in a fleet, despite the disadvantages that this again entailed.

412 See again ch IX § 2.10.2.1 supra for details about this proposal of 1628.
413 Thus, an Amsterdam fishing policy of 1637, in terms of which a fishing vessel was insured for the duration of the season on different voyages, contained the following hand-written clause: 'U verder consenterende dat her voorsz schip 't elcken reyse sal mogen varen en syn met ofte sonder convoy tot stiermans goedduncken'. See Den Dooren de Jong 'Practijk' 19.
414 For further details, see generally Jones Deviatie 92-94. The same was true of clauses permitting a ship to engage in privateering activities (see again ch VI § 5.4.3 n332 supra).
415 Thus, in a Rotterdam informal, short-form cargo policy from 1746, the premium was in a hand-written clause appended to the printed policy stated to be '3f met Convoy & sonder 6f ten hondd' (see Mees Gedenkschrift appendix 18).
416 See Plass 69-73; Spooner 105-106. This was also the position elsewhere. Thus, in the late eighteenth century the addition of the condition 'with convoy' would often halve the premium on the London market (see Sutherland 53) or result in a refund on the premiums paid (see Wright & Fayle Lloyd's 204). Fayle 43 mentions that the system of refunding a portion of the premium on the safe arrival of the insured ship, depending on whether she had sailed with a convoy, was preferred by shipowners since it made it possible for policies not to compel the ship but merely to permit her to sail with a convoy; underwriters too preferred this system of 'returns' to the quotation of differential rates for sailing with or without a convoy.
Turning to the non-legislative sources of Roman-Dutch insurance law, there are a number of examples which indicate that terms requiring the insured ship or the ship carrying insured goods to sail with convoy was a matter of some practical import.

The first of these was an opinion from the end of the seventeenth century which concerned an insurance on the hull of a ship lying in a particular port, with the express condition that the ship should undertake her voyage from there to her destination with a convoy ('met convoy'). The policy was in fact concluded on the basis of the risk under such circumstances and the premium was determined with reference it ('zijnde ook de police en premie naar de risico geproporzioneert, daar werd geposeert'). The ship departed from the port in question with a convoy but became separated from it in a storm and was compelled to return to her port of departure while the convoy in the meantime continued its voyage. The insured received notice of this occurrence but did not communicate it to the insurers. In fact, after a stay of a month in that port, the ship eventually departed without a convoy. Shortly after leaving port she was captured by a privateer, taken to an enemy port and there declared prize.

According to the opinion the insurers were not liable for the loss of the ship in these circumstances. One of the reasons was the breach of the express term that the voyage would be performed with a convoy, the contract being in fact concluded only on that condition ('het deficieren van de conditie, van dat namentlijk de reys soude vervordert met convoy, en dat aan en op die conditie alleen getekent is geworden').

Three cases before the Hooge Raad showed that the duty or the liberty to sail with a convoy could have a bearing on the consequences of a change of voyage or of course by the insured ship or the ship carrying insured goods.

The first decision, delivered in 1717, illustrated that the circumstances could also be such that the insured was not obliged but rather permitted to sail with a convoy. A ship was insured for a voyage from Sweden to Amsterdam against perils of the sea ('Zee-risico') and also against the fault of her master. It was declared in the policy that the ship could sail from the Sound, an intermediate place en route (and from where, no doubt, there was an increased risk of enemy attack), with a convoy to her final destination, but that if the convoy proceeded to Norway (as presumably convoys often did) she was to sail directly to Amsterdam (no doubt to avoid deviation and a prolongation.

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417 See Nederlands advysboek vol IV at 198 (1694).

418 It may be noted that here there was, firstly, a breach of the term because the insured vessel had (on her second departure on the voyage) left port without a convoy, and secondly, the loss (capture by the enemy) was caused or contributed to by that breach (or, at least could probably have been prevented had there been no breach). The position may well have been different (and that was something obviously not considered in the opinion) had the ship become separated from the convoy in a storm en route as a result of which the voyage was completed without a convoy, or had she become separated from the convoy as a result of the negligence of the insured owner or his master, or had she not been lost as a result of enemy capture but eg by a peril of the sea.

419 See Bynkershoek Observationes tumultuariae obs 1374; idem Questiones juris privati IV.8. The decision was also considered in § 1.2.4 supra in connection with the change of the voyage or of the course of the voyage.
of the insured voyage). Thus, to minimise the risk of an enemy attack which the insured bore himself, the ship was permitted to depart with a convoy, on condition though that the convoy was not destined for Norway. Here the ship sailed with a convoy to Norway where she was lost by perils of the sea. The insurers denied liability on the policy because of the fact that the master had changed the course of the voyage to remain and continuously to sail with the convoy ('om onder Convoyage van een Oorlogschip te zeilen') and so to reduce the risk of enemy attack en route to Amsterdam. The Raad rejected this defence and held the insurers liable because the change had not occurred on the instruction of the owner but through the actions of the master himself, something the owner was insured against. Presumably, had the change been instructed or the owner not insured against the master’s conduct, the insurer would have been relieved of liability.

In the second case which came before the Hooge Raad in 1719 goods were insured in Amsterdam on a voyage from Riga to London, on condition that the carrying ship had to sail with a convoy from the Baltic to London. When the carrying ship arrived in the Sound, she sailed with a pilot to Göteborg where a convoy was waiting which would accompany English ships on their voyage to London. Just before her arrival in Göteborg, the ship was pushed past the port by a storm and she ended up in Norway. Her master waited there for a passing Dutch fleet with its convoy and joined it to sail to Amsterdam and from there to London. While at anchor in the Amsterdam roadstead, another ship collided with the carrying ship and she was lost.

Before the Hooge Raad the insurer, against whom judgment had been given in the Hof van Holland, argued that the ship had departed from the Sound without a convoy in breach of their agreement ('tegen de order aan') and that the insurance was thus null and void for as long as the condition was not complied with ('dewyl de voorwaarde daar van niet was gehouden'). However, the Raad rejected this defence because of the custom ('Usantie'), established from the evidence of merchants, that it was irrelevant whether a ship sailed from the Sound with a convoy or from Göteborg with a convoy, Göteborg being at the time the rendezvous ('verzamelpaats') of English ships and the place where convoy ships ('Convoyers') waited for them. There was therefore no breach of the term when the ship sailed for Göteborg without a convoy. Furthermore, it appears from the decision that in appropriate cases compliance with the

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420 This was therefore not a case where the ship was compelled to sail with a convoy and where, in complying with that duty, a change of voyage occurred. For such a case, see the second of the decisions of the Hooge Raad delivered on the topic in 1719 which will be considered shortly. Presumably, such a change would in that case be excused in the circumstances as being akin to an involuntary change of voyage or at least one foreseeable by and thus consented to by the insurers.

421 That is, had the owner instructed the master to sail with the convoy even if it went to Norway. Again, the position would have been otherwise had the ship been compelled to sail to her destination with a convoy.

422 See Bynkershoek Observationes tumultuariae obs 1542; idem Quaestiones juris privati IV.9.

423 The insurer appears to have recognised, therefore, that the breach could be remedied.
obligation to sail with a convoy could amount to a necessity permitting a change of the agreed voyage or the course of that voyage. The majority of the Raad thought that even if a change of the course of the voyage had occurred in this case, it had occurred through an emergency since it was agreed that the ship had to sail with a convoy, and in this instance she therefore had to go with a Dutch convoy to Amsterdam where she could join another convoy to London.

The third Hooge Raad decision from 1719 showed that just as an obligation to sail with a convoy could excuse a change of voyage or course, so too the instruction of the commander of a convoy or the fact that the convoy itself changed the voyage or course amounted to an emergency excusing the change as between the insurer and the insured. In this instance the Raad held that no change of course had occurred but that if it had, it had occurred through necessity and did not relieve the insurer of liability. The ship here had at her port of departure received no information from the convoy other than that it would sail directly to her destination and she could do nothing about the fact that the commander of the convoy had subsequently ordered the ships to set sail for another port. It would appear, therefore, that when an express obligation to sail with a convoy was in conflict with the duty not to change the agreed voyage or the course of that voyage, the former was given preference.

A further decision of the Hooge Raad on the topic of convoys dates from 1728. It is also a cardinal decision illustrating the effect in Roman-Dutch law of the breach of an express undertaking by an insured in an insurance contract.

Goods were insured on a voyage from Koningsberg and surrounding areas to London, the carrying ship to sail with a convoy. There was no convoy available at Koningsberg with which the carrying ship could depart, so she sailed to Danzig (Gdansk) where she joined a convoy destined for London. The ship with her insured cargo was lost in a storm in the Baltic. The insurer denied liability because the ship in which the insured goods were loaded, did not from the commencement of her voyage sail with a convoy. The Hooge Raad rejected the insurer’s argument on this point, though, and allowed the insured’s claim for the loss of his goods. The reason given by one member of the Raad was because Danzig had to be taken as being in the vicinity of Koningsberg. The other members of the Raad based their decision on another ground. They thought that while the ship sailed without a convoy between Koningsberg and Danzig, the insured himself and not the insurer bore the risk

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424 As opposed, no doubt, to a mere liberty to sail with a convoy.

425 See eg Enschedé 98 and again § 1.2.4.5 supra.

426 See Bynkershoek Observationes tumultuariae obs 1579; idem quaestiones juris privati IV.9.

427 See again § 1.2.4.1 supra.

428 See § 1.2.4.5 supra.

429 Possibly this was so because the duty to sail with a convoy was based on an express term.

430 See Bynkershoek Observationes tumultuariae obs 2493; idem quaestiones juris privati IV.14.
of any loss, at least if the ship was captured by the enemy, a loss which would have been prevented had she sailed with a convoy as the insured had undertaken to do.\(^{431}\) From Danzig, however, when the ship did sail with a convoy, the insurer alone bore the risk, presumably of all losses. Therefore, because at the time of the loss the insured had complied with his undertaking, there was then no breach and the insurer was liable for the loss which had occurred at that time.

Van der Keessel approved of the decision and explained it in some detail.\(^{432}\) He remarked that if a term which the parties had inserted into their insurance contract had not been complied with by the insured, the insurer was not relieved of liability unless such breach had resulted in the loss or damage for which the insured sought to claim compensation from the insurer. He therefore required a causal link between the insured's breach of the insurance contract and the actual loss or damage in question before the insurer could avoid liability therefor.\(^{433}\)

He also sought to supply the answer to the question left open by the Hooge Raad, namely whether, if and when an insured was in breach of a term in the contract, the insurer incurred no liability at all or was merely relieved of liability for a loss causally linked to such a breach. Put differently, the question left open in the present case was whether the insurer would also have been liable had the carrying ship been lost in a storm at sea while sailing without a convoy. Van der Keessel thought not and gave the following further example to illustrate his view. Suppose, he said, that in the case of an insurance on a ship destined for some Mediterranean port it was agreed that she had to be armed with ten guns of war so that there would be protection against attacks and possible capture by the enemy and by pirates; and suppose further that this term of the contract was not complied with by the insured but that only six guns were placed on board. If the ship was then captured by Turkish pirates, the insurer would clearly not be liable.\(^{434}\) But if the ship, without encountering any enemy or pirate vessels, was lost in a storm,\(^ {435}\) the insurer would certainly have been liable for that loss.

Therefore, at least according to Van der Keessel, even if there was a breach of an undertaking by the insured at the time of the loss, the insurer could only avoid

\(^{431}\) They remarked that it was not necessary to decide here if that would also have been the position had the ship been lost in a storm at sea on that part of her voyage.

\(^{432}\) Praelectiones 1448 (ad III.24.6). See too eg Enschede 159; and Scheepers 100.

\(^{433}\) See again § 2.1 supra where this requirement of a causal link was explained in more detail.

\(^{434}\) There then being the required causal link between the breach and the loss.

\(^{435}\) Something which would in any case have occurred even if there had been no breach of the contract and, in fact something which would have been even more likely in that case, because of the fact that had there been no breach she would have carried a heavier load of guns and would have been more prone to getting caught in a storm.
liability for that loss if it was causally linked to that breach. A similar causal link between breach and loss was required in Hamburg.

With the codification of Dutch insurance law in the nineteenth century, the possibility of the insured ship or the ship carrying the insured cargo sailing with a convoy remained a matter for agreement between the parties themselves. The only reference to convoys in connection with the insurance contract in the Wetboek van Koophandel...
occurs in art 593-1 where it is provided that one may insure the hull of a ship sailing alone or with others. 438

2.4 Statutory and Contractual Control of the Risk in English Law

2.4.1 Introduction

In English law too the parties to an insurance contract were from early on in principle free to insert into their contract whatever lawful terms they could agree upon. This remained the case even after the codification of the Marine Insurance Act of 1906. Not only does the Act not prescribe any form of policy 439 but its provisions are largely permissive, for the most part regulating the legal position in the absence of any agreement to the contrary. 440 Thus, it recognises that not only implied obligations may be varied by an express agreement or a usage to the contrary but also those obligations declared by the Act itself, the modification of which is not prohibited. 441

Nevertheless, the freedom to insert specific terms and to regulate the position otherwise than generally provided for in the standard form of marine policy was used relatively infrequently and sparingly prior to the end of the eighteenth century and only in individual cases, for individual voyages, and in particular trades. 442 Terms inserted into marine policies more often than not concerned the risk taken over by the insurer and were attempts to exclude certain perils, or to circumscribe or limit that risk, or to place an obligation on the insured to act in a particular way so as not to increase the risk for the insurer. They were commonly referred to as 'warranties'. 443

438 It is possible that s 7 of title VI of the French Ordinance de la marine of 1681 served as an example in this regard. It laid down that an insurance could be made upon cargo, jointly or separately laden on board of any ship, armed or unarmed, alone or in company.

439 In terms of s 30(1) a marine policy may, and therefore does not have to be, in the form of the policy (the Lloyd's SG policy) appended to the Act in the First Schedule. See again ch VIII § 4.1.3 supra.

440 See generally eg Chalmers 139; Idelson 354-355.

441 Section 87(1) provides that where any right, duty or liability would arise under a contract of marine insurance by implication of law, it may be negatived by an express agreement or by a usage, if the usage be such as to bind both parties to the contract. Section 87(2) applies this also to any right, duty or liability declared by the Act and which may lawfully be modified by agreement. See too s 84(3) where the Act prescribes how, in the case of mutual insurance, its provisions may be modified by the agreement of the parties where such modification is permitted.

442 See eg John 'London Assurance' 139.

443 Apart from its meaning as a promissory warranty (as to which see § 2.4.4 infra) in the sense of an undertaking to be fulfilled by the insured (the meaning with which the present chapter is concerned), the term 'warranty' in English insurance law may also refer to a limitation on or exception from the general description of the risk in the policy. Thus, a promissory warranty that the ship is to sail with a certain number of guns or with a convoy aims at reducing the risk of enemy capture. By contrast, in an insurance 'warranted free from enemy capture' the risk of such capture is excluded from the cover provided by the insurance. It is not an undertaking by the insured that the ship will not be captured but merely a stipulation that such a capture is excluded from the risk borne by the insurer. However, both meanings show that warranties are all closely related to attempts by the insurer to control and circumscribe the risk.
The legal position regarding terms or warranties included by the insurer in the insurance contract in an attempt to control, restrict and circumscribe the risk he had taken over as it developed in English law up to the end of the eighteenth century, shows a distinct contrast to the position in Roman-Dutch law. It will therefore be treated in some but by no means complete detail. As in the case of the discussion of the position in Roman-Dutch law, these stipulations may for the sake of convenience be considered under the headings of seaworthiness and convoying. Then the general position in the Marine Insurance Act will briefly be referred to.

2.4.2 The Warranty of Seaworthiness

Early examples in English law of an undertaking by one party to a commercial maritime contract as to the seaworthiness of ships, date from the sixteenth century. Express warranties as to a chartered vessel's fitness and the fact that she was, as it was later put, 'tight, taught and strong', were then commonly inserted into charter parties. It is not improbable that these warranties found such general acceptance by merchants that in the course of time they came to be implied into such contracts in cases where the parties themselves failed to express such an undertaking.

It is uncertain whether or not it was by analogy to the position in the case of charter parties, that the warranty of seaworthy also came, by the turn of the nineteenth century, to be implied into marine insurance contracts. By that time it had come to be accepted that the mere breach of the warranty that the insured ship or the ship carrying the insured cargo was seaworthy at the commencement of the voyage, rendered the insurance contract void, irrespective of any knowledge or fault on the part of the

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444 As to the history of the commercial warranty of seaworthiness, see Chamlee 520-528 (warranties in contracts of affreightment).

445 The following clause appeared in a charter party in 1531: 'And the sayd owner shall warrant the said shyppe stronge stanche well and sufficiently vitalled and apparelyd, etc'. See Chamlee 521.

446 It is worth remembering that in the case of a charter party relating to a general ship, the common carrier was in any event in English law liable as an 'insurer' of the cargo, ie, he was absolutely liable for any accidental or intended loss or damage to the cargo entrusted to him for carriage, his liability being excluded only for loss or damage arising from an act of God, enemy action, or an inherent vice. On the history of carriers' liability in English law, see generally Beale.

447 None of the earlier customary maritime codes contained any provision to this effect but the French Ordinance de la marina of 1681 did contain a provision which may have formed (and was later in English law accepted as) the foundation of the commercial warranty of seaworthiness (see Chamlee 521-522). Article 12 of title III provided that if the merchant proves that when a ship put to sea she was unfit for sailing, the master lost his freight and was liable for other damage and loss. This was interpreted to mean that the merchant had a claim to compensation solely upon proof of the vessel's unfitness, irrespective of any fault or negligence on the part of the owner or master and independent of whether the unfitness caused or contributed to the loss. Thus, the shipowner or master was liable in the case of unseaworthiness even if the loss was not causally linked to such unseaworthiness and thus even if the unseaworthiness had been remedied before the occurrence of the loss.
insured and irrespective of whether or not the loss was in any way related to such breach.

Although the term warranty in the context of English insurance law dates from the seventeenth century, a number of cases decided in the last quarter of the eighteenth century give the clearest indication of the operation and effect on the liability of an insurer of a breach of (the then still expressed) warranty relating to the condition of the ship. 448 First a number of decisions will be referred to on the nature of the insurance warranty of seaworthiness and the effect of a breach of such a warranty, and then a few decisions will be referred to on the need or otherwise for a causal link between the breach of the warranty of seaworthiness and the loss for which it is sought to hold the insurer liable.

In Pawson v Watson 449 the ship to be insured was declared in the insured’s instructions to his broker to have on board ‘12 guns and 20 men’. The instructions were shown to one of the underwriters. At the time she was captured by an American privateer, though, she had on board only ten guns and six swivels with sixteen men and eleven boys. 450 The underwriter in question denied liability on the policy. Lord Mansfield held that whereas a warranty or condition inserted in a written policy of insurance had to be literally and strictly complied with, a collateral representation of a state of affairs to the insurer need only be substantially performed. But if false in a material point (that is, fraudulent), it too would avoid the policy. 451 In this instance the written instructions, not being part of and inserted into the policy, did not amount to a warranty, 452 and being only a representation, it was established that it was in substance complied with, ten guns and six swivels being of greater force than twelve guns and the boys being regarded as men. Therefore, given that there was no falsity nor any detriment to the underwriter and because no fraud was involved, 453 the underwriter was held liable on

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448 As to the history of the development of warranties in English insurance law, see in particular Hasson ‘Basis’ 29-32 (eighteenth-century background); Holdsworth History vol XII at 536; Patterson ‘Warranties’; and Vance ‘Warranty’.

449 (1778) 2 Cowp 785, 98 ER 1361; (1778) 1 Doug1 11, 99 ER 9 at 11, 10n[3].

450 The report noted (at 785, 1361) that ‘she had on board 6 four pounders, 4 three pounders, 3 one pounders, 6 half pounders, [the last two types] which are called swivels [as opposed to guns], and 27 men and boys in all, for her crew; but of them, 16 only were men’.

451 Non-performance of a warranty relieved the insurer of liability because such a warranty was part of the agreement between the parties. In the case of a fraudulent misrepresentation the policy was also avoided, but because of the fraud and not because the representation was part of the agreement.

452 ‘If a man warrants that a ship shall depart with twelve guns, and it departs with ten only, it is contrary to the condition of the policy’ (at 790, 1363-1363).

453 Furthermore, the representation had not induced the underwriter who denied liability. He had seen the instructions and in fact insured at the same premium rate as the other underwriters who had not seen them, a premium rate which was proved to be that for a ship such as the one in question sailing unarmed (‘without a force’).
the policy for the loss. It was clear, then, that the representation had to be turned into a warranty before insurers could rely on strict compliance with it.454

In Bean v Stupaft455 Lord Mansfield made it clear that an express warranty in the margin of the policy,456 which was held to be of the same effect as if it had been contained in the body of the policy itself, as to the number of guns and men on board, had to be complied with strictly and that, had it been breached,457 it would have relieved the insurer of liability for the loss which occurred as a result of the ship being captured by an enemy privateering vessel.

As far as the causal link between breach and loss was concerned, the first decision of note was that in Woolmer v Mullman.458 Cargo was insured in terms of a policy which stated: 'Warranted neutral ship and property'. The carrying ship with her cargo was lost in a storm en route. She subsequently appeared not to have been neutral at the time of the contract and the loss. Lord Mansfield, without hearing argument, held that the insured could not recover on the policy.459 It did not matter, therefore, that the loss was not causally linked to the breach of the warranty in question.

De Hahn v Hartley460 confirmed that whatever was written in the margin of a policy of insurance amounted to a warranty which, unlike a representation,461 had to be literally complied with.462 It also graphically illustrated that even where the breach of the

454 This had already been realised much earlier. One of the resolutions of the House of Commons in 1747-1748 better to regulate marine insurance, concerned the information to be inserted into insurance policies. It also provided that where important information was given by the insured, his broker or agent relative to the ship or the goods, such information had to be inserted into the policy as a warranty, and that no evidence could subsequently be given that any warranty was given other than those inserted into the policy. See further Raynes (1 ed) 166-167, (2 ed) 161.

455 (1778) 1 Doug! 11, 99 ER 9.

456 The underwriters had inserted the warranty in handwriting in the margin of the policy presented to them by the insured's broker.

457 In this case, upon a construction of the policy, it was held that the warranty had not been breached. The warranty here was that the ship would have on board 'thirty seamen, besides passengers'. It was interpreted to mean 30 persons belonging to the ship's company, including the cook, the surgeon, boys and apprentices (ie, seamen as opposed to landmen such as passengers), and not qualified or articled seamen - of which there were only 26 on board (as opposed to unqualified ones).

458 (1763) 3 Burr 1419, 97 ER 905; (1763) 1 Black W 427, 93 ER 243.

459 'This was no contract; for the man Insured neutral property: and this was not neutral property' (at 1420, 906). 'The point Is too clear to be argued. There was a falsehood, in respect of the condition of the thing insured; therefore, it was no contract' (at 428, 244).

460 (1786) 1 TR 343, 99 ER 1130.

461 In MacDowell v Fraser (1779) 1 Doug! 265, 99 ER 170 at 261, 170 Lord Mansfield declared that 'the distinction between a warranty and a representation is perfectly well settled'.

462 'A warranty in a policy of insurance is a condition or contingency, and unless that be performed, there is no contract. It is perfectly immaterial for what purpose a warranty is introduced; but being inserted, the contract does not exist unless it be literally complied with' (at 345-346, 1131).
warranty had been remedied prior to the loss, so that it could not have caused or con-ributed to that loss, the insurer was still relieved of liability or that he could, as in this case, recover that which he had mistakenly paid out on the policy. A slaver was insured in terms of a policy which in the margin stated: "Sailed from Liverpool with 14 six-pounders, swivels, small arms, and 50 hands or upwards: copper-sheated". It appeared that the ship left Liverpool with only 46 hands on board and arrived at Beaumaris on the island of Anglesey after six hours where the Liverpool pilot was dropped and six more hands taken on board. From there she sailed with 52 men on board. She was captured some six months later in the West Indies. The Court held that the earlier breach of the warranty in question had rendered the contract void and that the insurer was therefore not liable and could, in this instance, recover payment from the insured.

The implied warranty of seaworthiness also appeared towards the end of the eighteenth century. Thus, in 1781 Weskett referred to the doctrine of seaworthiness, that is, that every ship insured had to be able to perform her voyage unless some external accident should happen. It appears to have been first established in the unreported case of the Mills Frigate where it was held that at the commencement of her voyage, a ship had to be in a fit condition for that voyage, and that even if there merely existed an unknown inherent vice it was sufficient to avoid any insurance on the ship as well as on her cargo.

The implications of the warranty of the seaworthiness of a ship in the marine insurance policy must be seen against the well-established fact that an insurer was not liable for loss or damage caused by an inherent vice and the further consideration that the insured could, at that time, be taken to be fully acquainted with the condition of his ship on her departure and could ensure that she was not sent to sea in an unseaworthy state. The reason why the unseaworthiness of the ship avoided the insurance contract was because the position was deemed to be as if there had been no ship at all, and also because the defect of unseaworthiness was not the result of an external mis-fortune or an unavoidable accident arising from the perils of the sea of which the

463 As to the need for slave ships to be copper-sheated, see again ch VII § 3.1 n91 supra.

464 It mattered not that on the voyage between Liverpool and Beaumaris the risk was according to evidence not increased by the fact that there were only 46 instead of 50 men on board.

465 Digest 506 sv 'seaworthiness' par 1. At 508 par 5, Weskett referred to Weytsen according to whom, by the nature of the contract of affreightment, the master was necessarily held to warrant his ship to be in good and perfect condition to perform her voyage, under pain of damages, charges, and interests.

466 That is, unseaworthiness even without the privity of the insured.

467 See eg Diamond 37.
insurer bore the risk.\textsuperscript{468} Although the implications of such a warranty were at first not welcomed by shipowning interests, the opposition was overcome\textsuperscript{469} and the principle established in the case involving the \textit{Mills Frigate} of an implied agreement and warranty that the ship was seaworthy, became part of the general principles of the English law of marine insurance.\textsuperscript{470}

Thus, in \textit{Christie v Secretan}\textsuperscript{471} where it was stressed that there was no express warranty that the ship was neutral, it was explained that the warranty of seaworthiness was implied from the nature of the contract of insurance. The ability of the ship to perform her voyage was of the essence of the contract and if she were incapable, there was a failure of consideration and the contract was void.\textsuperscript{472} If a ship sailed without a sufficient crew, she must be taken as being incapable of performing her voyage. It was otherwise, though, if she did not have proper documentation on board, for she could then nevertheless perform her voyage. In this case, where the ship sailed without proper documentation, there was consequently no breach of the implied warranty of seaworthiness.\textsuperscript{473}

\textsuperscript{468} There are some indications that the doctrine of seaworthiness in marine insurance was regarded by some commentators at the time as being founded on the general principle of insurance law that an insurer was not liable for any loss arising from the insufficient or defective quality or condition of the thing insured, i.e., from an inherent vice. See eg Martin 129, referring to Park \textit{System Weskett Digest} 279 sv 'insufficiency' too linked inherent vice and unseaworthiness. He explained that insurers were not responsible for loss or damage occurring through the insufficient, defective or perishable quality of the thing insured, and that by the nature of the contract of insurance everything was understood and tacitly warranted to be in the good state and condition in which it ought to be.

\textsuperscript{469} One of the reasons for the revision of the marine insurance policy form by Lloyd's in 1779, was because of attempts at the time to introduce variations favouring the insured. These included a clause occasionally inserted into policies which rendered any unseaworthiness of (and also any deviation by (see again § 1.2.8 supra) the ship irrelevant, unless it had existed with the privy of the insured. The clause read: 'it is particularly agreed that any Insufficiency of the Ship, or Deviation of the Master, unknown to the Assured, shall not prejudice this Insurance'. The aim with the clause was to nullify the decision in \textit{Mills Frigate}. The policy form adopted by Lloyd's did not include this provision. See further John 'London Assurance' 140; Wright & Fayle Lloyd's 148.

\textsuperscript{470} See generally Raynes (1 ed) 171-172, (2 ed) 166.

\textsuperscript{471} (1799) 8 TR 192, 101 ER 1340.

\textsuperscript{472} Lawrence J explained \textit{(obiter at 197-198, 1343)} that the warranty of seaworthiness 'is implied from the nature of the contract of insurance. The consideration of an insurance is paid, in order that the owner of a ship which is capable of performing her voyage, may be indemnified against certain contingencies; and it supposes the possibility of the underwriter gaining the premium: but if the ship be incapable of performing her voyage, there is no possibility of the underwriter's gaining the premium; and if the consideration fail, the obligation fails. In the case of the \textit{Mills Frigate} [for which reference was made to Park \textit{System}] it was said, that the ship's being capable of performing the voyage was the substratum of the contract of insurance'.

\textsuperscript{473} See, however, eg \textit{Steel v Lacy} (1810) 3 Taunt 258, 128 ER 113 where it was decided that a ship was not seaworthy unless she was provided with the documents necessary to prove her neutrality.
The existence of the implied warranty of seaworthiness also had a significant influence on the matters which the English insured had to disclose to his insurer.\(^{474}\) Because, in the absence of a specific enquiry by the insurer for such information, it was impossible for the insured to disclose to his insurer all the facts which may have been material for that insurer to decide whether or not to underwrite the policy and, if so, at what premium, the existence of this warranty, as that of all other warranties, was taken to delimit the insured’s duty of disclosure. The insured was therefore not required to disclose any circumstances which had a bearing on the seaworthiness of his ship or of the ship on which he loaded his goods.\(^{475}\)

In the course of the nineteenth century, the precise scope of the implied warranty of seaworthiness came to be worked out in greater detail which, as will be shown shortly, came to be reflected in the Marine Insurance Act of 1906.

\textbf{2.4.3 Warranties as to Convoying}

In English insurance practice, as elsewhere, it was of importance to the underwriters of a marine risk not only whether or not a ship was seaworthy but equally whether or not she sailed with a convoy.

The practice of convoying was well known to English merchant shipping and was also there made compulsory in time of war.\(^{476}\) In the beginning of the nineteenth century, all insurances on ships and cargoes not sailing with a convoy were in fact declared null and void.\(^{477}\) It was further not uncommon for an insured ship or a ship carrying insured goods to be permitted in the insurance policy concerned to sail with a convoy, the premium being in part refunded if she did in fact so sail and arrived safely. An alternative and very common in time of war, but more onerous for the insured, was an undertaking in the insurance policy that the insured or carrying ship would depart or sail with a convoy. Being a warranty to that effect, the insurance was regarded as void simply if the warranty was not complied with.

\(^{474}\) As to which see again ch VIII § 4.2.9 supra.

\(^{475}\) In the case of \\textit{Schoolbred v Nutt}, Lord Mansfield is reported (in Haywood & Another v Rodgers (1804) 4 East 590, 102 ER 957 at 598, 960) as having said ‘[t]hat there should be a representation of every thing relating to the risk which the underwriter has to run, except it be covered by a warranty. It is a condition or implied warranty in every policy, that the ship is seaworthy; and therefore there need be no representation of that. If she sail without being so, there is no valid policy’.

\(^{476}\) See eg Syrett on the trade convoys during the American War of Independence 1775-1783; and Wright & Fayle Lloyd’s 203-207 on the convoy system operating during the Anglo-French War of 1793-1815.

\(^{477}\) In 1793 an Act (33 Geo III c 66) was passed to place masters of ships in a convoy under the orders of the escort commander and to punish ships breaking away from the convoy. In 1798 an Act (36 Geo III c 76), repeated in the Convoyage Act of 1803 (43 Geo III c 57), was passed to make the joining of a convoy compulsory for all British vessels engaged in foreign trade, unless specially licensed by the Admiralty to sail without an escort. This Act also declared policies of insurance upon ships, cargo or freight void if, on the instruction or with the knowledge of the insured, the insured or carrying ship did not sail with a convoy or if she departed from a convoy contrary to the Act or wilfully separated from it. The burden was on the insurer to show that the ship did not sail with a convoy as the Act required (see eg Thornton v Lance (1815) 4 Camp 231, 171 ER 74).
From the end of the seventeenth century onwards, a large number of cases dealt with the interpretation of such warranties. A few of them may be referred to briefly.

For purposes of a warranty to depart with a convoy, the word 'convoy' meant one appointed and instructed by the Government, so that, according to the decision in Hibbert v Pigou, the warranty was breached and the insurer consequently not liable for the loss of the ship in a storm where the insured ship sailed under the protection of an armed ship whose master was not so appointed and instructed. Further, the warranty was breached where sailing instructions or orders were not obtained from the commander of the convoy before the ship left her place of rendezvous with the convoy where, by an exercise of due diligence, her master could have obtained them at that time.

A warranty to depart with a convoy ordinarily meant not only that the ship should depart on her voyage with a convoy but also that she should remain with that convoy for the duration of her voyage. However, a breach of the warranty in an emergency would be excused. Thus, it was held in one case that where a ship was 'warranted to depart with convoy', the warranty was not breached where the ship departed in the company of a convoy on her voyage, even if afterwards she became separated by a storm in an emergency and without any fraud or default on the part of the master, and was then lost by enemy capture before she could rejoin the convoy. And if a ship, warranted to sail with a convoy, became separated from that convoy and was driven back to her port of departure by foul weather, she could sail from there without a con-

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478 See generally eg Holdsworth History vol VIII at 292; Walford Cyclopaedia vol II at 113-114 sv 'convoy'.

479 (1783) 3 Doug! 224, 99 ER 624.

480 In his majority decision, Lord Mansfield said at 227, 626: 'The convoy is that force under which Government has put the trade, and a ship cannot choose her own convoy'. It did not matter and was legally irrelevant in this case that the departure without a convoy did not in any way contribute to and was not otherwise causally related to the casualty (loss by a storm) which occurred. It was sufficient that the event warranted was causally related to one of the events insured against (ie, that it was a warranty on a material matter), as appeared from the fact that there were different premium rates depending on whether or not the ship sailed with a convoy.

481 These orders established the control of the commander over the ships in his convoy and regulated matters such as the place of rendezvous should the convoy become separated in a storm, and the procedures in case of an enemy attack.

482 See Anderson v Pitcher & Ux (1800) 2 Bos & Pul 164, 126 ER 1216 where a ship was insured 'with leave to go to the place of rendezvous to join convoy, and warranted to sail from thence with convoy for the voyage' and where she only received her instructions after the convoy had been under way for two days. It was held that she was not part of the convoy until she had received those instructions for until then there was no control over the ship in question. She therefore did not sail from the place of rendezvous with a convoy and the insurer was accordingly not liable for any loss at all.

483 See eg Jefferies v John Legendra (1692) 4 Mod 58, 87 ER 261; (1692) Carthew 216, 90 ER 730; (1692) Holt KB 465, 90 ER 1156; (1692) 2 Salkeld 443, 91 ER 384; Also Lethulier's Case (1692) 2 Salkeld 443, 91 ER 384.
voy, without having to wait for a next convoy to be assembled there, or without joining a convoy at another port. 484

Finally, a deviation from the course of the agreed voyage would be excused where the ship was merely complying with a warranty to sail with a convoy, such as when there was no convoy for ships sailing directly to the ship's destination, 485 or where she sailed from her port of departure to a usual place of rendezvous off the direct course of the voyage to join a convoy assembled and ready to depart from there. 486

2.4.4 Warranties in the Marine Insurance Act

By the end of the eighteenth century it was therefore clearly established in English insurance law that an undertaking by an insured in the form of a warranty in the insurance contract, inserted by an insurer in an attempt to control and circumscribe the risk, had to be literally and exactly complied with. Even a minor, immaterial or temporary breach of such a warranty avoided the contract and absolved the insurer from liability. It was irrelevant, furthermore, whether or not the breach in fact increased the insurer's risk, or whether or not it was still breached at the time of the loss. And if the warranty was in fact still breached at that time, it was equally irrelevant whether or not it was causally related to the loss in question. 487

The position in English law at the time accordingly differed sharply from that in Roman-Dutch law. This contrast is readily apparent if, on the one hand, the decision on the unseaworthiness of a ship of the Hooge Raad in 1716 488 as well as Van der Kees sel's example on the manning of a ship 489 are compared to the decision of the King's

484 See Laing v Glover (1813) 5 Taunt 49, 128 ER 604.

485 See Bond v Gonsales (1704) 2 Salkeld 445, 91 ER 386 where the ship, 'warranted to depart with convoy', was insured on a voyage from Bremen to London. She, together with several other Dutch and English merchant ships, sailed from Bremen under a convoy of Dutch men-of-war to the Texel from where, nine weeks later, she sailed to London with a squadron of English men-of-war. Having become separated from the latter convoy in a storm, she was captured by a French privateer, and then recaptured by a Dutch privateer to whom £60 had to be paid by way of salvage. The Court held that there was no deviation in this case because at the time there were no convoys for ships sailing directly from Bremen to London.

486 See Bond v Nutt (1777) 2 Cowp 601, 98 ER 1262. Here there was no warranty but the ship was merely permitted to sail with a convoy, the insurance being 'at a premium of 15 guineas per cent. to return 5 per cent. if the ship departed with convoy, and 8 per cent. if with convoy for the voyage, and arrived safe'. Presumably, had there been a warranty to depart with a convoy in this case, the ship would have been covered if lost while en route from her port of departure to the (nearby) place of rendezvous. See also eg Wright v Schiffner (1809) 2 Camp 247, 170 ER 1145.

487 See eg Diamond 36.

488 See again S 2.2.3 at n394 supra.

489 See § 2.3.2 at n432 supra.
Bench in *De Hahn v Hartley* in 1786, and if, on the other hand, the decision on the duty to sail with a convoy of the *Hooge Raad* in 1728 is compared to that of the King's Bench in *Hibbert v Pigou* in 1783.

However, the apparent inflexibility and harshness of the law relating to insurance warranties in England at the end of the eighteenth century must be seen against the fact that warranties were then largely if not exclusively concerned with matters which could potentially influence and increase the risk and cause a loss insured against. Put differently, the warranties concerned matters material to the risk. Warranties were serious attempts by insurers to control, ameliorate and circumscribe the extent of the risk which they actually took over in terms of insurance contracts, and therefore, although at law a breach of such a warranty was not required to be causally linked (or material) to the loss, in practice the topic of the warranty itself was a potential cause of (and thus material to) the risk of such a loss.

Only in the course of the nineteenth century, and predominantly in the field of non-marine insurance, did insurers, now with the aid of proposal forms which they themselves drafted, begin to turn all representations by the insured on those forms into warranties by way of the ubiquitous basis of the contract clause. Warranties were no longer concerned solely with the insured's future conduct and aimed at controlling that conduct and the risk during the currency of the contract. They were increasingly related to the insured's knowledge of the existence, at the time or even in the past, of particular factual matters. Further, warranties were no longer individually inserted into insurance policies to the specific knowledge of the insured or his broker. Increasingly, too, the warranty technique came to be used in respect of matters not having any direct bearing on the risk taken over by the insured in the particular case. Immaterial matters came to be treated as warranties, although not as a matter of law, but as a matter of practice.

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490 See § 2.4.2 n460 supra. And also if they are compared to the decision on nationality in *Woolmer v Mullman* in 1763 (see § 2.4.2 n458 supra).

491 See § 2.3.2 n430 supra.

492 See § 2.4.3 n479 supra.

493 There is no instance in the eighteenth-century English case law where a dispute between the insurer and the insured related clearly to an immaterial fact, i.e., a fact which had no bearing on the risk taken over by the insurer and which could not potentially increase the risk of loss or damage.

494 Put differently, in Roman-Dutch law the breach of the warranty was required to be causally linked and thus material to the loss which actually occurred and for which the insured sought to claim on his policy. And such a link and materiality were not possible if the subject-matter of the warranty was not at the same time relevant or material to the risk taken over by the insurer and if its breach did not amount to an increase of such risk. In English law, by contrast, the breach of the warranty was not required to be causally connected or material to the loss. But in practice the subject-matters of warranties were at least material to the risk, even though that was not legally required nor followed from any requirement that the breach be material to the loss.

495 By this clause, statements (answers) by the insured to questions in the proposal form were incorporated into the insurance contract by way of reference and made the basis of the contract so that any incorrect answer, warranted by the insured to be true, amounted to a material breach of the contract which entitled the insurer to rescile from it.
be warranted by the insured and that, combined with the earlier established rule that a causal link between the breach of the warranty and the actual loss was not required, resulted in a large-scale abuse of the technique to the detriment of insured, especially in fields of non-commercial insurance.

The Marine Insurance Act of 1906 retained the basic position as it had begun emerging by the beginning of the nineteenth century. Of course, it also reflects the considerable further judicial development and elucidation which had occurred in the course of that century.

Firstly the Act lays down the general principles relating to insurance warranties. A warranty, in the present context,\(^496\) is determined to mean a promissory warranty\(^497\) which may be either expressed or implied,\(^498\) and which must be exactly complied with, whether or not material to the risk.\(^499\)

In the event of any non-compliance with a warranty, and unless otherwise agreed,\(^500\) the insurer is entitled to be discharged from liability as from the date of the breach of the warranty.\(^501\) It is no defence for the insured that the breach was remedied and the warranty again complied with before the loss\(^502\) and, by implication, that the breach could and did not cause or contribute to the occurrence of the loss in question.

It is in this latter aspect that the main difference lies between the modern English law of warranties and the position as regards a breach by an insured of an undertaking in the insurance contract in civil-law systems, including modern Dutch law. In the latter any undertaking on the part of the insured with regard to matters such as the seaworthiness of a ship does not, if breached, avoid the contract or entitle the insurer to resile from it. A breach merely excludes the insurer's liability for a loss caused by or

\(^496\) And in ss 34-41 of the Act.

\(^497\) That is, a warranty by which the insured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts: see s 33(1).

\(^498\) Section 33(2). Section 35 deals with express warranties and provides that they may be in any form of words from which the intention to warrant may be inferred; that they must be included in or written upon the policy or be contained in some document incorporated by reference into the policy; and that an express warranty does not exclude an implied warranty unless inconsistent with it.

\(^499\) Section 33(3). Thus, the Act now specifically provides that the matter warranted need not be relevant or material to the risk taken over by the insurer.

\(^500\) Thus, breach of a warranty does not make the policy void (as was commonly stated in the eighteenth century): it may be waived (a void contract cannot be ratified); and it is possible and lawful for an express provision to be included in the policy that the insured be held covered in the case of a breach of warranty subject to a premium to be arranged, often on condition that the insurer be notified of the breach as soon as the insured becomes aware of it.

\(^501\) Section 33(3). The insurer remains liable in respect of losses occurring before that date. Thus, the marine insurance warranty is, in English legal terminology, a condition precedent, a breach of which gives rise to a right to avoid the contract and not a collateral stipulation, a breach of which merely gives rise to a claim for damages.

\(^502\) Section 34(2).
at least causally related to such a breach (that is, by or to the unseaworthiness), but the contract remains valid and the insurer liable for any other loss.\textsuperscript{503} However, such terms are not customarily expressed or inserted in insurance contracts in civil-law systems and in any case not implied in them;\textsuperscript{504} reliance being placed, rather, on misrepresentation, and the exclusion of liability on the part of the insurer for loss or damage caused by inherent vice and the insured's own conduct.\textsuperscript{505}

A breach of an insurance warranty may be excused\textsuperscript{506} or waived by the insurer,\textsuperscript{507} though. It is in the latter respect that many of the onerous consequences of

\textsuperscript{503} See further Anderson 24 (the differences In this regard between English law and German law); Buys 61-63 (the differences between English law and Dutch law); Van der Vorm (a Dutch view of the English law of warranties); and Ulrich 219-220 (English law and German law). The following remark by Idelson 354 underlines the extent of the difference In question: 'Noch krasser tritt die Antiquität des Common Law in dem Institute der promissory warranties ... hervor. Die alte römische Stipulation mit ihrem ganzen Formalismus ist hier wieder aufgetreten'.

\textsuperscript{504} Hence the absence of any regulation on the matter in the Wetboek van Koophandel. Of course, should such terms be inserted in an insurance contract, their breach will be governed by the general principles pertaining to the breach of contracts generally.

\textsuperscript{505} See Dorhout Mees Schadeverzekeringsrecht 35-36.

The most detailed analysis of the differences In this regard between the English law relating to the warranty of seaworthiness and the Dutch law relating to an inherent vice is that of Willeumier 28-50 and 69-71. In summary the differences amount to the following.

In Dutch law the insurer Is not liable for loss or damage caused by an inherent vice in the subject-matter insured. The mere fact or existence of such a vice at any stage (at the time of the conclusion contract or at any time thereafter, including at the time of loss) does not avoid the contract though; it will at most affect the insured's burden of proving the peril of the sea and the causal link between it and the loss. Further, there has to be a causal connection between the vice and the loss before the insurer is relieved of liability for that loss. Furthermore, it must be an inherent vice of the object insured and it is thus irrelevant that the loss of insured goods was caused by an inherent vice of the ship, such being an extraneous peril for the insured goods (thus, the cargo insurer is liable to the cargo owner although there may be a recourse against the shipowner). Also, the vice must be inherent and one of which the insured is unaware. However, although in Dutch law the unseaworthiness of or an inherent vice in the property insured does not by itself render the contract void, it will do so if the contract expressly so provides.

In English law, with its implied warranty of seaworthiness, the position is completely different. A mere breach of the warranty (i.e., the mere fact of unseaworthiness of the ship) renders the contract void and the insurer not liable for any loss, irrespective of whether it was caused by or otherwise relevant to such unseaworthiness. It is irrelevant therefore that the breach was remedied and that the unseaworthiness at the commencement of the voyage was repaired prior to the loss. It is also irrelevant that the insured is unaware of or not responsible for the unseaworthiness. Furthermore, a cargo insurer is also relieved of liability in the case of the unseaworthiness of the carrying ship.

\textsuperscript{506} In terms of s 34(1), that occurs when by reason of changed circumstances a warranty ceases to be applicable to the circumstances of the contract, or when compliance with it becomes unlawful in terms of a subsequent law. See Chalmers 52 for examples. For a criticism of this provision, see Cohen 'Notes' 118-119 (if compliance with a warranty is unlawful, the whole contract, including a condition (i.e., a material term) such as a warranty, will be void). Note, however, that non-compliance with a warranty will not be excused on the ground of compliance being rendered impossible by the perils insured against.

\textsuperscript{507} Section 34(3). Non-compliance discharges the insurer unless otherwise agreed. Waiver may be by way of a clause holding the insured covered at a premium to be agreed or, more specifically as to the implied warranty of seaworthiness, a seaworthiness admitted clause in terms of which the seaworthiness of the ship is admitted between the Insured and the insurer. See further eg Deutch & Hammond 89-90 (in the case of voyage policies on cargo, the seaworthiness admitted clause precludes litigation on the implied warranty of seaworthiness, cargo insurers as a business decision electing to admit seaworthiness...
the English law of warranties may be and are ameliorated in marine insurance practice so that, in effect, there is little practical difference between English legal practice and civil law in this regard.\(^{508}\)

Secondly, the Marine Insurance Act deals with specific types of warranty or, rather, with warranties on particular topics, two of them expressed and two implied. It is noticeable that warranties concerning convoying are not specifically treated in the Act.\(^{509}\)

The expressed warranties specifically provided for are those of neutrality \(^{510}\) and of good safety.\(^{511}\)

The implied warranties provided for are those of legality \(^{512}\) and of seaworthiness.

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508 In English law the strict doctrine of seaworthiness is cut down by a clause restricting the exclusion of the insurer's liability to a case of unseaworthiness to which insured was privy, i.e., to cases where in Dutch law the vice was not inherent and unknown.

509 Chalmers 54-55 warns that due to changed conditions of maritime commerce and war, it would be misleading to attempt to deduce any rules from the numerous decisions at the beginning of the nineteenth century on the effect of the warranty to sail with a convoy.

510 Section 36(1) provides that where insurable property (a ship or goods) is expressly warranted to be neutral, there is an implied condition that the property has a neutral character at the commencement of the risk and that, as far as the insured can control the matter, that neutral character will be preserved during the risk. In terms of s 36(2), where a ship is expressly warranted to be neutral, there is a further implied condition that, as far as the insured can control the matter, she will be properly documented, i.e., carry the necessary papers to establish her neutrality and will not falsify or suppress her papers or use simulated papers. If any loss occurs through a breach of this condition, the insurer may avoid the contract. Thus, the neutrality of a ship is not in English law treated as an aspect of her seaworthiness. Further, otherwise than in the case of a breach of warranty generally, a mere breach of the condition implied in the case of a ship warranted to be neutral is not sufficient to relieve the insurer of liability as such relief occurs only in respect of a loss causally related to that breach. To this s 37 adds that there is no implied warranty as to the nationality of a ship or that her nationality will not be changed during the risk.

Although the topic covered by s 36 shows some similarity with that of art 658 of the Wetboek van Koophandel, it appears that in Dutch law the equivalent of a breach of the implied condition flowing from a breach of an express warranty of neutrality in English law would be treated as a question of inherent vice.

511 In terms of s 38, in the case of a warranty that the subject-matter insured is 'well' or 'in good safety' on a particular day, it is sufficient that it is safe at any time during that day.

512 Section 41 provides for an implied warranty that the adventure insured is a lawful one and that, in so far as the insured can control the matter, it will be carried out in a lawful manner. This is in addition to the provision in s 3(1) that, subject to the provisions of the Act, every lawful marine adventure may be the subject of a contract of marine insurance.

The recognition of an implied warranty of legality appears strange, given that the legality of the conclusion and performance of the contract is required at common law (which remains relevant in terms of s 91(2) of the Act). That the correctness of this approach is doubtful, appears from fact that whereas the breach of a warranty may be waived by the insurer or the parties (in terms of s 34(3)), that is not the case with the implied warranty of legality (see eg Chalmers 52 and 61n1). As to the requirement of legality for the validity of an insurance contract, see again ch VIII § 5 supra.
As far as the latter is concerned,\textsuperscript{513} the Act lays down that in every voyage policy, presumably on whatever interest, there is implied a warranty that at the commencement of the voyage the ship is seaworthy for the purposes of the particular voyage insured.\textsuperscript{514} A ship is deemed seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the sea on the voyage insured.\textsuperscript{515} In a voyage policy on cargo, there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship but also reasonably fit to carry the cargo to the destination contemplated by the policy.\textsuperscript{516} However, in a policy on cargo there is no implied warranty that the cargo itself is seaworthy,\textsuperscript{517} and in a time policy there is no implied warranty of seaworthiness of the ship at any stage of the adventure.\textsuperscript{518}

\textsuperscript{513} See generally eg Chalmers 57-58 and 60.

\textsuperscript{514} See s 39(1). It is therefore not an implied warranty of continuing seaworthiness throughout the voyage.

Where the voyage in question is to be performed in different stages, during which the ship requires different kinds of or further preparation or equipment, s 39(2) provides that there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for purposes of that stage. If the policy attaches while the ship is in port, there is, in terms of s 39(2), also an implied warranty that the ship will, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port, that is, that she is 'portworthy'.

\textsuperscript{515} Section 39(4).

\textsuperscript{516} Section 40(2). Thus, in a voyage policy on cargo there is not only an implied warranty of the seaworthiness of the ship but also an implied warranty of her cargoworthiness.

\textsuperscript{517} Section 40(1). However, the insurer is not liable for loss or damage caused by an inherent vice in the cargo.

\textsuperscript{518} But where, in that case, an insured ship is sent to sea in an unseaworthy state with the privy of the insured, the insurer is in terms of s 39(5) not liable for any loss attributable to such unseaworthiness. Thus, if a ship sails on the insured voyage and is, to the knowledge of the insured, unseaworthy at that time, the insurer's liability on a time policy is excluded in respect of a loss caused by such unseaworthiness. A causal link is therefore required in this case. Also in this regard cargo policies which contain the seaworthiness admitted clause provide that in the event of a loss, the insured's right on the policy is not prejudiced by the fact that the loss is attributable to any misconduct of the shipowner committed without the privy of the insured consignor.

Although the distinction between voyage and time policies was recognised in English law by the end of the eighteenth century (see again ch XII § 1.2 supra), the distinction between them as regards the implied warranty of seaworthiness was not drawn until the second half of the nineteenth century when a series of decisions established that in a time policy there was no implied warranty of seaworthiness of the ship at any time. One of the reasons for this view was that a ship was often at sea when such a policy commenced with the owner being uninformed of her condition then, and with it being simply too onerous to enquire subsequently about and demand the seaworthiness of the ship at the inception of the risk. Rather than attempt to apply the rule concerning seaworthiness to time policies subject to exceptions, English courts simply abolished its application to time policies altogether. However, instead they imposed a new rule, namely, that if through his misconduct, the owner knowingly sent his ship to sea in an unseaworthy condition, he could not claim for loss caused by such unseaworthiness, this being but an application of the exclusion of liability for the insured's own conduct (see again ch VI § 4.11 supra). See further as to seaworthiness and time policies, Anderson 1; Deutch & Hammon 92.
As with warranties generally, the implied warranty of seaworthiness may be negated by an express term in the policy. The imposition of an implied warranty of seaworthiness of the ship, excluding the insurer’s liability in the circumstances already described, is harsh not only on an innocent consignor of insured cargo but also on an insured shipowner himself who is usually unaware of the precise condition of his ship on her departure. There is therefore a need to ameliorate the consequences of an implication of this warranty, limited though its field of application may be in practice. In practice, therefore, the insurer usually waives any breach of the warranty of seaworthiness unless the insured or his employees are aware of such unseaworthiness, and it is in any case usual to pay innocent consignors as a matter of honour. In short, the implied warranty of seaworthiness plays a relatively unimportant role in English marine insurance law and practice, namely only in those rare instances of voyage policies on hull or in the case of a voyage policy on goods which does not contain the customary seaworthiness admitted clause.

519 Voyage policies on hull, where an implication of the warranty is possible, occur but rarely and the warranty is not implied in time policies.

520 See eg Buys 67; Van der Vorm 38.
CHAPTER XIV
FRAUD

1 General Introduction

Ironically the single most important topic of Roman-Dutch insurance law is also treated in the shortest chapter in this investigation. The reason, simply, is that fraud, because of the all-pervasive influence it had on Dutch insurance law and practice, is also treated in one or more of its guises in almost every other chapter. Initially virtually all the provisions contained in insurance legislation were aimed solely at the reduction if not the eradication of fraudulent conduct in connection with the insurance contract. This was not only to protect the one or the other party to the contract but also, initially at least, primarily to protect the shipping industry and commerce at large. That much appears clearly from the sometimes lengthy preambles to sixteenth-century insurance legislation in the Netherlands.

This chapter, then, is no more than a focal point for references to the treatment of specific instances of fraud in the insurance context which are considered specifically and in detail elsewhere. It is also an attempt to distil and summarise the general principles involved, such as they were.

Before proceeding to some examples of insurance fraud and to a consideration of the applicable legislative provisions on such fraud generally, two brief preliminary points should be made.

The first is that in Roman-Dutch law fraud was both a civil and a criminal wrong and had both civil and criminal consequences. However, the distinction between private law and public (criminal) law was not yet clearly drawn in Roman-Dutch legal

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1 Thus, Bynkershoek Quaestiones juris privati IV.5 declared: ‘De Ordonnantien op het stuk van Assurantie zijn gemaakt, om bedrog voor te komen, en indien wy die niet heilig onderhouden, word er eene deur voor guity en bedrog geopent’. See too eg Lichtenauer Geschiedenis 179. The proposal for the establishment of an Amsterdam insurance company in 1628 (see again ch IX § 2.10.2.1 supra) contained various proposals to reduce the incidence of insurance fraud, ‘alsoo de assurantie veel fraud en boosheyt subject is’. See Blok ‘Plan’ 9 and also idem ‘Adviezen’ 117-118.
function with the damages being awarded including fines as a punishment for the fraudulent conduct involved.

Further, there was no consistency in the terminology employed to describe fraudulent conduct. Although a distinction was drawn not only between fraudulent and non-fraudulent conduct but also, as will be shown shortly, between different types of fraud, the precise relationship between fraud and good faith was not in all respects made readily apparent. It would appear, though, that in Roman-Dutch insurance law fraud meant no more than the absence of good faith (bona fides) and was therefore the equivalent of bad faith (malitia). Put differently, the duty to act in good faith, which duty applied to insurance contracts as it did to all other contracts, meant no more than that the parties were not to act fraudulently. This much appears clearly from the legislative provisions which will be referred to shortly. And in this regard Roman-Dutch law did not recognise different classes or shades of good or bad faith. Notions such as good, better, or best faith, or good and utmost good faith, were unknown. There was good faith and bad faith and nothing in between; and conduct could be classed as having been performed only in good faith or in bad faith.

2 Specific Examples of Insurance Fraud

Numerous examples of insurance fraud appear from the various Roman-Dutch sources. For present purposes insurance fraud is taken to refer to a fraud perpetrated by one party to an insurance contract, or by someone acting for him, on the other party to that contract. This chapter is not, or at least not specifically, concerned with the conduct of such a person which is aimed at defrauding the authorities, such as the fraudulent non-compliance with legislative duties and measures dealing with matters such as stamp duties, the registration of policies, and the seaworthiness of ships.

Prime examples of insurance fraud on the part of the insured included, firstly, intentional and conscious over-insurance, whether or not by way of double insurance, which was any insurance in excess of the real value of the property at risk - it therefore included an instance of over-valuation - or in excess of the proportion of that value.
which it was permitted to insure. Then there were fraudulent insurance claims, such as for a loss which had not occurred, or for one which had been caused by the insured’s own intentional conduct, or for an amount in excess of the actual loss which did occur. Thirdly, there was the well-known and pertinently regulated instance of an insured effecting an insurance with knowledge of the earlier loss of or damage to the property to be insured. A fourth instance of fraud was where the insured attempted to cover several consignments under one insurance policy by means of unidentified or improperly identified shipments. A fifth possibility was where the insured attempted to recover or to avoid payment of the insurance premium under false pretences, for example that the property had never been at risk or had arrived safely prior to the conclusion of the insurance. Finally it may be mentioned again that although a breach by the insured of his statutory duty to mention certain specified matters in his policy if he was aware of them could in appropriate instances amount to fraudulent conduct, that duty operated in addition to his wider duty to act in good faith and without any fraud.

It must be emphasised that these were merely instances of fraud which frequently occurred in practice and therefore attracted the specific attention not only of the legis-

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8 As to over-insurance, see ch XVIII § 4 infra. In the event of fraudulent over-insurance, the insurance contract or contracts were avoided and the insured had no claim on the policy or policies at all. In the case of an innocent over-insurance, the sum insured (on the only policy, or on the later policies, as the case may have been) was reduced to the real value of property at risk, that is, the contract was avoided only to the extent of the over-insurance. For a reference to good faith in the context of over-insurance, see eg the opinion in Nederlands advysboek vol II adv 120 (1669).

9 For example, because the insured ship had never departed on her voyage or the insured cargo had never been consigned, or because the loss which did occur was a feigned loss such as when the insured had connived with enemy capturers of the insured property to share with them in any insurance payment he could obtain on the grounds of a loss by capture.

10 Such as where the shipowner or his master scuttled the insured ship. In the absence of the institution of a claim on the insurance contract, an intentional causation of the loss by the insured himself was apparently not in Roman-Dutch law pertinently regarded as an instance of fraud or of breach of the principle of good faith which had any effect on validity of contract itself. Such conduct, as in fact the insured’s conduct generally, was simply a peril for which insurer incurred no liability on the contract (see again ch VI § 4.1 supra). However, it appears to have given rise to a criminal sanction (see § 4.3 infra) and thus to have been regarded as an instance of fraud if the insured attempted to recover on his policy for an intentionally caused loss.

11 See again ch XII § 2.2 supra. In the case of an insurance concluded after the loss with actual or presumed knowledge of that loss, the contract was null and void and the insured had no claim on the policy.

12 See again ch VIII § 4.2.7 supra as to insurances on unnamed ships (in quovis) and the additional safeguards legislatively required to prevent the perpetration of frauds in such cases.

13 See again ch XI § 6.2 supra as to the grounds for the recovery of the premium. In the event of any fraud on his part, it will be remembered, the insured was generally unable to recover any premium which may otherwise have been recoverable: see again ch XI § 6.3 supra for the grounds upon which the insured forfeited the premium.

14 See again ch VIII § 4.2.1 supra. The failure to mention the matters in question resulted in the nullity of the insurance contract.
tures in particular and the law in general but also of the merchant community itself. The ingenuity of insured knew no bounds, and many other fraudulent schemes and practices were no doubt devised. Of course, the actual instances of insurance fraud were much more interesting than this dull description of the various possibilities might suggest. Furthermore, it should also be remembered that the types of fraud mentioned overlapped in practice and that an insured’s conduct could be, and in practice often was, fraudulent in more than one respect. For example, he could claim on his insurance in respect of over-insured property never at risk or in respect of over-insured property intentionally destroyed.

Because of such overlap, as well as because of the fact that the treatment of fraud in Roman-Dutch insurance law was concerned merely with these frequently occurring instances, it may be thought that there was a need for fraud in the insurance context to be dealt with by way of general principles. However, as will be shown, such principles

15 A number of examples of insurance and insurance-related frauds prevalent in the sixteenth century were mentioned in preambles to the early insurance laws in the Low Countries, e.g., the placcaaten of 1550, 1551, 1563, 1569 (which prohibited the conclusion of insurances because of the prevalence of such frauds) and those of 1570 and 1571 (which again permitted it). See also e.g., Kracht 12-13. These frauds included arrangements between a local consignor of insured goods and a foreign shipowner/carerrier in terms of which the goods were sold to the latter, or on behalf of the consignor by the latter, while the consignor pretended to the insurer that the goods had been captured; schemes by which an insured shipowner by prior arrangement bought back his ship from her ‘capturers’ after he had received payment from the insurers; and insurances and bottomry loans being concluded in excess of the real value of the object at risk.

The report of Ferufini in 1557 to the King of Spain with a view to the establishment of an office for the registration of insurance policies in the Netherlands (see again ch IV § 1.3.2 supra, ch VIII § 3.3 supra) mentioned various insurance frauds perpetrated by insured and their brokers upon insurers. These included intentional over-insurance through double insurance; the recovery of the premium under false pretences (alleging the absence of risk by reason of a non-shipment or an earlier safe arrival); covering several consignments under a single insurance in which the carrying ship was not properly identified; and claiming for a loss intentionally caused by the insured himself. See further De Groote Zeeassurantie 67-68.

16 Aspirant merchants, including those who might become underwriters, were made aware of the possibility of fraud and the various types which could occur in connection with insurance contracts. Thus, in the Leerboek (1643) of the Antwerp firm of Van Colen-De Groot (see Denuce Koopmansleerboeken 200) the following example was provided: A person insures for a specific amount on the goods he expected and when the ship arrives safely he pretends to the insurer that there were no goods for him on that ship and that the amount of the premium (less ½ per cent) had to be returned to him or, if he had not yet paid the premium, that only a ½ per cent premium was due to the insurer. However, if the ship was lost, he would say that his goods had been loaded on the ship and would, on payment of the premium, claim the sum insured. As the manual noted, ‘dit geschiet maer onder schelmen en diven en die sonder conscientie syn’.

17 One particularly neat instance of fraud appears from an Antwerp notarial deed of 1564. See De Groote Zeeassurantie 21. One Antonio Jorge, a Portuguese merchant resident in Antwerp, while on a business trip in London, from there instructed his father in Antwerp to insure a consignment of goods which he would send from London to Antwerp. Shortly thereafter Jorge arrived in Antwerp and made it known on the Bourse that the ship on which his goods had been loaded, was wrecked on route. He promptly also claimed payment from the insurers. The latter however received information from London not only that nothing had been loaded for Jorge on the ship in question but that she had in fact not sailed for Antwerp. Jorge was found guilty and imprisoned for his failed attempt at defrauding the underwriters.
were not clearly established in Roman-Dutch law and there existed no uniformity as regards the consequences which flowed from the commission of a fraud by an insured. The insured, however, was not the only person capable of an insurance fraud. Insurers, too, were not averse to sharp practices upon their insured although their more passive role as far as the insurance contract was concerned, resulted in relatively fewer examples of fraud on their part. The main example referred to in the sources was that of the insurer concluding the contract with knowledge of the safe arrival of the property to be insured. But there were also other examples of unscrupulous and potentially fraudulent conduct by insurers, such as forcing the insured to claim separately from each of the individual insurers who had underwritten the policy in question; starting rumours of war or enemy activity so as to increase premium rates; delaying payments as long as possible; and undertaking to insure while actually or nearly insolvent or while overextended on other insurances. There are indications that an insurer was regarded as acting in bad faith if, in breach of his agreement with the insured, he relied on legislative provisions which had in any event fallen into disuse by reason of a contrary custom, and that an insurer himself sometimes realised that it would amount to bad faith for him to rely on a legislative measure abolished by such a practice. By analogy, insurers who relied on technical defences, or who sought to escape liability under their contracts by arguing sharp points of law contrary to

18 See again ch XII § 2.3 supra. In such a case the insurance contract was null and void and the premium either not due or, if paid, returnable.

19 See Barbour ‘Marine Risks’ 582.

20 Idem 582.

21 This practice was pertinently addressed in insurance laws: see ch XX § 2.2 infra as to provisional payments on insurance policies.

22 See again ch VII § 4.1 supra as to solvency reinsurance and ch IX § 2.9 supra as to underwriter insolvency and death.

23 See the Hooge Raad decision in 1712 (Bynkershoek Observationes tumultuariae obs 909; Idem Quaestiones juris privati IV.5), discussed in respect of the insurance of expected profit in ch V § 5.2 supra and also in respect of the renunciation of insurance laws in ch VIII § 5.2.3 supra. In another case before the Raad in 1722 (Bynkershoek Observationes tumultuariae obs 1873; Idem Quaestiones juris privati IV.11), the insurer did not rely on the legislative prohibition on full-value insurance lest he be regarded as acting in bad faith, the prohibition in question having been abolished by contrary custom (see again ch VIII § 5.2.3 supra, ch XVIII § 5.2 infra as to compulsory under-insurance, and Van Apeldoorn ‘Theorie en practijk’ 10-11).

24 The fanciful defences raised by insurers in one case before the Hooge Raad elicited some rather acerbic comments from Bynkershoek (Quaestiones juris privati IV.3): ‘Maar gelyk de Assuradeurs veel gretiger zyn om premie te ontfangen, dan om schade te betalen, en om dit te vermyden doorgaans zeer vernuutig zyn, gebruikten onze Assuradeurs ook andere redenen tot hun voordeel voor den Hoogen Raad, maar byna alle zodenige, die in feiten bestonden’. After recounting and rejecting these other defences, he concluded: ‘Zy voegden ’er noch eenige andere zaken by, maar alle zo beuzelachtig, dat ik my schaame dezelve te verhalen, ik laat staan te weêrleggen’.
accepted practice between merchants, may well in Roman-Dutch law generally have been regarded as acting in breach of their duty of good faith.

Lastly, persons not parties to but closely involved with the conclusion of insurance contracts, such as brokers and masters, may also have perpetrated frauds upon one or both of the parties to such contracts.25

3 Statutory Measures on Insurance Fraud and Good Faith Generally

Apart from those instances just mentioned where Roman-Dutch law generally and its insurance legislation more particularly made provision for specific types of fraudulent conduct by one of the parties to the insurance contract, Roman-Dutch sources of insurance law also contain a number of instances where fraud and its counterpart, good faith, were referred to and regulated without reference to any particular type of conduct or to conduct in any particular type of situation. In insurance legislation this occurred not only in legislative provisions themselves but also in the policy forms prescribed or suggested by the different measures.

Thus, the policy form appended to title VII of the placcaat of 1563, after stating that the insurers regarded the policy of insurance of as much effect as if it had been officially or notarially executed,26 declared that everything (which was presumably done) in connection with the policy would be without fraud or guile ("alles sonder bedroch oft argelyst"); "le tout sans fraude ou malegrin" in the French version of the policy). The placcaat itself, however, gave no indication of what, generally speaking, the consequences would be if there was any fraud.

The same appeared in the placcaat of 1571, where the policy form set out in s 35 declared that everything would be done by the insurers in good faith and without fraud or guile ("alles ter goeder trouen, ende sonder bedroch oft argelyst") and now also that they, in good faith and under oath, renounced all defences contrary to the wording of the policy ("[r]enuncerende by trouwe ende eede tot alle saecken, desen jegen woor­dighe contrarie zynde"). The presence of such an undertaking of good faith in the liability clause in insurance policies, although not present in the model policy form in the plac­caat of 1563, appears to have been common in insurance policies throughout the six­teenth century.27

25 As to brokers, see again ch X § 7 supra, and as to the barratrous conduct of masters and crew, see again ch VI § 4.3 supra.

26 See again ch VIII § 3.2.3 supra.

27 See De Groote Zeeassurantie 114-118 for examples. Thus, in a policy of 1531 the insurers renounced all legal exceptions and defences and anything else that could be relied upon, "sünst der alle bedroch, argelyst unde quade fünde"; and in a policy from 1591 it was declared: "Allen welke vorsekeren, ende gelovenn ter goder Truwen ende sonder einich bedroch... Renuncierende onder eedt alle Dinge ter Contrarie dese tegenwerdige".
In addition, s 22 of the placcaat of 1571\(^{28}\) now shed more general light\(^{29}\) on the consequences of the absence of good faith and the presence of fraud. This was both necessary and understandable, given that the prohibition of 1569 on the conclusion of insurance contracts in the Low Countries, a prohibition inspired primarily by the frauds which the insurance contract was considered to make possible, had just been repealed and the conclusion of such contracts again permitted.\(^{30}\) Section 22 provided that since insurance contracts were taken to be contracts of good faith in respect of which there ought to be no fraud,\(^{31}\) if it were found that because of insured or insurers, masters, shippers, pilots or others any fraud had occurred in connection with it, such persons would not only not be permitted to profit from their fraud, but would be held liable for any loss, damage and expenses their conduct had caused.\(^{32}\) Such persons would also be punished corporally as a discouragement and example for others, even capitally as a pirate or thief if it were found that they had employed any noticeable malice.\(^{33}\)

Section 22 therefore provided for both civil and criminal consequences to flow from the commission of any fraud in connection with an insurance contract, and such consequences arose not only for the immediate parties to the contract. The civil consequences, specifically, on the one hand prohibited any profit from being made from such fraud, and on the other hand imposed liability on the fraudulent party for any loss or damage suffered by any other party involved. However, it did not specifically provide that the contract would be avoided by such fraud. Thus, it would appear, an insured would still be able to claim on the contract, except if, in the specific context, his fraudulent conduct avoided the contract. But he would not be able to profit from his fraud and would have to compensate the insurer for any loss occasioned by his fraud.

The Amsterdam keur of 1598 retained this approach. The policies appended to it noted that everything done (and presumably to be done) in connection with the policy would be done without fraud ('[a]lles sonder arglist') and in accordance with the keur.

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\(^{28}\) Which was identical to s 23 of the provisional placcaat of 1570.

\(^{29}\) Other sections too referred to the need for an absence of fraud in specific instances, eg in s 21 (see again ch V § 5.6 supra) where the master, crew and others were prohibited from insuring their wages but permitted to insure their merchandise, if any, on board, 'alles sonder bedroch'.

\(^{30}\) See again ch XIII § 2.2.1 supra and on s 22, see generally Goudsmit Zeerecht 265-266; Kracht 27.

\(^{31}\) 'Als deze Contracten van verseeckeringen oft asseurantien, gehouden ende geestimeert worden, voor Contracten van goeder trouwen, daer inne egeen fraude oft bedroch en behoorde te intervenieren oft geschieden'.

\(^{32}\) 'Indien men bevint dat van wegen des verseeckerden oft verseeckeraers, Meesters, Schippers, Piloten oft andere, daer inne geschiede eenige fraude, bedroch oft argelist, en sullen niet alleenlijken met hun voorseyde bedroch ende argelist geensints profijtieren, maer sullen gehouden worden (soo voorseyt is) in 't verlies, schade ende interesten, procederende tot harer occasie'.

\(^{33}\) 'Ende aenden lyve exemplaerlijcken gestraft ende gepuniceert worden, tot vreese ende exemplar van anderen, jae metter doot, als Zee-roovers ende openbare dieven, indien bevonden wort dat sy van eenige merckelijcke malversatie, malitie oft argelist gebyruykct hadden'. Thus, as far as the possible punishment was concerned, a distinction was drawn here between 'gewone' bad faith and 'eenich groot ende merckelijck bedroch, oft quade ende loose handelinge'. See Mullens 80-81 and further § 4.3 infra.
itself ('ende volgende d'Ordonnantie vande Kamere van Asseurantie der Stadt Amster-
redam'). The insurers also, as men of honour, renounced all petty objections or technical
defences and all exceptions or legal defences not according with the policy
('renuncierende als Luyden van eeren, alle cavilatien ende exceptien die desen
souden mogen contrarieren'). 34

Section 31 of the Amsterdam keur of 159835 then repeated the provisions of s 22
of the placcaat of 1571 almost verbatim,36 merely adding that legislative provisions on
the topic would be followed ('alles achtervolgende den Placate daer van zijnde'). This
addition, it would appear, referred to legislative measures dealing with the criminal con-
sequences of fraudulent conduct generally and not of such conduct in connection with
insurances specifically.

One example of a measure concerning the criminal consequences of fraudulent
conduct generally, dating from the beginning of the seventeenth century, may be men-
tioned briefly. It was a placcaat of the Estates of Holland and West Friesland of 19
March 161437 which also provides a more detailed indication of the possible punish-
ments for fraud at the time. It provided for the punishment of thieves ('dieven'), a term
which apparently referred not only to thieves in the narrow sense of the word but to all
those who committed crimes upon property or financial crimes generally. In terms of s
1, in the case of ordinary theft ('simpele dieverye'), the punishments were, on a first
conviction, severe public flogging and branding; on a second conviction, flogging, branding
and banishment; and on a third conviction, capital punishment by hanging
with a forfeiture of all the person's property ('sonder eenige connivintie mete koord,
sucks datter de doot na volgt, gestraft'). The section also provided for the possibility, in
the case of multiple or serious crimes of this nature, of an imposition of the death pen-
alty already on the second or even on a first conviction. Section 2 dealt with more
serious versions of such theft, such as theft under false pretenses ('dieverye vermengt
met valscheyt'), housebreaking, piracy, or robbery. On conviction, capital punishment
(hanging or an even worse form of death, depending on the circumstances) with a for-
feiture of property were to follow ('sonder eenige connivintie oft dissimulatie ghestraft
... worden mette koords ofte anders swareder naer exigentie vander saacken, suicks
datter in alle gevalle de doot nae volcht, met confiscatie van goederen').

It may be mentioned in passing that the position in Amsterdam was largely similar
to that prescribed by the Antwerp Compilatae of 1609. Article 5638 of this compilation of

34 The revised hull policy of the Amsterdam keur of 1688 simply stated that everything would be done
according to law ('als na Rechten') while the insurers again undertook not to rely on unacceptable
defences. The cargo policy merely contained the insurers' renunciation and made no reference to any
compliance with either the law or the duty of good faith. The ransom policy in the keur of 1693 declared
that everything would be done in good faith and without fraud ('alles ter goeder trouwe sonder arg of
lisl').

35 Section 30 of the Middelburg keur of 1600 was in identical terms.

36 See generally Goudsmit Zeerecht 326.

37 See GPB vol I at 491.

38 Of par 2, title 11, part IV (see De Longé vol IV at 224).
customary law provided that in all contracts of insurance one had to act in good faith, without any fraud ("begrijpelijkheijt, argelist oft bedroch"), and that if it were found that the insured, insurers, masters, shippers, pilots or others had acted otherwise in the conclusion or execution of the contract, such person could not only not benefit but was also liable for all loss his actions had occasioned ("soude alleenelijck hun niet te stade commen, maer souden oock alle schade ende verlies daerdore veroorsaeckt moeten oprechten"). In terms of art 57, in the case of grossly fraudulent conduct, the guilty party could, depending on the circumstances and in accordance with legislation on the topic, also suffer public corporal punishment as an example to others, and even, in the same way as pirates and thieves of public property, capital punishment.

The Compilatae also stipulated that while proof of shipments and the value of any property lost was required, and while the insured had to declare under oath not only that the documents ("cargasoen oft .... priseringe") required for this purpose were not false, that the goods had in fact been shipped and had been at risk, and that there was no other insurance on the same property, it remained open to insurers to prove the contrary of all these matters. If it were found that any impropriety had occurred in the shipment, loading or valuation ("int cognossement, cargasoen of priseringe"), or that the goods had also been insured elsewhere in bad faith, the insured was not only deprived of his action but also punished according to the circumstances.

To return to Amsterdam legislation on the topic of insurance fraud. From s 2 of the Amsterdam amending keur of 14 July 1607 it appears that fraud in connection with insurance contracts was regarded as so serious that questions involving such fraud were removed from the jurisdiction of the Amsterdam Chamber of Insurance. This section was concerned with the case where any misconduct ("eenige mishandelinge") appeared to the Commissioners of the Chamber to have been committed by any person in connection with the conclusion of an insurance after receiving information regarding the loss of the property to be insured, or where a specific sum was first underwritten in good faith and later a specific sum in bad faith ("dat op een Police eerst is gedaen teeckenen sekere somme ter goeder trouwe, ende daer na sekere somme ter quader trouwe"). In such cases, the section laid down, the Commissioners were bound to refer the cases concerned as well as the parties to the Schepenen Bench ("Heeren van den Gerechte deser Stede"), and also to place the documents and evidence ("de stucken en de munimenten [bewijsstucken]") submitted to them by the

39 See art 266 of par 8, title 11, part IV (De Longé vol IV at 310).

40 See art 268.

41 See again ch IV § 1.4.3 supra.

42 As to which see eg Voet Observationes ad III.24.20 (n38); Schorer Aanteekeningen 422 (ad III.24.6) n15; Boey Woorden-tolk sv 'Despache'; and also Goudsmit Zeerecht 331. Section 1 dealt with the collection and distribution of the fines imposed by the Chamber.

43 It is not clear precisely to what situation this referred, that of over-insurance by an insured by the conclusion of further subsequent insurances, or the subsequent alteration of the sums underwritten by the insurers themselves.
parties in the hands of that tribunal. Despite the fact that the section merely referred to what appears to have been two common instances of insurance fraud, it may well have been that all insurance cases coming before the Chamber in which it appeared that fraud of whatever nature and in whatever form had been committed, had to be referred in this way.44

After the Rotterdam keur of 1604 had made no specific reference to fraud in the context of the insurance contract, its keur of 1721 followed the Amsterdam example. In both the hull and the cargo policies appended to the keur the insurers declared that their undertaking would be performed in good faith and without any petty objections ("[a]lle het welke wy be/oven ende aannemen ter goeder trouwe, ende zonder eenige cavillatie, te zullen voldoen"). The keur itself, though, said nothing about fraud in general.

The hull and the cargo policies appended to the Amsterdam keuren of 1744 and 1775 no longer referred to good faith or the absence of fraud but in them the insurers still renounced any reliance on technical and other defences contrary to the terms of the policy ("renuntieerende als luiden van eere, van alle cavillatien en exceptien, die dezen zoude contrarieeren"). The same was true of the fire policy in those keuren.45

Section 56 of the Amsterdam keur of 1744 was a virtual repetition in a somewhat more modern idiom of s 22 of the placcaat of 1571 and s 31 of the keur of 1598,46 while s 57 again merely repeated the measure of 1614 on the jurisdiction of the local Chamber in insurance cases involving fraud.47

4 The Effect of Fraud: The View of the Jurists

4.1 Introduction

With reference to the legislative measures concerning fraud in the context of the insurance contract, Roman-Dutch authors and lawyers too stressed the need for an absence of fraud. They noted that, like contracts generally, the insurance contract was one of good faith in which no fraud at all was tolerated.48 Van der Keessell, for example, explained that the fact that the insurance contract was a contract of good faith appeared not only

44 At least the marginal title of section 2 referred to 'eenige mishandelling ofte quade trouwe by de gene die hen doet versekeren gepleecht'.

45 The ransom policies in the keuren of 1744 and 1775 still noted that everything had to be done in good faith and without fraud ('alles ter goeder trouwe zonder arg of list').

46 Like the latter it also provided for the application of all relevant legislative measures ('alles agtvolgende de Placaaten dezer Lande').

47 As to s 57, see eg Van der Keessell Praelectiones 1481 (ad III.24.20) from which it is apparent that the instances of fraud mentioned there were merely examples and not an exclusive list of the cases in which the Chamber had no jurisdiction. As to ss 56 and 57, see generally Goudsmit Zeerecht 356.

48 See again ch III § 1.3.3 supra.
from the application to insurance contracts of those legal principles that were in his time still observed in respect of contractus bonae fidei, but also from the fact that most insurance laws expressly determined that good faith had to be observed and fraud had to be absent in the case of insurance contracts. Parties could insert any terms into their insurance policies, as long as such terms did not contravene the law and were not contrary to good faith. The insurance contract, it was thought by Grotius, by its nature even involved a certain specie of partnership, and it may be that contracts of insurance and of partnership were so related because a certain degree of trust between the parties involved was required in both cases.

4.2 The Effect of Fraud on the Insurance Contract and Other Civil Consequences

Another point made by the authors as regards the effect of insurance fraud was that particular private-law consequences flowed from the presence of fraud in the insurance context.

Firstly, the person acting dishonestly in an insurance transaction incurred liability for all loss, damage or expenses. Such liability, it should be noted, was in delict, the

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49 Praelectiones 1428 (ad III.24.1), 1481 (ad III.24.20). See too eg Van Zurck Codex Batavus sv 'Assurantie' par 23 n2 who noted that 'tijer goeder trouw, zonder arg, of list, zyn formule, nu in de meeste contracten gebruikelyk' and that there was in this time little if any difference between contracts bonae fidei and stricti iuris; Kersteman Woorden-Boek Aanhangzcl vol 1 sv 'Assurantie' (at 41) ('alle Contracten zyn by ons van goede trouw, en boven alle Assurantie'); and Bynkershoek Quaestiones Juris privati IV.26 (insurance is a contract of good faith in which all fraud must be absent, and if present, it must be punished).

50 See again ch VIII § 4 supra and ch XIII § 2.1 supra as to the freedom of insurance contract in Roman-Dutch law.

51 See eg Grotonus Inleidinge II.24.6; Groenewegen Aanteekeningen 15 (ad III.24.6); Wassenaar Praktijk notariael VIII.5 ('mids dat die niet en stryden jegens de goeder trouwen, ende niet met bedroch gemengt zijn'); Van Zurck Codex Batavus par 13; and Scheltinga Dictata ad III.24.6 sv 'mids niet strydende, etc'.

52 In an opinion delivered in 1632: see Hollandse consultatien vol III/2 cons 175 n2 and n3.

53 See again ch I § 4.5 supra.

54 The dispute in the case on which Grotius gave his opinion concerned an insurance of goods which the insured knew, but the insurer did not know, were contraband. The reason for the insurer being thought not to be liable, was because of the nature of the insurance contract and the relationship between the parties, which was analogous to that between partners. In respect of partnerships, Grotius pointed out, there was a well-known legal maxim 'quod in societatis judicium non veniunt ea, quae ex causis probitis amittuntur'.

55 See eg Grotonus Inleidinge III.24.20 (referring to liability for 'alle kosten, schaden ende winstderving', the latter term being translated as 'loss of profit' by Lee and (incorrectly) as 'mora interest' by Maasdorp); Groenewegen Aanteekeningen n38 (ad III.24.20); Wassenaar Praktijk notariael VIII.11 ('gehouden in alle kosten, schaden ende interessen die yemand daar door lijd'); Van Zurck Codex Batavus sv 'Assurantie' par 23 ('boven prestatie van kosten, schaden, en interesse'); Van der Keessel Praelectiones 1481 (ad III.24.20) (those who committed a fraud not only could not make any profit but they also had to compensate the loss and damage suffered by the other party as a result together with all his interest); and Van der Linden Koopmans handboek IV.6.10 ('kosten, schaden en winstderving').
fraudulent conduct causing loss being a civil wrong, and could be incurred not only by
a party to the contract or someone acting for such a party but also by a third person
unconnected to the insurance contract or to one of the parties to it.

Secondly, such liability was in addition to the effect such fraudulent conduct by
one party to the contract could in appropriate cases have on the validity of the con-
tract itself and, therefore, on the right of the party concerned to claim on the contract. It
is clear that in specific cases of fraud, such as in the case of a fraudulent insurance
after and with knowledge of the loss, the insured was not only liable for any loss caused
to the insurer but that his fraud also invalidated the insurance and resulted in his losing
any action on the policy or in the insurer being able to recover that which he may have
paid out. Of course, the insured in such a case also forfeited the premium, something
which occurred generally when there was fraud on the part of the insured.

It is uncertain whether such nullity of the insurance contract resulted in all cases of
fraud or only where it was specifically so provided in the relevant insurance laws, such
as in the case of an insurance concluded by the insured with knowledge of the loss.
The legislative measures and authors are rather inconclusive on the effect of fraud on
the validity of the insurance contract. This is not surprising, because the precise effect
of fraud upon contracts generally was a matter of some uncertainty in Roman-Dutch.

In Roman law the effect of fraud depended on the type of contract involved. In the
case of contracts bonae fidei, fraud resulted in the nullity of the contract, no action
being available if the contract was affected by any fraud. In the case of contracts stricti
iuris, by contrast, the compliance with formalities was all that was required and fraud
had no effect on the transaction unless, as was later possible, an action or defence
(actio doli/actio de dolo or exceptio doli) was on grounds of equity permitted by the
praetor. However, it had to be pleaded specially and expressly relied upon by the
innocent party to the contract and was only available if there was no other remedy.
Thus, these remedies were inherent in contracts of good faith and in the case of that
type of contract fraud prevented performance even if it was not specially pleaded since
it had to be taken into account by reason of the nature of the transaction itself.

56 But not by an unconnected party.

57 See eg Van der Keessel Theses selectae th 724 (ad Ill.24.5); idem Praelectiones 1444 and 1445 (ad
III.24.5) who explained that in the case of an insurance with knowledge of the loss, the insured was
criminalised not only by the loss of his action and by having to pay a double premium (ie a fine equivalent
to double the amount of the premium) and the cost of the litigation, including the expenses of obtaining
proofs, but that there were also criminal consequences (as to which see infra).

58 As to the forfeiture of the insurance premium, see again ch XI § 6.3.1 supra.

59 On this question, see generally Lee Introduction 233-237; De Vos 'Bedrog' 28-31; and Zimmermann
662-677 on which the following exposition is based.
In Roman-Dutch law, the victim of fraud could set the fraud up as a defence, or rely on it in a claim for damages, or could even have the contract which resulted from it set aside. As far as the effect of pre-contractual fraud on the contract was concerned, at least some Roman-Dutch law authors followed medieval developments which broke with Roman law and came to distinguish between two types of fraud. These types were fraud causing the conclusion of the contract (causal fraud or *dolus dans causam contractui*), which was fraud in the absence of which the contract would not have been concluded at all, and incidental fraud (*dolus incidens in contractum*), which was fraud not influencing the decision to contract but merely the content or the terms of the contract which would in any event have been concluded even in the absence of fraud but only on - for the innocent party - better terms. According to what appears to have been the emergent authoritative view, the main proponent of which was Grotius, causal fraud, in addition to providing the innocent party with a right to claim compensation for damage, also rendered the contract voidable at his instance. Incidental fraud, by contrast, did not affect the validity of the contract but merely gave rise to a claim for damages to compensate for the additional performance the innocent party was induced to perform as a result of such fraud. This view was already apparent in medieval times in respect of contracts *bonae fidei* but not in respect of the then still distinguished contracts *stricti iuris*.

This, however, was not the unanimous view. There were various other opinions on the issue, such as that causal fraud resulted in nullity (voidness) whereas inciden-

60 See eg Grotius *Inleidinge* III.48.7; Van Leeuwen *Rooms-Hollands regt* V.17.13.

61 See eg Decker *Aanteekeningen ad* IV.2.2.

62 See eg Van Leeuwen *Rooms-Hollands regt* IV.42.2 and 4. The remedy of rescission was available in Roman-Dutch law only in the case of fraudulent conduct which induced the contract; it was not recognised in the case of any non-fraudulent conduct (see Zimmermann 673n166).

63 See eg Scaccia *De commerclis* I.7.2.10.5 and 8 for the difference between *dolus dans* and *dolus incidens*.

64 See eg Grotius *Inleidinge* III.17.3 and III.48.7. The contract, it would seem, was merely voidable and not void, despite the suggestion to that effect in *Inleidinge* III.1.19 where Grotius was concerned with the law of nature. The position was otherwise where the fraud in question had induced mistake (error), thus excluding consent totally. It appears that where the contract was voidable as the result of fraud, it was avoided by an application for a *restitutio in integrum*.

65 See eg Grotius *Inleidinge* III.15.8 and III.32.12. Further support for this view appears from eg Van der Linden *Koopmans handboek* I.14.2.3, who referred also to Pothier on this point. The action for the damages recoverable by the innocent party (whether or not the contract was voidable and in fact voided) was delictual in nature, compensation being calculated as a negative and not (as in the case of contractual damages) as a positive interest; that is, the innocent party claimed only to be put by the damages in the position in which he would have been had no fraud been committed, not in the position he would have been had the fraudulent incorrect representation been correct. See eg Grotius *Inleidinge* III.15.8; Van Leeuwen *Consura forensis* I.4.42.2; and Voet *Commentarius* IV.3.11.

66 See eg Groenewegen *Aanteekeningen* n 15 (ad III.48 7); Schorer *Aanteekeningen* n521 (ad III.48.7), both of whom said nothing about incidental fraud. A decision of the *Hooge Raad* supports this view (see Neostadluis *Decisiones decis V*).
tional fraud resulted in the voidability of the contract, or that both forms resulted in nullity (voidness) or in voidability. Possibly the lack of unanimity amongst the Roman-Dutch jurists on the effect of fraud may be ascribed to the fact that, although in the end the regime applicable to contracts bonae fidei came to prevail, the traditional Roman-law distinction between contracts bonae fidei and stricti iuris had not yet completely and unequivocally been abandoned by all and still exerted an influence in this regard. Further, it was not yet clearly realised that there was a difference in principle between whether the fraud resulted in the nullity or voidness or in the voidability of a contract, conceptual and terminological clarity in this regard only emerging in the nineteenth century.

It is not surprising, therefore, that no general proposition was laid down in Roman-Dutch insurance law as to the effect of fraud on the validity of the insurance contract. However, that may well have depended on the causal effect of the fraud in question and that, again, on when the fraud had occurred. Thus, fraud at any stage, either before the conclusion or during the currency of the contract, could result in loss or damage being suffered by the other party. Then again, at least if the view as set out by Grotius is accepted as the applicable one, only pre-contractual fraud could have resulted in the conclusion of that contract and thus in its voidability. Fraud stanta contractu could have had no effect on the validity of the contract but at most have rendered the guilty party liable in damages.

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67 See eg Van Leeuwen Censura forensis 1.4.42 (an agreement concluded as a result of fraud is void, but only voidable in the case where the fraud did not cause it).

68 Noodt held this view: see De Vos 'Bedrog' 28 at n11.

69 See eg Van der Keessel Theses selectae 666 (ad III.18.3) who apparently favours voidability in all cases of fraud.

70 See again ch III § 1.3.3 supra.

71 Where the contract was automatically or ipso iure void, the fraud would also have benefitted the guilty party himself since he too could have relied on it to escape liability under the contract, whereas in the case of voidability, the choice of whether or not the contract had to be regarded as void was that of the innocent party.

72 See further Zimmermann 678-686.

73 Indirect support for this view in the insurance context appears eg from Santema's apparent suggestion (De assecutionibus III.16) that fraud vitiated the insurance contract only where the parties would not otherwise have concluded it, that is, only in the case of causal fraud. See further eg Roccus De assecutionibus notes 10 and 98 who concluded that otherwise than in the case of a contract stricti iuris where an incorrect representation did not affect the agreement, in the case of the insurance contract a false representation avoided the contract to the detriment of the insured if he had made it maia fide and knowingly ("quia falsa assertio, & demonstratio vitiat contractum assecutionis in odio assecurationi ex sua maia fide, dum scienter hoc fecit"), the reason being that that contract was an innominate contract ("quia est contractus innominatus") and because in the absence of the representation the insurer would not have concluded the contract at all.
Apart from the fact that the prime examples of pre-contractual fraud in the insurance context\(^{74}\) all resulted in the nullity of the contract, there is some evidence that that was not necessarily the case where the fraud occurred after the conclusion of the contract.\(^{75}\) In an opinion by Grotius in 1632\(^{76}\) on the question of a fraudulent claim by an insured for the expenses he had incurred to save the insured property,\(^{77}\) the point was made that the insurer was liable only for expenses incurred by the insured in good faith.\(^{78}\) For that reason the exorbitant expenses claimed by the insured in this case had to be reduced ‘ad illum modum, quam secutus fuiisset vir diligens’, the more so because the claim indicated a strong suspicion of fraud and because fraud had to be eliminated from all transactions as was also especially provided for in respect of insurance contracts by s 31\(^{79}\) of the Amsterdam keur of 1598. Thus, here the fraud was not considered to avoid the contract or to render it voidable (either \emph{ab initio} or even as from the time of the claim) and so to exclude the insured’s claim. It merely resulted in the inflated claim having to be reduced to what the insured would have been entitled to in the absence of his fraud.\(^{80}\) The insured, therefore, could obtain no profit from his fraud.

### 4.3 The Criminal Consequences of Insurance Fraud

The Roman-Dutch authors on insurance law were further aware of the fact that in addition to the consequences of insurance fraud as between the parties themselves, it also gave rise to severe criminal consequences and to the possible imposition of any of a variety of penalties, depending upon the circumstances of each case. The punishment, it was noted, was arbitrary and depended on the nature of the fraud involved in each instance.\(^{81}\)

\(^{74}\) Such as the conclusion of an insurance with knowledge of the loss; \emph{mala fide} over-insurance; and the failure to mention the required matters in the policy.

\(^{75}\) Such as where the insured instituted a fraudulent claim, eg for a loss he had intentionally caused himself or for a loss which in fact never occurred.

\(^{76}\) See \emph{Hollandse consultatien} vol III/2 cons 175.

\(^{77}\) As to the recoverability of compensation for such expenses in terms of an insurance contract, see further ch XVI § 1 \emph{infra}.

\(^{78}\) Grotius thought that in this regard the insured was the mandatary of the insurers, and that in the case of a mandate it was trite that there was not restitution of all expenses without any limitation but only for such expenses as were incurred in good faith and from a just cause (‘\emph{ex justa ratione}’).

\(^{79}\) The opinion incorrectly referred to s 32.

\(^{80}\) Of course, the fraud could be of such a nature that it reduced the claim to nothing at all, but that was not the same as the fraud avoiding the contract.

\(^{81}\) See generally Grotius \emph{Inleidinge} III.24.20; Wassenaer \emph{Praktyk notariael} VIII.11; Van Zurck Codex Batavus sv ‘Assurantie’ par 23; Boey Woorden-tolk, sv ‘Despache’; Bynkershoek \emph{Questiones juris privatui} IV.26; Van der Keessel \emph{Theses selectae} th 724 (\emph{ad} III.24.5); \emph{idem} \emph{Praelectiones} 1428 (\emph{ad} III.24.1) and 1481 (\emph{ad} III.24. 20); and Van der Linden \emph{Koopmans handboek} IV.6.10. See also Enschedé 119-120.
In this regard a distinction was seemingly drawn between less serious insurance fraud for which merely fines and corporal punishment were imposed, and more serious ones for which capital punishment could be imposed. Thus, Van der Keessela2 gave examples of serious fraud,83 deserving the gravest punishment, and of less serious fraud,84 without, however, specifically ascribing different criminal (or for that matter, civil) consequences to each of the types.85

The authors further noted in particular that the penalties prescribed by the various laws were not only applicable to frauds committed by the parties to an insurance contract, but also to all those involved in the insurance business apart from the insured and the insurer.86 This fact, as well as the fact that the prescribed imposition of the death penalty in appropriate case was not a mere idle threat, appear from two cases to which a number of Roman-Dutch authors referred.87 In the first case a master was sentenced to death by hanging in Amsterdam in September 1614 for having insured his ship and thereafter scuttling her.88 In the other case an Amsterdam broker, one Abraham van Beveren, had been involved and instrumental in the insurance of goods which had not been shipped and also in the stranding of the ship after she had been insured in two places. He was sentenced and hanged in March 1701.89 In aggravating circumstances, the perpetrators of insurance frauds were not simply put to death by hanging, but were

82 Praelectiones 1481 (ad III.24.20).

83 Such as where someone insured a very old ship with a worthless cargo for a considerable amount and shortly after the commencement of the voyage sank the ship intentionally, or where a person insured a house of a small value and himself burnt it down intentionally.

84 Such as where a person concluded an insurance as an insurer knowing that the property insured had already arrived safely; or where a person intentionally and knowingly had the same cargo insured twice over.

85 See Oelofse 287n19 who is of the opinion that these examples of Van der Keessel were of breaches of the relationship of good faith as opposed to of fraud.

86 See eg Scheltinga Dictata ad III.24.20 sv 'boven de straffe, etc'.

87 Even they were not without precedent. Mullens 81 mentions that in 1570 the Duke of Alva had an Antwerp broker hanged because he had insured a fictitious cargo and had arranged for its loss.

88 See Van Zurck Codex Batavus sv ‘Assurantie’ par 23 n3 (referring to the master ‘die de proppen uit de gaten, by hem doeleuslyk geboord, uitgetrokken hadde, en na gedane assurantie ‘t schip hadde doen zinken’); Decker Aanteekeningen ad IV.9.4 n(3)/(c).

89 See Van Zurck Codex Batavus sv ‘Assurantie’ par 23 n3 (‘met de koort gestraft ... als deel hebbende aan ‘t doen assureren van goederen, die niet scheep waren, en een ‘t in den grond boren van ‘t schip na gedane assurantie op twee plaatsen’); Decker Aanteekeningen ad IV.9.4 n(3)/(c). See also Suermondt ‘Rotterdam’ 213.
put to death in other ways as were pirates and others who had committed crimes against society ('als Zee-Rovers ende openbare Dieven').

### 4.4 Proof of Fraud

In general there was in Roman-Dutch law no presumption of fraud on the part of any party to or person involved with an insurance contract. In the absence of conclusive proof, good faith was presumed, the more so if the insured or, for that matter, the insurer, was prepared to declare under oath that he had acted in good faith. Where an insurer therefore alleged fraudulent conduct on the part of the insured or any other person, he had to adduce clear and specific proof to establish such bad faith. There was accordingly a heavy burden of proof on insurers who alleged fraud on the part of the insured, those acting for him, or his witnesses. And presumably the reverse was also true, that is, that a similar burden rested on the insured of proving any alleged fraud on the part of the insurer.

However, it also appears that in some, probably exceptional, cases fraud on the part of one of the parties to an insurance contract was presumed. That happened if the fraud was difficult to prove conclusively although a prima facie case had been made out for it, and if the party who had allegedly acted fraudulently was not prepared to take an oath to clear himself. The authority in this regard dealt with fraud on the part of an insurer and it is uncertain whether this was true also of cases where the fraud of an insured was at issue.

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90 See eg Bynkershoek Quaestiones juris publici I.17 (amongst the various other persons who on account of the atrocity of their crimes are punished as if they were pirates although they were not actually, are those who commit certain frauds in matters of insurance, in accordance with s 22 of the placcaat of 1571). Other forms of capital punishment, apart from the gallows, included death by being broken on the wheel, with or without decapitation; death by the sword; and death by strangulation, with or without scorching. See eg Van der Linden Koopmans handboek I.2.2 who pointed out that in his time death by quartering, burning, or drowning had fallen into disuse.

91 See Schorer Aanteekeningen 422 (ad III.24.6) n15; Van Zuck Codex Batavus sv 'Assurantie' par 13. See too the decision of the Hooge Raad in 1717 (Bynkershoek Observationes tumultuariae obs 1375; idem Quaestiones juris privati IV.8) to the effect that the insurer had to prove the insured's knowledge of the loss and that in the case of uncertainty, good faith on the part of the insured was presumed. See also its decision in 1777 (Pauw Observationes tumultuariae novae obs 1398); Oelofse 291; and again ch XII § 2.2.6 supra as to proof of the insured's knowledge of the loss.

92 In an opinion in 1681 (see Nederlands advysboek vol II adv 202) on the evidence of a master and the crew as to a loss for which a claim was instituted on an insurance policy, it was noted that the insurers were free to allege that the witnesses had been bought or corrupted to give the evidence or make the declarations which they did. But because fraud ('corruptien, frauden en falsiteit'en) was not presumed against honest men, the insurers had to prove such fraud, and had to do so clearly and conclusively ('het zelven bewijs moeten gedaan worden, niet door met presumptien, maar uytdrukkelijk, klaarlijk, en specifice').

93 In a case before the Hooge Raad in 1731 (Bynkershoek Observationes tumultuariae obs 6264; idem Quaestiones juris privati IV.15) there was a dispute as to whether cargo was insured to the river of Nantes or to the city of Nantes itself which was further upstream (see again ch VIII § 4.3 supra as to the interpretation of insurance contracts and ch XII § 1.3.1 supra as to the duration of the risk where this case was considered in more detail). The insured declared himself prepared to forfeit his claim if the insurer could show from his books that he had drawn a distinction in this regard or if he was otherwise prepared
5 Aspects of Insurance Fraud in the Wetboek van Koophandel and in English Law

Although an earlier draft of the Wetboek van Koophandel in 1830 had mentioned that all conduct in bad faith by any party to an insurance contract would avoid the contract, the Wetboek in its final form contains no specific provisions on the effect of fraud on that contract. The matter was at the time governed by the relevant provisions of the Burgerlijke Wetboek\(^{[94]}\) which were applicable to all contracts, including insurance contracts.

Specific provision is made only for the disclosure of certain information to the insurer.\(^{[95]}\) Article 251 provides that every incorrect or untrue representation ('verkeerde of onwaarachtige opgawe') of information to the insurer,\(^{[96]}\) or non-disclosure of circumstances known to the insured ('verzwijging van aan de verzekerde bekende omstandigheden'), which are of such a nature that the agreement would not have been concluded, or at least not on the same conditions, had the insurer known of the true state of affairs,\(^{[97]}\) will avoid the insurance ('maakt de verzekering nietig').\(^{[98]}\) This is the case, art 251 continues, however much the insured may have acted in good faith ('hoezeer te goeder trouw aan diens zijde hebbende plaats gehad'). The article therefore covers also instances other than those where the insured had acted in bad faith, and a false declaration or omission made in good faith also affects the validity of the insurance contract.\(^{[99]}\) In practice the scope of art 251 and of the insured's duty to make

to swear under oath that when he contracted, he had intended the insurance to run to the river only and not to the city itself. The insurer did not reply to this argument but all the members of the Raad were of the view that the insurer could easily establish his good faith, failing which he had to be taken to have acted fraudulently. The Raad accordingly decided that the insurer would win the case if on a production of his books it could be established, or if he would swear under oath, that he had intended to insure the cargo to the mouth of the river only. The matter was apparently not taken any further for Bynkershoek noted that he had later heard that the parties had reached a settlement on the matter.

\(^{[94]}\) Such as arts 1364 and 1374-1375 of the BW.

\(^{[95]}\) See eg Dorhout Mees Schadeverzekeringsrecht 204-208.

\(^{[96]}\) In terms of art 256-2 all policies must express, in general, all circumstances of which knowledge may be of material importance to the insurer (see again ch VIII § 4.2.8 supra as to the content of insurance policies). Unlike the case of non-disclosure, though, there is no requirement of knowledge on the part of the insured as regards the matters incorrectly represented.

\(^{[97]}\) Thus, material representations or omissions of both a causal and an incidental nature are included.

\(^{[98]}\) This came to be interpreted as meaning 'voidable', in accordance with art 1358 of the BW, and in consequence the provisions of arts 1482-1492 as regards the avoidance of contracts became applicable.

\(^{[99]}\) Earlier drafts of the Wetboek had provided that all false declarations by the insured amounted to bad faith ('alle valsche opgave van de zijde van den verzekerde, is kwade trouw') but this was omitted because of the possibility of false declarations which had no influence on the estimation of the risk and of in connection with which the insured had not acted fraudulently (see Voorduin vol IX at 154). Furthermore, art 251, which had no antecedent in Roman-Dutch law, is based on art 348 of the French Code de commerce where provision was made for \textit{mala fide} representations as opposed to incorrect representations. See eg Van der Burg 'Code de commerce'; Faber Aanteekeningen 29-31.
correct representations and to disclose particular information is considerably cut down by a concomitant duty on the insurer to investigate the risk. Accordingly, the insurance contract is not affected where the representation or non-disclosure concerns a fact which the insurer himself could have discovered upon a reasonable investigation.\(^{100}\)

Other instances of fraud are also touched on in the Wetboek, namely, in art 275, fraud in the case of a valued policy,\(^{101}\) and, in arts 281 and 282, on the absence of fraud on the part of the insurer being a requirement for the recovery of the premium. That is all. As in Roman-Dutch law, there is no general provision on the effect of fraud specifically on insurance contracts, the matter being governed by the general principles applicable to all contracts.

Insurance fraud was no less a problem in earlier English insurance practice and examples of such fraud abound in both legal and other sources. Fraud of this nature was by no means uncommon and took on forms also known elsewhere in Europe.\(^{102}\) The underwriting fraternity, the merchants and the law were familiar with over-insurance, often by means of different insurances effected in different places, as well as with over-valuation;\(^{103}\) the conclusion of an insurance by an insured with knowledge of an earlier loss;\(^{104}\) the institution of a claim for the loss of an often over-insured and worthless ship which was caused by the insured himself,\(^{105}\) with the shipowner and

\(^{100}\) As to the insurer's 'onderzoeksplicht', see eg Wery 46 and 57-58; and see again ch VIII § 4.2.1 at n185 supra as to the existence of this duty in Roman-Dutch law.

\(^{101}\) See further ch XVII § 5 infra.

\(^{102}\) See generally on the different types of insurance fraud encountered in earlier English insurance practice, Malynes Consuetudo I.24; Molloy De jure maritimo II.7.5, II.7.15; Weskett Digest 226 sv 'fraud' par 3; Martin 253-272; and Wright & Fayle Lloyd's 253. As to fire-insurance frauds, see eg Cato Carter 29 and 50.

\(^{103}\) That is, respectively, Insurance in excess of the real or agreed value, and an agreed valuation in the policy in excess of the real value. As to over-insurance and valued policies, see further respectively ch XVIII § 4 and ch XVII § 5 infra.

\(^{104}\) Martin 255 recounts the following fraud which turned out to be too clever for the perpetrator's own good. A ship on a voyage from Gibraltar to Lisbon was actually seen by her owner to be captured in the Bay of Gibraltar as she sailed out. Couriers were immediately dispatched to Lisbon and elsewhere with four or five duplicate orders for insurance cover on the ship. Unfortunately, if rather poetically, these orders all ended up in London where various insurances were effected and where, upon the various claims being instituted for the same loss, the fraud was discovered in time and the loss not paid out.

\(^{105}\) An example of this appears from the Diary of Samuel Pepys in his entries for 30 November and 1 December 1663. He recounted an instance of a master over-insuring his ship and her cargo and borrowing on bottomry in excess of her value, and then wilfully casting her away so as to claim on the insurance and to retain the loan. Pepys wrote: 'To the coffee-house, where I heard the best story of a cheat intended by a master of a ship, who had borrowed twice his money upon the bottomry, and as much more insured his ship and goods as they were worth, and then would have cast her away upon the coast of France, and there left her, refusing any pilot which was offered him'. However, the ship was saved by the local authorities and was returned with her cargo (which was in any event not what it appeared and was held out to be: 'vessels of tallow dubbed over with butter, instead of all butter') to the insurers in London. The master had in the meantime recovered in excess of £2,400 in total in respect of the vessel and her cargo which was worth not more than £500. The claim against him, presumably by the bottomry lender and/or the insurers for the return of the moneys he had received, was heard in the Kings Bench before Hyde CJ. The jury held against the master who was 'cried down as a most notorious cheat'.
master sometimes even colluding to sell the cargo on board for their own profit before the ship was scuttled;\(^{106}\) the insurance of cargo which, to the knowledge of the insured consignor at the time, was unlawful at its destination\(^{107}\) or the insurance of cargo laden on a belligerent or enemy ship; and an uninterested person insureing, and often over-insuring, a ship ‘interest or no interest’ and then spreading rumours about the well-being and whereabouts of that ship so that the owner either could not obtain any insurance cover or could do so only at excessive rates and therefore found it better to buy the policies already concluded on the ship by the rumour-monger himself.\(^{108}\) In short, the insurer was regarded as being in a rather vulnerable and enviable position.\(^{109}\)

The fact that in 1781 Weskett’s treatment of fraud was one of the longest sections in his work on insurance law and practice and that he referred to it as ‘indeed a very copious subject!’,\(^{110}\) shows the practical importance and extent of the problem. However, although the point was made by the early authors that insurances ought to be made in good faith,\(^{111}\) insurance fraud was in English law not a statutory crime as it was in other European systems.\(^{112}\) Barratry upon shipowners and insurers was

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See further Barbour 'Marine Risks' 584-585.

\(^{106}\) See Molloy *De jure maritimo* II.7.5 referring to such an example from 1678. In this instance, before the insured shipowner’s claim on the hull policy for the loss of his ship could go to trial, the consignors of the cargo on board successfully brought a trover (a Common-Law action to recover the value of property wrongfully taken) against the shipowner, in the process of which the whole story came out. The owner was advised that if he continued with his claim against the insurers, he should expect that his fraudulent actions would ‘totally poison his Insurance’. Not surprisingly he did not proceed against the insurers.

\(^{107}\) See Molloy *De jure maritimo* II.7.15, referring to Grotius *Inleidinge* and to Loccenius *De iure maritimo*.

\(^{108}\) See Weskett *Digest* 226 par 3.

\(^{109}\) As the following quotation from the *Autobiography* of Roger North (edited by Jessopp (1887), at 142) in respect of seventeenth-century insurance practice indicates (see MacKinnon 37): ‘I have had occasion to wonder at several things, one is that insurers of ships have a sort of obloquy, which either chance or custom have given them, and they come not to the law without prejudice, such as extortioners, usurers, or pawnbrokers usually meet with, and the insured is favoured, and all presumption is taken on his part. Whereas the insurer cannot be a cheat, but is very often cheated by the insured; for the falsities come on their side, who know their own motives, which are secrets to the insurers’.

\(^{110}\) See Weskett *Digest* 225-237 sv ‘fraud’ at 236 par 16. On the question of fraud he made reference to the Amsterdam *keur* of 1598 (see at 237 par 18). *Park System* (8 ed), too, devoted a whole chapter to the topic (chapter X, ‘Of Fraud in Policies’).

\(^{111}\) See eg Molloy *De jure maritimo* II.7.15.

\(^{112}\) See eg *Park System* (8th ed) 456-457 who referred to the position in Amsterdam and Middelburg to illustrate the contrast.
rendered punishable from early on, but seeing that barratry was covered by the insurance policy, insurers themselves were not actually protected. In 1718 an Act specifically mentioned shipowners who wilfully burnt or destroyed their insured ships as the perpetrators of frauds upon 'any Person or Persons that shall underwrite any Policy or Policies of Insurance thereon', or upon consignors, and rendered them punishable by death. Likewise, an Act of 1724 provided that the owner of a ship who wilfully cast her away, burnt or otherwise destroyed her with the intention of prejudicing any underwriter or consignor, would be regarded a felon 'and shall suffer as in Cases of Felony without benefit of Clergy'; and if the act was committed upon the high seas, the matter was to be tried in the same way as a case of piracy. Both these Acts were repealed in 1803 when an Act was passed 'for the more effectually providing for the Punishment of Offences in wilfully casting away, burning or destroying Ships and Vessels' with the intention of wilfully and maliciously prejudicing the owner of the ship, or the owner of cargo on board the ship, 'or any person or persons, body Politick or corporate, that hath or have underwritten or shall underwrite any Policy or Policies of insurance' upon such ship, upon her freight, or upon any goods laden on board her.

Further development in English insurance law on the question of fraudulent or bad-faith conduct may be credited to the decisions of Lord Mansfield in the latter part of the eighteenth century. He took over and incorporated into English law specifically for the insurance contract an important principle recognised by the law merchant and in civil law for contracts generally. He thought, namely, that insurance contracts, by reason of their aleatory nature, were contracts of good faith. In the process, though, possibly in an attempt to stress the importance of honest conduct by both parties in respect of their insurance contract, it became a contract not simply of good faith (bonae fidei) but in fact one of the utmost good faith (uberrimae fidei). Despite the different terminology, though, there is no clear indication that the phrase 'utmost good

113 Thus, in 1664 an Act (16 Car II c 6) dealt in s 12 with cases where 'the Masters and Mariners of Ships having insured or taken upon Bottomary greater Sums of Money than the Value at the Adventure, do wilfully cast away, burn or otherwise destroy the Ships under their Charge, to Merchants' and Owners' great loss'. To discourage such conduct, it was provided that such masters or mariners 'shall suffer Death as a Felon'.

114 See again ch VI § 4.3.5 supra.

115 4 Geo I c 12.

116 11 Geo I c 29, s 5.

117 43 Geo III c 113.

118 The Act of 1803 arose out of an apparently notorious case of a Captain Codling who had cast his heavily over-insured ship, the 'Adventure', away off Brighton. See Dover 47.

119 See in particular Rodgers 176-177 and also Holdsworth History vol XII at 536.

120 See, in particular, his decisions in Stevenson v Snow (1761) 3 Burr 1237, 97 ER 808 (see ch XI § 6.7 supra) and Carter v Boehm (1766) 3 Burr 1905, 97 ER 1182 (see ch VIII § 4.2.9 supra).
faith' was consciously intended at the time to convey any notion stronger than simply
the absence of any fraud on the part of any of the parties to the contract.\textsuperscript{121}

In the Marine Insurance Act of 1906, s 17 now provides pertinently that the con­
tract of marine insurance is one based upon the utmost good faith, and that if the
utmost good faith is not observed by either party, the contract may be avoided by the
other party.\textsuperscript{122} One example of a breach of the duty of utmost good faith is that of mis­
representation and non-disclosure, although, as has been shown earlier, these render
the contract voidable also in instances where there is in fact no fraud on the part of the
misrepresenting or non-disclosing insured.\textsuperscript{123} The only other mention of fraud in the
Marine Insurance Act occurs in s 84 in connection with the return of the premium where
it is made clear that the returnability of the premium depends upon the absence of
fraud on the part of the insured.\textsuperscript{124}

\textsuperscript{121} Thus, Park System (8th ed) 403 declared that 'the very essence of insurance consists in a rigid
attention to the purest good faith and the strictest integrity' and referred to the decision in Carter v
Boehm, Blackstone's Commentaries, and, significantly, to civilian authorities, including Grotius De iure
belli ac pacis ii.12.23 and Bynkershoek Quaestiones juris privati IV.26. See also generally Walford
Cyclopaedia vol II at 29-38 sv 'concealment' who noted that the principle of caveat emptor was not
applicable to insurance contracts and who referred to Bynkershoek for an example of insurer fraud.

\textsuperscript{122} Buys 31 notes that by contrast, In terms of Dutch law, the insurance contract is not different from any
other contract and that, at the time of codification, a provision such as that in eg art 1374 of the
Burgerlijke Wetboek was applicable to all contracts, including the insurance contract.

\textsuperscript{123} See again ch VIII § 4.2.9 supra. See also eg Chalmers 25 as to the duty of the utmost good faith in
litigation between the parties to a marine insurance contract.

\textsuperscript{124} Thus, there is no return of the premium in the event of a fraudulent misrepresentation or non­
disclosure, an insurance after loss with knowledge of such loss, and a double insurance effected
knowingly by the insured. Conversely, although according to the general rule the premium may not be
recoverable or be claimable by the insurer, in the case of fraud on his part it becomes recoverable by the
insured or no longer due. See again ch XI § 6.7 supra.
CHAPTER XV
TYPES OF LOSS

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1 General Introduction

In return for the insured’s undertaking to pay a premium\(^1\) the insurer undertook to bear a risk. The consequences of the bearing of risk for a particular determined or determinable period of time\(^2\) depended on whether or not there was a materialisation of the risk. If there was, the insurer had to compensate the insured for his loss, if any. The type of loss which occurred determined various matters, the most important of which was the amount of the compensation.\(^3\) It also influenced matters such as when the compensation had to be paid, and when the insured’s claim for the compensation became prescribed.

For insurance purposes, the basic division of loss was between a total loss and a partial loss.\(^4\) However, the terminology employed in this regard was not consistent, the

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\(^1\) See ch XI supra.

\(^2\) See ch XII supra.

\(^3\) See ch XVII infra.

\(^4\) As to the different types of loss, see generally Mullens 83-86.
word 'average' being employed in at least two senses and meaning both an accidental (total or partial) loss generally or simply a partial (as opposed to a total) loss.

In the first sense a distinction was drawn between a general average loss and a particular average loss, although the latter term was at first unknown to Roman-Dutch law, such losses merely being referred to as (simple) average or accidental losses. It only came into use at a later stage as a result of French influence. A particular average loss could be a total or, more commonly, a partial loss. To be distinguished from a particular average loss, was general average and its related forms of shared loss, damage or expense. This distinction was only in the seventeenth century commonly drawn when the conclusion of insurance contracts to cover accidental losses became a more general practice. The distinction was principally relevant in determining who had to bear the loss: the owner of the object lost or damaged himself, or his insurer, in the case of a particular average loss; or the owners of all the interests involved in the adventure on which the loss or damage had occurred, or their respective insurers, in the case of a general average loss.

5 See again ch I § 4.6.3 supra as to the different types of average.

6 A particular (material, private or simple) average was an accidental (external) loss or damage to property by reason of a maritime or other peril. It lay where it fell and was borne by the owner of the property concerned or his insurer and was not shared between nor contributed to by the other interests involved in the adventure on which the loss occurred.

7 Briefly (see again ch I § 4.6.3 supra for details) a general (great or gross) average loss was an extraordinary loss, damage or expense deliberately caused or incurred to avoid a greater loss and for the common safety of the interests involved in a common maritime adventure. It was borne by, apportioned between and contributed to by the owners of all the interests involved in proportion to the value of those interests; the loss was shared and did not lie where it fell nor was it, exclusively or otherwise, borne by the insurer of the interest on which it fell. The owner of each interest involved, or his insurer, was liable for his contribution to the general average loss levied upon his interest. A common (small, petty, ordinary) average loss was an ordinary, expected expense deliberately incurred on a voyage by the master of a ship, eg piloting or stevedoring and port costs. It was also not borne by the ship alone but contributed to, according to custom or as otherwise agreed, by the cargo owners involved. Common average was customarily borne one-third by the ship, and two-thirds by the cargo. This average was therefore also shared, though not according to the value of the cargo but in proportion to the package units and in the same way as freight was determined. The distinction between general and common average became obsolete in the nineteenth century. A contractual (conventional) average was a loss or damage shared by agreement on the basis of general average. It became uncommon as the scope of general average was extended by legislation and as the insurance of non-general average (i.e. of particular average) losses became more commonplace.

8 See eg arts 176-180 of par 6, title 11, part IV of the Antwerp Compilatae of 1609 (see De Longé vol IV at 274) which referred to the distinction between 'averie grosse, simpele ende commune'. In the case of a particular (or simple) average loss, the owner of the lost or damaged interest bore the loss, subject to any recourse he may have had against an insurer. Thus, art 222 of the Compilatae (see De Longé vol IV at 292) provided that in the case of insurance on goods coming from the East Indies with royalty ships and on which 'average fell' (i.e. which were partially lost or damaged), whether 'groote oft andere', 'tselve [ie, the ships] en compt in geene contributie om daervan over [om daer over] tschip ende goet int geheele oft in deele verdeijlinge te doen', but such loss or damage was borne by the merchant, the master or others affected by the damage, 'behoudelijck hem sijn regres tegens sijne versekereraers, indien hij eenige heeft'.
In the second sense, which was of more immediate importance for insurance law, average meant a partial or particular average loss and was distinguished from a total loss.

The way in which the term 'average' was used in these two senses appears from Van der Keessel, who referred to a general average loss ('damnum avariae'), and to a particular average or partial loss ('damnum particulare') which occurred much more frequently than a total loss ('damnum totale'). Thus, particular average loss meant both an accidental loss, in which sense it was distinguished from a general average loss, and a partial loss, in which sense it was distinguished from a total loss.

2 Total and Partial Loss

In the context of insurance, the distinction between total loss ('verlies', 'bederf') and partial loss or damage ('avarie', 'schade', 'verminderinge') was recognised from early on, both in legislation and in other sources. The terminology used was not always very precise though.

Thus, ss 23 and 24 of the placcaat of 1571 respectively referred to particular types of total loss ('in gevalle eenige Schepen gearresteert, genomen oft opgeheouden worden') in connection with abandonment, and to partial loss ('schade oft verminderinge van koopmanschap, die geheeten word avarye') in connection with prescription. Other laws followed suit. Section 18 of the Rotterdam keur of 1604, for example, mentioned, in connection with prescription, a partial loss ('avarie ofte schade') on the one hand and a total loss where 'de goederen in 't geheel verlooren oft bedorven zijn' on the other hand, and later referred to them as 'avarye ende verlies respective'.

In s 69 of the Rotterdam keur of 1721 the terms 'verlies of schade' were employed for total and partial loss and s 70 of that keur mentioned 'bedorven of verloren Goederen'. Section 23 of the Amsterdam keur of 1744 referred in connection with over-insurance to the position in the case of a partial loss ('in cas van schaaden of Avarie') while in s 35 in connection with freight insurance reference was made to total and partial loss respectively as '[d]er Avary op de Goederen gevallen' and 'een Totale Schade voorvallende'.

Roman-Dutch authors too used the terminology fast and loose although they did maintain the basic distinction between a total and a partial loss. Thus Grotius, in regard to the various periods of prescription, differentiated between loss or accident ('ongeluck') and damage or depreciation ('schade ofte vermindering waer die men is ghewoon te brenghen in avarie'). Van der Keessel, in turn, defined insurance as involving an undertaking to make good loss ('damnum') which included not only the destruc-

9 Praelectlones 1475c (ad III.24.17).

10 Sections 12 and 13 of the Amsterdam keur of 1598 (and ss 17 and 19 of the Middelburg keur of 1600) referred, in connection with prescription, respectively to 'schade of verminderinge van de geassureerde Schepen ofte goederen, die geheeten wort Avarie', and to 'de verseeckerde Schepen ofte Koopmanschappen, die verlooren, gerooff, bederfen, ofte andersin te beschadigen willen willen'.

11 Inleidinge III.24.21.
tion of the whole object ('interitus totis rei') but also the deterioration and the reduction in the value of the property insured. Also, referring to the provisions in Amsterdam on prescription, Van der Keessels noted the distinction between a total loss ('ad damnum totale') and the case where the damage consisted of a reduction in the value ('in deteriorations') of the ship or goods which was also known as 'average' ('awery'). Van der Linden, too, in discussing the extent of the insurer's liability and the assessment of the value of property, drew a distinction between the case where goods were lost or spoilt ('geheel verloren is, of als verloren beschouwd kan worden') and the case where they were merely damaged.

Apart from the extent of the insurer's liability, the principal consequence of the distinction between a total and a partial loss lay in the fact that in the case of the former the insured, being paid the full sum insured up to the value of the property insured, had to account to the insurer for the object of risk or whatever remained of it. This was known as the insurer's right to salvage. There was no such right in the event of a partial loss and neither could the insured turn a partial loss into a total loss by abandoning the property in question or its remains to the insurer and claiming for a total loss. For this reason a total loss was on occasion referred to as loss recovered by way of abandonment ('bij abandonnement') while a partial loss was referred to as one recovered by way of average ('bij avarie').

In addition to a total loss and a partial loss, a further important 'loss' or expense was that incurred to prevent the occurrence of loss and to limit the extent of a loss to insured property. Such expense could be a general average loss or a particular average loss, depending on the circumstances in which it was incurred. If it was a particular average loss, the insurer was traditionally liable for such an expense in addition to any compensation for any total or partial loss which may have occurred to the property in question itself.

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12 Van der Keessels Theses selectae th 712 (ad III.24.1); idem Praelectiones 1428 (ad III.24.1).
13 See Van der Keessels Praelectiones 1484-1485 (ad III.24.21). As to prescription, see ch XX § 3 infra.
15 This was made apparent by art 186 of par 6, title 11, part IV of the Antwerp Compilatae of 1609 (see De Longé vol IV at 278) which stated that when the insured ships or goods arrived delapidated or otherwise wholly or partly damaged at their destination, 'so on mogen die int geheel oft in deel niet geabandonneert oft verlaet worden', but the damage which had occurred or the expenses which were incurred en route could be recovered from the insurers as a partial loss ('bij maniere van avarie'). As to the Insurer's right to salvage and the insured's right to abandon, see ch XIX S 2.3.1 infra.
16 See eg art 256 og par 8, title 11, part IV of the Compilatae (see De Longé vol IV at 308) where it was stated that the insured has an action 'tot verhael, van verlies oft schade overt versekert gaat oft schip gecom, tsij bij abandonnement oft bij avarie'.
17 The prevention and minimisation of loss is treated separately in ch XVI § 1 infra.
3 Types of Total Loss

The distinction between a total and a partial loss was one which concerned the extent and not the cause of the loss. Most obviously, a total loss occurred in the event of the total physical destruction of the property at risk, such as when the insured ship or goods were burnt or were smashed to pieces on rocks so that nothing at all of the property remained. But there were also other instances where the loss was not physically a total or absolute loss but where the law nevertheless treated it as a total loss.

In the first place it was already clear from early on, especially in connection with maritime and bottomry loans, that the complete and actual physical destruction of the property in question was not necessary to constitute a total loss. Losses were also regarded as total if they were not real total losses in the physical sense just explained but merely losses presumed by law to be total losses. One instance of what may be termed a presumed as opposed to an actual total loss occurred where, although the insured ship or goods were in fact physically undamaged, the insured owner no longer had access to or the unhindered use of the insured property, or had otherwise irretrievably lost his ownership in the property in question. Examples include instances where the ship and her cargo, even though otherwise undamaged and unharmed, sank to the bottom of the sea, or became stranded and immovably stuck on a sandbank, or even when they were merely captured by the enemy or arrested by the authorities.

Although their exact status in Roman-Dutch law was not beyond dispute, three opinions from the seventeenth century clearly illustrated that a total loss did not have to be a total physical loss, at least in the case where the insured owner had, even if just temporarily, lost the ownership and possession or use of the insured property.18

In the first, from 1662,19 money was lent on bottomry until fourteen days after the safe arrival of the ship at her destination. En route she was arrested and confiscated by the Spanish authorities, and although she was eventually bought back ('op nieuws werd ingekogt') by her owners and thereafter arrived in an undamaged condition at her destination, she was still regarded as not having arrived safely, the loss as having occurred just as much as if she had ceased to exist, and the bottomry as voided. The

18 As to these opinions, see again ch I § 4.3.2.3 supra where they were considered in connection with the bottomry loan. The various possible forms of total loss were also reflected in other sources. Thus, Grotius Inleidinge III.24.5, in speaking of the insured's knowledge of the event insured against, mentioned three different types of (total) loss, viz where the property was destroyed, was captured, or perished ('vergaen, geroof ofte bedorven'). And in ss 11 and 12 of the Amsterdam keur of 1744 mention was made, in respect of the loss of a ship and goods, of property being 'verdronken, geroofd, verdorven, genomen, of gearresteerd'. See also Van Leeuwen Rooms-Hollands regt IV.9.1 who, in dealing with bottomry and referring to the opinions which will be discussed shortly, noted that a ship was regarded as not having arrived safely (ie, not having completed her voyage in safety) and a loss as having occurred (and the loan avoided) when she was captured and confiscated but thereafter bought back and redeemed (see Nederlands advysboek vol I adv 11), or where she was captured and thereafter abandoned by her capturers and returned to her master (see Nederlands advysboek vol I adv 52).

19 See Nederlands advysboek vol I adv 11.
argument was that the ship in effect did not arrive safely and without a loss having occurred; she arrived only because of the actions of the owners in redeeming her from her captors ('door een nieuwen inkoop ende redemptie voor rekening van de koopers').

Likewise, in the second opinion from 1676, where the view was expressed that a loss of ownership was a total loss, even if the property in question was still in existence and in fact undamaged, and even if such ownership was later acquired again and was therefore only lost temporarily. In this case money was lent on bottomry on goods loaded in a ship which was captured and plundered by Dunkirk privateers ('Duynkerkse Kapers'). It was thought that the bottomry remained void although the ship was later given up by the enemy and in fact arrived at Amsterdam, her destination. Her arrival there was not one in safety, that is, without any loss having occurred. The loan was repayable not simply when the ship arrived but when she in fact arrived safely ('behouden'), and that had not happened here because of her being captured. This, the opinion pointed out, had in fact been decided earlier by the Genoese Rota in respect of an insurance contract. This was therefore a rather uncommon instance of a reversal of the usual analogous application of the principles of the maritime or bottomry loan to the insurance contract.

The third opinion, in 1674, on quite a complicated matter involving a contract of carriage, pertinently followed this line of reasoning on the basis that it applied also to insurance. It confirmed in effect that the insured ship and her cargo of salt had to be taken as having been lost ('moet werden gehouden verloren te wesen') where it had been captured by the enemy who thereby became owners of it, the previous owners in

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20 See too Barels Advysen vol I adv 16 (1715) where it was explained that it was trite that insured ships and goods detained in the course of their voyage and prevented from completing it could be abandoned by the insured who could claim for a total loss ('om dat het na style mercantiel constant is, dat verzekerde schepen en koopmansschappen, wordende in het vervolgen hunner vrijvagen aengehouden en belet derzelve vrijvagen te vervolgen, door de Verzekerde mogen worden geabandoneerd en gelaeten aen en voor rekening van de Verzekerders'). See further ch XIX § 2.3 infra as to abandonment.

21 See Nederlands advysboek vol I adv 52.

22 More technically, having been captured by the enemy, she became theirs in terms of the then current international law after being in their undisturbed possession for 24 hours (see eg Grotius De jure belli ac pacis III.6.3 and again ch VI § 5.4.2 supra as to the peril of enemy capture). Thus, ownership was lost and subsequently acquired anew from the enemy. A second opinion on the same case confirmed this view for the reasons already alluded to in the first opinion, but the more so, it was thought, because those who had taken up money on bottomry in this instance were not insurers against the perils of enemy capture ('geen Assuradeurs en zijn, wegens de periculen van den vyanden'), ie, because the borrower did not undertake to bear the risk of the loan in the event of the enemy capture of the ship and her cargo.

23 The Rota Genoa (decis 101), it was noted, had decided that 'het Schip eens genomen, en daar door den eygendom verlooren zijnde geworden, [the lender] daar mede haar Recht ende Actie soodanig heeft verlooren gehad, dat sy de selve niet weder heeft kunnen bekomen, gelijk als Rota Genues. seer wel ten regarde van de Assuradeurs heeft gedeclareerd, wanneer de selve genomen geweest, niet tegenstaande de Geassureerde het naderhand had weder bekomen, alsoo niet kan geseyd worden, behouden te zijn, en het geen eens is vervreemdt, en naderhand wederom bekomen geweest'.

24 See Nederlands advysboek vol III adv 248.
consequence losing all their rights in or in respect of it. The insurers of such a captured ship and cargo were thus liable for the total loss suffered, even if the ship and the cargo were subsequently redeemed.25

It may be noted that Bynkershoek26 distinguished these opinions. He thought it unjust that, in the second and third of them, the insurer was liable for the value of the ship or her cargo captured by enemy where she was subsequently redeemed. They were not instances of a total loss, but the insurer should merely have been liable for the amount required to save or redeem the insured ship or cargo. Thus, he concluded, the loss to be covered by the insurer in such a case was that which had actually been lost or damaged of the ship or her cargo, or what was paid by way of ransom.27 But Bynkershoek did readily agree that if the captured ship was brought into an enemy port and condemned, so that the ownership in her was lost, a subsequent ransom of the ship should be considered as a new purchase, as was in fact thought in the first opinion.28

25 In this case the freight in terms of the contract of carriage was payable on delivery of the goods. The question arose whether, if the carrier obtained the release of the cargo captured by enemy and delivered it, he was entitled to payment of the freight as against the cargo owner and charterer of the ship. According to the opinion, the carrier's ownership in the ship and that of the charterer in the cargo had been lost because of the enemy capture, and through such capture the enemy became the new owners. The ship and the cargo had to be taken as lost as the previous owners no longer had any claim to it. If the carrier in this case purchased the cargo of salt from the enemy, he and not the cargo owner/charterer would be the owner. And the latter would not be obliged to accept delivery of the cargo and to pay the freight for such delivery.

26 Quaestiones juris publici I.25.3; idem Quaestiones juris privati IV.1.

27 It seems that doubt about the position also existed elsewhere. Thus, Roccus De assecurationibus note 34 mentioned an instance where an insured ship with her appurtenances and tackle were captured by pirates and where, damaged by guns in the course of her capture and with the loss of some of her masts and tackle, she was again released, taken to a nearby port from where, after some superficial repairs, she sailed home. The question was whether her insurers were liable to compensate the value of whole ship (ie, to pay for a total loss) or only the damage she had suffered (ie, to pay for a partial loss). The answer was that the insurers were not liable at all for a total loss if the insured ship survived the incident. Despite the fact that she was seriously damaged, there was no doubt that she was not lost because her keel was undamaged and, by implication, because she remained a ship, even if damaged; moreover, she remained the same ship and did not, by reason of her repairs, become another ship, such repairs having been made to preserve the ownership of the same ship and not to terminate it (on this point reference was made to Bellonius Decisiones Rotae Genuae decis I.7). Accordingly, hull insurers were not liable for a total loss as long as that hull remained intact.

Elsewhere, though, Roccus (De assecurationibus note 99) referred to the contrary decision of a Portuguese court concerning a case where a ship on which money had been loaned on bottomry, was captured by pirates, pillaged and badly damaged, and later released as unusable, and was then brought into port and repaired. In this case, it was thought, it could not be argued by the insurer of the insured borrower ('mutuans'), which insurer was, by the nature of things, liable for a total loss only, that he was not liable because the ship and the same hull was still in existence and because there had in consequence been no total loss at all.

28 See also eg Scheltinga Dicrta ad III.24.7 sv 'boven de waerde' who noted that the question whether, when pirates had captured a ship and later released her, the insurer could be held liable to compensate for the full value of the ship ('de geheele aestimatle van 't schip') or merely the ransom money and the actual damage she had suffered ('de waare geledene schade') in the process, had been answered correctly and in accordance with the practice of merchants by Bynkershoek.
Presumably the difference of opinion was the result of different interpretations as to when a deprivation of possession could be regarded as sufficiently serious, permanent and without hope of recovery (sine spe recuperandi) as to justify regarding it as a total loss. In Roman-Dutch law, as in the later Dutch law, fixed periods were laid down after which an insured could abandon insured property to his insurer and which eliminated the question of fact in every instance. These periods will be considered in more detail elsewhere. However, in the absence of any abandonment, as in the instances with which the opinions were concerned, uncertainty and a potential difference of opinion remained.

In the second place a loss could, depending on circumstances such as the type and nature of the property involved and of the loss which had occurred, be presumed to be total in cases where the insured property was not totally destroyed but was in fact damaged, as opposed to physically undamaged. The insurer then had to pay out the full sum insured on that property.

That was the case, for example, where the property was no longer of the same nature or species as that which was insured and where there was a total loss in an economic although not in a physical sense. In this case the insured property was not totally destroyed but something of it which had a value remained. Van Zurck, for example, explained that grain and other similar perishable goods which were damaged to such extent that they were no longer deliverable ('niet leverbaar'), had to be taken as being totally lost and the sum insured on them as being payable, as long as the insured gave up the damaged grain to the insurer ('mits de granen ten behoeve van den assuradeur gegeven worden'). It was not a question, he stressed, of the grain merely being partially lost and of an instance where the insurer only had to compensate the damage ('waar de scha alleen gepresteert moet worden'). The position was apparently otherwise where the insured property did not perish or become undeliverable but where, for example, only a part of it was damaged. In such a case the loss was partial and the insurers liable only for the reduction in the value of the insured consignment.

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29 See ch XIX § 2.3 infra.

30 Codex Batavus sv 'Assurantie' par 8 n2.

31 That is, presumably, when they were no longer of the quality and type specified in the sale or no longer deliverable 'as grain'.

32 He referred in this regard to Roccus De assecurationibus note 95 for the question whether, where grain deteriorated to such an extent that it became undeliverable ('irreceptibilla'), there was a partial loss (the insurer being liable for the damage to or reduction in the value of the cargo) or a total loss (the insurer being liable for the full value of the cargo). A Sicilian court had held the insurers liable to pay the full value of the grain, on condition that the insured ceded or abandoned it in favour of the insurers ('facta cessione per assecuratum dictorum frumentorum ad eorum beneficiu').

33 See Roccus De assecurationibus note 92 who explained that insurers were not liable for a total loss if the insured ship was not entirely lost or did not sink but if by a storm her rigging, masts or sails were chopped down and jettisoned to lighten her. Then the insurers were merely liable for the damage sustained. That case was distinguishable, according to note 95, because the insured property did not perish or become undeliverable ('non erat deterioratae, & irreceptibiles').
There was also a total loss, according to Van der Keessel, where a ship had stranded and had been damaged and could not be repaired ('reparanda') without a major expense ('sine majori impensa'), which was presumably determined in every case with reference to the value of the ship in question and to the practice of merchants. At least in Roman-Dutch law there was no fixed portion of the value, as was the case later in the Wetboek van Koophandel, which, when it was exceeded, resulted in the loss being taken as a total loss.

There was further a total loss, again according to Van der Keessel, so that the full value of the insured ship had to be paid out, when the ship was un navigable or incapable of completing her intended voyage and, therefore, even when there was no total loss in the physical sense of the ship having been destroyed or sunk or even in the sense of the loss of possession or use of the ship as in the case of a capture. This instance, like the others mentioned earlier, will be considered in more detail elsewhere. It should be remembered, though, that an insurer was not liable where losses such as these (or any other loss, for that matter, whether total or partial) were caused by wear and tear or inherent vice.

Therefore, to summarise, there were a number of examples in Roman-Dutch law of instances where there was not a real and actual total loss or destruction of the property in question in the sense that nothing was left or where what was left was not something of the species insured, but where, in an economic sense, the loss had to be regarded and was at law presumed to be a total loss. A total loss was presumed where the insured was deprived of his otherwise undamaged property and where there was no reasonable hope of recovering it. The same happened where the insured property, although merely damaged, was considered totally lost because of the nature (such as the irreparable of a ship) or the extent (her not being repairable recoverable at a reasonable cost) of the damage in question. The distinction between an actual and a presumed total loss was most clearly alluded to by Van der Linden who referred in one place to the case where a ship or goods were totally lost ('geheel en al vergaan'), and where they were damaged ('verongelukt') to such an extent that the insurer was liable for the payment of the full amount he had underwritten ('geheele geteekende somme').

34 In his translation of Van der Keessel, Lorenz translated it as 'recovered' rather than 'repaired', and in the context that is also a possibility.

35 See Van der Keessel Theses selectae th 746 (ad III.24.7), referring to the decision of the Hooge Raad of 1728 and to Bynkershoek Quaestiones juris privat/i IV.14. I will return to this point in ch XIX § 2.3.9 infra when discussing the circumstances under which an abandonment of the insured property was justified.

36 Praelectiones 1471 (ad III.24.13), which concerned the measure of indemnity, as to which, see further ch XVII § 3 infra.

37 See ch XIX § 2.3 infra as to the circumstances justifying an abandonment in Roman-Dutch law.

38 See again ch VI § 3.3 supra.

39 Koopmans handboek IV.68.
and elsewhere to a total (as opposed to a partial) loss as occurring where the property insured was totally lost or could be regarded as so lost ('geheel verloren is, of als verloren beschouwd kan worden').

A third instance of what may be termed a presumed total loss occurred when insured property went missing and it was therefore uncertain whether any loss had occurred but where such occurrence, as opposed to the extent of a loss which was known to have occurred for certain, was presumed by law. Because of the different issues involved and because of the fundamentally different basis of the presumption involved, this type of total loss will be treated separately.

It must be emphasised that the distinction, such as it was, between a real and a presumed total loss was not a major issue in Roman-Dutch law and that little attention was paid to it in the sources. It was merely one of convenience and not a difference in principle. As far as the sources were concerned, the same basic rules of indemnification applied to both (that is, to all) forms of total loss. In all cases where he could and wanted to claim for a total loss, the insured had to abandon the property insured or whatever remained of it to the insurer. Likewise, in all cases where he had paid out for a total loss, the insurer had a right of salvage by which he could recover the property insured or whatever remained of it from the insured. At most Roman-Dutch law differentiated between what may, if only to avoid confusion, be termed an irreversible and a potentially reversible total loss, a distinction which was drawn for a very restricted purpose. This distinction, which was in any event never formally drawn in the sources, served solely for the purpose of determining when an insured could claim and abandon on his policy and not to establish whether he could abandon or how such abandonment had to be made. In the case of an irreversible total loss, the insured could abandon and claim on his policy immediately; if the total loss was potentially reversible, he had to wait a specified period of time before he could abandon and claim on his policy, and could then only do so if in the meantime the loss had not been reversed in that it manifested itself as a partial loss. Thus, as far as abandonment goes, as will be shown later on, there was no distinction in principle in Roman-Dutch law between a real and presumed total loss.

\[40\] Ibid IV.6.9.
\[41\] See § 6 infra.
\[42\] Which in any event overlapped with the distinction between an actual and a presumed total loss in that the irreversibility or otherwise of a loss was either actual or presumed.
\[43\] See ch XIX § 2.3 infra where the issue of the different types of loss will be referred to again in connection with the doctrine of abandonment.
\[44\] It should already be emphasised at this stage that the superficially similar distinction in English law between an actual total loss and a constructive total loss should not be equated to the notions of a real and a presumed total loss in Roman-Dutch law. Although there was a large but by no means complete measure of correspondence in the factual circumstances under which a constructive total loss and a presumed total loss existed in the two systems, that is where the similarity ended. The distinction between an actual and a constructive total loss in English law was a distinction in principle. In the case of a constructive total loss the insured had to abandon if he wanted to claim for a total loss, while in the case of an actual total loss he did not. Because the notion of a constructive total loss in English law and of a presumed total loss in Roman-Dutch law was not completely identical, and especially because of the
4 Loss in the Wetboek van Koophandel

The Wetboek van Koophandel contains no specific definition of and distinction between the concepts of a total and a partial loss in the context of insurance. It merely lists, in art 663, the circumstances under which an abandonment of insured property to the insurer may take place by an insured who wishes to claim for a total loss. These include not only instances where the property is actually physically destroyed ('vergaan of bederf') but also instances on the one hand where it is merely captured or detained ('opbrenging of aanhouding'), presumably even without any damage, and on other hand where it is merely damaged but then in such a way that the damage is economically and therefore also legally a total loss. The analogy with the instances of a total loss ('verlies') in Roman-Dutch law is readily apparent.

The Wetboek does, however, contain an extensive treatment of partial loss or average. This may briefly be explained here.

In art 696, average ('avarij') is defined as all extraordinary expenses incurred in respect of the ship and goods collectively or separately ('alle buitengewone onkosten ten dienste van het schip en de goederen gezamenlijk of afzonderlijk gemaakt') and also as all damage occurring to the ship and goods ('alle schade die aan het schip en de goederen overkomt'). Article 698 accordingly distinguishes between two types of average: general average ('avarij-grosse of gemeene avarij'), which is distributed over different consequences of the distinction in the two systems between those losses on the one hand and actual or real total losses on the other hand, it seemed better to use different terminology altogether and not to refer to presumed total losses in Roman-Dutch law as constructive total losses. This issue and differences between Roman-Dutch and Dutch law on the one hand and English law on the other hand will be dealt with further in § 5 infra and in ch XIX § 2.5 infra.

45 In terms of art 666 this includes damage in excess of three-quarters of the value of the property.

46 In terms of art 666 this is taken to have occurred if the property is not handed back or recovered after particular and specified periods of time, which depend on the length of the voyage in question, or if the property is at an earlier stage declared forfeited.

47 Such as in the case of shipwreck or stranding, or when the insured property is no longer usable ('onbruikbaar'), which will be the case, in terms of art 664, when the repairs required to enable the completion of the voyage are not possible or when they would exceed three-quarters of the value of the ship when repaired. In terms of art 717, if the cost of repairs would run to more than three-quarters of the value of the ship, she must, as far as insurer is concerned, be regarded as condemned ('afgekeurd'). The insurer is then liable to pay out the full sum insured, subject to a deduction of the value of the damaged ship or wreck in so far as no abandonment has been made. Abandonment is treated in arts 663-668 and the circumstances under which it is permitted will be considered in detail in ch XIX § 2.4 infra.

48 For details of the process of codification of this part, see eg Van Nievelt XXXIX-XL.
and borne by the ship, freight and cargo,\textsuperscript{49} and particular average ("eenzondere avarij"), which is borne separately by the ship or goods which have suffered the loss or necessitated the expense.

Article 701 then provides a list of seven examples of particular average. This includes all loss of or damage to the ship or cargo by a storm, capture, shipwreck or accidental stranding; the charges and expense of salvage ("foonen en kosten van berging"); loss of or damage suffered to the equipment of the ship caused by a storm or another accident at sea; the cost of recovery ("reclame-costen") and the wages and maintenance of the crew during such recovery if either the ship or her cargo is detained;\textsuperscript{50} the cost of repair and salvage of damaged merchandise in so far as this was not the immediate cause of an occurrence giving rise to general average; the cost of onward carriage in the event of the avoidance of the contract of carriage in certain circumstances; and, generally, all damage, loss or expense which was not intentionally caused or incurred for the preservation and common welfare of the ship and the cargo but which was suffered or incurred for the benefit of the ship alone or for the cargo alone and which was not a general average loss or expenditure.\textsuperscript{51}

Articles 703-708 contain a variety of provisions as to what is and what is not to be taken as average. These include matters such as lighterage, the damage caused by certain negligent acts of the master and crew, and the usual expenses incurred in the course of a voyage.\textsuperscript{52}

The Wetboek van Koophandel also provides for a possibility not pertinently addressed in the Roman-Dutch sources, namely that of successive losses. By art 718, in the event of a loss an insurer is not liable to pay anything more than the sum he had insured. Where a total loss is therefore followed by a partial loss (as is possible, given

\textsuperscript{49} A list of 23 examples of general average is then provided in art 699, the last item of which mentions a general category of all loss caused and expense incurred intentionally in an emergency for the preservation and common welfare of the ship and her cargo. In the Wetboek the assessment of general average is treated in arts 722-740. See also again ch I § 4.6.4 supra where general average was considered in detail.

\textsuperscript{50} If both are detained and recovered, such a cost is a general average expense.

\textsuperscript{51} 'In het algemeen, alle schade, verliezen en de gemaakte onkosten die niet zijn veroorzaakt of gemaakt opzettelijk en tot behoud en gemeen weizijn van schip en lading, maar die zijn geleden door of gemaakt ten behoeve van het schip alleen, of voor de lading alleen, en welke dienvolgens, naar aanleiding van 699, niet onder avarij-gros behooren'.

\textsuperscript{52} Briefly, in terms of art 702 ordinary, non-emergency lighterage Is not average; in terms of art 707 the damage to merchandise by reason of accidents arising from the intentional actions or the carelessness of the master or crew is particular average in respect of which the consignor has a recourse against the master, the ship and the freight; and in terms of art 708-1 pilotage, towage and other fees to exit from or enter harbours or rivers, all tolls and expenses on sailing from or past a port, lighthouse fees and all other duties pertaining to shipping (ie, what is known as common average) are not average but ordinary expenses for the account of the ship, unless otherwise agreed in the bill of lading or charter party; such expenses are never for the account of insurers unless, in a particular instance, they are the result of unexpected and extraordinary circumstances arising in the course of the voyage ("komen nimmer ten laste van de verzekeraren, ten zil in het bijzonder geval, dat dezelve zijn het gevolg van enige onvoorziene en buitengewone omstandigheden gedurende de reis opgekomen").
that a total loss does not necessarily involve the complete destruction of the insured property), or where a partial loss is followed by another partial loss or by several such losses or by a total loss, the insurer is not liable for more than the sum insured.\footnote{As to the sum insured being the maximum liability of an insurer, see ch XVII § 2 infra. For a possible indication of the position in Roman-Dutch law as regards successive losses, see ch XVII § 2 n48 infra.}

5 \hspace{1cm} Loss in English Law

Being separated by almost a century of judicial pronouncement on the practices and procedures of average adjusters, the Marine Insurance Act of 1906 not surprisingly contains a much more detailed regulation of the different losses relevant in the context of marine insurance than does the Dutch \textit{Wetboek van Koophandel}.

According to s 56(1), a loss may be either total or partial, the latter being any loss other than a total loss\footnote{In terms of s 56(4), where the insured brings an action for a total loss and the evidence proves only a partial loss, he may recover for such a partial loss unless the policy provides otherwise (unless the policy is eg a total-loss-only policy: see § 7.2 infra). Chalmers 83-84 explains that a total loss of a part of the subject-matter insured (cargo) is a partial loss. Thus, a loss of ten bags of the 100 insured is a partial loss of the 100 bags, not a total loss of ten bags.} and being also more common.\footnote{Draw 35 points out that English underwriting and claims records and adjustments dating from the beginning of the eighteenth century suggest that claims were generally presented under two headings only, particular average and general average, to which was added, during periods of war, claims for total loss by capture and seizure. Only in times of war were there fewer claims for average losses than for total losses. See Sutherland 68.} In terms of s 56(2) a total loss may be either an actual total loss or a constructive total loss.\footnote{Unless a different intention appears from the terms of the policy (as with an actual-total-loss-only policy), insurance against total loss includes a constructive as well as an actual total loss (s 56(3)).} These terms are, of course, foreign to Roman-Dutch and ultimately also to Dutch law, but as will become apparent, the notions they convey not completely so.\footnote{See Buys 93 who remarks that the descriptions in ss 56 and 57 of the Marine Insurance Act differ significantly from the equivalent descriptions in arts 698 and 701 of the Dutch \textit{Wetboek} and also that they refer to concepts and contain definitions without any equivalent in Dutch law.}

In terms of s 57(1) an actual total loss occurs 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.\footnote{Chalmers 85 explains that prior to the Marine Insurance Act, the rule as regards goods was that they were deemed to have been an actual total loss where they were so damaged that they ceased to exist in specie or were incapable of arriving at their destination in specie, i.e., where they no longer answered to the commercial denomination under which they were insured. A provision to this effect was not included in the Act, so that it is possible that goods still existing in specie but incapable of arriving at their destination in specie may not be an actual total loss. Further, the maxim \textit{de minimis non curat lex} is applied to determine whether or not a loss is an actual total loss. Cohen 'Bill' 379 suggests that in s 57(1) provision should have been made that there is also generally an actual total loss 'where the adventure which is the subject of the insurance is wholly and absolutely frustrated'.}
A constructive total loss is defined in s 60(1) as occurring where the subject-matter insured is reasonably abandoned because its actual total loss appears to be unavoidable, or because it could not be preserved from an actual total loss without an expenditure which would exceed its value at the moment when the expenditure was incurred. This, however, is subject to an express provision in the policy to the contrary. Section 60(2) then contains three specific examples of a constructive total loss: firstly where the insured is deprived of his possession of the ship or goods by a peril insured against and it is either unlikely that he can recover the ship or the goods, or the cost of recovering the ship or goods would exceed their value when recovered; secondly, in the event of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired; and thirdly, in the event of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value upon arrival.

The importance of the distinction in English law between an actual and a constructive total loss lies in the fact that in the case of an actual total loss no notice of

59 Unless otherwise agreed, the actual repaired value (i.e., the value when repaired) and neither the value in the damaged condition, nor the value immediately before the damage, nor the agreed value is relevant in this regard. In terms of s 27(4), unless the policy otherwise provides, the value fixed by the policy is not conclusive for purposes of determining whether there has been a constructive total loss. See also ILL HR 15 107-108.

60 Chalmers 92n6 notes that it is the unlikeliness, not the uncertainty, of recovery, based on the true facts and not or not merely the facts known at the time of abandonment, which is relevant here. Cohen 'Bill' 380-381 explains that 'unlikely that can be recovered' is an inaccurate statement of the earlier law, for there is a constructive total loss if it is uncertain, though not unlikely, that the property can be recovered; if it is uncertain at the time of capture whether the property will be recovered (even if it is likely, e.g., because of presence of friendly war ships), a loss is presumably and conventionally total at the time when it occurred. Of course, if the property is recovered before the action is brought, the total loss is adeemed but until adeemed, it remains total. As to the ademption of loss, see further ch XIX § 2.5 infra.

61 In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired.

62 If the cost of repairing or reversing the loss of or damage to the insured property will exceed its sound or repaired value afterwards, the loss is not a particular average loss but a constructive total loss entitling the insured to abandon (see Barry 349-354). This rule was seemingly not yet clearly established by the latter part of the eighteenth century, although it was at that time part of the continental systems, including, as has been shown, Roman-Dutch law. According to Park System (B ed) 334-335, e.g., referring to French law, no abandonment was permitted unless the object or the voyage was totally lost, or if the loss did not amount to a moiety (i.e., a half) of the value of property insured.

The position in English law as it came to be codified in the Marine Insurance Act is, however, clearly different from the position in some foreign systems. Thus American law and most continental systems recognise the demonstration of a constructive total loss (in American law) or a loss entitling abandonment (in Europe) when the cost of repairs is substantially less (50 per cent in American law, 75 per cent on the Continent) than the repaired value. See further ILL HR 15 107-108.
abandonment need be given\(^{63}\) while in the case of a constructive total loss the insured may, in terms of s 61, either treat the loss as a partial loss or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss. If he elects to abandon the subject-matter insured to the insurer, the insured must give a notice of abandonment.\(^ {64}\)

Despite this important difference, the distinction between an actual and a constructive total loss in English law remains surprisingly nebulous. The essence of the distinction would appear to be that an actual total loss is a physical and economic total loss while a constructive total loss is merely a total loss in an economic sense. It has been suggested that to determine whether an insured is entitled to treat a loss as a constructive total loss, the prudent uninsured owner test may be applied by inquiring whether such an owner would write the property off as a total loss.\(^ {65}\) But because of the uncertainty, insured in practice always, or at least always if there is doubt, give notice of abandonment even though it may not strictly be required.

The English concept of a constructive total loss, by contrast to and principally different from an actual total loss, is peculiar to that legal system and was unknown to Roman-Dutch law although in that system different types of total loss which could be encompassed within the notions of an actual and a constructive total loss, were also known. The same is broadly true of English law and modern Dutch law,\(^ {66}\) and also of English law and modern German law.\(^ {67}\)

\(^ {63}\) Section 57(2).

\(^ {64}\) Section s 62(1). However, as Chalmers 92n5 points out, a notice of abandonment is not an ingredient of a constructive total loss. Abandonment and the notice of abandonment in English law are considered in more detail in ch XIX § 2.5 infra.

\(^ {65}\) See generally Chalmers 91-92 who notes that to avoid the uncertainty and complexity of the English rule, the laws of most foreign countries arbitrarily set out the circumstances which authorise an insured to abandon and claim for a total loss. That is true of Dutch law, as has been indicated earlier and as will be shown in more detail in ch XIX § 2.4 infra.

\(^ {66}\) See eg Buys 99-101 who explains that the concept of a constructive total loss is unknown in Dutch law. An analogous notion (but no more) is possibly to be found in the possibility of abandonment in terms of art 664 and in the condemnation in terms of art 717 as a total loss of a ship which is damaged to such an extent that the cost of her repairs would exceed three-quarters of her repaired value. However, the proportion laid down in arts 664 and 717 is purely arbitrary and Buys regards the English approach as preferable.

\(^ {67}\) See eg Ulrich 222 who notes that a constructive total loss in English law is an economic total loss which includes damage to the insured object which is of such a nature 'dass es im Schadenstale für den Eigentümer eine unwirtschaftliche Massnahme ist' to render the object workable by incurring expenditure. See also Idelson 359-359 who explains the evolution of a constructive total loss as being based on the unlimited liability of the shipowner at the time in English law, a position which was only amended in the latter half of the nineteenth century (by s 54 of the Merchant Shipping Amendment Act of 1862 (25 & 26 Vict c 63)) after the notion of a constructive total loss had already evolved. It is clear from the structure of this fiction (and especially from the position in American law where a total loss is presumed if the property is more than half damaged), Idelson continues, that this was 'kein Produkt der normalen Entwicklung des Versicherungsrechts, sondern ein Komprimis der rechtlichen Prinzipien und der Interessen'.
As far as average is concerned, the term also had and in fact still has multiple meanings in English law. Thus, in *Wilson & Another v Smith*\(^{68}\) Lord Mansfield noted the possible ambiguity which could arise when the same word was used in a policy in different senses. That was particularly the case with the word 'average' which was in the policy before him 'used to signify a contribution to a general loss: and ... also ... to signify a particular partial loss'.\(^{69}\) In the late eighteenth century the distinction was also generally recognised in English law between general or gross average; small or petty average; and simple or particular average.\(^{70}\)

Sections 64-66 of the Marine Insurance Act deal with partial losses and distinguish between general and particular average losses. Generally speaking a general average is a total or, more commonly, a partial loss voluntarily incurred for the common safety, and made good proportionally by all the interests concerned in the adventure, while a particular average loss is a partial loss fortuitously caused by a maritime peril, and borne by the interest upon which it falls.

In terms of s 66(1), a general average loss is a loss caused by a general average act which in turn includes a general average expenditure or a general average sacrifice. A general average act, in terms of s 66(2), occurs where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in a time of peril for the purpose of preserving the property imperilled in the common adventure. Section 66(3) provides that in the case of a general average loss, the party on whom it falls is entitled, in terms of the applicable principles of maritime law, to a rateable general average contribution from the other parties interested in the common adventure. Where appropriate,\(^{71}\) an insured who has incurred a general average expenditure or made a general average sacrifice may recover compensation from his insurer,\(^{72}\) while where he has paid or is liable to pay a general average contribution in respect of insured property, he may likewise recover compensation for it from his insurer.\(^{73}\)

According to s 64(1), a particular average loss is a partial loss of the subject-matter insured which is caused by a peril insured against, and which is not a general average loss. Section 64(2) excludes from a particular average loss the expenses incurred by or on behalf of the insured for the safety or preservation of the subject-matter insured, other than general average and salvage charges. These are called par-

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\(^{68}\) (1764) 3 Burr 1550, 97 ER 975.

\(^{69}\) At 1555, 977. See too Holdsworth History vol XI at 53; Rodgers 179.

\(^{70}\) See eg Weskett *Digest* 25 par 3 sv 'averages'. At 24 he declared that 'the matter of averages is one of the most thorny of those concerning insurances, because of the disputes which they occasion, when they are not well understood; and especially when good faith is not the basis of them'. See too *Idem* 394 sv 'petty average'; and Raynes (1 ed) 172-173, (2 ed) 167.

\(^{71}\) That is, if he is insured, subject to any provision to contrary in his policy, and (unless otherwise agreed) if the general average loss in question was incurred for the purpose of avoiding a peril insured against (s 66(6)).

\(^{72}\) Section 66(4).

\(^{73}\) Section 66(5).
particular charges and are usually the expenses incurred in terms of a clause in the policy, known as the sue and labour clause, which authorises the insured to incur expenses in the avoidance and minimisation of a loss. Thus, particular charges, being the expenses recoverable under a sue and labour clause other than general average and salvage charges, are not part of a particular average loss. By s 65(1), salvage charges incurred in preventing a loss by perils insured against may, unless expressly otherwise agreed, be recovered from the insurer as a loss by those perils. In terms of s 66(2) salvage charges are the charges recoverable under maritime law by a salver independently of contract. Therefore, expenses incurred for the safety or preservation of insured maritime property may be either a general average expenditure (in terms of s 66), or salvage charges (in terms of s 67), or particular charges (sue and labour charges in terms of s 64(2)), depending upon the circumstances in which and by whom they were incurred.

The Marine Insurance Act also deals with successive losses. Section 77(1) provides that, unless the policy provides otherwise and subject to the provisions of the Act itself, an insurer is liable for successive losses even though the total amount of such losses may exceed the sum insured. Thus, where a partial loss has been suffered and paid and is then followed by a further loss, the insurer is also liable for such further loss, even if added to the first loss the sum insured is exceeded. Unlike Dutch law, therefore, damage is not deducted from the sum insured until it is depleted, after which the insurer no longer incurs any liability.

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74 As to the avoidance and minimisation of loss and the sue and labour clause in English law, see ch XVI § 2.5 infra.

75 The fact that particular charges are not included in particular average means that such charges are not taken into account in determining whether or not a franchise (as to which see § 7.3 infra) has been exceeded. Also, such expenditure may therefore be recovered even if there is a 'free of particular average' warranty in the policy. As to these matters, see further § 7.3.4 infra.

76 That is, in terms of the policy and not in addition to the policy in terms of the sue and labour clause.

77 Salvage charges do not include the expense of services in the nature of salvage rendered by the insured or a person hired by him (which means that the expense is therefore not recoverable independently of contract) for purpose of averting a peril insured against, such being recoverable either as particular charge or as a general average expenditure, depending on the circumstances in which it was incurred.

78 See further ILL HR 3 58.

79 See further eg Chalmers 123.

80 See Buys 129 who adds that the position in Dutch law may be changed by an express agreement to that effect, eg by an agreement that during the currency of the insurance the sum insured will be maintained irrespective of the damage paid.
same policy a partial loss which has not been repaired or otherwise made good is followed by a total loss, the insured can only recover in respect of the total loss.\footnote{1}{The legal principle of such a 'merger' with the effect that a lesser loss is swallowed up by greater loss, both forming one loss, was first propounded in \textit{Livie v Janson} (1810) 12 East 648, 104 ER 253. There it was held that where, during the currency of the same policy, a particular average loss had been sustained but not repaired and was then followed by a total loss, the insured could recover only for the total loss or, if total losses generally or that particular total loss was not covered by his policy, could recover nothing from his insurer. See further ILL \textit{HR} 15 103.}

6 Missing Ships and Cargoes: The Presumption of Loss

6.1 Introduction

An issue of considerable importance in earlier times arose where the insured property, be it a ship or goods, had gone missing without any trace or news and where, by law and after the effluxion of a period of time, its loss was presumed to have taken place.

Three preliminary points must be made. First, the loss which was presumed to have occurred was, by the nature of things, a total loss. Secondly, the situation relevant here is where it was not certain at all whether or not a loss had occurred, the insured ship or goods merely being missing, and where it was presumed that a loss had in fact occurred. It was thus a presumption of the occurrence of a loss. This was not the situation where it was in fact established that a loss had occurred and where, by the nature of the property or of the loss in question, the loss which had occurred was presumed to be a total loss. Put differently, at issue here was a presumption of the occurrence of a (total) loss, and not a presumption that the loss which was known to have occurred, was a total loss.\footnote{2}{See further ch XIX § 2.3.1 \textit{infra} this difference is also discussed.} Thirdly, the presumption or legal fiction in this case was one of the occurrence of a total loss of the missing ship or goods, and not a presumption of knowledge of the (total or partial) loss of the missing ship or goods, as in the case of an insurance concluded after the departure and the occurrence of a loss.\footnote{3}{This latter case was considered in ch XII § 2 \textit{supra}. That the two situations could be and were confused appears from Wassenaer \textit{Praktyk notariaal} VIII.4 who may, though, have had a presumption of knowledge of a presumed loss in mind; he did not make it clear though. It is quite possible, of course, for there to be a presumption of knowledge of a presumed loss: see ch XIX § 2.3.1 \textit{infra}.}

The need for a presumption of loss is obvious given the lack of proper and speedy communications in earlier times. After having sailed from her port of departure, the owners of a ship or of cargo on board very often did not hear whether the voyage to the destination had been successfully performed until either the ship herself or another ship could bring that news from the port of destination. Ships and their cargoes often disappeared without trace and there was equally often no way of knowing what exactly had happened to them and their cargoes and where or when that had happened.
This uncertainty caused by the absence of knowledge whether or not a loss had occurred, referred to in Dutch as 'tijdingloosheid', was obviously not acceptable to the owners of ships and cargoes who had insured against the loss of their property. Not surprisingly insurance law from early on sought to resolve this uncertainty and to protect the insured. This was especially necessary because other rules applicable in the context of insurance required the insured to institute his claim and to abandon within stipulated periods after the occurrence of a loss. Such rules would otherwise have relieved the insurer of liability in the case of a ship or cargo which went missing without there being any certain information about its whereabouts and fate and about whether or not a loss had in fact occurred.

6.2 Legislative Regulation in Roman-Dutch Law

Section 5 of title VII of the placcaat of 1563 referred to the custom on the Antwerp Bourse that an insurer had to pay an insured the amount underwritten by him on the policy when, for a year and a day ('binnen Jaer ende dach') after the date of the subscription of the policy, no news had been received of the insured ship and goods. There was a proviso, though, namely that anyone who wished to avail himself of this custom would be obliged to show by lawful means ('by wettigen bescheyde te toonen') that at the time of the conclusion of the insurance such ship and goods still existed ('noch was in wesen').

This was in accordance both with the earlier position elsewhere and with prevailing custom in the Low Countries. A practically identical provision was taken up in art 3 of the Antwerp Antiquae of 1570 as also in art 7 of the Impressae of 1582 which,

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84 Note, not within such period after the departure, nor after the last news was received.

85 It should be remembered that in terms of s 4 there was no possibility of any valid insurance on a ship or goods already lost or perished at the time of the insurance. See again ch XII § 2.2.2 supra. As to the proof of loss, see ch XVI § 3 infra. And as to s 5 generally, see Van Leeuwen Rooms-Hollands regt IV.9.10; De Groote Zeeassurantie 34.

86 In earlier laws and practices a presumption of loss arose on the expiry of a specified period after the departure of the insured property if there was no news of that property during that period. Thus, early Italian and subsequent Barcelona policies provided that in the absence of news for a specified number of months, the insurer had to pay the sum insured. See eg Stracca De assecrationibus XXX (the Ancona policy of 1567 he discussed provided in this regard that 'si abhinc intra menses duodecem de dicta navi non fuerint vera nova perfata, Assecuratores obligentur dare & solvere pecuniam istiam ab illis assecuratam'); and Roccus De assecrationibus note 85 (noting that different periods of time applied in different places in this regard). See generally Mullens 69; Reutz Geschichte 141 (6 months in Barcelona); De Roover 'Early Examples' 188; and Sanborn 256.

87 See De Longé vol I at 600.
for the first time, provided for two distinct periods after which the presumption arose, depending on the duration of the voyage involved.  

There was no similar provision in the *plaecaten* of 1570 and 1571, and this was no doubt an omission for subsequent municipal legislation contained provisions of this nature right up to the end of the eighteenth century.

Thus, s 5 of the Amsterdam *keur* of 1598 provided that in the event of any insured ship or goods being overdue and not arriving ("achter blijft") within a specified period of time after the conclusion of the insurance and the departure from the port of loading, without any news of it in the meantime having been received at the place of loading or at the destination, the insured ship or goods would be presumed lost and the insured would be able to give notice ("doen intimatien") of the loss or, rather, of the lack of any news to the insurer. The period after which the presumption of loss arose in accordance with existing custom now depended on the duration of the voyage in question.

In the case of a voyage in Europe or to Barbary or thereabouts, the loss would be presumed and the insured would be entitled to notify the insurer after a year and a day and he would be able to claim payment three months later. In case of voyages to places further afield, a period of two years would henceforth apply.

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88 Article 7 of title LIV of the *Impressae* (see De Longé vol II at 402) stated that if any insured ship and goods on a voyage in Europe, Barbary or surrounds ("oft daer ontrent") had after a year and a day from the date of such insurance and the departure from the port of loading not yet arrived ("after blijft"), without any news in the meantime having been received at the place of loading or at the intended place of discharge, such ship and goods would be presumed lost and the insured could give notice of such loss to the insurers and claim payment. And in the case of voyages to more distant places ("pleatsen veredere ghelegen"), there would in future ("voortaen") be observed a period of two years. As to art 7, see Groenewegen *Aanteekeningen* n24 (ad III.24.10); Van Leeuwen *Rooms-Hollands regt* IV.9.10.

89 Section 12 of the Middelburg *keur* of 1600 was in identical terms.

90 This was an attempt to remedy the earlier provision which referred only to the time of the conclusion of the contract and which did not provide for the situation where the departure only occurred some time after such conclusion. Now, it would appear, the one-year period had to be calculated from the time of the conclusion of the insurance or from the time of departure, whichever was the later.

91 Scheltinga *Dictata ad* III.24.10 sv 'zonder dat daer van, etc' explained that the fact that news may have been received elsewhere would have made no difference, seemingly because such news was not necessarily then available to the insured.

92 See again ch XI § 6.2.2 n372 supra as to the periods and duration of trading voyages.

93 As to s 5, see Grotius *Inleidinge* III.24.10 (who used the phrase 'jaer ende dagen'; although translated by Maasdorp 286 as 'a year and some days', Lee 321 quite correctly points out that one has to read 'daeg' for 'dagen'); Groenewegen *Aanteekeningen* n24 (ad III.24.10); Schorer *Aanteekeningen* 428 (ad III.24.10) n24 (who noted that Groenewegen incorrectly referred to s 15 instead of s 5 of the Amsterdam *keur* of 1598); Van Leeuwen *Rooms-Hollands regt* IV.9.10; Van Zurck *Codex Batavus* sv 'Assurantie' par 17 (referring to a departure from the first port of loading ('na vertrek van de eerste lading-plaets') and, like Grotius, to a presumption of the loss of the ship only); Scheltinga *Dictata ad* III.24.10 sv 'zoo werd schip, etc' (who observed that although Grotius referred to a presumption of loss of the ship only, that had to be understood as referring to the ship as well as to her cargo; a presumed total loss of a ship therefore at the same time involved a presumed total loss of the cargo on board); and Van der Keessel *Praeflectiones* 1461 (ad III.24.10). See too Vergouwen 44.
Along largely similar lines, s 14 of the Rotterdam *keur* of 1604 laid down that where, on a voyage in Europe, to Barbary, or to the Canary Islands or thereabouts, any insured ship or goods did not arrive ("achter blijft") within a year and a day after her departure from the port of loading, and without any news ("tydinge") in the meantime having been received at the place of loading or at the place of the intended discharge, such ship and goods would be presumed lost, and the insured could therefore abandon it to the insurers. In the case of ships and goods destined further afield, the relevant period was two years.\(^5\)

The customary nature of these statutorily entrenched principles was confirmed by the Antwerp compilation of customary law, the *Compilatae*, in 1609.\(^6\) Provision was also made for proof of the absence of news at the port of departure and at the destination, for a prescribed period after the conclusion of the insurance,\(^7\) to be provided in the event of a claim based on a presumed loss of this nature.\(^8\)

An abridged and slightly changed version of the earlier measures was taken up in s 67 of the Rotterdam *keur* of 1721. It provided that when, after the expiry of one year and six weeks from the departure of the ship, no news at all had been received of her or of the insured goods, they would be taken as lost and the insured would be entitled to abandon them to the insurer. This period applied if the destination of the voyage in question was within Europe or not further than up to Barbary, the Canary Islands and

\(^4\) Thus, there was no longer any mention of the time of the conclusion or subscription of the insurance contract.

\(^5\) See Groenewegen *Aanteekeningen* n24 (ad III.24.10); Van Zurck *Codex Batavus* sv 'Assurantie' par 17; and Van der Keessel *Praelectiones* 1461 (ad III.24.10).

\(^6\) See art 245 of par 7, title 11, part IV of the *Compilatae* (see De Longé vol IV at 302) which laid down that if the insured ship went missing ("wech") for so long that for a year and a day after her departure from any port in Europe or Barbary to any other port in those countries there was no news of her, whether at the place of discharge or of loading, such ship and her cargo were presumed lost ("soo wort tschip mette gelaeten goeden gehouden voor verloren"). In terms of art 246, the same position pertained in the case of a voyage further afield, on condition that for West Indian or other similar distant voyages the period in question was two years, and for an East Indian voyage two years for a return voyage and three years for an outward-bound voyage. (The longer period allowed for outwards-bound voyages may be explained by the fact that news of the non-arrival of the ship would have taken longer to reach the Netherlands.) As soon as the prescribed time had expired, the insured could in terms of art 247 give immediate notice to the insurer of the lack of news ("van datter geene tydinge van alsulcken schip en is"), abandon the ship or cargo to the insurer, and claim for a total loss.

\(^7\) Section 5 of title VII of the *placcaat* of 1583, by contrast, had provided for proof of the existence of the ship at the time of the insurance.

\(^8\) Article 272 of par 8, title 11, part IV of the *Compilatae* (see De Longé vol IV at 312) laid down that in addition to his policy, the insured had to produce the bill of lading, and a receipt or valuation. He also had to produce three different attestations, one from the place of departure, the second from the place of discharge, and the third from place where the master lived. These were to be to the effect that not in any of these places was any news received of the ship or her cargo. In terms of art 273 these attestations had to be taken from those who could give the best information regarding the absence of any news, namely, at the residence of master, from his wife, children, family ("naeste maegen"), and friends, as well as from the owners of the ship, whether resident there or elsewhere. See generally as to position in Antwerp, Mullens 69-71 and 96.
the vicinity, but in the event of a voyage to a more distant place the period was two years.99

In terms of s 29 of the Amsterdam *keur* of 1744, in the event of any insured ship or goods not arriving ('*agterblyft*') after one year and one day from their departure from the port of loading, and without any news in the meantime having been received at the place of loading or at the intended place of discharge, then such ship and goods would be presumed to be lost and the insured could give notice of that loss to the insurers and claim payment three months later. That was the case where the ship was in Europe, or on a voyage to Barbary, the Canary Islands, or the whole of the Mediterranean Sea, the Levant and the islands or their surrounds ('*de geheele Middelandse Zee, de Levant en 'd Archipel of daar omtrent*'). But in the event of a more distant voyage, the relevant period after which the presumption arose was two years ('*sal men voortaen observeeren de tydt van twee jaren*'). 100

Section 29 was amended by the Amsterdam amending *keur* of 1756. First, voyages to Greenland and the Strait of Davis ('*Groenland en Straat-Davits*') were added to the voyages for which the presumption of loss arose after one year and a day. Secondly, provision was made for the insured to obtain at an earlier stage some measure of security of payment by the insurer in these cases.101 In essence the insurer could be compelled by the insured to make a payment into court after the expiry of half of the period after which the presumption of loss arose. More specifically, after the expiry of six months from the departure of the ship on European and Mediterranean voyages,102 or one year after the departure on more distant voyages,103 the insured could approach the Chamber of Insurance to condemn the insurers to consignation or payment into court ('*geregtelike inbetaling*') of the sums underwritten by them ('*van de Assuradeurs te vraagen Consignatie van de geteekende sommen ter Assurantie Kamer*'). Should the ship or goods in question subsequently arrive at their destination, or when certain news arrived either at the port of departure or at the destination that the ship had arrived in the one or other port, which had to be proved to the satisfaction of the Commissioners, the judicial payment ('*geconsigneerde penningen*') had to be returned to the insurers.

99 See Van der Keessel *Praelectiones* 1461 (ad III.24.10); Van der Linden *Koopmans handboek* IV.6.9.

100 See Van der Keessel *Praelectiones* 1461 (ad III.24.10) who remarked that in s 29 the Amsterdam Legislature had added a further number of destinations.

101 This was necessary because of the risk of insurer insolvency during the period which had to expire before the presumption of loss arose. As to insurer insolvency, see again ch VII § 4.1 and ch IX § 2.9 supra. Largely the same considerations applied (and will be expanded upon in ch XX § 2.2.1 infra) in the case of the provisional payment to the insured of the sum insured by the insurer.

102 Or, in the case of voyages to Greenland and the Strait of Davis, after the expiry of six months after the return of the last ship of the fleet ('*Disschener*') in a local port.

103 And, presumably, in both cases if no news had in the meantime been received of the ship and her cargo at the port of departure or at the destination.
with interest.\textsuperscript{104} The cost of the consignation was in all cases borne by the insured, and could not amount to more than a quarter per cent, presumably of the amount paid in.\textsuperscript{105}

Three final points should be made which do not appear clearly from the sources but which would appear to follow logically from the position laid down in the relevant Roman-Dutch legislative measures just referred to.

First, it seems that the presumption of loss which arose in the case of an absence of news ('tijdingloosheid') referred to a loss caused by the, or one of the, perils insured against\textsuperscript{106} and which therefore rendered the insurer liable.\textsuperscript{107}

Secondly, the presumption was a rebuttable one, and the insurer could prove that the ship and goods were in fact not lost or at least that news had been received of their whereabouts and condition.\textsuperscript{108}

Thirdly, however, after the presumption of loss had legally arisen and was not rebutted and after the insured had given notice of the absence of news and had abandoned and claimed on the policy, the fact that the ship or goods again appeared and were therefore not lost, had no effect on the insured's position. He did not have to return the payment, or provide security for such return, to the insurer who was, in turn, entitled to retain the property abandoned to him.\textsuperscript{109}

\textsuperscript{104} It was further provided that the insured was obliged to pay the insurer 'Interessen van de geconsigneerde penningen' at 4 per cent per annum, which interest had to run from the day of the payment into court ('met den dag der Consignatie') until such time as the money paid in was returned to insurer or when he could have claimed such return ('de geconsigneerde penningen door de assuradeurs zyn, of hadden kunnen zijn gelijkt'). And should the ship or goods happen to have arrived at the destination after the expiry of one year and a day, or two years, as the case may have been, or should after that time certain news be received that the ship was lying in one or another port, the interest on the amount paid in would cease (ie, the running of interest was stopped) on the expiry of the one year and a day or the two years.

\textsuperscript{105} As to these amendments to s 29, see Van der Keessel \textit{Praelectiones} 1461 (ad III.24.10).

\textsuperscript{106} Possibly if not usually eg a foundering at sea.

\textsuperscript{107} In effect although not in truth, therefore, 'tijdingloosheid' was seen as one of perils insured against. See further Dorhout Mees \textit{Schadeverzekeringsrecht} 327-328; Mullens 69-71.

\textsuperscript{108} See Dorhout Mees \textit{Schadeverzekeringsrecht} 327-328 who makes the point that the presumption of loss could be rebutted also by a presumption of knowledge of the loss, ie, if the ship was insured so long after the presumption of loss had arisen that the insured could be presumed to have been aware of the (presumed) loss. See again ch XII § 2 supra on insurance after loss.

\textsuperscript{109} This appears not to have been the position initially when the application and consequences of the doctrine of abandonment were not yet settled. Thus, Straccha \textit{De assecurationibus} XXX 30 referred to the Ancona policy of 1567 which provided for the presumption of loss (see n86 supra) but added that if the ship afterwards arrived safely, the insured had to make a restitution of the money he had received from the insurer ('Et si postmodum salva adventerit ..., [the insured] debet restitutere nummos istos, quos ab Assecuratore acceperit'). This appears to have been the solution favoured in Italy and Spain, and also in the oldest Antwerp policies. See eg Mullens 70-71; and also De Roover 'Early Examples' 189n55.

However, it was soon realised in the Low Countries that an abandonment was also required in the case of a presumed total loss. Already in 1459 the Bruges Schepenen Court accepted the principle that in the absence of news, the indemnity was not due as long as the insured did not renounce his title to the insured goods in favour of the insurer. See Gilliots-van Severen \textit{Cartulaire} vol II at 90-91 (Marco Gentile v Pol & Francesco Justiniani), and vol II at 92-94 (Marco Gentile v Michel Arnolfini, Charles
6.3 The Position in the *Wetboek van Koophandel* and in English Law

These ancient principles were taken over and in some respects expanded upon in the *Wetboek van Koophandel*. In art 667-1 it is provided that the insured may make an abandonment to the insurer and thereafter claim payment on his policy without any proof of the loss ("vergaan") of the ship being required, if, calculating from the day of departure ("uitzeilen"), or (and this was new) from the day on which the last news of the ship was received ("tot welken zich de laatst ontvangene berichten uitstrekken"), there was absolutely no news of the arrival of the ship ("in het geheel geene tijding van het-zelve is aangekomen") for six, twelve or eighteen months, depending on the distance of the voyage involved. In these cases it is sufficient for the insured to declare under oath that he has not received directly or indirectly any news of the insured ship or of the ship in which the insured goods were loaded, proof to contrary (by the insurer) nevertheless remaining permissible ("onverminderd het bewijs van het tegendeel"). Article 674 makes specific provision for the presumption of loss in the case of time policies.

The presumption of loss was also not unknown in English law. Thus, in the sixteenth century the Admiralty Court held that the absence of news of a ship for a year was presumptive evidence of her loss, and in the seventeenth century claims for

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110 Six months in the case of voyages from the Netherlands to any ports in Europe and to the coasts of Europe, or those in or of Asia or Africa, the Mediterranean and the Black Sea, and also in the case of return voyages from there; twelve months in the case of voyages from the Netherlands to Madeira, the West Indies, the Azores or the Canary Islands or other islands and coasts situated to the west of Africa and to the east of America, and also in the case of return voyages from there; and eighteen months in respect of voyages from the Netherlands to other parts of the world, or return voyages from there. Article 667-2 provides for voyages from and to ports situated outside the Netherlands, in which case the relevant period is calculated according to the closest resemblance of the distance between the ports in question and that provided for in art 667-1 ("naar gelang van den afstand dier havens, welke met de hiervoren bepaalde het naaste overeenkomt").

111 Article 667-3.

112 In terms of art 674-1, in those cases and after the expiry of the periods mentioned in art 667, the loss of a ship is presumed to have occurred within the period of the insurance; in terms of art 674-2, if nevertheless it is eventually proved that the damage occurred outside the time of the insurance, any abandonment made is void and the amount paid out has to be returned with interest.

113 The case was *De Salizar v Blackman* (1555). See Holdsworth *History* vol VIII at 291. In a case decided in 1562 (see Marsden *vol II* at bxvii), the period was stated as a year and a day.
ships not returned from their voyages were paid with a warranty (that is, on condition) that should the vessel eventually arrive safely, the insured would refund the payment to the insurers.\footnote{114}{See Drew 40, referring to the claims records of the London Assurance Corporation.} By the eighteenth century, a ship not heard of again after her departure was presumed to have foundered at sea\footnote{115}{See Green v Brown (1743) 2 Strange 1199, 93 ER 1126 where the presumption was that a missing ship insured in 1739 on a voyage from North Caroline to London against perils of the sea and with a warranty against (i.e., the exclusion of) captures and seizures, had been lost by sinking at sea without the insured having to prove the precise cause of the loss, or, for that matter, that she was not lost by an excepted peril.} and it appears that in practice specific periods after which the presumption of loss arose were then still customary even if not expressly provided for as on the Continent.\footnote{116}{See Weskett Digest 344 sv 'loss' par 4 who remarked that in England there was no express regulation or time limit for demanding payment in the absence of news arriving of the insured ship. But it was customary for insurers to deem her lost if she was not heard of for six months after her departure (or after the last news of her) for any port in Europe, and for twelve months if she departed for a more distant port. Likewise, a person whose life was insured, was presumed dead if not heard of in six years.}

By the time of the Marine Insurance Act of 1906, though, this was replaced by a reasonable period. Section 58 provides that where a ship concerned in an adventure is missing and after the lapse of a reasonable time\footnote{117}{In terms of s 88, what is a reasonable time is a question of fact.} no news of her has been received, an actual total loss may be presumed.

As far as the differences between English and Dutch law are concerned, apart from the application of a reasonable as opposed to specified periods of time in this regard, the presumed total loss in English law is an actual or absolute (as opposed to a constructive) total loss not requiring any notice of abandonment from the insured.\footnote{118}{See Buys 95; Chalmers 86; Helberg 41-48; Vaucher 94-95; and further on this point ch XIX § 2.5 infra.}

7 The Description of the Risk with Reference to Loss

7.1 Introduction

In the same way as insurers described and circumscribed the risk taken over with reference to the object of risk, the perils against which cover was provided, and the duration of that cover, so too they limited the risk in their policies with reference to the type or extent of the loss for which they were prepared to compensate.

For present purposes only two types of such policies, which appear to have been well-known and widely used in Roman-Dutch insurance practice, will be considered in some detail. On the one hand there were policies which covered a specific type of loss only, such as those in terms of which the insurer was liable only for a total loss and not at all for a partial loss; the insurer was, as it were, 'free from average' ('vrij van avarii'). On the other hand there were those policies which covered a specific amount of loss only, such as those which contained a so-called franchise clause by
which the insurer’s liability for losses below a certain percentage was excluded; in this case the insurer was, as it were, ‘free from average below a stated percentage’. Both types of policy did not protect the insured in full against all losses and both, in one way or another, were limitations on the scope of the insurer’s liability. 119

7.2 Total-Loss-Only Policies and Insurance Cover ‘free from average’

One of the differences between the maritime loan and the insurance contract in its modern guise was that in terms of the maritime loan only the risk of a total loss was transferred to the lender. The borrower had to repay the loan in the event of a total loss, and was therefore not protected against anything less than a total loss. 120 The same was true of the bottomry loan in terms of which the lender too bore the risk only of a total loss or at least of a partial loss reducing the value of the secured object to below the amount of the loan. Put differently, bottomry bore no average. 121

Both maritime and bottomry loans did not by their nature involve a complete transfer to the lender of the whole risk to which the borrower was exposed through the secured object. By contrast, from its nature and unless otherwise agreed, insurance effected a complete transfer of the whole risk to the insurer, rendering the latter liable not only for a complete destruction of the object at risk but also for a lesser loss, such as mere damage to and a depreciation in the value of that object. It was possible, though, for the parties to the insurance contract to agree that the insurer would be liable only for a total loss. And although the insurance contract was then even closer to the maritime or bottomry loan, it did not, in the process, cease to be an insurance contract, 122 or become a maritime or bottomry loan. 123

Apart from the fact that in the initial stages of its evolution and by analogy to antecedent transactions such as the maritime loan, the insurance contract may as a

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119 Obviously numerous variations on and permutations or combinations of these two principal types were possible and may in fact have been employed from time to time. However, apart from the fact that insufficient evidence appears from published sources on the form such other types may have taken in Dutch insurance practice prior to the end of the eighteenth century, the principles applicable to them would in the main have been deductions from those governing the two types to be investigated.

120 See again ch I § 4.2.3.2 supra.

121 Thus, Van der Keessel Praelectiones 1428 (ad III.24.1) defined the aim of insurance as being to compensate damage (‘damnum’), and explained that this meant not only the destruction of the whole object but also any deterioration by which the value of the object was diminished. In this respect, he pointed out, insurance differed from bottomry where the rule applied that bottomry bears no average. See again ch I § 4.3.3 supra.

122 Just as it did not cease to be an insurance contract if the insurer limited the extent of the risk he took over in any one of numerous other ways, eg with reference to perils, the nature or location of the objects of risk, or the duration of the risk.

123 The difference in the scope of risk transference was but one of several differences between insurance and such loans.
rule have been concluded in the form of total-loss-only policies, and that that may then have sufficed, there were even in later times sound reasons why the parties would expressly have wanted to conclude an insurance contract in that form. The most obvious reason was that total-loss-only policies were cheaper than those covering all types of loss. The insured who wanted so save on insurance premiums, whether or not as part of a planned even if still unsophisticated self-insurance program, was therefore satisfied to be protected against catastrophic losses only and to bear lesser partial losses himself.

Total-loss-only insurance was not unknown in Roman-Dutch insurance practice. It was concluded by adding a clause to the standard form of policy stipulating the insurer to be ‘free from average’ (‘vrij van avarij’). Insurance on such terms in essence meant that the insurer incurred no liability for losses other than total losses; he was free from any liability for partial losses of whatever nature or in whatever way caused. Variations on and different combinations of this occurred, most notably in the exclusion of liability only for particular types of partial loss and not for all partial losses. Furthermore, clauses excluding liability for all or certain types of partial loss appeared and continued to appear in insurance policies despite the more common exclusion of liability for a partial loss below or not exceeding a stated percentage. These franchise clauses were not only contractually but also statutorily regulated and as a result attracted considerable attention in the sources. However, they were, in the final instance, but a further variation in the way in which the liability of an insurer could be restricted.

The clause ‘free from average’ was known in early Italian and Spanish insurance practice and was used by insurers to delimit the scope of the widely drawn and extensive all-risks cover they provided in terms of the then customary marine policy. Unfortunately references to this type of policy are scarce in the Roman-Dutch sources. It may well have been that provisions in early legislation circumscribed, even if

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124 Thus, Walford Digest vol II at 108 sv ‘contract of insurance’ noted that originally the insurance contract, in the form of a maritime loan, protected the insured only in the event of a total loss. However, it may then not yet have been an insurance contract proper.

125 According to Dorhout Mees Schadeverzekeringsrecht 12, this crude arrangement was for the time probably satisfactory because small, primitive ships suffered total rather than partial losses. Also, those who had earlier lent money and/or taken over risks by way of maritime loans, were probably used to incurring liability only for total losses, not also for partial losses, and they probably preferred to narrow down the risk taken over under the newly emerged insurance contract.

126 See John ‘London Assurance’ 139 who observes that in the eighteenth century an insurance ‘free of average’ was in some cases 20 per cent cheaper than the usual policy.

127 As to self-insurance, see again ch IX § 2.2 supra.

128 See generally Mees Behouden 26-35.

129 Franchises will be treated in detail in § 7.3 infra.

130 See eg Guddat 7-11 as to the relevant Spanish laws and practices.
for other purposes mainly connected with the prevention of fraud, the risk transferred to insurers to such an extent\(^\text{131}\) that insurers themselves were not overly inclined to employ 'free from average' clauses in an attempt to reduce the risk even further.\(^\text{132}\)

However, that it had come into use by the beginning of the seventeenth century appears from what must be one of the earliest references to this practice in the Netherlands. The Antwerp Complilatae of 1609\(^\text{133}\) laid down that if it was agreed with the insurers that they would be free from average ('datter geene avarie soude val/en'), they were not liable for any damage which occurred to the insured goods, unless the goods were robbed by pirates or otherwise totally lost ('int geheel verloren waeren'), in which case the insurers would have to compensate the whole loss ('t'geheel verlies bi} "perte jurée" souden moeten goed doen"), but no more.\(^\text{134}\)

Further information on the practice of excluding the insurer's liability for all partial loss is lacking in the Dutch legal sources for almost two centuries. A variation on the clause 'free from average' only again appeared in two Amsterdam opinions in 1792.\(^\text{135}\) The opinions concerned the insurance of a package of jute\(^\text{136}\) against all risk ('voor alle gevaar') and with the addition of a clause that the insurer would be 'free from damage on safe arrival' ('vry van beschad/gdheid by behouden arrivement').\(^\text{137}\) In essence the opinions, which concerned the possible breach by a mandatary of his duty to take out insurance, were based on the view that the insertion of such a clause was customary on the Amsterdam market and that goods of this type were not insured on any other terms there. They further proceeded from the view that this clause meant that an

\(^{131}\) Notably by rendering under-insurance compulsory, by excluding liability for unspecified perishables, and by the inclusion of franchise clauses.

\(^{132}\) See especially Guddat 11-16 who notes with reference to the early Dutch legislation that the clause was not yet recognised in the placcaat of 1563 and that, even if it was employed in practice, it was apparently not permitted by the placcaat of 1571, the model policy form of which contained a franchise clause (see § 7.3.2 infra) but did not permit any deviation from it and therefore, presumably, no greater delimitation of the insurer’s risk than was allowed by that policy form.

\(^{133}\) In art 210 of par 6, title 11, part IV (see De Longé vol IV at 286-288).

\(^{134}\) See Mullens 86.

\(^{135}\) Casus positien vol II cas 32.

\(^{136}\) A rough fibre made from bark and from which ropes and sacks were manufactured.

\(^{137}\) In this case the cargo was insured at a premium of 6 per cent. The ship carrying the insured cargo was damaged en route from Petersburg to Marseilles and on discharge at the latter port, 11 of the 26 packages insured were found to be damaged. After inspection, the cargo was forwarded to Livorno with another ship and on arrival there further damage was discovered. The other 15 packages, which were forwarded with yet another ship, arrived undamaged. Being a partial loss, the insurers relied on the clause to deny liability for the damage.
The first opinion, delivered by Amsterdam lawyers (doctors and advocates),\textsuperscript{139} after noting the declarations by various insurers, brokers and others concerned with insurance in the city, thought that the presence of the clause in question was usual in policies on perishable goods.\textsuperscript{140} Furthermore, they thought that insurance of goods such as those in question was not possible on other terms in Amsterdam. A subsequent opinion of Amsterdam insurers and brokers confirmed the custom on the Amsterdam Bourse that no insurance on such goods were concluded otherwise than on the terms ‘vry van beschadigheid by behouden arrivement’. This opinion also expressed the view that those terms meant that the insurers were not liable to pay for any damage to the goods should such goods arrive at their destination (‘dat de Assuradeurs ongehouden zyn, eenige beschadigdheid aan Goederen te betaalen, by alden deelte ter plaatze hunner distinatie aankomen’).

The aim of the clause was therefore to circumscribe the risk taken over by insurers and to reduce their potential liability in respect of perishable goods. It relieved them of liability for any partial loss to such goods should they arrive at their destination, a type of loss which, presumably, non-perishables would not have suffered. Thus, in terms of the clause, insurers were liable only for a total loss of the insured goods, or if such goods did not arrive at their destination at all.

Although not readily apparent from the opinions themselves, it appears that there was then, or that there may subsequently in the nineteenth century have developed, a difference between insurances ‘free from average’ (‘avarij’) and insurances ‘free from damage’ (‘beschadigheid’) and therefore in the terms ‘avanf’ or ‘schade’ and ‘beschadigheid’. The latter term\textsuperscript{141} referred specifically to a reduction in the value of the insured goods, or to material damage by reason of a deterioration in their quality which did not amount to a total destruction of the property or any part of it.

\textsuperscript{138} The opinion held that in the light of these facts a mandatary was not liable for a breach of his duty to insure goods where he had insured the goods on those terms and had notified his mandator accordingly, and where, the insured good arriving in a damaged state, the insurer could not be held liable for the loss. See again ch X § 2.4.1 supra where this aspect was considered in more detail.

\textsuperscript{139} Their opinion was supported by another opinion, delivered by merchants, as being ‘geheel overeenkomstig, met de Wetten en Usantien in cas van Assuratie, alhier ter Stede gerecepleerd en by ons bekend’.

\textsuperscript{140} They noted that ‘volgens een constant gebruik, alhier ter Stede vigeerende, de Assurantien op goederen, die aan inwendig bederf onderhevig zyn, onder welke jugten, van Petersburg na Italien komende, mede worden gehouden te ressorteerende, nimmer anders dan onder deeze conditie worden gedaan, en de Assuradeurs alhier voestrekt weigerig zyn, om het pericul van inwendig bederf der goederen op zich te neemen, als waar door aanleiding tot manigvuldige bedriegeren en differenten wordt gegeeven, geyk algemeen bekend is’.

\textsuperscript{141} Which was already used in connection with franchises in s 34 of the Amsterdam keur of 1744. See further § 7.3.2 infra.
rather than to a reduction in the amount or number of the insured goods. The term, and therefore also this type of insurance, was used particularly in insurances of perishables and 'vrij van beschadigdheid' meant 'vrij van alle schade die door bederft of beschadiging aan de goederen geleden worden'. The reason for a separate and more restrictive concept of 'beschadigheid' in Dutch law was to achieve the same result with the clause 'free from average' as in English law where the clause had received such a restrictive interpretation. In the final analysis, though, this was but a type of 'free from average' clause, namely free from a particular type of average or partial loss, and therefore not a total-loss-only policy in the true sense of the word, especially not if the clause was coupled with a stipulation concerning the safe arrival ("behoudene aankomst") of the insured property, as was the case with the clause in the opinions of 1792.

But while insurance 'vrij van beschadigdheid' may, if the Roman-Dutch sources are anything to go by, have been relatively new at the end of eighteenth century, it

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142 Thus, 'beschadigdheid' referred to the partial loss of the whole rather than to a total loss of any part of the insured consignment, ie, to eg a 50 per cent depreciation in the value of the consignment as a result of heat or seawater, as opposed to the loss of 50 of the 100 boxes making up consignment as a result of theft.

143 See generally Dorhout Mees Schadeverzekeringsrecht 602 who, with reference to the opinions of 1792, makes the point that it appears that 'beschadigdheid' in this context did not refer to ordinary damage or a partial loss (by contrast to a total loss) but to a particular type of partial loss which occurred frequently in the case of perishables; and Mees Behouden 20-26. Buys 93 explains that 'schade omvat zoowel verlies in hoedanigheid als in hoeveelheid; beschadigdheid heeft alleen te maken met verlies in hoedanigheid'.

144 In English law it was customary to name easily perishable goods in a list or Memorandum in the policy, and such articles were then insured 'free from average'. In English law 'average' in this regard included both types of partial loss (ie, partial loss of the whole or total loss of a part of the insured consignment) but because the intention was to exclude liability only for a partial loss in the sense of a partial loss of the whole or what the Dutch termed 'beschadigdheid', the average clause was given a narrow interpretation in English insurance practice. The English insurer on terms 'free from average' was, as a result, not liable for a partial loss but was liable for a total loss of a separable if not separately insured part. In order to achieve the same result in Dutch insurance practice, a new term had to be introduced and a new clause devised which would limit the insurer's liability to this specific extent only. As to the English practice, see § 7.3.4 infra.

145 Insurance against the non-arrival of property at a specified destination ('bij behoudene aankomst') (as to which see generally Mees De assecratione 44-49) was not in widespread use in the Netherlands prior to the nineteenth century. The non-arrival of insured property did not at the same time also amount to the total loss of such property. It was possible, therefore, in the case of an insurance against total loss only ('free from average'), or in the case of variations on such insurance (eg 'vrij van beschadigdheid'), that property did not arrive but that the insurer was not liable because such non-arrival was not because of a total loss. For the insured, though, there was little practical difference between the two and for this reason he may have wished to insure against the non-arrival at the destination of insured property by reason of the perils of the sea.

Such an insurance provided the insured with different coverage than total-loss-only insurance in any of its forms. Insurance 'on safe arrival' covered all cases of non-arrival, whether or not there was a total loss or merely a partial loss. Put differently, it included all cases of non-arrival, as long, of course, as such non-arrival was caused by a peril of the sea. But if the insured property arrived, the insurer was not liable, however great the damage.
appears that this form of insurance was not only known in Dutch insurance practice at the beginning of the nineteenth century but that it was in common use. The Wetboek van Koophandel treats total-loss-only insurance or insurance 'free from average', and more specifically the type referred to as 'vrij van beschadigheid'.

In terms of art 646-1, if insurance is concluded with the clause 'vrij van beschadigheid', irrespective of whether or not there is added 'bij behoudene aankomst', the insurer is not liable for any damage ('schade') when the insured object arrives at the place of destination in a spoilt or damaged condition ('bedorven of beschadigd'). However, in terms of art 646-3, general average, in addition to damage by jettison, capture, robbery or such like, or caused by the destruction of the carrying or insured ship, must be paid by the insurer in terms of such a clause.

It seems that at the beginning of the nineteenth century a similar but more usual clause, and one providing the insured with a slightly more extensive cover, was the one which relieved the insurer of liability for 'beschadigheid', except where the insured goods were by reason of a shipwreck damaged in excess of 50 per cent. Therefore, a causal link came to be required with a particular cause of loss, something not encountered in the earlier Roman-Dutch sources. Apparently the clause was of English origin and came to be taken over in Continental insurance practice from the last decades of the eighteenth century. It is possible that this may also have occurred in Amsterdam and elsewhere in the Netherlands. At least such borrowing from English insurance practice may explain the 'sudden' appearance of the clause which featured in the opinion in 1792 and may have resulted in the introduction of the concept of 'beschadiging' as a deduction from 'average' in insurance practice on the Continent. Ironically, though, that clause was not always similarly interpreted in England, as will appear shortly.

146 In terms of art 646-2, the same applies if insured goods are sold en route or at a port of refuge ('noodhaven') by reason of damage or from fear that goods would perish or contaminate others.

147 According to Mees De assecuratione 23-24 the usage at the time was to add a clause to the policy reading 'vrij van beschadigheid onder 50 pc'). See too Asser et al WvK 239-240 (referring to the clause 'vri van beschadigheid, ten ware de goederen door schipbreuk meer dan 50 pc schade of beschadigd hadden'); Enschedé 163; Vaucher 10-13 (who provides a list of the exemptions from average in terms of Amsterdam policies in the 1830's; the extremely long list includes eg insurance 'free from average simpliciter' (ie, free from all damage on safe arrival and under 50 per cent on stranding or shipwreck), as well as insurance 'free from average' under a specified percentage).

148 That, at least, was the position in Hamburg (see Frantz Hamburgische Admiralitätsgericht 201-202; Guddat 26-29). There, in the 1790's, the English clause 'free from average except when stranded' ('frei von Beschädigung, ausgenommen in Strandungsfall und Haverie grosse') was taken over in the local insurance practice which, until then, had been identical with the Dutch practice. In 1799, in Dunker v Rodde, insurers were held liable by a Hamburg court for damage caused to insured goods even though such damage was only partial, the reason being that it had been caused when the carrying ship ran aground in a storm and was damaged so that the insured cargo had to be transshipped in lighters.

149 See Guddat 30r93.
7.3 Franchises and Insurance 'free from average below x per cent'

7.3.1 Introduction

Closely related to but in fact more common in practice than total-loss-only insurances, were insurance contracts which did not exclude the insurer's liability for all or for some types of partial loss, but which merely limited such liability. They covered only losses in excess of a certain percentage of the value of the insured property. In terms of such policies, insurers were, either by way of an express stipulation or by reason of a statutory enactment or a custom to that effect, stated to be 'free from average' below a specified percentage. This percentage was known as a 'franchise' or 'vrijstelling' and it occurred and was applied in particular in connection with cargo policies.

In terms of this practice an insurer incurred liability in respect of insured goods only if the damage to such goods exceeded a specified percentage of the value of the goods; if the damage was below that percentage, the insurer was not liable at all; but if it exceeded that percentage, the insurer was liable in full and not only for so much of the damage as exceeded that percentage. The percentage was therefore not deducted from the insured's claim, if any, and there was therefore no deduction or abatement, as cargo policies often expressly provided.

The main and most obvious aim of and the reason for the inclusion of franchise clauses in insurance policies, were to protect insurers from the nuisance and expense of frivolous claims being brought on policies for small, trifling losses. Such losses were not only likely to occur frequently in one form or another and in a large number of instances, but would often be preventable if the insured or his agents merely exercised some care. In this respect the aim of a franchise was much the same as that

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150 As to franchises in Dutch insurance law until 1800, see generally Dorhout Mees Schadeverzekeringsrecht 598-601; Mees Franchise 75-86.

151 Thus, if goods worth f1 000 were insured 'free from average below 3 per cent', the following possibilities arose. If the damage amounted to eg f20, the insurer incurred no liability at all. If the damage amounted to f100, the insurer was liable in full and not merely for f70. The precise amount below or above which the insurer was not or was liable, depended upon the wording of the applicable clause or legislative provision. Sometimes it was provided that the insurer would incur no liability for a loss 'below' x per cent, while in other cases the insurer was relieved of liability for a loss 'not exceeding' x per cent. In the one case a loss of exactly x per cent was covered while in the other case it was not.

152 A distinction must therefore be drawn between franchises and what may be (and were later) referred to as 'deductibles' (as to which see § 7.4 infra). The distinction is between the case where the insurer was not liable in the event of the loss not exceeding x per cent (but if the loss exceeded x per cent, the insurer was liable in full for the loss and not only for so much of it as exceeded x per cent), and the case where the insurer was not liable for a loss not exceeding x per cent (and if the loss exceeded x per cent, the insurer was liable only for such excess). The latter case was a form of compelled under-insurance, the former not. See also eg Dorhout Mees Schadeverzekeringsrecht 605.

153 See further § 7.4 infra for a further explanation of what was meant by 'abatement'.

154 See eg Hammacher 116-117.
with compulsory under-insurance. Furthermore, such losses frequently gave rise to disputes as to whether they were caused by an insured peril, such as a peril of the sea, or by an excluded peril, such as, in particular, an inherent vice or the ordinary and expected effects of their conveyance. Because of the size of the loss, a dispute would involve proportionally excessive expense to ascertain the precise cause of the damage and therefore had to be avoided.

But franchise clauses also came to serve another important function. Although cargo of all types were in principle insurable, some types of cargo could only be insured in a particular way, namely by declaring such cargo to be of a particular type. This applied in particular to goods of a risky nature, especially perishables and valuables. Such goods had to be insured as such and not under the general denomination of ‘merchandise’ or ‘goods’ so as to alert the insurer to their nature and the increased risk, and to enable him to fix the premium accordingly.

At first a failure to specify the nature of such goods in the policy, but insuring them under a general denomination, absolved the insurer of all liability for any loss of or damage to them. In the course of time, though, the practice arose of not disclosing the perishable nature of insured cargo because of the disadvantages for insured cargo owners inherent in such a disclosure. Insurers were prepared to insure goods, and to be liable for the loss of or damage to such goods, even if they were ignorant of the nature of the goods and irrespective of their perishable nature or otherwise. They were

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155 Franchise and compulsory under-insurance (which will be dealt with in detail in ch XVIII § 5.2 infra) were treated together and on a par by eg Van der Keessel Theses selectae th 720 (ad III.24.4) and Praelectiones 1440-1441 (ad III.24.4)). Both notions were founded upon the same underlying principle, namely to ensure the exercise of care by the insured, and both had the same effect, namely that the full amount of the insured’s loss was not recoverable in all cases. The basic difference between them, however, was that the one was a limitation on the amount which could be insured, while the other was a limitation on what could be recovered. In the case of a franchise the insured did not himself bear the risk of a certain percentage of his losses, only the risk of those losses not exceeding that certain percentage, for if they did, the insurer was liable in full and without any deduction. See further Mees De assecuratione 28-29.

156 For this reason s 17 of the Rotterdam keur of 1604 treated inherent vice and franchise together.

157 See again ch V § 4.2 supra.

158 What follows was recounted in more detail in ch V § 4.3 supra.

159 Dorhout Mees Schadeverzekeringsrecht 598-599 distinguishes three types of damage which could affect fragile or easily perishable goods: damage exclusively caused by inherent vice or defect, for which an insurer was not liable, unless expressly covered; ordinary damage (eg caused by the total loss of the carrying ship) which would also affect ordinary goods, and for which an insurer was fully liable; and damage caused by accident but which would not have affected ordinary goods, such as breakage, perishing in the course of a long voyage, theft, and the like. This type of damage an insurer did not want to cover without prior knowledge of the nature of the goods to be insured.
so willing because of a further practice which could be employed to limit their liability\textsuperscript{160} in respect of goods which subsequently turned out to be of a perishable nature.\textsuperscript{161} This was the practice of franchise.

Perishable goods were treated differently in that a greater percentage (franchise) applied to them if their nature was not disclosed, than to goods generally. Thus, insurers were specifically and additionally protected against small losses which were particularly common in goods of a perishable nature and were for that reason prepared to insure such goods without their nature having to be disclosed to them in the policy itself.\textsuperscript{162}

\subsection*{7.3.2 Legislation and Practice}

Various legislative measures dealing with franchises may now be investigated. It is noticeable how the regulation became more detailed in the latter part of the eighteenth century when the technique came to be used also specifically in regard to unspecified or undisclosed perishable goods.

In terms of s 25 of the \textit{placcaat} of 1571\textsuperscript{163} it was for the first time provided that if the loss ("schade"), whether an average loss or otherwise ("soo wel vander voorsz avarye als andersins"), did not exceed one per cent,\textsuperscript{164} the insurer would not be liable for any loss ("schade") nor for any return of premium ("retour"). The assumption was that if the loss did exceed one per cent, the insurer would be liable for all loss, including that one per cent. This was a general franchise in respect of losses to all goods irrespective of their nature and, on the face of it, even losses to other objects of risk such as ships.\textsuperscript{165} The aim of this provision may well have been to add a further incen-

\textsuperscript{160} See Dorhout Mees \textit{Schadeverzekeringsrecht} 598-599, noting that insurers logically preferred to rely on an exclusion of liability for small losses rather than on an exclusion of all liability because of non-disclosure. From Magens \textit{Essay} vol I at 9, where he noted what had to be specified in the policy and what was included under the general term 'merchandise', it would seem that the list of things which had to be specified (mainly goods easily perishable) were shortened with the introduction of the franchise clause which exempted the insurer from liability for the more common smaller losses in respect of such goods.

\textsuperscript{161} In respect of at least one type of ship, namely that built of fir-wood, an analogous principle was applied. If the insurer was not told in the policy that the ship to be insured was constructed of that type of wood, he was only liable for half of the damage. As to the insurance of fir-wood ships, see again ch \textsection{} V § 3.2.1; ch VIII §§ 4.2.4 n229 and 4.2.6 n277; ch XIII § 2.2.2 n387 supra.

\textsuperscript{162} Thus, in summary, initially only certain goods were included under the general term 'merchandise', other goods had to be specified. Later only specific goods had to be specified, other goods being included under the general term 'merchandise'. But in respect of some goods, which earlier had but later no longer had to be specified, a larger franchise applied.

\textsuperscript{163} Section 26 of the provisional \textit{placcaat} of 1570 was in identical terms.

\textsuperscript{164} That is, if the loss was 1 per cent or smaller, presumably of the insurable or agreed value of the insured property.

\textsuperscript{165} See eg Scheltinga \textit{Dictata} \textsection{} III.24.15; Van der Keessel \textit{Praelectiones} 1472-1473 (\textsection{} III.24.15) (who incorrectly referred to 1 per cent of the amount promised by the insurer, i.e., of the sum insured, rather than of the value of the insured property); and also Goudsmit \textit{Zeerrecht} 265; and Kracht 27.
tive, alongside compulsory under-insurance, for the owners of ships to improve the standard of seaworthiness of their vessels.

Section 26 of the Amsterdam keur of 1598\(^\text{166}\) followed this provision exactly. If the loss, whether in the nature of average or otherwise, did not exceed one per cent, the insurer was not liable for any loss or return of premium.\(^\text{167}\)

The Rotterdam keur of 1604 moved one step forward by recognising in s 17 that it was possible for an insurer specifically to insure against losses below the specified percentage.\(^\text{168}\) It provided that if the loss, whether of average or otherwise, did not exceed one per cent, the insurers would not be liable at all, unless they specifically took over that risk in the insurance policy ("ten ware sy 't selve perijckel by de Police van asseurantie specialijcken tot hunnen laste genomen hadden").\(^\text{169}\)

The Antwerp Compilatae of 1609 showed that franchises were well-recognised in practice at the time. In terms of art 203,\(^\text{170}\) if loss or damage occurring to insured goods, whether of general average or otherwise, did not exceed one per cent, the insurers were not liable, whether or not the goods were perishable, but such loss remained for the account of the insured. In terms of art 204, a higher percentage of twelve per cent applied to figs and raisins.\(^\text{171}\)

Although the customary franchise at the beginning of the seventeenth century was one per cent,\(^\text{172}\) it appears that by the beginning of the eighteenth century it had

\(^{166}\) And also, in identical terms, s 18 of the Middelburg keur of 1600.

\(^{167}\) See Grotius \textit{Inleidinge} III.24.15; Groenewegen \textit{Aanteekeningen} n32 (ad III.24.15); Van der Keessel \textit{Theses selectae} th 760 (ad III.24.15); and Goudsmit \textit{Zeerecht} 325.

\(^{168}\) At least this would appear to be the reasonable interpretation of s 17. The section excluded insurers' liability not only for losses not exceeding 1 per cent but also for losses caused by inherent vice (see again ch VI § 3.3 supra). There would not appear to be any reason, though, for limiting the insurers' freedom expressly to accept such liability only for the one and not for the other matter.

\(^{169}\) See Groenewegen \textit{Aanteekeningen} n32 (ad III.24.15); Wassenaar \textit{Praktyk notariael} VIII.12; and Goudsmit \textit{Zeerecht} 401.

\(^{170}\) Of par 6, title 11, part IV (see De Longe vol IV at 284).

\(^{171}\) See further Mullens 86. As to the subsequent practice in Antwerp, see Couvreur \textit{Zeeverzekeringspractijk} 198 who notes that there too the percentage had increased to 3 per cent by the mid-eighteenth century while a differentiation between named perishables and other goods was also introduced.

\(^{172}\) One of the objections against the establishment of a company for the compulsory insurance of ships and goods in the Netherlands as proposed in 1628 (see again ch IX § 2.10.2.1 supra), was directed at the anticipated franchise in its policies: 10 per cent while the customary percentage was only 1 per cent. See Blok 'Plan' 18 and also Blok 'Adviezen' 28 (referring to the lower rate in terms of 'd'oude costuyme'), 50 ('haverijen beneden thien ten hondert'), 55 ('daer toch de costume is, dat alle de asseuradeurs haverie batalen, die boven een procento soude moghen zijn'), 68-69 and 89-90 (the explanation for the higher percentage offered by the proposers of the company was that if liable for smaller losses, the company would not be profitable at the proposed premium, but if it later appeared that the company was successful, it could be considered to reduce the franchise to below 10 per cent). In an amended proposal of 1633, the franchise percentage was reduced to 5 per cent. See Blok 'Plan' 31; see also Blok 'Adviezen' 106.
increased to three per cent. In s 44 of the Rotterdam keur of 1721, the Legislature had increased the franchise, no doubt in recognition of the then current practice involving the insertion of clauses stipulating a specific and higher franchise percentage than was provided for by the earlier legislation,173 a practice of which there is evidence also in Hamburg in the latter part of the seventeenth century.174 The practice was also given impetus in Rotterdam specifically by an agreement in 1719 among local insurers concerning higher franchise percentages.175 But although recognising the increase in practice, the Rotterdam Legislature returned to a simple statement of the principle involved by providing that insurers were not liable to compensate loss ('niet gehouden in de vergoedinge van de schade') which did not exceed 3 per cent.176

Only in s 34 of the Amsterdam keur of 1744 did the franchise provision come to be used specifically in connection with perishables.

This section provided that if it appeared that there was insured under the general description of 'goods and merchandise or wherein the interest of insured may exist, nothing excluded' ('Goederen en Koopmanschappen, ofte waarin het Interest van den geassureerde soude mogen bestaan, niets uytgesondert'), and that the risk was in fact run on wool, flax, hemp, hake, herring, grain, round or flat seed, sugar, peas, beans,

172 Thus, Van Zurck Codex Batavus sv 'Assurantie' par 15 mentioned a 1 per cent franchise but in par 15 n(k) stated that in the policy it was usually specified that the insurers would not be liable in the event of a loss 'die benede 3 per cent bedragende'. Van der Keessel Praelectiones 1472-1473 (ad III.24.15) referred to the occasional practice to append to an insurance contract a stipulation that the insurer could not be held liable for a loss below a certain percentage, the usual wording in the contract being 'vrij van avarij en schade onder 3 per cento'.

174 That a similar increase in the franchise to 3 per cent occurred in Hamburg is reflected in cl II of the Accord of Hamburg insurers of 29 December 1677. In terms of it the insurers undertook for a period of 2 years, under monetary penalty in the event of non-compliance, only to issue policies which stipulated that there would be no liability for average below 3 per cent ('Met Conditie vry van drie pro Cento Averie'). See Dreyer 54-56. There was a similar agreement in the Accord of 9 February 1693: insurers undertook not to conclude any policy which did not contain a clause 'Met Conditie, vry van 3 pro Cento Averie, als die niet hooger loopt, en van't ordinari Lofts-Geld, en soo daer See-Schaede aan Goederen bevonden wiert, sull nae't Stadt-Boeck vervaaren worden, en men dien volgens zich geene generale Havarien onderwerpen'. See Dreyer 60-61. This clause was the result of problems experienced with the interpretation of the franchise clause of 1677. Insurers were no longer free from liability when the total of the damage suffered plus the insurance premium, expense and the broker's commission did not exceed 3 per cent of the sum insured. In future only the amount of damage was relevant which appeared from the 'Stadt-Boeck'. See also Frentz Hamburgische Admiralitätsgericht 200-201.

175 By their Reglement of February 1719 (see again ch IX § 2.6 supra and Appendix 14 infra for a reproduction), Rotterdam insurers bound themselves in cl 2 to stipulate in their policies for a franchise below 3 per cent, and in respect of wool, hemp and flax, for the exclusion of liability for any loss not exceeding 10 per cent. See further Enschedé 157-158; Goudsmit Zeerecht 401 and 443-444; and Kracht 38.

176 See Van der Keessel Theses selectae th 720 (ad III.24.4) and th 760 (ad III.24.15); idem Praelectiones 1440-1441 (ad III.24.4) and 1472-1473 (ad III.24.15) (incorrectly noting that the insurer was relieved of liability if the loss was less than 3 per cent, rather than if it was 3 per cent or smaller, i.e., the insurer was also relieved of liability if the loss was exactly 3 per cent); Van der Linden Koopmans handboek IV.6.2; and Goudsmit Zeerecht 401.
cheese, books and paper,\textsuperscript{177} the insurers would be free from liability for losses below ten per cent ('zullen de Assuradeurs van de beschadigtheyt op deselve vry zijn onder de 10 per Cento').\textsuperscript{178} It was expressly prohibited to agree otherwise by way of a contrary clause in the policy, although it is uncertain why an alternative arrangement was not permissible. But, s 34 continued, if anyone insured himself in terms of a policy on any such goods or merchandise while expressly specifying their nature ('met expresie in deselve [policy], dat de Risico daar op sal gelopen worden'), the insurers were only relieved of liability for losses below three per cent ('maar v, y van de beschadigtheyd onder de 3 per Cento'). Therefore, if the insured had specified in the policy that the goods he was insuring were of one or more of the types specially provided for in this section, so that the insurer was made aware of the increased risk involved, the franchise was reduced from ten per cent to three per cent, the percentage which, so it would appear although s 34 did not make this absolutely clear,\textsuperscript{179} customarily applied to all other goods or to goods generally.\textsuperscript{180}

There was a problem with the list of perishables in s 34, though. It differed from the list of perishables mentioned in s 17 of the \textit{keur} of 1598 which had to be insured specifically,\textsuperscript{181} and the latter list, unlike that in s 34, further referred to and included all

\textsuperscript{177} 'Wolle, Vlas, Hennep, Stokvis, Haring, Graanan, rond of plat Zaad, Zuyker, Erwelen, Boonen, Kaas, Boeken en Papier'.

\textsuperscript{178} Note, the insurer was no longer free from liability if the loss did not exceed x per cent, but now if the loss was below x per cent.

\textsuperscript{179} That is, s 26 of the Amsterdam \textit{keur} of 1598 was not repeated in the \textit{keur} of 1744. There was no mention here of the application of franchise in all cases as was the case in 1598. Possibly that could expressly be stipulated for in the policy, although it appears that the custom of applying a franchise in all cases and even in the absence of a statutory provision or contractual stipulation to that effect, was maintained.

\textsuperscript{180} See further Van der Keessei \textit{Theses selectae} th 720 (ad ill.24.4); \textit{idem Praelectiones} 1440-1441 (ad ill.24.4) (if the listed goods were not specified, the insurers were not liable for a loss smaller than one-tenth of their value, but if such goods were specifically insured, the insurers were relieved of liability only so far as the loss was smaller than 3 per cent); \textit{idem Theses selectae} th 760 (ad ill.24.15) (although the \textit{keur} of 1744 was silent on the issue, it appears that the rate of 3 per cent would be the one adopted by usage and custom, even where it had not been expressly provided for by agreement (thus, such a franchise was applicable even in the absence of an agreement to that effect)); \textit{idem Praelectiones} 1472-1473 (ad ill.24.15) (the position in Amsterdam was uncertain because the \textit{keur} of 1744 did not repeat the general franchise provision of s 28 of the \textit{keur} of 1598, apparently intentionally so, for in the latest model policy formula the insurer undertakes to compensate all damage without any deduction ('en dat zonder korting'); however, it was a recognised custom that losses of less than 3 per cent did not have to be compensated by the insurer); Van der Linden \textit{Koopmans handboek} IV.6.2, IV.6.10 (the insurer has a legal defence against a claim by the insured if the loss for which compensation was claimed 'zoo gering is, dat daar van geene vergoedlng valt', eg if it did not amount to 3 per cent of the value); Goudsmit \textit{Zeerecht} 350-351.

\textsuperscript{181} Thus, in s 34, the following items were not mentioned; fruit, wine, oils, salt, quicksilver, hops, honey, syrup and butter; see again ch VIII § 4.2.3 \textit{supra} as to content of the policy. The list in s 17 was also the list of the goods which could, in terms of s 9 of the \textit{keur} of 1598, be abandoned immediately, s 9 merely referring to the list in s 17. See further ch XIX § 2.3.5 \textit{infra} as to the abandonment of perishables in terms of this \textit{keur}.
other similar goods which perish easily. However, it was argued by Van der Keessel\textsuperscript{182} that the items not specifically contained in the list in s 34, as well as a generalisation and extension to all perishables, had to be read into s 34.\textsuperscript{183}

Section 34 was amended by the Amsterdam amending \textit{keur} of 1756.

Firstly, it repeated, without any major alteration, the provisions of s 34.

Secondly, it added an explanation of what was to be understood by a loss below ten and three per cent respectively ("beschadigtheid onder de tien en drie percenten respectieelijk"). Such a loss included the actual damage which occurred to the insured goods ("eigentijjk gezegde schaade aan het verzekerde goed toegekomen"), in addition to the expenses incurred to save the goods and to prove the damage suffered ("benevens de nodige kosten tot reddinge van het zelve goed, en tot justificatie der geleedene schaade wordende vereischt"),\textsuperscript{184} but without the addition of any general average payable in respect of such goods ("zonder eenige avarye grosse daar by te voegen").\textsuperscript{185}

Thirdly, it extended the franchise provisions to general average losses themselves. While for purposes of the franchise provisions and in determining whether the insured's loss was above or below the applicable percentage, only actual damage to the goods was taken into account and not also the general average payable in respect of such goods, the insurers of the goods were separately liable to pay the general average contribution payable in respect of such goods.\textsuperscript{186} The amended s 34 now provided, however, that no general average would be for the account of the insurers unless such general average contribution, excluding the cost of its assessment, amounted to at least more than one per cent ("ten zy dezeelve zonder byvoeginge van eenige onkosten tot het instrueren, opmaaken en depercheeren van dezelve geemployeert of vereischt worden, ten minste boven de een percento komt te bedraagen"). If it did amount to more than one per cent, such cost would be added to

\textsuperscript{182} \textit{Praelectiones} 1442 (ad III.24.4).

\textsuperscript{183} Van der Keessel supplied two reasons. The first and most convincing was that the argument which applied to render goods listed in s 34 subject to an increased franchise, applied to perishables generally. The second reason was based on an interpretation of the \textit{keur} of 1744 and was rather involved. The provisions of s 9 of the \textit{keur} of 1598, so it was reasoned, had been taken over in s 27 of the \textit{keur} of 1744 although there reference was made merely to 'grove en bederffelijke Waaren en Koopmansschappen'; s 27 appears to have taken over the list in s 9, which had in turn taken over the list in s 17, so that although s 17 was not repeated in the \textit{keur} of 1744, its list by implication survived and was still relevant.

\textsuperscript{184} That is, the expenses incurred in averting and minimising the loss were included.

\textsuperscript{185} That is, the amount to be contributed in general average by the owner of the goods was excluded. Thus, s 34 as amended in 1756 prohibited adding general average to particular average when determining whether the insured’s loss was below or above the percentage below which the insurer was excused from liability for the loss. As to what had to be included in the loss for purposes of the franchise and what not, see e.g Decker \textit{Aantekeningen ad IV.9.4 n(3)/(c); Van der Keessel \textit{Praelectiones} 1440-1441 (ad III.24.4) (loss means the reduction in the value of the goods themselves, plus expenses incurred in respect of them, but not the general average payable in respect of them); Enschéde 158; and Goudsmit \textit{Zeerecht} 350-351.

\textsuperscript{186} See again ch I § 4.6.7 supra.
the amount for which the insurer was liable ('maar de avarye grosse op zich zelve, en zonder dusdanig bykomen meerder dan een percento importeerende, zullen als van de deugdelyke kosten daar by gevoegt worden'). Therefore, a franchise also applied to the liability of the insurer for a general average contribution payable in respect of the insured goods.\textsuperscript{187}

In the case of the insurance of exceptionally perishable goods, the parties, no doubt at the insistence of the insurer, often by agreement applied a higher franchise percentage to their contract. One example of this was in the case of insurances on slaves.\textsuperscript{188} In other cases, such as in the case of mutual insurance, a higher franchise may have been to the benefit of all the parties involved.\textsuperscript{189}

An increase in the customary or statutory franchise percentage may also have occurred in run-of-the-mill cases at the insistence of the insured where he merely sought to save on premiums: the higher the franchise percentage, the smaller the insurer's risk and the cheaper the insurance.

As far as non-marine policies were concerned, there is evidence that franchise clauses were also not infrequently included in fire insurance policies.\textsuperscript{190}

\subsection*{7.3.3 The Position in the Wetboek van Koophandel}

The Roman-Dutch ancestry of the franchise provisions in the Wetboek van Koophandel is readily apparent. However, some innovations did occur. It seems that the Dutch Legislature realised that on this topic the position was more often than not

\textsuperscript{187} As to the franchise on general average losses, see Van der Keessel \textit{Praelectiones} 1440-1441 (ad III.24.4) (the insurer must pay a general average loss as long as it exceeds but 1 per cent); Goudsmit \textit{Zeerecht} 351.

\textsuperscript{188} Thus, a Rotterdam transport insurance on slaves from the end of the eighteenth century (see Mees \textit{Gedenkschrift} appendix 23) contained the following detailed franchise clause: 'Wijders Geschied deze assurantie van vijftien pCt. voor ordinaire Sterfte met wedersijds goedvinden aldus bepaald, zullenden van de gevalle Schade op 15 pCt. en daar beneeden vry zijn dog ingevalle de schade boven vijftien pCt. komt te bedragen zullen wif dat meerderen van 15 pCt. afgerekendt prompt en zonder Eenige uitvlugten aan d' heeren Geassureerdens voldoen en betalen'. See also eg Unger 'Bijdragen II' 102 (policy on slaves at a premium of 3 per cent and with a franchise of 15 per cent ('vrij beneden 15 per cent')).

\textsuperscript{189} Thus, in a mutual Insurance contract for whalers concluded in the Zaan region in 1745 (see Den Dooren de Jong & Lootsma 'Walvischvangst' 47) the franchise was 25 per cent. Clause 6 specifically provided that in the event of the insured ship suffering any lesser damage than a total loss, 'dat het selve in geen aanmerkinge sal komen ten waere dat deselve schaede of Averij quam te importeeren en te bedragen 25 pr Cto ofte meerder vande somme waar voor sodanige geassureereder hadde geteeken'. Clause 4 provided that the expenses incurred to recover a captured ship would only be paid if it exceeded 25 per cent of the insured value of the ship concerned, and therefore applied a franchise also to such expenses.

\textsuperscript{190} See Van der Keessel \textit{Praelectiones} 1448 (ad III.24.6), referring to a stipulation in a fire policy that the insurer was not liable for damage of less than 3 per cent, 'vrij van avarij en schade onder 3 p Co'. The model fire policy in the Amsterdam \textit{keur} of 1744 did not include such a clause but there was generally freedom of contract as regards such policies and the inclusion of such a stipulation was not prohibited. A Rotterdam fire policy of 1799 (see Mees \textit{Gedenkschrift} appendix 19 and Appendix 51 \textit{infra} for a reproduction) stipulated 'Vry van schade onder driis per Cent'.
governed by usage and custom, that it was unwise to codify extensively, and that if it did make some provisions, it should permit the parties to stipulate to the contrary.  

Article 644-1 is concerned with the case of an insurance on goods under the general description of ‘goods or merchandise’, or under the description of ‘in whatever the interest of the insured may exist’, and where it then appears that the risk was run on objects greatly susceptible to perishing or depreciation (‘voorwerpen, welke ligtelijk aan bederf of vermindering onderhewig zijn’). In such a case the insurer is not liable for the damage to such objects otherwise than to such an extent (‘tot zoodanig beloop’) as insurers are liable therefor according to existing usage (‘volgens de bestaande gebruiken’) at the place where the insurance was concluded. In the event of a dispute as to such usage, the Court had to determine the matter after hearing experts. Thus, the general franchise percentage now has to be determined in every case with reference to local usage and is no longer legislatively fixed. Of course, the parties themselves still can and usually do fix the franchise in their contracts.

Article 645 deals with the situation where goods of the type mentioned in art 644 (that is, goods easily perishable) are in fact specified in the policy (‘in de polis met derzelver namen zijn uitgedrukt’), and where nothing specifically is agreed on the issue of franchise (‘zonder eenig bijzonder beding’). In that case the insurer is not liable for damage below three per cent (‘is de verzekeraar niet aansprakelijk voor de avarij onder de drie ten hondert’). Thus, a specific franchise for perishables is determined at three per cent, unless otherwise agreed.

Article 719 sets out how it is to be calculated whether or not the relevant franchise percentage is exceeded. It provides that, subject to the provisions of arts 644, 645 and 646, the insurer is not liable to bear any general or particular average if this, excluding the cost of determining it (‘behalve de kosten van bezigtiging, begrooting en opmaking’), does not exceed one per cent of the value of the damaged object (‘geen een ten honderd van de waarde van het beschadigde voorwerp beloopt’), subject to the possibility that the parties may come to a different arrangement.

7.3.4 Insurance ‘free from particular average’ in English Law

Since the middle of the eighteenth century it had been customary for insurers in England, as for their Continental counterparts at an even earlier stage, to exclude liability for certain types of loss, or for certain types of loss below a specified percentage of the value of the property insured. This they did by stipulating their insurance to be ‘free from average (generally)’ or free from average below x per cent. The aim with the exclusion of certain types of losses or losses below a certain percentage, was, as Weskett put it, ‘to free insurers from the vexation of being called upon for every trifling

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191 See generally Goudsmit Zeerecht 351; Mees Franchise 87-112.
192 In terms of art 644-2, if it appears that the goods in question are according to custom not insurable at that place otherwise than free from average (‘vrij van beschadiging, lekkadje of smelting’), the insurer is not liable at all for any damage.
damage that might happen to a part of the consignment' on almost every voyage. A further aim was to ensure that insurers did not, in the case of perishable or fragile goods, incur liability for wear and tear and inherent vice under the guise of fortuitous losses. A clause to that effect, referred to as the (Common) Memorandum, was first added to the printed form of marine insurance policy by London underwriters in 1749, although clauses to the same effect had been in use in England earlier. It was the only major, generally accepted and therefore permanent modification (as opposed to ad-hoc additions) to the printed policy in use at Lloyd's and elsewhere in London during the eighteenth century. The notion it contained, of course, had long been familiar to Continental insurance laws and practices. In the absence of any legislation on the topic in England, the limitation of the insurer's liability in this way was only possible by inserting an appropriate stipulation in the insurance contract by which insurers protected themselves, and that was what happened when the Memorandum introduced a franchise.

The Memorandum of 1749 sought to achieve three things: firstly, to free the insurer from all particular average in respect of some named goods which were by their nature particularly susceptible to salt-water damage; secondly, to absolve the insurer from liability for particular average under five per cent of the sum insured in respect of some other named commodities which were by their inherent nature particularly susceptible to deterioration and decay in transit; and thirdly, to exclude the insurer's liability for particular average under three per cent as regards all other types of cargo, the ship, or freight. All three exclusions or limitations were in turn excluded (that is, they were not applicable) in the event of a total loss, when the goods or the ship or freight insured were contributors in general average, or when the carrying ship was stranded.

In the Lloyd's policy as it was revised and confirmed in 1779, the Memorandum printed at the bottom of policy read as follows:

'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.'

193 Digest 384-386 sv 'particular average'.

194 Thus, Weskett Digest 29 sv 'average' and 260-261 par sv 'goods' referred to the legislative provisions on the topic in the Netherlands.

195 On the Memorandum, see generally Blackstock 49 (a reproduction of the Memorandum added in 1749); Dorhout Mees Schadeverzekeringsrecht 608; Drew 35; Guddat 20-25; Hopkins 143-146; ILL HR 3 71-74; John 'London Assurance' 139-140; Sutherland 52-53 and 54; and Wright & Fayle Lloyd's 143-147.

196 Therefore, firstly, corn, fish, salt, fruit, flour, and seed were insured against a total loss only, unless the loss was a general average loss or unless the carrying ship was stranded. Secondly, a franchise of five per cent applied to sugar, tobacco, hemp, flax, hides, and skins, unless the loss was a general average loss or unless the ship was stranded. And thirdly, a franchise of three per cent applied to all other goods, and also the ship and freight, again unless the loss was a general average loss or unless the ship was stranded.
The Memorandum, therefore, contained two types of restriction or free from particular average provision, the one freeing the insurer from liability for all particular average losses, and the other freeing him of liability for particular average losses below a specified percentage or franchise.

Subsequent additions to and amendments of the Memorandum in the Lloyd's policy in individual cases occurred until the end of the eighteenth century and beyond, for example in the policy forms used by the two monopoly companies, the Royal Exchange Assurance and the London Assurance Corporation. Also, different commodities were catalogued under the three different categories or were deleted from them, as insurance practices, the nature of the trade, and individual instances required.

Not surprisingly, the prolix wording of the Memorandum gave rise to frequent disputes and was the subject of numerous judicial interpretations. In one of the earliest decisions on the topic, that in Wilson & Another v Smith in 1764, Lord Mansfield, who had not been referred by counsel to any common-law decisions on the topic, held that the words 'free from average unless general or the ship be stranded' meant that the insurer was liable for all losses, total or partial, arising from the stranding of the ship and for all general average losses, but that 'all other partial losses are excluded by the express terms of the policy'. The warranty here was not a condition or undertaking by the insured but an exception to or limitation on the cover he provided. Although it may well have been the intention that only partial losses caused by a stranding were to be borne by the insurer, the Memorandum was on its wording interpreted differently in the unreported case of Cantillon v The London Assurance Company in 1754, namely that in the case of a stranding, the insurer was liable for a particular average loss.

197 Almost, therefore, a total-loss-only policy, except for the fact that the insurer remained liable for all general average losses.

198 If the loss reached the specified percentage, the insured's loss was compensated in full and the percentage was not deducted from the claim. See again the example provided in § 7.3.1 n 151 supra.

199 Thus, the words 'sunk or burnt' were often added after 'stranded'; the stranding exception was omitted; or the exception was allowed 'unless otherwise specially agreed'.

200 (1764) 3 Burr 1550, 97 ER 975.

201 At 1555-1556, 978. The words 'free from average unless general', his Lordship noted, could plainly not mean that the insurers were liable for all particular average. Therefore, it did not mean that the insurer was not liable for any partial loss unless such was caused by stranding of the ship or was a general average loss; the word 'unless' meant the same as 'except', ie, the word 'warranted' referred to an exception and not to a condition. By necessary implication the insurer was liable for all total losses, irrespective of how they were caused.

202 See again ch XII § 2.4.2 supra for the meaning of the term 'warranty'.

203 The case was cited in Wilson & Another v Smith (1764) 3 Burr 1550, 97 ER 975 at 1553, 976-977. Apparently the two monopoly companies immediately struck the words 'or the ship be stranded' from their policies.
This approach was later confirmed in *Burnett v Kensington* \(^{204}\) where it was held that if the ship was actually stranded in the course of the voyage, the insurers were liable for a particular average loss arising from an insured peril, even if no part of the loss was caused by the stranding itself. \(^{205}\)

Subsequent decisions in the eighteenth and nineteenth centuries interpreting the Memorandum or variations of it came to be reflected in the Marine Insurance Act of 1906. Rule 13 of the *Rules for Construction of Policy* appended to the Act, provides that the phrase 'average unless general' means a partial loss of the subject-matter insured other than an average loss, and that it does not include particular charges. \(^{206}\)

Rule 14 states that where the ship has stranded, the insurer is liable for the excepted losses, although the loss is not attributable to the stranding, provided that when the stranding takes place, the risk has attached and, if it is a policy on goods, provided that the damaged goods are on board. \(^{207}\)

There are also other clarifying provisions which were taken up in the Marine Insurance Act, specifically in s 76 which deals with particular average warranties or franchises. It contains a codification of specific usages, in respect of which the parties are generally free to come to some other arrangement. \(^{208}\)

Where the subject-matter insured is warranted free from particular average, the insured cannot recover for a loss of a part other than a loss incurred by a general average sacrifice, unless the insurance contract in question is, by agreement or custom, apportionable. But if it is apportionable, he may recover for a total loss of any apportionable part. \(^{209}\)

Where the subject-matter insured is warranted free from particular average, either wholly or under a certain percentage, the insurer is nevertheless

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\(^{204}\) (1797) 7 TR 210, 101 ER 937.

\(^{206}\) Thus, the stranding nullified and abolished the warranty and rendered the insurers liable for all loss or damage whether occurring before or after the stranding. The underlying reason for this interpretation was, of course, the difficulty, in the event of a stranding, of proving any causal link between it and the loss and of proving what part of the loss had been caused by the stranding and what part by the nature of the insured goods (remembering that the insurer was not liable for a loss caused by an inherent vice, or wear and tear), a difficulty the Memorandum had intended to avoid. It was therefore taken that the Memorandum had been worded so as to avoid that difficulty.

\(^{207}\) That is, a general average loss cannot be added to a particular average loss to make up the specified percentage or franchise. See further eg *Chalmers* 163.

\(^{208}\) Therefore, the insurer is liable for all loss, including a partial loss, in the event of a stranding, irrespective of whether such loss was caused by the stranding. In this respect, it would appear, there is a divergence between English and Dutch practice (see *Buys* 127), the latter requiring a causal link between the stranding (or collision, etc) and the loss before the operation of the exclusion of the insurer's liability for that loss could itself be excluded.

\(^{209}\) Section 76(1). Therefore, a total loss of an unapportionable insured part is a partial or particular average loss. It is possible to agree on apportionability, eg that 'each package is to be regarded a separate insurance'. On the basis of this or a similar clause, the total loss of individual components of a single consignment can be recovered despite the 'free from particular average' warranty.
liable for salvage charges, particular charges, and other expenses incurred to avert the
loss insured against.210 Where the subject-matter insured is warranted free from particu-
lar average under a specific percentage, a general average loss cannot, unless other­
wise agreed, be added to the particular average loss to make up the specified percent­
age.211 And to ascertain whether the specified percentage has been reached, regard is
had only to the actual loss suffered by the subject-matter insured; particular charges
(expenses incurred in terms of the sue and labour clause) and the expenses of and
incidental to ascertaining and proving the loss are excluded.212

It is clear, therefore, that there are both similarities and differences between
English and Dutch practices regarding franchises, at least as those were and are legis­
latively regulated for.213 The clause ‘free form particular average’ had, it would appear,
a Continental origin, came to be adopted in English practice in the eighteenth century,
and was re-exported to the Continent within a few decades in a somewhat amended
form. In the process, too, differences of interpretation had come about214 while the
practices surrounding the clause grew more divergent in the course of the nineteenth
century.

In Dutch law, the franchise has primarily a statutory basis, although individual
arrangements are permitted, while in English law, at least prior to the Marine Insurance
Act, the basis was contractual. Any historical comparison is therefore primarily between
English clauses on the one hand and Dutch legislative provisions on the other hand.
Whereas Dutch law proceeds from all-perils coverage and whereas there is a more
precise statutory regulation of the insurer’s liability as regards perishables, the English
insurer is liable for named perils only and the regulation and restriction of his exposure
to risk and his potential liability as regards perishables and for small losses were
generally left to an agreement between the parties. Further, whereas in Amsterdam the
liability of the insurer for perishables was initially completely excluded and later limited
to a greater extent than in respect of goods generally only if those perishables were not
specified in the policy, in London the liability of the insurer was either excluded or more
severely limited than usual as regards specific named goods and types of loss. Further,
whereas in Roman-Dutch law the insurer was free from particular average if the loss did
not exceed the specified percentage, and only later if the loss was below such percent­
age, under English law freedom from particular average followed throughout if the loss

210 Section s 76(2) and see again § 5 supra as to the different types of loss in English law.
211 Section 76(3). This is the same provision as in s 34 of the Amsterdam keur of 1744, as amended.
212 Section 76(4). This is different from the provision in s 34 of the Amsterdam keur of 1744, as amended,
where such expenses were included.
213 See generally Buys 127. Of course, in both systems the parties could and may still generally come to
some other arrangement than that provided for in the applicable laws, so that in practice the differences
may in fact be negligible.
214 Such as to meaning of ‘stranding’: see eg Chalmers 163; Ulrich 225.
was below the specified percentage. In English law salvage charges are merely particular charges and are not part of particular average, whereas in Roman-Dutch and Dutch law all such expenses were and are included. And, finally, in English law there is no franchise on general average losses, whereas there was a franchise in terms of the amended s 34 of the Amsterdam keur of 1744.

7.5 Deductibles or Abatements

Insurance policies often contained a provision that the insurer undertook to pay the insured for his loss 'without any abatement' ('sonder enige kortinge'). This clause, it would appear, could have had any one of a number of meanings. It could have meant, at least in those instances where there was no express franchise clause, that no franchise, customary or otherwise, would be applicable to the policy and that the insurer's liability for certain types of loss or for losses below a specified amount would not be excluded. It could have meant, as a second possibility, in those cases where there was a franchise clause or where the intention was not to exclude the operation of the customary franchise, that once the specified percentage had been reached, there was to be no deduction of that percentage from the loss. Finally, it could have meant that the deduction of a specific percentage from the insured's claim which appears to have been customarily allowed as an incentive to the insurer for settling the claim speedily and without resorting to judicial process, would not be applicable to claims on the policy in question.

Model cargo policies included in Roman-Dutch insurance laws from the late seventeenth century, starting with the model cargo policy in the Amsterdam keur of 1688, contained an undertaking by the underwriters to pay compensation for any loss suffered by the insured and to do so without any abatement ('sonder korting'). Model cargo policies in the eighteenth century contained a similar phrase as did the ransom

215 See Vaucher ix-x (in London, such small losses fall on the insured, but when the loss exceeds the limitation, the whole average is paid by the insurer without abatement; in Amsterdam and Antwerp the whole damage must be paid if it equals or exceeds the maximum of the immunity).

216 In this the clause may merely have confirmed the accepted practice. As already shown earlier, there was no deduction or abatement of this percentage from the insured's claim and the insurer was not, where the percentage was exceeded, liable for the excess only. See § 7.3.1 n151 supra.

217 The undertaking did not appear in the policies appended to the placcaaten of 1563 and 1571, nor in those of the Amsterdam keur of 1598. Possibly the practice to which it referred or on which it was based, was one which had arisen in the course of the seventeenth century. Thus, in an Amsterdam policy from 1672 on the 'Witte Haes' there was an undertaking by the insurers to pay the full sum insured promptly within one month after abandonment 'without any abatement' ('sonder eenige korting'). See Den Dooren de Jong 'Practijk' 21 and Appendix 24 infra.

218 See the cargo policies in the Rotterdam keur of 1721, and in the Amsterdam keuren of 1744 and 1775. In the Constitution of the Rotterdam Insurance Co established in 1720, art 3 provided that the company would insure ships, goods, houses, warehouses and merchandise against fire and other perils 'en de te vallen schadens (die Godt genadiglijk verhoede) sullen altoos ten vollen zonder de minste korting betaalt worden' See Van Rijn 19-21.
and fire policies.219

This phrase would appear to have signified no more than that if the loss exceeded the specified percentage, the insurer would pay in full and without deducting that percentage from the insured's claim.220 This would appear to be confirmed by the fact that none of the model hull policies contained a similar phrase, and that franchise was not usually applied to hull policies. The position was in fact understood in this way by Van der Keessel.221

Abatements were also known in England in the seventeenth century where they made it possible for the insured to reduce his premiums, such abatements often being agreed upon in addition to the customary franchise. In practice an insurer deducted the amount of abatement (and of the premium, if not yet paid) from the amount of the insured's loss and only paid the remaining percentage or part of the loss.222 However, from the latter part of the seventeenth century, merchants often insisted upon the limitation or the total exclusion of such abatements, and therefore required that the insurers pay their subscriptions in full without any abatement.223 It appears likely that the same position pertained in England in the case of fire policies.224

However, it would appear that there was also another form of deduction or rebate which was known in the Netherlands in the eighteenth century in connection with the payment of claims by insurers. A rule was introduced by custom that where the

219 See the ransom policy in the Amsterdam keur of 1693, the Rotterdam keur of 1721, and the Amsterdam keuren of 1744 and 1775, and the fire policy in the Amsterdam keur of 1744.

220 Thus, the second of the three possible meanings referred to earlier.

221 Theses selectae th 760 (ad III.24.15) and Praelectiones 1472-1473 (ad III.24.15) where he explained that losses exceeding the franchise percentage should seemingly be made good without any deduction, as was also expressly required by the words 'en dat zonder korting' in the Amsterdam model insurance policy.

222 See eg Molloy De jure maritimo II.7.6. Barbour 'Marine Risks' 583 and 585 (referring to the example provided by Pepys of insurance sought at a 15 per cent premium but the insurers being prepared to underwrite only at 20 per cent, or at 15 per cent with a 15 per cent abatement in the event of loss); Wright & Fayle Lloyd's 40, 53 and 144.

223 See Barbour 'Marine Risks' 595, who refers to a clause in English insurance policies in the latter half of the seventeenth century to prevent or limit abatements, the bane of insurance. The clause read: 'And in case of loss which God forbid we the Assurers doe oblige ourselves to satisfie and pay the Several sums of money by us hereafter subscribed without any allowance or abatement whatsoever and that within one month next after notice of such loss any Use or Custom to the Contrary notwithstanding'. It was later revised to read: 'And in case of losse (which God forbid) to abate Ten pounds per Ct and noe more'. And later still the abatement of 10 per cent was made conditional on the insured receiving the sums underwritten within 1 month after his notice of loss.

224 The earliest fire policy provided for a deduction of 5 per cent from the insured's claim for defraying the charges and expenses of investigating the claim. This was later reduced to 3 per cent, ostensibly towards the cost of the process of verification. Company fire policies in the latter part of the eighteenth century, following the example of the Phoenix in 1782, all provided that when any loss or damage was proved as required, the insured was immediately to receive satisfaction in full of the amount of his loss without allowance of discount or any other deduction whatsoever. See generally Cato Carter 21, 23 and 36; Dickson 80; Jenkins 30; and Supple Royal Exchange Assurance 92.
loss exceeded a certain percentage\textsuperscript{225} of the insured property and the insurer paid it amicably and without disputing the claim, he could deduct two per cent from the amount claimed. This custom was no doubt introduced to encourage the insurer to pay without disputing the claim and raising trivial defences. It was likewise recognised by Van der Keessel,\textsuperscript{226} and was also known elsewhere, such as in Hamburg\textsuperscript{227} and also in Antwerp where it was explained by stating that the insurer is liable for 98 per cent of the loss, and where apparently sometimes the deduction was applied to all losses exceeding the franchise percentage, if there was any which in fact applied.\textsuperscript{228}

The word 'abatement' was also later used in England in connection with the prompt settlement of claims on insurance policies and no longer ostensibly with the aim of ensuring that the insured himself bore a specific part of the loss.\textsuperscript{229} The practice then arose of including such abatement in the sum insured and hence the use of the clause fell away and abatements came to be excluded in policies by the mid-eighteenth century.\textsuperscript{230}

\textsuperscript{225} It appears that 50 per cent was a common percentage, but the parties could no doubt have agreed on any percentage greater than the franchise percentage, if any.

\textsuperscript{226} Theses selectae th 780 (ad III.24.15) (a deduction of 2 per cent is permitted when the loss exceeds 50 per cent and the matter was settled by compromise and without recourse to legal proceedings); Praelectiones 1472-1473 (ad III.24.15).

\textsuperscript{227} See Hammacher 117-118 who distinguishes between franchise ('Integralfranchisen') where every loss which does not exceed x per cent of the Insurable value, is not compensated, and what he terms a form of 'Abzugsfranchise' where in the case of a loss in excess of x per cent of the insurable value, the Insurer could in every case bring 2 per cent in rebate. The latter form was provided for in art XXI.12 of the Hamburg Assecuranz-Ordnung of 1731. See further as to the 2 per cent abatement for prompt (cash) and undisputed payment, Dreyer 54, 56 (the Accord between Hamburg insurers of 1677 made provision for such an abatement), 156-157 and 193-194.

\textsuperscript{228} See eg Couvreur 'Zeeverzekeringspractijk' 198 who explains that in Antwerp in the eighteenth century, if the loss exceeded the stated franchise percentage, then, following the London market, there followed an indemnification 'a rato van 98 per cent in verhouding tot de door de compagnie verzekerde waarde der goederen'. The relevant clause in the policy of the Antwerp Insurance Company, established in 1754, read as follows: 'En cas de Pertes ou Dommages aux dites Marchandises (ce que Dieu ne veullie) promettons & nous obligons de payer ou rembourser au Porteur de cette Police, la perte et dommage, à proportion de la Somme que nous avons assurée, à raison de Quatre-vingt Dix-huit pour cent'.

\textsuperscript{229} See Weskett Digest 7 sv 'abatement', 343 sv 'loss' par 2, referring to a clause which used to be commonly inserted during times of war in all policies of insurance whereby 'in case of loss the assureds were to abate two pounds per cent'.

\textsuperscript{230} See also John 'London Assurance' 140.
CHAPTER XVI
PREVENTION AND MINIMISATION, NOTICE, AND PROOF OF LOSS

1 Prevention and Minimisation of Loss

1.1 Introduction

Because of the risk he bore in terms of the insurance contract in respect of the insured property, the safety of that property concerned the insurer as much as if not more than it concerned the insured owner. In the event of loss or damage, it was the insurer, rather than the insured, who would bear the loss. Insurers were therefore intimately concerned with the avoidance of any loss in the first place. But they were also concerned that where a loss could not be averted, its consequences should be limited as far as possible. Not only would that limit their liability directly in preventing a partial loss from becoming a total loss, but it would also do so indirectly in the case of total loss since it would increase the value of anything which may have remained of the property insured and which they could claim from the insured. Accordingly, the preservation of insured property from loss or from further loss was in the insurer's interest and in this regard it was necessary for the insured or his representatives who, being more intimately involved with the insured property, were in a better position to do so, to do their utmost to avert or minimise the effect of any loss.

1 The insured in earlier times in fact personally accompanied the insured ship or cargo.

2 On the avoidance and minimisation of loss, see generally Van Niekerk ‘Suing’.

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For this reason it was recognised from early on that despite the fact that the risk of loss was transferred to the insurer in terms of the insurance contract, there was a need for imposing a duty upon the insured to take steps for the safety of the insured property and not to stand idly by and let accident and loss take their course. But, as will appear, the duty was merely a duty to take such steps as were reasonable in the circumstances. Apart from the fact that a failure by the insured in his duty could absolve the insurer from liability if such a failure caused the loss, the duty existed not only prior to the occurrence of an accident or loss but also, more pertinently, after the risk had materialised and a casualty had occurred, even if an actual loss had then not yet manifested itself.

However, given that insured knew that the risk of loss was borne by their insurers and that the property in question, if not already abandoned to the insurers, could in future be so abandoned, some encouragement was required to ensure their compliance with and the continued existence in practice of this duty. For this reason insurers, for whose ultimate benefit the insured had to take the necessary steps, customarily undertook to compensate the insured, in addition to any compensation for loss, also for any expense he may have incurred in this regard. This liability was in exchange for the insured's compliance with his duty. The expense which could be incurred included matters such as the cost of salvage, the cost of ransom and of recovery, the cost of proceeding to a port of refuge, the cost of legal proceedings to obtain a release, or the cost of extraordinary quarantine measures.

By long-standing custom, these matters were provided for in an appropriate clause in the insurance policy, although, for obvious reasons, the topic gained in importance and its legislative regulation became more refined only when communications had improved. Only when that had happened could the insured, no longer himself accompanying the insured property, be apprised of a loss or a threatening loss to the insured property in a distant place sufficiently early so that something could still be done about preventing or minimising the effect of such a loss. Only then was he in a position to instruct others as to the steps they had to take in this regard and was he no

3 Just as the insurer was relieved of liability if the insured by his own conduct actively caused such loss: see again ch VI § 4.1 supra. See also eg Santerna De assecurationibus IV.28 (an insured owner of goods is obliged to defend his goods to the utmost. otherwise it could be said that they were lost through his fault and negligence, in which case the insurer was then not liable). See further also eg Roccus De assecurationibus notes 55 and 70 (explaining the liability of the insurer for the expenses incurred to prevent a loss for which he would have been liable, with reference to the general principles of negotiorum gestio).

4 That is, the duty to avert or minimise loss arose on the occurrence of either a casualty or of a loss of which the insurer had to be given notice, hence the close relationship between the insured's duty to notify the insurer of loss (see § 2 infra) and his duty to avert or minimise that loss.

5 There was inevitably a close relationship between the duty to avert or minimise loss and the insured's right to abandon and the duty has been referred to as an incident of abandonment (see Birch Sharpe 408). However (as Birch Sharpe 413 points out), the duty is one to avert or minimise all loss, partial and total, so that this duty applies also where there is no possibility of abandonment. As to abandonment, see ch XIX § 2.3 infra.
longer exclusively dependent upon the conduct of the master and crew. Therefore, the possibility of successfully averting loss and preserving the insured property was greatly enhanced as communications improved.6

1.2 Confirmation of the Customary Duty in the Model Policy Forms

The insured's customary duty to avert and minimise loss was expressly stipulated for in what may be referred to as the 'preservation clause' which invariably appeared in the model insurance policies appended to Roman-Dutch insurance laws.7

The clause was present in insurance policies and recognised in Italian and Spanish law before the introduction of the first legislative measures on insurance in the Netherlands,8 and it was also present in the oldest extant insurance policy concluded in the Low Countries, one issued in Antwerp and dating from 1531.9

The policy form prescribed by title VII of the placcaat of 1563 contained a preservation clause10 which in essence dealt with two matters. First, in a permissive part, the insurers authorised and instructed the insured, and gave him and his representatives the right in the case of a loss,11 to take all steps necessary for the preservation ('behoudenisse') of the insured property and to do so for the profit of the insurers and at their expense. This authorisation was a general one and was given in advance so that a specific later authorisation or instruction was, strictly speaking, not required. Although there was no express mention in the first part of a specific duty on the insured, that followed from the next part of the clause. In the second part the insurers

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6 See further on this point Hammacher 152-153.

7 See De Groote Zeeassuramie 103-106 who observes that all the sixteenth century policies he investigated, contained what he terms a 'proces- en arbeidsclausule'. This term is a literal translation of the term employed to refer to the equivalent clause in English policies, namely a 'sue and labour clause'. As to the position in English law, see § 1.7 infra.

8 See eg Reatz Geschichte 196-197 (the clause appeared in the Florentine model policy of 1523), 221 (it was also present in the Burgos model policy of 1538), 254 (it was provided for in ss 11 and 13 of the Burgos Ordinance of 1538), and 287-288 (a similar clause appeared in the Seville model policy of 1556); and Dover 31 (in the Florentine model policy of 1523 it was agreed that 'everything may be transacted which necessity shall require').

9 See Appendix 17 infra for a reproduction of this policy with the clause in question.

10 The clause read as follows, 'Ende in gevalle van 't voorseyde perijckel de voorseyde Asseureurs hebben gegeven, ende geven den voorseyden Nicolaes van Eemeren ghesseureerde, ende sijne gecommitteerde macht, dat sy sullen mogen ten profijte ende schade vanden voorseyden Asseureurs de hant houden tot behoudenisse vanden voorseyden goeden ende Koopmanschappen. Belovende te betalen alle de koste die gedaen sullen worden om de selve behoudenisse, 't sy datter yet wort gerecouvereert ofte niet, van welcken kosten gheloove gegeven sal worden der reeckeninge ende eedt vande geene ofte die de selve gedaen sullen hebben.' See further Goudsmit Zeerecht 248-249.

11 See ch XII § 2.2.2 n265 supra for 'perijckel' meaning loss.
undertook to pay the insured in addition to the indemnity for his loss also all the expense incurred in this regard, whether or not anything was in fact recovered ('gerecouvreert') or achieved by the steps he had taken, and further to accept the insured's account and oath (or that of person who had incurred the expense) as proof of such expense. Thus, the insured was under an obligation to take steps to avert or minimise loss at the expense of the insurer.

The model policy form appended to the placcaat of 1571 likewise contained a preservation clause in virtually identical terms, now referring to the saving as well as the preservation ('salvatie en behoudenisse') of the insured property. The cargo policy appended to the Amsterdam keur of 1598 contained a more streamlined preservation clause with some amendments and clarifications. It referred to the authorisation or instruction of the insured to save and benefit ('salveren ende beneficeren') the insured property at the expense and for the profit of the insurer, and to the possibility of his selling the insured goods if necessary without obtaining the insurers' permission. The insurers further undertook also to pay the insured's expense and to do so (and this was now pertinently added to the clause) in addition to the compensation of any loss of or damage to the goods in question. Again the insured's

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12 As was made pertinent in later model policies, the undertaking to pay the insured for the expense incurred must be taken to have been additional to the insurers' undertaking to pay a compensation for a loss. The preservation clause appeared in the policy immediately after the 'payment clause' in terms of which the insurers undertook to pay the insured compensation for the loss or damage he had suffered. Thus, Van der Keessel Praelectiones 1486 (ad III.24.23) stated that insurers added to the policy the promise to pay for the expense of and damage caused by his efforts ('addita promissione de solvendis impensis et damnis').

13 'Ende in ghevalle van perijckel ofte schade, den voorseyde Asseureur oft Verseecker aer heeft gegeven, ende geeft den voorseyden suicken verseckerden, ende sijne gecommitteerde macht, om tot profijte ende schade vanden selven Asseureur ofte versecker aer de hant te houden tot salvatie ende behoudenisse vande voorseyde goeden ende Koopmanschappen. Belovende te betalen alle de koste die om de selve salvatie ofte behoudenisse gedaen sullen worden, 'tzy datter yet gherecouvreert wort ofte niet, van welcke kosten ghelooce gegeven sal worden ende reeckeningen ende eedt vanden geenen die de selve ghedaen sullen hebben.'

14 As also that in the Middelburg keur of 1600.

15 The clause read: '[E]nde in suicken geval geven wy u [...]'insured') ende alle anderen volkomen macht, om soo wel tot onze schade als t'onsen profijte, de hant te mogen reycken, in 't salveren ende beneficeren van de selve goederen: de selve te verkoopen, ende de penninghen te distribueren indien 't van noode is, sonder ons consent oft oorlof te vragen: Sullen oock betalen d'onkosten daerom gedaen, mitsgaders de schaden daer op gevallen, 'tzy datter yet gesalveert wort oft niet, ende op d'onkosten van dien, sal men geloof geven den genen die de selve gedaen sal hebben op sijnen eedt, sonder yet daer tegen te seggen.'

16 There were two possible interpretations. The one is that the insurer was liable in terms of the clause for the expense of saving in addition to his liability in terms of other clauses in the policy for loss or damage caused by an insured peril. The other is that the insurer was liable in terms of the clause for the expense of saving and also for loss or damage caused by the saving, and that he was also liable in terms of other clauses in the policy for loss or damage caused by an insured peril. The latter is the interpretation of Dorhout Mees Schadeverzekeringsrecht 367 which appears preferable, if only because it avoids the unseemly repetition in the policy inherent in the first possibility. Dorhout Mees also suggests that this particular wording (and the reference to loss or damage) was omitted from the later model policy forms, although that was not the case. It continued to appear in the last model policy forms appended to the
account and oath was conclusive of the fact and the amount of the expense incurred. The model hull policy was identical except for a few differences necessitated by the different objects of risk.\textsuperscript{17}

The Roman-Dutch authors commented on this clause. Grotius,\textsuperscript{18} for example, observed that insurers were accustomed in their insurance policies to authorise and instruct the master (of the insured or the carrying ship) to save as best he could the goods which may be involved in an accident, or to sell them and divide the money (amongst the respective owners) without further permission, and further that the insurers also promised to pay all expenses incurred and damage suffered in this regard, whether any goods were saved or not, on the oath of the master. Clearly Grotius was referring here to the usual preservation clause.\textsuperscript{19} Likewise Wassenaer,\textsuperscript{20} who included the clause among those which had to be included in an insurance contract, explained that the purpose of the clause was to obviate the need for the insurer specifically to authorise the insured to take steps to avert or minimise a loss.\textsuperscript{21}

The insured’s duty to take steps to avert or minimise loss and the insurer’s liability to compensate him for any expense incurred in doing so were well-recognised in the Antwerp compilation of customary law, the Compilatae of 1609. These matters were touched on in a large number of articles in various contexts. Thus, art 54\textsuperscript{22} stated that a duty was commonly imposed on the insured merchant or his representatives by the insurance policy to incur all expense to preserve and to benefit the insured goods (‘\textit{om alle oncosten te doen tot bewaeringe ende beneficieringe van de goeden}’), such as to restore damaged goods to their proper condition (‘\textit{om t’goed wederomme in goede gesteltenisse te brengen}’) or to enforce his rights to recover forfeited or confiscated

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\textsuperscript{17} The clause in the hull policy read as follows (the differences are not italicised): ‘[E]nde in sulcken geval geven wy u ... [insured] ende alle anderen volkomen macht, om soo wel tot onse schade als torsen profijte, de hant te mogen reycken, in t’ salveren ende beneficieren van t’ voorschreven Schip, ende den aenkleven van dien, om t’ selve te doen helpen wat het van noode soude mogen hebben, oock te verkoopen, ende de penningen te distribueren soo de saecke sulcks veresacht, sonder ons consent oft oorlof te vragen. Sullen oock betalen d’onkosten daer omme gedaen, mitsgaders de schaden daer op gevallen, t’zy datter yet gesalveert wort oft niet: Ende op d’onkosten van dien, sal men geloof geven den gheenen die de selve gedaen sa/ hebben op sijnen eed, sonder yet daer tegens te seggen.’

\textsuperscript{18} Inleidinge III.24.23.

\textsuperscript{19} See also eg Scheltinga Dictata ad III.24.23; and Schorer Aanteekeningen 426 (ad III.24.7) n21.

\textsuperscript{20} Praktyk notariaal VIII.7.

\textsuperscript{21} Wassenaer explained ‘dat den versekeraar by de brieven asseurantie last geve, de goederen de welke verongelukken ofte bederven souden ten besten te redden ende te bergen, die selve ook verkopen, die penningen daar van komende te verdeelen so het nodich is &c sonder meerder last, met beloften van te betalen alle kosten daaromme gedaen, ende schaden daar over geleden, het zy de goederen behouden worden ofte niet, alles ter goeder trouwen ende op des schippers eed’. See also Lybrechts Redenerend vertoog II.17.5.

\textsuperscript{22} Of par 2, title 11, part IV (see De Longé vol IV at 222).
Prevention and Minimisation, Notice, and Proof of Loss

1.2. Goods ('om zijn recht te vervolgen tegens de gepretendeerde verbeurte oft confiscatie'), and similar occurrences for which the insurers could be liable ('en de diergelijcke swaricheden daerinne de versekeraers gehouden souden mogen zijn'). In the event of a necessary transshipment, salvage or restoration of damaged insured goods, the Compilatae in essence provided\(^23\) that the cost of such transshipment, of salvage and of any restoration would be borne by the insurer in the same way as a partial loss ('bij manièra van avarie'), and that the insured had to be believed on his declarations and accounts as to the amount of the expense he had incurred, as long as he confirmed it under oath. In the case of the capture or detention of insured property, the Compilatae\(^24\) provided in great detail how the insured had to obtain the release of the property and what the latter's liability was in this regard in various factual situations.\(^25\) Elsewhere provision was also made for the case where the insurers could not agree on whether or not to accept liability for the cost of ransoming and to what extent.\(^26\) The same position pertained where the insured ship was damaged or became unseaworthy and had to enter a port to be repaired or caulked ('om gecalfatert te worden').\(^27\) The master could have this done and the cost thus incurred could be recovered from the insurer by way of average ('tot laste van de versekeraers verhaelen bij wegen van avarie') or, if incurred to escape a common peril, it could be recovered by way of general average ('om meerderen noot te ontgaen, soo oock commen tot generale verdeijlinge overt schip').\(^28\) Thus, an expense incurred in

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\(^{23}\) In arts 181-184 of par 6, title 11, part IV (see De Longe vol IV at 276).

\(^{24}\) In arts 192-196 of par 6, title 11, part IV (see De Longe vol IV at 280).

\(^{25}\) Thus, the master could, within the first eight days after such capture or detention, at the expense of the insurers, attempt to obtain the release or ransom of the insured property. Thereafter the insured was obliged first to notify and to obtain the consent of all the insurers for such compromise (failing which the insurers were not liable for any expense incurred). On being notified, the insurers had to declare openly and unequivocally within at the most 24 hours whether they were satisfied 'dat men de lossinge thennen laste doen'. If they consented or gave an uncertain answer, it had to be taken that they had agreed to such ransoming and they would accordingly be held liable to bear 'd'oncosten van deselve lossinge oft compositie, als andere schaden ende lasten'. If, again, on being notified of the loss or capture, the insurers had declared that they would be liable only to a specified amount of ransom ('ende sij verklaeren geene kosten daeromme te willen doen dan tot sekere somme'), then such limit could not be exceeded on their account. If as result no release could be obtained, the insurers were liable on their insurance as if the ship could not be ransomed. If, contrary, the insurers agreed and the property was in fact released after which it was lost, they were liable not only for the sums they had underwritten on the policy but also for the expense incurred in obtaining such release ('soo moeten de versekeraers niet alleen dragen tgene daevoor sij geteeckent hebben, maer daerboven oock de oncosten die gedaen sijn om aislulcke lossinge oft rantsen te doen').

\(^{26}\) See arts 250-254 (see De Longe vol IV at 302-304). As to the ransoming of goods in terms of the clause, see also art 55 (see De Longe vol IV at 222-224) where it was provided that the clause did not serve to permit 'eenich ransoen oft compositie te mogen maken', unless the insured was also expressly authorised to do so by the policy, or unless such was done in an emergency ('vuijt grooten noot') or with the prior consent of the insurers ('oft bij voorgaende wete aan de versekeraers daeraff gedaen').

\(^{27}\) Caulking involved stopping up the seams of a ship with waterproofing material such as tar.

\(^{28}\) See art 310 of par 9, title 11, part IV of the Compilatae (see De Longe vol IV at 324).
the avoiding or minimising a loss was recoverable as a particular average loss from the insurer or as a general average loss from the owners of all the interests involved or their insurers, depending on the circumstances in which it was incurred.

After the preservation clause became settled in the Amsterdam keur of 1598, no major changes were effected to it over the course of the next two centuries. The model cargo policy in the Amsterdam amending keur of 1688 was in virtually identical terms to its predecessor of 1598, as was the model hull policy.29

The preservation clause taken up in the model policies appended to the Rotterdam keur of 1721 too did not differ in any material respect from its Amsterdam counterpart.30

The same was true of the cargo policy and the hull policy appended to the Amsterdam keur of 1744.31 The newly added fire policy too contained a provision for the preservation and saving of the insured property from which it appears that the insurer was to pay the expense of salvage and of saving (‘onkosten tot berginge en beredderinge’) that property.32 No changes were effected in the model policy forms appended to the Amsterdam amending keur of 1775.33

At the end of the eighteenth century and with reference to the model policy forms in the keur of 1775, Van der Keessel34 explained the legal position and noted that if damage to an insured ship in the course of her voyage was not quite so serious as to

29 Except that now it was in both cases made clear in the last sentence that it was the insured’s account of the expense incurred which would be accepted on his oath as conclusive proof (‘en sa/l men omtrent de Rekening van onkosten geloof geven op den eed van den geenen, die deselve gedaen sal hebben, sonder iet daer tegen te seggen’).

30 See Goudsmit Zeerecht 399.

31 The cargo policy read: ‘[E]n in sulcke gevallen geven wy u Geassureerde en alle anderen volkomen magt, om zo wel tot onze schade als onsens profyte de hand te mogen reiken in ’t salveeren en beneficiereen van de voorzys Goederen, deselve te verkopen, en de penningen te distribueren indien ’t van noden is, sonder ons consent of oorlof te vragen, stallen ook betalen de onkosten daarom gedaan, mitsgaders de schade daar op gevallen, ’t sy dat ’er iets gesalveert wert of niet, en sal men de rekening van onkosten geloof geven op den Eed van den genen die deselve gedaen sal hebben, sonder iets daar tegen te seggen.’ The package policy for land transit was in this respect identical to the marine cargo policy: see Goudsmit Zeerecht 347.

32 The clause provided that whatever remained or was saved of the property had to be taken into account in calculating the amount of compensation, less the expense incurred in saving the property (‘mis dat in cas van geene totale Schade tot afslag zal strekken alle het geene naar aftrek van onkosten tot berginge en beredderinge gedaan, sal bevonden werden, gesalveerd en geborgen te zijn, en waar omtrent den Gessureerde geloof zal werden op zyne Eed, zonder iets daar teegen te zeggen’).

33 The sole exception being the greatly amended fire insurance policy which now merely provided for the insurer to pay the loss in addition to all expense incurred in saving (‘nevens alle de kosten op de beredding gevallen’). In a Rotterdam fire policy on grain from 1799 (see Mees Gedenkschrift appendix 19 and Appendix 51 infra), the insurers undertook as follows: ‘[E]n de gevallene schade door ons, zonder eenige exceptie, worden voldaan, nevens alle kosten op de beredding gevallen’.

34 Theses selectae th 755 (ad III.24.12); Praelectiones 1488 (ad III.24.12).
justify an immediate abandonment;\textsuperscript{35} and if she was capable of being repaired at a small cost, the insured had to be careful because he was instructed and authorised in terms of the usual insurance policy to preserve the insured property ('\textit{in formula assecurationis huius negotii gerendi mandatum acceperit}') and this duty of preservation incumbent upon the insured owner should be strictly performed by him. Elsewhere, after paraphrasing the content of the customary preservation clause and what he referred to as the insured’s duty to preserve and protect ('\textit{ad servandam et custodiendam}') the insured property, Van der Keessel\textsuperscript{36} addressed the question whether the intentional or negligent failure of the master and the crew to take the necessary steps would render them liable and would affect the insured’s claim against the insurer. He observed that the master was obliged by reason of the contract for services and of service ('\textit{ex contractu locationis}') to take care of the cargo and of the ship respectively. In terms of this contractual obligation, it was clear that the master also had to perform the mandate the insured owner’s had received from the insurer. If the master failed to do so, the liability of the insurer to the insured depended on whether he was a hull or a cargo insurer and on whether such conduct of the master could be and was in fact insured against.\textsuperscript{37}

1.3 Further Relevant Statutory Provisions

The insured’s duty to take steps to preserve the insured ship or goods and to avert or minimise any loss, the insurer’s rights as regards such efforts, and the latter’s duty to bear the expense of any such efforts were not specifically dealt with in any detail in Roman-Dutch insurance legislation. In general very little was added by the various legislative measures to the contractual arrangement of the topic contained in the customary preservation clause.

The few relevant legislative provisions which existed, will be considered shortly. First, though, a brief reference may be made to provisions already considered in another context which addressed the topic indirectly. These were the provisions on two other matters, namely those pertaining to the cost of transshipment, which was, of course, but one of the possible steps which could be taken to preserve insured cargo from a loss or from a further loss, and those pertaining to negotiations with the enemy for the release of captured property, such negotiations with the capturers being another example of such steps.

In addition to the preservation clause contained in the insurance policy formulas themselves, specific provision was made in legislation for transshipment, a topic also provided for in a separate clause in the policy itself. Transshipment or a change in the

\textsuperscript{35} As to when an immediate abandonment was permissible, see ch XIX § 2.3.1 \textit{infra}.

\textsuperscript{36} \textit{Praelectiones} 1486 (\textit{ad} III. 24. 23).

\textsuperscript{37} See again ch VI § 4.3 \textit{supra}. Briefly, if the conduct was insured against, both the hull and the cargo insurer were not relieved of liability in the case of negligent conduct by the master. The cargo insurer was not relieved of liability in the case of intentional conduct but the hull insurer was.
carrying ship was one of the measures an insured cargo owner could in appropriate circumstances take to prevent or minimise the extent of a loss of or damage to such cargo. Where, for example, the carrying ship was arrested, or became incapable of completing her voyage, or in any other emergency for that matter, the insured owner of cargo could have it loaded onto another ship for onward carriage to its destination. The insurer would be liable for the expense, including any additional freight, incurred in respect of such enforced transshipment and any loss or damage to the cargo caused by it. The insured was not compelled to transship but otherwise transshipment was treated in the same way as a measure the insured was compelled to perform to preserve the insured property.

Another and in practice very common type of action the insured could take to preserve insured property and to avert or minimise a loss was, in the case where such property was captured or arrested, to attempt, through negotiation or otherwise, to obtain the release of such property from such capture or arrest, even by the payment of a ransom or a fine if necessary. From time to time such negotiations and ransoming were statutorily regulated in the context of insurance and such regulation could either exclude or at least severely restrict the insured's duty to take steps to preserve or recover captured or arrested insured property, and could also exclude his claim against the insurer for any expense and the amount of any ransom.

More specifically with regard to the measures to be taken in the case of such arrest and detention by an insured, a few legislative provisions in the eighteenth century sought to provide further guidance and clarity to the usual preservation clause. In particular they stressed that the insured was in fact under a duty to take such steps as may be required by the circumstances.

In terms of s 66 of the Rotterdam keur of 1721, in the case of the arrest of his ship or goods, the insured was obliged, during the period he had to wait before he could

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38 See ch XIII § 1.3 supra where transshipment was considered in detail.

39 See eg s 15 of the placcaat of 1571; s 8 of the Amsterdam keur of 1598; s 13 of the Rotterdam keur of 1604; arts 79-82, 118, 136-140 and 143 of the Antwerp Complatae of 1609; ss 53-54 of the Rotterdam keur of 1721; and s 26 of the Amsterdam keur of 1744.

40 He could do so, but if he did not, the insurer could. There was no similar arrangement in Roman-Dutch law as regards the saving or preservation of the insured property in other ways. However, in terms of the French Ordinance de la marine of 1681, both the insured and the insurer were empowered or entitled to take steps to obtain the release of detained property. Dorhout Mees Schadeverzekeringsrecht 367n2 refers to this provision as remarkable, no doubt because it empowered the insurer to take steps in respect of the insured goods before he had acquired any rights in it by way of abandonment and, in fact, before the insurer had admitted liability on the policy for the loss, if any, in question or even before a claim had even been instituted against the insurer on the policy.

41 See especially s 27 of the placcaat of 1571 and s 16 of the Amsterdam keur of 1744; Van der Keessel Theses selectae th 743 (ad III.24.7); and Goudsmit Zeerecht 266 and 340-341. See again ch VI § 5.4.6 supra where the topic was considered in detail.

42 See also Bynkershoek Quaestiones juris privati IV.1.
abandon to the insurer,\(^\text{43}\) upon the request and on the instruction of the latter, to promote the release as much as possible by writing and correspondence (‘met schryven ende Correspondentie’). Likewise, in terms of s 26 of the Amsterdam keur of 1744,\(^\text{44}\) in the event of the arrest and detention of the insured ship or goods, and while the insured had to wait a particular period of time before he could abandon to the insurer, the insured during this period of time nevertheless (‘doch ... niet te min’)\(^\text{45}\) remained obliged either himself or through his correspondents to preserve the goods from deterioration (‘de goederen te handhaven’) and to promote their release as much as was possible.\(^\text{46}\) Thus, the fact that the insured could possibly abandon the insured property did not relieve him of the need to take the necessary steps to preserve that property.

In the 1756 amendment of s 34 of the Amsterdam keur of 1744, in connection with the calculation of the applicable franchises, reference was also made to the cost of preserving the insured property. Damage (‘beschadigtheid’), it was provided, included actual damage to the insured goods in addition to the necessary expense of saving such goods and to assess the damage suffered (‘benevens de nodige kosten tot redding van het zelve goed, en tot justificatie der geledene schade wordende vereischt’). Thus, the cost of avoidance and minimisation of loss was included in the damage for purposes of determining whether the insured’s loss exceeded the applicable franchise percentage.\(^\text{47}\)

In terms of s 36 of the Amsterdam keur of 1744, the insured was able, on and in exchange for his giving notice of the loss, to claim on account (‘op Rekening’) and therefore, it would appear, in advance, from his insurers in proportion to the amounts they had underwritten, such amounts of money as may be calculated to be required in the circumstances of the case for the saving, repair or recovery of the accidents, damage or arrests (‘tot reddinge, of herstellinge van de Ongelukken, Schadens of Arresten’) which had befallen the insured property. Nothing was added to this in the amendment of s 36 in 1756. This was an important innovation. The insurer was not only liable to compensate the insured for the expense he had incurred in the prevention and

\(^{43}\) For the circumstances in which a delayed abandonment was permissible, see ch XIX § 2.3.1 infra.

\(^{44}\) As to ss 66 and 26, see Van der Keessel Praelectiones 1469 (ad iii.24.12).

\(^{45}\) That is, despite the occurrence of a loss and the possibility of an abandonment. That possibility therefore did not relieve the insured of his duty.

\(^{46}\) In terms of s 16 of the Amsterdam keur of 1744, an insurance against the perils of war (especially capture and arrest) did not automatically include cover against the amount of ransom the insured may have had to pay to obtain the release of the insured property. Such cover had to be stipulated expressly. Insurers were then liable to make good, by way of general average over the ship and the goods, the amount (including any expense) paid by way of ransom to obtain the release of the insured ship and goods from enemy capture.

\(^{47}\) See again ch XV § 7.3.2 supra and see ch XV § 7.3.4 supra for the different position in English law.
minimisation of a loss, but was in fact obliged to make an advance in this regard. This was also the position in Hamburg.

1.4 Decisions and Opinions on the Insured's Duty to Prevent and Minimise Loss

The most important contribution to the interpretation and practical application of the preservation clause and the exposition of its effect on the parties to the insurance contract came not from legislation but from the decisions and opinions on it in the course of the seventeenth and eighteenth centuries. From them it is clear that the clause had important practical implications.

The first opinion dates from 1629 and concerned the question whether insurers were liable to pay all the expense incurred and payments made for the recovery ('tot recouvrement') of the insured goods, even if such expense and payments amounted to more than the value of the goods recovered or even to more than the sum underwritten by them on those goods. In accordance with the law applicable in the case of insurances, the view was expressed in the opinion that they would be liable. Insurers were liable to pay all the expense incurred and the payments made to free and recover the insured goods, even if this amounted to more than the value of those goods or to more than they would have had to pay in the event of the goods having been lost from the start. This liability they incurred by virtue of the authority or instruction given to the insured in the policy (that is, in terms of the preservation clause) as well as, in particular, in terms of the additional ad hoc authorisation they had subsequently given to the insured in this case ('uyt krachte van de volmacht ende authoriteit by de politie gegeven, als in-sonderheyt uyt krachte van de particulier commissie ende belofte, onder haere handen daer nae gepasseert'). The opinion noted that it could easily happen and in fact often did happen that heavy expense was incurred for the recovery of goods and that those goods were then not recovered or at least not so much of it as to have made such expense worthwhile. However, even in such cases, where the value of the goods recovered, if any, was less than the amount of the expense the insurers had

48 See also Van der Keessel Praelectiones 1472 (ad III.24.14) who, in referring to s 36, explained that the insured now had the right to claim from his insurers the amount that was deemed necessary to repair the damage or to obtain the release of arrested property. See too Enschedé 119 (the insured was entitled to request from his insurers a 'voorschot voor de kosten tot behoud en herstel der verzekerde zaak'); and Goudsmit Zeerecht 352-353.

49 Section XV-1 of the Hamburg Assecuranz-Ordnung of 1731 provided that insurers were liable to advance the insured his expense whether in a lump sum or in instalments. See further Dreyer 168-170; Hammacher 112 ('Einen Teil dieser Kosten konnte der Versicherungsnehmer vom Versicherer als Vorschuss verlangen').

50 See Hollandse consultatien vol III(1) cons 13. The same opinion was also taken up in Hollandse consultatien vol VI cons 13.

51 Presumably the question was whether, even if taken alone, and not if when added to the amount of the loss, the expense and payments exceeded the insured value and the sum insured. For the difference between the value of the insured property and the sum insured, see ch XVII § 2 infra.
to make good, the insurer had to compensate the insured for the incurred expense with interest as well as pay him compensation for the value of the goods lost or damaged.

Thus, as Roman-Dutch authors explained this opinion, in the case where an expense was incurred to recover insured goods, the insurer had to pay that expense, irrespective of whether or not it was incurred successfully. In consequence, if the goods were lost (that is, not recovered) or otherwise damaged, the insurer had to pay the insured compensation for such loss or damage, up to the sum insured, plus the expense he had incurred to save those goods, even if the latter was fruitlessly incurred and amounted to more than the value of those goods or the sum insured on them.52

The topic was also considered in another leading opinion, this time one delivered by Grotius himself.53 In this case the insurers were notified of the loss of the insured cargo by arrest. Being ignorant of the true reason why the cargo was arrested, a reason which would have excluded their liability,54 they instructed the insured to take steps to recover it and expressly or tacitly acknowledged his notice of loss as if they were liable for that loss. Grotius advised the insurers to approach the Court for relief.55 But, he continued, if the insurers were unsuccessful in obtaining any relief, then at least there was a limit to the amount of expense the insured could have incurred for the insurers' account in order to save and recover the goods. Insurers were liable for such expense no further than to the extent that it was reasonable, that is, for so much as a prudent factor or mandatary would have incurred for his employer or mandator ('binnen die quantitate, tot de welke toe een voorsichtig ende getrouw Factoor apparentelijck voor syne Meester kosten gedaen soude hebben'). That was so even though insurance policies provided that the insurers authorised the insured in the event of loss or damage to save the goods and even though they undertook to pay the expense incurred in the process and to accept in this connection the oath of the person who had incurred it without disputing it. That was further so even though in this case some of the insurers, after having received notice of the loss, had in effect confirmed that authorisation by specifically authorising the insured again. The reason why this was so, quite simply, was that in these circumstances the insured acted as a mandatary of the insurers ('dat in dit stuck de geasseureerden zijn geweest Mandatarii van den Asseuradeurs') and it was trite in the case of a mandate that there would not be an unlimited compensation of the expense the mandatary had incurred but that only

52 See eg Voet Observationes ad III.24.22 (n 42) (requiring that the expense be incurred in good faith); Schorer Aanteekningen 426 (ad III.24.7) n21 (noting that this was so provided for in the Hamburg Assuranc-Ordning of 1731); Van Zurek Codex Batavus sv 'Assurantie' par 31 n1; La Leck Register sv 'assurantie'; and idem Index sv 'insurance'.

53 See Hollandse consultatien vol III(2) cons 175. Although dated 1622, that is apparently not correct for in the opinion references occur to a Spanish legislative measure of 1626 and to a Madrid judgment of 1630. The correct date is possibly 1632.

54 The cargo was arrested because it was contraband. See again ch VIII § 5.4 supra.

55 It could be that (but it does not appear from the opinion whether) they had paid out the insured in terms of the policy or had made an advance to him for the preservation or recovery of the goods, and that they were therefore advised to claim a repayment.
expense incurred in good faith and for a just cause ("ex justa ratione") would be compensated. Accordingly, the amount of the expense incurred in this case had to be reduced to what was reasonable in the circumstances ("ad illum modum, quem secutus fuerit vir diligentis"), the more so because the exorbitance of the expense the insured here sought to pass onto the insurers created a strong suspicion of fraud.\footnote{See further eg Van Zurck *Codex Batavus* sv 'Assurantie' par 31 n1 (who linked up this and the previous opinion by stating that expense incurred in good faith had to be paid even if it amounted to more than the value of goods insured; he referred also to Roccus *De assecurationibus* notes 70, 89, 90 and 91); and La Leck *Index* sv 'insurance' (Insurers are liable only for the reasonable cost incurred by the insured in salvaging the insured property).}

As appears from this opinion, insured were not satisfied with the general authorisation and instruction given by their insurers in the policy, but sought to obtain a specific authorisation and instruction for the steps they intended taking in an individual case so as to ensure that the insurers would not at a later stage deny liability to compensate them for the expense incurred on the ground that the loss in question was not one covered by the policy. Insurers, in turn, because of their potential additional liability, also preferred to give the insured specific instructions so as to ensure that the most effective and proper steps were taken by the latter.\footnote{It may be that earlier such specific authorisation and instruction was actually required. Thus Origo 140 refers to a letter by Genoese insurers who had insured goods in 1385 authorising the insured whose goods were captured, to recover those goods from a ship captured by pirates, the approval of the insurers being required for such an attempt at recovery. De Groote *Zeeassurantie* 22 refers to an Antwerp notarial deed of 1566 from which it appears that according to Spanish insurance law, after the occurrence of an accident to the insured goods, before the insured could take any steps to save such goods, to take possession of or to sell them, it was necessary for him first to give notice of the occurrence or the loss to the insurers and to obtain their permission for such measures. In the case with which the deed was concerned, it was impossible to give such notice and the insured requested the city magistrate for permission to take the necessary steps without prejudicing his position in terms of any of the provisions of his policy.}

\footnote{See eg Bynkershoek *Quaestiones juris privati* IV.6, referring to a case before the *Hooge Raad* in 1712 (see *idem Observationes tumultuariae* obs 1290) where the insured had instituted a claim for the loss of or damage to his ship not only on the policy signed by the insurers but also on the authorisation they had signed ("uit krachte hunner getekende autorisatie") and in terms of which they, being of the view that the loss or damage was for their account, had authorised the shipowner and the owner of the goods to collect and sell the wreckage and had undertaken that they would bear any damage and cost in this regard.}

\footnote{As to this, see § 2.3 *infra*.}
Messenger of the Insurance Chamber there became involved.\textsuperscript{60} The insured himself could of course in turn authorise and instruct others to take the steps required for the avoidance or minimisation of the loss.\textsuperscript{61}

An opinion from 1706\textsuperscript{62} provided further information on the insured's instruction and authorisation and on the basis of his claim to be compensated for the expense he incurred in preserving or recovering insured property.

After the insured ship and her cargo of perishables (a consignment of wine) were captured by the English on a voyage from Bordeaux to Middelburg and taken to Guernsey, the insured gave a notarial notice of loss and abandonment to his insurers. They acknowledged receipt of his letter, and later requested and authorised the insured to do everything necessary to obtain the release of the ship and the goods. Three months later the insured managed to obtain such a release.

As far as the expense was concerned which the insured had incurred to recover the ship and cargo,\textsuperscript{63} the opinion observed that it was incurred on the authority and against an undertaking of compensation set out in broad terms in the policy ('\textit{in seer ample terme by de Police gedaen}'), and also on a more specific oral authorisation ('\textit{eene nadere mondelinge authorisatie}') of the insurers. Furthermore, the opinion reiterated, the insurers were liable as mandators even in excess of the sum insured, in cases where the expense was incurred in vain, and even in cases of a total loss ('\textit{zeilis boven de getekende sommen, in cas van kwaed succes en alzo in cas van totale schaede, wagens die onkosten mandati actione, repetitie gedaen zoude hebben mogen worden}'). And, it alluded, there was also the possibility of the matter being treated as an instance of \textit{negotiorum gestio} ('\textit{men laete dan staen daer (als in deea} \textit{dit negotium utiliter (die zaek ten nutte) gegereerd, en ten grooten deele wel is uitgeval-len}').\textsuperscript{64}

\textsuperscript{60} See eg Vergouwen 45 (Insurers authorised the insured In the presence of a broker or a notary to take the steps necessary to limit the loss and to sell the remains of the insured property locally or to ship it home). The \textit{Archief van de Assurantiemeesteren In the Gemeente-Archief} in Amsterdam. houses volumes containing 'Authorisatien van Assuradeuren' dating from 1701-1810 (see inv 2925-3050 in \textit{Archief} 5061 (RA)) In which the insured was authorised to take steps to preserve the insured goods.

\textsuperscript{61} See eg an Antwerp notarial deed of 1592 (referred to by De Groote \textit{Zeeassurantie} 24) In which the owner of goods insured in terms of a policy containing a preservation clause, appointed a person at the place where the goods were discharged when the ship was forced there by a storm, to sell the goods.

\textsuperscript{62} See Barels \textit{Advysen} vol 1 adv 14.

\textsuperscript{63} The opinion was also concerned with the question whether the insurers could be held liable for the fact that, because of the capture and detention at Guernsey, the sale of the goods at their destination realised 50 per cent less than the value of the goods ('\textit{rendeert het nette proeven 50 per cento minder als den inkoop, premie en onkosten die gedaen zyn tot het ontslag van dit schip en goed hebben gekost, zonder eenige vragt te rekenen}')

\textsuperscript{64} The possible application of the principles of \textit{negotiorum gestio} in this connection was already recognised by eg Santerna \textit{De assecurationibus} IV.27. Presumably this possibility could only arise in the absence (unlike in practice, given the inevitable presence of a preservation clause in insurance policies) of any or of a sufficient authorisation and instruction by the insurer, and in a case such as this where there had been an immediate abandonment of the insured perishable cargo to the insurers. For the effect of abandonment, see ch XIX § 2.3.1 \textit{infra}. On this opinion, Van der Keessel \textit{Theses selectae} th 756 (\textit{ad III.24.13}); \textit{idem Praelectiones} 1470-1471 (\textit{ad III.24.13}) noted that although in the case of a capture of
In an opinion delivered in the very next year the important point was made that the preservation clause related only to the insured property and authorised the insured only to take certain steps with a view to the saving or salvaging of that property, and not as regards any action against a third party concerning that property. Therefore, it did not authorise the insured on behalf of the insurer to settle with or even to release a third party who had damaged the property. In 1712 the Hooge Raad was confronted with the thorny question whether an insurer was relieved of liability because the loss was caused by the insured's own conduct or whether he was in fact liable because such conduct had been aimed at averting or minimising a loss by a peril insured against.

In this case the master and crew of the insured ship, fearing that the three ships following their vessel were pirate ships, abandoned her at sea after setting her alight. The insured claimed on his policy but the insurer argued that the master had unjustifiably and from an unfounded fear ordered such drastic action. It subsequently appeared, namely, that the three ships were in fact French enemy ships and not pirates, and, so the insurer argued, the insured ship would not have been destroyed by the French and the insured would therefore not have suffered any loss or damage were it not for the master's order.

The Chamber of Insurance and the Schepenen Court held against the insured, the Hot van Holland held for him, and the Hooge Raad confirmed the latter judgment in favour of the insured.

According to Bynkershoek there was no evidence in this case that the insured had given an order to set the insured ship alight and to abandon her, and the actions of the master and the crew were not that unusual. Even if the insured did in fact give such an order, it was not unfounded. Had the three ships been pirate ships, the fear would have been well founded, and even if the master had realised that they were French, it would have been better to destroy his ship than to give her up to the enemy who would have taken her capture and had her declared forfeited as a prize. The insurers, therefore, could not prove that the ship would have been undamaged if she had not been set alight. This was a case, therefore, where the loss was not caused (or, at least, where it was not established that it was caused) by the

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65 See Bareis Advysen vol I adv 20 (1707).
66 As to the insurer's right of recourse against such third party and the insured's duty as regards that right, see ch XIX § 1 infra.
67 See Bynkershoek Observationes tumultuariae obs 893; idem Quaestiones juris privati IV.4.
68 Thorny, that is, given the underdeveloped theories of causation in the insurance context in Roman-Dutch law at the time. See again ch VI § 1 supra.
69 See again ch VI § 4.1 supra.
insured's own conduct or that of his representatives but rather by an insured peril or by attempts, reasonably in the circumstances, on the part of the insured to avert an insured peril.\textsuperscript{70}

In another decision by the \textit{Hooge Raad} in 1712\textsuperscript{71} the relationship between an authorisation in terms of a preservation clause and the insurance contract itself was at issue but unfortunately the \textit{Raad} did not have to pronounce on the matter. The decision concerned an insurance at Rotterdam of merchandise of no or little value as well as of expected profit, both being valued at f2 000. At the time the insurance of expected profit was prohibited there\textsuperscript{72} but the insurer had renounced the applicable law.\textsuperscript{73} When the carrying ship was captured on her voyage, the insurer was notified and he authorised the insured to recover the ship and her cargo at his expense ('\textit{om op zyne kosten het Schip, en de Lading ... te reclameren}'). However, the insured's attempts were fruitless and the ship and her cargo were subsequently confiscated. The insured claimed the f2 000 and also the expense he had incurred ('\textit{en de kosten ... tot de Reclame aangewend}').

As far as that expense was concerned, it was argued on behalf of the insurer that because the insurance of expected profit was prohibited and any renunciation of the prohibition was null and void, the insurer's authorisation of and instruction to the insured to incur the expense was also a nullity. The majority of the \textit{Raad}, however, held the renunciation in this case valid, held the insurer to his agreement, and gave judgment for the insured, seemingly also for the expense he had incurred. Presumably, through, if the insurance contract itself was invalid, the insurer would not have been able to claim any compensation for the expense he had incurred in saving the property thought to be insured by the contract, and that would have been the case even if the insurer had authorised him to incur that expense.

The basis of the parties' relationship as regards the steps to be taken by the insured to preserve and save insured property was also alluded to in an opinion in 1713.\textsuperscript{74} Here the insured had apparently failed to take the necessary steps to preserve the insured property.\textsuperscript{75} The advocate delivering the opinion was of the view that the insured had to be deemed to have caused the resulting loss or damage himself ('\textit{de Geassureerde verstaen moet worden de voorsz schaede ... door dat zyn verzuim zelfs}'}

\textsuperscript{70} Presumably the insurer would have escaped liability had the three ships, to the knowledge of the master, been friendly vessels so that no insured loss was possible from them, or had the fear of a loss by them been unfounded and the master's actions unreasonable in the circumstances.

\textsuperscript{71} See Bynkershoek \textit{Observationes tumultuariae} obs 909; \textit{idem Quaestiones juris privat} i IV.5.

\textsuperscript{72} See again ch V \textsuperscript{5.2 supra.}

\textsuperscript{73} See again ch VIII \textsuperscript{5.2 supra.}

\textsuperscript{74} See Bareis \textit{Advysen} vol I adv 13.

\textsuperscript{75} He had in any event also failed to institute a claim within the proper time so that his claim had become prescribed and the insurer was for that reason not liable in the first place. As to prescription, see ch XX \textsuperscript{3 infra.}
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veroorsaakt te hebben gehad’) and that the insurer was consequently not liable for that loss or damage.76 The insured, it was explained, was in this case under a duty to the insurer to preserve the insured property for, prior to abandonment, he remained the owner and in control of that property. He was therefore liable to the insurer if he failed to do so, irrespective of whether he was regarded as a partner, a mandatary or a negotiorum gestor as the relationship between the insured and insurers were in this regard commonly classified (‘tzy dat hy word geconsidered als socius, of als mandatarius, aut negotiorum gestor, zo als een Geassureerde notoirelyk tot de Assuradeurs deeze en diergelyke relatie is hebbende’).

In a wide-ranging opinion in 1715,77 one of the matters touched on was the avoidance and minimisation of loss and, more specifically, the supplementary nature of the insurer’s liability to compensate the insured in this regard.

Here the insurers had, as usual, undertaken to compensate the insured for any loss of or damage to the insured ship and goods. They had also added a further undertaking, namely to compensate all expense incurred in saving the insured property and in this way they extended the scope of the insurance policy as was customary (‘met ook nog een bygevoegde belofte van te vergoeden alle ‘t geene tot salveeringe van schip en goed zoude worden gedaen, zo als kennelyk is, dat de Police van Assurantie op diergelyke wyse worden geëxteendeerd, en ook anderzins en na style mercantiel constant is’).78 Accordingly, it was suggested, in a case where the insured ship and cargo were arrested and detained by the Swedish authorities, the insurers were liable to compensate the insured for the expense he had incurred in recovering the insured ship and goods, as well as in providing food for the crew during the detention, and also for the damage (‘bederf’) suffered by the ship and cargo during that time. The insurers were liable not only for the loss or damage suffered by the insured as a result of the detention of the ship and goods, but also for the expense of recovering and preserving the property in question. That was the case even when such other loss or damage exceeded the sum insured (that is, if it amounted to a total loss) or even if nothing of the property in question was recovered (that is, in the case of unsuccessful attempts to save it).79 This was in conformity with the general legal position in the case of mandate and negotiorum gestio and also with commercial usage in the case of

76 See again ch VI § 4.1 supra for the position in Roman-Dutch law in terms of which a loss caused by the insured’s own conduct was not recoverable from the insurer.

77 See Bareis Advysen vol I adv 23. See too Van der Keessel Theses selectae th 756 (ad III.24.13); idem Praelecriones 1470-1471 (ad III.24.13).

78 On this point, reference was made to Grotius Inleidinge III.24; s 33 (or, more probably, the model policy form in terms of s 36) of the Amsterdam keur of 1598; and the relevant provisions of the French Ordinance de la marine of 1681.

79 ‘[M]aar ook, om dat voorsz kosten, tot reclame en salveeringe geëmployeerd, zelfs dan ook nog zoude hebben moeten worden voldaan, wanneer dat de andere schade de volle getekende of geassureerde somme was beloopende, of dat ‘er zelfs niets gesalveerd of vry bekomen ware geweest.’
insurance. Thus, it would appear, even in the absence of any express instruction and authorisation by the insurer, the insured may well in appropriate cases have been able to recover his expense from the insurer; his right to do so therefore usually arose _ex contractu_, but may also be taken to have arisen _ex lege_ (by this was probably meant _quasi ex contractu_) where that was necessary and possible.

Another opinion in 1715 repeated much of what had been said in the earlier opinion in that year about the supplementary liability of the insurer to compensate the insured not only for the loss or damage but also for any expense he had incurred in attempting to avoid it. This was so, the opinion continued, for two reasons. Firstly because in terms of the common law ('_de algemeene Beschreven regten_') a person who, although without express authorisation, looks after the interests of another is entitled to be indemnified for the damage and expense which he has suffered and incurred in the process, even if his efforts were not successful, as long as they were not undertaken without any apparent hope of success and in good faith. This was the more so where, as in this case, those efforts were successful. The second reason was because in this case the insured had throughout acted with the authority and on the instruction of the insurer ('_om by ongelukige rescontres alles ten besten te redden_') in terms of the insurance policy. For these reasons the insured could claim compensation for the expense incurred or the damage suffered, even if the same could have been achieved much cheaper by someone else ('alwaer 't ook zuks dat de reclame door iemand anders onkostelyker zoude hebben konnen worden gedaen'). Finally, the opinion noted that in some insurance laws it was even specially provided that in certain instances an insured in the case of any unfortunate occurrence had the freedom or was even obliged to do everything necessary to avert or minimise a loss, subject to his claim against the insurer in that regard ('_om alles in cas van eenig ongelukkig toeval ten besten mogelyk te redden en te regt te brengen, behoudens alleen zyn regres, op of ten lasten van den Assuradeur_').

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80 ['C]onform de dispositie van Rechten ... zo met relatie tot de actie van Lastgevinge, als tot de actie van Onderwind [negotiorum gestio] [e]n conform mede de style mercantiel in materie van Assurantie'.

81 At least where that was not pertinently prohibited by the insurer.

82 See Barels Advysen vol I adv 16.

83 It was explained that (presumably in the case of a total loss) the insurer 'niet alleen zyne volle getekende of geassureerde somme aen [the insured] zal moeten voldoen; maer dat hy [the insurer] ook nog bovendien behouden is aen den Geassureerden te voldoen alle de kosten ... tot reclame en vrymaekinge van schip en goed gevallen'.

84 Thus, the insured's claim could be based on a contract of mandate or on _negotiorum gestio_, depending on the circumstances.

85 In confirmation of the general principles, that is.

86 In this regard reference was made to s 8 of the Amsterdam _keur_ of 1598 and to the relevant provisions of the French _Ordinance de la marine_ of 1681.
Whether an insurer's unqualified (and presumably his specific, ad hoc) authorisation of and instruction to the insured to take steps for the preservation of insured property could be regarded as an acknowledgement of his liability on the policy, was tantalisingly left unanswered in a Hooge Raad decision in 1717.\(^8\) In this case the insured argued that one of the grounds on which the insurers were liable for the loss of the insured ship and goods was because they had acknowledged liability for that loss and had for that reason authorised him to salvage the damaged goods, to sell them and to settle the salver's claim for salvage even though he had not requested them to do so ('naamentlyk de schade als voor hun rekening erkent hadden, en daarom hem geauthoriseert om de verongelukte goederen te bergen, te verkopen, en over het bergloon te accordeeren, zonder dat Zy hier over Relief vezocht hadden'). But while it appeared that the insurers did here issue such an authorisation and instruction with a reservation of their rights ('behoudens hun regt'), this argument was not considered by the Raad who held the insurers liable on other grounds.

A last decision of the Hooge Raad to which reference may be made, dates from 1729.\(^8\) It illustrates that the insurer's liability for expense incurred by the insured in the avoidance or minimisation of loss was not based on any specific authorisation or instruction he may have given to the insured but on the authorisation or instruction contained in the preservation clause in the policy itself. The insurer, in denying liability for such an expense incurred by insured, could therefore not argue that the specific authorisation and instruction was for some or other reason invalid.\(^8\) In this instance the Rotterdam insurers of a ship which had been stranded on a sand bank in December 1721, and also of her cargo, had, on receiving notice of that occurrence, specifically authorised and instructed the insured to refloat the vessel at their expense, or to sell her, or in another way to dispose of her and her cargo. Subsequently the insurers learnt that the ship had in fact not yet taken on her cargo and they restricted their authorisation and instruction to efforts in connection with the ship only. After it took almost the whole winter to free the ship and to bring her to sea, she was eventually refloated and arrived in Amsterdam in July 1722. The insurers refused to pay the expense of refloating her, and despite their two authorisations defended the legal proceeding instituted against them.

\(^8\) See Bynkershoek Observaties tumultuarie obs 1374; idem Quaestiones juris privati IV.8.

\(^8\) See Bynkershoek Observaties tumultuarie obs 2554; idem Quaestiones juris privati IV.15.

\(^8\) Accordingly, if the insurer in the ordinary case wanted to avoid any liability for the payment of such an expense, it was not sufficient for him merely to refuse a specific authorisation and instruction on being notified of loss by the insured. Presumably he either had to delete the preservation clause from the policy, or on the conclusion of the contract specifically limit his liability in terms of the policy to the sum insured. If he had failed to do so but did not wish to bear the risk of higher cost of averting or minimising loss, he could seemingly only avoid such liability by a payment of the sum insured. That was provided for in art XIV-2 of the Hamburg Assecuranz-Ordnung of 1731 which stated that the insurer could by an immediate payment of the sum insured free himself from the financial duty to contribute to the salvage expense to be incurred by the insured. Even that, however, only achieved this aim if the contract was terminated by such payment. See further Dreyer 165-168; Hammacher 112; and ch XIX § 2.4 n408 infra where this method of limitation of liability - referred to in German law as 'abandon' - is considered further.
After the Chamber of Insurance and the Hof van Holland had held for the insured, the insurers appealed to the Hooge Raad, raising numerous arguments. All their defences were rejected by the Raad who held them liable. The Raad pointed out that any defence concerning their authorisation (such as that it had been given negligently) was unfounded, because the insurers would be held liable even without such specific authorisation (‘de Assuradeurs zelfs zonder de gemelde beide authorisatien in de schade gehouden waren’). Such a specific, ad hoc authority was therefore not necessary nor required, although it could possibly have made it easier for the insured when claiming compensation from the insurers in a case where it was subsequently disputed that the loss in respect of which the expense was incurred, was one covered by the policy.

To summarise. In terms of the preservation clause customarily inserted in insurance policies, an insured was authorised and instructed to take the necessary steps to avert or minimise a loss covered by the policy. Although it was common practice for the insured to obtain a further specific authorisation in every instance, that was not necessary. The insured was authorised only to take steps in connection with the insured property itself, not, for example, to take steps as regards claims against third parties concerning that property. He was under this duty irrespective of whether or not the property in question had yet been or could in future possibly be abandonied to the insurer.

In terms of the clause, the insurer on his part undertook to compensate the insured for any expense incurred in taking the steps he had to. This liability was based on mandate or negotiorum gestio, depending on the circumstances of each case. The liability was supplementary to the insurer’s liability for any actual loss of or damage to the property concerned. The insurer was further liable to compensate such expense even if it was fruitlessly incurred, even if it exceeded the sum insured or the value of the property saved, or even if there was a total loss of that property. In addition to his liability to reimburse such an expense, he was apparently also liable for loss or damage caused in the process of avoiding or minimising the loss. The only requirement was that the expense had to be reasonably incurred by the insured. Finally, the insured could claim an advance from the insurer for the expense he had to incur in compliance with his duty to avert or minimise a loss.

1.5 Prevention and Minimisation of Loss in Terms of the Wetboek van Koophandel

The general principle involved in the insured’s duty to avert and minimise loss is stated in art 283-1 of the Dutch Wetboek van Koophandel. It is provided that, subject to any specific provisions made as regards particular types of insurance, an insured is under a duty (a so-called ‘reddingspligt’) to take all possible care (‘om alle vlijt en naarstigheid in het werk te stellen’) to avert or minimise loss (‘ten einde schade te

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90 See generally Dorhout Mees Schadeverzekeringsrecht 367-369; Voorduin vol IX at 248-249.

91 These will be considered shortly.
voorkomen of te verminderen’), on penalty of having to compensate the insurer himself for the expense, damage and interest resulting from his failure to do so. In terms of art 283-2, any expense incurred by the insured in order to avert or minimise loss is for the account of the insurer, even if, when added to the loss suffered by the insured, it exceeds the sum insured, or even if the insured’s attempts were fruitless.

In modern Dutch law there are three requirements for an insurer to incur liability in terms of art 283. There had to be an imminent danger of loss; a reasonable chance of success at the time the steps were taken and the expense incurred; and the expense had to be incurred for the advantage of the insurer concerned, that is, to prevent a loss or damage insured against by that insurer.

Specifically in the context of marine insurance, the topic is further regulated by the Wetboek. In terms of art 655-1, in the case where the insured is not, or presumably not yet, entitled to abandon the insured property to his insurer, he is obliged in the case of shipwreck, stranding, capture or detention to take all possible care and the necessary steps to save or to obtain the release of the insured property. For this, in terms of art 655-2, the insured does not require any specific authorisation from the insurer and he is entitled even to claim from the latter a sufficient amount to cover the expense which still has to be incurred in saving or recovering the property.

The Wetboek then makes further provision for individual instances. Thus, in the case where the insured has to take steps for preservation or recovery abroad and where he gave instructions to his own correspondents or to others of good repute in this regard, he incurs no liability to such mandatary but is obliged to transfer his right of action against the latter to the insurer. In the case of an insurance for the account of an unnamed third party, the insured is also obliged to take steps to obtain the release of insured goods, unless he is relieved of such liability in the policy. In terms of art 665-1, if ships or goods are stranded, captured or detained, an immediate abandon-
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ment is possible, by way of exception, as soon as the insurer refuses or fails to advance to the insured a sufficient sum to cover the expense of saving or recovering the property ('om de onkosten tot redding of reclame te kunnen goed maken'). Such an expense is borne by and is incurred for the account of the insurer even if, when added to the amount of the loss, the total exceeds the sum for which the property is insured. In abandoning insured property ('bij het doen van abandonnement'), the insured is also obliged to account to the insurer for what he has done to preserve or obtain the release of the property and to disclose which persons or correspondents he had instructed in this regard.

It is possible, of course, that the cost of the recovery or preservation of an insured ship is not an expense falling solely upon the insured in question and therefore not one to be borne in terms of art 283 by his insurer alone. It may be incurred to preserve not only the insured's property but also that of others involved in the adventure. In such a case, the expense would be in the nature of a general average loss which has to be borne by all those interested in the adventure and to be compensated by their insurers as a general average loss or expenditure. This is a factual question in every case.

1.6 Suing and Labouring in English Law

The earliest insurance policies in England in the sixteenth century contained a clause obliging the insured to take steps for the preservation of the insured property and entitling him, by way of inducement to comply with this duty, to recover the expense incurred in the process from the insurer. Early in the seventeenth century Malyres observed that it appeared plainly from all insurance policies that insurers gave their consent for the insured merchant to have the full power and authority, by himself or through his factors and servants, to take the steps necessary for the recovery of the goods, and that each of the insurers would contribute proportionally to

98 Thus, if the insurer refuses to advance such an expense, the insured can abandon immediately. See eg Ten Kate 40 and ch XIX § 2.2.1 infra as to when an insured may abandon. In the event of a dispute between the parties on the amount required to be advanced, it has to be determined by the Court (see art 665-2).

99 See art 665-3, repeating the general provision in art 283-2.

100 Thus see art 676.

101 Thus, in terms of art 701-4, the cost of recovery and maintenance and the salary of the crew during the process of recovery in the case of an arrest ('reclame-kosten en onderhoud en gagien van scheepsvolk gedurende reclame') is a particular average loss if only the ship or only the cargo has been arrested ('indien slechts het schip of de lading zijn aangehouden'); but if both ship and cargo are arrested and the master has incurred an expense to recover both ('indien schip en lading zijn aangehouden of opgebracht en beide door den schipper worden gereclameerd'), such an expense will be in the nature of general average. See again ch XV § 4 supra as to the difference between a particular and a general average loss or expense in the Wetboek van Koophandel.

102 See eg Birch Sharpe 411-412; Holdsworth History vol VIII at 284 and 290.

103 Consuetudo 1.28.
the expense incurred by the insured in this regard. He remarked, further, that compliance with this duty would not prevent the insured from subsequently abandoning and claiming on the policy.

By the middle of the eighteenth century Magens described the traditional clause permitting the insured to take steps for the preservation and recovery of insured property but noted that the equivalent clause in the model policy form appended to the Amsterdam insurance keur provided the insured with greater powers 'in a salvage' than did that in the London policy. The Amsterdam policy permitted the insured, when necessary, to sell the insured cargo saved and to distribute the proceeds, without the insurer's consent, and it further provided that the insurers would pay the expense incurred whether anything was saved or not, and that no objection could be made to the accounts given by insured on oath. All these features, it would appear, were not customary in London at the time.

The customary clause, which, by reason of its wording, became known in English law as the 'sue and labour' clause, also formed part of the Lloyd's policy when it was confirmed in 1779. The clause read as follows:

'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, safeguards, and recovery of the said goods and merchandises, and ship, etc, 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 insured.'

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104 Elsewhere Malynes Consuetudo 1.25 explained that 'by the Policie of assurance it is alwayes provided, That in case of any mistfortune, it is lawfull for him, his Factors or Assignes, or his Servants, or any of them, to sue, labour and travell for in and about the defence, safeguard, or recoverie of the goods, and any part thereof'. Likewise, later in the seventeenth century, Molloy De jure maritimo 11.7.15 explained that the insured was empowered by the policy 'to travel, pursue and endeavour a recovery (if possible) of the Adventure' after the occurrence of a loss for which the insurers were liable, 'the same being but a trouble to give ease to the Assurers'.

105 Essay vol I at 50. See also idem vol I at 90 from which it appears that London insurance companies and underwriters may have paid money in account or have advanced money for the institution of suits and the taking of steps to avert or minimise a loss, either in case of the reasonableness of the matter or upon a tender of proper security. It is uncertain, though, whether, like their Dutch counterparts, they could be compelled to do so.

106 See too Weskett Digest 20 sv 'Antwerp' who notes that in the policy in use at Antwerp there is a clause in terms of which insurers promise to pay all charges accruing for the preservation of the goods, 'whether any thing be recovered or not'.

107 The words 'sue, labour, and travel for' were used to explain the insured's duty: 'sue' meant 'to pursue' and not 'to institute legal proceedings', and 'travel' was a transliteration of 'travail', meaning 'to make laborious effort'. See Dover 302.
A 'waiver clause' was added in 1874 to make it plain that any compliance with this duty would in no way effect the insured's right to abandon and claim on the policy. It may be noted that like its Dutch counterpart, the sue and labour clause recognises no limitation of liability and imposes no condition of success for the recovery of an expense properly incurred.

A number of decisions in the nineteenth century clarified the clause further and as a result some codifying provisions came to be taken up in the Marine Insurance Act of 1906 on the topic of suing and labouring and, more specifically, on the sue and labour clause itself.

In dealing with this clause, s 78(1) of the Act provides that where the policy contains such a sue and labour clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the insured may recover from the insurer any expense properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss, or that the subject-matter may have been warranted free from particular average, either wholly or under a certain percentage. In terms of s 78(4), it is the duty of the insured or his agents, in all cases and therefore

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108 The 'waiver clause' provided as follows: 'And it is 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'. See further eg Birch Sharpe 412 (noting that the clause was introduced because of doubts as to whether or not the conduct of the insured could amount to a waiver of his right to abandon); and Hopkins 137-139.

109 Thus, the clauses are in effect not as different as may appear from the views of Magens and Weskett referred to earlier. According to Birch Sharpe 414-415, in the absence of such a clause, if there is no success, there is also no reimbursement of any expense. This unfairness is removed by the sue and labour clause which appears to have altered the law as to the requirement of a success.

110 There does not appear to have been any reported decision in which the clause was interpreted prior to the nineteenth century.

111 Unlike continental measures, the Marine Insurance Act deals with the clause, not with the topic it is concerned with or with the principles it embodies. As a result, suing and labouring and the relevant rights and duties of the parties are in English law exclusively a matter of contract and arise ex contractu, not ex lege. See eg Chalmers 125-126. The absence of a sue and labour clause in English law therefore has a rather different result than does the absence of a preservation clause in Dutch law.

112 That is, notwithstanding the fact that the insurers' liability will in total exceed the sum insured, which may eg be the case where the expense was incurred without any success.

113 In terms of s 64(2), expenses incurred by or on behalf of the insured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. Such particular charges, of which the expense recoverable under the sue and labour clause appears to be a species, are not included in particular average. In connection with s 78(1), s 76(2) confirms that where the subject-matter insured is warranted free from particular average, either wholly or under a certain percentage, the insurer is nevertheless liable for salvage charges and for particular charges and other expenses properly incurred pursuant to the provisions of the sue and labour clause in order to avert the loss insured against. Thus, the exclusion of the insurer's liability for all or some partial losses will not affect his liability for a suing and labouring expense. As to insurance 'free from particular average' in English law, see again ch XV § 7.3.4 supra, and note the different approach in Roman-Dutch and Dutch law (see ch XV §§ 7.3.2 and 7.3.3 supra).
even if there is no such clause, to take such measures as may be reasonable for the purpose of averting or minimising loss. Section 78(3) makes it clear that the expense incurred for the purpose of averting or minimising any loss not covered by the particular policy is not recoverable under the sue and labour clause. Furthermore, general average losses\(^{114}\) and salvage charges\(^{115}\) are according to s 78(2) also not recoverable under the sue and labour clause.

In English law too the parties are free, of course, to exclude some of the consequences flowing from the traditional sue and labour clause. It may be provided, for example, that the insured himself has to bear a proportional part of the expense in the case of under-insurance, or that the insurers’ total liability in terms of the policy, including the clause, will be limited to the sum insured.

2 Notice of Loss

2.1 General

Within a specific period after the occurrence of a loss falling within the ambit of the policy, the insured had to give his insurer notice of such occurrence. That notice was the starting point of the insured's claim under his policy against the insurer.\(^{116}\)

\(^{114}\) A general average loss includes a general average expenditure (s 66(1)), which is any extraordinary expenditure voluntarily and reasonably incurred in time of peril for the purpose of preserving the property imperilled in a common adventure (s 66(2)) and the party by whom it is incurred is entitled to a general average contribution from the other parties interested in that adventure (s 66(3)). Subject to an express provision in the policy, where an insured has incurred a general average expenditure, he may recover from his insurer in respect of the proportion of that loss which falls on him (s 66(4)) but must in respect of the other portion himself claim a contribution from the other interests involved. In the case of a general average sacrifice, the insured may claim in full from his insurer who then has the right of subrogation to claim a contribution from the other interests involved. See generally Chalmers 107-109. The same general position pertains in Dutch law. See Buys 113-115 and ch XV § 4 supra.

\(^{115}\) Salvage charges incurred in preventing a loss by a peril insured against may be recovered as a loss by that peril (see s 65(1)). If it is recoverable under the policy and not in terms of the sue and labour clause and there is accordingly no a supplementary obligation on the insurer in terms of that clause to pay salvage charges in addition to the sum insured; also, such charges can be added to the amount of the loss to calculate the franchise. In terms of s 65(2), a salvage charge is an expense recoverable under maritime law by a salvor independently of contract (and thus not by him as an agent of the insured). It does not include the expense of a service in the nature of salvage rendered by the insured, an agent or a person employed for hire for the purpose of averting a peril insured against. Such an expense, where property incurred, is recoverable either as a particular charge (under the sue and labour clause) or as a general average loss, depending on the circumstances under which it was incurred. The distinction between salvage charges and particular charges is not recognised in continental systems where the salvor is regarded as an agent of necessity. See further Buys 111; Chalmers 104-105; and Dorhout Mees Schadeverzekeringsrecht 376-378.

\(^{116}\) As to the notice of loss, see generally eg Hammacher 157-160; Mullens 93-94.
Although there was no clear and consistent difference in the terminology used,\(^{117}\) the notice of loss was in Roman-Dutch law distinguished, even if only notionally, from the notice of abandonment which was required in those cases where the insured was entitled and wished to abandon, that is, in the case of a total loss.\(^{118}\)

As will become apparent, the notice required from the insured was not merely a notice of the occurrence of an actual loss coming within the scope of the insurance cover and entitling him to institute a claim on the policy, but also a notice of information pertaining to circumstances which indicated that such a loss was imminent, even if at the stage of the notice there was no certainty yet of any actual occurrence as such. The notice of loss was therefore not inevitably also a claim for the payment of compensation for a loss.

As will appear from the legislative provisions which will be considered shortly, the notice of loss served several purposes. Because of the fact that he had taken over the risk of loss of or damage to the insured property, the well-being of that property was of as much concern to the insurer as it was to the insured owner. If a loss had occurred or was about to occur, the insurer could potentially be held liable to pay compensation for it. Even if a loss had not actually occurred yet or even if it should turn out that it never occurred, a notice by the insured of any casualty was required by the insurer because of his liability to compensate the insured for the expense the latter had incurred in averting or minimising a loss. But, more than that, the insurer was also in the latter case interested in the steps being taken to avert or minimise the loss and such notice served to enable him to take steps to that effect himself if he thought it necessary and worthwhile and if he was in fact permitted to take such steps. Mainly, therefore, the notice of loss or of an event which could give rise to a loss appraised the insurer of the circumstances which had given or could give rise to a claim against him and to his potential liability in terms of the insurance contract.

The notice of loss and/or of abandonment, as the case may have been, further fixed the date for the commencement of the statutory period within which the insurer had to pay the insured's claim\(^ {119}\) but not, it should be noted, the date for the commencement of the period within which the insured had to institute an action against the insurer to prevent his claim from becoming prescribed.\(^ {120}\) Also, in those instances

\(^{117}\) The following terms were used at various times for the insured's notice of loss: 'inthimatie' (in the placcaat of 1563); 'advertentie', 'inthimatie', 'notificatie', and 'certificatie' (in the placcaat of 1571); 'insinuatie' (in the Amsterdam keur of 1598); 'insinuatie' (in the Amsterdam amending keur of 1640); and 'advertentie' (in the Amsterdam amending keur of 1688, the Rotterdam keur of 1721, and the Amsterdam keur of 1744).

\(^{118}\) Where an immediate abandonment was permissible, the notice of loss and of abandonment were in practice combined. Where no immediate abandonment was permissible, separate notices of loss and abandonment were required. And if no abandonment was permissible at all (ie, in the case of partial loss), only a notice of loss was required. As to the notice of abandonment, see further ch XIX § 2.3 infra.

\(^{119}\) As to the time of payment in terms of the insurance contract, see ch XX § 2.2 infra.

\(^{120}\) Action had to be brought, according to the applicable legislative provisions, within a specified period after the occurrence of the loss or even after the conclusion of the contract. As to prescription, see further ch XX § 3 infra.
where an immediate abandonment was not possible but where the insured had to wait a specified period of time before he could abandon, the notice of loss fixed the date from which such period was calculated to run.\textsuperscript{121}

### 2.2 The Early Position

In the model policy prescribed in title VII of the placcaat of 1563, the insurers undertook to pay the insured within a specific period of time after having been properly notified of the damage or loss ('nae dat sy behoorlijk gheadverteert sullen wesen van 't verlies oft schade'). Further, in s 18 reference was made to this period as commencing to run when the insurer was properly notified of any damage to or loss of the insured ship or goods ('wanneer hy den Asseureurs 't perijckel otte verlies vanden gheasseureerden Schepe ofte goederen heeft behoorlijcken gheintimeert'). There is no indication in the placcaat what would have constituted a proper notification, how soon after the occurrence of the casualty it had to be given, and if it had to be given in any particular form.

Earlier legislative measures in the Low Countries did not contain a similar formal requirement of notification. Thus, the placcaat of 1537 had merely required payment by the insurer within a specified period of time after the occurrence of the loss.\textsuperscript{122}

The innovation introduced by the placcaat of 1563 was retained in the placcaat of 1571. In terms of the prescribed policy form, the insurer declared himself bound to make payment within a specific period of time after having been properly notified of the damage or loss, as provided for in the placcaat ('nae dien hy vande schade oft verlies behoorlijkcken geadverteert sal zijn, na uytwijzen van onse voorseyde Ordonnantie'). In s 23 it was provided that insurers had to pay the insured within a specific period of time after having been properly notified of the damage or loss ('t'sedert dat die intimatie, notificatie oft certificatie vande schade oft verlies, hen behoorlicken gedaen sal wesen'). Again no formalities or other requirements for such notification were laid down in that section or elsewhere in the placcaat and the reference to the provisions of the placcaat in the relevant clause in the model policy therefore seemingly did not refer to the method of such 'proper' notification but rather to the payment by the insurer. It is very likely, though, that the notice of loss may in practice as a rule have been given

\textsuperscript{121} As to the circumstances under which a delayed abandonment was permissible and the periods after which the insured could then abandon, see ch XIX § 2.3 infra.

\textsuperscript{122} See Goudsmit Zeerecht 248. In Barcelona too there was at first, in terms of its Ordinance of 1435, no express duty on the insured to give any notice to the insurer and the period within which the insurer had to pay commenced from the time when news of loss or damage arrived in the city. Only in the Ordinance of 1484 was a duty pertinent placed on the insured to notify his insurer and was it no longer assumed that the arrival of news in the city amounted to notice to the insurer. See Reatz Geschichte 140.
notarially, and evidence to support this possibility appears from both the middle\textsuperscript{123} and the end\textsuperscript{124} of the sixteenth century.

Not surprisingly the insured's duty of giving notice to the insurer of a loss or a potential loss was also recognised in customary insurance law. Article 258\textsuperscript{125} of the Antwerp \textit{Compilatae} of 1609 stated that if the insured wanted to claim for a loss or damage and had received news or information of such a loss or damage, or if after the passage of time the ship or goods were presumed to have been lost, he had to notify the insurers immediately or at least within three working days after he had received the news himself ('soo moet men terstont, oft binnen den derden werckdach naer den adviesen oft verloop van tijde, daeraff de wete doen aan de versekeraers'). This was an important indication of when the notice had to be given and also of the fact that the notice was required not only of an actual loss but also of a presumed loss of a missing ship or cargo.\textsuperscript{126}

2.3 Increased Sophistication in the Seventeenth Century

In both the policies appended to the Amsterdam \textit{keur} of 1598 insurers again undertook payment of compensation within the statutorily required period of time which commenced after they had been properly notified of the loss or damage ('naer dat wy behoorlick geadvertete sullen zijn van 't verlies ofte schade').

\textsuperscript{123} Thus, De Groote 'Zeeverzekering' 207 describes the procedure followed in Antwerp in the 1540's to notify insurers of the loss of insured property. A notary, accompanied by one or more witnesses, went to the house or the place of business of the insurer and gave him notice ('intimatie of aanzegging') of the loss, claiming from him payment of his proportion of the sum insured according to the terms of the policy. This claim was accompanied by a declaration of abandonment. Not only in doubtful cases but almost invariably the insurer merely responded that he would reply to the notification after he had investigated the matter or seen proof of the loss, after which he would pay according to the policy. The insurer also requested that his reply be added by the notary to the notarially executed notification (responses such as 'lck hoore', 'lck zal der mij op beraden', 'lck antwoorde daer niet op', or 'lck regulere mijn na de police' appear in sixteenth-century notarial deeds of this nature: see eg Sneller 117).

\textsuperscript{124} De Groote 'Polissen' 160-161 refers to the notarial records of an insurance of goods on a voyage to Spain in terms of two Antwerp policies from 1594. The arrest and detention of the goods in Spain as having come from Zeeland, whereas they were in fact from Antwerp, caused the insured to appear before an Antwerp notary to give notice of the detention to the insurers and to ask from them whether they wanted to send a representative to Spain to protest the detention and to attempt to obtain a release of the insured goods. The insurers, however, unanimously declared 'de intimatie niet willen aanthoren, noch er op te antwoorden', and this was noted on the notarial deed. Four months later the insured appeared before the same notary and declared that the insurers had failed to appoint a representative as he had requested. He indicated that he would at an appropriate time claim the sum insured from them. The notary notified the insurers of this and it appears that the insured later instituted action on the policy in the Antwerp Schepenen Court.

\textsuperscript{125} Of par 8, title 11, part IV (see De Longe vol IV at 306).

\textsuperscript{126} It seems the notice of loss (but not pertinently of an accident or occurrence which could give rise to a loss) also had to be given as soon as such loss was presumed, something which occurred if for a specified period of time no news was received of the insured ship or goods. See again ch XV § 6 supra. It seems further that there was no duty to give notice of the absence of news about the insured ship or goods prior to the time when that absence of news gave rise to a presumption of loss.
Section 28 of the keur now provided in more detail than before for the notice of loss. It laid down that generally all insured were bound to notify ('te doen insinueeren') all insured to notify ('te doen insinueeren') the majority of the insurers resident at the place where the insurance was concluded ('t meerendeel vande Verseeckeraers die in loco zijn, daer de assurantie geschiet is') of the reports or information ('d'advertentien') they may have received of accidents or occurrences, and of arrests of or damage happening to the insured ship or other goods. Such notification ('insinuatie') now had to be given formally through a broker or other public persons ('publijcke Persoonen') who had to keep a record ('notitie') of it.127

Therefore, the practical problem of giving notice to several underwriters residing in different venues was now solved,129 while it was now also provided, no doubt to alleviate any problems of proof and to prevent disputes on the matter, that formal notices were required in the insurance context.130 It was also made clear that a notice was required not only once an actual loss (in strict legal terms) had taken place or materialised, but also of any occurrence which could give rise to such a loss.

Furthermore, the notice of loss was important because it fixed the commencement of the period after which the insured could abandon in those cases where only a delayed abandonment was permissible. In terms of s 8 of the Amsterdam keur of 1598, in those cases where an immediate abandonment was not permissible,131 the insured had to wait for a specified period of time before he could abandon the insured property.
to the insurer. That section provided that this period was to commence from the time when the majority of insurers resident in the place where the insurance was concluded ('t meerendeel vande Verseecheraers die in loco zijn, daer de Asseurantie gemaect is'), had been notified by brokers or other public persons of the occurrence in question ('vande gelegentheyt sullen hebben veradverteert, ende insinuatie gedaen').

However, it appears that the system in Amsterdam whereby the notice of loss as well as other notifications in the insurance context had to be given through brokers, notaries, and other public persons, was not satisfactory. The matter came to be addressed by the local Legislature in 1640. The problems were identified in the Amsterdam amending keur of 25 January of that year. First, many notaries and brokers, by reason of their inexperience in insurance matters, and in direct contravention of the applicable insurance laws, made serious mistakes and committed abuses in the giving of the various required notifications. Secondly, others, instructed by their principals ('gelast sijnde van hare Meesters') to give the required notice to their insurers, failed to do so properly ('in gebreke blijven sulcx na behooren te effectueren'). And thirdly, many notaries and brokers were scared ('bevreest sijn') to convey the bad news of loss or damage to the insurers whom they had a but short time ago solicited to underwrite the policy. These problems had the result, the keur continued to explain, that many insured and merchants, without any fault on their part, were not only out of time ('verachtert warden') in important cases but also suffered great losses. Accordingly, the keur provided that in future all notifications of loss and of abandonment and all authorisations ('alle Abandonnement, Insinuation ende Authorisation') in insurance matters would be done, processed or executed ('gedaen, gepasseert ofte geexploiteert') solely through the Secretary and Messenger of the Insurance Chamber ('al/een by den Secretaris ende Bode van de Kamer van Asseurantie') who were fully authorised by the keur to perform those functions. All notaries, brokers and all other persons were expressly prohibited from performing those functions and were not to allow themselves to be employed for that purpose, on penalty that all their deeds ('Acten') would be held null and void and not justiciable ('ende daerop geen Recht sal worden gedaen').

Thus, the Amsterdam Legislature hoped, the involvement of the Secretary of the Chamber, who was appointed for his knowledge of the insurance contract and insurance practices, in the serving of notices with the assistance of his Messenger, would eliminate the problems which had been experienced.

In the model policies taken up in the Amsterdam amending keur of 1688, the insurers still undertook to pay within the required period of time after the proper

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132 See eg Van Zurck Codex Batavus sv 'Assurantie' par 20.

133 That is, the notice of abandonment and the authorisation to take steps to avert or minimise loss.

134 The keur referred to 'i instellen van Abandonnementen, Insinuation ende Authorisatien'.

135 See again ch IV § 1.4.2 supra.

136 As to the keur of 1640, see Goudsmit Zeerecht 328; Vergouwen 44-45.
notification of loss or damage ('na dat wy behoorlijk geadverteert sullen zijn van 't verlies of schade').

In the Amsterdam amending keur of 24 January 1701, the keur of 1640, which was not observed as it should have been,\textsuperscript{137} was repeated, and in addition provision was made for a fine of f25 for those contravening the prohibition ('by Contraventeurs, van dien t'elken reyse te verbeuren, de boete te appliceren als na rechten').

An opinion requested in 1694\textsuperscript{138} illustrates that the insured had a duty to notify the insurer not only of an actual loss which may have occurred but also of any other occurrence or accident ('ongelukken' in terms of § 28 of the keur of 1598) which could give rise to or make the materialisation of such a loss more likely. It also addressed, for the first time, the practical consequences of the insured's failure to give the required notice to the insurers, a matter not yet legislatively provided for.

In this case a ship was insured on condition that she sailed with a convoy.\textsuperscript{139} After her departure, she became separated from her convoy in a storm and was compelled to return to her port of departure. The insured received news of this occurrence but did not communicate it to the insurers. The ship was captured by a privateer when, after having stayed in the port of departure for a month, she departed without a convoy. The view expressed in the opinion was that the insurers were not liable for the loss of the ship. One of the reasons, apart from the failure to comply with the undertaking to sail with a convoy, was the insured's failure to give the insurers notice of the occurrence of the accident in question. It was pointed out that there was no doubt in practice as to the duty to notify insurers of any accident befalling the insured ship or goods so as to enable them to take steps or to ensure that steps were taken to prevent the occurrence of a loss or of a greater loss, and also with a view to their obtaining reinsurance.\textsuperscript{140}

Here the insured had not notified the insurers that the ship had become separated from her convoy and had to return to port. Furthermore, he did not notify them that no further convoy was available there or that he or the master did not intend waiting until another convoy was formed before they would sail from there.\textsuperscript{141} As a result of

\textsuperscript{137} Presumably brokers and notaries still involved themselves with notifications.

\textsuperscript{138} See Nederlands advysboek vol IV adv 198.

\textsuperscript{139} As to this, see again ch XIII § 2.3.2 supra.

\textsuperscript{140} It was trite, the opinion stated, 'dat alle rampen, die een geassureerde of sijn Schip of goed overkome, aan de respective assuradeurs moeten worden gecommuniceert, op dat Zy tot voorkoming van meerder schade soude mogen toeschieten [?] zich snel ergens heen begeven; toekomen met een geldsom; op dat Zy sig voor de toekomende reassurantie praecaveren'. Reference was made in this regard to Grotius \textit{Inleiding} III 26.30, § 28 of the Amsterdam keur of 1598, and § 21 of the Middelburg keur of 1600.

\textsuperscript{141} 'D[at] ter voorsz plaatse geen convoy verder en soude sijn geweest, of dat hy of sijn Schipper niet genegen en soude sijn geweest enige ander convoy af te wachten, om daar mede sijn reyse te vervoereren'. Although it is clear that a notice was required of an actual loss or of an accident which could lead to such a loss, there is no direct legislative support for the broader duty which the opinion appears to suggest here, namely a duty to inform the insurer of any increase in the risk generally.
his failure, the advocate delivering the opinion pointed out, the insured was obliged to compensate the insurers for all the damage they had suffered as a result of not being notified (‘de geassureerde als dan egter aan de assurateurs soude moeten beteren de schade door die non advertensie geleden’). In this case, that was in effect the amount the insured now sought to recover from the insurers, for if the insurers had received notice of the relevant state of affairs (‘de voorz gestaltenisse van zaken’), they could, whether by reinsurance or otherwise (‘het zy by reassurantie of andersints’), have avoided that damage. Put differently, had they been notified, they would have been in a position where they could have avoided having to pay out on policy without having a recourse upon reinsurers.143

2.4 The Position in the Eighteenth Century

In the policies prescribed by the Rotterdam keur of 1721, the insurers undertook to pay within a stated period of time after they had been properly notified of the loss or damage (‘na dat wy behoorlyk geadverteert sullen zyn van het verlies of schade’).144

In the model polices appended to the Amsterdam keur of 1744, the insurers, like before, undertook to pay within a specific period of time after having been properly notified of the loss or damage (‘na dat wy behoorlyk geadverteert sullen zyn van ’t verlies of schade’).145

In terms of s 36 of the keur of 1744 the insured was obliged to give, through the local Insurance Chamber, a notification (‘advertentie’) to his insurers of all information (‘van alle tydinge’) he had received of the insured ships or goods as regards accidents, arrests or damage occurring in connection with it (‘wegens de Ongelukken, Arresten, of Schadens deselve aan- en overgekomen’). From such notices (‘van welke Adverten cien’) the Secretary and Messenger of the Chamber had to extract authenticated

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142 See again ch VII § 4.2 supra as to reinsurance proper. The opinion under discussion was also considered in that context.

143 Thus, in the case of a failure to give notice, the insured was liable to the insurer for any loss caused by such failure. In this instance the failure had caused the insurer not to take any steps to shift the risk of having to make a payment in terms of the policy onto another insurer by way of reinsurance, something the opinion assumed the insurers here would invariably have done on receiving the required notice. In consequence the insurers’ damage was considered equal to the insured’s claim on the policy. (Of course, that is not quite correct, for the insurance premium, which had to be deducted from the insurer’s damage, would in this case not have been equal to the reinsurance premium which the insurers would have had to pay a reinsurer, given that reinsurance would of necessity have had to be concluded after the departure and ‘on good or bad tidings’.) Thus, if the insured’s claim on the policy and the insurers’ counterclaim for damages were set off, the insured in effect had no claim against the insurers for any loss of the insured ship.

144 There was nothing on the topic in the Rotterdam keur of 1604 which, at least in the version reproduced in the GPB, also did not contain any model policies.

145 In the hull, cargo and package policy payment was undertaken within a specified period after notification, but in the fire policy the insurers undertook to pay within a specified period of time after the occurrence of the fire and a proper notification (‘naar dat de Brand zal zyn voorgevallen, en ons behoorlyk zal zyn geadverteert’).
copies ('Copyen Authentiq') from the original of the letters ('uyt de origineele Brieven')146 and provide it to the insurers, if the latter so required and were prepared to pay the cost involved. Again, therefore, a notice was required not only of the actual occurrence of a loss within the scope of the policy, but also of facts and incidents indicating a possibility of such a loss materialising.147

Legislative provision was now for the first time also made for the consequences of the insured's failure to give a notice or to give a proper notice of loss, a matter only addressed in the opinion of 1694. Section 36 provided that when it was found that the insured had failed to give or was negligent in the giving of such a notice to his insurers, he would be liable to compensate them for all expense, damage or interest caused by his failure ('zullen zij gehouden zyn aan dezeelve te vergoeden, alle de Kosten, Schaden en Intresten, door deze hunne Negligentie veroorsaakt'). Such compensation was to be determined according to the discretion and decision of the Commissioners of the Chamber with reference to the circumstances of each case. The insured seemingly did not lose his action against the insurers, at least not according to the formal legislation on the matter,148 although the amount of the insurer's damage may in a given case have been equivalent to the amount of the insured's claim and may thus in practical terms have reduced it to nothing.

A matter still not pertinently provided for in the legislative measures, was when exactly an insured had to give such notice to his insurers. It is probable, though, that in practice149 he had to do so as soon as was reasonably possible after he himself had

145 Presumably the letters containing the information of which notice was given.

147 As to s 36, see eg Lybrechts Koopmans handboek V.86; Van der Keessel Theses selectae th 758 (ad III.24.14) (the insured must communicate all information he may have received of any loss, either already sustained or [merely] imminent, in respect of the insured object). Van der Keessel also remarked (Praelectiones 1471-1472 (ad III.24.14)) that in terms of s 36 the insured had to notify his insurers of all news received as to any casualty, arrest or damage the insured property may have suffered, together with a submission of authenticated copies of the letters he received should the insurers so demand and at their expense. However, this seems an incorrect reading of s 36. The letters had to accompany the insured's notification (see S 3 infra as to proof of loss) which was given to the Chamber which, in turn, notified the insurers, and copies of the letters and other documentation were made (at the request and cost of the insurers) by officials of the Chamber. See also Van der Linden Koopmans handboek IV.6.8 who also incorrectly refers to s 36 for the view that, if so requested, the insured had to provide copies of all the information he had received. Also off the mark is the view of Goudsmit Zeerecht 352-353 that in terms of s 36 the insured had to give notice and, if so required (by the insurers?), had to provide a copy, made by the Secretary and Messenger of the Chamber.

148 See however Scheltinga Dictata ad III.24.14 sv 'der verzeeckeraers, etc' who referred to an 'aanteekening van goederhand' [?] to the effect that at the chambers of insurance it was often understood that the insured, if he had failed to give notice, lost his action against the insurers. It is uncertain whether Scheltinga was referring to the position in the time of Grotius or in his own time. He also spoke, however, of the insured's failure to give notice through public persons such as brokers, something which was prohibited, at least in Amsterdam, from 1640 onwards, so that he may in this regard well have been referring to the position at an earlier time.

149 As confirmed earlier by the Antwerp Compilatae of 1609: see § 2.2 supra.
become aware of the loss or accident; the later the notice, the greater the prejudice or the less the advantage of it to the insurer.\textsuperscript{150}

In the \textit{keur} of 1744 the notice of loss to the insurer was also again pertinently linked to the notice of abandonment.\textsuperscript{151} Section 26 provided that where immediate abandonment was not permissible but only a delayed abandonment, the specified period of time which the insured had to wait commenced after the insured had, through the Messenger of the Chamber who was to serve it (\textit{`die het exploit sal doen'}, notified (\textit{`geadverteert'}) the majority of the insurers resident in the place where the contract was concluded, of the position (\textit{`toestand'}).\textsuperscript{152} More specifically, it commenced on the day of such notification (\textit{`met den dag van de Intimatie'}). In terms of s 27, where an immediate abandonment was possible, the insured could prosecute his claim immediately, although only after he had notified the majority of the insurers of the loss and the abandonment (\textit{`dog alvoorens als boven [in s 26], het meerder gedeelte van de Assuradeurs daar van moeten adverteeren'}).

In the Amsterdam amending \textit{keur} of 1756, s 36 of the \textit{keur} of 1744 was restated and reinforced. After a verbatim repetition of s 36, the amendment in essence repeated the measures earlier provided for in the \textit{keur} of 1640 and restated by the \textit{keur} of 1701\textsuperscript{153} on the way in which the notice of loss (and the notice of abandonment and the authorisation) in matters of insurance had to be given, that is, exclusively through the Secretary and the Messenger of the Chamber and with the exclusion of the involvement of any notary, broker or other person.\textsuperscript{154}

Finally, it would appear that a formal notice of loss was only required (or at least only pertinently provided for by way of legislation) in Amsterdam, the other municipal

\begin{footnotes}
\footnotetext[150]{La Leck \textit{Index} sv 'Insurance'; \textit{idem Register} sv 'assurantie' referred to the opinion of 1694 as authority for the statement that the insured had to inform the insurer immediately and without any delay of any accident or loss of which he became aware. That point, however, was not pertinently made in the opinion and is at most implicit from it. Van der Linden \textit{Koopmans handboek} IV. 6. 8 noted that such notice had to be given immediately and without delay, although there is no express authority for this statement in the applicable legislation to which he referred, viz s 36 as amended. See also Kohler 526 (the insured's duty in terms of s 28 of the \textit{keur} of 1598 was to give immediate notice).}

\footnotetext[151]{See further ch XIX § 2.3.8 \textit{infra}.}

\footnotetext[152]{Presumably, he had to notify them of the facts which justified the delayed abandonment.}

\footnotetext[153]{Seemingly those measures were still not satisfactorily complied with. Quite possibly the formalities involved were unacceptable in practice. However, it does appear from archival records that in the eighteenth century the Amsterdam Chamber was involved in giving notices of loss to insurers and in recording their replies to such notices, in much the same way as brokers and notaries were lawfully involved prior to 1640 and unlawfully thereafter. In the \textit{Archief van de Assurantiemeesteren} in the Amsterdam Gemeente-Archief, there are contained volumes entitled \textit{`Authorisatien van Assuradeuren'} dating from 1701-1810 (in inv 2925-3050 in Archief 5061 (RA)). They include notices of loss on which there is recorded by the Messenger of the Chamber that the notice in question had been given and also what the insurers' reply to it was.}

\footnotetext[154]{See Van der Keessel \textit{Praelectiones} 1471-1472 (ad ill. 24. 14) (referring to the need for the provision of information, abandonment or notification (\textit{`certioratio, derelictio vel denuntiatio'}) to take place through the Chamber); \textit{Goudsmit Zeerecht} 353.}
\end{footnotes}
laws, except for the Middelburg keur of 1600, being silent on the topic. However, a custom to the same effect may well have been followed elsewhere.\textsuperscript{155}

2.5 Notice of Loss in the Wetboek van Koophandel and in English Law

Provision is also made in the Wetboek van Koophandel for the insured to give the insurer a notice of loss. In terms of art 283-1, subject to any specific provisions made as regards particular types of insurance, an insured is obliged immediately after the occurrence ('ontstaan') of a loss to give the insurer notice of it, on penalty of having to compensate the latter for his expense, damage and interest in appropriate cases ('zoo daartoe gronden zijn').

This is generally confirmed in respect of marine insurance in art 654-1 which is but an application of the principle contained in art 283. It provides for a notice to be given without delay ('onverwijld') to the insurer, or if several had underwritten the same policy, to the first or leading underwriter, of all reports or news ('tijdinge') the insured has received of an accident which has happened to the ship or the goods. The insured also has to pass on to those of the insurers who may so request, copies or extracts of the letters in which such reports are contained. In terms of art 654-2, a failure in this regard renders the insured liable to compensate for all expense, damage and interest which the insurer may suffer as a consequence.\textsuperscript{156}

Apart from the disappearance of earlier formalities, the Roman-Dutch ancestry of these provisions is abundantly clear.\textsuperscript{157}

In English law, it would appear, there is no general legal duty on an insured to give the insurer any notice of loss as distinct from a notice of abandonment and of a constructive total loss.\textsuperscript{158} Such a duty therefore arises only from a contractual term imposing it, a term which is now commonly inserted in insurance contracts. Interestingly enough, the Lloyd's SG policy, unlike its Continental counterparts, contained no provision as regards any duty on the insured to give his insurer a notice of loss.

\textsuperscript{155} Thus, Van der Linden Koopmans handboek IV.6.8 noted that the insured had to give notice through a broker or some other public person, eg at Amsterdam through the Secretary and the Messenger of the Chamber. In Hamburg, notification of loss continued in the eighteenth century to be given through notaries who drew up a formal deed of the reported news received by the insured. See eg Hammacher 159-160; Kiesselbach 116-117.

\textsuperscript{156} See Faber Aanteekeningen 61 who draws attention to the fact that while the penalty for non-compliance with the duty here is the compensation of the resulting detriment suffered by the insurer, in terms of some other legal systems (eg Austrian law) such failure is penalised with a loss of the whole claim on the policy, 'welke bepaling', he notes, 'vrij hard is'.

\textsuperscript{157} See further Dorhout Mees Schadeverzekeringsrecht 379-382; Enschedé 114.

\textsuperscript{158} See Rankin v Potter (1873) LR 6 HL 83 (HL) at 103.
3 Proof of Loss

3.1 Introduction

The insured's notice of loss, or at least his subsequent claim against the insurer, had to be accompanied by the necessary proof of the occurrence of an event insured against and a resulting loss or damage.\footnote{As to the causal requirement, see again ch VI § 1 \textit{supra}.} Despite this very basic requirement, though, Roman-Dutch law appears not to have been overly troubled by the procedural ramifications of this requirement. At least information on this topic from insurance sources occurs patchily. One reason for this may have been the fact that proof of a maritime loss and the attendant evidentiary problems were not peculiar to the insurance contract and was a topic more generally treated in the maritime codes, especially in connection with general average losses as well as with maritime and bottomry loans.

Of course, the insured had to prove not only the occurrence of a loss by a peril insured against, but further also the extent of the loss he suffered as a result of the loss of or damage to the object of risk. Although closely related and often proven simultaneously and by identical evidence, proof of the amount of the loss to the insured property and of the amount of the loss to the insured himself, will for the sake of convenience be treated in conjunction with the principle of indemnity and the determination of the value of the object at risk.\footnote{See ch XVII § 4 \textit{infra}.}

3.2 The Position In Roman-Dutch Law

Although a record of an early insurance dispute in the Low Countries indicates that an insurer was permitted to bring evidence of the circumstances of the loss which would entitle him to refuse payment in terms of the policy,\footnote{The brief record, which is not in all respects clear, is of proceedings before the \textit{Groote Raad} at Mechelen on 26 February 1475 in an appeal against a decision of the \textit{Schepenen} Court of Bruges in the case \textit{Alonso de Couvres} [a Spanish merchant] \& \textit{Lazarre Lomein} [a Genoese merchant at Bruges] \textit{v} \textit{Alvaro Denis} \& \textit{Antoine Fernando} [Portuguese merchants at Bruges]. The \textit{Court a quo} had decided that the defendant insured would have to allow a particular witness to be heard in the investigation of the circumstances under which merchandise, belonging to the defendants and insured by the plaintiffs, was captured in the Spanish port of Laredo. (It seems the insurers were attempting to prove that the loss had occurred in circumstances which would exclude their liability.) Although the appeal was held to be well founded (i.e. that there was sufficient reason to have brought it) the decision \textit{a quo} was maintained. See \textit{De Smidt} \& \textit{Strubbe} \textit{GR Mechelen} vol I at 116-117. In further proceedings before the \textit{Groote Raad} on 8 May 1475 between the same parties (now referred to as \textit{Alphonse de Coenas} \& \textit{Lazaro Lommelin} [from Portugal] \textit{v} \textit{Alvaro Denis} \& \textit{Antoine Fernande} [from Portugal] on a related matter, the \textit{Raad} again heard an appeal against a decision of the \textit{Schepenen} in Brugge. The plaintiff insurers had refused to pay the insurance money ('verzekeringsspanningen') to the defendant insured for the insured ship which had been plundered in Laredo. The insurers offered evidence by way of witnesses and were absolved from the obligation to pay. See \textit{De Smidt} \& \textit{Strubbe} \textit{GR Mechelen} vol I at 164.} it appears to have been
generally accepted that it was the insured who bore the burden of proving the occurrence of the loss. This was recognised and provided for in the first general insurance regulation in the Low Countries. Section 18 of title VII of the placcaat of 1563 specifically enacted that the insurer would not be liable for any provisional or final payment unless the insured’s notice of loss was accompanied by proper documentary evidence or witnesses to establish the casualty and the loss (‘deuchdelijke certificatie ofte ghetuygenisse van ’t pericel ende verlies’) as well as of the nature and the value of the insured property. The placcaat did not say what such proper evidence would be, but Straccha, for example, had explained earlier that although technicalities in evidentiary matters between merchants had to be rejected, there nevertheless had to be legitimate and conclusive proof of the loss or damage.

The need for proper and conclusive proof was obvious. The loss or damage for which the insured sought to claim on the policy most often occurred in circumstances and in a location which could not subsequently satisfactorily be investigated by the insurer to ascertain whether or not there had in fact been a loss or damage as was alleged by the insured; and, further, if such a loss or damage had occurred, whether it had not been caused under circumstances which would relieve the insurer of liability, such as, specifically, through the conduct of the insured himself.

While there were apparently very few other legislative measures to allude to the proof of the occurrence of the loss, two did appear in the Amsterdam keur of 1744. Section 36 obliged the insured to give notice to his insurers of all information he had received with regard to the fate of the insured ships or goods. The original of the letters containing such information, and which could confirm the occurrence of the alleged loss or accident, had to accompany such a notice. The other legislative measure which directly mentioned the need to prove the occurrence of the loss, was s 19 of the keur of 1744. It dealt with insurances on bottomry and what the insured lender had to prove in the event of a loss or casualty (‘in cas van Schaade, ’t zy verongelukken, neemen, aanhouden van Vrienden of Vyanden, en het vermissen van ’t Schip’). It provided that the insured had to prove nothing more than the occurrence of a loss or casualty affecting the ship (‘[sal den Verseekerde] geen ander bewys behoeven aantetoonen, als alleen ’t ongeluk aan ’t selve Schip overgekomen’), as well as the existence or conclusion of the bottomry bond to establish his interest in the ship.

By contrast to the dearth of information on this topic in the official insurance legislation, the compilation of Antwerp customary law produced in 1609, the Com-

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162 See again § 2.2 supra.

163 See Goudsmit Zeerecht 248.

164 De assecurationibus XXVIII.1.

165 See again § 2.4 supra as to the notice of loss.
pilatae, contained a number of provisions\textsuperscript{166} which throw some light on practices at the time.

For a successful claim on any insurance, for example, it was necessary for the insured to produce proper evidence of the loss of the ship or that the insured goods had been captured, destroyed or damaged ('dat men brenge behoorlijke attestatie van dat het schip verloren is, oft dat de versekerde goeden ende [oft] coopmanschappen genomen, te niet gegaen oft beschadicht zijn'), together with a declaration of the place and time of that loss or damage, in so far as that was known.\textsuperscript{167} Depositions had to be taken of foreign and impartial persons who may have had the best information regarding the loss or damage and who could provide explanations, whether because they were at the place or in the vicinity of the place where the loss or damage had occurred, or because they were on board at the time.\textsuperscript{168} Similar depositions - although they may have had a lesser value in a court of law - had to be produced of those who were connected with the ship, starting always with the passengers, if there were any, and if not, the members of the crew ('schiplieden') who were employed on board for a salary or who otherwise had no interest in the freight, and failing the one or the other, of other members of the crew ('schipvolck') with an indication always of their capacity, that is, 'oft het schipvolck op loon gedient heeft ofte niet'.\textsuperscript{169}

Special provision was made if the insured wished to claim in the case of the disappearance of the ship.\textsuperscript{170} In addition to the policy, and the bill of lading, receipt or valuation (these to establish the extent of his loss), he had to produce three separate depositions, one from the place of departure, the second from the place of discharge, and the third from the place where the master lived. These depositions had to establish that not in any of these places had any news of the ship or her cargo been received.\textsuperscript{171} They had to be taken from those who could give the most reliable information, namely, at the master's residence, his wife, children, relatives and friends, and also from the owners of the ship themselves.\textsuperscript{172}

\textsuperscript{166} Articles 269-273 of par 8, title 11, part IV (see De Longe vol IV at 310-312) concerned the proof of the occurrence of the loss; arts 260-268 dealt with the proof of the value of the insured property and will be considered in ch XVII § 4.4 infra.

\textsuperscript{167} Article 269. In terms of art 308 (see De Longe vol IV at 326-328), an insured who wished to claim on an insurance policy on bottomry had to establish by proper 'attestatie' that the ship, 'daerop de bodemmerije is gesteit', was in fact lost or otherwise so damaged 'dat hij daerop zijn verhael niet en can hebben'.

\textsuperscript{168} Article 270.

\textsuperscript{169} Article 271.

\textsuperscript{170} For a period longer than two years after her departure: see again ch XV § 6.2 supra as to when a loss could be presumed in the case of such disappearance.

\textsuperscript{171} Article 272.

\textsuperscript{172} Article 273.
One of the ways in which the insured could prove the loss and the circumstances in which it had occurred, was by relying on the affidavits or protests ('scheepsverklaringen') customarily made by the master, officers and crew of the ship involved as soon as possible after their arrival in a port after a casualty at sea.\(^{173}\)

An opinion in 1681\(^{174}\) alluded to the weight attached in Roman-Dutch law to the evidence of the master and the crew of the ship involved, given that their impartiality may not always have been beyond doubt. The view was expressed that the evidence or depositions of the master and even of sailors on behalf of their employees ('meesters') had to be given weight notwithstanding the fact that such evidence was legally referred to as 'domesticum testimonium'. The reason was that facts and events occurring at sea could not be proved otherwise than by the depositions of those who had sailed with the ship.\(^{175}\) This position, it may be noted in passing, was not unique to Roman-Dutch law.\(^{176}\) The opinion recognised further that insurers may have wished to allege that witnesses were bribed or corrupted to give the evidence or make the declarations that they did. However, because corruption, fraud and falsity ('corruptien, frauden en fal-
were not presumed against honest men, insurers who wished to allege this had to prove such corruption, fraud and falsity, and such proof had to be express, clear and specific and not by way of presumption ('hetzelve bewijs moeten gedaan worden, niet door of met presumptien, maar uytdukkelyk, klaarlijk, en specifique').

Roman-Dutch authorities from the eighteenth century add further bits of information to this picture. It appears that the list of possible documents and proofs which an insured had to submit could be quite extensive.\(^{177}\) The insured had to bring his claim within the four corners of the relevant insurance contract and its terms,\(^{178}\) and if he could not prove the occurrence of an accident to the ship, he could not recover on the policy.\(^{179}\) Finally, Van der Linden recognised that the insured had to give the insurer proper notice and proof of the occurrence of a loss or an accident to the insured property.\(^{180}\)

In English insurance practice, where the insured also had to notify his insurers of the occurrence of loss or damage, even formally through the Office of Assurance if he wished,\(^{181}\) the insurers could require from him any number of proofs of and in connection with the loss. These included a so-called protest, which was a sworn affidavit, usually made by the master and others on board, before a court, notary or consul at the place where they first arrived on land after the occurrence of a loss, and which set out the nature of the casualty and the circumstances under which it had occurred.\(^{182}\)

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177 See Van Zurck Codex Batavus sv 'Assurantie' par 28 n1 who explained that from the insured's claim there had to appear 'bon in rerum natura su/sse, de facture, rekening, cognossementen, advis-brieven, verklaringen, tol-briefen, of diergelyken, met naem van den schipper, de gehouden cours in de reis, 't nemen van vyanden, of roovers, of afloopen door eigen volk, of vergaen, etc. ex supra dictis & adductis'.

178 See Decker Aanteekeningen ad IV.9.10 n(4)/(d) who stated that 'de rechts aanspraak conform de Police moet zyn ingericht, en tot het bedongene strekken'.

179 See Bynkershoek Quaestiones juris privati IV.12, referring to a case before the Hooge Raad in 1723 (idem Observationes tumultuariae obs 1916) from which it appears that the insured had not proved 'of het schip verongelukt was of niet'.

180 Koopmans handboek IV.9.10.

181 See Malynes Consuetudo I.28.

182 See generally Magens Essay vol I at 87-89, who makes the point that in some places the master was obliged in the case of an accident to make such a protest, as a result of which the practice sometimes arose that if the master did not make such a protest immediately upon his arrival, he would, if not be held liable for the loss, at least be presumed to have caused it. This in turn gave rise to the notion that the making of a protest freed the master from all liability, not only in the case of an accidental loss but even if he was at fault. See too Forte 408-410 on the role of protests in substantiating claims on insurance policies.