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

VOLUME I

by

JOHAN PETRUS VAN NIEKERK

submitted in accordance with the requirements for the degree of

DOCTOR OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

PROMOTER: PROFESSOR WJ HOSTEN

JULY 1997
SUMMARY

This study traces the development of the principles of insurance law in the Netherlands from 1500 to 1800. In the first part the origin of the insurance contract and its recognition and distinguishing features, and its classification and definition in pre-codified Dutch law are described. The adjudication of disputes arising from insurance contracts and the jurisdiction of Dutch courts in this regard are also considered.

In the second part the principles of pre-codified Dutch insurance law are detailed, from the general requirements for the conclusion of a valid insurance contract to the termination of insurance contracts. In the process matters such as the object of risk and the perils insured against in marine insurance; aspects of non-marine insurance; the parties to the insurance contract, including the involvement of third parties; the premium, the duration, alteration and control of the risk; insurance fraud; loss and its prevention, notice and proof; the principle of indemnity and co-insurance, double insurance, over-insurance and under-insurance; and the insurer’s right of recourse and the doctrine of abandonment are also analysed.

The primary materials consulted for this research were the published sources of Dutch insurance law prior to the beginning of the nineteenth century. In order to place developments in the Netherlands in a broader perspective, some comparative investigation was also undertaken into the earlier position in Spain, the contemporary position in Hamburg and London, and the subsequent codifications of insurance law in the Wetboek van Koophandel in the Netherlands and in the Marine Insurance Act of 1906 in England.

Key Terms

Insurance Law; History of Insurance Law; Development of the Principles of Insurance Law; History of Insurance Law in the Netherlands 1500-1800; Roman-Dutch Insurance Law; Insurance; Marine Insurance; Insurance Contract.
The research for this thesis was made possible by the financial assistance from the following organisations, to which I extend my gratitude: the University of South Africa for a bursary which enabled me to conduct research in the Netherlands, Belgium and England; the Institute for Research Development (in its case the usual disclaimer applies, and opinions expressed in this thesis and the conclusions drawn are my own and should not be ascribed to the Institute); and the Attorneys Notaries and Conveyancers Fidelity Guarantee Fund.

I also wish to thank my promoter, Prof WJ Hosten. I owe him both an apology and a debt of gratitude. The former is for not appraising him fully beforehand of the potential extent of the thesis, the more so because he consented to act as my promoter shortly before he retired from the University of South Africa and because the fulfilment of his duties in this regard no doubt impinged seriously on his well-earned retirement. The latter is for his attentive reading of the draft of the thesis and for his incisive and insightful comments which often made me think again about what I had written and how I had expressed myself.

Despite his failing eyesight and the fact that he had in his almost sixty years as an attorney probably read more than enough about the law, my father perused every single page of this thesis in order to improve spelling, grammar and meaning. I dedicate this thesis to him and to my mother, for their unselfish love and unfailing support over many years.

Finally I have the pleasure of thanking my long-suffering family: my wife Gardiol for shouldering more than her share of the household duties and for her artistic preparation of the appendices; and my sons, Anton and Stephen, who suffered many deprivations with good humour, even though they could not comprehend why anyone would want to spend so many hundreds of hours engaged in such a financially unrewarding, humbling and at times humiliating pursuit.

The research for this thesis was completed in December 1996.

July 1997
Pretoria
# SUMMARY OF CONTENTS

## VOLUME I

Summary ........................................................................................................... v
Preface ............................................................................................................ vii
Summary of contents ........................................................................................ ix
Table of Contents ........................................................................................... xi
Introduction ....................................................................................................... xxvii

### Part A: THE INSURANCE CONTRACT IN CONTEXT

| I | The Origin, Recognition and Distinguishing Features of the Insurance Contract | 3 |
| III | The Classification and Definition of the Insurance Contract | 194 |
| IV | The Insurance Contract and the Courts: Jurisdiction and Adjudication; Conflicts and Custom | 214 |

### Part B: THE PRINCIPLES OF INSURANCE LAW

| V | Objects of Risk in Marine Insurance | 295 |
| VI | Perils Insured Against in Marine Insurance | 376 |
| VII | Non-marine Insurance | 463 |
| VIII | The General Requirements for the Validity of Insurance Contracts: Formalities and Legality | 504 |

## VOLUME II

| IX | Parties to the Insurance Contract | 621 |
| X | The Involvement of Third Parties | 706 |
| XI | The Premium | 785 |
| XII | The Duration of the Risk and Insurance After Loss and Safe Arrival | 892 |
| XIII | The Alteration of the Risk and Statutory and Contractual Control of the Risk | 990 |
| XIV | Fraud | 1095 |
| XV | Types of Loss | 1117 |

## VOLUME III

| XVII | The Principle of Indemnity | 1204 |
| XVIII | Co-insurance, Double Insurance, Over-insurance and Under-insurance | 1299 |
| XIX | The Insurer's Right of Recourse and the Doctrine of Abandonment | 1380 |
| XX | Termination of the Insurance Contract: Payment and Prescription | 1488 |

Appendices ...................................................................................................... 1533
Bibliography .................................................................................................... 1604
Table of Legislative Measures ........................................................................ 1696
### TABLE OF CONTENTS

#### SUMMARY .......................................................................................................................... v

#### PREFACE .......................................................................................................................... vii

#### SUMMARY OF CONTENTS .............................................................................................. ix

#### TABLE OF CONTENTS ..................................................................................................... xi

#### INTRODUCTION .............................................................................................................. xxvii

**Part A: THE INSURANCE CONTRACT IN CONTEXT**

**Chapter I THE ORIGIN, RECOGNITION AND DISTINGUISHING FEATURES OF THE INSURANCE CONTRACT** ................................................................. 3

1. General Introduction ................................................................................................................. 4

2. The Origin of the Modern Insurance Contract ......................................................................... 5

3. The Process of Formal Legitimisation ...................................................................................... 9

4. The Insurance Contract and Other Contracts: Distinguishing and Common Features .......... 13

4.1 Insurance and Sale .................................................................................................................. 14

4.2 Insurance and Maritime Loan .................................................................................................. 18

4.2.1 The General Characteristics of the Maritime Loan ................................................................. 19

4.2.2 The Ordinary and the Maritime Loan Distinguished: Risk and Interest ................................. 21

4.2.3 Maritime Loan and the Insurance Contract .......................................................................... 25

4.2.3.1 The Insurance Element of the Maritime Loan ................................................................. 25

4.2.3.2 The Differences Between the Maritime Loan and the Insurance Contract, or Why the Maritime Loan Was not (Yet) Insurance ................................................................. 25

4.2.3.3 The Reasons for the Evolution of Insurance from the Maritime Loan ............................... 26

4.2.3.4 The Stages of Evolution of the Insurance Contract from the Maritime Loan ..................... 28

4.2.3.5 Conclusion ......................................................................................................................... 29

4.3 Insurance and Bottomry ......................................................................................................... 30

4.3.1 Maritime Loan and Bottomry ............................................................................................... 30

4.3.1.1 Some General Differences Between the Maritime Loan and the Bottomry Loan .......... 30

4.3.1.2 From Maritime Loan to Bottomry Loan ........................................................................... 33

4.3.2 The Bottomry Loan in Roman-Dutch Law ......................................................................... 35

4.3.2.1 A General Description of Bottomry ............................................................................... 35

4.3.2.2 The Master’s Authority to Conclude a Bottomry Loan .................................................... 37

4.3.2.3 The Nature of the Lender’s Risk ...................................................................................... 40

4.3.2.4 The Interest on a Bottomry Loan ................................................................................... 44

4.3.2.5 Bottomry as a Hypothecation of Property ................................................................. 45

4.3.2.6 The Preferential Claim of the Lender on Bottomry ....................................................... 50

4.3.2.7 Voluntary Bottomry Loans ............................................................................................. 53

4.3.2.8 The Disappearance of Bottomry ..................................................................................... 54

4.3.3 Insurance and Bottomry: Similarities and Differences ......................................................... 55
### Table of Contents

#### Chapter III THE CLASSIFICATION AND DEFINITION OF THE INSURANCE CONTRACT

   1.1 Introduction ......................................................................................................................... 194
   1.2 From a Law of Contracts to a Law of Contract ...................................................................... 195
      1.2.1 The Roman System of Contracts .................................................................................. 195
      1.2.2 The Influence of the Medieval Law Merchant ................................................................. 197
      1.2.3 The Roman-Dutch Contribution .................................................................................... 199
   1.3 The Classification of the Insurance Contract in Roman-Dutch Law .................................. 201
      1.3.1 The Insurance Contract as a Consensual Contract ...................................................... 201
      1.3.2 The Insurance Contract as a Nominate Contract ............................................................ 204
      1.3.3 The Insurance Contract as a Contract of Good Faith .................................................... 206
      1.3.4 The Insurance Contract as a Bilateral, Reciprocal Contract ......................................... 207
   1.4 Conclusion .......................................................................................................................... 208
2. The Definition of the Insurance Contract .............................................................................. 208

#### Chapter IV THE INSURANCE CONTRACT AND THE COURTS: JURISDICTION AND ADJUDICATION; CONFLICTS AND CUSTOM .......................................................... 214

1. Chambers of Insurance in the Netherlands ............................................................................ 215
   1.1 Introduction ......................................................................................................................... 215
   1.2 The Roman-Dutch System of Courts and Commercial Causes ........................................ 215
   1.3 Antecedent Commercial and Insurance Courts ................................................................... 217
      1.3.1 Italian and Spanish Examples ....................................................................................... 217
      1.3.2 The Adjudication of Insurance Disputes in the Fifteenth and Sixteenth Centuries in Bruges and Antwerp .......................................................... 219
   1.4 The Chamber of Insurance in Amsterdam ........................................................................ 226
PART B: THE PRINCIPLES OF INSURANCE LAW

Chapter V OBJECTS OF RISK IN MARINE INSURANCE

1 General Introduction ................................................................. 295
2 Objects of Marine Risk: Introduction .............................................. 298
3 The Ship as an Object of Marine Risk ............................................. 302
3.1 Ships and Shipowning ............................................................... 302
3.2 The Scope of the Policy on a Ship ................................................ 305
3.2.1 The Ship’s Hull ..................................................................... 306
3.2.2 The Cargo on Board the Ship ................................................... 308
3.2.3 Appurtenances and Equipment ................................................ 309
3.2.4 Other Goods and Property on Board ...................................... 312
4 Cargo as an Object of Marine Risk ............................................... 314
5.3 The Main Perils of War Capture and Arrest —----------------------------------------- 443

5.2 Privateering and the Law of Prize ........................................................................ 442

5.1 Introduction: Insurance Against the Perils of War in Practice.......................... 430

5. The Perils of War.................................................................................................. 430

4.3.5 Conclusion: The Position Elsewhere.................................................................. 429

4.3.4 The Application of the Law in Practice............................................................ 420

4.3.3 Developments in the Seventeenth and Eighteenth Centuries.......................... 418

4.3.2 The Position in Law and Practice in the Sixteenth Century............................... 414

4.3.1 Introduction...................................................................................................... 411

4.3 The Conduct of the Master and the Crew: Barratry............................................. 411

4.2 The Conduct of Third Parties ............................................................................. 409

4.1 The Insured’s Own Conduct.................................................................................. 403

3.3 The Exclusion of Inherent Vice............................................................................ 396

3.2 All-risks Cover .................................................................................................... 390

3.1 Named Perils: At Sea and of Fire ....................................................................... 387

3. Perils Clauses in Marine Insurance Policies ....................................................... 382

2. General Introduction ............................................................................................. 376

1 Perils Clauses in Marine Insurance Policies ....................................................... 382

Chapter VI PERILS INSURED AGAINST IN MARINE INSURANCE .................... 376

5.5.2 The Position up to the End of the Seventeenth Century................................. 354

5.5.1 Introduction: The Different Types of Insurance Involved............................... 349

5.5 The Insurance of a Bottomry Loan and of the Property Securing Such a Loan 349

5.6 The Insurance of the Wages and Property of the Master and Crew ................... 361

5.6.3 The Insurability of the Property of the Master the Crew ................................. 370

5.6.2 The Insurability of Seamen’s Wages ............................................................... 366

5.6.1 Introduction: The Salary and Remuneration of Seamen ................................. 361

5.6 The Insurance of the Wages and Property of the Master and Crew ................... 361

5.5.3 Legislative Regulation in the Eighteenth Century ............................................ 354

5.5 The Insurance of a Bottomry Loan and of the Property Securing Such a Loan 349

5.4.4 The Insurance of Freight Elsewhere: A Summary ............................................. 348

5.4.3 The Insurance of Freight by the Owner of the Goods ...................................... 346

5.4.2 The Insurance of Freight by the Carrier ............................................................ 343

5.4.1 Introduction: Types of Freight and Types of Insurance of Freight ................... 339

5.4 The Insurance of Freight ..................................................................................... 339

5.3 The Insurance of Return Cargoes ....................................................................... 336

5.2 The Insurance of Expected Profit ....................................................................... 332

5.1 Introduction ......................................................................................................... 329

5 The Insurance of Expected Advantages and Future Objects ............................ 329

4.4 Arms and Ammunition ....................................................................................... 325

4.3 Perishable and Valuable Goods ......................................................................... 318

4.2 The Scope of the Cargo Policy .......................................................................... 315

4.1 Introduction ......................................................................................................... 314

3.3 The Exclusion of Inherent Vice............................................................................ 396

3.2 All-risks Cover .................................................................................................... 390

3.1 Named Perils: At Sea and of Fire ....................................................................... 387

3 Perils Clauses in Marine Insurance Policies ....................................................... 382

2 General Introduction ............................................................................................. 376

1 Perils Clauses in Marine Insurance Policies ....................................................... 382
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.2.1 Introduction</td>
<td>545</td>
</tr>
<tr>
<td>4.2.2 Matters Which Had to be Mentioned in Insurance Policies</td>
<td>550</td>
</tr>
<tr>
<td>4.2.3 The Position at the Beginning of the Seventeenth Century</td>
<td>552</td>
</tr>
<tr>
<td>4.2.4 Further Developments in the Seventeenth Century</td>
<td>556</td>
</tr>
<tr>
<td>4.2.5 Judicial Interpretation in the First Half of the Eighteenth Century</td>
<td>558</td>
</tr>
<tr>
<td>4.2.6 Further Legislative Measures in the Eighteenth Century</td>
<td>564</td>
</tr>
<tr>
<td>4.2.7 Insurance of Cargo 'on ship or ships' or 'in quovis'; Policies in Blank; and Floating Policies</td>
<td>568</td>
</tr>
<tr>
<td>4.2.8 The Position Elsewhere and in the Wetboek van Koophandel</td>
<td>574</td>
</tr>
<tr>
<td>4.2.9 The Content of Insurance Policies and the Duty of Disclosure in English Law</td>
<td>578</td>
</tr>
<tr>
<td>4.3 The Interpretation of Insurance Contracts</td>
<td>584</td>
</tr>
<tr>
<td>5 Legality</td>
<td>589</td>
</tr>
<tr>
<td>5.1 Introduction</td>
<td>589</td>
</tr>
<tr>
<td>5.2 Non-compliance with and the Renunciation of Insurance Laws</td>
<td>590</td>
</tr>
<tr>
<td>5.2.1 Legislative Provisions</td>
<td>590</td>
</tr>
<tr>
<td>5.2.2 The Views of the Roman-Dutch Authors</td>
<td>594</td>
</tr>
<tr>
<td>5.2.3 The Position in Practice: Opinions and Decisions</td>
<td>596</td>
</tr>
<tr>
<td>5.2.4 The Position in the Wetboek van Koophandel and Elsewhere</td>
<td>600</td>
</tr>
<tr>
<td>5.3 The Insurance of Foreign and Enemy Property</td>
<td>601</td>
</tr>
<tr>
<td>5.3.1 Introduction</td>
<td>601</td>
</tr>
<tr>
<td>5.3.2 The Applicable Legislative Measures</td>
<td>602</td>
</tr>
<tr>
<td>5.3.3 The Position in Practice</td>
<td>606</td>
</tr>
<tr>
<td>5.3.4 The Views of the Roman-Dutch Authors</td>
<td>609</td>
</tr>
<tr>
<td>5.3.5 The Position in the Nineteenth Century and in English Law</td>
<td>613</td>
</tr>
<tr>
<td>5.4 The Insurance of Contraband</td>
<td>616</td>
</tr>
</tbody>
</table>

Chapter IX PARTIES TO THE INSURANCE CONTRACT 621

1 The Capacity to Conclude Insurance Contracts 622

1.1 Introduction 622

1.2 The Legislative Prohibition on the Conclusion of Insurance Contracts by Certain Persons 623

1.3 The Rationale for Restricting the Capacity to Insure 628

2 The Status of the Insurer: From Individual Underwriter to Insurance Company 632

2.1 Introduction 632

2.2 Self-insurance: The Insured as His Own Insurer 633

2.3 Individual Underwriters 637

2.3.1 The Incidental Part-time Underwriter 637

2.3.2 The Part-time Professional Underwriter 640

2.4 Marine Insurance Underwriting: From Pure Speculation to Calculated Assessment 641

2.5 Bourses and the Centralisation of Underwriting Activities 649

2.6 Underwriter Co-operation on the Insurance Markets 651

2.7 Underwriting Partnerships 653

2.7.1 Introduction: Partnerships in Roman-Dutch Law 653

2.7.2 Early Examples of Underwriting Partnerships 655

2.7.3 Insurance Partnerships in the Seventeenth and Eighteenth Centuries 656

2.8 Excursus: Potted Biographical Details of Some Individual Underwriters and Underwriting Firms In the Netherlands In the Seventeenth and Eighteenth Centuries 659

2.9 Underwriter Insolvency and Death 667
Chapter X THE INVOLVEMENT OF THIRD PARTIES ........................................................................ 706

1  General Introduction ............................................................................................................... 706
2  Insurance for Another: Agency and Mandate in Roman-Dutch Insurance Law ................ 707
   2.1 Introduction ....................................................................................................................... 707
2.2 Legislative Recognition of Insurance for Another ............................................................. 710
2.3 The Roman-Dutch Law of Agency ...................................................................................... 712
2.4 Agency in Roman-Dutch Insurance Law ........................................................................... 713
   2.4.1 The Authorised Agent ................................................................................................. 714
2.4.2 The Unauthorised Agent With the Intention to Insure for Another .............................. 171
2.4.3 The Unauthorised Agent Without the Intention to Insure for Another ...................... 721
   2.4.4 Some Further Practical Illustrations Relating to Agency in the Context of Insurance .... 724
3  Insurance 'for whom it may concern': The Stipulation in Favour of a Third Party in Roman-Dutch Insurance Law ................................................................. 730
   3.1 Introduction: The Need for Insurance 'for whom it may concern' ............................... 730
3.2 The Early Recognition of and Views on the Clause Insuring 'for whom it may concern' ... 734
3.3 The Clause in Dutch Insurance Legislation and Practice ................................................. 736
3.4 The Clause in Roman-Dutch Jurisprudence in the Seventeenth Century ....................... 740
3.5 The Clause in Roman-Dutch Jurisprudence in the Eighteenth Century ......................... 745
3.6 Conclusion: The Stipulation in Favour of a Third Party in the Insurance Law .............. 750
4  Order and Bearer Policies in Roman-Dutch Law ................................................................. 753
6  The Involvement of Third Parties in the Insurance Contract in Terms of the Wetboek van
# Chapter XI THE PREMIUM

1. The Description, Function and Nature of the Insurance Premium
   1.1 Introduction: From Interest and Risk Premium to Insurance Premium
   1.2 The Description of the Insurance Premium
   1.3 The Premium as an Essential of the Insurance Contract
   1.4 The Nature of the Premium: Money
   2. The Amount of the Premium
      2.1 Determination of the Amount of the Premium
      2.2 Certainty of Premium: Determined and Determinable Premiums and Additional Premiums
   2.3 Equality of Premium: Laesio Enormis and the Insurance Contract
   3. Payment of the Premium
      3.1 Reciprocity
      3.2 The Time of Payment of the Premium
      3.2.1 Early Practice
      3.2.2 The Position in Amsterdam
      3.2.2.1 The Keuren of 1610 and 1620
      3.2.2.2 The Practice in the Seventeenth Century
      3.2.2.3 The Position in the Eighteenth Century
      3.2.3 The Position in Rotterdam
   4. The Role of the Broker in the Payment of the Premium
      4.1 Accounting Between Brokers and Insurers
      4.2 The Broker's Liability for the Payment of the Premium
      4.3 The Broker's Claim for the Payment of the Premium Against the Insured and His Right of Retention and Hypothec
   5. Non-payment of the Premium
      5.1 The Nature of the Insurer's Claim for the Payment of the Premium
      5.2 The Enforcement of the Claim for the Payment of the Premium
      5.3 The Late Payment of the Premium and Interest
   6. Return, Recovery and Forfeiture of the Premium
      6.1 Introduction
      6.2 The Grounds for the Recovery of the Premium
      6.2.1 The Absence of Risk
      6.2.2 Over-insurance
      6.2.3 Summary
## Chapter XII THE DURATION OF THE RISK AND INSURANCE AFTER LOSS AND SAFE ARRIVAL

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>6.3 The Grounds for the Forfeiture of the Premium</td>
<td>867</td>
</tr>
<tr>
<td>6.3.1 Forfeiture of the Premium Because of Fraud</td>
<td>867</td>
</tr>
<tr>
<td>6.3.2 Other Instances of Forfeiture of the Premium</td>
<td>872</td>
</tr>
<tr>
<td>6.3.2.1 Omissions in the Policy</td>
<td>873</td>
</tr>
<tr>
<td>6.3.2.2 The Absence of an Interest</td>
<td>875</td>
</tr>
<tr>
<td>6.3.2.3 Insurance on Bottomed Goods</td>
<td>877</td>
</tr>
<tr>
<td>6.3.2.4 Solvency Reinsurance</td>
<td>878</td>
</tr>
<tr>
<td>6.4 The Return of the Premium and the Divisibility of the Risk and the Contract</td>
<td>879</td>
</tr>
<tr>
<td>6.4.1 Introduction</td>
<td>879</td>
</tr>
<tr>
<td>6.4.2 Divisibility and the Return Cargo</td>
<td>880</td>
</tr>
<tr>
<td>6.4.3 Divisibility and the Discontinued Voyage</td>
<td>882</td>
</tr>
<tr>
<td>6.5 The Nature of the Insured's Claim for the Return of the Premium</td>
<td>884</td>
</tr>
<tr>
<td>6.6 The Return of the Premium in the Wetboek van Koophandel</td>
<td>886</td>
</tr>
<tr>
<td>6.7 The Return of the Premium in English Law</td>
<td>888</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The Duration of the Risk</td>
<td>892</td>
</tr>
<tr>
<td>1.1 General Introduction</td>
<td>892</td>
</tr>
<tr>
<td>1.2 The Different Types of Insurance Policies</td>
<td>894</td>
</tr>
<tr>
<td>1.3 The Duration of the Risk in Terms of a Voyage Policy</td>
<td>895</td>
</tr>
<tr>
<td>1.3.1 The Duration of the Risk in Terms of a Voyage Policy on Cargo</td>
<td>897</td>
</tr>
<tr>
<td>1.3.2 Contractual Stipulations as to the Duration of the Risk in Terms of a Voyage Policy on Cargo</td>
<td>905</td>
</tr>
<tr>
<td>1.3.3 The Duration of the Risk in Terms of a Voyage Policy on Hull</td>
<td>915</td>
</tr>
<tr>
<td>1.3.4 'Surrounding places' and the Interpretation of the Description of the Insured Voyage</td>
<td>924</td>
</tr>
<tr>
<td>1.3.5 The Duration of the Risk in the Case of Other Types of Voyage Policies</td>
<td>927</td>
</tr>
<tr>
<td>1.3.6 The Duration of the Risk in Terms of Voyage Policies in the Wetboek van Koophandel and in English Law</td>
<td>929</td>
</tr>
<tr>
<td>1.4 The Duration of the Risk in Terms of a Time Policy</td>
<td>932</td>
</tr>
<tr>
<td>2 Insurance After Departure, Loss and Safe Arrival, and Insurance 'on good and bad tidings'</td>
<td>938</td>
</tr>
<tr>
<td>2.1 Introduction and a General Background</td>
<td>938</td>
</tr>
<tr>
<td>2.2 Insurance After Departure and Loss</td>
<td>946</td>
</tr>
<tr>
<td>2.2.1 The Early Position</td>
<td>946</td>
</tr>
<tr>
<td>2.2.2 Legislation in the Sixteenth Century</td>
<td>948</td>
</tr>
<tr>
<td>2.2.3 The Position in Antwerp Customary Law</td>
<td>952</td>
</tr>
<tr>
<td>2.2.4 The Position in Amsterdam in the Seventeenth Century</td>
<td>958</td>
</tr>
<tr>
<td>2.2.5 The Position in Rotterdam</td>
<td>963</td>
</tr>
<tr>
<td>2.2.6 Decisions in the First Half of the Eighteenth Century</td>
<td>966</td>
</tr>
<tr>
<td>2.2.6.1 Decisions on Insurances After Departure</td>
<td>966</td>
</tr>
<tr>
<td>2.2.6.2 Decisions on Insurance After Loss</td>
<td>970</td>
</tr>
<tr>
<td>2.2.7 Legislation in Amsterdam in the Eighteenth Century</td>
<td>976</td>
</tr>
<tr>
<td>2.2.8 Insurance After Departure and Loss in the Wetboek van Koophandel</td>
<td>979</td>
</tr>
<tr>
<td>2.2.9 Insurance After Departure and Loss in English Law</td>
<td>981</td>
</tr>
<tr>
<td>2.3 Insurance After Safe Arrival</td>
<td>984</td>
</tr>
</tbody>
</table>
Chapter XIII  THE ALTERATION OF THE RISK AND STATUTORY
AND CONTRACTUAL CONTROL OF THE RISK ......................... 990
1  The Alteration of the Risk .................................................. 991
1.1 General Introduction ..................................................... 991
1.2 Change of the Voyage or of the Course of the Voyage .......... 995
1.2.1 Early Legislative Regulation ......................................... 995
1.2.2 The Regulation in Antwerp Customary Law .................. 998
1.2.3 The Position in the Seventeenth Century ...................... 1001
1.2.4 Decisions and Opinions in the Early Part of the Eighteenth Century .............................................. 1006
1.2.4.1 Determining the Change of the Voyage or of the Course of the Voyage ............................... 1006
1.2.4.2 The Effect of the Change of the Voyage or of the Course ....................................................... 1009
1.2.4.3 Actual and Intended Change of the Voyage or of the Course ................................................... 1010
1.2.4.4 Authorised and Unauthorised Change of the Voyage or of the Course ........................................ 1015
1.2.4.5 Voluntary Change of the Voyage or of the Course and Change in an Emergency ..................... 1020
1.2.4.6 Liberty Clauses and the Permission of the Insurers ................................................................. 1022
1.2.5 Legislation and Further Developments in the Eighteenth Century ................................................... 1027
1.2.6 Change of the Voyage or of the Course: A Summary .......... 1031
1.2.7 Change of the Voyage or of the Course in the Wetboek van Koophandel ........................................ 1035
1.2.8 Change of the Voyage or of the Course (Deviation) in English Law .............................................. 1038
1.3 Transshipment ...................................................................... 1043
1.4 Delay .................................................................................. 1050
2  Statutory and Contractual Control of the Risk ....................... 1054
2.1 Introduction: Incidental Terms to Control the Risk and Their Breach ................................................... 1054
2.2 Statutory and Contractual Regulation of the Seaworthiness of Ships .................................................... 1060
2.2.1 Legislation on the Seaworthiness of Ships in the Sixteenth Century ................................................ 1060
2.2.2 Subsequent Legislation on the Seaworthiness of Ships ...................................................................... 1065
2.2.3 The Relationship Between Seaworthiness and Insurance in Other Sources .................................... 1068
2.3 Statutory and Contractual Regulation of the Duty to Sail With a Convoy .................................................. 1071
2.3.1 Introduction: The Practice of Convoying .................................................. 1071
2.3.2 Convoying and Insurance Law and Practice ................................................ 1073
2.4 Statutory and Contractual Control of the Risk in English Law ............................................................. 1080
2.4.1 Introduction .................................................................... 1080
2.4.2 The Warranty of Seaworthiness ....................................... 1081
2.4.3 Warranties as to Convoying ........................................... 1086
2.4.4 Warranties in the Marine Insurance Act ......................... 1088

Chapter XIV  FRAUD ................................................................. 1095
1  General Introduction ........................................................... 1095
2  Specific Examples of Insurance Fraud .................................. 1096
3  Statutory Measures on Insurance Fraud and Good Faith Generally ......................................................... 1100
4  The Effect of Fraud: The View of the Jurists ......................... 1104
4.1 Introduction ......................................................................... 1104
4.2 The Effect of Fraud on the Insurance Contract and Other Civil Consequences ...................................... 1105
1.2 Recognition of the Insurance Contract as One of Indemnity .............................................. 1206
2 The Sum Insured ....................................................................................................................... 1211
3 Unvalued Policies and the Insurable Value ............................................................................ 1216
3.1 Introduction ......................................................................................................................... 1216
3.2 The Insurable Value of Goods ............................................................................................. 1219
3.2.1 Introduction .................................................................................................................... 1219
3.2.2 Legislative Provisions in Roman-Dutch Law ................................................................. 1221
3.2.3 The Insurable Value of Goods in the *Wetboek van Koophandel* ................................. 1226
3.2.4 The Insurable Value of Goods in English Law .............................................................. 1228
3.3 The Insurable Value of Ships ............................................................................................. 1229
3.3.1 Introduction .................................................................................................................... 1229
3.3.2 Legislative Provisions in Roman-Dutch Law ................................................................. 1231
3.3.3 The Insurable Value of Ships in the *Wetboek van Koophandel* and in English Law .................................................................................................................................................. 1234
3.4 The Insurable Value of Freight .......................................................................................... 1236
3.5 The Insurable Value of Other Objects of Marine Risk and of the Objects of Risk in Fire Insurances .................................................................................................................................................. 1237
4 Proof of the Insurable Value of the Object of Risk and the Amount of the Insured's Loss .................................................................................................................................................. 1238
4.1 Introduction ......................................................................................................................... 1238
4.2 Statutory and Customary Recognition of the Insured's Burden of Proof in the Seventeenth Century .................................................................................................................................................. 1239
4.3 The Position in the Eighteenth Century ............................................................................. 1242
4.4 The Insured's Burden of Proof of Value and Interest in the *Wetboek van Koophandel* and in English Law .................................................................................................................................................. 1245
5 Valued Policies ..................................................................................................................... 1246
5.1 Introduction ......................................................................................................................... 1246
5.2 Early Views on Valued Policies and the Position in Antwerp ............................................ 1247
5.3 The Position Up to the Beginning of the Eighteenth Century .......................................... 1251
5.4 The Position in the Eighteenth Century ............................................................................ 1255
5.5 Valued Policies in the *Wetboek van Koophandel* ........................................................... 1263
5.6 Valued Policies in English Law .......................................................................................... 1267
6 Policy-proof-of-interest Clauses .......................................................................................... 1272
6.1 Introduction ......................................................................................................................... 1272
6.2 Examples of Policy-proof-of-interest Clauses in Roman-Dutch Law ............................... 1273
6.3 Policy-proof-of-interest Clauses in the *Wetboek van Koophandel* ............................... 1277
6.4 Policy-proof-of-interest Clauses in English Law .............................................................. 1278
7 The Measure of Indemnity ..................................................................................................... 1281
7.1 Introduction ......................................................................................................................... 1281
7.2 The Measure of Indemnity in Roman-Dutch Law ............................................................. 1282
7.2.1 Total Loss ....................................................................................................................... 1282
7.2.2 Partial Loss .................................................................................................................... 1283
7.2.2.1 Partial Loss of Goods ............................................................................................... 1283
7.2.2.2 Partial Loss of a Ship ............................................................................................... 1289
7.2.2.3 Partial Loss of Freight ............................................................................................ 1290
7.2.3 The Measure of Indemnity in Other Instances ............................................................. 1291
7.3 The Measure of Indemnity in the *Wetboek van Koophandel* ........................................ 1291
7.4 The Measure of Indemnity in English Law ................................................................. 1294

Chapter XVIII CO-INSURANCE, DOUBLE INSURANCE, OVER-INSURANCE
AND UNDER-INSURANCE ................................................................. 1299
1 General Terminological Introduction and Distinction ............................................... 1299
2 Co-insurance ................................................................................................................ 1301
2.1 Introduction .............................................................................................................. 1301
2.2 The Legislative Recognition and Regulation of Co-insurance .......................... 1304
2.3 The Views of the Authors on Co-insurance ......................................................... 1308
2.4 The Effect of a Release or the Insolvency of a Co-insurer on the Liability of the
Other Co-insurers ..................................................................................................... 1311
2.5 Co-insurance in the Wetboek van Koophandel and in English Law ....................... 1317
3 Double Insurance ........................................................................................................ 1319
4 Over-insurance ............................................................................................................ 1323
4.1 Introduction .............................................................................................................. 1323
4.2 The Early Legislative Regulation ........................................................................... 1329
4.3 Decisions and Opinions on Over-insurance .......................................................... 1335
4.4 The Position in Rotterdam ..................................................................................... 1340
4.5 Amsterdam Legislation on Over-insurance in the Eighteenth Century .................... 1343
4.6 Double Insurance and Over-insurance in the Wetboek van Koophandel ................. 1345
4.7 Double and Over-insurance in English Law ............................................................ 1348
5 Under-insurance .......................................................................................................... 1354
5.1 Introduction .............................................................................................................. 1354
5.2 The Prohibition of Full-value Insurance and Provisions on Under-insurance
in the Sixteenth Century ............................................................................................. 1357
5.3 Under-insurance in Antwerp Customary Law ....................................................... 1362
5.4 The Gradual Relaxation of the Prohibition of Full-value Insurance
in the Seventeenth Century ......................................................................................... 1364
5.5 The Abolition of the Prohibition on Full-value Insurance in the Eighteenth Century .......................................................... 1366
5.6 The Effect of Under-insurance on the Insurer’s Liability .................................... 1371
5.7 Under-insurance in the Wetboek van Koophandel and in English Law ..................... 1376

Chapter XIX THE INSURER’S RIGHT OF RECOUSE AND THE
DOCTRINE OF ABANDONMENT ......................................................... 1380
1 Claims Against Third Parties and the Insurer’s Right of Recourse ......................... 1380
1.1 Introduction .............................................................................................................. 1380
1.2 The Insurer’s Right of Recourse in Roman-Dutch Law ....................................... 1384
1.3 The Possible Deduction of a General Principle ..................................................... 1391
1.4 The Insurer’s Right of Recourse in the Wetboek van Koophandel ......................... 1394
1.5 The Insurer’s Right of Subrogation in English Law .............................................. 1397
2 The Doctrine of Abandonment .................................................................................. 1400
2.1 Introduction: Abandonment in Context ................................................................. 1400
2.1.1 Abandonment in the Law of Things .................................................................... 1400
2.1.2 Abandonment in the Law of Carriage ................................................................. 1406
2.1.3 Abandonment and the Limitation of Shipowner Liability ................................... 1411
2.1.4 Abandonment in the Case of Bottomry .............................................................. 1414
# Table of Contents

## 2.2 Abandonment by the Insured to the Insurer: Background ..................................................... 1415

## 2.3 Insurance Abandonment in Roman-Dutch Law ................................................................. 1419
### 2.3.1 Introduction ...................................................................................................................... 1419
### 2.3.2 Insurance Abandonment in Early Insurance Law .......................................................... 1422
### 2.3.3 The Position in the Low Countries in the Sixteenth Century ........................................... 1426
### 2.3.4 Insurance Abandonment in Antwerp Customary Law ..................................................... 1430
### 2.3.5 Provisions on Abandonment in the First "Keuren" Early in the Seventeenth Century ........ 1437
### 2.3.6 The Explanation of and Amendments to the Early Legislative Provisions in the Course of the Seventeenth Century ........................................................................................................ 1441
### 2.3.7 Decisions and Opinions on Abandonment in the Seventeenth Century ......................... 1447
### 2.3.8 Legislative Measures on Abandonment in the Eighteenth Century ............................... 1454
### 2.3.9 The Views of the Roman-Dutch Authors in the Eighteenth Century ............................. 1458
## 2.4 Insurance Abandonment in the Wetboek van Koophandel ................................................... 1463
## 2.5 Insurance Abandonment in English Law ................................................................................ 1471
### 2.5.1 The Early Position .............................................................................................................. 1471
### 2.5.2 Further Developments in the Eighteenth Century ............................................................. 1473
### 2.5.3 Abandonment in the Marine Insurance Act ....................................................................... 1480

## Chapter XX TERMINATION OF THE INSURANCE CONTRACT: PAYMENT AND PRESCRIPTION .............................................................................. 1488
### 1 General Introduction ............................................................................................................ 1488
### 2 Discharge of the Insurance Contract: Payment ................................................................. 1489
#### 2.1 The Nature of the Insurer’s Liability to Pay on the Insurance Policy ................................. 1489
#### 2.2 The Time for Payment: Provisional Payment and Interest ............................................. 1490
#### 2.2.1 Introduction ...................................................................................................................... 1490
#### 2.2.2 The Position in the Sixteenth Century .............................................................................. 1491
#### 2.2.3 The Position in Antwerp Customary Law ......................................................................... 1495
#### 2.2.4 Developments in the Seventeenth Century ..................................................................... 1498
#### 2.2.5 Provisional Sentence in Roman-Dutch Law: Some General Remarks ............................ 1504
#### 2.2.6 Interest in Roman-Dutch Law: Some General Remarks ................................................. 1507
#### 2.2.7 The Position in the Eighteenth Century .......................................................................... 1511
#### 2.2.8 Payment on the Insurance Contract in the Wetboek van Koophandel and in English Law ................................................................. 1515
#### 2.3 Recovery of the Amount Paid on the Insurance Contract .................................................. 1518
### 2.4 Reinstatement .................................................................................................................... 1521
### 3 Prescription of Actions on Insurance Contracts ...................................................................... 1523
#### 3.1 Introduction ......................................................................................................................... 1523
#### 3.2 The Early Position ............................................................................................................... 1523
#### 3.3 Prescription in the Seventeenth Century ............................................................................ 1525
#### 3.4 Prescription in the Eighteenth Century .............................................................................. 1529
#### 3.5 The Position in the Wetboek van Koophandel ..................................................................... 1531
APPENDICES .......................................................... 1533
BIBLIOGRAPHY ..................................................... 1604
TABLE OF LEGISLATIVE MEASURES ......................... 1696
INTRODUCTION

Researching the history of the insurance contract, its practice and law, is a completist’s nightmare. Emerging in its modern form in the thirteenth century in Italy, but having even older roots, the development of the insurance contract, and with it insurance law, spans many centuries and occurred in many different countries in parallel and largely analogous, but by no means identical, fashion. The history of that development, in completo, has yet to be written. I had often wondered why the work of Reatz\(^1\) on the history of the European law of marine insurance, never proceeded beyond volume 1, which treated the early stages in Italy and Spain and Portugal. Likewise I had wondered why of Goudsmit’s treatise on the history of maritime law (including insurance law) in the Netherlands\(^2\) only the introductory volume on the history of the sources was ever completed. Now I know. The study of the history of the law of insurance indeed demands the dogged perseverance of a long-distance runner.\(^3\)

The title of this thesis, *The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800*, serves to describe the scope of the research undertaken and reflected in it. An explanation of that title is simultaneously therefore also an explanation of the scope of this thesis. The need for delimitation and restraint in the field of the history of insurance law is obvious. I have attempted to do so in the way I will explain shortly. Nevertheless, despite the fact that I have touched on but a small corner of that field, I cannot claim to have covered in this thesis, voluminous as it has become, even that corner completely or sufficiently. Of necessity I have had to bypass many aspects of the topic and leave unexplored a multitude of archival and other sources directly relevant to it. Others will no doubt in the future take the topic up again, approach it from a fresh perspective, and add to our current insight. Hopefully they will find this thesis of some assistance.

In the first place this thesis is concerned with the historical development of a particular branch of the law over a period of more than three centuries. It is therefore a study of the evolution of insurance law, of insurance law in motion, and not merely of the position at any given time or stage in the past. The need for and importance of a chronological perspective and approach are therefore obvious. It means, to refer to but one example, that the views of Grotius and of Van der Keessel may be compared but not equated because, being separated by almost two centuries, the insurance law with which each was concerned, like the state of insurance practice in the Netherlands, was

---

1. *Geschichte* (1870).
3. In this regard it has quite aptly been remarked that ‘*geen geschiedenis, ook niet die van rechtsdocmatiek, mag worden beoefend zonder dat zij steunt op de bronnen en zonder dat die steun wordt gedokumenteerd. De weerbarstigheid van de oudere juridische bronnen maakt het voor elke ingewijde verstaanbaar waarom rechtshistorisch onderzoek vaak werk van lange adem is*’ (Jeroen MJ Chorus *De lijdelijkheid van de rechter. Historie van een begrip* (1987) at 7).
very and in some instances radically different. In principle I have attempted, as far as it was possible, to treat the sources relevant to the development of each topic chronologically. Hopefully, in so doing, the progression and refinement, if any, which did occur in respect of the principles relevant in each instance, will be more readily apparent.

In the second place the thesis deals with the development of the principles of a specific area of law. It is concerned not with the sources, institutions or organs of law but with the relevant legal principles, rules, concepts, and doctrines. In short, it is an internal history, not external history of insurance law. However, the two aspects are not always easily separated, and frequently reference had to be made to other works in which matters of external history have been treated in more detail.

Thirdly, the area of law which forms the subject of this thesis is the law of insurance. Apart from my personal interest in and involvement with this branch of the law, there were a number of other reasons which indicated the suitability of this choice of topic. Insurance formed an integral part of Dutch commerce, not only during but both before and after the golden seventeenth century. The insurance contract was one of the most important contracts concluded in a commercial context in the Netherlands in the period under investigation. Given its importance in practice, insurance law was further sufficiently important and complex to have received the specific attention of the

---


5 Van der Keessel Praelectiones 1426 (ad III.24.pr) suggested that much when he remarked that while the contract of insurance was unknown to the Romans, it was so prevalent in the Netherlands in his time that, apart from sale and lease, there was hardly a transaction in more frequent use ("[a]ssecurity contractus Romanis incognitus fuit.... [a] pud nos adeo frequens est, ut praeter emptionem et locationem vix aliu occurrat negotium magis usitatum"). Lee's view (Introduction 269) that "[a] young lawyer may be excused if he knows little of the law relating to marine insurance ..., but he will be expected to have some acquaintance with such common transactions as sale, hire, deposit, mandate, and suretyship", could clearly not have applied to the young Dutch lawyer in earlier centuries.

6 For example, fully a quarter of Bynkershoek's important work on the Dutch jurisprudence of his time, the Quaestiones juris privati, was devoted to the insurance contract. See further Van Niekerk "Bynkershoeck".

7 Kersteman (Academie part XVIII at 279) explained in some detail that the disputes arising between shipowners and insurers, masters and merchants concerning maritime matters were most complex, in particular those touching on the policy of insurance. For that reason, he thought, a complete knowledge was required of the multitude of converging usages, customs and collections of laws respecting trade and navigation, to which also belonged a specific course of dealing different from that employed in other areas of legal practice. Therefore, Kersteman, noted, to prevent ridiculous mistakes, it was plain that this topic required a separate study which had to be acquired by experience, and that it could not generally be part of the practice of all lawyers ("Processen ontstaande tusschen Reenders en Assuradeurs, Schippers en Kooplyden over Questien specteerende tot de Zeazaken zyn zeer difficiel in de wyze van haare behandeling, byzonder de zulke rakende Police van Assurantie, ... als waar toe behalven een Compleete kennis van een menigte zamenlopende Usantien, gebruikelijkeheden en verzameling van Wetten toucheerende den Koophandel en Navigatie, inzonderheid ook gehoorende is, een zekere particuliere slenter in de Rechtshandeling, groeatels verschillende van de geene weke in andere deelen van de Practyck geuseert worden. Weshalven zonder Absurditeit te begaan, daar uit gemakkelijk te besluiten is, dat deeze Materien van Zaken een aparte Studie vereisschen die door de ondervinding moet worden geacquireert, en dus niet Generalyk het werk van alle Practysms kan wezen").
Dutch legislatures and courts and of a large number of Dutch legal authors in earlier times. Also, being a contract frequently concluded in practice, the insurance contract provides an exceptional illustration not only of the interaction in past centuries between the world and the needs of merchants on the one hand and the world and the responses of lawyers on the other hand, but also of how insurance practice shaped insurance law.\(^8\)

The type of insurance with which this thesis is concerned, was largely determined by the period it investigates. The main form of insurance which occurred in the Netherlands prior to the end of the eighteenth century was insurance for profit, and more specifically marine insurance.\(^9\) I have concentrated, furthermore, on private insurance law and on insurance contract law. Aspects of public insurance law and insurance supervisory law were only investigated or mentioned where and to the extent that they were relevant to or formed what I considered an integral part of the law governing the private contract between the insured and the insurer.

Obviously, the insurance contract was but another type of contract and the law of contract generally as well as the principles relating to other types of contract had to be investigated where necessary and where related to particular aspects of the law relating specifically to the insurance contract. The general principles of the Dutch law of contract during the period under investigation were therefore not considered in any detail, except in so far as it appeared to me that they were considered relevant by the insurance sources themselves. Furthermore, it was necessary to consider in a little more particularity the principles governing closely related contracts such as those of wagering, maritime loan, and bottomry. Lastly, the many other areas of law with which insurance law has points of overlap could also not be totally overlooked. Account had to be taken of some aspects of matters such as shipping law, general average, and also smaller issues which were not solely within the domain of insurance law. It it is often in respect of such areas and topics that an author sticks his neck out and may have it chopped off when the amount of time he has put into becoming acquainted with the area or topic outside his field of expertise turns out either to have been insufficient or not to have been spent wisely. Hopefully in this respect there is only a short and sturdy part of my neck which sticks out.

In the fourth place this thesis is concerned with a specific area of law. As a point of departure, therefore, I had to investigate the formal sources of law, notably, for the law of insurance, the relevant legislative measures dealing with the insurance contract. I also had to determine how those measures were applied by the courts and interpreted...
by the lawyers. For this I relied mainly on published primary sources. Account had to be taken, furthermore, of another important source of insurance law, namely insurance practice. That practice was on occasion alluded to in the writings of jurists, but in a published form it is primarily reflected in judicial decisions and legal opinions. Of course, those are not the only sources which reflect the usages and customs followed in connection with the insurance contract. Contract forms, notarial and other archival and unpublished materials, and the works of contemporary mercantilists to a greater or lesser extent provide further pieces of the puzzle.

As far the sources consulted for this thesis are concerned, I had to make a number of choices. Given the logistical and financial constraints involved, I decided to investigate the published primary sources as fully as was possible. I cannot, alas, claim to have done the same with the unpublished primary sources or with the secondary sources. There is a veritable ocean of archival material in the Netherlands which will doubtlessly throw further light on insurance law and practice at various times and places. In this thesis I have at most consulted and reflected a few unpublished documents and materials which were, as far as I could determine, representative of the collections from which they were culled and of the practices they evidence. The full disclosure and a proper analysis of these materials must be left for another research project and to researchers more qualified and geographically closer to them. As far as the secondary sources are concerned, I suspect that I may have consulted the more important materials to a reasonable extent. However, from experience I know that further sources lurk in unexpected corners and I therefore cannot by any means claim complete coverage.

While primarily concerned with law and legal principles, this thesis is not exclusively a legal investigation. Like history generally, legal history can and may not be divorced from the socio-economic background against which it unfolded. This is true not only of those areas of law where the private individual featured centrally, but also of commercial law where the impersonal figure of the merchant made his deals. The merchant was no less a human being than was the husband or the father, and it is as crucial to view the merchant and his dealings against the social and economic circumstances of the time. If considered and investigated in isolation, legal principles are often baffling and seemingly illogical and inexplicable, the more so if viewed over a distance of three or more centuries. For our proper understanding of the reason for of those

---

10 One cannot but stress the enormous wealth of the uncharted information on, for example, the Amsterdam Insurance Chamber and the Rotterdam Chamber of Maritime Law which is to be found in the respective municipal archives in Amsterdam and Rotterdam. It will be possible from those sources to construct a much clearer and certain picture of the actual application of the principles of the law of marine insurance in practice than was possible merely from published legal writings and judicial decisions and from the official legislation. While the published opinions and decisions have proved to be of some assistance in determining the application of the formal law in practice, these and other unpublished sources still have to be marshalled, and possible links between them and the published sources established. It remains to be done for the history of insurance law in the Netherlands what Nehlsen-von Stryk *Seeverssicherung* has done for Venice and Dreyer and Frentz *Admiralitätsgericht* have done for Hamburg.

11 Some of these have been taken up in Appendices to this thesis.
principles and their operation in practice, it is crucial to view them in their proper context. For this reason I have consulted and referred to a large number of secondary non-legal sources, most of which are obviously concerned with economic and business history and with maritime history, but some of which treat social history in the broader sense. These sources not only added a tinge of colour to an otherwise all too gray historical canvass, but on many occasions provided an indispensable background to explain the otherwise apparently inexplicable existence and application of legal principles. More specifically, business and insurance history explain and provide vital background to the rate, direction, method, causes and consequences of the development of the principles of the law of insurance.

In the fifth place I have sought to limit my research in a geographical sense by concentrating on the development of insurance law in the Netherlands. Apart from personal reasons of background, training and interest, the development of insurance law in the Netherlands occupies in many senses, but then particularly in a chronological sense, a central position in the historical development of European and therefore world insurance law. Although this development in the Netherlands was, from a legal-historical point of view, preceded by some and succeeded by other important processes, phases and periods, the legal development there was arguably one of the most important and influential in the history of insurance law generally. The development of insurance law in Europe passed through the Netherlands and there, especially but not only in the seventeenth and eighteenth centuries, the fundamental principles which had evolved before were settled and refined, and from there they were taken over in other systems and in turn and in different ways influenced the subsequent position elsewhere.

The geographical terms and descriptions employed in this thesis require some explanation. The 'Netherlands' or the 'Low Countries' included, in the period under investigation, the southern Netherlands (comprising first the Burgundian principalities,

---

12 Of which insurance history forms an integral and, for present purposes, important part. I have consulted numerous published materials on insurance history but have not consciously sought to differentiate in this regard between the history of insurance business (eg Insurance companies) and the history of insurance practice (ie, the evolution of the techniques and institutions of insurance), a distinction alluded to by Supple Royal Exchange Assurance xvi.

13 The pre-eminence of earlier Dutch insurance law is thus explained by Wessels (228-229): 'Insurance had towards the beginning of the seventeenth century assumed large proportions, and disputes were growing more frequent and more difficult of solution. The Roman law afforded the judges but little help, inasmuch as the idea of marine insurance was first practically applied during the fifteenth century. There was no uniform law of insurance, and each maritime nation or town made its own regulations .... [I]t seems to be universally acknowledged that Holland contributed the most important share in the development of that branch of law throughout Europe .... These laws [of Holland on insurance] were constantly amended and amplified during the seventeenth and eighteenth centuries, and if we examine them we find that they contain all the fundamental principles of maritime insurance that are in vogue today in all the great commercial countries of Europe.'

14 The term 'Low Countries' is a literal translation of the Dutch term 'Nederlanden', or the French 'Pays-Bas'.
then the Southern Provinces, and then the present Belgium)\(^7\) and the northern Netherlands (the present Netherlands or Holland). The northern part was comprised of the seven provinces which seceded from the Southern Provinces and declared their independence from Spain in 1581 and which combined (with Drente and the Genera-liteitslanden) to form the Republic of the United (Northern Provinces of the) Netherlands (Republiek der Vereenigde Nederlanden), a commonwealth of independent states or provinces. Of the seven provinces, the most important was Holland which included North Holland, South Holland and West Friesland. The other provinces were Zeeland, Friesland, Overijssel, Groningen, Gelderland, Utrecht. From a maritime and insurance point of view, the most important centres were Amsterdam and Rotterdam in Holland and Middelburg in Zeeland. In this thesis the accent is on the legal position up to the end of the sixteenth century, in the undivided Netherlands, and on the position thereafter in the northern provinces and, more specifically, in the more important maritime centres.\(^16\)

It is also necessary to explain briefly the term accorded to the law of the Netherlands. Although I am aware of the fact that the term ‘Roman-Dutch law’ is not necessarily an acceptable or precise description of the principal legal system under investigation here,\(^17\) I have nevertheless decided to use it in this thesis as a term of convenience. Although no unified insurance law ever applied in the (northern) Netherlands prior to codification in the nineteenth century, those differences which did exist were marginal and negligible compared to the great measure of correspondence which existed between the different municipal insurance laws. For all practical purposes, there existed a unified body of Dutch insurance law prior to the end of the eighteenth century.\(^18\) That system differed, though, not only in form but also in content from the subsequently codified Dutch insurance law and cannot simply be referred to as Dutch insurance law.

---

\(^{15}\) The southern part of the Netherlands consisted of ten provinces, including the Flemish-speaking provinces of East and West Flanders, Antwerp, Brabant and Limburg. The most important centres in the south, and until the 1580’s in the Netherlands as a whole, were Antwerp and Bruges.

\(^{16}\) As to the possible terminological confusion in the use of the names ‘Netherlands’ and ‘Holland’, see eg P Geyl ‘Belgicistische geschiedschrijving. Naschrift: “Noord-Nederiandsch”, “Nedertandsch”, Hollandsch’\(^\text{16}\) (1928) 6 Bijdragen tot de vaderlandsch geschiedenis en oudheidkunde Vie Reeks 139-145.

\(^{17}\) Not least because there was in fact no direct antecedent ‘Roman’ element to Roman-Dutch insurance law, because the term is not even one generally employed in the country to whose earlier legal system it is applied, and, finally, because it has been regarded as a term applied to a legal system ‘created’ only \textit{ex post facto} and outside of the Netherlands (see PhJ Thomas ‘People Take Pictures of Each Other to Prove that They Really Existed’ (1995) 22 Ius Commune. Zeitschrift für Europäische Rechtsgeschichte 227-240).

\(^{18}\) Thus Witkop 23 explains that ‘[a]l hebben op papier ook met elkaar strijdige voorschriften bestaan in Amsterdam, Rotterdam, Middelburg, enz. dan zullen in ons kleine land deze verschillen wel zeer vervaagd zijn, niet het minst ook door de rechtspraak en de schriften en adviezen van rechtsgeleerde schrijvers als Hugo de Groot, Verwer, Quintyn Weytsen, Groenewegen, v. d. Keessel, Bynkershoek e. a. uit de 17e en 18e eeuw’. 
Other possible terms too seemed inappropriate for present purposes and I have therefore settled for ‘Roman-Dutch law’ when referring to the law applicable in the Netherlands prior to the process of national codification there in the nineteenth century.

In the sixth place, I have in the main limited my investigation to the period from 1500 to 1800, that is, to the sixteenth, seventeenth and eighteenth centuries. Apart from the obvious need to delimit the scope of my investigation in this way, there were a few other reasons for this. The practice of insurance did not arrive in the Netherlands before the middle of the fifteenth century and had no significant influence on its law prior to the sixteenth century. It was only from roughly the beginning of the sixteenth century that the first published sources on insurance law and practice in the Netherlands came into existence, when the customary insurance law became the subject of legislative attention and regulation and when the first judicial activity in the field of insurance law occurred. The earlier history of the origin and initial acceptance of insurance and the insurance contract, which occurred in Italy and which has, incidentally, been the subject of numerous investigations, therefore falls outside the central scope of this thesis. At the other end I have not consciously sought to trace in detail the developments in Dutch insurance law after the end of the eighteenth century, not least because of the crucial influence which the national codification had on the form and direction of those developments.

However, just as the development of the principles of insurance law cannot and was not studied in isolation, so too its development in the Netherlands from 1500 to 1800 had to be placed in a proper context. Given its central European location, its widespread economic, maritime and insurance influence in the region, especially in the seventeenth century, and its central chronological position in the historical development of insurance law in Europe, the history of insurance law in the Netherlands could not be treated completely in isolation. Account had to be taken of antecedent, simultaneous and succeeding developments of the principles of insurance law elsewhere on the Continent. The development of insurance law in the Netherlands had to be contextualised and put in its proper European perspective. I have therefore sought to go beyond the geographical and chronological limitations strictly suggested by the title of this thesis. Of necessity, though, I have had to be rather selective in deciding with which of these developments I would concern myself and likewise the excursions had to be concise and founded in the main on selective secondary sources. My choices of the excursions I have undertaken and the reasons for them, must briefly be explained and justified.

In the first instance I have, where relevant to a particular topic and where secondary material was readily available, briefly traced the legal position which existed

---

19 Such as ‘common law’ (‘gemereerreg’), because of the possible confusion with English Common Law; ‘oudvaderlandsche reg’ (the term commonly used in the Netherlands today) for which there does not appear to be an acceptable and well-known English translation; the ‘insurance law of Holland’, which is patently incorrect; and ‘Roman-European insurance law’ of which (to the extent that conceptually it may be said to have existed at any stage during the period under investigation: see further n 25 infra) the early insurance law of the Netherlands was merely a part, albeit an important one, and furthermore the only part thoroughly investigated in this thesis. For an attempt to reconstruct the European insurance ius commune, see the admirable and useful work of Hammacher.
before and which possibly influenced the shape of Roman-Dutch insurance law. For this purpose I have on occasion briefly set out the legal position in the fifteenth century in Spain whose insurance laws and practices had, for politico-historical reasons, a direct influence on the early position in Netherlands. Less occasionally I have also ventured into the antecedent position in Italy. In this regard I have also briefly reflected the views of some earlier (mainly Italian) authors on insurance law, notably Stracca, Santerna, Scaccia, and Roccus, who were themselves referred to in and no doubt had an influence on the Roman-Dutch sources. Hopefully these excursions will serve to give a clearer indication of the origin of the principles and practices of Roman-Dutch insurance law.

Secondly, I have, where relevant, sought to outline the contemporary development of insurance law in Hamburg, where the position was heavily influenced by the position in the Netherlands, but where also, in the odd instance, some surprising innovations and developments occurred which contrasted nicely with the position in Dutch centres such as Amsterdam and Rotterdam. I have also cursorily sought to describe the early development of insurance law in England, and, where possible, to compare the position in England with that at the time in the Netherlands. Generally developing at a somewhat later stage than its counterpart across the Channel, English insurance law not only shared a common ancestry in the international law merchant or lex mercatoria, but was influenced by and in turn occasionally appears to have

---

20 In this regard it may be mentioned that I made no conscious attempt to trace the influence of Roman law generally on the development of the principles of insurance law in the Netherlands. Although the insurance contract and insurance law in their modern guises were unknown to the Romans, Dutch lawyers on occasion reverted to the general principles of their common law to solve problems arising in respect of the insurance contract. The instances were this occurred, are referred to in the thesis.

21 There are many pronunciations attesting to this effect. Thus Weskett Digest 380 sv 'ordinance' par 1 noted that '[t]he laws and edicts, which have been established and published in foreign maritime countries ... containing the rules to be observed in such states, with regard to marine affairs and matters of insurance, are usually called ordinances: - although they are of no positive authority in this country, yet as they, as well as the laws, doctrines, and practice of insurance in England, have their foundation in the ancient sea-laws and usages, and the long experience and collective wisdom of all preceding commercial states and ages, I have [consulted and considered them] ... not only as great attention has been paid to them by the judges in our courts of judicature in the discussion and decision of divers curious points and important cases of insurance, but as they tend to illustrate the laws and practice here, and as it would also be well if, in some respects, where they supply the defects of our laws, or differ from our received opinion and custom, their rules etc. were adopted with us.' Marshall (in his Treatise on the Law of Insurance 3 ed (1823) vol I at 17, as quoted by Birch Sharpe 406-407) remarked that '[t]he law of insurance is considered as a branch of marine law .... It is also a branch of the law merchants, being founded on the practice of merchants, which is nearly the same in all countries where insurance is in use; .... The law of merchants, not being founded in the institutions or local customs of any particular country, but consisting of certain principles which general convenience has established, to regulate the dealings of merchants with each other in all countries, may be considered as a branch of public law. ... If it be asked where the law of insurance is to be found; the answer is, in the marine law, and in the customs of merchants, which may be collected (1) from the ordinances of different commercial states; (2) from the treatises of learned authors on the subject of insurance; (3) from judicial decisions in this country and others, professing to follow the general marine law and the law of merchants. Particular ordinances have seldom gone farther than to define, and to sanction by legislative authority, those principles which were already received as law in all commercial countries .... These ordinances are not, it is true, in force in England; but they are of authority, at least as expressing the usage of other countries upon a contract, which is presumed to be governed by general rules, that are understood to constitute a branch of public law.'
influenced the position in the Netherlands in a few respects. Altogether, though, the historical relationship between English and Roman-Dutch insurance law was largely symbiotic and, as a result, obscure in many respects and deserving of further investigation.\(^\text{22}\)

Thirdly, I have sought to trace some developments which occurred after the end of the eighteenth century. On the one hand I have investigated very briefly the way in which Roman-Dutch insurance law, already in a sense largely a codified system,\(^\text{23}\) came to be codified finally and nationally in the Dutch Wetboek van Koophandel in 1838. In this way some light was hopefully shed on the 'further development', or at least on the direction of any such further development, of Roman-Dutch insurance law. The investigation of the fortunes of principles of Roman-Dutch insurance law as they were transformed into a nationally codified form not only serves to accentuate the preceding line of earlier development but also adds a further dimension to the content of the earlier law and its acceptability and acceptance in practice. As it turned out, the earlier principles formed the backbone of codified insurance law in the Wetboek van Koophandel; and those principles, in turn, still represent the essence of modern Dutch law.\(^\text{24}\) It must be stressed, though, that my investigation of the position in the Wetboek was but cursory and for this narrow purpose alone. A description of the modern Dutch insurance law was certainly not intended. On the other hand I have compared that Dutch codification with the codification which the English common law of insurance underwent with the promulgation of the Marine Insurance Act in 1906. On numerous points, that Act provides a concise statement of what had already evolved in English insurance law by the end of the eighteenth century, thus adding further perspective to the historical angle. This brief and admittedly superficial comparison between the Wetboek and the Marine Insurance Act illustrates, more often than not, to what extent the legal principles of insurance law have remained if not largely identical then at least closely related.\(^\text{25}\)

---

\(^\text{22}\) One of the most obvious topics to be investigated further is the interaction and the differences and similarities in the fifteenth century between the insurance law and practice of Antwerp, as reflected in the placcaaten of 1563 and 1571 and in its Antiquae of 1570 and Impressae of 1582, and that of London, as it appears from the unpublished manuscript entitled 'A Booke of Orders of Assurances within the Royall Exchange' (dating from the 1570's and described by Kepler 'London Marine Insurance').

\(^\text{23}\) A significant but often overlooked feature is that the formal insurance law in the Netherlands existed from the sixteenth century onwards primarily in a legislated form, often in virtual 'codifications' of that branch of the law. In the fact that Roman-Dutch insurance law was a 'codified' insurance law in an otherwise largely uncodified system, that system found itself in the same position in which the English law of marine insurance finds itself in the twentieth century.

\(^\text{24}\) See generally on this point Clausing 45-46 and 48.

\(^\text{25}\) Two points must be stressed, though. The first is that apart from the fact that my superficial treatment of English materials would not have permitted it, I have resisted the temptation to make any comprehensive comparison between the Roman-Dutch or Dutch law of insurance and the English law of insurance, either as it appears to have been at any stage in the past or as it may be today. Suffice it to say, though, that very often, where contrast and conflict may have been expected, there were similarities and correspondence, if not in approach then at least in result. This appears not only when these systems are compared in their (nationally) uncodified forms but even more starkly so when the codified forms (that is, the Wetboek and the Act) are juxtaposed. The English law of marine insurance and of insurance generally is, and not only in an historical sense, very much a species of European insurance law.
Now that I have set out and explained the scope and limits of this research, it remains to describe my systematic approach very briefly. I have divided the thesis into two main parts.

Part A seeks to put insurance law and practice and the insurance contract in the Netherlands from 1500 to 1800 in some perspective. It is concerned with the recognition and distinguishing features of the insurance contract in the Roman-Dutch sources, and investigates in this regard the relationship between the insurance contract and other related and often antecedent forms of contract, including the maritime loan and the contract of gaming and wagering. The classification of the insurance contract in the Roman-Dutch legal system and its definition in the sources are also investigated. Lastly this part treats the application of insurance law and the settlement of insurance disputes in Dutch courts, and related matters.

Part B is devoted to the substantive principles of Roman-Dutch insurance law. It covers the application, in the insurance context, of matters common to contracts generally and traditionally the subject of any discussion of the general principles of the law of contract. These matters include the requirements for the validity of insurance contracts, the terms of insurance contracts, the involvement of third parties, the effect of fraud, and the duration and termination of the insurance contract. Obviously the traditional approach could not be followed throughout as there are also many matters which occur specifically but, as will appear, invariably not exclusively in connection with the insurance contract. These matters, traditionally considered separately in any discussion of the insurance contract, were accordingly also accorded separate consideration in this study. They include the objects of risk and the perils insured against, the premium, the duration and alteration of the risk, the types of loss and the principle of indemnity, and the insurer's right of recourse and the doctrine of abandonment.

The second point is that no attempt was or could be made to ascertain to what extent it may be said that an uncodified common European insurance law existed by the end of the eighteenth century or at any stage before. That a great deal of uniformity did exist, is obvious, the more so when superficially diverse systems such as those of the Dutch and the English are compared. It seems, furthermore, that whatever uniformity there was in pre-codified European insurance law was not solely due to the common origin of national or regional insurance law systems in the Italian lex mercatoria. It was, importantly, also due to subsequent legislative and doctrinal cross-referencing and borrowing, which was, in turn, facilitated and influenced by the international, uniform mercantile and insurance practices followed in the most important European insurance centres. This uniformity was in fact not confined to continental Europe or to the past. In an anonymous review (ascribed to Joseph Story) of Phillips' A Treatise on the Law of Insurance which appeared in Boston in 1823, the following statement from the preface of that work was considered of sufficient importance to be quoted in full (see Anonymous Review 75): 'A very great part of the law of insurance consists of deductions from certain principles, which constitute a science, in regard to which, mere precedent cannot have a very great influence, since deductions inaccurately made, lead to contradictions and inconsistencies, which no authority can vindicate. ... No branch of law can more properly be denominated a science, than insurance; and since this contract is substantially the same in different countries, and continues to be the same now that it was formerly, the decisions of courts, whether ancient or modern, and the opinions and reasoning of writers, whether American, English, Italian, or French, are generally applicable to it'.
A Note on Dates

Apart from the conversion from the Julian calendar to the Gregorian calendar, a change which concerned the calculation of the calendar year, a related change in the sixteenth century concerned the commencement of the calendar year. Prior to the late sixteenth century, the calendar year was taken in the Netherlands, as elsewhere, to commence not on 1 January but with Easter. Thus, 1 February 1540 did not precede but in fact came after 1 December 1540, while 1 May 1541 came merely three months after 1 February 1540 and not fifteen months later. However, given the fact that Easter had no fixed calendar date in any given year, falling as it does on the Sunday following the first full moon after the vernal equinox (that is, the occasion, in the spring, when day and night are of equal length, which in the Northern hemisphere occurs around 21 March), the inconvenience of this system of dating, commonly referred to as the Old Style (os), is obvious. The conversion to the New Style (ns), which occurred at different times in different areas of Europe from the end of the sixteenth century, necessitates that one of the two systems be chosen for the sake of uniformity and to avoid confusion. In the Netherlands, the Old Style - or the Easter Style (paasstijl) as it was referred to - was replaced by the New Style (hofstijl) in 1580.

In this thesis I have, where necessary, converted dates to the New Style, occasionally retaining the date in the Old Style in brackets in those cases where that has gained more notoriety in the sources. Thus, I have referred to the provisional placcaat of 27 October 1570 and to the (final) placcaat of 20 January 1571 (os 1570).

26 The Julian Calendar, with its 365 days with an extra day being intercalated between 23 and 24 February every four years, was too long and had created an accumulating discrepancy between the civil and the natural or solar year and an increasing dislocation of the seasons and with Easter moving ever forward to summer. By the mid-sixteenth century the error of just more than eleven minutes per year had accumulated to more than ten days. In 1582 Pope Gregory XIII (Ugo Buoncompagni [1502-1585], former law professor at Bologna in the 1530s) sought to rectify the matter. By a papal bull which appeared on 24 February 1582 (1581 os), a new calendar was introduced. It involved two matters. First, it laid down that in future the year would have 365 days with every fourth year being a leap year (that is, to have added to it an extra day, namely 29 February) except for every fourth centennial year (namely 1600, 2000, 2400, from whence the rule that a centennial year divisible by 400 is not a leap year but a common year). Secondly, it corrected the error caused by the inaccurate Julian calendar, and did this by the omission of 10 days. The bull determined that Thursday 4 October 1582 was to be followed by Friday 15 October of that year (in effect therefore, the dates 5-14 October 1582 never existed historically, at least not in the Vatican). In Holland the Gregorian calendar was also adopted in 1582, a placcaat of 10 December 1582 (GPB vol I at 395-398) 'over het inwilligen vanden Nieuwen Stijl, ende van het af-korten thien dagen uyt den Almanach' providing for an early Christmas in that 14 December 1582 was decreed to be followed by 25 December. On calendars and the calculation of time in the Netherlands, see eg SJ Fockema Andreae 'De invoering van den Gregoriaanschen kalender in Nederland' (1914) 5 Bijdragen tot de Nederlandsche Rechtsgeschiedenis 383-385; PJ Meij 'Nieuwe stijl' (1953-1954) 58 Nederlands Archivenblad 22-24; J Smit 'De invoering van de Gregoriaansche tijdrokennig in de Noordelijke Nederlanden' (1929) 8 Bijdrage tot de Nederlandsche Geschiedenis & Oudheidkunde Ves Reeks 125-139; EL Strubbe 'Nieuwe stijl' (1952-1953) 57 Nederlands Archivenblad 101-104; and EL Strubbe & L Voet De chronologie van de middeleeuwen en de moderne tijden in de Nederlanden (1991) passim.

27 This occurred by virtue of s 40 of the well-known Political Ordinance of the Estates of Holland of 1 April 1580 (see GPB vol I 330 at 340-341). As to dating of sixteenth-century Dutch sources and the confusion which may arise, and in fact did arise as regards the insurance placcaaten of 1570 and 1571, see Goudsmit Zeerecht 251-253 and Van Niekerk Sources 37n64 and references mentioned there.
A Note on Spelling and Translations

In quoting from original sources, I have retained the spelling and punctuation as I found it, inconsistent and at times baffling as that may have been. Unless specifically indicated, all translations into English are my own.

A Note on References

In the footnotes of this thesis I have referred to the relevant sources in a abbreviated fashion. The full references will be found in the Bibliography. The same applies to the various-legislative measures, for which the full references appear in a separate Table of Legislative Measures.
PART A: THE INSURANCE CONTRACT IN CONTEXT
1 General Introduction

The origin and early history of insurance and its contract became the object of scholarly attention and serious research only in the latter part of the nineteenth century. Initial findings and conclusions were soon rejected as new archival material came to light and new insights were gained into a fascinating, if at times obscure area of business and legal history. This process of discovery and re-evaluation continues, albeit lately at a relatively slower pace.

Despite those differences of opinion which remain as to specific mainly minor details, there is now general consensus that the true, undisguised premium-insurance contract made its first appearance in Italy in the latter part of the fourteenth century. Its appearance was the result of the evolutionary development of antecedent contract forms in which the transfer of risk from one person to another played a distinguishable, although not necessarily primary role. This evolution was characterised in its later stages by the fact that the insurance contract was disguised as other undisputed forms of contract before it eventually emerged and came to be recognised as valid in the form known today.

There is general acceptance of the fact that insurance on a profit basis or premium-insurance, as opposed to insurance on a mutual basis, was unknown to antiquity in general and Roman law in particular.

But this history of the insurance contract was not known, at least not in all its detail, to those Roman-Dutch legal writers who dealt with what had become one of the more important commercial contracts of their time. Furthermore, at least to the earlier Dutch legal writers, the nature and distinguishing features of this relatively recently emerged contract form were not yet properly understood and described. Following the lead of earlier, mainly Italian, jurists who had considered the insurance contract in their treatises, most of them quite naturally sought to find some link with Roman law. If it could be established that the insurance contract was known to Roman law, that would not only confirm the validity and facilitate the classification, description and definition in the Roman-Dutch law of the insurance contract in particular and insurance law in general, but would also justify the application of general principles of Roman contract law to the insurance contract.

It became readily apparent to most of the later Dutch lawyers, though, that the insurance contract was unknown to Roman law. For this reason there is no or at least very little constructive coverage of this form of contract in the works of those authors, mainly from the fifteenth and sixteenth centuries but also some later ones such as Voet, whose concern was not primarily the Roman-Dutch law of their time but the received Roman law. But even if the insurance contract were known to Roman law, as some
authors were in fact keen to establish right to the end of the eighteenth century, there was precious little if any Roman insurance law which could be relied upon. Furthermore, in the light of the state of contract law and doctrine at the time, the application of general principles of the Roman law of contract was not widely recognised as (if it in fact was) a viable method of describing and developing the law relating to insurance contracts.

Dutch lawyers, again following the example of their predecessors, therefore did the next best thing: they sought to explain and describe the insurance contract with reference to other contract forms or legal concepts with which they thought it shared some common features. The contract forms and legal concepts they employed were all known to Roman law, thus justifying reference to that system generally when dealing with the insurance contract. In this process they could also fit the insurance contract into the Roman system of contracts they had inherited. And, not surprisingly, most of the contract forms and concepts they relied upon played a role, either as antecedent forms or as guises, in the earlier evolution of the true insurance contract.

Only in the eighteenth-century did most Dutch lawyers clearly and unambiguously recognise the insurance contract as an indisputably valid and sui generis form of contract, distinguishable from all other forms of contract, including those with which it shared one or more common features. By that time, too, the distinguishing features of the insurance contract were sufficiently identified to permit a legal definition rather than a mere general description of the contract of insurance.

2 The Origin of the Modern Insurance Contract

Although Roman law and commerce were unfamiliar with a contract for the provision of insurance cover against a premium in the form known today, risk-transferring devices which, in a primitive sense, fulfilled the commercial function of insurance were utilised. Not only were the Romans familiar with institutions such as general average which involved the sharing and thus spreading of risk in particular situations and conditions, but they also employed contractual risk-shifting provisions in ordinary contracts of loan, sale, carriage, and exchange to transfer the risk of the loss of or damage to goods from one party to the other. The foremost example of the latter was the maritime loan (foenus nauticum), a monetary loan made in connection with a maritime trading venture. The loan enabled the borrower to furnish his ship or to acquire the goods with which he intended trading. In terms of the loan the lender bore the risk of the safety of that venture because of the stipulation that the loan, together with the interest on it, was repayable only upon the safe arrival of the ship or goods in question at an agreed

1 By contrast insurance on a mutual basis by friendly, religious, burial and other similar societies or collegia was known: see generally eg Müller ‘Kaiserzeit’. As to mutual insurance, see further ch IX § 3 infra.

2 See generally Krückmann. On the notion of risk (periculum) in Roman law, see MacCormack who specifically deals with the role of risk in the contract of loan at 160-162.

3 General average and its relationship with insurance is considered in detail in § 4.6 infra.
destination. The interest charged in the case of the maritime loan was then higher than normal because it included a premium to compensate the lender for the risk he ran of not being able to recover his capital and the stipulated interest.\(^4\)

But the insurance contract in its modern form, where the transfer of risk is the primary object of the contract and not connected nor subsidiary to another contract such as that of loan, was unknown in Roman law.

With the expansion of commerce and trade in the Middle Ages, especially in and around the Mediterranean, the need arose for a more streamlined, purpose-built device to shift the risks of trade from one person to another. This need was met not by the instantaneous creation of a new form of contract, but rather by the gradual adaptation of existing contract forms, the most important of which was the maritime loan.

The maritime loan was in first instance a loan of capital for purposes of a maritime adventure and for which the borrower paid the lender (who in some cases also fulfilled the role of the shipowner carrying the goods in question, or of the buyer or seller of those goods) a specified amount of interest. What distinguished it from the ordinary loan of money, the contract of mutuum, and what justified the higher interest being charged for the loan, was the stipulation that the capital with interest thereon had to be repaid only on the safe arrival of the ship or goods in question. It was a monetary loan with a speculative character, an aleatory contract: the lender bore the risk of the loss of the ship or goods and for that he charged a premium which was added to the amount of interest. In the event of the safe arrival of ship or goods, the lender received his capital plus interest (which included a premium for the risk), but in the case of loss the borrower did not have to pay back either the capital or even any interest.

The need soon arose for a device which would permit a merchant to transfer the risk of a maritime adventure to another person without having to borrow money from him. For this the subsidiary shifting of risk had to be unhinged from the underlying contract of loan. What was required was a contract in terms of which the transfer of risk was the primary object; one where parties were first and foremost risk transferor and risk transferee and not, for example, in the first instance lender and borrower; one in terms of which the transferor of the risk invariably paid a premium and not only in certain cases such as where no loss had occurred; one in which the premium was expressed as a separate and identifiable amount which did not form part of an underlying amount of interest, a purchase price or rent; one in terms of which the risk transferee had to part with his capital only in the event of loss rather than having to advance it in all instances with merely the prospect of being able to recover it at a later stage should no loss have occurred; and a contract in terms of which the risk not only of loss but also of damage could be transferred. In short, what was ideally required was a proper contract of insurance.\(^5\)

The evolution from maritime loan to modern insurance contract was a gradual and convoluted one, the details of which remain clouded by a still incomplete

\(^4\) The maritime loan and its derivative, the bottomry loan, are considered in more depth in §§ 4.2 and 4.3 infra.

\(^5\) See generally Rutgers van der Loeff 21-22.
reconstruction of its precise course as well as by a long-standing difference of opinion as to the relative importance of various influences. In particular the role in this evolutionary process of the canonical usury prohibition of the Middle Ages continues to be disputed. It is further clear that although the maritime loan played an important role in the process, it was not the only relevant contract form. Other risk-shifting devices known to medieval commerce, such as the maritime exchange (cambium maritimurum), the maritime partnership (societas maris or commenda), and contracts for the sale of goods on credit and for delivery elsewhere which contained particular provision for the transfer of risks in goods sold, also contributed in varying degrees. Another complicating factor is that the metamorphosis from maritime loan to marine insurance did not occur everywhere at the same time or in the same manner. And finally, the details of the process are further obscured by the fact that in the later stages of its evolution the insurance contract appeared disguised as other, uncontroversial forms of contract. Although the actual and main aim of the contract now was to transfer risk from the one party to the contract to the other, it was outwardly still disguised as and couched in the form and terminology of other recognised, indisputable forms of contract, the prime examples of which were insurance-loan and insurance-sale agreements. The disguise was thought necessary because the validity and nature of the newly evolved insurance contract were not yet clearly recognised and because it came under strong suspicion from the Church as being a vehicle for the transgression of its usury prohibition. In the

6 The insurance-loan was a fictitious (and, on the face of it, free) loan of an amount of money equivalent to the value of certain goods in respect of which the parties transferred the risk. In this agreement the (simulated) loan was stated to have been made by the lender or risk transferor to the borrower or risk transferee, it being repayable after a certain period of time except in the event of the safe arrival of the ship or goods. Thus, the 'loan' was repayable by the 'borrower' in the event of loss. Compared to the maritime loan, a reversal in roles had occurred: the transferor of the risk (the insured) was no longer the borrower of an actual sum of money but the lender of a fictitious sum. Examples of such insurance-loans dating from the middle of the fourteenth century are reproduced as documents 3 to 6 in Bensa Assicurazione 192-197. See further § 4.2.3.2 infra.

7 The insurance-sale was a fictitious contract of sale in terms of which the transferee of the risk declared that he had bought certain goods on credit from transferor at a certain price and in terms of which he undertook payment of the purchase price after the expiry of an agreed period of time and on the condition that goods arrived safe and sound at an agreed destination. The contract was stated to be cancelled and void in the event of the safe arrival of the goods at that destination and the transferee waived the exception that the goods had in fact not been bought, had or received. Again, therefore, a contract of insurance in the shell of a simulated sale, with the party to whom the risk in the goods had been transferred (the insurer) and the transferee of the risk (the insured) pretending to be the buyer and seller respectively of those goods. The insurance-sale appears to have superseded the insurance-loan as a disguise for the real insurance contract, presumably because it was thought to attract less attention as a possible vehicle for the circumvention of the canonical prohibitions on usury. Examples of such insurance-sale agreements are reproduced as documents 8, 12, 13, 16 and 21 in Bensa Assicurazione at 200, 213-214, 215-216, 223-224 and 231 respectively. See further § 4.1 infra on the relationship between the insurance contract and the contract of sale.

8 Simulated contracts of all types were quite common at the time and occurred not only in respect of the prototype insurance contracts. For a discussion of the Roman and medieval position regarding simulated transactions (simulatio) and (confusingly related) transactions in fraudem legis (fraus), see generally Blecher; and Zimmermann 646-650.
course of time the insurance contract became more recognised and its validity accepted, at least amongst merchants if not always at first so readily amongst civil and canon lawyers.

The further details of this evolutionary development of the contract of insurance need not detain us here. For present purposes it is sufficient to note that the first undisguised and recognisable insurance contracts, in which technical terms such as 'assecuratio' or 'securitas' were employed, made their appearance by the middle of the fourteenth century in Palermo and by the end of that century in Pisa and Florence. These contracts were not only concluded between parties whose primary relationship was that of the transferor and transferee of risk, but they were also no longer disguised as other forms of contract. They contained an express provision which made it clear that the one party, the transferor of the risk, paid a particular sum of money by way of premium in exchange for the other party's taking over of a certain described risk, and, more specifically, that this transfer of risk entailed that in the event of loss or damage the transferee would indemnify the transferor.

From Italy the insurance contract, being at the time a useful if not yet indispensable commercial technique, spread with the trade to other parts of Europe, notably to Spain, France and also to the Netherlands. Notarial documents show that in 1349 and 1350 already Genoese merchants, under the guise of insurance-loans, insured their goods on voyages from there to Bruges, and there is evidence too that

---

9 Some aspects will be touched on in passing at a later stage. The sources on the early history of insurance and the insurance contract are varied and voluminous. Major sources include the contributions on the early history of the insurance contract of Elsner; Endemann 'Wesen' and 'Studien'; Vivante; Salvioli; Bensa 'Assicurazione', 'Mittelalter' and 'Geschichte'; Goldschmidt 'Geschichte' and 'Universegeschichte' 354-383; Ehrenzweig 'Geschichte'; Schaube 'Beschaffenheit', 'Uebergang', and 'Versicherungsgedanke'; Ehrenberg 'Entwicklungsgeschichte'; and Perdikas 'Entstehung', 'Palermo-Verträge', 'Skizze', 'Vorläuffer', and 'Rustico de Rusticos'. An accessible overview of the current state of research is to be found in Van der Merwe 'Versekeringsbegrip' 24-120 and 'Winsbejag'. Other summaries include those of Buchner 'Betrachtungen', 'Impulse', 'Geschichte', 'Begriff und Beginn', 'Entwicklung', and 'Begriff'; Helmer; Knittel 5-9; Knoll; Rothbarth 7-10; Tesdorpf; and most recently Nissen 1-10. With a few exceptions (notably eg Dover; Holdsworth 'History' vol VIII at 274ff and 'History'; Lopez & Raymond 255-265; De Roover 'Early Examples'; and Vance 'History'), English contributions on the topic (especially that of the often-quoted Treverny) are rather superficial, largely ignorant of continental research, and very often concentrate mainly and in certain cases almost exclusively on the history of the very much later development of the insurance contract in England.

10 These contracts were no longer drafted in Latin but in Italian. Examples of those concluded in Pisa and Florence are reproduced as documents 11 and 14, dating from 1385 and 1397 respectively, in Bensa 'Assecuratione' 210-212 and 217-220. In Genoa insurance contracts continued to be drafted in Latin in the form of simulated sales until well into the fifteenth century: see the reproductions as documents 19, 22, 23 and 25 in Bensa 'Assecuratione' 228-229, 232-233, 234-235 and 237-238.

11 The first comprehensive legislative regulation of the insurance contract was passed in Barcelona in 1435, and was subsequently updated in 1436, 1458, 1461 and again in 1484 (see Jados 287-302 for an English translation of the last version). Earlier legislation in Italy, such as a Genoese law of 1369 (see Bensa 'Assecuratione' 149-151), concerned only certain aspects of insurance. See ch IV § 1.3.1 infra.

12 See documents 5 and 6 in Bensa 'Assecuratione' 195 and 196-197 and further De Groote 'Zeeverzekering' 206 and idem 'Zeeassurantie' 9.
the first such contracts were concluded a little while later in Bruges itself. Gradually the practice of insurance in the Netherlands, conducted at first and for many decades virtually exclusively by foreign, mainly Italian merchants, expanded. By the mid-fifteenth century the insurance contract in its modern form had become so widely known if not so widely used that it attracted the attention of the courts, the legislatures, and consequently also that of the jurists.

Lawyers were called upon not only to consider and advise on the insurance contract in practice but also to distinguish, describe, characterise, classify and define the newly emerged insurance contract in their treatises. In this process Roman law and legal science played an important role, if not in what the lawyers said about the insurance contract then at least in how they approached it in general.

3 The Process of Formal Legitimisation

Because of its evolutionary origin, its derivative nature, its close relationship with other devices of doubtful validity and its resulting disguised initial appearance, it is not surprising that both canon and civil lawyers experienced particular problems when confronted with a new commercial contract such as the contract of insurance. The first lawyers to write about insurance contracts appear to have been overly concerned with describing the contract, distinguishing it from some and aligning it with other antecedent and corollary legal devices, classifying it, defining it; in fact ultimately with legitimising it. And although their preoccupation receded as insurance contracts came into more widespread use and gained greater acceptance, it is noticeable to a greater or lesser degree in the works of virtually all Dutch legal writers right up to the end of the eighteenth century.

The cardinal question, at least in the fifteenth and sixteenth centuries, was whether insurance contracts were valid. The main threat to its validity was the canonical usury prohibition and the perception that the insurance contract, like the antecedent maritime loan and its other offspring, was employed merely as a ruse to obscure the usurious or speculative nature of the transaction between the parties. Confronted by a newish contract, so obviously accepted and used by merchants, lawyers were under

---

13 The first uncontroverted evidence of such insurance, still disguised as a loan, dates from 1370 (see document 10 in Bensa Assecurazione 203-209) and concerned an insurance concluded there by two Genoese merchants. Despite earlier support, the suggestion that an Insurance Chamber may have existed in Bruges as early as 1310, now seems unsupportable (see Van Niekerk Sources 12n25 for further references on this matter). Further, the Flemish document of 1303, held out by Tytens 'Policy' as an insurance policy, is clearly not one.

14 For extracts from judgements on insurance matters of the municipal or scabinal (Schepenen) Court of Bruges dating from this period, see De Groote Zeeassurantie 13-18; and Van Severen Cartulaire vol II at 43, 62-63, 74-75, 90-94, 181-182, and 203-204. See further ch IV § 1.3.2 infra.

15 The first legislative measure dealing with an aspect of insurance was the Placaat of Philip the Good of Burgundy of 1459. It is reproduced in Van Severen Cartulaire vol II at 88-90 and in the Vlaenderen Placaet-Bouck vol I at 72-74.
considerable pressure to establish its validity formally, in whatever way possible. In this process, as we shall see, they very often went to extreme lengths, even to the extent of ignoring if not suppressing the true nature of the contract of insurance. In the course of time, of course, the grounds for the unlawfulness of contracts, such as a usurious or wagering nature, were drastically reduced; agreements which were unlawful per se became the exception rather than a frequent occurrence. The validity of the insurance contract too was, at least by the seventeenth century, no longer in doubt. But the remnants of the earlier approach remained in the treatment of that contract by Dutch legal writers.

Faced then with what was to them a new form of contract, it was only natural that the lawyers should first have turned to the received Roman law to assist them in the process of legitimisation. If the relevance of Roman law could be established and the insurance contract fitted into its system of contracts, its validity would surely be beyond doubt. But moreover, if the insurance contract could be classified, it would be possible to determine its applicable naturalia and much would then become clear about its contents.

In order to classify the insurance contract, its distinguishing features had to be determined. And, being confronted by what appeared to be a new type of commercial contract, it was quite logical to attempt to classify it, or at least to determine whether it could be classified, as one of the contract types existing and considered valid in Roman law and, more likely than not, also in canon law. And on the basis of one or more shared features, Roman-Dutch lawyers attempted to classify the insurance contract as any one of a number of more familiar contracts, in the process very often ignoring even readily apparent differences between them. In the process of legitimisation, the aim, very often, was not so much determining the essentials of the contract of insurance, defining it and thus being able to distinguish it from other contracts, but rather to find the common features between the insurance contract and another lawful contract so that, by association, the insurance contract too could be clothed with validity.

---

16 The point must be stressed, though, that while the Church sought to prevent unlawful (usurious) contracts and lawyers attempted to explain every device used in trade with a view to determining its validity or otherwise, the merchants themselves were little concerned with the description, classification, definition and, ultimately, with the whole process of legitimisation of their commercial contracts: see Goudsmit Zeerecht 283.

17 Unlike Roman law, Roman-Dutch law (at least in the later stages of the development of its law of contract in the eighteenth century), did not recognise only a closed number of types of contract. Classification of a contract was therefore not required for its validity. But the early lawyers, of course, did not have this insight and even those writing in the eighteenth century give no clear and general indication that they had realised that a classification of the insurance contract as a particular type of contract was not necessary for it to be a valid contract. Put differently, Roman-Dutch contract law had not yet reached the sophistication of being able to distinguish between the essentia of the insurance contract and the requirements for the validity of all contracts, including the insurance contracts. On the need (even today) for and the methods of the classification of newly emerged forms of contract, see generally Joubert 'Klassifikasie'. On the classification of the insurance contract, see further ch III § 1.3 infra.

18 See Van Houdt 21n.42.
Roman-Dutch lawyers were, of course, not the first to grapple with the classification of the contract of insurance. The classification of newly emerged contracts within the system and with the formulas of Roman law was the legitimate pursuit of many medieval lawyers. In the case of the insurance contract this went hand in hand with justifying and defending it against canonical disapproval and condemnation as (initially) a usurious loan or (later) as a wagering agreement. In this regard the approach followed was no different from that followed in respect of other newly devised commercial devices, notably bills of exchange, which too were unknown to Roman law.

When, in the time of the usus modernus, the contract of insurance became the object of study, the early legal writers integrated it into the system of the ius commune and in the process settled a number of doubtful issues with reference to the common law, that is, Roman law. The fact that most civilians recognised or at least suspected that the insurance contract was not known in its modern form to that system was not regarded as preventing reference to and reliance upon it. References to Roman-law texts abound in their treatment of the insurance contract. Italian mercantilist writers of the sixteenth century who had a particular influence upon the Roman-Dutch lawyers who came after them, such as Santerna, Straccha, Scaccia, and even a later author such as Roccus, devoted significant parts of their treatises on insurance law to a consideration of the classification and validity of the contract of insurance. Writing at a time of theoretical confusion between the insurance contract proper and other contracts, they, other civilians as well as the theologians, in particular sought to explain the

---

19 See generally the contribution of Dilcher on the medieval classification of contracts.

20 See eg Amzalak 192 and Van Houdt 18.

21 See eg Faber 'Studien I' 82 and Molster 335-336.

22 See Coing Privatrecht 534. On pre-sixteenth century scholarly discussion and analysis of the insurance contract, mainly by theologians, legists and scholastic moralists, and generally in a non-specialised fashion as part of a broader description of commercial and civil law, see also eg Ebel 'Anfange'; Pesce; and Vereecke.

23 For further information on these Italian writers and their treatises, a number of works may be consulted. On Santerna (who wrote his treatise on the insurance contract c1488, although it was published only in 1552), see Amzalak; Franchi Review; Goldschmidt 'Stracca und Santerna'; Van Houdt; Maffei; Oliveira; and Peláez. On Stracca [1509-1578], see Chiaudano; Franchi Stracca; Goldschmidt Stracca und Santerna; Koch Pioniere 15-20; Lattes Stracca; Mordenti; and Tamassia. On Scaccia [1568-1618], see Schwarzenberg. And on Roccus [1605-1677], see Chiaudano. For details of the writings on insurance of other (and for Roman-Dutch law less important) writers, see eg Peláez's contribution on Catalan, Portuguese and Genoese legal literature on marine insurance in the fifteenth to the seventeenth centuries.

24 Theologians were preoccupied with the validity of commercial devices no less than their civilian counterparts. Although contemporary and subsequent civilians covered the insurance contract in much greater detail (and probably for that reason enjoyed a noticeable influence on the Roman-Dutch exponents of insurance law which the theologians never achieved), the theological contribution to the early jurisprudential treatment of the contract of insurance is nonetheless important in that it laid the foundation for much that was to follow. Thus, eg, the Spanish scholastic school of the sixteenth century was concerned especially (although not solely) with the permissibility of the insurance contract which they treated with reference to the usury prohibition and the maritime loan (from which insurance was carefully distinguished). This group included Franciscus de Vitoria [1492-1546] who considered insurance permissible on grounds of utility, regarded it as a type of sale, and distinguished it from wagering on
insurance contract with reference to and even as only an example of a number of con­
tracts recognised in Roman law. Most popular was the contract of sale (emptio
venditio), insurance being regarded as a purchase and sale of a risk (emptio et venditio
periculi). But other contracts featured as well: lease (locatio conductio), partnership
(societas), suretyship (fideiussio), loan (mutuum) or maritime loan (foenus nauticum),
mandate (mandatum), and wager (sponsio). Furthermore, they considered in detail
whether the insurance contract could be classified as a stipulatio, a cautio, a nominate
or innominate contract, a real or a consensual contract, or as a contractus do ut des or
do ut facias.\textsuperscript{25} They pointed out that the insurance contract was not usurious because
the obligatory premium (generally at a rate in excess of that allowed for interest on
loans) was not the equivalent of interest but was paid in exchange for the assumption
of risk, suscepi periculi. They stressed the lawfulness of the contract by accentuating
its characteristics as a non-profit or indemnity contract of good faith.

Thus, the process of legitimisation and with it the classification of the insurance
contract by direct or indirect reliance on Roman law was not unique to Roman-Dutch
law.\textsuperscript{26} Although most Dutch writers of the seventeenth and eighteenth centuries no
doubt realised that the evidence of the existence in Roman times of insurance in the
form they were familiar with, was slender and inconclusive, they lacked the conviction
to acknowledge that as a fact and accordingly to deny the insurance contract the
status that comes with such a heritage.\textsuperscript{27} And while not yet unambiguously recognising
the insurance contract as a contractus sui generis, they continued to refer to and apply
the subsidiary Roman law\textsuperscript{28} even where it was not strictly or directly appropriate and
even where doing so required great ingenuity, some highly artificial analogies and a dis-

\textsuperscript{25} See further eg Faber 'Studien I' 82; Foest 10-11; Goudsmit Kansovereenkomsten 4-5 and 188-189;
Koch Review 334; Lichtenauer Geschiedenis 177; Rothbart; Rutgers van der Loeff 14-15. See too Roccus
De assecuratione note 3 for a list of references to the earlier authors.

\textsuperscript{26} The view of English writers on insurance law of this civilian process is instructive. Thus Malynes, a
contemporary of Grotius, in 1622 considered 'vaine' the question whether or not an assurance made by
stipulation was a contract (Consuetudo vol I at 28). And Weskett, writing towards the end of the
eighteenth century, noted that the civilians had expended great effort in investigating the nature of the
insurance contract, but then declared that 'all this is frivolous and mere subtillty' (Digest 289 sv
'insurance' par 2).

\textsuperscript{27} See Enschedé 2-3.

\textsuperscript{28} Those who did so recognise the insurance contract, also noted the relevance of Roman law, but then
only such general principles of it as were applicable mutatis mutandis. Thus, Van Ghesel De
assecuratione I.1.4 noted that although the insurance contract was unknown to Roman law, and that it
was a novus contractus civilis, the general principles of Roman law nevertheless applied to it (idem I.1.7).
tortion of the true nature of the insurance contract itself.29 No doubt they could justify this method of describing, classifying, defining and legitimising the insurance contract in various ways. Generally, though, Roman-Dutch writers, to a greater or lesser extent, justified their approach by equating the insurance contract with a contract known to Roman law on the basis of one or more shared features, and by then analogously applying to the insurance contract the principles relating to the contract in question. And having linked the insurance contract in this way, it was also possible to classify it in the Roman-law system of contracts.

These two aspects of the process of legitimisation will now be considered in greater detail, namely, in the first place, the relationship in Roman-Dutch law between the insurance contract and certain other contracts and devices, and, in the second place, the classification of the insurance contract in Roman-Dutch law.

4 The Insurance Contract and Other Contracts: Distinguishing and Common Features

Several different types of contract have in Roman-Dutch law been equated to or discussed in connection with the insurance contract. Significantly they are all possessed of a Roman-law pedigree. Furthermore, all share one or more distinguishing feature with the insurance contract. On the basis of this communality, Roman-Dutch lawyers sought either to relate the insurance contract to the other contract if it was valid, or to distinguish it from such other contract if it was invalid or of doubtful validity. In this process the relationship between such other contracts themselves were on occasion also investigated. Of course, as the insurance contract gained acceptance and as its validity and sui generis nature became less contentious, lawyers became less concerned with equating the insurance contract and more concerned with distinguishing it.30 But right up to the end of the eighteenth century there is evidence of Roman-Dutch lawyers occasionally equating the insurance contract with other forms of contract from which it was clearly distinguishable.

Not surprisingly the features of the insurance contract also present in these other contracts all in one way or another relate to an aspect of the element of risk. The following features or combination of features of the insurance contract appear to have been particularly relevant: its aleatory nature in the sense that the performance of one of the parties depended upon the outcome of an uncertain event; the fact that it involved the (temporary) transfer of risk from one party to the contract to the other; the fact that such transfer of risk implied a transfer of liability for loss and a concomitant obligation to indemnify; the fact that in exchange the other party paid (or undertook to pay) a

29 See eg Goudsmit Zeerecht 14 and Rutgers van der Loeff 14-15. Lichtenauer Geschiedenis 108 refers to Voet Commentarius II.2.3 as an example of how mercantile-law concepts such as insurance were forced into the Roman-law system of contracts.

30 It is almost as if they gradually came to realise that one could not necessarily equate two contracts because they shared one or even more characteristic features, and that what distinguished the insurance contract was not any one or more of its characteristic features but rather the particular combination of all of them.
specific amount of money; and the fact that insurance, through the insurance contract, was yet another way of sharing or spreading risk and loss.

4.1 Insurance and Sale

The contract to which the insurance contract was most frequently equated was that of purchase and sale (emptio et venditio). This analogy was drawn in the earliest treatises on insurance law. The reasons why the contract of sale was used to explain the features of the insurance contract are not hard to find. Generally there was the reciprocal nature of both contracts with the performance of one of the parties consisting, in practice, in the payment of a sum of money.

More specifically though, both contracts involved a transfer of risk. As soon as a contract of sale was perfected, the risk of accidental loss, damage or destruction passed from the seller (who was usually the owner) to the buyer: periculum est emptoris. The passing of risk, but not the passing of ownership, was one of the natural consequences of a contract of sale. It was as central to that contract as it was to the contract of insurance.

Furthermore, in the early stages of its evolution the insurance contract appeared disguised as an adapted contract of sale, a so-called insurance-sale agreement. In terms of this agreement one person would agree to buy property (a ship or goods) from the owner on credit. Payment of the purchase price was deferred for an agreed period and was contingent upon the property not arriving at an agreed destination. Although the parties agreed on the nullity of the sale in the event of the safe arrival of the property, the sale came into effect immediately and the property in question was thus at the risk of the buyer from the commencement of the voyage. Accordingly, in the event of a loss en route the buyer would have to pay the purchase price to the seller, but if the ship or goods did in fact arrive safely the sale was cancelled and nothing was payable. Thus, the device of a sale was employed to effect the temporary transfer of

31 Thus, Straccha De assecurationibus VI.6 already stated that 'contractus noster assecurationis innominatus est, & cum proxime accedat venditioni, secundum regulas emptionis & venditionis statuendum est'.

32 Risk passed as soon as the contract of sale was perfecta (one of the requirements for which was that the sale had to be unconditional) and did so irrespective of and independently from the passing of ownership or possession; the risk which passed to the buyer was only that of vis maior and the seller in possession remained liable for custodia. On the principles relating to the passing of risk by sale in their historical context, see generally Wessels 602-604 and Zimmermann 281-292.

33 For details on insurance sales, see eg Amzalak 189; Gärtnner 339-340; Holdsworth History vol VIII at 276-277; Van der Merwe Versekeringsbegrip 100-102 and 'Winsbejag' 226-227; De Roover 'Early Examples' 186; and Sanbom 239 247-249. See also § 2 supra.
the risk of the loss of specified property to the buyer. The buyer was therefore in actual fact the insurer, and the purchase price the equivalent of the indemnity payable in the event of a loss. A separate arrangement, not reflected in the contract of sale so as not to reveal the true nature of the agreement, had to be made for the payment of the premium, or, alternatively, the premium had to be concealed in a deflated purchase price. Insurance contracts were concluded in this form in Genoa, for example, in the fifteenth century and a Genoese jurist of the time, Bartholomeus Boscus, still defined the insurance contract as a sale subject to the resolutive condition of safe arrival of the goods sold. In the case of this insurance-sale, therefore, the agreement, simulated and conditional, was simply the device used to disguise and to justify the main aim of the parties’ transaction, namely to transfer the risk of the loss of the object of the sale from the seller (the insured) to the buyer (the insurer).

After the emergence of the insurance contract as an independent agreement in an undisguised form, jurists quite naturally sought to explain it by analogy to a contract of sale. Because there was no pretext any longer of any sale of the property in question, the type of sale with which it was compared was not the sale of property but the sale of the risk of the loss of property. Insurance was regarded as an *emptio venditio periculi*, the unconditional sale by the insured to the insurer of a certain peril for a particular period of time. This sale of a risk was already a step removed from the

---

34 Whereas in terms of the insurance-sale the risk of the destruction of the property was transferred to the buyer, the opposite (in more sense than one) occurred in the event of a conditional sale of property not yet in existence but expected to be at some future date (eg crops or a litter). This form of sale, the *emptio rei speratae*, was one subject to the suspensive condition of the specified future object having come into existence at a particular date; if it did not materialise, no sale existed. In this case, therefore, the seller bore the risk of the non-materialisation of the property (see further Zimmermann 245-246).

An analogous form of sale, which may in certain circumstances have fulfilled the role (later taken over by the insurance contract) of a risk-shifting device, was the *emptio spei*. It was also a sale of future property but with the difference that here the sale was unconditional. The risk of the property not having appeared at a certain future date was thus passed onto and borne by the buyer. Zimmermann (who discusses this type of sale at 246-249 and 253) notes that by selling on this basis the seller in effect ‘insured’ himself against risk of the property not materialising. He points out, though, that this type of sale was probably not an ordinary business transaction since it contained a strong speculative element. Indeed, for the buyer to have been prepared to speculate and risk his money in this way (the purchase price had to be paid irrespective of whether or not the object came into existence), the price had to be a very good one; in effect the discounted price compensated the buyer for bearing the risk.

35 On Boscus, who wrote his *Consilia* between 1390-1425, see Bensa ‘Bosco’ and Piergiovanni *Lezioni* 181-197.


37 Despite the temporary nature of the transfer of the risk there appears not to have been any serious attempts to explain the insurance contract with reference to the contract of letting and hiring (*locatio conductio*) rather than that of sale. Roccus (*De assecurationibus*) note 48 did indicate that in the case of a contract for the letting and hiring of work (*locatio conductio operarum*) the contractor (*conductor*; eg a carrier) could by stipulation (*pactum*) in the contract agree to compensate the customer (*locator*; eg a consignee) for any damage to the property entrusted to him, including damage for which he would not otherwise have been liable (such as that caused by a *casus fortuitus*). Roccus appears to have regarded this indemnity clause as (a form of) insurance. According to Noonan 203-204, the theologists St Bernardine *De contractibus* XXXIX.1.3 regarded insurance as the hire of the insurer’s services, while St Antoninus *Summa* II.1.7 defended insurance as the rendering of a service for a price.
Insurance Law in the Netherlands 1500-1800

Insurance-sale. It was realised that as insurance did not involve the transfer of possession in the property insured and therefore did not amount to the transfer of ownership, it could not be equated to a sale of that property. Ownership and risk had to be separated. Insurance was nothing but the transfer, for a certain period of time, of only the risk in the insured property and could therefore be compared only to a sale of the risk in property.\(^{38}\)

Of course this explanation of the insurance contract did not clarify all its features satisfactorily. The most obvious anomaly which existed was that the insured, as seller of the risk, also paid the insurance premium which was considered to be the equivalent of the purchase price.\(^{39}\) Quite possibly only the emphasis and terminology used in the analogy were wrong. A reversal of the roles of the parties involved was all that would be required for the insurance contract, and in particular the insurance premium, to be more fully explained by the contract of sale. And such a reversal of roles could be achieved if the object of the sale was regarded not as a risk but rather as security: the insured was selling and transferring the risk, true, but in doing so he was buying security and it was for that that he paid the insurer a premium.\(^{40}\) In any event, although later writers did regard the insured as the buyer and the insurer as the seller,\(^{41}\) they continued to regard the sale as one of a risk. The inconsistency appears never to have attracted the attention of Roman-Dutch authors, possibly because in the course of time and as the insurance contract became less controversial, the relevance of an analogy with the contract of sale occupied a more peripheral place in their treatment of the law of insurance.

A good example of how and when the contract of sale was considered in connection with the insurance contract is provided by the approach of Roccus. He too drew an analogy between insurance and the sale of a peril or risk.\(^ {42}\) This he did especially when considering the amount, payment and return of the premium. For example, he referred to the analogy when considering the possible application of the doctrine of \textit{laesio}

\(^{38}\) See Roccus \textit{De assecuratione} note 4. An example of a sale without a \textit{res} already existed in the \textit{emptio spei} (see n34 supra) which too was a sale where the object of the agreement was not a physical \textit{res} but a \textit{spes}, that is, a risk or chance which could or could not materialise. The difference, of course, was that in the case of an \textit{emptio spei} the seller sold the risk of a future \textit{res} not materialising, whereas in the case of an insurance (at least in its early forms) the analogy would be of the seller (the insured) selling the risk of the loss of an existing \textit{res}.

\(^{39}\) See Rutgers van der Loeff 14-15. This incongruity appears not to have troubled or to have been detected by the early authors. Thus, Santerma \textit{De assecurationibus} III.13 noted that insurance was similar to a sale by virtue of the premium that is paid, since person who makes the insurance for a premium (the insured) is said to buy indemnification against the possibility of risk ("quod qui assecurationem facit propter pretiû, dicitur emere eventum periculi facit"). Scaccia \textit{De commerciis} I.7.3.6n5 explained that "assecuratio est contractus emptionis, & venditionis, in quo assecuratus emit periculum, & assecurans illud vendit".

\(^{40}\) See eg Van Houdt 21n42.

\(^{41}\) See eg Roccus \textit{De assecurationibus} note 7 and Pothier \textit{Assurance} note 4.

\(^{42}\) Roccus \textit{De assecurationibus} notes 7 and 8.
enormis to the insurance contract;\textsuperscript{43} he noted that an insurance contract of which the premium was fixed at a rate in excess of that permitted by way of interest on a loan, was nevertheless lawful because of it being a purchase and sale of risk;\textsuperscript{44} and he explained the recoverability of the premium in the case of an absence of risk by noting that no insurance was possible without a risk just as a sale was invalid without a res vendita.\textsuperscript{45} He stressed the point that ownership of insured goods did not pass to the insurer, insurance not being a sale of goods but a sale of the risk of the loss of goods.\textsuperscript{46}

The analogy with the contract of sale is encountered in the works on Roman-Dutch law too, not only in the works of the earlier exponents such as Lessius,\textsuperscript{47} Perezius,\textsuperscript{48} and Zoesius,\textsuperscript{49} but also much later. Thus Johannes Voet referred, as was a not uncommon practice, to the insurance premium as the price paid for the risk, the pretium periculi.\textsuperscript{50} And even by the end of the eighteenth century, when the insurance contract was recognised as a sui generis contract and not a type of sale,\textsuperscript{51} the analogy persisted, even if by then less forcefully pronounced. Thus, Van der Keessel, in rejecting the application of the doctrine of laesio enormis to insurance contracts, explained that insurance was not a sale, but nevertheless added and that if it were to be regarded as similar to one it would be akin to the purchase of a spes.\textsuperscript{52}

Despite the fact that the analogy between insurance and sale gradually lost its utility as the insurance contract established itself, it may well initially have had an influence on at least some aspects of the law relating to insurance contracts. The possibility exists that the contract of sale, in the form either of the insurance-sale or of the sale of a

\textsuperscript{43} Ibid.

\textsuperscript{44} Idem note 47.

\textsuperscript{45} Idem note 88.

\textsuperscript{46} Idem note 9; see also note 25 ("quia in contractu assecurationis, non venditur res, quae assecuratur ...").

\textsuperscript{47} De iustitia II.28.24 (insurance for a premium "est contractus similis emptioni & venditioni").

\textsuperscript{48} Praelectiones XI.5n22 where it was said that the contract of insurance "accedit contractui emptionis & venditionis, quia fit certo pretilio convento, quo aseimtunt merces postea solvendae, videtur enim is qui assecurationem facit, quasi eventum periculi emere ...".

\textsuperscript{49} Commentarius XVIII.5n23 where insurance was compared to a sale "cum Adsecurator sciens suscipiat rel alienae periculum".

\textsuperscript{50} Commentarius XXII.2.3. The French author Pothier Assurance note 4 by the end of the eighteenth century still regarded insurance as "une espèce de contrat de vente". See further ch XI § 1.2 infra for a description of the insurance premium.

\textsuperscript{51} Thus, Van Ghesel De assecuratione I.3.1 noted that sale and lease differed from insurance because they did not contain any susceptio periculi nor any praestatio indemnitatis. On the sophistry of the analogy with sale, see further Rutgers van der Loeff 15-16 who points out that a sale is something more than the 'buying' of the other party's performance.

\textsuperscript{52} Praelectiones 1428 (ad III.24.1). As to leasio enormis, see further ch XI § 2.3 infra.
risk, may have provided the impetus for the evolvement of a number of principles of insurance law. And new light may well be shed on the intricate and apparently conflicting details of those principles if they are viewed as consequences of the analogy historically drawn between insurance and sale. Thus, because the insured was regarded as selling to the insurer if not the property insured itself then at least the risk in that property, the notion may have arisen that he had to have some interest and, more specifically even, that he had to be the owner of that property to be able to sell it in this way. Many aspects concerning the insurance premium may be explicable with reference to the principles relating to the purchase price in a contract of sale. The rights of an insurer to and in respect of the remains of insured property or recovered insured property after payment for a loss may well be the consequences of the fact that the insurer was initially regarded, in the event of a loss, as having bought the property from the insured. Similarly, the fact that the insurer was regarded, in the event of loss, as having acquired ownership in the property concerned as from the inception of their voyage may explain the fact why, even prior to (payment for) a loss, he was entitled to sue for the recovery of the goods and why, in appropriate circumstances, he could demand assistance in this regard from the insured. Further, the prohibition on double insurance may be traceable to the notion that a person cannot sell the same property to different people at the same time. And, lastly, the fact that the insured was regarded as selling the property at risk to the insurer for a particular price, agreed upon between the parties beforehand and not necessarily having any relationship with the then or later value of that property, may well have provided the example for valued policies.

4.2 Insurance and Maritime Loan

In the same way as the insurance contract was in the early years of its evolution very commonly equated to the (valid) contract of sale, so it was, initially as well as right up to the close of the eighteenth century, most commonly distinguished from both the maritime loan and the analogous bottomry loan. The prime reason why insurance on the one hand and maritime and bottomry loans on other hand were sufficiently closely related so that a careful distinction was necessary, was because of the cardinal and characteristic role which the transfer of risk played in these contracts. Because quite a few of the features of the insurance contract, especially those relating to risk, were first described with relation to maritime and bottomry loans, these two forms of contract will be considered in some detail.

53 See generally in this regard Gärtner 339-341; Holdsworth History vol VIII at 277; De Roover 'Early Examples' 188; and Sanborn 247-249. The examples mentioned here will all be considered in more detail at a later stage.

54 This was the explanation given by eg Casaregis Discursus I notes 89-90.

55 As to valued policies, see ch XVII § 5 infra.
4.2.1 The General Characteristics of the Maritime Loan

The maritime loan was a specific type of loan of money already known in ancient Indian law, in the mercantile practices of the Phoenecians, and in Greek law. Because the Roman loan for consumption (mutuum) was, strictly speaking, a gratuitous contract not adapted to the hazards of maritime transport, the maritime loan was received into Roman law and custom from Greek law.

After sale, the contract of loan was the most prevalent contract of ancient and medieval commerce. The maritime loan was a contract specifically adapted to the needs of maritime commerce. It was a monetary loan by a capitalist to a merchant for the purposes of a maritime adventure. It was taken up by a merchant involved in the overseas trade who lacked the capital necessary to acquire and ship merchandise to or from his place of business.

As in the case of the ordinary loan for consumption, the money lent under a maritime loan was transferred to the possession and ownership of the borrowing merchant but with the addition of the following particular and characteristic term: the repayment of the capital and the stipulated interest was made conditional on the safe arrival at an agreed destination of the loan, or of the merchandise bought with it, and thus of the carrying ship concerned. Repayment of the loan was usually agreed to be made within so many days after safe arrival of the ship in a particular port. The loan could be for an outward voyage, a homeward voyage, or a round voyage: in the latter two cases the lender himself collected the repayment in the home port; in the first case repayment was received by an agent of the lender at the destination in question or was collected upon arrival there by an agent of his who accompanied the ship (and the loan) on her (and its) voyage.

---

56 In addition to the sources referred to in note 9 supra on the history of insurance, the following may be consulted on the maritime loan: Ankum; Ashburner ccix-ccxiv; Calhoun; Feenstra Grondslagen 142-143; Hammacher 10-17; Holdsworth History vol VIII at 277; Hoover; Jhering; Litewski; Lobingier 27-28n; Lopez & Raymond 157-161 and 168-173; Matthiass; Van der Merwe Verzekeringbegrip 24-120 and 'Winsbejag'; Molengraaff 'Verzekering' 411-415; Postan, Rich & Miller 53-55; Seffen Versicherung 5-42; Segers; Visky; and Zimmermann 181-186.

57 Various terms have been employed when referring to the maritime loan. It seems that in classical Roman law the usual term for it was pecunia traiectitia (that is, money which is to be carried abroad) while in post-classical Roman law and in medieval times it known as fenus nauticum. It has also been suggested (see eg Hammacher 10n6 and Ebel 'Glücksvertrag' 102) that pecunia traiectitia referred to the loan itself that the interest derived therefrom was called fenus nauticum. Likewise William Welwod, the Scottish civil lawyer who wrote in the beginning of the seventeenth century, explained (Abridgement 36-38) that in case of the maritime loan 'the profit of the ... loane is called usura maritima, or foenus nauticum. Likewise William Welwod, the Scottish civil lawyer who wrote in the beginning of the seventeenth century, explained (Abridgement 36-38) that in case of the maritime loan 'the profit of the ... loane is called usura maritima, or foenus nauticum, which is not the price of the loane, but of the hazard and danger which the lender takes upon him during the loane'. There was also an unfortunate tendency to use the terms maritime loan and bottomry loan interchangeably despite the fact that they were distinguishable types of contract. See further § 4.3.1 infra).
Thus, in the event of the loss of the ship (that is, of the loan or the merchandise bought with it) on the voyage from certain specified risks, the lender received neither principal nor interest and the borrower (and his heirs) were relieved of any obligation to repay such loan and interest. Accordingly, in a loan of this nature where repayment was conditional upon the safe arrival of the ship, the lender took over the risk of the maritime adventure in question. In the event of the loss of the ship and therefore the failure of the trading venture, lender and borrower in effect shared in the loss: the former lost his capital and the interest it could have earned while the latter lost the freight and/or the profit he had expected to make on the goods. But in the event of the safe arrival of the ship, the lender shared indirectly in the success if not in the profitability of the adventure, the borrower being compelled to repay him the amount of the loan and in addition also interest at an unusually high rate. The interest on a maritime loan was higher than usual because it included a compensation for the lender's having borne the risk in question.

Thus, for the borrowing merchant the maritime loan served a dual function: he not only obtained capital to finance a particular maritime venture but was at the same time also able to transfer (at least some of) the risks of that venture to another.

Numerous variations on this form of maritime loan occurred in practice. Thus, such loans were extended, albeit less commonly so, to shipowners who lacked sufficient capital to repair or equip their ships for particular trading voyages. Interestingly enough, evidence in the Middle Ages and even earlier suggests that maritime loans, like bottomry loans and insurance contracts later on, gave rise to much speculation and that in addition to what may be termed true maritime loans, speculative maritime

---

58 Generally risks occurring outside the control of the parties to the loan transaction, that is, maritime risks. The extent to which the lender took over the risk of loss was usually determined in contract itself, and it is uncertain whether, in the absence of any contractual arrangement, the risks transferred were confined to maritime risks.

59 A possible reason why the repayment of the maritime loan was conditional upon the safe arrival of the ship could have been that initially the borrower was an itinerant merchant (with the lender a sedentary capitalist investor) who accompanied the loan (or the goods acquired with it) and who thus perished when the ship was lost.

60 The parties to a maritime loan were clearly not partners for on the one hand the lender did not share in the (risk of the) business losses of the borrower and on the other hand he was not entitled to repayment (of interest on his loan) only if the maritime venture was profitable.

61 The lender, in turn, was moved to conclude a maritime loan because of the chance of employing his capital at an unusually high return without himself going on and planning the venture in question.

62 That is, loans where the condition for repayment was directly connected with the loan, e.g. repayment depended upon a condition relating to the safety of the loan, or that into which the loan was converted, or at least of the vessel engaged on the voyage for which the loan was made.
loans were concluded as well.\textsuperscript{63}

\section*{4.2.2 The Ordinary and the Maritime Loan Distinguished: Risk and Interest}

The principal difference between the ordinary loan for consumption and the maritime loan, not surprisingly, concerned the incidence of risk. In terms of the ordinary loan the money or property lent was transferred in ownership to the borrower who was under an obligation to return to the lender an equal sum of money or an object of the same kind, quality and quantity. Because possession and ownership passed to borrower, the latter, as a natural consequence of the contract, bore the risk of any accidental loss or destruction occurring during the period of the loan. Any such loss did not affect his obligation towards the lender.\textsuperscript{64}

An essential characteristic of the maritime loan was that in the event of the loss of the ship on which the loan (or the goods acquired with it) was carried, or of the ship to which improvements financed by the loan were effected, the borrower did not have to repay anything. Thus, otherwise than in the case of the ordinary loan, in the case of the maritime loan the risk, or at least some of the risks, of loss of the loan (or the goods or improvements to the ship into which it was converted) was assumed and borne by the lender and not by the borrower. The maritime loan was a loan subject to a resolutive condition relating to the safe arrival of the loan or its substitute. Put differently, repay-

\textsuperscript{63} That is, loans where the condition for repayment was unconnected to the loan itself or even the parties themselves, eg where repayment depended upon the arrival of just any ship or upon whether the borrower inherited from his wealthy cousin within a particular time. Roccus \textit{De assecurationibus} note 40 considered whether the following agreement was valid: A gives B 100 pieces of gold in Naples with the stipulation that in the event of the loss of the ship, destined for Sicily, on which the 100 pieces was carried, B will have to repay only 50 pieces; on the arrival of the ship in Sicily, though, B has to pay A 120 pieces. Roccus thought that this agreement was valid in same way as was a wager where both contracting parties were exposed to and ran the risk of loss or profit. Voet \textit{Commentarius} XXII.2.1 noted that conditional loans did not have to be connected to the carriage of goods by sea but that what he called a \textit{quasi nautica pecunia} could validly be concluded. Thus, eg, a loan could validly be made to a fisherman or an athlete which was repayable with interest only if something was caught or a competition was won. Such agreements were valid and not in themselves illegal. As to the validity of wagers and aleatory contracts generally, see ch II § 5.2 infra.

\textsuperscript{64} On the incidence of risk in terms of the loan for consumption (mutuum), see eg Zimmermann 181-186. By contrast, in terms of the loan for use (commodatum) which was a gratuitous loan of (usually) a non-fungible which had to be returned to the lender, ownership in the borrowed object did not pass to borrower but he was strictly liable for it. His liability was so-called \textit{custodia} liability, that is, it included liability for loss caused by his own \textit{culpa} and \textit{dolus} but excluded liability for the incidence of \textit{vis maior}. The parties were free to vary the borrower’s standard of liability and just as the borrower could contract to be liable for \textit{dolus} or \textit{vis maior} and \textit{culpa} only, he could assume full \textit{periculum rei} (so-called \textit{Versicherungs haftung}, which included liability for \textit{vis maior}) in which case he was in the position of an insurer: see further Zimmermann 188-205. In the case of a contract of deposit (depositum), too, there was no passing of ownership, but there the object was handed over not to be used but to be kept in safe custody. The depositor was not strictly liable (that is, there was no \textit{custodia} liability) but his liability was, generally speaking, only for loss by his own \textit{dolus}. Again the parties were free to make the depositary liable for \textit{culpa} or even to impose \textit{custodia} liability upon him: see further Zimmermann 205-220. On the influence of an undertaking to insure (or indirectly to stand in as insurer) on the incidence of risk in terms of a deposit, see Roccus \textit{De assecurationibus} note 26.
ment of the loan and thus the borrower's obligation in this regard was conditional on the safe arrival of the loan.

Concomitant with this prime distinction was a further difference which related to the role of any security which the borrower may have provided for the loan. The ordinary loan could have been accompanied by a stipulated hypothecation or pledge of property belonging to the borrower, either of property otherwise unconnected to the loan or more specifically of the property into which the loan was converted. Such additional security and its continued existence did not in principle affect the existence of the rights of the parties to the loan but only the remedies of the lender: even if the object of the security was lost, the lender's personal claim under the contract remained and only the value of his security was affected.

By contrast, in the case of the maritime loan the existence of the parties' rights under the contract depended upon the continued existence (until the expiry of the period for which the lender ran the risk involved) of property which may also have been (and which in fact customarily was) specifically put up as security for the repayment of the loan. If the goods bought with the loan or the ship concerned were hypothecated as security and were lost on the voyage, the lender lost not only the right to recover the amount secured out of those goods or that ship (that is, his action in rem), but, because the loan was extinguished by such occurrence (that is, because of the conditionality of the maritime loan), also his right against the borrower under the contract (that is, his action in personam). But if the goods or the ship arrived, albeit in a damaged state, the lender did not lose his personal right against the borrower nor was it reduced in any way; such damage merely affected the value of his security.

A third difference between the ordinary and the maritime loan, and one also flowing from the distinction regarding the incidence of risk, concerned the matter of interest. Whereas ordinary interest was charged for the ordinary loan, the maritime loan carried and was permitted to carry a higher, maritime interest (usura maritima). The justification for the maritime lender's charging such higher interest was that he bore the risk of not only such interest but also of the capital not being recoverable. Maritime interest thus included an additional amount to compensate the lender for the risk he assumed during the time the loan (that is, the goods or the ship concerned) were exposed to maritime perils: a premium periculi. But this higher maritime interest could be charged only where the lender in fact bore the risk in question and then only for the duration of that risk. This period usually began on the day fixed in the contract for the departure of the ship and ended when the ship concerned arrived at her destination. Therefore, no such interest could be charged while the vessel was still in port and it was therefore, strictly, not always due for the full (longer) period for which the loan may have been granted.

Being a compensation for the bearing of risk, maritime interest was in Roman law at first not subject to the limitations imposed upon the interest which could be charged in connection with other types of monetary loans; it could exceed the usura legitima and the higher rate of interest was not regarded as objectionable or usurious. The absence of any restriction on the interest rate charged for maritime loans existed until Justinian fixed a maximum of twelve per cent in AD 528, a rate still in excess of the maximum rate of six per cent laid down for interest on ordinary loans. If the interest levied on a (maritime) loan exceeded the statutory maximum, the loan remained valid but the
borrower was liable to pay, in addition to capital amount, only the legal maximum rate of interest on that amount.65

In medieval canon law the charging of any interest, and not only excessive interest, on a monetary loan was regarded as usurious and was prohibited.66 Interest, which was any increment (whether high or low, excessive or not) demanded beyond the principal of a loan, was illegal and rendered the loan as such invalid so that it did not have to be repaid at all. In principle the Church prohibited the taking of any interest on any kind of loan, irrespective of the status of the parties or the purpose of the loan, and no distinction was drawn between a charitable loan to a brother in need and commercial loans between businessmen. This prohibition on interest was based on the dogmatic protection of debtors in need and on the notion that money was sterile and could not yield fruit, only the profit of man’s own labours being morally justifiable.

But canon law recognised that usury could occur only in connection with a loan and no other contract; if there was no loan there could be no usury.67 Furthermore, interest was regarded as anything in addition to the principal amount exacted by reason of the loan itself, and accordingly any increment which was not based simply on the fact of the loan was not considered usurious. Thus, if it could be shown either that the contract in question was not a loan, or that the increment (interest) was not levied by reason of loan itself, the usury prohibition would not apply.68 This was exactly what was sought to be done with the maritime loan and, later, with contracts, such as bottomy and insurance, which evolved from or came to be associated with it.

Because the maritime loan involved a definite risk for the lender, the Church in the Middle Ages at first recognised the legitimacy of taking maritime interest: it was exacted not simply as compensation (or interest proper) for the use of the capital amount of the

65 On interest and usury in Roman law, see eg Zimmermann 166-170.

66 On the canonical usury prohibition of the Middle Ages and thereafter, and the views and teachings of the scholastics and canonists on the maritime loan and usury, see generally eg Bluhhardt; Endemann Studien; Lange; McLaughlin; Molengraaff ‘Woekerwetten’ 365-371; Noonan; De Roover ‘Scholastics’ 257-264; De Roover ‘Scholastic Economics’; Westerling; and Zimmermann 170-177.

67 Thus, the loan for consumption (mutuum) was a gratuitous contract, and if not it automatically became usurious; by contrast, the loan for use (commodatum) too was a gratuitous contract, and if not it became a lease (locatio conductio rei) which, however, was not a usurious contract.

68 In the course of time, a number of compromisory, sophisticated and casuistic exceptions and distinctions came to be recognised by the Church on its usury prohibition, but the legitimacy of interest as such was not recognised. Thus, whereas it was usurious to demand anything above the principal amount by reason of the loan itself, it was permissible to claim compensation by virtue of other titles not inherent in a loan; accordingly a distinction arose between usurious and compensatory interest. Similarly, a variety of commercial transactions developed and were increasingly employed simply for the purpose of circumventing the usury prohibition and making it possible for merchants to earn interest on their capital. Contracts were clothed either as something other than loans, or in terms of loans interest was stipulated for under the guise of damages (lucrum cessans and damnum emergens) or compensation. Thus, the bearing of risk by the lender excused usury in that the interest could be clothed as a compensation. Examples of contracts and devices employed in this regard included contracts involving the purchase of an annuity (emptio annuorum redituum), partnerships, so-called mental (non-legal) usury (binding in honour only) given by bankers, contracts of exchange, and also maritime loans.
loans granted to borrower but included a compensatory component for the risk borne by lender. In the early medieval contracts of maritime loan the interest was therefore quoted quite openly.

Then, in the thirteenth century, canonical legislation against usury in general was strengthened and was extended to include maritime loans as well. In his decretal *Naviganti vel eunti ad nundinas*, issued between 1230 and 1235, Pope Gregory IX prohibited in the case of loans any stipulation for interest simply because of the lender’s taking over of any risk from the borrower. Canonists and also civilian lawyers debated this prohibition and its scope, and whether or not it was applicable to the maritime loan, at great lengths. The prohibition had a profound influence on the use and form of the maritime loan as a credit and risk-transferring vehicle in commercial practice, and was, if not the sole or even the primary cause of, then at least an important contributing factor to the evolution of the insurance contract.69

Although the canonical prohibition on usury came to be received in principle in civil law and came to influence the law relating to all commercial transactions, economic realities and the emerging commercial capitalism in the long run proved too strong and further eroded the prohibition not only in the secular world but even in the Church itself. In the course of the sixteenth century it became clear that the prohibition was no longer tenable in civil law and a reversion to the Roman-law rules on interest was advocated. In Protestant countries, including the Northern Netherlands, the prohibition came to be regarded as having been abrogated by general custom, and in its place the notion of a market-related maximum interest rate was re-introduced by legislation or came to be recognised as customary.70 Maritime interest again became not only valid but was no longer subject to any maximum rate.71

69 See further § 4.2.3.3 infra.

70 The ordinary, customary rate of interest on an unsecured loan in time of Voet was between seven and eight per cent (see Commentarius XXII.1.3; see also eg Grotius *Inleidinge* III.10 and *Idem De jure bellii* II.12.22). But a number of exceptions to this were recognised, such as the rates charged by money-changers or bankers amongst themselves, or the interest on returns payable on a life. Also, in terms of s 8 of the Perpetual Edict of Emperor Charles V of 4 October 1540 (see *GPB* vol I 311 at 317) it was provided that local merchants could by express agreement charge interest up to twelve per cent per annum (‘niet en sullen mogen gheven gelt op fruict of gewin, hooger dan den Penninck twaelve op ’t hondert voor een Jaer’) and all contracts and obligations in terms of which greater profit than this was demanded were declared usurious and to such excess null and void. Voet (*idem*) also specifically mentioned that interest at twelve per cent per annum could be levied on amounts overdue as premiums payable or repayable by or to the insured, or on amounts overdue as the (provisional) payment or repayment of the sum insured to or by the insured. See further ch XI § 5.3 infra as to the payment of premiums by the insured, and ch XX § 2.2 infra as to provisional payment by the insurer.

71 On maritime interest generally, see Voet Commentarius XXII.2. He noted in XXII.2.3 that because of the lender’s risk, the rate of maritime interest was not limited to twelve per cent only, but that the borrower had to pay whatever rate of interest had in relation to the extent of risk been agreed upon between the parties.

In canon law too the usury doctrine declined in scope and in severity, in no small measure due to the exceptions and distinctions the Church itself drew or allowed to be drawn in clerical practices. The doctrine came to be opposed openly and generally by theologians who admitted to the fruitfulness of money and the legality of interest. Their main concern was no longer whether profits could be made, but whether those profits were excessive. In a sense the just price theory came to replace the usury doctrine as canon law’s prime concern with commercial contracts.
4.2.3 Maritime Loan and the Insurance Contract

It has already been noted that the maritime loan played an important role in the evolution and early history of the modern insurance contract.\textsuperscript{72} The relationship between these two contracts must now be considered in more detail.

4.2.3.1 The Insurance Element of the Maritime Loan

Up to the Middle Ages the maritime loan fulfilled the dual function of providing the merchant with both finance and security: it had a credit and a risk-transferring element. Although primarily a loan, it did have an insurance undertaking added to it: to the extent of the loan, the lender bore the risk of the loss or non-arrival of the loan (or the goods or the ship) involved. In effect, if not in intent, the lender, in exchange for a risk premium which was included in the interest he charged, advanced money to the borrower as an indemnity against loss. The insurance features of the maritime loan appear both in the fact that the risk (of the loan as objectified in the goods) was transferred (back) to the lender and in the higher interest rate paid to the lender by way of compensation. Generally speaking, the effect of the maritime loan was the same as that of true insurance: a particular (maritime) risk was contractually transferred from one party to another against the payment of a premium, that is, for a profit and not gratuitously. The maritime loan already contained the germ of insurance on the basis of profit.

But despite the fact that the maritime loan was in effect an insurance contract, some fundamental differences nevertheless existed between it and the true insurance contract.

4.2.3.2 The Differences Between the Maritime Loan and the Insurance Contract, or Why the Maritime Loan Was Not (Yet) Insurance

The principal distinction between the maritime loan and the contract of insurance\textsuperscript{73} lay in the subsidiarity of the maritime loan's insurance element. The maritime loan was originally and continued until the Middle Ages to be essentially a credit transaction. The lender was a financier in the first place and the transfer of the maritime risk from borrower to lender was a subsidiary arrangement. In short, there was no separate and independent transfer of risk against payment.

Linked to this subsidiarity was the fact that there was no transfer of risk to an independent (third) party but merely a transfer to the other party to the underlying contract. The maritime loan was therefore no more an insurance contract than was a contract of sale or a contract of carriage with a particular provision as to the incidence of risk: the risk was transferred to a lender, not to an insurer.

\textsuperscript{72} See § 2 supra.

\textsuperscript{73} See also § 4.2 supra and § 4.3.3 infra for the (largely similar) differences between the bottomry loan and the insurance contract.
A further consequence of this fundamental distinction was that because it aimed at the provision of capital in the first place, the amount paid to the risk transferor was paid out before the occurrence of any loss and in fact before the commencement of any risk. Only if no loss occurred during the voyage did it have to be repaid. By contrast, in the case of insurance, the sum insured is paid out only on the occurrence of a loss.

Yet another consequence was that the compensation paid to the risk transferee was paid only after the safe arrival of the loan, and then not as a separate amount but as part of or together with the interest on the underlying loan. Also, and more importantly, in the event of a loss the transferee received no compensation at all. Accordingly, the risk transferee did not in fact receive the compensation for bearing the risk at all: he did not take over the risk for the sake of a compensation but did so rather with a speculative motive and in the hope of making a profit. By contrast, in the case of insurance, the premium was payable to the insurer separately, unconditionally and inevitably, that is, whether or not any loss occurred.

One last difference lay in the fact that in terms of the maritime loan only the risk of a total loss was transferred. The borrower in fact received no protection at all against the risk of a partial loss of or damage to the loan, the goods or the ship involved. The maritime loan was therefore at most a rudimentary but, for the time, presumably a sufficient risk-transferring arrangement, small, primitive ships more readily suffering a total than a partial loss.74

Thus, the medieval maritime loan was not yet true insurance. In essence a separation of its element of risk was required. Roughly from the beginning of the thirteenth century the maritime loan’s credit function gradually declined in importance, and the subsidiary insurance function gained in significance. Increasingly the reason why merchants concluded maritime loans was to obtain protection against maritime perils and not to obtain finance for maritime adventures. There were in principle two reasons for this shift in emphasis.

4.2.3.3 The Reasons for the Evolution of Insurance from the Maritime Loan

The first possible cause of the emergence of the insurance contract from the maritime loan may have been the fact that the canonical prohibition on interest reduced the commercial importance of the maritime loan business.

It is a disputed point whether or to what extent the extension of the canonical usury prohibition to the maritime loan in the first half of the thirteenth century contributed to its decline in popularity and use, and to the eventual appearance of the insurance contract.

It had traditionally been accepted that the usury prohibition played a cardinal role in the creation of independent maritime-risk transactions. Conventional wisdom, from

74 This point is made by Dorhout Mees Schadeverzekeringsrecht 12; and see too Walford Cyclopaedia vol II at 108.
the late nineteenth century and later,²⁵ had it that the insurance contract developed from the maritime loan when, in order to transfer risk without falling foul of the prohibition on usury, the element of risk transference involved in the maritime loan was separated and became an independent arrangement carried on by way of simulated sale and loan agreements in terms of which the purchase price or loan was payable or repayable only after the loss of the ship. Put differently, the maritime loan became insurance when its credit element was abandoned. The usury prohibition was therefore regarded as having created the need to distinguish maritime-risk transactions from ordinary interest-bearing loans; the need to separate the transfer and bearing of the risk of another against the payment of a price (which was not prohibited) from the interest-bearing loan element of the maritime loan (which was prohibited).

But a later view held that the usury prohibition did not in fact initiate the evolutionary development of insurance from the maritime loan but at most accelerated it. The prime cause of the disappearance of the credit element of the maritime loan was changing business methods rather than any opposition from the Church. Purely as an instrument of credit, the maritime loan was at a disadvantage in that it came with a very high rate of interest because of the additional risk premium involved. Interest rates of up to 40 or 50 per cent were not unusual. Also from the lender’s side there were drawbacks; he assumed (some of) the borrower’s risks but he was not a partner and therefore unable to share in the profits of the particular maritime venture. In short, there were better and more economical methods of financing a maritime venture and of investing capital than to conclude a maritime loan. But not only that. There were also better and more economical methods of obtaining and providing security by way of the transfer of risk than by concluding such a loan. There was a need to transfer risk without also having to take up an unnecessary loan, or to take over risk without tying up capital in the process and having to worry about additional risk being created by the creditworthiness of the transferor. Therefore, it made economic sense to separate credit and risk and to transfer risk independently and not as a subsidiary part of a credit transaction. It was because of economic reasons such as these that an identifiable need for the transfer of risk without an accompanying transfer of capital arose, and that the transfer of risk by way of a maritime loan was replaced by the transfer of risk for compensation by a contract specifically adapted and solely devoted to that function.²⁶

But irrespective of whether usury in fact lead to the decline of the credit element of the maritime loan and provided the opportunity for the evolvement of insurance, or whether that was the result mainly of distinguishable economic factors, or whether in fact insurance arose as much from the need for a device like it as from an attack on the

²⁵ See eg the contributions of one of the main proponents of this view, Levin Goldschmidt.

²⁶ One of the main supporters of this view, Panayotis Perdikas, demonstrated in his various publications that it was not the usury prohibition, but changes already occurring from the beginning of the thirteenth century, if not before that, provided the impetus for the emergence of the modern insurance contract. Before the Church directed its attention to the maritime loan, that transaction was no longer used principally, as it was in earlier times, as a method to obtain capital for a maritime venture. Rather the form of the transaction had become employed to effect the transfer of maritime risks from one person to another.
usurious loan with which it was associated, it was clear that in an unadapted form the maritime loan could not meet the need for an independent transfer of risk unconnected with the provision of credit and thus not under the cloud of suspicion as being usurious. The metamorphosis from maritime loan to insurance contract therefore passed through various identifiable stages before, finally, the insurance contract in its modern form emerged.

4.2.3.4 The Stages of Evolution of the Insurance Contract From the Maritime Loan

For the true contract of insurance to evolve from the maritime loan, the link between the latter’s risk element and its credit element had to be severed; its credit character had to be abandoned. More specifically, then, the risk transferee’s performance no longer inevitably had to be paid in advance but had to be paid only after the occurrence of the loss, if any; and the risk transferor’s performance had to be payable in advance irrespective of the occurrence of loss, if any, and not merely only in the absence of the any loss. These changes, as will be shown shortly, involved a reversal of roles of the parties involved.

The evolution from maritime loan to modern premium insurance passed through several stages. The maritime loan underwent changes and transmuted into different forms. Notable was the fact that the interest charged came to be suppressed, and then the credit element as a whole became fictitious and eventually disappeared.

In the first place the loan, the repayment of which was still dependent upon the safe arrival of the loan, goods or ship, was disguised as an interest-free loan. A clause in the agreement stated that the loan was a *mutuum gratis et amore*. What may have happened was that the amount of the loan stated in the agreement included the interest (and compensation) on it and thus exceeded the amount in fact paid out to the borrower. Interest may also have been disguised as a penalty for late repayment of the loan or could simply have been dealt with by way of a separate agreement. One important change already rung by the interest-free loan was the fact that in appropriate cases (that is, depending on how provision was made for the payment of interest), interest and therefore also the risk premium came to be paid in all cases and not only in the event of and after a loss.

The maritime loan also came to be disguised as a maritime exchange (*cambium maritimum*). By that arrangement the money borrowed in one place was payable to the borrower in another place, the lender bearing the risk of the safe arrival of the loan and thus of the carrying ship at the agreed destination. The maritime exchange made it possible to conceal the interest (and risk premium) in the exchange rates involved in the conversion of currencies: the amount advanced by the lender in the local currency was repayable elsewhere (with interest) in a different currency.

---

77 On this evolution, see in addition to the general works on the history of insurance contract in § 2 *supra* and on the maritime loan in § 4.2.1 *supra*, also more specifically De Roover ‘Early Examples’; Silberschmidt; and Tydeman 13-22.

78 See further § 4.4 *infra* as to insurance and the maritime exchange.
But, for present purposes, the most important intermediary stage of the evolutionary process was the insurance-loan agreement. By this transaction the credit element of the maritime loan was not merely suppressed by the loan being held out to be free, but it in fact disappeared completely. In terms of such an agreement a capitalist merely pretended that he had borrowed and received money from a merchant (a consignor of goods or a shipowner). The 'loan' was stated to be repayable after a specified period of time but only on condition that the goods or ship specified did not reach the agreed destination. In the event of the safe arrival of the goods or ship the obligation to 'repay' the loan fell away, but the amount 'loaned' in fact had to be 'repaid' in the event of the loss of the goods or ship. These insurance loans too gave no indication of any interest being repayable together with the capital and again any arrangement as to such interest was probably just an oral one or was taken up in a separate agreement. But now, because the transfer of the risk was no longer linked to any actual loan and had become the main aim of the agreement, the risk-bearer's compensation or premium itself was no longer linked to the payment of any interest and became payable inevitably.

Compared to the maritime loan, then, a reversal of roles and more had been achieved by the insurance-loan agreement. The lender and borrower of an actual loan had become the borrower and lender respectively of a fictitious loan, and the condition involved was no longer the safe arrival of the loan or the goods or ship involved but its loss: in case of a maritime loan the transferor of a risk (the borrower) promised to repay the sum of money actually received if the loan did in fact arrive safely; in case of the insurance loan the transferee of a risk (the 'borrower') promised to repay a sum of money which he had not actually received if the 'loan' did not arrive safely.

Furthermore, the insurance loan was a loan in form only, and because there was no actual loan involved, the transfer of risk was the primary aim of the agreement. It was an independent transfer of risk to a third party who was not in the first place involved as a lender.

Thus, the insurance loan agreement was an insurance contract in substance although in form it remained a (maritime) loan. But from this imperfect insurance it was just a short step to proper insurance: all that was required was for the parties to relinquish the form and pretence of a loan.

### 4.2.3.5 Conclusion

There therefore existed a clear link between the maritime loan and the newly evolved insurance contract. Both Santerna and Straccha, the two earliest authors of separate treatises on the insurance contract, commence their works with considerations of the maritime loan and recognise the fact that the insurance contract had

---

79 On the insurance loan, see eg De Groote Zeeassurantie 10-12; De Roovery 'Early Examples' 177-180; Sanborn 243-244; Van der Merwe Versekeringsbegrip 81-93 and idem 'Winsbejag' 220-224. See too § 2 supra for a discussion of the insurance-sale agreement which played a comparable role in the evolvement of insurance.
Insurance Law in the Netherlands 1500-1800

4.3 Insurance and Bottomry

4.3.1 Maritime Loan and Bottomry

4.3.1.1 Some General Differences Between the Maritime Loan and the Bottomry Loan

Towards the close of the Middle Ages the maritime loan gradually became amalgamated with and taken up in the analogous medieval institution of a bottomry loan, a transaction with which it showed a large but not absolute correspondence. In essence, while the risk-transfer function of the maritime loan gave rise to the insurance contract, its credit function became assimilated into the loan on bottomry.

In its original and strict sense, bottomry was a monetary loan entered into by the master of a ship in an emergency in the course of a maritime adventure to obtain the funds necessary for the repair or equipment of the ship, for the preservation of her

---

80 Thus, eg, Stracca De assecurationibus XV.2 declared pertinently: 't[i]raelecititam pecuniam instar cujus assecuratio inventa est, periculo creditoris navigari'.

81 Thus, Santema De assecurationibus I.9 pointed out that insurance was no loan and could thus not be usurious, the amount received by the insurer being an honest compensation for the risk taken over, which risk justifies the amount; in I.10 he drew a clear distinction between insurance (for which a risk premium was permitted) and a loan (for which interest was not permitted): insurance involved only the acceptance of risk and not (also) a loan. Scaccia De commerciis I.tn501 noted that there were a number of contracts not usurious 'ratione periculi ex iustitia esse lucrosa, per ea', and then continued: 'primus est contractus assecurationis, in quo assecuranis ratione periculi, cui se exponit pro assecurato potest iustam mercedem, seu periculi pretium accipere'.

82 Thus Donellus's De usuris et nautico foenore (written in France and before he took up a professorship at the University of Leiden) contained nothing on the insurance contract. The canonist Zypaeus in his treatment of the maritime loan (De usuris, & nautico foenore) made a brief reference to insurance as an example of a contract which was not usurious. The same is true of the Romanist Noodt whose detailed treatment of the maritime loan and usury appears to contain nothing on insurance. Obviously those Roman-Dutch authors who were concerned primarily with the Roman law, considered the maritime loan but had no occasion to discuss the insurance contract in any detail. Voet, for example, treated the maritime loan extensively (Commentarius XXII.2) but mentioned insurance only in passing (ibid XXII.2.3).

83 On the relationship between the maritime loan and the bottomry bond, see generally eg Coing Privatrecht 552-553; Goldschmidt Universageschichte 6 and 354; Hoover 526-528; Matthiass 89-105; Dorhout Mees Handelsrecht 105; Van der Merwe 'Winsbejag' 39n42; and Sanborn 107-108. The most important Roman-Dutch authority on the differences between the maritime loan and the bottomry loan, was Van der Keessel Theses selectae th 556 & 557 (ad III.11.2) and idem Praelectiones 1184-1185 and 1185-1186 (ad III.11.2). See too generally Lee Commentary vol II at 281.
cargo, for the purchase of necessities, or otherwise for the advancement and completion of the voyage. Unlike a maritime loan, a true bottomry loan was not an advance made before the commencement of a maritime adventure in order to finance it. Therefore, the two types of loan were incurred for different purposes. And from this difference it followed that whereas the maritime loan was incurred, usually locally, to be carried and spent elsewhere (abroad) - hence pecunia triectitia - and it (or the goods bought with it) thus travelled at the risk of the lender, the bottomry loan was not intended to be carried elsewhere but to be spent where it was lent, usually abroad, and it (or goods acquired with it) therefore did not travel at the lender's risk.\(^{84}\)

Unlike the maritime loan, the true bottomry loan was not known to Roman law. Of medieval, Northern European origin, its roots were not in the civil law but in the customary maritime law. The bottomry loan was treated extensively in the medieval maritime codes.\(^{85}\)

It is generally accepted that the term ‘bottomry’ was derived from the Flemish term ‘bodemerje’, figuratively used of the bottom, keel or hull of a ship to signify the whole ship, a bottomry loan being a loan on security of the bottom of a ship, that is, of the ship as a whole.\(^{86}\)

Characteristic of a true bottomry loan was that the loan was by the nature of the contract and without the need for any express agreement secured by a ‘hypothecation’ of maritime property, namely the ship (or goods) in respect of which the loan was made. Bottomry was by nature a ‘hypothec’ of specific maritime property\(^{87}\) and without such a hypothecation the loan was not a bottomry loan. By contrast, a maritime loan could exist without any hypothecation, and the money lent was not necessarily secured by a hypothec, although security by way of a hypothec (of any type of property, not only maritime property such as a ship) could be and usually was provided to secure the maritime loan. Nevertheless, the presence of such a hypothec did not turn the loan into a bottomry loan.

Characteristic of the hypothec in case of a bottomry loan, and distinguishing that loan from an ordinary or maritime loan secured by a hypothec, was the fact that the hypothecated property itself was the sole object of the lender’s claim. An agreement of

---

\(^{84}\) According to Van der Keessel Praelectiones 1181-1183 (ad III.11.1) the reason for and origin of bottomry agreement had to be sought in the fact that in earlier times money could not in an emergency abroad be obtained by way of bills of exchange, hence the need to borrow money by way of bottomry.

\(^{85}\) See generally eg Verwer Bodemerijen 150-151 and Van der Keessel Praelectiones 1181-1183 (ad III.11.1). According to Tydeman 105 the reason why bottomry in an emergency was in use to a much greater extent in Northern Europe than the maritime loan, was because voyages there were not of the longer, non-coastal type as was the case along the Mediterranean; they therefore did not require advance financing to the same extent.

\(^{86}\) See eg Scheltinga Dictata ad III.11.1 and Van der Keessel Praelectiones 1179 (ad III.11.1). La Leek Index sv 'ship' pointed out that the word ‘bottomer’ ('bodemer') was used to denote either the person advancing money under a bottomry bond, or the owner or master borrowing the money.

\(^{87}\) The law of bottomry was therefore as much a part of law of things as it was of the law of contract.
bottomry gave the bottomry lender a real right (*ius pignoris*) over the ship or cargo. In fact, the lender had no personal action on the contract against the borrower at all but merely an action *in rem* against the hypothecated property. Thus, a bottomry loan bound the hypothecated ship (or goods) and not the shipowner (or goods owner) himself.

Both maritime loans and bottomry loans displayed the feature that the lender of the monetary loan undertook the risk of the loan not being repayable: in both cases, whether or not the loan (with interest) was repayable depended on the preservation and safe arrival of the object in respect of which the lender had undertaken to bear the risk. Should the object be lost, the loan in both cases was not repayable, albeit then for different reasons. The eventual liability (although, as will appear, not the extent of the liability) of the borrower depended upon the safe arrival of a particular object at a particular destination.

Both the maritime lender and the bottomry lender undertook the risk of loss of a particular object by maritime perils (*periculum maris*), and, in the absence of any further contractual arrangement, the same causes of loss were included and excluded in both cases of loan. There was therefore a strong temptation to suggest that the true bottomry loan was but an emergency maritime loan.

But although both lenders bore maritime risks, the risks were borne in respect of different objects. In the case of the maritime loan, the loan itself or the merchandise bought with it travelled at the lender's risk. In case of the bottomry loan it was not the loan itself which was at the risk of the lender but rather the object hypothecated to secure that loan, that is, the ship (or the goods). The maritime loan was a loan with regard to a particular maritime venture to be undertaken by a particular ship rather than one with regard to the ship itself. Because the bottomry lender bore the risk of the ship and had a claim only upon that ship, he was able to recover the loan not only if, but also only to the extent that the ship arrived in safety at the agreed destination and remained in that state until the date set for repayment of the loan.

Both loans carried interest at a rate higher than the rate of interest for ordinary loans. This was because the interest included a premium to compensate the lender for

---

88 A possible reason why a hypothec was an essential feature of the loan on bottomry in emergency (but not of the maritime loan) may be that the lender abroad was not acquainted with the shipowner (or goods owner), nor did he know whether his financial position was such that he would be able to repay the loan entered into by master. Hence the need for an action (automatically) secured by and in fact against the ship (or goods) rather than against the shipowner (or goods owner).

89 See eg Van der Keessel *Praelectiones* 1183 (ad III.11.1).

90 Although for both types of loan the loss of the object in respect of which the risk was undertaken meant that the loan was not repayable, the reverse was not necessarily true. In the case of the maritime loan the arrival of the loan (or the goods or ship) meant that the loan was repayable in full: the maritime loan was repayable in full or not at all. By contrast, in the case of the bottomry loan, such arrival meant merely that the loan was repayable to the extent of the value of the object hypothecated for the loan. Thus, a partial loss of the object at risk in a maritime loan had no effect on the amount to be repaid. In a bottomry loan, though, the lender had a claim not only if but also only to extent that the hypothecated property arrived safely.
barring the risk in question.91 Furthermore, the higher interest was earned only for as long as the lender was in fact at risk and after expiry of the period of risk he was entitled only to ordinary and not to maritime interest on the loan. But because the risk was in different objects, the duration for which the risk was borne also differed.92

Therefore, distinguished by its nature as a hypothec, the true bottomry loan, that is, concluded in an emergency, shared some but not all of the characteristics of the maritime loan. As such it was not simply a species of the genus maritime loan but a contract sui generis.93

4.3.1.2 From Maritime Loan to Bottomry Loan

Largely deprived of its risk-transfer element which was increasingly usurped by the insurance contract, the maritime loan, being also a loan in connection with a maritime adventure, came to be associated with the bottomry loan. Although it continued to be concluded in practice as a way of financing maritime adventures,94 the maritime loan came under increasing pressure on the grounds of possible usury, also because of its inadequacy as an economically sound credit instrument in the maritime trade. Other cheaper and more secure methods of financing maritime adventures gained prominence and replaced the maritime loan.

Because of the close similarity between them, it is not surprising that the maritime loan came to be associated with another analogous but distinguishable credit device in use in the maritime trade, the medieval bottomry loan. By this association a distinct form of bottomry bond, analogous to the original form of bottomry in an emergency, developed. The maritime loan transmuted into a different type of bottomry loan alongside the traditional bottomry loan in emergency: voluntary bottomry. In practice the voluntary bottomry loan took the place of the maritime loan. The term maritime loan disappeared and such loans came to be referred to simply as bottomry loans, which,

91 See Van der Keessel Praelectiones 1179 (ad III.11.1).

92 With the maritime loan the risk commenced when the ship, with the loan or the goods bought with it on board, sailed, and terminated when she arrived at the destination; loss of the loan (or goods) at any time during the sea voyage was therefore relevant. With bottomry the risk on the ship attached from the day on which the loan was entered into until it was repaid; loss of the ship at any time during the loan was therefore relevant. But because in both instances the lender bore only the risk of loss by perils of the sea, this difference may have been more one of theory than of practice.

93 Verwer Bodemerijen 155-156 already correctly asserted that no clear link existed between bottomry and the maritime loan of Roman law and that bottomry was not merely a species of maritime loan. Whereas Grotius Inleidinge treated bottomry (which he did not clearly distinguish from the maritime loan) right after his chapter on loans and usury (III.10 and III.11), Scheltinga Dictata ad III.11.1 explained pertinently that bottomry was in certain respects similar to and in other respects different from the maritime loan. Van der Linden Koopmans handboek IV.3.5 noted that bottomry was known to Roman law as the maritime loan although the Dutch bottomry was not in all respects similar.

94 Israel Dutch Primacy 76-77 notes that both before and after the establishment of the Amsterdam Loan Bank in 1614, a large amount of trade finance there was founded on bottomry loans which, because of their high-risk, high-return nature, wealthy lenders found attractive as a method of speculating with their capital.
given the differences between the maritime loan and the traditional loan of bottomry in emergency, was rather confusing. The popularity of the maritime loan, in its new guise as a voluntary bottomry loan, continued to decline and in practice it virtually disappeared long before the same fate was to befall emergency bottomry loans.

Thus, it is of the utmost importance that the distinction between the two different forms of bottomry always be maintained: on the one hand, the true, medieval bottomry in emergency; on the other hand voluntary bottomry, the maritime loan of antiquity. Although by the seventeenth and eighteenth century the distinction was clearly drawn in the Netherlands between bodemerij uit noodzaak and uitgaande bodemerij, the distinction often became blurred, not surprisingly, by the confusing, careless and even plainly incorrect use of terminology.

Apart from the expansion of bottomry in the strict sense because of the absorption of the maritime loan, the concept expanded also in another way. The earliest form of bottomry was a loan on the security of (the bottom of) a ship. The bottomry loan on the security of cargo on board the ship and not on the ship itself, also called the respondentia loan, came in use only from the seventeenth century onwards.

As was the case with both the maritime loan and the insurance contract, bottomry loans, and more specifically the voluntary bottomry loan, were employed also for speculative purposes. As a result various measures were at various times taken to counter such and other fraudulent practices. Some of these will be considered shortly.

95 See eg Van Bynkershoek Quaestiones juris privati III.16. Voluntary bottomry was referred to as outgoing (uitgaande) bottomry because of the fact that it usually was a loan concluded in the home port in advance of a voyage abroad.

96 Thus, it is incorrect to refer to the maritime loan in Roman law as a bottomry loan and to the (emergency) bottomry loan in Roman-Dutch law as a maritime loan.

97 See eg Verwer Bodemerije 151; Scheltinga Dictata ad III.11.1; and Van der Keessel Praelectiones 1181-1183 (ad III.11.1). Verwer distinguished in respect of bottomry on goods between true bottomry loans on goods (concluded abroad, in an emergency) and maritime loans on goods (concluded in Holland) and noted that the principles of bottomry on a ship applied equally to bottomry on goods. The term 'respondentia', used for a bottomry loan on goods, was derived either from 'respondere', to promise (to transport the cargo) in return (for a loan), or from 'res', the cargo or goods (on board the ship).

98 See § 4.2.1 supra (as to speculative maritime loans) and ch II § 6.3 infra (as to wagering insurance).

99 See eg Schorer Aanteekeningen 339 (ad III.11.1n2), referring to bottomry loans where 'geld geschoten is op eene louteren en verbodene wisselvalligheid of hazard'.

100 The high interest rates attracted speculators and fraud on their part as well as on the part of masters was a major concern. Masters, eg, borrowed money on the security of the ship or cargo goods even though there was no need for it, they concluded several such loans in excess of the value of the security, or they scuttled the hypothecated ships in order to avoid having to repay the loans. These problems were not unique to Dutch law. In England, s 10 of the Gaming Act of 1664 (16 Car II c 6), 'An act to prevent the delivering up of Merchant Ships', even went so far as to impose the death penalty on such barratrous masters, because 'it often happeneth that Masters and Mariners of Ships having ensured or taken upon Botomary greater summes of money then the value of their Adventures doe willfully cast away burne or otherwise destroy the Shippes under their Charge to the Merchants and Owners great losse', See further Barbour 'Marine Risks' 585n3.
Thus, it was especially with bottomry in emergency but also with voluntary bottomry, rather than with the maritime loan of antiquity, that Roman-Dutch writers, legislatures and courts were primarily concerned.

4.3.2 The Bottomry Loan in Roman-Dutch Law

4.3.2.1 A General Description of Bottomry

The bottomry loan was one of the more important maritime contracts in Roman-Dutch law. In one of the better descriptions of bottomry, Van der Keessel described it as a contract by which money is advanced upon the hypothecation of a ship on the condition that if the ship hypothecated was lost by an accident during the sea voyage, the borrower would be relieved of liability. From this and other definitions, it is clear that the following were essential: a monetary loan; secured by the mortgage or hypothecation of a ship (or goods); with the lender bearing the risk of the perils of the sea in that the loan (and with it the interest

---

101 On bottomry generally, see eg Burger 9-17; Frentz Admiralitätsgericht 177-187; Gehlen 141-143; Goudsmit Kanovereenkomsten 261-289 and idem Zeerecht 109-110, 211-212, 233, 249, 379-381, 410, 413-414, 417-418 and 428; De Groot Zeessurantie 33; Hart 121-123; Jolles Bijdrage 69-70; Kracht 13-14; Kohler ‘Handelsrecht’ 540-543 and 560-566; Lee Commentary vol II at 279-282; Van der Merwe Versekeringsbegrip 38-39 and 80; Rutgers van der Loeff 17-20;itoris Compendium 145-146; Tydeman 74-89; and Zimmermann 186n200. On the historical aspects of bottomry in English law, see eg Blackstock 5; Campbell ‘Usury’ 199-200 and 207; Holdsworth History vol VIII at 261-263 and vol XI at 448; Walford Cyclopaedia vol I at 333-353 sv ‘bottomry’; and Weskett Digest 44-60 sv ‘bottomry’.

102 Apart from the other Roman-Dutch sources referred to infra, see generally also Verwer Bodemerijen 141-149 (which was a supplement to Grotius Inleidinge III.11) and 149-176 (general notes on bottomry), and Denucé Koopmansleerboeken 200-201 (an explanation of the ‘negotie van de bodemarie’ for aspirant merchants in the Leerboek (1643) of the Antwerp firm of Van Colen-De Groot).

103 Theses selectae th 552 (ad III.11.1) and Praelectiones 1181-1183 (ad III.11.1).

104 Grotius Inleidinge III.11.2 defined bottomry as a monetary loan of which the lender bore the perils of the sea. This definition was too concise and failed to include a reference to the essential feature of a security (hypothecation). Better was Van Leeuwen’s definition (Rooms-Hollands regt IV.9.1) of bottomry as the lending of money on the bottom of a ship with an undertaking to return the same amount with a specific amount of interest if the ship arrived safely, a definition which Decker Aanteekeningen ad IV.9.1 n(1)/(a) reduced to the lending of money whereby the lender runs the risk of the sea, a definition reminiscent of that of Grotius. Bykershoek’s definition (Quaestiones juris privati III.16) was detailed but did contain elements not essential to but merely usually encountered in bottomry loans. He too omitted the element of a security (see the criticism of his definition by Scheltinga Dictata ad III.11.2). Another very accurate although unwieldy description of bottomry, was that of Van der Linden (Koopmans handboek IV.3.5) who described this form of contract as one by which a certain sum of money is advanced as a loan upon the hypothecation of a ship on the condition that if the ship is lost through misfortune, the lender would have no further right to claim the repayment of the money advanced than in so far as any part of the ship had been saved, and on the condition that on her safe arrival or if she was wilfully lost, the borrower would repay the money with a certain high interest.
on the loan) was not repayable if and to the extent that the mortgaged property did not arrive at an agreed destination because of specified (maritime) perils.  

To this may be added the feature of what may be termed 'an emergency' by which the two forms of bottomry were, at first not always clearly but later more precisely, distinguished. A bottomry loan could in all cases be concluded by the shipowner (or goods owner) concerned or by the master of the ship with express instructions to obtain such a loan (voluntary bottomry), or it could in appropriate circumstances of emergency be concluded by the master without such instructions (bottomry in emergency). The latter form of bottomry was, given the nature and development of maritime transportation at the time, a necessary and advantageous commercial instrument and it, and not voluntary bottomry, was regarded as true bottomry in the Roman-Dutch sources.

In terms of an agreement of bottomry in emergency, the master of a ship would acknowledge having borrowed and received a specified sum of money from a financier in a foreign port on bottomry on the ship's hull and equipment ('op Bodemerije ende rechte avonture van der See, op mijn voorsz. schips kiel ende schips gereetschap') for a specified voyage. The agreement mentioned the duration of the risk and the amount of interest on the money lent, and contained an undertaking to repay to the lender the loan together with that interest if and to the extent that the ship arrived safely ('soo verre dese voorsz bodem soo veel te lande brengt') within a specified number of days after such arrival. The lender would receive from the borrower a bottomry bond, payable

---

105 In an opinion in 1710 (see Barels Advysen vol I adv 71), the point was made that there was no bottomry if the lender did not bear a maritime risk (ie, if no 'gevaer van de zee word gelooopen'), and also no bottomry if there was not in effect a loan ('waer Bodemary is daer is geldleening waer van de Uitleener het gevaer loopt van de zee'). An earlier opinion in 1698 (see Barels Advysen vol I adv 63) concerned a contract of sale with a condition similar to that found in bottomry loans, namely that while part of the purchase price of the goods with which the buyer intended trading abroad was paid in cash, the balance had to be paid 'na de behoude reize of wederkomste van het schip', in which case 20 per cent more would be payable. This 20 per cent was referred to in the documents on which the opinion was requested, as bottomry, insurance, premium or interest.

106 Grotius Inleidinge II.48.5 (and see too III.11.3) noted that any person with the power to alienate property also had the power to mortgage such property, and that this included the master of a ship who could burden his ship with bottomry in the case of an emergency. According to Van der Keessl Theses selectae th 553 (ad III.11.2), one of the peculiarities of bottomry was that it could in appropriate circumstances be contracted by the master of a ship who had not expressly been authorised to do so. He recognised, therefore, that the bottomry did not have to be a voluntary bottomry.

107 What follows therefore concerns bottomry in emergency. On voluntary bottomry, see further § 4.3.2.7 infra.

108 See the form of bottomry bond on hull in Verwer See-rechten 223-224; a form of bottomry on merchandise is reproduced at 224-225. Other reproductions of bottomry bonds may be found in eg Hart 122 (a reproduction of a printed bottomry bond of 1644 for a voyage from Danzig to Amsterdam); Gehlen 140-142 (a reproduction and transcription of an extract from an Amsterdam bottomry bond of 1752 in the form of a notarial deed); and Wassenaer Praktijk notariële IX.4 (bottomry bonds on ship and on goods). The opinion of 1602 in Hollandsche consultatien vol IV cons 110 contains a reproduction of a bond entered into in 1601. According to Wassenaer (IX.3), a bottomry agreement had to contain the identification and name of the master and his ship, as well as the amount he had received on it, and also what risks (and when and for how long) the lender had to run, and how much the interest on the loan would be. See also Lybrechts Redenerend vertoog II.19.4.
at the ship's destination on her arrival there, the bond being for the amount of the loan plus interest on it at the stated rate. The lender sent the bond to his agent at the port of destination where payment was collected from the borrowing shipowner (or goods owner). Like a bill of exchange, a bottomry bond could be transferred by delivery and endorsement.\textsuperscript{109}

The contract of bottomry in emergency was a \textit{sui generis} contract, but had features common to other contracts such a that of loan, maritime loan, hypothec and insurance.

\subsection*{4.3.2.2 The Master's Authority to Conclude a Bottomry Loan}

Like the insurance contract, bottomry agreements attracted the attention of the legislatures from early on in Roman-Dutch law. Generally such legislation\textsuperscript{110} was promulgated to prevent abuses and frauds, especially by masters acting outside the scope of the instructions from their employers. This was sought to be achieved by delimiting the scope of bottomry in emergency with reference to the customary maritime law. More specifically, bottomry in emergency and a master's authority to conclude such a contract were circumscribed with reference to the place where and the circumstances under which such a loan could be concluded by a master without any express instructions from the shipowner, as well as the amount of such a loan.

Before turning briefly to these limitations, it must be stressed that an emergency or necessity was not required for the conclusion of a valid bottomry loan, but merely for a master to be regarded as having the necessary authority to conclude such a loan. Therefore, to conclude a valid bottomry loan, the master either had to have actual authority (voluntary bottomry) or there had to be an emergency (bottomry in emergency).

\textsuperscript{109} On the bottomry bill of exchange (bodemerijwisselbrief), see eg Van der Keessel \textit{Praelectiones} 1192 (\textit{ad} III.11.2) who explained that bottomry bonds and bills of lading could, like bills of exchange (\textit{litterarum cambium}), be transferred by mere endorsement without the need for a mandate or cession before a notary. Elsewhere (\textit{Praelectiones} 1222 (\textit{ad} III.13.1) he noted that bills of exchange could not only be given unconditionally but also subject to a condition, eg if a ship or the goods on board a ship had arrived safely, a type of condition usually included in a bottomry bill (\textit{in litteris cambialibus sub bodemeria contractis}). See too the opinion of 1706 in Barels \textit{Advysen} vol I adv 66 (on the need for a receipt acknowledging a bottomry bill to have been paid), and that of 1732 in Hollandsche consultatien vervolg vol II cons 99 (on the protest of a bottomry bill and where the legal position was said to conform to 'het Recht, en particulier in materie van Wissel, (waar mede de bodemeryen ten opzichte van Trekker en Acceptant of Betrokkene op dit point aliesints egali zyn, als zynde Zee Wisselbrieven')).

\textsuperscript{110} The first legislation on bottomry was the Amsterdam \textit{keur} of 13 August 1527 (see Amsterdam \textit{Handvesten} vol II at 541). Later legislation was more detailed because it at the same time took over and adapted provisions from the Visby compilation of maritime law: see s 19 of the \textit{placcaat} of 29 January 1550 (os 1549), repeated verbatim in s 18 of the \textit{placcaat} of 19 July 1551, and also s 12 title II and s 19 title VII of the \textit{placcaat} of 31 October 1563. For discussions of the latter \textit{placcaat}, see eg Van Glins \textit{Aenmerckingen passim}, Verwer \textit{See-rechten passim}, and Peckius \textit{Ad rem nauticam passim}. Other legislation on bottomry included the statutes of Friesland of 1716 (see Friesland \textit{statuten} I.27.1-11) as well as various municipal \textit{keuren} (such as ss 133-135 and 156 of the Rotterdam \textit{keur} of 1721).
In the first place, the master generally had authority to conclude a bottomry loan only abroad in a foreign port, the underlying idea being that only there would he be unable first to contact the owners of the ship or goods on which the loan was to be concluded for their permission to do so.\textsuperscript{111} As a rule, therefore, the master could not without the permission of the owners concerned, conclude such a loan in the ship’s home port. The Amsterdam keur of 1527 had already prohibited bottomry by the master ‘on this side of the sea’ (unless, of course, with the express consent of the shipowner) and had limited the master’s authority to the execution of bottomry bonds in appropriate cases ‘on the other side of the sea in foreign lands’. And in terms of s 19 of the placcaat of 1550, no one could raise any money on a ship’s bottom himself or through another, directly or indirectly, except in circumstances of an emergency abroad. By subsequent restrictive interpretation, the foreign place was additionally required to be distant: bottomry in an emergency could be concluded only on the other side of the Strait of Dover or past the Sound, that is, in the North Sea.\textsuperscript{112} Only in exceptional cases could the master, of his own accord and without consulting with and obtaining the permission of the owners, conclude a bottomry loan in the Netherlands.\textsuperscript{113}

In the second place, and in addition to this geographical limitation, the master could conclude a bottomry loan abroad only in appropriate conditions of emergency. Thus, the Amsterdam keur of 1527 provided that the master could conclude a bottomry loan without the consent of the owners only when abroad and it appears that he did not have an absolute freedom in this regard for the keur added that the loan could be concluded only if the master considered it necessary (‘al s hem dat nut ende orbaerlicken duncken sal’). Section 19 of the placcaat of 1550 was more precise in this regard, prohibiting the conclusion of bottomry abroad unless, as result of a maritime accident or enemy action, the master of necessity required money and it was not possible for him to sell any goods belonging to the shipowners. Most extensive were the provisions

\textsuperscript{111} Van der Keessel Praelectiones 1408 (ad III.20.47) noted that a master could conclude a bottomry loan in the case of necessity abroad without consulting with the owners involved, this being an exception to the common-law rule that property could not be hypothecated against the wishes of such an owner. Van der Linden Koopmans handboek IV.3.5 explained that a master could conclude a bottomry on a ship in an emergency in a foreign port where the owner of the ship did not reside nor have any correspondents, the master being regarded as having tacit authority from the owner for this purpose. See too Bynkershoek Quaestiones juris privatii III.11.16 who pointed out that a master has tacit authority - ‘een stilswyende last’ - to conclude a loan on a ship abroad in an emergency.

\textsuperscript{112} On the meaning of the words ‘aan deze zijde’ and ‘aan gene zijde van de zee’, see eg Grotius Inleidinge III.20.47; Bynkershoek Quaestiones juris privatii III.16; Nederlands advysboek vol II adv 115 (1680); and Goudsmit Zeerecht 109-110.

\textsuperscript{113} He could do so eg when he was a part-owner of ship (or goods) concerned but then only to extent of his interest (see eg Grotius Inleidinge III.24.4 and Nederlands advysboek vol II adv 13n1-3), or where the shipowner refused to provide him with the funds necessary to equip the ship for the voyage he was instructed to undertake (see Van der Keessel Praelectiones 1193 (ad III.11.3). He could, of course, also do so with the consent or on the instructions of the owners, but then it was a case of voluntary bottomry and not one of bottomry in emergency. See Scheltinga Dictata ad III.11.2 for a further explanation in this regard and also eg the opinion of 1680 in Nederlands advysboek vol II adv 115 and Van der Linden Koopmans handboek IV.3.5.
of the *placcaat* of 1563 which authorised the master to take the following course of action in an emergency abroad (of which he had to provide proof if required) when it was necessary to raise money. He firstly had to try and sell the property of the shipowner on board the ship; only then could he try and obtain a bottomry loan on the ship herself; if that was not possible, he was permitted to sell or pledge a part of the cargo of merchants on board for cash; and only in the last instance could he sell or pledge the equipment (such as ropes, sails, or anchors) of the ship and then only after consultation with the crew.\(^\text{114}\) Importantly though, as far as bottomry was concerned, the master first had to attempt to raise the money by selling the goods of the shipowner on board, and he could not sell or dispose of any goods of consignors carried on board the ship as cargo as long as he was able to obtain bottomry on the hull of the vessel.\(^\text{115}\) The master could, as a rule, also not sell the ship where he could not obtain a bottomry loan or raise sufficient money in another way to enable him to complete the voyage.\(^\text{116}\) Finally, if the master did differently, he was liable in damages to the shipowners or the owners of the cargo concerned and was also punished.\(^\text{117}\)

\(^\text{114}\) By s 12 of title II, if the master of a ship belonging to several owners and finding himself abroad 'ware *in noodde van gelde*, he could not sell the ship without the consent of owners, but had to take up a bottomry loan on the ship or sell the cargo laden on the ship, in accordance with s 19 of title VII; and if he could find no bottomry and if no cargo had been laden on the ship, or if he could not sell any such cargo, then he could borrow on the security of or sell the ship's ropes, 'met rade van synen Schiplieden'. By s 19 of title VII, no one could take up any money on the bottom of a ship ('gelt op Schips bodem, dat men ghemeenlijck bomerije ofte Wissele op Tol oft Kiele vanden Schepe nemende') unless he was unable to sell the goods of the shipowner.

\(^\text{115}\) See eg Grotius *Inleidinge* III.20.9; and Van der Keessel *Praelectiones* 940 (ad II.48.5), 1387 (ad III.20.9), and 1408 (ad III.20.47). The opinion of 1687 in *Nederlands advysboek* vol I adv 246 confirmed that a master had the 'magt van verkopinge' in respect of cargo only by way of exception in a single instance, namely 'als hy *in noodd van gelde* is, dan als wanneer hy geen geld op Bodemery vinden kan'. Frentz Admiralitätsgericht 177-187 misses the point when she declares that the Hamburg Admiralty Court, by recognising bottomry on cargo without any restriction, freed the law from the limitation imposed by s 19 of title VII of the *placcaat* of 1563. Section 19 did not prohibit bottomry on cargo but rather the sale of cargo if a bottomry loan on the ship was possible ('en s a l... niet moghen ter vente stellen, o f vermorden eenechte goeden wesende in suelcken schepe, soo lange hy sal vinden wissel oft bodemerye op den bodem van den Schepe').

\(^\text{116}\) See eg Grotius *Inleidinge* III.23.4. Van der Keessel *Praelectiones* 1425 (ad III.23.4) noted that the master could sell the ship abroad (without necessity or the consent of the owners or without having to write to them for assistance) only for the same reasons that the owners themselves could abandon the ship to her underwriters (see ch XIX § 2.3 *infra*), namely where the ship there 'zoo onbequaam was geworden, dat het incapabel was om daar mede de reyse naar Holland te kunnen doen'. See further the opinion of 1681 in *Nederlands advysboek* vol II adv 202 where such a course of action by the master was said to be the more justified by the fact that 'de Schipper aldaar geen credit ... dat hy verklaart, wist te vinden, om einiege gelden op Bodemery te kunnen bekom'. See too the opinion of 1692 in *Nederlands advysboek* vol IV adv 210 holding that the master abroad could 'verbodemen, belasten en beswaren, dog door misdaad niet verbeuren' the ship of his employer.

\(^\text{117}\) See s 19 of title VII of the *placcaat* of 1563. Bynkershoek *Quaestiones juris privati* III.16 explained that the master was not liable for any money borrowed abroad on bottomry in emergency, unless he was the owner or one of the owners of the ship, or if the cargo belonged to him. Van Zurck *Codex Batavus* sv 'schepen' par 1033 made the point that an emergency without the fault of the master (or the shipowner) was required before a bottomry by the master was justified.
In the third place, the master's authority to conclude a bottomry loan (in appropriate circumstances abroad) was limited as regards the amount which could be borrowed in this way. One of the abuses found to exist was the fact that the amount of money taken up on bottomry often exceeded the real value of the bottomed property. Legislation therefore limited the amount of money the master could take up by way of bottomry in emergency to a particular portion of the value of the property hypothecated as security for the loan. Section 19 tit VII of the placcaat of 1563, largely following the earlier provisions in this regard in the placcaaten of 1550 and 1551, provided that where the master was permitted to take up bottomry, he could take up no more than a quarter of the value of the ship, unless the emergency was such that he was forced to borrow a larger amount, in which case he could do so as long as he was able to provide proof of the need to do so. If the master did otherwise, he was again liable in damages to the shipowner.

118 Equivalent legislative measures existed also in the case of insurance: see ch XVIII § 5.2 infra as to compulsory under-insurance.

119 Similarly, in terms of s 19, in cases where the master could not obtain any bottomry and had to sell the cargo on board, he was not permitted to sell more of the cargo than amounted to a ¼ of the value of the ship, subject to the same exception as in case of a bottomry on the ship herself, and on condition that the owner of the cargo sold had to be compensated at the price his goods would have fetched at the place to which they were destined and consigned, and on the further condition that that owner paid the full freight, even though his goods were sold en route. Van der Keessel Praelectiones 1394 (ad III.20.17) discussed the position where the price for which the goods in question could be sold at their destination exceeded the value of the ship (eg because of the nature or the amount of the goods sold, or because of the fact that the ship was damaged in a storm). He noted that there was no authority for Grotius's view that the master could in such a case give up or abandon the ship to the owner of the cargo concerned, that being possible only where the ship had damaged or sunk another ship (see further ch XIX § 2.1.4 infra as to abandonment in these circumstances). But in terms of s 159 of the keur of Rotterdam of 1721, the giving up or abandoning of the ship by the master was in fact sanctioned in these circumstances.

120 The proportion was reduced by the Rotterdam keur of 1721 to an ⅛th of the value of the ship. According to Van der Keessel Theses selectae th 555 (ad III.11.2) and Praelectiones 1183 (ad III.11.1), if the amount of the bottomry loan in fact exceeded the amount actually required in circumstances of need to enable ship to complete her voyage, maritime interest could not be earned on such excess unless it was (or the goods bought with it were) shipped in the ship and thus conveyed at the lender's risk. See too Lybrechts Redenerend vertoog II.19.3.

121 The Hooge Raad held in 1711 that ownership in property subject to bottomry remained with the borrower and did not by reason of the bottomry pass to (or remain with) the lender. Thus, damage to such property which was not caused by the perils taken over by the lender, had to be borne by the borrower as the owner and did not affect the existence of the lender's right to claim the repayment of the loan (see Bynkershoek Observationes tumultuariae obs 746).

4.3.2.3  The Nature of the Lender's Risk

In the case of a bottomry loan, as with an ordinary loan, the thing lent (that is, the money) was transferred to the borrower. But in the case of bottomry, as with the maritime loan, the lender and not the borrower bore some of the risks of loss of or damage to the secured property. Unless the lender therefore bore (the maritime) risk
of loss of or damage to the ship or the goods concerned, the agreement could not qualify as a bottomry loan, despite the fact that it was called one.\textsuperscript{122} In the case of bottomry in emergency, the money lent itself or any goods bought with it were not at the risk of the lender, but merely the secured property. A hypothec in favour of the lender was created by the loan on the ship (or goods) because the bottomry loan was, by its nature, secured by the safety of the whole ship and her equipment (or, in the case of a loan on goods, by the safety of those goods). Thus, if the hypothecated ship was lost but the provisions or goods bought with the loan was saved, the bottomry loan was not repayable. But if the ship arrived safely despite the fact that the goods bought with the loan were lost, the bottomry loan secured by the ship was repayable.\textsuperscript{123}

The bottomry lender bore the risk of loss of the hypothecated property from the time the loan was concluded until such time as it was repaid. Because the risk in the usual form of bottomry bond was only that of the sea, losses occurring after the loan had been made and before the ship with the loan or the goods on board sailed, or after her arrival at the destination but before the repayment of the loan, did not affect the lender’s entitlement to be repaid.\textsuperscript{124} Strictly speaking, therefore, although in case of the bottomry loan, as in case of the maritime loan, it was characteristic that the arrival or non-arrival of the ship determined whether or not the loan with the interest had to be repaid, bottomry was not a money loan subject to the condition that the ship arrived safely. It was rather an unconditional loan for which the ship was hypothecated with the condition that the loss of or damage to the secured ship freed the borrower accordingly; the ‘condition’ attached not to the loan but to the hypothecation.\textsuperscript{125}

\textsuperscript{122} Bynkerhoek \textit{Quaestiones juris privati} III.16 explained that by a majority the \textit{Hooge Raad} held in 1718 (see Bynkershoek \textit{Observationes tumultuariae} obs 1476) that the agreement before it was not a bottomry bond. That was the case not only because the money had not been advanced ‘voor de noodwendigheid van de reis’ but also because the lenders had not taken any risk of the voyage upon themselves, ‘t geen de natuur van de bodemeryen absoluut vorderf. As to the requirement that the lender bore the risk of the hypothecated property on the voyage in question, see further eg \textit{Van der Keessel Theses selectae} th 554 (ad III.11.2), th 556 (ad III.11.2), and th 557 (ad III.11.2), and \textit{Praelectiones} 1183 (ad III.11.1), 1184-1185 (ad III.11.2), and 1185-1186 (ad III.11.2).

\textsuperscript{123} In this regard bottomry differed from the maritime loan. There the loan or the goods bought with it were at the risk of the lender so that if the ship was lost but the loan or the goods bought with it were safe, the maritime loan was repayable; and if ship arrived safely but the loan (or the goods) were lost, the maritime loan was not repayable. See generally the opinions in Barels \textit{Advysen} vol I adv 63 and adv 72. Of course, in the usual case where both ship and the loan (or goods on board) were lost, both the maritime loan and the bottomry loan were not repayable. And it was of course also possible for a bottomry loan to have been concluded on cargo, or on ship and cargo.

\textsuperscript{124} Although in case of the maritime loan the lender bore the risk only during voyage (ie, after ship sailed and until her arrival), there was in practice no great difference between the maritime loan and the bottomry loan on this score. See further eg \textit{Van der Keessel Theses selectae} th 556 (ad III.11.2) and \textit{Praelectiones} 1184-1185 (ad III.11.2).

\textsuperscript{125} See \textit{Van der Keessel Praelectiones} 1189 (ad III.11.2). According to Scheltinga \textit{Dictata} ad III.11.2, the essence of bottomry was that the parties intended that the repayment of the loan (and the interest) had to take place only when and in so far as the secured property escaped the perils of the sea and thus arrived safely.
But although the maritime and the bottomry lenders bore the risk of different objects, both did not bear the risk of loss of the object concerned from all perils but only from maritime perils or perils of the sea. Generally speaking, in the case of a bottomry loan, maritime perils were extraneous matters over which the borrower had no control. They included perils of the sea (such as storms, bad weather, or wind) and of enemies or pirates and the negligence of the master or the crew, but excluded losses caused by the borrower himself, by intentional acts of the master (such being ascribed to the borrower), or by any inherent vice in the secured property. More specifically, the loss of the secured property as a result of the fault of the borrower himself or the intentional actions of those for whose actions he was responsible, did not relieve him of liability towards the lender for the repayment of the loan. The same applied in the case of a deviation or a deliberate change of the voyage or the course of the voyage by the master.

126 See again eg Grotius's definition of bottomry in n104 supra. Note, however, that Voet Observationes ad III.11.2 (n3) made reference also to bottomry loans on ships navigating only on internal waters, ie, on rivers and lakes.

127 See eg Verwer Bodemerijen 152 (unless otherwise agreed, the bottomry lender bore the risk of ‘alle Schade ... buiten eigen bederf en gebrek der verbodemde sake; of buiten schuit des opnemers, oft der gener welker deed hij moet boeten; oft eindelijk der gener, waer van hij ’t misdrijf kan doen vergoeden’); Van der Keessel Theses selectae th 560 (ad III.11.2), and Van der Linden Koopmans handboek IV.3.5. As to the description of perils of the sea in the case of insurance, see ch VI infra.

128 See eg Voet Commentarius XXII.2.4 and Observationes ad III.11.3 (n4) who noted that in the case of the loss of the hypothecated ship not by accident but by the fault of the borrower, that loss fell upon the borrower rather than upon the lender. Schoelinga Dictata ad III.11.2 observed that not every loss of the hypothecated ship relieved the borrower of liability, while Van der Linden Koopmans handboek IV.3.5 described the wilful loss of the ship in the case of bottomry as the equivalent of her safe arrival so that the loan remained repayable. In an opinion in 1707 (see Barels Advysen vol I adv 20) the suggestion was made that where the ship did not arrive because of the master’s wilful refusal to enter the port of her destination, the condition for the repayment of the loan had been taken to have been fulfilled where such actual fulfilment was made impossible by the borrower or his master. On the analogous position in the case of the intentional causation of the risk insured against, see ch VI § 4.1 infra. Schorer Aanteekeningen 339 (ad III.11.1n2) thought that the reason why the loan remained repayable despite a loss, if such was caused by the fault of the shipowner, was that no one could be insured against his own fault.

129 See eg Voet Commentarius XXII.2.4 and Decker Aanteekeningen ad IV.9.1 n(1)/(a). In the case of a deviation from the course between the port of departure and that of destination, the lender’s risk immediately ceased with the actual change of course but not before: see the opinion in Hollandse consultatie vol IV cons 110 (1602) where the master, who had entered into a bottomry bond on goods in respect of a voyage from Danzig to Amsterdam, made a detour to England. The secured ship was wrecked on the way from England to Amsterdam. The opinion given was that because of the deviation, the loss did not relieve the owners of liability to repay the loan. Bynkershoek Quaestiones juris privati III.16 regarded the opinion by the Amsterdam merchants in 1602 (see Hollandse consultatie vol IV cons 110n2) that the lender did not have to be paid more than ‘voor zo verre men de route waar omtrent men overeengekomen was, gehouden had’, as ridiculous. He pointed out that if the ship did not sail at all, nothing would have to be paid and that one person would then be in a position to nullify the contract at will. As regards the alteration of the risk in the form of a change of voyage or of the course of the voyage, an analogy existed (and was drawn, eg by Bynkershoek Quaestiones juris privati III.16) between the position of the bottomry lender and that of the insurer. See further ch XIII § 1.2 infra. Obviously the position of the lender in terms of a maritime loan was also comparable (see eg Van der Keessel Theses selectae th 557 (ad III.11.2) and Praelectiones 1185-1186 (ad III.11.2)).
On occasion the question arose when it could be said that the secured ship was lost so that the bottomry loan on her was not repayable. Two examples from practice may serve to illustrate the principles applied in this regard. In the first place, when the ship was captured during her voyage by the enemy and confiscated but subsequently ransomed by the owner, after which she arrived safely at the destination specified in the bottomry bond, such a ship was not taken as having arrived safely but rather as having been lost. The bottomry was therefore avoided by the enemy capture and confiscation and the loan was not repayable. In the second instance, in the case of money lent on the security of the cargo loaded in a ship, where that ship was captured and plundered by the enemy and subsequently abandoned by them, and then returned to her owners after which she arrived at her destination, the respondentia loan on the cargo in question was similarly taken to have been avoided by the capture and to have remained void despite the subsequent release and arrival of the ship.

130 See generally eg Van Leeuwen Rooms-Holland's reig IV.9.1 and Van der Keessel Theses selectae th 560 (ad III.11.2). As to loss in case of insurance, see ch XV infra.

131 See the opinion of 1662 in Nederlands advysboek vol I adv 11 where Spaniards had captured the ship concerned and where she arrived at her destination only 'door een nieuwen inkoop ende redemptie voor rekening van de koopers'. Further, there was a loss here which relieved the borrower of liability because the lender did not exclude war risks (such as the risk of capture) from risks he bore, ie, the loan was 'niet bedongen ... vry van confiscatie'.

132 See the opinion of 1676 in Nederlands advysboek vol I adv 52 where the ship was captured by Dunkirk privateers. According to the opinion, the repayment of the loan was not promised otherwise than 'onder die expresse conditie, als het schip behouden wederom voor deze Stad [Amsterdam] soude zijn gearriveert', and that never occurred here because on her capture ownership was under international law (ius gentium) lost to the capturers. The promise was not merely to pay when the ship arrived but when she arrived in safety ('behouden'), and that had not happened here because she was captured by the enemy and became their property. Authority for the proposition that 'het Schip eens genomen, en daar door den eygendom verlooren zijnde geworden, [the lender] daar mede haar Regt ende Actie soodanig heeft verlooren gehad, dat sy de selve niet weder heeft kunnen bekomri', was found in a decision of the Genoese Rota (see Rotae Genuae Decisiones decis 101 and further Roccus De assecurationibus note 66) in an insurance case. (Whereas usually the principles of bottomry were extended by analogy to questions arising for the first time in insurance, this was an instance (rare but by no means unique) of a principle established in respect of insurance being applied to bottomry.) A further reason why the loan here was not repayable was 'om dat by de Bodemery brief staat gestipuleert, dat de gelden worden opgenomen, op de ingelade Goederen, ende de selve Goederen van de vyanden genomen zijnde, soo komt de Obligatie te vervallen'. Although according to Van der Keessel Theses selectae th 560 (ad III.11.2) an opposite opinion was expressed in 1707 (see Barels Advysen vol I adv 70) where the lender was thought to be entitled to claim repayment of the loan after the deduction from the amount due of the amount the borrower had paid by to the capturers way of ransom, that is not borne out by the opinion itself. In that case the secured ship was damaged in attempting (unsuccessfully) to avoid an enemy capture. Later great expenses were incurred by the owners to obtain her release from capture and to have her repaired for the voyage home. The question arose whether the lender of money on bottomry on the ship for the voyage on which she was captured, was entitled to claim that loan with interest on her eventual arrival at her destination, or whether the expenses incurred had to be shared by him. The opinion expressed was that because the ship had been captured by the enemy, ownership in her had in terms of the ius gentium passed to them so that obviously her voyage was not completed safely. Thus, the holder of a bottomry bond could have no right to the repayment of the loan since repayment was never promised otherwise than under the express condition that 'de voijage behouden gedaen zouden zyn'. The ship here would not have arrived safely but for her redemption and repair. In any case, even if the loan was still repayable (ie, if there was considered to have been no loss), then the expenses incurred in this case (which happened to exceed the value of the ship on her arrival) had to be deducted from the
4.3.2.4 The Interest on a Bottomry Loan

In cases where the bottomry loan had to be repaid, this occurred, in most instances, after the return of the ship to the Netherlands or after the delivery of the goods at their destination. The borrower had to pay the lender the interest on the loan together with the capital.

Because the lender bore the risk of the loan not having to be repaid (at all or fully) should the secured property be lost or damaged during the voyage, bottomry loans were concluded at a higher rate of interest than was legally permitted in the case of ordinary loans of money. Interest rates on bottomry were calculated with reference to the (maritime) risks involved. The higher interest was justified by, and was determined by the extent of, the risk borne by the lender.133 But, of course, while interest was generally agreed for a loan on bottomry, that was not an essential feature of the bottomry contract. A loan could nevertheless be one of bottomry even if merely ordinary interest had been stipulated and even if no interest at all was demanded by the lender.134

The amount of bottomry interest was not limited to the usual rate. The interest on a bottomry loan, being, at least in part, a compensation for the risk borne by the lender, was, for example, an exception to the statutory prohibition of 1540 on the stipulation of interest in excess of twelve per cent among merchants. Any rate of interest could be stipulated, depending on the nature and type of risk involved and undertaken by the bottomry lender.135 Rates of between 20 and 30 per cent were not uncommon.136 A

value of ship in preference to all other claims upon it (such expenses having been incurred to save the ship from loss: see § 4.3.2.6 infra as to this preference over bottomry). Accordingly, any claim the lender may have had upon the ship would have been reduced to nothing.

133 See eg Grotius Inledinge III.11.3; Wassenaer Praktyk notariael IX.2; Van Leeuwen Rooms-Hollands regt IV.9; Voet Commentarius XXII.2.4; Van der Linden Koopmans handboek IV.3.5 for the point that bottomry was not illegal or usurious because of the profit (interest) stipulated not being in consideration for the loan of money but as a compensation for the risk run by the lender of losing both the principal sum and the interest if the ship was lost.

134 This point was made by Scheltinga Dictata ad III.11.2.

135 See s 8 of the Perpetual Edict of 1540 (see n69 supra) and generally Grotius Inleidinge III.10.10 (interest at a rate of 6½ per cent could be stipulated between ordinary citizens, and between merchants, where profits were larger, 12 per cent per annum was permissible) and III.11.1; Voet Commentarius XXII.2.4; Schorer Aanteekeningen 339 (ad III.11.1n2); Van der Keessel Theses selectae th 557 (ad III.11.2) and Praelectiones 1179 (ad III.11.1) and 1185-1186 (ad III.11.2). As to interest in Roman-Dutch law, see generally ch XX § 2.2.6 infra.

136 See eg Barbour Capitalism 86. Voet Observationes ad III.11.2 (n3) referred to interest rates of 15, 16 or even 20 per cent per annum, depending on the duration of the loan and the risk involved. John 'Insurance Investment' 151-152 gives details of the investments by insurance companies and societies in the eighteenth-century London money market. They made some (although not large) investments in advances on bottomry and respondentia bonds. 'It was a business fraught with risks. These risks arose less from the hazards of the sea than from difficulties in the recovery of debts and from uncertainty of taxation. But profits were commensurately high. Premiums for bottomry loans from Cadiz to Buenos Aires in 1725, for example, were between 90 and 100 per cent' (idem at 151).
lender who had stipulated such a higher rate of interest, did not have to prove the extent of the risk he was to run or ran, there being a presumption that the risk justified the interest.\textsuperscript{137}

The higher interest could be charged for the period of risk which, in the case of the bottomry loan and otherwise than in the case of the maritime loan, was the same as the period of the loan.\textsuperscript{138} Thus, in the case of the bottomry loan not being repaid at the time when it was due, the interest which could be levied on such late payment was calculated at the ordinary and not at the bottomry rate.\textsuperscript{139}

4.3.2.5 Bottomry as a Hypothecation of Property

Whereas the hypothecation of property was not an essential element of the maritime loan (although it was usually added to the agreement), bottomry in emergency without a hypothecation was a contradiction in terms. A hypothecation was an essential feature of the bottomry contract. A bottomry loan was a loan for which the ship herself served as security, so that if there was no hypothec, there was no bottomry loan but at most another type of loan. Bottomry was a loan in the nature a hypothecation of the ship and conferred, automatically and without any express agreement on the matter, upon the bottomry lender a real right over the ship.\textsuperscript{140}

The classification and precise nature of the real right of the bottomry lender over the ship or goods securing the loan were matters of some controversy in Roman-Dutch law.\textsuperscript{141} Although thus far for the sake of convenience referred to as a hypothec, the right was variously and interchangeably described in the sources as a conventional (or

\textsuperscript{137} See further Scheltinga \textit{Dictata} \textit{ad} III.11.1 and \textit{ad} III.11.3.

\textsuperscript{138} See again § 4.2.2 supra. The period of the loan was linked to a particular voyage, the loan being repayable within a certain number of days after the arrival of the secured ship at the specified destination. Bynkershoek \textit{Quaestiones juris privati} III.16 noted that it did not matter that the voyage in question to the (ultimate) destination consisted of different stages and that ship eg discharged at intermediate ports (obviously, only as long as that did not involve any change of her voyage).

\textsuperscript{139} See eg Verwer \textit{Bodemmerijen} 143; Van der Keessel \textit{Theses selectae} th 557 (ad III.11.2) and \textit{Praelectiones} 1185-1186 (ad III.11.2).

\textsuperscript{140} Thus, eg, Voet \textit{Commentarius} XXII.2.4 described a bottomry loan a a loan where the lender lent money on the hypothecation (\textit{sub pignore}) of a ship, his claim being linked to the hypothecated object. See too Van der Keessel \textit{Theses selectae} th 556 (ad III.11.2) and \textit{Praelectiones} 1184-1185 (ad III.11.2) who also noted (\textit{Praelectiones} 1179 (ad III.11.1)) that the loan was called a bottomry loan because the bottom of a ship itself was usually expressly hypothecated for the money loan, or at least understood to be hypothecated where it was agreed that the money was lent on bottomry or that the lender would bear the risk of the perils of the sea.

\textsuperscript{141} See eg Lichtenauer \textit{‘Zeerecht’} 67-70.
express) mortgage or a pledge (pignus),142 or as a legal (or tacit) mortgage or a tacit hypothec (hypotheca).143 It has in fact been described as lying on the borderline between consensual and legal mortgages.144

But the result of bottomry being in the nature of a mortgage (whether in the form of a pledge or a hypothec) was that the lender’s claim for the repayment of loan was confined to the mortgaged or hypothecated property itself. He had no personal claim against the borrower or owner of the property on the contract of bottomry. It was as if the lender had contracted not with the borrower personally but with the secured object itself.145 The bottomry lender thus merely had a ius in rem against the ship which could be arrested, and no ius ad rem against the borrower or owner of that ship; he had an actio in rem and no actio in personam. The borrower or his estate generally was not liable for the repayment of the bottomry loan but only the hypothecated ship (or goods).146

142 The bottomry debt was regarded as creating a special pledge over a movable (pignus speciale rei mobilis) and as ranking in the same preference as a debt secured by the pledge of movable property delivered to the lender: see eg Van der Keessel Theses selectae th 564-567 (ad III.11.2) and Praelectiones 1190-1192 (ad III.11.2); Van der Linden Koopmans handboek IV.3.5. Although bottomry showed similarities to a pledge delivered to the lender or creditor, it was apparent that, in the case of a movable such as a ship (or goods) which was pledged as security for a bottomry loan and which remained in the possession of the borrower and was not delivered to the lender (a so-called possessionless pledge), there was not, strictly speaking, an actual pledge. To counter objections in this regard, the notation of the loan on goods on the bill of lading covering those goods was used at least to provide the lender with symbolic possession of the pledged goods (see Verwer Bodemerijen 148).

143 The bottomry lender was regarded as having a real right of hypothec over the ship or goods in question; see eg Voet Observationes ad III.11.3 (n4). In an opinion in 1707 (see Barels Advysen vol I adv 71), reference was made to the ‘Recht van Bodemarye met effect van Hypotheeeca’. Tacit hypotheces were an example of a legal (or tacit) mortgage in Roman-Dutch law; they arose by operation of law in a number of instances either over the debtor’s property in general, or over a particular item of property. An example of the latter was the special tacit hypothec of a person who had lent money or supplied materials for the repairing (but not for the building) of a house or a ship, as well as of one who had expended labour in doing so, over the house or ship concerned (see eg Grotius Inleidinge II.48.13; Van Leeuwen Rooms-Hollands regt IV.13.8; Voet Commentarius XX.2.28-29 and XX.4.19; Van der Keessel Theses selectae th 417 (ad II.48.13); and see generally Lee Introduction 187-197.

144 See Lichtenauer Geschiedenis 182-183. In English law too (see the sources referred to in n101 supra), bottomry was regarded as a species of (or as a contract in the nature of) a mortgage or hypothecation of a ship, a hypothecation which existed without possession and which was thus distinguished from a possessory lien or a pledge; and a contract of hypothecation, furthermore, which was adopted from the civil law because it was unknown to the common law.

145 Again, the reason why the bottomry loan gave rise to such a right should probably be seen against the circumstances under which such loans were granted: in a foreign port by a lender who did not know the owner of the property on the security of which he made the loan, and who had no means of ascertaining that owner’s creditworthiness. On the basis in maritime law for this personification of maritime property and for the concomitant limitation of the liability of the shipowner to value of his ship involved (that being the maximum which he could lose in any given case involving that ship), see generally Burger passim. See further ch XIX § 2.1.3 infra as to abandonment and the limitation of liability.

146 See eg Schettinga Dictata ad III.11.1 (‘het schip [is] executabel’).
The characteristic feature of bottomry as a mortgage (pledge or hypothecation) of the secured property, giving the lender only a real right on the ship or goods on which the loan was made, had several consequences.

First there was the effect of a loss of the secured property. In the event of the loss of the secured ship (or goods), no part of the loan was repayable, that is, the lender’s action in rem was extinguished. This was so because the condition for the repayment of the loan, that is, the safe arrival of the ship, was not fulfilled and also because nothing remained of the object against which the lender could claim a payment of the loan.  

Secondly there was the effect of the arrival of the secured property at the destination but in a damaged condition. Although both the bottomry and the maritime borrower were obliged to repay the loan only in case of the safe arrival of the ship (or goods) concerned, the bottomry borrower, unlike his maritime counterpart, was obliged to repay not only if but also only as far as the ship (or goods) arrived safely: he was liable to pay only 'soo verre die bodem zooveel te lande brengt'. Therefore, should the ship have arrived (so that the condition for repayment of the loan was fulfilled and loan was therefore repayable in principle) but in a damaged condition, the bottomry loan was repayable only to extent of the reduced value of ship (or goods) in question. Accordingly, and depending on the amount of the loan and the value of the damaged ship, the loan may have been repayable only in part.

Because the mere fact of damage to the secured property did not by itself extinguish the lender’s right to claim repayment of the loan, it was said that the bottomry lender bore only the risk of a total loss of the secured property. The general maxim was that bottomry was not subject to average: 'bodemrijje draagt geen avarije'. Put differently, the whole debt, together with interest, had to be repaid even if the ship suffered damage, as long as she reached the port of destination and as long as her owner was not prepared to abandon her, something which he would do if the ship's value was less than the amount of the loan. A partial loss of a secured ship was there-

---

147 In fact, by the loss of the ship the bottomry lender’s real right would have been extinguished even if there had been no condition of safe arrival. In this respect, therefore, the bottomry loan differed from the maritime loan where the conditionality of the loan had a direct bearing on the lender's personal right.

148 See eg Voet Commentarius XXII.2.4. Thus, if the ship did not arrive, the bottomry debt was not repayable; but the opposite (namely that if the ship did arrive, the debt was repayable in full) was not necessarily true in the case of bottomry as it was in the case of a maritime loan. The bottomry loan was repayable only if the ship arrived and only to the extent that it was repayable out of the value of the ship.

149 See eg Van der Keessel Theses selectae th 561 (ad III.11.2) and Praelectiones 1188 (ad III.11.2). A borrower could thus relinquish to the lender whatever remained of the (arrived) ship and thereby limit his liability for the debt: see Van der Keessel Praelectiones 1029 (ad 3 1 32) and further ch XIX § 2.1.4 infra as to this form of abandonment.

150 The loan was extinguished only in case of the total loss (non-arrival) of the ship and the amount of the loan was reduced only in case of damage to the ship which reduced her value to below the amount of the loan.
fore not a loss for purposes of bottomry.\textsuperscript{151} The position was the same if both the ship and the cargo on board were bound by the bottomry: the whole debt had to be repaid if the ship arrived safely, even if some of the goods on board had been lost or taken by pirates.\textsuperscript{152} But in the case of a bottomry (or rather a respondentia) loan on goods only, a difference of opinion existed.\textsuperscript{153} According to some authorities, in the case of a loan on goods, such goods were carried at the risk of the lender with the consequence that if they were damaged by a maritime peril, a proportionate part of that damage had to be borne by the lender in the form of a reduction in the amount of the loan which the borrower had to repay. According to this view, therefore, bottomry on goods (was similar to insurance and) did bear average: 'bodemerije op goederen draagt in avarye'.\textsuperscript{154} Later authorities held the opposite view.\textsuperscript{155} Van der Keessel\textsuperscript{156} favoured the

\textsuperscript{151} According to evidence given by Verwer in 1688 (see Barels Advysen vol I adv 61), it was custom on the Amsterdam Bourse, in the case of a partial loss of a ship on which, or on the risk of which, money had been lent on bottomry, for the borrower to remain liable to repay the amount of the loan plus interest should he wish to retain the perished, damaged or depreciated ship, according to the maxim 'Bodemarye draeget geene Avarye'. See also eg Verwer Bodemerije 146 ('de Bodemerije [mag] niet betrokken worden in eenige korting, oft toelage, ofte evenredigheid van last'). The practice of bottomry in Holland and more specifically on the Amsterdam Bourse was further alluded to in a declaration (in the form of a turbe, as to which, see ch IV § 4.4 infra) by several prominent Amsterdam merchants in 1699 (see the 'Verklaringe van Koopluiden tot Amsterdam, over 't ware recht der Hollandsche Bodemeryen' in Verwer Bodemerije at 177-178). According to them it was customary there, in the case of bottomry either concluded or to be paid there, that although the property hypothecated was by any misfortune diminished but still yielded more than the sum for which it had been pledged, the lender was to receive his money in full. They noted that the bottomry transaction had always been understood in this sense at Amsterdam, and that if a borrower wanted to stipulate anything to contrary, that had to be stated expressly in his bond. See further Van der Keessel Theses selectae th 558 (ad III.11.2), and Praelectiones 1183 (ad III.11.1) and 1186-1187 (ad III.11.2); and Van der Linden Koopmans handboek IV.3.5.

\textsuperscript{152} See the opinion of 1689 in Barels Advysen vol I adv 6, holding that in the absence of a contrary stipulation in the bottomry bond on goods, if a part of the goods had been captured by privateers, the borrower was not entitled to repay the loan merely proportionally according to the extent of the damage, but the lender could successfully claim payment in full 'zonder eenige korting of verminderinge'.

\textsuperscript{153} See Van der Keessel Theses selectae th 559 (ad III.11.2) and Praelectiones 1187-1188 (ad III.11.2) for a summary of the different views.

\textsuperscript{154} Three authorities supported this view.

The first was a judgment by the Amsterdam Schepenen Court (evidence of which is found in a legal opinion of 1704 in Barels Advysen vol I adv 65) in a claim on a bottomry bond on goods which arrived damaged. The borrower admitted liability but argued that the amount of the loan had to be reduced 'over schaede en Avarye, op de Cacao op de Bodemarye, ... gevallen'. The Court held for the borrower.

More important was a legal opinion of 1706 (Barels Advysen vol I adv 67) on a case where goods on which money had been lent on bottomry had arrived 30 per cent damaged by seawater. The question arose who was to bear this loss: the lender (by the loan not being repayable), the borrower (by the loan being repayable in full), or both (by the loan being reduced proportionally)? Although the ship had arrived and the goods had been delivered, so that apparently the condition for the repayment of the loan had been met, the opinion was expressed that it was still possible that the damage to the goods was not to be borne fully by the borrower but that the loan was to be repayable only to extent of the damage and that, in the case of a partial loss, the lender was liable as an insurer of the goods ('in der manieren als zulks, immers ten opzichte van verzekeringe, gedaen op of voor de risico van de zee, plaetse heeft'). The opinion regarded as irrelevant the practice amongst merchants that 'Bodemarye geene Avarye zoude behoeven te draegen' as that could by agreement between the parties be changed, and that was apparently the case where money was lent on goods. It was further argued that there existed a difference
latter view. According to him, in the light of the fact that by the nature of bottomry only a destruction of the secured property released the borrower, it was apparent that a reduction in the value of that property was for the account of the borrower and that, in so far as the secured property still existed, payment out of it to lender had to take place. Consequently, if the whole of the debt could still be paid from the damaged property, it had to be so paid.

Thirdly, and closely related to the previous consequence, there was the effect of a salvage or recovery of equipment, anchors, sails or ropes following upon the loss of a bottomed ship. Again there was a difference of opinion as to whether the bottomry lender had any rights in respect of such salvage, that is, whether he was able, in respect of such saved portion, to claim all or part of the principal sum or interest and thus had a preference on the proceeds of the salvage. On the one hand there was the view that because the ship did not arrive safely but was lost, the loan was not repayable at all, and that the lender, having lost the right to claim repayment, had no entitlement to the salvage which subsequently came to hand. On the other hand, the

in principle in this regard between a bottomry on a ship and one on goods because the words 'op bodemerye en risico van de zee' meant, in the case of goods, 'indien hulle nie alleen vervoer is nie maar ook behoue en onbeskadig aangekom het'.

Lastly, some support for this view is to be found in an earlier opinion in 1699 (see Barel's Advysen vol I adv 64) to the effect that the holder of a bottomry bond on goods participated in the loss of or damage to such goods in so far as the goods were partially safe, and, therefore, that the loan was to be reduced proportionally so that lender and borrower shared in the loss. The main reason for this opinion appears to have been that the loss of a part of the goods was not regarded as a partial loss but rather as a total loss of a part. This was different form a bottomry on an indivisible ship where damage could not be regarded as the loss of a part but only as damage of the whole. The cargo here was divisible - as was the bottomry bond on it - so that 'het verlies van een gedeelde, geene simpele beschaedigheid, maar een totaal verlies van dat gedeelte is'. Among the additional reasons relied upon for this view, was the analogy between bottomry and insurance, bottomry being 'veelal een soort van Assurantie ..., en die contracten ook met den anderen veelal worden vergeleken ..., en zulks dat gelyk in materie van Assurantie, zo ook in cas subject, de schaede proportionaliter (nae evenredigheid) moet gedraegen werden'.

155 Decisions by the Amsterdam Schepenen Court (1709), by the Hof van Holland (1710), and by the Hooge Raad (1711) (see Bynkershoek Quaestiones juris privati III.16). See too Verwer Bodemerij (1711) who explained that in respect of bottomry on goods 'heeft in alle gevalle sonder onderscheit, het sallde regt plaetse, ghelijk van [Bodemerij op] Schepen gesegt is').

156 Praeflectiones 1187-1188 (ad III.11.2).

157 Upon reflection, this difference of opinion may simply have been whether there was in fact a loss of the ship for purposes of a bottomry loan if a part of the ship was later salvaged.

158 That is, the lender had no right equivalent to the insurer's right of salvage after the payment of a total loss (as to which see ch XIX § 2.3.1 infra). (Quaere, was this because the bottomry contract was not one of indemnity?). See the opinion given in Amsterdam in 1609 and taken up in Hollandsche consultatien vol IV cons 111 to the effect that this was so even for a lender of money on a ship's hull and equipment. An earlier opinion in 1607 (see Hollandsche consultatien vol IV cons 124) held this to apply also to the hull and other salvaged parts of the ship. This opinion pointed out too that although it was argued by some that the salvaged hull and equipment of a ship had to be abandoned by the master and shipowners to the benefit of the holders of bottomry bonds on the ship, no clear proof of such a notorious and general custom existed. Bottomry lenders accordingly had no preferred claim to any salvage.
weight of authority thought that because some salvage remained, the ship was in fact not lost and that the bottomry lender was accordingly entitled to such salvage or to the repayment of the loan to the extent of the value of the salvage. This was especially to be the case if the bond was expressly passed over hull and equipment, as it usually was. But even if not, the same was to apply seeing that the equipment had no separate existence and followed the ship. Thus, the lender on bottomry on a ship had to be paid if and to the extent that the equipment and other parts of the ship were salvaged and arrived safely, even if ship herself was lost.\textsuperscript{159}

One final matter concerned the sale of property subject to and burdened by a bottomry loan. Generally a bottomry bond had legal force even against a third party who came into possession of the secured property, including the buyer of that property.\textsuperscript{160}

\subsection{4.3.2.6 The Preferential Claim of the Lender on Bottomry}

A bottomry loan entered into in an emergency created a real right over the secured property and conferred certain priorities on the lender (the holder or the endorsee of the bottomry bond) over other creditors.\textsuperscript{161} The following may briefly be noted in this regard.

\textsuperscript{159} See eg the Amsterdam opinion of 1663 in Nederlandsche advysboek vol II adv 13 ('omdat het Schip en Scheeps-gereetschap aan hem is verbonden, en dat dienstvolgende alles dat gebergt word, moet komen tot profijte van den Bodemer'); Voet Commentarius XXII.1.4 and XXII.2.3; Bynkershoek Quaestiones juris privati III.16; Schorer Aanteekeningen 339 (ad III.11.1n2); Van der Keessell Theses selectae th 562 (ad III.11.2), th 563 (ad III.11.2), and Praelectiones 1188-1189 (ad III.11.2), 1189-1190 (ad III.11.2), and 1192 (ad III.11.2); and Van der Linden Koopmans handboek IV.3.5 (who noted that if the debt could not be satisfied out of the proceeds of the salvage, the borrower was not liable for the deficiency).

\textsuperscript{160} See Van der Keessell Praelectiones 970 (ad II.48.32). In a case before the Hooge Raad in 1718 (See Bynkershoek Observationes tumultuariae obs 1467), the question arose whether the right created by a loan to the owner of a ship in terms of a document called a bottomry bond, and for which ship was hypothecated, was effective also against a third party who had bought the ship from the owner. By a majority the Raad held that the agreement before it was not a bottomry bond and it therefore did not find it necessary to deal pertinently with the question. In an earlier opinion in 1661 the point was taken that a privateer could not burden with a bottomry bond over the goods he had fraudulently bought, and that the holder of such a bond could accordingly have no preference over the seller of the goods who was entitled to claim them in the event of non-payment (see Nederlandsche advysboek vol I adv 42).

\textsuperscript{161} On the right of preference attaching to a bottomry bond, see the detailed treatment of the topic by Van der Keessell Theses selectae th 564-567 (ad III.11.2) and Praelectiones 1190-1192 (ad III.11.2). These preferences attached only to bottomry in emergency, not to voluntary bottomry loans, and only to loans which were in actual fact bottomry loans: see the opinion of 1710 (Barels Advysen vol I adv 71) and the decision of the Hof van Holland in 1712 (referred to by Bynkershoek Quaestiones juris privati III.16) where there was no actual loan but merely a set-off and where the ship on which the loan was purported to have been agreed, had already arrived at the destination at the time of the agreement. According to Van der Keessell Theses selectae th 553 (ad III.11.2), one of the peculiarities of bottomry in emergency was that it gave the creditor (lender) the privilege of a hypothec in respect of a movable, which privilege accompanied the movable wherever it went. Van der Linden Koopmans handboek IV.3.5 mentioned that bottomry was ranked in same way as a debt secured by the pledge of movable property with delivery to the lender.
In the first place, a bottomry bond over property had priority over other existing real rights over the same property, such as pledges, tacit hypothecs, rights of retention or liens. The reason for this priority was that the bottomry was contracted in an emergency for the preservation of the property, and the bottomry lender was thus preferred to prior creditors for whose ultimate benefit the loan was also taken up. Of particular practical importance in this regard was the fact that bottomry loans had preference over an earlier bylbrief, an analogous maritime instrument by which money was advanced for the building or purchase of a ship against the security of that ship.\(^{162}\)

Secondly, certain other tacit mortgages (such as those for salvage, the hire of equipment, or the general average contribution of the ship or cargo) had preference over earlier bottomry debts. These were mortgages for debts subsequently contracted or incurred for the preservation of a ship already under bottomry.\(^{163}\)

In the third place, a later bottomry had priority over an earlier bottomry. The reason why the principle of posteriority as opposed to the principle of priority applied and conferred greater rights on the later bottomry lender, was because the later bottomry in emergency was contracted also for the benefit of the earlier bottomry lender and for the preservation of his security. Another reason was because otherwise lenders would be discouraged from advancing money in respect of ships in an emergency if a

---

\(^{162}\) This point was initially controverted (see eg Van Leeuwen Rooms-Hollands reht IV.9.2, referring to the views of Vinnius and Van Glins). But according to an opinion in 1636 (Hollandsche consultatien vol III(2) cons 56), a bottomry loan had 'volgens immemoriale gebruuck ende usantie' preference over all other older bonds in respect of the proceeds of the ship and her equipment, even if such bonds arose from the building and buying of the ship and notwithstanding that the bottomry bonds were of a later date. Despite the fact that this was generally accepted to be the true position (see eg Voet Observationes ad III.11.3 (n4); Bynkershoek Quaestiones juris privatil III.16; Van Zurck Codex Batavus sv 'schepen' par 11:1; and Van der Linden Koopmans handboek IV.3.5), this custom was deviated from by s 250 of the Rotterdam keur of 1721 in terms of which the holder of a bylbrief had preference over the lender of money on bottomry.

A Bylbrief or (the older term) Waterbrief, according to Van der Keessel Theses selectae th 550 (ad III.11.1), was an instrument by which the purchase of a ship was acknowledged and the ship herself was, by a clausula generalis hypothecae, specifically hypothecated to the seller for an agreed (but as yet unpaid) price. A bylbrief thus served as a hypothecatory bond over a ship delivered on credit by a seller who could have been and usually was her builder. The bylbrief was also referred to as a kustingbrief, especially when it concerned the sale of a ship by someone other than her builder. Van der Keessel Praelectiones 1179 (ad III.11.1) noted further that this hypothecation differed from other hypothecations of movables in that it protected the creditor although the ship was delivered to the buyer (debtor). The differences between a bottomry bond and a bylbrief were summarised by Van der Keessel Theses selectae th 551 (ad III.11.1) and Praelectiones 1190 (ad III.11.1)) in the following points: (i) in the case of bottomry the debt arose on a loan (ex causa mutui or ex causa pecuniae creditae) while in the case of a bylbrief the debt arose on a sale (ex causa emptionis); (ii) whereas the loss of the ship terminated the bottomry lender's right in rem to claim repayment of the loan, in case of a bylbrief the loss of the ship merely affected the value of the creditor's security and he retained his personal right against the buyer; (iii) in the case of bottomry not only the ship and equipment but the cargo too could be hypothecated, while in the case of a bylbrief the ship alone could be hypothecated; and (iv) as far as preference was concerned, a bottomry bond, being conducive to the preservation of the ship, had priority over (even an earlier) hypothecation by way of a bylbrief. See further on the bylbrief, Lichtenauer Geschiedenis 182-183 and Goudsmit Zeerecht 413-414.

\(^{163}\) See eg Verwer Bodemenije 146. Cf too the opinion of 1707 in Barels Advysen vol I adv 70 (expenses incurred by the owner to save his ship have preference over earlier bottomry loans).
bottomry bond had already been issued for that ship. The rule applied unless several bottomry bonds were contracted within a short period of time at the same foreign port, in which case such bottomries ranked equally.

Fourthly, in case of several bottomry bonds on the goods on board a ship, those bonds passed over certain specified goods ranked above bottomry bonds passed on the cargo in general when it came to the proceeds of such specified goods.

Fifthly and lastly, by various municipal keuren, if a local consignee of goods sent from abroad received a bill of lading covering those goods, and in reliance on that bill accepted and paid a bill of exchange drawn on him (or gave an advance on the consignment, or incurred expenses in respect of the goods, such as insurance), a preferential right on those goods was conferred upon him. This right gave him a specific preference over the holder of a bottomry bond on the same goods which had been taken up by the consignor after the goods had been shipped and the bill of lading sent to the local consignee. Such a bottomry bond thus gave no right of preference to the lender against such a consignee.

---

164 See eg the opinion of 1606 in Hollandsche consultatien vol IV cons 127, noting that it was reasonable that later bonds were preferred before earlier ones ‘als veroorzaakt hebbende dat de gemeene hijpotheque behouden zoude wezen, overgegeven’; the opinion of 1636 in Hollandsche consultatien vol III (2) cons 56 (noting immemorial usage); Van Leeuwen Rooms-Hollands regt IV.9.2; Lybrechts Redenerend vertoog II.19.5; and Schorer Aanteekeningen 339 (ad III.11.1n2). In the decision of the Hof van Holland reported in Loenius-Boel Decision casus 127, the reason given for this rule was that it benefitted shipping and commerce.

165 In 1621 the municipality and judiciary of the town of Enkhuizen approached their Amsterdam counterparts to ascertain which rules were applicable there in determining the preference between bottomry bonds. After an investigation into the customs observed by the local courts, the Amsterdam government wrote in answer on 25 June 1621 (see Amsterdam Handvesten vol II at 538) and advised as follows: (i) foreign bottomry bonds notarially executed and signed by the borrower were preferred before all current debtors; and (ii) later bottomry bonds had preference over earlier bonds unless the borrower had within 8 or 10 days on different dates taken up money on bottomry in the same port, in which case all the bottomry bonds ranked equally. Bynkershoek Quaestiones juris privati III.16 regarded the latter point as ‘zeer zonderling’ and as contrary to ‘het algemeen Recht van hypotheek’, noting that it could be justified as an exception unique to bottomry bonds only if it was argued that the ship ‘van geen nieuw gevaar door een later-opgeschoten som gered was’. See further generally Goudsmit Zeerecht 12n1 and 379-381.

166 See the opinion of 1706 in Barels Advysen vol I adv 66 (‘Bodemarye op gespecificeerde goederen is praeferent boven Bodemarye op goederen in ’t generael gedaen’). The reason for this is not apparent from the opinion but Van der Keessel Theses selectae th 564-567 (ad III.11.2) and Praelectiones 1190-1192 (ad III.11.2) noted that it was because a special hypothec (specialis hypotheca) had preference over a general one.

167 This was first provided for in the Amsterdam keur of 30 January 1682 (see Amsterdam Handvesten vol II at 538), and the measure was subsequently taken over verbatim in the Rotterdam keur of 30 November 1684, and repeated in a simpler form in s 7 of the Rotterdam keur of 7 March 1719 and again in s 30 of the Rotterdam keur of 2 April 1768. This rule, which was contrary to the nature of bottomry according to Verwer Bodemerije 148, came to be applied generally not only to bottomry bonds but also to unconditional bills where the lender bore no risk at all (see Van der Keessel Theses selectae th 449 (ad II.48.45) and Praelectiones 995 (ad II.48.44).
A first bottomry loan on a ship was exempt from the statutory duties imposed upon other real rights of security, the non-payment of which duties resulted in those rights losing such preference as they may otherwise have had. The exemption applied only to a bottomry loan taken up in an emergency.

4.3.2.7 Voluntary Bottomry Loans

Voluntary bottomry, the successor of the earlier maritime loan, was in many respects treated differently in Roman-Dutch law from bottomry in the strict sense, that is, from bottomry in emergency.

There was little regulation of it in the earlier legislation on bottomry which was concerned mainly with the master's authority to take up money on his ship in an emergency. It seems, in fact, that there may at first have been some uncertainty as to whether bottomry could be concluded by anyone other than a master of a ship in an emergency. But later it was generally accepted that what was prohibited was not voluntary bottomry in general but simply the conclusion of such a type of bottomry loan by a master who did not have the consent of the owners concerned. What the legislation sought to do was not to limit the freedom of the owner of a ship or goods to conclude a bottomry or respondentia loan on his ship or goods, but merely to limit the implied authority of a master to do so in situations of emergency.

Thus, bottomry in emergency could be concluded only by the master of a ship and as a rule only abroad. By contrast, a voluntary bottomry loan could be concluded by the (majority of the) owners of the ship (or goods), or by a master with authority from the (majority of the) owners to do so, or by a shipowner-master to the extent of his share in the ship or goods. And it could be concluded at home or abroad and for emergency or non-emergency purposes.

---

168 In the 'Ordonnantien op den Veertichsten Penningh vande Schepen' of the Estates of Holland and West Friesland of 5 February 1665 (see GPB vol I at 1976), s 1 imposed a duty of 2½ per cent of the price ('den veertichsten penningh vanden prijs') on every sale or other alienation of a ship, boat or yacht ('Speel-Jachten'). Section 2 imposed a similar duty on all hypothecations ('Hypothecatieri') of such vessels (half of the duty being payable by the person executing and the other half by the person receiving the hypothec), on the condition, though, that 'de eerste Bijl-brief, ende ook de Bodemerey-brieven, van desen Impost vry wesen sullen ende exempt'. Subsequent legislation continued this exemption. See further eg Voet Observationes ad III.11.3 (n4); Van Zurck Codex Batavus sv 'scheper' par 11; Lybrechts Redenered vertoog II.19.6; Bynkershoek Quæstiones juris privati III.16; and Van der Keessel Theses selectae th 553 (ad III.11.2) and Praelectiones 954-955 (ad II.48.22).

169 See the opinion of 1707 (Barels Advysen vol I adv 71) which made it clear that the exemption applied only to bottomry loans in emergency, that is, bottomry 'buiten 's lands opgenomen tot conservatie van schip en goed, tot inkooping van eenige noodzaekelykheden, ofte anderzins tot bevordering van reize'.

170 See eg Scheltinga Dictata (ad III.11.2); and Van der Keessel Theses selectae th 553 (ad III.11.2) and th 569 (ad III.11.3), and Praelectiones 1193 (ad III.11.3). Interesting problems could arise if shipowners could not agree on whether and how to equip their ship for a voyage. The majority could do so and in appropriate circumstances raise the amount necessary for that purpose by way of bottomry loans on the ship: see Van der Keessel Theses selectae th 709 (ad III.23.2). Apparently in the fifteenth and sixteenth centuries, voluntary bottomry, but not bottomry in an emergency, was prohibited in the Hanseatic League. See Landwehr 'Hanseatischen Seerechte' 100-101.
As far as voluntary bottomry loans were concerned, there were no restrictions as to where, for what reason, under what circumstances, or for what amount an owner, or an authorised agent of his, such as a master, could conclude such loans. They could be concluded in the Netherlands itself (hence the term ‘uitgaande bodemerije’) and not only in a distant port abroad; they could be entered into for the purpose of financing, or of paying off the debts incurred in financing, a maritime venture to be undertaken with the ship or goods on which the loan was given, or even for a purpose totally unrelated either to the secured property or to the borrower himself (so-called speculative bottomry); and the amount of such a loan was not limited to a particular part of the value of the secured property.

As in the case of a maritime loan, a voluntary bottomry loan could (but did not automatically) involve the hypothecation of the ship or goods; the hypothecation of maritime property was not an essential characteristic but merely a natural consequence of the agreement. Furthermore, voluntary bottomry bonds gave no priority either over other bottomry bonds concluded in an emergency or over other real rights over the property which served as security for the loan.\(^\text{171}\)

4.3.2.8 The Disappearance of Bottomry

The function of the maritime loan as risk-shifting device disappeared for practical purposes with the emergence of the modern insurance contract. As a credit device the maritime loan came under increasing pressure from better and more economical methods of financing maritime trade and it continued a struggling existence in the form of the voluntary bottomry loan.

The use of the bottomry loan in emergency too declined although this occurred at a slower rate and at a much later time. As reasons for its eventual disappearance from practice may be mentioned the improved means of communication which reduced the instances where a master had authority to conclude such a contract because he could not communicate with the owners concerned; the development of facilities for international banking and financing; and the recognition of the lien for disbursements.\(^\text{172}\)

\(^{171}\) According to the opinion in the *Hollandsche consultatien* vol IV cons 127 (1606), bottomry bonds passed on ships ‘binnen lands [en] niet tot salveringe maar tot uitreedinge van ‘t opgem. Schip’, conferred no preference and ranked amongst themselves according to the principle of priority. See further the opinion of 1663 in the *Hollandsche consultatien vervolg* vol I cons 13 which stated the order of preference of claims against the insolvent estate of a master of a ship determined by arbitration as follows: (i) necessaries men (‘leveranciers’), (ii) the shipowners, and (iii) the local lenders on bottomry (ie, voluntary bottomry). The opinion in Barels *Advysen* vol I adv 71 (1707) noted that lenders advancing money at home under voluntary bottomry bonds enjoyed preference in chronological order, while that in Barels *Advysen* vol I adv 72 (1712) thought there was no preference because the loan was not a loan in emergency to save the ship or goods.

\(^{172}\) The Roman-Dutch law of bottomry survived in the Netherlands in arts 572-591 of the Dutch *Wetboek van Koophandel*. Both forms of bottomry were recognised but voluntary bottomry especially was largely extinct in practice. The provisions on bottomry in the *Wetboek* were repealed in 1924.
4.3.3 Insurance and Bottomry: Similarities and Differences

The contract of bottomry and that of insurance were sufficiently similar in Roman-Dutch law to have prompted various pronouncements on the precise relationship between them as well as numerous attempts to distinguish between them.

Thus, it has been said that insurance is a form of bottomry; that bottomry is a form of insurance; that bottomry and insurance are twin sisters with the former having the right of primogeniture; that bottomry is a mixed contract of loan and insurance; and even that bottomry is the reverse of insurance.

The confusion between bottomry and insurance was promoted not only by the role played in the development of both forms of contract by the maritime loan as well as by their shared characteristics, but also by their simultaneous application in particular instances. It was possible for bottomry and insurance to be concluded on the same ship or goods: not only could an owner insure his bottomed ship or burden his insured ship with bottomry, but the bottomry lender too could insure against the possibility of the loan not being repayable. Thus, for example, those who regarded bottomry as insurance or a form of insurance, considered the insurance of the bottomry loan as a

---

173 Thus, in an opinion at the end of the sixteenth century (see Hollandsche consultatien vol I cons 284) it was mentioned that the insurance contract under consideration had the nature and features of a bottomry contract; and in an opinion in c1622 (see Hollandsche consultatien vol I cons 234), the Amsterdam advocate S van Beaumont regarded insurance as being in the nature of bottomry.

174 In an opinion in 1699 (Barels Advysen vol I adv 64) the point was made that bottomry 'veelal een soort van Assurantie zyn, en die contracten ook met den anderen veelal worden vergeleken'. See too Kersteman Academie part XVIII (at 277) where bottomry bonds were referred to as 'een Specie van Assurantie Contracten'. Lipman 247 expressed the view that the maritime loan, in the form of the bottomry contract, was actually nothing other than an insurance against the loss of money and goods entrusted to the sea, with the only difference being that the premium was not inevitably due but only in case of safe arrival. See too Cleton 57 who regards bottomry as a form of financing which shows certain characteristics of total-loss ('behouden-vareren') insurance. A similar analogy was drawn in English law. In Joy v Kent (1665) Hardres 148, 145 ER 526, for example, the Court held usury laws not applicable to a bottomry bond because bottomry was regarded as a common way of insurance. See further Holdsworth History vol VIII at 261-263 and MacKinnon 32.

175 See Knittel 26. This statement is not only misleading but also historically incorrect.

176 See Verwer Bodemerije 163-164 for a refutation of the view that bottomry is a contractus mixti ex mutuo & periculo averso.

177 This is, of course, only partly true. See Nolst Trenite Zeeverzekering 4 (bottomry must not be regarded as a reverse insurance, as was once thought, but as an insurance in terms of which the sum insured is already paid in advance).

178 See eg Verwer Bodemerije 149 and further ch V § 5.5 infra as to the insurance of a bottomry loan and of the property securing such a loan.
form of reinsurance and the insurance of a ship subject to bottomry as double insurance.  

But what then were the similarities which led to the association and confusion of bottomry and insurance? The principal common characteristic was, of course, the transference of risk effected by and between the parties to the respective contracts. Several other common features flowed from it. Both bottomry lender and insurer took over for their own account some of the risks which threatened the financial interest of the owner of a ship or goods. This they did in terms of a contractual arrangement in return for an actual or promised financial reward on which there was no limitation. The perils they took over were, for all intents and purposes and absent any specific contractual arrangement, identical: perils of the sea.  

Furthermore, and ancillary to this principal common denominator, there was the fact that both contracts were aleatory contracts: the obligations of one of the parties to each contract depended upon the outcome of an uncertain (usually future) event. Whether or not the bottomry borrower had to repay the loan depended upon whether or not a loss occurred to the secured object within a particular time. Similarly, whether (and how much) the insurer had to pay by way of indemnity depended upon whether or not loss or damage occurred to the insured object within a particular time. By contrast, the performances of the other parties, namely of the bottomry lender to make the loan, and of the insured to pay the premium, were not conditional.

The close resemblance of bottomry and insurance as risk-transferring devices gave rise to the analogous application of principles first developed in respect of the contract of bottomry to the more recently evolved contract of insurance. Not surprisingly the principles relating to the description, nature, commencement, extent, alteration and increase, and termination of the risk found ready application. Such application was no doubt further sanctioned by the fact that, by way of the maritime loan, Roman law texts could be relied upon in the process.

---

179 See Verwer Bodemerije 175-176 who commented on this incorrect view and on the implications on customary practice if it were correct.

180 Thus, Bynkershoek Quaestiones juris privati IV.2, in relying by analogy on the position in the case of bottomry when considering an aspect of risk in terms of an insurance contract, noted that 'men kan, niet zeggen dat 'er tusschen een Assureur en een Houder van een Bodemery-brief, eenig onderscheid is, voor zo verre het overgenomen gevaar aangaat'. See too Lybrechts Redenerend vertoog II.19.1; Van der Keessel Theses selectae th 558 (ad III.11.2) and Praelectiones 1186-1187 (ad III.11.2); and Goudsmit Kansovereenkomsten 261-289.

181 On occasion the reverse also occurred: see the decision of the Genoese Rota referred to in § 4.3.2.3 n132 supra.

182 See eg the approach followed in the opinion taken up in the Hollandsche consultatie vol I cons 284 (c1598). The opinion was required on the duration of the risk in terms of a hull policy. A comparison was drawn primarily with the goods policy, in respect of which there were express legislative provisions. But it was also mentioned that an insurance contract had the nature and displayed the characteristics of the bottomry contract, and accordingly the position in terms of the latter contract was relied upon by way of analogy.
But despite what really were no more than superficial similarities, great and fundamental differences existed between the contracts of bottomry and insurance. These differences, most of which are interrelated, may be discussed very briefly.

Firstly, the bottomry contract was primarily a monetary loan, aimed at providing the maritime trade with the capital necessary for the building and equipping of ships or the purchase of cargo, or for the repair of a ship or the preservation of cargo in an emergency. The loan was an essential characteristic of bottomry. The risk-transferring or ‘insurance’ function of bottomry was but accessory and consequential to the loan agreement. It was a monetary loan which also involved the transfer of risk, no different in fact from any number of other contracts which may have contained specific stipulations relating to the transfer of risk between the parties involved. In the case of insurance the transfer and bearing of risk was not only the primary aim of the contract but also its sole purpose. Insurance was not or not also a loan.

Secondly, although both bottomry lender and insurer took over certain perils, the way in which the risk was borne in each case was not identical. The bottomry lender bore the borrower’s risk by lending to the borrower a sum of money on the condition that that amount plus interest (which included the compensation for his bearing of the risk) would not have to be repaid at all if a particular object exposed to the perils of sea did not arrive at a particular destination because of those perils, or would not have to be repaid to the extent that the value of that object, if it did arrive, was smaller than the amount of the loan. The insurer bore the insured’s risk by undertaking the obligation to indemnify the insured against the loss of or damage to a particular object caused by the perils of the sea.

Thirdly, and more specifically, the lender, as the risk transferee, made an actual payment by advancing a sum of money to the borrower as transferor which the latter had to repay in the absence of loss. This payment was made prior to and thus irrespective of the occurrence of the uncertain event, that is, the loss. By contrast, an insurer merely undertook payment in the event of loss. Such payment was made after and as a

---

183 See in addition to the Roman-Dutch sources referred to infra, also in particular Burger 9-17 and Goudsmit Kansovereenkomsten 261-289.

184 Thus Verwer Bodemerije 163-164 pointed out that it was wrong to regard bottomry as a contractus innominatus, do ut des when it was in fact a contractus mutui.

185 The reason advanced by Van Leeuwen Rooms-Hollands regt IV.9 for treating bottomry and insurance together was therefore wrong: he regarded both as examples of monetary loans which were exempt from the ordinary rate of interest by reason of the fact that the lender ran a risk.

186 See Verwer Bodemerije 163-164; Van der Keessel Theses selectae 558 (ad III.11.2) and Praelectiones 1186-1187 (ad III.11.2). Following from this difference was the fact that in the event of the loss of the bottomed property, the bottomry lender, who bore the risk of such loss from perils of the sea, had to prove that the loss was not caused by one of the perils he had taken over. By contrast, in the case of insurance, the burden of proof rested not on the insurer as bearer of the risk but on the insured to prove that the loss was in fact caused by a peril of the sea.
result of the occurrence of the uncertain event, and if that event did not occur within a particular time, no payment at all was made.187

Fourthly, the bottomry loan involving as it did the hypothecation of the object securing the loan, the bottomry lender had a right of hypothec on the object on which the money was lent, whereas an insurer had no similar right on the object of risk.188

Fifthly, the bottomry borrower as the risk transferor undertook to repay the amount he had received together with the bottomry premium only in the absence of any loss during a particular period. By contrast, the insured, whether he paid the premium in advance or merely undertook to pay it, had to pay that premium irrespective of whether any loss in fact occurred.189 The bottomry premium in fact consisted of two elements: interest on the borrowed capital and compensation for the bearing of the risk (periculi pretium).190 The insurance premium, by contrast, was solely a compensation for the bearing of the risk.191

Finally, in the absence of an agreement to the contrary, the bottomry lender bore the risk only of a total loss or of a partial loss reducing the value of the secured object to below the amount of the loan. The transfer of risk, not being the primary aim of the contract, was in principle not a complete transfer of the whole risk. A partial loss, not reducing the value of the secured object to below the amount of the loan, was not a loss for purposes of bottomry: bottomry bore no average. An insurer, by contrast, in the absence of an agreement to the contrary, bore the risk of a loss and of all damage to the insured object. The aim of insurance was to transfer risk from the insured to the

---

187 See Tydeman 92 who noted that in the Guidon de la mer (a compilation of customary maritime law, including insurance law, drawn up in the mid-sixteenth century in Rouen) IV.1, the distinction was drawn that in the case of bottomry the money was paid in advance whereas in the case of insurance there existed merely an obligation to indemnity.

188 See Van der Keessel Theses selectae th 558 (ad III.11.2) and Praelectiones 1186-1187 (ad III.11.2), noting that where the premium was paid, an insurer had no real right on the insured object, and thereby suggesting that such a right may in fact have existed where the premium had not yet been paid. See further ch XI § 5.1 infra.

189 Thus, bottomry was not a form of insurance because one of characteristics of an insurance contract, namely the payment or undertaking to pay a premium irrespective of the occurrence of the uncertain event, was absent. See Clausing 47.

190 Strictly, because it was payable only if no loss had occurred and therefore was not inevitably due, the periculi pretium portion of the bottomry premium could not have been paid as compensation for the bearing of the risk: the lender also bore the risk where a loss did in fact occur but then received no compensation for it.

191 A practical illustration of this difference was provided by Verwer Bodemerije 152-153. He noted that the bottomry lender's profit on the Amsterdam Bourse was usually double the price of insurance to the place to which the bottomed property was destined. Thus, for a voyage from Smyrna in Turkey to Amsterdam, the insurance premium was 20 per cent while the premium on bottomry for the same voyage was 40 per cent. The reason, according to Verwer, was because 'men geld op Bodemerije lichtende sijnen Gever ofte Crediteur, boven de winste die hij trekken sal voor 't verstrekken sijnes geldts, ook voorraad in handen laet van zijn gegeven geld te konnen laten versekeren voor 't gevaer, dat in desen te sijnen laste staat'.

insurer by compelling the latter to compensate the insured not only for the destruction of the whole object but also for a mere deterioration in its value.\textsuperscript{192}

\section*{4.4 Insurance and Maritime Exchange}

In the process by which in the course of the thirteenth century the maritime loan evolved into the modern insurance contract, one of the disguises the maritime loan adopted was that of the contract of maritime exchange (\textit{cambium maritimum} or \textit{cambium nauticum}).\textsuperscript{193}

Being an advance of funds repayable in a different currency and usually at a different place on the condition of the safe arrival of the particular ship carrying the loan or the goods acquired with it, this transaction made it possible for the parties to disguise the interest (which included a risk premium) on the loan in the rate of exchange. The lender's profit was not expressed as a particular percentage of the capital loaned, but was concealed in the rate of exchange by placing a fictitiously low valuation on the foreign currency in which the loan was to be repaid.

The maritime exchange therefore involved a credit transaction as well as an exchange transaction, and like the maritime loan, the credit transaction by its nature involved a transference of risk from the borrower to the lender. The correspondence with the maritime loan is obvious.\textsuperscript{194} Like the maritime loan, the effect if not the main aim of the maritime exchange was to shift a particular maritime risk from the borrower to the lender. But somewhat surprisingly the presence of the element of transfer of risk did not result in the maritime exchange being linked to the insurance contract on any significant scale.\textsuperscript{195} A possible reason for this may have been the relatively short-lived existence of the maritime exchange.

\textsuperscript{192} See Van der Keessel \textit{Theses selectae} th 558 (ad III.11.2), and \textit{Praelectiones} 1186-1187 (ad III.11.2) and 1428 (ad III.24.1). Thus, in the case of 50 per cent damage to a ship insured for 25 per cent, the insurer was liable for 25 per cent of the loss suffered, but in case of 50 per cent damage to ship bottomed to an amount equal to 25 per cent of her value, the lender was able to claim the full amount of his loan plus interest. The same applied in the case of bottomry on goods, such a contract not being, as was suggested by an opinion in 1699 (see Barels \textit{Advysen} vol I adv 64), ‘veelal een soort van Assurantie ... en die contracten ook met den anderen veelal worden vergeleken ... en zulks dat gelyk in materie van Assurantie, zo ook in cas subject, de schaede proportionaliter (nae evenredigheid) moet gedraegen werden’. See on this point Van der Keessel \textit{Theses selectae} th 559 (ad III.11.2) and \textit{Praelectiones} 1187-1188 (ad III.11.2), and again § 4.3.2.3 supra.

\textsuperscript{193} See generally on the maritime loan, Holdsworth \textit{History} vol VIII at 276; Lopez & Raymond 162-169; Postan, Rich & Miller 55-56 and 67; De Roover 'Cambium Maritimum'; and De Roover 'Early Examples' 175-177.

\textsuperscript{194} Thus Noonan 175 considers the maritime exchange to have been merely a variant of the maritime loan with the added condition that repayment was to be made in a foreign currency.

\textsuperscript{195} Forte 407n78 notes that Stair, one of first Scots writers to mention insurance, did so briefly in his \textit{Institutions} (1681) in the context of a discussion of contracts of exchange. Forte finds this interesting because Grotius \textit{De jure belli} II.12.5 too treated insurance as a species of exchange. On closer inspection, though, it appears that Grotius was referring there to exchange simply in the sense of an exchange (\textit{permutatio}, 'mangeling') of performances, that is, in the sense of reciprocity; he mentioned insurance as an example of a mutual agreement where, in exchange for money, there was not a delivery of goods or a performance of labour but an undertaking to indemnify.
In the course of the fourteenth century the maritime exchange was gradually replaced by the ordinary, unconditional, and cheaper\textsuperscript{196} contract of exchange contract (\textit{cambium}). Increasingly use was made of bills of exchange in the financing of foreign trade: money was lent in the form of the purchase of bills of exchange but these bills had to be paid unconditionally, also when the goods of the borrower were lost. Therefore, the lender no longer bore any risk. In any event, like the maritime loan, the maritime exchange had serious drawbacks as a means of insuring against risk: it forced the merchant to take up money whether or not he required it and to pay interest for its use.

4.5 Insurance and Partnership

4.5.1 Maritime Partnerships in the Middle Ages

The notion of a partnership was employed in the medieval maritime trade in instances closely approximating those of the maritime loan. The maritime lender bore the (maritime) risk of the loss of his capital but he did not generally share in business losses which may have been incurred by the borrower. By the same token he did not share in the profits of the venture for which the loan had been incurred, his profit consisting merely of the difference between the amount of his loan and the amount repayable in the case of the safe arrival of the ship or goods concerned. Because they did not share in (all) the profits and losses of the maritime venture concerned, the maritime lender and borrower were not partners.

A further method of investing in a maritime venture, namely by way of two typical contracts employed in the overseas trade in the twelfth and thirteenth centuries, did, however, show some, but not all, of the characteristic features of a partnership. These maritime partnerships, the \textit{commenda} and its derivative the \textit{societas maris}, also displayed a close similarity to the maritime loan. Because of attacks on the maritime loan as an usurious transaction, the \textit{commenda} in particular took the place of the maritime loan as an instrument for the transfer of risk.\textsuperscript{197}

Although many variations of the \textit{commenda} occurred in the Middle Ages, a common type involved one partner (a capitalist investor and the sedentary and silent or sleeping partner; the \textit{commendator}) supplying the other partner (an entrepreneur and the itinerant and managing partner; the \textit{commendatarius}) in a common maritime venture with the finance for a trading voyage the latter was to undertake. The latter partner

\textsuperscript{196}See eg Roccus \textit{De assecurationibus} note 47 (unlike insurance where any premium may be charged because of the risk involved, someone who concludes a bill of exchange (\textit{cambio}) with a pauper cannot demand any interest in excess of the customary or legal rate, notwithstanding the risk that he runs because the borrower is a poor man, because the lender has only himself to blame for contracting with such an impecunious borrower).

\textsuperscript{197}See generally Astuti; Lopez & Raymond 174-184; Van der Merwe 'Winsbejag' 154-156; Postan, Rich & Miller 49-53; De Roover 'Early Examples' 174-175; and Seffen 5-15. On land-trade partnerships during this time, see Lopez & Raymond 185-211. They note that the \textit{compagnia} and the \textit{societas terrae} were to the terrestrial trade what the \textit{commenda} and the \textit{societas maris} were to the sea trade: the basic instruments for the pooling of capital and the spreading of risks.
contributed only his skills and labour as a trader and also had to repay the amount advanced by the first partner together with a certain percentage of the profit made from or less the losses incurred in the venture.

The investing partner not only bore the risk of the loss of his capital investment but also shared in the profits of the venture. More specifically he did not simply receive a fixed percentage return on his capital investment, in the form of interest, but a predetermined fixed share of the profit of the adventure in addition to his capital. Typically the investor received three-quarters of the profits and the travelling merchant one-quarter. The investing partner alone bore the risk of the loss of his capital and was entitled to the agreed share of the profit. The travelling partner, by contrast, was entitled to a share in the profit but he did not share in the loss of the capital, his only loss being the loss of the reward for his labour if no profit was made.

The commenda was therefore somewhere between a (maritime) loan and a partnership. It was not a loan in the strict sense of the word but rather a pooling of the capital and labour in a particular overseas trading venture. But although approximating a partnership in the sharing of profit and loss, in other respects the commenda was not a partnership in the ordinary sense of the word. The investing partner did not become jointly liable with the trading partner in respect of transactions concluded by the latter with third parties, and his liability for loss could not exceed the amount of the capital he had contributed.

The main advantages of the commenda and the reasons also why it was employed in the maritime trade, were, first, that the investing partner’s liability was limited; secondly, that, unlike the maritime loan, it was not under any great suspicion of being usurious; and thirdly that it enabled more than just maritime risks to be transferred from one party to another.

A later development was for both or several of the partners to contribute capital to the venture with one or more of them continuing to provide the labour required. A corresponding adaptation in the sharing of any profit occurred and both parties bore the risk of accidental loss of their capital. In this bilateral or multilateral commenda, or

---

198 In the case of the trading venture showing a loss (eg because of the loss of the ship on which the goods was being conveyed, or even, depending on the terms of the particular contract, because of non-maritime perils), he not only did not receive a return on his investment but was not entitled to a (full) repayment of his capital.

199 That is, it was not repayable unconditionally and with interest irrespective of the profits of losses into which the amount loaned had been converted by the borrower. See eg Grotius De jure belli II.12.24 for the difference between a loan and a partnership and between a lender and a partner.

200 The commenda was at most an extraordinary partnership en commandite.

201 By contrast, in case of the land-trade partnership or compagnie, the partners (both investing and managing) were jointly and without any limitation liable as against third parties. This may have been one of the reasons why the compagnie was little favoured in the sea trade where risks were relatively higher and where an unlimited liability would have made the investment just too unattractive.
societas maris, both or all of the partners therefore bore the risk of the loss of their capital while sharing also in any profit.202

Still, like the maritime loan, both the commenda and the societas maris were not primarily risk-transferring devices. Such risk as was transferred, was transferred merely from one party to the agreement to another; there was no independent transfer of risk to an otherwise uninvolved third party.

4.5.2 Partnership and the Sharing in Profit and Loss

In a number of forms the partnership continued to play an important role in maritime trade and commerce, also during the time of Roman-Dutch law. Roman-Dutch shipping law provides numerous illustrations of the notion of a partnership being employed as the vehicle by which at least some of the risks inherent in trade and navigation at sea could be pooled, shared and thus spread. Prime examples include the device of consortship (admiraeischap)203 and the relationship between the co-owners of a ship equipped for and sent on a particular trading voyage (mederederschap).204 Not unexpectedly, also, certain risk-sharing devices were sought to be explained with reference to the partnership agreement, amongst others general

---

202 Yet a further development (see Lopez & Raymond 213) was for both partners to become sedentary and to appoint a commission agent to carry the money or goods purchased with it abroad, to trade with it, and to return with the proceeds. Unlike a partner, the agent did not share in that profit (and was not ordinarily liable to the partners for loss) but received a fixed commission. Such agents could also be based abroad and from there offer their services to a number of such trading firms.

203 On consortship (the sailing company, societas admiralitatis, or societas mutuae defensionis), see Grotius Inleidinge III.22 and Van der Keessel Praelectiones 1419-1423 (ad III.22). A consortship was a type of partnership agreement concluded between the owners of merchant ships with a view to their common defence on a particular voyage or voyages against enemy and pirate ships. The ships involved in an agreement of consortship, departed on the voyage at the same time, sailed in convoy, and were under command of the master of one of them who acted as admiral of the fleet. Unless otherwise agreed, a communality of loss existed in such a case (the loss of or damage to one ship in the fleet caused by an enemy or piratical attack was borne or contributed to in common by all the other vessels in the fleet) as well as communality of profit (profit derived eg from a prize captured by one member of the fleet was common to and shared by all the other ships in fleet). The sharing of profit was generally excluded by agreement, though. See further Hart 124-125. Consortship, being no more than an extension of the notion of general average over more than one ship and by way of agreement, bears a close resemblance in many respects to general average. Thus, eg, the relevant loss suffered by one ship in the fleet which had to be borne in common by the other vessels was borne and contributed to in the same way as in the case of a general average. See Van Zurck Codex Batavus sv 'avaryeri' par 6 and further § 4.6.3 infra.

204 The relationship between the several owners of a ship, or of shares in the same ship, or of several ships (or even the several charterers of a ship or ships) who equipped that ship or those ships for a particular voyage or voyages with the aim of a common profit was also regulated, in absence of any specific agreement to the contrary, according to the general principles of the law of partnership. On mederederschap, see Grotius Inleidinge III.23; Van der Keessel Praelectiones 1423-1426 (ad III.23): and further ch V § 3.1 and ch XIII § 2.3.1 infra.
average\textsuperscript{205} and insurance.\textsuperscript{206} Before turning in more detail to the interaction between insurance and partnership, some general remarks on the role of risk and the sharing of profit and loss in the context of a partnership may be apposite.

Noticeable with regard to the agreement of partnership (\textit{societas})\textsuperscript{207} was the fact that it was not based on an exchange of performances but rather on the pooling of resources for a common purpose. Although created by a bilateral (or multilateral) agreement, the performances of the parties to the partnership agreement were not reciprocal. All the partners had to contribute to the common venture and became joint or co-owners of the partnership assets so contributed. Equally, all partners had to share in such profit as the partnership or common venture realised; and all also had to bear the risk of no profit being generated. A community of profit and loss was a feature of the partnership agreement.

Although partners shared in both profit and loss in the same proportion, and further did so in accordance with the proportion in which each had contributed to the partnership, the parties to a partnership agreement were free to agree otherwise. They could exclude the equivalence between the proportion in which they contributed and the proportion in which they were to share in profit or loss,\textsuperscript{208} as well as the equivalence between the proportions in which profit and loss were shared.\textsuperscript{209} An unequal participation in profit and loss was therefore possible.

It was possible and permissible, further, for the parties to agree that a partner was entitled to share in the profit but was not liable to bear any loss.\textsuperscript{210} But the parties could also have concluded an agreement with the opposite effect, namely that only one was entitled to share in the profit and either that the other alone had to bear the loss or

\textsuperscript{205} Thus, eg, Van der Keessel \textit{Praelectiones} 1517-1518 (ad \textit{III.29.pr}) considered general average as a partnership \textit{ex lege}, arising from the community of peril between persons who had goods on the same ship. On the relationship between insurance and general average, see § 4.6 \textit{infra}.

\textsuperscript{206} Not without significance is the sequence and close proximity in which Grotius treated these matters in his \textit{Inleidinge}: partnership (\textit{III.21}), \textit{admiraelschap} (\textit{III.22}), \textit{mede-rederschap} (\textit{III.23}), and insurance (\textit{III.24}).

\textsuperscript{207} See generally Grotius \textit{Inleidinge} \textit{III.21}; Van Leeuwen Rooms-Hollands regt IV.23; Voet \textit{Commentarius} XVII.2; Van der Keessel \textit{Theses selectae} \textit{th} 698-706 (\textit{ad \textit{III.21}}); and Van der Linden \textit{Koopmans handboek} IV.1.11-14. See too Zimmermann 451 and 457-459.

\textsuperscript{208} Thus, it was possible for a partner who contributed 50 per cent of the assets to be entitled only to 25 per cent of the profit or liable only for 25 per cent of the loss, or for a partner who contributed only 25 per cent of the assets to be entitled to 50 per cent of the profit or liable for 50 per cent of the loss.

\textsuperscript{209} Thus, it was possible for a partner to be entitled to 60 per cent of the profit but liable only for 30 per cent of the loss, or to be entitled to only 30 per cent of the profit but to be liable for 60 per cent of the loss.

\textsuperscript{210} Thus, where one partner contributed money and the other services and by agreement between them the former was guaranteed his capital while profit had to be shared. If there was no profit but a part of the contributed capital was consumed, such an agreement had the effect that the latter partner had to add to the capital and he alone thus had to bear the loss. In case of a profit, because the partners shared in net profit, ie, profit remaining after any loss had been deducted, they in effect all still shared in that loss, each partner's share in the profit having been decreased by the loss.
that they would share such a loss. This agreement, called a leonine partnership (societas leonina) was in fact not a valid partnership agreement. But it was not in itself an unlawful agreement. Thus, while participation between partners in profit was an essential of the partnership agreement, their participation in loss was simply a natural consequence of such an agreement and could be excluded by an arrangement to the contrary.

4.5.3 Examples of the Interaction Between Insurance and Partnership

The contracts of partnership and insurance were mentioned in the same breath in Roman-Dutch law in a number of contexts. Not only was the relationship between the insured and the insurer, and also that between co-insurers, likened to the relationship between partners, but certain aspects of the partnership itself were explained with reference to insurance. A few examples may serve to illustrate the relevance of insurance and partnership to each other.

The first example concerned the case where the parties to a partnership agreement altered the way in which they had to share in profit and loss.

Grotius noted that an agreement in terms of which one party had to bear the loss (either alone or jointly with the other parties to the contract) without having any share in the profit (that is, a leonine partnership), although not invalid in itself, was contrary to the nature of a partnership agreement. By contrast, partners did not have to share equally in profit and loss nor in the same proportion as their contributions to the partnership. Thus, one partner could by agreement validly be entitled to a greater share of profit than otherwise in exchange for bearing a greater part if not all of the loss. In such a case, Grotius thought, there existed a mixed contract of partnership and insurance ("mixtus contractus ex societate et ex contractu aversi periculi"). But there was no valid partnership where one party had to share in loss or even bear all the loss without being entitled to participate in gains. Roccus too thought along these lines.

In an opinion delivered in 1631 (see Hollandsche consultatien vol III(2) cons 203) and concerning an ante-nuptial contract by which the property of the wife brought into the marriage had to go to her children without any proportional deduction of the losses of the joint estate, Grotius had further occasion to refer to the analogous case of a partnership contract altering the sharing of profit and loss. Again he distinguished an agreement in terms of which one party was not entitled to share in profit (and which was not a valid partnership agreement) from one in terms of which one partner did not have to share in loss (which was a valid partnership agreement). The latter was an instance of where the contracts of partnership and insurance co-existed; a case where two different contracts were intertwined, namely one of partnership by which all profit had to be shared and another of insurance by which one of the partners ensured the other of his contribution (eg of his capital). This type of transaction was not at all unreasonable, he thought, ‘wanneer dat het capitael van de asseurantie daer mede wert gerecompenseert, dat die d’ andere asseureert, meerder verwach uyt de conquesten, dan sy nadersins daer uyt soude hebben gehadt te verwachten’.

If the analogy of the mixed contract of partnership and insurance in the case where a partner bore more than his proportional share of the loss is taken a step further and applied to the case where such a partner bore only loss and had no share in profit (that is, to the leonine partnership which, as has been explained, was not a valid partnership but at the same time not in itself an invalid contract), it could possibly be argued that such an agreement could, depending on the particular circumstances, have been an insurance contract or even a contract of donation.

---

211 *Inleidinge* III.21.5 and *De jure belli* II.12.24.3.

212 In an opinion delivered in 1631 (see *Hollandsche consultatien* vol III(2) cons 203) and concerning an ante-nuptial contract by which the property of the wife brought into the marriage had to go to her children without any proportional deduction of the losses of the joint estate, Grotius had further occasion to refer to the analogous case of a partnership contract altering the sharing of profit and loss. Again he distinguished an agreement in terms of which one party was not entitled to share in profit (and which was not a valid partnership agreement) from one in terms of which one partner did not have to share in loss (which was a valid partnership agreement). The latter was an instance of where the contracts of partnership and insurance co-existed; a case where two different contract were intertwined, namely one of partnership by which all profit had to be shared and another of insurance by which one of the partners ensured the other of his contribution (eg of his capital). This type of transaction was not at all unreasonable, he thought, ‘wanneer dat het capitael van de asseurantie daer mede wert gerecompenseert, dat die d’ andere asseureert, meerder verwach uyt de conquesten, dan sy nadersins daer uyt soude hebben gehadt te verwachten’.

If the analogy of the mixed contract of partnership and insurance in the case where a partner bore more than his proportional share of the loss is taken a step further and applied to the case where such a partner bore only loss and had no share in profit (that is, to the leonine partnership which, as has been explained, was not a valid partnership but at the same time not in itself an invalid contract), it could possibly be argued that such an agreement could, depending on the particular circumstances, have been an insurance contract or even a contract of donation.
Again, it seems, what we had here was not an insurance contract in the true sense of the word (that is, the independent transfer of risk to an otherwise uninvolved third party) but merely a partnership agreement with an undertaking by one partner to bear the risk of loss of the other partner.

Van der Keessel\textsuperscript{214} also referred to the case where one partner contributed money and the other services and by agreement between them the former was guaranteed his capital while both were to share in any profit. If there was no profit but a part of the contributed capital was consumed, this agreement had the effect that the one partner himself had to supplement and repay that capital to the other partner and that he alone thus bore that loss. Van der Keessel agreed with Grotius that such an arrangement was valid, there being in effect two agreements, namely one of partnership and another which was a particular type of insurance (\textit{specie assecurationis}) in terms of which the partner to whom the money was paid over, bore the risk of it.

The second example concerned the relationship between the insured and the insurer.

In an opinion delivered in 1632,\textsuperscript{215} Grotius linked the insurance contract and the partnership agreement because of the particular degree of trust existing between the parties involved in those contracts. According to Grotius, the reason why an insurer was not liable on an insurance contract on goods for the seizure of those goods which the insured knew (but the insurer did not know) to be contraband, was because of the nature of the insurance contract and the relationship between the parties which was similar to that encountered between partners. By its nature, he thought, the insurance contract involved a type of partnership between the insured and the insurer ("\textit{de naturye van Asseurantie begrijpt seeckere specie van Societeyt}"). And, as in the case of a partnership where a loss due to the unlawful act of one partner was not shared by the other partners, so too any loss due to the unlawful act of the insured had no bearing on

\textsuperscript{213}\textit{De assecurationibus} notes 35-37. If one partner promised his co-partner that the capital the latter had brought into the partnership would not be lost (ie, if he guaranteed the return of the capital), the promise was void if the partner who bore the loss alone did not share in the profit at all. But it was valid if he received a reasonable and proper premium for insuring his co-partner the capital by a contract of insurance, because a contract of partnership and one of insurance could be concluded between two partners and these contracts did not have to be concluded separately and successively but could even be concluded simultaneously. Thus, a partnership could be created without any one of the partners having to run any risk of loss. And this could be accomplished in no other way than by adding an insurance to the partnership agreement. In the same way as a partner could have himself insured by a third party for the sum he brought into the partnership, so too such an insurance could be undertaken by his fellow partner.

\textsuperscript{214} \textit{Theses selectae} th 699 (\textit{ad III.21.5}) and \textit{Praelectiones} 1410 (\textit{ad III.21.5}). See too eg Voet \textit{Commentarius} XVII.2.8.

\textsuperscript{215} See \textit{Hollandsche consultatien} vol III(2) cons 175.
the relationship between the parties to an insurance contract. In similar vein, in an opinion in 1713 dealing with the relationship between the parties to an insurance contract after the occurrence of a loss and as far as the protection and preservation of the (damaged) insured object were concerned, the insured’s duties towards the insurer were said to exist "t zy dat hy word geconsidereerd als socius, of als mandatarius, aut negotiorum gestor, zo als een Geassureerde notoirelyk tot de Assuradeurs deeze en diergelyke relatie is hebbende'.

A third example concerns the relationship between co-insurers. Van der Keessell considered the case where an insurer insured only a part of the value of the goods and where that insurer and the insured, if there were no other insurers (thus, a case of under-insurance) or that insurer and the other insurers who had insured the same property, either in terms of the same or under different policies, were each liable for any loss only proportionally, according to the respective amounts each had underwritten. More specifically, it had been suggested in evidence given by Amsterdam merchants in 1599 already, that such co-insurers proportionally shared a common risk, were entitled similarly to share in any profit from the insurance, and that they were accordingly partners. But, as Bynkershoek had pointed out, there co-insurers had no intention of concluding a partnership. Also, the several insurers do not necessarily share the insurance premium proportionally; the premium may in fact, even if there was only one policy, be different for each of them, each insurer in effect concluding his own contract with the insured. And finally, co-insurers, whether they had

216 Clearly Grotius did not equate the insurance contract with a partnership agreement but merely pointed out that the two types of contract had at least one feature in common, namely the particular relationship between the parties involved; the insurance contract contained in itself certain of the elements of a partnership. See further also Zoesius Commentarius XVII.2.25 who treated insurance as guarantee given by one partner to another, although he did recognize that insurance was possible outside the partnership context (see Lichtenauer Geschiedenis 84 and 177).

217 See Barels Advysen vol I adv 21.

218 See further ch XVI § 1 infra as to the prevention and minimisation of loss.

219 See further ch XVIII § 2 infra. Of course, where the relationship between co-insurers is equated to that between partners, the insurance contract is not explained with reference to the agreement of partnership as is the case where the equation involves the relationship between insured and insurers.

220 Praelectiones 1475a, 1475c, 1475e and 1476-1477 (ad III.24.17).

221 See the opinion in Amsterdam Handvesten vol II at 541-542.

222 Quaestiones juris privati IV.2.

223 The general rule that several insurers of the same property, whether under a single or different policies, were held equally liable to make good the loss and to refund the premium, if necessary, regard being had to the amount for which each had underwritten the risk in question (see eg Van der Keessel Theses selectae th 763 (ad III.24.17) and ch XVIII § 2.3 infra), may have caused some confusion in this regard. The rule applied in respect of loss (insurers being held liable proportionally for any loss) but applied to the division of the premium on the insurance only where the same premium rate applied to all the insurers. In the unusual but not unknown case where different premiums had been stipulated for by the successive insurers who underwrote the same or different policies, each would receive the premium he had stipulated for himself, there being in effect as many insurance contracts as there were different
signed the same or different policies, were not joint and several co-debtors, any one of them not being liable for the whole loss suffered by the insured. Accordingly, Van der Keessel thought, co-insurers, including an insurer and an under-insured insured, were in truth not partners.

4.6 Insurance and General Average

4.6.1 The Origin of General Average

One of the most ancient and characteristic figures of maritime law is that of general average. It has a strong resemblance to and displays the features of other legal concepts known to maritime commerce, including insurance with which it also has a particularly close relationship. General average is a topic of some magnitude and of necessity what follows is a rather compressed version of some aspects of the Roman-Dutch law of general average.

General average was a much considered topic in Roman-Dutch law, no doubt in part because of its Graeco-Roman origin. The oldest evidence of the application of the principle underlying general average has been traced to the customary law relating to jettison which was applied on the Aegean island of Rhodes. According to this law, the loss suffered by the owner of goods jettisoned in an emergency to save the ship insurers. Thus, there was not necessarily a geometrically equal sharing of profit between co-insurers.

224 The sources, too, are extensive. Use was made of the following secondary works on general average in Roman-Dutch law: Aseaert 202-203; Van Empel 6, 131-137 and 148-149; Goudsmit Zeerecht 89-90, 119-127, 224-225, 228-229, 236-241, 330, 331-332, 365, 412, 414, 419 and 430-434; De Groote Zeesassurantie 148-151; Kohler 'Handelsrecht' 689-691; Lichtenauer Geschiedeinde 188-192; Schöffer 'Averij grosse' 74-83; Schook; De Smidt Compendium 148-151; Frenzt AdmiralitätsgesWi 52 and 208-220; Landwehr 'Hanseatischen Seerecht' 103-109; idem 'Preußische Seerecht' 132-141; idem 'Lübischen Seerecht' 163-166; and idem 'Haverei'. On the position in English law up to the end of the eighteenth century, see eg Holdsworth History vol VIII at 263ff; Lowndes & Rudolf pars 1-18; Mackinnon 35-36 (general average in the Admiralty Court); Magens Essay vol I at 55-74; Malynes Consuetudo vol I ch 25 and 26; Welwod Abridgement 42-44 (titles XVII & XVIII); and Weskett Digest 132-134 par 3-6 sv 'contribution' (which contains numerous references to Bynkershoek and to Dutch decisions) and 252-260 sv 'general or gross average'.

225 It was treated in the following works on maritime law: Weytsen's Avarien (written between 1554 and 1565 although published for the first time only in 1617; later editions with comments by Van Leeuwen, De Vincq, and Verwer); Peckius's Ad rem nauticam (first published in 1556; subsequent editions with comments by Vinnius); Bynkershoek's De lege Rhodia de iactu (1703); Verwer's See-rechten (1711) which included notes on Weytsen; and Van Glins's Aenmerckingen (1727). It was also broached in varying depth in the following general works: Grotius Inleidinge III.29; Groeneweghen Aanteekeningen ad III.29; Van Leeuwen Rooms-Hollands regt IV.31; Van Leeuwen Censura forensis I.4.29; Huber Heedendaegse rechtsgeslechert III.44; Voet Commentarius XIV.2 and Observationes ad III.29.8-9 (n11-n12); Van Zurck Codex Batavus sv 'averien'; Bynkershoek Quaestiones juris publici I.18 and Quaestiones juris privat ad IV.24 and IV.25; Lybrechts Koopmans handboek V.97-99; Scheltinga Dictata ad III.29; Schorer Aanteekeningen 447 (ad III.29.11), 453 (ad III.29.16), and 455 (ad III.29.17) n26; Aanhangzelve woorden-boek vol II sv 'iactus'; Boey Woorden-tolk sv 'averien'; Decker Aanteekeningen ad IV.31; Van der Keessel Theses selectae th 779-795 (ad III.29) and Praelectiones 1388 (ad II.20.10), 1436 (ad III.24.4), 1517-1540 (ad III.29), 1608 (ad III.38.16); and Van der Linden Koopmans handboek IV.5.1-6.
and other goods on board that ship was borne proportionally by the owners of that ship and those other goods. From Rhodian and Greek law, it was received into Roman law as part of the common lex mercatoria maritima and there the topic received detailed treatment and regulation as the lex Rhodia de iactu. From Roman law the underlying principle of the lex Rhodia was taken over in the medieval codes of maritime customary law, including those of Northern Europe such as the Laws of Oleron and the Sea-Laws of Visby. Subsequently it was the topic of legislation in the Netherlands too.

The first rather cursory statutory provisions on general average were contained in the placcaat of Charles V of 1551, the main importance of which was the statement that general average was to be borne by the owners of the ship and cargo in accordance with ancient maritime custom (‘nae ouder gewoonten van de zee’). More extensive and innovative was the regulation of general average in the placcaat of 1563 which devoted a whole title to the restatement of the received customary law and which also expanded on it in some minor points. But the established customs remained largely unchanged and apart from a few innovations necessitated by changing circumstances in shipping and navigation, legislation in the Netherlands restated rather than reshaped the law relating to general average. Most important of the later statutory measures was the extensive regulation of general average in the municipal keur of Rotterdam of 1721. By contrast, the law of general average in Amsterdam remained little affected by legislative provision.

4.6.2 The General Principle Involved

The essence of general average, which appears too from the definitions encountered in Roman-Dutch law, was that a loss or damage suffered or an expense

226 See Digest XIV.2 and further eg Coing Privatrecht 554-555; Kreller; Sanborn 108-113; and Zimmermann 406-412 which is an excellent summary of the Roman-law reception and subsequent developments.

227 General average was treated in arts 8 and 9 of the Laws of Oleron (see 30 Federal Cases 1171-1187 (1897) for an English translation) and arts 12, 20, 21, 25, 28, 38, 39, 40-43, 55, 56 and 60 of the Sea-Laws of Visby (see 30 Federal Cases 1189-1195 (1897) for an English translation).

228 In ss 28 and 41-42 of the ‘Placcaat ende Ordonnantie, Op ’t stick vande Zee-Rechten’ of 1551.

229 Sections 2 and 4-10 of title IV (‘Van Schip-breeckinge, Zee-werpinge, ende Avaryen’) of the placcaat of 1563.

230 Sections 83-119 of the Rotterdam keur of 1721 contain an extensive exposition of the then law, based largely on the approach and views of Weytsen.

231 Section 42 of the Amsterdam keur of 1744 explained that it contained no provisions on general average because of the instances giving rise to general average being so variable in circumstance that they cannot be determined or anticipated by legislation and are better left to the determination of the courts. Amsterdam general-average law was largely influenced by the writings of Verwer.
incurred for the common benefit of all the interests involved in a maritime venture, had to be borne in common by those interests.\footnote{232}

The underlying notion was that a specific community of loss and thus of risk (a so-called \textit{communio periculis} or \textit{Gefahrengemeinschaft}) existed between the various interests on the same ship and engaged in the same common venture because, as such, they were exposed to the same risks. Accordingly all those interests had a common stake in the safety and preservation or the destruction of that ship and in the safe completion of her voyage. In the event of an emergency threatening the ship, therefore, there was a common interest in averting it. This community of risk existed between the owner of the ship, those who were personally on board, and those who had goods on her, that is, between the shipowners, the master and crew, and the consignors. Furthermore, this community arose automatically by the mere presence of those various interests on the same ship and without the need for any agreement between them.\footnote{233}

It was only equitable, therefore, that any loss or damage caused or expenses incurred by one of these interests during the voyage, deliberately and necessarily to save the venture for the common benefit of all those interested, should not lie where it fell. It should not be borne either by the owner of the interest lost or damaged or by the master who had, possibly in breach of the relevant contract of carriage or of employment, caused such loss or damage or incurred such expense. Rather it should be made good and contributed to by all the interests involved in the venture.

Thus, the community of risk existing between the interests on a ship created a community of interests which in turn gave rise to a common liability to bear common loss, damage or expense suffered or incurred by one for the benefit and preservation of all. Thus, as Van der Keessel noted,\footnote{234} the basis of the obligation to contribute in general average lay not in the loss of a certain part of the community but in the preservation of the rest of that community by reason of that loss.

Although a classic doctrine of maritime law, the underlying notion of contribution to a communal loss or damage was capable of extended application in Roman-Dutch...
law also to voyages on internal waters\textsuperscript{235} and even outside the realm of shipping and transport.\textsuperscript{236}

4.6.3 Types of Average and the Terminology

At this stage it may be appropriate to distinguish between the different types of loss known in Roman-Dutch law and to clarify some terminology.

Although the origin of the word ‘average’ is disputed, the word ‘avarij’ was first used in the \textit{placcaat} of 1551 in a manner which evidences that it was not then an unfamiliar term. In Roman-Dutch law the term ‘average’ at first merely meant the loss or damage which could be adjusted as general average.\textsuperscript{237} But already in the sixteenth century a distinction was drawn between at least two different types of average\textsuperscript{238} so that the word came to mean no more than a loss or damage at sea \textit{(zeeschade)}, of which general average was but one type. The first distinction drawn was between general average and common average and subsequently other types of average came to be recognised also.

First then, there was general average (also known as great or gross average) which was an extraordinary loss, damage or expense deliberately caused or incurred for the common safety and to save the interests involved in a common maritime adventure. A general average loss did not lie where it fell but was borne and contributed to by the owners of all the interests involved in proportion to the value of those interests; a general average loss was shared.

In the second place there was common average (also known as small, petty or ordinary average) which was the ordinary, expected expenses incurred by the ship on her voyage. These expenses were ordinary in that they were not necessitated by any

\textsuperscript{235} Even if it was not clearly and unambiguously so applied in Roman-Dutch practice. See in particular Bynkershoek \textit{Quaestiones juris privatii} IV.19 for a summary of the conflicting views. His own opinion was that the maritime principle did apply to internal waters. See too Lichtenauer ‘Avarij-grosse’ who noted that the general practice - as opposed to the theory - may have been against such an extended application, mainly for the economic reason of not disadvantaging carriage on internal waters as against land carriage. The extension was subsequently recognised in art 951 of the \textit{Wetboek van Koophandel} which made the provisions on general average applicable to internal waters.

\textsuperscript{236} Thus, as Voet \textit{Commentarius} XIV.2.18 explained, some authority existed for the view that where the property of one person was sacrificed in a common danger to save the property of others, such as where a house was destroyed in order to prevent the spread of a fire even though the fire had not yet reached that house, the principle of general average applied. According to Voet, though, it could not, because there did not exist, in such a case, an equal risk of loss to all the other houses in the neighbourhood (the risk to the houses nearest being greater) so as to hold the owners involved liable to contribute to the destruction of the house in question. Rather, as Voet noted elsewhere (\textit{idem} IX.2.28), the loss had to be borne either by the owner of the destroyed house (if it had already caught fire) or by the person who had destroyed it (if the fire had not yet reached it). See too Van Zurck \textit{Codex Batavus sv ‘avaryen’} par 1611.

\textsuperscript{237} Thus, eg, title IV of the \textit{placcaat} of 1563 was concerned simply with jettison and average (‘Zee-werpinge, ende Avaryen’), Weytsen’s work was entitled \textit{Een tractaet van avarien}, and Grotius \textit{Inleidinge} III.29 was entitled ‘Van die lijft ofte goed hebben op eenen bodem, ende van avarie’.

\textsuperscript{238} See eg Van Leeuwen \textit{Censura forensis} I.4.29.9.
accident or emergency; they were simply part of the costs involved in operating the ship. Such expenses too were not borne by the ship alone but were contributed to by the owners of cargo on board the ship; a common average expense was shared in accordance with custom or as agreed between the parties involved.

Thirdly there was particular average (also known as private or simple average) which was the accidental loss or damage to a particular interest by reason of a maritime or other peril. Such a loss or damage, or an expense incurred as a result, lay where it fell and was borne by the particular interest concerned; it was not shared between the other interests involved and such interests incurred no liability to contribute in any way to a particular average. Particular average (loss caused or expense necessitated by accident) was loss which was neither general average (extraordinary deliberate loss or expense) nor common average (ordinary deliberate expense). The distinction between general average and particular average was seemingly drawn only during the seventeenth century when the conclusion of insurance to cover such accidental losses on a sea voyage had become a more general practice.

In the fourth place there was contractual (or conventional) average. In the case of contractual average, the sharing of loss between the parties to the agreement in question on the basis of general average occurred by virtue of that agreement. Such an agreement could be concluded either between persons between whom a community of risk would in any case have existed and between whom general average would in any

---

239 Examples include ordinary expenses of a ship on a sea voyage such as pilotage (or lodemanage), towage, beaconage (fees for the lighting of fires on the coast to indicate dangers to navigation), lighterage (the cost of hiring boats and smaller vessels to carry cargo to and from shore to ship, eg when the ship had too deep a draught to enter the port), anchorage and harbour dues, duties and tolls, quarantine fees, and buoy and signalling fees. See eg s 9 of title IV of the placcaat of 1563. Included in the list of common averages provided by Magens Essay vol I at 72-73, is the rather intriguing 'passage money by castles'. Weytsen Avaryen par 6 spoke of "t gunt dat de Schippers geven zeylende voor by eenige Kasteelen, t'zy in Rivieren ofte Havens'. Obviously for the owners of such fortuitously located castles, ships were passing trade in more than one sense.

240 In practice, if the ship carried the goods of several merchants, the master stipulated in the bills of lading issued to them for a specified, fixed percentage of the freight as a compensation for any common average; if the ship was freighted by one merchant and if no stipulation had been made on the matter in the charter-party, common average was customarily borne to the extent of two-thirds by the consignor (that is, by the cargo according to weight, not value) and one-third by the master (that is, by the ship).

241 Thus, in the case of particular average, and otherwise than in the case of a general average, the rule res perit domino applied. The owner of the interest concerned could, of course, have transferred the risk of such a (particular) average loss by way of agreement to another (eg, an insurer), and he may also in appropriate cases have been able to recover compensation for it from the person who had caused it.

242 In Hamburg the terminological distinction between general and particular average was apparently first drawn (possibly in reliance on the legal definition in the French Ordinance de la marine of 1681) in an opinion of Amsterdam merchants given in 1688 and in a private opinion in the case of Hupping v Hübner which came before the Hamburg Admiralty Court in 1689; see further Dreyer 191-192; Frentz Admiralitätsgericht 218-220; idem 'Seerechtsprechung' 137-141; and Landwehr 'Hanseatischen Seerechte' 109 and 125.
case have applied, or between persons between whom by law no general average would otherwise have applied. For example, the consignors of goods on the same ship, or they and the shipowners concerned, could agree that certain future accidental losses or expenditures would be shared between them as if they were general average losses. Various other possibilities existed of what were known as agreements of agermanament. Similarly, an agreement between the owners of ships sailing on the same voyage in a fleet (and between whom there would ordinarily be no general average) to provide mutual assistance and to share in losses could, depending on the terms of the agreement, also have contained a general-average agreement between the relevant parties. As the customary scope of general average was expanded by legislative and judicial activity, and as the insurance of accidental losses became more common, contractual average fell into disuse, and by the end of the eighteenth century such agreements were rarely if ever concluded in practice.

Unfortunately the clear distinction between general and common average was not always maintained and later, in the nineteenth century and under French influence, it became obsolete. The term ‘common average’ came to be applied also to general average which was contrasted merely with particular average.

4.6.4 The Requirements for General Average and Examples of General Average Losses and Expenditures

Some requirements had to be met for a loss or expenditure to qualify as a general average loss or expenditure in respect of which an obligation to make a general average contribution could be imposed. Such a loss or expenditure had to be a loss deliberately caused or an expense deliberately incurred for the common benefit of the adventure, such as for the preservation of the ship and/or the cargo on that ship, or to avoid a greater and more imminent loss or damage.

---

243 The agreement therefore merely extended the application of general average between them, eg to (certain) particular average losses.

244 By their agreement, the parties in effect created a community of risk between themselves: ‘havaria particularis per conventionem transit in communem’. The loss of goods by reason of capture by the enemy or pirates was often borne in common by way of a general-average agreement. See further as to conventional average or agermanament, eg Faber ‘Studien I’ 83; Goldschmidt ‘Lex Rhodia’; Goudsmit Zeerecht 42n1; Landwehr ‘Haverel’ 629-635; and Van der Merwe Versekeringsbegrip 127-128.

245 As to consortship (admiraealschap), see again § 4.5.2 supra.

246 In French law general average (avarie grosses) was also referred to as common average (avarie communes). In the draft Dutch Code of Commerce of 1809 common average was scrapped as a separate legal concept and the terms general average and common average came to be used without any distinction there and in the subsequent Wetboek van Koophandel (see eg art 698).

247 See s 83 of the Rotterdam keur of 1721.
From these and other requirements laid down in Roman-Dutch sources, it seems that, in the first place, the loss or damage had to be caused or the expenditure incurred deliberately to save the common adventure, which implies that there must have been some imminent and actual danger threatening all the interests involved and that the action taken had to be necessary. Proof of such danger and necessity caused particular problems in medieval times and resulted in particular procedures being laid down which the master of a ship had to follow. If he did not follow the prescribed procedures, or if the interest upon whom it was sought to impose a liability for a contribution could nevertheless prove that no danger or necessity had in fact existed, the master was held liable for the loss or damage caused. The procedure laid down was designed to establish and facilitate proof of the necessity of the master’s actions and compliance with it shifted the burden of proof as regards these particular requirements for general average from the shoulders of the master. Despite their continued presence in legislation, these prescriptions were rather cumbersome and they were later relaxed and not strictly observed in practice. Unlike bottomry, the emergency required to justify a general average loss or expenditure could have arisen anywhere, that is, either at home or abroad.

Secondly, the loss or expenditure had to result in the preservation of the particular adventure from the particular danger. Thus, if goods were thrown overboard to save

248 See eg the opinion in Nederlandsche advysboek vol I adv 286 (1654) requiring two conjunct requirements for general average, viz (i) that the loss or damage must have been caused to save the ship, cargo or life; and (ii) that it must have been caused voluntarily, that is, there must have been no choice in the matter, and must not have been necessitated by the negligence of the master, and that there must not have existed any duty to have done so (the action had to have been performed voluntarily and with the intention to save the venture in question); Schorer Aanteekeningen 453 (ad III.29.16) requiring (i) imminent danger or emergency; (ii) the consent of the majority of the crew; and (iii) the intention of preserving the ship and goods); and Decker Aanteekeningen (ad IV.31.2) n3, requiring (i) the necessary loss or damage of one interest; and (ii) the resulting conservation of another interest or interests.

249 The procedures to be followed by a master before causing loss or damage or incurring expense for the preservation of the interests involved (and which, if followed, prima facie established the necessity of his actions, ie, the presence of danger) involved either the consent of the owners of the interests concerned or consultation with his crew (see eg s 4 of title IV of the placcaar of 1563 and ss 96 and 144 of the Rotterdam keur of 1721). Thus, a master could act only with regards to cargo if he consulted with and obtained the consent of the cargo owner concerned or his representative on board (the so-called supercargo) for his proposed course of action. If no such consent could be or was obtained, the master had to consult with and obtain the consent of the majority of his crew (a so-called scheepsraad had to be called in which the master had the deciding vote), and upon their arrival in port the crew had to confirm under oath that there existed an emergency necessitating the taking of the measures in fact taken. The agreement of the crew was required also if the master’s course of action involved the ship herself.

250 In Amsterdam, eg, at the time when merchants or their representatives as a rule no longer accompanied their cargoes, it was only necessary to produce three witnesses who, with the master, had to make notarial declarations under oath at the first port of arrival of the circumstances giving rise to the loss or expenditure in question. Some of these deeds in fact state that the steps taken by the master were taken ‘met algemeen consent’. In English law too such rules largely disappeared by the end of the seventeenth century.

251 See the opinion in 1641 in Hollandsche consultatien vol II cons 65. As to the emergency required to justify a master’s conclusion of a bottomry loan, see § 4.3.2.2 supra.
the ship from danger but that proved unsuccessful so that the ship and her cargo were still lost as a result of that danger, there was no obligation upon the owners of the ship and of such other goods to contribute to the loss of the jettisoned goods, even if a part of the ship and some of such goods were subsequently salvaged; each interest had to bear its own loss.\textsuperscript{252}

The number of different types of losses or expenditures recognised as giving rise in appropriate circumstances to a duty to contribute in general average, gradually grew in the course of time. Initially, in Roman law, the jettison of cargo (\textit{zeeworp, lactus mercium}), the sacrifice of (parts of) a ship such as the cutting down of her mast (\textit{kerving}), and the payment of a ransom to pirates (\textit{redemptio a piratis}) were the only ones recognised\textsuperscript{253} and they remained the most important instances. But additions to the list of extraordinary losses and expenses recognised as giving rise to general average were made by custom in the Middle Ages and were subsequently confirmed in legislation. Some of the more important of these losses and expenditures may be mentioned briefly.\textsuperscript{254}

(i) The original and main example of a general average loss was the loss of cargo on board which had been cast into the sea for the sake of lightening the ship and avoiding a common danger such as a storm or an enemy attack. Also included was the loss or damage caused to other cargo by and on the occasion of such a jettisoning of goods.\textsuperscript{255} To ensure the reasonableness of masters' actions in jettisoning goods, detailed if not always very practical rules prescribed the sequence in which goods had

\textsuperscript{252} See Bynkershoek \textit{Quaestiones juris privati} IV.24. If the ship and her cargo were safe as a result of the jettison, but were subsequently lost by another or even by the same danger peril, a liability to contribute to the loss of the jettisoned goods did arise if any part of the ship or cargo was subsequently saved. A distinction thus existed between a successful and an unsuccessful sacrifice or expenditure.

\textsuperscript{253} In Rhodian law only the first type was recognised, hence the Rhodian law of jettison and not of general average. Even in medieval customary maritime law no general principles of general average were in fact recognised but merely specific instances of loss to which a contribution would be justified. The first general statement of principle is encountered only in s 41 of the \textit{placcaat} of 1551 (see again § 4.6.2 n232 supra). The \textit{placcaat} of 1563 again merely referred to the then recognised instances and this by and large remained the position. Even the Dutch \textit{Wetboek van Koophandel} in art 699 first lists the examples of recognised general average losses and expenditures and only then states the general principle involved.

\textsuperscript{254} The list is not complete, there not being in any case a \textit{numerus clausus} of losses and expenditures which may qualify. For the most extensive list in Roman-Dutch law, see ss 84-90, 92-94, 97-98 and 100 (examples of what could qualify in general average) and ss 90-91, 95-96, 99, 101 and 106-109 (examples of what did not qualify in general average) of the Rotterdam \textit{keur} of 1721. Magens \textit{Essay} vol I at 64-69 listed a total of 38 items which could qualify for a general average contribution, vividly depicting the occurrences both usual and weird which could befall ships and shipping at the time. Some of the interesting ones are the charges of lawyers, attorneys and proctors for reclaiming the ship and cargo; tavern expenses at meetings concerning the release of the ship and cargo; the premium of insurance and commission on monies disbursed; and the charges, in Roman-Catholic countries, of carrying the ship’s Holy Virgin home and of offering thanks.

\textsuperscript{255} See ss 84-85 of the Rotterdam \textit{keur} of 1721.
to be thrown overboard.\textsuperscript{256} In the case of jettison, the owner of the goods in question did not by that act lose his ownership in those goods.\textsuperscript{257}

(ii) The deliberate damaging or sacrifice of a ship (such as running her aground or stranding her) or of part of a ship (such as the cutting down and jettisoning of her mast, anchor, ropes, sails, tackle, rigging, boats, or the cutting of holes in her to speed up the loss of water) in order to preserve the ship and her cargo in distress was an equally well recognised general average loss.\textsuperscript{258}

(iii) The amount of ransom paid or goods given up to the enemy or to pirates for the release of the ship or her cargo was a general average expenditure or loss.\textsuperscript{259}

(iv) Loss, damage or expenses arising from the personal injury (wounding) or death of the master or a member of the crew (a sailor or soldier) in defence of the ship (such as during an enemy attack) were also borne in general average.\textsuperscript{260}

(v) Certain exceptional expenses also qualified as general average. The cost of hiring lighters to save a ship and her cargo in danger of loss (for example, to lighten and free

\textsuperscript{256} Thus, in terms of s 5 of title IV of the \textit{placcaat} of 1563 (and see too s 146 of the Rotterdam \textit{keur} of 1721), the master first had to jettison the heaviest and least valuable goods as they appeared to him externally, and he was thus not responsible if undisclosed valuables were contained in a chest.

\textsuperscript{257} Therefore, jettisoned goods did not ordinarily simply become unowned property (\textit{res nullius}) by reason of their having been jettisoned but were merely lost property (\textit{res deperditae}). See further on this ch XIX § 2.1.1 infra.

\textsuperscript{258} See eg ss 86-90 of the Rotterdam \textit{keur} of 1721 and the opinion of 1707 in Barels \textit{Advysen} vol I adv 69 (damage suffered by the stranding of a ship, done for her preservation and that of her cargo, comes under general average).

\textsuperscript{259} See s 100 of the Rotterdam \textit{keur} of 1721. See too the provisions in this regard in s 16 of the Amsterdam \textit{keur} of 1744 and Goudsmit \textit{Zeerecht} 340-341. The loss of the ship or her cargo by reason of enemy or pirate capture was, of course, not a general average loss but a particular average loss; it was an accidental loss and not one deliberately caused for the common benefit of all the interests involved.

\textsuperscript{260} Included were matters such as medical expenses, wages, passage money and burial costs. This item was first recognised in Roman-Dutch law in s 28 of the \textit{placcaat} of 1551 and was, strictly speaking, an extension of the \textit{general-average} doctrine beyond its underlying postulate, namely that it concerned voluntarily (that is, deliberately) incurred losses for the common benefit. By s 2 of title IV of the \textit{placcaat} of 1563 (and see too ss 97-99 of the Rotterdam \textit{keur} of 1721), the consequences of injury or death not only in defence of the ship but also simply in the service of the ship (\textit{"{o}fte anderen dienst van de scheepen'}) were borne in general average. See eg the opinion in the \textit{Nederlandsch advysboek} vol III adv 233 (1658) to the effect that this included ordinary service other than in defence of the ship. (In this case a sailor injured his arm and leg \textit{"{d}oor een val in het afsakken van den takel, door expresse last van sijn Meester"}, as a result of which he could no longer work.) Van Leeuwen \textit{Censura forensis} I.4.29.3 noted that whilst a free man (unlike a slave) was not an interest which could be held liable to contribute in general average since a valuation could not be made of his life or body, nevertheless if, in assisting the ship, a person has been injured, wounded, mutilated or killed, a liability in general average did arise in respect of concomitant losses and expenses. Thus, a person could in appropriate circumstances be an interest in respect of which a contribution had to be made even if he could not himself be an interest upon which such a contribution could be levied.
her when stranded) was a general average expenditure.\textsuperscript{261} The same applied to pilotage,\textsuperscript{262} and certain other expenses such as the cost of quarantine\textsuperscript{263} and the cost of maintaining the crew in a port of refuge.\textsuperscript{264}

But equally, if such losses were caused or expenses incurred in other circumstances they did not qualify as general average and were then not shared but borne by interest on whom they fell or by whom they were incurred, with only the possibility of a recourse against a responsible party in appropriate cases. These circumstances included the following:

(i) Where the loss or damage in question was not deliberately (that is, voluntarily) caused but was rather the result of the negligence of one of the interested parties or was an accidental loss.\textsuperscript{265}

\textsuperscript{261} See ss 92 and 93 of the Rotterdam \textit{keur} of 1721. If the ship, after being lightened, did not float but remained stuck, the lighterage was a particular average expense to be borne by the ship alone (see s 10 of title IV of the \textit{placcaat} of 1563). Lighterage incurred not to save the ship from danger (but eg merely to refloat an overloaded ship from a sand bank when there was no danger) was not a general but a common average expense. The loss of or damage to goods transshipped (eg transferred to lighters) to lighten a ship in an emergency was a general average, but not the damage caused to lighters in the process (see ss 94 and 95 of the Rotterdam \textit{keur} of 1721).

\textsuperscript{262} Initially a distinction was drawn based on the amount of the pilotage: the cost of employing a pilot was regarded as a common average expenditure, except if it amounted to more than Flemish £6 (\textsterling 36), in which case it was a general average expense (see s 9 of title IV of the \textit{placcaat} of 1563), the underlying idea being that if it exceed that amount, it was no longer an ordinary expenditure but rather an exceptional expenditure. This distinction was later no longer recognised so that, irrespective of the amount involved, pilotage was always a general average outlay (see s 139 of the Rotterdam \textit{keur} of 1721).

\textsuperscript{263} See eg the \textit{'Publicatie van de Staaten van Holland'} of 16 March 1765 (see \textit{GPB} vol IX at 1234) declaring that the cost of the compulsory quarantines of ships it imposed \textit{'by wyse van averye grosse over de Scheepen en ingelaade Goederen zullen worden omgeslaagen en gerepartieerf'}.

\textsuperscript{264} In Roman-Dutch law these expenses were always brought in general average, irrespective of the reason for the ship’s detention in that port: see Lugt 128 and Bynkershoek \textit{Quaestiones juris privati} IV.25. In this regard a fundamental difference existed between civil law and English law. The latter followed a narrower approach and required extraordinary measures to have been taken not merely for the common benefit of the interests involved but rather for their preservation or physical safety. Thus, expenses incurred once a vessel had reached a port of refuge in safety (eg the wages of the crew during the time when the ship was being repaired), were not considered a general average expenditure according to English law. See further Chalmers 108-109; Dorhout Mees \textit{Schadeverzekeringsrecht} 670-671; and ILL \textit{HR3} 46.

\textsuperscript{265} Thus, in terms of s 8 of title IV of the \textit{placcaat} of 1563, a loss caused by the negligence of the master had to be borne by him, the shipowners or the ship \textit{‘ende niet gebrocht worden in enige averye; Gelijk oock in geen averye gerekent sal zijn ’t geene dat by Tempeeste ofte ongelucke, gebrooken, gestrandt, verdorven, ofte verloren sal worden’}. For example, if a master deliberately ran his ship aground in a storm to prevent her capsizing, the resultant loss was a general average loss. But where she was stranded by his negligent navigation or because of the storm itself, the resulting damage was a particular average loss. See further the opinions (and the facts of the cases) in the \textit{Nederlandsche advysboek} vol I adv 286 and vol III adv 155, and in the \textit{Hollandsche consultatien} vol II cons 153. In an opinion in 1790, Amsterdam merchants, insurers, and brokers were of the view that the rotting or the bursting at the seams of a wooden ship while waiting for a long period for a cargo, did not come in general average and did not have to be contributed to by the cargo owners, but was solely for account of the owners of the ship; it was a loss through inherent vice and thus accidental (see \textit{Casus positien} vol I cas 19).
(ii) Where, although the loss or damage was deliberately caused in danger, that danger was in turn the result of the fault of one of the interested parties.\textsuperscript{266}

(iii) Where there was in fact no real but merely an apprehension or fear of danger and possible loss or damage.\textsuperscript{267}

\textsuperscript{266} Thus, to mention a few examples solely concerned with the jettisoning of cargo, the loss of goods by jettison in certain circumstances was not a general average loss but had to be borne by the cargo owner himself (who may, though, have had a right to recover compensation from the party at fault). This was the case, eg, where the jettisoning was necessitated by the overloading of the ship by her owner or master (see s 8 title IV of the placcat of 1563 and s 109 of the Rotterdam keur of 1721). It was the case also where the jettisoning was because of the goods being improperly stowed by the master or crew. So, in terms of s 8 of title IV of the placcat of 1563 (and see too s 91 of the Rotterdam keur of 1721), the jettisoning of deck cargo was in principle not taken in general average (but see the exception created in this regard by s 3 of the Amsterdam keur of 14 June 1607 in respect of deck cargo on the Levantine trade). Deck cargo often included live animals which were thus the first goods to be jettisoned:

\begin{quote}
When the still sea conspires an armor

True sailing is dead.

Awkward instant

And the first animal is jettisoned,

Legs furiously pumping ...
\end{quote}


\textsuperscript{267} This was illustrated nicely by a trio of decisions of the \textit{Hooge Raad} and reported by Bynkershoek on the recoverability as general average of the expenses incurred by the master of a ship in waiting in port for a convoy. They will be considered in some detail because insurance featured in the \textit{Raad}’s reasoning in two of them.

In the first of these decisions in 1713 (see Bynkershoek \textit{Observationes tumultuariae} obs 941; \textit{idem Quaestiones juris privatii} IV.25) the question was ‘of de schade van de legdagen, wanneer men op Convoy tot bescherming wachtte, onder de Avarie-grosse gerekent kon worden?’. On a voyage from Amsterdam to Venice, the master sailed first to London where he waited a year for a convoy. He then waited almost as long in Cadiz for another convoy. The expenses incurred during these periods were claimed to be general average expenses incurred in the preservation of ship and goods. The shipowners argued, namely, that the master had acted reasonably in the protection of ship and goods by waiting for the security of a convoy in time of war, and that it was only fair that the owners of the cargo on board should bear some part of the expenses caused by the delay in the voyage by reason of there being no convoy immediately available. The majority of the \textit{Raad} held the shipowner entitled to a general average contribution from the cargo owners. Bynkershoek was rather critical of the majority’s decision and gave prominence to the view of the minority which denied the claim because the expenses incurred while waiting for a convoy were not regarded as necessary. There was in fact no evidence of any imminent danger from an enemy attack, and although it was no doubt prudent and safer to wait for a convoy (as it was to wait for the summer season, for example), there was no necessity nor any compulsion to sail with a convoy as the ship was properly equipped and fully armed with 40 cannon and had advertised that she would sail without a convoy. In fact, the master was bound by that advertisement since the merchants had loaded their goods on his ship on that condition and they may have insured their goods on that basis. According to the minority, it seemed that the cargo owners may in fact have had a claim against the master for the delay in the carriage of their goods.

In the second decision in 1721 (see Bynkershoek \textit{Observationes tumultuariae} obs 1720), the \textit{Hooge Raad} held consignors liable to contribute to the expenses incurred during the time spent waiting for a convoy. In this case there was a present and immediate danger of enemy attack and additionally the owners of the cargo on board had in fact prohibited the master from sailing without a convoy (and had probably used that fact to obtain insurance at a lower premium).

In the third decision, delivered in 1722 (see Bynkershoek \textit{Observationes tumultuariae} obs 1858), a similar question arose. Here the ship waited for a convoy because of rumours of enemy activity en route to Amsterdam. During her six-month wait in Plymouth, expenses were incurred in the form of wages and provisions for the crew and in respect of which a contribution was then claimed by way of general average from the owners of the cargo on board. The majority of the \textit{Raad} held that there was no
4.6.5 The Adjustment of General Average

The adjustment of general average was the process by which the extent of loss or expenditure occurring on a particular voyage was determined, by which it was established whether and to what extent it was a general average loss or expenditure, by which the value of the contributing interests was determined, and by which, finally, the general average loss and expenditure were divided on the basis of those values between those interests by the levying of a general average contribution on each of them. Legislation in the Netherlands contained detailed provisions concerning this process and on how the general average statement (dispache) had to be made up.\textsuperscript{268}

Initially general average in the Netherlands was adjusted by an impartial commission of expert merchants appointed for every case, later by the local Schepenen courts, and after 1571 by the Office of the Registrar of Insurance established in Antwerp.\textsuperscript{269}

Soon after the establishment of the Insurance Chamber in Amsterdam in 1598, its jurisdiction was extended to include also all questions of average, thus conferring on that Chamber the status of a court of first instance in matters concerning (general) average in that city.\textsuperscript{270} The same applied in Rotterdam, where a Chamber of Insurance and

\textsuperscript{268} See eg the measures in § 6 of title IV of the placcaat of 1563 for the adjustment, the 'berekening en omslag der schade en het opmaken der dispache'. The word dispache comes from the Spanish and Portuguese 'despachar' (to dispatch, wind up, completa, divide) and a dispache, drawn up by a dispacheur, was the formal adjustment (or division) of a general average loss.

\textsuperscript{269} See ss 8 and 10 of the placcaat of 1571. The first Registrar was one Diego Gonzales Gante and he had deputies in Brugge, Amsterdam and Middelburg. According to his 'Memorie ende Instructie', dated 11 October 1571 (1570 os) and appended to the placcaat of 1571, his duties included 'die verificatie vande Avaryeri'. On the Office of Registrar and the registration of insurance policies, see further ch IV § 1.3.2 and ch VIII § 3.3 infra.

\textsuperscript{270} See the Amsterdam amending keur of 4 December 1598 and also § 4 of its keur of 14 July 1607. The Insurance Chamber continued to adjust and determine general averages until the end of the eighteenth century; see eg § 46 of the Amsterdam keur of 1744 and the detailed discussion of Schöffer 'Averyj grosse' on the adjustment of general average in Amsterdam. The Amsterdamsche Secretary 379-382 contained a reproduction of a dispache of the Amsterdam Chamber (and see also 386-387 for the form of citation to appear before the Chamber for such an adjustment), and it is reproduced in Appendix 8 infra. See further Nanninga 534-538 for a reproduction of an Amsterdam general average adjustment of 1764. On the Amsterdam Chamber of Insurance, see further ch IV § 1.4 infra.
Average was established in 1604.\textsuperscript{271}

A master had to approach a notary in the first port his ship reached after a loss or expenditure had been suffered or incurred and he and the required witnesses had to make the necessary statements (\textit{scheepsverklaringen}) on the circumstances under which that loss was suffered or those expenses incurred.\textsuperscript{272} The master was under a duty to refer losses to be adjusted in general average, even when only a single cargo owner requested it. The notarial statements, together with all the relevant documentation (such as invoices from which the value of goods could be established and specified accounts of the extent of loss and damage and the amount of expenditures) had to be forwarded to relevant body adjusting the general average. Generally, no doubt for reasons of convenience, general average was adjusted at the ship's destination (where the interests involved separated). Thus, the Amsterdam Chamber adjusted virtually all general average losses suffered by incoming ships and cargoes. The losses suffered on outward bound consignments were as rule adjusted at the port of destination. But it was not exceptional for general average to be adjusted in Amsterdam on cargoes destined and discharged elsewhere, such cases being referred to the Amsterdam Chamber especially in the event of losses occurring on the outward leg of a round voyage terminating again in Amsterdam, where the ship had to return to Amsterdam without completing her voyage to the destination or when the voyage was terminated at an intermediary port short of that destination, or where it was the (local) consignors and not the (foreign) consignees who were liable for a contribution to a loss suffered or expenditure incurred by a local ship.\textsuperscript{273} It would appear that the place of a general average adjustment was not prescribed in Roman-Dutch law, it being left to be determined by agreement between the interested parties. Furthermore, a general average regulated elsewhere (often with the local Dutch consul acting as a neutral facilitator) had legal effect and could be enforced in Amsterdam.

The master of a ship which had incurred average not only had a right of retention (\textit{ius retentions}) on cargo against consignors whose goods had been saved until they had paid a general average contribution, but also a right of hypothec (\textit{ius hypotheca}) on such cargo which gave him an action \textit{in rem}.\textsuperscript{274} A similar real right existed for the owner of jettisoned goods or goods lost or damaged in general average.

\textsuperscript{271} See s 23 of the Rotterdam \textit{keur} of 1604 and s 24 of the Rotterdam \textit{keur} of 1721 (by which time it had become the Chamber of Maritime Law). See Schadee Appendix Xa for a reproduction of a general average adjustment of the Rotterdam Chamber in 1758.

\textsuperscript{272} See eg the detailed provisions in this regard in the amendment of s 54 of the Amsterdam \textit{keur} of 1744 by the \textit{keur} of 30 January 1756. The procedure before and proofs required by the Amsterdam Chamber are set out in detail in ss 53 and 54 of the \textit{keur} of 1744, in the \textit{keur} of 1756, and also in the Amsterdam \textit{keur} of 31 January 1775. See also Witkop 5-7 for a reproduction of two Rotterdam notarial \textit{scheepsverklaringen} of 19 and 26 June 1592 concerning the jettison of goods to save a leaking ship, and Nanninga 529-530 for a \textit{scheepsverklaring} of 1764, in the form of a notarial deed, by the master and officers of a ship setting out how the loss had occurred.

\textsuperscript{273} See eg Nanninga 517n4.

\textsuperscript{274} See eg Weytsen \textit{Avaryen} par 57; the opinion in Barels \textit{Advysen} vol I adv 45; Verwer \textit{See-rechten} 115; and Van der Keessel \textit{Theses selectae} th 793 (ad III.29.16). \textit{Contra} Voet \textit{Commentarius} XIV.2.10.
over the other (saved) goods on board the ship, and over the ship herself, for whatever was due by way of a general average contribution. A contribution, it seems, could under Roman-Dutch law be recovered also by way of a direct personal action against the owner of the interest concerned. But, by abandoning and relinquishing the goods (or even the ship) saved, the owner concerned could relieve himself of any further liability to contribute in general average.

Little needs to be said about the actual process of adjustment itself. Put simply, the adjustor first had to determine the value of all the respective contributing interests; then he had to determine the extent of the loss or damage suffered or expenses incurred, and he had to establish which of those qualified under general average; and finally he had to divide the general average loss or expenditure between those interests on the basis of their respective values. In practice, of course, things were infinitely more complicated than this. Apart from the intricate arithmetical calculations

---

275 See eg s 118 of the Rotterdam keur of 1721.

276 See eg Van Bynkershoek Quaestiones juris privati IV.24 and Van der Keessel Theses selectae th 793 (ad III.29.16). Initially, in terms of the Rhodian law, the action for a contribution had to be channeled through the master; the owner whose goods had been lost sued the master on the contract of carriage for the value of his goods less his own share of the loss, and the master in turn sued the owners of the other goods on board for their proportional contribution to the loss. During the Middle Ages claimants obtained a direct action (bypassing the master or carrier) against those whose property had been saved for a contribution to their losses.

277 See s 119 of the Rotterdam keur of 1721. An owner would abandon his goods if their value was less than the amount of the general average contribution he had to pay in respect of them. As to abandonment and the limitation of shipowner liability, see further ch XIX § 2.1.3 infra.

278 See eg s 6 of title IV of the placcaat of 1563 and ss 114-116 of the Rotterdam keur of 1721. See too eg Grotius Inleidinge III.29.12; Van Zurck Codex Batavus sv 'avaryeri' par 6; Magens Essay vol I at 69-72; and De Groote Zeeassurantie 148-151.

279 Nanninga reproduces numerous documents pertaining to a general average loss which occurred on the voyage from Smyrna to Amsterdam of the ship 'De Vrouwe Catharina' in 1764 and which was adjusted in that city in 1765. These documents include (at 531-533) a 'rekening van eysch wegens extra kosten en schaden, gevallen op 't schip ... en op deszelfs lading' (also referred to as a 'rekening van schade'). It was drawn up by the accountant of the shipowners and submitted by them to the Chamber, and listed the expenses incurred and losses suffered with an indication of the amounts involved (in total fl 327.3). This account also contained a list of the consignors with the quantity, quality and value of their goods on board according to the invoice prices, together with the value of the ship.

Further there is reproduced (at 534-538) the 'vonnis in zake de avary grosse, gevallen op de schip' which contained: (i) a summary of the relevant facts taken from the sceepsverklaring (see n272 supra); (ii) a reference to the 'rekening' and the total amount of the loss involved, as adjusted by the Chamber (downwards to fl 268.6); (iii) a list of the goods loaded on the ship with an indication of their (and ship's) respective values, again with some adjustments (both up and down) by the Chamber (the total values involved were found to be f247 975 (f23 600 for the ship and f224 375 for the cargo); (iv) a 'rekening van extra kosten' examined and approved by the Chamber (including the cost of valuating the respective interests, the Chamber's fee and expenses, and stamp duties); these amounted to f467.10 and, when added to the adjusted loss of fl 268.6, produced a total general average loss of fl 735.16; (v) the following declaration: 'De voorschreeve fl 735.16 verdeelt over fl 247 975 bevinden Commissarissen dat yder Hondert daarinne komt te draegen f14. Dienvolgende condemneeren Commissarissen, dat voorschreeve kosten door navolgende inlaeders ende den schipper voldaan ende betaal zullen worden als volgt', and then there followed a list of the interests involved with the amount each was to pay the...
involved, some nice legal issues to complicate matters further. Two examples will suffice.

Firstly it had to be determined which interests involved were liable to contribute to the general average loss or expenditure. Not all interests, the loss or sacrifice of which could amount to a general average loss, were in turn liable to contribute to the loss in general average of another interest. In principle all those who benefited from that loss or expenditure incurred liability in this regard. This included the cargo on board the ship and also the ship herself and/or the freight earned on the voyage. Further-

shipowners.

See further Magens Essay vol I at 146-362 for numerous case studies illustrating the regulation and adjustment of general average in various cities and countries (London, Hamburg, France, Leghorn) during the second quarter of the eighteenth century, including (at 308-322) a case study showing how a general average was adjusted in 1748 by the Amsterdam Chamber of Insurance and Average.

After perusing the cases discussed by Magens (see the previous note) and being confounded by the numerous calculations showing how the adjustment of general average and particular average losses was arrived at, innumerates can only agree with the following wry remark of Magens Essay vol I at 428): 'And we are thoroughly persuaded that the Lawyers of most Eminence will allow, that such Matters as are contained in the foregoing Cases, may be much better decided by experienced Merchants, and good Accomptants, than by Persons who have studied the Law only.'

Including the cargo of the shipowners themselves or that of the master or crew; money in chests (something at one stage uncertain but settled by s 7 of title IV of the placcaat of 1563); and valuables such as gold, silver and jewels. In terms of s 5 of title IV of the placcaat of 1563, valuables in chests or packages had to be declared to the master either before departure or at least before jettison, otherwise, for purposes of general average as well as insurance, such goods were taken at face value ('andersins en sal in 't maeken van avaryen, ofte inde asseurantie te laste vanden Assureerders, daer geen reguard op genomen worden, anders dan voor sulcke Kisten oft Packen, als van buyten schijnen te weseren'). Of course, declaring that value also meant that a higher contributory value was placed on such goods (see infra).

This was a moot point in Roman-Dutch law. In terms of the medieval customary maritime law, the ship or the freight she earned on the particular voyage contributed in general average, it being left to the owners of cargo on board to accept the value of the ship as supplied by the master. In terms of s 6 of title IV of the placcaat of 1563, either the ship or the freight shared in general average. The owners of cargo on board had the choice whether the ship was to contribute to the extent of her full value, or whether the whole of the stipulated freight due to the master was to contribute (see eg Grotius Inleidinge III.29.12; and the opinion in the Nederlandsche advysboek vol III adv 252 (1674)). Weytsen Avaryen par 44 thought that the whole value of the ship as well as the whole freight on all goods ought to contribute, to the extent, of course, that those interests were in fact saved. But the position in practice remained different and either the ship or the freight contributed in general average. Possibly the reason why freight did not fully contribute in addition to the (value of the) ship earning it, was because freight was regarded as the civil fruits of the ship and as the equivalent of the expenses incurred on and wear and tear caused by the voyage (see on this point Magens Essay vol I at 57-59). In terms of s 114 of the Rotterdam keur of 1721, either the value of the ship or the value of the total freight contributed, whichever was the higher ('dat van beyde het meest zal bedragen'). Although there was no longer a choice, this provision was in practice little different from that in the placcaat of 1563; the cargo owners would in any case have chosen the higher value. The section made it clear too that freight included that on the saved cargo as well as that on the jettisoned or damaged cargo ('zullende dezen aangaende de Vragt werden gerekent niet alleen van de behoudene Goederen, maer ook het geen geworpen, of andersinz verloren zal zijn'). In Amsterdam, the Chamber usually took the value of the ship as the basis of the shipowners' contribution, and only when the value of the freight she earned on her voyage exceeded her value (which was not impossible, especially with older vessels) was the latter chosen as basis for the shipowners' contribution. See generally as to general average on freight, Lugt 116-123.
more, the cargo lost or damaged also contributed in general average to its own loss.\textsuperscript{283} By contrast, there were a number of other interests which, although entitled to general average contributions in the event of their own loss or damage, were never liable to contribute to the loss or damage of other interests.\textsuperscript{284}

Secondly, and equally complex, was the valuation of the interests for purposes of determining the extent of their respective contributions, a central aspect of the adjustment of general average. The principles which applied here were no doubt of interest also to insurers and insured who were just as much (and often at the same time) concerned with such values.\textsuperscript{285} Whereas the real value of the ship at the time of adjustment and the amount of net freight was generally accepted as the basis of the contributory value of those interests, particular problems arose with the contributory value of goods. Different approaches were followed at different times in Roman-Dutch law. In terms of s 6 of title IV of the \textit{placcaat} of 1563 lost and saved goods were valued together in the adjustment of general average according to the net price for which they could have been or were sold at their destination. But it appears that this rule was not followed in practice. There a rougher but more advantageous method, and one supported by earlier customary maritime law, continued to be applied. A distinction was drawn between cases where the loss was incurred in the first half of the voyage and

\textsuperscript{283} In medieval law, jettisoned goods did not necessarily contribute to their own loss. This happened only in the case of a loss by jettison occurring in the second half of their voyage. If the jettisoning occurred in the first half of the voyage, the jettisoned goods did not contribute but were compensated fully. But the practice changed, and both in terms of s 6 of title IV of the \textit{placcaat} of 1563 and in terms of s 116 of the Rotterdam \textit{keur} of 1721, general average was adjusted over all the goods on board the vessel prior to the incident, both the goods saved as those lost (see eg Van der Keessel \textit{Praelectiones} 1530-1531 (ad III.29.12)). In reality, of course, the interest suffering a general average loss was merely entitled to contributions from the other interests involved to the loss it had suffered and did not actually contribute to its own loss. Its own contribution was negative in that a general average loss was adjusted not only over the value of the saved interests but also over the (sound) value of the interests lost or damaged, thus reducing the contributions of the saved interests to the loss or damage of the lost or damaged interest. Because the interest which was lost or damaged or which incurred an expense in general average too contributed to that loss, damage or expense, general average contributions never provided a full compensation for a general average loss.

\textsuperscript{284} Examples of such interests include the personal effects (eg the clothing and personal money, except the valuables) of the passengers and crew on board the ship (see s 7 of title IV of the \textit{placcaat} of 1563); passengers, crew and the master personally; provisions on board; seaman’s wages (customarily so, to encourage seamen to consent more readily to a general average sacrifice or expenditure and not to expose themselves too much, thereby risking the whole adventure in an attempt not to incur liability for a general average contribution); and the loan on bottomry on the ship or goods (bottomry bearing no (general) average: see again § 4.3.3 \textit{supra}). As to the latter exclusion, Goudsmit \textit{Zeerecht} 343-345 explains that bottomry loans and their premiums were excused from contributing in general average by custom and for reasons of convenience. Although the bottomry lender indeed received a benefit by the sacrifice and expense which saved the secured property from loss, it was expedient not to expose him to a general average claim as that would have made bottomry lenders less willing to grant such loans and would also have increased the interest demanded for them.

\textsuperscript{285} See further ch XVII § 3 \textit{infra} as to the determination of the value of particular maritime property for insurance purposes, and ch XVII § 4 \textit{infra} for how that value was proved.
those where the loss was suffered in the second half of the voyage. In the first case lost as well as saved goods were valued according to their cost price (plus expenses until the cargo was placed on board, such as the insurance premium) and in the second place they were valued according to their selling price (less freight and expenses) at the destination.\(^{286}\) The distinction customarily drawn in practice was confirmed by s 117 of the Rotterdam \textit{keur} of 1721. It determined that goods were to be valued according to their cost price without the deduction of any expenses if the general average loss occurred in the first half of the voyage, and if the loss occurred in the second half according to their value (or selling price) at their destination but with the deduction of expenses which had to be paid there or which would have had to be paid there had it not been for the loss.\(^{287}\) Although also followed in other legal systems, this compromising rule had its shortcomings and the approach in Amsterdam, where no rules were laid down for the settlement of general average but where the adjustors were free to do so as they saw fit in the circumstances of each case, may well have had its merits.\(^{288}\)

\textbf{4.6.6 The Basis of General Average}

Numerous possible explanations have in the course of many centuries been suggested for the maritime principle of general average, also in Roman-Dutch law. But even those authors who made suggestions in this regard, readily admitted that there existed a large amount of disagreement and uncertainty as to the foundation and

\(^{286}\) See eg Weytsen \textit{Avaryen} art 22; Van Glins \textit{Aenmerckingen} ad s 6 title IV of the \textit{placcaat} of 1563; the opinions in the \textit{Nederlandsche advysboek} vol I adv 243 & adv 244, and vol III adv 251; the opinion in Barels \textit{Advysen} vol I adv 34; Van der Keessel \textit{Theses selectae} th 787 (ad III.29.12); and Goudsmit \textit{Zeerrecht} 239. Grotius \textit{Inleidinge} III.29.12 and a few others (eg Groenewegen \textit{Aanteekeningen} n14-16 (ad III.29.12); Voet \textit{Commentarius} XIV.2.16 and \textit{Observationes} ad III.29.12 (n15-16); and Van Zurck \textit{Codex Batavus} sv 'avaryen' par 6) continued to support the approach of the \textit{placcaat} of 1563.

\(^{287}\) Van der Keessel \textit{Theses selectae} th 787 (ad III.29.12) noted that Bynkershoek \textit{Quaestiones juris privati} IV.21 (and see too Van Leeuwen \textit{Rooms-Hollands regt} IV.31.4) was wrong in thinking that this distinction applied only to the lost and not also to the saved goods and that the latter were to be valued in all cases according to their selling price at their destination.

\(^{288}\) See s 42 of the Amsterdam \textit{keur} of 1744. Other possibilities, such as taking either the value of the goods at the port of departure, or their value at the destination as the only basis in all cases, had their problems too. Thus, determining the market value (selling price) at the destination was difficult and even unrealistic if there was in fact no market at that destination and if the owner, rather than selling at a loss on that market, would have forwarded his goods to another and more favourable destination, or if the general average contribution was adjusted at an intermediary port in the case where the voyage had been abandoned (see generally Magens \textit{Essay} vol I at 59-61 as to the contributory value of goods). English law, which at first reckoned the value of goods at their cost price if the loss occurred before the middle of the voyage, and at their market price at the destination otherwise, by the eighteenth century adopted the value of the goods at the destination as the measure in cases where the ship in fact reached that destination, the logic being that the owner whose loss had ensured the arrival of the ship and other goods there should be placed in the same position as the owners of the saved (and arrived) property. In cases where the ship was compelled to return to her port of departure, the cost price of the goods was the starting point (see Holdsworth \textit{History} vol VIII at 263-264).
nature of the right of action arising from a general average loss and for a general average contribution.\textsuperscript{289}

One possible line of explanation, vague and unhelpful as it was, was that the mutual obligations between the owners of interests engaged in a particular maritime adventure were created by the operation of law (\textit{ex lege}),\textsuperscript{290} or that it originated in natural law,\textsuperscript{291} or that it was based on equity.\textsuperscript{292}

A further possibility advanced on occasion was that general average was founded upon an implied agreement between the parties involved. While it is clear that general average could be founded upon an express agreement\textsuperscript{293} and that the liability for a general average contribution would then have been a contractual one, it is less certain whether and under what circumstances the relationship between the owners of the various interests could have been founded upon an implied agreement. The possibility was mooted that an implied agreement had to be read into either the contract for the carriage of goods by sea (\textit{locatio conductio operis})\textsuperscript{294} or into a contract of mandate.\textsuperscript{295} But in both cases, even if such an implied agreement could be established, that would at most explain the relationship between the consignors of cargo and the master (or shipowners) and not the action for a general average contribution between such consignors themselves.

\textsuperscript{289} See eg Schorer Aanteekeningen 455 (ad III.29.17) n26 and Bynkershoek \textit{Quaestiones juris privati} IV.25, both of whom indicated a few possibilities without expressing any preference. For a detailed analysis of the possible basis of general average, see generally Van Empel.

\textsuperscript{290} See Grotius \textit{Inleidinge} III.29.2. Section 150 of the Rotterdam \textit{keur} of 1721 spoke of the tacit average obligations (\textit{stilswygende verbintenisse tot Avarye}) between the interests involved.

\textsuperscript{291} See Grotius \textit{De jure belli} II.2.6.2 who referred to the original right of natural law to use another's property in case of extreme necessity, and who noted as an example of this that where on a sea voyage provisions run out, the stock of every individual could be made available for common consumption.

\textsuperscript{292} See the opinion in 1662 in the \textit{Nederlandsch advysboek} vol III adv 155, referring to 'de aequiteit ende billikheid, daar op het contribueren van Avarye is gefondeert'.

\textsuperscript{293} See again § 4.6.3 supra for agermanament.

\textsuperscript{294} Under Rhodian law (where there was no direct action for a general average contribution but simply a claim against the master who in turn had to claim the contribution from the other interested parties) the contract underlying the general average action was one of letting and hiring. Van Leeuwen \textit{Censura forensis} I.4.29.7, eg, still thought the action against the master for a contribution to be one \textit{ex locato} and that of the master against the owners of the other saved interests \textit{ex conducto}. Bynkershoek \textit{Quaestiones juris privati} IV.25 noted that in a case before the \textit{Hooge Raad} in 1713 (see Bynkershoek \textit{Observationes tumultuariae} obs 941) the minority thought that where the master claimed a general average contribution from one of the cargo owners, the claim was founded upon the contract of carriage between them.

\textsuperscript{295} Bynkershoek \textit{Quaestiones juris privati} IV.25 thought this a possibility if it could be established that there were (implied) consent and instructions from the respective owners that the master could in an emergency take particular steps to save the common venture.
Another explanation was that the action for a general average contribution was based on *negotiorum gestio*. But, as was pointed out, the master was under an obligation towards both the shipowners and the consignors to look after the ship and their goods respectively, and could therefore hardly have qualified as a *gestor* who voluntarily administered the affairs of the owners concerned. Furthermore, even if the master could qualify as a *gestor*, *negotiorum gestio* would explain only the action of the master against the other interests and not their actions against him or against one another.

The most popular explanation of general average in Roman-Dutch law was that the relationship between the interests involved in a maritime adventure was in the nature of a partnership. Some authors merely drew the analogy. Others specified that it was a particular type of partnership, namely a tacit, automatic, and *ex lege* one. Yet others were not convinced that it was in fact a partnership at all, arguing that there was a community not of profit but of (the risk of) loss. The answer to this was that a partnership could be concluded for the preservation of some goods by the sacrificing of others, and that the suffering of less damage was also a form of profit, so that the general average action could well have been an *actio pro socio*. The basis of

---

296 See Bynkershoek *Quaestiones juris privati* IV.25.

297 Thus, Grotius *Inleidinge* III.29.1 spoke of a ‘gemeenschap des uitkoms’; Van Leeuwen *Rooms-Hollands regt* IV.31.1 referred to the liability between consignors of goods on the same ship to make good general average losses as similar to that arising in case of a partnership (‘by gelykenis van Gemeenschap’); and Schorer *Aanteekeningen* 455 (ad III.29.17) n26 thought that the right of action accruing from a general average loss ‘steunt of op eene onderlinge gemeenschap’ (although he also thought it possible that it arose by implied consent or *ex lege*).

298 See eg Weytsen *Avaryen* par 51 mentioned an ‘onderlinge tacitam societatem, en heymelyck gemeenschap ende verbont’ between the interests involved in the maritime adventure. He made it clear in any event that the general average action between the interested parties *inter se* was a direct one, independent from any contract of carriage.

299 Thus, Decker *Aanteekeningen* ad IV.31.1 n(1), in explaining the basis of general average, thought that as soon as the master had contracted with the various consignors of goods on a particular voyage, ‘zoo subsisteert ’er dadelyk tusschen de respective bevragters, met welken de Schipper aizo finaal is geconvenieert, een Contract van maatschap, waar in zij als Socil door het sluiten der bevragting ipso facto zijn getreden, ten einde de onverhoopte schaade, welke een of meer van hun stante ilia Societate mogte overkomen, gemeenschappelyk pro rato te refarcieeren en te dragen’. This partnership automatically came to an end on the loss or arrival of the ship (see *idem ad* IV.31.3 n(4)).

300 See Van der Keessel *Praelectiones* 1517-1518 (ad III.29.pr) who spoke of a partnership *ex lege*, arising from the community of peril between persons who had body or goods on the same ship. Elsewhere (*Praelectiones* 1521 (ad III.29.8)) he described it as a tacit partnership introduced by law between the parties concerned.

301 See Bynkershoek *Quaestiones juris privati* IV.25, referring to Vinnius’s note on Peckius *Ad rem nauticam* II.1.

302 See Bynkershoek *Quaestiones juris privati* IV.25. Bynkershoek nevertheless did not fully support the partnership explanation for he thought that the appropriate basis could also be a special authorisation (mandate) or one arising *ex lege*. 
the obligation to contribute lay not in the loss of a certain part of the community but in the preservation of the rest of the community by reason of that loss.\footnote{303} It would appear, therefore, that there was strong albeit not unanimous support in Roman-Dutch law for a tacit maritime partnership (\textit{navalis societas}, or \textit{societas et comunio tacita}) as the true basis of the general average action.\footnote{304} This partnership arose automatically because of the factual (and non-consensual) community of risk (\textit{communio periculis}) existing between the interests on board a ship.

A final issue remains to be considered, namely the relationship in Roman-Dutch law between insurance and general average.

\section*{4.6.7 Insurance and General Average: Similarities, Differences and Interaction}

Both insurance and general average involved the spreading of risk.\footnote{305} The aim and effect of both were that a loss which fell on one person was not borne or not borne fully by that person but was spread amongst several persons.\footnote{306} But despite this similarity, there were differences in principle between insurance and general average.\footnote{307}

In the first place, general average had no indispensable contractual basis. Although the relationship between the parties between whom the particular risks were shared in general average could have been regulated by contract, that was not necessary and in fact in practice it was the exception rather than the rule. By contrast, there was no transfer and spreading of risk by way of insurance and in fact no insurance in the true sense in the absence of an agreement. That was true not only of insurance for a premium, but also of mutual insurance where each insured was at the same time also the insurer of every other insured who was a party to the agreement of mutual insurance.\footnote{308}

Secondly, in the case of general average risks were spread amongst the members of a naturally established and closed community of risk, namely between those whose property was exposed to the same perils on a particular voyage. The community was not created, as in the case of insurance, by an uninvolved outsider, the insurer, nor on purpose by the members the community themselves, as in the case of mutual insurance. Additionally, those liable to contribute in general average were exposed to the same risk (a common peril) and it was that common risk which was spread amongst those involved; it was not merely a spreading of similar risks amongst

\footnote{303} See Van der Keessela \textit{Praelectiones} 1521 (ad III.29.8).

\footnote{304} See further Van Empel 6 and 148-149; and Zimmermann 411n170.

\footnote{305} See on insurance and general average eg Dorhout Mees \textit{Schadeverzekeringsrecht} 566-582 and Rutgers van der Loeff 26-31.

\footnote{306} See Bynkershoek \textit{Quaestiones juris privati} IV.1 who thought that the aim of insurance was 'dat ... schade niet door een persoon, maar door verscheiden zou gedragen worden'.

\footnote{307} See eg Van Empel 6; Kracht 3; and Van der Merwe \textit{Versekeringsbegrip} 124-127.

\footnote{308} As to mutual insurance in Roman-Dutch law, see further ch IX § 3 \textit{infra}. 
those insured by the same insurer or amongst those who were members of a mutual insurance association. In the case of insurance the community of risk was not a natural one but an artificial one and there was no question of a common risk and a common loss being shared by all.

Lastly, whereas insurance could provide a full indemnity against a particular loss, that was not possible in the case of general average because of the fact that every interest contributed to and thus bore a share of its own loss: the common loss was literally shared by all.309

But what then was the relationship between insurance and general average in Roman-Dutch law? In principle there was none. General average existed independently and was not a subsidiary part of the law of insurance. In fact, it existed long before the appearance of the insurance contract in its modern form and, unlike insurance, formed an important part of medieval customary maritime law. The obligation to contribute in general average and the entitlement to claim such a contribution arose between the owners of the interests involved in a maritime venture irrespective of whether or not they were insured. And the existence of any such insurance had no influence on the adjustment of the general average.

Nevertheless, while insurance had no influence on general average the reverse was not true. If the interests concerned in a general average were insured, as they increasingly were in the seventeenth and more so in the eighteenth centuries, an interaction between the two concepts did arise. Then the insurers involved had an active interest in the general average adjustment because of the involvement of their insured in it. But general average was relevant to insurers and insurance law in the same way as any other maritime cause of action: a breach of a contract of carriage or a collision between two ships at sea.

Although the legislative regulation of insurance and general average in Roman-Dutch law was often intertwined,310 and although in Amsterdam, Rotterdam and Middelburg there was but a single Chamber to deal with matters of insurance and general average, they were nevertheless clearly separated in practice. The chambers kept separate registers and held separate hearings for the two branches of law. General average was determined first, and only when the position between the parties involved had been determined, was the attention focused on the legal position between each of them and his insurer.311

309 Thus in the Aanhangzel tot het Hollandsch rechtsgeleerd woorden-boek vol II sv 'lactus' the point was made that general average was not a 'gemeene schaadelooshouding want geen der Geinteresseerden word schaadeloos, alle, lyden egaal schaade, niet na de Aritmetische maar Geometrische proportie, le na rato van het Interest dat ieder hunner afzonderlyk in het Schip of de Laading heeft'.

310 See Schöffer 75. This was not always the case though. When the conclusion of insurance contracts in the Netherlands was prohibited in 1569 (see Van Niekerk Sources 44-45 for details of this prohibition), there was no similar prohibition of general average adjustments.

311 The legislature did recognise though, that general average had a bearing on insurance. Thus s 4 of the Amsterdam keur of 14 July 1607 provided that the Chamber could hold insurers liable only for what it had determined to be in general average.
The question arises whether and on what grounds an insurer could be held liable for general average losses suffered or expenses incurred by an insured and for general average liabilities imposed upon an insured to contribute to the general average losses or expenditures of others. At first blush it would seem that an insurer should not be held liable because such losses were not accidental but rather the result of a voluntary and deliberate act of destruction of the insured property, the more so if it was caused by owner of the interest himself.

Nevertheless there was no doubt that just as an insurer was liable for loss of or damage to insured property caused by a peril insured against, so he was liable if the general average act was necessitated by and the adventure saved from loss or damage by such a peril. The loss of goods jettisoned in a storm to lighten and save the ship and cargo was no different from the loss of the goods by that storm. The insurer's liability for such a loss was, however, reduced by the amount the insured owner had received by way of contribution from the other interests. Furthermore, the insurer would not have been able to impute liability for causing a general average loss to anyone, as long as the act was carried out reasonably in an emergency.

Likewise there was no doubt that the insurer of an interest was liable to reimburse the insured owner of that interest for the contribution he has had to pay for a

---

312 Put differently, could an insurer be held liable for a loss or an extraordinary expenditure deliberately caused or incurred to save not the insured interest only but all the interests involved in the common adventure? There was, on the one hand, no doubt that a common average expenditure, being an ordinary and expected expenditure deliberately incurred, could not be recovered from the insurer or insurers involved simply because it was not an accidental loss (see Schorer Aanteekeningen 447 (ad Ill.29.n1) and Magens Essay vol I at 72-73). And, on the other hand, a particular average loss or expenditure suffered by or incurred in respect of a particular insured object, being fortuitously caused by a maritime peril or incurred as a result of such a peril to save the insured interest alone, was recoverable from the insurer concerned.

313 The recoverability of general average losses from an insurer was already and most fully treated by Santerna De assecurationibus IV.43-45.

314 This was analogous to the principle that loss or damage caused or an expense incurred to avert or minimise the loss or damage of a particular interest by a peril insured against was recoverable from the insurer of that interest as a loss or damage caused by that peril: see further ch XVI § 1 infra on the insured's duty to minimise loss and his right to recover from his insurer the expense incurred in the process.

315 Roccus De assecurationibus note 62 made it clear that the insurer of an interest lost in general average was not liable to pay his insured the full value of the property so lost. The insured owner was entitled to contributions from the other interests involved and when he received such contributions he could not claim from the insurer who was liable only for the portion of the general average loss which the insured himself had to bear; it was only that portion which was in fact lost because no contribution was recoverable in respect of it. Neither Roccus nor Santerna made it clear whether in respect of contributions not yet recovered (or perhaps not recoverable at all), the insured could claim from his insurer. Under English law, in terms of s 66(4) of the Marine Insurance Act 1906, where an insured has suffered a general average loss, he may recover in full from his insurer without having enforced his right of contribution against the other interests the insurer being subrogated to such claims for a contribution. But where he has incurred a general average expenditure, he claims from his insurer only the portion of it which falls on himself.
general average loss. The only legislative recognition of this occurred in the Amsterdam amending keur of 1756 in its amendment of s 36 which concerned franchise. After providing that general average payable in respect of insured goods were not to be calculated as part of the damage for purposes of determining whether or not the applicable franchise percentage had been exceeded, it was further provided that the insurer of goods would be liable, however, to pay separately the general average payable in respect of the insured goods. Again the basis of the insurer's liability was the fact that the adjustment was considered a loss caused by an event for which the insurer was liable.

Accordingly, as regards both a general average loss and a general average contribution, the insurer's obligations flowed from an application of the general principles of causation and liability was assumed without expressly being prescribed in Roman-Dutch law or provided for in Dutch insurance policies. If necessary, an insured would have brought an action against his insurer under the clause providing that insurers place themselves completely in the position of their insured. But in both cases the

---

316 A case before the Hooge Raad in 1726 (see Bynkershoek Observationes tumultuariae obs 2242; idem Quaestiones juris privati IV.13) provides a clear illustration of this. The insured cargo of Augsburg merchants arrived undamaged at the destination in Cadiz but the conveying ship suffered a general average loss en route. The master claimed a general average contribution from the insured owners of the cargo under an adjustment made at Cadiz. The insured in turn claimed the amount of that contribution from their insurers in Amsterdam. The latter argued, inter alia, that they were not bound by the general average adjustment made up in Cadiz because the adjustment had to be made by the Chamber in Amsterdam where the policy in question had been signed, and that accordingly they could not be held liable for more than the contribution which the insured goods had to bear according to Amsterdam law. The Raad held in favour of the insurers because of the assumption that the law governing the insurance contract here was the law of the place where it had been made, viz, Amsterdam, and because the adjustment at Cadiz had not been drawn up according to the methods prescribed by the laws and customs prevailing in Amsterdam. Nevertheless, the Raad permitted the insured to have the average adjusted anew at Amsterdam so that they could recover the amount of their contribution from their insurers according to that adjustment.

The practice of English insurers in the mid-eighteenth century was to consider themselves liable in terms of English policies for general average contributions adjusted abroad, as long as such were properly made in accordance with the law and customs of that place and even if such an adjustment was based on a different scale of values (which resulted in higher contributions) than in England, and even if the loss or expense would not have come under general average in England. But by the end of the century there occurred a change in attitude and insurers began opposing liability in terms of foreign adjustments for more than they would have been liable for had it been a local adjustment. The courts upheld the custom that English insurers were bound under the English policy for foreign adjustments and the matter was only finally settled by the insertion of a foreign average clause into insurance policies. See generally ILL HR3 46-49.

317 See ch XV § 7.3 infra.

318 However, as will be shown, the franchise also applied to the insurer's liability for such general average.

319 According to Roccus De assecurationibus note 70, an insurer was liable for a contribution to a general average expense incurred to save the insured interest for had such expense not been incurred, the interest would have been lost and insurer liable in full.

320 For the content of Dutch insurance policies, see ch VIII § 4.2 infra.
insurer's liability in respect of general average arose only where the loss, damage or expenditure in question had been caused or incurred to save the adventure from a peril insured by that insurer.321

4.7 Insurance and Suretyship

4.7.1 The General Characteristics of the Contract of Suretyship

The direct lineage between the Roman-Dutch law of suretyship and the fideiussio of Roman law322 was no doubt one of the reasons why insurance and suretyship were not infrequently mentioned in the same context in Roman-Dutch law and why, on occasion, attempts were made to explain the contract of insurance with reference to suretyship.323 The fact that the two concepts shared certain prominent features as well as the fact that in Roman-Dutch law the differences between them were not yet fully comprehended or at least not prominently and pertinently considered, no doubt also contributed to this state of affairs.

In terms of an agreement of suretyship one party, the surety, undertook towards the other party, the creditor, to perform or satisfy an obligation owed to the creditor by a third party, the debtor, should the latter fail to perform or satisfy that obligation. The aim of the contract was to secure the performance of the principal obligation owed by the third party-debtor by obliging a further party or parties to that obligation. In this way the creditor obtained security and reduced the risk he ran of a loss as a result of the debtor's non-performance or insolvency. The risk of the debtor not being willing or able to perform his obligation was transferred to the surety.

In practice the contract of suretyship in Roman-Dutch law was, by reason of the personal relationship of friendship which usually existed between the surety and the creditor, a gratuitous contract.324 The appearance of compensated suretyship, no longer undertaken by an individual surety but by a corporate surety, dates from the beginning of the eighteenth century in England and took the form of fidelity business whereby employers were guaranteed or 'insured' against any losses resulting from the infidelity of their employees. Ordinary underwriting principles, including that of

321 Thus, an insurer covering war risks only was not liable for or in respect of the jettison of goods to save the ship and cargo from a storm. Further, an insurer was not liable if, for another reason such as the master's voluntary change of voyage, he would not have been liable had the insured object been lost by the insured peril in question: see Weytsen Avaryen pars 30 and 52, and see ch XIII § 1 infra for the effect of an alteration of the risk by the insured.

322 On the history and general features of the contract of suretyship in Roman and Roman-Dutch law, see generally Caney 1-23; Jones 'Suretyship'; Morgan; Slovenko; Wessels 587-591; and Zimmermann 114-152.

323 See Endemann Studien 355-356 who notes that one of the first authors to mention the comparison was Scaccia De commerciis l.1.129 ('assecurationis contractus ... sit contractus fideiussiosis').

324 But compensated suretyship was not uncommon at the time, and occurred especially between merchants. See eg Roccus De assecurationibus note 77.
averages, were applied to this business as they were to the marine insurance business. By later practice, compensated suretyship was extended to guaranteeing or 'insuring' the performance of public contractors.

The most important and characteristic feature of the contract of suretyship, and one of particular relevance for present purposes, was its accessory nature. The contract and the obligation of the surety were accessory to the principal contract existing between the creditor and the debtor and to the principal obligation owed by the debtor to the creditor respectively. Suretyship, being an accessory contract, presupposed a principal obligation. From this it flowed that in the case of a suretyship there were at least two separate obligations involved, the creditor-debtor or principal obligation and the creditor-surety or accessory obligation.

Accessory had several consequences, of which two are relevant for present purposes. First, it was essential for the existence and enforcement of a suretyship agreement that a valid primary obligation existed. If the principal obligation was invalid or otherwise void, or extinguished (such as by payment, novation, release, or cancellation), the suretyship agreement could also not be enforced. Secondly, the surety could, at least from the later Roman law onwards, be held liable only if the creditor could not recover from the debtor. The *beneficium ordinis vel excussionis* permitted but did not oblige the surety to compel the creditor to first sue the debtor before proceeding against him. The surety's liability, accordingly, was subsidiary or conditional, as opposed to that of the debtor which was primary; the surety undertook to perform only if the principal debtor did not.

Further features included the fact that if there were more than one surety, each of the co-sureties were, at first, bound for the whole debt. Later the *beneficium divisionis* allowed a surety to limit his liability to a *pro rata* share, determined by the number of solvent sureties at the time he raised this benefit against a claim for payment of the full amount. The creditor bore the risk of any of the sureties subsequently going insolvent. If the surety did not pleaded this benefit, it was considered to have been waived and the surety was then liable for the full amount. A further benefit to which the surety was entitled was the *beneficium actionum cedendarum* by which he could demand from the creditor a cession of the latter's action against the debtor.326

4.7.2 Insurance and Suretyship in Roman-Dutch Law

Insurance and suretyship had in common that in both cases a risk was transferred from one party to the contract to the other: in the first case from insured to

---

325 As to the special type of surety in Roman law, the *fideiussio indemnitatis*, whose liability was a subsidiary one and whose position thus antedated that of the later surety with a *beneficium excussionis*, see Caney 53; and Zimmermann 137 and 142n170.

326 The subsequent merger of this right with the *actio contraria negotiorum gestiorum* of an outsider who had paid the debt and the *actio mandati contraria* of a mandator who had paid the creditor on the instructions of the debtor resulted in the concept of an automatic legal subrogation of the surety to the creditor's rights under certain circumstances: see further on this Jones 'Suretyship' 135, referring to Pothier *Treatise on the Law of Obligations* (Evans' translation 1826) par 429 at 277. As to the comparable right of recourse of the insurer, see further ch XIX § 1 *infra.*
92 Insurance Law in the Netherlands 1500-1800

insurer and in the second from creditor to surety.\textsuperscript{327} The surety assumed the risk of having to pay the debt or perform the obligation in question if it was not paid or performed by the principal debtor. The creditor was protected against the risk of the debtor not paying or performing by the undertaking of the surety to pay or perform in place of the debtor. It is not surprising, therefore, that Bynkershoek\textsuperscript{328} defined insurance as the provision of security ("securitate") for the property of another by which the provider of the security (the surety or fideiusor) for a specified price undertook that risk to the exclusion of the person of the owner. Van der Keessel explained the use of the term 'surety' in this regard by noting that in case of both insurance and suretyship the risk of an object (periculum rei) was taken over.\textsuperscript{329} Obviously insurance and suretyship had many other features in common, but these seldom occupied the attention of Roman-Dutch lawyers.\textsuperscript{330}

The point must be made that the confusion between insurance and suretyship was particularly acute in those instances where the insurance contract between the insured and the insurer related to or was concluded with reference to another contract existing or arising between the insured (not the insurer) and a third party-debtor, such as was the case where the insured was the lender under a bottomry bond.\textsuperscript{331}

The close relationship which existed in Roman-Dutch law between insurance and suretyship (in any one of its many forms, including the performance guarantee) and the difficulty of distinguishing between these legal figures are vividly illustrated by a number of contracts which outwardly had the appearance of insurance contracts but which contained clauses or were concluded in circumstances which placed them out-

\textsuperscript{327} Roccus \textit{De assecurationibus} note 77 observed that a surety ("fideiusor") could be compensated for the risk he ran and the security he provided and that such an agreement was not usurious because the compensation was received on account of the risk involved.

\textsuperscript{328} \textit{Quaestiones juris publici} I.21.

\textsuperscript{329} \textit{Praelectiones} 1428 (ad III.24.1) and 1429-1430 (ad III.24.1).

\textsuperscript{330} One notable instance was in an opinion from 1707 taken up in Barels \textit{Advysen} vol I adv 20. Although the opinion pointed out some of the differences between insurance and suretyship (see § 4.7.3 \textit{infra}), one similarity was alluded to. The point was made that where an insurer was liable in respect of loss or damage for which a third party could also be held liable by the insured, the insured was not entitled to release that third party, either fully or in part. The inability of the insured in this respect, the opinion surmised, arose not only from the general legal principle that one could not without the knowledge and consent of the person concerned with a particular matter effect any change in his rights in respect of it and even less relinquish that right. In the case of insurance there was an additional reason, namely that if an insured wanted to claim from his insurer, he was obliged to grant his insurer's the full and undiminished benefit of his claim against any liable third party ("gehouden is alles aan de assuradeurs na rato van hunne signature te abdonneereren en af te staen"), in the same way as in case of suretyship the creditor was bound before obtaining payment from the surety to cede to him his action against the debtor ("cessie van actie ten behoeven van de Borgen heeft te doen"). Thus, according to this opinion, the \textit{beneficium cedendarum actionum} of suretyship had an equivalent in the case of the insurance contract. This point will be returned to in ch XIX § 1 \textit{infra} where the insurer's right of recourse is considered in detail.

\textsuperscript{331} See further ch V § 5.5 \textit{infra}.
side the ambit of insurance proper. Four rather complex and not in all respects fully explicable examples may be referred to briefly.

The first example concerns an undertaking in a document which had the form of an insurance policy of the Dutch East India Company. In this document, dated 1613, the signatories, who were some 300 shareholders of the Amsterdam Chamber of the Company, undertook to insure the Company generally (‘op alle ’t gene de voorschreven Compagnie op Eylanden, vaste landen, of op wat plaetse ofte plaatsen dat sy in Oostindiën soude mogen hebben’) against a number of risks, promising in case of the occurrence of the enumerated perils to protect it against loss (‘[st]ellende ons in alsulcken gevalle in U plaetse om U te guaranderen van alle verlies ende schade’). Additionally, in a clause unusual if not unique in a marine insurance policy, they undertook that if a specified return cargo of gold (‘het retour van twee en dertig tonnen gouts’) did not arrive within specified dates, they would pay the Company the value of the cargo and also any shortfall realised by that cargo on the market (‘verbonden wij ons bij desen te betalen aan de Bewinthebberen van de Generale Oostindische Compagnie de voorschreven twee en dertig tonnen gouts ofte soo veel daer een sal ontbreken’). The premium was payable to the signatories only more than a year after their signing of document. The additional undertaking placed the contract outside the realm of the ordinary marine insurance contracts of the time and gave the contract the appearance of a guarantee of the successful completion of the voyages and trading ventures undertaken by East Indiamen in 1613. The document, it seems, rather created a guarantee syndicate to ensure the payment of dividends from the particular trading ventures in that year. It was nothing more than a form of disguised self-insurance by the shareholders concerned against the trading risk involved, namely the non-arrival of cargo or the possibility that it realised less on the market than was expected, they being amongst the ones entitled to dividends from the Company upon the successful completion of the venture. And as the vehicle for this guarantee contract an adapted form of the well known marine insurance policy was employed.

A second example concerned a similar scheme established by way of an Amsterdam insurance policy of 1615 on the ship the ‘Rygsche Joffrou’. The policy purposed to insure cash (‘op comptant geld’), which apparently was the venture capital with which the insured had sent the master and that ship to the Mediterranean. The

---

332 Full details are to be found in Den Dooren de Jong & Stapel 81-87.

333 Den Dooren de Jong & Stapel 84 refer to ‘het in het leven roepen van een garantie-syndicaat voor de uitbetaling van de verwachte dividenden in geld na de terugkomst der uitgeruste vloot’.

334 Den Dooren de Jong & Stapel 87-91 mention that there was an equivalent scheme in 1636 with the English East India Company when a shortage of cash was experienced because of dividends that had to be paid. Similarly, in 1640, it was decided by that Company that ‘a Policy of Assurance ... should bee made and underwritt for securing that summe [the shortage experienced after the equipment of certain ships] in case of losse or miscarrying of any of their shipps’. This ‘policy’ too was underwritten by shareholders of the Company and despite the fact that the guarantee element was clear to all concerned, the agreement was nevertheless linked to and cast in the form of a marine policy.

335 See Den Dooren de Jong & Stapel 91 for details.
policy also covered all goods that the master had to acquire there. In addition to the usual marine perils, the policy also covered a list of additional risks so extensive that it appears that the ‘policy’ was in fact no more than one against the failure of the particular adventure. It was, in fact, a guarantee of the financial success of the trading venture in question.

The third example concerned a classic convergence of insurance and suretyship in the case of what was in Roman-Dutch law termed solvency ‘reinsurance’. Solvency ‘reinsurance’ occurred where an insured concluded a new insurance contract because of the fact or the fear that his present insurer would not be able to pay him. Santerna already discussed the difference between such (re)insurance and suretyship and thought that the second insurer was not a guarantor or surety of the obligation of the first insurer but was primarily liable on his own account although only conditionally so, the condition here being if the first insurer should not pay or pay less than he was liable for; the second insurer promised compensation not in the name of another but in his own name and his obligation was not that of a guarantor or a surety but a conditional principal obligation.

In Roman-Dutch law, legislation on the topic established two distinguishable regimes. In terms of the Amsterdam amending keur of 1626, an insured was entitled, in the case of the insolvency or financial distress of his insurer and on the cancellation of that insurance by notice to the insurer concerned or his curators, to insure himself anew. In return for being able to conclude a second insurance, the insured forfeited the premium he had already paid to the first insurer. Section 25 of the Amsterdam keur of 1744 in essence reenacted this provision. It is readily apparent that these measures did not create a situation where there could have been any question of suretyship. The first

---

336 The clause in question (which may be compared with the usual risks or perils clause in marine insurance policies: as to which see ch VI § 2 infra) read as follows: ‘Loopende gestadelijk den risique te water en te lande gedurende voors. reyse, ter tyde toe dat het voors. schip met de voors. goederen en retouren hier te stede in salvo gearriveert ende de goederen in 't vermogen van den geassureerde geleverd sullen syn. Sulcx dat wy ondergeschreven verseeckeraers midts dese wel expresselijck tot onze laste nemen alle perykelen, schaeden ende swaerigheden, dewelke de voors. comptante penningen ende retouren oft provenu alsvooren, soo te water als te lande, eenigzins soude mogen overkommen. Ende spetialyck alle schaeden ende swaerigheden die door het afsterven van de scipper facieurs oft commisen oft oock door valsche beschuldigingen ende cumuliën souden mogen geleden worden midtsgaders alle andere schaeden ende ... [here, in printed form, the policy listed all the usual perils found in an ordinary marine policy] swaericheden bedacht oft onbedacht, geene uitgesondert’.

337 Details in Den Dooren De Jong ‘Reassurantie’ 82-83. Reinsurance generally, including this form of solvency ‘reinsurance’, is discussed in ch VII § 4 infra.

338 Because the second insurance contract was concluded by the insured, this was not a case of reinsurance proper which occurs where an insurer concludes an insurance contract. But in Roman-Dutch law the term ‘reinsurance’ primarily although not exclusively referred to solvency ‘reinsurance’ and not to reinsurance proper.

339 De assecurationibus III.55-58.

340 This keur amended § 2 of the keur of 1598 and created an exception to the prohibition on double insurance contained in that section.
insurance had to be cancelled. The second one could therefore not in any way be regarded as accessory to the first. As far as the insured was concerned, the second insurance was a replacing insurance and not an additional insurance against the first insurer’s insolvency or his failure to perform.

But, it seems, these measures did not accurately reflect the practice at the time and s 25 of the keur of 1744 was amended by the keur of 1756. It provided that if an insurer failed or if the insured so wished (thus, also for reasons other than the insurer’s insolvency), the latter was free to conclude a new insurance which could include the premium and other expenses incurred in connection with the first insurance. Although the insured did not have to cancel the first insurance, he had to give the first insurer notice of the conclusion of a second insurance and he had to cede his action against the first insurer to the second insurer. Accordingly, it was now possible for an insured also to protect himself against the future insolvency of his insurer by concluding a second insurance and without having to cancel the first insurance. The two contracts existed alongside one another. But the second insurer was clearly secondarily liable: he was entitled to a cession of the insured’s action against the primarily liable first insurer and thus enabled to recoup whatever he could from the latter. However, this was not suretyship proper. The second insurance contract was not an accessory contract: the insured, it would appear, did not have to sue the first insurer before he could claim against the second insurer, and furthermore, the second insurance was not dependent upon the continued existence of the first.

The fourth and final example, existing alongside solvency ‘reinsurance’ and to be distinguished from it, concerned the informal guarantee of the solvency of insurers. In practice this usually occurred where a (local) intermediary of sorts for a small commission or ‘premium’ guaranteed the financial ability of the persons with whom he had placed an insurance for the account of a (foreign) insured who was not familiar with creditworthiness of those insurers. Although the same objective was achieved as in case of solvency ‘reinsurance’,\footnote{341} the undertaking of the intermediary was one of suretyship and not insurance. A nice example of the undertaking of what was referred to as an ‘assuradeur-delcredere’ came before the Hooge Raad in 1726.\footnote{342} In this case\footnote{343} the Raad accepted that the intermediary was in the position of an accessorially

\footnote{341}{That objective could, of course, be achieved in other ways. Thus, eg, Schorer Aanteekeningen 429 (ad III.24.12) sv ‘Borg of pand te stellen’ mentioned that an insured could protect himself against the insolvency of his insurer arising after a loss had been incurred and before payment was made in terms of the insurance contract, by demanding from the latter a security or pledge when there was a fear that the insurer would not be able to make payment in due course. This was, it seems, a case of real and not personal security.}

\footnote{342}{See Bynkershoek Observationes tumultuarie obs 2242; Idem Quaestiones juris privat V.13. Similar guarantees were also known on the London market: see Den Dooren de Jong ‘Reassurantie’ 91-94.}

\footnote{343}{The facts were briefly that two Augsburg merchants had sent goods to their Amsterdam correspondent with the instruction to send it for their account to Spain after they had insured it in Amsterdam. With regards to this insurance, the correspondent was requested to stand ‘delcredere’ for the insurers ‘onder genot van sekere provisie’. When the insurers later refused to pay the loss in question (a general average loss, because it was based on a foreign adjustment: see again § 4.6.7 n316 supra), a claim was instituted instead against the Amsterdam correspondent who had stood delcredere. The latter refused to pay, arguing that his position was equivalent to that of a surety and that, because as a surety he had not waived his right of excussion (‘voorrecht van uitwinning’), he was not principally liable.}
liable surety who was liable only if the insurers were liable but did or could not pay, and who was not liable when the insurers were not liable in the first place. Because, in this particular case, the insurers were not liable for the loss in question, those who had stood delcredere for them were also not liable. Furthermore, the insured first had to claim from the insurers and only if and to the extent that the latter could not pay (as opposed to was not liable to pay), would a claim against the surety succeed. Bynkershoek did not agree with this view and regarded the delcredere as principally liable for payment 'als eige Schuld' so that the insured could in the first place claim from him.\textsuperscript{344}

It seems, therefore, that there was a great deal of confusion in Roman-Dutch law and practice as to where exactly the dividing line between insurance and suretyship had to be drawn. Possibly because insurance against the insolvency of or non-performance by a debtor was still relatively exceptional, the difference between insurance and suretyship was not pertinently discussed until right at the end of the eighteenth century, and even then the discussion was not in all respects satisfactory.

4.7.3 Insurance and Suretyship Distinguished

The only Roman-Dutch author who specifically sought to distinguish insurance from suretyship was Van der Keessel.\textsuperscript{345} He pointed out that although there were similarities between the two institutions, there were also many differences, even if it was possible that a surety could be paid a price for his undertaking.\textsuperscript{346}

The first difference, according to Van der Keessel, was that the objects of insurance were usually ships and cargo to be carried over the sea, while suretyship related to debts by which a third party was bound as principal debtor. But in Roman-Dutch law ships and cargoes were not the only objects which could be insured and neither was insurance against marine perils the only recognised and regulated form of insurance. Van der Keessel in any event conceded that creditors and their claims too could be insured so that this was, in reality, not a distinguishing feature.\textsuperscript{347}

The second difference was linked to the first. Van der Keessel stated that even if the contract concerned a peril of the sea, as was the case where a bottomry lender had

\textsuperscript{344} Quaestiones juris privati IV. 13. For this view he relied upon the following statement of Verwer Bodemerijen 172: '[H]et Staen del Credere niet is een simpele adpromissie subsidiaire, edoch eene expromissie als of daer gerenunciert waer van alle auxilium Juris'. According to this, the delcredere was thus in the position of a surety who had waived the benefit of excussion.

\textsuperscript{345} Praelectiones 1428 (ad III.24.1) and 1429-1430 (ad III.24.1).

\textsuperscript{346} The point here was that while insurance was and could never be a gratuitous contract, suretyship was usually gratuitous although it could also validly be compensated. The gratuitousness of suretyship (the absence of compensation for the bearing of the risk) was therefore not a distinguishing feature of that contract.

\textsuperscript{347} La Leck Index sv 'insurance' pointed out, with reference to the opinion in the Hollandsche consultatien vol I cons 201, that an insurance against the impossibility of the performance of a contract by a promisor was binding.
insured his loan, there was a significant difference between an insurance of a bottomry loan \((\text{assecuratio bodemeriæ})\) and a suretyship in respect of such a loan \((\text{fideiussio pro bodemeria})\). The risks transferred to and borne by the insurer and surety respectively in these cases were not the same. Again, though, it would appear that this was not a difference in principle. The extent of the risks borne by an insurer was a matter for agreement between the parties, an \textit{accidentalia} of the agreement. The same could be said of the risks borne by a surety. The fact that in the particular example referred to by Van der Keessel the insurer (against marine risks) of a bottomry loan and surety for that loan did not bear the same risks, was therefore neither here not there. An insurance could be concluded against non-maritime risks generally or only against a particular (non-marine) risk such as the non-performance of a debtor generally or for a particular reason only, such as his insolvency or his fraudulent refusal to perform. Accordingly, exactly the same risks could be insured against as could be transferred to a surety under a suretyship agreement.

Thirdly, Van der Keessel noted that co-insurers were not in the same legal position as co-sureties. Several insurers who had each underwritten a policy for a particular sum were not liable jointly and severally. Each was liable only for the amount he had underwritten and not for the total sum insured. Accordingly the insolvency of one of the insurers did not affect and increase the liability of the others. In this the position of co-sureties were different because the liability of each one for the whole amount remained unreduced until he had raised the \textit{beneficium divisionis} against the creditor. A co-surety was therefore in the same position as a co-insurer only if and after he had raised the benefit of division. A small difference, indeed, but a difference nevertheless.

\footnote{348 For the insurance of bottomry loans, see further ch V § 5.5 \textit{infra}.}

\footnote{349 In this regard Van der Keessel referred to the opinion of 1707 in Barel's \textit{Advysen} vol I adv 20. In this case there was an insurance of a bottomry loan and the question arose whether the insured lender could claim from the insurer where the ship did not arrive (and the loan did not become repayable) because of the master's refusal (probably on the instructions of the borrower-shipowner) to enter the port at the destination. The opinion was that the insurer was not liable in this case to pay the insured lender the amount of the loan. Insurers took over the accidental risk of the non-payment of the loan by the borrower because of the non-arrival of the ship due to marine perils, not the general risk of failure or refusal of the borrower to repay the loan. The insurer of a bottomry loan did not stand in for the unwillingness or incapability of the bottomry borrower to repay the loan; \textit{‘de Assurantie gedaen op Bodemerypenningen, met wat dies aenkleeft, niet zyn borgtogten voor de solvabiliteit of suffisance van den Debiteur of Ligter [borrower] van de Bodemerygelden, of van het hypotheek daer vooren gesteild’}. The opinion noted this as an indubitable difference \((\text{‘de bekende distinctie, [wat] tusschen Assurantïën en Borgtogten onwederspreekelyk is’})\). The insurer was not a surety \((\text{‘cautionaris’})\) for the ability or good faith of the debtor under the bottomry bond, that is, the borrower.

\footnote{350 \textit{Praelectiones} 1474d-1475a (ad III.24.16). As to co-insurance, see further ch XVIII § 2 \textit{infra}.}

\footnote{351 By contrast, Bynkershoek \textit{Quaestiones juris privat} IV.2 held the view (an incorrect one, according to Van der Keessel \textit{Praelectiones} 1475b (ad III.24.17) that co-insurers were jointly and severally liable and that each was in effect a surety for the payment of the full amount due (the indemnity) under the policy \((\text{‘assecuratores singulos habere pro fideiussoribus indemnitatis, in solidum obligatis’})\).}
It is clear that although the similarities and interaction between insurance and suretyship were noted and on occasion commented on, Roman-Dutch law did not fully and clearly distinguish between these contracts. Accordingly, the fundamental difference in the content of the obligation of an insurer and a surety, as well as those further differences flowing from the fact that, unlike suretyship, the insurance contract was not an accessory contract, were never properly investigated.

352 That is, that whereas the insurer undertook to indemnify the insured creditor against a loss resulting from the debtor’s failure to pay or to perform, the surety undertook to pay the debt or perform the obligation in question if the latter did not pay or perform; the insurer assumed his own obligation while the surety undertook to perform the obligation of the debtor in his place; the insurer was liable only in the event of a loss resulting from the debtor’s non-performance while mere non-performance itself rendered a surety liable. This difference was merely alluded to in the 1707 opinion in Barels Advysen vol I adv 20 referred to supra where the difference was pointed out between the ‘twee byzondere handelingen van borgtgten voor de betaelinge en van verzekeringe van schaede, door uitwendige fortuine het geassurerde effect opkoomende’. 
# CHAPTER II
DISTINGUISHING FEATURES OF THE INSURANCE CONTRACT: INSURANCE AND GAMING AND WAGERING

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>General Introduction ...........................................................................................................</td>
<td>100</td>
</tr>
<tr>
<td>1.1</td>
<td>An Introduction to Gambling and Speculation in the Netherlands Prior to 1800 ..................</td>
<td>100</td>
</tr>
<tr>
<td>1.2</td>
<td>On the Need to Distinguish the Insurance Contract from the Wagering Agreement ...............</td>
<td>102</td>
</tr>
<tr>
<td>1.3</td>
<td>An Excursus: Aleatory Contracts and Some Terminological Clarification and Preliminary Distinctions</td>
<td>105</td>
</tr>
<tr>
<td>2</td>
<td>Gaming Agreements .............................................................................................................</td>
<td>110</td>
</tr>
<tr>
<td>2.1</td>
<td>Gaming and Wagering Distinguished .....................................................................................</td>
<td>110</td>
</tr>
<tr>
<td>2.2</td>
<td>The Legality of Gaming Agreements .......................................................................................</td>
<td>112</td>
</tr>
<tr>
<td>3</td>
<td>Lotteries ............................................................................................................................</td>
<td>116</td>
</tr>
<tr>
<td>4</td>
<td>Speculative Transactions on the Exchange .........................................................................</td>
<td>119</td>
</tr>
<tr>
<td>5</td>
<td>Wagering Agreements ..........................................................................................................</td>
<td>123</td>
</tr>
<tr>
<td>5.1</td>
<td>Topics of Wagering ..............................................................................................................</td>
<td>123</td>
</tr>
<tr>
<td>5.1.1</td>
<td>Wagers on Matters of Life, Death or Birth ...........................................................................</td>
<td>124</td>
</tr>
<tr>
<td>5.1.2</td>
<td>Wagers on Matters Factual and Political .............................................................................</td>
<td>125</td>
</tr>
<tr>
<td>5.1.3</td>
<td>Commercial Wagers ..............................................................................................................</td>
<td>126</td>
</tr>
<tr>
<td>5.1.4</td>
<td>Wagers on Games and Other Feats .......................................................................................</td>
<td>127</td>
</tr>
<tr>
<td>5.1.5</td>
<td>Pilgrimages and Wagers and Other Contracts on Voyages ..................................................</td>
<td>128</td>
</tr>
<tr>
<td>5.2</td>
<td>The Legality of Wagering Agreements ...................................................................................</td>
<td>134</td>
</tr>
<tr>
<td>5.2.1</td>
<td>Introduction ..........................................................................................................................</td>
<td>134</td>
</tr>
<tr>
<td>5.2.2</td>
<td>The Position Prior to the Seventeenth Century ...................................................................</td>
<td>137</td>
</tr>
<tr>
<td>5.2.3</td>
<td>The Seventeenth Century ....................................................................................................</td>
<td>140</td>
</tr>
<tr>
<td>5.2.4</td>
<td>The Eighteenth Century .....................................................................................................</td>
<td>149</td>
</tr>
<tr>
<td>5.2.5</td>
<td>Conclusion ...........................................................................................................................</td>
<td>152</td>
</tr>
<tr>
<td>5.2.6</td>
<td>Excursus: Wagers and Natural Obligations .........................................................................</td>
<td>155</td>
</tr>
<tr>
<td>6</td>
<td>The Distinction Between Wagering and Insurance; The Requirement of an Interest ...............</td>
<td>156</td>
</tr>
<tr>
<td>6.1</td>
<td>The Early History of the Interest Doctrine .........................................................................</td>
<td>156</td>
</tr>
<tr>
<td>6.1.1</td>
<td>A Physical Object and Ownership ........................................................................................</td>
<td>157</td>
</tr>
<tr>
<td>6.1.2</td>
<td>The Formulation of a Concept of an Interest .......................................................................</td>
<td>160</td>
</tr>
<tr>
<td>6.1.3</td>
<td>The Early Role of Interest in Distinguishng Insurance and Wagering ..................................</td>
<td>161</td>
</tr>
<tr>
<td>6.1.4</td>
<td>The Reaction of Practice to the Defective Concept of a nInterest .....................................</td>
<td>163</td>
</tr>
<tr>
<td>6.2</td>
<td>The Requirement of an Interest in Roman-Dutch Law .............................................................</td>
<td>166</td>
</tr>
<tr>
<td>6.2.1</td>
<td>Interest as a Distinguishing Feature .................................................................................</td>
<td>166</td>
</tr>
<tr>
<td>6.2.2</td>
<td>Interest as the Measure of Indemnity ...................................................................................</td>
<td>169</td>
</tr>
<tr>
<td>6.2.3</td>
<td>Conclusion ...........................................................................................................................</td>
<td>174</td>
</tr>
<tr>
<td>6.3</td>
<td>Insurance Without Interest: Wagering Insurances ................................................................</td>
<td>176</td>
</tr>
<tr>
<td>6.3.1</td>
<td>Introduction ..........................................................................................................................</td>
<td>176</td>
</tr>
<tr>
<td>6.3.2</td>
<td>Insurances by Way of Wagers ..............................................................................................</td>
<td>176</td>
</tr>
<tr>
<td>6.3.3</td>
<td>Wagers in the Form of Insurances ......................................................................................</td>
<td>181</td>
</tr>
</tbody>
</table>
1 General Introduction

1.1 An Introduction to Gambling and Speculation in the Netherlands Prior to 1800

Various forms of gambling and speculative activities generally formed an integral and important part of every layer of Dutch social and economic life in the period under investigation.¹ This importance is reflected in the prominent place the treatment of forms of gambling such as gaming and wagering occupied in the sources of Roman-Dutch law.²

For the ordinary burgher, gambling, invariably for financial gain, was not only a form of entertainment to be engaged in when frequenting taverns or attending other social events such as fêtes, but also presented the possibility of a quick profit and a chance of escaping from the clutches of poverty. The playing of games, of both chance and skill, for money,³ wagering, by both participants and spectators, on the outcome of such games or on other uncertain events,⁴ and the buying of a ticket (and also wagering on chances of winning a prize) in a lottery⁵ were popular and widespread pastimes in the Low Countries.

But speculation was not simply a pervasive pastime. It also played a role in Dutch commerce and trade. Speculation on the bourse acquired a more formal and organised character, and was often bound up with serious financial and commercial transactions. Many merchants, even if they did not gamble for entertainment outside the sphere of their businesses, routinely concluded speculative transactions and invested in uncertain, high-risk ventures. In short, merchants were accustomed to a

---

¹ See generally Van Deursen Kopergeld 45-46; idem Plain Lives 57-68, 166 and 106-106; Francken 136-137; Hermesdorf Rechtsspiegel 407-408; Van Houtte 129; and Huizinga passim.
² See eg Fockema Andreae Oud-Nederlandsch recht 76-78.
³ See § 2 infra.
⁴ See § 5 infra.
⁵ See § 3 infra.
greater or lesser degree to gamble and speculate for commercial purposes as part of their businesses. It has been noted that in the seventeenth century the Dutch did not save their money but tried to make more money with it; they were not satisfied with safekeeping or even a secure investment at an ordinary return but were prepared to risk losing their whole investment in return for the possibility of an extraordinarily high return. They therefore invested in shipping (by buying shares in ships) and in overseas trading and fishing ventures, in the (bottomry) loan business and in the insurance business. Furthermore, trade was conducted not only in actual, physical goods but also in future goods and in shares and securities, the parties often not actually trading in those goods or shares but merely speculating on possible fluctuations in their prices and, by way of options, hedging against any possible losses from such transactions.

By the end of the seventeenth century, Amsterdam was the undisputed European headquarters of dubious speculation. In fact, the decline of Dutch economic power in the eighteenth century has been ascribed to, among other factors, the increasing speculative activity on the Amsterdam Bourse in the course of the seventeenth century, especially from the second half of that century, and in the gradual shift in emphasis and interest from actual trading to banking, finance and speculative trans-

---

6 Huizinga 52 correctly notes that the distinction between gaming with a playful intent (eg the gambler at the gambling table) and gaming with a serious, business intent (eg the stock-jobber on the exchange) is at best blurred. Both participate in the hope of gain, both (may) rely on a 'system'. But the gambler will probably more readily admit to the role of fortuity than the businessman. Wilson Anglo-Dutch Commerce 104-105 and *Idem* 'Decline' 263 distinguishes between three types of 'investors' or participants in speculative commerce: (i) capitalists seeking permanent investment for their surplus capital who made real speculative purchases and sales; (ii) merchants who had an occasional flutter and who bought, sold and risked only part of their capital in moderate and pretty safe speculations; and (iii) out-and-out gamblers. He notes that very often the only difference between the latter two groups lay only in the frequency of their speculative transactions and in the fact that the gamblers did not employ brokers whereas businessmen very often did.

7 Van Deursen *Plain Lives* 67.

8 On occasion the trade in future goods occurred even on a national scale and, because of the small outlay required for participation, attracted even ordinary burgers in addition to merchants. This happened, eg, with the tulip-mania in the 1630s when all and sundry invested in tulip bulbs by buying and selling future crops of flowers in the hope of a great profit. Speculation in shares too occurred on a national scale in the Netherlands, as it did elsewhere in Europe, during the Bubble Era in the second decade of the eighteenth century. Not surprisingly, the origin of insurance companies can be linked directly to these speculative transactions on the different bourses during this time: see further ch IX § 2.10 infra.

9 See further § 4 infra.

10 See Wilson 'Decline' 266.
actions in commodities and securities.\textsuperscript{11}

Because gambling attracted all classes of society and occurred both for pleasure and for business, the interest at various times of the different Dutch legislatures in preventing speculative transactions cannot be ascribed to a single motive. Gambling and speculative activities caused, or were considered to cause, many different social problems, not only the dire financial straits and the impecuniosity of the gambling lower classes who participated excessively and additively, but also the widespread fraud and cheating which were frequently uncovered in connection with gambling in the commercial sphere. Legislation passed on gambling was aimed at removing and preventing any one or a combination of these and other undesirable social consequences.

1.2 On the Need to Distinguish the Insurance Contract from the Wagering Agreement

The insurance contract and the insurance business have historically always been regarded as in some way or another tied up with gambling and speculation generally and with wagering more specifically. Not only did insurance present an opportunity for the early part-time individual merchants who underwrote insurance risks of speculating with their capital,\textsuperscript{12} but insured too came to use the device in various ways not or not only to protect themselves against losses but with speculative profit-motives. For both parties, therefore, the insurance contract provided the possibility of making a profit. Insurance was speculative not only from the insurer's point of view but also from the insured's point of view.\textsuperscript{13}

Alongside the very necessary distinction which had to be drawn between the insurance contract and the usurious maritime loan, the other form of contract from

\textsuperscript{11} See Wilson 'Decline' generally and also Barbour Capitalism 74-84 for details of speculative trading in Amsterdam.

\textsuperscript{12} From the individual underwriter's point of view, the conclusion of an insurance contract was little different from the conclusion of a wager on the occurrence or non-occurrence of the risks insured against. The lack of any proper statistical basis (a further reason why insurance and wagers were so closely related in earlier times) was a common feature of both types of contract: see eg Daston 239 and see further ch IX § 2.3 infra where the role of the individual underwriter is canvassed in more detail.

\textsuperscript{13} For present purposes the concern is merely with the individual insurance contract as a speculative or wagering device from the point of view of the particular insured and not with the questions such as whether or not an insurer's insurance business (that is, all the contracts concluded by him) could or was permitted legally have been speculative (that is, not based on statistical data and without any actuarial calculation of risk and premium) and what effect that may have had on individual contracts. On this, see ch IX § 2.4 infra. Also, the fact that the insurance contract may during the period of Roman-Dutch law under review have been particularly speculative or hazardous for insured because of the very real possibility of insurers not being able (eg because of insolvency) - as opposed to not being liable - to pay, is not considered here. See further ch IX § 2.9 infra.
which the insurance contract had to be distinguished with great care was the wagering agreement. This was necessary for a number of reasons.\textsuperscript{14}

On a theoretical level, the close association between insurance contracts and gambling (gaming and wagering) agreements arose from the fact that a common feature of both was that the performance of at least one of the parties to the agreement was dependent upon the outcome of an uncertain event. These contracts all belonged to a class of contracts known as aleatory agreements.\textsuperscript{15}

Despite the frequency of their employment by merchants in practice, often in genuine commercial transactions, wagers and various other aleatory contracts had to a greater or lesser extent always been regarded with suspicion by the law. Accordingly, being also of an aleatory nature, the insurance contract naturally had to be distinguished on some other ground if it were to be given the same measure of legal approval as it had in practice.\textsuperscript{16} Furthermore, the need for distinguishing insurance and wagering was made even more acute and also more complex because, on the one hand, wagers were used in practice for the same purpose as insurance (insurance in the form of wagers), and because, on the other hand, insurance provided the disguise by which the suspicions attracted by wagers could be avoided (wagers in the form of insurance).\textsuperscript{17}

Although the distinction between insurance and the maritime loan caused relatively few problems in Roman-Dutch law itself and had by the end of the eighteenth century in any event virtually lost its practical importance, the opposite was true of the distinction between insurance and wagering.

First, and specifically because of the uncertainty surrounding the legal position of wagers which were more often than not regarded as valid in the absence of any statutory prohibition, there did not develop in Roman-Dutch insurance law a generally perceived need for any detailed theoretical basis for distinguishing between insurance on one hand and gaming and wagering on other hand. In fact, the diametrically

\textsuperscript{14} See generally eg Thilo 12-14.

\textsuperscript{15} See eg Nehlsen-Von Stryk ‘Kalkül und Hazard’ 195-196 and see further § 1.3 infra on aleatory agreements.

\textsuperscript{16} Van Houdt 19 notes that insurance was initially associated by its opponents not only with the usurious maritime loan but also with gaming and wagering agreements which were disapproved of by civil and canonical authorities alike. But then, as Brenner & Brenner 103-104 explain, the distinction between insurance and usurious transactions such as the maritime loan, both of which involved the transfer and bearing of risk, proved rather problematical in this regard. To establish this distinction and so to avoid any suspicion of usury, jurists had to prove that the risk involved in the case of insurance was large enough to justify a premium but then not so large and spurious as to raise any suspicion of gambling. As far as the role and the quantification of risk was concerned, therefore, the insurance contract appears historically to have been situated somewhere between usury and gambling.

\textsuperscript{17} See § 6.3 infra as to wagering insurance.
opposed sociological role and nature of risk in the case of insurance and gambling agreements respectively\(^{18}\) was not yet clearly perceived by the mid-eighteenth century.\(^{19}\) In this lawyers were not alone; mathematicians too did not distinguish nor realise the need to distinguish between insurance and gambling.\(^{20}\)

Secondly, even where a distinction was drawn by Roman-Dutch jurists,\(^{21}\) this was done cursorily and without any detailed explanation. Accordingly, while the legislatures did act\(^{22}\) to control both wagers and other forms of gambling, and also the use of wagers to conclude insurance contracts and of insurance contracts to conclude wagers, the distinction between and practical overlap of insurance and wagers specifically were of little concern to Roman-Dutch legal theory.\(^{23}\)

Traces of a gradual realisation of the need to distinguish between insurance and gambling, and the development of a theoretical basis for such a distinction, began

---

\(^{18}\) Thus, as far as the role of risk was concerned, an insured paid to avoid an existing risk to which he was exposed while a gambler paid to be exposed to and to run a risk to which he was not exposed; insured were averse to risk while gamblers were attracted to risk. The nature of risk too was different: the risk of an unavoidable loss in the case of insurance as against the risk of an unnecessary or artificial loss (or profit) in the case of gambling; the fact that for insurance a measure of certainty (quantification) of risk was required whilst for gambling a genuine uncertain risk was required. The relationship with chance too differed: in insurance averages were used to eliminate chance while in gambling the element of chance was central. See generally for an econo-actuarial view of validity of these distinctions, Brenner & Brenner 101.

\(^{19}\) Only with the establishment in England during the latter part of the eighteenth century of whole-life insurance companies which were the first branch of an already venerable insurance industry to make use of mathematical probability and empirical statistics, did a clear rift open up between insurance, based on mathematical certainty, and gambling, based on mathematical uncertainty. This occurred during the period 1760-1830. On this ‘domestication’ of risk, see further Daston 237-238 and 249.

\(^{20}\) Until the seventeenth century, the notion of probability was linked to gambling and not to insurance. Mathematicians who worked on and developed the probability theory did not explain how it applied to mortality (some in fact objected to such an application, mortality being regarded as matter of divine will) but considered it purely in connection with gambling devices such as games of chance and lotteries. See further Brenner & Brenner 104.

\(^{21}\) Usually by those who regarded wagers as invalid: see further § 5.2 infra.

\(^{22}\) Legislative overreaction was in fact not uncommon, no doubt as much because of an insufficient perception of the differences involved as because of the crude view that insurance had a close link with and that, if left uncontrolled, it could easily degenerate into gambling.

\(^{23}\) See eg Goudsmit Kansovereenkomsten 296 (Roman-Dutch criminal law was more interested in wagers than was the civil law of contract); Goudsmit Zeerecht 292; and Faber ‘Studien I’ 98-99 (wagers received the continuous attention of the legislatures in the regulation of the insurance contract); Goldschmidt Universalgeschichte 373 (whereas practice and the legislatures were little concerned with the mainly canonist theoretical debate over the possible usurious nature of the insurance contract, they, rather than the legal theorists and formal judicial doctrine, did react to prevent insurance from being used as a vehicle for wagering).
appearing in European legal systems only in the latter part of the eighteenth century. And only in the nineteenth century was this distinction generally drawn, and the insurance contract finally divorced from the many forms of the (by then clearly unlawful) gambling agreement.\textsuperscript{24} But even then the legal, systematic, or theoretical basis for the distinction was not generally accepted as conclusive or satisfactory.

Obviously, and as will become apparent from the discussion which follows, these developments came too late to have had any noticeable and definite influence on Roman-Dutch insurance law. In consequence, for example, only the rudiments of the interest doctrine, which was properly formulated and soundly based in Europe only in the nineteenth century, are identifiable in Roman-Dutch insurance law.

It is therefore apparent that in order to consider the relationship between insurance and wagering in Roman-Dutch law properly, it is necessary to treat the legal position relating to wagers in that system in some detail. Before doing so, however, it may be useful to clarify some terminology and then also to look briefly at some other forms of gambling and contracts of speculation closely related to wagering and thus also to insurance.

1.3 An Excursus: Aleatory Contracts and Some Terminological Clarification and Preliminary Distinctions

The relationship between insurance and wagering, like that between wagering and other forms of gambling and speculation such as, most notably, gaming, was historically one of considerable complexity.\textsuperscript{25} Two problems in particular compounded the matter. First there existed a rather frustrating terminological imprecision and consequent confusion between the various concepts and forms of gambling and speculation,\textsuperscript{26} and secondly the changing concepts of public policy and good morals played an important albeit not always clearly determinable role in the way the law viewed these and other aleatory contracts.

After the demise of the usury doctrine, parties were free to conclude contracts of whatever nature and in whatever form they chose. In principle all contracts were valid unless against public policy or good morals. In this simplistic scheme of lawful and unlawful contracts, one general group or category of contracts continually caused

\textsuperscript{24} As Brenner & Brenner 105-106 point out, the insurance contract was saved and its legitimacy placed beyond doubt by gaming, wagering and other gambling agreements unequivocally being outlawed.

\textsuperscript{25} Thus, it clear that similarities existed but less clear what the precise differences between the various forms of gambling and speculation were. See Pieck 187.

\textsuperscript{26} See also § 6.3.1 \textit{infra} for a similar confusion as regards wagering insurance.
problems of classification. This was the group of contracts which were subsequently\textsuperscript{27} termed aleatory contracts or contracts of chance.\textsuperscript{28} An aleatory agreement was a bilateral contract the content of which depended on the outcome of an uncertain event. More specifically, upon that outcome profit or loss or, more generally, advantage or disadvantage, for one or both of the parties to the contract depended. Aleatory contracts were those in terms of which the performance of one or both of the contracting parties, by the nature of that type of contract, depended on the outcome of the uncertain event; those where one or both of the parties to the contract ran the risk of suffering a loss or gaining a profit depending on such outcome. Accordingly, this dependence upon an uncertain event was a characteristic feature of these contracts.\textsuperscript{29} In the case of some aleatory agreements, the performance of both parties depended upon the outcome of an uncertain event; both ran a risk and had a chance of loss or profit. In the case of others the performance of only one of the parties was so dependent; only one of them had a chance of loss or profit. Although it was not unanimously accepted as correct, the insurance contract was regarded as belonging to the latter subcategory because the insured's performance was not considered as depending upon the uncertain event in question but as one that had to be made irreversibly and irrespective of the outcome of that or any other uncertain event.\textsuperscript{30} Thus, according to this view, the payment or at least the obligation to make a payment of a premium.

\textsuperscript{27} It is worth emphasising that aleatory contracts were unknown to Roman law as a separate group although individual contracts later classified as belonging to a category labelled aleatory contracts were known to that system. Even in Roman-Dutch law itself, aleatory contracts as a group did not greatly if at all feature in any theoretical or systematic division of obligations.

\textsuperscript{28} On aleatory contracts in general, see especially Goudsmit \textit{Kansovereenkomsten} and also eg Molengraaff \textit{Verzekering} 24; Wentholt 1-10; and (on the position in Dutch law after codification) Asser/Klein par 227-300.

\textsuperscript{29} Note that the uncertainty related simply to who would win and who would lose, but it was certain that one would win and the other lose. In fact, it was essential that the one lose and the other win.

\textsuperscript{30} Thus, the insured could never win or lose the premium depending on whether or not loss occurred because the premium was payable in any event and irrespective of what happened to the property insured. Only the insurer's performance was uncertain and depended on whether or not the property insured was lost or damaged; only the insurer had a chance of loss or profit. See eg Molengraaff \textit{Verzekering} 18-20 for this view which was received in Dutch law from the French \textit{Code civil} and indirectly from Pothier. But see \textit{contra} eg Goudsmit \textit{Kansovereenkomsten} 16-19 who is of the opinion that an agreement was aleatory only if the performance of both parties depended on the uncertain event and who argued that that was the case with the insurance contract. For other contributions on this issue, see eg Mees \textit{De assecurations} 77-84; Rutgers van der Loeff 17; and Van Veen 12-13.
was an essential feature of the insurance contract which distinguished it from at least some of the other forms of aleatory contracts.\textsuperscript{31}

The event upon which the performance of a party to an aleatory contract depended could be absolutely or objectively uncertain (that is, the outcome could not yet have been determinable, as in the case of a future event), or it could be relatively or subjectively uncertain (that is, determinable but not yet determined by the parties as in the case of a past event). Further, the uncertainty could relate not only to whether or not a particular event would occur or had occurred but also to the time and extent or consequences of such occurrence.

Whether or not one of the parties to the contract calculated the risk or quantified the uncertainty upon which his and/or the other party's performance depend, could not influence the legal nature of that contract as an aleatory contract.\textsuperscript{32}

Furthermore, an outward inequality in the monetary or mathematical value of the reciprocal performances of the parties concerned was characteristic of aleatory contracts. Whereas in the case of bilateral contracts, the reciprocal performances of the parties concerned were in fact or were at least presumed to be more or less equivalent in value, there was a lack of such equivalence in the case of aleatory contracts.\textsuperscript{33} Only the presence of an uncertainty of the performance(s) (that is, the risk) served to establish a legal equality of those performances in the case of aleatory contracts, a require-

\textsuperscript{31} Wagers, it appears, could take either of the two forms, that is, the performance of both or only of one of the wagerers could depend on the outcome of the uncertain event. Thus, Malynes \textit{Consuetudo} ch XXXVII (see too Pleck 193-195) distinguished between three types of wagers: (i) where both parties put up a sum of money which was handed over to a third party, the one to receive the stake if \(x\) happened and the other to receive it if \(x\) did not happen; (ii) where the one party promised the other a certain sum if \(x\) happened and the latter promised to pay the former an equivalent (or different) sum if \(x\) did not happen; and (iii) where one party paid (or promised to pay?) the other a certain sum and the latter had to pay the former a sum of money (which could be calculated as the former's initial payment together with an additional amount) only if \(x\) happened. It seems that only the latter type of wager was comparable to (and could conceivably be confused with) the insurance contract in its modern form. But see eg Hopkins 59.

\textsuperscript{32} Hence, the fact that insurers (at least in later times) ordinarily estimated the risk involved in a particular insurance contract or a series of such contracts while gamblers did not (ordinarily) do so, did not detract from the view that both insurance contracts and gambling agreements could be classed as aleatory contracts. See eg Molengraaff 'Verzekering' 399-400 who points out that such calculation was an economic and not a legal factor, and that the absence of any such calculation could therefore at most have had an influence on the (economic) nature of the business and not on the (legal) nature of the contracts by which that business was conducted. As to whether individual underwriters did or did not in fact calculate their risks in the Middle Ages, see ch IX § 2.4 \textit{infra} and eg Molengraaff 'Verzekering' 420-424.

\textsuperscript{33} Thus, typically, a certain smaller performance was rendered in exchange for an uncertain larger performance, such as where one party paid 5 and the other party undertook to pay 50 if \(x\) should occur; or one uncertain performance was promised in exchange for another, such as when one party promised to pay 100 if \(x\) should occur and the other party promised to pay 100 if \(x\) should not occur, so that if \(x\) occurred or did not occur, the one party paid 100 and the other nothing.
ment of the medieval *aequalitas contractuum* doctrine of which traces remained in Roman-Dutch law.\(^{34}\) Thus, with aleatory contracts the required legal equivalence was founded not merely in the monetary value of the performances themselves but in the value of the chance upon which one or both of those performances depended.\(^{35}\)

It was also important to distinguish the aleatory agreement from an agreement subject to a condition. In the case of the aleatory contract, on the one hand, the uncertain event formed the basis of the agreement and the uncertainty was an essential or distinguishing feature governing the nature and outcome of the agreement. In the case of an agreement subject to a condition, on the other hand, the dependence on an uncertain event was an accidental feature which governed not the nature but simply the content of the agreement. Every type of agreement, such as a sale, could, with the addition of a condition dependent on an uncertain event, become aleatory. But in the first instance the agreement was by nature unconditional although its consequences were conditional; in the latter instance the contract itself was conditional. Illustrative of this distinction was the difference between an *emptio spei*, which was an aleatory contract, and an *emptio rei speratae*, which was not.\(^ {36}\)

Thus, whereas the presence and transference of risk served to distinguish insurance and other commercial contracts from usurious contracts, that very same presence and transference of risk was a common feature of aleatory contracts. They were contracts involving an element of chance; contracts in terms of which the actual present performance or the possibility of a future performance of one party was exchanged for the mere possibility or chance of a future performance by the other

\(^{34}\) By reason of the analogy with the contract of sale (see ch I § 4.1 *supra*), the doctrine was thought to apply also to insurance contracts, the purchase and sale of a risk. See further eg Molengraaff 'Verzekering' 17-20 and 427-429 and see ch XI § 2.3 *infra* as to the doctrine of *laesio enormis*.

\(^{35}\) This was applied from early on to insurance contracts. According to Santema *De assecurationibus* V.1, eg, the equivalent of the premium was regarded as the risk run by the insurer and not the value of the goods which he may have to pay should the condition be fulfilled. Put differently, the equivalent of the premium was not the (larger) sum insured but the chance of the insurer having to pay that sum insured (or at least a part of it). Thus, only when there was an inequality between the premium and the risk run by the insurer (ie, when the premium charged for a particular risk was smaller or larger by half than the premium usually charged for such a risk), was the doctrine of *aequalitas contractuum* breached.

\(^{36}\) An *emptio spei* was an (unconditional) purchase and sale of a future (ie, an uncertain) *res*, such as an agreement to buy for a specified sum whatever a hunter could shoot or a fisherman catch on a particular day. It was the purchase and sale of the chance or hope (*spes*) that the *res* in question would materialise. If it did not materialise (eg if the hunter shot nothing or the fisherman caught nothing), the sale nevertheless remained valid and in existence and the price still had to be paid, the risk of non-materialisation being borne by the buyer. An *emptio rei speratae* was a conditional purchase and sale of a future *res*, such as an agreement to buy if the hunter shot or the fisherman caught something on a particular day. It was the purchase and sale of that *res* if it materialised and was thus conditional upon the *res* coming into existence. If it did not materialise (eg if nothing was shot or caught), no sale existed and nothing had to be paid, the risk of non-materialisation being borne by the seller. See again ch I § 4.1 *supra* and also eg Goudsmit *Kansovereenkomsten* 170-173.
party. The presence of such a chance or risk of loss or profit rendered the contract non-usurious and thus *prima facie* valid. Only after the usury issue was settled, did legal and theological theorists concern themselves in more detail with the differences between the various aleatory contracts.

Although even in Roman-Dutch law there was probably not a *numerus clausus* of aleatory contracts, the following were the most prominent of them: maritime loan and bottomry loan agreements, gaming and wagering agreements, lottery agreements, agreements of insurance, and agreements for the purchase and sale of an annuity.

But the mere classification of a contract as aleatory in principle served no more than a systematic purpose. Aleatory contracts were not *per se* treated differently in law from other non-aleatory contracts. They in fact possessed no unique characteristic resulting in any consequences being attached to them which differed from those attached to other contracts, and which could justify their separate classification. At least the uncertainty of the performance(s) was not such a feature. And although that uncertainty probably resulted in virtually all aleatory contracts attracting at least a suspicion of having to be disapproved of, not all of them were in fact disapproved of at all times. Thus, also as regards aleatory contracts a distinction had to be drawn between those which were valid and those which were not valid.

Where aleatory contracts were disapproved of in such strong terms that they were legally invalid, such disapproval more often than not occurred on moral grounds, and as morals altered so did the legal treatment of the different aleatory contracts. Some aleatory contracts gained acceptance and were raised above suspicion when their economic usefulness (in practice) came to outweigh the moral objections which could (in theory) be levelled against them. Others, once valid, came to be regarded as invalid when they fell foul of a changed morality. Thus, because a distinction existed between lawful and unlawful aleatory contracts, a need arose to differentiate on principle between the different types of aleatory contracts, a need which arose anew from time to time not only as a result of a shifting morality but also because occasionally new

---

37 See again ch I § 4.2.1 and 4.3.2.1 *supra*.

38 See §§ 2 and 5 *infra*.

39 See § 3 *infra*.

40 This list was taken from that given in art 1811-2 of the Dutch *Burgerlijk Wetboek*, as to which see further eg Voorduin vol V at 392-395 and *Asser NBW* 574-578.

41 Such a distinction was already drawn in Roman law which eg attached different consequences to gaming and to wagering agreements.

42 This shifting position will appear most clearly when the legal validity of wagers in Roman-Dutch law is investigated in § 5.2 *infra*. 
contracts of aleatory nature developed in commercial practice. The prime example of this, of course, was the insurance contract. In short, the different treatment at law of the various contracts of an aleatory nature necessitated a theoretical distinction between the different types of aleatory contracts, more specifically between those of them that were valid and those that were not.

As far as the insurance contract was concerned, it first had to win the battle against condemnation as an usurious contract, and then had to fight against being lumped together with those aleatory contracts which were or came to be regarded as legally invalid. In this process the distinction not only between insurance contracts and other aleatory contracts but also between those other contracts themselves became of crucial importance.  

2 Gaming Agreements

2.1 Gaming and Wagering Distinguished

Gaming and wagering agreements, collectively also known and referred to as gambling agreements, were both aleatory agreements, the basis of which was uncertainty. Both were reciprocal agreements in terms of which the parties undertook to render a performance (such as the payment of a sum of money or the delivery of a particular object), one or both of the performances being dependent upon the outcome of an uncertain event. Both were solely aimed at profit-making and contain as central feature the element of an advantage or disadvantage for one of the parties depending on the outcome of the uncertainty. So much for the similarities.

More difficult is the precise distinction between gaming and wagering in Roman-Dutch law. The most important Roman-Dutch authors in fact provided no distinguishing definitions of the two concepts. A contributing factor was no doubt the fact that in the seventeenth and more so in the eighteenth centuries, gaming and wagering were treated identically by an increasing number of Roman-Dutch authorities. But in principle Roman-Dutch law did distinguish between them. Initially at least, as in Roman law, it

---

43 See further eg Molengraaff 'Verzekering' 21-22.

44 It may be noted that the premise, which has been adopted for present purposes, namely that gaming and wagering were types of gambling, was widely but not uniformly accepted as correct.

45 On the differences, see eg Goudsmit Kansovereenkomsten 57-79; Molengraaff 'Verzekering' 25-26; and Wentholt passim.

46 This movement culminated, as will be shown shortly, in the codified post-Roman-Dutch law no longer distinguished formally between gaming and wagering, the same consequences being attached to both types of aleatory agreement in terms of the Burgerlijk Wetboek. See generally eg Scholten Oorzaak 131 and 147.
in fact treated gaming and wagering agreements differently and accordingly of necessity had to distinguish between them.

For present purposes an agreement of gaming (spel) may be regarded as an agreement between two or more persons in terms of which, by express or implied agreement, the loss or profit (of a stake) for (two or more of) the parties depended upon the outcome of an uncertain future event, which outcome was determined by the conduct of both parties intentionally performed according to specified rules to establish such outcome. An agreement of wagering (weddingschap), in turn, may be regarded as an agreement between two persons (thus, bipartite) in terms of which, as a result of the difference of (expressed, even if not held) opinions, the parties undertook that the party whose opinion turned out to be incorrect would forfeit a particular sum of money or thing.

In the case of both agreements, the performance of one or both of the parties depended upon the outcome of an uncertain event which was determined in the one case by the conduct of both parties, and in the other case by the truth of the parties' opinions. In case of gaming the conduct (handeling) of the parties, subject to certain rules expressly or tacitly agreed upon, was an essential, whereas in case of wagering any conduct by one or even both of the parties was merely incidental. Thus, the conduct of the parties itself was not a distinguishing feature; at most the absence of such conduct excluded the possibility of an agreement of gaming. But further, it appears, in the case of gaming it was the conduct of both or all of the parties which was relevant and that conduct also had to be according to the specific rules of the particular game, while in the case of wagering it could be the conduct of only one party which was determinant and no rules could have pertained to such conduct.

A further possible difference was the fact that in the case of a wager there was a pre-existing difference of opinion between the parties, whereas this characteristic was lacking in the case of gaming.

Briefly, therefore, in gaming the emphasis was on the conduct of the parties to the agreement while in wagering the emphasis was on the difference of the views held by the parties concerned. But despite this broad distinction, some overlap and nebulousity remained. Thus, parties could wager on the outcome of a game played by others (if the players themselves thus wagered, the agreement apparently was one of gaming), while a difference of opinion could in fact lead to the playing of a game, or gaming could be a compound of wagers. Not surprisingly, especially as the earlier distinction between the two contracts gradually faded away in Roman-Dutch law, gaming and wagering agreements were more often than not used in the same breath without any distinction.

47 But see on this point Molengraaff 'Verzekering' 26.

48 But see Molengraaff 'Verzekering' 28 who points out that it did not appear from either Roman law or later sources dealing with wagering, that the holding of opposing views was regarded as an element of a wager, and further that it was not possible for the prior motive of the parties to a contract to be regarded as an essential element of that contract.
2.2 The Legality of Gaming Agreements

In Roman law the playing of games of chance (alea) for money or value, as opposed to gaming for mere enjoyment alone, was prohibited and unlawful. The winner had no action to claim his prize while the loser was by contrast allowed to recover what he had paid to the winner. All accessory agreements concluded in respect of such games, such as those of suretyship or pledge, were equally void. Exceptions were nevertheless recognised, and specifically some games of skill and manly worth (ludi virtutis) were allowed although the amounts for which those games could be played were limited. This generally remained the position during the Middle Ages.

The Roman-Dutch law of gaming was characterised mainly by the numerous legislative measures which dealt, either alone or in conjunction with other forms of gambling, with the different facets of gaming. Furthermore, it is clear that gaming caused the authorities great difficulties. There was a continuous revision and re-promulgation of earlier provisions as their ineffectiveness became apparent and as loopholes were discovered. In consequence the mass of legislation provides a rather muddled picture of the statutory law of gaming in the Netherlands.

Gaming was at first generally but not uniformly prohibited by various municipal keuren and ordinances, although, on occasion, permission was by way of exception granted to some persons and towns to conduct gaming as a source of income. Numerous examples exist of the local prohibition and regulation of gaming. Typical of these were the five provisions on gaming taken up in the compilation of Antwerp cus-

49 On the Roman law of gaming, see further Aquilius 119-120; Gane 22-24; Goudsmit Kansovereenkomsten 51-57; Kurylowicz passim; Molengraaff 'Verzekering' 403-405; Molster Spel 14-15; and Wentholt 11-15.

50 See eg Scaccia De commerciis I.1.84 ('ludus generaliter est prohibitus') and Santerna De assecurationibus II.25.

51 As to which see Gane 27-29; Goudsmit Kansovereenkomsten 81-83; Harker par 417; Hermesdorf Rechtsspiegel passim; Molster Spel 21-22; Scholten Oorzaak 144-145; De Vries 'Dobbelverbod'; and Wentholt 19-21.

52 See eg Van der Keessel Praelectiones 1109 (ad III.3.49).

53 Thus, eg, of the measures promulgated in Amsterdam (and taken up in the Amsterdam Handvesten vol II at 505-507 sv 'Van Dobbel, Loterijen en Weddingen' the following keuren may be mentioned: the keur of 20 March 1461 (fraudulent gamesters to lose both their eyes); that of 11 February 1508 (amounts lost in excess of one ounce of silver in a game could be recovered from the winner); that of 18 February 1563 (public gaming prohibited); the keur of 25 July 1681 (excessive gaming and dicing prohibited); and that of 26 July 1681 (no public appointments, offices or benefits for persons accustomed to excessive gaming).
Insurance and Gaming and Wagering

Tomary law towards the end of the sixteenth century. These provisions determined that money won and paid over in cash to the winner at a game of chance could, in the absence of fraud, not be recovered from him; that the loser could however recover clothes or other stakes so lost; that a person who knowingly lent another money for gaming had no action to recover the amount loaned; that a person playing on credit was not liable for what he had lost, even if he had given security; and that the loser of some games of skill such as chess could, in the absence of fraud, be held liable without limit for what he had lost if he played for cash, or up to a specified limit if he played on credit. Measures such as these were promulgated in an attempt to curb the undesirable consequences perceived to arise from gaming activities.

In later times gaming, and in particular games of chance (hasard-speelen), were prohibited by various provincial edicts, including those emanating from the Estates of Holland. Prohibitions also existed on gaming on ships of the East India Company. But no statute of general application to all of the Netherlands was ever enacted to prohibit or regulate gambling.

Legislation usually specified the games concerned by name, and despite an inconsistent use of terminology and numerous exceptions, limitations and concessions, a distinction was generally drawn between different types of games. Three main types were recognised, each evoking a different response from the authorities.

First there were games of pure chance involving no skill of any nature whatsoever but pure luck alone. These were generally and usually prohibited outright with penalties.

---

54 For arts 17-21 title LIV of the Impressae of 1582, see De Longé vol II at 406. Title LIV, it may be noted, was primarily concerned with another aleatory contract, namely the insurance contract.

55 See too arts 15 and 16 of title 11, part IV of the Antwerp Compilatae of 1609 (see De Longé vol IV at 2-12).

56 Thus, Joost de Damhouder in his Practycke ende handbouck in criminele zaeken (1555) noted at 227 that the prohibitions on gambling were not concerned with 'spail in hem zelven, maar om iquaet, datet uut compt', namely 'blasphemien, vermaledydinghe, leelicke inurie, verzweerynghe, dieften, kerkeroot, dootslach, moordt ende andere ortalikke' (see De Vries 'Dobbelverbod' 253).

57 See eg those of 10 March 1749 (see GPB vol VII at 862) and 4 January 1763 (see GPB vol IX at 503).

58 See eg arts 77 and 78 of the 'Articul-Brief van de Geoctroyeerde Nederlandtsche Oost-Indische Compagnie' of 8 March 1659 (GPB vol II at 1278) which penalised those taking aboard a EIC ship any dice or cards or similar devices with 'acht dagen te Water ende te Broode inde Ysers ... ende boven dien t selve Spel over-boort geworpen te werden', and which denied a winner in games of chance on board any action whilst granting the loser an action to recover anything paid to the winner, if necessary directly from his salary; the same arts of the 'Articul-Brief van de Geoctroyeerde Nederlandtsche Oost-Indische Compagnie' of 3 September 1672 (see GPB vol III at 1311); and art 46 of the 'Articul-Brief van de Generale Nederlandtsche Geoctroyeerde West-Indische Compagnie' of 12 April 1675 (GPB vol III at 1346).

59 See eg Fockema Andreae Oud-Nederlandsch recht 76-78 and idem Aanteekeningen vol II at 256-257.
being imposed not only on participants but also on organisers and even on spectators. Exceptionally, in some instances, permission was granted for such gaming to be arranged and participated in. Apart from the criminalisation of gaming and related activities, ancillary transactions such as gaming loans or wagers on games were also prohibited.

Secondly there were games of intellectual skill, which if not outright prohibited were at least discouraged, for example by denying or restricting the extent of the winner's action to recover the prize or limiting the amounts which could be lost at such games. Thus, although not prohibited, the civil legal consequences flowing from such games were proscribed, although not uniformly so.

Thirdly there were games which involved physical skill. Persons with full capacity could participate in these in permitted places for a modest prize, and they could recover that prize at law.60

The courts in the Netherlands on occasion had the opportunity to give effect to such legislative provisions. Thus the Hof van Holland in 1562 in the case of Van Loon v Aelwijnse61 refused to grant the winner of numerous games of backgammon (tick-tacken) a provisional sentence on an acknowledgement of debt given to him by the loser. It upheld the latter's defence that the game was prohibited by law (and in this case by a keur of Leiden to which the Court referred) and that accordingly there was no legal liability on him to pay the gaming debts.

But what was the position at Roman-Dutch common law, that is, in the absence of any legislative intervention? For this we must turn to the view of some of the Roman-Dutch jurists who had occasion to set out their views on the matter.

According to Grotius all unauthorised gaming (alea) was prohibited in Holland, except where a town was granted the privilege to permit such gaming within its jurisdiction.62 As far as promises or undertakings in terms of contracts relating to games ('toesegginghen die in tuisch-spieelen geschieden') were concerned, Grotius pointed out that at common law one could not lose more in a game than he had with him, all further promises being null and not to benefit the winner; any such excess subsequently paid over, was recoverable from the winner. In short, no more could be claimed from the loser and retained by the winner of a game than the ready cash the loser had with him at the time.63

---

60 Examples of games of pure chance included some which involved dice or cards, games of intellectual skill included chess, while games of physical skill included wrestling, ball-games, athletics, skating, bowling or skittles, and archery.

61 See Neostadius Decisiones dec 58.

62 Inleidinge III.3.49. See too Groenewegen De legibus abrogatis note 116.

63 See too Rechtsgeleerde observatien obs 68.
In discussing contracts with an immoral or unlawful cause, Van Leeuwen noted that in a game of dice (alaeae lusus) or other similar games (tuis-spelen), that which had been promised by the loser could not (as in Roman law) be claimed by the winner. And there being turpitude on both sides, the loser, having paid, could not, as a rule (and otherwise than in Roman law), recover it from the winner.64

Voet confirmed that losses at games of chance could not be claimed by the winner (ex turpi causa non oritur actio) nor recovered by the loser once paid. The underlying principle and the exclusion of any reliance by the loser on the condictio indebiti, Voet explained, was that in the case of both parties having acted equally disgraceful, the position of the possessor was better than that of he who claimed possession (in pari delicto potior est conditio possidentis). He noted, though, that the principle was subject to (statutory) exceptions in the case of fraud, the loss of clothing, and gaming on board ships.65 Voet noted the change which had occurred in the received Roman-law position, not only as regards the penalties imposed upon gamesters but also with the winner now as a rule being permitted to retain what had been paid to him.66

Thus, in the absence of legislative provision, Roman-Dutch law regarded gaming agreements, at least in so far as they concerned prohibited games or games of chance, as illegal and thus as void. It permitted no action either by the winner (for payment) nor by loser (for the recovery of what had been paid).67 Subsequently, in the post-Roman-Dutch law codification of Dutch law, this position was in essence retained,68 although a more refined notion of the gaming contract as a valid but

64 Censura forensis I.4.14.10; see too idem Rooms-Hollands regt IV.2.13-15. The rule mentioned was subject to exceptions based on equity. Thus, a loser could recover what he had paid because of fraud, or when what was lost was not money but clothes, or such a large sum of money as to ruin his household. Huber Heedendaegse rechtsgeleertheyt XXI.52 classed losses at play with prohibited promises.

65 Commentarius VI.5.6. The exception made in the case of fraud was because then the parties were no longer equally at fault. A loser defrauded into paying (or playing?), could therefore recover what he had lost and paid over to the winner. The defrauding winner would, of course, still have no claim against the loser in the first place.

66 See too eg Schorer Aantekeningen n313 and n315 (ad III.3.49).

67 See further Scholten Oorzaak 144-145.

68 In terms of art 1825 of the Burgerlijk Wetboek no legal action was permitted in respect of a debt arising from gaming (or wagering: see § 5.2.5 intra). Article 1826 (derived from the French Code civil) contained an exception to this general rule in respect of games involving physical exertion where an action was permitted although the courts were given a discretion to deny or reduce any claim if the amount at stake appeared excessive. In terms of art 1828, a loser who had paid the winner voluntarily, could not recover that amount from the winner, except in the case of fraud on the part of the latter. See further eg Goudsmit Kansovereenkomsten 88 et seq; Molster Speel 28; and Wenthold 57-63.
unenforceable contract was spelt out more clearly.\textsuperscript{69}

\section*{3 \quad Lotteries}

Certainly one of the most visible and widespread speculative activities in the Netherlands was lotteries.\textsuperscript{70} So popular were they, in fact, that Voet noted somewhat tongue-in-cheek that in his time the laws pertaining to lotteries could be learned from drunkards and barbers rather than from lawyers.\textsuperscript{71}

Originating in Italy, and occurring as early as the mid-fifteenth century in Bruges,\textsuperscript{72} the numerous lotteries for prizes (usually in the form of cash or luxurious items such as ornaments of silver) projected in the Netherlands in the sixteenth and seventeenth centuries actively encouraged speculation among the populace. Lotteries were a recognised way in which municipal finances could be bolstered (even if only by way of reducing the city's debt), or in which money could be collected by the city or even by church and welfare organisations for particular charitable projects such as the building of hospitals, orphanages, and the like. In the early part of the eighteenth century, one of the most common sources of national, municipal an institutional revenue in the United Provinces was the lottery. Lotteries were sanctioned and authorised and also controlled by the provincial governments such as the Estates of Holland and West Friesland. By the end of the seventeenth century, private (and unauthorised) lotteries with no public or charitable object became the vogue, and resulted in stricter control by the authorities to prevent the frauds which were frequently associated with them. Even the Estates General itself organised lotteries (\textit{Generaliteitsloterijen}) by the beginning of the eighteenth century. The speculative element inherent in lotteries was further enhanced by the practice of issuing lottery tickets payable to bearer.\textsuperscript{73}

\textsuperscript{69} A valid but unenforceable contract (a so-called natural obligation) is largely although not in all respects similar to a contract which is void for illegality. In both cases there is no claim on the contract nor any claim for the recovery of a performance rendered in terms of the contract. The latter is so in the case of the natural obligation because of the fact that the contract is valid and may therefore validly be performed, and in the case of the contract void for illegality it is so because of the application of the \textit{par delictum} rule. But the fact that the one contract is valid and the other not, does, of course, imply differences in other respects.

\textsuperscript{70} See generally Van der Essen; Fokker.

\textsuperscript{71} \textit{Commentarius} XI.5.10.

\textsuperscript{72} See Gilliodts van Severen 'Loterie' for details, and see on the history of lotteries generally, Brenner & Brenner 1-18.

\textsuperscript{73} In England (as to which see Ashton \textit{Lotteries} and \textit{Idem Gambling} 222-241), the first public lottery was projected in 1566 and drawn in 1569, after having been postponed by Queen Elizabeth I on account of a lack of subscriptions. In 1699 lotteries were prohibited but again permitted in 1710 when the Government was in urgent need of funds. Lotteries were held for a variety of reasons, to build Westminster Bridge, to fund museums, and the like. Private lotteries were prohibited in 1721. On the historical development of English lottery laws, see eg Merkin 'Prize' 66-68.
Legally\textsuperscript{74} a lottery may be described as a game or scheme for the distribution of prizes by way of chance amongst those who had paid a specified sum of money (or stake) for such a chance. The prizes (and the organizer’s profit) were derived from the amounts paid by those participating in the lottery by having bought tickets representing the chance to win a prize, and the winners of prizes were determined by the drawing of lots (the counterfoils of the tickets sold) from an urn, hence the popular name for lotteries as ‘urns of fortune’. Thus, a participant or subscriber ran the risk of losing the amount of his stake but had the chance of winning a prize. And a lottery agreement was therefore the agreement between the participant and the organiser of a lottery. It was an aleatory agreement.\textsuperscript{75}

In Roman-Dutch law lotteries were lawful if not prohibited by law, and a lottery agreement was valid and gave rise to an enforceable action, again except where by statute the particular lottery was prohibited.

Numerous legislative measures dealt with, regulated (for example limited the nature or the value of prizes), and on different occasions prohibited the projection of lotteries in the Netherlands. Private and foreign lotteries in particular were often prohibited. Not only municipal legislatures were active in this regard but also the provincial legislatures.\textsuperscript{76}

Lotteries had many links with insurance. Not only were certain forms of mutual life insurance in the seventeenth century conducted through systems which contained ele-

\textsuperscript{74} On the legal aspects of lotteries, see eg Goudsmit Kansovereenkomsten 138-151; Scholten Oorzaak 133; and on the position in terms of the Dutch Burgerlijk Wetboek, see Asser/Kleijn par 338.

\textsuperscript{75} The lottery agreement was probably not a type of gaming agreement because the outcome of the uncertain event (the drawing of the lots) was not dependent upon the conduct of both parties to the agreement, and nor was it a conditional purchase (emptio rei speratae) because the organizer unconditionally retained the stake irrespective of whether or not the particular subscriber won a prize. It appears to have been (a form of) emptio spei (see again § 1.3n36 supra).

\textsuperscript{76} See eg the following: the placcaat of Philip II of 26 August 1563 (GPB vol II at 2990) which prohibited lotteries unless they were run for the recreation of common people and the prizes were below a specified value; the decree of the Estates of Holland of 24 September 1652 (GPB vol I at 466) which prohibited lotteries drawn by means of the throwing of a dice; the decree of the Estates of Holland of 24 September 1695 (GPB vol IV at 476) which provided that in future no privileges would be granted for projecting lotteries, except for serious reasons, and which also prohibited participation in foreign lotteries; the decree of the Estates of Holland of 27 August 1722 (GPB vol VI at 843) which extended the previous decree and generally forbade the collection of money for any lottery, whether set up inside or outside the province, if such was not approved by the Estates; the decree of 21 September 1725 (GPB vol VI at 848) which extended this last prohibition more widely; the resolution of the Estates of Holland of 26 October 1741 (GPB vol VII at 1123) which ordered the strict observance of the decree of 1725, as did the decree of the Estates of Holland of 14 May 1755 (GPB vol VIII at 970-971) which again prohibited foreign lotteries and the establishment of ‘Kans-reederyen’. See further Gane’s translation of Voet Commentarius vol II at 722n(b) from which this list was taken.
ments of chance and lottery, but very commonly the prizes on offer in lotteries in the Netherlands were not cash prizes but annuities in one form or another. The holder of a lottery ticket against payment of a certain sum (or premium) 'insured', often many times over, that that ticket should not be drawn blank, and if it was that the 'insurer' would pay for that ticket a sum agreed upon. This 'insurance' was, however, nothing more than a form of wagering on the chances of a particular lottery ticket or tickets winning a prize. Even those who had not bought lottery tickets, 'insured' or wagered in this way on a particular number or numbers being drawn in the lottery by choosing a particular number or numbers and agreeing to pay a specific amount if that number or numbers came up in the lottery and to receive a (larger) sum if they did not. In this way the 'insurers' in effect ran their own lottery alongside the official one and often made a handy profit in the process. That and the fact that such 'insurers' were not infrequently also involved in running the official lottery, resulted in legislation prohibiting what was known as a lottery within a lottery although, apparently, not the practice of ‘insuring’ lottery tickets itself. But that practice may

77 Thus, combinations of tontines (which contained an element of lottery) and contracts of survivorship occurred in different forms. In terms of one such form, eg, whether or the order or proportion in which survivors were to share in the annual interest was determined by the drawing of lots. See Wagenvoort ‘Overiewing’ for details.

78 See Riley 102-103.

79 On the ‘insurance’ of lotteries in England, see eg Ashton Gambling 231-233; Brenner & Brenner 11; Holdsworth History vol VIII at 298n1 (referring to Samuel Pepys’ Diary for 20 July 1664 where the practice is described) and vol XI at 543n1 (referring to a Parliamentary debate in 1783 on the policy of allowing the insurance of lottery tickets); and Magens Essay vol I at 30-31.

80 See eg Scheltinga Dictata ad III.24.4 sv ‘weddinge’ who noted in connection with the prohibition on wagering insurance and the insurance of wagers that ‘[e]chter heeft de practyk ook al assurantie op sommige soorten van weddingen als lotery ingevoerd’.

81 See Magens Essay vol I at 385-388 where (in case study 33) he described the practice in connection with the Amsterdam lottery of 1712. In that lottery the total number of tickets was 30 000 of which 3 800 were prizes. One Law, the ‘insurer’ of such tickets, proposed that if any one would give him their numbers of 10 tickets and pay him f100, he would insure them that they should not come out all blanks, or if they did, he would repay the possessor of the tickets f300 for the f100 received.

82 See eg the placcaat of the Estates of Holland of 14 May 1755 (GPB vol VIII at 970-971) which also expressly prohibited ‘het opresten van Kans reederyen en alle andere inventien, hoe genaamd, waar door een Lottery in een Lottery werd geïntroduceert’; and also the resolution of the Estates of Holland of 26 May 1756 (GPB vol VII at 979) in which there was a request that the placcaat of 14 May 1755, which was promulgated for the ‘weering van vreemde Loteryen en voorkoominge van Kansreedyen en anderen inventien, waar door in effecte een Loterye in een Loterye zoude worden geïntroduceert’, be interpreted and it be declared that ‘het assuureeren van Looten in de Generaliteits Loteryen onder de verboden inventien, by ... voorsz Placaat gementioneert, niet zyn begreepen, en overzuls niet vallen in de termen van hetzelve Placaat’. But the Estates decided that the placcaat of 1755, ‘waar by het doen van eene zuuyere Assurantie van Looten niet is verboden’, was clear and that no interpretation was necessary.
have been unlawful and thus void in any event.\textsuperscript{83}

4 Speculative Transactions on the Exchange

In addition to actual trading in goods and commodities, numerous speculative transactions took place on the Amsterdam and Rotterdam bourses from the sixteenth to the eighteenth centuries. In terms of these, merchants either dealt in future goods or did not actually trade but merely simulated trading to enable a speculation on the fluctuation in price of the goods in question.\textsuperscript{84} These transactions came in various forms, some highly complex and involved. For present purposes two principal types may be described briefly and without attempting to explain the technicalities involved fully. These were known as time contracts and premium contracts.\textsuperscript{85}

A time contract\textsuperscript{86} was an agreement for the purchase and sale of goods or commodities (usually identified by \textit{genus} only), shares or securities, or financial instruments (such as currency) in terms of which, for example, the buyer undertook to buy and to pay for a specified amount of goods at a determined future date (such as three months hence) at an agreed and fixed price stated in the agreement, while the seller undertook to deliver such goods on that date at that price. The fact that the seller was not (yet) in possession of the goods sold and only had to acquire them when he had to fulfil his obligation to deliver, gave this transaction its speculative character. At least that was the case if the goods in question were subject to fluctuations in their value over a short term, something which occurred regularly and to a considerable extent when there was uncertainty as to the availability of those goods on a particular market when war broke out or when there was the chance of peace. Not surprisingly, these contracts were concluded especially at such times. In effect the parties speculated on the appreciation or depreciation of the price of the goods in question between the date of their agreement and the date of delivery, the seller speculating on and hoping for a lower price (market value) for the commodity at the time of delivery than the current (contract) price.

\textsuperscript{83} See Rutgers van der Loeff 121-123 on the possibility of an insurance of the profits in a lottery being, like an insurance of wages, against public policy.

\textsuperscript{84} Kunst 74 notes that these transactions took place in Amsterdam '\textit{op de beurs op de Dam en voorts meestal op het plein voor het stadhuis op die plaats en in de Colly Huyser}'.

\textsuperscript{85} On time and premium contracts, see generally Ashton \textit{Gambling} 254; Asser/Kleijn par 335-336; Brenner & Brenner 106-109; Chalkin & Moher; Van Dillen 'Termijnhandel' and \textit{idem Rijkdom} 439-460; Goudsmit \textit{Kansovereenkomsten} 121-130; Molster \textit{Spel} 32-35 and 47-50; Neal 106; Sayous; Scholten \textit{Oorzaak} 152-155; Schubert 6; Smith \textit{Tijd-affaires}; and Wilson \textit{Anglo-Dutch Commerce} 13-14 and 79-87.

\textsuperscript{86} Also known as a futures contract, a transaction in futures, \textit{tijdkoop}, \textit{koop en verkoop op tijd}, or \textit{contracten van koop ofte verkoop op tijd ende op leveringh}.
so that he would be able to supply goods at profit, and the buyer in turn speculating on a higher market value so that he would make a profit having bought the goods at a bargain price. Such contracts also served a useful commercial purpose. By concluding a time contract, the buyer covered himself against a rise in the (future) price of the goods by his purchase at a fixed (current) price, while the seller had the opportunity of buying goods at (for him) the most opportune moment.

It was also possible for a succession of such time contracts to be strung together. This occurred where, before the date of delivery, the buyer in turn sold the goods in terms of an agreement of sale which stipulated the same dates for payment and delivery. Eventually delivery took place by the first seller, usually over the heads of all the intermediate buyers, to the last buyer in the string. For those intermediate buyers, therefore, the transactions were nothing more than an attempt to profit from an opportune fluctuation in the market price of the goods so bought and sold. But no actual delivery took place to and by them.

In principle a time contract was a valid contract of sale, and that was so despite the fact that the parties intended to resell the goods to make a profit from a fluctuation in the value of the goods, that is, despite the fact that the sale was linked with other similar sales. But, as occurred more often than not, such time contracts were a mere sham without any genuine intention to effect and accept delivery and to take up the goods in question. The parties merely had the intention to deal in the difference in the price of the goods between the date of the conclusion and the date of delivery, such difference to be settled by payment between them. If this was the case, the ostensible sale was nothing more than gambling. Put differently, a time contract was a gambling agreement if it did not contain any of the elements or essentials of a sale, such as when it was expressly or by implication agreed and understood between the parties that delivery would never be demanded (so that the seller had no intention of ever acquiring the goods) and that between them there would be nothing more than an accounting (crediting or debiting) for the difference between price of the goods at the relevant dates. They were contracts by which one party undertook the risk of variations in the price of goods between specified dates without transferring (or having any intention of transferring) the goods in question but simply on the understanding that at the appointed time, the one party (the 'purchaser') was to receive or to pay the difference between the contract price and the market price.

Such contracts for the settling of differences (koersverrekeningsovereenkomsten) amounted to a gambling in differences and were in the nature of wagers on the rise and fall of the market in particular goods, shares or currencies.

87 Hence time transactions, termijnhandel, or tijd-affaires.

88 But they were probably not wagers in the true sense of the word for there was no pre-existing difference of opinion between the parties. They may well have been sui generis gambling contracts. They were, of course, also aleatory contracts, the performance of both parties depending as they did on the outcome of an uncertain event, namely the market price of the goods on the day stipulated for 'delivery'.
Time bargains in the Netherlands occurred first in grain and herring, then also in colonial goods, and later in securities, especially those of the Dutch India Companies as well as foreign (mainly British) ones. A weekly price list (courant) for commodities was established in Amsterdam around 1613, and one for securities a little over a century later. Regular settlement days (monthly in the last quarter of the eighteenth century, quarterly thereafter) existed on the Amsterdam Bourse. On such days brokers settled differences and credited or debited accounts. In the course of the sixteenth and seventeenth centuries, many Dutch placcaaten prohibited time transaction in grain and other sensitive commodities. But these were certainly instances where economic factors outweighed any moralistic objections against these transactions, for in the seventeenth century an extensive futures trade existed in the Netherlands.

The second speculative bourse transaction relevant for present purposes was the premium contract. These contracts too came in many variations. Put simply, a premium contract was an agreement in terms of which one party undertook to deliver to the other party particular goods within a particular time at a particular price (thus, a time contract), but against payment of a specific premium one of the parties had the option to resile from this contract. Thus, on the payment of a premium, the buyer or the seller had the option of not buying or not selling, and he would exercise that option or not, depending on whether the price of the goods in question had fallen or risen.

In one form, the premium contract with a premium to receive was a time sale on condition that the buyer was not obliged to buy as agreed, but the seller was bound to sell if the buyer wished to buy within the period agreed upon, the seller for that reason requiring a compensation or premium for his (temporary) absolute obligation. Thus, the buyer in effect purchased an option (to be exercised within specified time), giving him

---

89 See eg Bloom 183-192 (on the role of Portuguese Jews in the trade and speculation in shares, options and securities on the Amsterdam Bourse); Gaastra 28-29; Van Rijn 24; and Wilson 'Decline' 263. Time transactions occurred even earlier on the Antwerp Bourse: see Rich & Wilson CEHE V at 331-332. Wilson Anglo-Dutch Commerce 107 recounts that speculators in British securities, annuities and lotteries (which were all quoted on the Amsterdam Bourse) employed correspondents and attorneys in London. In addition a number of Dutch immigrants in London too engaged in dealing in British shares for Dutch speculators. Amongst these was Isak Kuljock van Mierop, who arrived in London in 1717 and who, in addition to becoming a member of the Russia Company, later became the first chairman of Lloyd’s (see further ch IX § 2.11.3 infra).

90 See eg Van Houtte 161. Thus, eg, by the placcaat of the Estates General of 17 October 1698 (GPB vol IV at 1371) time contracts in grain were prohibited because 'ondervonden wert dat meer en meer wordt gepractiseert, dat groote quantiteyen van granen werden verkocht bij diegeene, die geen granen of geen soodanigen quantiteyt als sij verkoopen in eygendorom hebben, en dat daerdoor deselve granen merckelijk in prijs souden kunnen steygeren'. Accordingly, 'soodanige contracten van koop en verkoop van granen, die men niet heeft, alsmede die op tijdt verkocht werden en die men optie-partijen noemt, sullen worden gehouden voor invalide ende van onwaerde'.

91 Also known as contracts or transactions in options or (in the case of securities) as stock jobbing; premiecontracten; or premie-affaires.
the choice of whether or not to receive the agreed goods at the agreed price. The buyer would elect to buy if the market price of those goods had risen, so that he would be buying a bargain, but if the price of the goods had fallen, he simply did not exercise his option to buy and lost nothing more than his premium. The seller, in turn, was prepared to run the risk of selling at a loss because he had received a premium.\textsuperscript{92}

In the case of premium contracts too the parties could expressly or by implication have agreed that delivery of and payment for the goods could not be claimed and that only a settlement of differences would be made, the 'delivery' and 'receipt' of the goods simply being reflected in the debiting and crediting of accounts. This was often the intention of the parties because such premium contracts were frequently concluded by a party who had already entered into a time contract on the same goods in an attempt to cover himself against any possible losses he could suffer by virtue of that contract.\textsuperscript{93}

Premium contracts were associated with insurance contracts by more than just the use of the word 'premium'. In the Netherlands and elsewhere they were in practice cast in the form of insurance contracts and premium transactions were often merely seen as a form of insurance. They were therefore referred to as insurances on the rise and fall of the prices of commodities by way of a wager,\textsuperscript{94} or as speculative insurances made on the rise or fall of the prices of particular commodities.\textsuperscript{95}

More specifically in Amsterdam, but also elsewhere, premium contracts were cast in the form of policies of insurance underwritten for large sums, to be paid by insurers as a loss, should the price of specified goods rise or fall (as the parties agreed) beyond a specified limit within the time prescribed. The insured was the person who paid the premium while the insurer took over the risk of the price of the goods going up or coming own. This he did by binding himself to 'deliver' or 'receive' the goods in question (that is, to debit or credit the insured as if the goods were in fact delivered or received)

\textsuperscript{92} The reverse of this was also possible, that is, a premium contract with a premium to deliver. That was a time sale on condition that the seller was not obliged to sell as agreed, but the buyer was bound to buy if the seller wished to sell during the period agreed upon, the buyer for that reason receiving a compensation or premium for his (temporary) absolute obligation.

It was also possible to conclude a premium contract with a premium to receive or to deliver. In terms of this agreement, the one party had the option within agreed period either to receive (buy) or to deliver (sell) particular goods at a particular price. For this greater option, a proportionately larger premium was payable to the other party who had to deliver or receive such goods at such price depending on how the option was exercised.

\textsuperscript{93} See eg Weskett\textit{ Digest} 534 sv 'stocks' par 2.

\textsuperscript{94} See Magens\textit{ Essay} vol I at 29-30. In the list he provided (in vol I at 4-5) of things that could be insured, Magens included insurance on the rise or continuance of the current price of merchandises (see too case study 35 in vol II at 401-404).

\textsuperscript{95} See Weskett\textit{ Digest} 33-35 sv 'bargains' and Walford\textit{ Cyclopaedia} vol I at 253-254 sv 'bargains, insurance of'. The latter noted that this (what he referred to as a) 'system of insurance' originated in Holland.
at an appointed time, at the price agreed upon, and at the option of the insured. If the latter did not exercise his option, the premium was lost and the contract cancelled.\footnote{See Weskett Digest 33-35 sv 'bargains' for further details on premium contracts (or contracts on options) concluded in Amsterdam, including a translation in English of such a contract which read as follows: 'I underwritten confess to having received from bearer f150 against which I engage myself to deliver from now until .... x lbs of goods at price of f/100lb to be paid in ready money, but if bearer does not give notice that I am to deliver goods between ... and ... I shall be free and discharged of this contract and premium will be mine and will not have to be restored'. See too Walford Cyclopaedia vol I at 253-254 sv 'bargains, insurance of' who appears to have obtained his information from Magens Essay vol I at 401-404 (case study 35).}

Although time and premium contracts were widely used on the Bourse in Amsterdam and elsewhere in the Netherlands, to such extent that they were available in printed form in the eighteenth century, these contracts were no doubt recognised as a form of gaming and wagering. Nevertheless, time and premium transactions were regarded as advantageous to trade because of the important role of futures markets in providing both insurance against fluctuating prices and liquidity for the market participants. Thus, they were generally permitted, at least as long as there was no fraud involved and as long as there was no prejudice to the public, as was perceived to be the case where such contracts were concluded on corn and other necessary commodities, including raw materials used in local manufacturing.

There was clearly a theoretical problem in permitting (useful and legitimate) futures and option contracts while at the same time prohibiting or at least frowning upon other forms of gaming and wagering. But this issue was never addressed at all in the sources of Roman-Dutch law. The legislatures did not attempt to prohibit time and premium contracts themselves, at least not generally and in any case never successfully. Instead they acted only against the fact that wagers, including premium contracts, were cast in the form of insurances.\footnote{See § 6.4 infra for the legislative measures aimed at wagering insurance.}

5 Wagering Agreements

5.1 Topics of Wagering

Wagers for monetary gain were concluded in the Netherlands on the outcome of a wide range of uncertain events. They were entered into as an amusing diversion, more often than not in taverns and, given the frivolous nature of the matters on which
they were concluded, probably under the influence of alcohol.\footnote{98} They were also concluded for serious commercial reasons, often on the Bourse, and were often notarially executed. Although wagers could be and were placed on virtually any uncertainty, no matter how trivial or important, the examples of Dutch wagers from the Middle Ages onward of which records are extant, tend to show that certain topics were more commonly the subject of bets than others.\footnote{99} Not surprisingly, these topics largely correspond with those on which wagers were concluded in earlier times and at different places.\footnote{100} Furthermore, certain of those topics had a close relationship with the uncertain events against which insurance was taken out. In those cases the distinction between wagers and insurance became rather blurred, as it did also generally when wagers concluded for a serious commercial purpose took on the outward form of insurance contracts.

Some of the matter on which wagers were concluded in the Netherlands prior to the end of the eighteenth century, may be described very briefly.\footnote{101}

\subsection*{5.1.1 Wagers on Matters of Life, Death or Birth}

A popular topic for wagering was the longevity or otherwise of the wagerers themselves, of a mutual acquaintance, or of a public figure. Thus, wagers were concluded on whether X would die before the end of the year, on whether X or Y would die first, or on who of the two wagerers themselves would live the longer. Very often rumours of the ill health of a person or persons would give rise to such wagers.

The lives of the rich and the famous too attracted wagers. Thus wagers were concluded on whether Charles the Bold of Burgundy or Grand Duke Albert would die within a particular time;\footnote{102} on whether the ill King Louis XIV of France would live another

\footnotetext[98]{According to Van Deursen Kopergeld 46-47 and idem Plain Lives 106 (referring to Simon van Leeuwen's \textit{Costumen, keuren ende ordonnantien van het baljuschap ende lande van Rijnland} (1667)), the fact that transactions of various kinds, including wagers, were so frequently concluded by intoxicated patrons in inns and taverns, gave rise to the legal rule which applied in Holland that 'koop en verkoop in herberg of gelag gedaan mocht binnen 24 uur worden herroeperi. As to this rule, see eg Grotius \textit{Inleidinge} III.14.5 who referred to 'koophandelinghen geschied in droncke gelagen' and Fockema Andreae Aanteekeningen 265-266 ('hapkoop of malie weddingen' and 'dronken coopslaegen').}

\footnotetext[99]{See especially Van der Fluit (on Enkhuizen wagers and conditional commercial agreements from 1597-1632) and Pieck (on Rotterdam wagers 1604-1672); and generally eg Van Deursen \textit{Plain Lives} 46-47 and 105-106.}

\footnotetext[100]{For examples of English wagers, see Ashton \textit{Gambling} 152-172.}

\footnotetext[101]{The examples provided here were mainly culled from non-legal sources. Further examples which appear in legal sources may be found in §§ 5.2.3 and 5.2.4 \textit{Infra}.}

\footnotetext[102]{See Pieck 191-192.}
month;\textsuperscript{103} on when Napoleon would die;\textsuperscript{104} and on whether a certain number of public officials would die within a specified period of time.

Obviously wagers on lives were a cause of great concern to the moralists, involving as it did the hope on the part of some that others would die, and giving rise to anti-social behaviour\textsuperscript{105} and even the possibility of an inducement to murder. The proximity of such wagers to more serious insurances on lives was also unfortunate. Legislative reaction to wagers of this kind was so sweeping that for a very long time it prevented and stifled the undisguised development of life insurance in Roman-Dutch law.

Equally popular were wagers on personal matters such as the date on which an expected child would be born and whether it would be a boy or a girl, or on whether a particular couple would wed or would separate within a particular time.

5.1.2 Wagers on Matters Factual and Political

Wagers were frequently the result of differences of opinion on matters of a factual nature. Thus wagers were concluded on the weather, on whether the world was round, on how much smoke there was in a pound of tobacco (this to be determined by weighing the ashes after the tobacco had been smoked), on whose hat thrown in a river would reach a particular point downstream first, on the weight of certain coins, the height of a tower, the rules of a particular game, or the value of a particular ring.

Political or other newsworthy events too were popular topics on which to lay a bet. Thus, wagers were entered into on whether war would break out or a peace treaty be signed within a particular time;\textsuperscript{106} on the outcome of battles, or on whether a particu-

\textsuperscript{103} This wager was concluded by Lord Stair, the English ambassador to France.

\textsuperscript{104} Thus, A offered against 100 guineas down to pay 1 guinea a day for every day Napoleon lived, an offer taken up by a clergyman who was paid 365 guineas per year for three years until A disputed further payment (see Ashton \textit{Gambling} 165).

\textsuperscript{105} There is the (English) example of a wager promptly concluded between two patrons of a restaurant on whether a waiter who fell down in an apoplectic fit, was dead. The one wagerer objected when a doctor was called to attend to the waiter, saying that the wager would thereby be voided (see Ashton \textit{Gambling} 155).

\textsuperscript{106} The peace negotiations at Munster, eg, took from 1664 to 1668 and gave ample opportunity for rumours and speculation, difference of opinion, and wagers. An example of such a wager is described by Nouwen. By notarial deed, an agreement was concluded in October 1647 between Jacob Matthijsen van der Wijck and Thomas de Schilder concerning the end of the Eighty Years War between the United Provinces of the Netherlands and Spain. In the deed the agreement was referred to as 'een contract-wedinge'. Jacob thought that peace between the Estates-General and Spain would be announced in the Netherlands within eleven months, while Thomas was of the contrary opinion. The parties agreed that if peace was announced within that time, Thomas would be liable to pay Jacob f300, but if it was not, Jacob would be liable to pay Thomas f300. One Jan Otton stood surety for both parties and they renounced all exceptions. Peace (concluded in January) was announced on 5 June 1648, seven months after the date of their deed, with the result that Jacob won his bet.
lar city would be occupied by the enemy and on the duration of such an occupation. Royalty, and political and other figures too attracted attention. Thus wagers were placed in the Netherlands on the possibility of King Philip II of Spain visiting there; on the election of the Pope; and in 1697 on whether it was Tsar Peter I of Russia who was in Zaandam to learn shipbuilding.

5.1.3 Commercial Wagers

Wagers on commercial matters were frequently concluded in the Netherlands. More often than not they served a serious commercial purpose which could not, or not as fully or as conveniently, be achieved by the conclusion of other forms of contract. And equally frequently they were in fact disguised as such other forms of contract. Because the real intention of the parties was in such cases concealed, it is often a matter of considerable difficulty to identify these contracts as wagers. Also, such simulated contracts gave rise to numerous frauds and on occasion attracted the attention of legislatures, the prime example for present purposes being so-called wagering insurances.

Examples of commercial wagers include wagers on the future price of goods, commodities and shares; on the future rate of exchange; and on the safe arrival of ships and goods.

Wagers which were not of a commercial nature, or at least not concluded between merchants, were often disguised as commercial contracts with special condi-

---

107 Two famous examples being the events leading up to the fall of Antwerp to the Spanish in 1576 and the earlier Spanish occupation of Leiden in 1574.

108 In Italy and elsewhere, who would be elected Pope and nominated as cardinals were the object of large financial transactions in which not only merchants but brokers, bankers and money changers too were involved. Although Pope Sixtus V [1558-1590] prohibited these transactions repeatedly at the end of the sixteenth century, the assembly of cardinals in Rome to elect a new Pope was a topic of great speculation throughout the Catholic world. During the conclave of 1555 (there were in fact two in that year), eg, visitors to the Antwerp Exchange could guess who would become the next Pope. Also, after death of Pope Paul IV in 1559, a list with the names of 63 cardinals was posted in the Bourse for that purpose. For 3 kroner one could take a guess and win a prize if correct. This 'pausen-speel' was arranged after the example of an Italian lotto by Italian merchants resident in Antwerp and frequenting the Bourse there (see eg Huisman & Koppenol 26; Pleck 191).

109 See Pleck 196.

110 See § 6.3 infra.

111 See again § 4 supra for time and premium contracts.

112 For further details on such exchange-rate hedging by which merchants protected themselves against unfavourable exchange-rate fluctuations, see eg Pleck 190 and Plass 49-50. Such wagers, called 'parturas', were already concluded in Antwerp in the sixteenth century on future rates of exchange on Spanish markets and fairs.
tions. This may well have been to confirm the serious intention of the parties\textsuperscript{113} and may also in some measure have been due to the growing opposition against wagers in Roman-Dutch law.\textsuperscript{114}

A popular form of contract used in this regard was the contract of sale in terms of which the performance of the parties, or of one of them, was made conditional on the outcome of an uncertain event totally unconnected with the sale itself. Thus, instead of one party promising, against the payment of a sum of money by the other party, to pay the latter a sum of money or to give him a particular object on the outcome of a specified event, they would simulate a sale with the parties having to buy and/or sell only on such outcome. Many examples exist of these so-called sales on wagers\textsuperscript{115} and of cases where goods were bought or sold on condition that payment or delivery was to take place only if a particular uncertain event had occurred by a specified time.\textsuperscript{116}

5.1.4 Wagers on Games and Other Feats

Numerous examples exist of wagers in the Netherlands on the outcome of games or contests, both played by the wagerers themselves or by others, or on whether one of the wagerers or even someone else could perform a particular feat.

Thus, there were wagers on dog fights and on games of skill played with knives;\textsuperscript{117} on whether one of the wagerers would walk naked through town, could sail in

\textsuperscript{113} Whereas ordinary unconcealed and non-commercial wagers were invariably concluded orally and were thus difficult to prove afterwards, let alone enforce, commercial wagers or wagers cast in a commercial form were very often notarially executed, thus ensuring that the winner would be able to exact payment from the loser. This, of course, tends to distort any historical investigation into the frequency with which certain types of wagers were concluded in the past (see Pieck 195).

\textsuperscript{114} See § 5.2.3 infra.

\textsuperscript{115} See Pieck 195, referring to Malynes Consuetudo ch XL who distinguished between sales which the buyer or seller could renounce against payment of a pre-determined penalty (thus, akin to premium contracts), and sales on wagers which, according to Malynes, were common in the Netherlands and France.

\textsuperscript{116} The following examples may be referred to from the many mentioned by Van der Fluit (they are from notarial records in the Enkhuizen archive): (i) in 1618 A undertook to instruct B to build a boat for delivery in one month, on condition though that B was not to drink any beer or wine for one year; (ii) in 1631 C sold to D a cow for $80, with a stipulation that seller C should for one year drink no beer outdoors nor smoke any tobacco, failing which buyer D would get the cow for free; (iii) in terms of this previous agreement of 1631, it was further provided that buyer D would not have to pay anything for the cow should seller C die within two months; (iv) in terms of an agreement concluded in 1613, E sold material to sail-maker F for $58, payable one year later if E was still alive; (v) in 1624 G sold his horse to H for $215 on condition that H had to pay the price only if the Spanish occupied Breda between 17 December 1624 and 1 November 1625 (Breda surrendered in May 1625); (vi) similarly, in 1624, I bought a horse from J on condition that he would not have to pay anything for it if the enemy did not capture Breda; (vii) in 1630 K sold a cargo load of herring to L, the latter having to pay 350 Carolingian guilders (\textit{Carolus gulden}) if peace was announced between Spain and the Netherlands before 27 December, and if not, L was to get the herring for free (the peace of Münster was concluded only eighteen years later).

\textsuperscript{117} See Pieck 206.
a kneading-trough from Texel to Wieringen, abstain from drink and tobacco for a particular period of time, or consume a certain quantity of food and drink within a specified time.  

One pertinent example of wagers of this type were those concluded on the performance of pilgrimages or voyages. They will be considered separately in the next section.

5.1.5 Pilgrimages and Wagers and Other Contracts on Voyages

Apart from wagers on lives, those on voyages were probably the most important from an insurance point of view. Voyages were undertaken for various reasons prior to the end of the eighteenth century. Certainly voyages for pleasure were not yet popular and commonplace. Most voyages were undertaken rather for purposes of business and trading, or for religious reasons, while some voyages were also compelled by law. Wagers were concluded in respect of such voyages, but there were also voyages that were undertaken and to be performed solely to win a wager.

From the fourteenth to the mid-sixteenth centuries, enforced pilgrimages120 to holy places were on occasion imposed in the Low Countries in terms of municipal keuren as punishments (boetedoening) for both delicts and crimes. The wrongs and crimes in question were mainly of a religious and immoral nature but economic crimes such as fraud were later punished in this way too.121 These pilgrimages were usually described in the judgment or sentence, or occasionally by law, with reference to the time of departure (postponement was possible), the destination and method of travel, and other additional conditions. The pilgrim was provided with a letter of safe conduct (geleidebrief) and had to obtain a letter (bewijsbrief) at his destination as proof of having been there. In addition to local destinations, pilgrimages to holy sites in places such as Chartres, Santiago de Compostela, Rome (Roomse reijs) or Jerusalem, were the most frequent. The practice of enforced pilgrimages, closely linked to and influenced by older practices and principles of canon law, declined, especially from the mid-sixteenth century and more particularly in the Northern Provinces of the Netherlands, no doubt as a result of the Reformation.

---

118 See Van Deursen Plain Lives 46-47.

119 See Van Westrienen for a fascinating account of the educational journeys (grand tours) of young Dutchmen in Europe in the seventeenth century.

120 On pilgrimages, see generally Van Herwaarden Bedevaarten and idem Pilgrimages.

121 See generally Hallema who mentions the following two interesting examples. In the first one Peter Jansz van Edam was punished for swearing (he had 'onbetamelicken gevloeckt ende gezworen') and for gambling, and was sent 'voor penitencie van zijn onbetamelick zweren bedevaartsgewijze tot Roemen' while for his unlawful gambling he was merely fined. In the second, in 1542, Hendrick Hendricx Scharbiersman and Jacob Janssen were condemned in their absence for, amongst other transgressions, acting as brokers in Amsterdam without official sanction, to three years banishment, during which time they also had to undertake a pilgrimage to Lisbon and Danzig.
By contrast to enforced penal pilgrimages, voluntary pilgrimages were also known. These were undertaken mainly for religious reasons, for example as an expression of gratitude, in compliance with a vow, or to do penance. A variation on this form of pilgrimage arose by maritime custom. When a ship faced danger at sea, the crew would draw lots to determine who of them was to undertake the pilgrimage to a holy place they vowed to visit in exchange for the divine intervention to save them from that danger.\textsuperscript{122}

Even before penal pilgrimages finally disappeared in the Northern Provinces, they were increasingly being imposed not as the main but as an alternative or subsidiary punishment, and were often redeemable by monetary payment. While in the Southern Netherlands pilgrimages were imposed occasionally until the seventeenth and even into the eighteenth centuries,\textsuperscript{123} the practice had long fallen into disuse in the North and even voluntary pilgrimages were prohibited there from the end of the sixteenth century.\textsuperscript{124}

Contracts were and continued to be concluded with reference to voyages both before and after (compulsory and voluntary) pilgrimages disappeared from practice in the Northern Provinces. Although such contracts were very involved and it is therefore difficult to classify the arrangement between the parties with any great precision or certainty, it seems that, for present purposes, it is possible to distinguish as follows between contracts which involved voyages directly or indirectly. First there were contracts which were the reason for the voyage being undertaken in the first place. That is, the undertaking and completion of the voyage was the obligation or the condition for the obligation of one of the parties to the contract. Two main forms occurred, namely wagers on the outcome or completion of voyages and simulated sales (or disguised wagers) on condition of the outcome or completion of voyages. In the second place there were contracts concluded as a result of a voyage which had to be undertaken. Here the voyage was the reason for the conclusion of the contract. The main example of this was the sale concluded for a voyage.\textsuperscript{125}

First, then, wagers on voyages.

\textsuperscript{122} The person upon whom the lot fell, undertook the pilgrimage on behalf of others and at common expense, i.e., he was given 'lotegelt' collected by the crew which was to cover both his travelling expense and the offering. A reasonable or customary amount of 'lotegeld' was regarded as a general average expenditure because of the pilgrimage and offering being considered to have been made for the common safety of the ship and her cargo. See further e.g. Goudsmit Zeerecht 121-127; and Ter Gouw vol II at 175 and vol IV at 505.

\textsuperscript{123} Voluntary pilgrimages, of course, continued to be undertaken there: see Wingens on Marian pilgrimages during the seventeenth and eighteenth centuries.

\textsuperscript{124} See e.g. the plackaat 'tegens het Bedevaert gaan ende andere Superstitien' of 23 June 1587 (GPB vol I at 219) which was repeatedly repromulgated in the last decade of the sixteenth century, and that of 17 January 1647 (GPB vol I at 221) which prohibited pilgrimages undertaken to make 'Offerhande met veel superstitieuze Ceremonien, Gelt, Wassekeersen, of andere dingen'.

\textsuperscript{125} See generally, on wagers and other contracts on (and for) voyages, the following sources from which most of what follows was culled: Bezemer; Essink; Hermesdorf 'Roomsche reisien'; Van Herwaarden Bedevaarten 388-401; Hoetink; Lammerts; Merens; and Pleck.
Prevalent amongst wagers involving feats to be performed by one of the parties to the contract, were those where, in order to win the wager (and thus the sum of money or other prize put up by the other party), one of them had to undertake a particular voyage and complete it with success and, often, within a time specified. Voyages enjoyed a certain preference amongst wagerers, no doubt because of the dangers involved in long journeys on foot, on horseback, by coach or carriage, or by sea. There was also sufficient uncertainty involved, namely as to whether the voyage could in fact be completed safely and also whether it could be completed within a particular time.

In these cases the voyage was undertaken simply because of and in compliance with the wager itself. Had there been no wager, there would not have been any voyage. For the travelling wagerer to win his bet, it was often agreed that he had to meet one or more of the following requirements: he had to travel to a particular city (often one of pilgrimage such as Rome or Jerusalem) and there visit a particular place (such as the grave of St Paul or that of Jesus); he had to return safely home, often within a specified time; and he had to be able to prove that he had indeed visited the city and site in question.

Numerous examples exist of wagers on voyages. The most famous one in the Netherlands concerned a journey to establish the exact appearance of certain pillar in Rome. At stake was a house. In 1614, in a tavern in Rotterdam, one Abraham Michielsz got embroiled in a dispute with the innkeeper over what exactly a particular column in Rome, which both had seen some years before, looked like. The innkeeper promised to give Michielsz his house if the latter should go to Rome and ascertain that he (Michielsz) was correct. He required that Michielsz bring back a papal attestation of his presence in Rome and a drawing of the column in question. Michielsz, accompanied by his wife, succeeded in fulfilling all the conditions (he appeared before

126 Also possible were wagers on voyages to be performed by someone other than one of the wagerers, as well as wagers on whether a particular voyage had in fact been completed, the latter not being relevant here.

127 Remembering that the wagers dealt with here were put in writing, often by notaries. Obviously such detailed agreement was not necessarily reached in the case of mere oral wagers, but then they were that much less valuable should one of the parties have wished to enforce the contract.

128 Another famous wager on a voyage was the one which provided the background to Jules Verne’s Around the World in Eighty Days. Verne [1828-1905], the French author (and one-time Parisian law student) of futuristic and science-fictional travelling adventures, based his Le Tour du monde en quatre-vingt jours (1873) (the English translation appeared in the same year) on the wager Phineas Fogg, Esq, concluded in 1872 with fellow card-playing members of the Reform Club in London. He bet them £20 000 that he (and his servant Passepartout) would travel around the world in not more than 80 days. Other English examples included wagers on whether the one party could travel from London to Edinburgh and back in less time than it took the other to make one million dots on a piece of paper; on whether one could walk from Dublin to Constantinople and back in one year (this bet was apparently won when the journey was completed in nine months); and on whether one could journey from London to Lapland and return with two Lap women and two reindeer within a specified time (this bet too was won). See Ashton Gambling 158 and 163-164.

129 Note, ‘give’, not ‘sell’, so that this was not a question of a wager disguised as a sale.
Pope Paul V and obtained the required papal certification\(^{130}\) and on his return in 1615 thus won the house of the innkeeper.\(^{131}\)

Similar to undisguised wagers on voyages, because they were also the reason for the voyages being undertaken at all, were simulated sales on the condition that voyages would be undertaken. Here one of the uncertainties of a voyage would be employed as the condition for the final completion of the contract. Thus, parties would nominally agree to buy and sell a particular object with the delivery of the thing or the payment of the purchase price being postponed and made conditional upon the completion of a voyage by the buyer or by the seller. Should the buyer or seller, as the case may have been, not complete the voyage, the seller would retain the purchase price without having to deliver the thing sold, or the buyer would retain the thing sold without having to pay the price. Because the uncertain event upon which delivery or payment depended, on the face of it had nothing to do with sale, it may well have been that the parties in fact intended to wager under the guise of a sale, that is, intended to wager with the purchase price or the thing sold being the prize.\(^{132}\)

Again numerous examples exist of such sales on voyages. Two may be referred to. The first case concerned a decision of the Hof van Utrecht in 1592 in Lambert Wijers v Willem de Viana. De Viana was the curator of Joost Cornelisz van Well. Wijers argued as appellant before the Hof that Van Well had sold him a particular house in Utrecht for f625 a number of years before, the purchase price being payable if the buyer, Wijers, had been to Rome and had returned with proof of that fact. Thus, the buyer could pay the price (and thus buy the house) only if and when he returned from his ‘Roomsche

---

\(^{130}\) Details of this wager appear from a deed in the Rotterdam municipal archives. Dated 14 September 1614, it was drawn up by a papal notary in Rome and attested that one Abraham Michaelis from Rotterdam, together with his wife, had appeared before him and witnesses. For further details, see Bezemer.

\(^{131}\) Two further examples may briefly be mentioned. In the sixteenth century a Spaniard, Nicolas de Vintimilia, concluded wagers with a large number of people in Antwerp that he would alone undertake the long and dangerous voyage to Cairo in Egypt and to mount Sinai in Syria. He would win his wagers if he returned unharmed to Antwerp with letters signed by local consuls to prove his visits to those places. Although Nicolas did in fact complete his voyage successfully, he would for years afterwards be engaged in litigation to obtain payment from the losers. In the end he did succeed in all his claims, some of the losers being forced to sell property and even their homes to pay him (see Huisman & Koppenol 26). In 1614 Simon Pietersz Poorter undertook to walk to Jerusalem and back in under twelve months. Before his departure, he sold all his cows on condition that in the event of his safe return within a year, he would receive double the purchase price. He won his bet and also made a nice profit on the merchandise he had taken along on his voyage (see Van Deursen Kopergeld 46-47). For further examples, see eg Merens. See too the examples discussed by Hermesdorff ‘Roomsche reijsen' of the Hof van Utrecht upholding wagers in 1564 and again in 1565 where the uncertain condition was the completion of a voyage, in the one case by one of the wagerers to Rome, Naples and Prague, and in the other case by a third party to Jerusalem.

\(^{132}\) Wagers were not only disguised as sales but also, and importantly for present purposes, as insurance contracts: see further § 6.3 infra as to wagering insurance.
The Hof did not regard the contract as unlawful and summarily compelled the performance of the agreement, apparently on proof of the voyage having been completed. The second case concerned the sale of land. On 31 July 1597 one Cornelis Dignus sold to Claes Jansz Coster a plot of land at Poortvliet on condition that if he (Dignus) visited Rome and returned within five months, Coster was to pay him the agreed price for the land; and if the voyage was not completed within that time, or not properly performed, then Dignus did not have to pay anything at all for the land. Provision was made in the agreement for proper proof by Dignus of his fulfillment of the condition. Soon thereafter he undertook the voyage and returned safely and in time from Rome. A dispute arose between the parties, but it is unfortunately not known what the outcome was.

While it is quite possible, given the apparent irrelevance of the condition of a voyage to the contract itself, that sales such as these were in fact no more than disguised wagers, the matter is not necessarily that straightforward. It is in fact quite possible that in these and similar cases the sale was not in reality a wager, the conclusion of which made the voyage necessary, but that it was rather a real sale concluded with a view to facilitating a voyage which one of parties had to undertake.

This brings us to the second form referred to above, namely contracts and in particular sales concluded for a voyage.

In this situation the party to the contract had to or wished to undertake a voyage prior to and independent of the conclusion of that contract. It could, in earlier times, have been a pilgrimage or a voyage for another reason. The contract was concluded with a view to that voyage and the voyage was not a consequence of the contract. In such a case, the contract (whatever its nature, although it was usually a sale) may therefore have had a totally different purpose than mere wagering. This appears to be confirmed by the fact that it was often the well-to-do (and certainly not only indigent drunkards) who concluded these contracts, by the large amounts involved, and by the fact that these agreements were reduced to writing and often notarised. Although obviously difficult to determine with any precision, possible purposes with such contracts may have been to raise money to pay someone who undertook and completed a religious pilgrimage or voyage on behalf of one of the parties to the sale. Or it may con-

---

133 In respect of this case, there is in some sources also reference to the voyage being undertaken by the seller, which would mean that the buyer only had to pay the price if the seller returned from Rome, and, if not, that he would get the house for free.

134 For further details, see Hermesdorf 216-218.

135 For further details, see Lammerts who considers this a case of a sale on a pilgrimage to Rome. Further examples may be found in eg Van Herwaarden Bedevaarten passim.

136 For more detailed arguments on what follows, see in particular Hermesdorf 'Roomsche reijzen' and Hoetink.

137 But then, these facts may equally well indicate that the contracts were simply serious wagers for high stakes, cast in form of sales to avoid their being struck down as wagers, a growing possibility in the seventeenth and eighteenth centuries.
ceivably have been a way in which a person could fund his own pilgrimage or voyage, which would have been the case where he was to receive payment or an advantage on his safe return or did not have to return such payment of advantage in that case. Or, conversely, it may have been a way of ensuring an amount of money for his dependents while he was away or if he did not return, which would have been the case where payment was to be made to his family in the event of his not completing the voyage or of payment not having to be returned by his family in such an event.\textsuperscript{138} If this is correct, then obviously these contracts, for example of sale, were not disguised wagers but rational and reasonable contracts by which pilgrims and other voyagers could raise money on conditions favourable to the lender or person financing the voyage.

This explanation of the nature of contracts concerning voyages would appear plausible in the case of contracts concluded at a time when pilgrimages were still common. But it becomes less likely, given the fact that they appear more often than not to have involved a destination with religious connotations, that that was their purpose and nature at the time when pilgrimages were no longer common practice.

It may well be that such contracts initially fulfilled a useful function at the time when (enforced and voluntary) pilgrimages still occurred in the Northern Provinces, but that from the second half of the sixteenth century their purpose and nature changed when, although retaining the form of the earlier contracts, they became nothing more than wagers where the completion or otherwise of a voyage to Rome or elsewhere formed the decisive uncertain event. The frequency of such wagers relating to voyages to religious destinations may simply have been a remnant of earlier practices. There is evidence that such wagers were not simply ones concluded by inebriated gamsters on the spur of the moment in some tavern and as a result of some difference of opinion, but rather that they were concluded calculatedly by speculants, adventurers, bankrupts, and others who were prepared to go on such voyages in the hope of making a profit.\textsuperscript{139} This may well explain the amounts involved and the formalities with which these wagers were concluded. And, finally, the fact that the wagers were disguised, more often than not as sales, may have been a reaction to growing disapproval of such contracts in Roman-Dutch law. As will be shown shortly, this disapproval manifested itself in various prohibitions on wagers proper, and on wagers disguised as other conditional transactions, including contracts or sale and, importantly, contracts of insurance.

\textsuperscript{138} The sale may thus have been akin to a (conditional) loan or have fulfilled the function (later) performed by the insurance contract.

\textsuperscript{139} See further in this regard Hoetink who refers in this regard to Shakespeare's \textit{The Tempest} (Act III Scene 3 r 65) and to other contemporary English sources which indicate that such travelling for profit was not uncommon in the early seventeenth century. There were, of course, also other ways of making a living off this practice. There is evidence from 1605 of the Amsterdam cloth merchant Heyndrick Willemsz who sought to make an existence out of the purchase and sale of wagers on the capture of towns and on voyages (see Pieck 192-193).
5.2 The Legality of Wagering Agreements

5.2.1 Introduction

The principal characteristic of the approach of Roman-Dutch law towards wagering was the gradual shift it underwent from initially approving and later increasingly disapproving wagering agreements. Exactly how this came about and what the position regarding wagering agreements was at different times, are matters of some controversy. Not only were there differing local laws and legislative regulations on the topic, but the metamorphosis was no doubt largely the result of a change in the underlying values of public policy and morality which governed wagers. And, as was the case with other areas of Roman-Dutch law where shifting and variable public-policy considerations played a role, this unfortunately resulted in wagers being one of the more controverted and uncertain topics in the Roman-Dutch law of contract.

What follows is an attempt to reconstruct and outline the evolution of the law in the Netherlands relating to wagering agreements. Developments are described roughly in chronological order, and whilst the views of writers and the published opinions and judgments of the courts were canvassed in detail, the legislative measures referred to of necessity include but a small selection of the large body of mainly local provisions dealing with (gaming and) wagering.

Before turning to the legal position in the Netherlands, it may be useful, by way of providing some perspective, briefly to note the earlier position in Roman law and to spotlight, equally briefly, the position in later Italian law.

Unlike gaming agreements which were unlawful in principle, agreements of wagering were completely valid and enforceable, in Roman law. A certain form of wagering even fulfilled an important procedural function. All wagers, whether on the outcome of games of skill (by participants or spectators), or on other uncertain future events, were lawful, although limitations were later imposed on the amounts which could be wagered and which could be claimed at law. Only wagers at the gaming table

---

140 See eg Lee Introduction 246.

141 See generally on the Roman-Dutch law of wagering agreements, Aquilius 113-123; Fockema Andreae Oud-Nederlandsch recht 78-80; Gane 22-29; Goudsmit Kansoevereenkomsten 80-112; Harker par 418; Scholten Oorzaak 141-145; and Wentholt 21-22.

142 The reason why wagers were treated differently, according to Scholten Oorzaak 141, was because wagering was more of a private matter and less likely to be of public concern.

143 On wagering in Roman law, see eg Gane 22-24; Goudsmit Kansoevereenkomsten 51-57; Kurylowicz; Molengraaff ‘Verzekering’ 405-407; Molster Spel 16; and Wentholt 15.

144 The legal wager (sponsio in lite), customarily concluded between litigants and in terms of which the one who lost the case had to pay the winner a sum of money, was employed as a means of discouraging frivolous litigation and vexatious appeals. See further eg Gane 25-26 and Pieck 188. The practice had become uncommon in the time of Grotius (see his Inleidinge III.3.48 and further §§ 5.2.3 n182 and 5.2.4 n221 and n223 infra).
were unlawful. Thus, wagers were lawful unless the causa of the particular wager was prohibited, such as in the case of wagers on the result of a prohibited game.

The position in Italian law in the Middle Ages and thereafter was of interest to Roman-Dutch law because of the number of references by Roman-Dutch jurists to the very often contrasting approach to wagering of their Italian counterparts.

According to Santerna, for example, wagers were, in Florence at any rate, not in principle invalid. They were valid as was the case with all other conditional agreements, but similarly, like all other agreements, wagers too could be invalid if against good morals or public policy. An example of this was of a wager on illegal gaming or on the death of a free man. He noted that wagers were very much commercial contracts and that, in his time, merchants everywhere were accustomed to concluding such wagers, there being no doubt that it was permissible to wager. Wagers were not per se dishonest, the more so if they were concluded for reasons of tranquility and peace of mind. And since wagers were not prohibited by law and were permitted by the customs of merchants, there was no right of redress.

145 That is, wagers on (prohibited) games of chance. They were considered mere gaming (alea) and thus treated the same as gaming agreements. The winner of such a wager, like the winning gamester, could not sue for his winnings although the loser (or his heirs, father, master) could in fact recover what he had lost (see again § 2.2 supra on agreements of gaming in Roman law).

146 See generally Van Houdt 19-21.

147 See De assecurationibus II.29. Wagers remained valid irrespective of whether the outcome of the uncertain event in question depended on the conduct of a known or unknown third party (eg, if X marries), or on the conduct of the parties to the wager themselves (idem II.10-11 and II.13), irrespective of the fact that the parties had no connection or interest in the event in question (eg, whether or not Emperor dies within a year (idem II.1-4)), and even if the uncertain event was unusual (eg, whether or not a particular ship arrived (idem II.17)). But in the same way as agreements relating to illegal gaming (which included wagers made in the course of unlawful gaming (idem II.31)), and dishonest agreements generally were invalid, so too wagers which were against common decency were invalid, eg wagers which could endanger life and limb and bring misfortune upon someone (idem II.22). Further examples of immoral and thus invalid wagers (idem II.6-9) included wagers in terms of which A was to give B 10 if B killed C within a year; or if B committed adultery with C’s wife, failing which B was to give A 10. The reason for such invalidity was that no one should be encouraged to commit a crime (idem II.12). The only exception Santerna would recognise in this regard, was where the wager concerned the death of an enemy of the state or of the faith (eg Africans and Turks, but not Jews), in which case a condition endangering the life of such a person would be praiseworthy (idem II.14-15); if the contracting parties were by reason of circumstance unlikely to accomplish that act on condition of which they wagered (idem II.26); and where the person whose death was the condition of the wager, consented to the wager on his life (idem II.28).

148 Idem II.21 and II.23.

149 Idem II.23-24. See further Holdsworth History vol VIII at 296n1 according to whom, however, Santerna was here speaking not of wagers (sponsiones) but of insurances. See too Tytens ‘Policy’.
Straccha too mentioned a large number of examples of wagers which were valid but noted that wagers on the life of a person were not valid unless that person had agreed that his life could be the subject of a wager and had realised that his life could possibly in consequence be endangered. The basic principle, namely that (commercial) wagers were valid as long as they were not concerned with an improper matter, was subscribed also by Scaccia.

Of more relevance to Roman-Dutch law were the views of Roccus who wrote on the law of Naples in the mid-seventeenth century. He proceeded from the premiss that all wagers (sponsiones) were lawful and valid as long as they were not concerned with immoral matters. If the wager concerned an honourable object (causa honesta), the one party could as a result of the outcome of a particular uncertain event make a profit while the other suffered a loss. Thus, wagering agreements were valid, depending on the nature of the matter on which they were made.

One Italian example of a wager on the life of a third party was often referred to in Roman-Dutch law. It concerned the case of Hieronymus Andreini v Insurers which came before the Florentine Court in 1641 and which required the Court to determine the validity or otherwise of an agreement of wager on whether or not a third party would die within two years. In upholding the validity of agreement, the Court noted that the subject-matter of the wager here was not one of those on which it was, by reason of legislative intervention, prohibited to wager. It was accordingly valid at common law to wager on the life of a third person. Further, there was no doubt that wagers concluded between merchants on one or another future outcome were valid unless they concerned an immoral object.

---

150 Eg, a factual wager on whether the Emperor or the Pope would die within the year (‘sponsio facta, quod imperator vel pontifex hoc anno morietur, an valeat’), or whether or not a particular ship would arrive in the port of Ancona. He also noted that ‘sponsio facta super masculo vel femina nascituro, non est improbata’, but then wondered what the position would be ‘quid si pareret hermophroditum’. See De sponsionibus IV.1.

151 Idem IV.8 (‘sponsio super morte privati hominis, non valet, fallit, si is super cuius mortem fit est voluntatem suam accomodet’).

152 See De commerciis I.1.88 (‘sponsio (in commercio) ... si sit honesta, seu habeat causam honestam, est licita’).

153 See eg Schorer Aantekeningen 312 (ad III.3.48).

154 See De Assecurationibus note 73. Examples of invalid wagers were those on the election of the Pope and the nomination of cardinals, on the price of corn, and on the pregnancy of women, matters on which, by Neapolitan legislation, it was prohibited to wager.

155 And one in the form of an insurance: see § 6.3.2 infra as to wagering insurance.

156 See Roccus/Feitama Gewijsdens decils 3. On behalf of the defendants, reference was made to Stracca who required the consent of the person on whose life such a contract was concluded (see n151 supra); for the plaintiff it was argued that the contract was valid because a (genuine) uncertainty existed and also because such contracts were valid according to mercantile custom.
5.2.2 The Position Prior to the Seventeenth Century

The earliest indications in the Netherlands seem to suggest that, as in Roman law, wagers were, in principle at least, valid and enforceable contracts. Thus, on 2 October 1488, the Grand Council of Malines rejected an appeal against a decision of the Hof van Holland condemning the appellant to pay the amount due on a wager.\(^{157}\)

The validity of wagers at common law is confirmed by the fact that from early on various towns in their municipal ordinances prohibited wagers and wagers disguised as other conditional transactions on particular topics. Numerous examples of this exist in the fifteenth century. Thus, Leiden keuren declined the enforcement in local courts of ‘aventuerlijke contracten’ on various topics, including pilgrimages and voyages.\(^{158}\) In Kampen it was laid down on 26 September 1489 that no adjudication would be permitted on contracts (‘koopmanschap’) or wagers on pilgrimages. The Amsterdam keur of 24 March 1492 prohibited contracts of sale on pilgrimages and voyages, and determined that the local Court would no longer hear claims based on such sales, nor on any wagers or gaming of whatever nature.\(^{159}\) The prohibition seems to have been ineffective for it was repeated in 1500. A similar measure was promulgated at Gouda on

\(^{157}\) See De Smidt & Strubbe vol I at 220. The decision a quo was that in The Heirs of Jan Splinter v Jacob de Gortere. In reversing the decision of the local (Schepenen) Court in Rotterdam, the Hof van Holland had condemned the plaintiffs to a ‘door Jan Splinter bij een weddenschap ingezette bedrag’. Less clear from the bare facts known, is the earlier decision of the Grand Council on 25 March 1480 in the case of Laurens Tammy v Jehan Loupes & Andrieu Chinot in which, on appeal from the local Court in Bruges, the Council had refused the winner of a wager his claim to the stake and declared it forfeited, fining the loser and condemning the winner to pay the cost of the process (idem at 177).

\(^{158}\) As to the Leiden provisions of 1450, 1508, 1545, see eg Fockema Andreae Oud-Nederlandsch recht 79. He quotes from the last of these measures where these contracts were described as ones where one party claimed from the other ‘van gelagen of maeltijden, die zij voort an drinkken of eten, ende dat setten op kinder te winnen, of wijf of man te nemen, of op een eerst name van kinder te kersten, of op een eerst name van der stede huys te roepen, of op die tot enigen diensten van der stede geset te worden, of op breggescliach, of op die eerste, die tot Calis reysen sullen, of yement te kippen op een roester, of op beverden te gaen, of almsen van der bedevaert weder comt, of ervo te nemen, of succk ende diergeijelike manieren, hoe men die vinden, delynken, peynsen, voirtsetten, of visieren mach, ende of dat oick yement enige pennynge of gelden in der manieren ende formenc voirsor, utgave ende verleyde of oick comanscip dair op deden’. As to a Leiden keur of 29 September 1599 which provided that ‘alle koophandel’ (ie, conditional sales, or simulated sales, or disguised wagers) on the life or death of a third person not under the tutelage of the buyer or seller, would be invalid, see Roeleveld Lewensversekeringsreg 20.

\(^{159}\) The keur, reproduced in Breen 262, as follows: ‘Ommmedat dagelicx veel ende diversche questien vallen ende geschien tuschen denghenen, die up pellegrimaigen, reysen ende andere bevaerdende open ende vercopen, soe ist dat den heer ende gerecht daerinne voersen ende de questien ende geschienen na hore vermogen schuwen willen; daeromme geordonneert ende gewillkeurt hebben, willekeuren ende ordonneren, dat nyement, wie hy zy, up ghenen bevaerdende, reysen of andere boetschappen en cope noch en vercope, want men van nu voertan binnen deser stede geen recht daeraf doen en sal, noch oick van enighne weddinghen, sullen ende bouveren, oick hoe ende in wat manieren dat die geschien zullen mogen; waerschuwende mits desen een ygelike om hem daema te mogen rechten.’
11 March 1514 where it was provided that no claims would be heard on contracts on pilgrimages or on one or more lives.\textsuperscript{160}

Legislation on wagers was promulgated on a higher level as well. Thus, the \textit{placcaat} of Emperor Charles V of 4 December 1544 prohibited wagering on the details of the birth and sex of unborn children.\textsuperscript{161}

In the sixteenth century there is further evidence of the adjudication and approval by some courts, and the prohibition by some legislatures, of wagering agreements.

In 1551 a claim on an agreement of wager came before the \textit{Hof van Holland}.\textsuperscript{162} In a tavern one Van Weede boasted that he would before a specified date be elected to office in the town of Naarden (\textit{‘Schout van Naarden’}). A fellow patron, one Volkers, took him up on this and bet Van Weede one Carolingian guilder (which he paid him) against 100 that he would not be so elected. Volkers lost the wager and Van Weede claimed the 100 guilders from him. On 22 December, the \textit{Hof} dismissed the claim, not, it appears, because the wager as such was not regarded a binding, but because of the fact that Van Weede had at the time of the bet already received his appointment and thus knew with certainty that he would win the wager, a fact which was apparently regarded as indicating fraud on the part of the claimant.\textsuperscript{163}

A \textit{keur} of Haarlem of 19 March 1557, in s 74, provided all commercial contracts (\textit{‘commenscappen’}) and wagers entered into contrary to good morals and the interest of the State to be deemed null and void and prohibited any adjudication on them.\textsuperscript{164}

In a provision of major importance and also one which was subsequently (incorrectly) relied upon for the view that wagers on some particular topics were unlawful, s 32 of the \textit{placcaat} of 20 January 1571 prohibited insurances and wagering insurances on lives and also (insurances and wagering insurances) on wagers of journeys or voyages and similar events (\textit{‘asseurantien ende verseeckeringen, op ’t leven vande Lieden ende Persoonen, cock op weddingen van reysen oft voyagian, ende

\begin{flushright}
\textsuperscript{160}This \textit{keur}, quoted by Van Herwaarden \textit{Bedevaarten} 398n61 provided as follows: ‘Is noch overdragen dat men van nu voortan geen recht doen en zal van gheenrehande comanschappen die daghefijx geschyen up bedevaerden off up lyven [levens], heizy up een, twee of meer lyven hoet genoemp mach wesen.’

\textsuperscript{161}I could not trace this placcaat. It is, eg, not taken up in the GPB. In s 3 tit LIV of the Antwerp compilation of customary law of 1582, the \textit{Impressae} (see De Longé vol II at 400-401), it was stated with reference to and following this ordinance of Charles V, that \textit{‘weddingen op knechtkens oft meyskens zijn verboden’}.

\textsuperscript{162}See Naeranus \textit{Sententien} vol I decis 131.

\textsuperscript{163}See further Hermesdorf ‘Roomsche reijsen’ 215n2. See too \textit{idem} 218-219 (and again § 5.1.5 at n133 supra) for details the cases where the \textit{Hof van Utrecht} in 1564 and again in 1565 regarded wagers on voyages as valid by enforcing payment after they had been completed.

\textsuperscript{164}See Aquilius 116 who is of the opinion that \textit{‘commenscappen’} literally meant all mercantile contracts, but that the term was as a rule used to indicate contracts of insurance. I could find no positive indication that this was indeed the case. The terms may well here have referred to simulated contracts generally (and not only of insurance) which disguised wagers.
As is apparent from the wording of this provision, it was a prohibition not on wagers (on voyages and similar events), but on such wagers being cast in the form of and concealed as insurances. This is confirmed by the fact that the *placcaat* was one dealing specifically with insurance contracts. Undisguised wagers, and even wagers disguised as other forms of contract such as sales, were not affected by this provision and apparently continued, in the absence of any other legislative prohibition, to be regarded as valid. This restrictive interpretation, confining the operation of the section in question to wagers disguised as insurance contracts (that is, to wagering insurance), was supported by later commentators such as Schorer and Van der Keessel who made the point of noting that it provided no support for those who saw the measure as a general prohibition on wagers (at least on the topics mentioned) in the Netherlands.

Thus understood, it is therefore not strange that the *Hof van Utrecht* on 13 May 1592 approved of a wager disguised as a sale on a voyage. The *Hof* no doubt understood that the *placcaat* of 1571 was not concerned with wagers *per se* but rather only with the concealment of wagers, at least on particular topics, as insurance contracts. The same was no doubt true, as later commentators such as Van der Keessel pointed out, of the more pertinent decision of the *Hooge Raad* on 29 March 1597, approving a judgment of the *Hof van Holland* that a wager on the performance of a voyage or pilgrimage to Jerusalem was valid and of full legal effect.

---

165 This provision was preceded by s 4 tit VII of the *placcaat* of 31 October 1563 which contained a more restrictive prohibition (not of wagers generally but) of wagering insurances, ie, insurances in the form of wagers ("asseurantien ... by forme van verseekeringe, weddinge oft andersints").

166 See further § 6.4 infra as to wagering insurance.

167 See § 5.2.4 infra for their views.

168 The same may be said of s 2 tit LIV of the Antwerp compilation of customary law of 1582, the *Impressae* (see De Longe vol II at 400), which provided that "hoe wel men voor tijden [ie, previously] plochte t'useren asseurantie op d'leven van Persoonen ende op eenighe Reysen, ende daarop rechte te doen, stijnt de selve asseurancien, obligatien ende weddinghen ende dierghelijcke inventien ghemaect op d'leven van personoen, op eenighe reysen, oft voyagien, by d'ordinantie [of 20 January 1571] verboden".

169 See Naeranus Sententien vol I decs 175. Here the parties had concluded an agreement regarding a voyage to Jerusalem in which A (a surgeon from Gorinchem) undertook to pay B 100 gold coins ("Rosennobelen") (or 800 Carolingian guilders in specie or their value in ordinary currency), while B undertook to pay A 300 of those coins (or 2400 of those guilders in kind or their value), depending on whether or not A would travel to Jerusalem and return safely to Gorinchem. Thus, if he did not go on the voyage, A would lose 100, but if he did go, he would win 300. Because of great risks and expense of this voyage, A soon had a change of mind and the following day sought to cancel the contract he had concluded so rashly. He offered to pay B a specific amount by way of forfeit money (arrha, roukoop) to be relieved of his obligations, but B was intractable and claimed payment of the 100 gold coins in the local Court at Gorinchem, obtaining judgment against A on 26 March 1594. A thereupon reconsidered his position, decided to undertake the voyage and "niet zonder groote pericelen van gevangen ofte beroold te worden bij de Piraten", he travelled via Cyprus and reached Jerusalem on 15 August 1594. Upon his return, he appealed to the *Hof van Holland* which gave provisional judgment against B in the amount claimed, and later on 15 July 1596 finally condemned B to pay A that amount together with interest and costs. B went on appeal to the *Hooge Raad* but without any success.
Section 24 of the Amsterdam keur on insurance contracts of 1598 prohibited the conclusion of and declared null and void any insurances on the lives of any persons or on wagers of voyages or similar topics (‘Assurantien ... op 't leven van eenige ... Persoonen, [oft] op weddingen van reysen ofte voyagien, ende diergelijcke inventien’).\(^{171}\) In similar vein, s 10 of the Rotterdam insurance keur of 1604 provided that insurance was not permissible on the life of any person or on wagers (‘op 't leven van eenige persoonen ofte weddinghe’). Again, as was the case with the placcaat of 1571, these provisions did not prohibit wagers on certain topics but certain types of insurances, namely those on wagers or wagering insurances.

Confirmation that wagers on certain topics were in fact not prohibited by the Amsterdam keur of 1598, is to be found in the promulgation of a keur in that city specifically directed at wagers on such and other topics a little less than four years later.

During the Eighty Years war it became customary to conclude excessive wagers on the capture of cities, forts or trading posts or on the death of rulers.\(^{172}\) This was expressly prohibited in the general interest by the Amsterdam keur of 8 December 1601.\(^{173}\) This keur restated and amplified previous Amsterdam keuren on the topic and provided that in future no one was permitted to promise or to receive any money on the capture of cities or fortifications, the lives of princes, voyages or any other conditions of whatever nature, imposing specific penalties in this regard and declaring legal questions arising from such wagers not justiciable.\(^{174}\)

5.2.3 The Seventeenth Century

In the seventeenth century the pattern of continued judicial approval and of increasing legislative disapproval and curtailment continued. Now too the voices of jurists were heard and, as will become apparent, a difference of opinion as to the validity

\(^{171}\) See too the almost identically worded s 2 of the Middelburg insurance keur of 1600, the only difference being that this section declared that in future (‘voortaen’) such contracts would be prohibited, and omitted the reference to ‘voyagien’.

\(^{172}\) See again § 5.1.2 supra.

\(^{173}\) See Amsterdam Handvesten vol II at 507. According to Van der Keessel Prelectiones 1106-1107 (ad III.3.48 and 49), there were two reasons for the these wagers being declared invalid, namely to prevent someone squandering his property recklessly, and to prevent disputes and feelings of animosity arising as a result of such wagers being concluded between supporters of the opposing parties in the war.

\(^{174}\) It provided the ‘niemant van nu voortaen op het innemen van eenige Steden, Sterckten [fortifications or strongholds?], leven van Princen, Reysen ofte eenige andere conditien, hoedanigh die sullen mogen wezen, gelt uijtdoen ofte nemen sal mogen’, on the penalty, in the case of contracts involving amounts below f100, of a forfeiture of f25, and in the case of other contracts, of a forfeiture of f50, and, in addition, on a further punishment being imposed, depending on the circumstances, should the condition in question be found to be to the detriment of the common good or otherwise improper. Interestingly, therefore, only those wagers of an impermissible nature or against the public interest would be subject to additional punishment, from which it may be deduced that the wagers prohibited by the keur were not necessarily or per se improper or against public policy.
of wagers arose, at least in theoretical circles, and the view that wagers generally were not or at least not fully valid, made its first appearance.

The Amsterdam *keur* of 1601 apparently initially had little effect and wagers on the prohibited topics continued in the first decade of the seventeenth century. There is evidence, for example, that a reliance on the *keur* by the loser of a wager on a voyage concluded in Amsterdam did not prevent the *Hof van Holland* in 1609 from holding her liable on the contract, although the *Hof* did not express any opinion on the validity of the *keur* itself.\(^{175}\)

From this period, too, the Antwerp compilation of customary law of 1609, the *Compilatæ*, provides a useful summary of the legal position there. It appears that wagering agreements were not generally invalid but only those specifically prohibited. Wagers thus prohibited, together with wagers disguised as insurances and other contracts, were those concluded on particular topics, presumably those which were at the time considered to be contrary to public policy.\(^{176}\) In addition, wagering insurances on such topics were prohibited separately.\(^{177}\)

One of the most important influences on the Roman-Dutch law of wagering in the seventeenth century and thereafter, was the view of Grotius. Although rather cryptic and not specifically linked to any authority, his approach provided a minor but identifiable turning point.

Grotius treated wagers (‘*weddinghe*’) in conjunction with gaming.\(^{178}\) After discussing the effect of a condition (‘*indien*’) relating to a future event on a contract,\(^{179}\) he turned\(^{180}\) to the question whether or not wagers, which he regarded as promises made

\(^{175}\) The woman, jointly with a clergyman who had in the meantime sought refuge abroad, bought cloth in 1602 on condition that the purchase price was to be paid only when the seller had performed a voyage to Jerusalem, which the latter then in fact did. See further Pieck 192-193.

\(^{176}\) Paragraph 5, title 1, part IV (‘*Van geoorloofde ende ongeoorloofde contracten*’) of the *Compilatæ* (see De Longé vol IV at 2-9) referred to contracts in themselves invalid because of their impropriety (‘*onbehoorelijkheid van dijeri*’), and mentioned as examples of such invalidity usury and prohibited wagering (‘*woecker, verboden weddingen ende dijergelijke*’). Section 14 pointed out that all insurances, wagers and contracts made on condition of the life or death of a person, any voyages or pilgrimages, the sex of an expected child, the capture of cities and the like, were by various legislative provisions prohibited (‘*alle versekeringen, obligatien, weddingen ende diergelijke voorwaerden ende bespreken, gemaeckt op leven ende sterven van persoonen, op eenige reijsen oft bevaerden, oft baeren van knechtskens oft meijskens, oft op innenemen van eenige landen, plaetsen oft steden, sijn, volgende de placcadæn van den prince ende verschêrde ordonnantien daerop gemaeckt, verboden*’).

\(^{177}\) Section 316 of par 9, title 11 (on insurances), part IV of the *Compilatæ* (see De Longé vol IV at 198 et seq) noted that no one could conclude insurances on lives, capture of cities, sex of children to be born, or similar events (‘*niemant en mach eenige versekeringe aengaen op leven oft sterven van persoonen, op innemen oft niet innemen van landen oft steden, op de geboorte van knechtskens oft meijskens, oft diegerlijkke nieue vonden*’), as was provided for in more detail in title 1.

\(^{178}\) *Inleidinge* III.3.48-49. See generally on Grotius’s treatment of wagers and ‘*aventuerlike contracten*’, Fockema Andreae *Aanteekeningen* vol II at 256.

\(^{179}\) *Inleidinge* III.3.47.

\(^{180}\) *Idem* III.3.48.
upon a condition ('toezeggingen op een indien'), were legally binding and valid when there was neither an indication of an intention to donate nor any other transaction involved ('ende dat oock gheen andere handelinghe daer by en kome'). Acknowledging that it was an uncertain and disputed legal point, Grotius then expressed the opinion that for him personally ('by ons') it was clear that for the common good (and thus on grounds of public policy) all wagers were to be devoid of any legal effect ('krachteloos'). This rule, Grotius recognised, was subject to two exceptions, insurance being an example of one. Elsewhere Grotius provided the reason why he considered wagers as having no effect, namely because, although everyone has power over his own goods, a person was still not permitted to use his own goods to his own detriment and without the advantage of the common weal.

Thus, despite admitting that the point was uncertain, Grotius was disposed towards and expressed the view that wagers were not legally binding and valid. But some questions remain. Firstly, Grotius was concerned here with the validity or otherwise of wagers which did not involve any other transaction, and thus, it would seem, not with wagers disguised as sales or as insurances or concerned with any other purpose but speculating on the future. It is further difficult to determine from this text precisely what Grotius meant by 'krachteloos'. He answered the question whether wagers were legally valid and binding by stating that they were of no effect, so that the immediate assumption is that he considered wagers invalid. But it is still uncertain whether, according to Grotius, a wager was legally invalid so that any payment by the loser of the wager was recoverable (as was the position with gaming contracts in Roman law), or whether such recourse was denied for some other reason. Lastly, and frustratingly, especially in view of the considerable influence the views of Grotius had on his successors, there is of course no indication in the Inleidinge of the authorities he relied upon for this particularly restrictive view of wagers which, it would appear from the references subsequently supplied by commentators, was not fully supported by the legal authorities of his time.

---

181 And not necessarily in the whole of the Netherlands or even in Holland: see Aquilius 118 for this explanation.

182 On the first exception, insurance, see § 6.2 infra as to the view that insurances were a form of valid wager and as to the difference in Roman-Dutch law between insurances and wagers. The second exception concerned the practice, common in Holland in earlier times, of litigants wagering on the outcome of their legal process, i.e., 'wanneer de eene dingman den anderen in de recht eene wedde boodt over schuld of onschuld'. See again § 5.2.1 n144 supra.

183 Inleidinge III.30.13.

184 Pieck 193 notes that in the copy of the Inleidinge he consulted, there appears a marginal annotation in seventeenth-century handwriting to the effect that if someone sold his horse for ƒ388, payment to be made when Antwerp was captured by the Spanish, such sale was to be regarded as valid and not as a wager.

185 Such as Groenewegen: see infra.
Also dating from this time, there is a legal opinion of 1624 on the question whether a contract in terms of which a widow and a young girl undertook that the one of them who was to marry first, would have to pay the other a large sum of money, was legally valid. The widow, it turned out, was the first to marry and the young girl was no doubt intent on obtaining payment of the wager. According to the opinion, this agreement was contrary to all laws, both civil and canonical, as well as against good morals ("tegens de goede zeden"). Being null and void, the opinion continued, there was no valid claim on it and if anything had already been performed, it could be recovered. Thus, although nothing was said about wagers generally, the wager in this case was considered illegal and thus void because of its subject matter being considered against good morals.

Sande mentioned two cases of wager, the one on a question of impersonal fact, the other on whether the one party’s wife would give birth to twins. Both wagers were approved of and enforced by the Hof van Friesland early in the seventeenth century. It must be remembered, though, that the reception of Roman law in Friesland was more extensive than elsewhere in the Netherlands. By contrast, Stockmans, with reference to the question whether wagers on an uncertain event were valid and whether an action and an exception was available to the parties to it, expressed the opinion that the judicial view inclined towards invalidity. However, it was supported by, amongst other authorities, a decision by the Raad van Brabant in 1607 in which an agreement for the transfer of gems and pictures and the payment of money on condition of peace in France and the occupation of the town of Ostend, was upheld. From Schrassert there is a reference to a decision of the Hof van Gelderland of 3 October

---

186 See Hollandsche consultatien vol V cons 23.

187 It was contrary to good morals especially when the amount wagered was large, for then ‘de liberteit van Huwelijeken door een rechtveerdige vreese zoude belet worden’, and even if the amount was smaller, marriages would not be ‘in ’t geheel verhinderen’ but could at least be ‘grootelijks obsteren’.

188 Decisiones Frisiae III.9.1.

189 In the first case, decided on 24 March 1607 in Lijckle Hiddes v De Erfghenamen van Claes Waeyes, an agreement concluded subject to an uncertain condition or dependent upon chance or an uncertain outcome (‘onder Conditie van gheval, oft hangende aen het fortuyn ende twijffelachtige uytcomste’), such as if a ship arrived from Africa or Asia, or if someone became burgomaster within a year, or if someone did not die within one month, was regarded as valid. The Hof pointed out that it was accepted that all agreements concluded on a condition or dependent upon an uncertain outcome, were regarded as being of sufficient reason and cause and that their validity was not lessened or removed by any inequality of the respective promises, as long as the parties had consciously so agreed, there was no evidence of fraud, and they did not concern an immoral subject matter or were against good morals. A little earlier, on 11 February 1607 in Julius van Botnia v Johan van Hottinga, the Frisian Court had approved a contract in terms of which the one party promised the other ten against twenty ‘indien sijn Huysvrou Tweelinghen baerde’, which in fact happened. Sande contrasted this with the views of others (such as Christinaeus Decisiones Belgicae vol II decis 200 num 5) who rejected contracts ‘over de Swangbaerheytt der Vrouwen ... als ongheoorloft ende oneerlijk’.

190 Decisionum curiae Brabantiae decis 134.
1635 where an action on a wager was heard and enforced, despite the fact that it was concluded under the influence of beer.\textsuperscript{191}

In his comments on Grotius, Groenewegen expressed the rather surprising opinion that the Roman-law distinction between unlawful gaming and lawful wagering was not received in the Netherlands: gaming as well as wagering were both equally prohibited in the Netherlands. He sought to justify the view that wagers were invalid by noting that it was for the common good and, more specifically, that it was in the interest of the State that people should in appropriate cases not be permitted to squander their money on unnecessary and absurd wagers.\textsuperscript{192} Groenewegen further\textsuperscript{193} sought to provide support for Grotius and his view that wagers were invalid. He referred to a number of legislative provisions supporting this view.\textsuperscript{194} Apart from the fact that some of these were concerned not with the prohibition of wagers but rather of wagering insurance, those which did specifically prohibit certain types of wagers or wagers on certain topics, by their very promulgation tended to suggest that at common law wagers were in fact not invalid.\textsuperscript{195}

In apparent contrast to Grotius and Groenewegen, was the approach of Van Leeuwen. He was the first of the Roman-Dutch jurists to display a more principled approach to the question. But ultimately his contribution was rather negligible and unsatisfactory because of an apparent lack of confidence in opposing Grotius on this point. Van Leeuwen noted\textsuperscript{196} that contracts with an immoral or unlawful cause or which were contrary to public policy and general law, could not be enforced, and that, according to Grotius, wagers which depended on a bare accident and were not mutually beneficial, were included in this category of contracts. But, he noted further, wagers were in fact not prohibited by any law and were valid in themselves in so far as they were made on a fortuitous condition or depended on chance.\textsuperscript{197} Thus, as a rule wagers were valid in themselves, unless they were concluded in respect of an immoral subject, or were repugnant to morality, or the one party had by fraud induced the other

191 Codex Gelro Zutphanicus (1749) 512, referred to by Scholten Oorzaak 142): 'Die weddinge ingaat, schoon bij het bier, moet zijn verlos betaalen, ende werd daerop regtgedaeri'.

192 See Groenewegen Aanteekeningen n114, referring to Grotius Inleidinge III.30.13. But, as is readily apparent from the jurisprudence in the sixteenth and seventeenth centuries, numerous decisions in the period 1550-1670 show that wagers did in fact give rise to an action and that Groenewegen's opinion was not correct. True, wagers on particular topics were prohibited in some towns, eg in Amsterdam by the keur of 1601, but that says nothing about the common law on which Groenewegen was expressing his opinion here.

193 Aanteekeningen n 115.

194 Namely s 3 title LIV of the Antwerp Impressae of 1582, the Amsterdam keur of 1601, s 2 of the Middelburg keur of 1600, and s 14 of the Rotterdam keur of 1604.

195 See further § 5.2.4 infra for Van der Keessel's criticism of the authorities relied upon by Groenewegen in his support of Grotius.


197 Here Van Leeuwen referred to and defended the view of Sande (supra) as to the validity of wagers.
Insurance and Gaming and Wagering

145
to act. But then he backtracked and stated that he was nevertheless not prepared to affirm this view of the law in opposition to the contrary opinion of Grotius and, following him, Groenewegen.\(^{198}\)

Evidence of the fact that the judiciary too was changing its opinion on wagers, came in the form of a decision of the Hof van Holland on 7 June 1662 in which the Hof refused to adjudicate on a wager and interdicted the parties concerned not to trouble one another any further about their questionable wagers, either at law or elsewhere.\(^{199}\)

Even more decisive was an opinion two years later in 1664. While it was stressed that the agreement under consideration there was not a wager ("species sponsionis, of een toesegginge op een indien") and had nothing in common with it because of the fact that there was no reciprocity,\(^{200}\) according to the opinion wagers were null and void ("weddingen zijn nul ende krachteloos").\(^{201}\) Reliance for this view was placed, in the main, on Grotius. The agreement in question was merely a unilateral promise or undertaking conditional upon a future event which was lawful and binding and which, on the happening of that event, was fully effective and gave rise to an action. Such promises were enforced on a daily basis by the courts. And, the opinion continued, even if the agreement here was in fact a type of wager ("species sponsionis of sooerte van weddingen"), it could still have been valid had it been concerned with a lawful matter for such wagers are understood to be permissible and binding ("sponsiones super re honesta licitae sunt").\(^{202}\) Thus, while the opinion accepted the rule that wagers were null and void, it noted that in addition to the requirement of mutuality for wagers, the

\(^{198}\) In Rooms-Hollands regt IV.14.5, Van Leeuwen came around to the view of Grotius even more pertinently and declared that wagering was of the same nature as gaming, there being no claim and no redress in both. Other views from around the middle of the seventeenth century confirming the validity of wagers in principle, include that of Zutphen that a wager on the result of a (permitted?) game between two players was valid and enforceable (Practyke der Nederlandsche rechten sv 'spel' n 4, indexed in La Leck Index sv 'gambling' and ibid Register sv 'spel'; and that of Perezius Praelectiones III.43 who maintained that wagers were recognised by law, provided each party incurred an equal risk, or at least that neither staked his money on an event which he knew to be a certainty (that would be fraudulent), and provided also that the subject-matter of the wager was honourable and such as would be approved of by merchants.

\(^{199}\) See Alphen Papegay ofte Formulier boek (1720) 302, referred to by Scholten Oorzaak 143. Alphen remarked on this that it was commonly done in case of disputes arising from wagers: 'zulks werd gemeenlijk gedaan als tusschen parelijen kwestie is over weddingen die na regten niet mogen bestaan'. Scholten points out that it is unclear whether the words 'na regten niet mogen bestaan' referred to municipal statutes or to the common law. Although it is very possible that Alphen referred simply to the former, the presumption soon arose in Roman-Dutch law that it was in fact a reference to the latter, and Alphen was often quoted in support of the view that wagers were unenforceable at law.

\(^{200}\) Brothers A and B had concluded an agreement in terms of which A acknowledged owing B £3 000, which sum A was to pay B if he, A, were to marry his niece. A got married to his niece and B then claimed from A, hence the request for an opinion on whether or not the claim had any merit.

\(^{201}\) See Utrechtsche consultatie vol I cons 108.

\(^{202}\) Examples referred to of such wagers super re honesta, were wagers on a future marriage, or on the sex of an unborn child. But cf the opinion of 1624 supra where a wager on a future marriage was considered null and void.
rule did not apply to wagers on honest matters. Despite this, for the time, rather illogical formulation, an important shift in emphasis had occurred and it had become possible to reconcile the view of Grotius, that wagers were as a rule unlawful, with the practical realities, which generally considered wagers lawful. The generally accepted exception, applicable to all contracts and not only to wagers, had become the rule. This reversal of rule and exception an important conceptual step. As the conception of what were lawful and what unlawful topics shifted and more and more topics came to be regarded as unlawful, so the rule as formulated here gained in practical width while the exception shrank. And in the process the formulation became realistic and logical.

Not long after this opinion, an interesting case came before the Hooge Raad. It concerned a conditional agreement between one Du Mortier and one Van der Hoogh on each other’s lives. By a notarial deed the parties had agreed that the first to die would owe the survivor f10 000. Van der Hoogh died in an accident, and on 11 November 1670 his heirs were condemned to pay that amount, together with interest, to Du Mortier. The Raad regarded the agreement as a wager on an uncertain event, namely who should die first. After referring to the contrary opinion, it preferred the view that all conditional stipulations and even pure wagers, irrespective of whether or not the parties to it had any interest, were lawful (‘de jure subsisteren’) and that they were valid as long as there was reciprocity (‘zo wanneer de verbintenisse is ten wederzyden’), as was the case here. The Raad pointed out that such undertakings had often in the past been adjudicated on by both the Hof and the Raad itself. It accordingly enforced the agreement before it, despite the fact that no money had been paid in terms of it by any

203 Just as one would not say that contracts of sale are null and void except if they are not against public policy, so one would, given the state of the law at the time, not logically have said that wagers were unlawful unless they are super re honesta.

204 That is, ‘wagers are lawful and valid unless against good morals (eg on an immoral topic)’ had become ‘wagers are unlawful and void unless on a moral subject matter’.

205 See Bellum juridicum casus 9.

206 It referred to the view of Grotius that, subject to exceptions, wagers were not valid and binding. According to this view, there would be no claim on the agreement before it, for it was apparent ‘dat de causa debiti, contra publicam utilitatem, & contra bonos mores is, spruytende uyt een weddinge, op elkanderen leven, ende waar door aan d’een of d’andere zyde tot het genot, van zooodanigen notabelen somme te koomen, of groote schelmsstukken somtijds kunnen werden gebryukt, zelfs, teegens de Christelijke plicht, geimptieert op maltanders leven, daar op soo weynig provisie kan vallen, als op eenig spel, ofte super alia quadam’.

207 Reference was made in this regard to decisions mentioned by Christanaeus (see n189 supra), Sande (see n188 supra) and others, and also to the decision of the Hof van Holland in 1551 (see n162 supra) and of that Hof and the Raad in 1597 (see n170 supra). It further mentioned the Cromwell wager: One Hendriksz had bet Helveticus one royal crown (ryksdaaider) against 100 that he (Hendriksz) would not dare address the Lord Protector of England, Oliver Cromwell. Hendriksz travelled to England where he met and spoke with Cromwell. Helveticus was accordingly condemned by the Hooge Raad to pay the 100 crowns to Hendriksz’ heirs (see further on this case Gane 27).
of the parties, that is, despite their being no stake. Presumably the Raad considered the wager as originating in a lawful cause.\textsuperscript{208}

In an opinion of an uncertain date, but given, it appears, after the decision of the Hooge Raad of 1670, a contract subject to an uncertain event was considered valid and enforceable.\textsuperscript{209} If not actually a wager as such, the agreement came very close to one. One Beeks received £100 from one Van Lier in return for a written undertaking that he would pay Van Lier £1 000 and the local Lutheran church a further £100 if William III, the Prince of Orange, was ever appointed as stadholder, and if he occupied the position effectively for at least one year and six weeks, and further if Van Lier made no judicial or extrajudicial claim to enforce this undertaking before that time. They further agreed that failing any of these conditions, Van Lier would not bring any action to recover the £100. When all the conditions were met (William II becoming stadholder of the various Dutch provinces in 1672), Beeks (or rather, his widow) refused to pay the £1 000 to Van Lier. According to the opinion, the agreement in question was valid and Beeks liable to pay. The mere conditionality of undertakings or inequality between performances did not result in invalidity, as long as the agreement was not made on a dishonest or immoral subject.\textsuperscript{210} And, importantly, this outcome, that is, the validity of the agreement, was not altered by the argument that the undertakings in question may have smacked of wagers ("zoude smaken naar wedding") and thus be invalid and unenforceable as suggested by Grotius. The opinion pointed out that according to the authorities, conditional stipulations and even pure wagers were, subject to exceptions, legally valid,\textsuperscript{211} and that both the provincial courts and the Hooge Raad had on many occasions heard and adjudicated claims of this nature.\textsuperscript{212}

The Grotius view was given a further impetus by the way in which the prohibitions in some of the legislative measures referred to earlier, were interpreted in an

\textsuperscript{208} Wenthold 21 mentions a decision of the Hooge Raad in November 1675 that wagers in general were lawful 'mits uit geen verbode oorzaken voortspruitende'. Unfortunately he gives no precise reference to this decision, and it is unclear whether there was in fact a further decision or whether it was merely a case of an incorrect reference to the decision of November 1670.

\textsuperscript{209} Hollandsche consultatien vervolg vol I cons 99.

\textsuperscript{210} Thus, although the opinion was concerned also with matters such as whether conditional undertakings were valid or invalid for a lack of causa, and whether or not the exceptio doli was applicable because of the fact that the great inequality of the performances may have involved fraud, the view expressed was that undertakings, dependent upon uncertainty, were valid, even if unequal, as long as they were not concluded with reference to a dishonest topic and were not against good morals. Reference was made to the Frisian decision of 1607, mentioned by Sande (see n188 supra).

\textsuperscript{211} And that was so irrespective of any interest, and just as long as the obligations were reciprocal ("zoo wanneer de verbintenisse is ten wederzyderi"), as was the case here, seeing that on a different outcome Beeks would have remained profited by £100, or as long as the agreement was beneficial to merchants or the public ("of dat de handelaars of de republikee aan zodanige zaake waren gelegen"). This formulation of the rule and its exception thus reverted to the earlier position and stood in sharp contrast to the formulation adopted in the opinion of 1664 (see n200 supra).

\textsuperscript{212} Here reference was made to the decisions of 1551 (n182 supra), 1597 (n170 supra), 1670 (n205 supra) as well as to the decision on the Cromwell wager (n 207 supra).
opinion delivered in 1678.\(^\text{213}\) The opinion was concerned with a ransom insurance policy\(^\text{214}\) and with the question whether it contravened the prohibitions contained in the Amsterdam insurance *keur* of 1598, that of Middelburg of 1600, and that of Rotterdam of 1604 referred to earlier.\(^\text{215}\) The opinion thought no, because the ransom policy differed from the wagers on lives, voyages and similar events prohibited there, as was also the case with the Amsterdam *keur* of 1601 and the earlier *placcaat* of 1571. It thus equated all those measures and treated the provisions in the insurance *keuren* as concerning wagers on the topics in question generally and not merely wagering insurances on those topics.\(^\text{216}\) The opinion further considered that wagers on matters of life or death were by nature unlawful ("*weddenschappen over iemands leven of dood en diergelyke inventien* were justifiably 'uyt haar eigen natuur ongeoorloft"). And lastly, in discussing whether, in the absence of any legislative measures, a ransom policy was by its nature unlawful, the opinion proceeded from the premiss that, subject to exceptions, wagers were as a rule not valid but unlawful,\(^\text{217}\) and unlawful wagers were contrasted with lawful agreements concluded on an uncertain event ('*geoorlofde handelingen over onzekere gevallen en perijkelen*').

Not surprisingly, the Romanists maintained a view contrary to that of Grotius. Thus Huber,\(^\text{218}\) writing on Frisian law, recognised as the better opinion that conditional promises on an uncertain event (such as wagers) were valid, unless 'er een ongeoorloofde oorzaak is', and that the person who lost a wager was bound to pay the winner, as long as it did not relate to prohibited subject matters.

Thus, it seems that one may accept that in Roman-Dutch law in the sixteenth and seventeenth centuries, as in Roman law, agreements of wagering, as opposed to those of gaming, did as a rule give rise to an action. Wagers were not *per se* unlawful, but only if, like any other agreement, they were against public policy or good morals. This was so even where the wager in question was concealed in the form of another type of contract, such as one of sale or insurance.

In the seventeenth century, though, a different view gained support, namely that wagers were not *per se* valid subject to certain exceptions but that, subject to exceptions, they were in fact as a rule unlawful. This view, expounded by the influential Grotius and taken up and supported by both an opinion in 1664 and by the interpretation of legislation dealing with different forms of wagers, steadily gained ground. It was further clear that there existed a difference of opinion not only on the question how the

\(^{213}\) *Nederlands advysboek* vol II adv 170.

\(^{214}\) See further ch VII § 3.2 *infra*.

\(^{215}\) See again at n171 *supra*.

\(^{216}\) The insurance *keuren*, the opinion noted, subjected wagers ('*weddenschappen*') to insurances ('*ter occasie van ware assurantien, waar mede zy [ie, weddenschappen] eenige overeenkomingen schijnen te hebben, het zelve ter neder is gestelt*').

\(^{217}\) Reference was made in this regard to the views of Grotius and Stockmans (see n190 *supra*).

\(^{218}\) *Hedendaegse rechtsgeleertheyt* XXI.73 and 74. Cf too the view of Sande (n188 *supra*).
rule and its exception were to be stated (that is, on what was the rule and what the exception), but also on the question which topics of wagering exactly it was that were against public policy or good morals; opinion differed on what were res honestae and what not. 219

5.2.4 The Eighteenth Century

The Roman-Dutch law of wagering in the eighteenth century was characterised by a relative decrease in the number of authorities on the topic. There was also a continuing difference of opinion, with the view which regarded wagers as in principle invalid, gaining yet further ground.

Voet 220 regarded wagerers as being in the same position as gamblers so that wagers with regard to games of chance were not allowed and no claim on them permitted. Wagers were not permitted as being contracts for the purchase of a risk at certain price, but that was only the case if they did not fall within the type of contract known as gaming. And, Voet noted, a wager on a game of chance was clearly gaming, the cause of such a wager was clearly dishonourable, and the wager therefore invalid. By contrast, certain wagers were permitted, namely those on games of skill, or those on games of hazard where a claim was allowed by way of legislation. Furthermore, wagers on future matters of any kind, the result of which was clearly doubtful and uncertain and depended not on skill and human energy but on chance, were not permitted. An exception in this regard, were the insurances of goods. 221

Important, Voet established a considerable and, in view of Roman and earlier Roman-Dutch authorities, an unjustified extension of the concept of impermissible wagers. All wagers on an uncertain event, irrespective of the nature of the subject on which there was wagered, were, like agreements of gaming, considered unlawful. 222

After Voet the contributions on the topic by jurists were rather meagre. Van Zurck merely stated with reference to the Amsterdam keur of 1601 that contracts on the capture of cities, on the lives of princes and on the undertaking of voyages, were prohibited, and similarly, with reference to the placcaat of 1571, wagers on the lives of

---

219 See further on this, Gane 25-26.

220 Commentarius VI.5.8.

221 Idem XXII.2. Similarly, legal wagers between a plaintiff and a defendant on the outcome of a lawsuit were considered another exception (Idem III.6.8). See again § 5.2.1 n144 supra.

222 He noted that conditional stipulations, even though framed with regard to an uncertain event (eg if a ship arrived, or if the Dutch forces won a particular battle, or if peace came within a stipulated time), were well recognised and that with reference to such stipulations it was held in Friesland that wagers were valid. Nevertheless, reciprocal promises, constituting a wager on the occurrence of the same event, were not for that reason valid, for they then began to take on the nature of prohibited gambling.
persons and voyages. Bynkershoek was rather cryptic, tending to the view that wagers were invalid and giving rise to neither a claim nor any redress. But he noted that wagers were infrequently adjudicated on because they were prohibited by certain laws.

In the Rechtsgeleerde observatien, published in the 1770s' by way of annotation on Grotius's *Inleidinge*, one observation concerned Grotius's views on wagers. After setting out his opinion, the observation sought to provide the authority for it. First reference was made to numerous statutory provisions. But these statutes not only provide no proof of the general prohibition of wagers (they did not prohibit wagers or at least not wagers generally) throughout the Netherlands or even in the province of Holland, but in fact by their very promulgation tend to prove the contrary, that is, that wagers, and therefore also other (valid) contracts disguised as wagers, were in fact perfectly valid. The observation then referred to the decision of the Hof van Holland of 1662 denying to determine a dispute arising from a wager, without giving any weight to the numerous other decisions in Holland and elsewhere in which wagers were in fact enforced by the courts.

The last three Roman-Dutch authors in the eighteenth century who mentioned wagers in more than just passing, all pertinently made the point of, if not actually opposing the view of Grotius, then at least noting that the authorities relied upon by him and those sharing his view were not fully supportive of their views. They stressed, too, that a difference of opinion in fact existed on the question of the validity of wagers.

---

223 *Codex Batavus* sv 'Wedden' pars 2 and 3. He noted, though, that even after the *placcaat* of 1571 (which he obviously took to be a prohibition on wagers), wagers on voyages to Jerusalem were still held valid 'al lag daer niemand aen gelegeri' (par 2 n1, referring to the Hooge Raad decision of 1597). He also referred to legal wagers (in par 2 n2: 'oude Hollandse weddingen om door vreeze van groot verlies de liên af te schrikken van onregtmatige regtspleging': see again § 5.2.1 n144 supra). Elsewhere it seems that Van Zurck may have regarded the *placcaat* of 1571 as prohibiting insurances on lives and also (insurances on?) wagers on voyages (idem sv 'Verzekeringen').

224 *Quaestiones juris privati* II.7.

225 Vol II obs 67.

226 Namely the *placcaat* of 1553 (§ 5.2.2 n165 supra); that of 1571 (§ 5.2.2 n165 supra); the Antwerp Impressae of 1582 (§ 5.2.2 n168 supra); s 25 of the 'oude Keuren van Putte' of 18 August 1587 (which provided that in future there would be no adjudication on claims arising from games or 'van Weddingen, die niet zyn gepermitteerde assurantien, etc'); the Amsterdam keuren of 1492 and 1601 (§ 5.2.2 n159 and n173 supra); the 'oude Keuren van Oudewater' cap XLVIII by which 'het wedden om geld' were prohibited; and the 'Articulbrief' of the WIC and that of the EIC (§ 2.2 n58 supra).

227 See § 5.2.3 n199 supra. It noted also the view of Alphen that such denial was common, and that of Bynkershoek that wagers were seldom adjudicated.

228 In this regard the lawyers writing the observation merely noted that on occasion wagers were adjudicated, 'schoon ze relatie hadden tot dingen, daar den bedinger niet aan gelegen lag, of de conditie vervuld word of niet'. They referred to the decision of the Hof van Holland in 1551 (§ 5.2.2 n162 supra) and that of 1596 as confirmed by the Hooge Raad the next year (§ 5.2.2 n170 supra), but mentioned that the ratio for the latter decision was unclear, the more so in view of (what they thought was) the prohibition of wagers by the *placcaat* of 1571.
First, Scheltinga, in commenting on Grotius, explained that although Grotius was supported in his view by Groenewegen and the authorities referred to by latter, it had to be mentioned that numerous authorities in fact supported the view that wagers were valid.

Another author providing some perspective on the view of Grotius was Schorer. After explaining that the validity of wagers in terms of the law of nature was uncertain (although they were probably valid), and that they were said by Grotius to be null and void on the grounds public policy in terms of the civil law, Schorer mentioned the difference of judicial opinion on the validity wagers, including numerous authorities supporting the view that wagers were in fact by customs and decisions in principle valid in the civil (common) law of Holland, except where and to the extent that they were prohibited by legislation and except if they concerned unlawful or immoral matters. According to these authorities, wagering agreements could be concluded ‘omtrent alle eerlyke zaken’.

Lastly, the clearest summary of Roman-Dutch law of wagering and its earlier development came from Van der Keessel. In condensed form, his views boiled down to the following: Although it cannot be proved from the general laws enumerated by Groenewegen and by the jurists in the Rechtsgeleerde observatiën that all wagers were prohibited by the common law of Holland, it would appear from Alphen and Bynkershoek that causes were very rarely decided upon such wagers.

229 Dictata ad III.3.48 sv ‘zoo by ons etc’.

230 As has already been shown, this was in fact not the case. See too the comments in this regard by Van der Keessel infra.

231 That is, that ‘evenwel enkele reysen in Holl. noch op zoodanige reysen [sic] regt zyn gedaan, en wel schoon geen van beide aan het indien ietwes geleegeen was’. Scheltinga here made reference to the decisions of 1551 and 1597, noting that the latter was the more remarkable for having been given after the placcaat of 1571.

232 Aantekeningen 312 (ad III.3.48).

233 Inleidinge III.24.4.

234 He listed decision of the Hof van Gelderland in 1635 (referred to by Schrassert: see § 5.2.3 n191 supra); the position in Naples where, according to Roccus (see § 5.2.1 n154 supra) wagers were lawful as a general rule; and the Hooge Raad decision of 1670 (see § 5.2.1 n205 supra) holding that wagers were valid as long as they originated in a lawful cause. He further made mention to a case decided by the Grand Council of Malines on 1 December 1714 permitting an action against a person who had wagered 60 against three that he would not get married inside five years.

235 With reference to the s 32 of the placcaat of 1571, Schorer expressed the opinion that although it seemed to prohibit wagers on the topics mentioned in the Netherlands, that section ought to be restricted to (wagering) insurance. See further on this point, § 6.3 infra.

236 Theses selectae 514 (ad III.3.48).
Van der Keessel elsewhere considered the position in more detail.\textsuperscript{237} He noted that although controversial in view of the position in Roman law, Grotius held the opinion that, subject to certain exceptions, all wagers were invalid in the public interest. He noted further that Groenewegen and others after him, especially the jurists in the \textit{Rechtsgeneernde observatiën}, supported Grotius by relying on authorities which did, however, not support their view. First they relied on the Amsterdam \textit{keur} of 1601 which was a local prohibition of wagers on specific topics only, and the promulgation of which shows that in the absence of such legislation such wagers, like all others, were in fact as a rule valid before as they remained valid elsewhere in Holland thereafter. Secondly, they relied on the provisions contained in certain insurance laws as authority for the view that wagers were invalid. But, according to Van der Keessel, those provisions did not prohibit wagers generally but only some insurances concluded by way of wagers (\textit{'non prohibet sponsiones in genere sed assecurationes per modum sponsionum factas'}), or insurances on wagers on certain topics (\textit{assecurationes super sponsionibus}'), or insurances of wagers on certain topics (\textit{assecurationes sponsionum}).\textsuperscript{238} In view of this interpretation, the decision of the \textit{Hooge Raad} in 1597 upholding a wager on a voyage was therefore not surprising nor inexplicable. This decision, and the earlier one of 1551, established clearly that wagers were permissible and enforceable (\textit{licitas fuisse et in foro efficaces}), the more so because in neither of them the defence was raised that wagers were unlawful, a defence that in the latter of the two cases would obviously have been the best defence if only s 32 of the \textit{placcaat} of 1571 had been understood at the time as containing a prohibition on wagers on voyages. According to Van der Keessel, it was nevertheless strange that Grotius, who was probably not unaware of these decisions, presented it as the \textit{ius commune} of Holland that, subject to certain exceptions, wagers were prohibited. One could hardly conclude, he surmised, that Grotius regarded as the common law of Holland that which was merely recognised in a few municipal \textit{keuren}.

Still, Van der Keessel conceded, one should maybe admit that in subsequent times wagers became more and more unpopular, so that, as a result, they were less frequently adjudicated on by the courts.\textsuperscript{239}

5.2.5 Conclusion

The fact that by the end of the eighteenth century the distinction between gaming and wagering in Roman-Dutch law was no longer as clear-cut as it had appeared in earlier centuries and in Roman law, but that wagering had become more

\begin{itemize}
  \item \textsuperscript{237} \textit{Praelectiones} 1106-1109 (ad III.3.48-49).
  \item \textsuperscript{238} See further § 6.3 \textit{infra} for the various meanings of wagering insurance and for a detailed discussion of the relevant sections in the insurance laws referred to here.
  \item \textsuperscript{239} This appeared from the comments of both Alphen and Bynkershoek, although, Van der Keessel stressed, both expressed themselves carefully, the former restricting his view to wagers \textquoteleft die naar Rechten niet mogen bestaan\textquoteright and the latter warning that wagers were infrequently adjudicated on because they were prohibited by certain laws.
\end{itemize}
and more equated with unlawful gaming agreements, shows that a shift in the underpinning public policy had occurred.

While legislative measures, especially local but also national ones, not surprisingly prohibited or restricted wagers on particular topics, there was no general legislative prohibition on wagers in Roman-Dutch law. Apart from legislation clearly aimed at undisguised wagers, insurance (and other) legislation too prohibited not wagers per se but wagers disguised as other forms of contract. While some Roman-Dutch jurists comprehended this distinction, many did not and continued to rely on such legislation for the view that wagers themselves were prohibited.240

In English law, too, legislative measures on wagering were fragmented, of restricted application and, prior to the nineteenth century, rather unsuccessful. Although the Acts of 1746 and 1774, which prohibited marine and life wagering insurances respectively (see § 6.4.3 infra), were at one time understood to apply to wagers generally and not only to wagers in the form of insurances, there was until the mid-nineteenth century no general statutory prohibition of wagers. The English common law, which held wagers valid in principle, was abrogated only by s 18 of the Gaming Act 1845 (8 & 9 Vict c 109) which declared null and void (but did not prohibit) 'all contracts or agreements' (including those of insurance, which already prohibited in the previous century) 'by way of gaming or wagering'.

240 In English law, too, legislative measures on wagering were fragmented, of restricted application and, prior to the nineteenth century, rather unsuccessful. Although the Acts of 1746 and 1774, which prohibited marine and life wagering insurances respectively (see § 6.4.3 infra), were at one time understood to apply to wagers generally and not only to wagers in the form of insurances, there was until the mid-nineteenth century no general statutory prohibition of wagers. The English common law, which held wagers valid in principle, was abrogated only by s 18 of the Gaming Act 1845 (8 & 9 Vict c 109) which declared null and void (but did not prohibit) 'all contracts or agreements' (including those of insurance, which already prohibited in the previous century) 'by way of gaming or wagering'.
centuries and gained momentum. In this regard factors such as the growing popularity of gaming and wagering among the lower classes, where it was perceived to be more dangerous and socially unacceptable than among the upper classes, possibly played a role. Be that as it may, by the end of the eighteenth century there was still no unanimity in Roman-Dutch law that the transformation from valid wagers (subject to exceptions) to invalid wagers (subject to exceptions) had been completed. That was only finally achieved with codification in the nineteenth century when wagering contracts were unequivocally and inextricably linked to unlawful gaming agreements. Obviously this uncertainty in Roman-Dutch law as to the validity of wagering agreements makes it the more difficult to explain precisely the relationship, differences and similarities in that system between a wager and the closely related insurance contract. Before turning to that relationship, though, one further matter deserves brief attention.

241 A similar movement is recognisable in English law where the development of the law of wagering in numerous respects reflected earlier developments in Roman-Dutch law (see Gane 32). At English common law, wagers were not per se or by nature unlawful and an action could be brought and maintained upon it although neither of the wagerers had any previous interest in the matters upon which they wagered. But, as was the case with all other contracts, a wager was unlawful if its subject matter was objectionable or repugnant to morality, or contrary to public policy. In the seventeenth and eighteenth centuries, therefore, wagers were in principle legal contracts and often adjudicated upon (see eg Miers 116n30 who points out that between 1662-1843 there were 35 actions on the lawfulness of wagers). But although wagers were tolerated and enforced as rule, the courts did not (always) approve of wagers which were regarded as nuisances and a waste of judicial time and effort to be accorded a low priority in relation to other cases on the roll. Especially by the latter half of the eighteenth century, English courts actively sought under various pretexts to discourage actions on wagering contracts, eg by holding the particular contract in question unenforceable as being contrary to morality or public policy because of its subject matter. In effect, from that period onwards, a cognisable shift in the courts' view of what was immoral or not occurred, and as result more and more wagers were prohibited on that ground. (For a fairly representative illustration of the approach to what was there termed '[i]ndifferent wagers upon indifferent matters, without interest to either of the parties', see eg the decision of Lord Mansfield in Da Costa v Jones (1778) 2 Cowp 729, 98 ER 1331 (at 734, 1334), which concerned a wager on the sex of a French statesperson, spy and transvestite, the Chevalier d'Eon.) For further historical background to the English law of wagering, see eg Ashton Gambling 159-162; Blakey 215-232; Clark 35-68; Dixon 38-81; Finney 1-10; Holdsworth History passim, especially vol XI at 539-543 and vol XII at 520-521; Miers; Moodie 22-35; and Weskett Digest 582-587 sv 'wager'.

242 This was not an unnatural development. When wagers were valid, subject to exceptions, it was the exceptions which had to be measured against considerations of public policy and morality; when wagers were invalid, subject to exceptions, it was the rule which was based on public policy and morality. As the exceptions expanded because of changing perceptions of public policy and morality, they simply became the rule. And the difference may admittedly have been no more than a question of emphasis (and, of course, of the burden of proof), depending on the width of the rule and its exceptions.

243 In terms of art 1825 of the Burgelijk Wetboek of 1838, no claim was permitted in respect of a debt arising from gaming or wagering ('spel of weddenschap'). By art 1828, the loser of a game or a wager who had paid voluntarily, could, in the absence of fraud on the part of the winner, not recover what he had paid. See again § 2.2 n68 supra. According to Hermesdorf 'Roomsche reijsen' 221, there were sufficient measures and opinions in the sources of Roman-Dutch law which preceded art 1825 and which put paid to the notion that that article was simply taken over via the French Code civil from Pothier; the latter was in any event concerned only with gaming, not also with wagering.
5.2.6 Excursus: Wagers and Natural Obligations

As far as enforcement was concerned, Roman-Dutch law distinguished between civil and natural obligations, a distinction already known in Roman law. Natural obligations arose like civil obligations but did not enjoy precisely the same legal status; they gave rise to some but not all of the legal consequences which flowed from civil obligations.

Civil obligations enjoyed full legal protection and could be enforced both directly, by an order for specific performance, or indirectly, by an award of damages in the case of breach or by set-off. They could furthermore be the basis for a valid novation and the debt in terms of a civil obligation could be secured by real or personal security.

Natural obligations were of two types.

Full or effective natural obligations (obligationes naturales plenae) were fully valid obligations except that they could not directly be enforced by way of an action which was effective in civil law. But they could validly be performed, and thus provided an exception and a right to retain what had already been paid. Thus, no action but also no redress or condictio indebiti. Furthermore, they admitted of indirect enforcement by way of set-off, and could be secured.

Less than full or ineffective natural obligations (obligationes naturales minus plenae) were, in truth, not legal obligations at all. They were founded solely on duties of decency, gratitude, pity or generosity and were no more than moral obligations. Hence they had no legal effect, gave rise to no action nor to any exception (so that what had been performed could be recovered), and could not be set-off or secured. Akin the less than full natural obligations, were those full natural obligations disapproved of (fully or in part) by the civil law, so called obligationes improbatae, which had either no legal effect or only some legal effect, depending on whether they were wholly or partly so disapproved of.

The sources of natural obligations were never clearly defined in Roman-Dutch law. Obligations, it seems, were unenforceable (that is, natural) either because of the (defective) status of one of parties or because of the subject matter of the obligation. Because natural obligations were obligations not or less than fully approved of by the law, the reasons for disapproval varied according to the time and place; and the category of contracts so disapproved of varied likewise. It seems that there was in

---

244 On natural obligations, see eg Feenstra Grondslagen 132-134; Scholtens (generally on natural obligations after Roman law and specifically at 175-188 on natural obligations in Roman-Dutch law); Van Warmelo 410-421 (on Roman law) and 423-428 (on Roman-Dutch law); and Zimmermann 7-10.

245 See on natural obligations eg Voet Commentarius XLIV.7.2-3 and Van der Linden Koopmans handboek 1.14.9.

246 Examples of natural obligations included contracts concluded by persons without full contractual capacity, such as women who stood surety, or minors who contracted without the assistance of their guardians. But, contrary to the usual rule in the case of (full) natural obligations, the natural obligation of an unassisted minor did not preclude the recovery of what had been paid by the minor (see eg Voet Commentarius XXVI.8.4).
Roman-Dutch law no *numerus clausus* of natural obligations. In addition to those known to and derived from Roman law, new ones were no doubt also recognised as such.

But what about wagers? Were they full natural obligations? It seems not. Among the examples of natural obligations mentioned by Voet,247 wagers do not feature. In fact, it would appear that he did not regard wagers (and gaming agreements, which he equated) as giving rise to full natural obligations but merely as *obligationes improbatae* and thus as in the same category as less than full natural obligations.248 And in their treatment of wagers, Roman-Dutch authors drew no finer distinction than that between valid and invalid wagers. Those of them who did regard wagers as invalid *per se*, were not unanimous and clear as to the precise status and effect of wagers,249 but none of them suggested that wagers gave rise to natural obligations.

Nevertheless, it would seem that the consequences of wagers being regarded, at least by some authorities, as invalid in Roman-Dutch law, were very similar, although not identical to the consequences ascribed to (full) natural obligations. In both cases there was not only no action on the agreement in question but also no recovery of what may have been performed in terms of it.

6 The Distinction Between Wagering and Insurance; The Requirement of an Interest

6.1 The Early History of the Interest Doctrine

For obvious reasons there was no great need to distinguish wagering from insurance at the time when wagering agreements were regarded as valid and fully enforceable at law. Equally obviously the need to do so became rather acute when wagering agreements came to be regarded with growing suspicion in Roman-Dutch law and when, gradually, they came to be considered as unlawful and void. Not surprisingly it was mainly those lawyers who propagated the view that wagers were in principle against public policy and goods morals, who had to except the undoubtedly useful and valid insurance contract from this principle, or who at least had to find a basis on which to distinguish between the two contracts. In Roman-Dutch law, as in other legal systems, this basis was the requirement of an interest. Before turning to the way in which the notion of an interest was employed in Roman-Dutch law to achieve the differentiation between wagering and insurance, it is necessary to provide, by way of an

---

247 *Commentarius* XLIV.7.3.

248 See *Commentarius* XII.5.7 (gaming and wagering debts were *improbata* and could not be secured) and XLIV.7.3 (full natural obligations could be secured).

249 To recap, Grotius considered them ineffective (*krachteloos*); according to Schorer, Grotius meant that wagers were null and void on grounds public policy under civil law; according to Van der Kaesset, Grotius was of the opinion that in the interest of public policy all wagers were invalid; and Voet treated wagers on a par with gaming agreements: they were not adjudicated on and not only was there no action but there was also, because of the *par delictum* rule, no redress.
introduction and in broad outline, some details on the early history of the interest doctrine in insurance law.\footnote{For more detail on the historical background, see in particular Gärtner 337-347. Further information was obtained from beg Van Asch van Wijck 37; Van Berkhout 11 20-21; Dorhout Mees Schadeverzekeringsrecht 108-109; Hammacher 82-84; Kato 202-203; Kohler 'Handelsrecht' 510-513; Lugt 2-5; Mullens 39-40; Noyon 1-4; Rutgers van der Loeff 68-70; and Schweitzer 2-14.}

Although the doctrine of an insurance or an insurable interest is essentially a product of modern insurance law,\footnote{That is, of developments in the nineteenth century.} it seems and is generally accepted that the requirement of an interest, albeit in rudimentary form, was already clearly established in medieval insurance law. Traces of this requirement for the insurance contract are discernible, at any rate, relatively soon after the appearance of the contract in its modern form, and was noted if not yet explained in the oldest treatises on insurance in the sixteenth century.\footnote{Despite views to contrary, it is commonly accepted that interest formed an inherent part of the insurance contract and gave legal effect to the (at first mainly) moralistic difference between wagering and insurance and wagering (see eg Goldschmidt Universalgeschichte 370). The thesis to the contrary, propagated eg by Endemann 'Wesen' in the nineteenth century, that at the origin of insurance practice a legal interest was not required in the conclusion of an insurance contract but that it was only later under the influence of the canonical usury doctrine that it became a requirement, appears unsupported by the sources and has generally been rejected.}

In the early, medieval insurance law doctrine, no conceptual distinction was drawn between the object at risk, and the ownership of that object, and the interest in that object. The failure to distinguish between, if not the equation of, (the object at) risk $(risicum)$, ownership $(dominium)$ and interest $(interesse)$ was the result of the relatively simplistic early insurance practices and, with it, the original application of the insurance contract in commerce.

Although other forms of insurance, such as land transport and life insurance, were not unknown to the earliest writers on insurance law, they were primarily concerned with the most prevalent form of insurance of their time, namely marine insurance. And the forms of marine insurance which occurred in practice and which the writers analysed, were insurances on goods and ships. Furthermore, and importantly, it was almost without exception the owners of goods or a ship who took out insurance on their property.

In consequence, in early marine insurance, there was invariably in the first place a physical object which was exposed to risk, and secondly, the insured was invariably the owner of that object. These two aspects, which are, of course, not unrelated, may be considered in more detail.

### 6.1.1 A Physical Object and Ownership

Initially insurance was exclusively concerned with physical objects $(res corporales)$ such as goods or merchandise and ships, and the damage insured against
was the physical loss of or damage to that object. Not surprisingly the early view\(^{253}\) was that no insurance was possible or valid without a specific, corporeal object as the object of the insurance; an object, furthermore, that, at the time of the conclusion of the contract, had to be in existence, capable of monetary valuation, and susceptible if not already exposed to risk.\(^{254}\) No insurance and no insurable loss was thought possible without a material object and direct, physical loss of or damage to it.

This view was an incorrect deduction from the indemnity principle and the result of a warped conceptualization. Thus, it was argued, if the insurance contract was one of indemnity, there had to be a physical object, capable of valuation, in respect of the loss or damage of which the insured could suffer an actual loss (\textit{damnum emergens}) as opposed to a prospective future loss or loss of an expected asset or profit (\textit{lucrum cessans}), and in respect of the loss or damage of which the insured's indemnity could be calculated. Without such an object there was no measure of the indemnity and no guarantee that only an indemnity would be paid and that the insured would not make profit from his insurance. In short, the insurance contract was aimed at paying an indemnity for the physical loss or damage which occurred to the object at risk, and that indemnity was paid only to the owner of that object; the contract not compensate the insured for any further or indirect loss suffered as result of the loss of or damage to that object.

As a result of this narrow view which linked the interest doctrine to physical objects, no insurance was theoretically permissible where there was no physical object which was exposed to risk, and an insurance interest was totally lacking when there was no direct and unrestricted (ownership) link with such a corporeal object. Hence insurance was not permissible on an prospective advantage in the form of the profit expected to be made on goods or in the form of future freight which, of course, was nothing more than the profit expected to be made on the employment of a ship. In such cases there was no physical object, no tangible and measurable loss or damage, and therefore no possibility of insurance.

A further result was that, conceptually, interest was equated with the physical object at risk and the latter was regarded as the object of the insurance. Not the interest in the object at risk, but that physical object of risk itself (the goods or the ship) was what was insured. In consequence, no distinction was drawn between the interest and the object insured. This explains the common practice of the early and later writers, when describing what could be insured,\(^{255}\) to list the objects of risk (goods or merchandise, ships, and other such physical objects) and then to add 'and any other object in which there was an interest'. Thus, they confused the interest in the object

---

\(^{253}\) And in French law, eg, the view until deep in the nineteenth century.

\(^{254}\) Thus, the Genoese insurance ordinance of 1610 (XVII.4) provided that no one could conclude insurance when no risk was run, whether upon ship or goods or other things and in whatever form the insurance was made, nor conclude insurance for more than value of the risk (see Magens \textit{Essay} vol II at 65 for a translation of this provision). The technical term and notion of 'interest' was here still described by and confused with the word and concept of 'risk'.

\(^{255}\) See ch V \textit{infra} as to the objects of risk.
and the object at risk itself, regarding only the latter (or, on occasion even both) but never clearly only the former as the object of the insurance.\textsuperscript{256}

Early insured were the owners of the property at risk which they insured. From its beginnings, the proprietary or direct interests was central to insurance. At first no source of interest was in fact recognised as justifying an insurance contract other than a real right of ownership in the object exposed to risk. Thus, ownership and interest coincided. Being the interest of the owner, it was also unlimited, that is, it was worth exactly as much as the object of risk itself, hence the facility with which interest, ownership and the object of risk were equated. Accordingly no insurance of property was recognised and permitted as valid by one who was not the owner of that property or who did not at least have a mandate from that owner to insure that property. The close historical relationship between insurance and sale, and the continued identification of the two contracts in legal doctrine,\textsuperscript{257} may well have served to confirm the notion that only an owner of property could insure that property and that the only form of interest which was insurable, was a proprietary interest. Because only an owner could sell and transfer a particular object, only an owner could insure that object, and hence the requirement that the insured had to be interested as owner in the property to be insured.\textsuperscript{258}

The earliest insurance laws, therefore, did not recognise the right of anyone but the owner of property to insure that property.\textsuperscript{259} Only gradually were other limited interests recognised as insurable but those interests remained restricted to ones founded upon limited real rights in the property at risk.\textsuperscript{260} The proprietary interest, in any event, remained by far the most important of interests recognised as insurable. Only gradually did it become irrelevant whether the interest consisted of ownership or another real right. Not until the eighteenth century were rights other than real rights hesitatingly

\textsuperscript{256} This confusion possibly gave rise and perpetuated the shorthand by which insurance is described as being of the object of risk (insurance of the goods, the ship) rather than of the interest in that object.

\textsuperscript{257} The popular view was that insurance was but a sale of the risk to the insurer, and it was derived from the earlier notion that insurance was the sale of the physical object involved subject to a resolutive condition of undamaged arrival. See again ch I § 2 \textit{supra}.

\textsuperscript{258} See eg Holdsworth \textit{History} vol VIII at 278 and Sanborn 248.

\textsuperscript{259} Thus, in the marine insurance ordinances of Barcelona in the fifteenth century, an interest was required but not every interest in a ship or in goods qualified. For a long time only the insurance of one’s own property (i.e. an interest based on the right of ownership) was recognised. Section 5 of the Barcelona Ordinance of 1435, s 2 of that of 1536, and ss 6 and 17 of that of 1458, for example, required the insured to attest that the insured object belonged to himself or to the person who had instructed him to insure. In terms of s 9 of the Barcelona Ordinance of 1484, the person taking out the insurance was required to state under oath that the goods insured were real and not fictitious, and that they belonged to him or to the party on whose behalf he was acting or to his partners or to other interested parties who had an investment in those goods insured. See generally Reatz \textit{Geschichte} 79-81.

\textsuperscript{260} Thus, the Barcelona Ordinance of 1461 permitted insurance by a debtor with a right of pledge or mortgage in the object, and that of 1484 permitted insurance by anyone who had a share or interest in the cargo.
admitted as founding an interest, and only in the next century was the theoretical groundwork prepared for interests not founded upon any right at all.

Thus, in early insurance practice a physical object of risk was required. It formed the object of the insurance and only those with a proprietary interest in it could be insured or could benefit from an insurance of that object.

6.1.2 The Formulation of a Concept of an Interest

The question soon arose whether a person who had insured goods for their full value, could recover in full where it appeared that he was only a part-owner of the goods, or only the owner of a part of the goods, or not the owner at all but had merely insured, as often happened in practice, for another.

According to Santerna\(^{261}\) a merchant was entitled to the full insurance payment, even when he was not owner of all of the goods; the insurer could not refuse payment with the defence that the person taking out the insurance was not the owner but he had to pay out the full sum insured. By contrast, Straccha\(^{262}\) denied the non-owner merchant's claim for the payment of the sum insured. According to him, such a merchant could claim only that part of the sum insured which corresponded to his part or share of the goods insured. In this regard Straccha for the first time mentioned the requirement that the insured had to prove an interest when claiming the sum insured.\(^{263}\) Conversely, though, the insured had no defence against a claim by the insurer for payment of the premium by arguing that he was not the owner of the insured goods.\(^{264}\) But this was no more than the barest of statements which, in a specific context, spoke of the necessity of an interest of the insured. There was, as yet, no inkling of any doctrine of an insurance or insurable interest. That was to come only much later.

In the first decade of the eighteenth century, the Genoese jurist Casaregis, in considering the question posed above, aligned himself with Straccha and rejected the view of Santerna.\(^{265}\) He thought that, unlike a wagerer, an insurer could in fact raise the lack of ownership on the part of the insured as a defence (exceptio defectus dominii) against a claim on the insurance contract.\(^{266}\) A lack of ownership, that is, of interest, was irrelevant to the validity of an agreement otherwise qualifying as a wager. With the

\(^{261}\) De assecurationibus IV.47-48, V.10.

\(^{262}\) De assecurationibus X.17.

\(^{263}\) Ibid (‘doctrina ... intelligenda videtur constito de interesse assecurati, quem semper assecurati demonstrare tenetur’).

\(^{264}\) Idem X.6, answering in the negative the question ‘[n]um poteris objicere te mercium assecuratum dominum non fuisset?’. Ironically this very point was earlier used by Santerna who argued that if the insured could not rely on the fact that he was not the owner to avoid having to pay the premium, neither could the insurer do so to avoid having to pay out in full.

\(^{265}\) Discursus IV.4-5.

\(^{266}\) The reason being, ‘nam assecuratio pro forma exigat existentiam interesse, seu dominii assecuratorum’ (idem IV.5).
latter type of agreement it was assumed that the one party had been aware that the object in question did not, or did not exclusively, belong to the other party to the contract and that he had nevertheless undertaken to pay the agreed sum in the event of the loss of that object. Casaregis, in the process, made the interest of the insured a legal requirement for the existence of any insurance and for any claim on an insurance contract: *Sicuti enim principale fundamentum assecurationis est risicum, seu interesse assecuratorum, sine quo non potest subsistere assecuratio*.\(^{267}\) An insured had to prove not only the occurrence of the uncertain event (that is, the loss of or damage to the object at risk), but also an interest as a result of which he suffered loss or damage to the extent of the loss of or damage to that object. Casaregis therefore, for the first time, advanced a more or less defined interest doctrine. It must be borne in mind though, that for Casaregis the notion of interest was still a very restricted one: requiring the insured to have an interest in essence still meant that he had to be the owner of the physical object at risk. Thus, although the concept of an interest was now clearly recognised as an essential feature of the insurance contract, interest, ownership, and the object of risk were as yet not properly distinguished.

But what, exactly, was the role of this newly formulated doctrine of an insurance interest in separating the insurance contract from the wagering agreement?

### 6.1.3 The Early Role of Interest in Distinguishing Insurance and Wagering

For Casaregis and his predecessors there appeared to be no need in principle to distinguish between insurances and wagers. They recognised that, like the insurance contract, wagers, including those in structure and subject matter similar to insurances, were valid, especially but not only when they were concluded between merchants.\(^{268}\) In accordance with contemporary practice, therefore, insurances and wagers were not distinguished legally nor was there any need to do so because one could claim on a wager just as one could on an insurance contract. In both types of contract, payment was promised on the occurrence of an uncertain event, and it was irrelevant, legally, whether one had concluded a contract of insurance on a ship for a particular voyage or had wagered against the non-arrival of that ship from that voyage. Thus, from a legal point of view, no sharp conceptual distinction was drawn between insurance and wagering.\(^{269}\)

The only reason, in truth, why it later became important to differentiate between these two was because of the increasingly different moral values attached to them: the economically justifiable compensatory aim of insurance as opposed to the possibility of

---

\(^{267}\) *Idem* IV.1.

\(^{268}\) See eg Santema *De assecurationibus* II.7, 19, and 21-22.

\(^{269}\) Indicative of the extent to which insurance and wagers were equated is eg Straccha *De sponsionibus* I.1.131: *'Contractus assecurationis in substantia et iustitia profili non differt a contractu sponsionis, differunt autem solum hac qualitate, quod assecuratam habet evidentem causam, instam et utilem, quia assecuratus intendent evitare damnum, at sponso habet latentem causam, cultus utilas non apparat, et hac ratione commercium assecurationis est rei publicae utilius, et iustius'*. 
profit and enrichment in the case of wagering. Insurance promised to pay a compensation for the loss the insured suffered on the occurrence of the uncertain event (the loss of or damage to the physical object), whereas the wager promised an unconditional payment on the occurrence of the uncertain event irrespective of any loss that the winner of the wager may have suffered. For Casaregis there was no insurance proper ('propria assecuratio') but a wager ('sponsio') when, on the occurrence of the uncertain event (that is, on the loss of or damage to the goods), not the value of what had been lost or damaged was payable but an agreed sum ('summa certa'), even if it exceeded the amount of the loss (the value of the goods lost or damaged).

But this moral distinction did not assist in drawing a legal distinction between insurances and equally valid wagers. In drawing the distinction between insurance and wagers it was then no coincidence that Casaregis should have been the first to elevate the requirement of an interest to a typical characteristic institution of insurance law in this regard. Only when an insured could show his interest in (that is, his ownership of) the property lost or damaged, could he claim from the other party in the latter's capacity 'as an insurer'. In the absence of such an interest, though, he could nevertheless still, in appropriate circumstances, claim from that other party in the latter's capacity 'as a wagerer'. All the interest requirement therefore did, was to exclude lawful speculations from the sphere of equally lawful but morally less reprehensible insurances.

Interest served another function too. It was considered decisive in determining the extent of the compensation which could be claimed under an insurance contract.

Therefore, if an insured claimed payment from the insurer without having an interest, or if the amount of the payment claimed exceeded his interest, then the claim could not succeed as one on a contract of insurance. But, given the state of the law

---

270 This explains the view of eg Molengraaff 'Verzekering' 33-34 that interest is at most an economic and not a legal difference between insurance and wagering. Legally they belong to same genus and are different forms of the same type of contract, namely the aleatory contract. Insurance is an aleatory contract of indemnity while the wager is one not of indemnity.

271 See Discursus VII.12 ('in sponsione non est necessaria liquidatio valoris mercium').

272 According to Dorhout Mees Schadeverzekeringsrecht 109, it is misleading to state that the sole reason why the battle against insurance without an or a sufficient interest was waged, was because such a contract would then amount to a wager. (This, of course, in any event assumes that the absence of an interest necessarily results in the insurance contract being a wager, which may not necessarily be the case, as will be explained shortly: see n276 infra.) The main practical reason for requiring an interest, he notes, was to reduce the likelihood of an intentional causation of the risk by the insured himself, and especially in the case of life insurance to prevent murder. (Not only were the rules pertaining to an intentional causation of the risk (as to which see further ch VI § 4.1 infra) by an insured not in all respects fully worked out (although the principle was clearly established) and did insurers not yet by contractual provisions protect themselves sufficiently, but the proof of such causation was notoriously difficult in earlier times. (But this view too makes an assumption of dubious validity, namely that a person would in fact be less likely to destroy the object or murder the life in which he has an interest intentionally.)

273 Thus Casaregis Discursus VII.14 spoke of the 'quantitas risici'.

274 Casaregis Discursus IV.9 ('in contractu verae assecurationis, tunc requiritur de substantia illius dominium, seu interesse assecurati').
at the time, that did not mean, as Casaregis realised, that the insured necessarily failed in his claim. It was possible to claim with success from the other party to the contract without any interest or beyond whatever interest there may have been, as long as it could be established that the contract was in fact a wager.\textsuperscript{275} And that would be the case where the parties had from the outset agreed to wager, such as when the one party was aware that the other had no interest (that is, that the goods or ship did not belong to him), or where the one party had simply undertaken in the event of the loss of or damage to the goods to pay a stipulated sum without any further proof of value of loss.\textsuperscript{276}

Importantly, though, even after drawing and maintaining a difference between insurance and wagering by relying on the notion of an interest, Casaregis still employed the older and confusing terminology. Insurance, which required an interest, was referred to as proper insurance (\textit{vera} or \textit{propria assecuratio}) while wagering was called improper insurance (\textit{impropria assecuratio}).\textsuperscript{277}

\textbf{6.1.4 The Reaction of Practice to the Defective Concept of an Interest}

The requirement of an insurance interest or an insurable interest was initially of no great importance to the practice of insurance. Because wagers, too, were valid, the identification of an interest in any given case was more of theoretical than practical import. In the course of time, though, matters changed as the need to distinguish insurance from wagering became more and more pressing. But because the notion of an interest, as also the interest doctrine as it was described by Casaregis, remained narrowly based on the thesis that interest, (the object of) risk and ownership were synonymous concepts, and that only a proprietary interest in a physical object was recognised as valid, it is clear that the notion of an insurance interest, and the doctrine founded on that notion, could not theoretically in all respects explain the practical applications of insurance.

Firstly, there was plainly a need in practice for insurance to be recognised as valid also where it was taken out by one who was not necessarily the owner of the object at risk. Commercial relationships and requirements had become much more complex with those insuring no longer doing or being able to do so solely in respect of their own goods or ships, or in respect of goods of which they would remain owner for

\textsuperscript{275} See eg Santerna \textit{De assecurationibus} III.15, 16, and 19-20; Casaregis \textit{Discursus} IV.4-5.

\textsuperscript{276} The point being made here is important enough to bear some repetition and explanation. What was the result, in the time of Casaregis, of the insured not having an interest? It meant that the contract was not one of insurance (ie, it was a void contract of insurance) and that there was no claim on that contract as an insurance contract. It did not, at least not necessarily, mean that the contract was a (valid) wager. That would only be the case if there was in fact a common intention to wager. Put differently, the absence of an interest meant merely that the contract was not one of insurance; it did not mean that the contract was one of wagering. (Likewise, the presence of an interest did not necessarily mean that the contract was one of insurance, for the requirement of an interest was not the sole requirement and feature of such a contract.)

\textsuperscript{277} \textit{Discursus} IV.4 and VII.15 (" sponsiones uti impropriae assequationes").
the duration of the contract. Furthermore, it was clear that a person who was not the owner of property, could in appropriate circumstances suffer a loss if that property was lost or damaged, and the need for such persons also to be protected by insurance was recognised legislatively from early on.\textsuperscript{278}

Practice therefore required that the insurer's defence of non-ownership be countered to allow insurance by those who were not owners but who were otherwise interested, or by such persons on behalf of the owners. For this purpose numerous clauses were inserted into insurance contracts, notable the clause 'policy proof or interest' or 'interest or no interest', and the clause 'insurance for whom it may concern'. These will be considered in more detail elsewhere.\textsuperscript{279} In practice, therefore, insurance by others than the owner came to be recognised and it seems that by the end of the sixteenth century it was no longer necessary for the person taking out the insurance or his mandator, if any, to have had an interest, that is, to have been the owner.\textsuperscript{280} It was no longer even necessary that it had to be the owner who claimed in the case of loss or damage.

In theory, of course, these extensions could neither be explained nor justified. The narrow interest doctrine, equating interest and ownership as it did, was incapable of supporting the practice of persons other than only the owner concluding and recovering on an insurance, and of recognising an indirect or non-proprietary interest as sufficient. It was even less capable of recognising that several non-owners could indirectly be interested in the same object at the same time and that, in addition to the owner himself, they too should be permitted to insure and that the insurances of such several interests (proprietary and non-proprietary, direct and indirect) in the same corporeal object was possible without any breach of the indemnity principle and of the prohibition on over-insurance.\textsuperscript{281}

Secondly, the requirement of a physical object exposed to risk in which the insured could have an interest also caused problems. It meant, for example, that an insured had to describe and identify that object in the insurance contract, and this not was not always practical or desirable.\textsuperscript{282} It meant further that no insurance was possible

\begin{itemize}
\item \textsuperscript{278} Thus, the right of non-owners to insure property was recognised in Barcelona as long as they had a real right in that property. See § 6.1.1 n259 supra.
\item \textsuperscript{279} As to the former clause, see ch XVII § 6 infra, and as to the latter clause, see ch X § 3 infra. In combination, these clauses in effect eliminated the defence that the person taking out the insurance, did not have an interest (ie, was not the owner) and permitted whoever was in fact interested (ie, whoever was the owner) from time to time to claim on the insurance. Obviously someone like Casaregis analysed this circumvention of the interest requirement and what he referred to (in Discursus IV.3) as 'assecuratio ad commodum interesse habentium' in great detail.
\item \textsuperscript{280} As to the indemnity principle, see further ch XVII infra, and as to over-insurance, see ch XVIII § 4 infra.
\item \textsuperscript{281} Thus, it was impossible in the case of goods bought abroad by a representative, and unacceptable when the nature of an expected consignment had to be kept secret from competitors and thus also from insurers who were also merchants in their own right. As to the disclosure of such matters, see further ch VIII § 4.2 infra.
\end{itemize}
where there was in fact no such physical object and where the loss it was sought to be compensated against was a loss in the form, not of the loss of an asset (damnum emergens), but of the non-acquisition of an asset (lucrum cessans). The need for insurance cover in such cases existed and was met in practice, initially on grounds of practical utility rather than on basis of sound theoretical exposition of the principles involved or on any extension of the interest doctrine.

The narrow interest doctrine, which equated interest and the object of risk, did not consider that an interest alone and not one in a corporeal object exposed to risk could be sufficient. It could not explain or justify insurance where, exceptionally, there was no, or not yet a, physical object of risk, the loss of or damage to which could serve as the measure of indemnity. And neither could it accommodate the case of life insurance where, although there apparently was a physical object, that object was not readily capable of being valued in monetary terms.

Thus, in the course of time Casaregis' narrowly circumscribed (and so-called general) interest doctrine could no longer explain what had happened and what was happening in insurance practice. Insurance law and theory required a more detailed and well-defined doctrine of interest. The interest, rather than the physical object of risk, if any, had to be recognised as the object of insurance, and it further had to be recognised that interest could be of a non-proprietary nature. In short, interest and ownership had to be unhinged, as had to be interest and the physical object of risk, without in the process detracting from the underlying principle that insurance was not to provide any profit.

Noticeable and significant traces of progress in this direction began appearing in European legal systems only by the mid-eighteenth century, and the doctrine was...

---

283 Especially in the case of expected profit on goods (see further ch V § 5.2 infra) and future freight expected to be earned by a ship (see ch V § 5.4 infra), but also in the case of goods or a ship which may possibly (although unbeknown to the parties) already have been lost at the time of the insurance (see ch XII § 2 infra).

284 If not directly by eg permitting the insurance of expected profit eo nomine, then at least indirectly by permitting the profit expected on goods to be included in the insurable value of those goods. Thus, jurists considered the question whether it was permissible, in the calculation of loss, to take the sale value of the goods at their destination as basis (see eg Santerna De assecurationibus III.40-41; Straccha De assecurationibus VI.1-3; and Scaccia De commerciis I.1.169). As to the insurable value of goods, see further ch XVII § 3.2 infra.

285 Such as the definite need in practice for such cover and the fear of a loss of business to other markets where such insurances were in fact permitted.

286 In fact, the lack of theoretical underpinning and apparent conflict with the interest doctrine were probably the reasons why the recognition of the formal legal (legislative) validity of such insurances remained uncertain and disputed for so long in Roman-Dutch law and in many other insurance systems.

287 Even so, the requirement of an existing physical object was not consistently applied because insurance law and theory, after some initial reluctance which was speedily overcome by weighty practical considerations, fully recognised as valid the insurance (with the appropriate clause indicating the insurer's consent and on condition that fraud was absent) of an object already lost at the time of the contract: see ch XII § 2.2 infra as to insurance of goods or a ship 'on good and bad tidings'.
worked out in more detail only in the next century. In consequence, insurance law and
text at the end of the eighteenth century dealt with wagering insurance, the
insurance of expected profit and freight, and life insurance only with the greatest of diffi­
culty, if at all. That much will become apparent when some of these topics are con­
sidered in more detail.288

Now, however, the appearance and role of the requirement of an interest in
Roman-Dutch insurance law must be analysed.

6.2 The Requirement of an Interest in Roman-Dutch Law

It is readily apparent from the sources, that the concept of an insurance interest
was not unknown to Roman-Dutch law.289 Traces of the notion of an interest in the con­
text of the insurance contract date from the seventeenth century. But in the course of
that and the next century, Roman-Dutch law and theory, as opposed to the insurance
practice, did not proceed much beyond the boundaries of the narrow concept of an
interest which it had inherited from earlier insurance laws and customs. In fact, the
Roman-Dutch doctrine of an insurance interest, such as it was, was no more capable
than that formulated by Casaregis in the beginning of the eighteenth century, of
explaining what was happening in practice.

The term 'interest' had no uniform meaning in Roman-Dutch insurance law. It
meant different things in different sources. In essence the term was employed in two
connections, namely as a distinguishing feature of the insurance contract and as a
measure of indemnity. For present purposes this distinction will be observed in the fol­
lowing investigation of the sources.

6.2.1 Interest as a Distinguishing Feature

The need to distinguish the insurance contract from the wagering agreement
arose in particular with those Roman-Dutch authors and jurists who did not regard
wagering agreements as valid and who thus of necessity had to find a way of distin­
guishing them from valid insurance contracts. Those not thus persuaded, had less
occasion to draw this distinction and to rely, in the process, on the requirement of an
interest. In fact, those of them who did mention interest did so specifically to discount
the notion that the absence of an interest could have any effect on the validity of
wagers.

The first reference in Roman-Dutch law to an 'interest' in connection with
insurance occurred in Grotius' treatment of wagers.290 According to him one exception

288 As to wagering insurance, see § 6.3 infra; as to the insurance of profit, see ch IV § 5.2 infra, and as top
the insurance of freight, see ch IV § 5.4 infra.

289 The assumption of Roeleveld Lewensversekeringsreg 117-121 that Roman-Dutch law lacked any
requirement of an interest, at least in the case of life insurance, must therefore be treated with some
suspicion. See further ch XVII § 4 infra where the issue of the proof of an interest in Roman-Dutch law will
be discussed.

290 Inleidinge III.3.48.
to the rule that wagers (promises upon a condition, or ‘toezegging op een indien’) were void, was where reciprocal obligations were involved and where merchants were interested in the condition or uncertain event (‘ten waer datter verbintenisse waer ten weder-zijde, ende den handelaers aen het indien waer ghelegen’), which was the case with the insurance contract (‘t welck gebeurt in verseeckeringen’).

Thus, Grotius regarded the insurance contract as a type of wager, and more specifically as a valid one. It appears that he had a dual requirement in mind for the insurance contract: reciprocity and interest. The first requirement implied that non-reciprocal wagers could, according to Grotius, never be valid. But even if reciprocal, a further requirement was necessary before a wager could be valid and could qualify as an insurance contract.

Despite the cryptic nature of Grotius’s formulation of the second of these requirements, the various meanings attached to it, and the resulting uncertainty on particular points, this requirement in essence contains the germ of the notion of an interest as a distinguishing feature and requirement for the validity of insurance contracts. Therefore, the notion of an interest was employed by Grotius in distinguishing between insurance contracts and wagers.

---

291 From this it followed that in the absence of an interest, the contract was not one of insurance but merely an invalid wager. Similarly eg Voet, who regarded wagers on future matters of any kind as invalid (Commentarius VI.5.8), treated insurance of merchandise (which he considered briefly in XXII.2) as an exception (‘exceptio est cum assecurationibus’) and therefore as a valid wager. Of the contrasting view of eg Casaregis that a wager was a valid contract and merely an improper insurance and that, in the absence of an interest, one could at most say that there was no valid insurance contract and not necessarily that there was a (valid) wager. See again §6.1.2 supra.

292 Such wagers were those in terms of which only one party could win or lose depending on the outcome of an uncertain event. Of course, they could also not be confused with the insurance contract which is, by nature, reciprocal. Accordingly this requirement is not of further importance in the present context. See further ch III §1.3.4 infra.

293 According to Van Dale’s Nieuw Handwoordenboek der Nederlandse Taal 9 ed (1982) sv ‘gelegen’, the phrase ‘er is mij veel aan gelegen’ means it is of great importance or interest to me (‘het is voor mij van groot belang’), while ‘aan iets gelegen’ means ‘er ten nauwste in betrokke zijn, er van afhangen’. The phrase does not appear in Verdam’s Middelnederlandsch Handwoordenboek. In the Maasdorp translation of this passage from Inleidinge III.3.48 it is rendered as ‘unless there is an obligation on both sides, and unless the contracting parties have an interest in the consideration, as is the case with an insurance’, while in the Lee translation it is rendered as ‘unless there are reciprocal obligations and the parties have some interest in the event, which is the case in contracts of insurance’. See too Fischer ‘De Groot’ 608.

294 Thus, it is uncertain in what there had to be an interest, although it is probable, as the Lee translation suggests, that it had to be in the (occurrence or non-occurrence of the uncertain) event, and improbable, as the Maasdorp translation has it, that it had to be in the consideration. It is uncertain, furthermore, who had to have the interest, although it was probably only the insured and not both parties. The fact that the plural ‘merchants’ (‘handelaers’) is used may be explained by the fact that Grotius earlier referred to and was speaking of wagers or obligations (‘verbintenisse’). Interestingly, Van der Keessel, in commenting on Grotius’s view in this regard (Praelectiones 1106-1109 (ad III.3.48-49)), thought that the ‘promissor’ was required to have an interest, which, of course, raises the question whether this referred to the insured or the insurer or, given the reciprocal nature of the insurance contract, even to both,
Van Leeuwen expanded on Grotius’s view of the exception to the invalidity of wagers by explaining, rather unhelpfully, that the exception applied where the wager was such that it was both advantageous and useful as in the case of insurance (‘dat beider voordeel en nuttigheid daar in bestaat, gelyk als versekering’).

In sharp contrast was the Frisian decision of 1607 in which wagers were held valid, and where the Court noted that this was the case even though the contracting parties were not otherwise (than because of contract) interested in the occurrence or not of the uncertain event (‘hoewel den Stipulanten andersins daer niet aenghelegen is, dat de Conditie vervult worde’). Thus, although the Court, not surprisingly, said nothing about the difference between insurance and wagers, it specifically made the point that the absence of an interest in the uncertain event made no difference to and was thus by implication also not required for the validity of wagers. In the case before the Hooge Raad in 1670 in which the conditional agreement in question was regarded as valid and enforceable, the Raad expressed the view that all conditional stipulations were legally valid, even pure wagers, without any distinction as to whether or not the parties to the contract had any interest in the contract (‘daar by eenig interest hebben of niet’). In an opinion shortly afterwards, the same point was again made: wagers were valid, irrespective of whether the parties to it had any interest in it (‘daar by eenig interest hebben of niet’), as long as the obligations were reciprocal or the merchants were interested in the uncertain event (‘zo wanneer de verbintenisse is ten wederzyden of dat de handelaars of de republieke aan zodanige zaake waren gelegen’).

Of more importance to the question of an interest, was the opinion in 1678 on the validity of a ransom policy. One of the questions considered was whether such an insurance was by nature unlawful in the same way as were wagers on certain topics.

---

295 Rooms-Hollands regt IV.14.5.
296 In the Kotze translation this text, somewhat inaccurately, reads that a wager was not invalid where it was of such a kind that it promotes the benefit and interest of both parties, as in the case of insurance.
297 See § 5.2.3 n189 supra for the decision in Lijckle Hiddes v De Erfghenamen van Claes Waejes, reported by Sande Decisiones Frisiae III.9.1 where he also referred to earlier writers, including Leoninus Centuria consiliorum cons XXI.2.
298 See Bellum Juridicum casus 9 and § 5.2.3 n205 supra.
299 Hollandsche consultatien vervolg vol I cons 99.
300 Grotius had an ‘and’ here. Van der Keessel’s paraphrasing (Praelectiones 1106-1109 (ad III.3.48-49)) of Grotius’ requirements first stated them in the alternative (using the word ‘or’ (‘auf’)), and later rendered them, probably correctly, as cumulative requirements.
301 This is somewhat ambiguous: wagers were valid, irrespective of interest, as long as there was reciprocity or (and?) interest. It may have been no more than a (misplaced) attempt to hold wagers valid while at the same time accommodating the view of Grotius.
302 Nederlands advysboek vol II adv 170.
303 As to which, see ch VII § 3.2.2 infra.
In this regard, the opinion continued, one had to draw a twofold distinction between wagers and insurance proper (‘tusschen weddenschappen, en behoorlijke assurantie’). In the first place, wagers were, by nature, such that the parties had no independent interest in the outcome of the uncertain event but they simply wanted to wager (‘dat de weddenschappen natuur is, dat de partyen aan den uytslag niet is gelegen, om iets dat koopmanschap of andere private contracten raakt, maar alleen dat zy hebben willen wedden’). Thus, the wager itself provided the interest (and the motive) for the conclusion of the contract. By contrast, with valid contracts subject to an uncertain condition, it was characteristic that the parties had an interest in the outcome of the uncertain event (‘de geoorlofde handelingen over onzekere gevallen en perijkelen tot een eigenschap hebben, dat de handelaars aan het indien was gelegen’). From this distinction flowed a second, namely that in the case of unlawful wagers, the one party hoped for an unfortunate outcome or loss, while in the case of lawful contracts both parties hoped for a fortunate outcome or an absence of loss (‘in de ongeoorlofde handelingen en weddenschappen, de een naar des anders verlies en ongelukt haakt, daar zy in de geoorlofde beide op een goede uytslag hopen’). Thus, the lawyer writing this opinion saw the difference between unlawful wagers and lawful insurance contracts in the presence of an interest and in the intention of parties. When it then came to applying these requirements to the ransom insurance in question, the lawyer thought that it was clear that the insured had an interest in (‘was gelegen aan’) going on the sea voyage while being insured for a part of his ransom money in the event of his being captured as slave, and that both insured and insurers had reason to hope that he would in fact not be taken captive. Accordingly there was no doubt that this contract was not per se improper.

Scheltinga, in commenting on Grotius, mentioned that numerous authorities supported the contrary view that wagers were valid even though none of the parties had any interest in the outcome of the uncertain event in question (‘en wel schoon geen van beide aan het indien ietwas geleegen was’). Further on, though, he considered insurance as nothing but a wager, but then one which was in any event valid because of its reciprocal nature and the presence of an interest (‘evenwel zyn dezelve krachtig om de wederzydsche verbintenissen die er in zyn en om dat ook de handelaers aan het indien geleegen is’), as long as any further (legislative) requirements as to the content and form of the contract had been met.

6.2.2 Interest as the Measure of Indemnity

The use of the term ‘interest’ occurred in Roman-Dutch sources also in connection with, but not clearly as, the object of the insurance and, more specifically, as the concept with reference to which the measure of the insured’s indemnity had to be

---

304 On this point reference was made to Grotius Inleidinge III.3.48 and Stockmans Decisiones Frisiae decis 134.

305 Dictata ad III.3.48 sv ‘zoo by ons etc’.

306 Idem ad III.3.48 sv ‘t welke gebeurt in verzekeringen enz’. 
determined. Put differently, interest was used to indicate what could be insured, for how much, and what could be recovered in the event of loss or damage.

The employment of the notion in this sense seems to have been common amongst legal practitioners.

Thus, in an opinion in 1669\textsuperscript{307} which concerned over-insurance,\textsuperscript{308} the latter notion was throughout described with reference to the insured’s interest, it being defined as an insurance in excess of the insured’s interest (‘asseurantie tot meerder zomme gedaan, als de Geasseureerde daar by interest heeft’). The opinion mentioned both the insured’s interest in the ship and goods insured in this case, and also and in fact more frequently, his interest in the voyage on which the ship and goods were sent.\textsuperscript{309}

The concept of interest was also frequently used in cases where the person actually concluding the insurance for another, himself either had no or merely a limited interest in the goods. Clearly, in those cases, that other’s interest was regarded as the object of the insurance. Thus, in an opinion delivered in 1675\textsuperscript{310} on the conclusion of an insurance for another without the authority of the latter, the concept of an interest was mentioned several times in passing. It is apparent that the advocate who wrote the opinion, considered the interest, and not the physical property, as the object of the insurance, repeatedly stating that it was this interest which was insured. Further and interestingly, the opinion contained a pertinent recognition of the fact that non-owners of goods could and in fact regularly did insure their interests in such goods without the exception of a lack of ownership being raised at all.\textsuperscript{311}

Along similar lines were four opinions taken up in Barels’ Advysen. In the first, dating from 1698,\textsuperscript{312} there was mention of the need, in the case of an insurance for another, for the person claiming on the policy to establish that he himself had run the risk and suffered the damage (‘om te bewyzen, dat hy juist praecise, zelfs in zyn privé
risico moest hebben gelopen en schade geleden’), or that the person who had instructed him to insure had an interest and risk (‘interest en risico zoude hebben gehad’). Clearly noticeable here is the equation of ‘interest’ and ‘risk’. In an opinion the following year,\(^{313}\) it was stated that a person claiming on an insurance policy on behalf of his principal, should be able to prove the latter’s interest (‘den rechten genoeg zynde bewyst, het interest van zyne principæl’). In an opinion delivered by merchants in 1721,\(^{314}\) the point was made that a person with a limited interest in goods who had insured them for their full value for his own account, could not recover more on the insurance than the value of his own interest, unless he could prove that another interested party had instructed him also to insure his (that is, that party’s) interest. And finally, in the legal opinion given on this same matter,\(^{315}\) the point was made that insurers need pay no more than the value of the insured’s interest in the insured and totally lost goods.\(^{316}\)

The use of the term ‘interest’ as a measure of indemnity was also not unknown to, although not commonplace in, Roman-Dutch legislation, especially in the eighteenth century.

The first and rather remarkable statement of the interest principle occurred in the Antwerp compilation of customary law, the *Compilatae* of 1609.\(^{317}\) It stated that a person could insure ships, goods or effects only if such property belonged to him or if he had the authority of the one to whom it belonged, to insure it, or, alternatively, if he would enjoy an advantage or suffer a disadvantage upon the preservation or loss of that property.\(^{318}\) This was clearly an extended view of the concept of an interest. It was recognised that an interest could be founded in something other than the right of ownership. Interest could also exist where there was no legal right in or relationship between the insured and the property at risk, namely where a person profited by the continued existence and suffered a loss by the destruction of the object at risk. This was, in effect, nothing short of a very early formulation of the factual-expectation theory

\(^{313}\) Idem adv 18.

\(^{314}\) Idem adv 26.

\(^{315}\) Idem adv 27.

\(^{316}\) ‘B, die de Assurantie laeten doen, niet verder in de laedinge van ‘t Cargasoen in queeste, dan alleen voor de helfte is geïnteresseerd, en gevolgeiek ook voor zich zeilen niet meer dan de helfte van de gedaene Assurantie kan eischen’.

\(^{317}\) Article 24 of par 1, title 11, part IV (see De Longé vol IV at 208).

\(^{318}\) ‘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 gehad, noch bij t’verlies oft bewaernisse van djien geen profijt oft achterdeel en can hebben’. See further Mullens 39-40 who remarks that this indicates that the requirement of an interest was broadly regarded as an economic interest in the preservation of the object at risk.
for an interest which would gain prominence only in the nineteenth century. But, it was apparently an isolated instance.

More than a century later, in the Middelburg insurance keur of 1719, s 1 provided that insured were always obliged to prove the nature and extent of their risk or interest in the property insured ('aan te toonen ende bewysen, wat en hoeveel risico of interest zy in de Scheepen en Goederen hebben gelopen').

More substantial references to interest occurred in the Amsterdam insurance keur of 1744 and in subsequent keuren which amended it. Section 18 of the keur of 1744 concerned the non-marine objects (house, warehouses and other buildings) which could be insured against fire, and was greatly amended and added to by the amending Amsterdam insurance keur of 1775. The section, and the first paragraph of the amending provision, contained no reference to an insurance interest. But the second paragraph of the amendment did. It contained a more general provision as to what could be insured against fire and mentioned as insurable also furniture and all goods, as well as everything else in which one had an interest, as long as it was a real or actual interest ('men zal ook mogen laten verzekeren op al het gene, waar in iemand belang is hebbende, mits bestaande in een Reëel interest'). This was the first time the nature of the interest required had been described in Roman-Dutch law, although it was not a particularly illuminating description. The provision continued by requiring that for the

319 Thus, in English law the ‘factual-expectation test’ for an insurable interest (according to which a person has an interest if he profits by the continued existence of a thing and is disadvantaged by its destruction, irrespective of whether he has any legal interest in it) was apparently first unequivocally articulated by Lord Mansfield in Le Cras v Hughes (1782) 3 Doug 81, 99 ER 549. But the first clear delineation between that test and the older and stricter ‘legal-right test’ (according to which the insured was required to have a legal or equitable right in the property insured) came only in the House of Lords decision in Lucena v Craufurd & Others (1906) 2 Bos & Pul (NR) 269, 127 ER 630, affirming the decision of the Exchequer Chamber in Lucena v Craufurd & Others (1902) 3 Bos & Pul 75, 127 ER 42. The legal-right test, holding that an insurable interest was a property interest, was propounded by Lord Eldon (with whom Lord Ellenborough CJ of the King’s Bench, and Lord Erskine LC agreed), while Lawrence J (after referring, incidentally to definition of insurance by amongst others Grotius and Pothier: see at 300, 642) for the first time first clearly set forth the factual-expectation test (see especially at 301-303, 642-643). A third test was also proposed in Lucena v Craufurd by Graham B and six other judges for whom both aspects had to be present in order to find an insurable interest, ie, the requirement of a factual expectancy added to a legal right.)

Subsequently, the approach of Lord Eldon was adopted in English law, not only because of its relative simplicity but also because his Lordship was the senior judge of the House and because the Lord Chancellor agreed with him. See further eg Fegan II at 7-8; Fischer ‘Insurable Interest’ 447; Harnett & Thornton; Patterson ‘Interest’; and Vance ‘History’ 16.

320 Presumably what was required, was a real interest in the sense of an actual, existing (as opposed to a future) interest. In any event, it was required that that in which there was an interest, as well as the risk run in respect of, had to be specified in the policy ('mits dat het zelve [ie, the object in which there was an interest], mitszegers weike risico daar op gelopen zal worden, in het Contract van Assurantie bepaald van uitgedrukkt worde'). See eg Van der Keessel Theses selectae th 716 (ad III.24.4) and Praelectiones 1434 (ad III.24.20 who noted that a description was required of that in which the insured was interested ('id quod interest'). It would seem, otherwise than is suggested by the Afrikaans translation of this passage, that a description was not required in the policy of the interest itself, but merely of the object of that interest. On the description of the interest generally, see Hammacher 87-89 and see further ch VIII § 4.2.6 infra as to the content of insurance policies.
insured to recover in the event of loss or damage, he had to prove this interest as well as the amount of loss suffered by or in respect of that interest ('in cas van schade het by Contract bepaalde Interest moeten worden bewezen, als mede de hoe-grootheid der daar op gevallen schade'). Numerous other sections of the Amsterdam keur of 1744 mentioned interest, mainly in connection with the object of the insurance, but also as a factor in establishing the insured's claim on the contract.

Roman-Dutch writers, too, were not unfamiliar with such uses of the term 'interest'.

Thus, Bynkershoek mentioned interest in connection with insurance but then not as a feature distinguishing it from wagers or as being required for the validity of the contract, but simply as a measure of indemnity or as a requirement for a valid claim. For example, he stated that a person could insure no further than the extent of his interest in a particular object, or could not claim and recover more on an insurance contract than to the extent of his interest. From this it appears that under Roman-Dutch law an insured was required to have an interest at least at the time of the loss for which he was claiming. Without clearly stating the principle in this regard, Bynkershoek

---

321 See further generally Goudsmit Zeerecht 345-346.

322 It would seem that the interest itself was not yet clearly recognised as the only object of insurance, but that it was used merely to identify possible objects. Thus, it was commonly stated that a number of specified objects (goods, merchandise, etc) could be insured, as well as anything else in which there was an interest. But, it seems, this 'something else' had to be an identifiable object.

323 See eg s 19 (an insured bottomry lender had to prove the loss of the ship, the amount of his loss, and his interest ('en nopende zyn Interest')); s 21 and its amendment in 1756 (a lender on bottomry was entitled to insure his interest arising from the loan ('zyn Interest uyt hoofde der voornoemde Bodemary')); the 1756 amendment of s 21 further mentioned the possibility of insuring goods under the general description of goods, wares and merchandise, 'of waarin het Interest zal moogen bestaan, niets uitgezonderd'; ss 22 and 23 (referring to the determination of the value of goods and the proof of interest ('Justificatie van Interest')); s 24 (in connection with double insurance, referred to the case where there were more than one policy on the same persons, goods or interest ('meer dan een Police op een en deseelve party Goederen en Interest is gebruikt en geteekend')); and s 34 (mention of insurance under the general description of goods and merchandise, 'ofte waarin het Interest van den geassureerde soude mogen bestaan, niets uitgesondert').

324 See eg Quaestiones juris privati IV.1 ('niet verder ... dan voor zo verre hy interest in 't schip heeft'); IV 11 (mention of an insurer refusing a claim because of the insured allegedly not having 'zo veel belang in hadden, als zy moesten').

325 Eg idem IV.2 (an insured who had transferred insured property to another before the loss, could not claim from his insurers because he no longer had any interest ('geen Interest meer heeft'); idem IV.12 (an insured has to prove that had an interest to the amount for which goods were insured and which he claimed on his policy ('dat er voor 5 000 gulden in belang had')).

326 Although there is authority to the effect that an interest was required (apparently only) at the time of the conclusion of the contract (see eg Roccus De assecurationibus note 33), insurance could in Roman-Dutch law be concluded eg on return goods (retouren), ie, goods to be bought with the money obtained from the sale of the goods taken on the outward voyage. This would indicate that the existence of an interest at that stage was not required. Although none of the sources treated the issue pertinently, it appears (eg from Bynkershoek Quaestiones juris privati IV.2) that an interest was required only at the time of the loss. See further Mees De assecuratione 6-8.
seems to have recognised too that it was the interest in rather than the object of risk itself which was the object of the insurance, especially in cases where there was no physical object.\footnote{327 Thus, in the case of an insurer becoming insolvent, he stated that the insured could insure his interest with another insurer, \textit{(Quaestiones juris privati IV.2)}, and he referred to the interest of the insured as that which was valued in a valued policy \textit{(idem IV.5)}.}

In the \textit{Aanhangzéel tot het Hollandsch rechtsgeleerd woorden-boek}\footnote{328 Vol 1 sv ‘Assurantie’ at 38.} what was referred to as the three requirements of an insurance were listed, namely form, interest and loss ('ordre, interest en schaaden').

The term 'interest' was also used in connection with the object of insurance by Decker in his commentary on Van Leeuwen.\footnote{329 \textit{Aanteekeningen ad IV.9.4 n(3)/(c).}} He stated that insurance could be concluded on all commercial objects, or, in the words of the Amsterdam \textit{keur} of 1744, on anything in which there was an interest, as long as it was a real interest.

Lastly, Van der Keessell too was familiar with the term 'interest' as signifying the measure of indemnity,\footnote{330 Thus, he described over-insurance with reference to the interest of the insured (see eg \textit{Theses selectae} th 715 (ad III.24.3) and \textit{Praelectiones} 1437 (ad III.24.4)). See too Van der Linden \textit{Koopmans handboek} IV.6.10.} or in connection with the object of insurance.\footnote{331 Thus in \textit{Theses selectae} th 716 (ad III.24.4) he noted that everything could be insured in which someone had an interest ('immo et omne id quod alicujus interest'). See too \textit{Praelectiones} 1434 (ad III.24.4), referring to s 18 of the Amsterdam \textit{keur} of 1744 as amended in 1775. Although Nolst Trenité ‘\textit{Voorwerp}’ 3 takes Van der Keessel to task for defining interest (in th 716) as that which was of interest, it does not appear that Van der Keessell was either attempting such a definition or in fact said that much. He was merely using the concept of an interest to explain what could be insured, ie, what could be an object of insurance.} He also recognised the fact that a non-owner could insure a particular object and could therefore, by implication, have an interest in that object.\footnote{332 \textit{Theses selectae} th 370 (ad II.38.8) and \textit{Praelectiones} 778 (ad II.38.8), where he explained that just as prudent merchants commonly insured their ships against the perils of the sea, a usufructuary too ought to insure the ship he was entitled to use - the implication was that such a usufructuary was in fact entitled to insure such a ship. If he failed to do so, he could incur liability towards the owner in the event of loss of or damage to the ship. See further Fockema Andreae \textit{Aanteekeningen} 271.}

\subsection*{6.2.3 Conclusion}

It is clear that no formal, generally recognised and fully worked out doctrine of an insurance interest existed in Roman-Dutch law. This is not surprising, given the uncertainty and division of opinion on whether wagers were valid or invalid. In this,
Roman-Dutch law was no different from any other contemporary insurance system in Europe.\footnote{333}{By the mid-eighteenth century, before Lord Mansfield came to the King's Bench, it was still uncertain in English law whether or not what was later described as an insurable interest was required for the conclusion of a valid insurance contract. The common-law courts held insurances without interest valid (wagers still being valid) while the Chancery courts held such insurances void. See eg Holdsworth History vol VIII at 292 and vol XII at 539-540.}

But although the interest theory was under-developed, the concept was not altogether unknown. Especially those who regarded wagers as invalid, and who therefore had to find a way by which to distinguish them from valid insurance contracts, employed the concept as a distinguishing feature. But there was no clarity on the nature of such an interest, which of the parties was required to have it, or in what that interest had to be.

The term was also used, more generally, as a measure of the insured's indemnity or, more often, in connection with the object of insurance.

Roman-Dutch law no longer maintained the link between interest and ownership and recognised indirect, non-proprietary interests as insurable, at least those which were founded upon real rights in a particular object. The link between interest and (the object of) risk, by contrast, was seemingly not yet severed and the terms were often used interchangeably. Roman-Dutch law had, despite some promising indications, not yet accepted and theoretically explained that the interest and the object at risk were separable and that the former and not the latter was the object of insurance. In this regard, too, insurances where there was no identifiable physical object of risk, and, it may be added, one capable of monetary valuation, continued to cause conceptual and theoretical difficulties, even though such insurances were recognised and occurred frequently in practice.

The appearance of the first signs of a more detailed doctrine of an insurance interest coincided with the last decades of Roman-Dutch law and occurred at a time when such any novel developments in insurance law theory would not have found a ready reflection and consideration in its sources which were, at that time, in any case largely reflective of existing practice.

Although there is no doubt that the interest theory was accepted in the Dutch Wetboek van Koophandel in 1838, it reflects the state of the development of that doctrine at that time and many of its provisions concerning interest remain unclear. The doctrine was worked out in greater detail and the lacunae filled by Dutch courts and insurance lawyers only in the course of the nineteenth century.\footnote{334}{See further Dorhout Mees Schadeverzekeringsrecht 108-109. For some nineteenth century writings on the requirement of an interest, see eg Rutgers van der Loeff; Molengraaff 'Verzekering'; and Nolst Trenté 'Voorwerp'.} Article 250 links interest and indemnity and requires that to claim an indemnity, the insured or the person for whom he insured, had to have an interest in the insured object at the time of the insurance. Article 268 gives content to the concept of interest and makes clear what was not earlier in Roman-Dutch law widely recognised, namely that the interest in a
tangible object, and not the object itself, was the object of the insurance.\textsuperscript{335} Not made clear by the Wetboek are matters such as when the interest has to exist,\textsuperscript{336} what the position will be when there is no physical object in which there can be an interest, and what exactly the position is in the case of an insurance without any interest.

It is this last matter which must now be considered in more detail.

6.3 Insurance Without Interest: Wagering Insurances

6.3.1 Introduction

Wagering insurance was a central topic of insurance law, especially in the seventeenth and eighteenth centuries.\textsuperscript{337} Although the term in later times came to refer to insurance without any or with a doubtful or insufficient interest, that was not always the case. Unfortunately the topic of wagering insurance was befuddled by an imprecise and loose employment of terminology and as a result much confusion existed on two distinct matters, both of which were indiscriminately referred to as wagering insurance. These matters were insurances by way of wagers, and wagers in the form of insurances.

6.3.2 Insurances by Way of Wagers

From its emergence in a modern form, the insurance contract was regarded as a contract of indemnity. But the early insurance contract and the regulation of that contract had many commercial disadvantages. For present purposes, the most important of these concerned the particular limitations which were imposed upon the indemnity principle and which concerned the persons to whom, the extent to which, and the objects of risk in respect of which an indemnity could be provided by the insurance contract.

\textsuperscript{335} See too art 644-1 which reminds strongly of the amended s 18 of the Amsterdam insurance keur of 1774.

\textsuperscript{336} That depended, of course, on the function of the insurance interest. If it was to serve as a distinguishing feature, then obviously it had to exist at time of the conclusion of the contract as art 250 apparently required (see eg Faber Aanteekeningen 29), while if interest was to be a measure of indemnity, then the relevant time was when the indemnity had to be calculated, ie, at the time of loss. The requirement of an interest at the time of the conclusion of the contract appeared from at least one earlier draft of the Wetboek, namely in arts 3.11.1.3 and 3.11.1.9 of the Van der Linden draft of 1808-1809 (see Van der Linden Ontwerp 79).

\textsuperscript{337} On wagering insurance generally, see eg Dorhout Mees Schadeverzekeringsrecht 7 and 105-107; Ehrenberg 'Wettversicherung'; Elink Schuurman Brandschade 12-24; Frentz Admiralitätsgericht 124 and 145-147; Frentz 'Seerechtsprechung' 155-157; Hammacher 81-82; Holdsworth History vol VIII at 279-280; Van Houdt 19-21; Mees De assecratione 77-84; Molengraaff 'Verzekering' 417-420, 425-426, 431-432, 442-444 and 446-449; Nehlsen-Von Stryk 'Kalkül und Hazard' 196-198; De Roover 'Early Examples' 196-197; Sanborn 248-249; and Suermontd Taxatie 7-8.
The following examples of these limitations on the principle of indemnity may be mentioned. First, the narrow conception of an insurance interest which linked interest with ownership enabled the insurer to raise as defence against a claim on an insurance contract the fact that the insured, the person who took out the insurance, or the claimant was not the owner of the object of risk; in essence, an insured had to prove an interest by establishing his ownership. Secondly, it was a required that there be an interest in a physical object of risk, which required the description of that object in the policy and rendered the insurance void where no such object was either present or identifiable. Thirdly, an insured additionally had to prove the value of the object of risk and, at the same time, the value of his interest in that object, a burden which in times of notoriously bad communications was particularly onerous in specific instances, such as in the case of goods consigned to the insured from abroad. Lastly, the prohibition on over-insurance inherent in an insurance contract by reason of its nature as a contract of indemnity, became oppressive because of a further and fairly general prohibition on full-value insurance, that is, because of a requirement of compulsory under-insurance.

These and other limitations in particular instances not only gave insurers an unfair opportunity to evade their obligations but also restricted the value of insurance cover to less than what was required in practice. It is therefore not surprising that, for sound commercial and practical reasons, merchants sought to find alternative ways to achieve the same practical aim as with insurance (that is, to obtain certainty against risk, and to provide the insured with a more complete indemnity than was possible under existing insurance laws) while at the same time avoiding these limitations and disadvantages.

One of the ways in which this was achieved, was to conclude insurance contracts by way of wagers. At least this could be done in jurisdictions where and during periods during which wagers were not per se invalid. Not only were they valid contracts, but wagers were not subject to these and other limitations imposed by insurance legislation and theory on insurance contracts. Thus, by making use of a wager, a merchant could for example eliminate the exceptions which could otherwise be raised by insurers concerning the lack of a proper interest, the absence of proof as to the value of that interest, or as regards insurance in excess of the permitted percentage of that value.

Importantly, in this case, the wagers in question were not, as they could validly have been, aimed at providing a profit but they provided nothing more than a mere indemnification of a loss. The form of a wager was employed as a risk-shifting device

---

338 On the different objects of risk, see further ch V infra.

339 On the insured’s burden of proof, see further ch XVII § 4 infra.

340 As a result, over-insurance was not simply insurance in excess of the value of the interest in the goods or other object of risk, but insurance in excess of the portion or percentage of that value which it was statutorily permitted to insure. As to compulsory under-insurance, see further ch XVII § 5.2 infra.

341 To the full extent and thus beyond what was necessarily permitted by law, but not more than a full indemnity.
and to provide protection against genuine business and other losses. For example, two parties concluded a reciprocal wager on the outcome of an uncertain event upon the happening of which event one party could suffer a loss, the other party undertaking the payment of a predetermined and fixed amount which would roughly compensate the former party against that loss. In such a case, the loser of the wager could not raise as a defence the fact that the winner was not the owner of the ship, had failed to prove the precise value of the ship, or that the amount wagered exceeded that value or a lesser permitted portion of it. Therefore, these so-called non-profit wagers were simply an alternative to bona fide insurances.

Although obviously not identical to or as sophisticated as insurance either was or would eventually become, insurance by way of a wager was a practical and realistic alternative to undisguised insurances. Not only were wagers, at least initially, widely recognised as valid agreements, but they were not infrequently employed among merchants as part of their business activities. It may be surmised that mer-

---

342 Where wagers were valid agreements, merchants concluded them with a largely similar content as the insurance contracts they could have concluded in similar circumstances. Thus, A wagered 1000 on the loss of B's ship on a specified voyage while B in turn promised to pay x per cent of 1000 immediately and unconditionally. In jurisdictions where wagers were in principle valid, the courts had no option but to declare such agreements valid too. At least they were not unlawful by reason of their subject matter. The courts did not enquire whether the 1000 would go towards the compensation of a loss or whether the ship in fact belonged to B, and obviously A could not get out of the wager by relying on any of these matters as he could have done had he not wagered but concluded an insurance with B. Clearly, if A did have an interest in the ship, and if the loss he suffered by the loss of the ship did not exceed 1000, the wager in question served no different purpose than would an insurance contract.

343 In the case of both an insurance contract and a (non-profit, or, in English-law terminology, a non-gaming) wager for insurance purposes, the shipowner or goods owner would, because of there not being any possibility of profit from the contract in the case of loss, not have risked his ship or goods merely to be able to conclude the contract. He would have concluded the contract because he had, for other reasons (such as the possibility of making a profit by the employment of his ship or the sale of his goods), to expose that ship or goods to risk and because any loss would reduce if not exclude his chance of making that profit. Thus, his profit would be derived not from the contract and in the event of loss, but from outside the contract and only in the case of an absence of loss. Like the insured, the person concluding a non-profit wager would have hoped for the safe arrival of his ship or goods. See further Faber Aanteekeningen 8-11.

344 Two differences between ordinary, undisguised insurance and insurance by way of wagering may be mentioned briefly. In the first place, because the uncertain event was the safe arrival or loss of a ship or goods, the insurance wager was in effect merely the equivalent of a total loss only policy and it provided no protection against partial losses. But then, in its earliest form, insurance proper in practice too only covered total losses and not also mere damage of a ship or goods. See eg Molengraaff 'Verzekering' 454-455. As to total-loss-only policies, see ch XV § 7.2 infra. Secondly, wagers could but were not necessarily concluded on such terms that the owner of the ship or goods in question did not invariably pay the other party the sum agreed upon but merely did so on the safe arrival of the ship or goods, ie, when the other party won the wager. Put differently, the owner could either pay the other party to wager, or he could put up a stake which could be lost or retained, depending on the outcome of the uncertain event. Presumably the odds in the latter case would be higher than in the former case.

345 On the now generally rejected theory that marine insurance was in fact derived from and developed as a particular form of commercial wager prevalent in practice, namely a wager concluded by an owner on the safe arrival of his ship or goods, see further eg Molengraaff 'Verzekering' 417-420.
chants were, in earlier times, probably more familiar with both business and sporting wagers than with the newly emerged insurance contract.\textsuperscript{346} For the ordinary merchant it was irrelevant whether he acted as an individual (part-time) insurer, who did not as a rule initially calculate nor scientifically spread the risks he took over,\textsuperscript{347} or whether he concluded a wager and gave odds on the outcome of a particular uncertain event. And if there was no legal difference between them, whatever moral difference there was between wagers and insurance was probably of little concern to merchants and only became relevant when the moral objections against wagers had an impact on the law itself.

But, then, how did merchants conclude insurances by way of wagers? While the intention of the parties remained no different from that of parties concluding a \textit{bona fide} insurance, namely to provide an indemnity against a loss, the form of their contract had to conceal and contradict that intention so as to escape the limitations imposed on insurance contracts. This was achieved by the insertion of numerous different clauses or combinations of such clauses by which any intention to insure, or at least to insure within the strict confines of lawful insurance, was discounted. More specifically, these clauses made it impossible for the insurer to rely on certain technical defences to avoid liability on the contract. Examples of such clauses include those in terms of which the insurance was concluded without any description of the physical object, if any, in which there could be an interest (for example, on goods and merchandise generally),\textsuperscript{348} or in terms of which the insurance was concluded without any identification of the person whose interest in the object of risk was insured or without the insured himself having to have an interest (for example, insurance for whom it may concern).\textsuperscript{349}

A more pertinent example of insurances by way of wagers were those contracts in terms of which the one party did not have to prove the existence and thus also not the value of his interest in the object of risk. Hence, insurances not without but irrespective of interest. The addition of clauses such as 'interest or no interest' or 'policy proof of interest'\textsuperscript{350} not only deprived the insurer of any defences he may otherwise have had concerning the absence or insufficiency of the insured's interest, but at the same time,

\textsuperscript{346} See eg Mullens 20 who notes that in the sixteenth and seventeenth centuries in Antwerp (and there is no reason to suspect that it was any different elsewhere), insurance was used as security mechanism, but then only subsidiarily or complimentarily. It was merely another way in which merchants concluded gaming and wagering transactions on the Bourse.

\textsuperscript{347} See further ch IX § 2.3 \textit{infra} as to individual underwriters.

\textsuperscript{348} As to the description in the policy of the object of risk, see ch VIII § 4.3 \textit{infra}.

\textsuperscript{349} On insurance for whom it may concern, see ch X § 3 \textit{infra}.

\textsuperscript{350} Such clauses were already frequently added to insurance policies in medieval times. See eg Bensa \textit{Assicurazione} 66-67 and Gårtner 344n30 as to clauses '\textit{habeat vel non habeat}' (or simply '\textit{habeat vel non}'), '\textit{interesse vel non interesse}', or '\textit{participet vel non participet}'. 
of course, also alleviated the insured's burden of proof.\textsuperscript{351} Because the insurer either admitted the existence of an interest or the fact that presentation of the policy would suffice as proof of it, the insertion of such clauses amounted to a denial by the parties that they were in fact concluding an insurance for which, by law, there was required the existence and proof of an interest, proprietary in nature, in a physical object of risk, and not over-insured. Insurers consented to insurances in this form because, no doubt, they had beforehand satisfied themselves that the insured or someone else did in fact have an interest\textsuperscript{352} which was not insured in excess of its value.\textsuperscript{353} But outwardly the insurer, in effect, promised to pay an agreed amount on the occurrence of the event insured against without the insured having to prove that he had suffered any loss or damage as a result. Such clauses, as will be shown shortly, were also not unfamiliar in Roman-Dutch law.\textsuperscript{354}

Thus, clauses 'interest or no interest', 'policy proof of interest' and the like were initially primarily inserted to conceal otherwise \textit{bona fide} commercial insurances which, if not thus concealed, would have permitted insurers to rely upon strict and technical rules of insurance law to escape liability on their contracts. They had a largely cautionary, defensive function\textsuperscript{355} and were inserted to protect the insured against both unscrupulous insurers and an insurance law out of step with the needs of commercial practice.

Insurance by way of wagering was an insurance contract disguised as non-profit wagering agreement. It was intended as nothing but a form of insurance. Hence, the use of the phrase 'wagering insurance' in connection with this type of insurance is, strictly speaking, correct: it was a form of insurance and not a form of wagering. It is important to point out, though, that none of the Roman-Dutch authors or practitioners,

\textsuperscript{351} There is some uncertainty whether, apart from relieving the insured in case of the occurrence of the uncertain event from his burden of proving the presence of an interest, these clauses, or at least some of them, did not in fact merely shift the burden to the insurer of proving (or having to prove, should he so wish) the absence of such an interest on the part of the insured or claimant in appropriate cases. See further eg Nehlsen-Von Stryk \textit{Seeverssicherung} 136-150 on the effect of such clauses in fifteenth-century Venetian marine-insurance practices. And for the effect of such clauses in Roman-Dutch law, see further ch XVII § 6 \textit{infra}.

\textsuperscript{352} Although possibly not one based on ownership or on some other real right, or one not easily capable of proof and valuation, but nevertheless a commercial interest against which insurance protection was required.

\textsuperscript{353} Although possibly in excess of the proportion of that value permitted by law.

\textsuperscript{354} See too eg Roccus/Feitama \textit{Gewijsdens} decis 3 (the decision of the court in Florence in \textit{Hieronymus Andreini v Insurers} in 1641: see § 5.2.1 n155 \textit{supra}) where it was noted that in this case, where an insurance in the form of a wager was concluded on the life of a third party, the insurers permitted that a clause be added to the policy of insurance that the insured was not obliged to show the reason (\textit{causa}) or interest that he had in the insurance, so as to avoid any litigation on the probity of the insurance. In England wagering insurance where it was irrelevant to the insurer whether there was an interest, was practiced for many years even eg by the reputable London Assurance Company, one of the monopoly marine insurance companies established in 1720 (see Drew 42).

\textsuperscript{355} See Nehlsen-Von Stryk \textit{Seeverssicherung} 137.
nor any of their European predecessors or contemporaries, used the term 'wagering insurance'. That term, or its equivalent in other languages, it appears, came into use only during the eighteenth century and only frequently occurred in the nineteenth century when it was, not strictly correctly, applied to an analogous but distinguishable concept, namely wagering in the form of insurances.

6.3.3 Wagers in the Form of Insurances

Although the gradual liberalization of restrictive insurance and, more specifically, indemnity doctrines made recourse to the use of wagers in the insurance context less necessary, the practice of disguising insurance contracts as wagers served as an example for and made possible a different and, in a sense, an opposite practice. The prevalence of clauses by which the parties to an insurance contract concealed it as a wager soon gave rise to the serious evil of facilitating, by means and in the form of insurances, the mere wagering on the safety of ships or other property.

Already by the end of the fifteenth century a greater freedom with regard to insurance contract terms led to an increase in the practice of making insurance contracts solely for the purpose of wagering. This practice of insuring by way of non-profit wagers in turn gave rise to other undesirable and outright fraudulent practices which, by the seventeenth and especially the eighteenth centuries, occurred with increasing frequency.

Those who had no interest in any property of risk, nor any intention other than to make a profit by way of wagering on the outcome of an uncertain event, began employing insurance contracts, which were generally accepted as valid, as the disguise for their wagers or attempted wagers. This occurred especially but obviously not only in those jurisdictions where or in periods during which wagering agreements were if not expressly and unambiguously declared invalid at law, then at least increasingly being regarded with sufficient moral disapproval to necessitate such a subterfuge. In this case there was either an actual or an attempted wager, but in any event no valid insurance, hence the fact that in this case the term 'wagering insurance' is actually a misnomer.

In essence two types of wagering by way and in the form of insurance may be distinguished, but because the difference depends upon the largely concealed intention of the parties, it is not easy to determine from the outward form which type was involved in a particular instance.

The first form occurred where both parties involved had the common intention of wagering. Both the (nominal) insured and the (nominal) insurer were aware of the lack

356 In Italian 'assicurazione voto per pieno' or 'assicurazione voto per via di scommessa'; in French 'assurances par forme de gagneres'; in German 'Wettassurance'; and in Dutch 'wedasserantie'.

357 See eg Rutgers van der Loeff 52n1 who distinguishes between wagers in the form of insurance and insurance in the form of a wager. See also eg Argyroudi 79-82 for the difference (in English law) between what he terms 'a genuine honour policy' (where proof of an interest is dispensed with) which is a form of insurance by which a commercially real but unlawful risk is insured, and 'a mere wager in the form of an insurance policy' (where there is in fact no interest).
or insufficiency of the former's interest. Such wagers occurred especially between mer­
chants on mercantile topics358 and were often concluded by underwriters, not
infrequently with fellow merchants who also from time to time acted as underwriters.359
Except where wagers generally were per se legally invalid, or where wagers in this form
were specifically prohibited as often occurred in Roman-Dutch law,360 these wagering
insurances were valid.

The second form of wagering by way of insurances amounted to an abuse of
insurances concluded by way of wagering. The conclusion of insurances in this form
made it possible for the insured to defraud the insurer where it appeared that the
insured did not have any or an insufficient interest the insurer had thought to be pre­
sent, and as result of which assumption the insurer had consented to the conclusion of
an insurance in that form, or where the insured in any event concealed such lack of an
interest from the insurer, in short, the conclusion of an insurance ‘interest or no inter­
est’ or ‘policy proof of interest’ made it possible for the insurer to be defrauded.361 The
outwardly expressed intention of the parties here was to wager but whereas the real
intention of the insurer was to insure, even though he consented to doing so by way of
wagering so as to assist the insured, that of the insured was to make a profit by the
conclusion of what was nothing but a wager. And because of the expressed intention
as a result of which the insurer could not rely on the absence or lack of sufficient inter­
est, he could be defrauded by the insured by the latter relying on the outward form; the
insured abused the expressed intention of wagering by in fact doing just that.362

358 See further eg Molengraaff ‘Verzekering’ 451-452 for a discussion of the treatment by Casaregis
Discursus VII of wagers on ships and insurances on ships.

359 Obviously those who would most likely conclude wagers in form of insurance policies, rather than
disguise them as contracts of another type, would be merchants who were accustomed to having their
property insured or to providing insurance cover for others and who were therefore familiar with the
insurance contract.

360 See § 6.4 infra for the Roman-Dutch measures pertaining to wagering insurances.

361 Hence Magens Essay vol I at 28-29 (and see too Weskett Digest 311-312 sv ‘interest or no interest’
par 1) warned insurers that if insurance by way of wagering was proposed, they should carefully examine
the motives the insured may have for thus insuring so as to eliminate the possibility of fraud being
perpetrated upon them. Weskett 585-587 sv ‘wager’ par 6 added that insurance ‘interest or no interest’
where there was an insufficient interest (and therefore over-insurance) was more dangerous to the insurer
than a mere wager (presumably whether or not in the form of an insurance) where there was, to the
knowledge of the insurer, no interest: in the former case the insured was to some extent interested and
involved in the voyage and thus able to practice and perpetrate fraud with greater ease.

362 Because of the fact that it was a wager and not an insurance which was concluded between the
parties, the fact that one of the parties stood to make a profit on the outcome of the uncertain event no
doubt resulted in such contracts and practices often being accompanied by fraud in one form or another.
Thus, eg, there was a greater temptation than in the case of a mere insurance (which did not hold out the
possibility of profit) of an intentional causation or fictitious occurrence of the uncertain event in question
or for the conclusion of such a contract of wagering insurance after the occurrence of the event which
was known only to the one party. See eg Nehlsen-Von Stryk ‘Kalkül und Hazard’ 203-208 who refers to
insurance after the loss as an example of wagering insurance. Obviously the danger attached to wagering
insurance was enhanced when it occurred in the second form here described, ie, when the insurer
himself did not also intend to wager.
In short, there was no common, real intention of the parties either to wager or to insure and thus no valid contract of insurance (also, of course, because there was no or an insufficient interest) or one of wagering. Here, too, because there was no insurance, the term ‘wagering insurance’ is misleading.

Thus, whereas initially the clauses such as those insuring ‘interest or no interest’ or ‘policy proof of interest’ had served an innocent and useful purpose, they were later abused for speculative and even fraudulent purposes.363 A shift in the intention of the parties had occurred. Initially the real and common intention was to insure and to do so by way and in the form of a (non-profit) wager. Subsequently the real intention (either commonly held or at least of one of the parties) was to wager, and this was done by way of and in the form of an insurance contract.

Obviously merchants concluded wagers in an attempt to make a profit, and they cast them in the form of an insurance contract either because of the fact that wagers generally were statutorily prohibited and thus invalid, or in respect of those types of wagers which were regarded as invalid because of the nature of their subject matter. But even where this was not the case,364 the device was employed in an attempt to place the wager beyond any suspicion. Further, one must remember that in earlier times the institutionalised, available and legally permitted opportunities for gaming and wagering were much more limited than later, so that wagering by way of insurance was an option considered and employed in practice, despite the rather long odds365 and the fact that the traditional topics of insurance such as the safe arrival of a ship or goods were not ideal topics for wagering.366 Characteristic of wagers in the form of insurances

363 This occurred also elsewhere in Europe, also in English law: see eg Lucena v Craufurd (1806) 2 Bos & P (NR) 269, 127 ER 630 (HL) at 640-641 where this reversal of the function of these clauses was described.

364 It seems, otherwise than is by suggested by Fockema Andreae Oud-Nederlandsch recht 78-80, that wagering insurance was not simply an attempt to convert a void wagering obligation into a valid one by clothing wagers in form of insurances. Wagering insurance in this form (ie, of wagers by way of insurances) did not only occur where and when wagers were unlawful but also where and at times when they were not (yet) clearly invalid agreements.

365 See further Dorhout Mees Verzekering 73-74 who points out that unless the ‘insured’ knew at the time of the conclusion of the occurrence of the loss or if it was possible for him to cause the loss (in both of which cases the ‘insurer’ was of course not liable), he had a less than 50 per cent chance of winning the wager, given that brokers and insurers made a profit and a living from the conclusion of such wagering insurance contracts.

366 The safe arrival of a ship or goods was a rather unsuitable topic of wagering because of the uncertainty as to when exactly, if ever, the outcome of the uncertain event in question could be determined, and because of the possibility that the party wagering on the non-arrival, could influence the outcome by either preventing the arrival or arranging for it to be prevented. Not surprisingly, topics other than those traditionally associated with insurance became the most popular topics of such wagering
was a noticeably high premium, in some cases even up to 90 per cent; a renunciation of the adjustment of the loss in terms of promulgated insurance laws and by the proper authorities; and an undertaking by the insurer in the event of loss to pay the sum insured without any discount. 

### 6.3.4 Clauses of Wagering Insurance

Wagering insurance in all the forms just described were cast in the outward form of an insurance contract to which certain clauses were added, either to conceal the intention to insure or to give effect to the intention to wager. The same clauses by which the insured could avoid the disadvantages of a restrictive insurance law by holding out that the contract was in effect a wager, made it possible for parties to wager by making use of an insurance contract to which those clauses were added. Especially prevalent in this regard were clauses relating to the existence and proof of an interest. Thus, a clause by which the insurance was stated to be ‘interest or no interest’ amounted to an agreement between the parties that the existence of an interest was irrelevant and thus made it impossible for the insurer to rely either on a technical defence (in the case of an insurance by way of wagering) or on a real defence (in the case of a wager by way of insurance) in this regard. The same was true of an insurance ‘policy proof of interest’.

Clauses of this nature occurred in insurance contracts everywhere in Europe, also in the Netherlands. Obviously they did not appear in those policy forms prescribed or even just recommended by law. But they did occur in practice, no doubt in greater numbers than is suggested by the few extant policies in which such clauses are encountered. From these policies it appears that wagering insurances were concluded by the addition of a handwritten clause to a printed policy form. Usually, too, the clause followed upon or were combined with a valuation clause; provided that the policy or contract was agreed to be sufficient proof of interest and ownership; and was fol-

367 Obviously this was true only of those cases where there was a common intention to wager. Where the common intention or at least the intention of the insurer was to insure, he would in all probability require no more than the rate of premium usually asked in the market for the risk in question. See ch XI § 2 infra as to the amount and rate of premium.

368 See ch VIII § 5.2 infra for the renunciation of applicable laws.

369 On this discount or abatement, see ch XV § 7.4 infra.

370 See further ch VIII § 4 infra.

371 As to valued policies, see ch XVII § 5 infra.
owed by a clause renouncing any reliance on insurance laws or any recourse to the local Chamber of Insurance.\footnote{373}

### 6.4 The Legislative Response to Wagering Insurance

#### 6.4.1 Introduction

As will appear readily from the preceding general introduction to wagering insurance, the potential for confusion, both terminological and conceptual, was great. Wagering insurance, itself a term of post-Roman-Dutch origin and one thus not employed in that system itself, referred to two distinct types of contract: initially an insurance contract by way of a non-profit wager (\textit{insurances by way of wagers}), and later a wager or an attempted wager in the form of an insurance contract (\textit{wagers in the form of insurances}). In addition to wagering insurance in these two senses, the term was also used for the insurances concluded to counter the risks run by and to protect against the losses which could be suffered through wagers (thus, \textit{insurances on wagers}), and other speculative transactions concluded between merchants.\footnote{374}

\footnote{373} A few of these clauses may be quoted here. They all date from the latter half of the eighteenth century when, it appears, the practice of wagering insurance was at its zenith. Some of them are reproduced by way of appendices.

In an informal or short-form Rotterdam cargo policy from 1746 the handwritten clause read:

\begin{quote}
'taxeerende des geassureerds intrest op f360.- waarvan in cas van schade geen reek: factuur cognosst brief van ordre nog eenig 't minste bewijs van de waarde of vant intest sulle vordre' (see Mees Gedenkschrift appendix 18).
\end{quote}

A 1765 Rotterdam insurance policy on goods, including slaves to be taken on board during a slave-trading voyage to the coast of Africa and thence to America, determined after the valuation clause that 'welke taxatien ten alien tijden & in alle gevallen voor voldoende sulle aanneemen & dese polis voor dat alles als reële warede Eijgendom & taxatie' (idem appendix 22).

An Amsterdam fire policy on a plantation, buildings and slaves in Suriname dating from 1770 provided that 'dit Contract alleen tot voldoende bewijs van Interest & Eijgendom zal valideeren' (idem appendix 21).

A Rotterdam fire policy on grain of 1799 provided, in conjunction with a valuation clause, that 'in cas van ongeval, niets anders mogen worden geëischt dan alleen deze Police' (idem appendix 19).

More detailed were the (handwritten) clauses added to an Amsterdam insurance on an eighths share in the hull and equipment of a whaler dating from 1779 (see Den Dooren de Jong & Lootsma 62-64). The first clause stated that the agreed valuation was to be binding, although the hull and equipment may be worth or have cost more or less, 'zonder dat de Geassureerders eenig ander of nader bewijs van waarde Intrest of Eigendom zullen behoeven te toonen als alleen deze polis, die voor genoegsaam bewijs van waarde, Intrest en Eigendom zal dienen'. And at the end of the policy, the following (handwritten) clause appeared: 'De Geassureerders doen haar nog verzeekeren, op 't behoude vaaren, van de kiel van 't voorsz Schip daarom sullen de Geassureerders, in cas van Schade 't Voorn: Schip, op Een of andere wijze of maniere kwam te verongelukken of weg te Raaken, geen ander bewijs van intrest hoe ook genaamt behoeven te toonen, als alleen deze Polis, die voor genoegsaam bewijs zal dienen, daarom deze Assurantie ook met wederzijts genoeg geen Restorno geschiedt, En neeme wij ondergesz. aan in alle gevallen in Cas van Schade Prompt en zonder eenige Exceptie te zullen voldoen en betaalen zonder eenige andere Papieren of documenten te zullen vorderen, Renunntierende van alle wetten en ordonnantien die dem Inhoud deees zoude mogen Contrarieren of wel verblieden'.

\footnote{374} See eg Enschedé 41 referring to Emerigon \textit{Traité des assurances} 1.7 and the practice of insuring anew an object already 'insured' by way of a wager. See again § 3 n80 supra as to the 'insurance' of a lottery.
Not surprisingly, then, given also the unsettled state of the Roman-Dutch law of wagering, and the ill-drawn distinction between genuine insurance and wagers, exacerbated by use of the one to disguise the other, that when the Roman-Dutch legislatures reacted to counter wagering insurance, they drew no clear distinction between these various concepts. In consequence the legislative measures were rather imprecise and regulated or, more often, prohibited also matters not strictly within the purview of wagering insurance in the strict sense of that word. This had an adverse effect on the development of certain areas of Roman-Dutch insurance law.

Before turning to the specific legislative response to wagering insurance, though, the reasons for that intervention may briefly be analysed.

6.4.2 Policy Considerations Against Wagering Insurance

Clearly the use of wagers to circumvent restrictive insurance laws, or the use of the insurance form to disguise wagers and the potential for fraud to which this gave rise, contravened various considerations of public policy and could not be tolerated. At least two pertinent considerations militated against the mixing of wagering elements with those of insurance.

The first of these policy considerations was that against particular forms of wagering being concluded under the guise of what was increasingly regarded as a serious and economically important contract, namely that of insurance. In Roman-Dutch law, as in other European systems, this consideration in the seventeenth and eighteenth centuries caused legislative rather than judicial reaction. At the time, it must be remembered, wagers were, in the absence of specific legislative prohibition, generally and per se valid although not necessarily approved of by the courts and jur-

---

375 In England the first reaction against wagering insurances came from serious participants in the insurance market themselves. In fact, the wagering insurances being concluded on a widespread scale in the coffee house of Edward Lloyd (mainly, it appears, by a group of Scotsmen, although there was also some Jewish involvement) resulted in the more serious and full-time underwriters not merely denouncing these malpractices and in particular wagers on lives and "sham insurances, that is to say, insurances without property on the spot" (ie, wagers without property at risk), but in fact in their move from Lombard Street in 1769 to new premises, a move directly linked to the subsequent formation of the Committee of Lloyd's (see further ch IX § 2.11.3 infra). In 1774 this Committee passed resolutions condemning wagering policies on lives and on government securities as shameful, and further resolved that underwriting members would refuse to subscribe such policies and would in future act against brokers offering such policies to them. On wagering insurances at Lloyd's, see further eg Clayton 58; Dover 37; Martin 117-118 and 157; and Wright & Fayle Lloyd's 90-96 and 118.

376 The aim of the English Marine Insurance Act of 1746, which was directed at marine wagering insurances and which will be considered in more detail shortly, appeared from its preamble. Its aim was to prevent abuses for the benefit of maritime trade and insurance business, namely the further fraudulent loss and destruction of ships with their cargoes insured and encouraged by such wagering policies, and the many prohibited and clandestine trades which by means of such insurances concealed and insured, and also the "mischievous kind of gaming or wagering, under the Pretense of assuring the Risque on Shipping" which had perverted the institution and laudable aims of insurance. The preamble of Life Assurance Act of 1774, which was concerned with wagering insurances on lives, noted that the making of insurances on lives or other events in which the insured had no interest, had introduced "a mischievous kind of gaming". See further on the English law, § 6.4.4 infra.
ists. This was true even if the wager in question was concluded in the form of an insurance contract. Where wagers were in principle valid, wagering insurance too was valid. The use of wagers made it possible to circumvent legislative provisions directed at the insurance contract and this loophole had to be closed. This could be done only by legislative intervention and was in fact done in the insurance laws themselves.\textsuperscript{377}

Another but apparently less important\textsuperscript{378} consideration underlying the prohibition of wagering insurance was that against the intentional destruction of insured property, or even murder in the case of wagering life insurance, with a view to defrauding insurers. The conclusion of a wager by way of an insurance contract provided the one party (the nominal insured) with an interest which he did not have before, and more specifically an interest in the occurrence of the loss. Unlike other wagers, wagers in the form of insurance contracts were upon uncertain events which involved the loss or destruction of property, and very often property over which one of the wagerers exercised some form of control.

It is significant that the legislative steps taken against wagering insurance were contained in insurance laws. This confirmed the interpretation of those measures as not being aimed at wagering and certainly not at wagers generally as some authors thought, but as being specifically aimed at a particular form of wagering, namely wagering concluded in the form of insurance contracts. The aim was to prevent the transgression and circumvention of insurance laws, and the perpetration of insurance fraud under the cover of otherwise valid wagering insurances. Frauds upon insurers\textsuperscript{379} included, most prominently, the insurance or over-insurance of property by someone without any interest or with an insufficient interest, which insured property was then very often intentionally destroyed so as to make a profit by claiming from the insurer on the wagering policy. The legislative measures were promulgated only when the abuses and criminal practices they sought to contain, emerged on a more frequent scale, especially from the seventeenth century onwards.

\textsuperscript{377} According to Frentz 'Seerechtsprechung' 155-157 and \textit{idem Admiralitätsgericht} 145-147, the Dutch insurance legislation which prohibited wagering insurance linked the prohibition less to any absence of an interest (a concept at any rate not yet dogmatically circumscribed and legislatively recognised) and more to the abuses made possible by the practice of concealing certain types of wagers in contracts of insurance.

\textsuperscript{378} It is interesting to note that the objection to life insurance without an interest in English law was not the creation of any temptation to murder, but the fact that such wagers came to be regarded as mischievous kind of wagering; see eg the heading to the Life Assurance Act of 1774 referred to in n376 supra.

\textsuperscript{379} Wagering insurance also gave rise to other frauds, not primarily directed against the insurers concerned. One interesting example from England concerned the manipulation of the insurance market. Wagering insurance permitted uninterested persons to obtain an insurance, or even numerous insurances, 'interest or no interest' on a ship (or, more ambitiously, on the ships in a particular fleet) at an early stage of that ship's voyage. Those who concluded such insurance, then spread the false rumour on the Exchange that the ship (or the fleet) in question had been lost at sea. As a result of these rumours, the owners could no longer obtain insurance cover (on terms 'lost or not lost') themselves, and the existing insurance cover was then graciously sold at a huge profit to the owners of the ships concerned. This ingenious practice was described by John Cary \textit{An Essay on the State of England In Relation to its Trade} (1695) at 141-142, quoted by Barbour 589; and see too eg Weskett \textit{Digest} 226-227 par 3.
Unfortunately Roman-Dutch legislatures overreacted and prohibited not only particular types of wagers by way of insurance contracts, but also particular types of insurances. The reason for this was, primarily, the failure at the time to distinguish in principle between wagers and insurance and between the various forms of wagering insurance. They were unfamiliar, too, with the concept of an insurance interest which came to the fore only in the course of the latter half of the eighteenth century. In fact, as appeared from the investigation of the interest requirement in Roman-Dutch law, the notion of an interest was known in insurance laws but was never employed there to distinguish wagers and insurances. The regulation and prohibition of wagering insurances in Roman-Dutch law occurred in a fragmentary fashion, and the frequency with which measures were repeated, tends to indicate that the laws were not always adhered to.

Wagering insurance practices waned after the eighteenth century, not so much because of the success of the legislative prohibitions but rather because other forms of speculation had arisen which were more attractive than wagering conducted by the conclusion of insurance contracts. Still, wagering insurances continued to be concluded, even then, in cases where the law was incapable of meeting the needs of commerce.

It is against this background that Roman-Dutch legislation aimed at wagering insurance may briefly be considered.

6.4.3 Roman-Dutch Legislation on Wagering Insurance

The first legislative measure aimed at wagering insurance in the Netherlands was that contained in the title dealing with insurance contracts contained in the placcaat of 1563. Section 4 of title VII provided that no insurance ("asseurantien") could in future be concluded on certain objects, such as property already at risk or already lost, or against certain risks, such as against bartrary, whether by way of insurance, wagers or otherwise, in whatever form ("t'zy by forme van verseeckeringe, weddinge, oft andersints, in eenigerhande maniere"). It was expressly added that all usages and customs to the contrary were abolished and nullified and that all contracts or agreements to the contrary were declared null and void and ineffective. Clearly the provision sought to prevent the circumvention of particular insurance laws by the conclusion of insurance contracts in the form of, for example, wagers. Interesting is the use of two terms for 'insurance', the section in effect recognising that insurance ('asseurantien')

---

380 In this they were not alone. The English Legislature too did not only prohibit insurances without interest, but also insurances concluded irrespective of interest (ie, by way of gaming and wagering) in cases where there was in fact an interest. See further § 6.4.4 infra.

381 Magens Essay vol II at 25 translated this as: 'No Insurance shall ... be made in any Shape, either by way of Assurance, Wager or otherwise'.

could be concluded by way of insurance ('verseeckeringen') or by way of wagers, or otherwise, that is, disguised in another form.382

More important and of greater influence was s 32 of the insurance *placcaat* of 1571. It provided that to prevent abuses, frauds and crimes committed in insurances and wagering insurances ('inde asseurantien ende verseeckeringe') on the lives of members of the crew and persons ('op 't leven vande Lieden ende Persoonen'), and on wagers of voyages and similar events ('op weddingen van reysen oft voyagien, ende dierghelijcke inventien'), they (that is, such insurances and wagering insurances) were prohibited as against public policy ('als der ghemeyne welvaert schadelijck ende hinderlijck wesende, ende van quaden exempel'). As already explained earlier,383 this provision did not prohibit wagers generally and not even undisguised wagers on lives, voyages and similar events. It was aimed, rather, at wagering insurances, that is, at wagers on the topics mentioned which were disguised as insurance contracts. More closely read, though, it prohibited not only wagering insurances ('verseeckeringe') but also (undisguised?) insurances ('asseurantien') on lives and on wagers on voyages and similar events. All in all, it is rather unclear what exactly was prohibited but it may be that the section prohibited no more or less than life and marine wagering insurances.384 In any event it would appear that just as this provision cannot be taken to have prohibited marine insurances generally, so too it cannot be taken to have prohibited life insurances generally.

Around the turn of the sixteenth century, a trio of municipal *keuren* again tackled the topic in largely similar fashion. Section 24 of the Amsterdam insurance *keur* of 1598 prohibited insurances ('Asseurantien') on lives, and on wagers on journeys or voyages and similar events ('op weddingen van reysen ofte voyagien, ende diergelijcke inventien'), and declared them null and void. Again, it seems, this was but a prohibition of wagering insurances on the topics listed. Largely similar was the measure contained

---

382 This usage is reminiscent of that employed by earlier Italian authors (see eg Casaregis's distinction between proper and improper insurances: § 6.1.3 n277 supra) and is encountered in later legislative measures. But it appears that no firm conclusions can be drawn from this usage in Roman-Dutch insurance legislation because the two terms appear to have been used interchangeably at different times by different legislatures.

383 See § 5.2.2 supra.

384 The following argument about a possible interpretation of s 32 (and subsequent provisions which were worded similarly), but one, though, for which I could find no direct support, may be raised. Section 32 was not concerned with wagers on voyages to be undertaken by one of the parties to the wager himself (those wagers were in any case apparently usually clothed as sales and not as insurances: see § 5.5.5 supra) but rather with the maritime voyages on which ships and goods were sent. That is, s 32 dealt with wagers (in the form of insurance contracts) on the safe arrival of ships and goods and thus prohibited life and marine wagering insurances. Feint support for this argument is to be found in s 23 of the Rotterdam insurance *keur* of 1721 in which the jurisdiction of the Chamber of Maritime Affairs in that city was described as being over all disputes arising from insurances on ships, on goods loaded there, on ransom money, and also on everything that had a bearing on commerce, navigation, the export and import of goods, and to 'Reysen, sowel te Lande as te Water' and all disputes arising from them. It seems that the voyages ('Reysen') referred to here were commercial voyages undertaken by ships and goods, for in terms of s 24, the ordinary courts had jurisdiction over certain other non-commercial insurances not concerned with the import and export of goods, voyages and their consequences.
in s 2 of the Middelburg insurance keur of 1600. More concise was s 10 of the Rotterdam insurance keur of 1604 which simply declared that no insurance (‘asseurantie’) could be made on the life of any person or on wagers.

Not surprisingly, contemporary writers do not provide much assistance on the scope and meaning of these legislative provisions. Thus Grotius simply stated that everything could be insured except, amongst other things, human lives and wagers (‘uitgezeit menschen leven, weddinghen’), which clearly explains very little of what exactly was prohibited. Even if the measures referred to above did in fact prohibit insurances on lives and on wagers, they were certainly not confined to that.

The view that it was wagers in the form of insurances (wagering insurances) and not undisguised wagers nor undisguised insurances that were the target of these legislative prohibitions, finds some confirmation in an opinion dating from 1678 on the validity of ransom insurance. The lawyer expressing the opinion thought that ransom insurance did not fall foul of the municipal measures just mentioned. These were concerned with the prohibition of something completely different, namely a particular form of wagering on the topics in question, and those wagers, presumably because of the form in which they were cast, were contrasted in the opinion with and regarded as inferior to insurance proper (‘ware assurantien, waar mede zy eenige overeenkomingen schijnen te hebben’). This, the opinion continued, was clear also from the placcaat of 1571 which was the first to treat this particular matter.

The prohibition of wagering insurance was retained in legislation in the eighteenth century.

Thus, s 28 of the Rotterdam insurance keur of 1721 provided that one could not insure (‘asseureren’) any wagers (‘weddingschappen’), under which expected prof-

---

385 One difference was that it referred only to ‘reysen’ and not also to ‘voyagen’. Whether this was of any significance, is not clear.

386 The Antwerp compilation of customary law of 1609, the Compilatae, was rather sweeping. It provided that all insurances, obligations, wagers and similar conditions on the life or death of any person, any voyages or pilgrimages, the sex of an expected child, the capture of cities and the like were by various legislative provisions prohibited (see par 14 of title 1 of part IV), a prohibition specifically repeated in the context of insurance (in art 316 par 9 of title 11 of part IV). See again § 5.2.3 supra.

387 Inleidinge III.24.4.

388 See Nederlands advocboek vol II adv 170.

389 One may briefly contrast the position in Hamburg in the mid-seventeenth century (see Frentz ‘Seerechtsprechung’ 155-157 and idem Admiralitätsgericht 145-147 for further details). The Hamburg Admiralty Court’s decision in 1656 in Hübner v Von der Krentze concerned ‘insurance’ on an already departed ship ‘mit oder ohne Interesse’ at a premium of 75 per cent. The approach of the Court shows that it did not regard the wagering insurance before it as in principle not permissible. This may be explained by the fact that at that time there was not yet any law in Hamburg which prohibited insurance without any interest.

390 Magens Essay vol II at 88 has ‘No Assurance is allowed to be made on any Wagers’.
its too were included, but from which, by s 24, return cargoes were excluded. Similarly, s 13 of the Amsterdam insurance keur of 1744 provided that one could not take out insurance on wagers of journeys or voyages and similar events (‘niet mogen laten versekeren op Weddinge van Reysen ofte Voyagien, en de meer diergelyke inventien’) and that such insurances would not be adjudicated by the courts (‘en sal daar op geen Regt gedaan worden’). Again, it appears, what was prohibited was wagers in the form of insurances on certain topics which now, however, significantly even if inadvertently no longer included human life.

The opinions of eighteenth century authors shed little further light on the topic. Scheltinga noted the contrast between the measures where the wagers which were included under the things that could not be insured, were confined to wagers on voyages and other events, and the measure contained in the Rotterdam keur of 1721 which prohibited the insurance of all wagers generally. But he thought that the position was the same throughout the Netherlands because of the addition in the placcaat of 1571 of the words ‘en diergelyke inventie’. Thus, everywhere the insurance of wagers generally, that is, wagering insurances generally and not only those of a particular nature or on specific topics, were prohibited. Schor, who was inclined to restrict the scope of s 32 of the placcaat of 1571 to wagers in the form of insurance contracts and not to regard it as a prohibition on wagers generally, gave as reason for the prohibition the fact that wagers in this form (that is, wagering insurances) were not in the nature of insurance contracts which were concluded for the utility and convenience of trade (‘ten doel hat de bruikbaarheid en nuttigheid van den koophandel’). Finally, Van der Keessel, who likewise regarded the measures referred to above as not extending to wagers generally, noted that the Amsterdam insurance keuren of 1598

---

391 See further ch V § 5.3 infra.

392 Van Zurck made various statements on insurance and wagers. He noted with reference to the legislation just mentioned, that one could not insure human lives nor any wagers of voyages and similar events and that such insurances would be null and void (Codex Batavus sv ‘Assurantie’ pars 4 and 7D; sv ‘Wedden’ par 1). Nevertheless, he continued, with reference to Roccus, to explain that ‘op’s menschen leven en weddingen worden anders [elsewhere? otherwise?] assurantien van waerden gehouden, en is zulks niet buiten gebruik’ (Idem sv ‘Assurantie’ par 4n1). Van Zurck specifically mentioned elsewhere (idem sv ‘Wedden’ par 2) that wagers on particular topics, including the performance of voyages and the lives of princes, were also prohibited. It appears that Van Zurck understood the prohibitions to be on insurances on lives and wagers. See too eg Decker Aanteekeningen ad IV.9.4 n(3)/(c).

393 It is uncertain whether insurances (ie, wagering insurances) on those topics were invalid or merely unenforceable. The latter seems likely in view of the fact that later on in s 13 another prohibition was specifically declared null and void.

394 Dictata ad III.24.4 sv ‘weddingen’.

395 Aanteekeningen 417 (ad III.24.4).

396 Idem 312 (ad III.3 48) and see again § 5.2.4 n232 supra.

397 Praelectiones 1438-1439 (ad III.24.4).

398 See again § 5.2.4 n273 supra.
and 1744 contained prohibitions on insurances of (not ‘on’) wagers (‘assecurationes sponsionum’), that is, on wagering insurances, concerning (land) journeys and (sea) voyages or similar events (‘de itineribus vel navigationibus aut similibus inventis’), while the Rotterdam keur of 1721 prohibited the insurances of wagers of whatever nature (‘assecurationes sponsionum quarumcumque’).

6.4.4 Conclusion

Insurance legislation in the Netherlands from the middle of the sixteenth century promulgated prohibitions not against wagers generally but against wagering insurances, both in the sense of insurance contracts by way of wagers and wagers disguised as insurances. The measures were aimed at preventing wagering being used to conceal improper insurance contracts and also insurances being used to further wagering practices. Unfortunately the wording of the various statutory prohibitions do not bear close interpretation and in fact give rise to some nice questions which Roman-Dutch sources never properly addressed. It is noticeable, further, that in prohibiting wagering insurances, the Roman-Dutch legislatures in the eighteenth century were not yet sufficiently familiar with the interest doctrine as a way of distinguishing insurances from wagers, including wagers in a disguised form. But whether such familiarity would necessarily have resulted in a less uncertain and more systematic approach to the question of wagering insurances remains debatable.

At least the English experience, which may be considered briefly, would indicate otherwise. There the Legislature too sought to prohibit wagering insurances in the eighteenth century. At that time a rapid expansion of insurance and related enterprises occurred in England, albeit with strong gambling overtones. The common law courts were still only gradually moving towards a more general disapproval of wagers. After some earlier attempts to regulate wagering insurances, none of which provided any check on the making of wager policies on ships and other maritime property, lives and events, the first major legislative offensive against wagering insurance came in the form of the Marine Insurance Act of 1746. Section 1 prohibited and declared null and void ‘Assurances ... on any [British] Ship or Ships ... or on any Goods, Merchandises or

---

399 See too Elink Schuurman Brandschade 19-21, noting that Dutch insurance laws prohibited ‘verzekeringen op weddingen van reizen’ and ‘assurantien op ‘t leven van eenige persone ofte weddinge’. Dutch legislatures wanted no wagers on the safe arrival of ships or goods because of the fraudulent practices to which such wagers gave rise. Foreseeing that this prohibition would be circumvented by clothing the wagers in the form of insurance contracts, legislatures prohibited all insurances which, because of a lack of interest, were nothing but wagers, ie, they prohibited ‘verzekering op weddenschap’.

400 Thus, the Act 7 Anne c 16 of 1708 - ‘An Act to prevent the laying of Wagers relating to the Publick’ - in s 1 prohibited and declared null and void ‘all Wagers to be laid upon any Contingency relating to the present War, and all Policies of Assurance ... for the Payment of any Sum or sums of Money upon such Contingency’. section 2 made it clear that the prohibition was not to extend to any insurances upon any ship or cargo nor to any bottomry bonds on any ship.

401 19 Geo II c 37.
Effects laden or to be laden on board of any such Ship or Ships, Interest or no Interest, or without any further Proof of Interest than the Policy, or by way of gaming or wagering, or without benefit of Salvage to the Assurer'. This prohibition concerned insurance without or irrespective of any interest; it was directed against non-gaming wagers (that is, against insurances in form of wagers) but drew no distinction and applied also to insurances by way of gaming and wagering (that is, to wagers in form of insurances).

But the Act of 1746 applied only to marine wagering insurances and such wagers on non-marine topics such as the duration of life in particular, remained valid. The loophole was closed by the Life Assurance Act of 1774. Section 1 prohibited, and thus made unlawful, and declared void any insurance made on the life of any person, 'or on any other event or events whatsoever', in which the insured had no interest, or any insurance made 'by way of gaming or wagering'. Again, therefore, insurances made on lives without or irrespective of any interest were prohibited, again without any distinction between the different but overlapping forms of wagering insurance.

Interestingly enough, the Life Assurance Act, like its Dutch counterparts, also gave rise to different interpretations. Some commentators were initially of the opinion that it rendered void all wagers, but the contrary and more restrictive view, despite the fact that it was not that obvious from the wording, eventually prevailed, namely that the Act of 1774, like its marine predecessor of 1746, was concerned only with one form of wagering, namely with wagering disguised as notional insurance. Undisguised wagers or, presumably, wagers disguised as other forms of contract, fell outside its scope.

Despite the fact that both English Acts appeared more advanced than their Dutch counterparts by having adopted insurable interest as the test to determine whether one had to do with proper and legitimate insurance or with wagering insurance, the nature and content of that concept was not defined and described, nor was it indicated at what time or times the interest was required. These matters were only clarified, and not always satisfactorily so, by the English courts in the next century.  

402 14 Geo III c 48.

403 For the historical aspects of the English law of wagering insurance, see eg Ashton Gambling 275-286; Barbour 'Marine Risks' 587; Cockerell 13; Dumais 446-447; Evans 'Life Assurance'; Fegan; Holdsworth History vol XI at 447n6 and 448, and vol XII at 539; Magens Essay vol I at x-xii and 28-34; Martin 137-142; Merkin 'Gambling'; Molengraaff 'Verzekering' 445-446; Müller 'England' 11-15; Spooner 118-119; Supple Royal Exchange 9-10; Walford Cyclopaedia vol II at 108 sv 'contract of insurance' and 238-239 sv 'declaration of interest'; Walford 'Life Assurance' 14; and Weskett Digest 582-587 sv 'wager', 291 sv 'insurance' par 7, 309 sv 'interest' par 13, and 311-312 sv 'interest or no interest' par 1.
1 The Classification of the Insurance Contract: Its Nature and Distinguishing Features

1.1 Introduction

Having considered the first aspect of the process by which the legitimacy of the insurance contract was entrenched in Roman-Dutch law, namely by establishing its particular relationship with other contracts and devices in which the transference of risk played a role and which were known to Roman law, we may now turn to a second aspect of that process, namely the classification of the insurance contract.

Roman-Dutch law remained generally preoccupied with the process of classification and definition and, ultimately, the formal legitimisation of the insurance contract until the end of the eighteenth century. For purposes of this process, Roman-Dutch law, like other contemporary legal systems, made use of and referred to the system of contracts known to Roman law and its classifications and formulas. Just as Roman-Dutch lawyers sought to link the insurance contract and to describe it with reference to a type of contract known to Roman law, so they tried to fit the insurance contract into the Roman system of contracts.¹ This they did even though the insurance contract itself

¹ In explaining the nature of the insurance contract, and in identifying the legal principles involved, Roman-Dutch lawyers, like the jurists in the Middle Ages, as a rule argued by analogy: they sought, most specifically, to explain the contract of insurance with reference to one or more contracts in the Roman legal system, and, more generally, to place it in their own law of contract with reference to the Roman system of contracts and ultimately with reference to Roman law in general. While attempts at a specific comparison became less noticeable in the eighteenth century as Dutch jurists came to realise that the insurance contract was a contract *sui generis*, attempts to place it within and to describe it with reference to the Roman contracts system, continued right up to the end of the eighteenth century.
was unknown to Roman law and even though the details Roman system of contracts themselves had largely become obsolete.

Thus, it is necessary briefly to investigate the system of contracts in Roman law and the development of a general law of contract based on consent before turning to the classification of the insurance contract in Roman-Dutch law.

1.2 From a Law of Contracts to a Law of Contract

1.2.1 The Roman System of Contracts

The sources of an obligation provided the basis for the classification of specific obligations in Roman law. The main classification was that of 
\textit{obligationes ex contractu}, 
\textit{obligationes ex delicto}, and 
\textit{obligationes ex variis causarum figuris}.

Roman law recognised only a limited number of classes of agreement which were valid and actionable and which thus gave rise to obligations. Of these 
\textit{obligationes ex contractu}, there were various different classifications.\(^2\)

The first and main classification of contracts distinguished between them in the manner in which they were created. Three main types were recognised. First there were contracts which were concluded by the performance of particular formalities by the parties, usually in each other's presence, and of these formal contracts there were two types, namely 
\textit{contractus verbis} and 
\textit{contractus litteris}.\(^3\) Then there were contracts which were concluded by the delivery of the subject-matter of the contract. Possession of, and in certain instances, ownership in, a thing or money was (temporarily) transferred and entrusted, and in certain cases its use made available, to the debtor, and this handing over of the object or the money then obligated the repayment of an equal sum or the return of an equivalent or the very thing itself. Main examples of such real contracts (\textit{contractus re}) were the loan for consumption (\textit{mutuum}) or for use (\textit{commodatum}), deposit (\textit{depositum}) and pledge (\textit{pignus}). And lastly there were contracts which were created by mere informal (formless) agreement between the parties concerned. Four contracts were recognised as being consensual contracts (\textit{contractus consensu}) of this type, namely sale (\textit{emptio venditio}), hire (\textit{locatio conductio}) of things (\textit{rei}), services (\textit{operarum}) or work (\textit{operis}), mandate (\textit{mandatum}) and partnership (\textit{societas}). In this case the obligation was created simply by an informally declared and reached consent without any additional delivery of a thing, or any formal writing or verbalisation.

\(^2\) See generally on the Roman system of contracts, Feenstra \textit{Grondslagen passim}; Feenstra & Ahsmann 8-11; Kaser \textit{passim}; Lee \textit{Introduction} 230-231; Zimmermann \textit{passim}; and Van Zyl \textit{Romeinse Privaatrech passim}.

\(^3\) The \textit{stipulatio} was the main example of the \textit{contractus verbis}, and two types of transactions, conventional penalties (\textit{stipulationes poenae}) and suretyships (\textit{adpromissiones}), had to be concluded by way of an (oral) stipulation \textit{inter praeentes}. Akin to contracts concluded by way of oral formalities, were literal contracts which were concluded by a formal entry into his ledger or account book by a creditor at request of his debtor, which entry was regarded as the fictitious payment of money or delivery of the thing in question to the debtor.
In Roman law there was a *numerus clausus* of consensual contracts, and contracts which could not be brought under any one of the existing contracts, or which combined certain elements of two or more of them, were mere unenforceable pacts (*pacta*). All contracts which were not formal, real or consensual contracts, but which were simple, informal (consensual) arrangements, did not give rise to an action. They were not clothed with an action but were nude pacts (*pacta nuda*). Hence the rule that a nude pact gave rise to no action (*ex nudo pacto non oritur actio*). Parties could therefore not themselves create contractual obligations of a type for which the law did not provide an action. But such pacts were not entirely ineffective or invalid. Although a party could not sue on a *pactum*, it did provide him with a defence and he could therefore not be sued on it either. Put differently, a mere pact could not be enforced by action but might be pleaded by way of an exception.

Obviously any rigid adherence to such a closed actional system of contracts would have caused hardship. Accordingly, by the time of Justinian, a remedy was provided, at least in those cases where one of the parties had relied on the enforceability of the arrangement and had performed his side of it in the expectation that a counterperformance would be made. These agreements were later collectively referred to as innominate or nameless contracts (*contractus innominatus*), that is, contracts falling outside the traditional, closed system of contracts and for which specific actions did not exist. The general action available in post-classical Roman law for such contracts, was the *actio praescriptis verbis*. Because these contracts depended for their actionability upon something more than mere consent, and in fact required a performance by one of the parties to create a binding obligation upon which he could claim a counterperformance, they were real contracts, and thus innominate real contracts.

Thus, innominate real contracts covered all reciprocal consensual agreements, apart from sale and hire, and included a wide range of enforceable consensual arrangements, or pacts clothed with actionability (*pacta vestita*) as they were later called, outside the fourfold contractual scheme of the classical Roman law. Not surprisingly, the advent of innominate real contracts entailed a fairly major inroad into but not a complete abandonment of the rule *ex nudo pacto non oritur actio*.

The second classification of contracts in Roman law, and one which flowed from the development just described, was between nominate and innominate contracts. Nominate contracts included the four real contracts (of loan for use and for consumption, deposit and pledge), and later extended to include the four consensual contracts too. They were named because they each had an own action and procedure for

---

4 Thus, if an agreement based on consent could not be brought under one of the four recognised consensual contracts, it was not enforceable; further, in the absence of the required delivery of a thing or payment of money, a real agreement was regarded as a mere pact.

5 Some examples of these innominate contracts (which had actually acquired individual names) were those of exchange (*permutatio*), the contract for sale or return (*contractus aestimatorio*), the undertaking to act as an arbitrator (*receptum arbitri*), and the undertaking by a sea carrier, innkeeper or stable keeper for the safety of customers’ goods on board his ship or on his premises (*receptum nautarum cauponum stabulariorum*).

6 By praetorian or imperial intervention: *pacta praetoria* or *pacta legitima*. 

enforcement, individualised by a specific name. That is, every obligatio had its own actio with its own formula from which the requirements for liability were apparent. Innominate (real) contracts were contracts which had no special names of their own nor any special form of action, but their enforceability was based on the fact that actual performance had taken place by the one party which required that something should be performed in return by the other party. These contracts were classed under four heads: do ut des, do ut facias, facio ut facias, and facio ut des. The cause of action arose out of the actual performance, namely the give or pay (do) of something, or the do or not do (facere) of something.

A third division of contracts under Roman law was that of contracts of good faith (contractus bonae fidei) and contracts which depended not upon the observance of good faith but upon the strict observance of legal formalities (contractus stricti iuris). The former gave rise to iudicia bonae fidei in which the decision was discretionary because the guiding principle in determining whether or not there was liability, was notions of good faith,7 while the latter gave rise to iudicia stricti iuris in which strict and formalistic principles determined liability. Contracts stricti iuris included the stipulatio (that is, formal contracts), the contract of loan for consumption, the donation (donatio) and innominate pacts generally; contracts of good faith included loan for use, deposit pledge, sale, hire, mandate, and partnership. Thus, good faith contracts included all the consensual contracts and also some other nominate contracts besides.8

A fourth and final classification of contractual obligations in Roman law was that into unilateral obligations (where the one part as creditor had a claim against the other party as debtor), imperfectly bilateral obligations (which were non-reciprocal), and perfectly bilateral obligations (where each party was at the same time creditor and debtor and the obligations were therefore reciprocal, the one being undertaken in exchange for the other).9

### 1.2.2 The Influence of the Medieval Law Merchant

The Roman-law distinction between pacts (informal, or innominate formal or consensual agreements) which did not give rise to an action but only to defence, and fully effective nominate (formal, real, or consensual contracts) and innominate (real) contracts, was carried over into the medieval jurisprudence.10 In this regard, the Glossators drew the distinction between what they termed unenforceable pacta nuda and enforceable pacta vestita. An important task of medieval legal scholars consisted in assimilat-

---

7 Thus, the presence of fraud (dolus malus) and the debtor’s conduct as a whole had to be taken into account.

8 The importance of this was that when the notion later developed that all contracts were consensual contracts, they also all came to be regarded as contracts bonae fidei.

9 See further Kaser 165-167 who points out that this division had not yet fully been worked out in Roman law.

10 For the developments during this period, see eg Zimmermann 537-545.
ing new commercial devices and practices in the long-standing categories of Roman law.

While initially pacta vestita as a group remained a numeros clausus as was the case in Roman law, gradually, as more and more contracts came to be added to the pacta vestita by being recognised as innominate real contracts, the remaining number of unenforceable pacta nuda dwindled and the category became an anomaly. This happened especially with commercial contracts of post-Roman-law origin. Thus, whereas innominate real contracts were at one stage merely exceptions to the rule that nude pacts were not actionable, these exceptions subsequently became the rule.

One of the main reasons for this change was the influential role of the international law merchant (lex mercatoria). Already by the end of the Middle Ages the rule of Roman law began to be eroded and every informal agreement was regarded as legally binding in practice. For practical and commercial reasons, the Roman classification of contracts proved inadequate. In essence, the Roman obsession with rigid form was anathema to commercial contracts between merchants. By the sixteenth century a great disparity had arisen as regards commercial contracts and practices between what occurred in practice on one hand, and Roman-law influenced theological, legal and moral theories on other hand. 11

In the case of formal contracts, the requirement of oral formality also required the presence of the parties at the same time and place. This impracticality led to the eventual demise of the classical formal contract (or stipulatio) which gradually came to be converted into a written and often notarially executed contract. An amalgamation between the contractus verbis and the contractus litteris occurred. A lack of formalities was no longer recognised as a defence in commercial contracts. In the case of real contracts, a transformation into true obligatory contracts based, like all contracts, on consent, gradually occurred, the ‘formality’ of delivery too being found impractical in commercial situations.

From post-classical times there was a general disintegration of the classical system of contracts. Consensualism had gained ground and the element of consent therefore came to be emphasised also in the case of contracts (traditionally) concluded re, verbis or litteris. Such contracts were transformed into contracts based exclusively on consensus and the need for any additional delivery or transfer of an object or the payment of a sum of money, verbal formalities or writing, as the case may be, to create a binding contractual obligation, was thus obviated.

But another reason for the change was the prevailing opinion of the canonists from the thirteenth century onwards. They thought that informal consensual pacts (nuda pacta) were as binding and enforceable (giving rise to an action and not only to an exception) as any formal undertaking confirmed by an oath. The underlying idea was that a man’s word was his bond, even if there were no confirming formalities. Therefore, in canon law, the principle came to be recognised that a nude pact did in fact give rise to an action (ex nudo pacto oritur actio), or, put differently, pacta sunt servanda. This no doubt contributed to the acceptance in practice of the binding nature of consensual contracts.

11 See eg Savelli 47-48.
Therefore, in the course of time and especially under the influence of the law merchant, with its aversion of formality and technicality, and also canon law and medieval jurists, the classical, closed system of contracts lost its meaning and value in the civil law and there developed a general law of contract, as opposed to a law of contracts, based on consensualism. But although nude pacts were by the end of the Middle Ages generally recognised in practice as being enforceable, the breakthrough on a doctrinal level, though, occurred only much later in the seventeenth century. And in this breakthrough, Roman-Dutch lawyers played an important role.

### 1.2.3 The Roman-Dutch Contribution

While indications are that in early Dutch law not every promise was legally enforceable, the Roman system of contracts with its subtle classifications and distinctions was never received in practice nor formally adopted or strictly adhered to in Roman-Dutch legal theory. In effect, in the Netherlands, all contracts were consensual, and the distinction between formal, real and consensual contracts, and between contracts and pacts, was never further developed and practically became obsolete. But while the Roman-law system was not strictly adhered to, it was also not, or at least not yet clearly, abandoned.

Although an anomaly in practice, the Roman-law rule of ex nudo pacto non oritur actio continued to be asserted in Roman-Dutch law until well into the seventeenth century, albeit more and more sporadically as time went by. But the contrary rule was in any event not explicitly advanced.

The most important of the earlier Southern Netherlands authors was Wesenbecius from Louvain. He was the earliest authority of the usus modernus who argued that all pacts were actionable, not only according to canon law but also in civil law. The most important author of the Northern Provinces was Grotius. But although he was the main contributor to the doctrinal recognition of consensual nature of contracts, Grotius nowhere plainly and expressly stated that he considered all pacts enforceable. But it would appear that Grotius, who, it must be remembered, also nowhere
framed a comprehensive definition of contract in its modern sense, fully accepted the principle that every pact gave rise to an action.

Furthermore, although Grotius may not have been as clear as some of his predecessors, notably Wesenbecius, he was nevertheless very influential and was always cited by later authors as authority for the proposition that there was no distinction between solemn and bare pacts or promises. Nearly all later Roman-Dutch writers conceded that in their time nude pacts were regarded as enforceable. From the eighteenth century onwards this was no longer disputed and the general distinction between pact and contract had probably lost all significance. The rule was ex nudo pacto oritur actio, or pacta sunt servanda.

Thus, by contrast to Roman law, Roman-Dutch legal practice and, by implication, its legal theory held that promises seriously and deliberately made, were enforceable as a contract without the need of fitting it into a recognised category and without proving that particular formalities had been complied with in the making of the promise. All contracts were consensual and any agreement whatsoever was enforceable, as long as there was compliance with the general requirements for all valid contracts.

When the meaning of the fourfold Roman division of contractual obligations lost its significance, such obligations no longer had to be classified with reference to the way in which or the source from which they originated but rather according to their content and consequences. Still, the influence of obsolete practices very often do not die a simultaneous death and may in spirit at least linger on long after the demise of the practice itself. This was why many Roman-Dutch authors continued classifying contracts, including the insurance contract, with reference to the Roman-law system of contracts. Thus, despite the implicit break with the Roman contract mould by Dutch authors, a break already earlier achieved and maintained in commercial practice, this was not formally or explicitly recognised. Virtually all Roman-Dutch legal authors steadfastly and confusingly retained the classification and phraseology of Roman law despite the fact that the need to classify contracts at all, or at any rate according to the Roman not the parties were in one place, gave a right of action and of defence to an action (idem III.1.52). A reasonable cause was understood to exist whenever the promise took place by way of a gift or was incidental to some other contract, and whether it took place at the time of the contract itself or after it (idem III.1.53). See too eg the texts mentioned by Feenstra & Ahsmann 43-53 from Grotius's De jure belli.

17 See eg Groenewegen Aanteekeningen ad II.3.1.10 and Voet Commentarius II.14.9. Van Leeuwen Censura forensis I.4.2.2 was apparently the only author in the Northern Netherlands in the seventeenth century who denied the actionability of nude pacts, although his other works by contrast confirmed the view (of Grotius) that all promises seriously and deliberately entered into, were actionable.

18 See eg Zimmermann 546 who notes three main characteristic elements of the law of contract: (i) contracts being based on the consent of the parties to them; (ii) the scope of such consent not being confined to a number of specifically recognised types of transactions; and (iii) no compliance with formalities being required as a rule for the validity of contracts.

19 As was the case earlier with eg the Glossators: see generally Dilcher.

20 See eg Zimmermann 559n92, 468-469 and 561.
system, had long disappeared. This is readily apparent when the classification of the insurance contract in Roman-Dutch law is inspected more closely.

The treatment of the insurance contract in Roman-Dutch law, particularly interesting because of that contracts non-Roman-law origin, serves to illustrate the fact that there was no explicit abandonment of the Roman system. It continued to exercise a systematising influence and writers continued to feel the need to typify contracts, especially new ones, with reference to it, even if only for reasons of systematization and although they probably realised that such classification no longer served any practical purpose.

1.3 The Classification of the Insurance Contract in Roman-Dutch Law

The classification of the insurance contract in Roman-Dutch law with reference to the classical system of contracts was not without difficulty. But, it must be remembered, while the theorists continued to be engaged with problems of classification, practical lawyers and merchants continued to employ the contract in practice without any reference to its place in the system of law. Practitioners who wrote for the merchants realised that Roman law could not explain the insurance contract, although the general principles of that system were applicable to insurance contracts too.

In Roman-Dutch law the insurance contract was classified as a consensual, nominate and reciprocal contract of good faith. The classificatory role of these features will now be considered.

1.3.1 The Insurance Contract as a Consensual Contract

The first Roman-Dutch author to devise a systematic exposition of contractual obligations and to place the insurance contract in that system, was Grotius.

In book III of his *Inleidinge*, Grotius dealt with the personal right ("inschuld") of which, according to the law of nature, he recognised two sources, namely 'toezegging' and inequality. The term 'toezegging' was used as the vernacular equivalent of the Latin 'promissio' and was distinguished by Grotius from the promise ('belofte',

---

21 See Seiler as to the problems experienced by German Romanists in the eighteenth century in fitting the insurance contract into that system. On the classification of the insurance contract generally, see eg Coing *Privatrecht* 534-535.

22 At this stage the main concern is with the classification of the insurance contract. Substantive aspects of matters such as consent, reciprocity, and good faith and fraud will be treated in more detail later.

23 *Inleidinge* III.6. As to Grotius' system of contracts and the place of the insurance contract, see eg Feerstra 'Pact and Contract' 206-208; Feenstra & Ahsmann 52-54; Fischer 'De Groot' 608; and Gormley 104. For a summary, see eg Van der Keessels *Praelectiones* 1140-1148 (ad III.6). Like the insurance contract, other contracts unknown to Roman law were also fitted into Grotius’ system, such as bottomry (*Inleidinge* III.11), bills of exchange (*idem* III.13), the hereditary lease or *emphyteusis* (*idem* III.18), and the feudal grant (*idem* III.25). See further Lee *Commentary* vol II at 270.

24 *Inleidinge* III.1.9.
'pollicitatio'). The same terminology was used when he described the 'civil law', that is, the positive law which included but was not confined to Roman law. Grotius noted that the civil law had introduced various new types of obligations ('verbintenissen'), all of which were defined as the act of one person which conferred a personal claim on another person.26

The 'toezegging' ('promissio') was a source of obligations ('verbintenissen'), and could be either express ('uitdruckelick') or implied by law ('ex lege' or 'door wetduiding'). Thus, the distinction between the express promissio, which had acquired the force of a stipulation by usage, and the specific contracts, in which the promissio was implied by law, was maintained.

The express promissio could be either verbal (that is, the stipulatio of Roman law) or in writing. The implied promissio, in turn, could be either with an agreement ('overkominge'), or without an agreement, and agreement here referred to a consensual contract. Accordingly, a contract was a consensual, implied promissio ('toezegging door wetduiding met overkoming').

Agreements or contracts were divided into real contracts, which were created or 'voltrekken' by the transfer of a thing, and consensual contracts, which were created by an agreement or consent ('overeenkomste') alone. Real contracts included bottomry as well as, for example, the loan for use and for consumption, deposit and pledge. Consensual contracts included insurance as well as, for example, mandate, sale, exchange, hire and partnership.

Thus, the insurance contract continued to be classified in Roman-Dutch law as a consensual contract, despite the fact that all contracts were binding by consent alone.

The consensual nature of the insurance contract was also emphasised elsewhere by Grotius where he made it clear that the agreement ('overkoming') itself had binding force and that the transfer of a thing or the payment of an amount of money (or premium), for example, was not necessary as was the case with real contracts in

---

27 *Idem* III.1.49.
28 *Idem* III.1.50.
29 *Idem* III.6.1. Implied promissiones without contract included negotiorum gestio (treated *idem* III.27) and general average (*idem* III.29).
30 *Idem* III.6.10.
31 These real contracts were treated *idem* III.7-III.11.
32 Consensual contracts were treated *idem* III.12-III.25. See further Van der Keessel *Praelectiones* 1140 (ad III.6.1).
33 *Idem* III.24.2.
Roman law. This characteristic of the insurance contract, Grotius pointed out, was due to continuous mercantile usage ("het gestadig ghebruick der koopluideri").

Grotius was, of course, not the first to note the consensual nature of the insurance contract, and after him other authors continued to describe it as consensual, even when they full well realised that all contracts were consensual, a position which was maintained even after codification. Thus, despite the fact that it made less and less sense as time went by, Roman-Dutch law continued to stress in respect of the insurance contract, as it did with all contracts, that it was created by consensus alone without any particular form in which or formality by which the contract had to be concluded to be valid.

Of course, several important consequences flowed from the consensual nature of the insurance contract. For example, a written deed or policy was required not for the existence but merely for proof of the conclusion and content of the agreement; and the payment of the premium itself was not necessary to create the contract of insurance. Put differently, in the absence of an agreement to the contrary, an insurance contract was effective, valid and in force as soon as the parties had reached agreement on its essential terms. But although the drafting and issuing of a policy, or the payment of a premium, was not required for the creation of a valid insurance contract, the parties could by their agreement, or the legislature by statutory prescript, determine that matters such as those just mentioned would either be preconditions for the creation of a valid contract, or would suspend if not the creation then at least the operation of the contract. In such cases the purely consensual character of the insurance contract would be restricted. And the consensual nature of the insurance

---

34 Thus, Santerna De assecurationibus I.1 already described the insurance contract as a 'conventio qua unus infortuitum alterius in se suscipit precio periculi convento'.

35 See eg Van Ghesel De assecuratione I.3.8 (contractus consensualis); Scheltinga Dictata ad III.24.2 (the insurance contract is a contractus consensualis and must be taken as perfecta even though there has been no payment of the premium yet and even if no policy has been drafted yet); Decker Aanteekeningen ad IV.9.10 n(4)/(d) (apart from the fact that the distinction between nominate and innominate contracts no longer exists, the insurance contract is in any case not an innominate real contract but a consensual one); Bynkershoek Quaestiones juris privati IV.2; and Van der Keessel Praelectiones 1428 (ad III.24.1) (the consensual insurance contract is ab initio perfected by mere consent).

36 As to which see eg Lipman 100 and Van Renays 240-241 who note that this position was derived from Roman-Dutch law.

37 See also eg Rutgers van der Loeff 32; and generally Zimmermann 559-576.

38 See further ch VIII § 3.2 infra as to formalities.

39 See ch XI §§ 1.3 and 3.1 infra as to the agreement on and payment of the premium.

40 That is, by analogy to sale, as soon as consensus had been reached on the nature of the contract, on the object of the insurance, on the payment (of a determined or determinable) premium; or, put differently, the insurance contract was perfecta as soon as the parties had agreed to insure, which was the case if the premium was determined, the object of the insurance was determined, and there was no suspensive condition.
contract also meant, of course, although none of the Roman-Dutch authors made the point,\textsuperscript{41} that insurance was a matter of choice between private persons and not compulsory or imposed by the state.

1.3.2 The Insurance Contract as a Nominate Contract

Because they realised that the insurance contract was not one of the named contracts of Roman law, some of the earlier authors in particular regarded it as an innominate contract and thus, by implication, as a real contract for the creation of which a performance of some kind was necessary.\textsuperscript{42} And as the insurance contract was a bilateral and reciprocal contract, the performances of the two parties involved being given in exchange for one another,\textsuperscript{43} lawyers sought to classify the nature of these performances. As to the insured's performance there was little uncertainty: it was an obligation to give or pay (\textit{dare}) something, namely the premium. The insurer's performance, in turn, was seen as consisting of doing something (\textit{facere}), namely bearing the risk. Hence the insurance contract was regarded as an innominate real contract of a type or reducible to the formula 'I give or pay for you to do' (\textit{do ut facias}'), or, if seen from insurer's point of view, 'I do for you to give or pay' (\textit{facio ut des}).\textsuperscript{44}

In Roman-Dutch law attempts continued to classify the performances of the parties to the insurance contract in this way.

Grotius, for example, regarded the insurance contract as involving the payment of a compensation by one party and the bearing of his risk in return by the other party, and thus as a contract of the type 'do ut facias', that is, 'I pay a premium and you take over the risk'.\textsuperscript{45} Van der Keessel too thought the insured's performance to consist in

\textsuperscript{41} Unlike Magens Essay vol I at 1.

\textsuperscript{42} See eg Santerna De assecurationibus I.7, III.12 and 13 (with reservations: it should be regulated as a nominate contract) and Straccha De assecurationibus Introd.47; also Decisiones Rotae Genuae decis XXXVIIn9. Even some later authors held this view. See eg Roccus De assecurationibus notes 3 and 10; Struvius Syntagma XIX.5.46; and Emerigon Traité des assurances I.2 (where insurance was regarded as a \textit{pactum nudum, contractus innominatus}). See further eg Dorhout Mees Schadeverzekeringsrecht 41 and De Roover 'Early Examples' 187n45.

\textsuperscript{43} See further § 1.3.4 and ch XI XI S.3.1 infra.

\textsuperscript{44} See eg Straccha De assecurationibus Introd.47; Santerna De assecurationibus III.12 (according to whom the insurance contract was rather of the type \textit{do ut facias} because it was customary for the owner of goods to look for insurance and to promise the price of the risk to that person who was willing to act as the insurer, and especially because insurance was concluded for the insured's sake); Roccus De assecurationibus note 3; and Vegesack De assecurationes 9-10.

\textsuperscript{45} \textit{Inleidinge} III.6.8. More specifically Grotius noted here that where an undertaking consisted of doing something and giving something, it was called a lease if money was given, but when the doing for which the money was given consisted of the taking over of another's risk, then it was called insurance. See too eg Scheltinga \textit{Dictata ad} III.6.8. Guépin 10 notes that in Grotius' view of insurance, the performance of the insurer was seen as 'een gewis abstractum' (ie, the bearing of risk, 'een doen') and not as 'een ongewis factum' (ie, an eventual indemnification, 'een geven'). Elsewhere the same view was presented, although not without some ambiguity. In his \textit{De jure belli} II.12.3.5, Grotius was concerned with contracts where the performance of one of the parties consisted of doing something ('daadden'). One of the examples mentioned of a contract where one party pays something for other to do something, was the contract of insurance. The insurance contract was then
the giving or paying of something, namely a premium, for the insurer's doing of something, namely the averting of the risk from the insured, and that the contract was accordingly one 'do ut facias'. This was despite the fact that Van der Keessle was fully aware that the insurer's bearing of the risk resulted in appropriate cases (namely of occurrence of the event insured against) in his having to indemnify the insured.

Therefore, the insurer's performance was in Roman-Dutch law considered to be an obligatio faciendi, namely the bearing of a risk, and the possibility that it was, if not primarily, also an obligatio dandi, namely the payment of an indemnity, was not pertinently supported.

But although the Roman-Dutch lawyers continued to classify the reciprocal performances in terms of an insurance contract as if it were an innominate contract, that did not mean that they regarded it as such. In fact, they could strictly according to Roman law not do so. Innominate contracts were real contracts in Roman law and that made the payment of a premium necessary for the creation of the contract. But that was not the case with the insurance contract which Roman-Dutch law regarded, like all other contracts, as a consensual contract.

Accordingly, in Roman-Dutch law the insurance contract was no longer regarded as innominate but it was generally accepted that it was a nominate contract. More specifically, it was regarded as a (consensual) nominate contract because it had an own name, because particular actions flowed from it, and because it had received

---

46 See eg Praelectiones 1144 (ad III.6.8); idem 1429 (ad III.24.1) (noting the fact that the insurance contract had something in common with the (unnamed) contract 'do ut facias': 'I give a premium so that you may undertake the risk'); and idem 1430 (ad III.24.2) (according to its origin, insurance was closest in its nature to the unnamed contract 'do ut facias').

47 See eg his definition of the insurance contract in Praelectiones 1428 (ad III.24.1), discussed in § 2 infra.

48 If it were, Roman-Dutch lawyers might also have classified the insurance contract (or, rather, the obligation of the insurer to indemnify the insured) as by nature subject to a suspensive condition, namely the occurrence of the event insured against. See eg Decisiones Rotae Genuae decis LXIII num 1 ('assecurationis contractus est contractus conditionalis') and num 2 ('impedita conditione assecurandi nulli imputatur defectus'). See too eg Santerna De assecurationibus III.24.

49 For what was understood under the terms 'nominate and innominate' in Roman-Dutch law, see eg Van Leeuwen Censura forensis I.4.13.1-2 where he explained that nominate contracts were those certain and frequently recurring, always constituted in the same form, so that a fixed and specific name was given to them; innominate contracts were flexible, rarely occurred in the same form but varied from instance to instance and thus had no name because they were not defined by certain limits. Quaere, did this mean that innominate contracts had no essentialia negotii?

50 See eg Grotius De jure belli II.12.3.2. See too eg Stypmann De jure maritimo IV.7.159 who noted that 'assecuratio est contractus nominatus, quia sua natura et propriis qualitatis constet sicut reliqui; usu et necessitate exigente nomen invenit'.
1.3.3 The Insurance Contract as a Contract of Good Faith

The fact that the insurance contract, like all other contracts, was classified as consensual and was thus a lineal descendant of the four consensual contracts of Roman law, had a further important consequence. In Roman law, contracts of good faith (contractus bonae fidei) included the important group of consensual contracts, and as a result all (consensual) contracts in Roman-Dutch law were regarded as contracts of which the operation and interpretation were governed by notions of good faith. The insurance contract was accordingly a contract of good faith in Roman-Dutch law, as were all other contracts. And this was the case despite the fact that the Roman distinction between contracts stricti iuris and those bonae fidei had long since disappeared.

Not only was this fact recognised by the authors, but by the legislatures too. In legislation the insurance contract was frequently classified as a contract of good faith and various provisions regulated the conduct of the parties to an insurance contract in accordance with a standard of good faith and also laid down civil and criminal penalties for fraud in the context of insurance. The parties to insurance contracts too added clauses to their contracts confirming that they would not resort to conduct of any fraudulent nature whatsoever. Thus the insured declared that he would act in good faith and the insurer that he would not rely on technicalities to deny claims.

That the notion of good faith appears to have received a more prominent position in the context of insurance contracts than with other contracts generally, was no doubt because of the nature of the contract. But contemporary circumstances, and in particular the unreliable and slow lines of communication, made fraud by one party upon the other a very real possibility and a cause of concern, and this was reflected, as will be shown, in the law itself which made numerous provisions to reduce the opportunities for fraud and to provide for remedies where it in fact occurred.

---

51 See Van der Keessel Theses selectae th 713 (ad III.24.2); idem Praelectiones 1428 (ad III.24.1) and 1430 (ad III.24.2).

52 See eg Zimmermann 548.

53 See eg Dorhout Mees Schadeverzekeringsrecht 39 and Van Renays 240-241.

54 See eg Van Ghesel De assecuratione 1.3.10 (the reason why ‘assecuratio est contractus ... bonae fidei’, was because all bilateral contracts of Roman law were contracts of good faith); Van Zurck Codex Batavus sv ‘Assurantie’ par 23n2; Kersteman Woorden-boek aanhangsel vol I sv ‘Assurantie’; Van der Keessel Praelectiones 1428 (ad III.24.1) and 1481 (ad III.24.20).

55 See eg ss 22 of the placcaat of 1571, 31 of the Amsterdam keur of 1598, 30 of the Middelburg keur of 1600, and 56-57 of the Amsterdam keur of 1744.

56 See further ch XIV infra for a more detailed treatment of insurance fraud in general.
1.3.4 The Insurance Contract as a Bilateral, Reciprocal Contract

In Roman-Dutch law, the insurance contract was regarded as a bilateral (or onerous, non-gratuitous) and reciprocal contract.\(^57\) This was first made clear by Grotius who classed the contract as in the nature of an onerous or non-gratuitous transaction ("bejegening met vergoeding") where money was paid by the one party so that the other party would take over his risk.\(^58\)

From this classification it appears that Grotius identified two features of the insurance contract, namely that it was an agreement which was not gratuitous but which involved the payment of compensation by the one party, and that this compensation was paid in exchange for the other party's taking over of a particular risk of the former. Hence two performances were involved, namely the payment of premium and the bearing of risk.\(^59\)

\(^57\) See eg Dorhout Mees Schadeverzekeringsrecht 37n1 and Rutgers van der Loeff 31-32. A contract, being a bilateral juristic act, could be either a unilateral or a bilateral contract. In the case of a unilateral contract, only one of the parties was under a duty to perform, the other party therefore having the benefit of that performance gratuitously and not being burdened by any obligation to render any (positive) performance himself. In the case of a bilateral contract, both parties had to perform, and for both the contract was an onerous and non-gratuitous contract. Bilateral contracts could further be classified as reciprocal (or synallagmatic) contracts, where the several performances were undertaken in exchange for one another (so that the exceptio non adimpleti contractus could be raised in appropriate circumstances), and non-reciprocal contracts, where that was not the case. Only a bilateral contract could therefore qualify as a reciprocal contract. The donation was the prime example of an unilateral contract, and the loan of the non-reciprocal bilateral contract. Contracts such as sale, lease and insurance were reciprocal bilateral contracts.

\(^58\) Inleidinge III.6.8. Grotius distinguished between two types of dealings or transactions between parties ("onderlinghe bejegeninghe"), namely gratuitous ("sonder vergoedinghe") transactions where only one party performed and non-gratuitous ("met vergoedinghe") transactions where both parties performed and where the performances consisted of the transfer of property or another performance (idem III.6.4). ("Gratuitous", for Grotius, therefore excluded reciprocity.) Gratuitous transactions included the loan for use or for consumption, deposit, pledge (ie, the Roman nominate real contracts of Roman law), mandate, as well as donation and testament (idem III.6.5), the latter two being unilateral in nature. Non-gratuitous (bilateral) transactions included contracts where one performance was given in exchange for another ("de bejegening bestaat in 't geven om wederom te geven") and these included sale, exchange and hire where property was given for other property or money (idem III.6.6) or for something to be done in return, as in the case of partnership where the doing consisted in entering upon a common business (idem III.6.7). In the case of a non-gratuitous transaction where money was given for the use of thing, the contract was called a lease; but if thing done (by implication for money) consisted in taking another's risk upon yourself ("bestond in iemands gevaer op hem te nemen"), the contract was called insurance (idem III.6.8). See further Scheltinga Dictata ad III.6.8 who explained that when the doing for which the money was given, consisted of taking another's risk on you, then it was called 'insurance'.

\(^59\) These two elements are also apparent from his definition of insurance in Inleidinge III.24.1 (see § 2 infra). A similar classification appears from De jure belli II.12.3.5 where more content was given to the insurer's performance or his bearing of the risk by linking it to the payment of an indemnity: the insurer undertook to bear the risk of the occurrence of the uncertain event agreed upon, so that if it occurred, he had to indemnify the insured against the consequences of such occurrence.
This bilaterality and reciprocality is apparent also from Bynkershoek, who noted that the insurance contract gave rise to two actions, a direct action (‘eene directe Actie’) of the insured against the insurer for the compensation of the loss for which he stood in, and a contrary action (‘eene contrarie Actie’) of the insurer against the insured for the payment of the agreed premium for the risk that he took over. Kersteman very clearly described the and reciprocal and therefore also the bilateral nature of the contract of insurance by describing it as belonging to agreements and contracts ‘welke wederzydsch obligatorio yzn, en de Contrahenten over en weder tot prestatie verbinden; een reciproquelyk verbindent Contract’. Lastly, Van der Keessel too noted the bilateral, reciprocal nature of the insurance contract.

1.4 Conclusion

The contract of insurance was classified in Roman-Dutch law as a consensual, nominate, bilateral and reciprocal contract of good faith. But these elements applied also equally to virtually all other contracts and therefore did not assist in distinguishing and describing the insurance contract itself. For that it was necessary for Roman-Dutch lawyers to define the insurance contract and so to identify its essential and distinguishing characteristics.

2 The Definition of the Insurance Contract

The aim with any definition of a particular contract was to describe that contract in such a way that it could be distinguished from other contracts. In such a description the essential and distinguishing characteristics of that contract had to be enumerated. If a contract displayed all those characteristics, it was a contract of the type defined. The essential terms which are required for the conclusion of a (valid) contract of that type.

Different contracts may therefore share some characteristics, but it is the combination of all of those which make up one type of contract which distinguishes it from another type. Distinguishable from the characteristics (or essential terms) of a particular type of contract are the requirements for (the validity) of contracts generally, including for that particular type: all (types of) contracts have to meet all of those requirements before they can qualify as contracts in the first place.

---

60 Quaestiones juris privati IV.2.
61 Similarly Schorer Aanteekeningen 412 (ad III.24.1) n1. More complete was Decker Aanteekeningen ad IV.9.10 n(4)/(d) who explained that two actions arose out of the insurance contract: one for the insured to claim compensation of the damage suffered, or the furnishing of security for such payment, or a restitution of the premium; the other for the insurer to claim payment of the premium and interest. An even more complete description of the two actions is found in arts 255-256 of par 8, title 11, part IV of the Antwerp Compilatae of 1609 (see De Longé vol IV at 306).
62 Woorden-boek 29.
63 Praelectiones 1428 (ad III.24.1) (one performance being undertaken for (‘pro’) another) and 1478 (ad III.24.18) (the insured’s actio directa and the insurer’s actio contraria).
64 That is, the essential terms (essentialia negotii) which are required for the conclusion of a (valid) contract of that type.
65 Different contracts may therefore share some characteristics, but it is the combination of all of those which make up one type of contract which distinguishes it from another type. Distinguishable from the characteristics (or essential terms) of a particular type of contract are the requirements for (the validity) of contracts generally, including for that particular type: all (types of) contracts have to meet all of those requirements before they can qualify as contracts in the first place.
reason why it was necessary to distinguish between different types of contract was, amongst others, because different contracts attracted different terms implied by law.\(^66\)

Obviously definitions are not timeless. They are formulated to distinguish the object being defined from what is known and from what it is thought necessary to be distinguished at the time when they are formulated. That is true also of Roman-Dutch definitions of the insurance contract. They reflect the state not only of the insurance law at the time but also of the law and its systematization and development generally.

Interestingly enough, the Roman-Dutch legislatures, for all their fervent activity in the field of insurance over a period of two-and-a-half centuries, never formulated what is identifiable as a definition of the insurance contract. But Roman-Dutch authors were not as reticent and most of them provided a definition of sorts of the insurance contract as it was understood in their time and in which were included the characteristics of that contract necessary to distinguish it from other contracts known to them. That virtually all sought to describe the insurance contract is not surprising; it was, after all, one of the most prevalent types of contract of their time.\(^67\)

In one of the earliest pre-Roman-Dutch definitions of the insurance contract,\(^68\) Santerna defined it as an agreement whereby one person, having agreed with another on the price of a risk, takes upon himself that other's misfortune.\(^69\) Straccha described it as the taking over, against the payment of specific agreed price, of the risk of another's goods which had to be carried by sea or over land.\(^70\) Although these definitions clearly do not reflect the detailed nuances of the insurance contract, they nevertheless capture the essence by identifying two essential elements, namely the (agreement with regard to the) payment of an agreed price, and the (agreement with regard to the) taking over and bearing of a particular risk to which another is exposed.

Already implicit in these definitions were a number of corollary principles of insurance law. Thus, in the first place, the contract was if not solely then at least primarily concerned with the transfer of risk. Risk transference was the main and not merely a subsidiary aim of the contract and did not occur simply because the property concerned had been sold to or carried by one of the parties, or because one of them had borrowed money from the other. The insurance contract was an independent con-

---

\(^66\) Thus, essential terms (\textit{essentialia negotii}) allowed the classification of a transaction for purposes of determining its natural terms (\textit{naturalia negotii}). In addition to essential and natural terms, special arrangements (\textit{accidentalia negotii}) by the parties to a particular contract were also possible.

\(^67\) See eg Grotius \textit{De jure belli} II.12.3.5 (\textit{receptissimus}); Bynkershoek \textit{De lege Rhodia ad} IX.D (\textit{nullus hocie frequentior}); and Van der Keessel \textit{Praelectiones} 1426 (ad III.24.pr) (\textit{apud nos adeo frequens est, ut praeter emptionem et locationem vix aiud occurrat negotium magis usitatum}). See further Lichtenauer \textit{Geschiedenis} 24 and 178.

\(^68\) For an overview of the early definitions, see Amzalak in the Bibliographical Notes to the English translation of Santerna \textit{De assecurationibus} at 190-191.

\(^69\) \textit{De assecurationibus} I.2 (\textit{conventio, qua unus infortunium alterius in se suscepit pretio periculi convento}).

\(^70\) \textit{De assecurationibus} Intro.46 (\textit{assecuratio est alienarum rerum sive mari, sive terra exportandarum periculi suscepio certo constituto pretio}). See too Holdsworth \textit{History} vol VIII at 296n5.
tract for the transfer of risk against payment. Secondly, the insurance contract was characterized by the unconditional obligation to pay a premium. A separate and identifiable premium was payable unconditionally and inevitably, and not, for example, only in the event of the materialization of risk or of an absence of loss. Also, there was no such thing as a as gratuitous insurance contract. If the transfer and bearing of risk was to take place otherwise than against payment of a premium, there was no bilateral, reciprocal contract of insurance but at most a unilateral contract, for example, one of donation. In the third instance, the notion of risk implied uncertainty and, more specifically, the occurrence of an uncertain event. Fourthly, the contract presupposed the existence of a risk to which one party was exposed and which could be transferred to the other; and, of course, such risk existed only if that party was interested in the property in question, or would suffer a loss by the occurrence of the event insured against. Fifthly and flowing from the last point, the premium was earned only if the risk in fact existed and was in fact transferred; hence, no risk, no premium. Lastly, the contract was not disguised as another type of contract, such as the sale of a risk or of property at risk, or a loan with a particular stipulation as to risk.

Santerna’s ‘classic’ definition was taken over and expanded upon in the Netherlands. For example, Leonardus Lessius, the Flemish theologian and canon lawyer from Louvain, in the first decade of the seventeenth century defined the insurance contract as a contract by which one person takes over the risk of another’s property and undertakes gratuitously or against payment of an agreed premium to compensate the latter should the property perish.

This definition therefore explained what the transfer of the risk in property to the insurer implied, namely that he had to compensate the owner of the property in the event of that property being lost. This expansion was in turn reflected in the later definitions of the Italians Scaccia and Roccus.

Grotius defined insurance as an agreement (‘overkoming’) in terms of which one person took upon himself the uncertain risk or peril (‘gevaer’) apprehended by another, in return for which the other was bound to pay him a premium (‘loon’). The definition did not indicate the way in which the risk was taken over by the insurer and also contained no reference to the insurer’s (conditional) obligation to compensate the

---

71 See Van Houdt 18n20.

72 De iustitia II.28.4.24 (‘est contractus quo quis alienae rei periculum in se suscepit obligando se vel gratis [?] vel certo pretio ad eam compensandam, si perierit’).

73 De commerciis I.1.129 (‘contractus, quo quis alienae rei periculum in se suscepit, obligando se, vel gratis [?], vel certo pretio ad eam compensandam’).

74 De assecurationibus num 1 (‘assecuratio est contractus, quo, quis, alienae rei periculum, in se suscepit, obligando se, sub certo pretio, ad eam compensandam si illa perierit’). Note that unlike those of Lessius and Scaccia, Roccus’ definition did not include gratis insurance.

75 Inleidinge III.24.1. According to Lichtenauer Geschiedenis 102, the best description of the insurance contract by Grotius was in a single sentence in his historical work Annales et historiae de rebus Belgicis, first published in 1621. In the 1567 ed at 46, the description reads: ‘aversi periculi pactio qua incertus eventus certa mercede in alium transferri solet’.
insured. Scheltinga thought this definition correct, Schorer pointed out that this definition required an uncertain danger as an essential of the insurance contract, while Van der Keessel thought it could have been clearer seeing that it was not customary for the insurer to offer to take over the risk but rather for the insured or his representative to request the insurer to undertake the risk.

The idea of insurance involving the transfer, bearing and spreading of risk is also encountered in a legal opinion of 1678. Other seventeenth century definitions added detail but nothing of substance to the Grotius definition. Thus, Wassenaer's definition spelt out the implication of the insurer's bearing of the risk of a certain object, namely that in the case of that object being damaged, the insurer had to compensate that damage fully or up to the specified sum. Van Leeuwen expanded on the nature and duration of the risk which could be transferred to and borne by the insurer.

In the eighteenth century the dual elements of an undertaking to bear a risk (to which was sometimes added an undertaking to pay compensation) in exchange for an undertaking to pay a premium remained central to the definitions formulated by Roman-Dutch lawyers. Bynkershoek's description of insurance, for example,
accentuated the transference of risk from the insured to the insurer.\textsuperscript{83} Although verbose, Lybrechts’ definitions contained all the elements recognised earlier as essential for an insurance contract.\textsuperscript{84} Decker’s definition too added nothing new.\textsuperscript{85}

After referring to the definitions of insurance by Grotius, Roccus and Bynkershoek, and noting their similarity, Van der Keessel concisely described the contract of insurance as one in terms of which, for a fixed price, one party undertakes to make good the damage that could occur to the property of another from an uncertain peril.\textsuperscript{86} Here, therefore, the transference and bearing of the risk was implied and no longer expressed as the insurer’s obligation under the contract. Van der Linden likewise gave prominence to the insurer’s obligation to indemnify the insured.\textsuperscript{87}

To summarise: Roman-Dutch law recognised that the insurance contract was characterised by two main features. The first was that the contract involved the transfer of the risk, to which particular property of the insured was exposed, to the insurer and

\textsuperscript{83} Quaestiones juris privati I.21, stating insurance to be an engagement for the provision of security (‘securitate’) for another’s property by which the owner is liberated from the risk, which is assumed by the insurer (‘fideiussor’) in consideration of a fixed premium. For the acceptance of this definition by Lord Mansfield in the English case of Goss & Another v Withers (1758) 2 Burr 683, 97 ER 511, see eg Rodgers 174.

\textsuperscript{84} See Redenerend vertoog II.17.1, stating that insurance is ‘een contract, waar by d’een den ander, voor zeker gewin, de goederen en koopmanschappen ter zee, voor alle van buiten aankomende periculen en schade, die dezelve in de heen en wederom reize mochte overkomen, verzeker; en in geval van schade, ’t zelve te remedieren tot eenen zekeren pryze’, and Koopmans handboek V.75, describing it as ‘een overeenkoming of Contract van Verzekering, waar by iemand op zich neemt het Gevaar van een anders zaak of goed, zich verbindende voor een zekere pryze of premie, wanneer het zelve mogt komen te vergaan ofte verongelukken, deze zaak, dat is de waarheid [ie the value] van dien, in ’t Contract, of Police gemeenlyk uitgedrukt’. Interestingly, this latter definition is of a valued policy, as to which see ch XVII § 5 infra.

\textsuperscript{85} Aanteekeningen ad IV.9.4 n(3)/(c), describing insurance as ‘een contract, waar by den eene party der Contractanten tot zekeren bepaalden tyd op zig neemt het onzeker gevaar, voor het welk den ander bloet gesteld is of zal zyn, en dewelke daar voor gehouden is aan hem den bedongen loon of premie te betalen’. See too Boey Woorden-tolk sv ‘Assurantie’: Insurance is ‘een contract, waar by door men voor zeker geld, instaat voor het gevaar, waar aan een zaak is, of zal bloot gestelt worden en: insurance is ‘een contract ... waar by den een, mits genietende zeker voordeel premie genaamt, het gevaar, welk een ander loopt, ten zynen lasten neemt’.

\textsuperscript{86} Praelectiones 1428 (ad III.24.1): ‘quo pro certo pretio, suscipitur praestatio damni, quod ex incerto periculo res aliena pati possit’. See too Theses selectae th 712 (ad III.24.1).

\textsuperscript{87} Koopmans handboek IV.6.1 where he quoted the precise (‘naauwkeurige’) definition of Pothier Assurance I.1.1.2 of insurance as a contract by which one contracting party takes upon himself the risk of incidental misfortunes to which a certain thing is exposed, and binds himself to the other contracting party to hold the latter harmless against loss (‘schadeloos te houden tegen nadeelen’) caused by those misfortunes, on the condition of receiving a certain sum of money that the other contracting party promises to give him for the value of the risks he takes upon himself. Further on Van der Linden (Idem IV.6) appears to have confused the essential terms of and the requirements for the validity of insurance contracts when he noted the following as being essential to such contracts: an object capable of being insured; persons capable of insuring; a peril to which the insured object could be exposed; a determination of the sum which the insurer had to pay in the event of the loss of the insured object; an insurance premium; and the mutual consent of the contracting parties contained in a written policy.
the bearing of that risk by the latter. The nature and extent of the risk, and the manner in and duration for which it was to be borne were matters to be agreed upon by the parties. In line with the state of the development of the interest doctrine at the time, risk was still very prominently linked to the physical property of the insured. It was increasingly realised and mentioned that this bearing of risk implied that an uncertain event was involved and that if, on the occurrence of that event, the insured suffered loss or damage which, because of the transfer of the risk, had to be borne by the insurer, the latter had to compensate the insured for such loss or damage. The other main requirement was that the parties had to agree upon the payment of a fixed premium by the insured in exchange for the insurer's performance.

Interestingly enough, in the codification of Dutch law in the nineteenth century, the definition of the insurance contract explained the insurer's obligation to compensate or indemnify the insured in greater detail and abandoned the need for the risk to be linked to physical property belonging to the insured. In terms of a 246 of the Wetboek van Koophandel of 1838, insurance is an agreement in terms of which the insurer, against the benefit of a premium, undertakes to the insured to indemnify the latter against loss, damage or the non-materialisation of an expected advantage ("verlies, schade of gemis van verwacht voordeel") that he may suffer through an unforeseen event.

---

88 See again ch II § 6.2 supra for the interest doctrine in Roman-Dutch law.
CHAPTER IV
THE INSURANCE CONTRACT AND THE COURTS: JURISDICTION AND ADJUDICATION; CONFLICTS AND CUSTOM

1 Chambers of Insurance in the Netherlands ................................................................. 215
1.1 Introduction .................................................................................................................. 215
1.2 The Roman-Dutch System of Courts and Commercial Causes ............................ 215
1.3 Antecedent Commercial and Insurance Courts ...................................................... 217
1.3.1 Italian and Spanish Examples .............................................................................. 217
1.3.2 The Adjudication of Insurance Disputes in the Fifteenth and Sixteenth Centuries 
    in Bruges and Antwerp ............................................................................................... 219
1.4 The Chamber of Insurance in Amsterdam ............................................................ 226
1.4.1 Introduction: Establishment of the Amsterdam Chamber .................................... 226
1.4.2 The Composition of the Chamber: Commissioners and Secretaries .................... 227
1.4.3 The Jurisdiction of the Amsterdam Chamber ....................................................... 230
1.4.4 Procedural Matters ............................................................................................... 234
1.4.5 Appeals from the Chamber ................................................................................... 238
1.4.6 Excursus: The Chamber of Maritime Affairs in Amsterdam ............................... 239
1.5 The Chamber of Maritime Law in Rotterdam ....................................................... 240
1.6 Insurance Chambers Elsewhere in the Netherlands ................................................ 245
1.7 Excursus: Insurance Chambers in London and Hamburg ....................................... 246
1.8 Conclusion .................................................................................................................. 250
2 The Extra-Curial Resolution of Insurance Disputes ................................................ 252
2.1 Arbitration .................................................................................................................. 252
3 The Influence of Foreign Elements on the Insurance Contract, the Insurance Claim 
    and the Adjudication of that Claim .............................................................................. 258
3.1 Introduction ................................................................................................................ 258
3.2 The Applicable Law ................................................................................................. 259
3.3 The Scope and Extraterritorial Application of the Applicable Law ......................... 262
3.4 Local and Foreign Underwriters ............................................................................. 265
3.5 Foreign Currency ...................................................................................................... 267
4 Custom ......................................................................................................................... 268
4.1 Introduction: Customary Insurance Law, Maritime Law and the Law Merchant .... 268
4.2 Custom and the Legislature ..................................................................................... 272
4.2.1 The Divergence Between Insurance Practice and Theory .................................... 272
4.2.2 Legislative Recognition of Insurance Custom ....................................................... 274
4.2.3 The Compilation of Customary Insurance Law in Antwerp .................................. 276
4.3 Custom and the Insurance Contract ......................................................................... 279
4.3.1 Choice of Customs Clauses in Insurance Policies in the Netherlands ............... 279
4.3.2 The Insurance Customs of London: Lombard Street and the Royal Exchange .... 281
4.3.3 Possible Reasons for the Choice of Foreign Customs .......................................... 284
4.4 Custom and the Courts ............................................................................................ 286
4.5 Custom as a Source of Insurance Law: The Abrogation of Law by Contrary Custom 290
1 Chambers of Insurance in the Netherlands

1.1 Introduction

Characteristic of Roman-Dutch insurance law, but by no means unique in precodification commercial-law systems in Europe, was the fact that disputes arising from insurance contracts in the Netherlands were in the first instance heard by specialist courts. These courts formed an integral part of the system of civil courts in the Netherlands until the end of the eighteenth century.

In the Netherlands there did not exist a body of judicature exclusively competent in commercial matters. Both commercial and civil matters were brought before the ordinary local and provincial courts. Because the merchant class in the Netherlands was also the ruling class, there existed little need for separate mercantile courts as was the case in France, for example. Only exceptionally were courts created to hear particular matters. Most of them exercised a rather specialised jurisdiction, and some, but not all of them, may be classed as specialist mercantile courts. Thus, in cities such as Amsterdam and Rotterdam, local benches were created to determine disputes arising not only from matters such as insurance, shipping, and insolvency, but also from matrimonial affairs, small claims and deceased estates. These specialist local courts of first instance formed an integral part of the system of courts in the Netherlands.¹

For a proper appreciation of the role and function of municipal insurance chambers in the Netherlands in the seventeenth and eighteenth centuries, it may be informative to remark briefly on the Dutch court system in general and also to describe some relevant antecedent examples of commercial and more specifically insurance adjudication elsewhere in Europe.

1.2 The Roman-Dutch System of Courts and Commercial Causes

Probably the most important feature of the Roman-Dutch curial system was that there was no single, unified hierarchy of courts for all of the Netherlands. Each province and virtually each town had its own separate court or courts.²

On the municipal level, the court of first instance for civil matters was the Schepenen Court, often referred to as ‘den Heeren der Gerechte’ or ‘den Heeren Schout en Schepenen’. In various larger cities, specialist courts of first instance were created at a level below these Schepenen courts. For example, in Amsterdam there existed, in addition to the Chamber of Insurance (Kamere van Asseurantie), specialist judicial or quasi-judicial tribunals for maritime affairs (Zee-zaken), matrimonial matters (Huwelijksche Zaken), small claims (Kleyne Zaken), the property of orphans (Weesmeesteren) and insolvent estates (Desolato Boodolkamor). As a rule appeals against the decisions of these bodies were heard by the local Schepenen Court.


² See further eg Hahlo & Kahn 541-543; Van der Linden Koopmans handboek III.1.1; Wessels 166-173; and Van Zyl Geskiedenis 299-302.
In each of the provinces of the United Netherlands, there existed a separate provincial court. These courts heard appeals from the lower courts in the province but were also courts of first instance in certain cases. Thus, in the province of Holland a Supreme Court (curia), of appeal mainly, was in existence from the fifteenth century and was known, from 1462 onwards, as the Hof v Holland, Zeeland en West Friesland. From 1531, this body operated exclusively as a judicial organ, and more specifically as a court of appeal in civil and criminal matters. Its seat was in The Hague. In 1669 the Hof lost its jurisdiction over the province of Zeeland. Appellate courts, similar to the Hof van Holland, were established also in the other provinces. Thus, Utrecht, Gelderland, Friesland, Overijssel and later Groningen and Drente each had its own superior court to which appeals from the lower courts were brought.

From 1446, the Grand Council of Malines (Groote Raad van Mechelen) functioned as the general court of appeal for all of the Netherlands but opposition caused it to lose that jurisdiction in 1477. Nevertheless, until 1581 it served as the court of appeal not only for the province of Holland, and for other Northern provinces until 1579 or 1580, but also for other regions in the Southern Netherlands. Thus, from judgments of the Hof van Holland parties could appeal to the Groote Raad. When this became practically impossible after the outbreak of the revolt against Spain in 1581, the Estates of Holland in 1582 established the Hooge Raad (senatus) as a supreme court in The Hague, hoping that the other provinces too would adopt it as their court of final instance. The Hooge Raad heard appeals against decisions of the Hof van Holland and, from 1585 and 1587 when Zeeland and West Friesland respectively accepted its jurisdiction and when it became known as the Hooge Raad van Holland, Zeeland en West Friesland, it was also the court of final appeal for those provinces. In addition to its appellate jurisdiction in matters coming from the respective provincial courts, the Hooge Raad in some instances also heard appeals directly from lower courts: a few towns had the privilege of bringing appeals directly to the Hooge Raad from their local Schepenen Court, bypassing the provincial court in the process. Furthermore, and this is important for present purposes, the Hooge Raad also served as a court of first instance in a number of cases which included disputes between foreign merchants with no domicile in Holland, Zeeland or West Friesland; and all admiralty and maritime matters which were not adjudicated upon by the various provincial colleges of admiralty (Colleges der Admiraliteit). Insurance disputes, which in any event did not fall within the purview of these provincial colleges, were, it would seem, not included in such admiralty and maritime matters, and there was accordingly no direct recourse from a Schepenen decision to the Hooge Raad in such disputes.

3 The admiralty system in the Northern Provinces was reorganised by the end of the sixteenth century and five such colleges were established in North Holland (Amsterdam), South Holland (Rotterdam), Zeeland (Middelburg), Friesland (Dokkum) and West Friesland (with the seat alternating between Hoorn and Enkhuizen). In addition to their mainly administrative authority over the merchant marine, and naval and privateering matters, these colleges exercised a prize and stranding jurisdiction. See further generally Pollentier.
1.3 Antecedent Commercial and Insurance Courts

1.3.1 Italian and Spanish Examples

The establishment of chambers of insurance in the maritime centres of the United Provinces from the beginning of the seventeenth century, had clear precedents elsewhere.

Because of the unsuitability of ordinary civil or ecclesiastical courts, special courts existed since the Middle Ages, and especially from the fifteenth century onwards, to hear mercantile disputes. Composed of merchants, or at least of practising commercial lawyers, rather than lawyers or even academic scholars, they disposed of disputes between merchants in a summary fashion and in accordance with rules, customs and procedures with which both the tribunal itself and the litigants were familiar.4

One important example for the Netherlands was provided by the way in which insurance disputes were settled in the fifteenth century in Barcelona.5 In that city the procedural aspects of insurance law, like substantive insurance law itself, were the product of the endeavours of merchants and not of jurists. Catalan merchants avoided the royal courts and turned to the specialist Maritime or Consular Court (los consols de la mar) for the settlement of their disputes. Even before the first insurance ordinance was passed in the city in 1435, insurance policies concluded in Barcelona provided for disputes to be referred to the local Maritime Court. The Ordinance of 1435 compelled the parties to insurance contracts to take their disputes there. The Maritime Court was a civil court of first instance and was staffed by a periodically appointed body of prominent mariners (los promens nauegants, patrons à mariners). It was familiar with and applied maritime custom and followed a summary and informal procedure. By the Ordinance of 1458, an exclusive jurisdiction over local insurance claims was conferred upon the Barcelona Maritime Court. The Marine Insurance Ordinance of 1484 restated the existing position. Section 11 obligated parties to insurance contracts to submit all the disputes arising from such contracts to the local Maritime Court which, in turn, had to apply the Ordinance, and section 12 prohibited parties from challenging the jurisdiction of the Maritime Court before any other judicial body or from taking its decisions on appeal.6

There were also important Italian prototypes. The earliest insurance legislation in Italy was concerned, not surprisingly, with jurisdictional matters. Soon after the appearance of the modern insurance contract, provision was made for hearing disputes arising from it. The oldest legislative measure concerning insurance, promul-

---

4 See eg Piergiovanni ‘Courts’ 12, 17 and 18, noting that the importance of these merchants’ courts lay in reconciling market practices on the one hand and the doctrinal tenets of civil and canon law on the other hand.

5 See generally Guddat 47-49; Hammacher 166; Perels; and Reatz Geschichte 150-165.

6 For an English translation of these provisions, see Jados 294-295.
gated by the Doge of Genoa, Gabriele Adorno, on 22 October 1369, provided for heavy fines for those who raised usury as an exception to a claim on an insurance contract in an attempt to have the dispute transferred to an ecclesiastical court. While at Genoa and also at Florence competency over insurance disputes was given to the local mercantile courts at an early stage, this happened in Venice only in 1468.

In Genoa, a Civil Rota, established in 1529 and operational in the next year, replaced, for mercantile disputes, the existing court system of magistrates and mercantile courts, which were manned by merchants. In contrast, the Rota, equivalents of which existed also in other Italian cities, was made up of trained lawyers who held office for two years. The Genoese Rota acted mainly as a specialised court in mercantile and maritime matters and did not decide civil cases generally. It was instructed to apply both law and custom; to adjudicate \( \text{tam ex regulis quam ex inveterata consuetudine.} \)

The procedural rules (\textit{regulae}) of the Rota too promoted the adjudgment of commercial matters. Through its judgments it played an important role in the development of mercantile law generally and insurance law in particular, not only directly in Italy, but also, by reason of frequent references to those decisions by Roman-Dutch jurists in later centuries, indirectly in the Netherlands. Its judgments were influential because the Court referred to authority and advanced reasons for them. This exposition of the \textit{ratio} or \textit{rationes decidendi} in individual cases, enhanced the value of the decisions as precedents and this in turn contributed to the development of a science of commercial law. A collection of the decisions of the \textit{Rota Genua} which appeared towards the end of the sixteenth century, was subsequently published elsewhere in Europe, also in Amster-

---

7 See Bensa Assicurazione 149-150.

8 See Sanborn 246-247.

9 See eg Holdsworth History vol VIII at 281 and Maclean 22. Bensa 'Versicherungswesen' 6-7 refers to two insurance judgments of the \textit{Ufficio di Mercanzia di Genua} from 1419, the one concerning a general average loss and the other a claim by brokers against the heirs of the insured on whose behalf they had paid an insurance premium. See too Piergiovanni Lezioni 189-197 on the opinions on insurance matters of the fifteenth-century Genoese jurist Bartholomeus Boscus (Bosco).

10 The name 'Rota' comes from the Latin word for a wheel (\textit{rota}). Originally the meetings of these bodies were held in circular rooms or rotunda, a notion which was later continued in that the presiding officers sat around a semicircular table.

11 The first printed text of these rules dates from 1538 and contains information on aspects such as execution, delays and interventions in insurance cases. They were often revised. Thus, in 1557 some aspects of the process of execution were better determined as far as insurance payments and general average compensation were concerned. See further on these rules, Piergiovanni 'Rota' 31-33.

12 See generally on the influence of the \textit{Rota Genuensis} and its decisions in insurance disputes, Piergiovanni 'Rota' and \textit{idem} 'Courts' 17 and 20. For its decisions on mercantile law generally, see also Piergiovanni 'Banchieri'. And for the origin of the Ecclesiastical (as opposed to the Civil) Rota, see generally Dolezalek 69-73.

13 On the so-called style ('\textit{stile rotale}') and civilian methodology, and the doctrinal influence upon the judicial decisions, of Italian \textit{Rotae} in general from the mid-sixteenth until the end of the seventeenth century, see Gorla.
dam, and gained widespread renown and influence. The collection contained some 215 judgments of the Rota delivered between 1550 and 1577. At least fourteen decisions dealt with insurance contracts, and from them it is apparent that the Rota was averse to litigious parties, and to technical defences and tactics in insurance cases, and that it placed an emphasis on good faith in and an informality of its procedures.

But there were more direct and geographically closer antecedents of the Dutch insurance tribunals of the seventeenth century than these Spanish and Italian maritime or commercial courts. They functioned in Bruges and Antwerp.

1.3.2 The Adjudication of Insurance Disputes in the Fifteenth and Sixteenth Centuries in Bruges and Antwerp

It appears that insurance disputes were heard and adjudicated upon from the fifteenth century onwards in the Spanish Netherlands. At first cases arising in connection with insurance contracts were determined by the ordinary courts because no special tribunals existed for insurance or other commercial cases.

In Bruges, where there is evidence of insurances being concluded in the latter part of the fourteenth century, numerous records are extant of insurance disputes which came before the local Schepenen Court (College of Echevins) in the fifteenth century. Some of these decisions went on appeal to the Groote Raad at Malines.

14 The collection, Decisiones Rotae Genuae de mercatura et pertinentibus ad eam, was compiled and published in Genoa in 1581 and 1582 (by Antonio Roccatagliata) and was reworked and published almost simultaneously in Venice (by Marcus Antonius Bellonius). It was subsequently included in the Lyons edition of the work De mercatura decisiones et Tractatus varii de commercio (1592) and also in later editions of that work, one of which appeared in Amsterdam in 1669. For further details, see Coing Handbuch II-2 at 1153-1154 1181 and Savelli 88-94.

15 The decisions dealing with insurance are numbers 3, 5, 25, 29, 36, 40, 42, 55, 63, 130, 101, 102, 129 and 166: see Rotae Genuae Decisiones passim. Interestingly enough, another 40 of the decisions dealt with aspects of interest and usury while a further 20 were specifically concerned with the related issue of exchange.

16 For further background to the development and state of insurance law and practice in Genoa, see eg Bensa Assicurazione; idem 'Mittelalter'; Doehaerd; Gioffrè; Groneuer; Lattes 'Documento'; and idem 'Securare'. See further Origio 138-140 on the conclusion by Franchesco di Marco Datini, a merchant from Prato, of insurance on shipments of his own goods, and also on the conclusion of insurance, this time as underwriters, by his Pisan trading firm in 1384, 1385 (see Bensa Assicurazione 210 for a reproduction of this contract) and 1387.

17 See again ch I § 2 supra.

18 See eg Gilliodts van Severen Cartulaire vol II at 43, 62-63, 74-75, 90-94, 181-182 and 203-204 where these decisions are transcribed, and De Groote Zeeassurantie 13-18 and idem 'Polissen' for a summary of the judgments of the Bruges Schepenen Court in marine insurance matters in the fifteenth and sixteenth centuries. It appears that the earliest of these decisions dates from 24 September 1444 and that in it reference was made to 'la coutume entretenue sur les assurances' and to 'le contenu de la cédule de ladite assurance'. An earlier decision from 1441 was concerned with average and its assessment ('dispache'). Raynes (1 ed) 12 states that already in April 1377 the Schepenen Court in Bruges gave a judgment on a claim under a charter vanzecgger-scepe to recover the value of certain parcels of goods which had been lost, a case which may, according to him (or, more likely in my view, which may not) have concerned a marine insurance policy.
The suggestion, though, that a Chamber of Insurance existed in Bruges as early as 1310 where insurance contracts were concluded, appears unfounded and is unsupported by other evidence. In any event, it has not been thought that this Chamber was in any sense a judicial or quasi judicial body where disputes arising from insurance contracts were settled.  

The earliest legislation on matters of insurance in the Netherlands also concerned procedural matters and the determination of insurance disputes by the ordinary courts. Thus, the placcaat of Philip the Good of Burgundy of 15 February 1459 (1458 os) made provision for the speedier and more informal adjudication of insurance and other mercantile and maritime disputes, and for the immediate provisional payment by insurers who were also prohibited from appealing against provisional sentences and other decisions on frivolous grounds in an attempt to postpone payment on insurance contracts. But the jurisdiction of the ordinary courts over insurance matters remained. The placcaat of Charles V of 25 May 1537 confirmed these procedural matters by providing for summary proceedings, provisional judgments in insurance cases (against the provision of security by the insured), and a limitation on the grounds of defences and appeal open to insurers. It also specifically confirmed that the ordinary courts had jurisdiction in insurance matters by declaring that all insurance disputes as well as those on bills of exchange ('wisselbrieven') were to be submitted to the appropriate courts ('sijnen behoorlijcken rechter'). The provisional placcaat of Charles V of 29 January 1551 (1550 os) and its replacement of 19 July 1551 concerned maritime mat-

---

19 See De Smidt & Strubbe 116-117 for the decision of the Groote Raad of 26 February 1476 (1475 os) in an appeal against, and upholding on a procedural point, the decision of the Schepenen Court of Bruges in the insurance case of Alonso de Couvres [a Spanish merchant] & Lazarre Lomelin [a Genoese merchant at Bruges] v Alvaro Denis & Antoine Fernando [both Portuguese merchants there]. See also idem 164 for the decision of the Raad of 8 May 1478 in an appeal against the decision of the Schepenen in Bruges in the case (which may well have been a further appeal in the previous case) of Alphonse de Coenas & Lazaro Lommelin [both of whom were in this instance identified as being from Portugal] v Alvaro Denis & Antoine Fernande [both from Portugal], in which the plaintiffs, who had refused to pay 'verzekeringsspenningen' to the defendants for an insured ship which had been plundered in the Spanish port of Laredo, were absolved from having to make such payment.

20 For further information on the allegation in the Chronijk van Vlaanderen en Brabant (1736) that a Kamer van Versekeringe existed in Bruges early in the fourteenth century, see Van Niekerk Sources 12n25 and the authorities referred to there.

21 See further on this placcaat, Goudsmit Zeerecht 204-205; De Groote Zeeassurantie 33; Hammacher 40; Kracht 9-10; Plass 27; and Reatz 'Ordonnances' 47-48. On provisional sentence, see ch XX § 2.2 Infra.

22 On the placcaat of 1537, see further Couvreur 'Zeeverzekeringsspractijken' 199-200; Goudsmit Zeerecht 205; De Groote Zeeassurantie 64; Reatz 'Ordonnances' 48-50; and Verlinden 'Zeeverzekeringen' 192n3.

23 Apparently, just prior to the promulgation of the placcaat of 1537, the city magistrate of Antwerp had declared himself incompetent in matters such as insurance, as a result of which such cases came to be heard by the consular courts of the foreign merchants who concluded insurance contracts in the city as insurers. These courts each followed the customs of the merchants they represented, an obviously unsatisfactory situation for local insured and hence the need to confirm the jurisdiction of local Schepenen Court in insurance and other cases. See further eg Hammacher 166 and Mullens 97.
ters and especially the seaworthiness of ships. Various standards of seaworthiness for ships were laid down as regards matters such as manning, equipment, armament, and stowage; standards which depended in every case on the size and type of ship and on the nature of her cargo and her destination. In terms of s 8, officers were appointed in each port to oversee and enforce compliance with the seaworthiness provisions of the placcaat, and disputes arising between them and the masters of ships had to be determined at the port in question, and in a summary fashion so as not to delay the voyage, by the ordinary courts. Section 16 provided in this regard that ‘de Wethouders’ were entitled ‘op staende voet daer over recht en justicie doen, sonder eenigh vertrek of vorme van processe’.

In 1555, the Piedmontese merchant Jean-Baptiste Ferufini who was resident in Antwerp, petitioned the Government in Spain through its representative in Brussels. He proposed that to eliminate the extensive frauds and abuses being perpetrated in the Antwerp insurance business and to ensure compliance with insurance legislation and local (as opposed to foreign) insurance customs, the content of insurance policies concluded in the city should be controlled by an office where all policies would have to be registered. A notary in the office would vet, authenticate and register insurance policies complying with applicable law and custom, and only registered policies would be enforceable in the local courts. In effect, Ferufini was proposing the establishment of an insurance registration bureau and central broking office in Antwerp. Not surprisingly, he proposed also that such an office should be under his life-long supervision, and in return for this monopoly he undertook to pay the Government an annual sum of 500 carolingian guilders, payment to commence ten years after the establishment of the office. He would obtain an income from a registration fee (one-eighth per cent of the sum insured) and a brokerage (in the same amount) if the policy in question was also brokered and drawn up by the office, something which, it would appear, was not to be compulsory.

Not surprisingly, Antwerp merchants, brokers and notaries were strongly opposed to Ferufini’s proposal and they likewise petitioned the Government, resulting in yet further missives from Ferufini himself.

24 Insurance was treated cursorily in ss 20-23. On these placcaaten, see eg Goudsmit Zeerecht 207-215; De Groote Zeeassurantie 33-34; Hammacher 42-43; Kracht 11-14; and Reatz ‘Ordonnances’ 50-53.

25 ‘[T]wee Officiers ... ende eenen Contrrolleur, alle wesende Lieden van experience, en goed verstandt hebbende op 't stuck van der Zeevaert, en wesende persoenen van authoriteyt, goede fame, name en gelove’. These provisions were linked to the insurance provisions in that only seaworthy ships could be insured: see further on this matter, ch XIII S 2.2 infra.

26 In the event of a dispute arising between merchants (consignors) and the master of a ship over the amount of freight or hire because of the expenses the master had to incur to comply with the provisions of the placcaat, that dispute had in terms of s 17 to be settled by ‘onse Officieren ende Wethouders’ in the same way.

27 For a detailed account of Ferufini’s proposals and his attempts to be appointed superintendent of the Antwerp Insurance Registration Office, see Génard where the relevant petitions and counter-petitions, reports and other documentation (now housed in the Antwerp municipal archives) are reproduced. See eg at 197-201 for Ferufini’s main petition to the King Philip II of Spain in October 1556. See also eg Goris 187-189 and De Groote Zeeassurantie 66-91 for further details on Ferufini and his proposals.
At last, in 1559, the Government decided to establish a registration bureau and broking office for local insurance policies in Antwerp and to appoint Ferufini as its superintendent. Although a municipal ordinance was drafted for this purpose later in that year, it is uncertain whether this appointment was ever taken up and whether the Antwerp Office ever functioned under Ferufini.\(^{28}\)

Some four years later an important placcaat on maritime law was passed. The placcaat of Philip II of 31 October 1563 contained seven titles. Title VI concerned the adjudication of maritime disputes ("Vanden Schips-keuren ende breucken, ende andere saecken der Justitie aengaende") and title VII insurance.\(^{29}\) The latter title made no mention of any insurance office in Antwerp or of any obligation to register policies there. In terms of s 9 of title VI, though, inspectors ("Visiteerders") at the various places whence ships sailed were appointed to inspect them and to ensure compliance with the provisions of the placcaat as to the seaworthiness of ships. In terms of s 10 they could bring transgressors before the officers and courts at those places for the matter to be adjudicated. This would appear to have been a continuation of the system established in 1551.

In November 1569, after the Spanish crown's minister in the Low Countries, the Duke of Alva, had by a placcaat in March of that year prohibited the conclusion of insurances because of the frauds involved,\(^{30}\) the Government in the Netherlands sent a letter to Madrid requesting that the insurances again be allowed and that a secretary of insurances be appointed. From this it would appear that no one was then in office. On 27 October 1570 Alva again permitted the conclusion of insurance contracts, but now, despite continuing opposition from the local merchants, insurers and brokers, under close official supervision and subject to the provisional regulation of insurances contained in the placcaat issued on that date.

The insurance placcaat of 20 January 1571 (1570 os), like the provisional placcaat of 27 October 1570 which it replaced, resorted to the registration of insurance policies as a method to control both the content of insurance contracts and the propriety of insurance practices. In s 7 the placcaat provided for the compulsory registration of all insurance policies on goods sent from local ports, whether such policies were notarially executed or concluded informally or underhand, within six days after the first insurer had underwritten or agreed to it.\(^{31}\) To enforce this measure, only policies of which the original had been signed by the Superintendent of the Registration Bureau or his deputy would be enforceable in court. The courts referred to were the local

\(^{28}\) As to the Antwerp Office of Insurance, see further eg Couvreur 'Zeeverzekeringspractijk' 186-187 and 200-204; De Groote Zeeassurantie 43-44; idem 'Zeeverzekering' 2-10 and 48; Kiesellbach 161-167; Mullens 25 and 35-37; Verlinden 'Zeeverzekeringen' 192n3, 202 and 203; and Wijffels 96.

\(^{29}\) On the placcaat of 1563, see eg Goudsmit Zeerecht 229-250; De Groote Zeeassurantie 34-36; Hammacher 43-44; Jolles 35-37 and 53-70; Kracht 15-21; and Reatz 'Ordonnances' 66-74. Both Verwer See-rechten and Van Glins Aenmerckingen provided extensive commentaries on the placcaat.

\(^{30}\) See Van Niekerk Sources 43-45 for further details and references in this regard.

\(^{31}\) The registration of insurance policies is treated in more detail in ch VIII § 3.3 infra.
Schepenen courts which had jurisdiction in insurance matters. Brokers too were involved in the process of registration.\textsuperscript{32}

As Superintendent or Commissioner of the Registration Bureau in Antwerp, Alva appointed his secretary, Diego Gonzales Gante, a further reason for the dissatisfaction of the local insurance fraternity. His duties in the post of ‘Commis ende Administrateur Generael totte registratuere vande Contracten, Instrumenten ende Policen vande versjeckeringen oft asseurantien vande Koopmanschappen’ were confirmed in instructions, referred to in s 10 of the placcaat of 1571 as ‘Memorialen ende Instructien’.\textsuperscript{33}

Gante firstly had to appoint competent and qualified deputies in Bruges, Amsterdam, Middelburg and elsewhere, if necessary. It is uncertain whether any such appointments were ever made, either by Gante or any of his successors, and whether branches of the Antwerp Insurance Office ever functioned elsewhere in the sixteenth century.\textsuperscript{34} He also had to keep a register in which policies executed or brought before him (‘voor hem gepasseert oft ghebrocht’) could be transcribed after it had been ensured that they complied with the provisions of the placcaat of 1571. The contents of the register had to be kept secret, an important requirement in view of the relative small size of the Antwerp insurance market at the time and also because of the fact that the merchants who acted as both insured and insurers were often competitors. Policies presented to the Office had to be registered within 24 hours after which the original had to be returned to parties, verified and signed by the Superintendent. Entries in the register had the same evidential and executory value as other officially executed documents.\textsuperscript{35} Neither the Commissioner of the Office nor any of his deputies were permitted to be involved directly or indirectly with any insurance contract. Their fee was to be one-quarter per cent of the value of the goods insured and had to be paid by the insured for the registration and verification of his insurance policy. Thus, the placcaat of 1571 put a legislative stamp of approval on the monopolistic Registration Bureau first proposed for Antwerp by Ferufini, but it also placed the Office under the control not of a local merchant or broker but of a Spanish ‘commis ende administrateur generaal’. One may surmise that there was more than just token resistance amongst the Antwerp merchants and insurers against governmental control of and interference in insurance mat-

\textsuperscript{32} For their duties in this regard, see ch X § 7.3 infra.

\textsuperscript{33} These instructions were dated 11 October 1570. They therefore predated the provisional placcaat of 27 October 1570 and were probably initially issued with a view to that measure. They continued to apply also under the placcaat of 1571 - they were in fact specifically declared valid by s 36 of the latter placcaat and are usually appended to it.

\textsuperscript{34} Verlinden ‘Spaanse kooplui’ 206 mentions that the registration of insurance policies was compulsory also in terms of an insurance ordinance promulgated in 1569 (at the time when Alva had prohibited the conclusion of insurance in the Netherlands) for Spanish merchants resident in Bruges. The Secretary of the Spanish nation in Bruges, Diego de Aranda, was instructed to establish a register for this purpose. As to these Hordenanzas of 1569, see, in addition to Verlinden ‘Spaanse kooplui’, also idem ‘Consulat Espagnol’; Van den Bussche; and De Groote Zeeassurantie 45-58.

\textsuperscript{35} ‘[D]e selve sulcke auctoriteyt hebben sullen als andere openbare instrumenten gepasseert voor Wethouderen, Notarissen oft Tabellioenen, parate ende gereede executie hebbende’.
ters in the form of a compulsory registration of insurance policies, if only because of the registration fee which compliance with that duty involved.

The first years of the Antwerp Registration Office were turbulent ones. Middelburg seceded from the Spanish Netherlands in 1574; Amsterdam followed in 1578. And even if branch offices had been opened there they certainly did not operate after those dates. Antwerp itself was de facto an independent state from 1577, when Spanish soldiers left the city, until 1585, when the Spanish recaptured it, and it is probable that during this period the Office, if it had in fact ever functioned effectively before, was inoperative. In any event, it appears that by 1585 the post of Commissioner had for some time not been filled. Various persons laid claim to it and to the privileges it entailed, each supported by different Spanish government officials as well as local city councillors. Later in that year Francisco Guillamas, the secretary of the Duke of Parma (Alexander Farnese, who acted as governor of the Netherlands on behalf of king Philip II of Spain), was appointed as Commissioner of the Registration Bureau. Being absent in Spain, though, Guillamas appointed Diego de Peralta to the post. It is uncertain whether the Office ever functioned effectively, whether policies were ever registered there, and if so, whether the obligation to register insurance policies was ever generally complied with.

Various factors indicate that all these questions must be answered negatively. Extant Antwerp insurance policies dated after 1571 do not contain any evidence of registration, such as the signature of the Commissioner of the Office which was required to appear on the original copy of approved and registered policies. Furthermore, no registers of any such Office have ever been found. And finally, the Antwerp compilation of customary law of 1609, the *Compilatae*, which treated insurance in great detail, contained no reference to the registration of insurance policies. It seems that the registration function of the Office may by that time have fallen into disuse, if it in fact ever did register policies.

But although the Registration Bureau in Antwerp had little success, it seems that from it the idea for another institution developed, namely of a chamber of assurance for settlement of insurance disputes. As opposed to the insurance chambers established later in the northern Netherlands cities, which were specifically created to adjudicate upon all insurance cases in the first instance, the Antwerp Insurance Office, or Insurance Chamber as it was also on occasion referred to, remained, formally at least, exclusively concerned with the registration of policies. It appears from a request in 1565 to the Antwerp city magistrate, though, that in addition to their authority to register insurance policies, Ferufini’s successors also possibly drew up average adjustments. This is supported by the fact that in the instructions of 1570 to the first Commissioner, the

---

36 See generally on the Antwerp Insurance Office, Kiesselbach 166-167 and Suermontd 'Rotterdam' 214-215. As Couvreur ‘Verzekeringscompagnie’ 151 warns, the Antwerp Office or Chamber, established in 1570, must be distinguished from the Antwerp insurance company, the *Chambre Impériale et Royale d'Assurance aux Pays-Bas*, established in 1754. Spooner 44, eg, fails to draw this distinction when he states that an insurance chamber was established by charter in Southern Netherlands on 29 November 1754.

37 See Goris 189.
Gante, provision was made for the payment of the customary fee to him for the verification of average ('belangende die verificatie vande Avaryen, sal daer van betaeld worden, soo men gewoonlijk is van doen'). From which it would appear that the Office may have been intended to be involved with more than just the registration of policies.\footnote{The function of adjusting averages was not expressly conferred upon the Office in the placcaat of 1571. Nevertheless, although no one was apparently bound to notify losses at the Registration Office, the number of average adjustments dealt with by it apparently increased to such an extent that in 1585 the then Commissioner, Diego de Peralta, was himself referred to in a request to the Government by Antwerp merchants as the 'commis du registre des assurances et liquidation des avaries de ladite bourse': see Couvreur 'Zeeeverzekeringspractijk' 202.} It appears also from other sources that the Antwerp Registration Office functioned as, or possibly only as, an insurance chamber for the adjudication of insurance disputes. The most important evidence in support of this dates from the last quarter of the sixteenth century and comes from Hamburg. Insurance was introduced in that city during this time by Antwerp merchants who had emigrated there after the fall of the city in 1585, and Hamburg policies were still concluded with reference to the laws and customs of Antwerp.\footnote{See further § 4.3.1 infra as to choice of customs clauses in insurance policies.} Furthermore, disputes arising from those policies were, by agreement between the parties, also referred to the Insurance Office in Antwerp for settlement.\footnote{See eg Kiesselbach 16-20, 120-121, 164 for details and a reproduction of the adjustment by the Antwerp Chamber from 1593 on a dispute arising from a policy of 1591, underwritten in Antwerp and insuring a Hamburg merchant.} There is also evidence of the Office exercising not only an adjusting but a judicial function from an Antwerp insurance case in 1621.\footnote{From this case, JA Balbi v Goyvaertszoon vanden Graeff, it appears that the claimant had requested the Commissioners of the Antwerp Insurance Chamber for an adjustment of average ('despache') on his insurance policy to determine the liability of each of the insurers involved. In the course of the case, it was argued, apparently by the municipal sheriff, that the Chamber had exceeded its actual authority of drawing up dispatches, and had assumed judicial authority in insurance matters. It was pointed out that the Commissioners were not 'rechters, maer allenlijck calculateurs, alsser restorno, oft andere calculatien te doen valt, ghelijck oock geen placcaeten oft ordonnantien zijn verelischende hen despache, soo is hen eerste ampt geheweest, het registreeren vande policen daer op voorts gevolgt is, dat cooplieden die qualijck lesen oft cyferen conden, van hen hebben begeert de calculatie ende advuijs, over hen polizen, d'welck alsoo successievelijck in treyn is gebrocht; ende plaetsie heeft alsser geene contradictie en valt'. For further details, see Couvreur 'Zeeeverzekeringspractijk' 202-203.} It is not certain whether the Office and its officials did in fact adjudicate disputes themselves, and thus functioned as a special insurance court, or whether it merely arranged for the appointment of an arbitral panel made up of local merchants which met on its premises and which, for example, had no power to enforce its decisions.

The precise nature of the adjudicatory function, if any, of the Antwerp Insurance Office and the details of how from a registration office it evolved into a insurance chamber, would seem to require further investigation and need not detain us here. That there was a need for the adjustment of averages and also for the adjudication of insurance disputes outside the ordinary court system, is clear. The members of staff of the Office or Chamber obviously were or soon became experts in insurance. No doubt they were...
requested by often illiterate and innumerate merchants to calculate the amounts payable on policies in cases of loss and were also asked for advice on insurance matters and disputes. From there it may well have been a short step to the Office adjudicating disputes or at least facilitating such adjudication. Thus, the Office gradually ceased its original function of registering insurance policies and began exercising new unofficial functions. The fact remains, though, that the Insurance Office or Chamber in Antwerp was not formally a judicial body competent to hear and determine insurance disputes. Those remained within the competency of the ordinary courts in the city. Those courts could, in terms of the placcaat of 1571, refuse to adjudicate on unregistered policies and they also retained their control over the Superintendent of the Office and the execution of his duties. Whatever judicial function the Office did exercise, it did so not on any statutory basis but merely by virtue of an agreement between the parties concerned. It appears, though, that for the merchants of Antwerp, the Insurance Office remained too attached not only to the notion of a registration bureau but also to the placcaat of 1571 and its many unpractical and unacceptable measures, so that in the seventeenth centuries they increasingly turned away from the Office towards arbitration as the preferred method of resolving disputes arising from insurance contracts.42

Even if there is still uncertainty about the precise nature of any adjudicatory function the Antwerp Insurance Office may have exercised in the sixteenth century, it served as an important example for subsequent developments in Amsterdam, Rotterdam and other trading centres in the Northern Netherlands.

1.4 The Chamber of Insurance in Amsterdam

1.4.1 Introduction: Establishment of the Amsterdam Chamber

The need for a specialist tribunal to hear and determine the increasingly complex disputes arising from insurance contracts was readily apparent to the Amsterdam Legislature when it drafted that city’s insurance keur of 1598. Prior to the promulgation of the keur on 31 January of that year, insurance cases were decided by the local Schepenen Court which followed the placcaaten of 1563 and 1571 and the insurance customs of Antwerp in particular.43 Amsterdam merchants petitioned the municipal body with various requests concerning insurance.44 In particular they desired the establishment of a specialist judicial body which could be concerned exclusively with the adjudication of questions of insurance. And the Amsterdam Government too had good reason to grant this request. The Schepenen were overloaded with cases and simply

42 To this purpose, handwritten clauses were added to policies providing "soo en sal den gheassureerden niet gehouden syn te despascheeren dese police in de camen van Assurantie, hebbende eenigh difficulteyt ofte questie sal alles gheefent worden door twee goede mannen met aeren van deze borse van Antwerpen hun des verstaende". See Couvreur 'Verzekeringscompagnie' 151n2. Arbitration is considered in more detail in § 2.1 infra.

43 See eg Wagenaar vol XIII at 42.

44 See eg Kracht 30.
did not have sufficient background to deal with the complicated and time-consuming issues of insurance and average. As a result the keur of 1598 made provision for the establishment of the local Chamber of Insurance.\textsuperscript{45}

In terms of s 32, a judicial body was established to hear insurance disputes in Amsterdam at first instance. The body was referred to as 'den Commissarissen vande Kamere van Asseurantie alhier'. Although not the first specialist court in Amsterdam, the Chamber was the first instance of an official merchants' court in Roman-Dutch law. The Chamber, located in offices in the City Hall (Stadthuys), close by the Bourse,\textsuperscript{46} existed for more than two centuries, its continued functioning being provided for in s 43 of the Amsterdam insurance keur of 1744.

Having established the Chamber in 1598, the Amsterdam municipal government subsequently became concerned that it might have exceeded its authority,\textsuperscript{47} derived from ancient privileges, by creating a new judicial body. Although local precedents existed for the creation of such judicial bodies of first instance, and although other cities had soon after followed the Amsterdam example, the question remained whether it had acted properly in this regard. Accordingly, the Amsterdam Government approached the Estates of Holland and West Friesland requesting its ratification and approval not only of the right to establish 'de Collegien van Asseurantien ende Kleyne Saken', but also of the power to make amendments in this regard in future.\textsuperscript{48} After due consideration, the Estates granted the Amsterdam request by a Charter dated 17 July 1612.\textsuperscript{49}

\subsection{The Composition of the Chamber: Commissioners and Secretaries}

In terms of the keur of 1598, the Amsterdam Insurance Chamber was made up of three Commissioners with, to assist them, a Secretary, a sworn Clerk and a Messenger. They were to be appointed or reappointed by the Amsterdam judiciary ('Mijne Heeren van den Gerechte') annually on Good Friday, the first such appointment to take

\begin{footnotes}
\item[45]See generally on the Amsterdam Chamber, \textit{Amsterdamsche Secretary} 372; Enschedé 123; Goudsmit (\textit{Zeerecht}) 330-331 332-333 346 356-359; Suermond ('Rotterdam') 216-220 (who is rather inaccurate at times, eg stating at 216 that the Amsterdam subsidiary of the Antwerp Insurance Chamber became independent in 1598); and Wagenaar vol XIII at 42-43.
\item[46]See L'Espine/Le Long \textit{Koophandel} 40.
\item[47]Which included the power to promulgate keuren, so that it did have the power to legislate in the field of private law, including on insurance matters.
\item[48]In its in petition to the Estates, Amsterdam referred to the fact that 'Gheschillen spruytende uyt Asseurantie ende Avarije meestendeel so intricaet ende van sodanige nature waren, dat de selvige langen lijf, naastigh ondersoeck ende sonderlinge kennis ende veerleyt, ende over sulcx op bijsondere wijze, en de van Persoonen hen dies verstaende van noode waren verhandelt te worden': see Lichtenauer 'Handelsrecht' 352; and further Goudsmit \textit{Zeerecht} 289 and 332-333.
\item[49]The Charter is usually appended to the keur of 1598, also in the version in the \textit{GPB} in vol I at 842-847. Spooner 18 and also Suermond 'Rotterdam' 216 are therefore incorrect in stating that the Chamber was only established in 1612. It was in fact operational from 1598.
\end{footnotes}
place in 1599. From 1764, the number of Commissioners was increased to four. The occupations and other biographical details of the Commissioners and Secretaries of the Amsterdam Chamber of Insurance make for more than simply interesting historical background and provide invaluable information on the nature of the body and its place in Roman-Dutch insurance adjudication.

From chronological lists of the Commissioners (Commissarissen or Assurantiemeesters) of the Chamber of Insurance, it appears that in the period from 1598 until 1795, and with three (and later four) persons serving per annum, little more than a hundred different persons acted as Commissioners. This indicates not only to what extent those appointed to sit on the body were subsequently repeatedly reappointed, but also that there was a fair measure of continuity in the membership of the Chamber.

A large number of the Commissioners came from or married into prominent Amsterdam families, with the same names cropping up in different decades and even centuries as Commissioners of Insurance. The influence of familial relationships and business connections in the appointment of the Commissioners is readily apparent.

Most of the Commissioners were, prior or subsequent to their appointment to the Insurance Chamber, also members of the Amsterdam Schepenen Bench. And most of them were at other times in their careers also members of other Amsterdam tribunals, not only, as could be expected, of the Chamber of Maritime Affairs and of the College of Admiralty, but also of the Chamber of Small Claims (Kamer van Kleyn Zaken) and that of Marital Affairs (Huwelijkse Zaken), of the Bank of Exchange (Wisselbank) and of Loan (Bank van Leening), and of the Insolvency Chamber (Desolate Boedelkamer). At the same time, most of the Insurance Commissioners are also identifiable as merchants of one type or another, mainly shipowners and/or bank-

50 By the amending keur of 23 February 1600, this date was changed to mid-February. For the process of appointment, see Bontemantel/Kernkamp 255-256.

51 See eg Wagenaar vol XIII at 70 and Vergouwen 45.

52 What follows is based on the lists of Commissioners from 1598 until 1768 in Wagenaar vol XIII at 55-70. Information for the period until 1795, as well as additional biographical and genealogical details have been gleaned from Elias and from Bontemantel/Kernkamp.

53 Although many served a term or terms of a few years at a time, there are a few long-serving Commissioners who stand out: Cornelis Jansz Valckenier served 26 years (1600-1625); Dirck Geurtsz van Beuningen 17 years (1632-1648); Dr Cornelis van Drongkelaer 21 years (1627-1647); Nicolaas van Loon 16 years (1639-1651, 1666-1668); Jacob van Neck 26 years (1648-August 1668, 1669-1673); Jacob Hendricksz Bicker 26 years (1677-1682, 1684-1713); Willems Six 29 years (1694-1722); and Nicolaas Warin Jr 25 years (1751-1754, 1756-1776).

54 Names such as Alewijn, Beuningen, Bicker, Calcoen, Collen, Coymans, Hasselaer, Hooft, Hulft, Loon, Poll, Reael, Tersmitten, Trip, Valckenier, Warin and Wevering are frequently encountered.

55 And is vividly illustrated by Elias table VII.

56 See further § 1.4.6 infra.
ers. Some were at various times directors (bewindhebbers) of the East or West India Companies or of one of the other Dutch chartered companies of their time.

Interestingly enough, very few are identifiable as insurers: Jacob van Neck (Commissioner from 1648-1698 and again from 1669-1673) is referred to as a merchant and insurer; Joan Hulft (Commissioner from 1652-1654) as a merchant, shipowner and insurer; and Matthijs Ooster (Commissioner from 1785-1787) as a merchant and insurer. Possibly Dirk van der Meer (Commissioner from 1735-1738), whose father Jeremias was an insurer in the firm of Jeremias van der Meer & Soon, and Rochus van Capelle (Commissioner in 1674), who was likewise the son of an insurer, may also have been active in that capacity in Amsterdam. It should be remembered, though, that until the end of the eighteenth century, very few merchants were full-time insurers, most of those underwriting risks on insurance policies doing so sporadically and ancillary to their main business activities. Also, Commissioners of the Chamber were not permitted to act as insurers during their term of office, so that those who were dependent for their incomes on the insurance business in that they were full-time or almost full-time insurers, may well have been reluctant to accept such an appointment.

There were also a few other notable Commissioners. Dr Albertus Coenradus Burg (Commissioner in 1626) was a merchant, a member of the firm Elias Trip, Godin & Hans van Loon, an ambassador to Russia and Denmark, and also one of those who in 1628 submitted to the Estates General a proposal for the establishment of a company of compulsory insurance in the Netherlands. Joan Commelin (Commissioner from 1677-1781) went on to become a professor in botany at the Atheneum in Amsterdam in 1690. A knighthood was conferred on Dirck (or Diederick) Tulp (Commissioner in 1673) by Charles II of England in 1674 and a baronetcy in 1675. Dr Philip Wevering (Commissioner in 1672) was an advocate and his brother's grandson was Secretary of the Chamber from 1720-1735. In fact, very few lawyers served as commissioners. In addition to Wevering, Joan Veeneman (Commissioner in 1653) was an advocate first but later became a merchant; Frederik Sluyksen (Commissioner from 1695-1698) was an advocate and soon after his term of appointment as Commissioner he became President of the Hof van Holland from 1697-1710; Abraham del Court (Commissioner in 1755) was an advocate until 1749; Marten Adriaen Beels (Commissioner from 1770-1774, and in 1777 and 1780) was an advocate from 1751-1761.

As far as the Secretaries of the Amsterdam Chamber of Insurance are concerned, those that could be identified from the available information, served for a long

---

57 His father was also an insurer.
58 See further ch I § 2.3 infra on individual underwriters.
59 See further ch IX § 1.3 infra as to the capacity to insure.
60 As to this proposal, see further ch IX § 2.10.2.1 infra.
period in that capacity. The Secretary was no doubt the mainstay of the Chamber and continuity in the post was essential for its proper functioning.\textsuperscript{61}

1.4.3 The Jurisdiction of the Amsterdam Chamber

In terms of s 32 of the Amsterdam insurance \textit{keur} of 1598, the Chamber of Insurance had first-instance jurisdiction\textsuperscript{62} over all disputes between parties arising from insurances concluded in the city ('saecke van Asseurantie hier ter Stede geschiet'). It could also adjudicate, in accordance with the provisions of the \textit{keur}, on all disputes arising from insurance contracts concluded elsewhere if such contracts had a bearing on the Amsterdam Chamber or Bourse ('saecke van Asseurantien buyten dese Steden gedaen, die relatief sullen zijn totte Kamere van asseurantie ofte Beurse alhier').\textsuperscript{63} And it could also hear disputes, arising from contracts made before or after the promulgation of the \textit{keur}, which were otherwise submitted by the parties for decision by the Chamber.\textsuperscript{64}

By the amending Amsterdam \textit{keur} of 4 December 1598, the jurisdiction of the Chamber was extended to include all questions or disputes concerning average. They, like those concerning local insurances, had in the first instance to be brought before and determined by the Chamber of Insurance, in the same way as provided for in the case of insurance disputes. Although the Amsterdam Chamber's name was not

\textsuperscript{61} From Elias the following seven secretaries could be identified: (i) Simon van der Does (Secretary ?-?) was no longer Secretary in 1638 when he had already been ill for long time, although he died only in 1648 (Elias 327-327); (ii) Jacobus Wildschut (Secretary ?-1669): it is uncertain when he was first appointed but he was Secretary already in February 1668 (Elias 1153; Bontemantel/Kernkamp 256); (iii) Jan Backers Cornelisz (Secretary from 1679-1720) was first the clerk of Secretary Wildschut, and succeeded the latter in 1679 (Elias 1152); (iv) Marten Weveringh (Secretary from 1720-1736) was an advocate; his grandfather's brother, also an advocate, was a Commissioner of the Chamber in 1672; and Marten Antonisz Wevering, possibly a relative, was a Commissioner from 1773-1775 (Elias 975 1396); (v) Jacob Hop Hendriksz (Secretary from 1736-1776) was seemingly not related to the Jacob Hop who was a Commissioner of the Chamber from 1755-1759 and from 1763-1770 (Elias 361 741); (vi) George Clifford (Secretary from 1776-1782 and again in 1766) was the brother of the insurer Gerard Clifford (Elias 881); (vii) Theodorus Tersmitten (Secretary from 1782-1785) was the younger brother of Nicolaas Tersmitten, an Amsterdam advocate and 'taxateur en visitateur der schepen varende op de Middellandsche zee in 1777'; possible relatives Adolph Willem Tersmitten was a Commissioner of the Insurance Chamber from 1787-1788 and of the Chamber of Maritime Affairs from 1776-1784, while Hendrik Tersmitten was a Commissioner of Insurance in 1748 (Elias 843).

\textsuperscript{62} See generally eg Van Zurck \textit{Codex Batavus} sv 'Assurantie' par 29; Van der Keessel \textit{Praelectiones} 1482-1483 (ad III.24.21); and Van der Linden \textit{Koopmans handboek} IV.6.11.

\textsuperscript{63} The required link between the foreign contract and the local Chamber or Bourse was not specified. Possibly the fact that Amsterdam was the domicile of one of the parties to the contract, or the place of execution or of payment in terms of the contract, would have sufficed.

\textsuperscript{64} That is, according to Van der Keessel \textit{Praelectiones} 1482-1483 (ad III.24.21), disputes submitted to the Chamber by agreement ('compromissis') between the parties, or disputes submitted to the Chamber by way of prorogation of jurisdiction ('prorogatione jurisdictionis').
changed by this *keur*, it was on occasion referred to in contemporary and later sources as the Amsterdam Chamber of Insurance and Average.\(^65\)

In an opinion of 1678,\(^66\) the jurisdiction of the Amsterdam Chamber was one of the issues at stake. The opinion concerned the question whether the Chamber had any jurisdiction over disputes arising from a ransom policy. The question, more specifically, was whether, in view of fact that Amsterdam insurance legislation did not at the time yet deal expressly with ransom insurance, the Insurance Chamber could hear the present claim in preference to the *Schepenen* Court (*'deze zake uit de judicature van Schepenen zoude kunnen onttrekken'*). The opinion noted that ordinarily the court of first instance was the *Schepenen* Court (*'eigentlijk alleen de bank van de Ed. Heeren Schepenen'*), but that to relieve its burden, some subsidiary tribunals (*'subalterne banken'*) had been established, including one for insurance disputes. The lawyer giving the opinion thought that the claim should in the first instance be brought before the Chamber, not only because it decided all questions of insurance (*'alle zaken de Assurantie eenigzints rakende'*) but also because a dispute as to the respective jurisdictions of the *Schepenen* and the Chamber (*'dissipuit van judicature tussen Schepenen en Commissarissen'*) could not be resolved by the former.

The *keur* of 1598 clearly recognised that parties to a foreign insurance contract not otherwise within the Chamber's jurisdiction, could submit to its jurisdiction. The most obvious way in which this could occur was by way of an agreement\(^67\) in the form of a forum clause in the insurance contract. Such clauses had been included in insurance contracts from early on\(^68\) and were valid in Roman-Dutch law.\(^69\)

\(^{65}\) In a case before the *Hooge Raad* in 1726 (see *Bynkershoek Observationes tumultuariae* obs 2242; *idem Quaestiones juris privatî* IV.13), a claim was instituted against Amsterdam insurers by the owner of insured cargo for a general average contribution due by that cargo to a general average loss adjusted at Cadiz in Spain. The insurers argued, *inter alia*, that general average, adjusted by a court in Cadiz, did not bind them because such adjustment had to be made by the Commissioners of Insurance at Amsterdam where the policy had been signed. For this they relied upon s 32 of the *keur* of 1598, as well as its amendment later that year. The *Raad*, by a majority, held against the insurers. It was pointed out that in terms of s 32 an action on an insurance policy concluded in Amsterdam had to be instituted there in the first place, which was what had happened here, even though the action concerned an average, for the Chamber had jurisdiction also over such losses. Thus, it appears, the fact that the claim on an insurance policy concerned a loss which occurred or was adjusted elsewhere than in Amsterdam, did not affect the jurisdiction the Chamber otherwise had over that claim. The validity and binding effect of certain foreign general average adjustments was subsequently expressly provided for in s 40 of the Amsterdam *keur* of 1744.

\(^{66}\) See *Nederlands advysboek* vol II adv 170.

\(^{67}\) That is, a submission by an agreement, to submit an existing or a future dispute to the Chamber, between the parties to the contract. A submission by the voluntary unilateral act of one of the parties (ie, acquiescence) was presumably also possible.

\(^{68}\) See eg *Straccha De assecurationibus* XXXII. In terms of the relevant clause of the Ancona insurance policy of 1567 Straccha investigated there, the insurers renounced domicile as a defence (*'renunciantes domicilio'*, ie, they undertook not to rely on domicile and the Court's consequent lack of jurisdiction in any claim against them; they waived the procedures applicable in canon law (*'secundum pleniorem Camerae Apostolicae formulam'*) and they submitted themselves to whatever court or tribunal the insured may sue them in (*'se submittentes curvis loco, judico vel tribunal'*). The same Ancona policy of 1567 further provided (*see *idem* XXXVII*) that the insurers 'se submittentes omnibus locis, ubi fuerint inventi'. And in terms of the Ancona Insurance policy of 1588 (*idem* XXX.6-8), insurers specifically
The submission to the Amsterdam Chamber of disputes arising from Amsterdam policies or, presumably from foreign policies concluded in the appropriate form, was also confirmed by the policy form prescribed by the *keur* of 1598 which contained a choice of forum clause to that effect.\(^6\) This was taken a step further some 90 years later when the use of prescribed policy forms and compliance with insurance legislation were sought to be enforced. The amending Amsterdam *keur* of 29 January 1688 provided that in future only such types of policies could be printed and taken around the Bourse which followed verbatim the forms prescribed,\(^7\) and that these policies had to be signed by the Secretary of the Chamber, for which he was to receive three pence (stuyvers). Differently worded policies could not be employed, on penalty that policies other than those signed by the Secretary would not be justiciable by the Chamber.\(^8\)

Although the functions of the Chamber were thus extended from simply adjudicating disputes on insurance contracts to also overseeing the conclusion and ensuring the compliance with applicable legislation of such contracts, it is unclear whether a requirement of registration of Amsterdam policies was introduced by the *keur* of 1688.\(^9\)

The exclusive first-instance jurisdiction of the Chamber over disputes concerning both insurances concluded in the city and averages, was retained by the Amsterdam insurance *keur* of 1744.\(^{10}\) The Chamber also retained its jurisdiction to decide, according to local laws, disputes arising from foreign insurances related to the Chamber itself subjected themselves to the jurisdiction of Governor of Ancona or his assessors.

\(^{6}\) Thus, Lybreghts *Redenerend vertoog* II.17.5 included a choice of forum and submission to jurisdiction clause among the matters to be contained in an insurance policy: "t *Verband, ten bedwang van alle Heren, Hoven, Recten, en Rechteren, en specijlyk de judicature der Kamer van assurantie te ... submitterende zich zelfen, ten wederzyde, onder 't Rechtsgebruik, of Judicature derzelve, enz'. See too Van der Linden *Koopmans handboek* IV.6.11 as to the validity of such clauses.

\(^{7}\) As to the forms of insurance policies prescribed by legislation at different times, see further ch VIII § 4.1.2 *infra*. The *keur* of 1688 prescribed a hull and a cargo policy.

\(^{8}\) The amending Amsterdam *keur* of 26 January 1693 contained similar provisions for ransom policies.

\(^{9}\) The contemporary historian Pontanus *Beschrijvinge* III.4 (at 298-299) described the functions of the Chamber of Insurance as settling insurance disputes and overseeing the conclusion of insurance contracts which were executed before its Commissioners. See too eg Barbour *Capitalism* 33; *idem* 'Marine Risks' 575; and Spooner 23, both of whom ascribe a registration function of sorts to the Chamber. As to the registration of insurance policies, see further ch VIII § 3.3 *infra*.

\(^{10}\) See s 43 of the *keur* of 1744. The Chamber also had jurisdiction, in terms of s 39, to hear claims by brokers and other intermediaries against insured for the payment of premiums advanced on their behalf. See further as to brokers' right of retention in this regard, ch XI § 4.3 *infra*. 


or to the Amsterdam Bourse. The *keur* also retained the supervisory function exercised by the Chamber over local insurance policies.

Unlike the *keur* of 1589, that of 1744 did not provide specifically for the submission to the jurisdiction of the Chamber of disputes arising from foreign insurance policies. But the policies prescribed by the latter *keur*, and also the new policies prescribed by the amending *keur* of 1775, contained an appropriate submission to jurisdiction clause in terms of which the parties subjected themselves to the jurisdiction of the Chamber of Insurance and chose as *domicilium citandi et executandi* the house of the Secretary of the Chamber. As the Chamber was a compulsory court of first instance as far as local policies were concerned, the insertion of the clause in the prescribed policies may well have had in mind policies other than those concluded in Amsterdam itself.

The exclusive first-instance jurisdiction of the Amsterdam Chamber in matters of insurance and average was also confirmed in legislation regulating the ordinary courts. Thus, the Amsterdam *keur* on procedural matters ("Ordonnantie ende maniere van Procederen voor den Gerechte der Stad Amstelredam") of 27 April 1656 concerned the issue of where particular matters were to be decided in the first instance, and s 5 mentioned and confirmed the jurisdiction of the Chamber of Insurance in issues of insurance and average ("alle saecken van Asseurantien en Avarien sul gaan voor Commissarissen van Asseurantie volgens der selver Ordonnantie"). In fact, the parties to an insurance contract could not by agreement oust the Chamber’s exclusive jurisdiction and refer their dispute to the ordinary Schepenen Court instead. Also, the privileges

---

75 See s 44 of the *keur* of 1744, referring to insurances 'die relatief zijn tot de Kamer van Assurantie, of ter Beurse alhier'. See further eg Van der Keessel Theses selectae th 768 (ad III.24.21) and Praelectiones 1482-1483 (ad III.24.21).

76 Thus, s 38 of the *keur* of 1744 provided that in future brokers could employ only approved policies signed by the Secretary of the Chamber ('de Geoctroyeerde en by den Secretaris geteekende Policeri'), and s 60 provided that no insurers or insured could try to sign or in fact sign a policy other than one properly stamped and signed by the Secretary ('door de Secretaris van de Assurantie-Kamer geteekent, die daarvoor genieten sal drie stuyvers'), on forfeiture of f 300 in addition to the fine laid down by stamp-duty legislation. See further ch VIII § 3.4 infra for the stamp duties payable on insurance policies. The need to have policies signed by the Secretary of the Chamber was retained in the amending *keur* of 1775 which amended ss 59-61 of the *keur* of 1744.

77 The relevant clause read: 'Submitterende ons ter wederzyden om alle de quaestien, zoo wegens de schadens, als praemie en verbeteringen van dien, welke uit hoofde voorsz. zouden mogen ontstaan, aan de Judicature der Kamer van Assurantie en Avarye dezer Stede, en kiezende, voor zo verre wy buiten de Jurisdictie van dezelve mogten woonagtig zyn, domicilium citandi & executandi ten huize van den Seretaris derzetver Kamer in der tyd'. See further Boey Woorden-tolk sv 'Police van Assurantie' as to the need for an election of *domicilium citandi et executandi* in addition to a submission to jurisdiction.

78 See *Amsterdam Handvesten* vol II at 610. This *keur* amplified and added to a previous one of 30 November 1654.

79 See s 8 of the 'Nader Ampliatie, van de Instructien vanden Hoogen Rade, ende den Hove van Hollandt' of 24 March 1644 (GPB vol II at 779) which provided that in questions of insurance 'sal geene prorogatie van Jurisdictie toe ghelaten worden, tot wat somme dat de teyckeninge soude mogen ghedaen wesen'. See further Van Zurck Codex Batavus sv 'Assurantie' par 29 and Van der Linden Koopmans handboek IV.6.11.
of minors, widows, orphans and others to bypass the lower courts and to take their claims directly to the Hof van Holland, or even, if sued in a lower court, to have the case remitted to that superior court, were not available in the case of claims on insurance contracts.80

The question whether the parties could contract out of the application of the local insurance legislation and, by implication, thus exclude the jurisdiction of the local Chamber, which applied only that legislation and no other law, is considered elsewhere.81

By virtue of the seriousness with which it was viewed by the law, fraud was one matter over which the Amsterdam Insurance Chamber had no jurisdiction. The Chamber had to refer any case coming before it, together with all the accompanying documentation, to the local Schepenen Court as soon as it became aware that any fraud was in fact involved.82

1.4.4 Procedural Matters

The procedural rules applicable in cases coming before the Amsterdam Insurance Chamber largely reflect the Roman-Dutch rules of civil procedure generally. But there were some important differences, and these must be mentioned briefly. In essence they reflect the fact that the Chamber followed a less formal procedure than did higher courts in reaching its decisions.

In terms of s 35 of the keur of 1598, in the case of a decision of the Chamber, execution against an unwilling judgment debtor took place in the same way as was the case with a judgment of the Schepenen.84 By the amending keur of 4 December 1598, the declarations of the Commissioners in the case of averages were executed as pro-

80 See s 8 of the 'Nader Ampliatie, van de Instructien vanden Hoogen Rade, ende den Hove van Hollandt' of 24 March 1644 (GPB vol II at 779) ('ende sal Inde voorsz materie mede cesseren het voorseyde Privilegie van Weduwen, Weesen, ende andere miserable Persoonen'). See further Voet Commentarius V.1.126; Van Zurck Codex Batavus sv 'Assurantie' par 30; Van der Keessel Theses selectae th 768 (ad III.24.21); idem Praelectiones 1482-1483 (ad III.24.21); and Van der Linden Koopmans handboek IV.6.11.

81 See § 2.1 infra as to arbitration and ch VIII § 5.2 infra as to contracting out of the applicable law.

82 See s 2 of the amending Amsterdam keur of 14 June 1607, a measure repeated in s 57 of the keur of 1744. See further eg Voet Observationes ad III.24.20 (n38); Schorer Aantekeningen 422 (ad III.24.6) (n15); and Boey Woorden-tolk sv 'Despache'. On fraud generally, see ch XIV infra.

83 See eg Van Ghesel De assecuratione II.4.5 who noted that judicial proceedings in insurance cases were less formal than in other cases. It appears from a case before the Hooge Raad in 1719 (see Bynkershoek Observationes tumultuariae obs 1579 and idem Quaestiones juris privatii IV.9) that proceedings before the Chamber was not by way of written documents ('by geschrifte'). See further generally Wagenaar vol XIII at 53-55.

84 See eg Boey Woorden-tolk sv 'Despache'. The judgment of the Chamber was, at least in the case of general average, but on occasion also in insurance claims, referred to by the Spanish 'despache' or 'dispache'.
vided for in the case of insurance. Similarly, in terms of s 51 of the keur of 1744, judgments or adjustments ('Vonnissen of Despachen') of the Chamber had the same force and were executed in the same way as were those of the Schepenen Court.

The form of these judgments appears from both archival materials and from other contemporary published sources. They appear to be in a fairly standardised form and because no reasons were given by the Chamber for its decisions, they are rather unhelpful in determining the legal principles applicable and applied in each

55 The collection of documents of the Chamber of insurance, now housed in the Municipal Archives (Gemeente Archief) in Amsterdam in its Judicial Archives (Rechterlijke Archief, Archief 5061), includes insurance judgments ('Vonnissen terzake van assurantien 1700-1794') in 15 volumes (Inventory numbers 2791-2805), and of general average adjustments ('Vonnissen inzake Averij Grosse 1700-1810') in 118 volumes (inv no 2806-2924). The first volume of insurance judgments (inv no 2791) consists of 179 folios plus an 'Alphabet' and covers the period from 21 May 1700 until 7 July 1706. Judgments were been recorded in hand on one or, sometimes, two pages. No reasons are given for the judgments and the entries are no more than a recording of the Chamber's order in each case. A few random examples from that volume may be referred to by way of illustration.

A judgment of 21 May 1700 (which appears on folio 1 in vol I) provides as follows:

'Commissarissen van de earner van Asseur ende Avarijen ... Gesiuen hebbenb Een rekeninge van ... waar bij geiischt wert van ... en ... de naervolgende premie ... [273 in total, with a list of various premiums due] Hierop de voorn ... geciteertene gehoor, bekende de voorn premie verschuldig te zijn.

Sooist, dat de Commissarissen de voorn ... gecondemneert hebben gelijk sij Condemneren sjijdenaan de voorn Elisschte betalen de voorgeeschte 273 gulden, mitsgaders de Onkosten vande earner hieronder ...';

In a judgment of 6 September 1701 (on folio 52 in vol I) the Commissioners held as follows:

'Sooist, dat Commissarissen partijen geciteert ende gehoort & geproduceerde geexamineert, ende op aller ter materie diende geielt, ontsenegen den Elisscher Sijnen Eisczt, voor also nogt nader bewijs ...'.

Another example, from a judgment delivered on 12 May 1704 (folio 112 in vol I) reads:

'Sooist, dat Commissarissen in Qualite voors. voor uitspraak hebben gegaen, gelijk sij geven bij desen dat de voorn. Verseecckaers aan de voorn Eyserssaullen betaalen in plaatse vande geiischte 4130- de Summe van Vier en dertig honderd vyftig guldenssynde negen en sestig per cento pro rato yder teeckeninge'.

The judgments end as follows: 'Actum in Amsterdam den ... [date]'. Praesentibus de Heer ..., Regeerend Scheepen, en den Heeren ... en ... Assurantie Meesters', or, more usually, 'Actum bij de voorsz. Commissarissen Den ... [date]'.

86 The Amsterdam Secretary (first published in 1700; I had access to the 1737 edition) reproduced various documents and declarations pertaining to the Insurance Chamber, including various forms of its judgments ('despaches'). The following are of note and have been reproduced in the Appendices infra. (i) a judgment condemning the insurers to pay the sum underwritten plus the expenses of the Chamber (see the Secretary at 373-374 and Appendix 2 infra); (ii) a judgment absolving the insurer from liability for not having run any risk, and ordering a restitution of premium (see idem at 374-375 and Appendix 3 infra); (iii) a judgment condemning the insured to pay the premium due on his insurance policy plus costs and expenses (see idem at 375-376 and Appendix 4 infra); (iv) a judgment condemning the insured to the provisional payment of the premium due on his insurance against the provision of security by the insurer (see idem at 376-377 and Appendix 5 infra); (v) a judgment condemning the insured to the payment of the premium cue on his insurance, on condition of the insurer's declaring under oath that he was unaware of the safe arrival of the ship at the time the contract was concluded (see idem at 377-378 and Appendix 6 infra); and (vi) a judgment condemning the insurers to return the premium they had received for an insurance (see at idem 378-379 and Appendix 7 infra).
instance.\(^{87}\)

Of particular importance in proceedings before the Insurance Chamber, was its power to grant provisional sentence in claims on and relating to insurance contracts.\(^{88}\)

The possibility of default judgments and fines for non-appearance before the Chamber were provided for in 1606, apparently to counter the laxity of parties, usually probably insurers against whom claims had been instituted on policies, to appear before the Chamber when summoned\(^{89}\) by the Messenger to do so. The Amsterdam amending keur of 20 June 1606 prescribed that a defendant had to receive no fewer than four summonses, with at least three days in between each. Only after ignoring the fourth of them was default judgment given, but then it was a final judgment ("ten principale"), condemning the defendant to payment or, if appropriate, absolving him. It was not merely a provisional sentence, unless the Commissioners found it desirable to determine the matter only provisionally, that is, when they concluded that 'namptissement in plaetse van definitive Sententie behoorde gedeceerneert te werden'.

\(^{87}\) Nevertheless, the cases which came before the Chamber of Insurance form an integral part of a broader Roman-Dutch insurance law and adjudication and a detailed investigation into the archival materials of the Chamber housed in the Amsterdam Gemeente Archief's Rechterlijke Archief (Archief 5061) may well bring new perspectives (see too Van Nievelt LXXIV n3). A preliminary study of this nature has already been undertaken by Schöffner 'Averij grosse' in respect of the Chamber's general average adjustments and may fruitfully be undertaken on its insurance decisions. It would, for example, further be useful to trace insurance cases known to have been decided by the Hooge Raad back to the local insurance chambers.

Contained in the collection in Amsterdam are the rolls of insurance cases ('rol van Assurantie Zaken') decided by the Chamber from 1744-1810 (inv no 2633-2635), in 3 volumes. These volumes, entitled 'Memorie Boek der Schadens, etc' list the cases (identified by the parties involved in a register in each volume) heard by the Chamber in chronological order, and also their outcomes, and provide details, which were probably intended solely for the Chamber's own purposes, of how the Chamber dealt with documents involved in each case (eg to whom and on what date copies were given of the policy, declarations, and the like). From these volumes it is thus possible to compile a chronological overview of how each of the cases heard by the Chamber in the periods covered, came to its resolution (the details of cases disposed of are crossed out).

Also housed in the collection are 6 volumes (numbered A-F) containing registers of claims and other pleadings (the volumes are entitled 'Register van Eijsschen en Verdere Dingtalen') in insurance cases which came before the Chamber from 1749-1782 (inv no 2784-2789). They provide details of the claims and defences in those cases: the parties are identified; the circumstances of the insurance, the loss, the sum insured are provided; and the amount payable by each insured is calculated in each instance. Sometimes here are also accounts ('rekening van Eijsch'; 'van schade en restorno gevallen ... [by] geassureerde Eyscher'). Unfortunately the entries are not always clearly dated and the volumes appear to be nothing more than a record, in the Chamber's in-house register of claims, in which details of the proceedings before it were written down by the Secretary. What does appear, interestingly enough, is that not the Secretary or one of the Commissioners, but the Messenger signed summonses (dagvaarding).

\(^{88}\) Provisional sentence is discussed in detail in ch XX § 2.2 infra. The Amsterdam Gemeente Archief in its Rechterlijke Archief (Archief 5061) contains in a single volume (inv no 2790) a register of the provisional sentences ('register van bedrae/namptissementen ontvang ingevolge vonnis van namptissement') granted by the Chamber from 1773-1811.

\(^{89}\) For examples of the form of these summonses, see the Amsterdamse Secretary 386-387 (and Appendix 12 infra) where there is reproduced a summons of insurers by an insured in respect of the delivery of a policy, and one of an insured by insurers in respect of the payment of premiums.
in which case they were free to do so. The defaulting defendant was condemned to a fine on every default. With a view to expediting proceedings ('langwijlje processen te verkorten'), s 5 of the amending keur of 26 January 1693 authorised the Commissioners to permit summonses to be issued with two-day intervals and to grant default judgment after the third default. These measures were repeated in the keur of 1744.

Amsterdam insurance legislation also made provision for the costs to be awarded in insurance cases before the Chamber\(^9\) and for the interest payable on a judgment debt.\(^1\)

The Chamber also played an important role in the giving and receiving of notices, of abandonment or of loss, and authorisations between insured and their insurers.\(^4\)

The Commissioners of the Chamber of Insurance were accustomed to attach the original policy concerned to their general average adjustment or to their judgment in an insurance case ('aan deselve Despaches of vonnissen met het Stads zegel te annexeeren de Originele Police waar op de asseurantie is gedaan'). This became impossible when, to avoid stamp duty, a general practice developed of concluding several insurances in a single policy. Accordingly, for both these reasons, the amending keur of 25 January 1707 provided that in future, in the case of insurances or

\(^{90}\) A fine of 6 stuivers was imposed on the first non-appearance, 12 stuivers on the second, and 18 on the third. According to s 1 of the amending keur of 14 June 1607, these fines were to be collected by the Messenger of the Chamber, who was entitled to one-third of the money he collected, and if he could not do so, it had to be collected by the 'Dienaers van mijn Heere den Schout'.

\(^{91}\) Thus, s 48 determined that if a defendant did not enter appearance within three days of being summoned, he could be summoned a second, and, if then necessary, a third time. Final or provisional judgment could be granted upon his third default. A fine was imposed on each default, and although the claimant had to advance the amount of these fines before summons was issued in each case, the amounts were taken into account in the judgment. See also s 51 on the proceedings against a defendant who had not entered appearance, s 52 on default judgments in case of general average, and generally Boey Woorden-tolk sv 'Despache'.

\(^{92}\) Thus, s 4 of the amending keur of 14 June 1607 gave the Commissioners the power to condemn parties to the payment of the whole or half of the costs, or to order the compensation of costs incurred, according to the circumstances of each case.

\(^{93}\) See eg s 50 of the keur of 1744 for the interest due on judgment debts. See further ch XX § 2.2.6 infra where the question of interest is considered in detail.

\(^{94}\) The Amsterdam Gemeente Archief in its Rechterlijke Archief (Archief 5061) holds a large collection of 125 volumes with different notices, authorisations and the like ('authorisatien van assuradeuren benevens abandonnements en insinuation') made by and to insurers through the Chamber from 1701-1810 (inv no 2925-3050). Included are notices of abandonment, authorisations by insurers to one of them to settle insurance claims, authorisations by insurers to their insured to recover lost insured property, and notices of loss. These will be considered elsewhere infra when each of these matters are treated in more detail.

\(^{95}\) See Goudsmit Zeerecht 315.

\(^{96}\) See further ch VIII § 3.4 infra as to the stamp duty payable on insurance policies.
reinsurances on different ships or shares in ships or on goods loaded in different ships, separate policies had to be drafted for each independent insurance, on penalty of nullity of the whole agreement.

Finally, provision was made for the fees to be levied by the Chamber. 97

1.4.5 Appeals from the Chamber

One of the earliest problems addressed in insurance legislation was the abuse of the appeal procedure by insurers in an attempt to postpone payment on their insurance contracts. An appeal from the judgment of an inferior court to a higher court ordinarily involved a stay of execution of the judgment. 98 The solution was the introduction of provisional sentences in insurance cases, thus compelling the insurer to an immediate payment of the amount claimed. Not only were such sentences themselves not generally appealable, but they also prevented the postponement of payment on the policy until the matter was finally determined or until all possible appeals had been heard and decided. 99

Appeals against the judgments or orders of the Chamber of Insurance as a court of first instance were regulated in detail. 100 In terms of s 34 of the Keur of 1598, appeals were first to the local Amsterdam Schepenen Court ('aen Schepenen deser Stede') and a specific procedure was laid down in this regard. 101 By the amending Keur of 4 December 1598, an appeal against the judgment or finding of the Commissioners in a dispute concerning average was conducted in the same way. The amending keur of 18 January 1697 again reminded the Commissioners of the provisions regarding

97 In terms of s 32 of the Keur of 1598, for every dispute heard and determined by the Chamber, the Commissioners together with the Secretary were to receive for their efforts one-third of f 1 for every f 100 claimed (ie, one-third per cent of the amount claimed), the amount having to be paid by the claimant provisionally and in advance upon commencement of proceedings. Exactly the same was provided for in s 45 of the Keur of 1744. The Chamber's fees for general average adjustments were laid down in s 46 of the Keur of 1744 ('7 per mille' - ie, one-tenth per cent or one-thousandth - of the value of the interests (ship and cargo or freight) which had to contribute in general average ('van 't Capitaal, dat in d'Avarye grosse sal contribueeren'). That section also provided that in the event of a dispute over premiums, the same percentage (ie, one-tenth per cent) of the sum insured was due to the Chamber.

98 See eg Van der Linden Koopmans handboek III.1.6 on the civil procedure in appeals.

99 As to provisional sentence and payment in insurance cases, see ch XX § 2.2 infra. These measures were first introduced in the Netherlands by the placcaat of 1549 (see again § 1.3.2 supra). This placcaat provided for the speedier resolution of insurance disputes. In principle it prohibited appeals, and in cases where an appeal was permitted, the insurer was compelled to make an immediate, provisional payment of the amount claimed from him against the insured's provision of security for repayment in the event of a successful appeal. No longer could the insurer postpone having to comply with a judgment against him by going on appeal. See further eg Hammacher 40-41 and Mullens 16-17.

100 See generally Goudsmit Zeerecht 330-331.

101 In terms of s 36 of that keur, an appellant was bound to appeal within ten days of the judgment of the Chamber, and had to summon the respondent within a further ten days ('by Requeste voor Schepenen betreken'). In addition he had to deposit f 12 on the first day of the hearing which he forfeited if, on appeal, the judgment of the Chamber was confirmed by the Schepenen.
provisional payment in s 33 of the keur of 1598, and of the fact that appeals against provisional sentences or adjustments were prohibited. The position was restated by s 49 of the keur of 1744 which provided that one could appeal against the final judgment of the Chamber ("Vonnissen welke ten Principale was by commiss"), as well as against general average adjustments ("de Gedespacheerde Avaryen Grossen"), to the Schepenen of the city, that such an appeal had to be brought within ten days, and that one could not appeal against any provisional sentence.\(^{102}\)

From the Schepenen Court, an appeal in insurance cases was possible to the Hof van Holland and thence to the Hooge Raad.

1.4.6 Excursus: The Chamber of Maritime Affairs in Amsterdam

In 1641 a Chamber of Maritime Affairs (Kamere van Zee-saecken) was established in Amsterdam for the adjudication of maritime disputes arising there.\(^ {103}\) Located in 'het Zeerecht' on the Kampersteiger until it translocated in 1655 to the newly completed City Hall (Stadthuis),\(^ {104}\) the Maritime Chamber consisted of five Commissioners assisted by a Secretary and one or two Messengers.

In terms of s 1 of the keur of 1641, the Chamber had jurisdiction at first instance over a wide range of maritime matters: disputes in matters pertaining to shipping arising between merchant and master, between merchant and seaman, between master and seaman, between merchant and pilot, and between pilot and master; also between consignors and shipowners, between shipowners inter se, and also between a master and his shipowners. Specifically excluded from its jurisdiction were questions of insurance and average which continued to be determined by the Chamber of Insurance as before ('uytgeseyt in cas van Asseurantie, en Avaryen, metten aenkleven van dien, die als voor denen beschlecht sullen worden, by Commissarissen van den Kamer van Asseurantie'). The keur of 2 April 1649 extended the Chamber's jurisdiction to include disputes over arrests concerning seamen's wages ('maandgelden'), and it was further enlarged by the keur of 31 January 1774.\(^ {105}\) Legislation concerned with the jurisdiction of the ordinary courts too confirmed the exclusive jurisdiction of the Chamber over

\(^{102}\) See further on s 49, Boey Woorden-tolk sv 'Despache'; Van der Keessel Theses selectae th 768 (ad ill.24.21); and idem Praelectiones 1482 (ad ill.24.21).

\(^{103}\) See the Amsterdam 'Ordonnantie ende Instructie voor de Commissarisssen van de Zee-saecken' of 16 February 1641 (see Amsterdam Handvesten vol II at 682). This keur was subsequently amended by keuren of 24 May 1647, 2 April 1649, 21 November 1651, 14 November 1682, 29 January 1760, and 31 January 1774 (see idem vol II at 686). On the Chamber of Maritime Affairs generally, see eg Goudsmit Zeerecht 381-384; Lichtenauer 'Handelsrecht' 352-353; Rooseboom Recueil 281-297; Wassenaar vol XIII at 103-109; and Van Zurck Codex Batavus sv 'Zee-regten' par 1.

\(^{104}\) See Asaert et al MGN vol II at 97.

\(^{105}\) It conferred jurisdiction over all questions concerning the supplies and victuals of the ship or seamen ('reisprovisie ten behoewe van schepen of schepelingen geleverd'), claims between seamen, and liability arising from delict.
certain maritime matters. Thus, an Amsterdam keur of 27 April 1656\(^\text{106}\) provided a list of maritime matters (which included bottomry, the sale of ship’s shares, wages, the repair of ships, the provision of victuals, and the equipment of ships) which were to be heard by the Commissioners of the Chamber of Maritime Affairs.

From information on the identity of the Commissioners and Secretaries of the Chamber of Maritime Affairs,\(^\text{107}\) it is clear that despite their neatly separated jurisdictions, a position which sharply contrasted with the position in Rotterdam,\(^\text{108}\) the Chamber and its Insurance counterpart had more in common than just being located in the same premises. An inordinately large number of Commissioners of the Maritime Chamber at different times also served as Commissioners of the Insurance Chamber, which is probably not surprising, given the fact that the insurance cases coming before the latter were probably exclusively concerned with marine insurance.\(^\text{109}\) As in the case of the Chamber of Insurance, a large volume of archival material on the Amsterdam Chamber of Maritime Affairs awaits further investigation.\(^\text{110}\)

1.5 The Chamber of Maritime Law in Rotterdam

As far as the adjudication of insurance disputes was concerned, the provisions of the Rotterdam insurance keur of 12 March 1604 followed the broad pattern of the

\(^{106}\) Section 6 of the ‘Ordonnantie ende maniere van Procederen voor den Gerechte der Stad Amstelredam’ (see Amsterdam Handvesten vol II at 610).

\(^{107}\) A list of Commissioners from 1641-1768 is to be found in Wagenaar vol XIII at 109-128. Additional information came from Elias.

\(^{108}\) See § 1.5 infra.

\(^{109}\) Mention may be made of one notable Commissioner. Willem Adriaen van der Stel, Governor at the Cape of Good Hope from 1699-1707, was earlier a Commissioner of Maritime Affairs in 1693 and then a one of Marital Affairs from 1694-1698. From Elias, nine Secretaries of the Chamber could be identified for the period from 1643-1795, with a gap in the period from 1727-1729 and an overlap from 1756-1758. Notable among them are Dirck Strijcker (Secretary from 1643-1677), who was a knight of San Marco in Venice (where his brother Jacomo was consul of Holland) and also a receiver of shipping duties (see Elias 1153); Caspar van Collen (Secretary from 1677-1688), who was also member of the Schepenen Court (in 1695, 1697, and from 1701-1702) and a Commissioner of the Chamber (from 1696-1697 and from 1698-1700) - Bauduin van Collen (Secretary from 1677-1688), who may have been a relative, was an Insurance Commissioner from 1731-1733 - (see Elias 653); Jan Constantijn Rusius (Secretary from 1729-1749) was the son of an Amsterdam advocate (Elias 1153); and Jan Piter Theodoor Huydecoper (Secretary from 1749-1758) was President (from 1758-1764) and Director General (from 1764-1767) on the Coast of Africa at Guinea (see Elias 519).

\(^{110}\) The Amsterdam Gemeente Archief In its Rechterlijke Archief (Archief 5061) contains numerous materials on the ‘Bank van Zeezaken’ (the following information was obtained from the ‘Inventaris der Registers en Stukken behoudende tot de Schepenbank van Amsterdam’): ‘rol van Commiss van Zeezaken 1641-1815’ (inv no 2490-2612) in 114 vols; ‘register op rollen 1769-1809’ (inv no 2613-2615) in 3 vols; ‘register van rapporten in Zeezaken 1770-1775’ (inv no 2616) in 1 vol; ‘registers van consignaen 1657-1792’ (inv no 2617-2621) in 5 vols; ‘register 1776-1797’ (inv no 2622) in 1 vol; ‘lijst der schepen ... betaling tbv verminkte officieren 1754-1794’ (inv no 2623); ‘registers der op reis overleden zeeleiden 1774-1807’ (inv no 2624-2630) in 7 vols; ‘registers op bg 1774-1779, 1797-1806’ (inv no 2631-2632) in 2 vols; and ‘copien en extracten Archief Commis van de Buitelandvaarders’ (inv no 2632a).
earlier Amsterdam *keur* of 1598. But in a number of respects it was different from and very often an improvement upon the latter. In particular, unlike Amsterdam where insurance (and average) remained separated from maritime affairs, Rotterdam, at least after the mid-seventeenth century, had a single body which adjudicated all maritime disputes, including those arising from insurance contracts. In the following discussion, the accent will be on the differences between Rotterdam and Amsterdam rather than on any similarities.  

In terms of s 23 of the *keur* of 1604, all questions arising in Rotterdam with regards to insurance or average had to be decided at first instance by three qualified persons, appointed or reappointed annually, on the first Wednesday of March, by the ‘*Heeren Schout, Burgemeesteren, ende Schepenen*’. In addition to these Commissioners, s 25 envisaged the appointment of a Secretary and also a sworn Clerk who was specifically and dutifully to keep record of all appointments, judgments and average adjustments, and other orders (‘*alle Appoindtementen, Vonnissen ende Reecckeningen van Avanye ende andereren*’) made or given by the Commissioners. And for their services, the Commissioners, with their Secretary and Clerk, were entitled to a specified fee.  

A reorganisation of the Rotterdam Chamber took place in 1615 at the request of local merchants in the previous year. It is in fact possible that the Chamber established in 1604 may either not yet have come into operation or may have fallen into disuse. The Rotterdam municipal government decided to establish a Chamber of Insurance (*Kamer van Asseurantie*) for the determination and adjudication of all questions of insurance (‘*allen questien ende differenten die althier in de materie van assurantie sullen vallen*’), and in the process also appointed Commissioners and a Secretary. The Commissioners appointed on 8 July 1615 were Henrick Willemsz Nobel, Jasper Moerman and Joris Joosten Vlaming. Philips Visch was the Secretary of the Chamber. Still, the legal status of the reorganised Chamber was a source of some concern, the more so because its Amsterdam counterpart had in the meantime obtained the official sanction of the Estates of Holland in the form of a Charter. In 1635, under the pretext of having passed a new insurance *keur* (which in fact differed from the one of 1604 only in the

---

111 See generally on the Rotterdam Chamber, Goudsmit *Zeerecht* 392-393, 402-403, 407-410 and 435-438; Van der Hoven ‘Bijdrage’ 564-571; *idem* ‘Keure’; Kracht 32-34 and 39; Krans 9; Suermondt ‘Rotterdam’ 216-220; and Unger *Regering Rotterdam* ivii-lx. See too Van der Keessel *Theses selectae* th 768 (ad 111.24.21) and Van der Linden *Koopmans handboek* iv.6.11.

112 Engelbrecht XXXIII notes that in Rotterdam the ‘*Burgemeesteren en Schepenen*’ formed with the ‘*Baijuw*’ a college known as ‘*de Heeren van de Weth*’. In March of every year, this body appointed various persons (or renewed their appointment) to the different municipal posts, including ‘*de Commissarissen van de Zeegerecht*’.

113 The *keur* of 1604 in fact never refers to a ‘Chamber’ of any sort but simply to the ‘Commissioners’ (‘*Gecommitteerden*’).

114 They enjoyed one-third part of f1 for every f100 (ie, one-third per cent) claimed before them, which amount the claimant had to advance and the loser ultimately had to bear.

115 See Unger *Regering Rotterdam* 85.
addition of two new sections), a Charter was requested and obtained from the Estates of Holland on 26 April 1635.

By the Rotterdam maritime keur of 16 March 1655, a tribunal for the adjudication of maritime affairs (zeezaken) was established after the Amsterdam example of 1641. In terms of s 1, five Commissioners had jurisdiction in the first instance over a variety of disputes arising in the maritime context. They were appointed, in terms of s 3, for a term of two years but were re-appointable, and were in terms of s 5 assisted by a Secretary and a Messenger. The latter was concerned with the issuing and serving of summons and the execution of judgments. The first five Commissioners appointed in 1655 were Paulus Timmers (snr), Daen Dircksz Dane, Francois Verssen, Balthasar Wichelhuyzen and Piter Bisschop. The first Secretary was Dirck Block who died in 1657 and was replaced by Arent Sonmans.\(^{116}\) By ss 17 and 18 of the keur of 1655, the Chamber of Maritime Affairs met its expenses by the introduction of shipping duties (lastgeld) which were levied on at first only local, and from 1659 also foreign ships discharging their cargoes at Rotterdam. In terms of s 10, an appeal against decisions of the Chamber lay to the local Schepenen Court.

The Rotterdam Legislature recognised, though, that insurance and maritime matters were sufficiently closely related to render two separate chambers, as in the case of Amsterdam, unnecessary. Section 2 of the keur of 1655 therefore determined that the Chamber of Maritime Affairs could also decide all questions of insurance and average (‘op 't stuck van de Assaurantie ende Avarye vallende’), expressly adding that the keur of 1635 otherwise retained its force.

In terms of the Rotterdam keur on insurance and maritime affairs of 28 January 1721, the Chamber continued in existence, now becoming the Chamber of Maritime Law (Kamer van het Zee-regt), and functioned until 1811. Its composition remained unchanged as did its fees.\(^{117}\) The Chamber was housed in the Oude Hoodfdpoort where the Rotterdam Insurance Company of 1720 also had offices. The Company’s janitor was in fact also the Messenger of the Chamber.\(^{118}\)

The jurisdiction of the Rotterdam Chamber was first regulated in s 23 of the keur of 1604. It extended over all questions of insurance arising in Rotterdam on insurance matters. It also extended over all questions arising from insurance concluded or

---

\(^{116}\) See Unger Regeering Rotterdam 128-129 and 130.

\(^{117}\) To cover the Chamber’s expenses, the master of every ship arriving in Rotterdam had to pay a contribution to it within fourteen days of his arrival (ss 17-20 of the keur of 1721); in insurance cases the Commissioners and Secretary received one-third per cent of the sum claimed, and in average cases one-tenth per cent of the value of the contributing capital (ss 21-22).

\(^{118}\) See Slechte ‘Maatschappij’ 256 and further ch IX § 2:10.3 infra as to this Company. There appears to have been a close relationship between the Chamber and the Company in the eighteenth century. From a list of the directors of the Rotterdam Insurance Co from 1720-1874 (see Slechte 305-307) the following facts emerge. Of the twelve directors appointed in 1720, three were also at some time or another ‘commissarissen van het zeegerecht’: Jan van ’t Wedde (from 1720-1736); George Barons (from 1720-1726); and Isaac Verdoes (from 1720-1726). Four later directors were also Commissioners in the eighteenth century: Johannes Leuven (from 1739-1767); Rudolf Baelde (from 1750-1767); Corn. van der Hoeven (from 1770-1790); and P van de Wallen van Vollenhoven (from 1787-1811).
average losses occurring outside Rotterdam, if such questions were placed before the
Chamber in terms of a policy or otherwise. This applied to insurances concluded or
averages occurring before or after the promulgation of the keur. A new s 24 in the keur
of 1635 described the province of the Chamber more precisely as the adjudication of all
disputes arising 'ter oorsake van avarye of schade in zee, op reeden of rivieren ges-
chiedt, 't zy by werpen van goederen, koopmanschappen, schade aan schepen of
ingeladen koopmanschappen geleden, daer-over vergoeding of repartitie van de
geleden schade wordt geëxsect'.

By the nature of the fact that it was a Chamber of Maritime Affairs, the Rotterdam
tribunal differed from its Amsterdam counterpart in that non-marine insurance issues
were not within the scope of its authority. But this difference became relevant, and was
thus reflected in legislation on the matter, only in the eighteenth century when such
other forms of insurance became more prevalent. The Rotterdam keur of 1721, which
was concerned not only with insurance but with maritime law generally, provided in s 1
that all disputes arising in the city in respect of insurance, average and shipping ('over
Asseurantie ende van Avarye, mitsgaders over zaken van de Zeevaart') had to be
adjudicated in the first instance in the Chamber of Maritime Law. Section 23 made it
clear that the Chamber had competence over disputes arising from the insurance on
ships, on goods loaded there, and on ransoms ('op Rancoenen tot lossinge'), and also
over everything that had a bearing on commerce, navigation, the export and import of
goods, and on voyages, over land or by sea, as well as all disputes arising therefrom.
Section 24 added that the ordinary courts remained authorised to hear, and by implication
that the Chamber had no jurisdiction over, disputes on non-marine insurance and
all other cases not pertaining to commerce, navigation, the export and import of goods
and their conveyance.

As far as the procedures before the Rotterdam Chamber were concerned, s 23
of the keur of 1604 provided for summary proceedings in insurance matters without any

119 It would thus appear that in respect of insurances concluded outside of Rotterdam (or at least of
insurance disputes arising outside the city), a submission in one form or another to the Chamber's
jurisdiction was required. Submission to the jurisdiction of the Chamber seems to have occurred also in
later centuries. Thus, in a Rotterdam hull policy of 1803 (see Mees Gedenkschrift appendix 20) the
following clause appeared: '[S]ubmitterende ons specialyk ook, volgens hun Ed. Groot Mog. Resolutie
van den 12 Juli 1736, ten wederzyden, de Judicature der kamer van het Zeeregt der City, en
kiesende, voor zoo verre wy buiten de Jurisdiction van de zelve mogten woonaghtig zijn, Domicilium
Citandi & executandi ten huise van den Bode derzelver Kamer in der tijd'.

120 See further eg Van der Keessel Theses selectae th 768 (ad III.24. 21); idem Praelectiones 1482-1483
(ad III.24.21); Vergouwen 105; and Witkop 23.

121 The section mentioned 'Asseurantie van Huysen, Pakhuysen, ende andere Goederen, Effecten,
Regten, Los- en Lijf-renten ende Interessen, met relatie tot Brand ende andere gevallen, dewelke niet
behoren tot de Commercie, Navigatie, uyt ende invoer van Goederen, Reysen en de gevolgen van dien,
ende sulx buyten het geen in het voorgaande Artikel gemeld is'.
legal representation being permitted (‘sommierlijckens sonder Procureurs ofte Tael-lieden’). 122

The Chamber could give final or provisional judgments. Its judgments were to have the same force and effect as if given by an ordinary court, and were executable in the same way (that is, ‘by de Roededraegers [gerechtsboden] deser Stadt’) as those of such a court. 123

The appeals procedure in Rotterdam differed from that in Amsterdam. 124 An appeal against a judgment or order of the Chamber could be brought either before the local Schepenen Court or before the Hof van Holland, and in the latter case the matter was to proceed as if judgment had been given by the Schepenen. 125 In Rotterdam one could thus bypass the Schepenen and go directly to the Hof. This option in cases of insurance and average was retained in the keur of 1721. 126

As in the case of the Amsterdam Chamber, much research remains to be done on the role played by the Rotterdam Chamber of Maritime Law in the development of insurance law in that city and of Roman-Dutch insurance law generally. 127

122 But while lawyers and notaries were not permitted, brokers were. There is an example of a local insurance broker, Jacob Beierman, acting for an insured before the Chamber in the eighteenth century. He had placed insurance with the Rotterdam Insurance Co as well as with some individual underwriters. A loss occurred but there was a dispute on *quantum*, as a result of which the matter came before the Commissioners of Maritime Law where Beierman represented the insured. The Company later settled the claim. This information was obtained from the Company’s archive - *Archief der Maatschappij van Assurantie*, Resolutieboek B, vergadering 13 January 1734 - which is housed in the Rotterdam Gemeente Archief. See also Vergouwen 89-90. It appears that notaries may at a later stage also have been permitted to appear before the Chamber. See Krans 9 referring to A Schadee, a well-known Rotterdam notary in the eighteenth century, as practicing before the Chamber.

123 See s 27 of the *keur* of 1604.

124 See further Goudsmit *Zeerrecht* 402-403.

125 See further s 26 of the *keur* of 1604 which also contained provisions for various procedural matters in appeals.

126 One insurance case which eventually came before the Hooge Raad in 1729, had been heard by the Rotterdam Chamber in 1722, whence the insurers had appealed directly to the Hof (see Bynkershoek *Observationes tumultuariae* obs 2492; *idem Quaestiones juris privati* IV.14). In all other maritime cases, one could appeal only to the Schepenen Court. See ss 289-296 of the *keur* of 1721 for further details. It would appear that Kracht 39 is wrong in stating that in terms of this *keur*, appeals from the Chamber lay only to the Hof.

127 The Rotterdam *Gemeente Archief* holds an extensive collection of materials on the Chamber of Maritime Law in its *Archief van de Commissarissen van de Zeezaken, Assurantien en Avarij (het Zeegerecht) te Rotterdam*. These include the following; (i) ‘Registers behoudende resoluties ene aantekeningen van den Commissarissen van de Zeegerecht 1789-1811’ (inv no 981-983) in 3 vols; (ii) ‘Aantekeningen betreffende de verdeling van de ingekome leges onder de Commissarissen 1723-1762’ (inv 984) in 1 folder; (iii) ‘Instructie en legger van inkomsten voor de Secretary 1733’ (inv 985) 2 items; (iv) ‘Rol van het Zeegerecht 1670-1810’ (inv no 986-1063) in 78 vols (these contain registers of the judgments of the Chamber); (v) ‘Registers behoudende akten van borgstelling en procuratie voor de Commissarissen 1677-1762’ (inv no 1064-1068) in 5 vols; (vi) ‘Alphabetische index op een deel van 1g registers’ (inv 1069) in 1 part; (vii) ‘Registers houdende machtigingen en rapporten voor de Commissarissen 1735-1811’ (inv no 1070-1113) in 43 vols; and (viii) ‘Stukken behoren bij voor het Zeegerecht gevoerde processen 1725-1810’ (inv no 1114-1115) in 2 bundles.
1.6 Insurance Chambers Elsewhere in the Netherlands

A number of less important chambers of insurance existed at different times elsewhere in the Netherlands.

In Middelburg, in Zeeland, a Chamber of Insurance was established in 1600 after the Amsterdam example. In Middelburg appeals from the Chamber could be brought to the local Schepenen Court ("t Collegie van Burgermeesters ende Schepenen deser Stede"), and it appears that it was possible to appeal from the Schepenen directly to the Hooge Raad, circumventing the Hof.\(^{128}\)

In Dordrecht, in South Holland, a tribunal for the determination of maritime questions, including bottomry, average and insurance, had already been established in the fifteenth century, in 1439, although this date is disputed. The Chamber there was known as the 'Watergerecht'. But there existed no separate maritime or insurance law there until the second half of the eighteenth century when, on 29 June 1775, a keur on insurance and maritime affairs was passed with the title 'Instructie voor schepenen van 't watergerecht en ordonnantie op het stuk van assurantie en averije, mitsgaders van zeezaken en de manier van procedeeren omtrent dezelve'. This keur, it would appear, was identical in terms to the Rotterdam keur of 1721, with the result that the Dordrecht Chamber had jurisdiction over marine but not over non-marine insurance disputes.\(^{131}\)

An insurance chamber also existed in Vlissingen (Flushing), in Zeeland. From an opinion dating from early in the eighteenth century,\(^{132}\) it appears that, as was the case in Rotterdam, legal representation before the Flushing Chamber of Insurance was not allowed and that parties had to present their own cases ('zyne eyge defensie te doen').

---

\(^{128}\) Sections 33 and 36 of the Middelburg keur of 30 September 1600 provided mutatis mutandis the same as ss 32 and 35 of the Amsterdam keur of 1598. One minor difference was that the appointment of Commissioners was to take place annually from August 1601. Accordingly, Spooner 24 is incorrect in stating that the Middelburg Chamber changed in March every year at the beginning of the season favourable for navigation. The Middelburg Legislature furthermore never took over any of the changes the Amsterdam legislature subsequently effected to its keur of 1598.

\(^{129}\) In two cases before the Hooge Raad in 1725 (see Bynkershoek Observationes tumultuariae obs 2124 and obs 2185, idem Quaestiones juris privat\(\)s IV.12 and IV.12) where the Middelburg Chamber had held against insurers and the appeal against its decision had been refused by the local Schepenen Court, the insurers appealed directly to the Raad, 'het Hof verbygaande'. It is uncertain from the available information on what grounds the Hof could be bypassed, whether it was a regular or rare occurrence, and in fact which 'Hof' this was, Zeeland having withdrawn from the Hof van Holland (en Zeeland) in 1669.

\(^{130}\) See further Goudsmit Zeerecht 460-463.

\(^{131}\) See Van der Keessei Theses selectae th 768 (ad III.24.21) and Van der Linden Koopmans handboek IV.6.11, referring to ss 5 and 6 of the Dordrecht keur on maritime law.

\(^{132}\) See further Nederlands advysboek nieuw vol II adv 58-62 (1704) and La Leek Register sv 'verzekering'.
In this instance, the President of the Chamber had corrected an error in the minutes compiled by the Clerk, and the question arose whether in so doing he had committed a criminal offence. The opinion thought not, for there was no evidence nor any presumption of fraud in this case.

1.7 Excursus: Insurance Chambers in London and Hamburg

At the same time insurance offices and chambers were being established in the Netherlands, similar moves were afoot elsewhere. For present purposes, the institutions established in London and Hamburg may briefly be described, because in both instances the Netherlands example played a not insignificant role.

First, then, the Registration Office established in London in 1576.133

In 1574 Richard Candler, associate and factor in London of Sir Thomas Gresham, the English merchant active in Antwerp at the time, applied to the Privy Council for a patent to establish an Office of Assurances after the Antwerp example. This Office, Candler proposed, would, at a fee, draft and register all insurance policies concluded in the Royal Exchange. In this way, control could be exercised over the content of insurance contracts and frauds in the process reduced. Candler proposed, further, that he be granted an individual monopoly in this regard, in exchange for which an annual sum would be paid to the Crown. Not unexpectedly, a number of London notaries and brokers protested vehemently against the grant of such a monopoly,134 but to no avail.

Candler’s patent was granted on 21 February 1576,135 giving him and his deputies the sole right of drafting and registering local insurance policies in an office he was to set up for that purpose. This he did, and policies, or at least some, were compulsorily drawn up and registered there,136 the Clerk of the Office acting as a broker in placing the insurances with underwriters. The Office, it appears, functioned for over a

---

133 As to both this Office and the Court established some time later, see eg Blackstock passim; Blackstone 71 and 77; Clayton 31-32 and 49; Cockrell Lloyd’s 10; idem ‘Agency’ 66; Dover 13-16 and 42; Green 1-2; Holdsworth History vol I at 571, vol V at 136n6, 137n1, 150, 151 and 152n3, vol VI at 837-838, and vol VIII at 286-287, 287-288, 289-290, 293 and 295; Hopkins 32; Jones ‘Elizabethan Marine Insurance’ 63-64 and 65n1; Kepler ‘London Marine Insurance’ 45 and 54n22; Malynes Consuetudo I.24 and 28; Martin 35-41 and 142-143; Molloy De jure maritimo II.7.16 and 17; Raynes (1 ed) 41-63, 97 and 161-162, (2 ed) 157; Saunders 13; Vance Handbook 15-16; Waldford Cyclopaedia vol I at 485-487 sv ‘chambers of insurance’; Weskett Digest 150-154 sv ‘court of policies of assurance’; and Wright & Fayle Lloyd’s 143.

134 See Blackstock 24-25 and Tawney & Power vol II at 246-251 for a reprint of the protest they presented to the Lord Mayor, and from which details appear of the proposed monopoly itself.

135 For a reprint of the patent, see Blackstock 23-24. Round about the same time or just shortly afterwards, one Henry Rodrigues too applied (unsuccessfully) for a grant by the Crown as the sole broker for insurances in London (see Blackstock 26 for a reprint of his petition).

136 Thus, the earliest extant policy registered in the Office, the ‘Tiger’ policy, dates from 1613. (The oldest extant marine policy concluded in England, is that on the ‘Santa Maria’ from 1547.) See further eg Dover 32.
century, with the patent being renewed periodically.\textsuperscript{137} But it did not enjoy its intended monopoly. In 1676, for example, Charles Molloy\textsuperscript{138} explained that insurances were either public or private: 'pubick when made and entered in a certain Office or Court, commonly called the Office of Assurance on the Royal Exchange in London', and private when the insurance policy was not so registered but arranged, in the best interest of their clients, by brokers on the market. Importantly, the content of such private policies could be kept a secret by the insured. And in that lay one of the problems with the Office and its system of registration. Once entered in the Office's register, anyone, including competitors, could, on payment of a small fee, inspect the contents of such a policy and so ascertain which cargoes were bound where and when, vital information at a time when markets were small and later consignments fetched significantly lower prices on a quickly saturated market than earlier ones.

In addition to granting a patent for the registration of insurance policies, and possibly to meet objections levelled against that patent, the Privy Council also permitted Commissioners to be nominated and appointed from time to time by the Lord Mayor and Aldermen of London to draw up a scale of the fees which could be charged by the Registration Office, generally to oversee and supervise the Office, and also to resolve disputes which might from time to time arise on registered insurance policies. The Registrar of the Office, Candler, was to act as a type of Clerk to these Commissioners. The Commission, appointed on an ad hoc basis, as and when the Privy Council sent cases to it for adjudication for example, sat in the Office of Insurance in the Royal Exchange. The 'Commissioners for Assurances' acted, in effect, as arbitrators in insurance disputes. They were nominated from the ranks of merchants and lawyers, including foreigners and civil lawyers. From 1580 a judge of the Admiralty Court too sat as a Commissioner.

The Office, like its Antwerp counterpart, therefore in addition to its function as a broking office and registration bureau, also had, or was at least closely associated with the exercise of, an adjudicatory function. Although not a court of law but more of an ad hoc arbitration panel, very similar, no doubt, to the private arbitration tribunals agreed upon between merchants and underwriters themselves, the Commission sitting in the Insurance Office was more than just a first step in the establishment of an insurance chamber or court.

\textsuperscript{137} See eg Blackstock 31-34 for references to the patent granted to C Heyborne and R Candler in 1605 for the Office of Assurance; a further patent was granted to Ferdinando Richardson, and one to Giles and Walter Overbury on 14 December 1610; a grant of the reversion of the Office of Assurance to Richard Bogan in 1627 on the death of G & W Overbury, who, it seems, were not yet deceased for there was also a petition of G & W Overbury in 1634 requesting a continuance of the allowances as Registers of the Office of Assurance in London which they had had for 30 years. See too Holdsworth History vol VI at 306-307 who refers to a proclamation of Charles II of 1686 (Tudor and Stuart Proclamations I no 383) 'for better execution of the office of making and registering Policies of Assurances in London' by which the King granted to Sir Allen Broderick and his assigns the Office of making and registering all insurances etc, for a certain period on ships, merchandises, etc, in London'. Also in this case there was opposition from notaries and brokers, for the Proclamation noted that private offices had been set up which made assurances not entered in Broderick's Office, and it ordered that all assurances be registered in the latter Office.

\textsuperscript{138} \textit{De jure maritimo} II.7.2.
Such a court was established in London in 1601. In that year London merchants petitioned the Privy Council for an extension of the powers of the Commissioners sitting in the Insurance Office in the Royal Exchange. At the time there was no satisfactory permanent tribunal for the solution of insurance disputes. Neither the Common Law courts nor the Admiralty Court, although both claimed and exercised competing jurisdictions in insurance matters, were sufficiently familiar with the intricacies of insurance. Arbitration too was not a viable option because arbitral awards could not then be enforced. Furthermore, even if merchants did voluntarily submit themselves to the jurisdiction of the Insurance Commissioners, the orders they made, despite being confirmed by the Privy Council, were frequently not obeyed. In short, the fact that the Council had not given and could not give exclusive jurisdiction and judicial powers to the Commissioners, was fatal to their efficiency. To remedy the situation, it was at first proposed to confer the jurisdiction over insurance questions on the Court of Chancery, but this was not accepted because causes in Chancery were too prolonged and also because of its ignorance of the details of insurance. Instead the Council resolved to strengthen the jurisdiction of the Commissioners by giving it statutory authority.

In 1601, therefore, a Bill was passed, sponsored by Francis Bacon, for the establishment of a court for the adjudication of insurance disputes along the lines of similar courts on the Continent. By an Act of 1601 a judicial body was created which became known variously as the Court of Assurance, the Policies of Assurance Court, the Chamber of Insurance or the Court of Arbitration. Not so much a court as a commission of arbitration which met when necessary to dispose of insurance disputes arising on contracts concluded in London, the Court of Insurance was, in contrast to comparable bodies elsewhere, not manned exclusively by merchants.

In terms of s 1 of the Act of 1601, the Lord Chancellor was empowered to appoint annually a standing commission to hear all cases upon insurance policies entered in the London Office of Insurance. As Commissioners, six jurists (a Judge of the Admiralty Court, the Recorder of London, two Doctors of the Civil Law, and two Common Lawyers) and eight 'grave and discreet' merchants were appointed to hear insurance cases in a summary procedure without any formalities of pleadings and proceedings. Any five of these Commissioners made up the required quorum. The Court met weekly at the Office of Insurance in the Royal Exchange and the Commissioners themselves received nothing of the fees payable to the Court.

The Court's jurisdiction was closely circumscribed. It could hear and determine only disputes on the rather unpopular public insurances, that is, on policies registered in the Office of Insurance in London, and not on private insurances concluded in London or elsewhere. Appeals against its decisions lay to the High Court of Chancery.

---

139 See Blackstock 26-27 for an extract from Bacon's speech in the House of Commons on the Assurance Bill on 7 December 1601. The Parliamentary Committee, which deliberated the Bill on 11 December 1601, included Bacon, Sir Walter Raleigh, and Mr Dr Cesear, a civil lawyer and a judge of the Admiralty Court from 1584-1603.

140 43 Eliz c 12.

141 As to these, see Blackstock 40.
Although the London Court of Insurance held definite advantages for litigants, it had many more serious defects and never found favour with the London insurance market and commercial community. Not only was its jurisdiction too limited, but its composition and the annual rotation of its unpaid and hence rather indifferent members, severely hampered its effectiveness. Furthermore, the Court's powers were severely restricted and its procedures in many respects unsatisfactory. But most important, though, was its relationship with and position vis-à-vis other courts. The Court of Insurance had no exclusive first instance jurisdiction in insurance matters. The jurisdiction of the Admiralty Court and of the Common Law courts were not excluded and both continued to hear questions arising from private insurance contracts concluded in London and elsewhere. The Common Law courts in fact continuously eroded the Court of Insurance's concurrent jurisdiction, as it did that of the Admiralty Court, by interpreting the Act of 1601 restrictively on the basis that nothing short of an express Act could deprive them of their jurisdiction.

Not surprisingly the London Court of Insurance, after existing, nominally at least, until late in the seventeenth century, fell into disuse when Commissioners ceased to be

---

142 Molloy *De jure maritimo* II.7.19 listed the following advantages: the Court of Insurance was both a court of law and one of equity and adjudicated disputes according to both law and the custom of merchants; whereas the underwriters on a policy had to be sued separately at Common Law, they could be joined in an action before the Court; the Court sat outside and during term and dealt with cases much quicker than did the other courts; the judgments of the Court were delivered by persons well skilled in marine affairs.

143 It was apparently difficult to get a quorum of five Commissioners together and further Commissioners could not sit before they were sworn in by a Court of Aldermen which it was also not always easy to call together. In 1662 (by 14 Car II c 23) these problems were addressed when the quorum was reduced to three Commissioners, which had to include a Doctor of the Civil Law and a Barrister of five years standing, while Commissioners from then on only had to take an oath before the Lord Mayor.

144 Thus, it had no power to summon parties or witnesses to appear before it and to punish them for failing to do so, and while it could commit defaulting judgment debtors, it had no *in rem* powers. Also, it could not enforce its decisions and the appeal procedure was dilatory in the extreme, apart from the fact that in cases going on appeal the amount awarded to the insured was not paid to him but had to be deposited by the underwriters involved pending the final settlement. Some of these defects were addressed and rectified in 1662. Thus, a contempt procedure was introduced, the Commissioners given the power to make orders against the person or the goods of a defendant, and execution was no longer suspended pending an appeal.

145 See further Van Niekerk 'Admiralty Court' 32-46.

146 Thus, in *Denoir v Oyle* (1649) Style 166, 82 ER 616; Style 172, 82 ER 621, a case of life insurance, it was held that the Court had jurisdiction only over insurance contracts on merchandises; in *Came v Moy* (1658) 2 Sid 121, 82 ER 1290, Sir Edward Coke held that it was no bar to an action on an insurance policy at Common Law that the plaintiff had already and unsuccessfully sued the defendant on the same cause in the Court of Insurance; and in *Dalbye v Proodfoot* (1693) 1 Show KB 396, 89 ER 662, the King's Bench held that the jurisdiction of the Court of Insurance was limited to suits brought by an insured against insurers and not the other way around.
appointed.\textsuperscript{147} The same fate befell the Office of Insurance in the Royal Exchange and the compulsory registration of insurance policies there. Attempts to revive the Elizabethan Court of Insurance in the mid-eighteenth century came to nothing, but by that time the King's Bench, under Lord Mansfield, was already beginning to assert its influence through the more satisfactory adjudication of insurance disputes.

In Hamburg\textsuperscript{148} insurance disputes in the sixteenth century were either referred to Antwerp for adjudication or arbitration, or otherwise settled by the local courts. But taking insurance disputes to Antwerp was costly and time-consuming, while local proceedings were unsatisfactory not only because of the lack of expertise on the bench but also because of the possibility of decisions being taken on appeal to the Reichskammergericht, resulting in interminable delays.\textsuperscript{149} Local arbitration too was not the solution.\textsuperscript{150} An increase in the volume of the local insurance business and also in the number of disputes, showed up the need for a tribunal made up of experts to hear insurance issues.

After an unsuccessful attempt in 1611 to have a chamber of insurance established in the city after the Netherlands example, the Hamburg Admiralty Court (Admiralitätsgericht) was established in 1623. It had exclusive jurisdiction at first instance over all maritime and marine insurance cases and apart from the adjustment of general average, the Court's main activity was in fact the resolution of insurance disputes. Members of the Court were specialist practitioner-jurists and the Court functioned successfully until 1811.

1.8 Conclusion

Because the lawyers called upon to adjudicate disputes in the ordinary courts lacked sufficient knowledge of the largely unwritten customs of insurance practice, and because the duration and formalities of ordinary judicial procedures did not take account of the requirements of merchants and insurers, there existed a need for the creation of specialist tribunals to adjudicate insurance disputes according to swift and

\textsuperscript{147} Thus, disputes involving the two monopoly marine insurance companies established in 1720 (The Royal Exchange Assurance and the London Assurance) could be heard only by the Common Law courts (see further ch IX § 2.11.4 \textit{infra}). The Act of 1601 was only repealed in 1863 by the Statute Law Revision Act of that year (\textit{Vic et c 125}).

\textsuperscript{148} For further details on the adjudication of insurance disputes in Hamburg, see generally Dreyer 28 and 38-39; Frentz \textit{Hamburgische Admiralitätsgericht} 29-31, 38-39, 112-117 and 121; and Hammacher 168-171.

\textsuperscript{149} Thus, Guddat 55 mentions the case of \textit{De Rochas v Coyemenn} which was commenced before the local Hamburg \textit{Rat} in 1593 and was still pending before the \textit{Reichskammergericht} in 1610.

\textsuperscript{150} For example, it depended upon agreement between the disputants as to who were to be appointed as arbitrators. Arbitration clauses were not uncommon in Hamburg policies. Thus, a policy of 1654 provided for arbitration by 'neutrale Kaußleute zur Börse, die Christen sein, zu gueten Männer ernennen' (see Plass 99).
informal procedures. The insurance chambers established in Amsterdam, Rotterdam and elsewhere in the Netherlands met this need admirably.\textsuperscript{151}

They provided merchants' forums not only for the prompt and equitable resolution of disputes arising from insurance contracts but also expertly assessed and apportioned general average and other losses. The Dutch chambers of insurance were independent tribunals with exclusive jurisdiction, not interfered with by the other courts yet fully integrated into the established and, it must be added, unified system and hierarchy of courts existing in and for the cities concerned. Their jurisdiction, although not unlimited, was not unnecessarily restricted and was, in particular, not inextricably linked to a public system of compulsory registration of policies.

Composed not of lawyers but of a small body of merchants permanently in sitting, the chambers were abreast of and willing to apply the customs followed in the insurance market. As such they were in a unique position to promote and gave impetus to the development of insurance law and practice. And, of course, the status, knowledge and expertise of the Commissioners made them acceptable to merchants and insurers.\textsuperscript{152}

The chambers not only enjoyed a reputation for the expert and impartial settlement of cases, but procedurally too they had much to commend them. They were courts in the full sense of the word with the same power to enforce their decisions as any other court, and although the possibility of an appeal to a higher court was retained, sufficient safeguards were introduced to discourage frivolous appeals.

But there were drawbacks too. Although much had been done to reduce the delays inherent in the process of appeal, it could still take many years for cases to be finally settled. It was not uncommon for cases to reach the Hooge Raad more than ten, and sometimes as long as twenty years after they were first brought before a local chamber of insurance.\textsuperscript{153} And too much should probably also not be made of the level of expertise displayed by the Insurance Commissioners. Most of them served for a relatively short period not only on the insurance chamber but interchangeably also on any one or more of the other specialist tribunals in their city. The fact that the decisions of

\textsuperscript{151} See generally eg Guddat 49-52 and Lichtenauer Geschiedenis 142-143.

\textsuperscript{152} See eg De Smidt 'Seerecht' 213. Weskett Digest 31 sv 'average' par 17, writing in 1781, deplored the absence in England of 'commissioners, or other persons duly qualified, and appointed by authority, as in Amsterdam, Hamburg, France and other countries, for the settling of affairs relating to insurances and averages'.

\textsuperscript{153} One (probably extreme) example occurred in an insurance case which reached the Hooge Raad in November 1716 (see Bynkershoek Observationes tumultuariae obs 1290; idem Quaestiones juris privati IV.6; the date given by Bynkershoek is 1726 but that would appear to be wrong). It concerned a policy concluded in Amsterdam in November 1687, almost thirty years before. A claim on the policy was first heard by the Amsterdam Insurance Chamber in 1689 and by the Schepenen Court there in 1692, while the Hof van Holland gave judgment in the matter in 1702.
these merchant-judges were more often than not overturned by the professional and trained judges on appeal, also tends to confirm this.\footnote{\textit{Handelsrecht} 357. Not surprisingly, the chambers also tended to favour insurers rather than the insured, a fact often commented on by Bynkershoek in his description of the insurance cases which came before the Hooge Raad during his term of office.}

It is not surprising, then, that merchants and insurers continued to seek extracurial ways of solving their disputes. In particular they resorted to arbitration and the amicable settlement of their differences.

2 The Extra-Curial Resolution of Insurance Disputes

2.1 Arbitration

In the Netherlands merchants did what merchants everywhere did when the existing judicial system did not satisfactorily settle their disputes: they turned to private, extracurial adjudication by their peers. Insurance disputes too were settled in this way, despite the fact that in the seventeenth and eighteenth centuries the court system in the Netherlands, with specialist insurance tribunals forming an integral part of it, was probably more accommodating towards mercantile law generally and insurance law in particular than most other legal systems on the Continent.

Arbitration was employed in insurance cases not only in the period before the establishment of specialist insurance chambers, when insurance was to be regarded as a mercantile matter to be considered by merchants themselves and not by the ordinary courts,\footnote{\textit{Betrekkingen} 225. Sneller 114 and 166 mentions the reference of insurance disputes to arbitration by experts ('aen goede mannen, hen dies verstaende') in Amsterdam in 1592, although he is wrong in stating that at that time there existed no judicial organ in the city which gave judgment in insurance disputes.} but also thereafter.\footnote{\textit{Verzekeringscompagnie} 151, the Antwerp Insurance Chamber largely lost its importance for the settlement of insurance disputes because of the increasing tendency to refer such disputes to arbitration by 'twee goede mannen' on the Antwerp Bourse.} Arbitration had particular advantages which

\footnote{\textit{Handelsrecht} 357. Not surprisingly, the chambers also tended to favour insurers rather than the insured, a fact often commented on by Bynkershoek in his description of the insurance cases which came before the Hooge Raad during his term of office.}

\footnote{\textit{Betrekkingen} 225. Sneller 114 and 166 mentions the reference of insurance disputes to arbitration by experts ('aen goede mannen, hen dies verstaende') in Amsterdam in 1592, although he is wrong in stating that at that time there existed no judicial organ in the city which gave judgment in insurance disputes.}

\footnote{\textit{Verzekeringscompagnie} 151, the Antwerp Insurance Chamber largely lost its importance for the settlement of insurance disputes because of the increasing tendency to refer such disputes to arbitration by "twee goede mannen" on the Antwerp Bourse. Arbitration was popular also in Hamburg in the seventeenth and eighteenth centuries (see eg Dreyer 37-38 and Frentz \textit{Admiralitätsgericht} 70-72). At least three accords (\textit{Vergleichen}) between Hamburg insurers touched on arbitration. In the one of 3 January 1687, they agreed that in future disputes arising on their policies would have to be referred to arbitration and they imposed a penalty if this did not occur, although the penalty was later dropped after complaints that this was detrimental to the local Admiralty Court. By their agreement of 17 March 1697, the penalty was reinstated and recourse to courts of law permitted only after two months of fruitless arbitration. And their agreement of 22 December 1704 again ordered compliance with the earlier stipulations concerning arbitration, contained a decision to obtain official permission for such arbitration, and also to petition the Admiralty Court not to determine any insurance cases unless they had first been the subject of arbitration for at least two months, a proposition to which the Admiralty Court subsequently agreed. On these accords, see further Dreyer 58-64 and Frentz \textit{Admiralitätsgericht} 223-229. In England, too, resort was had to arbitral proceedings in insurance matters. Thus, in one of the earliest extant policies concluded there, the 'Santa Crux/Salazar' policy of 1555, the following clause appeared: 'We promys to remyt to honest merchaunts and not to go to the lawe' (see Wright & Fayle \textit{Lloyd's} 37). Arbitration of insurance disputes continued to be a viable option until the mid-eighteenth century when Lord Mansfield came to the King's Bench.}
attracted merchants and insurers to it even after insurance chambers had been set up. These included the informality and inexpensiveness of arbitral procedures, the fact that expert arbitrators could be appointed to determine the issues, and also the preservation of a good relationship between parties who were in daily and close commercial contact with one another.\footnote{157}

But insured and insurers turned to arbitration not only for reasons of convenience and dissatisfaction with the curial system. They also did so when they concluded insurance contracts which did not comply with legislative prescripts and on which, very often, the insurance chambers could and would not adjudicate. One of the consequences of a policy containing provisions not permitted by the applicable legislation, was the need for the parties to provide for an alternative way of settling any disputes which could arise on that policy and so to exclude the jurisdiction of the local chamber.\footnote{158}

Because the institution of commercial arbitration was relatively well developed in Roman-Dutch law,\footnote{159} quite a few examples exist of arbitration in insurance disputes in the Netherlands.

The earliest references to arbitration in insurance matters date from the mid-fifteenth century and concern a dispute before the Bruges Schepenen Court in 1459 as to validity and binding effect of an arbitral award, and an order by that Court in 1469 for the execution of such an award.\footnote{160} But there are also many later references. Thus, in a case where insurers refused to appear before the arbitrators after a dispute had arisen on an insurance policy in terms of which such disputes had to be referred to arbitration, the Hof van Holland in 1639, at the request of the insured, ordered the arbitrators to make a finding within one month.\footnote{161} In the next year there is a reference in an Amster-

\footnote{157} It should be emphasised, though, that in Roman-Dutch law the concept 'arbitration' did not necessarily in all respects bear its modern meaning or at least was not always employed as it is today. It was possible, eg, that an arbitral decision merely took the place of a judgment of first instance with the option of an appeal to a court of law, although parties could agree and instruct the arbitrators to give a final decision. It was also possible for arbitration to take the place of an appeal and for a matter to be referred to arbitration after a decision in a court of law. See further eg Lipman 230.

\footnote{158} See eg Den Dooren de Jong 'Practijk' 12; Faber 'Studien I' 89; and De Groote Zeeverzekering 143-148.

\footnote{159} See eg Voet Commentarius IV.8 and further Lichtenauer 'Handelsrecht' 354-356. Arbitration had its origin in the Roman compromissum, an informal agreement to submit disputes to the decision of an arbitrator. For the development of the compromissum and its reception into European law, see generally Zimmermann 526-530. As to the origins of the English Arbitration Act 1698 (9 Will III c 15), see generally Horwitz & Oldham. The Act was drafted by John Locke drawing upon the judicial practice of the late seventeenth century after he had considered but rejected as too complicated and too foreign the Dutch methods of arbitration of mercantile disputes.

\footnote{160} See further De Groote Zeeverzekering 15 and 15-16 for these two instances. In 1568 the Bruges Scheepenen confirmed the award of arbitrators in an insurance dispute where the parties concerned had, after the commencement of litigation, agreed to refer their dispute to four arbitrators, two to be appointed by each of them (Idem 17-18). See also De Groote 'Zeeverzekering' 207.

\footnote{161} See Loenius-Boel Decisien casus 93. The dispute was thereafter 'by Reductie van de Uytspraak der voorz Arbiter gedeveleerd Zynde aan het Hof'.
I
dam opinion on an insurance dispute which had been submitted to arbitration ('gesubmitteert aen sekere Arbiters').\textsuperscript{162} And it appears from an opinion delivered in 1669, that the insured there had summoned the insurers to appear before arbitrators because they had refused to pay the sum insured under the policy.\textsuperscript{163}

Insurance disputes were referred to arbitration because of an agreement between the parties to do so. This agreement usually took the form of an anticipatory arbitration clause in the insurance contract by which the parties agreed to refer to arbitration all future disputes arising from that contract.\textsuperscript{164} Obviously the policy forms prescribed in insurance legislation did not contain arbitration clauses by which the courts could be bypassed. Insurance arbitration itself was not a topic regulated in Roman-Dutch insurance laws.\textsuperscript{165}

But in practice arbitration clauses appeared regularly in insurance policies, often in the form of a handwritten clause added to an otherwise printed policy form, and equally often accompanied by a clause in terms of which the parties agreed to contract out of the applicable insurance legislation.\textsuperscript{166} Numerous examples exist of arbitration clauses in Dutch insurance policies in the seventeenth and eighteenth centuries.\textsuperscript{167} Not

\textsuperscript{162} See Hollandsche consultatie vol III(1) cons 80 (1640). The same opinion was also taken up in vol III(2) cons 80 (1641).

\textsuperscript{163} See Nederlands advysboek vol II adv 120. Interestingly enough, the insurance contract in this case appears to have been an oral agreement.

\textsuperscript{164} See eg Mullens 96.

\textsuperscript{165} In contrast, arbitration in the insurance context was treated in the French Ordinance de la marine of 1681, the reason being, according to Pothier, merely because its use was so widespread (see Enschedé 25-26). The Hamburg Assecuranz-Ordnung of 1731 likewise contained a detailed regulation of the arbitral adjudication of insurance disputes, a regulation in essence taken over from the earlier accords between Hamburg insurers on the topic. See nl56 supra and further Dreyer 175-180.

\textsuperscript{166} As to such contracting out, see ch VIII § 5.2 infra.

\textsuperscript{167} The following clause regularly appeared in Antwerp policies in the seventeenth and first half of the eighteenth centuries: 'Dat den bovenscr. geassureerden niet en sal gehouden wesen te despacheren dese police in de carmer van asseurantie, maer hebbende eenighe difficulteyt sal alles geefent worden door twee mannen met eere van de borse van Antwerpen, hun des verstaende'. See further Couvreur 'Zeeverzekeringspractijk' 200-204.

Other examples included the following:

(i) a Dutch policy of 1638 found in the records of the English Admiralty Court which renounced Antwerp insurance legislation and contained an agreement to submit disputes to arbitration (see Marsden 59 and Holdsworth History vol VIII at 284);

(ii) the arbitration clause in an Amsterdam policy of 1672 on the 'Witte Haes' which provided: 'Submitterende ons in d'uytsprake van goede mannen, bij den gaassureerde of Commis daer over te verkiesen met beloften van de selve uytsprake promptelyck neer te comen en voldoeri' (see Den Dooren de Jong 'Practijk' 11-12 and Appendix 24 infra);

(iii) the following arbitration clause in a 1677 Zaandam mutual insurance contract for a whaling fleet: 'Wat questie off dispuijt uyt desen zoude mogen ontstaen sal moeten gesubmitteerd ende verbleven werden ende arbitragie ende uytspraak van vijft personoen bij de meeste stemmen uyt ende door geonderteeckende te verkiesen, met welke te doene uytspraak alle die sulx mogt aengaen genoegen ende contentement sullen moeten nemen, sonder daer aff te mogen comen in appel, reffonatie of reductie, ten dien eynde alle exceptien ende privilegien in regten bekent te byuten gaende' (see Den Dooren de Jong & Lootsma 44-45);

(iv) an extensive arbitration clause in a 1746 mutual insurance contract for whalers from the Zaan region
only policies underwritten by individual underwriters but also policies issued in the
eighteenth century by insurance companies included arbitration clauses.\textsuperscript{168}

Arbitrators appointed to determine insurance disputes were usually merchants
with a knowledge of local insurance laws and customs. Insurance brokers too acted
in this capacity.\textsuperscript{169} Arbitral awards, it appears, were on occasion notarially executed.\textsuperscript{170}

Arbitration was, however, not the panacea for all insurance disputes and it often
presented real difficulties. Successful arbitration depended upon the cooperation of
the parties, and given the then state of development of arbitration law, a recalcitrant
party could very easily turn an insurance dispute into an arbitration dispute by ignoring
the arbitration agreement and proceeding judicially, by failing to appoint an arbitrator or not
accepting the one appointed by his opponent, or by refusing to abide by an arbitral
decision.\textsuperscript{171} But there were other options too.

---

\textsuperscript{168} Thus, the Antwerp insurance company established in 1754 (the Chambre Impériale et Royale
d'Assurance aux Pays-Bas) provided in its charter for the settlement by arbitration of disputes on its
policies (see Couvreur 'Zeeverzekeringspractijk' 199-200), and its policy provided as follows: '[S]oo en
sal den gheassureerden niet ghehouden syn te despascheeren dese police in de earner van Assurantie,
hebbende eenigh difficulteyt ofte questie sal alles gheefent worden door twee goede mannen met eeren
van deze borse van Antwerpen hun des verstaende' (see Couvreur 'Verzekeringscompagnie' 151 n2).

\textsuperscript{169} See Vergouwen 81.

\textsuperscript{170} See Vergouwen 81n1 who refers in this regard to a notarial protocol in the Rotterdam Gemeente
Archief dated 2 September 1692 concerning a claim by one Thymon van Schoonhoven, merchant and
owner of the ship 'St Pieter', against twelve underwriters. Two merchants and an insurance broker,
Tieleman Goris, all from Rotterdam, acted as arbitrators. After they had heard all the parties and took
account of all the documentation presented, they held that the insurers had to pay the sum underwritten
on the policy as well as 'de kosten van arbitrage'.

\textsuperscript{171} See eg Klesselbach 127. The reasons mentioned by Enschedé 22n2 for the disappearance
of arbitration clauses in the Dutch insurance market in the latter part of the nineteenth century may well have
applied also in earlier times: the involved procedures required to appoint an arbitration panel and the lack
of impartiality of party-selected arbitrators; the superficiality and inaccuracy of many arbitral awards,
reflected in their frequent reversal on appeal; and the ineffectiveness of arbitration award which did not
finally settle the matter because an appeal to the courts was still possible.
2.2 Settlement

First of all, and distinguishable from arbitration, disputing parties could by a form of consent to judgment (willige condemnatie) agree to settle their difference by submitting to a court of law written dispositions on which their dispute was then to be resolved. A form of official mediation also occurred, although probably only rarely. More relevant in the insurance context, though, was the settlement of insurance disputes by agreement.

Obviously, from a commercial point of view, the amicable settlement of insurance claims and disputes by way of an agreement or compromise (transactio; accord) between the parties concerned was preferable to litigation and even to arbitration on the matter. No doubt the extraordinary delays in deciding insurance disputes made settlement an attractive alternative, the more so because it could be arranged by the very same broker who had negotiated the insurance contract in the first place. In a mid-eighteenth century description of commerce and trade in Amsterdam, for example, the preference of merchants for such settlements with their insurers was specifically noted. There is evidence, furthermore, of insurance custom in fact promoting and encouraging underwriters to settle insurance claims without recourse to legal proceedings, for example by permitting a, or an increased, deduction from the amount of the claim.

172 According to De Smidt 'Seerecht' 216-217, this was already in the sixteenth century a possibility. It also occurred in combination with an agreement to arbitrate. Thus, in a Rotterdam policy concluded towards the end of the sixteenth century on a cargo of slaves consigned from the coast of Africa to places in America, the arbitration clause provided as follows: '[S]ubmitteerenden ons in Cas van verschil aan de Uytspraak van twee neutrale kooplieden door ons in [en?] de geassureerdens te kiesen ten welke Eynden wij beloven daar van op begeeren der Geassureerdens te tekenen een ordentlijk Compromis onder willige Condemnatie van den hoogen raaderi (see Mees Gedenkschrift appendix XXIII).

173 Thus, in the case of an Antwerp land transit policy of 1587 on which a claim was instituted in the local Schepenen Court, the Court foresaw certain difficulties with the case and appointed one of its members as a 'commissaris' to explain 'de zwarigheden' to the parties involved, to collect the necessary information on the dispute, and to try and get the parties to come to some arrangement. If this was not possible, he was to bring out a report and then 'recht zou geschieden zoals het behoorde'. See De Groote 'Polissen' 153-156.

174 See L'Espine/Le Long Koophandel 42: 'De meeste Kooplieden zyn ook gewoon, liever de Schaadens of haveryen met de Assuradeurs in der minne door den Maakelaar die de Party geslooten heeft, te laat af-maaken, als deseile voor de kamer van Assurantie te laten dienen, om onnoodige kosten te sparen'.

175 See Van der Keessel Theses selectae th 760 (ad III.24.15) and idem Praelectiones 1473 (ad III.24.15), referring to a general legal rule introduced by custom in Amsterdam in estimating and paying losses, to the effect that if the damage exceeded half of the value of the property insured and if the insurers compensated it by compromise ('transactione') without legal controversy ('ex amica conventione'), they could deduct two per cent from the insured’s claim. As to deductions or abatements, see further ch XV § 7.4 infra.
There are various instances in Roman-Dutch sources where such a settlement was reached between an insured and his underwriters. Sometimes this occurred after litigation had already commenced and was in fact already far advanced.\textsuperscript{176} Settlements were important in that they extinguished previous debts, and even mere attempts to reach a settlement could in appropriate cases have an influence on the position and respective rights of the parties involved.\textsuperscript{177}

It was a common occurrence for one or more of the underwriters concerned with a particular policy to be nominated and authorised by the others who had also underwritten it, to settle the insured's claim amicably ("in der mine te schikken").\textsuperscript{178} For this purpose they concluded amongst themselves a separate agreement 'to follow as may be settled' by the nominated or leading underwriter.\textsuperscript{179} There is no evidence of agreements of this nature being taken up in insurance policies to enable the insured to rely on it when negotiating and settling with one only of several underwriters on the policy rather than with each of them separately. On occasion there was a dispute even about whether the underwriter in question had the required authority from his co-

\textsuperscript{176} See eg the case before the Hooge Raad in 1711 (see Bynkershoek Observationes tumultuariae obs 779; idem Quaestiones juris privati IV.4), where the question of the quantum of the insured's loss was not considered because a settlement ('Accoord') had been reached by the parties on the estimation of the loss ('begrooting der schade'). In a Hooge Raad case in 1717 (see Bynkershoek Observationes tumultuariae obs 1374; idem Quaestiones juris privati IV.8), where the insurers were held liable, the Raad did not determine the amount of the loss because the insurers, being of the view that they were not liable at all, did not respond to the estimation expressed in the insured's claim. The Raad thought it better 'een accoord over de begrooting te tenteeren, en, indien dit niet wilde slagen, nauwkeurig te examineeren, of en war de Assuradeurs tot hunne defensie in te brengen hadden'. And in a case before the Raad in 1731 (see Bynkershoek Observationes tumultuariae obs 6246; idem Quaestiones juris privati IV.15), the matter at issue was similarly not decided by that body because of the parties settling their dispute.

\textsuperscript{177} Thus, in a case before the Hooge Raad in 1729 (see Bynkershoek Observationes tumultuariae obs 2492; idem Quaestiones juris privati IV.14), the insurers raised a defence of prescription. The Raad agreed that a mere demand for payment was not sufficient to stop the running of prescription, but was of the opinion that the fact that the parties were busy preparing a settlement could suffice to permit relief. In this instance, though, there was no evidence of such preparations and the Raad therefore held that if the insurers were prepared to confirm that no attempts at a settlement had been made, the insured's claim would be rejected on the grounds of prescription. But if they were not prepared to confirm that fact under oath, the insured's claim was to succeed. Bynkershoek mentioned that he had later heard that the insurers did not give this oath but that the parties had reached a settlement on the matter.

\textsuperscript{178} See Vergouwen 45.

\textsuperscript{179} In the Amsterdam Gemeente Archief (Rechterlijke Archief (Archief 5061), inv no 2925), there is an example of such an agreement dated 12 February 1701 by which the underwriters on a policy authorised two of their co-insurers to settle a claim on that policy. They specifically authorised 'onse mede Asseuradeurs omme wagens deselve Schaede met de Geasseureerde in der minne te accorderen ende af te meecken soodanigh als Sij oordelen Sullen te behooren. Beloven wij ondergesz: als eerlijkke Lieden na te comen, en in gereede gelden te betalen alle het geene bij deselve Hem Geauthorisedrens wagens de Voorz schaeden sal werden geaccordeert'.
underwriters. Insurers were on occasion so eager to settle insurance claims, that they were prepared to take over and stand in for the liability if one of them later did not abide by their settlement agreement with the insured. It appears, though, that with the advent of insurance companies merchants were afraid that it would become more difficult to reach settlements of claims and disputes.

3 The Influence of Foreign Elements on the Insurance Contract, the Insurance Claim and the Adjudication of that Claim

3.1 Introduction

Because of the cosmopolitan nature and transnational operation of marine insurance, foreign elements of one type or another often played a role in the conclusion, performance and adjudication of insurance contracts in Roman-Dutch law. The insurance of ships and goods to be carried by sea usually involved voyages and consignments to and/or from foreign ports and losses occurring elsewhere than at the place where the contract was concluded. From early on in the Netherlands, in Bruges as well as in Antwerp, the first insurers were mainly foreign merchants who, on occasion, sought to invoke the application of their own insurance laws and customs to contracts they concluded locally with local or other foreign insured. At a later stage, again, when the Dutch capital and insurance markets had gained pre-eminence in Europe, foreign merchants came to Amsterdam and other cities to insure their ships and cargoes.

Courts in the Netherlands were therefore not infrequently faced with insurance contracts which, although concluded locally, involved one or more foreign parties, or

---

See the case before the Hooge Raad in 1719 (see Bynkershoek Observationes tumultuariae obs 1542; idem Quaestiones juris privati IV.9), where the insured argued without success that the insurers, who now denied liability on the policy, had authorised one of them 'om met den geassureerden over de schade, indien het mooglyk was, te accordeeren'.

Mees Gedenkschrift 14-15 provides details of the settlement of an insurance dispute between an English insured and Rotterdam insurers in the 1760's. The insured was condemned at first instance to repay the amount provisionally paid out on his policy. The insured made an offer of repayment without the full interest due, which offer was eventually accepted in part by all the underwriters on the policy but one. Interestingly enough, in order to settle the matter finally ('om voor de heele zaak volle kwijting te geven') as the insured's offer required, the other underwriters declared themselves willing to stand in for the recalcitrant one.

Thus, one of the objections against the proposed establishment of a company for the compulsory insurance of shipping in 1628 (see further ch IX § 2.10.2.2 infra) was that in the event of a dispute it would be more difficult to settle with the company than with individual underwriters with whom insured contracted on an equal footing. It was argued that 'de assurantie tot allerlei kwestien aanleiding pleegt te geven, die door particuliere assuradeurs veel gemakkelijker kunnen worden opgelost dan door de bewindhebbers eenen het voordeel der participanten behartigende Compagnie' (see Blok 'Plan' 21). As soon as it was clear that there was no fraud involved in the claim, it was said, individual insurers were 'gewoon ... mette geassureerde int vrindelijck te accorden' (idem 'Adviezen' 51). Against this the proposers of the company argued that in the case of loss the company would be able to pay promptly, 'hetwelcke eene groote differentie is met de hedendaechsche asseuradeurs' (idem 'Adviezen' 88).
even with insurance contracts concluded elsewhere. In such cases various questions arose: whether the local court had jurisdiction; if it had, which law it had to apply to the claim before it; and whether the law it had to apply was in fact applicable to the contract in question or whether, by reason of the foreign element present, it was not.

These matters were not fully and systematically worked out in Roman-Dutch law by either the applicable insurance legislation, or by the courts, or by jurists devoting their attention to the insurance contract.\textsuperscript{183} There were exacerbating factors too. Because insurance contracts were regulated on a municipal rather than a provincial or national level, foreign meant non-local, that is, arising outside the city concerned. In many respects a Rotterdam insured was as foreign in Amsterdam as an Englishman or a German. Although these various local insurance laws differed but little when it came to matters of substantive insurance law, their approaches did when it came to form and procedure. Nevertheless, there are some indications as to how the problems created by the presence of foreign elements in the insurance context were addressed in the civil procedures of the various Dutch cities at various times. Some of these problems and their solutions will be considered briefly.

3.2 The Applicable Law

The jurisdiction of the different insurance chambers in the Netherlands has already been referred to.\textsuperscript{184} Jurisdiction was based on any one of a few factors. There was exclusive first instance jurisdiction over insurances concluded locally. There was jurisdiction also over foreign insurances either if they had some link to the local chamber or bourse, or if the parties had in some form or another submitted to the jurisdiction of the local chamber. In Rotterdam, uniquely, the Chamber of Maritime Affairs had jurisdiction only over marine insurances.

Once it had been made out that there was jurisdiction, or if it was at least not disputed that the chamber or court in question had jurisdiction over a dispute arising from a particular insurance contract, the question arose which law it had to apply. Generally speaking, a tribunal had to apply the law and customs of the place where it was situated, as those laws and customs appeared to it at the time. This was on occasion made apparent in legislation as will be shown shortly.

Before the advent of insurance legislation, or in the absence of any provision on the matter in existing legislation, it appears that local courts may well have applied, or at least have been requested to apply, not only insurance customs but also insurance laws originating elsewhere. Thus, in 1472 in an insurance claim brought before the Bruges Schepenen Court by the Spanish merchants resident there, assisting the master of a Spanish ship in his claim for average, the Genoese insurers relied upon a provision of a statute of Genoa. The Court sought and obtained the advice of foreign

\textsuperscript{183} To avoid the ‘Frequent Instances ... in which Laws and Customs have been unjustly made a Pretext to deny the Satisfaction that was due to Foreigners’, Magens Essay vol I at 6-7 advised parties in the mid-eighteenth century to provide for such eventualities by an express stipulation in their policies.

\textsuperscript{184} See again §§ 1.4.3 and 1.5 supra.
merchant groups in Bruges which apparently advised against the Genoese since they were condemned to pay.\(^{185}\)

The general rule in Roman-Dutch law, and one derived from Roman law, was that contracts were governed by law of the place where they were concluded, that is, by the *lex loci contractus*, except if they were to be performed elsewhere, in which case the law of the latter place, that is, the *lex loci solutionis*, was applicable.\(^{186}\) The law applicable in the court in which the insurance claim was instituted (that is, the *lex fori*), or the law of the place or places where either or both parties were domiciled, or even the law of the place where the insured ship or goods were destined, where the loss occurred, or where it was assessed, were all as a rule therefore irrelevant.

The only known case in Roman-Dutch law which concerned the applicable law in an insurance claim brought on a local policy appears to confirm this general principle. The case came before the *Hooge Raad* in 1726.\(^{187}\) The insured owner of cargo had instituted a claim on an insurance policy concluded in Amsterdam against local insurers. The claim was for a general average contribution due by that cargo to a general average loss adjusted in Cadiz in Spain. The insurers argued, *inter alia*, that a general average adjusted elsewhere did not bind them, because the adjustment had to be made by the Commissioners of Insurance at Amsterdam where the policy had been signed. For this they referred to local Amsterdam legislative provisions.\(^{188}\) Although the *Raad*, by a majority, held against the insurers on this point, it did concede that Amsterdam legislation was applicable because, *inter alia*, of the presumption at common law that parties intend their contract to be governed by the law of the place where it was concluded. In the present case that was the law of Amsterdam.

In terms of s 24 of the Rotterdam *keur* of 1604, the local Chamber, in deciding an insurance dispute, had to apply the provisions of that *keur* in so far as the dispute pertained to disputes arising from local insurances concluded after the date on which it came into operation. In respect of insurances concluded before that date, or in respect of foreign insurances, the Chamber had to decide according to the law or legislation chosen by the parties to the contract (*'sullen sy volgen 't recht oft ordinantie die de Contrahenten by de Police hun sullen hebben onderworpen*'). If the parties had not

---

\(^{185}\) See eg De Groote 'Zeeverzekering' 207; *idem Zeeassurantie* 16-17. In a dispute between Spanish and Portuguese merchants resident in Antwerp (evidence of which appears from a notarial deed of 1568), the city magistrate decided that the Portuguese nation at Antwerp had the ancient right to draw up a general and particular average adjustment of all Portuguese ships coming to Antwerp which had been loaded in Portugal or in a Portuguese territory, irrespective of whether or not the majority of the consignors were Portuguese. This, it appears, was the custom also amongst other nations (such as the English and the Spanish) in Antwerp. See further De Groote *Zeeassurantie* 22-23.

\(^{186}\) See eg Voet *Commentarius* IV.1.29; Van der Keessel *Praelectiones* 1454 (ad III.24.9); and cf too Magens *Essay* vol I at 5-7. In this context 'law' included customs. Thus, Wassenaer *Praktijk* notariaal VIII.1 noted that in respect of insurance 'ende in 't contraheren van dien [moeten] gevolgt worden de costumen van de plaats daar gecontraheert word'.

\(^{187}\) See Bynkershoek *Observationes tumultuariae* obs 2242; *idem Quaestiones juris privati* IV.13.

\(^{188}\) They based their argument on s 32 of the Amsterdam *keur* of 1598, as well as on the amending *keur* of 4 December 1598: see again § 1.4.3 supra.
chosen any applicable law, the Chamber had to decide the matter as it saw fit (‘sullen sy ter-mineren ofte decideren na dat sy in goeder conscientie sullen bevin-den te behooren’). In Rotterdam, therefore, the law to a limited extent recognised the parties’ right to select a legal regime to govern their insurance contract; a choice of law, and presumably even of local law, was permitted for earlier or foreign insurances but, it seems, a choice of foreign law was not allowed for local insurances.

Some indication as to what the Rotterdam Chamber may have done in a case where the local legislation and law were not automatically applicable and where there was no express choice of law by the parties concerned, may be gathered from an opinion in 1733. The opinion concerned the legal position in Rotterdam in a particular case of double insurance. Unlike the Amsterdam and Middelburg keuren, the Rotterdam keur of 1721 did not specifically provide for the issue. Nevertheless, the opinion thought that the position elsewhere might be relevant to that in Rotterdam. First of all, it was apparent from the preamble to the keur of 1721 where it was stated that uniformity with other cities, especially Amsterdam, was considered practical, that the Rotterdam Legislature in this instance had no intention to deviate from other commercial centres. Secondly, and more important for present purposes, the oath of the Commissioners of the Rotterdam Chamber as set out in s 10 of the keur, resulted in their being obliged, in cases not provided for in the keur, ‘[om] regt te doen’ according to ‘de Placaten van den Landen, Regten en Costumen’ that they considered applicable to the case. Thus, the keur pertinently sanctioned a comparative approach in appropriate cases.

In terms of s 42 of the Amsterdam keur of 1744, the Chamber had to decide in insurance cases in accordance with the keur, and general average cases according to the law and equity (‘aangesien de Gevallen, waar uyt de Avaryen grossen resulteeren, zoo veranderlyk in Omstandigheden zijn, naar Regt, reeden en billikheyt’). In terms of s 40, all damages and averages had to be adjusted by the Commissioners in accordance with the keur, an exception being made in that general averages which were adjusted judicially at the place where the ship was bound, were considered binding in Amsterdam (‘ten waare de avary-grosse buyten ’s Lands ter gedestineerde plaats Judicieel mogte zijn gereguleert’). And in terms of ss 43 and 44, all differences arising from local insurances and from foreign insurance which had a bearing on the Chamber or Bourse, had to be decided in accordance with the keur of 1744.

The choice of a particular legal system or, more commonly, of the insurance customs of a particular place, to govern the rights and obligations of the parties to an insurance contract, was a not uncommon occurrence in Roman-Dutch law. Clauses embodying such a choice of law or choice of customs will be considered in more detail shortly. They were often accompanied by clauses in terms of which the parties at the same time chose a judicial or arbitral forum other than the one which would ordinarily be seized of the case, presumably, amongst other reasons, because the latter forum would or could not have permitted a choice of that foreign law or customs. The need for parties to exercise such choices in their insurance contacts appears when the

189 See Nederlands advysboek nieuw vol II adv 46.

190 The Chamber did have jurisdiction over such differences: see again § 1.4.3 supra.
scope and possible extraterritorial application of Roman-Dutch insurance legislation is considered more closely.

3.3 The Scope and Extraterritorial Application of the Applicable Law

Even after it had been determined that a particular Chamber had jurisdiction over an insurance claim and which law it had to apply to the claim before it, it still remained to be ascertained whether that law could in fact be applied to the insurance in question, especially if there was a foreign element of some kind or another. Most Roman-Dutch insurance laws made pertinent provision for the situation where the foreign involvement was also simultaneously an enemy involvement. These cases will be considered separately elsewhere. For the present only those cases will be considered where the foreign parties involved were not also subjects of an enemy state or territory.

At first blush it would seem that the title VII of the maritime placcaat of 1563, which title dealt with insurance, was concerned primarily, if not solely, with imports. For example, in the stipulations in the prescribed policy form which describe the duration of the insurance cover, the port of destination was specified as Antwerp whereas the port of departure was not specified at all. The placcaat may therefore be taken to have been concerned only with the insurance of goods consigned to Antwerp. But such an assumption may very well be unfounded and Antwerp may have been used merely as an example of a port of destination. This would appear to be confirmed by the fact that the insurance placcaat of 1571, which did not similarly identify a port of destination (or of departure), was more clearly primarily concerned with exports from the Netherlands.

The placcaat of 1571, as well as the provisional one of 1570, distinguished pertinently between the insurance of imports and that of exports. The placcaat was directed principally at the insurance of exports, presumably because in such a case the contract would be concluded locally. Its application to the insurance of imports was limited. The placcaat as a whole applied to goods consigned from the Netherlands while only some specified provisions were applicable to the insurance of incoming cargoes.

More specifically, in terms of s 28 of the placcaat of 1571, it applied only to the insurance of goods exported by sea, that is, goods 'treckende uyt de Lande van

---

191 See ch VIII § 5.3 infra as to the insurance of foreign and enemy property.

192 See further De Groote Zeeassurantie 122.

193 As to the relevant provisions of the placcaat of 1571, see generally Dorhout Mees Schadeverzekeringsrecht 19; Goudsmit Zeerecht 262 and 268-269; and Mullens 99.

194 And s 28 of the one of 1570.
**Courts, Jurisdiction and Adjudication, Conflicts and Custom**

In terms of s 30 of the *placcaat* of 1571, insurances concluded locally on goods imported by sea, land or internal waters, or so carried between foreign places, that is, goods 'komende ter Zee, over soete Wateren, oft te Lande uyt vremde landen ende contreyen inde Landen van herwaerts overe, oft in andere Continkrijkken ende Landen', were governed by the agreement between the parties themselves. There was a limitation on this though. On such insurances the provisions of the *placcaat* concerning some specified matters had to apply and could not be excluded by the parties in their agreement. The matters which could not be regulated by parties themselves differently from the way they were regulated by the *placcaat*, were the compulsory under-insurance of goods; the insurance of ships, wagons, horses, guns and ammunition; and the insurance of the wages of the crew and the salary of carriers. Put differently, only some provisions of the *placcaat* of 1571 applied to the insurance of imports, and for the rest the parties enjoyed freedom of contract.

In terms of s 29 of the *placcaat* of 1571, insurances of goods exported or imported over land or internal waters were, presumably because of the smaller risk involved in those cases, not regulated by the *placcaat* since, it was thought, merchants themselves could regulate such insurances best. The only limitation here, too, was that the application of the provisions of the *placcaat* concerning the compulsory under-insurance of goods, the prohibition on carriers to insure the goods themselves, and the prohibition on the full-value insurance of horses or carriages or on the insurance of wages or salaries were compulsory. Section 31 of the *placcaat* of 1571 provided that the *placcaat* was applicable in full both to goods loaded on foreign ships, wagons or horses, and to goods loaded on ships, wagons or horses belonging to local citizens. Somewhat confusingly this was so (that is, the *placcaat* was applicable without any limitation) irrespective of whether the insurance contract had been concluded with a local subject or with a foreigner, and irrespective further of whether the insurance was for goods being exported or imported on ships, wagons or horses belonging to for-

---

195 By s 9 of the *placcaat* of 1571, the obligation to register insurance contracts (which was necessary for the contract to be justiciable by the local courts) existed also in respect of insurance contracts on goods imported from other countries, or carried between other countries, if local merchants and citizens were involved.

196 And s 31 of the *placcaat* of 1570.

197 Accordingly, the parties could chose an applicable legal system other than the *placcaat* itself.

198 Thus, s 29 concerned imports and exports over land or internal waters while s 30, which provided virtually the same, concerned imports over sea, land or internal waters. The two sections therefore overlapped in respect of imports over land or internal waters. By way of exception, the insurance of exports over land or internal waters were treated on a par with the insurance of imports generally.

199 And s 30 of the one of 1570.

200 This would appear to be in conflict with the provisions of ss 29 and 30 by which the *placcaat* was not fully applicable in certain cases but the parties were, to a limited extent, allowed the freedom to make their own contract. Possibly s 31 must be read as supplementing only s 28 in respect of exports by sea.
eigners or locals, the intention being for the placcaat to have a general application, that is, to be 'een gelijcke gemayne ende generale Wet'.

The separation between the insurance of imports and that of exports, so pertinent in the placcaat of 1571, was less clearly taken over in the Amsterdam keur of 1598.201 Section 14 determined that the keur was to be applicable to all insurances concluded locally, whether on ships and goods departing from Amsterdam by sea ('treckende uyt den Lande van herwaerts-overe'), or on ships and goods coming by sea from elsewhere, or on ships and goods going by sea (from other countries) to other countries ('comende naar dese Landen of gaende op andere Landen of Con-inckrijcken'). This, then, was an extension on s 28 of the placcaat of 1571 which applied that placcaat only to exports by sea. In addition insurances on ships were now also included. But foreign policies, which were not concluded locally, remained outside the scope of the keur. In terms of s 29, the keur of 1598 applied to all insurances concluded locally with local citizens or with foreigners; in respect of goods loaded on ships, wagons or horses belonging to foreigners ('uytlanders') as well as to local residents; and irrespective of whether the insured goods were consigned from or to the Netherlands. The keur of 1598 was therefore clearer than the placcaat of 1571: in effect it applied to all locally concluded insurances, irrespective of the presence of any foreign element. It did not apply, at least not per se, to foreign insurances, even if the local Chamber did have jurisdiction over certain of them.202

This approach was continued in the Amsterdam keur of 1744. Section 40 stated that the keur applied in full to all insurances concluded in Amsterdam, whether or not the parties concluding it were resident in the city, and irrespective of whether the insured were locals or foreigners, and friendly or enemy subjects ('het zy dat het Inter-est of risico mogten loopen for Ingezeetene of Vreemden, Vrienden of Vyanderi'). All parties to local insurances would be regarded as having chosen their domicile in Amsterdam, for which reason also all losses and damage would, except in the case of certain foreign-adjusted general averages,203 be determined by the Chamber of Insurance in accordance with the provisions of the keur.204

Therefore, the general principle appears to have been that Dutch insurance laws applied to all insurances concluded within the jurisdiction of the legislature concerned,

201 See generally Dorhout Mees Schadeverzekeringsrecht 19 and Goudsmit Zeerecht 329.

202 See again s 32 of the keur of 1598 and the discussion in § 1.4.3 supra.

203 See again § 3.2 supra.

204 See further Goudsmit Zeerecht 365. According to Magens Essay vol I at 7, the inference was that the provisions of the keur of 1744 'reaches not beyond their own jurisdiction'. Elsewhere (vol I at 143) he noted that despite what was provided in s 40 of the keur of 1744, the intention could not have been that the keur 'should extend itself farther than to such risks as end within their own jurisdiction'. This was no doubt correct. The Amsterdam Legislature could provide for and enforce the application of the keur by no other body than the local Chamber of Insurance. Whether other foreign tribunals applied it could not be legislated for. But if a claim on a local policy (over which the Chamber did have jurisdiction, as has already been pointed out: see again § 1.4.3 supra) in respect of exports (where the risk, in the words of Magens, did in fact not 'end' within the local Chamber's jurisdiction) were brought before the local Chamber, then, by virtue of s 40, the keur was applicable and had to be applied by the Chamber.
even if there was a foreign involvement of one kind or another. By concluding insurance contracts in, for example, Amsterdam, foreigners therefore subjected themselves to the insurance laws applicable there, at least in so far as they instituted claims on those contracts before the Amsterdam Chamber of Insurance.²⁰⁵

3.4 Local and Foreign Underwriters

Not infrequently the risk it was sought to insure against was too large for the local market to bear and it was therefore necessary to obtain additional insurance cover elsewhere. It could therefore happen that a particular insurance policy was partly underwritten in two or more places so that the underwriters on that single policy were domiciled in different cities and jurisdictions.²⁰⁶

This, of course, raised various questions, not only as to the appropriate forum in which the insured was to institute his claim on the policy but also as to where, for purposes of determining jurisdiction and the applicable law, the contract was to be considered as having been concluded.

These problems came up for consideration in a case before the Hooge Raad in 1710.²⁰⁷ The insured there wanted to institute a claim on his insurance policy against the underwriters involved. They were resident in Amsterdam, Rotterdam and at various other places in Holland. With the permission of the Hof van Holland, he summoned them simultaneously in the first instance before the Hof. This he did because he feared different judgments if he claimed from each underwriter separately in his local chamber. On behalf of the Amsterdam insurers, the Schepenen Court there wrote to the Hof requesting that it revoke its permission in this case. It suggested also that the parties be referred to the Amsterdam Chamber of Insurance because the Amsterdam insurers could, in terms of s 32 of the Amsterdam keur of 1598 which provided it with exclusive jurisdiction, not be sued except before the Amsterdam Chamber, and also because, by s 8 of the ‘Nader Ampliatio, van de Instructien vanden Hoogen Rade, ende den Hove van Holland’ of 24 March 1644,²⁰⁸ an exclusion of jurisdiction was also prohibited in insurance cases (‘ook in Assurantie-zaken de prorogatie van Jurisdictie verboden was’). The insured, on his part, requested the Hof that his case should be heard. The Hof gave no order on this request but did revoke the authorisation it had granted. The

²⁰⁵ See further eg Bynkershoek Quaestiones juris privati IV.1; and Van der Keessel Praelectiones 1427 (ad III.24.pr) who pointed out that this was in conformity with the common law by which contracts were governed by the law of the place where the contract was concluded, the lex loci contractus.

²⁰⁶ See eg Spooner 153. This was especially true of risks sought to be covered in the smaller centres. For example, in 1802 the Middelburg Commerce Compagnie sought insurance for one of its ships and her cargo and gave instructions to several brokers to obtain the insurance with the request that, if possible, as much of the cover as possible was to be underwritten in Middelburg itself. Eventually the insurance was underwritten mainly in Amsterdam with a much smaller portion also being obtained in Rotterdam and Middelburg. See Emmer ‘Slavenreis’ 84 and 116.

²⁰⁷ See Van Bynkershoek Observationes tumultuariae obs 676; idem Quaestiones juris privati IV.26.

²⁰⁸ See GPB vol II at 779 and again § 1.4.3 n79 supra.
insured thereupon appealed to the Hooge Raad. The Raad conceded that the rule was as provided for in s 32, but it noted that it had not there been provided what the legal position would be where the underwriters concerned resided in different places. It was true that if one could proceed directly before the Hof as soon as but one of the insurers was resident elsewhere, s 32 would be nullified; but it was equally true that if each of the insurers had to be brought before his own local court, a multiplicity of judgments, both a quo and, possibly, on appeal, could not be prevented. The Raad nevertheless refused the insured’s appeal on the technical point that he could not establish that the Hof had given any judgment against him to his detriment.\textsuperscript{209}

The issue was therefore not finally determined and remained uncertain until 1736 when the Estates of Holland and West Friesland, which had approved the establishment of the Amsterdam Chamber in 1612,\textsuperscript{210} once again had to intervene in a dispute over the competency of the Chamber, specifically on the question whether or not the Chamber had any competency in an insurance dispute should the insurers involved reside in different jurisdictions (‘Judicature over quaestien van Assurantie, ingeval de Assuradeurs onder verscheide Jurisdicctien woonachtig zijn’).\textsuperscript{211} It appears that in a case decided after the Hooge Raad decision of 1710, the Hof had maintained as lawful an authorisation in terms of which different parties to an insurance contract had been called before it at first instance. When the Amsterdam Schepenen requested the Estates of Holland in 1736 that this authorisation be withdrawn, the Estates, after due consideration, refused their request and decided that that authorisation (‘mandament van rauactie’) would be valid in the particular instance. It resolved that in the present case the matter was best left to the discretion of the Hof. But it added that for the avoidance of such problems in the future, Amsterdam and other cities where chambers existed were empowered to take precautions by including in their official forms of insurance policy a clause in terms of which there could be a submission to the jurisdiction of that particular Chamber (‘de Clausule van ... Submissie aan de Judicature van de Commissarissen van de Kamer van Assurantie en Avaryen ..., zoo ten reguardre van de Geassureerdens als van de Assuradeurs’). Such a submission to jurisdiction clause would be fully effective and any dispute arising from an insurance containing such a clause would then in the first instance have to be brought before the Chamber in question.\textsuperscript{212}

Thus, underwriters residing in different jurisdictions who had underwritten one and same insurance policy, had to be summoned at first instance before Chamber to

\textsuperscript{209} Bynkershoek criticised and disagreed with this outcome because, according to him, the Raad did not in fact decide the matter before it but dodged the issue.

\textsuperscript{210} See again § 1.4.1 supra.

\textsuperscript{211} See the ‘Resolutien van de Staaten van Holland’ of 12 July 1736 (GPB vol VII at 933) and further Goudsmit Zeerecht 16n1 and 333.

\textsuperscript{212} For the form of this clause in the policy forms contained in the amended Amsterdam keur of 1775, see again § 1.4.3 n77 supra. Because of these forms, Van der Keesel Praelectiones 1482-1483 (ad III.24.21) noted a difference in the laws of Amsterdam and Rotterdam.
whose jurisdiction they had submitted in that policy.\textsuperscript{213} Only when there was no such uniform submission to a single jurisdiction, did each insurer apparently have to be summoned before his own local court,\textsuperscript{214} and they could no longer all at the same time be summoned before the Hof.\textsuperscript{215}

\section*{3.5 Foreign Currency}

Roman-Dutch legislation or lawyers did not specifically in the context of insurance consider the implications of dealings, valuations or payments in foreign currencies.

But it appears that customary rules in this regard did exist, for the 1609 compilation of Antwerp customary law, the \textit{Compilatae}, contained detailed provisions on how conversions into the local currency had to be made.\textsuperscript{216} The only instance of a dispute on this matter appears from an opinion delivered in 1721.\textsuperscript{217} In it the view was expressed that it was trite that in the event of the loss of insured goods, the value of those goods had to be paid without regard to what they had originally cost in the currency in which they were bought, and without converting that amount into a foreign currency. In such a case regard had to be had only to the amount and currency in which the insurers had underwritten the policy in question ("conform de getekende somme ter plaets de van de signature"). Insurers, then, were liable to pay on the policy in the currency in which they had underwritten it ("assuradeurs zyn gehouden hunne signature te

\textsuperscript{213} See Boey \textit{Woorden-tolk} sv 'Assurantie' who remarked that this was an exception to rule that no prorogation of jurisdiction was permissible in questions of insurance. Van der Keessel \textit{Theses selectae} th 768 (ad III.24.21) thought this to be necessary because of the peculiar nature of a cause where the parties resided at different places.

\textsuperscript{214} Although it was, of course, a different matter whether such courts would in fact have had jurisdiction over what in certain cases would have been a foreign policy.

\textsuperscript{215} See Van der Linden \textit{Koopmans handboek} IV.6.11.

\textsuperscript{216} The only instance of a dispute on this matter appears from an opinion delivered in 1721. In it the view was expressed that it was trite that in the event of the loss of insured goods, the value of those goods had to be paid without regard to what they had originally cost in the currency in which they were bought, and without converting that amount into a foreign currency. In such a case regard had to be had only to the amount and currency in which the insurers had underwritten the policy in question ("conform de getekende somme ter plaets de van de signature"). Insurers, then, were liable to pay on the policy in the currency in which they had underwritten it ("assuradeurs zyn gehouden hunne signature te

\textsuperscript{217} See Barels \textit{Advysen} vol I adv 90.
insurance law in the Netherlands 1500-1800

268

4

Custom

4.1 Introduction: Customary Insurance Law, Maritime Law and the Law Merchant

In Roman-Dutch law generally, customary law featured stronger as a formative source of law in those areas of law not derived from Roman law than in those with a clear Roman origin. This was true also of commercial law where mercantile custom played an important albeit ever diminishing role in the development of the relevant principles of Roman-Dutch law. And it was therefore also true of insurance law.

Before the advent of detailed legislative regulation of the insurance contract, mercantile custom (consuetudo inter mercatores; stilus or mos mercatorum) was the most important source of insurance law. At the time of its first appearance, the insurance contract was governed exclusively, and for a long time thereafter primarily, by a body of customary law (gewoonterecht) which gradually developed between merchants concluding that contract and which remained, as a rule, unwritten or, if written, at least unofficial and without any sanction as binding law. The insurance contract was known to and recognised as valid by mercantile custom in the Netherlands long before, in the sixteenth century, the legislature or the formal doctrinal law paid any attention to it and pertinently recognised it as valid. Early insurance law was in the first instance customary law.

On occasion the view is expressed that in the various ancient and medieval codes of maritime law and customs references to and, sometimes, even a detailed

---

218 See Lichtenauer Geschiedenis 14.

219 Molengraaff Leidraad 9 notes that a distinction was not drawn in Roman-Dutch law between custom (gewoonte) and usage (gebruik) on the basis of a so-called opinio necessitatis which was supposedly a requirement for customary law. Likewise Hosten par 379 points out that there was no difference in principle in Roman-Dutch law between custom and trade usage. Such a difference was and continues to be drawn in English law, though. See eg Aske. On custom in the Netherlands generally, see in particular Gilissen Inleiding 261-294.

220 See eg Coing Privatrecht 535; Mossner 48-51; Seffen Versicherung 29 and 33; and Witkop 4.

221 See eg Heemskerk 91.

222 In a case before the Bruges Schepenen Court in 1512, the insurers based their defence on a certain point which they alleged was 'ingevolge de stijl van de asseurantie'. See De Groote Zeeassurantie 17.

223 For an overview of and general introduction to the most important codes of customary maritime law, see eg Ashton 'Maritime Law'; Van den Auweele; and Wigmore 875-930.
treatment of, insurance matters are to be found.\textsuperscript{224} This view is patently incorrect.\textsuperscript{225} Given its non-Roman origin and the fact that it first appeared only in the thirteenth century, there was, not surprisingly, no mention of the marine insurance contract for a premium in the ancient sea-laws, although the historically closely related maritime loan was dealt with. Nor, despite their often extensive treatment of other maritime agreements, including the maritime loan and the bottomry loan, did insurance receive a mention in the later medieval codes of maritime law. Although some of them were compiled and added to after the appearance of insurance as an independent commercial contract, the insurance contract was at the time not yet so widely known and generally accepted as to warrant an inclusion in what were essentially compilations of customary maritime law.\textsuperscript{226} Historically, therefore, the marine insurance contract and customary

\textsuperscript{224} See eg Emerigon \textit{Traité des assurances} at xxxviii-xxxix of the translation, suggesting that insurance was treated in art 66 of the Laws Visby; Jadós xiv (insurance is referred to in part II arts 298-334 of the Consulate of the Sea); Malyres \textit{Essay} I.24 (insurance is mentioned in the Laws of Oleron); Park \textit{System} 8 ed lxix (art 66 of the Laws of Visby concerned insurance); Smith \textit{Compendium} Ixxv (art 66 of the Laws of Visby contained the first definite reference to marine (life?) insurance while art 7 of the Laws of Oleron may have anticipated compulsory sickness insurance for seamen).

\textsuperscript{225} See eg Beneke 5; Blackstock 12; Dover 24-25; Faber \textit{'Studien I'} 90-93; Goudsmit \textit{Zeerecht} 6-10, 45, 61-62, 79 and 197; Hendriks 142-145; Reatz \textit{Geschichte} 26; Vance \textit{'History'} 9 and 10; and Witkop 4.

\textsuperscript{226} But it is easily explicable how traces of insurance could be thought to occur in them, and more generally, how insurance law could be linked to the maritime codes. Two examples will suffice.

First, the Consulate of the Sea (an English translation of which was prepared by Jadós; parts of it were translated also in 1809 \textit{American Law Journal and Miscellaneous Repertory} 385-391, 1810 \textit{American Law Journal} and \textit{Miscellaneous Repertory} 1-13, and 1813 \textit{American Law Journal} 299-304). This Code appeared in Barcelona in the thirteenth or the first half of the fourteenth century in the Catalan language. It comprised 334 articles, 252 of which concerned substantive maritime law. By the fifteenth century, the Consulate had gained general acceptance as the maritime common law of the southern part of Europe. It was also translated into Spanish and Italian and later also into German and Dutch (see further eg Goldschmidt \textit{Universalgeschichte} 208-209). The Dutch translation, \textit{Het Consulaat van de Zee}, was by Westerveen and appeared in Leiden in 1704. From the translations of the Consulate no references to marine insurance appear, and in any case not in arts 298-334 as Jadós would have it. The fact that marine insurance was treated in the Barcelona Marine Insurance Ordinances of 1435 and its amendments (see Jadós 287-302 for a translation of the 24 sections of the Barcelona Ordinance of 1484), and that these Ordinances were often appended to various editions of the Consulate, may have caused confusion and lead to the view that marine insurance was one of the topics covered in the Consulate (see Vallebona 29). Roccus \textit{De assecuarationibus} note 80 stated that in the case of insurance and ships, disputes had to be decided according to maritime laws (\textit{'leges maritimas'}) and that the customs of sea (\textit{'maris consuetudines'}) had to be followed, and further that in insurance the style of the Consulate (\textit{'stylus Consulates'}) had to be borne in mind. Feitama's note to this pointed out that there was nothing on insurance in the Consulate of the Sea and that Roccus must be taken to have referred to the Barcelona Ordinances (see too Ingersoll's comments in this regard). It is also possible that Roccus was here referring simply to the style of proceeding in maritime matters as prescribed by the Consulate, a possibility rendered more likely by the fact that in 1655, when Roccus wrote, Naples was under the dominion of Spain and Spanish laws were in force there.

Secondly, reference may be made to the Maritime Laws of Visby. (Visby, or Wisby, was the ancient capital of the island of Gothland in the Baltic Sea.) This Northern European maritime code dates from the early part of the fourteenth century and was subsequently widely received in the various European national maritime laws. It contained no references to the marine insurance contract. Article 66 (or, in some versions, art 67), often said to deal with insurance, was in fact concerned with suretyship. The confusion here may possibly have been the result of inaccurate translations of the article in question. Thus, it is rendered as follows in French (see Pardessus vol III at 114): 'Si le patron est obligé de se
insurance law were not part of the maritime law and customs of the sea.

Despite their disparate origins and the historical separation between maritime and marine insurance customary law, insurance law was nevertheless later very often treated as part of maritime law, a trend also identifiable, although not uniformly so, in the legislative treatment of insurance law in the Netherlands. And even if insurance was not strictly part of maritime law, a close relationship nevertheless existed between them. Both were in fact part of the general law merchant (ius mercatorum) and were in the first instance the products of and initially based upon mercantile customs. And as part of the law merchant, customary insurance law shared the features displayed by customary commercial law generally.

The most important characteristic of the law merchant, and therefore also of the early customary insurance law, was its supranationality and, in consequence, the large measure of uniformity in the insurance customs followed in different centres throughout Europe. Uniformity was a necessity of trade. It was promoted, in insurance in particular as in commercial law generally, in the fourteenth and fifteenth centuries by itinerant Italian merchants who transferred and spread Italian business methods and practices all over Europe. Italian merchants resident outside Italy propagated the use of the insurance technique and the contract itself: they acted as the underwriters of risks on foreign markets and bourses, and, of course, they also insured their own commodities wherever they traded. As a result, Italian methods and practices concerning the insurance of ships and goods and also Italian insurance policy forms had a formative

porter caution dans l'intérêt du navire, l'armateur sera tenu de garantir le patron'. And as follows in Dutch (see Verwer See-rechten 27; and see too his notes at 47-48): 'Waer't sake dat de Schipper soude borge setten voor dat Schip; soo ware de Reeder schuldig borge te setten voor des Schippers lijf'. The English translation in 30 Federal Cases 1189-1195 (1897) rather freely reads: 'If the merchant obliges the master to insure the ship, the merchant shall be obliged to insure the master's life against the hazards of the sea'.

227 See eg the Guidon de la mer, a compilation of customary maritime law, including marine insurance law, which appeared in Rouen in the second half of the sixteenth century. For a transcript, see Pardessus vol II at 377 and vol VI at 495.

228 The placcaaten of 1550 and 1551 concerned mainly maritime affairs but included sections on insurance. The placcaat of 1563 concerned shipping and maritime law and treated insurance in a separate title VII. The placcaaten of 1570 and 1571 concerned insurance alone, as did the Amsterdam, Middelburg and Rotterdam keuren of 1598, 1600 and 1604 respectively. Only in 1721 did the Rotterdam keur again treat insurance and maritime law together, an example not followed in the Amsterdam insurance keur of 1744.

229 See eg Van den Auweele 220; Goldschmidt Universalgescichte 28, who explains that an important part of the principles of commercial law, in Antiquity as well as in the Middle Ages, had its origin in maritime commerce, and that these principles were gradually extended and applied to land-based commerce. In Roman-Dutch law there was, generally speaking, no commercial law distinct and separate from the civil law, and insurance law was simply part of Roman-Dutch private law: see Fisher; Molengraaff Leidraad 1-15; De Smidt Compendium 143-150; contra Lichtenauer 'Handelsrecht'.

230 On the law merchant, see generally eg Endemann 'Handelsrecht'; Lastig; Goldschmidt Universalgescichte passim; and Smith Compendium lxiii-booxxii.
influence on local methods and forms in the main commercial centres throughout Europe. In turn, the influence of the law and customs of the relatively few larger maritime centres with more developed insurance markets on that of smaller, less developed cities, facilitated a subsequent uniform development of European insurance law and contract forms. The standard insurance policy, too, assisted in enhancing uniformity, containing as it did in a permanent and visible form of at least some of those insurance customs.231

Thus, there existed, in the formative years of insurance law and as part of a larger law merchant, a common and customary European marine insurance law.232 And although this uniformity in insurance law and customs gradually disintegrated when different national, regional and municipal legislatures started taking an interest in the insurance contract in general and in some insurance customs in particular, it never disappeared completely. Roman-Dutch insurance law accordingly formed an integral part of a European common insurance law.

In the Netherlands, marine insurance law was until the mid-sixteenth century regulated exclusively by the customary law of merchants which, despite its unwritten form, fulfilled the function later performed by legislation. It provided a certain basis for the conclusion of insurance contracts not only between local merchants but also, significantly, between local and foreign merchants. Despite the unofficial nature of this customary law, the merchants considered themselves bound to it and were in fact held bound to it.

As legislative measures concerning insurance grew in number, scope and importance, first on a national and later in the Northern Netherlands also on a municipal level, the influence of insurance custom gradually receded, but, as will appear from the paragraphs which follow, it never disappeared completely from practice during the era of Roman-Dutch law.233 Even after extensive legislative measures were promulgated on the insurance contract, those customs largely lived on, having either been left alone by the legislation or having been restated without any significant amendment or restriction. But, of course, the legislation did not in all respects leave customary insurance law untouched and especially in those areas where the legislatures perceived abuses and frauds, custom was intentionally abolished and the law amended. In any event, there

231 On the role of the insurance policy in the shaping and spread of insurance customs, see eg Reatz Geschichte 106-107.

232 Reatz Geschichte 10.

233 In English law, the reign of customary insurance law continued even longer, albeit as in the eighteenth century modified by the Common Law under the guidance of Lord Mansfield. There codification on the scale which occurred in the Netherlands already by the beginning of the seventeenth century, only took place two centuries later when the customary insurance law was finally overrun by legislation in the form of the Marine Insurance Act of 1906. See Dover 46. Even after 1906, the subsidiary role (at least in theory) of customary insurance law was still recognised in s 91(2) of that Act which provides that "[t]he rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance'. See further eg Chalmers 139 142 and Cohen 'Law' 29.
was a clear and important link between insurance legislation and insurance custom in Roman-Dutch law. It will be described in more detail below.

But there was also a symbiotic relationship between the insurance contract and insurance custom. In the absence of legislative measures and, initially, of a fixed and detailed subsidiary customary insurance law, the written insurance contract between parties played a crucial role in shaping the emerging insurance law. The legal relationship between parties was then primarily governed by the terms of their contract. The recurrent use of the same policy forms, for sake of convenience if nothing else, hardened this ‘party law’ into fixed and acceptable commercial customs which, in the course of time, came to be recognised and enforced as law. The marine insurance policy was thus not merely a record of the legal relationship between the parties to the contract it embodied, but also the source and, because of its form, the bearer of an emerging body of marine insurance customs. As insurance law became more complex, and in the absence of legislative intervention, parties increasingly relied on the ‘creation’ of marine insurance law in their contracts. Insurance contracts provided for the legal position of the parties in more and more detail and left less and less to be governed by and determined with reference to often uncertain and disputed commercial customs.\(^{234}\) The relationship in Roman-Dutch law between the insurance contract and insurance custom will also be considered in more detail shortly.

The influence of insurance custom was noticeable also in another source of Roman-Dutch insurance law, namely in judicial decisions. The specialist insurance courts in particular, but also Dutch courts generally, were aware of and receptive to commercial custom. Special rules existed for the proof of such custom. And it was recognised not only as the source of new insurance law, but also as having the capacity, in appropriate circumstances, of abolishing existing law, whether that existed in the form of legislation or otherwise. In the insurance context there are vivid illustrations of the constitutive as well as the abrogatory functions of mercantile custom. This important role of custom will also be treated in more detail below.

4.2 Custom and the Legislature

4.2.1 The Divergence Between Insurance Practice and Theory

Legislative measures concerned with insurance reacted in one of two ways to the underlying customs governing insurance law. Firstly, in the majority of instances they confirmed, and in the process thus fixed, existing rules of customary insurance law.\(^{235}\) This also explains why there was such a marked correspondence between the insurance laws of various places, not only in the Netherlands itself but also elsewhere in

\(^{234}\) An indication of the formative role of the insurance policy is provided by Molloy *De jure maritimo* II.7.7 who noted in the latter part of the seventeenth century that ‘[t]he Policies now adays are so large, that almost all those curious Questions that former Ages and the Civillians according to the Law Marine, nay and the Common Lawyers too, have controverted, are now out of debate’.

\(^{235}\) As to this declaratory and compilatory function of insurance legislation, see eg Koch ‘Kodificationen’ 300-301 and Mossner 62.
Europe: they were all based on largely identical customs. But in other instances legislation ignored such rules of customary law and in fact abolished them by laying down a contrary or at least an incompatible rule of insurance law. In those respects the insurance laws of different places often diverged.

Understandably, in those instances where legislation overruled custom, merchants often ignored the legislative prescripts and continued to adhere to their own customs. As a result a chasm developed between strict and theoretical law, as contained in the formal legislation, and practical law, as represented by the mercantile custom followed in the market-place.236 Not infrequently the position as it appears from statutory measures simply did not reflect what in fact happened in practice.

Proof of the divergence of formal law on the one hand and practice and custom on the other hand is not hard to find. It is clear from the preambles to the various pieces of insurance legislation passed at various times in the Netherlands that they were on many points badly obeyed.237 Many promulgations were no more than restatements of what had been passed before with, often, stricter penalties for non-compliance. The repeated amendments to and amplifications of legislative provisions tend to show the extent to which they continued to be ignored in practice. There was a remarkable conflict too between the content of the policies officially prescribed by the various statutes and that of the policies used in practice.238 Proof of the gap between theory and practice appears also from the evidence given in insurance cases by expert merchant witnesses, evidence which at times deviated radically from the formal principles of law expounded in legislation and regurgitated by the learned lawyers.239

The reasons for the divergence are similarly not hard to come by.240 Italian, and later European, insurance customs were practical, flexible and a creation of the merchants themselves. In principle the parties to the insurance contract were granted freedom of contract and could regulate their relationship as they saw fit without any interference or limitation. This very flexibility and freedom was perceived by the authorities to give rise to many abuses and to frauds being perpetrated under the guise of insurance contracts. Not that the authorities were always primarily concerned about the frauds being committed by the parties upon one another. They were, at least at first, often more concerned, for example, with the effect on national security of losses of

---

236 On the disparity between theory and practice in Roman-Dutch law generally in the first half of the eighteenth century, see Van Apeldoorn 'Theorie en praktijk'. This divide was reflected also in the approach of the theoretical and the pragmatical lawyers. Only towards the end of the eighteenth century, for example, did Roman-Dutch lawyers take a more serious view of commercial law generally and topics such as insurance law specifically. See eg Lichtenauer Geschiedenis 64, 68 and 73-74. On the conflict in England between law and custom, also in insurance matters, see Hopkins 428-463, especially at 438-442.

237 See Dorhout Mees Schadeverzekeringsrecht 21-23.

238 See eg Den Dooren de Jong 'Lombard Street'; idem 'Practijk' 9-12; and Sneller 106.

239 See eg the merchants' evidence reproduced in Barels Advysen vol I adv 25 (1719); see further § 4.4 infra.

240 See generally eg IJzerman & Den Dooren de Jong 225-226; Den Dooren de Jong 'Practijk' 11; and Kracht 11-12.
insured ships caused by the failure of their insured owners to take proper precautions to prevent such losses. Insurance, it was thought, gave owners a false sense of security and caused them to act carelessly. The solution was to limit the extent to which insurance could be provided, and if such compulsory under-insurance did not work, to prohibit insurance totally, as in fact happened in the Netherlands in 1569.\footnote{For details on the prohibition on the provision of insurance cover in the Netherlands by the \textit{placcaat} of 31 March 1569, see eg Goudsmit \textit{Zeerrecht} 251-256; Ter Gouw vol VI at 336; De Groote \textit{Zeeassurantie} 37; \textit{idem} 'Zeeverzekering' 209-210; Kracht 21-24; and Reatz 'Ordonnances' 74-80.} Of course, legislative intervention to this extent was exceptional, but other less drastic statutory measures which sought to abolish existing customs were no less ignored as they attempted to restrict the merchants' freedom of contract. Often promulgated without any prior consultation with the local merchant community, with little regard to the practical consequences involved, and inevitably lagging behind a more rapidly evolving insurance practice, it is no wonder that insurance legislation was so frequently ineffective. In the sixteenth century there was also a further dimension in the Netherlands. Legislation was passed by an unpopular Spanish Government after the example of Spanish insurance laws, and the different morality which infused the latter did little to make the measures more acceptable to Dutch merchants and insurers. But even after the Spanish rule ended and legislation was promulgated by local authorities, little changed, at least initially, with the main tenets of Spanish-influenced insurance legislation being retained and on certain matters only gradually being watered down and phased out in the Northern Provinces.\footnote{In the South matters became even worse and insurance custom resurged and became even more important as the \textit{placcaat} of 1571, which until codification in the nineteenth century was never periodically updated or replaced as in the North, became increasingly out of date. See further Couvreur 'Zeeverzekeringspraktijk' 188.} This process, it is hoped, will become apparent when those areas of substantive insurance law which were particularly prone to legislative overreach are considered in greater detail.

For present purposes, though, the disparity between formal insurance law and practical insurance custom had two important consequences. Firstly, it compelled the parties to contract out of the applicable legislation by choosing another legal regime to govern their insurance contract. This they initially almost invariably did by choosing the insurance customs of a particular foreign place. And secondly, the continued adherence to contrary custom, on occasion, had an impact on existing law and legislation, an impact which, in a number of instances, caused the courts to give preference to that custom over the formal law. Both these matters will be considered shortly, but first some other aspects of the interaction of custom and legislation must briefly be investigated.

### 4.2.2 Legislative Recognition of Insurance Custom

The legislatures in the Netherlands were themselves not unaware of the fundamental role of insurance custom. Insurance laws often contained references to insurance customs generally, usually to indicate the source from whence gaps in the
legislation itself had to be filled. They also often abolished generally all or specifically certain customs contrary to the legislation.

A good example of the early role of custom in insurance legislation is provided by the first relatively comprehensive legislative regulation of insurance law in the Netherlands, namely title VII of the *placcaat* of 1563. It contained the first official recognition of customary law as a subsidiary source of insurance law, an official recognition which strengthened the importance of insurance customs and, more specifically, which introduced the insurance customs of Antwerp as the norm for insurance law in the Netherlands, at least until the end of the sixteenth century. Section 2 provided that in future all insurances of goods were to be made according to the customs of the Antwerp Bourse and according to the policy form prescribed by the *placcaat* ('naer costuyme vander Borse van Antwerpen ende teneur oft substantie van der police van assurantie hier naer volgende'). The policy form prescribed by s 34, contained a clause stating that it provided insurance cover in accordance with the *placcaat* and the usages and customs of the Antwerp Bourse ('naer de gewoonte ende costuyme vander Borse van Antwerpen'). Section 20 provided generally that if anything had been omitted by the *placcaat* or the prescribed policy, it was to be determined in accordance with the common written law ('naer gemeene geschreven Rechteri) and further that all contrary customs were to be considered abolished by the *placcaat* ('deroguerende alle costuymen ende Usantien ter contrarien'). Other references to insurance customs also occur in the *placcaat* of 1563.

Clearly, then, the legislature considered the *placcaat* as being based on and additional to existing non-contrary customs. It recognised custom as the underlying source of insurance law and also, because of that recognition, expressly abolished only all contrary customs. The customs specifically referred to here, were those followed by merchants and insurers in Antwerp and on its Bourse which was established in 1540. These customs were, it would appear, unwritten at the time, the first written compilation of Antwerp customary law in which insurance featured only appearing in 1582.

The insurance *placcaat* of 1571, having been promulgated after consultation with the Antwerp merchants who had complained about the earlier provisional *placcaat* of 1570, contained fewer references to insurance customs. Only in the policy prescribed in s 35 was there a concise reference to the fact that insurers were bound in accordance with the *placcaat* itself and with the usages and customs followed in

---

243 See generally eg Hammacher 45; Kracht 17; Mullens 25; and Plass 29.

244 Section 4 contained a prohibition on the insurance of goods already at risk and one on insurance against barratry, and abolished all customs to the contrary ('[a] bolerende ende te niet doende alle Usantien ende Costuymen ter contrarien'); ss 5 referred to the customs on the Antwerp Bourse in respect of missing ships; and ss 14 and 15 both mentioned the 'ouder costuyme' in respect of the entitlement of insurers to one-half per cent of the premium in the case of over-insurance.

245 See eg Goudsmit Zeerecht 242-243; Jolles 55 and further § 4.2.3 infra as to the process of homologation.

246 For the relatively minor differences between the two *placcaaten*, see eg De Groote Zeeassurantie 38-44 and Kracht 26-28.
Antwerp which were not contrary to the placcaat ("der Usantie ende Costuyme vander Borse van Antwerpen, der selver Ordonnantien niet contrariertende").

This trend continued, and in the Amsterdam insurance keur of 1598, and for reasons unconnected with the fact that by that time custom was no longer the most important subsidiary source of insurance law, there was no reference any longer in the keur itself or in its prescribed policies to either the Antwerp insurance customs specifically or to insurance customs generally. In the policies, which had to be and were stated to be in accordance with the keur, the parties merely submitted to the law, usages and jurisdiction ("t recht, ghebruyck ende de judicature") of the local Chamber of Insurance which was itself by s 32 instructed to determine disputes in accordance with the keur, no mention being made of any insurance customs.

Political changes as well as the decline of the Antwerp insurance market had by the end of the sixteenth century made any reference to the insurance customs of that city unacceptable in Amsterdam or any of the other cities in the Northern Provinces. But clearly, too, the legislative measures had become so encompassing that a reference to the decreasingly important customary insurance law was no longer considered necessary. But that the unwritten customary law remained a subsidiary source of insurance law was implicit, even if it was no longer pertinently recognised as such in insurance legislation.

4.2.3 The Compilation of Customary Insurance Law in Antwerp

Just as the legislative restatement of certain insurance customs had rendered them certain and fixed, so too the process of compilation and homologation of customary law sought to create legal certainty by reducing previously unwritten customary law to writing.

In an attempt at greater centralisation, Charles V in 1531 gave instructions to municipal governments in the Netherlands to embark upon the official and systematic writing down of customary law. Such compilation would, it was hoped, eliminate the legal uncertainty inherent in the application of law in that form and would also create greater uniformity. Instructions were given as to how this was to be done, from the first recording by the local authority until the homologation or official sanctioning of the compilation by the Government which would by decree affirm and announce the text, in so doing conferring on it the force of law. But the local structures in the Netherlands were opposed to these attempts and the relevant instructions to them had to be repeated in 1532 and 1540, while in 1546 (twice) and 1548 letters were specifically dispatched to the Antwerp city magistrate ordering compliance. When Philip II, son of Charles V, sent the Duke of Alva as his envoy to the Netherlands in 1568, the latter also issued a similar instruction in Holland. As a result of opposition to the Spanish crown, compliance, if any, was tardy and the attempts at homologation generally unsuccessful.

247 On the process of compilation and homologation of customary law generally, and that of Antwerp in particular, see eg Asser 'Bills of Exchange' 106; Gillissen Inleiding 282; Gotzen; De Groote Zeeassurantie 59-65; Molengraaff Leidraad 13; and Mullens 28-29.
Specifically with regard to insurance, three compilations and recordings of Antwerp local customary law (Costumen) are of importance, also, as will be shown shortly, for Roman-Dutch insurance law. The first version or edition of customs submitted by the Antwerp magistrate, the Antiquissimae of 1547, contained nothing on insurance in particular or on commercial law in general.

In 1570 Philip II again ordered an amended recording of customs to be submitted, and Antwerp compiled in the same year with a compilation known as the Anti­quae. Insurance customs were mentioned in twelve unnumbered articles in title XXIX.248

In 1578 the Antwerp authorities decided to revise these Costumen and a new compilation, called the Impressae, appeared in 1582 in print under the title Rechten ende costumen van Antwerpen. It dealt in title LIV with insurance (arts 1-16) and with gaming and wagering (arts 17-21).249

In 1592 the authorities ordered yet another revision of the Antwerp Costumen. This was completed and forwarded to the Raad van Brabant only in 1608. Known as the Compilatae, this version was homologised by the Raad in 1609, the only version of the customary law of Antwerp ever to be elevated to official law in this way. The compilation contained an extensive code of commercial law. Insurance was treated in title XI in 323 articles, with bottomry occupying a further 65 and average another 92 articles.

Although only the Compilatae of 1609 were ever authenticated and officially sanctioned by the central government in Brussels, these compilations are nevertheless important in that they at least provide prima facie evidence of the insurance customs being followed in Antwerp at the time. In contemporary practice, too, great value was attached to the compilations of 1582 and 1609. Although the Impressae of 1582 lacked homologation, it paradoxically remained the most authoritative and best known of all the customary codes, not only in the Spanish Netherlands,250 but also in the Northern

---

248 See De Longe vol I at 598-400. Some of the customs recorded were apparently in conflict with and had in fact been abolished by the then existing official insurance law as contained in the placcaat of 1563. It is probable, according to Goudsmit Zeerecht 242-243, that the Antwerp Government did not merely record what remained applicable as custom at the time but relied on a written but unofficial compilation of customs dating from before 1563.

249 See De Longe vol II at 400-407. Verswyvel 'Extrait' 10-13 has a reproduction of the conditions of insurance on the Antwerp bourse in 1582 under the title 'Acte de 1582, stipulant les conditions auxquelles les assurances peuvent etre souscrites, conformément aux us et coutumes de la Bourse d'Anvers'.

250 The insurance provisions of the Impressae were in practice appended to the placcaat of 1571 and enjoyed preferential status. This appears from an Antwerp case of 1621, JA Balbi v Goyvaerszoon vanden Graeff, in which a report, presumably by the municipal recorder, declared that in many provisions the placcaat was no longer observed, 'sijnde d'ordonnante vande Jaere 1571 in verscheyde poincten gevallen in ongebruyck'. Although the policy in this case in a number of respects deviated from the placcaat and was therefore strictly null and void, the Court nevertheless brought out a provisional sentence in favour of the insured claimant. It made no reference to the Compilatae of 1609 but only to the earlier Impressae. See further on this case Couvreur 'Zeeverzekeringspractijk' 188-190.
Provinces and in Amsterdam in particular. The Antwerp customs had a great formative influence in numerous areas of commercial law, including insurance law, where there had been little local development. This was the case not only for Amsterdam law and customs but for Roman-Dutch law generally. References to title LIV of the Impressae of 1582 occur frequently until the end of the eighteenth century in the works of Roman-Dutch writers on the insurance contract as well as in the opinions of practitioners and in judicial decisions.

In those parts of these Antwerp compilations of customary law which dealt with insurance, reference was made also to customs and usages. Article 1 of title XXIX of the Antiquae of 1570 referred to the conclusion of insurance contracts according to ancient customs ('naer costuyme hier van allen ouden tyden geobserveert'). And art 1 of title LIV of the Impressae of 1582 spoke of insurance contracts being concluded and adjudicated upon according to local customs and usages ('men is nae de costume ende usantie deser stad gewoonlijk contracten van asseurantien oft verserekeringen op

251 There were a number of reasons for its influence there. The Impressae of 1582 was the only of the compilations to exist in a contemporary published edition; it was written in Flemish; it was completed in the period of Protestant Government in Antwerp (1578-1585); subsequent editions were published in Amsterdam in 1597 and 1613; and it was introduced and no doubt popularised in the Northern Provinces by Antwerp merchants who settled there after the fall of Antwerp in 1585. See further Rich & Wilson CEHE V 336.

252 One pertinent example of the influence of the Antwerp Costumen was on the Roman-Dutch law pertaining to bills of exchange. Grotius' chapter on bills of exchange in his Inleidinge III.13, was largely based on title LV of the Antwerp Costumen (see eg Fockema Andreae Aanteekeningen vol II at 264). In a merchants' opinion of 17 March 1663 (referred to by idem), it was noted that in Amsterdam in matters of bills of exchange 'ordinaris ... de gedrukte costumen van Antwerpen' were followed. See also further Ter Gouw vol V at 423 and Rich & Wilson CEHE V 324. In 1638, in a decision by the Hof van Holland in an insolvency matter, the Antwerp law was expressly recognised as valid ('deselve coustume in Patria Nostra en andere landen, daar de negotie en koopmanschap vigeeren, zijn gerecipieerd'); see Loenius/Boel Decisien casus 98.

253 Although in Amsterdam there were no codification or attempts at the homologation of municipal law as in Antwerp, various editions of Amsterdam statutory measures (Keur en Privilegeboeken) appeared in which the various keuren and handvesten were chronologically arranged (see generally on what follows, Oldewelt 64-67 and 70-71). In them the Antwerp influence was noticeable. In the oldest edition of these Handvesten (1597), there is also to be found 'zekere extracten uyt den custuymen van Handwerpen nopende den asseurantien ende wisselbrieven'. This is in fact the first visible trace of the influence of the Antwerp Costumen on Roman-Dutch insurance law. Another edition of Keurboeken, which appeared in 1639 from the printer Jacob Pietersz Wachter, had added to it, amongst other materials, the Maritime Laws of Wisby, those of the Hanse Towns and of Charles V and Philip II (ie, the placcaaten of 1551 and 1563), and 'een tractaet van Avarije'. Also appended to it was 'De rechten ende costumen van Antwerpen'. The latter inclusion was justified in the preface of the collection where it was noted that 'om derselver gebruik in zake van koophandel als hebbende geen minder autoriteit bij ons als ons eigen landrecht en dezer stede costumen'. More important, generally, was the collection of Rooseboom. Systematic arrangements of the contents of the Amsterdam Keurboeken appeared in a number of works by Amsterdam city secretaries, including that of Gerard Rooseboom which appeared in 1644 as Recueil van verscheyde keuren en costumen, Mitsgaders maniere van procederen in civiele en criminele zaken binnen de stad Amsterdam. The system he followed was that of the Antwerp Impressae. Another important later edition of the Handvesten was that of Noordkerk (1748) and its two published Vervolgen (1755, 1778).
4.3 Custom and the Insurance Contract

4.3.1 Choice of Customs Clauses in Insurance Policies in the Netherlands

Just as official policies, prescribed by insurance legislation in the Netherlands, contained references to the applicable customs, so too did policies drawn up by the parties themselves. Some of them merely referred to and made applicable the local customs of the place where the insurance contract was concluded, somewhat superfluously so, given that the law of that place, including its customs, would have applied even in the absence of such a stipulation. More interesting, other policies referred to the customs of a place other than the one where the contract was concluded as governing the contract, thus in effect amounting to a choice of foreign law.

There are many examples of such clauses in policies concluded in the Netherlands, and those concluded before the end of the sixteenth century are particularly interesting. After that time contracting out of the provisions of the applicable insurance legislation, and also excluding the jurisdiction of the local Chamber, continued, although no longer by way of a choice of foreign law or customs clause. It can only be surmised why a different method was adopted to achieve essentially the same result, but it may be that the reduced influence of insurance customs played some role. Also, in subsequent decades the insurance customs of some foreign cities may, for political and other reasons, have become less appropriate and relevant to Dutch merchants and their insurers.

In the oldest extant insurance policy concluded in the Netherlands, one underwritten in Antwerp and Bruges in 1531 on the ship and cargo of the Hamburg
merchant Remlinckraede, the contract was stated to be governed by ‘dem Seerechte, Vsantie vnde Costume der Stadt Lunden yn Engelandt’. Other Antwerp policies in use prior to the promulgation of the placcaat of 1563 also contained references to the insurance customs followed in London, on occasion in conjunction with a reference to the customs pertaining on the Antwerp Bourse.

References to the insurance customs of London continued after the promulgation of the placcaat of 1563. Thus, a policy concluded in Antwerp in April 1566 commenced with following clause: ‘Au nom de Dieu amen. A l’usance et coutume de la Strade Lombarde de Londres et de ceste bourse d’Anvers, nous les soubssignez assureurs’. And this only three years after the placcaat of 1563 had prescribed that insurances concluded in Antwerp should be governed by the placcaat itself and further by the customs followed on the Antwerp Bourse.

Another Antwerp policy, drafted in Spanish in 1567 and insuring goods on a ship bound for Cadiz in Spain, referred to the customs followed on bourses of London and Antwerp.

After the placcaat of 1571 was passed, there appears to be no evidence of further references to foreign insurance customs in Antwerp policies. Like the policies prescribed by that placcaat, references, if any, were only to local customs. In the oldest extant policy concluded in Amsterdam in 1592 on the cargo of Daniel van der Meulen, though, the contract was concluded with reference to ‘d’usantiën ende coustumen van der straten van Lonnen ende de borse van Antwerpen’. This policy was in a printed form largely corresponding with that prescribed by the placcaat of 1571, which at that time still applied in Amsterdam, but the reference to the London and Antwerp customs was added in writing. The earliest extant policy concluded in Ham-

---

260 As to the policy of 1531, see eg Hofmeister; Klesselbach 6; and Plass 41-42. The policy is reproduced in Appendix 17 infra. For further information on the colourful Remlinckraede who subsequently turned pirate, see eg Von Bippen; Ebel ‘Remlinckrade’; Hofmeister; Plass 42-45; and Prüser.

261 Thus, two policies from 1535 and another from 1540 referred to ‘la forme et maniere des assurances’ customary on the streets and Bourse of London; and a policy from 1557 referred to the ‘usances et coutumes de l’estrade de Londres et de ceste bourse d’Anvers’.

262 This was the first reference specifically to Lombard Street in a policy drafted outside England. As Den Dooren de Jong ‘Lombard Street’ points out, certain provisions in this policy deviated from the provisions of the placcaat of 1563 and accorded with London insurance practices and customs. It is not absolutely certain but at least highly probable that the points on which the policy contravened the placcaat were at the same time the points on which it agreed with London customs. As to the latter and Lombard Street, see further § 4.3.2 infra.

263 See further Ijzerman & Den Dooren de Jong 226 and Krans 21. Interestingly enough, in the policy prescribed by the Insurance Ordinances (Hordenanzas) for Spanish merchants resident in Bruges in 1569, reference was made to ‘a l’usance et coutume de l’estrade lombarde de Londres, bourses d’Anvers et Bruges’ (see further Verlinden ‘Zeeverzekeringen’ 201-202).

264 As to this insurance contract, see generally Ijzerman & Den Dooren de Jong and Sneller. It is reproduced in Appendix 19 infra.

265 The reference to Antwerp customs, also contained in the prescribed form, was not strange, Amsterdam customs, such as they were at the time largely following those of Antwerp (see again § 4.2.3 supra and also Sneller 118).
burg dates from 1590. It was in Dutch and, like those in use there at the end of the sixteenth and during the seventeenth centuries, largely corresponded to the policies concluded at that time in the Netherlands. The one notable exception was that it contained no reference to the *placcaat* of 1571 but simply stated that it ‘Achtervolgende de forme ende naar Costuyme van de Börse van Antwerpen, onder welchen wy ons sumiteren’.

4.3.2 The Insurance Customs of London: Lombard Street and the Royal Exchange

Insurance policies concluded in London in the latter half of the sixteenth century generally referred only to local customs. In the ‘Broke’ policy of 1547 it was stated that ‘it is to be understoode that this praesente writinge hathe as muche forse as the best made or dicted bill of surance which is used to be made in this Lombarde Streete of London’. In the ‘Cavalchant’ policy of 1548, the following appeared: ‘And the assurers be content that this wrytinge be of as muche forse and strength as the best that ever was made or myghte be made in this Lombard strete of London’. Similarly, in the oldest extant life policy concluded in England, one on the life of William Gibbons from 1583, the contract was stated to have been concluded ‘according to the customs and usage of Lombard Street and the Riall Exchange’. References to Lombard Street and/or the Royal Exchange remained the norm in English policies also after the sixteenth century.

There were but a few exceptions. In the ‘De Salizar’ policy of 1555, there was a reference also to the customs on the Antwerp Bourse (‘And we will that this assurans shall be so stronge and good as the most ample writinge of assurans whiche is used to be maid in the strete of London or in the burse of Antwerp or in any other forme that shulde have more force’). This policy was drawn up in London by a Spanish broker in favour of an Antwerp insured, which may explain the reference to Antwerp. And in a London policy of 1565 in which the Antwerp merchant Pieter de Moucheron insured three ships, the insurance was stated to be ‘after the use of this Street of London and of the bourse of Antwerp’.

266 On this aspect of Hamburg insurance law and the relevance there of Antwerp ‘Börsenrecht’, see further eg Hasselmann 450; Klesselbach 110; Knittel; Koch ‘Ansätze’ 381; and Seffen 40. Despite the initial high regard in Hamburg for Antwerp insurance customs, its *Assecuranz-Ordnung* of 1731 ultimately expressly prohibited parties from submitting to the customs on the Antwerp Bourse. See eg Dreyer 117.

267 For the examples which follow, see eg Blackstock 12; Clayton 30; Den Dooren de Jong ‘Lombard Street’ 18; Holdsworth *History* vol VIII at 283-284; Jones ‘Elizabethan Marine Insurance’ 55; Raynes (1 ed) 31, 33 and 38; and idem (2 ed) 28-29 and 30-31.

268 Thus, in 1779, when the form of the Lloyd’s SG policy, for all purposes identical to the form of marine policy used in England at least since the beginning of the seventeenth century, was formally fixed, it retained these references. See further Wright & Fayle Lloyd’s 126-152. This policy is reproduced in Appendix 47 *infra*. In the policy appended to the Marine Insurance Act of 1906, the following reference survived: ‘And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London’.
The references in English and in Antwerp policies to Lombard Street and the Royal Exchange in London require a brief explanation. Lombard Street was close to the place where the first London Bourse, the Royal Exchange, was opened in 1571. Also located in that area at the time were the residences of Italian merchant-bankers or Lombards,\(^{269}\) some of whom were also lombards or pawnbrokers.\(^{270}\) Together with the German merchants active in the city under the aegis of the Hanseatic League,\(^{271}\) they were the principal capitalist entrepreneurs in London in Elizabethan times. It is generally accepted, also, that they introduced marine insurance practices there. Accordingly, the customary law of marine insurance followed in London came to be referred to as the customs of Lombard Street. By the end of the sixteenth century, insurance transactions in London were no longer only or mainly concluded in Lombard Street and by foreign merchants.\(^{272}\) Insurances were then written on the Royal Exchange and the business had to larger extent come into English hands.\(^{273}\) Lombard Street resurged in the insurance field at the end of the seventeenth century when, in 1691, Edward Lloyd moved his Coffee House there, but it again lost that direct link with insurance when, in 1769, marine underwriters broke away and re-established themselves first in Pope’s Head Alley and later, in 1774, in the rebuilt\(^{274}\) Royal Exchange.\(^{275}\)

As far as the content and nature of the customary insurance law followed in London in the sixteenth century were concerned, many aspects remain uncertain.\(^{276}\) It is probable that, at least by the mid-sixteenth century, largely common principles of customary insurance law applied in both London and Antwerp, and probably in other maritime and insurance centres in Western Europe as well. In any case, from the indiscriminate references in some Antwerp insurance policies to the customs of both these cities it appears that there were no discrepancies or at least none perceived to be

\(^{269}\) That is, merchants from Northern Italian cities such as Genoa, Venice, Florence, Pisa and not necessarily from the Lombardy region only.

\(^{270}\) For the meaning of Lombards and lombards, see eg Nelli 'England' 84 and De Roover 'Money, Banking, and Credit' 65.

\(^{271}\) See further generally Ehrenberg Hamburg.

\(^{272}\) During that time the Lombards in London were ousted by the Hanseatic merchants and they were in turn banned from England by Queen Elizabeth in February 1597, thus ending the foreign monopoly in London of, amongst other activities, marine insurance (see also Owen 404).

\(^{273}\) In Candler’s patent of 1575 for the establishment of an Insurance Office in London (see again § 1.7 supra), reference was made to ‘the auncient custome of merchantautes in Lombard Strete’ and also to the fact that marine insurance was previously conducted in Lombard Street ‘and nowe in the Royall Exchange’.

\(^{274}\) The first building having been destroyed by the Great Fire of London in 1666.

\(^{275}\) References to Lombard Street after the sixteenth century therefore no longer had the same meaning as before. See further Malynes Consuetudo I.24 and Wright & Fayle Lloyd’s 136-137.

\(^{276}\) See generally eg Jones 'Elizabethan Marine Insurance’ 56; Raynes (1 ed) 19-20 and 161; and idem (2 ed) 36 and 156.
major. A contemporary allegation in an English case in 1562 would tend to confirm the
similarity between London and Antwerp insurance customs. It is also not unlikely that
the relocation of London insurance activities from Lombard Street to the Royal
Exchange and the transfer of the market from Italian to English control may, from the
end of the sixteenth century onwards, have resulted in a gradual severance of any
close correspondence with Antwerp law and customs and in changes in certain local
usages and practices.

The insurance customs followed in London in the sixteenth century were, as far
as is known, unwritten. At least no official recording of them is known to have been
published. But attempts were made between 1574-1577 to have them written down, possibly even after the example of Antwerp which, at that time, not only had a fairly
comprehensive insurance statute in the form of the placcaat of 1571 but also a compil-
ation of customary law which included at least some of the Antwerp insurance
customs. At that time a set of 126 draft ‘Orders’ was prepared by a commission of
London merchants, appointed by the Lord Mayor of London on the instructions of the
Privy Council, to codify the no doubt uncertain customary rules and procedures which
governed marine insurance contracts on the Royal Exchange. The attempt, it seems,
ever proceeded further than the draft stage. Evidence of it exists as archival material in
the form of an undated handwritten manuscript entitled A Booke of Orders of
Assurances within the Royall Exchange, London. It is possible that the London draft
Orders were compiled in part by, or with the assistance of, foreign merchants and that
they were based to some extent on then recent developments in Antwerp. In order 87,
at least, Antwerp was mentioned as one of the places where insurances were com-
monly concluded. But only further investigation and analysis of the London Orders, and
a comparison with their Antwerp counterparts, will determine the extent to which these
Orders followed the provisions of the Antwerp placcaat of 1571 and corresponded with
the customs applicable there, and also whether they in fact reflected the insurance
customs then actually followed in London itself.

277 The allegation, in Admiralty pleadings in case of Ridolphye v Nunez (1562), mentioned that ‘[t]he use
and custome of makynge bylls of assuraunce in the place commonly called Lumbard Strete of London,
and likewyse in the Burse of Antwerpe, is and tyme out of mynde hath been emongst merchants usinge
and frequentinge the sayde severall places, and assuraunces used and observed, that ...’ (and then
followed the statement of the particular custom in question). See Holdsworth History vol VIII at 283-284;
Raynes (1 ed) 27-28; and idem (2 ed) 24-25.

278 See further Holdsworth History vol V at 136 and vol VIII at 284; Jones ‘Elizabethan Marine Insurance’

279 British Museum, Harleian MS 5103, fols 158-185.

280 There was at least one further unsuccessful attempt to codify English marine insurance law in the
eighteenth century. In 1748 a committee of the House of Commons considered a series of ordinances for
marine insurance, but the matter came to nothing. See John ‘London Assurance’ 139. Apart from
piecemeal legislative interventions, mainly in the eighteenth century, English marine insurance law and
customs remained unwritten and uncodified until the Marine Insurance Act was passed in 1906.
4.3.3 Possible Reasons for the Choice of Foreign Customs

There are many possible reasons why the parties concluding an insurance contract in the Netherlands in the sixteenth century would have chosen the customs of a foreign city to govern their contract, and why, in so doing, they would have contracted out of the insurance laws and customs of the place where they concluded the contract.

It has been suggested, albeit not very convincingly, that the choice of foreign law and customs occurring in Antwerp policies may have been prompted by the absence of any written local customs.\(^{281}\) But this would not satisfactorily explain the references to the insurance customs of London which, it would appear, were likewise also not recorded, and would in any event not explain the choices of foreign customs in policies concluded after the first compilations of insurance customs in Antwerp in 1570.

Another possible reason may be that foreign customs were chosen and referred to in order to accommodate foreign parties to the insurance contract, not only a foreign insured but also local insurers of foreign extraction.\(^{282}\) This may have been the case, but given that the earliest insurance contracts concluded in the Netherlands were inevitably concluded by foreigners, most often Italian, Spanish or Portuguese merchants, the references to London rather than to Naples, Florence, Barcelona, Burgos or Lisbon, nevertheless seem strange.\(^{283}\)

Yet another possibility is that parties chose to refer to a place where, because of age and size of its insurance market, the insurance customs were more settled. This may have been true of the references in Hamburg policies to the customs in Antwerp, but whether it can be said also of the references in Antwerp policies to London is less clear-cut.\(^{284}\)

\(^{281}\) See eg Schuddebeurs 'Oudste polissen' 205, referring to the Antwerp policy of 1531, and suggesting that the reference to London was because the Antwerp insurance customs were not then yet recorded.

\(^{282}\) This may have been the underlying reason for the references to Antwerp in the London policies of 1555 and 1565 referred to above. This possibility was mentioned by eg Walford *Cyclopaedia* vol I at 172 sv 'Antwerp', who suggested that the references to Antwerp may also have been because of the possibility that insurance was introduced into London by Lombards from Antwerp.

\(^{283}\) It could be, though, that the early reference specifically to Lombard Street rather than simply to London was intended as a reference to the customs followed by the Italians there. Foreign (including Italian) merchants active in insurance on the Antwerp Bourse simply referred to the insurance practices followed by other Italians abroad, and the Lombards in London were the best known example at the time. Thus, referring to Lombard Street may just have been a convenient and generally understood way of referring to Italian insurance customs.

\(^{284}\) According to Den Dooren de Jong 'Lombard Street' 14, the reference in the London policy of 1555 to London and Antwerp is explicable because the practice of insurance in Flanders was then much older than that in London. Because insurance was introduced in London from Italy and Spain via Antwerp, that reference merely reflected the origin of English Insurance law and customs. If it is accepted that this assumption is correct, it would mean, of course, that the references to the (younger) London customs in the Antwerp policies cannot be explained on this basis. But other sources assume the reverse, and if they are correct that London is the older insurance market, that could at least in part explain the references to the (older) London customs in the Antwerp policies. For support for the view that insurance was in fact introduced from London to Antwerp and that London was therefore the older insurance market, see eg Sneller 111-113 (Italian merchants were active in...
The most convincing explanation, in my view, is that parties referred to and chose as applicable to their contract the less restrictive law and customs of another place. Thus, parties in Antwerp, where the first legislation on insurance matters already appeared in 1459\textsuperscript{285} and where increasingly irksome and impractical measures were passed and penalties imposed in the course of the sixteenth century, may well have looked to places where there had been less or, as in the case of London, no legislative interference with the common customary insurance law. The insurance law in London, being unadulterated customary law, may just have been preferable for local merchants and insurers in the Netherlands to the restrictive insurance laws introduced by their Spanish rulers. Put differently, the parties in effect wanted their contracts to be governed by Antwerp insurance customs as they were before legislation had, formally at least, abolished and altered them, and to achieve this without appearing to be in conflict with that legislation, they simply made applicable the presumably largely similar if not identical insurance customs applicable in London.\textsuperscript{286} There are in fact a number of points on which the earlier Antwerp customs, and presumably also those of London, could, from a practical point of view, have been more favourable that the formal insurance law in Antwerp.\textsuperscript{287} And the authorities too appear to have realised that that was the aim with such choice of foreign customs clauses.\textsuperscript{288}

\textit{London long before Antwerp became an important trading centre, which is why, where both were referred to in insurance policies, London was invariably mentioned first); and Malynes Consuetudo I.24 (insurance was introduced into England 'and after us imitated by the Antuerpians', and the customs of Lombard Street are 'imitated also in other places of the Low-countries'). See also eg Dover 10 and Lay 15. It seems that there is much scope here for patriotic arguments about which insurance law and customs were the oldest, or the best and the most advanced. It would appear that further research is required on this point, and the possibility should not be excluded that both Antwerp and London received their marine insurance practices independently and at roughly the same time directly from Italy and/or Spain.}

\textit{\textsuperscript{285} A placcaat of Philip the Goods of Burgundy of 15 February 1459 (1458 os) concerned the adjudication of commercial and maritime disputes and also touched on insurance claims.}

\textit{\textsuperscript{286} See for a further elaboration of this point Den Dooren de Jong 'Lombard Street' 14-15 and Ijzerman & Den Dooren de Jong 225-226.}

\textit{\textsuperscript{287} From a comparison of an Antwerp policy of 1561 and the policy prescribed by the placcaat of 1563 (see Den Dooren de Jong 'Lombard Street' 16-17), for example, it appears that on a number of points certain vital conditions were prohibited by legislation which were considered practical and customary in Antwerp. (Of course, that these were also customary in London, can only be assumed at this stage.) These included the prohibition on full-value insurance, the prohibition on the insurance of profit, restrictions on the insurer's liability in case of a change of voyage, and the prohibition on insurance cover against barratry. All these aspects will be considered in more detail in due course, and it seems clear that the legislative intervention on these and other matters were sufficiently serious to have resulted in parties seeking to avoid the application of that legislation to their contracts.}

\textit{\textsuperscript{288} In Ferufini's petition in 1555 to the Spanish authorities to allow him to establish a registration bureau in Antwerp to counter insurance frauds, one of the abuses specifically mentioned was the reliance in local contracts on foreign laws to the exclusion of local legislation. See again § 1.3.2 supra.}
4.4 Custom and the Courts

In the absence of legislative provisions on insurance matters, and in filling any gaps in the formal law, lawyers and the courts in the Netherlands employed not only the methods of analogous reasoning but also frequently relied upon the customs of merchants in the insurance business. The question was simply whether the existence and content of the unwritten commercial custom relied upon by the one party and, more often than not, disputed by the other, could be taken as having been established with sufficient certainty.

Generally speaking, in merchants’ courts (curia mercatorum) commercial customs presented no problems and received ready and effortless acceptance and recognition. In the Rota Genuensis, for example, notorious and general customs did not have to be alleged and proved but the Court took judicial notice of them; other commercial customs still had to be proved though. Customs were usually attested to by a body of merchants or of jurists or practitioners. But in ordinary courts, with professional judges and not merchants deciding cases, commercial customs, like all other customs, had to be pleaded and proved. For such proof the parties and the courts not surprisingly turned to the experts, that is, to the merchants themselves, to provide the necessary evidence. In different legal systems different methods were followed of establishing customs. Whereas in English law a jury of merchants or merchant assessors played an important role in the incorporation of commercial custom into the Common Law, the device of an inquisition per turbam was commonplace in civil-law systems, also in the Netherlands where it was used until the end of the eighteenth century.

In earlier Roman-Dutch law, the rule that a court or judge was presumed to know the law (ius curia novit) applied only with regard to formal or learned law (geleerde recht), including notorious customary law, but not, for example, to obscure or uncertain rules of customary law. The line between universal and particular custom, vague as it was, and that between what had to be proved and what not, depended on the nature of the custom in question and on the scope of its intended and alleged application. Also,

286 Insurance Law in the Netherlands 1500-1800

---

289 A neat example of this appears in an opinion given around 1599 (see Hollandsche consulatien vol I cons 284) in respect of a hull insurance concluded at Middelburg in November 1598 and thus before the promulgation of the keur of 1600. The policy did not contain all the usual clauses but simply referred to ‘de Police van Antwerpen’. When a question arose on the duration of the cover provided by the policy, the opinion relied firstly on the goods policy prescribed by the placcaat of 1563, noting that the Antwerp policy to which the parties referred to had to be decisive in this matter. Secondly it relied on the analogous position in the case of a bottomry loan where the duration of the risk on the hull ‘est notorius usus mercatorum’.

290 On the proof of commercial (insurance) customs in Roman-Dutch law, and on the role of the turbe in this regard, see eg Gerbenzon & Algra 103; Gilissen Inleiding 261-269; Gotzen 204-205; De Groote ‘Zeeverzekering’ 207-208; idem Zeeassurantie 19n1; Lichtenauer Geschiedenis 149; Nörn 196-197; Waelkens; and Wedekind 105-106.

291 See eg Rodgers 164-165, noting that in insurance cases the directors of the leading insurance companies, underwriters and brokers were favoured expert witnesses.
custom had to be proved when the other party placed it in dispute, or had otherwise to be determined by the court itself when it was necessary for it to deliver judgment in a particular case.

For present purposes the most important method of establishing and proving the content of rules of non-notorious commercial custom was by way of the investigation, and the hearing of the evidence of ‘expert’ witnesses by way of a turbe (turbeonderzoek; inquisitio per turbam). Because insurance customs in the Netherlands were unwritten, generally not notorious and usually disputed by the other party, a turbe was relied upon to prove such customs when necessary.

A turbe could be requested in one of two ways. The Court itself could ex officio require the evidence of expert merchant witnesses. Or it could be requested by one of the parties to a dispute when he relied upon a particular custom in his pleadings but the existence or precise content of such a customary rule was placed in dispute by the other party. By questioning or obtaining the opinion of a relatively large number (hence, a turbe or multitude) of creditable and knowledgeable persons who were supposed to have knowledge of the rule in question, the existence and content of that rule could be established before the Court. Usually a question or questions were posed on which the members of the turbe collectively had to give an answer. Lawyers (members of the local Schepenen Bench, attorneys, advocates or notaries) and merchants could be approached in this regard, the composition of the group and the qualifications of its members depending on the nature of the custom in dispute.

The unanimous opinion or corroborative evidence of an exact minimum number of witnesses (turbiers or costumiers) was usually required to prove a custom, but this number varied from time to time and from place to place. In Antwerp the minimum was ten, and although there was no maximum, there were seldom more than fifteen members. In Holland there was a difference of opinion as to the number of witnesses required to prove a non-notorious custom, but ten also appears to have been a commonly accepted minimum number. Obviously, the larger the number the better, but too big a group was also problematic in view of the unanimity required. Furthermore, the unanimous opinion of a turbe commission was given the same weight as that of a

---

292 In addition to the usual methods of proof such as precedent (a previous judgment as to existence of a custom afforded proof of that custom and of the fact that it had the force of law, and thus no further proof was required of its existence), inquiry, and other methods peculiar to the proof of custom such as obtaining the opinion of experts per turbam, the following possibilities also existed in Roman-Dutch law to establish the existence and content of a custom: (i) wijsdromen; which were initially oral, later written expositions and explanations (rather than declarations) of customary law; and (ii) hoofdvaart (or learing), which was the consultation by one court, usually a local one, of another, usually a higher court or hoofdbank, to ascertain which legal rule was applicable in a particular case.

293 The use of the turbe in insurance disputes was by no means unique to Roman-Dutch law. A similar process was known in Italian law (see eg Roccus De assecuracionibus note 68). And in Hamburg, marine insurance customs (and, initially, foreign insurance legislation too) had to be proved in a similar way before the local Admiralty Court. As to the role of merchants’ opinions in maritime and insurance processes in Hamburg in the seventeenth and eighteenth centuries, see further Frentz ‘Kaufmännische Gutachten’ and idem Hamburgische Admiralitätsgericht 102-103 and 128-130.

294 The Dutch ‘turbe’ comes from the Latin ‘turba’, a multitude.
single witness, so that a customary rule was only regarded as proven if at least two corresponding turben could be relied upon to.

Proof of a custom by way of a turbe not only established the uniform observance of a particular custom but also proved the content of that custom. From the fifteenth century onwards, the results of investigations and evidences by way of a turbe were increasingly written down and recorded in special registers or turbeboeken. This contributed to legal certainty on many rules of customary law.

In Roman-Dutch law there were a number of instances of turben on insurance and related matters. Although the substantive matters with which they were concerned will be treated in greater detail elsewhere, a brief chronological reference to some of them may be useful to indicate the role and importance not only of the practice of evidence by way of turbe in establishing insurance customs but also of such customs in the development of Roman-Dutch insurance law.

In a turbe in April 1574, twelve Spanish merchants resident in Antwerp declared that the following custom was certain and indubitably known in Antwerp, namely that no one was qualified to insure the life, goods or fortune of another unless he himself had either an interest, or had received an order from another who had an interest, in the death or loss insured against. A turbe of 21 October 1599 consisting of a large number of Amsterdam merchants gave evidence before the Amsterdam Schepenen 'op een dispositys van het Hof' as to the customs in connection with the removal of the name of an underwriter from an insurance policy. By a turbe of 1658 evidence was given as to the customary rate of interest. On 17 September 1699, a number of Amsterdam merchants gave evidence of the customary rule on the local Bourse that 'bodemerij draagt geen avarije'. A turbe of merchants and insurers gave evidence in 1713 that the practice on the Amsterdam Bourse of acknowledging the receipt of the premium in the insurance policy, was in fact not intended as such an acknowledgement but was merely inserted to comply with the legislative requirement of an immediate payment of the premium. A turbe in 1719 of a commission made up of the 'Heeren Gecommitteerden van de Groenlandsche Handel en Visserye', shipowners, bookkeepers, insurers and insurance brokers (38 members in total) was concerned with the question whether ice damage suffered by fishing vessels off Greenland was customarily regarded as wear and tear for which insurers were not liable. And a turbe of 1721

---

295 The turbe gave evidence in litigation concerning a term insurance on the life of another. The turbe is reproduced in Goris 387-388. See further idem 385-392 and De Groote 'Polissen' 163-166.

296 The turbe is reproduced in Amsterdam Handvesten vol II at 541-542. See further eg Bynkershoek Quaestiones juris privatii IV.2; Barels Advysen vol I adv 12 (1706); Enschedé 97; and Goudsmit Zeerecht 325 (who notes that a number of merchants unanimously answered the question posed in this case 'bij maniere van turbe' in the negative).

297 See Van der Keessel Praelectiones 1177 (ad III.10.9 & 10).

298 See Barels Advysen vol I adv 61 and Goudsmit Zeerecht 344-345.

299 The turbe is reproduced in Barels Advysen vol I adv 22.

300 The turbe is reproduced in Barels Advysen vol I adv 25.
dealt with the proposition that a person with a limited interest in goods who had insured them for their full value for his own account, could not recover more on the insurance than the value of his own interest, unless he could prove that another interested party had also instructed him to insure his interest. 301

In a number of cases before the Hooge Raad there were references to the evidence of an insurance custom provided by way of a turbe. In one case, in 1708, 302 the insured proved ‘door een turba mercatorum et nautarum’ of a large number of merchants what a particular clause in his insurance policy was commonly taken to mean by merchants. Similarly, in a case in 1720, 303 28 Amsterdam merchants testified by way of a turbe that a clause providing that the insurance was ‘free from Christian capture’ was to be taken as having been repeated in and not excluded from an extension of the insurance to a further portion of the voyage of the insured ship. The turbe pointed out that if the risk of such capture was in fact also covered on the extension of the voyage, the premium requested for the extension would not have been an additional two per cent but anything between ten and twelve per cent. In 1722, in a case before the Raad 304 Amsterdam merchants gave evidence on the French practice of changing and concealing the real names of ships on passports of safe passage. In a 1731 case 305 there was mention of many turben of merchants giving evidence to support both sides on the interpretation of a geographical description in an insurance policy. And finally, in a case heard by the Hooge Raad in 1740, 306 which concerned the question of when a vessel could be taken to have commenced her return from a fishing expedition, eighteen Amsterdam merchants gave evidence on the one side and 24 merchants, commanders of fishing fleets and others qualified in fishing attested on the other side.

The most instructive instances of turben giving evidence on insurance matters are contained in a collection entitled Verzameling van casus positien, voorstellingen en declaraten, betrekkelijk tot voorvallende omstandigheden in den koophandel which appeared in two volumes in Amsterdam in 1793 and 1804 respectively. All in all ten of the opinions or declarations concerned insurance questions. 307 Of particular interest is the composition of the turbe or turben in each of the cases. In quite a few of them there were two opinions, one by lawyers 308 and another by merchants. The latter were

---

301 This turbe is to be found in Barels Advysen vol I adv 26.

302 See Bynkershoek Observationes tumultuariae obs 380; idem Quaestiones juris privati IV.3.

303 See Bynkershoek Observationes tumultuariae obs 1647; idem Quaestiones juris privati IV.11.

304 See Bynkershoek Observationes tumultuariae obs 1819; idem Quaestiones juris privati IV.11.

305 See Bynkershoek Observationes tumultuariae obs 6246; idem Quaestiones juris privati IV.15.

306 See Bynkershoek Observationes tumultuariae obs 3173; idem Quaestiones juris privati IV.17.

307 Vol I casus 5, 12, 16, 19 and 20; vol II casus 31, 32, 37, 42 and 45. These opinions are on occasion referred to by Van der Keessel in his Praelectiones.

308 'Juris utriusque Doctores en Rechtsgeleerden te Amsterdam'; 'Advocaaten voor de Edele Achtbare Gerecht deezer Stad'; 'Advocaaten by den Edele Hove van Holland'.
identified as merchants, insurers, brokers and the like. And on two occasions an opinion was delivered jointly by merchants and lawyers practicing before the local Chamber of Insurance.

Dutch *turben* were even requested elsewhere, for example in Hamburg where Dutch insurance law and customs were followed in practice prior to the promulgation of the Hamburg *Assecuranz-Ordnung* of 1731. Thus, a *turbe* of Amsterdam merchants in 1688 for the first time drew the terminological distinction in that city between general and particular average.

The fact that merchants' evidence by way of *turben* played a formal and recognised role in court procedures in commercial matters, and that such *turben* were not infrequently requested in insurance disputes, provide a clear indication of the role customary law generally and insurance custom specifically played in the judicial determination and expansion of the law. In this way custom continued to be an important source of Roman-Dutch insurance law.

4.5 Custom as a Source of Insurance Law: The Abrogation of Law by Contrary Custom

Custom (consuetudo) was a formal or formative source of law, especially of mercantile law and also of insurance law. A commercial custom, if uniformly observed and certain, that is, if its existence and content had been proven, created binding law. This occurred continuously as customs were proved and accepted as such by the Dutch courts.

But the contrary also occurred in Roman-Dutch law. Just as an existing custom could be abolished by a later written or statutory law, so too custom could abolish an existing rule of law, whether a statutory or common-law rule. Such abolition occurred because of the fact that the uniform observance of a contrary custom meant that the legal rule in question had become abrogated by uniform non-observance. When a court held this to have occurred, the custom was recognised and the rule of law ignored even if, in the case of a statutory rule, it had not yet been repealed formally.

The power of custom to abrogate a legislative measure was of particular importance at the time when legislative intervention in matters of insurance often ran counter

---

309 ‘Kooplieden, Assuradeurs en Cargadoors’; ‘Kooplieden en Assuradeurs ter Beurze der Stad Amsterdam’; ‘Kooplieden en Banquiers ter Beurze der Stad Amsterdam’; ‘Kooplieden, Assuradeurs, Makelaars in Assurantie en Assurantiebezorgers’. Interestingly the members were identified by name in each case, and it is possible to identify those who were active as insurers in Amsterdam at the time. See further ch IX § 2.8 infra.

310 ‘Kooplieden, Assuradeurs, Makelaars en Commissionairs in Assurantie, als mede Practicyns, postuleerende voor de Kamer (Rechtsbank) van Assurantie en Avaryen deazer Stede’.

311 See eg Dreyer 191-192.

312 See eg Molengraaff *Leidraad* 8. Although in English law, generally, the principle of non-abrogation of statutory law by disuse applied, Malynes *Consuetudo* I.25, referring to a custom observed in the case of over-insurance in apparent contravention of a rule of law, noted that ‘a Law not observed is inferior to a Custome well observed’. 
to what merchants required and desired. This occurred not infrequently in Roman-Dutch insurance law. On one occasion the abrogation of the formal legal rule in question was so generally accepted that proof was not required and that even the party (the insurer) who was, strictly speaking, entitled to rely on the legal statutory rule in a defence against a claim by the other party, did not do so lest he be regarded as thereby acting in bad faith. There were at least five instances of where such abrogation was accepted in Roman-Dutch insurance law. All of them involved the abrogation of a statutory rule. Because they, and the legal rules involved, will be considered in detail elsewhere, a brief summary of the cases will suffice for present purposes.

First, it appears that the rules as to the seaworthiness of ships provided for in the placcaat of 1551 were abolished by desuetude. Secondly, by a general custom of merchants, the need for an immediate payment of the insurance premium, required by an Amsterdam keur of 1620, was apparently abrogated by a general practice to the contrary. In the third instance, insurance legislation in the Netherlands initially generally prohibited the insurance of imaginary profit on penalty of nullity. But a majority decision of the Hooge Raad in 1712 recognised such insurance as valid on the ground that it occurred daily and that the parties had here, validly according to the Raad, contracted out of the applicable prohibition. In fact, to such an extent had custom emaciated the rule in question that, according to the Raad, an insurer who in conflict with his contract with the insured relied on the legislative rule, would be regarded as having acted in bad faith.

Fourthly, early Dutch insurance laws generally contained rules providing for compulsory under-insurance, that is, prohibiting full-value insurance. In 1716 a majority of the Hooge Raad held that custom had abrogated the applicable statutory rule. It saw proof of this in the fact that policies sold everywhere contained a printed clause in terms of which the parties renounced the contrary provisions of the applicable legisla-

313 On the abrogatory power of insurance custom in Roman-Dutch law, see eg Van Apeldoorn 'Theorie en practijk' 10-11 and Lichtenauer Geschiedenis 152-154. The renunciation of a legislative provision by agreement has to be distinguished from the abrogation of law, including legislative provisions, by a contrary practice, even though it could have had a very similar effect on the position inter partes. See further ch VIII § 5.2 infra.

314 See ch XIII § 2.2 infra.

315 See Voet Observationes ad III.24.18 (n36) (‘sed generali mercatorum desuetudine ista praesentis solutionis necessitas abrogata futi’); Bynkershoek Quaestiones juris privati IV.2. See further ch XI § 3.2.2.2 infra as to the payment of the premium.

316 See Bynkershoek Observationes tumultuariae obs 909; idem Quaestiones juris privati IV.5. See further ch V § 5.2 infra as to the insurance of such profit.

317 See further ch VIII § 5.2 infra.

318 See Bynkershoek Observationes tumultuariae obs 1290; idem Quaestiones juris privati IV.6. Earlier, in 1711, the Raad was divided on whether the compulsory under-insurance of goods had been abolished by custom, but did not have to decide the matter because of a settlement between the parties (see Bynkershoek Observationes tumultuariae obs 779; idem Quaestiones juris privati IV.4).
tion, including those concerning compulsory under-insurance, and also in the fact that the Commissioners of the Amsterdam Insurance Chamber had in their judgment ignored the provisions renounced by the parties. Subsequently the legislatures themselves abandoned the rule, in all probability recognising the fact that a contrary custom was and continued to be followed in practice.

And lastly, in connection with the statutory rule requiring mention in the policy that the goods insured were perishables, reference was made in a case before the Hooge Raad in 1731 of custom having abolished that statutory provision because of the difficulty and at times impossibility of describing the nature of the goods insured; it had become custom to accept a description of the goods as perishable or unperishable goods ("bederffelyke of onbederffelyke goederen"). This custom was later recognised by statutory provisions permitting such a description.

It must be noted, though, that the approach of the Dutch courts with regards to the derogative power of custom remained unsettled. The Hooge Raad invariably did not decide these matters unanimously, and in fact its decisions of 1712 and of 1716 are difficult to reconcile on principle. It appears that there were two approaches. The first recognised the possibility that legislation and legal rules generally could be abolished by custom, on proof of that custom. The other view, of which Bynkershoek was a proponent, held that custom had such power only if that was custom confirmed by a judgment ("door een contradictoir vonnis bekrachtig"), the reason being that custom was not regarded as an independent source of law alongside common law and legislation; the Court recognised and applied custom only if it were permitted to do so by statute.

The fact that the derogative power of custom featured relatively frequently in judicial decisions on insurance matters, would tend to support the proposition, explained above, that the divergence of formal law and commercial practice was a prominent feature of Roman-Dutch insurance law.

319 See Bynkershoek Observationes tumultuariae obs 2646; idem Quaestiones juris privati IV.15.

320 Bynkershoek was in the minority in the decision in 1712 and in fact highly critical of the majority view. In the 1716 case he was in the majority. In 1719 he again managed to sway the majority of the Raad to his view against the abolition of a provision in a Vlissing keur of 1697 according to which officers and sailors could for own use not take more cargo with them than was permitted by the shipowner, on penalty of forfeiture (see Bynkershoek Observationes tumultuariae obs 1584). But in 1723, again, in a case also not concerned with insurance, he did not succeed and was in the minority in a decision holding that a particular legislative measure had in fact been abolished by custom (see Bynkershoek Observationes tumultuariae obs 1899).

321 See § 4.2.1 supra.
PART B: THE PRINCIPLES OF INSURANCE LAW
CHAPTER V
OBJECTS OF RISK IN MARINE INSURANCE

1 General Introduction ................................................................. 295
2 Objects of Marine Risk: Introduction ........................................ 298
3 The Ship as an Object of Marine Risk ....................................... 302
  3.1 Ships and Shipowning .......................................................... 302
  3.2 The Scope of the Policy on a Ship ......................................... 305
    3.2.1 The Ship’s Hull .......................................................... 306
    3.2.2 The Cargo on Board the Ship ....................................... 308
    3.2.3 Appurtenances and Equipment .................................... 309
    3.2.4 Other Goods and Property on Board ............................ 312
4 Cargo as an Object of Marine Risk ........................................... 314
  4.1 Introduction ........................................................................ 314
  4.2 The Scope of the Cargo Policy ............................................. 315
  4.3 Perishable and Valuable Goods .......................................... 318
  4.4 Arms and Ammunition ...................................................... 325
5 The Insurance of Expected Advantages and Future Objects ..... 329
  5.1 Introduction ........................................................................ 329
  5.2 The Insurance of Expected Profit ....................................... 332
  5.3 The Insurance of Return Cargoes ....................................... 336
  5.4 The Insurance of Freight .................................................... 339
    5.4.1 Introduction: Types of Freight and Types of Insurance of Freight .................. 339
    5.4.2 The Insurance of Freight by the Carrier .......................... 343
    5.4.3 The Insurance of Freight by the Owner of the Goods ......................... 346
    5.4.4 The Insurance of Freight Elsewhere: A Summary ....................... 348
  5.5 The Insurance of a Bottomry Loan and of the Property Securing Such a Loan ..... 349
    5.5.1 Introduction: The Different Types of Insurance Involved ............ 349
    5.5.2 The Position up to the End of the Seventeenth Century ............. 350
    5.5.3 Legislative Regulation in the Eighteenth Century .................. 354
  5.6 The Insurance of the Wages and Property of the Master and Crew .................................................. 361
    5.6.1 Introduction: The Salary and Remuneration of Seamen .................. 361
    5.6.2 The Insurability of Seamen’s Wages ................................ 366
    5.6.3 The Insurability of the Property of the Master the Crew ............. 370
  5.7 The Insurance of the Premium ............................................. 371

1 General Introduction

This and the following two chapters concern two distinct albeit closely related topics of insurance law, namely the objects of risk and the risks or perils insured against.
As has already been pointed out, in Roman-Dutch insurance law, as in other contemporaneous legal systems, no clear distinction was drawn between the object of risk, for example the ship, and the object of insurance, that is, the interest and, at least earlier, more specifically the proprietary interest in the object of risk. Also, only existing physical objects of risk capable of valuation were recognised as clearly insurable. The law and legal theory, by contrast to practice, experienced particular problems in recognising as valid insurances where no physical object of risk, or an object exposed to risk could be identified, or, if such an object was present, where it was not capable of monetary valuation.

There was also confusion in Roman-Dutch law between the object of risk and the risk or peril insured against. On occasion, when discussing what was legally insurable, some authors would list different insurable objects of risk and insurable risks without distinction.

The latter confusion probably arose because the object of risk and the risk insured against were both factors with reference to which different types of insurance could be classified. For example, a ship is an object of marine risk and the insurance of a ship was thus classifiable as marine insurance. At the same time the insurance of a house was non-marine insurance. Equally, the insurance of an object, such as a ship or goods, against marine risks, such as perils of the sea or piracy, was classifiable as marine insurance, whilst the insurance of an object, such as a house or goods, against the risk of fire was non-marine insurance, or, more specifically, fire insurance.

The objects of marine risk recognised in Roman-Dutch law will be considered in this chapter while the marine risks insured against in that system will be treated in the next chapter.

There is no doubt that marine insurance was by far the most prevalent form of insurance in Netherlands prior to the end of the eighteenth century. As such it also had the most fully worked out substratum of legal rules and principles. But various forms of non-marine insurance, that is, insurances of non-marine objects of risk as well as insurances of objects against non-marine risks, were known and practised very soon after the emergence of the marine insurance contract in its modern form.

1 See ch II, especially §§ 6.1.1 and 6.2.3 supra.

2 For example, where the insured's interest consisted not of a real or proprietary right in a physical object but of a personal right in respect of an object.

3 See further § 5.1 infra.

4 See eg Van der Linden Koopmans handboek IV.6.1 and IV.6.2. A similar confusion between the object of insurance, the object of risk and the risk insured against was transplanted in the Dutch Wetboek van Koophandel, eg in arts 247-1 and 250. See further eg Van Veen 9-10.

5 Initially insurance was mainly concerned with protecting movable maritime objects against the risks of marine transportation. Very soon, if not contemporaneously: see ch VI infra, insurance extended also to movable non-marine objects and to non-marine risks of transportation (risks both ancillary to sea transportation as well as independent from it, ie, risks involved in non-marine transport), and then it extended to non-transportation risks (including non-commercial risks) and to objects (both movable and immovable) not transporting, being transported or in any way involved with transportation itself. Thus, in respect of insurable objects, there was a development from marine to non-marine objects as well as one from movable to immovable objects; and in respect of the risks insured against there was a development.
prisingly, the law relating to such non-marine insurances developed largely with reference to, and was greatly influenced by, the law of marine insurance. Insurance law evolved naturally by an extension of existing principles to new forms of insurance. In short, the principles of non-marine insurance emerged by analogy to those of marine insurance.

In this regard there was also in Roman-Dutch law an identifiable movement towards the recognition of general principles of insurance law applicable to all types of insurance. As a result the type of insurance became less important. One of the reasons for this development was no doubt the fact that new objects were continuously being insured against risks not covered before. And because different types of objects could be insured in the same policy against different risks, the classification of insurance into its different types became more and more problematical.

An illustration of the emergence of more general principles of insurance law is provided by an opinion requested in 1678 with regard to a policy of ransom insurance, a type of insurance which was, at that time, not yet recognised and regulated in any insurance legislation. The view was expressed in the opinion that this type of insurance was valid and the insurer liable, and that the local Chamber had jurisdiction over the contract in question. However, the question was left open whether the principles applicable to this type of insurance were those prescribed by legislation for other, similar or at least related types of insurance (that is, whether an analogous method had to be applied), or whether the issues arising from such an insurance contract had to be decided according to what the Court regarded as just and fair and by the application of the common law, that is, the general principles of the law. Thus, the choice was between an extension of the principles applicable to one type of insurance to other types, and the extension of the general principles of law and, more specifically, of the law of contract, to insurance law and the insurance contract.

A further illustration appears from the legislation on insurance itself. Whereas the earliest legislative measures were specifically directed at marine insurance, later ones made provision also for specific forms of non-marine insurance and even for insurance generally, that is, irrespective of the type of insurance, the nature of the object of risk or the type of risk insured against.

from transportation risks to non-transportation risks and from commercial risks (ie, risks to which merchants were exposed in that capacity) to non-commercial risks.

6 See Nederlands advysboek vol II adv 170. As to ransom insurance, see further ch VII § 3.2 infra.

7 See ch IV § 1.4.3 supra.

8 Something which the Court had to do in any case whenever any particular issue, as opposed to the type of insurance, was not specifically covered by legislation.

9 See eg Van der Keessel Theses selectae th 716 (ad III.24.4); idem Praelectiones 1432 (ad III.24.3) and 1434 (ad III.24.4) who noted that compared to the Amsterdam keur of 1598, that of 1744 was of a more general nature and concerned fire insurance too, while the amendment of 1775 permitted also other types of insurance for which no prescribed policy form was provided. Everything in which one had an interest ("immo et omne id quod alicujus interest") could therefore be insured, as long as it was accurately defined in the contract.
Nevertheless, despite these signs of a process of generalisation, the distinction between the different types of insurance never disappeared in Roman-Dutch law. Hence the separate treatment of non-marine insurance in chapter VII below.

2 Objects of Marine Risk: Introduction

An object of risk was essential for a valid insurance contract in Roman-Dutch law. If no such object existed at the time of the conclusion of the contract as the parties had contemplated, the contract was void.

As far as insurable and uninsurable objects were concerned, there was a recognisable movement in Roman-Dutch law from a specific insurability with only some named objects being insurable to a more general insurability with all objects being insurable in principle subject to a limited and diminishing number of named objects which were not insurable. Very often, therefore, an object originally not insurable later became insurable, occasionally on condition that it should be expressly mentioned in the policy. This development, in the cases where it occurred, will be described below. Two further points may be noted regarding the insurability of objects of risk. Firstly, objects were uninsurable either because insurance legislation specifically excluded them by reason of the nature of the object, or because they were excluded on the basis of general principles of common law by reason of the particular circumstances surrounding their insurance. In the first case the list gradually grew smaller and in both cases the list of uninsurable objects was never static. Secondly, uninsurability meant different things in the sources. Certain objects were not insurable at all; others, although insurable, were not fully insurable, that is, not insurable to their full value; and yet others were insurable only under specific conditions, for example, if described in the policy.

10 See eg Van der Linden Koopmans handboek IV.6.2, noting that one of the essential requirements for insurance was 'een zaak, geschikt om geassureerd te worden'; Coing Privatrecht 535, who explains that as with the merx or subject matter of the contract of sale, the existence of an insured object belonged to the substantia contractus of the insurance contract.

11 See eg Santerna De assecrationibus III.14-18. The practical implication of this rule was that it excluded a valid insurance being concluded on a ship or goods already lost at the time of the contract, unless the parties had made special provision for that possibility: see ch XII § 2.2 infra.

12 These circumstances concern, in particular, the legality of the insurance contract: see further ch VII § 5 infra.

13 Mullens 43 points out that although in Antwerp in the sixteenth and seventeenth centuries everything capable of monetary valuation and exposed to the perils of navigation could in principle be insured, many limits and prohibitions existed as far as objects of risk were concerned.

14 These types of restriction were and are often mentioned in tandem when discussing the insurability of different objects of risk. In this chapter attention will be paid only to the first type of restriction. The second type will be considered when the prohibition on full-value insurance is treated (see ch XVIII § 5.2 infra) while the third type, although it will be mentioned in passing here, will be considered in detail elsewhere (see eg ch VIII § 4.2 infra as to the prescribed content of insurance policies).
Roman-Dutch authors recognised from early on that not only particular named objects were insurable but that, subject to particular named and mainly statutory or statutorily confirmed exceptions, all objects were insurable. It was therefore not necessary to compile a list of insurable objects and valid insurances were not restricted to particular objects only.\(^\text{15}\)

Insurance legislation displayed a similar recognition.\(^\text{16}\) In s 4 of title VII of the *placcaat* of 1563, for example, mention was made of insurance on ships, goods, merchandise, wages, freight or other things (*"of andere dingen").\(^\text{17}\) From the *placcaat* of 1571, too, it appears that insurance was not permitted on particular objects only, but rather that it was expressly prohibited on some objects only. Thus, unless so prohibited, the implication was that all objects were in principle insurable.\(^\text{18}\) The municipal *keuren* at first contained examples of the objects which were insurable and a list of those not insurable, but they never expressly stated that in principle all objects were insurable.\(^\text{19}\) Later on,\(^\text{20}\) though, all objects were expressly stated to be insurable as a rule.\(^\text{21}\)

In principle and generally therefore, all objects were insurable in Roman-Dutch law and any list of named objects of risk\(^\text{22}\) was not limitative but merely enunciative. There-

\(^{15}\) See eg Grotius *Inleidinge* III.24.4; Wassenaer *Praktijk notariaat* VIII.2; Van Leeuwen *Rooms-Hollands regt* VI.9.6; Van Zuck *Codex Batavus* sv 'Assurantie' pars 4 and 7A; and Decker *Aanteekeningen ad IV.9.4 n(3)/(c). The rule was most clearly stated by Van der Keessel *Praelectiones* 1434 (*ad III.24.4*), namely that all objects (res) whatsoever could be insured unless specially prohibited. See too Van der Linden *Koopmans handboek* IV.6.2.

\(^{16}\) See generally Van der Keessel *Praelectiones* 1434 (*ad III.24.4*).

\(^{17}\) See Goudsmit *Zeerecht* 244. Reatz *Geschichte* 77-79 notes that the earlier Barcelona Marine Insurance Ordinances mentioned only ships and goods as objects of risk together with the loans given on both. Only in the Ordinance of 1484 was there a more general description of the object of risk when 'and other things' was added to the list. But other objects exposed to maritime risks were no doubt also insured in practice, and the silence of the Ordinances is insufficient ground for deducing that the insurance on a particular object was either unknown or invalid, as long as such insurances were not specifically prohibited. Ships and goods were the only ones mentioned because they were the most obvious, valuable single items exposed to maritime risk at the time.

\(^{18}\) See Goudsmit *Zeerecht* 262.

\(^{19}\) See eg ss 2, 10 and 11 of the Amsterdam *keur* of 1598.

\(^{20}\) An interim stage in this development was eg s 26 of the Rotterdam *keur* of 1721. After mentioning a number of objects of marine and non-marine risk which could be insured, it provided generally that one could insure *'alles het geen tot de Commercie, Navigatie, uyt ende invoer van Goederen, ende tot de Reyse behoort, ende daar uyt voortkomt'*; but subject to the provisions of subsequent sections (ss 27-29) which declared particular objects to be uninsurable. See further eg Van der Keessel *Theses selectae* 717 (*ad III.24.4*); idem *Praelectiones* 1437 (*ad III.24.4*); and Van der Linden *Koopmans handboek* IV.6.2.

\(^{21}\) In the amendment of s 18 of the Amsterdam *keur* of 1744 by the amending *keur* of 1775, eg, insurance was permitted simply and generally on any object in which someone had an interest (*'op al hetgene, waarin iemand belang is hebende'*). See again ch IV § 1.6.2.2 supra and also also Decker *Aanteekeningen ad IV.9.4 n(3)/(c) and Van der Keessel *Theses selectae* th 716 (*ad III.24.4*).

\(^{22}\) As also of risks or perils themselves: see ch VI § 3.2 *infra* as to all-risks cover.
Therefore, the objects of risk specifically considered below are discussed not because they were the only ones recognised as insurable in Roman-Dutch law but because they were the ones most commonly insured and accordingly the ones which attracted the specific attention of the law. The Roman-Dutch rule of general insurability unless specifically excepted was taken over in the *Wetboek van Koophandel*.23

The main objects of risk in the case of marine insurance were the two physical objects exposed to marine risk, namely ships and the goods carried on ships. Put differently, the main forms of marine insurance were insurance on the hull of a ship and that on marine cargo.24 It is uncertain which came first. There is some logic in the argument that if it is accepted that insurance derived from the maritime loan which was in essence a loan on the safety of a ship, hull policies must be taken to have come first. Nevertheless, it appears that insurance on cargo, if not the first form to appear in practice,25 was at least the most prevalent and hence also the relatively most developed form of insurance in Roman-Dutch law.26 This may well be ascribed to the peculiar system of ownership of shares in ships which prevailed in the Netherlands and by which not only the cost of running ships but also the risks to which they were exposed were distributed amongst the co-owners. This system, in essence a form of self-insurance, reduced the need for proper insurance cover on ships.27

---

23 Thus, in terms of art 268, insurance may have as object all interests (in the old terminology, all objects) capable of monetary valuation, exposed to risk, and not excluded by law. See eg Rutgers van der Loeff 106-107. Article 593-1 provides a list of possible objects of risk in marine insurance, objects not insurable being listed in art 599. A part of this latter article was subsequently repealed, underlining the fact that the decrease in the number of uninsurable objects continued even after codification. Additionally, the insurance of the interest must also, on general common-law principles, be lawful. See eg Faber Aanteekeningen 49-51 who notes that not only must the interest not be excluded by art 599, but it must also not be illegal at common law.

24 See eg Wassenaer Praktijk notariael VIII.2 who noted that insurance was of two types, namely on ‘de koopmanschappen ende goederen’ and on ‘de casquen ofte het corpus van ‘t schip self’.

25 See generally Sanborn 242 for the view that the earliest insurance contracts dealt with the transportation of merchandise and goods only, with the insurance of the ship herself and of the freight she earned only emerging at a later stage.

26 In the sixteenth century Antwerp insurance policies analysed and compared by De Groote, marine cargo was by far the most prevalent object of insurance in practice. In the books of the Antwerp insurance broker, Juan Henriquez, nearly 97 per cent of all the insurances (in total 1 488) in which he was involved over a fourteen-month period in 1562-1563, concerned cargo; hull insurance was much less common, about 2 percent (or 33) of the insurances transacted through him. See De Groote Zeeassurantie 129-130 and 132. He is wrong, though, in thinking that the time policy on hull in the Marine Insurance Code of Spanish merchants resident in Bruges (the *Hordenanzas*) of 1569 was the only hull policy officially prescribed in the Netherlands in the sixteenth century. Although the *placcaaten* of 1563 and 1571 prescribed only cargo policies, the Amsterdam *keur* of 1596 contained separate policies for cargo and hull, an example followed in subsequent *keuren*. It has been noted that by 1680 the insurance of ships in the Netherlands was still in its infancy compared to the insurance of ships’ cargoes: see Broeze 126.

27 As to shareholding in and ownership of ships, see § 3.1 infra. As to self-insurance, see ch IX § 2.2 infra.
In Dutch insurance practice hull and goods policies were in principle separate and did not overlap. The standard policy on hull, as will be shown in more detail below, did not, at least not in its usual form, include cover for the cargo on the insured ship, nor, conversely, did cargo policy include cover of the carrying ship. Separate policies were therefore issued in respect of a ship and the cargo on her, even where both belonged to the same merchant. This practice is also reflected in the fact that legislation prescribed separate policies for hull and cargo. But there are also earlier examples of instances where, exceptionally, the same policy covered both hull and cargo. And later it became necessary to provide specifically that insurances of different ships or of goods to be carried on different ships had to be made in as many different policies.

The practice in England, although initially possibly similar to that in the Netherlands, was for ship and goods to be insured in the same policy, a practice said to be a survival from the days when the same person owned both.

28 Thus (and this is but one of many similar examples), in a case before the Hooge Raad in 1712 (see Bynkershoek Observationes tumultuariae obs 883; idem Quaestiones juris privatii IV.4) an Amsterdam merchant had insured both his ship and his cargo on her for a particular voyage, and it appears that separate hull and goods policies were issued for this insurance.

29 See eg Schuddebeurs 'Oudste polissen' 205 (referring to an Antwerp policy of 1531 on ship and goods together); Nederlands advysboek vol I adv 130 (1667) (insurance 'op seker Casque van het Schip en Ladinge' in the same two policies, each covering a different voyage); Nederlands advysboek vol II adv 202 (1681) (insurance on ship as well as 'op de ingelade goederen'); Bynkershoek Observationes tumultuariae obs 2554 and idem Quaestiones juris privatii IV.15 (a case before Hooge Raad in 1729 concerning an insurance on ship and goods). In respect of the argument that the duration of risk (as to which see further ch XII § 1 infra) in the case of an insurance on hull should be the same as that on goods, Van der Keessel Praelectiones 1460 (ad III.24.8 noted that support existed for the presumption that the position was thus understood in customary law, especially where the ship and goods were insured in the same contract. Further evidence of the fact that insurances of ship and goods were at one stage concluded in the same policy, may be found in the prohibition of this practice in the Marine Insurance Code of the Spanish merchants resident in Bruges (the Hordenanzas) in 1569; see De Groote Zeeassurantie 130.

30 See eg Van der Keessel Praelectiones 1450 (ad III.24.6), referring to s 58 of the Amsterdam keur of 1744. The reason for this provision was the need to counter the avoidance of stamp duties which were levied at a specified sum on each individual policy. See further ch VIII § 3.4 infra.

31 See Kepler 'London Marine Insurance' 48, referring to a Bristol policy of 1598 which, while purporting to conform to the customs of Lombard Street and the Royal Exchange, insured both ship and goods in a single policy, a practice expressly prohibited by order 97 of the draft Booke of Orders compiled in the 1570's.

32 See Wright & Fayle Lloyd's 129, referring to the policy used at Lloyd's. This policy, as fixed in 1779 (see Appendix 47 infra), was one on ship and goods (the SG policy), although there are indications that earlier at least three types of printed policy were in use in London: on ships only (S), on goods only (G), and on ships and goods (SG). See eg John 'London Assurance' 126; Dover 33; and Sutherland 52. Because all three policies, the description of the subject matter aside, were largely identical, it was only natural that the convenient SG policy should have become the one preferred in practice. As to other suggested, but now rejected, meanings of the letters 'SG' in the top left-hand corner of the Lloyd's policy, such as 'Salutis Gratia' (for the sake of safety) or 'Somma Grande' (sum guaranteed), see Wright & Fayle Lloyd's 132-134.
Various other objects of marine risk were also insured in Roman-Dutch law. Because they did not involve an insurance against the positive loss or damage of an existing asset, that is, loss or depreciation in the value of a real right, but rather the non-materialisation of an expected asset or the loss of a personal right, such insurances were recognised, officially in legislation at least, only much later. No doubt the theoretical and conceptual problems involved in the insurance of such ‘negatives’ were inhibiting factors. The most important of these objects of risk were the freight earned by the carriage of goods, the profit on goods, mariners’ wages, and maritime or bottomry loans. Because in all these cases the insured did not have a real or proprietary right in an existing physical object, the question whether and the extent to which these matters could be insured resulted, as will be shown shortly, in great and in some cases unresolved controversy and uncertainty in Roman-Dutch law.

3 The Ship as an Object of Marine Risk

3.1 Ships and Shipowning

In the course of several centuries, both before and after the golden seventeenth, ships and the trade carried on with them provided the thrust for Dutch economic advancement. But this advancement was as much due to the ships themselves as it was to the widespread participation and investment by Dutchmen in shipowning and the shipping business.

Dutch ships were built from imported and locally sawn wood. They were built in Dutch ports not only for local owners but merchants ships especially were frequently on order by foreign buyers because of their design, the quality of the artisanship involved, and the keenness of their prices. French and English in particular were regular clients. At its height in the seventeenth century, Dutch shipbuilding remained a high profile activity until well into the eighteenth century.33

Ships of a wide variety of classes were known to Dutch mariners and merchants. Sailing vessels, either square-rigged or fore-and-aft-rigged, were employed on various routes and trades, the type depending on the nature and duration of the voyage and on the commodities carried. In addition to merchantmen, warships and fishing and whaling boats were also purpose-built. Then, of course, there were also the Indiamen. The Dutch East India Company employed ships of two different shapes, square-sterned, ornate and heavily armed Indiamen (spiegelscheepen) for the trade to the East, and round-backed fly-boats (fluitscheepen) for its European trade.34 In addition to sea-going

33 For example, in 1707 in the Zaan region alone, there were no less than 306 ships simultaneously under construction.

34 In the latter part of the sixteenth century, the most prevalent type of Dutch ship was the vlieboot, a small, lightweight and fast vessel. The increase in Dutch trade at that time created the need for a larger vessel which was, however, still fast. This need was fulfilled by the fly-boat or fluit, a cheaply built, long, narrow and fast ship with an increased carrying capacity and a small manning requirement. The fluit was equipped for intra-European navigation but it was not strong enough to carry heavy guns or to endure longer voyages. See generally Bruijn, Gaastra & Schöffer 36-41; Van Dillen Rijksdom 198-202 and 399-401. Boxer ‘Dutch East-Indiamen’ 82-83 notes the general lack in uniformity in the types and sizes of and requirements for the ships employed by the DEIC on its India trade, despite prescriptions as to uniformity having been issued by the Company in 1697.
vessels (Zee-schepen), there were also lighters (Lichters), boats (Booten, Schuiten) and river barges.35

As far as the owning and employment of ships in Europe after the Middle Ages were concerned, a broad and very generalised pattern may be distinguished.36

Initially the owner of a ship was, if not also her builder, then at least also her master, and he sailed and employed her primarily to carry his own goods. In this era of the master and merchant-shipowner, the functions of ownership, navigation and merchant (or consignor or cargo-owner) were still united in one person. In the course of time, as shipowning and trading patterns became increasingly sophisticated, a diffusion of these functions occurred. At first, the functions of ownership and navigation or operation of the ship became separated, the shipowner himself no longer being concerned with the navigation of his ship but being simply a merchant-shipowner. The master, an expert in navigational matters, became an employee of the shipowner and he was, as a rule, no longer the owner, at least not sole owner of the ship. Until the second half of the seventeenth century, though, the master was very often a part-owner of the ship and directly interested in and actively involved with the sale of her cargo.37

From the seventeenth century too more and more ships came to be employed to earn freight for their owners. Shipowners were no longer in the first instance merchants who operated and navigated their ships themselves or through their masters primarily to convey their own goods. Ships were increasingly owned and operated to carry the goods of others. Shipowning and trading became separated and by the eighteenth century the era of the professional carrier or carrier-shipowner had arrived. This latter development was accompanied, facilitated and eventually perfected by two fundamental changes in the organisation of the shipping industry. Firstly, there was the increased employment in the course of the eighteenth century of ship-brokers (cargadoor, scheepsmakelaar or bevrachtingsmakelaar) who, on behalf of the owners and charterers of ships, secured cargoes and arranged for them to be shipped on board for particular voyages. Such brokers were already mentioned in contracts for the carriage of goods by sea prior to the mid-seventeenth century. Secondly, there was the introduction, early in the nineteenth century, of liner shipping in goods transport, that is, of ships no longer plying from port to port in search of cargo and going where the cargo she had loaded happened to be destined (hence the term 'ocean tramp') but sailing on a regular route, according to a timetable and irrespective of the amount of cargo on board.

35 For illustrations of seventeenth century Dutch ships, with the Dutch terms for the different parts, see Van Beylen 38-39 and Van Bruggen 42. On how illustrations of ships can provide information on the history of ship design, see Unger 'Dordrecht Ships' where four illustrations of ships in a Dordrecht keurboek dating from the 1560’s are described and analysed.

36 See on shipowning generally and on the Dutch system of shareholding in ships in particular, Asaert 180; Barbour 'Merchant Shipping' 243; Boxer Seaborne Empire 6-7; Broeze 99-101 and 129-130; Fayle 27-29; Hart 106-111; and Jarvis 304-305.

37 As Unger 'Bijdragen' II 23 puts it, a capable master was required to be 'een zeeman ... en negotiant'.
Thus, from the sixteenth century the merchant-shipowner began replacing the classical master-shipowner, to be replaced in turn in the eighteenth century by the carrier-shipowner. In the course of time, therefore, the various shipping functions, at first performed by a single person, had become divided amongst the shipowner as financier and carrier, the master as the navigational expert, and the merchant as the consignor, a sure sign of an increasing sophistication in the sea trade.

As the volume of trade and with it the size of ships increased, so did the cost and the risk of shipowning. This gave rise to the need to spread such cost and risk over a number of persons. The time had passed for the individual capitalist shipowner. The need to spread risk was especially acute in earlier times when the insurance of ships was not yet a common practice.  

This resulted already in the course of the fifteenth century in the emergence in the Netherlands of a highly flexible type of cooperative enterprise by which a group of people joined together especially to own, but on occasion also to build, buy, charter or freight a ship. The enterprise involved the participation by various capitalist investors in the owning and operating of a ship. This happened especially with larger, more expensive ships, engaged on long-distance trading, but, of course, the size of the ship did not exclude small investors from owning small shares in her. By becoming the owners of shares in the ship, the investors jointly bore the burden and risk of owning her. Shareholding in ships became a characteristic feature of the seaborne trade in the Northern Netherlands and from the latter half of the sixteenth century it provided the impetus there not only for the expansion of Dutch shipbuilding but also for the rapid expansion of the shipping industry itself. Although also known elsewhere in Europe, the Dutch system of shareholding in and co-ownership of ships, broad-based as it was, contributed largely to the Dutch becoming the sea-carriers of Europe in the seventeenth century.

The first step in establishing an enterprise involving the co-ownership of a ship would be for a capitalist to build a ship and then to offer shares in her for sale to the public. Alternatively an entrepreneur would sell shares in a ship yet to be built, thus not funding her building himself. For these purposes ships, or rather the ownership of ships, were divided into shares, thus making it possible for many relatively small investors to participate in merchant shipping. Many of these investors were themselves involved in the shipping industry as owners, builders, necessariesmen (that is, the suppliers of necessaries to ships) or as masters, but just as many if not more were not.

---

38 See Broeze 126.

39 The Dutch merchant navy was estimated at 15,000 ships by the mid-seventeenth century, three times more than the rest of Europe combined. By the end of the eighteenth century there were still some 6,500 Dutch ships, as opposed to some 6,000 English ones, which were engaged in the maritime trade. See Kunst 133.

40 Shareholding in ships was also known in England, for example, although participation and investment were not as widespread as in the Netherlands. See eg Jarvis. Individuals often acquired shares in ships sold as prizes in Admiralty. Thus, the diarist Samuel Pepys on 28 March 1667 became the part-owner of a Dutch prize and took his cronies on board to celebrate by sampling the wines (which he pronounced ‘very good’) the ship was carrying when captured. See Barbour ‘Merchant Shipping’ 249.
Shareholding in or fractional ownership of ships was widespread in the Northern Netherlands in the seventeenth century and many Dutchmen participated and invested in shipping without ever going to sea, operating a ship or being involved in any way in the trading with and carriage by sea of goods and merchandise.\(^{41}\)

Individual investors thus contributed capital and shared in the cost and risk of owning and operating a ship, but, of course, also in the profit made by the employment of their ship. It was also possible for individuals to invest not in the ship herself or in her building, but merely in her equipment and outfit for a particular voyage and to share only in the profit made on that voyage. The owners of shares in a ship were known as 'reders' and the reders of all parts of one ship formed a 'partenrederij' or simply a 'rederij'. Each ship owned by several co-owning shareholders was thus managed by her own rederij under the control of a hoofreder.\(^{42}\) The decision of the majority of the owners (the majority, that is, in terms of their shareholding) determined the way in which a ship was to be employed. Usually one of the shareholders (reders) or a main shareholder (hoofreder) was authorised to represent the interests of all the others and he had to render accounts to them on the completion of every voyage. Shares in ships (scheepsparten) were bought and sold out of hand or at auctions. The acquisition of a share in a ship at sea gave the buyer no right to share in the freight earned on her current voyage, such buyer not having made any contribution to her equipment for that voyage.\(^{43}\)

Shareholding in ships offered various advantages. Not only was the liability and exposure of an individual shareholder (reder) limited to the amount of his investment, which could in any event have been relatively small for a start, and that of the enterprise (rederij) in total to the value of the ship herself, but shares were freely transferable without the consent of other participants. These were also the main differences between the part-ownership of ships and other non-maritime forms of business enterprise such as companies and partnerships.\(^{44}\)

### 3.2 The Scope of the Policy on a Ship

Of cardinal importance in the case of an insurance on a particular ship was to determine what exactly, in the absence of any express provision on matter, was

\(^{41}\) An example of shipowning in this form appears from the inventory of the estate of the widow of a sailmaker and shareholder in ships dating from 1610. From the inventory it appears that he owned 22 shares (scheepsparten) in various ships, viz 1/16th part in 13 ships, 1/17th part in 1 ship, 1/28th part in 1 ship, and 1/32nd part in 7 ships. For this and other examples of shareholding in ships (partenrederij), see Hart 106-111. See also Barbour 'Marine Risks' 569-570; Israel Dutch Primacy 21; and Riemersma 331-333.

\(^{42}\) As a rule each rederij owned only one ship which made the further spreading of cost and risk by an individual participant over several rederijen possible.

\(^{43}\) For the legal aspects of 'rederij' in Roman-Dutch law, see eg Grotius Inleidinge III.23; Van der Keessel Theses selectae th 709-710 (ad III.23); Van der Linden Koopmans handboek IV.4.1; and generally Fischer 'De Groot' 608 and Kohler 'Handelsrecht' 535-540 and the sources mentioned there.

\(^{44}\) As to these forms of enterprise, see further ch IX § 2.7 and § 2.10 infra where insurance partnerships and insurance companies in Roman-Dutch law are considered in more detail.
included in the term 'ship' and what not; and also to determine what was in principle insurable by a policy on a ship and what not.

3.2.1 The Ship's Hull

Central in the insurance of a ship was cover against the loss of or damage to her hull, that is, her main body or frame, referred to in the Roman Dutch sources as her 'casco' or 'corpus'. As long as the hull remained in existence and relatively undamaged, so did the ship, despite extensive damage to or even the loss of attachments to masts, such as sails, or of equipment on the ship such as her anchor or guns.45

The earliest and also later legislative provisions made it clear that a ship was insurable in principle, although, at least initially, not fully insurable.46 The insurance of ships was mentioned in various contexts in the legislation and if not directly stated, then it was at least implied and to be assumed that ships were insurable. Thus, the insurance of ships was often linked to provisions dealing with compulsory under-insurance where it was provided, for example, that a ship was not insurable otherwise than for a specified portion of her value.47 Prescribed policies on a ship, too, indicated that the hull or body of the ship (Casco of Corpus van 't Schip) was what was insured by them.48 Roman-Dutch authors likewise recognised the insurability of ships without any comment.49

Because of the shareholding in or part-ownership of ships which was so common in the Netherlands, it was possible to insure only one's share in or a portion of a ship. In

45 If the ship was insured for a total loss only, and the ship and her equipment, appurtenances, tackle, masts and the like were merely damaged, the insurer was not liable. The reason, according to Roccus De assecurationibus note 34 (which, admittedly, is not all that clear), was that if the ship survived the incident, there was, notwithstanding the fact that she was seriously damaged, no doubt that she was not totally lost because her keel remained in existence. And even though the ship was refitted and restored to her previous position, she remained the same ship and did not, as a result of the incident, become another ship.

46 See ch XVIII § 5.2 infra as to compulsory under-insurance.

47 See eg ss 21 of the placcaat of 1570; 20 of the placcaat of 1571; 10 of the Amsterdam keur of 1598 (to which was identical s 4 of the Middelburg one of 1600); 3 of the Middelburg keur of 1719. More directly providing that ships were insurable, were eg ss 6 of the Rotterdam keur of 1600; 25 of the Rotterdam keur of 1721; and 7 of the Amsterdam keur of 1744. See too art 286 of par 9, title 11, part IV of the Antwerp Complatae of 1609.

48 See eg the hull policy in terms of the Amsterdam keur of 1598 (described as a policy 'op ... Kaske ofte corpus van een Schip') and likewise that in terms of the amending Amsterdam keur of 1688 (a policy 'op ...[name of ship] 't Caske of Corpus van 't Schip, dat God beware'). See too eg the policies on ship prescribed by the Rotterdam keur of 1721, and by the Amsterdam keur and amending keur of 1744 and 1775 respectively.

49 See eg Grotius Inleidinge III.24.4; Van der Keessel Theses selectae th 717 (ad III.24.4); idem Praelectiones 1434-1435 (ad III.24.4) (noting that the insurance of ships themselves was recognised in legislation and was known as 'asseurantie op 't Casco van het Schip'); and Van der Linden Koopmans handboek IV.6.2.
this regard there was a statutory prohibition in Amsterdam on the insurance of shares in or portions of different ships in a single policy, a measure intended to curb the practice of including different insurances in a single policy in an attempt to avoid stamp duties which were levied on individual policies.\footnote{50}{The insurance of shares in or portions of a ship was mentioned in this regard in the Amsterdam amending keur of 25 January 1707 where separate policies were prescribed for insurances or reinsurances on goods loaded in different ships, or on different ships or any portion of different ships ("of eenige Portien in verscheyde Schepen"). Apparently, therefore, a shipowner could not insure in one policy the shares he held in different ships although, presumably, those holding shares in one ship could insure all those shares in a single policy.} But despite the fact that insurances of shares in ships, as opposed to those of ships as a whole, were possibly not uncommon, there is scant reference to the practice.\footnote{51}{I came across only a few instances. In a 1779 Amsterdam policy on a share in the hull and equipment of a whaling ship where the insurance was described as 'op 1/8 Part in 't Toebehooren van 't Casco of Corpus van 't Schip' (see Den Dooren de Jong & Lootsma 62-64). From an entry in the ledgers of the accountant of a ship dated 1763 it appears that while the shipowners' cargo was insured by the accountant, each of the eight shareholders in the ship insured his share in the ship himself (see Nanninga 509 and 513).}

In principle, therefore, all ships were legally insurable in Roman-Dutch law as they remained in the wetboek van koophandel after codification,\footnote{52}{Article 593-1 provides a list of possible objects of risk in marine insurance, which includes the hull or keel of a ship, empty or laden, armed or not, sailing alone or with others.} irrespective of the type, size,\footnote{53}{Dutch ships were measured according to their carrying capacity. The measure used in this regard in the seventeenth century was the 'last', a weight-measure of grain (hence 'korenlast'), one last being equal to two tons or roughly 2,000 kg, or, converted into volume, a shipping space of roughly 3.4 cubic meters. Thus, a ship of 100 last had a carrying capacity of 200 tons of grain or shipping space of 340 cubic meters. As to the tonnage measurement and size of Dutch ships, see eg Van Bruggen 49-53; Bruijn, Gaastra & Schöffer 42-44; Hart 110-111; French; Lane; and Rich & Wilson CEHE IV 218-219.} or age.\footnote{54}{The age of a ship was irrelevant to her insurability and there was no legal prohibition in the way of insuring an old ship. Thus, the question whether a very old ship could validly be insured was answered in the affirmative by the Hooge Raad in 1716 (see Bynkershoek Observationes tumultuariae obs 1290; idem Quaestiones juris privat.i IV.6). The Raad rejected the insurers' defence that they were not liable on their hull policy because the insured ship, which had been involved in a collision with another ship, was old and unable to resist storms at sea. See further Van der Keessel Theses selectae th 717 (ad III.24.4), idem Praelectiones 1434-1435 (ad III.24.4); and Van der Linden Koopmans handboek IV.6.2. As to whether the age of a ship had to be mentioned in the insurance policy on her, see ch VIII § 4.2.3 infra, and as to the seaworthiness of ships, see ch XII § 2.2 infra.} But, of course, such factors played a role in determining whether or not a particular underwriter would be prepared to insure the ship in question and, if so, at what premium, although exactly to what extent this occurred in insurance practice is not readily apparent.\footnote{55}{Spoonier 139 speculates that ship design probably affected insurance premiums in Amsterdam, but acknowledges that it is difficult to find accurate information on this. Elsewhere (at 197) he suggests that in Amsterdam the fact that insured ships differed in tonnage and design were apparently irrelevant to premium rates, premiums being averaged on the market. See further ch XI § 2.1 infra as to some of the factors which did influence the calculation of premiums on Dutch insurance markets.} Only one type of ship was singled out by the insurance laws as
deserving of special treatment. This was the type of ship known as a ‘Vuyrblasen’ or ‘een Vuuren-blaas’, which, it appears, referred to the fact that ship was constructed of ‘Vuren hout’ or fir-wood, an factor aggravating the risk on ships.\textsuperscript{56} If such ships were insured, that fact had to be mentioned and expressly stated on the policy, otherwise the insurers were not liable to compensate the insured for more than half of any damage that might occur.\textsuperscript{57}

### 3.2.2 The Cargo on Board the Ship

A question addressed early on was whether an insurance on a ship included the cargo loaded on that ship, and, conversely, whether an insurance of cargo also included the carrying vessel. According to Santerna,\textsuperscript{58} this question concerned the difference between a container and its contents. He thought that a reference to the one did not include the other, and that, accordingly, the insurance of a ship (or of goods) by a shipowner (or by a consignor) could not ordinarily and in the absence of express words to that effect, be regarded as also covering the goods on board the ship (or the carrying ship) since that was not the intention of the person insuring.\textsuperscript{59} In Roman-Dutch

---

\textsuperscript{56} Whereas English and French merchant ships were built of oak (genus Quercus) (which, incidentally had a strong tannin which rendered it distasteful to marine borers or sea-worm), Dutch ships were often constructed of pine (genus Pinus) or fir (genus Abies) (see Barbour ‘Marine Risks’ 562). Fir-wood contained a resin instead of sap and thus required less time for seasoning, it was versatile in that the whole ship from keel to topmast could be built from it, and it was a lighter wood resulting in fir vessels being lighter and consequently faster. But it was also a softer wood and as a result the vessels constructed from it were generally considered less durable and able to withstand heavy storms at sea. Apart from the external decay of ships, which was caused by sea-worm, their internal decay was the result of dry rot, caused by a fungus growth which pulverised the wood, especially in the area around the waterline where the wood was intermittently exposed to water and air. Fungal growth was enhanced by the use of unseasoned timber, that is, green or undried timber from which the sap had not been removed. See further Asser NBW 224; Albion 5, 10-12, 15-16 and 26-27; and Dorhout Mees Schadeverzekeringsrecht 228 and 533.

\textsuperscript{57} See the amendment of s 10 of the Amsterdam keur of 1651 concerning ships (‘nopens de Schepen’) by the amending keur of 27 January 1733 (which referred in this regard to insurances on the ‘Casque ofte Corpus van Schepen, dat Vuyrblasen zijn’). This provision was repeated in s 8 of the Amsterdam keur of 1744 with the additional proviso that apart from the requirement that the type of the ship had to be mentioned expressly if she was ‘een Vuuren blaas’, everything mentioned in s 7 on ships generally would apply also to such ships. See further Van der Keessel Theses selectae th 717 (ad III.24.4) and idem Praelectiones 1434-1435 (ad III.24.4). See further ch VIII § 4.2.3-5 infra as to the content of insurance policies.

\textsuperscript{58} De assecurationibus IV.69-72.

\textsuperscript{59} Thus, a merchant with goods on a ship who insured a shipload of merchandise was not thinking of the ship, for only the goods were his and not also the ship, and thus, in the event of doubt, that is, unless it had been made clear, only the goods were insured. Similarly, if the owner of a ship with goods on board insured his ship, he was not thinking of goods not belonging to him, and thus, in the event of doubt, only the ship was insured. And this, Santerna thought, was the case even if the owner of the ship with his own goods on board her, insured the ship. Roccus De assecurationibus note 16 too made the point that an insurance simply concluded on a ship no doubt meant the whole of the ship, but not any goods loaded in her; and on other hand, that an insurance on goods did not include the ship, unless a contrary intention appeared.
law a similar approach was supported by Wassenaer\textsuperscript{60} who thought that under an insurance of goods and wares, the ship on which they happened to be loaded was not understood to be included. It was necessary for a separate insurance policy to be concluded if the ship had to be covered as well. One may take it that the insurance of a ship likewise did not in Roman-Dutch law include the goods loaded on that ship.\textsuperscript{61} But, as indicated earlier, ship and goods could, and were on occasion, expressly insured in the same policy, so that this was not an absolute rule but one applicable only in the absence of an express stipulation in the relevant policy or of another clear indication to the contrary.

\subsection*{3.2.3 Appurtenances and Equipment}

Apart from cargo, being merchandise on board for the purpose of carriage for freight, there were also other things on board a ship. Of these the most important were no doubt her appurtenances: masts, rudder, sails, rigging (the ship’s spars, ropes and the like supporting and controlling the sails) and tackle (the mechanism of ropes, pulley-blocks, hooks and the like for managing her sails), and the anchor. There were also other pieces of equipment belonging to the ship such as the instruments of navigation (the magnetic compass and charts, and other devices like the astrolabe and quadrant for measuring the altitude of the sun or the stars), and the tools used for sail-making, woodworking and caulking (that is, the making watertight of a ship by stopping up her seams with a waterproofing material such as tar). And then there were also life- and other boats. The question was whether such appurtenances and equipment were, automatically, included in an insurance of the ship. In fact, could they be insured at all?

Although there are indications that at first an insurance on a ship included her masts, anchors, ropes, sails and the like,\textsuperscript{62} the earliest insurance legislation in the Netherlands provided that equipment and other accessories could not be insured at all.\textsuperscript{63} Likewise s 10 of the Amsterdam \textit{keur} of 1598 specifically provided that no

\textsuperscript{60} \textit{Praktyk notariael} VIII.9.

\textsuperscript{61} For similar sentiments in English law, see eg Molloy \textit{De jure maritimo} II.7.8 (referring in this regard to Loccenius); and Malynes \textit{Consuetudo} I.28.

\textsuperscript{62} See eg Straccha \textit{De assecrationibus} VIII.7-9 who thought that an insurance of a ship included the equipment (parts, instruments, tackle) of ship, indicated by the word ‘corredi’, but that her lifeboat (‘scapha’) was not included because it was not affixed to nor a part of the ship but a separate small boat in itself. Likewise, in the case of the sale of a ship, the lifeboat did not have to be delivered as well. See further eg Decker \textit{Aanteekeningen ad} IV.9.4 n(3)/(c), referring to Straccha. Van Ghesel \textit{De assecratione} I.3.3 noted that, according to maritime law, a ship included everything belonging to her (ornaments, instruments, and the like) but not her lifeboat.

\textsuperscript{63} See eg ss 21 of the \textit{placcaat} of 1570 and 20 of that of 1571, declaring the insurance of equipment (‘toerusting’) null and void. See also eg Goudsmitt \textit{Zeerecht} 263, referring in this regard to ‘scheepsgereedschap’. A similar position obtained earlier. Thus in terms of s 20 of the \textit{placcaat} of 1550, a ship’s tackle, equipment or furniture (‘takelinge, equippagie of xarcia’) could not be insured, and the same applied in terms of s 8 of title VII of the \textit{placcaat} of 1563. See further Kracht 13, 18 and 26.
insurance on the equipment (‘toerustinge’) of a ship was possible. But the hull policy prescribed by this keur was stipulated to be on the hull or body of a ship with her equipment and attachments (‘Kaske ofte corpus van een Schip, met zijn ... gereedschappen, ende aenkleven van dien’). The same description appeared in a later version of the hull policy prescribed at Amsterdam as well as in that prescribed in Rotterdam. It would appear, therefore, that some conflict and uncertainty existed, unless there was a difference between ‘toerustinge’ on the one hand and ‘gereedschappen’ on the other hand. But such a distinction was not alluded to in the sources and there would appear to have been no consistency in the use of these two terms.

The reason for the exclusion of ‘toerustinge’ was stated to be the fact that such appurtenances were particularly susceptible to wear and tear. Because insurers were not liable for a diminution in the value of equipment, and, for that matter, of the ship herself, which was the result of ordinary wear and tear occurring in the course of a voyage, insured often tried to pass off such diminution as a loss by a storm or heavy weather at sea so as to recover on their policies. The prohibition, it seems, was primarily intended to counter fraud of this nature and to protect insurers.

By the mid-eighteenth century, though, a change had occurred in practice, that is, if the earlier provisions in fact ever correctly reflected the practice on Dutch insurance markets. Thus s 7 of the Amsterdam keur of 1744 provided that insurance was possible on ‘[t]he Hull of a Ship, with her Masts, Yards, Bowsprit, standing and running Rigging, Anchors, Cables, Sails ... and further Appurtenances thereof, nothing

64 See eg Van Leeuwen Rooms-Hollands regt IV.9.6; Goudsmit Zeerecht 317 (again referring to ‘gereedschap’).

65 The hull policy in terms of the amending Amsterdam keur of 1688 was ‘op ... ’t Caske of Corpus van ’t Schip, dat Godt beware, met zijn ... Gereetschappen en aankleven van dien’. And the hull policy in terms of the Rotterdam keur of 1721 was ‘op het Caske of Corpus van het Schip (dat Godt beware) met zyn ... Gereetschappen, ende aankleven van dien’.

66 That is, appurtenances and parts of the ship such as rigging and tackle; the ‘fitting out of Ships’, according to Magens Essay vol II at 70.

67 That is, tools and instruments.

68 Mullens 43 notes that the term ‘toerustinge’ sometimes referred to a ship’s sails and gear, sometimes to her equipment and supplies on board, and sometimes to both.

69 See further ch VI § 3.3 infra.

70 See Weskett Digest 244 sv ‘freight and freighter’ par 1; idem 601-602 sv ‘wear and tear’ par 1, referring to the Amsterdam legislation.

71 An indication that this may in fact not have been the case is to be found in art 286 of par 9, title 11, part IV of the Antwerp Compilatae of 1609 (see De Longé vol IV at 318) where there was mention of the insurability (up to permitted portion) of the ship and any appurtenances (‘toebehoerten’). In terms of art 287, the insurance of a ship, her appurtenances and equipment included items such as the bottom or keel of ship and everything on it, sails, cables, tackle, ropes, anchors, the boat, ‘ende andere diergelijcke dingen, tot bewaeringe van den schepe noodich sijnde, mitsgaders den prij van de versekeringe van dijen’.
excluded'. This position was confirmed by the wording of the hull policy form appended to the *keur* of 1744 and to the amending *keur* of 1775, and retained in the *Wetboek van Koophandel*. English law, it appears, was likewise little different in this regard.

Prior to the formal legislative recognition of the insurability of all types of appurtenances and equipment on board a ship, such items were no doubt insured in practice, especially in trades such as the important fishing industry. Thus, an Amst-
Insurance Law in the Netherlands 1500-1800

dam fishing policy of 1637 covered the named fishing vessel and also a long list of
equipment belonging to the ship and used in the fishing itself. Included in this list were
fishing nets, salt, barrels, as well as the catch ('den haringh telcken reyse door Goodes
segeningh te vangen').

3.2.4 Other Goods and Property on Board

Of the other goods and property on board ships not carried as cargo but belong-
ing to the ship, special mention must be made of the provisions carried for the
sustenance of her crew and passengers. Dutch ships carried, and were in fact by
maritime legislation compelled to carry, a wide variety of food and drink, depending,
naturally, on the voyage in question.

Although provisions on board could be regarded as part of and included under
the term 'equipment' of a ship, the distinguishing feature of such provisions was their
consumability. That such a distinction was drawn appears from the placcaat of 1571
in terms of which victuals ('Victualien'), unlike the ship's equipment, were in fact
insurable.

discoveries to any sovereignty over the East Indies, and neither did they have any exclusive right by
custom or prescription to sail the seas or to trade. Grotius' views had an influence not only on later Dutch
trade with the West Indies but also in disputes, especially with England, over fishing rights in and around
Europe. England claimed to have certain exclusive rights to the sea, in support of which Selden published
his work. In it he argued that although the sea was originally res communis, later laws and customs had
changed that so that the English had, by long and continuous possession, obtained sovereignty over the
sea to the south and east of England with Scotland and Ireland exercising sovereignty over the north and
the west. This sovereignty, he argued, was limited only by foreign coasts and ports. See generally as to the
freedom of the seas, Kunst 136-138.

See Den Dooren de Jong 'Praktijk' 2 and 12 (where the policy is reproduced). The Hamburg
Assecuranz-Ordnung of 1731 contained a prescribed policy form 'auf Gronland und andere Fishereyen'.
See further Dreyer 117 and 336-338.

The insurance of the mariners' property will be considered conjunctly with the insurance of their wages
in § 5.6.2 infra.

For ships of the Dutch East India Company, at least, the victuals to be loaded and daily rations per
seaman were prescribed in detail. In addition to eg bread, meat, pork (also live pigs which were
slaughtered mainly on important occasions, such as crossing certain latitudes or passing certain points
on the voyage), dried and salted fish, cheese, water, lime juice, treacle, oil, butter, oats and peas, beer
and Spanish wine were also taken on board, the barrels of French wine shipped being only for
distribution to the sick! Although it may appear from the list of victuals required to be put on board, that
seamen had a varied and plentiful diet, they in fact as a rule probably did not receive all that was due to
them during the voyage. This may have been the case either because of the master and/or the purser
and steward embezelling their rations and selling the surplus upon their arrival for their own profit, or
because of the voyage taking longer than planned and victualled for, or because of the rations becoming
putrid in the tropics. See generally Boxer 'Dutch East-Indiamen' 94-95; Bruijn et al 214-218.

See Mullens 43-45.

See ss 21 of the placcaat of 1570 and 20 of the one of 1571. See too Goudsmit Zeerecht 263.
By the time of the Amsterdam *keur* of 1598, though, this was no longer the case. Victuals, like equipment, were not insurable.82 As in the case of the prohibition on the insurance of the equipment of a ship in the same *keur*, the reason appears to have been the consumability of such victuals which made the proof of their accidental loss or damage difficult and which created the possibility of fraud on the part of the insured.83 Nevertheless, such insurance did occur in practice.84

The Amsterdam prohibition was repeated by the end of the seventeenth century,85 and although the position in the Rotterdam *keuren* of both 1604 and 1721 was identical,86 a different position obtained in Middelburg. There s 3 of the *keur* of 1719 amended the earlier one of 1600, which was identical to that of Amsterdam of 1598 and which therefore prohibited the insurance of victuals, and accepted the principle that one could insure the consumables on board ("op al het consumabele in de Scheepen").87

By the mid-eighteenth century, the Amsterdam legislature recognised the need for victuals to be insurable and to be included in the hull policy. It accordingly provided in s

82 See s 10 of the Amsterdam *keur* of 1598 (with which agreed s 4 of that of Middelburg of 1600). See also eg Van Leeuwen *Rooms-Hollands regt* IV.9.6; Goudsmit *Zeerecht* 317. This may have been the accepted practice at the time, for in terms of the Antwerp *Compilatae* of 1609 (art 286 of par 9, title 11, part IV: see De Longe vol IV at 318) insurance was not permitted on any foodstuff or drink (‘eetwaeren oft drinckwaeren’) on board nor on any other goods similarly consumable (‘die eenichsints in den scheepen gesloten [gesleten] oft verdaen worden’).

83 See eg Schorer *Aanteekeningen* n6 and n7 (ad III.24.4) where the Dutch translation added that the reason for this prohibition was because of the difficulty, in the case of accident or shipwreck, of proving how much of the provisions still remained; Weskett *Digest* 244 sv ‘freight and freighter’ par 1 and *idem* sv ‘wear and tear’ par 1, where provisions were said to be uninsurable ‘because of their constant consumption’.

84 Thus, an Amsterdam policy of 1672 (on the ‘Witte Haes’) covered the ship and also ‘t consumabel mede goederen en coopmanschappen’ (see Den Dooren de Jong ‘Practijk’ 2 and Appendix 24 *intra* where this policy is reproduced); and in an opinion from 1681 there was mention of an insurance not on the (named) ship alone but also ‘op het consumabel van dien’, as well as ‘op de ingelade goederen’ (see *Nederlands advysboek* vol II adv 202).

85 See s 1 of the Amsterdam amending *keur* of 1693 where, in decreasing the amount of compulsory under-insurance on ships (see ch XVIII § 5.4 *intra*), the prohibition on the insurance of some objects was repeated, amongst other ‘Victualia of diergelijke dingen, die eenigszints geconsumeert werden’.

86 In terms of s 4 of the Rotterdam *keur* of 1604 the shipowners, master or crew could not insure the victuals and other goods ‘die op de reyse geconsumeert werden’, while s 27 of the Rotterdam *keur* of 1721 simply provided that whatever was consumed on the voyage (‘het geen op de Reyse geconsumeert werd’) could not be insured. See further Goudsmit *Zeerecht* 396; Enschedé 41.

87 See further Van Zurck *Codex Batavus* sv ‘Assurantie’ par 7C n(f) and Schorer *Aanteekeningen* 418 (ad III.24.4) n6 and n7 who specifically noted this position in Middelburg. Van der Keessel *Praelectiones* 1438 (ad III.24.4) too mentioned that in Middelburg it had been accepted as a rule that edibles and potables could be insured, including all consumables on board.
7 of the keur of 1744 for the insurability of the ship and her consumables on board ('Casco van 't Schip, met desselfs ... Consumabel').

In summary, therefore, by the middle of the eighteenth century foodstuff on board for daily consumption by the crew of a ship could be insured against the perils of the sea in Middelburg and, following its example, in Amsterdam, but not in Rotterdam. The position in Amsterdam was that which was eventually adopted in the Wetboek van Koophandel. It is worth pointing out, though, as did Van der Keessel, that obviously this insurance was against the loss of victuals by fortuitous causes such as storms or sea water, and not against their daily consumption.

4 Cargo as an Object of Marine Risk

4.1 Introduction

The insurance of marine cargo was the most important and developed part of the Roman-Dutch law of insurance. Various terms were employed in the sources to indicate the goods carried for remuneration on board a ship: cargo, merchandise, wares or consignment (goederen, coopmanschappen, waren, cargasoenen or carga, from the Spanish for consignment or consignment note). These terms were seemingly used interchangeably.

It has already been shown that, in principle and unless otherwise agreed, the insurance of a ship did not include her cargo, nor did the insurance of cargo on board a ship include the ship herself. Furthermore, goods carried on board for consumption by the crew and passengers, not being carried for remuneration, were not part of the

---

88 See Goudsmit Zeerecht 337. Kersteman Academie par XVIII (at 274) and Woorden-boek at 29 did not reflect this change and thought that 'Lyfbehoefteri' were not insurable.

89 See eg Van der Keessel Theses selectae th 717 (ad III.24.4); idem Praelectiones 1439 (ad III.24.4); and Van der Linden Koopmans handboek IV.6.2 who thought that the Middelburg/Amsterdam position was the correct one.

90 Article 593-1 provides a list of possible objects of risk in marine insurance, including 'mondbehoeften'. In the sixteenth century English insurance practice cover was also not available for a ship's victuals (see Kepler 'London Marine Insurance' 49). This practice no doubt changed subsequently and although victuals were not mentioned in the Lloyd's policy as being included in hull cover alongside appurtenances and equipment, a custom to include victuals probably came to be recognised and is now reflected in rule 15 of the Rules of Construction appended to the Marine Insurance Act 1906 where the term 'ship' is specifically stated to include 'stores and provisions for officers and crew'. The insurable value of a ship in terms of s 16(1) of the Act includes the value of her 'provisions and stores for officers'.

91 Van der Keessel Praelectiones 1438 (ad III.24.4) ('contra casus fortuitos, non contra cotidianam consumptionem').

92 See Mullens 45 and § 1 n26 supra.

93 See § 3.2.2 supra.
There was also a distinction between cargo and the personal belongings of the mariners and passengers.

4.2 The Scope of the Cargo Policy

In principle all types of cargo were insurable. This appears clearly, and if not expressly then at least by implication, from the various legislative measures and prescribed policies on cargo. The cargo policy prescribed by the amending Amsterdam *keur* of 1688, for example, covered goods, wares and merchandise of whatever nature, perishable or unperishable, nothing excluded, laden or still to be laden, on a ship specified in the policy. Likewise, in terms of s 25 of the Rotterdam *keur* of 1721, for example, one could insure all kinds of goods, wares and merchandise, perishable and unperishable, nothing excluded, and also the expenses incurred in preparing the goods for shipment. The Roman-Dutch authors too reflected this position.

But although no type of goods was uninsurable by reason of its inherent nature, otherwise insurable goods may under given circumstances not have been validly and lawfully insurable. This included instances where goods belonged to the enemy, had been declared contraband, or of which the exportation or importation was otherwise prohibited. And furthermore, although cargo of all types was in principle insurable, a distinction was for insurance purposes drawn between particular types of cargo in that

---

94 See § 3.2.4 *supra*.
95 See § 5.6 *infra*.
96 ‘[O]p Goederen, Waren, en Koopmanschappen, van wat soort of soorten de selve souden mogen wesen, bederffelijck of onbederffelijck, niets uitgesondert, geladen of noch te laden in 't Schip, 't Welck God beware, genaemt...'. See too the cargo policy in terms s 34 of the *placcaat* of 1571 which described the object of risk as 'sulcke koopmanschappen ende goederen by hem [ie, the insured] of anderde voor hem ende in sijnen name geladen, of te laden' in a particular ship; the cargo policy in terms of the Amsterdam *keur* of 1598 which was described as being 'van ... [description and identification of goods] die geladen zijn oft geladen sullen werden in het Schip genaemt ...'; and the cargo policy prescribed by s 2 of the Rotterdam *keur* of 1604 which insured the merchant on 'alle 't geene sy in eenige Schepen laden'.

97 ‘[A]llerhande Goederen, Waren ende Koopmanschappen, bederfelyk en ohnebderfelyk, geen uytgezondert, ende daar benevens de onkosten tot de Ladinge toe inclusief'. The goods policy prescribed by the Rotterdam *keur* of 1721 provided for insurance 'op de Goederen, van wat soort of soorten dezelve zouden mogen wesen, bederflyk of onbederflyk, niets uitgezondert, geladen of nog te laden, in het Schip ... genaamt'. Similarly, the goods policies prescribed by the Amsterdam *keur* and amending *keur* of 1744 and 1775 respectively both insured 'Goederen, Waren en Koopmanschappen, van wat soort of soorten dezelve zouden mogen wezen, bederflyk of onbederflyk, niets uitgezondert, gelaaden of nog te laaden in 't Schip, het welck God beware, genaemt ...'.

98 See eg Van Zurck *Codex Batavus* sv 'Assurantie' par 7A; Decker *Aanteekeningen ad IV.9.4 n(3)/(c) (insurance 'bevatten kan alle zaken, onder de menschen handelbaar, kostbaar of gering'); Van der Keessel *Theses selectae* th 717 (ad III.24.4); *idem Praelectiones* 1435 (ad III.24.4); and Van der Linden *Koopmans handboek* IV.6.2.

99 These matters are treated in ch VIII § 5 *infra* in connection with the legality of the insurance contract.
for such types additional requirements existed and or in that they could be insured only in a particular way, namely by expressly declaring the cargo to be insured as being of that particular type.\textsuperscript{100}

As a rule, though, cargo was insured generally as such without any further description, the premium being calculated with reference to value rather than nature.\textsuperscript{101} The reason for this practice was that merchants generally wanted to keep the nature of their consignments secret, so as not to alert competitors (who may in fact as insurers have underwritten their cargoes) as to what they were consigning where and when, or of what was or had been consigned to them. Any disclosure of such information could also negatively influence their price on the market at the destination to which the goods were consigned. The price obtained for a first consignment of a particular type of goods arriving at a particular place and that obtained for a second and later consignments of the same goods could differ significantly as the demand for those goods was met and the market became saturated. Merchants therefore preferred to, and as a rule could but obviously did not have to, insure their consignments simply under the general denomination of 'goods or merchandise'.

Then again, certain goods were of such a nature that they presented a greater than average risk of loss or damage to the insurer. In fairness to the latter, one could not expect him to insure such goods and to bear such an inflated risk, either at all or at the usual premium rates, without any prior knowledge of their nature.

Obviously a balance between the need of merchants for secrecy and that of insurers for information had to be struck. As insurance practice and law became more sophisticated, this was achieved by compelling the insured to disclose to his insurers in the policy of insurance that such extraordinarily risky goods were being insured. But only certain goods had to be specified and all others could still be insured under the general term of 'merchandise'.\textsuperscript{102} Thus, whereas originally merchandise (coopmanschappen) included all possible goods, an obligation gradually arose to mention particular goods expressly because of their nature.

In Roman-Dutch law the two types of cargo pertinently designated as worthy of special consideration in this regard were perishables and valuables. Because they were insurable and insured only if expressly described as such in the policy, perishables and valuables were not included in an insurance simply 'on goods' and the insurer accordingly did not incur any liability in respect of such goods if they were not specified beforehand in the policy. Additionally, even if they were described, the insurer in the

\textsuperscript{100} The nature of particular types of goods also necessitated a different treatment in insurance law for purposes other than insurability and the methods in which they were insured. Thus, special rules existed in respect of the transshipment and abandonment of perishables: see further ch XIII § 1.3 and ch XIX § 2 \textit{infra} respectively.

\textsuperscript{101} See ch XI § 2 \textit{infra} as to the calculation of the premium.

\textsuperscript{102} See on this point Reatz \textit{Geschichte} 227-229, referring to the designation of the insured object in the policy prescribed by the Burgos Insurance Ordinance of 1538; and Mullens 45-48, on the practice in Antwerp at the beginning of the sixteenth century.
case of perishables incurred a smaller liability than in the case of other goods because of a greater franchise percentage being applicable to such perishables.\textsuperscript{103}

Of course, there was a difference between an insured not wishing to disclose the nature of the goods he insured and an insured not being able to do so. Very often, and usually in the case of imports or return cargoes, an insured did not know the nature of goods being consigned to him. He may have instructed his factor abroad to sell the exports consigned to the latter and to purchase other goods of a specified or unspecified nature with the profit for shipment back to the Netherlands. The insured could not always specify the nature of such goods in his policy at all or with absolute certainty.\textsuperscript{104} He may therefore in appropriate cases have had no choice but to insure them under the general description of 'goods', for if he insured them under one description, he could not later claim for the loss of or damage to goods of a different description. In such cases the insurer may have been and apparently very often was prepared to accommodate the insured by expressly expanding the meaning, for purposes of the insurance in question, of the term 'goods' by covering goods irrespective of their perishable or valuable nature. The insurer would have been prepared to issue an insurance specifically on goods of whatever nature, or on goods irrespective of their nature, as long as the goods in question were specifically described in the bills of lading issued on them. Such specification was possible because the bills were issued by or on behalf of the carrier at the place from where the goods were consigned upon their shipment, and because it was necessary to verify that goods were in fact shipped for the insured. Obviously, the insurer may have been prepared to insure on this basis only at a higher premium than he would ordinarily have charged.\textsuperscript{105}

The evolution of these principles in Roman-Dutch law will now be discussed in more detail. More specifically the law relating to the insurance of perishable and valu-

\textsuperscript{103} As to franchise, see ch XV § 7.3 \textit{infra}. As to the exclusion and limitation of the insurer's liability in respect of high risk goods generally, see eg Dorhout Mees \textit{Schadeverzekeringsrecht} 598-599 who regards such exclusion or limitation as a more logical solution than the avoidance of the policy on the grounds of the non-disclosure of the nature of the goods in question. As to the prescribed content of insurance policies and the insured's duty to disclose information to his insurer, see ch VIII § 4.2 \textit{infra}.

\textsuperscript{104} Thus, where he instructed his factor as to what to buy, it not always certain that the factor was able to do so.

\textsuperscript{105} See further Dorhout Mees \textit{Schadeverzekeringsrecht} 537. Magens \textit{Essay} vol I at 8-9 advised insured to particularise goods to be insured in the policy (by marks, numbers, or description of package) if they had knowledge of the relevant particulars, rather than to declare them under the general term 'merchandise'. This was advisable, he thought, especially where the insurance was made for the account of several persons. Such specification obviated the difficulty of proving to insurers that the particular goods they had insured, were those lost or damaged. But Magens warned that it was not advisable to do so in the case of goods expected from abroad when exact details were not known. Then the goods were rather to be insured under the general term 'merchandise' because orders for the purchase of foreign commodities could, because of changed or unknown circumstances, not always strictly be complied with by factors abroad.
able goods will be considered. Then a further type of goods which also received special treatment in Roman-Dutch law, namely arms and armaments, will be highlighted.106

4.3 Perishable and Valuable Goods

Perishable goods were those goods particularly prone to diminution in quality, volume and thus in value in the course of a voyage at sea, either because of external perils, for which insurers were, as a rule, liable, or because of inherent vice, for which insurers were, as a rule, not liable.107 Legislation in some instances provided a list of such goods108 while in other cases a broad description of the nature of such goods was regarded as sufficient. Perishable goods not only involved a greater risk of liability for the insurer but also a greater risk of fraud as an insured could try to pass off a loss due to inherent vice as one due, for example, to perils on the sea.

Valuable goods were generally those of a value which was high relative to their volume or mass. They included not only precious stones, pearls and jewels but also gold and silver in both unminted form or minted, that is, money or coins.109 Such valuables were therefore not only at risk of theft or enemy capture but were, because of their size and value, easily embezzled by the crew or fraudulently claimed for by the insured himself.

From early on perishables were generally insurable only if their nature was specified in the policy.110 By contrast, valuables did not similarly have to be specified if the merchant concerned did not want to, as long as their nature and value and the fact

106 For a concise summary of the position in Roman-Dutch law as regards the insurance of perishables, valuables, and arms and ammunition, see Weskett Digest 260-261 sv ‘goods’ par 2.

107 As to inherent vice, see ch VI § 3.3 infra.

108 As will be shown shortly, these lists invariably contained a core of goods but in the course of time new goods were added while some older ones were no longer mentioned. It seems that the content of the lists was largely determined by current insurance practice at the place where the legislation was promulgated.

109 Money was often conveyed by ship. Thus, the Dutch East India Company was mainly an importer of goods from the East and exported very few commodities there. The most valuable cargoes on outward-bound ships were, more often than not, money ('contanter'). This money came in various forms, not only as currencies but also as uncoined silver and gold. It was sent to pay for the purchases of imports and also to pay company employees in Batavia. Money, in the form of coins or otherwise, was packed in bags. These bags were then placed in chests which were double-locked, wrapped in canvass, sealed and stowed in the officers' quarters. See further Gaastra 139-146 and Pol.

110 In terms of s 4 of the placcaat of 1571, the policy had to specify the type and nature ('soorten ende specien') of the goods and merchandise to be insured. The section then listed, seemingly by way of example, a number of mainly perishable goods (oil, wine, quicksilver, sugar, fruit, grain, salt, fat, butter, cheese, hops) which were examples of perishable goods ('t welck specien zijn van grove Waren ende Coopmanschappen') and which could be insured only if specified in the policy.
of their loading appeared and could be proved from a charterparty or bill of lading which could be produced when a claim was instituted on the policy.\textsuperscript{111}

According to s 17 of the Amsterdam \textit{keur} of 1598, perishables\textsuperscript{112} and also at least some valuables\textsuperscript{113} had to be expressed in the insurance policy, otherwise such insurance would be of no value. The reason was that such goods, if not thus specified, would not be included under the general words ‘goods and merchandise’ ('Waren ende Koopmanschappen').\textsuperscript{114}

In s 3 of the Rotterdam \textit{keur} of 1604 too valuables were treated on a par with perishables. In the case of the insurance of goods easily perishable or prone to spillage ('[w]aren die soo haestellijcken verderven ofte spillen'),\textsuperscript{115} or of certain valuables,\textsuperscript{116} the
nature of the goods had to be expressed clearly in the insurance policy, on penalty of nullity, since such goods were not comprehended under the general term ‘wares and merchandise’ (‘Waren ende Koopmanschappen’).\textsuperscript{117}

Subsequently, in 1614, Amsterdam went a step further as regards perishables and followed the Rotterdam example\textsuperscript{118} more generally as regards valuables. In that year s 17 was amended\textsuperscript{119} because of the many disputes which had arisen and the continuing abuses being perpetrated in connection with it. It was now provided, firstly, that the general words ‘perishable and unperishable goods’ (‘bederfjelijke ende onbederfjelijke goederen’) which, it would appear, were or at least came to be employed to exonerate an insured from his obligation to specify such goods in the policy and thus to disclose not only to the insurer but to all and sundry the nature of the goods he was expecting or consigning, would in future be understood to include all types of merchandise and goods, of whatever nature.\textsuperscript{120} It seems that a practice to that effect had arisen in Amsterdam and that s 17 merely confirmed it.\textsuperscript{121} Secondly, it was provided that a person who wished to insure gold and silver (coined or uncoined), as

\textsuperscript{117} See eg Scheltinga Dictata ad III.24.4 sv ‘oorlogs-tuig, etc’, who contrasted s 3 of the Rotterdam keur of 1604 with s 4 of the placcaat of 1571 which, as he pointed out, would still apply in places where no contrary provisions had been passed, that is, in places other than Rotterdam, Amsterdam and Middelburg. See also Goudsmit Zeerecht 385.

\textsuperscript{118} And probably accepted practice too. Thus, art 13 of the Antwerp Impressae of 1582 (which was identical on this point to art 8 of the Antwerp Antiquae of 1570) provided that in the case of perishable goods, the nature of such goods had to be expressed in the policy otherwise the insurance was invalid, ‘[w]ant als inde Police van asseurantie staet dat yemandt hem doet versekeren op eenige waren ende coopmanschappen, en verstaetmen daer in niet begrepen te zijn sulcke bederfjelijk waeren’. Valuables (metals) too had to be mentioned in the same way and for the same reason, but this was not mentioned in the earlier Antiquae.

\textsuperscript{119} By the amending keur of 9 May 1614.

\textsuperscript{120} Possibly insurers had, despite the addition of such words in their policies, still relied on s 17 to avoid liability for loss of or damage to perishables not specified in the policy.

\textsuperscript{121} See eg Scheltinga Dictata ad III.24.4 sv ‘oorlogs-tuig, etc’ who mentioned that despite the various legislative provisions that perishables had to be specified, a custom (‘gebruik’) had generally been introduced amongst merchants ‘dat ligt bedervende waeren niet behoeven uitgedrukt te worden, maar dat het genoeg is indien de police van assurantie maar gemeld wordt dat de asse. geschiedt op bedervelyke en onbedervelyke waeren’. According to Scheltinga, this custom was expressly confirmed and given effect to by the amendment of 1614. See too eg Van der Keessel Praelectiones 1441-1442 (ad III.24.2) who explained that to circumvent the problem that perishables were insurable only if specified, a custom had arisen amongst merchants at Amsterdam and that it was also approved by the Amsterdam legislature in 1614 that the insurance of such goods was valid if it had been declared that the insurance was concluded on ‘bederfelyke en onbederfelyke goederen’. According to Schorer Aanteekeningen 420 (ad III.24.4) n9, the reason for the custom and the subsequent legislative amendment was the frequent difficulty, and on occasion the impossibility, of determining the different types of goods. The Amsterdam policy of 1672, which covered the ship and her consumables (see § 3.2.4 n84 supra), also specifically covered ‘goederen en coopmanschappen, bederfelycke en onbederfelycke geene exempt’ (see Den Dooren de Jong ‘Practijk’ 2 and Appendix 24 infra).
well as on ‘Besaeltijens’, stones or other jewels, was bound to specify and describe such goods in the policy, failing which such insurance would be regarded as null and void.

In 1731, in connection with a policy concluded in Middelburg on goods perishable or unperishable, the Hooge Raad confirmed the existence and validity of the custom just referred to and its abrogatory effect on the statutory obligation in that town on the insured to specify perishables in their policies.

By the eighteenth century, again, a further development came to be reflected in the legislation. Section 41 of the Rotterdam keur of 1721 provided that valuables were not included under the general terms ‘wares and merchandise’ (‘Waren ende Koopmanschappen’) and that such goods had to be clearly expressed in the policy. Thus, the position as to valuables had remained largely unchanged since the beginning of the seventeenth century. Nothing was said of perishables, so that such goods were therefore covered under a general insurance simply on goods, as well as an insurance on goods perishable or unperishable, a fact confirmed by s 25 of that keur which declared insurable all types of goods, perishable and unperishable, without

122 According to Scheltinga Dicata ad III.24.4 sv ‘oorlogs-tuig, etc’, ‘Besaeltijens’ (also referred to as ‘besailles’, ‘besaeltjes’, or ‘bezaantjes’) were round ornamental medallions from Byzantium, usually of gold or silver, with a family or similar crest embossed on them.

123 According to Voet Observationes ad III.24.4 (n9), if an insured had taken pains that his goods were insured under the description of ‘bederflyk en onbederflyk’, s 17 provided that all merchandise, excluding valuables but including perishables, were to be understood under such general words. This was confirmed by Van Zurck Codex Batavus sv ‘Assurantie’ par 8 n1 who noted, with reference to the amendment of 1614, that under insurance ‘van bederfelyke en onbederfelyke goederen’ valuables were not included.

124 See Bynkershoek Observationes tumultuariae obs 2646; idem Quaestiones juris privati IV.15. The insurance in question was concluded at Middelburg in April 1725 ‘op alla goederen en Koopmanschappen, bederfelyk of onbederfelyk, die men behoorde te noemen, of niet te noemen’. Although the insurers denied liability because the ship had been loaded with wheat (‘tarw en garst’) not mentioned in the policy as was required by s 7 of the Middelburg keur of 1600, their defence was rejected. The Raad held that s 7 applied only when the insurance was simply on goods, not when the terms ‘perishable or unperishable’ had been added as was the case here. Because it was often difficult if not impossible to specify the nature of goods, a mercantile custom had arisen to insure in this way and in consequence the need for specification in the policy had been obviated. The Raad noted that such a custom had also been affirmed in Amsterdam. See further also Van der Keessel Praelectiones 1441-1442 (ad III.24.4).

125 It mentioned gold and silver (either minted or unminted), stones, or other jewels.

126 See eg Van Zurck Codex Batavus sv ‘Assurantie’ par 8 n1 who referred to ss 17 cf the Amsterdam keur of 1598, 7 of the Middelburg keur of 1600, 3 of the Rotterdam keur of 1604, and 41 of the Rotterdam keur of 1721 for the statement that valuables were not included under an insurance on goods simpliciter but had to be specified in the policy.
exception.\textsuperscript{127} Rotterdam thus went further\textsuperscript{128} in that unspecified perishables were covered not only if so agreed but even where there was no specific agreement on the matter.\textsuperscript{129} In short, in terms of the Amsterdam \textit{keur} of 1598 and that of Rotterdam of 1604, perishables had to be specified if they were to be covered; in terms of the Amsterdam amendment of 1614, unspecified perishables were covered if the parties had so agreed; and in terms of the Rotterdam \textit{keur} of 1721, unspecified perishables were covered without further ado.

Similarly, s 10 of the Amsterdam \textit{keur} of 1744 provided that under the general term of 'goods, wares and merchandise' ('\textit{Goederen, Waaren en Coopmanschappen}'), valuables would not be included,\textsuperscript{130} and if one wished to insure such goods, there was an obligation to mention and express such wares in the policy, also when they were packed with other goods, or otherwise the insurance would be regarded as null and void. Again there was no mention of perishables so that they were presumably insurable without specification.

In summary, perishables were insurable in principle, not only where they had been enumerated specifically, as was formerly required because they were not included under an insurance simply 'on goods', but also generally, as had become customary and as approved in Amsterdam, under the terms 'perishable and unperishable goods' and, clearly at least in Rotterdam, even more generally simply under the general term 'goods'.\textsuperscript{131} Put simply, as a direct result of custom, perishables no longer had to be specified. Insurers were prepared to insure goods irrespective of whether or not they were perishable, and the legislature therefore permitted this practice.

As far as valuables were concerned, the insured by contrast remained under a duty to bring their nature to the attention of insurers by specifying in the policy that the goods being insured were valuables.\textsuperscript{132}

\textsuperscript{127} Van der Keessel \textit{Praelectiones} 1441-1442 (ad \textit{III.24.4}) interpreted s 25 as follows: s 3 of the Rotterdam \textit{keur} of 1604 no longer applied to perishables as it was by implication amended or repealed by s 25, a fact in turn confirmed by the fact that s 41 had taken over only the other part of s 3 which concerned valuables and in respect of which a special exception was therefore still recognised.

\textsuperscript{128} And did not simply follow the Amsterdam amendment of 1614, as assumed by eg Van Zurck \textit{Codex Batavus} sv 'Assurantie' par 8 and also by Goudsmit \textit{Zeerrecht} 395 who misread the latter provision.

\textsuperscript{129} See Kracht 36 who seems to have recognised this difference.

\textsuperscript{130} The section mentioned gold, silver (coined or uncoined), jewels, pearls or trinkets ('\textit{Kleynodier}').

\textsuperscript{131} See Van der Keessel \textit{Theses selectae} th 721 (ad \textit{III.24.4}), idem \textit{Praelectiones} 1441-1442 (ad \textit{III.24.4}).

\textsuperscript{132} See eg Van der Keessel \textit{Praelectiones} 1442 (ad \textit{III.24.4}); Van der Linden \textit{Koopmans handboek} IV.6.2.

In Hamburg, again, it appears that coined money at least was in fact included under the general term 'merchandise' and that no closer specification was required. See Frentz 'Seerechtsprechung' 143-144, referring to a decision to that effect by the Hamburg Admiralty Court in 1726 in \textit{Lemvig v Several Insurers}. The judgment in this case gained acceptance to such extent that it was recognised as confirming current practice in derogation of s 1 of the Hamburg Insurers' Accord of 1697 in which a comprehensive duty of specification was provided for. It resulted also in s IV.9 of the Hamburg \textit{Assecuranz-Ordnung} of 1731 providing that gold and silver, coined or uncoined, as well as precious stones and pearls were included under the general term 'merchandise'.

In English law too precious metals or coins did not have to be mentioned and were included under the general term 'goods'. See eg Magens Essay vol I at 10-11.
The reason why perishables were treated differently and why the liability of an insurer was no longer excluded, as it was in the case of valuables, if the nature of such goods were not mentioned, must be sought in or at least seen against the background of another concurrent development in insurance law, namely the franchise. Although treated in detail elsewhere,\textsuperscript{133} franchise briefly amounted to the following. In terms of a franchise clause an insurer was liable only if the damage claimed exceeded a particular percentage of the value of the object insured; if that percentage was exceeded, the insurer was liable for the damage in full. Thus, a franchise of three per cent meant that if goods worth \( f\)100 were damaged and the damage amounted to \( f3 \), the insurer was not liable at all; but if the damage was for example \( f10 \), the insurer was liable in full for that loss. The notion of a franchise was introduced by the custom of merchants to protect the insurer not only against the nuisance of small claims generally, but also against such claims in the case of goods of a particular nature where small losses were common.

Perishables were treated differently from other goods in that a greater percentage of franchise (ten per cent) was by custom applied to them than to other goods. Because an insurer’s liability was thus more restricted in respect of perishables, it became possible to relax the duty on the insured to inform his insurer in the policy that goods to be insured were of a perishable nature. Custom further accommodated the insured in that if he could and did disclose the perishable nature of the goods, and the insurer was nevertheless prepared to provide cover, the ordinary percentage of franchise (namely three per cent) applied to such specified or disclosed perishables as it did to goods generally.

This may be illustrated by taking as an example the provisions of the Amsterdam keur of 1744.\textsuperscript{134} Whilst perishables, as all other types of goods, were insurable in full irrespective of whether their nature was disclosed, s 34 of the keur of 1744, as amended in 1756, provided that if someone insured certain perishable goods\textsuperscript{135} under the general nomination of ‘goods’, the insurers were not liable for a loss smaller than ten per cent of the value; but if such goods were specifically insured, the insurers were relieved of liability to compensate any damage only in respect of a loss smaller than three per cent.\textsuperscript{136}

Thus, the non-specification of perishables no longer resulted in the exclusion of the insurer’s liability. The insurer now remained liable in respect of unspecified or undisclosed perishables but his liability in the case of their loss was restricted by the

\textsuperscript{133}See ch XV § 7.3 infra.

\textsuperscript{134}See further ch XV § 7.3.2 infra.

\textsuperscript{135}Wool, flax, hemp (the plant \textit{cannabis sativa} from the fibres of which the best natural rope was made), hake, herring, grain, seeds, sugar, peas, beans, cheeses, books and paper were mentioned in this regard.

\textsuperscript{136}See further eg Decker \textit{Aanteekeningen ad} IV.9.4 n(3)/(c); Van der Keessel \textit{Praelectiones} 1440-1441 (\textit{ad} III.24.4); and Enschedé 158. On the interpretation of s 34, which contained a different list of perishables from that mentioned in other sections in the \textit{keur}, see Van der Keessel \textit{Praelectiones} 1442 (\textit{ad} III.24.4).
imposition of a greater franchise percentage. This greater percentage was a way of encouraging the insured to disclose the perishable nature of goods, if he could, or, if he could not or did not want to, of limiting the exposure of the insurer in the event of the loss of unspecified perishables.

The Roman-Dutch ancestry of the provisions on perishables and valuables in the Wetboek van Koophandel is clear. And not surprisingly, the position in English law, although not identical, would not have been foreign to Roman-Dutch lawyers of the time.

137 This was yet another example in Roman-Dutch law of the limitation rather than the exclusion of the insurer's liability in the case of non-disclosure. Cf too the case of unspecified ships made of fir-wood referred to in § 3.2.1 supra.

138 In terms of art 596-1, if an insured is ignorant as to what goods consigned to him consist of, he may conclude an insurance on them under the general terms 'goods', but, in terms of art 596-2, under such an insurance on goods generally were not included certain valuables ('gemunt goud en zilver, gouden en zilveren staven, juweelen, paarlen of kleinooderi'). Such valuables were therefore not insured unless specified in the policy so that the insurer was warned and able to decline the risk or require a higher premium. See generally Dorhout Mees Schadeverzekeringsrecht 599-600. As in later Roman-Dutch law, perishables did not in the same way have to be specified because of the fact that, by virtue of a higher franchise, the insurer's liability was more restricted in their case. See too eg art 644-1 for a provision restricting the insurer's liability in the case of unspecified perishables in accordance with local custom ('de bestaande gebruiken, op de plaats der verzekering'). Again, therefore, a distinction was drawn between valuables (insurer incurs liability unless nature of goods specified) and perishables (insured is covered even if nature of goods not specified but insurer's liability restricted by a greater franchise).

139 In customary English law in the sixteenth century, 'goods and merchandizes' were 'general words' under which were subsumed 'dry Wares'. A long list of such dry wares was specified in order 2 of the draft Booke of Orders dating from the 1570's which further provided that 'non other to pass by theis generall words'. In terms of orders 3, 4 and 5, policies had to specify by name certain perishables and valuables which were not included in and could not be insured under the general words 'goods and merchandizes', either generally or at least against the peril of arrest. These goods included precious metals, jewels, corn or grain of whatever sort, any kind of victual usually to be eaten, and leakage wares (wines, oils, raisins, and the like). See further Kepler 'London Marine Insurance' 49, 50 and 54n19.

In the seventeenth century, goods could be insured under the general description of the goods concerned (eg hides) and it was not necessary to specify the type of goods (ie, the type of hides). Insurance could also eg be made 'on goods laden or on uncertain goods to be laden' for the account of the insured, and the words 'goods' then included 'all uncertaine things vendible' (see Malynes Consuetudo I.28; Molloy De jure maritimo II.7.9). The same practice continued in the eighteenth century and goods were insured without being further specified than by the word 'goods', although some goods (gold, diamonds, quicksilver, ores, wool, sugar, tobacco, cocoa, tallow, fodder, corn) were customarily named in the policy. According to Drew 35, the reason why some goods were specified may have been because of a clause (similar to the later Memorandum which only appeared in English policies in 1749) which made such specification necessary.

In the Marine Insurance Act of 1906, insurance may be made on 'goods or other movables' exposed to maritime perils (s 3(2)(a)), 'movables' meaning any movable, tangible property other than a ship, and including money, valuable securities and other documents (s 90). In terms of rule 17 of the Rules of Construction appended to the Act, the term 'goods' means goods in the nature of merchandise, and does not include personal effects or provisions or stores for use on board (which were included under the term 'ship'). And in the absence of a usage to the contrary, deck cargo and living animals must be insured specifically and not under the general denomination of 'goods'. As to the (different) position as regards deck cargo prior to the Act when no description was necessary if the insurer could be taken to be aware of a usage that it could be insured generally, see Cohen 'Law' 29-30; and as to the effect of the general duty of disclosure requiring an insured to specify the nature of some (exceptional) goods in appropriate circumstances, see eg Chalmers 165.
4.4 Arms and Ammunition

Another group of goods which received special treatment in Roman-Dutch insurance law was what may generally be termed 'arms and ammunition'. This group caused some difficulty in that armaments were carried on board ships in two capacities. In the first place they were carried as part of the ship's equipment. In the main a ship's armaments consisted of her guns, the main type of which was the cannon, and ammunition such as gunpowder and gunshot. But arms and ammunition were also carried as cargo. In the former capacity they displayed some similarity with victuals in that the ammunition was intended to be and often was 'consumed' in the course of a voyage. In both capacities they, like perishables and valuables, created an increased risk, not only of explosion for example, but also of enemy and piratical capture or confiscation by the authorities.

Unfortunately Roman-Dutch law was not always clear in distinguishing the insurance of arms and ammunition as equipment and as cargo. Furthermore, it is not always readily apparent from the terms employed what exactly the legislature understood under the terms 'arms and ammunition'.

Guns and munition ('Geschut, Munitien') were insurable, although not fully so, in terms of the placcaat of 1571.

In s 10 of the Amsterdam keur of 1598, though, some refinement was introduced. Guns and munitions of war ('Geschut, Munitie van Oorloge'), being equipment on and hence part of the ship, remained partly insurable, but gunpowder and shot

---

140 In the sixteenth century the arming of merchant ships for defensive purposes was a normal practice on longer voyages (see eg Hoogenberk 9-10), but by the seventeenth century most merchantmen were unarmed or carried only a few guns. In some trades masters organised their own convoys and if necessary the navy provided convoyships (see eg Bruijn & Van Heslinga 7). As to convoys, see further ch XIII § 2.3 infra.

141 In the seventeenth century, Amsterdam was an advanced and active producer, seller and shipper of arms and munitions. In fact, as was the case with insurance (see ch VIII § 5.3 infra as to the insurance of foreign and enemy property), Amsterdam often supplied even its enemies with weapons in time of war! (see further Barbour Capitalism 35-42). Consignments of arms were often insured. Thus, in 1560, at a time when the export of weapons and ammunition from the Netherlands to England was prohibited, Sir Thomas Gresham, the builder of the Royal Exchange in London and representative of Queen Elizabeth I in Antwerp, had three ships loaded in Hamburg with weapons consigned to England. The value of the weapons was £9 000, of which Gresham had £3 000 insured in Antwerp, the rest being carried at the risk of the Queen although the precaution was taken of sending the ships under convoy. Further consignments were similarly insured on the Antwerp Bourse at a premium rate of 5 per cent. See further Ehrenberg Hamburg 61n16 and 247-248.

142 See s 20 and also s 21 of the placcaat of 1570. See too Goudsmit Zeerecht 263,

143 With which s 3 of the Middelburg keur of 1600 corresponded.
('Kruyt, Klooten'), which were consumable like victuals, were not insurable at all.\footnote{144} In terms of s 17 of the keur of 1598,\footnote{146} though, if one wanted to insure munitions of war ('Munitie van Oorloge'), such goods, like perishables and valuables, had to be specified in the policy otherwise the insurance was null and void, these goods not being included under the general terms 'goods and merchandise'.\footnote{147} Then again, in terms of the hull policy prescribed by the keur of 1598, the object of risk was described as the hull of a ship with her guns, munitions and equipment ('Kaske ofte corpus van een Schip, met sijn Geschut, Munitie, gereetschappen, ende aenkleven van dien'). It seems that s 10 was concerned with arms (which were insurable) and ammunition (which was not insurable) on board as part of the equipment of the ship, while s 17 was concerned with arms and ammunition (both of which were insurable, if specified) on board as cargo.\footnote{148} This appears to have been in accordance with insurance practice at the time.\footnote{149}

Although the insurance of certain types of goods, including munitions of war, was subsequently regulated further in Amsterdam,\footnote{150} the position remained essentially

---

\footnote{144} 'Kruyt, Kogels' in the Middelburg version.

\footnote{145} A comparison between eg Grotius Inleidinge III.24.4 and Van Leeuwen Rooms-Hollands regt IV.9.6 brings out the refinement nicely. See too Goudsmit Zeerecht 317.

\footnote{146} With which agreed s 7 of that of Middelburg of 1600.

\footnote{147} See eg Grotius Inleidinge III.24.4; Voet Observationes ad III.24.4 (n9).

\footnote{148} It seems that because of the distinction drawn in s 10 between insurable guns and munitions of war ('Munitie', 'oorlogs-tuig', which term included in its ordinary sense not only the weapon itself but also the ammunition and thus also gunpowder and shot), and uninsurable gunpowder and shot ('Kruit', 'kogels'), the latter must be taken to have been restricted to gunpowder and shot loaded on board the ship with the intention of being consumed, if necessary, in the course of the voyage. See Scheltinga Dictata ad III.24.4 sv 'oorlogs-tuig' who concluded that s 10 accordingly had to be taken to mean that 'nog kruit of kogels in een schip gelaaid om dezelve op de reis te verbruiken geassureerd moogen worden', and accordingly that munitions ('oorlogstuig'), including 'kruit' and 'kogels', could be insured 'mits maar het zelve oorlogstuig niet is in schip gelaaid met oogmerk om hetzelve op de reys te verbruiken, maar om hetzelve na elders te vervoeren'.

\footnote{149} In terms of art 13 of the Antwerp Impressae of 1582 munitions (like perishable and valuable goods) had to be expressed in the policy otherwise the insurance was invalid, the reason being that munitions were not included under the general term 'wares and merchandise'. Earlier art 8 of the Antwerp Antiquae of 1570 had spoken in identical terms but only of perishables. In terms of art 286 of par 9, title 11, part IV of the Antwerp Complatae of 1609 (see De Longé vol IV at 318), ammunition ('tcruijt, clooten') on board the ship, like victuals and other similar matters 'die eenichsints in den schepen gesloten [gesleten] oft verdaen worden', were not insurable. Article 287 provided a list of what was included under the insurance of a ship and her appurtenances and equipment (see § 3.2.3 n71 supra), but specifically not included was 'geschut', unless it was expressly agreed. This latter provision appears to indicate the existence in customary insurance law of a duty of disclosure also in respect of guns (which were insurable) carried as equipment.

\footnote{150} Thus, the Amsterdam amending keur of 9 May 1614 provided that because of the many disputes arising in respect of s 17 of the keur of 1598, it was amended so that if one wanted to insure on, amongst other things, munitions of war, there was an obligation to specify and express ('stellen ende uyt te drucken') their nature in the policy, for otherwise the insurance would be regarded as null and void. Nothing new, therefore, as far as ammunition was concerned.
unchanged in subsequent amendments of the keur of 1598.\textsuperscript{151}

Rotterdam followed a comparable line. In terms of s 3 of the Rotterdam keur of 1604 the insurance of, amongst other things, munitions of war ("Munitie van Oorloge"), carried as cargo, like valuables and perishables, had to be clearly expressed in the insurance policy, on penalty of nullity, since such goods were not comprehended under the general words 'wares and merchandise' ("Waren ende Koopmanschappen"). In terms of s 4, the owner of a ship could not insure, as part of the equipment of a ship, victuals, gunpowder, gunshot and other goods consumed en route ("Bussepoeder, Kogels ende andere goederen die op de reyse gheconsumeert werden").

Again, as was the case with victuals, s 3 of the Middelburg keur of 1719 by way of exception presciently deviated from the position in Amsterdam and Rotterdam. It provided that one could fully insure guns, gunpowder, lead, gunshot and other munitions of war, as well as all other consumables on board ("op Kanon, Buskruyt, Loot, Kogels en andere Ammunitie van oorlogh, als mede op al het consumable in de Scheepen").\textsuperscript{152}

In the eighteenth century the Rotterdam keur of 1721 did not alter the earlier position there. In terms of s 25 all types of cargo were insurable, but in terms of s 41 the general term 'wares and merchandise' ("Waren ende Koopmanschappen") did not include any ammunition of war ("Ammunitie van Oorlog") unless and to the extent that such goods were clearly expressed in the policy.\textsuperscript{153} The hull policy prescribed by the keur of 1721 provided for insurance on the hull of the ship with her guns, ammunition and equipment ("op het Caske of Corpus van het Schip (dat Godt beware) met zyn Geschut, Munitie, Gereetschappen, ende aanklaven van dien"). In terms of s 27, though, consumables, which in all probability included ammunition on board for use in course of the voyage, were not insurable.

Under the Amsterdam keur of 1744 too, arms and ammunition, carried as cargo, were insurable, but had to be specified. Thus, s 10 provided that the general term 'goods, wares and merchandise' ("Goederen, Waaren en Coopmanschappen") would not include ammunition of war and guns ("Ammunitie van oorlog en Geweer"). If one wished to insure such goods, there was an obligation to mention and express them in the policy, also when they were packed with other goods, or otherwise the insurance

\textsuperscript{151} Thus, the hull policy prescribed by the Amsterdam amending keur of 1688 was described as being 'op ... 't Caske of Corpus van 't Schip, dat God beware metijn Geschut, Munitie, Gereetschappen en aanklaven van dien'; and in terms of the amending keur of 1693, s 1 (in decreasing the amount of compulsory under-insurance on ships (see ch XVIII § 5.2 infra), repeated the prohibition on the insurance of certain objects: 'Kruyt, Loot, Vicntualie of diergelijke dingen, die eenigsints gheconsumeert werden' could not be insured.

\textsuperscript{152} See Van Zurck Codex Batavus sv 'Assurantie' par 5 n(b): Schorer Aantekeningen 418 (ad lll.24.4) n6 and n7. According to Van der Keesel Praelectiones 1439 (ad lll.24.4), although s 3 in permitting this insurance did not state that the insurance had to be specific (as was later required elsewhere), it nevertheless appeared that this may have been required by implication because of the greater risk involved, especially in the case of gunpowder.

\textsuperscript{153} See eg Van Zurck Codex Batavus sv 'Assurantie' par 8 ("Oorlog-tuig" was not included in an insurance on goods simpliciter but had to be expressed in the policy of insurance); Van der Linden Koopmans handboek IV.6.2 ('oorlogs-behoefte' was only insurable if specified).
would be regarded as null and void. But now, following in all probability the position in
Middelburg, arms and ammunition carried on board the ship as part of the equip­
ment and for consumption in the course of the voyage, were both insurable and
included in an insurance on the ship.

In summary, arms and ammunition carried as cargo, the insurance of which was
earlier prohibited, had by the eighteenth century become insurable, but only if they
were specified as such because of their not being included under the term 'goods'.
Arms and ammunition on board as part of the ship's equipment were also insurable
and were included under an insurance on the ship's hull.

The position as reflected in the Amsterdam keur of 1744 was essentially also that
provided for in the Wetboek van Koophandel, although the latter was not quite as
encompassing. In terms of art 593-2 an insurance on a ship, without any further indica­
tion, includes her hull, keel and also, amongst other things, the munitions ('het oorlog­
uinst'). In terms of art 596-1, if an insured is ignorant of the nature of consignment he
wishes to insure, he may insure them generally as 'goederen' but, in terms of 596-2, as
in Roman-Dutch law, such general description of goods does not include armaments
('krijgsbehoeften'). In English law, again, the position was not much different.

---

154 See Goudsmit Zeerecht 453.
155 Section 7 of the Amsterdam keur of 1744 provided that the hull of a ship, with her 'Geschut,
Ammunitie van oorlog, Consumabel en verder aankleven van dien, niets uitgesonderd', was insurable. A
ship's guns were clearly insurable, as was confirmed by the hull policies prescribed by the Amsterdam
keuren of 1744 and 1775. They were stated to be '[o]p ... 't Casko of Corpus van 't Schip, dat God
beware met zyn Geschut, Munitie, Gereetschapen en aankleven van dien'. It may be taken that
gunpowder and shot were now also recognised as insurable, if not because such goods could be
regarded as 'consumabel' or 'munitie', then at least because nothing on board was uninsurable any
longer.
156 Thus, Van der Keessel Theses selectae th 718 (ad III.24.4) noted that gunpowder and bombs ('pulvis
pyrius & globi ad tormenta bellica parata') were no longer prohibited from being insured, provided they
were specifically mentioned. See also idem Praelectiones 1439 and 1442 (ad III.24.4).
157 See Van der Keessel Praelectiones 1434-1435 (ad III.24.4), referring to the arms and instruments
('armamenta et instrumenta') of a ship.
158 Apparently not included under the term 'hull', in the absence of an express provision to that effect,
therefore, are pieces of equipment other than those specifically mentioned. Article 593-1 provides a list of
possible objects of risk in marine insurance, amongst others 'oorlogstuig'. See further Dorhout Mees
Schadeverzekeringsrecht 534 and 538.
159 Accordingly, such goods are not insured unless specifically named, in which case the insurer is
alerted and able to ask a higher premium. See Asser NBW 225; Dorhout Mees Schadeverzekeringsrecht
599.
160 It appears that in the sixteenth century the hull and armaments of a ship could be insured: see Kepler
'London Marine Insurance' 49. Later the custom of covering armaments came to be reflected in the
Lloyd's policy which provided cover 'also upon the body ... ordinance [ie, mounted guns, cannon],
munition, artillery ... of and in the good ship or vessel called the ...'. As far as the conveyance of arms and
ammunition as cargo was concerned, it appears from the Booke of Orders with regard to the items upon
which insurance was available in London in the 1570's, and specifically from orders 3, 4 and 5, that
policies had to specify by name certain types of cargo, amongst others gunpowder and arms: see Kepler
'London Marine Insurance' 54n19. According to Kepler 50, certain items suffering restraint and
5 The Insurance of Expected Advantages and Future Objects

5.1 Introduction

The reasons for the prohibition, at first, on the insurance of expected advantages or future objects were many, varied and to some extent overlapping, as were the reasons for the conceptual problems experienced, right up to the end of the eighteenth and in fact until deep into the nineteenth century, with this type of insurance. It is difficult to pinpoint a single reason, for, as will become apparent from the discussion which follows, the prohibition did not always appear in the same context in the various legislative measures.\footnote{It is more likely that a combination of different reasons operated in both instances.}

The principal reason for the early prohibition on the insurance of an expected advantage or future object in Roman-Dutch law was the absence of a specific, identifiable physical object, such an object rather than any interest in that object being at the time regarded as the necessary object of insurance.\footnote{Linked to this were various other reasons, such as that the prohibition was necessary to prevent a breach of the indemnity principle, wagering and fraud.}

Insurance was aimed at an indemnity and only that which was directly exposed to risk could be the object of an insurance contract. In the case of an expected or future advantage, there was no existing object to which the insurance could be linked. A mere expectation, often exaggerated if not totally unfounded, and in any event of an uncertain value prior to its actual materialisation, was a nonentity and the insurance of it contrary to all the rules of indemnity if the merchant should in the process be ‘compensated’ for the loss or non-materialisation of something so uncertain. It was therefore not accepted at the time, and insurance theory was in any event insufficiently advanced to explain, that a reasonable expectation of the materialisation of an advantage or object was sufficient to found a claim for an indemnity.\footnote{Further, the role to be played by the insurer’s right of recourse in preserving the indemnity principle in the event of third-party involvement by providing the necessary recourse to an insurer was not yet realised. More specifically, by the end of the eighteenth century the insurer’s right of recourse to any delictual claims of the insured was not yet fully developed, and recourse to his contractual claims, which were the ones pertinently involved in some of the expectations which were insured in practice, even less so. As to the right of recourse, see further ch XIX § 1 infra.}

detainment by governments were not always covered; among the items which could not under the general words of ‘goods and merchandizes’ be insured against the perils of arrest or detention, were gunpowder, saltpeter, guns, munitions of war, and arms.

\footnote{See generally eg Goudsmit Kansovereekomsten 219-220; Lugt 175-192; and Rutgers van der Loeff 161-165 and 175-192.}

\footnote{See again ch II §§ 6.1.1 and 6.2.3 supra.}

\footnote{These, rather than the fact that the insured was not the owner of the expectation (see Dammers 17), would appear to be the true possible reasons for the initial denial of the validity of such insurances.}
The loss or, rather, the non-materialisation or even the less than full materialisation, of an expected advantage or future interest (*lucrum cessans*), as opposed to the loss of or damage to an existing physical object (*damnum emergens*) was, generally, not regarded as a loss or damage which it was possible or permissible to compensate.

This was so in the Roman-Dutch law of delict\(^{165}\) no less than in its insurance law. Hence, the insurance against such a 'loss' or non-materialisation of an expected advantage was not regarded as permissible or proper.\(^ {166}\) The accepted notion was that the sum insured should cover *damnum emergens* but not also *lucrum cessans*;\(^ {167}\) that insurance should place the insured in the position he was in before the adventure insured had been commenced, not in that position in which he would possibly have been in had the adventure been successfully completed.\(^ {168}\)

But further, even if it were to be regarded as a compensable loss, the absence of any physical object meant that it was difficult if not impossible not only to estimate, determine and prove the value of that which was lost or which did not materialise, but also to ascertain whether the expectation was in fact based on

---

\(^{165}\) A pertinent example is provided by an opinion delivered in 1674 (see *Nederlands advysboek* vol III adv 252). It concerned a claim for damages caused in a collision between two ships. The owners of the one ship, which was saved, acknowledged liability for half the damage or value of the other ship, which was lost, and also the goods on her. But they refused to accept liability for the freight stipulated on the completion of her voyage, which freight, because of her loss in the collision, was never earned. The reason for their refusal was the fact that unearned freight, when it was also uncertain whether it would be earned, could not be taken as a loss, and also that one could not claim for the loss of an uncertain advantage. The question put to the advocate, therefore, was whether or not this argument was valid. According to the opinion, no liability arose in respect of freight which would have been earned when the goods carried had been brought safely to and delivered at their destination. There was no liability for consequential loss. Furthermore, in compensating loss, one could claim only 'sodanige schade, die het seker is dat heeft geleden, en niet sodanige die nog in onseker hebben bestaan, ende daarom ook niet sekerlijk kan bewesen werden, dat men waarschut heeft geleden'. (The lawyer delivering the opinion then referred to an example of a ship damaging fishing nets being liable for the damage to nets themselves but not for any fish not caught as a result.) Thus, there was no claim in this instance for 'de te verdiende vraag, dewij het onseker is geweest, of de verdient soude hebben geworden'.

\(^{166}\) At most such 'insurance' would amount to or be in the nature of a wager, which explains why the prohibition against the insurance of an expected advantage, either generally or specifically against one or more forms of such insurance, was often mentioned in Roman-Dutch legislation in the same breath as the prohibition on wagering insurance (as to which see again ch II § 6.4.3 supra).

\(^{167}\) As Coing *Privatrecht* 536 explains, the difference between the two types of loss, ie, *damnum emergens* which is the loss of something which would have been retained in absence of the occurrence in question (‘verlies’) and *lucrum cessans* which is the loss of not obtaining something that in absence of the occurrence in question would have been obtained (‘winstderving’), was at first practically, and later remained conceptually crucial for insurance purposes. The latter type, the non-materialisation of an advantage, was not regarded as a provable and thus not as an insurable loss.

\(^{168}\) Thus, there was a strict application of the indemnity principle which, for example, took as the basis of compensation the value of the ship and goods at the time and place of commencement of the voyage, and thus prohibited the insurance of freight (ie, the profit on the ship) and that of the profit on the goods, both of which could be realised only on the completion of the voyage. Even when the insurance of profit came to be permitted by legislation, only such profit as expected at the time of commencement of the voyage was allowed and not, eg, the value of the goods at their destination in an undamaged condition. See further Star Busmann 14-15. As to the measure of indemnity, see further ch XVII § 7 infra.
reasonable grounds and was not simply the product of an inventive imagination. This absence made possible not only a breach of the indemnity principle by the over-compensation of the insured but also fraud on his part.\footnote{169}

Another possible reason for the prohibition on the insurance of some types of expectation\footnote{170} was that the prohibition was, most clearly in the \textit{placcaaten} of 1550 and 1551, specifically linked to and equated with the over-insurance of goods. It was a measure, together with the compulsory under-insurance introduced for the first time by those \textit{placcaaten}, aimed at countering abuses in this regard.\footnote{171}

Equally possible was that the prohibition on the insurance of other types of expectation\footnote{172} was related to the earlier crude notion that by permitting such insurance, an insured would tend to neglect his vigilance and effort in preventing the loss of the ship and her non-arrival at the destination.

Examples of the insurance of expected advantages or future objects which caused problems in Roman-Dutch law included the insurance by a consignor of the expected profit on the consigned goods; the insurance by a consignor of the goods expected as return cargo; the insurance by the owner or charterer of a ship of future freight expected to be earned by the carriage of goods in that ship; the insurance by the lender of money under a bottomry bond; and the insurance by an insurer of insurance premiums.

The clearest indication of the difficulties experienced in Roman-Dutch law with, and the objections against, insurance on expected or future objects or interests, appears from a discussion by Verwer.\footnote{173} He noted that the lender of money on bottomry could insure the money lent but not the interest because such insurance would be in nature of an insurance on profits or uncertain returns in addition to the capital amount lent out. And the latter, he explained, was prohibited by various legislative measures because the insurance contract had to concern physical objects and not mere expectations. What was prohibited was the insurance of incorporeal things ("onlichamelijke effecten"), such as "actien, credijten, vracht, volkhure, weddingen, ende diergelijke inventien". Insurance had to be on corporeals ("op lichamelijke dingen"), such as a ship and the cargo on board, and not "op windt-partijen".

Only when it was realised, firstly, that the loss or the non-materialisation of an expected advantage was a compensationable loss, and, secondly, that the interest in such an advantage was the object of the insurance and not the physical object itself into which the expectation could or could not materialise, was the insurance of future

---

\footnote{169}{Even when the insurance of expected advantages eventually came to be permitted, several precautionary conditions were invariably imposed by legislation to prevent both such a breach and related frauds by the insured and to protect the insurers.}

\footnote{170}{In particular, that of expected profit on goods.}

\footnote{171}{See eg Hammacher 42-43; Kracht 12.}

\footnote{172}{In particular the freight of the master-shipowner-carrier and seamen’s wages, both being earned only on the safe arrival of the ship at her destination.}

\footnote{173}{See-rechten par 34 (at 149, 175-176).}
interests permitted, or, more properly, was such permission explicable on a sound theoretical basis. As will appear from the discussion which follows, such theoretical clarity never emerged during the period of Roman-Dutch law.

The insurability of expected advantages and future objects was recognised and permitted in Roman-Dutch law in the course of the eighteenth century. No doubt long being available in practice, legislative approval of this form of insurance was granted initially on the grounds of utility, more specifically because of the definite need in practice for such insurance cover and also because of the fact that such interests were insurable elsewhere, and in particular in London. The Dutch legislatures simply feared that a loss of business would result if the practice was not legalised. The legalisation was not based on any sound theoretical exposition of the principles involved. That only came in the nineteenth century.

The insurance of the different types of expected advantages or future objects occurring in the maritime context in Roman-Dutch law will now be considered in more detail. Particular attention will be paid to the two main but related types of such insurance which caused a great deal of difficulty, not only in Roman-Dutch law but in most other contemporary systems. These were the insurance of the profit expected on goods carried by sea, and the insurance of the freight expected to be earned by a ship for the carriage of goods by sea.

5.2 The Insurance of Expected Profit

Insurance was permitted in Roman-Dutch law on goods to be carried by sea to the value of those goods at the time and place of their consignment. Because merchants consigned goods to foreign destinations in the hope of selling them there at a profit, the loss of or damage to such goods involved more than just the loss of the value of the goods concerned at the time and place of their consignment. Merchants in such a case also lost out on the profit they had hoped to make on the sale of the goods at their destination. No doubt they therefore wished to insure also against the loss of such expected profit resulting from the loss of or damage to the goods themselves. This

174 See eg Magens Essay vol I at 15-18 who noted that an absolute prohibition on insuring freight was an inconvenience to trade, because in the case of distant voyages, the freight which a ship could earn could surpass even her value. The same was no doubt true of other insurances of expectations, notably that of expected profit on goods.

175 As to the insurable value of goods, see ch XVII S 3.2 infra.

176 The insurance of profit with which Roman-Dutch law was concerned, was therefore the insurance against the loss of expected profit because of the loss of or damage to the goods themselves (consequential loss) and not the loss of such profit independently of any loss of or damage to the goods. Put differently, the loss of the profit had to be the result of a peril insured against, which, in the present context, meant a marine peril. Thus, if the goods arrived safely, the insurer on profit was relieved of liability even though the profit was for another reason (eg, a fall in prices because of the outbreak of war) not realised. The insurer bore the risk of marine perils or perils on the sea, not that of a fall in the market at the destination. There is no evidence of insurance against the latter risk being available on Dutch markets before the nineteenth century. See further eg Goudsmitt Kansovereenkomsten 228-224. Mullens 50 notes that the Antwerp Compilatae of 1609 provided that insurers were not obliged to compensate for the loss of an expected profit on the safe arrival of the goods on which such profit was expected.
they could do either *suo nomine*, that is, the insurance on profit *per se*, or as part of and included in the value of insured goods themselves. 177

In the Netherlands, though, it was to be a long time before such insurances were officially permitted, let alone theoretically explained. 178

One of the earliest insurance laws, the *placcaat* of 1550, contained a prohibition on the insurance of the profit expected on a consignment of goods. 179 In terms of s 11 of title VII of the *placcaat* of 1563, too, the profit expected to be made on goods at their destination ("*suicke winninge als hy hoopt of meynt te doen, syne Coopmanschappe comende ofte ghebracht zijnde ter plaetsen daer hy de selve bevracht heeft*") could not be included in the value of insured goods; an implicit prohibition, therefore, on the insurance of such profit. 180 There was no mention of the insurance of profit in the otherwise equivalent s 3 of the *placcaat* of 1571, 181 nor in the equivalent s 2 of the Amsterdam *keur* of 1598. 182

The next legislative measure to devote attention to the insurance of expected profit, was the Rotterdam *keur* of 1604 which formally approached the matter from a different angle but which, in practical terms, probably did not change the existing legal position. Section 2 prohibited a consignor of goods from insuring on expected profit or

---

177 See generally Magens *Essay* vol I at 27-28 and vol II at 134 who advised merchants to follow the latter option (ie, to include such profit in the valuation of goods) and to avoid using the expression 'imaginary profits' in their insurance contracts and thus to avoid the uncertainty surrounding such insurance. See too Weskett *Digest* 426-427 sv 'profit' par 6 who also explained that although insurances on profit distinct and separate from the goods were concluded frequently, and at the same premium as that on the goods themselves, the risk on profit separately was actually greater than that on the goods (there could be a total loss of profit without a total loss of the goods) so that a higher premium ought in fact to be charged.

178 The profit on goods, determined in advance according to a fixed scale of tariffs, was already in the fifteenth century customarily insured in Venice. See Nehlsen-Von Stryk *Seeversicherung* 106-107.

179 Section 22, with which was identical to s 21 of the *placcaat* of 1551, prohibited the insurance of 'sulke winnijne als hy meent of verhoopt te doen, syn Koopmanschepe kommende en gebroght wesende ter plaetsen daer hy se bevracht heeft'. See too Goudsmit *Zeerecht* 213.

180 Den Dooren de Jong 'Lombard Street' 16 notes that the valuation clause in an Antwerp policy on goods of 1566, in which profit was included in the valuation of the goods, was in direct contravention of this provision. No doubt for this reason alone the policy was stated to be governed by the insurance customs of London where there was no similar limitation on the insurable value of goods. As to the choice of foreign customs, see again ch IV § 4.3.1 *supra*.

181 Although not expressly prohibited, the insurance of profit was probably prohibited by implication. At any rate, profit was not mentioned amongst the matters which could be taken into account in calculating the value of goods to be insured. As to the insurable value of goods, see ch XVII § 3.2 *infra* and see further eg Goudsmit *Zeerecht* 263.

182 It seems that the view of Kracht 32 that in terms of this Amsterdam *keur* the insurance of expected profit was permitted, must be incorrect. As Goudsmit *Zeerecht* 317 points out, it followed from s 2, which concerned the insurable value of goods, that no insurance was permitted on expected profit.
Elsewhere, prior to end of the eighteenth century, different approaches existed with regard to the insurability of the profit expected on goods. Some legal systems and laws permitted it, others did not.

After codification in the Netherlands, the Wetboek van Koophandel permitted the insurance of the profit expected to be made on the sale of goods consigned by sea but subject to various precautionary measures. For example, such insurance had to be separately valued in the policy (that is, it was no longer possible to include the amount of profit in the agreed value of the goods) with a specification of the goods on the profit of which the insurance was made. Proof was also required of the amount of profit reasonably to be expected on such goods. It is not surprising that this system proved rather impracticable and came largely to be ignored in practice.

5.3 The Insurance of Return Cargoes

The Dutch merchant who consigned goods abroad was usually not satisfied to have the consignment sold at its destination and to have remitted to him the proceeds of the sale, which, hopefully, included his profit on the goods sold. Accordingly he instructed his agent at that place to acquire and ship back to him, even on the same

---

195 In Dordrecht the insurance keur of 1775, otherwise identical to that of Rotterdam of 1721, in s 72 permitted the insurance of expected profit which, though, had to be valued in the policy. See Goudsmit Zeerecht 466.

196 In English law there was no formal prohibition of the insurance of profit (see Dorhout Mees Schadeverzekeringsrecht 22) but it appears that it was not until the end of the nineteenth century that loss of profit insurance gained any general recognition on the London market (see Golding 20). It is now recognised in the Marine Insurance Act of 1906 (see eg s 3(2)(a) which provides that there is a marine adventure, which may be the subject of a contract of marine insurance, where the earning or acquisition of any profit is endangered by the exposure of insurable property to maritime peril. See further Buys 51.

197 In France, where s 15 title VI of the Ordinance de la marine of 1681 had prohibited the insurance of expected profit, the prohibition was retained in art 347 of the Code de commerce, a prohibition repealed only in 1885. Before this repeal, though, such insurance cover was granted by way of honour policies (police d’honneur). See eg Enschedé 47 and 49n1; Van Veen 39.

198 See art 615-1 as to the valuation and specification. In terms of art 621, the proof of the profit to be expected was to be provided by price-lists ('prijscouranten') or, if none was available, by an expert valuation showing the profit that the insured goods would reasonably have realised on their safe arrival at the destination in question.

199 Thus, Goudsmit Kansovereenkomsten 226-228 notes that in practice there is exclusive reliance on a valued policy on the goods, the expected profit on the goods being included in their agreed value and insurers waiving the right of demanding proof and expressly agreeing unconditionally to pay the agreed value. Lipman 234 refers to a clause usually inserted in policies insuring profit to the effect that the sum insured will be paid in the event of loss of or damage to the goods 'hetzij de winst al of niet zoude hebben mogen bestaan'. See further eg Van Renays 344-346.
ship on her return voyage, other goods which he could sell at a profit locally. This latter consignment was referred to as the return cargo. It too had to be insured and it is that insurance which is considered here.

The insurance of return cargoes or imports, although initially distinguished, was later generally treated in insurance legislation in the same way as the insurance of exports. Apart from the issue of their insurability and the extent to which they were insurable, which will be considered here, return cargoes seem not to have caused Roman-Dutch law too many additional problems.

The insurance of return cargoes was, at least initially, specifically mentioned in connection with the insurance of expected profit. Possibly this was because of the fact that such profit was often expended on the acquisition of a return cargo.

The first mention of return cargoes and their insurance occurred in s 5 of the Middelburg keur of 1600. In terms of this provision an exception was made to the provisions on the compulsory under-insurance of goods. In the interest of trade on the East Indies, it was determined that when a person who had insured his goods on an outward-bound voyage to the Indies, received certain and trustworthy information ('seeckere ende waerachtige tydinge') of the arrival of those goods at their destination, he could insure a return cargo from the East Indies for twice the amount that he could in terms of the keur have insured on the outward-bound cargo. Thus, an appreciation of 100 per cent in the value of the return cargo over the outward-bound cargo was permitted in determining the amount insurable on the return cargo.

This novel measure was taken over in a slightly amended form in s 2 of the Rotterdam keur of 1604 where it was mentioned in conjunction with the insurance of expected profit. Section 2 prohibited the insurance of profit. It also prohibited the insurance of an uncertain return cargo, consigned from anywhere, over and above the

---

200 Obviously it was not always possible to insure such return cargo specifically for it was not always known what would be shipped back. Hence the need to insure the return cargo under the general term 'goods'. See again § 4.2 supra.

201 See eg Bynkershoek Quaestiones juris privati VI.1 who mentioned that the insurance laws were applicable to both imports and exports by sea. The difference between foreign and local insurances, it seems, was more significant: see again ch IV § 3.3 supra.

202 One such was mentioned in an opinion of 1697 taken up in Barels Advysen vol I adv 19. It concerned an insurance concluded at Middelburg on goods of whatever nature, including 'op het retoer', loaded or to be loaded in a named ship. In the present case the ship discharged a cargo loaded in Rotterdam on the Canary Islands but did not load 'eenig retour of laeding voor rekening van gemelde Geassureerden' there or anywhere else. The question arose whether any return of premium was possible in respect of the return voyage. According to the opinion, it was, because the insurance policy was divisible. See further ch XI § 6.4 infra as to the divisibility of the insurance contract and ch XI § 6.2 infra as to the return of premiums.

203 Which, incidentally, was one of very few in the Middelburg keur of 1600 which had no equivalent in the earlier Amsterdam keur of 1598.

204 The following example was given in the section: a person who may on an outward-bound cargo insure for Flemish £100, may on the return cargo insure for Flemish £200, if, of course, the condition had been met. See Goudsmit Zeerecht 452-453.
capital invested in goods exported ("op winste ofte onseeckere retouren boven het uytgesonden Capitael"). The only exception on this was if the insured had specific and trustworthy information ("advijsen") with regard to the return cargo he expected, in which case he could insure up to but not exceeding 50 per cent in excess of the invested capital ("boven hun uytgesonden Capitael"). The Rotterdam Legislature obviously had a more conservative if not more realistic view of the profit to be expected on goods.

Accordingly, while the profit on exports could at the time not be insured, the goods into which that profit was converted abroad could be insured, albeit subject to certain limitations. The difference between expected profit and a return cargo, it seems, was that although both did not yet exist at the time of the conclusion of the insurance, a return cargo did exist at the time of the loss under that insurance. The notion underlying these provisions was possibly not unknown to insurance practice and custom, and it was also significant that the provisions customarily applied not only when the proceeds of the sale of exports had been expended on the acquisition of a return cargo or imports, but also when exports were exchanged or bartered abroad for imports.

By the time of the Rotterdam keur of 1721, a clearer distinction was drawn between expected profit and return cargoes and a more moderate position taken up as regards the latter. In terms of s 28 of the keur, one could not insure any wagers ("weddingschappen"), under which term was understood to be included expected profit.

---

205 The relevant information or advices ("advij-brieven") had to be annexed to the insurance policy, or at least be shown to the insurers and mentioned in the policy, stating the name of the person from whom the information had been received and the date of the advice.

206 Thus, to adapt the example just referred to, if goods worth f100 had been exported, one could insure the return cargo for f150. See further eg Groenewegen Aanteekningen ad III.24.4 (n8); Goudsmit Zeerecht 395-396; Jolles 46; and Vergouwen 79.

207 This view appears to have been the underlying notion for the approach in Rotterdam. See further Enschede 43 who, referring to Emerigon and Pothier, suggests that the reason for the distinction was that in the case of a return cargo the profit had actually been realised, obtained, and converted into a physical object, so that it was no longer a case of insuring an 'expected' profit.

208 Article 215 of par 6, title 11, part IV of the Antwerp compilation of customary law, the Compilatae of 1609 (see De Longe vol IV at 288), concerned exchanged goods and return cargoes. It provided that where insured goods were conveyed to their destination where no sale but merely an exchange against other goods took place, and the insurance was made 'op gaen ende wederkeeren, oft op wederom commen alleen', in so far as a loss occurred on the return voyage 'soo rekent men den prijs vant gemangelt goet [exchanged goods] twintich ten honderden meer dan d'eerste cargasoen was vant gene derrewaerts ginck, daerop de mangelinge is geschiet'. In terms of art 216, though, where the loss occurred on the outward-bound voyage ('int gaen'), then the goods were not taken nor calculated otherwise than according to the bill of lading ('cargasoen') of the goods insured on that voyage, 'gelijck hiervoore geseght is dat alle andere versekeringe van coopmanschappen geschiet'.

As far as English insurance customs were concerned, the Booke of Orders indicates that the items upon which insurance was available in London in the 1570's (see the preamble to the Orders and more specifically orders 11, 18, 34, 103, 105 and 116) included goods sent into or out of England, including round trips, and goods sent into or out of foreign ports including those sent from one foreign port to another without touching England. See Kepler 'London Marine Insurance' 49.
339

In terms of s 29, though, wagers were expressly stated not to include return cargoes ("de Retouren van gezondene Koopmanschappen"). Accordingly, such cargoes could be insured for their full value, and no longer only up to a certain percentage mark-up over the value of the exports, on condition, though, that the insurers would not be held liable for any loss unless sufficient proof of such returns and the fact of their consignment could be provided ("ten zy de Regter genoeg komt te blijcken van zoodanige Retouren, mitsgaders van de afschepinge ende afzendinge van dien"). By s 30, though, when the ship in which the return cargo had been loaded, sank (so that the return cargo was, by implication, completely lost), and the real value of that return cargo could not be proved, then, depending on the circumstances, such value had to be arbitrated and estimated ("gearbitreert ende begroot") by the Chamber of Maritime Affairs, on condition that in all cases it could not be valued at a value higher than a maximum of 50 per cent above the value of the goods exported ("boven het uytgezondene Capitaal").

The Amsterdam Legislature in the eighteenth century recognised the insurance of return cargoes by implication only. 211

5.4 The Insurance of Freight

5.4.1 Introduction: Types of Freight and Types of Insurance of Freight

Two different types of freight were recognised in Roman-Dutch law, although the terminology was not always clear and consistent and although the distinction was not always drawn. For purposes of insurability, both types appear to have been treated without any distinction.

Although the term 'freight' (vrachtpenningen; vrachtloon) was also loosely used to indicate the goods or cargo consigned and carried on board a ship, it strictly speaking referred to the remuneration paid in terms of two different contracts. First it referred to the remuneration paid in terms of a locatio conductio operis (the letting and

209 See Van der Keessel Praelectiones 1439 (ad III.24.4), who explained that in s 29 'retouren van gezondene koopmanschappen' referred to uncertain merchandise which a ship would bring back on her return voyage; Dorhout Mees Schadeverzekeringsrecht 550.

210 See Van Zurck Codex Batavus sv 'Assurantie' par 7D n(g); Decker Aanteekeningen ad IV.9.4 n(3)/(c); and Goudsmit Zeerecht 395-396. See too Magens Essay vol I at 27-28 who, after discussing the position in Rotterdam and Middelburg, noted that it was doubtful that a profit of 50 per cent was realistic, 'which makes the liberty of insuring so much rather precarious'.

211 The amendment of s 21 of the Amsterdam keur of 1744 by the amending keur of 1756 concerned the insurance by a person expecting a return cargo (retouren) and being unaware of what exactly the object of his interest would be, by the general words 'op Goederen, Waaren en Koopmanschappen, of waar in het Interest bestaan zal mogen, niets uytgezondert'. Apparently such insurance was valid but no return of any premium was possible unless the insured declared under oath that he had no interest in those goods.

212 For the different meanings of the word 'freight, see further eg Buys 147; Chalmers 141-142 and 151; and Lugt 14-15.
hiring of a piece of work) by the owner (consignor or consignee) for the carriage of that cargo from one place to another by the owner or lessee (that is, the charterer) of a ship. Secondly, it referred to the remuneration paid in terms of a *locatio conductio rei* (the letting and hiring of a thing) by the lessee or charterer of a ship or of space on a ship to the owner of that ship for its use (charter). There was a distinction, therefore, between freight as the fee paid for the carriage of cargo on a ship and freight as the hire paid for the lease of a ship. Or, to use a different terminology, there was a difference between bill of lading freight\(^\text{213}\) and charterparty freight.\(^\text{214}\)

More generally, in the case of insurance law, the term ‘freight’ also included the ‘freight ‘saved’, and thus the profit derived, by a shipowner or charterer when he carried his own goods, as opposed to that of another, in his own or a chartered ship with a view to the increased value those goods would have at their destination. Put differently, ‘freight’ included the value of the carriage of one’s own goods.

As a general rule of Roman-Dutch law, a carrier earned his bill of lading freight by the carriage of the goods to and their delivery at the agreed destination. Accordingly no freight was earned in the case of the non-arrival of the goods there, for example because of their total loss en route. The risk on bill of lading freight and that on goods were therefore similar, also as regards the duration of the risk.\(^\text{215}\) But whereas freight was in principle not payable in respect of lost goods, it remained payable in the event of the arrival of goods, even if in a damaged condition.\(^\text{216}\)

---

\(^{213}\) Bill of lading freight was the remuneration earned by the owner or lessee (charterer) of a ship by the employment of the ship to carry the goods of others; it was paid by the owner (consignor or consignee) of the cargo in terms of the bill of lading issued in respect of that cargo by or on behalf of the carrier (owner or charterer). See generally Kohler ‘Handelsrecht’ 571-581 for the sources and materials on the contract of affreightment in Roman-Dutch law.

\(^{214}\) Charterparty or chartered freight, also referred to as hire, was the remuneration earned by the owner of a ship by leasing out (chartering) his ship or space on his ship to another; it was paid in terms of the charterparty concluded in respect of such lease by the charterer who may, in turn, have been entitled to bill of lading freight from the owners of cargo consigned on the chartered ship. Charterparties (‘charte partye ofte brieven van contracte’; ‘charte partye ofte andere instrumenten’) were provided for in eg s 39 of the *placcat* of 1551 and ss 1 and 5 of title II of the *placcat* of 1563. See further eg Grotius *Inleidinge III.20; Kohler ‘Handelsrecht’ 581-584 for the sources and materials on the hire of ships in Roman-Dutch law; and Gehlen 132-138 for a reproduction, transcription and explanation of a Rotterdam charterparty of 1675.

\(^{215}\) The earning of charterparty freight or hire, by contrast, did not depend upon the safe arrival of the goods at their destination. But, of course, the charterer may have borne the risk of his hire being lost should the ship be lost, in which case the risk (including the duration of the risk) on such freight approximated that on the ship herself. See further on these points eg Ten Kate 81-82; Lugt 28-37. As to the duration of the risk, see ch XII § 1 *intra*.

\(^{216}\) An opinion of 1654 (see *Nederlands advysboek* vol I adv 286), which concerned *pro rata* charterparty freight payable on arrival, noted that according to both law and practice, freight was not earned if the ship was lost or captured on her voyage, the obligation to pay any freight to the carrier being conditional on the arrival of the ship with her cargo at the destination. See too eg Coren *Observationes* obs 24 (1604).
The result of this rule was that, unless otherwise agreed, freight was expected or future freight and not unconditional freight,\textsuperscript{217} even if in fact paid in advance.\textsuperscript{218} And because in principle freight was not payable in the event of the loss of the consigned goods, the loss of the ship with her cargo also resulted in the loss of freight for the carrier.

Various other types of bill of lading freight were known in practice.\textsuperscript{219} For insurance purposes, though, all types of freight appear to have been in principle treated identically in Roman-Dutch law and for the sake of simplicity the term 'freight' will henceforth be employed generically.

Two types of insurance of freight were possible in Roman-Dutch law,\textsuperscript{220} namely by the person entitled to the freight (often referred to as true freight insurance), and by the person obliged to pay the freight.

The first type was the insurance of freight by the carrier, either the owner or the charterer of a ship. For a carrier, freight represented the profit he derived from the employment of the ship. Such insurance was concluded either separately or, more commonly in practice, as part of the insurance on the ship in the same policy. The insurance of freight by the receiver of the freight (nicely termed in French 'fret à recevoir') was an insurance against the risk that freight which was to be earned on the

\textsuperscript{217} Asaert 201-202 notes that in the fifteenth century freight was usually paid in two instalments, one-half a few days (20-30 days or shorter) after the arrival or discharge of the ship and the other half during the next year-market. In respect of a return voyage, an advance was made to the master. Freight was generally determined at a specified rate per ton (c1 000 kg). According to Gehlen 137-138, it was often further agreed in the contract of affreightment that a part of the freight would already be paid out by or on behalf of the owners of cargo in successive ports which the ship touched on her voyage, and that payment would be in the local currency, to enable the master to acquire the necessary provisions in those ports.

\textsuperscript{218} It was possible for the parties to agree on the payment of freight in advance. In terms of most legal systems, including Roman-Dutch law, advance freight too was repayable in the case of the loss of the goods, that is, it was not also unconditional freight. (The shipowner-carrier therefore had an interest in the freight which may have been lost if the goods were lost.) In English law, by contrast, advance freight as such was (and is) not repayable in the case of the loss of the goods (thus, the shipowner-carrier had no interest in such freight but the person advancing it did have), although the position may have been reversed if by special agreement advance freight was made repayable in the event of loss. See further Buys 25; Chalmers 19.

There was a distinction therefore, at least in Roman-Dutch and similar systems, between unconditional freight, which was earned irrespective of the arrival of the goods, and advance or prepaid freight, which was paid or payable in advance of the voyage and not eg on arrival. Advance freight could be either conditional or unconditional freight.

\textsuperscript{219} Such as pro rata freight, which was earned proportionally depending on the amount of shipped goods arriving at their destination; gross freight, which was the freight received by the carrier from the cargo owner (bedongen vracht); nett freight, which was the gross freight less the expenses incurred by the carrier to perform the carriage and to earn the gross freight; that is, the profit made by the carrier by the employment of the ship.

\textsuperscript{220} See further and generally Dorhout Mees Schadeverzekeringsrecht 543-544; Lugt 27; Mullens 48-49; Rutgers van der Loeff 165-175; and Van Veen 69-77.
arrival and delivery of goods, and whether or not already paid and received,\textsuperscript{221} could in fact not be earned because of the goods not arriving at their destination. The loss of the goods was therefore also a loss of freight for the carrier and as such this form of insurance was akin to the insurance of an expected profit and was a form of insurance of an expected advantage. Because a carrier usually lost his right to freight, through the non-arrival of the consigned goods on which it was to be earned, only in the event of the total loss of the ship and her cargo rather than when they were merely damaged, freight insurance was often concluded on total-loss only terms.\textsuperscript{222} In principle the same type of insurance could in appropriate cases be concluded by a shipowner on the charterparty freight or hire claimable from the charterer of his ship.

The second type of insurance of freight was in a sense the opposite of the insurance of freight by the receiver or carrier. Freight could be insured also by the owner of cargo\textsuperscript{223} consigned on a ship where he had to pay such freight for the conveyance of the goods irrespective of whether the goods actually arrived at their destination\textsuperscript{224} and irrespective even, as was usually the case, of whether the goods arrived undamaged. The freight could be insured either separately or as part of the insurance on the goods themselves, such freight being included in the value of the goods. This type was therefore an insurance of freight by the payer of the freight (in French, 'fret à payer') and was against the risk that the freight would have to be paid despite the loss of or damage to the goods, and against the risk, therefore, that such freight could not be recouped, or be recouped fully, from the profit made on the sale of those goods at their destination. Put differently, the risk here was one of having spent the freight unprofitably.\textsuperscript{225}

The insurance of freight was not unknown to Dutch insurance practice although it appears to have been rather rare, at least in the sixteenth century.\textsuperscript{226} One possible

\textsuperscript{221} That is, conditional freight. Freight earned unconditionally, whether or not in fact paid and received in advance, was accordingly not insurable because such freight was not exposed to any risk of loss.

\textsuperscript{222} As to total-loss only insurance, see ch XV § 7.2 \textit{infra}.

\textsuperscript{223} Whether he was the consignor or the consignee of the goods.

\textsuperscript{224} That is, unconditional freight.

\textsuperscript{225} Thus, whereas the carrier insured against perils which may have prevented him realising an expected profit in the form of freight, the owner of cargo insured against such perils resulting in the freight he had to pay being wasted. But such freight was insurable only if the payer (cargo owner) was at risk, that is, if he had to pay the freight irrespective of the non-arrival of the goods (ie, when the freight was unconditional freight), or if he had to pay it irrespective of the damaged arrival of the goods. Where the cargo owner had eg waived the right not to be liable for the full freight - or the right to recover any advanced freight - in the case of shipwreck, stranding or any other loss of the goods, his freight was not 'at risk' and could not be insured. In such a case, of course, the carrier again bore no risk in respect of the freight and he could not insure. In the case of the freight being payable pro rata, both carrier and cargo owner would, of course, have been entitled to insure and to recover proportionately.

\textsuperscript{226} In a fourteen-month period in 1562-1563, only one of the 1,488 insurances which the Antwerp broker Juan Henriquez recorded in his ledgers, concerned the insurance of freight. A shipowner insured freight of £250 for the carriage of goods from one place to another, the freight probably being payable on arrival, at a premium of 5½ per cent, a rate in accordance with that charged at the time on goods. See further De Groote 'Zeeverzekerings' 212; \textit{idem Zeeassurantie} 130.
reason for the late and relatively slow development of freight insurance, may have been the fact that in earlier times the same person was usually interested in both ship and cargo so that there was no need to make a separate calculation of the cost of the carriage of the goods. Such a need arose only later when shipowners more generally became the carriers of the goods of others. A further reason, of course, was that the insurance of freight was not necessarily concluded on freight alone but more often as part of an insurance of the ship or goods.

5.4.2 The Insurance of Freight by the Carrier

Although the insurance of freight by the carrier was at most implicitly prohibited by the _placcaaten_ of 1550 and 1551, as well as by that of 1563, all of which prohibited any insurance on expected profit, s 4 of title VII of the latter _placcaat_ did expressly mention, in a different context, the insurance of freight ("vrachtloon") so that the occurrence of such insurance in practice appears to have been recognised, if only by implication.

The first pertinent legislative measure on the insurance of freight was contained in s 29 of the _placcaat_ of 1571 which provided that non-marine carriers ("Voerlieden") could not insure their freight ("loon oft salaris"). Although it has been argued that the freight to be earned by a ship (that is, marine freight) was under the _placcaat_ of 1571 probably prohibited by implication alongside the insurance of expected profit, it is equally possible that because there was no specific mention of freight insurance, it was impliedly permitted, as may also have been the case in terms of the earlier _placcaat_ of 1563.

---

227 See further eg Lugt 52-53 and again § 3.1 _supra_.

228 For that is what the carrier in effect insured when he insured freight; see again § 5.2 _supra_.

229 Namely that of insurances concluded after a loss, as to which see ch XI § 2.2 _infra_.

230 See eg Kracht 18; Goudsmit Zeerecht 244. It would appear that the reference in s 9 of title VII of the _placcaat_ of 1563 to the 'Vaer-loon ofte huyre' of the master and mariners did not refer to the freight earned by a ship but rather to the (equally uninsurable: see § 5.6 _infra_) salary or hire of such persons. There was a distinction, it would appear, between 'vrachtloon' on the one hand and 'vaerloon' or 'huyre' on the other hand. Confirmation of this comes from s 4 which mentioned 'huyre' alongside 'vrachtloon'. But the terminology was not always consistent and was occasionally employed rather confusingly. See eg Van Leeuwen _Rooms-Hollands regt_ IV.9.6 who stated that 'de Vragten en Huurren' of masters and mariners could not be insured, and s 29 of the _placcaat_ of 1571 (discussed _infra_) where the terms 'loon oft salaris' were used to refer to non-marine freight.

231 See Grotius _Inleidinge_ III.24.3, explaining that 'wagentluiden', 'voerluiden' and 'vrachtluideren' could not insure their charges for the carriage, ie, their freight, fare or hire, at all.

232 See Mullens 48-49.

233 See eg Enschedé 31 who holds the view that the insurance of freight was permitted by the _placcaat_ of 1571; and Goudsmit Zeerecht 263 who states that because there was no mention in the _placcaat_ of 1571 of any prohibition on the insurance of (marine) freight, it was therefore permitted.
The freight to be earned by ships was first specifically mentioned in s 10 of the Amsterdam *keur* of 1598\(^{234}\) where it was provided that such freight (‘vracht’) could not be insured.\(^{235}\) In s 15\(^{236}\) the earlier prohibition on the insurance of non-marine freight was repeated.\(^{237}\) In 1693 there was a further promulgation on the topic in Amsterdam. Section 1 of the amending *keur* of that year, in decreasing the amount of compulsory under-insurance on ships,\(^{238}\) repeated the prohibition on the insurance of certain objects, including freight (‘de Vrachten’) to be earned by ships.\(^{239}\)

The fact that the Amsterdam prohibition was out of step with the needs of commerce and with accepted practice, appears from a case which came before the *Hooge Raad* in 1722.\(^{240}\) It concerned an insurance concluded in 1712 in Amsterdam on the freight a specific ship would earn (‘de vragten, die een zeker schip zoude verdienen’) on a voyage from Bordeaux to Amsterdam. The insurance policy declared that the insurer renounced all ordinances contrary to this insurance, that is, the parties provided that s 10 of the Amsterdam *keur* was not to apply. However, in terms of s 1 of the *keur*, such a renunciation was not permissible.\(^{241}\) Although, therefore, the insurer could in this case, despite his renunciation, have refused payment on the ground that in terms of s 10 the insurance of freight was not permissible, he did not do so. According to Bynkershoek the insurer did not want to appear to be acting in bad faith (‘oneerlyk te handelen’) and he therefore relied on other grounds to refuse payment on the policy.

In sharp contrast to the position in Amsterdam, the insurance of future marine freight was permitted in the more liberal and advanced Rotterdam *keur* of 1721, the earlier one of 1604 having been silent on the matter of the insurance of such freight. In

\(^{234}\) Also in the identical s 4 of the Middelburg *keur* of 1600.

\(^{235}\) See further on the position in Amsterdam, Grotius *Inleidinge* III.24.4 (‘vracht-loon van schepen bedongen’); Van Leeuwen *Rooms-Hollands rechts* regt IV.9.6; Van Zurck *Codex Batavus* sv ‘Assurantie’ par 5; Scheltinga *Dictata ad* III.24.4 sv ‘loon van schippers etc’; Kersteman *Academie* part XVIII (at 276) (‘de bedongen Vragten’); idem *Woorden-boek* at 29; and also Goudsmit *Zeerecht* 317.

\(^{236}\) As in s 27 of the Middelburg *keur* of 1600.

\(^{237}\) According to Scheltinga *Dictata ad* III.24.3 sv ‘voorts wageluiden, etc’, s 29 of the *placcaat* 1571, being of general application (‘een generale landswet’), resulted in the position in Rotterdam, where there was no similar measure in the *keur* of 1604, being the same as that in Amsterdam and Middelburg. See further Van der Keessel *Praelectiones* 1432-1433 (ad III.24.3).

\(^{238}\) See ch XVIII § 5.4 *infra*.

\(^{239}\) See Goudsmit *Zeerecht* 321.

\(^{240}\) See Bynkershoek *Observationes tumultuariae* obs 1873; idem *Quaestiones juris privati* IV.11.

\(^{241}\) See further on this point ch VIII § 5.2 *infra*.
Object of Risk

terms of s 26 freight to be earned ("te verdienen Scheeps-vragten") could be insured, but the section contained no further regulation of the matter.242

The Amsterdam legislature subsequently followed the example of Rotterdam243 and not only permitted the insurance of freight by a carrier but also regulated such insurance in great detail. Section 15 of the keur of 1744 determined that net freight244 could be insured and recovered to the extent or amount that it could, according to the charterparty or bill of lading, reasonably be earned (and hence lost, if the goods did not arrive) on the voyage in question ("voor so verre men na billikheyt bevind, dat op de reyse verdiend of verlooren kan worden, 't zy by Cherte party, Manifest of volgens de Cognossement te doceeren").245 Otherwise than in the case of the permission granted for the insurance of expected profit in the same keur of 1744, s 15 required no valuation of freight because the amount of freight was easily proven with reference to the relevant contracts in terms of which it was payable.246

Section 15 further made special provision for cases where the ship carried the goods for the account of the owner himself, that is, where a carrier carried his own goods and in respect of which conveyance the saved freight was to be insured ("in gevallen een Schip voor eyge Meesters reekening Goederen geladen heeft, waar van

242 See Van Zurck Codex Batavus sv 'Assurantie' par 7B; Van der Keessel Praelectiones 1435 (ad III.24.4); and Van der Linden Koopmans handboek IV.6.2 (noting that this was also the position in Dordrecht). See too eg Goudsmit Zeerect 396-397. Interestingly the position as regards the insurability of wages (vaerloon) in Amsterdam and Rotterdam was identical to that regarding freight (vrachtloon); see § 5.6 infra.

243 The position in Hamburg, where s 1 of title III of the Assecuranz-Ordnung of 1731 permitted the insurance of 'Fracht-Gelder' may also have played a role. See further eg Dreyer 122-124; Frentz 'Seerechtsprechung' 157-158.

244 That is, the agreed or gross freight less the expenses such as the wages of the crew and other expenses (eg port charges) which were usually deducted after a successful completion of a sea voyage and which had to be paid from the freight when it was earned. These expenses were deducted because the carrier no longer had to pay them by reason of the non-arrival of the (ship and) goods at the destination. The section described it as freight or hire and the ordinary charges (usually called common average), after the deduction of unpaid seamen's wages and other charges that must have been paid out of it if the ship had arrived (Vraagpenningen nevens de ordinaire Ongelden of soogenaamde Avaryen ... (na aftrek der Gagien van 't Volk en verdere ongelden, die men by behouden vaaren daar uyt moet betalen'). In short, in the case of the non-arrival (loss) of the goods, for which eventuality the insurance on the freight had been concluded, the amount of the agreed or gross freight (as that appeared from the relevant documentation) had to be reduced with whatever the carrier no longer had to pay because of such non-arrival. See further Lugt 54-58.

245 See eg Van der Keessel Theses selectae th 717 (ad III.24.4) ("naula pro mercibus vehendis solvenda" could be insured against maritime perils); idem Praelectiones 1435 and 1439 (ad III.24.4); and Van der Linden Koopmans handboek IV.6.2. See too eg Enschedé 37-38; Goudsmit Zeerect 339; Weskett Digest 244-251 sv 'freight and freighter'; and Magens Essay vol I at 15-18 who, with reference to s 15, gave a detailed example of how net freight had to be calculated and what was recoverable from an insurer on such an insurance.

246 See further Van der Keessel Praelectiones 1435 (ad III.24.4) (the amount of freight had to be proved by the charterparty or bill of lading); Goudsmit Kansovereenkomsten 226-227.
Such freight had to be valued in the policy. A valuation was required because there was no bill of lading or other documentation from which the value could be proved, and probably it had to be made with reference to freight rates applying at the relevant time at the port of loading. Failing such valuation, the amount of freight had to be determined by the Commissioners as provided for in other analogous cases.

5.4.3 The Insurance of Freight by the Owner of the Goods

A further innovation in the Amsterdam keur of 1744 was the somewhat belated recognition that the freight payable for the carriage of goods could in appropriate circumstances also be insured by the owner of such goods. Because of the possibility that freight remained payable despite damage to the goods and that it was then wasted, freight was in such a case at the risk of the owner of the goods, and could, to the extent it was at risk, be insured. The owner of insured goods could not simply recover his loss of freight, that is, the wasted expenditure, from the insurer of his goods. He could recover only if the freight had been included in the value of the goods, or, alternatively, if he had concluded a separate insurance on the freight. Such separate insurance was possible and recognised in Roman-Dutch law, as will be explained shortly.

Although the insurance of freight by the cargo owner will be considered again when the insurable value of goods is discussed, it may be mentioned at this stage that in the earlier legislative measures, such as the placcaat of 1550 and that of 1551, there was at most an implicit prohibition of the insurance of freight by the goods owner as part of the insurance on those goods themselves. The prohibition may be implied from the fact it was provided that the insurable value of goods was to be their value at the time and place of departure, the freight payable on those goods for their conveyance being excluded from their value. It was accordingly not possible, or at least not permissible, to insure goods at their value at the destination, and the same applied to the insurance of the freight payable on those goods. This prohibition was expressly repeated in the placcaat of 1563 which provided in s 11 of title VII, in respect of the insurable value of goods, that matters such as duties, freight ('Schip-vracht') and the like had to remain uninsured. But in s 3 of the placcaat of 1571, again, it was provided

247 Such a saving of freight was also included in the meaning of the term 'freight': see again § 5.4.1 supra.

248 See generally as to freight insurance by the shipowner or carrier as cargo owner, Lugt 80-88. He notes that it gradually became less and less common for a carrier to carry his own goods, although it obviously still occurred sufficiently regularly by the mid-eighteenth century to warrant this specific provision in the Amsterdam legislation.

249 And even despite the loss of the goods, in the case of unconditional freight.

250 See generally as to this form of freight insurance, Lugt 89-105.

251 The amount of freight payable for the carriage of insured goods usually being included in the value of those goods themselves: see further ch XVII § 3.2 infra.
that the insurable value of goods excluded all the costs of and incurred up to loading ('alle ... onkosten toter ladinge ... inden Schepe'). Freight was no longer mentioned in this regard so that the implication was that freight was no longer excluded. It would appear, therefore, that the insurance of freight, in so far as it was included in the value of insured goods, was permitted in Antwerp before 1550 and again after 1571.\textsuperscript{252} Subsequent municipal \textit{keuren} too did not expressly exclude or even mention freight when considering the insurable value of goods.

A more pertinent but rather nebulous provision was that in s 35 of the Amsterdam \textit{keur} of 1744, as later amended by the amending \textit{keur} of 1756. It made provision for the calculation and assessment of loss where goods arrived at their destination in a damaged condition. In terms of this section, in the event of insured goods arriving safely at their destination (by implication, so that the freight on them was payable) but in a damaged condition,\textsuperscript{253} the amount of such damage was to be assessed with reference to their value in an undamaged condition at that destination and without including in this assessment the freight and other expenses paid or to be paid in respect of them by the owner of the goods.\textsuperscript{254} But the owner of the cargo, whether the consignor or consignee, was at the same time permitted to insure separately\textsuperscript{255} the freight and other expenses that still had to be paid in full by him on the arrival of such goods at that destination, and that despite the damage to and diminution in value of the goods in question.\textsuperscript{256}

Conditions were laid down in s 35 for such separate insurance of freight by the cargo owner. First, insurers who insured such freight separately were liable to compensate the insured only, and no further than, to the extent of the damage to the goods themselves, that is, in the same proportion as that applied to the damaged goods

\textsuperscript{252} See Mullens 48-49.

\textsuperscript{253} That is, in the event of a partial loss of the goods, the words safe arrival ('behouden aankomst') referring to the fact of arrival itself and not to arrival in an undamaged condition.

\textsuperscript{254} The underlying assumption here being that the owner would have to pay such freight and other expenses, the goods having arrived at their destination.

\textsuperscript{255} See Goudsmit \textit{Zeerecht} 338-339 who, on the basis of s 35, agrees with Kist (and disagrees with Lugt 98-100) that 'de te betalen vracht' could be insured separately.

\textsuperscript{256} The original s 35 read as follows: '\textit{Inlaaders, Eigenaars of Geconsigneerdens gepermitteert ..., de vragten dier Goederen, die by behoudens Reys moeten betalen, te mogen verseekeren}'. In 1756 it was amended as follows: '\textit{Inlaaders, Eigenaars of geconsigneerdens gepermitteert ..., de schaade by hen te lyden in de Vragten der geavarieerde Goederen, en ordinaire onkosten, dewelke zy van deseelve, even als van gezonde, by behoude arrivement moeten betaalen, te doen verseekeren, ...}'. Thus, whereas originally s 35 provided that cargo owners were permitted to insure the freight payable on the arrival of the goods ('bij behouden rejs'), the amended version made it clear by its description that cargo owners were permitted to insure the loss that they would suffer in respect of the (wasted) freight payable on the arrived (but damaged) goods.
themselves.\textsuperscript{257} The second condition was that when the goods did not arrive at their
destination (by implication, because of their total loss) with the result that no freight was
payable on them,\textsuperscript{258} such separate insurance of freight became void and the premium
returnable.\textsuperscript{259}

5.4.4 The Insurance of Freight Elsewhere: A Summary

Because the insurance of freight was a matter of some complexity and contention not only in Roman-Dutch law but in most other contemporary systems, it may be
useful, by way of summary, to note briefly the fate of the insurance of freight elsewhere
than in the Netherlands. Before doing so, though, the provisions of the Dutch \textit{Wetboek van Koophandel} on the topic should be set out.

The position which pertained in Roman-Dutch law at the end of the eighteenth
century greatly influenced the provisions of the \textit{Wetboek}. It permitted insurance of both
earned and to be earned freight and both by the receiver or carrier and by the payer or
cargo owner. As far as the former is concerned, the provisions of s 15 of the Amsterdam
\textit{keur} of 1744 were to a large extent retained in arts 616 and 623 of the \textit{Wetboek van Koophandel}.\textsuperscript{260} Article 613, in part derived from s 35 of the Amsterdam \textit{keur} of
1744, permits the insurance of freight by the cargo owner.\textsuperscript{261}

\textsuperscript{257} The amended portion of s 35 read as follows: ‘zoodanig, dat de Assuradeurs, daar op (scll op de
vracht en onkosten) verzeekerd hebbende, gehouden zullen zyn te voldoen gelyke percentoos van
hunne getekende sommen, als over de schade of averye, op de Goederen zelve gevallen, moet
worden betaald’.

\textsuperscript{258} Which, to repeat, would not be the case where freight was payable unconditionally.

\textsuperscript{259} The relevant part of s 35 read as follows: ‘en een Totale Schade voorvallende, sal van die op de
Vragen verzeekert heeft, restorno kunnen gevordert worden’. The 1756 amendment quite correctly
added to this that a partial return of premium was to take place if a part of the goods only was consigned.
The amendment further stipulated that a return of premium was to occur not only in the case of a total
loss, as foreseen in the original s 35, but also in the case of a partial loss. Therefore, the amended s 35
referred to two cases: that of a total loss, when the whole insurance premium was returned, and a partial
loss, when a proportion was returned. See further eg Van der Kessel \textit{Theses selectae} th 739 (ad III.24.6); \textit{idem Praelectiones} 1453-1454 (ad III.24.6); and Van der Linden \textit{Koopmans handboek} IV.6.8. As
to the return of the premium, see ch XI § 6 infra.

\textsuperscript{260} Article 613 of the \textit{Wetboek} expressly permits the insurance of freight by the receiver (ie, the carrier). In
terms of art 616 gross freight may be insured in full, except that it has to be reduced by what the insured
saved on the expenses by reason of the loss. By art 623-1 the amount of freight is proved by the
charterparty or the bill of lading, and in terms of art 623-2, in the absence of such documents or if the
goods are those of the carrier, the amount of the freight is to be estimated by experts.

\textsuperscript{261} Article 614 makes special provision for the case of advanced freight. See further eg Dorhout Mees
\textit{Schadeverzekeringsrecht} 550; Goudsmit \textit{Kansovereenkomsten} 224-226; \textit{idem Zeerecht} 339; Lipman
234; Lugt \textit{passim}; De Renays 347-349; and Voorduin vol X at 282 (noting the similar nature of expected
profit and freight to be earned) and at 323-324 (noting the view that the Amsterdam provisions were
superior to those of the \textit{Wetboek}).
In French law the insurance of freight by a carrier, like that of expected profit, remained prohibited until the late-nineteenth century.\textsuperscript{262} Prior to its repeal, the prohibition on freight insurance, as that on expected profit, was in practice circumvented by the use of honour policies. By contrast to the insurance of freight by a carrier ('fret à recevoir'), the insurance of freight by a cargo owner or consignor ('fret à payer') was never prohibited in French law.

The insurance on freight by both the carrier and the cargo owner was permitted in English law.\textsuperscript{263}

\section*{5.5 The Insurance of a Bottomry Loan and of the Property Securing Such a Loan}

\subsection*{5.5.1 Introduction: The Different Types of Insurance Involved}

Because of the close and historical relationship between insurance and the maritime loan, including the form in which it appeared in Roman-Dutch law, the bottomry loan,\textsuperscript{264} the particular topics of the insurance of a bottomry loan and of the property securing such a loan attracted more than their fair share of attention from Roman-Dutch lawyers. Legislative pronunciation too was not lacking and became progressively more detailed, culminating in extensive provisions in the Amsterdam keur of 1744.

Although not common, the insurance of bottomry loans did occur in practice in the Netherlands. Obviously such insurances declined as the practice of loans on bottomry declined.\textsuperscript{265}

\textsuperscript{262} In terms of art III.6.15 of the Ordinance de la marine of 1681, the owners or masters of ships could not insure the freight of their ships. Article 347 of the Code de commerce distinguished between earned freight (the insurance of which was permitted) and to be earned or future freight (the insurance of which was prohibited because of its nature as a mere expectation). The latter prohibition was repealed only in 1885. See further eg Lugt 7.

\textsuperscript{263} See eg Weskett Digest 244-251 sv 'freight and freighter' and Magens Essay vol I at 15-18, both referring to the insurability in London of net (or 'neat') freight by the carrier. Net freight meaning the 'gain or overplus of a voyage'. In terms of s 3(2)(b) of the Marine Insurance Act of 1906, where the earning or acquisition of any freight (and also passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements) is endangered by the exposure of insurable property, such as a ship or goods, to maritime perils, it may be insured. In addition to the insurance of this so-called chartered (and ordinary, unconditional) freight, the insurance of freight by a cargo owner is also permitted. In terms of s 12, in the case of advance freight, the person advancing it has an insurable interest in so far as such freight is not repayable in the event of loss, which is the general rule in English law unless otherwise agreed: see again § 5.4.1 n218 supra.

\textsuperscript{264} See again ch I § 4.3 supra.

\textsuperscript{265} In a fourteen-month period in 1562-1563, the Antwerp broker Juan Henriquez recorded in his ledgers his involvement in eight contracts (out of a total of 1 488) in terms of which a merchant who had concluded a bottomry contract, insured himself against the risks involved. See De Groote Zeeassuranie 129; \textit{idem} 'Zeeverzekering' 214 who notes further that bottomry lenders were often merchants who invested or speculated either on bottomry loans or on the conclusion of insurances on ships and goocs. Such merchants were therefore familiar with the practice of insurance. Premium rates varied between one and six per cent, and the premium rate for bottomry (that is, the rate of interest on a bottomry loan) was generally the same as the rate of premium for insurances on a ship or on goods, as the case may have been.
The bottomry loan involved a monetary loan on the condition that the amount of the loan, together with the stipulated interest, was repayable only upon the safe arrival of the ship (or goods) upon the security of which the loan was granted. In case of the loss of the ship (or goods), the lender thus lost the right to claim the amount of the loan and the interest on it from the borrower. Not surprising then that the bottomry lender (creditor) would wish to insure against this possibility. At the same time the bottomry borrower (debtor), upon the security of whose ship or goods the loan was granted, may prior to taking up the loan have insured, or may subsequent to the loan have wished to insure the burdened property. The lender himself may obviously also have wished to insure the property securing his loan as opposed to the loan itself. Whether and to what extent such insurances were possible in Roman-Dutch law will be investigated in more detail below.

By way of an introductory synopsis, the position may briefly be set out as follows. Because the lender on bottomry bore the maritime risk of the loan and the interest on it not being repayable in the event of the loss of the secured maritime property, he was, in principle, able to insure that risk. And because the risk in turn depended on the safety or otherwise of the secured property, he was able to insure that property, at least up to the amount of the loan but no more. By the same token, the borrower who by reason of the bottomry loan no longer bore the risk of the secured property, at least not up to the value of loan, was to that extent not able to insure his property, although he could insure any excess in the value of the property over the amount of the loan and the interest.

5.5.2 The Position up to the End of the Seventeenth Century

At first the validity of the insurance of a bottomry loan or at least of the interest on such a loan was, if not denied, then in any case in doubt in Roman-Dutch law. But once it came to be accepted that the insurance of an expected advantage such as an expected profit or future freight was permissible in practice, it followed that no objection could be raised against the insurance not only of the bottomry loan itself but also of the

266 Because of the complicated nature of the subject-matter and the often confusing terminology and treatment in the sources, a number of distinctions, although not always clearly drawn in Roman-Dutch law, must be borne in mind throughout the discussion which follows. It is important, firstly, to distinguish between the insurance of the loan itself by the lender, the insurance of the secured ship or goods by the owner-borrower, and the insurance of that property by the lender. As will appear from the discussion below, it is necessary in the second place to distinguish also between a bottomry loan on a ship and a bottomry or respondentia loan on goods, as well as between voluntary and emergency bottomry loans.

267 See further Lipman 230-231; Rutgers van der Loeff 128 and 148.

268 Put differently, he was entitled to insure up to the value of the property or the amount of the loan, whichever was the smaller.
interest due on it.\textsuperscript{269} Despite the fact that evidence indicates that in customary
insurance law the position regarding the insurance on bottomry loans, and on the prop-
erty securing such loans, was worked out in great detail,\textsuperscript{270} early references in non-
legislative sources to such insurances happen to be scarce and in any event rather
inconclusive, a matter rectified only when legislative measures came to be promulgated
on the topic.

Thus, an opinion in 1672 thought that the owner of goods, when insuring those
goods, had to mention in the policy that they were burdened by a bottomry loan, but
that the insurance remained valid if that was not done because the owner was unaware
at the time of that fact.\textsuperscript{271} Specifically as far as the insurance of bottomed goods was
concerned, the opinion was unfortunately not in all respects clear.\textsuperscript{272}

\textsuperscript{269} See Lugt 12, noting that the bottomry premium or interest was an example of an expected advantage
and was insurable as such. Whereas the loss of the capital amount of the loan amounted to actual
(positive) loss, the loss of the interest was nothing but the non-materialisation of an expected advantage.

In addition to the insurance of bottomry interest being prohibited on the same grounds as that of
an expected advantage, there was also a further reason for the prohibition (see eg Rutgers van der Loeff
192-195). The excessive maritime interest earned by a bottomry lender was justified and accepted as
non-usurious by reason of the fact that he bore the risk of the loss of the secured property. But if the
lender was then permitted to shift that risk by way of insurance onto another, and, more specifically, by
insuring not only the loaned capital amount but also the interest on it, the bottomry contract, so it was
thought, would become usurious because of the reason for the increased interest, namely the bearing of
risk, having fallen away. For that reason the insurance of bottomry interest was prohibited or at least of
doubtful validity. Apart from the fact that this line of argument lost sight of the fact that the lender, in
insuring the interest, in turn had to pay a premium to the insurer, it obviously no longer applied after the
disappearance of the prohibition on maritime interest as being usurious.

\textsuperscript{270} See eg arts 289-291 and arts 302-310 of par 9, title 11, part IV of the Antwerp Compilatae of 1609 (see
De Longé vol IV at 320 and at 324-326). References to some of the relevant measures reflecting the
customary-law position will be made below where appropriate. As to the insurance of a loan not secured
by bottomry, see arts 311-312 of the Compilatae (see De Longé vol IV at 324-326).

\textsuperscript{271} See Nederlands advysboek vol I adv 288. The facts were briefly as follows. A merchant, a partner in a
commercial firm (\textit{mede Participant in een Negotie ofte Compagnie}), was expecting a consignment of
unspecified goods by sea which he insured under the general term 'goods'. Unknown to him, the firm's
factor abroad had obtained money to acquire the shipment by way of a bottomry loan on the goods. The
ship and her cargo (including the insured goods, which turned out to be a consignment of 110 pipes of
wine from the Canary Islands) were captured and confiscated by the English, a risk covered by the policy.
The insurer denied liability because the fact that the goods were subject to a bottomry bond was not
mentioned in the policy. The lawyer giving the opinion thought that although the applicable local \textit{keur} (it
is not apparent from the opinion which one) provided that in the case of an insurance on bottomry, one
had to mention that fact in policy (\textit{dat men de risico op Bodemery moet expliceren}), the merchant here
had acted in good faith and had not disclosed the bottomry on the goods because he was not aware of it;
he was excused from compliance, as the opinion put it, \textit{door impossibiliteit}. Furthermore, it was pointed
out that in any case the insurance here was not one on a bottomry loan (by the lender) but on the goods
securing that loan (by the borrower). Accordingly, the insurer was liable and the insured merchant could
recover on his policy.

\textsuperscript{272} First, it was concerned with an insurance by the borrower on the goods securing his loan and thus
only clearly relevant to that type of insurance (for its possible effect in that connection, see § 5.5.3 n295
and n311 \textit{infra}), the validity of which was subsequently regulated legislatively (see § 5.5.3 \textit{infra} as to an
insurance concluded on the secured property both prior to and after the granting of the loan).

Secondly, it appears that in any event at the time of the opinion no legislative prescript existed
requiring mention of the fact that the insurance was one on a bottomry loan. It was only required later - by
the Amsterdam amending \textit{keur} of 1693 and by (the third point of) § 21 of the Amsterdam \textit{keur} of 1721,
Although earlier insurance legislation on occasion contained, alongside the regulation of the insurance contract, also measures concerned with the closely related bottomry contract, the first legislative attention to the insurance of bottomry loans appeared relatively late.

In s 3 of the Amsterdam amending keur of 1693 it was expressly provided that no insurance concluded on a bottomry loan on goods ("op gelden, gegeven op Bodemerye van goederen") would be valid unless the fact of the loan, together with the date of and place where it was granted, and the names of the lender, borrower and the person in fact receiving the money ("aan wien getelt") were expressly mentioned on all the bills of lading ("cognossementen") covering the goods in question. The reason for such a mention was to alert the holder of the bills of lading, and eventually thus the consignee of the goods, to the existence of a bottomry loan burdening the cargo in question. The validity of the lender's insurance was therefore made dependent on his meeting a requirement which had, in principle, nothing to do with the insurance itself but which served to protect the interests of a third party. If the insurance was concluded in a place where no such bills of lading were issued and signed, s 3 continued, it would be sufficient if the facts and circumstances in question were noted ("werden gedaoteert") on, and thus proved by, the bottomry bond itself. Finally, s 3 of the keur both of which will be treated in detail infra - that in the case of an insurance on a bottomry loan by the lender, the fact of such bottomry had to be mentioned in the bill of lading on the goods (and not in the policy itself), while it was also then provided - by (the fourth point of) the just mentioned s 21 - that specific mention in the policy was required of the fact that it was on a loan on goods, such loan not being covered by an insurance on goods generally. Still, such a requirement appears to have been recognised at customary law and the opinion may have had that in mind. Thus, art 302 of the Antwerp Compilatae of 1609 (see De Longé vol IV at 324-326) provided that a lender may insure a bottomry loan on a ship on condition that he expressly insured "op bodemmerije, oft ander schult, ende niet van den schepe". In terms of art 303, the lender had to express how much the loan amounted to, on what rate and conditions it had been granted, when the ship departed or was to depart, "ende d' oorsaecken die hem bewegen" to take out the insurance so that the insurer may know precisely what and under what circumstances he was insuring. And in terms of art 304, if the insured did not declare all these matters "oft andersints eenige voorwaerde oft circumstantie verswege daermede de versekeringe quame beswaert te worden", then he would as a result have no action or recourse against the insurer while remaining liable for the premium.

Thirdly, as Bynkershoek Quaestiones juris privati IV.26 noted, the reason why existence of the bottomry had to be mentioned in the policy was not immediately apparent.

273 See eg s 19 of title VII of the placcaat of 1563 and again ch I § 4.3.2.2 supra.

274 According to Goudsmit Zeerecht 263 and 317 (and see too Kracht 26), because there was no mention in the placcaat of 1571 of any prohibition on the insurance of 'bodemerijpenningen', it was therefore permitted. The same was true of the early Amsterdam keuren, eg that of 1688.

275 That is, on money lent by way of bottomry on goods, such a loan also being known as one on respondentia.

276 See also eg Barels Advysen vol I adv 20 (1707); Verwer See-rechten par 36 (at 149); Van der Keessel Theses selectae th 568 (ad III.11.2); and idem Praelectiones 1192 (ad III.11.2). Goudsmit Zeerecht 318 notes that in practice this provision must have caused problems, the burden of proof (of compliance) resting on the insured money-lender not being met easily. Also, it appears that insurers were also not backward in raising the defence of non-compliance with s 3. Despite these problems, it was repeated in s 21 of the Amsterdam keur of 1744 (see the third point referred to in § 5.5.3 infra).
of 1693 also determined that that section would not come into force earlier than ten months after publication of that keur.

In interpreting s 3 of the Amsterdam keur of 1598 which concerned the content of insurance policies, \(277\), s 1 of the Amsterdam amending keur of 1699 provided for the content of policies of insurance on bottomry loans ('op Bodemery-gelden, 't zy op Schepen of Goederen'). This would confirm that the insurance on bottomry loans on both ships and goods was not uncommon and in any case not prohibited at the end of the seventeenth century.

Verwer, writing on the common-law position in 1711, set out in detail the various principles of the law of bottomry, including those relating to the insurance of a bottomry loan and of the property securing such a loan. \(278\)

He noted that a lender could insure the money lent out but not what he referred to as the 'opgeld' which, it appears, referred to the interest on the loan. \(279\) The reason, according to Verwer, why the 'opgeld' \(280\) was not insurable, was because such an insurance would be in the nature of one on profit or an uncertain return in addition to the capital amount paid over, and such insurance, being of incorporeal things rather than physical property, was generally prohibited. \(281\) Because the insurer of the loan took over only the risks the insured lender bore under the bottomry agreement and no other, he was not liable in the event of the partial loss of the secured property, such partial loss or damage not resulting in the loan not being repayable. \(282\) Verwer noted further that when one insured a bottomry loan, even one granted on the security of a

---

\(277\) See ch VIII § 4.2.3 infra.

\(278\) See Verwer See-rechten par 34 and 35 (at 149) and par 34 (at 175-176).

\(279\) The term 'opgeld', it seems, bore several possible meanings. Strictly speaking it meant the metal value of money (coins) in excess of its nominal value, or the amount added to the selling price of an object to cover the seller's expenses, or (more specifically) the agio or percentage commission charged on changing money from one currency into another (more valuable) currency. It would appear from the context (as well as from eg Van der Keessel Praelectiones 1436 (ad III.24.4) and Goudsmit Zeerecht 341) that it may also have referred to and included the interest charged on an amount of money lent out. But then the matter was in the 1756 amendment of s 21 of the Amsterdam keur of 1744 clarified in such way (it was provided that 'opgeld' and interest were insurable) that it appears that 'opgeld' did not include such interest. See further n290 and n305 infra where the matter is considered further.

\(280\) And the same would apply to the interest, if that was in fact not included in that term.

\(281\) See again the views of Verwer referred to in § 5.1 supra.

\(282\) See too as to the liability of an insurer on a bottomry loan the opinion in Barels Advysen vol I adv 20 (1707) where it was made clear that the insurers on a policy on a bottomry loan on a ship were liable only to perform if an external (maritime) casualty prevented an action to recover the loan from arising. They did not stand in for any unwillingness or incapability on the part of the borrower to repay the loan, a position which, according to the opinion, 'na style mercantiel constant, en ook uit de bekende distinctie, tusschen Assurantien en Borgtochten onwederzprechelyk is'. The reason, simply, was that 'de Assurantie gedaen op Bodemerypenningen, met wat dies aankleeft, niet zyn borgtochten voor de solvabiliteit of suffisance van den Debiteur of Ligter [borrower] van de Bodemerygelden, of van het hypotheek daer vooren gesteld'. As to the difference between the insurance of a (maritime or bottomry) loan and suretyship, see again ch I § 4.8.3 supra.
Insurance Law in the Netherlands 1500-1800

ship, such insurance was always at law regarded as being one 'on goods' and was accordingly governed by the same principles as applied to cargo insurance; it was in practice concluded in the form of a policy on goods with the addition of a clause specifying that the insurance was made on a bottomry loan on a specific ship or goods ('op gelt ofte penningen, gegeven op Bodemerye op sulken Schip of Goed, etc').

Verwer explained further that the borrower of money on bottomry too could insure himself against a loss but that this was possible only to the extent that the ship or goods in question were not covered by the bottomry loan. Hence, where a loan was taken up to the equivalent of two-thirds of the value of the property securing it, the borrower was permitted to insure and to recover only for the remaining one-third of the value.

5.5.3 Legislative Regulation in the Eighteenth Century

The first legislative measure in the eighteenth century on the insurance of bottomry loans appeared in s 26 of the Rotterdam keur of 1721. It simply stated that money lent on bottomry on ships or on the merchandise loaded in them ('de Gelden gegeven op Bodemerye, op Scheepen of Goederen daer in geladen'), could be insured against the perils of navigation.

In the case of an insurance by the lender of money on bottomry to the master of a ship, the insurer, according to a recognised mercantile custom, bore the risk not only of the money lent itself if the master kept it and had it on board, but also of the goods bought with it and put on board in place of the money. This custom was accepted and confirmed by a decision of the Hooge Raad in 1738. In its decision, the Raad accepted the evidence of various merchants, insurers and brokers that according to

283 This, Verwer thought, showed the falsity of the view which regarded bottomry as form of insurance, for, if that were so, the insurance of a bottomry loan would have to be considered a form of reinsurance on the ship or goods in question and would, contrary to established practice, have to be concluded in the form of a policy on ship or on goods as the case may be. As to reinsurance, see ch VII § 4 infra.

284 See further eg Van Zurck Codex Batavus sv 'Assurantie' par 7B; Schorer Aanteekeningen 415 (ad III.24.3) n4; Van der Keessel Theses selectae th 717 (ad III.24.4) (incorrectly referring to s 15 of the keur); idem Praelectiones 1436 (ad III.24.4); Van der Linden Koopmans handboek IV.6.2 (noting an identical provision in s 30 of the keur of Dordrecht of 1775); and Goudsmit Zeerecht 396-397 (noting that the earlier keur of 1604 was silent on the topic).

285 See Bynkershoek Observationes tumultuariae obs 3074; idem Quaestiones juris privati IV.16. A Middelburg merchant had given instructions to his broker in Rotterdam to conclude an insurance in respect of a voyage from Middelburg to Batavia 'met het schip 't Slot ter Hooge' the master of which was Willem de Smit, 'op 10 300 silvere Ducations en 7 320 guldens aan getelde gelden, op een Notariale Obligatie, ten laste van de voorn Willem de Smit'. Various insurers insured both these sums on the stated conditions. The ship was lost on her voyage with her cargo but the coins were salvaged and thus not lost. The other amount of f7 320, though, given to the master on the (notarially executed) bottomry, had been used by him to buy goods, which goods were lost with the ship. The insured argued that he was insured for the debt of f7 320 and that it was lost with the ship, while the insurers argued that they were not liable because they had not insured on goods but 'op Contanten', namely f7 320 in cash ('aan getelde gelden'), and that the all cash on board had been salved. In view of the custom referred to, the Raad, like the Rotterdam Chamber and the Hof van Holland, held for the insured.
received custom ("volgens den Koopmans styl by hen gerecipieert") it was generally accepted that an insurer who insured the money lent to the master of a ship was deemed to have insured either the cash ("op contant gelden") if the master took the money with him, or, as was usually the case, the goods which the master had purchased with that money and which he had taken on board his ship, for in such case the goods were regarded as having taken the place of the cash.286

Section 2 of the Amsterdam keur of 1744, in dealing with the content of insurance policies, like the earlier keur of 1699, mentioned insurances on bottomry loans on both ships and goods ("op Bodemery gelden, het zy op Scheepen of Goederen").287

In addition the Amsterdam keur of 1744 contained an extensive and highly complicated regulation of the insurance of bottomry loans in three sections. Section 19 contained a general provision, s 20 was concerned with the insurance of a bottomry loan on a ship, and s 21 with the insurance of a bottomry loan on goods.288

In terms of s 19 of the keur of 1744, the lender of money on bottomry to a mariner, master of other person going on any voyage289 could insure the amount of the loan and (expressly) now, unlike the time of Verwer, also the 'opgeld'.290 There was a condition though, namely that the amount of money given on bottomry as well as the 'opgeld' or interest had to be mentioned in the policy, otherwise it would be taken that only the amount lent, and not also such interest, was insured. Thus, s 19 now expressly permitted the insurance of bottomry interest or 'opgeld', subject to the condition stated, thereby clarifying any doubts which may have existed in this regard.291 Section 19 also

286 See further eg Van der Keessel Theses selectae th 717 (ad III.24.4); idem Praelectiones 1436 (ad III.24.4); and Van der Linden Koopmans handboek IV.6.2. Note that an insurance by a lender on a bottomry loan on goods (ie, a respondentia loan) had to be made specifically and was not included in an insurance on such goods generally. See further n309 infra.

287 As to the content of insurance policies, see ch VIII § 4.2 infra.

288 For detailed comments on these provisions, see generally Enschedé 38-40 and Goudsmit Zeerecht 341-345.

289 Thus, this provision specifically concerned a voluntary bottomry loan: see Enschedé 38; Goudsmit Zeerecht 341.

290 The section referred to insurance 'op Penningen door de Verseekerde aan een Navigant, Schipper of ander Persoon, varende op eenige Voyagie, op Bodemerye ofte behoude reys meede gegeeven met het opgeld incluys'.

291 In this the Amsterdam legislature may have been influenced by the needs of practice as well as by the Hamburg Assecuranz-Ordnung of 1731. Although the Hamburg decision of 1641 in Berenberg v JanBen (1641) by implication recognised the validity of a specified insurance of a bottomry loan, the insurance of bottomry loans and of the interest on such loans was generally disputed there prior to 1731 because it was thought that the lender could not transfer to a third party the risk for the bearing of which he received maritime interest from the borrower. In terms of art 1 title IX of the Ordnung of 1731, a lender on bottomry could insure the capital and the interest on it fully. See further Dreyer 150-152 and 206; Frentz Hamburgische Admiralitätsgericht 184.
contained further provisions dealing with the insurance of bottomry loans which are not directly relevant here. 292

Section 20 of the Amsterdam keur of 1744 laid down that where a master was, in the course of a voyage by reason of damage to his ship or otherwise, necessitated to conclude a bottomry loan on his ship in order to preserve and repair his ship and to prosecute the voyage in question, the lender of the money was permitted to insure the amount of the bottomry loan together with the interest on it, even though it appeared that the owners, or any one of the owners of the ship had insured her or any part of her either before or after the lender had concluded his insurance. 294 Therefore, the existence or conclusion of insurance, entered into by the owner-borrower, on the ship on which a bottomry loan was made in an emergency, did not affect the validity of any insurance concluded by the lender on that loan itself. An insurance on an emergency bottomry loan, but presumably not one on a voluntary bottomry loan, concluded by the lender could validly exist alongside an insurance concluded by the borrower on the ship securing that loan.

Finally, s 21 of the keur of 1744 contained a number of measures of importance for the insurance of a bottomry loan on goods. It was extensively clarified, amended and added to by the Amsterdam amending keur of 1756. Read with these amendments, the provisions contained in s 21 may be enumerated under six separate points.

Firstly, s 21 declared null and void, with a forfeiture of premiums and the possibility of the imposition of a fine, any insurance on goods that were fully burdened by a bottomry loan either at the port of their discharge or elsewhere. 295 Thus, the existence of a bottomry loan on goods rendered any subsequent insurance on those goods by

292 These concerned the content prescribed for the policy of such an insurance (see ch VIII § 4.2 infra); the proof of interest in the event of the disappearance of the ship for a particular period purely by the production of the bottomry bond (see further ch XVII § 4 infra); the obligation on the insured lender of transferring his action on the bottomry deed against the borrower to the insurer on payment by the latter in terms of the policy (see ch XIX § 1 infra); and the effect on such insurance of a change of voyage by the master without the fault of the borrower, including the case where the latter was also the master (see ch XIII § 1.2 infra).

293 That is, a bottomry in emergency, by contrast to the voluntary bottomry with which s 19 was concerned.

294 Section 20 read that 'den Geever van 't geld, [sal] 't verloop der selver Bodemary vermogen te laten verseekeren met het opgeld, schoon 't quam te blyken, dat de Redery ofte eenige van dien, 't Schip, of zyn portie, in 't zelve bevoorens, of daar na had doen verseekeren'.

295 In view of the opinion expressed in 1672 (see Nedeelands advysboek vol I adv 288, discussed in § 5.5.2 n271 supra), it may be that this result would ensue only where the insured was aware, at the time of the conclusion of the insurance, of the existence of the bottomry loan. Special provision was in any event made for the situation where the insured was thus unaware: see infra.

The 1756 amendment made it clear that the insurance so declared void was any insurance concluded by or on behalf of the owner or consignor of the goods (ie, the borrower); that such nullity followed only where the goods were already earlier (ie, before the conclusion of the insurance) fully burdened ('ten vollen zyn beswaert') with a bottomry loan or loans; that the premiums were forfeited to the insurer; and that the fine was an additional possibility and could be imposed on such owner or consignor of the goods.
the owner or borrower, as opposed to an insurance on the loan itself by lender, null and void, at least to the extent of such loan. Put differently, an insurance on bottomed goods was null. Such an insurance was prohibited to prevent the borrowing owner of goods from making a profit from his insurance in event of their loss and to prevent it serving as a temptation for him in fact to destroy those goods or to have them destroyed. Put differently, because of the nature of the bottomry loan, the lender bore the borrower's risk of the loss of the secured goods by maritime perils. The borrower himself was therefore relieved of the risk of such loss, so that if he was permitted to insure, he would receive from the insurer a compensation in respect of a loss that was no longer his, but which was exclusively for the account of the bottomry lender. In effect at least, this was nothing but an over-insurance through double insurance. The prohibition applied, of course, only if the loan agreement was in fact a bottomry loan.

It appears that the possibility was never investigated in Roman-Dutch law whether the borrower could validly take out a partial-loss only insurance in view of the fact that the risk taken over by the bottomry lender was a total-loss only risk. It is not immediately clear why a similar provision was not made in respect of the insurance of a ship by the borrower of a bottomry loan on security of that ship, although an identical prohibition

---

296 See further Lybrechts Koopmans handboek V.95; Van der Keessel Theses selectae th 717 (ad III.24.4) (whilst the insurance of a bottomry loan on goods by or in favour of the lender by custom included cover on those goods, such goods, bound to their full value by a bottomry, could not be insured in favour of the borrower); idem Praelectiones 1436 (ad III.24.4); and Van der Linden Koopmans handboek IV.6.2.

297 The reason for the prohibition of insurance by the owner of goods burdened by a bottomry loan, according to Van der Keessel Praelectiones 1436 (ad III.24.4), was to prevent the owner of the goods from profiting from their loss. The borrower (debtor) in this case had already received, in the form of the loan, the full value of the goods from the bottomry lender (creditor) and would therefore suffer no loss by the loss of the goods for in that eventuality he would be freed from his liability towards the lender to repay the loan. Therefore, should the borrower also be insured against the loss of the goods, he would be able to make a profit and that was contrary to the nature of insurance.

298 For another example of where overlapping bottomry and insurance was treated as the equivalent of double insurance, see Van der Linden Koopmans handboek IV.6.8 (upon making an abandonment, the insured was bound to declare all further insurances made by him, including the money that 'hij op de geassureerde goederen op bodemerij genomen heeft'). The forfeiture of the premium in this case, at least when the insured was aware of the existence of the bottomry loan, was by analogy to the position in the case of fraudulent over-insurance: see ch XI § 6.2.2 infra. For double insurance and over-insurance, see further ch XVIII §§ 3 and 4 infra.

299 That is, as the Hooge Raad decided by a majority in 1718 (see Bynkershoek Observationes tumultuariae obs 1467; idem Quaestiones juris privati III.16), if it was made in necessity and if the lender had taken the risk of the voyage upon himself, "t geen de natuur van de bodemerijen absolutu vordert". In this case, because the loan was in fact not one on bottomry, the borrower had also quite validly insured his ship ("een andere assurantie voor zyn Schip bezorgt").

300 On general principles, it would appear, such insurance, not being double insurance, may well have been valid. The question possibly did not arise because of such insurance cover possibly not being generally available on Dutch markets.
may on general principles have existed at common law.\footnote{See, in addition to the Hooge Raad decision of 1718 just referred to (see n299 supra), also arts 289-291 of par 9, title 11, part IV of the Antwerp Compilatae of 1609 (see De Longé vol IV at 320).}

Secondly, it was possible in terms of s 21, though, for the \textit{borrower} on a bottomry loan on goods, if more goods, or goods of a greater value, were consigned to him than the capital amount of the loan taken up (\textit{'indien meerder goederen versend als 't Capitaal van de opgenoemene Bodemary bedraagt'}), to insure the goods to the extent of that excess or difference (\textit{'meerdere'}), as well as to insure the goods for general average.\footnote{The 1756 amendment made it clear that the insurance declared possible here was by the owner or consignor of goods who was also the borrower on a bottomry loan or loans (\textit{'Eigenaar of Afzender en Opneemer der Bodemarye-gelden'}); that it was possible if the goods secured by the loan were worth more (\textit{'vebodemde Goede meer waardig zyri}) than the amount of the loan; and that in respect of such insurance of the excess there would be no forfeiture of premiums nor any penalty.}

Thus, this was a qualification on the first point just made. The insurance of goods subject to bottomry was null, but only to the extent of the bottomry loan.\footnote{The same applied at customary law in respect of ships: see art 289 of par 9, title 11, part IV of the Antwerp Compilatae of 1609 (see De Longé vol IV at 320), in terms of which the borrower on (voluntary or emergency) bottomry on a ship could not thereafter insure the ship further than the excess of the value of the ship over the amount of the bottomry loan (\textit{'dan naer advenent van tgene de bodemarye min bedraecht als ... de weerde van den selven schepen'}).}

Thirdly, and in contrast to the second point, the \textit{lender} on bottomry or the subsequent holder of the bottomry bond could, in terms of s 21, insure his interest in terms of the bottomry loan (\textit{'zyn Interest uyt hoofde der voornoemde Bodemarye'}) fully,\footnote{Goudsmit Zeerecht 342 notes that this provision concerned a bottomry loan on goods, which seems correct in the light of the condition (to be mentioned shortly) required for such insurance.} together with the \textit{'Opgeld'} on it.\footnote{There was a condition though,\footnote{See too s 19 (n290 supra) for the condition that had to be met if such \textit{'opgeld'} was to be covered.} namely that the raising and the taking up of the loan was specifically mentioned on all bills of lading and manifests of the cargo (\textit{'all Cognossementen of Manifesten der Ladinge'}) together with the date when and place where the loan was granted, to whom it was paid, and for

\footnote{In essence nothing more than a somewhat expanded repetition of the earlier provision in the \textit{keur} of 1693: see n275 supra.}
whose account it was taken up. This requirement was expressly limited, though, to money lent locally (‘hier te Lande’) and to loans for voyages from the American colonies to Amsterdam. In the case of other loans, the relevant information had to be mentioned on the bottomry bond itself.

Fourthly, the amendment of 1756 added a new provision regarding the insurance concluded on a bottomry loan by or in favour of the lender of money on bottomry on goods. Such insurance had to be made specifically on the loan (that is, that fact had to be expressed in the policy) and bottomry bonds were not otherwise included in an insurance stated to be simply on goods, merchandise or in whatever there may be an interest, nothing excluded (‘of waar in het interest bestaan zal moogen, niets uitgezonderd’). A possible reason for this specification was to make it clear that it was an insurance of the lender’s interest in the loan, not an insurance of the borrower’s interest in the secured property, which insurance was affected by the existence of a bottomry loan.

Fifthly, and in conjunction with the previous point, s 21 provided that where, as could well happen, an instruction to insure a particular consignment of goods was given by the consignor (that is, the borrower) before the bottomry loan was taken up, or where such insurance had already been perfected (‘gepasseert oder geperfektioneerd’) at that time, a particular duty was imposed on the owner of the goods in

307 And this was where s 21 differed from the 1693 provision.

308 According to Van der Keessel Theses selectae th 568 (ad III.11.2) and idem Praelectiones 1192 (ad III.11.2), the requirement was limited to sums loaned on voyages from the East Indies or back, and from Holland to the American colonies or back. But this interpretation would not appear to be justified by the text of s 21 which read ‘alleen te verstaan van gelden hier te Lande, en van de Americaanse Colonien ... naa deze Landen gegeven’. Goudsmit Zeerecht 342 interprets this to mean that, as a rule and unless the money was advanced in Amsterdam or in the American colonies on goods destined for Amsterdam, the bottomry bond too had to mention the insurance, which is patently a misreading of the relevant portion of s 21.

309 But if someone, expecting a return cargo and being unaware of what the object of his interest would be, insured himself not only under general words such as those mentioned but specifically also ‘op Bodemarye-brieven’, then such insurance would be valid also in respect of such interest in the loan (‘Bodemarye-interest’). In such case, though, no return of premium was permitted unless the insured declared under oath that he had no direct or indirect interest, either in the goods, or in the loan (‘geen Interest, hetzy in goederen, of in Bodemarye, direct of indirect’), that is, according to Goudsmit Zeerecht 343, unless the insured confirmed under oath that his interest never consisted of a bottomry interest. See further Decker Aanteekeningen ad IV.9.4 n(3)/(c); Van der Keessel Theses selectae th 717 (ad III.24.4); idem Praelectiones 1436 (ad III.24.4). As to the return of premiums, see ch XI § 6 infra.

310 See again point one supra and point five infra.

311 Thus, this point concerned an existing insurance on goods, as opposed to a subsequent insurance, which was considered in point one supra.

Again, by analogy to the opinion expressed in 1672 (see Nederlands advysboek vol I adv 288, discussed in n271 supra), it may be that a subsequent insurance would have been treated as an existing insurance if, at the time such an insurance was concluded, the insured was unaware of the existence of the bottomry loan.

The 1756 amendment made it clear that s 21 was here concerned with the case where the order to insure was given by the owner or consignor of the goods before the bottomry bond was passed and where such insurance was immediately perfected and in force (‘dadelyk word geperfectioneert’).
question, that is, on the borrower. He had to transfer (‘by overwysinge transporteeren’) or cede his right under that policy of insurance to the holder of bottomry bond, that is, to the lender.\(^{312}\) If he failed to do so, the insured borrower would not only not be able or allowed to claim on that policy (that is, he would have no action against the insurer) but his premium could also be retained by the insurer. The legal consequences in this case\(^{313}\) was changed by the 1756 amendment. It laid down that the existing insurance was\(^{314}\) to become void to the extent that it was not in excess of the amount of the loan (‘verbodemde Capitaal’), although the premium now had to be returned to the insured borrower.\(^{315}\) Analogous principles applied at common law, also in respect of the conclusion of a bottomry loan on an insured ship.\(^{316}\)

In the sixth and final place, s 21 provided that an insurance on bottomry on goods was not subject to general average nor to any diminution of value due to internal deterioration of the property in question (‘Assurantie op Bodemary gedaan op Goederen, is vry van alle Avary grosse, en vermindering van waarde door eigen bedert’). By the 1756 amendment, this was applied to insurances on bottomry generally, and not only to those on bottomry on goods.\(^{317}\)

The Roman-Dutch principles again provided the basis for the regulation of the insurance of bottomry loans and property subject to bottomry in the Wetboek van Koophandel.\(^{318}\) A large measure of correspondence with those principles also existed

---

\(^{312}\) Presumably only to the extent of the loan, though, if that was smaller than the sum insured.

\(^{313}\) That is, where money was lent on bottomry on the security of insured goods.

\(^{314}\) In greater similarity to the prohibition on any subsequent insurance by the owner of bottomed goods.

\(^{315}\) See Van der Keessel Praelectiones 1436 (ad III.24.4).

\(^{316}\) Article 290 of par 9, title 11, part IV of the Antwerp Compilatae of 1609 (see De Longé vol IV at 320) provided that if a bottomry loan was concluded after an insurance, such insurance would be void (or reduced by the amount of the loan) and the premium forfeited to or claimable by the insurer, except (in terms of art 291) where it was a bottomry in emergency (the burden of proving that this was the case was on the master), in which case the insurance was not thus avoided or reduced.

\(^{317}\) See further Van der Keessential Praelectiones 1436 (ad III.24.4); Magens Essay vol I at 19-22 and vol II at 136. Goudsmit Zeerecht 344-345 has detailed comments on the effect of and background to this rule and for the reason why the restriction to bottomry on goods was omitted in 1756. The fact that in s 21 there was initially mention only of bottomry on goods, has an historical explanation. In the case of bottomry on ships there was no doubt about the application of the ancient and customary rule that ‘bodemerij draagt geen avarij’ (see again ch I § 4.3.2.5 supra); in the case of bottomry on goods the older view could still persist, ie, that ‘bodemerij op goederen draagt in de avarij’. Only when, after a number of decades, that view came to be rejected generally, could the ‘op goederen’ be omitted, as happened in the keur of 1756.

\(^{318}\) Thus, eg, arts 593-6 and 607 recognised as a subject of marine insurance not only the bottomry loan itself but also the interest on such loan, although such interest had to be mentioned separately in the policy if it were to be included in the cover. Article 599-3 declared an insurance void when made ‘op schepen of goederen, waarop de volle waarde vroeger op bodemery is geschoten’, while in terms of art 600 one could insure on ships or goods ‘waarop niet de volle waarde op bodemeriij is geschoten’ only the excess value ‘mitsgaders hetgeen als bijdrage in de avariij, bij behoudene aankomst, zoude moeten betaald worden’ (this is an application of the principle that without an interest the insurance is void; also, it was applicable only in the case of voluntary bottomry); in terms of art 609 the lender on bottomry in emergency could insure such a loan even if the secured property had already been insured earlier; and by art 659, in the case of an insurance on a bottomry loan, the insurer was not liable for a loss due to the
in English law.

5.6 The Insurance of the Wages and Property of the Master and Crew

5.6.1 Introduction: The Salary and Remuneration of Seamen

The salary, remuneration and other benefits of sailors in the Netherlands up to the end of the eighteenth century, like their conditions of employment generally, depended largely on the branch of shipping in which they were employed: the merchant marine, the navy, the fishing or whaling industry, or the East India Company. For present purposes only some of the more important aspects of the compensation of mariners, including some of the differences in the position of seamen in these respective areas, will be mentioned and then but very briefly.

319 There too insurance was permitted by the lender of money on bottomry or on respondentia (see eg Molloy De jure maritimo II.7.15 for an example of an insurance upon monies lent on bottomry). The prevalent view was that an insurance by the bottomry lender was in the nature of a reinsurance. Thus, Magens Essay vol I at 19 explained that the lender under a bottomry bond, having taken over the sea risk of the borrower in respect of the secured property, was in fact an insurer of the borrower, and if he (the lender) caused himself to be insured it was to be considered as a reinsurance (similarly Weskett Digest 44-60 sv 'bottomry' at 46-47 par 4). Where bottomry or respondentia interests were insured, they had to be specified in the policy (see eg Glover v Black (1763) 1 Black W 422, 96 ER 240 and Holdsworth History vol XII at 537).

In the Marine Insurance Act of 1746 (19 Geo II c 37), s 5 provided that 'the lender of money on bottomry or respondentia alone has the right to be insured for money lent and the borrower shall in case of loss recover no more upon any insurance than the surplus of the property above the value of his bottomry or respondentia bond'. See further Holdsworth History vol XI at 448. See too eg Cohen 'Notes' 119-120 on the invalidity of the view that a borrower on bottomry and respondentia has no insurance interest in the property pledged, except in so far as the value of such property exceeds the amount for which it is pledged.

In terms of s 3(2)(b) of the Marine Insurance Act of 1906, the security for any advances, loans, or disbursements, endangered by the exposure of insurable property to maritime perils, may be the subject of a contract of marine insurance; and by s 10 of this Act the lender of money on bottomry or respondentia has a contingent insurance interest in respect of the loan. Loans on bottomry and respondentia must seemingly be insured as such (see Chalmers 40-41, referring to s 26(1) of the Act of 1906).

320 The following sources were considered for this purpose: Asaert 183-184; Boxer 'Dutch East-Indiamen' 84-86; Bruijn 'Seamen'; Bruijn, Gaastra & Schöffer Dutch-Asiatic Shipping 210-213 (details of the wages of various members of the crew on EIC ships on voyages to Asia); Bruijn & Van Heslinga 13, 14, 16 and 18; Bruijn & Lucassen 13 and 17; Hart 111-112 and 116-121; and Lucassen 135 and 140-144.
The crews on board Dutch ships comprised various ranks, from the master right down to deck-hands with a wide variety of levels and occupations in-between. The number and type of mariners on board obviously depended on the type of ship and the voyage in question. Aboard merchantmen in the seventeenth century, the ship’s company numbered around twenty while the average complement of an out-going East Indiaman in the seventeenth and eighteenth centuries was respectively 180 and 230 of which one-third was usually made up of soldiers. Because of the high mortality rate on the east-bound voyage and the large number of European deaths in the tropics, returning ships were usually less well manned, at least until the eighteenth century when Asian seamen came to be employed on at least a part of the return voyage, many of them being left behind at the Cape of Good Hope. A surprisingly high percentage of the crew on board Dutch ships was foreigners, also on Dutch naval vessels. During the first half of the seventeenth century this was as high as 40 to 50 per cent.

The master of a merchant ship did not look for his crew himself but made use of professional seaman’s agents in port to hire sailors for the intended voyage. For Indiamen the recruitment of personnel was the task of the authorities of each separate chamber of the Company while the captain of a naval ship recruited his own marines. Seamen were signed on and employed for a certain or ascertainable period of time and were paid off at the end of each period of their employment. Not surprisingly, most members of the crew had no particular loyalty to the ship or her master or owners as

---

321 The master (schipper) was in most cases the main representative and functionary of the ship company (rederij) in employing the ship. Often himself the owner of shares in the ship (ie, one of the reders), the master was in addition also in the service (loondienst) of the rederij and acted on its behalf in concluding contracts of carriage and signing bills of lading for cargo delivered for conveyance on board the ship. He was in charge of the ship, her navigation, maintenance, equipment and crew. Occasionally he was authorised to purchase goods abroad for the rederij or even for consignors. The legal position of the master, including his relationship with shipowners (reders), consignors (bevrachters) and seamen (bootsgezellen), was a much discussed topic in Roman-Dutch law. See eg Grotius Inleidinge III.20; Van der Keessel Theses selectae th 681-697 (ad III.20).

322 It has been estimated that anything from a quarter to a third of those who left Europe never returned home from the East Indies.

323 For example, during the great sea battle of Texel on 21 August 1673, the Dutch Admiral Cornelis Tromp, when confronting the English fleet under the command of Sir Edward Spragge, had amongst his 46 petty officers 22 who came from France, Scotland, and other countries. His flag captain was an Irishman with the delightful if somewhat uncommon Irish name of Thomas Tobiaszoon! See Bruijn & Van Heslinga 11.

324 These private agents found employment, and also board and lodging ashore, for seamen and also negotiated their wages with the master of the ship concerned. They were paid a commission out of the potential earnings of those sailors for whom they managed to arrange employment. In 1702-1704 there were nine such agents active in the port of Amsterdam while in Rotterdam, after 1721, a city-appointed commissioner for the hiring of seamen acted as the sole intermediary.

325 For example, for the duration of a particular voyage in the case of a merchant or naval vessel, for a period of five years in the case of ships of the East India Company, or for the season in the case of fishing and whaling ships.
they had to search for new employment every time a voyage or employment contract ended.

Seamen received their salary in a number of forms. Although payment in natura did occur, payment in specie (money) was by far the most common. They could also enjoy any one of a number of additional benefits, some of which will be considered shortly. Depending, amongst other things, on the branch of shipping involved, the wages and other benefits received by seamen varied considerably. For ordinary seaman on the average merchant vessel the wage in the seventeenth century was in vicinity of £14 per month. The East India Company paid less generously: the master on an Indiaman earned £70-80 per month and an ordinary seaman around £7-11 per month, although they did receive free food and lodging on board. Naval salaries were generally much smaller than those paid by the company, while in the whaling industry there was quite a complex salary structure, monthly salaries being supplemented by a variety of additional benefits, profit-sharing arrangements and piece-wages, that is, wages paid depending on the amount of work performed.

According to customary maritime law, and unless otherwise agreed, seamen's wages were payable on the completion of the voyage or contract in question.\(^\text{326}\) In the merchant fleet, where sailors were employed for a single voyage, half of their salary was paid in advance on the commencement and the other half on the completion of the voyage. In the India trade wages were in principle due only on completion of a voyage, although advances and loans were possible\(^\text{327}\) and seamen could, before departure, arrange for a part of their wages to be advanced and paid periodically by the Company to their dependents in their absence.\(^\text{328}\) The advances made before and during the voyage to the Indies, as well as medical expenses\(^\text{329}\) and fines imposed by the Company for breaches of discipline and contract, were deducted from the salary agreed on

\(^{326}\) This legal rule and its implications will be considered in more detail infra.

\(^{327}\) For example, seamen regularly received an advance of two months' salary (handgeld) on signing up.

\(^{328}\) This was done by way of a system of monthly tickets (maandbrieven), subscription letters, or signed acknowledgements of debt (schuldbrieven). The amounts so paid were deducted from the seaman's salary payable at the end of the voyage. Because seamen were invariably short of cash, both to buy goods on the voyage and to maintain their families at home, and because seamen or their families could not always wait until these letters matured and became payable, they often pawned or sold (at a discount of, in some cases, up to 25 per cent, because of the risk that the salary might never or only partly be earned and that the letter may thus become worthless or worth less) these letters, which were bearer documents, to subscription-dealers (so-called zielverkopers).

\(^{329}\) At least those for injuries resulting from fighting or for the treatment of venereal disease, which were for the account of the sailor himself. In the case of the illness of a mariner, during the voyage and occurring without his fault and necessitating treatment on land, he was entitled to his full wages and other benefits (see eg s 27 of the placcaat of 1551; art 19 of the Laws of Visby). In the case of the injury or death of a mariner in a battle with the enemy, or with pirates in defence of the ship, the damages, wages or funeral costs involved were adjusted as a general average loss over the ship and her cargo (see s 28 of the placcaat of 1551; arts 18 and 43 of the Laws of Visby; and again ch I § 4.6.4 at n260 supra). See generally Goudsmit Zeerecht 221.
for the voyage. The possibility also existed of a loan from a seaman’s agent, obviously at a rather exorbitant rate of interest.330

In addition to their wages, the master and the crew of Dutch ships enjoyed a number of other traditional benefits and privileges.

First, there was primage (or kaplaken), the premium (priemgelden) or reward promised and paid by the owner or owners of the ship as an incentive to the master for and in the event of the safe and speedy completion of the voyage. Primage could be paid also by a consignor to ensure particular care for his perishable or valuable cargo on board. It could consist of a sum of money or a small gift in silver or gold for the master, his wife, or the ship. Occasionally the payment of primage, or of an increased primage, was linked to a particular condition, such as the master succeeding in bringing the first Portuguese figs of the season to Amsterdam.

Secondly, there was the right of portage (or voering), the customary privilege of the master331 and some of the crew333 of carrying merchandise of a specified kind for their own account and profit in a certain allocated part of the available cargo space on board the ship, free of charge and without the payment of freight (vrachtvrij) to the shipowner.334 Details of this privilege, concerning matters such as the amount and type of goods that could be taken as portage, were in each case set out in the contract of employment, and this varied considerably depending on the nature of the trade, the destination, and the standing and rank of the master or sailor involved. An ancient form of additional income, especially in the Middle Ages, the right of portage was from the sixteenth century gradually replaced by the payment of a salary in specie, no doubt because the privilege was open to abuse and gave rise to a variety of undesirable

330 These agents also stood surety for the seaman for the repayment of the advances on his salaries received from his employer should he, the seaman, for some or other reason not take up employment when the ship sailed or if the term of his employment was not completed and the wages accordingly not earned. Seamen were often heavily indebted to these agents.

331 See eg Goudsmit Zeerecht 173-174 for a provision in this regard in art 18 of the Flemish Maritime Laws. See too eg s 15 title III of the placcaat of 1563 and Grotius Intleidinge III.20.25-30 for further deals.

332 Walford Cyclopaedia vol I at 442 refers to it as the 'captain's adventure', meaning the master's own private trading venture.

333 Some members of the crew shared in the privilege to a limited extent. For example, some seamen on East India Company ships were permitted to bring merchandise in a chest home with them on the return voyage which they could try and sell at a profit. In the Company the right of portage was also an important additional compensation in the case of non-marine employees returning from their Batavian tour of duty. The right to gepermitteerde cargazoen occurred also on certain merchant ships. There was no portage in the navy where there was a right of booty though (see further ch VI § 5.2.2 infra as to the law of prize).

334 It could be the master's (or the crew member's) own merchandise or that of another, that is, he could have his own goods carried free of charge, or he could also transfer, against the payment of an amount equivalent to or less than the usual rate of freight, the right to carry goods on board free of charge to a third party, the latter standing in the place of the master or seaman and enjoying all his privileges.
clandestine practices.\textsuperscript{335} Furthermore, when the existing international custom that no import or export duties were payable on portage gave rise to and encouraged smuggling and other transgressions, legislation eventually abolished the freedom from duty as a result of which portage further declined.\textsuperscript{338} By the mid-eighteenth century it had already fallen into disuse.\textsuperscript{337}

Thirdly, there was the right of the master and crew, and on occasion also of stevedores (lossers), to share in whatever remained behind in the hold by way of spillage from bags and vats after the discharge of the cargo from the ship. As was the case with the right of portage, abuses occurred in connection with this right to spillage (\textit{matschudding} or \textit{veegsel}) which the legislatures sought to counter.\textsuperscript{338}

Fourthly, for the crews of naval ships and privateering vessels, who did not enjoy any right of portage, as well as for those of the East India Company, booty money (\textit{buitgeld}) presented a possible windfall in times of war. Enemy ships and cargo captured in war were declared forfeited and sold as prize. The proceeds were shared between the authorities, the shipowner and the master and crew of the ship which had captured the prize.\textsuperscript{339}

\textsuperscript{335} For example, despite strict prohibitions, officers on East India Company ships bought slaves in Batavia which they then sold at a profit at the Cape of Good Hope.

\textsuperscript{336} The Estates General of the Netherlands passed a number of \textit{placcaaten} concerning the right of portage. Thus, the \textit{placcaat} of 26 July 1597 (\textit{GPB} vol I at 1024) noted how under the guise of ‘\textit{de Bootman’s voeringe}’ (which were free from duties) great frauds were perpetrated. To prevent these, it was provided that in future no one would be permitted under the cover of portage to conceal any imports in the notification of goods for the payment of duties, while no portage of exports would be permitted any more. The \textit{placcaat} of 22 February 1657 (\textit{GPB} vol II at 2467) repeated the prohibition on the portage of exports which shows that the abuses had not ceased. And finally the \textit{placcaat} of 21 February 1671 (\textit{GPB} vol III at 1270) provisionally and until further notice, repealed the earlier one of 1657 and withdrew every freedom and privilege relating to portage. Goudsmit notes that the effect of this last \textit{placcaat} has not always been clearly understood. It has often been taken to have abolished the portage of master and crew, but in reality it merely abolished the freedom from duty of portaged goods. See further Goudsmit \textit{Zeerecht} 17-18.

\textsuperscript{337} See eg Van der Keessel \textit{Theses selectae} th 688 (\textit{ad} III.20.25-30); Van der Linden \textit{Koopmans handboek} IV.4 5; Goudsmit \textit{Zeerecht} 250.

\textsuperscript{338} Under the pretext of offloading their portage or selling their spillage, masters and their crews caused merchants great losses by damaging the receptacles and even embezzling cargo. An Amsterdam \textit{keur} of 15 April 1614 accordingly prohibited them from landing, measuring or selling spillage without the knowledge and consent of the merchants and owners of the cargo concerned, and appointed an official (‘\textit{opziener op de mat-schuddinge}’) to exercise control in this regard. To prevent circumvention, the \textit{keur} prohibited all discharge of ships at night. A further \textit{keur} of 25 April 1618 increased the penalties and regulated the duties of the ‘\textit{opziener}’ in more detail, giving him powers of inspection on board ships and prohibiting him from buying spillage himself. But no doubt the abuses continued, and a \textit{keur} of 30 January 1649 repeated the prohibition on the sale of spillage without the consignor’s knowledge. See further Goudsmit \textit{Zeerecht} 374-376.

\textsuperscript{339} The crew, for example, received f30 on the capture of an enemy ship worth f10 000. On privateering ships, the crew’s share of the prize made up a larger part of their salary so as to serve as an incentive. The crew was also in any case entitled to the ‘\textit{clean plunderagie}’, that is, to share amongst themselves the personal possessions of the crew of the captured ship. As to privateering and the law of prize, see further ch VI § 5.2.2 infra.
Finally, on whalers and fishing vessels, members of the crew may in addition to their ordinary wages have been entitled to a share of the catch or of the profit from a whaling or fishing expedition (hand-en visgelden; vatgelden).

5.6.2 The Insurability of Seamen’s Wages

A fairly general rule in early Roman-Dutch law, although it appeared in slightly different formulations and thus had a varying scope in the legislative measures, was that the master and members of the crew, and also some others on board such as the pilot, were not permitted to insure their wages. The earliest legislation, which appear to have treated wages (vaerloon) on a par with freight (vrachtloon), reflected this rule. Section 21 of the placcaat of 1571, for example, prohibited masters, pilots, mariners, soldiers (‘Meesters, Piloten, Bootsgesellen, Oorloghsvolck’) and others on board ships from insuring their wages or salaries (‘heuren loon ofte salaris’).

The rule, it seems, was in accordance with continuing practice in the early part of the seventeenth century, and was followed too in Amsterdam and Middelburg. Quite exceptionally, a more liberal attitude prevailed in Rotterdam in the eighteenth century where s 26 of the keur of 1721 provided that sailors could on fact insure

340 See again § 5.4.2 n230 supra.

341 Thus, s 21 of the placcaat of 1550 prohibited the ‘Schipper, Schips-officier, Stierman, Hoogebootsmen, Schieman, Temmerman, Busgeschut, Kock, nochte Bootsgeselle of Knecht’ from insuring their ‘vaerloon of huere’ against the capture by Scottish and other pirates of the ship on which they were employed. Section 20 of the placcaat of 1551 was in identical terms, except that it prohibited such insurance against ‘Zee-roovers, oft andere de navigatie en coopvaerderye van herwaerds overe willende verhinderen’. See Goudsmit Zeerecht 213. Section 9 of title VII of the placcaat of 1563 prohibited the insurance generally of wages or hire (‘Vaer-loon ofte huere’). See further Goudsmit Zeerecht 245; De Groote Zeeassurantie 35.

342 Section 22 of the provisional placcaat of 1570 was identical. See further Goudsmit Zeerecht 252.

343 See eg art 315 of par 9, title 11, part IV of the Antwerp Compilatae of 1609 (see De Longé vol IV at 330) prohibiting ‘voerlieden oft carlieden, piloten, bootsgesellen, schippers, oorlogsvlokk oft andere op de schepen dienende’ from insuring ‘hennen loon’, also known as their ‘siet oft nolo’.

344 Section 11 of the Amsterdam keur of 1598 (with which s 6 of the Middelburg keur of 1600 agreed) referred in this regard to ‘Meesters, Piloten, Bootsgesellen, oorlogsvlokk, ende alle andere die opte voorsz Schepen sullen zijn’ and to ‘heuren loon ofte salaris’. See further eg Grotius Inleidinge III.24.4; Groenewegen Aanteekeningen ad III.24.4; Van Leeuwen Rooms-Hollands regt IV.9.6; Van Zurck Codex Batavus sv ‘Assurantie’ par 4; Schorer Aanteekeningen 415 (ad III.24.3) n4 (specifically stressing that soldiers on board too could not insure their wages); Scheltinga Dictata ad III.24.4 sv ‘loon van schippers, schippers-ghezellen, etc’; Decker Aanteekeningen ad IV.9.4 n(3)/(c) (wages of the crew (‘gagien der Schiplieden’) may not be insured, but under ‘gagien of loon’ one was not understand the victuals on board (‘de rantsoenen der Schiplieden’); see again § 3.2.4 supra); Kersteman Academie part XVIII (at 276) (‘Maandgelden van Schippers en Bootsgesellen’); idem Woorden-boek at 29; and Goudsmit Zeerecht 316.
their wages ('de Gagie van Scheeps-volk').\textsuperscript{345} The new Amsterdam keur of 1744 retained the old prohibition and was not influenced by the Rotterdam keur of 1721 on this point.\textsuperscript{346}

The reason for the prohibition on the insurance of wages must be seen against the fundamental albeit exceptional\textsuperscript{347} principle of maritime law at the time that the master and crew both earned their wages and that these became enforceable only when their employer, the shipowner, had earned his freight, which, in turn, happened only on the safe arrival at the destination of the ship and her cargo for the carriage of which that freight was due.\textsuperscript{348} This principle is neatly expressed in the maxims, encountered especially in English law, that 'freight is the mother of all wages', or 'no freight, no wages'. The rule was intended to counter the strong and natural tendency

\textsuperscript{345} In the earlier Rotterdam keur of 1604 there was nothing directly on the insurance of wages, and at least no direct general prohibition on the insurance of their wages by the crew of a ship. See generally eg Van Zurck Codex Batavus sv ‘Assurantie’ par 7B; Schorer Aanteekeningen 415 (ad III.24.4) n4 (referring, incorrectly it seems, only to the master’s salary (‘schippers-loon’) in this regard and not to that of the crew generally); Van der Linden Koopmans handboek IV.6.2 (whose exposition would appear to regard the Rotterdam position as the rule and that in Amsterdam and Middelburg as the exception); and Goudsmit Zeerecht 396.

In terms of s 4 title II of the Hamburg Assecuranz-Ordnung of 1731, too, the insurance of wages (‘Haure oder Lohn’) was possible. See further eg Dreyer 120; Goudsmit Zeerecht 359n1.

And in English law too, it would seem, wages may have been insurable in the eighteenth century. In 1748, when 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 insurance on ships and goods, one of the resolutions contained in the Committee’s report was that if the wages of masters and mariners were insured, the amount of such wages (either per month or per voyage) had to be endorsed on the policy so that it could be ascertained in the case of loss. See further Raynes (1 ed) 166, (2 ed) 161; Wright & Fayle Lloyd’s 162-163. Earlier schemes had been projected to insure seamen’s wages. One of the projects proposed in London in 1720 was for the ‘Insurance of Seamen’s Wages, at “Sam’s Coffee House”’ (see eg Walford Cyclopaedia vol I at 398 sv ‘Bubble Insurance Projects’). Section 11 of the Marine Insurance Act of 1906 now expressly permits a master or any member of the crew of a ship to insure his wages.

\textsuperscript{346} See s 13 of the keur of 1744 and further eg Goudsmit Zeerecht 336.

\textsuperscript{347} See eg Pothier Maritime Contracts III.2.1 (par 184; at 111-112) who explained this principle as an exception to the general rule applicable to contracts of letting and hiring (of which the contract of service was but an example) and according to which the master and crew ought to be deprived of a part of their salary only in proportion to that part of the voyage which remained uncompleted at the time of loss, and according to which they therefore ought to be paid for that part of the voyage already performed at that time. The reason for the exception was one of expediency.

\textsuperscript{348} Although not expressly so provided in s 12 title IV of the placcat of 1563, as it was provided in art 15 of the Laws of Visby, viz that a member of the crew has no right to wages when the ship was lost, it does seem that the placcat of 1563 did not in this respect intend any deviation from the generally accepted custom that if the ship was wholly lost by shipwreck, the sailors lost their wages; if goods were saved, they were entitled to their wages only in so far as it could be realised out of the freight due to the shipowner (or carrier) in respect of such saved goods. Furthermore, if the cargo was saved by their efforts, the crew was additionally entitled to a reasonable salvage reward. Section 12 contained only the provision for such a reward. See further eg Grotius Inleidinge III.20.42; Van der Keesel Theses selectae th 694 (ad III.20.42); Van der Linden Koopmans handboek IV.4.5; Goudsmit Zeerecht 236; and Weskett Digest 523 sv ‘shipwreck’ par 1 and 591-592 sv ‘wages’ par 17.
on the part of sailors to place their own interest first to the detriment of the ship, by linking the fate of the ship to the recoverability of their wages and thus giving the crew an interest in the safety of the ship on which they served.

The prohibition on the insurance of wages was justified as follows. If the crew were permitted to insure, and thus to secure, their wages against their not being earned by reason of a maritime peril resulting in the non-arrival of their ship at her destination, they would not exert themselves to ensure the safety of the ship and her cargo. This would be to the detriment not only of shipowners but also of insurers. The insurability of wages would sever the link between the loss of the ship on the one hand, and the consequent loss of their wages on the other hand and the fundamental rule would be circumvented and nullified, something not in the interest of shipowners in particular nor of shipping in general. The prohibition made the interest of the crew subservient to that of the owner and served to encourage the crew to exert themselves for the safety and preservation of the ship and, in particular, her cargo. It provided them with a financial interest and incentive in the safe arrival of the ship and cargo.

One argument to the contrary, and maybe the one which prevailed at Rotterdam, was that in time of dire emergency a seaman was more likely to be encouraged by his sense of self-preservation than by any entitlement to wages. Another view, in favour of the insurability of wages, argued that the underlying principle that wages

---

349 A tendency further strengthened by the fact that, more often than not, by virtue of their casual and temporary employment on her, seamen felt no emotional sense of commitment to the ship or her owners.

350 If by their own positive actions they actually caused the non-arrival of the ship and thus their wages not becoming payable, their insurance would in any case not be enforceable: see ch VI § 4.1 infra as to the influence of the insured's own conduct on the liability of the insurer.

351 A similar argument was applied to justify not only the general prohibition on insurance in the Netherlands in 1569 but also the subsequent prohibition on full-value insurance, namely, if full-value insurance were permitted it would make insured shipowners less careful and increase losses due to their negligence. See eg Hammacher 42-43 and further ch XVIII § 5.2 infra as to the prohibition on full-value insurance.

352 For the same reason sailors were entitled to a salvage reward if they succeeded in saving cargo. See eg Magens Essay vol I at 76-78 who noted that to discourage seamen from only being concerned with the saving of their own lives and their own chests and goods, some laws, in addition to providing that wages were due only on the completion of the adventure, also permitted the payment of an additional reward to seamen for their extraordinary labour in saving cargo.

353 One argument to the contrary, and maybe the one which prevailed at Rotterdam, was that in time of dire emergency a seaman was more likely to be encouraged by his sense of self-preservation than by any entitlement to wages. Another view, in favour of the insurability of wages, argued that the underlying principle that wages

---

354 See eg Voorduin vol X at 298.

355 Analysed in detail by Burger 18-24 with reference to the Wetboek van Koophandel.
were earned only after the ship and her cargo had arrived and freight had been earned, as well as the concomitant prohibition on the insurance of wages, were fallacious. The stated aim of the principle, namely to encourage effort by the crew, was not served by the application of this principle, for otherwise the compliance with their duty towards the ship, and not the success of their efforts, would have been the criterium.\textsuperscript{356} The fallacy was further highlighted by the fact that the crew did not have to return advanced wages in the event of freight not being earned. It seems that the true reason for the fundamental rule and the prohibition was rather that the contractual right of the crew to wages was fully equated with that of the bottomry lender and other maritime creditors. It also gave effect to the even more fundamental principle of maritime law and commerce that a shipowner should not be liable for more than he entrusted to the sea. Therefore, the right of the crew to their wages was itself also limited to whatever the ship could deliver up by way of her own value and the freight she earned on the voyage in question.\textsuperscript{357}

The uninsurability of seamen's wages in Amsterdam rather than the position in Rotterdam was followed by the drafters of the \textit{Wetboek van Koophandel}. Article 418 retained the fundamental principle concerning the earning of wages, namely that the officers and crew of a ship have no claim for the wages due to them in respect of the voyage on which that ship was captured, declared prize, or stranded or broken to such an extent that the ship and her goods were totally lost ('de scheepeling verliest zijn loon, als het schip genomen wordt of vergaat'). In consequence article 599-1 retained the Amsterdam prohibition on the insurance of seamen's wages ('soldijen of gagien van het scheepsvolk').\textsuperscript{358}

The repeal of the basic principle of maritime law regarding the earning of seamen's wages in relatively modern times, so that a shipowner is now unconditionally liable to pay a seaman his wages at the end of the voyage, irrespective of whether or not freight had been earned on that voyage, has resulted in the reason for the prohibition on the insurance of seamen's wages also falling away: \textit{cessante ratione legis, cessat et ipsa lex}. In some instances, as in the Netherlands in 1930, the prohibition has now been repealed expressly. But, in fact, his wages no longer being at risk, a seaman can probably no longer insure them, at least not against being lost by the loss of the ship or cargo by marine perils.\textsuperscript{359}

Primage, one of the other additional rights and privileges to which the master or a member of the crew may have been entitled, may well in Roman-Dutch law have been treated in the same way as wages for purposes of insurability. Although the legislation did not mention it specifically, the insurance of the right to primage too would have

\begin{footnotes}
\footnotetext[356]{That is, the principle would have been that wages were earned if the crew had exerted themselves, not only if their exertions had resulted in the safe arrival of the ship and in the freight being earned.}
\footnotetext[357]{Thus, a seaman's claim for wages, like that of a bottomry lender for the repayment of his loan and interest, was one \textit{in rem} against the ship and freight, and not against the owner of the ship personally and upon his whole estate. For a similar limitation upon the shipowner's liability towards a bottomry lender, see again ch I § 4.3.1.1 \textit{supra} and see further ch XIX § 2.1.3 \textit{infra}.}
\footnotetext[358]{See eg Lipman 233.}
\footnotetext[359]{See eg Buys 23; Dorhout Mees \textit{Schadeverzekeringsrecht} 117; Enschedé 54; and Jolles 62-63.}
\end{footnotes}
deprived the master's promised reward of its incentive value so that such insurance would probably by analogy have been found to be prohibited too.\footnote{360}{See eg Rutgers van der Loeff 109. This would appear to be confirmed by art 599-2 of the Wetboek van Koophandel which declared an insurance void when made 'op de premien of het kapijken des schippers'. See further Lipman 233; Voorduin vol X at 298.}

Distinguishable from the question whether the master or mariners of a ship could insure their wages, was the issue whether a shipowner could insure such wages. Obviously this would in principle only have been possible if such wages had to be paid irrespective of whether they had in fact been earned, the voyage completed, or freight earned. In terms of s 4 of the Rotterdam keur of 1604 the wages of the crew ('de huyre vande Bootsgesellen') could not be taken into account by the shipowner in determining the insurable value of his ship, a provision which would appear to confirm this principle. In the Amsterdam keur of 1744 also there is authority for the view that the wages advanced to a seaman, which, it appears, were not repayable if freight was not earned, were in fact insurable by the shipowner or the employer of the seaman. In terms of s 7 such advances on their wages ('de op hand gegevene gelden') could be included in the insurable value of a ship.\footnote{361}{See Lybrechts Koopmans handboek V.83n1 ('de ophand gegeven gelden'). Such insurance of advanced wages by the owner may have been possible also in terms of the Rotterdam keur of 1721; at least it was not one of the items expressly declared uninsurable. See further eg Hammacher 85; Weskett Digest 587-588 sv 'wages' par 1. The same custom apparently pertained in London: see Magens Essay vol I at 18-19.}

5.6.3 The Insurability of the Property of the Master and the Crew

As already explained, a master may, in that capacity and not as owner or co-owner of the ship, have carried goods on the ship as cargo by virtue of his right of portage. Furthermore, he may also have had personal belongings on board. The same applies to members of his crew. The question arises whether such property could be insured by them.\footnote{362}{Although not an instance of the insurance of an expected advantage, this question would appear to be most conveniently considered here, immediately after the insurability of the wages of the master and the crew.}

In terms of s 21 of the placcaat of 1571, goods carried by the master or crew as baggage were not insurable but goods they carried as cargo was.\footnote{363}{The section provided that 'Meesters, Piloten, Bootsgesellen, Oorloghsvolck' and others on ships could not insure their wages nor anything belonging to them ('eengerhande dingen hen toe behoorende'), except only merchandise ('Koopmanschappe'), if they had any. See further Goudsmit Zeerecht 262; Mullens 50.} Section 11 of the Amsterdam keur of 1598 provided likewise and seemingly also made it clear that the
goods referred to here were those carried by virtue of the right of portage.\textsuperscript{364} This principle appears to have been one of customary insurance law\textsuperscript{365} and it was retained in Roman-Dutch law in the eighteenth century. Thus, s 13 of the Amsterdam keur of 1744 provided that while the master, crew and others on board a ship could not insure their wages, they could insure the merchandise they had taken with them or were to take with them (‘de Koopmanschappen door hen meede te neemen, ofte meedegenomen’). Although the insurance of baggage was no longer expressly prohibited, it was also not, like merchandise, expressly permitted.\textsuperscript{366} In the same way a master and his crew may have been permitted to insure the enemy or pirate ship or goods they had captured as prize.\textsuperscript{367}

5.7 The Insurance of the Premium

In terms of the insurance contract in its modern form, the premium was in Roman-Dutch law payable to the insurer under all circumstances, that is, irrespective of the loss of or damage to the insured property on the one hand, or its safe arrival on the other hand. By contrast, for example, the interest on a maritime or bottomry loan, which included the maritime or bottomry (or risk) premium and which was linked to the capital amount of the loan itself, was payable to the lender only in the event of the safe arrival of the property securing that loan.\textsuperscript{368} The insurance premium was therefore not at maritime risk for it was payable in any event. Strictly, therefore, it ought not to have been insurable, not because such insurance would have resulted in a breach of the indemnity principle, but because it enabled the insured to obtain more in the event of a loss, when he received the premium back from the insurer, than he would have had no

\textsuperscript{364} It provided that the master, crew, and all others on board could not insure their wages nor anything belonging to them, except only merchandise, if they had any, that were received in addition to their wages (‘alleenlick Koopmanschappen, indien sy eenige (boven 't geene sy van haer huyr ontfangen) hebben’). Likewise s 6 of the Middelburg keur of 1600, with only a slightly different word order. Thus, Schorer Aanteekeningen 415 (ad III.24.3) n4 noted that all such goods ‘die zonder vracht-loon worden medegenomen’, were insurable. See generally Goudsmit Zeerecht 316.

\textsuperscript{365} See eg art 315 of par 9, title 11, part IV of the Antwerp Complatae of 1609 (see De Longé vol IV at 330) which laid down that persons serving on board ships could not insure their wages nor anything else belonging to them, except only ‘coompmanschappen indien sij eenige gelaeden hebben’.

\textsuperscript{366} Scheltinga Dicata ad III.24.4 sv ‘loon van schippers’ at least thought that property belonging to seamen was not insurable unless it happened to be merchandise carried as cargo.

\textsuperscript{367} Although Van der Keessel Theses selectae th 717 (ad III.24.4); idem Praelectiones 1436 (ad III.24.4) appears not to have distinguished very clearly between the wages and the merchandise of the crew - he declared merchandise (‘mercedes’) not to be insurable in Amsterdam but only in Rotterdam - he did state that the profit or premium obtained from the capture of pirate ships (that is, the booty), like the merchandise that the master and crew were permitted to carry with them, was insurable. See also Weskett Digest 504-505 sv ‘seamen’ par 5.

\textsuperscript{368} Thus, in case of the loss of the property concerned, the insurer did not lose the premium while the lender did. See again ch I § 4.3.3 at n187 supra for this difference between insurance and bottomry.
loss occurred, when the premium would have been ‘wasted’.

Nevertheless, Roman-Dutch insurance practice determined otherwise. The insurance of an insurance premium by an insured occurred frequently in Roman-Dutch law in that the cost of an insurance was included in the insurable value of the property insured. In this way the insured sought to offset the cost of the premium paid in respect of the insurance of a particular property, at least in the event of the loss of that property. The premium was in effect regarded as a necessary expense which the consignor or ship owner had to incur and by which the value of the insured object was increased. Hence, naturally, the insurance of the premium by an insured occurred as part of the insurance on a ship or goods, as the case may have been, when the amount of the premium was added to the value of such ship or goods.

369 Thus, should an insured have insured an object of risk for its full value (eg £1,200) and further have included in the sum insured the amount of the insurance premium (eg £100) that he had paid or would have to pay for the insurance of that object, he would have been in a better position in the event of the loss of that object than he would have been in had it not been lost. In the case of a loss he would have received from the insurer £1,300 (1,200 plus 100), which, less the amount of the premium paid of £100, would have left him with £1,200 (which was not necessarily a profit or a breach of the indemnity principle, of course). In the absence of any loss, he would have retained only the object worth £1,200 but would have had to pay the premium of £100 premium without it being ‘refund’ by the insurer. See further the examples given by Van Veen 44-45 and 95.

370 On all aspects of the insurance of premiums generally, see Van Veen.

371 That is, it was a way for the insured in effect not to pay any premium in the case of a loss and, thus, to be in the same position he would have been in had he rather concluded a maritime or bottomry loan on the property in question. Had he been a borrower instead of an insured, he would in the case of a loss not have had to repay the loan, which would have compensated him for his loss, had the amount of the loan been equal to the value of the property lost, nor the interest, including the risk premium, on the loan. See also ch X § 1.1 infra as to the difference between interest and the risk premium on the one hand and the insurance premium on the other hand.

Historically (and what follows has been distilled from Van Veen 12-35) the insured quite possibly sought in terms of the recently evolved insurance contract to be in as good a financial position as he would have been in had he rather transferred the risk by way of one of the contract forms preceding the insurance contract, specifically the maritime and bottomry loan agreement. He sought not having to pay the insurance premium by ‘getting it back’ from the insurer in the case of the loss of the insured property, and this he did by insuring that premium. Subsequently the insurability of insurance premiums was defended on the ground that for an insured to obtain a more complete indemnity against loss, he also had to be compensated for the premium he had paid, at least in the case of a loss where the payment of the premium was considered to have been a wasted expenditure. On this basis the insurance of the premium was permitted as a corrective for the insurable value of the property which, because of the prohibition on the insurance of an expected profit or advantage, was taken as the value at the commencement, rather than at the successful completion, of the adventure. But permission to insure premiums by including it in the insurable value of goods remained even after the insurance of expected advantages came to be allowed (ie, after the insurable value came to include the value at the destination after a safe arrival) and despite the fact that the expense of the premium was by them already insured as part of that advantage or profit. As to the insurable value of goods, see further ch XVII § 3.2 infra.
This was apparently accepted practice\(^{372}\) and quite lawful, various legislative measures, not only in Roman-Dutch law but also in other legal systems,\(^{373}\) permitting an insured to include, together with certain other expenses,\(^{374}\) the amount of the insurance premium due or already paid on the insurance of property in the sum insured on that property by that insurance. Thus, the insurable value of a ship or goods could include the price of its insurance.

In s 3 of the \textit{placcaat} of 1571, the insurable value of goods, for purposes of determining the amount of compulsory under-insurance, included duties, packing, the insurance premium (\textit{'gelt van verseeeckeringe'}) and all other expenses incurred in respect of the goods up to their loading.\(^{375}\) Section 2 of the Amsterdam \textit{keur} of 1598 and s 3 of the Middelburg \textit{keur} of 1600 provided likewise,\(^{376}\) and s 2 of the Rotterdam \textit{keur} of 1604 allowed an insured to include in the insurable value of goods all expenses incurred on the goods prior to their loading, \textit{'waer inne oock begrepen wort de premie die sy over hunne ghedaene verseeeckeringe betaelt ofte belooff hebben'}. Similarly, s 25 of the Rotterdam \textit{keur} of 1721 permitted the insurance of goods of all description, and also the expenses incurred up to and including the loading of those goods as well as the insurance premium paid or payable for their insurance (\textit{'de praemien gegeven of belooff'}).\(^{377}\)

\(^{372}\) See eg art 3 of par 1, title 11, part IV of the Antwerp \textit{Compilatae} of 1609 (see De Longé vol IV at 200) where the insurable value of insured goods included various expenses incurred in respect of the goods up to the time of their loading, such as the cost of packing, freight, duties, commissions paid to a factor, and also the insurance premium, \textit{'prijs oft loon van de verseekering, mitsgaders tgene men heeft betaelt ofte soude moeten betaelen om den selven loon te versekeren, dwelck men in desen heten asseurancie'}. This latter part is not immediately explicable but Mullens 49 notes that in the \textit{Compilatae} even the premium paid in respect of the insurance on the premium was mentioned as being included in the value of the goods. The same happened in the case of an insurance on a ship, for art 287 of par 9, title 11, part IV of the \textit{Compilatae} (see De Longé vol IV at 318) included under an insurance of a ship, the insurance premium paid for such insurance (\textit{'den prijs van de verseekeringe van dijen'}). See further eg De Groote \textit{'Polissen'} 157 who mentions Antwerp marine insurance policies of 1594 in which the duties paid, a \textit{‘provisie’} of 2 per cent, the insurance premium on the insured value at 8 per cent, plus 1/3 per cent brokerage were added to the value of the insured goods.

\(^{373}\) See further Van Veen 33-34.

\(^{374}\) These included, in the case of goods, the expenses incurred in respect of the goods up to the time of their loading (eg, the cost of their packing and conditioning, and the duties paid on them), and, in the case of a ship, the expenses incurred in readying the ship for and loading her with cargo.

\(^{375}\) The \textit{placcaat} contained no equivalent provision in respect of ships in s 20 which concerned the compulsory under-insurance of them. See Mullens 49.

\(^{376}\) In permitting full-value insurance, s 2 of the Middelburg amending \textit{keur} of 1719 provided that the insured could insure property fully, including the premium of insurance (\textit{‘tot de praemie van Assurantie incluys’}). See eg Van Zurck \textit{Codex Batavus} sv \textit{‘Assurantie’} par 7A who stated that one could insure \textit{‘de premien van assurantie gegeven, of belooff’}.

\(^{377}\) See Van Zurck \textit{Codex Batavus} sv \textit{‘Assurantie’} par 7A. See too eg Mees Gedenkschrift appendix 18 for an informal (short-form) Rotterdam cargo policy of 1746 in which it was stated \textit{‘vijemogeande den geassureerde zig tot de premie inkluis te verzekeren’}. 
The Amsterdam keur of 1744 was the first and only one to mention the insurance of the premium in the context of an insurance on a ship. Section 7 provided that ‘de praemie van assurantie’ could be insured as part of the value of a ship.\(^{378}\) Section 22 of this keur repeated the measure in respect of the insurance of goods, allowing the value of goods to include the premium paid for their insurance (’met de Premie van Assurantie inclusive’) and also permitting such inclusion in the agreed value of goods in a valued policy.\(^{379}\) In the 1756 amendment of s 25 of the Amsterdam keur of 1744 which permitted an insured to insure himself anew with another insurer, either in part or fully, when his first insurer went insolvent,\(^{380}\) it was made clear that he could include in such new insurance the premium paid and expenses incurred in respect of the first insurance (’hetzy voor een gedeelte, of voor het geheel, en benevens de voorheen uit-geschoote Premie en onkosten’).

The Wetboek van Koophandel contains similar provisions to those in Roman-Dutch law, the insurance of premiums being mentioned in connection with what may be included in the insurable value of a ship and goods.\(^{381}\) In English law, too, an insured could and may still insure the premium he has paid or has to pay to his insurer.\(^{382}\)

There is no indication in Roman-Dutch law, nor in the Wetboek van Koophandel, that the insured in practice insured premiums separately or that this was in fact permitted.

Distinguishable from the insurance by an insured of the insurance premium he has paid or has to pay on an insurance, was the insurance by an insurer of the

\(^{378}\) See eg Lybrechts Koopmans handboek V.83n1; Van der Keessel Praelectiones 1440 (ad III.24.4). As to the insurable value of ships, see ch XVII § 3.3 \(\text{infra}\).

\(^{379}\) See generally Van der Keessel Theses selectae th 717 (ad III.24.4); idem Praelectiones 1435 (ad III.24.4); and Van der Linden Koopmans handboek IV.6.2. As to valued policies, see ch XVII § 5 \(\text{infra}\).

\(^{380}\) As to this form of ‘reinsurance’, ie, solvency reinsurance, see further ch VII § 4.1 \(\text{infra}\).

\(^{381}\) See arts 602 (by implication, in the case of hull insurance) and 612 (more explicitly, in the case of cargo insurance).

\(^{382}\) Magens Essay vol I at 37-38 noted that the question of whether the premium of an insurance of a premium ought to be admitted as part of the value insured, used to be heatedly contested in London, but that in his time insurance was permitted in full on all the premiums. According to Weskett Digest 408 vs ‘premium’ par 7, an insured could include in the insurance not only the premium but the premium of the premium \(\text{ad infinitum}\), until all the premiums were included, even to the smallest fraction. Thus, an insurance on goods could include in their insurable value the amount of premium for the insurance of those goods and also the amount of premium for the insurance of that premium, and so forth. The practice of abatement (that is, of an insurer paying only 98 per cent of all losses: see further ch XV § 7.4 \(\text{infra}\)) likewise resulted in London merchants insuring the abatement as well as the ship or goods (see Magens Essay vol I at 104-106; John ‘London Assurance’ 140).

In terms of s 13 of the Marine Insurance Act of 1906 an insured has an insurable interest in the charges (ie, the premium, brokerage, and stamp duty), if paid by him, and in terms of s 16 the charges of insurance are included in the insurable value of a ship, goods, or freight.
insurance premium due to him on an insurance.\textsuperscript{383} In terms of the insurance contract in its modern guise, the insurance premium is inevitably payable irrespective of the occurrence or otherwise of the risk insured against by the contract for which the premium was due. Therefore one would have thought that the insurance of the premium by the insurer against a maritime risk, as opposed to the risk that the insured did or could not pay it, would in principle not have been permissible in Roman-Dutch law. Nevertheless, Dutch insurers did reinsure themselves\textsuperscript{384} and may have included in the sum insured by such reinsurance contracts not only the amount of the reinsurance premium\textsuperscript{385} but also the amount of the original premium. Put differently, they may have insured the amount they were to pay in terms of the original or primary insurance contract in the event of the loss of the insured property without deducting from it the premium they had received from the original insured.\textsuperscript{386} There is no indication from the consulted sources that Dutch insurers ever insured premiums separately.

\textsuperscript{383} Schorer Aanteekeningen 417 (ad III.24.4) sv 'Weddingen' failed to draw this distinction when he stated that an insurer could at first not insure his premium ('verzeker-loon'), but that such insurance was later permitted by s 2 of the Middelburg keur of 1719 and s 25 of the Rotterdam keur of 1721.

\textsuperscript{384} See as to reinsurance proper, ch VII § 4.2 infra.

\textsuperscript{385} This, of course, they insured not as insurers but as insured or, rather, reinsured.

\textsuperscript{386} According to Van Veen 93-94, in the case of reinsurance proper, an insurer may reinsure the amount of the sum insured by the primary insurance (ie, the amount he would have to pay out in the event of a loss) and need not deduct from that amount the premium he had received from the primary insured, but he may not strictly speaking include the amount of the premium he in turn pays to the reinsurer. See further eg Enschedé 44-45.
# CHAPTER VI
**PERILS INSURED AGAINST IN MARINE INSURANCE**

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>General Introduction</td>
<td>376</td>
</tr>
<tr>
<td>2</td>
<td>Perils Clauses in Marine Insurance Policies</td>
<td>382</td>
</tr>
<tr>
<td>3</td>
<td>The Perils of Nature</td>
<td>387</td>
</tr>
<tr>
<td>3.1</td>
<td>Named Perils: At Sea and of Fire</td>
<td>387</td>
</tr>
<tr>
<td>3.2</td>
<td>All-risks Cover</td>
<td>390</td>
</tr>
<tr>
<td>3.3</td>
<td>The Exclusion of Inherent Vice</td>
<td>396</td>
</tr>
<tr>
<td>4</td>
<td>The Perils of Human Conduct</td>
<td>403</td>
</tr>
<tr>
<td>4.1</td>
<td>The Insured's Own Conduct</td>
<td>403</td>
</tr>
<tr>
<td>4.2</td>
<td>The Conduct of Third Parties</td>
<td>409</td>
</tr>
<tr>
<td>4.3</td>
<td>The Conduct of the Master and the Crew: Barratry</td>
<td>411</td>
</tr>
<tr>
<td>4.3.1</td>
<td>Introduction</td>
<td>411</td>
</tr>
<tr>
<td>4.3.2</td>
<td>The Position in Law and Practice in the Sixteenth Century</td>
<td>414</td>
</tr>
<tr>
<td>4.3.3</td>
<td>Developments in the Seventeenth and Eighteenth Centuries</td>
<td>418</td>
</tr>
<tr>
<td>4.3.4</td>
<td>The Application of the Law in Practice</td>
<td>420</td>
</tr>
<tr>
<td>4.3.5</td>
<td>Conclusion: The Position Elsewhere</td>
<td>429</td>
</tr>
<tr>
<td>5</td>
<td>The Perils of War</td>
<td>430</td>
</tr>
<tr>
<td>5.1</td>
<td>Introduction: Insurance Against the Perils of War in Practice</td>
<td>430</td>
</tr>
<tr>
<td>5.2</td>
<td>Background: Privateering, Piracy and Maritime Warfare</td>
<td>433</td>
</tr>
<tr>
<td>5.2.1</td>
<td>Reprisals</td>
<td>434</td>
</tr>
<tr>
<td>5.2.2</td>
<td>Privateering and the Law of Prize</td>
<td>435</td>
</tr>
<tr>
<td>5.2.3</td>
<td>Piracy</td>
<td>442</td>
</tr>
<tr>
<td>5.3</td>
<td>The Main Perils of War: Capture and Arrest</td>
<td>443</td>
</tr>
<tr>
<td>5.4</td>
<td>The Legal Position</td>
<td>447</td>
</tr>
<tr>
<td>5.4.1</td>
<td>Introduction: The Policy Provisions</td>
<td>447</td>
</tr>
<tr>
<td>5.4.2</td>
<td>The Peril of Capture by the Enemy</td>
<td>448</td>
</tr>
<tr>
<td>5.4.3</td>
<td>The Peril of Reprisals and Privateers</td>
<td>450</td>
</tr>
<tr>
<td>5.4.4</td>
<td>The Peril of Pirates, Robbers and Thieves</td>
<td>452</td>
</tr>
<tr>
<td>5.4.5</td>
<td>The Peril of Arrest and Detention</td>
<td>454</td>
</tr>
<tr>
<td>5.4.6</td>
<td>Negotiations with Captors and Arresting Authorities</td>
<td>455</td>
</tr>
<tr>
<td>5.4.7</td>
<td>The Exclusion of Perils of War</td>
<td>458</td>
</tr>
<tr>
<td>5.4.8</td>
<td>Conclusion: Perils of War in the Wetboek van Koophandel and in English Law</td>
<td>460</td>
</tr>
</tbody>
</table>

## 1 General Introduction

The insurance contract is concerned with the transfer of risk from the insured to the insurer. Risk is the possibility that a particular peril or perils may cause a particular loss. The peril, being one of the central components of risk, was therefore also in Roman-Dutch law one of the main elements with reference to which an insurer's liability
in terms of the insurance contract was circumscribed, others being, for example, the object of risk and the loss or damage itself.1

In terms of an insurance contract, the insurer undertook to compensate the insured against loss of or damage to a particular object. However, not all loss or damage to that object was covered, but only such loss or damage as was caused by the peril or perils against which the insurance in question provided protection. Whether an insurer was liable thus involved at least three elements: the loss of or damage to the object of risk, a peril insured against, and a causal link between that peril and that loss or damage.

But just as a clear distinction between the object of insurance and the object of risk2 was not always maintained in Roman-Dutch sources,3 so too peril, being the cause of the loss, and loss, being the result of the peril, were not always kept apart. This confusion occurred throughout the period of Roman-Dutch law.4

The insurance contract was an aleatory contract5 in that the performance of one of the parties depended on the outcome of an uncertain event. Roman-Dutch law recognised full well that it was an essential characteristic of the insurance contract that there had to be a risk, which, implying a possibility, meant that there had to be an uncertainty of one type of another. Most commonly and elementarily, it was an uncertainty as to the occurrence of loss or the absence of loss, that is, of safe arrival.6 And it was the burden of this uncertainty which the insurer took over from the insured. Thus Bynkershoek7 described insurance as an engagement for the security of another’s property by which the owner was liberated from the risk which was assumed by the insurer in exchange for a premium.

1 Thus, in addition or alternatively to a circumscription of the insurer’s liability or, rather, of the risks he took over with reference to a particular type of peril, such liability could be circumscribed with reference to a particular object of risk (see ch V supra), a particular period of time (see ch XII § 1 infra), or a particular type of loss (see ch XV § 7 infra). More specifically, an insurer could be liable only for the loss of a particular ship, only for a loss caused by the particular peril of fire, only for a loss occurring on a particular voyage, and/or only for a total loss.

2 That is, the object exposed to a peril or perils.

3 See again ch V § 2 supra.

4 See eg art 100 of par 4, title 11, part IV of the Antwerp Compilatae of 1609 (see De Longé vol IV at 242) where it was stated that insurers were liable for ‘alle schaaden, ongeluck, perijckelen ende verliesen’ occurring to insured goods; and Van der Linden Koopmans handboek IV.6.4 who noted that ‘peril of the sea’ included everything caused by winds, storms, and the like.

5 See again ch II § 1.3 supra.

6 Uncertainty may, of course, relate to something other than the occurrence of loss, such as to the time of its occurrence (whether loss will occur during a particular period of time; or simply when it will occur) or to the extent of its occurrence (what type of loss it will be). There is little indication that Roman-Dutch lawyers had developed any theories about risk which reflected these and other sophistications. See further ch IX § 2.4 infra where the underwriting practices of Dutch insurers up to the end of the eighteenth century are considered.

7 Quaestiones juris publici l.21.
It was recognised from early on and was admitted by virtually all the Roman-Dutch authors too that the presence of uncertainty or risk was an essential feature of the insurance contract, as also of the maritime or bottomry loan. Thus, Grotius noted that if there was no uncertainty, for example, if at the time of the conclusion of the contract the insurer knew of the safe arrival of the object of risk or if the insured knew that it had already been lost, the purported insurance contract would be totally null and void. The reason, according to him, was not so much the parity naturally required in all reciprocal contracts (\textit{contractuum permutatoriorum}) but rather because uncertainty as to the occurrence of loss was the very essence of the contract of insurance (\textit{"propria materia huius contractus est damnnum sub ratione incerti"}).

Later authors too stressed the element of risk or uncertainty as essential to an insurance contract. Van der Keessel\(^8\) made the point that the insurance contract or the obligation to indemnify another was \textit{ipso iure} void if there was no uncertainty.\(^9\)

The requirement of uncertainty or risk was most clearly illustrated in Roman-Dutch law in the principles applying to an insurance concluded after the occurrence of loss or the safe arrival of the object of risk,\(^10\) and in those governing the recoverability of the insurance premium.\(^11\)

It appears from an opinion in 1697,\(^12\) furthermore, that one could not by agreement obviate the need for the existence of, as it was called, \textquote{een reëel en waer risico}, thus showing that risk was an essential requirement and not merely a natural consequence of or simply an incidental term in the insurance contract. The interesting point made in the opinion was that it was not possible to argue that by agreement the premium agreed upon for the risk could be regarded as having been earned whether or not the risk was in fact run by the insurer. Such an agreement, the opinion thought,

\(^8\) See Grotius \textit{De iure belli} II.12.23.

\(^9\) See \textit{Theses selectae} th 712 (ad III.24.1); \textit{idem Praelectiones} 1429 (ad III.24.1). See further eg Van Zurck \textit{Codex Batavius} sv \textquote{Assurantie} par 9 n1 (uncertainty \textquote{maakt uit de stoffe van assurantie}); Schorer \textit{Aanteekeningen} 412 (ad III.24.1) sv \textquote{het onzeker gevaar}; Decker \textit{Aanteekeningen} ad IV.9.4 n(3)/(c) (the insurance contract is null if \textquote{het gevaar, waar over het Contract gesloten is, niet geexisteerd heeft}); Bynkershoek \textit{Quaestiones juris privati} IV.26 (the contract is unlawful if there is no uncertainty); and Van der Linden \textit{Koopmans handboek} IV.6.4 (a peril to which the thing insured could be exposed was one of the requirements necessary for insurance). See also Roccus \textit{De assecurationibus} note 88 who explained that the insurance contract was invalid if no risk was run, just as the contract of sale was invalid if there was no \textquote{res vendita}.

\(^10\) Of course, if risk was an essential of the insurance contract in the true sense of the word, its absence would not (or at least not necessarily), as stated by some authors, have rendered the insurance contract void or unlawful; it would simply not have been a contract of insurance but may well have been a (valid) contract of a different type. It seems that the difference between the essentials of an insurance contract and the requirements for the validity of a contract (of insurance) was not appreciated in Roman-Dutch insurance law.

\(^11\) See ch XII § 2 infra.

\(^12\) See ch XI § 6 infra.

\(^13\) Barels \textit{Advysen} vol I adv 19.
would be ‘contra naturam & substantiam contractus’, the insurance contract being nothing other that a ‘susceptio periculi’, so that ‘waer geen risico zou geloopen worden, ook geen Assurantie zyn kan of bestaen’.14

The earliest authors writing on the insurance contract expended considerable time and effort in an attempt to formulate a precise if theoretical description of the nature of the risk acceptable for the insurance contract. They paid particular attention, for example, to the exact meaning of general expressions such as ‘periculum’, ‘risicum’, ‘fortuna’ and ‘casus fortuitus’ to determine what was permissible under the banner of insurance and what not.15 In the process too elements such as the frequency, forseeability and avoidability of the occurrence of events16 were considered to determine whether they could be insured against.17 Little trace remained in later

---

14 The opinion concerned the recoverability of the premium, or a part of the premium, paid for the insurance of goods for an outward-bound voyage and of goods to be loaded for the return voyage when no goods were in fact ever loaded for the latter voyage. The opinion was to the effect that a proportion of the premium was recoverable because of the contract being divisible and because of that part not having been earned by the insurer as he had borne no risk. The insurer here had undertaken to bear the real and existing risk of the loss of the goods loaded for the return voyage and not (also) the risk of such goods in fact being loaded at all (ie, not the risk of the ‘real’ risk arising). Therefore, because no goods were loaded, no premium had been earned; if it were otherwise, the premium would have been earned irrespective of whether or not any goods were loaded for the return voyage. See further ch XI § 1.4 infra as to the nature of the premium and ch IX § 6 infra as to the return of the premium.

15 See further eg Coing Privatrecht 536; Van Houdt 22-25; and the Bibliographical Notes to the English translation of Santerna De assecurationibus by Amzalak.

16 Thus, attention was paid, as regards frequency, to whether insurable perils had to be normal or abnormal, usual or unusual, frequent or rare; as regards forseeability, to whether they had to be forseeable or unforseeable, forseen or unforseen; and as regards avoidability, to whether they had to be preventable or outside the insured’s control.

17 A few random selections (and there are many more) from the works of Stracca and Santerna may provide some illustration of the nature of their investigations and discourses on the topic of risk. Stracca explained, eg, that risk (periculum) was a wider term than fortuitous cause because it included any occurrence whether or not arising from the fault of the insured: ‘periculum genus est, casus ... fortuitus species dicitur’ (De assecurationibus XV.2). Elsewhere (idem XVI.1-2) he noted that the word ‘risicum’ was not a Latin but a vulgar word which bore the same meaning as ‘periculum’. A large part of Stracca’s work was devoted to a discussion of the various phrases occurring in the Ancona marine policy of 1567 which insured goods against certain named perils and all other extraordinary, fortuitous, deliberate, sinister, onerous and detrimental events (‘et omnis alius casus portentosi, fortuiti, infortunii, sinistri, impedimenti & casus mali & qualiscunque fuerit vei intervenerit’). For example, he stated (idem XXII.1) that a fortuitous event was an accident which could not be avoided through the care, attention and mindful diligence of the person who was exposed to it.

Santerna, again, noted that the intention with insurance was to protect against fortuitous (uncertain) cases which were events the occurrence of which was unforseeable and unavoidable (De assecurationibus IV.12). He drew a distinction between, on the one hand, unforseeable (and hence unavoidable) events which could be insured against and, on the other hand, forseeable but unforseen (and hence, if avoidable, unavoidable) events which could not be insured against (idem III.65); fortuitous (unforseeable) events happened also to prudent persons (idem III.66) and were to be distinguished from (forseeable but) unforseen events in that no blame could be attributed to the person suffering in consequence of the event (idem III.67; see too Scaccia De commerciis I.1.134: ‘casus sinister, adversus, & fortuitus dictur ille, quem providentia humana praevidere non potest’). According to Santerna, the distinction between normal and abnormal events was of little relevance: the occurrence of snow out of season was abnormal but a loss caused by such snow was normal (idem III.77-78).
Roman-Dutch law and its sources of the influence that their labours in this regard may have had on the insurance-law theory. Only very few Roman-Dutch authors gave any indication of what the nature of an insurable risk or peril was, and the matter at least appears not to have been given much serious consideration. Nevertheless, the earlier theoretical and often esoteric discussions on the nature of risk can often be related to and be relied on to explain the uninsurability of particular perils in later Roman-Dutch insurance law and practice.

One central characteristic of risk which continued to be mentioned or discussed in the Roman-Dutch sources, albeit at no great length, was that of uncertainty and, with it, the ignorance or absence of knowledge on the part of the parties to the insurance contract of the outcome of the uncertainty. Some authors required the uncertainty to exist for both parties, while others, and indeed also the legislatures, by the nature of things seem to have required or at least to have concentrated exclusively on the need for uncertainty as to loss on the part of the insured.

One of the more detailed discussions of the element of risk or uncertainty was that of Van der Keessel. He noted that the nature of insurance actually required the uncertainty of a future event, that is, an event the occurrence or outcome of which, at the time of the conclusion of the contract, was objectively uncertain and which could not at that time have been known by either of the parties nor by anybody else for that matter. Still, an insurance after the occurrence of the loss insured against was valid in appropriate cases. This was so because the law did not distinguish between that which did not exist (that is, between something objectively uncertain) and that which was simply not apparent to the parties (that is, something subjectively uncertain). Because of the commonplace nature of such insurances and the justifiable ignorance that often

---

18 For example, only Kersteman, of all people, pertinently picked up on the elements of fortuity and unavoidability in listing the 'toevallige periculen en gevaren' and 'andere onafweerlyke ongelukken' that could be insured against: see Academie part XVIII (at 274-275) and also Woorden-boek at 28.

19 This applies especially to uninsurable or, at least, in principle uninsurable, perils such as wear and tear or inherent vice (not unforeseeable, uncommon), the insured's own fault (not unavoidable), and the like. These perils will be considered in detail infra where reference will be made, where appropriate, to the opinions of the earlier insurance lawyers.

20 Most clearly by Grotius De jure belli II.12.23 (see again n8 supra). See also, Schorer Aanteekeningen 412 (ad III.24.1) sv 'het onzeker gevaar'; and Van der Linden Koopmans handboek IV.6.4 who noted that the risk had to be uncertain and unknown to both parties.

21 Bynkershoek Quaestiones juris privati IV.26 and, following him, Van der Keessel Praelectiones 1429 (ad III.24.1), made the point that the legislatures were in this respect solely concerned with the conclusion of insurance after the occurrence of a loss without treating the identical case, mentioned by Grotius, of the conclusion of insurance after a safe arrival of the insured property at the destination.

Of course, these two possibilities (ie, the insurer knowing of the safe arrival; the insured knowing of the loss) were not the only ones. Various other possibilities existed (the insurer knowing of the loss; the insured knowing of the safe arrival; both knowing of the loss; both knowing of the safe arrival) and in the case of all of them the same questions could arise, namely whether the contract concluded between the parties was valid, and whether it was an insurance contract. Roman-Dutch law never got around to investigating these admittedly not too practical issues.
prevailed in such cases, the law recognised as valid an insurance where the event in question was a past event, as long as the parties themselves were unaware of the occurrence or outcome of that event. Thus, for insurance purposes, risk could relate either to an event in the future, in which case there was objective uncertainty and the knowledge of the parties was irrelevant and presented no problem, or to an event in the past, in which case there at least had to be uncertainty to the knowledge of both insured and insurer.

One final aspect concerns the element of causation. Roman-Dutch law did recognise that a causal link had to exist between peril and loss and that an insurer was liable only for such loss as was caused by a peril insured against. But, for whatever reason, there was no need yet for a detailed theoretical exposition as to the nature of this causal link and the test to be applied to determine whether or not it existed in any given case. There is thus little concrete and principled, as opposed to merely casuistic, evidence on the legal position in Roman-Dutch law in cases where multiple and often interacting (included and excluded) perils or causes operated, or where intervening causes were identifiable. It would appear though, that traces may be identified, in the way in which cases were decided, of the application of a crude and rather restricted doctrine of causation which considered loss as having been caused by a particular

---

22 These matters will be considered in more detail in ch XII § 2.2 infra when the practice of insuring after the commencement of the risk is dealt with in detail.

23 See Van der Keessel Praelectiones 1443 (ad III.24.5). He noted that in this regard the insurance contract differed from the contract of sale and the stipulation. Whereas both objective uncertainty (ie, where the occurrence or outcome was indeterminable) and subjective uncertainty (ie, where, although the occurrence or outcome was determinable from an objective point of view, the parties were ignorant of it) were sufficient for the insurance contract, objective uncertainty was required for the latter two. For example, a suspensive condition had to relate to a future uncertain event and if it related to a past event or to the present time, even if the parties concerned were not (yet) aware of it, the condition was not considered suspensive. See further as to the condicio suspensiva, Zimmermann 718.

24 See Van der Keessel Theses selectae th 712 (ad III.24.1); idem Praelectiones 1429 (ad III.24.1). He pointed out further that the occurrence or outcome of the (past) event had to be uncertain to the knowledge of both parties for if either of them was aware that the loss had already occurred (or, it should be thought in the case of the insurer, that it had not occurred), the contract was null and void. See again n10 supra as to the possible consequence if risk was absent.

25 See eg Van der Linden Koopmans handboek IV.6.9 who referred to the insurer's liability arising for loss caused 'door één van zulke onheilen, waar van de Assuradeur het gevaar op zig heeft genomen'.

26 Quite possibly the fact that Dutch insurance policies provided cover not against a named peril or perils but against all perils or risks, so that a causal link was required only between a or any peril and the resulting loss, may have played a role in this regard. The all-risks nature of Dutch marine insurance policies will be considered in the next section.

27 That need may have arisen only when (non-marine) insurance cover came to be provided against named perils or when named perils came to be expressly excluded from all-risks marine cover.

28 See generally Dorthout Mees Schadeverzekeringsrecht 305 and 315 for a further analysis.

29 Specifically in eg Bynkershoek Quaestiones juris privat 4 IV.25.
occurrence if it had been directly and immediately, in both time and space, caused by it; thus, a narrow, literal proximate cause test.  

2 Perils Clauses in Marine Insurance Policies

The wording of the perils clause in marine policies prescribed by the various Roman-Dutch legislative measures over a period of two-and-a-half centuries shows a remarkable similarity. It is clear that the form of the marine policy and the nature of the cover it provided were fixed from early on and remained, although not absolutely then at least relatively, unchanged thereafter.  

Insurance policies customarily contained a provision that the insurer placed himself in the position of the insured and undertook to compensate him as agreed. In addition policies contained a perils clause in which was listed or summarised a number of perils against which cover was provided. The list contained, broadly speaking, two types of peril, those caused by the elements (natural risks), the most important of which were perils at sea, and those caused by human conduct (human risks), some of which were classifiable as war risks while others involved the actions of the insured himself, of the master and crew of the ship concerned, or of other third parties.

Importantly, the list of perils appearing in the perils clause in Dutch marine policies was not limitative but merely enumerative. Named were merely those perils more regularly encountered on a maritime adventure. This was made clear by the addition of a further provision in the perils clause to the effect that cover was provided against the risk of all other perils of whatever nature and in whatever manner they could materialise, no peril being excluded. Thus, cover in terms of a marine insurance contract in the standard form was not limited to the perils specifically named, for in Dutch insurance practice, as also elsewhere on the Continent, the principle of the universality of coverage against all risks applied. Only exceptionally and in specific cases did Dutch marine policies provide cover simply against a named peril or perils.

Despite the principle of universal coverage, there were exclusions from the general all-risks cover provided by Dutch marine insurance policies. These were named or

30 Dorhout Mees Schadeverzekeringsrecht 315 describes it as a test 'die de schade alleen dan aan het evenement toerekent indien zij daardoor direct, onmiddellijk en zonder tijdsverloop is veroorzaakt: de letterlijke causa proxima'. Such a proximate cause test (from the rule 'causa proxima non remota spectatur') was applied also in English law until the beginning of the nineteenth century from when a proximate cause gradually came to be regarded as the effective or operative rather than the immediate and sole or last cause. See further Buys 87-89; Dorhout Mees Schadeverzekeringsrecht 669-670.

31 See Dorhout Mees Schadeverzekeringsrecht 582. See further ch VIII § 4.1 infra as to the prescribed policy forms.

32 But not in England: see § 5.5.8 infra.

33 See Hammacher 99-101 ('das Prinzip der Universalität der Gefahrdeckung'); Gehlen 150; Kohler 524-525; and Mullens 63-64. Gudat 6-7 notes that the principle had been taken over in the earliest undisguised insurance contracts from antecedent maritime loan agreements. As to the risks borne by the lender on a maritime or bottomry loan, see again ch I § 4.3.2.3 supra.
at least identifiable detractions from the broad cover provided and they appeared in various forms.\textsuperscript{34} Firstly, perils could be excluded expressly in the prescribed policy itself or by express legislative provision. Secondly, exclusions of coverage could occur by way of specific agreement between the parties and be added to individual policies as and when required.\textsuperscript{35} Thirdly, some perils were excluded by virtue of the nature of the insurance contract generally and of the element of risk specifically. Occasionally these implied exclusions were confirmed by express legislative provision or contractual stipulation. Examples of the more prominent traditional exclusions from cover include barratry, expressed in the prescribed policy forms and in legislation itself, and the conduct of the insured and inherent vice, which were in essence implied exceptions although they were often expressly confirmed as such in legislation.\textsuperscript{36}

Although the coverage provided by the marine insurance contract may appear to have been excessively broad, insurers’ exposure was in fact not so extensive as may appear at first. Not only were the risks they took over limited further by circumstances other than the description of the peril or perils which may cause a loss for which they would be liable,\textsuperscript{37} but the physical risks were in earlier times very different and insurers’ exposure much smaller.\textsuperscript{38} Various legislative measure too favoured insurers and excluded their liability for a number of quite prevalent perils or at least limited any such liability as might arise by measures such as compulsory under-insurance. Also, until the end of the eighteenth century, and thereafter until the introduction of steamships and of insurance for a period of time rather than for a voyage, the insurance requirements of shipowners and cargo owners were straightforward: they required cover only against

\textsuperscript{34} See eg Hammacher 102.

\textsuperscript{35} Such express contractual exclusion of coverage was increasingly resorted to as time went by, especially in times of war to exclude liability for losses caused by enemy action. Exclusions of this nature were more generally introduced in the Dutch insurance market from 1750 when insurers began offering cheaper alternatives alongside the traditional all-risks cover. See eg Broeze 126; Gales & Gerwen 50.

\textsuperscript{36} See eg Verwer See-rechten ad par 1 (at 151-152), who, in comparing the risk borne by the bottomry lender with that taken over by the insurer, noted that the risk borne by the former was not usually restricted by any stipulation in the bottomry bond, although the perils included could be enumerated as was done in the case of insurance policies. But otherwise the bottomry lender’s risk included ‘alle Schade ... buiten eigen bederf en gebrek der verbodemde sake; of buiten schult des opnemers; oft der gener weker daed hij moet boeten; oft eindelijk der gener, waer van hij ‘t misdrijf kan doen vergoeden’. All these exclusions, he pointed out, were implied in the term ‘perils of the sea’ (‘Formulier van rechte avonture vander See’). See also Wassenaar Praktijk notariael IX.4 for a reproduction of a bottomry contract in which the lender ran the risk in respect of the bottom (ie, the ship) of ‘periculen ende avonturen van der zee’ generally. As to the perils of and on the sea, see further § 3.1 infra.

\textsuperscript{37} See again n1 supra for the other elements with reference to which the risk taken over by the insurer could be circumscribed.

\textsuperscript{38} Ships were smaller and thus less costly, sail-driven and thus less prone to heavy collision damage, and they sailed close to the coast (although, as Barbour ‘Marine Risks’ 562-563 points out, that in turn increased the risk of stranding and, once stranded, of being plundered by would-be ‘salvors’).
major losses caused by the ordinary marine perils or by the perils of war, and the traditional policy in an unamended form sufficed for this purpose.\(^{39}\)

The perils clauses appearing in some of the statutorily prescribed marine insurance policies may now be considered and compared in a little more detail. The individual perils enumerated in them, will be considered in specific detail shortly.

The cargo policy prescribed in s 2 of title VII of the placcaat of 1563 stated that the insured was covered on the goods shipped or to be shipped by him or on his behalf 'against all Risks, Dangers, or Accidents, that may happen', and the perils clause then provided further that the insurers insured the insured

'from the Sea, Fire, Winds, Friends, Enemies, Letters of Marque, and Counter-marque, from Arrests and Detainments of Kings, Princes, and Lords, whoever they may be, and from all Perils and Accidents whatever that may happen, let it be in what Manner it will, or one could imagine it might be'.\(^{40}\)

The goods policy prescribed in terms of s 35 of the placcaat of 1571 retained the earlier format but in addition to some minor, mainly editorial, changes, also contained a few important additions to the perils clause. To arrests and detentions of kings, princes and lords was added restraints ('ophoudinge'); cover against the fraud and barratry of the ship's pilot or master was included; and a more general wording following the list of named perils if anything strengthened the universality of the cover.\(^{41}\)

Both the cargo and hull policies prescribed by the Amsterdam keur of 1598, like those prescribed by the identical Middelburg keur of 1600, followed the established format, although they too contained some additions. Perils 'of' the sea became perils 'at' sea; bad weather was added to the list of named perils; the arrests and detentions, but no longer the restraints, of queens\(^{42}\) and peoples ('Gemeenten') were added to that

---

\(^{39}\) See IIIL HR 3 1.

\(^{40}\) This somewhat free translation appears in Magens Essay vol II at 23-24. The original Flemish text read as follows: 'tegens alle resicq, perijkel ende avontuur, die daer ['there', i.e., on specified ship and in the course of the specified voyage] souden mogen ghebeuren', and 'vande Zee, Veere, Winde, Vrienden, Wyanden, Brieven van Marcque ende Contramarcque, van Arreste ende detentie van Coningen, Princen ende Heeren, wie sy zijn, ende van alle periculen ende fortuynen, die daer souden mogen overkomen, in wat manier dat zy, ende dat men soude mogen imaginereri'.

\(^{41}\) The relevant portions read as follows (changes from the 1563 version are not italicised): 'tegens alle resica, periculen ende avonturen dier [goods] soude mogen toeslaen ende overkomen', and 'vander Zee, Vyere, Winde, Vrienden, Wyanden, van Brieven van Marcque ende Contramarcque, van Arresten, ophoudingen ende detentien van Coningen, Princen ende Heeren, hoedanich die zijn, midtgaders oock van fraude oft bedroch ende batterye vanden Pylote oft Patroon vanden Schepe, ende vande Schippers, ende generallycken van alle andere periculen ende fortuynen hoedanich die zijn, die daer souden mogen toe komen, in wat voegen oft manieren dattet ware dat zy, ende dat men soude mogen dencken oft imagineren'.

See further Couvreur 'Zeeverzeekeringspractijk' 193-194 who notes that seventeenth-century Antwerp policies remained in all material respects identical and that even the policy of the Antwerp insurance company of 1754 largely retained the text of the policies prescribed in the sixteenth century.

\(^{42}\) Did the drafters of the keur have in mind Queen Elizabeth I of England who acceded to the throne in 1558?
of kings, princes and lords; villainy and inattention, rather than fraud and barratry, of mariners in addition to that of masters, but no longer that of pilots, were covered; and a further strengthening of the comprehensive nature of the cover by the addition of a provision that cover was provided also against all other perils and accidents that may befall the goods or the ship, whether they be expected or unexpected, usual or unusual, without any exclusion.43

In the cargo and hull policies prescribed by the Amsterdam amending keur of 1688, the now traditional composition was retained but again there were some minor shifts in the precise scope of the cover. A change occurred in the cover provided against the villainy and inattention of masters and mariners to reflect the changes in the law,44 while the general provision (occurring after the list of named perils) of cover against the risk of all perils without exception now made it clear that only perils and accidents befalling the cargo or the ship which were not caused by the insured ('buiten toedoen van de Geassureerde') would be covered.45

The perils clauses in the cargo and hull policies prescribed by the Amsterdam keur of 1744, as well as in those prescribed by the amending keur of 1775, were identical to those prescribed almost a century earlier in 1688. The cargo policy provided that the risks taken over by the insurers consisted of

'all Perils at Sea, Stress of Weather, Fire, and Wind, Arrests by Friends, and Enemies, Detentions by Kings and Queens, Princes, Lords, and Republics, Letters of Mart, and Contra-Mart, Villainies, and Carelessness of Masters, or Sailors, and all other Perils and Adventures which any Ways may happen to the said Goods, thought of and unthought of, usual and unusual, none excepted'.46

The Rotterdam legislature in its keur of 1721 followed a somewhat different approach to that of Amsterdam. Section 42 of the keur contained a list of named perils

43 The relevant portions of these policies (again with the addition not in italics) provided as follows: 'van allen perijckel ter Zee, Onweder, Vyer ende Wint, voor Vrienden, Vyanden, van Arresten ende detentien van Coningen, Coninginnen, Princen, Heeren ende Gemeenten, van Briefen van Marcquen ende Contramarquen, schelmerye ende onachsaamheydt van Schippers ende bootsgezellen, ende alle andere perijckelen ende avontueren die den voorsz goederen [die dit voorsz Schip] enichsints souden mogen aan komen, bedacht ofte onbedacht, gewoon ofte ongewoon, geen uytgesondert'.

44 The cargo policy covered the villainy and inattention ('schelmerye ende onachsaamheydt') of the mariners and the master while the hull policy covered the inattention of the master and mariners as well as the villainy of the mariners but no longer that of the master. See further § 4.3 infra as to barratry.

45 See § 4.1 infra as to the insured's own conduct.

46 This English translation is from Magens Essay vol II at 149-150. The original Dutch read as follows: 'alle perikelen ter Zee, onweder, vuur en wind, arresten van Vrienden en Vyanden, Detentien van Koningen en Koninginnen, Prinsen, Heeren en Gemeenten, Brieven van Marquen en Contramarquen, onagtsaamheden van Schippers en Bootsgezellen, en alle andere perikelen en adventuren, die dit voorsz. Goederen eenigsints zouden mogen aankomen, bedagt of onbedagt, gewoon of ongewoon, geen uitgezondert'.

The hull policy was identical except, as was the case in 1688 already, for the provision as regards barratry in that it included the villainy of the mariners as a peril, and except that it, like the cargo and the hull policies of 1688, expressly excluded loss occasioned by the insured's own conduct.
against which cover could be provided with subsequent sections then providing for matters against which it was not possible to insure. The cargo and hull policies prescribed by the *keur* contained perils clauses reflecting these legislative provisions.\(^{47}\) In terms of s 42 the perils covered by insurance were those

> 'occasioned by Wind or other Accidents, by Water, by Fire, Arrests or Restraints of higher Powers, whether Friends or Foes, by Letters of Marque, by the Villainy or Neglect of the Masters or Sailors, and in general all Dangers and Misfortunes, that may in any Shape befall the Goods or Ships assured, whether designed or not, usual or unusual, none excepted'.\(^{45}\)

These perils were repeated verbatim in the policies prescribed by the *keur* of 1721.\(^{49}\) The perils specifically excluded by the provisions of the *keur* included Barratry, in s 43, and inherent vice, in s 45.

In commenting on the perils which could validly be insured against in a marine policy, Roman-Dutch authors often did little more than list these perils and paraphrasing the perils clauses.\(^{50}\)

These perils clauses were, of course, only those prescribed by the various legislative measures. And although probably by far the most common form of contract employed in practice, it did and could\(^{51}\) happen that parties either adapted this clause

\(^{47}\) The Rotterdam *keur* of 1604 contained no list of insurable perils nor did it prescribe any policies.

\(^{48}\) The translation is from Magens *Essay* vol II at 89. As will appear from the Dutch version below, all accidents 'at' (rather than 'by', as in the Magens translation) sea (water) were covered, while there was reference to arrests and detentions (but not to restraints, as Magens would have it) of a (friendly or enemy) ruling power generally. The original read: 'van wind ende alle andere te Water, van vuur, van arresten ende Detentien van hooger Hand, soo wel van Vrunden als van Vyanden, van Brieven van marque, van schelmeryen ende onachitzaamheid van Schippers ende Bootsgesellen, en voorts generelij de periculen ende ongelukken dewelke de geasseureerde Goederen of Schepen eenigzints zouden mogen overkomen, bedacht of onbedacht, gewoon of ongewoon, geen uytgezondert'. See further eg Goudsmit *Zeeracht* 397; and Kracht 37 who noted that in addition to the perils listed, insurers took over all other dangers at sea.

\(^{49}\) Both cargo and hull policies were identical except as regards barratry, the cargo policy covering the villainy and inattention of masters and mariners while the hull policy covered the inattention of masters and mariners and the villainy of mariners only. As to barratry see further § 4.3 *infra*. Also, the hull policy excluded perils occasioned by the insured himself while the cargo policy did not. See further § 4.1 *infra* as to the insured's own conduct.

\(^{50}\) See eg Grotius *Inleidinge* III.24.7 (noting that the perils covered by insurance merely included those he then mentioned, and that cover included generally everything - every loss - whether intended or unintended, usual or unusual); Groenewegen *Aanteekeningen* ad III.24.7 (n21) (noting that Grotius' list was '[volgens den inhoud van de Polissen van Assurant.'); Van Zurck *Codex Batavus* sv 'Assurantie' par 15; Schorer *Aanteekeningen* 426 (ad III.24.7) n21; Wassenaer *Praktijk notariaal* VIII.1; Van der Keessel *Theses selectae* th 742 (ad III.24.7); *idem Praelectiones* 1454 (ad III.24.7); and Van der Linden *Koopmans handboek* IV.6.4 and IV.6.9.

\(^{51}\) As to the parties' freedom of contract, see ch VIII § 4.1.3 *infra*. 
or even drafted one specifically to meet their own needs.\textsuperscript{52}

3 The Perils of Nature

In discussing the perils insured against by the standard Dutch marine insurance policy and the judicial interpretation of the perils clause, I will first consider the natural risks that is, perils at sea and also perils of fire, including that of inherent vice. In this regard, too, I will for the sake of convenience consider all-risks cover even if such cover included risks other that natural ones. Then I will deal with the perils, or rather, more often than not, the exclusion of perils, involving human conduct generally. These include, on the one hand, those perils of insured himself, of third parties generally and more specifically of the master or crew of the ship in question, and, on the other hand and discussed, again for the sake of convenience, under the separate heading of perils of war, those perils of enemies, governments and officialdom.

3.1 Named Perils: At Sea and of Fire

The most important of the individual, named perils covered by the Dutch marine insurance policy was perils at sea.

At the outset it must be emphasised that cover was provided not against perils ‘of’ the sea but against perils ‘at’ sea or ‘on’ the sea. Although earlier prescribed policies spoke of perils ‘of’ the sea\textsuperscript{53} this later uniformly became perils ‘at’ sea.\textsuperscript{54} Individual

\textsuperscript{52} Special policies drafted for special circumstances also contained unique perils clauses. Two examples will suffice.

In an Amsterdam policy of 1615 on cash money (‘op comptant geld’, apparently the venture capital with which the insured had sent his master to the Mediterranean) as well as all the goods that were to be acquired with it, the perils clause, partly in handwriting, covered, amongst other things, ‘den risique te water en te lande ... Sulcx dat wy ondgeschreven verseekeraers midts deze wel expresselijk tot onze laste nemen alle perykelen, schaeden ende swaerigheden, dewelke de voorsz. comptante penningen ende retouren oft provenu alsvooren, soo te water als te lande, eenigzins soude mogen overcommen. Ende spetalyyc alle schaeden ende swaerigheden die door het afstetven van de scipper facteurs oft commissen oft dook door valsche beschuldigingen ende eilumniën souden mogen geleden worden midstgaders alle andere schaeden ende ... [here, in printed form, were then listed all the perils ordinarily found in marine policies], swaericheden bedacht oft onbedacht, geene uitgesondert’. See further Den Dooren de Jong ‘Zeeverzekering VOC’ 91 for a reproduction of this policy.

In a mutual whaling insurance contract dating from 1746, covering the whaler against loss or damage, it was specifically provided ‘[d]at onder te vallene schaede sal worden gereekent het blijven, vergaan en verongelukken, alsmede het verbranden van de scheepen, voor het geheel of ten deelen en generelijk alle nadeele, die de respective Scheepen buijten toedoen van de Comparanten in deesen, die daar voor hebben getekent eenigsints souden mogen aancomen, bedagt of ondecdagt, gewoon of ongewoon, het sij dat de voornoemde schaede wert veroorzaakt door quaedweer of op eenige andere wijse’. See further Den Dooren de Jong & Lootsma 19 and appendix IV at 50-58 for a reproduction. As to mutual marine insurance, see ch IX § 3 infra.

\textsuperscript{53} Such as the policy prescribed by the placcaat of 1563 (perils ‘vande Zee’) and that prescribed by the placcaat of 1571 (‘vander Zee’).

\textsuperscript{54} Such as the prescribed Amsterdam policies of 1598, 1688, 1744 and 1775 (perils ‘ter Zee’); the prescribed Rotterdam policy of 1721 (‘te Water’).
policies could, of course, provide cover against perils of the sea.\footnote{See eg the hull policy considered in the 1666 opinion in the Nederlands advysboek vol I adv 135 which provided cover 'voor alle perijkelen van de Zee'\footnote{But see, exceptionally, Verwer See-rechten ad par 1 (at 151-152), who, in writing about the differences between bottomry and insurance and, more specifically, the differences between the risks borne by the bottomry lender and the insurer, noted that the lender's risk (in respect of the money lent, as opposed to in respect of the secured property) was that of perils of the sea, or, more precisely as he pointed out, perils at sea ('ter See').}}

The difference was important in that a policy providing cover merely against the named perils 'of' the sea was more proscribed than one covering perils 'at' or 'on' the sea.\footnote{Dutch policies, of course, did neither as they normally provided all-risks cover.} In the latter case the included perils were not only those caused by the actions and force of the sea, that is, for example, by the waves, a storm or bad weather, or by sea-water,\footnote{Examples of perils of the sea include stranding or running aground, foundering, sinking, colliding with another ship or some other object. All of these accidents could, naturally, only happen at sea. Of course, a loss was usually caused by a combination of perils, eg by a storm which caused large waves as a result of which sea-water entered the ship's hold which in turn caused her to sink. See further eg Hammacher 102-103, Spooner 139-142.} but also those occurring at sea, irrespective of, and not necessarily limited to those caused by the sea itself. The location of its occurrence rather than origin of the peril was therefore the determining factor in the case of an insurance against perils at sea. Accordingly, some natural perils (such as rain, hail, ice, snow or lightning; or vermin, moths or worms on board the ship) and also human perils generally, although not perils of the sea, may be perils at sea if they occurred and caused loss there, that is, while the insured ship or goods were seaborne.

Because of the all-risks cover provided by Dutch marine policies, Roman-Dutch authors did not always draw or realise the importance of drawing this distinction between these dissimilar but overlapping expressions.\footnote{Thus, they did not interpret policy wordings so strictly and carefully but simply regarded the cover provided as being against perils of the sea.\footnote{Accordingly they often merely concerned themselves with the meaning of the phrase 'perils of the sea'. That, they pointed out, included whatever occurred from or was caused by the action or violence of the sea itself, such as rain, hail, ice, snow or lightning, or vermin, moths or worms on board the ship, which would occur while the ship was seaborne.}} Thus, they did not interpret policy wordings so strictly and carefully but simply regarded the cover provided as being against perils of the sea.\footnote{But see, exceptionally, Verwer See-rechten ad par 1 (at 151-152), who, in writing about the differences between bottomry and insurance and, more specifically, the differences between the risks borne by the bottomry lender and the insurer, noted that the lender's risk (in respect of the money lent, as opposed to in respect of the secured property) was that of perils of the sea, or, more precisely as he pointed out, perils at sea ('ter See').} Accordingly, some natural perils (such as rain, hail, ice, snow or lightning; or vermin, moths or worms on board the ship) and also human perils generally, although not perils of the sea, may be perils at sea if they occurred and caused loss there, that is, while the insured ship or goods were seaborne.

Earlier Straccha De assecurationibus XVII.1, eg, in discussing the Ancona policy of 1567 by which goods were covered 'super omni casu mari', noted that with the words 'cessus mari' (perils or accidental occurrences of the sea) the insurer seemed to undertake all perils of adverse storms at sea, the force of winds and gales, and would thus be liable if goods were soaked by sea-spray and were delivered in deteriorated condition, or because of (sea) water entering the hull of the ship they were delivered spolt and deteriorated.

Earlier Straccha De assecurationibus XVII.1, eg, in discussing the Ancona policy of 1567 by which goods were covered 'super omni casu mari', noted that with the words 'cessus mari' (perils or accidental occurrences of the sea) the insurer seemed to undertake all perils of adverse storms at sea, the force of winds and gales, and would thus be liable if goods were soaked by sea-spray and were delivered in deteriorated condition, or because of (sea) water entering the hull of the ship they were delivered spolt and deteriorated.
as winds or storms, but not that which arose in connection with or at the sea, such as from human action.\textsuperscript{60}

This deduction of the authors may well have been based on an opinion given early in the eighteenth century\textsuperscript{61} which concerned a rather unusual case where an insurance was concluded on goods against all risks with the express exclusion of the 'perils of the sea',\textsuperscript{62} and in which the distinction between perils of the sea and perils at sea was clearly recognised. In this case the ship and the insured goods sank in shallow water as a result of the negligence of the pilot and were eventually lost. The legal opinion given was that the insurer was in fact liable. The policy was interpreted as excluding only liability for losses caused by perils of the sea and not, or not necessarily, liability for all losses caused by perils at sea.\textsuperscript{63} The opinion therefore was important in providing some clarification of the scope of the term 'perils of the sea',\textsuperscript{64} but it was also important in showing that Roman-Dutch law did, albeit only in the exceptional context here, recognise the difference between perils of the sea and perils at sea, a distinction which could, but apparently never was, more generally applied to the prescribed policy forms which provided cover not against perils of the sea but against perils at sea.

---

\textsuperscript{60} See Van der Keessel \textit{Theses selectae} th 742 (ad III.24.7); \textit{idem Praelectiones} 1454 (ad III.24.7), explaining the meaning of the term 'peril of the sea' ('\textit{periculum maris}').

\textsuperscript{61} See Barels \textit{Advysen} vol II adv 13 (1706).

\textsuperscript{62} The perils of war were also excluded (see § 5.5.7 \textit{infra}). The clause in question read: 'voor alle gevaer \textit{exempt de risico van de Zee en de Turken}'.

\textsuperscript{63} According to the opinion, a distinction had to be drawn between (losses caused by) perils of the sea ('\textit{van de zee}') and perils at sea ('\textit{op zee}'). All perils, and all losses occurring, at sea were not (also) perils and losses of the sea, otherwise the cover provided by policy in this case (namely all-risks cover while the ship was at sea) would be illusory and worthless. Perils of the sea (which, of course, could also take place at sea), the opinion pointed out, were storms, bad weather and the like; but the fault of the pilot, although a peril at sea, was not one of or caused by the sea ('\textit{door de zee}'). According to mercantile practice, the opinion continued, the term '\textit{risico van de zee}' meant nothing more than 'alleen schaede die op zee door Gods weêr en wind, zonder toedoen van menschen, veroorzaakt word'.

Thus, in effect a distinction was drawn in the opinion between (i) perils of the sea, which occur by the sea itself; and (ii) perils at sea, which occur at sea and may or may not be a peril of the sea. And, therefore, the exclusion of liability for losses caused by perils of the sea was not an exclusion of liability for all losses caused by perils on the sea.

\textsuperscript{64} See too the case before the \textit{Hooge Raad} in 1722 (see Bynkershoek \textit{Observationes tumultuariae} obs 1873; \textit{idem Quaestiones juris privati} IV.11) which concerned an Amsterdam insurance on the freight which a particular ship would earn on a voyage from Bordeaux to Amsterdam, and where policy noted that ship had already left (was '\textit{in Zee gelopen}'). The insurer denied liability on the policy where it appeared that the ship had been lost in the mouth of the river at Bordeaux, arguing that in view of the phrase '\textit{in Zee gelopen}' he had taken over only the risk of the sea, not of the river ('\textit{alleen de risico van de Zee, en niet van de Rivier}'). The \textit{Raad} appears to have rejected this argument, pointing out that the insurer had taken over the risk from Bordeaux to Amsterdam, and that the reference to the sea in this case was merely to indicate that the ship had already left Bordeaux. It did not, therefore, as was usually the case, circumscribe the risk nor for that matter determine its commencement.
The distinction was further notable as contemporary English marine insurance policies consistently provided cover only against perils of the sea.\(^{65}\)

Apart from perils at sea, the peril of fire was another one of those as a rule expressly mentioned in prescribed Dutch marine insurance policies.\(^{66}\) From this it may be deduced that the peril of fire was not a peril of the sea nor, necessarily, a peril at sea, especially not, for example, if the goods were covered beyond the strict duration of their conveyance on board the ship. The separate insurance against fire of goods carried by sea, as of ships, was uncommon, if it in fact occurred at all. Hence the need\(^{68}\) to provide shipowners and cargo owners with cover against the very real risk of the loss of or damage to the insured ship or goods by fire\(^{69}\) and to do so in the standard marine policy itself.\(^{70}\)

### 3.2 All-risks Cover

In addition to the list of named perils, which included mainly perils of nature, Dutch policies expressly provided cover against all other perils and did so in very broad

---

\(^{65}\) See eg the policies referred to by Malynes Consuetudo I.25 and Molloy De jure maritimo II.7.15 in which there was mentioned perils 'Of the Seas'. The Lloyd's policy of 1779 too provided cover against a number of named perils, one of which was 'Perils ... of the Seas'. See also Buys 17 165; Voet 'Antwerp policy' 14.

\(^{66}\) See again the prescribed policies of 1563 and 1571 ('Veyre'), 1598 ('Vyer'), and of 1688, 1721, 1744 and 1775 ('vuur'). English policies, such as the policy used at Lloyd's, also referred to the peril of fire.

Exceptionally policies on ships did make a more extensive provision for the peril of fire. Thus, a mutual insurance contract for whalers (on which the fire hazard was of course much greater by reason of the presence of oil and blubber on board) dating from 1745, insured the ship against a total loss by marine and war risks. One clause specifically provided cover also '[i]ndien het mogen voorvalien, dat eenigh schip of scheepen, dewelke tot dit Contract van assurantie behooren, door eenig quaad weeder, van donder, of weerligt of door andere occasien in brant geraakte of het sij op hoedanige wijse deselve brand mogten sijn veroorsaakt en toegecomen, en alsulk Schip of Scheepen quam of quaemen te verbranden, soo sal in dien gevallen, 't selve ook moeten aangemerkt werden als of sodanig schip of Scheepen geheel en al weren agtergebleven, en weg waren, en sal mitsdien de Somma, waar voor sodanig schip of scheepen was, of waaren geassureerd, werden voldaan, en betaalt'. See Den Dooren de Jong & Lootsma 47.

\(^{67}\) See Hammacher 106.

\(^{68}\) See Witkop 19.

\(^{69}\) In the case of goods, both on board the ship and, if the cover was thus extended, in warehouses or on the quayside before or after their conveyance.

Straccha De assecurationibus XVIII.2, in discussing the cover in the Ancona marine insurance policy on goods of 1567 against, amongst other perils, fire ('ignis'), described three possible causes of shipboard fire, namely the fault of those on board the ship (which was a frequent occurrence); or a battle at sea when an inextinguishable fire was started by fire bombs; or by lightning. According to Straccha the cargo insurer ought to be liable in all three cases. In noting that the marine insurer was liable for loss due to a fire, Malynes Consuetudo I.25 referred to the case where a fire was caused 'by a candle unadvisedly used by the boyes' before the ship had been discharged.

\(^{70}\) Even though, in view of the all-risks cover this policy provided, this was strictly speaking probably not necessary at all.
terms. They referred, for example, to all other perils of whatever kind, and in whatever way occurring, expectedly or unexpectedly, usually or unusually, none excluded. All perils were therefore in principle included and an insurer could not deny liability either because the loss was not caused by one of the perils specifically named in the perils clause, nor because the loss was caused by a peril not of the same kind as those so named. The wording left no room for an application of the eisdem generis rule by which cover could be limited to the risk of perils in the nature of those expressly listed in the policy.

It should be readily apparent, therefore, that the difference between perils of the sea and perils at sea, as also the question whether a loss by fire was a loss by a peril of the sea or a peril at sea, were in the ordinary case simply irrelevant in Roman-Dutch law. A peril of the sea or a peril at sea was just an example, and no more, of the type or types of peril which were insured against and it was not necessary for an insured to establish that the loss for which he claimed was in fact specifically caused by such a peril. This may explain the lack of attention paid in Roman-Dutch law to these matters in the context of the standard marine insurance policy.

Furthermore, an insurer could not deny any claim on the policy on the ground that the peril causing the loss, or the way in which it was caused, was novel, unusual, extraordinary, or not expected or anticipated by himself.

71 See eg Roccus De assecurationibus note 43 who explained that when insurance was generally for all accidents (generalis de omnibus casibus), presumably as opposed to for named perils only, then the insurer was liable not only for losses caused by named perils but for all other accidents and casualties that could befall the ship on her voyage (assecurator tenentur ... de omni alio casu adverso, qui possit evenire durante itinere).

72 See Dorhout Mees Schadeverzekeringsrecht 583 who notes that in view of this general all-risks cover part of the perils clause, the preceding summary of perils (in the statutorily prescribed policies or in legislative prescripts) was of little value and consequence. The result of the broad terms of cover was that the question whether a particular cause of loss fell under perils at the sea or any other of the named perils, was simply not tested with reference to the named causes but against the requirement of an uncertain event in general.

73 Because of the principle of universal coverage, the precise meaning and width of the named perils were of lesser importance in Roman-Dutch law. More important was the meaning and width of those perils expressly or impliedly excluded from the all-risks cover. The position in cases where coverage was provided against named perils only, as was also the case in English law, was therefore fundamentally different. In those cases the meaning of certain terms had to be determined for a different purpose and, moreover, had to be established by the insured who had to prove that the loss he was claiming for was caused by one of those named perils. Therefore, the interpretation of similar or at least closely related terms occurred for very different purposes and it is not surprising that the meaning accorded those terms in different circumstances and in different legal systems did not always correspond exactly.

For example, in Roman-Dutch law the meaning of 'barratry' had to be determined because, in certain cases, it was excluded from cover, while in English law it had to be determined if the conduct causing the loss qualified as barratry which was an included peril.

74 According to Van der Keessel Praelectiones 1456 (ad III.24.7), the words 'bedagt en onbedagt, gewoon ...' appearing in policy formulas included all accidental occurrences ('casus fortuitus'), not only the ordinary but also the most extraordinary of them.

It seems that the position may earlier well have been different and that the need for such wide terms may be explicable historically. Straccha De assecurationibus XXI-XVI, for example, analysed in detail the different terms in the following clause in the Ancona policy of 1587 which insured goods against named perils 'et omnis alius casus portentosi, fortuiti, infortunii, sinistri, impedimenti & casus mali &
The principle of universal cover against all risks was taken over from Roman-Dutch law in the *Wetboek van Koophandel* so that it was accepted there that the marine insurance contract covered all uncertain events through which the insured suffered loss, at least in so far as the liability of the insurer was not expressly excluded in respect of any particular peril.\(^{75}\) The principle was a peculiarly Continental one, though, for in English law, despite evidence that the position may earlier have been different,\(^{76}\) the

\[\text{qualiscunque fuerit vel intervenerit}.\] See again § 1 n17 supra. As Roccus *De assecurationibus* note 63 pointed out, with the more recent practice of stating in policies of insurance a general promise to compensate for all events, usual and unusual, expected and unexpected, through which the goods may be damaged, it was not, or no longer, necessary to determine the precise meaning of terms such as ‘unusual’ (which in one opinion, was an event which had not occurred for 40 years or more!) and ‘unexpected’.\(^{75}\)

Thus, in terms of art 594, marine insurance may be concluded ‘voor alle zeegevaren’. Article 637 contains a long list of perils for which the marine insurer is liable. Although the phrase ‘peril at sea’ is no longer employed, the list is much more detailed and extensive than the ones commonly found in Roman-Dutch law. This was necessitated, it would seem, as much by the advent of steam-powered ships than by anything else. The list is then followed by the statement, also encountered in Roman-Dutch law, that the insurer is liable, in general, for all extraneous loss or damage of whatever nature (‘en, in het algemeen, door alle van buiten aankomende onheilen, hoe ook genaamd’; the latter phrase, ‘hoe ook genaamd’, being the equivalent of the phrase ‘bedacht of onbedacht, gewoon of ongewoon’ which occurred in the earlier marine policies), unless the insurer’s liability for such loss or damage is excluded by statutory or contractual provision. See further eg Dorhout Mees *Schadeverzekeringsrecht* 560 (who observes that in respect of the scope of marine insurance, the *Wetboek* specifically followed Roman-Dutch law) and 668-669 (on how the Dutch position differs from the English position); Goudsmit *Zeerecht* 397 (linking s 42 of the Rotterdam *keur* of 1721 and art 637).

\(^{75}\) English marine insurance policies provided cover against named maritime perils (one of which was perils of the sea rather than perils at sea: see again n65 supra) but it appears to have been legally permissible to insure against ‘any other perils, either of the like kind, or which may be designated by the policy’ (see s 3 of the Marine Insurance Act 1906 which contains the embodiment of this principle).

Earlier policies, as well as the later Lloyd’s policy of 1779, listed the perils against which they provided cover. Not surprisingly the list was very similar to that encountered in the perils clauses in Dutch marine policies.

The earlier policies then appear to have added a rather extensive catch-all sentence to the list of named perils. For example, in the early seventeenth-century policy quoted by Malynes *Consuetudo* I.25, cover was extended to ‘all other Perills, Losses and Misfortunes whatsoever they be, and howsoever they shall happen or come, to the hurt and detriment of the Goods and Merchandises, or any part or parcel thereof’ (see too the ‘general policy’ quoted by Molloy *De jure maritimo* II.7.15). This wide cover appears to have been recognised in earlier insurance practice. Evidence from the draft *Booke of Orders* as to the types of risk which underwriters were willing to bear in London in the 1570’s, indicate (in order 1) that in addition to a list of named perils (which included ‘all perills and dangers of the Seas, and freshwaters’), it was also possible to insure against ‘all other perilles and dangers whatsoever’. See Kepler ‘London Marine Insurance’ 49. Speaking of the comprehensiveness of the marine policies of his time and the wide cover they provided, Molloy *De jure maritimo* II.7.7 dilly noted in 1676 that they insured ‘against heaven and Earth ..., &c or whatever detriment shall happen or come to the thing Ensured’, and Malines *Consuetudo* I.28, in considering whether an insurer was liable for a loss caused to goods by eg vermin (which, it is to be noted, was not a peril of the seas), pointed out that the insurer was liable for all loss or damage or detriment happening to goods after his underwriting and occurring at sea.
principle of coverage against named perils only came to be applied by the end of the eighteenth century.\textsuperscript{77}

The effect of the final catch-all phrase in the perils clause in Dutch policies was therefore to provide cover against all risks of loss or damage, that is, loss or damage occurring from all perils. The insurer was not liable only for loss caused by named perils or ones like those named, but for all perils not expressly or impliedly excluded. The ordinary, prescribed form of Dutch marine insurance policy was in principle an insurance against all risks. Sometimes, it appears, Dutch policies in fact took a shortcut and unequivocally provided just that. Evidence of this exists both in references to the content of policies\textsuperscript{78} as well as in the actual wording of such short-form policies.\textsuperscript{79}

But cover against all risks, or, more correctly, the risk of all perils, was not cover against all loss, merely against all risks of loss, a distinction which it is important to bear in mind in view of the often imprecise terminology employed in this regard.\textsuperscript{80} The insured therefore still had to prove a casualty, that is, that the loss was caused by a peril although not necessarily by one of the named perils nor by one of same type of peril as those named. It was necessary to prove, it seems, the occurrence of a fortuitous event which caused the loss in question.\textsuperscript{81} Furthermore, the event had to be one

\textsuperscript{77} Thus, when the Lloyd's policy came to be fixed in 1779, the concluding phrase in the perils clause was less extensive and referred to '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, or any part thereof'. Furthermore, this phrase was restrictively interpreted by the application of the \textit{eiusdem generis} rule so that the term 'all other perils' came to include 'only perils similar in kind to the perils specifically mentioned in the policy'. See rule 12 of the \textit{Rules of Construction} appended to the Marine Insurance Act of 1906. Therefore, the cover provided by the commonly used Lloyd's policy was not equivalent to insurance against all risks. See eg Chalmers 12; Hopkins 135-139.

In this respect English law thus differed from Roman-Dutch law and from the later art 637 of the \textit{Wetboek van Koophandel} in that the Continental principle of the universality of coverage was not applicable. See further Buys 17; Gudat 22; Hammacher 100-101; and Idelson 357.

\textsuperscript{78} See eg the following descriptions: Bynkershoek \textit{Observationes tumultuariae} obs 380, \textit{idem} \textit{Quaestiones juris privati} IV.3, referring to a case before the \textit{Hooge Raad} in 1708 in which a ship was insured 'voor alle gevaar'; Bynkershoek \textit{Observationes tumultuariae} obs 779, \textit{idem} \textit{Quaestiones juris privati} IV.4, referring to a case before the \textit{Raad} in 1711 on an insurance concluded 'voor alle gevaar op goederen'; and Bynkershoek \textit{Observationes tumultuariae} obs 1168, \textit{idem} \textit{Quaestiones juris privati} IV.5, mentioning a case before the \textit{Raad} in 1715 on an insurance of a ship and goods from Middelburg to the coasts of Africa and America 'voor alle perikel, geen uitgezonderd' and 'tegen alle gevaar'.

\textsuperscript{79} See eg Mees \textit{Gedenkschrift} appendix 18 and Witkop 13 for a reproduction of an informal marine policy on goods underwritten in Rotterdam in 1746 in which the covered perils were merely described as 'alle perykelen als in een welgestelde police'.

\textsuperscript{80} See eg Wassenaer \textit{Praktyk notariael} VII.1 who referred to insurance against 'het perykel van de zee, ende al ander ongeval ende verlies', although he may conceivably have meant 'het perykel van de zee, ende het perykel van al ander ongeval ende verlies'.

\textsuperscript{81} Thus, Van der Keessel \textit{Praelectiones} 1438 (ad III.24.4) pointed out that the insurability of consumables on board (albeit subject to special requirements: see ch V § 3.2.4 supra) did not mean that they were insured against daily consumption but only against fortuitous causes ('contra casus fortuitos, non contra cotidianam consumptionem').
extraneous to the insured property. And lastly, the loss or damage had to be a loss of or damage to the object at risk, not merely in connection with that object: it was, after all, all risks cover on a specific object of risk.

Therefore, where insured goods were sold at their destination at a loss and that was not because of any loss of or damage to the goods themselves but simply by reason of a fall in the market in those goods, the all-risks insurer could not be held liable. Similarly, he could not be held liable for the mere fact that the shipowner did not make any profit from the employment of his ship on a particular maritime venture for which that ship was insured. This was nicely illustrated by a legal opinion delivered in 1706. Perishable goods (wine) had been insured for a voyage from Bordeaux to Middelburg in terms of the usual policy 'voor alle perykel bedagt of onbedagt'. The ship and insured goods were captured by the English and taken to Guernsey where they were released only after three months. The eventual sale of the cargo at Middelburg, which was authorised by the insurer, realised 50 per cent less than its insurable value. The question was whether the insurer was liable for the 50 per cent loss caused by the capture and detention at Guernsey. The opinion expressed the view that if the damage to the insured cargo or a reduction in its value was caused by the perils of capture and the subsequent detention for a period of time, then the insurers would be liable to compensate the insured for it: they had bound themselves for 'alle schade, bedagt of onbedagt', and thus stood in for all losses, even though not mentioned in the usual policy form, as long as they were not expressly or impliedly excluded. In the present case the insurers were liable because the capture and detention for an extended period had caused deterioration and leakage ('bedervinge en lekkage') and had resulted in damage and a reduction in the amount realised at sale. But, the opinion stressed, although the insurers in this case were liable to compensate the insured for all losses, and thus for the difference between what the wine had realised at its sale and its

---

82 See further § 3.3 infra as to the exclusion of loss caused by inherent vice.

83 Which, of course, was not the same as a loss of profit because of a loss of or damage to the goods themselves.

84 See Barels Advysen vol I adv 14.

85 This capture and detention were insured perils in terms of the policy.

86 This value included the cost or purchase price, the insurance premium and the expenses incurred up to the time of sale, but excluded the freight payable on the cargo. See further ch XVII § 3.2 infra as to the insurable value of goods.

87 As was loss caused by inherent vice: see § 3.3 infra. Thus, had the cargo here deteriorated because of inherent vice rather than because of the delay caused by the detention, the position would have been different.

88 Another ground for the insurer's liability in this case was the fact that the insured had, as he was entitled to do given the perishable nature of the cargo, immediately on the capture and detention of the ship and her cargo at Guernsey abandoned the insured cargo to the insurers. And by virtue of such abandonment, any subsequent decrease in the value of the wine was for the account of the insurers. As to the effect of abandonment of insured property to insurers, see further ch XIX § 2.3 infra.
insurable value, they would not be liable for any ordinary decrease in the value of insured goods, for example by reason of a drop in their market price, subsequent to their acquisition or their insurance ('uitgezonderd die van vermindering van pryzen na den inkoop of gedaene Assurantie'). Accordingly, the insurer's liability here was in no way based on the possibility that an insurer would be liable for the rise or for the non-depreciation of the price of insured goods.89 Such a drop in the market, although possibly insurable, was therefore not covered by a marine policy on goods, even one covering all risks of loss or damage to them.90

Equally, an insurer was not liable for a depreciation in the value of an insured ship or goods resulting from ordinary wear and tear occurring in the ordinary employment of the ship or in the ordinary conveyance of the goods, but only for loss or damage due to an unexpected and external accident or peril. This was an important principle, especially in earlier times when voyages were of such a long duration and ships were built of wood so that wear and tear and the natural depreciation in the value of the ship on a single voyage was appreciable. In this regard it was necessary to distinguish between, on the one hand, the depreciation in the value of a ship because of the damage she sustained, for example, in a storm at sea, and, on the other hand, the ordinary or natural depreciation, even if, as was often the case, it was an excessive depreciation, in her value as a result of her employment or the wear and tear she sustained in the course of and as a result of the nature of the sea voyage as such.

Support for this appears, albeit not as clearly as one would have wished, from a merchants' opinion91 from 1719.92 A ship going to Greenland on a fishing expedition (a so-called Groenlandsvaarder) was insured for her voyage.93 While engaged in fishing

89 The liability here was 'in geen deele op het fundament van dat de Assuradeurs zouden hebben moeten insteen voor het rysen of wel anders voor het niet daelen van de pryzen derzelven'.

90 In another opinion (see Barels Advysen vol I adv 23 (1715)), the point was made that where an insured had not suffered an unfortunate accident ('ongelukke rencontre') or other physical damage for which the insurer could be held liable, the insurer was not liable at all, because 'Assuradeurs [zyn] alleen aenspraakelyk ... voor 't geen door eene uitwendige fortuine, en niet voor het minder of meerder succes in het employeeren van het schip, of voor de goede en kwaede markt van het goed, min of meer, geleden zoude mogen worden'. See too art 208 of par 6, title 11, part IV of the Antwerp Complatae of 1609 (see De Longé vol IV at 286) where it was stated that insurers were not bound to indemnify a consignee of goods if the goods arrived undamaged at the place of discharge but with their value or price decreased because of a fall in the market.

91 Delivered by a turbe of 'de Heeren Gecommitteerden van de Groenlandsche Handel en Visserye', shipowners, accountants, insurers and insurance brokers; 38 of them in all.

92 See Barels Advysen vol I adv 25. See too Van der Keessel Theses selectae th 741 (ad III.24.6); idem Praelectiones 1454 (ad III.24.6) and 1468 (ad III.24.12), who explained that an insurer was not liable if the defect in the ship arose from the nature of the sea voyage as such ('ex ipsa natura navigationis ... contractum sit'); and Van der Linden Koopmans handboek IV.6.9. See also art 300 of par 9, title 11, part IV of the Antwerp Complatae of 1609 (see De Longé vol IV at 324) where it was stated that in the case of hull insurance, insurers were not liable for any loss other than that resulting from a storm, bad weather, enemies or other extraneous accidents but 'niet van natuurlijckken staat, die de reijsse ende den tijd medebrengt'.

93 It does not appear pertinently that she was insured against all risks.
there, she suffered some ice damage but was still capable of continuing fishing and in fact returning home safely from her voyage. The question arose whether the insurers were liable for the damage suffered in the ice. According to the opinion they were not. The reason was that ships sailing to Greenland for fishing, in order to obtain a good catch, often intentionally ventured into the ice ('zich veelmaelen ... al willens en wetens en met voorweeten in het ys begeeven') and the damage suffered by such ships in the ice has always been considered as wear and tear which was to be borne by the owners themselves ('altyd gerekend is geworden als slytagie en by deEigenaars der schepen gedraegen is geworden') and not by their insurers.

3.3 The Exclusion of Inherent Vice

It was a general rule of Roman-Dutch law that an insurer incurred no liability for loss or damage caused by an inherent vice in the object of risk. Inherent vice may be described as a particular condition present in an object which objects of that nature should not have. It could be present from the inception, as in the case of a defective construction, or be acquired afterwards. Just as insurers were not liable for damage in the form of a depreciation in the value of an object of risk due to ordinary wear and tear, so too they were not liable for any loss of or damage to such an object which was due to a vice inherent in that object itself. Although these two causes were often difficult

94 A question, therefore, of intentional exposure to the possibility of damage which was in fact foreseen and which was thus not unexpected.

95 The point was made that the position was different when the ship was totally lost and sank, presumably because then the damage was not regarded as 'ordinary' wear and tear.

Although it is clear that ordinary wear and tear was not covered, the difficulty remains as to when particular damage to a ship was no more than ordinary or expected wear and tear. This came to be commented on further on in the opinion. It was stated, namely, that this view (ie, that ice damage was not recoverable) corresponded with a general usage (Usantie) that when a ship on the open sea was surprised by heavy storms and she and her equipment were damaged although she remained above water and was brought into a port, 'dezelve schade altyd is gehouden als slytagie', against which the master earned his freight, without her insurers ever being liable for such damage. It seems that, given the prevailing circumstances (the nature of ships, the duration of voyages), a different view may have prevailed at the time in practice (this was, after all, an opinion of merchants) as to the nature of wear and tear. Relatively extensive, or even all partial, damage appears in certain cases, such as where it had been caused by a storm at sea or by ice, to have been regarded as par for the course, to be expected in the employment of the ship, nothing more than wear and tear, and not as a partial loss recoverable under an insurance policy.

At any rate, according to Dorhout Mees Schadeverzekeringsrecht 23, this turbe provides evidence of the (at times radical) divergence between insurance practice and formal law. The damage in this case would not, according to strict law, have been regarded as ordinary, natural depreciation or wear and tear.

96 A similar exclusion of liability for loss caused by inherent vice existed in the case of the antecedent maritime and bottomry loan contracts where loss by an external peril was also essential: see Voorduín vol IX at 147.

97 See Dorhout Mees Schadeverzekeringsrecht 264.
to separate and distinguish in practice, the reason why the insurer was not liable was
different for each of them though.

In the case of wear and tear, loss or damage is caused by an extraneous event
which, however, is not fortuitous, unexpected or accidental. It is loss or damage
ordinarily and naturally occurring through the use of the object. For example, it is not
unexpected that a ship will depreciate in value in the course of a particular voyage due
to wear and tear. In the case of loss or damage by an inherent vice, by contrast, such
loss or damage is not caused by an extraneous event, although it may be unexpected
and accidental. It is uncertain whether or not a ship will on a particular voyage suffer
loss or damage due to an inherent vice or, for that matter, whether she in fact has any
inherent vice at all, although it is obviously not uncertain that, other causes aside,
sooner or later a wooden ship or goods of a perishable nature will be lost or damaged
by an inherent vice. Thus, loss by inherent vice is, unlike wear and tear, uncertain. But
this is only so as a rule, and it need not be. It is also, by definition, not extraneous.

Thus, for an insurer to have been liable at all under a marine insurance contract,
the loss or damage for which the insured claimed, had to have been caused by an
accidental and external cause, non-accidental and internal causes being impliedly
excluded from the cover provided by the insurance contract.98

The possibility of fraud upon insurers no doubt played a role in the formulation
and acceptance of this rule excluding insurers’ liability. Not surprisingly, the exclusion
of liability for inherent vice was of particular importance for insurers in the case of
insured goods which were easily perishable on the often long sea voyages. The same
no doubt applied to wooden ships which were particularly prone to damage and even
loss from this cause. The rule was present in the earliest customary insurance law and
was also later expressly provided for in insurance legislation.

The most detailed exposition of the legal position as regards insurers’ liability for
loss or damage caused by inherent vice may be gleaned from the Antwerp compilation
of customary insurance law contained in the Compilatae of 1609.99 Not only was an
insurer of goods not liable for loss of or damage to insured goods from a vice inherent
in those goods, whatever the extent of such loss or damage,100 but various examples
were provided of causes and manifestations of such loss or damage: spontaneous

---

98 See eg Van der Keessel Praelectiones 1429 (ad III.24.1), referring to the insurer’s liability for damage
when the value of an object was diminished by an accidental and extraneous occurrence ("casu fortuito
extrinsecus accidente"). See too eg Weytsen Avarijen XX (at 196) (or par 10 (at 5) in the 1707 ed) who
noted that if goods were wetted or perished by a storm, such a loss was for the account of the insurers;
but if they were wetted and perished without any storm, the loss was for the account of the merchant); De
Vicq, in his commentary on Weytsen XV (at 21 of 1707 ed), explained that if goods were damaged
‘proprion, & intrinseco vitio’, the insurers were not liable for that loss unless they had specifically taken
that risk on themselves.

99 See generally Mullens 71-72.

100 This principle was already recognised in earlier compilations of customary law. Thus in art 10 title
XXIX of the Antwerp Antiquae of 1570 (see De Longé vol I at 602) it was laid down that in the case of the
perishing or deterioration of insured goods ‘door hem selven, zonder eerich toecomende vuywendige
fortuyne’, the insured could not abandon the goods and the insurers were not liable for such loss.
Likewise, art 15 of title LIV of the Antwerp Impressae of 1582 (see De Longé vol II at 406).
heating, curdling, rotting, a deterioration in condition, leakage, melting, spillage, a reduction in volume, or spoiling.\textsuperscript{101} Included in the loss or damage from inherent vice was loss or damage caused to insured goods by an inherent vice in the packaging of the goods.\textsuperscript{102} Furthermore, insurers' liability for such loss or damage remained excluded even if, as was usually the case, the goods in question were insured against all risks of loss of or damage to the goods, that is, even if such liability was not expressly excluded.\textsuperscript{103} Finally, liability was excluded also in the case of the loss of or damage to an insured ship by reason of an inherent vice in the ship, as it was also in the case of ordinary wear and tear.\textsuperscript{104}

Roman-Dutch legislative measures uniformly excluded the insurer's liability for loss or damage caused by inherent vice. In terms of s 27 of the Amsterdam \textit{keur} of 1598, as in terms of the identical s 20 of the Middelburg \textit{keur} of 1600, an insurer incurred no liability to compensate an insured if the insured goods became spoilt or their condition deteriorated ("bederft ofte verargert") by themselves and without any intervening extraneous casualty ("sonder eenige toekomende uytwendige fortuyne").\textsuperscript{105} Section 17 of the Rotterdam \textit{keur} of 1604 provided likewise,\textsuperscript{106} but made it clear that such a peril could in fact be insured against as long as it was specifically ("specialijcken") declared in the policy that the insurer had taken over the risk of loss.

\textsuperscript{101} Thus art 205 of par 6, title 11, part IV of the \textit{Compilatae} (see De Longe vol IV at 286) stated that if damage and depreciation occurred to goods ("sonder eenich vuijtwendich ongeval, maer vuijtdijen de selve vuijt naturelijeck gebreck oft anderssints vuijt hun selven verhitten, versueren, verrotten, verargeren, vuijtoopen, smilten, verstroijen, minderen oft bederveri", insurers were not liable. See further art 103 of par 4, title 11, part IV (see De Longe vol IV at 244) which provided for the liability of the insurers of goods (in the circumstances dealt with there) for ("eenigh ongeluck door storm oft diegelijcke vuijtwendige oorsaecke toecompt") and in terms of art 108, ("quaeme het ongeluck vuijtte naturelijcke bederffenisse van de goederi", insurers were not liable.

\textsuperscript{102} In terms of art 148 of par 4, title 11, part IV of the \textit{Compilatae} (see De Longe vol IV at 262), in the case of the leakage of vats or barrels, insurers were not liable, unless through storm, bad weather or another extraordinary circumstance ("oft door andere extraordinaris ongeval") they were so compressed ("geperst") that they broke, leaked, their bottoms popped out or their contents spilled. In such a case, though, the liable insurer may in appropriate cases have had a right of recourse against the master ("indijen tselve door quade stouwinge oft dat anderssints door henne versuerenisse waere toegecorrien").

\textsuperscript{103} See art 206 of par 4, title 11, part IV of the \textit{Compilatae}, stating that the exclusion of liability remained despite the presence of the usual clause in the policy ("dat de versekeraers hun stellen in de plaetse van den versekerde, om voor hem te draegen ende schaefloos te houden van alle schade ende verlies, die op die versekerde goeder soude moghen commen").

\textsuperscript{104} See art 300 of par 9, title 11, part IV of the \textit{Compilatae} (De Longe vol IV at 324), providing that hull insurers were not liable for any loss other than that resulting from storm, bad weather, enemies ("oft ander vuijtwendich ongeval ... ende niet van naturelijcken sleet, die de reijse ende den tijt medebrenght").

\textsuperscript{105} See eg Grotius \textit{Inleidinge} III.24.15; Groenewegen \textit{Aanteekeningen ad} III.24.15 (n31); and Van Leeuwen Rooms-Hollands regt IV.9.5. See further also eg Goudsmit \textit{Zeerecht} 325.

\textsuperscript{106} It stated that if insured goods were wholly or partly spoilt ("bederven") by themselves without any intervening external accident ("sonder eenige toekomende uytwendige fortuyne"), the insurer was not liable at all.
from that peril for his account. Thus, because it was, at least as a rule, fortuitous and uncertain, an inherent vice, ordinarily excluded by implication, could be insured against, as long as this was done expressly. The non-extraneous nature of this peril was therefore not an absolute bar to its insurability. And, according to Van der Keessel, the possibility of expressly insuring against inherent vice was so obvious and certain that, with the obvious exception of the Rotterdam keur of 1604, insurance laws found it unnecessary to mention it. Further, the principle that insurers' liability for loss caused by inherent vice remained excluded even where the liability was not expressly excluded, such as when the insurers had insured against all risks, was confirmed in a legal opinion in 1706.

In terms of s 45 of the Rotterdam keur of 1721, an insurer was not liable to compensate a loss when the insured goods, by themselves and without any cause operating from the outside ('zonder een oorzaak van buyten aangekomen'), wholly or in part became spoilt, depreciated in value, or damaged ('in het geheel of ten deele bedurven, vermindert, of beschadigt zijn'). Likewise, by s 32 of the Amsterdam keur of 1744,

---

107 See eg Groenewegen Aanteekeningen ad III.24.15 (n31); Wassenaer Praktyk notariaal VII.12; and Van Zurck Codex Batavus sv 'Assurantie' par 15.

108 But see Willeumier 1-27 who argues an insurance against loss from an inherent vice is contrary to the nature of insurance and should not be possible at all, such a loss not being an uncertain event because the eventual destruction by inherent vice is not uncertain. The implied exclusion of liability for inherent vice, he suggests, is an essential characteristic of insurance. His reliance (at 18) for this view on eg Grotius Inleidinge III.24.14 and Van der Keessel Theses selectae th 759 (ad III.24.15) seems somewhat misplaced though. These authors merely suggested that an insurer was not liable for such a loss in terms of the ordinary (all-risks even) policy, that is, that it was an implied exclusion, not that an insurer could not by way of an express term undertake to be liable. Furthermore, even if it can be accepted, as he argues, that loss from an inherent vice is certain, then it is still uncertain whether or not such loss will occur during the period of insurance.

109 Praelectiones 1472 (ad III.24.15).

110 See Barels Advysen vol I adv 14 (1706). The opinion concerned an insurance against all risks ('voor alle perkyel bedagt of onbedagt': see again § 3.2 n84 supra). It was pointed out that insurers who had bound themselves 'voor alle schade, bedagt of onbedagt' stood in for all losses or, more correctly, for loss caused by any peril, even though not mentioned by the usual policy form and as long as such losses were not specifically excluded, except only (ie, an express exclusion was not necessary) if the loss was caused by inherent vice ('indien het goed door zich zelve, zonder eenige toekomende uitwendige fortuine, kwam te bederven of te verageren').

In this regard Feitama's note on Roccus De assecurationibus note 49 to the effect that an (all-risks?) insurer was liable for damage to goods caused by leakage, melting, scattering or deterioration, would appear to be wrong, at least for Roman-Dutch law where there was an implied exclusion of such liability.

If loss from an inherent vice was not included in all-risks cover, unless expressly so provided, it followed that similarly it was not included in cover against a named risk such as perils at sea. See Van der Linden Koopmans handboek IV.6.4.

111 See also Goudsmit Zeerecht 401; Kracht 38.
when a ship\textsuperscript{112} or goods by themselves became spoilt or deteriorated in their condition without the operation of any extraneous casualty ('door hem selve sonder eenige toekomende uytwendige fortuyne bederdt, ofte verergerd'), an insurer was not liable.\textsuperscript{113}

Thus, according to Van der Keessel who stated the relevant principle in even broader terms, an insurer was not liable for any loss or damage (such as a depreciation in value) arising from the nature of insured goods (such as perishability) or from any internal defect ('internum vitium') in them without the occurrence of any external casualty ('casus fortuitus extrinsecus').\textsuperscript{114} But, obviously, whether loss or damage in a particular case was in fact caused by an inherent vice or by an external casualty was not always immediately apparent. It had to be clear, and it had to be established by the insurer if he wanted to escape liability, that the loss or damage for which the insured claimed had in fact been caused by an inherent vice in the insured ship or goods and not by an extraneous cause.\textsuperscript{115}

Even where, on the face of it, loss was caused by an inherent vice, an insurer may have been held liable if that inherent vice was in turn caused by an extraneous casualty, if, of course, such casualty was an insured peril. Put differently, if the particular external casualty which caused the inherent vice, rather than the inherent vice itself, was the primary cause of the loss in question, the insurer's liability was not excluded. This point was illustrated by an opinion of Amsterdam merchants, insurers and brokers delivered

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{112}] See Van der Keessel \textit{Theses selectae} th 759 (ad III.24.15); \textit{idem Praelectiones} 1472 (ad III.24.15) who noted, with reference an Amsterdam opinion of 1790 (see \textit{infra}), that the rule which was stated in s 32 to apply to loss caused by inherent vice in insured goods, was also applicable to insured ships so that insurers did not incur any liability for loss caused by an internal defect in the ship herself. It seems that Van der Keessel misread s 32, not realising that it specifically did mention an inherent vice also in a ship.

\item[\textsuperscript{113}] See further Van der Linden \textit{Koopmans handboek} IV.6.9-10; Goudsmit \textit{Zeerrecht} 350.

See too the provision in this regard in s 21 of the \textit{keur} of 1744 which underlined that the insurer of a bottomry loan on goods was not liable for any depreciation in the value of the goods through inherent vice ('vry van alle .... vermindering van waarde door eigen bederft'). See further Van der Keessel \textit{Praelectiones} 1436 (ad III.24.4). Section 35 of the \textit{keur} of 1744 mentioned, in respect of the calculation of the measure of indemnity and the insurable value of goods, '[d]e Avary of Schaaden aan Goederen geduurende de Reys door uytwendige fortuyne overgekomen'.

\item[\textsuperscript{114}] Van der Keessel \textit{Theses selectae} th 759 (ad III.24.15); \textit{idem Praelectiones} 1472 (ad III.24.15), referring to the Rotterdam \textit{keur} of 1721 and that of Amsterdam of 1744. The insurability of perishable goods (which was nevertheless subject to special requirements: see again ch V § 4.3 \textit{supra}), did not mean they were insured against inherent vice, just as the insurability of consumables did not mean they were insured against anything but accidental causes: see \textit{idem Praelectiones} 1436 (ad III.24.4).

\item[\textsuperscript{115}] In a case before the \textit{Hooge Raad} in 1716 (see Bynkershoek \textit{Observationes tumultuariae} obs 1290; \textit{idem Quasstiones juris privati} IV.6), the insurer of a ship, almost completely lost in a collision with another ship in a storm, argued that the insured ship was old (see again ch V § 3.2.1 n54 \textit{supra}) and not sufficiently seaworthy to withstand storms at sea. The \textit{Raad} held that this defence was not valid but thought that in any event the ship in the present case had not been lost through her inherent vice ('deszells onbequaamheid') but because of external forces which could easily have caused loss of a brand new and even the staunchest of ships ('een nagel-nieuw en het sterkste schip'). See also Enschedé 98.

The difference between the unseaworthiness of a ship and an inherent vice in a ship was and remains rather nebulous, and it seems either one of these causes of loss may equally be the cause of the other. See further ch XIII § 2.2 \textit{infra} as to the seaworthiness of ships.
\end{itemize}
\end{footnotesize}
According to the opinion, the rotting or other internal decay ("verrotting of doorknaaging van Wormen ...; of dat ... de naaden opentrekken") of an insured ship, caused by the fact that she remained overly long in the West Indies in an attempt to obtain a return cargo, had to be considered as a loss caused by inherent vice ("inwendig bederf"). Such loss was therefore not for the account of her insurers (nor did it come in general average) but had to be borne by the owner himself. The position was different though, the opinion continued, where the decay or deterioration was caused by the ship’s arrest or detention on the order of a foreign power for then, such arrest and detention being insured perils, the loss would have to be borne by the insurers.\textsuperscript{117}

That the facts and causal links in such cases may become rather involved, was illustrated by a case on which a unanimous series of opinions was given in 1792, first by a Hamburg corn merchant, then by Amsterdam merchants, and finally by other Amsterdam merchants, insurers and practitioners appearing before the Insurance Chamber there.\textsuperscript{118} The bottom part of a consignment of grain was damaged by sea-water which the ship had taken on during a storm at sea. As a result of the moisture and the foul smell of that part of the cargo ("door deszelfs damp of kwaade reuk"), the other part of the cargo became heated and it too became spoilt in varying degrees to such an extent that the grain was no longer in a merchantable condition ("dat het voor geen gezond Koopmans-goed te estimeeren is").\textsuperscript{119} In the light of these facts, the cargo insurers argued that they were liable only in respect of that part of the cargo apparently wetted and damaged by direct contact with sea-water and not for the other part of cargo which, so they contended, was not damaged by that peril but by the cargo itself, that is, by inherent vice. The insured, in turn, established that the grain had been loaded in a good and dry condition and without any defect, and that all the damage in this case had been caused by sea-water; damage by sweating could not have resulted from inherent vice in so short a time as had elapsed here between the storm and the

\textsuperscript{116} See Casus positien vol I cas 19.

\textsuperscript{117} See further Van der Keessel Praelectiones 1472 (ad III.24.15). Likewise, by art 207 of par 6, title 11, part IV of the Antwerp Compilatae of 1609 (see De Longé vol IV at 286), if goods were spoilt by an inherent vice occurring during and, presumably, as a result of, any arrest or detention of the ship, then such damage was for the account of the insurers of such goods. See further as to the liability of an insurer for loss or damage to goods caused by a delay in prosecuting and completing the voyage, eg arts 107 and 108 of par 4, title 11, part IV of the Compilatae (De Longé vol IV at 244), according to which an insurer was liable if the ship was detained under quarantine because she arrived from ‘besette plaetse’, but not if ‘quaeme het ongeluck vuijtte natuurlijcke bederffenisse van de goederen’.

\textsuperscript{118} See Casus positien vol II cas 42.

\textsuperscript{119} The master of the ship declared on arrival at the destination that his ship had been in a proper state of repair when the grain was loaded; he also did not deny the entry of sea-water into the ship nor the fact that, after the relatively short voyage in question of five weeks from Copenhagen to Marseilles, she had to be caulked (ie, her seams had to be stopped up and made watertight) before she could ship further cargo. This, the opinion noted, was the strongest proof that on her voyage the ship must have suffered significant damage by the storm.
arrival of the cargo at the destination. \(^{120}\) In the opinion requested by the insured from the merchants and other experts, the view was expressed that the insurers were liable to compensate the damage to the whole consignment, because it was thought that it could not be argued, on the evidence presented in this case, that any of the damage arose from the nature of or from any defect or vice in the goods themselves. \(^{121}\)

The legal position in Roman-Dutch law remained virtually the same in the Dutch Wetboek van Koophandel where art 429 provides that an insurer is never liable for loss or damage directly (‘ommiddellijk’) caused by any inherent vice (‘eigen gebrek’), inherent deterioration (‘eigen bederf’) or from the nature of the insured object itself (‘uit den aard en de natuur van de verzekerde zaak zelve’), unless he had expressly insured such a risk. \(^{122}\) In English law, too, an insurer is not liable for loss or damage to an insured object of risk caused by an inherent vice in that object, but there too the pos-
sibility exists that liability for such a loss could be undertaken expressly.  

4 The Perils of Human Conduct

Apart from natural causes of loss or damage, Roman-Dutch insurance law was, of course, also concerned with loss or damage caused by human conduct. For present purposes and for the convenience of treatment, such human conduct may be grouped into different categories, depending on the identity of the actual person or persons whose conduct was involved or on the nature of such conduct. To be considered first is the effect on insurers' liability where loss was caused by the insured's own conduct, then where loss was caused by third parties generally, and then where it was caused by a specific category of third party, namely the master and mariners on board the insured ship or on board the ship on which the insured cargo was carried. Special attention will then be devoted in a separate section to the third-party human conduct which may broadly be categorised as perils of war. In addition to the physical loss caused in times of war by the enemy in its various forms, consideration will be given under this head also to matters such as arrest and detention by both enemy, friendly and the insured's own authorities. Perils of war are treated separately because such perils were often contrasted with perils at sea, either in that they were specifically excluded from the (all-risks) cover provided by the marine policy or in that insurers provided cover against them only.

4.1 The Insured's Own Conduct

After perils of the sea and of war, the risk of loss or damage to insured property by the insured's own conduct was a very real one for insurers. Because, in most cases, the insured was also the owner and very often in actual possession of the insured property, he was in the unique position, on the one hand, to prevent, as far as was humanly possible, the occurrence of loss but also, on the other hand, to cause such loss, whether intentionally and with a view to defrauding the insurer or through his own reckless or careless conduct.

---

123 See now s 55(2)(c) of the Marine Insurance Act of 1906, treating ordinary wear and tear, ordinary leakage and breakage, and inherent vice or the nature of the subject matter together.

This appears to have been position already in the sixteenth century, according to evidence from the draft Booke of Orders as to the types of risk which London underwriters were willing to bear in the 1570's. Thus, Order 10 determined that an insurer was not liable for the leakage of a number of named products 'and all other sort of Victuall', whether such occurred by unkind occurrence or long delay, nor for any kind of corruption of them or waste or lack of weight or measure, unless the damage was caused by a storm, jettison or bad stowage. Likewise, an insurer was not liable for slaves, oxen or other cattle running away or dying from sickness, except if such goods were drowned at sea and the carrying ship too lost. But, in terms of order 43, if these 'leakage wares' (perishables?) were damaged because of arrest and detainment, the insurer was liable. See Kepler 'London Marine Insurance' 50 and further Weskett Digest 279 sv 'insufficiency' and 601-602 sv 'wear and tear' par 1.

124 Insured shipowners and cargo owners were, however, not in exactly the same position in this regard, as will appear shortly.
The issue of an insurer's liability for loss caused by the insured's own conduct was one of the areas of Roman-Dutch insurance law fraught with uncertainties. This was exacerbated by the fact that at the time the various degrees of fault and the different consequences to which they could and did give rise, were not yet clearly distinguished, either in insurance law specifically or in the law of delict more generally. Furthermore, the issue was one then infused by a parochial public-policy perception of the aim of insurance.

As a general proposition, Roman-Dutch insurance law, like most other contemporary systems of insurance law, held the insurer not liable for loss caused by the insured's own conduct. The exclusion of liability for loss or damage occasioned by the fault of the insured appears to have been recognised in earlier customary insurance law too, and the principle was espoused also by the early writers on insurance law.

The reason, in theory, for the exclusion of the insurer's liability was, as in the case of inherent vice, because this cause of loss, although uncertain was not extraneous. Put simply, extraneous perils were in Roman-Dutch insurance law taken to mean also perils outside the influence and control of the insured himself. The practical reason for the exclusion was an attempt to eliminate recklessness and even careless-

---

125 The underlying principle was stated as follows: 'Damnum qui culpa ipsius assecurati causam dedit, ab assecuratore non resarcirendum est': see Dreyer 137, referring to s 6 title V of the Hamburg Assecuranz-Ordnung of 1731.

126 Thus, in art 117 of par 4, title 11, part IV of the Antwerp Compilatae of 1609 (see De Longé vol IV at 248), insurers were not liable for loss or damage to a ship or goods caused by the 'toedoen, scult of mishandeling' of the insured, 'oft dat hij anderssints oorsaecke is geweest van de schade'. Further references and allusions to the exclusion of insurers' liability on this principle in the Compilatae occurred in arts 102, 103 (where there was a reference to the fault, will or conduct of the insured), 106 and 132 (where there was a reference to 'eenich misdaet, misbruijck oft schult van den versekerde').

127 See eg Santerna De assecurationibus IV.16-18; Scaccia De commerciis l.1.154 ('casus sinister, si evenerit dolo seu culpa assecurati, non comprehenditur in assecuratione casus sinistri'); and Straccha De assecurationibus XX.3. See also Roccus De assecurationibus notes 21, 22 (an insurer is not liable when the peril was caused by the fault of the insured) and 98.

Elsewhere (De assecurationibus note 14) Roccus mentioned the interesting situation where the prosecution of a voyage was prevented by the insurer of goods who also happened to be the owner of the ship on which those goods were loaded. In such a case, the insurer had to repay the premium. Tantalisingly Roccus did not address the question what the position would be where an insurer caused the loss of insured property.

128 See further eg Dorhout Mees Schadeverzekeringsrecht 270; Frentz Hamburgische Admiralitätsgericht 167-169.

129 In the case of the insurance of a person against capture, the fault of the insured resulting in his capture was commonly equated with an inherent vice in insured property: see further n135 infra as to view of Bynkershoeck in this regard and ch VII § 3.2 infra as to ransom insurance.

130 At least it was certain only to the insured, and then only in the case of intentional causation and only once he had resolved to cause the loss.
ness on the part of the insured. It was considered against public policy to permit an insured to protect himself against the consequences of his own faulty conduct.\footnote{On one occasion, in 1569, the fear of insured persons acting carelessly because of their being insured even resulted in the prohibition of insurance generally in the Netherlands. For this prohibition, see Van Niekerk \textit{Sources} 44-45 and the authorities referred to there. Later it merely resulted in cautionary measures such as the provisions directed at compulsory under-insurance and in the continued recognition of the principle that an insurer was not liable at all for loss caused by the insured's provable fault.}

The exclusion of liability for loss caused by the insured himself did not have to be mentioned expressly in Dutch insurance policies. Like the exclusion of liability for loss caused by inherent vice, this was an implied exclusion from the cover ordinarily provided by the insurance contract. Nevertheless, references to this exception did on occasion surface in Roman-Dutch insurance legislation and in some of the policies prescribed by the various statutory measures. Thus, in the hull policy prescribed by the Rotterdam \textit{keur} of 1721, liability for loss caused by the insured himself was specifically excluded or, rather, the policy specified that the insurer was liable for loss of or damage to the insured ship '\textit{buiten toedoen van de Geasseureerde}'.\footnote{The goods policy in the \textit{keur} did not contain this reference to the conduct of the insured. Possibly this was because, unlike the insured shipowner who was himself, or through his employees, in constant control and possession of the insured ship during the voyage and for the duration of the insurance contract, the insured cargo owner, who no longer travelled with his cargo but entrusted it to the care of the carrier, was not similarly in possession of the insured goods. An express exclusion was therefore not deemed necessary in the case of the insurance of cargo. Liability was, of course, still excluded by implication.}

\footnote{In Roman-Dutch law, as in other contemporary systems following Roman law, fault (\textit{culpa}) could take the form of intention (\textit{dolus}, \textit{fraus}) or negligence (\textit{negligentia} or \textit{culpa} in the narrow sense). There were various degrees of negligence (\textit{culpa}) in the case of contractual liability, e.g. \textit{culpa levis} (or \textit{levissima}) which was, especially in certain contractual contexts, excluded as the basis of liability in an attempt to impose a less strict degree of care (\textit{diligentia}) on the parties than was usually required in terms of the law of delict. On occasion \textit{dolus} included gross negligence or recklessness (\textit{culpa lata}). See generally Kaser par 36.IV; Zimmermann 1027-1028.}

The hull policies prescribed by the Amsterdam \textit{keuren} of 1688, 1744 and 1775 too referred to insurers being liable for the loss of or damage to the insured ship caused by whatever peril may befall ship, '\textit{buiten toedoen van de Geassureerde}'.

Amongst Roman-Dutch authors too there was no doubt that an insurer was not liable for any consequences of the insured's own conduct or, as it was also put, for loss caused by his fault. And under fault (\textit{culpa}) they included not only intention (\textit{dolus}) but also negligence (\textit{culpa} in the narrow sense).\footnote{Schorer Aanteekeningen 415 (ad III.24.3) n4 (‘een verzekeraar \textit{is} nimmer verplicht ... schaden te vergoeden, die de verzekerde door kwade trouwe of bij verzuim (‘dolum culpamve’) heeft geleden’). See too eg Van Zurck \textit{Codex Batavus} sv 'Assurantie' par 18 n1 (referring to Roccus \textit{De assecurationibus} notes 22, 23, 38, 41 and 42); La Leek \textit{Index} sv 'insurance'; \textit{idem} \textit{Register} sv 'verzekering' (a person may not be insured against his own carelessness).} Thus, Schorer referred to the general proposition that an insurer was never liable to compensate loss caused by the fraud or negligence of the insured.\footnote{Earlier Bynkershoek had already drawn an analogy, at least in the case of ransom insurance, between the fault of the insured and an inherent...}
vice in stating that an insurer was not liable for loss or damage caused by the insured's own conduct. Elsewhere, too, the non-liability of the insurer in the case of the insured's fault was noted or alluded to. And a case heard by the Hooge Raad in 1728 showed that for an insurer successfully to deny liability on the policy on the basis of the insured's fault, the presence of fault as well as the fact that it had caused the loss in question had to be established.

Otherwise than in the case of inherent vice where an express insurance against loss caused by that impliedly excluded peril was clearly permitted, there is no ready evidence on whether, and if so to what extent, cover could in Roman-Dutch law expressly be granted against loss or damage due to the fault of the insured. It may well have

---

135 See Quaestiones juris privati IV. 1. Ransom insurance covered the insured against having to pay a sum of ransom to obtain his release from enemy capture (see further ch VII § 3.2 infra). Some uncertainty existed in Bynkershoek's mind as to whether one could insure against this risk. He made the point (one repeated frequently after him), though, that even if it was permissible, the insurer would not be liable in the event of the fault (words such as cowardice, negligence, inertia were used in this regard) of the insured leading to his capture. Thus, Bynkershoek thought, if the insured had surrendered through cowardice, he should have no action, 'want iemand word tegen de magt der vyanden geassureert, en niet tegen zyne lafhartigheid', and he then drew the analogy with liability for loss resulting from inherent vice where it was beyond doubt that the insurer incurred no liability. Clearly, therefore, a loss (capture) caused by the insured's own fault, was adjudged to be on a par with a loss of goods from their inherent vice.

See too eg Scheltinga Dictata ad III.24.4 sv 'uitgezeit menschen leven etc' who thought an insurer to be liable on a ransom policy, at least where the insurer could not prove that the loss of the insured's freedom was due to 'zyn eigen negligentie'. Also Dorhout Mees Schadeverzekeringsrecht 264.

136 See eg Bynkershoek Quaestiones juris privati IV.2 who pointed out that an insurer was not liable for an arrest and forfeiture of an insured ship in an enemy port which was lawful because the insured had failed to obtain permission to sail there; it was the duty of the insured and not of the insurer to have obtained that permission, and the insured has only himself to blame for the loss. Bynkershoek also explained Quaestiones juris privati IV.5 that war risks insurance covered the insured 'tegen de verongelyking van den Vyand, niet tegen dat gene, dat de Vyand met het grootste recht, uit hoofde van bedrog of schuld van den geassureerden zelf, gedaan heeft'. In an opinion in 1713 (see Barels Advysen vol I adv 21) where the insured had failed in his duty to preserve the insured ship and goods, or to give instructions to have them preserved, after the occurrence of an accident (see ch XVI § 1 infra as to this duty), the insurer was thought not to be liable for the eventual loss which had to be borne by the insured himself because 'de Geassureerde verstaen moet worden de voorsz schaede ... door dat zyn verzuim zelfs veroorsaekt te hebben gehad'.

137 See Bynkershoek Observationes tumultuariae obs 2449; idem Quaestiones juris privati IV.14. Although the Raad noted that cover against one's own fault was not possible, it permitted the claim by the insured owner-master of the lost ship to succeed against the insurer of the ship, amongst other reasons because the insurer could not establish fault on the part of the insured owner-master. The insurer's burden in this regard, it would appear, was a heavy one for, as appears from the decision, the tendency was to believe that the owner-master would not intentionally have risked his own life and safety in deliberately sinking his ship. The Raad held here that the desertion of a ship which had stranded and could not be repaired without greater expense than her value, was not to be considered as fault on the part of the owner-master. See further Van der Keessche Theses selectae th 746 (ad III.24.7) who suggested that the insurer in this case in any event did not establish that the fault of the insured had caused the loss in question.
been possible, though, at least in the case of the insured's conduct being no more than negligent.\textsuperscript{138}

Roman-Dutch law was not alone in excluding liability for all forms of fault on the part of the insured. The same position obtained in French law in the eighteenth century\textsuperscript{139} as also in English law.\textsuperscript{140}

The principle that the insurer was relieved of liability for loss or damage occasioned by the fault of the insured, also referred to as the principle of the uninsurability of fault ('de onverzekerbaarheid van schuld') was taken over in the Wetboek van Koophandel in art 276. The provision was said to have been derived, though, not from Roman-Dutch law but from French law.

In terms of art 276 the insurer is not liable for any loss or damage caused by the own fault ('eigen schuld') of the insured. The meaning and scope of the term 'fault' were not in all respects clear at the time of the promulgation of the Wetboek in 1838. More particularly it was uncertain whether or not it included only intentional conduct (\textit{dolus}) or also \textit{culpa} in both its senses of negligence (\textit{culpa levis}) and recklessness (\textit{culpa lata}).\textsuperscript{141} In the case of fire insurance, art 294 provides specifically that the insurer

\textsuperscript{138} Roccus \textit{De assecurationibus} note 22 explained that an insurer was not liable when loss derived from the fault ('\textit{culpa}') of the insured. This was the position even though a clause had been added to the policy that all loss was covered, however it may be caused ('\textit{omni melior modo, quocumque, & qualitercunque}'), because those words did not include cases of which special (ie, express) mention had to be made. The implication here, it would seem, was that express cover was indeed possible against loss caused by the insured's own conduct. See the comparable position in contemporary French law, referred to the next footnote.

\textsuperscript{139} The provision in art III.6.27 of the \textit{Ordinance de la marine} of 1681 (and later in art 351 of the \textit{Code de commerce}) excluding the insurer's liability for any consequences of fault ('faute'), which included negligence, on the part of the insured, was strictly interpreted and contracting out was regarded as unlawful, not only because of the fear of abuses and negligence in the equipping of ships but also because an agreement in terms of which an insurer undertook to be liable for the consequences of the insured's own fault was regarded as against public policy. See eg Pothier Assurance n65.

\textsuperscript{140} Up to the middle of the nineteenth century, English law generally considered it against public policy to allow anyone to insure against the results of his own negligence, let alone his own intentional or fraudulent conduct. The notion was that carelessness should be punished, not rewarded. Thus in \textit{Delanoy v Robson} (1814) 5 Taunt 605, 128 ER 827 it was held obiter that it would be illegal to insure against the consequences of the wrongful acts of the insured. See also ILL HR 3 1-2.

The intentional or wilful destruction of insured ships not only by the master and crew (as to which more in § 4.3 \textit{infra}) but also by the owner with the intention of prejudicing the insurer or the owner of cargo on board, was repeatedly prohibited and made punishable as a felony in the eighteenth century. See eg the Acts 1 Anne II c 9 s 4 (1702); 4 Geo I c 12 s 3 (1717); 11 Geo I c 29 s 5 (1724); and 43 Geo III c 113 s 1 (1803). See further eg Weskett \textit{Digest} 227 par 3; and Walford \textit{Cyclopaedia} vol I at 255 \textit{sv} 'barratry'.

By the time of the Marine Insurance Act of 1906, the prohibition on insurance against the insured's fault had come to be reduced to cases of wilful misconduct (s 52(2)(a)) but parties could still not contract out of the prohibition. See further Buys 89; Chalmers 76-79.

\textsuperscript{141} In one of the drafts of the Wetboek the word 'toedoeri' was used in this regard, and the opinion was that it should be confined to the insured's intentional actions so that the insurer would remain liable for the negligent causation of loss or damage by the insured. But after the introduction of 'eigen schuld', the question remained whether it also included negligence (\textit{culpa levis}). See Voorduin vol IX at 240.
is relieved of liability to compensate a loss if he can prove that the fire was caused by the marked or serious fault or negligence ("merkelijke schuld of nalatigheid") of the insured himself.\textsuperscript{142}

Later, in the case of fire insurance, it was argued and came to be accepted that the relevant provisions were to be so interpreted that the insurer was liable for loss caused by the negligence, but not by the recklessness or intentional conduct, of the insured.\textsuperscript{143} In the case of marine insurance, though, the insured’s negligence, like the graver forms of fault, continued to relieve the insurer of liability.\textsuperscript{144} It is possible and permissible, nevertheless, expressly to insure against the negligent conduct of the insured, but not against his intentional conduct because such insurance would be against public policy.\textsuperscript{145}

One important consequence of the exclusion of the insurer’s liability for the conduct of the insured in Roman-Dutch law was that, generally speaking, liability insurance, whether separately or as part of the marine policy, was not possible or at least not conceived of.\textsuperscript{146} Insurance against liabilities only came to be recognised and practised in the nineteenth century and hence there was no direct authority on it in Roman-Dutch law nor, for that matter, in the Wetboek van Koophandel. In English law, too, the standard form Lloyd’s marine insurance policy did not cover marine liabilities which the insured owner of a ship or cargo could incur towards third parties. Supplementary

\textsuperscript{142} According to some, the adjective ‘merkelijke’ here referred also to ‘nalatigheid’ and thus excluded ordinary negligence (culpa levis) so that the insurer was relieved of liability only in the case of gross negligence or recklessness (culpa lata) and intentional conduct (dolus). See Voorduin vol IX at 270. The same principle was also adopted for life insurance (in art 307) in respect of cases of capital punishment or suicide of the life insured.

\textsuperscript{143} The reason for this interpretation, apart from the presence of ‘merkelijke’ and the distinction between fault (‘schuld’) and negligence (‘nalatigheid’) in art 294, was because in the case of fire insurance, the insured is usually in continuous contact with the insured property and because, as a result, most fires are caused by his negligence. If the insurer’s liability for such negligence were to be excluded, fire insurance would be deprived of most of its usefulness. See further Dammers 12.

\textsuperscript{144} The same argument applied with less force to marine insurance, especially since the time when shipowners and cargo owners were no longer personally on board the ship. Their contact and dealings with the insured ship or cargo were at most indirect and intermittent. In short, the marine insured’s conduct was not a continuous risk, and because his fault had a relatively smaller influence on the risk, the exclusion of the insurer’s liability for negligence was of little practical concern and a restrictive interpretation not as imperative. See generally Dorhout Mees Schadeverzekeringsrecht 271 and Holleman. Accordingly, in the case of hull insurance, fault in modern Dutch law includes negligence: see Dorhout Mees Schadeverzekeringsrecht 669 who points out that although fault in English law does not include negligence as in Dutch law, but only wilful misconduct, the strict view taken in English law of the insured’s duty to keep the insured ship seaworthy results in many losses, attributable to the negligence of the insured shipowner, not being covered by the insurer.

\textsuperscript{145} See Dorhout Mees Schadeverzekeringsrecht 274-275 and 281-383.

\textsuperscript{146} No doubt the absence of a physical object of risk, at least in those cases where the insured’s liability could not in some way be linked to such an object belonging to him, would also have caused conceptual and theoretical problems for Roman-Dutch insurance lawyers. See again ch V § 1 supra.
clauses appended to the policy to provide such cover only came to be accepted by both underwriters and the law in the course of the nineteenth century.\footnote{147} An important exception to the non-recognition of liability insurance occurred where the liability was imposed on the insured by law independent of any actual conduct on his part. The best example of this was the liability imposed upon the owners of a ship and the cargo on her to make a general average contribution to a general average loss.\footnote{148} There is Roman-Dutch authority implying that if the owner of the ship or cargo concerned was insured, he could claim such general average contribution from his insurer.\footnote{149} The insurance cover on a relevant marine object of risk therefore included cover against the liability incurred by the owner of that object for a general average contribution by the object. Of course, Roman-Dutch marine policies did not expressly stipulate for this because of the universal coverage they provided.\footnote{150}

4.2 The Conduct of Third Parties

In direct contrast to the case of loss emanating from the insured's own conduct, an insurer was liable in Roman-Dutch law for loss caused by the conduct of third parties generally. Not only was the risk of such human conduct clearly uncertain but it was equally clearly an extraneous cause of loss or damage. For present purposes, the conduct of one particular category of third party, namely the master and crew of the insured ship or of the ship on which the insured goods were loaded, will not be con-

\footnote{147} Thus in De Vaux v Salvador (1836) 4 A & E 420, 111 ER 845 it was held that the liability of a shipowner for damage caused to another ship in a collision between his own and that other ship was not a peril of the seas and was covered therefore only if the hull policy contained a special clause covering such liability (a so-called running-down or collision clause). As to the introduction of this clause, added to the old Lloyd's policy as a supplementary clause, which covered the shipowner against liability for damage done by his ship, in a collision, to another ship and her cargo, see eg Wright & Fayle Lloyd's 368-369. They note that the clause was initially disliked by underwriters because they thought it would render masters and shipowners less careful and increase the incidence of collisions at sea. Collision-liability cover was offered from as early as 1814, when the legality of such insurance was in fact still at issue in Delauny v Robson (see n140 supra). Shipowners' third-party liability risks came to the fore only by the mid-nineteenth century, and when marine underwriters refused to cover them or to cover them fully, they came to be insured on a mutual basis by so-called Protection and Indemnity Clubs which developed from earlier Hull Clubs. As to this cover and these clubs, see further ch IX § 3.3 infra.\footnote{148}

\footnote{148} See again ch I § 4.6 supra.\footnote{149} \footnote{149} In a case before the Hooge Raad in 1726 (see Bynkershoek Observationes tumultuariae obs 2242; idem Quaestiones juris privati IV.13), the majority of the Raad denied a claim against the Amsterdam insurer of cargo by the owner of that cargo for a general average contribution due by the cargo to a general average loss. The reason for this denial was because the loss and contribution had in this case been adjusted abroad (see again ch I § 4.6.7 n316). But the Raad added that the insured was free, if he so wished, to have the loss assessed anew locally and to pursue the matter further against his insurer before the local Chamber.

The same principle is also embodied in s 66(5) of the English Marine Insurance Act of 1906.\footnote{150} The Lloyd's policy as settled in 1779 did provide cover against the peril of 'jettisons' but also did not cover marine liabilities generally nor the liability to make a general average contribution specifically.\footnote{150}
sidered,\textsuperscript{151} and neither will third-party conduct which may be described as amounting to a peril of war.\textsuperscript{152}

Although in earlier times a negligible risk compared to natural perils such as those at sea and those of loss through enemy action,\textsuperscript{153} the insurer's liability towards his insured for loss or damage caused by the actions of third parties was already recognised in customary insurance law.\textsuperscript{154} This was not the case, though, if the insured was responsible for the actions of the third party involved, or if he had connived with that third party, in which case the position was the same as if the insured's own conduct had caused the loss.\textsuperscript{155}

Roman-Dutch sources made little of this matter, although it is uncertain whether it was regarded as not meriting comment because of the principle being so generally accepted or because of third-party involvement with insured property occurring so relatively infrequently. Decker, for example, simply stated that an uncertain peril ('onzeker gevaar') included the conduct of a third party which could not prevent the insurance contract from operating ('alzoo de daad van een derde niet kan beletten, dat de verbintenis zyn kragt niet zoude hebben').\textsuperscript{156} And Van der Keessel explained that although not expressly stated in the policy formulas, the logic and nature of the insurance transaction suggested that as long as the third person by whose intent or fault the loss was

\textsuperscript{151} See § 4.3 infra.

\textsuperscript{152} See § 5 infra.

\textsuperscript{153} In the context of shipping and maritime trade, loss from the conduct of non-enemy third parties was possible especially, but obviously not only, in two cases: where the carrier caused the loss of or damage to cargo on board the ship, and where one ship caused the loss of or damage to another ship or the cargo on her. In earlier times, though, merchants more often than not carried and thus accompanied their own goods in their own or a hired ship, that is, the cargo owner was his own carrier so that there was much less third-party involvement. Also, in such earlier times, and in fact until the nineteenth century, ships relied on sail-power and proceeded at a much lower speed. Collisions, at least at sea, were infrequent and not always fatally serious if they did occur. In confined spaces, though, such as in port, the risk of collision was relatively high, given the sailing ships' relative lack of manoeuvrability.

\textsuperscript{154} Very clearly, eg, by Santerna \textit{De assecurationibus} IV.18-19 who noted that while an insurer did not incur liability for loss caused by the fault ('culpa') of the insured, he was liable to, and had no defence against a claim on the policy by, the insured in the case of a loss occurring through the fault of a third person. But then, in such a case, it was possible for the insurer to institute an action against that third party. Santerna also pointed out (\textit{idem} IV.23) that the insured owner did not gain anything from the conduct of the third party, which conduct harmed only the insurer who was liable for that risk. See too Coing \textit{Privatrecht} 536 explaining that Santerna IV.10 & 19 regarded a \textit{factum tertii} as an accident. See also eg Scaccia \textit{De commercis} I.1.155; and Straccha \textit{De assecurationibus} XX.3-4. Roccus \textit{De assecurationibus} note 23. In summarising the earlier position, pointed out that the fault of a third party was not treated the same as the fault of the insured, and that the insurer was liable irrespective of the nature of the third party's conduct.

As to the insurer's recourse against a liable third party, see ch XIX § 1 infra.

\textsuperscript{155} See eg Santerna \textit{De assecurationibus} IV.23. The best example of this occurred in respect of the conduct of the master and crew of the insured ship or of the ship on which the insured goods were carried, a topic treated in the next section.

\textsuperscript{156} Decker \textit{Aanteekeningen} IV.9.4 n(3)/(c), referring to Roccus \textit{De assecurationibus} note 23.
caused, did not perform the conduct upon the order or with the authorisation of the insured shipowner or cargo owner, the insurer was liable for the consequences of such conduct.\textsuperscript{157}

The principle that an insurer was liable for a loss caused by a third party did not mean, though, that the insurer was not liable if the third party whose actions had caused the loss, was found not legally liable towards the insured for that loss or damage. The insurer was liable for loss or damage caused by the conduct of a third party whether or not that conduct at the same time also rendered the third party liable to the insured in delict or for a breach of contract. Put otherwise, the insurer incurred liability for the conduct of the third party irrespective of the degree of fault, if any, or the civil liability, if any, attached to it.\textsuperscript{158} By the same token, the fact that a third party was liable to the insured for the loss or damage did not mean that the insurer was relieved of liability to compensate the insured in terms of the insurance contract for that loss or damage.\textsuperscript{159}

4.3 The Conduct of the Master and the Crew: Barratry

4.3.1 Introduction

The principles relating to the liability of an insurer for loss or damage caused to an insured ship or goods by the master or the crew of a ship were, for the greater part, nothing more than a logical deduction from the two principles just elucidated, namely that an insurer incurred no liability for the insured’s own conduct but was liable for the

\textsuperscript{157} Van der Keessel Praelectiones 1456 (ad III.24.7).

\textsuperscript{158} This appears from a decision of the Hooge Raad in 1716 mentioned by Bynkershoek Observationes tumuituarie obs 1290; idem Quaestiones juris privati IV.6. An insured ship was almost completely lost in a collision with another ship in a storm. The insurer argued that because the master of the other ship involved was held to be not liable at Cadiz when a claim for the compensation of the damage caused in the collision by his ship was instituted against him by the insured, he too was not liable to the insured on the insurance policy. The Raad rejected this argument. Apart from the fact that the finding of the Court at Cadiz that the master of the other ship was not liable for the damage to the insured ship was (because of the then applicable rules concerning the apportionment of damages in contributorily caused collisions at sea: see ch XIX § 1.3 infra) not a finding that he did not have any fault, that finding, whether or not it was wrong, was simply not relevant in the present case. The implication was, therefore, that the liability or otherwise of the third party involved was simply irrelevant in determining the liability of the insurer under the insurance contract.

\textsuperscript{159} This point was never pertinently made in any Roman-Dutch source but from the fact that in terms of Roman-Dutch law the insurer had a right of recourse against such third party in appropriate cases, it followed that this was no doubt the case. As to the insurer’s right of recourse in Roman-Dutch law, see ch XIX § 1 infra. The Hamburg Assecuranz-Ordnung of 1731 contained a pertinent provision to this effect. In terms of s 3 title VIII, the insurer of a ship or cargo was liable in the usual way to pay collision damage to the owner of an insured ship or goods for which a third party may be (fully or partly) liable; and in terms of s 4 the owners of a damaged insured ship or cargo, were obliged, when the insurer requested it but at the risk and expense of that insurer, to exercise their rights against the owners and consignors of the ship which caused that damage, and had to pay over to the insurer from whom they had received their indemnity, whatever was so recovered from the third party after the deduction of their expenses. See further Dreyer 49.
conduct of a third party which caused the loss or damage to the insured property. However, it took quite some time before Roman-Dutch law had satisfactorily systematised this area of the law and provided solutions for all the different permutations which could arise in this regard. Included in this discussion of the conduct of the master and crew is also a treatment of batartry (batarterie), a particular type of such conduct. Batartry was one of the classic topics of marine insurance and maritime law in the Roman-Dutch as in other contemporary legal systems, and it was a matter, so Decker advised, which was best provided for pertinently in the insurance contract itself.160

Initially the master or captain (meester, schipper, or patroon, from the French ‘patron’) of a ship was usually also her owner. Even at a later stage, when ships, or at least the shares in them, came to be owned by various co-owners,161 the master was more often than not still the main figure in the shareholding of the ship and usually himself the owner of a share or shares in her. An important point in this regard is that where the master was also the owner or co-owner of a ship, the conduct of the master had precisely the same consequences for the insurance contract on that ship as the conduct of the insured owner of that ship himself. Only later was the master as a rule no more than a mere employee on board the ship, either of the owners of ship (gouverneurs oft reeders vanden schip; eygenaars) themselves, or, in those cases where she was chartered out, of her charterers.

In addition to the master, there were also numerous other employees on board as members of the ship’s crew (scipliedden).162 These ranged from the officers (opperofficieren), which included the navigating officers (opperstuurman, onderstuurman), the under-officers (onderofficieren) through to the ordinary mariners (bootsgesellen) and other specialists such the carpenters and the cook. The upper hierarchy (the master, officers and the senior merchant, representing the owners of cargo) on board constituted the ship’s council (scheepsraad; kajuitraad) which was called together by the master to decide, by a majority vote, important matters arising in the course of the voyage, including matters concerning the discipline of the crew.163 Other persons on board included soldiers (oorlogsvolk) and pilots (piloten).164

---

160 See Decker Aanteekeningen ad IV.9.4 n(3)/(c).

161 See again ch VI § 3.1 supra.

162 As to the composition of the crew, see generally Unger ‘Bijdragen’ II 21-22.

163 See further Hoogenberk 86-151 for the maintenance of discipline and the administration of criminal justice on board ships, as well as for the rights, duties and disciplinary powers of the master over his crew. In the case of warships, the rules that governed the legal position on board were contained in instructions (artikelbrieven) issued by the Admiralty. For merchantmen, the maritime law in general, first customary and then as set out in various legislative measures (see eg title III (‘Van den Schiplieden, ende heure Officien’) of the placcaat of 1563) applied and regulated matters such as desertion, leave, wages, discharge, illness and injury, and discipline.

164 Also referred to in older sources as the ‘lodeman’, from whence words such as ‘loods’, ‘lodestar’ and ‘mother lode’.
latter being taken on when circumstances required their intimate knowledge of local conditions and navigation.

Unlike in the case of the insured’s own conduct and that of a third party where it was irrelevant, for purposes of the insurer’s liability on the insurance contract, whether or not such conduct was accompanied by fault, or if it was, what degree of fault, a definite distinction was drawn between the consequences of the various types of conduct of the master and the crew. In essence a distinction lay between two types of conduct, namely barratrous and non-barratrous conduct.

Barratrous conduct generally was at first variously and, it should be noted, rather extensively described in the insurance legislation, for example as ‘baratterye, dieverye, ofte eenich misbruyck’ in s 4 of title VII of the placcaat of 1563, or as ‘fraude oft bedroch ende baratterye’ in the policy prescribed by the placcaat of 1571. Later the more precise and circumscribed term ‘schelmerye’, meaning literally ‘knave’, ‘villainy’ or ‘thievery’, or, more technically, ‘barratry’, was the most commonly used in this regard. Non-barratrous conduct, in turn, was most commonly referred to in the legislation by the term ‘onachtzaamheyt’, meaning neglect, carelessness, or inattention.

In other Roman-Dutch sources, barratrous conduct in the narrower sense of ‘schelmerye’ was described as involving fraudulent conduct and wilful intent, while, by contrast, non-barratrous conduct included fault (culpa) or negligent conduct, both in the positive and negative senses of commissions and omissions. More pertinently, Bynkershoek pointed out that the word ‘onachtzaamheid’ in the various legislative measures included all non-fraudulent fault and not only negligence.

---

165 In terms of art 110 of par 4, title 11, part IV of the Antwerp Compilatae of 1609 (see De Longé vol IV at 244-246), cover against barratry included cover against loss or damage caused through the ‘onervaerenheijt, versuijmenisse, bedroch oft diefte’ of the master or crew, and in terms of art 111 barratry generally included ‘alle fauten, mishandelingen ende gebreken daermede den schipper oft sijn schipvolck belast oft beschuldicht connen worden’.

166 See eg the policy prescribed by the Amsterdam keur of 1598; s 5 of the Rotterdam keur of 1604; the prescribed policy in the Amsterdam amending keur of 1688; ss 42 and 43 of, and the policy prescribed by, the Rotterdam keur of 1721; and the policies in terms of the Amsterdam keuren of 1744 and 1775.

167 See eg the policies prescribed by the Amsterdam keur of 1598; that prescribed by the Amsterdam amending keur of 1688; s 42 of, and the policy prescribed by, the Rotterdam keur of 1721; and the policies prescribed in terms of the Amsterdam keur of 1744 and the amending keur of 1775.

168 See eg Van der Keessel Theses selectae th 745 (ad III.24.7); idem Praelectiones 1455 (ad III.24.7) (‘dolus vel fraud’). According to Jolles 57, the term ‘baratterye’ employed in the placcaat of 1563 was derived from the Spanish for a crook or ‘gaauwdief’. Dorhout Mees Schadeverzekeringrecht 585 renders ‘scheimertij’ as ‘kwade opzet, dolus directus’.

169 See eg Van der Keessel Theses selectae th 746 (ad III.24.7); idem Praelectiones 1456 (ad III.24.7).
tegen over de schelmery staat, en enkel niet de schuld van nalatigheid”), and therefore also recklessness (dolus eventualis).

Generally speaking, therefore, barratry was any wrongful, and hence unjustified, conduct fraudulently committed by the master or crew to the detriment and at the expense of the owner of the ship or of the owner of cargo on board the ship. It included a variety of possible acts, as long as they were performed with the required fraudulent intent and were not justified by the circumstances. The most common forms of barratry were the casting away or scuttling\(^{171}\) of the ship with her cargo; deserting or abandoning the ship; selling her or embezzling her cargo; using the ship to smuggle prohibited goods or contraband or to engage in illegal trade with the enemy; diverting her and changing or deviating from her course; or refusing to discharge the ship at her destination.

### 4.3.2 The Position in Law and Practice in the Sixteenth Century

The earliest insurance practice regarding the peril of barratry appears ambiguous.\(^{172}\) On the one hand, it seems that although barratry may have been an insurable risk in some instances, early Italian insurance policies customarily excluded the insurer’s liability for loss or damage caused by the barratry of the master.\(^{173}\)

---

\(^{170}\) See Bynkershoek *Quaestiones juris privati* IV.4. From his discussion *Quaestiones juris privati* IV.6 of a case of 1716 (see § 4.3.4 n220 infra), it appears that a distinction was drawn between ‘schelmerij’ on the one hand and recklessness (‘de uiterste onachtzaamheid’ and ‘grove schuld’) on the other hand. Recklessness was not the same as ‘schelmerij’ but, at least for present purposes, on a par with negligence.

\(^{171}\) Scuttling was the deliberate sinking of a ship by opening her seacocks or blowing holes in her bottom with explosive charges so that she filled with water. A ship could be justifiably scuttled, eg in time of war to avoid enemy capture, or unjustifiably so, eg by her unscrupulous owners with a view to recovering on their insurance contract.

\(^{172}\) This is best illustrated by the explanation of Roccus *De assecurationibus* note 44.

\(^{173}\) See eg Holdsworth *History* vol VIII at 280; Piergiovanni ‘Rota’ 36-37 (‘baratteria del capitano’ was excluded by custom in Genoa); Roccus *De assecurationibus* note 89, who noted that although insurers were liable for the barratry of the master and crew, the insurance policies effected in Naples and elsewhere in his time customarily expressly excluded the risk. That barratry was an included peril in Naples, appears from the Neapolitan all-risks policy which covered ‘oro omnibus casibus fortuitus, & periculis, quovis modo intervenientibus’ and which did not contain any exclusion of liability for barratry. When a dispute arose on this policy whether the insurers were liable where the master had absconded with the ship and the insured goods, the local Court in the case of Ioannis Baptista v Ioannis Marcus Maresca (1607), and again in the case of Octavius Blanditus v Insurers (1615), held for the insured because of the absence in the policies of a clause excluding the liability of the insurers for the barratry of the master. See further Roccus *De assecurationibus* note 89 and also Roccus/Peltama Gewijsdens decis 6 (Odoardus & Guilelum Micco [who were Englishmen] v Emanuel Vaez (1643)), and decis 11 (Joan Baptista Ghirardini & Other Insured v Stephanus Thieri & Galeatus Nale & Other Insurers (1646)), both cases involving and indirectly concerning defences of barratry of the master.

See too *Rotae Genuae Decisiones* decis III num 15 where it was decided that insurers were liable for a fault committed by the master of a ship, and that they had to claim against the master who had caused the damage (‘assecuratores an teneantur de culpa commissa per gubernatorem, seu patronum navis, et de dolo vel barattaria’).
Santerna noted that policies usually excluded the fraud of the master of a ship, but thought that in some appropriate cases one could while in others one could not expressly insure against such conduct. But there were at least as many other Italian policies which in fact explicitly mentioned the barratry of the master as one of the insured perils.

In the fifteenth century barratry appears not to have been covered in insurances concluded in the Low Countries. The earliest evidence of the position appears from the case of Jean Vasques v Jacques Dorie & Partners which came before the Schepenen Court of Bruges in 1468. Vasques had insured a cargo of sugar on board a ship which was wrecked on the coast and he claimed the sum insured on the policy. The Court ordered the insurers to make a provisional payment to Vasques with the sum being repayable if they could prove within a particular period of time that the ship’s cargo or a part of it had been embezzled by the master, the latter’s barratrous conduct not being covered by the local and Italian underwriters of the policy.

174 Santerna De assecurationibus III.68-72. According to him, an insurance on a ship against all risks did not include cover against the barratry (‘barattoria, ribalderia, & fraudes’) of the master and the mariners. The reason was that loss caused by such conduct was not regarded as fortuitous (‘casus fortuitus’), the master being appointed on board the ship by the owner as a trusted person. By contrast, though, Santerna pointed out, in the case of an all-risks insurance on goods, the insurer was liable for loss caused by the fraud of the master, unless that peril was expressly excluded, as was customary. This was only fair to the cargo owner who loaded his goods on the ship in good faith and who could not have had much knowledge of the honesty of the master whose fault could for that reason not be attributed to him. In this case, the loss had to be regarded as fortuitous and included in the insurance, unless the owner of the insured goods was also at the same time the owner of the ship, in which case he would be accountable for the master’s fault.

175 See eg De Roover ‘Early Examples’ 187; Mullens 68. Thus, the Florentine policy of 1523 included the risk ‘di Barratteria di Padrone’ (see Magens Essay vol I at 76) and the Ancona policy on goods of 1567 provided for the insurer’s liability for ‘de fraude Magistri navis sive scribae’ (see Straccha De assecurationibus XXXI).

Straccha (XXXI.3-5) considered whether, if barratry were not expressly excepted or mentioned in the policy, it could be regarded as a legal (implied?) exception so that the insurer would not be liable. He noted a difference of opinion. According to some, including Santerna, barratry had to be expressly mentioned if it were to be covered (ie, it was an implied exclusion), while others thought it had to be expressly excluded if the insurer were not to be liable (ie, it was an implied inclusion). Straccha himself recognised various possibilities, the most important being that if the fraud of the master was excepted, the agreement had to be given effect to. He also mentioned various other factual situations under which the insurer was, presumably in the absence of an express exclusion, liable for the barratrous conduct of the master.

176 See Raynes (1 ed) 13 who mentions a further case before the Bruges Court in 1456; Gerard Plouvier, of Bruges, and Saldonne Ferrier, a Catalan merchant, had effected an insurance with ‘la Compagnie de George Spingle’ on a particular ship. The insurers pleaded that they were not liable as the master of the ship had committed barratry and as, according to custom, barratry was never covered under the insurance (‘selon la coutume sur ce entretenue, rebaudise de patron n’esté point comprise souutz la généralité des cedules des assurances’). Again the insurers were ordered to make a provisional payment of the sum insured, the amount being repayable if they could prove within a stipulated time that the master had in fact committed barratry on the voyage.
Although it appears that in practice insurance against barratry may have been possible, 177 fear of a possible connivance between the insured shipowner and his master resulted in the Spanish authorities in 1563 excluding the peril of barratry from the cover to be provided by insurance policies.

In terms of s 4 of title VII of the placcaat of 1563 no insurance could be concluded against the 'Barrety, Roguery or other Misbehaviour of the Master or the Ship’s Crew'. 178 This specific exclusion was necessary in view of the universal cover provided by the policy prescribed by that placcaat. The aim with this measure, no doubt, was to ensure and increase the interest and care of the insured shipowner in the proper and careful selection and control over the persons, both the master and the mariners, to whom he entrusted his ship. This was achieved by having the shipowner bear the risk of any misbehaviour by his master and the crew of his ship. 179 The provision lacked the finer distinctions already drawn elsewhere 180 and which would only be drawn later in the Netherlands. Thus, it did not differentiate between the conduct of the master and that of the crew, nor between the consequences of such conduct in case of hull insurance and cargo insurance respectively. And although insurance against the consequences of all types of conduct of the master and crew was not prohibited, the specific type at which this provision was aimed was not absolutely clear. It does appear, though, to have been at least something more than mere neglect on the part of the master and the crew, against the consequences of which, presumably, insurance was still possible. 181 The cargo policy form prescribed by the placcaat of 1563 made no mention of the conduct of master and crew and thus provided no clarification.

It appears, further, that insurance against barratry was customary at the time and also before the promulgation of the placcaat of 1563, 182 and that the blanket

---

177 Thus, Ferufini's proposal in 1555 (see again ch IV § 1.3.2 supra) included 'schelmerij' in the form of insurance policy he proposed.

178 The translation is that of Magens Essay vol II at 25. In the original: 'tegens die baratterye, dieverye, ofte eenich misbruyck vanden Schipper ofte Schiplited'.

179 See further eg Goudsmit Zeerecht 246 (any insurance against barratry was null and void); Hammacher 113; and Kracht 19.

180 See eg the exposition of Santerna in nl74 supra.

181 But see Scheltinga Dictata ad III.24.7 sv 'oock alle 't qunt by schelmerie, etc', according to whom s 4 did not permit insurance against damage caused by 'schelmerie ofte onagtzaamheid'. The latter type of conduct was, however, not mentioned in s 4, unless it had to be understood under the phrase 'eenich misbtyyck'.

182 In any event s 4 added to the prohibition the express further provision that all contrary customs were abolished ('[af]bolerende ende te niente donee alle Usantien en Costuymen ter contrarien'). In the sixteenth-century Antwerp policies concluded prior to 1563 investigated and compared by De Groote, most covered barratry. See De Groote Zeeassurantie 129.
prohibition on insuring against the barratry of the master was not in accordance with mercantile usage, as a result of which it came to be ignored in practice.\textsuperscript{183}

The \textit{placcaat} of 1571, in contrast to its predecessor, contained no provision mentioning the conduct of the master and crew and the earlier prohibition was therefore not repeated. In fact, in terms of the perils clause in the cargo policy prescribed by s 35 of the \textit{placcaat}, one of the perils covered was the fraud or deceit and barratry of the pilot or master of the ship and the mariners (\textit{fraude oft bedroch ende baratterye vanden Pylote oft Patroon vanden Schepe, ende vande Schippers}).\textsuperscript{184} On the face of it, therefore, this constituted an about-turn in the legal position and a return to the accepted practice which was valid prior to 1563 and which became invalid but was still adhered to thereafter.\textsuperscript{185} It is to be noted, though, that the fact that the fraudulent conduct (\textit{\textquoteright schelmerij\textquoteright}) of the master could be insured against, merely meant that the insurer was liable in the case of loss or damage caused by such conduct if it was committed without the instructions, knowledge or consent of the insured shipowner or cargo owner, for then the insured himself would have been at fault and the insurer relieved of liability.\textsuperscript{186}

From evidence regarding the insurance customs in Antwerp in the first decade of the seventeenth century,\textsuperscript{187} it appears that a distinction was drawn in practice between cargo and hull policies, a distinction which, as will appear below, subsequently also came to be reflected in the formal Roman-Dutch law as it developed by way of legislation.

As a rule insurers were not liable for loss or damage caused by the barratry of the master or crew, but such perils could, at least in the case of the cargo policy, expressly and pertinently be insured against in terms of customary insurance law.\textsuperscript{188} If expressly so insured, though, the master or the member of the crew involved and not the insurer was primarily liable to the insured, the insurer being relieved of liability to the

\textsuperscript{183} See eg Den Dooren de Jong \textquoteleft Lombard Street\textquoteright 17. He refers to an Antwerp policy on goods of 1566 which specifically covered barratry in direct contravention of the prohibition in the \textit{placcaat} of 1563. The policy further contained a reference to the insurance customs in London which, at the time, regarded barratry as insurable (see further § 4.3.5 \textit{infra}). In the sixteenth-century Antwerp policies investigated by De Groote which were concluded after 1563, the majority continued to cover barratry as before. See De Groote \textit{Zeeassurantie} 129.

\textsuperscript{184} This peril was not mentioned in the policy prescribed by the provisional \textit{placcaat} of 1570 which therefore merely repealed the earlier prohibition of 1563 by implication.

\textsuperscript{185} See eg Scheltinga \textit{Dictata ad III.24.7 sv \textquoteright oock alle \textquoteleft t gunt by schelmerije, etc\textquoteright}; and further Goudsmit \textit{Zeerecht} 263 who suggests that the requests of merchants may have resulted in the repeal of the prohibition; and Sneller 110-111.

\textsuperscript{186} See Mullens 66 and again § 4.1 \textit{supra}.

\textsuperscript{187} See generally Mullens 68-69.

\textsuperscript{188} In terms of art 109 of par 4, title 11, part IV of the Antwerp \textit{Compilatae} of 1609 (see De Longé vol IV at 244-248), when any loss was caused by the \textquoteleft toedoen, schult oft mishandelinge\textquoteright of the master or the crew, known amongst merchants as \textquoteleft baraterie du patron\textquoteright, the insurers were not liable for such loss, unless they had expressly agreed to be so liable.
extent that the master or mariner was liable and able to compensate the loss in question. This was clearly an indication, therefore, that in practice it was not acceptable for a barratrous master in any way to reap benefit from the fact that the person suffering a loss as a result of his conduct was insured.

By contrast, in the case of hull insurance, barratry was according to Antwerp customary law not insurable at all and insurers could consequently not be held liable for any loss or damage caused by the barratry of the master or crew. The reason given for this was that the insured shipowner had to accept responsibility for the conduct of his master and mariners ('ist den reeder die hem heeft doen versekeren, moet voor den schipper ende sijn schipvolck instaan; ist den schipper, moet de schaede van sijn eigen gebrech [fault] draegen').

### 4.3.3 Developments in the Seventeenth and Eighteenth Centuries

In the Amsterdam *keur* of 1598, as in the *placcaat* of 1571, there was no provision with regard to barratry itself. But in the perils clause of both the hull and the cargo policies prescribed by the *keur*, there was included in the list of named perils the villainy and carelessness of the master and mariners ('schelmerye ende onachtsaemheydt van Schippers ende Bootsgesellen'). This was therefore the first mention of both types of conduct of the master and crew which could be relevant in this context. But otherwise the position as set out in the *placcaat* of 1571 continued to apply in Amsterdam and there was as yet no distinction in the legislation, as apparently there was in practice, between hull and cargo policies.

A more detailed treatment of the topic appeared in the Rotterdam *keur* of 1604 where a whole section was devoted to it and where distinctions were for the first time drawn in a legislative measure between an insurance concluded by or on behalf of the shipowner on the ship and an insurance by or on behalf of the owners of cargo on

---

189 By art 112 of the *Compilatae*, the insured could in respect of loss caused by barratrous conduct not forthwith ('terstonf') claim from the insurer but he had to have recourse first of all ('eerst ende voor al') against the master concerned. Article 113 provided for the insured to retain the freight due to the master for the carriage of his goods 'tot vergeldinge van de schade' for which the master was liable, 'oft, bij gebreke van dijen, gelijckene somme als de vracht debracht om op sijne rekeninge moeten nemen, ... ende ander advenant de verseeckeraers onlasten vant gene sij ter saecken van de verseeckeringe souden schuldich sijn'. Thus, to the extent that the liable master compensated the loss, the insurer was relieved of liability in terms of the policy. Finally, art 114 laid down that where the insured could not proceed against the master, he could forthwith claim from his insurer, 'midts hun overgevende oft cederende sijne actie'. These matters will be considered again in ch XIX § 1 *infra* in connection with the insurer's right of recourse.

190 Article 292 of par 9, title 11, part IV of the *Compilatae* (see De Lange vol IV at 320-322), referring to 'de versuijmenisse, mishandelingen, ontrouwicheit oft gebrech van den schipper ende vant schipvolck'.

191 See Grotius *Inleidinge* III.24.7: Schettinga Dicatta ad III.24.7 sv 'oock alle 't gunt by schelmerije, etc' who noted that the position in Middelburg was identical. The latter also pointed out that in Amsterdam the insurability of the villainy and carelessness of the master and crew, whether expressly provided for or done by implication ('tacite'), could only be acceptable in respect of the cargo policy and not in respect of the hull policy, a distinction which, he pointed out, was drawn in the Rotterdam *keur* of 1604 (which will be considered next) and which was followed everywhere.
board that ship; between the conduct of the master and that of the crew; and between a master appointed by the shipowner himself and a replacement master. Section 5 provided that masters and owners ('Schippers ende Reeeders') of ships could not\textsuperscript{192} insure themselves against the villainy of masters ('tegens de schelmerey van de Schippers') whom they themselves appointed on their ships,\textsuperscript{193} but could insure against the villainy of the crew ('tegens de schelmerey van 't Bootsvoelck') and that of masters appointed abroad ('buyten 's Lands') in the place of the original master on the latter's death or for another reason.

By 1688, when certain amendments were effected to the Amsterdam keur of 1598, the legal position there was more refined following the earlier Rotterdam example. A distinction was introduced not only between hull and cargo policies but also between the position in the case of the conduct of the master and that in the case of the conduct of the crew. In the amended policy forms prescribed in that year, the hull policy provided cover against the villainy of the crew ('schelmery van de Bootsgesellen') and the carelessness of the master and the crew ('onachtzaamheid van Schippers en Bootsgesellen'), while the cargo policy covered the villainy and carelessness of both master and crew ('schelmerey en onachtzaemheid van Schipper en Bootsgesellen').\textsuperscript{194}

The most detailed provisions on insurers' liability for the consequences of the conduct of the master and the mariners were contained in the Rotterdam keur of 1721. In the list of perils mentioned in s 42 against which one could insure, was included the peril of 'the Villainy or Neglect of the Masters or Sailors'.\textsuperscript{195} This was qualified in s 43, though, where it was provided that a shipowner (presumably as opposed to a cargo owner) could not insure himself against the villainy\textsuperscript{196} of the master whom he had appointed himself ('de schelmerey van de Schippers, die zy zelve komen te stellen'). He could insure, however, against the carelessness of such a master ('derzelver onagtzaamheyd') as well as against the villainy of the crew ('de schelmerey van de Bootsgesellen') and of a master who may be appointed to the ship abroad and without his knowledge in the event of the death of original master or for any other reason.\textsuperscript{197}

\textsuperscript{192} Otherwise than in Amsterdam: see Jolles 46.

\textsuperscript{193} The insurer was therefore not liable, irrespective of any knowledge of the insured shipowner of such villainy, ie, even if the shipowner was unaware of it.

\textsuperscript{194} In a discussion of a Hooge Raad case (about which more shortly) of 1717, Bynkershoek Quaestiones juris privati IV.8 made mention of the Amsterdam policies prescribed in 1688 covering 'op schepen tegen de onagtzaamheid van de schipper en op goederen tegen de schelmerij en onagtsaamheid van den schipper'.

\textsuperscript{195} The translation is from Magens Essay vol II at 89. The original read: 'periculen ... van schelmenyen ende onachtzaamheyd van Schippers ende Bootsgzeellen'.

\textsuperscript{196} 'Barretry' according to Magens Essay vol II at 89.

\textsuperscript{197} See Goudsmit Seerecht 397. Magens Essay vol I at 75-76 referred to the distinction in s 43 between the master chosen by the owners and the master who was appointed as replacement elsewhere as a 'remarkable' one. Hammacher 114 is incorrect in his interpretation of s 43.
The position was confirmed by the policies prescribed by the Rotterdam keur of 1721: the hull policy included cover against the villainy of the crew and against the carelessness of the master and the crew, while the cargo policy included cover against both the villainy and the carelessness of the master and the crew.

The Amsterdam keur of 1744, strangely enough, did not directly address the question of the insurability of loss or damage caused by the conduct of the master and the mariners. In the prescribed policies, though, the hull policy provided cover against the villainy of the crew and the carelessness of the master and the crew, while the cargo policy covered both the villainy and the carelessness of the master and the crew. They were thus in this respect identical to the policies prescribed in Rotterdam, and this position was maintained when new policies came to be prescribed by the Amsterdam amending keur of 1775.

Thus, at the end of the eighteenth century, a fairly uniform position obtained in Roman-Dutch insurance law as far as the liability of an insurer for the loss or damage caused by the conduct of the master and the crew was concerned. The position, as it was provided for or as it may be deduced from legislative provisions, may be summarised as follows. The rule, which formally applied from 1571 onwards, and which was in line with the application of the principle of the universality of coverage in Roman-Dutch law, was that one could insure against the villainy ('schelmerij') and the carelessness ('onachtzaamheid') of both the master and the crew. To this rule there was only one exception, namely that a shipowner could not in terms of a hull policy insure against the villainy of the master he had appointed himself, such master's villainous or fraudulent conduct being the equivalent of his own. This exception aside, the rule had at least four possible applications in practice. Firstly, the shipowner could insure against the carelessness of his (own) master; secondly, the shipowner could insure against both the villainy and the carelessness of mariners; thirdly, the shipowner could insure against both the villainy and carelessness of a replacement master; and fourthly, the cargo owner could insure against both the villainy and the carelessness of both master and crew.

4.3.4 The Application of the Law in Practice

No doubt because of the fact that initially the position in Roman-Dutch law was rather unsettled, and because of its complexity when once it was settled, the liability of the insurer for the conduct of the master and the crew frequently gave rise to legal opinions and litigation. These sources not only provide illuminating illustrations of the

---

198 See Goudsmit Zeerecht 340.

199 See eg Bynkershoek Quaestiones juris privati IV.4; Van der Keessel Theses selectae th 745-746 (ad III.24.7); idem Praelectiones 1455-1456 (ad III.24.7) and 1485 (ad III.24.23); and Van der Linden Koopmans handboek IV.6.2 and IV.6.9. See also Dorhout Mees Schadeverzekeringsrecht 584-585; Mullens 66-69.

200 But as Van der Linden Koopmans handboek IV.6.4 pointed out, although insurable, this peril was not included under the named 'perils of the sea'. 
application of the rule and its sole exception in practice, but also indicate the conventional reasoning behind them. In the exposition which follows, I will first treat the exception and then the various applications of the rule, in the order in which they were just mentioned.

To start, then, the exception, namely that a shipowner could not validly insure against loss or damage caused by the villainy ('schelmerij') of the master he had himself appointed to command his ship. By the end of the eighteenth century this exception was beyond doubt. The rationale behind the exclusion of the liability of the hull insurer in this case was simply that the shipowner was responsible for the appointment of the master, and that where he appointed one who was incapable, untrustworthy and villainous, and who acted barratrously, such conduct had to be ascribed to the owner himself. And, of course, it was a well-known principle that an insured could not insure against his own fault, especially not against his own fraudulent conduct. Therefore, the insured could not be permitted to circumvent this prohibition indirectly by being permitted to insure against the villainy of his own master. But, for the exception to find application the master's villainy (schelmerye) had to be established by the insurer, failing which the rule applied and the insurer remained liable.

The most detailed explanation of the prohibition on insurance against loss caused by the villainy of the master, setting out the underlying rationale, the limitations of the exception, and the fact that the parties could not contract out of the prohibition, is to be found in an opinion delivered in 1713. The advocate delivering the opinion noted at the outset that it was trite that the master and his employer, the shipowner,

---

201 See eg Van der Keessel Praelectiones 1485 (ad III.24.23) who explained that if the master intentionally failed in his duty, the insurer of the ship was relieved of liability for the shipowner could not be insured against the fraudulent conduct of the master whom he had appointed himself.

202 According to Scheltinga Dictata ad III.24.7 sv 'oock alle 't gunst by schelmerij, etc' the reason was 'om dat die rheeders zelfs aanstellers geweest zynde zich zelven imputeeren dat zy een zodanig slegt schipper hebben aangesteld'. See too eg Enschedé 32 who suggests that by appointing an untrustworthy master, the shipowner himself was guilty of culpa in eligendo and, by implication, vicariously liable for the conduct of the master who was his employees. Less instructive was Van der Linden Koopmans handboek IV.6.2 who simply stated that shipowners could not insure themselves against the barratry of the master since they themselves appointed him.

203 See again § 4.1 supra.

204 For further explanations along this line, see eg Van der Keessel Praelectiones 1455-1456 (ad III.24.7) who thought that it was the duty of the shipowner himself to exercise care in the appointment of a master and also because otherwise an opportunity for fraud would be created by the shipowner colluding with his master to the detriment of the insurers. See too Dorhout Mees Schadeverzekeringsrecht 585 who thinks that the exception was probably the result of attempts to counter the negligence of shipowners in the equipping, manning and also the commanding of their ships.

205 See the case before the Hooge Raad in 1712 (Bynkershoek Observationes tumultuariae obs 883; idem Quaestiones juris privati IV.4), which will be discussed infra.

206 See Barels Advysen vol I adv 21.
were considered as one so that the shipowner was liable for the acts of his master. This was in fact the basis of s 4 of title VII of the placcaat of 1563 in terms of which no insurance at all was permissible against the baratry, thievery or any other abuse of the master, such insurance being null and void, even if the parties had repudiated the provisions or any customs to the contrary. The master's fault was regarded as the fault of the insured shipowner. Thereafter, the opinion continued, although distinctions were drawn with regard to instances where insurance was possible against the villainy of the master in appropriate circumstances, still in practice insured and insurers persisted in the earlier position, namely that a shipowner could not insure himself against 'schelmerye ... door den Schipper gedaen'. Thus, and this was the crux of the opinion, although one could, as the parties had done in this case, include in an insurance policy a clause in terms of which the insurers undertook liability for loss that may be caused by the villainy of the master ('door toedoen van de schelmery van den Schipper'), such a clause was devoid of any legal effect because one could not contract out of what the opinion termed 'a public law', especially not one in terms of which such contracting out had specifically been declared void.

Related to these views was the point made by the Hooge Raad, more in passing than directly pertinent to the issue before it, in a collision case which was heard in 1733. The Raad noted that in cases such as that before it, an action was often instituted by the shipowner against his insurers where the loss of or damage to the insured ship had been caused by the 'arg of list, of schuld' of the master and that this was done for no other reason than that policies expressly provided that the insurers were also liable 'voor de schuld zo wel as voor de schelmery van den Schipper en de Bootsvolk'. Although it was correct that such action could succeed under these circumstances in the case of cargo policies, that was not necessarily the position with hull policies. It was unlikely, the Raad thought, that such an insurance (that is, by the shipowner against the villainy of the master) by way of an express provision was in fact permissible in a hull policy, especially if one equated the fault of the master, appointed by the insured shipowner, with the fault of the owner himself.

So much for the exception; now to the rule and its various applications.

In the first place, the application of the rule which gave rise to the most controversy and which received the most attention was the one that a shipowner could

---

207 Reference was made in this regard to eg Straccha De assecurationibus XIV.13; Leoninus Centuria consiliorum cons 23; and Rotae Genuae Decisiones decis III n5 and decis XXV n4.

208 Specifically, the opinion noted, where the insurance was concluded by a cargo owner. Although the opinion suggested that the rule was that villainy (schelmerye) was not insurable, that was only the position in terms of the placcaat of 1563. The placcaat of 1571 reversed the rule and accordingly also the exception.

209 Such 'schelmerye' included any (fraudulent) change of voyage or of the course of the voyage ('veranderinge van voijages'). See further ch XIII § 1.2 infra and eg Dorhout Mees Schadeverzekeringsrecht 586 who notes the application in the case of a change of voyage of the principle that an insured was not entitled to insure against the villainy of his master.

210 See Bynkershoek Observationes tumultuariae obs 2808; idem Quaestiones juris privati IV.23.
insure against the negligence or carelessness, as opposed to the villainy, of the master he had appointed himself. This was no doubt because of the proximity of this application of the rule to the well-known exception to the rule.\footnote{211} Although the distinction between this application of the rule and the exception just discussed was no doubt a fine one, and in any event one never fully analysed in the Roman-Dutch sources,\footnote{212} this application of the rule had already been recognised in the seventeenth century in a series of opinions in which it arose for consideration.

In an opinion delivered in 1666\footnote{213} the point was made that the fact that the loss was caused by the fault of the master, provided no defence for the insurers as such fault was in fact a peril insured against.\footnote{214} A pair of opinions given in 1667 on the same legal issue\footnote{215} and which concerned the liability of an insurer in the case of a change of voyage,\footnote{216} noted that for the insurer to be liable\footnote{217} the insured had to prove fault on the part of the master, the liability of the insurers then being founded upon their undertaking, the validity of which was not doubted in these opinions, to be liable also for the fault...
of the master. In the second of these opinions of 1667, the further quite valid point was made, namely that although it was true that insurers stood in for the fault of the master, that was only the case where at the time of the loss or damage caused by the master, he had been acting in that capacity. An example where this was not the case would be where the master had been appointed also as a factor or representative of the shipowner and where, for the particular conduct which caused the loss in question, his command of the ship was actually irrelevant but the quality of his acts as factor or representative was relevant. In such a case, in fact, the loss was caused ‘door schuld van Factoor, en niet van Schipper’. From the eighteenth century, during which time legislation finally removed any remaining doubts, there is evidence also of the judicial acceptance of the rule as to the liability of the insurer for the negligence and carelessness of the master.

In a case decided by the Hooge Raad in 1716, the insurers of a ship which was almost completely lost in a collision with another ship in a storm at sea, denied liability. They argued that the vessel’s master had acted in bad faith or had at least been grossly negligent (‘[met] de uiterste onachtzaamheid’) and had caused the collision recklessly (‘[met] grove schuld’). The Court rejected this defence. It seems that the insurers here could not prove their allegation. But, the Raad continued, even if the collision was caused by the ‘bedrog en grove schuld’ of the master, the insured was covered against it.

218 Similarly, in an opinion in 1681 (see Nederlands advysboek vol II adv 202) it was stated that even if the master had not complied with his duty properly en ‘het zelve Schip malitieuselijck verlaten en geabandonneerf’, something which could not be established in this case, the insurers would still be liable in terms of the policy because of their having undertaken to take over the risk of the ‘versuym en onagtsaamheid, en malitie van de Schipper en Matrooseri. According to Van der Keessel Praelectiones 1456 (ad III.24.7) and 1485 (ad III.24.23), it was not negligent of a master if he abandoned a ship which had stranded on the coast and was so damaged that she could not be repaired without greater expense than her value. But even if, in such a case, the ship was thereafter further damaged through the negligence of the master (or the crew), the insurer remained liable. See again § 4.2 supra.

219 But, while the insurer was liable for loss caused by the fault of the master acting as such but not for the fault of the master acting as a representative of the insured, the underlying principle probably remained, namely that when the master could be regarded as an outsider or third party proper (and not as a representative of shipowner), the insurer remained liable. See again § 4.2 supra.

220 See Bynkershoek Observationes tumultuariae obs 1290; idem Quaestiones juris privati IV.6.

221 The Raad thought it unlikely that the master would recklessly risk his own life by a collision in a severe storm with another ship, or that the crew would risk their own lives in obeying the master’s orders to cause such a collision. There was evidence, in any event, that the ship’s rudder had broken in the storm and that that had caused her to collide with the other ship.

222 In the context, obviously as opposed to his ‘schelmerye’. The decision therefore showed that recklessness was not the same as villainy (‘schelmerye’) but was on a par with negligence: see again n170 supra.
In a decision in 1717\textsuperscript{224} which was concerned with a change of voyage under a hull policy, the Hooge Raad pointed out that although the shipowner did appoint the master and was liable in terms of Roman law for the latter’s acts, in terms of current law the shipowner could not insure against the fraud of the master but he could insure against his fault (‘schuld’).\textsuperscript{225} And finally, in a case before the Raad in 1728,\textsuperscript{226} the obvious but often overlooked point was made that although a shipowner could insure against the carelessness and (non-fraudulent) fault of the master, where the master was also the owner, or a co-owner, of the ship in question, such insurance was not permissible, for then the fault of the master was equivalent to the fault of the insured owner of the ship himself.\textsuperscript{227}

The second instance of the general rule as to the insurability of loss or damage caused by the conduct of the master and the crew, was that a shipowner could insure against both the villainy and the carelessness of a member of the crew on board his ship.\textsuperscript{228} On the one hand, the reason why he could insure against the villainy of mariners but not against the similar conduct of the master may have been explicable by the fact that unlike the master, the crew were not, at least not as a rule and at least not directly, appointed by the shipowner himself but rather by the master. On the other hand, the insurability of the carelessness and fault of the crew followed logically from the insurability of similar conduct on the part of the master.\textsuperscript{229}

In the third place, the shipowner could insure against both the villainy and the carelessness of a replacement master, at least one appointed without his knowledge, for example abroad. The insurability of the villainy of such a master, by contrast to the uninsurability of that of his own master, was justified because the owner could not be held responsible in any way for the type of master appointed without his knowledge and neither could the conduct of such a master be ascribed to the owner.\textsuperscript{230} And the

\textsuperscript{224} See Bynkershoek Observatio\ns tumultuar\iae obs 1374; idem Quaestiones juris privati IV.8.

\textsuperscript{225} In this case a ship was lost at sea and her insurers denied liability, arguing that the master had deviated from the permissible course in order to sail with a convoy (as to convoys, see ch XIII § 2.3 \textit{infra}). The Raad decided, though, that the deviation in this case had not been made fraudulently but merely so to continue sailing with the convoy and to proceed to the destination with a smaller risk of enemy attack. Therefore, an insured shipowner, being covered against the fault of his master, could claim from the insurer for loss caused by a deliberate change in the course of the ship's voyage by the master, as long as there was no villainy (\textit{schelmerye}) involved.

\textsuperscript{226} See Bynkershoek Observatio\ns tumultuar\iae obs 2449; idem Quaestiones juris privati IV.14.

\textsuperscript{227} See again § 4.1 \textit{supra} as to the uninsurability of such fault.

\textsuperscript{228} See eg Van der Keessel Praelectiones 1456 (\textit{ad} III.24.7).

\textsuperscript{229} See eg Van der Keessel Praelectiones 1485 (\textit{ad} III.24.23) where the negligence of the master and that of the crew were treated without distinction.

\textsuperscript{230} See eg Van der Keessel Praelectiones 1455-1456 (\textit{ad} III.24.7) who noted that the reason for the uninsurability of the villainy of the owner's own master, namely, according to Van der Keessel (see again n204 \textit{supra}), the opportunity for fraud upon the insurer as a result of collusion between the owner and his master, obviously did not apply to a replacement master.
insurability against the carelessness of the own master naturally extended also to that of the replacement master.

The fourth and final application of the rule concerned cargo policies. The owner of goods on board a ship could insure against the villainy and carelessness of both master and mariners.\(^{231}\) The reason, simply, was that the master and crew were clearly third parties as far as the cargo owner was concerned. Because he was in no way responsible for their appointment, nor for their conduct, he could insure against any loss or damage resulting from it.\(^{232}\)

Despite the apparent logic of this proposition,\(^{233}\) there appears to have been some uncertainty about it, especially about the insurability by the cargo owner against the villainy of the master. The reason for this may have been the lack of any express provision for this case in the applicable legislative measures and the fact that the position had to be deduced from the stipulations contained in the prescribed policies.

Thus, in 1636 an opinion was requested on the matter. It confirmed that insurers of goods were liable to compensate the owner of those goods for a loss suffered when the goods were confiscated because of the master of the ship not paying all the duties due on those goods.\(^{234}\) According to Bynkershoek,\(^{235}\) this opinion of 1636 was correct

---

\(^{231}\) See eg Van der Keessel *Praelectiones* 1456 (ad III.24.7), 1472 (ad III.24.15) who pointed out that although the insurer was not liable for inherent vice (see again § 3.3 *supra*), this did not include cases where the damage to or the diminution in the value of the insured goods was the result of the negligence of the master or the crew in failing to exercise proper care for the preservation of the cargo. The insurance of goods usually included also cover against the intentional or negligent conduct of the master and the crew (see *Praelectiones* 1485 (ad III.24.23)).

\(^{232}\) See eg Scheltinga *Dictata* ad III.24.7 sv 'oock alle 't gunt by schelmerije, etc' who specifically referred to the owners of insured goods who did not themselves appoint the master or crew ('welke den schippers of schippers-gezellen zelfs hebben niet aangesteld').

\(^{233}\) It appears that the point was never taken that a cargo owner, by selecting a particular ship on which to consign his goods, at the same time also chose the master to which he entrusted his goods. The name of the master in fact had to be stipulated on cargo policies (see ch VIII § 4.2 *infra* as to the prescribed content of insurance policies). Possibly the cargo owner was not considered to have the same choice as the shipowner who appointed the master as his employee and agent. The master was not in the employment of the cargo owner. Apart from the fact that the cargo owner's contract was with the carrier and not with the master, that contract was one of carriage (*locatio conductio operis*) and not one of employment (*locatio conductio operarum*). The master was not his employee, and the fact that he may have been his factor or representative did not matter in this regard: see again n219 *supra*.

\(^{234}\) See *Hollandsche consultatien* vol V cons 222. In this case the master had received from the insured consignor of goods sent from the Baltic free port of Danzig (now Gdansk in Poland) to Calais the full amount of the dues payable on them in the Sound between Denmark and the Scandinavian peninsula. The master, however, declared up the amount and value of goods incorrectly so as to pocket some of the money received from the consignor. As a result, the goods in question were confiscated by the Danish authorities. The question arose was whether the insurers of the goods who underwrote them in Denmark were liable for this loss.

The opinion mentioned decisions of the Amsterdam Chamber of Insurance absolving insurers in similar cases which were either approved by the Amsterdam *Schepenen* Court on appeal or acquiesced in and not taken on appeal by the insured. It also noted that although it could not be established if a judgment to that effect had ever been approved by the *Hof van Holland*, a contrary decision had in fact been handed down by the *Hof* in 1626.

The insurers here could not prove that it was generally observed in all places where insurance was regulated, and that it was also so observed and understood by the Amsterdam Chamber, that as far
if the master had been entrusted by the owner with the care of the goods and the pay­
ment of the duties, for the owners of goods were insured against the fault as well as the fraud of the master. But if the duty of paying the duties had been entrusted to someone for whose actions the insurer was not liable, the position would have been different.

The liability of an insurer for the villainy of the master extended only to the case of an insurance on goods, and not, for example, to an insurance on a bottomry loan on a ship.\footnote{Quaestiones juris privati IV.26.}

Less uncertainty existed in the eighteenth century on the issue of the validity of an insurance by a cargo owner against the conduct of the master and the crew.

A case confirming that a cargo owner could insure against the fraud of the master was heard by the Hooge Raad in 1712.\footnote{This much appears from the opinion of 1707 taken up in Barels Advyseen vol 1 adv 20. The opinion expressed was that the insurers of the loan were not liable where the ship securing the loan did not arrive at her destination because of her master’s refusal to enter the port. The argument of the insured was that both the villainy and the carelessness of the master were included in the insurance cover and that the unwillingness of the master to enter the port and the resulting loss accordingly had to be borne by the insurers. This argument was thought unfounded for two reasons. First, the insurability of the villainy of the master had no further application than in the case of cargo insurance. It could not be extended to the insurance of bottomry bonds or to an action on such a bond since such a loan was not the same as goods loaded in ship nor movable or immovable but incorporeal property. Secondly, even if one could extend the stipulation in the policy to bottomry loans, it was still incompatible with local practice. Ever since the placcaat of 1563, insurances against the barratry of a master had been considered invalid and there was but one exception to that, namely \textit{wanneer de Geassureerde goederen en koopmanschappen in een gehuurd schip gelaeden zyn geweest}.}{235}

\footnote{It concerned Amsterdam hull and cargo policies covering the insured’s ship and goods against all risks. The policies specifically included cover, in the case of the hull policy, against the villainy of the crew and the carelessness of the master and the crew, and in the case of the cargo policy, against the villainy and carelessness of both master and crew.\footnote{This much appears from the opinion of 1707 taken up in Barels Advyseen vol 1 adv 20. The opinion expressed was that the insurers of the loan were not liable where the ship securing the loan did not arrive at her destination because of her master’s refusal to enter the port. The argument of the insured was that both the villainy and the carelessness of the master were included in the insurance cover and that the unwillingness of the master to enter the port and the resulting loss accordingly had to be borne by the insurers. This argument was thought unfounded for two reasons. First, the insurability of the villainy of the master had no further application than in the case of cargo insurance. It could not be extended to the insurance of bottomry bonds or to an action on such a bond since such a loan was not the same as goods loaded in ship nor movable or immovable but incorporeal property. Secondly, even if one could extend the stipulation in the policy to bottomry loans, it was still incompatible with local practice. Ever since the placcaat of 1563, insurances against the barratry of a master had been considered invalid and there was but one exception to that, namely \textit{wanneer de Geassureerde goederen en koopmanschappen in een gehuurd schip gelaeden zyn geweest}.}{236} On the instructions of the master who feared that the three ships following his ship were pirate ships, the crew of the insured ship set her alight and abandoned her. The insured claimed for the loss of the insured goods while the insurer argued that the master had acted fraudulently. The Hooge Raad confirmed the judgment a quo in favour of the insured. Even if the master and the crew had any fault (\textit{schuld}) in this case, which they did not, it was lawful for the owner of cargo to insure against such fault. And it was also lawful for them to

as the payment of duties on his goods was concerned, a merchant could not transfer the risk (ie, could not insure against the risk) of their confiscation by reason of the non-payment of duties on them to another, but had to bear it himself with only the possibility of a claim against the master or another one of his representatives. Not only could such a general rule not be established, but the contrary in fact appeared to be the position, as was shown by the opinions given on the matter by various merchants from different commercial centres.

\footnote{See Bynkershoek Observationes tumultuariae obs 883; idem Quaestiones juris privati IV.4.}{237}
insure against the fraud or villainy ('schelmer') of the master. It was true that a shipowner could not insure against the villainy of the master he had appointed to his ship, but here there was no evidence that the master had acted in bad faith ('ter quader trouw').

Similarly a further case of 1722 again confirmed that a goods owner could insure against the villainy and carelessness of the master and the crew. In that case the insurers denied liability for the loss of insured goods through their capture by the English as prize. They argued that the master and crew had simply abandoned the ship and that this was a case of gross carelessness ('groe onachtzaamheid') if not of villainy ('schelmer'). The Hooge Raad rejected this defence on the basis that there was no evidence of any conduct of this nature, but pointed out that in any event the insured cargo owner in this instance was covered also against the villainy and the carelessness of the master and the crew.

One final matter concerns the liability of the master or the mariner. The master, or a member of the crew although this was less likely to have been an issue in practice, obviously incurred liability to the insured shipowner or cargo owner, as the case may have been, for the consequences of his intentional or negligent conduct. But that liability itself did not relieve the insurer of his liability, if any, in terms of the insurance contract to compensate the insured owner against the same loss or damage. The insured did not forfeit his action against the insurer merely because he had an action against the master who was, after all, just another third party. But in those cases where the insurer was liable also for the consequences of the master's conduct, he had a right of recourse against the master.

239 But not, it may be thought, if the cargo owner was also the owner of the ship carrying the insured cargo, for then he had appointed that master and was responsible for his fraud. This point was not taken in this case, but would not have made any difference because of the finding that there was no fraud at all. See too the case which came before the Raad in 1711 (see Bynkershoek Observationes tumultuariae obs 779; idem Quaestiones juris privati IV.4). There the insurers of cargo which was damaged when the ship sank, argued that the loss had occurred through the fault of the master and the crew. That did not appear to have been the case but in any event, Bynkershoek noted, cargo insurers were liable for the fault of the master and the crew.

240 See Bynkershoek Observationes tumultuariae obs 1819; idem Quaestiones juris privati IV.11.

241 In a case before the Raad some seven years later, in 1729 (Bynkershoek Observationes tumultuariae obs 2492; idem Quaestiones juris privati IV.14), the point was made in passing that at Rotterdam an insurance on goods clearly covered any 'bedrog of schuld' of the master and that such conduct, even if it had been established by the insurer, which it had not in this case, would not have relieved the latter of liability.

242 See again § 4.2 supra. See further Van der Keessel Praelectiones 1485 (ad III.24.23) who referred to the master's obligation (treated in more detail in Praelectiones 1389 (ad III.20.14)) ex contractu locationis to take care of the ship and the goods.

243 As to the insurer's right of recourse, see further ch XIX § 1 infra.
4.3.5 Conclusion: The Position Elsewhere

Although the *Wetboek van Koophandel* largely reflects the earlier Roman-Dutch law, it is not in all respects identical as by 1838 the position had become even more refined. More specifically, the exception relating to the villainy of the master had become more circumscribed.\(^{244}\)

The rule, in terms of art 637, is that an insurer is liable for all losses and damage caused by the negligence, omission or villainy of the master or mariner ("veroorzaakt door nalatigheid, verzuim of schelmerij van den schipper of de scheepsgezellen"). The exception to this rule is stated in art 640-1. In the case of an insurance on ship and freight, the insurer is not liable to compensate damage caused by the villainy of the master, unless the parties have otherwise agreed ("ten zij anders bij de polis waren bedongen"). But this exception is in turn limited by art 640-2 according to which such an agreement to the contrary is invalid ("ongeoorloofd") if the master is the sole or a co-owner of the ship in question. The prohibition contained in this exception makes sense in the case of an insurance taken out by the owner for one cannot insure against the consequences of one's own conduct, especially not if it consists of unlawful acts.

Therefore, it became possible, in terms of the *Wetboek*, for the shipowner, by express agreement with his insurer, to insure against the villainy also of his own master, except where the latter is the owner of the ship, in which case the Roman-Dutch exception applies unmitigatedly, as it still does in the absence of such an express agreement.

In terms of art 641-1, the rule is subject to a further exception in its application to cargo policies. In the case of insurance of goods belonging to the owners of the ship in which those goods are loaded (that is, where the goods owners ship their goods in their own ship), the insurers are likewise not liable for the villainy of the master or for loss caused by his voluntary change of voyage, route or ship, even if this occurs without the knowledge of the insured, unless otherwise agreed.

The position in English law differed from that in both Roman-Dutch law and in its denouement in the form of codification in the *Wetboek van Koophandel*.

It appears that in the late sixteenth century, a ship could be insured in London against loss due to barratry.\(^{245}\) As late as 1748, when an attempt was made to codify the law of marine insurance, the Report of the Committee appointed for this purpose by the House of Commons suggested that an insured ought not to recover on account of barratry, unless the master and crew actually ran away with the ship or goods, or stole

\(^{244}\) See further Dorhout Mees *Schadeverzekeringsrecht* 585; Enschedé 112; Jolles 57-58; Lipman 238-239; Noyon 71-73; and Van Renays 366-371.

\(^{245}\) See Raynes (1 ed) 33, (2 ed) 29-30 who refers to a London policy of 1563 which covered the barratry of masters and mariners, a peril excluded by the Antwerp *placcaat* of that year. From the draft *Booke of Orders* on the degree of protection available in London in the 1570's, it appears that in terms of Order 1 insurance covered 'all.perills and dangers of ... Barratrie of the Master and Marriners [to] whose Government ye Shipp, Goodes and merchandizes shalbee committ'. See Kepler 'London Marine Insurance' 49. Malynes *Consuetudo* 1.29 noted in 1629 that the 'barratries' of the master and mariners could not be avoided, except 'by a provident care to know them, or at least the Master of the Ship whereupon the assurance is made'.
part of it, and then only the actual loss ought to be recoverable. Whether this latter suggestion in fact impacted upon practices then current, though, is not clear, for the earlier position appears to have been maintained by the mid-eighteenth century. Insurers did and were permitted to accept liability for loss or damage caused by the barratry of the masters as also by the fault and negligence of the master and the crew. And when the Lloyd's policy was settled in 1779, it no doubt reflected current practice by insuring, without further ado, both ship and goods against the 'Barratry of the Master and Mariners'.

The meaning of the term 'barratry' came to be considered in several English cases towards end of the eighteenth century. These interpretations eventually came to be codified in the Marine Insurance Act of 1906 in which rule 11 of the appended Rules of Construction provides that the term 'barratry' includes, but is not restricted to, every wrongful act wilfully committed by the master or crew to the prejudice of the owner or, as case may be, the charterer.

5 The Perils of War

5.1 Introduction: The Insurance of Perils of War in Practice

For the Dutch the sixteenth, seventeenth and eighteenth centuries had almost as many years of war as of peace. Even after the Dutch War of Independence (the Eighty Years War) against Spain from 1568 to 1648, there were numerous other intra-European conflicts in which the Netherlands were involved, including four Anglo-Dutch Naval Wars in 1652-1654, 1665-1667, 1672-1674 and 1780-1784, and a war against France from 1672 to 1679. Not surprisingly, war and the risks attendant upon it were of crucial importance to the practice and law of insurance during this period. Furthermore, Dutch insurance markets were influenced not only by wars in which the Netherlands were directly involved as one of the belligerents but also, because of their important role as insurers of interests throughout the Continent, by European wars and conflicts generally.

---

246 See Raynes (1 ed) 166, (2 ed) 161; Wright & Fayle Lloyd's 162-163.

247 See Magens Essay vol I at 50-51 who, in considering the perils for which insurers were not liable, noted that insurers ought not to avail themselves of the defence that the loss or damage was caused by the fault of master or crew. He suggested, rather, that after paying they may oblige the insured to sue the master at their expense.

248 See eg Holdsworth History vol XI at 532-533; Rodgers 178-179. In one of them, Vallejo & Another v Wheeler (1774) 1 Cowp 143, 98 ER 1012, Lord Mansfield decided that barratry was every type of fraud, knavery and criminal conduct wilfully committed by the master or mariners of a ship by which the owners were prejudiced and, by implication, to which they were not privy. The Court was referred to Dutch and other Continental legislative measures in this regard.

249 In terms of English law, barratry cannot be committed against a cargo owner. See further eg Walford Digest vol I at 255 sv 'barratry'; Chalmers 161.
The importance of war is reflected, most visibly and prominently, in the perils specifically named as covered in the insurance policies of the time. Initially, though, there was no need in Dutch insurance law for any distinction to be drawn between marine risks and war risks, the latter of which included, as will become apparent, both the risks of enemy action and capture as well as, more generally, the peril of arrest by authorities, both local and foreign and both friendly and belligerent. Both marine risks (risicum maris) as well as war risks (risicum gentium) were covered by the standard and prescribed policy forms which, in fact, covered the insured against all risks. As was the case with marine perils, there was no need to determine or specifically to name any individual perils of war nor for any special agreement to be concluded in order for those perils to be covered. But although there was no need to mention the individual perils covered in the insurance contract, the model policies prescribed by various Roman-Dutch legislative measures did, right from the start, specify some named perils, including some perils of war.

In the course of time, the Dutch insurance market and practices and, importantly, the requirements of insured, became more sophisticated. A need to distinguish between marine and war risks, and to identify a particular loss as having been caused by the one or the other type of peril, arose with the realisation of the advantages of insuring only against the perils of war, or, conversely, of excluding cover against such perils from the all-risks cover provided by the standard policy. There was no doubt, and this was soon realised, on the one hand, that the perils of war posed, even in com-

250 The distinction between the perils of war, in the narrow sense, and those of arrest has been known in the Netherlands from at least the early part of the seventeenth century. In the proposal for the establishment of a monopolistic insurance company in the Netherlands in 1628 (see Blok 'Plan' 8 and further ch IX § 2.10.2.1 infra), the company was to provide compulsory insurance cover against perils of the sea and against perils of war, but not against arrest and detention of the insured ship or goods by neutral or allied powers. This exclusion was in fact one of the objections against the proposal (see Blok 'Adviezen' 28, 50, 56, 69 and 90).

251 The type of perils covered by the traditional marine insurance policy may variously be distinguished. In addition to natural (marine) perils to which shipping was exposed, and in addition to those perils of human conduct already discussed (ie, of the insured himself, of third parties generally, and of the master and the crew), a further important category of perils insured against concerned what may conveniently be termed 'the perils of war'. Mullens 64, eg, distinguishes between natural and human risks, and the latter is again distinguished for the sake of convenience in marine risks (arrests and detention) and war risks (enemy capture). The perils of war (in the broad sense) may therefore be taken to include the perils of war (in the narrow sense of the peril of enemy capture) and the peril of arrest.

252 See eg De Roover 'Early Examples' 174.

253 See again § 3.2 supra.

254 See Mullens 63 who notes that this arrangement was only logical and practical in a period of virtually continuous war.
comparison to marine risks, a very grave threat to shipowners and merchants, and, on the other hand, that the inclusion of war-risks coverage as a result made insurance very expensive or, conversely, that the exclusion of such cover resulted in a considerable reduction in the amount of the premium payable to the insurer.

Accordingly, there emerged a demand, noticeable and continuously met in the course of the eighteenth century, for cheaper insurance cover both in the form of war-risks cover alone in a time of war, as well as for the exclusion of such cover from the standard marine policy in times of peace. And with this emergence of different ways in which to cover perils of war or in which to exclude such cover, the need arose in Roman-Dutch law, exacerbated by changing and increasingly sophisticated techniques of warfare, also to distinguish and describe the perils of war with ever greater

---

255 The outbreak of war traditionally resulted in an increased demand for insurance cover on local insurance markets. In the sixteenth and seventeenth centuries the conclusion of insurance contracts was not yet a common and widespread practice and the premium that had to be paid for insurance cover was considered an unnecessary and wasteful expense, especially in time of peace. If they insured at all, merchants were likely to do so only in time of war when insurance rates were at their costliest. The demand for insurance in peace-time increased significantly only in the eighteenth century, and it was only then that the more economical option of excluding cover against perils of war was realised and exercised in an attempt to make insurance cover more affordable. See further eg Barbour 'Marine Risks' 571, 589 and 595; Den Dooren de Jong & Lootsma 11; and Gales & Gerwen 50.

256 The outbreak of war, and even the mere possibility of such an outbreak being evidenced by increased hostilities, dramatically drove up insurance (and other, eg freight) rates on local markets, just as peace in turn caused them to drop. See eg Barbour 'Marine Risks' 590 who notes that premium rates easily jumped by 400-500 per cent on the outbreak war; Israel Hispanic World 193, 271, 288 and 324; and Spooner 96-113 who provides a detailed account of the influence of war and related events in the latter part of the eighteenth century on the marine insurance business on the Amsterdam Bourse. The reason for this increase was not simply the increased risk and consequent increase in the ratio of losses expected by the insurers on a particular market, but also the reduction, at the time when an increased demand for insurance cover was traditionally experienced, in the capacity of such insurance markets. This occurred through (part-time) insurers (see ch IX § 2.3 infra) either withdrawing totally from participation, being prepared to cover only marine risks, or going insolvent (see ch IX § 2.9.2 infra) because of increased losses and reduced profitability. See further Spooner 78, 98, 106 and 111; and Zwaardemaker 1-2.

257 See Zwaardemaker 17-20 who notes the following five ways of providing cover against the perils of war: (1) the insurer could be liable for all risks, which was the oldest system, followed in Roman-Dutch legislation; (2) the insurer could be liable for all risks, subject to the condition that an additional premium would be payable on the outbreak of war, which was the method followed in France in the seventeenth and eighteenth centuries; (3) the insurer could be liable for all risks, subject to his right on the outbreak war to waive liability for war risks or to conclude an insurance against those perils for an additional premium; (4) the insurer could be liable only for ordinary (marine) risks with all liability for war risks being specifically excluded in the policy, so that a special, separate insurance contract had to be concluded to cover those risks; and (5) the insurer could be liable only for ordinary marine risks subject to the condition that the insurance would terminate as soon as a peril of war caused loss. It follows that it was possible for an insurer to insure only against the perils of war.
specificity. Unfortunately this need was never fully or satisfactorily met by Roman-Dutch insurance law. 258

5.2 Background: Privateering, Piracy and Maritime Warfare

Before turning to the legal niceties of insurance against the perils of war generally, and before considering the provisions of Dutch insurance policies in this regard more specifically, it is necessary to consider briefly the background against which the relevant legal rules applied and against which those policies operated. This will be done by first investigating what was understood under the general appellation ‘enemies’ and by describing the more common types of enemy conduct which could occur in time of war, and, secondly, by considering, from the point of view of insurance cover, the two main types of peril of war, namely that of capture, and that of arrest and detention.

It is important to stress at this stage that the discussion here is concerned with the insurance of maritime objects of risk, such as ships, goods and freight, against the perils of war. The practice of insuring persons against enemy or piratical capture by way of ransom policies will be considered separately elsewhere. 259

Cover against the perils of war, strictly speaking, included protection against a number of different types of losses. Apart from the risk of physical loss or damage to ships and their cargoes as a result of being rammed by an enemy vessel, shot at by enemy guns or cannon, or set alight by fire-bombs, an equally large risk was that of being captured by the enemy. Not only did such capture involve the detention of the ship and her goods but quite possibly also the owner’s loss of ownership in his often otherwise undamaged ship and goods.

War-risks insurance comprised cover against the conduct of a wide variety of persons and groups of persons. Broadly a distinction existed between the conduct of friends or subjects of friendly or allied nations, and the conduct of enemies or subjects of enemy nations. But in Roman-Dutch law the term ‘enemy’ was not restricted to those belonging to a nation or state formally at war with the Netherlands. It referred also, at the other end of the spectrum, to individuals who, irrespective of their nationality and the friendly or enemy status of their place of domicile, if any, were considered enemies of the Dutch people. Of these pirates were the most important. Apart from pirates, enemies came in various forms, both formally in the shape of the naval warships of a belligerent state, or less formally as armed merchant ships or privateering vessels by which war was conducted in a less formal and organised way.

The distinction between the various forms in which the enemy could appear, was not always clear. Especially in the fifteenth and sixteenth centuries, before the principles

258 See Vergouwen 102-103 who notes that although the practice of separate war-risks insurance developed on Dutch markets in the eighteenth century, the first traces of this practice appearing during the Spanish War of Succession from 1702 to 1713. It was only in the last quarter of that century that there was some clarity about the term used to exclude war-risks coverage namely ‘vrij van molest’. See further § 5.4.7 infra.

259 See ch VII § 3.2 infra.
of the international law of maritime warfare began occupying the attention of lawyers, a very fine and often disputed line existed between, for example, a naval man-of-war, an armed merchantman, a privateering vessel and a pirate ship. To explain the difference, often crucial in view of the wording of clauses in insurance contracts covering or excluding from cover certain named perils of war, it is necessary briefly to look at and to describe the right of maritime reprisal, and the practices of privateering and piracy.

5.2.1 Reprisals

A practice of maritime warfare of particular relevance to insurance against the perils of war was the ancient right of reprisal or retaliation (represailles; schadeverhaal). To be contrasted with piracy on the one hand, and underlying the later practice of privateering on the other hand, reprisals were initially nothing but a question of a shipowner or merchant taking the law in his own hands. Where the property of a person was unlawfully taken from him at sea, he either forcibly recaptured that property or, more usually, as an act of retaliation, he captured similar property from others of the same nationality as those who first took his ship or goods. Later, though, reprisals were only such acts of retribution as were authorised by a state by the issue of letters of reprisal.

When a particular shipowner or merchant, or even a group of them, such as those belonging to a particular city or guild, had been prejudiced in a time of peace by the subjects of a foreign country damaging or capturing his ship or goods at sea, he had to attempt to obtain, through available and legitimate channels, reparation and justice from those aggressors or from the authorities and through the courts of the foreign country of which they were subjects. If unsuccessful, international law permitted such owner or merchant to recover, with force if necessary, compensation for his loss from any person, or through the property of any person, belonging to that country. This he could do in his own country or its adjacent waters, or on the open sea. It was the right, therefore, of a private shipowner to cruise in search of a foreign merchant vessels of a particular nationality to capture as reprisal for the losses he had suffered and to appropriate as his own the ship and her cargo so captured as compensation.

260 See eg Vrijman 23.

261 Of necessity what follows is no more than a potted description. For further, and often fascinating, details on privateering, piracy and maritime warfare generally, see eg the following mainly Dutch sources: Baetens; Geerligs 1-56; Van Grol passim; Van Hamel passim; Hoogenberk 49-85; Kulsrud passim; Kunst 134-136; De Meij passim; Moquette passim; Oudendijk passim; Prud'homme van Reine & Van der Oest 11-31; Starkey passim; and Vrijman passim. Of the Roman-Dutch authors, the most comprehensive was Bynkershoek Quaestiones juris publici I.17 (piracy) and I.18 (privateering). See too eg Van Zurck Codex Batavus sv 'Zeerovers' par 1-3.

262 That is, either from the wrongdoer himself or from one of his innocent fellow nationals.

263 See eg Stracca De assecurationibus XX.1 who referred to reprisals as the law of arrest called 'repressalias' or 'jus hoc prehensionis'.
brought into service on the outbreak of war, private shipowners, either individuals or shipowning companies, were authorised to attack enemy shipping at sea with their own ships. Such authority was granted because of the obvious advantages of destroying enemy shipping and disrupting its maritime commerce at no public cost. And shipowners were prepared to seek permission to attack enemy ships in their private capacity because they were rewarded if successful from the proceeds of the ships and cargoes they captured. Such shipowners were known as privateers, and privateering was therefore the use of privately owned and manned ships to attack and capture enemy vessels and property. Shipowners undertook privateering mainly for commercial purposes and did so at their own risk in the hope of making a profit from their share of the captured enemy property after it had been declared a prize of war. This explains why commissions were issued by states not only to its own subjects but also to foreigners and also why such commissions could be bought.

The authorisation to act as privateer was granted by way of a legal document known as a letter of privateering commission (kaperbrief; commissiebrief; bestelbrief; aantstellingsbrief; stelbrief). The term 'letter of mart' was also used in this connection in the seventeenth and eighteenth centuries, although it applied originally and primarily to the authorisation granted to exercise the right of reprisal. Such letters were granted upon request in the Netherlands by the Stadhouder as well as the Admiral-General of the navy in the name of the Estates-General. They were issued by various provincial Admiralties (Colleges ter Admiraliteit) to both subjects and to foreigners who were given permission to operate as privateers and to search for (ter buit te varen; op vrije nering varen), attack and legitimately capture (kapen) enemy ships, subject to the conditions contained in those letters.

The most important type of privateer was the professional, full-time one whose main aim and activity was to capture enemy ships and goods as prize. These privateers often operated in much the same way as mercenaries, acting on commission from whoever was prepared to grant it to them. The privateer, or the shipowning company

---

267 The most famous Dutch privateer was arguably Pieter (Piet) Pieterszoon Heyn [1578-1629] who captured the Spanish treasure or silver fleet near Cuba in 1628, in the process obtaining a large fortune for the Rotterdam branch of the East India Company of which he was a director.

268 The privateer's aim was therefore not to destroy enemy ships and cargoes but to capture them intact.

269 See eg De Meij 328 for a reproduction of a 'commissiebrief' issued by William of Orange in November 1570.

270 A declining practice at the time when privateering became more common, the language of the practice of reprisal nevertheless survived and continued to be applied to privateering or 'general reprisal' as it was also referred to.

271 There was, nominally at least, a distinction between offensive commissions and defensive commissions. The latter merely authorised the master of a merchantman to defend his ship against attack by the enemy, privateers and pirates, and prohibited any offensive action. For examples of the two types, see eg Hoogenberk 241-252.
acts of reprisal could in terms of international law be performed only when the injured shipowner or merchant's own authorities had acceded to his petition and had granted him permission to proceed by issuing to him a letter of reprisal or of mart (reprisaillebrief; brief van schadeverhaling; commissie van retorsie; lettre de marque) or, if the reprisal concerned action against someone holding such a letter from his own authorities, a letter of counter-reprisal or of countermart (lettre de contremarque). Such a letter authorised the holder to recover the amount of his own loss by the capture of property belonging to a national of the country concerned, with any surplus obtained in the process belonging to his own Government.

This permission to act against foreign shipping distinguished the act of reprisal from an act of piracy. The exercise of the right of reprisal through being granted individual permission to remedy a specific personal wrong committed by a foreigner at sea by way of retaliation was, in theory at least, distinguishable also from privateering. Although the latter also involved a permission to act in an individual capacity against foreign shipping, it occurred in time of war and thus involved action against enemy shipping, and more specifically action against such enemy on behalf of one's own state and not as a means of private repair. Taking reprisal was a form of sanctioned private 'war'. It was a method employed in time of peace and made possible minor acts of 'war' without breaking the general peace between the nations involved.

The practice of issuing reprisals in time of peace was virtually discontinued by the seventeenth century when justice through diplomatic channels became possible and more effectively obtained and when, if it was not obtained, only the state could act and no longer individuals themselves.

5.2.2 Privateering and the Law of Prize

The practice of privateering (kaapvaart; commissievaart; de vaart met Staatse bestelling) which came to prominence in the seventeenth century and reached its zenith in the eighteenth, was based on the ancient but declining practice of taking reprisals. In a sense it was nothing more than a 'general', unlimited reprisal against a national enemy in time of war.

In such times the Netherlands, like other European states, made use of private enterprise to advance their offensive against the enemy at sea and to support their often inadequate navies. In addition to the warships of the Estates-General which were already maintained in service to protect the merchant and fishing fleets, or were

---

264 And this they would, or at least should, have done only after official and peaceful methods to obtain compensation had been attempted without success.

265 In both cases too, the sovereign or government concerned had a financial interest in the outcome of the individual's efforts because of the entitlement to the surplus over the compensation of loss in the case of reprisals, and to the surplus over the reward of effort in the case of privateering.

266 On occasion, though, a sovereign or government granted such letters in time of war against the enemy, and then it was difficult to differentiate a permission to take reprisal from a commission to act as privateer.
involved, specifically equipped a warship which would cruise wherever it was likely that enemy ships could be encountered and captured. Such vessels did not sail on predetermined voyages, had no fixed destination and carried no cargo, and generally their crews received no wages but merely shared in the proceeds of the privateering venture.

Distinguishable from these professionals, were the incidental and occasional privateers, who acted as such in time of and for the duration of a particular war. In such times, merchantmen were usually armed and modified for defence against attacks by enemy, privateering or pirate ships. By obtaining a letter of privateering commission for a particular voyage, such a defensively armed merchant ship instantly also became a privateering vessel, with the possibility of adding to the profitability of the particular voyage should she happen to come across an enemy ship en route to her destination and succeed in capturing that ship. Obviously such part-timers were less likely to succeed than a full-time privateering ship which cruised in search of the enemy, and which carried no cargo but only guns and men and was therefore more capable of overtaking and capturing heavily laden enemy merchantmen.

Letters of privateering commission contained the legal authorisation for the privateering and stipulated the conditions upon which privateers were authorised to act. They empowered the authorised shipowner to capture the ships and goods of the particular enemy named in them and also to search for and, if justified, to capture

---

272 In addition to individual privateers, privateering companies (kaapvaartrederijen) were often established in time of war. Their main activity was the capture of enemy ships and cargoes. They offered participation to the public in the form of shares in the profits derived from the sale of captured enemy merchantmen and cargoes, the subscription of shareholders being used to equip and maintain the privateering vessel. Obviously such enterprises carried a high risk. Apart from loss of or serious damage to the ship in a contact with the enemy, a premature end to the war could put an end to any chance of generating a profitable return on the investment. And, of course, the ship could simply not succeed in capturing any, enough or sufficiently valuable prizes.

See Schadee appendix XIV for the reproduction of a Rotterdam agreement of 1781 to form a kaaprederij to equip and employ a privateering vessel.

273 Merchant ships of both the East and West India Companies participated in privateering in this way.

274 From early on it was recognised in the law of maritime warfare that enemy goods could be captured wherever they were found; enemy goods on a neutral ship were not free and they were not granted immunity by a neutral flag. Likewise, it was even permitted in certain cases to capture neutral goods on an enemy ship. (As to the application of the principle that 'onvry schip soude maken onvry goed', see the opinion of 1673 taken up in Nederlands advysboek vol III adv 253.) The principle, which allowed the confiscation of enemy goods on a neutral ship, the neutral ship herself and any neutral goods having to be restored, continued to be followed in the Netherlands until the second half of the seventeenth century.

Then a new principle gained acceptance, namely that a neutral or free ship made free goods ('vrij schip, vrij goed'). Enemy goods on board a neutral ship could therefore no longer be captured, even if destined for an enemy port. One exception to this was contraband, which continued to be liable of capture even if on a neutral ship (see ch VIII § 5.4 infra for the position of contraband). (Neutral goods on an enemy ship too continued to be liable of seizure.) One of the reasons for the Dutch support of this new principle was that when the Netherlands were neutral, Dutch merchants could continue trading as usual with the warring nations, while, if the Netherlands were at war, it was possible to bring Dutch ships under a neutral flag or at least to falsify such neutrality. At first the principle was merely provided for in some but not all individual commercial treaties and by way of departure from customary international law. By the latter part of the eighteenth century, the principle had gained formal acceptance in Europe (but apparently not in England): property belonging to warring nations was free on board neutral ships, with
enemy goods or contraband in neutral ships.

International law prescribed certain procedures to be followed in order to have captured enemy ships and goods declared as a prize, and to settle any disputes arising in this regard. Dutch prize law was derived from Roman law and maritime customs. It established a formal process according to which the Prize Court (Heeren van het Prijsgerecht), on behalf and under the auspices of the various Admiralty Colleges or, if necessary, the consular representative of the Netherlands in a foreign port to which a

the exception of contraband.

In time, though, this new principle was in turn abandoned as unpractical and commentators on international law in the eighteenth century often supported and expounded the original rule.

There existed an uncontested right in time of war for a belligerent ship to visit and search neutral vessels on the high seas and in its own coastal waters to ascertain whether such vessels were in any way connected with the hostilities, eg, whether they carried contraband. This right was recognised because of the practice of disguising enemy ships as neutral, and of neutral ships carrying enemy goods and contraband. Its aim was to prevent the abuse of a neutral flag. Any resistance to such a search amounted to a forfeiture of neutrality. The right was exercisable by warships or properly commissioned privateers.

In essence, contraband were prohibited goods, mainly of the type which could be used in connection with the war, which were destined for an enemy port. Such goods could be captured even if they belonged to neutral subject and were carried on a neutral ship. As to the insurance of contraband, see ch VIII § 5.4 infra.

Whereas English prize law was extensively developed by the Admiralty Court in the eighteenth century and gained widespread fame, Dutch prize law (prijtrecht) remained more unsystematic although no less detailed and complex. It was set out and described in important sources such as Grotius' De jure praedae commentarius (it contained sixteen chapters, was written in 1604-1606 but published only in 1668, except for chapter 12 which was published in 1609 as Mare liberum, and much of it was repeated in De jure belli ac pacis (1624): see further Braunius 144; Fruin; Molhuysen and also ch V § 3.2.3 supra) and Bynkershoek's Questiones juris publici, as well as in numerous decisions and opinions.

In practice, a placcaat was issued on the outbreak of war to regulate the application of prize law, while treaties on trade and navigation concluded by the Estates-General with other countries also dealt with the topic. See generally for the sources and jurisprudence of Roman-Dutch prize law, Van Hamel 155-157. For early Dutch prize law, see Roelofsen, who discusses a prize case heard by the Hof van Holland and the Grand Council of Malines in 1477-1482. For a fascinating account of a case of privateering and prize in the fifteenth century, see De Roover 'Prize'. The case involved the confiscation in 1473, from a captured ship en route to Florence, of a painting by Hans Memling of the 'Last Judgment'. It was painted in Bruges for the manager of the local branch of the Medici firm, one Tomasso Portinari. The latter made several legal (including obtaining a judgment in 1496 from the Grand Council of Malines against the Hanse privateer who had captured the painting) and extra-curial attempts to recover the painting. His persistence in this regard was due, it seems, to the fact that Portinari and his fellow merchants were also depicted in the painting.

By 1597 five decentralised Admiralty Colleges had been established in the Northern Netherlands, namely in Amsterdam, Rotterdam, Zeeland (Middelburg), Hollands Noorderkwartier and Friesland, under the control of an Admiral-General and, in certain international matters, of the Estates-General in whose name they adjudicated cases. These Colleges were so-called generaliteitscolleges, separate from the provincial or municipal authorities. They exercised jurisdiction over virtually all naval and maritime matters, including prizes. See further eg Van Hamel 153-154; Pollentier 297-301. See too eg the Nederiands advysboek vol II adv 65 (1673) for an extract from the minutes ('Notulen der Besoingnes') of a 'Collegie ter Admiraliteit' containing some rules and procedures in prize cases.
captured ship and cargo were taken, adjudicated upon the validity, in terms of international prize law, of the capture of a ship and other property at sea. The owner of the captured property could appear personally as a defendant in those proceedings as could rival captors who were interested in a share of the prize. If the capture was found to have been unjustified, the ship and cargo were released and the owners compensated for their detention. But if the Court found the capture justified, the captured ship and goods were condemned as a prize of war. Such a prize was then sold at a public auction. After the deduction of the cost of the process and a specified, often large, percentage which went to authorities, the proceeds of such sale, or prize money, was paid over to the capturer for further distribution. The process of the capture and declaration as prize of enemy ships and goods was therefore subject to strict control and the master of a privateering vessel, as also the captain of a naval warship, had to follow the conditions of his commission to the letter.

Obviously, from the point of view of Dutch shipping, commercial and insurance practices, the privateering activities of other nations posed a considerable war risk. Various measures were taken to avoid loss or damage by enemy capture. Apart from overt measures such as arming their ships, or sailing in convoys which could also have been accompanied by men-of-war, Dutch shipowners resorted to a number of subterfuges to

---

279 To contest the process on the ground, eg, of his being a neutral subject, or of irregularities in the capture of his property. An appeal against the decision of the Prize Court was possible to the Estates-General.

280 Who could be privateers but also, of course, naval warships.

281 That is, if it was within the terms of the commission in case of capture by a privateer, and if the captured property in fact belonged to an enemy subject or was contraband goods.

282 From which was distinguished booty (buitgeld), a form of prize which, when an enemy ship was captured at sea, was permitted to be distributed amongst the captors at once and without having to be condemned as prize by a legal process (see again ch V § 5.6.1 supra). According to an old definition, booty was everything that could be picked up by hand above the main deck of the captured ship, except for furniture and the ship’s guns. The ancient custom of permitting captors to lay claim to booty no doubt resulted in much abuse, with the holds of ships often being broken open and the contents strewn on the upper deck to be picked up subsequently as booty. Because of such abuses, letters of privateering commission (or the crew’s contracts of service) often and by the eighteenth century invariably expressly prohibited or circumscribed the captor’s right to booty and pillage. By the beginning of the nineteenth century, this form of prize pickings or pillage came to be abolished.

Also to be distinguished from prize money was bounty, which was the money offered to the crew of naval and privateering vessels for capturing alive the members of the crew of an enemy or pirate ship, so-called head-money.

283 In the case of a privateering ship, the prize money was divided between the owners or shareholders of the ship and her master and crew. The division of prize in Roman-Dutch law was regulated statutorily according to maritime custom and by applicable agreements between the parties concerned. Thus, in terms of a resolution of the Estates-General of 1 April 1602, which was renewed on 27 April 1672, the Admiralty received one-tenth of the proceeds of what had been captured as prize north of the Tropic of Cancer, and one-thirtieth of what had been captured between the Tropic of Cancer and the Tropic of Capricorn. The officers, crew and soldiers on board the capturing ship too received a portion of the prize, determined by their agreement with the owners of the ship, while the participants in privateering enterprises too received portions, as determined by their charters.
conceal the nationality of their vessels.\textsuperscript{284} The nationality of a ship was generally not reliably identifiable at sea merely on her appearance.\textsuperscript{285} It had to be established and proved by other means such as the ship's flag and her documentation. It was easy, of course, to conceal a ship's identity by renaming her for purposes of a particular voyage, or her nationality by flying a foreign (neutral) flag or, when confronted by the enemy at sea, by presenting false documentation such as shipping papers (\textit{scheepspapieren})\textsuperscript{286} which fictitiously indicated her place of origin, destination and her ownership as well as that of the cargo on board. The use of passports or safe-conducts (\textit{geleidebrieven}; \textit{sautconduyten}; \textit{paspporten}; \textit{vrijgeleidebrieven}) was also resorted to in an attempt to escape enemy capture.\textsuperscript{287} Similar steps were taken to conceal the true origin of cargo on board by the falsification of bills of lading and other pertinent docu-

\textsuperscript{284} Initially the nationality of a ship was determined primarily by the domicile of her master, and masters for this purpose often took on citizenship of a neutral port. Later the residence or place of business of a ship's owners became decisive in establishing her nationality.

\textsuperscript{285} There were various reasons for this. Dutch-built ships under foreign ownership were very common. It has been estimated that around 1670 between one-third and one-quarter of England's merchant tonnage may have been foreign built, and that of those ships the great majority had been built in the Netherlands. Furthermore, foreign ships, often after having been captured and sold as prize, were widely sold on local markets not only to locals but also to foreign buyers. See further Barbour 'Merchant Shipping' 250-252.

\textsuperscript{286} Shipping papers were kept on board in the ship's box (\textit{scheepsdoos}), and at the end of the eighteenth century this box regularly contained more than 50 items on every voyage, no doubt making falsification and duplication quite a task. See further eg Bruijn, Gaastra & Schöffer Dutch-Asiatic Shipping 34-35; Kunst 141.

\textsuperscript{287} These passports were official letters, issued in the name of a particular authority and were often obtained, at a price, by the master of a ship from the local representative (so-called \textit{neutralisatiekantoren}) of a foreign neutral state. Some of them granted the master permission to perform a particular voyage and sought to protect his ship against attacks from ships under control of or belonging to the same nation as that of the authorising state, while others were letters containing a certificate of nationality (\textit{nationaliteitscertificaat}) in which the authorising state requested foreign ships to safeguard the ship in question. Naturally masters hoped that these passports would make it possible for his ship and her cargo to sail freely and untroubled by enemy attack. See eg Bijl 35, 46 and 73-74; Emmer 'Slavenreis' 80-81; Hart 124-125 (who also reproduces a \textit{seebrief} of 1678); and Hoogenberk 23-48, and for examples of such passes, 229-240. For a decision of the \textit{Hooge Raad} in 1722 which concerned such a passport and the change of a ship's name, see Bynkershoek Observations tumulutiae obs 1819; \textit{idem} Quaestiones juris privati IV.11. The case is discussed further in ch VIII § 4.5.2 infra.

See also the \textit{Amsterdamsche Secretary} 282-289 for transcripts of passports or letters of recommendation issued by the Amsterdam municipal government requesting an unhindered passage for individual travelers and Amsterdam merchants, as well as assistance, if required. The letters contained a promise of mutuality. Some of these letters were in Dutch while others were in French or Latin. There is even one (see at 288-289) for the conveyance of a dead body. Also transcribed (at 291-293) is an Amsterdam \textit{seebrief}, issued in respect of foreign-going ships to ensure their unhindered passage. This letter declared the ship's nationality and identity and requested a safe passage for her. See too Magens \textit{Essay} vol II at 456-468, where the maritime treaty concluded between Charles II of England and the Estates-General of the Netherlands in London on 1 December 1674 is reproduced. The treaty contained the form of the passport or sea-brief which had to be issued in terms of it by the Admiralty to ships sailing out of England (see at 466-467), or by the Burgomasters of Dutch cities to ships sailing from there (see at 467-468).
mentation. Clearly, in times of war, deceit and subterfuge, all of which of course facilitated insurance and other frauds, were part of the planning of and preparation for any commercial voyage by sea.

Despite, or maybe because of, the formal control over the capture of enemy ships and goods in terms of the international law of prize, and despite the forfeiture of the security (borgsom; bonds for good behaviour) which had to be deposited upon application for the proper compliance with the conditions of a privateering commission, many abuses and clandestine activities occurred. If a shipowner or the master of a ship acted unlawfully as a privateer, for example without the authority of a commission or in breach of the conditions laid down in such a commission, or otherwise bypassed the formal procedures and system prescribed by prize law, he was de iure a pirate.

Privateering was practised in the Northern Provinces from 1568 in the War against Spain, and right through the seventeenth and eighteenth centuries. It was practised especially in Zeeland (Middelburg and Flushing) but also to lesser extent in Holland (Amsterdam and Rotterdam). By the end of the eighteenth century the practice began declining. The last letter of privateering commission was issued to a Dutch privateer in 1810. Privateering, as a form of warfare, was eventually abolished, at least in Europe, by a statement of principle of international law adopted as part of the Declaration of Paris Respecting Maritime Law of 16 April 1856.

---

288 See eg Weskett Digest 350 sv 'masqued ship or property' for further details of the methods employed in time of war to disguise the origin and destination of ships and their cargoes.

289 Such as where he accepted a further commission from another state or sovereign without the permission of the first authorising state or sovereign; where he attacked and captured friendly or neutral shipping; where he murdered the master and crew of the captured ship; where he operated outside the geographical area in which, or the period for which, he was permitted to act as privateer; or where he released the captured vessel on receipt of a ransom.

290 Such as to avoid the complicated and time consuming procedures involved and, more importantly, to obtain a larger share of the captured property.

291 Of course, for the victim, privateers in general were de facto pirates even if they acted perfectly lawfully and under the authority of a commission. It was simply a question of one man's privateer being another man's pirate and it was most apparent when the authority of those who issued the letters of commission were not recognised. In 1587, for instance, the Estates-General declared the Dunkirk (Duinkerker) privateers to be pirates, whether or not they were in possession of commissions. These privateers/pirates were commissioned by the Spanish Government in the Southern Netherlands to attack the merchant shipping of the Northern Provinces during the Dutch War of Independence. Many of them were traitors from the North, a factor which no doubt enhanced their status as pirates there (see further Vrijman 97-171). Likewise, the commissions issued in the United Provinces from 1568 onwards to its own privateers (the Watergeuzen or Sea Beggars) to attack not only the Spanish warships and privateering vessels, but also Spanish and Portuguese merchant shipping, were regarded as invalid by the Spanish authorities.

292 See further Roberts & Guelff 23-27.
5.2.3 Piracy

Just as the transformation from merchantman to privateer required a few steps, so too the owners and masters of privateering vessels who succumbed to temptation very easily and quickly degenerated into full-time pirates or, at best, into operators whose actions occasionally and strictly speaking amounted to acts of piracy.\(^{293}\)

The theoretical distinction between privateering and piracy (zeeroof; piraterie), which was, of course, already known in antiquity, came to the fore in the seventeenth century. Although both involved a violent attack at sea, privateering was authorised and therefore legitimate in terms of international law. Piracy was not. In essence the difference was administrative: the possession of an official sanction in the form of a prior written permission to attack ships at sea obtained from a recognised and competent authority. The possession of a letter of commission proved, at least as far as the issuing authority was concerned, that the privateer was not a pirate. The latter had no such permission, or at least not one from a recognised authority, or he acted outside the scope of his permission. Pirates, who in any case acted both during and outside the time of war, were therefore not under any state authority and were not bound by any rules of international law. In short, a pirate was the enemy of all mankind and not just of a particular state.

But, of course, not all pirates were formerly privateers. Many full-time pirates, even though some of them may have used privateering as a cover for their activities, cruised the waters around Europe and further afield. The most infamous of these were the Barbary pirates of the Mediterranean.

Headquartered in Tripoli, Algiers and Tunis, all of which broke away from Turkish rule in the mid-seventeenth century and became military republics, these pirates plied mainly along the North African coast and in the Mediterranean Sea, especially around the narrow Strait of Gibraltar through which shipping to and from Western Europe had to pass. There they attacked and captured ships and their cargoes, taking sailors captive to be sold as slaves.\(^{294}\) Occasionally they ventured into the English Channel, up to

\(^{293}\) Virtually all privateers and even some warships from time to time transgressed the strict conditions of their commissions and thus legally became pirates. Many full-time pirates and their crews were Dutch privateers turned pirate. One, (Ali) Pisselingh from Flushing, was so successful a pirate that he even became viceregent (onderkoning) of Algiers in 1645 (see Vrijman 264-265). Jean Bart [1650-1702], a Frenchman who operated out of Dunkirk in the second half of the seventeenth century, first with and later against the Netherlands, was another famous and legendary European privateer-pirate. After escaping from English capture in Plymouth, he was made a captain in the French Navy. Another famous or infamous privateer-pirate was Hubert Hugo, an ex-employee of the East India Company, who operated under a French letter of commission. After again being taken into the Company's employment, he was sent to Mauritius in 1761 as Governor to establish a trading post for it there. En route he visited the Cape of Good Hope, and during his stay of almost two months there during 1672, he obtained sitting in the local governing Council and was first in line after the caretaker Governor Albert van Breugel. On the times and tribulations of Hugo, see generally Stapel.

\(^{294}\) The sale of captured seamen as slaves was in fact one of the most profitable aspects of Barbary piracy. During the first half of the seventeenth century, more than 20,000 Christian slaves were sold in the Algiers market alone, and many more in Tunis. The risk of being captured as a slave and having to pay a ransom to obtain one's release, was an insurable peril: see further ch VII § 3.2 infra as to ransom policies.
Ireland, and once, in 1627, even as far as Reykjavik in Iceland. Many renegades from European nations, including a fair number of Dutchmen, joined the Barbary pirates in their profitable business. The threat of piracy, at least in the Mediterranean, declined during the eighteenth century, but was only finally eliminated with the French conquest of Algiers in 1830.

In addition to these pirates, also operating in the Mediterranean Sea were the so-called corsairs who were legitimate privateers licensed by the Turkish government in Constantinople. Of course, from the European point of view, there was little difference between them and the other pirates operating there: both attacked European commercial shipping indiscriminately.

A particular type of pirate known as a buccaneer (filibuster; freebooter; vrybutter) cruised for their own account in the Caribbean and later in the Pacific in the seventeenth century. They differed from pirates only in that did not attack ships of their own nation. Many of them styled themselves privateers, although they were not in possession of commissions. The buccaneers adopted a code of laws amongst themselves, known as the Jamaica discipline, which amongst other matters regulated the division of prize captured by them, and which remained in force until early in the eighteenth century.295

From a legal point of view, piracy was considered a very serious crime. The Estates-General promulgated a range of placcaaten against piracy, showing that the problem was one of considerable complexity and that the measures promulgated were either defective or not properly enforced. On the capture of a European pirate ship, her master was usually put to death, the ship confiscated, and the crew who were often unemployed seamen, pardoned and set free. When a Barbary pirate was captured, the right of throwing everybody overboard, referred to in Dutch by the curious term 'voetspoeling',296 still applied, except when the possibility existed of exchanging captured members of the pirate crew for captured Europeans. Piracy also served as the prime example of a serious maritime offence and many other frauds at sea or in connection with shipping, including insurance fraud, were often likened to piracy, the fraudster having to be punished as would a pirate.297

5.3 The Main Perils of War: Capture and Arrest

Up to the end of the eighteenth century at least, there were two main types of peril of war, namely that of capture by the enemy and that of arrest and detention by the authorities.

295 The code provided, eg, that the captain of a buccaneering ship received 2 shares, officers 1½ share, and seamen 1 share each in all captures.

296 This practice must, it seems, be distinguished from another said to have been originated by the Dutch, namely keel-hauling (kielhauling). This was a form of punishment of insubordinate sailors which involved tying them to a rope and hauling them underneath the ship a few times, a horrifying experience given that most sailors could not swim, that the water was often icy cold, and that the barnacled bottom of the ship could cause serious injury to the human body.

297 As to insurance fraud and such references to piracy, see ch XIV § 4.3 infra.
Enemy capture, also referred to as a taking at sea (neming), was the most severe form of loss by a peril of war. It could occur in different circumstances. The most common was the capture of a merchant ship and her cargo as prize by a warship or privateer of a belligerent nation in time of war. Also possible was capture by a pirate ship. The consequences of such captures depended on a number of factors.

As far as the ownership in a ship or goods captured by a naval or privateering enemy ship was concerned, at common law a ship or goods captured by the enemy during a war became the property of the capturer because of there being no iuris communio with such enemy. The original owner of the ship or goods thus lost his ownership as soon as the enemy capturer had exercised the necessary control over the property and there was no longer any justifiable hope of recovery. Thus, if a captured Dutch ship was recovered or recaptured by a Dutch naval vessel, privateer or merchantman after the enemy could be regarded as having taken proper control of captured ship or goods, ownership passed to the recapturer and did not revert to the original owner. This rule was ameliorated in the seventeenth century by promulgations of the Estates-General providing for the return of the property to its original owner in the event of a recapture within certain stated periods, and allowing the recapturer only a right to a liberal salvage reward (servaticum, droit de recousse), calculated as a certain portion of the value of the recaptured property and payable by the owner of the ship and cargo concerned.

However, once a captured ship and her cargo had been taken into a hostile port and there been condemned as a prize, the right of the owners concerned became wholly extinct in terms of international law. If the ship or cargo was for example sold to a neutral subject, it could not be seized from the buyer by the former owner or by one of

---

298 See generally Scholvinck 118-120.

299 See generally Van der Keessel Theses selectae th 191 (ad II.4.34); idem Praelectiones 408-411 (ad II.4.34), on which the following exposition is based.

300 See eg Grotius De jure belli III.6.3 n2 in fin who required that the enemy must have been in possession and control of the captured ship for 24 hours before ownership passed. It was not necessary, though, that the ship and her cargo had to be taken into an enemy port, that probably being no more than evidence of the capturer having exercised the necessary control and of there no longer being a reasonable hope of recovery.

301 See Grotius De jure belli III.6.7.

302 See eg the Nederlands advysboek vol II adv 63 (1666) for an extract from the procedural rolls of a case heard by the 'Heeren Gecommitteerde Raden ter Admiraliteit' at Rotterdam. A Dutch ship was captured by the English prior to the declaration of war between the two countries and was thereafter, during the war, recaptured by a Dutch privateer. She had to be restituted to her previous owner, and the latter had to pay the recapturer's costs.
his nation's warships as enemy property, even though it was found at sea before it had reached a neutral port.\textsuperscript{303}

In the event of the condemnation of a captured ship and goods as prize, the owners' chances of recovery were very slim indeed. Unless the owner could himself succeed in purchasing his property at the auction at which it was sold as prize,\textsuperscript{304} or was fortunate enough to have his property recaptured, the only other possibility was if the return of captured (but unsold) property was part of the conditions of peace. And even if the captured ship and goods were not condemned as prize but were later returned to the owners, their detention may, and in the case of perishable goods most certainly would, have involved some physical damage apart from a loss of profits.

In the case of the capture of a ship or goods by pirates, the chances of recovery were even less remote than in the case of a capture by the enemy in the strict sense of the word. Because there was no adjudication on the legality of the capture, the owners' only hope was to ransom their ship and goods, and on that option severe restrictions existed.\textsuperscript{305}

Legally ownership in the ship or goods captured by pirates was not considered to have passed to them,\textsuperscript{306} but in practice this obviously made little difference to the owners' position.

\textsuperscript{303} This according to Bynkershoek Quaestiones juris publici I.4, who regarded as inequitable and contrary to international law the resolution of the Estates-General of 27 November 1666 (extracted in the Nederlands advysboek vol II adv 61 (1666)) where it was provided that a Dutch ship captured by the enemy and taken into his port and there declared prize and sold to the subject of a neutral nation, could be recaptured by Dutch men-of-war when leaving that port and before she arrived at the neutral port of the buyer, and be declared a prize of war. (Note, even in terms of the placcaat she was not returned to her original owners.)

That international law and the comity of nations played an important role in this regard, appears from the Nederlands advysboek vol II adv 67 (1677) where there is evidence of a resolution of the Estates-General by which an English ship, recaptured from the French by a Dutch warship, was restituted to her owners without the payment of any premium to the recapturers, upon an undertaking by the English ambassador of reciprocal treatment for Dutch ships.

\textsuperscript{304} Which, of course, still involved a loss for the owner.

\textsuperscript{305} See § 5.4.6 infra.

\textsuperscript{306} See eg Bynkershoek Quaestiones juris privati I.17; Weskett Digest 398 sv 'piracy' par 4 & 6. In the English case of Goss & Another v Withers (1758) 2 Burr 683, 97 ER 511, Lord Mansfield, with copious reference to continental authorities, including Grotius and Bynkershoek, decided that capture by a pirate or by the holder of an unlawful commission did not pass ownership, but that as between the insurer and the insured owner of the captured goods, a capture of this nature was on the same footing as a capture by the enemy. The insured ship or goods was lost, and totally so, by the fact of capture itself, irrespective of the further consequences of such capture and irrespective of the chances, if any, of a recovery. This appears to conform to what was mentioned by Grotius De jure belli VI.9.17 and 19 to have been the usage prevailing in Holland. See further ch XV infra as to the different types of loss recognised for insurance purposes.

By contrast, in the opinion taken up in the Hollandsche consultatien vol VI cons 152 (1651), where the question was whether the sale of a ship by her owner after she had been captured by Turkish pirates was valid in view of the rule that ownership was lost in the case of capture by an enemy of the state ('openbare Vyanden van dezen staat'), the view was expressed that such pirates were in fact enemies and that the position when ships were captured by pirates, was no different from that when ships were captured by enemies proper.
The perils of war in the broad sense of the word also included the peril of arrest and detention and, at worst, forfeiture as a result of the actions of the rulers or authorities of a particular city or state. This included not only an arrest by enemy authorities but also by friendly ones outside the context of war and even by the authorities of the nation or city of which the owner of the insured ship or goods was a subject.

Arrest (aanhouding) differed from capture in that at the time of the arrest the aim was to deprive the owner of the arrested ship or goods of his possession, or at least to curtail his unrestricted use of it. It was not intended to deprive him of ownership.\(^{307}\) It was, furthermore, not an act of war against the owner's state, and could also be performed by friendly third parties, and could occur only in the ports or territorial waters (roadsteads) of the authority concerned.

A ship or her goods could be arrested and detained at sea or in port and even declared forfeited for any one of a number of reasons.\(^{308}\) A ship or goods could be requisitioned for particular purposes in appropriate circumstances, such as by reason of a public emergency. This could be done upon payment of compensation, and even with the ship later being returned. A ship or her cargo could be placed under arrest and detained for a number of other reasons as well. These may, or may not have involved some transgression on the part of the owner or master of the ship.\(^{309}\)

Two frequent reasons for the arrest of a ship or a cargo and for their being placed under embargo were the failure to pay duties and the imposition of quarantine.

The avoidance of the various duties, fees and charges imposed upon ships and shipping was a constant problem, not only in the Netherlands\(^{310}\) but throughout Europe. The avoidance of the import and export duties imposed in the Netherlands by the five Admiralty Colleges\(^{311}\) occurred on a large scale and in a wide variety of guises. In addition to avoiding payment altogether by employing smugglers (convooilopers; sluikhandelaars) or by themselves concealing the wares they brought into and took out of the various ports, merchants also sought to reduce the amount of the duties payable by the under-valuation of their goods and by using falsified invoices, bills of lading and

---

\(^{307}\) The fact that the arrested ship or goods were later returned to the owner, or that they were eventually forfeited, was irrelevant, and the intention at the time the act was committed was the only factor to be considered in this regard.

\(^{308}\) See eg Barbour 'Marine Risks' 563.

\(^{309}\) And whether the insured was covered, depended on the application of the rules concerning causation of a loss by the insured's own conduct, that of third parties, and that of the master and his crew: see again §§ 4.1, 4.2 and 4.3 respectively \(\text{supra}\).

\(^{310}\) See generally eg Van Dillen \textit{Rijkdom} 270-282; Kunst 81-82, 106-107 and 119-120; and De Vries \textit{'Convooien'} \textit{passim}.

\(^{311}\) Import and export duties were known as 'convooien' and the duties levied on trade with the enemy as 'licenten'. The Colleges were in charge of equipping the Navy, and in this regard they were also entrusted with the levying of 'convooien en licenten', the proceeds of which were used to build and maintain warships. A uniform import and export tax system was introduced for the Netherlands as a whole only in 1725.
other documentation. Other duties were also imposed on the shipping industry, including port duties, levies on the loading and discharge of berthed ships, convoy charges, pilotage, beaconage, lighterage, lighting duties, and many more.

Not surprisingly, strict legislative measures existed to counter the avoidance of duties and to ensure the accrual of the expected revenue by their proper collection. The contravention of these measures involved not merely punishment and fines for those involved, but also the arrest, detention and even the forfeiture of the ship and goods involved. Thus, Peckius, in his treatment of the law of arrest, noted that the process of execution and detention (′uitwinninge ende besettinge'; ′via executiva, & detentio′) was permitted to a greater extent against those such as masters and carriers who had to pay duties (′tol′) than against others.

By reason of their mobility, ships were one of the prime ways in which the diseases and plagues which ravaged Europe in earlier centuries could relatively easily and quickly be spread from one country to another and from one city to the next. Various measures were taken to curb this. Ships as a matter of course carried a bill of health (gezond-brief) to avoid being placed under quarantine in port or having their cargo confiscated on the grounds of being infected.

5.4 The Legal Position

5.4.1 Introduction: The Policy Provisions

The insurance policies prescribed by Roman-Dutch insurance legislation at various times listed a number of perils of war in their perils clauses. Although the precise

---

312 Such as documents permitting the importation and exportation of goods duty-free or at a reduced rate of duty. See eg the Amsterdamsche Secretary 289-290 for the reproduction of an Amsterdam ′tolbrief′, a letter permitting the duty-free passage of goods by water or land.

313 In olden times, fires were often lit at night on beaches to warn passing ships of a rocky and dangerous coastline.

314 De iure sistendi cap IV (who and whose property could legitimately be arrested) par 22.

315 In his notes on the Dutch translation of this work of Peckius, Van Leeuwen (ad IV.22) mentioned that in the case of the failure to pay the duty on imports and exports levied in Holland, the possibility of proceeding against masters, carriers and others ′tot confiscatie van hun Schepen, Wagens, Karren, Paerden, ende andere gereetschappen′ existed in addition to the general right of arrest, detention and parate executie of the property.

316 The bill of health was a certificate authenticated by the consul or other recognised port authority. It declared that the ship came from a place where there was no contagious epidemic and that none of her crew was infected upon departure with any such disease. Hence the term ′clean (as opposed to foul) bill of health′. See the Amsterdamsche Secretary 293-295 for a reproduction of an Amsterdam gezond-brief, in Latin, which sought to avoid quarantine in Italian ports by declaring that there was no contagious disease in the ship's port of departure. By contrast, a certificate of pratique was one given to a ship on her arrival from a foreign port in which the health officer at the port of arrival expressed his satisfaction that the health of all on board was good and that there was no contagious disease on board.
wording employed in this regard varied from time to time, the perils expressly insured against remained basically the same.\textsuperscript{317}

Firstly, there was enemy conduct generally. The peril of enemies without further qualification was mentioned in the policies prescribed by the \textit{placcaaten} of 1563 and 1571, and the Amsterdam \textit{keuren} of 1598 and 1688. But this was not or no longer the case in the \textit{keur} of Rotterdam of 1721 and those of Amsterdam of 1744 and 1775 where enemies were referred to only in connection with arrest. Secondly, there was the more specific peril of capture and detention, both by enemies and by friendly powers, which was mentioned in all the prescribed policies.\textsuperscript{318} And thirdly, there was the peril arising from the issue of letters of mart and countermart\textsuperscript{319} which too was mentioned in all the prescribed policies.

The legal position with regard to these perils of war will briefly be considered with reference to the various relevant sources of Roman-Dutch law. For the sake of convenience, the perils of piracy, thievery and robbery, although not specifically mentioned in the prescribed policies, will be also considered under a separate heading.

5.4.2 The Peril of Capture by the Enemy

Dutch marine insurance policies covered the peril of enemies generally or the peril of enemy capture more specifically. Occasionally policies made specific provision for the peril of enemies by the addition of other named perils which were considered relevant to the particular insurance.\textsuperscript{320}

\textsuperscript{317} See again § 2 supra where the perils clauses were discussed in more detail.

\textsuperscript{318} The relevant portions of the prescribed policies employed the following terms. In the \textit{placcaat} of 1563: arrest and detainment of kings, princes and lords whoever they may be ("Arreste ende detentie van Coningen, Princen ende Heeren, wie sy zyn"); in the \textit{placcaat} of 1571: arrests, restraints and detentions of kings, princes and lords of whatever capacity ("Arresten, ophoudingen ende detentien van Coningen, Princen ende Heeren, hoedanich die zijn"); in the Amsterdam \textit{keuren} of 1598 and of 1688: arrests and detentions of kings, queens, princes, lords and peoples ("Arresten ende detentien van Coningen, Coninginnen, Prinsen, Heeren ende Gemeenteri"); in the Amsterdam \textit{keuren} of 1744 and of 1776: arrests by friends, and enemies, detentions by kings and queens, princes, lords, and peoples ("arresten van Vrinden en Vyanden, Detentien van Koningen en Koninginnen, Prinsen, Heeren en Gemeenteri"); and in terms of the Rotterdam \textit{keur} of 1721: arrests and detentions of ruling powers, both friends and foes ("Arresten ende Detensien van hooger Hand, soo wel van Vruden als van Vyanden").

\textsuperscript{319} Various terms were used in this regard ("Brieven van Marken ende Contremarcen"; "Brieven van Marquen ende Contremarquen") and, as pointed out in § 5.2.2 supra, they could have referred both to permissions to take reprisal, or, later, to privateering commissions.

\textsuperscript{320} Thus, an Amsterdam fishing policy of 1637 covered the ship, her equipment and the catch against the usual perils (these were printed on the policy), and also against the following perils (these were added in handwriting): 'U oock versekeren voor alle schaden en interessen, hinder, verlet en versuym die dese voorst schepe met als soude mogen overcomen ter oorsaekte deselve door de Engelse, Vleemsche ofte andere rovers en vlianden deser landen in eenige havenen en stroomen werden gejaeght'. See Den Dooren de Jong 'Practijk' 19.
Insurers were therefore liable in terms of the standard marine insurance policy for the loss of the insured ship or goods by reason of enemy capture. The mere fact of such capture, irrespective of the consequences, constituted a loss for which the insurer was liable. It did not matter, therefore, that the ship or cargo was in fact undamaged or that the owners may not legally have been deprived of their ownership by the capture. The insured was entitled to claim on his policy on the abandonment to the insurer of his ownership in the captured property, if any such ownership in fact remained. This abandonment could take place only after a stipulated period of time. In the event therefore of a ship or goods being recaptured from the enemy, or being returned by them, or redeemed from them before the insured was entitled to abandon, he could not claim from the insurer, at least not for the loss of the ship or goods so recovered or returned.

But the fact that the captured ship or cargo was recovered by their insured owner from the capturers after he had legally abandoned them to the insurers, did not mean that there had been no loss and that the insurers were not liable for the loss by the original capture. This principle was first suggested in an opinion on a bottomry loan and later confirmed in an opinion concerning the capture of an insured cargo of salt on a voyage from Spain to the Netherlands. The ship carrying the cargo had been captured by the French and taken to England. There the master of the ship, on behalf of the carrier, succeeded in buying back his vessel with her cargo. He then sought to compel the insured owner to accept delivery of the cargo and to pay him the agreed freight. According to the opinion he could not do so. The main reason, briefly, was that where a ship and her cargo were captured by the enemy, the captors become

---

321 See eg Roccus De assecuratioenibus note 66 who pointed out that the capture of a ship by pirates or enemies or infidels could be regarded as a misfortune (casus sinister) for which insurers were liable.

322 Put simply, a total loss of insured property for insurance purposes was a much broader concept than a loss of ownership in that property. See again § 5.3 supra and further ch XV § 3 infra.

323 As to abandonment and the periods after the occurrence within which the insured could abandon, see ch XIX § 2.3 infra.

324 For example, on the capture being declared unlawful by a prize court.

325 As to negotiations with the enemy for the release or ransom of captured property, see § 5.4.6 infra.

326 See the opinion of 1662 (Nederlands advysboek vol I adv 11) to the effect that the fact that a ship and her cargo, confiscated by foreign authorities en route to their destination, were subsequently repurchased from them, were so recovered by the owners, and then arrived at the original destination, did not mean that the ship had arrived safely for purposes of a bottomry loan on the ship which was repayable fourteen days after her safe arrival at that destination. The bottomry was voided even though the ship eventually arrived at the destination as it could not be said that she had arrived safely in this case since she was in fact arrested and only arrived 'door een nieuwe inkoop ende redemptie voor rekening van de koopers, te meer, alsoo by den gever [bottomry lender] niet bedongen is vry van confiscatie'.

327 See Nederlands advysboek vol III adv 248 (1674).
the new owners and the original owners are deprived of their ownership. The cargo delivered in this case therefore no longer belonged to the original owner who could not be compelled to receive it or to pay any freight for it. Having been captured by the enemy, the ship and goods had accordingly, as far as their owners were concerned, to be considered as having been lost ("moet werden gehouden verloren te wesen") because such owners no longer had any right to the captured property. And the insurers of such captured ship and goods were therefore liable for the loss suffered by those owners. The insured owners were, according to the opinion, entitled to claim from the insurer on abandoning any rights in the cargo to the insurers. This was so even if the property was later redeemed from the enemy by the carrier, for he then became the owner of the property, ownership not reverting back to the original owners.

5.4.3 The Peril of Reprisals and Privateers

From an insurance point of view, reprisals and privateering could involve the owner of an insured ship or cargo in a risk either as privateer or as the victim of privateering.

There was a risk, where such a shipowner himself obtained a letter of mart for a reprisal or a commission for a privateering venture, that those activities could result in the loss of or damage not only to his ship but also to the cargo, if any, on board. As far as professional, full-time privateers were concerned, the absence of cargo and the sheer physical risk involved in such activities probably meant that the owners of private men-of-war made do without or with inadequate insurance cover against losses arising from their own privateering enterprises. Dutch sources, though, are silent on this aspect. The insurance of ordinary merchantmen who also sailed with privateering commissions may likewise have been influenced by their activities in this regard.

---

328 The position would have been otherwise, the opinion stressed, had the property been captured by a neutral, for then the parties retained ownership in the ship and goods respectively, and the cargo owners would in the event of a recovery have been obliged to accept the goods and to pay the freight, and also to pay a general average contribution for the expenses incurred in obtaining the release of the property.

329 It appears, though, that this was the position even if ownership had not been lost as a result of the capture: see supra. In any case, the insured had to abandon any rights he may have had in the insured property to the insurer, including his right of ownership.

330 See further ch XIX § 2.3 infra as to when such abandonment could be made.


332 The fact that the insured ship was going to be employed on a privateering venture, may have had an influence on her insurance in various ways. One example will suffice. In pursuing an enemy ship or a neutral ship with suspected enemy goods on board, and in accompanying such a vessel after her capture to a safe port to be adjudicated as prize, the insured ship would have deviated from her course. Such a change of course would ordinarily have avoided the insurance (see ch XIII § 1.2 infra) so that any loss or damage sustained after the change of course would not have been covered. For this purpose insurers were prepared, at an additional premium, to insert clauses in insurance policies to accommodate the insured. Thus, the clause "met of zonder kaperbrief" or the one "met het recht om jacht te maken, en prises te nemen" permitted the insured ship to capture enemy ships that she came across and to pursue such ships and to accompany a captured one to port, after which she had to return to her course to complete the insured voyage. It did, however, not permit the insured vessel to wander around looking for
Alternatively, there was the risk of damage or, worse, of loss, through capture and condemnation, of the insured ship caused by a commissioned enemy captor. The Roman-Dutch sources were concerned primarily with this aspect of the peril and that, no doubt, was what was understood to fall under the cover provided by the words ‘letters of mart’. The mere capture by a commissioned capturer, whether a privateer or someone exercising a right of reprisal, involved a loss for insurance purposes, apart from the fact that the insured owner may further also have lost his ownership in the property.

In terms of customary insurance law, there was a specific indication that the loss of or damage to an insured ship, as well as to the insured cargo, flowing from the exercise by an enemy shipowner of his right of reprisal, was covered under the ordinary marine policy. This was so irrespective of whether or not the letter of mart had been properly and justifiably granted, unless the insured himself was the cause of the letter having been granted in the first place. But the insurer was liable even if no letter had been granted at all, as he was in principle liable for all loss or damage caused by enemy conduct, again unless the insured was the cause of the enmity.

Finally, it was also possible, of course, for the privateer to have insured a valuable captured ship and her cargo, for if that ship was lost before it could legally be condemned as a prize, the captor lost any entitlement to prize money.

enemy ships and was therefore not suitable for ships primarily fitted out for and engaged in full-time in privateering. For that case a clause had to be inserted in the policy permitting the insured ship to cruise (‘kruisen’). See further Jolies Deviatie 94-96.

That is, unless the insured himself had attacked the enemy shipping, and was therefore not an innocent victim of the reprisal.

See art 101 of par 4, title 11, part IV of the Antwerp Complatae of 1609 (see De Longe vol IV at 242-244) which determined that insurers were liable for all loss, also in the case of the capture, ‘buijten oortoge’, by someone to whom ‘brieve van marca ofte van trepessalien’ had been granted. Article 102 made it clear that whether or not such letters had been granted properly did not concern the insured, ‘die hem tegens alle schaden ende interesten oft perijckelen heeft doen versekeren’. In terms of art 103, though, cargo insurers were not liable if the insured had known beforehand that a letter of reprisal had been issued against the ship on which the insured cargo had been loaded and if that fact was not mentioned in the policy. And by art 104, the liable insurer was entitled to have recourse against those ‘die t’onrechte oorsake mogen gegeven hebben tot verleeninge van alsuicke brieve’.

Thus, art 105 of the Complatae (see De Longe vol IV at 244) provided that insurers were equally liable where any ship or goods were captured ‘door voorgaende vijantschappen’ between the captor and the insured, even if the former had not been granted any letter of mart. See further on cover at Antwerp against loss through reprisals, Mullens 66-67. See too Straccha De assecurationibus XX who discussed the Ancona goods policy of 1567 which covered the goods against ‘repressaliarum, vel direptionum foederatorum vel hostium’.

See Starkey 64. Such insurance probably occurred infrequently, and there is no evidence of such insurance in Dutch sources. In English law, eg, *Boehm & Others v Bell* (1799) 8 TR 154, 101 ER 1318 held that the captors of ships seized as prize could insure their interest in such ship despite the fact that such interest was defeasible until such time as their right to the prize money had been judicially confirmed.
5.4.4 The Peril of Pirates, Robbers and Thieves

Although the peril of loss or damage as a result of acts of piracy was not specifically mentioned in Dutch marine insurance policies, it was undoubtedly covered, be it because the term ‘pirates’ was included in the term ‘enemies’ which was specifically named in those policies,\(^336\) or because of the fact that those policies in any case provided all-risk cover.

Insurers were therefore liable for the loss of a ship or cargo by reason of its capture by pirates. The insured was entitled to claim on his policy upon the abandonment of the property concerned to the insurer after the particular prescribed period of time, if any, for such abandonment had expired.\(^337\) If the property was recovered within that period, there was accordingly no loss; but after such abandonment the insurer could not escape liability merely because of the recovery of the property. And although the insured was under a duty to take steps to recover the insured property,\(^338\) restrictions were imposed on negotiations with the enemy, including pirates, for the recovery or ransoming of captured property.\(^339\)

But there was a period in the history of Roman-Dutch insurance law when insurance against piracy was specifically and exceptionally not permitted fully.\(^340\) In its preface, the *placcaat* of 1550 mentioned the great losses being suffered by the Dutch merchant fleet, caused by the activities of Scots pirates and also by the unseaworthy condition of ships. In this regard the influence of the practice of marine insurance, including the practice of over-insuring ships and cargoes, was noted.\(^341\) As a result serious abuses occurred, including even connivance with pirates whereby captures and losses were feigned to enable insured to obtain payment from their insurers. In the light of this, s 20 of the *placcaat* provided for the compulsory under-insurance of ships in ballast\(^342\) or less than half loaded specifically against the peril of Scots or other pirates (‘teghens de Scotten of andere Zee-rovers’).\(^343\) Changed circumstances no

---

\(^336\) Van der Keessel, *Theses selectae* th 744 (ad III.24.7) for one thought that ‘enemies’ in the policy forms included ‘pirates’. He pointed out that ‘friendly nations’ were not included but suggested that where friendship was in doubt, express mention of the nation in question was required in practice.

\(^337\) See ch XIX § 2.3 *infra* for the periods an insured had to wait before he could abandon and claim on his policy.

\(^338\) See ch XVI § 1 *infra* as to his duty to avert or minimise loss.

\(^339\) As to these restrictions, see § 5.4.6 *infra*.

\(^340\) See eg Kracht 12, 14, 15 and 18.

\(^341\) The *placcaat* spoke of the insurance of ‘alle interesten, soo sey sulks ten uyttersten weten of willen calculeeren’.

\(^342\) That is, not loaded with cargo but merely with some heavy material to ensure her stability.

\(^343\) In effect, only a partial recovery of loss or damage to the insured ship was permitted in the case of such loss or damage having been caused by pirates.
doubt resulted in a slight amendment in the replacement placcaat of 1551 where s 19 provided for such compulsory under-insurance against pirates and enemies generally ('teghens de Zee-roovers, oft andere de navigatie et coopvaerderye van haerwaerts overe willende verhinderen'). By the time of the placcaat of 1563, compulsory under-insurance was in s 8 of title VII provided for generally ('tegens den periculen vanden Water, Vyer, Vyanden, Zee-Roovers ofte andere, geen uytgesondert') and not only against specific perils.344

Apart from pirates operating at sea, robbers and thieves generally were often mentioned in Roman-Dutch sources in connection with pirates, but, like the peril of piracy, the peril of loss by robbery or theft was not named in the prescribed marine policies. It seems that earlier Italian policies specifically provided cover against 'pirates, robbers and thieves',345 and authors devoted some attention to the difference between these concepts.346

Act of piracy were characterised not only by the lack of authority with which they were committed,347 which therefore distinguished them from authorised acts of violence such as reprisal and privateering, but also by the fact that they involved violence348 at sea, which therefore distinguished them from clandestine theft by members of the crew or from theft or robbery from land. It appears from the lack of any investigation into this matter in the context of insurance, though, that distinctions like these were of lesser

344 See further ch XVIII § 5.2 infra as to compulsory under-insurance.

345 Apropos of which possibly Shakespeare's choice of words in The Merchant of Venice Act I Sc 3 that 'ships are but boards, sailors but men, there be land-rats, and water-rats, water thieves, and land thieves, I mean pirates, and then there is the peril of waters, winds, and rocks'. In older sources, a distinction was seemingly also drawn between pirates and rovers or sea robbers ('Pyraten' and 'Zee-Roovers': see eg n350 infra). While pirates operated only at sea, robbers could operate either at sea (in which case they were referred to as sea robbers or rovers) or on land.

346 See eg Santerna De assecurationibus III.61-67, IV.25-26 (where he noted that loss or capture by pirates or robbers was a fortuitous cause for which the insurer was liable), and IV.49 (where he explained that a pirate was a sea thief or robber, and that piracy was included in the peril of theft or robbery, but that there was a difference between theft and robbery, the former being committed furtively, the latter with violence). See too Roccus De assecurationibus notes 41-43 who, with copious references to his predecessors, drew a fine distinction between (i) theft at sea by pirates, or on land by robbers (the latter being a fortuitous cause and covered by an all-risks policy, but not by a policy covering only 'perils of the seas'); (ii) simple theft ('furtum') of goods committed clandestinely on board ship by a member of the crew or one of the passengers (the insurers not being liable for such theft, amongst other reasons because it was reckoned to be the fault of the insured or the fraud of the master - both of which perils were not insured - if such a theft occurred and not a fortuitous cause ('furtum non est casus fortuitus')); and (iii) violent theft ('latrocinium') committed by thieves or robbers from the shore ('a latronibus terrestribus') while the ship was in port and at night (the insurers not being liable if they insured only against pirates because robbers or thieves ('latrones') differed from pirates ('pyratis'), but being liable on an all-risks policy). See further Weskett Digest 543-544 sv 'theft' par 2 for a detailed reference and explanation of these distinctions of Roccus.

347 According to Bynkershoek Quaestiones juris publici I.17, a pirate was one who robbed at sea without the authorisation of any sovereign.

348 Bynkershoek Quaestiones juris publici I.17 required an element of robbery.
importance in Roman-Dutch insurance law. All-risks cover was the norm and where, later, perils of war were excluded, this was done generally. The terms may well have been used indiscriminately and interchangeably.

5.4.5 The Peril of Arrest and Detention

Apart from capture by the enemy, Dutch marine insurance policies also covered loss or damage caused by the arrest and detention of insured property by national or municipal authorities, or, as it was put, by kings, queens, princes, lords and peoples, of whatever disposition, and thus even if allied or neutral and even if the insured's own.

In the case of an arrest in port, the insurer could conceivably escape liability if such arrest had taken place at the port of departure before the risk had commenced in terms of the policy, or at the destination after the risk had already terminated.

In the case of an arrest and detention caused by the fault of the master, the liability of the insurer depended on whether it was an insurance on hull or on cargo and,

---

349 In one of the few references to the topic, Verwer See-rechten, in his notes on s 4 of title VII of the placcaat of 1563 (at 133-134), mentioned the insured's right to abandon immediately in all cases of 'Diefereye, Rooverije, en verder gewelt van woeste Boosdoeners' for which an insurer was liable, and he then extended this to the case of 'neming van den Turk, en van andere Barbaren; want dese gehooren onder Roovers'. Dorhout Mees Schadeverzekeringsrecht 447 notes that transport insurance (i.e., the insurance of goods being carried) as a rule included also cover against theft and robbery, and that separate insurance against these perils, especially in respect of goods not being carried, was unknown until the end of the nineteenth century.

350 So, in s 27 of the placcaat of 1571 (as to which see further § 5.4.6 infra), there was reference to capture at sea or in port or on land, by pirates, (sea) robbers or thieves, of any nationality ('op de Zee, oft inde Havenen, Rivieren oft Passagien, in Lande, by eenige Pyraaten, Zee-Roovers of Dieven, van eenige Landen'). And Bynkershoek Quaestiones juris publici 1.17 thought a pirate to be one who robbed without authority on land or at sea.

351 See again § 5.4.1 n318 supra.

352 See Van der Keessel Praelectiones 1454-1455 (ad III.24.7) (who noted that Grotius here mentioned only loss or damage caused by enemies) and 1469 (ad III.24.12).

One particularly interesting example of this peril occurred in Italy. Because of a local famine, the inhabitants of the city of Reggio, through their city magistrate, forced a ship coming into port and loaded with a cargo of corn destined for Naples, to offload part of her cargo for local consumption. The cargo was insured with underwriters in Messina and the local Court there in 1628 held the insurers liable for this loss. It was a loss by 'peoples' and was, like that by authorities or rulers, fortuitous: see Vincinio de Medici v Assuradeurs van Messina, referred to in Roccus/Feltama Gewijsdens decis VIII. See too Roccus De assecurationibus note 65 and also arts 141-143 of par 4, title 11, part V of the Antwerp Compilatae of 1609 (see De Longé vol IV at 258-260) which concerned cases where insured goods 'bij den prince oft hooger handt gearresteert ende aeneert worden, om hem daeraff te dienen oft die te houden tot sijn oft des lants gebruick'.

353 Whether the insurer was liable or not depended on whether the risk had commenced or terminated, and that differed according to whether the insurance was on hull or on cargo, and whether it was insurance for a particular voyage or a particular period of time. For the duration of risk, see ch XII § 1 infra.
in the former case, on the degree of fault involved, whilst his liability was excluded if
the arrest and detention was attributable to the fault of the insured himself. Thus, where
insured goods were arrested and forfeited as a result of the master not declaring
them in order to evade payment of duties, or because they were prohibited goods, the
insurer of such goods was liable, unless some fault could be attributed to the insured
himself, such as where he had instructed the master not to declare the goods. Similarly,
where a ship insured at Middelburg was quite lawfully arrested and sub­
sequently confiscated in an enemy Spanish port because the insured had failed to
obtain the necessary permission from the Spanish authorities to visit that port, the
insurers were thought not to be liable for the loss. But apart from the fact that it could
indicate fault on the part of the master or the insured, the unlawfulness or otherwise
of the arrest itself offered the insurer no defence, the fact of such arrest being a fortuitous
cause and a loss in terms of the policy.

5.4.6 Negotiations with Captors and Arresting Authorities

As a general principle of Roman-Dutch insurance law, an insured was under a
duty towards his insurer to avert and minimise any loss or damage he was insured
against by his insurance contract. This meant, in the case of perils of war, that an
insured not only had to take reasonable steps to avoid imminent capture or arrest, but
also that he had to take such steps to have an insured ship or goods released from
such capture or arrest. And this meant, of course, entering into negotiations with the
captor or the arresting authority, either directly or though an intermediary, to obtain a
release, whether by the payment of a ransom or otherwise. Obviously such negotia­
tions might not always have been in the best interest of the insured's own city or state
at the time. For example, if the payment of a ransom to such capturers or authorities
were facilitated, it could well serve to encourage further and increased occurrences of

354 See again § 4.3 supra.
355 See § 4.1 supra. Articles 134 and 135 of par 4, title IV of the Antwerp Compilatae of 1609 (see
De Longé vol IV at 256) stated that insurers were not liable in case of an arrest caused by the insured's
own fault, but that they were liable if the arrest 'geschiet by versuijmenisse oft toedoen van den schipper'
and if the insurance included cover against the fault and barratry of the master.
356 See Van der Keessel Praelectiones 1455 and 1456 (ed III.24.7). See also again the opinion of 1636
(Hollandsche consultatien vol V cons 222), discussed in § 4.3.4 supra.
357 See also Bynkershoek Quaestiones juris privati IV.2, criticising the opinion in the Hollandsche
consultatien vol I at 284 (c1598) - see again § 4.1 supra - for suggesting that the insurer was liable for the
loss of the ship which had been declared 'by Sententie geconfisqueert tot profijte van den Koning' simply
because the risk was considered not to have been terminated upon arrival at the port. He pointed out that
'de assuradeur had niet tegen de magt van het Recht verzekert' and that the insurer was in any event not
liable because the lawful arrest had been the fault of the insured himself.
358 See Roccus De assecurationibus note 54.
359 See ch XVI § 1 infra where this duty is discussed in more detail.
such captures and arrests. It is therefore not surprising to find legislation on the topic regulating the insured's conduct in this regard.

Very detailed was the regulation in s 27 of the placcaat of 1571. It concerned two cases: that of the capture of merchandise at sea, in ports, rivers or straits, or on land by pirates, sea robbers, or thieves of any nationality; and that of the arrest by officials in terms of the ordinances of allied, neighbouring or confederated authorities or rulers. In both those cases one could not compromise, contract or settle with the capturers or arresting authorities but had to proceed lawfully and reasonably, in accordance with international law (the ius gentium) or the treaties concluded on the matter, both for the recovery of such property and also for the punishment of the capturers. In this regard assistance had to be sought from ambassadors, and use had to be made of letters of recommendation, reprisals or other lawful and proper methods. If this route was not followed, s 27 provided not only for the penalty of forfeiting that which was due but also for the imposition of a fine and punishment for having aided and encouraged such robbers and thieves.

It seems that s 27 did not prohibit the insurance against capture (generally or by pirates specifically) and detention - it in fact made absolutely no mention of insurance - but merely sought to regulate negotiations and the payment of ransom to capturers and arresting authorities.

Only in s 16 of the Amsterdam keur of 1744 did any of the Dutch legislatures in the context of insurance revisit the topic of negotiations with capturers or arresting authorities. It did so in great detail. Section 16 provided that a person who wanted to insure a ship and cargo with the intention of ransoming or redeeming such property if it were captured by the enemy ('van door Vyanden verovert wordende, het selve te laten

360 It is not clear whether what was forfeited was the captured or arrested property or the amount of ransom offered for its release.

361 But see eg Bynkershoek Quaestiones juris privat I IV.1 (and also idem Quaestiones juris publici I 25.3 and Van der Keessel Praelectiones 1455 (ad III.24.7)) who clearly misread s 27 by stating that although in terms of s 8 of the placcaat of 1571 (this should in any case be the placcaat of 1563: see again § 5.4.4 supra) one could insure against pirates, in terms of s 27 one could not claim from the insurer the ransom paid to obtain the release of the goods from pirates or friends ('het losgeld van goederen, uit handen van Zeeroovers, of uit de magt van Vrienden, niet van Vyanden, vrygekort'). He also stated that there was nothing on the topic in the municipal keuren, while the Amsterdam keur of 1744, published just before he wrote, did in fact again provide for the matter. Bynkershoek did note, though, that the provision in s 27 of the placcaat of 1571 should not be regarded as having been abolished by the general authority to save insured goods which was commonly inserted in insurance policies (ie, the authority by insurer to the insured to facilitate compliance by the latter with his duty to avert and minimise loss: see ch XVI § 1 infra). Such an authority was in fact also found in the policy formula prescribed by that placcaat.

362 There were other more general measures not specifically linked to the insurance contract. For example, earlier, in 1621, the Estates of Holland and Friesland, in a placcaat 'tjegen rantsoenen tot laste vande Reeders beloofd' (see GPB vol I at 1076), prohibited a captured master or seaman or passenger from giving or promising a ransom for the release of a ship or goods from enemy or pirate capture for the account of the owners of the ships or goods concerned ('tot laste vande Reeder, Eygenaers offe Participanten vande Schepen ende goederen'). It declared such promises void and the owners not bound by them. An exception was made in respect of the payment of ransom for the release of captured persons. See further ch VII § 3.2 infra as to ransom insurance.
Rantsoeneeren, of vrykoopen”), would be bound to express that intention clearly in his policy. He had to mention the maximum amount which the master or someone else was authorised to pay for such ransoming. If the insured had done this, the insurers continued to bear the risk on such ransomed ship and goods until they arrived safely at the original place of discharge, presumably despite the changed voyage or other additional risk involved. Additionally, the insurers were also bound to make good, by way of general average over the ship and goods, the amount, including expenses, paid by way of ransom to obtain the release of the insured ship and goods.

It appears, therefore, that insurance against the perils of war, and specifically the perils of capture and arrest, did not automatically include cover against the amount of ransom that an insured may have had to pay to obtain the release of the insured ship or cargo but that such cover had to be stipulated expressly. It appears, furthermore, that by this time the prohibition in the earlier placcaat of 1571 on obtaining the release, in a way other than that prescribed, of captured goods, and presumably also of a captured ship, may indeed have fallen into disuse or at least have come to be ignored in practice. At least the practice of ransoming captured ships or cargo, although never without controversy, appears to have been lawful elsewhere in Europe, for example in England, at least until the last quarter of the eighteenth century when it was statutorily prohibited there.

363 In this regard provision was made for the method of calculating the respective values of the ship and goods which were to be accepted for purposes of calculating the proportions of their respective general average contributions. See again ch I § 4.6.4 supra.

364 See eg Van der Keessel Theses selectae th 743 (ad III.24.7); idem Praelectiones 1454-1455 (ad III.24.7) who appears to have suggested that the insurer’s liability in terms of s 16 to make good the amount of the ransom as a general average loss, was only relevant in the case of the policy in question covering the perils of war when the insurer was liable not only for the damage caused by the arrest but additionally also for the amount of ransom paid to obtain a release. See further Goudsmit Zeerecht 340-341.

365 See Van der Keessel Praelectiones 1455 (ad III.24.7).

366 As to the position in English law regarding ransom and the agreement concluded or bill signed by the master of a ship captured by privateers in which he promised them and bound the owners concerned to the payment of an amount (usually more than the privateers would have obtain had the captured ship been declared prize in the usual way) in return for the release of his ship, see generally Senior. Although such contracts were recognised in Admiralty, Lord Mansfield in particular made a significant contribution to their introduction in the common law (see eg Holdsworth History vol XI at 534-535; Rodgers 179-182). His Lordship consistently adopted the principle that if the agreement would be enforced by the courts of the capturer’s domicile, then it should be accepted as enforceable in English law. In the six cases on the topic which came before him, he frequently referred to continental authorities, including Grotius.

But the English legislature intervened and by the Act 22 Geo III c 25 (1782) passed ‘An Act to prohibit the ransoming of ships or vessels captured from His Majesty’s subjects’, making it unlawful for any British subject to enter into a ransom contract, all such contracts being declared void. This Act did not apply to the converse case of a British privateer capturing an enemy ship and then releasing her on receiving a ransom. It thus prohibited the giving, not the receiving, of ransom bills. In 1793 an Act was passed (s 36 of 33 Geo III c 66) forbidding the masters of private ships-of-war to ransom any neutral or other ship after she had been taken as prize, unless in case of extreme necessity it was allowed by the Admiralty Court, therefore also prohibiting for all practical purposes the receiving of ransom bills. See further Walford Digest vol I at 445-447 sv ‘capture’ who compares the English position with that prevailing at Amsterdam at the time.
5.4.7 The Exclusion of Perils of War

In the course of the eighteenth century the practice arose of either insuring ships and their cargoes only against the perils of war, or, more commonly, of excluding such peril from the scope of the standard all-risks marine insurance policy. Another popular method was for the insurer to stipulate for an increase in the premium on the outbreak of war in exchange for which he remained at risk also for loss or damage caused by the perils of war. Van der Keessel noted that just as it was possible to add to the minimum required in a prescribed policy, so too it was possible and not in itself unlawful to exclude certain perils that the insured wished not to be covered against but which he was content to bear himself, such as the perils of war in time of peace.

One of the terms employed in this regard was 'molest', apparently taken over from Hamburg insurance practices, and to insure only against perils of war or to exclude cover against such perils, insurance was therefore concluded 'alleen voor molest' or 'vrij van molest'. Exceptionally the policy may have specified the type of 'molest', for example, 'molest' caused by the subjects of a particular country, depending, no doubt, on the prevailing political situation.

Unfortunately, there is little helpful legal authority on the nature of cover, or the exclusion of cover, specifically against the perils of war. The earliest, and for the time apparently exceptional, case of an exclusion of the peril of arrest appears from an Antwerp notarial deed of 1568. Goods, insured in Antwerp, and the ship carrying them, had been captured and subsequently condemned as prize in Stockholm. In reply to a claim on the policy, the insurer argued that while the text of the policy provided that the insurance also covered arrests by kings and rulers, this was amended at the bottom by an express provision stating 'geexcepteerd alle arresteringen van koningen en prinsen'. This defence was apparently rejected, for the insured won his case.

367 See generally Dorhout Mees Schadeverzekeringsrecht 285-286; Vergouwen 102-103.
368 See Zwaardemaker 30 and again § 5.1 n257 supra.
369 Or, presumably, which the insurer was not prepared to cover.
370 See van der Keessel Praelectiones 1449 (ad lil.24.6).
371 See eg Vergouwen 102-103 referring to an insurance of a ship at Rotterdam in 1782 for a voyage from Macao to Lisbon 'vrij van Noord-Amerikaansch Molest', a phrase commonly employed during the American War of Independence 1775-1783. Another insurance on a ship in 1782 for a voyage from Rotterdam to Guernsey provided cover 'vrij van Aanhaalen en Confiscatie van de Engelschen'.
372 See De Groote Zeeassurantie 23.
373 As was usual, the Antwerp Court gave no reasons for its decision, although one may speculate that the insurer lost because the exclusion here was not of one of perils of war generally or even in the narrow sense of the word (ie, the peril of enemy capture), but simply an exclusion of the peril of arrest, which, of course, did not apply here since the ship was captured.
An opinion in 1706 was concerned with an insurance policy excluding cover, rather unconventionally, against perils of sea and piracy risks ("voor alle gevaer exempt de risico van de Zee en de Turken");\(^{375}\) a case before the Hooge Raad in 1717 concerned the insurance of a ship and goods against the perils of the sea ("Zee-risico") only, the insured himself bearing the perils of war;\(^{376}\) while another case before the Raad in 1720 dealt with an insurance of goods against all risks except the risk of enemy attack ("vry van Christen molest").\(^{377}\) However, none of them shed any light on the legal implications of the exclusion of the perils of war. Unfortunately, therefore, there was a dearth of Roman-Dutch authority in addition to an uncertainty as to the precise meaning of the terms, such as "molest",\(^{378}\) employed in this regard.\(^{379}\)

As a result the position in Roman-Dutch law at the end of the eighteenth century was rather unsatisfactory as far as the inclusion or exclusion of cover against the perils of war was concerned. The need existed, clearly, for specifically named perils of war to be taken up in marine insurance policies when they did not provide the usual all-risks cover but either covered only the perils of war, or excluded such cover from their protection.

\(^{375}\) See Barels Advysen vol I adv 13 and again § 3.1 supra.

\(^{376}\) See Bynkershoek Observationes tumultuariae obs 1374; idem Quaestiones juris privati IV.8. Added to the policy here was the permission for the ship to sail with a convoy. The insurers refused to pay when the ship was lost at sea, arguing that in order to sail with a convoy, the insured ship had dallied for some days at an intermediary location on her voyage at a time when, because of a favourable wind, she could have sailed and possibly have avoided her loss by the perils of the sea. The Raad rejected this defence and pointed out that the insured in this case had borne the perils of war himself, and that the insurers had not stipulated that the ship was to sail as soon as possible or as soon as the wind was favourable. On the contrary, to minimise the risk that the insured himself bore, the ship was permitted to depart with a convoy and thus to wait for such a convoy to arrive or to be formed, something which, the insurers should have realised, could result in some delay.

\(^{377}\) See Bynkershoek Observationes tumultuariae obs 1647; idem Quaestiones juris privati IV.11. The qualification of the enemy as Christians served to exclude from this exclusion the peril of piratical attack, usually referred to as "Turken molest".

\(^{378}\) For example, did it, if not qualified further as in case of 'Christen molest' or 'Turken molest', include only capture by the enemy in the narrow sense of the word or also piratical capture? And did it also include an arrest by (friendly) authorities? Heemskerk 95 eg notes that the term 'vrij van molest' was incorrect because cover against the peril of piracy was not excluded by it; it should, he suggests, rather have been 'vrij van oorlogsrisico'.

\(^{379}\) The Hamburg Assecuranz-Ordnung of 1731 did contain some provisions on the matter. Thus, in terms of art 7 title IV, 'Seegefahr' included 'Türkengefahr' while in terms of art 1 title X, insurance against the latter only was possible. But in that city, too, it would appear, there was no absolute clarity about the precise difference in the meaning of terms such as eg 'Kriegsgefahr', 'Kriegsmolestation', 'Arrestgefahr', 'Türkengefahr', 'Barbareskengefahr' and 'Gefahr des Seeraubes'. See generally eg Dreyer 129-130, 135-136; Frentz 'Kaufmännische Gutachten' 171; Hammacher 103-107; and Heise.
5.4.8 Conclusion: Perils of War in the *Wetboek van Koophandel* and in English Law

Given the state of Roman-Dutch law, it is not surprising that, when it came to the regulation of insurance against the perils of war, the drafters of the Dutch *Wetboek van Koophandel* turned elsewhere for assistance and borrowed also from earlier French examples.

After providing in art 594 that an insurance contract may be concluded in time of war or peace, art 637 lists the perils that are, in the absence of any provision to the contrary, borne by the marine insurer. The list includes capture, privateers, pirates, detention by the authorities, the declaration of war, and reprisals ("neming, kapers, roovers, aanhouding op last van hooger hand, verklaring van oorlog, represailles"). It is therefore similar although not identical to the perils of war specifically named in the earlier Roman-Dutch policies and s 42 of the Rotterdam *keur* of 1721 for example.  

As far as the exclusion of perils of war is concerned, the *Wetboek* contains more precise guidance in arts 647-649 for the various possible scenarios. Article 647-1, for example, determines that in the case of an insurance "vrij van molest", the insurer is relieved of all liability should the insured property be lost or damaged "door geweld, neming, kaperij, zeeroverij, aanhouding op last van hooger hand, verklaring van oorlog en represailles"; thus clearly identifying the perils excluded from the usual all-risks coverage. The term ‘molest’ is therefore here given some content. Pertinently, it includes also violence in general and piracy in addition to other perils traditionally included under the concept ‘perils of war’. Even so, given the rapid changing nature of shipping in general and maritime warfare in particular, these legislative provisions too were soon modified, expanded and adapted to changing circumstances by way of contractual stipulation.

The position in English law provides, in some respects, an interesting contrast to that in Roman-Dutch law. There, crucially, the standard marine insurance policy provided cover not against all risks but only against certain named perils, and against others like them. Amongst these named perils were a large number of perils of war.

---

380 Article 637 was taken over via art 350 of the French *Code du commerce* from art III.6.26 of the *Ordinance de la marine* of 1681.

381 Article 648-1 provides that in case of a stipulation ‘vrij van molest’, the insurer remains liable for ‘al gewoone schade’ caused by ‘het gewoone gevaar’, despite the occurrence of ‘molest’ in the form of ‘opbrengen’ (which refers to the taking of a captured ship or goods to a port to be declared forfeited as prize). And in terms of art 648-2, if the cause of loss is uncertain, it is assumed that ‘de verzekerde door een gewone ramp is vergaan’, for which the insurer is liable.

382 See further Enschedé 164; Netten (loss caused by ‘molest’ is a wider concept than ‘oorlogsschade’); and Zwaardemaker 2-16. See too Geerligs 1-56 who notes (at 191), not quite correctly, that no provisions similar to arts 547 and 648 were known to Roman-Dutch law but that possible antecedents may be found in the clauses in use in the eighteenth century in Hamburg, clauses such as ‘frei von Kriegsmolestationen’ and ‘blös für Seegelahr’.
Thus, at the end of the sixteenth century it appears that London insurers provided cover against ‘all perills and dangers of ... men of Warr, Robbers, Enemies, Letters of mart, and counter Mart, Restraint and Deteynment and Arrest of Kings, princes, and all other persons’. Likewise, the Lloyd’s policy, as settled in 1779, provided cover against a long list of perils, including ‘Enemies, Pirates, Rovers, Thieves, ... Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes, and People, of what Nation, Condition or Quality soever’.

From the start, then, each of the terms employed in the perils clause in English policies, including those referring to the various perils of war, had to be assigned a meaning to determine whether the insured was in fact covered against a particular loss. By the time of the codification of the English law of marine insurance in the Marine Insurance Act of 1906, most of these terms had acquired a specific meaning.

However, it became practice in England too for an insurer to exclude his liability for these perils by the addition of a so-called fc & s (‘free of capture and seizure’) clause to the standard policy. Although the clause was first formally introduced and became part of, as opposed to merely being attached to, the standard Lloyd’s policy in 1898 when marine and war risks were formally separated, the exclusion of the perils of war by virtue of a variety of such clauses already occurred on occasion earlier in the eighteenth century, although the practice was seemingly rare prior to the Napoleonic Wars from 1800 to 1815. By the ‘fc & s clause’, the insurance was ‘[w]arranted free of capture, seizure, arrest, restraint, or detention, and all the consequences thereof or of any attempt thereat (piracy excepted), and also from all consequences of hostilities or

---

383 See Kepler ‘London Marine Insurance’ 49, referring to Order 1 in the draft Booke of Orders dating from the 1570’s.

384 Thus, in Pickering v Barkley (1672) Style 132, 82 ER 587, the Court held, in a charter-party case, that, as the evidence of merchants showed, pirates were a peril of the sea; in Barton v Wolliford (1660) Comberbach 56, 90 ER 341 the Court similarly decided in a case on a bill of lading that piracy was one of the dangers of the sea; and in Anon (1690) 2 Vern 176, 23 ER 716 it was held in Equity that the term ‘restraint of princes’ did not cover a restraint due to the wilful default of the insured himself. See further Holdsworth History vol VIII at 291.

385 Thus, the term ‘pirates’ had come to include passengers who mutiny and rioters who attack the ship from the shore (see rule 8 of the Rules of Construction appended to the Act); the term ‘thieves’ does not cover clandestine theft, or a theft committed by any one of the ship’s company, whether passengers or crew (rule 9); and the term ‘arrests etc of kings, princes, and people’ had come to refer to political or executive acts, and does not include loss caused by riot or the ordinary judicial process (rule 10). As to an insurer’s liability for, and the meaning of, these named perils of war, see further eg Malynes Consuetudo I.25, I.28; Weskett Digest 167-168 sv ‘detention’, 193-194 sv ‘embargo’ par 1, 398 sv ‘piracy’ par 4 and 6; Magens Essay I.75; and Walford Cyclopaedia vol II at 39 sv ‘condemnation’ (noting that the condemnation as prize was not necessary to render insurers liable, the capture being sufficient) and at 484 sv ‘embargo’ (noting that the most common cases falling within the words ‘arrests, restraints, and detainment of princes, powers. etc’ concerned an embargo of some sort),

386 See eg Green v Brown (1743) 2 Strange 1199, 93 ER 1126 in which a ship was insured for a voyage with a warranty against captures and seizures, and Green & Others v Elmslie (1794) Peake 278, 170 ER 156 where a ship was insured against capture only.
warlike operations whether before or after declaration of war'. The need for such a clause must be seen against the fact that because perils of war are included under maritime perils generally, it was not sufficient merely to delete from the policy the affirmative expressions importing them explicitly. An exception of the perils of war had to be introduced in sufficiently wide terms to exclude all perils of war entirely. Accordingly, unless this clause, which in turn overrides the relative part of the perils clause in the Lloyd's SG policy, was deleted, cover against the perils of war was excluded from the scope of that policy.387

387 See further ILL HR 3 121-123; ILL HR 15 121-123; and Miller War Risks 3-4.
CHAPTER VII
NON-MARINE INSURANCE

1  The Insurance of Non-marine Transport Risks .............................................................. 463
2  Fire Insurance of Immovable and Movable Property ....................................................... 467
2.1 Introduction: The Peril of Fire and the Development of Fire Insurance in the Netherlands 467
2.2 Excursus: Fire Insurance in England ............................................................................. 470
2.3 The Roman-Dutch Law of Fire Insurance ..................................................................... 472
3  The Insurance of Slaves and Against Slavery ................................................................. 474
3.1 The Insurance of Slaves .................................................................................................. 475
3.2 Insurance Against Slavery .............................................................................................. 480
3.2.1 Background: The Practice of Ransoming Seamen from Slavery ................................. 480
3.2.2 Ransom Policies and the Law ....................................................................................... 484
4  Reinsurance ........................................................................................................................ 490
4.1 Solvency Reinsurance ..................................................................................................... 490
4.2 Reinsurance Proper ......................................................................................................... 495
4.3 Excursus: Reinsurance in English Law ......................................................................... 501

1  The Insurance of Non-marine Transport Risks

Roman-Dutch insurance law was not unfamiliar with the insurance of non-marine objects of risk and the insurance against non-marine perils and in some cases made extensive provision for it.

The insurance of goods carried otherwise than by sea no doubt evolved more or less at the same time as marine insurance proper, and it in any event thereafter formed a natural and important adjunct to that branch of insurance law and practice. Although uncommon until at least the end of the seventeenth century, the insurance against non-marine transport risks, either in conjunction with or incidental to marine carriage, or for pure overland conveyances, was not unknown as a business practice in the early fourteenth century. Extant Italian archival records from that time provide evidence of the insurance against perils attendant upon the land transportation of goods. In fact, one of the earliest definitions of insurance made reference to land-transit risks.

1 See eg Bensa Assicurazione 50-51 and 184-189 for references to the account books of the Florentine firm of Franchesco del Bene. Entries for the period 1318-1320 show that an insurance was effected on goods sent overland from Florence to Pisa, and from there by sea to Nice, and from there again overland through France to Avignon. See further Goldschmidt Universalgeschichte 358-359; Holdsworth History vol VIII at 294; Postan, Rich & Miller 100; De Roover ‘Early Examples’ 195; Sanborn 241-242; Seffen 41; and Vance Handbook 9.

2 See Straccha De assecuratione Introd.46: ‘Assecuratio est alienarum rerum sive mari, sive terra exportandarum pericull susceptio certo constituto pretio’.

463
Insurance Law in the Netherlands 1500-1800

Such insurances were by the sixteenth century, and in all probability even earlier, concluded in the Netherlands also\(^3\) as they were elsewhere.\(^4\) And being known to insurance practice and customary law,\(^5\) insurance legislation not surprisingly also made provision for non-marine transport insurances.\(^6\)

One of the earliest legislative measures in the Netherlands dealing with insurance, in fact evidences that the insurance against land-transport risks was so well known in the first half of the sixteenth century that it rated a mention alongside marine insurance. In the placcaat of Charles V of 25 May 1537,\(^7\) which was concerned with procedural matters and the adjudication of mercantile and maritime disputes, specific mention was made of ‘brieven van asseurantie oft versekerheydt voor eenighe schip oft Coopmans-cap te water oft te lande’.\(^8\)

While the subsequent insurance laws of 1550, 1551 and 1563 did not mention non-marine insurance in any form, the placcaat of 1571 did provide for it. Section 1 permitted the insurance of goods being imported or exported by sea, overland, as well as on ‘sweet waters’ (that is, internal waters such as rivers) (‘Coopmanschappen, inkomende ende uytvarende, soo wel ter Zee, te Lande, als over soete Wateren’). In terms of s 28, the provisions of the placcaat were applicable only to the insurance of goods exported from the Netherlands by sea. Section 29 then specifically dealt with the insurance of goods being exported or imported overland or by internal waters (‘gaende oft komende te Lande, oft over soete Wateren’) because in those cases, the section

---

3 Two extant Antwerp policies covering land-transit risks, both coincidentally dating from 1587, are of the oldest examples extant. The one was for the insurance of two parcels or bales of hides carried by wagon from Cologne to Antwerp (see eg Krans 73; Vergouwen 67-68). The other was for the insurance of a letter containing four rings to be carried by post overland from Antwerp to Frankfurt-on-Main. Insured for Flemish £25 at a premium of 5 per cent, the risk on this letter commenced from the day and hour when it was placed in the hands of the insurer (who was either also the carrier or who undertook to deliver it to the carrier) in Antwerp and continued until it was delivered in the hands of the addressee in Frankfurt. The perils insured against were ‘alle periculen van vrienden ende vijanden, arestementen ende ophoudingen van Coninghen, Princen ende zoodanighe Heeren, zoude moeghen ghebeuren, oock van veranderinghe van boden oft posten ende generael van alle anderen periculen ende fortunen die saude moegen overcommen in eenigher manieren soe men soude moegen verdenken’. See De Groote ‘Polissen’ 153-156 and 166 for a discussion and reproduction of this policy.

4 Thus, English authors in the seventeenth century mentioned the insurance of goods carried overland and by river: see eg Malynes Consuetudo I.24 and Molloy De jure maritimo II.7.4. Cockerell & Green 47 refer to a 1693 policy described as being ‘upon Goods that are sent by Wagon, or Cart, etc. by Land, from all Robbers, or Thieves, etc.’.

5 In art 1 of title XXIX of the Antwerp Antiquae of 1570 (see De Longé vol I at 598-600) there was a reference to the ancient custom of concluding insurances on ‘schepen, coomanscapeen ter zee ofte ter landen gezonden worden’, and in art 1 of title LIV of the Antwerp Impressae of 1592 (see De Longé vol II at 400) there was a mention of the customary insurance on ‘schepen oft coomanschappen ter zee ende te lande’.


7 See Brabandt Placcaaten 512.

8 See also eg Kracht 10; Plass 28.
pointed out, the perils were not as great as in the case of the carriage of goods by sea. Those insurances would therefore be regulated less strictly by generally permitting merchants to contract as they saw fit. The only exceptions to the freedom of contract allowed in the case of the non-marine transport insurance of goods were in respect of the compulsory under-insurance of such goods; the prohibition on carriers, conveyancers, freighters ('Wagenlieden, Voer-lieden, Vracht-lieden') from acting as insurers; the fact that such conveyancers were compelled to under-insure their wagons, carts or horses ('Wagenen, Karren oft Paerden'); and the prohibition on such carriers on insuring their hire or salary ('loon oft salaris'). Section 30, again, made a comparable provision in respect of insurances concluded locally on goods imported by sea, overland or by internal waters.

Following this example rather unimaginatively, s 15 of the Amsterdam keur of 1598 provided substantially the same for non-marine transport insurance as did s 29 of the placcaat of 1571. It too allowed virtual freedom of contract, and did so for the same reason, namely 'dat aldaer soo groote perijckelen niet ende zijn als ter Zee'. Additionally, s 16 provided for a specific, shorter period of prescription than in the case of marine insurances, and s 29 provided for the keur itself to be applicable also to all local insurances on goods loaded on ships, wagons or horses belonging either to locals or to foreigners. Therefore, as a rule the principle of freedom of contract applied to non-marine transport insurances in Amsterdam. It should be noted that the relevant provisions were concerned with the non-marine insurance of goods only, and

---

9 See ch XVIII § 5.2 *infra*.

10 That is, themselves providing insurance cover to the consignors of goods. See further ch IX § 1.2 *infra* as to the capacity to insure.

11 See ch XVIII § 5.2 *infra*. Note that horses were insured in terms of land-transport insurance: an early form of cattle insurance. In 1720 there were attempts in England to establish companies to insure horses (see Cockerell & Green 47) and livestock insurance was practised in Germany from the beginning of the eighteenth century (*idem* 48). See eg Magens *Essay* vol I at 34 for a reference to a Hamburg policy of 1720 on the lives of cattle against 'Distemper'.

12 See again ch VI § 5.6 *supra*.

13 See again ch IV § 3.3 *supra*, and on these provisions of the *placcaat* of 1571 generally, see Goudsmit *Zeerecht* 260 and 268; Kracht 25 and 28.

14 Section 27 of the Middelburg *keur* of 1600 contained measures identical to those of ss 15 and 16 of the Amsterdam *keur*.

15 Different periods of prescription were prescribed because of the different circumstances involved. See further ch XX § 3 *infra* as to prescription and also eg Grotius *Inleidinge* III.24.21.

16 See again ch IV § 3.3 *supra*.

17 See generally eg Bynkershoek Quaestiones juris privati IV.1 ('om dat het gevaar ten deze opzichte minder is'); Scheltinga *Dictata* ad III.24.6 sv 'in aile verzeecckinge over zee, etc'; and Goudsmit *Zeerecht* 329.
presumably the insurance of ships, barges and boats plying the internal waters were regulated in the same way as the insurance of ocean-going vessels.\(^{18}\)

The Rotterdam Legislature, silent on the matter in the seventeenth century, was also less precise than Amsterdam in the next and merely included non-marine transport insurances, together with marine insurances generally, under the jurisdiction of the local Chamber of Maritime Affairs.\(^{19}\)

In the Amsterdam keur of 1744, s 9 specifically provided that the parties themselves could regulate and agree on the insurances of goods, wares and merchandise, cash, gold, silver, jewels, pearls and other precious stones being imported or exported overland or by internal waters (‘Goederen, Waaren en Coopmanschappen, Contanten, Goudt, Silver, Juweelen, Paarlen, en andere kleynden, gaande ofte komende te lande, of over soete wateren’). Unlike in earlier provisions, there were no exceptions to this freedom of contract, except that it was provided that such contracts were not to contravene the keur (‘mits niet contrarieerende deese Ordonnante’),\(^{20}\) and specifically added that carriers could now insure their vessels (‘ook sullen de Schippers haar Vaartuigen mogen laten verseekeren’). Different periods of prescription for claims for loss of insured goods carried by land or internal waters were again prescribed.\(^{21}\) Furthermore, the Amsterdam keur of 1774 for the first time prescribed, in form V, a policy, largely in the form of the prescribed marine goods policy, for the insurance of baled or packed goods to be carried by terrestrial (riding) post\(^{22}\) or by sea. The same policy appeared in the amending keur of 1775.\(^{23}\) From these model policies and from records

\(^{18}\) That, at least, was the opinion of Bynkershoek Quaestiones juris privati IV. 1. Some of the measures did have a bearing on the wagons, carts and horses used in land transportation, and in respect of their insurance freedom of contract was presumably also allowed.

\(^{19}\) See s 23 of the Rotterdam keur of 1721, referring to ‘Reysen, sowel te Lande as te Water’.

\(^{20}\) This, as Goudsmit Zeerecht 346-347 and Vergouwen 67-68 point out, was not altogether clear. Whereas the keur of 1598 mentioned a number of exceptional matters to which that keur still applied in the case of insurances of non-marine transports, the keur of 1744, on the face of it, left everything to the will of the parties. But the proviso that such freedom applied only on condition that the insurances were not in contravention of the keur, would tend again to make the keur as a whole mutatis mutandis applicable to them, so that there would in effect be no such freedom, or at least no more than in the case of marine insurances.

\(^{21}\) See s 31 of the keur and further ch XX § 3 infra.

\(^{22}\) This probably referred to the carriage or delivery of packages by horse or horse-drawn coach. As to the postal services at the time, see further ch XII § 2.1 infra.

\(^{23}\) There it was entitled ‘Formulier eener Police van Assurantie, op geëmbaleerde of gepakte goederen, afgezonden of nog te zenden met de rydende Post, of geladen of nog te laden in een Schip’.

This policy, which was a valued policy (see the warning to insurers in this regard by Magens Essay vol II at 154, and see further ch XVII § 5 infra as to valued policies), covered specified goods ‘bereids afgezonden of te zenden, met de rydende Post ofte geëmballeerd, gepakt in sodanige Pajquet, Kas, Sak ofte Doos, gemerkt en genommend als volgt ...’; or ‘bereids geladen ofte nog te laden in ‘t Schip ... varende van ... geëmballeerd ofte gepakt in sodanige Pak, Kas ofte Fust, gemerkt en genommend als volgt ...’. And it covered such insured bales or packages against ‘alle periculen, zoo te Water als te Lande, Omweder, Vuur en Wind, arresten van Vrienden en Vyanden, detentien van Koning en Koninginnen, Prinsen, Heeren en Gemeenten, Brieven van Marquen en Contra-marquen, Schelmeryen en onagtsaamheden van de Postillons [ie, the coachman], Comptoir-bediendens [servants
of other similar policies,\textsuperscript{24} it is clear that in the eighteenth century the insurance of goods being transported overland, as well as on inland waterways such as the Rhine in particular, became increasingly popular. The fact that relatively lower premiums were charged was an indication of the relatively lesser risks involved which, in turn, explains the infrequency of such insurances on Dutch insurance markets in earlier times.

By the time of codification, more detailed provisions were required with regard to the insurance against the perils inherent in the transportation of goods overland and on internal waters. Although the \textit{Wetboek van Koophandel} provided that such insurances were in general to be governed by the measures prescribed for marine insurance,\textsuperscript{26} some special provisions were nevertheless made for this type of insurance.\textsuperscript{26}

2 Fire Insurance of Immovable and Movable Property

2.1 Introduction: The Peril of Fire and the Development of Fire Insurance in the Netherlands

Although fire was mentioned as one of the perils insured against in the standard Dutch marine policy, and although the loss of or damage to goods by fire in the course of and incidental to a sea carriage was covered, separate insurance against fire was not usual in the Netherlands prior to the seventeenth century.\textsuperscript{27} One of the reasons for this may well have been that, unlike marine insurance where the exposure to the perils in question was of a temporary nature\textsuperscript{28} and it was practicable to transfer the risk of the postal office], Schryvers, Scheeps-volk, Voerluiden, Herbergiers, Logies-houders [ie lodge-keepers], Partyen, Roovers en Dieven, en alle ander periculen en avanturen, die de voorsz. Goederen eenigzints zouden mogen aankomen, bedagt ofte onbedagt, gewoon ofte ongewoon, geene uitgezonderd'.

\textsuperscript{24} See eg the Amsterdam insurance policy dated 29 May 1759 in the name of Jacob Nunes Henriques, or whom it may have concerned, on a parcel of diamonds that had to be carried 'met de rijdende Post' from Amsterdam to Florence. The parcel was insured for f 1 000 at a premium rate of 1 per cent of and was covered against 'alle periculen so van violeeren der Post 't zij door Struykroovers of wie en onder wat pretext 't mogt geschieden, vriend of vijand niemand uytgesondert, alsmeede weegens ontrouwighed, onagtzaamheid en schelmeren van Postillons, Postmeesters ofte hunnen bedienden'. See Vergouwen 68 who traced this policy in the policy copy book of the unsworn Amsterdam brokers Baerlman & De Vos.

\textsuperscript{25} See art 687.

\textsuperscript{26} In arts 688-695. Most noticeable of these was the provision, in arts 694-695, that the rules prescribed in respect of abandonment were applicable to this type of insurance, although the parties were free to contract otherwise. See further on this point ch XIX § 2.5 Infra.

\textsuperscript{27} See generally on fire insurance in the Netherlands, Dorhout Mees \textit{Schadeverzekeringsrecht} 24; Krans 13-15; Nolst Trenité \textit{Brandverzekering} 4-5; Pimentel; Vergouwen 68-69 and 104-106; and Witkop 19-20.

\textsuperscript{28} That is, for the duration of a voyage, or of the carriage from one place to another. Also, in the case of marine insurance, the need for protection by marine cover was concentrated in the larger maritime centres where in could readily be met by the merchant-underwriters congregated on the local bourse.
involved to several individual underwriters on an ad hoc basis, fire risks were of a more permanent nature, requiring, perforce, the underwriting capability and the more stable existence and secure financial structure of a mutual society or a company. The relatively late development of fire insurance may therefore be ascribed to the relatively late emergence of insurers in a form suited to this type of risk. Additionally, the emergence of fire insurance coincided with the period of industrialisation which gradually sidelined agriculture and the maritime trade as the main commercial and capitalist enterprises.

This is not to say, of course, that the risk of loss or damage from fire in the period up to the end of the eighteenth century was not great. Not only flammable building materials but also the lack of fire-fighting equipment and services, the nature of the goods kept or stored in buildings, as well as the type of activity carried on in them made the risk of fire an appreciable one. Particularly great was the risk in mills which pressed a variety of seeds and extracted from them oil (olieslagerij) for human consumption and which also formed the basis for the manufacture of soap and dyes. Initially oil was pressed by horse and later by windmills (oliewindmolen), and the presence of furnaces stoked with peat in these mills rendered them especially prone to conflagration. By the seventeenth century, oil-milling had become an important industry, especially in the Zaan region where a large number of mills were, like ships (and also known as 'rederijen'), owned by shareholders in co-ownership. The owners of these oil mills sought to protect themselves against the perils of fire. They concluded mutual fire insurance contracts amongst themselves for particular, often extended, periods, existing millers thereafter leaving the arrangement and new ones joining it and therefore also the mutual insurance group for as long as it existed. The oldest known mutual fire insurance concluded between oil millers ('tusschen olieslagers') from the Zaan region dates from 1663. It was followed by various other similar contracts. At first these contracts covered only materials and products in the mills, but later the mills

29 And if not of an immovable then of a relatively sedentary nature, eg the peril of fire to which houses and buildings, and their contents, were exposed.

30 See further ch IX § 3 infra as to mutual insurance and ch IX § 2.10 infra as to insurance companies.

31 Although fire insurance developed later than marine insurance, fire underwriting on a corporate basis as opposed to an individual basis for the same reason developed earlier than in the case of marine insurance.

32 On these oil mills, see eg Van Dillen Rijkdom 204-209, 404, 414 and 544.

33 See again ch VI § 3.1 supra.

34 Fire insurance was exclusively the product of the mutual activities of guilds in Northern Europe, and it evolved independently from the development of (mainly marine) insurance on a profit basis in Italy and elsewhere. By the end of the sixteenth century, a highly developed fire-insurance business operating on a mutual basis existed in Germany, the most famous example of which was the Brandgilde in Schleswig-Holstein. Such mutual fire-insurance arrangements were also concluded in Hamburg, the first of the so-called Hamburger Feuerkasse being agreed there in 1591. See further eg Büchner 'Feuerkasse', Seffen 75-104 and the sources referred to there.
themselves were also insured against fire. The best known contract of mutual fire insurance was the 'Olieslagerscontract' ('Contract van verzekering tegen brandschade aan Oliemolens en derzelver Ladingen aan den Zaan') concluded in 1727 which, by the mid-eighteenth century, involved up to 145 mills.\(^{35}\)

From the Zaan region and oil mills, the practice of mutual fire insurance spread to other regions and also to other industries. Fire insurance cover in the Netherlands remained mainly in the domain of mutual arrangements until the nineteenth century when fire insurance contracts with individual insurers on a profitbasis became more prevalent.

The first traces of individual fire insurance contracts appeared in the seventeenth century,\(^{36}\) but it was practised in this form on a significant scale only from the latter part of the eighteenth century with the establishment of insurance companies. It was these companies, rather than individual underwriters, who took over fire risks. Such companies were by their nature more capable and suited to take over those risks. The fire insured's requirements were of a continuous nature and not linked to a particular period of time or voyage, and the security of an insurance contract backed by a company and not dependant upon the fortune or duration of the life of an individual underwriter was therefore required.\(^{37}\)

But even so, it took quite some time before the eighteenth-century insurance companies began underwriting fire risks on any significant scale. The slow growth of non-marine insurance, and in particular fire insurance, is evidenced by the fact that the first share-company to insure non-marine risks was only established in Amsterdam in 1770.\(^{38}\) And companies insuring both marine and non-marine risks likewise experienced little growth in the latter part of their business.

Thus, although the Rotterdam Insurance Company, established in 1720, from the start conducted business in both marine and fire insurance, it was until the end of the eighteenth century virtually exclusively concerned with the former.\(^{39}\) The fact that the Company's fire insurance premiums were constantly amended in the first few years,

\(^{35}\) On the Zaan olieslagerscontract of 1727-1912, see in addition to the sources referred to in n27 supra also also Anonymous Olieslagerscontract.

\(^{36}\) Evidence of one such fire insurance contract appears from the protocol of the Rotterdam notary Basius. In the volume for 1646 (Gemeente Archief Rotterdam, Oude Notariele Archief no 438, folio 27, 8 and 9 January 1646) there is mention of a claim for the execution and delivery of the policy by an insurer of a fire insurance agreement ('project van accoart') by which a Rotterdam brewery was insured against the 'ongeluck van vier, brandt ende andere ongevallen (dat Godt verhoeden)'. See further eg Vergouwen 105; Witkop 8-9.

\(^{37}\) See eg Mossner 79.

\(^{38}\) This company insured against all risks except that on ships, and provided cover eg on houses and buildings against fire, on goods against the perils of land-transportation, on the lives of travellers during a journey, and on the credit (or rather the solvency) of merchants and others taking up loans. See further Heemskerk 99.

\(^{39}\) Thus, in 1747 the fire insurance premiums of the Company amounted to a paltry f700: see eg Slechte 'Maatschappij' 253 and 277.
would seem to indicate that it was not yet proficient in assessing fire risks. Only gradually would such assessment become more refined and be accompanied by a rigorous differentiation, classification and inspection of the risks involved in individual cases. The Company's techniques of fire insurance underwriting, it seems, were developed with reference to industrial property rather than domestic property. Only in the 1790's did the peril of fire come to be insured on a noticeably larger scale, and it was only in the nineteenth century that the Company's fire business became its most important.40

2.2 Excursus: Fire Insurance in England

In England, too, fire insurance first emerged in the seventeenth century41 and appears to have had a relatively more vigorous growth42 than in the Netherlands. Interesting facts emerge which no doubt reflect the state of fire insurance in the seventeenth and especially the eighteenth centuries not only in that country but also elsewhere.

After, and possibly spurred on by, the Great Fire of London of 1666, a private office for the insurance of buildings and houses against fire was established there in 1680. Its founder, Dr Nicholas Barbon, was a physician 43 who also speculated in the property market by rebuilding houses and other structures. Together with eleven associates, he founded a joint-stock society or company, the Insurance Office for Houses (later, simply the Fire Office), which had premises at the rear of the Royal Exchange. It commenced business in 1681. In 1688 a Letter Patent was granted to the Fire Office conferring on it a one-year monopoly, after which it and a competitor, The Friendly Society for Securing Houses from Loss by Fire which had in the meantime been established as a mutual society, were to alternate their activities on a quarterly basis. The Patent laid down a premium rate of 6d per £1 rent payable by the insured, the insured property being valued at ten times the amount of the annual rent.44 It seems that this shared monopoly never came into effect for both offices continued conducting their businesses independently.

The Fire Office issued long-term fire insurance policies, for terms of up to 35 years and, occasionally, even for the duration of the insured's life. Later the standard term

40 See further as to the Rotterdam Insurance Company of 1720, ch IX § 2.10.3 infra.

41 See generally on the history of fire insurance in England, Blackstock 58-83; Cato Carter Loss Adjusting 7-8, 10-12, 16 and 19-20; Chapman 'Business History' 15; Clayton 34-45; Cockerell & Green 24 and 27; Dickson 3-16, 26-32, 38 and 73-99; Evans 'Fire Insurance' 88-90; Holdsworth History vol VIII at 294; ILL HR 15 2-3; Jenkins 14; Maclean 31-32; Magens Essay vol I at 31-32; Nelli 'England' 85; Pearson 'Fire Insurance' 3 and 8-12; Ryan 'Fire Insurance' 44; Raynes (1 ed) 76-96, (2 ed) 70-92; Supple Royal Exchange 7-8, 10, 11, 47, 84-85 and 87-91; Schwarz & Jones 368 and 373; Trebilcock 2-5; and Walford Cyclopaedia vol III at 436-594 sv 'history of fire insurance'.

42 Or maybe this growth has merely been documented in more detail.

43 He had earlier, in 1661, studied medicine at Leiden and also at Utrecht. See Clayton 37; Dickson 8.

44 For a reprint of the Letter Patent given to Barbon’s Fire Office, see Selden Society Vol 28: Select Charters of Trading Companies AD 1530-1707 (1913) at 207-212.
was reduced to seven years, the policy being renewable thereafter.\textsuperscript{45} Policies were concluded on houses and buildings. Brick houses were insured at a fixed premium rate of 2½ per cent (6d per £1 rent) and timber houses for 5 per cent (1s per £1 rent), it being taken for granted that the yearly rental represented about 10 per cent of the property’s value.\textsuperscript{46} Premiums were payable quarterly. In 1705 the Fire Office adopted the name The Phenix Office and it appears to have ceased operating in 1720.

A number of other fire offices, both mutual societies and joint-stock companies, were established at the end of the seventeenth and beginning of the eighteenth centuries. Some of the longest survivors of these included a mutual society, the Amicable Contributorship (also known as the Hand-in-Hand Fire Office) which was established in 1696; the Sun Fire Office of 1708, an unincorporated company or joint-stock venture without limited liability and the first to insure, from 1710, also movables, merchantises and other wares from loss by fire, and the first also to insure property outside of London; the Union Fire Office of 1714; and the Westminster Fire Office of 1717. Fire companies’ policies were now normally issued for one year only, or even lesser periods in the case of industrial property. Policies were renewable annually though.\textsuperscript{47} All of the offices maintained fire-brigade services. To facilitate the rendering of fire-fighting services, insured houses of subscribers or insured were identified by badges affixed or nailed to them. The benefit of having access to fire-fighting services was one of the primary reasons for taking out fire insurance, it seems. Furthermore, all the offices reserved, and in fact frequently exercised, the right to have insured property reinstated or rebuilt rather than to have to make a cash payment to the insured. This right was to a limited extent even statutorily confirmed in 1763 and again in 1774\textsuperscript{48} in an attempt to prevent arson and other fire-insurance frauds.

As elsewhere, the practice of fire insurance developed relatively slowly in England compared to marine insurance, and even by the end of the eighteenth century it remained a small business. Initially the principles of marine insurance were applied to the fire insurance contract,\textsuperscript{49} and the law of fire insurance developed but slowly in the eighteenth century.\textsuperscript{50}

\textsuperscript{45} Thus, in 1662 Nicholas Barbon signed a policy in which he and his partners undertook to pay £230 within two months if the insured house should burn down. And in 1684 an insured’s house, worth £100, was insured for 21 years at a premium of 50s. See Cato Carter Loss Adjusting 7.

\textsuperscript{46} That is, the sum insured and the premium was related to the house’s rent per annum which was taken to represent a fixed proportion of its value.

\textsuperscript{47} Mutual societies’ policies, by contrast, continued to be issued for longer periods. See Appendices 31 and 34 \textit{infra} for reproductions of a Sun Fire Office fire policy of 1719 and one of 1727 respectively. A Royal Exchange Assurance fire policy of 1782 is reproduced in Appendix 50 \textit{infra}.

\textsuperscript{48} By s 10 of the 4 Geo III c 14 (1763) and s 83 of the Fires Prevention (Metropolis) Act 1774 (14 Geo III c 78).

\textsuperscript{49} See eg Holdsworth History vol XII at 540.

\textsuperscript{50} Probably the two most important decisions were Roger Lynch & Another v Robert Dalzell & Others (1729) 4 Brown 431, 2 ER 292, where the House of Lords held that the person insured by a fire policy had to have an interest in the property concerned at the time of the loss and that fire policies were not by their nature assignable, and The Sadlers Company v Badcock (1743) 2 Atk 554, 26 ER 733, where it was held
2.3 The Roman-Dutch Law of Fire Insurance

The first mention of fire insurance in Dutch insurance legislation occurred in connection with the jurisdiction of the Rotterdam courts in the early part of the eighteenth century. While the Rotterdam Chamber of Maritime Affairs had jurisdiction over disputes arising from marine insurance as well as non-marine transport insurance, its jurisdiction over disputes arising from all other types of insurance was excluded and the ordinary courts thus retained their jurisdiction in that regard. Section 24 of the Rotterdam keur of 1721 specifically mentioned as within the jurisdiction of the ordinary courts the insurance of houses; warehouses and other goods and effects against fire and other perils, but otherwise the keur contained no measures specifically concerned with fire insurance.

The first regulation of fire insurance appeared only in the Amsterdam keur of 1744. In terms of s 18 the insurance against fire was permitted, for one year only, on rope yards ('Lynbaanen'), sugar refineries ('Rafinaerderijen'), distilleries ('Branderijen'), mills ('Molens') and other buildings serving as factories, together with the effects and equipment belonging to them, located both within and outside the country, as well as on houses ('Huysen') and warehouses ('Pakhuysen').

Furthermore, the keur prescribed in form IV a fire policy which covered the specified property, both buildings and their contents, against fire and all the perils of and losses arising from fire in whatever way they might arise. Significantly, it covered

that the insured should have an interest or property in the house insured at the time the policy was taken out as well as at the time the fire happened.

51 See again ch IV § 1.5 supra.

52 It mentioned the 'Asseurantie van Huysen, Pakhuysen, ende andere Goederen, Effecten, Regten, Los-en Lijf-renten ende Interessen, met relatie tot Brand ende andere gevallen'. Section 24 may have been regarded as necessary because of the establishment in 1720 of the Rotterdam Insurance Company which had mentioned non-marine insurances in its statutes. See eg Elink Schuurman 'Aanteekeningen' 117; Mees Gedenkschrift 15.

53 Unlike the subsequent Amsterdam keur of 1744, the Rotterdam keur prescribed no official fire policy form. The Rotterdam Insurance Company had its own form which was drafted notarially by brokers, and it differed in some respects from the Amsterdam forms. See eg Witkop 23 and 31.

54 See generally on Amsterdam position and provisions, Goudsmit Zeerecht 345-346.

55 The policy described the objects of risk as 'den Opstal, Timmeragie &c genaamt de ... staande en geleegen ... met alle de Huisinge en Gereedschappen, mitsgaders de Meubilen, Goederen, waren en Koopmanschappen, van wat qualiteit of natuur dezelve zoude mogen weesen, geene uitgesondert, so reets in ofte op de voorz ... zyn of gedurende den geheelen yd van deeze Versekering zullen worden in ofte opgebracht, en sal het den Geassureerde vry staan, om telkens zoo veelle Goederen in of op te slaan, en wederom af te leeveren, als het denzelven gelfeven zal'.
also fire negligently caused by employees of the insured himself,\textsuperscript{56} and did so, in accordance with s 18, for a period of twelve months.\textsuperscript{57} The policy was, as it had to be, a valued policy and was stipulated to be conclusive evidence of the valuation it contained,\textsuperscript{58} and in case of a partial loss the full amount of the damage was payable after a deduction of the value of the property saved from destruction, the insured being taken at his word under oath as to this value.\textsuperscript{59}

In 1775, s 18 of the Amsterdam keur of 1744 was amended. To the list of places and things insurable against fire were added plantations ("Plantagien"), breweries ("Brouweryen"), cotton mills ("Catoendrukkerien"), paint shops ("Ververyen") and other factories however they might be called, barns ("Loosten"), and also furniture ("Meubelen"), household goods ("Huissieradien") and the like inside such buildings. Also insurable were goods, wares and merchandise of whatever nature or name inside such buildings, and irrespective of whether such buildings were located inside the country or abroad. It was also provided that such fire insurances had to be made in accordance with the prescribed fire policy appended to the 1775 amending keur which, in terms and form, was largely an expanded version of earlier one of 1744. A few of the differences included the specific mention of the fact that the land itself ("de Gronden of Erven") was not included in the policy cover; a somewhat expanded perils clause;\textsuperscript{60}

\textsuperscript{56} The perils clause covered the insured 'voor Brand en alle pericule van Brand, mitsgaders voor alle Schade die uyt hoofden van Brand, zoudde komen te ontstaan, het zy door Onweeder, Vuur, Wind, Eigen-Vuur, Onagtsaamheid, en schuid van eigen bedienden, of van buuren en beledene [next-door], en voorts van alle uytelijke toevallen en ongevallen bedagt of onbedagt, op welk een wyze de schaade door Brand ook soude mogen ontstaan'.

\textsuperscript{57} Van der Keessel Praelectiones 1434 (ad III.24.4) noted that although such insurance was permitted for a period of one year only, the understanding was that a new insurance could be concluded after the expiry of that term.

\textsuperscript{58} The valuation clause provided 'Taxeerende wel Expresselyk ... zullende niet prejudiceeren of dit alles meerder of minder mogte waardig wesen ofte gekost hebben'. In the event of loss or damage, the insured therefore did not have to prove the value of the property, 'alsoo ons bewust is zulks niet doendelyk te zijri'. As to valued policies, see further ch XVII § 5 infra.

Contemporary English authors criticised this aspect of the Amsterdam fire policy which was clearly founded upon the valued policy of marine insurance. They regarded such valuation as open to abuse, promoting fraud and totally inapplicable to fire insurance, and thought that it ought not to be permitted by English law. They pointed out that London fire policies were better in that they merely stated the sum insured (ie, the maximum amount for which the insurer could be liable to make good any loss or damage by fire). See eg Magens Essay vol II at 153; Weskett Digest 218-219: sv 'fire' par 7-9; and Walford Cyclopaedia vol I at 92 sv 'Amsterdam, Insurance Ordinances of'.

\textsuperscript{59} In this regard the policy provided that 'in cas van geene totale Schaade tot afslag zal strekken alle het geene naar aftrek van onkosten tot berginge en bereddinge gedaan, sal bevonden werden, gesalveerd en geborgen te zyn, waaromtrent den geassureerde geloofd zal werden op zijne eed'.

\textsuperscript{60} It provided cover against 'Brand, veroorzaakt het zy door Onweer, eigen Vuur, Onagtsaamheid, Schuld of Scheimery van eigen Bedienden, of van Buuren, Vyanden, Roovers, en alle anderen, hoe ook genaamd, op welk een wyze de Brand ook zoude moogen zyn ontstaan of veroorzaakt, bedagt of onbedagt, gewoon of ongewoon, geene uitgezonderd, mitsgaders voor de Schaade, dewelke als een gevolg van de Brand moet worden genomen, aangemerkt of gehouden, als bederf of vermindering van het verzekerde door het Water ter blussing gebruikt, ook Dieveryen of het vermissen van iets van het verzekerde, geduurende de brandblussing en beredding'.
more detailed rules and stipulations as to the way in which the extent of any damage to buildings, and contents, furniture or goods, had to be established, the insured now only being taken at his word under oath when other means were lacking to determine the amount of the damage. Although it was still a valued policy, and in fact contained more detailed stipulations in this regard, the fire policy was no longer restricted to twelve months only as this limitation was no longer mentioned in the amended s 18.

These policies seem fairly representative of the fire policies in general use in the Netherlands at the end of the eighteenth century.61

Only Roman-Dutch authors from the latter part of the eighteenth century mentioned fire insurance. They add little insight to what, for those of them not attuned to practice, was no doubt a new form of insurance contract.62 Van der Keessel,63 for example, referred to fire insurance as an extension by analogy of the insurance against the perils of the sea.

Although lacking in detailed rules and principles applying specifically to fire insurance, the position in Roman-Dutch law as it evolved further and came to be refined in practice formed the basis for the codified provisions on the topic in arts 287-298 of the Wetboek van Koophandel.64

3 The Insurance of Slaves and Against Slavery

Two closely related but in fact opposite forms of insurance known to Roman-Dutch law were that of slaves and that against slavery, the link between them merely being the existence, until the beginning of the nineteenth century, of the practice of

61 See eg the Amsterdam policy of 1770 covering, for a period of twelve months, a plantation with its homestead (‘opstal’) of houses, barns, buildings and equipment, including slaves (see § 3.1 infra), in Suriname against fire and generally against ‘andre onvoorsiene Extraordinaire Evenementen waardoor de schade mogte veroorsaakt worden’. See Mees Gedenkschrift appendix 21.

A Rotterdam fire policy of 1799 insured, for a period of six months, the grain in various warehouses in Rotterdam (‘op graenen liggende op diverse plaatsen binne deeze stad hieromme’), a schedule being added to the printed policy specifying the quantities and locations, and the insured being under an obligation to notify the insurer of any subsequent changes in the movement of the grain in and out of the specified warehouses. It was therefore a type of floating policy. The perils clause was largely similar to the earlier Amsterdam examples although it added cover for damage caused by the water used to put a fire out or otherwise caused in the process of saving the grain from fire. See Mees Gedenkschrift appendix 19 and Appendix 51 infra.

62 See eg Kersteman Academie part XVIII at 274; idem Woorden-Boek at 28; and La Leek Index sv ‘insurance’ who mentioned that the insurance of buildings or houses frequently occurred in England and that recently a company of that kind had been formed in Rotterdam for the insurance of buildings against damage by fire.

63 Praelectiones 1434 (ad III.24.4).

64 Thus, art 290 lists the causes of loss or damage which would, subject to a contrary agreement, render a fire insurer liable. They are largely similar to the perils clause in the prescribed Amsterdam fire policies of the previous century. Article 291 includes as fire damage, any damage arising from a fire in neighbouring buildings and also damage caused by water and other means employed to save the insured property.
3.1 The Insurance of Slaves

The insurance of slaves was already known from the time the insurance contract first emerged in Italy when slaves consigned on voyages by ship were insured. In those cases the insurance was in principle no different from other forms of marine cargo insurance. Rather further removed from the insurance of slaves against the perils at sea, was the practice occurring in Italy of an owner could insuring himself against the possible death of a female slave during childbirth. The insurance of slaves was also known and practised in Spain in the fifteenth and sixteenth centuries.

There is evidence too of the early practice of insuring slaves in the Netherlands, first by Spaniards and later also in connection with the customary insurance law of Antwerp. From the latter it appears that the object of risk had to be specified in the case of insurances on certain named perishables and valuables, including slaves, livestock and animals ('slaven, beesten ende gedierden'). Dutch involvement in the slave trade dates from the seventeenth and eighteenth centuries, though, and it is from these centuries that most of the information on the insurance of slaves comes.

---

65 See generally Ebel 'Sklavenversicherung' 124-130 (slaves) and 130-142 (slavery).

66 See eg Bensa Assicurazione 129 and generally Piattoli. The papers of Francesco di Marco Datini, a Tuscan merchant from Prato, contain a insurance policy of 1401 on a female Tartar slave sent from Porto Pisano to Barcelona. She was insured for 50 gold florins against 'any risk from the hand of God, the sea, human beings, barter, or her master', but not against any attempt at flight or suicide. See Origo 101.

67 See Bensa Assicurazione 129-130 who reproduces two documents (no XXIII at 234-235, and no XXV at 237-238) of insurances in this regard, still disguised as fictitious loans or sales and dating from 1430 and 1467 respectively. See also Sanborn 261.

68 See generally Madurell Marimon Seguros de vida de esclavos on the insurance on the lives of slaves in Barcelona from 1453 to 1523.

69 The Hordenanzas of 1569, an insurance code drafted for Spanish merchants resident in Bruges at the time, in art 7 of title II provided in some detail for the insurance of slaves to be conveyed by sea. Thus slaves, no doubt because of the particular risks involved, were one of the commodities which had to be specifically mentioned in the policy. Furthermore, the insurer was not liable for the death of or injury to slaves caused by their attempting to escape, nor for their death through sickness (that, no doubt, because such sickness was regarded as an inherent vice), but only if they were drowned when the ship on which they were carried, was wrecked in a storm. If the slaves were saved, or saved themselves from such drowning, the insurer was liable for the cost and expense incurred for the slaves until they reached the destined port. See further De Groote Zeeassurantie 50; Verlinden Zeeverzekeringen 208-209.

70 See art 41 of par 2, title 11, part IV of the Antwerp Complatae of 1609 (see De Longé vol IV at 216-218).

71 On the Dutch slave trade generally, see eg Barbour Capitalism 109-111; Van Brakel 'Slavenhandel'; Emmer 'Atlantisch' 307-317; Israel Hispanic World 241; Kunst 122-131 and 161-170; Kunst 'Slavernij'; Unger 'Bijdragen' 1; and idem 'Bijdragen' II.
Although there was no slavery in the Netherlands itself, it was practised in the Dutch colonies. The Dutch were also involved in the triangular trade of slaves between Europe, Africa and the Americas, slaves being carried in Dutch ships on the second leg of the three voyages involved. Dutch slavers bought slaves or, more usually, traded them for a variety of different goods, especially guns, alcohol, gunpowder as well as bric-a-brac at well-known trading posts on the Western African seaboard. They then transported those consignments of slaves to Spanish America in particular but later also to places such as New Netherlands in North America. Slaves were delivered for sale in the West Indies where Curacao served as one of the most important slave depots, trading posts and transit points. Slaves were delivered there by the slaving ships to the agents of the holders of concessions to import slaves into Spanish America. In payment, the Dutch slavers accepted bills of exchange, drawn, for example, on Amsterdam bankers. Some or all of those bills were used locally to purchase return cargoes of sugar, coffee, cocoa, timber, or tobacco. Occasionally goods other than slaves were also shipped in Africa and routed to Europe via the West Indies.

The slave trade generally, and specifically the supply and delivery of slaves to Spanish America, was indirectly controlled by the Spanish Crown who from the 1680's concluded so-called asientos de negros or concessionary contracts for the supply of Negro slaves to the Spanish colonies in America with certain individuals or companies. The holders of such concessions, or asientistas, alone were permitted by the Spanish to trade in and deliver slaves to the West Indies. Dutch individuals and companies acted mainly as subcontractors to these asientistas in transporting slaves from Africa.

Dutch involvement in the slave trade was at first primarily through the West India Company which had a monopoly on the Dutch slave trade to America from around 1630 and which, from 1675 to 1731, transported an average of around 2,500 slaves per year. The Company was subcontracted by Portuguese and Italian, and later also by Dutch asientistas. After the Company had lost its Dutch monopoly over trading on the coast of Africa, at first only partially and later by the 1730's fully, a period of free trade was ushered in. Merchants from the province of Zeeland, and from Flushing and Mid-

---

72 Also referred to as 'black ivory' (Unger 'Bijdragen' I 138) or 'kroesvee' (idem 162).

73 Especially along the Pepper Coast, Ivory Coast, Gold Coast, Slave Coast, the Gulf of Guinea and even down to Angola.

74 See generally Emmer 'Slavenhandel'.

75 Later Suriname too became an important entrepôt for the Dutch slave trade.

76 Initially only Portuguese and Italian contractors received concessions, but after 1703 the asiento came into French hands and from 1713 the Spanish Crown appointed the English as traders. For a transcript of the asiento given to the English in 1713, see Browning 883-885. No Dutch concerns received concessions before 1648, and they and others often smuggled slaves. But the holders of the asiento often sub-contracted with others, and especially with Dutch merchants and companies because of the fact that the Dutch island of Curacao could serve as a convenient refreshment station and place where delivery could be taken of consignments of slaves. Similarly, English traders were involved because of the English occupation of Jamaica. Capital for the acquisition by Portuguese and Italian concerns of the asiento may also have been raised on Dutch markets, eg in Amsterdam.
delburg in particular, were increasingly involved in the trade, at first through the Zeeland chamber of the West India Company. Thereafter the Middelburg Commercie Compagnie, established in 1720, also became an important participant, while there was also some private involvement by individuals in partnerships (reederije) who equipped ships for slave-trading voyages. These free-traders (vrijhandelaren) from 1730 to 1780 transported around 5,000 slaves per year to the Americas.

In the latter part of the seventeenth century, from around 1650 to 1675, the Dutch were the second largest slave-trading nation after the Portuguese and the biggest supplier of slaves to Spanish America. By the beginning of the eighteenth century, the English had taken second and later first place for their involvement in the slave trade in general. In the course of the eighteenth century, opposition to slavery in Europe grew steadily. Legislation in 1807 eventually abolished the slave trade in the British Empire, and in 1815 the English and the Dutch agreed officially to stop that trade.

The slave trade by its nature carried a high risk and was not necessarily very profitable. The greatest losses were from the deaths of slaves after their capture and during the voyage of two to three months from Africa to America. Estimates as to the mortality rate of slaves vary. One estimate puts the average mortality rate throughout the period from 1674 to 1802 at seventeen per cent, with a high of twenty and a low of twelve per cent, although that may be too low. Major causes of death were scurvy, dysentery (roode loop), pox, as well as suicide and murder.

Contracts for the delivery of slaves (leveringscontracten van slaven) usually contained a description of the slaves and the condition in which they were to be delivered, and the terms of delivery and payment. As a rule, they provided for the slaves to be carried at the risk of the trader, that is, the risk of the death of slaves en route to their destination, for a specific period after their arrival, and until delivery to the buyer or his agent was to be borne by the seller with the buyer bearing the cost of their sustenance (costgeld van de negers). Generally these contracts did not mention or specify any

---

77 The reference by Unger 'Bijdragen' I 173n2 to 'de Middelburgse regent W. Schorer (1717-1800)' who 'bestreed de slavenhandel (en ook de pijnbank)' appears to be to the well-known Roman-Dutch jurist, author and sometime judge on and president (1767) of the Court of Flanders, Willem Schorer. He was probably involved as a shareholder in the Middelburg Company rather than as an actual trader or owner of a slave-ship.

78 From the sixteenth to the nineteenth centuries, anything between 15 to 20 million Africans were taken to the Americas as slaves, with as many probably having died in the process of capture and transportation.

79 See Unger 'Bijdragen' II 62.

80 Cooper 34 estimates the rate at 20-30 per cent of the slaves embarked on English ships. The ordinary mortality rate accepted by Rotterdam insurers at the end of the eighteenth century, was fifteen per cent, although franchises (about which more shortly) as low as ten per cent appear to have been common. The mortality rate of the crew of slave-ships was equally high: 30 per cent on the triangular voyage.

81 See Emmer 'Slavenhandel' 118, referring to the trade carried on by the West India Company.
insurance on the slaves. Nevertheless, it is clear from various sources that the Dutch not infrequently insured cargoes of slaves. Sometimes the insurance was on the cargo generally, but insurance was also concluded on slaves specifically.

Insurance policies, of which there are numerous examples extant, provide some interesting information on this branch of insurance law and practice.

Such insurances were undertaken at varying premium rates for the three separate stages of the triangular voyage undertaken by slavers, although often the first two legs of the voyage were taken as one for purposes of fixing the premium with the price of the insurance of the return voyage left for subsequent negotiation. As far as the perils clauses were concerned, a fairly standard wording in cargo policies covered

---

82 For such delivery and sale contracts, see Van Brakel 'Slavenhandel' who discusses some seventeenth-century contracts (from 1662, 1668 and 1675) for the delivery of slaves concluded by the West India Company. In a list of expenses (see idem 81-83) incurred in 1678 in Amsterdam to equip a slave carrier for her voyage to the Americas, various expenditures were mentioned, mainly for food and drink, and although lighterage, pilotage, the wages of the crew, and similar expenses were listed, there was no mention of insurance on either the ship or her cargo.

Unger 'Bijdragen' II discusses several such contracts for the transportation, delivery and sale of consignments of slaves (see at 114-115, 127-129, 136-138, 141-142, and 143-145). The addendum to the draft of such a contract dated 1758 and concluded by the Middelburg Company (see at 135-138), contained a calculation of the expected expenses and profit, and in it provision was made for the cost of the insurance premium at eighteen per cent on the slaves and at 40 per cent on the ship and her equipment.

83 See eg Unger 'Bijdragen' II 35, 90 and 138; see also the policies referred to infra.

84 See eg Spooner 151-159 for details of eight voyages (and the insurance on those voyages) between 1764 and 1781 of the ship the 'Haast U Langzaar', belonging to the Middelburg Commercie Compagnie which was engaged on the slave trade to Africa and thence to the West Indies. Mees Gedenkschrift, appendix 22, reproduces a 1765 Rotterdam insurance policy on goods, including slaves, to be taken on board on a slave-trading voyage to the coast of Africa and thence to America, the insurers to bear the risk 'op de Slaven die voort cargasoen sullen werden ingekogt verhandelt of getrocqueert werdende met wederzijds goedvinden'. In Mees Gedenkschrift, appendix 23, there is reproduced a Rotterdam transport insurance concluded at the end of the eighteenth century (c1795) specifically on slaves only ('Geschiedende deze assurantie op 't Leven der Slaven en Slavinnen aan Boord van 't Schip ...'). As to the latter two policies, the originals of which are housed in the archives of the Rotterdam brokerage firm R Mees & Zoonen, see further Van Brakel 'Slavenhandel'; Unger 'Bijdragen' II; Vergouwen 74; and Witkop 14.

Krans 74 refers to an Amsterdam policy of 1777 concluded by 25 individual insurers 'voor de handel in slaven op de kusten van Afrika'; Emmer 'Atlantisch' 313 reproduces a 1790 London policy on the hull of a Dutch slave-ship; and see too Weskett Digest 11 sv 'Africa' for examples of clauses inserted in (English) policies on slaves, and also in policies on ships and goods from England to Africa.

These policies will be referred to below as the Middelburg policies of 1764, the Rotterdam policy of 1765, the Amsterdam policy of 1777, the London policy of 1790, and the Rotterdam policy of c1795.

85 That is, from Europe to Africa, from Africa to the Americas, and from the Americas back to Europe.

86 Emmer 'Atlantisch' 314 quotes a premium of 4½ per cent for the outward voyage to the Americas and 8 per cent for the return voyage from there back to Europe, which was increased up to 25 per cent in time of (impending) war. The premium quoted in the Rotterdam policy of 1765 was 3 per cent and that in one of the Middelburg policies 8 per cent.

87 See eg the Rotterdam policy of 1765.
the slaves in particular against all accidents except death from natural causes. This wording was employed elsewhere as well. By contrast, it appears that in policies which covered only slaves and which were intended to dovetail with policies covering cargo, including slaves generally, the approach was more sophisticated and the aim was to provide a more comprehensive cover. They covered the insured slaves against all risks of death, whether natural (such as caused by disease), intended (caused by suicide) or violent (caused by fighting or an uprising), no cause of death whatsoever being excluded, except only such causes covered by insurers on ship and cargo. In the absence of such express wide cover, insurers were, of course, not liable for natural or self-inflicted death, such being regarded the result of an inherent vice in the slaves.

---

88 See eg the London Assurance Company policy on slaves of 1733 which provided that it was ‘free from all damage by prohibited trade, and free from the death of Slaves either natural, Violent, or Voluntary’. Another policy of the same company and year provided that ‘the Assured doth hereby ... take on himself all loss and damage arising by Death and Insurrection of Negroes’. For these policies, see Drew 36-40.

89 Slaves killed in the process of quelling an uprising was brought in general average. Another possible general average loss of slaves was a jettisoning of slaves in an emergency. In this regard one English case was of particular interest and influence. In 1781 the Liverpool ship ‘Zong’, captained by Luke Collingwood, was on a slave-trading voyage. A prolongation of the voyage due to a navigating error, resulted in the ship’s supply of fresh water running out. Collingwood ordered over 130 sickly slaves to be thrown overboard. The story came to light only when the insurers of the slaves were sued by the owner of the ‘Zong’, one Gregson, in London in 1783 (see Gregson v Gilbert (1783) 3 Doug 232, 99 ER 629). Gregson claimed to recover the value of the slaves thrown overboard on the ground that they were lost due to a peril of the sea. The insurers argued that there was in fact no real shortage of water on board (it being the rainy season at the time) but that sick (and thus less valuable) slaves were thrown overboard solely to obtain their full value from the insurance. (Thus, they argued, there was no real emergency and therefore no valid jettison: see again ch I § 4.6.4 supra.) Although, in the reported case, a retrial was ordered, it was apparently subsequently held that the slaves had been thrown overboard unnecessarily and solely in order to defraud the insurers. The case served in the early days of the anti-slavery campaigns in England to draw attention to the conduct of slave-traders. See further Cooper 34; Hogg 21-22.

Opposition to slavery in England resulted in an Act of 1788 (30 Geo III c 33) which sought to ensure that sufficient provisions were taken on voyages and other necessary measures taken to prevent the death of slaves en route. For this purpose s 8 of the Act rendered void all insurances on slaves against any risk other than ‘the Perils of the Sea, Piracy, Insurrection, or Capture by the King’s Enemies, Barratry of the Master and Crew and Destruction by Fire’. In Tatham v Hodgson (1796) 6 TR 656, 101 ER 756, slaves were insured against perils of the sea. The Court held that their death because of a lack of sufficient and suitable provisions caused by a prolongation in the voyage due to bad weather was not a loss within the policy but one by natural causes which could not be insured against because of the Act of 1788. An Act of 1799 (34 Geo III c 80) was more explicit and provided in s 10 that ‘no loss or damage shall be recoverable on account of the mortality of slaves by natural death or ill treatment, or against loss by throwing overboard of slaves on any account whatsoever’. Thus, this Act put an end to the jettisoning of slaves and claims for their loss to be taken in general average. Finally, an Act of 1806 (47 Geo III c 36), in abolishing the slave trade, prohibited, under heavy penalties, any insurance of slaves or slave-ships, although some insurers argued that this prohibition was not applicable to ships under a foreign flag. See further generally Cockerell Lloyd’s 14; Cooper 34; and Wright & Fayle Lloyd’s 218-219.

90 The Rotterdam policy c 1795 insured against ‘alle gevaaren des doods ’tzy Naatwurlijke moedwillige of geweldige, geen oorzaak des doods hoe ook genaamt uitgezondert als alleen zoodanige toevalle ... die door de heere assuradeurs op het schip Cargazon Goed of Lading verzekert hebben als Schade en averij gros betaalt zal worden blyvende ale ander sterfte hoe en waar door ook veroorzaakt ten onze lasten’.
Insurance Law in the Netherlands 1500-1800

91 Suicide by slaves, which, it must be stressed, was considered an inherent vice in the slave and not intentional conduct by an insured, was the largest cause of death after illness. English underwriters ordinarily accepted risks on slaves only on condition that the insured warranted that his ship was 'sheathed' or copper-bottomed, that is, that copper sheathing had been nailed over the ship's wooden hull as a precaution to prevent slaves from escaping by boring holes in the side of the vessel and sinking her in the process. See eg Cockerell & Green 14; Drew 36-38; and John 'London Assurance' 139.

92 Thus, the Middelburg policies provided for the insurers to be liable 'tot de Plaats daar de laatste Slaaf of Slavin zal worden verkogt'. Similarly, the Rotterdam policy c1795 insured the slaves from the coast of Africa to places in the Americas until the last slave had been sold.

93 The franchise percentage, 3 per cent on ordinary goods, varied between 10 and 15 per cent on slaves. It seems that in the course of time, due to pressure from insurers rather than for humanitarian reasons, the franchise was increased upwards in an attempt to improve the care exercised by the insured over his cargo. As to franchise, see further ch XV § 73 infra.

94 See again § 2.3 supra.

95 The policy provided cover 'voor de of aangaande de Negers of Slaven (de natuurlijke doodeytgesoniderd) voott afloopen [desertion] & Revolteeren derselven 't zij aile of gedeeltse hoe & op wat wijze en uyt welke oorsake zulx zoude kunen worden veroorzaakt 't zy doodslag, moord of dergelijke, waardoor negers of slaaven mogte verlooren worden en de voorschreeve Plantatie soude kunnen 't onbruyk worden gemaakt directelyk of indereclijk'. See again Mees Gedenkschrift appendix 21 for a reproduction of this policy.
was made. And it put the fear of God into even the most experienced and saltiest of sailors.\textsuperscript{96}

The peril of piracy not only included the risk of a ship and her cargo being captured and carried off\textsuperscript{97} but also the risk that her master, crew and passengers might be taken capture. A particular threat in this regard were the Turkish, Moorish or Barbary pirates, collectively often referred to as the heathen or unchristian pirates (\textit{Onchristelijke Roovers}), operating in the Mediterranean Sea and along the Atlantic coast of Portugal. Because their city states were often at war with one or more of the maritime powers of Europe, these pirates considered captured seamen as a prize of war, as property, with lower status even than that of true slaves.\textsuperscript{98} But European seamen of captured ships were taken captive by these pirates more with a view to the money which might be paid for their ransom than for their capability and capacity to work and their inherent value as slaves. Furthermore, holding their subjects, often for very long periods of time,\textsuperscript{99} was an important bargaining chip for the Turks and the North African city states in any negotiations with the European powers. Negotiations for peace with these Barbary nations were invariable accompanied by offers of the ransoming of Christian slaves.

\textsuperscript{96} As to the capture of Dutch seamen as slaves and their ransoming generally, see Bijl 73 and 101-104; Boon; Bruijn \textit{'Zeevarenden'} 184-186; Van der Does; Van Eeghen; Hardenberg; Knittel 15-19; Lootsma; Prud’homme \& Van der Oest; Den Ridder; and Vrijman 128, 132 and 136.

\textsuperscript{97} See ch VI § 5.4.4 \textit{supra} as to the peril of piracy and § 5.4.6 \textit{supra} as to the ransoming of the ship and her cargo.

\textsuperscript{98} The capture of sailors by European belligerents, although by no means a lesser risk, was one which seemingly never involved the practice of insurance. European capturers, often regarded as pirates by the Dutch but who often were, in truth, nothing more than privateers (see again ch VI § 5.2.2 \textit{supra} for the difference) or marines, also captured Dutch ships. At first, they did not as rule take their crews captive but simply threw them overboard. Exceptionally passengers who were suspected of being wealthy or important, may have been taken captive and their release offered for a ransom. Gradually, in the course of the seventeenth century, the exception became the rule when the possibility was realised of the profit which could be made from the ransoming of captured passengers and crew. Occasionally peace treaties made provision for the exchange of captured seamen.

Only by end of the eighteenth century did the practice arise among the states of Europe of exchanging prisoners of war in the course of a war. An interesting case illustrating the practice of a public exchange of prisoners in time of war was the English decision in \textit{The Dalijie} (1800) 3 C Rob 139, 165 ER 414. It concerned, against the background of an exchange of English and Dutch prisoners, the capture by the English of Dutch ships claiming to be engaged in the transportation of prisoners for exchange and thus being exempt from capture as prize. The Court noted that the practice of prisoner exchange was unknown or at least not familiar to Grotius because it was not mentioned and discussed in any detail in his \textit{De jure belli}. See further the notes in the Appendix to his case at 3 C Rob (App) 1-7, 165 ER 494-497.

\textsuperscript{99} The reasons for the period of captivity being prolonged may have been because it was not realised at home what had happened to the ship and her crew, or because of the captured seaman not being offered for ransom, or because of protracted negotiations to obtain ransom and release, the latter often being linked to peace negotiations. Thus, during negotiations with Algiers in 1729, it appeared that 256 seamen from Dutch ships, captured between 1690 and 1726, were still alive there in slavery, seven of them having been held captive for longer than 30 years. On occasion some European powers even negotiated for the release of nationals other than their own, eg the Dutch in 1631 redeemed English sailors captured by the Turks. See Gray for further details.
In the seventeenth century the money paid for the ransom of captured Dutch seamen generally did not come from public funds. It was feared that if such funds were allocated for this purpose, ransoms would be increased as a result, that more dangerous and careless voyages would be undertaken by shipowners, and that the seamen themselves would not do their utmost to avoid capture. Public funds were allocated only on an ad hoc basis where treaties necessitated ransoming, and then only in addition to funds otherwise collected privately. The Estates-General and the provincial and municipal governments nevertheless supported attempts to ransom subjects in a non-financial way in the seventeenth century, for example by supplying logistical and diplomatic support. This official support appears also from the fact that the ransoming of subjects was excluded from the prohibitions on the ransoming of captured ships and goods.  

Funds to ransom seamen and others therefore had to be found from sources other than from the authorities. These included private collections of money for the ransoming of a particular local seaman or seamen;  

more general public collections for the ransoming of a number of seamen;  

lotteries which were occasionally held to collect money for ransoms;  

the permanent and dedicated community funds (slavenkas) established, especially in larger coastal towns, for the ransoming of local

---

100 See eg the 'Placaet ... Tegen rantsoenen tot laste vande Reeders belooff' of the Estates of Holland and West Friesland of 3 May 1621 (see GPB vol I at 1076) and also s 16 of the Amsterdam keur of 1744, both of which were discussed in ch VI § 5.4.6 n362 supra. The placaat of 1621 excepted the ransoming of the master or crew of a captured ship in the following terms: 'Maer dat niemant hen onderstaen, ofte mogen sal, eenich ander rantsoen te beloooven, als voor sijn eygen Persoon, ende 't geene hy achten selfs te konnen betalen' and provided that shipowners were not to be liable further 'als voor 't gedeelte sulcke Schipperen ofte Stuyrluyden, ofte anderen die gevangen ende gerantsoent sullen worden, selve originelijck toekomende'. See also Goudsmit Zeerecht 17.

101 Permission was eg granted by the local municipal authorities for such a collection. They also supervised it to prevent abuses such as collecting for a person who had already been released, who had been released without ransom, who had never been captured or, who had died in captivity. Money was collected in the form of promises or subscriptions and was paid over, only when the seaman concerned had arrived 'vrij op Christenbodem', to the person (not infrequently the merchant who undertook to negotiate and obtain the release of the captive) who had advanced the amount of the ransom. If the need to pay the ransom fell away, the book in which these subscriptions were written down, was destroyed. On other occasions the promisees paid the money in advance. It was usual practice for the authorities, in granting permission, to determine a maximum amount which could be collected for the ransom in this way.

102 Such collections were held especially after a peace treaty had been concluded and a mass ransom had been agreed upon. Thus, in 1632 and again in 1633 the Estates-General instructed the various provinces to hold collections for the ransoming of a large number of seamen held captive in Tunis and Algiers.

103 Collections and lotteries were initially the only, and later a supplementary, source of funding for ransoms.
seamens' organisations to provide benefits to their member, including the payment of a ransom to obtain their release from captivity.\footnote{105}

More relevant for present purposes was the possibility that, in appropriate cases, one could conclude a contract with another in terms of which the latter undertook to pay the amount of ransom required to obtain a release from capture. Such contracts were feasible and were concluded between the itinerant and sedentary partners in a partnership.\footnote{106} And obviously, one could also for a premium conclude such a contract with an insurer. It must be conceded, though, that ransom insurance contracts were in the greater scheme of things no doubt a less important and subsidiary source of funding for the ransoming of seamen.\footnote{107} This form of insurance, known somewhat misleadingly in Roman-Dutch law as an insurance against slavery, or as an insurance of freedom,\footnote{108} could be taken out by a mariner or by a member of his family who would be expected to pay the ransom should he happen to be captured. It was possible that others travelling on ships in a different capacity than as mariners, for example merchants and pilgrims who travelled as passengers, may also have insured against having to pay a ransom to obtain their release from capture.\footnote{109}

\footnote{104} These funds were often merely destined to supplement privately collected funds. They were administered by the local authorities and funded either by compulsory contributions from departing seamen themselves (the amount of their contribution depending on their destination), or by contributions from the municipality and other local church and welfare organisations. For details on the "slavenkas" established in Zierikzee in 1735, see Schot.

\footnote{105} Some of these mutual insurances were not designated specifically for ransom (some in fact even excluded it because of the great expense involved), but to compensate seamen more generally for losses (such as a loss of wages or personal effects) they could suffer in the case of a loss of their ship. Some of these funds (and initially, in fact, most), just provided for the cost of repatriation of members after their release from captivity. Gradually, though, the aim of these beurzen changed as the risk of being captured by pirates increased. In some cases even the beneficiaries of these beurzen eventually changed, and not only seamen but also their families benefitted from them. In other cases the funds acquired an even more general character and became unemployment and compensation funds for seamen. As to these beurzen, see further Bakker; Van der Does; De Jong 113-122; and Lootsma. As to mutual insurance generally, see ch IX § 3 infra.

\footnote{106} See Van Brakel 'Vennootschapsrecht' 179 who refers to a partnership agreement of 1598 in terms of which the partners undertook in respect of one of them that "soo verre [hij] in 'tgaen off keeren van den Turck off andere vijanden gevaandelijk genomen ende geranchionneert werde, dat die voorn pertijen gehouden zullen wesen ende belooven bij desen, den selven te remideren, lossen ende pro rato tottet ranchioen ende oncosten te betalen".

\footnote{107} After all, it seems hardly likely that large numbers of unschooled seamen would have had the prescience to conclude such private insurances before they went on voyages, let alone that they would have been able to afford the premiums.

\footnote{108} See further § 3.2.2, especially at n136 and n140-n142 infra as to the legal nature of ransom insurance.

\footnote{109} It is known, eg, that pilgrims to Jerusalem 'insured' themselves for overland voyages by concluding wagers on their safe return: see again ch II § 5.1.5 supra.
The actual payment of a ransom was arranged in different ways. In the case of a mass ransom after the conclusion of a treaty, an official representative of the Netherlands, such as a consul, was sent to obtain the release of Dutch sailors. In other cases a merchant may have been prepared, for a fee, to negotiate the release of an individual seaman. Some merchants (loskopers) specialised in ransoming seamen and others from pirate capturers. They were employed by the family of a captive or by the collectors of funds for his release, and were authorised to negotiate for his release by the payment of an amount of ransom up to a specified maximum. This amount was handed over to the merchant beforehand or, alternatively, may have been advanced by him as part of the agreement.\textsuperscript{110} No doubt, given the distances and slow means of travel and communication at the time, such negotiations could be protracted,\textsuperscript{111} costly,\textsuperscript{112} and often in vain. The amount of ransom was determined by the market price of captive slaves in Barbary which, in turn, was influenced by the status and personal characteristics of the particular captive. It was paid to the capturers either by way of bills of exchange or in cash. In addition to the actual amount of the ransom itself, various additional expenses\textsuperscript{113} could add significantly to the total outlay involved in obtaining the release and safe return of a captured Dutch subject.

In the eighteenth century, and especially in the latter half of it, official policy as regards ransoming changed. Provision was made by the various Admiralties and the Estates-General for ransoms to be paid from the taxes collected in connection with shipping, and ransom costs came to be borne fully by the central authorities. As a result, the private sources of funding became less important and, with it, the practical value of ransom insurance was considerably reduced.

3.2.2 Ransom Policies and the Law

Despite its apparent relative insignificance as a method of providing funding for the release of captured Dutch subjects, ransom insurance was in practice sufficiently important to warrant the rather detailed attention of Roman-Dutch insurance law.

From the compilation of Antwerp customary insurance law in the first decade of the seventeenth century, it appears that ransom insurance was well known there at that

\textsuperscript{110} Such agreements also determined who was to bear the risk of the death of the seaman before his arrival in a 'Christenland'. In some cases, eg, the fund or authorities involved undertook to pay the merchant the amount of the ransom in case of the death of the seaman after his release but before his safe arrival at home.

\textsuperscript{111} Although the majority of releases were obtained within 3 to 5 years of capture, there were exceptions. See eg Boon for the details of one Jan Cornelisz Dekker who was captured in 1714 and who, despite continuous though intermittent attempts to obtain his release, only returned to the Netherlands from Morocco in 1743.

\textsuperscript{112} The negotiators undertook their commissions for a certain percentage (eg 3 per cent) of the amount of the ransom eventually paid, plus their expenses.

\textsuperscript{113} Including the fees of intermediaries and negotiators, the levies on the bills of exchange, and the cost of the released seaman's transport and sustenance.
time. The legal position was in fact regulated in detail which was equalled in formal legislative sources only some 140 years later in Amsterdam.\textsuperscript{114}

The first reference to ransom insurance in Roman-Dutch sources occurred in an opinion given on an Amsterdam ransom insurance policy in 1678.\textsuperscript{115} Two underwriters had each underwritten f1 000 for the ransom ("Rantsoen-geld") which might have had to be paid for one S, the master of a particular ship going on a particular voyage. After S was captured, his wife claimed the sums concerned from the insurers who refused to pay. The opinion first of all thought that the policy did not contravene legislative prohibitions on wagers on lives, voyages and similar such events.\textsuperscript{116} Secondly, it thought that a ransom policy, such as the one under consideration here, was not by its nature unlawful. It was an insurance proper and not a wager because of the parties and specifically the insured master S having an interest in the outcome of an uncertain event.\textsuperscript{117} Thirdly, the opinion advised that the Amsterdam Chamber of Insurance did have jurisdiction over disputes arising from a ransom policy despite the fact that such policies were not provided for in the Amsterdam \textit{keur} of 1598 or any of its subsequent amendments.\textsuperscript{118} Fourthly, the opinion left open the question whether the rules and principles applicable to ransom insurances were, in the case where none was prescribed by statute, those so prescribed for the marine insurances of ships and goods\textsuperscript{119} or whether the general principles of (the common) law were applicable.\textsuperscript{120} Lastly, a few other interesting points were raised in the opinion without any further discussion, for

\textsuperscript{114} The relevant principles were taken up in arts 317-323 of par 9, title 11, part IV of the Antwerp \textit{Compilatae} of 1609 (see De Longé vol IV at 330-332). Article 317 permitted masters, pilgrims, merchants and others undertaking distant voyages on which they ran a risk of capture and ransoming by heathen or other enemies ("schippers, pelgrims, cooplieden oft andere die verre reijsen aennemen, daerinne siij bij de ongeloovige oft openbaere vijanden ende quaetdoeners gevangen ende op rantsoen gestelt souden mogen worden") to insure such ransom and the cost of their imprisonment. In terms of art 318, the sum insured had to be stated in the policy so that the insurers would know the maximum extent of their liability ("waerinne sij ten vuijtterste gehouden sijn"), but the insured nevertheless had to bear one-third of the ransom himself ("opdat hij oorsaeche hebbe on voor hem te sien ten sijnde hij niet gevange en worde, ende, gevangen sijn, hem ten minsten coste daervan vriij maecker"). Proper identification was required in the policy of the person insured (eg, "de gesteltenisse, groote oft cieijnte van hennen persoon, mette lieteeken en doe sij int aensicht oft elders mogen hebben, daeruijt men de seive mach onderkennen") (see art 319). An insurer was not at risk for longer than three years after the commencement of the specified voyage (ie, for the insurer to be liable, the insured had to be captured but not necessarily ransomed within that period) (art 321).

\textsuperscript{115} See \textit{Nederlands advysboek} vol II adv 170.

\textsuperscript{116} See again ch II § 5.2.3 supra.

\textsuperscript{117} See ch II § 6.2.1 supra.

\textsuperscript{118} See ch IV § 1.4.3 supra.

\textsuperscript{119} It noted that a number of such provisions could or should not be applied to ransom policies, eg abandonment and the principle that no abandonment and no claim was possible within a certain period after the occurrence of loss; also, the usual periods of prescription.

\textsuperscript{120} See ch V § 1 supra.
was relieved of his liability should the insured die before he could be ransomed
and released, and that the insurance money should be returned if the ransom was not paid
(‘de sorge die daar gedragen werden, dat indien het uitgeschote geld tot waar Rand-
zoen niet besteed kan werden, het gerestitueert werde’). Clearly, some regulation of
ransom policies was required, the more so because ransom insurances appear not to
have been uncommon at the time.121

Such regulation was not long in coming and the first legislative measure
appeared towards the end of the seventeenth century. Section 2 of the Amsterdam
amending keur of 26 January 1693122 permitted insurance to be made on the ransom
payable to pirates for the release of masters and mariners.123 Ransom policies had to
be in the form prescribed by the keur. It furthermore repealed s 24 of the Amsterdam
keur of 1598 which prohibited insurance on the lives of any person and on wagers on
voyages and similar inventions124 to the extent that it was in conflict with that section,
but no further.125 The ransom policy prescribed by the keur of 1693 insured the body
and person (‘op ’t Lijf en den Persoon’) of a named person during a specific voyage
and only against a specific peril, namely that of capture and ransoming by heathen
pirates.126 The insurers promised to pay, to the full extent of the sum insured, the
ransom and expenses necessary to obtain the release of the insured, and to pay it as
soon as notice had been received of his release or of the acceptance of the bill of
exchange given for such release. Presumably insurers were not prepared to advance
any sum prior to such release, given the uncertainties involved.

121 There is an extant Amsterdam ransom policy dated 1692. It is considered in detail in Vergouwen 73n3
and is reproduced in Appendix 28 infra. It was in a printed form and was sold by an Amsterdam
bookseller, which would indicate the extent to which such insurances occurred at the time. The policy
was not authorised by the local Chamber nor signed by its Secretary, and it in fact renounced the
application of the Amsterdam insurance keur. In this regard it provided that ‘alsoo gesustineert word, dat
deze verseekering is strijdende tegens de ordonnantie van de Kamer van Assurantie, soo renuntieren
wij voorbedachtelijk van dese Ordonnantie ende de Wetten ende Placcaten, die den Inhoud deses
soude mogen contrarieren’. The two underwriters of the policy at a premium of just below 2 per cent (so
low because the insured voyage did not extend beyond the Strait of Gibraltar) promised to pay out the
sum of f3 000 (each underwrote f1 500) to the wife of the master (one Gilles Joosten van den Brande) of
a ship should the latter en route on a single voyage from Rotterdam to Cadiz be taken capture by pirates
(‘van alsulcke natie als soude mogen wesen, hetzij Turksche, Moorsche of andere Roovers’).

122 As to which see eg Enschedé 34.

123 It referred to insurance ‘op de simple Rantsoenen [losprijs, losgeld, ransom] van Schippers en
Bootsgesellen, tegens de Zee-Rovers’.

124 See ch II § 6.4.3 supra. According to Goudsmit Zeerecht 317-318, under the ‘inventiën’ mentioned in s
24 was originally apparently also included ransom insurance.

125 The relevant part of s 2 read: ‘werdende het 24. Artikul ... by desen vernietigt, voor so veel als ’t selve
met dit Articul komt te contrarieren, en verders nog anders niet’.

126 It provided as follows: ‘en sullen wy de Risico alleen loopen voor het nemen van alsulcke Natie, als het
soude mogen wesen, hetzy Turksche, Moorsche, Barbarische, of andere Onchristene Rovers, waar de
voorsz ... [name of the object of risk] genomen, gevangen, weg-gevoert, of gerantsoeneert wierde’.
Early in the eighteenth century Verwer explained that although incorporeal matters such as profits or uncertain returns were not insurable, the insurance of the freedom of the master and the crew of a ship, and of them alone, against heathen piratical capture was permitted because of its importance, and despite fact that such freedom was also incorporeal.\textsuperscript{127} By the time of the Rotterdam \textit{keur} of 1721, the insurance of ransom ('de Rantcoenen tot lossinge uyt slavernye') was expressly permitted\textsuperscript{129} and ransom insurance was specifically included in the jurisdiction of the local Chamber of Maritime Affairs.\textsuperscript{130} The \textit{keur} of 1721 also prescribed a ransom policy which insured a named person and his liberty ('op de Persoon ende voor de vryheit van ...') going on a specified voyage on a named ship, the insurers undertaking to pay, to the full extent of the sum insured, the ransom and other expenses incurred in obtaining the release of the insured in the case of his capture by heathen pirates ('indien de voorschreve ... (het welk Godt verhoede) genomen, gevangen, weggevoert, of gerantcoeneert mogte werden by eenige van de Onchristene Natie, het zy Turksche, Moorsche, Barbarische, of andere van de Onchristenen'). It seems, therefore, that in Rotterdam, as in Amsterdam and no doubt elsewhere, ransom insurances were not infrequently concluded.\textsuperscript{131}

Despite these legislative measures, in the mid-eighteenth century Bynkershoek still had some doubts as to the validity of what he termed the insurance of civil freedom ('Burgelyke Vryheid'). He expressed these doubts\textsuperscript{132} despite the earlier opinion of 1678 and despite the fact that such insurance had not expressly been declared unlawful by any law.\textsuperscript{133} Nevertheless, Bynkershoek did not condemn the practice, especially in view of the fact that the State itself often ransomed its subjects for large amounts from the enemy. He thought that ransoming in fact had to be encouraged where the captured person had displayed bravery in resisting capture. He had one proviso, though, namely

\textsuperscript{127} See again ch V § 5.1 \textit{supra}.

\textsuperscript{128} See Verwer \textit{See-rechten ad} par 34 (at 175-176).

\textsuperscript{129} See s 26; Van Zurck \textit{Codex Batavus} sv 'Assurantie' par 7B; and Goudsmit \textit{Zeerecht} 397. See too the \textit{Vriesland Statuten} of 1716, art I.28 which provided that insurance could be concluded 'op rantcoenen, van Schippers en Bootsgezellen, tegen Turksche, Moorsche, Barbarische, en andere Onchristen Zeeroovers'.

\textsuperscript{130} See s 23.

\textsuperscript{131} Quite remarkably, the first policy concluded by the Rotterdam Insurance Company established in 1720 was a ransom policy, 'op Lijven voor risico van den Turk'. See Appendix 15 \textit{infra} for a reproduction from the first page of the Company's underwriting register.

\textsuperscript{132} In \textit{Quaestiones juris privati} IV.1.

\textsuperscript{133} His main reason was that, as in the case of the insurance of their wages, if mariners were permitted to insure the payment of a ransom on their capture, they would be less likely to resist such capture and with it the capture of the ship and her cargo. He pertinently rejected the view that ransom insurance was akin to life insurance and for that reason unlawful.
that even if there were a law expressly permitting such insurance of freedom, a court should have the discretion to determine if the person whose freedom was insured, had done everything possible for the protection of the ship, and that if that was not the case and he had surrendered through cowardice, he should have no action, ‘want iemand word tegen de magt der vyanden geassureert, en niet tegen zyne lafhartigheid’. This was clearly an analogy with an insured’s own fault against which insurance not possible. But, as Van der Keessel pointed out later, the provisions of the Amsterdam keur of 1744 which were passed at the time when Bynkershoek expressed his views, removed all doubts as to the validity of what he, more correctly, termed the insurance of the amount to be paid as ransom (‘pretia redemptionis’).

The most detailed provisions for ransom insurance appeared in the Amsterdam keur of 1744. In terms of s 14, the insurance of masters, members of the crew and, now for first time, other passengers against pirates (‘Lyтеekeingen voor Schippers, Scheepsvoork en Passagiers tegens Onchristenen en andere Rovers’) bound the insurers to pay the sums they had insured for as soon as the bills of exchange drawn for the payment of the ransom had been accepted, or even earlier if it appeared that the person released had arrived in Christian territory. A proviso made it clear that should it appear, presumably in the case of an advance payment, that the insured had been ransomed for less than the amount of the sum paid out, the balance had to be returned to the insurers.

The keur of 1744, as well as the amending keur of 1775, both contained a prescribed ransom policy in virtually identical terms. It insured the body of the insured (‘op ‘t

---

134 Which, of course, there was in Rotterdam at the time he wrote, although he appears not to have been aware of it.

135 See again ch VI § 4.1 supra. See further Schorer Aanteekeningen 415 (ad III.24.3) n4 who explained this analogy and also quite correctly pointed out that ransom insurance was in fact expressly permitted in Rotterdam; Scheltinga Dictata ad III.24.4 sv ‘uitgezeit menschen leven etc’ who thought that there was insufficient reason to regard insurance on someone’s freedom as prohibited and that it was not likely that the legislatures’ aim was to include freedom under the prohibition on insurances of lives and wagers: an insurer was liable under such a policy, he thought, at least where it could not be proved that the loss of the insured’s freedom was due to ‘zyn eigen negligentie’; Decker Aanteekeningen ad IV.9.4 n(3)/(c).

According to Enschede 36, Bynkershoek’s analogy here was with inherent vice in the object of risk. This, of course, is not possible if the object of risk is regarded as the ransom and not the liberty of a particular person, and it is also incorrect in view of the fact that the insured was not necessarily the seaman concerned.

136 See Van der Keessel Theses selectae th 717 (ad III.24.4); idem Praelectiones 1436-1437 (ad III.24.4). See also Van der Linden Koopmans handboek IV.6.2.

137 See eg Goudsmit Zeerecht 340; Weskett Digest 440 sv ‘ransom’ par 9.

138 See again ch II § 5.1.5 supra for pilgrimages and wagers on voyages and also Van Westrienen at 61 for the danger of robbers, bandits, and plundering soldiers, and at 88-99 for details of the sea passage from the Netherlands.
lijk van den Persoon van ...’) against the peril of capture and ransoming by heathen pirates.\textsuperscript{139}

The proviso in s 14 clearly showed that ransom insurance was a form of indemnity insurance - an insurance of the ransom as Van der Keessel correctly pointed out - and more specifically a form of (marine) liability insurance, namely the liability to pay a ransom. The insurer’s liability was limited to the sum insured\textsuperscript{140} or the amount actually paid by way of ransom,\textsuperscript{141} whichever was the smaller. It was not, as the wording of the prescribed policy may have suggested and as was the view of Bynkershoek and others, an insurance of the body or liberty of the insured or anybody else.\textsuperscript{142}

It seems that in addition to ransom insurance in this sense, which was the only form known or at least formally recognised in Roman-Dutch law,\textsuperscript{143} there was also known elsewhere a form of life insurance\textsuperscript{144} in terms of which the insurer was liable to pay the sum insured in case of the accidental or even the natural death of the life insured during his captivity, or as a result of attempts to prevent or to escape from captivity. Known in Hamburg, for example, as ‘Türkenlebensversicherung’, it could be concluded separately or together with ransom insurance proper (‘Freiheitsversicherung’) and was distinguishable by reason of the specific peril insured against from the more

\textsuperscript{139} The policy provided that ‘zullen wy de risico alleen [the 1744 policy did not have ‘alleen’] loopen voor het nemen van al zulke natie als het zoude mogen weezen, het za Turksche, Moorsche, Barbarische, of andere Onchristerse Rovers, waar van de voorsz ... genomen, gevangen, weggevoert, of geransoneeert wierde’.

\textsuperscript{140} Which, it appears, was often kept secret so as not to encourage bargaining or an inflation of the amount of ransom.

\textsuperscript{141} The sum insured was only due when the ransom had in fact been paid, and was not payable in case of an escape or a release without ransom, nor in case of the captive’s death prior to his release. The insurer also did not bear the risk of a safe return after the release nor the risk of natural or even unnatural death at any stage.

\textsuperscript{142} Thus, ransom insurance was an insurance against the insured’s loss of having to pay a sum of money by way of ransom to obtain his own release or that of a specified person. See too eg Nolst Trenité ‘Voorwerp’ 27-28; Rutgers van der Loeff 142-143 (it was an insurance against the loss of the amount of ransom, not against the loss of freedom). Dorhout Mees Schadeverzekeringsrecht 25 and 553-554 explains that insurance against slavery was an insurance against the risk that a ransom would have to be paid for the release from captivity of a particular person; it was, in a sense, an insurance against a moral liability. It could be concluded by the object at risk (lijk) as well as by another who may have felt obliged to pay the ransom. Ransom insurance was an integral part of marine insurance, not a form or a predecessor of life insurance, the uncertain event not being in any way linked to the life or death of the object (body) at risk; it was also not an insurance against the loss resulting from the loss of freedom through captivity. See contra eg Van der Burg Begunstiging 8 who regards ransom insurance as term or temporary life insurance, and Van Schevichaven Leven en sterven 13-14 who considers it a hybrid form of life insurance.

\textsuperscript{143} On the largely similar English practice of ransom insurance, see eg Molloy De jure maritimo II.7.4; and Walford Cyclopaedia vol I at 442-445 sv ‘Insurance against captivity’.

\textsuperscript{144} Walford Cyclopaedia vol I at 444-445 sv ‘Insurance against captivity’ suggests that captivity insurance led very much to the practice of life insurance or was often substituted for life insurance in countries where the latter form of insurance was prohibited. But see again n142 supra.
The word ‘reinsurance’ in Roman-Dutch law referred to two disparate forms of insurance. First, it referred to reinsurance proper, or reinsurance in the modern sense, which was an insurance concluded by an insurer (the primary insurer) with another insurer (the reinsurer) to cover himself against the liability or liabilities which he could incur in terms of other (primary) insurance contracts. Secondly, it referred to solvency reinsurance which was an insurance concluded by an insured and which was a second (or new) insurance concluded to take the place of an earlier insurance in case of the insolvency, or of doubt as to the solvency, of the first insurer. The primary meaning of the term ‘reinsurance’ in Roman-Dutch law for a very long time was solvency reinsurance, and it is therefore appropriate to treat that form of reinsurance first.

4.1 Solvency Reinsurance

By far the majority of insurers during the period of Roman-Dutch law were individual underwriters. Their financial position and possible insolvency were often

---

145 See eg ss 1-6 of title X of the Hamburg Assecuranz-Ordnung of 1731 on the insurance of ransom, of life against pirates, and of life during a sea voyage. See further Ebel ‘Sklavenversicherung’ 130-142; Knittel 26. Ordinary life insurance generally, ie, against death from any cause whatsoever and not necessarily by piratical capture or on a sea voyage, was permitted and clearly regulated by the Prussian Allgemeines Landrecht of 1794 (pars 1968-1973).

146 See arts 247, 593-10 and 618 and generally eg Enschedé 42; Van Veen 97.

147 As to these two meanings of ‘reinsurance’, see eg Den Dooren de Jong ‘Reassurantie’ 81; Goudsmit Kansovereenkomsten 215-217; and Vergouwen 62-63. Mossner 42-45 refers to seven transactions or concepts incorrectly referred to as ‘reinsurance proper’, including solvency reinsurance which he regards not as ‘Rückversicherung’ but as ‘Wiederversicherung’ or ‘Afterversicherung’.

Reinsurance must further be distinguished from other forms of (successive) insurance, eg double or multiple insurance where a second insurance is concluded which overlaps rather than takes the place of the first insurance (see further ch XVIII § 3 infra) as well as from co-insurance where different insurers conclude the same insurance contract as co-debtors (see further ch XVIII § 2 infra).

148 See further ch IX § 2.3 infra as to individual underwriters.
causes of concern, not only for those who had underwritten policies with them but obviously also for those whose policies they had underwritten.

The narrow issue to be considered here is to what extent an insured could, by concluding another insurance contract, have ameliorated his position in the event of his insurer, or one of his insurers, going insolvent or threatening to go insolvent. In case of the actual insolvency, or even just the anticipated insolvency where the insurer was in severe financial straits, the insured may have wanted to insure his ship or goods with another insurer because of the fact that he bore the risk of his insurer being unable to pay. Should he simply have concluded a new insurance, he would have been doubly insured and quite possibly over-insured, and having done so intentionally, he would have had to bear all the consequences attached by law to such intentional double-insurance and over-insurance. Clearly the law had to come to the assistance of the insured in such a case.

Although solvency reinsurance was not unknown in early Italian insurance practice and in the Netherlands, the topic was not treated in the earlier placcaaten, nor

---

149 See further ch IX § 2.9.2 infra as to the insolvency of individual underwriters.

150 See ch XVIII § 2.4 infra for the effect of the insolvency of one co-insurer on the position of other co-insurers.

151 See ch IX § 2.9.2 infra for the effect of the insolvency of an insurer on the insured's right of recovery under an insurance policy.

152 See in particular Den Dooren de Jong 'Reassurantie' 82-98.

153 He may, of course, have achieved the same result in any one of a number of other ways. Thus, the insolvent insurer and the first insurance contract may have been replaced by a new insurer and contract by way of novation (ie, an agreement between the first and second insurers and the insured), or the insured could have obtained a surety or guarantee for the liability of the insurer whose financial position was in doubt. See further infra.

154 In the case of a single insurer, the insured clearly bore the risk of not being able to recover on his policy. But even in the case of the insured being co-insured, as was usually the case, the insolvency or inability of one of the co-insurers to pay the sum he had underwritten on the policy fell to be borne by the insured and not by the other co-insurers, they not being joint debtors. As to co-insurance, see further ch XVIII §§ 3 and 4 infra as to double- and over-insurance.

155 See further ch XVIII §§ 3 and 4 infra as to double- and over-insurance.

156 See eg Santerna De assecurationibus III.55-58 who referred to it as a case of the insured insuring his insurance and who noted that the second insurer was not a surety; and Straccha De assecurationibus Introd.49. See further eg Den Dooren de Jong 'Reassurantie' 82-83; Berkhout 32-35. The latter points out that despite fact that Roccus De assecurationibus note 12 at first blush appears, and is usually taken, to have been referring to reinsurance proper, he was in fact concerned with solvency reinsurance, as also appears from his references to the texts of Santerna and Straccha mentioned above.

157 Article 45 of par 2, title 11, part IV of the Antwerp Compilatae of 1609 (see De Longé vol IV at 218) provided that if the insured feared that his insurers would not be able to meet their obligations, he could conclude the same insurance with others, 'd'weilck men oock heet reassurantie'. Article 46 provided for the way in which this had to be done. In terms of art 63, where the first insurer went insolvent, the insured was not at all liable to pay the premium (in terms of art 62, if the financial position of the insurer merely deteriorated, the insured was entitled to refuse to pay the premium unless the insurer provided security for his obligation under the policy), and the insurance contract between the parties was automatically
in the Amsterdam *keur* of 1598, nor in the Rotterdam *keur* of 1604.\(^{158}\) That happened only in 1626.

In its amplification of s 2 of the Amsterdam *keur* of 1598, the amending *keur* of 30 January 1626\(^{159}\) provided that in future, where someone insured on outgoing or homeward-bound merchandise or ships and his insurer went insolvent or fell upon financial difficulty (*'ende sijnen Assureur komt te failleren, ofte in onghelengentheyt van saecken te vervallen'*), the insured could renounce and cancel that insurance and could insure himself again anew on good and bad tidings.\(^{160}\) There were two provisos though. Firstly, the insured could conclude such new insurance only on condition that he first gave notarial and witnessed notice of such renunciation of the first insurance to the curators of the insolvent insurer (*'Curateurs vanden failleerden'*) or, presumably where he was not yet insolvent, to the insurer at his last known residential address (*'t sijnder laetster woonplaetse'\(^{161}\)*. And, secondly, he could do so only on the understanding that premiums already paid to the first insurer were not recoverable but fell to the benefit of the estate and creditors of that insurer.\(^{162}\) Therefore, notice of

\(^{158}\) Strangely enough, solvency reinsurance was never regulated in Rotterdam by way of legislation. According to Den Dooren de Jong 'Reassurantie' 85-86, the first known instance in which solvency-reinsurance was clearly mentioned in the Netherlands, dates from around 1603 and was in the form of a reference in the accounts of the East India Company to the premiums paid for insurance and reinsurance as the amounts to be deducted from the profit on a particular cargo.

\(^{159}\) There is some uncertainty about the date which is given as 1626 in the version of the *keur* of 1598, as amended, in the *GPB* vol I at 846, and as 1629 in the separate edition of the amending *keur* in Amsterdam *Handvesten* vol II at 658.

\(^{160}\) The phrase 'on good and bad tidings' (*'op goede ende quade tijdinge'*) was necessary because such new insurance would, in all probability, have been concluded after the insured ship or goods had already departed, had been exposed to risk, and might even, unbeknown to the parties, already have been lost. See further ch XII § 2.2 *infra* for insurance after departure and loss.

\(^{161}\) See the *Amsterdamsche Secretary* 384-385 for such a notice of cancellation of insurance to the curator of the estate of the insolvent insurer. This notice is reproduced in Appendix 11 *infra*.

\(^{162}\) See eg Voet *Observationes ad III.24.22* n42; Van Zurck *Codex Batavus* sv 'Assurantia' par 25. Bynkershoek *Quaestiones juris privati* IV.2 noted that this measure was passed to prevent unfaireness to an insured as a result of the insolvency of one insurer on the liability of the other co-insurers (see ch XVIII § 2.4 *infra*). He thought, however, that the cancellation of the first insurance was unnecessary because *bona fide* and non-fraudulent double-insurance was permissible (see ch XVIII § 3 *infra*) and because nothing in any event prevented an insured from obtaining, in another way, the undertaking of a third person to stand surety for the liability of the first insurer. Furthermore, Bynkershoek could not understand why there was a forfeiture of premiums here, seeing that it was due to the insurer himself that the insurance was worthless. Of course, as Van der Keessel later pointed out (*Praellectiones* 1474d-1475a (*ad* III.24.16)), the reason why the first insurance had to be cancelled was to prevent the insured from later attempting to recover on both policies, eg, if it turned out that something was recoverable from the first insurer after all.

See generally eg Enschede 93; Goudsmit *Zeerecht* 326 who thinks that by his notice, the insured abandoned any rights which he may have derived from the first insurance; and Magens *Essay* vol I at 82-83 who was of the unsubstantiated opinion that the Amsterdam *keur* of 1626 provided for the forfeiture of the premiums only if the insurer became insolvent later, so that the insurer could still recover the
renunciation of the first insurance and a forfeiture of the premiums paid to the first insurer distinguished solvency reinsurance from double-insurance and over-insurance. No co-existing insurances were possible in terms of the solution provided by the Amsterdam Legislature.  

In the Amsterdam keur of 1744 the earlier measure of 1626 was restated. Section 25 provided that if any of his insurers went insolvent ("quamen te failleeren"), the insured could insure the line underwritten by that insurer ("sodanige post van Assurantie") anew on good and bad tidings with another insurer, and he could ("kunnen") cancel the risk borne by the insurer concerned by a notice through the Messenger of the Chamber of Insurance at the first insurer's residence or to the curator of his insolvent estate. The onerous provision regarding the forfeiture of the premium paid to the insurer was now scrapped.

Although there are indications that the system established in 1626, logical as it may have been, was not acceptable in practice, the attempt at renewal in 1744 was

---

163 Den Dooren de Jong 'Reassurantie' 86-87 explains that the earlier notion of Santerna and Straccha that solvency reinsurance was in essence of a subsidiary character and co-existed alongside the primary insurance, was not followed in Amsterdam. There the first insurance had to be cancelled for the second to be valid. Accordingly, in Amsterdam the question, heatedly discussed by the earlier authors, could not arise whether the reinsurer was subsidiarily or primarily liable for the full amount of the loss, nor (if primarily liable) whether one could or had to cede any action against the insolvent estate to the second insurer, nor could the question arise what had to happen to the premiums. In Amsterdam, it was clear, there was absolutely no relationship whatsoever between the first and the second insurer.

164 The legislature thus recognised that co-insurance was the norm.

165 But, notably, no longer when he was merely in financial difficulty.

166 But he apparently no longer had to do so.

167 Although, obviously, the chances of recovering it in full from the insolvent estate was not always good. Magens Essay vol I at 82-83 apparently thought that in terms of s 25 the first policy was cancelled by notice because he wondered what happened to the premium paid for it, seeing that the provision on that aspect contained in the keur of 1626 was not repeated in the keur of 1744.

168 Two examples will suffice.

Den Dooren de Jong & Lootsma 'Walvischvangst' 28-29 refer to a West Zaandam notarial protocol of 1737 in terms of which the insured notified the curator of the estate of an insolvent insurer that he was cancelling and avoiding the insurance underwritten by that insurer, and stating that he was thereby relieving the insolvent estate of all existing or future liability on the policy but at the same time also denying it any entitlement to the premiums paid or payable for the insurance. The notice also stated that the insured had already or was going to reinsure the same ("de asseurantie aan andere ... laeten herteekenen en ver-asseureeren"). Although the insured's notice to the curator was generally in accordance with what the keur of 1626 required, it importantly transgressed it by denying the insolvent estate any claim on the premiums due to it in terms of the cancelled contract.

Den Dooren de Jong 'Reassurantie' 94 refers to a Rotterdam policy form in use in 1747 for reinsurance. Entitled 'Reassurantie wegens Miscrediet voor den Assuradeur', it provided as follows:

'... geschiedende deze assurantie als reassurantie voor 't geen ... den ... 1747 aan de Geassur. heeft getekent en alzoo de Geassurante zich met deze teekening niet secur secur oortwelt zoo doet dezelve zich reassureeren weke risico wij ten onzen lasten overmeenen op alle zoodanige conditiën als door gemelde ... zijn getekent en egenals of dezelve hier alle waaren geïnsurereert, zullende het niet prejudieeren dat de risico aan hem niet is opgezet en ook zal in cas van schade of avary niet in mindering op deze assurantie strekken 't geen van zijn boedel mogte kwomen maar door de
patently ill conceived and contained numerous lacunae and uncertainties. There had been a move away from the earlier system, but clearly the Legislature had not given enough consideration to the new system it wanted to introduce. Not surprisingly, in just over a decade s 25 of the keur of 1744 was amended.

The amendment of s 25 by the Amsterdam amending keur of 1756 provided that if one of the insurers went insolvent, or if the insured so chose, the insured was free to insure himself anew with another insurer on good and bad tidings, whether for a part of or for the full sum first insured and in addition also for the premium already paid and any expenses incurred in respect of the first insurance. The insured was obligated, though, to give notice through the Messenger of the Chamber of this new insurance to the first insurer or, in case of his insolvency, to the curator of his estate. Furthermore, the insured had to cede to the new insurer any right and action he might in the event of a loss have had against the first insurer, or, should the latter be insolvent, against his estate.

Thus, a completely new system was introduced by the Legislature in 1756. It recognised the ultimate subsidiary character of the second insurer's liability. The first insurer was not relieved of his liability towards the insured although that liability was now in effect owed to the second insurer. Seen from a different perspective, the way in which the insured was permitted to insure anew without thereby giving rise to a possible breach of the indemnity principle had by 1756 changed somewhat from that provided for in 1626. At first the insured had to cancel the first insurance (and in the process forfeit the premium paid for it) when he concluded a new insurance. Now the

---

The amendment of s 25 by the Amsterdam amending keur of 1756 provided that if one of the insurers went insolvent, or if the insured so chose, the insured was free to insure himself anew with another insurer on good and bad tidings, whether for a part of or for the full sum first insured and in addition also for the premium already paid and any expenses incurred in respect of the first insurance. The insured was obligated, though, to give notice through the Messenger of the Chamber of this new insurance to the first insurer or, in case of his insolvency, to the curator of his estate. Furthermore, the insured had to cede to the new insurer any right and action he might in the event of a loss have had against the first insurer, or, should the latter be insolvent, against his estate.

Thus, a completely new system was introduced by the Legislature in 1756. It recognised the ultimate subsidiary character of the second insurer's liability. The first insurer was not relieved of his liability towards the insured although that liability was now in effect owed to the second insurer. Seen from a different perspective, the way in which the insured was permitted to insure anew without thereby giving rise to a possible breach of the indemnity principle had by 1756 changed somewhat from that provided for in 1626. At first the insured had to cancel the first insurance (and in the process forfeit the premium paid for it) when he concluded a new insurance. Now the

---

From this it is apparent that not only was the first insurer not relieved of liability, but the second insurer, who was supposed to be taking his place, expressly declared that whatever the insured could recover from the insolvent estate of the first insurer, did not have to be taken into account in reducing his liability, clearly a breach of the indemnity principle.

Thus, provision was again made for the case where the insurer was not (yet) insolvent but where the insured suspected that such insolvency was not far off and had lost confidence in the insurer's ability to meet his obligations under the policy.

Such premium and expenses could be included in the new insurance so that the insured therefore no longer forfeited such premium.

He no longer had to cancel and renounce the first insurance.

This was necessary because the first insurance was not renounced and cancelled and to prevent the indemnity principle being breached as a result.

See eg Decker Aanteekeningen ad IV.9.4 n(3)/(c); Van der Keessel Theses selectae th 717 (ad III.24.4) (who somewhat loosely referred to this as insurance against the risk apprehended from the poverty ('inopia') of the first insurer) and th 764 (ad III.24.17); *idem Praelectiones* 1437 (ad III.24.4) and 1474d-1475a (ad III.24.16); Van der Linden Koopmans handboek IV.6.3; and generally Goudsmit Zeerecht 351-352.

See Den Dooren de Jong *Reassurantie* 95.
insured no longer had to cancel the first insurance when he concluded the new insurance (and he could in fact include the premiums paid for the first insurance in the sum insured by the second insurance), but he had to cede his rights under the first insurance to the new insurer.

This second insurance which the insured was permitted to conclude when the first insurer went insolvent or fell into suspected financial difficulty, was referred to by Roman-Dutch authors as 'reinsurance' and the use of the term in this sense remained dominant until late in the eighteenth century.

The system established by the Amsterdam Legislature in 1756 was not taken over in the Wetboek van Koophandel. In terms of art 272-1 the insured is permitted, by formally renouncing ('bij een geregtelijke opzegging') the first insurance and relieving that insurer of his future obligations, to insure his interest anew for the same period and against the same perils.

### 4.2 Reinsurance Proper

Reinsurance proper was not a topic of great concern in Roman-Dutch law. There were in fact no legislative measures dealing with it. It is unclear whether this was so because it did not give rise to any unique problems, or because its incidence in practice did not justify any legislative intervention, or because reinsurance was not recognised as valid, being an insurance by a non-owner who was thus without sufficient interest. Other sources likewise contain but scant information and provide a rather casuistic picture of the Roman-Dutch law of reinsurance proper.

What seems clear is that the practice amongst insurers of insuring themselves with other insurers against the liabilities they might incur in terms of the primary insurance contracts they had concluded, became commonplace much later than the conclusion of solvency reinsurances by insured.

Although the earliest known contract of reinsurance proper dates from soon after the emergence of the insurance contract in its modern form, it appears to have

---

175 See eg Boey Woorden-tolk sv 'Reassurantie'; Decker Aanteekeningen ad IV.9.4 n(3)/(c) ('Contract van Reassurantie').

176 See Den Dooren de Jong 'Reassurantie' 98.

177 See eg Van Veen 77.

178 Such problems as did arise being solvable by the application of the principles governing insurance contracts generally.

179 As argued by Berkhout 20-21.

180 For a discussion of a Genoese reinsurance contract of 1370 (reproduced in Bensa Assicurazione 200), see eg Mossner 28-35. This reinsurance was an insurance of the risk of the carriage of goods only in respect of the presumably dangerous part of the voyage insured by the original insurer. The voyage originally insured was from Genoa to Sluys (the pre-port of Bruges at the mouth of the river Zwin), and the reinsured part was from Cadiz to Sluys. A condition of the original insurance was that the original insurer would be liable in respect of the voyage between Cadiz and Sluys only if he could obtain this reinsurance. Clearly what had happened was that the original insurer, who had taken over what appeared to him to be an unfavourable risk (or, at least, a risk in part unfavourable), sought out other insurer(s)
been an isolated example. The development of reinsurance as a way in which insurers
could further spread risk amongst themselves, was no doubt restricted by the fact that
another such method, namely co-insurance, was the usual way in which insurers
underwrote risks.\textsuperscript{181} Reinsurance was therefore probably only turned to in those rela-
tively infrequent instances where an individual underwriter had concluded an insurance
contract on his own. And the combination of reinsurance and co-insurance\textsuperscript{182} in
spreading risks occurred only when the insurance markets had become much more
sophisticated.

But though not treated in legislative sources, there are numerous other indica-
tions that reinsurance by insurers must have existed in practice in the Netherlands from
at least the sixteenth century,\textsuperscript{183} including a mention of reinsurance proper alongside
solvency reinsurance in a compilation of Antwerp customary law early in the seven-
teenth century.\textsuperscript{184} Its existence was also recognised in passing in legislation.\textsuperscript{185} Roman-
Dutch authors do mention various points about reinsurance although most of it was
rather in passing and without too much attention to detail. One of the few to attempt a
definition was Lybrechts who described reinsuring somewhat loosely as that which
occurs when an insurer who had concluded an insurance on goods, has himself

\textsuperscript{181} See ch XVIII § 2 \textit{infra} as to co-insurance.

\textsuperscript{182} That is, co-insurers reinsuring and reinsurers being co-insurers.

\textsuperscript{183} See generally Barbour \textit{Capitalism} 34; De Groote \textit{'Zeeverzekering'} 214; Den Dooren de Jong
\textit{'Reassurantie'} 98-103; and Mullens 50. De Groote \textit{Zeeassurantie} 16 refers to a decision of the Bruges
Schepenen Court in 1469 which concerned reinsurance, although this may have been an instance of
solvency reinsurance. He also notes (at 129) that many reinsurances were included amongst the
insurance contracts concluded through the Antwerp broker Juan Henriquez in a fourteen-month period in
1562-1563. It appears that although he was in essence a broker (see ch X § 7.3 \textit{infra} for the conclusion of
insurances through brokers), Henriquez had in most cases himself concluded the reinsurances as
insurer. By agreement with other merchants, he took over a part of the risk of the insurances they had
concluded and, interestingly enough, did so at same rate of premium they received from their insured.

\textsuperscript{184} See art 45 of par 2, title 11, part IV of the \textit{Compilatae} of 1609 (see De Longé vol IV at 218) which
provided that just as an insured could 'reinsure' himself where he feared his insurers would not be able to
meet their liabilities toward him, so too a person who insured another could insure himself fully or in part
with another. The way this could be done was provided for in art 46.

\textsuperscript{185} Although not treated in any legislation, reinsurance proper was mentioned in a few statutory
provisions, eg, in measures concerned with stamp duties or with the duties and responsibilities of brokers
in respect of the stamping of policies. Thus, the Amsterdam amending \textit{keur} of 25 January 1707 which, in
an attempt to stop the evasion of stamp duties, compelled the use of different policies for insurances on
different ships or for insurances on goods loaded in different ships, provided that in future '\textit{alle
asseurantien of reasseurantieri} made on different goods loaded in different ships had to be expressed in
separate policies. See in similar vein the Amsterdam amending \textit{keur} of 27 January 1721 and s 58 of the
Amsterdam \textit{keur} of 1744. In s 61 of the latter \textit{keur} there was a mention of '\textit{reassurantie}' in connection
with the duties of brokers to have policies stamped. As to stamp duties, see ch VIII § 3.4 \textit{infra}.
insured in turn by another insurer\textsuperscript{186} so that the reinsurer was liable for the insurance concluded by the first or primary insurer and was bound to pay or reimburse the latter what he has or had to pay to his insured.

One of the first mentions of reinsurance proper in a judicial context occurred in an important opinion delivered in 1633 in which some cardinal legal issues were clarified.\textsuperscript{187} An insured had concluded an insurance contract on his ship with the insurer in question only and only the latter had underwritten the policy, without the insured having been informed nor having agreed to the insurer's transactions with any other merchants for the reinsurance of a part of the amount he had underwritten. The insurer later refused to pay the insured on the primary policy because his reinsurers had disputed the validity of his claim under his reinsurance policy and had refused to pay him. In effect he sought to make his payment to the insured dependent upon the outcome of his litigation against the reinsurers. The opinion was requested on the correctness or otherwise of the decision in this matter by the Amsterdam Chamber of Insurance and that of the local Schapenen Court to the effect that the insurer was in fact liable to his insured. The view expressed in the opinion was that these decisions were correct and that the insurer was liable.\textsuperscript{188}

In the course of its consideration, the advocate delivering the opinion, noted three points of importance.

Firstly, the liability of the insurer to pay his insured was a primary one and was not dependent upon the liability of his reinsurers or even on any actual payment by them.\textsuperscript{189} The fact that the reinsurers were not liable or able to pay\textsuperscript{190} was no defence for the insurer against the claim of his insured. Therefore, the dispute and process that had arisen between the insurer and his reinsurers could not put the insured in a worse position than he would have been in had no such dispute arisen.

Secondly, the clause in the primary insurance policy that the insurer would pay the amount he had underwritten to the insured when he had received payment from the reinsurers,\textsuperscript{191} did not detract from this position. Such a clause could not be understood otherwise than that the insurer was merely granted a reasonable, temporary extension of time for payment to enable him to recover from his reinsurers. It applied only in the

\begin{itemize}
\item \textsuperscript{186} Lybrechts Koopmans handboek V.76 ('reassureeren ... wanneer een Assuradeur eenige assurantie op goederen hebbende gedaan, zich weder laat verzekeren door een ander Assuradeur').
\item \textsuperscript{187} See Hollandsche consultatien vol II cons 30. See also Den Dooren de Jong 'Reassurantie' 99-100.
\item \textsuperscript{188} The opinion thought this was corroborated by, amongst other things, the fact that the insurer had in terms of the primary insurance 'veel hoger premie heeft genoten' than he had promised to his reinsurers.
\item \textsuperscript{189} The opinion noted that 'of schon de zelwe Asseuradeur, van zijne Reasseuradeurs, niet ontvangen heeft de penningen, daar voor zij luiden geteikend mogen hebben; dat hij, des niet tegenstaande, gehouden is zijne voorsz geteikende somme, aan de Geasseureerde op te leggen, en te betalen'.
\item \textsuperscript{190} Whether because of a valid defence, or their insolvency, or because no valid contract had ever been concluded with them.
\item \textsuperscript{191} That is, a clause providing for the '[insurer] to pay when the reinsurers shall have paid', or its equivalent, 'to pay as may be paid'.
\end{itemize}
case where he had a lawful and existing claim (‘een recht-matige, en bestandige actie’) against his reinsurers and where he had instituted that claim, but not where the reinsurers were not liable or disputed their liability. In the latter instance, the time of payment by the insurer was not permitted to be extended, indefinitely or permanently, to the detriment of the insured. This ‘stipulatie van betaling’, that is, an extension of the time for payment in terms of the clause in question, was therefore permitted only where the insurer had made a fixed and indisputable agreement with his reinsurers in terms of which the latter would, without any extended processes, immediately pay in full the amount of the reinsured sum after which he would then promptly pay the amount he had underwritten to his insured. The clause could never entail that rights under the original policy were dependent upon the question whether reinsurers had to, wanted to, or could pay the insurer.

The third point, adjunct to the first, was that the insured had no direct claim against the reinsurers because, as the opinion put it, the insured ‘de voorszetekeraars, niet heeft gekent, nochte met de zelve eenigzins gecontracteerd, veel min op henluiden heeft gezien’. There was simply no direct legal relationship between the primary insurance and the reinsurance.192

A number of further points of importance in regard to reinsurance proper appear from other sources. Thus, it was no defence that the insurer reinsuring a ship or goods was not the owner of the ship or goods he had originally insured and then reinsured, as long as he had an interest in those objects.193 The prohibition on full-value insurance did not apply to an insurer who, as reinsured, could insure fully.194 In practice, it appears, reinsurance contracts were concluded in the form of policies on a ship or on goods, depending on whether the primary insurance contract was on a ship or on goods,195 but this may not have been an invariable practice as evidence exists of a

192 See further generally Dorhout Mees Schadeverzekeringsrecht 416-417.

193 See Nederlands advysboek vol III adv 17 (1675): ‘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 versekeren, ende reassureren respective, ende dat met volkomen effect, sonder dat daar jegens enigsints in consideratie kan komen, de voorsz allegatie ofte exceptie, van dat sy in geen eigendom aan het Schip of goed waren hebbende’. See again ch II § 6.2.2 supra.

194 See Van Zurck Codex Batavus sv ‘Assurante’ par 7 n2. Thus, whereas an insured had to keep a certain portion of his goods uninsured (say 10 per cent, and could thus insure goods with a value of f1 000 for only f900), the insurer could, as reinsured, insure his liability to the full extent (ie, for f900). As to compulsory under-insurance, see further ch XVII § 5.2 infra.

195 Verwer See-rechten ad par 34 (at 175-176). For this reason, Verwer noted, bottomry could not be a form of insurance for then, contrary to this practice, the insurance by the lender on a bottomry loan would have to be classified as a form of reinsurance on the ship and would accordingly have to be contained in a hull policy as was required for the primary as well as for the reinsurance of the risk on a ship. Interestingly Magens Essay vol I at 19 still considered a bottomry lender to be an insurer of the borrower and an insurance by such lender to be a reinsurance.
policy in a form specifically drafted for reinsurance.\textsuperscript{196}

One of the provisions appearing in the reinsurance contract itself was the clause later more commonly known as the reinsurance loss settlement clause. In terms of this clause, the reinsurer agreed to be bound by payments made in good faith by the reinsured primary insurer to the original insured in settlement of his liability under the original policy without the reinsurer having to establish or prove that he was in fact liable under that original policy.\textsuperscript{197}

An important point about the practice of reinsurance proper during the time of Roman-Dutch law is that although the legal construction of the relationship between insured, reinsured insurer and reinsurer already in essence had the shape known in later centuries, the practical aspects, and in particular insurers' motives for concluding reinsurances, were still rather unsophisticated.\textsuperscript{198} In practice, it appears, reinsurance was not routinely and invariably concluded nor concluded in respect of a range or portfolio of risks borne by the insurer, at least not by individual underwriters. It was not regarded as a preventative measure in the true sense of word. Insurers turned to reinsurance irregularly as and when they thought it necessary and then only in respect of the risk undertaken in terms of an individual primary insurance contract. And invariably such reinsurances were concluded after the conclusion of the primary insurance. There was no question of a planned further distribution of risks amongst the underwriting fraternity itself. Rather, reinsurance was a haphazard off-loading of risks when it subsequently appeared that they were too large or too risky for the liking of the individual insurer concerned. Thus, an insurer may in respect of his exposure in terms of a particular primary contract, have taken out reinsurance only if, at any time after the conclusion of the original insurance contract, there was an actual or anticipated increase in the risk or a suspicion of a loss having occurred and of liability having

\textsuperscript{196} Den Dooren de Jong 'Reassurantie' 101-102 reproduces the following formula for a reinsurance concluded in Amsterdam in 1747:

'Reassurantie ten behoeve van een assuradeur, van de risico willen ontslagen zijn, geschiedende deze assurantie als reassurantie voor 't geen door den Geassureerde den ... 1747 is getekent aan ... welke risico wij ten onzen lasten overneemen op alzoozoodanige conditien als door de Geassureerde zijn getekent eevenals of dezelve hier alle waaren geinsereert belovende wij in cas van ongeluk op 't vertoonen van d'origineele polis alle de schade door de Geassureerde betaaitte zullen restitueeren zonder eenig ander bewijs te vorderen'.

\textsuperscript{197} In the Amsterdam reinsurance of 1747 just referred to, the reinsurer undertook to indemnify the reinsured insurer, on presentation of the original insurance policy, for the loss or damage the latter had paid in terms of that policy, without any further proof being required of the insurer's liability under that policy.

Similar clauses appeared in the early eighteenth century in France in a variety of wordings, eg 'all settlements binding on the reinsurer', 'the reinsurer to follow the settlements (or the fortunes, or the liability) of the reinsured', or 'pay as may be paid'. See further Hoffman as to the acceptance and interpretation of such clauses in French law. In passing it may be noted that by the end of the eighteenth century, reinsurance appears to have been worked out in considerable detail in French law, not only by virtue of numerous judicial decisions but also through copious comments on this branch of the law by authors such as Emerigon, Pothier, Valin and others. See generally Berkhout for references to the French position.

\textsuperscript{198} See Den Dooren de Jong 'Reassurantie' 81 and 105; Mossner 23 and 46-48.
Such a reinsurance contract was then concluded on good and bad tidings with insurers who were prepared to take over the risk in question. If needs be, the reinsurance was concluded even at a much higher premium than the premium the insurer had received on the primary insurance. Reinsurance was then not a method of spreading risk but a loss-cutting measure; no more than an attempt to shift an imminent loss onto another insurer at a price.

There may also have been other reasons for the conclusion of reinsurance contracts in earlier times. For example, there could have been speculative reasons in that insurers speculated by concluding reinsurance contracts only when they could do so, usually on another market, at a smaller reinsurance premium than the premium they had received for the original insurance. Even more blatantly speculative were the instances of merchants concluding original insurances as insurers only because they could subsequently reinsure at a lower premium, and where they then pocketed the difference in premiums without having borne any risk at all.

The reinsurance practices of insurance companies may have been different. There is evidence, for example, that the Rotterdam Insurance Company of 1720 approached the matter of reinsurances rather more systematically, even though they were still only concluded in respect of existing individual insurance contracts. Regular, precautionary and planned reinsurances by insurance companies which, it must be

---

199 For example, when no news had been received of an insured ship which was overdue; when news had been received of the outbreak of war or bad storms in the region where the insured ship was destined or had to sail through; or when the insurer discovered other unfavourable information about the shipowner, the ship or her master after the conclusion of the insurance contract.

200 That would be the case if the risk was of such a nature that no reinsurers more speculative than the insurer himself were available at a premium rate cheaper than that he himself had charged.

201 See eg Dorhout Mees Schadeverzekeringsrecht 423, referring to an instance of where a ship was stranded or so seriously damaged that a total loss was feared, and where her insurer sought reinsurance against a total loss. Such a reinsurance was available at a premium rate in excess of 80 per cent.

202 This much appears from an opinion at the end of seventeenth century (Nederlands advysboek vol IV adv 198 (1694)) which explained the rationale behind the existence of a duty upon an insured to give notice to his insurers not only of a loss or damage but also of accidents or occurrences which increased the risk and which could result in a loss or damage (see further ch XVI § 2 Infra as to insured’s duty to give notice). Such notice enabled the insurer not only to take the necessary steps and to grant the necessary permission to the insured to prevent further loss or damage (see ch XVI § 1 infra as to the insured’s duty to avert and minimise loss), but also to put himself in a position to conclude the necessary reinsurance (‘op dat zij sig voor de toekomende reassurantie praecaveren’). Such notice enabled insurers to take the necessary steps, ‘het zy by reassurantie of andersints’, to prevent any liability for loss or damage falling upon themselves. See further Den Dooren de Jong ‘Reassurantie’ 100.

203 Apart, of course, from the insolvency or non-liability of their reinsurers.

204 See eg Berkhout 8.

205 Thus, at an extraordinary meeting in 1726 to consider the precautions the company had to take to avoid losses on insurances concluded for voyages to the West Indies in the event of an outbreak of war, it was resolved to obtain reinsurance in London for premiums of up to 30 per cent or less in respect of certain insurances. See further Den Dooren de Jong ‘Reassurantie’ 101.
remembered, may have found it more difficult or at least less natural to spread their risks by way of co-insurance, only appeared in the eighteenth century as a method to limit their exposure on individual contracts. Individual reinsurances on an ad hoc, facultative basis in appropriate cases in respect of particular single risks,\(^{206}\) remained the norm until the end of the eighteenth century and obligatory reinsurances\(^{207}\) appeared only in the first part of the nineteenth century. The oldest forms of reinsurance were quota reinsurances where a particular proportion or quota of the original sum insured was reinsured, and excess reinsurances which were reinsurances of amounts in excess of a stated limit. The first insurance companies exclusively concluding reinsurances were only established in the mid-nineteenth century.\(^{208}\)

By the time of codification in the Netherlands, the *Wetboek van Koophandel* recognised reinsurance proper, art 271 providing that an insurer may always insure that which he has insured.\(^{209}\)

### 4.3 Excursus: Reinsurance in English Law

This discussion of reinsurance may be concluded with a brief comment on the rather remarkable fate of reinsurance in English law in the eighteenth century.\(^{210}\)

Although known in practice in the sixteenth century,\(^{211}\) and recognised as valid at common law and in Admiralty,\(^{212}\) the Marine Insurance Act of 1746,\(^{213}\) an Act intended to check wagering,\(^{214}\) in s 4 prohibited as unlawful all reinsurances together

---

\(^{206}\) That is, facultative reinsurances in terms of which each selected risk was offered separately to the reinsurer who had the option to accept or reject it.

\(^{207}\) That is, the compulsory reinsurance by an insurer of all the risks of a particular type he had taken over, so that a selection by the insurer of risks to be reinsured was no longer possible. The reinsurer, in turn, had no choice but to accept all the risks of that type.

\(^{208}\) See further generally eg Dorhout Mees *Schadeverzekeringsrecht* 414-415; Golding 40 and 58-59; Mossner 16-20; and Trebilcock 267-268 and 273.

\(^{209}\) See eg Faber ‘Studien’ I 53-54; Van Veen 77.

\(^{210}\) See generally Dover 37; Holdsworth *History* vol XI at 488; Magens *Essay* vol I at 93-95; Mossner 75-78; Raynes (1 ed) 168, (2 ed) 163; and Sutherland 49-50.

\(^{211}\) See eg Kepler ‘London Marine Insurance’ 49 for evidence in the draft *Booke of Orders*, from which it appears that sums of money underwritten by insurers were among the items upon which insurance was available in London in the 1570’s.

\(^{212}\) See Holdsworth *History* vol VIII at 291, referring to the assumption by the Admiralty Court in *Ravens v Hopton* (1561), under the influence of Continental rules, that reinsurances were valid.

\(^{213}\) 19 Geo II c 37.

\(^{214}\) Hence its alternative name, the Gambling Act.
with the other abuses prohibited in s 1 of the Act. The only exception to this prohibition were reinsurances concluded in cases where the insurer was insolvent, had become a bankrupt, or had died. Then that insurer or his representatives (executors, administrators or assigns) could make a reinsurance for the amount he had insured, on condition that such policies had to be expressed as being reinsurances.

Some years after the passing of the Act, Magens pointed out that such reinsurances would often be concluded by the insurer's heirs but that it would seldom happen in the case of an insolvent or bankrupt insurer, the reason being that the insured would invariably conclude fresh insurances themselves rather than rely on reinsurances being concluded by or for the insolvent or bankrupt insurer himself. Having concluded such a second insurance, the insured remained a creditor against the bankrupt's estate only for what he had paid under this second insurance by way of premiums and what he had incurred otherwise by way of expenses. But, as Weskett later argued, Magens may have been mistaken in this view. In terms of another Act, also passed in 1746, an Act for Amending the Laws relating to Bankruptcy of 1746, an insured was by s 2 permitted to claim for any insured loss under the first insurance as if such loss had happened before the issuing of a commission of bankruptcy against the insurer, and he was, for that purpose, regarded as a concurrent creditor of the estate and entitled to a proportion of his claim. The intention with the exception created in s 4 of the Marine Insurance Act of 1746, in allowing insurance by or on behalf of an insolvent, bankrupt or deceased insurer, was simply to make funds available to meet the claims of insured, permitted by the Bankruptcy Act of that year, for losses occurring after the insolvency or death of the insurer concerned.

There was no indication in the Marine Insurance Act of 1746 of the difference between solvency reinsurance and reinsurance proper. It appears, at any rate, that solvency reinsurance was not at the time regarded as having been included in the prohibi-

---

215 Namely insurances made interest or no interest, or without further proof of interest than the policy, or by way of gaming and wagering, or without the benefit salvage to the insurer. See again ch II § 6.4.4 supra.

According to Golding 26, the Act of 1746 prohibited marine reinsurances only, and although that does not appear from s 4 but at most from the preamble which referred to insurances on ship and on the goods laden on them, the Act was so interpreted in the American colonies.

216 That is, he could reinsure current contracts.

217 The explanation for these exceptions (see Wright & Fayle Lloyd's 92-93) was that at the date of an insurer's bankruptcy or death, the premiums due to him could not be used for partnership debts until full satisfaction had been made of all claims arising under outstanding policies (ie, the insured had a priority claim against the estate of an insolvent or deceased insurer). Therefore, payment of any considerable claim might seriously reduce the surplus ultimately carried to the partnership account, or available for distribution to the insurer’s heirs. For this reason his trustee in bankruptcy or his executor sought to protect the estate by reinsuring the amount of the outstanding policies.

218 See Magens Essay vol I at 93-94.

219 19 Geo II c 32.

220 See Weskett Digest 458 sv 'reinsurance' par 8 and 529 sv 'statutes'.
tion on reinsurance, nor to have been unlawful for any other reason.\textsuperscript{221} Also, despite the fact that they too were linked to insurer insolvency, the exceptions provided for in the Act in any event did not concern solvency reinsurances, that is, reinsurances concluded by or on behalf of an insured but rather reinsurances concluded by or on behalf of the insurer.

The generally accepted reason for the prohibition of reinsurance was that the technique was abused as a means of gaming and wagering and, more specifically, as a method of speculating on the rise and fall of premium rates. Such speculation occurred because the difference in insurance premium rates on different markets made it possible for an original insurer to conclude an insurance with the sole aim of subsequently reinsuring at a smaller premium,\textsuperscript{222}

Thus, in an attempt to eradicate abuses occurring in connection with it, the English Legislature simply prohibited the otherwise useful practice of reinsurance. No wonder, then, that despite the prohibition, reinsurance contracts continued to be concluded by English insurers on Continental markets or by way of honour policies in England itself.\textsuperscript{223} The prohibition was repealed only in 1864\textsuperscript{224} after which reinsurance contracts were again lawful.\textsuperscript{225}

\textsuperscript{221} But see Golding 38 who suggests that solvency reinsurance was illegal in England as being in the nature of a wager.

\textsuperscript{222} The practice was for agents of English merchants in foreign ports to insure the ships and goods of foreigners abroad, their principals then reinsuring the risk in England where premium rates were generally lower. In so doing, the merchants made gains of up to 100 per cent on the different levels of premiums between the bigger and smaller markets. These practices, according to Magens, declined after London merchants were condemned to pay as insurers abroad without having been able to recover from their local reinsurers.

Den Dooren de Jong 'Reassurantie' 97-98 and 103-104 holds a different view. According to him the reason for the legislative prohibition of reinsurance in England could not have been speculative practices, given that these were apparently on the decline. He ventures the opinion that the prohibition was directed rather at abuses occurring in connection with solvency reinsurance when an insured concluded a new insurance with the second insurer waiving any entitlement to a reduction in his liability should the insured receive any compensation from his first insurer. It was thus aimed at preventing double-insurance. This view is strengthened by the fact that similar breaches of the indemnity principle lay at the heart of the other abuses sought to be prevented by the other prohibitions in the Marine Insurance Act of 1746. The Legislature simply did not properly distinguish between the different forms of reinsurance so that reinsurance proper also, quite unintentionally, fell within the prohibition. Against this view of Den Dooren de Jong it may be pointed out, though, that the inadvertent prohibition of reinsurance proper seems less likely, given the fact that the exceptions on the prohibition in s 4 specifically concerned reinsurances proper, that is, reinsurances concluded by or on behalf of the insurer.

\textsuperscript{223} See eg John 'London Assurance' 128.

\textsuperscript{224} By s 1 of the Revenue (No 2) Act of 1864 (27 & 28 Vict c 56).

\textsuperscript{225} In terms of s 9(1) of the Marine Insurance Act of 1906, an insurer under a contract of marine insurance has an insurable interest in his risk, and may reinsure in respect of it, while in terms of s 9(2), the original insured has no right or interest in respect of such reinsurance unless that contract provides otherwise.
## CHAPTER VIII
THE GENERAL REQUIREMENTS FOR THE VALIDITY OF INSURANCE CONTRACTS: FORMALITIES AND LEGALITY

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>General Introduction</td>
<td>505</td>
</tr>
<tr>
<td>2</td>
<td>Consensus and the Insurance Contract</td>
<td>505</td>
</tr>
<tr>
<td>3</td>
<td>Formalities</td>
<td>511</td>
</tr>
<tr>
<td>3.1</td>
<td>Introduction</td>
<td>511</td>
</tr>
<tr>
<td>3.2</td>
<td>Writing</td>
<td>512</td>
</tr>
<tr>
<td>3.2.1</td>
<td>The Insurance Policy: The Need for Written Evidence of the Insurance Agreement; Different Forms of Policy</td>
<td>512</td>
</tr>
<tr>
<td>3.2.2</td>
<td>Writing as a Legal Formality in Earlier Insurance Practice</td>
<td>516</td>
</tr>
<tr>
<td>3.2.3</td>
<td>Statutory Requirements of Writing In Roman-Dutch Insurance Law</td>
<td>518</td>
</tr>
<tr>
<td>3.2.4</td>
<td>The Requirement of Writing in the <em>Wetboek van Koophandel</em></td>
<td>524</td>
</tr>
<tr>
<td>3.3</td>
<td>The Registration of Insurance Policies</td>
<td>525</td>
</tr>
<tr>
<td>3.4</td>
<td>The Imposition of Stamp Duty on Insurance Policies</td>
<td>528</td>
</tr>
<tr>
<td>4</td>
<td>Excursus: The Content and Interpretation of Prescribed and Standard Insurance Policies</td>
<td>533</td>
</tr>
<tr>
<td>4.1</td>
<td>Statutorily Prescribed Policy Forms</td>
<td>533</td>
</tr>
<tr>
<td>4.1.1</td>
<td>Introduction</td>
<td>533</td>
</tr>
<tr>
<td>4.1.2</td>
<td>Policy Forms Prescribed by Dutch Insurance Legislation</td>
<td>536</td>
</tr>
<tr>
<td>4.1.3</td>
<td>The View of Roman-Dutch Authors and the Position Elsewhere</td>
<td>542</td>
</tr>
<tr>
<td>4.2</td>
<td>The Content of Insurance Policies and the Insured's Duty of Disclosure</td>
<td>545</td>
</tr>
<tr>
<td>4.2.1</td>
<td>Introduction</td>
<td>545</td>
</tr>
<tr>
<td>4.2.2</td>
<td>Matters Which Had to be Mentioned in Insurance Policies</td>
<td>550</td>
</tr>
<tr>
<td>4.2.3</td>
<td>The Position at the Beginning of the Seventeenth Century</td>
<td>552</td>
</tr>
<tr>
<td>4.2.4</td>
<td>Further Developments in the Seventeenth Century</td>
<td>556</td>
</tr>
<tr>
<td>4.2.5</td>
<td>Judicial Interpretation in the First Half of the Eighteenth Century</td>
<td>558</td>
</tr>
<tr>
<td>4.2.6</td>
<td>Further Legislative Measures in the Eighteenth Century</td>
<td>564</td>
</tr>
<tr>
<td>4.2.7</td>
<td>Insurance of Cargo 'on ship or ships' or 'in quovis'; Policies in Blank; and Floating Policies</td>
<td>568</td>
</tr>
<tr>
<td>4.2.8</td>
<td>The Position Elsewhere and in the <em>Wetboek van Koophandel</em></td>
<td>574</td>
</tr>
<tr>
<td>4.2.9</td>
<td>The Content of Insurance Policies and the Duty of Disclosure In English Law</td>
<td>578</td>
</tr>
<tr>
<td>4.3</td>
<td>The Interpretation of Insurance Contracts</td>
<td>584</td>
</tr>
<tr>
<td>5</td>
<td>Legality</td>
<td>589</td>
</tr>
<tr>
<td>5.1</td>
<td>Introduction</td>
<td>589</td>
</tr>
<tr>
<td>5.2</td>
<td>Non-compliance with and the Renunciation of Insurance Laws</td>
<td>589</td>
</tr>
<tr>
<td>5.2.1</td>
<td>Legislative Provisions</td>
<td>589</td>
</tr>
<tr>
<td>5.2.2</td>
<td>The Views of the Roman-Dutch Authors</td>
<td>594</td>
</tr>
<tr>
<td>5.2.3</td>
<td>The Position in Practice: Opinions and Decisions</td>
<td>596</td>
</tr>
<tr>
<td>5.2.4</td>
<td>The Position in the <em>Wetboek van Koophandel</em> and Elsewhere</td>
<td>600</td>
</tr>
<tr>
<td>5.3</td>
<td>The Insurance of Foreign and Enemy Property</td>
<td>601</td>
</tr>
<tr>
<td>5.3.1</td>
<td>Introduction</td>
<td>601</td>
</tr>
<tr>
<td>5.3.2</td>
<td>The Applicable Legislative Measures</td>
<td>602</td>
</tr>
<tr>
<td>5.3.3</td>
<td>The Position in Practice</td>
<td>606</td>
</tr>
<tr>
<td>5.3.4</td>
<td>The Views of the Roman-Dutch Authors</td>
<td>609</td>
</tr>
</tbody>
</table>
1 General Introduction

Given the fact that there was little discussion in the sources of Roman-Dutch law of the general principles of the law of contract, and specifically of the general requirements for the validity of contracts which had not yet fully been conceptualised and worked out in legal theory, it is not surprising that these requirements were not specifically and systematically treated in the context of the insurance contract. Nevertheless, the requirements for the conclusion of a valid contract, namely agreement or consensus; the capacity of the parties involved to contract; the possibility of performance; the compliance with any formalities; and the legality of the contract, no doubt applied also to insurance contracts as they did to all other types of contract. There are in fact sufficient references in connection with insurance contracts to most of these requirements to justify this assumption.

However, not all of these requirements were of equal practical importance in the context of insurance and the number of references to each of them vary considerably. Some of them, in particular those relating to formalities and to legality, crop up in their own right and as a result they deserve special treatment. Traces of the others, namely consent and capacity, are less frequent and direct and no identifiable mention of the requirement that performance must be possible was encountered in connection with insurance contracts.

This chapter will treat as requirements of a valid insurance contract first, consensus; secondly, the formalities which had to be met in Roman-Dutch law, including matters such as writing, notarial execution, registration, stamp duties, prescribed policies and the prescribed contents of policies, and interpretation; and thirdly, the requirement of legality. The next chapter will consider the parties to the insurance contract and there the relevant points encountered in the sources on the issue of the capacity of parties to conclude an insurance contract will also be mentioned.

2 Consensus and the Insurance Contract

It has already been explained that in classifying the insurance contract, Roman-Dutch law regarded it, like all other contracts, as a consensual contract.¹ The first complete exposition in Roman-Dutch legal theory of the insurance contract as a consensual contract was that of Grotius.² After him odd bits of information shed some further mostly incidental and rather unsystematic light on the topic.

It seems that the consensual nature of the insurance contract in Roman-Dutch law had a twofold meaning. On the one hand it meant that the actual consent of the parties

---

¹ See ch III § 1.3.1 supra.

² *Inleidinge* III.6.10 and III.24.2. See again ch III § 1.3.1 supra where his views are set out in more detail.
involved was required for the formation of a valid insurance contract. This underlying function of consent in the creation of a valid insurance contract appears from early on in insurance sources. On the other hand it meant that it was not possible for a valid contract to be postulated merely because one or both of the parties involved had performed some or other action or because the contract had been cast in some form. Thus, the mere fact that a policy had been issued or a premium paid was in itself insufficient to create a valid insurance contract. Consent was required, and if there was consent, there was, at least in principle, a valid insurance contract. At most the issue of a policy or payment of a premium was evidence of such consent.

But while it was clear that consent was required, and while it was also clear that formalities alone were insufficient to create a valid insurance contract, it was less certain whether consent alone was sufficient in Roman-Dutch law to create a valid insurance contract, that is, whether the insurance contract was a purely consensual contract. The answer to that, it would appear, depended on the nature of the requirement of formalities which, in turn, not only depended on the type of formality in question but which also varied from time to time.

In principle, in Roman-Dutch non-statutory or common law, a valid insurance contract existed even though there had not yet been any delivery of a policy by the insurer nor any payment of a premium by the insured. It seems further that, at least in later Roman-Dutch law, in the absence of any legislative prescripts consensus alone was generally sufficient. But various formalities were at various times required by statute. The effect of non-compliance with such formalities depended on the provisions in question. Compliance could be and in earlier Dutch law was made a requirement for a valid insurance contract, so that consensus alone was not sufficient. Such statutory requirements therefore restricted the consensual character of the contract at common law. Often, though, in terms of the law requiring compliance with a formality, non-compliance did not render the insurance contract invalid but merely had a lesser effect on its nature and validity, such as rendering it unenforceable in a court of law. In short, there were different types of formalities required in different periods and non-compliance did not have a uniform effect on the consensual nature of the insurance contract.

In commenting on the consensual character of the insurance contract, some Roman-Dutch authors of the seventeenth and eighteenth centuries specifically declared that, in principle, as a rule, and/or at common law, consent alone was sufficient to create a valid and binding insurance contract, and that form and formality were

---

3 See eg Zimmermann 559-576 for further background on the requirement of consent as the basis for the validity of contracts.

4 See eg art 1 of par 1, title 11, part IV of the Antwerp Complatae of 1609 (see De Longé vol IV at 198) which referred to the parties’ freedom to insure against such losses and on such terms and for such premium ‘als zij des eens connen worden’.

5 See Zimmermann 546-549 on the background to the disappearance of form as a requirement for the validity of contracts.

6 See further § 3 Infra for the different formalities required in Roman-Dutch law.
irrelevant, with writing merely required to prove the existence and the content of the concluded contract.\textsuperscript{7} Clearest on this point was Van der Keessel who unequivocally stated that the insurance contract was concluded and perfected \textit{ab initio} by mere consent, \textit{nudo consensu}.\textsuperscript{8} No further delivery of property or money, such as the issue of a policy or the payment of a premium, was required.\textsuperscript{9} Also, reduction to writing was not required before a valid insurance contract was created. Formalities such as writing, or others which presupposed a reduction to writing such as registration and notarial execution, were only required for evidentiary purposes,\textsuperscript{10} to promote certainty, to ensure enforceability, or for some other purpose, but not to validate the insurance contract. These matters are considered in more detail elsewhere.\textsuperscript{11}

Accordingly, an oral insurance contract was perfectly valid in Roman-Dutch law\textsuperscript{12} and any subsequent reduction to writing did not create a new obligation between the parties but was based upon and derived from the existing, unwritten agreement between them.\textsuperscript{13}

The clearest practical illustration of the purely consensual nature of the insurance contract in Roman-Dutch law appears from an opinion delivered in 1706\textsuperscript{14} which shed some light on the conclusion of insurance contracts and the role played in this regard by formalities. In this case the insurer, having verbally expressed agreement with a

\textsuperscript{7} Thus eg Schorer Aanteekeningen 413 (\textit{ad} III.24.2) n2 stated that the insurance contract was completed by mere consent ("verzekeringe bestaat door enkele toezegginge"). See too eg La Leek \textit{Index} sv 'insurance' (the contract of insurance is binding as soon as there is agreement); Van Ghesel \textit{De assecuratione} II.1.1.

\textsuperscript{8} See \textit{Theses selectae} 713 (\textit{ad} III.24.2) (the insurance contract is by custom and law a nominate contract, depending on consent alone); \textit{Praelectiones} 1431 (\textit{ad} III.24.2) (the insurance contract is concluded by mere consent, 'solo consensu'). See too Van der Linden Koopmans handboek IV.6.7 who noted that the mutual agreement of the contracting parties was a requirement necessary for the insurance contract because it belonged to those contracts that existed and were valid by mere agreement.

\textsuperscript{9} See eg Bynkershoek \textit{Quaestiones juris privatil} IV.26 who noted that in agreement with the principles of Roman law regarding consensual contracts, further actions by the parties were not required for their validity but that mere consent was sufficient; Scheltinga \textit{Dictata ad} III.24.2 who stated that the insurance contract was \textit{perfecta} even if there had not yet been any payment of the premium to insurer and even if no insurance policy had yet been drafted; Decker Aanteekeningen ad IV.9.10 n(4)/(d) who explained that the consensual insurance contract differed from innominate contracts in that the payment of a premium was not necessary before the insurer was bound.

\textsuperscript{10} That is, as proof of the conclusion and content of the contract, not as a precondition for its conclusion.

\textsuperscript{11} As to the reduction of the contract to writing, and the issue or delivery of a policy, see \S\ 3.2 \textit{infra}; as to the payment of a premium, see ch XI \S\ 3 \textit{infra}.

\textsuperscript{12} Thus, Decker Aanteekeningen ad IV.9.4 n(3)/(c) said that the insurance contract could be concluded both orally or in writing, and Van der Keessel \textit{Theses selectae} th 729 (\textit{ad} III.24.6) noted that it could be contracted by mere consent and without writing.

\textsuperscript{13} See Van Ghesel \textit{De assecuratione} II.4.3. See further \S\ 3 \textit{infra} as to formalities.

\textsuperscript{14} See Barels \textit{Advysen} vol I adv 12.
policy offered to him by the employee (possibly the broker) of the insured, had written with pen and ink on the policy the amount for which he was willing to underwrite the risk, as well as his Christian names, when news arrived of the loss of the property to be insured. He thereupon refused to complete his signature on the policy and claimed not to be bound under it at all. The advocate consulted thought that he was in fact bound, and noted that it was sufficient for the existence and completion of the insurance contract that agreement with or an acceptance of the other party's offer had been indicated in some way. There was no need for words, writing and even less for formulas, especially not when the parties were *inter praesentes* as in this case. It was irrelevant, furthermore, that the insurer's signature had not been completed as it would usually be, it being clear that the contract could be concluded without any writing or signature of the insurer ('dat een contract van Assurantie, zo wel zonder, als met geschreven en ondertekening van den Assuradeur zyn leden heeft'), and that such conclusion could be proved by witnesses or in any other way. It was also irrelevant that the parties here had made use of a written document in concluding their contract, for they had not chosen writing as a requirement for a valid contract but merely for reasons of proof ('eerder tot bewys dan tot kragdadigheid van het verhandelde').

It appears to have been recognised in Roman-Dutch law that consent was reached by a process of offer and acceptance. The precise details of how consensus was reached in the case of insurance contracts, depended largely on the individual circumstances of each case so that it is difficult to suggest any invariable sequence or pattern.

Given the way in which insurance business was conducted at the time, though, an offer, or at least a first approach, may well ordinarily have gone out from the insured. This is confirmed by Van der Keessel who, in commenting on Grotius' definition of the insurance contract, noted that it was not, as was suggested by the definition, customary for the insurer who undertook the risk to offer himself to conclude the contract; it was rather the party to whom the insurance cover was provided, or his representative, who requested the insurer to undertake the risk. Thus, it was the insured and not the insurer who made an offer to conclude an insurance contract.

The insured, through his broker, drafted an insurance contract which was then offered around to be underwritten by one or, usually, several insurers if they found the risk as described in the policy acceptable. In practice, therefore, the written contract or policy was in actual fact not the reduction to writing of an existing agreement. The written form preceded the conclusion of the contract between the parties. The policy was

---

15 No doubt on the basis of 'on good and bad tidings', as was customary at the time, so that he would be liable for losses which had already occurred but of which the parties were unaware. See further ch XII § 2 *infra*.

16 See again ch III § 2 *supra*.

17 See Van der Keessel *Praelectiones* 1428 (ad III.24.1). See also eg Voet *Observationes ad* III.24.17 (n35) where there is mention of the insured approaching the insurer who accepts the offer of the risk at a certain premium.
drawn up beforehand, often only in a short-form known as a ‘handpolis’ which remained unstamped and which was replaced at a later stage by a stamped policy proper. Such a short-form policy served as the insured’s basis for negotiations if not as his offer to the insurers to conclude an insurance contract.

In passing it may be mentioned that from the start the insurance policy was signed only by the insurer or the insurers involved. At first the policy was drafted by the insured or his broker and, without the insured having signed it, the policy was then offered for signature to the insurers. The position remained the same with the introduction in the eighteenth century of policies drawn up by insurance companies: the policy still contained only a signature on behalf of the insurer. A possible explanation may be that by his signature the insurer sought to provide additional security as to his future obligation to pay. Because insurances were usually concluded not for extended periods of time but at most for a single voyage, the parties did not invariably have any long-term relationship. The insured, who usually paid, or was supposed to pay, the insurance premium immediately and who had thus complied with his main obligation in terms of the contract, required whatever additional security he could get that the insurer would meet the conditional future obligation he had undertaken, the more so if a number of insurers were involved. But, it must be emphasised, even though the insurance policy was a unilaterally signed document, the insurance contract remained a bilateral, reciprocal contract.

It is uncertain to what extent the broker’s slip (sluitbriefje), in which the terms of the insurance were informally set out prior to the drawing up of a formal policy and which was signed by insurers underwriting the risk concerned, were in use in the Netherlands prior to the nineteenth century. There is some evidence of the use of informal or short-form policies (handpolissen) in the eighteenth century though, and they may have performed the same function if they were in fact different from such slips. See Appendix 22 infra for an Amsterdam short-form policy of 1655. See also Mees Gedenkschrift appendix 18 for a reproduction of a Rotterdam informal cargo policy (in printed form) from 1746. This policy form contained the following statement: ‘En zullen dezen alien tijden op een gezegelde Police overteekeneri. The term ‘Hand Police’ was referred to also in a placcaat of 1773 on stamp duties (see § 3.4 infra) and in the 1775 amendment of ss 59-61 of the Amsterdam keur of 1744 (see § 3.2.3 n81 infra).

Likewise it is uncertain whether and to what extent covering notes, in which the broker gave a summary confirmation to his client of the insurance concluded, were in use before the nineteenth century. See eg Mees Gedenkschrift opposite p 38 for a reproduction of a Rotterdam covering note from 1827.

It appears, at any rate, that in Dutch law, where there is no express provision on the matter in the Wetboek van Koophandel, a covering note, unlike a slip which is signed by the insurer, does not provide any proof of the conclusion of the insurance (see Buys 37). The position is different in English law where ‘the slip or covering note or other customary memorandum of the contract’ may be referred to to determine when the insurance contract was concluded (see s 21 of the Marine Insurance Act 1906) and where, in the case where there is a stamped policy, the slip or covering note may be used as evidence of the terms of the contract (see s 89 of the Marine Insurance Act).

18 It is uncertain to what extent the broker’s slip (sluitbriefje), in which the terms of the insurance were informally set out prior to the drawing up of a formal policy and which was signed by insurers underwriting the risk concerned, were in use in the Netherlands prior to the nineteenth century. There is some evidence of the use of informal or short-form policies (handpolissen) in the eighteenth century though, and they may have performed the same function if they were in fact different from such slips. See Appendix 22 infra for an Amsterdam short-form policy of 1655. See also Mees Gedenkschrift appendix 18 for a reproduction of a Rotterdam informal cargo policy (in printed form) from 1746. This policy form contained the following statement: ‘En zullen dezen alien tijden op een gezegelde Police overteekeneri. The term ‘Hand Police’ was referred to also in a placcaat of 1773 on stamp duties (see § 3.4 infra) and in the 1775 amendment of ss 59-61 of the Amsterdam keur of 1744 (see § 3.2.3 n81 infra).

Likewise it is uncertain whether and to what extent covering notes, in which the broker gave a summary confirmation to his client of the insurance concluded, were in use before the nineteenth century. See eg Mees Gedenkschrift opposite p 38 for a reproduction of a Rotterdam covering note from 1827.

It appears, at any rate, that in Dutch law, where there is no express provision on the matter in the Wetboek van Koophandel, a covering note, unlike a slip which is signed by the insurer, does not provide any proof of the conclusion of the insurance (see Buys 37). The position is different in English law where ‘the slip or covering note or other customary memorandum of the contract’ may be referred to to determine when the insurance contract was concluded (see s 21 of the Marine Insurance Act 1906) and where, in the case where there is a stamped policy, the slip or covering note may be used as evidence of the terms of the contract (see s 89 of the Marine Insurance Act).

19 See Dorhout Mees Schadeverzekeringsrecht 86-87.

20 See Buys 37.
opinion of 1706 already mentioned earlier. 21 The insurer, who had verbally expressed agreement with the policy offered to him on behalf of the insured but sought not to be bound by the agreement, raised the further argument that his acceptance of the risk had not yet been accepted by the insured. But, according to the advocate delivering the opinion, once the insured's offer as contained in the insurance policy had been accepted by the insurer, the latter could not withdraw his expressed intent merely because there was no acceptance by the insured of the willingness he had disclosed to the insured's representative to provide the insurance cover in question. This was therefore not a case where the insurer had in fact made an offer which he could withdraw until it, in turn, was accepted by the insured. No further acceptance was necessary in this case to perfect the mutual consent already reached and the contract already created as a result. In short, the insurer's acceptance of the insured's offer resulted in the conclusion of the contract and no further acceptance was required by the insured of the insurer's acceptance. 22

Obviously, counter-offers may have been made by the insurers to whom policies were offered to be underwritten. Thus, the particular premium rate or rates at which they were prepared to and in fact underwrote the policy, such being noted alongside their subscriptions of the risk in question and their signatures, could in turn have been unacceptable to and rejected by insured.

No doubt, where the contract was concluded between absent parties, it may often have been difficult to establish when and where consensus was reached and the contract was concluded, if in fact consensus had been reached at all. Outward manifestations of the required consent, that is, of the making and the acceptance of an offer, were therefore important. Such manifestations may not have been found in tangible documentation only 23 but could also have occurred in the form of the words used by the parties or even in their conduct which indicated an offer or an acceptance. 24

The conclusion of a valid contract of insurance was not prevented by the fact that one of the parties laboured under a unilateral and unreasonable mistake as to, for example, the nature of the perils insured against. Thus, in a case before the Hooge Raad in 1715, 25 the insurer argued for a particular interpretation of the policy and said that that was the way he had understood it, for if he had understood it otherwise he

21 See Barels Advysen vol I adv 12 and n14 supra.

22 After the agreement had been reached, the opinion pointed out, no change could be made by the insurer to the terms of the contract. Equally, it may be added, the insured too could not eg relieve some of the insurers who had underwritten the risk to the detriment of the others. On this point, see further ch XVIII § 2.4 infra.

23 Thus, Voet Observationes ad III.24.2 n2 thought there was agreement as soon as the insurance document had been signed (underwritten) by the insurer.

24 Thus, Decker Aanteekeningen ad IV.9.4 n(3)/(c) explained that the conclusion of an insurance contract could even arise tacitly from the payment and acceptance of a premium ('zelfs uit de betaling en aanneeming der praemie tacite').

25 See Bynkershoek Observationes tumultuariae obs 1168; idem Quaestiones juris privati IV.5.
would have charged two or three times the premium that he did for the greater risk actually involved. He therefore requested relief from the amount he had so carelessly ('onvoorzichtich') underwritten. The Raad, though, was of the opinion that such relief was not possible for that would undermine the binding value of contracts at law ('want zo men dit, uit hoofde van onvoorzichtigheid, in de Assurantien wilde toelaten, is het met alle de trouw van diergelyke Contracten gedaan'). The position was different, however, where the parties had in fact not reached agreement on a material matter such as the destination of the voyage for which the ship or goods were to be insured. That much appears from an earlier decision of the Hooge Raad in 1711. The case concerned an insurance for a voyage to the Island of St Thomas. There were in fact two islands with that name, the one off the African coast, the other near the Americas. The insurer obviously thought the voyage was to the former island while the insured was under the impression that he was insured for a voyage to the more distant island. The Raad held the insurer not liable for a loss which occurred on the voyage to St Thomas in America.

The consensual nature of the insurance contract was fully recognised in the codification in the Wetboek van Koophandel. Thus, art 257-1 provides that the agreement of insurance exists as soon as it is concluded and that the mutual rights and obligations of insurer and of insured commence from that moment, even before the policy has been signed. This is the position in English law too.

3 Formalities

3.1 Introduction

Because most of the other formalities presupposed it, the most basic formality which could be required for the insurance contract was that of writing, that is, the reduction of the insurance contract to a written document known as an insurance policy. Once cast in a written form, further formalities which could be and which were, in different legal systems and at different times, required, included the issuing and delivery, the signing, the notarial execution, the registration, and the stamping of the insurance policy. Some of these formalities had to be performed by the insurer, others by the insured.

---

26 See Bynkershoek Observationes tumultuariae obs 781; idem Quæstiones juris privati IV.4.

27 See further Van der Keessel Praelectiones 1452 (ad III.24.6) who considered this an instance where the parties were not ad idem. The decision is considered in more detail in ch XIII § 1.2.4.1 infra in connection with the change of a voyage or the course of a voyage.

28 See further eg Van Renays 240-241.

29 Thus, s 1 of the Marine Insurance Act of 1906 defines the marine insurance contract as one in terms of which the insurer agrees to indemnify the insured in the manner and to the extent 'thereby agreed'. Section 21 provides that the contract is deemed to be concluded when the proposal of the insured is accepted by the insurer, whether or not a policy is then issued. See also eg Chalmers 139.
It is important to realise that virtually all statutory requirements of compliance with some or other formality served either to exercise official control over the conclusion or content of insurance contracts, usually with as its main aim the control over and possible prevention of frauds, or to utilise insurance contracts as a source of public revenue.

3.2 Writing

3.2.1 The Insurance Policy: The Need for Written Evidence of the Insurance Agreement; Different Forms of Policy

The earliest insurance contracts were reduced to writing in the form of a document which became known as a policy of insurance. The origin of the word ‘policy’ appears to have been the thirteenth-century Italian term ‘polizza’, meaning, generally, a list or schedule, or, more precisely, a commercial deed of indebtedness, an obligating document serving an evidentiary purpose, or a bill. But, strangely enough, ‘polizza’ did not originally refer to a deed or document of insurance in Italy. That was referred to in the Italian sources as an ‘instrumentum’ when concluded before a notary, or as an ‘appodisia’ or ‘apodixia’ when concluded by a broker. The term ‘polizza di assicurazione’ is only of later origin and the word ‘polica’ was first used in legislation to indicate the document containing an insurance contract in s 5 of the Barcelona Marine Insurance Ordinance of 1458.

In Roman-Dutch law the insurance policy was known and referred to by various names. Thus, Grotius referred to it as the ‘schrift van verzekering’, while early legislation referred to it as ‘asseurantie-Brieven’ and ‘d’instrument van Asseurantie of verseeckeringe’. The insurance policy was, of course, not the same as the insurance contract, despite common usage indicating the contrary. It was simply the document or

---

30 The origin of the word ‘polizza’ itself is uncertain and there are various possibilities such as ‘pollex’ (thumb), ‘polyptichos’ (multiple folds), ‘polliceri’ (promise), or ‘pollicitatio’ (legal promise). See eg Koch Begriffe 5.

31 Thus, eg Boey Woorden-tolk sv ‘Police van Assurantie’ described a policy as ‘de Lyst der verzeekerde goederen’ and noted that it came from the Italian ‘polizza’, meaning a list or ‘Cedulle’. See too eg Van Ghesel De assecuratione 11.1.4.

32 Thus, one encounters ‘polizza di carico’, meaning a bill of lading, or ‘polizza di cambio’, meaning a bill of exchange. See eg Hammacher 132-133; Rothbart 10.

33 Kimura ‘Entstehung’ 15 notes that the term ‘policy of insurance’ was not used in England until after the mid-sixteenth century. Earlier descriptions included ‘scritta’, ‘writinge of assurance’, and ‘protest’ or ‘bill of assurance’.

34 Inleidinge III.24.6. The Lund edition of this work has the word ‘police’ annotated here in the margin. Schorer Aanteekeningen ad III.24.6 (n14) referred to written insurances by the terms ‘Police’, ‘Polis’ and ‘brieven van verzekeringe’.

35 See eg s 17 of title VII of the placcaat of 1563 and s 4 of the placcaat of 1571 respectively.
deed in which the insurance contract was embodied and by which it was evidenced; the tangible form to which the agreement between the parties was reduced. This point was fully realised by Roman-Dutch authors.\footnote{Thus, Lybreghts Koopmans handboek V.77 referred to the policy as 'een Acte van Verzeekering' as distinct from 'een overeenkoming of Contract van Verzeekering'; Boey Woorden-tolk sv 'Police van Assurantie' referred to the policy as 'een acte van verzekering van schip of goederen'; Van Ghesel De assecurationi II.2.1 described the policy as the 'assecurationis instrumentum ... quod sit scriptura legitima'; and Van der Linden Koopmans handboek IV.6.1 noted that the policy was the contract entered into in writing in respect of a transaction or agreement of insurance. See generally too Dreyer 117.}

Even though the insurance contract was consensual and a reduction to writing not required for its validity, insurance contracts were invariably cast in the form of an insurance policy.\footnote{Of course, as will appear shortly, certain laws at certain times made such writing compulsory.} Merchants no doubt from early on realised that the existence of such a policy would serve to avoid many disputes not only as to the precise content of the contract of insurance but in fact as to whether such a contract had been concluded at all.

Because in the early stages of the development of the insurance contract no insurance law or fixed insurance customs yet existed, it was necessary for the parties to express their relationship in writing and to do so in some detail. No clear and undisputed subsidiary insurance law existed which could regulate their relationship and with reference to which they could contract. The parties themselves of necessity had to regulate their positions by way of detailed contractual stipulations. Numerous matters, as much as, if not more than, in any other civil or mercantile contract in common use at the time, had to be agreed upon between the parties and the content of such an agreement was best evidenced by a policy. Put differently, in the early stages of the development of insurance law there was no clarity yet as to the naturalia of the insurance contract; it was not yet clearly established, once it had been made out that the contract between the parties was one of insurance, which terms the law would read into it. Accidentalia therefore played an enhanced role. In a sense the policy fulfilled the role of the most important source of insurance law governing the relationship between insured and insurer.\footnote{One seventeenth-century example appears to illustrate this well. From an opinion delivered in 1669 (see Nederlands advysboek vol II adv 120) it appears that the insured was there 'mondelling verzekert', which may explain why the insurance was (taken to have been?) 'simpelijck' for the benefit of the named insured or the person taking out the insurance and not, as was usually the case because of an express stipulation in the policy, also for the benefit of another or even for the benefit of whom it may concern. As to insurance for the benefit of third parties, see ch X § 3 infra. As to the role of the insurance policy as a source of law, see further § 4.1.1 infra.}

Even after insurance law had become more settled and legislatively regulated, the role of the policy in providing proof of the content of the insurance contract changed but did not diminish. Legislative intrusion on the freedom of contract necessitated that the insurance contract be cast in a written form so that compliance with official prescripts could be monitored.\footnote{See Reatz Geschichte 109.} Writing was therefore no longer solely for the benefit of the
parties involved but also for the authorities, and it was no longer voluntary but had become compulsory.

The written policy provided proof, furthermore, of the consent of the parties, that is, of the insurance contract having been concluded and, accordingly, of the insured having at least a *prima facie* claim against his insurer.\(^4^0\) In earlier times the books and documents of merchants had no legal credibility and this enhanced the need for a policy to prove the agreement. Furthermore, negotiations prior to the conclusion of the insurance contract were often conducted orally, and not invariably by way of letters which could subsequently be used to prove the existence of an agreement. The policy itself was therefore the only reliable evidence in this regard, hence its importance and the inevitable reduction of the insurance contract to this written form.\(^4^1\) The promotion of certainty and the avoidance of disputes and litigation by the evidentiary value of the insurance policy more than offset the trouble and expense of reducing insurance contracts to writing.\(^4^2\)

The policy was drafted and signed, therefore, not to create or validate a binding insurance contract, but merely to provide the insured with proof of the conclusion of such a contract and the parties with proof of its content. But although, or rather because, the existence or execution of an insurance policy was not necessary for the creation of the insurance contract, it was possible in Roman-Dutch law, on the grounds of such a contract, to claim the issue and delivery of a signed policy from the insurer which reflected the underlying agreement.\(^4^3\)

As opposed to an oral agreement of insurance, often referred to as a contract attested to by witnesses only, the insurance contract in writing could take the form of either an authentic deed or an underhand deed.\(^4^4\)

Authentic deeds were public instruments which were drafted by and executed before a notary or some other public official or organ such as a local magistrate or

\(^4^0\) According to Hammacher 138-139, the most important function of the policy was in fact in the area of insurance litigation, especially in the case of provisional judgments. As to the latter, see further ch XX S 2.2 *infra*.

\(^4^1\) See generally Reatz *Geschichte* 107-109.

\(^4^2\) See *Van Ghesel De assecuratione* II.1.1 who stated that from experience merchants knew that written evidence prevented litigation, was convenient and promoted certainty.

\(^4^3\) See eg Witkop 8-9 who discusses a notarial document dated 8 January 1646 containing a claim by an insured for the execution (ie, the delivery of a policy) of a fire insurance agreement by the insurer concerned (*verzoek om te insinueeren, en de insinuatie zelf, ter zake van een project van brandverzekering, welke de assuradeur weigerde uit te voeren*). See too the *Amstadsche Secretary* 386-387 for the form of summons to appear before the Chamber of Insurance which had to be issued by an insured to insurers from whom he demanded the delivery of a policy. It is reproduced in Appendix 12 *infra*.

\(^4^4\) See eg *Van Ghesel De assecuratione* II.4.1 and generally Mullens 34-35.
Schepenen court. Of medieval origin like the notariate itself, authentic deeds offered certain advantages for the parties to commercial contracts. The main advantage of notarially executed documents was their higher evidentiary value, especially important where several persons were involved in a single transaction as was the case with insurance. The authenticity of such deeds, which had great value before foreign courts, made any vexatious denial of or dispute concerning its date or content impossible as they provided *prima facie* proof of those matters. Furthermore, a copy of the deed was preserved in the protocols of the notary so that a loss of the original deed was not fatal. However, in the course of time and although notarial fees were relatively low, it

45 Until the late Middle Ages, notaries were officials of the church and were referred to by various names, such as *notarii*, *clerici*, *scribae*, and *tabelliones*. Their services were earlier probably indispensable in commerce, given the general illiteracy of merchants. Legislation on the notarial office was passed in the Low Countries in 1524 and 1540 to counter growing abuses and made provision for matters such as the qualifications of notaries and their examination by the registrars of the local court, their obligation to keep registers and protocols of the deeds they drew up, and the formalities they had to follow in such drafting. Later municipal *keuren* continued the regulation of the notarial office, placing a limit on the number of notaries permitted in a given town and laying down their duties. Already by the end of the fifteenth century, and especially in the sixteenth century, treatises on the *ars notariatus* appeared in the Netherlands as guides for notaries. More detailed notarial manuals (notarisboeken) were published in the seventeenth and eighteenth centuries, eg Simon van Leeuwen (*Notarius publicus* (1656) and *Ars notarius* (1676)); Gerard Wassenaer (*Praktijk notariaal* (1669)); Arent Lybrechts (*Redenerend practycq over het t oeffenen van t notaris ampt* (1742) and *Redenerend vertoog* (1743)); and FL Kersteman (*Nieuwe oeffenschoole der notarissen* (1766) and *Praeceptor der jonge notarissen* (1790)).

On the history of the notarial office in the Netherlands, see generally Gehlen 11-15; and Pitlo. A useful summary of notarial practice in the seventeenth and eighteenth centuries may be found in Postan, Rich & Miller 68-69.

46 Van Ghesel *De assecuratione* II.4.4 explained that whereas public policies provided complete proof, private policies, being signed by the insurer only, provided proof only against the insurer and not against the insured.

But in the seventeenth and eighteenth centuries, insurance policies not notarially executed were no less liquid documents than were those which were so executed. It was therefore possible to obtain a provisional judgment on an insurance policy irrespective of whether or not it was in the form of an authentic deed. See further ch XX § 2.2 *infra*.

47 It appears that no claim was possible where the insured had lost his insurance policy if it was not notarially executed and where the insurers refused to issue another or otherwise denied the existence of the contract in question. Firstly, if no longer in possession of his policy, the insured may well have been unable to prove the conclusion and existence of a valid insurance contract. Secondly, and this applied also in appropriate cases to notarial policies, if the policy was payable to the insured or whomever it concerned (see ch X § 3.1 *infra*), the policy was in effect payable to any bearer who was able to prove ownership of or an interest in the property insured, so that even if the insured could prove the conclusion and existence of the contract, he was not necessarily the person entitled to claim under it.

Thus, in 1545 in Antwerp an insurance contract was declared invalid by the Antwerp Schepenen Court because the insured had lost the document concerned. In another case, details of which appear from an Antwerp notarial deed of 1577, where an insurance policy in the name of the insured or bearer (thus, the insured could transfer the policy) was lost during the Spanish occupation of the city, the authorities prohibited any dealings ('verhandelen') with the policy as well as any payment on it to anyone but the named insured or a person with a specific mandate or procuration from him, all transactions in contravention of this being declared invalid. See further De Groote *Zeewaassurance* 20 and 23-24; *idem* 'Zeeverzekering' 208.

Blackstock 44 mentions an advertisement in the London *Daily Courant* of 2 October 1719 in which a reward was offered for the return of a lost marine insurance policy to save the trouble of making
became inconvenient and time-consuming to approach a notary for every important business transaction. Additionally, a further important drawback of officially executed deeds was the publicity attached to them. Mercantile practice therefore gradually came to recognise informal documents as valid. Notarial execution was dispensed with and notaries were only involved when, by legislative prescription, official execution was required to give legal validity to contracts.

Underhand deeds were private instruments (*handschriften*) signed by the parties and/or by witnesses. Generally they presented a more practical alternative to commercial practice than did authentic deeds. Drafted in ordinary language and not in Latin or legalese by the parties themselves, or by an intermediary or intermediaries such as a broker acting on behalf of one or both of them, underhand deeds embodied contracts concluded between the parties themselves without any official intervention. They were popular due to the ease with which they were created, the lower cost involved and, importantly, the secrecy which the parties could preserve as to the details of their transaction. Initially attempts were made to overcome any lack of authenticity by the introduction of a number of improvisations. So, for example, the intermediary involved was obliged to guarantee the signature of the party he represented as well as the date of the agreement; or intermediaries were compelled to keep duplicates of underhand deeds in special registers; or such deeds were in some places sometimes deposited with notaries (this happened with insurance policies in Antwerp); or the parties sought to increase the legal value of their underhand deed by agreeing that it was to be of the same value as an authentic deed concluded before a notary or another public official.

### 3.2.2 Writing as a Legal Formality in Earlier Insurance Practice

Although insurance contracts were originally concluded orally as well as in writing, legislation from early on started a trend by prescribing writing and a public attestation, authentication or recording in one form of another. Through compelling the conclusion of insurance contracts before official or sworn notaries, for example, legislatures sought to control and enforce compliance with their prescripts as to the form and content of such contracts.

Such legislative measures aside, the position in practice in earlier times is not always easy to determine. Obviously notarial documents are more likely to have survived than underhand policies. The oldest extant insurance contracts are almost exclusively notarial deeds but this allows no inferences about whether public policies or underhand policies were the more preferred in practice. It is also obviously impossible

---

*another 'which the said Subscribers promised to do'.

48 See eg Coing *Privatrecht* 534.

49 Very few early insurance policies in notarial form are in any event extant (see Wijffels 96), which may, in turn, suggest that underhand deeds were the preferred form. It appears that only when underhand insurance policies gave rise to litigation, were they preserved as part of the documentation of the process or were they copied by a notary into his protocols. Furthermore, many notarial archives were in fact lost and it is therefore difficult to establish or estimate with any certainty the total number of insurance contracts notarially concluded. At any rate, it appears that one must approach with some caution statements such as that of Gehlen 149-151 that insurance contracts, especially those concerning maritime and transport insurances, were in the seventeenth and eighteenth centuries not only concluded
to make any assumptions with regard to the extent to which oral contracts were prevalent in practice, if at all. Without further empirical and archival investigation, one can in fact do no more than establish whether, according to legislative promulgations, it was permitted or prohibited or compulsory to conclude insurance contracts in any one of these forms.

In the early Italian insurance laws, where the consensual character of the insurance contract was recognised, even in most cases to the extent of recognising the binding nature of informally written and even verbal insurance contracts, there appears to have been a divergent approach in practice. On the one hand, written insurance contracts were in certain jurisdictions notarially executed, either because, in isolated cases, that was compelled by legislation or because that form was customarily employed in view of the evidentiary and procedural advantages it entailed. Notarially executed insurance contracts were facultatively concluded in for example Genoa and Palermo. The first, and still disguised, insurance policies which were concluded there in the fourteenth century, were notarially executed and in Latin. On the other hand, in most other Italian jurisdictions the legislatures were satisfied with the practice of avoiding the formalism of notarial or public execution by concluding insurance policies in the form of underhand deeds. Policies in this form were concluded in for example Tuscany (Florence, Pisa) and Venice, and were drafted by brokers in Italian, the commercial as opposed to the legal language of the time.

Although the earlier Barcelona insurance ordinances did not expressly require writing or declare oral insurance contracts invalid, the invariable use of written policies appears to have been assumed in many of the provisions. In the course of time, though, notaries came to be entrusted with the indirect enforcement of insurance laws and for this purpose notarially executed policies were eventually made compulsory. Thus, s 7 of the Ordinance of 1484 required an authentic deed drafted by a notary and signed by him and the parties, and expressly declared all private underhand deeds void.

in the form of underhand documents but often, and even for the most part, in the form of authentic deeds. As will appear below, the more likely position in Dutch insurance practice appears to have been the opposite. See also eg Vergouwen 43.

As to the early insurance contracts from Genoa and Palermo, see eg Bensa Assicurazione and Perdikas 'Palermo-Verträge' respectively.

See generally on the early position in Italy eg De Groote Zeeassurantie 143; idem 'Zeeverzekerings' 215; Holdsworth History vol VIII at 279; Koch 'Kodification' 300; Mullens 33; De Rover 'Early Examples' 187 and 188; Rothbart 11-12; Sanborn 24-245 and 250-251; and Seffen 25. As to the later position in Naples, see Roccus De assecrationibus note 5.

It seems that in Barcelona notaries fulfilled the role which insurance chambers and brokers would later play in the Netherlands in ensuring compliance with legislative provisions.

See further especially Reatz Geschichte 100-103, 109-115, 116-117 and 126; and also Mullens 33; and Seffen 30. Similarly, notarial policies were required and private deeds declared invalid in the Burgos insurance law of 1538. See Reatz Geschichte 224.
3.2.3 Statutory Requirements of Writing in Roman-Dutch Insurance Law

The earliest indications are that in the Netherlands\(^\text{54}\) notarial execution of insurance contracts was permitted but not compelled by law. Thus, a decision by the Schepenen Court in Bruges in 1468 held that insurance policies could be drafted by underhand deed, or by a notary or by a broker ('bij onderhandse akte, ofwel door een notaris of door een makelaar').\(^\text{55}\) During the sixteenth century it was customary in Antwerp to have policies drafted either by notaries or by brokers and quite a few notarial deeds of insurance contracts from the first half of that century are extant. It appears, though, that from the middle of the century policies increasingly came to be drafted informally by brokers. Thus, the Antwerp broker Juan Henriquez in a fourteen-month period in 1562-1563 drafted no fewer than 1488 insurance policies at an average of more than a 100 per month. Given that there were also a number of other brokers active in the city, it would be very surprising if more policies were at that time notarially executed in Antwerp. But at least some policies in the form of authentic deeds may well also still have been concluded.\(^\text{56}\)

No doubt this movement, if that was in fact what it was, away from the formalism of notarial execution occurred in the interest of simplified business practices. The notarial deed (*instrumentum*) was replaced by a policy unilaterally drafted by the insured or his broker and signed by the insurer which contained the whole agreement between the parties involved and which represented the primary evidence of their consent and their legal relationship. But, as will appear below, although the notarial form may have been increasingly less popular in insurance practice in the Netherlands, notarial policies were only languidly and carefully abandoned. Furthermore, although insurance policies may no longer have been notarially executed, numerous documents relating to insurance and the insurance claim in particular, such as notices of loss and of abandonment to insurers, were still executed in that way.

In the *placcaat* of 1563 the assumption apparently was that although writing was required, the intercession of a public official such as a notary was not necessary as was the position in Spain earlier.\(^\text{57}\) The prescribed policy form expressly declared that much. It also still provided that the policy was of as much value and force as if it were concluded by authentic deed, which tends to show that the underhand deed was not yet...

---

\(^{54}\) As to the position in Roman-Dutch law, see generally eg Dorhout Mees *Schadeverzekeringsrecht* 86; Scholten 27-31.

\(^{55}\) See De Groote *Zeeassurantie* 15; idem 'Zeeverzekering' 207.

\(^{56}\) See De Groote *Zeeassurantie* 143. De Roover 'Early Examples' 187 notes that notarially drafted contracts were still found in Antwerp in the sixteenth century.

\(^{57}\) See Kracht 18.
fully trusted as the most appropriate and problem-free form for the insurance contract.\textsuperscript{58}

In terms of the placcaat of 1571, insurance contracts were expressly permitted to be concluded either by authentic or underhand deed. Section 6 provided that parties contracting for insurance were permitted to do so before public officials, by own private deed, signed by the parties concerned, or before witnesses, as may be agreed upon by the parties ('voor Wet-houderen [ie, the Schepenen], Notarissen, Tabellioenen [a type of notary] of andere publicke Persoonen, oft by eygen ende particuliere Policen, Cedullen, Signaturen oft Obligatien, geteeckent by de veroobligeerde persoen oft by galoofweerdige getuygen, soo die partyen des halven veraccorden sullen').\textsuperscript{59}

Whether writing was compulsory is not beyond all doubt. Although oral insurance contracts were not prohibited, they can be regarded as having been permitted only if the reference to witnesses in s 8 is not taken to have referred to the underhand deed and to their being an alternative to the signatures of the parties to such deeds, but if the section is read, as it appears a number of Roman-Dutch commentators thought, as providing that policies could be concluded either by underhand deed, signed by the parties, or by way of an oral agreement evidenced by witnesses only and not by writing.\textsuperscript{60} But even if oral contracts were in fact permitted, it was merely a theoretical liberty. Additionally and apart from the fact that policies had to comply with numerous prescripts of the placcaat, all insurance contracts were in terms of s 8 subject to a further formality which presupposed writing, namely registration within specified period subsequent to the conclusion of the contract.\textsuperscript{61}

Furthermore, the position, at least as on the face of it provided for in the placcaat of 1571, appears to have been that accepted in practice, at least in Antwerp where writing was still required according to customary law for the conclusion of a valid insurance contract.\textsuperscript{62}

\textsuperscript{58} In this regard the policy form prescribed by s 2 of title VII of the placcaat of 1563 contained the following clause: 'Ende willen ende consenteren de selve Asseureurs, dat dese police van asseurantie van soo groeter kracht zy, gelijk of de selve gemaeckt wende gerassert ware voor Schepenen, openbare Notarissen, oft andersints, alles sonder bedroch oft ergeist'. Similar clauses appeared also elsewhere. Thus, the Ancona policy of 1567 (discussed by Straccha De assecurationibus XXXVII) declared that it was conferred with the same power and form as contracts concluded formally ('Et velint hoc instrumentum habere easdem vires & formam, quas per omnia habere queat contractus secundum formulam cameræ'). Straccha (XXXVII.1) discussed the issue whether an agreement created by informal private writing was valid and had the force of a public deed.

\textsuperscript{59} Section 6 was identical to s 8 of the provisional placcaat of 1570. See De Groote Zeeassurantie 39.

\textsuperscript{60} See also eg Dorhout Mees Schadeverzekeringsrecht 86 who considers oral insurance contracts, evidenced not by writing but by witnesses alone, to have been permitted in Roman-Dutch law alongside written ones.

\textsuperscript{61} See eg Goudsmit Zeerecht 261-262; Trenerry 269-270 (as to the liberty regarding the form of the insurance policy in fifteenth-century Flanders). As to registration, see further § 3.3 infra.

\textsuperscript{62} The 1609 compilation of Antwerp customary law, the Compilatae, provided in this regard (in art 26 of par 2, title IV: see De Longé vol IV at 210) that '[a]lle contracten van asseurantie moeten geschieden tusschen partijen aengegaen ende gesloten worden bij geschrifte, tij voor de weth, voor notaris ende getijden, ende andere wetige persoonen, oft bij police onder 'handteeken van de versekeraers', and that before a contract was put in writing, insurers were not liable whatever negotiations may orally have been made or concluded between parties in this regard. A prior oral
Section 18 of the Amsterdam keur of 1598 took over the provision of the placcaat of 1571 without any amendment.\textsuperscript{63} Insurance contracts could be concluded by way of authentic or underhand deed, signed by the parties or by credible witnesses.\textsuperscript{64} Although policies were no longer subject to registration, s 19 of the keur instead compelled brokers to draft insurance policies in accordance with the keur and to take down verbatim everything added by hand to the printed policy form ("metter hant of handen in der Police geschreven sal worden").\textsuperscript{65} The policy forms appended to the keur still declared it to be of as much value as a policy officially executed ("om alle prolixiteit te eviteren, wy maintineren dese Police van Asseurantie van soo grooter waerden, als oft die gemaeckt ende gepasseert waer voor Schepenen"), apparently following current Amsterdam practice\textsuperscript{66} received from the earlier Antwerp usage. The Middelburg keur of 1600 was largely similar to its Amsterdam predecessor, ss 8 and 10 being identical for present purposes to ss 18 and 19 of the Amsterdam measure.

The Rotterdam keur of 1604 too was rather ambivalent about writing. Section 20 provided that an insurance contract could be made or proved ("ghemaeckt ofte beweseri") by public or private deeds ("met publicque ofte privé Instrumenten"), signed by the insurers ("geteeckent ofte beschreven mette handt vande Verseeckeraers"), or also by creditable witnesses ("ofte oock by geloofwaerdige Getuyen").\textsuperscript{67}

From the Roman-Dutch authors it appears, though, that they accepted that insurance contracts could in terms of the early municipal keuren validly be concluded without writing. Thus, as Bynkershoek pointed out with reference to those keuren, an insurance contract could be concluded by public instrument ("door een publiek instrument") or by private deed ("door een privaat handschrift") signed by the contracting parties, or even informally and orally through witnesses ("by geloof-waardige agreement was not enforceable and an insured had no action against his insurer without presentation of a policy. See also eg Mullens 33-34.

\textsuperscript{63} On the position in Amsterdam, see eg Goudsmit Zeerecht 313.

\textsuperscript{64} Again there is uncertainty whether the reference to witnesses meant that they, rather than the parties, could sign the underhand deed, or whether the insurance contract could be concluded orally and proven by such witnesses only.

\textsuperscript{65} As to the duties of brokers in this regard, see further ch X § 7.3.1 infra.

\textsuperscript{66} Thus, the following clause was added to an Amsterdam policy of 1592 (reproduced by Sneller 118 and in Appendix 19 infra): 'Ende omme alle prolixiteit te eviteren, wij maintineren dese politie van asseurantie van alsoo grooter waerden ... oft die ghemaeckt ende gepasseert ware voor schepenen ende openbaer notarisseri'.

\textsuperscript{67} See also eg Van der Keessell Praelectiones 1447 (ad ill.24.6). Possibly the 'also' ('oock') here suggested a third alternative, namely oral contracts in which witnesses took the place of writing.
getuigen'”, as the parties saw fit and thought best.\(^{68}\) Van der Keessela\(^ {69}\) declared that the insurance contract could be concluded before the Court (‘coram iudice’), before a notary and witnesses, before private witnesses, or even by way of a personal document (‘proprio chirographo’).

But although notarial execution was permissible in Amsterdam and Rotterdam, it seems not to have been popular in insurance practice there.\(^ {70}\) Very few insurance policies occur in notarial archives\(^ {71}\) although notarial references to disputes involving insurance contracts and notarial notices in terms of such contracts are more common.

Subsequent developments, at least in Amsterdam, did not change this basic position and merely brought some refinements, mainly with more stringent provisions relating to the control to be exercised by brokers,\(^ {72}\) control which was presumably regarded as necessary given the absence of any registration of policies.

The Amsterdam amending keur of 1688 did not amend s 18 but added some further subtlety. Thus, the use of the prescribed policy forms was made compulsory\(^ {73}\) and the policy also had to be signed by the Secretary of the Insurance Chamber, the use of other and of unsigned policies being prohibited. But the policies prescribed in 1688, as also those afterwards appended to insurance keuren in Amsterdam, no longer contained the clause declaring the policy of as much value as one publicly executed,\(^ {74}\)

---

\(^{68}\) Bynderkhoek Quaestiones juris privati IV.26. See too Grotius Inleidinge III.24.6 (the insurance contract may be made in any way the parties wished, before the court (‘voor't gerechte’), before notaries (‘voor ghemachtigde schrijvers’), before witnesses (‘getuigen’), or underhand (‘onder haer hand’); Groenewegen Aanteekeningen n14 (ad III.24.6); Van Zurck Codex Batavus sv ‘Assurantie’ par 13 (Insurances may be concluded ‘voor ’t Geregt, onder de hant of voor Notaris’, as long as a copy of it was kept); Wassenaar Praelectiones 1447 (ad III.24.6).

\(^{69}\) Praelectiones 1447 (ad III.24.6).

\(^{70}\) Although charter-parties were apparently notarially executed in the Netherlands, bills of lading, which were in printed form, were not. See Asaert 201; Hart 114.

\(^{71}\) See eg Elink Schuurman 111-112. Vergouwen 43 mentions one example in the notarial protocol of the Rotterdam notary J van Weel dating from 1685. The protocol referred to an insurance contract concluded between two merchants and declared the insurance valid ‘als oft daervan behoorlycke ende ordinaire police van asseurantie gemaakt ende getyckent waere’. It appears that the protocol was drafted because no policy existed in this case to prove the conclusion of the insurance contract. Gehlen (as to whose views in this regard, see again n49 supra) reproduces and transcribes (at 145-149) an extract from an Amsterdam notarial policy on goods from 1687. This policy is reproduced in Appendix 26 infra.

\(^{72}\) As to which see further ch X § 7.3.1 infra.

\(^{73}\) See § 4.1 infra.

\(^{74}\) The fact that this clause was dropped from prescribed policies (ie, after the Amsterdam keur of 1598) possibly indicate a measure of acceptance in official circles of the binding nature of informal insurance contracts.
although the practice of inserting such clauses may, if at all, not have been abandoned for very long.\textsuperscript{75}

The Rotterdam \textit{keur} of 1721 contained no provision similar to s 20 of the earlier \textit{keur} of 1604 as to the permissible form of an insurance contract. Section 75 prohibited the use of policies other than printed ones embossed with the city crest and conforming to the policy formulas appended to the \textit{keur}.\textsuperscript{76}

Despite the example provided in this regard by the Hamburg \textit{Assecuranz-Ordnung} of 1731,\textsuperscript{77} the Amsterdam \textit{keur} of 1744\textsuperscript{78} rather disappointingly did not take the opportunity of clarifying the respective roles of and relationship between the parties' consent and the prescribed formalities. It did not provide that insurances concluded orally were valid\textsuperscript{79} and also did not contain any express provision that insurance contracts could be concluded by authentic or by underhand deed. The latter, however, followed from its provisions concerning the duties of brokers, rather than notaries, in regard to unstamped policies.\textsuperscript{80}

Fortunately the situation was remedied in the Amsterdam amending \textit{keur} of 1775.\textsuperscript{81} The \textit{keur} now specifically and clearly provided that insurances and reinsurances could be concluded in an unstamped underhand form of writing or even orally ("zullen alle Assurantien en Reassurantien ... wel op onderhandsche ongezegelde Aannemingen, of ook mondeling, mogen worden aangegaan en gesloten").\textsuperscript{82} But now there was the express provision,\textsuperscript{83} which may have been implied by

\begin{footnotes}
\item[75] Thus, an Amsterdam policy of 1672, reproduced by Den Dooren de Jong 'Practijk' 22 and also in Appendix 24 \textit{infra}, contained the following printed provision: 'En de om alhe prolixiteit te eviteren, Wy maintineren deze Police van Assurantie van also grooter weerden, als of d't gemaekckt ende gepasseert ware voor Schepenen'.
\item[76] This was in addition to the obligation in terms of s 76 on brokers to use only policies conforming to that prescribed and to sign such policies in terms of s 77. See further eg Goudsmit \textit{Zeerecht} 394; Kracht 35.
\item[77] By s IV-1 of this measure, private insurance agreements were possible and permitted but had to be transferred into one of seven prescribed policy forms before signing. In the event of conflict between the private and the prescribed forms, the former had precedence. See further Dreyer 125.
\item[78] See generally Goudsmit \textit{Zeerecht} 335-336.
\item[79] Unlike its predecessors, there was no reference to creditable witnesses in this regard.
\item[80] See further § 3.4 \textit{infra} as to the provisions of ss 59-61 concerning stamped policies, as well as ch X § 7.3.1 \textit{infra} as to the role of brokers in this regard.
\item[81] It amended ss 59-61 of the Amsterdam \textit{keur} of 1744 in a single unnumbered section. See generally Goudsmit \textit{Zeerecht} 335-336.
\item[82] See Van der Keessel \textit{Praelectiones} 1447 (\textit{ad} III.24.6) who explained that in terms of the Amsterdam amendment of 1775, insurances could validly be concluded by way of private documents ('\textit{privatis chirographis}') or promises, or even orally ('\textit{viva voce}').
\item[83] Which overcame the somewhat incongruous situation that although formalities such as registration and stamping were at various times required, and although it was determined in detail what insurance policies had to contain (see further § 4.2 \textit{infra}), it was not clearly prescribed that insurances were valid only if contained in a written deed. The formality of writing for purposes other than as a requirement for the validity of the contract (ie, for evidentiary purposes) was assumed but not expressly prescribed in municipal \textit{keuren} prior to 1775.
\end{footnotes}
law and accepted in practice earlier,\textsuperscript{84} that insured or their brokers had to ensure that within fourteen days at the most after the conclusion of the agreement, a proper formal policy was drafted and signed by at least one underwriter who had insured on the informal policy, unstamped (written) acceptance, or oral agreement ("Hand Police of ongezegelde Aanneming of ook mondeling").\textsuperscript{85} This latter policy had to be authorised and stamped, signed by the Secretary of the Insurance Chamber, and had to take the form of the official policy forms ("behoorlyk geoctroyeerde gezegelde en door den Secretaris van de assurantiekamer getekende Policen, volgens de Formulieren hier agter gevoegd"). Notable was that the obligation to draft this policy and to have it signed as prescribed, was imposed on the insured or his broker.

Thus, writing and the compliance with any of the other formalities linked to or presupposing a reduction to writing, was not required for the conclusion of a valid insurance contract in terms of the Amsterdam insurance legislation. As Scheltinga explained,\textsuperscript{86} there was no doubt that the insurance contract, being a consensual contract, could effectively be concluded and was fully valid ("haar volle beslag heeft") even if it was not in the form of a written policy of insurance, as long as the agreement could be proved. An exception was where it appeared from their agreement that the intention of the contracting parties was that their agreement would only be effective after a policy had been drafted. The possibility was therefore recognised that the parties themselves could elevate writing to a requirement for the validity of their particular contract. But, as Scheltinga continued, one could not deduce that a subsequent reduction to writing, and a compliance with accompanying formalities such as stamping, was not required and that an oral agreement of insurance would necessarily remain effective.\textsuperscript{87} Some legislation in fact required a subsequent reduction to writing, for example for purposes of stamp duties, but such legislation did not prevent insurances from being validly concluded orally ("dat assurantie ab initio kan bestaan zonder geschrijf").\textsuperscript{88}

\textsuperscript{84} Such an implication and acceptance being supported by, eg, the duty of an insurer to issue, and the right of an insured to claim delivery, of the insurance policy, which duty and right could have been based on an earlier oral agreement.

\textsuperscript{85} The policies appended to the \textit{keur} of 1775, unlike earlier official policies, concluded with the following statement pertaining to such transcription: 'En is deze door my eerste ondergeteekende Assuradeur overgeteekend den ... [date]'.

\textsuperscript{86} \textit{Dictata ad} III.24.2, and see too \textit{idem ad} III.24.6 sv 'ofte onder haer hand'.

\textsuperscript{87} One could not assume that 'een simpele conventie over assurantie by woorden altoos obligatorl zouden kunnen blijven zonder geschrijf'. In this regard he thus distinguished writing as a requirement for the valid conclusion of a contract on the one hand, from writing as a means of proving the insurance contract and as a requirement for enforcing it in a court of law on the other hand.

\textsuperscript{88} See too eg \textit{Decker Aanteekeningen ad} IV.9.4 n(3)/(c) (an oral and even an informal conclusion of a valid insurance contract was possible but a subsequent reduction to writing was required for the contract to have legal force); \textit{Van der Kesssel Theses selectae} th 713 (\textit{ad} III.24.2); \textit{idem Praelectiones} 1431 (\textit{ad} III.24.2); and \textit{Van der Linden Koopmans handboek} IV.6.7.
The practical effect of the legislative provisions as to writing was summarised also by Van der Keessel who posed the question whether one of the parties could, after the conclusion of the insurance contract but before its reduction to writing, unilaterally resile from it. He though that the insurer, for example, could not change his mind and decide not to be bound simply because he had not yet signed his name on the policy or, one should add, simply because the contract had not yet been reduced to the form of a policy, as long as the insurer’s consent could be proved. The reason was that the formality of writing was not required for the formation of a valid insurance contract but merely for purposes of proof and for the payment of stamp duties. Of course, until such stamping, for which a reduction to writing was of necessity required, the contract was not enforceable at law.

3.2.4 The Requirement of Writing in the Wetboek van Koophandel

The position in Roman-Dutch law provided the basis for the provisions in the Wetboek van Koophandel, although there the opportunity was taken in arts 255-261 to regulate more closely the consequences of the consensual nature of the insurance contract and the relationship of that requirement to the requirement of writing. But all the difficulties with the distinction between the consensual nature of the agreement and the primarily evidentiary function of the policy were still not completely eliminated.

Thus, art 255 provides that an insurance must be concluded in writing by a deed ("bij een akte"), bearing the name of ‘policy’ which, in terms of art 256-2, must be signed by every insurer. Article 255 therefore appears to require the existence of a written document for the conclusion of a valid agreement of insurance.

But in terms of art 257 the provisions of art 255 are clarified, the conclusion of the contract and the existence of a written and signed policy are clearly separated, and the purely consensual nature of the contract and the solely evidentiary function of the written policy reaffirmed. In terms of art 257-1, an agreement of insurance exists as soon as it is concluded and the mutual rights and obligations of insurer and insured

---

89 Already answered in the opinion of 1706 (see Barels Advysen vol I adv 12 and n14 and n21 supra) which, it is clear, remained valid despite the legislative requirement of the formality of writing. The opinion was in fact referred to with approval by Van der Keessel.

90 That is, there was no right to withdraw or locus poenitentiae.

91 That is, the mutual consensus and the conclusion of the agreement.

92 See Van der Keessel Theses selectae th 729 (ad III.24.6); idem Praelectiones 1447 (ad III.24.6).

93 See generally Lipman 100; De Renays 34-35 and 38-40.

94 Originating in art 332-1 of the French Code de commerce, art 255 has been regarded as an unnecessary and confusing provision.

95 According to Voorduin vol IX at 191, this separation is in accordance with the needs of practice and commerce, the moment of signature being in practice often long removed from the moment of agreement.
commence from that moment, even before the policy has been signed. It is therefore clear that, as in Roman-Dutch law, writing in the form of a policy is not a requirement for the conclusion of a valid insurance contract in Dutch law.\(^96\)

Such conclusion, though, gives rise to certain consequences. In terms of art 257-2, an insurer is then under an obligation within a specified time to sign and deliver a policy to the insured. Accordingly, the creation and issue of a policy is a necessary and inevitable consequence of, rather than a precondition for, the conclusion of the insurance contract.\(^97\)

In terms of art 258, written proof (that is, the policy) only serves to establish the conclusion of the insurance contract as against the insurer.\(^98\)

### 3.3 The Registration of Insurance Policies

Characteristic of most systems of insurance law in the sixteenth and seventeenth centuries was the fact that authorities sought to exercise control over the conclusion and content of insurance contracts, and also to ensure compliance with legislative prescriptions on insurance generally, through a system of registration of insurance policies. For this purpose some appropriate institution such as an office, bureau, or chamber was created to administer the system of policy registration. Such registration was generally made compulsory by declaring unregistered policies not justiciable at law, and control was exercised by permitting the registration only of polices complying with applicable legal measures. Very often the registration office was funded by allowing it to levy a fee for each policy it registered.

From a practical point of view there was considerable opposition to such systems of registration. It forced merchants, if they wanted to have their insurance contracts to be registered and to be justiciable at law, to comply with often unpractical and harsh legislative provisions. Furthermore, such registration of necessity rendered their con-

---

\(^96\) See eg Van der Hoeven 'Aanteekening' 75.

\(^97\) In terms of arts 259 and 260, if an insurance is concluded immediately between an insured and the insurer, the latter must sign and issue a policy within 24 hours after the agreement was concluded by him, or if the insurance is concluded through the intervention of an insurance broker, a signed policy must be issued within eight days after the conclusion of the agreement. See further De Renays 243-244; Scholten 23. Faber Aanteekeningen 40-41 notes that the reason for the short periods here is to prevent fraud, for otherwise insurers may withhold or refuse to issue the policy in the event of a loss occurring soon after the conclusion of the contract. Article 261 provides that in the event of a non-compliance in the cases mentioned in both aforementioned articles, the insurer or the insured's broker is liable to compensate any damage that may arise from such a failure. Because of the fact that multiple co-insurers are usually involved in the case of marine insurances, the provisions of arts 259 and 260 do not apply to them.

\(^98\) In the meantime (ie, after the conclusion and before the issue of the policy), the specific terms with regard to which a dispute may have arisen, may be proved by all permissible means ('door alie bewijsmiddelen in zake van koophandel toegelaten'), such as a handpolis or a slip (see again n18 supra), on condition though that the matters of which an express mention in the policy is required by law in certain insurances on penalty of nullity (see § 4.2.2 infra), must be evidenced in writing.
tracts public documents, making it possible for competitors to establish which cargoes and ships were due where and when. Registration authorities were often also permitted to draft insurance policies, and this intrusion upon the traditional terrain of notaries and especially brokers caused further resentment on the part of the commercial sector. All in all it was not surprising that the role of registration as a tool of control over the insurance industry and practice was not successful and that by the eighteenth century it had largely disappeared, to be replaced by other means of control, notably by control through insurance brokers.

After the earlier proposals to the Spanish authorities by Ferufini in 1555 for the establishment of an office for the registration of insurance policies in Brussels, the first mention of the requirement of registration in Roman-Dutch law occurred in the *placcaat* of 1571. It in essence approved the system of control through registration proposed earlier by establishing registration bureaux in Antwerp and elsewhere in the Netherlands under the superintendency of Diego Gonzales Gante. The creation, functions and operations of these bureaux, including the contents of the ‘*Memorie ende Instructie voor Diego Gonzales Gante, Commis ende Administrateur Generael totte registratuere vande Contracten, Instrumenten ende Policen van verseckeringen oft asseurantien vande Koopmanschappen*’ validated by and appended to the *placcaat* of 1571, have already been considered in detail elsewhere. It was suggested that these bureaux, if they ever operated at all, appear not to have been a great success and not to have had any significant influence on insurance practice at the time. For present purposes it remains to consider the material provisions concerning the proposed formality of registration in more particulars.

In s 7 of the *placcaat* of 1571, the need for the registration of insurance policies was stated to be to prevent frauds and abuses and the prejudice of particular persons (no doubt insurers), and to regulate insurance contracts in the public interest and in the interest of shipping and trade. Gante, who was appointed for this purpose, at first only provisionally, to ensure that insurances were not made in contravention of the *placcaat*, was instructed to register and copy precisely and in full all insurance contracts, whether they were notarially executed or concluded underhand. Policies on goods consigned from the Netherlands would not be regarded as valid, and would not be adjudicated valid without registration.

---

99 A feature also of notarially executed contracts which no doubt served to advance the appearance and prevalence of underhand deeds. See again § 3.2.1 supra.

100 See again ch IV § 1.3.2 supra.

101 See ch IV § 1.3.2 supra. The Registration Office operating in London from 1576 was discussed in ch IV § 1.7 supra.

102 See generally De Groote *Zeearssurantie* 39-40; Goudsmit *Zeerecht* 261-262.

103 The section instructed him ‘te registreren ende grosseren, oft in ’t nette te stellen [‘in het net schrijven’ or ‘in het groot schrijven’], as opposed to ‘minuteren’ by hem oft syne Commissen, alle Contracten ende Instrumenten vande ... verseckeringen ende Asseurantien, ’tzy dat deselve voor publiche personen gemaeckt ende gepasseert zijn, oft onder signaturen oft hand-teekenen van particuliere personen’.
upon unless registered ("ten zy de selve op zijn Registers geschreven sijn"), and such registration had to appear from an authentic copy from the book in which policies were registered, and had to be signed by the superintendent or his substitute or deputies. No doubt such signature would signify compliance by the parties with the formality of registration in particular and, more generally, of the stipulations in the policy with the provisions of the placcaat. But s 7 then made it clear that such registration was not a requirement for the valid conclusion of an insurance contract, despite the earlier provision that unregistered policies would not only be unenforceable but also invalid. It laid down, by way of a proviso, that despite these provisions, insurances were to be effective ("stadt grijpen sal") from the moment that they were agreed ("belooff") or signed, subject to the contract of such insurance being registered within six days after the first insurer had signed or agreed to be bound to it.\textsuperscript{104}

In terms of s 8 of the placcaat of 1571,\textsuperscript{105} certain duties were imposed upon brokers to ensure the registration of policies and to counter evasions of this formality.\textsuperscript{106} Section 9\textsuperscript{107} concerned insurances concluded, presumably locally, on merchandise imported from other countries or regions, into the Netherlands or elsewhere ("t zy inde Lande van herwaerts-over oft elders")\textsuperscript{108} where merchants and inhabitants of the Netherlands were involved.\textsuperscript{109} The provisions concerning registration in ss 7 and 8 applied to such insurances as well. It is not immediately obvious why there was no mention of the registration of policies of insurance on ships.

The apparent failure of the system of control through the registration of insurance policies in Antwerp no doubt persuaded subsequent municipal legislatures in the United Provinces not to follow suit. Thus, the Amsterdam Legislature in its insurance keur of 1598 chose to deviate in this respect from the placcaat of 1571. Although the keur established a Chamber of Insurance for the city,\textsuperscript{110} it did not require policies to be registered there or anywhere else. Rather there was an increase in the duties imposed, for example in s 19, on insurance brokers and others concerning the form in which policies could be drafted and the record or copy which had to be kept of them.\textsuperscript{111}

\textsuperscript{104} This clarifying proviso did not appear in the earlier provisional placcaat of 1570, s 9 of which was otherwise identical to s 7 of the placcaat of 1571. It was in all probability inserted at the insistence of merchants who would have been seriously inconvenienced had registration been interpreted as a requirement for the valid conclusion of an insurance contract.

\textsuperscript{105} Which had no equivalent in the placcaat of 1570.

\textsuperscript{106} See further ch X § 7.3.1 infra as to these duties of brokers.

\textsuperscript{107} Which was the equivalent of s 10 of the provisional placcaat of 1570.

\textsuperscript{108} That is, goods imported into the Netherlands or goods shipped from one country outside the Netherlands to another such country.

\textsuperscript{109} See De Groote Zeeassurantie 39 for an interpretation of this provision.

\textsuperscript{110} See again ch IV § 1.4 supra.

\textsuperscript{111} See further ch X § 7.3.1 infra as to s 19 of the keur of 1598.
Interestingly enough the Middelburg Legislature, in most respects slavishly following the example of its Amsterdam counterpart in its insurance keur of 1600, deviated in this respect. Section 10 of the latter keur, which was otherwise identical to s 19 of the Amsterdam keur, in its exposition of the duties of brokers, added that the insured had the right, when he thought there was not sufficient security in the broker’s copy of the policy (that is, when he sought ‘meerder verseeckeringe’), to have his policy registered in the local Chamber of Insurance (‘te doen registreren ter Kamere van Asseurantien deser Stede’). Unfortunately the keur contains no further information in this regard.

Rotterdam, in s 21 of its insurance keur of 1604, likewise imposed specific duties on insurance brokers and other intermediaries to draft policies in conformity with the keur and to keep (presumably a private) register of them. The keur did not mention the public registration of insurance policies.

3.4 The Imposition of Stamp Duty on Insurance Policies

Closely related to the requirement that insurance contracts be reduced to writing for evidentiary purposes, was the requirement that such written policies be stamped.\(^{112}\)

The imposition and regulation of stamp duty on insurance contracts were exclusively of statutory origin and concern. Measures of two types may be distinguished in this regard in Roman-Dutch law. On the one hand there was a mass of general measures on the imposition of stamp duty which dealt with the topic in great detail.\(^{113}\) These were constantly restated, renewed and amended in an attempt to impose, increase and to counter the evasion of such duty. In some of these measures insurance policies were specifically dealt with. On the other hand there were also specific measures on the topic of stamp duty in insurance legislation. They mainly served to counter the avoidance of stamp duty, rather than to impose and fix the amount of such duty payable on insurance policies. For present purposes the statutory provisions in insurance laws which concerned stamp duty, and only some of the more important of those provisions in general stamp-duty measures which mentioned insurance contracts specifically, will be treated in chronological sequence.

It appears that the potential of legal contracts generally, and of insurance contract more specifically, as a source of revenue was first realised in the seventeenth century.\(^{114}\)

---

\(^{112}\) See generally eg Dorhout Mees Schadeverzekeringsrecht 103; Enschedé 16-17; and Vergouwen 60-61.

\(^{113}\) See eg GPB vol II at 1018-1037.

\(^{114}\) In England, the first stamp duty on insurance policies and other contracts was imposed during the reign of William III in 1694 as a source of revenue to fund the war against France. In an Act of that year (5 Wm & Mary III c 21), ‘An Act for Granting to their Majesties Several Duties upon Vellum, Parchment, and Paper for Four Years, towards Carrying on the War against France’, an imperial tax was imposed on all insurance policies by s 3 (‘for every skin or piece of vellum, parchment, or sheet of paper, upon which any charter-party, policy of assurance, passport, bond, release, contract, or other obligatory instrument ... the sum of sixpence’). This duty was initially imposed for four years, but was afterwards continued by several further Acts (eg 9 & 10 Wm & Mary III c 25 (1698)). See further Walford Cyclopaedia vol III at 450 sv ‘history of fire insurance’; and Wright & Fayle Lloyd’s 288. Blackstock 44 notes that by 1775 the duty of 6d per policy had risen to 6s per policy.
The placcaat of 18 May 1635, entitled the 'Ordonnantie ... op ... het recht van 't Kleyn Zegel', was a general measure regulating the stamp duty payable on a great number of different instruments, acts and deeds. It provided that in the absence of such instruments being stamped as required, they would not be adjudicated upon and that fines would be imposed upon those who failed to have them stamped. In terms of s 5, a duty of four pennies would in future be payable on insurance policies ('tot vier stuyvers van 't Zegel van alle ... Policien van Asseurantie'). The placcaat of 15 August 1677, entitled the 'Nieuwe Ordonnantie van de ... Staten van Hollandt ende West-Vrieslandt, ... op ... het recht van 't Kleyn Zegel', was a measure to the same general effect. It provided in s 58 for a duty of twelve pennies on insurance policies ('sullen op een Zegel van twaelf stuyvers geschreven moeten worden ... alle Policien van Asseurantie').

In view of the measures of 1635 and 1677, Bynkershoek posed the question whether their effect was that insurance could not, or no longer, be concluded without writing, that is, orally. He noted that in terms of the general measures dealing with insurance contracts, writing was not required for the conclusion of a valid insurance contract. It appeared, he thought, that insurance contracts could be concluded orally, like contracts of the sale of movables but unlike contracts of lease of immovables for which writing was specifically and pertinently required. The implication of Bynkershoek's exposition was that the requirement of stamping insurance policies had no effect on the conclusion but only on the enforceability of the insurance contract.

No doubt insured and their insurers soon realised that they could in appropriate circumstances save on the stamp duty which was imposed on individual policies. Thus, insurances on different ships, or on goods loaded in different ships, were covered in a single policy and as a result the income derived from stamp duty on insurance policies was adversely affected. The Amsterdam Legislature in a keur of 25 January 1707 therefore prohibited this practice. It provided that in future all insurances or reinsurances concluded on different goods loaded in different ships, would have to be contained in separate policies ('sal moeten werden gebruukt een bysondere en aparte Police'), under the penalty that all policies which insured or reinsured more than one

115 See GPB vol I at 2232-2241.
116 See GPB vol III at 1020-1037.
117 Quaestiones juris privati IV.26.
118 See again § 3.2.3 supra.
119 Such composite policies also created other problems. The Commissioners of the Amsterdam Chamber of Insurance had always been accustomed to attach the policy in respect of which a dispute had arisen to their judgments (id despaches), and this now became if not impossible then at last unpractical.

In England too policies were concluded covering a series of voyages or cargoes in an attempt to reduce the duty payable. In 1764, eg, there was an agreement between the Commissioner of the Stamp Office and the London Assurance Corporation that in future policies would pertain to one person, ship or insurer only. See John 'London Assurance' 139.
ship, or any parts or shares (‘Portien’) in different ships, or also different goods loaded in different ships, would be null and void in their entirety, and consequently that in future such policies would not be justiciable at law (‘voortaan geen Recht sal werden gedaan’).

Some fourteen years later the Amsterdam Legislature again promulgated a measure in this regard, this time a much more extensive one. It appeared that unstamped or improperly stamped policies of insurance and reinsurance continued to be employed to the detriment not only of the authorities but also of those local merchants and others who accepted such policies because they were not familiar with the nullity of such instruments.120 Accordingly, a keur of 27 January 1721 made further detailed provisions. It provided, firstly, that no bookprinters, booksellers or other persons in the city could print or sell unstamped policies (‘kleine Policen zonder Zegels’), on penalty of a fine of £300.121 Secondly, no insurers or insured could sign a policy other than one on which the proper stamp duty had been paid (‘gmunieerd met een behoorlijk Zegel’), on penalty of a fine of £300 in addition to the penalty imposed on avoiders of stamp duty by the general stamp-duty measures applicable at the time. Thirdly, no broker could arrange or effect any underwriting of an insurance policy other than one stamped in accordance with the applicable placcaat, on penalty of a fine of £100 for the first offence, a £200 fine and suspension for six weeks for a second offence, and a fine of £200 and permanent disqualification (‘cassatie’) for a third offence. In the fourth place, to give effect to these measures and no doubt to enable the easy prosecution of brokers in the case of any contravention, all brokers effecting (‘besorgen’) any insurance or reinsurance would be bound to countersign policies with their usual signatures.122 The penalty provided in this case was that no claim would be allowed on the policy but only against the broker123 who had failed to countersign, and he would therefore have to bear and make good the loss caused by his omission. Lastly, brokers who noticed any unstamped or improperly stamped policies being underwritten, had to notify the authorities (‘den Heer Hooft-Officier’), on a penalty of a fine of £300 for failing to do so.124

In 1744 a further general measure dealing with stamp duty was promulgated which also contained some specific reference to insurance contracts. In the ‘Nieuwe ... Ordonnantie ... op het regt van het klein Zeegel’ of the Estates of Holland and West

120 It seems that even if the insured was unaware of the need to pay stamp duty, the policy was still void, although, in appropriate cases, he would have a claim against the broker involved. See further § 3.4 infra.

121 Enschedé 16 notes that the authorities in Rotterdam were more radical. They simply withdrew the printing of policies from private printers and assigned the task to official printers in the employ of the city.

122 This was always done in the margin alongside the text of the policy and underneath the signature of the Secretary of the Chamber whose signature was in turn below the city crest embossed on the policy.

123 Presumably the broker was liable in the place of the insurer who was, in turn, not liable because the policy was void.

124 See generally Goudsmit Zeerecht 314-315 and Vergouwen 61 on the measures contained in the Amsterdam keuren of 1707 and 1721 to prevent the avoidance of stamp duty.
Friesland of 30 September 1744\textsuperscript{125} it was noted that earlier measures regarding stamp duty were not being complied with. It therefore restated the general principles and increased the penalties for non-compliance. In s 60 specific provision was made for insurance policies. It was provided that insurance could not be concluded otherwise than on properly stamped policies (‘op behoorlyk gezeegelde Polussen’). Not only were unstamped policies declared null and void, but in addition the person in whose favour the insurance was made, had to pay $50$ for every signature appearing on an unstamped or improperly stamped policy. The placcaat also prescribed the amount of duty payable on insurance policies, different amounts of duty now being imposed depending on the sums insured by them.\textsuperscript{126}

In the same year the Amsterdam insurance keur of 1744 was passed. It restated the earlier provisions of 1707 and 1721. Section 58, virtually identical to the keur of 1707, prescribed separate policies for separate insurances or reinsurances on different ships, on shares in different ships, or on goods loaded in different ships. Sections 59-61 again were restatements of the earlier keur of 1721. Section 59 prohibited bookprinters, booksellers or other persons in the city from printing or selling unstamped policies, on a penalty of a fine of $300$. In terms of s 60, insurers or insured could not sign any improperly stamped policy, which (and this was new) also had to be signed by the Secretary of the local Insurance Chamber at a fee (‘door de Secretaris van de Assurantie-Kamer geteekent, die daarvoor genieten sal drie stuyvers’), on a penalty of a fine of $300$ in addition to the penalty imposed by the applicable general measure imposing the stamp duty. Section 61 provided that no broker or any other person could arrange or effect the underwriting of any insurance or reinsurance on a policy not stamped as prescribed, on a penalty for a first, second and third offence of a fine of $100$, a fine of $200$ and six weeks' suspension, or a fine of $200$ and disqualification respectively.

Still the provincial authorities did not regard the existing municipal and other measures as sufficient. On 13 November 1773 the Estates of Holland and West Friesland passed a measure specifically directed at the stamping of insurance contracts.\textsuperscript{127} The placcaat noted that notwithstanding s 60 of the earlier placcaat on the topic of 1744, numerous abuses still occurred. In particular, it appeared, it was accepted practice on the Dutch insurance markets that upon the conclusion of insurances, certain brokers and others often let insurers sign unstamped acceptances or short-form policies\textsuperscript{128} in terms of which the insurers undertook to transfer such insurances onto properly stamped policies (‘om zoodanige verseekeringe op behoorlyk gezeegelde

\textsuperscript{125}See GPB vol VII at 1455.

\textsuperscript{126}In the case of policies of less than $200$, the duty was three pennies (‘zullen moeten worden geschreven op een Zeegel van 3 stuyvers’); for policies of $200$-$499$, 6 pennies; for policies of $500$-$999$, 12 pennies; for policies of $1000$-$9999$, 24 pennies; and for policies of $10000$ and more, 48 pennies.

\textsuperscript{127}See GPB vol IX at 1341-1342.

\textsuperscript{128}These were probably the equivalent of the slips used in other markets, eg in London. See again § 2 n18 supra.
Policen over te tekenen. But, it appears, this was never done or at least done only where a dispute arose on the contract with the possibility of judicial involvement. Accordingly, the placcaat provided that everyone who concluded an insurance himself, including brokers and others who arranged insurance, were free on the conclusion of an insurance to have the insurer or insurers with whom the contract was concluded, provisionally sign an unstamped policy by which the latter bound himself or themselves to transfer the concluded insurance within fourteen days onto a properly stamped policy ('om binnen veertien daagen daar na, op een behoorlyk geoctroyeerde gezeegelde Police ... de gecontracteerde Verseekering over te tekenen'). It provided further that the insured or broker was obliged, within at most fourteen days after the conclusion of the insurance, and even if the risk terminated during this period, to draft a properly stamped policy or to have one drafted, and to have it signed by the insurer or insurers concerned. It further determined that to ensure that the insured and the broker complied with this obligation inside the stated period, the unstamped acceptance or short-form policy ('de ongezeegelde Aanneeming of zoogenaamde Handpolice') had to be attached and had to remain attached to the formal stamped policy ('de gezeegelde overgeteekende police'). A procedure was prescribed setting out how this obligation could be met should the insurers refuse to sign the stamped policy. Penalties were stipulated for insured who failed to meet the obligation in addition to those penalties already prescribed by s 60 of the placcaat of 1744, as well as for the broker in appropriate cases. The insured was specifically relieved of this penalty, and such unstamped documents, if subsequently stamped, were specifically declared justiciable, if it was established that the broker was responsible for failing to have a proper policy drafted, stamped and signed. Lastly the placcaat also provided for the situation where, on the conclusion of the insurance contract, no unstamped policy was signed but where there was simply a verbal agreement ('maar alleen een mondelinge afspraak gemaakt worden'). In this regard it provided that a stamped policy reflecting such oral agreement had to be signed within fourteen days, with the same penalties to apply in the case of non-compliance.

The municipal measures contained in the Amsterdam insurance keur of 1744 now lagged behind in its regulation of the stamping of insurance policies in that they did not

129 See eg Mees Gedenkschrift appendix 18 for an informal, short-form Rotterdam cargo policy from 1746, in a printed form and unstamped, which stated: 'En zullen dezen alien tijden op een gezegelde Police overteekenen'.

130 It appears that the same practice was then current also in England (see Wright & Fayle Lloyd's 288-291). Slips had been used from early on by English brokers in getting risks underwritten. From a fully subscribed slip, a formal policy was then made out, signed by every underwriter concerned. The imposition of stamp duty lead to attempts to evade such duty by not drafting a formal and stamped policy but by treating the unstamped slip itself as an instrument of insurance. Already in 1724 an Act (11 Geo I c 30) prohibited the 'giving of Promissory Notes instead of Policies' and provided that when a ship was insured, a duly stamped policy had to be issued within three days.

131 Van der Keessel Praelectiones 1447 (ad III.24.6) noted that in the placcaat of 1773 on unstamped policies ('ongezegelde Policen'), the Legislature expressly acknowledged that an insurance contract could validly be concluded orally ('door eene mondelinge afspraak').
pertinently recognise the temporary use of unstamped policies or acceptances. With the amendments affected to the keur of 1744 by the amending keur of 1775, the provisions dealing with the topic therefore had to be amended yet again.

Firstly, in the second part of the Amsterdam amendment of 1775 of s 18 of the keur of 1744,\(^{132}\) provision was made for insurances for which no official or authorised ('geoctroyeerde') policy was provided. Such insurances could be concluded\(^ {133}\) by way of such properly sealed policies as might be agreed upon between the parties concerned, and the stamp duty for such policies was the same as that prescribed in s 60 of the placcaat of 1744 for official policies ('welke Zegels zullen moeten zyn, even als die der geoctroyeerde Policen, volgens den taux gespecificeerd in het 60 Art. van de Ordonnante op het Middel van 't Klein Zegel van 't Jaar 1744').

Secondly, ss 59-61 of the keur of 1744 were repealed and restated in an amended form. It was now provided that in future all insurances and re-insurances could, in terms of the placcaat of 1773, be concluded on unstamped underhand acceptances or even orally ('wel op onderhandsche ongezegelde Aannemingen, of ook mondeling, mogen worden aangegaan en gesloten'), on condition though that the insured and those who concluded the insurance for him were obliged in all cases to draft, or to have drafted, and to have signed by at least one of the insurers who had insured on the short-form policy or unstamped acceptance or even orally ('Hand Police of ongezegelde Aanneming of ook mondeling'), a properly authorised, stamped policy ('behoorlyk geoctroyeerde gezegelde ... Policen'). This had to occur at the latest within fourteen days after conclusion of the agreement. It was noted, too, that such stamping had to be in accordance with the provisions of, and was subject to the penalties laid down in, the general stamp-duty measures of 1744.

To summarise, an increasingly complicated set of legislative measures provided for the stamping of insurance policies in Roman-Dutch law. These measures made it abundantly clear that the stamping, and by implication the underlying reduction to writing, was not required for the conclusion of a valid contract of insurance but merely for its enforceability at law.

4 Excursus: The Content and Interpretation of Prescribed and Standard Insurance Policies

4.1 Statutorily Prescribed Policy Forms

4.1.1 Introduction

The insurance policy played an important role in the development of insurance law. It was much more than merely the central focus of the legal relationship between the parties to the particular insurance contract it embodied. Especially at the time when unwritten insurance customs and practices were the main source of insurance law and

---

132 The first part dealt with fire insurance: see again ch VII § 2.1 supra.

133 As long as there was a 'real interest': see again ch II § 6.2.2 supra.
before legislative activity in the field of insurance had acquired an impetus and importance, the insurance policy was not only a valuable additional source of insurance law but also the vehicle by which insurance law became both settled and dispersed geographically.\textsuperscript{134} The extent to which this was so appears from one of the earlier legal texts exclusively concerned with the law of insurance, Stracca's \textit{De assecurationibus}, published in Venice in 1569. It was not a systematic discussion of the principles of insurance law but rather a seriatim treatment and analysis of the stipulations contained in the model or standard-form insurance policy in use in 1567 in Ancona, an Italian port on the Adriatic Sea. The policy form in question was reproduced at the end of the work's Introduction and the rest of the treatise consisted of 40 glosses on the content of the policy form.

But even after insurance legislation had become a much more important if not the most important source of insurance law, the role of the insurance policy was not diminished. The reason for this was the generally permissive nature of most of the legislative provisions. Insurance laws largely regulated the position only in so far as the parties themselves did not provide for it in their own contract. Many legislative provisions applied, if not expressly then at least by implication, only in the absence of an agreement between the parties to the contrary. The precise legal position between, and the content of the rights and obligations of, the parties to an insurance contract were left for the parties themselves to determine and were not peremptorily prescribed by legislation. Insurance law, and marine insurance law in particular, was and to a large extent remains principally agreement-based.

A striking feature of insurance policies used in different insurance markets in Western Europe at different times is the large measure of uniformity in both form and content. Policies in use there from the fifteenth century onwards display a great deal of correspondence, not only as regards layout but also as regards the specific stipulations they contained. Being the vehicles by which the practice of insurance first spread from Italy to other maritime centres, insurance policies soon became settled and stereotyped.\textsuperscript{135} Available, by the sixteenth century, from booksellers in a printed form

\textsuperscript{134} On the insurance policy as a source of law, see eg Koch 'Ansätze' 368 and 379 (pointing out that the model marine insurance policy was, together with legislation and the judgments of the courts, a direct source of both insurance history and insurance law); \textit{idem} 'Kodification' 301 (the insurance policy already contained a codified insurance law in the widest sense of the word); Reatz \textit{Geschichte} 107; and Sanborn 251-252 (insurance contracts were in the first place the written version of the customs and practices of insurance brokers and notaries).

\textsuperscript{135} Although it would no doubt be an interesting and often illuminating exercise to trace the lineage of well-known types of insurance policies, if not of individual and commonly occurring clauses, it does appear a somewhat restrictive approach in that it would in the case of statutorily prescribed policies indicate no more than which legislature was possibly influenced by which other legislature, or, in the case of non-prescribed policies, which insurance market was possibly influenced by which other market. The influences appear to have been too diverse and complex to permit any sure reconstruction of the lineage of the policies employed in practice. In any case, insurance policies generally show more points of correspondence than divergence. For a detailed analysis of the ancestry of the Lloyd's insurance policy as settled in 1779 and also of extant English policies from the sixteenth and seventeenth centuries, see Kimura 'Ursprung' and \textit{idem} 'Entstehung'; and for a similar analysis concerning extant Antwerp insurance policies from the sixteenth century, see De Groote 'Polissen'.
with blanks to be completed to individualise the particular contract, the basic terms themselves varied only exceptionally. And having become fixed, the form and content of insurance policies remained relatively unchanged in the course of the next three centuries and beyond.\(^\text{136}\)

The uniformity of insurance policies may, more specifically, be ascribed to various factors. Firstly the international nature of marine insurance no doubt contributed if not necessitated such uniformity. Secondly, as with all frequently and repeatedly concluded types of contract, convenience not only for the parties in agreeing on the terms of the insurance contract but especially for brokers in the drafting of actual policies was no doubt an important factor leading to standardization.\(^\text{137}\) Thirdly, uniformity was enhanced by the fact that, as part of the attempt to eliminate deviant and unacceptable if not fraudulent practices, legislatures generally prescribed or at least suggested a form of insurance policy which parties had to or could use. Policies different from the official policies were not permitted or at least not encouraged.\(^\text{138}\)

The different policies prescribed by way of legislation in Roman-Dutch law may now be considered more closely. In particular it may be determined what the status of such official policies was, that is, whether they were absolutely compulsory with no deviation being permitted and with the parties having no freedom of contract whatsoever; whether they merely established the minimum of what policies had to contain

\(^{136}\) On the relative immutability of insurance policies, see generally Dorhout Mees *Schadeverzekeringsrecht* 97; Holdsworth *History* VIII-279; De Roover 'Early Examples' 198; Sanborn 251-252; and Seffen 40.

\(^{137}\) It was convenient and also cost- and time-effective to have a standard-form from which one could subtract or to which one could add stipulations as circumstances demanded, rather than to have to negotiate and draft all the stipulations individually in every case.

It must be remembered that insurers were initially individuals who only insured the property of others on an incidental and part-time basis. They clearly had no incentive to draft and produce their own standard-form policies. In any event, in practice insurance contracts were contained in documentation specifically drafted for every instance by the insured or, more likely, his broker. The latter no doubt soon developed or adopted a basic standard-form of contract, in printed form, which could be employed for all or at least for all analogous cases, the insured or insurer merely adding or deleting stipulations as the occasion required. Only when insurance companies were established in the eighteenth century, did the printed standard form of contract become 'their' contract, with it being adapted to suit the needs of each case no longer by the insured, but now by the company itself. But, the policies adopted by these companies as their own differed very little from the policies in use on the market at the time. See too Hasselmann 452 who makes the point that with the arrival of insurance companies which made use of their own policy forms, the relevance of permissible insurance legislation, with its permissible model policy forms, was pushed into the background.

\(^{138}\) Although for the most part taking the form and content of insurance policies in use on the market at the time the legislation was passed, it must be emphasised that official policy forms were not in all respects necessarily representative of the policies employed in practice. It is clear that in respect of irksome and unpractical aspects, the policies employed in practice may have and in fact did deviate from the legally prescribed or commended forms. See again ch IV § 4.2.1 *supra* for the divergence between insurance practice and insurance legislation. Furthermore, at a later stage and at least in the eighteenth century, if these official forms were regarded as compulsory at all, they were at most considered to prescribe only the minimum provisions that had to be contained in valid insurance policies, leaving the parties a large measure of freedom to add to if not to deviate from the official form. This aspect will be considered in more detail shortly.
with additions being permitted; or whether they were simply examples, with additions and subtractions being permitted and the parties having full freedom of contract. What follows is therefore a very narrow investigation.\(^{139}\)

As will appear from the discussion below, a broad pattern of development may be discerned as far as official policies were concerned.\(^{140}\) Initially there were no statutorily prescribed insurance policy forms and parties for all practical purposes enjoyed complete freedom of contract. But Roman-Dutch legislatures soon realised that control over the practice of insurance could very usefully be exercised by prescribing not only the legal rules which the parties to an insurance contract had to adhere to, but also the content of their contract itself. Insurance laws contained statutorily prescribed forms of insurance policies, the use of which was made compulsory. The use of any other deviating form of policy was not permitted and in fact rendered the insurance contract null and void. As insurance practices became more sophisticated, a greater variety of policies was prescribed. In the course of time, though, it was realised that such strict control was simply not feasible or practical. And being out of touch with practice, prescribed official policies were often ignored in practice where the needs of the parties in different circumstances could not be met by a single, statutorily prescribed standard-form contract from which no deviation was permitted, whether in the form of additions to or subtractions or deletions from the official form. A more relaxed approach was accordingly followed in the eighteenth century. Official policies became merely a model added to legislation for the convenience of merchants while the legislature merely provided for certain matters which had to be mentioned in the policy, otherwise leaving the form and content of the policy to the initiative of the parties. This development will now be traced with specific reference to the official policies contained in Roman-Dutch insurance legislation.

4.1.2 Policy Forms Prescribed by Dutch Insurance Legislation

Prescribed or model policy forms were not unique to Roman-Dutch law. The first model policy forms\(^{141}\) prescribed by legislation were those in a Florentine Insurance

\(^{139}\) Thus, individual clauses and stipulations in such policies will not be dealt with here but are treated where the relevant legal principles which they involved, arise for discussion. Also not treated here is the way in which the form and content of these prescribed policies developed in the course of time. Again any such development will be mentioned where relevant when the substantive legal rules concerned arise for analysis. Furthermore, it is not considered here how the form and content of the official policies differed from, or agreed with, contemporary policies in use in practice. This would have involved an investigation of a sufficiently large and representative number of extant policies before any meaningful and substantiated general conclusions could be arrived at as to the extent of the difference (about existence of which there is no doubt) between formal law and practice. Such differences as do appear from secondary sources, will be mentioned where the particular points in respect of which the divergence occurred, are discussed. See eg Den Dooren de Jong ‘Lombard Street’ 12 for a discussion of an Antwerp policy from 1566 which deviated in a number of respects from the policy form prescribed by the placcaat of 1563.

\(^{140}\) See too Enschedé 12.

\(^{141}\) As to model policy forms generally, see eg Hammacher 133-138; Vergouwen 39-42.
Ordinance of 1523.¹⁴² Spanish and other Italian insurance legislation in the sixteenth century similarly provided model policy forms.¹⁴³

The first statutorily prescribed official insurance policy in Roman-Dutch law appeared in the placcaat of 1563.¹⁴⁴ In terms of s 2 of title VII, insurances of goods or merchandise in future had to follow ("sullen vortaen ... ghedaen werden") the customs prevailing on the Antwerp Bourse as well as the tenor or substance ("teneur oft substantie") of the insurance policy set out in the section, without the addition of any further clauses ("sonder eenige meerdere clausulen daer aen te mogen voegen").¹⁴⁵ The section then provided a policy form for the insurance of cargo under the title "Teneur vande Policen" in Flemish, followed by a translation in Walloon, the French dialect used in the southern part of the Low Countries. The policy form was, or was at least held out to be, that in use on the Antwerp insurance market.¹⁴⁶ In terms of s 3, when somebody wished to insure (or to provide insurance?) ("sal willen doen asseureren"), he had to do so in the form and according to the substance of this prescribed policy ("naer forme ende substantie vanden voorseyden Police"). And in terms of s 20, all contracts and policies of insurance not drafted ("niet ghemaect") as prescribed, or drafted in contravention and derogation of the placcaat, were declared null and void ("nul, machteloos ende van onwaerde").¹⁴⁷ At least in so far as such deviations were not pertinently permitted by the provisions of the placcaat itself.¹⁴⁸ It seems that freedom of contract still existed as far as the insurance of ships was concerned.

¹⁴² For an English translation of the Florentine cargo policy forms, see Magens Essay vol II at 4-7. The Ordinance provided in s 2 that no insurance was permitted 'otherwise, than according to the Tenor of the general and common Ordinance now in use, without having Liberty to add any Thing thereto' (the English translation is from Magens Essay vol II at 2).

¹⁴³ A policy form was prescribed in the Insurance Ordinance of Burgos of 1538 (see eg Reatz Geschichte 215-223) while the Ordinance of Bilboa of 1560 too prescribed model policies (see Kimura 'Entstehung' 25-26). As to the position in the various Spanish jurisdictions, see further Enschedé 12-15.

¹⁴⁴ See generally eg Dorhout Mees Schadeverzekeringsrecht 17; Goudsmit Zeerecht 244; Jolles 55; and Kracht 17 and 19-20. De Groote 'Zeeverzekering' 215 notes that the prescription of a policy form in the placcaat of 1563 must be seen against the background of Ferufini's earlier proposals for control over the insurance business (see again ch IV § 1.3.2 supra). Ferufini had pointed out that under the pretext of usages, brokers who drafted insurance policies for their insured amended the text of customary policies to meet their own needs and those of their insured, and that insurers then underwrote such policies in good faith and under the impression that they were drafted in the usual form.

¹⁴⁵ See further Kracht 17.

¹⁴⁶ For discussions of the policy form prescribed by the placcaat of 1563, see eg Mund; and Raynes (1 ed) 19-20, (2 ed) 35-36. Both Magens Essay vol II at 23-25 and Wallord Cyclopaedia vol I at 172 sv 'Antwerp, Insurance Ordinance of' reproduce an English translation of this official policy form. See Appendix 18 infra for a reproduction of the English translation of this policy.

¹⁴⁷ It is unclear whether subtractions from the prescribed form were permissible, only additions and not deviations generally (ie, additions and subtractions) being prohibited by s 2. It seems unlikely though, given the wide terms used in s 20.

¹⁴⁸ Thus, by s 13 the parties were permitted to vary the provisions of the official policy in respect of the duration of the insurance cover. See further ch XII § 1.3.2 infra as to this matter.
A broadly similar pattern was followed in the *placcaat* of 1571. Section 1 permitted insurance in accordance with the form of the official policy prescribed by the *placcaat* ('forme ende Policie by dese onse jegenwoordige Ordonnantie gestelt ende geprescribeert'). In terms of s 6 both notarial and underhand policies ('eygen ende particuliere Policen, Cedullen, Signaturen oft Obligatien') were permitted, on the understanding though that no conventions, contracts or accords ('Conventien, Contracten oft Accorden') could be made in contravention of the provisions of the *placcaat*. Section 34 concerned the official policy form. It prescribed or provided ('stellen') a policy form ('een forme van Police, Cedulle ofte Obligatie van ... verseekerings oft asseurantie'), which was contained in s 35, for the insurance of goods being exported from the Netherlands. It did so, the section declared, to provide for better, easier and more convenient negotiation by those contracting insurances; to provide those drafting policies ('d'instrumenten') with a standard formula ('eene gelijcken formularys') which would have as little chance of being defective as possible ('dies te min mogen fail­leren'), presumably by reason of contravening the *placcaat*; and also to reduce the need for litigation ('occasien van Processe'). It would appear that use of the policy form was not compulsory but that it was simply a suggested example. At least the *placcaat* of 1571, unlike the earlier one of 1563, did not provide that any policy not in this form would be void but merely suggested that a policy in that form would not contravene the provisions of the *placcaat* and that use of the suggested form would avoid the consequences of such contravention. Again no official form was prescribed or suggested for hull insurances.

In the Amsterdam *keur* of 1598, s 1 declared all contracts of insurance contravening the *keur* null and void ('voor nul, neegen, ende van onwaeden'). In terms of s 18, underhand policies ('eygen ende particuliere Policen, Cedullen, Signaturen oft Obligatien') were allowed, but in terms of s 19 brokers and other intermediaries were obliged to draft all policies ('alle Policen te dresseren') in conformity with the *keur* and to keep a verbatim record of whatever they added in handwriting to the printed policy form, presumably in the spaces left blank on the policy. Appended to the *keur*, but not referred to or made compulsory in any section in the *keur* itself, were two policies, one on goods and the other on hull under the respective headings 'Inhouden

---

149 See again § 3.2.3 supra.

150 Apart from minor deviations in form, the Antwerp policy form contained in the *placcaat* of 1571 remained in general use there until the mid-eighteenth century when the policy form of the Antwerp Insurance Company, established in 1754, also came to be employed on the market. See Couvreur 'Zeeverzekeringspractijk' 190.

The oldest policy known to have been concluded in the Northern Provinces, an Amsterdam policy of 1592 (the 'Van der Meuleri policy), was in printed form and its text corresponded largely with the form of policy prescribed by the *placcaat* of 1571. See further on this policy Ijzerman & Den Dooren de Jong 227; and also eg Barbour *Capitalism* 33. It is reproduced in Appendix 19 infra.

151 *Contra* Dorhout Mees *Schadeverzekeringsrecht* 86 who is of the view that in both the *placcaaten* of 1563 and 1571 the use of the prescribed policies was compulsory and that on penalty of nullity no deviation whatsoever was permitted from the official policy form.

152 Note, not in conformity with the model policies which the *keur* contained.
It would appear that compliance with the provisions of the *keur* rather than absolute correspondence with prescribed policy forms may well have been the Legislature's main concern here.\(^{154}\)

In the Rotterdam *keur* of 1604 compliance with the provisions of the *keur* was also specifically provided for in s 1 which declared all contravening stipulations, but not the contract as a whole,\(^ {155}\) null and void. In terms of s 21 brokers had to draft policies in conformity with the *keur*. But here too no provision was made for any particular form in which policies concluded in Rotterdam had to be cast. In fact, the Rotterdam *keur* of 1604 contained no official policy formulas at all.

In 1688 the Amsterdam legislature decided to follow a different approach. The amending *keur* of that year stated that day by day more and more amendments ("veranderinge") were printed in policies, with almost every broker coming up with something new ("by na yder Makelaer iets nieuws is voor den dach brengende"). As a result of this, merchants and insurers were obliged to read not only the written sections but also the printed sections in every policy, something which was hardly feasible given the multiple activities on the Bourse ("de menigvuldigheid der affaires ter Beurse"). As a result many frauds were being committed and many contraventions of the insurance *keur* occurred. The Legislature sought to remedy this state of affairs by exercising tighter control over the content of insurance policies. The *keur* of 1688 therefore pertinently provided that in future only such types of policies would be printed and taken around ("gedruckt en omgedraagen") the Bourse as followed verbatim ("van woort tot woort zijn volgende") the policy forms prescribed by the *keur*. Furthermore, these policies had to be signed by the Secretary of the Chamber of Insurance, for which he would have to be paid a fee of three pennies. No deviating insurance policies could be employed, on the penalty that no policies other than those signed by the Secretary (and he would presumably not sign any policy not precisely in the prescribed form) would be adjudicated on. Brokers who presented any policies other than those prescribed to merchants for underwriting, would forfeit f50 for each of them. The *keur* of 1688 then prescribed two policies, one on hull and the other on cargo.

Continuing along this line, the Amsterdam amending *keur* of 1693, in permitting insurances to be concluded on the ransom of the master and crew of a ship,\(^{156}\) provided that the policy for this type of insurance had to be drafted in conformity with the formula provided. Again the policy had to be signed by the Secretary of the Chamber.

---

\(^{153}\) Goudsmit *Zeerecht* 314 is incorrect in stating that the *keur* of 1598 did not contain any policy formulas.

\(^{154}\) Sections 1, 8 and 10 of the Middelburg *keur* of 1600 were the equivalent of ss 1, 18 and 19 of the Amsterdam *keur* of 1598. The Middelburg *keur* contained a cargo policy but not, at least not in the reproduction in GPB vol I at 875, a hull policy. It is uncertain whether the reproduction of the *keur* in the GPB is incomplete, or whether the original also omitted the hull policy form.

\(^{155}\) As to the effect of the illegality of a stipulation in an insurance contract in Rotterdam, see further § 5 *infra*.

\(^{156}\) See again ch VII § 3.2 *supra* as to ransom policies.
for it to be justiciable at law, and again brokers were penalised if they made use of policies deviating from the prescribed form.

Not surprisingly this narrow and impractical approach did not find favour in Rotterdam. In s 73, following upon earlier sections containing provisions on matters which had to be mentioned in insurance policies, the keur of 1721 generally and pertinently provided that, on penalty of nullity, policies had to contain everything they had to contain in terms of the provisions of the keur ('[e]n zal verders in de Police moeten geëxpreesert alles het geen by deze Ordonnantie geboden is daar in te expresseren, op ... poene van nulliteyt'). And in s 74 it provided that equally, on the other hand ('aan de andere syde'), a policy could not include anything prohibited by the keur. In order for merchants to be better instructed in the contents of the keur, s 76 prohibited brokers from using any policy of insurance other than those officially printed, in accordance with the forms appended to the keur ('geene andere Policen van Asseurantie mogen gebruiken dan gedrukt, volgens de Formulieren hier agter deze Ordonnantie gebragt, hebbende ter zyde gedrukt het Wapen van deze Stad'). In terms of s 79, brokers forfeited their commission and had to pay a fine in the event of non-compliance, or were suspended, should they have acted in this regard with gross negligence or fraud. Five different policy forms were appended to the keur under different headings. Two of them were on cargo ('Formulier van Policen van Asseurantie op Goederen, leggende of geladen binnen deze Landen'; 'Formulier van Policen van Asseurantie op Goederen, leggende buiten deze Landen'); two on hull ('Formulier van Policen van Asseurantie op Scheepen, leggende binnen deze Landen'; 'Formulier van Policen van Asseurantie op Scheepen, leggende buiten 's Lands'); and one on ransom ('Formulier van Policen van Asseurantie voor Rantgoen tot lossinge uyt slavernye').

It is uncertain what the consequences would have been for the parties to the insurance contract if the policy they employed differed from the appropriate one appended to the Rotterdam keur of 1721. It is unclear whether s 73 suggested that the policy forms appended to the keur were compulsory or, as some Roman-Dutch authors later thought, whether they merely contained the minimum which policies had to contain. The use of the official forms was not specifically referred to in s 73 and made compulsory for the parties, and policy forms other than in the form of the official ones were not made void or unlawful and at most had a consequence only for brokers who were the only ones directly obliged to make use of the model policy forms. It is clear, though, that policies generally had to comply with the provisions of the keur and that even if deviations from the official model policy form were permitted, that could only have been in so far as there was no contravention of the keur at the same time.

The approach in Rotterdam in turn seems to have appealed to the Amsterdam Legislature. In the Amsterdam keur of 1744, all terms and stipulations in insurance

157 As to the prescribed content of insurance policies, see § 4.2 infra.

158 Of course, if it contravened the provisions of the keur, the particular contravening clause would have been null and void. See further § 5 infra.

159 There is no direct support for the view of Kracht 35 that by s 76 the exclusive use of the policy forms appended to the keur was made compulsory.
policies in contravention of the provisions of the keur were declared null and void by s 1. In terms of s 38, in order to avoid fraud, brokers and other intermediaries were compelled not to employ policies other than those authorised and signed by the Secretary of the Chamber (‘geen andere dan de Geoctroyeerde en by den Secretaris getekende Policen te gebruiken’) and to keep a copy of everything added to or in (‘by en ingeschreven’) the policy by hand, on the penalty of a forfeiture of their commission and a fine in the case of non-compliance. Appended to the keur of 1744 were five policies, on hull, on cargo, on ransom, against fire, and on packaged goods carried overland or on inland waters.\[^{160}\] In terms of s 9, in the case of an insurance on packaged goods carried overland, parties were permitted, despite the appended policy form to which the section contained nothing more than a reference and the use of which it did not make compulsory, to regulate their contract as they saw fit, as long as the keur was not contravened in the process (‘zal by Partyen zyn te reguleeren, zoo als zy onderling sullen kunnen Convenieeren, mits niet contrarieerende deese Ordonnantie’).\[^{161}\] But again, as was the case with the Rotterdam keur, the implication of a deviation\[^{162}\] from the official policies for the validity of the contract,\[^{163}\] and the status of the appended policy forms generally, were not quite clear.

Lastly, the Amsterdam amending keur of 1775 took the opportunity of providing further policy forms which took account of the changes necessitated by the amendments which had been effected to Amsterdam insurance laws since 1744. The keur again had five policy formulas appended to it: on hull (‘Formulier eener Police van Assurantie op ’t Casko of Corpus van ’t Schip’); on cargo (‘Formulier eener Police van Assurantie op Goederen, Waren en Koopmanschappen, geladen of nog te laden in een Schip’); on ransom (‘Formulier eener Police van Assurantie op ’t lyf van een vaarend Persoon’); against fire (‘Formulier eener Police van Assurantie voor Brand’); and on packaged goods (‘Formulier eener Police van Assurantie, op geëmbaleerde of gepakte goederen, afgezonden of nog te zenden met de rydende Post, of geladen of nog te laden in een schip’). Only in respect of the fire policy did it give any indication that the model policy form was in any way compulsory. It noted that all fire insurances had to follow the model policy form (‘zullen moeten geschieden volgens het Formulier-Police ... hier agter gedruk’t’). In addition, the keur of 1775, in its amendment of s 18, provided that one could generally insure anything in which there was an real interest (‘op al het gene, waar in iemand belang is hebbende, mits bestaande in een Reëel interest’) and on condition that the object in which there was an interest and the peril insured against,
were expressed in the policy. In this regard it was further provided that where no official or authorised policy existed for such an insurance, a special properly sealed contract could be drafted in such form as mutually agreed on by the parties ('en zullen van zulke Verzekeringen, ingevalle geen geoctroyeerde Policen daar van zyn, mogen worden gemaakt byzondere behoorlyk gezegelde Contracten, zo als Partyen wederzyds zullen convenieeren').

4.1.3 The View of Roman-Dutch Authors and the Position Elsewhere

What then did the Roman-Dutch authors make of the status of these prescribed or suggested model policy formulas appended to the various legislative measures? 

Those who considered the insurance contract in the seventeenth century, did not express themselves on the issue. The first to do so clearly, was Van Zurck, early in the eighteenth century. He noted that the form of policies appearing after the municipal keuren was only a suggested form which the parties could or could not use as they saw fit ('is slechts een model, 't welk partyen volgen mogen of niet'). Thus, he seems to have been of the view that an unlimited freedom of contract existed despite the model policy forms appended to the applicable legislation. Nevertheless, even though deviation from the model form was possible according to this view, it may well be that the model forms were in practice only exceptionally and occasionally deviated from in material respects, and that this occurred less and less as the formal law, and the model polices it described, became more attuned to the needs of practice.

More pertinently and with a view to the various promulgations in the course of the eighteenth century, Van der Keessel declared that all stipulations which were not prohibited by law, could be added to or inserted into an insurance policy, even one for which a fixed formula had been prescribed. He pointed out that this freedom of contract was especially clear in those cases where no policy form had been prescribed by legislation. But even in the case of those types of insurance for which legislation had prescribed a fixed formula and which had to be cast in such official form, it was possible to add other conditions. However, just as any agreement in contravention of the provisions of an applicable keur was unlawful, so too was it unlawful to omit any of the stipulations which were contained in the prescribed model policies, as was in fact pertinently provided for by s 73 of the Rotterdam keur of 1721.

---

164 See again ch II § 6.2.2 supra.

165 Codex Batavus sv 'Assurantie' par 12 n1. In par 12 he contrasted the municipal keuren with the preceding placcaaten of 1563 and 1571, suggesting that the position may in this regard have been different earlier. See too eg Van Ghesel De assecuratione II.2.2 who noted that a model form was provided for in the keuren but that there was no doubt that insurance contracts could deviate from those policy forms.

166 See eg Dorhout Mees Verzekering 17 who notes that although the use of model policy forms was not made compulsory, it was presumably 'wel zeer in zwang'.

167 See Van der Keessel Theses selectae th 730 (ad III.24.6); idem Praelectiones 1447 and 1448 (ad III.24.6).
Apart from the fact that this latter deduction was not all that apparent from the wording of s 73 as Van der Keessel would have his readers believe, he himself qualified the prohibition on omitting from an insurance policy anything which was contained in the model policy form, if any, for that type of insurance. He noted that while one was not permitted to deviate from those prescribed model policies, it was undoubtedly true that an insured could exclude from his policy certain risks against which he wished not to be insured but which was he content to bear himself. Where exactly the line had to be drawn between what could and what could not validly be omitted or excluded, was obviously a rather niggling problem which may have caused some uncertainty in practice.

It thus appears that Van der Keessel regarded the statutorily prescribed policy forms as the minimum that a policy had to contain. Additions were permitted, as long as they did not contravene the general provisions of applicable legislation, but omissions or subtractions were not generally permitted. Therefore, there was a limited freedom of contract in the case of those types of insurance for which no model policy was prescribed and an even more limited freedom of contract in the case of those types of insurance for which such model policies were appended to the applicable legislation.

At any rate, it appears that by the eighteenth century some freedom of contract was permitted at least and that the use of a policy form absolutely identical to that contained in legislation was not compelled. And it would not surprise if in practice the straightforward view of Van Zurck held sway over the rather unwieldy exposition of Van der Keessel.

In Hamburg, at any rate, the policy forms prescribed by its Assecuranz-Ordnung of 1731 were not compulsory forms but merely recommendations. Parties could deviate from them in so far as was permitted by the Ordinance itself.

In England, too, the marine policy form was formally standardised in the second half of the eighteenth century, albeit not legislatively but merely by the underwriters at Lloyd's. The earliest policies in use in England in the sixteenth century showed great

---

168 More pertinent was the provision concerning the fire-policy form in the 1775 amending keur, to which he did refer elsewhere in a different context (see Praelectiones 1434 (ad III.24.4)).

169 Thus, additions were permitted only within the framework of what was generally prescribed as imperative by the legislation. Put differently, even if deviations from the model forms were in principle permitted, contracting out of applicable and compulsory legislative measures was not permitted. See further § 5 infra as to the requirement of legality and the extent to which such contracting out was permitted.

170 Thus, permitted were deviations from the official policy forms but not contracting out of the provisions of the applicable legislation. See eg Dreyer 117; Koch "Kodification" 302. Section 1 title I of the Hamburg Ordinance recommended the use of seven policy formulas which were named in s 3. These policies were (i) 'auf das Kasco eines Schiffs'; (ii) 'auf Güter'; (iii) 'auf Bodmeroy, Kambio Marino und Fracht-Gelder'; (iv) 'auf Grünland und andere Fishereyen'; (v) 'auf das Leben einer Person'; (vi) 'auf Türkken-Gefahr, auf die Ranzion-Gelder'; and (vii) 'auf Waaren so zu Lande oder auf Strömmen versandt werden'. These policies are reproduced in Dreyer 330-343; in the Reglement (at 59-70) containing the Hamburg Ordinance appended to Roccus/Feitama Gewijsdens (in a Dutch translation); and in Magens Essay vol II at 243-252 (in an English translation).
correspondence with both antecedent and contemporary Italian insurance policies. Although there appeared little uniformity in the contents and length of the then still hand-written and very often abridged marine policies in use on the London insurance market, by the beginning of the seventeenth century some measure of uniformity had come about. Broadly identical though somewhat less skeletal forms, more closely approximating the later Lloyd's policy, came into general use in the seventeenth century. They appeared by the end of that century in a printed form with blank spaces for the insertion of the information necessary to particularise the contract. The oldest printed English policy dates from 1680 and was virtually identical to the later Lloyd's policy. In 1779 this form of marine insurance policy was revised, sanctioned and thus settled, rather than drafted or newly designed, by the Committee of Lloyd's for the use of its members, it being resolved that members were not permitted to underwrite any policy containing stipulations different from those in the approved form. With only

171 It has generally been propagated that although not identical, English marine policies and also the later Lloyd's marine policy showed a strong resemblance to and were in fact descended from the Florentine policy of 1523 (as to which see again § 4.1.2 n142 supra). See eg Holdsworth History vol VIII at 284; Raynes (1 ed) 15-17, (2 ed) 14-16 (a discussion of the contents of the Florentine policy form with some comparison with the Lloyd's form); and Wright & Fayle Lloyd's 135.

However, it has now authoritatively been established that the Lloyd's policy and the earlier short-form English policies from which it evolved, like the oldest French policy of 1584 from Marseilles, have their origin in fourteenth-century Tuscan (Florentine and Pisan) policies rather than in the Florentine one of 1523. On the origin of the Lloyd's marine insurance policy, see Kimura 'Ursprung'; idem 'Entstehung'. Thus, the Lloyd's policy as settled there in 1779, had twelve clauses, while the Florentine policy of 1523 had fourteen; and only seven of the clauses in both were comparable but in any event not even nearly identical. More closely related to the Lloyd's policy, for example, was a Florentine policy of 1397. Kimura also excludes the possibility that the Lloyd's policy had its origin in early Genoese or Venetian insurance policies, in sixteenth-century Spanish policies, or in the Antwerp policy of 1563.

172 See eg Blackstock 80; Jones 'Elizabethan Marine Insurance' 55.

173 On the early English policies, see Kimura 'Entstehung'; Raynes (1 ed) 64-75, (2 ed) 59-69; and Wright & Fayle Lloyd's 137-143. The only addition to the printed marine policy form in use in the 1680's and the policy form adopted by Lloyd's almost a century later, was the addition of the Memorandum in 1749. See eg John 'London Assurance' 126.

174 The policy form adopted by the Committee was the printed form generally in use on the London market and which had already been the subject of judicial interpretation, especially since the middle of the eighteenth century when Lord Mansfield was appointed to the King's Bench. The reason why it was thought necessary in 1779 settle a policy form for compulsory use at Lloyd's, appears to have been attempts during the past decade or more to introduce into the traditional form certain variations favouring the insured.

It appears that the Committee revised three forms of policy in 1779: on ship (S), on goods (G), and on ship and/or goods (SG). Only minor variations occurred in them. The first two forms, it seems, disappeared as a result of the Stamp Duties Act of 1795 (35 Geo III c 63). This Act made the use of five stamped policy forms - three of which were identical to the forms adopted at Lloyd's - in the form set out in the Schedule to the Act compulsory for private underwriters but not for companies which retained the right to use their own forms which, but for a few minor details, were nevertheless identical with the Lloyd's forms. As a result of the Act it was found more convenient to keep stocks only of stamped SG policies.

On the Lloyd's policy of 1779, see generally eg Chalmers 148-149; Hopkins 117-148; Lay 43; Martin 157-158; Martindale 347; Winter 16; Wright & Fayle Lloyd's 126-127 and 148-149. It is reproduced in Appendix 47 infra.
one minor amendment\textsuperscript{175} and some additions,\textsuperscript{176} the Lloyd's marine policy came to be appended as the First Schedule to the Marine Insurance Act of 1906. Section 30 of the Act states that a marine policy may, but obviously does not have to, be in that form.\textsuperscript{177}

4.2 The Content of Insurance Policies and the Insured's Duty of Disclosure

4.2.1 Introduction

In addition to prescribing or at least suggesting the use of certain official policy forms, Roman-Dutch insurance legislation also generally prescribed certain matters which had to be mentioned in insurance policies. In so doing, the legislatures for practical purposes imposed a duty upon the insured to mention the information in question in the insurance policy.

The reason why such a duty was imposed, why it was imposed on the insured in particular, and why the matters had to be mentioned specifically in the policy, must be seen against a number of factors. Firstly, the information in question concerned matters of which the insured himself had, or was most likely to have, knowledge. In conjunction with this, the information concerned matters which, objectively seen, had a bearing on the risk and which the insurer would have taken into account in deciding whether to underwrite the risk in question and if so, for what amount and at what rate of premium. Additionally the information was necessary to describe the risk taken over by the insurer with sufficient precision so as to avoid subsequent disputes as to whether or not he was liable for a particular loss. Secondly, the information in question par excellence concerned matters which the insured merchant would ordinarily not of his own volition have disclosed to competitors, that is, to other merchants on the market. And those other merchants were, until the 1720's, the only, and thereafter the main, insurers of ships and goods.\textsuperscript{178} In fact, not only would an insured merchant not freely have disclosed such information but, had no duty been imposed upon him in this regard, he would probably have been inclined actively and knowingly to conceal and mislead his competitors on those matters and thus even his insurers, if they happened also to have been his competitors. Thirdly, it was common practice for the insured, or at least his broker, to draft insurance policies and to take it around the Bourse inviting subscriptions. In the absence of any opportunity for the insurer to request information by way of a questionnaire, or to exclude in the policy his liability in appropriate circumstances, the insured or his broker was in the ideal position the provide the information

---

\textsuperscript{175} Gradually from 1850 the phrase 'in the name of God, Amen' came to be replaced by the words 'Be it known that', 'a change', according to Martin 160, 'from the pious to the profane'.

\textsuperscript{176} Thus, the waiver clause was added in 1874. For further details, see Wright & Fayle Lloyd's 151-152.

\textsuperscript{177} According to Chalmers 46, it may also be in the insurer's or the insurance company's own form.

\textsuperscript{178} See Voorduin vol X at 293 who notes the secretiveness of merchants in their correspondence, especially as regards insurances where many of their insurers were themselves competing merchants.
spaces left open for it on the prescribed policies, or by mentioning it on the insured's own, privately drafted policy before it was offered to insurers for their acceptance. Fourthly, the fact that model policy forms probably gradually came to be regarded as mere examples rather than as compulsory forms, resulted in a loss of legislative control over what was contained in the policies in actual use in practice. As a result, the role of specific legislative prescripts about what policies had to mention, grew in importance. And with it the list of matters which had to be mentioned grew in length.

The insured's duty to mention particular information in his insurance policy expressly was a, or at least the closest Roman-Dutch law came to a, duty to disclose information to the insurer. But the insured's duty to mention matters in the policy may not have been exclusively a duty of disclosure aimed at informing the insurer beforehand. Importantly, it may have served additionally to describe and identify properly the particular risk taken over by the insurer with sufficient certainty in the contract itself. That is, it served to particularise and individualise the general and standard-form contract employed in insurance practice, and in so doing to reduce the chance of fraud by the insured upon his insurer.

Thus, as will become apparent from the discussion which follows, the insured's duty to mention certain facts in his policy displayed a number of features. These may conveniently and by way of introduction be summarised here.

In the first place, the duty was a very limited one to disclose only certain information. The information which had to be mentioned, was, generally, objectively relevant to the risk, but the scope of the matters on which information was requested varied from time to time, no doubt in accordance with the needs of practice. Apart from the information specifically provided for in the applicable legislation, though, Roman-Dutch law imposed no general duty upon an insured to disclose any other information to his insurer, even if such information would either objectively have had an influence upon the estimation of the risk, or would subjectively have influenced the particular insurer's

---

179 Model policies obviously left those blanks to enable compliance with the insured's duty to mention the required information on the policy.

180 Thus, as will become apparent from the discussion which follows, the duty did not exist where there was no policy, although this may, in the context of the practice in marine insurance, not have affected the operation of the duty overly much. By contrast, though, the duty to mention facts in the policy apparently did not exist if the insurer was aware of those facts, eg if the information had been conveyed to him orally. See in this regard the decision of the Hooge Raad in 1739 (see Bynkershoek Observationes tumultuariae obs 3121; Idem Quaestiones juris privati IV.17, discussed in § 4.2.5 infra) where the fact that the insurer had knowledge of the matter in question, excused the insured for not having mentioned it in the policy.

181 More particularly matters such as the object of the risk, the nature and types and duration of the risk, and the identity of the insured.

182 One of the arguments advanced by Ferufini in 1555 in his proposals for the establishment of a registration office and the compulsory registration of insurance policies (see again ch IV § 1.3.2 supra), was that there was a need to ensure that policies contained sufficient information to eliminate the possibility of such fraud. See De Groote Zeeassurantie 69.
decisions on whether and on what terms to take over the risk.\textsuperscript{183} Thus, there was no general duty of disclosure apart from the narrow duty in respect of a casuistic but nevertheless extensive range of facts which legislation required the insured to detail in the policy.

Secondly, the insured’s duty to disclose was limited to, and seen narrowly in Roman-Dutch law as being complied with by, disclosing the information by way of mentioning it in the relevant insurance policy. Although the validity of oral insurance contracts was not disputed in Roman-Dutch law, there is no evidence of a general duty upon the insured or his broker to disclose information by mentioning it orally to the insurer prior to conclusion of the contract.\textsuperscript{184} But this is not to say that in such a case the insured was not under a duty to mention the information in question in a policy drafted for the first time subsequently to the oral conclusion of the insurance contract. Because the duty to mention this information served not only to alert the insurer to information relevant to the risk, but apparently also to circumscribe the risk, it had to be mentioned in the policy even in that case. It was therefore not, or at least not in ordinary instances, necessarily a pre-contractual duty of disclosure. The insurer, it seems, had only himself to blame if he discovered relevant information on the policy only after he had earlier agreed to take over the insured’s risk without requesting and considering that relevant information from the insured. Thus, it seems, the insured’s duty to disclose certain information was balanced by a duty, of at least equivalent practical proportion and weight, on the insurer to obtain other information himself.\textsuperscript{185} The existence of such

\textsuperscript{183} There is evidence, though, of a more general duty existing in Antwerp customary law in the case of insurances on bottomry specifically. In terms of art 304 of par 9, title 11, part IV of the Antwerp Complatae of 1609 (see De Longè vol IV at 326), if the insured did not declare all the matters which he had to mention in term of art 303, ‘oft andersints eenige voorwaerde oft circumstantie verswege daarmede de verzekeringe quame beswaert te worderi’, then he would have had no action or recourse against the insurer but would have remained liable for the premium. See too art 312 for a similar provision in respect of insurances on debts other than bottomry. The fact that forfeiture of a premium was envisaged in these provisions, would appear to suggest that the duty may have been breached only where the insured’s conduct had been accompanied by fraud. The relationship between non-disclosure and fraud will be touched on shortly, and see ch XI § 6.3.2.1 infra as to the forfeiture of the premium.

\textsuperscript{184} Of course, if such information was requested by the insurer, and if the insured fraudulently supplied incorrect information, the ordinary consequences of fraudulent conduct on the part of the insured, which the insurer would have had to establish of course, would have come into play. See ch XIV infra as to fraud.

\textsuperscript{185} Rather than a general duty on insured to disclose or to provide relevant information to their insurers, it seems that Roman-Dutch law considered that there was a duty on the insurer (which, of course, he owned to himself only) to make his own inquiries and to elicit information from the insured as to the matters he may have considered relevant to the risk. See eg the Hooge Raad decision of 1716 (see Bynkershoek Observationes tumultuarie obs 1290; idem Quaestiones juris privati IV.6) considered in § 4.2.3 n220 infra.

The restricted scope of the insured’s statutory duty of disclosure and the resulting greater responsibility on the insurer to inform himself of the nature and extent of the risk he was to take over, was no doubt completely acceptable to insurance practice in the sixteenth century and thereafter. Insurers were mostly present in the port town from where the insured conducted his business and were, at first invariably and later mainly, also merchants themselves, alternatively insuring the cargoes of other merchants or in turn having their cargoes insured by such other merchants. (This close personal and interchangeable relationship presumably not only served to counter fraud but equally to deter insurers from relying on technical defences.) It was possible for insurers to calculate risk and premium not only on
a duty upon the insurer appears to have been recognised from early on.\textsuperscript{186}

Thus, to recap on the first two features, there was no duty of disclosure in Roman-Dutch law apart from the matters specifically provided for, and no such duty in the absence of a written insurance contract. At least, despite the extensive scope of Roman-Dutch insurance regulation, there was no express statutory provision that a general duty rested upon an insured to disclose all relevant facts and information to his insurer prior to the conclusion of an insurance contract. This was in line with earlier and contemporary insurance systems in Europe.\textsuperscript{187}

A third feature of the insured’s duty was that it was a duty only to mention the required facts if he knew of them. Thus, an absence of knowledge-excused the insured from the statutorily imposed duty.\textsuperscript{188} In appropriate cases, though, the insured had to mention in his policy that he was ignorant of the required details he had to mention concerning the relevant fact. The supposition was, though, that this had to be done, and in fact could be done, only where, although ignorant of the details, he was actually aware of the existence of the fact in question.\textsuperscript{189}

Fourthly, a breach of the insured’s duty of disclosure was excused by Dutch courts in cases where such breach did not result in an increase in the risk taken over the ground of personal experience of the risks involved but also because of their personal acquaintance with or at least a fair knowledge of the insured and the circumstances affecting his risk. And in any event, information on the risk to be underwritten could be obtained directly from the small insurance market’s closed circle of merchants. On the duty to disclose and early insurance practices, see generally Latimer 485-486.

No doubt, in the seventeenth century and thereafter, with a growing insurance market, the underwriting of unknown and even foreign and geographically distant risks increased. Insurers were no longer invariably in a position to calculate risk on the basis of their own inspection and knowledge. As a result, the burden on insurers to enquire about the risks they were to underwrite, became of increasing importance. Still, apart from a steadily increasing number of matters which the insured had to mention specifically in his insurance policy, Roman-Dutch legislatures did not see any need to impose a wider general duty upon the insured. Rather, it was left to insurer himself to obtain any additional information he thought necessary to assess the risk.

\textsuperscript{186} See eg Straccha \textit{De assecurationibus} XX.2, explaining that an insurer who had undertaken a risk at an agreed premium, had to be taken to have investigated the risk in question, and that it made no difference that he failed to enquire diligently about the nature and extent of the risk in question.

\textsuperscript{187} As to the absence of a general duty of disclosure in early insurance law, see eg Hammacher 118 (an abstractly formulated general pre-contractual duty of disclosure on the person taking out insurance did not occur in the early statutes on the insurance contract); Klesselbach 112-114; and Reatz \textit{Geschichte} 133-135 (there was no general duty of disclosure under the Barcelona Insurance Ordinances but merely a duty to mention specifically in his insurance policy, Roman-Dutch legislatures did not see any need to impose a wider general duty upon the insured. Rather, it was left to insurer himself to obtain any additional information he thought necessary to assess the risk.

\textsuperscript{188} Thus, where there existed a bottomry loan on goods, that fact had to be stated on any policy on the goods themselves (see again ch V § 5.5.1 \textit{supra}). From an opinion in 1672 (see \textit{Nederlands advysboek} vol I adv 288 and ch V § 5.5.1 n271 \textit{supra}) it is clear though, that an insured who had not mentioned that fact, would be excused if he was actually unaware of the existence of such a loan secured by his goods, the non-disclosure in such a case being compared to impossibility of compliance with his legal obligation.

\textsuperscript{189} This is illustrated by a second decision of the \textit{Hooge Raad} in 1717 (see Bynkershoek \textit{Observationes tumultuariae} obs 1363; \textit{idem Quaestiones juris privati} IV.7) which is discussed in § 4.2.5 n251 \textit{infra}. 
and borne by the insurer. But, once a breach had been established (that is, once it had been established that there was an increase in the risk), the insurance contract was considered void and it was irrelevant that the increase in the risk did not cause the loss in question.\(^{191}\)

In the fifth place, the main and general consequence of a failure by the insured in his duty properly to mention certain facts in his policy\(^ {192}\) was the nullity of the insurance contract. Only in isolated instances did a failure result in a reduced liability on the part of the insurer, either directly in that his liability was limited to a certain percentage of the loss, or more indirectly in that a larger franchise percentage applied.

Sixthly, the duty was one imposed statutorily upon the insured to protect individual underwriters and could therefore not be abolished or limited, on the one hand, nor be enlarged, on the other hand, apparently\(^ {193}\) not even with the informed consent of the insurer or of the insured respectively.

Finally, the circumscribed statutory duty of disclosure operated alongside and in addition to the larger effect which the fraudulent conduct of any one of the parties to the insurance contract had on the contract itself. The duty, it would appear, was not part of the insured's duty to act in good faith, and although a breach of it could at the same time amount to a breach of the duty to act in good faith, that was not necessarily the case. Although fraud in the insurance context had serious consequences in Roman-Dutch law and was heavily penalised,\(^ {194}\) it would seem that the insured's duty to mention certain facts in the policy was introduced by law to supplement the protection afforded to insurers by the rules relating to insurance fraud.\(^ {195}\) The statutory duty of disclosure and the general duty to act in good faith overlapped but the latter was much wider in scope in that it concerned not only the conduct of the insured and not only his

\(^{190}\) See the majority decision of the Hooge Raad in 1720 (see Bynkershoek Observationes tumultuariae obs 1621; \textit{idem} Quaestiones juris privati IV.10), which is considered § 4.2.4 infra.

\(^{191}\) This appears from a second decision of the Hooge Raad later in 1720 (see Bynkershoek Observationes tumultuariae obs 1623; \textit{idem} Quaestiones juris privati IV.10) which is considered in § 4.2.5 infra. The position was different in the case of a breach of contract (as opposed to a breach of the duty to disclose certain facts) though, for there a causal link between the breach and the loss was in fact required. See further on this point ch XIII § 2 infra.

\(^{192}\) That is, where there was no disclosure at all, or no full disclosure, or a disclosure of incorrect information.

\(^{193}\) Most clearly in s 75 of the Rotterdam keur of 1721: see § 4.2.6 infra.

\(^{194}\) Fraud and the duty to act in good faith are considered in more detail in ch XIV § 2, especially at n14 infra.

\(^{195}\) For example, it did away, in respect of the matters which the insured failed to mention on the policy but sought to conceal from his insurer, with the burden otherwise resting on the latter of proving fraud on the part of the insured.
conduct directed at the mentioning of particular information in his policy.\textsuperscript{196} It would seem that the statutory duty of disclosure was not encompassed in the duty to act in good faith for it appears to have been breached, at least on a reading of the applicable legislation alone, even in the absence of fraud on the part of the insured. In some instances it would appear, though, that the Dutch courts regarded fraud as necessary before an insurer could escape liability on the grounds of non-compliance with the statutory duty to mention certain facts.\textsuperscript{197}

4.2.2 Matters Which Had to be Mentioned in Insurance Policies

The nature of the information which by statutory prescript had to be contained in insurance policies in terms of Roman-Dutch law\textsuperscript{198} broadly concerned a number of distinguishable topics.

\textsuperscript{196} Of course, fraudulent misrepresentation by an insured was an important instance of such conduct and may no doubt have been difficult to separate from negative misrepresentation (or non-disclosure) in practice, every positive misrepresentation of a fact being at the same time also a non-disclosure of the truth as to that fact.

Additionally, fraudulent conduct by an insured generally, as also his illegal conduct, by its very nature very often went accompanied by a non-disclosure of particular facts to the insurer prior to the conclusion of the contract. An insured who fraudulently insured goods already lost (see ch XII § 2.2 \textit{infra}), or who illegally insured enemy property (see ch VIII § 5.3 \textit{infra}), was hardly likely to tell his insurers what he was about.

In one of the few instances where the phrase 'concealment' ('verzwijging') was used in a Roman-Dutch source (in an opinion delivered in 1594: see Hollandsche consultatien vol II cons 322), it occurred in connection with fraud. The insurers were in this opinion thought not to be liable for a loss occurring to insured property belonging to the enemy, the insured being considered to have acted fraudulently (\textit{mala fide}) in the particular circumstances of the case for having failed to inform the insurer of that fact. It does not seem possible to deduce from this case the existence of a general duty of disclosure, the breach of which would, at least not in absence of fraud on part of insured, have absolved the insurer from liability. (But see \textit{contra} Dorhout Mees \textit{Schadeverzekeringsrecht} 226.) The reason why the insurer was not liable here was because the insured had acted fraudulently, not simply because he had not disclosed certain facts.

\textsuperscript{197} See eg the decisions of the Hooge Raad in 1717 and again in 1722, both of which are discussed in § 4.2.5 \textit{infra}.

\textsuperscript{198} Obviously many other matters either had to be contained in policies by virtue of the nature of the contract (ie, \textit{essentialia} which had to be present in insurance contracts by virtue of the common law), or were inserted into policies because they were customary or useful or advantageous although not strictly necessary.

This would appear, eg, from the list of matters which notaries and others such as brokers were advised to include in insurance policies when they drafted them. See eg Wassenaer \textit{Praktyk notariael} VIII.6 (matters statutorily prescribed) and VIII.7 (additional matters, ie, in addition to those matters specifically required by legislation, which had to be expressed in policies; this included matters such as the perils insured against, the duration of the cover, and the premium). Likewise, the list provided by Lybrechts \textit{Redenerend vertoog} II.17.5 of matters which had to be mentioned in insurance policies (\textit{in een Acte van Assurantie}), apparently in goods policies for II.17.8 appears to have been concerned with hull policies, was for the benefit of notaries and was not a list merely of the matters which were statutorily required. The Lybrechts list contained the following matters: (i) who insured whom; (ii) what goods (in specie, volume or weight) were insured; (iii) the name of ship (and of her master) on which the insured goods were to be loaded, as well as their destination; (iv) when the insurance was to commence and to terminate; (v) the perils insured against; (vi) the rate of premium; (vii) an authorisation to the insured and the master to take the necessary steps to avert and minimise loss; and (viii) a submission to the
Firstly, there was the identity of parties. With the name of the insured usually appearing in the first clause in the policy and that of the insurer or insurers being stated if not also in that clause then at least at the bottom of the policy where they 'underwrote' the risk, the identity of the parties usually presented no problem. But the identity of the insured could do so if the insured was not also the person who took out the insurance, such as where the insurance contract was concluded either on the instructions or for the benefit of the insured. Therefore, although there was no particular statutory obligation to disclose the identity of the parties to the insurance contract, specific statutory provision was made for insurances in blank and also for insurances on behalf of others where it was required at least to identify the insurances as being of that nature.\textsuperscript{199}

Secondly, the information often concerned the nature of the cargo to be insured. Certain types of cargo, most notably perishables, valuables or ammunition, if insurable at all, were only insurable or only fully insurable if specified in the policy itself. The insurability of cargo as an object of marine risk has already been considered in detail, including the instances where, in order to be (fully) insurable, certain types of cargo had to be specified in the insurance policy.\textsuperscript{200} This particular aspect will therefore not be considered further in the present context.

\textsuperscript{199} See § 4.2.6 \textit{infra} and ch X § 3 \textit{infra} respectively.

\textsuperscript{200} In summary the position was as follows.

(i) To be insurable, perishables (as to which see again ch V § 4.3 \textit{supra}) had to be specified in terms of s 4 of the \textit{placcaat} of 1571, s 17 of the Amsterdam \textit{keur} of 1598, and s 3 of the Rotterdam \textit{keur} of 1604. They could be insured under the general term 'perishable and unperishable goods' in terms of the Amsterdam amending \textit{keur} of 1614 which amplified s 17, and could be insured under the general term 'wares and merchandise' in terms of s 41 of the Rotterdam \textit{keur} of 1721 (by implication) and s 10 of the Amsterdam \textit{keur} of 1744 (although, in terms of s 34, with a higher franchise percentage if they were not specified).

(ii) Valuables (as to which see again ch V § 4.3 \textit{supra}) did not have to be specified in terms of s 4 of the \textit{placcaat} of 1571. But they had to be specified in terms of s 17 of the Amsterdam \textit{keur} of 1598, s 3 of the Rotterdam \textit{keur} of 1604; the Amsterdam amending \textit{keur} of 1614, s 41 of the Rotterdam \textit{keur} of 1721, and s 10 of the Amsterdam \textit{keur} of 1744.

(iii) Munitions of war (as to which see again ch V § 4.4 \textit{supra}) had to be specified in terms of s 17 of the Amsterdam \textit{keur} of 1598, s 3 of the Rotterdam \textit{keur} of 1604, the Amsterdam amending \textit{keur} of 1614, s 41 of the Rotterdam \textit{keur} of 1721, and s 10 of the Amsterdam \textit{keur} of 1744.

(iv) Other objects which were insurable only if an appropriate specification appeared on the policy, were return cargoes (in terms of s 2 of the Rotterdam \textit{keur} of 1604: see ch V § 5.3 \textit{supra}); expected profit (in terms of s 17 of the Amsterdam \textit{keur} of 1744: see ch V § 5.2 \textit{supra}); the freight saved by carrying one's own goods (in terms of s 15 of the Amsterdam \textit{keur} of 1744: see ch V § 5.4 \textit{supra}); and the interest on a bottomry loan and the property subject to such a loan (in terms of ss 19 and 21 of the Amsterdam \textit{keur} of 1744 respectively: see ch V § 5.5.3 \textit{supra}). In terms of s 18 of the Amsterdam \textit{keur} of 1744, as amended by the \textit{keur} of 1775, one could insure on anything in which there was an actual interest, on condition that that in which there was an interest, as well as the risk run in respect of it, were described or expressed in the insurance contract (see ch II § 6.2.2 \textit{supra}).
In the third place, there was the name or identity of the ship which was being insured or on which the goods being insured would be or had been loaded.\textsuperscript{201}

Lastly, there was the voyage itself, and, more specifically, matters such as the place of loading, the place where the risk was to commence, the destination, and whether (and when) the insured or carrying ship had already departed.

4.2.3 The Position at the Beginning of the Seventeenth Century

The earliest Spanish legislation on marine insurance already prescribed the content of insurance policies in some detail.\textsuperscript{202} In the earliest comprehensive insurance measure in Roman-Dutch law, the \textit{placcaat} of 1563, though, there was no specific provision requiring any particular information to be mentioned in the insurance policy. However, from the policy form included in the \textit{placcaat}, the use of which was made compulsory by s 2,\textsuperscript{203} it appears by implication that the insured had to supply certain particularised information. By way of illustration, the prescribed model policy contained particularised information, the equivalent of which the insured was no doubt likewise expected to include in his policy, about matters such as the identity of the insured ("Nicolaes van Eemeren, woonende t'Antwerpen"); the ship on which the insured goods were to be conveyed (insurance on goods loaded or to be loaded by or for the insured 'in het Schip genaemt S. Jacob, daer Meester af is Pieter Heeerinck van Amstelredam, oft andere');\textsuperscript{204} and the voyage in question ('vander Poort, Haven oft Reede van Seville, tot oft na der voorseyder Stadt van Antwerpen').

The insured's duty was much more clearly and extensively spelt out in s 5 of the \textit{placcaat} of 1571.\textsuperscript{205} In terms of this section the policy had to contain the name of the ship which was to sail from the Netherlands and that of her master ("Meester") or the skipper ("Schipper") who was in command of her ("die daervan 't bevel hebben sal"),\textsuperscript{206} as well as the place where she was to be loaded and the place to which she was to sail.

---

\textsuperscript{201} The legislation on information of this nature will be mentioned in general in the following sections and will be considered in specific detail in § 4.2.7 \textit{infra} when insurance in blank is considered.

\textsuperscript{202} See generally Reatz \textit{Geschichte} 102-103 (the content of the policy as required by the Barcelona Ordinance of 1435), 121-123 (the content of the policy as prescribed in more detail than before by the Barcelona Ordinance of 1458), and 224-225 (the relevant provisions of the Burgos Ordinance of 1538).

\textsuperscript{203} See again § 4.1.2 \textit{supra}.

\textsuperscript{204} It seems that in view of the words 'oft andere', a change of master had no effect on the insurance, even if the risk was increased as a result. Similar and even clearer descriptions also appeared in subsequent statutory policies. See further eg Frentz \textit{Hamburgische Admiralitätsgericht} 152-154.

\textsuperscript{205} See eg Goudsmit \textit{Zeerecht} 262. Hammacher 46 sees in this section a pre-contractual duty of disclosure ('vorvertragliche Anzeigepflicht'). But see again my remarks in § 4.2.1 \textit{supra}. Section 5 was largely identical to s 7 of the provisional \textit{placcaat} of 1570.

\textsuperscript{206} As to the need for this information and the practice of insuring on an unnamed ship or ships, see § 4.2.7 \textit{infra}.
Failure to mention this information in the policy, s 5 continued, resulted in the nullity and invalidity of the obligation of insurance ('nulliteit ende onweerd vande Obligatie der selver Asseurantien oft versekeringe') if such omission was the fault ('schult') of the insured, and if not the fault of the insured, the latter had a claim for the recovery of the insurance payment ('andersins sal men 't selve verhalen') upon the person drafting the policy in so far as it was his failure and fault.

Notable was the fact that the non-disclosure led to the nullity and invalidity of the contract as a whole, and that this result followed whether or not the non-disclosure was the fault of the insured himself or of someone else. Recognition was given to some of these measures in the insurance policy prescribed in s 35 of the placcaat where, by appropriate wording, it was indicated what required information should be inserted.

The Antwerp customary law at the beginning of the seventeenth century in general corresponded with the formal legislative position. In terms of art 27 of the Antwerp Compilatae of 1609, insurance contracts on goods consigned on ships had to contain the following information: the name of the ship; the name of her master; and the names of the places where loading and discharge was to take place. The bill of lading on the insured goods had to confirm these details. If any of this information was omitted from the policy, or if it was contradicted by the bill of lading, the insured had no recourse or action on the policy ('soude ter saecken van dijen geen vervolch...').

Specifically required was the identity of the insurer ('Eenen sulcken woonende in sulcker platsen heeft beloofd ende hem verbonden ...'); the identity of the insured ('te verseekeren ende indemneren eenen sulcken oft sucick Kooplyden ...'); the nature of the cargo ('voor sucick Koopmanschappen ende goeden ...'); the ship involved ('by hem of anderen voor hem ende in sijn name geladen, of te laden in 't Schip genaemt [...] daer af Maester is eenen sulcken, oft eenen sulcken is ieyts-man oft Conducteur van dien ...'); and the description of the voyage ('vander Haven, Reede oft Plate van sulcker plaeften uyt te varen ende seylen, na sulcker Stadt oft Haven').

Mention of her destination was not required in the provisional placcaat of 1570. As Bynkershoek Quaestiones juris privati IV.1 (and see too Lybrechts Koopmans handboek V.78) pointed out, the reason why the place of departure and the destination had to be specified in the policy was to determine the duration of the insurance cover. As he put it, 'de natuur van de zaak zelfs vereischt dit volkomen, want men moet kundig zyn wanneer de risico van den assuradeur begint en wanneer Zy ophoud'. As to the duration of the risk, see ch XII § 1 infra.

Or even, it seems, if there was no fault at all. The policy was null and invalid if it did not contain the required information, irrespective of whether the omission was the fault of the insured or of his broker. In the latter case, though, the insured had a claim upon the broker.

Specifically required was the identity of the insurer ('Eenen sulcken woonende in sulcker platsen heeft beloofd ende hem verbonden ...'); the identity of the insured ('te verseekeren ende indemneren eenen sulcken oft sucick Kooplyden ...'); the nature of the cargo ('voor sucick Koopmanschappen ende goeden ...'); the ship involved ('by hem of anderen voor hem ende in sijn name geladen, of te laden in 't Schip genaemt [...] daer af Maester is eenen sulcken, oft eenen sulcken is ieyts-man oft Conducteur van dien ...'); and the description of the voyage ('vander Haven, Reede oft Plate van sulcker plaeften uyt te varen ende seylen, na sulcker Stadt oft Haven').

See generally Mullens 37-39.

Article 27 of par 2, title 11, part IV (see De Longé vol IV at 210-212).

See too eg art 263 of par 8, title 11, part IV of the Compilatae (see De Longé vol IV at 308) as to the content of the bill of lading ('cognossement') and the invoice ('cargasoen') which had to correspond with the policy as well as with one another as regards the matters mentioned in art 27, without any contradiction or difference.
Insurance Law in the Netherlands 1500-1800

noch actie vallen'). Article 28 provided that the substitution of the master did not affect the validity of the policy, as long as such change was notified to the insurer and as long as the other facts remained unchanged. In terms of art 29, and unlike in the earlier placcaaten, the name of the consignor and consignee too had to be declared on the policy, on penalty of nullity of the policy. And in terms of art 30, the details on the bill of lading also had to agree with this information.

The regulation of the content of insurance policies was continued in the municipal keuren, starting with the Amsterdam keur of 1598. In terms of s 3 an insurance policy had to contain the name of the ship which was to sail or depart from Amsterdam to other countries or kingdoms or which was to arrive there from elsewhere. It also had to contain the name of the master of the ship or of the skipper who would be in command, as well as of the place where this ship would be loaded and to which she was to sail. If the policy did not contain this information, the insurance obligation was null and invalid if it was due to the fault of the insured, and otherwise, although the obligation was presumably still null and void, the insured would have recourse against the person who drafted the policy in so far as the defect and fault were attributable to his fault. Again the policies appended to the Amsterdam keur made provision for this information, now by providing spaces on the printed form where the relevant information had to be inserted by hand.

---

214 See generally Enschedé 17-20.
215 See eg Goudsmitt Zeerecht 315-316.
216 Section 9 of the Middelburg keur of 1600 was identical to s 3. See further § 4.2.5 infra for the judicial interpretation of s 3.
217 Van der Keessel Praelectiones 1450 (ad III.24.6) noted that the policy had to mention both the name of the ship and that of her master, not either one of them as Grotius had thought.
218 See eg Grotius Inleidinge III.24.6; Groenewegen Aanteekeningen n19 (ad III.24.6); Scheltinga Dicata ad III.24.6 sv ‘van den schipper ofte van ’t schip’; Schorer Aanteekeningen 424 (ad III.24.6) sv ‘met de plaatze’.
219 Thus, the cargo policy read as follows (the details in [square brackets] are my insertions and are in the original indicated by blank spaces): ‘Wy ondergeschreven belooven ende verbinden ons te verseekeren, ende verseeckeren midts desen aen [name and identification of insured], te weten, elck een voor de somme by hem hier onder geteyckent, van [sum insured and description of goods] die geladen zijn oft geladen sullen werden in het Schip genaemt [name of ship] groot omtrent [tonnage] Lasten, daer Schipper op is [name of master] ofte daer op voor Schipper oft Schippers souden mogen varen ..., vander hyre ende dach af ... ende sal gheduyren ter tijd toe dat het voorsz Schip tot [destination] sal ghekomen wesen’.

Likewise, the hull policy read as follows: ‘Wy ondergeschreven belooven ende verbinden ons te verseeckeren, gheelij wy verseeckeren midts desen aen [name and identification of insured], te weten elck voor de somme by hem hier onder geteyckent, van [sum insured] toe, op [??] Kaske ofte Corpus van een Schip ... den voorsz [insured] ofte yemant anders toe behoorende, genaemt [identity of ship] groot omtrent [tonnage] Lasten, daer Schipper op is [name of master] ofte wie in sijn plaetse voor Schippers oft Schippers souden mogen varen ..., vander hyre ende dach af dat [commencement of voyage/place of departure?] ter tijd toe ’t voorsz Schip ... gekomen sal wesen tot [destination] toe’.

Both policies also contain other blank spaces where could be inserted information on matters such as the name of the insured or of another person who was the consignor, the person to receive payment, the person authorised in terms of the preservation clause, and the person who had paid the premium; the amount of the premium; and the place where and date upon which the policy was signed.
The Rotterdam *keur* of 1604 followed the Amsterdam example, although in more detail and with some innovations.

In terms of s 6, in the case of an insurance on a ship, the owner or master had to express ('*moeten expresseren*') in the policy the name of the master and of the ship on which the insurance was required ('waer op de Assurantie versocht wort'), as well as the age of the ship, but only if those facts ('t selve') were known to him. If not, then such ignorance had to be declared in the policy. This was a Rotterdam innovation. Failure by the insured in his obligation in this regard resulted in nullity of the contract ('alles ende yeder Poinct op peyne van nullite').

In terms of s 7, in the case of an insurance on the cargo to be conveyed on a ship, merchants were obliged to express in their policies ('*in hunne Policen te expresseren*') the name of the ships, and of their masters, in which they had loaded their goods, as well as the place of loading and place of discharge ('de plaetse vande ladinge ende gedestinieerde lossinge'). Failure to do so resulted in the nullity of the contract, unless (and this was another innovation) the merchant was ignorant of the ship in which, or of the master with whom, his goods were to be shipped, something which was quite possible if the cargo was consigned from abroad. If this case ('*in welcken ghevallen*'), that is, where the merchant was ignorant of those matters, the insured had to declare such ignorance ('t selve') in the policy and had to attach to the policy the notice ('*advijis*') that he had received of the loading of his goods, or to show it ('t selve'; that is, the notice) to the insurers and declare it in the policy with an express mention of the name of the person who had given him the notice ('*advijis*') as well as the date of that notice.

These matters will all be considered in more detail where appropriate.

---

220 The age of the ship (or the insured's ignorance of that fact) was already no longer required to be mentioned in s 6 of the 1635 restatement of the Rotterdam *keur* of 1604. No doubt this simplification was for practical reasons. See too Scheepers 72 as to the age of a ship, and see again ch V § 3.2.1 supra.

In a case before the *Hooge Raad* in 1716 (see Bynkershoek *Observationes tumultuariae* obs 1290; *idem Quaestiones juris privatii* IV.6), the *Raad* rejected an Amsterdam insurer's defence that he was not liable for the almost complete loss of the insured ship and cargo in a collision with another ship in a storm because the insured ship was old and not (or no longer?) capable of withstanding storms at sea. In Amsterdam, the *Raad* noted, the *keur* did not require that the age of the insured ship be expressed in policy, and the insurer himself, being resident in Amsterdam, could have inspected the insured ship there or could have had such an inspection carried out by shipwrights ('scheepstimmerluiden') before deciding whether or not he wanted to take over the risk and if he wanted to require a larger premium on grounds of her age. See too Van der Keessel *Praelectiones* 1434-1435 (ad III.24.4).

221 See eg Groenewegen *Aanteekeningen* n19 (ad III.24.6).

222 On a plain reading of the section, mention of the name of the person instructing the insurance was required only if the name of the ship or that of the master was not known and not where he was unaware of the place of loading or discharge.

223 See eg Groenewegen *Aanteekeningen* n19 (ad III.24.6); Van Zurck *Codex Batavus* par 13; Van der Keessel *Praelectiones* 1450-1451 (ad III.24.6) (noting that the duty to name the place where the goods were shipped only arose with cargo insurance and not in the case of an insurance on hull); *idem Praelectiones* 1450 (ad III.24.6) (noting that in requiring the mention of the insured's ignorance, s 7 of the Rotterdam *keur* of 1604 differed from s 3 of the Amsterdam *keur* of 1598 and provided the example for later provisions in this regard such as s 71 of the Rotterdam *keur* of 1721 and s 2 of the Amsterdam *keur* of 1744).
Additionally, in the event of non-compliance with s 7, but apparently not with s 6, s 7 laid down that there would be no return of any premium already paid in advance. This was an exception to the general principle laid down in s 18 as to the recoverability of premiums in the case of a short- or non-consignment of goods. The aim was to eliminate the possibility of an insured, on the safe arrival of the insured goods, attempting to recover his premium by holding out that the consignment of goods, unspecified because of the non-compliance with s 7, was in fact never shipped or that a lesser amount was sent to him.

In terms of an innovative and later generally to be followed s 8, in the case of an insurance on cargo or a ship which had already departed from the place of loading, that fact and the time of such departure had to be mentioned in the policy, unless the insured was ignorant of that matter, in which case he was equally obliged to express that ignorance in his policy, on penalty of nullity.

4.2.4 Further Developments in the Seventeenth Century

In the course of the seventeenth century a number of additions and amendments were effected to the provisions of the Amsterdam keur of 1598 on the question of what had to be expressed in insurance policies.

The general Amsterdam shipping keur of 24 January 1651 on the mounting ('monture'; of guns?) and manning of ships sailing to the Mediterranean Sea, contained a number of measures to ensure compliance with this keur and with earlier placcaaten of 1627 and 1641 on the topic. One of them was s 10 which determined that in a policy of insurance made on the hull of ships which were built of fir-wood, that fact had to be expressed on the policy ('op 't casque ofte corpus van Schepen dat vuyrblasen sijn, sal 't selve expresselijck moeten verhaelt ende gestelt worden'), on penalty of the insured forfeiting half of the insurance. Here, therefore, the policy was, by way of exception, not totally voided by the insured's failure to provide the required information. The

---

224 This provision too had no equivalent in s 3 of the Amsterdam keur of 1598, but was subsequently taken over in an amended form in s 2 of the Amsterdam keur of 1744.

225 Thus, it was in effect laid down that a return of premium in the case of a short- or a non-consignment of goods was only possible if s 7 had been complied with. On the recoverability of premiums in this instance, see further ch XI § 6.2.1 infra. On ss 6 and 7 of the Rotterdam keur of 1604, see generally Goudsmit Zeerecht 394-395.

226 See eg Groenewegen Aanteekeningen n19 (ad III.24.6). According to Wassenaer Praktijk notariael VIII.11 the policy also had to state where the departed ship presently was. He added that these matters had to be mentioned if the insured had knowledge of them 'en de daarvan niet te verswygen, maar in alles ter goeder trou te gaan'. See too § 4.2.5 infra for the interpretation by the Hooge Raad in 1717 of the Amsterdam amending keur of 1688 which in essence followed s 8.

227 See generally Goudsmit Zeerecht 315-316.

228 See Amsterdam Handvesten vol VI at 1493; also Goudsmit Zeerecht 362.

229 As to ships made of fir-wood, see again ch V § 3.2.1 supra.
insurer’s liability was merely limited. This provision was restated and somewhat altered in the Amsterdam amending keur of 1733 where it was provided that in insurance policies made on hull, the fact that the ship was constructed of fir-wood ("dat Vuur­blazen zijn") had to be mentioned and expressly stated in the policy, otherwise the insurer would not be liable to pay more than half of any loss\(^{230}\) which might occur. This was therefore an instance of the application of proportionality in the case of a non­disclosure.

By the Amsterdam amending keur of 1688, the keur of 1598 was altered by providing, after the example of s 8 of the Rotterdam keur of 1604, that where someone insured himself on cargo or ships which had already departed from the place of loading, that fact ("het zelve"), as well as the time of such departure, had to be declared on the policy. The policies compulsorily prescribed by the keur continued to make provision for and to reflect the legislative obligation to include certain information in policies. They also reflected the amendments effected in the meantime to the Amsterdam keur of 1598, especially as regards cargo policies.\(^{231}\)

Section 1 of the Amsterdam amending keur of 1699 interpreted s 3 of the Amsterdam keur of 1598 in a single respect.\(^{232}\) It provided that in so far as s 3 required, on the penalty of nullity, that policies had to contain a reference to the place where ship would be loaded, that section in future had to be understood as requiring, firstly, that the place of loading would only have to be expressed in those cases where the goods were to be loaded at a place different from that where the insurance would commence.\(^{233}\) And, secondly, it provided that in the case of an insurance on the hull of a ship and her appurtenances, as well as on bottomry loans, whether on ships or goods ("Bodemery­gelden, 't Zy op Schepen of Goederen"), such mention of the place of loading would not be necessary and that the insured need instead merely mention the place from where the insurance would commence.

Lastly, s 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 to have departed from their places of loading except after they had advanced ("geavanceert") to the other side of or outside the estuaries or sea-ports ("Zeegaten of Zeehavens") of the places

\(^{230}\) Note, no longer half of the sum insured as was apparently the case in the keur of 1651.

\(^{231}\) Thus, the cargo policy read as follows (the matters in [square brackets] are my insertions and were in the original indicated by blank spaces): 'Wy ondergeschreven verzeekeren aan U [name and identification of insured] ..., te weten elck voor de somme, by ons hier onder getekent, van [sum insured]. En dat op Goederen, Waren, en Koopmanschappen, van wat soort of soorten de selve souden mogen wesen, bederfelijk of onbederfelijk, niet uitgesondert, geladen of noch te laden in 't Schip, 't Welck God beware, genaamd [name of ship] daer Schipper op is [name of master] of wie daer op voor Schipper of Schippers in sijn plaat souden mogen varen ..., of hoe den naam van den Schipper of Schip, anders soude mogen georthographieert, gestelt of gespelt worden'. The hull policy provided blank spaces for the name or identification of the insured; the sum insured; the name or identification of the ship and her master; and the time of the commencement of her voyage.

\(^{232}\) See further § 4.2.5 \textit{infra} for the judicial interpretations of s 3 as amended in 1699.

\(^{233}\) That is, the place from where the insurer was at risk, which was not, or at least not necessarily, the place where the insurance contract was concluded.
from where the insurance was to commence, and had further also passed all other buoys and similar beacons ("Tonnen of diergelijke Tekenen"). Furthermore, 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.

4.2.5 Judicial Interpretation in the First Half of the Eighteenth Century

Section 3 of the Amsterdam keur 1598, as amended in 1699, was the subject of a number of decisions in the Hooge Raad.\textsuperscript{234} Firstly, there were a few decisions regarding the mention of the place of loading and/or the place of the commencement of the risk. This appears to have been quite a thorny issue in practice.\textsuperscript{235} It was necessary to mention these matters so that it would be known from where the risk taken over by the insurer was to commence.\textsuperscript{236}

The first decision pertinently to deal with the place of loading was delivered in 1720.\textsuperscript{237} It concerned an insurance at Amsterdam on cargo loaded or to be loaded at Copenhagen and surrounding places for a voyage to Rouen in France. The ship loaded some goods at Copenhagen and then sailed through the Sound and loaded fur-

---

\textsuperscript{234} See generally Van der Keessel \textit{Praelectiones} 1450 (ad III.24.6).

\textsuperscript{235} See also n272 \textit{infra} as to Van der Keessel's unsuccessful attempt to reconcile the different provisions on this topic.

\textsuperscript{236} According to an opinion in 1665 (see Nederlands advysboek vol III adv 169), mention of the place or time where or from which the insurance could be said to have commenced, was 'van de essentie der Assurantie, die sonder de tijd of plaatsie van haar begin of aanvang niet kunnen bestaan'. For this it referred to s 9 of title VII of the \textit{placcaat} of 1563, s 5 of the \textit{placcaat} of 1571, s 3 of the Amsterdam keur of 1598, and s 7 of the Rotterdam keur of 1604, noting that these provisions indicated 'dat 'er geen Assurantie ofte risico en kan zijn, daar geen begin ofte aanvang van het selve en is'. All true contracts, the opinion continued, whether of insurance or otherwise, none excluded, had to have a starting point. According to Grotius \textit{Inleidinge} III.24.6, the insurance was void if the place of loading and the destination ('nomen loci a quo et ad quem') were not named in the policy because the nature of the insurance contract required that it be known when the risk commenced for account of the insurer and when it terminated. See also generally eg Schorer \textit{Aanteekeningen} 424 (ad III.24.6) sv 'met de plaatze etc'; Van der Keessel \textit{Praelectiones} 1450-1451 (ad III.24.6); and see further ch XII § 1 \textit{infra} as to the commencement and duration of risk.

\textsuperscript{237} See Bynkershoek \textit{Observationes tumultuariae} obs 1621; \textit{idem Quaestiones juris privat\'\' IV.10.

In an earlier decision by the Raad in 1717 (see Bynkershoek \textit{Observationes tumultuariae} obs 1347; \textit{idem Quaestiones juris privat\'\' IV.8), one of the judges took the (what Bynkershoek termed exceptional ('zonderling')) view that in terms of s 3 of the Amsterdam \textit{keur} of 1598 read with s 1 of the Amsterdam amendment of 1699, the insurances on ship and goods in the case before him were null and void because the place of discharge ('Plaats van de aflading'), which had to be mentioned in terms of s 3 in addition to the place of loading, had not been expressed in the policy as required by s 1 where the risk commenced from another place than that where the discharge took place. According to Bynkershoek, this only applied to insurances on cargo, not to one on a ship as was the case here. He also thought that s 1 applied only where the insurance was concluded after the departure of the ship and where there could be a presumption of fraud, and that for that reason it did not apply to this case where the insurance had been concluded before the ship had departed from the place where the risk on the ship and her cargo was to commence for the insurers.
ther goods at Elsinore. The ship was subsequently lost on her voyage to France and the insured claimed on his policy for the loss. The insurers refused payment for the goods shipped at Elsinore, arguing that those goods were not carried at their risk for, in terms of s 3 of the Amsterdam keur of 1598, the insurance was null if the place where the goods were loaded was not expressed in the policy and here there was no mention in the policy of the Sound or of Elsinore. On his part the insured argued that being on the same coast of Denmark, Elsinore was included in the surroundings ('circumjacentien') of Copenhagen. The insured added that from s 3 of the Amsterdam keur of 1699 it was clear that under the surroundings of a place were included her estuaries and ports and, he argued, the Sound was an estuary or outer port of Copenhagen. In support of his arguments, the insured called a large number of merchants from Amsterdam and Copenhagen who gave evidence that in the case of insurance Elsinore or the Sound was understood to be included in any reference to Copenhagen. The Hooge Raad, by a majority, confirmed the decision of the Hof van Holland and held the insurers liable on the policy. It did so on two grounds. Some of the majority thought that Copenhagen and Elsinore were for purposes of the insurance not different places and that had therefore been no breach of his duty by the insured. Others held for the insured on the ground that s 1 of the Amsterdam amending keur of 1699 required the place of loading to be expressed only when the goods were loaded at a place other than that from where the risk commenced, that is, if the insurers ran a greater risk through loading at a different place such as when the place of loading was further away from the place from where ship was to depart. In the present case the ship, on a voyage from Copenhagen to France, of necessity had to pass through the Sound so that the loading of goods at Elsinore involved no greater risk for the insurers. On the contrary, the insurers' risk was much reduced for the goods in

---

238 Also known as Helsingor ('Elseneur'), this Danish port is located at the narrowest part of the strait or Sound between Denmark and Sweden. The town is probably best known for its Kronborg Castle, which not only played an important role in the collection of the toll but was also the Elsinore Castle in Shakespeare's Hamlet. From medieval times a toll was imposed there by the Danish Crown on ships passing through the narrows. A Sound Toll Register was kept from the 1490's and it provides important historical information on the number and size of the ships which passed through the Sound. By the end of the sixteenth century, for instance, some 5000 ships annually sailed to and from the Baltic. This toll was abolished only in 1857. See further Rich & Wilson CEHE vol IV at 170-171 and vol V at 266.

239 But as Bynkershoek noted, the distance at sea between Copenhagen and Elsinore was too great for them to be in each other's neighbourhood. The term 'circumjacentien' (see again § 4.2.4 supra for the use of the term in the Amsterdam keur of 1699) referred to 'naburige plaatsen, rivieren, havens, reeden', but not places so far removed from one another. See further ch XII § 1.3.4 infra as to the meaning of 'surrounding places'.

240 Bynkershoek thought that this was not the case for while all ships proceeding from Copenhagen to France had to pass through the Sound and had to pay a toll to the King of Denmark, that applied also to ships proceeding from other Baltic ports (such as Riga, Koningsberg and Reval) to France.

241 However, some Amsterdam merchants denied that this was the case.

242 And also no change of voyage: see further on this point ch XIII § 1.2 infra.
question were not carried for their account from Copenhagen to Elsinore. The important point to be deduced from the second ground for the decision, therefore, is that the *Hooge Raad* apparently regarded any breach of the duty to mention particular information on the policy as excusable if the insurer's risk was not increased as a result.

This view was confirmed in another decision of the *Hooge Raad* later in 1720 which also concerned a case where the insured goods were loaded at a place other than the place from where the risk commenced. Here, though, the risk was in fact increased as a result. It is further important to note that in this case the *Raad* also held that it was irrelevant that the increase in risk, as a result of which the failure to supply the necessary information was not excused so that the policy was in fact void, did not cause the loss in question.

---

243 The minority of the *Raad* held against the insured because they thought that Elsinore had not been mentioned in the policy as a place of loading as was required by s 3 of the Amsterdam *keur* of 1598, as amended, and further because Copenhagen and Elsinore were not neighbouring but in fact different places for this purpose.

244 See Van der Keessel *Praelectiones* 1450 (ad III.24.6) who stressed the point that the decision showed clearly that the (majority of the) *Raad* understood the words of s 1 of the Amsterdam amendment of 1699 (ie, 'dat de plaats van de Lading alleen zal behoeven uitgedrukt te worden, in zulke gevallen, als de goederen op een andere plaats geladen mogen zijn, dan van waar de Assurantie zyn aanvang neemen zal') to refer only to a more distant place where there was a greater risk (more distant, that is, from the destination), and not merely to a place past which the ship had to sail in any event (so that there was no greater risk). Accordingly, it was no defence that goods had been taken on board at such an intermediary place, even if it had not been mentioned in the policy, as long as the terms of the insurance did not expressly exclude that place specifically or such places generally (ie, as long as the policy did not prohibit the ship from entering such intermediary ports).

245 See Bynkershoek *Observationes tumultuariae* obs 1623; *idem Quæstiones juris privati* IV.10. In this case there was an insurance on goods loaded or to be loaded from the Swedish port of Staden and surrounding places for a voyage to America and the Spanish West Indies. When the ship was lost on her voyage, the insurer denied liability because the place of loading had not been expressed in the policy and because the insurance was as a result null in terms of s 3 of the Amsterdam *keur* of 1598 read with s 1 of the Amsterdam amending *keur* of 1699. The place where the goods were in fact loaded, was Hamburg, which was five German miles from Staden. According to the insurer, Hamburg was not an adjacent place but involved a greater risk. In a unanimous decision, the *Raad* held for the insurer and rejected the insured's claim. Firstly, it thought that the two places here were in different jurisdictions and so far from one another that they were not circumjacent. Consequently, s 1 of the Amsterdam amendment of 1699, in terms of which it was not necessary to express the place of loading if it was the same as the place from where risk was to commence, did not apply. But, secondly, the *Raad* felt that s 1 of the 1699 amendment had to be understood as referring to an increased risk and that it was not to apply if there was no increase in the risk as a result of the goods being loaded elsewhere. Here, though, there was in fact an increased risk for two reasons: the voyage was prolonged by the loading of goods at Hamburg, and furthermore, goods loaded at Staden, which was a neutral Swedish port, were not subject to capture by the French or Spanish while goods loaded at the German port of Hamburg were. The insured here, the *Raad* thought, although resident in Hamburg and insuring goods originating there on a German ship, purposely did not mention Hamburg but only Staden so as to obtain a cheaper rate of premium and that, clearly, was fraudulent. Possibly for that reason the *Raad* held the premium not recoverable. See further ch XI § 6.3.1 infra.

246 Thus, it was irrelevant in this case that the insured goods were not lost either as a result of the prolongation of the voyage or as a result of French or Spanish capture.
In the second place there were decisions dealing with the instances where insurance was concluded on a ship or cargo which had already departed and was at sea, and where the insured was under an obligation to mention that fact and the time of such departure.\textsuperscript{247} In this regard the Amsterdam amendment of 1688 was considered by the Hooge Raad in three cases. Two of them were heard in 1717 and the third in 1739.

In the first case\textsuperscript{248} a ship and her cargo were insured at Amsterdam for a voyage from Amsterdam and surrounding places ('\textit{van Amsterdam en de circumjacenten van dien}'). The insurers refused payment for the loss of the ship on her voyage because, at the time the policy was signed, the ship was no longer at Amsterdam but already in the roadstead at Texel ('\textit{op de reede van Tessel}') and this was not expressed in the policy as was required in terms of the Amsterdam \textit{keur} of 1688. The Raad, like the Hof van Holland, held for the insured though. Texel, it thought, being the roadstead for ships sailing from or to Amsterdam, was included in the term 'surrounding places' ('\textit{de circumjacentien}') so that the ship in this case had in fact not yet departed from her place of loading, that is, from Amsterdam.\textsuperscript{249}

In the other case on this issue decided by the Hooge Raad in 1717,\textsuperscript{250} the Raad interpreted the \textit{keur} of 1688 rather narrowly and, in this instance, in favour of the insured. The insurer here argued that at the time the contract was concluded, the carrying ship had already departed from the place from where the cargo on her was insured (and presumably loaded) but that nothing had been mentioned in the policy of that fact nor had any indication been given that the insured was ignorant of this matter as was required by the Amsterdam \textit{keur} of 1688. The policy here merely stated that the ship was still at the place of loading on a certain date. This point was not taken by the majority of the Raad who understood the \textit{keur} as to be concerned with the case where the insured had a certain knowledge ('\textit{zekere kennis}') of the departure (that is, where he knew the ship had departed) but was merely uncertain of the time of her departure. In the present instance the insured knew nothing of the departure and could in fact not have known anything, and he therefore merely made known what he did know or

\begin{itemize}
  \item \textsuperscript{247} As to the important topic of insurance concluded after departure and after loss, see further ch XII § 2 \textit{infra}.
  \item \textsuperscript{248} See Bynkershoek \textit{Observationes tumultuariae} obs 1332; \textit{idem Quaestiones juris privati} IV. See also Van der Keessel \textit{Praelectiones} 1450 (ad III.24.6).
  \item \textsuperscript{249} Furthermore, the Raad mentioned that in s 3 of the Amsterdam amending \textit{keur} of 1699 it was provided expressly what had in this case actually been stipulated in the policy, namely that under the name of the cities or towns from where a ship and her cargo would depart, would also be understood any outlying ports and roadsteads. This latter \textit{keur} was in fact promulgated after the insurance in this case was concluded (the case thus took more than eighteen years to reach the Hooge Raad!). But, the Raad pointed out, that \textit{keur}, and thus presumably also the stipulation in the policy before it, merely confirmed the common law, namely that a reference to a particular city or town included a reference to the port of that city or town. See further § 4.3 \textit{infra} for the interpretation of insurance contracts, and ch XII § 1.3.4 \textit{infra} for the meaning of 'surrounding places'.
  \item \textsuperscript{250} See Bynkershoek \textit{Observationes tumultuariae} obs 1363; \textit{idem Quaestiones juris privati} IV.7.
\end{itemize}
thought he did know, namely that ship was still at a particular place on a particular time.\textsuperscript{251}

The third case on the topic of a departure prior to the conclusion of the contract was heard in 1739.\textsuperscript{252} There the Hooge Raad held that, in terms of the Amsterdam keur of 1688, it was not sufficient in the case of an insurance of a ship, or of the cargo on a ship, which had already departed, that such departure be mentioned in the policy. In addition, the insured also had to add the time when such ship had departed. However, if the insurer himself had heard that fact from a source other than the policy before he had signed the policy, he could not rely on the insurer's failure to mention that fact in the policy itself.\textsuperscript{253}

A third and last matter on which Dutch courts had occasion to interpret the applicable legislative provisions, concerned the obligation on the insured to mention the name of the ship, whether the insured one or the one carrying the insured cargo, in his policy.\textsuperscript{254} A Hooge Raad decision in 1722\textsuperscript{255} held that a bona fide change of the name of the ship would not affect the contract, provided that the identity of the ship remained certain. Mention of the ship's name in the insurance policy was required so that it would be certain which ship was insured by that policy or, as in the present case, on which ship the goods insured by that policy were carried. Although a change of name could give rise to fraud upon the insurer, the Raad thought that where, as in the present case, the change had occurred in good faith and for an acceptable reason and it remained certain that the ship lost was actually the ship mentioned in the policy, the fact that the name of the ship in the policy differed from that of the ship lost did not render the policy

\textsuperscript{251} In terms of the keur of 1688, the fact and time of the ship's departure had to be specified in the policy, unless the insured was ignorant of that matter ('t zelve'), in which case such ignorance had to be expressed on the policy. The Raad therefore interpreted 'that matter' as referring not to the fact, or to the fact and the time of departure, but to the time of departure only. Upon reflection this was quite logical, of course. If the insured was unaware or ignorant of the ship's departure he could not be expected to specify that fact or his ignorance of it on the policy.

\textsuperscript{252} See Bynkershoek Observationes tumultuariae obs 3121; idem Quaestiones juris privat\textit{i} IV.17.

\textsuperscript{253} Here goods were consigned from Hull in England to Amsterdam. On 29 May the owner in Amsterdam received a letter, dated 20 May, in which it was stated that ship had departed from Hull the day before, on 19 May. On 29 May the owner had the goods insured and he stipulated in the policy that according to the letter of 20 May, the ship had already departed from Hull. The ship was lost on her voyage but the insurers refused payment and argued, amongst other things (they also argued that the insured had known of the loss, but could not prove that), that in terms of the Amsterdam keur of 1688 the insurance here was of no value because the time of departure, or the insured's ignorance of that time, was not expressed in policy in addition to the fact of the departure. The Raad held for the insured, the main or most convincing reason, according to Bynkershoek, being because it appeared that the letter of 20 May in which the time of departure was stated, had been shown to the insurers who had read it before they had signed the policy. The insurers here thus had exactly the same information as the insured, and it did not matter that that information had not been obtained from the insurance policy but in another way.

\textsuperscript{254} See generally eg Van der Keessel Theses selectae th 733 (ad III.24.6); idem Praelectiones 1450 (ad III.24.6); and Van der Linden Koopmans handboek IV.6.7.

\textsuperscript{255} See Bynkershoek Observationes tumultuariae obs 1819; idem Quaestiones juris privat\textit{i} IV.11.
void in terms of s 3 of the Amsterdam keur of 1598. Furthermore, as appears from a decision delivered in 1725, although it was required that the name of the ship in question be mentioned in the policy, in appropriate circumstances a description of the ship would suffice if such description clearly identified and distinguished the ship from all other vessels.

In this case an insurance was concluded on goods 'geladen in het schip le Thomas, Capitein Pierre Guion'. The carrying ship and the insured cargo were captured and declared prize by the English. It appeared from the letter of confiscation that the captured ship carrying the insured cargo, was in fact 'La Dauphin Galere' and not 'Le Thomas' as was stated on the policy. The insurer refused the claim on the policy and argued that the correct name of the ship had to be mentioned in the policy otherwise the insurance was null and void in terms of s 3 of the Amsterdam keur of 1598. In particular, the insurer pointed out, if a change in name was permitted without his knowledge, it could result in frequent frauds, since two ships under the same name could sail and he would not know which one sailed at his risk.

In evidence before the Raad it appeared that the old name of the ship here was in fact 'La Dauphin Galere' but that that was changed since the passport requested from the King of France for 'La Dauphin Galere' had not arrived in time to permit her to sail with a fleet about to leave, while a passport which had been obtained for a ship named 'Le Thomas' happened to be available at the place of loading. (As to passports and the concealment of the identity of ships, see again ch VI § 5.2.2 supra.) Amsterdam and French merchants declared by turbe that for purposes of such passports, the names of ships were often changed. Furthermore, in the present case, the name had been changed with the permission of the French Admiralty and as result all documentation referred to her new name, 'Le Thomas', as did the policy too. The reason why the English letter of confiscation still referred to the vessel by her old name, 'La Dauphin Galere', was because that name still appeared on her stern together with 'de beeltenis van den Dauphin'!

The majority of the Raad held for the insured on this point. It was certain that 'Le Thomas' and 'La Dauphin Galere' were the same ship. The change of name was not made in bad faith but merely so that the ship could sail with the fleet under a proper passport, even if through negligence her old name was not removed from her stern. The insured owner of the cargo on board the ship here acted in complete good faith, as appeared from his mentioning the correct name of the master of the ship. Thus, the Raad concluded, while a change of name could give rise to fraud, there was patently no question of any fraud in this instance.

In this case the insured cargo was described as 'de goederen in de Admirante' without the name of the ship or that of her master being noted (in the appropriate spaces) on the policy as was required by s 9 of the Middelburg keur of 1600. (Section 9 was identical to s 3 of the Amsterdam keur of 1598.) The insurer argued that this description was sufficient for everyone knew that in each Spanish fleet there was but one 'Admirante'. (Presumably this description referred to the ship of the Admiral of the fleet or the Admiralty's ship accompanying the fleet.) On the other hand, the insurer argued that each year's fleet had such a vessel. (A Spanish fleet sailed annually to and from the Americas.) The insurance here was concluded on 8 August 1696. From the evidence before the Raad it appeared that on 4 August 1696 the Spanish fleet had sailed from America and that the whole fleet, including 'de Admirante', had arrived safely, but that of the fleet which sailed in 1697, 'de Admirante' was lost. The Raad rejected the insurer's argument however. It noted that it was customary to insure goods which were about to be shipped or which had just departed and not to insure goods which would be shipped only in a year's time. Thus, the insurance here pertained to goods which were shipped on 'de Admirante' sailing with the fleet which had left in four days earlier on 4 August 1696. As that vessel had arrived safely, the insured had no claim against the insurer and the insurer was therefore, despite the sufficiency of the description of the carrying vessel, not liable on the policy. The Raad thought that what had most likely happened here, was that the insured, having heard of the loss of 'de Admirante' in 1697, had fraudulently attempted to claim on his policy on cargo safely carried in the ship of that description the year before.
4.2.6 Further Legislative Measures in the Eighteenth Century

The provisions on the content of insurance policies in the Rotterdam keur of 1721, although based on earlier provisions both there and in Amsterdam, were the most extensive yet.\(^\text{259}\)

In terms of s 32, one could insure goods or ships already departed on condition that that fact and the time of the departure were expressed in the policy. In terms of s 33, if the insured was ignorant of those matters, such ignorance had to be expressed in the policy. And in terms of s 34, if the insured omitted to express these matters ('by omissie van de expressie'),\(^\text{260}\) the insurance was null and of no value.\(^\text{261}\)

By virtue of s 71 of the Rotterdam keur of 1721, insurance policies had to express the name of the ship and of her master, unless that could not have been known by the insured. In that case, however, the notices ('advijfsbrief of Brieven') advising him of the shipment of the goods had to be attached to the policy, or at least shown to the insurers, and the fact that there were such notices had in any case always ('altoos') to be mentioned in the policy with an indication of the name of the person who had given the notice ('met expressie van de Naam van de gene die het Advjs gegeven heeft') and of its date. Any failure in this regard would result in the nullity of the insurance contract.\(^\text{262}\)

Section 72 of the Rotterdam keur of 1721 provided that in addition the policy had to express the place of loading, and, if the risk commenced from a different place, then

---

\(^{259}\) See eg Kracht 35-36.

\(^{260}\) That is, the fact and time of departure, or his ignorance of those matters.

\(^{261}\) The Rotterdam keur of 1721 in essence provided in three sections the same as that which had earlier been provided for in s 8 of the Rotterdam keur of 1604. See further ch XII § 2.2 infra as to Insurance after departure.

\(^{262}\) Unlike the equivalent provisions in Amsterdam legislation (s 3 of the keur of 1598, and also s 2 of the keur of 1744), the Rotterdam legislature did not either in ss 6 and 7 of the keur of 1604, nor in s 71 of the one of 1721, make provision for the broker to be liable in damages to the insured if the failure to mention the required information, and the consequent nullity of the contract, was his fault. According to Van der Keessels Praelectiones 1452-1453 (ad III.24.6), though, logic dictated that on general principles the position in Rotterdam was no different, provisions such as ss 21 of the keur of 1604 and 76 of the keur of 1721 (see ch IX § 7.3.2 infra) indicating that a broker would in such a case be liable for a breach of his duty to exercise skill and expertise.

In terms of s 57 of the Rotterdam keur of 1721, if in a policy on goods the name of the ship or her master was not expressed, as was required by s 71, and if it was not stipulated in the policy that a return of the premium was to take place in such a case, then the full premium had to be paid, or, if paid, then no return could be claimed. Thus, a return of premium in the case of a failure to specify the name of the ship or master only took place if so agreed in the policy. See further eg Van der Keessels Theses selectae th 762 (ad III.24.16) and ch XI § 6.3.2.1 infra as to the return of the premium.
also the place from where the risk was to commence. Further, the place of discharge also had to be stated. Again any failure in this regard would result in nullity.

In addition, the policy had to express, in terms of the catch-all s 73 of the *keur* of 1721, everything that was required by the *keur* to be expressed in the policy ("alles heet-geen by deze Ordonnantie geboden is daar in te expresseren"), similarly on penalty of nullity, while in terms of s 74, on the other hand, a policy could not include anything that was prohibited by the *keur*. Finally, in terms of s 75, contracting parties could not, by any form of stipulation, whether by way of renunciation or otherwise, confer any validity upon insurances in which was not expressed that which had to be expressed in terms of the *keur* on penalty of nullity. Thus, no contracting out was permitted in this regard.

The policies appended to the Rotterdam *keur* of 1721 made provision for blank spaces where the required information could be inserted.

Finally, the Amsterdam *keur* of 1744 likewise made rather extensive provision as to what an insured of necessity had to mention in his insurance policy.

A rather lengthy s 2 contained numerous prescripts in this regard. It provided that an insurance policy had to mention the name of the ship that would sail from the Netherlands to other countries or kingdoms, or would come from other countries to the Netherlands or to other countries or kingdoms. It also had to state the name of the master or the skipper who would have command of her. But if either of these facts ("t selve") were not known to the insured, such ignorance ("zulks") had to be mentioned in the policy, stating the name of person who gave the order to insure or the advice of the shipment of the goods ("met expressie van de naame van die gene die d'order of advys gegeeven heeft"), as well as the date of such advice or order ("advys of order-

---

263 Compare the provision in s 2 of the Amsterdam *keur* 1744 in this regard.

264 Sections 71 and 72 of the *keur* of 1721 thus retained in broad detail the provisions of ss 6 and 7 of the *keur* of 1604. See too, from the same period, the similar though less detailed provisions in Friesland in s 4 of title 28, book I of the *Vriesland Statuten* of 1716.

265 See Van der Keessel *Praelectiones* 1449 (ad III.24.6) whose explanation nicely illustrated the relationship between ss 71 and 72 on the one hand and ss 73 and 74 on the other hand.

266 For example, the policy on ships in local waters ("op Scheepen, leggende binnen deze Landen") provided for insurance 'op het Caske of Corpus van het Schip ... genaamt ... daar Schipper op is ... of wie in zyn plaatse voor Schipper zoude mogen varen, ..., [*], om te varen naar ... of de Circumjacentien van dien'. The policy on ships lying in foreign waters ('op Scheepen, leggende buiten 's Lands'), added here [*]: 'leggende tot ... of in de Circumjacentien van dien, om te varen naar ...'.

The policy on exports ('op Goederen, leggende of geladen binnen deze Landen'), provided for insurance 'op de Goederen, van wat soort of soorten dezelve zouden mogen wesen, bederfelyk of onbederfelyk, niets uytgezondert, geladen of nog te laden, in het Schip ... genaamt ... daar Schipper op is ... of wie daar voor Schipper in zyn plaats zoude mogen varen, ..., [**], om te varen naar ... of de Circumjacentien van dien'. The policy on imports ('op Goederen, leggende buiten deze Landen'), added here [**]: 'leggende tot ... of in de Circumjacentien van dien, om te varen naar ...'.

267 See eg Goudsmit *Zeerecht* 336.

268 It appears that this had always to be stated if the name of the ship was unknown. The Amsterdam provision was therefore clearer on this point than that of the Rotterdam *keur* of 1721.
The policy further had to express the place where the ship was to be loaded, and to which she would sail, also on penalty of nullity and invalidity ('nulliteit en onwaarde') of that obligation ('obligatie van Assurantie') if the omission was the fault of the insured. Although still null and void, the insured would have recourse against the person who had drafted the policy in so far as the defect or fault was his. In a proviso it was stated, though, that the place of loading had to be expressed only in cases where the goods would be loaded in a different place than that from where the insurance was to commence. The proviso added further that in the case of an insurance concluded on the hull of a ship as well as on a bottomry loan, whether on ships or goods, such mention of the place of loading was equally not required.

Although s 2 was not specifically mentioned, it most probably formed the basis for two concurring opinions delivered in Amsterdam in 1792, the first by lawyers on 7 March, and the other by notaries, merchants and insurers on 13 March. The opinions determined that insurers were not liable under an insurance contract concluded on cargo with an incorrect indication of the name of the ship (or her master) on which the insured goods were loaded, where it appeared that, at time of the conclusion of the contract, there was no such ship (or master) in the port from where the insurance was to commence as was stated in the policy. This was especially so if the name of the ship indicated in the policy implied and involved a lesser risk than that actually presented by the ship on which the goods were in fact loaded. The insurers were in such a case obliged, though, to return the premium they had received for the insurance.

---

269 It further provided that in such case (of ignorance), no return of premium could be claimed, unless the name of the consignors and of the consignees ('des Afladers naam of die 'er bewind van heeft,mitsgaders des geconsigneerdens naam') had been stated in the policy. See further ch XI § 6.3.2.1 infra as to the return of the premium.

270 This was apparently not possible in the case of an omission relating to the name of the ship or the master.

271 That is, not if the ship was loaded at the place from where the insurer was at risk. As to the commencement of risk, see ch XII § 1 infra.

272 Thus, in terms of s 2 of the Amsterdam keur of 1744, the place of loading had to be mentioned only when it differed from the place where the risk was to commence. By contrast, in terms of s 72 of the Rotterdam keur of 1721, the place of loading had to be mentioned and also the place where the risk was to commence if they were different. Van der Keessel Praelectiones 1450-1451 (ad III.24.6) unsuccessfully attempted to reconcile these two measures by stating that the place of loading had to be mentioned only where it differed from the place where the risk commenced, and that in such a case the place where the risk commenced too had to be mentioned.

273 Casus positien vol II cas 31.

274 The facts were briefly as follows. Two merchants, the one from Amsterdam and the other from Gand (Ghent or, as in the opinion, 'Gend') in 1792 chartered a ship called the 'George Washington', her master one Briggs and sailing under the American flag, to carry their wares to Boston. After she had already taken on the cargo and was already in the roadstead with her sails hoisted, the Amsterdam merchant (who had in meantime become unable to meet his obligations) was replaced by another merchant from the same city. The latter took over the charter of the ship and decided, no doubt in view of the continuing American War of Independence, to have her sail to Boston under a neutral German flag ('Keizerlijke Flag'), under the name of 'Joseph de Tweede', and under the command of another master, one Van Wyk.
Section s 3 of the keur of 1744 concerned insurances concluded after the departure of the insured ship or goods from the place of loading. In such a case the policy had to mention the time of such departure, it not being permitted and in fact being expressly prohibited to add a provision to the effect that an earlier or later departure would not prejudice the insurer ('zonder daar by te mogen voegen, dag vroeger of later vertrokken sal niet prejudiceeren'). If the insured had no knowledge of any departure from the notice advising the shipping of the cargo ('advysbrief'), the place and date of that notice had to be mentioned in policy, on penalty of nullity with, after the amendment of s 3 in 1775, a return of the premium to the insured.\textsuperscript{275}

In s 8 of the Amsterdam keur of 1744, the earlier provision regarding ships constructed from fir-wood was repeated. That fact, that is, that the ship was 'een Vuuren-blaas', had to be mentioned pertinently in the policy, on penalty, otherwise, that the insurers could not be held liable to compensate the insured for more than half of any loss or damage that occurred.\textsuperscript{277}

In terms of s 13, no insurance could be made on a ship or on goods before the ship had arrived at the place from where the insurance was to commence, except if it

\textsuperscript{275} That is, if he was unaware of whether or not the ship had already departed.

\textsuperscript{277} See further ch XI § 6.3.2.1 infra as to the return of the premium and ch XII § 2.2 infra as to insurance after a departure where the rest of this provision, including its amendment in 1775, will again be referred to.

\textsuperscript{277} See eg Van der Keessels Theses selectae th 717 (ad III.24.4); idem Praelectiones 1434-1435 (ad III.24.4); Weskett Digest 515 sv 'ship' par 10. Goudsmit Zeerecht 466 (and also Enschedé 18nl) notes that the Dordrecht insurance keur of 1775, which was otherwise identical to the Rotterdam keur of 1721, in s 75 followed the Amsterdam example in the case of an insurance of 'vuure of grijne schepen' by requiring that that fact had to be expressed in the policy. As to the construction of ships from fir-wood, see again ch V § 3.2.1 supra and also § 4.2.4 n229 supra.
was expressly stated in the policy that the ship had not yet arrived there, on penalty of
nullity.\footnote{278}{The reason, according to Goudsmit Zeerecht 337, was that there was then uncertainty about the time when the risk would commence, an uncertainty which could have had an influence on the premium. This was no doubt the case because premiums often fluctuated seasonally. See further ch XI § 2.1 \textit{infra} as to the determination of premiums.}

Again the policies appended to the \textit{keur} of 1744, as well as to the amending \textit{keur} of 1775, accommodated the information which had to be included in insurance policies.\footnote{279}{Thus, the hull policy in terms of the \textit{keuren} of 1744 and 1775 provided for insurance on the ship 'genaamt ... daar Schipper op is ... of wie in syn plaats voor Schipper of Schippers soude mogen varen'. The cargo policies in terms these \textit{keuren} made provision for the name of the ship on which the goods were loaded or to be loaded, and the name of the master of \textit{wie voor Schipper of Schippers in zyn plaats zoude mogen varen}, of \textit{hoe de naam van den Schipper of 't Schip anders zoude mogen georthographeert, gestelt of gespelt worden}.}

4.2.7 Insurance of Cargo 'on ship or ships' or 'in quovis'; Policies in Blank; and Floating Policies

In Roman-Dutch law an insured in principle, and on the pain of the nullity of his insurance, had to name the ship, and also her master, on which insured cargo was to be carried.\footnote{280}{See eg s 5 of the \textit{placcaat} of 1571; s 3 of the Amsterdam \textit{keur} of 1598; ss 6 (hull insurance) and 7 (cargo insurance) of the Rotterdam \textit{keur} of 1604; s 71 of the Rotterdam \textit{keur} of 1721; and s 2 of the Amsterdam \textit{keur} of 1744.

This appears to have been the practice from early on. In all the sixteenth-century policies investigated and compared by De Groote Zeeassurantie 110-111, the insured or carrying ship was named and on occasion also described with reference eg to size, owner, and port of origin. Similarly, all policies named also the master of the ship, on occasion with an indication that a replacement was acceptable.}

In the policy on cargo, the identification of the carrying ship served to identify the object of risk (the goods) and to distinguish the insured cargo from similar cargoes of that type. The identification of the insured goods as, for example, six bales of hemp was not precise enough for insurance purposes because the insured merchant concerned may have had several consignments of such goods coming and going at any given time. It was necessary to link the consignment of insured goods to a particular ship to enable its closer identification. In particular the role of naming the ship in the identification of the cargo became more important with the practice of not describing goods in any detail but of insuring merely 'on goods and merchandise', that is, of insuring on unnamed or unspecified goods. The name of the master, in turn, served to identify the ship in question and to distinguish her from other ships of the same name or description, something for which there was a need at a time when no formal registration of ships yet existed.\footnote{281}{Sneller 117 points out that as far as the name of the master was concerned, more latitude was obviously allowed than with the name of the ship itself. Thus, the master of the carrying ship was often named with the express recognition and acceptance of the possibility of a replacement.} In short, the identification of the ship and her master served, more generally, to describe the risk.
If not identified and particularised in this way, the insurance of goods on an unnamed ship or ships could give rise to various possible frauds upon insurers.\textsuperscript{282} Most obviously, an insured would have been able to extend the insurance cover, being over goods on an unnamed ship and thus of an unidentified consignment of goods, over numerous similar consignments coming within the description, if any, in the policy of the insured cargo and the risk taken over.\textsuperscript{283} In the case of a loss of or damage to any one of those consignments, the insurance could at the choice of the insured in effect have been applied to that particular consignment. The insured would thus in effect have insurance cover over several consignments for the price of the insurance of one single policy. In effect, if precautions were not taken, insurers could be kept at risk for prolonged periods and could be taken to cover many different consignments for the price of one, until eventually a loss did occur. Furthermore, should no loss or damage have occurred but should the goods have arrived safely, the insured could also have been in a position to claim a return of premium by alleging that no goods had in fact ever been sent to him on a particular ship, something which it would not be possible to verify because of the insured consignment not being tied to any particular ship.

Despite these possible frauds, though, the requirement of naming the carrying ship was impractical in certain circumstances. Put shortly, in the case of a consignment of goods expected from abroad, a local consignee may well have been ignorant of the name of the ship on which the goods would be shipped but at the same time desirous of immediate cover on the consignment of goods which he knew would be sent to him or which may in fact already have been sent to him.\textsuperscript{284} Because insurances of goods 'on an unnamed ship or ships', or insurance 'in quovis', was necessary and useful in practice, they had to be recognised and regulated by law.\textsuperscript{285}

\textsuperscript{282} See generally Weskett Digest 520-521 sv 'ship or ships' par 20.

\textsuperscript{283} That is, over similar consignments of the same goods, if their nature had been specified in the policy, and to or from the same ports, if the voyage on which they were insured had been described in the policy.

\textsuperscript{284} Where the insured was the consignee and the insurance was on goods expected from abroad, it was often uncertain, because of the lack of proper and speedy channels of communication, on which ship such goods would be or had been loaded. The merchant may have instructed his factor abroad to acquire particular goods there and to consign such goods on the first available ship. There was thus a need in practice for valid insurance to be concluded without this information having to be declared on his policy or at least before this information became known to the insured and could be declared on his policy. The insured could not be expected to wait until that information became known before he transferred the risk to the insurer. In fact, it could become known only once the goods he wished to insure, had arrived safely at their destination or after they had been lost en route.

\textsuperscript{285} Insurance on an unnamed ship or ships or, simply, 'on ship or ships', occurred where the name of the ship on which the insured goods were carried, was omitted from the policy. More specifically, it was an instance where the location of the insured goods in transit as an element of the description of the insured goods as an object of risk, or as a risk-describing device, was not relied upon. For this reason such policies were also referred to as 'floating policies', although that term seems to have had a more specific meaning (see infra). Being a policy in which the insured was given the freedom as to the ship on which he wanted to load the insured goods, it was also referred to as insurance 'in quovis'. This appears to have been a contraction of 'in quo nave vis'.
There was therefore a need for the legislatures to recognise insurance ‘on ship or ships’ as valid and to relax or create an exception to the requirement that the name of the ship and that of her master had to be expressed in the insurance policy. But, at the same time, in permitting the insurance of goods in this way, it was necessary to lay down additional requirements as a precaution to prevent frauds being perpetrated upon insurers.

Apart from the frauds flowing directly from insurance on unnamed ships alone which have already been described, the position of insurers was even more critical if, in addition to the name of the ship and her master, other information was omitted at the same time. Examples of such information included the nature of the goods, which was generally not required to be mentioned, the ports of departure and destination, which were statutorily required to be mentioned in the policy though, and the duration of the insurance. One further matter which in particular caused problems if it were omitted in the case of an insurance on an unnamed ship or ships, was the name or identity of the insured. Thus, the practice arose of concluding insurances for an unspecified person, on unspecified ‘goods and merchandise’, consigned on an unnamed and thus unspecified ship or ships, and possibly even without an indication of any limitation of the insurance as to voyage or time. Because the spaces provided for this information on printed policies were left open, such policies were known generally as policies ‘in blank’, although the use of the terminology in this regard was not always consistent or clear. Clearly, if the name or identity of the insured was not specified, the person taking out such insurance ‘in blank’ could then sell the cover he had obtained to another person, the range of possible sellers expanding in proportion to the number of matters not specified on the policy. Thus, he could in an appropriate although extreme case, sell the insurance to anyone who had any goods on any ship, that is, in so far as the unspecified nature of the insurance permitted it to be applied to any goods of any person being carried by any ship on any voyage.

In summary, insurance cover could be made to apply not only to different consignments of goods when the carrying ship was not specified, but also to the goods of

---

286 Often, no doubt, ‘interest or no interest’. See again ch II § 6.3.2 supra.
287 That is, for whomever the insurance may concern. See further ch X § 3 infra.
288 A policy ‘in blank’ in the general sense appears to have been one on which any or all of the matters which had to be mentioned on it, were not so stated. Accordingly, an insurance on goods ‘in ship or ships’ or ‘in quovis’ was also an insurance ‘in blank’ in this general sense.

More specifically, though, it appears (especially from English law: see § 4.2.9 infra), that the term policies ‘in blank’ referred to policies on which the identity of the insured, or the identity of the person affecting the insurance on account of or for benefit of or on the instructions of the insured, was not mentioned in the policy, that is, where the policy was, in effect, made payable ‘to bearer’. As to bearer policies, see further ch X § 4 infra.

289 No doubt at a considerable profit. Because of the unspecified nature of the risk the insurer took over, such insurance was in any event more expensive. See eg Raynes (1 ed) 183, (2 ed) 176.
290 And if, as was usually the case, such insurance was concluded ‘on good or bad tidings’ (see ch XII § 2 infra), it could be sold to someone who suspected if not knew about the loss of his goods at sea.
different consignors or consignees when the insured was not identified. And obviously, insurances 'in blank' would have given rise to sharp practices, especially if also at the same time an insurance 'on ship or ships'.

For that reason the Roman-Dutch legislatures, while permitting the useful practice of insurance 'on ship or ships', introduced a number of measures of control and safeguard, most commonly by requiring that in such cases of insurance on unnamed ship or ships the policy additionally had to mention certain other information not normally required.\textsuperscript{291}

The exceptional case where the name of the ship and her master was not or could not be mentioned in the policy, was not provided for in the early Dutch insurance legislation. Neither the \textit{placcaat} of 1571 nor the Amsterdam \textit{keur} of 1598 mentioned an exception to the requirement that, on penalty of nullity, the ship and her master had to be named in the policy. Although apparently in earlier times not permitted in practice if not in fact legislatively prohibited,\textsuperscript{292} such insurances '\textit{in quovis}', in terms of which the name of the ship was only supplied later, if at all, did occur and were later recognised in insurance practice in the Netherlands.

The Antwerp compilation of customary law, the \textit{Compilatae}, in the early seventeenth century in fact provided for insurances 'on ship or ships' in detail never even approached in subsequent municipal \textit{keuren}.\textsuperscript{293} Although the name of the ship and of her master were required to be mentioned by Antwerp customary law on the pain of nullity of the contract,\textsuperscript{294} very extensive provision was made for the situation where this was not possible and for safeguards to protect the insurer in such a case.\textsuperscript{295} In terms of art 31 of the \textit{Compilatae}, insurance on an unnamed ship or ships was permissible in the case of imports coming from further than London or Rouen\textsuperscript{296} when the insured expected merchandise but did not yet know on which ship or ships they would be consigned. In terms of art 32, though, it was necessary in such a case expressly to declare on the insurance policy the quantity and nature of the merchandise expected to arrive, as well as the name of the place or port from where the ship or ships would sail, as well

\textsuperscript{291} See especially Caarten, in particular 17-21 where the history of insurance '\textit{in quovis}' is treated.

\textsuperscript{292} In early Italian insurance practice it was not customary to permit the insured to insure goods '\textit{in quovis}', i.e., in whatever ship he pleased (see eg Bensa \textit{Assicurazione} 69-70), and the identity of both ship and master were required to be mentioned in the policy. See eg Straccha \textit{De assecurationibus} VIII and IX. Insurance '\textit{in quovis}' was also never allowed in Barcelona because of the fear of gambling and of insurance by non-owners (see eg Bensa \textit{Assicurazione} 106; Holdsworth \textit{History} vol VIII at 280; Sanborn 254 and 260). See too Reatz \textit{Geschichte} 229-232 on the designation of the ship and master in the policy in terms of the Burgos Insurance Ordinance of 1538.

\textsuperscript{293} See Mullens 37-39.

\textsuperscript{294} See again § 4.2.3 supra.

\textsuperscript{295} See arts 31-40 of par 2, title 11, part IV of the Antwerp \textit{Compilatae} of 1609 (see De Longé vol IV at 210-216).

\textsuperscript{296} Presumably because, in the case of voyages of that distance or longer, information on the name of the ship could sometimes not easily be obtained by the insured.
as the name of the consignor and consignee of the goods.\textsuperscript{297} Furthermore, in terms of arts 34 and 35, if the insurance was concluded on unnamed ships in this way, then the loading of the goods which the insured wished to bring under such insurance, had to take place, on penalty of nullity of the insurance, not longer than two, four, six or twelve months, depending on the port from where the goods were consigned, after the day that the first insurer underwrote the policy in question.\textsuperscript{298} Article 37 laid down that as soon as the insured had been advised of the name of the ship on which his goods had been loaded, he in turn had to advise his insurer within three days, failing which he not only forfeited his claim under the policy but also the premiums he had paid in terms of it. In addition, in terms of arts 38 and 39, special proof was required in the event of any loss where the insurance was on an unnamed ship or ships,\textsuperscript{299} and, in terms of art 40 and contrary to the general principles in this regard, an insured could not claim any return of premium in respect of a non- or short-consignment of goods insured on an unnamed ship or ships.\textsuperscript{300}

The way in which the municipal legislatures sought to counter the possibility of fraud in the case of an insurance of goods on unnamed ships was not only much less detailed than the provision made in Antwerp customary law, but also somewhat different.\textsuperscript{301} The respective provisions have already been referred to in a broader context in the preceding paragraphs and will be mentioned here but very briefly.

In terms of the Rotterdam \textit{keur} of 1604, if those facts, that is, the name of the ship or of her master, were not known to him, then the insured on the pain of nullity had

\textsuperscript{297} In addition, certain requirements were also laid down as regards the bills of lading on those goods. In terms of art 33, the 'cognossemmenten oft bekantenissen' which were accepted from the master for his receipt of the goods which were shipped on board such unnamed ships, had to be executed officially ('voor de weth van de plaetse, of ten minsten voor notaris ende getuijgen'), and the insured or his mandatary had to declare in the same way that the goods mentioned in those bills, were the same as those he had insured ('de selve sijn die hij heeft doen versekereri').

\textsuperscript{298} In terms of art 36, if the goods were not loaded within the prescribed periods, the insurance would be invalid. Thus, for goods loaded after that time, no compensation for any loss could be claimed from the insurers who would also be entitled to retain the premium.

\textsuperscript{299} In terms of art 38, the insured had to present 'wettige attestatie' of everything that was loaded within the prescribed time. And even if the insured later argued that a lesser amount had in fact been loaded than was stated in the policy, he would only be entitled to recover proportionally for such a loss ('sal evenwel de schade oft verlies over de geheele somme ende quantiteit van de goeden aldaer genoempt, vedeijlt ende genomen worden al oft die int geheel waeren gelaeden'). Likewise, in terms of art 39, if it appeared that more goods had in fact been loaded than was stated in the policy, the recovery for any loss would be calculated over the full amount loaded ('soude de verdeijlinghe geschieden over alle de gelaeden goeden, al oft die al onder de verseeckeringhe begrepen waren, sonder dat de verseeckeringhe, in den eenen oft anderen gevallen, d'een schip van d'ander sal mogen scheijden, oft daerop apaert vervolch doen, wat schade oft verlies op d'eene dan op d'ander soude mogen gevallen sijn').

\textsuperscript{300} See ch XI § 6.2.1 \textit{infra} as to the return of the premium.

\textsuperscript{301} Although the topic was regulated in Rotterdam in 1604 and in 1721, with Amsterdam following suit only in 1744, it must be remembered that in practice the situation may well have been provided for by the insertion of appropriate clauses in insurance policies.
to declare his ignorance of those facts on his policy and he also had to attach to the policy the notice ('advijs') that he had received of the loading of his goods, or to show it ('t selve', that is, the notice) to his insurer, and declare it in the policy with an express mention of the name of the person who had given the notice ('advijs') and its date. In the case of a failure to comply, there was no return of premium in this case.

In terms of the Rotterdam keur of 1721, if the name of the ship or of her master could not be known to him, then, in terms of s 71, the insured (who no longer had to declare his ignorance on the policy), again on the pain of nullity, had to attach to the policy the notice(s) ('advijsbrief of Brieven') of the shipment of his goods, or at least show it to the insurers, and the fact of the notice ('daar van') had in any case ('altoos') to be declared in the policy with an indication of the name of the person who had given the notice ('met expressie van de Naam van de gene die het Advijs gegeven heeft') and of its date. In the case of a failure to comply, there was a forfeiture of the premium only if such forfeiture had been agreed upon.

Finally, in terms of s 2 of the Amsterdam keur of 1744, on the pain of nullity, if either the name of the ship or that of her master was not known, then such ignorance ('zulks') had to be stated in the policy, stating the name of the person who gave the order to insure or the advice of the consignment of the goods ('met expressie van de naam van die gene die d'order of advys gegeven heeft'), as well as date of such advice or order ('advys of orderbrief'). In the case of such an insurance, that is, on ship or ships, no return of premium could be claimed, unless the name of the consignors and consignees ('des Afladers naam of die 'er bewind van heeft, mitsgaders des geconsigneerdens naam') were mentioned in the policy.

It seems that the advice or notice (advysbrief) referred to a letter received prior to the conclusion of the insurance in which the insured was notified by a third party that goods had been bought for him and had been or would be sent to him, whereas the order (orderbrief) referred to the letter in which the representative or mandatary of the insured instructed that insurance was to be concluded on certain goods. By alerting the

---

302 In terms of s 7, but not in terms of s 6, of the Rotterdam keur of 1604.

303 Compare too the very similar provisions in s 2 of the Rotterdam keur of 1604 in respect of insurance on return cargoes. See again ch V § 5.3 supra.

304 See s 18 of the keur of 1604.

305 As opposed to the 'were not known to him' in the keur of 1604.

306 According to Magens Essay vol I at 13, in terms of s 71 the name of the person ordering the insurance, with the date of the order or of the letter of advice, had to be set forth in policy in the case where the name of the ship was not known.

307 See s 57 of the keur of 1721.

308 There were thus two possibilities.
insurer in the policy to the existence and contents of such correspondence, it was hoped to make it more difficult for the insured to defraud him.\textsuperscript{309}

Therefore, insurances of goods 'on ship or ships' was permitted in Roman-Dutch law, but in the case of such an insurance the identity of the particular consignment covered by the insurance had to be specified in another way which was broadly but not exactly the same in the various keuren.\textsuperscript{310} Most clearly, in the Amsterdam keur of 1744, insurance 'in blank' was not permissible in such a case.\textsuperscript{311}

Insurance 'on ship or ships' or 'in quovis' could not be used where it was not known that a particular shipment of goods from a particular place had been made or was about to be made, that is, where the insured had no letter of advice (\textit{advijsbrief}) to that effect. Another form of insurance was required to cover possible but unspecified and unspecifiable shipments or shipments anticipated over a period of time but where the insured was not in a position to conclude insurance 'on ship or ships' in good time. By an extension of the notion underlying insurances 'on ship or ships', insurances in such cases came, in the nineteenth century, to be concluded by way of what was known as 'general' or 'floating policies'. In the course of that century, these policies overtook insurances 'on ship or ships' as the only way to insure goods in unknown consignments on unknown ships. They were characterised by the requirement that the insured had to declare consignments as and when he became aware that they were made. Occurring in various forms and with various limitations and conditions to protect insurers, floating policies came to be regulated in Dutch law largely by practice and stipulations in the cargo policies themselves.\textsuperscript{312}

4.2.8 The Position Elsewhere and in the \textit{Wetboek van Koophandel}

Roman-Dutch law was not alone in requiring the insured to mention certain matters in his insurance policy.

\textsuperscript{309} See Caarten 51-52.

\textsuperscript{310} In terms of the Rotterdam \textit{keur} of 1604, if the name of the ship was not known, the insured had to declare his ignorance in the policy, and either the notice had to be attached to policy or shown to insurer with a mention in the policy of the name of the person who gave the notice and its date.

In terms of the Rotterdam \textit{keur} of 1721, if the name of the ship could not be known, the insured either had to attach the notice to the policy or show it to insurer, and he also had to mention in policy the name of the person who gave the notice and its date.

In terms of the Amsterdam \textit{keur} of 1744, if the name of the ship was not known, the insured had to declare his ignorance in the policy and mention in the policy the name of the person who gave the notice or order and its date.

\textsuperscript{311} See also Voorduin vol X at 293 who notes that in Roman-Dutch law an indication of the name of the original insured was compelled only in the case of an insurance on goods to be carried on unnamed ships.

\textsuperscript{312} See further Caarten 85-108.
Thus, in Hamburg the Dutch position was followed in the seventeenth century and the position was later formally regulated in detail along equivalent lines in the Hamburg Assecuranz-Ordnung of 1731. Section 4 of title I mentioned seven matters to be stated in the policy, namely the name of the person insuring (‘der Nahme dessen, der die Assekuranz thun lasset’), although the Ordinance did permit the policy to be made payable to bearer; the name of the object insured; the time when the ship departed from the place where the risk commenced; the place of loading and of discharge; the name of the ship and her master; the amount of the premium; and the name of the broker involved.

The insured in Hamburg thus bore only a fragmented duty to disclose certain statutorily prescribed information to his insurer. The casuistic enumeration of individual matters in respect of which there existed a duty of disclosure, resulted in the legal consequences of non-disclosure also being regulated rather casuistically in Hamburg insurance law. The most common consequence was invalidity and, if there was fraud, a forfeiture of the premium. In addition to the rather comprehensive statutorily imposed duty of disclosure as regards individual matters, supplemented as they were in practice by the insurers’ own attempts, including the insertion of appropriate clauses in policies, to obtain further information from the insured, an abstractly formulated general duty to disclose all facts of which the insured was aware and the insurer unaware and which could increase the risk, evolved in German law only gradually and emerged fully only in the course of the nineteenth century.

The already detailed provisions in Roman-Dutch law with regard to the contents of insurance policies formed the basis of the subsequent codification of the law on the topic in the Dutch Wetboek van Koophandel. However, by then the list of matters to be

---

313 Thus, the Accord (‘Vergleich’) of Hamburg insurers of 17 March 1697 provided that, as was customary in Holland, the person taking out the insurance had to inform the insurer comprehensively about the ship and the goods to be insured. See Dreyer 61-63.

314 See further Dreyer 119-120 and 129-133. Although the Hamburg Ordinance did not eg provide for the fact that the ship was built of fir-wood (‘Föhrenholz’) to be stated in the policy, Hamburg policies contained clauses limiting the insurer’s liability if that fact was not disclosed. See Frentz Hamburgische Admiralitätsgericht 148-150.

315 See Hammacher 125. At 126 he notes that in terms of the Prussian Allgemeines Landrecht of 1794, there were two possible consequences of non-disclosure. On the one hand, the non-disclosure of circumstances required in terms of statutory prescriptions, did not result in the invalidity of the contract but merely in the exclusion of the insurer’s liability for any loss caused by the non-disclosed circumstance (thus, a causal link was required between the non-disclosed fact and the loss). On the other hand, the non-disclosure of a matter required to be disclosed in terms of a general clause in the policy requiring such disclosure, rendered the contract null and void.

316 See Hammacher 122-123 who sees the first signs of a more general duty in art 12 title IV of the Hamburg Assecuranz-Ordnung of 1731 which concerned the question of insurance after the departure of the ship or cargo.
mentioned had grown considerably, the marine policy having to contain information on some fourteen separate matters.\footnote{317}{See generally Enschedé 19-20 and 22 who considers the French influence to be the main reason for the tremendous increase in the number of matters which had to be mentioned in the policy.}

In terms of art 256-1 of the Wetboek, all policies,\footnote{318}{With the exception of policies of life insurance, the prescribed content of which is separately regulated in art 304.} must contain the following matters: the date on which the insurance contract was concluded;\footnote{319}{Which, of course, is not necessarily the same as the date on which the policy was issued or signed.} the name of the person concluding the insurance for his own account (that is, the insured) or for that of a third party;\footnote{320}{In the case of an insurance in favour of a third party, it must expressly be mentioned in the policy whether the insurance is concluded by virtue of an instruction ('lastgeving') or without the knowledge of the interested party (see art 265). In terms of art 267, if no mention is made in the policy that the insurance is made for the account of a third party, the person who concludes the contract is regarded as having concluded it for himself. As to insurance for another, see further ch X § 2 infra.} a sufficiently clear description\footnote{321}{As opposed, it seems, to a specified one. At least in terms of art 596-1, if the insured is ignorant as to what the goods sent or to be sent or consigned to him consist of, he may conclude the insurance on them under the general term 'goods'.} of the object of risk which is insured;\footnote{322}{Which is not the same as the value of the object insured (see ch XVII § 2 infra as to the sum insured). That must be specified, though, in the case of marine policies.} the amount or sum for which it is insured;\footnote{323}{In terms of art 251, all incorrect or untrue representations ('opgave'), or all non-disclosures ('verswijginge') of circumstances known to the insured, however much he acted in good faith ('hoezeer te goeder trouw aan diens zijde hebbende plaats gehad'), which are of such a nature that the agreement would not have been concluded, or not on the same conditions, had the insurer known of the true state of affairs, avoid the contract (ie, renders it 'nietig').} the perils that the insurer takes for his account;\footnote{324}{This nullity \textit{ab initio}, though, is at the option of insurer, and it is therefore rather a matter of avoidability of the contract. Furthermore, the good faith of the insured is only relevant in this context in that he cannot in terms of art 281 recover any premium in the absence of such good faith.} the time when the risk commences and terminates for the insurer; and\footnote{325}{Article 251 had no direct antecedent in Roman-Dutch law. It first appeared in earlier drafts of the Wetboek van Koophandel (eg in arts 74-76 of the Ontwerp Wetboek of Van der Linden). Its origin is not clear although it appears that art 348 of the French \textit{Code de commerce} as well as Van der Linden's} the premium of insurance. In terms of art 256-2, all policies must contain, in general, all circumstances of which knowledge may be of material importance to the insurer. This latter aspect, therefore, confirms the existence of a general duty of disclosure in modern Dutch law, a duty specifically regulated by art 251.

A failure to mention any matters other than those specified in art 256-1 does not invariably result in the nullity of the insurance agreement, but only does so if they concern a material fact known to the insured. In that case art 251, which provides for a more general duty of disclosure, finds application.\footnote{323}{However, art 251 does not require}
a disclosure or description in the policy, so that the absence of any mention of a particular matter in the policy is only relevant if it is material and if the insured cannot otherwise - than with reference to the policy - prove that he had disclosed it to his insurer. Put differently, only non-disclosure of this information, and not its mere absence from the policy, renders the insurance void.

In terms of art 592-1 of the Wetboek, a marine insurance policy must contain, in addition to the matters required by art 256, also the name of the master, that of the ship with an indication of her type and, if it is an insurance on hull, a statement whether she is constructed of fir-wood ('van vuren hout') or a statement that the insured is ignorant of that fact; the place where the goods have been loaded or will be loaded; the port from where the ship is to depart; the port where the ship is to load and discharge; the ports she may enter on her voyage; the place from where the risk commences to run for account of the insurer; and the value of the insured ship.

Insurances on unnamed ships are regulated in art 595 of the Wetboek. In terms of art 595-1, if the insured is ignorant of the ship on which expected imports ('van buiten 's lands verwacht wordende goederen') were or are to be loaded, he need not mention the name of the ship or her master, on condition, though, that a declaration is included in his policy as to his ignorance as well as a note of the date and identity of the person who sent the last notice or order ("advijs- of orderbrief"). This declaration of ignorance on the policy merely serves to alert the insurer to the fact that it is an insurance 'on ship or ships' or 'in quovis', and any failure to do so does not, as it did in Roman-Dutch law, automatically result in the nullity of the contract. But a failure to mention the last notice or letter of advice, which serves to establish the insured's ignorance and to facilitate proof of the insured goods, does render the insurance null. It is uncertain what the position will be if there is no such letter or notice.

Ontwerp may have had an influence on art 531 of the Ontwerp Wetboek of 1809 from where the current art 251 was derived via the Ontwerpen of 1822, 1825 and 1835. See generally Van der Burg 'Codificatie' 7-10; idem 'Code de Commerce' 148-149; and Dorhout Mees Schadeverzekeringsrecht 214 and 226.

324 See further Asser NBW 224 who notes the antecedent provision in s 8 of the Amsterdam keur of 1744; Lipman 229; Van Renays 339; and Voorduin vol X at 275-277 who stresses that the obligation to indicate if the ship is of fir-wood arises only in a policy on hull but that a similar need for disclosure may well exist also in the case of a cargo policy.

325 For the matters which a policy on goods to be carried overland or on internal waters must mention in addition to those required by art 256, see art 686. For a similar provision concerning fire policies, see art 287.

326 See generally Dorhout Mees Schadeverzekeringsrecht 536-537.

327 There is no need to extend the precautionary provisions to goods consigned locally and destined abroad, for any ignorance of the name of the ship in such circumstances is unlikely. Even if the insured is a consignee abroad, his local representative concluding the insurance locally has the necessary knowledge not to have to conclude an insurance 'on ship or ships'. Of course, with the increased efficiency of international communications, the absence of knowledge even in the case of imports gradually became less and less likely so that the need for insurance 'in quovis' was destined to disappear in practice.
The *Wetboek van Koophandel* also introduced a further precautionary measure, one found only in the Antwerp customary law and never in Roman-Dutch legislation. In terms of art 595-2, the insured’s interest can be insured by way of an insurance ‘on ship or ships’ only for a limited period of time. The intention here is to prevent an insurance ‘in quovis’ from being transferred to a subsequent voyage, and to limit the duration of the period for which the insurer will be at risk. And in terms of art 650, as was the position in Antwerp customary law, the insured must prove that the goods so insured, were loaded within that time on the ship in question.

As far as an insurance after the departure of the ship or goods is concerned, art 603-1 of the *Wetboek* allows insurances to be concluded on ships and goods which have already departed or been carried from the place from where the risk is to run for the insurer, on condition that there is expressed in the policy either the true moment of departure of the ship or goods, or the insured’s ignorance of that fact. Article 606-1 deals with the opposite situation, namely with an insurance on a ship which is not yet at the place from where the risk is to commence or which is not yet ready for the commencement of the voyage or to receive her cargo, and with an insurance on cargo which cannot be loaded immediately. It provides that in such cases the insurance is void, unless those circumstances are mentioned in the policy or unless it is mentioned there that the insured is ignorant of those matters. Then the notice or order (‘den advijs- of order-brief’) must be mentioned in the policy, or a declaration included that no such document exists, as well as, in all cases, a declaration of the last news that the insured had received of the ship or the cargo.

4.2.9 The Content of Insurance Policies and the Duty of Disclosure in English Law

In the absence of general insurance legislation, authority in English law on whether any matters, or which matters, were required by law to be mentioned in insurance policies, is scattered but not totally absent.

In a draft prepared in 1748 by a Committee appointed by the House of Commons to consider the better regulation of insurances on ships and goods, resolution 2

---

328 Accordingly, such an insurance can be concluded by way of a time policy, but an insured cannot insure goods ‘in quovis’ for a voyage from X to Y unless it is specified that the insurance will be valid only for a specified time.

329 In practice the position of the insurer is further safeguarded by the insertion of special clauses, eg one requiring that the insurer be notified of the name of the ship as soon as the insured becomes aware of it (cf again the Antwerp customary law where this duty was also known); or by specifying or excluding certain ships or types of ships; or by specifying or excluding certain types of goods; or by specifying or excluding certain voyages. See further Caarten 48-50.

330 In terms of art 603-2, the policy must in all cases, on penalty of nullity, mention the last news (‘tijding’) which the insured has received of the ship or the goods.

331 See further Dorhout Mees *Schadeverzekeringsrecht* 534-535 who notes that art 608 is an application of art 251. The fact that it is uncertain when the risk will commence, is regarded as of such importance that a non-disclosure or incorrect representation of that fact will avoid the insurance.
required the insured to specify in policies on ships the vessel’s value and tonnage and whether she was British or foreign built. In the case of insurances on goods from any port in Europe, the insured had to state for whose account the insurance was made, and where the goods were shipped from any port in Asia, Africa or America, he further had to state to whom the goods were consigned. Furthermore, by resolution 6, where the insured or his broker provided important information or a warranty (undertaking) to the insurer relating to the insured ship or goods, such information or warranty was to be inserted in the policy, no proof being subsequently admitted that any representation or warranty had been given other than those inserted in the policy.  

In 1755 Magens noted a number of matters which it was essential to express in insurance policies: the name of the person for whom the insurance was made; the thing insured; the name of the place of loading, the destination and the time the risk was to commence and terminate; the perils insured against; the premium received, with the name of the broker involved; the amount payable in case of loss and when it was due; the date the policy was executed; and any news or advices relating to the adventure received at the time of making the contract.

Around this time the existence of a duty of disclosure upon an insured was first recognised in English law. It made its rather sudden appearance in 1766 in the decision in *Carter v Boehm*. The duty was based on the Roman law duty of good faith as developed in European civil law systems and which had entered the English Common Law of contract through the Admiralty Court in the course of the sixteenth century, replacing, at least in the case of contracts of sale and certain others, the Common Law rule of *caveat emptor* or analogous notions in other contracts. But what was no doubt then already an accepted principle in commercial law and practice, was only formally recognised and developed as part of the Common Law during the latter half of the eighteenth century under the guidance of Lord Mansfield.

The principle was rather narrowly stated in *Carter v Boehm*, and was in fact interpreted in the eighteenth century as arising only in respect of facts within the exclusive knowledge of the insured as opposed to facts which the insurer could himself have discovered upon a reasonable inquiry, or in respect of facts which the insurer could not in the circumstances have realised or suspected. The insurer’s duty to enquire was at

---

332 See further Raynes (1 ed) 166-167, (2 ed) 161; Wright & Fayle *Lloyd’s* 162-163.

333 To this the following declaration was commonly added: ‘for his own or any other person’s account’. As to insurance for another, see further ch X § 2 *infra*.

334 See Magens *Essay* vol II at 3 who referred in this regard to art 4 title i of the Hamburg *Assecuranz-Ordnung* of 1731 and s 2 of the Amsterdam *keur* of 1744.

335 (1766) 3 Burr 1905, 97 ER 1162. The decision is also less extensively reported in (1766) 1 Black W 593, 96 ER 342. As to the origin of the duty of disclosure in English insurance law, see generally Davis.
least as extensive as that of insured to disclose. Although this narrow view was at first followed in the nineteenth century, by a quirk of history and the quotation of certain passages out of context to the exclusion of others, and no doubt because of changed circumstances in the relationship between insured and insurer, Carter v Boehm came in the course of the nineteenth century to be regarded as authority for the existence in English law of a general duty upon the insured to disclose all material facts to the insurer while the latter was relieved of any responsibility whatsoever to obtain any

336 See further in particular Hasson 'Ubertima Fides' 616-618 who notes that it is clear from the judgment in Carter v Boehm (one which in fact went against the underwriter) that Lord Mansfield placed a responsibility on the insurer to obtain the relevant information. The duty on the insured extended only to information in his private knowledge and of which the insurer had no inclination or suspicion whatsoever. As soon as the insurer was put on guard by the circumstances of the insurance, there was a duty on him to enquire. The duty on the insured to disclose information was therefore a very narrow one. This is confirmed by the fact that Lord Mansfield thought that the principle of disclosure and the duty of good faith were applicable to all contracts as was the case in civil law. See further also Harnett 397 and 398-399; Holdsworth History vol XII at 536.

Subsequently in the eighteenth century, the insured's duty was in fact even further restricted in cases decided by Lord Mansfield, all of which, incidentally, went in favour of the insured. Thus, in Mayne v Walter (1787, quoted in Park System (8 ed) 431), Lord Mansfield stated that it must be a fraudulent concealment of circumstances which will vitiate a policy (on this point, see Achampong 331); in Noble & Another v Kennoway (1780) 2 Doug I 510, 99 ER 326 it was held that the insurer was under an obligation to inform himself of the practice of the trade he insured, regardless of whether or not such practice was established; and in Court v Martineau (1782) 3 Doug I 161, 99 ER 591 it was held that a waiver by the insurer of information could be inferred from the fact that the insurer had charged the insured a very large premium.

337 See eg Friere v Woodhouse (1817) 1 Holt NP 572, 171 ER 345 where it was noted that an insured must disclose what is exclusively known to him, but not what an underwriter may by fair enquiry and due diligence learn from ordinary sources of information.

338 The following neat statement by Lord Mansfield in Carter v Boehm (at 1909, 1164) was quoted to the exclusion of almost everything else from his judgment and it was read as requiring a very wide duty of disclosure on the part of the insured:

'Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention; yet still the under-writer is deceived, and the policy is void; because the risque run is really different from the risque understood and intended to be run, at the time of the agreement'.

Other statements in the judgment, however, indicate a more circumscribed risk. Thus, to refer to a few at random (at 1909-111, 1164-1165):

'Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary. But either party may be innocently silent as to grounds open to both, to exercise their judgment upon.... There are many matters, as to which the insured may be innocently silent - he need not mention what the under-writer knows ... [or] what the under-writer ought to know; what he takes upon himself the knowledge of; or what he waves being informed of. The under-writer needs not be told what lessens the risque agreed and understood to be run by the express terms of the policy. He needs not to be told general topics of speculation .... The reason of the rule which obliges parties to disclose, is to prevent fraud, and to encourage good faith. It is adapted to such facts as vary the nature of the contract; which one privately knows, and the other is ignorant of, and had no reason to suspect'.

See further in particular Hasson 'Ubertima Fides' 616-618 who notes that it is clear from the judgment in Carter v Boehm (one which in fact went against the underwriter) that Lord Mansfield placed a responsibility on the insurer to obtain the relevant information. The duty on the insured extended only to information in his private knowledge and of which the insurer had no inclination or suspicion whatsoever. As soon as the insurer was put on guard by the circumstances of the insurance, there was a duty on him to enquire. The duty on the insured to disclose information was therefore a very narrow one. This is confirmed by the fact that Lord Mansfield thought that the principle of disclosure and the duty of good faith were applicable to all contracts as was the case in civil law. See further also Harnett 397 and 398-399; Holdsworth History vol XII at 536.
information himself. By the time of the codification of the English law of marine insurance in the twentieth century, the existence of a general duty of disclosure had come to be accepted. Thus, after declaring in s 17 of the Marine Insurance Act 1906 that the contract of marine insurance is a contract based not just upon good faith but the utmost good faith and that it is avoidable in its absence, s 18(1) imposes a duty upon the insured to disclose to the insurer, prior to the conclusion of the contract, every material fact not only of which he has knowledge but also of which, in the ordinary course of business, he ought to have knowledge.

The practice of insuring goods 'on ship or ships' was known in English law from early on. Thus, it appears that one of the types of insurance available in London in the 1570's was an insurance on future voyages where the goods, the ship and her master were not named. Omitting to mention certain matters was not always advisable, though, and in 1676, for example, Molloy warned against the practice of not stipulating the destination of insured goods in insurance policies. The practice, increasingly common in the eighteenth century, of effecting insurances 'in blank', that is, without specifying the name of the insured affecting the insurance or of the person on whose account or for whose benefit the insurance was effected, no doubt gave rise to the opportunity for fraud, if not to actual frauds upon insurers, especially if in addition the name of the ship or a description of the goods was also omitted from the policy.

339 See further Hasson 'Uberrima Fides' 618-621 for developments in the nineteenth century. Writing in the 1870's, eg, Walford Cyclopaedia vol II at 28-38 sv 'concealment' already stated the principle widely, noting that it was a general principle of all mercantile states and of the uniform decisions of the courts at Westminster that the suppression or concealment of material information, whether fraudulent or not, vitiates the policy.

340 See on this Idelson 356; Buys 33 notes that s 18 of the Marine Insurance Act is wider in its scope that art 251 of the Wetboek van Koophandel.

341 See Kepler 'London Marine Insurance' 49. See too Blackstock 21-22 who refers to an Admiralty suit in De Salizar v Blackman on a policy dated 1555 which covered 'all kindes of merchandises' to be laden on a specified ship. In the libel it was alleged, according to Blackstock, that the insurers were liable if they did not within two years or one year of the ship sailing, certify or inform the insured of the goods insured (it appears that this must be: the insurers are not liable if they were not informed by the insured) for, as Blackstock speculates, this probably referred to the usage that in case of such an openly worded policy, there was a duty to declare the nature of the objects insured within a certain period of time, something which only the insured, and not the insurers, could do.

342 See Molloy De jure maritimo II.7.14. He warned that if the destination of insured goods was left blank, eg to prevent enemy capture, and the ship was lost on her voyage, even though there were private instructions to the master as regards her port of destination, the insured would by reason of the uncertainty have to 'sit down by the loss' (bear the loss himself?). Likewise, if the value of the ship or cargo was left blank, he warned, the insured may endanger his policy. See too Walford Cyclopaedia vol I at 325 sv 'blank policies' who referred to the apparent custom in earlier days to leave 'blanks' in the policy, eg where as ship was insured 'from London to ...', a practice which arose with a view to prevent capture as a result of the destination of the ship being revealed. See also Weskett Digest 520-521 sv 'ship or ships' par 20 on the hazards of insuring of goods in policies expressed to be 'on any ships or ships', ie, insurance on blank policies.

343 See Weskett Digest 368 sv 'name' who noted that the practice of leaving blanks for the insured's name in policies on ships and goods opened the door for frauds.
Not surprisingly the Legislature acted in this regard. In 1785 an ‘Act for Regulating Insurances on Ships, and on Goods, Merchandizes, or Effects’ was passed to prevent and render void insurances ‘in blank’. The Act compelled, on threat of illegality, the insertion of the name of the insured or that of his agent in insurance policies on ships or goods. This proved unsatisfactory in practice and the Act was repealed three years later by the Marine Insurance Act of 1788 which repeated the provisions in this regard in a somewhat more precise and practical form. The new measure provided for the insertion of the name of the person ‘interested’ in the insurance, or, ‘instead thereof’, of 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. Policies not containing this information were declared void.

However, although policies ‘in blank’ were voided, floating policies ‘on ship or ships’ continued to meet an important need in practice. For example, where goods expected from abroad were insured locally, the merchant wishing to insure was often uncertain on which ship, and therefore when, his goods would be consigned. He then insured the goods ‘on board any ship or ships’, on the condition, though, of having to declare on the face of the policy as soon as he became aware of it, and if possible before any loss, the name of the ship or ships on board which goods had actually been loaded.

The legality of the practice of effecting floating policies ‘on ship or ships’ was judicially affirmed in England in 1794 in Kewley & Another v Ryan. Faced by an insurance ‘on any kind of goods as interest should appear, in ship or ships’, the Court held that the legality of a policy ‘on ship or ships’ was well established by both usage and authority, and that an insured clearly had the right to apply such insurance to whatever ship he thought proper within the terms of the policy in question.

Also in fire insurance ‘general policies’ came to be issued at the end of the eighteenth century, for example on the contents of warehouses which constantly fluctuated.

344 25 Geo III c 44.

345 28 Geo III c 56.

346 See Wright & Fayle Lloyd’s 173-174. Earlier, in 1774, the Life Assurance Act (14 Geo III c 48) in s 2 declared policies on lives unlawful if the name of the person interested, or for whose use or benefit, or on whose account such policy was concluded, was not inserted in them. Section 4 of this Act specifically declared that it did not apply to insurance bona fide concluded by any person on ships, goods, merchandises. See further too Blackstock 53; Dover 47; Raynes (1 ed) 168-169, (2 ed) 163; and Weskett Digest 368 sv ‘name’.

347 This explanation is that of Walford Cyclopaedia vol II at 239 sv ‘declaration of interest’.

348 (1794) 2 H Bl 343, 126 ER 586.

349 At 347, 589.

350 The policy here eg stated that it covered goods shipped on behalf of insured merchants, on or before a certain date. The insured wanted cover for the goods which they intended to ship on board some or other ship which was to sail with the first available convoy from Grenade to Liverpool.
in value and quantity as stock came and went and where it was accordingly difficult to assess the sum insured for precisely. Such policies provided cover up to a stated amount for all goods in named warehouses without assessing the specific sum on each of them. From such 'general policies' developed 'floating policies' where the insured was not even required to identify the place where the insured property would be housed.\(^{351}\)

These matters came to be reflected in codified form in the Marine Insurance Act of 1906. Section s 23 of the Act of 1906, which Act repealed the Marine Insurance Act of 1788, requires that a marine insurance policy must mention (i) the name of the insured or of the person who effects the insurance on his behalf;\(^{352}\) (ii) the subject-matter insured and the risk insured against; (iii) the voyage and/or the period of time covered by the insurance; (iv) the sum or sums insured; and (v) the name or names of the insurers.\(^{353}\) The Lloyd’s policy appended to the Marine Insurance Act of 1906 too provides for the insertion of information as to the identity of the insured, the name of the ship and her master, and the identification of the voyage.\(^{354}\)

In terms of s 26(1), the subject-matter insured must be designated in a marine policy with reasonable certainty\(^{355}\) but in terms of s 26(2) the nature and extent of the insured’s interest in the subject-matter insured need not be specified in the policy.\(^{356}\)

\(^{351}\) See Dickson 79 who notes that some confusion existed about the names of these two types of policy and that in the nineteenth century a distinction was drawn between a ‘general floating policy’ and a ‘floating policy’. See too Jenkins 33 who considers these ‘general policies’ as a type of ‘blanket cover’ which did not require a detailed identification of the insured property. ‘Floating policies’, again, were an extension of general policies in that property could be insured in this way but also without any specification of the location of the property.

\(^{352}\) Thus, policies ‘in blank’ remain prohibited.

\(^{353}\) Subsections (2)-(5) were repealed by the Finance Act 1959 (7 & 8 Eliz II c 58), Schedule 8, Part III. According to Chalmers 37-38, the Marine Insurance Act of 1788, now repealed as to marine insurance by the Marine Insurance Act of 1609 and construed as merely prohibiting insurance ‘in blank’ or to bearer, is sufficiently reproduced by s 23(1) of the latter Act. According to Ulrich 217, s 23(1) means that ‘Inhaberpolicen [bearer policies] ohne Namensbezeichnung [sind] nicht beweiskräftig’.

\(^{354}\) It states as follows: ‘Be it known that [X] ... doth make assurance and cause [himself] ... to be insured lost or not lost, at and from [London to Amsterdam]. Upon goods and merchandises, and also upon the body ... [etc] of and in the good ship or vessel called the [Y] whereof is master under God, for the present voyage [Z] or whatsoever else shall go for master in the said ship, or by whatsoever other name or names the said ship, or the master thereof, is or shall be named or called’.

\(^{355}\) With the repeal of s 23(2), it no longer has to be specified.

\(^{356}\) The effect of s 26(2) is that it is unnecessary to specify whether the insured (or rather, the person taking out the insurance) insures for himself or as trustee for another, or as full owner or a person with a limited interest. In terms of s 26(3), where the policy designates the subject-matter insured in general terms, it is to be construed to apply to the interest intended by the insured to be covered. Section 26(3) is aimed at eg the floating policy and is intended to protect the insured against technical objections to the description of his interest. In terms of s 26(4), regard must be had to any usage regulating the designation of the subject-matter insured. Thus, in terms of rule 17 of Rules of Construction, deck cargo and live animals must, in the absence of any usage to the contrary, be insured specifically, while expected profit may be insured apart from the goods from which they are expected to arise, but must then be specifically described as such, while bottomry loans too must apparently be insured as such. Obviously, the application s 26 will also be influenced greatly by the insured’s duty to disclose any fact pertaining to the
‘Floating policies by ship or ships’ are provided for in s 29 of the Marine Insurance Act of 1906 and are referred to in subs (1) as policies which describe the insurance in general terms, and which leave the name of the ship or ships and other particulars to be defined by subsequent declaration.

4.3 The Interpretation of Insurance Contracts

Closely related to the content of insurance policies was the often moot issue of the interpretation of insurance contracts generally, that is, of the written document in which they were contained. In Roman-Dutch law, the only document generally relevant in this regard was the insurance policy. In practice the policy contained the whole insurance contract and there were, as a rule, no appendices, endorsements, nor any other documents such as proposal forms which were incorporated in the policy either physically or by way of reference to it. Other insurance documentation, such as notices of loss or abandonment and the like, might, of course, also exceptionally have given rise to the need for interpretation.

Apart from the odd instances of interpretation of terms encountered in insurance policies prescribed or suggested by the legislatures, Roman-Dutch insurance laws did not generally attempt to lay down rules as to how insurance contracts should be interpreted. They left the matter to be decided by the courts by the application of general principles. There are numerous examples of instances where Dutch courts had occasion to interpret particular words and phrases in insurance contracts. These present, on the whole, a rather casuistic picture of the way in which insurance contracts were interpreted in Roman-Dutch law. Clear indications of the application of any gen-

---

357 The need for and problems involved in interpretational issues were no doubt respectively enhanced and exacerbated by the widespread illiteracy amongst merchants and by the unsettled rules of spelling. Thus, the goods policy suggested by the Amsterdam amending keur of 1688, in making provision for the insertion of the name of the carrying ship and that of her master or his replacement, added, by way of precaution, ‘of hoe den naam van den Schipper of Schip, anders soude mogen georthographieert, gestelt of gespelt worden’. Likewise the policies added to the Rotterdam keur of 1721 added ‘ende hoe den naam van den Schipper of het Schip anders zoude mogen gestelt of gespelt worden’.

358 See eg the meaning of ‘goods and merchandise’ (‘Waren ende Koopmanschappen’) and ‘perishable and unperishable goods’ (‘bedeffelijcke ende onbederffelijcke goedereri’) in s 17 of the Amsterdam keur of 1598 (see again ch V § 4.3 supra), and the meaning of ‘surrounding places’ (‘circumjacentien’) in s 3 of the Amsterdam keur of 1699 (see § 4.2.4 supra and also ch XII § 1.3.4 infra).

359 That was the position in Hamburg too, where the Assecuranz-Ordnung of 1731 did not, eg, repeat the provision contained in an earlier draft for the priority in case of conflict of subsidiary agreements in handwriting which were included in printed policies (see Frentz Hamburgische Admiralitätsgericht 124). In English law, Rules for Construction of Policy, ie, the Lloyd’s policy, are added to the Marine Insurance Act of 1906 as the First Schedule. These Rules set out particular meanings, based on earlier decisions, for the more important and frequently considered terms and expressions appearing in that policy or in any like form. In terms of s 30(2), those terms and expressions bear the meanings assigned to them, subject to the provisions of the Act and unless the context of the policy requires otherwise.
eral principles of interpretation to insurance contracts are unfortunately not as common and illuminating as one might have wished. By way of illustration, a few isolated instances which appear to provide some guidance on the question of interpretation, may briefly be mentioned here.

The first case which may be referred to, illustrated the principle that effect must be given to the intention of the parties and that that had to be determined primarily but not exclusively from the wording of their contract. The background against which they contracted might also be taken into account in establishing their intention. The case came before the Hooge Raad in 1719 and concerned the insurance at Amsterdam of goods 'from Bremen to London, to depart with a Dutch convoy to the Elbe or to Holland and from there with an English or Dutch convoy to London'. The ship sailed with a Dutch convoy from Bremen to the mouth of the Elbe, from there with the same convoy to Amsterdam, and from there with another convoy to London. On the last stage of this voyage, she became separated from the convoy in a storm and was captured by French privateers. The insurer refused payment on the ground that there had been a deviation from the agreed and permitted voyage and a prolongation of the voyage by the carrying ship going first to the Elbe and then to Amsterdam in Holland instead of, according to policy, either from the Elbe or from Holland directly to London. At issue here, therefore, was whether there was a change of voyage and that, in turn, depended on the description of the voyage in the policy. In holding for the insured and deciding that there had in fact not been any change, the Raad noted that although there appeared to have been a change of voyage on the strict wording of the policy alone, this was not the case according to the intention of the parties. The mention of the Elbe in the policy occurred for no other reason than because Dutch convoys sailing from Bremen usually sailed directly to Holland if the wind was favourable, but otherwise, if the wind was not favourable, sailed first to the mouth of the Elbe and from there to Holland. That this was the intention with the words used to describe the route, appeared readily from the insured's letter instructing the insurance. Thus, the wording of the policy had to be taken as if it had read 'from Bremen to Holland or from Bremen to the Elbe and then to Holland, and from there with a different convoy to London'. This was the more so since no convoy, whether English or Dutch, sailed directly from the mouth of the Elbe to London. Therefore, background factors such as shipping practices and customs, and even matters such as the rate of premium ordinarily agreed upon for particular risk, could be relevant in determining the intention of the parties.

Secondly, there were numerous indications in Roman-Dutch law of the way in which ambiguous words or clauses in insurance contracts had to be interpreted. An important factor in the interpretation of insurance contracts in earlier times was the fact that, prior to the appearance of insurance companies in the eighteenth century, policies

360 See Bynkershoek Observationes tumultuariae obs 1579; idem Quaestiones juris privati IV.9.

361 As to the change of voyage or the course of the voyage, see ch XIII § 1.2 infra.

362 See in this regard the decision of the Hooge Raad in 1720 (see Bynkershoek Observationes tumultuariae obs 1647; idem Quaestiones juris privati IV.11) about which more shortly in n377 infra.
were drafted by the insured or his broker.\textsuperscript{363} It is against this background that the rather a remarkable instance must be seen of a clause in the insurance policies prescribed by the Amsterdam \textit{keur} of 1598 which made provision for the interpretation of the contract itself. In this clause the underwriters consented\textsuperscript{364} not only to all relevant clauses not expressed in the policy being read into it as circumstances demanded, but also to an interpretation \textit{in favour of the insured}, despite the fact that the latter in practice drafted the policy.\textsuperscript{365} This clause did not subsequently appear in any official policies.\textsuperscript{366} In fact, the principle of favoured interpretation it contained was turned on its head and the subsidiary nature of the rule emphasised in two seventeenth-century legal opinions according to which any ambiguity in the policy, as opposed to clear and unambiguous words and phrases, had to be interpreted \textit{against the insured} because he drafted it and was in a position to have expressed his intention with greater clarity.

The two opinions both date from 1665. The one stated the underlying principle of strict interpretation and the subsidiary principle of favoured interpretation in case of ambiguity.\textsuperscript{367} It noted that words and phrases had to be given their ordinary meaning and could not be interpreted extensively to cover analogous or other unexpressed instances. The usual approach in the case of insurance contracts was to follow the text of the policy strictly ("\textit{strict te houden aan de woorden van het contract, so die leggen}").\textsuperscript{368} The reason for this was the heavy reliance placed by insurers on the text of the policy offered to them for their signature when estimating and considering the risk in question. One could not extend the policy to accommodate the unexpressed intention of the insured. And for this the insured had no one to blame but himself, \textit{‘die de police...’}
van Assurantie selve heeft gedaan, instellen, ende\textsuperscript{369} dierhalve de sake twijfelagtig sijnnde, souden de woorden van het contract moeten worden geinterpreteert ende verstaan, tegens de selve geassureerden, ende tot voordeel van de Assuradeurs\textsuperscript{370}.

The other opinion\textsuperscript{371} concerned the interpretation of a clause quite clearly excluding the insurer’s liability for the loss in question. According to the opinion, the wording of the clause, being clear and unambiguous (‘leggende klaar, eenvoudig ende naakt’), could not be interpreted extensively against its ordinary meaning or the clear intention it expressed (‘niet en kunnen worden geduid of uitgeleid, tegens der selver gewoonlijke betekening, intentien of conjecturen’) but such ordinary meaning had to govern (‘maar moeten de saken worden gereguleert naar het gene men conditioneert, ende met woorden uitdrukt, verba contractus sunt lex contractus’). So, the opinion stressed, one could not follow an interpretation in conflict with the clear and unambiguous words of the contract. That would both fly in the face of the intention and the subscription of the insurers and be inequitable (‘encte sulks mede jegens de intentie en ondertekening van de Assuradeurs, het welk niet sijn en mag, nog de billikheid (die onder de Koopluiden behoorden plaats te hebben) lijden kan’). In support of this view, reference was made to various Roman law texts and the point was made that the general principles they expressed were applicable to the insurance contract too which was just another type of contract.

A further illustration of the rule of favoured interpretation in the event of ambiguity appears from a decision of the Hooge Raad in 1731.\textsuperscript{372} The issue was whether an insurance from Bruges to ‘the river of Nantes’, that is, the Loire, covered a loss occurring between the mouth of that river and the city of Nantes further upstream. The minority of the Raad held in favour of the insurers, pointing out that the cover in this case clearly extended only to the mouth of the river of Nantes and not to the city itself, and that even if there was doubt, the insured only had himself to blame for not making it any clearer, because ‘in een twyffelachtige zaak de uitlegging tegen den genen die de stipulatie gemaakt heeft moet geschieden’. But the majority, as a matter of interpretation, held in favour of the insured and thought that the insurance terminated not at the mouth of the river but at that part of river where the city was located, for which reason the description referred not to the name of the river itself but to ‘the river of Nantes’. In effect, they held that the policy did not refer to the river generally but to a particular place on river, namely at Nantes. Both Bynkershoek and Van der Keessel were rather critical of this view. The former thought it not a very convincing interpretation,\textsuperscript{373} while

\textsuperscript{369} Thus, both the rule of strict interpretation and the rule of favoured interpretation in the case of ambiguity were based on the same rationale.

\textsuperscript{370} In this regard reference was made to Santema De assecurationibus IV.58 who noted that a contract should be interpreted against the party who was in a better position to have made the stipulations in the contract more explicit.

\textsuperscript{371} See Nederlands advysboek vol III adv 168.

\textsuperscript{372} See Bynkershoek Observationes tumultuarïae obs 2646; idem Quaestiones juris privati IV.15.

\textsuperscript{373} See Bynkershoek Quaestiones juris privati IV.15.
the latter warned that one should be careful not to deduce any general rule from this decision if there was no ambiguity in the description or name of the place mentioned, and if the insurance was expressly and specifically concluded up to that place only.\textsuperscript{374}

The principle of favoured interpretation in cases of ambiguity as expounded in the two opinions of 1665, and its application to insurance contracts in later decisions, were most clearly summarised by Schorer. As a general rule, he noted, an ambiguous contract had to be interpreted against the party who was responsible for its drafting, for he had the power to make its meaning plain.\textsuperscript{375} This general rule was applicable to all contracts, including the insurance contract where doubtful words would be interpreted against the insured in so far as he was responsible for the drafting of the policy.\textsuperscript{376}

A third example concerned the case where, exceptionally, a further insurance was concluded by way of an appendix added to an existing policy. In such a case the provisions contained in the policy itself had to be taken as having been repeated in that appendix,\textsuperscript{377} at least unless the parties expressed a clear intention to the contrary.\textsuperscript{378}

\textsuperscript{374} Van der Keessel Praelectiones 1452 (ad III.24.6). Thus, if goods were specifically insured 'to Texel', Van der Keessel was inclined to believe that the insurers would not be liable in the event of their loss while being conveyed from Texel to Amsterdam.

\textsuperscript{375} See Schorer Aanteekeningen 379 (ad III.15.9) who stressed that the interpretation was not against, for example, a seller or lessor as such, but against them because they had drafted the contract in question. If the contract in question was drafted by the buyer or lessee, the interpretation would be against them.

There was a need for special care to be exercised in this regard by the insured or his broker. Wassenaer Practyk notariæl VIII.1, in discussing the contract of insurance in his practitioners' guide, advised merchants as follows: '[S]taat op de conditien van dien wet te letten, en die met klare duidelyke woorden uit te drukken, want de woorden van Assurantie-brieven wel overwogen moeten worden, ... hoe-wel anders in contracten meer gesien moet worden op de meeninge van de contrahenten, als op de woorden'.

\textsuperscript{376} See Schorer Aanteekeningen 425 (ad III.24.6) n20. See too eg Roccus De assecurationibus note 53. La Leek Index sv 'insurance', with reference to Schorer, explained that in case of doubt the contra proferentem rule resulted in an interpretation against the insured as the stipulator. He noted, though, that the rule was not inflexible and the interpretation still had to accord with law and natural justice.

\textsuperscript{377} This appears from a decision of the Hooge Raad in 1720 (see Bynkershoek Observationes tumultuariae obs 1647; idem Quaestiones juris privati IV.11). In this case the destination as well as the carrying ship of goods, insured against all risks except the peril of capture by privateers, were changed when goods arrived in safety at an intermediate port. On being notified of the changed destination and the fact that the goods would be transferred to a smaller vessel (a barque), the Amsterdam insurers signed the original policy, acknowledged the alteration, and added a statement that they took over the risk at a specified rate of premium ('en nemen wy de risico op ons, en alles tot onsen laste, waar voor wy twee per Cento hebben genooten'). During their further conveyance, the goods were captured by privateers and the insurers denied liability for this loss. The insured argued that by their statement added to the policy, the insurers took over all risks ('alles') without any qualification, and that the exception in the policy was not to be taken as having been repeated in the addendum. But the Raad, confirming the decision of the Hof van Holland, held for the insurers. They had argued that the exception in the policy was to be taken as repeated in any addition to that policy, 'de risico' referring to the risk taken over in the policy itself and the 'alles' to the changed circumstances, ie, the altered route and ship. Twenty-eight Amsterdam merchants declared by way of a turbè that the intention of the parties appeared to them to have been as the insurers argued, for if the risk of privateering capture was also to have been covered on the voyage from the intermediate port to the changed destination, the premium would not have been an additional two per cent but an additional ten to twelve per cent. This factor, that is, the amount of premium agreed upon, it seems, was important in the interpretation of insurance contracts and in determining the extent of cover they provided. See also Dorhout Mees Schadeverzekeringsrecht 99.
5  Legality

5.1  Introduction

As was the case with all other contracts, one of the requirements for a valid insurance contract was that its conclusion, content, performance and object had to be lawful, that is, not prohibited by common law or statutory law nor contrary to public policy. Of particular importance in Roman-Dutch insurance law was, firstly, the question of the legality of insurance contracts which did not comply with statutory prescriptions as to the content and permissible terms and stipulations of insurance contracts. A second and concomitant question was whether the parties could by their agreement validly renounce and thus contract out of such applicable legislation. And a third issue was whether, in terms of statute law or, more usually, the common law, one could conclude an insurance contract with a foreigner or insure property belonging to a foreigner, and whether the position was any different when the foreigner was also the subject of an enemy state. In this regard the insurance of goods and merchandise known as 'contraband' posed particular problems. These matters will now be considered.

5.2  Non-compliance with and the Renunciation of Insurance Laws

5.2.1  Legislative Provisions

It has already been pointed out that, especially in earlier times, Dutch merchants found many of the measures contained in insurance legislation impractical and unnecessarily restrictive. In practice they therefore not infrequently concluded insurance contracts which on one or more points contravened the applicable legislation. In such contracts they then frequently renounced the applicable legislation,\(^{379}\) In such contracts they then frequently renounced the applicable legislation,\(^{380}\)
chose the less restrictive insurance laws or customs of another place to govern their relationship, and in addition also turned to the extra-curial resolution of any disputes which could arise from their contracts.

The consequences of illegality by reason of a transgression of a statutory provision in Roman-Dutch law were derived from the earlier position in Roman law. There such illegality did not invariably render the contract void and ineffective. It depended on the transgressed law (lex) what exactly the consequences of infringement were and whether the contract was valid or invalid. In this regard Roman law distinguished between the rather uncommon *leges imperfectae*, in terms of which no consequences at all resulted either for the contract (which remained valid) or for the guilty party or parties (upon whom no penalty was imposed); *leges minus quam perfectae*, in terms of which the contract remained valid, the transgression resulting only in a penalty for the guilty party; and, most commonly, *leges perfectae*, in terms of which the contract was void and a penalty was imposed on the guilty party. Even though, by the time of Roman-Dutch law, this distinction had largely fallen away because of the prevalence of *leges perfectae*, traces of it still remained, also in insurance law.

Roman-Dutch insurance laws, like earlier insurance legislation, without exception contained specific provisions relating to the consequences of any non-compliance with the legislative measure in question. As will appear shortly, these consequences were, on the whole, more varied and involved than may be suggested by the simple

---

381 See ch IV § 4.3.1 supra as to choice-of-customs clauses and ch IV § 4.3.3 supra for the reasons why such a choice was exercised.

382 See ch IV § 2 supra. The renunciation of legislative provisions by agreement must be distinguished from the abrogation of law, including statutory provisions, by contrary customs. As to the latter, see again ch IV § 4.5 supra.

383 Contracts concluded *in fraudem legis*, that is, contracts which, while respecting the wording of the specific statute, were aimed at circumventing the relevant legislative provisions, were equally illegal.

384 See further generally eg Zimmermann 697-705.

385 See eg s 11 of the Barcelona Insurance Ordinance of 1484 where it was decreed that all insurers and insured had to follow the Ordinance in all contracts, abide by its provisions and also promise that they would in all circumstances be bound by them. Section 13 prohibited the inclusion in any insurance contract of any clauses contrary to the Ordinance, and specifically prohibited the use of the words 'binding' or 'not binding', or 'there is' or 'there is not', from being written into the contract. In addition it laid down that under no circumstances were any deviations from the meaning and intent of the Ordinance allowed. As it was enacted for the public good and for common usage, any attempt to deviate from the Ordinance would render the instrument of insurance void and of no consequence. See Jados 294 and 295-296 for these provisions.
division recognised in Roman law. Furthermore, legislation often specifically referred to the validity or otherwise of any renunciation of its provisions.

In the earliest insurance measure in the Low Countries, the provisional placcaat on shipping of 1550, one of the only four sections concerned with insurance addressed the question of non-compliance. Section 23 provided that where the provisions of the placcaat dealing with insurance were not complied with, the insurers of the ship or cargo concerned would in the event of a loss not be liable under the policies ("sulcke zijne versekerijinge te vulkommenne otte betalene"). This was the case even if, as regards the requirement of the seaworthiness of ships, the insurance policy contained a clause renouncing the applicable measure ("'t Schip gereed wesende naer d'Ordonnancie, of niet gereed"). Such and all other renunciatory clauses detracting from the placcaat ("doende ter praegudie van dese onse Ordonnancie") were declared null and void ("nui, van onweerden en magteloos"). In addition, those directly or indirectly providing insurance ("asseurancie ... gevene") in contravention of the placcaat, were to forfeit their money ("penningen") and were liable to be punished according to the circumstances ("arbitralicken gecorrigeert te wordene"). Section 22 of the final placcaat of 1551 provided likewise.

In title VII of the placcaat of 1563, in addition to individual instances where non-compliance with particular provisions were referred to, s 20 more generally provided that all contracts and policies of insurance, and all matters pertaining thereto, which were not concluded or done as prescribed, or which were contrary to and in derogation of the provisions concerning insurance, or the prescriptions of title I on the equipment of ships, would be null and void ("nul, machteloos ende van onwaerde"). Further, strict compliance with the title (that is, title VII on insurance) was ordered ("in al hare...")

---

386 Thus, a particular law could only be in part a lex perfecta or minus quam perfecta (ie, the transgression of only certain sections resulted in nullity (and a fine)), and/or it could only partly have the consequences of a lex perfecta (ie, only the transgressing clause itself and not the whole contract could be void). Many provisions of insurance laws applied in the absence of a provision in the contract to the contrary (ie, parties were given freedom to contract out without any resulting nullity), so that it was not in all cases necessary expressly to renounce, or to exclude the application of, the law for those provisions not to be applicable.

387 These concerned the seaworthiness of insured ships and of ships carrying insured goods; compulsory under-insurance of ships and goods; and a prohibition on the insurance of wages and expected profit.

388 According to Kracht 14, both parties to the insurance contract were penalised and both the sum insured and the premium forfeited. See generally also Goudsmit Zeerecht 213 and 222. He notes that s 32 of the placcaat of 1551 similarly declared void contracts between master, crew and shipowner concluded in contravention of the placcaat and also imposed punishment on the contracting parties.

389 Thus, s 1 prohibited the insurance of goods when such goods were not seaworthy ("niet en zijn toe gherust") or when they were loaded on ships not equipped and otherwise complying with the applicable legislation, but provided no penalty for non-compliance. In terms of s 4, insurance on ships, goods and the like already at risk, as well as insurance against the barratry of master or crew, were prohibited, all usages and customs to the contrary being abolished and all contracts or agreements which may have been made to the contrary being declared null and void ("verklaren de selve nui, machteloos ende van onwaerden").
"Pointen ende Articulen"), absence or ignorance not being an excuse after the expiry of six weeks after the date of the *placcaat*.390

This approach was followed in the *placcaat* of 1571. Section 2 ordered that no contract of insurance would be valid, whatever devices, stipulations, conditions or oaths ("devisen, stipulatien, conditien oft eeden") might have been added to it, otherwise than in so far as was permitted by the provisions of the *placcaat* and by the example and form of the policy prescribed by it.391 Section 6 provided that whatever the form in which the contract was concluded (that is, underhand or notarially or orally), no agreement, contract or accord ("egeene Conventien, Contracten oft Accorden") could be made in contravention of the *placcaat*. Noticeably, otherwise than in the earlier *placcaaten*, the section did not state what the consequences would be if an insurance contract did contravene any of the provisions of the *placcaat*. Nullity may well have been intended though, for s 31, which provided that the *placcaat* was applicable in full to goods loaded on foreign or on local ships, declared as null and of no effect and value ("nul ende van geenen effecte ende waerde") all insurances which contravened or deviated from the example ("uitwijse") of the *placcaat*, irrespective of whether the contract was concluded with a Dutch subject or a foreigner, for goods being exported or imported, or being carried on foreign or local ships, it being the intention to make a measure of general application ("een gelijcke gemeyne ende generale Wet").392

In s 1 of the Amsterdam *keur* of 1598393 all contracts of insurance contravening the *keur* were declared null and void ("worden voor nul, negeen, ende van onwaerden verklaert"), whatever stipulations, conditions, or oaths were included to counter this consequence ("t zy hoedanige stipulatien, conditien of eeden daer toe souden mogen worden gedaen").394 The policies appended to the *keur* too confirmed that they were in accordance with the *keur* ("alles ... volgende d' Ordonnantie vande Kamere van Asseurantie der Stadt Amsterdam").

From an opinion delivered in 1678 concerning the validity under Amsterdam law of a ransom policy,395 a type of insurance at that time not yet specifically regulated by way of legislation there, it appears that the approach in s 1 of declaring void insurances

---

390 See further Kracht 17 who notes that in addition to the prohibition of any addition to or deviation from the prescribed policy form in terms of s 2 (see again § 4.1.2 supra), other sections, including ss 4 and 20, prohibited any deviation from or contravention of the provisions of the *placcaat* in general.

391 See Goudsmit *Zeerecht* 260.

392 See Kracht 28 and again ch IV § 3.3 supra.

393 Section 1 of the Middelburg *keur* of 1600 was identical.

394 This was repeated in s 29 (and in s 28 of the Middelburg *keur*), which made the *keur* applicable to all local insurances even if concluded with foreigners or on imports or exports (see again ch IV § 3.3 supra), and which added that the general application of the *keur* was such that all insurances contravening the *keur*, without distinction as to persons or property, would be null and void as provided earlier in the *keur*, i.e., in s 1. See eg Groenewegen *Aanteekeningen* n17 (ad III.24.6); Goudsmit *Zeerecht* 313; and Enschedé 157.

395 See Nederlands advysboek vol II adv 170. See again ch VII § 3.2 supra as to ransom insurance.
which contravened the keur, meant that an insurance or the stipulations it contained had to be taken as *prima facie* valid, unless specifically prohibited, which, obviously, could not be the case if a specific type of insurance or stipulation in an insurance contract was not treated in the *keur*. Section 1 did not say that an insurance or an insurance stipulation would be valid only in so far as it was permitted by the *keur*, but merely that those insurances and stipulations were invalid which contravened the *keur*. Hence, nullity only followed upon the contravention of a specific specific prohibition and, it may be added, if such consequence was attached to that non-compliance.

In connection with the *placcaat* of 1571 and the Amsterdam *keur* of 1598, Scheltinga\(^{396}\) made the point that the stipulations agreed upon in insurance contracts did not only have to comply with the requirements of good faith as was specifically required by those two laws,\(^{397}\) but that they also could not aim to evade that which was prescribed in this regard for the common good by public laws ("*publyke wetten*"). In other words, stipulations in insurance contracts could not in *fraudem legis* aim to contravene the applicable legislation.

Also in this regard, as in so many other instances, the Rotterdam *keur* of 1604 displayed a different approach and broke away from the line followed in earlier municipal *keuren*. Section 1 provided that all conditions and undertakings contained in an insurance policy had to comply with the *keur*, so that if a policy contained any particular matter ("eenige Poincten") specifically prohibited by the *keur*, that matter would be taken as if it had not been expressed in the policy, that is, as void. That would be the case notwithstanding any renunciation of the *keur* by the insurer. But the policy itself would nevertheless remain valid as if the prohibited matter had not been not included in it. Therefore, a contravention of the Rotterdam *keur* did not lead to the nullity of the whole insurance contract as in Amsterdam but merely to the nullity of the particular clause containing the prohibited stipulation.\(^{398}\)

The refinement contained in s 1 of the *keur* of 1604 had seemingly fallen by the wayside by the time the Rotterdam *keur* of 1721 was promulgated.\(^{399}\) Section 73 of the Rotterdam *keur* of 1721 provided that generally\(^{400}\) the policy had to contain everything that the *keur* required policies to express, on penalty of nullity of the whole policy, while s 74 provided that the policy could on similar penalty of nullity not contain anything that

\(^{396}\) Scheltinga Dictata ad III.24.6 sv 'mids niet strydende, etc'.

\(^{397}\) That is, by ss 22 of the *placcaat* of 1571 and s 31 of the Amsterdam *keur* of 1598. See further ch XIV *infra* as to fraud.

\(^{398}\) See Van Zurck Codex Batavus sv 'Assurantie' par 12 who noted this innovation; Goudsmit Zeerecht 393-394; and Vergouwen 79.

\(^{399}\) See Van Zurck Codex Batavus sv 'Assurantie' par 12 n(l); Boey Woorden-tolk sv 'Assurantie' who made this point but seems not to have understood the position quite correctly; Van der Keessel Praelectiones 1449-1450 (ad III.24.6) who explained the Rotterdam position the best; and Goudsmit Zeerecht 393-394.

\(^{400}\) That is, in addition to the matters specifically required in terms of ss 71 and 72. See again § 4.2.6 *supra*. 
In the Amsterdam *keur* of 1744, though, it appears as if the approach followed by the Rotterdam legislature in 1604 may have been adopted. In terms of s 1 all stipulations and conditions contained in a policy of insurance in contravention of the *keur* would be held null and void (‘voor nul en van onwaarde’), notwithstanding that the contracting parties may have renounced the *keur*. It seems that the contract as a whole was not void but merely the contravening stipulation itself. In s 41, though, the *keur* of 1744 differed from earlier measures and appears to have nullified or at least cut down the effect of the opinion of 1678 on the validity of a ransom policy referred to earlier. It provided that in case something was stipulated or agreed in a policy which had not been provided for in the *keur*, the validity of such conditions or stipulations would be determined by the Chamber of Insurance (‘staan ter decisie van Commissarissen’). Thus, there was no automatic or *prima facie* validity in the absence of a specific prohibition any more.401

5.2.2 The Views of the Roman-Dutch Authors

In his exposition of the law of insurance, Grotius noted rather cryptically in this regard that nothing could be stipulated contrary to public or common statutory provisions or laws (‘de ghemeene wetten’), otherwise such stipulation would be of no effect (‘krachteloos’), the rest of the contract retaining its effect (‘waerde’) though.402

This was clarified by later commentators to mean that it was not possible to contract out of or renounce statutory provisions which were enacted for, and the contravention of which was prohibited in, the public interest. But it was possible, as Groenewegen first noted, to contract out of provisions which were introduced for the benefit of one of the parties to the contract only and for the party concerned to dispense with or waive such advantage by agreement while the contract otherwise remained valid.403

401 See further Goudsmit Zeerecht 334-335; Vergouwen 60.

402 Grotius *Inleidinge* III.24.6. It seems Grotius was referring here to the consequences not of a contravention of the common law (gemeene recht) but rather to that of a legislative measure passed for the public good. But, it may be noted, the consequence described here by him would in his time have resulted from the contravention of only the Rotterdam *keur* of 1604, and not the Amsterdam one of 1598.

403 See eg Groenewegen Aanteekeningen n16 (ad III.24.6); Wassenaer Praktijk notariael VIII.5; Scheltinga *Dictata* ad III.24.6 sv ‘anders is zulcken bedING krachteloos’; and Schorer Aanteekeningen 411 (ad III.24.6) n1 and 423 (ad III.24.6) n16 and n17. Van Zurck *Codex Batavus* sv ‘Assurantie’ par 5 n1 explained that it was trite that ‘door handel der particulieren ’t gemeen regt’ could not be renunciated, but that the advantage (‘voordeel’) conferred on one or another of the parties by way of legislation (‘by ’t gemeen best’) could be renounced by way of an agreement. See too Lee Commentary 321.
Despite the fact that there appears not to have been a uniform approach in Roman-Dutch legislation as to whether non-compliance rendered the whole contract null and void or merely the offending stipulation or clause in the contract. Bynkershoek did suggest that the latter approach was the more equitable and that one unlawful stipulation in the contract ought not to not render the whole contract void but that, as had in fact been provided for in the Rotterdam keur of 1604, it ought simply to be regarded as pro non scripto.

By the end of the eighteenth century Van der Keessel considered the question of the legality of insurance contracts in some detail. He noted that there was freedom of contract to insert into an insurance contract all such stipulations as were not prohibited by law, which was especially apparent in respect of the new forms of insurance. This applied even if there was a prescribed policy in which case it was possible to add other conditions as long as they were not prohibited. But if stipulations which were pertinently required to be inserted in an insurance contract, were not included (as s 73 of the Rotterdam keur of 1721 required in so many words), or if stipulations expressly and specifically prohibited by insurance laws were included in an insurance contract (as foreseen in s 74 of the Rotterdam keur of 1721), they either vitiated the whole contract (as in terms of ss 71-74 of the Rotterdam keur of 1721) or were themselves invalid and could not be validated by a renunciation of the prohibition. Van der Keessel pertinently rejected the distinction drawn by Groenewegen and others between statutory provisions for the public good and those which concerned a private interest, and specifically the view that the latter could validly be renounced. He thought that this distinction was most clearly proven false by the fact that statutes prohibited renunciation generally. The aim with all the provisions of insurance laws was to prevent fraud being committed by one party on the other and to avoid litigation and disputes, an aim which would be thwarted if a renunciation were possible. But, and this shows that Van der Keessel's blanket rejection of all renunciations may not have been the most practical solution, he then acknowledged that certain provisions in the prescribed policy may be deviated from, especially those as to the perils which were insured against, and that an insured may be content to bear some of those himself.

---

404 As appears to have been the position in terms of the Amsterdam keur of 1598, the Middelburg keur of 1600, and the Rotterdam keur of 1721.

405 As was apparently the position in terms of the Rotterdam keur of 1604 and the Amsterdam keur of 1744. See Van der Keessel Praec. 1449-1450 (ad III.24.6) for a summary.

406 See Bynkershoek Quaestiones juris privati IV.26. See too Enschedé 159.

407 See Van der Keessel Theses selectae th 730 (ad III.24.6); idem Praec. 1447 and 1448 (ad III.24.6); Van der Linden Koopmans handboek IV.6.7. However, compare s 41 of the Amsterdam keur of 1744 which did not provide for the automatic validity of stipulations not prohibited.

408 See Van der Keessel Theses selectae th 732 (ad III.24.6); Van der Linden Koopmans handboek IV.6.7.

409 See Van der Keessel Praec. 1448 (ad I.24.6). See again his views on the effect of official policy forms which was described in § 4.1.3 supra.
5.2.3 The Position in Practice: Opinions and Decisions

In practice, the contravention of legislative measures by the parties to insurance contracts was not uncommon, especially in the sixteenth and seventeenth centuries but seemingly less so in the eighteenth century when insurance legislation had become more liberal and attuned to the insurance needs of commerce.\(^{410}\)

Numerous examples exist of insurance contracts which did not comply with applicable legislation. Usually such policies contained a clause renouncing the application of the relevant legislation and/or excluding the jurisdiction of the local chamber of insurance, thus in effect agreeing to settle any disputes extra-curially.\(^{411}\)

The large number of opinions and decided cases on the topic give an indication of the frequency with which non-compliance and renunciation must have occurred in

---

\(^{410}\) See generally eg Den Dooren de Jong 'Practijk'; Faber 'Studien I' 89.

\(^{411}\) The following selection of clauses may briefly be mentioned by way of illustration (see too ch IV § 2 n167 supra for instances where the renunciation of the legislation and/or the exclusion of the jurisdiction of the chamber was accompanied by an arbitration clause):

(i) An Amsterdam policy of 10 August 1712 (see Vergouwen 39-40) contained a hand-written clause permitting the insured to insure, in contravention of legislation existing at the time, the full value of goods, ‘want deze assurantie geschiet wederzijds zonder Restorno; also wij daervan volkomen renuntieren, alsmee van de Camer van Assurantie en alle Wetten, Placaten en Ordinantie deze contrarie’. Despite this clause, the policy was sanctioned by the signature of the Secretary of the Chamber of Insurance. (Could the clause have been added afterwards?)

(ii) An Amsterdam policy of 7 December 1713 (see Vergouwen 40) on hull contained the following clause written in by the broker: ‘[R]enuntiereren wij hiernevens van de Camer van Assurantie deser stede en van alle andere wetten of gewoontens hoegenaamt of door wie gegeven, voor sooveer die den inhoudt deses zijt int geheel ofte in eeneig gedeeltse soude moogen verbieden of strydig syn’. This policy too displayed the approval of the Secretary of the Chamber.

(iii) An Amsterdam fishing policy of 1637 provided: ‘Belovende schade ofte verlies buyten de dispatsie van de Camer van assurantie prompteleijk te betalen’, and: ‘Secluderende d’assurantiecamer deser stede’ (see Den Dooren de Jong ‘Practijk’ 11-12).

(iv) An Amsterdam policy of 1650 (see Vergouwen 40) contained a promise by the insurers to pay promptly and fully, such payment ‘buyten de Camer van Asseurantie sonder eenighe rechts vorderinghe en acte of corlinghe te pretenderen’.

(v) A wagering insurance on lives of 1676 shows that the greater and more obvious the transgression, the more prolix the renunciation clause. In the deed in question there was an express renunciation of the applicable insurance keur, and a promise of prompt payment ‘sonder eenige exceptien ofte uitvluchten te sullen gebruichiken nochte mij ooch niet te sullen behelpen noch doen behelpen met eenige weten, keuren, statuifen, placaten, ordonnantien ofte iets ter wereld bedacht oft onbedacht dat hier tegens soude mogen strijden als van alle desevel weel expresselijck renuntierende bij desen als mede van de ordonnantie van de kamer van assurantie deser stede voor soo veel die mij soude mogen patrocinereen, aangesien deze voors betalinge ... bij mij zal worden gedaen promptelijck ende reallijck sonder eenige corlinge buiten de camer van assurantie alhier’ (see Wagenvoort ‘Risicoverzekering’).

(vi) An Amsterdam insurance of 1779 on a share in the hull and equipment of a whaler contained a clause stating that the policy and its valuation clause would be taken as sufficient proof of the value of the property insured and the insured’s interest in and ownership of it. The following hand-written clause was added to the end of the policy: ‘En neeme wij onderges. aan in alle gevallen in Cas van Schade Prompt en zonder eenige Exceptie te zullen voldoen en betaalen zonder eenige andere Papiere of documenten te zullen vorderen, Renuntieerende van alle wetten en ordonnantien die dem Inhoud deses zoude mogen Contrarieeren of wel verbieden ...’ (see Den Dooren de Jong & Lootsma 62-64).
practice, the more so if it is remembered that most of such instances were probably settled outside the courts. These opinions and decisions also serve to illustrate the practical application of the underlying principles set out above.

An opinion delivered in 1602 concern destination a Rotterdam policy of 1598 which renounced the applicable insurance laws and dealt with the question whether the policy was valid and effective in whole or only in part, and, if only partly valid, to what extent the insurers were liable. Doubting whether the placcaat of 1571 had the force of law in Holland, the opinion considered only the placcaat of 1563. It noted, amongst other points, that that placcaat contained a prescribed policy formula; that it prohibited the addition of any further clauses to it; and that it provided that all insurance contracts concluded otherwise than in conformity with the placcaat, or in contravention or derogation of it, would be totally null and void. The opinion therefore advised that the contract in question was null and void for not only exceeding but also transgressing many different points specifically prohibited by the placcaat of 1563. As a general legal principle, it noted, all agreements made and concluded contrary to express legislative prohibition ('contra expressam juris prohibitionem') were null and void. Furthermore, the fact that the policy contained a renunciation of the placcaat did not change the position at all, for this measure was passed in the public interest ('omme 't gemeene best wille') and generally to prevent frauds which might be committed in connection with insurance contracts. It was accordingly not in the power of any particular party to renounce it.

The distinction between a statutory provision of public interest and one of private benefit to one of the parties was thereafter consistently drawn in the context of insurance legislation. Thus, in an opinion in 1640 the point was made in passing that a person in whose favour a legal measure was introduced, could renounce it, and in an opinion delivered in 1713 the point was made that one could not contract out of a public law, that is, a measure passed in the public interest, especially not if a policy not

---

412 See Hollandsche consultatien vol I cons 187.

413 That is, the placcaaten of 1563 and 1571.

414 It having been made during the reign of the Duke of Alva and also not having been published properly in the form of a perpetual edict ('eewig Edict') but merely provisionally. Verwer See-rechten at 135 agreed with this view while Bynkershoek Quaestiones juris privati IV.1 pointed out that the placcaat had in fact been promulgated in Holland and was continually being applied and followed in practice. See further on this issue eg Scheltinga Dicata ad III.24.3 and ad III.24.8; Jolles Bijdrage 36-39; Lichtenauer Geschiedenis 11-12; and Wagenaar vol XIII at 41-42.

415 See Hollandsche consultatien vol III/1 cons 80 (1640), also taken up in Hollandsche consultatien vol III/2 cons 80 n5 (1641).

416 The provision relevant here determined that a premium had to be paid to the insurer in cash, and according to the opinion, an acknowledgement in the policy by the insurer of having received the premium in cash without it in fact having been received at all, was in effect a valid renunciation of such a measure. See further ch XI § 3 infra as to the payment of premiums.

417 See Barels Advysen vol I adv 21.
complying with or containing a contravention of that measure was specifically declared null and void.\textsuperscript{418}

But it was not always clear-cut whether a particular measure in an insurance law was promulgated in the public interest, so as not to be renouncable, or whether it was passed solely for the benefit of one of the parties, in which case compliance could validly be waived.\textsuperscript{419} For this reason, possibly, Van der Keessel may have rejected this distinction.\textsuperscript{420}

The Dutch courts too had occasion to express their view on the renunciation of statutory provisions. Usually the issue was intermingled with the question whether the legislative provision in question, which had been transgressed by the parties and the application of which had also been renounced by them, had not been abrogated by a contrary custom. As a result it is rather difficult to pinpoint and describe the approach of the Dutch courts in the first half of the eighteenth century to the issue under discussion with any certainty. Many of the decisions on the topic were in fact not unanimous decisions. It would appear, nevertheless, that the general approach of the \textit{Hooge Raad} was that the renunciation of a provision in an insurance \textit{keur} by an insurer was not possible and could not be relied upon by an insured where that provision was a \textit{lex perfecta}.

The first case on the matter decided differently, though. In proceedings before the \textit{Hooge Raad} in 1712,\textsuperscript{421} expected profit had been insured in a Rotterdam policy in contravention of the local \textit{keur} which prohibited such insurance.\textsuperscript{422} The parties had renounced the application of the \textit{keur} generally and thus also this prohibition. When a claim on the policy arose, the insured argued that his claim was valid because received custom amongst merchants had long ago overturned the prohibition.\textsuperscript{423} The insurer, in turn, relied on the prohibition in the \textit{keur} and on the fact that any renunciation was equally null and void in terms of s 1 of the Rotterdam \textit{keur} of 1604, even if it had been done under oath as foreseen in s 2 of the \textit{placcaat} of 1571. Here, he contended, was an example of a \textit{lex perfecta} (\textit{'een volmaakte Wetten'}, that is, of a law with a penalty, and an \textit{irriterende clausul}, that is, one which prescribed nullity) and, furthermore, the

\textsuperscript{418} The provision here contained a prohibition against the insurance against the fraud of a master (see again ch VI § 4.3.4 supra) and the policy in question, which included a clause in terms of which the insurers undertook liability for loss caused by such fraud, was therefore devoid of any legal effect, despite the parties' renunciation of the particular prohibition.

\textsuperscript{419} Thus, Bynkershoek \textit{Quaestiones juris privati} IV.2, on the assumption that the opinion in 1640 was correct in regarding the provision requiring the payment of premiums in cash as still in force (Bynkershoek thought it had been abrogated by contrary practice and custom: see again ch IV § 4.5 supra), thought that the opinion was wrong and that the particular provision could in fact not be renounced. Unfortunately he gave no reason for his view, but it may have been because he thought that the measure had been passed in the public interest.

\textsuperscript{420} See Van der Keessel \textit{Praelectiones} 1448 (ad III.24.6) and again § 5.2.2 supra.

\textsuperscript{421} See Bynkershoek \textit{Observationes tumultuariae} obs 909; \textit{idem} \textit{Quaestiones juris privati} IV.5.

\textsuperscript{422} At the time there was no similar prohibition in force in Amsterdam. See again ch V § 5.2 supra.

\textsuperscript{423} See again ch IV § 4.5 supra.
provision in question was promulgated for the common welfare to prevent fraud so that it could not validly be waived by the parties. The Raad, by a majority, held the renunciation in question valid and effective and held the insurer to his agreement.\textsuperscript{424} 

Shortly thereafter, in 1716, another case came before the Raad which turned on the same point. Here the Raad had a change of heart and, by a majority, adopted the view that the renunciation was invalid.\textsuperscript{425} A ship had been insured in Amsterdam for an amount in excess of the fraction of her value permitted by the applicable legislation.\textsuperscript{426} The majority of the councillors on the Raad was of the view that the insurance was null in terms of the relevant prohibition read with the nullifying provision ("vernieutigende" or 'irriterende clausul") contained in s 1 of the Amsterdam keur of 1598.\textsuperscript{427} The minority held for the insured and permitted his claim. They thought that a contrary custom had abrogated the relevant prohibition and found proof of this in the fact that policies sold everywhere contained a written clause in terms of which parties renounced the contrary provisions of the insurance keur, including, therefore, the prohibition relevant in this instance.\textsuperscript{428} Bynkershoek made the point in this regard, as he had done in respect of the earlier decision of 1712, that a valid renunciation was not possible in this case, the provision being a \textit{lex perfecta} ("een volstrekte Wet")\textsuperscript{429} so that the proof relied upon in support of an abrogation was not valid. He also, quite correctly, pointed out that the decision of the Raad here was difficult to reconcile with the earlier one of 1712.

From a case before the Hooge Raad in 1722,\textsuperscript{430} however, it appears that despite its invalidity in terms of s 1 of the Amsterdam keur of 1598 and according to the decision of the Hooge Raad in 1716, a renunciation may well have had some practical advantage. An Amsterdam insurer, who had insured the freight to be earned on a particular voyage in contravention of the prohibition on such insurance in the Amsterdam

\textsuperscript{424} This appears to have been the incorrect basis on which to have held for the insured. This was a case where the insured's argument (ie, that there existed a custom to the contrary which had abrogated the legislative prohibition) should have been upheld rather than the insurer's argument (that the renunciation was invalid) rejected. The minority, which included Bynkershoek, thought that a custom overturning the prohibition had not been proved and held for the insurer, by implication thus agreeing with the argument that the renunciation here was not effective.

See further Van der Keessel Theses selectae th 717 (ad III.24.4); idem Praelectiones 1439 (ad III.24.4) who appears to have been under the mistaken impression that the Rotterdam keur of 1721 was applicable here.

\textsuperscript{425} See Bynkershoek Observationes tumultuariae obs 1290; idem Quaestiones juris privati IV.6. See also eg Van der Keessel Praelectiones 1450 (ad III.24.6).

\textsuperscript{426} See ch XVIII § 5.2 \textit{infra} as to compulsory under-insurance.

\textsuperscript{427} In admitting the insured's claim though, albeit only up to the amount he was permitted to insure with a return of premium in respect of the excess, it may be thought that the insurance was in fact not regarded as totally null and void as provided for in s 1.

\textsuperscript{428} See again ch IV § 4.5 \textit{supra}.

\textsuperscript{429} That, it would appear, was also the reason for the majority decision.

\textsuperscript{430} See Bynkershoek Observationes tumultuariae obs 1873; idem Quaestiones juris privati IV.11.
keur of 1598,\textsuperscript{431} and who had renounced the application of all legislative provisions with which the insurance did not agree, did not refuse the claim instituted under the policy on the basis that the insurance was void and his renunciation of no effect. According to Bynkershoek, he did not want to appear to be acting dishonestly ("oneerlyk te handelen") in doing so and therefore relied on other grounds.\textsuperscript{432} Interestingly enough, the Raad in this case did not of its own accord rely on the contravention of the applicable legislation to declare the insurance void, from which one may well deduce that the renunciation was regarded as valid and effective.

\subsection*{5.2.4 The Position in the Wetboek van Koophandel and Elsewhere}

Clearly Roman-Dutch law did not in all instances permit the parties to an insurance contract sufficient leeway to come to a suitable mutual arrangement about the way they wanted to insure. And though traces of the earlier position remain in the Wetboek van Koophandel, the position is there regulated in a less complicated and overall more pragmatic manner. The Legislature had come to realise that insurance legislation in the form of a code should, for the most part and excluding those matters really in the public interest which should in any event be narrowly defined, provide only for those situations where the parties did not express themselves on the issue and should not prescriptively write their contract for them unless absolutely necessary.

In terms of art 254 of the Wetboek, any renunciation, made at the conclusion of the insurance contract or during its currency, of what is legally required for the essence of the agreement ("tot het wesen der overeenkomst"), or of what is expressly prohibited, is void ("nietig"). It is therefore possible to contract out of non-essential matters,\textsuperscript{433} as long as such contracting out is not expressly prohibited.\textsuperscript{434} Thus, renunciation is no

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{431} See again ch V § 5.4.2 supra.
\item\textsuperscript{432} See too Dorhout Mees Schadeverzekeringsrecht 22 who notes that it was regarded as improper for an insurer to rely on a renounced legislative prohibition on the basis of the invalidity of such renunciation.
\item\textsuperscript{433} Elsewhere Bynkershoek Quaestiones juris privati IV.17 criticised his fellow-councillors on the Raad for suggesting in a case in 1740 (see Bynkershoek Observationes tumultuariae obs 3168) that insurers could express satisfaction in a policy with a matter clearly in contravention of a statutory provision which provided for nullity in the event of any non-compliance with it. He noted that the Raad had on many occasions held that a renunciation of insurance keuren was not possible. Although he agreed that it was reprehensible that the insurers had broken their word and gone back on their agreement to renounce the application of the particular provision, that was perfectly permissible in the case of a lex perfecta.
\item\textsuperscript{434} That is, naturalia, the exclusion of which would not render the contract anything other than one of insurance.
\item\textsuperscript{434} Examples of instances where, in the context of marine insurance, contracting out is permitted and where parties may make their own arrangement different to that provided for by the law, include the following: the exclusion of liability for loss due to an inherent vice (art 249); the application of average in the case of under-insurance (art 253-3); the transferability of the insured object (art 263); the duration of cover (art 634); the perils insured against in a marine insurance policy (art 637); cover against barratry (arts 640-641); and the insured's duty to take steps to avert and minimise loss (art 657). In the case of the insurance of goods carried overland and on internal waters, there is general freedom of contract (arts 687-688 and 695). See further Asser NBW 104.
\end{enumerate}
\end{footnotesize}
longer generally prohibited as it was in some of the earlier Roman-Dutch measures. Furthermore, if an insurance contract does contain a stipulation contravening a prescript of such compulsory law ("dwingende recht") in respect of which contracting out is not permitted, then only that stipulation is void and not the contract as a whole.

In English law, too, the principle of freedom of contract was central to and has largely been preserved in the codification in the Marine Insurance Act of 1906. A large number of its provisions regulate the position 'unless the policy otherwise provides', so that the parties are in such cases free validly to renounce or contract out of the relevant provision and to make their own arrangement. Section 87(1) in fact makes it clear that any right, duty or liability arising under a contract of marine insurance 'by implication of law' may be negatived or varied by express agreement or, in appropriate cases, by contrary usage. In seemingly only one case, though, is there a positive prohibition and is the contract expressly rendered void in the case of non-compliance.

5.3 The Insurance of Foreign and Enemy Property

5.3.1 Introduction

The legality of insuring one type of object of risk was at issue for virtually the whole period of Roman-Dutch law. That was the insurance of foreign, and more specifically enemy ships and goods, especially but not only against the perils of war.
Illegality here could have been the result of a contravention of a particular statutory provision or the common law, it could have been against public policy, or it could, conceivably, have been the result of a combination of these grounds. As will appear from the discussion which follows, there was a considerable difference of opinion between the theorists, in particular Bynkershoek in his capacity as an international lawyer, and insurance practice as to the validity or otherwise of such insurances. Of course, being in the final instance a reflection of public policy, as interpreted by the courts or as enacted for by the legislatures, the opinions that were expressed were in any event not timeless.

5.3.2 The Applicable Legislative Measures

The earliest insurance-related legislation in Italy condemned the insurance of foreign-owned property. Such legislation was generally very nationalistic and protectionist and prohibited the insurance of the property of foreigners, considering that such insurances would unnecessarily confer public wealth and protection upon foreign competitors. Thus, a Genoese statute of the late-fourteenth century prohibited the insurance of foreign ships, and a Florentine statute of 1393 prohibited insurance of any foreign ships and goods as did Venetian laws of 1411 and 1421.441

The earliest insurance laws in Barcelona followed suit and totally prohibited any insurance on foreign ships and goods, or on goods loaded on foreign ships. This prohibition was linked to a prohibition on the export of goods on foreign ships and was part of an attempt to protect the indigenous shipping and shipbuilding industries against foreign competition. By the time of the Barcelona Insurance Ordinance of 1484, though, these measures were generally relaxed and a more refined distinction was drawn. Insurances of ships and goods belonging to foreigners were specifically permitted, but now insurances of the property of enemies were prohibited.442

441 See eg Hammacher 75-76; Holdsworth History vol VIII at 281; Sanborn 256-257; Seffen 29; and Vance ‘History’ 9-10. See Bensa Assicurazione 152 and 153-154 for a reproduction of the Genoese and Florentine statutes. See too Roccus De assecurationibus note 71 who referred to a Florentine local statute in terms of which residents were prohibited from insuring foreigners. He explained that this prohibition was binding and could not be renounced, having been introduced for the common good and in any case being a prohibitionary statute (‘statutum prohibitorium’).

442 See s 1 of the Barcelona Ordinance of 1484 which allowed the insurance in the city of ships belonging to foreigners, regardless of their nationality, and of cargoes carried on such ships to any destination, regardless of the nationality of the owner of such cargoes. But it prohibited insurance in Barcelona of ships or cargoes belonging to enemies of the King, or to the allies of such enemies, whether directly by its owners or through some intermediary.

However, in two respects something of the earlier distinction between the insurance of foreign and of local property remained, and the insurance of foreign property continued to be more restricted than that of inhabitants of the city themselves and foreigners therefore remained in a worse position than locals. In terms of the same s 1, the insurance of foreign property was not permitted to the same extent as that belonging to local subjects because the amount of compulsory under-insurance required on such property was higher (see further ch XVIII § 5.2 infra). And in terms of s 2, the local insurance on the ships and cargoes of foreigners (but not those belonging to locals) which were not destined to or from Barcelona (ie, which were destined from one foreign port to another) was prohibited because of a lack of information regarding such vessels and the impossibility of ascertaining whether such cargoes were actually carried aboard such vessels. In terms of s 3, all cargo bound to or from Barcelona was insurable there, even if loaded on enemy ships. See generally Reatz Geschichte 59-74, especially at 63-64; and
Dutch insurance legislation generally drew no distinction between the insurance of foreign and local property, nor between the insurance of enemy property and that of Dutch subjects. In terms of Antwerp customary law, though, goods belonging to the enemy ("de goeden toecommende vijanden") could not be insured under a general description but had to be mentioned separately and expressly. Even insurance expressly for the account of whomever the insurance may concern or whoever may be the owner ("de clause "toebehorende eenen alsulcken", oft wie die souden mogen aengaen oft toebehooren, van wat qualiteit oft natie die soude mogen sijn") could not detract from this obligation. Nevertheless, the insurance of enemy property seems not to have been prohibited in principle.

But general legislative measures, not specifically concerned with insurance matters, during the many wars in which the United Provinces of the Netherlands were involved during the sixteenth, seventeenth and eighteenth centuries, did prohibit dealings with the enemy. Specifically included in such prohibitions, especially in later times, were the conclusion of many specific types of contract, including insurance contracts.

For example, during the Dutch War of Independence against Spain from 1568 to 1648, trade with and on Spain, her allies, and any of her territories was prohibited by various legislative measures. Although not specifically prohibiting the conclusion of insurance contracts in this context, such insurance might nevertheless have been implied in measures which, for example, generally prohibited any correspondence, communication and exchange of money, directly or indirectly, between subjects of the

also eg Dorhout Mees Schadeverzekeringsrecht 117; Enschedé 27-28; and Holdsworth History vol VIII at 282.

443 See arts 51 and 53 of par 2, title 11, part IV of the Antwerp Compilatae of 1609 (see De Longé vol IV at 222) and Mullens 46-47. See too Santerna De assecurationibus V.10-14 who made the point that the insurer could not object against the insured that the property insured was not his, but that he could object if the property belonged to an enemy or to pirates.

444 The insurance of enemy property was regulated by way of edicts of the Estates-General and not by way of municipal keuren for it was a matter of international concern and within the legislative competence of the Estates only.

445 See eg the placcaaten of the Estates-General of 22 and 27 July 1584 (see GPB vol I at 1076-1083); 4 April 1586 (see GPB vol I at 1082-1089); 18 July 1586 (see GPB vol I at 1088-1093); and 4 August 1586 (see GPB vol I at 1092-1097). See too the placcaaten of the Estates of Holland of 21 December 1580 (see GPB vol I at 1098-1099); 22 May 1582 (see GPB vol I at 1100-1101); 23 March 1583 (see GPB vol I at 1102-1105); and 27 July 1584 (see GPB vol I at 1104-1109).

446 That is, the insurance of Spanish ships or goods or that of Spanish allies, or of goods consigned to or from Spanish territory.
Netherlands and those of Spain.  

However, from early in the seventeenth century legislative measures began appearing which did mention insurance specifically. During this period and because of the ascendency of the Dutch insurance market, the insurance of foreign property was very common and provided a noticeable portion of the premium income generated in centres such as Amsterdam and Rotterdam. And, of course, with the frequency with which wars broke out and national allegiances shifted, it was quite possible that a foreign insured one day could the very next have become an enemy subject. Not that Dutch merchants in particular and public policy in the Netherlands in general necessarily saw much wrong with trading with the enemy and thus also with insuring enemy property. However, the Estates-General saw matters differently and on various occasions sought to prevent the insurance of enemy property. Four such instances may be referred to by way of example.

In terms of the placcaat of the Estates-General of the United Netherlands of 1 April 1622, promulgated during the course of the Eighty Years War against Spain, merchants and inhabitants of the Netherlands were expressly prohibited from insuring, directly or indirectly, the goods, merchandise, consignments and ships (‘Goederen, Koopmanschappen, Cargasoenen ende Schepen’), of whatever nature, belonging to the subjects or inhabitants of countries under the control of the King of Spain and his allies (‘toe behoorende de Subjecten, Onderdanen oft Inwoonderen vande landen, onder den Koningh van Spagnien ende des zelfs Adherenten sorteren’). Any such insurance already concluded, or to be concluded in future, was declared null and void (‘voor nul ende van onwaerden’). Furthermore, the judiciary, including the various chambers of insurance, were prohibited from adjudicating on such insurances (‘over

447 At least the authority to the contrary provided by an opinion of c1598 (see Hollandsche consultatien vol I cons 284) is not conclusive on this point. In this instance an opinion was requested on the duration of the risk on a hull policy. A ship was in 1598 insured for a voyage from Middelburg to St Lucas in Spain where, on her arrival, the ship was arrested and later confiscated. The insurer denied liability on the ground that on the vessel’s arrival, his risk terminated so that he was not liable for the loss caused by her arrest. The opinion was that the insurer was nevertheless liable because, by analogy with a goods policy, the risk continued until the ship had safely been at anchor at her destination for at least 24 hours (as to the duration of risk, see further ch XII § 1 infra). Furthermore, mention was made in the opinion of the fact that it was public knowledge that at the time the ship undertook her voyage, namely in October 1598, ‘het regouere Placcaat van interdictie der navigatie ende commercie deser Geunieerder Provincien op Spangien, by den nieuwen Spaanschen Koning afdoen by Publicatie Is vernieuwt, geamplieert, ende stricter als oyt te doen geobserveert ende geexecuteert Is geworden’. As a result the ship could not be said to have arrived safely (‘in salvamente’) so that insurer’s risk had not terminated at the time of her arrest at St Lucas. Put differently, she had not arrived safely but in enemy hands and in captivity. The underlying assumption appears to have been that the insurance of a ship destined for a Spanish port was not illegal and invalid.

448 Barbour Capitalism 130-131 makes the point that in the seventeenth century loyalties to town and province were still stronger than any as yet commanded by the loose federation of the United Provinces, and that trade with the enemy during this time must be seen in this light. Holland’s great dependence on trade meant that even in time of war it could not be foregone: trade with the enemy had to contribute to the war against the enemy.

449 See GPB vol I at 841-843.
soodanige asseurantien recht te doen'). Insurers concluding such contracts in future were to be fined Flemish £100, half of which was to go to the person reporting the insurance ('Aenbrenger')! Thus, the penalty of nullity operated retrospectively although the penalty of the fine did not. But, by a subsequent decision of the Estates-General on 13 May 1622,450 it was resolved, 'om verscheyde pregnante redenen ende consideratien', to restrict the prohibition to insurances concluded subsequently ('tot allen asseurantien gedaen naer date van publicatie van dien'). Therefore, the placcaat of 1 April was declared not to be of retrospective operation, from which it may be deduced that the Estates did not regard the insurance of enemy property as invalid at common law and in the absence of an express legislative prohibition.

The reason for the prohibition of 1622 appears from the placcaat itself and provides some indication of how the Dutch authorities saw the issue of insuring enemy property at the time. It was noted that when enemy ships and goods which were insured locally, were captured by Dutch warships, local insurers, having paid out on the policies which covered such capture as part of the perils of war, sought to obtain the release of such ships and goods as their own.451 Also, in such cases, the damage caused by such capture was not borne by the enemy itself but, because of the insurance by local insurers, by subjects of the Netherlands themselves who enjoyed but a small premium in return. In consequence, the placcaat noted, the insurance of enemy property resulted in an impoverishment not of the enemy but rather of Dutch subjects.452 In short, the insurance of enemy property was seen as defeating and diverting the impact of attacks on the enemy and the losses inflicted thereby, and for that reason it was prohibited.

The placcaat of 1622 set the tone of later ones in the seventeenth century. On 31 December 1657 the Estates-General promulgated a placcaat453 which concerned navigation to and trade with Portuguese ports and which contained a prohibition on the conveyance of contraband to Portuguese subjects.454 Section 13 dealt with insurance and expressly prohibited inhabitants of the Netherlands from insuring, directly or indirectly, themselves or through another, in or outside the country, in whatever pos-

450 See GPB vol I at 843.

451 Such insured property having been abandoned by the insured owners to the local insurers. For the consequences of abandonment, see ch XIX § 2.3 infra.

452 Specifically, the placcaat explained that insured enemy property 'niet alleenlijk by de ... Asseuradeurs ende Verseeckeraers werden gereclameert, vervolcht, ende als hare eygen goederen om d'ontslaginge van dien t'obtineren, gesoliciteert: Maar de schade daer van evenwel niet de voorsz Vyanden, maer de Ingesetenen deser Landen, uyt krachte vande voorsz ghedare asseurantien ende verseecckerlinge (die daer voor maer eene kleyne premie zijn ghenieterende) is raeckende ende betreffende: Sulcks dat de selve Ingesetenen deser Landen, ende niet de voorsz Vyanden daer door verarmt ende ghedepaupeert werden'.

453 See GPB vol II at 513-522.

454 At the time, Portugal was still a part of Spain, although her War of Independence (1640-1668) was in progress. The Netherlands was then at war with Portugal, a ten-year truce having been terminated in 1651.
sible way, any goods or ships belonging to subjects of the Portuguese Crown. But then it went further than the earlier placcaat of 1622 and extended the prohibition also to the insurance of ships or goods, even if neutral and presumably even if belonging to Dutch nationals, going or consigned to any port in Portugal, or coming from such a port. If concluded in future, any such insurance would be held null and void, with no adjudication on it being permitted, and with an additional penalty being imposed on the insurers.\textsuperscript{455}

A placcaat of the Estates-General of 9 March 1689,\textsuperscript{456} by which the United Provinces of the Netherlands, as part of a European alliance, declared war on Louis XIV's France, prohibited navigation to and trade with French ports. Section 13 temporarily prohibited, in terms very similar to the ones before, insurances on French property or on other goods consigned to or from French ports. Here, though, the prohibition was on penalty of forfeiture by both parties of a sum equivalent to that insured.

Lastly, in terms of a placcaat of the Estates-General of 5 December 1747,\textsuperscript{457} inhabitants of the Netherlands were expressly prohibited from in future insuring, fully or in part, any ships, goods, wares, merchandise or effects belonging to subjects of the King of France, or from promising any compensation of damage, however caused, or from offering, whether through a representative ('in Commissie') or otherwise, such property to be insured. The placcaat prescribed as penalty not only the nullity of all insurances concluded after its date of publication but also the forfeiture, by both the insured or prospective insured and the insurer or prospective insurer, of three times the value of the property insured or sought to be insured. The reason for the prohibition, according to the placcaat, was to ensure that the damage that might be caused by war to French subjects did not, through being insured locally, revert back to subjects of the Netherlands ('niet op Onze eige Onderdaenen redundeere'). From a decision of the Hooge Raad in 1763,\textsuperscript{458} it appears that an insurance on French property concluded on 25 November 1747, and thus ten days before the promulgation of the prohibition on the insurance on French goods, did not become invalid by reason of this prohibition. From this it may be deduced that neither did the placcaat of 1747 operate retrospectively nor did the Raad apparently consider insurances of enemy property as being against the common law. This matter must now be investigated in a little more detail.

5.3.3 The Position in Practice

The question arises whether the insurances of enemy property expressly prohibited by these and other legislative measures were not in any event illegal for

\textsuperscript{455} Likewise, on the outbreak of the Second Anglo-Dutch Naval War in 1665, English ships continued to be insured at Amsterdam as a result of which the Estates-General prohibited the insurance of enemy ships in 1665. See Barbour 'Marine Risks' 582.

\textsuperscript{456} See GPB vol IV at 196-201.

\textsuperscript{457} See GPB vol VII at 516-517.

\textsuperscript{458} See Pauw Observationes vol II obs 867.
being in conflict with the common law or public policy. Put differently, was the insurance of enemy property illegal even in the absence of specific statutory prohibition?  

The legislative prohibitions were usually stated to be an express prohibition of the insurances they described. One possibility is that they were promulgated merely to strengthen an implied or common law prohibition. On the other hand, though, it may equally well be argued from the approach followed by the Dutch Legislature that its general view was that the insurance of enemy property was not prohibited at common law and that express statutory measures were from time to time required to prohibit such insurances for the duration of a particular war with a particular enemy. Support for the latter approach appears from the fact, alluded to in the previous section, that the Dutch Legislature thought it necessary to declare that its prohibitions were to apply prospectively only and, on one occasion, to clarify expressly that such a statutory prohibition did not to operate retrospectively. As already indicated, this also appears to have been the view of the Hooge Raad in 1763.

Some further support for the view that the insurance of enemy property was, in principle and in the absence of express legislative measures, not illegal, in fact appears from the very policy forms prescribed by the various insurance laws. Quite a number of them provide that the insurers covered the named insured 'or whomever else the insurance may concern', in whole or in part, friend or enemy, none excepted. The reason for the use of clauses insuring an unnamed person was not only to protect the anonymity of the insured but also to permit the substitution and interchange of interested parties of whatever description as insured, even if, for example, the person to whom insured goods were sold turned out to be an enemy subject.

But not all such clauses contained precisely the same description. In some, especially those inserted in policies in the sixteenth century, the words 'friend or enemy' ('vriend of vyand') were for example not added. That may have made a difference so that not all clauses of this type protected an enemy insured in all cases. Thus, where the person concluding the insurance fraudulently failed to disclose on his policy that the goods he was insuring, belonged to an enemy subject, or even that they

459 The issue was, of course, more complicated than appears from this simple formulation. Various possibilities exist (see Zwaardemaker 21): (i) all insurances of enemy property could be null, even if concluded before the outbreak of war; (ii) only such insurances concluded after the outbreak of war could be null; (iii) all insurances of enemy property against the perils of war could be null, and such insurances against ordinary perils could be null if concluded after the outbreak of war; (iv) all insurances of enemy goods could be valid as long as no legislative insurance or trade prohibition had been promulgated.

460 See ch X § 3 infra for insurance in favour of third parties and 'for whom it may concern'.

461 See eg the policies in terms of the Amsterdam amending keur of 1688 in terms of which the insurers undertook to versekeren aan u, ... [name of insured] of die het anders, in 't geheel of ten deele soude mogen aangaan, Vriend, of Vyand, niemand exempt'; the goods policy in terms of the Rotterdam keur of 1721 ('versekeren aan U ... of die het anders in het geheel of ten deele zoude mogen aangaan, Vrund of Vyand'); the hull policy in terms of the Amsterdam keuren of 1744 and 1775 ('versekeren aan u ... of die het anders in 't geheel of ten deel zoude mogen aangaan, Vriend of Vyand'); and the cargo policy in terms of the Amsterdam keuren of 1744 and 1775 ('versekeren aan U ... of die het anders in 't geheel of ten deel zoude mogen aangaan, Vriend of Vyand').
were being loaded on a ship together with such goods, the insurer could escape liability,\textsuperscript{462} despite the presence of a clause insuring ‘whomever the insurance concerns, of whatever nature and status he may be’. This much appears from an opinion delivered in 1594\textsuperscript{463} in which two lawyers, following the opinion of various Amsterdam and Middelburg merchants, held the view that insurers were not liable for a loss occurring in connection with insured merchandise belonging to persons residing with the enemy, notwithstanding the presence in the policy of a clause insuring goods belonging to the named insured ‘or to whomever else, of whatever nature or status’ (‘\textit{op \textquoteright t goed hem toekomende, of iemand anders, wie dat \textquoteright et zij, van wat qualiteit, of conditie datze zijn}’).\textsuperscript{464} The reason, according to the opinion, was that clause did not (or was not wide enough to) include enemy property,\textsuperscript{465} because, if it did, the insurers would either not have insured at all or would not have insured at the premium rate they did. An additional reason was that it appeared that the insured here had acted fraudulently, concealing (‘\textit{verzwijgende}’) that the goods belonged to the enemy.\textsuperscript{466} The supposition appears to have been that by the addition of the words ‘friend or enemy’ to the clause insuring ‘whomever the insured property may concern, the insurers indicated that they would pay on the policy even if it eventually turned out that the insured (that is, the person who was always, or who had subsequently bought and thus became, the owner of the insured property) was an enemy subject and that the insurance was of enemy property. Support for this may be found in two decisions of the \textit{Hooge Raad}.\textsuperscript{467}

\textsuperscript{462}According to Dorhout Mees \textit{Schadeverzekeringsrecht} 154, the addition of the words ‘friend or enemy’ to the clause stating the insurance to be ‘for whom it may concern’, meant that the insurer also relinquished any reliance on non-disclosure or misrepresentation or an incorrect indication in the policy of the nationality of the interested insured.

\textsuperscript{463}See \textit{Hollandsche consultatien} vol II cons 322.

\textsuperscript{464}Here the insured goods were loaded on board a ship together with other goods belonging to the enemy. En route the ship was arrested by the English who confiscated the enemy goods and were prepared to release the insured and other neutral goods only on the payment of a small ransom, the amount of which the insured sought to recover from his insurers.

\textsuperscript{465}Under the clause, it was explained, one could not understand ‘\textit{die goederen, personen toekomende, jegens deze Landen partije houdende}’. See too eg Voet \textit{Observationes ad} III.24.4 (n6) who stated that should an insured not disclose (presumably on his policy) the fact that it was enemy property which was being insured and should a loss occur, the insurer could not held liable for such a loss, even though the policy did contain the clause that it covered whomever the insurance may concern (‘\textit{op het goed hem toekomende of ymand anders, wie hy zy, ende van wat qualiteit ende conditie}’). However, this seems irrelevant, if, as appears was in fact the case here, the insured goods did not in fact belong to the enemy but merely to persons residing with them.

\textsuperscript{466}The insured’s conduct was the more fraudulent in view of the reason why such a general clause was inserted into the policy, namely to avoid the need to disclose the names of merchants who, for various reasons, wished to remain anonymous. For a similar opinion by Grotius in 1632 concerning contraband, see \textit{Hollandsche consultatien} vol III cons 175 which is treated in detail in § 5.4 n517 \textit{infra}.

\textsuperscript{467}See Dorhout Mees \textit{Verzekering} 88-90.
The first was a decision in 1760 in which the Raad considered an insurance concluded in 1748 for a named insured ‘or whomever else it may concern in whole or in part, friend or enemy’ (‘of die het anders in ’t geheel of ten deele zoude mogen aangaan, vriend of vijand’), to which was added that ‘this insurance is for a neutral account’ (‘geschiedende deeze verzeekering voor neutrale rekening’). Although it appeared that the goods were not in fact consigned for a neutral account, the insurers were condemned to pay. However, this was the result not so much of the presence of the words ‘friend or enemy’ as of the fact that it was the named insured himself who turned out not to have been a neutral subject. The majority of the Raad would not permit any reliance by the insurer on the stipulation that the insurance was to be for a neutral account against the contracting insured himself. It thus interpreted the addition to refer only to the unnamed insured: only he, and not the named insured, had to be neutral.

The other decision, delivered in 1763, concerned goods insured in Amsterdam in 1747 for a named insured ‘or whomever else it may concern, friend or enemy’ (‘of die het anders zoude mogen aangaan, vriend of vijand’). The ship carrying the insured cargo was captured by the French and taken to Spain where the capture was adjudged to have been irregular. At the same time the owners of the goods, resident in Boulogne, were condemned by a French prize court to pay the value of the goods to the privateer. They in turn claimed against the insurers for that loss and were successful in the Hof van Holland. On appeal the insurers argued that they would not have taken over the risk had they known that the owners were French. This argument was rejected by the Raad because the policy insured the named insured or whom it may concern, ‘hoc etiam addito sive is amicus esset sive inimicus’. From this it appears that the Hooge Raad regarded the words ‘friend or enemy’ as a renunciation by the insurers of any reliance on the fact that the insured may be or may turn out to be an enemy subject.

5.3.4 The Views of the Roman-Dutch Authors

The early Roman-Dutch authors and lawyers appear not to have considered pertinently the legality and validity, in the absence of legislative measures, of the insurance of enemy property. Most appear to have supported the view that such insurance was invalid, at least where it was specifically, or trade with the enemy generally, prohibited by legislation. But they did not state any general principle in this regard.

So, to the list of objects mentioned by Grotius which could not be insured, Groenewegen added ships or merchandise belonging to the enemies of the Netherlands and he referred for authority to the placcaat of 1622. Further, if statutorily

---

468 See Pauw Observationes vol II obs 750.
469 See Pauw Observationes vol II obs 867.
470 See Groenewegen Aanteekeningen ad III.24.4 (n6). See too Voet Commentarius ad XXII.2.3 (referring to the placcaat of 1689); idem Observationes ad III.24.4 (n6); and Van Zurck Codex Batavus sv ‘Assurantie’ par 5 (one could not insure ‘goet den vyand toekomende, of handel met den vyand na ’t verbor’).
prohibited, enemy goods could not validly be insured, even if the policy in question expressly insured the goods also if they should belong to an enemy subject.471

By far the most detailed treatment of the question whether it was lawful to insure enemy property was that of Bynkershoek in his work on international law.472 He regarded the insurance of enemy property invalid, even in the absence of any specific legislative prohibition and even if a clause in the policy expressly insured such property.

Bynkershoek's main proposition was that war, by its very nature, precluded any permission to insure the ships, merchandise and other goods of the enemy. The reason was that to assume the risks of the enemy was nothing but promoting their maritime commerce since the aim of insurance was to permit maritime commerce to be carried on by a diversion of the consequences of loss. By contrast, the lawful aim of war was to destroy the enemy trade and commerce. Accordingly, he thought the legislative prohibition of 1622 to have been perfectly proper, for, in terms of the law of war, the aim with every declaration of war was to do as much damage to the enemy as possible and it was thus forbidden to assist the enemy, whether directly or even indirectly by insuring their property.473

An additional factor advanced by Bynkershoek in support of his view that the insurance of enemy property was objectionable,474 was that enemy ships or goods captured by Dutch naval forces might, if such insurance were regarded as lawful, be claimed by the underwriters as their own property on the basis of abandonment. And if local insurers could on this basis lawfully lay claim to captured property as their own, that would mean that in terms of the law of prize the property would have to be released.475 In consequence, Dutch capturers who had lawfully captured enemy property as prize would be deprived of their reward of a portion of the value of such property, and that, in turn, would defeat the whole aim with the capture of prize and privateering in time of war, which was to encourage subjects to fit out ships with which to attack the enemy. In short, the insurance of enemy property would, in appropriate cases, enrich and benefit Dutch insurers over Dutch privateers while at the same time

471 See eg Van Zurck Codex Batavus sv 'Assurantie' par 5 n2 ('police dan, hoe generael ze ook legt, behelst geen waren verboden te transporteren').

472 See Bynkershoek Quaestiones juris publici I.21, the whole chapter being devoted to this issue.

473 Those who agreed with this line of reasoning no doubt also disapproved of the converse, namely the insuring of locally-owned property abroad in a time of war, as equally not being in the national interest. Apart from the negative influence on the balance of trade, another reason for this disapproval was that such insurance resulted in sensitive information concerning the movement of ships, in fleets or in convoys, and the value and nature of cargoes being made known on foreign (whether enemy or neutral) markets where it was freely available to enemy intelligence. See Spooner 46.

474 This one he got from the placcaat of 1622 itself. See again § 5.3.2 supra.

475 As to the law of prize, see again ch VI § 5.2.2 supra. For a further explanation as to why Dutch capturers had no valid defence against a claim by Dutch insurers to captured enemy property which had been abandoned to them, see Bynkershoek Quaestiones juris publici I.25.3.
indirectly profiting the enemy itself. And it was readily apparent to Bynkershoek that this was contrary to the law of war.\textsuperscript{476}

He did note the argument to the contrary, no doubt strenuously advanced by the merchant community, that for the insurers concerned the insurance of enemy property generated more profit in the form of premiums than it caused losses in the form of insurance pay-outs, and thus benefitted the Netherlands more than the enemy. This view, Bynkershoek thought, was unsound since experience could not prove the truth of this assertion, whereas it was certain that such insurance aided the enemy by enabling him to extend his commerce more widely by being insured.\textsuperscript{477}

Furthermore, Bynkershoek referred to the view that unless specifically prohibited, the insurance of enemy goods was not unlawful and invalid. In particular he considered the support which was derived for this view from the fact that the retrospective operation of the \textit{placcaat} of 1622 was specifically repealed, from which it could be deduced that the Estates-General, by regarding earlier insurances of enemy property as valid, approved of such insurance if it was not prohibited by a special legislative measure. He thought that this deduction was incorrect and that the \textit{placcaat} of 1622 merely confirmed the general law of war and did not enact any new law. The repeal, he thought, was an error and not binding at all.\textsuperscript{478}

Next he referred to the possibility that the insurance of enemy property could be so prevalent that custom might be said to have established the validity of the practice. His view was that even if such insurances occurred frequently, it could not be considered a custom so well established as to have the force of law, unless it was confirmed by an uninterrupted line of judicial decisions. In addition, Bynkershoek made the point that one could not contract out of the general prohibition on the insurance of enemy property, so that the insurance of enemy property remained unlawful and hence invalid even if the parties had expressly insured property irrespective of whether or not it belonged to the enemy.\textsuperscript{479}

Importantly, though, Bynkershoek did consider the prohibition on the insurance of enemy property in terms of the law of war to be just that and nothing more. It was a prohibition on insuring property which belonged to the enemy itself. Hence, he thought, by prohibiting the insurance of Portuguese property in 1657, the Estates-General were acting in accordance with the laws of war. But he doubted the legality of the general

\textsuperscript{476} Put differently, it was against public policy the promise to compensate the loss caused by one’s own state in exercise of the law of prize, that is, for a Dutch insurer to insure the enemy against Dutch capture.

\textsuperscript{477} Therefore, even though the Netherlands might profit more from the conclusion of such insurances than from not concluding them, which was uncertain, it was certain that the enemy benefitted more from the conclusion of such insurances than from not being able to conclude them.

\textsuperscript{478} He did concede, however, that the amending \textit{placcaat}’s restriction on the imposition of the penalty, in contrast to the prohibition and the declaration of invalidity, to future cases, was binding.

\textsuperscript{479} Thus, as to the opinion of 1594, he thought that even if the policy there had expressly stated that the goods being insured belonged to the enemy, the insurers would still not have been liable since such contract would be illegal and void.
prohibition added in that placcaat on insuring any property merely on the way to or from Portugal, for if such property belonged to subjects of the Netherlands or of a friendly power, there was no reason to prohibit the insurance of such goods since trade with Portugal was not prohibited by placcaat except for trade in contraband. In so far as the prohibition therefore concerned the property of Dutch subjects and friendly or allied foreigners, it interfered with their legitimate (that is, non-contraband) commerce and was in contravention of international law (‘error contra Jus Gentium’).

Finally, Bynkershoek advised that because the practice of insuring enemy property was so widespread, a perpetual placcaat should prohibit it generally and in addition to those measures promulgated from time to time which did so only for the duration of a specific war and in respect of a specific enemy.

Despite numerous indications that his views did not correctly reflect practical commercial realities, after Bynkershoek Roman-Dutch authors generally followed his views. Van der Keessel, for example, merely emphasised that the insurance of enemy property was generally, that is, even in the absence of specific legislation, prohibited and void, even if the insurer was aware of the fact or, presumably, prepared to insure such goods by inserting an appropriate clause or by permitting it to be inserted in the policy.

To conclude, according to Roman-Dutch legal theory, the insurance of enemy property was illegal for being against the law of war and public policy, being an advancement of the enemy trade when the aim in time of war was to destroy such trade. Parties to an insurance contract could not renounce or contract out of this common law prohibition. Furthermore, it seems the prohibition applied to the insurance generally of enemy property and not only to insurance which included cover against the perils of war, including, therefore, enemy (that is, Dutch) capture. It also seems that nullity was not only attached to such insurance concluded after the outbreak of war but also to insurances concluded prior to the declaration of war.

However, it seems that this view did not hold sway in Dutch commerce and insurance practice and there are numerous indications that in practice the notion of freedom of trade was adhered to. Therefore, despite theoretical opposition, the
insurance of enemy property was valid and permitted even in time of war, unless, of course, such insurance was statutorily prohibited, something which was not uncommon in the seventeenth and eighteenth centuries.

5.3.5 The Position in the Nineteenth Century and in English Law

Although the issue was raised in earlier drafts, there is no mention of the insurance of enemy property in the Wetboek van Koophandel. The legality and validity of such insurance therefore depends on the dictates of public policy. In terms of art 657, though, in an insurance for the account of an unspecified insured ('voor onbepaalde rekening'), where it is not stated in the policy to which nationality the owner of the insured property belongs, the person taking out the insurance is obliged to mention that fact to the insurer and to specify if the goods in fact belong to an enemy subject, unless he is relieved of that obligation by a clause in the policy itself.

Subsequent developments in international law in the nineteenth century led to a reappraisal of the rather extreme view of Bynkershoek that every subject of a belligerent state was an enemy, also in his private capacity, and that every private law relationship with such a subject was prohibited and was or became invalid. Even if it were a view in accord with public policy and favoured in insurance law and practice in the previous century, by the nineteenth century a change in the public policy underlying the idea of such illegality had occurred.

Various possibilities came to be differentiated. According to some theorists only the insurance of enemy property against the perils of war, concluded after the outbreak of war, was null and void; the insurance of such property against marine perils only was always valid, and insurance against war risks only or also was valid if concluded before the outbreak of war. Another view held that all insurances of enemy property was in fact valid in the absence of an express and specific prohibition on insurance specifically, or on trade with the enemy generally. Such a specific prohibition was either supported or opposed by these theorists. Some of them added that although valid, there had to be a suspension of the payment of an indemnity in terms of such insurances until after the conclusion of peace.

Nevertheless, there was still no unanimity on this point in Dutch law in the nineteenth century, although, as was frequently pointed out, the matter was largely academic because legislation would invariably specifically prohibit such insurances in time of war.

486 See eg Van der Linden's Ontwerp Wetboek which provided in III.11.1.14 that insurance on the goods belonging to the enemy was to be void.

487 Compare the position in the Antwerp customary law. See § 5.3.2 supra.

488 See Schölvinck 4-5.

489 See eg Dorhout Mees Verzekering 89-94; Rutgers van der Loeff 117-119; Schölvinck 103-105; and Zwaardemaker 23-27.
In English law it appears that the insurance of enemy property was accepted as valid from early on, at least in the Admiralty Court and in insurance practice in the sixteenth century. By the early eighteenth century, insurances on foreign account (that is, on foreign ships and cargoes) were common in London, as were insurances of such property against foreign risks or on foreign voyages. The insurance of enemy property too was regarded as valid and English underwriters generally freely insured enemy property in time of war, also against losses inflicted by English men-of-war and privateering ships.

In the mid-eighteenth century Lord Mansfield, for example, on the grounds of expediency, defended the freedom to insure enemy property and opposed statutory measures prohibiting such insurances. For this he relied on the then current mercantilist arguments and on financial considerations, namely that the country enjoyed a greater advantage from the profitability of the insurance of enemy property than any disadvantage, because more money always entered the country in cash by way of premiums (which were in any case greater because of the perils of war) and brokers’ commissions than left it in the form of insurance payments. Apart from the resulting favourable balance of trade, especially important in time of war, such insurances also permitted valuable intelligence to be gained on the movement of enemy shipping. Although he went so far as to consider it dishonourable for insurers to raise a statutory defence of illegality to defeat such contracts, Lord Mansfield appears never to have been quite sure of how to reconcile his view, clearly based on expediency and no more, with the two well-known principles of the Common Law, namely that trading with enemy subjects was illegal and that a foreign enemy had no locus standi in English courts. This anomaly was pointed out in subsequent English decisions.

---

490 See generally eg Buys 149; Cockerell 13-14; Dover 47; Holdsworth History vol XI at 448 and vol XII at 539-540; John 'London Assurance' 136; Raynes (1 ed) 165, (2 ed) 160; Rutgers van der Loeff 113-116; Walford Cyclopaedia vol II at 502-504 sv 'insuring the ships and property of enemies'; and Wright & Payle Lloyd's 80-81, 157-158 and 178-180.

491 See eg Holdsworth History vol VIII at 291.

492 Insurance cover 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. See Kepler ‘London Marine Insurance’ 49.

493 The insurance of a voyage between two foreign ports was referred to as being on a ‘cross risk’.

494 See eg Gist v Mason & Others (1786) 1 TR 88, 99 ER 987. These two reasons appear from Lord Mansfield’s directions to the jury in this case, as reported by Park (8 ed) 523. In addition, the underwriting community no doubt feared that if enemy property was, even temporarily, not insurable on English markets, that business would be permanently lost to competitors. Furthermore, it was also argued that it was impossible to prohibit transactions which could be carried on solely by way of correspondence.

495 See eg Potts v Bell & Others (1800) 8 TR 548, 101 ER 1540.

496 See most clearly eg Bell & Others v Gilson (1798) 1 Bos & Pul 345, 126 ER 942 at 354, 948.
The English Legislature, though, by an Act passed in 1748, had earlier, for the duration of the then current War of Austrian Succession, expressly prohibited and declared void all insurances of French ships and of goods loaded on French ships, and had imposed a penalty on those concluding such insurances in future. This temporary prohibition aside, though, the insurance of enemy property was not only permitted by law but openly practised, although it remained controversial and hotly debated and disputed.

After some difference of opinion, Lord Mansfield's liberal views had by the beginning of the nineteenth century been overturned and judicial decisions came to regard marine insurances on enemy property as against public policy, illegal and void. This view was no doubt strengthened not only by the legislative prohibition in

497 21 Geo II c 4.

498 An earlier Bill of 1741 which had attempted to do the same was strongly opposed on the London market, amongst others by the London Assurance Corporation which had petitioned against it. The Act of 1748 was only passed, despite continued opposition in Parliament, in the last year of the War of Austrian Succession (1740-1748) between Prussia (supported by France and Spain) and Austria (supported by England), which, after 1744, had developed into a colonial conflict between the Franco-Spanish block and England. Interestingly enough, the Act did not also prohibit the insurance of Spanish subjects and property, presumably because an intervention in the lucrative business of insuring the Spanish treasure fleets would have aroused strong opposition and would have been very unpopular.

499 An Act of 1752 (25 Geo II c 26) prohibited, for a period of seven years, insurances on foreign (note: not enemy) ships bound to or from the East Indies. The aim was to protect the interests of the East India Company which had in 1723 been given a British monopoly on that trade. The Act was strongly opposed on the ground that it was to the advantage of competing insurance markets where such vessels came to be insured as a result of the prohibition.

500 Similar measures were not passed in other late-eighteenth century wars in which England was involved, such as the Seven Years' War (1756-1763) or the American War of Independence (1775-1783).

501 One Corbyn Morris wrote two tracts on the Insurance of Enemies' Ships (1758), a topic also treated in his Essay of 1747 (see Blackstock 51). See too Weskett Digest 197-202 sv 'enemy' where the arguments for and against permitting such insurances were recounted in some detail (In pars 2 and 3-5 respectively). The arguments against included the following: it amounted to aiding the enemy to provide them with the best and cheapest (ie, English) insurance; the provision of insurance negatived the losses inflicted by war; the profit on insurance, especially in a time of war, was much less than otherwise, if there was in fact any such profit at all; the increase in premium rates as a result of the insurance not only against the perils of war but also of enemy property, affected local merchants too, so that the increased premium income generated locally helped pay for foreign losses; the prohibition on trade included a prohibition on insurance for otherwise the former prohibition would be defeated; the alms of war and insurance were in direct conflict and could not be reconciled; and the insurers of enemy property might, in order to prevent losses, leak intelligence to the enemy. In support of these arguments, Weskett (In par 6) referred to the position in the Netherlands, in particular to the views of 'some civilians' and to the placcaat of 1622. He noted, not altogether correctly, that 'the Dutch, who have seldom overlooked any advantage to themselves in trade, have always thought it necessary to prohibit this kind of insurance'.

502 See eg Bell & Others v Gilson (1798) 1 Bos & Pul 345, 126 ER 942 where it was held that the insurance of goods produced in Holland and bought there during hostilities between Holland and Great Britain by a British agent resident there and shipped for British subjects, was legal, not being an insurance of enemy property, the illegality of which was 'now pretty well settled' (at 354, 948). And in Furtado v Rogers (1802) 3 Bos & Pul 191, 127 ER 105 it was said (at 197, 108) that 'it has been understood for some years past to have been the opinion of all Westminster-Hall, and ... of the nation at large, that such insurances [ie, by a British subject of an enemy] are not strictly legal or capable of being
1793 on the insurance of French ships and goods for the duration of the French Revolutionary Wars (1792-1802), but in particular also by the two common law principles mentioned earlier. By the same token, any insurance expressly against British capture was null and void, even if concluded before the outbreak of hostilities and even of neutral property.

5.4 The Insurance of Contraband

Closely related to the insurance of enemy property was the insurance of goods known as ‘contraband’. Contraband, generally speaking, were goods or commodities which a country, blockading the port or ports of an enemy state, prohibited from entering those ports by the declaration of a blockade. Contraband consigned to such enemy ports could lawfully be captured as a prize of war by the blockader. Thus, the Dutch could capture contraband consigned to an enemy port, not only when carried there by Dutchmen or in Dutch ships but even when such goods belonged to

enforced in a court of justice’.

503 Severe restrictions were imposed by the Traitorous Correspondence Act of 1793 (33 Geo III c 27) on trade with the enemy. Section 4 prohibited the insurance, on any voyage whatsoever, of vessels or goods belonging to person residing in French dominions, and also the insurance of arms, canon, masts, timber, sailcloth and other naval stores, coals, provisions, and certain other articles on any voyage to any port in French territory. But the Act in fact included a long list of articles of which the insurance was permitted, even on a voyage to a French port.

504 See eg Furtado v Rogers (1802) 3 Bos & Pul 191, 127 ER 105; Kellner v Le Mesurier (1803) 4 East 396, 102 ER 883. From both these decisions it appears that a policy on a foreign ship (which was, of course, valid) insuring her against the perils of war, including ‘capture’, generally, had to be understood as containing an implied exception of British capture. See further Chalmers 159.

505 The term ‘contraband’ is first encountered in the time of the Crusades when the Popes banned and prohibited trade with the Muslim in munitions of war, trade in such goods being ‘contra bannum’. See eg Geerligs 21. Van Ghesel De assecuratione I.3.15 noted that res in commercio did not include ‘contrabandae’, ie, goods carried ‘contra bannum’. As to contraband, see generally eg Kulsrud 244-294.

506 It was a crime for Dutch subjects to carry contraband goods to an enemy port. See eg Bynkershoek Quaestiones juris publici I.10.

See also the undated legal opinion delivered by the end of the sixteenth century (Hollandsche consultatien vol III/2 cons 336) which concerned a placcaat of 4 August 1586 by which it was prohibited directly or indirectly to carry any victuals or weapons of war to the enemy (ie, the Spanish). Inhabitants of the United Provinces contravening the prohibition were punishable by death in addition to forfeiting their ships (‘haere Scheepen’), goods and bills of exchange as being ‘fauleurs ende geaffectioneerden des gemeenen vyands’. According to the opinion, in terms of the placcaat only the ship carrying the contraband and in fact belonging to the transgressor himself was thus forfeited. Therefore, if the master, without the consent or instructions of the owners, traded with the enemy and carried such contraband, the ship was not subject to forfeiture, even if the master was a part-owner. The opinion did admit, though, that it could be disputed if the master’s part, like his own goods and merchandise, should not be forfeited, but regarded it as it beyond controversy that the parts belonging to the other co-owners were not forfeited because they were not transgressors.
neutrals and even when carried on neutral ships. The idea was to prevent contraband goods from reaching the enemy by sea.

The type of goods considered to be contraband varied from blockade to blockade. It invariably included goods directly advantageous to the prosecution of the war by the enemy nation, such as weapons and ammunition. But on occasion it extended also to goods only ancillary to the conduct of war. Nevertheless, despite repeated definition in later times in individual treaties concluded by the Netherlands and in national legislation, the term 'contraband' remained one with an uncertain content, the more so because it meant different things at different times. For example, although it was generally accepted in international law that goods manufactured for the purpose of warfare and immediately capable of being used in war, such as munitions of war, were contraband, and although it was accepted that on the other end of the spectrum luxury goods were not contraband, there was a large grey area in between of materials and goods which were only capable of being turned into instruments of war. These included provisions, naval stores, timber, hemp, sail-cloth, sulphur and the like. Neutrals,

507 In this regard contraband was an exception to the principle that property belonging to warring nations were free on board neutral ships and could not be detained and seized. In the latter part of the seventeenth and during the eighteenth centuries, the Netherlands, like the rest of Europe, adhered to the principle that enemy goods on board a neutral ship could not lawfully be captured because of the principle that a free or neutral ship made free goods (as to 'free ship, free goods', see again ch VI § 5.2.2 supra). But if those goods had been declared contraband, they could in fact be captured if destined for a blockaded enemy port, even if they were carried on board a neutral ship.

Bynkershoek *Quaestiones juris publici* I.10 described the general rule as being that neutrals could not carry contraband goods to the enemies of the Netherlands, and if they did and were caught, the goods could be confiscated. Aside from contraband, though, neutrals could freely trade with either party and carry anything to them with impunity. See also eg Boxer *Seaborne Empire* 102-103.

508 Thus, the Netherlands in time of war concluded treaties with neutral nations in which the rule 'free ship, free goods' was applied, and which then described the type of goods which, between the Netherlands and that neutral ally, would (or would not) be regarded as contraband and which could therefore be captured if carried on board one of its ships to the port of the country then at war with the Netherlands. Likewise, the Dutch in turn concluded treaties with its allies who were at war and undertook not to carry contraband to the ports of their enemies.

For references to such treaties, see eg Braunius 143; Kunst 141; and Weskett *Digest* 127-130 sv 'contraband' pars 2-3. See generally Magens *Essay* vol II at 436-473 for a summary of the articles of the treaties between England and the Estates-General of the United Provinces of the Netherlands concluded between 1667 and 1689 which concerned commerce and navigation.

509 Such legislative measures determined which goods could not be carried to enemy ports or mentioned the goods which Dutch subjects could not, by reason of a treaty, carry to the ports of the enemy of an ally. See eg the *Nederlands advysboek* vol II adv 64 (1667) which contains an extract from the Register of Resolutions of the Estates-General of a resolution of 6 May 1667 on 'wat goederen voor Contrabande te houden'. See too Van Zurck *Codex Batavus* sv 'Contrabande Waeren' pars 1-7 whose treatment of contraband considered the topic with reference to the various legislative measures promulgated in, and also the different treaties concluded by, the Netherlands.

510 See Walford *Cyclopaedia* vol II at 106-107 sv 'contraband of war', referring to Grotius' threefold classification (in his *De jure belli*) in this regard of goods as (i) munitions of war or *instrumenta belli*; (ii) articles of luxury; and (iii) raw materials. See too Bynkershoek *Quaestiones juris publici* I.10 who described contraband very widely as those articles which were serviceable in war, irrespective of whether or not they were of any use outside war; everything which served a warlike purposes in the form in which it was bought, whether it was an instrument of war or material by itself fit for use in war. He noted that not all materials out of which instruments of war could be made, were contraband, for that would be too wide
intent upon trade, would obviously regard such materials as not being contraband while belligerents, intent upon thwarting trade with the enemy, would hold the contrary opinion. And even if there was consensus that munitions of war were contraband, there was disagreement as to which goods qualified as such, a difference of opinion which international law found difficult to overcome given the constantly changing methods of warfare. In the eighteenth century goods which were regarded as contraband because of their direct serviceability in warfare, that is, because of their being munitions of war, included weapons such as swords, guns, muskets, pistols, cannon, mortars, and ammunition such as bullets, gunpowder, bombs, grenades, and cannon balls.\(^{511}\)

Aside, therefore, from those areas where it could be said that, by general consent and practice, international law had emerged, much of the law relating to contraband was governed by divergent national laws, and different parties would interpret the description of contraband in treaties and the like differently. What goods were contraband was a matter of some uncertainty which depended, amongst other things, on the time, the place, and the parties involved, and on applicable treaties. And when it came to the insurance of contraband, it had to be determined in each case whether or not the goods concerned qualified as such.\(^{512}\)

The general rule in Roman-Dutch law was that contraband goods, whether belonging to subjects of the Netherlands or to neutral subjects,\(^ {513}\) could not validly be insured. It is important in this regard to note that only goods regarded as contraband in terms of Dutch law were uninsurable, that is, goods destined for an enemy port or for a port of the enemy of an ally where there was a treaty between the Netherlands and that ally regulating the matter of contraband. Goods not regarded as contraband in terms of Dutch law were insurable on Dutch markets, even though they might in terms of another legal system have been regarded as contraband. Thus, goods were insurable if destined for a Dutch port or for a (as far as Dutch were concerned) neutral port, even if they were regarded as contraband in terms of the laws of another country. But their insurability was subject, of course, to their being specified in the insurance policy, not only if that was necessary by reason of their nature\(^ {514}\) but, at least where the insured was aware of that fact, possibly even simply by reason of their being con-

---

511 See eg Van Zurck Codex Batavus sv ‘Contrabande Waeren’ par 1 who described contraband as ‘Vuurwerken, en ’t geen daar toe behoort, als kanon, musquetten, mortieren, petarden, bussen, granaden, ..., kruit, lood, ..., en alle toerusting, gemaak tot gebruik van oorlog’. See further eg Spooner 104.

512 See Van Hamel 158.

513 If they belonged to the enemy, different considerations of course applied. See § 5.3 supra.

514 See again ch V § 4.4 supra on the insurability of arms and ammunition.
traband.\textsuperscript{515} Thus, to put the rule differently, contraband could not validly be insured if destined for an enemy port but could otherwise be insured if specified in the policy.\textsuperscript{516}

The insurance of contraband was mentioned in several Roman Dutch sources. In an opinion delivered by Grotius in 1632,\textsuperscript{517} he expressed the view that if at the time of the conclusion of the insurance, the insurer did not know that the goods to be insured were declared contraband in terms of the legislation of another country and the insured did know this, the insurer was not liable to compensate the insured for the confiscation of the goods resulting from their being contraband.\textsuperscript{518} This opinion would appear to be in consonance with Antwerp customary law at the beginning of the seventeenth century which regarded it as necessary to specify in the policy that the export or the import of the goods to be insured was prohibited at the place of loading or at their destination. Accordingly, if contraband goods which were insurable in principle (that is, which were not destined to the port of an enemy of the Netherlands) were insured, their contraband nature had to be specified, at least where the insured was aware and the insurer unaware of that fact, even if the insurance was on goods generally for whom it may concern, and even if the insured had permission to export or import them.\textsuperscript{519}

The issue of contraband came up in passing in a case before the Hooge Raad in 1729.\textsuperscript{520} Goods, insured at Rotterdam for a voyage from France to Spain, were declared prize after the ship in which they were conveyed was taken by a Spanish privateer. The insured had claimed successfully from the insurers in the Rotterdam Chamber of Insurance and the insurer’s appeal to the Hof van Holland had failed. On further

\textsuperscript{515} Straccha \textit{De assecurationibus} V.1-5 already distinguished between the insurance of goods declared contraband by foreign legislation and that of goods declared contraband in terms of local legislation. He regarded the latter as forbidden but not the former, because such foreign legislation was not binding on local merchants. But although the former type of goods was insurable, it had to be specified because of the greater risk involved.

\textsuperscript{516} See Zwaardemaker 28-29.

\textsuperscript{517} See \textit{Hollandsche consultatien} vol III/1 cons 175. See also Bynkershoek \textit{Quaestiones juris publici} I.21.

\textsuperscript{518} In this case goods of English origin were declared contraband in terms of Spanish legislation of 22 April 1626, and it was presumed that the insurers did not at the time of their underwriting the policy know either that the goods were English or that they were contraband goods, something of which the insured could not have been ignorant.

\textsuperscript{519} See arts 50-53 of par 2, title 11, part IV of the Antwerp \textit{Compilatae} of 1609 (see De Longé vol IV at 220-222); Mullens 46-47. The same position pertained earlier in the sixteenth century. Thus, in terms of the marine insurance code of Spanish merchants resident in Bruges, the \textit{Hordenanzas} of 1569, an insured in times of war had to declare that his ship contained no contraband and an insurer was entitled to declare that he did not take over the risk for merchandise belonging to ‘hombres de contrabanda’. If the insured did not wish to accept this condition, a higher premium was payable, and if the insurer did not stipulate such, he was liable even for contraband. See Verlinden ‘Zeeverzekeringen’ 209. See too Straccha \textit{De assecurationibus} V.1-5 on the question whether a general insurance concluded on all merchandise (‘super ... omnis generis aliis mercibus’) included contraband goods; and Roccus \textit{De assecurationibus} note 21.

\textsuperscript{520} See Bynkershoek \textit{Observationes tumultuariae} obs 2492; \textit{idem Quaestiones juris privati} IV.14.
appeal to the Raad, one of the insurers’ contentions was that the carrying ship had loaded contraband. The Raad was in some doubt about the precise tenor of the defence for it appeared that the insured goods were not contraband, and that alone was sufficient to reject the defence. It would appear, therefore, that the fact that other goods on board the ship were contraband could not prevent a claim in respect of the insured and non-contraband goods on the same ship.

Later authors confirmed that an ignorant insurer was not liable under a policy if the insured goods were contraband, but added, following the view of Bynkershoek,\(^\text{521}\) that even if the insurer was not ignorant, the insurance of contraband was null and void.\(^\text{522}\) Therefore, the parties could not contract out of this illegality, although presumably such illegality resulted only as regards contraband consigned to an enemy port.

In terms of art 599-4 of the Wetboek van Koophandel an insurance is void when made on objects in which, according to (Dutch) law or legislation, one may not trade. Such goods would include contraband consigned to an enemy port. Article 599-5 added another dimension not apparent from the Roman-Dutch sources, namely that the insurance is void when made on ships, whether Dutch or foreign, that are used for the carriage of such contraband goods.\(^\text{523}\)

\(^{521}\) Quaestiones juris publici I.21. See also Enschedé 37.

\(^{522}\) See eg Schorer Aanteekeningen 417 (ad III.24.4) sv ‘Weddingen’ (insurance of contraband was prohibited, especially if the insurer (not ‘the insured’ as the Maasdorp translation would have it) was ignorant, in which case he was not liable for any compensation); Decker Aanteekeningen ad IV.9.4 n(3)/(c) who added that if the insured, without the knowledge of the insurer, mixed the merchandise mentioned in the policy with contraband wares, the insurer was not liable for the loss suffered as a result (‘komt de schaade, deswegeens ontstaande, voor zyne eigene rekening propter dolum’); and Van der Keessel Praelectiones 1439-1440 (ad III.24.4).

\(^{523}\) See generally eg Dorhout Mees Schadeverzekeringsrecht 117; and Rutgers van der Loeff 112.