THE LAW AND CUSTOMS OF MARINE INSURANCE IN ANTWERP AND LONDON AT THE END OF THE SIXTEENTH CENTURY: PRELIMINARY THOUGHTS ON THE BACKGROUND TO AND SOME OF THE SOURCES FOR A COMPARATIVE INVESTIGATION

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1 Introduction

It is well known that by the end of the sixteenth century insurance contracts were regularly concluded in both Antwerp and London. Fuelled not only by a growth in overseas trade, but also by the speculative possibilities that the underwriting of marine risks offered capitalist merchants, the practice of marine insurance in particular expanded rapidly in the course of that century.

As far as insurance was concerned, the two cities shared many common features: the Mediterranean origin of the insurance techniques practised there, at first by foreign merchants; the role of their respective bourses as centres for the transaction of insurance contracts; the existence, in an attempt to counter fraudulent practices, of a formal requirement of insurance policy registration in an official insurance office, and, coupled with that, the rudiments of insurance-specific dispute resolution. For present purposes, though, I wish to focus on another common feature: attempts in both cities to set the general customs and rules of insurance down in writing.

However, my aim is modest. I will not attempt to analyse or compare the content of these respective compilations. Nor will I attempt any broader comparison of the many other aspects of insurance law and practice in the two cities: of policy terms, prescribed or standard policy forms generally, judicial decisions and merchants’ opinions on insurance matters, premium rates, or underwriting practices. I wish merely to provide an introduction to and an overview of the sources of customary insurance law so as to

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facilitate a future internal comparison. In doing so, I will hopefully place the Antwerp and London compilations of insurance customs in their proper historical perspective.

2 Antwerp

2.1 The background

It is not known when insurance was first practised in Antwerp or the Low Countries generally or, indeed, how the technique was introduced there. It seems likely that foreign merchants, possibly of Italian or Spanish extraction, concluded the first insurance contracts in the city. The Antwerp bourse, dating from 1515, was the first dedicated central meeting place for merchants in Europe, and quite possibly some of them participated in the underwriting of marine risks there.

By 1560, more than 600 foreign merchants and factors of foreign nations were resident and active in Antwerp, then the foremost trading centre in Europe. By comparison, it has been said, London was “a mere trading satellite of mighty Antwerp”. There were, at the time, close and busy trading relations between London and the Low Countries, especially the Duchy of Brabant, and more specifically its main port, Antwerp. English

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1 In short, I wish merely to reconsider, update and expand on some of the views I expressed earlier on the issue of customary insurance law in Antwerp and in London at the end of the sixteenth century: see JP van Niekerk The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800 2 vols (1998) 253-255 and 257-259 respectively. I will therefore not refer again to all the sources I mentioned there, but will focus on ones published or that I have come across since.

2 On the presence of foreign merchants in Antwerp at the time, see, eg, JA Goris Étude sur les colonies marchandes méridionales (Portugais, Espagnols, Italiens) à Anvers de 1488 à 1567 Contribution à l’histoire des débuts du capitalisme moderne (1925, repr 1971); Oskar de Smedt De Engelse natie te Antwerpen in de 16de eeuw (1496-1582) 2 vols (1950 and 1954).

3 A Nieuwe Beurs was built in 1531 after a design by the architect Cornelius Floris. It featured an Italianate interior cortile or courtyard. Its multifunctional character – it housed shops around the courtyard – was copied in both the Royal Exchange in London (1566-1569) and later in the Amsterdam Exchange (1608-1611). See, further, Piet Lombaerde “Antwerp in its golden age: ‘One of the largest cities in the Low Countries’ and ‘one of the best fortified in Europe’” in Patrick O’Brien, Derek Keene, Marjolein ‘t Hart & Herman van der Wee (eds) Urban Achievement in Early Modern Europe. Golden Ages in Antwerp, Amsterdam and London (2001) 108 (there is a depiction of the Antwerp Bourse at 57); and see also the wonderfully illustrated volume (and catalogue to an exhibition entitled “Antwerp 93”) by Jan van der Stock (dir) Antwerp. Story of a Metropolis 16th-17th Century (1993) 234-235 for a depiction and a description of the Bourse.

merchants, too, were active in the city. The main commodity traded was unfinished English cloth in exchange for silk fabrics and other fine mercery goods.

The introduction in Antwerp of new, or the refinement of existing, commercial techniques by foreign and local merchants contributed to its economic influence: techniques such as agency and factoring, partnership arrangements, bookkeeping, currency exchange and financing, and also insurance. Antwerp was not only a commercial and industrial but also a financial centre, a warehouse of raw materials and, importantly, the transportation and communication (postal) hub of Europe. In the latter regard its position was enhanced by the availability of transportation insurance.

However, Antwerp’s economic growth in the sixteenth century, especially between 1535 and 1560, ground to a virtual halt in 1567 with the Spanish invasion to quell the Protestant revolt. By the time of Antwerp’s surrender to the Spanish army in 1585 and with access to the city being relinquished to the Dutch who were in control of the River Scheldt, her international commercial pre-eminence was a thing of the past. Antwerp’s international trade declined by half between 1568 and 1589, while that of London (and other cities like Amsterdam) grew exponentially.

An idea of the sophistication of insurance practices in Antwerp is provided by the extent of its legislative regulation of the topic up to the end of the sixteenth century.

Thus, the London Merchant Adventurers’ Company had secured privileges in Antwerp by the mid-fifteenth century. John Wheeler, the Company’s secretary in his *A Treatise of Commerce* (1601) – despite its title, this was not a work on trade or commerce but one defending the Company against (especially foreign) charges of monopolistic practices – recounts how the Company had moved from Bruges to Middelburg and from the latter to Antwerp in 1444, “[a]t which time Antwerp being but a poore and simple Towne, standing in Brabant, made great sute to the Companie to repaire thither” by offering it large and beneficial privileges (at 15) which were granted and confirmed in August 1446. At the time when the English merchants arrived, there were no more than four local merchant traders, none of whom was an “adventurer to the sea” (*ibid*). Within a few years, though, trade by the locals and the presence of foreign merchants had increased to such an extent that Antwerp had become the “Packe-house of Europe” (at 17). The Company remained in Antwerp “under the name of the English Nation, by which name the said Company ever since hath beene most commonly knowne in the low Countries” (at 16), until the Spanish finally took over in 1585. See further TS Willan *Studies in Elizabethan Foreign Trade* (1959) 48-51, 56-57 and 59-60.

For an idea of the balance (if not then the extent) of London-Antwerp trade in the sixteenth century, see Willan (n 5) 343, showing that the range of goods exported to the Low Countries by far exceeded the range imported from there into England.

See further Herman van der Wee “Anvers et les innovations de la technique financière aux XVIe et XVIIe siècles” 1967 (22) *Annales histoire, sciences sociales* 1067-1089.

See Michael Limberger “‘No town in the world provides more advantages’: Economies of conglomeration and the Golden Age of Antwerp” in O’Brien *et al* (n 3) 56.

For a summary, see Fred Stevens “The contribution of Antwerp to the development of marine insurance in the sixteenth century” in Marc Huybrechts (ed) *Marine Insurance at the Turn of the Millennium* Vol 2 (2000) 15-20; and JP van Niekerk *An Introduction to and Some Perspectives on the Sources and Development of Roman-Dutch Insurance Law with Appendices containing the more important Roman-Dutch Insurance Legislation* [no 5 [Unisa] Tax and Business Law Centre Monograph Series] (1988) 31-51, and see, also, the appendices for reproductions of the relevant measures.
After several earlier legislative measures concerning, in the main, the procedural aspects of the resolution of insurance disputes, a specific regulation of insurance in twenty sections was taken up in title VII of the placcaat of October 1563 on maritime law. For the first time it referred in section 2 to the unwritten insurance customs of Antwerp and provided that in future all insurances of goods or merchandise had to be done according to those customs (“naer costuyme vander Borse van Antwerpen”) and in the form of the policy prescribed by and attached to the measure. That policy, too, provided that the insurance was concluded in accordance with those customs (“naer de gewoonte enede costuymen vander Borse van Antwerpen”) as well as the applicable legislation. However, section 20 determined that such customary law was subject to the written (Roman) law and that those matters not dealt with in the placcaat had to be decided and determined according to it (“naer gemeene geschreven Rechten, deroguerende alle costuymen ende usanties ter contrarien”).

In a placcaat of March 1569 (ns), the Spanish authorities prohibited all insurances for the time being (that is, provisionally, pending a new regulation of insurance matters), the unseaworthiness of insured ships being mentioned as one of the reasons. After nineteen months, a placcaat of October 1570 again permitted insurances and regulated the topic in some detail in thirty-six sections. It prescribed, eg, compulsory under-insurance, the contents of individual policies that had to be in a standardised prescribed form, and their notarial execution and registration. This enactment was the first permanent legislative measure in the Low Countries solely concerned with insurance and also the last to apply to the whole of the Low Countries. Its prescribed model policy form again referred to the underlying customary law that applied if not contradicted by the legislative measures (“Usantie ende der Costuyme vander Borse van Antwerpen, der selver Ordonnantien niet contrarierende”).

Crucially, therefore, the compilation of Antwerp insurance customs at the end of the sixteenth century should be seen against the background not only of its common law, but also of this quite extensive statutory intervention.

10 By a placcaat of Feb 1459 (ns) and one of May 1537.
11 By a provisional placcaat of Jan 1550 (ns), soon replaced by one of Jul 1551.
12 See Albert Mund Le police d’assurance maritime d’Anvers en 1563 (1953).
13 It prescribed, eg, compulsory under-insurance, the contents of individual policies that had to be in a standardised prescribed form, and their notarial execution and registration.
14 Thus, a smaller proportion of compulsory under-insurance was allowed.
15 Also relevant for an understanding of Antwerp insurance law at the time, are the numerous Spanish examples of insurance regulation, such as that of Barcelona in 1435 (and amended several times afterwards, culminating in a marine insurance statute of twenty one sections in 1484), Burgos in 1538, Seville in 1556, and Bilboa in 1560.
The compilation of customary insurance law in Antwerp

In October 1531, Emperor Charles V ordered local authorities in the Low Countries to create official compilations of their local customs (“reductie van den costumen van den lande”), namely those unwritten usages of a reasonable nature that had been accorded binding legal force through repeated, open, uncontested and uniform observation over a period of time. The compilations had to be completed within six months and submitted for approval (“homologatie”) by the central government on the advice of the relevant provincial council. The aim was greater legal certainty and, ultimately, legal uniformity and the elimination of contradictory laws and customs; it was part of a greater attempt at centralisation which included legal centralisation with imperial regulation being, and supplanting customary law as, the primary source of law.

The procedure in compiling a redaction of customary law and getting it approved, generally displayed four phases. First there was the creation of a draft by the local authority; then an investigation of that draft by the provincial authority (in the case of Antwerp, the Duchy of Brabant in Brussels) and consultation with the local authority with a view to improving and amending the draft where considered necessary; then a perusal of the amended draft by the Privy Council in Brussels, after which it was returned to the provincial body; and, finally, the imperial approval or homologation which confirmed and announced the text by decree. After that the customary law as taken up in the compilation would apply because it had been approved in this manner and no longer "sua sponte."

Viewing this as an interventionist threat to local independence and interests, relatively few cities responded to the initial instruction. Antwerp, one of the recognised

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17 For a reproduction of this Ordinance, see Gilissen Historische inleiding (n 16) 287-288.

18 One of the ways in which a local custom was established at the time for purposes of litigation, often before a foreign or before non-local courts such as the Council of Brabant or the Grand Council of Malines, was by means of an inquisitio per turbam. A panel (turbecommissie) of a minimum number of qualified lawyers – customary-law experts – was appointed by a litigant to testify under oath in his favour on the content of a particular custom. The panel’s evidence carried the same weight as that of one witness and in practice a customary rule was taken as proved if agreed to by two unanimous turben. The most important of these opinions were taken up in special registers or turbeboeken. The official reduction of customary law to writing in the course of the sixteenth century caused the virtual disappearance of the turbeonderzoek in the seventeenth century. In any event, it appears, Antwerp turbeboeken from the sixteenth century contain nothing on insurance: see De Groote (n 16) 60.
areas with its own customary law in the Duchy of Brabant, too ignored the order from above. As a result, the instructions were generally reissued in October 1540, and several further demands were directed at Antwerp specifically: in March 1546, allowing it three months to comply; again in November 1546, allowing it a further period of two months; and a final admonition in January 1548. Eventually, after seventeen years, the Antwerp authorities took steps to comply and hastily sent their compilation off to Brussels.

This was the first of four editions or compilations of Antwerp customs (costuymen or consuetudines) that would be created. Important, for present purposes, is the fact that all of them contained sections on topics of commercial law and all but the first a progressively more detailed treatment of the principles of (marine) insurance specifically.

The first compilation of Antwerp customs, generally known as the Antiquissimae (1547-1548), consisted of sixteen chapters with 897 articles. It contained nothing on insurance law specifically, but was in any event a rather unsystematic and imprecise compilation that the Antwerp authorities later recalled before it had been or could be approved by the Council of Brabant.

After an Ordinance of Philip II of March 1570 (ns) had ordered new, amended customs to be sent to the Council of Brabant, Antwerp submitted its draft in July. It was a much more detailed, expanded exposition than the first version, even if the systematisation was still disappointing given a rather haphazard division of the topics covered.

The second compilation, on which a panel of Antwerp judicial officials and lawyers had laboured for ten years, known as the Antiquae (1570-1571), treated insurance contracts (“Contracten van asseurantien” or “Contrats d’assurance”) in title XXIX in twelve unnumbered articles. In the first article, it referred to the conclusion of insurance

19 They are all reproduced in Flemish and French in G de Longé (ed) Coutumes du pays et duché de Brabant. Quartier d’Anvers [Recueil des anciennes coutumes de la Belgique], 7 vols (1870-1878); Vols 1-4: Coutumes de la ville d’Anvers (1870-1874). See also D Verswyvel Extrait des us et coutumes de la ville d’Anvers avec les conditions d’assurances maritimes sur la place d’Anvers ... (1902).

20 Mention should be made of a compilation of insurance laws, known as the Hordenanzas, of May 1569. It was promulgated by Spanish merchants in Bruges for their own use and was binding on them and on those contracting insurance with them and who therefore subjected themselves to the jurisdiction of the Spanish consuls there: “Hordenanzas echas por los consules de la nacion de Espanna residentes en esta ciudad de Brujas.” This occurred at the time when the conclusion of insurance contracts was (temporarily) prohibited in the Netherlands (see again the effect of the placcaat of Mar 1569 (ns), discussed earlier) and was intended to regulate insurances amongst themselves, to prevent frauds, and to ensure greater certainty as to the applicable law and customs. The Hordenanzas, published in Spanish and French, contained twenty titles with some 147 individual provisions or hordenanzas as well as five prescribed policy forms. It has been argued that this compilation was intended as a proper codification of Antwerp customary marine insurance law, but a comparison of the text of the Hordenanzas with that of the Antwerp Antiquae of the following year shows that that is not the case, and that the Spanish compilation is in fact closer to the marine insurance statute of Burgos of 1538. See further Charles Verlinden “De zeeverzekeringen der Spaanse kooplui in de Nederlanden gedurende de XVle eeuw” 1948 (2) Bijdragen voor de geschiedenis der Nederlanden 191-216 and “Code d’assurance maritimes selon le coutume d’Anvers, promulgué par le consulat espagnol de Bruges en 1569” 1949 (16) Bulletin de la Commission royale des anciennes lois et ordonnances de Belgique 38-142; and Stevens (n 9) 17.

21 See De Longé (n 19) Vol 1 at 598-605.
contracts according to ancient local customs (“naer costuyme hier van allen oude tyden geobserveert”). Although never recalled, the Antiquae was also never approved.

In July 1578, the city, then largely Calvinistic, wished to express a greater independence in its customs and hence the local authorities ordered a third, revised edition of Antwerp customs (“de costuymen deser stadt”). Known as the Impressae (1582), this compilation was systematically a great improvement on its predecessor. The fact that a few individuals rather than a cumbersome panel were involved in its drafting was probably the primary reason for this. Occasionally it even went beyond a mere restatement of the perceived customary law by taking account of the underlying statutory and common law. It also attempted to formulate as customary, some new rules for situations not (satisfactorily) covered by existing principles. In its formulation and scope, the Impressae approaches a codification of law generally, and not only of unwritten customary law. The draft compilation was presented to the city council in July 1580 for scrutiny and after further revisions by experts and a translation from Flemish into French, a final version was presented to the local authorities in June 1582.

With seventy two titles and some 1838 articles in total, various topics of commercial law were taken up in titles XLIX-LVI of the Impressae. It dealt with insurance as well as gaming and wagering (“Van contracten van asseurantien, van weddinghe ende spel” or “Des contrats d’assurance, de gaguere et de jeu”) in title LIV in twenty one articles. In article 1 it spoke of insurance contracts being concluded and adjudicated upon according to local customs and usages (“men is nae de costume ende usantie deser stadt gewoonlijck contracten van asseurantien oft versekeringen ... te maecken, ende recht daer op te doen”).

Despite the fact that it was never approved, the Impressae of 1582 acquired the virtual power of legislation as well as a widespread influence and authority, and that despite the fact that the compilation was not only prohibited from being relied on by local courts (“buiten werking gesteld”), but was formally rejected and disapproved of by the new Catholic local council in 1586. The main reason for its influence was the fact that of all four compilations, the Impressae – as its name indicates – was the only one that appeared in print at the time.

In November 1582, the Antwerp municipal council ordered 300 copies of the compilation in legible print type on good quality paper from the local printer and

22 A commission of five lawyers was involved, of whom advocates Carel Gabri (who had earlier been involved in the compilation of the Antiquae) and Philippus van Mallery were the main contributors.

23 According to Stevens (n 9) 18, as far as insurance was concerned, the text of the Impressae adapted that of the Antiquae to the provisions of the insurance placcaat of 1571.

24 The customs were to be seen against the underlying (Roman or canon or feudal) common law, which continued to serve as subsidiary source from which gaps had to be filled. That much was actually made clear in the Impressae itself in tit 1, art 6: “Ende daer men hier ’t antwerpen egheene besondere costumen, ordonnantien oft statuyt aff en heeft, is men ghewoonlyck int wysen te achtervolghen de ghemeyne geschreven rechten.”

25 See De Longé (n 19) Vol 2 at 400-407. For a comparison of the insurance provisions in the Antiquae and in the Impressae, see De Groote (n 16) 61-64.

26 See for what follows, Dave de Ruysscher “Antwerp commercial legislation in Amsterdam in the 17th century: Legal transplant or jumping board?” 2009 (77) Tijdschrift voor rechtsgeschiedenis 549-579.
Published before the end of that year as *Rechten ende Costumen van Antwerpen*, it was the only contemporary published record of the local customs of Antwerp. Although numerous (often unauthorised, pirated) reprints appeared elsewhere in Europe, including in Amsterdam, so extending the compilation’s influence way beyond its city of origin, it would be more than two centuries (1793) before the next Antwerp edition would appear in print.

After the fall of Antwerp in 1585, the new local council felt itself compelled to declare the *Impressae* formally nullified, meaning that it could no longer be relied on. Not surprisingly, a new version was soon mooted. In 1586, the council determined to compile a new edition and appointed a commission, it being reappointed and expanded in 1592. After many years, the project was at last completed and the draft sent to the Council of Brabant in 1608.

The fourth compilation of Antwerp customs, known as the *Compilatae* (or *Novae* or *Transcriptae*) of 1608-1609, was by far the most extensive and most important (if not the best known) version of Antwerp customs. It consisted of seven main parts, each consisting of several titles, and some 3800 articles. Part IV concerned obligations and contracts and a large portion of it was specifically concerned with commercial and maritime law. Even long after the start of Antwerp’s economic decline, Brussels – while not approving the compilation – implicitly recognised this part as the most worthy of the *Compilatae*. In February 1609 it officially authorised the printing of that part, the only official “approval” ever obtained by Antwerp for any edition of its customary law. However, the permission was never acted on and Part IV never appeared in print at the time.

More systematic, comprehensive and clear than its more famous predecessor, the *Compilatae* again contained not just customary law. It took full account not only of imperial legislation, but also of local ordinances. For this reason it was criticised for not containing merely “customary law” in the strict sense but – in instances of uncertainty – for introducing (and presenting as ancient customs) much that was new while at the same time also ignoring or omitting several ancient but no longer acceptable customs.

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27 The printing house of Plantin, now a delightful museum and pilgrimage destination for bibliophiles (see, also, L Voet *Het Museum Plantin-Moretus* (1965)) printed some 1500 works over a period of thirty four years, 1555-1589. Plantin (1520-1589) became the official printer to the Antwerp authorities in 1578 and in that capacity “he had to print all governmental proclamations and edicts” (see Colin Clair *Christopher Plantin* (1960) 137) and “all the ordinances and acts” (*idem* at 270). Plantin published other legal texts too, eg, a best-selling edition of the *Corpus iuris civilis* in 1567 (*idem* at 268).

28 For further details, see *De Ruyscher* (n 26) 564-570.

29 The compilation of 1582 was no doubt considered “een kind van den opstand”: see Gotzen (n 16) 113.

30 The Antwerp municipal secretary and Dr Hendrik de Moy oversaw the editing of the last draft of the *Compilatae* in 1608. The grandfather of the artist Pieter Paul Rubens’ first wife, was also closely involved with the earlier compilation of the *Impressae*: see Mullens (n 16) 5.

31 *Idem* at 118, 122.
The *Compilatae* treated insurance (“Van versekeringe oft asseurantie” or “De l’assurance”) in title XI of Part 4 (contracts and obligations) in nine paragraphs consisting of 323 individual articles.32

Despite the fact that, like most other compilations of customary law originating in the Low Countries, the four Antwerp versions were never approved (gehomologeerd) and therefore never formally obtained any legal force, they continued, by virtue of their official reduction to writing, to serve as *prima facie* proof of the contents of the customs taken up in them. They, and particularly then the Impressae, established some measure of legal certainty and continued to be referred to in merchants’ opinions (*turben*), judicial decisions and commentaries33 in the seventeenth century, not only in centres such as Antwerp, but also in Amsterdam and elsewhere. In effect, if not in reality, they were codifications of Antwerp customary law (“gecodificeerde antwerps gewoonterecht”).34

And as far as insurance was concerned, Antwerp customs, pre-eminent in the latter half of the sixteenth century throughout Europe,35 were also recognised in insurance practice on the London market.

3 London

3.1 The background

In London, too, insurance was underwritten from long before the sixteenth century and was, by the end of that period, a familiar business technique, even if, sometimes surprisingly, it is not as often mentioned in contemporary writing as one would expect.36

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32 See De Longé (n 19) Vol 4 at 198-334. Title XI is made up of par 1 (arts 1-25): what may be insured and for how much; par 2 (arts 26-59): the manner of insurance, formalities, and the contents of policies; par 3 (arts 60-99): the price or premium and the return of the same; par 4 (arts 100-155): the risks to which insurers are exposed; par 5 (arts 156-175): the commencement and termination of cover; par 6 (arts 176-222): the recovery of loss or damage in the event of average; par 7 (arts 223-254): the recovery of damage in the case of abandonment of goods; par 8 (arts 255-285): procedural matters such as claims and what documents and proofs may be necessary; and par 9 (arts 286-323): insurance of hull, bottomry and the like. Bottomry itself is dealt with in Part 4, title VIII par 3 in sixty five articles.

33 See, eg, Gerard Rooseboom *Recueil van verscheyde keuren en costumen, mitsgaders maniere van procederen in civiele en criminele zaken binnen de stadt Amsterdam* (1644). For other (published and unpublished) commentaries on the Antwerp *costuymen*, see Gotzen (n 16) 198-200, and for the works of jurists that referred to them (eg, Anselmo, Christineus, Stockmans, Wamesius, Leoninus, Wielant, and Damhouder), see *idem* at 200-203.

34 See Mullens (n 16) 28.

35 Thus, L Th Maes, in a review of Laenens & Leemans (n 16) in 1953 (21) *Tijdschrift voor rechtsgeschiedenis* 371, refers to the “zo belangrijke Antwerpse handelsrecht, het zeerecht en het zeeverzekeringsrecht, dat onder Spaanse juridische invloed, een der belangrijkste was van heel Europa in de Moderne Tijden”.

36 It is somewhat surprising, for instance, that William Shakespeare (1564-1616) never mentions insurance, not even in the one place where one would have expected him to have done so, namely in the *Merchant of Venice* (1596-1598), that most “legal” of all his plays and one replete with mercantile ideologies. The occasional use of the word “assure” in the play, it has been suggested, was not intended
From the beginning foreign merchants played a role in the local insurance business and it was in all probability those merchants that originally introduced insurance to the city. Thus, the traditional meeting place for London merchants was in (what became known as) Lombard Street. Located in its vicinity were the businesses and residences of northern Florentine merchant-bankers or Lombards, some of whom were also lombards or pawnbrokers. Present there from at least the mid-fourteenth century, they were probably involved in the first insurance contracts to be concluded in London, in Italian, either as insured or as part-time, individual underwriters of marine and other risks. In that they followed Italian insurance practices and customs so that, one may speculate, those came to be known in the sixteenth century as the insurance practices and customs of Lombard Street.

Gradually, though, foreign control over insurance and underwriting lessened and English merchants – involved in underwriting from at least the 1540s – gained the upper hand, drafting policies no longer in Italian but in English.

to bear any technical insurance connotation, but merely refers to creditworthiness or suretyship: see Theodore B Leinward Theatre, Finance and Society in Early Modern England (1999) 15. Thus, the merchant Antonio, having several ships at sea, did not take out insurance on them – and is hence saddened by the potential for and the rumours of their simultaneous loss at sea – despite the fact that the risks associated with sea voyages and shipwreck were familiar plot elements in contemporary drama and romance (see further Anne-Julia Zwierlein “Shipwrecks in the city: Commercial risk as romance in early modern city comedy” in Dieter Hehl, Angela Stock and Anne-Julia Zwierlein (eds) Plotting Early Modern London. New Essays on Jacobean City Comedy [Studies in Performance and Early Modern Drama] (2004) 75-94); and despite the fact that, at the time, marine insurance was well known in both Venice, where the play is largely set, and London, for whose inhabitants it was written and performed (see Marc Shell Money, Language and Thought (1982) 54 n 19; Michael Ferber “The ideology of The Merchant of Venice” 1990 (20) English Literary Renaissance 437; Richard A Posner Law and Literature (2009) 145 n 10). It therefore seems reasonable to argue that the absence of any (reference to) insurance was an intentional decision by Shakespeare; that “a lack of insurance is an enabling condition of the play” and that “insurance’s absence is structurally crucial” (see Luke Wilson “Drama and marine insurance in Shakespeare’s London” in Constantine Jordan & Karen Cunningham (eds) The Law in Shakespeare [Early Modern Literature in History] (2007) 131). If Antonio had insured his ships, the possibility and rumours of their miscarriage would not have saddened him to the extent they did as he would not have faced financial ruin, and the later report of their actual safe arrival would not have had the dramatic impact it was intended to have. Insurance lawyers will, of course, offer an alternative explanation. The fact that Antonio was not insured – as also the fact that he did not take out insurance after the rumours of loss had reached him, as he could legally have done by concluding insurance “lost or not lost” (“op goede en quade tijdingh”) – was a conscious commercial decision on his part. After all, as he explained, he had taken other risk-spreading measures to minimise any loss: “My ventures are not in one bottom trusted / Nor to one place; nor is my whole estate / Upon the fortune of this present year” (I 1 42-44).

37 John Stow in his Survey of London (1598) said (at 180 of the 1603 ed) that Lombard Street was “so called of the Longobards, and other merchants, strangers of divers nations assembling there twice a day, of what original or continuance I have not read”.

38 One of the early legislative recognitions of these merchants was the Lombards Act, 1351 (25 Edw III, St 5, c 23), providing that the unpaid debt of a Lombard had to be paid by his company.

39 The Lombards in London were already subject to repressive measures from the last decade of the fifteenth century onwards and that lead to their departure from England by the time of the reign of
By the end of the sixteenth century, insurance transactions were no longer only or mainly concluded in the unsheltered, cramped and public location in Lombard Street. After earlier suggestions of moving merchants’ business from Lombard Street to Leadenhall or of building a bourse in the street itself came to nought, business came to be transacted and also insurance came to be written mainly in the courtyard of Gresham’s Exchange. This first London Exchange was completed on a site between Lombard Street and Cornhill in December 1568. Almost immediately after it opened, the Exchange – it came to be called the Royal Exchange after Queen Elizabeth visited the building in January 1571 – merchants moved their activities, including those concerning insurance underwriting, there from Lombard Street.

While the insurance business conducted in London was certainly no less sophisticated than that in Antwerp, there was no legislative attempt at regulation, either of insurance law in general or of any particular aspect of it, before the end of the sixteenth century. References up to that time in legislation to “assurances” or “assuraunces” – the common phrase being “fraudulent Graunte, Conveyaunce or Assuraunce” – had nothing to do with insurance contracts or policies. Rather they concerned the law of property and, more
particularly, the (often secret, or simulated and hence) fraudulent (for instance by rebels or traitors guilty of high treason to avoid forfeiture to the Crown, or by debtors to deceive their creditors) assurances (conveyances, grants, or gifts) of lands or goods.\textsuperscript{44} Maybe, for that reason, insurance was at the time always referred to as “assurance between merchants” so as to distinguish it from “assurance” in the conveyancing context.

In the absence of insurance legislation, therefore, insurance custom, whatever it may have been, reigned supreme and that, coupled with a great deal of jurisdictional uncertainty as to the appropriate or competent forum for the resolution of insurance disputes, proved irksome.

Not surprisingly, therefore, the need arose for a compilation of the insurance rules and customs prevalent on the London market.

### 3.2 The compilation of customary insurance law in London\textsuperscript{45}

By the last quarter of the sixteenth century, the status of insurance litigation and law in London was quite problematic and uncertain.

\textsuperscript{44} The issue of the fraudulent conveyance or transfer of property later became part of the law of bankruptcy, involving acts of bankruptcy or voidable preferences. See further Anon “A reading on the Statute of the 13 Eliz., c. 5” 1827 (4) Property Lawyer 332-349; Anon, “A reading on the Statute of the 27 Eliz. c. 4” 1827 (4) Property Lawyer 350-364; and see generally Charles Ross Elizabethan Literature and the Law of Fraudulent Conveyance Sidney, Spenser and Shakespeare (2003). The use of the term “assurance” in that sense continued: see, eg, William Sheppard The Touchstone of Common Assurances ... or Conveyances of the Kingdom (1 ed 1648), explaining at 1 (of the 1820 ed) that the “common or general assurances or conveyances” are those “by which commonly the property of things is made [created] or changed [transferred or alienated]” and at 1 n 1 that by those legal evidentiary devices or assurances for the transfer of property “every man’s estate is assured to him and all controversies, doubts and difficulties are either prevented or removed”. As to Sheppard (1596-1674), see Nancy L Matthews William Sheppard, Cromwell’s Law Reformer (1984). See, also, In re Ray [1896] 1 Ch 468 (CA), explaining (at 476) that “[a]n ‘assurance’ is in reality something which operates as a transfer of property” and is not strictly the same as nor does it include a covenant or contract for the sale of that property.

For one, in addition to voluntary arbitrations, several different courts were or could be involved in the resolution of insurance disputes: the Lord Mayor’s Court, the King’s Bench, the Admiralty Court, a special London Assurance Court (from 1578), and, through the Lord Chancellor and the Privy Council, specially appointed ad hoc commissions which had the powers of, and whose decisions could be enforced by an injunction from, the Lord Chancellor’s Chancery Court.

For another, apart from the absence of any statutory regulation of insurance law or procedures, there was also great uncertainty about the precise nature and content of those rules of insurance that were followed on the London market and that not only merchants, but also lawyers had to apply to resolve increasingly complicated and novel disputes when called upon to do so.

It appears that it was the very troublesome and repeated petitions by merchants – very often foreign insured complaining about the tardiness of local underwriters in meeting their obligations under insurance contracts – addressed to the Privy Council for the appointment of such commissions in insurance matters, or to direct the Lord Mayor to take steps to resolve disputes,46 that prompted the Council to turn its attention also to substantive insurance law. The refusal of London merchant-underwriters to meet their obligations under insurance contracts, the Council said in one missive, “tended to the discredit of the City”.47 For the sake of London’s standing as an emerging insurance market, something had to be done about the general uncertainty over the legal principles governing insurance contracts concluded on the Royal Exchange and elsewhere in the city.

In December 1574, the Council instructed the Lord Mayor of London that “by conference with suche as be most skilfull in those cases, [he] shold certifie my Lordes what lawes, orders and customes are used in those matters of assurance, to thend they may be put in use acordinglie”48 Nothing emerged from the Mayor, though, and several increasingly irritated repetitions of the instruction from the Council followed. From these further details may be gleaned of what was intended, namely that the Council was conscious of what had been achieved in adjoining countries (by which it probably had Antwerp in mind),49 and that in addition to “skillful” merchants, the Mayor also had to

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46 There are numerous references to these petitions in John Roche Dasent (ed) Acts of the Privy Council of England (NS) 46 vols covering the period 1542-1631 (1890-1906): see, eg, for a period of some eighteen months in 1573-1575, the entries in Vol 8 at 167 (Dec 1573), at 195-196 (Feb 1574 (ns)), at 206 (Jul 1574), at 262 (Jul 1574), at 321 (Dec 1574), at 337 (Jan 1575 (ns)), at 348-349 (Feb 1575 (ns)), and at 373 (May 1575).

47 Idem in Vol 8 at 337 (Jan 1575 (ns)).

48 Idem in Vol 8 at 321.

49 Thus, in a letter in Jun 1575, the Council again wrote the Lord Mayor “to certifie their Lordships what had been donne for the setting downe of some orders for matters of assurance which their Lordships required to be done long agoe; and, further, to rate the prices for making and registringe of pollicies of assurances, wherein he shold do well to enquire and folowe the prices acustomable paied in other counr[ie]s adjoyninge”: Idem in Vol 8 at 397.
consult civil lawyers in the compilation of the “bokes of orders of assurance which his Lordship [the Mayor] hath so often times ben written unto for may be finished with expedicion and brought unto their Lordships to be confirmed, for the better avoiding of such suites as they be dailie troubled with for want thereof”.

Some time later, probably in early 1577, it appears, the Lord Mayor’s commission of merchants and lawyers did produce something approaching a set of rules and customs governing a wide range of issues pertaining to insurance. It exists today in archival form in the shape of two undated, handwritten manuscripts.

The one, entitled *A Booke of Orders of Assurances within the Royall Exchange, London*, consists of fifty four pages with 126 numbered articles or orders, dealing in considerable detail with various aspects of marine insurance as well as (in arts 113-119) with life insurances which are treated as indemnity policies. There is a table of contents and a heading summarises the contents of each order.

The other is a somewhat longer and apparently later version of the first, more detailed on some points and containing on others a slightly different interpretation of existing customs. Quite possibly both were works in progress, produced at different stages of the commission’s ongoing deliberations to establish what exactly the rules and customs of insurance were.

50 In a letter to the new Lord Mayor in Nov 1575, the Council repeated the original instruction in detail and with even greater urgency than before. The letter explained that their Lordships had “sundry tymes” written to his predecessor that “by sume lernid in the Civill Lawes and other skilfull merchauntes certen orders might be set downe whereby controversys arrising about matter of assurance might be decided”: idem in Vol 9 at 43. In attempts to secure the jurisdiction of the Admiralty Court over insurance causes, petitioners to the Privy Council naturally stressed the civilian origin of insurance. In one such petition in 1575 it was pointed out that insurance “is not grounded upon the lawes of the realme but rather a civill and maritime cause to be determined and discided by civilians, or else in the hige courte of Admiralty”: see Reginald G Marsden (ed) *Select Pleas in the Court of Admiralty, Vol II AD 1547-1602* (1897) at lxxvi.

51 Dasent (n 46) in Vol 9 at 177; see also idem at 163.

52 In Jan 1577, the Lord Mayor and the Court of Aldermen passed a resolution stating that the oft requested compilation of the insurance customs and usages in use in Lombard Street and also in other countries was far advanced in the process of being completed, with the assistance of both local and foreign merchants. It explained that “sundrye Lord maiors of this Cittie ... did Aucthorize ... certeine of the said bretheren and otherwise and discrete comissioners marchanttes boethe Englishmen and Strangers well exparte in these affaires, to sett downe in writinge such good and lawdable orders as to them shall be thoughte moste indifferent, convenient and agreeable, to the Auncient orders heretofore used in Lombarde Strete unto which orders all other Countreys heretofore haue submytted them selues, whee accordinge to the said charge given unto them, haue verie painfullie traveled therein and haue alreadye sett downe manye good orders, which notwithstandinge are not yet fullye finished for that the same are throughlye with advize to be considered upon”: see Kepler *Business History* (n 45) 45-46.

53 British Library, Harleian MS 5103, fols 158-185.

54 “Orders” here means “customs”: see, eg, the petition by “an Easterling” to the Privy Council arguing that insurance “consistethe and standeth muche upon the orders and usage of merchauntes by whom rather than by course of [common] law yt may be forwarded and determined”: see Marsden (n 50) at lxxvi.

55 British Library, Additional MS 48023, fols 246-273.
The *Orders* commences by providing in a preamble that all insurances of whatever nature and by whoever and on whatever subject matter concluded in the Royal Exchange or in the City of London will be lawful as long as “it is not contrary to the Articles and Orders hereafter declared”. Order 87, in dealing with the liability of the underwriters involved in double or multiple insurances, often contracted in several places, mentions Antwerp as one of the venues where insurances are commonly underwritten. In order 123, there is an all important savings provision: disputes not covered by the *Orders* “shall never ye lesse be adiudged, ordered, or Determyned by ye discrecon of the Judges of Assurance” for the time being who in matters of doubts, if they think good, shall call unto them 4 or 6 discrete Marchants before whom the matters in question shall be heard and by their assistance shall also be adjudged and determined, whose Order and Judgment shall be entered by ye Register of Assurance as a Rule and president”. Once so entered, the judgment will bind everyone, English and foreign, and will be of as much force and effect as if it were expressly provided for and contained in the *Orders* themselves. Those responsible for the drafting of the *Orders* were clearly quite aware of the continuously evolving insurance practice and customs and of the fact that their compilation would require to be supplemented, and they presciently made provision for that.

There is no evidence that the *Orders*, in the draft form they are known today – there are a number of gaps in the text, possibly where at the time there was no information or consensus yet about the content or formulation of particular rules – were ever finalised, formally approved by the authorities, acted upon by any of the various judicial bodies involved in insurance disputes, or published.

That, in essence, was to remain the position until the eighteenth century.

When, in 1601, Parliament for the first time turned its attention to insurance, it sought to regulate only the procedural aspects. The Act concerning Matters of Assurance amongst Merchants provided for the summary resolution of insurance disputes arising from registered policies by a general or standing panel of Commissioners to be appointed by the authorities to hear and determine the matters in question. This is a reference to the London Court of Assurance existing at the time.  

May one deduct from this that the merchants thought that the *Orders* had been finalised in the sense that they had been “confirmed” by the drafting commission, even if not formally “put in execution” and confirmed by the authorities? That they had not been formally approved or confirmed by the authorities themselves appears from the Council’s observation to the addressees that it is necessary that “some good and settled order shoulde be established and observed touchinge assurances, beinge a matter that moche importuneth the continuance and increase of trade within this realme”. In proceedings in the insurance matter of *Adderley v Symonds* (Oct 1598 - Feb 1601) and involving the Chancery Court (see Ibbetson (n 45) at 303-305 for details), the underwriters at one stage referred in their argument to the *Book of Orders*, to which the insured countered that the *Book* had no authoritative status.

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56 This is a reference to the London Court of Assurance existing at the time.

57 There is tantalising evidence, though, that in 1601 merchants knew of a set of *Orders* or thought that it had been finalised. With a letter by the Privy Council in that year addressed to the Lord Chief Justice Popham and to the Judge of the Admiralty Court Dr Julius Caesar (see Dasent (n 46) in Vol 31 at 252-253), the Council forwarded a petition by merchants “that use to assure goodes”. In their petition the merchants complained “that certaine orders devise and sett done some yeres sithence and confirmed by us touchinge assurances amonge merchantes uppon the Exchange are not put in execution, but greatly impunged by willfullnes and forward disposicion of some whoe refuse to submytte and conforme them selves to the order of Commissioners appointed to heare those causes”. May one deduct from this that the merchants thought that the *Orders* had been finalised in the sense that they had been “confirmed” by the drafting commission, even if not formally “put in execution”? That they had not been formally approved or confirmed by the authorities themselves appears from the Council’s observation to the addressees that it is necessary that “some good and settled order shoulde be established and observed touchinge assurances, beinge a matter that moche importuneth the continewance and increase of trade within this realme”. In proceedings in the insurance matter of *Adderley v Symonds* (Oct 1598 - Feb 1601) and involving the Chancery Court (see Ibbetson (n 45) at 303-305 for details), the underwriters at one stage referred in their argument to the *Book of Orders*, to which the insured countered that the *Book* had no authoritative status.

58 1601 (43 Eliz c 12).
annually by the Lord Chancellor, the panel to be made up of the Judge of the Admiralty Court, the Recorder of London, two doctors of civil law, two common lawyers, and up to eight merchants. The Act of 1601 left the substantive insurance law unregulated, merely acknowledging in its preamble that “it hathe bene tyme out of mynde an usage amongste Merchantes, both of this Realme and of forraine Nacyons, when they make any great adventure (speciallie into remote partes) to give some consideracion of Money to other persons (which comonlie are in noe small number) to have from them assurance made of their Goodes Merchandizes Ships and Things adventured, or some part thereof, at suche rates and in suche sorte as the Parties assurers and the Parties assured can agree, which course of dealinge is comonly termed a Policie of Assurance”. A tweaking of the judicial arrangement in 1662 likewise contained nothing on the underlying substantive insurance law, but merely sought to improve the adjudicative procedures.

In London, therefore, insurance customs reigned supreme at the end of the sixteenth century, whatever their content may have been in certain disputed and novel instances. That is confirmed by Gerard Malynes in his major work, the 500-page *Consuetudo, vel Lex Mercatoria, or The Ancient Law-Merchant. Divided into three Parts: According to the Essential Parts of Trafficke*, first published in London in 1622. Although a merchants’ manual – directed at merchants in the usual sixteenth-century sense of import-export traders – it did contain information of such English commercial practices

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59 Interestingly, the Bill was reportedly drafted, but in any event introduced and steered, by Francis Bacon. The committees to whom the House of Commons referred the Bill for consideration on 12 Nov and again on 11 Dec 1601, comprised not only all Privy Councillors being members of the House, but also “all the Doctors of Civil Law” likewise members as well as Sir Walter Raleigh, Admiralty Judge Dr Julius Cesear, and others: Simonds d’Ewes (ed) *The Journals of All the Parliaments during the Reign of Queen Elizabeth [House of Lords and House of Commons Journals 1558-1601]* (1682, repr 1973) at 636, 669, 680, 684 and 685.

60 See the Additional Act concerning Matters of Assurance used amongst Merchants, 1662 (14 Car II c 23).


62 There were subsequent editions in 1629, 1636 and 1686. No English legal or commercial texts of any consequence dealing exclusively or even partly with insurance law, customs or practice appears to have been published during the sixteenth century: see generally, eg, Richard J Ross “The commoning of the common law; The renaissance debate over printing English law, 1520-1640” 1998 (146) *University of Pennsylvania LR* at 323-461.

63 In contrast, Lewes Roberts *The Merchants Mapp of Commerce* (1638), although likewise aiming to instruct merchants on all matters relevant to trade, is much less directed at legal-commercial issues
as may, according to its title page, be “necessarie for all Statesmen, Iudges, Magistrates, Temporall and Civile Lawyers, Mint-men, Merchants, Marriners, and all others negotiating in all places of the World”. Malynes dealt with insurance in Part 1 in five chapters situated in the midst of a treatment of various aspects of maritime law. His coverage of the topic stretches to some twenty printed pages and is probably the closest one will come, for the time being at least, to a description, in published form, of the laws and customs of insurance in England at the end of the sixteenth century.

In his introduction to the law merchant, Malynes lists as one of the things a “compleate merchant” ought to know about, the “manner of making of Assurances upon goods, ships, the persons of men, or any other things adventured by sea or by land, and the customs observed therein betwene nation and nations”. Incorrectly ascribing “this most laudable Custome of Assurances” to the Romans and observing that it was taken up in the Law of Oleron and observed in French coastal towns, Malynes then quite patriotically asserts that insurance “was first used in England, and after us imitated by the Antverpians, and all other Nations there inhabiting when that Citie flourished”. Throughout his discussion, it is apparent that what Malynes describes are merely the customs followed among London merchants in regard to insurance. So, he declares that “a Law not observed is inferior to a Custome well observed”, and elsewhere he draws a distinction between and declares custom preferable to “the civile law”, explaining that the “Civilians [themselves] therefore have noted, That in Assurances the customes of the sea-lawes, and use amongst Merchants is chiefly to be regarded and observed”. And, finally, it is significant that Malynes’s advice was particularly directed at individual – and more concerned with the general (eg, geographical) information merchants may require to conduct their overseas trade. Roberts mentions insurance but cursorily (at 17-18) as being one of the matters concerning shipping that may be useful for a merchant engaged in the “Art of Merchandizing” to know something about.

The five chapters are: ch 24 (“Of the Office of Assurances, and the Ancient Custome of the same”), ch 25 (“Of pollicies of Assurances, and the substance of them, and of [general average] Contributions”), ch 26 (“Of the manner of Contributions, or Averidges”), ch 27 (“Of the particulars to be observed in Assurances”), and ch 28 (“Of the manner of Proceeding for Assurances in the case of losses”). Bottomry or the *foenus nauticum* is considered in ch 31. Malynes may have had more than a passing interest in insurance, for he is said to have given evidence in Nov and Dec 1601 before a committee of the House of Commons on the Merchants’ Assurance Bill: see n 59 above and also EAJ Johnson “Gerard de Malynes and the theory of the foreign exchanges” in Blaug (n 61) at 3. Malynes himself declared in his *Consuetudo* (in Part 1, ch 28 at 147) that to ensure passing of the Act of 1601 through Parliament, “I have sundrie times attended the committees of the said parliament, by whose meanes the same was enacted, not without some difficultie”.

64 The five chapters are: ch 24 (“Of the Office of Assurances, and the Ancient Custome of the same”), ch 25 (“Of pollicies of Assurances, and the substance of them, and of [general average] Contributions”), ch 26 (“Of the manner of Contributions, or Averidges”), ch 27 (“Of the particulars to be observed in Assurances”), and ch 28 (“Of the manner of Proceeding for Assurances in the case of losses”).

65 Part 1, ch 1 at 6-7 (of the 1 ed).

66 As Malynes treats general average as part of insurance, that may explain this statement.

67 Part 1, ch 28 at 146.

68 Part 1, ch 29 at 156. He did point out, though, that it remained necessary for merchants to know the latest common-law decisions even if “we handle the law merchant in this treatise, and not matters of the common law”:

69 Part 1, ch 28 at 166, considering the liability of several insurers on a policy in the event of over-insurance (a smaller consignment having been shipped than insured) and explaining that according to custom the insurers are liable in the order in which they underwrote the policy, while according to civil law they are liable proportionally.
and mainly local, English – merchant-underwriters whom he compared to orphans who could do no wrong but could endure much wrong at the hands and instigation of those – mainly foreign merchants – they insured.

4 Some conclusions

From the sources canvassed here, it is readily apparent that by the end of the sixteenth century there existed in both Antwerp and London relatively sophisticated systems of insurance law and customs. It is further clear that in each of the cities there was an awareness of the insurance customs and practices of the other.

Virtually all surviving and known Antwerp and London insurance policies from the sixteenth century contain what may be termed a “choice of law and customs clause”. Policies concluded in Antwerp not unexpectedly generally referred to the insurance customs on the Antwerp bourse and, in the case of the legislative prescribed policy forms, to the applicable legislative measures. They were stated to have been concluded in accordance with “de usantie vande stadt van Antwerpen” or “de costuymen vande borse van Antwerpen”. However, notably from the mid-sixteenth century onwards, they also, or in a few instances exclusively, referred to the insurance customs followed in London on Lombard Street. Sixteenth-century London policies, again, generally referred to the local insurance customs and were declared to 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”. However, there are also examples of insurances concluded in London that referred to the insurance customs of Antwerp.

70 In Part 1, ch 27, eg, he lists the factors merchants should consider when insuring a risk, these being “very materiall for every Merchant, and deserve a particular Chapter in this Treatise, which I have compiled ... for the assurors benefit”.

71 Thus, he observes that “Assurors are verie fitly compared unto Orphanes, because they may endure much wrong, but cannot commit any; for they are to be ordered and commanded by the commissioners’ sentence’ and may be committed to prison if they do not pay as ordered”: Part 1, ch 24 at 149. In stark contrast stands the (admittedly now politically incorrect) comparison, several centuries later, of insurers to women: “de verzekeringsmaatschappijen zijn als de vrouwen; zijn ontvangen in vreugde en baren met smart”: H van Barneveld Inleiding tot de algemene assurantiekennis (1978) at 25.


73 This phrase survived into the twentieth century as part of the policy form appended to the Marine Insurance Act, 1906 (6 Edw VII c 41).

74 See, eg, the “De Salizar” policy of Aug 1555, drawn up in London by a Spanish broker in favour of an Antwerp insured, that provided “that this assurans shall be so stronge and good as the most ample writinge of assurans wiche is used to be maid in the strete of London or in the bourse of Antwerp or in any other forme that shulde have more force”; a policy of 1565 in which an Antwerp merchant insured three ships “after the use of this Street of London and of the bourse of Antwerp” (see Van Niekerk (n 1) at 257-259 for these and other instances of choice of customs clauses in London policies); and a policy of Dec 1599 for a London merchant on goods consigned to him there, stating the policy to be as valid “as any other writing of assurance which is used to be made at the Royall Exchange in London, or at the Burse in A”, the latter probably referring to Antwerp although Amsterdam may be a possibility:
Without further investigation and a proper collation of all surviving policies from the period, it is difficult to draw any firm conclusions about the significance of these choice of law and customs clauses and, more specifically, about the relevance of a choice of local as opposed to foreign customs. Very broadly and relatively speaking, the choice between Antwerp and London was a choice between, on the one hand, a regulated (and often therefore prescriptive and inhibiting) insurance law coupled with a measure of certainty about the applicable customs, and, on the other hand, an unregulated (and hence more permissive) insurance law with a measure of uncertainty about insurance customs. But then, this is a modern perspective and probably not one perceived by those merchants participating in insurance at the time. At this stage one may only speculate that those merchants no doubt inserted choice of law and customs clauses in an attempt to ensure the validity and enforceability of their insurance contracts and not necessarily because they perceived the law and customs in the one city to be superior or less restrictive to those in the other. But no doubt patriotism, or anticipation as to where disputes arising from their policies would have to be settled, may have played a role, while there is also the possibility of a purposive contracting out of local customs. And no doubt, a proper analysis of the Antwerp costyumen and the London Orders may assist in determining the extent of the influence, if any, of Antwerp on London, or of London on Antwerp.

However, when it comes to comparing the state and content of insurance law and customs in Antwerp and London at the end of the sixteenth century, one should exercise a measure of caution. The extant sources from which the relevant substantive principles may be gleaned, present no more than a snapshot of the content of those principles at a particular moment in time. Insurance law and customs were in a constant process of evolution, and that is true not only of the emerging London insurance market, but also of the declining Antwerp one. Importantly, too, the prescripts of formal law did not always coincide with the customs and usages merchants followed in practice. Further, the sources I have mentioned are not the only relevant ones: judicial pronunciation, for one, may cast significant further light on the interpretation and application of both law and custom. And, naturally, there were significant differences between the compilations of insurance customs in Antwerp and that attempted in London. In Antwerp they were not insurance-specific but part of a general redaction of law; they were not drawn up by or with the assistance of merchants but by lawyers who were not specifically insurance experts; they were formally edited and prepared for publication even if not (always) published; and, importantly, they have to be seen against the background of a quite extensive legislative regulation of insurance law.

And, crucially, when this comparison is attempted, all the available sources should be taken into account. Thus, to compare the customs taken up in the London Orders around 1577 with only the formal law contained in the Antwerp placcaat of 1563 and – whatever its relevance may have been for Antwerp – in the Seville Insurance Ordinance of 1556, while ignoring not only the more extensive subsequent legislation passed for is reproduced in William West First Part of the Symbooleographie London, in the augmented 1647 ed (the work was first published in 1597) in s 663.

As did Kepler Business History (n 45) at 51-53. Even less acceptable is to suggest, as does Lewin Pensions and Insurance (n 45) at 108, that the Orders were apparently strongly influenced by
and applicable in Antwerp, but also the comprehensive compilation of its customary insurance law, is like comparing a punnet of London apples with a single Antwerp pear, to which a Spanish orange has been added for good measure. And then to draw the conclusion\(^{76}\) on the basis of that comparison that the English fruit is by far the superior quality and juicier apple – that London insurance law was, at the end of the sixteenth century, far more developed and liberal than that in Antwerp\(^{77}\) – is rather disingenuous and not supported by the sources I mentioned here.

### Abstract

The law, customs and practices of marine insurance were by the end of the sixteenth century familiar in both Antwerp and London. For a proper comparison of the state of marine insurance in these two centres at that time, though, it is necessary that all the relevant sources be canvassed. This contribution seeks to provide an overview of the nature and scope of those sources.

Continental insurance practice (as is in fact quite plausible) and then to refer not to the laws and customs of Antwerp as a possible source but to the French *Guidon de la mer*, a compilation of maritime law, which (according to Lewin himself) dates from after the presumed date of the London compilation!

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76 Conclusions such as that “the possibilities for the legal use of marine insurance were much greater in London” (Kepler *Business History* (n 45) at 51) as far as were concerned the subjects-matters that could be insured, or the risks that could be insured against, or the extent to which under-insurance was compulsory; or that London’s “insurance regime [was] significantly more liberal than that revealed by the equivalent rules from Antwerp and Seville” (Ibbetson (n 45) at 301).

77 More specifically, to suggest in this connection that the London *Orders* permitted reinsurance and so implying that the notion was either unknown or not permitted in Antwerp (see Kepler *Business History* (n 45) at 51; Ibbetson (n 45) at 295), is simply not correct as the customary rules concerning reinsurance in the *Compilatae* of 1608 (Part IV, tit 11, par 2, arts 45-46) alone arguably provides strong evidence supporting its practice in that city in the sixteenth century (see further on reinsurance Van Niekerk (n 1) at 442-447). Surely one would not draw any like conclusion from the mere fact that (marine) reinsurance was prohibited in England in 1746. Further, to suggest that insurance “lost or not lost” was specifically allowed in London but expressly prohibited in Antwerp (Kepler *Business History* (n 45) at 51; Ibbetson (n 45) at 301), or even that such policies were innovations of the 1580s and unique to the London insurance market (Wilson (n 36) at 135, 138) is simply not supported by the available sources which clearly show that insurance “op goede ende quade tijdinghe” was such a well known Antwerp insurance custom that it was extensively regulated in the relevant statutes (see further Van Niekerk (n 1) 850-891). Likewise, the fact that life insurance was specifically mentioned (as a form of short-term indemnity insurance) in the *Orders*, but prohibited as a form of wagering in the legislation that applied at the time in Antwerp. The very prohibition, as wagering contracts, of insurances (or, rather, as it was formulated, in the *placcaat* of Jan 1571, of wagers being cast in the form of insurances) on the lives of persons and on voyages, tends to suggest that such (wagering) insurances were in fact prevalent on the Antwerp insurance market; the sixteenth-century prohibition was in any event not an insurance-specific one, but has to be seen against the increasing disapproval of wagering contracts, in whatever form, generally (see further Van Niekerk (n 1) 122-125). And in any event, prohibiting wages and insurances on particular matters was not unfamiliar to the English legislature. Thus, Act 16 of 1708 (7 Ann c 14) prohibited “all Wagers to be laid upon any contingency relating to the present War and all [non-marine] Policies of Insurance Bonds Notes or Other deeds or Writings whatsoever for the Payment of any Sum or Sums of Money upon any such Contingency”.