# THE *BOOKE OF ORDERS OF ASSURANCES*: A CIVIL LAW CODE IN 16th CENTURY LONDON

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## ABSTRACT

*The 16th century was the century of 'codification' of insurance customs in Europe. The passage from oral knowledge to written rules entailed significant changes and favoured major developments. This was particularly the case for England, where an insurance code was written between the late 1570s and the early 1580s. In the 16th century English mercantile customs evolved rapidly, detaching themselves from the Italian influence. At the same time, the increasing importance of Anglo-Dutch trade favoured the assimilation of Dutch customs into the London insurance practice. The fast development of English insurance customs, however, entailed significant uncertainty as to the applicable rules. The rapid growth of an insurance market attracted the attention of several courts, thus further increasing uncertainty. The answer of the mercantile community was to establish a specialized court for insurance in London and to write down their customs. The result was a remarkably elaborate code of insurance, quite a unicum in England. The code sought to strike a balance between continuity and change, consolidating some old usages and borrowing foreign customs, mainly Dutch. The significant influence of Dutch customs was probably favoured by the strong commercial links with the Netherlands. English merchants considered similar rules as a means to further trade. In this respect, the English code attests how economic integration might pave the way to legislative convergence.*

**Keywords:** code; codification; insurance; legislative convergence; London

## §1. INTRODUCTION

There are few other subjects in which the influence of the Continent, and in particular of the Netherlands, was so crucial to the development of English law, as that of insurance.

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If we take a London insurance policy of the early 16th century, unsurprisingly enough, we shall see something resembling a late medieval insurance agreement. But if we move on a few decades and take a London policy of the late 16th century, we shall see that its wording is almost identical to a twentieth century Lloyd's insurance policy.[1] This paper seeks to explain what happened five centuries ago – in just a few decades – and to show how Continental influence (Dutch in particular) played such a crucial role in the development of English insurance.

The 16th century was, loosely speaking, the century of 'codification' of insurance customs all across Western Europe. During that century many insurance 'codes' were written, some as legislative enactments, others as customary compilations.[2] As it always happens, the passage from oral knowledge to written rules entailed significant changes and favoured major developments. This was particularly the case for England. The first code ever written in England, in fact, was a code of insurance. Such a code provides precious evidence on early English insurance and shows the crucial influence of Continental customs in its development. Further, this code seriously questions the Civil law/Common law divide on merchant law, for it is virtually undistinguishable from any Continental insurance code. With the exception of the Antwerp code of 1609 (which is however the product of later developments), the English code is by far the most complete and sophisticated among all European insurance codes of that age. During the 16th century English merchants progressively severed their links with the Italians and exponentially increased their trade with the Dutch. The rapid development of insurance customs entailed a significant degree of uncertainty on the rules applicable to insurance contracts. The London code provided a clear set of applicable rules on insurances, eliminating uncertainty insofar as possible. At the same time, the code sought to mirror the commercial development of the London market. The economic integration between England and the Netherlands favoured legislative convergence. The increasing number of exchanges stimulated convergence in the legal rules applicable to such exchanges. As England was commercially less developed than the Netherlands, Dutch customs exercised an increasing influence over the English ones as long as the Netherlands remained England's main commercial partner. In committing their insurance rules to writing, English merchants often departed from the rules customarily applied in London

1 H.E. Raynes, *A History of British Insurance* (2nd ed., Pitman, London 1950), p. 68–71, compared the standard Lloyd insurance policy of the 1930s with a policy of 1637, which is perfectly identical to those written in the late 16th century.

2 The forerunner was Barcelona, with its all-important 1484 Ordinances. In Spain, the 16th century saw the great Ordinances of Burgos (1538 and 1572), Seville (1556) and Bilbao (1560). In France, the very important compilation known as *Guidon de la Mer* was written in Rouen probably in the 1580s. In the Netherlands several *placcaaten* were enacted during the second half of the century (the main ones in 1563 and 1571). Antwerp puts its customs in writing (more and more in detail) towards the end of the same period (1570, 1582 and 1609). So did Amsterdam (1598) and Rotterdam (1604). Even Venice, historically reluctant to legislate on insurance, had eventually to enact a series of decrees. A full list of 16th century insurance codes would seriously challenge the reader's patience.

(which were part of the Italian commercial legacy) in favour of provisions applied in the Netherlands. Writing the London insurance code therefore served a twofold purpose: to introduce a clear discipline so to dispel ambiguities and uncertainties in the applicable rules, and to draw it closer to the Dutch customs to enhance commercial relations.

This work will examine both such aspects. Firstly, it will follow the making of the code and explain the reasons behind its creation. Then, it will briefly examine its content and trace the main Continental influences.

## A. THE CODIFICATION OF ENGLISH INSURANCE CUSTOMS

### *1. Changes in London insurance customs: from Italy to the Netherlands*

In the 16th century the so far all-encompassing Italian influence on English mercantile practice rapidly faded away. During the early decades of the century the centre of maritime trade shifted from places like Southampton and Plymouth, until then the main English gateways for international commerce, to London.[3] Many Italian merchants left the country, others re-located to London. The growth of London as the main commercial centre of England, in turn, brought the swift rise of an English mercantile class, eager to break the Italian predominance first, and to entirely replace it later. The rupture with the Roman Church and the increasing inclination of the English government towards financial and economical protectionism provided the ideal background for such developments. As a result, the Italian influence rapidly declined. English merchants began progressively to act as insurers, and insurance policies were increasingly written in English.[4] From the 1570s, all the policies we have are in English. This shift doesn't attest a simple linguistic change. Rather, it signals the change of hands from Italian to English merchants in the London insurance market.

Until the mid-16th century London insurance customs were of clear Italian origin, later referred to as the 'usages and customs of Lombard Street'.[5] Detached from Italian hands, however, those customs soon began to change, both acquiring new and

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3 K.F. Stevens (ed.), *The Brokage Books of Southampton, 1477–8 and 1527–8* (Southampton University Press, Southampton 1985), p. xvi.

4 The few known policies stipulated in London until 1550 were all written in Italian: policy of 3.10.1532, BL, MS Additional 48082, *fols.* 160*v*-161*r*; policy of 26.11.1548, R.G. Marsden (ed.) *Select Cases in the Court of Admiralty*, vol. 2, (Quaritch, London 1897), p. 45–47; policy of 20.9.1547, ibid., p. 47–49. The passage from Italian to English in the policies seems to have occurred during the 1550s, as the most of the known policies from that time are in English: policy of 7.12.1553, British National Archives, Public Record Office, Kew, High Court of Admiralty (hereinafter HCA), 24/33, *fol.* 199*r*; policies of 5.8.1555, 6.12.1557, of 12.3.1562 and of 22.11.1563, R.G. Marsden, *Select Cases in the Court of Admiralty*, p. 49–54. Another policy written in Italian bears the date of 20.6.1555, BL, MS Additional 48082, *fol.* 160*r.*

5 Significantly enough, insurance policies began to refer expressly to such customs when the language in which they were written changed from Italian to English, probably to attest at the continuity in the applicable rules. BL, MS Additional 48020, *fol.* 346*r.* Cf. D.J. Ibbetson, 'Law and Custom: Insurance in Sixteenth-Century England', 29 *Journal of Legal History* (2008), p. 291–307, at 292.

autonomous features and absorbing foreign uses, mainly Dutch. Dutch uses came chiefly from Antwerp. As it is well known, until the 1570s Antwerp was the main commercial and financial centre of Northern Europe. Its commercial pre-eminence was also reflected in insurance. In the second half of the 16th century, before the growth of Amsterdam, Dutch insurance customs followed Antwerp's customs.[6] The influence of Antwerp's insurance customs on London was mainly due to two factors. The first was the enormous increase of Anglo-Dutch trade. According to the London Port Book for the year 1575–76, for instance, the importations by the Italians amounted to £13,019 and their exportations to £1,768. The Italian merchants listed there were only 15. In contrast, the importations by the Dutch amounted to £34,693 and their exportations to £9,294. The Dutch merchants listed were 230.[7] The second reason lay in the characteristics of the Dutch customs. Antwerp's insurance customs were rapidly evolving so as to better serve the fast-growing commercial development of the city. On the other hand, Italian customs were more conservative and developed more slowly.

One of the most significant examples of the shift from Italian to Dutch influence in London insurance customs is the clause 'to whom it may belong'. Such a clause enabled the insurance of merchandise belonging to a third party without naming it in the policy. A merchant might have an interest not to insure in his own name for a number of commercial reasons. Yet, often authorities perceived figureheads insuring someone else's belongings as a way to defraud the insurers, who relied on the good reputation of the official insured. Italian customs therefore requested the policy to name the true insured. On the contrary, Dutch practice allowed insuring in the name of anyone else, without mentioning the identity of the true insured. London followed the Italian prohibition, so that any policy that didn't mention the true insured was void. In 1558 an English merchant in Calais, one William Algar, fearing for his position because the city was under siege by the French, asked a stranger, one John Johnson, to insure his merchandise in Flanders (probably Antwerp). Johnson did so, and stated in the policy that the merchandise belonged to himself or to anyone else to whom they might belong. When the French occupied Calais, unsurprisingly, they seized English property. The merchant fled to London and demanded to be indemnified, but the insurers refused to pay.[8] The dispute was settled by way of arbitration. After the signature of the three arbitrators, all of them pre-eminent London merchants, however, the document bears that of another 15 English

6 The influence of Antwerp's customs on Dutch insurance was such that the insurance policies appended to the Dutch *placcaaten* of 1563 and 1571 expressly referred to the customs of the Bourse of Antwerp. The text of the two policies is reported in C.-F. Reatz, *Ordonnances du duc d'Albe sur les assurances maritimes de 1569, 1570, 1571, avec une précis de l'histoire du droit d'assurance maritime dans les Pays-Bas*, 5 *Compte Rendu des Séances de la Commission Royale D'Histoire* (IV series), p. 41–118, at 60–62 and 116–118 respectively.

7 BL, MS Lansdowne 22, *fols.* 55*r* and 56*r*-60*r* respectively.

8 The document does not say why the actual insured person sought the enforcement of the policy in London, but it is probable that the policy had been signed by English merchants in Flanders.

merchants, who approved of the arbitrators' decision.[9] Such an unusual practice attests the importance of the decision, for it was a major rupture with the consolidated practice of Lombard Street. The newly accepted custom spread quickly. In the 1560s, three out of the four known policies contained the same clause. Significantly enough, the three policies were all written in English, whereas the fourth one, the sole policy without such a clause, was written in Italian.[10] Rather unwisely, however, the first of the three policies (of 1563) referred only to the customs of Lombard Street and not to those of Antwerp. The insurers took advantage of this to challenge the validity of the clause. The defence of the insured was to invoke the customs of Antwerp and to insist on their applicability in London.[11] The third policy (of 1566) not only mentioned both London and Antwerp customs but also cautiously added that the policy was to be interpreted as having the same legal strength as those written by Dutch notaries.[12] In the 1570s, the clause was present in half of the known policies (8 out of 16).[13] From 1580 onwards, the same clause was present almost in all the known policies.

As long as London insurance customs remained under Italian influence, insurance disputes were usually decided either by arbitration of fellow merchants[14] or before the Aldermen Court of London, whose jurisdiction in matters of insurance is attested from the late 15th century.[15] The growth of an independent (and lucrative) insurance market, however, soon attracted the interest of several courts, each claiming jurisdiction on insurance contracts – or at least not rejecting such pleas.[16] Thus, the uncertainty

9 Corsini Archive of Florence (henceforth ACF), Room II (provisional collocation).

10 HCA 35/283 (policy of 12.3.1563), 37/74 (policy of 22.11.1563 – the insured was the Lord Mayor of London himself) and 39/20 (policy of 8.1.1566), R.G. Marsden, *Select Cases in the Court of Admiralty*, p. 52–57. The Italian policy was written on 17.6.1561, ACF, Room II (provisional collocation). To my knowledge, it is the last known insurance policy made in London to have been written in Italian.

11 R.G. Marsden, *Select Cases in the Court of Admiralty*, p. 52–53.

12 Ibid., p. 55–57.

13 Policies written on 17.4.1573, 9.1.1575, 27.8.1575, 2.11.1575, 4.9.1577, 18.12.1577, and two policies written on 11.4.1579. ACF, Room II (provisional collocation).

14 The first evidence dates back to 1465, when a Venetian merchant insured in London demanded the Venetian consul in London to name a panel of 'good merchants' and settle the dispute. G. Camerani Marri, *I documenti commerciali del fondo diplomatico mediceo nell'Archivio di stato di Firenze (1230–1492)* (Olschki, Firenze 1951), doc. 383, p. 125–6. A Chancery petition of ca. 1565 attests at the widespread preference for merchant arbitration instead of judicial courts in matters of insurance, *Barne* c *Ridolphie*, in W.J. Jones, 'Elizabethan Marine Insurance. The Judicial Undergrowth', 2 *Business History* (1959), p. 53–66, at 59. Cf. D.J. Ibbetson, 29 *Journal of Legal History* (2008), p. 294–295.

15 The earliest case attesting the Lord Mayor's jurisdiction is of 6 June 1480, in the insurance stipulated by two of the most important Italian merchants in London, Antonio Spinola and Marco Strozzi. Roll A 99, m. 3*v*, in P.E. Jones, *Calendar of Plea and Memoranda Rolls*, *1458–1482* (Cambridge University Press, Cambridge 1961), p. 139.

16 Insurance litigation under Common law is attested from 1538: *Mayne and Poyn* c *De Gozi*, British National Archives, Public Record Office, Kew, KB 27/1107, m. 37. See Sir J. Baker, *Oxford History of the Laws of England*, vol. 6, 1483–1558 (Oxford University Press, Oxford 2003), p. 215, note 51. Ten years later we begin to find suits in the Admiralty: *Broke* c *Maynard* (1548), R.G. Marsden, *Select Cases in the Court of Admiralty*, p. 47; *Cavalchant* c *Maynard* (1549), ibid., p. 45. The first known commission appointed by the Chancellor in matters of insurance dates to 1555 or 1556, for on 1556 the Admiralty

on the applicable rules created by the development of customs was enhanced by a similar uncertainty on the proper jurisdiction. As each court applied a very different law (Common law in the Royal courts, Equity in Chancery, Civil law in Admiralty, customary law in the Aldermen Court) the variety of competing jurisdictions turned uncertainty into chaos.

## 2. *The making of the London Code*

The chaos reached its apex in the early 1570s. In 1571 the King's Bench heard a writ of prohibition against the Admiralty on an insurance suit, which amounted to rejecting the Admiralty's jurisdiction in matters of insurance.[17] The following year the Queen wrote to the Mayor of London warning him not to meddle in matters falling within the Admiralty's jurisdiction (which extended to 'any contract any other things happening upon or beyond the seas').[18] Unsure about what court should hear their claims, merchants increasingly turned to the Privy Council. Sometimes they lamented the refusal of the insurers to comply with the arbitrators' decision.[19] At other times they simply sought justice directly before the Council, which in turn referred them either to the Aldermen Court of London[20] or to the Admiralty.[21] Determined to put an end to the growing state of uncertainty, on 6 December 1574 the Privy Council ordered the Lord Mayor of London to collect and write down the insurance customs applied in London with the advice of the most experienced merchants in matters of insurance. The request was rather unprecedented, and the Mayor needed more than one prod to comply with it.[22] The growing irritation of the Council eventually stirred the Mayor, who summoned a meeting to discuss the code on 27 March 1576.[23] Continuous pressure of the Privy

found contempt against the party that sued there: HCA 27/174, ibid., p. lxvii; Jones, 2 *Business History* (1959), p. 57.

17 Anon. (1571) Cambridge University Library MS Hh 2.9, *fol.* 23*r*, in D.J. Ibbetson, 29 *Journal of Legal History* (2008), p. 297, note 41.

18 R.G. Marsden, *Select Cases in the Court of Admiralty*, p. xii; copy in BL MS Additional 12505, *fol.* 187*r*, dated 20 May 1572. The conflict between the Admiralty and the Mayor of London became aggravated in the ensuing years. On 4 February 1577 the Admiralty judge Lewis obtained from the Crown a special commission to hear maritime cases, including insurance matters, without possibility of appeal. Calendar of the Patent Rolls, Elizabeth I, vol.7, 1575–1578, London, 1982, 384 (C 66/1162, m.5d); R. G. Marsden (ed.), *Select Cases*, p. xii–xiv (4 Feb. 1577). See further D.J. Ibbetson, 29 *Journal of Legal History* (2008), p. 298–299.

19 J.R. Dasent (ed.), *Acts of the Privy Council of England*, vol. 8, 1571–75 (Eyre and Spottiswoode, London 1894) (henceforth APC), p. 195–196 (27 February 1574); APC 1571–75, p. 337 (25 January 1575).

20 APC 1571–75, p. 167 (15 December 1573).

21 APC 1571–75, p. 206 (8 March 1574); APC 1571–75, p. 262 (5 July 1574).

22 APC 1571–75, p. 321 (6 Dec. 1574); p. 326 (19 Dec. 1574); p. 374 (9 May 1575); APC 1575–77, p. 43 (8 Nov. 1575) respectively.

23 Corporation of London Record Office, *The Repertories of the Court of Aldermen, 1495–1835* (Harvester Press, 1986) (henceforth CLRO Rep.), Book 19, *fol.* 60*r*.

Council[24] ensured that a first version of the insurance code was completed by the end of 1576. There is good evidence that 'an interim' draft code was already in circulation at the beginning of 1577.[25] This first draft is preserved in a manuscript of the British Library, MS Additional 48023 (henceforth Additional).[26] The first version of the code, however, was hardly finished when a second draft had to be undertaken to take into account some late innovations. At the beginning of 1577 in fact the London Court of the Mayor and Aldermen set up an Assurance Chamber to hear insurance disputes.[27]

The insurance code had to consider the provisions introduced with the new court. Rather contrary to the first draft, however, the preparatory works for the second version started at once. The earliest evidence of the second draft of the insurance code is a list of titles preserved in another manuscript of the British Library, and it bears the date of 1 March 1577.[28] The last three titles, which are not present in Additional, incorporate the relevant provisions of the ordinance that established the Assurance Chamber. Unlike the first draft of the insurance code, which was accomplished in a few months, devising the second version took considerably longer.

According to a later deposition of one of the first judges of the Assurance Chamber in a life insurance case, *Adderley* c *Symonds*, around 1582 the merchants of London finally agreed on a book of orders in matters of insurance.[29] The text of such a book of orders is once again preserved in the British Library, MS Harleian 5103 (hereafter Harleian). At first sight the text of Harleian would seem to be an earlier draft of the code, and not its final version. *Adderley* c *Symonds* focused on whether a life insurance stipulated for a long journey had to indicate the furthest point of the journey. Another deposition in the

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24 On 11 July 1576 the Privy Council urged the Mayor to hand in at once what 'hath ben done in that behalf', APC 1575–77, p. 163 (11 July 1576). Nineteen days later, the Privy Council wrote a last letter to the Mayor, urging 'that the book of orders of assurance which his Lordship hath so often times ben written unto for may be finished with expedition and brought unto their Lordships to be confirmed', APC 1575–1577, p. 177 (30 July 1576).

25 Copy of a letter of the Mayor of London to the Admiralty judge David Lewis, dated 1 March 1577, BL, Additional 48020, *fol*. 356*r*. In the letter, the Mayor referred to the draft code as 'an interim for the ease of your Lordships upon importune suits'. The draft, therefore, must have been advanced enough to allow the Admiralty judges to base their decisions on it (at least further to the intentions of the Mayor). The same letter gave also an account of 'the great pains […] taken to reduce the rules and traditions of assurance in such cases as can be remembered to certainty', adding that the code was 'in greater towardness to be perfected'. Further, the ordinance of 29 January 1577 establishing the Assurance Chamber referred to the 'many good orders, which notwithstanding are not yet fully finished', CLRO Rep., Book 19, *fol*. 167*r*.

26 BL, MS Additional 48023, *fols*. 246*r*-273*r*.

27 We shall deal with the Assurance Chamber in the next paragraph.

28 BL, MS Additional 48020, *fols*. 351*r*-354*v*.

29 *Adderley* c *Symonds* was tried before the Admiralty between 1599 and 1601. In 1600, during the trial, one of the original judges of the Assurance Chamber appointed in 1577, Thomas Wilford, deposed that the merchants of London had agreed on a book of orders 'about 18 yeres agoe' – and so around 1582. BL, MS Lansdowne 131, *fol*. 93*r*. Wilford's appointment is attested in CLRO Rep., Book 19, *fol*. 167*r* and BL, Additional 48020, *fol*. 350*r*. On *Adderley* c *Symonds* see D.J. Ibbetson, 29 *Journal of Legal History* (2008), p. 303–305.

same trial stated that Article 117 of the code provided as much.[30] Unlike the first draft of the code (in Additional), the articles in the version preserved in Harleian are numbered. But the provision of Harleian containing the rule discussed in *Adderley v. Symonds* is numbered as Article 116, and not 117. A careful examination of the manuscript, however, reveals that the hand, probably seeking to embellish the copy (which is written with very clear, careful and neat handwriting), changed the first article into a general preamble, thereby altering the whole numeration of the orders. The hand changed the numeration but not all the cross-references contained in each article. A number of such cross-references prove the conclusion beyond doubt.[31] The provision referred to as Article 117 in the deposition does correspond to Article 117 of Harleian.

A first comparison between the two versions of the London code (Additional and Harleian) betrays a number of differences pointing at the progressive refinement of the London code. With its approximately 29,000 words against *circa* 24,700 of Harleian, Additional is considerably longer. And yet, such a length does not entail more refined provisions. First of all, as with many early-modern legislative compilations, Additional has lengthy preambles, which Harleian almost entirely expunges. Secondly, several articles of Additional are omitted in Harleian: some because of the intention to depart from Additional, others simply because of their explanatory character – they are examples, not provisions. Thirdly, Additional's reiterations are avoided, its lengthy provisions are considerably reduced, and all its verbose constructions simplified. What is left from such a simplification is a text of as comparable length as Additional. Crucially, while Additional continuously refers to old customs, particularly to explain why it is departing from them, references to customs are almost entirely absent in Harleian. The lack of references to old customs and uses seems to suggest that the compilers of Harleian were not moving from collective (and oral) knowledge of customs to writing, but from a written text to another and better-refined version of it.

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30 Deposition of William Bore, BL, MS Lansdowne 131, *fol*. 93*v*.

31 The text of Art. 58 (*fol*. 170*r*) refers to Art. 1 as 'the 2d Article'. The text of Art. 49 (*fol*. 168*v*) refers to Art. 13 (*fol*. 160*r*-160*v*), but the actual reference is to the content of Art. 12 (*fol*. 160*r*). The text of Art. 51 (*fol*. 168*v*) refers to Art. 25 (*fol*. 162*v*), but the actual reference is to the content of Art. 24 (*fols*. 162*r*-162*v*). The text of Art. 12 (*fol*. 160*r*) refers to Art. 51 (*fol*. 168*v*), but the actual reference is to the content of Art. 52 (*fols*. 168*v*-169*r*). The text of Art. 19 (*fol*. 161*v*) refers to Art. 27 (*fol*. 163*r*), 34 (*fol*. 165*r*) and 37 (*fol*. 165*v*), but the actual reference is to the content of Art. 26 (*fol*. 162*v*), 33 (*fol*. 164*v*) and 36 (*fol*. 165*r*-165*v*) respectively. The text of Art. 26 (*fol*. 162*r*) refers to Art. 34 (*fol*. 165*r*) and Art. 37 (*fol*. 165*v*), but the actual reference is to the content of Art. 33 (*fol*. 164*v*) and 36 (*fol*. 165*r*-165*v*). The text of Art. 31 (*fol*. 164*r*) refers to Art. 33 (*fol*. 164*v*) and 41 (*fol*. 167*r*), but the actual reference is to the content of Art. 32 (*fol*. 164*v*) and 40 (*fols*. 166*v*-167*r*). The text of Art. 85 (*fol*. 175*v*) refers to Art. 63 and 64 (both in *fol*. 171*v*), but the actual reference is to the content of Art. 62 (*fol*. 171*r*-171*v*) and 63 (*fol*. 171*v*). The text of Art. 24 (*fol*. 162*v*) refers to Art. 53 (*fol*. 169*r*), 62 (*fols*. 171*r*-171v) and 82 (*fol*. 175*r*), but the actual reference is to the content of Art. 52 (*fols*. 168*v*-169*r*), 61 (*fol*. 171*r*) and 81 (*fol*. 174*v*). Finally, the text of art. 123 (*fol*. 184*r*) refers to art. 103 (*fol*. 180*r*), but the actual reference is to the content of Art. 104 (*fol*. 180*r*).

### 3. *The London Assurance Chamber*

Established by an ordinance of the Court of the Mayor and Aldermen of London of 29 January 1577,[32] the Assurance Chamber probably began to function at the beginning of February.[33] Its importance for our purposes is that the Court was as an integral feature of the same design leading to the insurance code. Among the courts claiming jurisdiction in matters of insurance, in fact, the mercantile community above all feared the Common law Courts. Accordingly, they firmly intended to ward off Common law from insurance practice. Merchants had two good reasons for that: 1) maintaining a degree of uniformity with Continental practice meant attracting business from overseas – or, at least, not losing it; 2) crucially, insurance customs were so deeply rooted into the Civil law tradition that merchants seriously doubted whether Common law would have suited them. This second fear is clearly expressed in both the versions of the London code. The first one (Additional), being more descriptive, is particularly open on the matter. According to it, insurance disputes had always been decided by panels of merchants according to the use of Lombard Street and not according to the Common law. However, an increasing number of 'ill-disposed' people, 'pretending right, and having none', were then resorting to the Common law courts, infringing thereby the Lombard Street customs.[34]

The ordinance setting up the Court sketched out some provisions regarding its functioning. First of all, seeking to put an end to disputes over jurisdiction in matters of insurance, it provided that all the insurance policies made in London should contain a jurisdiction clause in favour of the new Court.[35] To what extent such a clause put an end to quarrels with other courts is arguable. Nonetheless, this was all the Mayor could do. Prohibiting overtly London merchants from suing elsewhere would have gone far beyond his prerogatives. Requiring them to insert a jurisdiction clause in their policies and hoping for the best, given the circumstances, was a better policy.

The Assurance Chamber consisted of seven merchants chosen annually by the Mayor and Aldermen of London, and who were sworn before them.[36] Obviously enough they were prohibited from taking part in insurances, both in the vest of insured and in that

32 CLRO Rep., Book 19, *fols*. 166*v*-168*r*, and Additional 48020, *fol*. 350*r*-350*v*.

33 Five out of seven members of the Assurance Chamber were appointed on the second day of February 1577. CLRO Rep., Book 19, *fol*. 156*v*; copy in BL, MS Additional 48020, *fol*. 350*r*.

34 Additional [Art. 134], *fol*. 272*v*: 'And for as much as the causes of assurance have been always referred to the order of Lombard Street, and that the causes have taken end by the judgment and determination of merchants and hath not been ended by the Common laws of this realm until now of late, that some ill disposed, pretending right, having none, have sought their recovery indirectly to the ancient orders of assurance, whose vexation hath urged many times composition, to the infringing of the orders and ancient custom of the said assurance'. Cf. Harleian, Art. 123, *fol*. 184*r*. The articles of Additional are reported in square brackets because the manuscript, unlike Harleian, does not number them.

35 CLRO Rep., Book 19, *fol*. 167*v*; BL, MS Additional 48020, *fol*. 350*v*.

36 CLRO Rep., Book 19, *fol*. 167*v*.

of insurers.[37] The newly established Insurance Registrar was appointed as their clerk.[38] The Registrar had to enter the judgments of the Court in the Register and to summon the defendants.[39] The Court was to sit every Monday and Thursday in the rooms of the Insurance Registrar, situated inside the London Royal Exchange.[40] A constitutive quorum of four members was sufficient for the Court to pronounce judgment. Such a relative low quorum was probably meant not to impose too heavy a burden on the judges, who were merchants themselves and therefore actively engaged in their own business. The fee of the Court, in fact, was hardly enough to support the judges. The ordinance established it in one penny per each pound of the value of the dispute (that is, 1/240 of the insurance's value).[41] Considering that, out of 39 extant policies written from 1573 to 1593, the average sum insured was of £527, where the insurers were sued for total loss the average fee was of £2.2: probably just enough to pay the expenses. Therefore, merchants hardly sat as judges for gain. Probably they did so for prestige, but chiefly because having a court exclusively staffed by merchants was in their best interest.

The ordinance that established the Court contained also quite a technical provision on its procedure. If the defendant did not appear after the third summons the Court was authorized to enter judgment *in absentia*.[42] The interest in such a provision lies in that it seems to betray clear foreign influences. The same struggle between merchant- and law-courts in matters of insurance, in fact, was taking place on the other side of the Channel, in one of the most important French insurance markets – that of Rouen. The jurisdiction of the Consulate of Rouen on insurance was expressly provided for by the 1556 edict establishing the Consulate itself.[43] Nonetheless, the jurisdictional powers of the Consulate were continuously under attack from other courts. Unable to challenge directly the Consulate's jurisdiction, they attacked its judgments *in absentia*, granting relief to the contumacious defendants and so ignoring the Consulate's decisions.[44] The possibility that the Court of the London Mayor sought to prevent other courts from doing the same as in Rouen is far from being implausible. Not only did London have very tight commercial links with Rouen, but the ordinance setting up the London Court

37 Ibid.

38 The Register of Insurance was introduced in January 1575 by the Crown, which established a monopoly in making and registering insurance policies in London. C 66/1131, m.40–41. See G.D. Duncan, 'Monopolies under Elizabeth I', thesis submitted for the degree of Doctor of Philosophy, University of Cambridge, 1977, p. 220–223; C.G. Lewin, *Pensions and Insurance before 1800: a Social History* (Tuckwell Press, East Linton 2003), p. 100–105.

39 CLRO Rep., Book 19, *fol.* 167*v* and Additional 48020, *fol.* 350*r*.

40 CLRO Rep., Book 19, *fol.* 167*v* and BL, MS Additional 48020, *fol*. 350*v*.

41 CLRO Rep., Book 19, *fol.* 167*r*.

42 CLRO Rep., Book 19, *fol.* 167*v* and Additional 48020, *fol*. 350*r*-350*v*.

43 Art. 4 of the Edict; text in N. Plantrou and C-E Harang, *De la Jurisdiction Consulaire au Tribunal de Commerce de Rouen de 1556 à nos Jours* (PTC, 2007), p. 14.

44 H. Lafosse, *La Jurisdiction Consulaire de Rouen* (Defontaine, Rouen 1922), p. 67–76.

probably also took inspiration from Rouen on other minor points.[45] To this end, the same provision contained in the ordinance setting up the Court was repeated in the insurance code itself.[46]

The struggle for the jurisdiction on insurance did not cease with the establishment of the London Assurance Chamber. The Court was eventually reformed in 1601. Its members were appointed by the Chancellor and consisted of 14 members (the double of its original number), eight of which were chosen from merchants, two Civil law lawyers and another two Common law lawyers. The remaining two were the Admiralty judge and the Recorder of London.[47] The new composition of the Court, therefore, made room for all the litigants.[48] What is remarkable of the London Assurance Chamber is its highly specialized nature, being the first court to deal only with insurance disputes. In the mercantile Consulates the judgments were given by the Consuls with the eventual advice of merchants particularly experienced on the subject, but not by the merchants themselves. The need for specialized courts in matters of insurance towards the late 16th century was hardly confined to England. During the same years, in Antwerp what had hitherto been an office deputed to the registering of insurance policies progressively acquired judicial functions as well, serving as a model for other cities, from Hamburg to Amsterdam.[49]

## *4. Different views on the authoritativeness of the Code*

Was the London Code ever enacted? To answer the question we must turn again to *Adderley* c *Symonds*. The depositions of two of the first judges of the Assurance Chamber seem to suggest that it was not. One stated that the merchants of London did agree on 'certain articles […] for determining of causes of assurance', but those articles were 'not perfected'.[50] The other 'deposed that the book was not concluded', so that 'the Commissioners for Assurances in London [were not] tied to those articles'.[51] The text of Harleian is spotless. The writing is very elegant and it lacks even the smallest crossing out. At the bottom of almost every article there is a list of cross-references to

45 For instance, in providing that the plaintiff had in any case to put 12 pence into a poor box provided for the purpose. CLRO Rep., Book 19, *fol.* 167*v*; BL, MS Additional 48020, *fol*. 350*v*. The same usage in the Consulate of Rouen is attested by the *Guidon de la Mer* (Martin le Mesgissier, Rouen 1619), ch. 21, p. 75.

46 Harleian, Art. 126, *fol.* 185*r*.

47 43 Eliz. c. 12, now in D. Jenkins and T. Yoneyama (eds.), *History of Insurance*, vol. 7 (Pickering & Chatto, London 2000), p. 3–5.

48 After 1601, our knowledge of the activity of the Court becomes extremely scarce, but enough to conclude that in the new 'ecumenical' vests the Court was hardly successful. The last evidence of its activities dates to the early 1660s. CLRO Rep., Book 68, *fols.* 1*v*-2, 5*v*, 11*r* and 40*r* (December 1661).

49 J.P. Van Niekerk, *The Development of the Principles of Insurance Law in the Netherlands from 1500 – 1800*, vol I (Juta, Kenwyn 1998), p. 205–207.

50 Deposition of Thomas Wilford, BL, MS Lansdowne 131, *fol*. 93*r*.

51 Deposition of Robert Dowe, ibid., *fol*. 94*v*. Dowe's appointment to the Assurance Chamber is attested in CLRO Rep., Book 19, *fol*. 167*r* and BL, Additional 48020, *fol*. 350*r*.

other articles to better guide the reader through the whole body of the text. In a final effort to embellish the text, as already said, the hand has even changed the first article into a general preamble. On the other side, however, a few blanks are left in the text, although they are very marginal details.[52] This might point at the same conclusion as the deposition of the first judge: the code was agreed upon but 'not perfected'. The statement could be read in the sense either that the code was not enacted or that some formal imperfections and slight gaps were left in the text. If we could prove that the code was enacted, therefore, there are good chances that the copy of Harleian is indeed the final text of the code.

The proof that the code was indeed enacted comes from a letter of the Privy Council of 1601, addressed to Popham CJ and the judge of the Admiralty Caesar. In the letter, the Council lamented that more and more insurers were refusing to abide by the judgments of the Assurance Chamber, thereby impairing the application of the code, which had been confirmed by the same Privy Council some years before.[53] The problem, therefore, was that the Assurance Chamber was not working as it should, despite the fact that the rules on which it had to decide had been properly sanctioned. There is some evidence that the Chamber had not been properly functioning for a decade before the letter of the Privy Council.[54] When the first judge affirmed that the code was 'not perfected', therefore, he referred to some imperfections in the text, and not to the lack of legal sanctioning. But, if so, then why did the second judge state that he and his colleagues were not 'tied to those articles'?

Quite probably, and much to the dislike of the Privy Council, the merchants sitting in the Assurance Chamber considered the code a compilation of customary law, thereby undermining its authoritative status. When the second judge affirmed that, in his view, the Assurance Chamber was not tied to the code, he probably expressed a common understanding among the insurance judges. They considered the code as written evidence of the insurance customs of a given period, and so as a set of rules subjected to change over time. The evidence coming from insurance policies duly registered according both to the London code and to the provisions of the ordinance establishing the Assurance Chamber seems to strengthen such a conclusion. On several occasions the policies do

52 Harleian, Art. 119, *fol.* 183*r* (the amount of interest payable upon return of a payment later found to be undue), Art. 23, *fol.* 162*r* (probably the word 'right'), Art. 24, *fol.* 162*r* (probably the word 'port'), Art. 40, *fol.* 166*r* ('to make proofe by…'), Art. 40 n. 2, *fol.* 166*v* and art. 81, *fol.* 174*v* (in both cases the name of a city), Art. 43, *fol.* 167*r* (probably the word 'damage').

53 APC 1600–1601, 252–253 (29 March 1601): 'certain orders devised and sett down some years sithence and confirmed by us touching assurances among merchants upon the Exchange are not put in execution, but greatly impugned by willfulness and forward disposition of some who refuse to submit and conform themselves to the order of Commissioners appointed to hear those causes, being chosen of skillful merchants and sworn by the order of the Lord Major to deal indifferently and uprightly'.

54 Letter of the merchant Bartolomeo Corsini to Stefano Patti, Venice, Archivio di Stato di Venezia (henceforth ASV) *Miscellanea Gregolin*, B. 12-*ter*; transcription of G. Stefani, *Insurance in Venice. From the Origins to the End of the Serenissima* (Assicurazioni Generali di Trieste e Venezia, Trieste 1958), vol. I, p. 104.

not comply with the provisions contained in the code. A good example is a hull policy of 1584,[55] for it diverges from the provisions of both the versions of the code. The ship's appurtenances are in fact included in the object of the insurance, while both manuscripts excluded their insurability.[56] Further, if we accept Harleian as either the final text or a very similar version of it, then another of its provisions was not applied in the insurance policies. Harleian provided that all insurance policies be registered within four days from the first underwriting, and requested the procedure to be repeated if other signatures were added later.[57] However, none of the known policies underwritten in more than four days complies with such a requirement.[58] These examples seem to suggest that the judges of the Assurance Chamber did not see the code as a piece of legislation but as a guideline for their decisions, as long as the customs had not meanwhile diverged from its provisions.[59] Thus, the inner flexibility of customs ultimately prevailed on the rigidity of law.

## B. LONDON CODE AND FOREIGN INFLUENCES

Although the London code was influenced by several customs and legislations, the main influx came from the recently introduced Ordinances of the Spanish Consulate in Bruges, which came into force on 1 January 1570.[60] Although most of the Spanish merchants active in the Netherlands lived in Antwerp, for political reasons the Spanish Consulate remained in Bruges, but its jurisdiction extended to Antwerp as well.[61] The Ordinances themselves leave no doubt that their main recipient was the considerably larger market of Antwerp, not that of Bruges.[62] Unsurprisingly, therefore, the provisions

55 Policy of 24.10.1584, ACF, Room II (provisional collocation).

56 Harleian, Art. 99, *fol.* 179*v* and Additional [Art. 107], *fol.* 268*v*.

57 Harleian, Art. 125, *fol.* 184*v*.

58 Taking into account only the policies written after 1582, there is none complying with such a requirement. In the policy of 26.1.1583 the underwritings were made between 27 and 30 January, but the registration occurred only on 10 February. In the policy of 3.11.1584 the underwritings were made between 4 and 10 November, but there is only one registration, on 11 November. In the policy of 21.1.1585 the underwritings were made between 24 and 31 of January, but the policy was registered only on 10 February. In the policy of 17.11.1586 all the underwritings were done between 18 and 21 November, but the registration occurred only on the last day of the same month. In the policy of 11.11.1591 the underwritings were made between 15 and 19 November, but the registration did not occur until 22 December. Finally, in the policy of 13.10.1593 the underwritings were done between 16 October and 3 November, but the registration bears the date of 5 November. The first policy is in London Metropolitan Archives, MS 22282, p. 125–128. All the others are in ACF, Room II (provisional collocation).

59 For a different interpretation on both the dating of the manuscripts and the enactment of their final version see D.J. Ibbetson, 29 *Journal of Legal History* (2008), p. 300.

60 For the text of such Ordinances see C. Verlinden, 'Code d'Assurance Maritimes selon le Coutume d'Anvers, promulgué par le Consulat Espagnol de Bruges en 1569', 16 *Bulletin de la Commission Royale des Anciennes Lois et Ordonnances de Belgique* (1950), p. 38–142, at 47–142.

61 Ibid., p. 39–41.

62 Title XIX, ord. 2–3, ibid., 117.

of the Ordinances reflected mainly the customs of Antwerp, though sometimes they incorporated Spanish uses as well.[63] These Ordinances were of particular importance for two reasons. First, they were the first articulate and comprehensive body of written rules on insurance to appear in the Netherlands. The first compilations of Antwerp customary law, as well as the Dutch *placcaaten*, were extremely short and limited in their content.[64] Second, and crucially, they were enacted shortly after the government of the Spanish Netherlands prohibited insuring (31 March 1569), due to special permission from Philip II of Spain.[65]

Quite probably, therefore, their timing was dictated by the need to circumvent such a prohibition.[66] The Ordinances applied to any Spanish merchant resident in the Spanish Netherlands, but non-Spaniards could also choose them as the applicable law to their policies.[67] In this way, the Ordinances became for some time the only way to stipulate a valid insurance policy in the whole of the Spanish Netherlands. When the prohibition on insurance was eventually lifted (October 1570), the importance of Antwerp was already beginning to decline because of the revolt against the Spanish rule and the subsequent invasion from Spain. Soon thereafter, the fall of the city in 1585 sealed its downfall. It is therefore not surprising that the main Dutch influence on the London code did not come from the (rather poor) Antwerp compilations of the late 16th century, but from the Bruges Ordinances of the Spanish Consulate.

An overall comparison between the two versions of the London code would suggest a high degree of continuity on a formal level and significant divergences on a substantial one. Harleian respected the general scheme of Additional. Where Harleian departed from the order of Additional it did so to further completeness and coherence. As for the content, Additional was more innovative than Harleian. The earlier version of the code sought to depart from the existing customs on several points. If, as it seems, the elaboration of Additional was carried out rather swiftly, then the formulation of oral customs in written form and the borrowing of new solutions from foreign models were conducted almost at the same time. Foreign influences, in other words, did not creep into

63 The Bruges Ordinances are in fact an interesting example of normative contamination, for they sought to conciliate the Antwerp customs with some provisions of the Ordinances of the Burgos Consulate, enacted in 1538.

64 The first efforts towards the compilation of Antwerp insurance customs, in fact, were far from remarkable. The Antwerp compilation of customary law of 1570–1571, also known as *Antiquae*, contained just 12 articles on insurance. Similarly, that of 1582, better known as *Impressae*, devoted only 21 articles to insurance. For a short introduction on the Antwerp compilations see J.P. Van Niekerk, 'The Law and Customs of Marine Insurance in Antwerp and London at the End of the Sixteenth Century', 17 *Fundamina* (2011), p. 144–163, at 148–152. By contrast, the Ordinances of the Spanish Consulate in Bruges amounted to a 147, divided in 20 titles.

65 S.M. Coronas Gonzalez, 'La Ordenanza de seguros marítimos del Consulado de la Nación de España en Brujas', 54 *Anuario de historia del derecho español* (1984), p. 385–407, at 397–398.

66 C. Verlinden, 16 *Bulletin de la Commission Royale des Anciennes Lois et Ordonnances de Belgique* (1950), p. 41.

67 Title XIX, ord. 2, ibid., p. 117.

a body of customary rules until such rules had been accurately committed to writing, to fill gaps or to solve any incongruities. Provisions from foreign models were inserted in the code at an early stage of its making. Overall, such foreign influence is clearly visible in Harleian as well, but it is not as pronounced as in Additional. Importantly enough, the compilers of Harleian limited themselves to confirm, edit or expunge those provisions of clear foreign origin already present in Additional. They did not add any new provision coming from abroad. The resilience of English customs in Harleian might be explained with the reluctance of merchants to depart from familiar and widely accepted rules. This, however, does not mean that Harleian rejected all the novelties coming from abroad which were present in Additional. Rather, the final version of the code sought to strike a balance between innovation and tradition. The following section provides some examples of how new and old rules were combined together.

### *1. Thorough importation of foreign examples: life insurance*

Life insurance is a subject in which foreign influences are particularly evident in the London code. Early modern legislative compilations were often selective in the discipline of a subject, regulating some aspects and leaving others outside. Life insurance found no room in 16th century insurance codes except for two.[68] One was the 1582 customary collection of Antwerp, which however devoted to the subject only a single article.[69] The other was the Ordinances of the Spanish Consulate in Bruges.[70] The similarity between the London code and the Bruges Ordinances on life insurance is striking. The Bruges Ordinances devoted 10 articles to the subject. Those articles are condensed, and often literally transcribed, in the seven articles of the London code dealing with life insurance. On this subject, Harleian left the provisions of Additional substantially unaltered, therefore adopting the discipline of the Bruges Ordinances in bulk.[71]

The code allowed insuring against one's own life, or the life of another person, as long as there was a lawful economic interest to do so. Such an interest could lie in any sort of annuity, pension or benefit enjoyed for his entire life by the person whose life was insured. In case of insurance of the life of another, the policy was valid if the insured had

68 Another form of personal insurance, however, found relatively more room in early modern insurance compilations: the insurance against ransom. It was disciplined in the *Guidon de la Mer* (the sole form of personal insurance allowed in France), ch. XVI, 64, and in the Antwerp *Compilatae* of 1609 (part IV, title IX, Art. 316–323), in G. de Longé, *Coutumes du pays et duché de Brabant. Quartier d'Anvers*, vol. IV (Gobbaerts, Brussels 1872), p. 331–334. Interestingly enough, the London code did not provide for ransom insurances.

69 Customs of Antwerp of 1582 (*Impressae*), title XLIV, Art. 4, in G. de Longé, *Coutumes du pays et duché de Brabant. Quartier d'Anvers*, vol. II (Gobbaerts, Brussels 1871), p. 402–403.

70 Title XX, ord. 1–10, in C. Verlinden, 16 *Bulletin de la Commission Royale des Anciennes Lois et Ordonnances de Belgique* (1950), p. 119–122.

71 Compare Additional [Art. 123–129], *fols.* 271*v*-272*r* and Harleian, art. 113–119, *fols.* 182*r*-183*v.* with the Bruges Ordinances, title XX, ord. 1–10, in C. Verlinden, 16 *Bulletin de la Commission Royale des Anciennes Lois et Ordonnances de Belgique* (1950), p. 119–122.

a credit against or received any kind of benefit from that person for the duration of that person's life.[72] No life insurance could exceed one year from the date of the signature of the policy. Any policy stipulated for a longer term would be automatically reduced to one year.[73] Life insurance was subjected to a compulsory 20% underinsurance, and it could not exceed £1,000.[74] Unlike maritime insurance, the premium for life insurance was not returnable in any case.[75] A list of other provisions on the required evidence to demand payment and on the case of life insurance made in occasion of a long journey completed the treatment of the subject.[76]

## 2. *A case of rejection of Additional's innovations: the reduction of the insured value*

Harleian did not always repudiate some of the most original innovations of Additional out of sheer conservatism. In this regard, the best example is perhaps the insurance premium. Customarily, the premium was paid at the moment of the underwriting. In case the value insured against exceeded the insurable value, the reduction of the value (also called *restorno* after the Italians) followed the chronological order of the underwritings, starting with the last subscription. Originally, each underwriting was in fact considered a distinct undertaking. As a consequence, if the insurable value was already fully covered, any further underwriting amounted to an illicit over-insurance.

Additional revolutionized all this. Seeking to encourage merchants to insure, and so to increase the volume of insurances, payment of premium was postponed. Payments had to be settled three times a year.[77] The new discipline required new provisions in case the insured refused to pay the premium for fear of the insurer's insolvency – a case that could not have occurred under the old customs.[78] In case of over-insurance the reduction of the insured value and the parallel return of the premium were done by dividing the insurers in groups according to the time of their underwriting.

Very probably, such innovations were due to the influence of the Ordinances of the Spanish Consulate in Bruges. In the Bruges Ordinances the insurers were divided in groups. All those who underwrote within four days from the first one would be grouped together, and so on, each group covering the following four days. In case of over-insurance all the underwritings of the last group would be proportionally reduced. If they were not

72 Harleian, Art. 113–115, *fol.* 182*r*-182*v*.
73 Harleian, Art. 113, *fol.* 182*r*.
74 This is the only significant difference between the London code and the Bruges Ordinances on life insurance. The Bruges Ordinances did not put a cap on the maximum insurable value and provided for a compulsory underinsurance of 10%, title XX, ord. 8, in C. Verlinden, 16 *Bulletin de la Commission Royale des Anciennes Lois et Ordonnances de Belgique* (1950), p. 122.
75 Harleian, Art. 118, *fol.* 183*r*.
76 Harleian, Art. 116 and 118–119, *fols.* 182*v*-183*r*.
77 Additional [Art. 116], *fol.* 270*r*.
78 Additional [Art. 117–118], *fol.* 270*r*-270*v*.

enough, the next group would be taken into account, and so on.[79] The rationale was to strike a balance between the chronological order of underwritings and the need not to over penalize the last insurers (who, otherwise, would have borne the full weight of the reduction of the insured value).

Additional, however, outdid the model. It divided the insurers in groups covering 10 days each, thus nearly tripling the original term.[80] Insurance policies were usually underwritten in a few days, less than a week on average. Grouping together the underwritings done within four days made perfect sense, for it usually divided the insurers in two groups. Those falling within the first group (the majority) were confident enough not to suffer any reduction of their underwriting, and thus they felt encouraged to subscribe to the policy as soon as possible. Those falling within the second group could rely on the fact that, if any reduction had to be effected, it would be far milder than it would have been if strict chronology applied. If we look at the extant insurance policies stipulated in London during the last quarter of the 16$^{th}$ century, we have to conclude that such a long term would have rendered the whole mechanism virtually inoperative. Out of 39 extant policies stipulated from 1573 to 1593, in fact, the division in groups would have worked only in four cases.[81] In all the other 35 the result would have simply been to have a single group encompassing all the underwritings. Grouping together all the underwritings, however, would have meant effectively abolishing any chronological order. Thus, instead of creating some incentives to all the insurers (for the first ones to sign promptly, for the last ones not to be discouraged from doing the same), Additional's design would have brought disadvantages to all. The first insurers would have had no reason to sign the policy at once. On the contrary, they might have prudently waited to see who else trusted the adventure enough to partake in it, joining only later. Further, any insurer who signed the policy after 10 days from the first underwriting could have been pretty sure that the whole burden of an eventual reduction of its value would have fallen entirely on his shoulders.

Unsurprisingly enough, Harleian rejected Additional's innovations and went back to the traditional system.[82] However, Harleian retained two important innovations introduced by Additional on the discipline of the premium. The first regarded the

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79 Title IX, ord. 13, in C. Verlinden, 16 *Bulletin de la Commission Royale des Anciennes Lois et Ordonnances de Belgique* (1950), p. 88. The text reads 'five days', but it provides that both the initial and the last day be taken into account. Additional's discipline of the payment of the premium to the insurers (*supra*, note 77) is taken from title XIX, ord. 1 of the Bruges Ordinances, ibid., p. 115–117. In turn, such discipline derives from the 1538 Ordinances of the Burgos Consulate, ord. 53–54, in E. Garcia (ed.), *Ordenanzas del Consulado de Burgos de 1538* (Institución Fernán González, 1995), p. 248–250.

80 Additional [Art. 28], *fol.* 254*v*.

81 Policy of 24.11.1575 (underwritten between 24 November and 8 December 1575), policy of 30.4.1576 (underwritten between 30 April and 25 May 1576), policy of 4.9.1577 (underwritten between 4 September and 20 September 1577), policy of 13.10.1593 (underwritten between 16 October and 3 November 1593). All the policies are in ACF, Room II (provisional collocation).

82 Harleian, Art. 27, *fol.* 163*r*.

broker's liability. In order to curb the fraud to the insurers perpetuated with the avail of the broker, Additional made brokers jointly and severally liable with the insured for the payment of the insurers' premium.[83] The second innovation concerned the reckoning of the insurers' liability in case of an accident to the ship during the loading of the cargo. A mishap which occurred to the ship while the insured merchandise was loaded onboard had the effect of concentrating the whole risk insured against in just a part of its object. If, for instance, the ship sank while lading the cargo onboard, the loss would affect only the part of the cargo already in the ship, and not the whole insured cargo. The insurance would of course cover such a mishap, but the value insured against would be higher than that of the lost portion of the cargo. If, however, the customary rule for the reduction of the insured value were to be followed, then the last underwriters would be reimbursed and the loss would fall only on the first ones. Accordingly, Additional once again followed the Ordinances of the Spanish Consulate in Bruges, and provided for the loss to be proportionally divided among all the underwriters.[84]

### *3. Cost-price valuation and underinsurance: innovations of the Code*

Cargo policies were subjected to a 10% compulsory underinsurance on the first thousand pounds. Beyond that, the insured was free to insure all the remaining value.[85] This limitation was very common in early modern insurance legislation and customs, both to limit frauds and to make the insured interested in the safekeeping of the cargo. As for hull policies, no underinsurance was imposed, although the code expressly prohibited insuring the hull above its value.[86] Compliance with underinsurance rules was however often imperilled by the liberty of the parties to valuate the merchandise in the policy by themselves. Customarily, in London there was no rule on how to value the insured cargo. Such a freedom gave rise to many abuses: to circumvent the rules on compulsory underinsurance it was sufficient to inflate the actual value of the merchandise. Thus, in case of loss, the insured would recover the integral value of the cargo – and possibly even more. Therefore, the London code sought to regulate the valuation of the cargo in insurance policies. The matter was a very sensitive one. Leaving the subject unregulated would have further encouraged fraud. Compelling the parties to value the cargo to its cost-price,[87] as many coeval legislations did, however, would have been unfair when

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83 Additional [art. 116], *fol.* 270*r* and Harleian, Art. 108, *fol.* 181*r*.

84 Compare Additional [Art. 70], *fol.* 263*r* and Harleian, Art. 64, *fol.* 171*v*, with the Bruges Ordinances, title XII, ord. 3, in C. Verlinden, 16 *Bulletin de la Commission Royale des Anciennes Lois et Ordonnances de Belgique* (1950), p. 93–94. The latter in its turn was probably influenced by the 1538 Ordinances of the Consulate of Burgos, ord. 74, in Garcia, *Ordenanzas del Consulado de Burgos de 1538*, p. 273.

85 Harleian, Art. 59, *fol.* 170*r*-170*v*.

86 Harleian, Art. 102, *fol.* 180*r*. However, if the shipowner insured both hull and freight, the code imposed compulsory underinsurance of one-quarter of the freight when it was insured against at a considerable value (that is, at least £4 per ton). Harleian, Art. 98, *fol.* 179*r*-179*v*.

87 Cost-price is the average price at which the merchandise was purchased at the place of departure.

the difference in price between the place of departure and the place of arrival was very significant. If a ship carrying wool to Leghorn, for instance, sank or was captured in proximity to the Italian coast, reckoning the price of the wool according to the London market would have entailed an enormous loss of profit to the insured. Merchants put on significant pressure to avoid universal application of cost-price. Whatever early modern jurists might have said,[88] merchants insured against the risk that their merchandise did not arrive at the given destination, and not to be put in the same condition as if the ship never left the port of departure. As a result, the London Code opted for a flexible criterion based on distance. The farther the destination of the ship, the more freedom was granted to the parties in valuing the merchandise. Compulsory cost-price valuation applied to cargoes directed to the Baltic Sea and the European Atlantic coasts up to the Iberian Peninsula. If the goods were to be shipped to Italy or to the eastern Mediterranean, however, the parties were free to valuate them according to the price at destination.[89] The same freedom applied to cargoes coming from the Indies.[90]

In granting the parties progressively more freedom to valuate the insured cargo according to the distance to be covered, the London code perfected some Continental examples. Genoese customs first and then those of Burgos allowed the valuation of the insured cargo at the price at destination if the loss occurred in a place closer to the port

88 In the 16th century accusations of usury were still heavily influencing many authors (in particular Canon lawyers and moral theologians) against the legitimacy of insurance. The jurists sought to shield the contract of insurance from such accusations by stressing the element of *susceptio periculi* (transfer of the risk). The owner of the cargo or the ship, they said, paid a third party to accept the transfer of the risk that the same cargo or ship could perish or be damaged. This way, the premium paid by the insured to the third party (the insurer) was not usurious, for it recompensed the insurer for having accepted a risk. However, since the object of the risk that the insurer accepted to bear was the loss of the cargo or ship, the value insured against could not exceed the cost of the same cargo or ship. In other words, such a theory necessarily implied that the insured value was the mere cost of the object at risk, excluding any profit the insured could have realized selling that object. If the insured cargo sunk with the ship, therefore, the insured could recover only the value at which he had purchased it, and not also the profit he hoped to make by selling the cargo at destination. See A. Beró, *Consilia* (Venetiis, Rossij, 1577) *consilium* 168, n. 3; G. Cornhuysius, *Digestorum seu Pandectarum iuris ciuilis partitio et Methodus* (Antverpiae, ex officina Christophori Plantini, 1565), p. 67; A. Perez, *Commentarius in quinque et viginti Digestorum libros* (Apud Ludovicum Elzevirium, Amstelodami 1669), *ad* Dig. XXII.2; Id., *Praelectiones in dvodecim libros Codicis* (Apud Ludovicum Elzevirium, Amstelodami 1653), *ad* Cod., IV.33; P. Santerna, *Tractatus de assecurationibus et sponsionibus Mercatorum* (Apud J. Schipper, Amstelodami 1669), *proemium*, n. 45; S. Scaccia, *Tractatus de commerciis et cambio* (Sumptibus Bertanroum, Venetiis 1650), pars I, quaestio 1, n. 97; B. Stracca, *De Assecurationibus*, in ibid., *De mercatura, cambiis, sponsionibus, creditoribus* (Apud J. Schipper, Amstelodami 1669), *proemium*, n. 35; M. Wesenbeck, *in Pandectas juris civilis et codicis Justinianei libros commentarii* (Reusnerum, Francofurti 1619), *ad* Dig. XXII.2, n. 3; H. Zoesius, *Commentarius ad Digestorum seu Pandectarum iuris civilis libros L* (Sumptibus Hieronymi Nempaei, Lovanii 1656), *ad* Dig. XXII.2, n. 1.

89 Harleian, Art. 15, 67, 70 and 72, *fols.* 160*v*, 172*r* and 172*v*-173*r* respectively.

90 Harleian, Art. 16, *fols.* 160*v*-161*r*. In such a case, the code dispensed with the requirement to prove the value of the insured merchandises, demanding the insured only to prove that the merchandises were effectively laden on the ship. The reason was just practical: if the ship sank during the voyage to Europe, no proof of the cargo's value could reasonably be gathered.

of destination than to that of departure. Accordingly, both Genoa and Burgos divided the voyage in two halves. If the mishap occurred in the second half, the loss would be reckoned the value of the cargo at destination.[91] Such a solution was undoubtedly more advanced in comparison with most of coeval legislation, which imposed the valuation of the cargo at its cost-price. However, it did not take into account a crucial factor: the length of the voyage. If the distance between departure and arrival was considerable, not only the value of the cargo could have significantly varied even within the first half of the voyage, but also the investment of the merchant who purchased the merchandise would have been more relevant (both in absolute terms and for its duration). The solution adopted in the London code, therefore, was significantly more advanced, as it allowed cargoes leaving from England to the Mediterranean and vice versa to be freely valuated (which usually meant valuation according to the price at destination).[92]

### *4. Refinement of foreign examples: the case of reinsurance*

Although reinsurance is attested in the Mediterranean from the second half of the 14th century[93] and it was rather a common practice in the 16th,[94] noticeably few early modern insurance codes dealt with it. In particular, among 16th century insurance codes, only the *Guidon de la Mer* of Rouen and the Ordinances of the Spanish Consulate of Bruges expressly provided for reinsurance. The *Guidon*, however, only mentioned the faculty of the insurer to pass the risk he accepted with the first insurance onto another party. But it did not discipline the subject any further.[95] The Bruges Ordinances provided a (slightly) more accurate discipline. They required the reinsurance policy to indicate the original insured and insurer, together with the quality of the merchandise at risk, so to allow the re-insurer to better appreciate the risk he was about to accept.[96]

By contrast, the London code was more detailed on the subject. The original insurer, now himself the insured, and the reinsurer were free to negotiate the premium, as long

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91 In Genoa such custom (although applied from the late 15th century if not earlier) became law only with the 1588 Statute, book IV, ch. 17, text in J.M Pardessus, *Us et Coutumes de la Mer*, vol. IV (Imprimerie Royale, Paris 1837), p. 532. In Burgos the same provision was enacted in the Ordinances of the Consulate of 1538, ord. 64, text in E. Garcia, *Ordenanzas del Consulado de Burgos de 1538*, p. 260.

92 A similar solution had already been adopted in the Ordinances of the Consulate of Burgos of 1538, but only to avoid litigations on how to divide in two halves the most important route, that from the Iberian Peninsula to the Flanders. The Ordinances provided that, if the mishap occurred before the Island of Ushant (in Brittany), then the loss would be accompted according to the cost-price. Where, on the contrary, the mishap took place after Ushant, the loss would be reckoned according to the value at destination. Ord. 63, text in E. Garcia, *Ordenanzas del Consulado de Burgos de 1538*, p. 259–260.

93 In Genoa, the first known reinsurance policy was written on 12 July 1370, text in E. Bensa, *Il contratto di assicurazione nel Medio Evo: studi e ricerche* (Tipografia Marittima, Genova 1884), doc. 8, p. 200.

94 H.L.V. De Groote, *De Zeeassurantie te Antwerpen en te Brugge in de zestiende eeuw* (2nd ed., Marine Academie, Antwerp 2000), p. 134; G. Stefani, *Insurance in Venice*, vol. I, doc. 8, p. 258–259.

95 *Guidon de la Mer*, ch. II, p. 12–13.

96 Title III, ord. 1, text in C. Verlinden, 16 *Bulletin de la Commission Royale des Anciennes Lois et Ordonnances de Belgique* (1950), p. 67.

as the reinsurance reported the main elements of the first policy: date of the instrument and of the insurer's underwriting, name of the insured, of the ship and of the shipmaster, merchandise insured, and voyage.[97] The difference between the London code and the Bruges Ordinances, however, was more formal than substantial. In the Ordinances of Bruges reinsurance polices, as any insurance, were subjected to compulsory registration. As any merchant could inspect the insurance register, the elements not present in the Bruges Ordinances but listed in the London code could have been easily gathered by the reinsurer, as they were all compulsory in an ordinary policy. Registration was compulsory also in the London code, but its compilers nonetheless sought to provide a more detailed discipline for reinsurance.

## §2. CONCLUSION

The interest of the London insurance code goes beyond the fact that it is the earliest attempt to codify customs in England. It also proves how different commercial legislation might converge in the presence of tight economic relations between two or more countries. In this regard, insurance is quite emblematic. Ships could be insured indifferently in the place of departure or in that of arrival. A cargo shipped from London to Antwerp, for instance, could be insured in either city. In one case, the insurance would be made by the owner; in the other, by his factor. Choosing one city or the other, however, also entailed selecting the applicable legislation to the contract. 'Forum shopping' is quite a popular expression today, but it is hardly new. In 1596, when the Venetian Senate was contemplating the introduction of stricter regulation on insurance, the commercial Court of Venice did its best to dissuade it. The Court argued that imposing stricter rules would have had the effect to discourage merchants from insuring in Venice. Merchants, said the Court, would simply insure their cargoes in the place of arrival, and no longer in Venice, where the ship would depart.[98]

Very often, discussions on the dangers of 'forum shopping' tend nowadays to highlight its dangers. The usual fear is that, leaving commercial operators free to select the most favourable legislative discipline, legislations would compete with each other in what is usually termed a 'race to the bottom'. Such a 'race' is supposed to encourage legislative laxity. The basic tenet is that economic operators seek the discipline lying at the 'bottom' – that is, the legislation allowing more freedom and fewer rules. What is remarkable in early modern insurance codes, and in particular in the London code (which was the expression of the mercantile community, and not of administrative bureaucrats), is that it proves quite the opposite. Economic operators were free in their choice of the applicable legislation. The result was that they strived to level it, not to move

97 Harleian, art. 11, *fol.* 160*r.*

98 ASV, Senato Mar, Filza 135, transcription of G. Stefani, *Insurance in Venice*, vol. I, doc. 50, p. 324–326.

in mass to the 'bottom' market (the less regulated one). Their interest lay in making commercial laws converge – not compete – with each other. The tighter the economic relations between two countries, the more such an effort towards legislative convergence was successful. The striking similarities between the London code and the Ordinances of the Spanish Consulate in Bruges offer an emblematic example. The close commercial relations between the two countries brought their respective rules on insurance to a remarkable level of resemblance with each other. Crucially, such rules were made by the economic operators themselves (the merchants), not by Parliaments or governmental authorities.