# 1

# Introduction

The sixteenth century is undoubtedly the turning point in the history of insurance, as it broke with late medieval schemes and thus inaugurated the modern use of the instrument. Nonetheless, the same period has received little scholarly attention. Much effort has been devoted to medieval insurance, and works on modern insurance typically start with a few historical digressions to rapidly move on to modern times. Sixteenth-century insurance has remained somewhat neglected, as it does not look medieval and yet it is not wholly modern. It seems to leave scholars dissatisfied: the period is either too late, or too early.

In Britain, the situation is hardly better. Traditionally, the history of English insurance starts with Lloyd's or, more precisely, with some vague references to Edward Lloyd and his coffee house. Before then, the common opinion was – and still largely is – that insurance in England was not really a serious business until (at the very least) the late seventeenth century.[1] Thus, the early history of insurance in England has traditionally received poor attention by legal historians.[2] Over the past decades, however, some studies by non-legal historians have raised some interest in the subject.[3] Although inevitably not focused on the legal aspects of insurance, they provided important material for legal historians, who recently began to investigate the subject more carefully.[4] The present work builds on these studies, concentrating on the substantive rules of insurance in Elizabethan London. Beyond the crucial importance of that period for the evolution of English insurance, there is an additional reason to look at it. For a felicitous case, new sources have become

[1] E.g. John (1958), pp. 126–7.
[2] Holdsworth (1919), pp. 85–113; Jones (1959), pp. 53–66.
[3] Raynes (1964), pp. 38–69; Boiteux (1968), pp. 125–9; Kepler (1975), pp. 44–55; Lewin (2003), pp. 85–119.
[4] Van Niekerk (1998), vol. I, pp. 224–228 and 257-261; *id.* (2011), pp. 144–63; Ibbetson (2008), pp. 291–307.

available for late-sixteenth-century London: the archive of the Corsini merchants, active in London from the late 1560s to 1601.[5] A few premises are however necessary to explain the peculiar and perhaps unorthodox choices on which this work is based.

## 1.1 Methodological choices

The main purpose of this work is to study the insurance code written in London during the late 1570s and early 1580s (hereinafter 'London Code') and English insurance during the late sixteenth century. In few fields – if any – have continental influences played a role as significant for the development of English customs as insurance. It is therefore vital to study the London Code against the background of sixteenth-century insurance customs and compilations. The importance of a comparative analysis is magnified because of the lack of evidence on English customs. Not much is known of the Lombard Street insurance usages, and the only known records come from a handful of Admiralty and Chancery records and the Corsini Archive of Florence. Studying the London Code means also understanding whether its provisions consolidated pre-existing practice or departed from it. In both cases, it is essential to study the Code from a comparative standpoint. Where the London Code departed from earlier Lombard Street customs, comparative analysis will help to understand the origin of the new provisions. Where the London Code consolidated earlier practice, foreign customs might shed light on the origins of such practice. So as not to overburden the reader, most of the comparative elements are – insofar as viable – in footnotes.

No comparative work can be found on early modern insurance. Sometimes a few provisions of a single compilation have been compared with those of another, without much explanation of the reason for the choice. The results have been arbitrary at best.[6] Comparing insurance

[5] Rossi (2012), pp. 93–100.

[6] Kepler (1975), pp. 51–3, sought to compare some provisions from the version of the London Code contained in BL, MS Harleian 5103 (hereinafter 'Harleian 5103') with the Dutch *Placcaat* of 1563 and the Spanish Ordinances of Seville of 1556. Both choices are questionable. The *Placcaat* was extremely short and its writing heavily supervised by the Spanish authorities. The Seville Ordinances were exclusively aimed at trans-ocean commerce (and so at voyages significantly different from intra-European ones). On the same line, almost forty years later Lewin (2003), p. 108, sketched a brief comparison between the same Harleian 5103 and some provisions of the Normand compilation known as *Guidon de la Mer*. More generally, when a study focused on more than a single insurance market it often did not

compilations is extremely important both to gather information and, crucially, to understand better the functioning of the system itself. Obviously, any compilation had its own peculiarities, due both to the place and the period. However, beyond such peculiarities, they show a remarkable similarity. Very often they provide vital information on the general approach towards insurance, attesting rules that substantially recur all around western Europe. Yet, work on this wider field is virtually non-existent.[7] Perhaps one of the reasons for this lies in its inherent difficulty. First, no critical edition is available. Some of the most commonly employed editions are either grossly outdated or somewhat infelicitous. Sometimes they are both. Early modern insurance codes are not always easy to read and understand. But before reading them, to make sense of their provisions, one has to study the economic, commercial and legal historical developments of the place where the code was written and used. Without such a background, it is difficult not to misinterpret the codes. They were thought of as working instruments for people already well experienced with insurance – they were not introductions. Another serious difficulty is that the codes are hardly organised and coherently structured. Before comparing them, therefore, they need to be re-organised. Too often rules applicable to particular cases are boldly announced as general principles, whereas they are in fact just exceptions, or particular instances, of a more general rule. Further, very often a rule is not spelled out or is described rather ambiguously. Knowledge of customary law applicable to the area where the code was written is therefore essential to interpret the code, both to fill substantial gaps and to avoid misleading deductions as much as possible.

To draw the comparative background of English insurance, the vast majority of the sources employed will be archival documents and insurance compilations roughly contemporary with the London Code.

compare different customs but rather merged them together. It is the case for the majority of studies on Italian early modern insurance when not limited to a single area within a certain timeframe. They simply blurred any difference and described insurance without any chronological or geographical boundary, as if Genoa, Florence and Venice shared the same customs, or as if nothing really happened between the early fifteenth century and the late seventeenth.

[7] The study of Boiteux (1968) is perhaps the only attempt in this direction. Interesting as it is, however, it focuses on the historical dimension of insurance, not on its legal features. Even within such an historical dimension, it does not go beyond a useful but introductory overview of pre-modern insurance, ranging from the early fourteenth century to the late eighteenth all across western Europe.

Lawyers' treatises and courts' decisions will be mentioned only when they report some coeval practice. This choice is deliberate but never attempted before with regard to early insurance, and is in fact contrary to mainstream legal research on the subject. As such, it probably warrants an explanation.

### 1.1.1 *Theory and practice*

The poor dialogue between doctrine and practice on insurance has old roots. During a rather animated debate on jurisdiction over insurance matters, the Mayor of London (probably John Langley) wrote to the Admiralty judge Dr David Lewis stressing how insurance had always relied on mercantile customs, and never on Common or Civil law.[8] Lewis retorted that many Civil lawyers had written on insurance, thereby implying that the Mayor's argument was flawed.[9] Both parties were right, but their arguments were not contradictory. Rather, they lay on different, parallel levels. In the course of the next four centuries such levels have overall remained parallel with each other.

From the mid-sixteenth century some important treatises of Civil lawyers on insurance were published.[10] Their importance quickly grew as learned courts began to rely on them to decide insurance matters. Around the same time, the decisions of several important courts on mercantile issues began to be published. Their wide diffusion decreed the position of those treatises as the ultimate authority on insurance

[8] BL, MS Additional 48020 (hereinafter 'Additional 48020'), *fol.* 355*r* (1 March 1577).

[9] *Ibid.*, *fol.* 357*r*.

[10] The first known insurance treatise was written by the Portuguese jurist Santerna (*c.* 1460–?). Although the earliest extant manuscript was written no later than 1488 (Ms Vat. Lat. 5922; Maffei (1983), p. 716), the treatise was printed only in 1552. Santerna's treatise was highly unsystematic, but its influence on both learned jurists and learned courts was enormous. A few years later, in 1569, the work of Stracca (1509–1578) was printed. Unlike Santerna's, Stracca's was not a treatise but rather a scrupulous gloss on a maritime insurance policy made in Ancona. In 1619 it was the turn of the treatise of Scaccia (1568–1618). Scaccia's treatise was more theoretical than Stracca's but less tangled than Santerna's. The *Responsa* of Roccus (1605–1676), published in 1645, relied on Santerna to the extent that they may be considered a clearer (and highly simplified) version thereof, which probably contributed to the lasting influence of Santerna's thought. Despite an increasing number of jurists beginning to write about insurance from the late sixteenth century onward, by and large the chief *auctoritas* on insurance matters within Continental Europe at least until the end of the seventeenth century remained the dyad Santerna-Stracca, followed at a short distance by the Genoese mercantile Rota.

matters. The main purpose of such treatises, however, was to fit the relatively new contract of insurance within the *ius commune* framework. To do so, they explained and organised insurance after Civil law categories. The result was a treatment coherent with the *ius commune* principles, but wholly detached from merchants' customs. Already in the mid-fifteenth century one of the most important treatises on mercantile practice advised merchants to avoid cities where Roman law – rather than mercantile customs – was applied on commercial matters, 'for nothing is worse for merchants than the debates of jurists, who are in all things enemies to exchanges'.[11] A century later, the strenuous opposition of the London Mayor to the jurisdictional claims of the Admiralty shared the same reasons. Comparing the position of learned jurists with contemporary mercantile practice would vindicate the merchants' mistrust of learned jurists' theorisations.[12]

[11] Cotrugli (1990), lib. 1, ch. 4, pp. 146–7. Cotrugli's treatise was written in 1458 but published only in 1573. On the divorce between *ius commune* and mercantile needs see the excellent introduction of Sapori (1970), pp. 92–110. More specifically on insurances, see Nehlsen von Stryk (1985), pp. 107–39, esp. p. 135. The Florentine Statute of 1463, mainly the product of a rich mercantile class, placidly observed how many provisions on insurances were no longer applied in Florence because of the damage to commerce. Although 'optimis rationibus fuerunt provisa et ordinata; tamen hodie minime observantur, quod plerumque redundat in maximum damnum civium et mercatorum florentinorum'. The Statute is transcribed in L. Piattoli (1932), p. 55. Ultimately, the Florentine Statute expressed the same concept as Malynes nearly two centuries later: 'A Law not observed is inferior to a Custome well observed'. Malynes (1622), pt I, ch. 25, p. 156.

[12] A few examples may suffice. *i. Barratry* (fraud of the shipmaster). Jurists excluded the insurers' liability in case of barratry with two exceptions. First, when the insurance policy mentioned the shipmaster's name. In such a case, the insurer was considered to have formally approved the choice of shipmaster. E.g. Stracca (1569), gl. 31, n. 4, *fols*. 129*v*–131*r*. Early modern jurists did not take into account the fact that policies usually mentioned the shipmaster simply to identify the ship. The second case was when the shipmaster was particularly trusted by the insured, who owned the ship. Instead of considering such a barratry as particularly suspicious – as merchants did – jurists qualified it as a *casus fortuitus*, by analogy with the theft committed by the son or the wife of the owner. E.g. Medices (1578), pt I, q. 13, n. 17–18, p. 135; Santerna (1552), pt III, n. 68–71, *fols*. 27*r*–28*r*; Stracca (1569), gl. 31, n. 4; Menochius (1594), cons. 353, n. 10, *fol*. 133*v*. See further Moschetti (1994), pp. 85–95. *ii. Reduction of the insured value*. Early modern authors shaped the insurance policy after some of the main contracts found in the Roman sources. The prevailing opinion followed the *emptio-venditio* model. E.g. Molinaeus (1601), pt II, disp. 507, n. 2, p. 676; Lessius (1605), lib. 2, ch. 28, dub. 4, n. 24, p. 324; Zoesius (1667), *ad* Dig. 18.5, n. 23, p. 393; Roccus (1665), not. 3, n. 7, p. 393; Santerna (1552), pt I, n. 7, and pt III, n. 13, *fols*. 4*v* and 17*r* respectively. If the insured cargo amounted to less than the value agreed upon in the contract, however, the contractual model of sale prevented a simple reduction of the insurance value. The insurer, as *emptor periculi*, bought the *periculum* at a certain price and the *emptio-venditio*

### 1.1.2 *Learned courts*

The progressive assertion of learned courts' jurisdiction on insurance matters entailed a corresponding decline of mercantile justice. What happened in England, with the struggle between Admiralty and Aldermen's Court of London,[13] is just an example of the same European-wide phenomenon. Already by the early seventeenth century, one of the first English treatises on commerce stated that 'assurances are grounded on the Civill Law'.[14] The reference to the 'Civil law' is perhaps debatable,[15] but what is interesting is the emphasis on the legal dimension, and the corresponding underplaying of the customary one. Such a shift from custom to law is widely attested, from Portugal to Castile and Catalonia, from Genoa to Naples, Rome and Sicily. During the well-known process of 'reception' of the *ius commune*, the staffing of high courts with Civil lawyers ensured the progressive compliance of local courts with Civil law principles. Insurance was not an exception. During the early modern period, and mainly in the sixteenth century, insurance customs began to be subsumed within the *ius commune* framework. More than integration, it was colonisation. The celebrated mercantile Rota of Genoa (established in 1528) provides an excellent example, not least because of its enormous European-wide influence. The Genoese Rota assumed

contract did not allow the alteration of the price but only the rescission of the contract for *laesio ultra dimidium*. E.g. Santerna (1552), pt III, n. 45, and pt V, n. 1, *fols.* 23*r–v* and 48*r* respectively; Stracca (1569), gl. 6, n. 4, *fols.* 52*v*–53*r*; Beroius (1577), vol. I, cons. 168, n. 5, p. 626; Scaccia, (1619), § 1, q. 7, pt 2, *ampl.* 10, n. 5, pp. 322–6. Needless to say, such a solution was hardly practical and never attested among merchants. *iii. Mishap before payment of premium.* As we have just said, most lawyers considered insurance as falling into the *emptio-venditio* model. However, much the reverse of classical Roman law, in early modern *ius commune* the *pretii solutio* was often viewed as instrumental to the validity of the sale contract (cf. e.g. Chartarius (1608), dec. 96, n. 1–8, p. 293). As such, jurists argued that the premium had to be paid in advance of the adventure. If the mishap occurred before its payment, the policy was void. E.g. Santerna (1552), pt III, n. 22, *fol.* 19*r*; Roccus (1665), not. 28, n. 7, p. 400. As we shall see, the premium was very frequently postponed in practice (*infra*, pt II, § 7.1). *iv. Lighters.* Jurists did not consider them as part of the ship. Accordingly, if the cargo sank while on the lighters they excluded the insurers' liability. E.g. Santerna (1552), pt III, n. 30–1, *fols.* 20*v*–21*r*. The customary approach was diametrically opposite. *v. Subjects not present in treatises.* Learned treatises diverged from insurance practice not only in what they stated, but also in what they did not mention. Subjects of enormous importance such as abandonment to the insurers, presumption of loss, reinsurance, duties of the insured to preserve the cargo and so on, were not even mentioned.

[13] *Infra*, pt I, § 3.2. [14] Misselden (1971 [1622]), ch. 7, n. 123.

[15] And probably motivated by political more than legal considerations: cf. Cordes (2005), p. 60.

the functions and competences of older mercantile courts such as the *Officium Mercantiae* and the *Officium Gazariae* (which was responsible *super facto navigandi*). Highly respected modern scholars argued that the great success of the Genoese Rota lay in the ability of its judges 'to reconcile mercantile regular practice with school tradition'.[16] The problem is whether mercantile practice and school tradition were in fact reconcilable. Let us just focus on a few examples:[17] *factum principis*, jettison and shipmaster's liability. In case of arrest, seizure or detention by public authority (*factum principis*), the Rota held the insurers not responsible, for no one could resist the prince.[18] By contrast, the same *factum principis* was, together with shipwreck and privateering, the most common case of insurers' liability in practice. Even if the policy expressly excluded the insurers' liability for jettison, according to the Rota the insurers would remain liable for any damage to the ship's appurtenances related to it (such as cut cables etc.). The jettison, argued the Court, was only the *causa mediata* of the damage to the appurtenances, and not *immediata*.[19] It is hard to see how a mercantile court would have reached the same conclusion. On the shipmaster's liability the *Rota* relied on his position as a third party in respect of the insurance contract. Accordingly, in the absence of an express clause excluding barratry (fraud of the shipmaster) from the policy, the Court held the insurers liable for it.[20] Customary practice was the opposite.

Even when the Rota acknowledged mercantile customs, still the structure of its decisions was far too imbued with Civil law categories effectively to reconcile insurance customs with *ius commune* principles. Almost paradoxically, it was the obligation of the court to justify its decisions that sealed the fate of mercantile customs. Even if they wanted to take into account mercantile usages, learned jurists could not apply the same rationale as mercantile courts. Insurance customs relied on tradition: a rule was such because it was customarily followed. Ultimately, such rules were based on fairness and experience. Lay judges adhered to

[16] Piergiovanni (1987), p. 28.

[17] More generally, it should be noted how the Court's reliance on the jurists' assimilation of the insurance contract to the *emptio-venditio* model entailed several and important consequences. One of them was the reckoning of the insurers' liability according to the cost of the merchandise before departure (cost price). Bellonius (1582), dec. 3, n. 27–8, *fols*. 21*r*–22*r*; Armenzani (1679), dec. 45, n. 13, p. 144. As we shall see, mercantile practice diverged sensibly from the cost-price rule.

[18] Bellonius (1582), dec. 56, n. 2, *fol.* 131*r*.

[19] *Ibid*., dec. 129, *fol.* 194*r*–*v*.

[20] *Ibid*., dec. 166, n. 4, *fol*. 221*v*.

customs because over time they proved to be fair and were accepted by the community. Civil lawyers based their arguments on rather different grounds: not tradition, but the authority of the *Corpus Iuris* as interpreted by generations of learned lawyers.

The Genoese Rota relied especially on Santerna,[21] the most abstract among early modern jurists dealing with insurance – perhaps also because (in all probability) he was the first to write a treatise on the subject. Jurists, however, were remarkably selective in their treatises. Far from organising the whole subject of insurance, they limited their remarks to some points of general interest. As a result, sometimes the courts found no learned authorities on a particular issue. In such cases they tended to rely on any *auctoritas* of sufficient weight, even though in so doing they detached themselves even further from maritime customs.[22]

[21] *Ibid*., dec. 3, n. 15 and 19, *fols*. 18*v*–19*r*; dec. 5, n. 11, *fol*. 28*v*; dec. 101, n. 5, *fol*. 174*v*; dec. 102, n. 3, *fol*. 175*r*; dec. 166, n. 4, *fol*. 221*v*. It might be interesting to observe that also the London Admiralty Court relied on Santerna: see e.g. the notes of Caesar in BL, MS Lansdowne 131, *fols*. 95*v* and 188*v*.

[22] Also in this regard an interesting example comes from the Genoese Rota. During the sixteenth century, insurance customs progressively increased the presumptive 'speed' at which the news of the mishap 'travelled' (*infra*, pt II, § 10.5), for the old and slower criteria were becoming increasingly antiquated. In a case of 1669–70 (on a policy of 7.4.1668), the Genoese Rota decided that the 'speed' at which the news of the mishap travelled had not to be reckoned from the place of the mishap – as it was customary – but rather from the moment the news arrived on land. Further, the Court reduced the 'speed' at which the news of the mishap travelled by half, considering the news of the mishap to 'travel' only during the day – and so for twelve hours a day. In so doing, the Court relied on a quotation (wrongly) attributed to Cicero, which read that the night is made for resting and not for travelling: Armenzani (1679), dec. 31, n. 13–14 and 18–20, pp. 109–10. The excerpt quoted ('tempore nocturno redit amica quies') was in fact a variant on a clause of Claudianus' Panegyric to Honorius (*praefatio*, v. 2; the original text read 'reddit'). The Genoese decision indicates a seventh Verrine oration as the source, and so probably meaning the second oration, part V. The Verrine were usually printed with the oration *in Caecilium*, so that the *oratio in verrem* II.5 might have counted as part VII. Referring to this 'seventh' Verrine was appropriate enough, as it dealt – mainly in the first part – with ships unlawfully acquired by Verres. However, all of its references to night-time were only associated with robberies and violence. The decision is even more surprising as the 1588 Genoese Statute had codified the customary principle that the presumption of knowledge of the mishap 'travelled' at two leagues per hour, clearly meaning every hour of day and night. The Rota took even the trouble to report the contrary opinion of Scaccia (1619), § 2, q. 1, n. 161–2, p. 43, who was simply stating the custom of Genoa, but the learned judges dismissed his argument since he 'absque aliqua auctoritate contrarium firmauit, & tamen Doctori sine auctoritate loquenti, nihil creditur.' Armenzani (1679), dec. 31, n. 22, p. 110.

### 1.1.3 Early insurance and modern scholars

With remarkably few exceptions, scholars have extensively relied on early modern doctrine and, to a lesser extent, learned courts' decisions. By contrast, the attention devoted to practice and customs has been minimal. Ultimately, for many legal scholars legal thought and legal practice seem to overlap. Scholars presumed that early modern law treatises described coeval practice, but failed to check whether that was actually the case. Relying on the *auctoritas* of earlier scholars has often led to uncritical acceptance of their treatises. It is perhaps revealing that the vast majority of insurance studies based on archival evidence are confined to the middle ages. As no treatise is available for the fourteenth and fifteenth centuries, no legal source could be used until the sixteenth. Thus, while economic historians were making enormous progress using archival sources, legal historians (with the exception, mainly, of some Spanish, Flemish and Dutch scholars) continued to rely primarily on learned treatises and left notarial ledgers to their dust, although some of them are exceptionally rich in commercial material for the sixteenth century. To date, for instance, the most important introductory work for any scholar (lawyers included) interested in late medieval and early modern Italian insurance remains that of the economic historian Melis, published – posthumously and just in small part – forty years ago.[23]

The enduring faith in the *auctoritas* of earlier jurists often led modern scholars to a further mistake. The authority-based system has virtually remained the same for a long time: new generations of lawyers have always sought to build on what earlier jurists had already written. The best way to structure a new work, therefore, was to ground it on older ones. To some extent, this *modus operandi* has remained the same from the dawn of the Bologna school in the twelfth century to the present day. Once sixteenth- and early-seventeenth-century lawyers had accomplished their main task – fitting insurance within the *ius commune* framework to shield it from usury accusations – later generations continued their work with different aims, for example clearly separating insurance from wagers. In a system based on the weight of older *auctoritates*, the best way to do this was to find any possible foothold in earlier treatises, irrespective of whether their authors had actually meant as much. Twisting what earlier jurists wrote has been one of the most

[23] Melis (1975).

common – and successful – *ius commune* techniques for centuries. It is hardly surprising that the same occurred with insurance. The resulting sense of continuity between earlier and later authors has often been only apparent. And yet very often modern scholars have read sixteenth-century jurists through the eyes of eighteenth-century ones, thus losing even that minimal grasp on contemporary practice that earlier lawyers might have had.

Because of its practical approach the present work will not linger on general issues on insurance – merchants never did – but sometimes will presuppose them. Given the underlying difference with most of modern works on the sources employed, the reader might find some deep incongruities with the mainstream studies on early modern insurance. To avoid that, a few words must be spent on a couple of crucial points. First, wager and insurance. During the early modern period there was no clear-cut division between insurance and wager. The division became important only once the contract of insurance had acquired clear and autonomous features, and so after the period we are concerned with. Often, however, scholars have applied later categories to interpret early modern insurance. Early modern insurance was a risk-shifting device whereby the insured passed his risk onto the insurer against the payment of a sum of money. The legal form of such a device was considerably less important than its function. As long as there was a risk to be transferred, contracts and wagers would equally work. The difference was not always neat, and merchants turned the ambiguous boundary between insurance and wager in their favour. Where the validity of the agreement could be challenged if considered as a contract, they described it also as a wager.[24] The first jurists who dealt with insurance did similarly. In the sixteenth century, accusations of usury were still heavily influencing many authors (in particular Canon lawyers and moral theologians) against the legitimacy of insurance.[25] Because of that, jurists sought to explain the insurance contract by shaping it after nearly any contract apart from loan (for a loan with interest was the prototype of any usurious agreement).[26] As a

[24] *Infra*, pt II, § 8.1.1 and § 14.1.1. Even though for the *ius commune* wager was not a *stipulatio*, and so in theory a non-enforceable innominate contract, it was actionable in mercantile courts: Stracca (1556*b*), pt II, n. 4, pp. 179–83.

[25] Quite representative of the common attitude towards insurance among moral theologians is for example Villalón's description of the 'horrible and monstrous [practice] in the region of Flanders', Villalón (1546), cap. 15, *fols.* 23*r*–25*v*. Cf. Pesce (1966), pp. 47–51.

[26] E.g. Covarrubias (1552), lib. 3, ch. 2, n. 5, *fol.* 174*v*; Santerna (1552), pt I, n. 5–12, *fols.* 4*r*–5*v*; Cornhuysius (1565), pp. 66–7; Wesenbeck (1566), *ad* Dig. 22.2, n. 3, p. 273; Stracca