A Comparative History of Insurance Law in Europe

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I. THE FUTURE OF LEGAL HISTORY

The editors of this journal have asked me, among others, to contribute a short piece on the future of legal history to the inaugural issue of the re-launch of this journal. They have specifically asked me to speculate on the directions I would like legal history to go in. I have happily accepted their invitation. However, when I sat down to write my contribution, I started to worry. Many legal historians teach legal history because it is meaningful for the understanding of today's law and for its future development. Thus, when being asked about the future, they will write on the past. Yet, the editors specifically asked for thoughts on the future of legal history, not its past. Nevertheless, every speculation on the future will include an—at least implicit—assessment of the past and the present as well. Furthermore, I started to worry that my contribution could be pretentious. I believe in diversity in research; I am not fond of being told what fields my research should focus on and what the one correct method supposedly is. I do have clear ideas concerning my own research, but I want to be surprised by other peoples' research. Nevertheless, it makes perfect sense to commission such contributions for an inaugural issue of a re-launched journal on legal history: ideally, the different contributions will show the breadth of legal history with respect to research questions and methodological approaches. If read together they will give insight into the directions legal history is currently heading towards. I understood my task accordingly: to introduce the readers to my current project on a comparative history of insurance law in Europe; to explain the project's why, how, and what for; to reflect on past research in the field; to point out methodological problems; and to put the project thereby into the context of historical research in law in general.

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II. A COMPARATIVE HISTORY OF INSURANCE LAW IN EUROPE

A. The history of insurance law in need of being (re-)told

Today's state of research in the field of the history of insurance law is, for a number of reasons, unsatisfactory.[1]

1. The national narratives give the impression as if insurance law—with the exception of maritime insurance—developed differently in the individual European states. Let me first turn to the exception: maritime insurance. There is consensus as to its genesis and development.[2] Its origins are to be found in the 14th century, and it was first restricted to the Mediterranean. Until the 16th century it spread from Italy to Portugal and, via the Netherlands and England, to Germany. In the Netherlands and in England the maritime insurance business was, at first, dominated by Italian merchants, and it was only starting in the middle of the 16th century that English insurers took over in England. Soon thereafter, insurers in London gave up using the Italian customs of the insurance trade and leaned towards the customs that had been developed in the Netherlands; the Dutch had also emancipated themselves from the Italian customs. The first maritime insurance contract in Hamburg dates back to 1588. In Hamburg, right from the outset, the Dutch customs served as a model and remained in use for quite a while. Maritime insurance has been a truly international institution. This is also reflected in the national legislation on maritime insurance, which is said to have simply mirrored the international practices. A comparative approach to understanding the historical development of maritime insurance is, thus, straightforward and has been adopted in the past.

The differences in the national narratives become obvious when going beyond maritime insurance. The German literature identifies three roots of modern insurance law.[3] The first root is maritime insurance, and it is said to be the origin of mercantile insurance. Life and fire insurance are said to have developed from two other roots. There is, firstly, the cooperative protection by guilds against the risks of fire, ill health, and death dating again back to the Middle Ages. Secondly, there were, from the 17th century onwards, public insurances run by the state. Usually they covered the risk of immoveable property against fire, they were compulsory, and they had a monopoly. By speaking of different roots of insurance law, the literature suggests that commercially run insurances, the cooperative protection, and state run insurances developed independently from each other, and that these lines of development merged relatively late: in the late 18th and early 19th century.

In contrast, the English literature draws a very different picture:[4] English scholars do not speak of three roots of insurance law. Life insurance is said to have developed

1 For more detail on the following, see P Hellwege, 'Die historische Rechtsvergleichung und das europäische Versicherungsrecht' (2014) 131 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Germanistische Abteilung) 226, 228-35.

2 On maritime insurance compare the ground breaking monograph by K Nehlsen-von Stryk, *Die venezianische Seeversicherung im 15. Jahrhundert* (Gremer 1986). In addition, see D Ibbetson, 'Insurance' in SN Katz (ed), *Oxford International Encyclopedia of Legal History* (OUP 2009) vol 3, 252; CM Scheuren-Brandes, 'Insurance' in ibid 257; G Rossi, 'The Booke of Orders of Assurances' (2012) 19 Maastricht Journal of European and Comparative Law 240.

3 A summary of the development is provided by P Koch, 'Versicherungswesen' *Handwörterbuch zur deutschen Rechtsgeschichte* (Erich Schmidt 1998) vol 5, 815.

4 For a summary of the development, see Ibbetson (n 2) 253.

from maritime insurance: early on merchants insured the lives of a ship's crew. The starting point for the development of fire insurance in England was the Great Fire of London in 1666. The law regulating fire insurance was based on maritime and later life insurance. Thus, according to the English literature, modern insurance law has one root: maritime insurance. In the literature on the Dutch, Italian, and French developments, we find similar narratives,[5] and the research focus is generally on maritime insurance. There is, however, one special institution developed in France: *tontines*. They were invented by the Italian *Lorenzo di Tonti* (1630-1695) in the 17th century in France[6] and were an early form of pension scheme. Their importance for the development of insurance law is stressed in the German literature.

Both narratives, that of the three distinct roots and that of the singular root, are oversimplifications. Cooperative forms of protection were also known outside of Germany. And it is quite unlikely that in Germany the different forms of protection developed isolated from each other.

2. The reason why the history of insurance law is told differently in the individual European countries, without an awareness of the others' narratives, is simple: apart from maritime insurance, the research often has a national or even regional focus. At times, it seems as if this narrow focus is the very agenda of modern research:

> Even though the idea of insurance is international, its implementation shows many regional peculiarities . . . . The insurance business found its special characteristic features in a local setting by the implementation of the idea of insurance and combining it with independent local ideas . . . .[7]

Other authors argue that any differences we see today are the result of this development:

> Globalisation is a great challenge to the insurance business. In reaction we should try to understand the German insurance industry from historical perspective. History teaches us that there are many national specialities. The German private insurance industry is paradigm for the European-continental insurance which shows many differences . . . to the Anglo-Saxon type of insurance.[8]

A national or even regional focus, as important as it may be, is simply not able to question the different narratives we see in the national writings on the history of insurance law. Quite to the contrary, these unchallenged broad theories or clichés on

5 See, eg JP van Niekerk, *The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800*, 2 vols (Juta 1998); E Bensa, *Il Contratto di Assicurazione nel Medio Evo* (Tipografia Marittima Editrice 1884); PJ Richard, *Histoire des Institutions d'assurance en France* (Edition de l'Argus 1956).

6 See eg C von Zedtwitz, *Die rechtsgeschichtliche Entwicklung der Versicherung* (vdf Hochschulverlag 1999) 138ff.

7 P Koch, *Geschichte der Versicherungswirtschaft in Deutschland* (Verlag Versicherungswirtschaft 2012) 6-7 (my translation).

8 H Frommknecht, 'Gibt es eine westfälisch-lippische Versicherungsgeschichte?' in P Koch, *Geschichte der westfälisch-lippischen Versicherungswirtschaft und ihrer Unternehmen* (Gesellschaft für Westfälische Wirtschaftsgeschichte 2005) 7 (my translation).

the development of the history of insurance law—such as the distinction of a European-continental and an Anglo-Saxon type of insurance—seem vaguely to support the observed differences in today's insurance laws.

3. We have seen that in the writings on the history of insurance law certain clichés have gone unchallenged. There are further clichés which should be called into question: even though the German literature has always believed there to be different roots of insurance, the older literature had conceded that maritime insurance law has been of outmost importance for the development of insurance law, and it had stressed that there are no distinct streams of development. Only in the 1930s were the aforementioned three roots of insurance, for ideological reasons, thought of as separate. A quotation from a work of 1936 captures this:

> Mutual insurances and state run fire insurance, which were inspired by the first, are a Germanic creation, something we ought to be proud of. However, the idea of commercial insurances came from foreign countries to us.[9]

The groundbreaking German monograph on insurance law written by Viktor Ehrenberg in 1893 does not mention this distinction; however, just like the English literature, it states that the contract of insurance as a whole has its origins in maritime law.[10] Levin Goldschmidt speaks of 'in many ways interwoven roots'.[11] Goldschmidt indeed speaks of different roots of modern insurance law, but he does not allege that these roots developed in isolation from one another. Nevertheless, the picture of the three distinct roots is inveterate in the German literature on the history of insurance law.

4. In the preceding paragraphs I have referred to the literature on the history of insurance law. However, that was a distortion. There is hardly any research on the doctrinal history of insurance law. Instead we find histories of single insurance businesses, of certain forms of protection, and works which draw broad pictures and develop broad theories (such as the one cited above about the European-continental and the Anglo-Saxon type of insurance) without basing these theories on detailed studies. Thus, what the literature provides us with are histories of the idea of insurance and of insurance business, but we do not find a genuine history of insurance law.

5. The national writings on the history of insurance (law) often use different concepts of insurance.[12] Those authors who focus on the history of mercantile insurance will not take into account forms of cooperative protection by guilds or public insurances and they will, consequently, write a different history than those authors who include such forms of protection. What is problematic is that many authors do not lay open which concept of insurance they follow. This, among other factors, may

9 G Helmer, *Entstehung und Entwicklung der öffentlich-rechtlichen Brandversicherungsanstalten in Deutschland* (Fischer 1936) 95 (my translation).

10 V Ehrenberg, *Versicherungsrecht* (Duncker & Humblot 1893) 35.

11 L Goldschmidt, *Handbuch des Handelsrechts*, vol 1 (3rd edn, Enke 1891) 40 (my translation).

12 Regarding this problem, see F Büchner, 'Geschichtliche Betrachtungen zum Begriff der Versicherung' in R Schmidt and K Sieg (eds), *Grundprobleme des Versicherungsrechts: Festgabe für Hans Möller* (Verlag Versicherungswirtschaft 1972) 111.

well explain why, for example, the focus of research differs: in Germany, there is a rich literature on the cooperative protection by guilds and on state run insurances, whereas in other countries the literature tends to focus on the history of mercantile insurance.

6. The fact that different authors use different concepts of insurance may also have something to do with the fact that insurance history is an interdisciplinary field of research: economic historians are leading the way. They have, however, a different concept of insurance in mind than legal historians, and the same is true for social historians and general historians. There is nothing wrong with interdisciplinary research—to the contrary. However, each discipline has to independently define the object of research according to its special ends. And interdisciplinary research calls for an increased awareness of the methodological problems attached to it.

B. Harmonising insurance law in Europe

Thus, the history of insurance law in Europe needs to be (re)told. But why is it important to (re)tell it today? This brings me back to the general point I made at the beginning of this contribution: many legal historians teach history because it is meaningful for the understanding of today's law and for its future development.

The harmonisation of European insurance contract law is on the agenda of scholarship, and it is on the political agenda, too.[13] The reason is simple. Insurance is generally referred to as a 'legal product'.[14] What does this mean and what is the difference to other types of contracts? In the case of a contract for the sale of goods, for example, the very object of the contract is goods. Of course, in a contract for an international sale of goods the difference between national laws might have an impact on the contract terms. Nevertheless, the very object of the contract remains the same. Admittedly, technical standards that need to be observed in certain markets may require the seller to adapt his goods to the requirements of that market and thereby to change the product which he is offering. However, within the European Union this is the exception.

The case of insurance is different. The insurer receives the premiums from the policy holder and promises, in turn, to pay the insured sum when a certain risk eventuates. The right of the insured to the insured sum is determined in the contract, mainly in the insurer's standard terms, and the details of when and under what circumstances this right exists will define the product which the insurer is offering. The national insurance contract laws in Europe are different, including the mandatory provisions. Insurers who want to enter another market, as a consequence, have to adapt their standard terms to the requirements of each national legal system, and they, thus, have to change the very product they are offering. Insurers cannot use their products throughout Europe, and there is, as of yet, no European Single Market in the insurance sector.

13 J Basedow, 'Der Versicherungsbinnenmarkt und ein optionales europäisches Vertragsgesetz' in M Wandt, P Reiff, D Looschelders, and W Bayer (eds), *Kontinuität und Wandel des Versicherungsrechts: Festschrift für Egon Lorenz* (Verlag Versicherungswirtschaft 2004) 93.

14 Meinrad Dreher, *Die Versicherung als Rechtsprodukt* (Mohr Siebeck 1991).

To remedy this problem, scholars of insurance law have started to work on harmonising insurance law in Europe. Insurance scholars have worked out the *Principles of European Insurance Contract Law*[15] as a first step towards European insurance contract law legislation or, more specifically, as a first draft of an optional instrument in the field of insurance contract law.[16] Thus far, only a comparative method has been adopted. However, just as comparative legal history in the field of general contract law was able to create a historical basis for harmonising general contract law in Europe, a comparative history of insurance law could potentially create a historical basis for a European scholarship in the field of insurance law and could, thereby, create a historical basis for the process of harmonising insurance law in Europe.

In the last paragraph I have referred to the role which comparative legal history has played, and still plays, in the context of harmonising European general contract law. However, around 25 years ago, when comparative legal history gained prominence in this context, there was a great debate about whether historical research should adopt a purely historical approach or whether it is methodologically permissible to put historical research into a context where it might contribute to the solving of contemporary problems. Many argued, and still argue today, that historical research can help to lay open the common historical roots of the European private law systems.[17] These common roots are to be found in the *ius commune* as it developed since the Middle Ages after the Roman legal sources had been re-discovered. Historical research should uncover these roots where they exist and reveal when and why the different legal systems developed apart. The findings of such research can help in rebuilding a common European legal science—the promoters of this approach spoke and speak of rebuilding because they say that a common European legal science already existed during the time of the *ius commune*. Others disagreed.[18] Their main arguments were that the *ius commune* was not a single phenomenon, but that it differed regionally, and that it developed over time. Furthermore, they feared that historical research would fall short if it is embedded in a research programme inspired by, and focused on the solving of present day problems: scholars will look for common roots and disregard differences. It was thought that research would be reduced to the literature of the *ius commune* in order to produce quick results, thereby disregarding the law in practice, its complexity, and the socio-economic conditions in which the so-called *ius commune* functioned. The heated debates have faded away. Indeed, there is no antagonism between the two positions. Research in legal history needs to be methodologically correct. If this is the case, then to point out why the findings are of importance for present day discussions would represent merely an additional step.

15 J Basedow, J Birds, M Clarke, H Cousy, H Heiss, and LD Loacker (eds), *Principles of European Insurance Contract Law* (Sellier European Law Publishers 2009).

16 H Heiss, 'Optionales europäisches Versicherungsvertragsrecht' (2012) 76 Rabels Zeitschrift für ausländisches und internationales Privatrecht 316, 322, 335-38.

17 See eg R Zimmermann, 'Das römisch-kanonische ius commune als Grundlage europäischer Rechtseinheit' [1992] Juristen-Zeitung 8.

18 See eg P Caroni, 'Der Schiffbruch der Geschichtlichkeit' (1994) 16 Zeitschrift für Neuere Rechtsgeschichte 85.

C. A research agenda

It has been argued that comparative legal history may disclose the common roots of today's European general contract laws in the *ius commune*, that it may uncover when and why the European contract laws developed apart, and that it can thereby assist in the rebuilding of a common European legal science. At the time this research agenda was formulated, the awareness of the existence of the *ius commune* was still very much alive. In the case of insurance law, the starting point is different: apart from the understanding that maritime insurance is a truly European phenomenon, today's research in the history of insurance law is focused on national developments, and it suggests that insurance developed differently within the individual European countries. This is thought to be the reason that there is no awareness of a strong common heritage. Furthermore, modern insurances are said to be an invention of the Middle Ages, so that the Roman-canon *ius commune* is, prima facie, of little relevance. However, even in the modern literature we are able to find hints of interaction between the different national developments.[19]

1. The importance of guilds for the development of insurances is stressed in the German literature. However, guilds existed all over Europe, and in other countries they also had the function of protecting their members in case of fire or illness.[20] And for the north of France some, indeed, suggest that the protection by guilds was a forerunner to fire and life insurances.[21] Yet, their impact on the development of insurance law across Europe has never been explored from a comparative perspective.

2. *Tontines* existed in European countries other than France and Italy as well.[22] In Germany they were discussed by the cameralists, and they are said to have had a great influence on the development of widows' and orphans' funds. Again, widows' and orphans' funds existed in European countries other than Germany. Even though the first successful English life insurance company was only founded in 1762, there were forerunners. One influential figure at the turn of the 17th to the 18th century is said to have been one John Hartley, who is said to have worked on *tontines*.[23] Again, the impact of *tontines* on the development of insurance law has never been explored from a comparative perspective.

3. It is accepted that maritime insurance is a European phenomenon, and in some jurisdictions it is alleged that maritime insurance has been the starting point for the development of life and fire insurance. Again, the impact of maritime insurance law on the early development of life and fire insurance has never been assessed from a comparative perspective.

19 For more on the following, see Hellwege (n 1) 235-42.

20 See eg F Schulz-Nieswandt, *Gilden als 'totales soziales Phänomen' im europäischen Mittelalter* (eurotrans-Verlag 2000) 27f.

21 G Hubrecht, 'Zur Geschichte der Versicherung in Frankreich' [1958] Versicherungswissenschaftliches Archiv 349.

22 Regarding the influence of *tontines*, see eg T O'Donnell, *History of Life Insurance in its Formative Years* (American Conservation Company 1936) 163ff.

23 H Braun, *Geschichte der Lebensversicherung und der Lebensversicherungstechnik* (2nd edn, Duncker & Humblot 1963) 113.

4. English, French, and Belgium life and fire insurance companies were doing business in Germany in the 19th century.[24] They used their standard terms when conducting business in Germany, and it is said that the newly founded German insurance companies of the early 19th century were imitating the standard contract terms of their English competitors.[25] Furthermore, the English literature claims that the French life insurance companies were, in the early 19th century, very much under the influence of the practices of English life insurance companies.[26] Again, the impact of standard contract terms of internationally active insurers on the legal developments outside their home countries has never been assessed from a comparative perspective.

5. In Germany, further points of interaction may be seen in the protagonists of the development of life and fire insurances in the early 19th century, when the first commercially run life and fire insurance companies were founded in Germany. Many of the persons involved in the process of founding such insurance companies had previously worked for English insurers.[27] Again, one may assume that the German insurers were influenced by the practices of their English competitors.

6. It would be possible to add many more points of interaction between the national developments of insurance law. I would like to name just one other point: apart from public insurances as they existed, for example, in Germany, insurance transactions are based on contracts. Insurance contract law did not develop independently from general contract law. The general contract laws in Europe were part of the *ius commune*. This may have had the effect that courts from different countries applied similar legal doctrines from general contract law to solve identical problems in insurance contract law.

In the national legal writings on insurance history, the aforesaid points of interaction often appear to be footnotes to a national development. They have existed all along, and it thus seems problematic to claim that insurance business and insurance practices became internationalised only in the late 19th century.[28] They have, however, as yet not been taken as the starting point for the undertaking of an in-depth research into the history of insurance law. That is what my project aims at: focusing on and working out interactions between the national developments and working out their impact on the development of insurance law.

Three methodological points are worth mentioning. First, the project's focus is on legal aspects. Nevertheless, the project will need to put itself into the context of the historical development of insurance institutions. This means that the project will need to critically assess the many clichés we find in the literature on the history of insurance. Secondly, the concept of insurance is crucial for the purpose of defining the very object of the project. However, as the focus is on legal aspects, the project should not simply follow the concept of other disciplines. In essence, all institutions of mutual protection and mutual assistance need to be included if they had an impact on the development of insurance law. Thirdly, for a project on the history of

24 Koch (n 7) 61.

25 Koch (n 7) 49.

26 O'Donnell (n 22) 391ff.

27 See eg S Heiss, *Die Institutionalisierung der deutschen Lebensversicherung* (Duncker & Humblot 2006).

28 This, for example, is claimed by TJ Röder, *Rechtsbildung im wirtschaftlichen 'Weltverkehr'* (Klostermann 2006).

insurance law, an interdisciplinary approach is essential even if the project's focus is on legal aspects and even if this implies that the project will follow its own cognitive interests. The reasons are, again, obvious: institutions of protection, support, and insurance can only be understood in the socio-economic context of a society. In addition, many questions of detail can only be appreciated if one goes beyond the law: if one looks, for example, at the development of the duty of disclosure in life insurance business, it will become obvious that during the course of the 18th century detailed declarations on the state of health developed. Such a finding would need to be linked to developments in medicine. When researching in the field of fire insurance, one has to take notice of the developments in the fields of fire prevention, fire protection, and fire fighting. In maritime insurance the development of communication is relevant. In all fields of insurance law, the development of actuarial mathematics was essential.

How, then, may such a comparative historical approach help to create a basis for a European scholarship in the field of insurance law. Of course, nobody will argue that today's insurance law should return to whatever we find in legal history. And it is probably also impossible to directly apply the findings of such research to solving today's legal problems. However, such research may be helpful in other ways: for an optional instrument to be successful, the acceptance of the legal and business communities is necessary. Furthermore, in order to safeguard its harmonising effect, lawyers have to interpret it free from any nationally coined preconceptions. Comparative historical research in the field of insurance law can be helpful in both respects. To give just one example:[29] the differences between a condition precedent in English law and an *Obliegenheit* in German law are looked upon by many as a hurdle to harmonising European insurance contract law. Both the observations that German courts also characterised such clauses as a condition precedent until 1865 and that today's approach was developed by the courts between 1865 and 1870 can help to bridge this gap. The reasons why German courts developed in a different direction may be used as an argument in today's discussion. However, it is important to note that comparative historical research can do nothing more than show where we come from. The observation that English and German law had a common starting point is not an argument for a return to this common position. Or to put it differently: comparative historical research will help us to understand the differences between the national insurance laws, and this, in turn, may be helpful in the process of harmonisation.

III. The future of legal history

I would like to return to the beginning of my contribution. I wanted to introduce the readers to my current project on a comparative history of insurance law in Europe and to put the project into the context of historical research in law in general. Some broader, perhaps banal, remarks on the future of legal history are, in conclusion, possible: 1. One cannot say that insurance law is in any way an exotic area of law; nevertheless, its history is simply under-researched. At first sight that might be surprising.

29 P Hellwege, 'Obliegenheiten im Versicherungsvertragsrecht aus historisch-vergleichender Perspektive' (2012) 76 Rabels Zeitschrift für ausländisches und internationales Privatrecht 864.

However, the same is true for many other fields of law: the history of labour law, the history of commercial law, the history of procedural law—to name just a few. Each area of law has in the past been neglected by legal historical research. 2. We see that historical research done in the past often suffers from simplifications, from adopting unfounded broad theories, and from uncritically absorbing clichés. 3. A national or regional focus of research may be sensible. My project, as well, has a focus on Europe, and this journal used to have a focus on American legal history. However, one should not forget that every regional or national development took place in a broader setting. 4. Interdisciplinary research is important. However, one needs to be aware that each discipline has to independently define its research agenda according to its cognitive interest. 5. There is nothing wrong with undertaking legal historical research because it is meaningful for the understanding of today's law and for its future development. Yet, this is not necessary for every research project in legal history. Nevertheless, in a time in which we see an ongoing internationalisation of law, a historical approach is greatly needed to fully understand the differences between the national laws today. In summary, there is no need to worry about the future of legal history.