# Chapter 1: Introduction

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## A. A comparative history of insurance law in Europe: two possible points of departure

By the time of its publication, the editor of a volume bringing together the contributions of different authors will have answered the same question again and again: why? The editor will have asked himself why he pursues the project. The funding body will have asked why it is worthwhile investing money into it. The contributors will have asked why they should put time into writing their papers. The publisher will have asked why anybody will buy the book. And colleagues will have asked why the project is so important to the editor.

In his introduction the editor again needs to address a why-question: why is it worthwhile to read the volume? This time it is harder to develop the answer. As the editor has answered the why-question a great many times, he will be aware that he has presented his answer in variations even though its essence has always remained the same. The funding body, contributors, the publisher, and colleagues have different interests, and the editor will have tried each time to present the answer in such a way that it will catch the interest of the questioner. In his introduction the editor faces the problem that he has different types of readers in mind,

and he will be worried that each type of reader will need the one answer to be presented differently.

This problem is always present in the kind of research into comparative legal history in which I am interested, and it is particularly so in the present project on a comparative history of insurance law in Europe. In a nutshell, there are two distinct starting points for developing an answer to the question of why it is worthwhile to read this volume: one could simply explain why the history of insurance law is in need of being re-told. This answer would be directed at legal historians. Or one could point to the project's importance for today's law. This answer would be directed at scholars of contemporary insurance law.

When around 25 years ago comparative legal history gained prominence in the context of European private law, there was a debate on whether it is permissible to put historical research into a context such that it may help in solving contemporary problems. Many argued – and still argue today – that historical research can help to expose the common historical roots of the European private law systems.[2] These common roots are to be found in the Roman-canon *ius commune* as it developed since the Middle Ages after the re-discovery of Justinian's Digest. Historical research is able to uncover these roots where they exist and to reveal when and why the different legal systems developed in different directions. The findings can then help with the re-building of a common European legal science – the promoters of this approach spoke and speak of re-building because they say that a common European legal science in fact already existed during the time of the *ius commune*. Others forcefully disagreed.[3] Their main argument was 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 will fall short if it is embedded in a research programme that is inspired by solving present-day problems: scholars will look for common roots and disregard differences; they will reduce their research to the literature of the *ius commune* in order to produce quick results; and they will thereby disregard the law in practice, its complexity, and the socio-economic conditions in which the so-called *ius commune* functioned. Thus, if I had written this introduction 25 years ago, I would have had to decide: do I want to lose immediately the interest

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[2] From the rich literature see, e.g., *Reinhard Zimmermann*, Das römisch-kanonische ius commune als Grundlage europäischer Rechtseinheit, (1992) Juristenzeitung 8–20; *idem*, Roman law, contemporary law, European law. The Civilian Tradition Today (2001); *idem*, Roman Law and the Harmonization of Private Law in Europe, in: Arthur S. Hartkamp et al. (eds.), Towards a European Civil Code (4th edn., 2011), 27–53; *idem*, Roman law, in: Jürgen Basedow et al. (eds.), Max Planck Encyclopedia of European Private Law, vol. 2 (2012), 1487–1491; *idem*, Roman law in the modern world, in: David Johnston (ed.), The Cambridge Companion to Roman Law (2015), 452–480, 470.

[3] From the rich literature see, e.g., *Pio Caroni*, Der Schiffbruch der Geschichtlichkeit, (1994) 16 Zeitschrift für Neuere Rechtsgeschichte 85–100.

of scholars of today's insurance law by omitting the importance of the present project for today's law? Or do I want to provoke objections by some legal historians?

The heated debates have faded away and the approach of comparative legal history in contemporary context has gained acceptance. Indeed, there is no antagonism between the two positions. Research on comparative legal history needs to be methodologically correct. If it is, it is only an extra step to point out whether and why the findings are of importance for present-day debates.

## B. The first point of departure: the history of insurance law in Europe in need of being re-told

In a first article on a comparative history of insurance law in Europe I have, mainly from a German perspective, reached a number of conclusions, and these are the initial starting point for the present project.[4] In summary, I have argued that today's state of research on the history of insurance law is, for a number of reasons, unsatisfactory.

1. There is hardly any detailed historical analysis of insurance *law* and there are hardly any works on the *doctrinal* or *dogmatic* history of insurance law.[5] Instead we find, for example, histories of the idea of insurance,[6] a rich historical literature on individual insurance companies,[7] and studies which develop broad theories on the development of insurance as an institution and of insurance law without basing these theories on detailed research – as, for example, the theory that there is a clear, historically-based division between a European-continental and an Anglo-Saxon type of insurance.[8]

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[4] *Phillip Hellwege*, Die historische Rechtsvergleichung und das europäische Versicherungsrecht, (2014) 131 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Germanistische Abteilung) 226–265, 228–235.

[5] Two rare exceptions are *Johan P. van Niekerk*, The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800, 2 vol. (1998) and *Guido Rossi*, Insurance in Elizabethan England. The London Code (2016).

[6] This is the main focus of, e.g., *Albert Schug*, Der Versicherungsgedanke und seine historischen Grundlagen (2011).

[7] See, e.g., *Clive Trebilcock*, Phoenix Assurance and the Development of British Insurance, 2 vol. (1985 and 1998).

[8] See *Heinrich Frommknecht*, Gibt es eine westfälisch-lippische Versicherungsgeschichte?, in: Peter Koch, Geschichte der westfälisch-lippischen Versicherungswirtschaft und ihrer Unternehmen (2005), 7–11, 7. And see below the quotation to n. 21.

2. Authors writing on insurance history often employ different concepts of insurance. Some authors focus on the history of mercantile insurance.[9] Consequently, they will not take into account forms of cooperative protection by guilds and early forms of state-run insurance as both were not operated on a commercial basis. Thus, these authors will write a different history than those scholars which do include such forms of protection.[10] What is problematic is that many authors do not make explicit which concept they follow in their historical research.

3. The fact that different authors use different concepts of insurance may have something to do with the history of insurance being an interdisciplinary field of research: scholars of economic history will, for example, have a different concept of insurance in mind than legal historians.[11] The former will focus on commercial insurance whereas the latter might include other forms of protection. Of course, there is nothing wrong with interdisciplinary research – quite the opposite is true. Yet, each discipline needs to define independently the object of research according to that discipline's particular interests. And interdisciplinary research calls for an increased awareness of the methodological problems attached to it.

4. There are distinct national narratives of insurance (legal) history – the reason why I have put the word 'legal' into parentheses is that these national narratives often concern the history of insurance as an institution written by (economic) historians, but it is regularly assumed, and sometimes made explicit, that the development of insurance law followed the development of insurance as an institution. And these national narratives give the impression of insurance (law) being developed – with the exception of maritime insurance – differently in the single European countries.

Let me first turn to the exception. There is consensus as to the genesis and development of maritime insurance.[12] Its origins are to be found in the 14th century. It was first restricted to the Mediterranean. Moving forward into the 16th century, it spread from Italy to Portugal, Flanders, the Netherlands, England and Germany. In Flanders, the Netherlands, and in England the maritime insurance

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[9] This is the focus of, e.g., the contributions in Peter Borscheid and Niels Viggo Haueter (eds.), World Insurance. The Evolution of a Global Risk Network (2012).

[10] See, e.g., *Clemens von Zedtwitz*, Die rechtsgeschichtliche Entwicklung der Versicherung (1999).

[11] Indeed the volume cited in n. 9 has been edited by an economic historian and the book cited in n. 10 has been authored by a legal historian.

[12] On maritime insurance compare *Karin Nehlsen-von Stryk*, Die venezianische Seeversicherung im 15. Jahrhundert (1986). In addition see *David Ibbetson*, Insurance: English Common Law, in: Stanley N. Katz (ed.), Oxford International Encyclopedia of Legal History, vol. 3 (2009), 252–254; *Christoph M. Scheuren-Brandes*, Insurance: Medieval and Post-Medieval Roman Law, in: ibid., 257–259; *Guido Rossi*, The Booke of Orders of Assurances: A Civil Law Code in 16th Century London, (2012) 19 Maastricht Journal European and Comparative Law 240–261.

business was, at first, dominated by Italian merchants. In England, it was only in the middle of the 16th century that English insurers took over. Soon after, insurers in London gave up using the customs of the Italian insurance trade and leaned towards the customs which had been developed in Flanders and the Netherlands; these customs, too, had emancipated themselves from the Italian practices. The first maritime insurance contract in Hamburg dates back to 1588. In Hamburg, right from the outset the Flemish and Dutch customs were used as a model. 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, for example, suggests that there are three distinct roots of modern insurance (law).[13] The first root is maritime insurance. It is said to be the origin of mercantile insurance. Life and fire insurance are said to have developed from the other two roots. There is, firstly, the cooperative protection provided by guilds against the risks of, for example, fire, ill health, and death dating again back to the Middle Ages. Secondly, there were, starting in the 17th century, state-run insurances. Most importantly they covered immoveable property against the risk of fire, and often these state-run insurances were compulsory and constituted a monopoly. By speaking of different roots, the literature suggests that commercially run insurances, cooperative protection, and state-run insurances developed independently from each other and that the threads of development merged together only relatively late, in the late 18th and early 19th centuries.

By contrast, English scholars claim that life and fire insurance (law) developed from maritime insurance (law).[14] Early on merchants insured the lives of a ship's crew. This was the starting point for the development of the idea of life insurance. The first successful life insurance company was set up in 1762. The starting point for the development of fire insurance in England was the Great Fire of London in 1666. The law regulating life and fire insurance was based on maritime insurance. English scholars thus suggest that there is one root to insurance (law): maritime insurance (law). The literature on the developments in France, Italy, and the Netherlands follow similar patterns.[15]

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[13] See, e.g., *Peter Koch*, Versicherungswesen, in: Adalbert Erler et al. (eds.), Handwörterbuch zur deutschen Rechtsgeschichte, vol. 5 (1998), 815–826, 815.

[14] See, e.g., *Ibbetson* (n. 12), 253.

[15] See, e.g., *Van Niekerk* (n. 5); *Enrico Bensa*, Il Contratto di Assicurazione nel Medio Evo (1884); *Pierre Joseph Richard*, Histoire des institutions d'assurance en France (1956).

Both narratives – that of the three roots and that of the single root – are oversimplifications. Cooperative forms of protection were also known outside Germany. However, they are rarely taken into account in the literature on the history of insurance outside Germany. And it is simply unlikely that, in Germany, the different forms of protection developed isolated from each other.

Linking this point to the last two observations, it might be the case that the lead of economic historians in, for example, the English literature on insurance history featuring a strong focus on mercantile insurance, may have resulted in an understanding which falls short. However, this does not mean that the German literature is correct: in Germany, maritime insurance had always been carried out on a commercial basis. In contrast, it is only in the late 18th and early 19th centuries that we find commercially run fire and life insurance companies in Germany. Insofar, there might be some truth to the distinction of the said three roots – if this distinction is used only to describe the development of how insurances were operated. *Yet, this distinction does not necessarily imply that the legal rules governing the different branches of insurance developed in complete separation, too.* The problems which an insurance scheme faces are often more or less identical regardless of whether it is operated on a commercial or cooperative basis. In both commercial and cooperative life insurance schemes insurers will, for example, want to know the age of the insured; legal rules have to be included in such a scheme to oblige the insured to disclose his or her age; and legal rules have to be recognized in case the insured misrepresents his or her age.

5. The modern German literature still seems to follow an ideologically manipulated view of insurance history. The German literature has always believed there to be different roots of insurance, but in the 19th century it was conceded that maritime insurance had been of utmost importance for the development of insurance in general, and it was stressed that there were no distinct streams of development. It was only in the 1930s that the three roots of insurance were thought apart for ideological reasons. A quotation from a 1936 work captures this:[16]

> Während also die Gegenseitigkeitsversicherung und die auf ihrer Grundlage aufgebaute öffentlich-rechtliche Brandversicherung eigenes, urdeutsches Gewächs ist, eine Schöpfung, auf die wir mit Recht stolz sein können, ist der Gedanke der Erwerbsversicherung vom Auslande her zu uns gekommen.
>
> Mutual insurance and state-run fire insurance, which has been inspired by the former, are Germanic creations, something we ought to be proud of. By contrast, the idea of insurance operated on a commercial basis came from foreign countries upon us.

In his 1893 monograph on insurance law, Viktor Ehrenberg (1851–1929) did not mention this distinction, but, just like the English literature, states that the

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[16] *Georg Helmer*, Entstehung und Entwicklung der öffentlich-rechtlichen Brandversicherungsanstalten in Deutschland (1936), 95.

contract of insurance as a whole has its origins in maritime law.[17] And Levin Goldschmidt (1829–1897) speaks of 'sich mannigfach verschlingende[n] Wurzeln' ('in many ways interwoven roots').[18] Goldschmidt indeed speaks of different roots, but he does not allege that there were completely distinct developments.

6. Apart from maritime insurance, there is a focus on national or even regional developments and on the history of individual insurers. It seems as if this narrow focus often is the very agenda of modern research:[19] 'Die Versicherungsgeschichte ist somit im Wesentlichen die Summe der Entwicklung zahlreicher einzelner Gesellschaften …' ('The history of insurance is basically the sum of the development of the individual insurance companies …'). The same author writes:[20]

> Obwohl der Versicherungsgedanke als solcher weitgehend international ist, unterliegt seine Ausgestaltung im Einzelnen zahlreichen regionalen Besonderheiten … Ihr Gepräge fand die Versicherungswirtschaft dabei in dem lokalen Rahmen durch die Verbindung von außen übernommener Anregungen mit eigenständigen Ideen …
>
> 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 implementing the idea of insurance and combining it with independent local ideas …

And again other authors argue that any differences we see today have been a result of this development and thereby adopt the aforementioned broad theories, or clichés, on the development of insurance:[21]

> Auch in der Versicherungswirtschaft ist die Globalisierung eine der großen Herausforderungen der Gegenwart. Dies sollte Anlass sein, die deutsche Versicherungswirtschaft in historischer Perspektive zu betrachten, denn schon ein flüchtiger Blick in die Geschichte lehrt, dass es zahlreiche nationale Prägungen gibt. So gilt die deutsche private Versicherungswirtschaft als Prototyp der ‚europäische-kontinentalen Assekuranz', die sich in vielen Punkten … z.B. vom Modell der ‚angelsächsischen Assekuranz' unterscheidet.
>
> Globalization is a great challenge to today's insurance sector. In reaction we should try to understand the German insurance industry from a historical perspective. History teaches us that there are many national peculiarities. The German private insurance industry is looked upon as paradigm for 'European-continental insurance' which shows many differences … to, for example, 'Anglo-Saxon insurance'.

In summary, the history of insurance law in Europe is in need of being re-told.

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[17] *Viktor Ehrenberg*, Versicherungsrecht (1893), 35.

[18] *Levin Goldschmidt*, Handbuch des Handelsrechts, vol. 1 (3rd edn., 1891), 40.

[19] *Peter Koch*, Geschichte der Versicherungswirtschaft in Deutschland (2012), 7.

[20] *Koch* (n. 19), 6 f.

[21] *Frommknecht* (n. 8), 7.

## C. The second point of departure: harmonizing insurance contract law in Europe

The harmonization of European insurance contract law is on the agenda of scholarship and on the political agenda.[22] The reason is simple: insurance is a 'legal product'.[23] In the case of a contract for the sale of goods, the object of the contract is goods. Of course, in a contract for an international sale of goods the differences between national sale laws might have an impact on the contract terms with the result that the transaction costs are higher compared to a purely domestic sale. Nevertheless, the object of the contract remains the same. Admittedly, technical standards which need to be observed in certain markets may require the seller to adapt the 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. Consequently, the harmonization of national sale laws is in the case of sales not a prerequisite for a European Single Market, even though such harmonization is beneficial to it.

The case of insurance contracts is different. The insurer receives a premium from the policy holder and promises in return to pay the insured sum when a specific risk eventuates.[24] 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 differ, including the mandatory provisions. Consequently, insurers who want to enter another market have to adapt their standard terms to the requirements of each national legal system, and they thus have to change the product which they are offering:[25] insurers cannot use their products throughout Europe and there is, as yet, no European Single Market in the insurance sector.

In order to remedy this problem, insurance law scholars have started to work on harmonizing insurance law in Europe. Insurance scholars have worked out the

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[22] *Jürgen Basedow*, Der Versicherungsbinnenmarkt und ein optionales europäisches Vertragsgesetz, in: Manfred Wandt et al. (eds.), Kontinuität und Wandel des Versicherungsrechts. Festschrift für Egon Lorenz (2004), 93–110.

[23] See the title of the monograph by *Meinrad Dreher*, Die Versicherung als Rechtsprodukt (1991) which translates as 'Insurance as Legal Product'.

[24] See with slight variations, e.g., Art. 1:201(1) Principles of European Insurance Contract Law (PEICL); *Angus Rodger*, An Introduction to Insurance and Insurance Law, in: Robert Merkin (ed.), Insurance Law – An Introduction (2007), 1–35, 1; *Alexander Bruns*, Privatversicherungsrecht (2015), para. 1.2.

[25] See the analysis of *Fritz Reichert-Facilides*, Europäisches Versicherungsvertragsrecht?, in: Jürgen Basedow et al. (eds.), Festschrift für Ulrich Drobnig (1998), 119–134.

'Principles of European Insurance Contract Law'[26] as a first step towards European insurance contract law legislation or, more specifically, as a first draft of an optional instrument on insurance contract law.[27] Thus far, it is only a comparative method that has been adopted. However, just as comparative legal history was able to create a historical basis for harmonizing general private law, it has the potential to create a historical basis for a European scholarship in the field of insurance law and can, thereby, create a historical basis for the process of harmonizing insurance law in Europe.

## D. A comparative history of insurance law in Europe: a research agenda

Let me return to the beginning of my introduction: it is argued that comparative legal history is able to disclose the common historical roots of the European private law systems in the Roman-canon *ius commune*, that it may uncover when and why the European legal systems developed apart, and that it thereby can help to re-build a European legal science. When this research agenda was formulated, the awareness of the existence of the *ius commune* which formed the common basis of the European private law systems was still vibrant.[28]

In the case of insurance law the starting point is different: even though forms of protection against risks were already known in the ancient world, it is generally acknowledged that modern insurance is a creation of the Middle Ages.[29] Consequently, the Roman-canon *ius commune* was, prima facie, of no direct relevance for the development of insurance law – at a minimum the impact of the Roman-canon *ius commune* on the development of insurance law is an open research question. Furthermore, apart from the understanding that maritime insurance is a truly European phenomenon, the history of insurance law is told differently across Europe. Thus, there seem to be no signs of common historical roots. In addition, there is not even an independent historiography of insurance *law*, and the existing writings are often based on clichés. One could conclude that it is necessary to work out the history of insurance law in every single jurisdiction

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[26] Jürgen Basedow et al. (eds.), Principles of European Insurance Contract Law (2009). On these see, e.g., *Helmut Heiss*, Principles of European Insurance Contract Law (PEICL), in: Jürgen Basedow et al. (eds.), The Max Planck Encyclopedia of European Private Law, vol. 2 (2012), 1331–1334.

[27] *Helmut Heiss*, Optionales Europäisches Versicherungsvertragsrecht, (2012) 76 Rabels Zeitschrift für ausländisches und internationales Privatrecht 316–338, 322, 335–338.

[28] See, e.g., *Paul Koschaker*, Europa und das römische Recht (4th edn., 1966); *Helmut Coing*, Europäisches Privatrecht, 2 vol. (1985 and 1989).

[29] In addition to the references in n. 12 and 13 see, e.g., *Bruns* (n. 24), para. 3.17.

from the beginning to today before one could even think about adopting a comparative approach to the history of insurance law. However, a different approach seems to be possible, too: an approach that aims to identify points of interaction between the different national developments and focus on them.[30]

1. It is, for example, accepted that maritime insurance is a European phenomenon, and in some national writings on the history of insurance law it is suggested that maritime insurance law has been the starting point for the development of life and fire insurance law.[31] The impact which maritime insurance law had on the early development of life and fire insurance law has never been assessed from a comparative perspective.

2. The importance of guilds for the development of insurance is stressed in German literature, yet guilds existed all over Europe, and in other countries they also had the function of protecting their members in case of fire or illness.[32] For the north of France some authors, indeed, suggest that the protection provided by guilds was a forerunner to fire and life insurances.[33] However, it seems that primarily in Germany their importance is stressed for the development of life and fire insurance. Again, the impact which guilds had on the early development of insurance law has never been assessed from a comparative perspective.

3. Tontines were 'invented' by the Italian Lorenzo Tonti (1602–1684) in 17th-century France.[34] For subscribers, tontines were an early form of a pension scheme. Their importance for the development of insurance law is stressed in German literature. However, tontines existed also outside Germany and France.[35] Again their impact on the development of insurance law has never been explored from comparative perspective.

4. Starting in the late 18th century, English, French, and Belgian life and fire insurance companies were doing business in Germany.[36] They used their standard terms when conducting their business in Germany, and it is said that the

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[30] See in detail *Hellwege* (n. 4), 235–242.

[31] See, e.g., the reference in n. 14.

[32] See, e.g., *Frank Schulz-Nieswandt*, Gilden als 'totales soziales Phänomen' im europäischen Mittelalter (2000), 27 f.

[33] *Georges Hubrecht*, Zur Geschichte der Versicherung in Frankreich, (1958) Versicherungswissenschaftliches Archiv 349–365, 359.

[34] See, e.g., *von Zedtwitz* (n. 10), 138 ff.

[35] See, e.g., *Terence O'Donnell*, History of Life Insurance in its Formative Years (1936), 163 ff.

[36] See, e.g., *Koch* (n. 19), 61.

newly founded German insurance companies of the early 19th century were imitating the standard contract terms of especially their English competitors.[37] Furthermore, the English literature claims that French life insurers were, in the early 19th century, very much under the influence of the practices of English life insurance companies.[38] Again, just how the standard contract terms of internationally active insurers impacted legal developments outside their home countries has never been assessed from a comparative perspective.

5. The assumption that English insurers brought their standard contract terms to the continent, which then influenced the standard contract terms of their continental competitors, is of further importance: in Germany it is assumed that the first drafts on insurance legislation in the early 19th century reflected the insurers' practices and standard terms.[39] However, if the insurers' practices and standard terms were themselves influenced by the practices and standard terms of those English insurers that were active on the German market, the latter would have had an indirect impact on early drafts on insurance legislation.

6. Insurance transactions are – with exceptions in the context of state-run insurance schemes as they existed, for example, in Germany since the 17th century – based on contracts. Insurance contract law did not develop independently from general contract law.[40] 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. Again, this has never been explored from a comparative perspective.

In national legal scholarship on insurance history these possible points of interaction often appear to be footnotes to a national development, and it would be possible to add many more such possible points of interaction. These interactions seem to have existed all along and it, thus, seems problematic to claim that the insurance business and insurance practices became internationalized only in the late 19th century.[41] These interactions have, however, not yet been taken as the starting point for undertaking an in-depth research into the history of insurance law. That is what the present project aims at: focusing on and working out interactions between the national developments and working out their lasting impact on the development of insurance law. The focus on such points of interaction

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[37] See, e.g., *Koch* (n. 19), 49.

[38] See, e.g., *O'Donnell* (n. 35), 391 ff.

[39] See, e.g., *Ralph Neugebauer*, Versicherungsrecht vor dem Versicherungsvertragsgesetz (1990), 56.

[40] See, e.g., *Guido Rossi*, Civilians and insurance: approximations of reality to the law, (2015) 83 Tijdschrift voor Rechtsgeschiedenis 323–364.

[41] This is, e.g., claimed by *Tilmann J. Röder*, Rechtsbildung im wirtschaftlichen 'Weltverkehr' (2006).

can, in the long run, stimulate further detailed research on the *national* development of insurance law.

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 want to propose that today's insurance law should return to whatever we find in legal history. However, such research may be helpful in other ways:[42] an optional instrument needs for its success the acceptance of the legal and business communities. Furthermore, in order to safeguard its harmonizing effect, lawyers have to interpret it free of any nationally coined preconceptions (*Vorverständnis*). Comparative historical research in the field of insurance law can be helpful in both respects. To give just one example:[43] the differences between a condition precedent in English law and an *Obliegenheit* in German law are looked upon by many as a hurdle to harmonizing European insurance contract law.[44] The observation that German courts, too, characterized such clauses as a condition precedent until 1865 and that it was only in the years between 1865 and 1870 that today's approach was developed by the courts can help to bridge this gap. The reasons why German courts developed in a different direction may be used as arguments 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 to 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 which we are able to observe today, and this in turn may be helpful in the process of harmonization.

## E. The objective and structure of the present volume

It is planned to carry out this research agenda over the coming years. In order to succeed with a research agenda that aims to focus on possible points of interaction between the national developments of insurance law it is, in a first step, necessary to identify such points. From a German perspective I have already done so elsewhere.[45] However, it is important to have a broader understanding

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[42] *Hellwege* (n. 4), 263–264.

[43] See *Phillip Hellwege*, Obliegenheiten im Versicherungsvertragsrecht aus historisch-vergleichender Perspektive, Rabels Zeitschrift für ausländisches und internationales Privatrecht 76 (2012), 864–892; *idem* (n. 4), 242–262.

[44] Arguing the contrary *Giesela Rühl*, Die englischen warranties – Stolpersteine auf dem Weg zum Europäischen Binnenmarkt für Versicherungen?, (2006) 14 Zeitschrift für Europäisches Privatrecht 607–629.

[45] *Hellwege* (n. 4), 235–242.

of the different national narratives in order to identify possible points of interaction. It is the objective of the present volume to do just this, and the present volume will thereby be the starting point and framework for future volumes. These will be published in the series which the present volume inaugurates. It is also hoped that the present volume will stimulate further research by others. As the present volume represents the starting point and framework of a broader research project, it is essential to reflect on some methodological questions.

## I. The concept of 'possible points of interaction'

In this introduction I have repeatedly used the phrase 'possible points of interaction'. This phrase needs explanation. It would be misleading to speak of 'common roots'. We simply do not know the extent to which 'common roots' of insurance law exist in Europe. The term 'common roots' should, therefore, be avoided in order to signal that the project does not aim to discover commonalities where there might not be any. Nevertheless, there are clear signs that there are points of contact between the national developments of insurance law. In order to signal the project's open ended approach it is best to speak of 'possible' points of interaction.

There are three categories of such points. First, there is the outbound perspective: from the perspective of one national narrative we may find indications that it influenced another national development. Secondly, there is the inbound perspective: from the perspective of one national narrative we may find indications that it had been influenced by another national development. Both categories look at the same phenomenon from different perspectives. I have already mentioned an example: the activities of English insurers on the continent in the late 18th and in the 19th centuries. Thirdly, there may be the observation of parallel developments based on a common starting point. Again, I have already pointed out a possible example: if the development of life and fire insurance was based on maritime insurance, then this may have had the effect that they developed parallel in more than one country. The inclusion of parallel developments based on a common starting point suggests that the concept of 'legal transplants' is too narrow to be used in the present volume.

## II. Europe and beyond

The contributions to the present volume will work out possible points of interaction from Italian, French, Spanish and Portuguese, Belgian, Dutch, English and Scottish, German, and Scandinavian perspectives. Thus, only a small number of jurisdictions have been selected to be covered in the present volume. These are the jurisdictions which appear in the literature as being most important for

the development of insurance. Coverage of these jurisdictions should be sufficient to identify possible points of interaction. Future volumes of the present research project will then focus on one of the identified possible points of interaction, and these future volumes will, of course, include further jurisdictions in order to make the project truly European. With some points of interaction it will even be advisable to go beyond Europe and include other jurisdictions.

The chapters of the present volume are put into an order which roughly follows the development of maritime insurance, which originated in the Mediterranean and spread from there to the north of Europe: Italy, France, and Spain (with some observations on Portugal); Belgium (maritime insurance first arrived in the Southern Netherlands, territories which today are part of Belgium), the Netherlands, Great Britain, Germany, and Scandinavia. Taking the borders of modern states to define the scope of historical papers is of course problematic, as the example of Belgium makes clear. And the followed order of the chapters is of course only one possible structure. However, on the basis of the present state of research it seemed to be the most sensible order because it is clear that maritime insurance is a type of insurance which appeared in all of the jurisdictions which are covered in the present volume and because in many of these jurisdictions maritime insurance is presented as the origin of insurance as a whole.

## III. The development of insurance as an institution and the development of insurance law

The title of the overall project is: 'a comparative history of insurance *law* in Europe'. This implies that its focus will be on *legal* developments. The contributions to the present volume, however, need to take a broader view. Or to put it differently: in the present volume there is less 'history of insurance *law*' and more 'history of insurance as an institution' than in the future volumes of the overall project. The reason is simple: the development of insurance law can only be understood against the background of the development of insurance as an institution. However, the history of insurance as an institution is, as has been pointed out above, told differently in the individual national narratives. Thus, the contributions first need to provide a critical assessment of the state of research into the history of insurance (without law) onto which a history of insurance law can then build upon. To give two obvious examples: before we can identify guilds as a possible point of interaction and as an institution which might have influenced the development of insurance and the development of insurance law, we need to point out in which jurisdictions guilds played a role. In the German literature their importance is stressed; in other national narratives they are neglected. And before we can ask ourselves the extent to which the development of national insurance laws was influenced by foreign insurance companies being active and using their practices and standard contract terms outside their home

jurisdiction, we need to have an understanding about the international activities of insurers in the past. In other words: a project on a comparative history of insurance law is not possible without a clear understanding of a comparative history of insurance as an institution. Furthermore, there is, as yet, hardly any doctrinal or dogmatic history of insurance law in the individual national narratives which we could simply build upon.[46] And the historiography of insurance law often simply follows the narratives of economic history without questioning whether the findings of economic history are suitable for the purpose of research into the history of insurance law.

The way we have gone forward in the present volume is that each author looked for notions in the history of insurance as an institution which other authors have previously found in their national historiographies. However, the contributors have gone a step beyond critically reflecting on the development of insurance in their national historical writings. Namely, they have linked their findings to the legal sphere by pointing out why these findings may have had an impact on legal developments.

## IV. The time period covered

All contributions to the present volume cover the time between the Middle Ages and the late 19th century. A similar time frame in each paper is essential for the purpose of the present volume. To start in the Middle Ages is straightforward: even though institutions of mutual aid and mutual assistance have existed in the ancient world, it is acknowledged that modern insurance developed in the Middle Ages. To end with the late 19th century is simply explainable on the basis that the developments during the 20th century are fully covered by modern textbooks on insurance law. Where authors have covered a different time frame they have explained why they have done so. The French contribution, for example, extends to the early 20th century as there were some interactions with other jurisdictions which are of interest from a comparative perspective.

## V. An interdisciplinary approach: problems and necessities

The German literature stresses that insurance law is a sub-discipline of the greater discipline of *Versicherungswissenschaft* ('insurance science'), and 'insurance science' is said to be a *Sammelwissenschaft*. The word *Sammelwissenschaft* literally translates as an 'accumulative field of science'.[47] Other sub-dis-

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[46] An exception is *van Niekerk* (n. 5).

[47] *Peter Koch*, Geschichte der Versicherungswissenschaft in Deutschland (1998), 4–10.

ciplines are, for example, insurance economics, actuarial mathematics, and insurance medicine. I do have my doubts whether insurance law is in this respect any different than most other areas of law: medical law, banking law, financial market law, competition law, environmental law – all of these areas of law can only be truly understood in their relation to other, related, disciplines. The reason why the German literature looks upon 'insurance science' as a *Sammelwissenschaft* might simply be that in 1899 the *Deutscher Verein für Versicherungswissenschaft* (German Society for Insurance Science) was founded in Berlin, uniting different disciplines in their importance for insurance. Nevertheless, all of this reminds us of the fact that insurance law is closely related to other disciplines, and this, in turn, suggests the importance of interdisciplinary research.

However, interdisciplinary research calls for an increased awareness of the methodological problems attached to it. Above I have argued that historical research in insurance law has not proven to be aware of these problems: the lead of economic historians in some national writings had the effect that legal historians, too, have restricted themselves to the history of mercantile insurance, leaving aside other forms of insurance. Yet, each discipline has its own research interest, and the interest of a research project in legal history is mainly about law.

Nevertheless, it is important to acknowledge that writing on the history of insurance law is not possible without a careful understanding of the findings of related disciplines. To give just some obvious examples: if one looks at the development of the duty of disclosure in life insurance, it will become obvious that during the course of the 18th century detailed declarations on the state of the insured's 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 firefighting. In maritime insurance the development of communication is relevant. In all fields of insurance law the development of actuarial mathematics is essential, as is how this development was transposed into defining the risk in insurance contracts. And most fundamentally, the need to seek protection from the consequences of risks by means of insurance can only be appreciated in the socio-economic context of a society.

The necessity of an interdisciplinary approach is reflected in the present volume. It includes two contributions of scholars from other disciplines, one from economic history and the other from social history, whose task was to comment on the findings of the present volume from the perspectives of their fields of expertise. Scholars of related disciplines will also be included in future volumes.

## VI. The concept of insurance

Finally, in a project on the history of insurance law it is, of course, essential and of utmost importance to reflect on the concept of insurance. Insurance is the research object of the present project. Thus, we need to know which institutions we have to include in our research and which institutions we may disregard. However, the task of developing a suitable definition of insurance for a historical project on insurance law is not without problems.

Art. 1:201 Principles of European Insurance Contract Law (PEICL), for example, defines an insurance contract as 'a contract under which one party, the insurer, promises another party, the policyholder, cover against a specified risk in exchange for a premium'. A number of elements can be gathered from this definition: (1) the PEICL cover insurance contracts; (2) the policyholder pays a premium; (3) the insurer in return promises to pay a sum (4) when a specified risk eventuates. The word risk implies some degree of uncertainty, most importantly, as to whether or when the event will happen. Similar definitions are to be found, for example, in the modern English literature.[48] The modern German literature adds another element: the insurer will conclude a number of insurance contracts which concern the identical risk so that the risk will be spread among the entirety of policyholders.[49] These modern definitions of insurance are, however, not apt to be the starting point for research into the history of insurance law. The restriction to insurance contracts would exclude all those institutions which have not been regulated by contract, as is, for example, the case with many state-run insurance schemes. The insistence on a premium to be paid by the insured would, if understood narrowly, exclude those institutions where the loss was simply apportioned among the insured after it had occurred. The restriction to those institutions which spread the risk among the entirety of the policyholders would exclude early forms of maritime insurance when it was the exception that a single insurer insured a great number of vessels.

Instead of starting with an abstract definition of insurance one could also begin with its functions. The modern German legal literature, for example, discusses a number of such functions.[50] Foremost, two such functions are considered: (1) compensation for loss suffered and (2) coverage of special needs as consequence of a specified risk having eventuated. Again, these functions are not apt to define the object of a historical study in insurance law. Insurance shares, for example, the function of compensating for suffered loss with other legal institutions, as is most obviously the case with claims for damages. One could finally

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[48] See, e.g., *Rodger* (n. 24), 2 f.; *Robert Merkin*, Colinvaux's Law of Insurance (9th edn. 2010), paras. 1-002–010.

[49] See, e.g., *Bruns* (n. 24), para. 1.2.

[50] On what follows see, e.g., *Bruns* (n. 24), para. 1.4–22.

start by distinguishing insurance from related concepts: saving, betting, and public welfare. However, the abuse of life insurance for the purpose of betting on other peoples' lives shows that, in the past, a clear cut division is again not possible.

Starting off with modern definitions of insurance, with today's discussions on its functions, or with present-day distinctions between insurance and other institutions is also flawed on a more general level: these definitions, functions, and distinctions are themselves the product of a historical development. And they have been developed to explain today's law.

Legal historians, too, have tried to define insurance. They add three further elements to the above definitions: (1) the risk must be calculable, (2) there must be a legally enforceable claim by the insured against the insurer, and (3) the insurance must be the sole purpose of the contract.[51] The insistence on the risk's calculability assumes the existence of actuarial mathematics. However, in early times the risk was guessed rather than calculated. The *foenus nauticum* of Roman law was a loan combined with an element of insurance: the loan to a ship-owner only had to be repaid if the ship successfully completed the journey for which the loan was given. The birth of maritime insurance is said to be when, in the Middle Ages, the insurance element was isolated and turned into an independent contract. Thus, the idea that insurance must be the sole purpose of the contract is of relevance. However, guilds which seem to have been of importance for the development of insurance served other purposes, too.

That leaves us with two elements:[52] first, the insured needs to have an enforceable claim against the insurer. Otherwise, we are outside the legal sphere. Second, the institution needs to involve the transfer of a risk.

Most fundamentally, a project which wants to lay open the development of insurance law needs to consider all institutions which have influenced this development regardless of whether the institution itself counts as insurance according to any modern definition.[53] This means that the distinction between what needs to be included in the present volume and what may be disregarded cannot be made on the basis of a single abstract definition. Rather, it needs to be openly discussed anew for each case of doubt.

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[51] *von Zedtwitz* (n. 10), 23–26; *Schug* (n. 6), 52–59.

[52] Compare also *Koch*, Versicherungswesen (n. 13), 815; *idem* (n. 19), 4.

[53] Similarly *Koch* (n. 19), 4; *idem*, Versicherungswesen (n. 13), 815, who argues that it is not necessary for research into the history of insurance law to exactly define the concept of insurance ('Es erscheint nicht notwendig, für rechtshistorische Untersuchungen den Begriff der Versicherung genau zu definieren').