

Chapter 10: A Comparative History of Insurance Law in Europe

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The starting point of the present volume was the observation that, hitherto, research on the history of insurance had a clear focus on maritime insurance and on insurance operated on a commercial basis. Furthermore, the existing research has primarily been conducted by economic historians and, consequently, legal developments have largely been neglected. Finally, research into the history of insurance has developed distinct national narratives. The research project on a comparative history of insurance law in Europe, to which the present collection of essays is the inaugural volume, wants to go beyond these national narratives and analyse the history of insurance law in Europe from comparative perspectives. It seeks to do so by focusing on possible points of interaction between the different national legal developments.¹

In order to succeed with this research agenda it is necessary, first, to critically revisit the state of research on the history of insurance and to map out the prospects for a comparative history of insurance law in Europe. This is what the present volume aims at. Accordingly, the authors of the different chapters were asked to give an overview of the state of research as regards the diverse national historiographies. Consequently, the chapters in this volume have different focal points: whereas Sophie Delbrel,² for example, looks in detail into the history of social insurance in France, Miguel Ángel Morales Payán focuses on the development of insurance companies in Spain,³ and Dirk Heirbaut on the early history of mutual assistance in the event of fire in Flanders.⁴ To some extent, these various focal points simply reflect the divergent states of research in the different national historiographies. However, they also reflect distinct developments in the evolution of insurance. This is an important point which needs to be stressed: even where we find points of interaction between more than one national narrative in, for example, parallel institutions these institutions may have appeared in the different European countries with a time lag. Furthermore, their development

¹ Above *Hellwege*, 9–25.

² Above *Delbrel*, 47.

³ Above *Morales Payán*, 84–87.

⁴ Above *Heirbaut*, 91–94.

in the different countries will have depended on the different socio-economic settings therein. Finally, Morales Payán and Heirbaut, for example, even remind us of regional differences in the development of insurance in Spain and Belgium.⁵

In addition, each contributor was asked to look for themes in the history of insurance which other authors have identified in their national historiographies. And each author was asked to go beyond reflecting on the development of insurance as an institution and link the findings to the legal sphere by pointing out why these findings may have had an impact on legal developments. As the present volume marks the starting point of a project on the comparative history of insurance law in Europe, these findings are, of course, of a preliminary nature only. They need to be fully researched and put into perspective.

Even though, the purpose of the present volume is to work out prospects for a comparative history of insurance law in Europe and, thus, to identify starting points for future research, the different contributions have already confirmed the observation that the history of insurance is mostly in the hands of (economic) historians and that research on the history of insurance *law* has fallen into neglect. Yet, there are exceptions: for the Netherlands there is the work by Johan P. van Niekerk titled ‘The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800’;⁶ for England there is the recent study by Guido Rossi, of which John MacLeod makes extensive use;⁷ and also in other countries, as for example in Italy, we find studies on the development of insurance law.⁸ Delbrel has stressed with respect to France that there is again a rising interest in the history of insurance law in recent times,⁹ and the same is true for other countries as well. In addition, there is in the different national narratives a clear focus on maritime insurance.¹⁰ Yet again, there are exceptions. Delbrel and Morales Payán, for example, show that in France and Spain the history of social insurance has received considerable attention.¹¹ Furthermore, it is generally thought that other types of insurance, like fire and life insurance, were derived from, or were at least treated analogously to, maritime insurance. Finally, it seems that a comparative approach to the history of insurance has, with the exception to maritime insurance, played only a minor role in the different national narratives. However,

⁵ Above *Morales Payán*, 77–79; *Heirbaut*, 94 f.

⁶ Above *Hellwege*, 134.

⁷ Above *MacLeod*, 150–169.

⁸ Above *Fortunati*, 31.

⁹ Above *Delbrel*, 50–52.

¹⁰ Above *Fortunati*, 27–31; *Heirbaut*, 89; *MacLeod*, 154.

¹¹ Above *Delbrel*, 49–50; *Morales Payán*, 71.

what are the prospects for a comparative history of insurance law in Europe? What are the possible points of interactions?¹²

Maritime insurance has already in the past been studied from comparative perspectives, and Morales Payán even looks beyond Europe and includes in his contribution American developments.¹³ However, Dave De ruysscher reminds us of shortcomings of modern research.¹⁴ He identifies these shortcomings with respect to the Southern Netherlands, but they hold equally true for other national historiographies. The research has primarily focused on specific centres of maritime insurance. Furthermore, legal developments have often been neglected. The research that has taken account of legal developments has either focused on the developments in legislation or on the developments in respect of insurance practices and customs. The interplay between these two lines of development is under-researched. And, the research has focused on specific time frames. Moreover, the research has thus far focused primarily on premium insurance, yet maritime insurance appeared also in the form of mutual insurance. In addition, Maura Fortunati reminds us of the importance of the case law of the Genoese *Rota Civile* for the evolution of commercial law in Europe, and she rightly poses the question as to ‘how the reception of the case law of the Genoese *Rota* has influenced the further development of insurance law in Europe and whether and how its case law has been observed by other European courts’.¹⁵ Fortunati also draws our attention to the literature as an object of comparative research:¹⁶ the treatise written by Balthazard-Marie Emerigon (1716–1785) was of great importance beyond France. Yet she reminds us of the work by the Italian Ascanio Baldasseroni (1751–1824) which appeared only three years after Emerigon’s work and which took notice of European developments. Fortunati stresses that Baldasseroni’s work needs to be studied in detail, that it needs to be put into a European context, that it needs to be compared to Emerigon’s treatise, and that its impact needs to be analysed. Finally, for the 19th century, Delbrel points to the role of associations of maritime insurers and mentions those located in Paris: these association had an international agenda, but their impact on the development of maritime insurance law in France and beyond has thus far not been the object of research.¹⁷ Thus, Delbrel suggests that there were still points of interactions between the national insurance laws as late as the 19th century. By contrast, MacLeod works out the Italian and Dutch origins of insurance law in England, but he argues that

¹² Above *Hellwege*, 21.

¹³ Above *Morales Payán*. 76.

¹⁴ Above *De ruysscher*, 110–113.

¹⁵ Above *Fortunati*, 34–36.

¹⁶ Above *Fortunati*, 36–37.

¹⁷ Above *Delbrel*, 63–64.

English law became insulated ‘from the continuing dialogue with foreign sources’ in the 18th century.¹⁸

Associations which, among other purposes, aimed at providing mutual assistance to its members are mentioned in all the papers of the present volume:¹⁹ these include guilds, such as craft guilds and fire guilds, as well as fraternities. However, it becomes obvious from the different contributions that in many national historiographies they have received only little attention. And where they are covered by modern research, it is the aspect of mutual assistance that has been mostly ignored, as Heirbaut reminds us.²⁰ Furthermore, it appears that where they have been put into a comparative context, the research has been flawed: Heirbaut challenges Charles Trenerry’s findings on guilds in Flanders.²¹ However, German, English, and Scandinavian research conducted in the past relied on the findings in Trenerry’s work. The mutual assistance granted by the different forms of guilds needs further research. And it is worthwhile to put this research into comparative perspective: Morales Payán, for example, draws attention to the Spanish literature alleging that the concept of guilds came to Spain via the Way of St. James.²²

The 17th century saw three innovations. First, there were assurances for widows and orphans. In the 17th century such assurances were initiated by some states for specific professions, foremost for civil servants and in protestant countries for pastors. They are mentioned in the chapters on Germany, the Netherlands, Spain, and Scandinavia.²³ These assurances gained importance in the 18th century. This finding does not suggest that there was any uniformity in their development. It may have been a mere parallel development or it may have been a transfer of institutions. The developments may have occurred with a time lag. Assurances for widows and orphans may have played a different role depending on the different socio-economic settings in the single countries. Nevertheless, it is again worthwhile to put widow and orphan assurances into a comparative context and to assess their importance for the development of life insurance (law).

The second 17th-century innovation which is mentioned in all the contributions is tontines.²⁴ Tontines are pooled life annuities which served a number of

¹⁸ Above *MacLeod*, 162–163.

¹⁹ Above *Fortunati*, 31–33; *Delbrel*, 53–55; *Morales Payán*, 71–73; *Heirbaut*, 91; *Hellwege*, 145–148; *MacLeod*, 158; *Hellwege*, 175–178; *Sunnqvist*, 208–209, 220–221.

²⁰ Above *Heirbaut*, 89.

²¹ Above *Heirbaut*, 91–94.

²² Above *Morales Payán*, 71–73.

²³ Above *Sunnqvist*, 220–221; *Morales Payán*, 71–73; *Hellwege*, 145–148; *idem*, 178–181.

²⁴ Above *Fortunati*, 40; *Delbrel*, 47, 52; *Morales Payán*, 85; *Heirbaut*, 102–106; *MacLeod*, 154–156, 166–169; *Hellwege*, 145–148; *idem*, 178–181, 183–184; *Sunnqvist*, 219–220.

purposes. For investors they could function as a pension scheme. They were ‘invented’ by Lorenzo Tonti (1602–1684) in 17th-century France. Most tontines were issued between the 17th and the 19th centuries.

The third 17th-century innovation is modern fire insurance. For the 17th century, fire insurance, or at least plans for fire insurance, is mentioned in the chapters on Belgium, the Netherlands, England, Germany, and Scandinavia.²⁵ Their origins are contested in each national historiography. Heirbaut points out that in the Southern Netherlands it is unlikely that they were in any way connected to the Flemish institutions of mutual assistance in the Middle Ages. Similarly, the Dutch historiography assumes that modern fire insurance is rather a spin-off from maritime insurance. The narrative for Germany presents itself slightly differently:²⁶ the Hamburg *General Feu-Cassa* of 1676 was based on the Hamburg fire contracts which were first concluded in 1591. Nevertheless, it is doubted that the Hamburg fire contracts derived in any way from the fire guilds in 16th-century Schleswig-Holstein.

In most national historiographies on the history of insurance it is thought that life insurance and fire insurance derive from maritime insurance.²⁷ In contrast, modern German literature speaks of three distinct roots of insurance.²⁸ Tentatively, it seems most plausible to speak, in the words of Levin Goldschmidt (1829–1897), of ‘sich mannigfach verschlingende(n) Wurzeln’ (‘in many ways interwoven roots’).²⁹ In the chapters on Germany and on the Netherlands it became obvious that both the early Hamburg fire contracts and the Zaanstreek fire contract of 1663 did not apply those technical terms which are familiar from maritime insurance contracts. This could be an indication that fire insurance was in both countries initially based on a different tradition than maritime insurance. These technical terms were only in the late 17th and early 18th centuries adopted in the context of fire insurance – even though the respective schemes can at that point of time not be characterized as commercially run premium insurance.³⁰ This is an indication that the distinction between a cooperative style of insurance and mercantile insurance is, even though of great importance for economic historians, of less importance when analysing the regulations of the different insurance schemes. There was a borrowing between the different schemes. And this borrowing could have taken place also with respect to the legal rules. A similar point has been made in the chapter on Germany when the development of duties

²⁵ Above Heirbaut, 106–109; Hellwege, 138–145; *idem*, 175–181; Sunnqvist, 209–215.

²⁶ Above Hellwege, 175–181.

²⁷ Above Fortunati, 27–33; Morales Payán, 67–70; Heirbaut, 101–110; Hellwege, 134–145.

²⁸ Above Hellwege, 173.

²⁹ Levin Goldschmidt, *Handbuch des Handelsrechts*, vol. 1 (3rd edn., 1891), 40.

³⁰ Above Hellwege, 138–145; *idem*, 189–190.

of disclosure in commercial life insurance in England was contrasted with the development of duties of disclosure in non-commercial, state-run widow and orphan assurances in Germany.³¹

For the further development of fire insurance and life insurance, two points are worth noting. Both in Germany and in Denmark state-run fire insurance was predominant in the 18th century. For Denmark, Martin Sunnqvist points to the influence of the writings of the so-called *Kameralisten* – *Kameralismus* was the German version of mercantilism – for the establishment of state-run fire insurance.³²

The second point worth noting for the further development of fire and life insurance relates to international ties on a personal level and internationally active insurers. In Belgium it was Englishmen who were the driving force behind establishing fire insurance in the 18th century.³³ But it was only in the 19th century that fire insurance had its break-through, and this time there was a strong Dutch influence.³⁴ Similarly for France, Delbrel identifies English influences when in the 18th century fire insurance became established in France, and during the 19th century both English and Belgian insurers were active on the French market.³⁵ In Germany, too, English, Belgian, and French insurers were active since the late 18th century,³⁶ and Sunnqvist points to English insurers who were active in Sweden.³⁷ According to Morales Payán, international insurers became active on the Spanish market only in the second half of the 19th century.³⁸ Consequently, it needs to be analysed whether these international insurers used the practices, customs, and standard contract terms from their home markets and whether these practices, customs, and standard contract terms had any lasting impact on the development of insurance law outside their home market.

The customs, practices, and standard contract terms of the insurance trade are also for other reasons an interesting point of research. Fortunati draws our attention to the treatment of suicide in the standard terms of life insurance contracts, and she puts this treatment into an intriguing Italian-French-Belgian context. She rightly poses a number of questions: ‘were the solutions which were adopted by Italian insurers in any way original? Or did Italian insurers simply imitate and copy solutions which were developed by other, perhaps foreign companies?’

³¹ Above *Hellwege*, 190–195.

³² Above *Sunnqvist*, 210–212.

³³ Above *Heirbaut*, 106–109.

³⁴ Above *Heirbaut*, 110.

³⁵ Above *Delbrel*, 53–55, 58–63.

³⁶ Above *Hellwege*, 181–183, 195.

³⁷ Above *Sunnqvist*, 212 f.

³⁸ Above *Morales Payán*, 87.

Standard terms in life insurance contracts on suicide by the insured party are a good example for exploring these questions.³⁹ Furthermore, Delbrel points to the importance of the international of re-insurance trade which might, early on, have produced a convergence of standard contract terms.⁴⁰

As is the case with many other areas of law, it is also in the context of insurance law that it is worthwhile to study the impact of the Napoleonic laws which were enforced in many European states. Fortunati exemplifies the interplay between Italian and French law in her discussion on the prohibition of life insurance.⁴¹

Finally, Delbrel points to an interesting chapter in the development of social insurance:⁴² in France, there was a German influence. First, France tried to suppress the adoption of German social insurance schemes. However, via Alsace-Moselle the German model gained importance in France. And the German social insurance schemes were partly based on earlier layers of development, most importantly the mutual protection offered by guilds.⁴³

³⁹ Above *Fortunati*, 37–40. See also *Heirbaut*, 106.

⁴⁰ Above *Delbrel*, 63–64.

⁴¹ Above *Fortunati*, 40 ff.

⁴² Above *Delbrel*, 65.

⁴³ Above *Hellwege*, 186–186.