

Normative Hybridity in Antwerp Marine Insurance (c. 1650–c. 1700)

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I. Living and Official Law in Early Modern Marine Insurance: Some Preliminary Thoughts

It is regularly suggested that, in the early modern period, merchants developing new types and provisions of contract relied foremost on informal and unofficial methods of adjudication, such as mediation and arbitration. Early modern official law regulating mercantile agreements and also those laws concerning marine insurance have been described as severe and estranged from commercial practice.² Even though it is

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² Admittedly, concerning marine insurance, this view is expressed in older and generalizing rather than in recent and specialized literature. See, for example, van Niekerk's distinction between legislative provisions corroborating customs of merchants and sections of laws that overruled contrary (normative and other) practices: *J.P. van Niekerk*, The development of the principles of insurance law in the Netherlands 1500–1800, I, Kenwyn 1998, p. 249. Elsewhere, he stressed that sixteenth-century central and local legislation was progressively amended so that it became more adapted to mercantile practice. See *J.P. van Niekerk*, Sources of insurance law in R. Feenstra and R. Zimmermann (eds), *Das römisch-holländische Recht. Fortschritte des Zivilrechts im 17. und 18. Jahrhundert*, Berlin 1992, p. 305–327, at p. 312. Geographical and temporal differences are considerable. See, for the varying approaches of the administrators of Amsterdam and Rotterdam in the 1600 s: *S.C. Go*, *Marine insurance in the Netherlands 1600–1870: a comparative institutional approach*, Amsterdam 2009, p. 96 and p. 145; and for differing legislative positions as to concrete solutions in London in the 1570 s: *G. Rossi*, The booke of orders of assurances: a civil law code in 16th century London in *Maastricht Journal of European and Comparative Law*, 19, 2012, p. 240–261, at p. 253 and p. 255. For older views, see for example *L. Couvreur*, *Recht en zeeverzekeringspraktijk in de 17de en 18de eeuwen* in *Tijdschrift voor Rechtsgeschiedenis (Legal History Review)*, 16, 1939, p. 184–214, at p. 185–188 and p. 206; and *A.E. Sayous*, *Les méthodes commerciales de Barcelone au XV^e siècle d'après des documents inédits de ses archives: la bourse, le prêt et l'assurance maritime, les sociétés commerciales, la lettre de*

stated that official courts, with learned judges, acknowledged usages and customs of merchants concerning marine insurance,³ judicial policies of keeping track of mercantile developments have not often been recognized.⁴ The only law regarding marine insurance that allegedly mattered in day-to-day commercial practice was the customary law that was in use among merchants.⁵

It is often said that in judicial practice, usages and techniques of trade could be ‘picked up’ and ‘formulated’, which hints at an underlying view that judges simply acknowledged and applied them, and this implies mercantile usages and customs are fully applicable normative precepts.⁶ This idea is linked with common assertions about sections regarding marine insurance agreements in the compilations of the laws of the commercial cities of the Low Countries, particularly Antwerp. These collections, called *costuymen* (*coutumiers*, from *coutumes*), are said to be the enacted local mercantile ‘us et coutumes’ to which insurance policies and documents stemming from insurance practice sometimes referred. However, these *costuymen* contained official law.⁷ Even when they were receptive to mercantile usages and cus-

change, une banque d’État in *Revue historique de droit français et étranger*, 4th series, 15, 1936, p. 255–301, at p. 261–270.

³ Sixteenth- and seventeenth-century Italian higher courts have been described as particularly open to acknowledging mercantile innovations on the basis of arguments that had been drawn from legal literature, i.e., from the *ius commune*. See, for example, *C.M. Moschetti*, *Caso fortuito, trasporto marittimo e assicurazione nella giurisprudenza napoletana del Seicento*, Naples 1994; and *V. Piergiovanni*, *The rise of the Genoese civil rota in the sixteenth century: the “Decisiones de Mercatura” concerning insurance in V. Piergiovanni (ed.), The courts and the development of commercial law*, Berlin 1987, p. 33–38.

⁴ This idea of a developing law through court practice has been put forward by some historians writing in the common law tradition and not by those studying civil law countries. See, for example, *Fl. Edler-De Roover*, *Early examples of marine insurance in Journal of Economic History*, 5, 1945, p. 172–200, at p. 198–200. This has also to do with the lack of research into court practice. An exception, studying the consular court in seventeenth-century Mallorca, is *J. Pons Pons*, *El pago del seguro marítimo y los conflictos ante el tribunal consular in Pedralbes* 1992, p. 71–94. Along the aforementioned lines, for civil law countries, it is often underscored that customs of merchants could be acknowledged by the courts, but only if they were proved. Merchant courts are sometimes excepted. See, e.g., *van Niekerk*, *The development*, I, p. 261–65.

⁵ For customary law being the primary law in marine insurance in the early modern Low Countries, see *van Niekerk*, *The development*, I, p. 245–68.

⁶ E.g., *van Niekerk*, *Sources*, p. 321.

⁷ Many state that in those *costuymen*, sections that had been drawn from princely legislation were written *next to* provisions of acknowledged customs. The notions of ‘registration’, ‘enactment’, ‘compilation’ and such, which are used when describing the process of writing the municipal law books that were called *costuymen*, often implicitly refer to this idea of an identity between normative practices and written sections of law in such law books. (The current author has also done so in his first publications.) A distinction must be made between: (1) customary law as a label, referring to a source of law; (2) the systematic and written official law that was named *costuymen*; and (3) ‘us et coutumes’, which was a label referring to normative practices, *secundum, praeter* or *contra* the official law in (2), and thus not to (2) as such. Under (3), the notion of ‘*costuymen van de Beurs van Antwerpen*’ (customs of the

toms, its provisions were not *per se* identical to normative practices of merchants. The customs and practices of trade were recalibrated, rephrased and expanded. As a result, they were different from the practices on which legislators had based their laws. The scope and quality of customs of merchants have also been exaggerated, as recent studies have demonstrated.⁸ Indeed, for some places, it has been discovered that the majority of rules applying in practice to commercial contracts were official.⁹

All in all, it is not well-known how in the early modern period, legislation on commercial themes related to mercantile practices and customs, or how mercantile innovation in this period was supported or hindered by legislation and/or judicial approaches. This is also largely true for the early modern Low Countries. Even though extensive research has been done with regard to official law and doctrine concerning marine insurance,¹⁰ the contractual practice regarding this contract in major ‘Dutch’ insurance centres of the late 1500s and of the 1600s (such as Amsterdam, Rotterdam and Antwerp) has not been fully explored.¹¹ The same gap exists in understanding the approach of courts in those cities *vis-à-vis* innovations in marine insurance in this period.¹²

Antwerp Exchange), which was used in insurance contracts and princely legislation as from 1563, can be categorized. A comparable view is that of van Niekerk, who refers to the written municipal law books of Antwerp (*costuymen*) as restatements of the ‘perceived customary law’. See *J.P. van Niekerk*, The law and customs of marine insurance in Antwerp and London at the end of the sixteenth century: preliminary thought on the background to and some of the sources for a comparative investigation in: *Fundamina: A Journal of Legal History*, 17, 2011, p. 144–63, at p. 150–52.

⁸ *D. Ibbetson*, Law and custom: insurance in sixteenth century England in *Journal of Legal History*, 29, 2008, p. 291–307, at p. 293; *E. Kadens*, The myth of the customary law merchant in *Texas Law Review*, 90, 2012, p. 1135–1206.

⁹ E.g., *J. Edwards* and *S. Ogilvie*, What lessons for economic development can we draw from the Champagne fairs? in *Explorations in Economic History*, 49, 2012, p. 131–48.

¹⁰ *Van Niekerk*, The development, 2 vols.

¹¹ For the 1760s, 1770s and 1780s, an analysis of the contents of marine insurance policies that were drawn up in Amsterdam, Rotterdam and Middelburg can be found in *F.C. Spooner*, Risks at sea. Amsterdam insurance and maritime Europe, 1766–1780, Cambridge, 1992, p. 33–40. A selection of some 25 marine insurance policies, from the seventeenth and eighteenth centuries, that had been made in Amsterdam, Rotterdam and Antwerp, were analysed in *van Niekerk*, The development, vol. II, p. 1414–55.

¹² For a first comparative analysis of local and specialized courts, which is mostly based on secondary literature and legislative sources, see *Go*, Marine insurance in the Netherlands. In 1598 in Amsterdam, a Chamber for Insurance and Average was established, which heard lawsuits regarding *inter alia* marine insurance. Until recently, it was thought that the earliest preserved written judgments of that Chamber date from 1700. However, an early book of judgments has now been discovered. See, for a first appraisal of the practice of the Chamber in the 1600s on the basis of that book, *S. Go*, The Amsterdam Chamber of Insurance and Average: a new phase in formal contract enforcement (late sixteenth and seventeenth centuries) in *Enterprise & Society*, 14/3, 2013, 511–43. In 1604, a comparable Chamber was established in Rotterdam.

The goal of this contribution is to address some of these themes in relation to Antwerp in the second half of the seventeenth century. It will be argued that in this period and in Antwerp, there was normative hybridity¹³ of ‘law’ known by merchants and official law with regard to marine insurance, but also that the actions of law-makers and judges determined to what extent these legal ‘orders’ diverged or converged in terms of rules that they produced. Furthermore, even if legislators and courts lacked a benevolent approach towards the customs of merchants, their attitudes inevitably had an impact on trade practice. Even if the customs of merchants and official law, each different in their nature and origins, did not overlap substantively, they naturally interacted with one another.

First, this chapter seeks to analyse the normative practices regarding marine insurance in use among merchants in Antwerp in the aforementioned period. It looks, too, at the relationship between these practices and official norms – that is, were the practices *secundum*, *contra* or *praeter legem* with respect to the official legal norms (i. e., the legal texts issued by the Antwerp aldermen or by princely institutions)? The customs of merchants, which are normative practices recognized as binding for their behaviour, are understood as pertaining to a *Rechtsleben* (*living law*), which expresses the idea that norms can exist outside of the legal framework of state authorities.¹⁴ A ‘normative practice’ is defined in this chapter as a constraint based on an idea or feeling of normativity (‘ought’). This corresponds with the late medieval and early modern academic notion of *tacitus consensus/voluntas populi*.¹⁵ Therefore, ‘practices’ (i. e., repeated actions) are distinguished from ‘normative practices’ (i. e., usages linked to the aforementioned *consensus/voluntas*).

These notions can be understood with regard to contractual practice. The writing of standard terms (i. e., terms of contract that are added to an agreement without prior negotiation between the parties involved) into a written contract is a normative practice because it is felt that every contract should contain those terms. Negotiated terms are not normative practices, but they can refer to normative practices that are not described in detail in the contract, thus supplementing the provisions of the contract.

¹³ ‘Normative hybridity’ is defined as the coexistence of at least two contradictory normative practices, or of at least two normative practices different in origin but with comparable contents. The vantage point is that of the merchant, either insurance underwriter or insured.

¹⁴ The concept *Rechtsleben* was developed by Eugen Ehrlich in 1911. For a proper understanding of its intended meaning, see *D. Nelken*, Law in action or living law? Back to the beginning in sociology of law in *Legal Studies*, 4, 1984, p. 157–74; and also *M. Hertogh*, A European conception of legal consciousness: rediscovering Eugen Ehrlich in *Journal of Law and Society*, 31, 2004, p. 457–81, at p. 472–73.

¹⁵ *R. Garré*, Consuetudo. Das Gewohnheitsrecht in der Rechtsquellen- und Methodenlehre des späten ius commune in Italien (16.–18. Jahrhundert), Frankfurt am Main 2005, p. 66–72 and p. 145–60. This required element of *consensus/voluntas populi* was – albeit not in those terms – acknowledged by Ehrlich. See *Hertogh*, A European conception, p. 472–73.

Second, the contribution focuses on the interactions between decisions of the Antwerp City Court of Aldermen, which was the main tribunal in the city of Antwerp, and the contents of marine insurance contracts that were signed in Antwerp. The judicial decisions of the Antwerp aldermen-judges can be defined as ‘law in action’, for they had to reconcile fixed official rules regarding marine insurance that had been written down in the compilations of Antwerp law (so-called *costuymen*) of 1582 and 1608 with the facts of the case.¹⁶ It will be assessed how the Antwerp City Court interpreted these written rules and how this resulted in the municipal law (the official law, including the ‘law in action’) developing in matters of marine insurance.

The main theme of this chapter is that around the middle of the seventeenth century, the relationship between the Antwerp government and the merchants residing in the city had become troubled as a result of matters relating to marine insurance. A gap had come into being between the official law on marine insurance and the mercantile, normative and other practices regarding that contract. However, in swift response to this crisis, the Antwerp City Court principally endorsed what was occurring among merchants. The aldermen softened written official rules, mostly concerning the transfer of information between the insured and the underwriters of the contract, which had been imposed previously, and a new balance between the interests of the parties involved was found and established in official rules, setting forth standards for contractual practice.

II. The 1608 *Costuymen*: Crisis Legislation in a Dwindling Insurance Market

Towards the end of the sixteenth century, marine insurance in Antwerp was regulated with laws that went a long way in terms of acknowledging contractual practice. They had been in the making for two decades. Following the strict princely ordinances of 1550 and 1551 on naval traffic, merchants residing and trading in Antwerp had debated over rules regarding terms of contract, and with the support of the Antwerp leaders, a compromise was ultimately struck. A princely law of January 1571 and the Antwerp compilation of municipal law of 1582 contained provisions allowing for the

¹⁶ The fixedness of provisions in the abovementioned compilations must not be overrated. The Antwerp compilations of municipal law (*costuymen*) had not received the status of princely law through homologation by higher councils, even though in 1609 a provisional princely decree for printing the parts of the 1608 compilation concerning mercantile matters had been issued. Therefore, change as to their contents was not a breach of princely law. The Antwerp aldermen, who supervised the redaction committees of the abovementioned collections, could thus adapt rules that had been written into earlier compilations. Moreover, the municipal law collections of Antwerp were not regarded as being codifications (in the sense of more or less definitive collections of official law). On the legal nature of the Antwerp compilations, see *D. De ruyscher*, From usages of merchants to default rules: practices of trade, *ius commune* and urban law in early modern Antwerp in *Journal of Legal History*, 33, 2012, p. 3–29, at p. 18.

use of contract clauses that had emerged from practice, but at the same time these laws imposed an exchange of information between the insured and the underwriters, and set forth limits and standards for insurance agreements. The community of merchants agreed with these rules, and for a certain period of time, the living law of merchants and the official law overlapped.¹⁷ However, in the early years of the seventeenth century, the Antwerp leaders made another attempt at obtaining central approval of their municipal law. The 1582 compilation was very popular and was applauded for its quality, even though it had not been homologated as princely law. Since this compilation had been issued under a Calvinistic (anti-Spanish) municipal government, in 1585 – when Spanish rule was restored – the decision was made to assemble a new collection, which was finished in 1608. In contrast to the 1582 law book, the Antwerp municipal law of 1608 imposed more formalistic requirements and compulsory mentions onto marine insurance contracts, and in so doing drove a wedge between mercantile practice and the official law of the city.

The new approach of the Antwerp aldermen, who left the careful policy of their predecessors, was brought about by economic circumstances. In the years following the surrender of the city to the Spanish in 1585, sea traffic to Antwerp waned because of the collection of tolls for ingoing and outgoing merchandise.¹⁸ The shock of 1585 and the lasting fiscal burdens on trade over the River Scheldt in the decades thereafter caused an enduring change in the patterns of naval commerce. From that moment onwards, not only foreign firms but also many from Antwerp, oriented their business activities towards other European harbours. In the early 1600s, companies that were based in Antwerp transported raw materials over land or had them sent over from neighbouring ports.¹⁹ With the 1608 compilation of law, the Antwerp government tried to overcome these setbacks by providing for extensive sections of law regarding commerce and mercantile contracts. The new municipal law was considered to be a means to economically revive the city. However, in contrast to what had been done in the second half of the sixteenth century, it was a product of policy-making that no longer involved consultation with groups of resident merchants. The strict approach of its sections came with a conviction that freedom of contract, which had been considered a valuable goal in the aforementioned compromise of the later 1500s, caused fraud and uncertainty, and ultimately economic decay.

The 1608 compilation mandated that, when bringing a lawsuit regarding marine insurance, the insured had to confirm his good faith. The insured had to acknowledge that the terms and data mentioned in the insurance contract were correct and that no

¹⁷ On the long discussions preceding the 1571 princely law, see *D. De ruysscher and J. Puttevils*, *The art of compromise. Legislative deliberation on marine insurance institutions in Antwerp (c. 1550-c. 1570)*” in *BMGN Low Countries Historical Review* in press.

¹⁸ *A.K.L. Thijs*, *The River Scheldt closed for two centuries in F. Suykens et al. (eds), Antwerp: a port for all seasons, Antwerp 1986*, p. 165–273, at p. 203–10.

¹⁹ *E. Stols*, *Handel-, geld- en bankwezen in de Zuidelijke Nederlanden 1580–1650 in Nieuwe Algemene Geschiedenis der Nederlanden*, VII, Haarlem 1980, p. 133–34.

other agreement had been made for insuring the same ship or merchandise.²⁰ This rule thus built on the presumption that a marine insurance contract was fraudulent. Other sections, along the same lines, provided that brokers had to write in insurance policies that they had seen the parties put their signature to the contract.²¹ The 1608 compilation was also strict in terms of imposing sanctions. Fraud in insurance was prosecuted as theft,²² which was a capital offence, and notaries and brokers who drew up insurance contracts containing forbidden clauses were fined.²³ Many insurance products and provisions of contract relating thereto were outlawed. Insuring unspecified valuables and foodstuffs, as well as insurance policies covering the insurance of merchandise belonging to enemies,²⁴ was forbidden. According to the *Memorieboeken*, which are documents written under the supervision of the Antwerp government and interpreting the sections of the 1608 compilation, all these measures aimed at eliminating treacherous insurance practices. The authors of the *Memorieboeken* stressed that – in their opinion – marine insurance in Antwerp had fallen prey to disarray and confusion, and that the new rules would tackle these problems in order to restore certainty and to stimulate growth in the insurance market.²⁵

The new version of the Antwerp municipal law was too intrusive and received little support from merchants remaining in Antwerp. As a result, terms in insurance policies that were signed after 1608 did not differ from those that had been made before that time.²⁶ As a result, the living law of merchants regarding marine insurance and the official law were no longer overlapping. From 1608 onwards, the new approach of the Antwerp leaders ensured that, in matters of marine insurance and other mercantile contracts, many more normative practices of merchants differed from official norms.

However, confrontation between the two sets of rules only came later. Between around 1600 and approximately 1650, marine insurance in Antwerp was generally exceptional, and therefore confrontations of insurance contracts with the new legal provisions of the 1608 compilation remained rare, at least for a while. Because

²⁰ Coutumes du pays et duché de Brabant. Quartier d'Anvers. Coutumes de la ville d'Anvers, III–IV, Brussels, 1872–74 (ed. G. De Longé), (vol. IV is hereinafter referred to as 'Antwerp 1608 costuymen'): Antwerp 1608 costuymen, p. 310 (book 4, ch. 11, s. 266).

²¹ *Ibid.*, p. 224 (book 4, ch. 11, s. 59).

²² *Ibid.*, p. 208 (book 4, ch. 11, s. 24) and p. 240 (book 4, ch. 11, s. 97).

²³ *Ibid.*, p. 224 (book 4, ch. 11, s. 58).

²⁴ *Ibid.*, p. 222 (book 4, ch. 11, s. 51).

²⁵ Antwerp City Archives (hereinafter ACA), Vierschaar (hereinafter V), 28bis.

²⁶ E.g. international Institute of Social History (hereinafter ISSH), Netherlands Economic History Archive (hereinafter NEHA), Special Collections 471, 2.4.37.2 (insurance contract of 28 May 1636) and 2.4.31.2 (insurance contract of 29 March 1638). The second policy stipulates the insurance of merchandise 'a qui icelles pourroyent apertenir' (to whoever it may belong), which was a provision that had explicitly been prohibited in the 1608 compilation. This general clause had been customary before 1608. See *H.L.V. De Groote, De zeeassurantie te Antwerpen en te Brugge in de zestiende eeuw*, Antwerp 1975, p. 99.

in the early seventeenth century marine insurance contracts were often negotiated at the location where the insured cargo was shipped or at the place of arrival, and naval traffic to and from Antwerp was at a low, fewer insurance agreements were made in Antwerp.²⁷ Business records of Antwerp merchants dating from the first half of the 1600s contain few references to marine insurance contracts that were signed in Antwerp. The bulk of them were drawn up at insurance centres abroad. The books of the important Antwerp merchant families Van Immerseel and Boussemart, for example, contain entries for 88 marine insurances that were signed between 1607 and 1628. Of these contracts, 31 were made in Antwerp, while the remainder were drawn up in Seville and Lisbon.²⁸ Of the 13 premium payments that in 1645 were made on behalf of the Antwerp-based firm De Groote-Meerts, only one related to a contract that had been signed in Antwerp. The other marine insurance contracts engaged in were most probably signed in Seville.²⁹ The court records of the Antwerp City Court also demonstrate a decline in the number of lawsuits regarding marine insurance for the first half of the seventeenth century.³⁰

Decreasing litigation concerning marine insurance was most certainly not due to a growing importance of arbitration or mediation, which also became less practised. In

²⁷ General descriptions of the early seventeenth-century marine insurance business in Antwerp, presenting it as 'booming' or 'blossoming', are not correct. See, for those traditional accounts, *R. Baetens*, *De nazomer van Antwerpens welvaart. De diaspora en het handelshuis De Groote tijdens de eerste helft der 17de eeuw*, I, Brussels 1976, p. 264–69; *H. Pohl*, *Die Portugiesen in Antwerpen (1567–1648): zur Geschichte einer Minderheit*, Wiesbaden 1977, p. 268. An exception is *E. Stols*, *De Spaanse Brabanders of de handelsbetrekkingen der Zuidelijke Nederlanden met de Iberische wereld, 1596–1648*, I, Brussels 1971, p. 316–19. He recognized the early seventeenth-century trend of insuring in London, Hamburg, Amsterdam and Dover, rather than in Antwerp.

²⁸ See *Stols*, *De Spaanse Brabanders*, II, p. 158–65.

²⁹ ACA insolvente Boedelskamer (hereinafter IB), 10.

³⁰ A random sample of 639 case files that were drawn from a total of 16,247 (4%), containing written arguments and evidential materials from lawsuits brought in the Antwerp City Court of Aldermen between 1585 and 1713, yielded only two trials regarding marine insurance of before 1650, whereas six others date from after that year. The two lawsuits dated from the 1580s, and one of them had started before the 1585 surrender of the city. See ACA, *Processen* (hereinafter P), S2955 (1585–86) and S245 (1588–89). These data contrast with the cases on other commercial affairs found in the abovementioned sample. Within the same sample of 639 case files, 31 were found concerning bills of exchange, and of these 31 files, 18 date from before 1650. So-called 'extended sentences' of the Antwerp City Court, which are written judgments containing references to arguments that were presented in court, yield comparable numbers. Of 17 sentences regarding marine insurance and dating from the same period between 1585 and 1713, four date from the first half of the 1600s. The decisions dating from before 1650 are: ACA, V, 1291, f. 137 (24 February 1602), 1296, f. 251 (judgment, 3 October 1613), 1315, f. 46v (4 December 1632) and 1324, f. 25v (26 March 1630). Compare these numbers with those relating to bills of exchange: of 34 extended sentences dating from between 1585 and 1713 concerning bills of exchange, 15 date from before 1650. For more details on the sample, see *D. De ruysscher*, 'Naer het Romeinsch recht alsmede den stiel mercantiel'. *Handel en recht in de Antwerpse rechtbank (16de–17de eeuw)*, Kortrijk 2009, p. 25–27.

the second half of the sixteenth century, mediation had been organized in close interaction with the authorities of the city. Commissioned mediators had been chosen from among the merchants and the Antwerp government had formally endorsed them. At first, these commissioners were primarily involved in the calculation of shares in damage compensation following accidents that were admitted as cases of average. After a few years, however, they also determined the insurance compensations that had to be paid by underwriters.³¹ The commissioners did not have the power to settle disputes, which had to be presented before the Antwerp City Court.³² They were commonly referred to as ‘good men’. They could mediate, and check documents and books, but when no compromise could be reached, they could not impose a decision. Instead, when that happened they had to send the case over to the Antwerp aldermen-judges.³³ It seems that this form of mediation by these commissioners and other ‘good men’ dwindled after 1585. The relative decline of marine insurance in late sixteenth and early seventeenth-century Antwerp also made the appointment of the aforementioned commissioners largely redundant. Such commissioners were last mentioned in the late 1620s.³⁴ Clauses referring disputes to be heard before ‘good men’ appeared in marine insurance contracts only in the late 1620s. They were absent from insurance policies before that time.³⁵ Only after 1650 did adding mediation clauses to marine insurance contracts become normal practice (see below).

The structural deficiencies of the 1608 Antwerp insurance law became problematic when, around the middle of the seventeenth century, marine insurance experienced a modest revival. In the Antwerp City Court, the sections of the 1608 compilation could then provide arguments against pleas for compensation. This was the case because most insurance policies, reflecting a living law that had moved away from the official norms, were contrary to the 1608 law book.

³¹ See IISH, NEHA, Special Collections 471, 2.4.13.2 (‘Nous soussignez commis aux assurances ...’, 7 September 1585), 2.4.17.3 (December 1597) and 2.4.20.3 (‘Nous soussignez commis aux assurances et avaries de ceste bourse d’Anvers ...’, 12 September 1602). See also *De Grootte*, *De zeeassurantie*, p. 144–45; *van Niekerk*, *The development*, I, p. 63–64.

³² Although they were sometimes referred to as members of a ‘Chamber of Insurances’, they did not have any official jurisdiction. See *Couvreur*, *Recht en zeeverzekeringpractijk*, p. 201–04; *De Grootte*, *De zeeassurantie*, p. 143–47; *van Niekerk*, *The development*, I, p. 206.

³³ This was normal practice in Antwerp, where the aldermen strongly shielded their competence to decide a case, especially when its solution related to questions of law. See *De ruysscher*, *From usages of merchants to default rules*, p. 13, n. 35.

³⁴ IISH, NEHA, Special Collections 471, 2.4.33.2 (report, 1628). See also *De Grootte*, *De zeeassurantie*, p. 146; *van Niekerk*, *The development*, I, p. 206.

³⁵ *Van Niekerk* cites the example of a 1638 and probably Antwerp insurance policy including a mediation agreement. See *van Niekerk*, *The development*, I, p. 232, n. 167. Another early example of a mediation clause is IISH, NEHA, Special Collections 471, 2.4.40.2 (insurance policy of 25 June 1640).

III. The Living Marine Insurance Law in Standard Terms of Contract (c. 1650–c. 1700)

Around the end of the 1640s, changing contexts facilitated the restoration of Antwerp marine insurance. Shortly after the 1648 Peace of Münster, renewed safety at sea stimulated naval traffic, which contributed to an expanding use of marine insurance. The numbers of shipments to and from Dutch and Spanish harbours mounted.³⁶ In those years, marine insurance in Antwerp underwent important changes. Due to the now unwieldy official law, insurance policies were – at least among merchants who made use of them – considered to be self-reflexive, i. e., as setting up a relationship between the insured and underwriters that stood completely apart from the official laws of Antwerp. One of the results of this development was that contractual insurance terms that had been the subject of negotiations grew to become standard terms applying to any form of marine insurance. The Antwerp merchants had opted for a complete breach with the rules that had been imposed following the 1608 compilation.

1. From Negotiated to Standard Terms

In the seventeenth century, marine insurance agreements predominantly took the form of private instruments, whereas before 1560, they were usually written in notarial deeds.³⁷ The privately written insurance policy, which had occasionally been used before the middle of the sixteenth century, had been swiftly replaced around that time with the contract forms that had been attached to the princely ordinances of 1563, 1570 and 1571. Already by 1590, printed insurance policies, which were based on the 1571 form, served as a basis for almost every Antwerp marine insurance contract.³⁸ However, in spite of the use of printed contracts, it had remained customary to add clauses in writing below the printed provisions of the contract forms and

³⁶ In spite of the generally applied protectionism and temporary crises following the Anglo-Dutch and French Wars, commerce to the United Provinces, for example, remained at a high level. See *R. Birn*, *Crisis, absolutism, revolution: Europe and the world, 1648–1789*, London 2005, p. 46–59; *J. Stoye*, *Europe unfolding, 1648–1688*, London 1988, p. 253.

³⁷ *Van Niekerk*, *The development*, I, p. 469. Of some late sixteenth-century and early seventeenth-century Antwerp public notaries such as Gillis van den Bossche and Michiel van Couwenberghe, it is known that they had mainly merchants as clients. However, samples of their ledgers contain virtually no insurance agreements. See *ACA, Notariaat (ancien régime)*, 470 (1616), 480 (1626) and 3568 (1596). By contrast, most marine insurance contracts that have been made before 1560, and that have been preserved, were found in notarial ledgers. See *De Grootte*, *De zeeassurantie*, p. 96–97.

³⁸ IISH, NEHA, Special Collections 471, 2.4.13.1 (insurance policy of 9 January 1585), 2.4.13.2 (insurance policy of 9 December 1585), 2.4.15.1 (insurance policy, 8 October 1591), 2.4.15.2 (insurance policy, 8 October 1591), 2.4.15.3 (insurance policy, 18 November 1591), 2.4.11.2 (insurance policy of 11 December 1595), 2.4.17.3 (insurance policy of 13 November 1597), 2.4.20.3 (insurance policy of 23 November 1600) and 2.4.26.2 (insurance policy of 7 June 1607). These policies were written on preprinted Spanish forms of the 1571 policy, measuring 322 x 255 mm.

this was still normal practice in the middle of the seventeenth century. Around 1650, these handwritten parts of the insurance policy still reflected negotiations between the insured (or his agent) on the one hand and the underwriters of the contract on the other. It was insurance brokers coordinating these talks, and they often moved between the different parties in order to strike a deal before a contract could be signed. In spite of the importance of mutual consent as to the contents of the agreement, insurance brokers had considerable influence in terms of proposing insurance products and contract clauses, and they also played a vital role in the enforcement of the agreement.³⁹ However, their professionalism must not be overrated and it seems that very soon after 1650, even the handwritten provisions added to the printed forms were highly standardized. This also had to do with an increasingly fierce competition between European insurance markets, which resulted in the hollowing-out of insurance obligations, especially with regard to the disclosure of information between the insured and the underwriter(s).

These developments are clear in the evolving contents of marine insurance contracts dating from the second half of the seventeenth century. Some 451 marine insurance contracts, which were made up in Antwerp on the basis of a printed form between approximately 1650–1720 provide an insight into the changes outlined above.⁴⁰ On the basis of the clauses contained in these insurance policies, it is possible to distinguish standard terms from negotiated terms of contract. Standard terms were not open to compromise, were automatically inserted into the insurance contract and did not bear any relation to the rate of the premium. Most of them reflected normative practices, in which case, adding such terms to the contract relied on a constraint to use them. Such terms referred to a normative practice that any marine insurance encompassed this term and that it could not be altered by the agreement. Standard insurance terms are not per definition standardized as to their formulation, but in the contractual practice of marine insurance in late seventeenth-century Antwerp, it seems that they

³⁹ *Van Niekerk*, The development, I, p. 701–02. The history of Antwerp insurance brokers remains to be written. For some general notes, see *De Grootte*, De zeeassurantie, p. 152–54.

⁴⁰ ACA insolvente Boedelskamer (hereinafter IB), 2446 and 2447. These two files contain 447 marine insurance policies. This rich collection has not been studied before, even though the existence of a collection of ‘hundreds of policies’ in the Antwerp City Archives had already been signalled in 1945. See *Fl. Edler-De Roover*, Early examples of marine insurance in *Journal of Economic History*, 5, 1945, p. 198, n. 91. The 447 mentioned insurance contracts were drafted for the Antwerp merchants Jacques de Lannoy, Jacques de Bruyne, Cornelis de Wael and Willem Forchoudt. Four additional Antwerp marine insurance contracts of the 1650s and 1660s were located in bundles of evidential materials that had been used in lawsuits. See ACA, P, K8793 (contract of 11 December 1666), L9005 (contract of 16 May 1655) and S69 (contract of 17 February 1653); ACA, *Processen Supplement* (hereinafter PS), 3558 (contract of 30 December 1654). These insurance policies (447 + 4) will hereinafter be analysed in detail. In order to check whether their contents are representative, they will be compared with some published insurance contracts, dating from the second half of the seventeenth century. See for those policies *Baetens*, De nazomer, I, p. 381 (contract of 6 July 1674); *Couvreur*, Recht en zeeverzekeringsspractijk, p. 209–11 (contract of 28 August 1676); *van Niekerk*, The development, II, p. 1427 (contract of 9 December 1681).

usually were. Standard terms in different marine insurance contracts mostly had the same phrasing and were often identical. Of course, not every standardized provision was a standard term. Brokers had a portfolio of clauses which they could add to insurance contracts if the parties agreed that they could be used. Similar products and formulas were expressed in the same wording, since brokers recycled previously used provisions of contract and did not create new ones for every insurance policy they negotiated. In short, a standard term, corresponding to a 'risky' insurance, can be distinguished from a negotiated term against the same peril or providing similar coverage on the basis of the relation of the term to the rate of the premium. Comparing the abovementioned insurance policies makes it possible to draw distinctions between different types of contractual provisions (standard terms, stereotyped negotiated terms and varying negotiated terms).

Of the 451 insurance policies noted, 411 (91.13 %) were written on the printed form that had been attached to the 1571 princely ordinance. These contracts had the printed text in the middle of the page with blank spaces above and below it for additions in writing. From the middle of the seventeenth century onwards, the Antwerp government sold these large policy forms (500 x 370 mm or 625 x 490 mm), bearing the city seal, and levied a stamp duty against them.⁴¹ This was certainly inspired by the new expansion of the marine insurance business in Antwerp.

In the middle of the seventeenth century, the additions in handwriting that were made to the printed policy were, as a rule, negotiated. However, even these handwritten provisions could become standard terms. Some contract clauses that had originally been negotiated and written below the printed text on the insurance form evolved to become standard terms and were then added (in handwriting!) to every marine insurance policy. Quite surprisingly, this also happened with respect to clauses covering against risks, which resulted in the aforementioned hollowing-out of the marine insurance contract and in fraudulent practices.

An example of a shift from a negotiated provision on an insured peril towards a standard term not influencing the premium rate relates to the 'perishable or not perishable' clause. In the seventeenth century, it was normal practice, as with cargo insurances, to keep quiet about the nature of the insured object. Secrecy about the contents of insured ships was common: underwriters were not professional insurers specializing in this area of business, but merchants engaging in bulk trade as well, and thus they were competitors of the insured. They might profit from information regarding the quality, value and prices of products that were insured with them. Therefore, the insurance contracts were vague about what exactly was insured, even though they informed the underwriters of the value of the objects under coverage. As a result, identification of insured merchandise was impossible on the basis of the description in the insurance contract alone, which was usually vague and general. Insurance policies referred to such notions as '*koopwaar*' (merchandise) or '*goederen*' (goods),

⁴¹ The stamp duty was introduced with a 1648 princely ordinance. See ACA, PK, 921, f. 55 (17 February 1648).

without further detail. The insurance of cargo was generally proven with the bill of lading, in combination with the name of the ship, which was normally mentioned in the insurance contract.⁴²

However, the aforementioned practices of secrecy and vagueness resulted in the insurance of some goods being riskier than that of others, and this was especially the case for fresh foods, such as fish, meat and salt, and goods that were prone to spillage, such as beer and oil. When the underwriter(s) did not know about either the amount or the quality of such goods, this could result in discussions. It was often difficult to draw the line between (insurable) damages and (non-insured) deterioration. Another problem related to the insurance of valuable cargo (gold, coins and diamonds, but also weapons), which was vulnerable to theft and the presence of which on-board the ship increased the risk of seizure or capture.

In the second half of the 1500s, legislation had responded to these problems. The 1571 princely ordinance and the 1582 and 1608 Antwerp *costuymen* provided that the underwriters had to be informed about the presence of valuables, weapons and foodstuffs (so-called ‘perishable’ goods or ‘perishables’) among the cargo by mentioning them in the insurance policy.⁴³ These rules began to be less frequently applied. Towards the end of the 1600s, non-detailed declarations of shipped goods, which had been common around 1650, had slowly been replaced with the line ‘perishable or not perishable’. A total of 85.71 % (90 out of 105) of cargo insurance policies in which the insured merchandise was not detailed and that had been drawn up between 1690 and 1700, and even 100 % (49 out of 49) of those written in the following decade, contain this clause (see Table 1). This remarkable development was more than a standardization of terms. Not only were the vague descriptions of insured cargo made uniform, but the formula ‘perishable or not perishable’ also received more normative content. At the beginning of the 1600s, the ‘perishable or not perishable’ provision had been used for insuring shipments containing an indefinite portion of foodstuffs.⁴⁴ Back then, the normative contents of the clause referred to the rule that, under the coverage ‘perishable or not perishable’, the underwriter(s) agreed to compensate damages to foodstuffs among the insured cargo even if their nature, amount or state had not been declared. With the mounting popularity of the formula ‘perishable or not perishable’ in the latter half of the 1600s, the normative contents of the coverage were stretched. In the early eighteenth century, merchants regarded the words ‘perishable or not perishable’ as sufficient for the insurance of undeclared and indefinite cargos

⁴² *van Niekerk*, The development, I, p. 288–91.

⁴³ *Coutumes du pays et duché de Brabant. Quartier d’Anvers. Coutumes de la ville d’Anvers*, Brussels, 1871 (ed. G. De Longé), II (hereinafter ‘Antwerp 1582 *costuymen*’), p. 404 (ch. 54, s. 13); Antwerp 1608 *costuymen*, p. 216–18 (book 4, ch. 11, ss. 41–43).

⁴⁴ The clause was in this meaning, condemned in the 1608 *costuymen*. See Antwerp 1608 *costuymen*, p. 218 (book 4, ch. 11, s. 42). In Amsterdam, the provision ‘perishable or not perishable’ was condoned to some extent in a municipal ordinance, and as early as 1614. See *van Niekerk*, The development, I, p. 293–94.

of gold, silver or jewellery as well.⁴⁵ By that time, it had become a normative insurance practice that the underwriters paid out compensation irrespective of what the cargo consisted of, and even when it was only discovered upon shipwreck, seizure or capture that valuable or perishable goods had been on-board. It is remarkable that this widening of the normative contents of the formula did not affect the premium. Near the end of the seventeenth century, Antwerp marine insurance contracts containing the aforementioned broad provision were insured against the same rates as had been applied for non-valuable or non-perishable cargos before 1650.⁴⁶

Another example of a contractual provision that grew to become a standard term was the ‘on good and bad tidings’ clause. Many insurance contracts were signed by agents acting on instructions. The latter were often not aware of the exact date of departure of the ship that was to be insured, something that was often only known to the insured. Even when the latter wanted to communicate this information, news travelled slowly. Messages from the Spanish ports, for example, reached Antwerp with a delay of 30–50 days.⁴⁷ This practice of insuring from abroad had become more important after 1585, when the River Scheldt had been closed by toll barriers. Often it only became clear later on that the cargo or ship specified in an insurance contract had already been lost when the contract was signed. In that case, it was presumed that the insured had not known about the damages if the parties had concluded the insurance contract before the loss could be known. For that purpose, it was presumed that news travelled at a speed of one mile an hour. If, for example, a ship perished 240 miles from Antwerp, a contract insuring its cargo was nonetheless deemed valid if it had been signed in Antwerp within 240 hours or 10 days following the shipwreck. This normative practice was already known in Antwerp in the 1530s⁴⁸ and it had found its way into the 1571 princely ordinance and the Antwerp *costuymen*, which nonetheless adapted the speed calculation to three miles for two hours.⁴⁹ The provision ‘on good and bad tidings’ evolved from a reference to this custom towards a specific insurance product, for which a higher rate applied. In the 1580s, the clause ‘on good and bad

⁴⁵ No policies from after 1700 refer to silver cargo. See for the last known examples of references in a policy to a cargo of that kind: ACA, IB, 2447, 39 (insurance policy of 19 April 1694) and 48 (insurance policy of 19 April 1692).

⁴⁶ See, for example, ACA, IB, 2447, 19 (insurance policy of 7 June 1695) for a voyage from Amsterdam to Cadiz against a 5% premium, which was the regular interest rate. All insurances ‘perishable or not perishable’, after 1650, were signed for premium rates between 5 and 10%, which do not differ from rates applied before 1650 for similar routes, but without the provision.

⁴⁷ *Baetens*, De nazomer, I, p. 93–94.

⁴⁸ The rule is mentioned in a *consilium* of Elbrecht de Leeuw, which was made following a judgment of the Antwerp aldermen dating from 1539. See A. *Wijffels*, Business relations between merchants in sixteenth-century Belgian practice-orientated civil law literature in V. Piergiovanni (ed.), *From lex mercatoria to commercial law*, Berlin 2004, p. 256–59. See further *De Groote*, De zeassurantie, p. 21; *van Niekerk*, The development, II, p. 867, n. 298.

⁴⁹ See s. 11 of the princely ordinance of 20 January 1571 (n.s.) (e.g. in J.-M. Pardessus (ed.), *Collection de lois maritimes antérieures au XVIIIe siècle*, IV, Paris 1838, p. 103–19). See also Antwerp 1582 *costuymen*, p. 402 (ch. 54, s. 10).

Table 1
Descriptions of insured cargo (1650–1720) (ACA, IB, 2446–47)

| | Hull | Specification of the cargo | 'Goods' | 'X or other' | 'Of whatever nature' | 'X or perishables' | 'Perishable or not perishable' | 'Silver' | 'X or silver' | 'Silver or perishables' | Total |
|-----------|------|----------------------------|---------|--------------|----------------------|--------------------|--------------------------------|----------|---------------|-------------------------|-------|
| 1651–55 | | 3 | | 1 | 1 | | 5 | 1 | | | 11 |
| 1656–60 | | 2 | | | | | | | 1 | | 3 |
| 1661–65 | | 2 | | | | | 1 | 3 | | | 6 |
| 1666–70 | 1 | 13 | 2 | | 2 | | | 1 | | | 19 |
| 1671–75 | 2 | 56 | 54 | 12 | 2 | 3 | 11 | 3 | 1 | | 144 |
| 1676–80 | | | | | | | | | | | 0 |
| 1681–85 | | 13 | | | | | | | | 1 | 14 |
| 1686–90 | | 4 | | | | | 9 | 2 | | | 15 |
| 1691–95 | 2 | 20 | | | | 5 | 36 | 5 | | | 68 |
| 1696–1700 | 2 | 20 | | | 1 | 3 | 54 | 1 | | | 81 |
| 1701–05 | 1 | 6 | | | | | 45 | | | | 52 |
| 1706–10 | | 9 | | | | | 4 | | | | 13 |
| 1711–15 | | 2 | | | | | 14 | | | | 16 |
| 1716–20 | | 4 | | | | | 1 | | | | 5 |
| Total | 8 | 154 | 56 | 13 | 6 | 11 | 180 | 16 | 2 | 1 | 447 |

tidings' aimed at preventing discussions on insurance after loss even if the 'three miles, two hours' test failed. In the latter case, when fraud by the insured could be presumed, only a small opening was left for the underwriters to the 'on good and bad tidings' contract. They could have the insurance contract annulled if they were able to prove that the insured had already heard about the damage at the time when he engaged in the insurance contract.⁵⁰ Since information on the route and fate of a ship often remained private, the aforementioned remedy for underwriters hinged on a *probatio diabolica* and was elusive. The normative contents of this 'on good and bad tidings' provision were now so large that underwriters accepting it engaged in high-risk stakes, for which they requested higher premiums.⁵¹ These rewards for underwriters counterbalanced the considerable danger of fraud by the insured.

Bearing these straightforward rules in mind, it is surprising to see that, after 1648, the Antwerp term 'on good and bad tidings' became a standard term, and that it lost its impact on the insurance premium. Of the 451 examined marine insurance policies dating from between 1650 and 1720, no fewer than 444 contain this clause. It is clear that as early as 1650, the 'tidings' provision was a standard term inserted into every marine insurance contract that was drawn up in Antwerp. The normative practice of the 'three miles, two hours' test had been expanded early on to turn into a broadly conceived presumption that the insured had not known about loss occurring before the date of the contract. Actually, ideas as to the timely signing of marine insurance contracts, and the corresponding rule that considered insurances after loss within the 'three miles, two hours' timeframe as null and void, were abandoned. Underwriters now took more risks in this respect and were not compensated for doing so because the premium rate did not reflect the risk.⁵² It seems that this phenomenon resulted from fierce competition between different European insurance centres (Seville, London, Dover, Amsterdam and Rotterdam), in all of which insurance prices dropped in the latter half of the seventeenth century.⁵³ Underwriters in Antwerp start-

⁵⁰ Antwerp 1608 *costuymen*, p. 204–08 (book 4, ch. 11, ss. 13–22).

⁵¹ See *Stols*, *De Spaanse Brabanders*, I, p. 318, referring to premiums up to 20% in the 1610s and 1620s.

⁵² In the later 1660s, Antwerp insurances between northern harbours and Cadiz 'on good and bad tidings' were signed against 4 to 6%. See ACA, IB, 1878. Compare with the 7% premium for a 1655 marine insurance, not 'on good and bad tidings', which was signed in Amsterdam for a trip from Dunkirk to Cadiz. See *van Niekerk*, *The development*, II, p. 1423 (policy drafted in Amsterdam, 30 July 1655).

⁵³ Rates dropped to below 2%, for voyages within Europe by the middle of the eighteenth century. See *J. de Vries* and *A. van der Woude*, *The first modern economy: success, failure, and perseverance of the Dutch economy, 1500–1815*, Cambridge, 1997, p. 137–38. See, for the United Provinces, *K. Davids*, *Zekerheidsregelingen in de scheepvaart en het landtransport, 1500–1800* in *J. Van Gerwen* and *M.H.A. Van Leeuwen* (eds), *Studies over zekerheidsarrangementen. Risico's, risicobestrijding en verzekeringen in Nederland vanaf de middeleeuwen*, Amsterdam 1998, p. 193–95. For seventeenth-century London, see *A.B. Leonard*, *Pricing revolution in marine insurance*, unpublished paper, http://histproj.org/completed/LEO_NARD_Marine%20insurance%20pricing%20revolution.pdf.

ed tinkering with the contents and conditions of marine insurance in order to make their products attractive to merchants who were signing contracts of insurance all over Europe.

The extensions in scope and the increasing use of the ‘perishable or not perishable’ and ‘on good and bad tidings’ clauses attest to fundamental changes in marine insurance after 1650, both in Antwerp and elsewhere. By 1700, Antwerp marine insurances had become more attached to formulas than to negotiation and exchange of information. The developments had made the legal compromises of the 1571 princely law and of the 1582 *costuymen* largely meaningless. The severe contents of the 1608 Antwerp municipal law, which were still in force around 1650 and which were stricter than the aforementioned compromise, provoked a swift and radical reaction from the merchant community.

2. Breaking Away from Legislation

The innovative insurance terms could not be based on the Antwerp municipal law or the princely ordinances. Around 1648, and even earlier, the 1608 *costuymen*, with their many severe and finicky precepts, were understood to be contrary to both earlier conventional practices among merchants and rapidly developing insurance products. The newly-established provisions in marine insurance contracts were (as stated above) often contrary to the official law. The clauses and formulas, written either above or below the printed text of policy forms, were not always consistent with the printed terms that reflected the 1571 princely ordinance to which they were attached.⁵⁴ After 1650, the 1571 policy form had very limited legal significance. It did not form the backbone of the contract, as had been intended, even though nearly every insurance agreement was drafted on such a model contract. In the written parts of the insurance contract, norms of official law, many of which were referred to in the printed lines of the policy, were ruled out. Mentions of data, which were prescribed by legislation and at which the printed form hinted, were circumvented with vague descriptions in the handwritten segments of the policy.

Furthermore, it became common to add a stereotyped clause providing that (princely) ordinances and *costuymen* did not apply to the contract. Of the 451 Antwerp insurance policies dating from between 1650 and 1720, only two lack this renunciation clause. According to the formula, insurance contracts containing the clause had to be understood and interpreted only on the basis of the contents of the written agreement. Ambiguous or unclear provisions should not be interpreted by means of sections of legislation or official law. When accepting insertion of

⁵⁴ Such discrepancies have been reported for early eighteenth-century Amsterdam insurance policies as well. See *Spooner*, Risks at sea, p. 34–35. Most striking is the example of hull insurances, for which the 1571 form was used, even though the latter spoke only of the insurance of cargo. See, for example, ACA, IB, 2447, 58 (insurance policy of 24 October 1695).

the clause, the underwriter promised not to challenge the insurance policy with arguments based on official law.⁵⁵ The popularity of this provision, which grew in the 1650s, was clearly due to the confrontation with the backward municipal law of 1608. The contractual renunciation of legislation that became a standard term in those years had grown out of other clauses, which targeted specific provisions of official law⁵⁶ and thus also reflected distrust of the authorities. The standardization of such formulas accompanied a broadening of their scope of application, which went on to encompass all types of official law, a process which was accomplished very quickly in the middle of the seventeenth century.⁵⁷

Around the middle of the 1600s, contractual provisions on mediation in marine insurance policies quickly became uniform as well and developed into standard terms. As mentioned above, by the first decades of the seventeenth century, the practice of mediation by ‘good men’ in marine insurance had virtually disappeared in Antwerp. After the revival of the arrangement in the late 1640s, mediation was generally organized with ‘good men’ appointed by the parties, and henceforth mediation clauses were commonly written into insurance contracts. Contractual provisions on mediation became standardized in the 1650s.⁵⁸ They were included in 448 of the 451 Antwerp marine insurance policies dating from between 1650 and 1720. The typical mediation clause provided that any conflict arising out of the insurance contract had to be solved by two men frequenting the Exchange. Its purpose was to prevent a dispute regarding the insurance contract being brought before the city’s aldermen, who were likely to impose official law on the agreement. With a mediation clause, the parties aimed at raising the status of their contract above the law, and in particular above the 1608 law. The clause therefore complemented the provision phrasing re-

⁵⁵ After 1650, the customary phrasing was ‘... met renuntiatie van alle ordonnantien rechten ende exceptien die daer in ons faueur souden moghen wesen, dese assurance eennichsints contrarierende ...’ (‘... renouncing the application of all ordinances, laws and exceptions to our advantage and contradicting this policy ...’).

⁵⁶ Some policies renounced from the 1563 princely ordinance, for its reaction against insurance ‘on good and bad tidings’, or for its inhibition to insure more than half of the hull. See, respectively, IISH, NEHA, Special Collections 471, 2.4.17.3 (insurance policy of 13 November 1597) and 2.4.27.1 (insurance policy of 26 July 1607).

⁵⁷ Still in the 1630s, most Antwerp marine insurance contracts did not contain the renunciation clause. See, e. g., IISH, NEHA, Special Collections, 471, 2.4.37.2 (insurance policy of 28 May 1636). In the 1640s, the renunciation clauses inserted into some policies were not yet harmonized. See, e. g., IISH, NEHA, Special Collections 471, 2.4.40.2 (insurance policy of 25 June 1640). Only after 1650 was the stereotyped formula cited in n 56 used in (nearly) all Antwerp contracts of marine insurance.

⁵⁸ The formula was ‘... ende hebbende eenighe difficulteyt sal alles geeffent worden door twee mannen met eere van de borse van Antwerpen, hun des verstaende’ (‘... and any dispute will be settled by two men of honor of the Exchange of Antwerp with experience in the matter’). *The standardization took place in the later 1650s.* See, e. g., ACA, P, S69 insurance contract of 17 February 1653, with another mediation clause. This clause has been described as an ‘arbitration clause’, but it was not intended to procure the ‘good men’ with the powers to decide a dispute against the opinions of those involved. See *van Niekerk*, *The development*, I, p. 232.

nunciation from official law. After 1650, the mediation clause, as well as the renunciation clause, was a reflection of an insurance custom not to resort to official rules and courts, and neither of the two provisions related to the insurance premium.

IV. Marine Insurance Law in Action in the Antwerp City Court (c. 1650–c. 1700)

In spite of the popularity of mediation clauses in marine insurance contracts, lawsuits on the fulfillment of such contracts were brought before the Antwerp City Court. Even though after 1650, mediation in marine insurance disputes became popular once again it remained possible to have insurance policies tested against the official law by the municipal judges. Even if a contractual provision referred differences of opinion regarding the fulfillment of the agreement to the ‘good men’, according to the Antwerp aldermen-judges, it was acceptable to summon an insurance underwriter to the court, even if no ‘good men’ had been appointed. This was a practice that was – of course – condemned within the merchant community,⁵⁹ but this did not prevent the Antwerp City Court from hearing cases of this kind. Moreover, the Antwerp aldermen also decided lawsuits that were brought before them following the drawing-up of a compromise under the guidance of mediators, which subsequently had been breached by one of the parties to that agreement.⁶⁰ Before the City Court, a contractual provision renouncing legal arguments did not have any effect whatsoever. As a result of this litigation that went against mediation and renunciation clauses, in the 1650s and 1660s, the recent insurance terms and conditions, which largely differed from the earlier practices, were tested before and by the Antwerp Court. Judicial decisions provoked other cases. Therefore, in these years, the number of lawsuits in the City Court relating to marine insurance grew.⁶¹ The fact that it remained possible to seek justice before the Antwerp aldermen – before, during or after the mediation efforts or talks under the direction of the ‘good men’ – made that the official norm, and the judicial approaches towards their application and interpretation influenced standards that were used during extra-judicial conflict management as well. Mediated settlements radically confronting the views of the Antwerp City Court were exceptional, because in that case, the frustrated party would have been able to seek compensation from the aldermen-judges.⁶²

⁵⁹ E.g., ACA, PS, 3558 (1656).

⁶⁰ ACA, P, M9627 (1653–57).

⁶¹ Of the eight case files submitted to the Antwerp City Court between 1585 and 1713, four were brought in the court in the 1650s. Of the 17 extended sentences of the Antwerp Court concerning marine insurance, which were made in the same period, six date from the 1650s and 1660s. See *De ruysscher*, ‘Naer het Romeinsch recht alsmede den stiel mercantiel’, p. 299 and p. 304.

⁶² A 1653 report of four ‘good men’ regarded the decision of a captain to navigate to a dangerous harbour. The insurance policy had stipulated that the captain could go for anchor in any harbour. According to the defendant, who was one of the underwriters, such a clause did

After 1650, the Antwerp aldermen had to seek a new compromise by weighing the different interests involved and by trying to balance older and outdated laws against the new customs of merchants. This is clear in their decisions concerning the above-mentioned ‘perishable or not perishable’ and ‘on good and bad tidings’ insurance clauses. The arguments of advocates as to the applicable norms in lawsuits regarding those clauses went in all directions. The many sections of the 1608 municipal law compilation imposing the mentioning of data or limiting insurance products were cited by underwriters’ advocates when they claimed that the insurance contract was null and void.⁶³ For the ‘perishable or not perishable’ insurance clauses, it proved problematic that neither the 1608 *costuymen* nor the older laws acknowledged the general term. Advocates of the insured could thus only plead the binding force of agreements in response to arguments of the aforementioned kind.⁶⁴

In spite of their seemingly weaker positions, advocates’ tactics nonetheless proved successful very quickly. Already in 1652, testimonials of merchants on the ‘perishable’ clause were inserted into the official ledgers of the city. Merchant witnesses had stated at a *turbe* inquiry (i. e. an inquiry inquiry of a group of specialists by a court on a point of custom) that the ‘perishable’ provision customarily served to insure – even non-detailed – foodstuffs.⁶⁵ Such *turbe* inquiries were organized by the Antwerp aldermen: when in the course of a trial a party wanted to prove a normative practice (*coutume*) that could not be found in ordinances or compilations of municipal law, 10–12 experts were interviewed and asked whether the alleged norm was of municipal law.⁶⁶ The merchant testimonies demonstrate the gradual integration of the new insurance custom into the Antwerp legal scenes. It was consecutively applied by the Antwerp City Court. In a 1707 judgment, for example, the contention made by an underwriter that a cargo of silver coins had not properly been described in the insurance contract containing the ‘perishable or not perishable’ clause was ignored and the Antwerp aldermen sentenced him to pay out compensation.⁶⁷ A 1711 decision of the Antwerp City Court decided likewise against allegations that even though grain had been insured while using the ‘perishable or not perishable’ provision, this description had been insufficient.⁶⁸ Most probably, in the aldermen’s opinion, arguments on the nullity of the insurance contract were less persuasive than the

procure the freedom to sail to enemy or dangerous harbours (a French vessel had sunk the Spanish ship). In their report, the mediators nonetheless confirmed the insured’s claim, thus following the contract and official law. See ACA, P, M9627 (1653–57).

⁶³ ACA, P, S69 (1653), M9627 (1653–57) and D6012 (1705–57).

⁶⁴ ACA, PS, 2052, written arguments, 14 October 1676, s. 14, and 3062, written arguments, 8 May 1669, ss. 32–36.

⁶⁵ ACA, V, 70, f. 160 (31 May 1652). In December 1677 and January 1678, this same rule was repeated in new *turben*. See ACA, V, 71, f. 28v (29 December 1677 and 5 January 1678).

⁶⁶ See in detail, *De ruysscher*, From usages of merchants to default rules, p. 12–14.

⁶⁷ ACA, V, 1360, f. 136 (judgment of 13 July 1707).

⁶⁸ ACA, V, 1361, f. 97v (judgment of 10 July 1711).

fact that the underwriters had acknowledged its flaws when signing it, which reflected the *nemo auditur* principle of the *ius commune*.

In one respect, the 1608 law was also invoked for the benefit of the insured. The 1608 collection could be used in favour of the ‘on good and bad tidings’ provision, even though it had subjected it to conditions. Following the application of the ‘on good and bad tidings’ contractual term, in its stretched normative meaning, to all marine insurance contracts, the interests of underwriters were seriously challenged. As previously mentioned, for a ‘on good and bad tidings’ contract, even when the insured failed the ‘three miles for two hours’ test, the underwriter had to demonstrate the insured’s knowledge of the loss at the time when the insurance policy was signed. Yet, new emerging means of business communication softened the underwriters’ risks to some extent, as they provided them with more possibilities to demonstrate fraud.

After 1620, newspapers, which reported *inter alia* on naval accidents became well-liked in the Low Countries.⁶⁹ In the early eighteenth century, journals distributed in harbours of Northwest Europe listed departures and arrivals of ships.⁷⁰ These documents could be used as evidence on early rumours of calamities. However, in fact, the stubborn 1608 Antwerp law was difficult to handle in this respect as well, because even when facing proof of this sort, the insured could claim his entitlement to a decisive oath. Thus, even when being confronted with overwhelming evidence to the contrary, the insured could state that he had not known about the damages when signing the insurance contract. The procedural technique of the decisive oath was confirmed in the 1660s in judgments of the Antwerp aldermen when, due to the revival of marine insurance in Antwerp, the judges heard more pleas on this matter.

The new discussions surrounding ‘on good and bad tidings’ insurance clauses can be illustrated by a case pending before the Antwerp City Court between 1668 and 1673. In December 1666, a few days before an insurance policy was presented to an underwriter for its signing, a commercial paper that was distributed in the city of Haarlem in Holland brought the news that the insured ship had sunk at sea. Even with suspicions being raised, and in spite of the evidence pointing towards his guilt, the aldermen nonetheless granted the insured the facility of disavowing the allegations by means of an oath.⁷¹ Around the same time, a similar dispute occu-

⁶⁹ The 1668–73 trial refers to the *Gazette van Haarlem*, which was also known as the *Haarlemse courant* and which had been founded in 1662. On seventeenth-century Dutch newspapers, see *O. Lankhorst*, *Newspapers in the Netherlands in the seventeenth century*, and *P. Arblaster*, *Policy and publishing in the Habsburg Netherlands, 1585–1690* in B. Dooley and S. Baron (eds), *The politics of information in early modern Europe*, Oxford 2001, respectively p. 151–78 and p. 179–98.

⁷⁰ In London, a first newspaper including lists of departures and arrivals of ships was issued in the 1690s. See *J.J. McCusker*, *The demise of distance: the business press and the origins of the information revolution in the early modern Atlantic world in American Historical Review*, 110, 2005, p. 295–321, at p. 309–10.

⁷¹ ACA, V, 1346, f. 259 (judgment of 20 December 1668).

pied the Antwerp City Court: it was proved that two weeks before underwriters accepted insurance of a vessel, rumours of its shipwreck were already circulated in Hamburg. In the judicial decision, again no exception was made to the 1608 rule, and the claimant received compensation from the underwriters following a solemn statement of his clear conscience.⁷²

Even though these solutions may seem unfair, in other lawsuits the aldermen nonetheless set forth equitable standards, and they did so by adapting the older rules of official municipal law regarding ‘on good and bad tidings’ insurance clauses. Disputes on the dispersal of information were commonly decided in favour of the insured, but this was only the case if no substantive indications of fraud were found. In the aforementioned lawsuits, the decision had most probably been based on doubt, which had then been interpreted to the advantage of the insured claimant. The abjuration of charges of fraud was considered to be an appropriate remedy only under those circumstances. In 1668, for example, an insured claimant summoned an underwriter to the City Court after having received a letter from his agent in which it was stated that the insured ship was lost somewhere along the coast of Holland. The insured immediately drew up a statement of abandonment of the cargo, in return for which he could claim compensation from the insurers. According to the normative practices among merchants and the official law, such a forfeiture of a shipment could only be done if no news had been received during the year that followed the signing of the insurance contract.⁷³ The insurance policy had been drafted in October 1667, and already by March 1668, summons for compensation were presented in the Antwerp City Court. During the trial, it was discovered that there was no substantive news of an accident, and the claimant did not bring the slightest material evidence of a probable loss. As a result, the aldermen rejected the demand for compensation and did not offer the insured the possibility of swearing an oath.⁷⁴

Indeed, the flexibility of the Antwerp aldermen, of which the acceptance of the ‘perishable or not perishable’ provision and the adaptation of the 1608 rules on ‘good and bad tidings’ are examples, did not result in the condoning of all usages and normative practices. The City Court sought a new compromise between the ideas of merchants and the outdated standards of early seventeenth-century official law. On the one hand, as the granting of the oath on ‘on good and bad tidings’ insurance demonstrates, the Antwerp City Court refused to accept what was stated in the insurance policy without preliminary control as to the facts, and on the basis of reservations as to fraudulent behavior. The oath was a requirement that had been prescribed by the 1608 law compilation, and in the later seventeenth century, the Antwerp aldermen continued to impose it on the insured, even though a test of the good faith of the insured clearly went against the intended meaning of the ‘on good and bad

⁷² ACA, P, K8793 (1668–73). An example of a similar decision can be found in ACA, V, 1348, f. 1v (judgment of 7 January 1671).

⁷³ *De Grootte*, *De zeeassurantie*, p. 20 and p. 111–12.

⁷⁴ ACA, V, 1349, f. 279 (judgment of 11 January 1673).

tidings' contract clause. The judges considered the official law, which they nonetheless interpreted, as being applicable, and the customary renunciation clauses in marine insurance contracts were ignored. On the other hand, the insurance contract remained an important benchmark for the judges and, in many cases, which is shown by the example of the 'perishable or not perishable' provision, terms that had been outlawed by earlier official law could be acknowledged and enforced.

Soon after 1650, the Antwerp aldermen adhered to legal principles holding the middle ground between rigorous sections of the 1608 compilation, the more moderate 1571 and 1582 official laws, and the new normative practices. This attitude was not so different from the approach of the Antwerp government in the second half of the sixteenth century. The support that was offered by the Antwerp aldermen-judges was the main reason why Antwerp insurance policies could further develop in the direction of standardized contracts lacking information in many respects. The continuing use of mediation and renunciation clauses in Antwerp insurance contracts after 1670 was – quite paradoxically – due to the flexible attitude of the City Court's judges. Even though after 1670 a lawsuit before the Antwerp City Court was not a real danger to parties involved in an insurance contract, they stuck to these standard terms that had earlier been inserted so as to avoid control from the municipal judiciary. This was caused by the standardization of terms and probably also by the fact that the 1608 *costuymen* remained in force, even though they were adjusted by the Antwerp aldermen.

V. Conclusion

The developments relating to marine insurance in the city of Antwerp in the second half of the seventeenth century demonstrate the dynamic relationship between the relevant living law consisting of normative practices that were used by merchants residing or trading in Antwerp, and the law in action regarding the subject, which was the judicial practice of the Antwerp City Court of aldermen.

By the middle of the seventeenth century, the aforementioned living law of merchants and the official law of the city of Antwerp had drifted apart. In the second half of the 1600s, when marine insurance was revived in Antwerp, the law in action of the Antwerp City Court soon caught up with mercantile practices. Following a confrontation with the commercial novelties, the Antwerp judges adjusted older official norms that had been written in the municipal law compilation of 1608 to elements of living law. The Antwerp aldermen could not be too strict in their approach to marine insurance practice, for the commercial stakes were high and a severe policy could turn the marine insurance economy into a scam-ridden and uncontrollable black market. The living law of merchants had become involved with the standardization of terms of contract and the generalization of certain insurance products, which before 1650 had been offered against high rates of premium, but which were now considered as elements that pertained to every marine insurance contract. This breaking away from official law had not made the living law entirely immune to

interference by judges. Even though merchants considered insurance contracts as being self-reflexive and mediation was preferred as a method of dispute resolution, actions and ensuing agreements were dependent on what the official law provided. In the 1650 s and 1660 s, the Antwerp aldermen bent the existing written law of the city, but this new approach did not end up in an assimilation of legal 'orders' concerning marine insurance. The living and official law did not become completely identical as to the contents of rules. The aldermen did more than integrate the customs of merchants into their judicial practice, for they continued to set out standards for behaviour, but now on the basis of newly acknowledged mercantile techniques, usages and customs. The law regarding mercantile contracts cannot be reduced to a customary law made by merchants, and not should official law be regarded as out of touch with commercial realities. Interactions between the living law of merchants and the official law were natural: each one had an impact on the other. Whether they became intertwined with or opposed one another depended largely on the attitudes of the legislators and the courts.