Civilians and Insurance

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1. Premise

‘Italian writers, seeking in Roman law what is not to be found there, got themselves entangled in dissertations more likely to fatigue the mind than to enlighten it.’ With a couple of lines written in late eighteenth century, Emerigon dismissed centuries of Civilians’ debates (‘Italian’ should perhaps be read as mos italicus) as plain nonsense. He was right of course. And yet this article is entirely devoted to such nonsense. It does not aim at reconstructing the actual practice of insurance, but the issue faced by Civil lawyers. For a Civilian, a contract was valid if supported by Roman law. Some support, therefore, had to be found for this new contract. Inconveniently enough, early modern insurance had little to do with Roman law, yet it ought to be described through Roman categories. In other words, Civil lawyers had to square the circle. This paper does not aim at a thorough survey of early modern authors who dealt with insurance. There would be little point in that, as there are already excellent studies. Rather, the purpose is to look at the most significant among those ‘mind-fatiguing’ dissertations in order to study the approach of Civil lawyers towards a new instrument. A first consequence is the choice of authors: medieval jurists will be overlooked almost entirely, little attention will be paid to moral theologians, and

* I am particularly grateful to John Cairns, Paul du Plessis and David Ibbetson for reading the manuscript and giving me precious suggestions. All errors remain obviously my own.

1 ‘Les Docteurs Italiens, voulant trouver dans le Droit romain ce qui n’y est pas, se sont enveloppés dans des dissertations plus capables de fatiguer l’esprit, que de l’éclairer’, Balthazard-Marie Emerigon, Traité des assurances et des contrats à la grosse, Marseille, Chez Jean Mossy, Imprimeur du roi, 1783, vol. 1, p. 8.


3 This also means that the so-called contractus trinus (a combination of partnership, sale and insurance) will be ignored: hotly debated among moral theologians, it was neglected by Civilians (and, incidentally, never heard of in mercantile practice). For a short introduction on this ‘triple-contract’ see however the classic work of J. P. Levy, “Un palliatif à la prohibition de l’husure: le ‘contractus trinus’ ou ‘triplex’”, Revue historique de droit français et étranger, Série 4, 18 (1939), 423-433, esp. 425-426, and, among the most recent contributions, W. Decock, “In Defense of Commercial Capitalism: Lessius, Partnerships and the Contractus Trinus”, SSRN Max Planck Institute for European Legal History Research Paper Series, 2012(04), 1-36.
business-oriented authors⁴ will not even be taken into account. Further, chronology will not be strictly observed, authors repeating in a few lines what they found elsewhere will be normally overlooked, and secondary points will be dismissed. Complex debates not immediately related to the systematisation of insurance within the Civil law (such as causation and casus fortuitus) will not be mentioned. If we accept them for what they are, Civilians’ dissertations on insurance might prove fascinating. Far from providing a legal description of commercial reality, they offer some interesting insights in the way Civil lawyers filtered reality through the lens of Roman law. This ‘approximation’ of reality to the law took place on two distinct but complementary levels: first, the contractual category chosen to describe insurance; second, its application to actual insurance issues. No general contractual category (i.e. no nominate contract) was entirely compatible with insurance on both levels. This resulted in much mental gymnastics (‘legal convulsions’ would perhaps be more appropriate).

We will first examine the main contractual schemes adopted, and then proceed with the issues faced by their advocates. Once dealt with the Civilians’ approach in their own terms, a short conclusion will seek to assess what reasons moved them.

2. The quest for the ‘right’ contractual scheme

2.1. Prologue: the problem of usury. From locatio-conductio to emptio-venditio

Although insurance was practiced almost continuously from antiquity,⁵ Romans had the great advantage not to be devout Christians. It was only in the Middle Ages that usury became a significant obstacle to insurance.

It is trite knowledge that the root of all problems on insurance was the premium: the insurer was simply agreeing to cover the value of the merchandise in case of mishap against the payment of a sum of money. The premium he received was therefore dangerously close to usury: barring mishap, his money would produce more money. In the Roman maritime loan (foenus nauticum), the insurer was also a lender. The sum lent to the borrower allowed him to furnish his ship or to acquire the goods with which he intended trading. The lender would receive back his loan, but only if the ship arrived safely at destination. Thus the insurer lent a sum to the merchant and assumed the risk of mishap. So, technically, he was not just producing money out of his capital. But, because of the risk involved, exorbitant interests were normally asked. This prompted pope Gregory IX to issue the famous decreetal Naviganti, forbading foenus nauticum as usurious.⁶ The decreetal had a momentous effect: in a

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⁴ That is, authors not interested in legal disquisitions. Legal issues might come up in works of writers such as Benedetto Cotrugli (or Benedictus de Cotrullis), Gerard Malynes and Jacques Savary (to name but a few), but always as a means to a different, more practically-oriented end.


⁶ X.5.19.19: ‘Naviganti vel eunti ad mundinas certum mutuans pecuniae quantitatem pro eo, quod suscipit in se periculum, recepturus aliquid ultra sortem, usurarius est censendus.’ On the interpretation and scope of Naviganti, the number of primary sources is exceedingly vast (and modern scholarly literature, boundless). Perhaps the best introduction is that of Martin de Azpilicueta, better known as Doctor Navarrus (1492-1586), Commentario resolutorio de usura, Barcelona, en casa de Clausio Bornat, 1557, both because it is entirely focused on the decreetal (as interpreted by a great
short while overt contracts of foenus nauticum virtually disappeared from notarial records. If souls were safer, trade was in danger. Naviganti was clear in its prohibition, yet its target (the maritime loan) was a two-fold agreement: risk-shifting and money-lending. Channeling the prohibition to just one part of it would have meant saving the other. The more the taint of usury could be put on the loan, the easier it would be to rescue the risk-shifting element. In retrospect, it is hardly surprising that this is what happened: the two sides of the agreement were both logically and technically separable. One of the first important attempts to 'rescue' the risk-shifting element came from the famed theologian Bartolomeo of San Concondio (Bartholomaeus de S. Concordio, 1262-1347), the author of the widely popular Summa casuum conscientiae seu Pisanella of 1338. Bartolomeo argued that in foenus nauticum the lender’s interest had a twofold cause: ratione mutui and ratione periculi. While the interest ratione mutui was usurious and condemned by Canon law, the interest ratione periculi was legitimate.

The idea began to gain momentum also among Canon lawyers. A few decades after the Pisanella, it was endorsed by one of the greatest Canonists of his time, Francesco Zabarella (1360-1417). With Zabarella the passage from maritime loan to modern insurance was already fully-fledged: while the loan ought to be condemned, ‘the passage of the risk may well be the object of a separate contract’.

Focusing on the passage of risk (susceptio periculi) was the key. The problem was the legal clothing of such a passage. Not all Canon lawyers were as accommodating as Zabarella. In a guise or another, the same objection stood for centuries. As Sinibaldo de Fieschi (Sinibaldus de Fieschis, c.1195 – 1254, from 1243 Pope Innocent IV) lucidly argued, so long as the thing-at-risk remained with the insured any undertaking

number of late medieval and early modern scholars), and for it has the advantage to have been entirely translated in English by J. Emery, “Commentary on the Resolution of Money”, Journal of Markets & Morality (2004) 7(1), 171-312.


9 ‘Civilians' approach to foenus nauticum falls way beyond the scope of this work. Glossators did not devote too much attention to the subject, yet their analysis is complex enough to discourage rushed attempts to provide a brief summary. Suffices to look at Accursius' glosses to D.22.2.1 (Digestum vetus, Perusii, Cuy, 1476, § Traiecticia, fol. 417v) and C.4.33.2 (Codex, Venetiis, Baptista de Tortis, 1500, § De nautico fenore, fol. 117v; see also ibid., C.4.33.4, § Cum pronaos). Postglossators followed suit and continued to analyse the two faces of foenus nauticum, yet they did not feel the need to separate them in full – as merchants were beginning to. This started the progressive (and incremental) forking between law and practice on insurance.

10 The Summa Pisanella was probably meant as an ‘updating’ of the Summa Confessorum of Johannes von Freiburg (d. 1314) to integrate it with the Liber Sextus and the Clementinae. Perhaps because of the large number of manuscripts, there is no critical edition of the Pisanella to date. The relevant passage on insurance is transcribed in Pesce, note 2, 42, note 3.

11 ‘Susceptio periculi bene potest deduci in contractum de se'. While the loan is illegitimate because usurrious, ‘it is lawful to receive something because of the transfer of the risk’ (‘alias liceret propter susceptionem periculi aliquod percipere’). Zabarella, Francisci Zabarellae ... Super primo [-quinto] Decretalium subtilissima commentaria ..., Venetijs, apud Iuntas, 1602, ad V.19.17, § Naviganti, fol. 89r.
would fall within the scope of Naviganti. To avoid this, there should be a clear relationship between the insurer and the thing-at-risk. For instance, continued Sinibaldo, if the shipmaster also acted as insurer of the cargo, the agreement would not be usurious. In such a case, the insurer would be effectively doing something (carrying the merchandise as well as being responsible for its safety) and so he could well receive a price for his work. The future Innocent IV was a conservative on the subject, but his point was, technically speaking, inescapable. Unsurprisingly enough, the debate dragged on for centuries. So long as the insurer had no direct relationship with the thing-at-risk, his undertaking to preserve it against a premium remained suspicious.

This is probably why the first attempts to classify insurance as a nominate (and legitimate) contract looked at locateto-conductio. If susceptio periculi was considered as labor, then bearing the chance of loss would resemble an actual task. One of the first attempts – in truth no more than a hint – was made by the Florentine Dominican Piero Strozzi (Petrus Strozzi, 1293-1362). Strozzi’s passage was then copied by the

12 Commentaria Innocentii Quarti ... Super Libros Quinque Decretalium, Francofurtum ad Moenum, per Martinum Lechler, impensis Hieronymy Feyerabend, 1570, ad V.19.17, § Navigonti, fol. 518v: ‘fatemur tamen, quod si navigans pretium accipiat, vel alius, ut pecuniam semum ultra mare deferret, ibi sibi redditar, sive periculum in se recipert, sive non, non esset usura, sed locatio operarum, suti non accipit pretium tantum, ut portet, sed negotiatori dat, in ea negotiatu, haec est usura, quia pecuniae nullus est usus, vel utilitas utendi, nec deterioratur utendas, vel periculi, nec laboris vel periculi, nec scio eum excusare, licet alii contradixerint’. 

13 The complex and long debate was in fact very simple. Ultimately, Canon lawyers were perfectly conscious of two irreconcilable facts: foenus nauticum was at the same time both useful (and wisely regulated by the Romans), and sinful (and expressly forbidden by the Church). This tension is already indeed, almost palpable – in the work of the great Canon lawyer Henrico de Susa, cardinal Hostiensis (c.1200-1271), Henrici a Segusio Cardinalis Hostiensis, Aurea Summa, Coloniae, Sumptibus Lazari Zetzneri Bibliopolae, 1612, ad V.19.17, n. 3 and 5, c. 1434-35. First, Hostiensis briefly condemns the foenus nauticum without exception (ibid., § Quot sunt eius species [n. 3], c. 1434-35). Then, he provides a lengthy and detailed explanation of its working – with the excuse of describing what the Romans did before the Canon law prohibition (ibid., § Ex quibus causis [n. 5], c. 1435).

14 Strozzi, Opusculum de Monte, in J. Kirshner (ed.), “Storm over the ‘Monte Comune’: Genesis of the Moral Controversy over the Public debt of Florence”, Archivium fratrum praedicatorum 53 (1983), 219-276, at 268, lines 350-351: ‘Iste enim qui portat mercianias et assccurat, recipit pretium sui laboris vel periculi’. The object of Strozzi’s Opusculum was the liceity of Florentine public debt obligations (the Monte Comune), and in particular whether the bondholder of a forced loan obligation could sell the bond to a third party. It would seem that Strozzi wrote to dispute the argument of the Franciscan Francesco of Empoli (Francesco di San Simone da Pisa, 14th century). Francesco sought, in classical Franciscan fashion, to distinguish use of money from its possession, and to allow the voluntary resale of the bond. The transferee would thus not step in the transferor’s position, but they would remain different from each other. Further - and crucially - he argued that, as repayment of the capital is unsure, the interest that the transferee of the bond would receive is licit. Strozzi did not accept the distinction between use and possession, and so held that the transferee would replace the transferor and become the principal obligee of the forced loan. Accordingly, he could not receive any interest of the bond, for that would be usury. For a short summary see Ceccarelli, note 2, 618-619.

The principle that combining labor with risicum was the key to escape the decretal Naviganti. It derived directly from the text of the decretal itself, which put an exception to its prohibition: ‘Ille quoque, qui dat X. solidos, ut alio tempore totidem sibi grani, vini vel olei mensurae reddantur, quae licet tunc plus valeant, utrum plus vel minus solutionis tempore fuerint valuitae, verismilititer dubitatur; non debet ex hoc usurarius reputari. Ratione huius dubii etiam excusatur, qui pannos, granum, vinum, oleum vel alias mercies vendit, ut amplius, quam tunc valeant, in certo termino recipiat pro eisdem; si tamen ea tempore contractus non fuerat venditurus’, V.19.17. For a short and
Canon lawyer Lorenzo Ridolfi (Laurentius de Rodulphis, 1362-1443) in his Tractatus de usuris (1402-1404), who classified insurance as locatio-conductio. In describing the insurer as the locator (operae), Ridolfi sought to distance the agreement from the usurious mutuum and to shape it as actual work. It was because of the opus he undertook that the insurer-conductor was paid by the insured-locator, not because of a purely financial undertaking. By Ridolfi’s times Florentine insurance policies were rather open on the nature of the agreement: the insurer simply undertook to pay in case of mishap. The scheme envisaged by Ridolfi was therefore a close description of reality in Civil law terms: the insurer undertook the opus to warrant for the safety of the insured thing. It may not be fortuitous that Ridolfi seems to have been the first jurist to use the neologism ‘assecurare’, for that was found in coeval Tuscan insurance practice. Closeness to reality, however, does not necessarily make things stronger in law. The objection of many Canon lawyers, embodied in Sinibaldo’s few lines on the subject, stood like a Damocles’ sword on the locatio scheme. No legal cosmetics could fully justify the premium. If the thing-at-risk remained with the insured, the opus was too abstract to cleanse the taint of usury.

particularly insightful example see e.g. Luis Saravia de la Calle (fl. 1544), Instrucion de mercaderes muy prouechosa. En la qual se enseña como deven los mercaderes tracter y de que manera se han de evitar las usuras de todos los tractos de ventas y compras. Medina del Campo, Pedro de Castro … a costa de Antonio de Vruëuela, 1547, ch. 8, § Del lucro cessante, fol. 30r.
16 Given the substantial affinity between locatio operis and operarum, it is not easy to qualify the insurer as conductor or locator. Apart from Ridolfi, all later advocates of insurance as locatio-conductio simply wrote about him as ‘assecurator’. It would be somewhat ahistorical (and dogmatic) to distinguish sharply between the two kinds of locatio until modern times. Given that medieval authors considered locatio operis essentially a kind of locatio operarum (or rather, they did not see the point in any sharp distinction between them), for the present purposes it seems more correct to qualify the insurer as locator, just as Ridolfi did. Cf. R. Fiori, La Definizione della ‘Locatio Conductio’: Giarisprudenza Romana e Tradizione Romanistica, Naples, Jovene, 1999, esp. 306-308.
17 It has been suggested that Ridolfi sought to assimilate insurance to locatio-conductio because, in open conflict with the Franciscans, he sided against the separation of money’s ownership from its use: Ceccarelli, note 2, 621. Further, in Ridolfi’s treatise the Monte Comune issue comes immediately after insurance (both are in his tertia particula principalis; insurance is dealt with until n. 11, fol. 38v; and the Monte issue starts immediately thereafter, from n. 12, ibid.). However, while of course this is possible, there might be a simpler explanation. Locatio-conductio was the first contractual scheme invoked by Canon lawyers and theologians alike, starting at least in the thirteenth century. Already Sinibaldo de Fieschi used the locatio scheme to highlight the difference between lawful and usurious maritime contracts (supra, note 12). Further, and more importantly, locatio-conductio was an extremely broad contractual figure, capable of encompassing nearly any undertaking. The most objective description of insurance was the innominate facio ut des, but its the closest approximation as a nominate contract was locatio-conductio.
19 Supra, note 12.
20 It is no coincidence that the sixteenth century author most fiercely opposed to insurance, Conrad Summenhart (1458-1502), effectively applied the same reasoning as Innocent IV to deny legal standing to insurance shaped as locatio-conductio: [assecurator] praedictus justificando contractum [assecurat] inducit, quod ibi sit locatio et conductio, modo illa via cessat, quando nullas operas [assecurator] apponit circum mercem [assecurat]. It was difficult to consider a mere financial undertaking as opus: ‘fimdamenta cessant assecurans nullas impedit operas’. Summenhart, De
The solution was suggested only a few years after Ridolfi by the Genoese Civilian Bartolomeo Bosco (Bartolomeus de Bosco, d.1433/37). Bosco fully accepted Sinibaldo’s point – in order for the contract to be lawful, the thing-at-risk must pass to the insurer. And so it did: for Bosco, insurance was a particular case of emptio-venditio. The insurance contract was a conditional sale of the merchandise shipped: in case of safe arrival at destination, the sale was void. The whole mechanism was obviously thought as a way to use the principle res perit domino. The insurer would pay out because he was the dominus rei. This classification did not justify the premium but that was a minor issue, for it was not put in the contract and often paid in advance. The problem was how to force the insurer to honour his undertaking in the event of mishap without letting him bring up the usufty question. At least, this was the main problem for learned jurists. From their perspective, the idea of a straightforward contract of sale solved many issues.

It is not clear whether Bosco was the first jurist to shape insurance as conditional sale. In the relevant passages of his consilia on the subject he never quotes any auctoritas other than Roman law texts. It is just possible that Bosco gave legal form to the thought of another theologian. Just as Ridolfi looked at Strozzi, so the possibility cannot be excluded that Bosco was influenced by the reflections on usurious contracts of Bernardino of Siena (St. Bernardinus Senensis, 1380-1444). Bernardino founded his argument on the same principle as Sinibaldo de Fieschi: only a clear, strong link between the insurer and the thing-at-risk would cleanse the contract from usury. Locatio-conductio would not do: the object of the insurer’s locatio was not the thing, only the risk that it would perish. Hence, Bernardino thought of emptio-venditio. This would give the insurer ownership of the thing-at-risk: the strongest possible relation.

In any case, it is not fortuitous that the sale model was envisaged – or brought to general attention – by a Genoese jurist. Unlike in Ridolfi’s Florence, in Bosco’s Genoa the policy was typically shaped as a fictitious sale of goods, sold by the insured to the insurer, of the same value as the thing-at-risk, whose payment was...
conditional upon the safe arrival of the ship at its destination. If the ship arrived safely, the insured-seller would forfeit the payment for the goods he allegedly sold to the insurer-buyer; if the ship sank, he would be entitled to claim it. It is possible that Bosco looked at the mercantile practice of his city and then described it in Civil law terms, just as Ridolfi did in Florence. Bosco, however, sought to provide a stronger legal structure to his scheme. He could not possibly ground his reconstruction upon a blatantly fictitious sale of goods that – by a fortuitous coincidence – were of the very same value as the insured cargo. Hence, the fictional nature of the sale contract linked to the value of the insured thing was best ignored. It was safer to argue for a single contract of conditional sale, seemingly inspired by the similar market practice.23

2.2. Emptio-venditio: from selling the thing-at-risk to selling the risk in the thing

Bosco was an influential lawyer, and his two consilia (at least, among those printed) devoted to insurance date to the mid-1420s. It is, however, only towards the end of the century that the same emptio-venditio scheme was re-elaborated in what became the first and most influential treatise on the subject. The Tractatus de assecurationibus et sponsionibus mercatorum of the Portuguese jurist, Pedro de Santarém (c.1460-?), better known as Santerna, was probably written in the late 1480s (the earliest extant manuscript is of 148824), but it was printed only in 1552.25 ‘Obscure’ in the words of the Genoese Rota26 and unsystematic in the eyes of the modern reader, Santerna’s treatise was however enormously influential. According to Santerna, insurance is ‘the agreement whereby one bears the mishap of another against the price of the risk’.25 Strictly speaking, the agreement is an innominate contract in the form of facio ut des: the insurer bears the risk so that the insured pays the premium (‘suscipio periculum ut des pecuniam’).28 The insurer accepts to bear the risk of a mishap, not the mishap itself. The contract is conditional, for the payment depends on the event of mishap. ‘The contract of insurance is shaped this way: if it happens that your merchandise be lost during the sea-voyage […] I

23 Cf. Coronas Gonzales, note 2, 251. The overwhelming majority of scholars seem to have read Genoese practice through the lens of Bosco and other later learned jurists to the point of ignoring the actual text of Genoese policies. So, it is very common today to find accounts of insurance shaped as a fictitious sale in the very same way as Bosco described them, thus missing entirely the subtle difference between practice and theorisations. The first authors who stressed the point, in the first half of the twentieth century, went more or less unheard: G. Valeri, "L’archivio Datini e gli studi storici di diritto commerciale attraverso il documento del 1329", Rivista del Diritto Commerciale 26 (1928), 601-641, at 442; L. Piattoli, “La Scritta di Sicurtà Genovese e una Speciale Scritta dei Mercanti Fiorentini in Genova Attraverso i Documenti dell’Archivio Datini”, Assicurazioni, rivista di diritto, economia e finanza delle assicurazioni private 6 (1939), 164-180, at 173.
25 Petri Santernae Lusitani iuris utrius doct. peritissimi ac famosissimi, Tractatus de assecurationibus et sponsionibus mercatorum; nunc primum in lucem datus, cum repertorio et summariis, Venetiis, apud Baltassarem Constantinum, 1552.
26 M. Bellone, ed., Decisiones Rotae Genuae De Mercatura et pertinentibus ad eam ..., Venetiis [apud Franciscum Zilettum], 1582, dec. 166, n. 4, fol. 221v.
28 Ibid., pt. 1, n. 7, fol. 4v.
promise to pay its value, so that you pay me [i.e. the premium].’

Santerna is therefore describing a financial undertaking which does not involve any transfer of ownership or possession: the cargo remains with its owner, the insured, and the insurer simply vouches for its safety. Yet, this guarantee clearly comes at a price – the insurance premium. For the insurer is just agreeing to cover the value of the merchandise in case of mishap against the payment of a sum of money. The sum he receives is therefore dangerously close to usury. Santerna was well aware that the facio ut des scheme was the most obvious, but not the safest. It could not shelter the insurance from usury accusations, for the facio of the insurer was just a conditional undertaking against the actual des, the unconditional payment of a sum of money. If the ship arrived safely at destination, the insurer would pocket the premium without doing anything. His conditional promise to use his money (to pay for the mishap) earned him some more money – a straightforward case of usury. This is why Santerna looked at the scheme of emptio-venditio. The insurance contract, argued the Portuguese author, ‘may be assimilated to the sale and purchase contract because of the price paid for the risk’.

Whether other jurists wrote in support of the emptio-venditio scheme between Bosco and Santerna, we do not know. Nor do we know of any direct link between the two authors – at least, Santerna never quotes Bosco. Yet it may not be excluded that Santerna, who spent long years in Italy, was influenced by Bosco’s reconstruction. The difference between the two authors – and, more generally, between Bosco and nearly all the later jurists who used the emptio-venditio model to describe insurance, lay in the object of the sale: no longer the thing-at-risk, but the risk that it would perish. Although perhaps not as watertight a solution than one might think at first,

29 Ibid., pt. 3, n. 2-4 fol. 19v: ‘iste contractus assecuracionis est contractus conditionalis [...] Conceptur enim contractus assecurationis hoc modo: si contingent in hac navigatione res tuas sive merces depersi [...] ego promitto valorem tuarum mercium: et hoc, dummodo mihi des.’

30 Ibid., pt. 1, n. 7, fol. 4v: ‘asimiletur emptioni venditioni propter pretium quod datur ratione periculi’.

31 There were some exceptions, but they did not meet with particular success. One of the main ones came from the famed nominalist theologian Juan de Medina (1490-1546). As Bosco, Medina used the emptio-venditio scheme to circumvent the problem of the premium given for the susceptio periculi. Unlike Bosco, however, Medina was still thinking in terms of foenus naucicum, so that the undertaking he had in mind retained both its functions – financing and risk-shifting. Substantially, therefore, Medina’s scheme was a variation on the theme of maritime loan – with the obvious advantage that it fell outside the scope of the usurious loan. The difference with the standard foenus lay in that the merchant-insured did not borrow money from the insurer-lender so to purchase the merchandise, but bought it directly from the insurer-buyer with a forward sale contingent to the safe arrival at destination. Under this contract, the merchant-buyer asked the insurer-seller to pay for the purchased cargo later, and only if it reached safely its destination. The agreement shifted the risk from the buyer to the seller, thereby inverting the principle res perit domino. And for this reason the seller was entitled to receive an extra – the insurance premium. Joannis Medinæ ... De Poenitentia, Restitutione, Et Contractibus Praeclarum Et Absolutum Opus, vol. 2, Ingolstadii, ex Officina Typographica Davidis Sartorii, 1581, q. 38, causae 1-4, p. 228-235, esp. causa 3, p. 233, lit. a, n. 3: ‘in casu Decretalis [X.5.19.19] mutuans inducebatur mutuatarium, ut sibi aliquid dare pro eo, quod mutuator periculum in se susciperet, nec [mutuans] volebat aliter mutuare, et ideo non gratis mutuare volebat, sed cum lucro, quod ex assecuratione speraret. In nostro autem casu, venditor non volens suscipit periculum preti expectati, sed ad instantiam emptoris: emptor enim petit a venditore, ut vendat illi mercem ad terminum, et pro pretio solvendo ei tempus aliquid concedat; quod si venditor annuat, precium mercis periculo exponit [...] Et ita emptor venditorem inducens, ut ad terminum vendat, ex consequenti eum inducit, ut valorem, seu pretium mercis periculo exponat: quod tamen venditor gratis facere non tenetur. In casu autem Decretalis mutuatarius non inducit mutuatem, ut rem suam cum periculo mutuet, sed potius ipse mutuans praevenit, et mutuatarium compelli, ut si vult mutuatum obtinere, illium secundum contractum assecurationis secum ineat.’
the fictional sale had obvious advantages. But it was probably too far-fetched to
describe overt policies, where the undertaking was expressly described in terms of
insurance. Only the Genoese stuck to their obscure policies, while most of other
merchants insured openly. If the policy focused on the passage of the risk (and not of
the property of the thing-at-risk), jurists had to find a legal mechanism to justify that.
In shaping insurance as *emptio-venditio* Santerna describes the insurer as the buyer:
‘he who underwrites against a premium is said to purchase the chance of mishap’. In
Buying and selling the risk in a thing is a remarkably modern idea. We often say,
especially in economic literature, that the insured ‘buys’ insurance. Yet, Santerna
does exactly the opposite than one would expect. For him, it is the insurer who buys
the risk. While the choice of *emptio-venditio* offered clear advantages to Santerna, it
is not immediately obvious why the insurer had to be described as the buyer of the
risk. Once again, the problem lay in the premium, the *pretium periculi*. What Santerna
could not say was that the insurer accepted to bear the *periculum* for a price. To avoid
that, he sought to focus as much as possible on the *periculum*, describing its *pretium
as merely ancillary. As the object of the sale is the *eventum periculi*, the *pretium
periculi* is an accessory element to the transfer of the risk of such *eventum*. Santerna
played with the ambiguity of the term *‘periculum’*, which could refer either to the risk
that the goods insured were lost or to the payment of their value in case of loss. The
key-text is a well known passage in the Digest (D.22.2.5 pr.).

32 In the absence of further elaborations on Bosco’s scheme, the boundaries of the liability of the
insurer-buyer remained ill defined. The thing-at-risk was sold but never delivered to the insurer. So the
principle *res perit a domino* was not fully applicable. While it would have sufficed for the proper *casus
fortuitus*, it might have proven more problematic when the mishap derived from negligence – say, of
the shipmaster, to whom the seller-insured had entrusted the thing. Cf. e.g. Sebastiano de Medici
(d.1595), *Tractatus De Fortuitis Casibus, Coloniae Agrippinae*, Ex Officina Ioannis Gymnnici, 1596, pt.
1, q. 16, n. 20, p. 149. The issue is rather complex (and, moreover, speculative) and it depends on the
definition of *casus fortuitus*, which falls beyond the scope of the present work.

eventum periculi.’

34 The problem was illustrated clearly by Antonio Perez, (1583-1672), *Ant. Perezi, Praelectiones in
Codicem Justinianeanum, Amstelodami, Sumptibus Anthoni Jacobi, 1645*, *ad* C.4.33. n. 6, p. 192: ‘Plane
idem jus est terreni foenoris, quod maritimis, veluti si creditor convenerit de suscipiendo pericum
pecuniae transuendae, per loca periculosa, et praedonum infidis infestissima; cum utrobiue militet
eadem juris ratio, fundata in periculi susceptione […] Haec tamen excusatio non placet Gregorio IX
Pontifici, in cap. 19 De usur. [X.5.19.19] ubi dicit creditorum non posse etiam ratione pericii suscepti
in se, supra sortem, sine nota usururam quippiam accipere: sed commodo accipi potest de illo caso,
quod praetextur periculum, ubi nullum est, vel majus quam subset, sic ut lucrum maius sit ipso periculo.’

35 As the translation provided in the text diverges from most vernacular translations, it is important to
provide the full text of D.22.2.5 pr. (from Scaevola’s *Liber sextus responsorum*), from the Mommsen
and Krueger’s edition: ‘Periculi pretium est et si conditione quamvis poenali non existente recepturus
sis quod dederis et insuper aliiquid praeter pecuniam, si modo in aleae speciem non cadat: veluti ea, ex
quibus conditiones nasci solent, ut “si non manumittis”, “si non illud facias”, “si non convalueru” et
cetera. Nec dubitabis, si piscatores ergogaturo in apparatum plurimum pecuniae dederim, ut, si cepisset,
redderet, et athletae, unde se exhiberet exercerique, ut, si vicisset, redderet.’ Many interpolations
have been suggested over the time, but most of them have no serious grounds, and they will not be
considered here. Assuming the text is genuine, the translation provided above diverges on two main
points from most translations. First, scholars read separately the conjuctions ‘et si’ at the beginning of
the text. The resulting translation would seem to exclude penal bonds (‘… et, si conditione quamvis
poenali non existente, recepturus sis quod dederis…’) without any clear reason for that. This,
incidentally, would strengthen the interpretation of ‘aliiquid praeter pecuniam’ as ‘something else
besides money’ (as in the translation edited by A. Watson, *The Digest of Justinian*, Philadelphia,
University of Pennsylvania Press, revised edition, 1998, vol. 1), which is rather misleading. Second,
most translations consider the subordinate ‘si modo in aleae speciem non cadat’ as excluding aleatory
One may recover what he has given, as well as something more, as compensation for bearing the chance of loss (pretium periculi), even if there is no penal clause, so long as the event is not a modal clause.

The text refers to foenus nauticum, and so to an actual loan repayable upon condition that the ship arrives safely at destination. The insurer is also a lender, hence the reference to the recovering of what was given. Because of the foenus nauticum context, the term ‘pretium periculi’ encompassed both the interest and the money lent (by the insurer-creditor to the insured-debtor) to buy the goods insured. The object of the contract, therefore, was not only a risk, but also a sum of money equivalent to the value of the goods.

In a proper insurance context, the insurer does not lend any money. Adjusting the text accordingly, the insurer receives a sum of money as ‘compensation for bearing the chance of loss if the risk does not materialise’. This means that the insurer may retain the premium if the mishap does not occur.\(^\text{36}\) In this context, the term ‘pretium periculi’ is used both in its meaning of risk for which a price has been paid (and so the accent is on periculum) and in that of price given to accept the risk (and so the accent is on pretium). It follows that the same term can be used for both parties of the insurance contract: the insured pays a pretium to pass on the periculum, which the insurer accepts. Receiving the pretium periculi, the insurer is therefore accepting both price and risk. If we translate this into the emptio-venditio scheme, it is possible to

contracts. However, foenus nauticum itself is an aleatory contract. Moreover, Scaevola’s passage ends with two examples that are unquestionably aleatory contracts: the loan to the fisherman to buy his equipment, and that to the athlete training for a competition. In both cases Scaevola states that there is no doubt that the lender can recover the loan (with interest) if the fisherman catches some fish or if the athlete wins the competition. The ‘aleae speciem’ in the sentence must have given some trouble to glossators as well, for the Accursian Gloss reads ‘aliam speciem’ and explains that such ‘other species’ refers to other contracts, different from foenus nauticum, such as the innominate ‘do ut facias vel non facias’ (Accursius, note 8, ad D.22.2.4 pr., § Speciem, fol. 322r). What might have troubled the Glossators was the reference to alea, precisely because foenus nauticum is aleatory. Rather, the sentence ‘si modo in aleae speciem non cadat’ seems to refer to modal conditions, just as the examples immediately following the sentence – and clearly related to it through the adverb ‘veluti’ – seem to do (‘veluti ea, ex quibus conditiones nasci solent, ut "si non manumittas", "si non illud facias"’, ‘si non convalueru et cetera.’): This interpretation is hardly new: see e.g. Guillaume Maran (1546 - 1621), Guillielmii Marani … Opera Omnia, seu Paratitia Digestorum …, Trajecti ad Rhenum, apud Ioannem Broedelet, 1741, ad D.22.2, p. 204. But it is not popular among scholars. Among its most recent critics see P. Thomas, “Insurance in Roman law: Martialis Epigrammaton II 52”, 2 Journal of South African Law (2009), 268-270, arguing that the Romans distinguished between aleatory contracts and pure wagers. As such, the ‘aleae speciem’ should be referred to simple wagers, and not to aleatory contracts.

The point clearly has some merit. But it is doubtful whether the Roman who played dice had to pay in advance, so the restrictive clause (‘si modo in aleae speciem non cadat’) would ill fit into the general statement ‘recepturus sis quod dederis’. Thomas seems to find confirmation of his argument in the writing of Gerhard Noodt (1647-1725), who made a distinction between aleatory contracts with a socio-economic function (such as insurance itself) and mere wagers, extremely common (and prohibited) at his time. Noodt, “Gerardi Noodt … De Foenore et Usuris Libri Tres …”, lib. 2, ch. 7, in Id., Opera Omnia … In Duos Tomos Distributa …, Ludgini Batavorum, apud Johannem Arnoldum Langerak, 1735, vol. 1, p. 218-219. The problem is that the distinction between ‘useful’ aleatory contracts and ‘sterile’ wagers is a late medieval and early modern one, developed in the attempt to justify insurance despite the heuristic nature of foenus nauticum.


10
consider the insurer as the buyer of the periculum against a certain pretium, and conversely the insured as the seller of the pretium to pass on the periculum. Because of the ambiguity of the pretium periculi, each party could be regarded as buyer or as seller. The same Santerna, having initially described the insurer as buyer (of the periculum), then changes perspective and considers the insured as buyer (of the indemnity). After Santerna, however, most authors preferred to focus only on the indemnity as the object of the contract (and not also on the periculum). This way, the insurer was considered only as seller and the insured only as buyer. An obvious explanation for this might lie in its simplicity – it is more intuitive to consider the insured ‘buying’ security rather than ‘selling’ the risk. But perhaps the reason lies in the progressive acceptance of insurance as a lawful contract. So long as some doubts were still lingering on the usurious nature of insurance, ‘selling’ security was somewhat dangerous. It was close to vouching for the safety of the thing in exchange for a sum of money – precisely the ‘weak’ locatio scheme of Ridolfi. By contrast, ‘buying’ the periculum was conceptually more distant from that, and therefore safer. This is probably why Santerna himself described the object of the sale first of all in terms of periculum (and so with the insurer as buyer), and only later also in the more realistic terms of indemnity (where the insurer is the seller). Santerna was writing in the late fifteenth century. In all probability, he still perceived the accusation of usury as a serious (or at least possible) threat to insurance. By the second half of the sixteenth century, few Civilians still regarded the decretal Naviganti as a menace. At least, by then the description of insurance in terms of emptio-venditio was widely considered more than sufficient to shield insurance from usury accusations. So, it was enough to apply the simple scheme of sale and purchase: if the insurer receives a payment, then he is surely the seller, and if the insured pays the premium, then he is surely the buyer. This was the approach chosen by Benvenuto Stracca (1509-1578), in his highly influential treatise on insurance (1569). Some years later Lenaert Leys (Leonardus Lessius, 1554-1623) summed up Stracca’s argument with a definition soon to become the standard one on the subject: 40

If one insures against a price he is selling his obligation, for he undertakes to pay the value of the thing in case it perished, and the counterparty – that is, the insured – is buying the same obligation.

Lessius’ definition was then followed verbatim by some of the most influential Civil lawyers who wrote on insurance, such as Sigismondo Scaccia (1568-1618) and

37 Supra, note 33.
38 Santerna, note 25, pt. 4, n. 45, fol. 43r: ‘Item dominus mercium propter pretium periculi quod dat, videtur emere aestimationem suarum mercium’.

11
Francesco Rocco (1605-1676). Despite its success, as we will see, the formula contained the seeds of the most significant limitations to the *emptio-venditio* scheme.

2.3. From *locatio* to *fideiussio*

The *emptio-venditio* was probably the most successful scheme on insurance both in terms of adherents and of longevity, but it was not the only one. The *locatio-conductio* scheme, in all probability the first to be used for insurance, had its influential advocates throughout the early modern period. A number of authors referred generically to *susceptio periculi* as the object of the insurance, without specifying whether such a *susceptio* was a *sui generis* undertaking (and so an innominate contract) or it fell within the scheme of a nominate contract. It is possible that some of them implicitly thought of a nominate contract, in which case the most obvious candidate should be (at least in principle) *locatio-conductio*. Nonetheless, the *locatio* scheme never had many followers. Initially, perhaps because it was not safe. Describing the *susceptio periculi* in terms of *operae* meant highlighting the actual task, and so the (userious) warranty. Later on, because it paved the way to *fideiussio*. Once it became common to qualify insurance in terms of nominate contracts, some jurists began to look at the content of the insurer’s obligation more closely, focusing on the warranty function of his undertaking. Since the insurer vouched for the thing to arrive at destination, they argued, his role was closer to that of a guarantor (*fideiussor*) than a *locator* (let alone a seller). Thus, the indemnity (or rather, the undertaking to indemnify) could be sold as *emptio-venditio* or more simply promised (in terms of guarantee) as *fideiussio*.

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41 Scaccia, note 36, § 1, q. 1, n. 128, p. 35 (cf. also § 1, q. 7, pt. 3, lim. 6, n. 5, p. 440); Rocco, De Assecurationibus, in Id., Respensorum legalium cum decisionibus centuria secunda ac mercatorum notabiliia in sex titulos distributa, Neapoli, ex Typographia Lucae Antonij Fusi, sumptibus Iacobi Antonii Bagnuli, 1655, not. 3, n. 7, p. 393. Cf. Van Nierkerk, note 8, 190-191.

42 At the beginning of the sixteenth century *locatio-conductio* was the scheme chosen in the greatly influential work of Silvestro Mazzolini da Prierio (Sylvester Prierias, 1456/7-1523), *Summarum notabilium Assecurationibus* (cf. also § 1, q. 7, pt. 3, lim. 6, n. 5, p. 440); Rocco, De Assecurationibus, in Id., Respensorum legalium cum decisionibus centuria secunda ac mercatorum notabiliia in sex titulos distributa, Neapoli, ex Typographia Lucae Antonij Fusi, sumptibus Iacobi Antonii Bagnuli, 1655, not. 3, n. 7, p. 393. Cf. Van Nierkerk, note 8, 190-191.

43 This was especially common among moral theologians. See e.g. Francisco de Vitoria (c.1483-1546), *De Iustitia*, (V. Beltrán de Heredia, ed., Madrid, Publicaciones de la Asociacion Francisco de Vitoria, 1934, tomo 4, De iustitia, qq. 67-88, quest. 78, art. 2 p. 634, and Juan de Lugo (Iohannis de Lugo, 1583-1660), R. P. Ioannis de Lugo ..., *Disputationvm de Iustitia et Ivre*, vol. 2, Ludgvmi, Sumpt. Laurentii Arnaud, et Petri Borde, 1670, disp. 31, sect. 6 (*rectius*, sect. 7), p. 447. Further literature in Pesce, note 2, 54-62.

44 It is not surprising, then, if one of the clearest definitions of insurance as *fideiussio* came from a jurist who considered insurance as *emptio-venditio*. Scaccia, note 36, § 3, gl. 3, n. 29, p. 622: ‘qui enim assecurat, stat veluti fideiussor mercium, et pecuniarum adversus quemcumque casum sinistrum, et quia pro illo periculo accipit pretium, dictitur vedere illud pericum, et dominus pecuniae, alterius mercis assecuratiae, quia solvit pretium periculi, dictitur emere illud pericum [...] et ei, qui, fideiubendo, se periculo exponit, deberti periculi pretium’. 

12
Fideiussio had the clear advantage of being legitimate – the recompense of the guarantor was not usurious.⁴５ Indeed, many Scholastics of the Salamanca school approved of it – a clear sign of its moral legitimacy. Domingo de Soto (1494-1560) was one of the first to write of the insurer as fideiussor, albeit in passing.⁴⁶ The parallel proved popular, and it spread soon also among more legally-minded authors,⁴⁷ reaching even eminent law courts.⁴⁸ It was one thing, however, to allude to the insurer as fideiussor; it was another to describe insurance fully in terms of fideiussio. The majority of jurists used the parallel with fideiussio to underline the warranty function of the susceptio periculi, but then moved on to classify insurance – typically – as emptio-venditio.

In its fully-fledged version, the parallel with fideiussio had few enthusiasts, who were mainly Spanish scholars. The first thorough reflection on insurance as fideiussio was proposed by Bartolomé de Albornoz in his Arte de los Contractos (1573).⁴⁹ The main

⁴⁵ Probably the clearest explanation of this point is in Luis Lopez (d.1596), Instructionum negotiantium duobus contentum libris, Salamanctae, excudebat Cornelius Bonardus, 1589, p. 356: ‘Patet etiam, quia assessorator est veluti quidam fideiussor: sed fideiussor pro fideiussione secundum communem sententiam potest aliquid accipere: ergo et mesus assessorator’. See also, and especially, ibid., p. 361: ‘Tantem adverto tito, quod quia fideiussio quodammodo quidam modus est assecurationis,ideo diximus absque vsura posse fideiussorem aliquid recipere a debito, quia hic mutuum tacitum, vel expressum non est inaenire, cum fideiussor hic nihil praeter fidem cautionis praestet, et quia ratione obligationis qua astringitur periculum, et onus solvendi subire, si debitor principalis solvendo non fuerit, aliquam retributionem moderatam meretur.’ It may be useful to add that Lopez’s work is nowadays typically cited in its 1593 edition with a different title (Lodovici Lopez Tractatus de contractibus et negotiationibus. Lugdunum, Ex Officina Iunarum, 1593), but in many parts it hardly differs from his Instructionum of 1589. In particular, the section on insurance is reproduced verbatim (in the 1593 work it may be read in lib. 2, ch. 16, p. 121-132).
⁴⁶ De Soto, Fratris Dominici Soto ... De justitia et iure Libri decem, Salamanctae, Excudebat Ioannes Baptista a Terranova, 1569, lib. 6, q. 7, p. 536, lib. 6, q. 7, p. 536: ‘licitum est fideiussore pro alio, quem non est adeo tutum solvendo fore, aliquid pro illo periculo suscipere cui se exponit solvendi. Persimile autem contingit in assecuratione.’
⁴⁷ Stracca, De Assecurationibus, note 39, praefatio, n. 45 fols. 25v-26r; Lupo, note 42, Commentarius tertius, § 1, n. 16, fol. 96r; Miguel Bartolomé Salón (1539-1621), Controversiae de justitia et iure, atque de contractibus et commercis humanis, licitis ac illicitis ..., Venetiis, apud Baretium Baretiarum Bibliopoliam, 1608, vol. 2, § Disputatio de Contractu Assecurationis, art. 1, n. 3, p. 667; Scaccia, note 36, § 3, gl. 3, n. 29, pp. 621-622; Rocco, note 41, not. 91 n. 347, p. 418; Acacius Antonio de Ripoll (c.1475-1555), De Magnificatus Logiae Maris antiquitate ... Tractatus, Barcinonae, Ex Praelo Antonij Lacavallaria, 1655, ch. 21, n. 124, p. 231; Ansaldos Ansaldos (Ansaldus de Ansaldis, 1651-1719), De commercio et mercatura, discursus legales, Romae, ex Typographia Dominici Antionij Herculis, 1689, disc. 70 n. 12, p. 428; Medina, note 31, q. 38, causa 3, p. 230 lit. f, and p. 231, n. 2.
⁴⁸ Bellone, note 26, dec. 25 n. 6, fol. 89r; Juan Pedro Fontanella (1575-1649), Sacri Regii Senatus Catholoniae Decisiones, per Ioannem Petrym Fontanella [...] elaborata, vol. 1, Barcinone, ex Praelo, ac aere Petri Lacavallaria, in via Bibliopolarum, 1639, vol. 1, dec. 243, n. 23, p. 597 [Similarly, in the early seventeenth century the Senate of Barcelona considered the insurers ‘fideiussores indemnisatis’]; Alvaras Valascco (1526-1593), D. Alvari Valasci ... Decisiones Consultationum ac Rerum iudicatarum in Regno Lusitaniae, In Bibliopolio Comelminiano, 1607, lib. 1, consult. 18, proem., n. 1-2, 4 and 6, p. 87-91. This last consultatio is of particular interest, for it was entirely based on the assumption that insurance is truly a form of fideiussio. The conceptual closeness between fideiussio and insurance may be seen in other law courts as well see e.g. Cesare Manenti (fl. 1612), Decisiones Sacri Senatus Mantuani, Venetiis, apud Antonium Pinellum Impressore Ducalem, 1622, dec. 54, n. 51, p. 214; Cesare Barzi (1542-1605), Decisiones Aliae Rotae Bononiensis, Venetiis, apud Haeredom Damiani Zenarii, 1610, dec. 24, preamble and n. 1-6, pp. 45-46.
⁴⁹ Albornoz, Arte de los Contractos, Valencia, En casa de Pedro de Huete, 1573, fols. 19v-20v. Cf. Coronas Gonzales, El Concepto de Seguro, p. 251. Despite his fame, our knowledge of Albornoz’ life remains significantly wanting. What we know is that he was born in Galicia, studied at Salamanca, published his great opus in 1573, and spent a long time in the ‘New World.’ See E.S. Kloss, “El arte de
obstacle for a proper reconstruction of insurance in terms of *fideiussio* lay in the number of parties involved (debtor, creditor and debtor’s guarantor): insurance was a party shorter. This algebraic inconvenience led some careful jurists to describe as *fideiussio* the guarantee of a third party to the insured about the insurer’s solvency (the so-called insurance *de solvendo*), not the insurance itself. But Albornoz was not a man to be easily discouraged. If the insurer fulfills the role of the guarantor, then the insured must be the party receiving the guarantee (and so, the creditor). What was missing was the debtor. Albornoz found the missing debtor in the thing-at-risk itself. The insured cargo or ship is the debtor, and its obligation lies in arriving safely at destination. If the insured thing ‘defaulted’, then the creditor (the insured) would have recourse on the guarantor (the insurer). It would be easy to dismiss such a reconstruction as extravagant. In fact, it was extremely ingenious. The great advantage of the *fideiussio* scheme lay in removing the insurer from the underlying relationship between main obligor and obligee. This way, the insurer-guarantor would look as a third party. The apparently bizarre idea of considering the insured thing as the obligor (undertaking to arrive safely at destination) was in fact a subtle way of ‘internalising’ the – potentially usurious –

50 Scaccia, note 36, I q. 1, n. 133, p. 36: ‘*fideiussor, assecurans mutuament ad instantiam mutuatarij, possit assecurationis pretium exigere a mutuaturio*’. Cf. Stracca, *De Assecurationibus*, note 39, praefatio, n. 49 and 62, fols. 27r-v and 32v-33r respectively, and, somewhat more vaguely, Santerna, note 25, pt. 3, 55-58, fol. 25r-v. Although Civilians used *fideiussio* typically to describe insurance *de solvendo*, it may even happen to find mention of *fideiussio* in case of proper reinsurance: Flaminio Armentani (1586-1676) *Decisiones Almae Rotae Civilis Ser.Ma Reipublicae Genuensis*, Aescii: Typographia Episcopali, 1679, dec. 31, n. 1, p. 108. In this case (probably dating to the early 1670s, as the policy was of 1668) the reinsurer was considered as *fideiussor assecuratorius*.
51 Albornoz, note 49, fol. 19v: insurance ‘es una fianza pura, en la quale el acreedor es el senor de la mercaderia, y el obligado es la mercaderia que se obliga de llegar en salvamento y, para esto, die por su fiadorel assegurador, el qual la fia que llegarla, y, sino llegarla, que el pagara todo lo que la mercaderia vale’. Cf. Juan Azor (Ioannis Azorius, 1535-1603), *Institutionum moralium...,* pt. 3, Ronae, ex typographia Aegidis Spadae, 1611, lib. II, cap. 18, p. 1020. The level of abstraction of the *fideiussio* scheme’s advocates was such that it overlooked a rather obvious objection: the *beneficium excussionis*. According this privilege, the creditor could demand payment to the *fideiussor* only after having sought satisfaction from the main debtor. As the main debtor is the thing insured, it does not exist as a legal party. So the *beneficium* can never take place. Interestingly enough, the only author to mention the point was Luis Lopez, but he was more concerned with the moral issue of whether it was lawful to sell one’s *fides* (i.e. the guarantee) for money. Lopez, note 45, pt. 2, ch. 16, p. 361. As a matter of fact, the objection could have been easily solved, had Lopez looked at legal practice. Civil law distinguished between two kinds of *fideiussiones*: a *fideiussio simplex* and a *fideiussio indemnittatis*. In the first case, the guarantee was *simplex* precisely because the *fideiussor* did not enjoy the *beneficium excussionis*. See e.g. Matteo D’Afflitti (c.1447-c.1528) *Decisiones Sacri Consilii Neapolitani, à Dn. Matthaeo de Afflictis... emendatæ* (Lvdgvni: apud haeredes Iacobi Iunctae, 1552), dec. 318, n. 1-2, pp. 577-588; Gerolamo Magonio (1530-1596), *Decisiones Causarum tam Rotae Florentinae quam Rotae Lucensis, Venetiis, apud Sessas, 1605, dec. 38, n. 2-14, pp. 104-105, Ottavio Cacherano d’Osasco (d.1589), *Decisiones Sacri Senatus Pedemontani, Taurini, Strata & Gallus, 1569, dec. 2, n. 14, fol. 9v; Flaminio Cartari (Flaminii Chartarii, 1531-1593), *Decisiones Causarum Executivarum Rotae Reipublicae Genuensis*, 2nd edn., Francofurti ad Moenum: Feyrabend., 1608, dec. 45, n. 1, p. 128.
mechanism of the transfer of risk. The insurer no longer owed the *rei aestimatio* to the insured (as in the case of *emptio-venditio*). Rather, the *rei aestimatio* was now owed by the *res* itself. The insurer would simply warrant its payment in case the main obligor were to default. Strictly speaking, the passage of risk would occur between the owner and his property: the thing-at-risk would warrant for its own safety, and its owner would merely seek additional security in case of its default. Ultimately, therefore, Albornoz sought to apply the insurance *de solvendo* mechanism to proper insurance contracts.

Albornoz’s scheme was further elaborated by Francisco García (1525-1585). García worked on the underlying concept of *rei vindicatio*: the thing is obliged ‘to arrive safely to the power of the creditor’ because he is its owner. The easiest explanation to first-year law students about *rei vindicatio* is the image of the magnet: ownership attracts the thing owned, regardless of who is in possession. To some extent García thought on the same line: the *res* ‘tends’ to its owner. He simply gave a legal form to this ‘tension’ in the insurance context.

García elaborated Albornoz’s scheme (especially the ‘internalisation’ of the risk transfer) with reference to the *foenus nauticum*, so as to highlight the difference between the two contracts and the ensuing non-usurious nature of insurance. As we have seen, the position of many jurists was that the risk element (the *periculum*) would ‘neutralise’ the usury accusation. This however was based more on subjective views about usury than on strict legal reasoning. All creditors faced some risk, for any debtor could default. Admittedly, in case of insurance the risk was magnified because of the objective danger to which the cargo was exposed. But it was not clear why a higher risk would *per se* ward off usury, especially since the interest rate was proportional to the level of risk. The adage *incertitudo tollit usuram* ultimately relied on moral grounds (or common sense), not on legal reasoning. It is probably not fortuitous that such an argument was more frequent among moral theologians than lawyers. Legally speaking, the caveat of Sinibaldo still stood: Gregory IX’s decretal prohibited interest despite the uncertainty of the gain. As a consequence the *foenus nauticum* had to be considered usurious ‘even if the lender assumed the *periculum*’.

53 Ibid., n. 449, p. 474: ‘*La mercaduría asegurada es como el deudor, la cual se considera como si tuviese obligación de llegar salva a poder del acreedor, que es el dueño de ella, de la manera que el deudor tiene obligación de pagar al acreedor su deuda*’ (emphasis added).
54 See also infra, notes 82-83.
55 A good example is Diego de Covarrubias y Leyva (1512-1577), Varia rum ex Iure Pontificio, Regio et Caesareae Resolutionum Libri III. Salamanticae, excudebat Andreas a Portonarïjs, 1552, lib. 3, ch. 2, n. 5, fol. 174v: ‘*quod ultra sortem accipitur, non datur ratione mutui: nec propter usum pecuniae, nec propter nudum interesse interusurij (sic) temporis: sed propter aliam iustissimam causam: nempe periculi contra naturam mutui spectantis ad creditorum*. Equitable as it might be, this reasoning could hardly lift the prohibition of the decretal *Naviganti*. Hence, Covarrubias highlighted the labour of the insurer-lender, the reasonable amount of interest, and any other possible feature which would make the interest look more as remuneration for actual work than a simple premium (*ibid.*, fol. 175r-176r). From a legal viewpoint, however, the problem was not solved. Cp. the second (and much revised) edition of the treatise of Luis de Alcalá (c.1490-1549), *Tractado de los prestamos que passan entre mercaderes y tractantes*, Toledo, en casa de Juan de Ayala, 1546, pt. 2, fol. 29v (the first edition is of 1543).
56 François Marc (Franciscus Marcius, XVI century), *Decisiones Aureae in Sacro Delphinitus Senatu Discussae ac Promulgatae*, Venetii, 1559, quasio 891, n. 1, fol. 324v: ‘*naviganti vel eunti ad mundinas mutuans pecunias etiam si suscipiens in se periculum prohibetur aliquid recipere vita sortem*’.
Albornoz's and García's insurance-fideiussio scheme sought to avert the application of Naviganti on strictly legal basis. Instead of arguing for the non-usurious nature of the undertaking (and so, avoiding the decretal ex post, through moral arguments), it pre-empted the decretal’s applicability ex ante, focusing on the formal position of the insurer as simple guarantor.

Having described the thing-at-risk as the main debtor, García added that all this was obviously a fiction. Effectively, with regard to the insured, the position of the res and that of the insurer are one and the same. So, he concluded, the obligation of the thing to its owner is actually that of the insurer towards the insured: the thing simply represents the value of the obligation. García insisted on the fictitious nature of the entire scheme not to give his game away, but to pave the way for his true innovation to Albornoz's scheme. Albornoz used the fideiussio scheme to avoid the decretal Naviganti with an abstract theorisation; García moved between legal fiction and reality so as to exploit their combined effect against the application of Naviganti to insurance.

While the fideiussio scheme personified the thing-at-risk, considering it the main debtor, in practice the position of the insurer and that of the thing-at-risk (the main debtor) were one and the same. The obligation of the thing-at-risk was therefore owed to the insured as owner of the thing. In the foenus nauticum, the insurer has a conditional credit against the insured: the latter would pay back the amount he borrowed if the thing arrived safely. As the foenus is a particular kind of mutuum, when the contract is made there is only one outstanding obligation – that of the borrower towards the lender. But describing the operation in terms of fideiussio meant keeping alive also the obligation of the lender to the borrower (or, in theory, of the thing-at-risk towards its owner). The insurer-guarantor would therefore still owe a debt to the insured (the rei aestimatio), which is precisely the same as his credit as lender. This would make the insurer at the same time debtor and creditor of the obligation, which would lead to the ipso iure setting-off of the two positions (or rather, to their mutual extinction by confusio).

At first sight, García’s reasoning would appear clearly wanting. The entire scheme of fideiussio may be used so long as the insurer is not effectively lending money to the

57 García, note 52, ch. 15, n. 459, p. 477.
58 Ibid., n. 459-461, p. 477-478: ‘Arriba se declaró comó, en este contrato, y en el de las fianzas, concurrían tres personas, el acreedor, el deudor, y el asegurador o el fiador. Dijimos más, que aunque formalmente entrevengan estas tres personas, con todo eso, no hay más de dos contrayentes, a causa de que el fiador o el asegurador, juntamente con el deudor, hacen oficio de un solo contrayente. De manera que el asegurador y el fiador siempre se tienen de parte del deudor, cuya obligación toman a su cuenta, y con quien hacen una misma persona. Luego si esto es así, no puede el que empresta salir fiador o asegurador de su mismo dinero, porque entonces el asegurador se tendría de parte del acreedor, y esto repugna a la naturaleza de este contrato. Quién jamás vio, que el mismo acreedor salga fianza, o pueda salir fianza por su misma deuda que otro le debe? Pues tampoco puede asegurar sus mismos dineros emprestados que el otro le debe. Ultra de esto imposible es convenir en un mismo subjetivo, y en respecto de una misma cosa, dar y recibir seguridad sobre un mismo negocio, porque el dar seguridad es acción, y el recibirla es pasión, y no se pueden hallar en un mismo subjetivo, y en respecto de una misma cosa, acción y pasión, de suerte que el mismo que es agente de una cosa, ése sea el paciente de ella. Luego de que empresta no puede asegurar su misma moneda, haciendo oficio de acreedor y asegurador, porque (en cuanto es acreedor) recibe seguridad de su deuda, y en cuanto asegurador, promete y da la misma seguridad de aquélla. Más adelante, el que asegura o da seguridad, toma en sí los peligros temidos, el que recibe la seguridad, y a quien se hace el aseguramiento, queda libre de los dichos peligros; pero no es cosa posible que uno mismo reciba en sí y a su cuenta los peligros de una cosa, encargándose de ellos, y que juntamente quede libre de ellos. Luego no puede ser que uno mismo sea, en un mismo negocio, acreedor y asegurador, y por consiguiente, que el mismo que empresta, ése asegure sus dineros emprestados.'
insured under a *foenus nauticum*. But that was precisely the point: shaped as *fideiussio*, insurance was incompatible with *foenus nauticum* – and so with any rule provided expressly for it.\(^{59}\) Insurance was not the same as maritime loan, but the ultimate effect of the decretal *Naviganti* was to neutralise the defence of the lender’s risk. As such, it could be applied by analogy to the risk of the insurer, in which case the *susceptio periculi* might not suffice to prove insurance as legitimate. García’s ingenuity lay precisely in this: the usury accusation stemmed from the *foenus nauticum*, which the *fideiussio* scheme made inapplicable even by analogy to insurance. As García had it, ‘the position of creditor is incompatible with that of insurer’.\(^{60}\)

### 2.4. Insurance as sponsio

Another possibility – the simplest – was to consider insurance as wager, shaped as a promise (*sponsio*, or *stipulatio conditionalis*).\(^{61}\) Jurists often mentioned *sponsio* when writing about insurance,\(^{62}\) but mainly for the sake of completeness – as yet another way to classify insurance. No lawyer dealing thoroughly with insurance considered a wager a satisfactory option. This chiefly because *sponsio* is a supremely abstract agreement. Such abstraction led to a combination of great practical malleability and extreme legal inflexibility. Practical ductility, because it is possible to wager on anything. Whatever the content of the wager, legally speaking it would be not its object but its condition.\(^{63}\) So, in the insurance context, the safe arrival of the cargo at destination would not be the object of the contract but rather the condition of the wager. This means that the actual object of the wager is somewhat peripheral to its structure, it is simply a condition attached to it. Wager has neither socio-economic function nor legal *causa* beyond itself. In the words of Scaccia, ‘insurance has a clear *causa*, which is just and useful: the insured seeks to avoid the damage. *Sponsio* has an indirect *causa*, whose utility is not immediate’.\(^{64}\) Legally speaking, the *causa* of the *sponsio* is the *sponsio* itself. Several authors argued that the *sponsio*’s condition

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\(^{59}\) Cf. Salón, note 47, § *Disputatio de Contractu Assecurationis*, art. 4, n. 6, p. 687.

\(^{60}\) García, note 52, ch. 15, n. 462, p. 478: ‘el oficio del asegurador repugna al oficio del acreedor’.

\(^{61}\) In theory, it was possible to consider wager either a simple *sponsio* or a more formal *stipulatio conditionalis*. Yet in practice there was no difference, for in mercantile courts *sponsio* (as much as any other *nudum pactum*) was enforceable even if lacking of the formal vest of *stipulatio*: Stracca, *De sponso sinebus*, in Id., *De Mercatura, seu mercatore, omnia quae ad hoc genus pertinent*, Ludgini, Apud Sebastianum Barptolomaei (sic) Honorati, 1556, pt. 2, n. 4, p. 179-183, esp. 182-183.


\(^{63}\) Or, as elegantly put by Jean Wamèse (Johannes Wamesius, 1524-1590), ‘purificatio conditionis’. Wamèse, *Responsa seu Consilia ad Ius, Forumque Civile Pertinentia*, vol. 2, Antverpiae, apud Henricum Aretissens, 1651, centuria 4, cons. 24, n. 4, p. 65.

\(^{64}\) Scaccia, note 36, § 1, q. 1, n. 131, p. 36: ‘contractus assecurationis in substantia, et iustitia pretij non differt a contractu sponsionis, differunt autem solum in hac qualitate, quod assecurationi habet evidentem causam, iustam, et utilem, quia assecuratorius intentit evitare damnum, at sponsio habet latentem causam, cuius utilitas non apparat, et hac ratione commercium assecurationis est Reipublicae utilius, et iustius.’ Clearly enough, the term ‘causa’ is voluntarily ambiguous, for it refers both to the economic function of the agreement as well as the legal *causa negotii*. 
should be treated as its *causa*. Such attempts, however, could not fully avoid the limits of *sponsio*, first of all its abstraction. For the focus of the agreement would necessarily shift from the safety of the thing-at-risk (and so on the impact the mishap would have on the ship or cargo insured) to the abstract occurrence of the condition. A good example comes from a hull policy shaped as a wager. The ship was spoiled by pirates and left as a wreckage, but a wreckage that arrived at destination. The object of the insurance-wager was whether the ship would arrive at destination. Technically she did, for ‘even if torn to pieces it was then repaired keeping the same hull, leaving no doubt that it was the same ship’. On this basis, the insurers refused to pay. Strictly speaking, the condition had not occurred: in its essence, the ship arrived at destination. The court was able to condemn the insurers only by moving away from the wager structure and stressing the *susceptio periculi* element.

In the above case the insurers were probably specious in their arguments, which might resemble the paradox of the ship of Argo, but they had a point in law. Yet the limits of *sponsio* may be more easily appreciated in case of blatant fraud. Absence of risk

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65 Ibid., § 1, q. 1, n. 89, p. 24: ‘in stipulationis conditionalis solus eventus conditionis habetur pro causa’. See also Santerna, note 25, pt. 2, n. 2-3, fol. 8v; Stracca, De *sponsionibus*, note 61, pt. 2, n. 4, p. 180: *Conditio ipsa in sponsione adjecta pro causa habeatur, et de aliqua causa curandum non sit: sucedet enim, cum existerit loco causae [...] In illis verbis, est enim iusta conventio, si quaelibet causa in conditione iurisurandi deducta fuerit [...] Et notandum est praedicta vera esse, etiam si conditio proprie dici non possit: ut in illa quae praesens, vel praeteritum tempus respicit: licet enim proprie non sit conditio, pro causa tamen habeatur*.

66 Stracca, De *sponsionibus*, note 61, pt. 11, n. 1, p. 194: ‘Si enim merces vel naufragio, impetu ventorum, vel tempestatem, seu alio casu perierint, ex quo tuo periculo merces suscepsisti, non interveniente stipulacione adversus te, qui promitisti, actione oneris adversi recte agito. [...] Quam conventionem non improbandam ego etiam puto, propter periculum, quod promittentes (vulgo Assecuratores nuncupati) suscipiant.’ Cf. Denis Godefroy (Dionysius Gothofredus, 1549-1622), Corpus Iuris Civilis in IIII Partes Distinctum (ed. Rudgini, in officina Barthol. Vincentij, 1583, *ad D.22.2.5* pr., § in *aliam speciem* [lit. a]), col. 693. The point was not fully appreciated by other jurists, who reduced insurance to ‘pure’ wager and thus lost the peculiarities of the instrument. For instance, in looking at insurance as a simple wager, Bañes seemed to forget that the premium did not correspond to the win of the insurer (in case of safe arrival of the ship), but it would be paid to him also in case of mishap. Bañes, note 62, q. 78, art. 4, p. 324, ‘Contractum qui dicitur depositions, sive daciations (sic), quod vulgo dicitur, apuesta [wager], est enim perinde talis assecuratio, atque si asecurator deponeret 100 amittenda, si navis perierit, contra quatuor lucranda si non perierit.’


It might be noted that some jurists reasoned on a similar line, *mutatis mutandis*, so as to exclude the insurers’ liability for cargo insurance when the mishap occurred on a lighter. When the place of arrival did not face on the sea but on a river, the cargo had to be brought to the ship or ashore through small lighters. Yet the lighter was not considered as an integral feature of the ship. So, in case of mishap occurring on the lighter, the insurer did not have to pay – unless he had expressly extended his obligation also to the lighters. Hevia Bolanho, note 42, lib. 3, ch. 14, n. 23, p. 657, Santerna, note 25, pt. 3, n. 36-39 *folis*. 21v-22r, and Stracca, De *Assecurationibus*, note 39, gl. 8, n. 7, *folis*. 61v-62r and esp. gl. 13, n. 3, *folis*. 97v-98r.

68 Pereira, note 67, dec. 56, n. 10, p. 286: ‘assecuratores, qui periculum subeunt in corpore navis, quod illa vivente non tenetur, unde si a pyratis (sic) capiatur, et destrauantur armamenta, rostra vel clavus, malaque prascindatur, utique si tunc evader, debet aestimari navis, in eo statu in quo relicta fuit, ut illud praetium deteriorationis solvat, residuum vero a Magistro [navis] petatur.’
did not invalidate the undertaking: ‘though the chance of mishap terminates, the *causa*
of the promise of the price does not’. 69 False representation of the value of thething-at-risk was equally irrelevant, ‘because in contracts of strict law a false *causa* does notavoid the undertaking’. 70 Once established that the wager was lawful, the court wouldsimply enforce it. 71 Equitable considerations could play no role in it, 72 and little roomwas left for a thorough analysis of the will of the parties. 73 By contrast, *emptio-venditio* and *locatio-conductio* were both contracts grounded ongood faith. 74 Among the two, *emptio-venditio* was perhaps more open to legalcontrols, because of the correspondence required between *res* and price. Linkinginsurance to wager was obvious, but also dangerous: *sponsio* could not be fullycontrolled. It is no coincidence that the first treatise on insurance, that of Santerna,was entitled *de Assecurationibus et Sponsionibus*. The ambiguity between*assecuratio* and *sponsio* in the title perfectly matches its content: reading Santerna’s treatise, it is often difficult to neatly distinguish the two contracts. Yet, when defininginsurance in legal terms, Santerna opted for *emptio-venditio*. Almost a century later,Stracca had no qualms about explaining insurance in terms of *sponsio* when writinghis treatise *de Sponsionibus*. 75 In that context, insurance was simply used by way ofexample. But when he devoted a treatise specifically to insurance, Stracca opted forthe *emptio-venditio* scheme. The same is true for several other jurists. 76 A lastconsideration on the suitability of wager is more ethical. *Sponsio* did not dispelthe doubts as to the morality of the agreement. On the contrary, especially if appliedtolife insurance, it was positively repugnant. 77

Not all jurists who dealt with insurance felt the need to investigate its precise legalform. If the purpose was simply to justify the premium, it could be sufficient to

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69 ‘*Licet cesset periculum, nondum cessat causa promissionis et stipulationis ipsius pretii*’, Santerna, note 25, pt. 3, n. 21, *fol. 19r*. Many jurists used the same principle to defend the validity of the cargoinsurance when both parties were aware that nothing had been laden onboard. In such a case, theyargued, the agreement no longer focused on the assumption of the risk, but rather it was a simplewager. See e.g. Lopez, note 45, pt. 2, ch. 16, p. 360; Bañes, note 62, q. 78, *art. 4*, p. 324; Hevia Bolaño,note 42, *lib. 3*, ch. 14, n. 17, p. 655; Leys, note 40, *lib. 2*, cap. 24, *dub. 4*, n. 28, p. 324-325
70 ‘*Quia in contractibus strictis iuris, falsa causa non vitiat obligationem*’. Santerna, note 25, pt. 3, n.11, *fol. 16v*.
71 More in general, it might be interesting to note how the Civilians’ dislike of *sponsio* was onlymatched by the enthusiasm for penal bonds among litigants, especially at Common law, as the mostsuccessful way to ward off interference from the bench.
72 For instance, if the insured agreed to pay the premium but did not load the cargo onboard andnotified the insurer, the latter could still claim the premium in full: *ibid*. See also the problems arisingfrom the difference in quantity between the insured cargo and the cargo actually laden onboard, or forthe case the cargo insured was already damaged or wasted when laden onboard. In such cases, thejurists resorted to equity to reduce the premium: *ibid.*, *pt. 4*, n. 56-59, *fols. 44v-45r*.
74 Cf. Luis de Molina (1535-1600), *Disputationes de Contractibus ...*, Venetiis, Apud MatthiamColloso, et Baretium Baretium (sic), 1601, pt. 2, disp. 507, n. 6, 677-678.
76 For instance, Molina placed wager immediately after insurance, and Scaccia did the opposite. Butboth defined insurance as *emptio-venditio*. Molina, note 74, disp. 507 (*De contractu assecurationis*, p.675-680) and disp. 508 (*De Contractu sponsionis*, p. 680); Scaccia, note 36, § 1, *q. 1*, n. 84-127, p. 21-34 (*De Sponsione, et Ludo*), and n. 128-170, p. 34-46 (*De Assecuratione*). Cf. Cecchelli, note 2, 627.
77 See for all Mazzolini, note 42, *sub* *Negotium*, q. 4, *fol. 344v*. One of the few authors who defendedlife insurance in terms of *sponsio* was Scaccia. But he did so mainly to put as much distance as possiblebetween insurance and loan. Scaccia, note 36, § 1 *q. 1*, n. 97, p. 25-27, esp. p. 27. The dubious moralityof life insurance as wager was by contrast a strong point for the advocates of the *fideiusso* scheme: see e.g. Lopez, note 45, pt. 2, ch. 16, 357-358.
highlight the useful economic function of insurance for commerce,\textsuperscript{78} or just to stress the aleatory nature of the insurer’s undertaking.\textsuperscript{79} Often, the same jurist provided several alternative schemes for insurance.\textsuperscript{80} The only limit was loan: whatever the legal relationship between insurer and insured, insurance could be defended so long as it was not qualified as \textit{mutuum}.\textsuperscript{81} The insurer’s risk was against the very nature of loan (\textit{contra naturam mutui}), and so ‘the uncertainty eliminates the vice, or presumption, of usury’.\textsuperscript{82} As the \textit{periculum} made the insurer’s gain uncertain, and so it removed suspicion of usury, Civilians insisted on the \textit{susceptio periculi} to defend the legitimacy of insurance.\textsuperscript{83}

3. Laying insurance on Procrustes’ bed

Wager aside, whatever the contractual scheme adopted (and so the underlying legal reasoning), some practical consequences were the same. Without merchandise laden onboard, the undertaking was void. No \textit{pericum} was actually sold, agreed upon in a \textit{locaito-conductio}, or undertaken as an obligation to do in an innominate contract. In case of \textit{fideiussio} this was all the more apparent, for lack of merchandise meant absence of debtor.\textsuperscript{84} The same applied to the case where the mishap was imputable to the insured (either as \textit{culpa} or, even more, as \textit{dolus}). Whatever the contractual scheme

\textsuperscript{78} E.g. E.g. Johan Marquard (1610-1668), \textit{Tractatus Politico-Juridicus de Iure Mercatorum et Commerciorum Singulairi,} ..., Francofurti, Ex Officina Thomae Matthiae Götzi, 1662, lib. 2, ch. 13, n. 4 and 9, p. 330 and 332 respectively. See further Ceccarelli, note 2, 629-630; Cassandro, “Note Storiche sul Contratto di Assicurazione”, \textit{Assicurazioni} 26 (1959), 16-57, at 17-19.

\textsuperscript{79} E.g. Peter Binsfeld (Petrus Binsfeldius, 1545-1598), \textit{Commentarius theologicus et juridicus in titulum iuris canonici de usuris,} 1593, ch. 19, q. 2, p. 527-528.

\textsuperscript{80} So, for instance, for Salón, note 47, § \textit{Disputatio de Contractu Assecurationis}, art. 1, n. 3, p. 677, insurance could be a \textit{locaito-conductio} (specifically, ‘contractus commissionis’), but also a \textit{fideiussis} (\textit{ibid.}), and possibly also a case of \textit{emptio-venditto} (\textit{ibid.}, n. 5).

\textsuperscript{81} Cf. Lupo, note 42, \textit{Commentarius tertius,} § 1, n. 15-16, \textit{fol. 96r; Agostino Beró (Augustinus Beroius, 1474-1554), Consiliorum sive responsorum Augystini Beroi Bononien, ...}, vol. 1, Venetiis, apud Franciscum Zilletum, 1577, cons. 168, n. 1, p. 625.

\textsuperscript{82} Stracca, \textit{De Assecurationibus,} note 39, praefatio, n. 35, \textit{fol. 22r-v: ‘Diversa ergo est ratio inter emptionem et venditionem et mutuum. In emptione enim incertitudine tollit vitium suum praesumptionem usurai: Contra vero in mutuo, in quo vitium usuramur non purgatur, licet periculum ad creditorem pertinent [...] diversitas rationem esse, quis contractus mutui magis proximus est usurai, quam aliis contractus. Nam in contractu mutui usurae vere et proprie quod ad formam et re ipsa contrahitur: sed in aliis veluti in contractu emptionis licet re ipsa et impropre usura contrahit dici possit; tamen quo ad sui formam et proprie non contrahitur’}. Cf. esp. Santerna, note, 25, pt. 1, n. 5-12, \textit{folis. 4r-5v.}


Incidentally, in the same period the \textit{susceptio periculi} was employed also to shield the \textit{foenus nauticum} from usury accusations. See e.g. Paul van Christyenus (Paulus Christyenus, 1543-1631), \textit{Practicarum Quaestionum Rutunque in Supremis Belgarum Curis Iudicatarum Observarumque,} vol. 3, Antverpiae, apud Hieronimum et Ioannem Bapt. Verdvssen, 1660, tit. 33, dec. 47, n. 4, p. 548.

\textsuperscript{84} Garcia, note 52, cap. 15, n. 455, p. 475-476.
chosen for insurance, the imputability of the mishap to the insured would exonerate the counterparty.\textsuperscript{85} This was the case even for wager: ‘broad as it may be, the sponsio formula could not be shaped so that the promissor insured against the fraud or fault of the promisee’.\textsuperscript{86} More precisely, in a sponsio the condition that fails to materialise (e.g. the safe arrival of the thing-at-risk) because of the fact of the promisee is to be considered as having occurred.\textsuperscript{87}

Beyond these and similar scenarios the choice of a contractual scheme did have important consequences. A few times, they were advantageous. It is the case, for instance, of \textit{emptio-venditio} of the thing-at-risk (as opposed to the risk in it) and \textit{fideiussio}. Considering the insurer as the owner of the thing-at-risk until its safe arrival at destination, as Bosco did, had a practical advantage: it allowed the insurer to vindicate the ownership of any part of the insured cargo that had not perished in the shipwreck.\textsuperscript{88} This way, the insurer was entitled to claim whatever was left of the cargo (or ship) insured after having paid for its whole value to the insured. Such was the practice among merchants: upon recovery, the insured would transfer his rights on the insured thing to the insurer, so to allow him to recover (and sell) it, thereby reducing his loss. If the insurer was already the owner of the thing, then he could proceed with the recovery at once, without having to wait for the insured’s waiver. \textit{Fideiussio} reached the same purpose, because of the right of recourse of the guarantor on the main debtor (the insured thing). This way, the insurer-guarantor could claim

\begin{quotation}

\textsuperscript{86} \textit{Quamvis enim latissime concept} sit formula sponsionis \ldots ita tamen concepta non est, \textit{imo concipi non potuit}, \textit{ut} dolum ac culpam stipulantis assecuracionem sponsor praestare debeat\ldots\textit{,} Wamése, note 63, centuria 4, cons. 25, proem. and n. 1, p. 67. Wamése was particularly clear on the point, perhaps because he was counsel for the insurer. The other counsel was another law professor and colleague of Wamése at Leuven, Elbert de Leeuw (Elbertus Leoninus, 1520-1598). Leeuw was more detailed on the point: \textit{Quamvis enim latissime concepta sit formula sponsionis: ita ut vix illius sit casus eventuri periculi, qui ea non comprehenderatur, sive is sit plane fortuitus, sive ex tertij aliquis facto, etiam improbabilii, proveniunt, et qui aliquo in simplici assurance, suo sponsione non facile contineretur\ldots ita tamen concepta non est, \textit{imo concipi non potuit} [...] ut dolum ac culpam stipulantis assecuracionem sponsor praestare debeat: ideoque in generali, effusaque periculi quomodocunque contingentis promissione, non continetur illud periculum, ac damnum, quod facto aut culpa stipulantis contingit, sed illud exceptum semper intelligitur, quasi illiberae et contra bonos mores sit, facti proprie poenam in alterius detrimentum, et damnum convertere, et ex hujusmodi stipulacione dolum et culpam affectanti occasionem praeberet\ldots\textit{,} Leeuw, \textit{Centuria consiliorum clarissimi jurisconsulti Elberti Leonini \ldots} Arnhemii, ex officina Joannis Jacobi, 1656, cons. 23, proem. and n. 1, 255-256.


whatever was left of the cargo or ship insured after having paid for its whole value to the insured. 89

In many important cases, however, no contractual scheme would entirely suit insurance. Or rather, in order to do so, Civilians had to be considerably flexible with the contractual scheme of their choice.

A good example is the issue of the insurable value, especially with regard to the value at destination. The emptio-venditio scheme focused on the rei aestimatio. In Leys' definition of insurance, the insurer 'undertakes to pay the value of the thing in case it perished' ('se obligat ad solvendum rei aestimationem, in eventum quo perierit'). 90

This however presupposed that the object of the contract was the value of the thing-at-risk at the moment of the sale. A first consequence was that the thing had to be in existence at the moment of the contract. Stracca was particularly clear on the point. If the insurance is a contract of sale, and its object is the value of the thing-at-risk, then the thing must exist when the contract is made. Otherwise, the sale would be an emptio spei. 91

Moving from Bosco’s sale of the thing-at-risk to Santerna’s sale of the risk in the thing offered many advantages, but it could not be pushed too far. The periculum suszeptum by the insurer was limited in time: within a certain period it would either materialise or disappear. But it was necessary that the risk existed at the moment of the contract. To this end, it was essential that the thing also existed. 92

The jurists who analysed insurance in terms of emptio-venditio were keen on the point, for this distinguished insurance from wagers at large. If the rei aestimatio was ‘sold’ when the policy was made, then it ought to refer to the value of the res at the moment of departure, not of arrival of the ship. 93 In other words, the emptio-venditio model conditioned the insurable value, ‘because the valuation takes the place of the thing’. 94

As the policy could not exceed the cost price, it was not possible to insure the value at

89 García, note 52, ch. 15, n. 453, p. 475: ‘De aquí nace que cuando la cosa asegurada se pierde, todo lo que de ella queda salvo se entrega al asegurador, para que de allí rehaga sus daños, o en todo, o en parte, según que fuere posible.’

90 Supra, note 40.

91 Stracca, De Assecurationibus, note 39, praefatio, n. 13, fol. 13v: ‘quia emitur alea, hoc est spes rei, non dicitur periculi pretium, sed rei non existentis, et rei quae in spe est emptio’. See further ibid., n. 46, fol. 26v: As we will see, when applied to insurance, the emptio-venditio scheme could not be fully separated from emptio spei. This is probably why a jurist as careful as Molina, note 74, pt. 2, disp. 507, n. 2, 675, was clear to shape the emptio-venditio of the periculum to the emptio spei model.

92 Stracca, De Assecurationibus, note 39, praefatio, n. 13, fol. 13v: ‘Licet nec emptio nec venditio sine re quae veneat, possit intelligi, aliquando tamen sine re venditio intelligitur, veluti cum quasi alea emitur, quod si cum captus piscium et avium, quia spei emptio est’.

93 Ibid., gl. 6, n. 1, fol. 51r: ‘Quoniam licet conditionalis sit contractus, considerato adversae fortunae causu, non tamen assequar coram dicitur debitor rei sub conditione vel modo [...] sed semper dicitur debitor aestimationis ad quam se obligavit, quae aestimatione certa est’.

94 Santerna, note 25, pt. 4, n. 57, fol. 45r: ‘sicut ille qui habet extimationem rei dicitur ficte habere rem [...] ita possimus dicere, quod promittens extimationem ficte, censetur promittere rem, et in eo possit habere locum dispositio [...] quia aestimatio succedit loco rei’. See also ibid., pt. 3, n. 42, fol. 23r: ‘licet iste contractus [assecurationis] ut pluries dixit sit conditionalis habitu respectu ad adventum periculi, tamen non potest dici debitor rei, sub conditione vel modo [...] sed semper dicitur debitor illius extimationis quam promittit quando se obligat, quae extimatione certa quando promittit quasi re est [...] quod hic debetur extimatione ture obligationis, eo quod principaliter ad eam se obligat, et sic inspicietur tempus contractae obligationis’. Cf. Stracca, De Assecurationibus, note 39, gl. 6, n. 3, fol. 52r: ‘verum dicit posset spectari tempus emptionis in casu nostro, non illud quo merces emptae sunt, ä dominis, sed quo assecurationis contractus celebratus est, contractus namque iste (ut non semel dixi) similis est emptioni, et merito inspiciatur tempus quo pretio periculum emitur, vel diem tempus contractae obligationis super assecuratione spectandum, [...] ut damnum emendetur ratione contractus super assecuratione, quasi contrahentes ad tempus contractae obligationis se retulerint’. 
destination. Of course the parties could inflate the value of the thing-at-risk. But this ill-suited the scheme of emptio-venditio, for it relied on the fact that only an exorbitant disproportion between value agreed upon and actual value would trigger the laesio aenormis mechanism. Insuring the value at destination was not fully compatible with the emptio-venditio scheme—it might have suited more the locatio-

95 Santerna, note 25, pt. 3, n. 40-46, fols. 22v-23v; Stracca, De Assecutionibus, note 39, gl. 6, n. 1-3, fols. 50v-52v; Scaccia, note 36, § 1, q. 1, n. 169, p. 44-45.
96 Santerna, note 25, pt. 3, n. 45-46, fol. 23r-v, and pt. 5, n. 1, fol. 48r; Stracca, De Assecutionibus, note 39, gl. 6 n. 4, fol. 53r; Ripoll, note 47, ch. 21, n. 131, p. 232; Beró, note 81, cons. 168 n. 5, p. 626; Scaccia, note 36, § 1 q. 7, pt. 2, ampl. 10, n. 14, p. 331 (for a lengthy review of juristic debates on the point see ibid., n. 5-7, p. 322-329). A dissenting voice on the point was that of Rocco. According to him, the laesio aenormis remedy could not be invoked in insurance matters, because the insurer knew from the beginning that his premium would amount to far less than the value of the insured thing. Accordingly, 'the said remedy does not apply where both parties were aware of that' ('dictum remedium non habet locum inter scientes'), Rocco, note 41, not. 7, n. 15, p. 394. Strictly speaking, Rocco had a point in law. If insurance fell within the sale scheme, then the premium was the pretium paid for the rei aestimatio. In practice, the premium was discounted after the expected probability of mishap. So it would typically amount to just a little part of the value of the insured thing. But this discounting operation was alien to the laesio aenormis principle. As such, the disproportion between pretium and rei aestimatio ought to trigger the laesio mechanism. Rocco avoided this unfortunate conclusion by invoking the 'inter scientes' principle. But his argument is rather telling about the limits of the emptio-venditio scheme.

97 Santerna, note 25, pt. 3, n. 41, fol. 22v, argued that the insurance value (the rei aestimatio) was to be reckoned according to whether the warranty focused on the value of the thing or on its safe arrival at destination: 'aut qui promittit salutem mercium in certo loco, ut puta Vlisbonae, et tunc eius loci existimatio inspicienda est [...] non promissit dare merces salvas in certo loco: sed tantum extimationem, vel valorem merciorum in casu pericii scilicet si navis periret, ut fieri solet etiam inspici debet tempus obligationis, et sic prout tunc valebant, debet fieri extimatio'. The cost price reckoning had sound basis: 'quia tunc extimatio debetur iure obligationis, et sic videtur permitte id quod tunc valebant [...] Iten qui procurat in adventu pericii estimationem rerum suarum videtur magis providere damnun ne patiatur in ammissione (sic) rerum non autem considerat lucrum, et per consequens venit illud in quo tunc damnun sentire posset quando stipulatur, et non venit lucrurn' (ibid.). But Santerna found a legal ground for the value at destination as well. Since the object of the insurer's obligation was the rei aestimatio, nothing prevented the parties from agreeing to a different aestimatio than the price cost: 'licet iste contractus ut pluries dixit sit conditionalis, habito respectu ad adventum pericii, tamen [assecurator] non potest dici debitor rei sub conditione vel modo [...] sed semper dicitur debitor illius extimationis quam promittit quando se obligat (ibid., pt. 3, n. 42, fol. 23r). The proof that something might be valued at its price at destination was found in the law on jettison (the lex Rhodia de tactu, D.14.2.2.4), where the remaining part of the cargo (i.e. that which was not jettisoned) is to be reckoned at its value at destination (ibid., pt. 3, n. 40, fol. 22v). Santerna's argument was the object of a lengthy critique by Stracca, De Assecutionibus, note 39, gl. 6, n. 2-4, fols. 50v-52v. According to Stracca, Santerna's conclusions were not compatible with emptio-venditio (unless moving to emptio spei). For it was possible to shape the suscepto pericii as sale of the rei aestimatio so long as the value of the res was reckoned at the moment of the contract. If the sale took place at the moment of the insurance, then the value of the thing (the rei aestimatio) would necessarily refer to the same time: 'Dixerit aliquis ergo in quaestionie proposita spectandum erit emptionis tempus, non autem contractae obligationis [...] verum dici posset spectari tempus emptionis in casu nostro non illud quo merces emptae sunt, a dominis, sed quo assecurationis contractus celebratus est, contractus nanguie iste (ut non semel dixi) similis est emptioni, et merito inspiciatur tempus quo pretio pericium emitur, vel diem tempus contractae obligationis super assecuratione spectandum [...] ut damnum emendetur ratiome contractus super assecuratione, quasi contrahentes ad tempus contractae obligationis se retulerein', ibid., n. 3, fol. 52r. Further, argued Stracca, the jettison concept is conceptually different from insurance, and could not be invoked in support of Santerna's interpretation. The jettisoned cargo is reckoned at its cost value, but the part of the cargo which arrives safely at destination is valued after the higher price it now commands. The reason, Stracca explained, is to share the loss more equally among the merchants involved, for the loss is to be divided among all merchants proportionally to the value of their goods. The owners of the safe goods would thus pay more than the owners of the jettisoned ones. Thus, the mechanism is based on fairness: since
conductio model, short of the obvious sponsio alternative.

Other attempts to reconcile the emptyo-venditto model with the insurability of the value at destination resulted in yet more convoluted arguments, or in their complete absence. For instance, after having used the same definition as Lessius on insurance as emptyo-venditto of the rei aestimatio (and so, based on the cost price of the rei), Rocco then nonchalantly argued that the insurance could also be considered as emptyo spei, and so it was possible to give a different value to such spes – the value the cargo would have if it reached safely its destination. Following Santerna's scheme – by then, a topos – Scaccia concluded that one thing was to insure the value of the thing, another to guarantee the safe arrival of the rei at destination. Scaccia was however aware that the second case looked more as emptyo spei and so it could not easily be reconciled with the definition of insurance as sale of the rei aestimatio. So he just referred the reader to the opinions of Santerna and Stracca – who, incidentally, were in open contrast with each other on the point. Ansaldi sought to solve the problem by using emptyo spei without mentioning it overtly. The approaches of Rocco, Scaccia and Ansaldi on the insurability of the value at destination highlight the underlying legal (and logical) problem. The more the accent fell on the value of the goods at destination, the more it moved away from the thing-at-risk. Rei aestimatio and emptyo spei are not fully compatible with each other. More precisely, emptyo spei is conceptually a case-limit within emptyo-venditto: it is not possible to use it as the default scenario of a sale agreement – let alone of the contract of insurance – without mentioning it expressly. Yet, if one is to rely on emptyo spei overtly to justify insuring the value at destination, then it is extremely difficult to reconcile its use with the standard definition of insurance as (normal) emptyo-venditto, based on the sale of the rei aestimatio. Trying to use emptyo spei in a somewhat furtive way is understandable, but it is equally dangerous. In the insurance context, it blurs the difference between emptyo-venditto and wager.

Qualifying insurance as the sale of the rei aestimatio had its problems. By contrast, the sponsio scheme perfectly suited the insurability of the value at destination. As jettisoning necessarily entails a discrimination between different goods, some compensation ought to be given to the owners of the merchandise sacrificed. The legal (and logical) basis is therefore wholly different from that of insurance, and so it cannot be applied by analogy to it (ibid., n. 2-3, fols. 51r-52r).
Santerna had it, 'if my things were to perish, you will give me a thousand; in such case there is no issue'. One of the advantages of sponsio was that, as a simple wager, no correlation was needed between the wager’s amount and the value of the thing-at-risk. Yet, insisting on the abstractness of the wager was not easily reconcilable with the attempts of some scholars to shape it as suscepto periculi. If the insurance-wager was made ‘because of the pericum that the promisors [...] accepted’, it was difficult to separate the amount of the wager from the value of the thing-at-risk. Ultimately, this depended on the ambivalent meaning of pretium periculi in the Digest (D.22.2.5 pr.), as we have seen earlier.

In theory, both locatio-conductio and fideiussio schemes should have been more fortunate on the subject of insurability of the value at destination. In both cases the accent is on the guarantee, not on the thing-at-risk. It follows that the amount of the guarantee does not have to be necessarily the same as the value of the thing. The pretium periculi, in other words, could be higher than the rei aestimatio. Effectively, this was the case with locatio-conductio: the service undertaken by the conductor was to guarantee the safe arrival of the thing. Yet, as we have seen, locatio-conductio was the least fortunate contract in terms of advocates, and they did not elaborate much on the point.

The fideiussio scheme should have perfectly suited the insurability of the value at destination. If the insurer guaranteed the safe arrival of the thing, then he was answerable for the value the thing would have had at destination. However, no advocate of the fideiussio scheme said expressly as much. At first sight, the silence might appear odd. Yet, it was justified: fideiussio could well cover lucrum cessans in general, but not when applied to insurance. In principle, the value of the fideiussio could well be higher than that of the underlying debt. The only limit was that, in such case, the fideiussor could not swear an oath. For the oath referred to his guarantee of the debt, and so it could not exceed its value. Now, fideiussio could be applied to insurance so long as the fideiussor did not enjoy the privilege of being asked to pay only after the main debtor had defaulted (beneficium excussionis). As the main obligor was the thing-at-risk, it was necessary that the fideiussor did not enjoy such privilege – lest the entire construction would collapse.

Franchium, 1719, disc. 4, esp. n. 1, 5 and 9, pp. 23-25. Admittedly, Casaregis’ was a somewhat drastic position, but it soon became authoritative; see e.g. Ascanio Baldasseroni (1751-1824), Delle Assicurazioni Marittimi, Firenze, Stamperia Bonducciana, 1786, vol. 1, pt. 1, tit. 1, n. 20-25, pp. 34-37, and pt. 2, tit. 5, n. 7-15, pp. 180-195. Still, it should be noted that most (if not all) of the previous jurists seem to have thought of the insured always as the owner or his agent (or at the most as the only co-owner who wanted to insure the thing in common: Stracca, De Assecurationibus, note 39, gl. 10, n. 1-8, fols. 63v-66r).

Earlier authors had not worked out in full the implications of the emptio-venditio scheme. Both Santerna and Stracca had simply invoked the freedom to contract without looking at the specific effects of the sale scheme (based as it was on ownership) on the capacity to insure. Santerna, note 25, pt. 5, n. 10-11, fol. 50r-v: ‘non potest assec救援or opponere assecurato, quod merces non erant suae [assecuravit] [...] quia super re aliena quis potest contrahere’; Stracca, De Assecurationibus, note 39, gl. 10, n. 5, fol. 65r: qui convenitur ex contractu non potest referre quaestionem Dominij [...] agenti ex contractu, opponi non posse, quod non sit dominus, vel quod alter sit dominus; quia licet alius sit Dominus: tamen contractus consistit’. Cf. Rocco, note 41, not. 46, n. 150-153, p. 405, and not. 94, n. 365-366, p. 419, and Ansacl, note 47, disc. 12, n. 3, 5-6, 11-13, 17, p. 62-65.

106 Si res meae peribunt, dabis mille, et in hoc casu nulla est dubitatio’; Santerna, note 25, pt. 3, n. 43, fol. 23r. Cf. Stracca, De Assecurationibus, note 39, gl. 6, n. 4, fol. 52v (rightly referring to D.45.1.52); Rocco, note 41, not. 32, n. 104, p. 401; Scaccia, note 36, §1, q. 1 n. 169, p. 45.

107 Stracca, supra, note 66.

108 Stracca, De Assecurationibus, note 39, gl. 6 n. 4, fols. 52v-53r.

109 Supra, note 51.
beneficium excussionis would apply to the fideiussor unless he swore an oath on the
guarantee. 110 As such, the advocates of the fideiussio scheme prudently overlooked
the issue of the insurable value.

Another issue was the case of insurance after loss. Rather frequent in practice (often
the insured did not know when the ship would set sail, or he would become anxious
about its tidings), insurance after loss was problematic, especially for the emptio-
venditio scheme. For if the thing was already lost, then there was no longer any
periculum to transfer. 111 However, while the jurists agreed that previous knowledge of
the mishap on the part of the insured avoided the insurance, they were equally clear to
defend the contract if the parties were ignorant about the ship’s tidings. 112 Yet, the
legal principle did not change according to the knowledge of the mishap. In either
case, no risk was left. The jurists insisted on the subjective ignorance so to
compensate for the lack of objective uncertainty. But, in point of law, this would have
suited more a wager than a contract of sale. 113 Within the sale model, it was more a
case of emptio spei. Ironically, the reason why Stracca dismissed the spes as the
object of the sale when introducing insurance as emptio-venditio would have now
suited very well the case of insurance after loss. The reality of the periculum, argued
Stracca, depends on the existence of the res. Buying the chance that a thing
materializes (rei spes) is therefore different from buying the pretium periculi. In case of
emptio spei the pretium does not refer to the (actual) periculum, but rather to the
thing which might or might not come into existence. 114 When dealing with insurance
after loss, however, Stracca shifted the focus from the actual (and present) risk to the

110 E.g. Antonio Petrucci (1390-1464), Repetitio Solemnis et Perutilis. L. I. ff de iureiurando,
Helmstadi, ex officina Iacobi Lucii Typographi, 1592, § Sextus Effectus iuramenti, fol. 53-55, and
Ippolito de’ Marsili (1450-1529), De Fideiussioribus, in Antonius Heringuis, ed., Tractatus de
Fideiussioribus, Genevae, sumptibus Leonardi Chouët, 1675, n. 291, p. 461.
111 Leys, note 40, lib. 2, cap. 24, dub. 4, n. 25, p. 324: ‘impossible enim est praestare periculum rei,
ubi iam res perijt.’ Representing the insurer, Leuw, note 86, cons. 22, n. 2-4, 249-250, was more
elaborate on the point: ‘Assecurationem contractam, aut tempore Assecurationis imminente periculo
intelligitur, nec ad praeteritum datum seu periculum estendi potest. Nam praeterit periculi
susceptio, ac rerum jam deperditarum, et quas jam perisset (sic) in rerum natura certum est, promissa
securitas, ex juris communis dispositione nullius momenti esse: tum quia res, ad quam sit securitatis
promissae relatio, tempore quo sit promissio non existit, aut non est in nostro commercio [...] tum quia
nihil continet praeter aleam ac vanae sponsonis speciem, quae non fundatur super aliqua justa causa,
sed dumtaxat super inopinata ac inconsulta captione ac supergressione alterius contrahentium, quae
ianquam Reipublicae damnosa, et ad inconsultos contractus respiciein, a jure non probatur’.
112 E.g. Leys, note 40, lib. 2, cap. 24, dub. 4, n. 26, p. 324; Scaccia, note 36, § 1 q. 7, pt. 2, ampl. 10, n.
19-21, p. 331-332.
113 ‘Assecurationis contractus valeat: sicut in contractu sponsonis [...] de re aliqua preterita, satis
est, si incerta sit utrique contrahentium’, Molina, note 74, pt. 2, disp. 507, n. 3, p. 676. The issue is
luckily explained in Johan Locken (Johannes Loccenius, 1598-1677). After a long argument on the
invalidity of insurance after loss, Loccenius closed the matter simply referring to wager. Shaped as a
sponsio, no objection would stand against insuring after the mishap. Loccenius, De iure Maritimo libri
tres, in F. Stypmann, Scriptorum Iure Nautico et Maritimo Fasciculus, Halae Magdeburgicae,
sumptibus Orphanophilet, 1740, lib. 2, ch. 5, n. 9, p. 984.
114 Stracca, De Assecurationibus, note 39, praelatio, n. 13, fol. 13v: ‘Aleam emere, hoc est incertum
erum eventum [...] Licet nec emptio nec venditio sine re quae veneat, possit intelligi, aliquando tamen
sine re venditio intelligitur, veluti cum quasi alea emitur, quod sit cum captus piscium et avium, quia
spei emptio est. Dum ergo in d. i. periculi [D.22.2.5] dictur, si modo in speciem aleae non cadat;
exponentum est, nisi in speciem illum emptio at CADAT, incertumque rei eventum. et quod hic fit versus
sensus, indicant exempla subjecta, et illud maxime, si Piscatoris erogaturu in apparatum plurimum
pecuniae, ut si cepissent, hoc enim casu, seu casibus: quia emitur alea, hoc est spes rei, non dictur
periculi pretium, sed rei non existentis, et rei quae in spe est emptio.’ Cf. supra, note 97.
abstract possibility of mishap (that is, from periculum to eventus).\textsuperscript{115} In the ignorance of the parties, he claimed, the eventus would still remain possible despite it referred to the past. From a legal standpoint, the argument was not entirely persuading, for it implicitly moved from emptio-venditio (even of just a spec) to wager.\textsuperscript{116} Scaccia realised the problem but could not avoid it entirely. It is possible to insist on the eventus downplaying the existence of the actual periculum only if the existence of the object is itself aleatory. Hence, Scaccia argued for the validity of insurance after loss by considering the thing-at-risk as ‘res incerta et dubia’.\textsuperscript{117} The argument is based on the similarity between wager and insurance so as to extend the broader scope of the former to the latter. But it does not offer any logical reason for the analogy, all the more given the wholly different juridical structure of the two contracts.\textsuperscript{118} Worse, it seems to blur the difference between emptio periculi (referring to an existing thing) and emptio spei, creating a sort of emptio periculi sperati. Which, needless to say, went entirely against Scaccia's own definition of the object of insurance as the undertaking to pay for the value of the thing-at-risk (‘obligat[io] ad solvendum rei aestionem’).\textsuperscript{119}

The case of insurance after safe arrival was symmetrical with that of insurance after loss, so it presented the same problem. Arguing for the invalidity of the contract in case the insurer had previous knowledge of the safe arrival of the ship, the advocates of the emptio-venditio scheme insisted on the lack of objective periculum. The insurance is void, wrote Leys, ‘because the obligation undertaken by [the insurer] is worthless’.\textsuperscript{120} Yet, by the same token, the obligation undertaken after the res had already perished (the insurance after loss) should have similarly been considered worthless. The only author coherent on the point was Rocco, who reached the same conclusion (on the lawfulness of the policy) both for insurance after departure and

\begin{itemize}
\item \textsuperscript{115} Stracca, \textit{De Assecuracionibus}, note 39, gl. 27, n. 4, fol. 110r: ‘incertus namque dubiusque eventus emitur et periculi precium in re incerta praestatur.’
\item \textsuperscript{116} Ibid., gl. 27, n. 5-6, fols. 120v-121r. It is particularly interesting to note that Stracca, subtle jurist as he was, does not offer a legal argument in support of his conclusion, but relies only on customs and fairness. He was hardly the only one: see e.g. de Ripoll, note 47, ch. 21, n. 80-82, p. 225.
\item \textsuperscript{117} Scaccia, note 36, § 1, q. 7, pt. 2 ampl. 10, n. 21, p. 332.
\item \textsuperscript{118} Ibid., n. 21-22, p. 332: ‘assequarur et sponsio in substantia conveniunt […] Sed sponsio potest fieri de re incerta, et dubia, tam si sit de re dubia futura […] quam si sit de re dubia praesenti, vel praeterita […] quia sponsio est species ludi […] sed ludus ex sui natura tia potest esse de re futura, sicut de re praeterita: admitto tamen, quod in sponsione de re praeterita, vel praesenti facultius committi potest fraud, quam in sponsione de re futura. Ergo etiam assequarur potest fieri de re praeterita; et ita servatur, quia sufficit, risicum semel extitisse.’ What is interesting to observe is that Scaccia’s discussion about insuring something which might not exist is divided in two cases. The first is about the validity of the insurance after loss, the second whether the insurance on a larger quantity of merchandise than that effectively laden onboard is valid. The first issue is dealt with in a few lines, then the author moves immediately to the second, dealing with it for several pages (ibid., esp. n. 22-38, p. 332-336). Of course also this second issue was important, but far easier to solve in law. The whole arrangement leaves the reader with the clear impression that the author was trying to shift the subject to something easier to discuss. Moving from the premise that both issues stemmed from the same legal problem and focusing on the second with long and erudite juridical arguments, the entire problem would hopefully look satisfactorily concluded.
\item \textsuperscript{119} Supra, note 41.
\item \textsuperscript{120} Leys, note 40, lib. 2, cap. 24, dub. 4, n. 24, p. 324, ‘quia obligatio, quam in se suscipit, nullius est pretij.’ Molina went further: since the premium depends on the periculum, there has to be some proportionality between the two. Hence, if the insurer knew that the ship was close to destination (but not yet arrived), he ought to return part of the premium because of the lower risk. Molina, note 74, pt. 2, disp. 507, n. 3, p. 676.
\end{itemize}
insurance after safe arrival. But Rocco’s coherence came at the price of a higher incongruity – his easiness to move from proper emptio-venditio to emptio spei. The list of insurance-related matters hard to reconcile with Civil law could continue, but listing them all was not our purpose. Incongruities aside, abstract contractual schemes had also other problems: they were too broad. For instance, it was difficult to argue for the exclusion of the fraud of the shipmaster (barratry), even though in practice barratry was included in the policy only if expressly agreed upon. From a legal perspective, the shipmaster was a third party. His liability therefore was not a defence for the insurer to avoid paying the insured.

4. Concluding remarks

Accusing some among the most brilliant legal minds in early modern Europe of poor understanding of basic legal principles would be ridiculous. They must have realised the possible objections to their theories. But the only way to avoid such objections would have been to reconsider the legal models applied to insurance. Faced with this trade-off, they showed no hesitation in keeping the abstract model. And yet, when looking at practical issues arising in insurance matters, they were equally ready to detach themselves from those abstractions. It would seem that they considered the two subjects somewhat independent of each other. First came the need to provide a Civil law scheme for the insurance contract. Then, having secured this new business practice on safe ground, Civilians proceeded to analyse practical issues arising in a more down-to-earth fashion.

If there is a lesson to be learned, it might be not to take too seriously those abstract theorisations: their authors were the first not to do so. Modern scholars’ interest in the arguments of early modern jurists on insurance is perfectly understandable, even commendable. So long as this interest does not lead, as it often happened, to a sort of quasi-irrebuttable presumption on the correspondence between those arguments and coeval commercial reality.

122 One of the many other examples that could be made is the so-called ‘sue and labour’ clause, which allowed the insured to recover and preserve the cargo at the insurers’ expenses in case of mishap. Such expenses were met for the safety of the thing-at-risk: it was only fair that the insurers would reimburse the insured. So, for instance, the case of ransom paid by the insured was relatively easy to solve. As capture by pirates was one of the risks insured against, the insurer ought to refund the payment effected by the insured. See e.g. Santerna, note 25, pt. 4, n. 26-27, fols. 38r-v; and Rocco, note 41, not. 55, n. 191, p. 408. Cf. C.M. Moschetti, “Caso Fortuito, Pagamento del Nolo e Risarcimento dei Danni, in Id., Caso Fortuito, Trasporto Marittimo e Assicurazione nella Giurisprudenza Napoletana del Seicento, Naples, Edizioni Scientifiche Italiane, 149. The problem was for the case in which the expenses were made so to prevent the loss or damage of the thing – and so to avoid the risk from materialising. Not only there was a problem of causality there, but also the legal basis for the insurer's liability was less obvious, and - moreover - considerably more difficult to fit within the emptio-venditio scheme. Ironically, it would have been easier to hold the insurer responsible going back to Bosco's scheme of insurance as sale of the thing. It seems quite telling that the only reference to Roman law that Rocco was able to find on the issue was D.3.5.20(21) pr., substantially a case on the liability of the promissor against his guarantors. The parallel (considering the insured as the insurer's guarantor) is somewhat paradoxical. Rocco, note 41, not. 70, n. 259, p. 413.
123 See the long discussion in Santerna, note 25, pt. 4, n. 18-25, fols. 36r-38r, ultimately leading to the scheme ‘si facto venditioris, ipse tenetur emptor; si emptoris, ipse venditor; si tertii, pertinet ad emptorem’ (ibid., pt. 5, n. 9, fol. 50r). Cf. Stracca, De Assecurationibus, note 39, gl. 20, n. 3, fols. 113v-114r; Scaccia, note 36, fols. 1, q. 1, n. 155, p. 42; Barbosa, note 85, ad C.4.33.4, § Cum proponas, n. 1, fol. 153r.
It is important to notice that opting for the innominate contract facio ut des would have been considerably less problematic than any nominate one. Nearly all Civilians used it to describe the practical working of insurance, but not to define its legal features. Their preference for nominate contracts is intriguing: if they saw the limits of emptio-venditio, locatio-conductio or fideiussio, then why not content themselves with an innominate contract? Short of classifying early modern Civilians as proto-Pandectists, there might be two answers to that.

The first is to be found in the old problem of the legitimacy of insurance. It would be easy to dismiss the interminable discussions on the problem as a literary topos. In part, it might have been the case. But the treatises we have examined were not meant as academic divertissements. They were precious guides for practitioners and high courts alike. What is not always taken into account is that the decretal Naviganti targeted expressly the susceptio periculi: no premium was allowed despite the fact that the lender-insurer bore the risk in the thing (‘pro eo, quod suscipit in se periculum’).\(^{(124)}\) It is doubtful whether the decretal was still scrupulously applied in law courts. But this does not mean that Civilians could dismiss it, as Naviganti still stood as a juridical obstacle to their task. The issue was considerably thornier than it would appear in most of modern literature. It was a problem of law, not of morality.\(^{(125)}\) Defending the legitimacy of insurance was thus a precondition to its legal analysis.

The second and more important reason lies in the dissatisfaction with innominate contracts, which were considered residual categories, and in the deeply entrenched habit of thinking in terms of nominate contracts. The long list of rules elaborated by the doctrine, and then also the case law of high courts, were both thought for – and so applicable to - particular kinds of contracts. But always nominate ones. Opting for an innominate contract to explain a new type of agreement would have precluded the applicability of all those rules. It is true that the new instrument was so different from most standard contracts that not all those rules would have been applicable to it. Still, reasoning by categories of contracts was too entrenched in the mind of jurists. If the new contract were to be taken seriously, a proper legal clothing ought to be found for it. And this could mean only a nominate contract. Also, and more deeply, finding the legal basis of insurance in a facio ut des contract would have meant creating new law. The rules immediately applicable to innominate contracts were few. Moving from general principles to ad hoc agreements could have suited some moral theologians (and, later, natural lawyers), but not Civil lawyers.\(^{(126)}\) At least, not lawyers operating within – and thinking in terms of – mos italicus. Emerigon’s contempt of those ‘mind-fatiguing’ dissertations is perfectly justified, but it misses the point entirely.

\(^{124}\) Supra, note 6.

\(^{125}\) The moral objections raised by most of the authors often studied by modern scholars (see e.g. Pesce, note 2, 47-51) were easily dismissed, but not so the underlying legal issue. One of the best summaries of most coeval literature on the point may be found in Joseph Gibalini (1592-1671), Josephi Gibalini ... De Vsuris, Commerciiis, deique aequitate et vsu fori Lugdunensis ... tractatio bipartita ..., Lvdgvi, Sumpt. Phil Borde, Laur. Arnaud, et Cl. Rigaud, 1657, lib. 2, cap. 4, art. 3, n. 16-26 , p. 246-250. As any other jurist, Gibalini eschewed open confrontation with the old dilemma highlighted by Sinibaldo de Fieschi. Rather, he opted for a number of restrictions and indirect attacks.

\(^{126}\) With hindsight, the case of insurance seems to show one of the underlying reasons for the shift towards a general contractual scheme: the tension between enduring reliance on nominate contracts and the progressive realisation of their structural limits.