

**Comparative Studies
in the History of Insurance Law**

**Studien zur vergleichenden Geschichte
des Versicherungsrechts**

Volume / Band 1

A Comparative History of Insurance Law in Europe

A Research Agenda

Edited by

Phillip Hellwege



Duncker & Humblot · Berlin

PHILLIP HELLWEGE (ED.)

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Edited by/ Herausgegeben von
Prof. Dr. Phillip Hellwege

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Preface

The history of insurance law has fallen into neglect, and the state of research is for a number of reasons unsatisfactory. It is only recently that the topic has again received attention from legal historians. Nevertheless, the focus of today's research is largely on the history of maritime insurance law.

It is against this background that I have decided to initiate a project on the 'Comparative History of Insurance Law in Europe' (CHILE). CHILE is funded through a Consolidator Grant of the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme.

I will fully expand on CHILE's research agenda and on the objective of the present volume in my introductory chapter. Nevertheless, four points are worth highlighting in this preface. (1) Hitherto, research into the history of insurance had a clear focus on maritime insurance. CHILE will go beyond maritime insurance and will include other forms of insurance. (2) In the past, research on the history of insurance had a clear focus on insurance which is operated on a commercial basis. CHILE will go beyond mercantile insurance and will include forms of mutual assistance. (3) Up to now, research on the history of insurance has been led by economic historians and, consequently, legal developments have been neglected. CHILE will include legal developments. (4) Finally, in Europe there are distinct national narratives on insurance history. CHILE wants to go beyond these national narratives and analyse the history of insurance law in Europe from a comparative perspective. It is planned that this research agenda will be carried out over the coming years. In order to succeed with this agenda it is necessary to critically revisit the state of research on the history of insurance in Europe. That is what the present volume aims at. Thereby, the present volume seeks to map out the prospects for a comparative history of insurance law in Europe.

For the purpose of the present volume, only a small number of jurisdictions have been selected: Italy, France, Spain (with some observations on Portugal), Belgium, the Netherlands, England and Scotland, Germany, and the Scandinavian countries. I will fully explain the choice of these jurisdictions in my introductory chapter. I have asked each author to map out the state of research and prospects for future research in approximately 20 to 25 pages. For the Belgian perspective I had contacted two authors, and due to imprecise communication on my side the two authors believed that they each had 20 to 25 pages. Thus, the

Belgian paper is longer than the other contributions. As the paper on the developments in the Netherlands builds upon the Belgian paper, I was able to shorten my own paper on the Dutch perspective. The deadline for submitting the final papers was 31 March 2016. Some authors have taken the opportunity to update their respective contributions with respect to the latest literature on the subject before the volume went into print. Finally, I would like to thank Michael Friedman for correcting the English of the contributions of non-native speakers.

The present volume is the first volume of CHILE and at the same time it is the inaugural volume of a new series launched by Duncker & Humblot carrying the title ‘Comparative Studies in the History of Insurance Law/Studien zur vergleichenden Geschichte des Versicherungsrechts’. It will be followed by further volumes which will present the results of CHILE. However, it is hoped that the present volume, and CHILE as a whole, will also stimulate research into the history of insurance law by others; the series is, of course, not restricted to publishing the results of the CHILE-project but is open to anyone.

Augsburg, June 2018

Phillip Hellwege

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Chapter 1: Introduction

By *Phillip Hellwege*¹

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

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

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

¹ This chapter is a revised and extended version of *Phillip Hellwege*, *A Comparative History of Insurance Law in Europe*, (2015) 56 *American Journal of Legal History* 66–75.

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

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

When around 25 years ago comparative legal history gained prominence in the context of European private law, there was a debate on whether it is permissible to put historical research into a context such that it may help in solving contemporary problems. Many argued – and still argue today – that historical research can help to expose the common historical roots of the European private law systems.² These common roots are to be found in the Roman-canon *ius commune* as it developed since the Middle Ages after the re-discovery of Justinian's Digest. Historical research is able to uncover these roots where they exist and to reveal when and why the different legal systems developed in different directions. The findings can then help with the re-building of a common European legal science – the promoters of this approach spoke and speak of re-building because they say that a common European legal science in fact already existed during the time of the *ius commune*. Others forcefully disagreed.³ Their main argument was that the *ius commune* was not a single phenomenon but that it differed regionally and that it developed over time. Furthermore, they feared that historical research will fall short if it is embedded in a research programme that is inspired by solving present-day problems: scholars will look for common roots and disregard differences; they will reduce their research to the literature of the *ius commune* in order to produce quick results; and they will thereby disregard the law in practice, its complexity, and the socio-economic conditions in which the so-called *ius commune* functioned. Thus, if I had written this introduction 25 years ago, I would have had to decide: do I want to lose immediately the interest

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

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

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

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

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

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

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

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

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

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

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

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