

Institutions for Contract Enforcement:
Insiders, Outsiders, and Insurance in Early Modern London

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Abstract: Marine insurance arrived in London in the fifteenth century, with Mediterranean merchants. Accompanying them was a set of customary practices known as the Law Merchant, which set out the rules and their enforcement. Merchants embraced insurance as a mutually beneficial system of risk-sharing, trading it as a club good, rather than a profit-making investment (although profit was not unwelcome). They resolved disputes internally, based on good faith.

This system worked well when underwriting and purchasing were confined to an interconnected merchant community, characterised as *insiders*. However, when insuring expanded in the later sixteenth century, many *outsiders* began to participate. Some new buyers did not wish to observe customary market practice, preferring instead to trade for the maximum personal utility or profit, which drove up total costs. Others possessed different understandings of customary practice, or worse, intended to defraud established participants. In this analysis, since the real behaviours of actual individuals often defy theoretical separation into binary categories, *outsiders* are self-defining, comprising anyone who did not play by the insiders' rules-of-the-game.

In the 1570s, London's merchant-insurers sought assistance from the state in their effort to deal with outsiders. Institutional responses included a three-stranded programme implemented by England's Privy Council, and culminated in the establishment of organisations for both the execution and enforcement of agreements. The former comprised 1) the establishment of a policy preparation and registration office, 2) the codification of the existing customs of insurance in 'Lombard Street', and 3) the creation of an official body of adjudicators to preside over insurance disputes. The latter culminated legislation of 1601 which formalised, as the Court of Assurances, the tribunal created earlier.

These institutions did not operate in a vacuum. They were entangled in contemporaneous issues, especially the battle between common and civil law, and questions of royal prerogative and monopoly. They were inhibited by a legal system ill-equipped to handle insurance disputes. However, these problems were overcome when merchant-insurers and the state cooperated to meet the challenge of developing market infrastructure which formalised merchant-insurers' customary rules. The institutions created were sympathetic to merchant needs, and structured to preserve much of the flexibility which heretofore characterised London marine insurance. In this way, they served to formalise and entrench merchant practice, and thus to support and advance pre-industrial long-distance trade.

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From its earliest days in the fifteenth century, London's market for marine insurance was an open one, a broad, public market focussed on individuals who had been known from at least the seventeenth century as 'merchant-insurers'. Their product can be characterised as a 'club-good' (or, perhaps, a club-service) which they used to improve the commercial experience of all the participants. Buchanan defines club-goods as those which fill the 'gap between the purely private and the purely public good... the consumption of which involves some "publicness", where the optimal sharing group is more than one person or family, but smaller than an infinitely large number.'¹ Merchant-insurers used their club-good to make more secure the trade both of individuals, and of the community, despite commercial rivalries. In a theoretical perfect underwriting environment, all merchants would share in the losses of the community proportionally to the risks which they brought to its risk-pool. In practice, when underwriting was profitable, some of the cost was defrayed, but loss-costs ultimately had to be covered. Insurance made paying more manageable. This club-good nature of marine insurance provided one of the strengths of London's underwriting system. It also gave rise to challenges. When the optimal size the group sharing the club-good was exceeded, and especially when the nature of some of the participants changed, problems could and did emerge.

The methodology of insurance was dictated by merchant-insurers' custom, which was embodied in the Law Merchant, an uncodified, international body of rules embraced by merchants trading between national legal jurisdictions. The Law-Merchant provided the rules-of-the-game followed by merchant-insurers. Within London's early underwriting community, this framework was usually sufficient to ensure the smooth operation of the market. Typically when disputes arose, they were resolved through a process of arbitration, and according to the judgements of members of the community disinterested in the specific case. The perceived intentions of the participants in specific situations, rather than rigid prescriptions of statute or ordinance, were given most weight. Specific custom was typically deemed to have been applied 'time out of mind',² which in practice meant that applicable precedent was limited to the earliest which could be summoned from the knowledge and memory of the oldest adjudicator in the room. Principles governed decision-making. This built flexibility into the system. When merchant practice changed in response to circumstances, the principles underlying merchant-insurers' customary practice could be invoked to respond in a way which reflected the nature of their product as a club-good. When the merchant-insurers were the only buyers and sellers participating in the market for their club-good, this system proved efficient at sharing loss-costs at the lowest price. The involvement of third-parties was rarely necessary.

However, individuals could and did participate in this market as buyers, sellers, or both without being members of the merchant-insurer community. Because diversification of the underlying risks which comprised the insured risk-pool was of benefit to all, and because

1 For the seminal explanation of the idea of club goods, see Buchanan, James M.: 'An economic theory of clubs', *Economica*, New Series, Vol. 32, No. 125 (1965), pp. 1-14.

2 Such as in the 1601 *Act Conc'ninge matters of Assurances, amongste Merchantes*', HeinOnline, 4 Statutes of the Realm, 1547-1624, p. 978.

every additional underwriter accepting risk from the pool spread insured risk more widely, the participation of outsiders as buyers and sellers was of general advantage. This occurred increasingly from the sixteenth century, as London underwriters' customer-base and the general take-up of insurance expanded.

However, some participants were not always willing to play by the merchant-insurers' rules-of-the-game, or to abide by arbiters' decisions. Such non-observance of these institutions defines the category of market participants hereafter called *outsiders*. Some outsider-sellers were merchants who also subscribed to insurance policies as underwriters. Others were merchants whose interest in insurance was purely as a financial speculation, even though they may also have been merchant-buyers of insurance. Some outsider-buyers were foreign merchants whose understanding of the Law Merchant relating to insurance was different from that of London's merchant-insurers. Others did not wish to observe the rules-of-the-game, and sought satisfaction through the royal courts. Still other outsider-buyers wished simply to perpetrate fraud.

This division between insiders and outsiders is more than theoretical. It was recognised by contemporaries. A good example of this awareness survives from somewhat later than the period under discussion: in testimony to a parliamentary enquiry in 1810, the insurance-buying merchant John Inglis identified outsider-sellers: 'I perceive that the true principle of insurance is that of merchants meeting by some means or another to participate in their risks by insuring each other, and that a professional underwriter coming to Lloyd's without a known capital, is not of that class of insurers that merchants would wish to take upon their policies.'³

Trust was a key element in relationships between merchant-insurers. Writing in 1622, Malynes stated that 'Merchants Assuring each to other, may rescounter [settle through offset] their Premio's [premiums], in the accounts kept thereof between them; for herein is used great trust and confidence between them'.⁴ Trust was the underpinning of credit, which Muldrew describes as 'a currency of reputation... the means by which such trust was communicated beyond local face-to-face dealing between people who knew each other.' Muldrew maps the trust-reputation-credit link onto the general population, noting, critically, that 'as the market expanded in the late sixteenth century such trust became harder to maintain, leading to an explosion of debt litigation'.⁵ Problems could develop in the merchant-insurers' market when such trust began to break down. The resort to litigation was a common outcome.

A theoretical conception of the division between merchant-insurers and outsiders can be drawn from Braudel, who describes a two-tiered system of commerce. The lower tier, he

3 *Report from the Select Committee on Marine Insurance (Sess. 1810), 5 March 1810*, House of Commons, reprinted 11 May 1824, testimony of John Inglis, p. 50.

4 Malynes, Gerard: *Consuetudo, vel, Lex Mercatoria: or, The Ancient Law-Merchant*, London: printed for T. Basset and R. Smith, 1685 (first published 1622), p. 112.

5 Muldrew, Craig: *The economy of obligation: the culture of credit and social relations in early modern England*, Basingstoke: Palgrave, 1998, p. 7.

proposes, is characterised by routine transactions of transparent but competitive exchange governed by a set of rules, and which involve only the buyer, the seller, and sometimes an intermediary. Such was the market of the merchant-insurers. In Braudel's higher tier, transparency, control, and the rules which limit profitability are sometimes avoided, or are not enforced. Transactions of great sophistication may be based on arbitrary financial arrangements. Chains are longer, and exchange may be unequal. Different mechanisms and agents govern the tiers.⁶ During the later sixteenth century, as England's trade expanded in reach and complexity, a higher-tier insurance market comprising both buyers and sellers collided with that of the lower-tier merchant-insurers. Established institutions were shown to be inadequate to meet challenges posed by outsider-merchants. Disputes could not always be managed within the framework of custom and the Law Merchant. External mechanisms, principally those of the state, were found wanting.

Another useful and more recent historiographical categorisation can be drawn from Janeway's description of participants in what he dubs the 'three-player game' of enterprise. In it, sovereign *states* interact constantly with the *market economy* (which Janeway defines as the institutions enabling production) over resource allocations, while *financial capitalism* exploits discontinuities that may arise.⁷ The distinction is useful since it neatly bisects the mechanisms of the market from speculations. The merchant-insurers, underwriting primarily to share risk, are part of the nuts and bolts of the market economy. Those underwriting purely for profit, or investing passively in insurance companies, are credit-providing financial capitalists, at least when their activity is not routine. Thus, they constitute another type of market outsider, distinguished by their motivations (rather than by their choice to reject the merchant-insurers' rules-of-the-game). Their pursuit of economic rents made them the type of men Inglis saw as the wrong sort.

At the root of the entry of multiple groups of outsiders into London's insurance sector was a significant increase in demand. The patterns of England's international trade changed dramatically in the late sixteenth century, and overall volume increased in the seventeenth. These structural changes, along with the wartime perils arising from the English Civil and Anglo-Dutch wars, prompted many English merchants to begin to purchase insurance regularly. Demand was met with supply, as new underwriters entered the market. The capital cushion they provided was widely understood and broadly appreciated. The West Indies merchant William Freeman, for example, explained that 'it's my general custom to insure when adventures are anything considerable, whether at peace or war. When the danger is least, premium is low, and so I look upon it as a safe way.'⁸ By the time Freeman was

6 Braudel, Fernand: *Afterthoughts on material civilization and capitalism* (Ranum, P., trans.), Baltimore: Johns Hopkins University Press, 1977, pp. 49-56, 62-64.

7 Janeway, William: *Doing capitalism in the innovation economy*, Cambridge: Cambridge University Press, 2013, pp. 3-5.

8 William Freeman to John Bramley, 16 July 1680, in Hancock, David (ed.): *The letters of William Freeman, London Merchant, 1678-1685*, London: London Record Society, 2002, p. 162.

writing, in 1680, insurance prices in London had already fallen dramatically in a much-developed market.⁹

The tensions arising from the participation of groups of outsiders, as both buyers and sellers, in this expanded market required institutional interventions into the otherwise obscure operation of the merchant-insurers' system. Such interventions played an important role in the evolution of London insurance. Three took place between 1547, the date at which the earliest extant insurance policy was underwritten in London, and 1824, when the market was reopened to the participation of corporate insurance bodies. This paper focuses on the first of these interventions, a series of initiatives made by the Privy Council and parliament between 1574/5 and 1601. It established new, formal institutions to govern practice, and was launched at the request of merchant-insurers in response to the actions of outsider-buyers. Ultimately these institutions failed, in part because they inhibited the efficient operation of the market they were intended to support, but after more than a century of relatively effective use.

Institutional changes arising from the intervention were implemented either by the merchant-insurers themselves, or by the state at their behest. Here the state has several faces, including the monarch, the Privy Council, parliament, and the judges of various courts, whether of civil or common law. Relieving outsider challenges was the state's usual motivation, but parliament sometimes intervened to serve what could be described as the national interest (although agreement upon the substance of this interest was disputed). Ultimately, the institutional changes wrought by the state must account for an important proportion of London's forthcoming success as an international insurance centre, but that success owes as much or more to the state's lack of involvement in the functioning of the market. State interventions were few. When they were made effectively, they served to reinforce the old institutions of the merchant-insurers. It is characteristic of the origins and development of London marine insurance that custom was reintroduced or reinvigorated by interventions, including state interventions.

Such reaffirmations of merchant practice furnished certainty, a condition always sought by the institution-builders. As London insurance expanded from its founding circle of merchant-insurers who traded based on trust and mutual interest to encompass the trading risks of the world's seaborne adventurers, the delivery of certainty became increasingly important. The old system worked when it was perceived to deliver certainty of outcomes. Because it was based on custom, uncodified law, and, in cases of dispute, judgements which could be enforced only through honour on the part of the participants and ostracism on the part of the community, it was unable always to deliver certainty when the market began to grow beyond the small community of London merchant-insurers, let alone when it began to serve foreign buyers. It was uncertain which courts would hear cases, or what judgements they would

⁹ The prescribed length of this thesis precludes presentation of a discussion of the long-term declining trend in marine insurance pricing, and the causes of this decline. I have identified these causes through my analysis of a database of more than 20,000 historical marine insurance prices which I have collected from manuscript sources and collated. My working paper, 'The pricing revolution in marine insurance', presented to a general meeting of the Economic History Association in 2012, can be downloaded from <http://eh.net/eha/system/files/Leonard.pdf>.

make; it was uncertain if measures to prevent abuse of the system were adequate, or if strengthened defensive systems would limit market flexibility sufficiently to render it uneconomic. All that appears to have been certain to contemporaries was that marine insurance was essential to trade, and that trade was critical to the common good.

The Privy Council's intervention

The first major intervention into the operations of the London insurance market was made in the years 1574 to 1601. It was a series of institution-building initiatives intended to answer challenges to the effectiveness of the incumbent system of the merchant-insurers. The system's shortcomings had been brought into sharp focus by the actions of outsider-buyers who wished to perpetrate fraud against underwriters, but the intervention was extended, perhaps beyond the wishes of the merchant-insurers, to measures which both would address the burden of outsiders who would not play by the merchant-insurers' rules-of-the-game, and would set some restrictions on the operation of the market. The measures had the further aim of resolving the jurisdiction battle between different royal courts over the right to hear insurance disputes, and to ensure that merchants' customary practices and Law Merchant principles were brought to bear on those disputes which did arise. The intervention was sympathetic to merchant needs, and was structured such that it preserved much of the flexibility which characterised insurance practice in London. In this way it served further to formalise and entrench merchant practice in London. Ultimately, however, it was unsuccessful.

Braudel placed the arrival in England of higher-tiered capitalism in the era after 1688,¹⁰ but the elements of complexity, state involvement, diversification, and hierarchy were appearing in England during Elizabeth's reign. These conditions created greater demand for more diverse provision of insurance, as trade was increasingly divided among more London merchants, and distributed to new markets. Old methods of governing marine-insurance market practice began to prove insufficient in some situations. The system of informal dispute resolution and enforcement, based on the mutual interests of the merchant-insurers and the uncodified, flexible Law Merchant, was not always sufficient to ensure order in the market. The established judicial system was unable adequately to cope with insurance disputes which slipped out of the merchant-insurers' system, and was itself in turmoil. Merchants called for solutions; the Privy Council, and later parliament, chose to act. Both were, as always, interested in maintaining the efficacy of the insurance market, which was seen as essential to the support of trade, and thus to the continued flow of customs revenue.

Alongside the Elizabethan Privy Council's celebrated involvement in discouraging royal marriages, influencing international policy, and appointing provincial royal officials, the bulk of its responsibilities lay in passing judgement on 'the minutia of everyday life', including the hearing of insurance disputes. It met daily for this work, often seven days a week.¹¹ After

¹⁰ Braudel, *Afterthoughts*, p. 64.

¹¹ Sloan, Roy: 'Elizabeth I: government of England', in Lotherington, John (ed.): *The Tudor years*, London: Hodder & Stoughton, 1994, pp. 212-221.

insurance disputes had become regular business, the Privy Council launched the first regulatory initiatives targeting the smooth operation of London's insurance market. Until the 1570s, the merchant-insurers who comprised this market had operated under their own rules, and with few exceptions resolved their own disputes. However, the number of disputes was increasing, confusion over the correct jurisdiction and form of law to govern them was mounting, and merchant complaints about the operation of the system became more formal and frequent.

It seems, too, that a reputational impact was of concern. In February 1573/4 the Privy Council wrote to the Lord Mayor to complain that a sustained failure entirely to resolve a dispute between the merchant William Soninge and several of his insurers 'tendeth to the derogacion of so auncient a custome as assuraunce amongst merchauntes is, and breadeth grete discredit to the parties'.¹² In response to these problems, royal officers acted to implement institutional solutions to the problems which had arisen, in part, from the participation of a wider array of individuals in the expanding insurance market.

One result of the participation of a growing number of outsiders into a closely-knit market which traded in a club-good was an increase in transaction costs arising from enforcement challenges, and, typically, increasing recourse to enforcement by third-party institutions. The rules-of-the-game, known to the merchant-insurers trading in London, might not be known to new arrivals, and could be flaunted by those who did not see adherence as important to their commercial future. Established dispute resolution tools, comprising binding arbitration within the community, were no longer sufficient.

Over the next several years the Council attempted to resolve the growing problem of insurance disputes with a three-pronged programme of action. It was to formalise the resolution of insurance disputes under the Law Merchant through the existing governing institutions of the city at the Guildhall; to codify that law to produce a more concrete set of regulations than the arcane 'custom of Lombard Street'; and to establish an information system which could help to counteract the involvement of individuals who did not know the rules, or were unwilling to play by them.¹³ Through this programme, the Privy Council was to create new institutions of enforcement which were intended to cope with the arrival of newcomers, and with others who simply did not wish to play by the rules, whether they were outsider-buyers, -sellers, or both. The new institutions' focus on London insurance reinforced her merchant-insurers' custom, making practice elsewhere secondary.

The Office of Assurance.

In February 1575/6 the Privy Council received a 'suit of the principal merchants of England' which complained that

¹² Dasent, *Acts of the Privy Council*, VIII, pp. 195-196.

¹³ In a different context, the legal historian Ibbetson identifies this three-part action. Ibbetson, *Law and custom*, p. 295.

for wante of good and orderly kepyng in Register the Assurances made within this our Realme... the trade of merchaundize have bene and yet be oftentimes greatly abused by evyll disposed people who for theyr private gayne and advantage have assured one thyng in sondrie places thereby intendyng if any losse should happen to recover in all the sayd places and so oftentimes have done to the great losse and hynderance of dyvers such honest merchautes as did assure the same And the auncient custome of merchautes in Lomberd strete, and nowe the Ryall Exchange by that means almost growne out of estimation which here to fore as we are enformed hathe bene accompted the chief foundacion of all assuraunces.¹⁴

Unscrupulous merchants and sea captains – outsider-buyers – were attempting to maximise their returns from short-term plays in the insurance market by over-insuring, then making multiple, fraudulent claims, a gross breach of the rules-of-the-game set out by the Law Merchant, which amounted to fraud. Criminal-law remedies existed to punish fraudsters, but for such prosecutions to succeed, the frauds necessarily had to be detected. Merchant-insurers preferred that they were avoided before they occurred, through an information-sharing institution.

In answer to the merchants' complaint, the Privy Council considered granting monopoly rights over the intermediation of the insurance business. Shortly afterwards, a patent was granted to Richard Candeler, a mercer, Treasury agent, and factor of Thomas Gresham (himself a regular insurance buyer, and his cousin an underwriter). The patent gave Candeler the exclusive right to the 'making and registering of all assurances, policies and the like upon ships and goods going out of or into the realm made in the Royal Exchange or any other place in the city of London'.¹⁵

Thus was erected the Office of Assurance. It was located in a ground-floor shop on the Royal Exchange, and was the only office accessible from the interior quadrangle of the iconic building.¹⁶ Candeler's patent states that 'assuraunces not made with Candeler... shall be voyde',¹⁷ although this declaration appears to have carried no further legal weight. No policy appears to have been argued at law to have been void because it was not made in Candeler's office, although non-registration probably meant that royal courts were completely inaccessible. This low level of illegality could have been comfortably ignored by merchant-insurers operating according to customary practice.

14 TNA C66/1131/41, patent granted to Richard Candeler 21 Feb. 1575/6.

15 For Thomas Gresham's insurance buying and his relationship with Candeler [often 'Candler', although the patent and extant signatures include two letters 'e'], see Burgon, J.W.: *The life and times of Sir Thomas Gresham*, London: R. Jennings, 1839, pp. 329-330; also Lemon, John: *Calendar of State Papers, Domestic, Edward, Mary and Elizabeth, 1547-80*, Vol. XXXI, 1856, p. 232. Gresham's brother John appears as an underwriter on TNA HCA 24/30/151, a policy underwritten in London on 06 Dec. 1557. For a more detailed discussion of Candeler and his background, see Ibbetson, *Law and Custom*, p. 296.

16 Glaisyer, Natasha: *The culture of commerce in England, 1660-1720*, Woodbridge: Royal Historical Society & Boydell Press, 2006, p. 29.

17 TNA C66/1131/41, patent granted to Richard Candeler 21 Feb. 1575/6.

At roughly the same time, another market participant, Henrye Rodrigiz, made application to the Privy Council to be created sole broker of ‘all the assuraunces that shalbe made wⁱn the cyttye of London’. Two surviving documents, both undated, refer to his requests. A hastily written summary of his applications mentions his intention ‘to keepe perfect registars of all pollisy^es’, which were intended to combat fraud.¹⁸ However, in a second, more formal and detailed document Rodrigiz cited among the justifications for the grant of a monopoly patent not only the elimination of ‘dubble enssuringe of adventurers’. He added that buyers would know ‘where to fynde the assurer and assuraunce’, and ‘the pollicy^es and th^e dealinge touchinge the same assuraunce shallbe more orderlie, readie, and certen for all merchaunts’,¹⁹ reasons reflecting provision of certainty for outsider-buyers. He requested that all policies otherwise undertaken would be void. The application did not find favour. Because the Rodrigiz petition, and the summary of his request, both lack a contemporaneous date, it is not clear whether his requests competed with that of Candeler, were subsequent to it, or straddled it. Since Candeler’s patent did not include the broking of insurance policies, it is possible that the Rodrigiz request came later, and was for a further function. In any case, the Privy Council chose not to grant to Rodrigiz a monopoly patent over the intermediation of insurance policies, which certainly would have limited the flexibility of London underwriting.

Creating the Office of Assurance under Richard Candeler was a genuine act of institution-building on the part of the Privy Council, made in response to a call for action by the community of merchants, as Candeler’s patent clearly indicates. Candeler performed at least some of the responsibilities of his office personally; his own signature appears on nine extant insurance policies issued to the merchant Bartholomew Corsini in 1580-83.²⁰

Upon the inception of the Office, the Privy Council took steps to ensure that it added only minimally to insurance transaction costs, by closely regulating the fees it was permitted to charge. The patent stated that Gresham, along with the Lord Mayor, the Mayor of the Staple, and the Governor of the Merchant Adventurers could set the level of Candeler’s fees.²¹ When it came to it, he engaged in a protracted negotiation with Walsingham over this question.²² In support, the Privy Council solicited the Lord Mayor ‘to rate the prices for making and registring of pollicy^es of assuraunces, wherein he shold do well to enquire and folowe the prices acustomable paide in other count[r]ies adjoyninge’.²³ Candeler had to make do with much lower fees than he initially had desired. Thus his actions, and those of Gresham, were not naked rent-seeking, and the position was not entirely a sinecure (although the office of Registrar of Assurances, was to become a grant of privilege, and always awarded to court placemen).

18 BL Lansdowne MS 65 f. 104, summary of the petition of Henry Roderigues (undated).

19 Also rendered Henry Roderigues. TNA SP 12/110/104, petition of Henry Roderigues.

20 GHLC/B/062/MS22,281, CLC/B/062/MS22,282, the Corsini papers.

21 TNA C66/1131, patent granted to Richard Candeler.

22 For a detailed discussion of Candeler’s negotiations with Walsingham over fees, see Raynes, *British insurance*, pp. 43-46.

23 Dasent, *Acts of the Privy Council*, VIII, p. 397.

Official registration of policies was not a new idea. In Venice, the *Avogaria di comun* had offered policy registration since the early fifteenth century, for example.²⁴ However, it was new to London, and it seems that the Office and office-holder had ambitions beyond simple registry. Candler's role sometimes extended, whether or not according to the intention of the Privy Council, from simple registration and drawing-up of policies to the broking of insurance risk, or at least of the provision of a place for interested underwriters to make subscriptions. A policy insuring the *Tyger*, issued in 1613, states that 'wee the Assurers have hereunto sevelly subscribed a^r names ... in the office of Assurance wthin the Royall exchange in London'.²⁵ However, the patent-holder did not always act as broker, nor was this the precedent upon the formation of the office. Some of the surviving policies drawn in Candler's hand in the 1580s name a third-party broker; others do not.²⁶ The Office of Assurance appears to have offered a flexible service.

The grant of a monopoly to Candler resulted in petitions of protest to the Lord Mayor and aldermen from two key groups within London's insurance sector. These shed some light on the institutional structure of the market before the Privy Council's interventions. Brokers (at this time sometimes called *roggers*), who 'beinge thritie householders in nomber, and no more', claimed that they were likely to be ruined by the grant. Notaries, who numbered sixteen in 1574, also complained, stating the patent would mean the 'impovrishinge overthrowe and utter decaie of all the Notaryes publicke of this sitie wth their children servanntes apprentices and families to the number of one hundredth and twentie psones'.²⁷ Notarial seals were not applied to insurance policies at this time, as was the practice in some Italian cities,²⁸ but notaries were often engaged to draw up policies, sometimes in Italian, French, Spanish, or Dutch, when their customers were merchant-strangers and wished to send their policies abroad. In addition, they kept private registers of the policies which they penned. Their charge for drawing and registering a policy was two shillings, regardless of the sum insured under the policy. Sometimes too they acted as bankers for foreign clients, in that 'merchauntes straungers havinge assuraunces made in Englande beinge otherwise employed about their affayres have putte their Notaryes and Scrivenours to receive the same to large sommes, which hath ben honestly and trewlie repayed... and also some retornes of moneye when the assuraunce hath not taken place'. The brokers state of themselves in their petition that they were 'bounde with sureties in diverse and sondry greate sommes of money for their honest and trewe dealinge in their facultie', indicating a bonding system amongst the broking community, and thus a significant level of sophistication.²⁹

24 Stefani, *Insurance in Venice*, pp. 87-89.

25 BOD MS Tanner 74, f. 32, contemporaneous copy of a policy underwritten for Morris Abbot and Devereux Wogan, 15 Feb. 1613.

26 These policies refute van Niekerk's unwise contention that 'the earliest extant policy registered in the Office' was the *Tyger* policy of 1613. GHLC/B/062/MS22281-2, the Corsini papers, policies issued to Bartholomew Corsini; van Niekerk, *Principles of insurance law*, I, p. 225, n. 136.

27 BL Lansdowne MS 113/36, 'Some Merchants, Notaries, and Brokers petition Sir James Hawes, Lord Mayor of London, against Rich. Candler's grant for registering policies of assurance' (undated, 1574?).

28 Jones, *Elizabethan marine insurance*, p. 55.

29 BL Lansdowne MS 113/9.

As well as arguing that the monopoly would infringe upon the freedom of individuals to prepare and place their own insurances, the notaries and brokers stated that all merchants would be disadvantaged by the loss of swift, skilful, expedient, and confidential service offered by a diverse group of providers. They declared wryly that Candler would become a ‘notarye private’, and suggested that the sums of clients’ money that he might come to hold could be so great as to see him succumb to the temptation of theft. Further, the liberties of choice would be eliminated, and the practice of merchants garnering subscriptions to their insurances directly with underwriters (without the intervention of a third party, as seems to have occurred at least some of the time) would have been made impossible.³⁰ ‘It would be a great Bondage to Merchants to be tied to one particular Person, who might either for Favour or Reward dispatch one Man, and for Displeasure or Ill Will delay another’, a near-contemporary chronicler reported.³¹

The testimony of the of thirty bonded brokers describes an established set of sophisticated practices which were followed within that market. However, London’s merchants were not unanimously supportive of the Office, which had no power to compel insurance buyers to use its services. In July 1576 the Privy Council wrote to the Lord Mayor complaining that ‘certain evill disposed persons do refuse to bring their assuraunces to be registred, so as the said Mr. Candler cannot thereby receive the said commoditie of his office’.³² Individual motivations for non-registration cannot be determined, but the desire for commercial secrecy in the time-sensitive arena of early modern trade is one more likely explanation for widespread avoidance than intent to defraud.³³ Registration threw open policies to public scrutiny, which could reveal to prying competitors competitively sensitive details about the timing and nature of merchants’ voyages and cargoes. Braudel cites an unnamed Dutch merchant who, writing to a factor in Bordeaux, ‘advised their plans be kept secret, otherwise “this affair will turn out like so many others in which, once competition comes into play, there is no chance to make a profit”’.³⁴ Another motivation is the avoidance of fees, however regulated; a third is the simple preference of insider-merchants for their customary market practices. In his 1622 *Lex Mercatoria*, Malynes wrote that ‘Assurances are made in the said Office [of Assurances] in the West end of the said Royal Exchange’, which suggests exclusivity without a local alternative, but he was one of the architects of the Office, was close to members of the Privy Council including Walsingham and Cecil, and sometimes acted as consultant to them on mercantile matters.³⁵

By creating the Office of Assurance, the Privy Council had begun, at the behest of at least some of the merchant-insurers, to overcome one of the problems caused by the entry of outsiders into the expanding London insurance market: that of information-sharing among a

30 Ibid.

31 Stow, John: *A survey of the cities of London and Westminster (Styve’s edition)*, (first published 1598), London: printed for A. Churchill and nine others, 1720, pp. 242-3.

32 Dasent, *Acts of the Privy Council*, IX, p. 177.

33 Price, *Transaction Costs*, p. 296.

34 Braudel, *Afterthoughts*, pp. 57-58.

35 Malynes, *Lex Mercatoria*, pp. 106, 109; Gauci, Perry: ‘Malynes, Gerard’, *Oxford Dictionary of National Biography Online*, www.oxforddnb.com/view/article/17912, viewed 15 Aug. 2013.

broader group of merchant-insurers. While the solution was not universal and did not survive indefinitely, it marked the first step in state intervention into London's insurance sector. However, one impact endured. The most lasting institutional impact of the intervention was the partial fixing of the wording of the marine insurance policy used in London, and later around the world. The policies in the archives of the High Court of Admiralty, all drawn before the Office was established, have many common elements, but they follow no standard wording. Those underwritten for Corsini in Candelero's office in the 1580s adopt a form of words which is a close match to successive London forms.

The 'Booke of Orders'

The second institutional development ordered by the Privy Council in the 1570s to accommodate the shift of insurance from a small community to a larger market which included outsider-buyers and -sellers was the codification of insurance regulation, as it was understood according to the Law Merchant. The Councillors set out not to change the customary rules-of-the-game, but instead to create certainty, and to give the rules regulatory teeth by defining formally the accepted practices of Lombard Street, and the system of underwriting developed by the merchant-insurers. This is in keeping with an institutional development identified by North as reducing transaction costs: the blending of the Law Merchant into formal English law.³⁶

Several major port cities had already promulgated insurance codes or other forms of written regulation. Perhaps the earliest were those of Florence, set out in 1523. Burgos established ordinances in 1538, and Antwerp in 1563.³⁷ In December 1574 their Lordships of the English Privy Council wrote to the Lord Mayor of London, requesting that he, 'by conference with suche as be moste skilfull in [insurance] cases, should certifie my Lordes what lawes, orders, and customes are used in those matters of assuraunce, to thend they may be put in use acordinglie'. The third-party enforcement required when outsiders choose to disavow insiders' rules could not be conducted adequately without consistent rules-of-the-game. Codification would address this problem. By June 1575 the Orders must not have been transmitted, because the Privy Council again wrote to the Lord Mayor 'to certifie their Lordships what had been done for the setting downe of some orders for matters of assuraunce which their Lordships required to be donne long agoe'. Following the election of a new Lord Mayor, a further letter was despatched requiring that 'by sume learnid in the Civill Lawes and other skilful merchaunts certen orders might be set downe wherebye controversies arising out of matters of assuraunce might be decided'. A sharper, fourth missive requesting the orders was sent in July 1576, since 'the wante whereof doth dailie brede grete troubles'.³⁸

36 North's argument has been roundly refuted; see below. North, Douglass: 'Institutions, transaction costs, and the rise of empires', in Tracy, James (ed.): *The political economy of merchant empires*, Cambridge: Cambridge University Press, 1991, p. 30.

37 Magens, *An essay*, II, p. 1.

38 Dasent, *Acts of the Privy Council*, VIII, pp. 321, 397; IX, pp. 43, 163.

The *Booke of Orders of Assurances within the Royall Exchange*, c. 1577, set out standard insurance practice under the Law Merchant.³⁹ The code was never adopted by statute, although Kepler's scepticism that the rules 'were ever used by merchants' is odd, since by definition they comprised the merchants' established practice.⁴⁰ A 1572 petition by the London merchant Thomas Cure, related to a dispute over the insurance of a shipment of broadcloths from Spain, states that the policy was drawn 'according to the order of assurance used among merchaunts in the royall exchange in London', *before* they were codified at the request of the Privy Council.⁴¹ Rossi argues that the written Orders comprise the 'earliest attempt to codify customs' in England, and discusses at length the question raised by Kepler as to whether or not the code was ever formally adopted. He concludes that it was, citing a 1601 letter from the Privy Council to a judge of the Admiralty in which, in Rossi's words, the Orders are described as 'confirmed by the same Privy Council some years before'.⁴² This, however, seems scant evidence that the Orders had been formally adopted. It is certain that the rules laid out in the Orders were never imposed under a Parliamentary Act or formal proclamation.

It may be that the orders never proceeded beyond draft stage. If any records of the Office of Assurance have survived, they have yet to be identified. Thus, if a *Booke of Orders* was kept by the Office, and regularly updated, it has probably been lost. However, Rossi argues, based on his interpretation of primary evidence, that the judges of the Admiralty 'considered the code as written evidence of the insurance customs of a given period, and so as a set of rules subjected to change over time', and that the merchants who sat as arbiters of insurance disputes did not see them as definitively authoritative. Thus, he concludes, the Orders reflect the fact that 'the inner flexibility of customs ultimately prevailed on the rigidity of law'.⁴³ The adaptability of the Law Merchant survived in London; her merchant-insurers' flexibility to provide the insurance product their customers desired remained unimpaired by this attempted codification.

The Commissioners of Assurance

The Privy Council on several occasions had called for the formation of arbitration panels on an *ad hoc* basis to handle specific disputes. Their recognition of the insufficiency of the common-law courts was recorded following a meeting held on 7 November 1576. A letter was drafted to Sir William Cordell, Master of the Rolls, and to the Justices Southcote, Harper, and Jeffries 'touching the hearing and examyning of a metter in controversye' between a merchant and his insurers. 'Foreasmuch as the matter is of some waighte, and therefore dowbtfull whether it may be tryed by the Common Lawe or not, the Lord Chief Justice and the Lord [Justice] Dyer are required to joyn with the abovenamyd, and to

39 Two manuscript copies, with slight differences, have survived, both unfinished: BL Add. Ms. 48,023, ff. 246-273, 'Booke of Orders of Assurance'; BL Harleian Ms. 5103, 'Booke of Orders of Assurance' (later version).

40 Kepler, *Operating potential*, p. 47.

41 Cited in Jones, *Elizabethan marine insurance*, pp. 58-59.

42 Rossi, *Booke of orders*, pp. 260, 250-252.

43 *Ibid.*, pp. 251-252.

examine the said controversie anew, considering the circumstances requireth thadvice and opynion of such as are learned in the Civill Lawe'.⁴⁴ Three months later they were to establish a more permanent solution than this *ad hoc* panel of justices of the common and civil law. In this, the Privy Council's third action to address the challenges of the changing institutions of London insurance, their Lordships instructed the Lord Mayor to formalise the arrangements for dispute resolution.

The details of the civil-law solution are set out in the records of the city's Court of Aldermen. In January 1576/7 the Court did, for the term of one year, 'ellecte nomynate and chuse, for the desidinge and endinge of the causes [of assurance, seven men]... as indifferent p'sons to order, judge, and determyne all suche causes touchinge assurance made or hereafter to be made, w'hin the Royall Exchange, or the cittie of London'. The named men were to be 'after the seconde daye of the moneth of februarye nexte, comynge two dayes in the weeke, that ye to be mundays and Thursdays, sitt in the office howse of assurance in the Royall Exchange'. Candeler – now styled Registrar of Assurances – or his designate was to act as recorder, incorporating new decisions into the *Book of Orders* to form an evolving, and thus flexible body of insurance law.⁴⁵ This direction too indicates the flexibility of the rules governing insurance in London, and supports Rossi's contention that the rules were known contemporaneously to be 'subject to change'. Commissioners were not permitted to charge a fee for their services, so the creation of this permanent panel of arbitrators will have had a neutral or downward pressure on transaction costs.

Shortly afterwards, Admiralty Judge David Lewis was appointed by the Privy Council to sit as an additional commissioner. Almost concurrently, he received a Royal patent for the summary determination of maritime disputes, after his repeated complaints that his Admiralty post was insufficiently remunerative to supply a living wage.⁴⁶ Lewis, an outsider, was presumably appointed to lend the new body the Admiralty's procedural knowledge related to insurance disputes.⁴⁷ However, the Commission remained primarily an institution of the merchant-insurers. This did not suit everyone: foreign merchants – the most frequent appellants to the Privy Council on insurance matters – were not appeased. They complained, and in response their Lordships, meeting at Nonesuch on 15 June 1593, wrote to the Lord Mayor and aldermen. 'Marchant strangers, having occasion to deale in matters of assurance, remaine discontented that no strangers are admitted to joyne with suche Englishe Comissioners as you appoint in theis causes'. In appointing the Commissioners, the aldermen had 'omytted to make chise of some two or three straungers, a matter very meet to have bene remembered in respect that many of sondrie nations within the cittie are dailie intressed in causes of assurance'. The aldermen were ordered to appoint 'yearlie unto the rest alreadie established or in liewe of some of them three strangers of forrein nations, being marchantes

44 Dasent, *Acts of the Privy Council*, VIII, p. 230.

45 LMA COL/AD/01/022 (MR X109/037), Letter Book Y, fos. 126-7.

46 For a discussion of the circumstances surrounding Dr Lewis appending to the panel, and the jurisdictional battle between the prerogative, common law, and private courts over jurisdictions in marine insurance disputes, see Ibbetson, *Law and custom*. Senior, William: *Doctors' Commons and the old Court of Admiralty: a short history of the civilians in England*, London: Longmans Green, 1922, pp. 79-80.

47 Ibbetson, *Law and custom*, p. 298.

knowne to be of worthe, judgement and integritie'. These men were always to be called to participate when merchant strangers were involved in arbitrations, following a principle in Edward I's *Carta Mercatoria* of 1303, which allowed foreign merchants to request that juries include up to six merchant strangers.⁴⁸ Such compromises served to maintain the flexibility of the rules in London. As has been shown, insurance practice varied between major trading cities. It seems likely that a foreign merchant acting as a commissioner would have a different understanding of the local rules in at least some circumstances. By inviting foreigners to participate in arbitration panels, not only was a valid reference-point provided to the possible understanding of foreigners involved in disputes, but also English merchants were exposed to alternative customs which may have been preferable to their own.

Malynes provided a contemporary account of the routine of the Commissioners of Assurance. An insured with a claim would gather testimonials, witnesses, letters, and other evidence of the loss, and bring it, along with any policies, charter-parties, bills of lading, invoices, and other relevant documents, to the Office of Assurance for examination by the Commissioners on one of their appointed days of hearing. The insurers would be summoned to appear, and a record made of the proceedings. If foul play was suspected, the Commissioners could examine the claimant under oath, 'then deal therein as they find cause, according to the Custom of Assurances'.⁴⁹

With this third set of actions the Privy Council had made a concerted (if not consciously coordinated) attempt to resolve the issues raised by the increasing use by outsider-buyers and sellers of London's insurance market. It had established a system of information exchange, a codified body of rules-of-the-game to aid enforcement, and a permanent tribunal to deal with disputes arising in the merchant-insurers' market after the arrival of outsiders, some foreign and therefore unfamiliar with the custom of Lombard Street, some genuinely unfamiliar with the local Law Merchant, and some simply unscrupulous. In so doing, the Queen's policymakers had taken steps to keep flowing the contingent capital which allowed trade to proceed and expand, and had attempted to improve market institutions such that they could effectively reduce transaction costs by improving enforcement mechanisms.

Insiders and outsiders

Much of the analysis presented here turns on a distinction between market 'insiders' and others, 'outsiders'. New Institutional Economics (NIE) sometimes adopts a theoretical framework which distinguishes between 'individualists' and 'collectivists' in markets.⁵⁰ While the collectivist/individualist model provides a useful framework for analysing the London market, it is not without serious shortcomings. A fundamental weakness of the construct is the simple reality that people usually defy sweeping categorisation, as was the case in insurance markets. Consider, for example, the case of the Quaker merchant James

48 Dasent, *Acts of the Privy Council*, XXIV, p. 313; Oldham, James C.: 'The origins of the special jury', *University of Chicago Law Review*, Vol. 50, No. 1 (1983), p. 173.

49 Malynes, *Lex Mercatoria*, p. 116.

50 See, for example, Greif, Avner: *Institutions and the path to the modern economy: lessons from medieval trade*, Cambridge: Cambridge University Press, 2006.

Claypoole, who traded in a variety of commodities in Europe and the West Indies in the time of Charles II, before leaving England with William Penn as a founder of Philadelphia. His letterbook, which survives for the years 1681 to 1684,⁵¹ reveals him to be astute and successful, but also willing to cheat customs officers and correspondents, and when it suited him, to smuggle. He was quick to go to law, even with family members, but also employed reputational remedies and, when called, would go to arbitration. As a member of the Society of Friends (and not a passing one, he was treasurer of the Society at a time when many were imprisoned for their faith, and many died in prison)⁵² and of the close-knit London merchant community, he was plainly a collectivist in the jargon of NIE. However, as a cheater in business and a frequent litigant, he was an NIE individualist. In practice, though, he remained a market insider. This tension is apparent in his insurance dealings.

Claypoole regularly purchased cover in London for, among others, his Lisbon correspondent, Richard Gay. He dealt through brokers, and thus was a member of the merchant-insurers' secondary, international distribution force. He had purchased £400 of cover for goods belonging to Gay *en route* from Hull to Lisbon on the *Swallow*, which sailed in late December 1681. However, events coincided to complicate the routine. By early March the *Swallow* was overdue. Gay, already in financial difficulty, was to return to England, then at Claypoole's suggestion to head to Ireland to hide from his creditors. In order to pay off some of these associates, Claypoole endeavoured to collect quickly the insurance indemnity due for the loss of the *Swallow*. He wrote to the creditors that 'tomorrow I am to dine with the insurers in order to agree with them, and I shall, if I can possibly, secure this money for your account [with Gay]'. He was planning an aggressive stance, and was willing to litigate. 'If no other way will do it, I intend to lay an attachment privately in your names.' The dinner was a partial success. Some of the insurers attended, and agreed to pay £78 per £100 insured, within two months. Claypoole agreed to return the money if the ship arrived in Lisbon before the end of the following February, but, apparently unsatisfied with the wait (probably fearing other of Gay's creditors would get their hands on the insurance money first), Claypoole offered to accept a further two percent reduction in exchange for immediate payment. The insurers, no doubt suspicious, refused this offer. Claypoole immediately sued. Soon after the Lord Mayor placed an attachment of £1,000 on Gay's assets, potentially including the indemnity. By October Claypoole was satisfied that at least three of the insurers would pay him – one had done so – but four more had 'joined with the attacher... so I lately arrested them, all four, and we are now on a trial'. In January 1682, he wrote to Gay to explain 'I have at length made a full conclusion... we see that the lawyers at last would get all if we went on, and we should have nothing to divide.'⁵³

Despite these events, which cannot have endeared Claypoole to the insurers in question, he continued successfully to arrange insurances for his clients and correspondents around the world, and was not excluded from the market. The incident shows the difficulty in

51 A heavily edited selection has been published. Balderston, Marion (ed.): *James Claypoole's letter book, London and Philadelphia, 1681-1684*, San Marino, CA: Huntington Library, 1967.

52 Harris, *Politics under the later Stuarts*, p. 179.

53 Balderston, *Claypoole's letter book*, p. 136 ff.

categorising merchants active in the insurance market as either collectivist, a group playing by the rules-of-the-game, or individualist, playing every-man-for-himself. Claypoole had all the characteristics of the former, but often behaved like the latter. Further, the market did not react according to the framework. Claypoole was not roundly excluded from the community; he was neither ostracised nor black-listed, and thus continued to buy insurance.

A late-seventeenth century commentator outlined the subtle difference between the parties described herein as insiders and outsiders, and illustrates how underwriters, as well as their customers, can count as outsiders. In roughly 1693, William Leybourn, the mathematician, surveyor, and printer, published his master work, entitled *Panarithmologia*, which covered topics including insurance. He advised insurance buyers suffering a loss to inform their underwriters swiftly,

for if they are punctual Men, and value their Reputations, they will presently pay you; if not they will shuffle you off, and endeavour to find out flaws, and raise Scruples for a larger abatement than ordinary; and sometimes will keep you a Year or two out of your Mony, and many times never pay; but generally get, in case of Loss, 15 or 20 *per Cent.* abated. I have known 40 *per Cent.* abated, upon very small pretensions; which makes a common Proverb about such Insurers, *What is it worth to insure the Assurers?* Be careful therefore to deal with Honest Men; that value their Reputation when you have any thing to be Insured.⁵⁴

The maintenance of one's reputation was critical. Reputation was the foundation of trust in early modern markets, and thus of commercial credit; it was the glue that held the insurance market together. According to Muldrew, 'These ethics meant that wealth was gained through reputation, not accumulation, individualism, or inward piety.'⁵⁵ The merchant-insurers' system operated because individual participants correctly trusted each other to meet their obligations. When market participants did not interpret their obligations in a like way, the system had no measures beyond exclusion, no remedies to encourage compliance. Such rules would have to be imposed from outside, by an authority with the ability to assess greater penalties.

The insurance Act of 1601

Despite the Privy Council's success at the creation and shaping of a permanent panel of insurance arbitrators, which gained the name 'Commissioners of Assurance', the Council was still occasionally called upon to intervene in insurance disputes. Alterations to the composition of the panel were not sufficient to excuse the Councillors from occasional adjudication duties related to insurance. Although the usual channels of dispute resolution remained extrajudicial, on occasions when they proved insufficient, no clear path through the formal courts was apparent. Insurance-related cases in the High Court of Admiralty dwindled at about the time of the Privy Council's tripartite overhaul of the institutions of insurance-

54 Leyborun, William: *Panarithmologia*, London: for John Dutton *et al*, 1693, p. Ap. 33.

55 Muldrew, *Economy of obligation*, 1998, p. 2.

contract enforcement. The Admiralty Court was further pressured under the jurisdictional battles between the civil- and common-law communities which heightened at this time under what Levack called a ‘full-scale attack’ launched by ‘common law judges’ against courts including Admiralty and Chancery.⁵⁶ Levack argues, however, that too much may be made of the divisions between civil and common lawyers, who often acted together.⁵⁷ The example of the Court of Assurance supports this view. Although it was constituted at the height of the division between law and equity, which in the Privy Council was embodied in the royal law officers, some motivations (presumably pragmatism and a desire to make the court effective) led these legal rivals to require that lawyers of both stripes were involved as commissioners, along with the judge of the admiralty, the senior legal figure involved.

The courts of King’s Bench and Chancery, and the Privy Council itself, continued to hear insurance cases. This was in part a result of the lack of statutory power of enforcement on the part of the Commissioners of Assurance. In March 1601 the Privy Council wrote to the Lord Chief Justice of King’s Bench and the Judge of the Admiralty – heads of institutions locked in an ongoing jurisdiction battle – enclosing a petition from merchant-insurers which complained that the system was not working. They complained that ‘certaine orders devysed and sett downe some yeres sithence and confirmed by us touchinge assurances amonge merchantes upon the Exchange are not put in execucion, but greatly impunged by willfullnes and forward dispoicion of some whoe refuse to submytte and conforme them selves to the order of Commyssioners appointed to heare those causes’. They asked the judges to consult with leading merchants and consider a way forward.⁵⁸

One of the merchants involved in the consultations was Malynes, author of *Lex Mercatoria*. In it he recorded that ‘I have sundry times attended the Committees of the said Parliament, by whose means the same was enacted’. Malynes reported that the discussions ‘were not without some difficulty’, and attested to a weakness in the authority of the Commissioners of Assurance. ‘There were many suits in [common] Law by Action of *Assumpsit* [breach of promise] before that time, upon matters determined by the Commissioners for Assurances, who for want of Power and Authority could not compel contentious persons to perform their ordinances’.⁵⁹ The need was clear: insurance buyers and sellers who did not wish to play by the merchant-insurers’ rules-of-the-game were causing strife.

Proposed solutions were advanced in *An Act Concerning matters of assurances amongst merchants*. The 1601 law established formal dispute resolution facilities for insurance, including the creation of a specialised court ‘for the hearing and determining of causes arising and policies of assurances’, and for an ‘office of assurances within the city of London’. The Act stated specifically that one aim of the legislation was that ‘no Suite shalbe depending... in any of her Majesties Courtes’. Provisions included the appointment of Court commissioners, to include a Judge of the Admiralty, the Recorder of London, two doctors of civil law and

56 Levack, *Civil lawyers*, p. 73.

57 Levack, *Civil lawyers*, pp. 73-78, 126.

58 TNA PC 2/26 f. 138, *Privy Council letterbook*, 29 Mar. 1601.

59 Malynes, *Lex Mercatoria*, p. 106.

two common lawyers, and eight merchants (any five of whom constitute a quorum); that the court should be summary, foregoing formalities of pleadings and proceedings; that the Commissioners, who were to take an oath of office before the Lord Mayor and Aldermen, could call witnesses, could imprison, without bail, those who did not adhere to its summons, but could not charge fees for their justice or hear cases in which they are a party; that it should meet once per week at minimum in the Office of Assurance or elsewhere in public; and that appeals against its judgements could be made to the High Court of the Chancery, upon payment in the interim of awards into the Court, in order to avoid imprisonment, and which would be doubled if the appeal should fail.⁶⁰

The new court created by the Act was a legislative afterthought. According to the address Sir Francis Bacon, presumed author of the bill, made to parliament when he tendered the bill, the Court was introduced following discussions of an earlier version by a committee including Bacon, Walter Raleigh, Admiralty judge Dr Julius Caesar (a judge of the Admiralty protégé of Assurance-Office proponents Walsingham and Lewis⁶¹), the merchant and former Lord Mayor Stephen Soame, and others. Bacon told the House ‘The Committees have drawn a new bill far differing from the old. The first limited power to the Chancery, this to certain Commissioners by way of Oyer and Terminer [roughly, to hear and determine]. The first that it should only be there, this that only upon appeal from the Commissioners it should be there finally arbitrated.’ The committee believed trials at Chancery would take too long, which merchants ‘cannot endure’, and that the appointment of Commissioners would fill a knowledge gap, which existed ‘because our Courts have not the knowledge of [insurers’] Terms, neither can they tell what to say upon their Causes which be secret in their Science’.⁶²

Foreshadowing Lord Mansfield, who would re-make the common law governing marine insurance more than a century and a half later, Bacon wrote in *De Augmentis Scientiarum* (1623) that ‘certainty is so essential to law, that law cannot even be just without it... It is well said also, “That that is the best law which leaves least to the discretion of the judge” [citing Aristotle]; and this comes from the certainty of it.’ He went on to say that uncertainty in law arising from an absence of prescription can be solved in one of three ways: by cautious reference to precedent, by using examples which were not yet law (presumably custom), and through arbitration.⁶³ In its structure, the institution established by the Act, with the support of those established earlier by the Privy Council, went some distance towards providing all three solutions. The bill appears at this point to have been uncontroversial, as on 14 December 1601 only slight amendments to the bill were read, twice, and the legislation was ordered engrossed.⁶⁴

60 43 Elizabethæ c. 12.

61 Levack, *Civil lawyers*, p. 28.

62 Bacon, Francis: ‘Speech on bringing in a bill concerning assurances amongst merchants’ (1601), in Spedding, James (ed.): *The letters and life of Francis Bacon, Vol. III*, London: Longmans, Green, Reader and Dyer, 1868, pp. 34-35.

63 Robertson, John M. (ed.): *The philosophical works of Francis Bacon*, Abingdon: Routledge 2013, pp. 614-615.

64 d’Ewes, *Journal of the House of Commons*, 1682.

The committee's changes were innovative. The tribunal they sketched out was not a common-law court, but nor was it purely a prerogative court, given its parliamentary constitution, although it seems to have been a creation of the Privy Council (which was itself a prerogative court). Its operation alongside, but outside, the common law allows it best to be classified as a court of equity (as were Chancery and the Court of Requests), but its informal charge of enforcing the Law Merchant governing insurance contracts places it most closely to the prerogative High Court of Admiralty, which Aylmer described as 'in a category by itself'.⁶⁵ While the combination of civil and common lawyers was not uncommon in the English formal courts,⁶⁶ the odd constitution of the Commissioners of Assurance, neither jury nor panel of judges, *was* unusual. Yet by incorporating a group of merchant-insurers among its panel of Commissioners, as well as lawyers from both legal schools, the design of the Court of Assurance cleverly circumvented the twin problems of the common-law jury's usual lack of legal knowledge, and the civil judge's sometimes arbitrary approach, while retaining familiar dispute resolution practice in London. The court was also able to act much more quickly than its competitors. The Court of Assurance was, in effect, an extension of the dispute resolution system established by the Privy Council in the 1570s, and the Commissioners an expansion of the permanent panel of Commissioners of Assurance they created, and who were appointed by Guildhall.

The significant difference was the inclusion of lawyers, whom Bacon described as having little knowledge of the Law Merchant. Additional notes added to the extant contemporaneous copy of the *Tyger* policy hint at their thought process (although no direct evidence affirms that the notes were added by Commissioners of the Court). Beneath the contract wording reproduced in the copy, an extracted clause outlining permissions for putting-in of the vessel has been repeated, with the following added:

The Questioⁿ is: 1. whether it be Lawfull or not for the said Shipp to Touch twice at one porte in this p^rsnt voyadge w^hin the Scope lymitted if the M[aste]^r & ffactors doe thinke it soe ffitt / And .2. though ther were noe expresse covenant that had relacon to the ffactors discretioⁿ yett in case the shipp (haveing discharged her goods) should in the intertime of tyme while monys were pvidinge goe 24 howrs saylinge thence & retourne in saffety without losse of tyme or priudize proved (not more than if the shipp had stayed soe longe together in porte) whether the assurance ought in conscience to be made voyde or noe.⁶⁷

The principles of equity seem here of utmost importance, as the adjudicators attempt to determine what 'in good conscience' ought to be their verdict.

In any case, given that only five members of the panel of commissioners needed to be present, no change at all was required to the actual constitution of any panel of

65 Aylmer, *King's servants*, p. 44.

66 Levack, *Civil lawyers*, p. 126.

67 BOD MS Tanner 74, f. 32, contemporaneous copy of a policy underwritten for Morris Abbot and Devereux Wogan, 15 Feb. 1613.

Commissioners from that directed by the Privy Council a generation earlier. Despite this, it evidently became difficult to achieve a quorum in a timely way. This shortcoming was addressed following the Restoration, when *An Additional Act concerning matters of Assurance used amongst Merchants*, adopted in 1662, changed slightly the requirement: only three, including at least one lawyer, could comprise a quorate panel of commissioners. Their appointment remained the responsibility of the Mayor and aldermen at the Guildhall. Their powers were extended to include the calling of witnesses ‘beyond the Seas’, and to make judgements not just against the person of the defendant, but also against his goods and chattels (although not both simultaneously).⁶⁸

The Commissioners appear to have become something of a standing panel to arbitrate merchant disputes, even when they were not insurance-related. For example, in December 1610 the Chancery ordered the Master and two others of Trinity House, which under an Elizabethan order had jurisdiction over certain maritime disputes,⁶⁹ and ‘Ralph Freeman, Humphry Basse and Robert Bell, commissioners for insurance policies’ to hear a dispute over non-payment of a charter party and the resulting wage liability to crew members.⁷⁰ Some insight into the popularity and functioning of the Court can be gleaned from a letter of the Canaries merchant John Paige. In March 1652 he met with underwriters about a claim related to the vessel *Susan*. ‘I was fain to put them to suit in the Insurance Court before could bring them to any reason’, he wrote to an agent. In a later dispute, Paige predicted victory because ‘there’s several precedents of the very same nature upon record in the Insurance Court’.⁷¹ Still, older methods of dispute resolution were preferred. In a third dispute over a claim, Paige brought underwriters around to settlement having ‘given the insurers upon the *Swan* a dinner at tavern, where I found them inclining to reason’.⁷²

Certain prerogative courts, notably the Star Chamber and the High Commission, had been dismantled under the Commonwealth, and were not revived after the Restoration.⁷³ However, judicial evidence and merchant records suggest the Court of Assurance – a parliamentary foundation – continued to operate throughout the interregnum. The survival of the Court shows that equity and prerogative were not always tied. Equity courts had a broader and more widely regarded function. Commissioners were sworn regularly until 1662, when this requirement was dropped under the *Additional Act*. The continuity of the Office of Assurance, and of the position of Registrar, a royal placeman, seems less certain. William Cowper’s 1660 petition states that the office was ‘void’,⁷⁴ indicating an interruption. Although the Court could hear only cases arising under policies registered at the Office, it is possible that this requirement had been overlooked during the period of the Commonwealth.

68 14 Caroline c. 23, HeinOnline, 5 *Statutes of the Realm*, 1625-1680, pp. 418-9.

69 8 Eliz. cap. 13.

70 13 Dec. 1610: Westminster. Order in Chancery to Hugh Merricke, Master of Trinity House. Harris, *Trinity House of Deptford Transactions*, p. 6.

71 John Paige to William Clerke, 05 Mar. 1652, 18 Nov. 1653, Steckley, G.F. (ed.): *The letters of John Paige, London merchant, 1648-1658*, London: London Record Society, 1984, pp. 64, 97-98.

72 Paige to Clerke, 01 Mar. 1653. Steckley, *Letters of John Paige*, p. 86.

73 Harris, *Politics under the later Stuarts*, p. 34.

74 Green, Mary Anne Everett (ed.): *Calendar of State Papers domestic: Charles I, Vol. XVII, Sept. 1660* (1860).

It is further possible that the office of Registrar was suspended, but that the clerks of the Office of Assurance continued to carry out its functions. It seems to have been a going concern during the later years of the Protectorate, when Captain John Lymbrey proposed that, to reduce its cost, insurance should be underwritten by the state. Under his scheme, premium rates would be fixed (and one per cent higher for foreigners), profits would be diverted to trade protection through convoys, and the business conducted from the 'Office of Assurance'.⁷⁵

Erosion of the Office and Court

The Court appears to have become a landmark institution. Samuel Lamb, a merchant who offered his suggestions for the advance of trade to the Lord Protector in 1657, proposed the establishment of a 'Court of Merchants' which could be accomplished by broadening the jurisdiction of 'the Court of Insurance sitting in the Insurance Office, who are yearly chosen, [that it] may have power to determine all such matters as they do causes of Insurance'.⁷⁶ Despite this prominence, and Charles II's *Additional Act*, which increased its powers, this institution of dispute resolution continued to suffer shortcomings, largely because competing courts progressively eroded its jurisdiction, in a period when the courts, and particularly the common lawyers, were staking further claims in other areas of jurisdiction.

When Privy Councillor Sir Edward Coke became Chief Justice of King's Bench in 1613, the common-law assault upon civil-law jurisdictions was renewed with vigour. In 1614 Coke prohibited the interference by courts of equity into the findings of common-law courts, and claimed mercantile law as the province solely of the King's Bench, insisting especially that the Admiralty had no jurisdiction over any contracts made on land, in England or overseas. Even the London Sherriff's Court encroached upon Admiralty. It used a legal fiction to claim jurisdiction over trade-related disputes by arguing that contracts which had been signed abroad were in effect signed in London. Common-law judges issued prohibitions against Chancery, preventing it from hearing cases. Coke clashed with Lord Chancellor Baron Ellesmere, held the constant enmity of Bacon, and later fell out with James I, who was a natural proponent of the civil law. Coke's fall was delayed by his role as judge in the 1615 trial of the murder of Sir Thomas Overbury, brother of the holder of the patent for the Office of Assurance, and despite his setbacks, he proved both a political and literal survivor, returning to relative favour before retiring aged 74.⁷⁷

Civil lawyers gained ground during the reign of Charles I. In 1633, with his intervention, an agreement was reached which restored or underlined Admiralty jurisdiction in several areas. Efforts by the common-law judges to remove from the Admiralty any jurisdiction over

75 BL Egerton Ms. 2395, ff. 149-151, 'Proposals to be presented to his Highness the Lord Protector and his Councill, for the greater encouragement of Merchants in their Navigations' (1657?).

76 Lambe, Charles: *Seasonable observations humbly offered to his highness the Lord Protector*, London: Printed at the authors charge, 1657, p. 13.

77 Senior, *Old Court of Admiralty*, pp. 66-67, 84; Steckley, *Merchants and the Admiralty Court*, pp. 143-145; Boyer, Allen D.: 'Coke, Sir Edward', *Oxford Dictionary of National Biography Online*, www.oxforddnb.com/view/article/5826, viewed 16 Aug. 2013.

commercial disputes were more concretely reversed under an ordinance of the Long Parliament in 1648. A restatement of the agreement of 1633 returned responsibility for resolving disputes over merchant contracts, charter-parties, and seamen's wages to the Admiralty. This was the same parliament that had abolished the Star Chamber and Court of High Commission, but complaints about the adequacy of common law to handle merchant disputes, from a broad spectrum of the London merchant community including Trinity House, seem to have led to Admiralty's preservation, despite opposition in the Commons and support in the Lords, until 1659, when the Ordinance was not renewed. Upon the Restoration, all bills presented to the Commons to support the Admiralty failed to pass. Steckley has used this episode effectively to demolish the New Institutional Economics claim of North and Thomas that the ultimate shift away from equity to common law was the inevitable result of institutional improvement and cost saving, and was driven by merchants who preferred a cheaper and more efficient common law. Throughout the interregnum, when merchant voices were heard, they rallied behind the civil courts.⁷⁸

In 1663, the year after the *Additional Act* was passed, a book by Richard Zouch, an Admiralty Judge from 1641, was published posthumously under the title *The jurisdiction of the Admiralty asserted*. Zouch stated, 'As to the instances of Policies of Assurance held tryable at the Common Law', Coke argued in *Dowdales Case* that common-law trials can occur only in the place where the *assumpsit* occurred, even when the primary question at issue took place elsewhere (in *Dowdales*, the arrest of a ship in France). When no alternate venue is possible this make senses, Zouch conceded, but the precedent had been invoked 'to the prejudice of the Admiralty jurisdiction'.

Even in the example Coke cited in *Dowdales*, heard in 1588/9, 'the Cause being Maritime, and amongst Merchants, it might more properly have been tryed in the Admiralty or in the Assurance-Court, without a Jury or Tryal of Twelve Men, by Witnesses'.⁷⁹ Zouch was in error in his final point; the Court of Assurance was not yet founded in 1589 (a fact of which he was aware, since he stated, in the same paragraph, that 'by the Statute of the 43. of *Elizabeth*, it has been shewed, that the Proceedings in those [insurance] Causes at the Common Law, were altogether inconvenient to the Kingdom').⁸⁰ Nonetheless Chancery, and the civil courts in general, were threatened in the seventeenth century. At issue was the balance between the desirability of equity and the need for stability in legal rules. The question turned upon a perceived connection between strict rules and English liberty. Equity could appear not only as 'an institutional jurisdiction distinct from common law, but as a system of adjudication essentially antithetic to the genius of English jurisprudence.' The overriding concern appears to have been a constitutional issue – the fear that decisions at Chancery might overrule the common law.⁸¹

78 Steckley, *Merchants and the Admiralty Court*, pp. 137-140, 146-150.

79 Zouch, *Jurisdiction of the Admiralty*, p. 108.

80 *Dowdale's Case*, 1589, 6 Co. Rep. 46 b; Zouch, *Jurisdiction of the Admiralty*, p. 108.

81 Lieberman, *Province of legislation determined*, p. 78.

The Court of Assurance was unable to settle the turf wars, and was soon to be affected directly by them. In the 1658 case *Came v. Moye*, an insured had sued his insurer in the Court, where his claim had been dismissed. At the Court of King's Bench, the insurer-defendant's barrister, Sir Thomas Twisden (later a judge of the regicides) agreed to jurisdiction, since the Admiralty had overlapping jurisdiction in many matters over which the common-law courts also held sway, but declared it was not correct for one to overrule the judgment of another.

He argued further that the plaintiff had made his choice of venue and, in the common interest, there was no need to hear the case again, and, finally, that the statute which established the Court of Assurance specifically allowed for appeal to Chancery, not King's Bench. However, Lord Chief Justice John Glynne found that the Court of Assurance, as a Court of Equity, held jurisdiction *in personam* (where action is against an individual), rather than *in rem* (where action relates to property), and that Equity Court decisions *in personam* did not remove the remedy of common law, and thus that the case could lie before him.⁸² The decision was a clear victory of the common law over the civil courts, and perhaps prompted the inclusion, in the *Additional Act* of 1662, of powers to act against property, and of its restatement of the Chancery as the designated court of appeal.

Merchants remained discontented. Writing about merchant disputes at law in the 1660s, Josiah Child said they are commonly commenced in Admiralty, where 'after tedious Attendance and vast Expences, probably just before the Cause should come to Determination', it removed to the Court of Delegates (an *ad hoc* appellate court of both civilian and common-law judges), 'where it may hang in suspence until the *Plaintiff* and *Defendant* have empty purses and grey Heads', or, more likely, the defendant will bring a writ of prohibition, and move the case to King's Bench 'where after great Expences of Time and Money, it is well if we can make our own *Council* (being *common Lawyers*) understand one half of our Case, we being amongst them as in a Foreign Country, our Language strange to them, and theirs as strange to us'. However, since most of the evidence is foreign, it will be inadmissible there, Child wrote, so the case may well then go to Chancery, 'where after many Years tedious Travels to *Westminster*, with black Boxes and green Bags, when the *Plaintiff and Defendant* have tired their Bodies, distracted their Minds, and consumed their Estates, the Cause if ever it be ended, is commonly by order of that Court referred to *Merchants*, ending miserably, where it might have had at first a happy issue if it had begun right.'

More important, perhaps, than this colourful picture of merchant frustration with the courts after a century of jurisdictional battles, Child goes on to call for the establishment of a 'standing Court Merchant' in the City of London, comprising twelve elected merchant arbiters, to adjudicate mercantile disputes as a Court of Record. Appeal would be to a further group of merchants. Although insurance is not specifically mentioned in Child's list of

⁸² I am extremely grateful to Dr Neil Jones of Magdalene College for his translation from English legal French of *Came v. Moye*, K.B., 1658, 2 Siderfin 121 (82 E.R. 1290).

matters in the proposed court's jurisdiction, it includes bills of bottomry, and 'any other thing related to trade or shipping'.⁸³

Decisions in the common-law courts continued to erode the authority of the Court of Assurance. In *Delbye v. Proudfoot and Others*, some thirty-five years after *Came v. Moyer*, Bartholomew Shower, the lawyer for the defending insurers (who was also reporter of the case) argued successfully that 'the court of commissioners of policies of insurance only extends to suits by the insured against the underwriters', and that 'any other construction would make a clashing of jurisdictions'.⁸⁴ The insurers had wished to sue their clients as having acted fraudulently. Shower argued that this made void the policy, and therefore removed the case from a court established to make rulings under insurance policies. 'It was never intended further than the relief of the insured against the insurers, and being such a law, was not to be extended further than the words', he argued (without any particular evidence), claiming that the intention of the policy was to limit litigation by providing a venue in which the insured could sue all underwriters at once under a policy, rather than pursuing each individually (notwithstanding the convention that the outcome of a suit against one subscriber to an insurance policy was, according to custom, followed by the others).⁸⁵

Nothing concrete has been found in the record showing that the Court of Assurance was active after 1692, when Shower showed that its jurisdiction was limited to suits brought by policyholders. Thus an important indirect implication of the case, which did not involve honest merchants sharing risks among themselves (Shower reported that the defendants had no interests in the vessel or goods they were insuring), was the removal of a whole category of actions from the dedicated insurance court. But already the weight of insurance cases had left the civil-law court in favour of the common law, especially when criminal fraud may be shown. Such a case was witnessed by Samuel Pepys in 1663, at the Guildhall before the King's Bench. According to Pepys's diary entry for 1 December, Lord Chief Justice Hyde, with 'all the great counsel in the kingdom in the case', heard how an unnamed ship's master over-insured a ship laden with bogus cargo worth at most £500 ('vessels of tallow daubed over with butter, instead of all butter'), then abandoned it to flounder on the rocks at low tide, refusing the help of pilots who came to his aid. The judge found in favour of the insurers, one of whom had salvaged the ship, uncovered the fraud, and later repaired the vessel for just six pounds.⁸⁶

Another case before the King's Bench, described in 1682 by the London press as a 'great Tryal between some Merchants, and those of the Insurance-Office'⁸⁷ (presumably the underwriters, not the Registrar, since the defendant was the leading insurer), turned on the question of verbal amendments to an insurance contract which had not been recorded in the

⁸³ The passage was written between 1668 and 1670, according to Letwin; indeed, Child opens the chapter cited with reference to 'the late Fire in London'. Child, Josiah, *A new discourse of trade*, London: T. Sowel, 1698 (1692), pp. 132-138.

⁸⁴ *Delbye v. Proudfoot and Others*, 1692, 1 Shower. K.B. 396 (89 E.R. 662).

⁸⁵ See p. 71.

⁸⁶ Latham and Matthews, *Diary of Samuel Pepys*, IV, pp. 401-404.

⁸⁷ *Loyal Protestant and Domestick Intelligence, on NEWS both CITY and Countrey*, No. 174, 29 Jun. 1682, p. 1.

policy document. The case shows how the traditions of the Law Merchant were incorporated into legal precedent. Chief Justice Pemberton (himself the son of a merchant)⁸⁸ found that ‘policies were sacred things, and that a merchant should no more be allowed to go from what he had subscribed in them, than he that subscribes a bill of exchange, payable at such a day, shall be allowed to go from it’.⁸⁹ In recording the case, Skinner emphasised the importance of accepted community practice. ‘The custom of merchants ought to be proved by those that have had frequent experience, and have known cases so ruled,’ he wrote.

The case appears to have been heard three times: first the insurer, Sir Robert Knightley (former Sheriff of Sussex), argued that while the policy stated the voyage to be insured was from Archangel to Leghorn, a verbal side agreement revised the cover to be only from the Downs, off the Kent coast. The jury initially found, against Pemberton’s instruction, for the insurer. Later the case was heard a second time, and this time was resolved in favour of the insured merchants. The final hearing – that described in the pages of the *Loyal Protestant* – supported the decision of the appellate court. This ultimate airing of the case was of some import, as the leading barristers of the city were involved, including, for the underwriters, serjeant-at-law John Maynard, Henry Pollexfen (later Attorney General), Edmund Saunders (later knighted), and John Holt (later Chief Justice), and for the merchants, Sir George Jeffreys (later Lord Chief Justice and Lord Chancellor), and his colleague in the Monmouth trials, Sir Francis Wythens. According to the newspaper, ‘many Eminent Merchants [were] produced as Witnesses on either side’.⁹⁰

Yet merchant-insurers appear still to have preferred the course of arbitration. Blackstone, in his *Commentaries on the Laws of England*, wrote of the Court of Assurance that

The jurisdiction being somewhat defective, as extending only to London, and to no other assurances but those on merchandize, and to suits brought by the assured only and not by the insurers, no such commission has of late years issued: but insurance causes are now usually determined by the verdict of a jury of merchants, and the opinion of the judges in case of any legal doubts; whereby the decision is more speedy, satisfactory, and final.⁹¹

Despite the sympathetic intervention of the Privy Council and the House of Commons to establish new enforcement mechanisms to ensure the continued smooth operation of a market now comprising both outsiders and merchant-insurers exploiting a club-good, London’s merchant community effectively wound-back the clock and returned to a system of internal dispute resolution and enforcement. This return to the status quo was aided by jurisdictional battles between the English courts, which eroded the new structures founded to support the

88 Halliday, Paul D.: ‘Pemberton, Sir Francis’, Oxford Dictionary of National Biography, Oxford University Press; online edn, Jan. 2008, www.oxforddnb.com/view/article/21821, viewed 4 Dec 2011.

89 *Kaines v. Sir Robert Knightly*, 01 Jan. 1681; Skinner 54; 90 E.R. 26.

90 *Loyal Protestant*, No. 174, 29.06.1682, p. 1.

91 Blackstone, William: *Commentaries on the Laws of England*, IV vols, Oxford: Clarendon Press, 1765-1769, III, pp. 74-75.

insurance market, and by the absence of a mechanism to compel merchants to use the Office of Assurance.

Merchant preference obviously drove the return: use of the Office was never universal, as illustrated by the protests of the Privy Council just after its inception, and of James II just before its collapse. One reason that this return to insider practice was possible must be that London's community of merchant-insurer-insiders remained relatively close-knit. Extant documents can be used to illustrate this. Over forty-seven months from 1664, Charles Marescoe purchased 108 policies underwritten by just thirty-one discrete individuals, ten of whom accounted for almost eighty-four per cent of the total value of the policies. The underwriters John Berry, Peter Lupart, and Nicolas Skinner each participated in thirty-eight or more of the policies (Berry in fifty-three).⁹² This extremely cooperative market was also highly horizontally integrated. Many underwriters, perhaps most, were also active merchants. Both Marescoe and his commercial successor, Jacob David, were merchants trading between London, Baltic, French, and Spanish ports in the post-Restoration period. Each was a regular buyer of insurance, and an underwriter of other merchants' cargoes and vessels.⁹³

Additionally, London's insurance market was physically small. A record of insurance transactions made in 1654 and 1655 survived until the late nineteenth century in the Rawlinson manuscripts. Before it was lost, a transcription was published by Martin in his *History of Lloyd's*, in 1876. Described by Martin as 'perhaps representing the accounts of some insurance broker', the lost document is instead almost certainly the record of an underwriter, since it records the same details recorded by underwriters in extant eighteenth century risk-books. It shows that insurance policies were underwritten at addresses including Bartholomew Lane, Crutched Friars, Mark Lane, St Helens, and Threadneedle Street, all within an easy walk.⁹⁴

Because of these factors, information was widely known within the insurance community. Thus, importantly, in most instances it would have been difficult for individuals to gain an information advantage over colleagues, given their closeness and interconnection. Samuel Pepys once thought he had such an advantage, which could be used to profit from underwriting. In November 1663 he learned 'at the Coffee-house... by great accident' that a vessel carrying naval stores from Archangel had arrived safely in Newcastle. 'Now, what an opportunity I had to have concealed this, and seemed to have made insurance and got 100*l*, with the least trouble and danger in the whole world.'⁹⁵ It seems unlikely, however, given the nature of information exchange within London's merchant community, that Pepys (who was

92 Roseveare, Henry (ed.): *Markets and merchants of the late seventeenth century: the Marescoe-David letters, 1668-1680*, Oxford: Oxford University Press, 1987. See especially Appendix E, p. 582.

93 Ibid., pp. 583-588.

94 I learned, after two days of searching at the Bodleian, that this fascinating source has been missing since the 1890s. Martin, *History of Lloyd's*, pp. 53-54.

95 Latham and Matthews, *Diary of Samuel Pepys*, IV, pp. 395-6.

an occasional, although by no means frequent, trader in insurance) could have kept his deception secret for long.⁹⁶

Enforcement of the rules-of-the-game poses only minor challenges when it is in the interests of the other party to live up to agreements, North argues,⁹⁷ and indeed this is usually the case in the insurance market. It is likewise eased when it is in the interests of all players of the game to see that all the others play honestly. Milgrom, North, and Weingast describe the institution comprising the Law Merchant, along with the systems of judges used to enforce it, as having the five-fold effect of successfully encouraging merchants to behave honestly, of imposing sanctions on violators, of securing information about the behaviour of others, and of compelling merchants both to provide evidence against cheaters, and to pay any judgements assessed against them.⁹⁸ In other words, it is very likely that another merchant-insurer would also have heard the story of the arrival in Newcastle, and prevented or uncovered the deception which Mr Pepys considered. In any case, the hearing of the case at King's Bench shows the ineffectualness of the reforms of the Privy Council and parliament. An insurance dispute had arisen despite the registration facilities established, and was being heard neither at the Court of Assurance, nor under appeal at Chancery. The challenges of dealing with outsiders active in the London insurance market had not been resolved.

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96 For the culture of commercial gossip and commercial information-sharing in seventeenth-century London, see Glaisyer, *Culture of commerce*, 2006.

97 North: *Institutions, institutional change*, p. 33.

98 Milgrom, P.R, North, D.C. & Weingast, B.R.: 'The role of institutions in the revival of trade: the Law Merchant, private judges, and the Champagne fairs', *Economics and Politics*, Vol. 2, No. 1 (1990), pp. 1, 6-7.