

ABANDONMENT IN MARINE INSURANCE LAW:
AN HISTORICAL-COMPARATIVE STUDY

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requirements of the degree PhD at the Institute of
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ABSTRACT

This study follows upon an LLM thesis in which the writer submitted that South African marine insurance law should be allowed to develop by way of a codification process which co-ordinates research of the principles of Roman-Dutch law.

Abandonment is defined as a special remedy available to the assured under a marine insurance policy in in special circumstances. It is related to the indemnity principle and subrogation and operates as a method of transferring real rights. The reasons for the research are examined and the historical-comparative method is proposed as the appropriate research method.

An historical review of the origins and early history of indemnity insurance is undertaken. It reveals that abandonment is an original institution of marine insurance which has been imported into to the legal systems of the countries of western Europe and England.

After recounting the historical developments in customary and statute law pertaining to abandonment spanning the period from the birth of marine insurance to the end of the eighteenth century, the principles of abandonment currently applicable in Dutch, German, French, English and American law are analyzed and compared in order to determine what the basic rules of abandonment are. In this process certain common principles of abandonment are identified and arranged into a set of basic rules.

The theoretical implications of abandonment and its relationship with the indemnity principle and subrogation are considered in order to arrive at some conclusions with regard to the origins of abandonment, its functions as a servant of the indemnity principle and its links with economic loss as a species of indemnifiable loss. It is concluded that the purpose of abandonment is to compensate for a loss which is wholly or partially economic in nature. Abandonment as a means of transferring real rights without formal delivery of the abandoned things is discussed against criticism by others that abandonment does not have the effect of transferring real rights in South African law.

The development of abandonment principles in South Africa after 1652 is investigated against the background of the original customary law which applied in Europe, the local ordonnances which were promulgated in the towns of Holland between 1563 and 1744, the writings of the most important Roman-Dutch authors and developments in South African statute and case law. This allows the basic principles of abandonment in the law of the countries used for comparison and arrived at by the historical-comparative method to be compared to the principles of abandonment in the Roman-Dutch law of the seventeenth and eighteenth centuries and to current South African law. It is concluded that, whilst there are unimportant differences, the South African common law recognizes the same basic rules of abandonment as the classic Roman-Dutch law, recent Dutch law and current German, French, English and American law. In the

discussion of South African case law it is pointed out with reference to Roman-Dutch, English, French and Dutch authorities that an injustice has been done in the case of the '*Morning Star*'.

Three general recommendations are made with regard to the future development of South African law, namely that total loss should be recognized as a separate category of loss, that it is unnecessary to import the concept of a constructive total loss into South African law, and that the insurer should be allowed to decline receiving transfer of ownership of the abandoned ship or goods. The principles of abandonment are also stated on three different bases, allowing the South African legislature to choose its own model, namely:

those which apply in South African law as the inherited Roman-Dutch principles;

those which apply in English law, firstly as they applied prior to codification in 1906 and secondly as they now apply under the Marine Insurance Act 1906; and lastly

those which the writer recommends should be taken up in a proposed South African marine insurance act.

Case law is stated as at 31 December 1995. In the case of English law the wealth of material has made it necessary for the author to use his own discretion on the question whether any particular case or work was worthy of a mention.

LIST OF AUTHORITIES: TREATISES

- Abbink, *Het Zeerecht en de Zee-assurantiewetten aller volken*, (1847).
- Allgemeine Deutsche Seeversicherungsbedingungen, (1973).
- Ancel, *Utilité et Méthodes du Droit Comparé*, (1971).
- Anonymous, *The Guidon de la Mer*, (circa 1550-1560).
- Ansaldis, *Commercio et Mercatura Discursus Legales*, (1689).
- The Antwerp Exchange, *The Customs and Usages of the Antwerp Exchange*, (1582).
- Appleman & Appleman, *Insurance Law and Practice*, Vol 6.
- Arnould, *A Treatise on the Law of Marine Insurance and Average*, 2nd ed, (1857).
- Aschenheim, *Der Abandon des Versicherten in der Seeversicherung*, (1893).
- Baldasseroni, *Delle Assicurazioni Marittime Trattato*, (1786).
- Bamford, *The Law of Shipping and Carriage in South Africa*, 2nd ed, (1973).
- Bamford, *The Law of Shipping and Carriage in South Africa*, 4th ed, (1983).
- Barels, *Advysen over den Koophandel en Zeevaart*, (1780-1781).
- Battacharjee, *The Marine Insurance Act 1963*, (1969).
- Baur and Baur, *Lehrbuch des Sachenrechts*, (1989).
- Benecke, *System des See-Assekuranz- und Bodmerei-Wesens*, (1805-1821).
- Benecke, *A Treatise on the Principles of Indemnity in Marine Insurance, Bottomry and Respondentia*, (1824).
- Bensa, *Il Contratto di Assicurazione nel Medio Evo*, (1884).
- Bermann, de Vries and Galston, *French Law*, (1989).
- Bosco, *Consilia*, (1390-1425).
- Boulay-Paty, *Cours de Droit Commercial Maritime, d'après les Principes et Suivant l'Ordre du Code de Commerce*, (1854).
- Boulay-Paty, *Droit Commercial*, (1822).
- Boulay-Paty, *Traité des Assurances et des Contrats a la Grosse d'Émérigon*, (1827).
- Brown, *Marine Insurance- Vol I- Principles and Basic Practice*.
- Brown, *Marine Insurance- Vol 3- Hull Practice*.
- Brown & Menezes, *Insurance Law in Canada*, (1982).
- Bruck-Möller, *Kommentar zum Versicherungsvertragsgesetz*, (1980).
- Buckland and McNair, *Roman Law and Common Law*, 2nd ed, (1965).
- Buys, *De Engelsche Zeeverzekeringswet 1906 vertaald, toegelicht en vergeleken met het Nederlandsche Recht*, (1946).
- Bynkershoek, *Quaestiones Juris Privati*, (1744).

Calisch, *Nieuw Volledig Nederlandsch-Engelsch en Engelsch-Nederlandsch Woordenboek*, (1873).

Casaregis, *Discursus Legales de Commercio*, (1707).

Casaregis, *Discursus Legales et Commercio*, in *Opera Omnia cum Additionibus*, (1740).

Cauvet, E., *Traité des Assurances Maritimes*, (1881).

Cauvet, J.V., *Traité sur les Assurances Maritimes*, (1862).

Chalmers and Owen, *A Digest of the Law relating to Marine Insurance*, 2nd ed, (1903), 83-84.

Chauveau, *Assurances Maritime*, (1972).

Clausing, *Korte inleiding tot het vermogensrecht onder het Nieuw BW*.

Constantinesco, *Traité du Droit Comparé*, (1972).

Coren, *Observationes XLI rerum in Senatu Hollandiae, Zelandiae, Frisiae judicatarum' item consilia XXX quaedam*, (1633).

Danjon, *Traité de Droit Maritime*, (1914).

Davis, *The South African Law of Insurance*, 4th ed, (1993), 406.

De Ansaldis, (Ansaldis), *Commercio et Mercatura Discursus Legales*, (1689).

De Casaregis, (Casaregis), *Discursus Legales de Commercio*, (1707).

De Courcy, *Questions de droit maritime*, (1877/1888).

De Groot, *De Jure Belli ac Pacis*, (1625).

De Groot, *Inleidinge tot de Hollandsche Rechtsgeleerdheid*, (1631).

De Jager, *The Roots and Future of the South African Law of Marine Insurance*, (1993).

De Smet, *Traité Théorique et Pratique des Assurances Maritime*, 2nd ed, (1959-60).

De Wet, *Die Ou Skrywers in Perspektief*, (1988).

De Wet & Van Wyk, *Die Suid-Afrikaanse Kontraktereg en Handelsreg*, 5th ed, (1992).

Derham, *Subrogation in Insurance Law*, (1985).

Dillon & Van Niekerk, *South African Maritime Law and Marine Insurance: Selected Topics*, (1983).

Domat, *Le lois civiles leur ordre naturel*, (1689), (translated by Cushings as *The Civil Law in its Natural Order*, (1850)).

Dorhout Mees, *Nederlands handels- en faillissementsrecht*, 6th ed, (1974).

Dorhout Mees, *Nederlands handels- en faillissementsrecht*, 7th ed, (1987).

Dorhout Mees, *Ontwerp voor een Nieuw Burgerlijk Wetboek*.

Dorhout Mees, *Schadeverzekeringsrecht*, 4th ed, (1967).

Dorhout Mees, *Schets van het Nederlands Handels- en Faillissementsrecht*, (1990).

Dover, *A Handbook to Marine Insurance*, 8th ed, (1975).

Droz, *Traité des assurances maritimes, du délaissement et des avaries*, (1881).

Eldridge, *Marine Policies*, (1938).

Émerigon, *Traité des Assurances et des Contrats a la Grosse*, (1783), (Boulay-Paty edition), (1827).

Feitama, *Merkwaardige aanmerkingen vervat in twee tractaaten, waarvan het eene is handelende over schepen en vrachtgelderen, het anderen over assurantien ofte verzekeringen, mitsgaders eenige uytgesogten gewijsdens*, (1737).

Gautier, *Du recours de l'assureur contre le tiers responsable du dommage*, (1939).

Getz and Davis, *The South African Law of Insurance*, 4th ed, (1993).

Gilmore & Black, *The Law of Admiralty*, 2nd ed, (1975).

Goldschmidt, *Handbuch des Handelsrechts*, (1891).

Gordon and Getz, *The South African Law of Insurance*, 3rd ed, (1983).

Goudsmit, *Geschiedenis van het Nederlandsche Zeerecht*, (1882).

Haanappel and MacKaay, *Nieuw Nederlands Wetboek: Het Vermogensrecht*, (1990).

Hagen, *Seeversicherungsrecht*, (1938).

Hahlo and Khan, *The South African Legal System and its Background*, (1973).

Hahlo & Khan, *The Union of South Africa. The Development of its Laws and Constitution*, (1960).

Halsbury, *Laws of England*, 4th ed, (1973), Vol 1, (Admiralty).

Halsbury, *Laws of England*, 4th ed, Vol 16, (Equity).

Halsbury, *Laws of England*, 4th ed, (1981), Vol 35, (Personal Property).

Hannen & Pritchard, *Pritchard's Digest of Admiralty and Maritime Law*, 3rd ed, (1887).

Harrel-Courtès, *Le Nouveau Droit Français de l'Assurance Maritime et des Événements de Mer*, (1968).

Hartkamp, *Compendium van het vermogensrecht volgens het nieuwe Burgerlijk Wetboek*, (1990).

Heineccius; *Elementa Juris Germanici tum veteris, tum hodierni*, (1736-1737).

Helberg, *Der Abandon in der Seeversicherung auf rechtsvergleichender Grundlage*, (1925).

Hofmann, *Het Nederlandsch Zakenrecht*, 3rd ed, (1944).

Hofmann, *Privatversicherungsrecht*, (1991).

Holdsworth, *A History of English Law*, (1977), Vol VIII, 273.

Hosten et al, *Introduction to South African Law and Legal Theory*, (1977).

Ivamy, *General Principles of Insurance Law*, 5th ed, (1986).

Ivamy, *Marine Insurance*, 4th ed, (1985).

Ivamy, *Fire and Motor Insurance*, 4th ed, (1984).

- Jhering, *Geist des römischen Rechts*, 7/8th ed, (1924).
- Jolles, *Bijdrage tot de Kennis van de Ontwikkeling van de Zeeassurantie in de Verenigde Nederlanden*, (1867), 25-7.
- Joubert (ed), *The Law of South Africa*, ('LAWSA'), (1988), Vol 12, (Insurance).
- Kahana, *Three Great Systems of Jurisprudence*, (1955).
- Kent, *Commentaries on American law*, (1826-1830), 12th ed, (1873).
- Kiesselbach, *Die wirtschafts- und rechtsgeschichtliche Entwicklung der Seeversicherung in Hamburg*, (1901).
- Kremer, *Het Indemniteitsprincipe, een juridische (her)waardering*, (1988).
- Kritzinger, Schoonees & Cronjé, *Van Schaik se Groot Woordeboek*, 12th ed, (1981).
- Lambert-Faivre, *Droit des Assurances*, 8th ed, (1992).
- Lambeth, *Templeman on Marine Insurance*, 5th ed, (1981).
- Lambeth, *Templeman on Marine Insurance*, 6th ed, (1986).
- Lee, *The Elements of Roman Law*, (1944).
- Lokin and Zwolve, *Hoofdstukken uit de Europese codificatiegeschiedenis*, 2nd ed, (1992).
- Lybrechts, *Burgerlijk, Rechtsgeleerd, Notariaal en Koopmans Handboek*, 3rd ed, (1761), 92.
- MacGillivray & Parkington, *Insurance Law (relating to all risks other than marine)*, 8th ed, (1988).
- Maclou, *Le délaissement dans l'assurance maritime*, (1954).
- Malynes, *Consuetudo, vel, lex Mercatoria*, (1685).
- Magens, *An Essay on Insurances*, (1755).
- Magens, *Versuch über Assecuranzen, Haveren und Bodemreyn*, (1753).
- Malaurie and Aynès, *Cours de Droit Civil: Les Biens*, (1990).
- Marshall, *A Treatise on the Law of Insurance*, (1802).
- Marshall, *A Treatise on the Law of Insurance*, 5th ed, (by William Shee), (1865).
- Martin, *Die Haftung des Versicherers für Güter aus deutschen Schiffen in italienischen und portugiesischen Häfen*, (1918).
- Matthiass, *Das foenus nauticum und die Geschichtliche Entwicklung der Bodmerei*, (1881).
- Memorie van Toelichting (to the Ontwerp NBW.)
- Meredith, *A Treatise on Insurances*, (1850).
- Mijnssen and Schut, *Bezit, levering en overdracht*, 3rd ed.
- Molengraaff, *Leidraad bij de Beoefening van het Nederlandse Handelsrecht*, (1955).
- Mustill and Gilman, *Arnould's Law of Marine Insurance and Average*, 16th ed, (1981).

Naeranus et al, *Hollandsche Consultatiën*, (1645-1666).

Nolst Trenité, *Zeeverzekering*, 2nd ed, (1930).

Oxford English Dictionary, (The Compact Edition), (1987).

Pardessus, *Collection de lois Maritimes antérieures au XVII^e siècle*, (1837).

Park, *A System of the Law of Marine Insurances*, (1786).

Park, *A System of the Law of Marine Insurances*, 8th ed, (1842).

Parks, *The Law and Practice of Marine Insurance and Average*, (1988).

Pfennigstorf, *German Insurance Law*, (1975).

Phillips, *A Treatise on the Law of Marine Insurance*, (1823).

Phillips, *A Treatise on the Law of Insurance*, 4th ed, (1854).

Picard and Besson, *Les Assurances Terrestres*, 5th ed ed, (1982), (by Besson).

Pöhls, *See-Assekuranz-Recht*, (1834).

Pollock & Bruce, *A Compendium of the Law of Merchant Shipping*, 4th ed, (1881).

Pothier, *Traité du Contrat d'Assurance*, (1768-1778).

Prölss-Martin, *Versicherungsvertragsgesetz*, (1992).

Raines, *A History of British Insurance*, (1948).

Ripert, *Précis de Droit Maritime*, 7th ed, (1956).

Ritter-Abraham, *Das Recht der Seeversicherung*, 2nd ed (by Abraham), (1967).

Roberts, *A South African Legal Bibliography*, (1942).

Rodière, *Droit Maritime: assurances et ventes maritime*, (1983).

Rodière and Pontavice, *Précis Dalloz: Droit Maritime*, 10th ed, (1986).

Roccus, *De Navibus et Naulo, item de Assecurationibus Notabilia*, (1708).

Rodière and Pontavice, *Précis Dalloz: Droit Maritime*, 10th ed, (1986).

Sanborn, *Origins of the Early English Maritime and Commercial Law*, (1930).

Santerna, *Tractatus de Assecurationibus et Sponsionibus Mercatorum*, (1552).

Scaccia, *Tractatus de Commerciis et Cambio* (1619).

Scheltema-Mijnsen, *Algemeen Deel van het Schadeverzekeringsrecht*, 4th ed, (1991).

Scheltinga, *Scheltinga se 'Dictata' oor Hugo de Groot se Inleidinge tot de Hollandsche Rechtsgeleerdheid*, published by De Vos and Visagie, (1986).

Schoenbaum, *Admiralty and Maritime Law*, (1987).

Schorer, *Inleiding tot de Hollandsche Rechtsgeleerdheid beschreven By Hugo de Groot, bevestigd met Plakaten, ens, door Mr Simon van Groenewegen van der Made, nu met Latynsche aantekeningen uitgebreidt door Mr Willem Schorer*, (1767).

Schwab, *Sachenrecht*, (1987).

Shaw, *Admiralty Jurisdiction and Practice in South Africa*, (1987).

Straccha, *Tractatus de Assecurationibus et Proxenetis*, (1569).

Straccha (ed), *De mercatura decisiones et tractatus varii*, (1621).

Tecklenborg, *Handlexikon für Reeder, Versicherer und Schiffskapitäne*, (1856).

Tecklenborg, *System des See-Versicherungswesens nach der Natur der Sache*, (1862).

Thomas, *The Institutes of Justinian*, (1975).

Thut, *Der Regress des Versicherers*, (1924).

Trenerry, *The Origin and early History of Insurance*, (1926).

Valin, *Commentaire sur l'Ordonnance de la Marine du Mois d'Aout 1681*, (1760), (Becane edition of 1829).

Van Barneveld, *Inleiding tot de Algemene Assurantiekennis*, 10th ed, (1978).

Van Bynkershoek, (Bynkershoek), *Observationes Tumultuariæ*, (1704 to 1783), (published between 1926 and 1962).

Van Bynkershoek, (Bynkershoek), *Quaestiones Juris Privati*, (1744).

Van den Berg, *Nederlands Advys-Boek*, (1693-1698).

Van der Feltz, *Beschouwingen over Titel 17 van Boek 7 van het Ontwerp voor een Nieuw Burgerlijk Wetboek*.

Van der Keessel, *Theses Selectae Juris Hollandici et Zelandici*, (1800).

Van der Keessel, *Praelectiones Juris Hodierni ad Hugonis Grotii Introductionem ad Iurisprudentiam Hollandicam*, (published only in 1961-1967).

Van der Linden, *Rechtsgeleerd, Practicaal en Koopmans Handboek*, (1806).

Van Niekerk, *The Decline, Revival and Future of the Roman-Dutch law of Insurance in South Africa*, (1986).

Van Niekerk, *An Introduction to and some perspectives on the sources and development of Roman-Dutch Insurance Law*, (1988).

Van Warmelo, *An Introduction to the Principles of Roman Civil Law*, (1976).

Van Zurck, *Codex Batavus*, (1727).

Van Zyl, *Beginnels van Regsvergelyking*, (1981).

Van Zyl, *Geskiedenis van die Romeins-Hollandse Reg*, (1979).

Verwer, *Nederlands See-Rechten; Avaryen; en Bodemeryen*, (1711).

Visser and Potgieter, *Law of Damages*, (1993).

Voet, (Johannes), *Commentarius ad Pandectas*, (1698-1704).

Voigt, *Das deutsche Seeversicherungsrecht*, (1887).

Wery, *Hoofdzaken van het Verzekeringsrecht*, 4th ed, (1984).

Weskett, *A Complete Digest of the Theorie, Laws and Practice of Insurance*, (1781).

Wessels, *History of the Roman-Dutch Law*, (1908).

West Publishing Co, *Corpus Juris Secundum-A Complete Restatement of the Entire American Law*, by the editorial staff of West Publishing Co, (1946), Vol 45, Insurance.

Zeffertt, *The South African Law of Evidence*, 4th ed, (1988).

Zweigert and Kötz, *Introduction to Comparative Law*, 2nd ed, (1992), (translated by Tony Weir).

LIST OF AUTHORITIES: THESES

Aaftink, *Afstand van Vermogensrechten*, (1974).

Barkhausen, *Voraussetzungen und Wirkungen des Abandon bei der Seeversicherung*, doctoral thesis, Erlangen, (1895).

Cambanis, *Constructive Total Loss*, Dissertation, University of London, (1957).

Den Beer, *De Assecurationibus*, doctoral thesis, Utrecht, (1729).

De Jager, *The Roman-Dutch law of Marine Insurance applicable in South Africa*, LLM thesis, Cape Town, (1987-1988).

De Smidt, *Compendium van de Geschiedenis van het Nederlands Privaatrecht*, 2nd ed, (1972).

Enschedé, *De Hoofdbeginselen van het Zee-Assurantie-Recht*, LLD thesis, Amsterdam, (1886).

Feldthusen, *Economic Negligence: The Recovery of Pure Financial Loss*, doctoral thesis, University of Michigan, (1983).

Gualtherie van Weezel, *De wettelijke subrogatie bij verzekering*, doctoral thesis, Leiden, (1894).

Hammacher, *Die Grundzüge des allgemeinen Seeversicherungsrecht in der deutschen Gesetzgebung des 18 Jahrhunderts vor dem Hintergrund der älteren europäischen Seeversicherungsgesetzgebung*, doctoral thesis, Bonn, (1982).

Harckenroth, *De Assecuratione, et Bodemeria*, doctoral thesis, Utrecht, (1756).

Hassoun, *The History of the Marine Insurance Act, 1906 and its Interpretation by the Courts*, MPhil thesis, London University, (1970).

Hawthorne, *The Crime of Abortion. A Historical and Comparative Study*, (1982).

Hunt, *A comparative analysis of the Civil Liability and Fund Conventions, TOVALOP and CRISTAL, the U.S. Federal Oil Pollution Act and U.S. State legislation, as legal mechanisms regulating compensation for tanker source oil pollution damage*, LLM thesis, University of Natal, (1995).

s'Jacob, *Het Recht van Abandon*, doctoral thesis, Leiden, (1890).

Kent, *Commentaries on American Law*, 12th ed, (1896).

Khoury, *Subrogation in Marine Insurance*, thesis, University College of London, (1961).

Ledeboer, *Het recht van den verzekeraar tegen derden*, doctoral thesis, Leiden, (1927).

Leproust, *Du recours de l'assureur contre les tiers*, (1914).

Marnewick, *A Critical Analysis of the Law to be applied to a Claim for Marine Insurance, with reference to Non-Disclosure and Abandonment, and the Need for Codification*, LLM thesis, University of Natal, (1991).

- Martin, *L'Abandon du Navire et du Fret en Droit Francais*, doctoral thesis, Bordeaux, (1957), 219.
- Mens Fiers Smeding, *Eenige Opmerkingen over het Recht van Abandonnement*, doctoral thesis, Leiden, (1895).
- Mulder, *Subrogatie*, doctoral thesis, Leiden, (1988).
- Nourney, *Das Recht des Abandons*, doctoral thesis, Heidelberg, (1905).
- Ochsz, *De Contractu Assecurationis Vulgò Assecuranz*, doctoral thesis, Leiden, (1699).
- Pauw, *Skuld in die Suid-Afrikaanse Privaatreg: ń Regshistoriese en Regsvergelykende Onderzoek*, (1976).
- Sarlis, *Abandonment in Marine Insurance*, thesis, University College of London, (1960).
- Schlemmer, *Verkryging van Eiendomsreg deur 'n Versekeraar in geval van Diefstal van 'n Versekerde Saak*, LLM thesis, Rand Afrikaans University, (1991).
- Schook, *Het Abandonnement*, doctoral thesis, Utrecht, (1858).
- Van Asch van Wijk, *De subrogatie van den verzekeraar*, doctoral thesis, Utrecht, (1895).
- Van der Merwe, *Die Beskerming van Vorderingsregte uit Kontrak teen Aantasting deur Derdes*, (1959).
- Van Ghesel, *Theoreticae-Practicae De Assecuratione*, doctoral thesis, Leiden, 1725.
- Van Heerden, *Grondslae van die Mededingingsreg*, (1961).
- Van Niekerk, *Subrogasie in die Versekeringsreg*, ('Subrogasie'), LLM thesis, Unisa, (1979).
- Van Nievelt, *Bronnen van de Nederlandse Codificatie van het Zee- en Assurantierecht 1788-1822*, LLD thesis, Leiden, (1978).
- Van Zyl, *Die Saakwaarnemingsaksie in die Suid-Afrikaanse Reg: ń Regshistoriese en Regsvergelykende Onderzoek*, (1970).
- Vegesack, *De Assecuratione quam numine summo annuente*, licentiate, Leiden, (1704).
- Vellieux, *De l'application à l'assureur de la subrogation légale de l'article 1251-3 du Code Civil*, thesis, Paris, (1948).
- Wieling, *De Assecuratione, ejusque instrumento quo vulgo polizza dicitur*, doctoral thesis, Utrecht, (1752).

LIST OF AUTHORITIES: ARTICLES

- Ancel, 'Quelques Considérations sur les Buts et les Méthodes de la Recherche Juridique Comparative', in Rotondi, (ed), *Buts et Méthodes du Droit Comparé*, (1973).
- Atkin, 'Transit Insurance', *Businessman's Law*, 15 June 1975, 183.
- Bewer, 'Das Herrschaftsgebiet des Abandon', (1891) 38 *Zeitschrift für das Gesamte Handelsrecht* 372.
- Booyesen, 'South Africa's new Admiralty Act: A Maritime Disaster', (1984) 6 *MB* 75.
- Booyesen, 'Admiraliteitshowe in die Suid-Afrikaanse Reg', (1973) 36 *THRHR* 241.
- Chao-Kuo Chiang, 'Das Interesse im Seeversicherungsrecht' in *Versicherungsrechtliche Studien*, Vol 3.
- Davies, 'Australian maritime decisions 1992', 1993 *LMCLQ* 253.
- Den Dooren de Jong, 'De Praktijk der Amsterdamsche Zeeverzekering in de 17^e eeuw' (1927) VIII *Verzekerings-Archief* 1.
- Feldbrugge, 'Sociological Research Methods and Comparative Law', in Rotondi, *Buts et Méthodes du Droit Comparé*, (1973), 211.
- Fletcher, 'The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance', (1984) 97 *Harvard Law Review* 1513.
- Forsyth, 'The Conflict between modern Roman-Dutch law and the law of Admiralty as administered by South African Courts', (1982) 99 *SALJ* 255.
- Gilissen, 'Histoire Comparée du Droit' in Rotondi, *Buts et Méthodes du Droit Comparé*, (1973), 255.
- Graveson, 'Methods of Comparative Law in Common Law Systems', in Rotondi, *Buts et Méthodes du Droit Comparé*, (1973), 299.
- Jolowics, 'Development of common and civil law - the contrasts', 1982 *LMCLQ* 87.
- Juglart, 'Droit maritime' (1965) 18 *Revue Trimestrielle de Droit Commercial* 934.
- Kahn, 'Have certain English precedents binding force in South Africa?' (1965) 82 *SALJ* 526.
- Khurram, 'Total Loss and Abandonment in the Law of Marine Insurance' [1994] 25 *Journal of Maritime Law and Commerce* 95.
- Kokkini-Iatridou, 'De Rechtsvergelijking' in Kokkini-Iatridou, (ed), *Een Inleiding tot het Rechtsvergelijkende Onderzoek*, (1988), 28-29.
- Linsmayer, 'Der Abandon', (1916) 63 *Zeitschrift für das Gesamte Handelsrecht*, 395.
- Lureau, 'La nouvelle législation des assurances maritimes', (1968) 20 *DMF* 193, 257.
- Markesinis, 'Comparative Law- A Subject in Search of an Audience' (1990) 53 *Modern Law Review* 3.
- Marnewick, *The Origins, Diaspora and Destiny of South African Marine Insurance Law*, unpublished paper delivered to the South African Maritime Law Association's 1996 Annual Conference.

Mitchell, 'The law of Subrogation', 1992 *LMCLQ* 483.

Mitchell, 'Subrogation and Insurance law: proprietary claims and excess clauses', 1993 *LMCLQ* 192.

National Geographic, Vol 170, No 6, December 1986).

National Geographic, Vol 185, No 4, April 1994).

Nicolas, 'Piraterie maritime dans la "guerre du thon"' (1994) 46 *DMF* 622.

Nolst Trenité, 'Behoeven de beginselen van schadeverzekeringsrecht opgenomen in de artikelen 246-283 WvK wijziging?', an advice published (to members) before the Annual Meeting of the Nederlandse Juristen-Vereniging, 1939.

O'Keefe, 'Gold, Abandonment and Salvage', 1994 *LMCLQ* 7

Pappenheim, (1899) 44 *Zeitschrift für das Gesamte Handelsrecht* 602.

Pauw, 'Aanspreeklikheid vir 'suiwer vermoënskade' in die Suid-Afrikaanse reg' 1975 *De Jure* 23.

Reinecke, 'Versekering sonder Versekerbare Belang?', 1971 *CILSA* 193.

Rycroft, 'Changes in South African Admiralty Jurisdiction', 1984 *LMCLQ* 417.

Rycroft, 'The "Morning Star": An Omen for the Law of Marine Insurance?', 4 (1984) *SAILJ* 73.

Sheller, 'Pride and Precedent: Economic loss-the search for a bright new line', 1995 *LMCLQ* 203.

Staniland, 'Developments in South African Admiralty Jurisdiction and Maritime Law', 1984 *Acta Juridica* 271.

Staniland, 'The Implementation of the Admiralty Jurisdiction Regulation Act in South Africa', 1985 *LMCLQ* 462.

Staniland, 'What is the Law to be Applied to a Contract of Marine Insurance in terms of s 6(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983?', (1994) 1 *SA Merc LJ* 16.

Tapp & Chivers, 'No Licence, No Disclosure, No Abandonment', 1992 *LMCLQ* 25.

Vance, 'The Early History of Insurance Law', *Select Essays in Anglo American Legal History*, (1907).

Van der Merwe, 'Die ontstaan van versekering gerig op winsbejag' 1977 *TSAR* 34.

Van Niekerk, 'Enkele bibliografiese gegewens oor Cornelis van Bynkershoek en die Romeins-Hollandse versekeringsreg', (1988) 51 *THRHR* 26.

Van Niekerk, 'Insurable Interest 1, Legal Certainty 0', (1995) 7 *SA Merc LJ* 262.

Van Niekerk, 'Marine insurance Claims in the Admiralty Court: An Historical Conspectus' (1994) 1 *SA Merc LJ* 26.

Van Niekerk, 'Suing, labouring and the insured's duty to avert or minimise loss', 1987 *MB* 144.

Van Oven, 'De begrippen belang, waarde en schade in het verzekeringsrecht van heden en morgen', March 1977 *Bouwrecht* 225.

LIST OF AUTHORITIES: CASES

SOUTH AFRICA

Ackerman v Loubser 1918 OPD 31.

Administrateur, Natal v Trust Bank van Afrika Bpk 1973 3 SA 824 (A).

Avex Air (Pty) Ltd v Borough of Vryheid 1973 1 SA 617 (A).

BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 1 SA 391 (A).

Canadian Superior Oil Ltd v Concord Insurance Co Ltd (formerly INA Insurance Co Ltd) 1992 4 SA 263 (W).

The Cape of Good Hope Marine Insurance Co v Berg (1865) 1 Roscoe 289.

Chiappini v Jones (1837) 3 Menzies 181.

Clarke v Hurst 1992 4 SA 630 (D).

De Pass v Commercial Marine Insurance (1857) 3 Searle 46.

Erasmus v Davis 1969 2 SA 1 (A).

Gerber v Wolson 1955 1 SA 158 (A).

Government of the Republic of South Africa v Ngubane 1972 3 SA 601 (A).

Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd 1978 4 SA 901 (N).

Gypsum Industries Ltd v Standard General Insurance Co Ltd 1991 1 SA 718 (W).

R v Harrison and Dryburgh 1922 AD 320.

Herschel v Mrupe 1954 3 SA 464 (A).

Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries 1987 1 SA 842 (A).

Johaadien v Stanley Porter (Paarl) (Pty) Ltd 1970 1 SA 394 (A).

Laws v Rutherford 1924 AD 261.

Maritime & General Insurance Co v Sky Unit Engineering (Pty) Ltd 1989 1 SA 867 (T).

Millward v Glaser 1949 4 SA 931 (A).

Moti & Co v Cassim's Trustee 1924 AD 720.

Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality 1985 1 SA 419 (A).

Mutual Life Insurance Co of New York v Ingle 1910 TS 540.

The Myvonwy (1883) 4 NLR 43.

Nafte v Atlas Assurance Co Ltd 1924 WLD 239.

National Fire Assurance Co v MacLaren (1886) 12 OR 682.

Osaka Mercantile Steamship Co Ltd v South African Railways and Harbours 1938 AD 146.

Petreas & Co v London Guarantee and Accident Co Ltd. 1925 AD 371.

Phillips v Hughes; Hughes v Maphumulo 1979 1 SA 225 (N).

Pilkington Brothers (SA) (Pty) Ltd v Lillicrap, Wassenaar and Partners 1983 2 SA 157 (W).

Przybylak v Santam Insurance Ltd 1992 1 SA 588 (C).

Shooter t/a Shooter's Fisheries v Incorporated General Insurances 1984 4 SA 264 (D).

South African Railways and Harbours v Wm. Anderson & Co. 1917 CPD 121.

Suid-Afrikaanse Bantoetrust v Ross en Jacobz 1977 3 SA 184 (T).

Supermarket Haasenback (Pty) Ltd v Santam Insurance Ltd 1989 2 SA 790 (W).

Supermarket Leaseback (Elsburg) (Pty) Ltd v Santam Insurance Ltd 1991 1 SA 410 (A).

Teper v McGees Motors (Pty) Ltd 1956 1 SA 738 (CPD).

Tjollo Ateljees (Edms) Beperk v Small 1949 1 SA 856 (A).

Van Rensburg v Weiblen 1916 OPD 247.

Woodley v Guardian Assurance Co Ltd 1976 1 SA 758 (W).

M Zahn Investments (Pty) Ltd v General Accident Insurance of SA Ltd 1981 4 SA 143 (SECL).

AMERICA

Aetna Insurance Co v S.S. Ortiguera 583 F Supp 671.

Alexander v Baltimore Insurance Co (1808) 8 US 370.

Bidwell v Northwestern Insurance Co 19 NY 179.

Bohemia Inc v Home Insurance Co 725 F 2d 506.

Bradlie v Maryland Insurance Co (1838) 12 Pet 378.

Burnham v Boston Marine Insurance Co 139 Mass 399.

Burt v Brewers' & Maltsters' Insurance Co 78 NY 400.

Calmar S.S. Corp v Scott 109 F 2d 852.

Canada Sugar-Refining Co v Insurance Co of North America 175 US 609.

Carr v Providence Washington Insurance Co 109 NY 504.

Chicago S.S. Lines v U.S. Lloyds 12 F 2d 733.

Continental Insurance Co v Clayton Hardtop Skiff 367 F 2d 230 and 239 F Supp 815.

Delaware Mutual Safety Insurance Co v Gossler 96 US 645.

Delovio v Boit 7 F Cas 418.

Fireman's Fund Insurance Co v Globe Navigation Co 236 F 618.

Globe Insurance Co v Sherlock (1874) 25 Ohio St 50.

Great Western Insurance Co Ltd v Fogarty (1873) 86 US 640.

Hampton Roads Carriers Inc v Boston Insurance Co 150 F Supp 338.

Harvey v Detroit Fire & Marine Insurance Co 120 Mich 601.

Jeffcott v Aetna Insurance Co 129 F 2d 582.

Lenfest v Coldwell 525 F 2d 717.

Mason v Marine Insurance Co 110 F 452.

Mattson v Connecticut Fire Insurance Co of Hartford 80 F Supp 101.

Merchants & Manufacturers Insurance Co v Duffield 2 Handy, Ohio 122.

Murray v Great Western Insurance Co 25 NYS 414.

Pacific Fire Ins. Co v Pennsylvania Sugar Co 72 F 2nd 958.

Peele v Merchants' Insurance Co 19 Fed Cas 98.

Queens Insurance Co of America v Globe & Rutgers Fire Insurance Co 263 US 487.

Republic of China v National Union Fire Insurance Co of Pittsburgh 163 F Supp 812.

Robinson v The United Insurance Company 1 Johnson (US) Rep 592.

Rock Transport Properties Corp v Hartford Fire Insurance Co 312 F Supp 341.

Seamen v Enterprise Fire & Marine Ins. Co 21 F 778.

The St. Johns 101 Fed 469.

Wilburn Boat Co v Firemans Fund Insurance Co 348 US 310.

Wood v Lincoln & Kennebeck Insurance Co (1810) 6 Mass 479.

AUSTRALIA

Corr v Standard Fire & Marine Insurance Co of New Zealand (1881) 7 VLR (L) 504. (Australia).

N.S.W. Leather Co. Pty Ltd v Vanguard Insurance Co. Ltd (1991) 25 NSWLR 699.

Sunshine Fisheries v Lambert-Pain Pty Ltd (The Lady Amelia) (1991) 6 ANZ Insurance Cases No 61-069.

BELGIUM

Marc Gentil v Arnulphian, Lommelin and Tany, (1459).

CANADA

Anchor Marine Insurance Co v Keith (1884) 9 SCR 483.

Baker v Brown (1872) 9 NSR 100 (CA).

Barrs v Merchants' Marine Insurance Co (1887) 26 NBR 339 (CA).

Berner v Sun Insurance Office Ltd [1952] ILR 1-069 (Ont. H.C.).

Cunningham v St Paul Fire Insurance Co (1914) 16 DLR 39.

Harkley v Provincial Insurance Co (1868) 18 UCCP 35 (CA).

Kenny v Halifax Marine Insurance Co (1840) 1 NSR 141 (CA).

McLeod v Insurance Co of North America (1901) 34 NSR 88 (CA).

McGhee v Phoenix Insurance Co (1890) 18 SCR 61.

Meagher v Aetna Insurance Co (1861) 20 UCQB 607 (CA).

Providence-Washington Insurance Co v Almon (1885) Cas SC 390 (S.C.C.).

Rose v Weekes (1984) 7 CCLI 287 (Fed. T.J.).

Singer Manufacturing Co v Western Assurance Co (1896) 10 Que SC 379 (CA).

Stalker v Wier (1854) 2 NSR 248 (CA).

Taylor v Smith (1868) 12 NBR 120 (CA).

Watson v Mercantile Marine Insurance Co (1873) 9 NSR 396 (CA).

Western Assurance Co v Scanlan 33 LC Jur 301.

ENGLAND

Adams v MacKenzie (1863) 1 Asp 272.

AG v Glen Line Ltd and the Liverpool and London War Risks Insurance Association Ltd [1930] 37 LLR 55 (HL).

Airedale Trust NHS v Bland [1993] 1 All ER 821 (HL).

Aldridge v Bell (1816) 1 Stark 498.

Allgemeine Versicherungs-Gesellschaft Helvetia v Administrator of German Property [1931] 144 LT 705.

American Surety Co of New York v Wrightson (1910) 103 LT 663.

Amien Rasheed Corporation v Kuwait Insurance 1984 AC 50.

Assicurazioni Generali v Bessie Morris & Co [1892] 2 QB 652.

Bank of America National Trust and Savings Association v Christmas and Others (The "Kyriaki") [1993] 1 LLR 137 (QB).

Barker v Blakes 9 East 281.

Barracclough v Brown 1897 AC 615.

Benson v Chapman 6 M & G 810.

Blane Steamship Ltd v Minister of Transport [1951] 2 LLR 155 (CA).

Boston Corporation v France Fenwick & Co Ltd [1923] 15 LLR 85 (KB).

Bradley v Eagle Star Insurance Co Ltd [1989] 1 All ER 961 (HL).

British Dominions General Insurance Co v Duder [1915] 2 KB 394.

British Trader's Insurance Co. Ltd v Monson (1964) 111 CLR 86.

Broke v Maynard and Lodge, (1547), Admiralty file 27 number 147.

Brotherston v Barber (1816) 5 M & S 418.

Bruce v Jones (1863) 1 H & C 769.

Burnand v Rodocanachi (1882) 7 App Cas 333 (HL).

Cambridge v Anderton (1824) 2 B & Cr 691

Campbell v Hall (1774) 1 Cowp 204.

Cammell v Sewell 3 H & N 617.

Captain J A Cates Tug and Wharfage Co Ltd v Franklin Insurance Co 1927 AC 698.

Case v Davidson (1816) 5 M & S 79.

Castellain v Preston (1883) 11 QBD 380 (CA).

Cavalchant v Maynard, (1548), Admiralty file 18 numbers 131-132.

Cazalet and Others v St Barbe 1 TR 187.

G Cohen Sons & Co v Standard Marine Insurance Co Ltd [1925] 41 TLR 232.
Cologan v London Assurance 5 M & S 447.
Compania Maritima of Barcelona v Wishart [1918] 23 Com Cas 264.
Compania Naviera Martiartu v Royal Exchange Insurance [1924] 1 K.B. 650.
Copelin v Phoenix Insurance Co 9 Wall 461.
Cosman v West; Cosman v British America Assurance Company (1888) 13 LR (App Cas) 160 (PC).
The Crystal 1894 AC 615.
Currie v Bombay Native Insurance Co (1869) LR 3 PC 72.

Da Costa v Firth 4 Burr 1966.
The Douglas (1882) 7 PD 151.

Edwards and Co Ltd v Motor Union Insurance Co Ltd (1922) 38 TLR 690.
Ewer v National Employers' Mutual General Insurance Association Ltd [1937] 2 All ER 193.

The Fanny and Elmira Edwards Adm Rep 117.
Fleming v Smith (1848) 1 HL Cas 513.

George Cohen, Sons & Co v Standard Marine Insurance Co (1925) LLR 30 (KB).
Gernon v The Royal Exchange Assurance Company 6 Taunt 383.
Glen Line Ltd v A G (1930) 36 Com Cas 1 (HL)
Godin v London Assurance Co (1758) 1 Burr 489.
Goss v Withers 2 Burr 683.

Haigh v De la Cour 3 Camp 318.
Hall v Hayman [1912] 106 LT 142.
Hamilton v Mendes (1761) 2 Burr 1199.
Hayman and Others v Moulton 5 Esp 65.
Hobbs v Marlowe [1978] AC 16 (HL).
Holdsworth v Wise 7 B & C 799.
Houstman v Thornton (1816) Holt NP 242.
Hudson v Harrison 3 Brod & Bing 97.
Hunt v Royal Exchange Insurance Association (1816) 5 M & S 47.
Hunter v Parker 7 M & W 342.

Irvin v Hine [1950] 1 KB 555.
Irving v Manning 6 CB 419; (1847) 1 HL Cas 287.

John Edwards & Co v Motor Union Insurance Co Ltd [1922] 2 KB 249.

Johnson v Shippen 2 Raym 984

Kaltenbach v Mackenzie (1878) 3 CPD 467 (CA).

Kelly v Walton (1808) 2 Camp 155.

King v Victoria Insurance Co 1896 AC 250 (PC).

Lewis v Ruckner 2 Burr 1167.

Lind v Mitchell [1928] 32 LLR 70 (CA).

Marc Gentil v Arnulphian, Lommelin and Tany, (1459).

The 'Marel' [1994] 1 LLR 624 (CA).

Marstrand Fishing Co Ltd v Beer [1937] 1 All ER 158.

Mason v Sainsbury (1782) 3 Doug KB 61.

Mellish v Andrews 15 East 13.

The Midland Insurance Co v Smith (1881) 6 QBD 561.

Milles v Fletcher 1 Dougl 231.

Mitchell v Edie 1 JR 608.

Moore v Evans [1918] AC 185.

Morley v Moore [1936] 2 KB 359 (CA).

Morgan v Price (1849) 4 Exch 615.

Moss v Smith (1850) 9 CB 94 and (1850) LJCP 225.

Mullett v Sheddon 13 East 304.

Munro Brice & Co v Marten [1920] 25 Com Cas 112.

Lord Napier and Ettrick v Hunter [1993] 2 WLR 42 (HL).

Naylor v Taylor 9 B & C 718.

North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co (1877) 5 Ch D 569 (CA).

Norwich Union Fire Insurance Society v William H Price Ltd (1934) AC 455.

Oceanic Steam Navigation Co Ltd v Evans [1934] 50 LLR 1 (CA).

Page v Scottish Insurance Corp Ltd, Foster v Page [1929] 33 LLR 134.

Panamanian Oriental Steamship Corporation v Wright [1970] 2 LLR 365 (QB).

Parmeter v Todhunter (1808) 1 Camp 541.

Patterson v Ritchie (1815) 4 M & S 393.

Peele v Merchants' Insurance Co 3 Mason 27.

Pesquerias y Secaderos de Bacalao de Espana SA v Beer [1946] 79 LLR 417.

Petros M Nomikos Ltd v Robertson [1939] 64 LLR 45 (HL).

Polurrian SS Co Ltd v Young [1915] 1 KB 922 (CA).

The 'Popi M' [1985] 2 LLR 1 (HL).

Post Office v Norwich Union Fire Insurance Society Ltd [1967] 1 All ER 577 (CA).

Pringle v Hartley 3 Atk 195.

The Provincial Insurance Company v Leduc (1874) LR 6 PC 224.

The Quebec Fire Assurance Company v Augustin St. Louis and John Molson [1851] 7 Moore 286 (PC).

Randal v Cockran (1748) 1 Ves Sen 99.

Rankin v Potter and Others (1873) 42 LJ Rep 169 (HL); (1873) 6 AC 83 (HL).

Rickards v Forestal Land, Timber and Railways Co Ltd [1941] 3 All ER 62 (HL).

Robertson v Clarke 1 Bing 445.

Roura & Forgas v Townend [1919] 1 KB 189.

Roux v Salvador (1836) 3 Bing (NC) 266.

Rowland and Marwood's SS Co v Maritime Insurance Co (1901) 6 Com Cas 160.

Royal Exchange Assurance Co v Idle 3 Brod & Bing 151.

Russian Bank for Foreign Trade v The Excess Insurance Co Ltd [1919] 1 KB 39 (CA).

Ruys v Royal Exchange Assurance Corporation (1897) 2 QBD 135.

The Sailing Ship 'Blairmore' Co. Ltd v Macredie (1898) AC 593.

Sailing Ship Holt Hill v United Kingdom Marine Association (1919) 2 KB 789.

Scottish Union and National Insurance Co v Davis [1970] 1 LLR 1 (CA).

S.C. in Cam. Scacc. 5 H & N 728.

Simpson v Thompson (1877) 3 App Cas 279 (HL).

Smith v Robertson 2 Dow 474.

Somes v Sugrue 4 Car & Payne 276.

Standard Marine Insurance Co Limited of Liverpool v North Beach Lighterage & Transportation Co 133 F 636.

St Paul Fire & Marine Insurance Co v Pure Oil Co 63 F 2d 771.

Stewart v Greenock Marine Insurance Company (1848) 2 HL Cas 159.

Stringer v English & Scottish Marine Insurance Co (1869) LR 4 (QB) 676.

Stringer and Others v The English and Scottish Marine Insurance Company (1870) 5 LR 599.

Thornely and Another v Hebson 2 B & Ald 512.

Tremenhere v Tresilian 1 Sid 452.

The Utopia 1893 AC 492.

Vacuum Oil Co v Union Insurance Society of Canton [1926] 25 LLR 546 (CA).

Vandervell v I.R.C. [1966] Ch 261.

Weddell v Road Transport and General Insurance Co Ltd [1932] 2 KB 563.

Western Assurance Co of Toronto v Poole [1903] 1 KB 376.

Williams v North China Insurance Co (1876) 1 CPD 757 (CA).

Wilson Brothers Bobbin Co Ltd v Green [1917] 1 KB 860.

Woods v Co-operative Insurance Society 1924 SC 692.

Yorkshire Insurance Co Ltd v Nisbet Shipping Co. Ltd [1962] 2 QB 330 (HL).

Young v Turing 2 M & G 593.

FRANCE

'Alesia' (1965) 17 DMF 674 (Tribunal de Grande Instance de Morlaix 21/10/64), with comment in (1965) 18 *Revue Trimestrielle de Droit* 934.

Assurances maritimes v Bilard ('Le Charles-Adolphe') 1857 (2) DJG 77 (Cour Impérial).

Assurance Mutuelle v Riedman ('La Bonne Clemence') 1851 (2) DJG 243 (Cour d'Appel).

Assureurs v Delrue 1852 (1) DJG 118 (Cour de Cassation).

'Bage' (1930) 8 DMF 220 (Tribunal de Commerce de Marseilles 7/4/30).

'Barbel' (1978) 30 DMF 328 (Cour de Cassation Chamber Commerce 11/10/77).

Basse v Assureurs Maritime ('La Nanine') 1853 (2) DJG 4 (Cour Impérial).

Blandin et autres v Bergès ('Le Gaston et Félicie') 1860 (1) DJG 439 (Cour de Cassation).

'Césarée' (1932) 10 DMF 179 (Tribunal de Commerce d'Alger 6/1/32).

Compagnie d'assurances La Foncière v Poret-Lobez ('L'Aiglou') 1925 (2) DJG 63 (Cour Douai).

Compagnie le Palladium v Pérès (the 'Virgen del Carmen') 1855 (1) DJG 315 (Cour de Cassation).

Comp d'assurances générales v Fournier ('La Neustrie') 1856 (2) DJG 173 (Cour Impérial).

Comp la Gironde v Amanieu (the 'La Louise-Marie') 1854 (2) DJG 15 (Cour Impérial).

'Djurdjura' (1975) 27 DMF 123 (Tribunal de Commerce de Paris 13/2/74).

Durand de la Bédouandière et comp v Sellier et Autres ('Le Juste') 1858 (1) DJG 392 (Cour de Cassation).

Georges et comp v Sargent et comp ('Le Mussa-Pacha') 1859 (1) DJG 356 (Cour de Cassation).

'Giota's' (1985) 37 DMF 613 (Cour d'Appel de Paris 29/10/84).

'Ismene' (1988) 18 DMF 170 (Cour d'Appel de Paris 29/5/87).

Laporte v Guildbaud et autres ('Le Jules') 1851 (1) DJG 289 (Cour de Cassation).

Lemaître et comp v Assurance Mutuelles ('La Ceres') 1853 (2) DJG 61 (Cour Impérial).

'La Manilla' 1859 (2) DJG 20 (Cour Impérial).

'The Medipas Star' (1995) 47 DMF 313 (Cour d'Appel D'Aix-en-Provence).

Picard, Terrieux et comp v Compagnie d'assurances générales maritimes ('La Bella-Cubana') 1880(1) DJG 131 (Cour de Cassation).

Régis v Leray et Lafargue ('L'Arabie') 1880 (1) DJG 132 (Cour d'Appel').

Société Maritimes d'Agde v Puginier et Abbal ('Le Théodicée') 1870 (1) DJG 305 (Cour de Cassation).

'Terzic' (1966) 18 DMF 540 (Cour d'Appel de Rennes 1st Chamber 4/1/66).

L'Union de ports v Wanner Langer et autres ('L'Oriental') 1851 (1) DJG 33 (Cour de Cassation).

Vanderlenne et Bulot v Sauvage ('La Notre-Dame-de-Mer') 1903 (1) DJG 447 (Cour de Cassation).

GERMANY

'Green Park' (1981) 80 BGH 55 (Landgericht and Oberlandesgericht München).

Bundesgerichtshof, 17 March 1954, BGHZ Bd 13, 28.

Oberlandesgericht Hamburg 13.7.1915, 1918 APV 98.

Oberlandesgericht Hamburg 6.7.1917, 1919 Juristenzeitung 280.

Reichsgericht I 15.10.1916, 89 Entsch. 40.

Reichsgericht I 4.4.1917, 90 Entsch. 140.

Reichsgericht I 2.1.1918, 88 Entsch. 240.

Reichsgericht I 6.11.1918, 1919 APV 71.

Reichsgericht I 23.2.1923, 92 Entsch. 240.

THE NETHERLANDS

De Allgemeine Versicherungs Aktien Gesellschafft 'Hansa' v De Vennootschap van Koophandel, onder de firma P Onnes en Zoon 1924 NJ 824.

Assuradeuren v De N.V. Stoomvisscherij 'Letty' 1928 NJ 1143.

Boedel W A Baron Baud v The Maritime Insurance Company Ltd 1918 NJ 537, (on appeal, 1920 NJ 410).

Derkx v IBC 1970 NJ 172.

De Handelsvennootschap onder de firma Simonis en van Bavel v De Deutsche Versicherungs-Gesellschaft 1921 NJ 881.

De Handelsvennootschap aktieselskabet Wilhelm Olsen v Nederlandsche Verzekering Maatschappij 1919 NJ 850.

N.V. Hollandsche Assurantie Sociëteit van 1841 v N.V. Volker Aanneming 1964 Schip en Schade 194, (also 1962 Schip en Schade 73).

Import en Commissiehandel v Assuradeuren 1919 NJ 1043.

A Kramer v De N.V. Centrale Spaar- en Verzekeringsbank 1919 NJ 1077.

Land v Het Hollandsche Kruis 1978 NJ 577.

Jacob Maring v La Confiance 1972 NJ 339.

A.J. Muller v Assuradeuren 1928 NJ 1106.

De Nederlandsche Transportverzekering Mij v Aktieselskabet Wilhelm Olsen 1921 NJ 73.

De Oostenrijksche Vennootschap 'Providentia' Allgemeine Versicherungsgesellschaft v De N.V. Wageningsche Lederfabriek v/h J.B. Roes & Zonen 1921 NJ 1089.

N.V. Petroleum Mij 'La Corona' v De Staat der Nederlanden 1959 Schip en Schade 58.

De Handelsvennootschap onder de firma Simonis en van Bavel v De Deutsche Versicherungs-Gesellschaft 1921 NJ 881.

De Naamlooze Vennootschap Stoomboot Maatschappij 'Carsjens' v L. Groenewegen, (Rechtbank Utrecht), 14 Dec 1910, W 9149; (Rechtbank s'Gravenhage), 21 Jan 1915, 1915 NJ 448.

Union Insurance Society of Canton Ltd and Allianz Versicherungs Aktien Gesellschaft v De Handelsvennootschap onder de firma Gärtner & Aurich 1921 NJ 24.

Van Eyk v Schlesische Feuer Versicherungs-Gesellschaft 1914 NJ 214.

M van Marle v Wereldhave NV 1994 NJ 243.

De N.V. Verzekeringsbank De Nieuwe Eerste Nederlandsche v De N.V. Hollandsche Ijzeren Spoorweg Maatschappij, (Hof Amsterdam), 28 Dec 1917, W 10223; (Hoge Raad), 31 Dec 1931, 1932 NJ 419.

A Visser en A M L van Wesenbeck v Assurantie Maatschappij 'De Zeven Provinciën' NV, (Hof Leeuwarden), 6 Feb 1957, 1957 NJ 644; (Hof s'Hertogenbosch), 14 March 1978; (Hoge Raad), 27 April 1979, 1981 NJ 139.

N.V. Volker v N.V. Hollandsche Assurantie Sociëteit van 1841 1962 Schip en Schade 73.

LIST OF AUTHORITIES: STATUTES

SOUTH AFRICA

Admiralty Jurisdiction Regulation Act 105 of 1983.

Companies Act 1926, 1973.

Criminal Procedure Act 1917, 1955 and 1977.

Divorce Act 70 of 1979.

General Law Amendment Act 8 of 1879, Cape of Good Hope.

General Law Amendment Ordinance 5 of 1902, Orange Free State.

Insolvency Act 24 of 1936.

Merchant Shipping Act 57 of 1961.

Railways and Harbours Regulation, Control and Management Act 22 of 1916.

Pre-Union Statute Law Revision Act 43 of 1977.

AMERICA

Clean Water Act, 33 USC.

Comprehensive Environmental Response, Compensation and Liability Act, 42 USC.

AUSTRALIA

Marine Insurance Act 1909.

BELGIUM

Wetboek van Koophandel.

CANADA

Marine Insurance Act 1993.

DENMARK

Copenhagen Ordonnance 1746.

Maritime Code 1561 of Frédéric II of Denmark.

ENGLAND

Administration of Justice Act 1970.

Admiralty Court Act 1840, 1861.

Colonial Courts of Admiralty Act 1890.

Gambling Act 1774.

Marine Insurance Act 1906.

Sale of Goods Act 1979.

Third Party (Rights against Insurers) Act 1930.

South Africa Act 1909.

Supreme Court of Judicature Act 1873.

Vice-Admiralty Courts Act 1863.

FRANCE

Code des Assurances 1976.

Code de Commerce 1807.

Law 522 of 1967.

Ordonnance de la Marine 1681.

GERMANY

Bundesgesetzbuch 1900.

Hamburg Ordonnance 1731.

Handelsgesetzbuch 1900.

Königsberg Ordonnance 1730.

Versicherungsvertragsgesetz 1908.

ITALY

Florence Ordonnance 1523.

Genoa Ordonnance of 1588 (or 1610).

Savona Ordonnance 1503, 1522.

INDIA

Marine Insurance Act 1963.

NEW ZEALAND

Marine Insurance Act 1908, as amended by the Marine Insurance Amendment Act 1975.

THE NETHERLANDS

Amsterdam Ordonnance 1598, 1640 (amendment), 1744, 1756 (amendment).

Burgerlijk Wetboek 1838.

Dordrecht Ordonnance 1775.

Flessingen Ordonnance 1661.

Nieuw Burgerlijk Wetboek.

Middelburg Ordonnance 1600.

Ordonnances of Philip II of Spain 1558, 1563, 1570.

Rotterdam Ordonnance 1604, 1721.

Wetboek van Koophandel 1838.

NORWAY

Stockholm Ordonnance 1750.

RUSSIA

Riga Ordonnance 1672.

SPAIN

Barcelona Ordonnance 1435, 1436 (2), 1458, 1461, 1484.

Bilbao Ordonnance 1560, 1738.

Burgos Ordonnance 1538.

Saint-Sebastian 1682.

Seville Ordonnance 1556.

SWEDEN

Maritime Code 1667 of Charles XI.

PART I: INTRODUCTION

'Le délaissement est une institution originale du droit maritime ...'

Rodière et Pontavice¹

CHAPTER ONE

THE DEFINITION OF ABANDONMENT

1. INTRODUCTION

- 1.1. Abandonment is a special remedy in terms of which the assured may claim the full indemnity provided by a marine insurance policy. It is available only in special circumstances, which are defined by the law and are subject to the terms of the policy. In order to make use of this remedy the assured is required to offer to transfer his rights in the thing insured to the insurer. This offer is called an abandonment. However, the doctrine of abandonment is also a much wider concept, which includes all the rules and principles relating to the question when the right to abandon arises, what formalities have to be complied with in exercising the right, and what the consequences of a proper abandonment are. Abandonment in its wider

1

Précis Dalloz: Droit Maritime, 10th ed, (1986), para 633.

meaning is the subject of this study².

1.2. Abandonment is the feature which most clearly distinguishes marine insurance from all other kinds of indemnity insurance. It has been said to be an '*institution originale*'³ of marine insurance. It may be unique to marine insurance⁴ although it has been held by the Court of Appeal in England that abandonment is a feature of all indemnity insurance contracts⁵.

1.3. It will be demonstrated in the following chapters that abandonment dates back to the origins of the contract of indemnity insurance itself and that it has been a feature of marine insurance, the oldest form of indemnity insurance, from its very birth. Abandonment was also mentioned in one of the oldest known reported cases on marine insurance on

2 Whether abandonment is called a feature, a concept, a doctrine or even an institution of marine insurance does not matter as it will become clear that different meanings may be attached to the word abandonment. The subject of this study is abandonment as a collection of principles or rules constituting a separate legal concept or doctrine within marine insurance.

3 Rodière and Pontavice, *op cit*, para 633.

4 Rodière and Pontavice, *op cit*, para 633.

5 *Kaltenbach v Mackenzie* (1878) 3 CPD 467 (CA). This opinion seems to confuse abandonment with subrogation. The controversy raised by this judgment will be addressed in Chapter 12 *infra*.

the continent⁶, and was raised as a defence in the case involving the oldest preserved written policy of insurance in England⁷. Further, throughout the history of marine insurance statutes, abandonment has been accorded a special section or chapter, and it has been the subject of great debates among the most important writers on the subject of insurance during the seventeenth and eighteenth centuries⁸, when the principles of marine insurance were part of the commercial *jus commune* of western Europe and England. Disputes involving abandonment came before the courts regularly, and the law reports abound with decisions explaining its precise nature and effect, especially in England and America, where the law is built on a

6 *Marc Gentil v Arnulphian, Lommelín and Tany*, a case decided in Bruges, a town in Belgium, in 1459 and referred to in Trener, *The Origin and early History of Insurance*, (1926), 270 fn 1. The report of the case mentions the obligation of the plaintiff '*de ceder et transporter... tout le droit qu'il avoit*' ('to cede and transfer all the rights that he has') to the defendant insurers, and relies on a custom of long standing, ('*la coustume de tout temps*'), as the origin of the rule.

7 *Broke v Maynard and Lodge*, in the case of the policy dated 20 September 1547 on the '*Santa Maria*', referred to in Raines, *A History of British Insurance*, (1948), 29-30. The record of the case can also be found in the files of the Admiralty Court in 1547 file number 147. One of the underwriters, Maynard, raised the defence that he had received no notice of abandonment, and no part of the salvaged goods.

8 Among these are the Roman-Dutch lawyers De Groot, Bynkershoek, Van der Keessel and Van der Linden, the Frenchmen Valin, Pothier and Émerigon, the Italian Baldasseroni, the Englishmen Park and Marshall, and the Americans Phillips and Kent. Their works will be referred to later in this study. These men wrote their works, for the most part, two or three hundred years ago. The most important contributions by German lawyers, with the exception of Kuricke and Benecke, were made more recently, in studies which follow the particularly German legal philosophy, and the works of Bewer, Goldschmidt, Martin, Aschenheim, Barkhausen and Helberg will be referred to. More recent works in England, on the continent and in America will also be consulted when the occasion arises.

system of precedents.

- 1.4. Abandonment was present in marine insurance when the means of communication and travel were still undeveloped, unreliable and slow. This, according to some writers, gave rise to it in the first place. It has also been contended that abandonment was introduced as a presumption designed to alleviate the difficulties experienced with proof of loss by an insured peril which arose as a result of the assured's inability to reach the ship or to communicate with her⁹. In the early stages in the development of communication and navigation aids the assured's ability to determine whether his ship or goods were still safe was limited by his inability to reach the ship or communicate with her. It was very difficult and in many cases impossible for the assured to prove a loss by a peril insured against if the ship should have been lost or should have been detained by a foreign ruler in a distant sea or port. The lack of news of the ship therefore gave rise, in certain circumstances, to the invention of the principle of abandonment, according to these

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De Smet, *Traité Théorique et Pratique des Assurances Maritime*, 2nd ed, (1959-60), Vol I, para 527.

writers¹⁰. There are other theories for the origins of the principle of abandonment, however, which are not dependent on the same reasoning. According to one abandonment is merely a manifestation of the indemnity principle at work while another has it that abandonment has always been part of marine insurance. It may even be that there is an element of truth in each of these theories and that abandonment cannot be explained completely by any one of them¹¹.

- 1.5. The concept of abandonment is now found with some variation in the continental¹² codes of marine insurance and also in English¹³ common law in its codified form in England and in its uncoded form in American law, but it has been suggested that it has not been received into South African

10 Helberg, *Der Abandon in der Seeversicherung auf rechtsvergleichender Grundlage*, (1925), 13-5; De Smet, *op cit*, Vol I, para 527.

11 These theories are considered in Chapter 13 *infra*.

12 See for example the treatment of abandonment in the numerous European countries discussed by De Smet, *op cit*, Vols I to III and Abbink, *Het Zeerecht en de Zee-assurantiewetten aller volken*, (1847), Vols I to III. A notable exception is the Netherlands, where abandonment in marine insurance was abolished with effect from 1 January 1992.

13 It also spread with the influence of the British Empire to its overseas colonies, notably America, Canada, Australia, New Zealand and India. In these countries too, with the exception of America, marine insurance law has been codified in a form and in content substantially the same as the English Marine Insurance Act 1906 ('the MIA'). Canada has recently passed a new Marine Insurance Act which came into effect on 6 May 1993.

law¹⁴.

- 1.6. The extent, and limits, of any scientific study must to a large extent be determined by a precise definition of the subject. In the case of abandonment one finds that a number of different approaches have been adopted in the past. Nevertheless, the principal aspects of abandonment are capable of being identified from the definitions of abandonment which were utilised in earlier treatises and statutes.

2. DEFINITIONS OF ABANDONMENT

- 2.1. In ordinary parlance the verb '*to abandon*' means '*to cast away*' or '*to leave behind*', and the noun '*abandonment*' has a corresponding meaning. In marine insurance, however, it has a special, technical meaning. In French abandonment is called

14

See for example, Schlemmer, *Verkryging van Eiendomsreg deur 'n Versekeraar in geval van Diefstal van 'n Versekerde Saak*, LLM thesis, Rand Afrikaans University, (1991), 55; Viljoen JA's minority judgment in *Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries* ('*The Morning Star 2*') 1987 1 SA 842 (A) at 864F-H, and Friedman J's judgment in the same case in the trial court, *Shooter t/a Shooter's Fisheries v Incorporated General Insurances* ('*The Morning Star 1*') 1984 4 SA 264 (D). It has also featured in four other reported cases so far and is dealt with in the few textbooks on marine insurance on the basis, even assumption, that it is part of South African law. That assumption will not be made here as one of the purposes of this study is to determine whether it is in fact part of South African law.

'le délaissement', although 'l'abandon'¹⁵ is also sometimes used. In German it is called 'der Abandon', while the Dutch 'abandonnement'¹⁶ may also suffice for Afrikaans instead of the words 'afstanddoening' or 'prysgawe', which appear to be more appropriate outside the field of marine insurance.

- 2.2. However, none of the words mentioned above gives any indication that a 'transfer' of proprietary rights rather than a mere waiver or giving up of personal or real rights may be involved¹⁷. The abandonment of a right does not ordinarily conjure up the thought that the right abandoned may be transferred to another, either directly or by operation of law, but in marine insurance that may

15 Émerigon, *Traité des Assurances et des Contrats a la Grosse*, (1783), (Boulay-Paty edition), (1827), Vol II, 205-206, pointed out that the *Guidon de la Mer* used the word 'délais' or 'délaissement', while the *Ordonnance de la Marine* of 1681 used both 'délaissement' and 'abandon'. The word 'abandon' was thought to be more appropriate to the case of the surrender of the ship to creditors for the purpose of the limitation of liability, and the *Code de Commerce* of 1807 ('the CdeC') therefore did not make use of it in relation to marine insurance; Boulay-Paty, *Traité des Assurances et des Contrats a la Grosse d'Émerigon*, (1827), Vol II, 206; Rodière and Pontavice, op cit, para 633. (The edition of Émerigon's work referred to also has Boulay-Paty's commentary after the original text. Where the reference is to the commentary by Boulay-Paty, this work will be referred to as Boulay-Paty, *Traité des Assurances*.)

16 'Abandon' in Dutch refers to the act of a shipowner which gives rise to limited liability in respect of claims arising from the contract of carriage or from delict while 'abandonnement' was used in the past in relation to marine insurance; s'Jacob, *Het Recht van Abandon*, doctoral thesis, Leiden, (1890), 18 and 48-49. See also page 238 *infra*.

17 Aaftink, *Afstand van Vermogensrechten*, (1974), 14, describes abandonment (not in its marine insurance sense) as 'de rechtshandeling welke gericht is op het uit het vermogen doen van een recht, zonder dit daarbij aan een ander over te dragen'.

be its effect in certain jurisdictions¹⁸.

2.3. Different aspects of abandonment are emphasised by various writers and statutes in their attempts to define or explain the concept. Many writers and statutes did not attempt a definition, but simply set about describing the circumstances in which an assured has the right to abandon, the procedure to be followed by an assured exercising that right and the effects of a proper abandonment¹⁹.

2.4. What becomes apparent upon a comparison of these definitions is that there are a number of different approaches and that there are many different aspects to abandonment. The presence of these differences approaches and aspects are helpful because they draw attention to important characteristics of abandonment. What is also apparent is that the subject of abandonment is not approached in exactly the same way by different legal systems, although a great deal of similarity which transcends national borders is clearly present.

18 This subject is considered in Chapter 14 *infra*.

19 As a method of transfer of certain rights and a special method of claiming the full indemnity.

3. THE NETHERLANDS

- 3.1. The *Wetboek van Koophandel* of 1838 ('the WvK'), like the 1598 and 1744 Amsterdam ordonnances²⁰ before it, did not define abandonment²¹. Its abandonment provisions were repealed altogether with effect from 1 January 1992²². Some important features of abandonment are apparent from the treatment of abandonment in the WvK. Firstly, the abandonment provisions were found in that part of the WvK which applied only to marine insurance. Nevertheless, while those provisions also to applied to voyages on internal waters and to land transport, many of the abandonment provisions could by their nature not apply to any form of transport other than by sea or at least on

20 The Rotterdam Ordonnances of 1604 and 1721 and the Middelburg Ordonnance of 1600 treated the subject in the same manner as the Amsterdam Ordonnances of 1598 and 1744, and are not discussed separately here.

21 The substantive and procedural provisions of abandonment were set out in increasing detail in consecutive ordonnances, and also by the institutional writers. These writers generally treated the subject of abandonment rather cursorily by reference to the applicable statute or statutes in force at the time of writing. De Groot wrote before the Rotterdam and Amsterdam ordonnances of 1721 and 1744 respectively were promulgated, and his comment is therefore confined to the earlier round of ordonnances. Van Bynkershoek, (referred to in this work as Bynkershoek), on the other hand, wrote after the Rotterdam Ordonnance of 1721, but before the Amsterdam Ordonnance of 1744.

22 The principal reason for the repeal was the almost invariable practice of insurers to exclude the right to abandon from their standard policies. See pages 226-227 *infra*.

water²³. The WvK also dealt with abandonment in the same pattern as the earlier ordonnances²⁴.

3.2. Schook defined abandonment as

*'die handeling van de verzekerde of diens gemachtigde, waardoor hij, op grond van natuurlijk, of door Wetduiding als zoodanig aangenomen, verlies, de verzekerde zaak in evenredigheid tot de verzekerde som, geheel en zuiver, met al hare gevolgen, afstaat aan den verzekeraar, terwijl deze daardoor gedwongen wordt de verzekerde som aan hem, of aan zijne regthebbenden, uit te betalen.'*²⁵

This definition draws attention to a number of important aspects. Firstly, abandonment is not, as one would expect when the word is given its strict etymological meaning, an act whereby the assured relinquishes the thing insured so that the world

23 This suggests that abandonment could only apply to marine insurance, a conclusion which will be tested later in this study. See page 552 *et seq. infra*. See also Nolst Trenité, *Zeeverzekering*, 2nd ed, (1930), Vol II, 642.

24 The WvK first set out the circumstances which give rise to the right to abandon, then laid down some formal requirements for the exercise of the right, and lastly provided what the effect of an abandonment as between the parties were. For the development of this pattern, see Chapter 5 *infra*.

25 *Het Abandonnement*, doctoral thesis, Utrecht, (1858), 4.

at large may claim it as *res nullius* or *res derelictae*. The abandonment is 'aan de verzekeraar'. Secondly, what is abandoned is the insured 'zaak' or thing. Dutch law therefore contemplated only the abandonment of a *res*, which in marine insurance terms means the ship and her cargo. Thirdly, the effect of the abandonment is that the insurer becomes obliged to pay the sum insured.

3.3. Mens Fiers Smeding's definition of abandonment is similar to Schook's, although he placed the emphasis on abandonment as

*'het recht, aan den verzekerde gegeven, om in bepaalde, door de wet aangewezen, of door de partijen afgesproken gevallen, het verzekerde schip of lading, of beide, in evenredigheid tot de verzekerde som, geheel en zuiver, aan den verzekeraar af te staan, onder verplichting voor den laatste, om de verzekerde som binnen den door de wet gestelde termijn te voldoen.'*²⁶

He therefore saw abandonment as a legal remedy

26

Eenige Opmerkingen over het Recht van Abandonnement, doctoral thesis, Leiden, (1895), 39-40.

which the assured could enforce in certain circumstances. Both Schook and Mens Fiers Smeding's definitions mention other important aspects of abandonment. Abandonment is a remedy which is only available to the assured in the prescribed cases. It also has to include the whole insured interest and may not be made conditionally. Mens Fiers Smeding makes it clear that only the ship and her cargo could be abandoned in Dutch law²⁷.

3.4. To Nolst Trenité, probably the most respected Dutch marine insurance practitioner and writer of his time, abandonment was

*'een buitengewoon middel, aan den verzekerde gegeven, om zich op gemakkelijke en snelle wijze de schadeloosstelling voor het geleden verlies te verschaffen.'*²⁸

This view draws attention to yet another important aspect of abandonment, namely its function as a

27 This is an important consideration for the future of South African law, which may or may not recognize the right to abandon in respect of a wider range of rights including the freight, profits, commissions and the like, depending on whether South African law is to follow English or Roman-Dutch law on the subject.

28 *Op cit*, Vol II, 640.

procedural shortcut to allow the assured to recover his investment capital sooner. The link between this function of abandonment and some abandonment theories will become apparent later²⁹. Notwithstanding his own definition of abandonment Nolst Trenité also regarded the transfer of ownership of the insured 'goederen' to the insurer and the insurer's obligation to pay as the '*hoofdbeginsel van abandonnement*'³⁰.

3.5. More recent writers³¹ in the Netherlands have not attempted a definition, but have contented themselves with a discussion of the provisions of the WvK. Nevertheless, Dorhout Mees' statement that

*'Tegenover de eigendomsovergang verplicht een geldig abandonnement de verzekeraar om ... de verzekerde som ... te betalen ...'*³²

makes it clear that abandonment is still seen as

29 See Chapter 13 *infra* in this regard.

30 *Op cit*, Vol II, 640.

31 As, for example, Dorhout-Mees, *Nederlands handels- en faillissementsrecht*, 6th ed, (1974), (cited as '*Handelsrecht*'), 132-133, and Van Barneveld, *Inleiding tot de Algemene Assurantiekenis*, 10th ed, (1978), 484-486.

32 *Handelsrecht*, 134.

containing two main components. The first is the transfer of the thing insured to the insurer. The second, inextricably linked to the first, is the duty of the insurer to pay the sum insured, with the concomitant right of the assured to payment.

4. GERMANY

- 4.1. The German Commercial Code, the *Handelsgesetzbuch* of 1900 ('the HGB') contains no definition of abandonment, but follows a predictable pattern³³. It defines the circumstances under which an assured may abandon, stipulates the procedures to be followed, and lays down the consequences of a legitimate abandonment³⁴. The German authors appear to fall in three different categories. According to some the most important aspect of abandonment is the transfer of rights from the assured to the insurer, while others stressed its function as a special method of claiming the full indemnity. A third group see abandonment as a special rule, a presumption, operating in the field of the law of evidence.

33 This pattern dates back at least to the Amsterdam Ordonnance of 1598. See Chapter 5 *infra*.

34 Articles 861 to 871, Section 10, Book 4 of the HGB.

- 4.2. The first group includes authors like Benecke, who stated:

*'Die völlige Übertragung des Eigentumsrechts einer versicherten verunglückten Sache an den Versicherer wird Abandon genannt'*³⁵

and Helberg, who also emphasised

*'die Übertragung der vollen und unbedingten Herrschaft des Versicherten über den versicherten Gegenstand auf den Assekuradeur.'*³⁶

- 4.3. The second group includes authors like Pöhls, who combined the right of the assured to claim payment with the transfer of rights, writing:

'Unter dem Abandon ... ist die Handlung zu verstehen, durch welche der Versicherte seinem

³⁵ *System des See-Assekuranz- und Bodmerei-Wesens*, (1805-1821), 485. ('The complete transfer of ownership of the thing ('res') affected by the casualty to the insurer is called abandonment ...')

³⁶ *Der Abandon in der Seeversicherung auf rechtsvergleichender Grundlage*, (1925), 18. ('The transfer of full and unconditional control of the insured thing by the assured to the insurer.') Helberg, *op cit*, 19 did not ignore the effect of an abandonment on the right to claim and pointed out that *'das HGB unter Abandon das Recht des Versicherten versteht, die Zahlung der Versicherungssumme gegen Abtretung der genannten Rechte zu verlangen'*. ('The HGB views abandonment as the right of the assured to claim the full amount of the insurance against his relinquishing the named rights.')

*Assecurateur anzeigt, dass er die Bezahlung des versicherten Summe in Unspruch nehme und dagegen ihm, dem Assecurateur, den Gegenstand der Assecuranz mit allen ihm, dem Versicherten, zustehenden Rechten überlasse'*³⁷

and Martin, who also linked the effect of the transfer of the assured's rights in the insured thing to the insurer's obligation to pay the sum insured where he wrote:

*'Unter Abandon versteht man die Übertragung aller³⁸ Rechte an dem versicherten Gegenstand auf den Versicherer mit der Wirkung, dass der Versicherer verpflichtet wird, die volle Versicherungssumme zu zahlen.'*³⁹

- 4.4. Some German theorists do not appear to contest the functions of abandonment as a method of claiming the full indemnity and of transferring ownership

37 *See-Assekuranz-Recht*, (1834), Vol II, 594. ('Abandonment is the act by means of which the assured demands from his insurer payment of the sum insured and relinquishes to the insurer the thing insured together with all rights the assured has in respect of it.')

38 Martin's definition contains an important principle, namely that the assured has to abandon all his rights in the thing insured.

39 *Die Haftung des Versicherers für Güter aus deutschen Schiffen in italienen und portugiesischen Häfen*, (1918), 45. ('Abandonment is the transfer of all the assured's rights in the insured thing with the effect that the insurer becomes obliged to pay the full amount of the insurance.')

to the insurer, but they stress that abandonment operates in the sphere of the law of evidence.

4.4.1. Bewer pointed out that it is one of the basic principles of insurance that the assured should not be indemnified until both the occurrence of an indemnifiable loss and its quantum have been proved⁴⁰. This is so because the strict indemnity principle stands, as he put it, '*unter der Herrschaft des Beweissystems*'.⁴¹ However, in certain cases proof of an actual loss is not possible and an injustice is may result from the assured's inability to discharge the onus of proof. This shortcoming led to the introduction of a presumption of loss⁴² which allows the assured to recover the sum insured⁴³. A total loss is thus created by a presumption⁴⁴. This approach raises the question whether abandonment is merely a presumption of the law of evidence rather than

40 *Das Herrschaftsgebiet des Abandon*, (1891) 38 *Zeitschrift für das Gesamte Handelsrecht* 372, 1-2.

41 *Op cit*, 373. ('under the rule of the law of evidence', literally, 'under the rule of the system of proof'.)

42 '*der Schadensvermutung*', ('a presumption of loss'); *op cit*, 373.

43 *Op cit*, 373.

44 *Op cit*, 374.

a set of rules and principles of substantive law⁴⁵.

4.4.2. Aschenheim⁴⁶ and others⁴⁷ adopted Bewer's theory, and explained that abandonment was allowed in cases where a total loss entitling the assured to claim the full indemnity was created by a legal fiction or presumption.

4.5. Generally, however, the German view of abandonment is that it is method of claiming the full indemnity against a transfer of ownership in the insured thing to the insurer. Nevertheless, a consideration of the precise place of abandonment within the system of laws is necessitated by Aschenheim's approach.

5. FRANCE

5.1. Law 522 of 1967 which came into effect in France on 4 July 1967 and replaced the outdated

45 This subject is dealt with in Chapter 13 *infra*.

46 *Der Abandon des Versicherten in der Seeversicherung*, (1893), 2.

47 Barkhausen, *Voraussetzungen und Wirkungen des Abandon bei der Seeversicherung*, doctoral thesis, Erlangen, (1895), 1 called abandonment the method by means of which the fiction of an absolute total loss ('*die Fiction des absoluten Totalverlust*') was created. See also Nourney, *Das Recht des Abandons*, doctoral thesis, Heidelberg, (1905), 2-3.

provisions of the CdeC of 1807 did not attempt a definition of abandonment, but simplified its principles abandonment considerably⁴⁸. All losses and damage are regarded, as a rule, as particular average, except where the assured has the right to abandon in such cases as are determined by the law or the policy⁴⁹. The effect of an abandonment is prescribed in article 31 of Law 522 of 1967 as follows:

*'Il transfère les droits de l'assuré sur les objets assurés à l'assureur.'*⁵⁰

The section does not define abandonment as much as it describes its effect, or one of its effects, but it at least draws attention to one of the essential characteristics of abandonment.

5.2. The famous French authors of the eighteenth century generally defined abandonment with emphasis on its procedural aspect as an unusual or special method of claiming the full indemnity

48 Harrel-Courtès, *Le Nouveau Droit Français de l'Assurance Maritime et des Événements de Mer*, (1968), 3 et seq.

49 Article 28. This means in effect that the grounds allowed by the CdeC still apply unless the policy provides otherwise in any given case.

50 ('It transfers the rights of the assured in the things insured to the insurer.')

stipulated in the policy, but some of them also mentioned the transfer of rights by abandonment as an important part of the concept.

5.3. The *Guidon de la Mer*⁵¹ of the second half of the sixteenth century listed the specific grounds upon which an abandonment could be made and described it as an '*extreme remède*'⁵², an approach which has been followed ever since in France⁵³. The *Guidon* further provided the oldest known definition of abandonment⁵⁴. It provided as follows:

'Il est en liberté du marchand chargeur faire delais à ses assureurs, c'est a dire quitter et delaisser ses droits, noms, raisons et actions de la propriété qu'il a en la merchandise chargiez

51 This collection of customs was first published in Rouen in 1731, but dates back some centuries; Dover, *A Handbook to Marine Insurance*, 8th ed, (1975), 23. It is generally accepted that the *Guidon* dates back to the middle of the sixteenth century.

52 Chapter VII, article 1. The grounds were '*nauffrage ... avarie qui excède ou endommage la moitié de la merchandise ... prise ... arrest de prince ... tel autre destourbier en la navigation, ou telle empirance en la merchandise, qu'il n'y ait moyen l'avoir fait naviger à son dernier reste, ou qu'elle ne valust le fret ou peu de chose davantage.*' ('Shipwreck, damage which exceeds half the value of the goods, capture, arrest of princes, or any other disturbance of the voyage or any other hindrance of the goods which makes it impossible to forward them to their destination, or not worth the freight or of little advantage.')

53 See the discussion of the *Guidon* in Chapter 4 *infra* and the French statutes in Chapters 5 and 8 *infra*.

54 It is certainly the oldest definition I have been able to find.

*dont il est assuré.*⁵⁵

5.3.1. The *Guidon's* definition places the emphasis on the effect of abandonment as a method of transfer of the assured's rights in and to the thing insured to the insurer. The definition is also so wide that it can be said to include those rights which are now accepted to fall under the concept of subrogation rather than abandonment, namely the '*rights, titles, causes of action and rights of ownership*'.

5.3.2. The *Guidon* therefore alerts one to the possibility that the rules of abandonment and subrogation may, at one time, have been viewed as falling under only one concept and that a separation of the two must have occurred after the time of the *Guidon*⁵⁶.

5.4. In the *Ordonnance de la Marine* of 1681⁵⁷ the general approach of the *Guidon* was followed. The

55 Article 1. ('The merchant shall be entitled to make an abandonment to his insurers, that is to say, to quit and relinquish his rights, titles, claims and actions of ownership which he has in the cargo laden on board and insured.')

56 This subject is explored in Chapter 12 *infra*.

57 A comprehensive ordonnance on maritime matters, including marine insurance law and practice, promulgated by Louis XIV, and the '*fount of most modern marine insurance law*'; Dover, *op cit*, 23.

specific circumstances giving rise to the right to abandon were precisely stated⁵⁸, and the principle that an abandonment transfers ownership to the insurer re-affirmed⁵⁹. The *CdeC* of 1807 did not define abandonment but virtually repeated the provisions of the 1681 Ordonnance verbatim⁶⁰.

5.5. The three great French commentators on the 1681 Ordonnance, Valin, Pothier and Émerigon each followed his own approach. Valin, adopting the approach of the *Guidon*, described abandonment as '*cession et transport*'⁶¹. Pothier, on the other hand, described it as a means through which the assured could claim the indemnity⁶². Émerigon also emphasised that abandonment is '*un remède extrême*'⁶³, a special method of claiming the

58 Article 46.

59 Article 60. The word '*appartiendront*' meaning '*shall belong*' was used in contradistinction to the '*quitter et délaisser*' of the *Guidon*. This is a significant provision for the contention that abandonment constituted a unique method of vesting ownership in the insurer in some marine insurance cases where physical delivery was not possible because neither the assured nor the insurer could exercise sufficient physical control over the thing to be transferred to be able to effect a delivery in the ordinary way.

60 Articles 369 to 394.

61 *Commentaire sur l'Ordonnance de la Marine du Mois d'Aout 1681*, (1760), (Becane edition of 1829), 562.

62 *Traité du Contrat d'Assurance*, (1768-1778), para 128: '*Pour que l'assuré puisse demander la somme assurée...*'. (By this the assured may claim the sum insured.)

63 *Op cit*, Vol II, 209.

indemnity, but added that it was the act through which the assured

*'quitte et délaisse aux assureurs les droits, noms, raisons, et actions de la propriété qu'il a en la marchandise assurée.'*⁶⁴

According to Émerigon the abandonment was equivalent to a transfer⁶⁵. These eminent writers do not appear to have added anything to, nor deviated from, the definition given by the *Guidon* some two hundred years earlier.

5.6. The more modern writers on French marine insurance followed a different approach. De Smet, in what is probably the most comprehensive yet succinct definition, described abandonment as follows:

'Le délaissement est une mode exceptionnel de réclamation de l'indemnité, grâce auquel l'assuré obtient, dans certains cas, la totalité de la prestation convenue, à la condition de céder à

⁶⁴ *Op cit* Vol II, 230. ('He quits and abandons to the insurers the rights, titles, claims, and rights of action, of the property he has in the merchandize shipped (sic).') (The translation is from Meredith's translation of Émerigon's work under the title, *A Treatise on Insurances*, (1850), 684 and should refer to the 'merchandize insured' rather than the 'merchandize shipped'.)

⁶⁵ *Op cit*, Vol II, 230.

*l'assureur la propriété des choses sauvées.'*⁶⁶

This definition states what may be regarded as the essential elements of abandonment⁶⁷.

5.7. Rodière and Pontavice⁶⁸ described abandonment in similar terms as De Smet. In the approach of these writers the link between abandonment and the indemnity is stressed..This link may be more than a mere procedural one, because abandonment may be seen as forming part of the field of operation of the principle of indemnity⁶⁹.

6. ENGLAND

6.1. While the earliest writers on marine insurance in England did not set out to define abandonment,

66 *Op cit*, Vol I, para 527. ('Abandonment is a special method of claiming the full indemnity, through which (method) the assured may, in certain cases, claim the full amount of the insurance, against a cession to the insurer of ownership of the things saved.')

67 The essential elements of abandonment apparent from this definition are:
1. it is a method of claiming the full indemnity;
2. it is an exceptional method;
3. it applies only in certain cases;
4. in order to make use of this right the assured has to transfer his rights in and to the thing saved to the insurer.

68 *Op cit*, para 633: '*Le délaissement est une institution originale du droit maritime par laquelle l'assurée recevra l'intégralité de somme assurée en abandonnant à l'assureur la propriété de la chose assurée*'. ('Abandonment is an original institution of maritime law by means of which the assured recovers the full amount of the insurance and abandons to the insurer ownership of the thing insured.')

69 The links between abandonment and the indemnity principle are discussed in Chapters 11 to 13 *infra*.

their initial approach to the subject makes it clear that they also regarded it in the same light as the French writers, with emphasis on the procedural aspect. Malynes⁷⁰ did not deal with the subject in any detail in his work, published in 1685. Magens⁷¹, writing in 1755, still described the circumstances under which an assured could abandon along the lines adopted by continental writers and statutes, but he was an expatriate who had emigrated to England after he had written his main work in German.

- 6.2. Sir James Allen Park⁷², writing in the first edition of his famous work, dealt with it by referring to the many cases which had come before the courts and in which the circumstances were analysed in an endeavour to determine whether the loss was total or not. He declared that the definition of abandonment was the same in the laws of the different nations.

'(W)hen any goods or ships that are insured,

70 *Consuetudo, vel, lex Mercatoria*, (1685), Chapter 28.

71 *An Essay on Insurances*, (1755), Vol II, 174-175.

72 *A System of the Law of Marine Insurances*, (1786), 68-92 and 161-194. The edition used as a reference in this study is the first American edition, printed from the original plates in Philadelphia in 1789.

*happen to be lost, taken, or spoiled, the insured is obliged to abandon such goods or ships for the benefit of the insurers, before he can demand any satisfaction from them.'*⁷³

Park's definition is so wide that an abandonment would be required in all cases where the assured makes a claim for an indemnity, even if there were only a partial loss. However, at the time of this definition no clear distinction had yet been drawn in English law between abandonment and subrogation, and Park's definition appears to embrace the ground covered by both concepts.

- 6.3. The Marine Insurance Act 1906 ('the MIA') also did not attempt a definition of abandonment, but dealt with it in a series of sections which lay down in broad terms in what circumstances an assured may abandon and claim the full indemnity⁷⁴. By the time the MIA was finally passed into law in 1906 the concept of a constructive total loss had crystallized in English law, and the emphasis had shifted from a discussion of the precise cause of the loss in each case to the effect of the event.

73 *Op cit*, 162.

74 Sections 60-63.

Indeed, Marshall was of the view that the main difference between English and French law could be summarised as follows:

*'By the French law, the right to abandon seems to depend on the species of misfortune which has happened; with us (English law) it depends rather on the degree of loss, sustained in consequence of it.'*⁷⁵

This comment identifies the principal difference between the English law concept of a constructive total loss and continental law on the subject of abandonment, but it remains to be seen whether both systems are not designed to remedy the same problem namely the compensation of the assured in cases of loss which are wholly or partially economic in nature as opposed to cases of real or actual loss⁷⁶.

6.4. Mustill and Gilman⁷⁷, stress the distinction between abandonment and notice of abandonment,

75 *A Treatise on the Law of Insurance*, 5th ed, (by William Shee), (1865), Book I, 453.

76 This subject is considered in Chapter 13 *infra*.

77 *Arnould's Law of Marine Insurance and Average*, 16th ed, (1981), para 1259-1261. This work is referred to in the remainder of this work as 'Arnould'.

relying on the questionable dictum in *Kaltenbach v Mackenzie*⁷⁸ that abandonment is an incident of all contracts of indemnity while notice of abandonment is required only in cases of constructive total loss to enable the assured to claim as for a total loss. The transfer of rights and the procedural aspect of abandonment are both catered for in his approach, although the difference between abandonment and subrogation tends to be obscured by it. Nevertheless, it appears from the foregoing that the concept of a constructive total loss lies at the heart of English law relating to abandonment.

7. AMERICA

7.1. In American law abandonment has been said to be '*the surrender by the insured on a constructive total loss of all his interest to the insurer to claim the full sum insured.*'⁷⁹ Phillips defined abandonment in more detail as

'an act on the part of the assured, by which he

78 *Supra.*

79 *Corpus Juris Secundum-A Complete Restatement of the Entire American Law*, by the editorial staff of West Publishing Co, (1946 with annual supplement), Vol 45, Insurance, para 957 (cited as 45 C.J.S. Insurance para...); *Chicago S.S.Lines v U.S.Lloyds* 12 F 2d 733 at 738.

*relinquishes and transfers to the underwriters his insurable interest, or the proceeds thereof, or the claims arising from it, so far as it is insured by the policy. An abandonment is requisite in order to recover the whole amount insured by the policy, only in case of a technical or constructive total loss.'*⁸⁰

Both the effect of the abandonment as a means of transfer and the necessity for an abandonment before the assured may claim the full indemnity are stressed by Phillips' definition. The first part of this definition is also remarkably similar to that of the *Guidon de la Mer*⁸¹.

7.2. Abandonment also means, in American law, the act of notifying the insurer of the election to treat a particular loss as total by surrendering the assured's interest in the insured object⁸². The distinction between abandonment and the notice of abandonment is not obscured in American law.

80 *A Treatise on the Law of Insurance*, 4th ed, (1854), paras 1490-1491. This work is available in the library of the Supreme Court in Durban, probably a relic of the early days of Natal jurisprudence when Natal judges frequently relied on American authorities for guidance in insurance cases.

81 The *Guidon* has always enjoyed great standing among American lawyers, especially after the War of Independence.

82 *Merchants & Manufacturers Insurance Co v Duffield* 2 Handy, Ohio 122.

8. SOUTH AFRICA

8.1. Van Niekerk's definition appears to that of English law. He described abandonment as:

*'the voluntary cession by the assured to the insurer of whatever remains of the subject-matter insured, together with all the proprietary rights and remedies in respect thereof.'*⁸³

He also expressed the opinion that it operates as an independent method of transferring ownership⁸⁴, with actual delivery unnecessary.

8.2. Schlemmer attempted no definition, but disagreed with the notion that abandonment operates as a method of transfer of ownership⁸⁵. Schlemmer does not appear to have considered that abandonment may be unique to marine insurance law and that its operation and effect may therefore be different to the operation of a waiver or transfer of rights in other branches of the law. Schlemmer also appears

83 *Subrogasie in die Versekeringsreg, ('Subrogasie')*, LLM thesis, Unisa, (1979), 320, fn 33.

84 *The Law of South Africa ('LAWSA')*, (Joubert, ed), (1988), Vol 12, (Insurance), para 307.

85 *Op cit*, 41 et seq. She also criticised Van Niekerk's approach as stating English law. This difference of opinion is examined in Chapter 14 *infra*.

not to have taken account of the fact that an abandonment may involve two separate legal acts namely the act of the assured by means of which he relinquishes ownership in favour of the insurer, coupled with an independent provision of the law by means of which the abandoned thing then vests in ownership in the insurer. Abandonment is then not a means of transfer, but the name given to the process by means of which the assured is divested of ownership and ownership of the thing abandoned is then acquired by the insurer⁸⁶.

8.3. In none of the five cases⁸⁷ in which abandonment was considered by a South African court in the last hundred and fifty years was a definition attempted.

8.4. In *Osaka Mercantile Steamship Co Ltd v South African Railways and Harbours*⁸⁸ the ship *Paris Maru*, owned by the defendant, sank and became a

86 This aspect is considered in Chapter 14 *infra*.

87 *Chiappini v Jones* (1837) 3 Menzies 181; *De Pass v Commercial Marine Insurance* (1857) 3 Searle 46; *The Cape of Good Hope Marine Insurance Co v Berg* (1865) 1 Roscoe 289; *South African Railways and Harbours v Wm Anderson* 1917 CPD 121; *Shooter t/a Shooter's Fisheries v Incorporated General Insurances ('the Morning Star 1')* 1984 4 SA 264 (D); *Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries ('the Morning Star 2')* 1987 1 SA 842 (A).

88 1938 AD 146.

wreck in the harbour of Algoa Bay. The plaintiff was vested with the power under section 3(u)(A) of the Railways and Harbours Regulation, Control and Management Act 22 of 1916 'to raise, remove or destroy any sunken, stranded or abandoned ship or wreck within its jurisdiction ... (and) to recover the expense of such raising, removal or destruction ... from the owner of such ship or wreck ...' The question before the court was whether the owner of a wreck or ship as contemplated by the section was intended to mean the owner at the time of removal of the wreck or the owner at the time of the casualty. This question became important because the defendant's defence was that it had ceased being the owner of the ship or wreck when it abandoned her to her underwriters, who paid on the basis of a total loss. The trial court had held that the liability under the section arose when the casualty occurred so that the 'owner cannot free himself from that liability by abandoning the ship so as to let it become *res nullius*.' On appeal the court found that construction of the section to be correct⁸⁹.

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The court distinguished the case of *The Crystal* 1894 AC 615 by virtue of the differences in the language used in the legislation under scrutiny.

8.5. The case highlights some of the important aspects of abandonment including whether, under South African law, the owner of the ship is fully and finally divested of all rights and obligations once an abandonment to the insurer has occurred⁹⁰.

8.5.1. It appears in the first place that one may have an abandonment in the ordinary sense such as occurs where an owner gives up and relinquishes ownership (or some other right) with the intention that whoever should wish to have it should be entitled to acquire it. The abandoned thing or *res derelictae* then becomes *res nullius* which may be acquired by *occupatio* by any person.

8.5.2. A second meaning was alluded to in the judgment. Beyers JA pointed out that the ship had been abandoned in a maritime sense⁹¹ when she sank and her crew left her. Such an abandonment is merely a physical abandonment and the ship still has an owner as there is no intention on the part of the

90 This matter is not capable of being resolved in this study as it is clear from the judgments that different countries may have different legislative provisions on the subject so far as it concerns the cost of removing wrecks.

91 'in 'n seesin'; at 187. See also the judgment of De Wet JA at 192.

owner to divest himself of ownership⁹².

8.5.3. The third meaning of abandonment in the circumstances is that of an abandonment to the insurer under a marine policy. The defence had been raised in the case that the defendant was no longer the owner of the ship or wreck when the cost of removing her were incurred because the ship had been abandoned to underwriters. This defence was rejected on the ground that the section imposed the liability on the party who was the owner at the time of the casualty. Implicit in the court's reasoning was the acceptance that the defendant had been divested of ownership by the abandonment to underwriters⁹³.

8.5.4. It is apparent from the foregoing that the effect of abandonment as a means of divesting the assured of his ownership and the vesting of ownership in the insurer, are not merely idle questions in South Africa.

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At 187.

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The case was decided in the setting where the English common law (as it was before the MIA 1906) applied to questions involving marine insurance law in the Cape of Good Hope, where the casualty occurred. Whether the abandonment transferred ownership of the ship or wreck to the insurer therefore had to be determined according to English common law, which provided that there would be an automatic transfer to the insurer, retro-active to the date of the casualty. See Chapter 9 *infra*.

9. CONCLUSION

9.1. While the subject of this study is abandonment in its marine insurance sense, it must be stressed that the verb 'to abandon' and the noun 'abandonment' are used in different settings and with different meanings intended according to the dictates of the relevant setting. At least six different scenarios have to be distinguished⁹⁴.

9.1.1. Firstly, a person who gives up ownership and possession of his property so that it becomes *res derelictae* and therefore *res nullius* is said to have abandoned such property and that his act of abandonment operates in favour of all the world. Any person may thereafter acquire ownership of such abandoned property by *occupatio*. This is the ordinary meaning of abandon and abandonment.

9.1.2. However, when a the master and crew of a ship leave the ship in pursuance of an order to 'abandon ship' because they perceive that their lives are in danger or because they think that there is no hope of preventing the demise of the

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The different meanings will be distinguished in the text of this study so far as the circumstances allow.

ship through, for example, shipwreck or stranding, they physically 'abandon' the ship or goods without relinquishing any of the owner's rights and without any other person obtaining any rights to the ship or anything on her⁹⁵. This is the maritime meaning of abandon and abandonment.

9.1.3. The word abandonment is also used to describe the surrender of the ship by her owner to his creditors. This process occurs outside the field of marine insurance, and does not transfer ownership to such creditors. Such a surrender may even occur concurrently with an abandonment in the marine insurance sense⁹⁶.

9.1.4. In the fourth place, the giving of notice of abandonment to an insurer has in the past been referred to as the 'abandonment' to the insurer. Used in this sense, some confusion is possible and it would be preferable to refer to the notification simply as notice of abandonment, which is precisely what it is.

95 See Nourney, *op cit*, 3-4.

96 See s'Jacob, *op cit*, for a detailed exposition of abandonment in this field.

- 9.1.5. In marine insurance context the process of the transfer of proprietary rights from the assured to the insurer is also called an 'abandonment', with 'abandon' as the appropriate verb. This is abandonment in the marine insurance sense⁹⁷.
- 9.1.6. Lastly, the word 'abandonment' is also used to describe the peculiar doctrine or the set of rules of marine insurance which pertains to the assured's right to abandon, the procedures to be followed by him, the effect of the notice of abandonment, and the 'cession' or transfer of rights pursuant thereto. This meaning of abandonment and abandon is also appropriate to marine insurance.
- 9.2. Abandonment as contemplated in the last three scenarios is the subject of this study. Having distinguished abandonment from its non-marine insurance uses, an appropriate, if preliminary, definition of abandonment must then be adopted for the purposes of this study. It has become clear that there are two main aspects to abandonment in marine insurance. The first is its function as a special method of claiming the full indemnity. The

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See Nourney, *op cit*, 3.

other is its operation as a means of transferring proprietary rights. Abandonment's place within the greater legal system also calls for some consideration. The definition which appears to satisfy the criteria of all the legal systems referred to earlier and which also maintains the emphasis on the two main aspects referred to is that of De Smet. It identifies the following aspects of abandonment:

9.2.1. It is a method of claiming the full indemnity⁹⁸. As such it is an extraordinary remedy which applies only in particular, defined cases. In order to make use of the right to abandon, the assured has to relinquish or cede his proprietary rights in the thing insured to the insurer, who becomes entitled to recover the abandoned thing or rights for himself. The insurer becomes obliged to pay the full sum insured when a proper abandonment is made.

9.3. In the next two chapters the reasons for this research will be considered and an appropriate research method sought.

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This statement immediately links abandonment to the indemnity principle, which is the paramount principle of all indemnity insurance.

CHAPTER TWO

MOTIVATION FOR THE RESEARCH OF ABANDONMENT PRINCIPLES

1. INTRODUCTION

- 1.1. While abandonment perforce has to be dealt with in all standard works on marine insurance law and practice, the subject has not, so far as South African law is concerned, been exhausted. On the contrary, there are many good reasons for a detailed study of the origins and principles of abandonment, including its history and development in other countries.

2. ABANDONMENT AS A NEGLECTED SUBJECT

- 2.1. In an unpublished LLM thesis, *A Critical Analysis of the Law to be applied to a Claim for Marine Insurance, with reference to Non-Disclosure and Abandonment, and the Need for Codification*¹, I argued in favour of codification of marine insurance law for a number of reasons. One of those reasons was that the law on abandonment in South Africa is obscure and undeveloped. It was found that abandonment was a truly neglected

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University of Natal, (1991)

subject in South African law, while certainly not the only marine insurance subject which had been neglected. I therefore suggested that further research into the important aspects of marine insurance was a necessary step in the process of drafting a South African Marine Insurance Act and was in any event necessary in order to achieve certainty in relation to the principles involved.

2.2. The purpose of this study is thus to analyse the sources of the law and to provide the material for the drafting of appropriate sections on abandonment in such an act. If there is to be no such act then this endeavour to collect and analyse the available material may be helpful to those engaged in shipping and legal practice, enabling them to determine what the applicable principles of abandonment in South African law are.

2.3. Abandonment has been the subject of great debates about its origins², of some of the oldest preserved commercial legislation³ and some of the

2 These are discussed in later chapters.

3 The older statutes on marine insurance and abandonment are discussed in Chapter 5 *infra*, while the current law applicable in selected countries is discussed in Chapters 6 to 10 *infra*.

oldest known cases on marine insurance law, not only on the continent⁴ and in England⁵, but also in South Africa⁶. Furthermore, by virtue of difference in approach between English and Continental law, coupled with the fact that English law was applied to marine insurance in the Cape Province and Orange Free State until recently, abandonment was and is the most likely subject of marine insurance to give rise to conflicting views and uncertainty in practice⁷. This is so because abandonment, apart from the question of non-disclosure, is probably the area of marine insurance law where English law and continental law differs the most.

2.4. Yet, the subject has received only passing attention in South Africa, both in reported cases

4 *Marc Gentil v Arnulphian, Lommelin and Tany*, (1459). The case is not reported in any official report, but is referred to by Trenerry, *The Origin and early History of Insurance*, (1926), 270 fn 1. In England *Broke v Maynard and Lodge*, (1547) and *Cavalchant v Maynard*, (1548) were the earliest cases in which abandonment principles were raised. (These two cases are not found in any official reports, but their papers continue to exist in the Admiralty Court records in 1547 file 27 number 147 and 1548 file 18 numbers 131-132 respectively.) See Chapter 4 *infra* for a discussion of these cases.

5 *Broke v Maynard and Lodge*, *supra*.

6 *Chiappini v Jones* (1837) 3 Menzies 181.

7 And it has done so as the case of *Shooter t/a Shooter's Fisheries v Incorporated General Insurances* 1984 4 SA 264 (D) and *Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries* 1987 1 SA 842 (A) on appeal demonstrates. The case and its ramifications for South African law are discussed in Chapter 18 *infra*.

and in academic writing, and no intervention by the legislature has taken place. Only five cases⁸ dealing with abandonment have been reported in the law reports of South Africa in the last hundred and fifty years⁹. In none of them were the precise principles of abandonment discussed in any detail, nor were the origins of abandonment researched, or the applicable sources clearly identified. In *Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries*¹⁰ one of the members of the Appeal Court even cast doubt on the question whether abandonment was part of South African law at all¹¹. Most South African academics have also dealt with it as if English law applied, not only in their writings¹², but also in their

8 *Chiappini v Jones, supra; De Pass v Commercial Marine Insurance Co* (1857) 3 Searle 46; *The Cape of Good Hope Marine Insurance Co v Berg* (1865) 1 Roscoe 289; *South African Railways and Harbours v Wm Anderson* 1917 CPD 121 and '*Shooter t/a Shooter's Fisheries v Incorporated General Insurances Ltd, supra*' and '*Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries, supra*'.

9 This spans virtually the whole period of formal law reporting in South Africa.

10 *Supra*, at 864F-H.

11 It is debatable whether the outcome of this case would have been the same if the sources of Roman-Dutch marine insurance law had been properly consulted. The case is discussed in Chapter 18 *infra*.

12 See for example: Bamford, *The Law of Shipping and Carriage in South Africa*, 4th ed, (1983), 337 et seq; Van Niekerk, *Subrogasie in die Versekeringsreg*, ('Subrogasie'), LLM thesis, Unisa, (1979), 319-335; Getz and Davis, *The South African Law of Insurance*, 4th ed, (1993), 410-413; Rycroft, '*The "Morning Star": An Omen for the Law of Marine Insurance?*', 4 (1984) *SAILJ* 73. The exception to this practice is Van Niekerk in Joubert, (ed), *The Law of South Africa*, ('*LAWSA*'), Vol 12, (Insurance), para 307.

lectures¹³. In the one work on South African law where abandonment is treated as subject to Roman-Dutch law the entire discussion takes but one paragraph over a few pages¹⁴, and even there the discussion seems to take more account of English law than to plumb the depths of the seventeenth to eighteenth century Roman-Dutch law and its development in South Africa.

2.5. Even within the Roman-Dutch law abandonment has not been examined in any depth by the seventeenth and eighteenth century writers. De Groot dealt with it as part of his general exposition of the principal aspects of insurance in his *Inleidinge tot de Hollandsche Rechtsgeleerdheid*¹⁵, but did not attempt to analyse the concept of abandonment. He explained the principles of abandonment without reference to the ordonnances in force in his time¹⁶. Bynkershoek¹⁷ also did not analyse the

13 Professor Alan Rycroft in his lectures on marine insurance in 1986 at Natal University. Although students at the University of Natal now have the choice whether they want to be taught English or Roman-Dutch marine insurance law, I believe this trend is continuing at those South African universities offering courses on marine insurance.

14 LAWSA, Vol 12, para 307.

15 (Referred to as '*Inleidinge*'), (1631), Book III, Chapter 24.

16 Footnotes referring to the applicable articles of the relevant ordonnances were supplied by Groenewegen in an edition published in 1644.

concept of abandonment. He wrote at a time between the passing of the second Rotterdam Ordonnance (1721) and the passing of the second Amsterdam Ordonnance (1744). Van der Keessel¹⁸ went a little further in his discussion of abandonment. He elaborated on De Groot's *Inleidinge* and explained the local ordonnances in force in Holland in his day. He did not undertake any scientific analysis of abandonment nor of its origins and principles. The same can be said of Van der Linden¹⁹. Other writings on abandonment in seventeenth and eighteenth century Roman-Dutch law are fragmented and casuistic²⁰ in that the subject is not dealt with as a complete concept, and no theoretical analysis of any moment has occurred. More recent Dutch works²¹ on marine

17 *Quaestiones Juris Privati*, (1744).

18 *Theses Selectae Juris Hollandici et Zelandici*, (referred to as '*Theses Selectae*'), (1800), and *Praelectiones Juris Hodierni ad Hugonis Grotii Introductionem ad Iurisprudentiam Hollandicam*, (referred to as '*Praelectiones*').

19 *Regtsgeleerd, Practicaal en Koopmans Handboek*, (referred to as '*Koopmans Handboek*'), (1806), 4.8.2-4 and 4.8.1.

20 Like Schorer's notes on De Groot and the opinions and judgments contained in the main collections, including Bynkershoek's *Observationes Tumultuariarum*; collections of opinions such as Naeranus et al, *Hollandsche Consultatiën*, (1696); Van den Berg, *Nederlands Advys-Boek*, (1693-1698) and Barels, *Advysen over den Koophandel en Zeevaart*, (1780-1781). One of the opinions in *Nederlands Advys-Boek* and three of the opinions in the *Advysen over den Koophandel en Zeevaart* are of crucial importance to the question whether abandonment operated in Roman-Dutch law as a method of vesting or transferring ownership without delivery, and they are discussed in Chapters 14 and 17 *infra*.

21 By, for example, Enschedé, Van Barneveld and Dorhout-Mees.

insurance since the *Wetboek van Koophandel* ('the WvK') was put into effect in 1838 have also concentrated on explaining the articles of the WvK rather than to investigate the origins and theories of abandonment. Such detailed theoretical analysis as has occurred appears to have taken place in France²², Italy²³ and Germany²⁴, with a sprinkling of the same in England²⁵. It is therefore submitted that South African law will have to look beyond the institutional writers if it were to acquire a full and proper understanding of the Roman-Dutch principles of abandonment.

3. THE LACK OF LOCAL GROWTH OR DEVELOPMENT

3.1. The isolation of South Africa from Europe the last three hundred years, the absence of a well

22 The early French writers who gave attention to the concept of abandonment beyond merely explaining the legislation in force in their respective times were Valin, Pothier and Émerigon. More recent writers on French law who have also contributed to the theoretical approach to abandonment include Becane, Boulay-Paty, J. Cauvet, E. Cauvet, Danjon, Ripert and De Smet.

23 Baldasseroni and Bensa.

24 By, for example, Tecklenborg, Aschenheim, Barkhausen, Bewer, Ritter, Martin and Helberg.

25 The early works on marine insurance like those by Park, Marshall and Arnould of necessity had to explain abandonment in more detail than the works published subsequent to the Marine Insurance Act 1906, ('the MIA'). In the process the theories behind the concept of abandonment were touched upon from time to time. More recent studies of the subject include some theses, by Rokas, whose work was not available to me, and by Sarlis.

established local marine insurance industry and the lateness of the introduction of a sophisticated system of international trade have all contributed to the stagnation of the development of marine insurance law in South Africa while South Africa's main trading partners have developed their marine insurance laws, even through codification.

3.2. South African marine insurance law, on the other hand, has virtually stood still for hundreds of years. So much so that, if Roman-Dutch law were to apply, the principles of abandonment may have to be sought in old ordonnances²⁶, old treatises written by Italian²⁷, Portuguese²⁸, French²⁹,

26 These old statutes are discussed in Chapter 5 *infra* where the focus is on the history and origins of abandonment in statute law.

27 Bosco, *Consilia*, (1390-1425); Straccha, *Tractatus de Assecurationibus et Proxenetis*, (1569); Scaccia, *Tractatus de Commerciis et Cambio* (1619); De Ansaldis, (also referred to as Ansaldis), *Commercio et Mercatura Discursus Legales*, (1689); De Casaregis, (also referred to as Casaregis), *Discursus Legales de Commercio*, (1707); Roccus, *De Navibus et Naulo, item de Assecurationibus Notabilia*, (1708).

28 Santerna, *Tractatus de Assecurationibus et Sponsionibus Mercatorum*, (1552).

29 Valin, *Nouveau Commentaire sur l'Ordonnance de la Marine du Mois d'Aout 1681*, (1760). The edition referred to in this work is that of V Becane, published at Poitiers in 1829. Émerigon's treatise, *Traité des Assurances et des Contrats a la Grosse*, (1783) has been translated into English by Samuel Meredith under the title *A Treatise on Insurances*, and was published in 1850 in London. When referring to Émerigon's work these two editions will be used, with the English version indicated as ('Meredith'). Pothier's *Traité du Contrat d'Assurance*, (1768-1778) as taken up in Volume 6 of the collection of Pothier's work under the title *Oeuvres de Pothier*, published in 1825, will be used here.

English³⁰ and German³¹ lawyers, the commentaries of the institutional writers³² on Roman-Dutch law, and the numerous judgments of the courts of Europe, England and America. One of the questions which would then arise is whether statutory developments in marine insurance law in Holland subsequent to the ordonnances of Amsterdam (1598), Middelburg (1600) and Rotterdam (1604) and the commentaries of the institutional writers who wrote their works after De Groot's *Inleidinge* form part of the Roman-Dutch law which still applies in

30 The English authors are too numerous to mention here, but the earliest treatises having a bearing on the subject of this study are: Malynes, *Consuetudo, vel, Lex Mercatoria*, (1685); Magens, *An Essay on Insurances*, (1755), (which was first published in German in 1753 under the title *Versuch über Assecuranzen, Havereyen und Bodemreyen*); Park, *A System of the Law of Marine Insurances*, (1786), (a work which went to eight editions and is regarded as the first systematic exposition of English marine insurance law); and Marshall, *A Treatise on the Law of Insurance*, (1802). See Van Niekerk, *An Introduction to and some perspectives on the sources and development of Roman-Dutch Insurance Law*, (referred to here as 'Introduction'), (1988), 67 for a discussion of these and other English authors.

31 An equally large number of treatises were written in German. Some of these are listed in Van Niekerk, *Introduction*, 66-67. The ones of greatest value for this study are Benecke, *System des See-Assecuranz- und Bodemrei-Wesens*, (1805-1821), (updated and reworked in an English edition in 1824 as *A Treatise on the Principles of Indemnity in Marine Insurance, Bottomry and Respondentia*); Bewer, 'Das Herrschaftsgebiet des Abandon', (1891) 38 *Zeitschrift für das Gesamte Handelsrecht*, 372; Aschenheim, *Der Abandon des Versicherten in der Seeversicherungsrecht*, (1893); Barkhausen, *Voraussetzungen und Wirkungen des Abandon bei der Seeversicherung*, doctoral thesis, Erlangen, (1895); Martin, *Die Haftung des Versicherers für Güter aus deutschen Schiffen in italienen und portugiesischen Häfen*, (1918); Helberg, *Der Abandon in der Seeversicherung auf rechtsvergleichender Grundlage*, (1925); Linsmayer, *Der Abandon*, (1916) 63 *Zeitschrift für das Gesamte Handelsrecht*, 395.

32 Van Niekerk, *Introduction*, discusses the most important of these writers at 69-72. They are De Groot, *Inleidinge*; Verwer, *Nederlants See-Rechten; Avaryen; en Bodemeryen*, (1711); Bynkershoek, *Quaestiones Juris Privati*; Van der Keessel, *Praelectiones and Theses Selectae*; and Van der Linden, *Koopmans Handboek*.

South Africa³³.

3.3. If, on the other hand, English law as at 1890 were to apply, the English statutes, case law and textbooks of the period before 1890 would have to be consulted. If subsequent developments in English law are part of South African law, the question which arises is precisely which later statutes have become part of South Africa. That English law enters this discussion at all is the result of two independent factors. The first is the curious history of marine insurance in the legislation of the Cape of Good Hope and the Orange Free State. The second is the correct construction to be put on section 6 of the Admiralty Jurisdiction Regulation Act 105 of 1983³⁴.

3.4. In the Cape Province *'the law administered by the High Court of Justice in England for the time being (and) having reference to questions of fire, life and marine insurance'* applied from 1879 until

33 Not only was a second round of municipal ordonnances passed in the eighteenth century in Rotterdam, (1721) and Amsterdam, (1744), but a number of the works on the Roman-Dutch law which are regarded as the cornerstones of South African law were written much later. The question which arises is whether these works and ordonnances are sources of South African law so far as abandonment is concerned.

34 Whether English law applies is discussed in Chapter 15 *infra*.

1977³⁵. A similar provision applied in the Orange Free State from 1902 to 1977³⁶. This 'brutal injection'³⁷ of English law was generally taken further than the express words of the enabling statute permitted³⁸ and Van Niekerk justifiably commented that the development of the principles of Roman-Dutch insurance law had been considerably hampered thereby³⁹. It is not yet certain to what extent, if any, English law principles relating to abandonment have become part of South African law as a result.

- 3.5. An atmosphere was created during this period of English influence where lawyers across the board, academics, practising attorneys, advocates and even the highest judges in the land, sought refuge in English law and neglected the sources and principles of Roman-Dutch marine insurance law. However, the old statutes which made English law

35 By virtue of section 2 of the General Law Amendment Act 8 of 1879.

36 By virtue of section 1 of the General Law Amendment Ordinance 5 of 1902.

37 Hahlo & Khan, *The Union of South Africa. The Development of its Laws and Constitution*, (1960), 670.

38 Van Niekerk, *The Decline, Revival and Future of the Roman-Dutch law of Insurance in South Africa*, ('Decline'), (1986), 27-39.

39 *Decline*, 23-24.

applicable in the Cape and the Orange Free State were repealed recently⁴⁰ and the Roman-Dutch law was restored as the residual common law in insurance matters in the whole of South Africa⁴¹. Shortly thereafter, when a proper case⁴² for the investigation and application of Roman-Dutch law relating to abandonment presented itself for decision before the Durban and Coast Local Division of the Supreme Court⁴³, the opportunity was unfortunately not taken⁴⁴. The uncertainty in South African law is likely to continue until marine insurance law is codified or the law authoritatively stated in a judgment⁴⁵.

40 By section 1 of the Pre-Union Statute Law Revision Act 43 of 1977.

41 This is not a question without some dispute. Van Niekerk, *Decline*, is certain that the Roman-Dutch law of insurance has now been restored as the residual common law in those two provinces, while Staniland has expressed the view that, on a proper interpretation of s 6 of the Admiralty Jurisdiction Regulation Act 105 of 1983, and the matters falling within the jurisdiction of the old English Admiralty courts, the law of marine insurance in South Africa may be the English law applying as at the commencement of Act 105 of 1983. If Staniland is correct, it would mean that the Marine Insurance Act 1906 is now part of South African law. This conflict with its ramifications is considered in Chapter 15 *infra*.

42 *Shooter t/a Shooter's Fisheries v Incorporated General Insurances Ltd*, *supra*.

43 This division of the Supreme Court handles a higher volume of maritime cases than any other court in South Africa. The judge who presided at the trial, Friedman J, was also a maritime law specialist.

44 Even the Appellate Division declined to express any views on the abandonment point, preferring to decide the case on another point altogether; *Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries*, *supra*, at 863.

45 This research is done in an attempt to find, analyse and sift the available material in order to assist the legislature and the courts in their task of laying down the precise principles of South African law on the doctrine of abandonment.

4. A UNIQUE OPPORTUNITY FOR SOUTH AFRICA

4.1. South Africa finds itself in a unique situation today, with an equally unique opportunity. Its situation is unique in that its legal heritage has firm links with both Roman-Dutch and English law, especially so far as marine insurance law is concerned. South Africa therefore has the unique opportunity to draw on the wisdom, experience and learning of both systems for the future development of its own marine insurance law. So far as abandonment is concerned, an election will have to be made between the approach of English law and the continental approach, particularly with regard to the doctrine of constructive total loss. No other country has ever been called upon to make such an election. Neither has any other country had as legitimate a reason to be able to draw on the wisdom and experience of both the English common law and continental legal systems.

4.2. There are also some important differences between English and American law, and between the laws of the Netherlands, Germany and France, and similar elections may have to be made to find the most appropriate principles for South African

circumstances. These differences and the aim to find and develop South African law necessitate a close inspection of the principles of other jurisdictions with regard to abandonment.

5. THE CODIFICATION PROCESS

- 5.1. In the LLM thesis referred to earlier I concluded that there are a number of sound reasons why South African marine insurance law should be codified⁴⁶. There can be no objection in principle to such an act as much as South African commercial law is already statute law⁴⁷. Marine insurance has, in any event, been regulated by legislation from the earliest times⁴⁸, and it is also part of a much wider set of commercial laws relating to maritime commerce and having an international character. Such laws ought, ideally, to be standardised statutes which are the same or at least similar in all countries. This would facilitate international trade⁴⁹.

46 *Op cit*, Chapter 7.

47 Marnewick, *op cit*, 216-218.

48 Marnewick, *op cit*, 218. See also the various ordonnances, acts and codes discussed in Chapters 5 to 10 *infra*.

49 Marnewick, *op cit*, 219.

5.2. The uncertainty and inaccessibility of the law of marine insurance constitute further justification for the law to be codified⁵⁰. The codification process in South Africa is gathering steam and it is important that a modern act with principles compatible with those of South Africa's main trading partners and the principal insurance markets should be drafted and enacted. The principles of such an act will also have to be complement rather than clash with the main body of South African law. So far as abandonment is concerned, a decision of fundamental importance will have to be made, as has been argued earlier, namely whether the English concept of a constructive total loss should be adopted in preference to the continental approach of specifying the precise but limited number of causes giving rise to the right to abandon.

5.3. It is also of the utmost importance that the act should be a carefully researched one, rather than a hasty enactment thrown together quickly to suit a particular interest group. The main parts of the act will require in-depth research into the applicable principles, the most appropriate

examples of such legislation in force elsewhere, and the requirements of the maritime industry of the future in South Africa. The codification process in South Africa, if it were to be done properly, would require the principles of marine insurance to be researched in detail by way of the historical and comparative approach. This study therefore seeks to perform the task outlined above in relation to that part of the act dealing with abandonment.

6. THE NEED FOR THE DOCTRINE OF ABANDONMENT

- 6.1. The factors which gave rise to the introduction of the abandonment in marine insurance may no longer justify its application, either in its present form or at all. Improved means of communication, navigation and travel question the need for the concept of abandonment in modern marine insurance, especially if it were to be justified by the assured's inability to communicate with the ship or to reach her once she had sailed over the horizon. If abandonment still has a role to play, its principles may have to be adapted to take account of the circumstances of modern maritime traffic. The answers to these questions depend to

an extent on the precise reasons for the original introduction of the principles of abandonment, which in turn makes it necessary to investigate the origins of abandonment, the reasons for its introduction, and the development of its principles through the years⁵¹. South Africa thus has the opportunity to examine this question in conjunction with the other important matters referred to earlier.

6.2. The institution or concept of abandonment in marine insurance has recently been abolished altogether in the Netherlands⁵². What conclusions can be drawn from this fact, especially in the light of the circumstance that Canada has equally recently passed a fresh Marine Insurance Act⁵³ which maintains the traditional English law concept of a constructive total loss with its concomitant, abandonment? The vexed question whether abandonment has a future has become

51 The theories on the origins of abandonment and the reasons for its introduction will be addressed in Part IV, while the historical evidence will be examined in Part II in Chapters 5 and 6 *infra*. The theories espoused by eminent writers on marine insurance are based, to a large extent, on speculation and circumstantial evidence. It remains to be seen whether any one theory alone is capable of explaining the reasons for the introduction of the concept of abandonment and can be credited as its *raison d'être*.

52 See Chapter 6 *infra*.

53 See Chapter 9 *infra*.

topical and these conflicting indications will have to be considered before final decisions can be made about the future stance of South African law.

7. CONSTRUCTIVE TOTAL LOSS OR THE CONTINENTAL APPROACH?

7.1. While abandonment is a doctrine commonly applicable in the marine insurance laws of all the important maritime nations of the world, it is ironically in their approach to abandonment that the single most important difference between English common law⁵⁴ on the one hand and the laws of continental countries⁵⁵ on the other is to be found.

7.2. Even the most cursory study of the subject reveals a difference in approach between countries applying English common law⁵⁶ and the law applied

54 English common law forms the basis of the law of marine insurance in a number of countries, including England, America, Canada, Australia, New Zealand and India. In most of them marine insurance law has been codified, with America being the notable exception.

55 The European countries included in this study are the Netherlands, Germany, France, Portugal, Spain, Italy, Greece, Russia and the Scandinavian countries, while the law in the first three only will be analysed in some detail. In all these countries the law of marine insurance has been codified.

56 This division may not be as absolute as a first impression appears to indicate, however.

by continental countries. In English law the assured may abandon if a constructive total loss has occurred. This general approach emphasises the economic effect of the insured event rather than the precise description of the cause of the loss. Continental law, on the other hand, frequently defines the events which permit an abandonment without paying such high regard to the economic effect of the event⁵⁷. The difference between the two systems could be explained as follows: English law utilises the concept of a constructive total loss to determine the assured's right to abandon in a general way while continental law defines specific events or circumstances which give rise to the right to abandon. Questions which arise from these different approaches include whether the concept of a constructive total loss is not merely a device created in order to provide the assured with a right to recover when the loss is an economic loss or partly an economic loss rather than the actual loss of the thing insured, and whether English law and continental law do not perhaps both achieve the same result

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The most obvious example is the attitude of French law to shipwreck or stranding with breaking up, which gives rise to the right to abandon and to claim the full sum insured even if the ship should be saved after technically fulfilling the requirements of shipwreck or stranding with breaking up.

notwithstanding their different approaches.

- 7.3. South African law now has the opportunity to investigate these questions and to make an election in respect of the approach which is regarded as the most suitable to its present and likely future circumstances. No proper evaluation of the merits and demerits of these two systems, the English and continental, has yet been made either nor has there been any investigation into the question which of these two systems or approaches provides the best example for the future South African law. Perhaps a totally new approach is called for so that neither the English nor the continental approach should be adopted. It may also be that some of the basic principles of abandonment are indeed the same in the various maritime countries. In such a case those principles which apply uniformly ought to be identified and the reasons for their existence determined so that South African law may consider adopting them even though there may not be any direct Roman-Dutch or other relevant authority for their application in South Africa.

8. SECTION 6 OF THE ADMIRALTY JURISDICTION REGULATION
ACT 105 OF 1983

8.1. Some controversy has been introduced recently in South African academic circles with regard to the question whether English law or Roman-Dutch law constitutes the residual common law in marine insurance matters. Staniland has recently offered the opinion that marine insurance was originally a topic within the jurisdiction of the early Admiralty Courts in England and that the Admiralty Court was unlawfully deprived of that jurisdiction. He therefore concludes that English law may well be the legal system regulating marine insurance in South Africa by virtue of the operation of section 6 of Act 105 of 1983⁵⁸.

8.2. The controversy is centred around the provisions of section 6 of the Admiralty Jurisdiction Regulation Act 105 of 1983 and the causes over which the Colonial Courts of Admiralty exercised

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Staniland, 'What is the Law to be Applied to a Contract of Marine Insurance in terms of s 6(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983?', (1994) 1 SA Merc LJ 16. But see the counterpoint to Staniland's article by Van Niekerk, 'Marine insurance Claims in the Admiralty Court: An Historical Conspectus' (1994) 1 SA Merc LJ 26.

jurisdiction. The section divides matters⁵⁹ over which the courts exercising admiralty jurisdiction into two classes, those in respect of which English law applies, and those in respect of which the residual common law namely the Roman-Dutch law applies. The matters in respect of which English law applies are determined by reference to the jurisdiction of the South African courts under the Colonial Courts of Admiralty Act of 1890. Marine insurance was not, until recently, regarded as one of the causes over which admiralty jurisdiction was exercised⁶⁰. Until Staniland's recent article there was no suggestion that marine insurance was included in the list of matters over which a court of admiralty of the Republic had jurisdiction, and it was consequently not questioned in South African law that marine insurance fell in the category of matters referred to as 'any other matter' in section 6(1)(b) of the Act and that 'the Roman-Dutch Law applicable in the Republic'

59 Marine insurance is a subject within the definition of a 'maritime claim' as defined in section 1(1)(iv)(u) of Act 105 of 1983 (as amended), where a maritime claim is defined to include 'any claim arising out of or relating to- (u) marine insurance or any policy of marine insurance, including the protection and indemnity by any body of persons of its members in respect of marine matters'.

60 The causes over which admiralty jurisdiction was exercised were succinctly summarised by Bamford, *The law of Shipping and Carriage in South Africa*, 3rd ed, (1983), 337 as follows: 'Booty of war; Building of ships; Damage by a ship; Master's wages; Master's disbursements; Mortgagee's claims; Ownership of ships; Repair of ships; Salvage; Seamen's wages; Towage.'

therefore applied⁶¹. Nevertheless, the matter will now require to be investigated again with particular emphasis on Staniland's conclusions, as the outcome will have an important consequence on the question of the sources and content of South African law of marine insurance. Indeed, if Staniland were to be correct, the English common law as codified by the Marine Insurance Act 1906 ('the MIA') would be the law of South Africa and the doctrine of constructive total loss would apply⁶².

- 8.3. While these matters form part of the investigation into the sources of South African law to be discussed in later chapters, the fact that such a controversy exists makes it necessary to examine the principles of abandonment in the competing legal systems.

61 Section 6 of the Act elicited a considerable amount of interest and a number of articles were published on its aims, shortcomings and effect. See for example: Rycroft, 'Changes in South African Admiralty Jurisdiction', 1984 LMCLQ 417; Staniland, 'Developments in South African Admiralty Jurisdiction and Maritime Law', 1984 Acta Juridica 271; Staniland, 'The Implementation of the Admiralty Jurisdiction Regulation Act in South Africa', 1985 LMCLQ 462; Booysen, 'South Africa's new Admiralty Act: A Maritime Disaster', (1984) 6 MB 75.

62 That the MIA could have become the law in South Africa so quietly and unheralded would be a cause for concern, as it would reflect adversely on the concentration of those vested with the duty to consider the implications of draft legislation, as well as the vigilance of those who were asked to comment on the Bill yet failed to realise that the MIA was about to enter through the back door.

9. THE RELATIONSHIP BETWEEN ABANDONMENT AND SUBROGATION

9.1. Abandonment was mentioned in treatises on commercial and insurance law and in cases before the doctrine of subrogation received the attention of the early writers and the courts. Yet both doctrines ought to have been part of indemnity insurance from the very beginning as each of them performs an invaluable function in preserving the integrity of the indemnity principle⁶³.

9.2. What is the precise relationship between abandonment and subrogation? What are the differences between them? Do they overlap? Can the one be absorbed into the other? Do abandonment and subrogation perhaps have common origins? What lessons can be learned from the experience of other jurisdictions in this field? These questions have not yet been considered in South African law, and they may be topical when one considers that the general practice of insurers is now to exclude the right to abandon from their policies.

63

The functions of abandonment and subrogation as servants of the indemnity principle are discussed in Chapters 12 and 13 *infra*.

10. ABANDONMENT AND THE TRANSFER OF REAL RIGHTS
WITHOUT DELIVERY

- 10.1. There is also a controversy among South African academics about the effect of an abandonment in respect of the rights of the assured in the abandoned thing. Van Niekerk⁶⁴ has defined abandonment in such a way that it means that abandonment operates as a method of transferring the assured's proprietary rights in the thing insured to the insurer, and that such transfer occurs without any recognized form of delivery. Schlemmer⁶⁵ has disputed this view on the ground that it expresses English law and not South African law. She has also criticised certain opinions in Barels, *Advysen over den Koophandel en Zeevaart*⁶⁶ and contended that abandonment cannot transfer ownership of the things abandoned because the Roman-Dutch law as well as South African law require an accepted form of delivery to take place before there could be a transfer of ownership. Further, if Staniland's approach were to be the

64 *Subrogasie in die Versekeringsreg, ('Subrogasie')*, LLM thesis, Unisa, (1979), 320 fn 33.

65 *Verkryging van Eiendomsreg deur 'n Versekeraar in geval van Diefstal van 'n Versekerde Saak*, LLM thesis, Rand Afrikaans University, (1991), 42 et seq.

66 *Supra*.

correct one then English law would apply to the question. Then one would have to consider whether the English law which applies is that of the *MIA* or whether it is the English common law preceding the *MIA*. The distinction is important because the English common law provided that the abandonment transferred all the assured's proprietary rights in the subject-matter of the insurance and all rights incidental thereto to the insurer retroactively to the date of the loss, whereas the *MIA* now allows the insurer to decline to accept such transfer⁶⁷. The merits and demerits of these approaches require to be investigated. It may well be that English law does not apply and even that abandonment is in any event not in conflict with the general requirements of South African law that ownership does not transfer unless a delivery in a form acknowledged by the law takes place⁶⁸.

11. CONCLUSION

- 11.1. It is thus apparent that there are a number of good reasons to study abandonment principles. A comparative and evaluative study of abandonment

67 See Chapters 5 and 9 *infra*.

68 This subject is discussed in Chapter 14 *infra*.

will therefore be undertaken in an endeavour to answer the questions raised by the points mentioned. The history⁶⁹, origins and development of abandonment from its introduction in its most rudimentary forms from the fourteenth century to its modern forms in the legal systems of some western European countries, England, America and South Africa will be traced, compared and evaluated in an endeavour to determine what the form and content of the law of abandonment should be. The relationship between abandonment and the indemnity principle is important in this context, and will be explored in relation to the theoretical aspects of abandonment.

- 11.2. The real and urgent need for a proper examination of the sources of the doctrine of abandonment requires that its principles be determined in a scientific manner. Before that process can be commenced, however, an appropriate research method has to be found.

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An historical approach is inevitable, with the recent restoration of Roman-Dutch law as the law regulating marine insurance: Van Niekerk, *Introduction*, 1.

CHAPTER THREE

'(L)egal science has degenerated into the jurisprudence of states, limited like them by political boundaries- a discouraging and unseemly posture for a science! But it is up to legal science itself to cast away these chains and rediscover for all time that quality of universality which it long enjoyed: this it will do in the different form of comparative law. It will have a distinct method, a wider vision, a riper judgment, a less constrained manner of treating its material: the apparent loss (of the formal community of Roman law) will in reality prove a great gain, by raising law to a higher level of scientific activity.'

Jhering¹

METHODOLOGY

1. INTRODUCTION

Different methods or approaches could be adopted for the research of the concept of abandonment and for an evaluation of its principles. A method which recommends itself with a high degree of persuasion is the historical-comparative method. The comparative approach as a method of legal research has gained ground in the last forty years², not only in South African legal treatises

1 *Geist des römischen Rechts*, 7/8th ed, (1924), 50-41, (Weir's translation in Zweigert and Kötz, *infra*.)

2 Van Zyl, *Beginnels van Regsvergelyking*, (1981), 14: 'Tog het daar gedurende die afgelope jare hier te lande 'n groeiende belangstelling in regsvergelyking as navorsingsmetode en hulpmiddel by die bestudering van regsprobleme ontwikkel.'

or theses³, but also in judgments of the courts, especially those of the Appellate Division⁴. There are also several reasons which justify the use of the historical method. The combination of the two methods in the historical-comparative method has many advantages, especially in research into the origins and development of abandonment.

2. THE COMPARATIVE METHOD

2.1. The comparative method in legal research has gained strength over the last fifty years and can be justified as a method of research for this study by a number of reasons of general application.

2.1.1. Comparison allows one to learn from another and

3 Van Zyl, *op cit*, 14 cites the following examples: Van der Merwe, *Die Beskerming van Vorderingsregte uit Kontrak teen Aantasting deur Derdes*, (1959), (English, American, French, Dutch, German and Swiss law); Van Heerden, *Grondslae van die Mededingingsreg*, (1961), (German, Dutch, English and American law); Van Zyl's own thesis, *Die Saakwaarnemingsaksie in die Suid-Afrikaanse Reg: 'n Regshistoriese en Regsvergelykende Onderzoek*, (1970), (French, Dutch, Italian, German, Swiss and Hungarian law); Pauw, *Skuld in die Suid-Afrikaanse Privaatreg: 'n Regshistoriese en Regsvergelykende Onderzoek*, (1976), (German, Swiss, Dutch, French and English law). See also Hawthorne, *The Crime of Abortion. A Historical and Comparative Study*, (1982), (English and continental law).

4 Van Zyl, *op cit*, 14 cites the following examples: *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A), (German, Dutch, English and American law); *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 1 SA 394 (A), (German, Dutch, English and American law); *Government of the Republic of South Africa v Ngubane* 1972 3 SA 601 (A), (Dutch, German, Italian, Spanish, Austrian, Swiss, French, English, American and Scots law). For an insurance case, see *Maritime & General Insurance Co v Sky Unit Engineering (Pty) Ltd* 1989 1 SA 867 (T), (English law).

science thus makes progress⁵. If every person had to find out personally that the earth was round and travelled on a set oval course around the sun, only Copernicus and a few others would have taken the trouble to question or examine the earlier Ptolemeian concept of a static earth. Comparison is also a deep-seated human trait⁶ and the very nature of law is to compare one set of behaviour with another⁷. The words comparative law '*suggest an intellectual activity with law as its object and comparison as its process.*'⁸ Since the determination of the law relating to the concept of abandonment is the purpose of this research, the comparative method recommends itself.

2.1.2. The diversity of the laws created by the human spirit in order to regulate conduct invites comparison to explain the differences⁹ and to distil the essence of the concept under evaluation. Contact with foreigners also makes it indispensable to know their laws, otherwise

5 Constantinesco, *Traité du Droit Comparé*, (1972), 8.

6 Kahana, *Three Great Systems of Jurisprudence*, (1955), 2.

7 Kahana, *loc cit.*

8 Zweigert and Kötz, *Introduction to Comparative Law*, 2nd ed, (1992), (translated by Tony Weir), 2.

9 Ancel, *Utilité et Méthodes du Droit Comparé*, ('Utilité'), (1971), 9.

conflict is likely¹⁰. Marine insurance is a clear example of a case where the a South African exporter or importer would need to know the law of his foreign counterparts. It is therefore not only natural for a study like this to compare different legal systems, but inevitable in the nature of field of activity where the law applies. Knowledge of foreign law is thus advisable in the interest of the businessmen engaged in that field.

- 2.1.3. In the last hundred years all sciences have put on a international cloak¹¹, probably as a result of the improved means of communication and travel¹². The process of comparison is not a new one in marine insurance. Indeed, comparison has been used as a means of discovering or improving the law in marine insurance from a very early time, as will become apparent in subsequent chapters. Comparison has been used as a tool not only in legislation, but also by the most important writers on the subject of marine insurance in the past, and the judgments of the courts on both sides of the

10 Ancel, *Utilité*, 9-10.

11 Ancel, '*Quelques Considérations sur les Buts et les Méthodes de la Recherche Juridique Comparative*', ('*Buts et Méthodes*'), in Rotondi, (ed), *Buts et Méthodes du Droit Comparé*, (1973), 5.

12 These are, ironically, the same factors which may sound the death-knell of the concept of abandonment.

Atlantic reflect the extent of the use of that method over the last two hundred years.

2.1.4. The comparative method of research is used to determine what the law is in different countries or legal systems in order that one may distil the essence of subject of study into a set of basic principles which are universally applicable in the countries or legal systems chosen for examination. One can then compare the domestic law with those basic principles in order to determine whether the domestic law is sufficient. The comparative method is designed to allow *lacunae* in the domestic system to be filled with the best and most modern provisions developed in other countries¹³. The combined experience and learning of other researchers who may be able to make important contributions to the project through their own studies of the subject are also made available to the domestic system through the comparative method. How others have approached a particular problem or solved it can be a useful guide.

2.1.5. Comparison also enhances the knowledge of foreign law, and through that knowledge, understanding of

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Van Zyl, *op cit*, 17; Ancel, *Buts et Méthodes*, 4-5.

the domestic legal system¹⁴. This in turn allows the researcher to make or suggest improvements to the domestic legal system¹⁵, and provides a platform for the homologation of the law so that the domestic and foreign legal systems may correspond or so that differences between their provisions may be minimised¹⁶. Some even say that comparative law and its unifying effect 'advances amity of nations'¹⁷. This may be of special importance in a branch of the law such as marine insurance law which deals with international trade¹⁸.

2.1.6. An understanding of the differences between other legal systems also enhances the overall understanding of the particular subject¹⁹ and a general legal theory²⁰. It further leads to an

14 Van Zyl, *op cit*, 18; Ancel, *Buts et Méthodes*, 1 and 5; Zweigert and Kötz, *op cit*, 17-19; Kokkini-Iatridou, 'De Rechtsvergelijking' in Kokkini-Iatridou, (ed), *Een Inleiding tot het Rechtsvergelijkende Onderzoek*, (1988), 28-29.

15 Van Zyl, *op cit*, 19.

16 Van Zyl, *op cit*, 23-24.

17 Kokkini-Iatridou, *op cit*, 26.

18 Other branches of commercial law which would tend to fall in this category would include patents, copyright, trade marks, the carriage of goods by sea and air, admiralty, the law of the sea and seabed, pollution control and navigation on sea, in the air and in space.

19 Ancel, *Buts et Méthodes*, 6.

20 Kokkini-Iatridou, *op cit*, 26.

appreciation of the influence and indebtedness of one system to the others compared²¹. These considerations are of particular importance for South African law with its questionable understanding of abandonment and its search for guidance in two different legal systems, namely the English common law, possibly as amplified by the Marine Insurance Act 1906, ('the MIA'), on the one hand, and the continental law as embodied in the Roman-Dutch law of the seventeenth and eighteenth centuries, on the other.

2.1.7. Legislative comparison²² has earned high dividends in the past in commercial and maritime law in having a unifying effect on different legal systems²³. Good examples include the American Harter Act of 1893 which ultimately led to the Hague and Hague-Visby Rules, the English Bills of Exchange Act of 1882, and the English Sale of Goods Act of 1893²⁴. Given that the MIA has been

21 Kahana, *op cit*, 5.

22 The assistance of comparative law is essential to legislators to make good laws and has been used in the legislative process for more than a century; Zweigert and Kötz, *op cit*, 15-16. In marine insurance it can be said with justification that the comparative process started much earlier. See the discussion of statutory developments in Chapter 5 *infra*.

23 Zweigert and Kötz, *op cit*, 23 *et seq*; Kokkini-Iatridou, *op cit*, 26.

24 Graveson, 'Methods of Comparative Law in Common Law Systems', in Rotondi, *op cit*, 299-316.

copied in Canada, Australia, New Zealand and India, it could be added to these examples. This process was also at work in past centuries when legislation on marine insurance was passed in western Europe. The fount of all modern marine insurance law, the famous French *Ordonnance de la Marine* of 1681, was itself the product of a number of earlier enactments, some of them of foreign origin, such as the consolidating Barcelona *Ordonnance* of 1884, the 1563 *Ordonnance* of Phillip II of Spain and another *ordonnance* by him in 1593 '*pour les assurances de la bourse d'Anvers*', the *Guidon de la Mer* of the second half of the sixteenth century and the 1598 *Ordonnance* of Amsterdam²⁵. As will become apparent in later chapters, there is a considerable body of statutes on marine insurance available, both in relation to the past and the present. The process of legislative comparison would thus not only be possible, but may also be helpful, even in a civil law country such as South Africa,

'where English law in the fields of commercial law, criminal law and procedure has been adopted, but subject to a modified civil law doctrine in

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Émerigon, *Traité des Assurances et des Contrats a la Grosse*, (1783), (Boulay-Paty edition of 1827), Preface, xiv.

*the tradition of Roman-Dutch law.'*²⁶

- 2.1.1.8. The comparative method, and consequently a study using it, can also draw benefits from the study of foreign case law. Foreign case law can be an important means of correcting or improving domestic law and in shaping its development²⁷. It can supplement the picture of the foreign legal system's provisions by revealing what the law is, how it is applied in practice, and why it is what it is²⁸. The problems experienced in a particular legal system over a period of time may also become apparent through a study of case law²⁹. This is an important point for this study, especially since case law abounds on the subject of abandonment, particularly in the English common law jurisdictions, and dates back a very long time. The wisdom of all those judgments and years could be invaluable for South African law, as the problems encountered by foreign courts over the

26 Graveson, *op cit*, 311.

27 Markesinis, 'Comparative Law- A Subject in Search of an Audience' (1990) 53 *Modern Law Review* 1, at 3. A recent example of a wideranging search for wisdom in a tragic case is to be found in the case of *Airedale Trust NHS v Bland* [1993] 1 All ER 821 (HL), where the House of Lords referred to American, Canadian, and New Zealand case law and even to an unreported South African judgment (by Thirion J and now reported as *Clarke v Hurst* 1992 4 SA 630 (D)) on the question of the cessation of feeding of a patient in what is known as a persistent vegetative state.

28 Markesinis, *op cit*, 7-12.

29 Markesinis, *op cit*, 16.

years may suggest what direction any future developments will take or require.

- 2.1.9. The comparative method involves a logical process of a number of different steps, all designed to serve the prime purpose of the comparison, namely to find and evaluate the policy of the law. The process commences with the posing of the question or the selection of a problematic concept or principle as subject of the study. This makes the study functional by giving it a defined object of research and a functional purpose³⁰. The research then proceeds to determine how the different systems approach that subject after choosing the systems most suited for comparison and stating the law in each country objectively according to a special syntax or classification suitable for the study of that particular object. Sometimes the mere compilation of materials for a comparison will be sufficient in itself and no further work will be necessary³¹. It may however not be sufficient simply to compare the statutory provisions³². The comparison and evaluation occur

30 Zweigert and Kötz, *op cit*, 30; Kokkini-Iatridou, *op cit*, 22.

31 Feldbrugge, 'Sociological Research Methods and Comparative Law, in Rotondi, *op cit*, 211 at 214.

32 Feldbrugge, *op cit*, 214.

throughout this process³³. This process will be used in this study, but not on its own, as there are good reasons why a study of abandonment should go beyond a mere comparison of the existing rules and principles of different legal systems. Throughout, however, cognizance will be taken of the fact that what is used for comparison depends to a large extent on the circumstances³⁴, which cannot be determined in advance.

2.2. There are an equal number of reasons why the comparative approach is specifically useful for a study and evaluation of the principles of abandonment in South African law.

2.2.1. The history of abandonment, like the history of marine insurance generally, is truly international, which makes the comparative approach indispensable. It will become apparent in the chapters dealing with the history of abandonment provisions that the principles of abandonment did not originate or develop in a single country or place³⁵. Marine insurance law

33 Zweigert and Kötz, *op cit*, 30-41. See also Kokkini-Iatridou, *op cit*, 22-23.

34 Feldbrugge, *op cit*, 215.

35 See Part II, Chapters 4 and 5 *infra*.

developed in the setting of a European *jus commune*, based on Roman law, developing over a number of centuries and spreading across the face of Europe and beyond³⁶. It is clear that developments in one country or town frequently influenced developments relating to abandonment principles in other countries or towns³⁷. It is equally clear that marine insurance law is generally the same in all the countries where continental law or the English common law prevails³⁸. A comparison of the law in the countries which share a common legal heritage with South Africa also allows one to determine whether South African law is in consonance with the law of the rest of the world and has kept pace with the latest scientific legislative acts elsewhere³⁹.

36 Marnewick, *A Critical Analysis of the Law to be applied to a claim for Marine Insurance, with reference to Non-disclosure and Abandonment, and the Need for Codification*, LLM thesis, University of Natal, (1991), Chapters 2 and 3.

37 See Chapters 5-10 *infra*, where the individual ordonnances and codes are discussed and compared.

38 'No branch of the law can more properly be denominated a science, than insurance; and since this contract is substantially the same in different countries, and continues to be the same now that it was formerly, the decisions of the courts, whether ancient or modern, and the opinions of writers, whether American, English, Italian, or French, are equally applicable to it': Phillips, *A Treatise on the Law of Insurance*, 4th ed, (1854), Vol I, Preface, vii.

39 In *Van Rensburg v Weiblen* 1916 OPD 247 at 252 Ward J referred to the French and German codes to demonstrate that South African law was the same as French and German law on the question of the validity of a *pactum commissorium* and added: 'I do not quote the Codes as proving what the law on the subject is but only as showing that the law as here laid down is in accord with the most recent scientific legislation in countries which like our own drew largely from the same sources.'

This is especially true for marine insurance which has seen recent codifications in Germany⁴⁰ and England⁴¹, and replacements of earlier codes more recently in Greece⁴², France⁴³ and Canada⁴⁴ in the last forty years.

2.2.2. South African law is an amalgam⁴⁵ of the Roman-Dutch law of the seventeenth century, English law, and statutes which were and still are often based on English statutes⁴⁶. The Roman law component of Roman-Dutch law was not unique to Roman-Dutch law, but formed part of the European *jus commune* and law merchant which regulated the commercial aspects of business in and between the various trading countries of western Europe, and spread under the influence of the Roman Catholic Church

40 In 1900.

41 In 1906.

42 In 1956.

43 In 1967 the provisions of the *Code de Commerce* ('the CdeC') of 1807 on marine insurance were replaced by those of Law 522 of 1967 and the Decree of 1968 supplementing it.

44 In 1993.

45 On the precise composition of South African law see Hahlo and Khan, *The South African Legal System and its Background*, (1973); Hosten et al, *Introduction to South African Law and Legal Theory*, (1977); Van Zyl, *Geskiedenis van die Romeins-Hollandse Reg*, (1979); and De Wet, *Die Ou Skrywers in Perspektief*, (1988).

46 Examples of such acts are the Admiralty Jurisdiction Regulation Act 103 of 1983, the Merchant Shipping Act 57 of 1961, the Insolvency Act 24 of 1936 and the Divorce Act 70 of 1979.

and with the exploits of the early seafaring explorers. The result was a set of commercial laws based on Roman law⁴⁷ which were substantially the same in all the mercantile countries of Europe and in England, as well as in their overseas possessions. These facts justify the comparative approach in the study of legal problems or concepts which have not been finally resolved in South African law.

- 2.2.3. The comparative approach is also justified with regard to abandonment in South African law in that the law on the subject is uncertain, undeveloped and incomplete⁴⁸. Comparison would allow a widening of the horizon for South African law, both historically and scientifically, and would allow change to be effected at a quicker pace⁴⁹. The question whether improved means of communication and navigation have not rendered abandonment altogether unnecessary also arises, and it will be helpful to see how other legal systems have responded to that question⁵⁰,

47 Ancel, *Buts et Méthodes*, 5.

48 Marnewick, *op cit*, Chapter 6.

49 Constantinesco, *op cit*, 9.

50 Compare, for example, the approach in *Van Rensburg v Weiblen*, *supra*, at 252.

especially in the light of the contradictory approaches adopted recently by the Netherlands⁵¹ on the one hand and Canada⁵² on the other. The former abolished the assured's right to abandon altogether while the latter enacted a Marine Insurance Act which preserved the right to abandon.

- 2.3. The comparative method alone, however, is felt to be insufficient for the purposes of this study, as the abandonment principles which were introduced into South African law are those which applied in the Roman-Dutch law of the seventeenth and eighteenth centuries. Since then there has been a considerable amount of development in English law and in continental law through the codification of marine insurance law. It would be useful to determine how the law was changed by these codifications, and it is therefore considered that the mere comparison of the current law applying in various countries is insufficient.

51 See the discussion of Dutch law in Chapter 6 *infra*.

52 See the discussion of English law in Chapter 9 *infra*.

3. THE HISTORICAL METHOD

3.1. Legal history can fill the gap left by a strict application of the comparative method. Generally it can be said that,

*'while comparative law studies legal systems co-existent in space, legal history studies systems consecutive in time.'*⁵³

The historical method thus allows the researcher to study the development of a legal rule or concept from its origins to the present. This enables the researcher to determine what events or needs motivated the introduction of the particular rule or concept, and further to determine how and why the rule or concept underwent change. The historical approach is adopted to ascertain the reasons for a particular principle and to use the knowledge so obtained to determine whether adaptation of the principle is necessary to meet the demands of the present or future.

3.2. The value of this approach for the present study lies therein that it allows a study of the

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Zweigert and Kötz, *op cit*, 8.

development of abandonment principles to be made in the setting provided from time to time over the centuries. This setting is determined mainly by the circumstances prevailing in navigation and shipping from time to time, commercial practices, socio-political developments and the development of the law generally over that period.

- 3.3. Van Niekerk⁵⁴ has argued that the effect of recent legislation⁵⁵ is that the Roman-Dutch law has been restored as the residual common law in insurance matters in South Africa with the result that the determination and development of the principles of South African marine insurance law will inevitably involve an historical approach⁵⁶. The historical method is particularly appropriate for research of South African marine insurance principles for two main reasons. In the first place the Roman-Dutch law was introduced to different parts of the Republic at different times. In the second place, from 1806 onwards

54 *An Introduction to and some Perspectives on the Sources and Development of Roman-Dutch Law of Insurance*, (cited as 'Introduction'), (1988), 1.

55 Section 1 of the Pre-Union Statute Law Revision Act 43 of 1977.

56 Staniland has expressed some doubt whether Roman-Dutch law is the residual common law in insurance matters, and argues that it may be the law which an English admiralty court would apply, namely English law: 'What is the Law to be Applied to a Contract of Marine Insurance in terms of s 6(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983?', (1994) 1 SA Merc LJ 16.

English law exerted an influence on virtually every branch of the law and it was expressly introduced in marine insurance contracts in the Cape of Good Hope in 1879 and the Orange Free State in 1902. The influence of these factors on the development of the law of abandonment cannot be done properly, it is submitted, without taking historical facts into account.

4. THE HISTORICAL-COMPARATIVE METHOD

- 4.1. The relationship between comparative law and legal history is said to be a very complex one⁵⁷. Notwithstanding that caveat, the historical-comparative method as a separate method of research has developed, albeit more recently, among Belgian, French and Russian researchers, especially from about 1934⁵⁸. This method has two main steps. The first step is the documentation of the material pertinent to the period under consideration in the place or countries under examination⁵⁹. The second step is the analysis of

57 Zweigert and Kötz, *op cit*, 8.

58 Gilissen, '*Histoire Comparée du Droit*' in Rotondi, *op cit*, 255 at 261.

59 Gilissen, *op cit*, 262-263.

that material on a comparative basis⁶⁰. The legal historian is bound to make comparisons, the new with the old, one system with another, and so on⁶¹. The historical method therefore presupposes a comparison. The main difference between the comparative and historical-comparative methods lies therein that the former studies the law as it now is, while the latter also studies the law as it evolved in different places over a period of time⁶².

- 4.2. The historical-comparative method is a useful tool, enabling one to distil the main parts of the subject from the mass of material available over time, and to reduce the infinite variety of rules to a manageable form⁶³. By the use of this method one can arrive at a definition of the concept⁶⁴, one can determine what its main or essential principles are, one can determine what its subsidiary or supplementary principles are, and how to distinguish between the essential and

60 Gilissen, *op cit*, 263.

61 Zweigert and Kötz, *op cit*, 8.

62 Gilissen, *op cit*, 265-266.

63 Gilissen, *op cit*, 282.

64 Gilissen, *op cit*, 282-288.

subsidiary rules⁶⁵. It further allows one to ascertain the causes of evolutionary changes of the concept⁶⁶, and to find a place for it within the wider body of the law⁶⁷.

- 4.3. *'Legal history ... contributes to a critical evaluation of the policy of law, which is ... the principal aim of pure comparative law'*⁶⁸,

said Zweigert and Kötz. The comparative and historical approaches will therefore be combined in this research in the historical-comparative method as that appears to provide the best method for the attainment of the goals of this study. Neither the comparative method nor the historical method provides, each separately, a sufficiently broad basis for the research, having regard to the nature of abandonment as a subject and the purposes of this research. It would be insufficient merely to compare the different provisions on abandonment in place at the present

65 Gilissen, *op cit*, 288-289.

66 Gilissen, *op cit*, 292-295.

67 Gilissen, *op cit*, 289-292. It is in this field especially that German theorists have been most active in their efforts to classify abandonment as either a set of rules of substantive law or as a set of presumptions designed to determine the onus of proof in certain cases of loss. This subject is more fully discussed in later chapters.

68 Zweigert and Kötz, *op cit*, 9.

time in different countries without taking account of the historical development of its principles. There would also not be any purpose in merely recounting the history of abandonment as the comparative method is in any event necessary for the evaluation of the history and philosophy of the law⁶⁹.

5. THE CHOICE OF LEGAL SYSTEMS TO BE USED FOR COMPARISON

5.1. It is crucial to select the proper counterpart or counterparts for comparison in the historical-comparative method⁷⁰. The choice of legal systems to be used for comparison depends on a variety of factors, including the peculiar history of the rule or concept to be examined, the compatibility of the different legal systems with South African law, the availability of sources within those systems⁷¹, and most importantly, whether abandonment has received any worthwhile attention in the legislation, case law and treatises

69 Ancel, *Utilité*, 10.

70 Feldbrugge, *op cit*, 214.

71 Van Zyl, *op cit*, 39-40.

produced in those systems⁷².

5.2. While the history of marine insurance and abandonment makes it necessary to refer to the law in a large number of countries, mainly European, the law will be considered in detail in only five, namely the Netherlands, France, Germany, England and America. These countries are South Africa's most important trading partners within that section of the world's trading nations which share a common legal heritage with South Africa. These countries also experienced substantial activity in the development and practice of abandonment principles over the centuries⁷³, although not all to the same extent, and are therefore able to contribute a wealth of experience and material for consideration.

5.3. The same countries also provide a balance between the old, (the Netherlands, Germany, France and England), and the new, (America); between English common law systems and continental legal systems; and even between English common law as codified in

72 In this respect it is as well to remember that different values are assigned to the different sources of the law in different countries. Case law, for example, is accorded much higher status in America than in the continental countries.

73 See Chapters 6-10 *infra* for the developments in individual countries after 1800.

England, Canada, Australia, New Zealand and India on the one hand, and the uncodified English common law built upon by the American case law system on the other.

5.4. Even within the continental law countries one can distinguish an older approach, followed in the Netherlands (until recently) and Germany, from a newer approach, followed by France. The French *CdeC* of 1807 and the Dutch *WvK* of 1838 also both date back to the time of sailing ships and the period of the great codification of continental law which commenced at the beginning of the nineteenth century. Their provisions on abandonment may provide invaluable insight into the state of the law and the problems experienced in those countries at that time with regard to abandonment. By the same token, the law was codified more recently in Germany (in 1900) and in relation to marine insurance in England (in 1906), which provides a different era for comparison. Between that time and the early nineteenth century, for example, the steam engine was put to use in steamships and communication along telegraph lines was introduced. It would be interesting and helpful to see how these developments in the means of travel and

communication influenced the abandonment provisions inserted in the more recent codes, or even if they exerted any discernable influence at all.

5.5. It would be equally interesting and useful to see whether or to what extent even more recent inventions like radar, television, satellite navigation and more advanced techniques in salvage operations have influenced more recent legislation and decisions on the topic of abandonment. This knowledge would be extremely useful to the draftsman of a South African marine insurance act, who may, with the knowledge so gained, even decide not to make any provision for abandonment in the act at all and to leave the matter in the hands of the parties for inclusion in the policy if they so desire.

5.6. Furthermore, marine insurance principles were shaped from the outset by commercial customs and usages. How current usage has affected the law may be demonstrated by a single example, namely the Netherlands, where the concept of abandonment was abolished as a result of the invariable practice of the Dutch insurers to exclude the right to

abandon from their standard policies⁷⁴.

- 5.7. The sources of the law in these countries are also accessible to South African researchers⁷⁵. These sources, particularly the ones on marine insurance, are a veritable mine of information although the researcher may have to be able to read Italian⁷⁶, French⁷⁷, German⁷⁸, Dutch⁷⁹ and

74 See Chapter 6 *infra*.

75 The sources differ from country to country. In the Netherlands the sources are legislation, (Van Zyl, *op cit*, 112-113), the common law, which is used as a tool for the interpretation of the code, (Van Zyl, *op cit*, 113-114), decisions of the courts which, although they do not have binding force, are not easily departed from, (Van Zyl, *op cit*, 114), and treatises which have persuasive force only, (Van Zyl, *op cit*, 114). See, for instance, the wide range of authorities cited in the argument of counsel before the Arr-Rechtbank Amsterdam in *N.V. Volker v N.V. Hollandshe Assurantie Sociëteit van 1841 1962 Schip en Schade* 73. In France the sources of the law are legislation, (Van Zyl, *op cit*, 86), the common law, which plays a lesser role because the Code Civil repealed the common law which is contrary to the code, (Van Zyl *op cit*, 87), decisions of the courts which have persuasive value only as there is no precedent system in operation, (Van Zyl, *op cit*, 87), and treatises which are used to assist with the interpretation of the code, (Van Zyl, *op cit*, 87). In Germany the sources are legislation, (Van Zyl, *op cit*, 143), the common law which plays a more important role than in France, (Van Zyl, *op cit*, 143), decisions of the courts, which are relied upon even though there is no strict system of precedent in effect, (Van Zyl, *op cit*, 143), and treatises which have persuasive force only, (Van Zyl, *op cit*, 144). In England the sources of the law on abandonment are the Marine Insurance Act 1906, decisions of the courts, which apply a strict system of precedent, (Van Zyl, *op cit*, 186), the common law which incorporates mercantile customs, (Van Zyl, *op cit*, 187), and treatises which are accorded less status than on the continent, (Van Zyl, *op cit*, 187-188). In America English law was adapted to the needs of the fast growing colonies, (Van Zyl, *op cit*, 198), but marine insurance law has not yet been codified as in England and some of her other erstwhile colonies. The main sources of the law are case law and common law, which includes custom, (Van Zyl, *op cit*, 204-206).

76 One of the most important works on the origins and history of marine insurance, Bensa's *Il Contratto di Assicurazione nel Medio Evo*, (1884), was written in Italian.

77 The main French writers whose works are relied upon in this study are Valin, Pothier, Émerigon, Boulay-Paty, J. V. Cauvet, Danjon, Ripert, De Smet, (a Belgian but wrote extensively on French law), Harrel-Courtès, Lambert-Faivre, and Rodière and Pontavice.

78 Works written in German by Benecke, Bewer, Tecklenborg, Aschenheim, Barkhausen, Pappenheim, Martin, Helberg and others are relevant to any study of German law relating to abandonment. The most authoritative and comprehensive current German work on the subject of marine insurance is

Latin⁸⁰ to make full use of them.

6. CONCLUSION

- 6.1. The historical-comparative method, as its name suggests, requires that there should first be an investigation into the origins and development of the subject under consideration through the centuries, whereafter the comparative process can be set in motion. A two-stage process is therefore contemplated, but it should be kept in mind that there is no strict separation between the two stages as they overlap to a large extent.
- 6.2. The first stage of the historical-comparative process requires a recounting of the historical facts relating to the origins and development of abandonment over the centuries⁸¹. That process of

Ritter-Abraham, *Das Recht der Seeversicherung*, 2nd ed (by Abraham), (1967).

79 While English translations of the works of De Groot and Van der Linden are available, that is not the case with regard to the works of Bynkershoek and Van Der Keessel, who both wrote their main works in Latin, nor with regard to more modern works in Dutch like those of Abbink, Enschedé, Dorhout-Mees, Van Barneveld and Aaftink, which are referred to in the following chapters.

80 Not only were the earliest treatises on commercial custom and law and marine insurance written in Latin by men like Bosco, Santerna, Straccha, Scaccia, Roccus, De Casaregis and De Ansaldis, but so were some of the works of the Dutch institutional writers.

81 The mere stating or recounting of the principles of abandonment as they developed over the centuries is necessary for South Africa since the materials are distributed far and wide, with disappointingly little of it being available locally.

recounting will be undertaken in the next seven chapters. Even while this process is undertaken in respect of different countries, as it is proposed to do, a measure of comparison becomes inevitable.

- 6.3. The second stage in the historical-comparative process is that of the true comparison, where principles in force in different places and at different times are compared directly. This process of direct comparison will be performed in the chapters dealing with the law in the countries chosen for comparison. In the process one will be able to compare vertically as well as horizontally. There is a vertical comparison when one compares earlier facts or stages with later ones⁸². Horizontal comparison occurs when one compares the principles in force at one place with those in force at another at the same time⁸³. All of these steps will be taken in the following chapters.

82 As one may for example be able to do in respect of the ordonnances which applied in various parts of the province of Holland and were passed in the years 1563, 1570, 1598, 1600, 1604, 1721, 1744 respectively and ultimately were replaced by the *Wetboek van Koophandel* of 1838.

83 So, for example, one may compare the common law of France as set out in the *Guidon de la Mer* of the second half of the sixteenth century with the law of Amsterdam as set out in its ordinance of 1598.

PART II: HISTORY OF ABANDONMENT

'Researches into the antiquity of maritime jurisprudence will not appear useless to persons, who will remark that these ancient doctrines, several of which are now obsolete, are still the foundation of those now in force; and that consequently it is difficult to comprehend many rules of the modern law without recourse to the ancient.'

Émerigon¹

CHAPTER FOUR

THE ORIGINS AND HISTORY OF ABANDONMENT TO THE END OF THE EIGHTEENTH CENTURY: MERCANTILE CUSTOM

1. INTRODUCTION

- 1.1. The indemnity principle which is the cornerstone of marine insurance² was not established overnight by the stroke of a legislator's pen, nor in some other similar sudden fashion. It developed over millennia, from ancient and humble transactions, apparently unconnected to the concept of insurance as it is now understood. Nevertheless, the idea of an indemnification in respect of transport risks was present in these transactions and the insurance contract was born out of them after a long history of incremental development.

¹ *Traité des Assurances et des Contrats a la Grosse*, (1783), (Meredith's translation, 1850), Author's Preface, xl-xli.

² It is also the cornerstone of all other forms of indemnity insurance.

- 1.2. In this chapter the roots of indemnity insurance will be reconsidered in an endeavour to determine whether the concept of abandonment formed part of indemnity insurance from the outset or whether it was introduced at a later stage. In the recounting of the evidence the method by which abandonment was first introduced and the reasons for such introduction will be explored.
- 1.3. The precise origins and early history of indemnity insurance have been investigated in depth by a number of researchers in Europe³. One South African researcher has investigated the origins of indemnity insurance in detail, namely Van der Merwe⁴. It is not the intention to traverse all the ground covered by prior research as the emphasis of this study differs markedly from other studies⁵. Nevertheless, it quickly becomes apparent that the origins of abandonment are deeply embedded in the very roots of indemnity insurance itself, which necessitates some recounting of the history of insurance.

3 These authors are referred to in the following text and footnotes.

4 'Die ontstaan van versekering gerig op winsbejag' 1977 TSAR 34.

5 In any event, successive researchers of necessity rely to some extent on the earlier work of others. Use will therefore be made of the results and conclusions of such studies where helpful in tracing the origins of abandonment.

2. THE ORIGINS OF ABANDONMENT IN MARINE INSURANCE

2.1. INTRODUCTION

- 2.1.1. Marine insurance has its origins in the search for a commercial solution to the risks inherent in the transportation of goods in the course of trade⁶. The first devices used to alleviate these risks were unsophisticated, but they developed over many centuries into the body of laws which became known as marine insurance. While it is commonly accepted that the origins of marine insurance are to be found in these ancient commercial transactions, the evidence of those transactions has not been preserved well enough to enable even the most intrepid researcher to express incontestable opinions⁷. It seems clear, however, that insurance is a recent invention, probably after the Middle Ages⁸ and developed out of the maritime loan and

6 Joubert (ed), *The Law of South Africa*, Vol 12, (1988), ('LAWSA'), paras 1-5.

7 'The origin of insurance like that of many other customs, which depend rather upon traditional than written evidence, and for the honour of inventing and introducing which rival nations contend, has occasioned much doubt among the writers upon mercantile law. Indeed it is involved in so much obscurity, that after all the researches which have been made on the present occasion, any very satisfactory solution of this doubt cannot be promised': Park, *A System of the Law of Marine Insurances*, (1786), Introduction, (iii). (The edition printed in Philadelphia in 1789 is used as the text of reference.)

8 Danjon, *Traité de Droit Maritime*, (1914), Vol IV, 190.

its immediate successors, the simulated loan and sale contracts. Its exact history and origins are nevertheless uncertain⁹.

2.1.2. The maritime loan¹⁰ was the first known type of contract used to achieve the transfer of the risk in maritime transport against payment of some form of counterprestation¹¹. It did not start as a contract relating to maritime transport, though, and was the product of evolution over many centuries¹². It was still in frequent use until recently, but has now practically fallen into disuse.

2.2. THE BABYLONIAN LOAN

2.2.1. The ancient Babylonians were the first traders known to have created a device to transfer the risk of the loss or destruction of goods in transit from the trader, (who often had to acquire

9 Danjon, *op cit*, Vol IV, 192.

10 The maritime loan has at various times and places been known in its different forms as '*foenus nauticum*', '*pecunia traiectionis*', '*le contrat a la grosse*', '*the loan on bottomry*', '*die maritieme leenkontrak*', '*bodemryen*', '*die Bodmerei*' and '*das Seedarlehn*'.

11 Van der Merwe, *op cit*, 36.

12 For its development from Grecian times see Matthiass, *Das foenus nauticum und die Geschichtliche Entwicklung der Bodmerei*, (1881).

the goods on credit), to the credit grantor, against payment of extraordinary interest. The consequences of default on the ordinary loan were severe for the trader¹³. These consequences followed even if the goods were lost through transport risks and without fault on the part of the trader¹⁴. To encourage trade the contract of loan was adapted to produce a new arrangement whereby the risk of the loss of the goods during the journey was effectively transferred to the lender or creditor. In terms of the adapted contract the trader still had to give himself and his family and property as security for the loan, but against payment of additional interest on the loan he was freed from the debt if the goods were lost in transit through the actions of an enemy¹⁵. The risk of a loss through that particular peril was thus transferred against

13 The trader and his family and property had to be given as security for repayment of the loan and were sold into slavery if the debt was not paid, a practice which the Jews may have adopted during their years in exile in Babylon. See the book of *Nehemiah*, Chapter 5, verse 5.

14 These risks included 'nature, barbarian raiders and avaricious semi-autonomous princes': Atkin, '*Transit Insurance*', *Businessman's Law*, 15 June 1975, 183.

15 Article 103 of the Code of Hammurabi (circa 2250 BC) heralded a long history of legislation on the special contracts whose effect was the transfer of the risks inherent in the transportation of goods, and provided as follows: '103. If while he goes on his journey the enemy has made him quit whatever he was carrying the agent shall swear by the name of God and go free.' In another translation the words 'go free' are given as 'be absolved'. For a detailed discussion of this provision and its effect see Trenerry, *The Origin and Early History of Insurance*, (1926), 54-59.

payment of the premium of additional interest above the usual rate of interest¹⁶. Important features of these contracts were the following: In the first place, they were true contracts of loan. In the second place, the merchandise or money lent was in the care and custody of the trader. In the third place, the trader was freed from the debt, capital and interest, if the contingency stipulated in the contract eventuated. Lastly, the rate of interest was much higher than that applied to ordinary loans¹⁷.

- 2.2.2. Another very important aspect of these contracts was that the trader always had an interest in the money or goods lent in the sense that their loss or destruction would have affected his patrimony adversely because he would have been obliged to repay the capital and interest. The capital and interest also accurately reflected the extent to which his patrimony was at risk. It is only by stipulating that he would pay the higher rate of interest and would be freed from the debt if the particular peril eventuated that the trader escaped the threatened reduction in his patrimony.

¹⁶ Trenerry, *op cit*, 54-59; Van der Merwe, *op cit*, 38; Atkin, *op cit*, 183.

¹⁷ Trenerry, *op cit*, 58-59.

This interest which the trader had was an inherent feature of these contracts and was the principal reason why these special stipulations were resorted to in the first place. The notion of a protectable ('insurable') interest was thus inherent in these contracts. At the same time, the extent of that interest was also clearly ascertainable as being the capital amount of the debt together with the agreed interest¹⁸.

- 2.2.3. In this ancient and unsophisticated setting two of the cornerstones of the indemnity principle were already apparent, namely the existence of an interest which could be adversely affected and the notion that the extent of the loss is determined by the value of that interest. The ramifications of these conclusions are far-reaching, in that they lead inexorably to the conclusion that the modern concepts of the indemnity principle and insurable interest were, unobtrusively yet firmly, part and parcel of this special Babylonian contract of loan.

18

Since the indemnity principle has the inextricably linked concepts of interest, value and loss at its epicentre, as will be demonstrated in Chapter 11 *infra*, it would appear that the same concepts were already present in the Babylonian loan.

2.3. THE MARITIME LOAN: Phoenicia, Greece and Rome

2.3.1. This adapted contract of loan became customary in Babylon, and eventually the custom spread from there to Phoenicia¹⁹, where it was adapted to maritime trade²⁰. From their contact with Phoenician maritime traders this type of contract also became known to the Greeks²¹, and then to Roman²² traders, the latter obtaining their knowledge of it from the Greeks. Amongst the Romans the contract, known as *foenus nauticum*²³ and *pecunia traiecititiae*²⁴, developed its own characteristics until it differed significantly

19 It also spread to the Hindu people of Asia, (Trenerry, *op cit*, 61-71), but as no influence was eventually exerted from that quarter on the development of true insurance, the further development of the contract among the Hindu people will not be considered here.

20 Trenerry, *op cit*, 64; Atkin, *op cit*, 183.

21 Trenerry, *op cit*, 61-71; Atkin, *op cit*, 193. The principles of bottomry were applied in many such contracts among the Greeks; Sanborn, *Origins of the Early English Maritime and Commercial Law*, (1930), (1989 reprint), 6. Van der Merwe, *op cit*, 38 cast doubt on the view that the practice had spread from Phoenicia to Greece, but the evidence of constant communication and commerce between these two countries lends support to Trenerry's view.

22 Trenerry, *op cit*, 61.

23 From about 100 BC to about 300 AD the principles of the maritime loan were discussed in the works of the pre-Justinian Roman lawyers, and it was the subject of legislation during the reigns of Diocletian and Maximianus, and also of special legislation on the permissible rate of interest by Justinian. It is mentioned in D 22.2.1 to 22.2.9, D 45.1.1 to 45.1.2 and C 4.33. Justinian's legislation appears at C 4.32 and Novellae 106 and 110.

24 *Pecunia traiecititia* is defined in D 22.2.1 as follows: '(P)ecunia est quae trans mare vehitur ... et interest, utrum etiam ipsae periculo creditoris navigent: tunc enim traiecititia pecunia fit.' See also Goldschmidt, *Handbuch des Handelsrechts*, 3rd ed, (1891), Vol I, 81.

from the contract as used by the Greeks²⁵. The form of security by this stage was often the ship used for the venture, the shipowner fulfilling a dual function, namely that of trader and also that of carrier. In the process and by virtue of its association with sea trade the contract became known as the maritime loan or loan on bottomry²⁶.

2.3.2. The maritime loan was, however, not a true contract of insurance. Its main function and purpose was still the provision of finance and the transfer of the risk was merely incidental to that main function²⁷. What is important to note at this juncture is firstly that the economic circumstances provided the motivation for the transfer of the risk, and secondly that the parties achieved the transfer of the risk by introducing a special stipulation to their contract²⁸. These two factors provided the motivation and the means for the birth of the indemnity insurance contract as we know it.

25 Trenergy, *op cit*, 61-84.

26 The ship's 'bottom' (hull) provided the required security, though not necessarily the only security, and gave the device its name; Park, *op cit*, 469; Van der Merwe, *op cit*, 39-40.

27 Van der Merwe, *op cit*, 44 and 151; Matthiass, *op cit*, 9.

28 Matthiass, *op cit*, 12.

2.3.3. An aspect which distinguishes the maritime loan from the modern concept of indemnity insurance is its operation, in that the debtor was freed from his liability to repay the loan if the ship or goods did not arrive safely. The payment by the lender (who bore the risk) thus preceded the loss, unlike the situation in insurance where the loss precedes the payment by the insurer²⁹. The additional interest paid as counterprestation for the transfer of the risk also followed the loss, as opposed to insurance where the premium is usually payable in advance³⁰. Notwithstanding these circumstances, the concept of a premium which is payable in exchange for the transfer of the risk was introduced to commerce by this device of Babylonian origin.

2.4. THE MARITIME LOAN: The Papal Ban of 1236 AD³¹

2.4.1. The maritime loan survived through the Middle Ages³² until 1236 AD when Pope Gregory IX

29 The contract of loan is more compatible with this sequence than insurance.

30 Van der Merwe, *op cit*, 158.

31 The date of this decree is not entirely certain, but it appears to have been issued in the fourth decade of the thirteenth century; Van der Merwe, *op cit*, 153 fn 136.

32 Van der Merwe, *op cit*, 156.

prohibited it on the ground that it was usurious³³. By that time, the practice was in wide use in commerce³⁴, and in order to escape the provisions of the papal decree, merchants in the northern Italian cities of Florence, Palermo, Venice, Genoa and Pisa started concluding fictitious or simulated contracts disguised as contracts of sale or interest free loans³⁵. Another form of contract known as *commenda*, a type of partnership or profitsharing contract had also become popular at the time, and to some extent displaced the maritime loan.

2.5. THE MARITIME LOAN: The simulated loan contract

2.5.1. The maritime loan continued to be used, however, but its form was adapted³⁶. The borrower or

33 De Smet, *Traité Théorique et Pratique des Assurances Maritimes*, 2nd ed, (1959-60), Vol I, 11; Danjon, *op cit*, Vol IV, 193; Dover, *A Handbook to Marine Insurance*, 8th ed, (1975), 5 *et seq*; Holdsworth, *A History of English Law*, (1977), Vol VIII, 273 *et seq*; Jolles, *Bijdrage tot de Kennis van de Ontwikkeling van de Zeeassurantie in de Verenigde Nederlanden*, (1867), 25-7.

34 Jhering went as far as calling it '*das Assecuranzgeschäft des Alterthums*', 'the insurance transaction of antiquity'; Goldschmidt, *Handbuch des Handelsrechts*, (1891), Vol I, 363.

35 Bewer, '*Die Herrschaftsgebiet des Abandon*' (1891) 38 *Zeitschrift für das Gesamte Handelsrecht* 372, 385; Goldschmidt, *op cit*, Vol I, 363 *et seq*; Holdsworth, *op cit*, Vol VIII, 275; Jolles, *op cit*, 26; Van der Merwe, *op cit*, 34, 220 *et seq*.

36 Van der Merwe, *op cit*, 156.

(insurer)³⁷ now formally acknowledged having received a certain sum of money *gratis et amore*, and undertook to repay it upon the loss of the ship or goods³⁸. The amount so stated to have been received was always the value or price of the ship or goods. In fact only the additional interest payable for the transfer of the risk was paid over, but when the event insured against occurred, the value or price of the ship or goods had to be paid to the lender (assured). The payment of the 'premium' now preceded the loss, and the payment of the 'insured amount' followed the loss, as in modern insurance. The contract remained a simulated one, however, with this qualification: Its true function was no longer that of a loan or credit transaction³⁹, but of insurance.

- 2.5.2. In another form of disguised loan transaction, two separate contracts were concluded. In terms of the first, the lender advanced money free of interest. In terms of the second, the lender accepted the

37 The 'insurer' now took the position of a borrower, whereas previously the 'assured' was always the borrower.

38 The obligation to pay was conditional upon the loss or destruction of the ship or goods; Van der Merwe, *op cit*, 222.

39 Van der Merwe, *op cit*, 223.

risks of marine losses against payment of a premium. The first contract did not contravene the papal decree, and the second did not fall within its scope. Eventually it was found that the second contract could stand on its own⁴⁰, and it soon became common practice⁴¹ in the form of marine insurance contracts⁴².

- 2.5.3. In all these disguised loan transactions the one party, (the assured), had an interest in the safe arrival of the ship or goods in that he was the owner of the ship or goods at risk. This interest dictated the form of these special contracts as it was only in the case that the ship or goods were at risk that the need for a transfer of that risk to the creditor, (the insurer), was desired. The

40 Goldschmidt, *op cit*, Vol I, 363; Sanborn, *op cit*, 245; Ripert, *Précis de Droit Maritime*, 7th ed, (1956), para 582.

41 De Smet, *op cit*, Vol I, 15; Jolles, *op cit*, 26-27; *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A), 427. The papal decree can rightfully be credited as having been a contributory cause of the birth of the contract of insurance. The maritime loan is regarded as the most important source of the development of the contract of insurance, an opinion shared by both early writers on the subject like Straccha, Santerna and Molinaeus, and more modern historians like Bensa, Goldschmidt, and Holdsworth, according to Sanborn, *op cit*, 239-240. However, when one considers that the concepts of abandonment and subrogation are more readily explained with reference to the other type of simulated contract, namely the simulated sale, it is at least arguable that the simulated sale was the direct forerunner of the contract of insurance even though the maritime loan may also have played a role in the development of the contract of insurance. Indeed, in the century that the insurance contract developed out of the underlying mercantile practises the simulated sale appears to have been the last step in the process of evolution which preceded the true contract of insurance.

42 The first insurance contracts covered marine risks; Holdsworth, *op cit*, Vol VIII, 276-277.

concept or idea of insurable interest present in the Babylonian loan was thus also an ingredient of the maritime loan and the simulated loan which succeeded it. The maritime loan thus gave insurance the idea of the premium, that is the immediate disbursement of a sum of money in return for the indemnity to be received should the risk materialise⁴³, while the concept of insurable interest was also part of it, on the same basis that it had been part of the special Babylonian contract of loan.

- 2.5.4. Notwithstanding the development of the true insurance contract, that is insurance for the sake of profit, the maritime loan continued to be used and to develop its own peculiar principles⁴⁴. It was practised widely⁴⁵ and it was recognized by the law of various countries in its most common forms of bottomry and respondentia⁴⁶. The two most distinguishing features of these contracts

43 Danjon, *op cit*, Vol IV, 193.

44 See generally: Park, *op cit*, Chapter 21; Benecke, *A Treatise on the Principles of Indemnity in Marine Insurance, Bottomry and Respondentia*, (1824), Chapter 3. For detail of the development of the principles and theory of the maritime loan, see Matthiass, *op cit*.

45 Park, *op cit*, 472-474 mentioned references to it in the laws of Oleron, the Hanse towns and Wisby.

46 Park, *op cit*, 472; Benecke, *op cit*, 99-106.

were, firstly that the master was authorised to mortgage the ship and burden the goods as security for certain types of loans granted to him for the purpose of completing the voyage⁴⁷, and secondly, that the loan obligation was extinguished if the ship in the case of bottomry or the goods in the case of respondentia did not arrive safely⁴⁸. However, these contracts were contracts of loan and not true insurance contracts.

2.6. THE SIMULATED SALE CONTRACT

2.6.1. The other type of contract used as a vehicle to effect a transfer of the risk against payment of an additional sum while at the same time circumventing the papal ban on maritime interest was the simulated sale⁴⁹. In the simulated contract of sale the creditor conditionally sold the goods to the debtor in terms of a contract which contained the unusual stipulation that the price was only payable at a future date if the goods did not arrive safely at their destination. A special interest clause of the contract took

47 Park, *op cit*, 471.

48 Park, *op cit*, 475.

49 Bewer, *op cit*, 385.

account of the risk and was simply separated from the rest of the principal stipulation. The primary idea was to fix a price or premium to take account of the arrangement that the obligation to pay the price was subject to the failure of the ship to arrive safely⁵⁰. Thus the risk passed to a person, the creditor, who had no intention of actually buying the goods⁵¹, against payment of the premium constituted by the additional interest by the other party.

2.6.2. Two important principles of insurance were recognized in these fictitious or simulated sale contracts. In the first place, the assured had to be the owner of the goods, or have an interest in them, some insurable interest, in modern parlance⁵². Without such an interest he could not 'sell' the goods. In the second place, in this very setting the roots of the indemnity principle are evident in that it was realized that the

50 Ripert, *op cit*, para 582.

51 Van der Merwe, *op cit*, 226-227.

52 Sanborn, *op cit*, 247. The indemnity principle was thus an ingredient of the simulated sale, as it is inextricably linked to insurable interest; *Castellain v Preston*, (1883) 11 QBD 380 (CA); *Petreas & Co v London Guarantee and Accident Co Ltd*. 1925 AD 371; Ivamy, *General Principles of Insurance Law*, 5th ed, (1986), (cited as *Principles*), 21-22.

assured could not suffer a loss unless he had such an interest in the goods.

2.6.3. This realisation was taken a step further. If the risk materialised, the insurer became entitled to so much of the goods as could be recovered⁵³ as the sale now had to be completed by the delivery of the goods to the 'buyer'. In order to achieve the transfer of the remains or salvage of the goods, and in order to give effect to the fiction of the sale, some form of delivery had to take place. Since physical delivery⁵⁴ was in all but the most extraordinary cases impossible, a formal declaration was made to the effect that the ship or goods sold were at the disposal of the buyer where they were. The ship or goods thus had to be relinquished⁵⁵ to the insurer in his guise as buyer, who then had to take the necessary steps to retrieve them if he wanted to take them into his possession. This type of delivery did not quite comply with all the requirements of Roman law for transfer of ownership, mainly because there was no

53 Holdsworth, *op cit*, Vol VIII, 278; Sanborn, *op cit*, 247. This principle relates to subrogation and abandonment, and will be discussed more fully later.

54 *Traditio de manu in manum*.

55 Bewer, *op cit*, 386.

physical control or *detentio* of the ship or goods to be transferred⁵⁶. Nevertheless, this relinquishing of the insured ship or goods to the buyer appears to have been the first step in the introduction of abandonment into marine insurance. Whether this device operated as a unique method of transfer of ownership which was later to become part of marine insurance principles is a contentious matter, but it appears to be the most likely explanation for abandonment to have become a method of transfer in marine insurance.

- 2.6.4. The further development of these fictitious loan and sale contracts ensured a place for abandonment in the marine insurance contract which developed out of them. While the function of an abandonment is difficult to imagine in the loan type of transaction, it had a more obvious place in the simulated sale which required some form of delivery to the insurer.

56

See in this regard Schlemmer, *Verkryging van Eiendomsreg deur 'n Versekeraar in geval van Diefstal van 'n Versekerde Saak*, LLM thesis, Rand Afrikaans University, (1991), 10, 11 and 25.

2.6.5. The oldest known contract of insurance dates back to 1347 and was still in the form of a loan⁵⁷. From that year until about 1368 the form of the old policies was still that of the contract of loan⁵⁸. Within a period of twenty years thereafter, however, the Genoese insurance contracts predominantly took the form and used the terminology of the contract of sale and the latter became the dominant form of contract⁵⁹. By the turn of that century the sale form of contract was so firmly in place that Bosco⁶⁰ described insurance in accordance with the principles of sale⁶¹.

57 Bensa, *Il Contratto di Assicurazione nel medio evo*, (1884), 58-59, with the text of the policy at 192; Sanborn, *op cit*, 247. The insurer, Giorgio Lescavello, acknowledged having received the monies *gratis et amore* from the assured, Bartolomeo Basso, in respect of a voyage from Genoa to Majorca, according to the policy.

58 Bensa, *op cit*, 59-60 and the policies of 15 January 1348 (at 194) and 9 March 1350 (at 196).

59 Sanborn, *op cit*, 247; Bensa, *op cit*, 59, where it was put as follows: 'Dal 1368 in poi, in tutti gl'instrumenti genovesi di sicurtà l'assicurato si obbliga a pagare la somma assicurata nomine venditionis et puri cambii.' ('From 1368 in all the Genoese contracts the insurer was obliged to pay the sum insured in the form of a purchase and sale.') The first of these contracts, known and preserved, was dated 21 February 1368 and expressly stated the arrangement to be 'nomine venditionis et cambii'; Bensa, *op cit*, 198.

60 *Consilia*, (written between 1390-1425), *Consilium* 391 at 612.

61 *Consilium* 369 at 570: 'Assecuratio est contractus ultro citro obligatorius, quaestuaris, saepius reiterabilis, et est contractus emptiois, ut ex verbis contractus quibus statur, et ex substantialitate, nam si contingeret res merces super quibus facta est assecuratio, perdi, assecurator solvit pretium et valorem pro quo assecuravit, et recuperat merces quae sunt suo periculo a se emptae, si recuperati possunt, propter quod modus faciendi istas securitates inventus est per viam venditionis sub conditione resolvendae.'

2.6.6. This process simulating the sale of the ship or goods had an important consequence in relation to the transfer of ownership of the ship or goods when the risk materialised, a consequence which is controversial in South African law, namely that abandonment operated as an independent method or process of transferring ownership which method was peculiar to marine insurance.

2.6.7. It was but a short step from the simulated contract of sale to the true contract of insurance and thence to the Ordonnance of Genoa of 1588⁶², which allowed the assured in case of a loss to claim the full indemnity but required him to relinquish the goods insured to the insurer⁶³. An important aspect of the sequence of events is that the custom preceded the legislation, or put the other way, the statute confirmed the existing custom. This pattern was to prevail for centuries to come.

2.6.8. The simulated sale contract and the insurance contract modelled on it did not only lay the

62 Book 5, article 7: '*Assecuratus, in quocumque casu sinistro, possit securitates in totum exigere, si voluerit et res assecuratas, seu, ut vulgo dicitur, implicitam relinquere assecuracionibus, quibus tali casu spectent ...*'

63 See also Bewer, *op cit*, 387.

foundation for the concept of abandonment, but also confirmed the notion of an insurable interest and the supremacy of the indemnity principle. One of the logical corollaries of Bosco's theory or model of insurance as being based on the contract of sale was that the assured had to have a real interest in the goods insured, because he could not deliver what he did not own. Originally this interest was required to extend to actual ownership⁶⁴. It was required from a very early stage that the insurance should not result in a profit to the owner of the property at risk, but should be a matter of indemnity only, and further that the insurance should not be effected for the benefit of anyone except the true owner⁶⁵. There were, of course, other legal interests which do not go as far as absolute ownership. Gradually the rule requiring actual and absolute ownership was relaxed as a result of the commercial need to safeguard other economic interests and this interest was then legally recognized⁶⁶.

64 Sanborn, *op cit*, 248.

65 Bensa, *op cit*, 69; Sanborn, *op cit*, 248.

66 Goldschmidt, *op cit*, Vol I, 370; Sanborn, *op cit*, 249.

3. THE EARLIEST ITALIAN POLICIES

3.1. It has been established so far that marine insurance principles developed out of merchant's customs. These customs were inserted or recorded in the earliest policies, which are an important clue in the search for the origins of the principles of abandonment.

3.2. Bensa⁶⁷ found a number of old policies, the oldest dating back to 23 October 1347, in the archives of Genoa, which at that time was one of the prosperous northern Italian cities where insurance itself was first practised. These policies did not refer to abandonment specifically, nor did they refer to customs which may have included abandonment⁶⁸. However, the insurance contract embodied in these policies was still expressed in the form of the contract of sale⁶⁹, with the stipulation that the insurer was to pay the purchase price of the goods upon materialisation of the risk. This stipulation carried with it the inevitable consequence that

67 *Op cit*, 192-231.

68 *Bewer, op cit*, 387.

69 *Bewer, op cit*, 386.

the assured had to relinquish or leave the goods insured to the insurer upon payment of the sum insured or '*purchase price*'.

- 3.3. That the concept of abandonment developed out of the simulated sale contract, is confirmed by the practices apparent from the policies in use in the fourteenth century. It is apparent from these sources that the transfer of the goods insured to the insurer was a consequence of the fiction that the contract was in essence a conditional sale, which was given effect to when the risk materialised⁷⁰. This means that the origins of the principle of abandonment go back to the very roots of the contract of insurance. Since the contract of insurance by all accounts had its origins in the northern Italian cities of Florence, Venice, Genoa and Pisa, one could conclude, on this evidence alone, that abandonment probably also originated there. It also means that it is more likely that the contract of insurance developed directly out of the simulated sale contract rather than the maritime loan.

3.4. A missing ship clause featured in some of these old policies. In a Florentine policy of 10 July 1397 there was a clause stipulating that the insurer had to pay the sum insured in the event of no news of the ship being received for six months, subject to the assured having to make restitution should the ship return safely later⁷¹. The restitution provision precluded this clause from being a true abandonment provision. A similar clause appeared in a policy issued more than a century and a half later, in 1567, in another northern Italian town⁷². The missing ship provision also featured prominently in early marine insurance legislation⁷³, but so far as the Italian cities are concerned, the clause first appeared in the policies which have been preserved and only appeared in statutes later. When the history of statutory provisions on marine insurance and abandonment are considered in the next chapter, however, it becomes clear that abandonment did not develop out of the missing

71 Bensa, *op cit*, 217; Bewer, *op cit*, 390. This clause precedes the missing ship provision of the Barcelona Ordonnance of 1435 by almost forty years and constitutes the most ancient evidence of a special provision designed to alleviate the assured's difficulty with proof of a loss by a peril insured against when the ship simply disappeared without trace after sailing.

72 Bewer, *op cit*, 391.

73 This subject is discussed in the next chapter.

ship provision in the old policies and statutes, but developed parallel to it. In other words, the missing ship provision and abandonment formed separate stipulations in the contract between the assured and insurer and were applied, at first at any rate, each in its peculiar and special area. It was only much later, it will be shown, that the missing ship was also given the status of a case for abandonment in certain jurisdictions.

- 3.5. The form and wording of the policy which developed in the northern Italian cities in the closing years of the fourteenth century were still in use in the sixteenth century. Indeed, the policy wording remained very much the same until the middle of the nineteenth century⁷⁴. That is not to say that the form of the policy continued to be that of the contract of sale. On the contrary, technical terms such as policy and premium were introduced by the brokers and notaries who were used to drawing up maritime loans and contracts of affreightment and eventually the contract of insurance as a true insurance contract in pursuit

74

Sanborn, *op cit*, 251-252; Park, *A System of the Law of Marine Insurances*, 8th ed, (1842), 989-990; Goldschmidt, *op cit*, Vol I, 375.

of the premium as a means of making profit came into being⁷⁵.

4. ABANDONMENT IN EARLY TREATISES LAW

4.1. BARTOLOMEO BOSCO

Bosco wrote a series of essays on the commercial activities of his time⁷⁶. In some of them he touched upon the subject of insurance. According to Bosco⁷⁷ the property insured was sold by the assured to the insurer, subject to the condition that the contract would be void if the goods arrived safely⁷⁸. The sale was effective immediately with the result that the insured goods were at the risk of the insurer from the commencement of the voyage. This is but another way of saying that the price was only payable if the goods did not arrive safely. In case of a loss

75 Sanborn, *op cit*, 244-245. See also Bensa, *op cit*, 134 on the word 'Polizza'.

76 *Consilia*, (1390-1425).

77 *Consilium* 391 at 612.

78 *Consilium* 391 at 612: 'Item per viam venditionis mercium resolvendae sub conditione assecurationem contrahunt, quod probatur ex communi observantia tali, quo si contingat res illas, super quibus est facta securitas, capi, dicte res tamquam effecte assecuratorum pro parte, qua assecuraverunt super ipsis, per eos vendicantur et recuperantur, et de ipsis, tamquam de propriis disponunt, quasi tamquam resvenditae ex die contracte assecurationis toto viagio fuerint ipsorum emptorum, et assecuratorum periculo.'

the assured was paid the contract price but had to relinquish all his rights in the goods insured to the insurer⁷⁹. It is apparent from his definition of insurance that it had its roots in the simulated sale contract, which also gave birth to the concept or doctrine of abandonment⁸⁰.

4.2. PETRUS SANTERNA

The earliest known and preserved work on marine insurance as a separate topic⁸¹ is that written by Santerna⁸², more than a hundred and fifty years after Bosco's *Consilia*. He was Portuguese but lived in northern Italy. Santerna recorded some important aspects of insurance practice, including the principle that in matters relating to marine insurance, mercantile custom was always taken into account⁸³ and was regarded as binding

79 *Consilium* 369 at 570. See also Sanborn, *op cit*, 247; Bewer, *op cit*, 385-387.

80 *Consilium* 391 at 612, discussed in the next chapter.

81 Van Niekerk, *Introduction*, 65.

82 *Tractatus de Assecurationibus et Sponsionibus Mercatorum*, (1552). A copy of this work is available in the library of the Natal Provincial Division of the Supreme Court in Pietermaritzburg in a collection of treatises, collected by Straccha and published in 1621 under the title *De Mercatura Decisiones, et Tractatus Varii*.

83 *Op cit*, 3.1: '*In assecurationibus maris consuetudo semper est inspicienda.*' This and the following quotations from Santerna's work are taken from his summary of the contents of each chapter.

among merchants⁸⁴ as though it had the force of law⁸⁵. He also emphasised that these customs were not applied rigorously, but equitably⁸⁶. Of greater significance for the quest to find the origins of abandonment, is Santerna's statement that the contract of insurance is similar to the contract of sale⁸⁷. He elaborated on this point by explaining that it follows of necessity that the insured goods, when they are lost, are taken to have been sold to the buyer, (insurer), and that the sale is thus rendered complete⁸⁸. There are several other passages in Santerna's treatise where he likened insurance to the contract of sale or used the terminology of the contract of sale⁸⁹, which demonstrates that as at the middle of the sixteenth century the influence of the simulated sale was still being exerted on the

84 *Op cit*, 3.55: '*Maris consuetudo semper est observanda.*'

85 *Op cit*, 3.3: '*Consuetudo introducitur ab eo, qui habet potestatem legis condenda.*'

86 *Op cit*, 3.2: '*Inter mercatores non juris rigor, sed aequitas spectatur.*'

87 *Op cit*, 3.13: '*Assimilatur autem emptioni, ut ibi dixi, ratione pretii quod datur ...*'

88 *Op cit*, 3.23: '*Necessario ... ubi damnum rei venditae pertinet ad emptorem. Ita demum si est perfecta venditio ...*'

89 See for example, *op cit*, 1.7, ('... *sed si suscipio periculum ut des pecuniam ... et cum assimiletur emptioni vendi ... propter pretium quod datur periculi ...*'), 3.25, 3.40 and 5.3, ('... *quod assecurator iste vendidit tantum spem futuri eventus, in qua bene potest extare venditio ...*').

contract of insurance⁹⁰. By this time, too, the Barcelona Ordonnance of 1435⁹¹ and its successors had been in force for a long time, the case of *Marc Gentil v Arnulphi, Lommelin and Tany*⁹² had been determined in Bruges, the Burgos Ordonnance of 1538 with its direct abandonment provisions was already in operation in Spain⁹³, and the case of *Broke v Maynard and Lodge*⁹⁴ had been decided in England.

4.3. BENVENUTUS STRACCHA

Straccha's treatise⁹⁵ was published shortly after Santerna's. He was the first jurist to treat commercial law as a separate branch of the law and

90 This also explains the continued use of abandonment as a method of allowing the transfer of the goods to the insurer when the risk materialised.

91 The ordonnance is discussed in Chapter 5 *infra*.

92 The case is not found in any official law report, but has been referred to in Treanery, *The Origin and Early History of Insurance*, (1926), 270 fn 1.

93 The ordonnance allowed the assured to abandon the goods in the case of shipwreck, (article 11), capture of the ship, (article 13), and damage to the goods caused by perils of the sea or tempest, (article 29). This ordonnance is discussed in Chapter 5 *infra*, where the history of statutes on abandonment is examined in detail.

94 Raines *A History of British Insurance*, (1948), 29-30. The case record can still be found in the records of the Admiralty Court in 1547 file 27 number 147.

95 *Tractatus de Assecurationibus et Proxenetis*, (1569). Straccha was Italian, and the first jurist to treat commercial law as a separate branch; Roberts, *A South African Legal Bibliography*, (1942), 296. Straccha's work contains numerous references to Santerna and the decisions of the courts of Genoa; Van Niekerk, *Introduction*, 65.

was responsible for the collection and publication of a set of treatises on commercial and maritime matters in 1621⁹⁶. No reference to abandonment could be found in Straccha's work.

4.4. SIGISMUNDUS SCACCIA

Scaccia⁹⁷ presented the views held in the early part of the seventeenth century, yet still opted for a description of insurance which left no doubt that he also saw it in terms reminiscent of the contract of sale⁹⁸. By this time, however, diverse opinions had been expressed, namely that the contract of insurance was a contract of purchase and sale, or a contract of letting and hiring, or an innominate contract similar to the contract of sale, or even a contract of *fideiussionis*⁹⁹. Scaccia persisted, however, in

96 *De mercatura decisiones et tractatus varii*, (1621), which contains Santerna's work as well as those of other jurists of their time and also some decisions of the Rotae Genoa.

97 *Tractatus de Commerciis et Cambio*, (1619). Scaccia practised as an advocate in Rome; Roberts, *op cit*, 275.

98 *Op cit*, 7.3.6 num 5: '... nam assecuratio est contractus emptio, et venditionis, in quo assecuratus emit periculum, et assecuratus illud vendit, ut potest ex his ...'

99 *Op cit*, 1.1.129: 'Hic asseccurationis contractus, (sive sit emptio, et venditio, ut dixi infra (7.3.6) seu similis emptioni, ut dicam, sive sit locatio, et conductio ..., sive sit contractus innominatus, similis venditionis ad ea ..., sive sit contractus fideiussionis ...'

his view that it was a contract of sale¹⁰⁰, and relied heavily on the opinions expressed by Santerna and the judgments of the court of Genoa. It appears that a substantial body of authority had been established by this time in an atmosphere where insurance was seen as a contract of sale, or at least as similar to the contract of sale. There was clear evidence though that the indemnity principle was obeyed as the insurer was only held liable for that part of the insured goods given up by the assured for recovery, as salvage, and not for the value of the undamaged part of the goods¹⁰¹.

4.5. ANSALDO DE ANSALDIS

Ansaldus, writing towards the end of the seventeenth century, pointed out that the terminology of insurance was not different to that of the contract of purchase and sale¹⁰², a significant comment so late in the development of

100 *Loc cit.*

101 Scaccia, *op cit*, 1.1.145: '*... assecurator tenetur solum ad illud, quod dominus mercium didisset pro recuperatione, et non ad pretium omnium mercium.*'

102 *De Commercio et Mercatura Disursus Legales*, (1689), Disc 12.4: '*Neque de facto termini Contractus Assecurationis distant ab illis emptionis, et venditionis ...*'

insurance principles, because by this time a large number of insurance ordonnances¹⁰³ were already in force in Italy, Spain, the Netherlands and France and the doctrine of abandonment was well established in all those places¹⁰⁴.

4.6. FRANSISCUS ROCCUS

Roccus' relied in his treatise¹⁰⁵ on Santerna, Straccha and Scaccia as authority for statements he made in the two main paragraphs touching upon abandonment in his work¹⁰⁶. Otherwise he relied mainly on decisions of the courts of Genoa. Neither Roccus nor those relied upon by him went into the origin and history of abandonment¹⁰⁷.

103 These are discussed in chronological order in the next chapter.

104 De Groot had, by this time, discussed abandonment in the chapter in his main work.

105 *De Navibus et Naulo, item de Assecurationibus Notabilia*, (1708). Roccus was a councillor at Florence, with a profound knowledge of practice and the civil law; Roberts, *op cit*, 267; Van Niekerk, *Introduction*, 66. Roccus' work has been translated into Dutch by J Feitama, (1737), and has been referred to in *Mutual and Federal Insurance Co. Ltd. v Oudtshoorn Municipality* 1985 1 SA 419 (A) and in *Hamilton v Mendes* 2 Burr 1199 and other cases in England. (Roccus' work is available in the Dutch translation in the library of the Appellate Division of the Supreme Court in Bloemfontein.)

106 *Op cit*, paras 54 and 66.

107 Santerna, *op cit*, 4.20 et seq, 4.27 and 4.28; Straccha, *op cit*, 3.14.27; Scaccia, *op cit*, 1.1.144 and 145.

4.7. JOSEPHI CASAREGIS¹⁰⁸

Almost two centuries after Santerna's pioneering treatise Casaregis wrote an exposition on the principles of, *inter alia*, insurance, but he did not enter upon a discussion of the origins of abandonment either. The reason is probably that these authors were mainly concerned with recording and explaining existing custom. However, even Casaregis described insurance as a contract in terms of which the risk insured against was sold¹⁰⁹.

5. ABANDONMENT IN EARLY CASE LAW

5.1. The first express mention¹¹⁰ of abandonment in any form is to be found in the case of *Marc Gentil v Arnulphi, Lommelin and Tany*, which was heard in Bruges in Flanders in 1459¹¹¹. Gentil sued for

108 Casaregis was born in Genoa, but may have practised in Florence; Roberts, *op cit*, 75.

109 *Discursus Legales et Commercio*, (1707), in *Opera Omnia cum Additionibus*, (1740), disc 1 num 90, 3 num 1 and 70 num 9. This work was the first scientific analysis of the concept of insurable interest.

110 Sarlis, *Abandonment in Marine Insurance*, thesis, University College of London, (1960), 1.

111 Trenerry, *op cit*, 270 footnote 1. The missing ship provision of the Barcelona Ordonnance of 1435 came earlier, but there is some controversy whether it was a true abandonment provision; Sarlis, *op cit*, 7.

the sum insured when the ship and merchandize loaded on board were lost. The insurers raised the defence that Gentil was, according to existing custom, bound to cede and transfer to them all the rights he had on the goods loaded on board in his name to enable them to recover anything salvaged¹¹². The custom relied upon was stated to be an existing custom in insurance matters¹¹³, and the understated manner in which it was mentioned suggests not only that the custom was well-known, but also of long standing¹¹⁴. It is also noteworthy that the custom was not stated to be a local custom of Bruges¹¹⁵. The case resolves a particular question in that it makes it clear that the principle was created and sustained by custom rather than statutory law. It is likely that the particular custom, like other aspects of marine insurance, had spread from Bruges in the

112 '... Marc estoit tenu de ceder et transporter ausdits assureurs ... tout le droit qu'il avoit es marchandises chargez en son nom ... pour lesdits deffendeurs en estre recouvre ce qui en estre ou pourroit estre salue et peschie ...'; ('Marc is held to cede and transfer the same to the insurers, the right that he has in the merchandize laden on board and his title (literally, his name) to allow the said defendant insurers to recover that which they are able to save and recover'); Trenerry, *op cit*, 270.

113 '... la coustume entretenue en matier dassurance ...' (a standing insurance custom').

114 Sarlis, *op cit*, 2.

115 This led Sarlis to conclude that abandonment was a feature of northern European trade rather than a custom of particular towns; *op cit*, 2.

course of trading, and that it must therefore have become known at least to the other members of the Hanseatic League¹¹⁶. The probability is thus that abandonment was introduced to Bruges by the Italian merchants and underwriters who had settled there and conducted business from there.

- 5.2. The first known English case on abandonment was the case of *Broke v Maynard and Lodge*¹¹⁷, which was heard by the Admiralty Court almost a century after the case of *Marc Gentil v Arnulphi, Lommelin and Tany* had been in Bruges. A policy was issued by Maynard and Lodge as underwriters in London on 25 September 1547, on goods carried on the '*Santa Maria*' from Cadiz to London. A second policy on the return voyage was underwritten by nine underwriters, including Maynard. In an action under the first policy, Maynard resisted the claim on two grounds, namely that he had received no notice of abandonment and that he had received no

¹¹⁶ Bruges and Antwerp were members of the Hanseatic League, which was formed in 1241 by Hamburg and Lubeck and eventually had about 84 or 86 members. The members of the League were given equal trading rights in member trading centres, and colonies of Hanse traders also established themselves elsewhere, as, for example, in London; Dover, *op cit*, 11.

¹¹⁷ Raines, *A History of British Insurance*, (1948), 29-30. The case record still exists in the records of the Admiralty Court and can be found in 1547 file 27 number 147. (At that stage it appears that the Admiralty Court exercised jurisdiction over marine insurance claims.) The policy on the *Santa Maria* is the oldest preserved English insurance policy known.

part of the salvaged goods. He relied on the customs and usages of Lombard Street for these defences¹¹⁸. There is no indication in the report on the case where these customs and usages were thought to have originated from, nor what their precise ambit was.

5.3. These two cases precede any specific mention of abandonment in legal literature and in the legislation passed in their respective areas by many years¹¹⁹.

5.4. The *Rotae Genoa*, the mercantile court in Genoa which decided marine insurance disputes and whose decisions were relied on by almost all the early writers on marine insurance, defined insurance in terms which also stressed its similarity to the contract of sale as follows:

'Contractus assecurationis, id est avertendi periculi, dicitur contractus innominatus. Facio ut des, do ut facias, unde debet regulari juxta naturam contractum quibus assimilatur; assimilatur

118 Raines, *op cit*, 29-30.

119 This becomes apparent when the history of abandonment provisions in statutes and treatises on marine insurance in western Europe and England is considered in the next chapter.

autem emptioni et venditioni¹²⁰, propter praetium quod datur ratione periculi; quia assecurationem, facit propter praetium, dicitur emere eventum periculi.'¹²¹

An important judgment of this court is its *Decisio* 101 where the transfer of the abandoned thing to the insurer is discussed¹²².

6. ABANDONMENT IN RECORDED CUSTOMARY LAW

6.1. The customs of merchants relating to marine insurance principles were recorded in two notable instances. The one was the world famous *Guidon de la Mer* and the other the Customs and Usages of the Antwerp Exchange. These documents give invaluable insight into the principles of abandonment which applied by custom in the second half of the sixteenth century.

120 (My underlining.)

121 *Decisiones* 3 par 28 and 39 par 9, quoted by Marshall, *A Treatise on the Law of Insurance*, (4 vols), (1802), 1 fn (a).

122 This case was referred to as authority for that proposition by some of the Roman-Dutch authorities. This subject is discussed in Chapter 14 *infra*.

6.2. THE GUIDON DE LA MER

6.2.1. The *Guidon de la Mer*¹²³ was a compilation of customs applicable at Rouen. It dates from about the same time as the customs and usages of the Antwerp Exchange¹²⁴. The *Guidon* became the model for subsequent marine insurance legislation¹²⁵.

6.2.2. The *Guidon* defined abandonment¹²⁶, and recorded that it was allowed in respect of goods in the

123 A sixteenth century compilation of uncertain origin of the customs and usages of the merchants of Rouen; Pardessus, *Collection de lois Maritimes antérieures au XVII^e siècle*, (1837), Vol II, 369 and Vol IV, 370; Dover, *op cit*, 23. According to Rodière, *Droit Maritime: assurances et ventes maritime*, (1983), para 180 the *Guidon* was largely inspired by the ordonnances of Phillip II of Spain. If this is so South African law and the *Guidon* and consequently French law would share a common source in the ordonnances of Phillip II. See Chapters 8 and 16 *infra* for the sources of French and South African law respectively.

124 The *Guidon* exercised such influence that it overshadowed the Customs of the Antwerp Exchange, however.

125 The *Ordonnance de le Marine* of Louis XIV of 1681 on which virtually all subsequent marine insurance legislation was based, adopted its principles almost without change. This is perhaps the strongest indication that the early marine insurance legislation merely gave the force of statutory law to customs which were already applied with the power of enforceable law. The *Guidon de la Mer* enjoyed a great reputation as a source and authority of marine insurance principles, and has been relied upon as authority by innumerable authors on the subject, including Valin, Émerigon, Benecke, Park and Kent.

126 'Il est en liberté du marchand chargeur faire delais à ses assureurs, c'est-à-dire, quitter et délaisser ses droits, noms, raisons, et actions de la propriété qu'il a en la merchandise chargée, dont il est assuré, quand il advient naufrage du tout ou de partie, ou bien avarie qui excède ou endommage la moitié de la merchandise, quand il y a prise d'amis ou d'ennemis, arrest de prince, ou tel autre destourbier en la navigation, ou telle empirance en la merchandise qu'il n'y ait moyen l'avoir fait naviger à son dernier reste, ou qu'elle ne valust le fret ou peu de chose davantage'; Article 1, Chapter VII. ('The merchant is entitled to make an abandonment to his insurers, that is to say, to leave and abandon his rights, titles, causes of action and actions of ownership he has in the cargo laden on board, which has been insured, when it is shipwrecked in whole or in part, or when it is damaged to the extent of more than half the value of the goods, when there is a capture by friends or enemies, an arrest by a prince, or such other disturbance of the voyage, or such damage to the goods that they cannot be forwarded to their destination, or not worth the freight or of little value.') Pardessus, *op cit*, Vol II, 400.

case of shipwreck, unfitness of the ship to continue the voyage, damage to the goods to an extent of 50% or more, capture and restraint of princes, as well as any other impediment to the completion of the voyage or encroachments upon the merx which made onward carriage not worth the freight or of negligible value¹²⁷. It was also allowed in the case of a missing ship, if a year and a day elapsed with no news being received of the ship¹²⁸. In the case of certain longer voyages the period was increased by six months¹²⁹.

- 6.2.3. While the other causes giving rise to the right to abandon were treated as actual losses, the missing ship was treated as a case of a presumed loss¹³⁰. The missing ship provision of the *Guidon* has been said by some authors to be the first indication that the missing ship was a case giving rise to the right to abandon¹³¹. That opinion may well be correct in respect to the area where the *Guidon*

127 This provision fixing 50% as the extent of damage allowing the assured to abandon still subsists in American law; See the discussion of American law in Chapter 10 *infra*.

128 Article 12; Pardessus, *op cit*, Vol II, 404.

129 Article 12.

130 Pardessus, *op cit*, Vol II, 404 fn 4.

131 Rodière and Pontavice, *Précis Dalloz: Droit Maritime*, 10th ed, (1986), par 634.

was applied, especially considering that the customs of the Antwerp Exchange of the same period did not expressly allow for an abandonment in the case of the missing ship. However, the provision in the 1558 Ordonnance passed by Philip II of Spain which created a presumption of loss in respect of voyages to and from the Indies if the ship was not heard of for a year and a half and allowed the assured to recover the sum insured on '*making a resignation to the insurers and giving them the necessary cessions and procurations*'¹³², was in essence a provision which allowed for the abandonment of the missing ship. The latter should thus be accorded the honour of being one of the first.

- 6.2.4. No time limits were specified in the *Guidon*, save that the assured could recover the sum insured two months after giving notice of the abandonment¹³³. Only the damaged portion of the goods could be abandoned and the undamaged part retained¹³⁴, a notion at odds with the now universally accepted principle that the abandonment may not be partial.

132 *Magens'* translation.

133 Article 2; Pardessus, *op cit*, Vol II, 401.

134 Article 7; Pardessus, *op cit*, Vol II, 403.

The assured had the right to abandon and was not obliged to do so¹³⁵. However, if he elected to exercise that right, he had to comply with certain requirements. He was required to make his decision without delay once he had reliable news of the casualty, and also had to provide the insurer with information about the cargo and the bills of lading, and had to give the proofs of the arrest or loss¹³⁶. The notice was apparently given through the registrar of insurance¹³⁷.

6.2.5. There was not yet clarity about the effect of the notification of the assured's election to abandon. Some thought that the notice was sufficient to entitle the insurer to recover the goods insured so far as they continued to exist. Others thought that the abandonment itself constituted a cession or transport of all the assured's rights to the insurer¹³⁸.

135 '...il est en liberté du marchand chargeur faire delais', ('... it is the election of the assured to make an abandonment') and 'Le delais n'est de necessité, mais depend de la volonté du marchand chargeur...', ('The abandonment is not an obligation but depends on the wish of the merchant shipper'); Article 1.

136 Article 2; Pardessus, *op cit*, 401.

137 'du devoir du greffier'; Article 2.

138 Article 3; Pardessus, *op cit*, 401.

6.3. THE CUSTOMS AND USAGES OF THE ANTWERP EXCHANGE

6.3.1. It is clear from the discussion of the 1563 and 1570 Ordonnances of Philip II of Spain¹³⁹ that the customs of the Antwerp Exchange were maintained in written form. Although there were obviously earlier editions, the 1582 version is the earliest one which has survived. The provisions of this compilation were effectively given the force of statute law by the 1563 and 1570 ordonnances.

6.3.2. Article 14 of the 1582¹⁴⁰ compilation of the customs of the Antwerp Exchange provided that the assured could abandon the ship or insured goods to the insurer in the event of the ship becoming unfit to continue the voyage, or of the ship or goods being restrained by the enemy or being captured or taken, and in similar cases, in which

139 These ordonnances are discussed in the next chapter.

140 Pardessus, *op cit*, Vol IV, 186: 'Item, als de geasseureerde tydinghe heeft, dat gheasseureert schip innavigabel gheworden is, of dattet schip oft goed by vyanden of uyt crachte van represalien aenghehouden of gerooft oft ghenomen is, in dese ende ghelycke ghevalen, vermach de gheasseuraerde het gheasseureert schip oft goed t'abandonneren tot behoef van den versekerer. Ende 't selve ghedaen, is d'asseureerder schuldich binnen dry maenden na d'intimatie de somme by hem verseeckert te betalen.' The underlined words (my underlining) suggest that the cases expressly referred to were not necessarily regarded as a *numerus clausus*, an approach followed in ordonnances subsequently passed in Holland. See Chapter 5 *infra*.

event the insurer was bound to pay the sum insured within three months of notice.

6.3.3. The missing ship, however, was not treated as a case for abandonment, but was dealt with separately in article 7, which created a presumption of loss if no news were received of the ship for a year and a day at the port of sailing in European or Barbarian (Turkish) waters or for two years in the case of more distant sailings¹⁴¹.

6.3.4. Having regard to the importance of Antwerp as the centre of trade and marine insurance business at that time and the role it played in the diffusion of marine insurance principles to other towns and countries, it is likely that this compilation of customs was applied not only in those places with which Antwerp had strong trade ties, but also in those places to which the Antwerp merchants had taken their business when they left Antwerp. The towns which would have benefitted most from this process are Middelburg, Amsterdam and Hamburg, being the towns where the Antwerp merchants settled in large numbers. Not only did the

merchants rely on the customs of the Antwerp Exchange where they went, the authors writing on marine insurance matters in the towns where they settled also did so¹⁴². Policies issued elsewhere also maintained the usages and customs of the Antwerp Exchange¹⁴³. The fact that these customs were reinforced by statutes confirms the correctness of the conclusion that the early ordonnances on marine insurance confirmed existing customs and were initially aimed at particular malpractices.

7. CONCLUSION

7.1. One may therefore conclude that marine insurance and the concept or institution of abandonment developed at the same time and out of the same device, namely the simulated sale contract which was used to achieve the transfer of the risk against some form of counterprestation. Two aspects of abandonment come to the fore in the earliest treatises and discussions on marine insurance questions. The first is that it is

142 See for example Groenewegen's footnotes to De Groot, *Inleidinge tot de Hollandsche Rechtsgeleerdheid*, ('*Inleidinge*'), (1631), 3.24.10 fn 24.

143 See for example, the policy on the *Santa Cruz* issued in 1555, referred to by Dover, *op cit*, 32.

linked to the concept of an indemnification where it was felt that the assured should not receive more than a full indemnity. The other is that some method of transferring the remains of the goods insured to the insurer had to be found as a physical delivery was not possible. These aspects are to be discussed in later chapters.

- 7.2. It is in the form of legislation that the evidence of the origins and the development of the principles of abandonment is best preserved¹⁴⁴. That evidence will be considered next in order to determine whether the conclusions drawn so far with regard to the origins of the concept of abandonment are confirmed by developments in the statutory field.

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Two men did most to collect these old statutes and to provide translations of them, namely Magens, *An Essay on Insurances*, (1755) and Pardessus, *op cit*.

CHAPTER FIVE

THE ORIGINS AND HISTORY OF ABANDONMENT TO THE END OF THE EIGHTEENTH CENTURY: STATUTE LAW

1. INTRODUCTION

- 1.1. While the principles of marine insurance were originally determined by mercantile custom in a setting of the revived Roman law, statutes were soon passed to regulate its most important aspects¹. Statutory regulation of marine insurance, as with other branches of the law, occurred more readily on the continent, with its affinity for codes², than in England. It is not always clear to what extent legislation merely re-enacted existing customary law, but, having regard to the development of marine insurance from merchant custom, it is more likely than not that the statutes discussed below to a large extent restated, with or without modification, customs already generally in operation with the force of

1 This pattern of statutory regulation of the subject dates back to the crude forms of transfer of the risk against some form of counterprestation discussed in Chapter 4 *supra*, and is discernable in the Code of Hammurabi (2250 BC), early Greek legislation and Roman law: See Trenerry, *The Origin and Early History of Insurance*, (1926), for a detailed discussion of the Greek and Roman development of a body of statutes regulating the maritime loan, and Dover, *A Handbook to Marine Insurance*, 8th ed, (1975), Chapter 1, for a resumé of the most important early statutes in Europe and England.

2 Jolowics, 'Development of common and civil law - the contrasts', 1982 *LMCLQ* 87.

law³. It is also more than likely that these customs were of general rather than local application by virtue of the internationality of the trade to which marine insurance applied.

- 1.2. Further, the discovery of new lands overseas in the sixteenth century and the expansion of commerce to exploit them strengthened the need for security for the ventures undertaken by merchants to distant ports. Marine insurance was such a security, and abandonment in particular gave merchants the additional protection against loss of the ship or cargo and the commercial venture.⁴ Abandonment was necessary, in short, to cover those instances where the ship or goods continued to exist *in specie* or could not be proved to have been lost, but for practical purposes the merchant had lost his investment. This stifled trade. These features concentrated the attention of merchants and legislatures on marine insurance and

³ Some statutes referred specifically to customs in use at a particular place or exchange, like the draft policy attached to the Ordonnances of Philip II of 1563 and 1570. The extent to which the customs of the Antwerp Exchange and the provisions of the *Guidon de la Mer* were adopted in subsequent statutes graphically demonstrates how custom was converted into legislation.

⁴ Sarlis, *Abandonment in Marine Insurance*, thesis, University of London, (1960), 10.

abandonment⁵. This chapter will be devoted to the development of abandonment principles through the most important statutes which were passed from the earliest time to the end of the eighteenth century⁶. While the currently valid statutes logically form part of the historical development of abandonment principles, the current law in different countries will be examined separately in Chapters 6 to 10⁷.

- 1.3. During the initial period of legislative activity on the continent, English marine insurance law developed as common law through case law in the precedent system. The historical survey of the development of abandonment principles up to the end of the eighteenth century would be incomplete if English marine insurance law were not taken into account⁸. For that reason the early

5 Sarlis, *op cit*, 11.

6 The great codification process started sweeping across Europe at the beginning of the nineteenth century and, since the marine insurance sections of those codes applied until recently, they will be discussed in the next part of this study where the principles of abandonment as set out in those codes will be compared to current law.

7 It should be borne in mind though that the law, including the principles of abandonment, continues to develop and that the current statutes inevitably must form part of any historical survey of the subject. Part III of this study, while devoted to the laws currently in force in the countries under consideration, should therefore also be considered as part of the historical survey.

8 As a matter of fact, English law provides a nice counterpoint to continental law where statutory law was the dominating force, whereas case law or precedent dominated in England.

development of abandonment principles in England will be dealt with in this chapter. In the process the differences in approach and in the content of continental and English law will become clearer.

2. THE FIFTEENTH CENTURY

- 2.1. Abandonment is not mentioned by name in the earliest statutes on marine insurance, such as the Barcelona Ordonnances of 1435⁹, 1436, 1458, 1461 and 1484, nor in the Florence Ordonnance of 1523¹⁰. It was not mentioned in the Venice Ordonnance of 1468¹¹. The absence of abandonment provisions in this ordonnance might be taken to suggest that abandonment did not have its origin in Italian insurance practice. The absence of any mention of abandonment in the ordonnances of other

9 The Barcelona Ordonnance of 1435 is the oldest known statute dealing specifically with the subject of marine insurance; Jolles, *Bijdrage tot de Kennis van de Ontwikkeling van de Zeeassurantie in de Vereenigde Nederlanden*, LLD thesis, Leiden, (1867), 28-29.

10 These old statutes have been collected, translated into French and commented upon by Pardessus, *Collection de lois Maritimes antérieures au XVII^e siècle*, (1837), 3 vols. The text of the ordonnances referred to in what follows can be found at the places cited in the various volumes of Pardessus' work. Since Pardessus' collection was just that, a collection, he did not comment on the material as fully as one would have expected in an analytical study. Nonetheless, having all the old ordonnances available in one work is of incalculable value to researchers. Magens, *An Essay on Insurances*, (1755), also contains an invaluable collection of some of the statutes, (translated into English), in force in various parts of Europe.

11 This ordonnance contained a provision at odds with abandonment as it later came to be understood, to the effect that if part of the goods lost through shipwreck was salvaged, that which was recovered had to be shared equally between the insurer and assured. See Pardessus, *op cit*, Vol V, 65.

Italian towns lends strength to this theory¹². However, if abandonment was an essential part of the simulated sale transaction, it must have been part of the insurance customs applied used in the Italian towns¹³.

- 2.2. Article 15 of the Ordonnance of the magistrates of Barcelona of 1435 is the first known statutory provision on the subject of missing ships and provided that if no news were received at Barcelona of the departed ship for a period of six months, the insurers were liable to pay the indemnity¹⁴. Other articles of the ordonnance¹⁵ stipulated that the assured had to repay the sum received to the insurers if the Court found that the insurers had not been liable in the first place¹⁶. Thus also, if the ship arrived safely after indemnification by the insurer, the assured

12 The Florence Ordonnance of 1523, for example. See Pardessus, *op cit*, Vol IV, 598.

13 A possible reason for abandonment not being mentioned in the local ordonnances of the Italian towns may be that these ordonnances regulated insurance whereas the abandonment related to the simulated sale, which still dominated the form of transactions for some time after premium insurance was born.

14 Pardessus, *op cit*, Vol V, 500.

15 Articles 12, 13 and 14.

16 Article 13. The same principle was restated in article 19 of the Barcelona Ordonnance on marine policies of 1458; Pardessus, *op cit*, Vol V, 519.

had to make full restitution. He did not have to part with ownership of the ship or goods, however, and article 15 for that reason cannot be regarded as a true abandonment provision. Shortly after the Barcelona Ordonnance of 1435 was promulgated, the case of *Marc Gentil v Arnulphi, Lommelín and Tany*¹⁷ in Bruges mentioned abandonment as a '*coustume entretenue*', a well-maintained custom, which suggests that abandonment and the missing ship provision developed parallel to each other in the beginning¹⁸. If abandonment were known in Barcelona at the time, one would have expected some provision on it or at least to mention it. On the other hand, the salvaged property may simply have been treated in accordance with the common law, which was Roman law, or according to local custom, so that the legislature preferred not to interfere¹⁹. It may also be that the contract was still regarded as a sale, with the result that the insurer became entitled to the goods insured or

17 The case was heard in 1459, and was discussed in the previous chapter. See also Trenerry, *op cit*, 270 fn 1.

18 Pardessus correctly remarked on the absence of an express reference to abandonment in the Barcelona Ordonnance of 1435; *Op cit*, Vol V, 500 fn 1: '*Déjà, comme on le voit, la présomption légale de perte étoit admise et fondée sur défaut de nouvelles; mais on n'avoit pas encore fixé expressément des délais ...*' (my underlining). ('Thus, as one sees here, the legal presumption of loss was admitted and founded on the absence of news; but one did not yet have a specific reference to an abandonment ...')

19 Sarlis, *op cit*, 8-9.

their salvage by operation of law when he paid the sum insured, and for that reason it was thought unnecessary to regulate the insurer's rights in this regard by statute. This appears to be the most likely reason.

- 2.3. The magistrates of Barcelona promulgated a number of further ordonnances²⁰ to regulate marine insurance between 1436 and 1484, but none of these mentioned abandonment or added anything to the missing ship provision of the 1435 ordinance.
- 2.4. At this stage already there were a number of factors indicating that abandonment had not developed out of the missing ship provision of the Barcelona Ordonnances of 1435, 1458, 1461 and 1484²¹. In the first place, these ordonnances were silent on the subject of abandonment when it was already regarded as existing custom in Bruges according to the case of *Marc Gentil v Arnulphi, Lommelin and Tany*. In the second place, article 13

20 Amending ordonnances were promulgated in 1436, (twice), 1458, 1461 and a consolidating ordinance in 1484; Pardessus, *op cit*, Vol V, 502 - 543. Procedural aspects of the existing laws were dealt with in two consulates, in 1510 and 1599 respectively; Pardessus, *op cit*, Vol V, 543 - 554.

21 Enschedé, *De Hoofdbeginselen van het Zee-Assurantie-Recht*, LLD thesis, Amsterdam, (1886), 136 called the missing ship provision of the Barcelona Ordinance of 1435 a case of '*oneigenlijk abandonnement*'.

of the 1435 ordonnance stipulated for restitution in the event of the insurer subsequently being found not to have been liable, that is, if the missing ship were to return after payment of the sum insured²². In the third place, as will be demonstrated in the following paragraphs, when abandonment was mentioned in the ordonnances of Burgos (1538), Seville (1556) and Bilbao (1560) a century later, the missing ship was still not being treated as a case for abandonment²³. Lastly, the absence of any direct abandonment provisions from the ordonnances passed in 1563²⁴

22 This is in conflict with one of the most basic of the abandonment principles, namely that an abandonment is, between insurer and insured, final and irrevocable once the insurer has made payment.

23 A significant feature of the sixteenth century ordonnances of other Spanish trading towns, Burgos, Seville and Bilbao, is that the missing ship situation was not dealt with as an abandonment case. Even the collection of Antwerp customs of 1582 and the Amsterdam Ordonnance of 1598 did not treat the missing ship as a case for abandonment, yet both contained express provisions on abandonment.

24 Article 5 of Title VII of this ordonnance provided that an assured who wished to claim payment by relying on the '*costuyne*' of the Antwerp Exchange to the effect that the insurer was obliged to pay if no news of the ship had been received for a period of a year and a day from the date of the policy, had to prove that the ship and goods were still in existence when the policy was concluded. Article 5 read with article 2 of Title VII leaves no doubt, however, that there was some custom in place at the Antwerp Exchange at that time already in terms of which the assured could claim the sum insured if no news were received of the ship a year and a day from the date of the policy; Pardessus, *op cit*, Vol IV, 93 and 95-96. The period of a year and a day survived through to the Amsterdam Ordonnance of 1598; See the text below where the Amsterdam Ordonnance of 1598 is discussed. So far as the Netherlands (also referred to as the Low Countries) are concerned, it would appear from the foregoing that even the missing ship provision had its origin in custom rather than in statute law. Article 2 of Title VII obliged the parties to contract into the provisions of the customs of the Antwerp Exchange.

and 1570²⁵ for the Netherlands²⁶ by Philip II of Spain is further evidence that the Spanish lawmakers preferred to leave abandonment to local custom or to the contract between the parties until after 1570²⁷. An earlier round of legislation touching upon insurance by Philip the Good in 1549 and by Charles V in 1537, 1550 and 1551 contained neither missing ship nor abandonment provisions²⁸. However, the Spanish local ordonnances of the towns of Burgos, Seville, and Bilbao contained very specific abandonment provisions.

3. THE SIXTEENTH CENTURY

- 3.1. The Savona Ordonnances of 1503 and 1522 contained no direct abandonment provisions, but contained a provision obliging the assured to give notice to

25 The form of policy, which was obligatory in terms of article 34, made the insurance subject to the usages and customs of the Antwerp Exchange, which included the missing ship provision referred to in the previous footnote; Pardessus, *op cit*, Vol IV, 117.

26 Which the still included what is now Belgium.

27 The draft policies attached to the 1563 and 1570 ordonnances were, however, subject to the usages and customs of the Exchange of Antwerp. Article 2 of Title VII of the 1563 ordonnance, provided: '*Ende zullen voortaan alle asseurantien van goedere oft coopmanschepen ghedaen worden naer costhuyme van der borse van Antwerpen*'; Pardessus, *op cit*, Vol II, 93. Pre-1582 compilations of these usages and customs are not available to us; Pardessus, *op cit*, Vol II, 96 fn 1. However, the 1582 compilation contained clear abandonment provisions, as was pointed out in Chapter 4 para 6.3.2 *supra*.

28 Pardessus, *op cit*, Vol II, 37 - 63.

the insurer of a loss through shipwreck, capture or any other cause, which notice had to be given within a specified time²⁹.

- 3.2. The Burgos Ordonnance of 1538³⁰ allowed abandonment of the insured goods (not the ship) in the case of shipwreck³¹, capture of the ship³², and damage to the goods caused by perils of the sea or tempest³³. Perishables were expressly excluded³⁴. The abandonment had to be made formally, before the secretaries of the corporation³⁵ and time limits which depended on

29 Bewer, *Das Herrschaftsgebiet des Abandon*, (1891) 39 *Zeitschrift für das Gesamte Handelsrecht*, 372, 391-392. The words in the first-mentioned ordinance are 'intimare, notificare et denuntiare'. Although these words all appear to mean 'to give notice', they may not have been used in mere repetition, as 'denuntiare' may also mean 'to denounce', which is capable of containing the same meaning as 'to abandon' so long as it is understood that the abandonment is not to the world at large but to the insurer only.

30 Pardessus, *op cit*, Vol VI, 135 et seq. Burgos was a flourishing commercial centre in the province of Castille in Spain. The ordinance was a codification of existing customs and usage; Sarlis, *op cit*, 12. Although Burgos was situated some distance away from the sea, it had a good purpose for marine insurance legislation, namely to facilitate its export trade, upon which the town's welfare depended; Enschedé, *op cit*, 5. Enschedé, *op cit*, 4-5 also mentioned that the Barcelona Ordinances had been introduced to Burgos as early as 1484, and disputed Pardessus' opinion that insurance was unknown in Burgos before 1538.

31 Article 11; Pardessus, *op cit*, Vol VI, 156-8.

32 Article 13; Pardessus, *op cit*, Vol VI, 160-161.

33 Article 29; Pardessus, *op cit*, Vol VI, 180-3. The words used were 'fortuna e tormenta de mar notoriá', translated by Pardessus as 'fortune de mer ou tempête notoire'.

34 Article 29.

35 Article 11.

the destination of the ship were introduced³⁶. Failure to comply with the prescribed time limits invalidated the abandonment and discharged the insurer from liability for total and partial loss³⁷.

- 3.3. The Seville Ordonnance of 1556³⁸ was the first to allow abandonment of the insured goods in the case of unfitness of the ship to continue the voyage³⁹. It also allowed abandonment in the case of shipwreck⁴⁰. The sum insured was payable immediately, but the assured had to give security for restitution plus thirty three percent, which he was obliged to pay to the insurer if it should later turn out that his information was incorrect⁴¹. No time limits were stipulated. Abandonment of the ship was apparently not allowed, by omission rather than express prohibition in the ordinance. Innavigability or

36 Article 11.

37 Article 11.

38 Pardessus, *op cit*, Vol VI, 76 fn 2; Magens, *op cit*, Vol II, 30-32.

39 Article 48; Pardessus, *op cit*, Vol VI, 85. Unfitness was defined in article 56. Article 48 only applied to sailings to and from the West-Indies carrying gold, silver or pearls.

40 Article 55.

41 Pardessus, *op cit*, Vol VI, 88.

unfitness was added to the number of causes giving rise to the right to abandon by this ordonnance. The ship was deemed to be innavigable if the abandonment was made before a court which gave permission for the cargo to be discharged and discharge actually occurred⁴².

3.4. In 1558 Philip II passed an ordonnance for the whole of Spain which created a presumption of loss in the case where the ship was not heard of for a period of a year and a half⁴³. This applied only to voyages to and from the Indies. The assured could recover the sum assured '*on ... making a resignation to the insurers and giving them the necessary cessions and procurations.*'⁴⁴ The missing ship thus joined the other causes as a case for abandonment.

3.5. The Bilbao Ordonnance of 1560⁴⁵ was the first to allow the abandonment of ships⁴⁶ expressly and

42 Article 56; Pardessus, *op cit*, Vol VI, 88.

43 Magens, *op cit*, Vol II, 33.

44 Article 7 (Magens' translation).

45 Pardessus, *op cit*, Vol VI, 195 *et seq.* Bilbao is a town near Burgos. The ordonnance was probably also a codification of existing custom and usage, (Sarlis, *op cit*, 15 fn 46), but reflects the development of these customs and usages since the Burgos and Seville ordonnances.

46 Article 58; Pardessus, *op cit*, Vol VI, 236.

did so in the case of shipwreck⁴⁷ and unfitness to continue the voyage⁴⁸. The abandonment of the insured goods was allowed on the same terms as the Burgos Ordonnance of 1538⁴⁹. The assured, on abandoning the ship or goods was obliged to sell them where they were, by public auction and under the authority of the local judiciary, for the benefit of the insurers⁵⁰. The assured had to give formal notice of the abandonment before a notary of Bilbao within prescribed time limits, failing which the loss was treated as particular average⁵¹. This appears to be the first statutory indication that the right to abandon was lost if it was not exercised expeditiously.

- 3.6. It is clear from the Burgos, Seville and Bilbao ordonnances that the principles of abandonment were known and practised in some of the towns in Spain before Philip II promulgated the 1563 and 1570 ordonnances for the Netherlands, yet the

47 Article 58.

48 Article 59; Pardessus, *op cit*, Vol VI, 238. The article further provided that the insurer was entitled to the freight earned on the voyage before the unfitness arose.

49 Article 57; Pardessus, *op cit*, Vol VI, 235.

50 Article 61; Pardessus, *op cit*, Vol VI, 240-1.

51 Article 58.

latter did not contain any direct provisions on abandonment. The case of *Marc Gentil v Arnulphi, Lommelin and Tany* leaves little doubt that abandonment must have been part of the marine insurance customs and usages of Bruges and Antwerp at that time already. However, the draft policies referred to in these two ordonnances required the parties to adhere to the customs and usages of the Antwerp Exchange, and it is therefore likely that the Spanish lawmaker was content to leave the question of abandonment to be determined according to those customs and usages.

3.7. The Maritime Code of 1561 promulgated by Frédéric II of Denmark contained a missing ship provision but no abandonment provisions. Article 10 of Chapter VI created a presumption of loss if, after careful investigation, no news were received of the ship and merchandise for a year and a day on a voyage to a port in Europe and two years if the destination was outside Europe. The sum insured was payable after three months⁵².

3.8. The ordonnance of Philip II of Spain which was

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Pardessus, *op cit*, Vol III, 304. This article was later taken up in the Swedish Code of 1667 in Chapter XII, the 6th part; Pardessus, *op cit*, Vol III, 304, fn 2.

promulgated on 31 October 1563 and applied to all the Spanish possessions in the Netherlands⁵³ contained no direct abandonment provisions, but made the customs of the Antwerp Exchange applicable⁵⁴. It also contained a provision to the effect that any assured who wished to rely on a particular custom of the Antwerp Exchange relating to the missing ship had to prove that the ship or goods insured still existed when the policy was concluded⁵⁵. This ordonnance is proof of the fact that there existed at that time already a defined set of customs at Antwerp which was given effect to in practice and was recognized by statute.

- 3.9. The final Spanish ordonnance on insurance for the Netherlands was promulgated on 20 January, 1571⁵⁶ and contained thirty-six sections dealing with

53 The description is used here to denote a geographical rather than political entity. The province of Holland was included in the Spanish possessions.

54 Title VII, article 2.

55 Article 5.

56 On 31 March 1569 the Duke of Alva prohibited the conclusion of insurance contracts and declared policies already concluded on ships and goods which had not yet departed null and void. The prohibition was lifted by the Duke on 27 October 1570, and insurance again permitted, but under very strict terms which were in consonance with Spanish practice, but not with that of the Antwerp Exchange; Van Niekerk, *Introduction*, 44-6.

insurance law in detail⁵⁷. A model policy was included⁵⁸, which was expressly stated to be subject to the provisions of the ordonnance itself and the usages and customs of the Antwerp Exchange⁵⁹. Thus, as was the case with the ordonnance of 1563, the underlying customs and usages of the Antwerp Exchange were applied.

- 3.9.1. Article 15 of the ordonnance provided that if a foreign king, prince or potentate confiscated the ship or if the ship became innavigable and incapable of completing its voyage, then the assured was obliged to wait for six months before he could pursue payment under the policy, and during that period he was obliged to tranship the insured goods onto another ship to carry them to their destination. If the assured did not tranship the goods, the insurer was entitled to do so himself. In all these cases the insurer had to bear the cost of the transhipment as well as any

57 Although published on 20 January 1571 it was known as the 1570 ordonnance because the new year was then taken to commence at Easter. See Van Niekerk, *Introduction*, 37 fn 84.

58 Sections 34 and 35; Pardessus, *op cit*, Vol IV, 117 et seq.

59 Clause 1 of the model policy as contained in Section 35: '*... ende der usancie ende costuyne vander borse van Antwerpen...*'. This provision restored the Antwerp customs and usages as the operating ones, rather than the Spanish practice imposed by the Duke of Alva.

damages resulting from the arrest⁶⁰.

3.9.2. Article 16 provided that the assured was not obliged to wait for the effluxion of the period of six months if the goods insured were perishables such as wine, fruit, grain and other specified goods. In such a case the assured could pursue his action forthwith as he deemed advisable⁶¹.

3.9.3. Article 23 of the ordonnance provided that when the ship had been arrested, taken or laid under embargo by kings, princes or potentates, and there remained hope to recover the same, the assured had to wait six months from the date of the taking or embargo before he could recover payment if the port of destination was in Europe or Barbary, (Turkey) but if the ship was destined for the Indies or to a port outside the limits of Europe or Barbary, the abovementioned term was extended to one year. In the meantime the insurers had to provide security by way of bail or pledge for payment of the insured sum. If the goods were lost or damaged for certain, or without hope of

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It will become apparent in the discussion of subsequent legislation that this provision was taken up also in the Dutch ordonnances.

61

This principle was maintained in subsequent legislation.

recovery, the insurers had three months in which to pay the insured sum, calculated from the date of a properly executed notification of the loss or damages.

3.9.4. Article 23 of the 1570 ordonnance referred to an '*inthimatie, notificatie oft certificatie vande schade oft verlies, hen behoorlicken gedaen sal wesen*'. It appears that formal notification of some sort was required before the assured could recover the loss. Not only is it clear that the underlying requirements for the notice to be given by the assured before he could claim under the policy were contained in the customs of the Antwerp Exchange and even the underlying customary law, but the words used, namely '*inthimatie, notificatie oft certificatie*' in general meaning echo the words '*intimare, notificare et denuntiare*' of the Savona Ordonnance of 1503⁶².

3.9.5. These articles of the 1570 ordonnance do not refer to abandonment directly, nor to the case of the missing ship. One must therefore assume that the underlying custom still regulated abandonment.

62

The Savona Ordonnance of 1503 was discussed earlier in this chapter.

3.10. The Genoa Ordonnance of 1588⁶³ allowed abandonment on the basis of damage exceeding fifty percent of the value of the insured things⁶⁴ and caused by any kind of peril⁶⁵. No distinction was drawn between the ship and the goods. This was the first statute allowing abandonment whatever the cause of the damage, rather than defining a *numerus clausus* of circumstances which give rise to the right to abandon. The ordinance also adopted the same approach as the *Guidon de la Mer* by providing that damage to a fixed percentage of the insured value gave rise to the right to abandon⁶⁶.

63 Book V, Article 17; Pardessus, *op cit*, Vol IV, 256. Mogens, *op cit*, Vol II, 66 gives the date of the Genoa ordinance as 1610, and translated the article as follows: 'The assured may, upon all and every unfortunate accident, according to his own choice, either demand the full insurance, and abandon the effects insured to the assurers, whose property they shall be in such a case, or else he may make up an account of the damage according to the directions prescribed in these chapters. If it should appear that the loss amounted to fifty percent, then the assurers may either pay the full sum assured, and take the insured effects to themselves, or pay the loss, as it is demanded, and leave the goods assured to the assured. The assurers shall, in these and all other cases, when a reasonable average for making good damages is demanded, have the liberty of choosing, whether what is insured remain in the whole, or in part only.'

64 'Res assecratae' which would include both the ship and the goods.

65 'in quocumque casu sinistro'.

66 This unusual provision of the Genoa Ordinance shows some remains or influence of the simulated sale. By allowing the assured to abandon on the ground of damage to the goods, the spirit of the simulated sale that the insurer was to acquire the goods in the event that the goods did not reach their destination safely was maintained. By fixing the degree of loss or damage at fifty percent, the Genoese lawmakers probably thought that the fiction of the sale should be maintained in the case where the goods were, on balance, more damaged than whole. This provision of the ordinance is thus in consonance with the concept of insurance as well as the simulated sale. This constitutes further evidence that the concept of abandonment developed out of the simulated sale contract.

- 3.11. The first round⁶⁷ of Dutch ordonnances span the transition from the fifteenth to the sixteenth century. After the northern provinces⁶⁸ managed to regain their independence from Spain, the trading towns reverted to their old practice of regulating mercantile and shipping activities within their jurisdiction⁶⁹. The 1570 Ordonnance of Philip II was to remain in force, however, until repealed or amended by the towns⁷⁰.
- 3.12. Amsterdam was the first of the towns of the province of Holland to promulgate its own ordinance⁷¹ regulating insurance, and did so on 31 January 1598⁷². The ordinance repealed the ordinance of Philip II of 1571, but re-enacted

67 The phrase was coined by Van Niekerk, *An Introduction to and some Perspectives on the sources of Roman-Dutch Insurance Law*, ('Introduction'), (1988), 55.

68 The southern provinces, including Antwerp, remained under Spanish domination much longer.

69 The privilege to make such laws at local level was granted in the case of Amsterdam, by Count Willem on 9 December 1342, and embraced the authority '... omme keuren ende ordonnantien te maken en te vernieuwen, dienende tot rust, vrede, goede policie en justitia'; Jolles, *op cit*, 39. Rotterdam had received a similar privilege at an even earlier date, 7 July 1340; Jolles, *op cit*, 45.

70 The effect of this period in the history of the Netherlands is that the influence of Spanish law and custom is still apparent in Dutch law.

71 Van Niekerk, *Introduction*, 51-3 advocates the use of the word 'keur' (plural 'keuren') to describe the local ordinances, but for the sake of continuity I shall refer to them as ordinances.

72 The text of this ordinance appears in Pardessus, *op cit*, Vol IV, 122 et seq.

many of its provisions. Many innovations were introduced, including the creation of a Chamber of Insurance⁷³.

3.12.1. Article 8 of the *ordonnance* allowed the assured to abandon the ship or goods insured in the case of arrest or detention by foreign rulers, and also in the case of the ship becoming unfit to continue with the voyage⁷⁴. In such cases the abandonment could only be made after the elapse of a period of six months or a year, depending on where the loss occurred. The assured also had to notify the insurer of the event giving rise to the loss through a broker or other '*publijke personen*'.

3.12.2. An immediate abandonment was allowed by article 25, firstly of the ship in the case of innavigability, and secondly of the ship or insured goods in the case of capture or pillage by the enemy, and in any other case of certain loss or damage beyond hope of recovery. The assured could claim the sum insured after three months in

73 Van Niekerk, *Introduction*, 55-7.

74 De Groot, *Inleidinge*, 3.24.12. An important aspect which demonstrates the underlying economic purpose of abandonment is to be found in article 8, which allowed the assured, in the case of arrest or detention of the ship, to abandon the insured goods, even though they were not arrested or detained with the ship.

such cases⁷⁵.

- 3.12.3. Article 5 contained provisions for the case where the ship disappeared without any news for a year and a day, in which event the assured was allowed to claim the sum insured three months after giving notice of the fact to the insurers⁷⁶. Article 5 did not expressly provide for abandonment of the ship or goods, but entitled the assured to give an 'inthimatie'⁷⁷ to the insurers, and to claim payment after three months. This article further developed the principle laid down in article 5 of Title VII of the 1563 Ordonnance of Philip II⁷⁸ by giving statutory effect to the custom referred to in the latter.

75 De Groot, *Inleidinge*, 3.24.13.

76 De Groot, *Inleidinge*, 24.3.10. By providing for the missing ship in a separate article, the by now longstanding practice of the legislators was continued.

77 Pardessus, *op cit*, Vol IV, 124, translated this as 'la dénonciation', which differs significantly from his translation of the same word in the identical article (12) of the Middelburg Ordonnance of 1600 as 'l'abandon'; *Op cit*, Vol IV, 172. It is submitted that both attempts at translation were unsuccessful as 'inthimatie' means 'notice' or 'intimation' in English, or 'aanduiding' or 'kennisgeving' in Afrikaans; Kritzinger, Schoonees & Cronjé, *Van Schaik se Groot Woordeboek*, 12th ed, (1981), 1129, sv 'intimation'. The word is no longer found in current Dutch dictionaries and appears to have fallen into disuse, but Calisch, *Nieuw Volledig Nederlandsch-Engelsch en Engelsch-Nederlandsch Woordenboek*, (1873), translated the noun 'intimatie' as '(law) notification, notice, writ', and the verb 'intimeeren' as '(law) to notify, enjoin, give legal notice of'. The word appears to stem from the Latin 'intimare', which means 'to indicate'. This error on the part of Pardessus has lead Sarlis astray, (*Op cit*, 19-20) inducing the statement that the Middelburg Ordonnance of 1600 was the first to treat the missing ship as a case for abandonment.

78 Pardessus, *op cit*, Vol IV, 124.

3.12.4. Some formalities were also laid down in the ordonnance. Article 28 provided that the assured was obliged to communicate whatever intelligence he received of restraint or loss to the insurers⁷⁹. By amendment effected on 25 January 1640 the notice of abandonment was required to be served by the secretary or 'bode' of the Chamber of Insurance⁸⁰.

3.12.5. The Amsterdam Ordonnance of 1598 established a pattern in abandonment provisions which was to be followed in other countries and still applies today. This pattern is to be found in the distinction between three categories of abandonment cases. In the first category falls those cases and causes where the assured is entitled to abandon immediately, namely innavigability, capture or pillage by the enemy, and other losses which are certain and final in their effect. In these cases the loss is regarded as certain, complete and irreversible, and no purpose would be served in delaying the

79 De Groot, *Inleidings* 3.24.14. This provision is an indication of the importance of early notice to the insurers to enable them to act immediately as their interests and the situation required.

80 Pardessus, *op cit*, Vol IV, 132 fn 1; Enschedé, *op cit*, 137. The chamber was created by the Amsterdam Ordonnance of 1612. This provision was repeated by an ordonnance of 1701; Enschedé, *loc cit*.

abandonment. In the second category falls those cases where there might be some hope that the insured ship or goods may still be saved or recovered, like arrest or detention by foreign rulers or unfitness of the ship to complete the voyage. In this category of cases a prescribed period has to elapse without the ship or goods being freed before the assured may abandon⁸¹. The third category is constituted by the missing ship, which may not be abandoned until the expiry of the prescribed period.

3.13. Articles 15⁸² and 26⁸³ of the Middelburg⁸⁴ Ordonnance of 30 September 1600⁸⁵ merely adopted articles 8 and 25 respectively of the Amsterdam

81 The result was that the right to abandon did not exist until the required period had elapsed and the ship or goods have not been recovered.

82 For the text, see Magens, *op cit*, Vol II, 73-74; Van Niekerk, *Introduction*, 254.

83 For the text, see Magens, *op cit*, Vol II, 75; Van Niekerk, *Introduction*, 254.

84 Middelburg was the centre of trade of the province of Zeeland, and her laws are of lesser importance to South African law, as the law of the province of Holland was transplanted to the Cape of Good Hope. See on the process of this transplant generally: De Wet, *Die Ou Skrywers in Perspektief*, (1988), Chapter 1; Hahlo and Kahn, *The South African Legal System and its Background*, (1973), 571-575; Hosten et al, *Introduction to South African Law and Legal Theory*, (1977), 186-194; Van Zyl, *Geskiedenis van die Romeins-Hollandse Reg*, (1979); Wessels, *History of the Roman-Dutch Law*, (1908); Tjollo Ateljees (*Edms*) *Beperk v Small* 1949 1 SA 856 (A), 865 and *Gerber v Wolson* 1955 1 SA 158 (A), 170-171.

85 Pardessus, *op cit*, Vol IV, 167 *et seq.*

Ordonnance of 1598, and article 12⁸⁶ repeated article 5 of the Amsterdam Ordonnance on the missing ship⁸⁷.

- 3.14. Rotterdam⁸⁸ promulgated its own ordinance on 12 March 1604⁸⁹, and re-promulgated it in 1635 to overcome a technical difficulty with the legality of the creation of its Chamber of Insurance⁹⁰. Its provisions on abandonment were essentially the same⁹¹ as those in Amsterdam and Middelburg⁹², save that notice of abandonment had to be given by a public official⁹³. In the process Rotterdam simplified the abandonment provisions enacted in Amsterdam a few years earlier, but adopted the

86 For the text, see Magens, *op cit*, Vol II, 75; Van Niekerk, *Introduction*, 253.

87 The Middelburg Ordonnance of 1600 took over the provisions of the Amsterdam Ordonnance of 1598 with '*eenige kleine wijzigingen*'; Enschedé, *op cit*, 7

88 Although the Rotterdam Ordonnance of 1604 was promulgated in the next century, it was very much the product of the sixteenth century, having largely adopted the principles of the Amsterdam Ordonnance of 1598.

89 The full text appears in Pardessus, *op cit*, Vol IV, 152 *et seq*; Van Niekerk, *Introduction*, 213.

90 Van Niekerk, *Introduction*, 58-9.

91 Enschedé, *op cit*, 137.

92 Articles 12, 13 and 14 contained the abandonment provisions, including the missing ship as a case for abandonment in article 14. Whereas article 12 of the Middelburg Ordonnance of 1600 treated the missing ship as if it were a case for abandonment without stating so explicitly, article 14 of the Rotterdam Ordonnance expressly provided that the assured was entitled to abandon her to the insurers.

93 Article 15 required written notice through '*een publicq persoon*'.

same three principal categories of losses giving rise to the right to abandon.

4. THE SEVENTEENTH CENTURY

4.1. The application of the principles of abandonment spread with the enactment of similar statutes to the ones so far referred to in other parts of Europe. Flessingen⁹⁴ promulgated an ordonnance on 12 February 1661 which was in effect a copy of the Middelburg Ordonnance of 1600⁹⁵, and the Saint-Sebastian Ordonnance of 1682 copied the Bilbao Ordonnance of 1560⁹⁶.

4.2. In Sweden, article 12 of Part VI of the Maritime Code of 1667 of Charles XI provided for the right to abandon if the ship or merchandise were to be damaged, taken by pirates or enemies, or lost in any other manner without hope of recovery. The insurers had to pay the sum insured within three months of the abandonment⁹⁷. This article took

94 A town in Zeeland close to Middelburg.

95 Pardessus, *op cit*, Vol IV, 182; Enschedé, *op cit*, 8. Bynkershoek referred to it in *Quaestiones Juris Privati*, (1744), Book IV, Chapter 1.

96 Pardessus, *op cit*, Vol VI, 253.

97 Pardessus, *op cit*, Vol III, 187-188.

the emphasis away from the traditional causes of the loss, and concentrated attention on the effect of the event instead, an approach which applied in England too⁹⁸. The Maritime Code of 1667 also contained a missing ship provision identical to article 10 of the Maritime Code of 1561 of Denmark, referred to earlier⁹⁹.

4.3. In Russia, article 2 of Title VII of the Riga Ordonnance of 1672 contained a missing ship provision, but no abandonment provisions. If no news were received of the ship insured for a year and a day, she was deemed to be lost and the assured was entitled to give notice to the insurer, who had to pay the sum insured after three months if no fresh news were received of the ship during that period¹⁰⁰.

4.4. The famous *Ordonnance de la Marine* promulgated by Louis XIV of France in 1681¹⁰¹ was based mainly

98 See the discussion of the position in English law in the text below.

99 Pardessus, *op cit*, Vol III, 304 fn 2.

100 Pardessus, *op cit*, Vol III, 525.

101 Pardessus, *op cit*, Vol IV, 370 *et seq.* This ordinance, which dealt with a large number of other maritime matters, became the model statute on which later codifications in Europe were based, including the French *Code de Commerce* of 1807. Valin, who wrote a detailed analysis of its provisions, was of the opinion that it had been 'executed in a masterly manner'; Kent, *Commentaries on American Law*, 12th ed, (1896), Vol V, 14.

on the *Guidon de la Mer*, although it also bears traces of influence by the Amsterdam Ordonnance of 1598¹⁰² and the Rotterdam Ordonnance of 1604¹⁰³. It represented the sum total of legal and commercial experience of that time. It appears that the main principles of marine insurance were firmly fixed in the law and practice of the various seafaring countries of Europe by the time of its enactment. This ordonnance played an important role, however, in the drafting of subsequent ordonnances on the continent¹⁰⁴. It was reproduced almost unaltered in the *Code de Commerce* in France in 1807¹⁰⁵ and formed the basis of the Hamburg Ordonnance of 1731¹⁰⁶. Its

It was based on the earlier insurance codes of Antwerp and Amsterdam and on the *Guidon de la Mer*, and in turn served as leading light to subsequent continental legislation. According to Dover, *op cit*, 23 it 'is the fount of most modern marine insurance law'.

- 102 Louis XIV sent one of the draftsmen of the *Ordonnance de la Marine* to the Netherlands to study the Dutch legislation; Enschedé, *op cit*, 8. Valin, as reported by Enschedé, *op cit*, 150, stated that articles 44 and 58 of the 1681 Ordonnance were based on articles 5 and 8 respectively of the Amsterdam Ordonnance of 1598. Article 46 of Title VI, which enumerates the circumstances giving rise to the right to abandon, was based on article 25 of the Amsterdam Ordonnance of 1598 and article 1 of Chapter VII of the *Guidon* according to Pardessus, *op cit*, Vol IV, 376 fn 3. A number of other articles also echoed the provisions of the Amsterdam Ordonnance; see Pardessus, *op cit*, Vol IV, 370-379.
- 103 De Smidt, *Compendium van de Geschiedenis van het Nederlands Privaatrecht*, 2nd ed, (1972), 149; Van Niekerk, *Introduction*, 61.
- 104 It was even described as '*le droit commun des nations*', ('the international common law'); Enschedé, *op cit*, 9.
- 105 Enschedé, *op cit*, 8.
- 106 Dover, *op cit*, 23; Van Niekerk, *Introduction*, 61. Nevertheless, the Hamburg Ordonnance of 1731 allowed the assured to abandon only in the case of the missing 512.

influence was also felt in the Netherlands when the *Code Napoleon* was imposed there¹⁰⁷. The result was that the Ordonnance of 1681 formed the basis of the marine insurance provisions of many European countries, with the consequence that marine insurance law after 1681 on the continent did not differ greatly from one country to the next.

- 4.4.1. The 1681 Ordonnance provided for abandonment in the cases of capture¹⁰⁸, shipwreck¹⁰⁹, breakage of the ship's timbers¹¹⁰, stranding¹¹¹, restraint of princes¹¹², or total loss¹¹³ of the insured effects¹¹⁴. It was amended on 17 August 1779 to provide that stranding would henceforth be a ground for abandonment only if accompanied by the breaking up of the ship's timbers¹¹⁵. The

107 Enschedé, *op cit*, 10. The same applied to Belgium; *Ibid*.

108 'prise'.

109 'naufnage'.

110 'bris'.

111 'échouement'.

112 'arrest'.

113 'perte entiere'.

114 Article 46; Pardessus, *op cit*, Vol IV, 375.

115 'échouement avec bris'; Pardessus, *op cit*, Vol IV, 376 fn 3.

ordonnance further allowed abandonment in the case of the missing ship¹¹⁶.

4.4.2. Similar provisions relating to time limits as the ordonnances discussed earlier were imposed¹¹⁷. In the case of perishables the periods were shortened¹¹⁸. The ordonnance deviated from the *Guidon* by providing that all the assured's rights had to be abandoned¹¹⁹, and provided expressly that the rights of the assured belonged to the insurer '*après le délaissement signifié*'¹²⁰.

4.4.3. Article 46 of the Ordonnance specified that an abandonment could only be made in the cases of '*prise, naufrage, bris, échouement, arrest de Prince, ou perte entiere des effets assûrez*'¹²¹. Émerigon has argued convincingly that the article was prohibitive, not permissive. This means that, although abandonment could be made in the cases

116 Article 48; Pardessus, *op cit*, Vol IV, 376.

117 Article 49; *ibid*.

118 Pardessus, *op cit*, Vol IV, 377.

119 Article 47; *ibid*.

120 ('after the notification of the abandonment'); Article 60.

121 'capture, shipwreck, breaking up' stranding, arrest of princes, or total loss of the insured effects'.

expressly mentioned, it did not follow that abandonment would always be available in each of the cases specified in the article¹²². All other damage was to be only average. The last provision demonstrated, according to Émerigon¹²³, that average was the ordinary remedy while abandonment was an extraordinary action. In the cases of '*prise, naufrage, bris, échouement (et) arrest de Prince*', there was a total loss irrebuttably presumed by the article¹²⁴. However, in the case of '*perte entiere*', an actual as opposed to a presumed total loss had to occur. The first gives rise to a title in law; the second means the absolute loss of the things insured¹²⁵. There was considerable divergence of opinion among Pothier, Valin and Émerigon on what precisely constituted '*perte entiere*'¹²⁶.

122 *Traité des Assurances et des Contrats a la Grosse*, (1783), (Boulay-Paty's edition, published in 1827), Vol II, 209.

123 *Op cit*, Vol II, 209.

124 Émerigon, *op cit*, Vol II, 211.

125 Émerigon, *op cit*, Vol II, 211-212: '*On doit donc distinguer ici deux sortes de perte entière, la légale et la réelle. La première est un nom de droit; la seconde est la privation absolue des choses assurées.*' ('One must therefore distinguish here between two types of total loss, the legal and the actual. The former is a legal title; the second is the absolute deprivation of the things insured.')

126 See the discussion of this subject by Émerigon, *op cit*, Vol II, 214.

- 4.4.4. The assured was obliged upon receipt of news of the loss of the ship or goods or the arrest of princes and of other accidents at the risk of the insurers to notify the insurers directly and give them notice that he may abandon in due course¹²⁷.

5. THE EIGHTEENTH CENTURY

- 5.1. The legislatures which enacted marine insurance ordonnances in the eighteenth century had the advantage of all the learning and experience which had gone into earlier legislation and the application of marine insurance principles in practice. In the ordonnances which were passed in this century, the subject of abandonment was dealt with in considerably more detail than previously, in a manner which clearly showed the influence of the *Ordonnance de la Marine* of 1681. Such laws were passed in relatively quick succession in Rotterdam, (1721), Königsberg (1730), Hamburg, (1731), Bilbao, (1738), Amsterdam, (1744), Copenhagen, (1746), and Stockholm, (1750). These statutes were very similar in form and content with the result that at the end of the eighteenth century there was virtual uniformity in western

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Article 42; Émerigon, *op cit*, Vol II, 210.

Europe in marine insurance law and on abandonment in particular.

5.2. Rotterdam took the first step after the *Ordonnance de la Marine* of 1681 by promulgating its own, entirely new ordinance '*op het stuk van Asseurantie ende van Avarye: mitsgaders Zee-zaken*' on 28 January 1721¹²⁸. Its ordinance was regarded as an outstanding one¹²⁹ and it reflected the developments and changed circumstances of insurance practice¹³⁰. Its abandonment provisions were a model of clarity.

5.2.1. Abandonment was allowed in five cases, namely in the case of shipwreck¹³¹, perishing of the ship or perishing of the goods¹³², arrest¹³³ and the case of the missing ship¹³⁴. These causes were amplified to some extent by the other articles of

128 Jolles, *op cit*, 47.

129 Jolles, *op cit*, 42. The text of the ordinance can be found in Van Niekerk, *Introduction*, 220.

130 Van Niekerk, *Introduction*, 60.

131 '*vergaan*'.

132 '*bedorven*'.

133 The first four causes were listed together in article 60.

134 Article 67.

the ordonnance. Innavigability was not mentioned as a separate cause, but was regarded as synonymous with damage to or perishing of the ship¹³⁵. The missing ship could be abandoned if '*geen de minste tijding*' had been received of her for a period of one year and six weeks after sailing to a destination in Europe as far as Barbary and the Canary Islands, and two years on longer voyages¹³⁶.

- 5.2.2. The abandonment had to be made in writing through the '*bode van het Zee-recht*'¹³⁷ and the assured had to abandon the ship or goods '*ten behoeven van de Assuradeurs*' before the assured could claim the sum insured¹³⁸. In the case of shipwreck or innavigability of the ship or perishing or capture of the goods, or other cases where it was clear that there was no hope of recovery, the abandonment could be made forthwith¹³⁹. The same applied when perishable goods were arrested¹⁴⁰.

135 Article 62.

136 Article 67.

137 Article 61.

138 Article 60.

139 '*aanstonds*'; Article 62.

140 Article 63.

In other cases where there was still hope of recovery of the arrested ship or goods, the assured had to wait a specified period after giving notice of the event to the insurer through a '*publijck persoon*', the period being six months in respect of losses occurring in European waters as far as Barbary and the Canary Islands, and a year in respect of losses occurring in more distant places¹⁴¹. In the meantime the insurer was obliged, at the request of the assured, to give security for payment of the sum insured¹⁴². The assured, for his part, was obliged, when requested and authorised by the insurer, to work towards the recovery of the ship or goods¹⁴³. The insurer was obliged to pay within a month after the notice of abandonment¹⁴⁴.

5.3. In Königsberg in Prussia¹⁴⁵ an ordonnance

141 Article 64.

142 Article 65.

143 Article 66.

144 Article 68.

145 Königsberg was part of Prussia at the time and is now part of Russia, and is called Kaliningrad.

covering marine insurance was passed in 1730¹⁴⁶. It contained extensive abandonment provisions. The three categories of circumstances identified earlier and under which the assured was given the right to abandon were dealt with separately.

5.3.1. In the first place, the assured could abandon immediately if the ship or goods were entirely lost without hope of recovery, or if the ship became unfit for further service¹⁴⁷. In such a case the assured could abandon provided he had given proper and timeous notice¹⁴⁸ to the insurer, who had to pay the sum insured within four weeks unless the policy provided a different period for payment¹⁴⁹.

5.3.2. In the second category of cases fell those of

146 In 1861 Prussian law was codified. The marine insurance provisions of that code were taken over unchanged in the commercial code, the *Handelsgesetzbuch*, ('the HGB'), (De Smet, *op cit*, Vol I, para 846.), which came into effect for the whole of Germany on 1 January 1900, and is still in effect. It is apparent from the provisions of the HGB that the Königsberg Ordonnance of 1730 played a large role in shaping the existing law on abandonment. It is clear that the codification process resulted in abandonment provisions which are wider than those of the Hamburg Ordonnance of 1731, but narrower than those of the Königsberg Ordonnance of 1730. In this way Germany enacted its own, unique set of abandonment provisions.

147 Article 22; Magens, *op cit*, Vol II, 192.

148 Article 21 required the assured to notify the insurers without delay of the news that the ship or goods had been lost, stranded, or arrested or had suffered some other misfortune; Magens, *op cit*, Vol II, 191.

149 Article 22; Magens, *op cit*, Vol II, 192.

arrest or detention of the ship or goods, and sale of the ship or goods by the master on account of the voyage being delayed. In these cases the assured could only abandon after the expiry of six months, if the event occurred in European waters, and a year, if it occurred elsewhere in the world. The time for payment after the abandonment was still four weeks, but the insurer could demand security for restitution¹⁵⁰. In the case of perishables the assured could abandon immediately¹⁵¹.

5.3.3. The last category was that of the missing ship. In such a case the ship or goods could be abandoned if no news were received of the ship after certain periods¹⁵², as the ship was then deemed to be lost¹⁵³.

5.4. The Hamburg Ordonnance of 1731 broke from the pre-existing links with insurance practice in the Netherlands and Antwerp and set out the peculiar

150 Article 25; Magens, *op cit*, Vol II, 192-193.

151 Article 26; Magens, *op cit*, Vol II, 193.

152 The periods were six months for the East Sea, one year for the area between the North Cape and Gibraltar, eighteen months in sailings to the Mediterranean as far as Venice, and two years for more distant sailings; Article 27.

153 Article 27; Magens, *op cit*, Vol II, 193.

marine insurance law which had developed at Hamburg¹⁵⁴. It provided that the missing ship could be abandoned after the elapse of the stipulated time¹⁵⁵, yet did not provide for abandonment in any of the other circumstances allowed elsewhere¹⁵⁶. It was revised in 1759 and replaced by a fresh ordonnance in 1847 which in turn was replaced by the *Handelsgesetzbuch* ('the HGB') in 1900¹⁵⁷.

- 5.5. The Bilbao Ordonnance of 1738 provided for the right to abandon in the cases of capture, shipwreck, bulging, stranding, embargo of princes and total loss. All other damages were regarded as average losses¹⁵⁸. The missing ship, and the goods carried on her, could also be abandoned after the expiry of prescribed periods¹⁵⁹. Upon detention by a prince, the assured could not

154 Van Niekerk, *Introduction*, 61-62 fn 149.

155 Article 1, Title 11.

156 The narrowness of the Hamburg approach gave Benecke the opportunity to comment that it distinguished itself from all other ordonnances by allowing abandonment only in the case of the missing ship; Benecke, *A Treatise on the Principles of Indemnity in Marine Insurance, Bottomry and Respondentia*, (1824), 346.

157 Articles 861-871 of the HGB deal with the subject of abandonment in detail. Its provisions are discussed in more detail in Chapter 7.

158 Article 31; Magens, *op cit*, Vol II, 416.

159 Article 37; Magens, *op cit*, Vol II, 417-418.

abandon immediately, but only after six months if the detention occurred in European waters, and twelve months in American or equally remote places. In other cases the assured was allowed to abandon immediately¹⁶⁰. Bilbao thus also recognized the same three categories originally found in the Amsterdam Ordonnance of 1598. During the period the assured was obliged to wait before he could abandon, he could demand security from the insurer, but had to use his best endeavours to obtain the release or discharge of the ship¹⁶¹. If the assured wished to exercise his right to abandon, he had to do so without delay and by judicial notification to the insurer¹⁶². The abandonment could not be partial, and had to include or cover all the goods insured¹⁶³. The assured was obliged to deliver the documents, probably the bills of lading and other documents of title, to the insurer before he could demand payment¹⁶⁴. After the abandonment the ship or

160 Article 38; Magens, *op cit*, Vol II, 416-417.

161 Article 34; Magens, *op cit*, Vol II, 417.

162 Article 30; Magens, *op cit*, Vol II, 416. If the insurers were abroad, the assured had to act as their agent in caring for the goods abandoned to them; Article 30.

163 Article 32; Magens, *op cit*, Vol II, 416.

164 Article 36; Magens, *op cit*, Vol II, 417.

goods were to '*appertain to the insurer*', even if they were later to arrive safely¹⁶⁵.

5.6. The Amsterdam town fathers had more than twenty years to study the Rotterdam Ordonnance of 1721 in practice, to learn from its example, and to avoid its mistakes and shortcomings¹⁶⁶. They also had the opportunity to learn from other recent statutes elsewhere in Europe, in particular the Hamburg Ordonnance of 1731¹⁶⁷. On 10 March 1744 Amsterdam promulgated its new marine insurance ordinance. It was a complete revision of the earlier Amsterdam ordinance and its amendments, and showed the influence of the Rotterdam Ordonnance of 1721 as well as the Hamburg Ordonnance of 1731¹⁶⁸. So far as abandonment is concerned, it re-enacted articles 8, 9, 25 and 5 respectively of the 1598 Amsterdam Ordonnance in articles 26, 27, 28 and 29¹⁶⁹.

165 Article 38; Magens, *op cit*, Vol II, 418.

166 Enschedé, *op cit*, 7-8.

167 Van Niekerk, *Introduction*, 61-62 fn 149.

168 Van Niekerk, *Introduction*, 61.

169 Enschedé, *op cit*, 139. The text of the ordinance is to be found in Van Niekerk, *Introduction*, 170.

5.6.1. The 1744 Ordonnance maintained the by now customary three categories of cases where abandonment was allowed. The first category was that of arrest, detention or capture by a foreign power, where it was uncertain whether the ship or goods would be recovered. In such a case the assured was allowed to abandon the ship or goods after the expiry of a period of six months, if the loss occurred in European waters, or twelve months if it occurred outside Europe, calculated from the date of notice to the insurer. The notice had to be given through the '*bode van de Assurantie Kamer*', by way of an '*exploit*'. During the period the assured had to wait before he could make the formal abandonment, the insurer could be compelled to put up security for the sum insured, while the assured was under a duty to labour towards the saving and preservation of the insured things¹⁷⁰. In the case of perishables the assured was not bound by the periods laid down, but could abandon immediately, against notifying the majority of the insurers¹⁷¹.

5.6.2. The second category of cases where abandonment was

170 This was all provided in a single article, article 26.

171 Article 27.

allowed encompassed innavigability of the ship, capture or taking of the ship or goods by enemies, the perishing or loss of the ship or goods, or where the goods or ship were damaged or lost without hope of recovery. In such cases the assured could abandon the insured ship or goods '*ten behoeve van den Verseekeraars*' forthwith. The insurers then had to pay within three months¹⁷².

5.6.3. The third category was that of the missing ship, except that the Amsterdam Ordonnance specifically provided the same principle for the cargo as for the ship. If no news was received locally of the ship or cargo for a year and a day after departure the ship and the goods were presumed to be lost¹⁷³. As in the previous categories, the insurer had three months to pay after expiry of the applicable period¹⁷⁴.

5.7. The Copenhagen Ordonnance of 1746 dealt with abandonment in less detail. It provided for the right to abandon if the ship became unserviceable

172 Article 28.

173 This period applied to sailings to and from European ports and the coast of Barbary and the Canary Islands. If the voyage went beyond those distances, the period was two years.

174 Article 29.

or had been plundered, taken or detained by the enemy, without hope of recovery. This applied only to insurance against '*dangers from Christians*', and the insurer was obliged to pay the sum insured within three months¹⁷⁵. In the case of detention by powers or states, or any other causes which hindered or rendered the ship incapable of prosecuting the voyage, whether there was hope of recovery or not, the assured had to give timely notice to the insurer. He also had to sell perishables and preserve the rest of the cargo. In this instance the assured could only abandon after six months, if in Europe and twelve months if out of Europe¹⁷⁶. The missing ship was deemed to be lost after the expiry of a year and a day without news in European voyages and two years for sailings outside Europe. The assured could then claim payment of the sum insured three months later after giving notice to the insurer¹⁷⁷. Although this provision did not mention the abandonment of the ship and cargo, that was probably contemplated.

175 Article 10; Magens, *op cit*, Vol II, 330.

176 Article 11; Magens, *op cit*, Vol II, 330.

177 Article 9; Magens, *op cit*, Vol II, 330.

5.8. The Stockholm Ordonnance of 1750, on the other hand, expressly provided that the ship would be deemed to be lost and that the ship and cargo could be abandoned if no news or intelligence of the ship was received during the prescribed periods, the length of which depended on the destination in each case¹⁷⁸. The abandonment had to be done through a notice by a sworn broker or some other credible method¹⁷⁹. The assured could also abandon the ship or goods if they were taken, attached or detained outside Sweden and it was uncertain whether they may be recovered. In such a case, the assured could abandon six months, (or twelve months if the event occurred outside Europe), after notice to the insurer, or immediately upon a court pronouncing that the ship or cargo was irretrievably lost¹⁸⁰. The insurer then, as in the case of the missing ship, had two months to pay¹⁸¹. Perishables could not be abandoned unless they were in a ship which had been taken and six months had elapsed without their recovery, or the court ruled that they had

178 Article 2, Section II; Magens, *op cit*, Vol II, 272-273.

179 *Ibid*.

180 Section 3; Magens, *op cit*, Vol II, 273.

181 Sections 2 and 3; Magens, *loc cit*.

been entirely spoilt¹⁸². No abandonment was allowed if the ship or goods could be saved in whole or in part, and the assured was obliged to take all possible steps to save them¹⁸³.

5.9. Dordrecht took over the Rotterdam Ordonnance of 1721 with minor changes in its own ordonnances of 1772 and 1775¹⁸⁴.

6. With the exception of the Genoa Ordonnance of 1588, the Dutch ordonnances and the Swedish Maritime Code of 1667, all the continental ordonnances discussed thus far restrictively defined the circumstances under which an assured was given the right to abandon by naming the particular event, for example, shipwreck or capture. Detailed rules were laid down regarding time limits for the insurer to effect payment and the giving of notice. The development of the rules of abandonment, and marine insurance in general, followed the pattern of the civilian systems of continental Europe. In England, however, the development of the principles of marine insurance

182 Section 4 read with section 7; Magens, *op cit*, Vol II, 273.

183 Section 1; Magens, *op cit*, Vol II, 272.

184 Enschedé, *op cit*, 8; Van Niekerk, *Introduction*, 60 fn 144.

and of abandonment followed a totally different pattern, in keeping with the English system of law being a common law system. Here the codification of marine insurance law occurred only at a very late stage.

7. ENGLISH LAW: THE COUNTERPOINT

7.1. English marine insurance principles, while at first following the pattern of the continental countries from whence England had inherited the Italian law merchant, eventually developed in its own unique way. Legislation did not play any important role in the development of marine insurance principles until 1906 when the Marine Insurance Act ('the MIA') was passed. While the main purpose of this chapter is to trace abandonment principles through statute law, the discussion would be incomplete without English law¹⁸⁵.

7.2. At first marine insurance disputes were determined by the Admiralty Court, but the struggle between

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The discussion of English law in this chapter allows a comparison with the law set out in the various ordonnances which were passed on the continent up to the end of the eighteenth century. Further, when current English law is discussed in Chapter 9 *infra*, one should be able to determine how the English common law was amended by legislative interference.

the Common lawyers and the Admiralty Court resulted in a series of prohibitions which caused the Admiralty Court to cease exercising jurisdiction over marine insurance matters. Had this not occurred, English marine insurance law may well have followed the same approach as that of the continental where the law was shaped mainly by legislation. Instead, as a result of the influence of the Common lawyers, English marine insurance law developed slowly and laboriously through the precedent system which shaped the general English common law. Two main consequences followed. The first was that English law parted company with continental law and developed its own unique principles relating to abandonment. The second was that the law could not be found in a single instrument or document, but was scattered in hundreds of reported and even unreported judgments of the courts. Against this background one may examine the earliest traces of abandonment in English law.

- 7.3. The earliest mention of abandonment in English law is to be found in the case of *Broke v Maynard and Lodge*¹⁸⁶. No clear principles appear from the

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Sarlis, *op cit*, 27.

record of the case. The understated manner in which the defence was raised and reliance placed on the customs and usages of Lombard Street indicates that the principles of abandonment were well known, of long standing and of uniform application at the time. Generally speaking, the customs of Lombard Street were similar to those practised in Antwerp¹⁸⁷, no doubt because of the close trade links between London and the trading towns of northern Europe. There is strong evidence that London marine insurance practice took its cue from the usages and customs of the Antwerp Exchange. For example, the policy dating back to 1555 on the *Santa Cruz* refers to the usages of London and the Antwerp Exchange¹⁸⁸, a strong indication that the usages of the Antwerp Exchange influenced insurance practice in England.

- 7.4. The earliest writing on marine insurance in England was by Malynes, who mentioned that the assured could '*make a renunciation of all the goods to the assurers ... when there is no hope of recovery of any part thereof*'¹⁸⁹, an approach

187 Raines, *History of British Insurance*, (1948), Chapters I and II.

188 Dover, *op cit*, 32.

189 *Consuetudo, vel, Lex Mercatoria*, (1685), Chapter XXV, 115.

which does not limit the right to abandon to a *numerus clausus* like the majority of continental ordonnances. Magens, on the other hand, was a German, and treated the subject more in the continental manner, listing the circumstances under which the assured may abandon as

*'the loss of the ship, or of goods insured, of the detention by princes, and of any other accidents for which the insurers are answerable'*¹⁹⁰.

He dealt with the missing ship separately. If no news were received of the ship for a year in respect of ordinary voyages and two years in respect of those of great distance, the assured could abandon¹⁹¹. Two things are apparent from Magens' approach. The first is that the circumstances under which the assured could abandon were more broadly defined in England than on the continent. The second is that the case of the missing ship was provided for as a distinct and separate situation, as on the continent.

7.5. By the time James Allan Park published his

190 *Op cit*, 174.

191 Magens, *op cit*, Vol II, 177.

treatise on marine insurance in 1786 the distinction in English law between an actual total loss and a constructive total loss had become clearer¹⁹², although there was not yet a complete separation. According to Park, total loss with respect to insurance meant that

*'by some of the usual perils, it (the thing insured) is become of so little value, as to entitle the insured to call upon the underwriter to accept of what is saved, and to pay the full amount of his insurance, as if a total loss had actually happened.'*¹⁹³

Some continental influence¹⁹⁴ was still apparent from Park's discussion of the principles of abandonment, but he relied mostly on the judgments of the English courts, especially the judgments of

192 Park, *A System of the Law of Marine Insurances*, (1786), 161: 'Indeed, the word abandonment conveys the idea, that the whole property is not lost; for it is impossible to cede or abandon that which does not exist.' (References are to the first American edition, published in 1789 in Philadelphia, but apparently printed from the same plates as the original London edition.)

193 *Op cit*, 161.

194 In his discussion of abandonment he referred to continental writers like Pothier and Roccus and relied on the *Guidon de la Mer* and continental ordonnances like those of Bilbao, Rotterdam and the *Ordonnance de la Marine* of Louis XIV as authority for his views.

Lord Mansfield¹⁹⁵.

- 7.6. Marshall¹⁹⁶, writing shortly after Park, echoed Park's approach. By the time of the fifth edition of his work in 1865¹⁹⁷ the distinction between total and partial losses and between actual and constructive total losses had been clarified¹⁹⁸. According to Marshall, total losses were understood in two senses, namely natural and legal total losses.

*'In its natural sense it signifies the complete and absolute destruction in whole or in part, of the thing insured. In its legal sense, it also means such damage to the thing insured, though it specifically remain, as renders it constructively and in a mercantile sense of no value to the owner.'*¹⁹⁹

- 7.7. Although abandonment was mentioned in an earlier

195 Lord Mansfield played a very large role in organising the customs relating to marine insurance into a workable body of legal principles.

196 *A Treatise on the Law of Insurance*, (1802), Book I.

197 *A Treatise on the Law of Marine Insurance*, 5th ed, (by William Shee), (1865), Book I.

198 *Op cit*, (1865), Book I, 373.

199 *Op cit*, (1865), Book I, 373.

case²⁰⁰, the first case in which the principles of abandonment were fully gone into was *Goss v Withers*²⁰¹. It was tried before Lord Mansfield and a jury and the single question upon which the decision turned was '*whether the insured had upon all the circumstances ... an election to abandon.*'²⁰² Lord Mansfield held that the assured has the right to abandon upon a capture '*or any other such disturbance as defeats the voyage, or makes it not worthwhile or worth the freight, to pursue it.*'²⁰³ It is apparent from the judgment that, although the loss had to be by a peril insured against²⁰⁴, the effect of the event rather than its precise nature is important to the assured's right to abandon. While Lord Mansfield did not elaborate on the origins of abandonment, he did, by way of an interjection

200 *Pringle v Hartley* 3 Atk 195. According to Marshall, *op cit*, (1865), Book I, 444, this was the first case on abandonment in England on the right to abandon. This statement may not be strictly correct if *Broke v Maynard and Lodge* (see Chapter 4 *supra*) is regarded as a case on abandonment.

201 2 Burr 683.

202 At 695.

203 At 697. This statement was taken over directly from article 1 of Chapter VII of the *Guidon de la Mer* and is the clearest example of the influence of the *Guidon* on English law.

204 Some of the risks insured against were described in the policies usually concluded in terms very similar to the descriptions of the events which gave rise to the right to abandon in continental ordonnances, like loss '*by capture or detention of princes*'.

during the argument, state that 'it goes so far back as the Rhodian law and the laws of Oleron'²⁰⁵.

7.8. Marshall, like Park²⁰⁶, thought that abandonment dated back to the origins of insurance itself, but was of the view that it did not result from the nature of the contract²⁰⁷. He was of the opinion that it probably resulted from a practice of occasionally introducing into policies peculiar stipulations enabling the assured to abandon, which practice later became the general rule²⁰⁸.

7.9. After *Goss v Withers* the principles of abandonment were discussed and refined in a large number of decisions²⁰⁹. In many cases the judges referred

205 However, no traces of abandonment can be found in those sources. It seems probable that at Lord Mansfield's time the origins of abandonment, like those of insurance, had already been lost in the mists of time, but that the right to abandon had become firmly fixed in practice and the common law.

206 *Op cit*, 161-162.

207 *Op cit*, (1865), Book I, 443.

208 *Op cit*, (1865), Book I, 444. This view did not take into account the origins of abandonment in the simulated sale contract.

209 Of these some of the earlier decisions are noteworthy, like *Hamilton v Mendes* 2 Burr 1199, (1761); *Da Costa v Firth* 4 Burr 1966, (1766); *Milles v Fletcher* 1 Dougl 231, (1779); all decided by Lord Mansfield; *Cazalet and Others v St Barbe* 1 TR 187, (1786), before Justice Buller; and *Barker v Blakes* 9 East 281, (1808), before Lord Ellenborough. Two cases almost a century later belong to the same class of landmark decisions, namely *Rankin v Potter and Others* (1873) 42 LJ Rep 169 (HL) and *Kaltenbach v MacKenzie* (1870) 46 LJ Rep 9 (CPD), 3 CPD 467 and 3 App Cas 467.

to and relied upon continental authors and ordonnances²¹⁰, yet English law differed in many respects from continental law²¹¹. It is clear from these judgments that abandonment had its origins in the common law, which gave effect to merchants' customs on the subject, and that the MIA mainly restated the existing English common law of insurance²¹².

- 7.9.1. While the concept of a constructive total loss lies at the heart of English law on the subject of abandonment, there was not always such a clear recognition of a constructive total loss as a separate category of loss²¹³. It was recognized from an early stage, however, that there were circumstances under which the ship or cargo could be irretrievably lost to the assured even though they may continue to exist, and that the effect of such an event was the same as if the ship or goods

210 Sarlis, *op cit*, 29; Raines, *op cit*, 175.

211 *Ibid*.

212 Although it was at first meant to be a codification of existing law, the Marine Insurance Act 1906 ('the MIA') introduced some important alterations to the common law relating to abandonment; Sarlis, *op cit*, 29. The function of the English courts since 1906 has mainly been to explain and interpret its provisions.

213 Park, for instance, did not distinguish between actual and constructive total losses; *op cit*, Chapter IX. Neither did his contemporary, John Weskett, *A Complete Digest of the Theorie, Laws and Practice of Insurance*, (1781), 1-5, s v 'Abandonment'.

had actually sunk or perished²¹⁴. The concept of a total loss was therefore taken to include a constructive total loss²¹⁵. The perils which usually gave rise to a constructive total loss were capture²¹⁶ and arrest of princes²¹⁷, detention²¹⁸, barratry²¹⁹ and shipwreck²²⁰ but not mere stranding²²¹, but this was not an exclusive list, as the same result could follow as a result of any other peril insured against²²² provided the voyage was wholly defeated, not merely retarded²²³. The term 'constructive total

214 ' (W)hen we speak of a total loss ... we do not always mean that the thing is absolutely lost and destroyed: but that by some of the usual perils, it is become of so little value as to entitle the insured to call upon the underwriter to accept what is saved and to pay the full amount of his insurance, as if a total loss had actually happened'; Park, *op cit*, 161. See also Weskett, *op cit*, 545; *Moss v Smith* (1850) LJCP 225.

215 *Adams v MacKenzie* (1863) 1 Asp 272; Hannen & Pritchard, *Pritchard's Digest of Admiralty and Maritime Law*, 3rd ed, (1887), Vol I, 1066; Cambanis, *Constructive Total Loss*, Dissertation, University of London, (1957), 3-4. This principle is also accepted by section 56(2) of the MIA.

216 Park, *op cit*, 73.

217 Marshall, *op cit*, (1865), Book I, 453.

218 Park, *op cit*, 87. A detention is an arrest or embargo, in time of peace or war, laid on by the public authority of the state; Park, *loc cit*; Pollock & Bruce, *A Compendium of the Law of Merchant Shipping*, 4th ed, (1881), Vol I, 488, 529.

219 Park, *op cit*, 93; Pollock & Bruce; *op cit*, Vol I, 490.

220 Park, *op cit*, 161; Marshall, *op cit*, (1865), Book I, 472.

221 Marshall, *op cit*, (1865), Book I, 472.

222 Park, *op cit*, 161.

223 Marshall, *op cit*, (1865), Book I, 474-475.

loss' was first used in a reported case by Lord Ellenborough in 1812, in an interjection during counsel's address²²⁴. It has since been subjected to strong criticism²²⁵, but has survived to the present²²⁶, to the extent that it is now understood wherever insurance is practised. Initially there was no exact dividing line between an actual and a constructive total loss. The decisive feature appears to have been that in the case of a constructive total loss something of measurable value remained at the place where the ship or goods were²²⁷. The essential difference between an actual and a constructive total loss was that in the latter case the assured could only recover for a total loss, that is the full sum insured, upon a proper abandonment²²⁸.

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- 224 *Mellish v Andrews* (1812) 15 East 13; *Cambanis*, op cit, 13.
- 225 *Irving v Manning* 6 CB 419; *Rankin v Potter* (1873) 6 AC 83 (HL) at 135 and 166.
- 226 Section 60(1) of the MIA.
- 227 *Park*, op cit, 161; *Marshall*, op cit, (1865), Book I, 373; *Cambanis*, op cit, 7. In *Roux v Salvador* (1836) 3 Bing (N.C.) 266 at 286-287 Lord Abinger stated that '... if ... it (the ship) becomes totally destroyed or annihilated by the perils insured against or is by the same perils wholly and irretrievably lost to the assured, so that it is totally out of his power or that of the Underwriter to procure its arrival, this latter is bound to pay the sum insured.'
- 228 *Marshall*, op cit, (1865), Book I, 443: '(H)e must renounce and yield up to the insurer all his right, title and claim to what may be saved, and leave it to him to make the most of it for his own benefit. The insurer then stands in the place of the insured and becomes entitled to all that can be rescued from destruction.' This passage in Marshall's work could equally have been written to explain the process which occurred in the simulated sale when the condition upon which the 'sale' was dependant was fulfilled, and tends to confirm the conclusion that abandonment was

7.9.2. Under the English common law the missing ship was treated as a case of presumed loss by a peril insured against. The presumption was triggered if no news was received of the ship within a reasonable time²²⁹. It was presumed that the ship had foundered at sea '*because a loss proceeding from any other cause, would probably, sooner or later, have been heard of.*'²³⁰ The assured had to prove that the loss occurred during the insured period as there was no presumption as in some continental countries to assist him in this regard²³¹. The assured had to make a proper abandonment if he wanted to recover the full sum insured, as in a case of a constructive total loss²³². The insurer was regarded as the owner of the ship if she were to re-appear after payment²³³.

7.9.3. In the case of damage to the ship or goods, the

the product of the simulated sale. See also Pollock & Bruce; *op cit*, 528 and 538; Hannen & Pritchard, *op cit*, 1066; Cambanis, *op cit*, 8; *Kaltenbach v MacKenzie* (1878) 3 CPD 467.

229 Park, *op cit*, 71-72; Pollock & Bruce, *op cit*, Vol I, 484; Cambanis, *op cit*, 9.

230 Marshall, *op cit*, (1865), Book I, 387.

231 Cambanis, *op cit*, 9.

232 Marshall, *op cit*, (1865), Book I, 485.

233 *Houstman v Thornton* (1816) Hol & N P 242.

test to decide whether the loss was a constructive total loss or merely an average loss was whether a prudent uninsured owner on the spot would have incurred the expense of repairing. If he would not, the loss was a constructive total loss²³⁴. In insurance of the freight, no simple test appears to have been devised and every case was determined according to its own facts²³⁵.

- 7.9.4. Whether a loss was partial or a constructive loss was determined according to the facts as they were on the date action was commenced, and not as they were at the time the notice of abandonment was given²³⁶. Once a constructive total loss was present, the assured had a right, not a duty, to abandon²³⁷, but had to exercise that right in such a way that the insurer was not prejudiced.

234 Marshall, *op cit*, (1865), Book I, 472-473; *Young v Turing* 2 M & G 593; *Irving v Manning* 6 CB 419; *Moss v Smith* 9 CB 94; *Roux v Salvador*, *supra*; *Pollock & Bruce*, *op cit*, Vol I, 530; *Hannen & Pritchard*, *op cit*, Vol I, 1070.

235 For examples, see *Pollock & Bruce*, *op cit*, Vol I, 534-535. In *Rankin v Potter*, *supra*, the interesting situation arose that there remained no freight to abandon and the court held that the assured's failure to give notice of abandonment did not preclude him from claiming the full indemnity in the circumstances. The assured could abandon the freight to the insurer of the freight if a constructive total loss of the ship occurred; *Benson v Chapman* 6 M & G 810; *Hannen & Pritchard*, *op cit*, Vol I, 1078.

236 *Park*, *op cit*, 165 and 181-183; *Marshall*, *op cit*, (1865), Book I, 454-455; *Hamilton v Mendes* 2 Burr 1210; *Naylor v Taylor* 9 B & C 718. The rule was doubted by Lord Eldon in *Smith v Robertson* 2 Dow 474. In French and American law the facts as they are at the time of notice of abandonment are decisive and final; *Pollock & Bruce*, *op cit*, 538.

237 *Marshall*, *op cit*, (1865), Book I, 478.

7.9.5. Notice of abandonment could only be given by the owner of the insured ship or goods, or by his authorised agent²³⁸, and had to be given to the insurer or his authorised agent²³⁹. This was so because the abandonment transferred property. The abandonment had to be total²⁴⁰, unconditional²⁴¹, and express and direct in its terms²⁴². It had to be made within a reasonable time of knowledge of the loss²⁴³. An unreasonable delay in giving notice was taken to be a waiver of the right to abandon²⁴⁴. No formality was required and notice could be given in writing, which was the usual method, or even verbally²⁴⁵. Acceptance of the abandonment made it irrevocable and binding on the insurer, even if the underlying

238 *Rankin v Potter, supra*; Pollock & Bruce, *op cit* Vol I, 539.

239 Marshall, *op cit*, (1865), Book I, 486.

240 Park, *op cit*, 162; Marshall, *op cit*, (1865), Book I, 486-487; Pollock & Bruce, *op cit*, Vol I, 539.

241 Marshall, *op cit*, (1865), Book I, 487.

242 *Parmeter v Todhunter* (1808) 1 Camp 541; Pollock & Bruce, *op cit*, Vol I, 539.

243 *Gernon v The Royal Exchange Assurance Company* 6 Taunt 383; *Kaltenbach v MacKenzie, supra*; Pollock & Bruce, *op cit*, Vol I, 540; Hannen & Pritchard, *op cit*, Vol I, 1067 and 1082.

244 Marshall, *op cit*, (1865), Book I, 479.

245 *Parmeter v Todhunter, supra*; Marshall, *op cit*, (1865), Book I, 485; Pollock & Bruce, *op cit*, Vol I, 539.

facts did not justify the abandonment²⁴⁶.

7.9.6. The effect of the abandonment was that it entitled the assured to claim the full amount of the insurance. It also transferred the whole property and interest in the thing insured to the insurer retro-actively as from the date of the loss²⁴⁷. In under-insurance the assured retained the *pro rata* proportion in respect of which he was regarded as self-insurer²⁴⁸. Marshall was of the view that the insurer should not be required to become the owner of the thing insured against his will²⁴⁹, a view which may have resulted in a deviation from the common law when the MIA was finally enacted in 1906²⁵⁰. Freight earned after the transfer accrued to the insurer²⁵¹ of the ship as owner of the ship. If, after payment of the loss, the assured received payment from a

246 Hannen & Pritchard, *op cit*, Vol I, 1067 and 1085.

247 *Cammell v Sewell* 3 H & N 617; *S.C. in Cam. Scacc.* 5 H & N 728; *Stewart v Greenock Marine Insurance Company* 2 HL Cas 159; Marshall, *op cit*, (1865), Book I, 487; Pollock & Bruce, *op cit*, Vol I, 541; Hannen & Pritchard, *op cit*, Vol I, 1081 and 1086.

248 Marshall, *op cit*, (1865), Book I, 493.

249 *Op cit*, (1865), Book I, 443.

250 See section 63(1).

251 *Case v Davidson* 5 M & S 82; Marshall, *op cit*, (1865), 493; Pollock & Bruce, *op cit*, Vol I, 541-542.

third party, that payment had to go to the insurer²⁵², but this was probably a consequence of the doctrine of subrogation rather than abandonment²⁵³.

- 7.10. In 1906 the MIA was passed into law in England and she thus followed the continental countries into the codification of their marine insurance law. When English law after the MIA is discussed in Chapter 9 one will be able to determine to what extent the English common law was changed by it.

8. CODIFICATION IN EUROPE

- 8.1. The great movement for the codification of the law in Europe gained momentum with the French Revolution towards the end of the eighteenth century and between 1806 and 1900 the codification process was completed in France²⁵⁴, the

252 Marshall, *op cit*, (1865), Book I, 495; *Randal v Cochran* 1 Ves Sen 98.

253 It appears that abandonment and subrogation were not yet seen as separate from each other at this stage of the development of English law. See Chapter 12 *infra* in this regard.

254 In France the whole body of the law was codified in four separate codes, the *Code de Procédure civil*, (1806), the *Code de Commerce*, (1807), the *Code d'Instruction Criminelle*, (1808), and the *Code Pénal*, (1810). Together these codes became known as the *Code Civil*; Van Zyl, *Beginnels van Regsvergelyking*, (1981), 82.

Netherlands²⁵⁵ and Germany²⁵⁶. In each case commercial law was taken up in a separate code which included marine insurance law. In England there was no general codification of the law, but some branches of commercial law were codified separately by the enactment of statutes dealing with specific topics²⁵⁷. The MIA is such an act and was passed after a lengthy period of uncertainty and opposition in 1906²⁵⁸. The provisions taken up in these codes still form the backbone of marine insurance law in those countries. While they cannot be regarded as the final destination of marine insurance law, they must be taken to reflect current law in those countries. When their provisions on abandonment are considered in detail in the next part of this study where the current law in the Netherlands,

255 In Belgium and the present Netherlands legal developments were common to both when they were still joined to each other; Van Zyl, *op cit*, 93-94. They were separated in 1830, however. After the imposition of the Napoleonic Code for a short while, the *Code Civil* including the *Code de Commerce* was imposed on the Netherlands with effect from 1 March 1811 after the incorporation of the Netherlands in the French Empire; Van Zyl *op cit*, 109. After the Netherlands regained its independence and the separation from Belgium was completed in 1830, the present *Wetboek van Koophandel* was promulgated with effective date 1 October 1838; Van Zyl, *op cit*, 110.

256 In Germany the codification process was slow, and the *BGB* and *HGB* only came into operation on 1 January 1900; Van Zyl, *op cit*, 138.

257 Van Zyl, *op cit*, 184.

258 On the legislative process and problems which accompanied the passing of this act, see Hassoun, *The History of the Marine Insurance Act, 1906 and its Interpretation by the Courts*, MPhil thesis, London University, (1970), 1-63.

Germany, France, England and America is examined, the degree with which the later statutes merely built on the prior ordonnances will become apparent.

9. THE COLONIES

While the law relating to marine insurance was an important aspect of the customs and laws of the colonial powers to be taken to the Americas²⁵⁹, Africa²⁶⁰, the Near East²⁶¹ and to Australia²⁶² and New Zealand²⁶³, the law relating to abandonment was so settled already that no contributions were made to the development of its principles by the colonies. What did occur,

259 The French *Code de Commerce* was adopted or influenced the law in North and South American countries and states, like Louisiana and Quebec, (Van Zyl *op cit*, 101-103), Haiti, Bolivia, Uruguay, Argentina, Paraguay and the Dominican Republic, (Van Zyl, *op cit*, 99-100). English common law became the law of America and Canada; Van Zyl, *op cit*, 195.

260 French law as embodied in the *Code de Commerce* was also carried to French territories in Africa, like Algeria, Tunisia, Morocco, Senegal, Mali, Niger and the Ivory Coast; Van Zyl, *op cit*, 104. English common law was taken to a number of British colonies in Africa, (Van Zyl, *op cit*, 196), but not to South Africa and Zimbabwe, which inherited Roman-Dutch law.

261 Turkey's commercial law is based largely on the French *Code de Commerce*; Van Zyl, *op cit*, 103.

262 An English act of 1828 provided for English common law to be the law of the Australian colonies, and it still is the law of Australia; Van Zyl, *op cit*, 195. A marine insurance act which was based on the *MIA* was enacted for Australia in 1909.

263 New Zealand also adopted English common law wholeheartedly; Van Zyl, *op cit*, 195. In New Zealand marine insurance law is also regulated by an act, passed in 1908, which was based on the *MIA*. It was amended in 1975.

however, is that the law of the colonial powers spread to the far corners of the world. This gave the codes passed in Europe in the nineteenth century a reach into new lands where the influence of these codes is still felt.

10. CONCLUSION

10.1. Two things are clear from this review of the development of abandonment principles through legislative intervention. The first is that the earliest ordonnances at first restated the existing customs while later ordonnances dealt with abandonment in a more innovative and scientific manner. The second is that a virtually uniform set of rules regulating abandonment developed and became applicable throughout the continent. In the creation of this set of rules, the *Guidon de la Mer*, the Amsterdam Ordonnance of 1598 and the *Ordonnance de la Marine* of 1681 played leading roles. These rules differed only in minor respects from the law in England, where the unique concept of a constructive total loss had developed during the same period.

10.2. While there were some variations between the

different jurisdictions, the basic principles of abandonment which applied through the customary law of the *Guidon de la Mer* and the Usages and Customs of the Antwerp Exchange and the statute law of the various jurisdictions could be summarised as follows:

- 10.2.1. The assured had a right to abandon in the circumstances allowed by the law or the policy. There was no obligation upon him to abandon, except that he could not recover the full amount of the insurance unless he did so.
- 10.2.2. The precise circumstances under which the right to abandon arose differed slightly from one jurisdiction to the next. Broadly speaking there were three categories of loss giving rise to the right to abandon. Firstly, where the loss was certain and irreversible an immediate right to abandon arose. Secondly, where there was some uncertainty as to whether the insured ship or goods could still be recovered, the right to abandon was delayed for a prescribed period during which the assured was obliged to work for their recovery or release. Lastly, the ship which disappeared without news or trace could be

abandoned after the expiry of a prescribed period if no news of the ship were received during that period. The length of the prescribed period depended on the length of the last voyage.

10.2.3. In some jurisdictions there were specific requirements for the notice of abandonment and its service on the insurer. There were also time limits within which the abandonment had to be made, and if the assured failed to meet them he lost the right to abandon. The abandonment had to be unconditional and had to extend to the full extent of the insured interest.

10.2.4. The consequences of a proper abandonment were generally that the insurer became the owner of the abandoned property and became obliged to pay the full amount of the insurance.

10.3. The scramble to develop commercial links with new lands gained impetus in the sixteenth century and exposed merchants to greater risks, especially the risk of losing their investment in the venture without the ship or goods being actually lost or destroyed. The principle of abandonment was well suited to give additional protection or security

in respect of that type of risk. This probably led to an acceleration of the development of its principles and the further spread of the practice. The principle is now found in the marine insurance law of all the most important industrial countries.

- 10.4. The abandonment provisions which were previously in force in the Netherlands and those which are currently in force in Germany, France, England, America will be considered and compared in the next part of this study. It will then be possible to determine what the most important points of agreement and disagreement between the different legal systems are. It should also be possible to determine to what extent, if any, the previously uniform or at least similar principles of marine insurance were affected in individual countries by the general codification process which took place from the Napoleonic era onwards. One may also be able to determine why the Netherlands has abolished the doctrine of abandonment whilst the other jurisdictions mentioned have retained it, or at least, have taken no steps to abolish it.

PART III: THE NINETEENTH CENTURY TO CURRENT LAW

' (S)ince this contract is substantially the same in different countries, and continues to be the same now that it was formerly, the decisions of the courts, whether ancient or modern, and the opinions of writers, whether American, English, Italian, or French, are equally applicable to it.'¹

CHAPTER SIX

THE NETHERLANDS

1. INTRODUCTION

- 1.1. It was demonstrated in the previous chapters that up to the end of the eighteenth century marine insurance law developed into a body of substantially similar rules in the different continental countries and in England, at first mainly as a result of the influence of the Italian traders in the places where they traded, but later also as a result of the influence of the *Guidon de la Mer*, the Amsterdam Ordonnance of 1598 and the *Ordonnance de la Marine* of 1681. The large scale copying of statutes added momentum to this process so that the principles of marine insurance were the same or very similar in the various places

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Phillips, *A Treatise on the Law of Insurance*, 4th ed, (1854), Vol I, Preface, vii.

where insurance was practised. However, after 1800 the continental countries started to develop and amend their respective national laws on a more national basis with the result that important differences were introduced into the laws of the individual countries on abandonment. These differences are apparent from the comparison in the following chapters of the law as it was applied and developed in the Netherlands, Germany, France, England and America between 1800 and the present.

1.2. The early history of marine insurance in the Netherlands may be recounted briefly before developments in Dutch law² from the beginning of the nineteenth century are considered³.

1.2.1. Insurance practice in the Netherlands was at first

² The law of the province of Holland prior to the codification of the law of all the Netherlands in 1838 is known to South African lawyers as 'Roman-Dutch law'. The post 1838 law of the Netherlands will be referred to here as 'Dutch law' without any intention to diminish the status of the other provinces of the Netherlands.

³ For a more detailed history of the history of maritime law in the Netherlands, including marine insurance, see Goudsmit, *Geschiedenis van het Nederlandsche Zeerecht*, (1882) and Den Dooren de Jong, 'De Praktijk der Amsterdamsche Zeeverzekering in de 17^e eeuw' (1927) VIII *Verzekerings-Archief* 1 et seq. The content of Dutch law before the *Wetboek van Koophandel* ('the WvK') is not discussed in this chapter for two reasons. In the first place it mainly falls outside the period under consideration here. More importantly, however, the Roman-Dutch law of the province of Holland in the seventeenth and eighteenth centuries constituted not only the marine insurance law of the Netherlands generally at that time, but was also the source of South African law, which is discussed in the chapters of Part V. That discussion will not be duplicated here.

strongly influenced by the customs of the Antwerp Exchange and Spanish legislation. The legislation of the Spanish rulers of the Netherlands and the customs and usages of the Antwerp Exchange initially constituted the most important sources of Dutch law of insurance⁴. Subsequently the law of the Province of Holland developed its own peculiar marine insurance principles, which were set out in the local ordonnances of port towns like Amsterdam, Middelburg and Rotterdam.

- 1.2.2. The Amsterdam Ordonnance of 1598⁵ set the pattern for Dutch law for four centuries. It allowed abandonment in three distinct categories of cases⁶. In the first category the assured had an immediate right to abandon the ship in the case of innavigability of the ship, and a similar right to

⁴ The customs of the Antwerp Exchange and the Spanish legislation which preceded the sacking of Antwerp underpinned subsequent developments in insurance law and practice in Amsterdam and the other towns of the province of Holland; Van Niekerk, *An Introduction to and some Perspectives on the Sources and Development of Roman-Dutch Insurance Law*, ('Introduction'), (1988), 15-17.

⁵ The abandonment provisions of the ordinance are explained by Hugo de Groot, *Inleidinge tot de Hollandsche Regtsgeleerdheid*, ('Inleidinge'), (1631) at 3.24.10 to 14. Cornelis van Bijnkershoek, *Quaestiones Juris Privati*, ('QJP'), (1744), 4.17 also had occasion to report on the concept of abandonment as known in his time. Dutch marine insurance practice and principles were also discussed in a number of theses written during the currency of the Amsterdam Ordinance of 1598. See for example Ochs, *De Contractu Assecurationis Vulgò Assecuranz*, doctoral thesis, Leiden, (1699); Vegesack, *De Assecuratione quam numine summo annuente*, licentiate, Leiden, (1704). Other theses were written after the Rotterdam Ordinance of 1721 was promulgated. These are mentioned below.

⁶ In articles 5, 8, 9 and 25. The Middelburg Ordinance of 1600 (articles 12, 15, 16 and 26) and the Rotterdam Ordinance of 1604 (articles 12, 13, 14 and 15) followed the same pattern.

abandon the ship or goods in the cases of capture or pillage by the enemy or any other cause where the loss was certain or the damage beyond hope of recovery⁷. In the second category the assured had the right to abandon the ship or goods after the effluxion of certain prescribed periods in the case of an arrest or detention by foreign rulers or unfitness of the ship to complete the voyage arising after commencement of the voyage⁸. The third category comprised the case of the missing ship where the assured could abandon the ship and the goods shipped on her after the effluxion of similar prescribed periods if no news of the ship were received during the relevant period⁹. These different categories were maintained in the Amsterdam Ordonnance of 1744¹⁰ and the *Wetboek*

7 The causes falling within this category are distinguished by the feature that the fact of the loss and its effect on the patrimony ('*boedel*') of the assured are certain.

8 The distinguishing feature of this category is that the ship or goods insured are so removed from the possession and control of the assured that it is uncertain whether he will recover them in the foreseeable future or at all.

9 The case of the missing ship has always been a separate category. It has features in common with both the prior categories. The loss may well be final on the existing facts, yet without the assured's knowledge. The assured therefore cannot prove a loss by a peril insured against without the assistance of a presumption.

10 (Articles 26, 27, 28 and 29), as also by the Rotterdam Ordonnance of 1721 before it, (articles 60, 61, 62 and 67). These ordonnances were considered in detail by Dionysius van der Keessel, *Theses Selectae Juris Hollandici et Zelandici*, (1800), 3.24.12 to 14 and *Praelectiones Juris Hodierni*, (translated and published in South Africa 1961-1967) 3.24.12 to 14 and Johannes van der Linden, *Regtsgeleerd, Practicaal en Koopmans Handboek*, ('*Koopmans Handboek*'), (1806), 4.6.8 and 11. Prior to 1838 a number of theses on insurance were submitted at Dutch universities, for example by Ochez, *De Contractu Assecurationis Vulgò Assecuranz*, doctoral thesis, Leiden, (1699); Vegesack, *De Assecuratione quam numine summo*

van Koophandel of 1838 ('the WvK')¹¹.

- 1.2.3. The pressures in favour of codification of the law were felt in the Netherlands too at the beginning of the nineteenth century and in the approach to the policy to be adopted in the drafting of a code a conflict between the old Dutch customary law and French law became apparent¹². Napoleon then conquered the Netherlands and imposed the Code Napoleon on them in 1811¹³. In 1813 the

annuente, licentiate, Leiden (1704); Van Ghesel, *Theoreticae-Practicae De Assecuratione*, doctoral thesis, Leiden, 1725; Den Beer, *De Assecurationibus*, doctoral thesis, Utrecht, (1729); Wieling, *De Assecuratione, ejusque instrumento quo vulgo polizza dicitur*, doctoral thesis, Utrecht, (1752); and Harckenroth, *De Assecuratione, et Bodemeria*, doctoral thesis, Utrecht, (1756). However, abandonment did not feature prominently in their content.

¹¹ Notwithstanding that its abandonment provisions have been repealed recently, the articles of the WvK on the subject will be discussed in the following text for two main reasons. In the first place it allows the development of Dutch law from 1598 to the present to be presented as a complete unit with its own lessons for South Africa. In the second place it will allow a proper comparison to be made with German, French, English and American law in the following chapters.

¹² It was the King's desire that the commission entrusted with the task of preparing the code should not ignore French law, and should make use of the Code de Commerce ('the CdeC'), but without following it slavishly if there were contrary principles in force in the Netherlands; Enschedé, *De Hoofdbeginselen van het Zee-Assurantie-Recht*, LLD thesis, University of Amsterdam, (1886), 10. In 1809 the King gave instructions that a draft code of commercial law be prepared, which was completed that year and codified the 'keuren, usantiën en geldende praktijk'; Dorhout Mees, *Schadeverzekeringsrecht*, 4th ed, (1967), 8 (referred to below as 'Schade'). The commission entrusted with the task to draft a code included Johannes van der Linden; Enschedé, *op cit*, 10. See also Van Nievelt, *Bronnen van de Nederlandse Codificatie van het Zee- en Assurantierecht 1788-1822*, LLD thesis, Leiden, (1978) and Haanappel and MacKaay, *Nieuw Nederlands Wetboek: Het Vermogensrecht*, (1990), xiii.

¹³ The French notions of marine insurance were not entirely compatible with those of the Dutch, and the differences also related to abandonment. The French approach that a total loss arises in the case of certain 'sinistres majeurs' without regard to the probability of recovery was so much against the prevailing Dutch attitude that the Amsterdam insurers immediately added clauses to their policies which precluded an abandonment except in cases where the insured ship or goods were indubitably lost or where no well-founded hope of recovery remained; Benecke, *A Treatise on the Principles of Indemnity in Marine Insurance, Bottomry and Respondentia*, (1824), 347.

Netherlands regained their freedom, but it took until 1838 before the WvK was adopted in a form acceptable to the Dutch¹⁴. The end product, however, was a compromise between the '*zuiver nationale gedeelte van het wetboek*' and the French law of the *Code de Commerce*¹⁵ ('the CdeC'). It was in the abandonment provisions of the WvK that the French influence of the CdeC was the most obvious and made the greatest impact, bringing the principles of abandonment in the whole of the Netherlands in line with those of France, and even Belgium, which had adopted the French approach more readily¹⁶.

1.3. Slightly differing reasons for the existence of the concept of abandonment have been advanced by Dutch writers.

1.3.1. According to Schook¹⁷, the doctrine of

¹⁴ Enschedé, *op cit*, 9-11. See also Lokin and Zwolve, *Hoofdstukken uit de Europese codificatiegeschiedenis*, 2nd ed, (1992).

¹⁵ Nolst Trenité, *Zeeverzekering*, 2nd ed, Vol II, 640; Enschedé, *op cit*, 9. The '*nationale gedeelte*' included the pre-existing Dutch legislation and customs.

¹⁶ One of the consequences of this harmonisation of the law of France, Belgium and the Netherlands was that Belgian and Dutch lawyers relied more heavily on the writings of the famous French lawyers like Valin Pothier and Émerigon in matters relating to marine insurance. See for example the doctoral theses of Schook, *Het Abandonnement*, Utrecht, (1858) and Mens Fiers Smeding, *Eenige Opmerkingen over het Recht van Abandonnement*, Leiden, (1895).

¹⁷ *Op cit*, 13.

abandonment was based on equity, as a natural and necessary consequence of the contract of insurance, and was designed to resolve the difficulty with proof, in certain circumstances, of an actual total loss. Two aspects of Schook's explanation deserve comment. In the first place, abandonment is linked to the indemnity principle by the fact that it is regarded as a necessary consequence of the nature of the contract. The second is that its effect is to introduce a presumed total loss.

1.3.2. Mens Fiers Smeding¹⁸ appears to have favoured the idea that the concept of an abandonment was necessary in the interests of allowing the assured to re-invest his capital sooner, which he would not be able to do if he had to wait for confirmation that the loss was certain. In order to achieve this the law created a presumed loss. Nolst Trenité¹⁹ followed a similar approach.

1.3.3. Dorhout Mees²⁰ also saw abandonment as a necessary means of bringing an end to the

18 *Op cit*, 28-29.

19 *Op cit*, Vol II, 640.

20 *Schade*, 637-638.

uncertainty which could prevail for a long time in cases where the loss was probable but not certain. If the assured had to await certainty, the insurance would not achieve its purpose. The notion of a presumed loss was therefore implemented, but in fairness the insurer had to be given the right to all the remains of the thing insured. Implicit in Mens Fiers Smeding, Nolst Trenité and Dorhout Mees' views of abandonment is the notion that a loss of an economic nature is involved and that the *raison d'être* is to be found in commercial necessity or expediency.

2. THE CIRCUMSTANCES GIVING RISE TO THE RIGHT TO ABANDON UNDER THE WvK of 1838

- 2.1. Until recently Dutch law did not formally distinguish between total and partial losses²¹, like English²² and German law²³. Its approach had more in common with French law, which also recognized only two categories of loss namely those entitling the assured to abandon and claim

21 Nolst Trenité, *op cit*, 545 used this classification, however, as did Dorhout Mees, *Schade*, 656.

22 The English category of total loss has two subcomponents, namely an actual total loss and a constructive total loss.

23 'Totalverlust' or total loss, abandonment cases and 'Teilverlust' or partial loss.

the full indemnity, and those constituting average losses²⁴. Dutch marine insurance practice, however, recognized an actual total loss as the '*totale vernietiging en onherroepelijk verlies van de verzekerde voorwerpen in hun geheel*'²⁵, but no distinction between that type of loss and losses giving rise to the right to abandon was drawn in the WvK. An abandonment was required in the defined cases mentioned in article 663 of the WvK, and one may conclude that an abandonment was not required in the case of an actual total loss²⁶.

2.2. Insurance practice also recognized two types of total loss, namely a '*feitelijk geheel verlies*', being an absolute or actual total loss, and '*wettelijk geheel verlies*', being similar to but not entirely the same as the constructive total loss of English law²⁷. Examples of a '*feitelijk geheel verlies*' are the complete perishing or

²⁴ Prior to their repeal with effect from 1 January 1992 articles 663-680 of the WvK set out the law on the question of abandonment in much the same way as the CdeC in France did prior to the latest French legislation was passed in 1967. Articles 696 to 721 contain the legal principles to be applied to particular average losses, including the circumstances which entitle an assured to claim for a particular average loss and the quantification of such claims. These articles were not repealed and are still in force.

²⁵ Dorhout Mees, *Schade*, 651.

²⁶ Dorhout Mees, *Schade*, 637.

²⁷ Molengraaff, *Leidraad bij de Beoefening van het Nederlandse Handelsrecht*, (1955), Vol III, 679. Mens Fiers Smeding, *op cit*, 33 pointed out that the concept of a '*wettelijk geheel verlies*' had been taken over from English law.

destruction of the ship²⁸ and damage to the extent that repair is impossible²⁹. There is a 'wettelijk geheel verlies' when the cost of repair would exceed three quarters of the insured value of the ship³⁰ or goods³¹. In the latter instance the insurer is obliged, in the absence of an abandonment, to pay the sum insured less the value of the wreck in terms of article 717 of the WvK³². It is clear from the fact that the value of the wreck has to be deducted from the sum insured that the 'wettelijk geheel verlies' thus recognized by the WvK is not entirely the same as the constructive total loss of English law.

2.3. The WvK³³ distinguished between the same categories of events giving rise to the right to abandon which were already present in the

28 'Vergaan'. See Molengraaff, *op cit*, Vol III, 679.

29 'Onherstelbaarheid'. See Molengraaff, *op cit*, Vol III, 679.

30 Molengraaff, *op cit*, Vol III, 680.

31 Article 666.

32 Article 717: '*Indien de reparatie-kosten meer dan drie vierden der waarde van het schip zouden belopen, moet het schip, ten aanzien van den verzekeraar, gehouden worden als afgekeurd; en de verzekeraar is alsdan, voor zoo verre geen abandonnement heeft plaats gehad, verplicht de som waarvoor hij verzekerd heeft, aan den verzekerde te betalen, onder korting van de waarde van het beschadigde schip of wrak.*'

33 Chapter III, Book II, Title 9, articles 663-684.

Amsterdam Ordonnance of 1598. Under article 663³⁴ the assured could abandon the ship or goods insured to the insurer in five cases namely shipwreck³⁵, stranding with breaking up³⁶, unfitness of the ship through a maritime peril³⁷, destruction or damage caused by a maritime disaster³⁸, arrest or detention by a foreign

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Article 663 (1): 'De verzekerde schepen en goedere kunnen aan de verzekeraar geabandonneerd of overgelaten worden in geval: Van schipbreuk; Van stranding met verbrijzeling; Van onbruikbaarheid door zeeschade; Van vergaan of bederf door zeeramp; Van opbrenging of aanhouding door eene vreemde mogendheid; Van aanhouding door de Nederlandsche regering na het begin van der reis.' See generally Schook, *op cit*; Mens Fiers Smeding, *op cit*; De Smet, *Traité Théorique et Pratique des Assurances Maritime*, 2nd ed, (1959-1960) Vol III, para 1711; Van Barneveld, *Inleiding tot de Algemene Assurantië kennis*, 10th ed, (1978), 484. In many cases the insurance contracts concluded in the Netherlands have a clause which makes English law applicable. Such a clause is enforceable. In *N.V. Hollandsche Assurantie Sociëteit van 1841 v N.V. Volker Aanneming 1964 Schip en Schade 194* the insurance was placed at the Amsterdam Exchange, but English law was made applicable by the policy. When the assured was nationalised and lost the power to dispose, ('de beschikkingsmacht'), over his ships insured completely, even though he was left in possession as agent of the Indonesian Government, this was held by the court, (Hof Amsterdam on appeal from the Arr-Rechtbank Amsterdam), to constitute a deprivation of possession and a constructive total loss in English law. Judgment was granted accordingly. The judgement of the trial court is also reported, (1962 *Schip en Schade* 73), and reflects the wide variety of authority referred to in argument by the parties. The draft *Wetboek* of 1809 provided for the right to abandon as follows: *De geassureerde schepen en goederen kunnen geabandonneerd, of aan den assuradeur overgelaten worden, wanneer er zekere tijding is ingekomen, dat het verzekerde schip of goed is vergaan, geroofd of genomen, en voor een goede prijs verklaard is, bedorven, of door de zee onbruikbaar is geworden, zonder dat er eenige hoop is om dezelve te redden of terug te bekomen*'; Enschedé, *op cit*, 151. This accorded more accurately with the Amsterdam Ordonnance of 1744 than the ultimate provisions of article 663(1) of the *WvK*, and the influence of the *CdeC* is probably responsible for the change. Since the Paris Convention shortly thereafter abolished the taking of prizes, one of the causes contemplated by the draft fell away and it was therefore not taken up in Article 663; Enschedé, *loc cit*.

35

'schipbreuk'.

36

'stranding met verbrijzeling'.

37

'onbruikbaarheid door zeeschade'.

38

'vergaan of bederf door zeeramp'.

power³⁹ or detention by the Netherlands Government after commencement by the voyage⁴⁰. Article 667 added the sixth case namely that of the missing ship⁴¹.

- 2.4. By reason of its effect of divesting the assured of his ownership in the ship or goods insured and vesting it in the insurer an abandonment could only be made by the assured or his authorised agent to the insurer or the latter's authorised agent⁴². It is also clear from the unambiguous wording of article 663(1) that only the insured ship or insured goods (or both) could be abandoned. The freight, anticipated profits and bottomry and average monies were therefore not capable of being abandoned, even if they were

³⁹ 'opbrenging of aanhouding door eene vreemde mogendheid', which is the same as the 'arrêt d'une puissance étrangère' of article 369 of the CdeC; Enschedé, *op cit*, 151. The Amsterdam Ordonnance of 1744 used the phrase 'by Vyanden gerooft/genoomen ...' in article 28 and the Rotterdam Ordonnance of 1721 'genomen ... of gearresteert' in article 60 without reference to a foreign power.

⁴⁰ 'aanhouding door de Nederlandsche regeering na het begin der reis'. This cause was first introduced in the drafting process in 1835; Enschedé, *op cit*, 151. Articles 369 and 370 of the CdeC were to the same effect.

⁴¹ Article 667 (1): 'De verzekerde kan aan de verzekeraar alomede abandonnement doen en vervolgens de betaling vorderen, zonder dat er bewijs van het vergaan van het schip noodig zij, indien, te rekenen van den dag van het uitzeilen van het schip, of van den dag, tot welken zich de laatst ontvangene berigten uitstrekken, in het geheel geene tijding van hetzelfde is aangekomen ...' The article then proceeds to lay down different periods for voyages of different duration.

⁴² This is also the case in German, French and English law.

properly the subject of the insurance⁴³.

2.5. The precise circumstances of the different causes were limited not only by the historical definitions of the relevant causes in Dutch law, but also by the further provisions of the WvK⁴⁴.

2.5.1. The first three causes namely shipwreck, stranding with breaking up and unfitness could only apply to the ship insured and not to the cargo, unless the cargo was irrecoverably lost or damaged beyond three quarters of its value, in which event the cargo could be abandoned on the ground that it had perished or had been damaged as a result of a 'zeeramp'⁴⁵.

2.5.2. The word 'schipbreuk' was not interpreted according to its etymological components to mean that the ship must be broken up, but was given its general meaning. Sinking without breaking up was

43

In this respect Dutch law is more similar to French law, which also allows abandonment only in respect of the ship or goods insured, than German and English law, which allow abandonment also of the freight, anticipated profits and bottomry and average monies.

44

Article 663 (2): '*Alles behoudens de nadere bepalingen in de volgende artikelen voorkomende.*'

45

Schook, *op cit*, 21-37; Nolst Trenité, *op cit*, Vol II, 645.

thus included⁴⁶. The notion of shipwreck requires an actual loss of the ship either by her sinking without hope of being raised or by her disintegration to the extent that she ceases to be a ship⁴⁷, or at least '*een geheel of bijna geheel vergaan van het schip*'⁴⁸.

- 2.5.3. Mere stranding was not sufficient in itself to entitle the assured to abandon the ship. The ship also had to break up and be incapable of being saved⁴⁹. Further, as with shipwreck and unfitness, the stranding alone was insufficient to give rise to the right to abandon. The ship or goods also had to be beyond saving in the sense that a loss in the nature of an economic loss had actually occurred⁵⁰. A casualty in the nature of a '*sinistre majeur*' was required⁵¹. Further, only accidental stranding gave rise to the right to abandon. If the ship was deliberately driven

46 Schook, *op cit*, 21-23; Mens Fiers Smeding, *op cit*, 49-50; Nolst Trenité, *op cit*, Vol I, 61 et seq.

47 Mens Fiers Smeding, *op cit*, 50.

48 Nolst Trenité, *op cit*, Vol I, 61.

49 Schook, *op cit*, 27; Mens Fiers Smeding, *op cit*, 53-54; Nolst Trenité, *op cit*, Vol II, 643.

50 Schook, *op cit*, 27; Mens Fiers Smeding, *op cit*, 53-54.

51 Nolst Trenité, *op cit*, Vol II, 643.

ashore by the master in an endeavour to save her cargo, the event gave rise to general average, not abandonment⁵².

2.5.4. Unfitness of the ship to continue her voyage only gave rise to the right to abandon if it was caused by a maritime peril⁵³. The ship was regarded as innavigable or unfit ('onbevaarbaar' or 'onbruikbaar') if she had been damaged to the extent that she could not reach her destination except by the expenditure of an amount exceeding three quarters of her insured value⁵⁴.

2.5.5. Where the vessel was grounded but could be refloated or repaired and could continue the voyage to her destination, and the repair cost did

52 Schook, *op cit*, 28.

53 'onbruikbaarheid door zeeschade'. See Schook, *op cit*, 34-35. The term is a direct translation of the French CdeC's 'innavigabilité par fortune de mer' and clearly demonstrates the French influence on the WvK; Nolst Trenité, *op cit*, Vol II, 644.

54 Schook, *op cit*, 29-37; Mens Fiers Smeding, *op cit*, 56-58; Dorhout Mees, *Schade*, 638. The Amsterdam Ordonnance of 1744 used the phrase 'innavigabel geworden is' (article 28) and the Rotterdam Ordonnance of 1721 the phrase 'vergaan of innavigabel geworden' (articles 60 and 62), while the CdeC had 'innavigabilité par fortune de mer' (article 369). These words and phrases convey the same meaning, namely that the ship or goods must become incapable of being used as a ship as a result of a maritime peril. See also Enschedé, *op cit*, 150-151. Unfitness appeared to Schook, *op cit*, 35 to be a case of an actual total loss, as the ship loses her character as a ship when she is no longer seaworthy. It is submitted that what Schook meant is that the assured's patrimony must definitely be diminished. A loss in the nature of an economic loss therefore had to be present before the assured could abandon.

not exceed three-quarters of the insured value⁵⁵ of the ship, the assured could not abandon her to the insurer⁵⁶. When the repair cost did exceed three-quarters of the value, the ship was regarded as condemned⁵⁷ *vis-a-vis* the insurer, who was obliged to pay the full sum insured minus the value of the wreck if there had been no abandonment⁵⁸. Some regarded this provision as the equivalent of the constructive total loss of English law⁵⁹.

2.5.6. 'Vergaan of bederf door zeeramp' was a cause giving rise to the right to abandon the cargo so affected⁶⁰. In this case the assured could not

⁵⁵ The three quarters was measured against the insured value, not the actual value at the time of the conclusion of the contract; Dorhout Mees, *op cit*, 639.

⁵⁶ Article 664; Dorhout-Mees, *Nederlands handels- en faillissementsrecht*, 6th ed, (1974), Vol I, (referred to as '*Handelsrecht*'); 132 Dorhout Mees, *Schade*, 638. This principle was first introduced by article 3 of the Declaration of 17 August 1779 in France, and was also taken up in article 389 of the *CdeC*; Enschedé, *op cit*, 151. It was contemplated in the Netherlands at the time of the 1809 draft already, in the phrase '*zonder dat er eenige hoop is om dezelve te redden of terug te bekomen*', and applied in *Van Eyk v Schlesische Feuer Versicherungs-Gesellschaft* 1914 NJ 214 where the policy also limited the assured's right to abandon '*tenzij hetzelve ongetwijfeld zoude verloren zijn of er geen redelijk grond tot hoop van terugkomen plaats heeft*.' The ship sank but was salvaged, and the remains sold for f 1550.22. The court, (*Gerechtshof s'Gravenhage*), held that, since the ship was in fact saved, it could not be said to be '*verloren*', and dismissed the claim based on abandonment.

⁵⁷ '*afgekeurd*'.

⁵⁸ Article 717; Enschedé, *op cit*, 151; Dorhout-Mees, *Handelsrecht*, 134.

⁵⁹ Dorhout Mees, *Handelsrecht*, 134. See also Mens Fiers Smeding, *op cit*, 65.

⁶⁰ Schook, *op cit*, 37 regarded this cause as equivalent for the cargo what stranding and breaking up constituted for the ship. See also Nolst Trenité, *op cit*, Vol II, 645-646.

abandon unless the damage exceeded three-quarters of the insured value⁶¹. The precise manner of calculating the three quarters gave rise to considerable difficulty in practice⁶². In the case of perishing of the goods or where the ship was condemned whilst under way and was sold, the assured could abandon his rights to the insurer if he did not recover the price realized by the goods or ship within certain prescribed periods⁶³.

- 2.5.7. Arrest and detention were likewise causes which applied to both the ship and the cargo insured. A distinction was drawn between arrest and detention by a foreign power and the Netherlands' government, in the latter case only after the voyage had commenced⁶⁴. It is clear that the arrest or detention had to occur at the instance of a governmental power. A capture by pirates was

61 Article 666: '*Het abandonnement in geval van vergaan of bederf kan niet gedaan worden, dan wanneer het verlies of de schade drie vierden van de verzekerde waarde bedraagt of te boven gaat.*' In the draft of 1809 it was two-thirds; Enschedé, *op cit*, 152. The equivalent provision of the CdeC was article 369.

62 See Schook, *op cit*, 37 *et seq*; Mens Fiers Smeding, *op cit*, 60-65 and Nolst Trenité, *op cit*, Vol II, 646.

63 Article 669; Dorhout Mees, *Schade*, 639; Enschedé, *op cit*, 152. The same periods applied as in the case of the missing ship.

64 Nolst Trenité, *op cit*, Vol II, 649. The reason for the distinction is not always clear, but it may be that it was thought that the risk did not attach until the ship set off on the voyage from the home port. Since an arrest or detention by a foreign government in a Dutch port was most unlikely, if not entirely impossible, the assured was given protection against the home government after the voyage had commenced whilst he would enjoy protection in respect of foreign governments too as soon as the ship departed.

therefore not included⁶⁵. The mere arrest or detention was also not enough: It had to endure for the prescribed period which applied in terms of article 668 without the ship or goods being freed or released, unless the arrest or detention was followed by a confiscation order⁶⁶.

- 2.5.8. The missing ship was provided for separately. In the case where no news was received of the ship within defined periods, which varied in length depending on the destination of the last voyage on which the ship sailed, the assured was entitled to abandon the ship or goods and claim payment of the sum assured without having to prove that the ship had been lost or destroyed by a peril insured against⁶⁷. A presumption that the loss occurred

⁶⁵ Schook, *op cit*, 42.

⁶⁶ Nolst Trenité, *op cit*, Vol II, 647. This principle presents an important distinction for a proper consideration of the correctness of the South African case of the 'Morning Star' in *Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries* 1987 1 SA 842 (A) which is discussed in Chapter 18 *infra*.

⁶⁷ Article 667; Enschedé, *op cit*, 152; De Smet, *op cit*, Vol III, para 1719; Van Barneveld, *op cit*, 485. These periods were six, twelve and eighteen months respectively for sailings to and from European ports, including the Asian and African ports of the Mediterranean and Black Sea ports, the Atlantic, excluding the Americas, and sailings to other parts of the world. In *De Handelsvennootschap onder de firma Simonis en van Bavel v De Deutsche Versicherungs-Gesellschaft* 1921 NJ 881 the operation of the presumption was clearly demonstrated. The plaintiff insured a cargo on the motor-sailer 'Lichtstraal 2' on a voyage from Rotterdam to Gothenburg in terms of separate policies with different insurers. One policy was 'vrij van molest', (free of war risks); the other insured only that risk. The ship and goods simply disappeared after sailing on 9th April 1918, without any news of her or her cargo being received for more than six months, the applicable period to sailings between those ports. One of the ship's lifebuoys was found in the sea by another ship. The plaintiff sued on the policy which insured only 'molest'. The question to be decided was whether the ship and cargo had perished as a result of a war risk such as running into a mine, or being torpedoed,

during the period of the insurance through an insured peril operated in the case of time policies⁶⁸. The presumption could be displaced by evidence to the contrary⁶⁹. The assured was, however, not limited to a claim based on the missing ship provision of article 667 and the applicable time limits where he could prove the loss of the ship by means of the ordinary rules of evidence, including proof by way of deductions made from the circumstantial evidence⁷⁰. The standard policy of the Amsterdam Exchange shortened the periods laid down by article 667⁷¹ in order to bring practice in line with the

which had happened to a number of other ships in those waters at that time. If this conclusion could not be drawn on the evidence, the presumption in article 667 would operate and the plaintiff would be entitled to recover from the insurer who insured 'vrij van molest' on the ground of 'tjdingloosheid'. The court, (Arr-Rechtbank Rotterdam), held that the presumption only operated if the evidence did not outweigh it, which it did on the facts, and the plaintiff therefore succeeded. See also Dorhout-Mees, *Handelsrecht*, 132-133 and Nolst Trenité, *op cit*, Vol II, 650. If war risks were excluded, the loss was presumed to have been caused by an ordinary peril covered by the insurance, and not caused by a war risk; Article 648(1) and (2). Article 667 restated the provisions of article 29 of the Amsterdam Ordonnance of 1744; Enschedé, *loc cit*. Article 70 of the Rotterdam Ordonnance of 1721 was to the same effect.

68 Article 674(1); Dorhout Mees, *Schade*, 639; Nolst Trenité, *op cit*, Vol II, 650 et seq.

69 Article 674(2); De Smet, *op cit*, Vol III, para 1720; *Assuradeuren v De N.V. Stoomvisserij 'Letty'* 1928 NJ 1143 at 1144.

70 Nolst Trenité, *op cit*, Vol II, 654.

71 De Smet, *op cit*, Vol III, para 1719. The Rotterdam Exchange did likewise; Nolst Trenité, *op cit*, Vol II, 650.

realities of modern shipping⁷².

- 2.5.9. If the ship or goods were stranded, arrested or detained, the assured was entitled to abandon immediately if the insurer refused or failed to advance a sufficient amount to cover the cost of saving or recovering the ship or goods⁷³. In the case of a dispute between the assured and insurer, the amount to be paid by the insurer was determined by the Court. The amount so determined by agreement or by the Court was added to the amount payable by the insurer, even if it exceeded, together with the amount of the damage, the sum assured⁷⁴. If the assured failed to comply with his obligation to notify the insurer timeously to enable the latter to put up the funds to save or recover the thing insured, he did not

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This fact brings to light what may be regarded as a deficiency of the systems where the law is codified, in that it is not easily or promptly amended or adjusted to take account of changing circumstances. See Nolst Trenité, *op cit*, Vol II, 651-652. While this may be a valid criticism in other branches of the law, it seems to have less value in marine insurance where the policy conditions are capable of being tailored to the needs of the particular time and even voyage. The standard policy conditions have been so adjusted, in any event, from the earliest time, if regard be had to the policy of the Antwerp Exchange which influenced marine insurance as far afield as Amsterdam and Hamburg in the sixteenth century.

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Dorhout Mees, *Schade*, 639.

74

Article 665; Enschedé, *op cit*, 151-2; De Smet, *op cit*, Vol III, para 1712. The assured could not call for such an advance after he had made the abandonment to the insurer; *Van Eyk v Schlesische Feuer Versicherungs-Gesellschaft*, *supra*, 215. In the Netherlands the costs incurred by the assured were always recoverable, no matter the amount; In France they were recoverable only '*jusqu'à concurrence de la somme assurée*' ('to the extent of the sum insured') in terms of article 393 of the *CdeC*; Enschedé, *loc cit*.

lose his right to abandon, but was held liable for the damages suffered by the insurer as a result of the breach⁷⁵.

- 2.5.10. Shipwreck, stranding with breaking up, unfitness and destruction and deterioration and other forms gave rise to an immediate right to abandon⁷⁶, provided that the loss was in fact irreversible⁷⁷. Other causes, like the missing ship and arrest or detention, only gave rise to the right to abandon after the effluxion of the relevant specified period⁷⁸. These periods were the same as for arrest and detention on the one hand and the missing ship on the other⁷⁹. Articles 667 to 672 provided the relevant periods and time limits⁸⁰. Since the right to abandon did

75 *Boedel W A Baron Baud v The Maritime Insurance Company Ltd* 1918 NJ 537, confirmed on appeal, 1920 NJ 410.

76 *Mens Fiers Smeding*, *op cit*, 95.

77 See Nolst Trenité's discussion of the phrase '*ongetwijfeld verloren*' and the cases cited at *Op cit*, Vol II, 658-661.

78 *Mens Fiers Smeding*, *op cit*, 95; Dorhout-Mees, *Handelsrecht*, 133. This distinction was also apparent from the provisions of the Amsterdam Ordonnance of 1744, (article 26), and the Rotterdam Ordonnance of 1721, (articles 62, 63 and 64).

79 Articles 668 and 667 respectively. In *De Oostenrijksche Vennootschap 'Providentia' Allgemeine Versicherungsgesellschaft v De N.V. Wageningsche Lederfabriek v/h J.B. Roes & Zonen* 1921 NJ 1089 the court, (Gerechtshof s'Gravenhage), held that the standard policy of the Rotterdam Exchange which shortened the periods of article 667 relating to missing ships did not apply to article 668, which related to detention and arrest. It was pointed out (at 1091) that the reason for the shortening of these periods was that the '*snellere verkeer in onze dagen den twijfel ingeval van vermissing eerder doet verdwijnen*'.

80 See Enschedé, *op cit*, 152.

not arise until the relevant period had expired⁸¹, the result was that if the facts changed so that the assured recovered the thing insured within the specified period, he had no right to abandon. Only if the defined cause persisted to the end of the prescribed period was there a right to abandon. These periods thus operated in favour of the insurer and ensured that the loss was in fact irreversible before an abandonment was allowed.

- 2.5.11. In the case of a confiscation order in respect of the arrested or detained ship or goods, the assured had the right to abandon them immediately⁸², because it was then clear that the loss is certain and permanent⁸³. Notwithstanding the provisions of the *WvK* relating to abandonment

81 Mens Fiers Smeding, *op cit*, 95; Dorhout Mees, *Schade*, 640.

82 Article 668; De Smet, *op cit*, Vol III, para 1712; Enschedé, *op cit*, 152. In *Boedel W.A. Baron Baud v The Maritime Insurance Company Ltd*, *supra*, the court, (Arr-Rechtbank Amsterdam), held that the fact that the French Government, which had detained the cargo destined for delivery at Rotterdam, was prepared to release the cargo on condition that it be sold in France or England, did not non-suit the assured, who had abandoned the cargo on the ground of detention, as the voyage was still defeated by the condition imposed. In *A Kramer v De N.V. Centrale Spaar-en Verzekeringsbank* 1919 NJ 1077 the court, (Arr-Rechtbank Rotterdam), held (at 1080) that the refusal by the detaining authorities to grant leave for the goods to be carried on to the planned destination was itself equivalent to 'een aanhouding van het betrokke goed' and that Article 668 was therefore applicable, entitling the assured to abandon. (On this point see also *De Nederlandsche Transportverzekering Mij v Aktieelkabet Wilhelm Olsen* 1921 NJ 73.) The court further held that the period of six months which applied in terms of article 670 started to run from the time the assured had knowledge of the refusal.

83 Dorhout Mees, *Schade*, 649.

it had long been the practice of insurers in the Netherlands to limit or exclude the right to abandon in the policies issued by them⁸⁴, even by referring to it unnecessarily in cases of non-marine insurance⁸⁵.

3. SUBSIDIARY RULES OF ABANDONMENT UNDER THE WvK

- 3.1. For an abandonment to be effective as a means of transfer and entitling the assured to the sum insured, it had to be made in accordance with the provisions of the WvK⁸⁶. Notice of abandonment had to be served by '*deurwaardersexploit*', of which a copy had to be left with the insurer⁸⁷. In the case where there were multiple insurers underwriting the particular policy or risk there had to be an abandonment to each of them *pro rata* according to the cover granted⁸⁸. The exploit had

84 Enschedé, *op cit*, 155; Van Barneveld, *op cit*, 485; Dorhout-Mees, *Handelsrecht*, 132 and 134. The Amsterdam Beursgoederenpolis (1991) expressly excluded the right to abandon in its clause 12: '*De verzekerde zaken kunnen of mogen niet aan de verzekeraars worden geabandoneerd.*'

85 Enschedé, *op cit*, 155.

86 Article 678; Schook, *op cit*, 84.

87 Article 680(1); Schook, *op cit*, 84; Mens Fiers Smeding, *op cit*, 99. In practice formal service was almost invariably waived by the insurer; Nolst Trenité, *op cit*, Vol II, 664.

88 Nolst Trenité, *op cit*, Vol II, 665.

to contain certain information⁸⁹. The cost of the exploit was for the account of the insurer⁹⁰.

- 3.2. The notice of abandonment had to be served on the insurer within three months of the elapse of the periods of six, twelve or eighteen months referred to in article 670⁹¹. In the cases falling under article 671 notice of abandonment had to be given according to the period applicable determined by the destination⁹². Time ran from the date the assured received knowledge of the relevant facts. After the three month period provided for the giving of notice of abandonment had elapsed, the assured was no longer entitled to abandon⁹³, but retained his right to claim for an average

89 Such as the policy under which the abandonment was made, the ground upon which the abandonment was based, a declaration of all insurances held by the assured and covering the subject-matter of the insurance, any loans on bottomry which had, to the knowledge of the assured, been taken on the security of the ship or goods, what steps the assured had taken to save the ship or goods, and which persons had assisted in such steps; *Mens Fiers Smeding, op cit*, 100.

90 Article 680; *Mens Fiers Smeding, op cit*, 100.

91 Article 670 applied to the cases covered by articles 667, 668 and 669. The relevant period was determined by the place where the casualty occurred. See also *Enschedé, op cit*, 152; *A. Kramer v De N.V. Centrale Spaar- en Verzekeringsbank, supra*, at 1080. The notice had to be given by 'deurwaardersexploit'; *Van Barneveld, op cit*, 485.

92 Articles 664-666. See also *Enschedé, op cit*, 152.

93 Article 672; *Enschedé, op cit*, 152. In *A.J. Muller v Assuradeuren* 1928 NJ 1106 (Hof Amsterdam) the plaintiff's alternative claim based on abandonment was dismissed because notice of the abandonment was ineffective by reason of having been given outside the time allowed by article 671.

loss⁹⁴. The period operated as a 'vervaltermijn' and not as a prescriptive period⁹⁵.

3.3. In cases where the assured was entitled to abandon, he was obliged to disclose to the insurer any news of the ship or goods received within five days of receiving same, failing which he was liable for the cost, damage and interest resulting from his failure to do so⁹⁶.

3.4. If the insurance had been taken for a particular period, it was presumed that the ship was lost during that period⁹⁷. But if it should be proved that the loss had occurred outside the period of the insurance, the abandonment lapsed and the assured became obliged to return the sum paid together with interest according to the general

94 Mens Fiers Smeding, *op cit*, 98; Dorhout-Mees, *Handelsrecht*, 133. The average action prescribed after five years. Article 744 of the *WvK* was not a strict time bar; it only applied if the insurer claimed to have paid already. See also Mens Fiers Smeding, *op cit*, 98.

95 Mens Fiers Smeding, *op cit*, 98.

96 Article 673; Mens Fiers Smeding, *op cit*, 102; De Smet, *op cit*, Vol III, para 1724. The period was previously eight days. Article 374 of the *CdeC* stipulated three days, while article 42 of the *Ordonnance de la Marine* of 1681 required the assured to make the disclosure 'incontinent', or immediately; Enschedé, *op cit*, 153.

97 Article 674 (1), which applied only to missing ship cases; Enschedé, *op cit*, 153; De Smet, *op cit*, Vol III, para 1721. Article 674(1) was the equivalent of article 376 of the *CdeC* and followed that article as well as the suggestions of Valin and Émerigon; Enschedé, *loc cit*.

provisions of the law⁹⁸.

3.5. The assured was, upon the abandonment, obliged to notify the insurer of all insurances taken on the ship or goods and any loans granted on the security of the ship or goods to his knowledge, failing which the time for payment by the insurer was delayed until the relevant information had been provided, without there being any extension of the period for the giving of notice of abandonment⁹⁹. In the case of a fraudulent return of this information, the assured lost all the benefits of the insurance¹⁰⁰.

3.6. The assured was also obliged, on abandoning, to notify the insurer what he had done to rescue or free the ship or goods and which persons he had employed for that purpose¹⁰¹. The assured was obliged to work to save the ship or goods insured when threatened by an insured peril, or to obtain

98 Article 674 (2); Enschedé, *op cit*, 153; De Smet, *op cit*, Vol III, para 1721.

99 Article 675 (1); Schook, *op cit*, 86; Mens Fiers Smeding, *op cit*, 108; Enschedé, *op cit*, 154; De Smet, *op cit*, Vol III, para 1725.

100 Article 675 (2); Schook, *op cit*, 87-89; Mens Fiers Smeding, *op cit*, 106-107; De Smet, *op cit*, Vol III, para 1726. The penalty of the 1681 Ordonnance, (article 55), obliging the assured to repay the undeclared loan on bottomry was not taken over by articles 379 and 380 of the Cdec or article 675 of the WvK; Enschedé, *op cit*, 154.

101 Article 676; Schook, *op cit*, 87; Enschedé, *op cit*, 154; De Smet, *op cit*, Vol III, para 1728.

their release¹⁰². He needed no mandate from the insurer and could even demand a sufficient advance from the insurer to enable him to perform this obligation¹⁰³. If the assured used foreign agents to assist in such efforts, he was not held responsible for their actions, but had to transfer his rights against them to the insurer when he abandoned¹⁰⁴. Article 283(1) of Title IX made the assured liable, on breach of his duty to prevent or minimise the loss, for the '*kosten, schaden en interessen*' caused by his breach¹⁰⁵.

3.7. An abandonment could not be partial nor conditional¹⁰⁶. There appeared to be an exception to the apparent rigidity of this rule. Cargo already discharged did not need to be abandoned with the remains of damaged cargo still on board

102 Article 655(1); De Smet, *op cit*, Vol III, para 1728. The article required the assured to use '*alle mogelijke vlijt en gepaste pogingen*', and had as its equivalent for all types of indemnity insurance in the Netherlands the general provision of article 283(1) of the *WvK*.

103 Article 655(2); De Smet, *op cit*, Vol III, para 1728.

104 Article 656; De Smet, *op cit*, Vol III, para 1728.

105 See also Van Niekerk, '*Suing, labouring and the insured's duty to avert or minimise loss*', ('*Sue and labour*'), 1987 MB 144, at 157.

106 Article 677 (1); Enschedé, *op cit*, 154; Nolst Trenité, *op cit*, Vol II, 664; De Smet, *op cit*, Vol III, para 1722. The prohibition against a partial abandonment was already part of the '*oud-Hollandsch recht*'; Enschedé, *op cit*, 145. See also *Import en Commissiehandel v Assuradeuren* 1919 NJ 1043 at 1044-1045.

4.2. When the abandonment had been made properly according to the provisions of the law, the ship or goods belonged to the insurer from the day of the service of the notice of abandonment¹¹², subject to the retention by the assured of that part of the insured ship or goods in respect of which he was regarded as self-insurer¹¹³. Only rights which attached to the assured in his capacity as owner of the insured ship or goods were transferred to the insurer. Rights of a personal nature were not¹¹⁴. Article 678 used the phrase '*behooren de verzekerde voorwerpen aan de verzekeraar*', following the French practice from the time of *Ordonnance de la Marine* of 1681. It has been held that the transfer took place without any formalities other than service of the

112 'Een geldig abandonnement doet van rechtswege de eigendom van het geabandonneerde op het dag van de betekening op de verzekeraar over gaan'; Dorhout-Mees, *Handelsrecht*, 133. See also Schook, *op cit*, 68-70 where he questioned the absence of an act of delivery or *traditio*. Nolst Trenité, *op cit*, Vol II, 666 merely stated that the insurer acquired ownership against his will and without any form of delivery.

113 Article 678; Enschedé, *op cit*, 154; Dorhout-Mees, *Schadeverzekeringsrecht*, 134; Van Barneveld, *op cit*, 485. In *N.V. Petroleum Mij 'La Corona' v De Staat der Nederlanden* 1959 *Schip en Schade* 58 the assured, after an abandonment, was paid for a total loss by English underwriters on an English policy. In a deed of subrogation in favour of underwriters the assured was indemnified by underwriters against all costs, expenses and disbursements incurred on underwriters' behalf. The court, (Hof Amsterdam), held that the assured no longer had any insurable interest in the ship because, in English terminology, title of the ship no longer vested in the assured, having been transferred to the underwriters. The court further held that, though the assured was left in possession of the ship, the re-vesting of title in him could only occur through '*daden, waarbij de wil op zulk herkrijging is gericht*', of which there was no evidence.

114 Nolst Trenité, *op cit*, Vol II, 669.

precise cause of the loss was open to doubt¹²⁰. The insurer was not discharged from the obligation to pay the insured sum if the goods or ship were to be recovered or freed after the abandonment as the validity of the abandonment was determined by the facts as they were at the time of the service of the exploit¹²¹.

- 4.5. Some controversial questions were associated with the fact that the abandonment operated as a means of transfer. The first was whether the assured's right to the freight passed to the insurer of the ship upon the abandonment. The second was what effect a mortgage (bottomry loan) on the ship or goods had on the transfer. Yet a third was whether the assured's rights against third parties also

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In *Assuradeuren v De N.V. Stoomvisscherij 'Letty'*, *supra*, the ship was insured 'vrij van molest', but then disappeared without any news of her after last being seen fishing in the North Sea on 4th June 1915. ('Vrij van molest' means free of war risks.) On 25th November 1915 the assured abandoned the ship to the insurers by service of the customary 'exploit'. It was argued on behalf of the insurers that the assured had to prove that the ship was not lost as a result of 'molest', but the court, (Hof Amsterdam), held (at 1144) that it was sufficient for the assured to prove that no news had been received of the ship for the required period to entitle the assured to payment of the sum insured. It was pointed out that the assured is 'onder zekere omstandigheden ... van het bewijs van het vergaan van het schip tengevolge van een buiten aankomend onheil ontheft', which means that, subject to proof to the contrary, the ship is presumed to have been lost as a result of a peril insured against if no news was received of her during the required period. It is then for the insurer to prove that the loss occurred as a result of a cause or peril not covered by the insurance.

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Article 679; Enschedé, *op cit*, 154; De Smet, *op cit*, Vol III, para 1730; Dorhout Mees, *Schade*, 642. In English law the validity of the abandonment is determined according to the facts as they are at the time action is commenced, with the exception of the case where the change of circumstances is brought about by the insurer; Lambeth, *Templeman on Marine Insurance*, 6th ed, (1986), 219-220; *The Sailing Ship 'Blairmore' Co. Ltd v Macredie* (1898) AC 593.

transferred to the insurer as a result of the abandonment.

4.5.1. The controversy about the freight earned before the abandonment has raged for a long time in other legal systems too¹²². According to Schook, the notion that the freight must, on abandonment of the ship, go to the insurer of the ship, was based on the dual misconceptions that the freight was *fructus civiles* of the ship and that the assured would otherwise be enriched by the insurance¹²³. Nevertheless, after the abandonment the insurer was the owner of the ship and consequently any freight earned from that date accrued to him¹²⁴.

4.5.2. In the case of abandonment of a ship burdened with bottomry mortgage, article 318 of the *WvK* gave the holder of the mortgage a preference so that he would effectively receive anything saved. The effect of the abandonment of a ship or goods subject to a bottomry mortgage was therefore that

122 Schook, *op cit*, 71-72. See also Nolst Trenité, *op cit*, Vol II, 669-671.

123 *Op cit*, 71 *et seq.* Mens Fiers Smeding, *op cit*, 111 adopted Schook's argument, which appears to be correct. There is no reason in equity why the assured should benefit from the ship's ability to earn freight after the ship has been transferred to the insurer. By the same token there is no reason why the insurer should benefit from the assured's endeavours to earn the freight which is actually earned before the casualty occurs.

124 Mens Fiers Smeding, *op cit*, 112.

the transfer was subject to the rights of the holder of the mortgage¹²⁵.

4.5.3. The abandonment did not also serve the function of subrogation, namely to transfer the assured's rights or claims against third parties to the insurer after payment of the full indemnity provided for by the policy. Such rights or claims fell within the ambit of article 284 of the *WvK*, and were not transferred by the abandonment. They were only transferred upon indemnification. Abandonment only transferred the '*verzekerde voorwerpen*'¹²⁶. Naturally all the assured's rights pertaining directly to the thing insured passed to the insurer¹²⁷.

4.6. The assured's right to the sum insured was expressly dealt with by the *WvK*¹²⁸. The sum insured had to be paid, in the absence of any other provision in the policy, within six weeks of service of the notice of abandonment. This gave

125 *Mens Fiers Smeding, op cit, 109-110. See Nolst Trenité, op cit, Vol II, 677 for a discussion of preferential debts and their relevance in an abandonment case.*

126 *Mens Fiers Smeding, op cit, 108-109.*

127 *Mens Fiers Smeding, op cit, 110; Nolst Trenité, op cit, Vol II, 669.*

128 Article 679.

the insurer an opportunity to consider his position before he made any payment. The cost of the abandonment had to be paid at the same time¹²⁹. After the expiry of the period of six weeks, interest as determined by law became payable¹³⁰. Until the sum insured and the costs of abandonment were paid, the abandoned ship or goods served as security in favour of the assured¹³¹.

- 4.7. Abandonment operated only in the field of marine insurance law. It was clearly distinguished from the act of a shipowner giving his ship over to creditors, which was called 'abandon'¹³². After an effective abandonment the shipowner could no longer give the ship over to his creditors because he was no longer her owner¹³³. The converse was possible though, so that the assured who, as shipowner, had previously given the ship over to

129 Article 680 (1); Enschedé, *op cit*, 154; Dorhout-Mees, *Handelsrecht*, 134; Van Barneveld, *op cit*, 485. The 1809 draft and article 382 of the *CdeC* specified three months. It has, however, become common for the policy to stipulate a different period; Enschedé, *loc cit*.

130 Article 680 (2); Mens Fiers Smeding, *op cit*, 119; Enschedé, *op cit*, 154; *De Handelsvennootschap aktieselskabet Wilhelm Olsen v Nederlandsche Verzekering Maatschappij* 1919 NJ 850 at 851.

131 Article 680 (3); Mens Fiers Smeding, *op cit*, 120; Enschedé, *op cit*, 154; Dorhout-Mees, *Handelsrecht*, 134; Dorhout Mees, *Schade*, 642.

132 s'Jacob, *Het Recht van Abandon*, doctoral thesis, Leiden, (1890), 44. See also Schook, *op cit*, 100 *et seq.*

133 Mens Fiers Smeding, *op cit*, 121.

his creditors, could still effect a valid abandonment because the act of giving the ship over to creditors did not transfer ownership to them¹³⁴. In the latter case the insurer received the ship subject to the burden of creditors claims. Further, the abandonment to the insurer after abandonment to creditors could only be effective if there had not been complete execution ('uitwinning') by creditors¹³⁵.

5. THE ABOLISHMENT OF THE INSTITUTION OF ABANDONMENT

- 5.1. By 1970 the abandonment provisions of the *WvK*, like its other provisions, were a hundred and thirty years old. In the meantime a drive to modernise the whole of the *Burgerlijk Wetboek* and *Wetboek van Koophandel* had started in the Netherlands and had advanced considerably. The advent of steamships powered by coal and later by oil and even nuclear power, the development of navigation and communication aids like radio, television, satellite navigation and the like have also raised questions about the continued need for abandonment. It was pointed out earlier that the

134 S'Jacob, *op cit*, 48; Mens Fiers Smeding, *op cit*, 123-124; Nolst Trenité, *op cit*, Vol II, 675.

135 Mens Fiers Smeding, *op cit*, 124.

Dutch insurers excluded the right of abandonment from their standard policies¹³⁶.

5.2. The view was also expressed that the institution of abandonment would not be missed if it were to be abolished altogether¹³⁷. Nevertheless, when the clauses of the *Nieuw Burgelijk Wetboek* ('the NBW') relating to the doctrine of abandonment came to be considered, the developments of the past century and the practice of Dutch insurers were taken into account. In the 1972 *Ontwerp voor een Nieuw Burgerlijk Wetboek* ('the *Ontwerp NBW*') of Professor E M Meijers the part dealing with insurance was prepared by Professor mr T J Dorhout Mees¹³⁸. Some innovative proposals with regard to abandonment were made by Dorhout Mees. In a *Memorie van Toelichting* which accompanied the *Ontwerp NBW*, Mr F J De Jong explained the reasons for the various articles proposed and mentioned that it was intended to seek '*meer aansluiting bij*

136 This is a strong indication that the Dutch insurers either regarded the doctrine of abandonment as obsolete or were not prepared to bear those risks for which the doctrine provides the assured with recourse.

137 Professor Van der Feltz, *Beschouwingen over Titel 17 van Boek 7 van het Ontwerp voor een Nieuw Burgerlijk Wetboek*, 312.

138 Book 7.

*de Engelse praktijk*¹³⁹. The extent to which it was proposed that Dutch law should be amended to give effect to that stated intention is apparent from the proposed articles of the *Ontwerp NBW*.

- 5.3. In the *Ontwerp NBW* abandonment of the insured effects¹⁴⁰ was still provided for¹⁴¹, but only in two cases namely that of the missing ship ('*tijdingloosheid*') and arrest and detention ('*aanhouding*' and '*opbrenging*')¹⁴², as opposed to the six cases of the *WvK*. In both these cases a period of six months had to elapse without the ship being found or released before the right to abandon arose¹⁴³. Further, in the case of the

139 *Memorie van Toelichting*, 1187, ad article 7.17.2.32. For a comparison of English and Dutch law prior to the *Ontwerp NBW*, see Buys, *De Engelsche Zeeverzekeringwet 1906 vertaald, toegelicht en vergeleken met het Nederlandsche Recht*, (1946).

140 It was not expressly stated precisely what could be abandoned but it may be assumed that it was not intended to broaden the existing categories, namely the insured ship and cargo.

141 Articles 7.17.2.32-37.

142 Article 7.17.2.32: '*Indien gedurende ten minste zes maanden geen tijding omtrent een schip is ontvangen zonder dat dit aan een algemene storing in de berichtgeving kan worden geweten, alsmede indien de verzekerde zaak is aangehouden of opgebracht en zes maanden zijn verlopen zonder dat zij is vrijgegeven, kan zij door de verzekerde aan de verzekeraar worden geabandoneerd.*' The clause thus combines the two classes of cases which were previously categorised as the second and third categories of abandonment cases and were recognized by Dutch law as long ago as the *Amsterdam Ordonnance* of 1598. In the case of the ship, arrest and detention usually co-incides, but in the case of the cargo one speaks of detention rather than arrest; Van der Feltz, *op cit*, 312.

143 It was felt that, with modern means of communication, longer or shorter distances hardly played a role and therefore to replace the different periods laid down in the *WvK* by one single term of six months; *Memorie van Toelichting*, 1188, ad article 7.17.2.32. Van der Feltz, *op cit*, 313-314 regarded six months as too long in the case of the missing ship.

missing ship the abandonment could only be made if the lack of news could not be ascribed to 'een algemene storing in de berichtgeving', which could occur readily in time of war without necessarily indicating that the ship was lost¹⁴⁴. It was thus proposed, in consonance with the then current practice, to restrict the right to abandon to only those two categories of losses where the final outcome of the event was uncertain¹⁴⁵. The approach of the Amsterdam Ordonnance of 1598 and subsequent Dutch legislation to allow abandonment also in cases which amounted to actual total losses was thus finally to be departed from¹⁴⁶ and an approach which was nearer German law advocated¹⁴⁷. Under the *Ontwerp NBW* abandonment would have remained a right vesting in the assured as opposed to an obligation. This long-standing principle was thus to be retained.

- 5.4. The *Ontwerp NBW* required the abandonment to be express, unconditional and to be in respect of the

144 *Memorie van Toelichting*, 1188, ad article 7.17.2.32.

145 In particular, the right to abandon on the ground of damage to the ship, to whatever degree, previously allowed under defined circumstances by article 666 of the *WvK*, was not recognized; *Memorie van Toelichting*, 1188, ad article 7.17.2.32.

146 This was the first category of cases where the *WvK* allowed the right to abandon.

147 See Chapter 7 *infra*.

whole insured interest¹⁴⁸. It also was required to be made by service of an 'exploit' unless otherwise agreed¹⁴⁹. The reasons for the formal service of the notice of abandonment are to be found in the fact that the abandonment is a matter of great consequence and that the exact time of the abandonment could be important¹⁵⁰. The *Ontwerp NBW* did not prescribe how or within what period the insurer could accept the abandonment¹⁵¹.

- 5.5. The assured was also obliged to obtain sufficient information regarding the thing insured, justifying the abandonment, before he could abandon. Further, as in English law, he was obliged to give notice of abandonment as soon as was reasonably possible in the light of the intelligence received, failing which the right to

148 Article 7.17.2.33.1; '*Abandonnement kan slechts uitdrukkelijk, onvoorwaardelijk en voor het geheel waarvoor het mogelijk is worden gedaan.*' The last part of the article refers to that situation where the assured is entitled to abandon part of the cargo, for example where only part of the cargo insured is detained; *Memorie van Toelichting*, 1188, ad article 7.17.2.33. The requirement of an express abandonment was superfluous in the light of the provision that the notice of abandonment had to be made by way of an exploit; Van der Feltz, *op cit*, 315.

149 Article 7.17.2.33.2: '*Abandonnement moet bij exploit worden aangezegd, tenzij de verzekeraar verklaart met een andere wijze van aanzegging genoeg te nemen.*' This provision seems to have taken into account the existing practice of insurers not to require formal service of the notice of abandonment.

150 *Memorie van Toelichting*, 1188, ad article 7.17.2.33.2.

151 Van der Feltz, *op cit*, 315.

abandon would lapse¹⁵². The purpose of the requirement that sufficient information had to be obtained before the assured could abandon was to discourage an over-hasty abandonment based on insufficient information. The purpose of the requirement that the notice had to be given as soon as reasonably practicable was to ensure that the abandonment was made at the earliest opportunity, enabling the insurer to take prompt steps to preserve the abandoned ship or goods¹⁵³.

- 5.6. The assured was required to institute a claim for an order declaring the abandonment valid within three months of the abandonment, unless the abandonment was accepted in toto by the insurer, failing which the right to abandon would lapse¹⁵⁴. This provision was thought to be necessary to clear up the uncertainty which would arise if the insurer did not accept the abandonment or disputed the assured's right to

152 Article 7.17.2.34: '*De verzekerde is verplicht onverwijld de nodige inlichtingen omtrent de verzekerde zaak in te winnen en aanzegging van abandonnement te doen zodra dit op grond van de ontvangen inlichtingen rederlijkerwijs mogelijk is, op straffe van verval van het recht op abandonnement.*' Van der Feltz, op cit, 316 was of the opinion that the assured ought to have been given a reasonable opportunity to make enquiries when the information was of doubtful character.

153 *Memorie van Toelichting*, 1188, ad article 7.17.2.34.

154 Article 7.17.2.35: '*De verzekerde moet, op straffe van verval van het abandonnement, binnen drie maanden na de aanzegging de vanwaardeverklaring vorderen, tenzij het abandonnement voor het geheel wordt aangenomen.*'

abandon¹⁵⁵. The claim could be instituted by ordinary legal process or by commencing arbitration proceedings in terms of the contract¹⁵⁶. It was also proposed that the assured should only be entitled to abandon once in respect of a particular incident¹⁵⁷. It was therefore all the more important that the assured should have gathered all the relevant information relating to the matter before giving notice of abandonment, and the assured could not serve a series of notices of abandonment in the course of an event¹⁵⁸. On the other hand, the *Ontwerp NBW* did not prescribe the period within which action had to be instituted if the abandonment had been accepted by the insurer¹⁵⁹.

- 5.7. Under the *Ontwerp NBW* the assured would become entitled to the full amount of the insurance, or

155 *Memorie van Toelichting*, 1188-1189, ad article 7.17.2.35. The date upon which proceedings were instituted was important as the facts justifying the abandonment had to exist at that date; Van der Feltz, *op cit*, 315.

156 *Ibid.*

157 Article 7.17.2.36: '*De verzekerde kan ten aanzien van een zelfde voorval slechts eenmaal abandonnement doen.*' But if the abandonment has not been accepted and the three month period in article 7.17.2.35 has expired, the assured would on the face of it be entitled to give a fresh notice of abandonment provided new information justifying the abandonment has come to hand; Van der Feltz, *op cit*, 316.

158 *Memorie van Toelichting*, 1189, ad article 7.17.2.36.

159 Van der Feltz, *op cit*, 315.

in the case of the abandonment of part only¹⁶⁰ to a proportionate part of the insured amount, if the abandonment had been accepted by the insurer or declared valid by the court¹⁶¹. The *Ontwerp NBW* was also to the effect that the insured thing was to belong to the insurer from the service of the notice of abandonment¹⁶². The abandonment could therefore only be made by the owner of the insured thing, or his duly authorised agent¹⁶³. A requirement that the abandonment of the ship be recorded in the shipping register was considered but abandoned because the desirability for and practical implementation of such a requirement were doubtful¹⁶⁴. In the case of goods it was taken for granted that the assured had to deliver

160 As in the case of underinsurance.

161 Article 7.17.2.37.1: '*Indien het abandonnement is aangenomen of bij een in kracht van gewijsde gegane beslissing van waarde is verklaard, heeft de verzekerde recht op de verzekerde som of, in geval van abandonnement van een gedeelte, op een evenredig deel.*' The article merely restated current law; *Memorie van Toelichting*, 1189, ad article 7.17.2.37.1. An arbitration award also serves as a '*gewijsde gegane beslissing*'; Van der Feltz, *op cit*, 317.

162 Article 7.17.2.37.2: '*Door de aanzegging van het abandonnement gaat de eigendom van de geabandonneerde zaak op de verzekeraar over. Indien de zaak reeds was verkocht, gaat het recht op de koopprijs op de verzekeraar over, met dien verstande dat indien deze prijs reeds contant aan de verzekerde was betaald, deze die prijs aan de verzekeraar moet verantwoorden.*' See also Van der Feltz, *op cit*, 317.

163 To demonstrate the principle, Van der Feltz, *op cit*, 314 mentioned the case of the bank which as financier of the acquisition of the goods insured held the bills of lading in pledge. In such a case, he contended, the bank does not have the right to abandon. The holder of a pledge is not the owner of the goods and cannot transfer ownership in them.

164 *Memorie van Toelichting*, 1189, ad article 7.17.2.37.2.

the documents of title to the insurer¹⁶⁵. The effect of the service of a notice of abandonment as a method of transferring ownership was thus to be maintained in Dutch law. There is one circumstance, however, where ownership would not pass. If the insured thing had been sold prior to the abandonment, the right to the purchase consideration would pass to the insurer and, so far as the assured may have received it already, he became obliged to account for it¹⁶⁶.

- 5.8. Another innovation proposed by the *Ontwerp NBW* was the introduction of the concept of a total loss into Dutch law¹⁶⁷. The introduction of this category of loss in Dutch law was based on the existing standard policy of the Dutch insurers¹⁶⁸ and on sections 57 and 60 of the English Marine Insurance Act 1906 ('the MIA')¹⁶⁹. This approach was also consistent with the removal of those cases which constituted the first category of

165 *Ibid.*

166 Article 7.17.2.37.2. See also Van der Feltz, *op cit*, 317.

167 Article 7.17.2.38.1: '*Er is totaal verlies: a. wanneer de zaak teniet is gegaan; b. wanneer de zaak zodanig is beschadigd dat zij heeft opgehouden een zaak van de verzekerde soort te zijn; c. wanneer de zaak buiten de macht van de verzekerde is geraakt en terugbekoming redelijkerwijs niet is te verwachten.*'

168 Van der Feltz, *op cit*, 318.

169 *Memorie van Toelichting*, 1189, ad article 7.17.2.38. and 39.

abandonment cases (referred to earlier) from the field of operation of the doctrine of abandonment. They had to be accommodated by some special provision. Under the *Ontwerp NBW* there was to be a total loss if the thing insured was destroyed¹⁷⁰, or damaged to the extent that it ceased to be of the same nature, 'van de verzekerde soort'¹⁷¹, or was removed from the control of the assured without any reasonable expectation of recovery¹⁷². These instances of 'totaal verlies' were not new although their categorisation as total losses was. These cases were previously encountered as those constituting the first category of abandonment cases where the assured could abandon immediately upon the occurrence of the event because the loss was certain in its effect¹⁷³. Only the first two, however, appear to be true cases of actual total loss, the last being a constructive total loss as known in English law¹⁷⁴.

170 Article 7.17.2.38.a.

171 Article 7.17.2.38.b. This provision was the same as English law; Van der Feltz, *op cit*, 318.

172 Article 7.17.2.38.c.

173 That the *Ontwerp NBW* further contemplated that the insurer would be entitled, upon payment as for a total loss, to demand transfer of ownership of the insured thing (article 7.17.2.38.2.) lends support for the above conclusion.

174 Van der Feltz, *op cit*, 318.

5.9. However, the provisions of the *Ontwerp NBW* on abandonment were not taken up in the *NBW*. In the *Memorie van Toelichting* to the *Ontwerp NBW* of 1972 it was still thought that:

*'Hoezeer abandonnement uitzondering is, komt het toch in voldoende mate voor om dit instituut te handhaven.'*¹⁷⁵

This view appears to have been supported by Professor Van der Feltz¹⁷⁶, but in the *Memorie van Toelichting* which went before the members of the Second Chamber of Parliament in the 1985-1986 parliamentary year it was stated that the provisions of the proposed articles 7.17.2.32-37 might as well be allowed to lapse because the right to abandon was being excluded by the policies of the Dutch insurers in any event¹⁷⁷.

5.10. The right to abandon was therefore abolished with effect from 1 January 1992 by the repeal of articles 663 to 680 of the *WvK*. Nevertheless, the effect of an abandonment as a method of

175 . *Memorie van Toelichting*, ad article 7.17.2.32.

176 *Op cit*, 312, (ad article 7.17.2.32 t/m 37).

177 Tweede Kamer der Staten-Generaal, Vergaderjaar 1985-1986, 19529, Nr 3, *Memorie van Toelichting*, para 3.a.

transferring ownership previously contained in article 678 of the WvK did not lapse completely since such a transfer is still possible under the general provisions of the law set out in article 3.4.2.7a of the *Ontwerp* which became article 3:95 BW. The result is therefore that Dutch law has abolished the doctrine of abandonment after it had existed in Dutch legislation since 1598 and in Dutch marine insurance practice from even before that date.

6. CONCLUSION

6.1. There are four distinct phases in the development of abandonment principles in the Netherlands. They can conveniently be described as the Italian phase, the phase when the local *ordonnances* dominated, the phase of the WvK and the present phase.

6.1.1. The Italian phase commenced when Italian insurers and merchants settled at Bruges and later Antwerp and established insurance practice there. When the Zwin silted up the bulk of the Bruges insurance practice was transferred to Antwerp where the Italian customs were translated into the Customs and Usages of the Antwerp Exchange, which in turn

were preserved by the Spanish legislation of Philip II¹⁷⁸. So far as abandonment is concerned two important aspects of the Italian customary law found their way into the early Roman-Dutch law during this stage. The first was the principle emanating from Genoese insurance custom that a right to abandon existed not only in the cases expressly mentioned but also in '*ghelycke ghevallen*'¹⁷⁹. This means that early Roman-Dutch law, unlike French and German law, did not have a *numerus clausus* of cases where the right to abandon was created¹⁸⁰, but was more like English law in this respect. The second principle imported into the early Roman-Dutch law was that ownership of the abandoned ship or goods was vested in the insurer by operation of law when a proper abandonment was made¹⁸¹.

6.1.2. During the second phase when the local ordonnances

178 The most important of his ordonnances were the 1563 and 1570 ordonnances. These ordonnances were discussed in Chapter 5 *supra* and will also be referred to in Chapter 16 *infra*.

179 Article 14 of the 1582 version of the Customs and Usages of the Antwerp Exchange, read with article 2 of Title VII of the 1563 Ordonnance of Philip II and article 34 and the model policy of the 1570 Ordonnance of Philip II.

180 This principle was in accordance with that of the Genoa Ordonnance of 1588, which also allowed an abandonment irrespective of the precise nature of the event causing the loss, '*in quocumque casu sinistro*'. See Chapter 5 *supra*, para 3.10.

181 Consultatie 52 by Jacob de la Mine in Van den Berg, *Nederlands Advysboek*, (1693-1698), 112, which relied on *decisio* 101 of the *Rotae Genoa*.

dominated, the first principle was maintained as the local ordonnances also granted the right to abandon in undefined cases where the ship or goods '*andersints seeckerlick sullen zijn bedorven, verlooren, oft sonder hope van de selfde te recouvreren*'¹⁸². All that was thus required was that the loss was caused by an insured peril and was certain. The transfer of ownership in the insured and abandoned ship or goods, however, was not mentioned in the local ordonnances at all, and it must be concluded that it was left to the common law which underlay the insurance contract.

- 6.1.3. During the codification phase which followed, and probably as a result of the influence of the *CdeC* on the *WvK*, the right to abandon was restricted to the *numerus clausus* of cases mentioned in articles 663 and 667 of the *WvK*. The *WvK* also expressly, probably also as a result of the French influence, provided that ownership of the insured ship and goods would vest in the insurer upon the making of a proper abandonment¹⁸³.

182 Article 25 of the Amsterdam Ordonnance of 1598, which was echoed by article 26 of the Middelburg Ordonnance of 1600, article 12 of the Rotterdam Ordonnance of 1604, article 62 of the Rotterdam Ordonnance of 1721 and article 28 of the Amsterdam Ordonnance of 1744.

183 Article 678 of the *WvK*. The inclusion of this principle in the *WvK* is a strong indication that this principle had always been a part of the underlying Dutch law even though it had not been mentioned in the local ordonnances of the towns.

- 6.1.4. The fourth phase of Dutch law is the present where the institution of abandonment has been abolished and an abandonment can only be made by deed under article 3:95 of the *NBW*.
- 6.2. Thus, although they bore some resemblance to those of the *CdeC*¹⁸⁴, the abandonment provisions of the *WvK* of 1838 were peculiar to the Netherlands. The *Ontwerp NBW* of 1972 would have introduced new and far-reaching amendments to the law, but its proposals were not accepted. By abolishing the right of abandonment completely the Netherlands has now taken an innovative step.
- 6.3. When recent developments in the Netherlands are compared with events in the other maritime states singled out for consideration in this study, the following picture emerges: In Germany the provisions of the *Handelsgesetzbuch* of 1900 ('the *HGB*') allowing abandonment are still in force. In France Law 522 of 1967 with its decree has recently re-affirmed the status of abandonment by retaining it and by enacting provisions substantially the same as those of the *Ordonnance*

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The restriction of the right to abandon to the cases enumerated in article 663 and the express provision that the abandoned ship or goods were to belong to the insurer from the moment of a proper abandonment in article 678 are examples of correspondence between the *WvK* and *CdeC*.

de la Marine of 1681 and the *CdeC*. In England and other English common law countries no important developments have occurred since the passing of the *MIA* in 1906 save that Canada passed its own version of the *MIA* in 1993 which has retained the concepts of a constructive total loss and abandonment. American law has continued on its own course the last two hundred years, applying, interpreting and expanding the English common law of marine insurance from case to case, while also retaining abandonment as part of the concept of a constructive total loss.

- 6.4. Two important events which served to diminish the strong links between the Roman-Dutch law applying in the province of Holland and at the Cape of Good Hope occurred at the beginning of the eighteenth century. The first was the transfer of possession of the Cape of Good Hope to the British in 1806, which allowed the law applying at the Cape to be influenced by the importation of English institutions, laws, procedures and lawyers¹⁸⁵. The second was the codification of the law in the Netherlands in 1838, which exacerbated the break

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Cf Visagie, *Regspleging en Reg aan die Kaap vanaf 1652 tot 1806*, PhD thesis, Cape Town, (1964); Hahlo and Kahn, *The South African Legal System and its Background*, (1973), 577-8.

with the Roman-Dutch law of the Cape. The codified Dutch law was no longer exclusively the Roman-Dutch law of the province of Holland, but was the law of all the provinces of the Netherlands. Notwithstanding this, Dutch law has remained a source of guidance to South African law. With regard to abandonment Dutch law may have important lessons for the future South African law of marine insurance, especially since the doctrine was subjected to such close scrutiny in the Netherlands in recent years.

6.5. Three most important issues arise for South African law from the study of Dutch law in this chapter. These three issues are the following:

6.5.1. The Roman-Dutch law inherited by South Africa did not know or recognize the separate category of loss known in English law as an actual total loss, and the assured was required to abandon if he wished to claim the full amount of the insurance in the defined events giving rise to the right to abandon. This means that a notice of abandonment was required in all cases where the assured claimed the thing insured had been lost or destroyed completely. The question is thus whether South African law should now follow the recent

example of Dutch law by introducing the concept of a total loss as a separate category of loss, and if so, whether the insurer should in such a case be entitled to demand transfer to him of ownership of the insured thing or its remains.

6.5.2. The second question which arises is whether South African law should not abolish the doctrine of abandonment completely. It was pointed out earlier that even in the Netherlands abandonment occurred by way of exception and was excluded from the standard policies issued by insurers. It was therefore felt that it had fallen into desuetude. In South Africa this consideration also applies, since there have only been five reported cases in the official South African law reports on the doctrine of abandonment in the last hundred and fifty years.

6.5.3. Lastly, the question arises whether, if abandonment still has a role to play, the proposals contained in the *Ontwerp NBW* of 1972 should not be followed, which would import a measure of English practice into South African marine insurance law. It is clear that insurers in Europe do model their own policies to some extent on English policies and thereby import English

concepts into their insurance practice. It further appears that the proposals of the *Ontwerp NBW* are a sound reconciliation of the old Roman-Dutch principles and English practice, both of which deserve to be taken into account in South African law by virtue of the peculiar history of South African law of marine insurance.

6.6. The basic principles of abandonment under the *WvK* may now be spelled out here to facilitate a comparison with German, French, English, American and ultimately South African law in the following chapters¹⁸⁶. For the sake of the comparative process these principles are stated as if articles 663 to 680 of the *WvK* are still in force.

6.6.1. Abandonment is a right enjoyed by the assured in the circumstances determined by substantive law. The right exists only in respect of an insured ship and her cargo¹⁸⁷. There is no obligation on him to abandon if those circumstances are present

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It is recognized that the *WvK* no longer provides for a conventional abandonment, but a comparison of the now repealed provisions *WvK* with the abandonment provisions of other countries is necessary for the distillation of common abandonment principles.

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Article 663 of the *WvK* uses the phrase '*de verzekerde schip en goedere kunnen ... geabandonneerd of overgelaten worden*', ('the insured ship and goods may be abandoned or relinquished'). Not even the proceeds of the insured ship or goods could be abandoned, with one exception. See Nols *Trenité*, *op cit*, Vol II, 654-655 and the case of the '*Cato*' there discussed.

and he may elect to claim for a particular average loss instead¹⁸⁸.

6.6.2. If the assured elects to claim the full amount of the insurance in the cases where an abandonment is permitted, he must actually make an appropriate abandonment; otherwise he can only claim the full amount of the insurance minus the value of the salvage¹⁸⁹.

6.6.3. In those cases where the loss is certain and irreversible the assured may abandon immediately¹⁹⁰.

6.6.4. In other cases the assured may not abandon forthwith but must wait a prescribed period during which he must take steps to try and save the ship or goods¹⁹¹. The right to abandon then arises when the prescribed period has elapsed without the ship

188 Mens Fiers Smeding, *op cit*, 45 put it succinctly thus: '*(H)et recht van abandonnement (is) eene bevoegdheid ... aan den verzekerde geschonken: hij kan nooit tot 't abandonnement van schip of lading gedwongen worden: tot staving dezer bewering lette men slechts op 't woord "kunnen" in art. 663 W. v. K.: nergens wordt er van "moeten" gesproken.*'

189 This is a matter of deduction: it is not expressly so provided in the WvK. See paras 2.1 and 2.2 at 213-214 *supra* and Mens Fiers Smeding, *op cit*, 107; Molengraaff, *op cit*, 682; and Dorhout Mees, *Handelsrecht*, 134.

190 This principle is expressly provided for by articles 665(1) (if the insurer fails to put up the funds required for the purpose of saving the ship or goods) and 668(2) of the WvK.

191 Articles 664, 668(1) and 669 of the WvK. See also Mens Fiers Smeding, *op cit*, 95; Dorhout Mees, *Handelsrecht*, 133.

or goods having been freed or saved and the loss has thus become certain and irreversible.

6.6.5. In the case of a ship which disappears without trace or news, the assured may abandon after the effluxion of a prescribed period¹⁹², the function of which is to ensure that the loss is in all likelihood certain and irreversible. A peril insured against is then presumed to have occurred during the period of the insurance¹⁹³.

6.6.6. Certain formalities have to be observed by the assured. Firstly, the assured is obliged to disclose news of the ship or goods to the insurer within a stipulated period or pay such damages as the insurer may suffer as a result of his failure¹⁹⁴. Secondly, the notice of abandonment has to be served on the insurer by the person entrusted with the service of legal process¹⁹⁵. Lastly, the assured is obliged, when abandoning, to notify the insurer of other policies on the ship or goods and of mortgage rights existing over

192 Article 667 of the WvK.

193 Article 674(1) of the WvK.

194 Article 673 of the WvK.

195 Articles 670 and 671 of the WvK. See also Schook, *op cit*, 84.

the ship or goods so abandoned¹⁹⁶.

6.6.7. The abandonment may not be partial, nor conditional¹⁹⁷, and is irrevocable¹⁹⁸.

6.6.8. Two consequences follow the abandonment. The first is that the insurer is obliged to pay the sum insured within the time stipulated by the law or the policy¹⁹⁹. The second is that the ship or goods abandoned become the property of the insurer to the extent that they were covered by the insurance²⁰⁰, subject to the real rights of third parties²⁰¹.

6.7. When abandonment principles applying in other European countries, England, America, and eventually South Africa are discussed in the following chapters, one may determine to what extent these principles are common to other jurisdictions and legal systems.

196 Article 675 of the *WvK*.

197 Article 677(1) of the *WvK*.

198 Schook, *op cit*, 79 *et seq*; Mens Fiers Smeding, *op cit*, 107.

199 Article 680(1) of the *WvK*.

200 Article 678 of the *WvK*.

201 See para 4.5.2 at 236-237 *supra* and Mens Fiers Smeding, *op cit*, 109-110.

CHAPTER SEVEN

GERMANY

1. INTRODUCTION

- 1.1. At the end of the sixteenth century marine insurance was introduced to Hamburg by Dutch merchants, who brought Dutch law and insurance customs to German soil¹. The transplant of insurance societies from the Netherlands made the customs and draft policy of the Antwerp Exchange applicable to Hamburg, at least in practice². The 1563 and 1570 ordonnances of Phillip II of Spain which underpinned the customs of the Antwerp Exchange thus came to be applied indirectly at Hamburg until the Hamburg Ordonnance of 1731 was promulgated³.
- 1.2. Initially the different port towns in Germany followed different approaches towards the doctrine

¹ The first evidence of insurance practice in Germany is to be found in a policy taken by a Dutch inhabitant of Hamburg, one Hans de Schotte, in 1588. The insurers were mainly foreigners, thirteen of them being Dutchmen. See Kiesselbach, *Die wirtschafts- und rechtsgeschichtliche Entwicklung der Seeverversicherung in Hamburg*, (1901), 15 and also Hammacher, *Die Grundzüge des allgemeinen Seeverversicherungsrecht in der deutschen Gesetzgebung des 18 Jahrhunderts vor dem Hintergrund der älteren europäischen Seeverversicherungs-gesetzgebung*, doctoral thesis, Bonn, (1982).

² Kiesselbach, *op cit*, 109.

³ Kiesselbach, *op cit*, 110-123.

of abandonment. The Königsberg Ordonnance of 1730⁴ followed a similar approach to the Rotterdam Ordonnance of 1721 while the Hamburg Ordinance on Insurance and Average of 1731⁵ adopted its own unique approach. In 1861 a general commercial code was promulgated by Prussia, which was eventually adopted by all the German states⁶. Its marine insurance provisions were taken over without change in the *Handelsgesetzbuch* ('the HGB') of 1900⁷.

- 1.3. In German legal theory, given effect to in the HGB, the essence of abandonment lies therein that there is some uncertainty about the final fate of the ship or goods insured. Until the fate of the ship or goods insured is certain it cannot be

⁴ Articles 21 to 27 dealt extensively with the subject of abandonment but did so in a style and with provisions modelled on the Rotterdam Ordonnance of 1721. Under article 22 the assured could abandon immediately if the ship or goods were entirely lost without hope of recovery or if the ship became unfit for further service. In the case of arrest or detention, the assured could abandon under article 25 after the expiry of a prescribed period, if the arrest or detention still continued. Perishables could be abandoned immediately in such a case. Under article 27 the ship which disappeared without news being received for a prescribed period also gave rise to the right to abandon.

⁵ Article 1 of Title 11 provided for abandonment of the missing ship only, and included the requirement of formal notice. Article 4 expressly provided that neither ship nor goods could be abandoned in any other case.

⁶ The *Allgemeine Deutsche Handelsgesetzbuch*, which was also known as the Prussian Code. The most important commentators on the marine insurance provisions of the Prussian Code were Voigt, *Das deutsche Seeversicherungsrecht*, (1887) and Tecklenborg, *System des See-Versicherungswesens nach der Natur der Sache*, (1862).

⁷ De Smet, *Traité Théorique et Pratique des Assurances Maritime*, 2nd ed, (1959-1960), Vol II, para 846. See also, for a more general discussion, Van Zyl, *Beginnels van Regsvergelyking*, (1981), 138.

proved that the assured has suffered a loss in his patrimony, and there would consequently be no loss to indemnify. Aschenheim⁸, Barkhausen⁹ and Helberg¹⁰ espoused a theory based on this element of uncertainty as the reason for the introduction of the concept of abandonment.

- 1.3.1. According to their theory, the law imported the fiction or presumption of a total loss (in cases defined by law) in order to overcome the problem of proving a real and substantive loss in cases where the final outcome of the event was uncertain.
- 1.3.2. However, at first a condition was added to this fictitious or presumed total loss. In case the insured thing should be recovered after receipt of the sum insured, it would be clear then that the assured has not suffered a total loss. For this reason the assured was at first required to repay the amount received from the insurer if he should recover the thing insured after payment.

⁸ *Der Abandon des Versicherten in der Seeversicherung*, (1893), 2-3.

⁹ *Voraussetzungen und Wirkungen des Abandon bei der Seeversicherung*, doctoral thesis, Erlangen, (1895), 5.

¹⁰ *Der Abandon in der Seeversicherung auf rechtsvergleichender Grundlage*, (1925), 14-15.

- 1.3.3. This condition led to uncertainty whether such repayment would be required in the future and reduced the ability of the assured as merchant to reinvest the money in another venture. This stifled trade.
- 1.3.4. The concept of abandonment was thus introduced to bring an end to the uncertainty, but the assured was obliged in turn to make his rights in and to the thing insured over to the insurer.
- 1.3.5. The effect of the fictitious or presumed loss which is present in an abandonment case is that the assured is relieved of the onus of proving that he has suffered an actual diminution in his patrimony, that is that the event has actually caused him financial loss¹¹. By allowing the assured to recover the sum insured in such a case, the invested capital is then available for re-investment in another venture¹².
- 1.4. Two aspects of this approach are important to note at this juncture. The first is that the concept of abandonment presupposes an event which gives rise

¹¹ Barkhausen, *op cit*, 4; Hagen, *Seeversicherungrecht*, (1938), 136-7.

¹² Aschenheim, *op cit*, 2-3; Barkhausen, *op cit*, 5; Hagen, *op cit*, 137.

to uncertainty as to whether an actual loss has occurred or will occur. That problem is then resolved by the introduction of the notion of a presumed total loss¹³. The second is that the integrity of the indemnity principle is preserved by the requirement that the assured should abandon his rights in and to the thing insured to the insurer so that there is no danger that he receives more than a full indemnity.

2. THE CIRCUMSTANCES GIVING RISE TO THE RIGHT TO ABANDON

2.1. The HGB identifies three separate and distinctly different types of losses¹⁴. The first category is that of an actual total loss¹⁵. The second category encompasses those cases giving rise to

13 'fingierten' or 'präsumierten Totalverlust'.

14 Ritter-Abraham, *Das Recht der Seeverversicherung*, 2nd ed, (1967), 897.

15 'Totalverlust'. Article 854 of the HGB provides as follows in respect of the ship and cargo:--'Ein Totalverlust des Schiffes oder der Güter liegt vor, wenn das Schiff oder die Güter zu Grunde gegangen oder dem Versicherten ohne Aussicht auf Wiedererlangung entzogen sind, namentlich wenn sie unrettbar gesunken oder in ihrer ursprünglichen Beschaffenheit zerstört oder für gute Prise erklärt sind. Ein Totalverlust des Schiffes wird dadurch nicht ausgeschlossen, dass einzelne Teil des Wrackes oder des Inventars gerettet sind'. ('A total loss of the ship or goods occurs when they perish or are removed from the possession of the assured without hope of retrieval, namely when they sink without the possibility of salvage, or are destroyed in their original nature, or are condemned as a lawful prize. A ship is not precluded from being a total loss by the fact that individual parts of the wreck or the inventory are salvaged.') A total loss of freight is said by article 855 to occur 'wenn die ganze Fracht verlorengegangen ist', ('when the whole of the freight is lost'). These articles imported the concept of a total loss into German law.

the right to abandon and to claim the full indemnity¹⁶. The third is that of a partial loss¹⁷. Each of these categories is dealt with separately and specifically in the *HGB*.

Total loss

- 2.2. The concept of a total loss was introduced in German law by the draft *Allgemeinen Deutschen Handelsgesetzbuch* in 1857¹⁸. The draft defined total losses of the ship and cargo¹⁹, of freight and hire²⁰, and of anticipated profits and commissions²¹ separately. These provisions of the draft were later substantially included in the *Allgemeine Deutsche Handelsgesetzbuch* of 1861 and were eventually taken up in the *HGB* of 1900.
- 2.3. Although the phrase *actual total loss* is not used, it is clear that this is the type of loss

16 'Abandon'.

17 'Teilverlust' or 'Beschädigung'. Articles 872, 876 and 878 cover partial losses to the insured ship, goods and freight respectively.

18 Martin, *Die Haftung des Versicherers für Güter aus deutschen Schiffen in italienischen und portugiesischen Häfen*, (1918), 50.

19 Draft article 650(1).

20 Draft article 650(2).

21 Draft article 650(3).

contemplated by the articles 854 to 860 of the *HGB*²². The English concepts of an actual total loss and a constructive total loss have been imported into German practice even though the *HGB* does not expressly use either term. Barkhausen referred to the cases provided for in articles 854 to 860 of the *HGB* as '*Fälle des absoluten Totalverlusts*'²³ and to abandonment cases as '*Fälle des constructiven Totalverlusts*'²⁴. Aschenheim²⁵ gave as examples of an 'absolute total loss' those cases where the ship or goods are destroyed or sink beyond retrieval. He equated absolute total loss with the '*Totalverlust*' of the *HGB*. In such a case of an absolute total loss the effect of the loss is certain. The assured then has the right to indemnification for the full loss. The effect of an absolute or actual total loss is that the patrimony of the assured is demonstrably reduced by the value of the insured interest.

22

Article 854 defines a total loss of the ship or cargo in such terms that it is clear an actual total loss is envisaged. Similar definitions of a total loss of freight in article 855, of anticipated profits or commission in article 856, and of bottomry and average moneys in article 857 confirm that the approach of German law in these articles is to provide for actual total losses.

23

'cases of actual total loss'; *Op cit*, 20 et seq.

24

'cases of constructive total loss'; *Op cit*, 12 et seq.

25

Op cit, 1.

2.3.1. When the ship or cargo has been removed from the possession of the assured without any prospect of retrieval, namely by sinking²⁶, or by being destroyed so as to lose their original character²⁷, or by being declared a lawful prize²⁸, a similar demonstrable loss which is total is apparent. Thus far the type of loss encountered is the same as that which is known in English law as an actual total loss of the ship or cargo, as the case may be. Contrary to the situation in English law, however, a ship which continues to exist but is impossible to repair or not worth repairing is not regarded as a total loss but as a partial loss²⁹.

2.3.2. There is a total loss of freight when the whole

26 'unrettbar gesunken sind'; article 854. It is not enough that the ship has sunk. Sunken ships can, and often are, raised to the surface and salvaged. She must not be capable of being salvaged without exorbitant cost; Ritter-Abraham, *op cit*, 875-876.

27 'in ihrer ursprünglichen Beschaffenheit zerstört sind', ('destroyed in its original nature'); article 854. 'Das Schiff ist auch total verloren, wenn es "in seiner ursprünglichen Beschaffenheit Zerstört" ist'; Ritter-Abraham, *op cit*, 869. When the ship has been reduced to mere planks she is no longer a ship and is a total loss. French and English law are to the same effect.

28 'für gute Prise erklärt sind', ('has been declared a lawful prize'); article 854. Article 71 of the *Allgemeine Deutsche Seeversicherungsbedingungen*, (1973), ('the ADS'), no longer refers to the taking of prize, as it is apparent that this old custom has itself fallen into disuse.

29 Articles 873 and 874; Ritter-Abraham, *op cit*, 869. Barkhausen, *op cit*, 20 disagreed with this view.

freight is lost³⁰.

2.3.3. The anticipated profits or commissions are totally lost if the goods on whose safe arrival those profits or commissions depend do not reach the port of destination³¹.

2.3.4. There is a total loss of bottomry and average moneys when the articles pledged in bottomry or in respect of which average payments have been advanced or expended are themselves totally lost or so affected that there is nothing left to cover the loans and advances³².

2.4. In the case of a total loss the assured may claim the full sum insured³³. He must, however, deduct the value of anything salvaged³⁴, together with any rights attaching to it³⁵. The value of the salvaged portion is determined by public auction

30 Article 855.

31 Article 856.

32 Article 857.

33 Article 858; Ritter-Abraham, *op cit*, 883.

34 Article 859(1).

35 Ritter-Abraham, *op cit*, 884-885.

on the demand of the insurer³⁶. When the insurer has paid the sum insured the rights of the assured in the insured thing are transferred to the insurer³⁷. Even after transfer of the rights the assured remains obliged to mitigate the loss as far as the insurer is unable to do so, at the insurer's expense³⁸. He must also give to the insurer any documents of title and any information required by the insurer to enable the latter to exercise the rights transferred to him³⁹.

Abandonment

- 2.5. For some special cases the assured where the assured is so deprived of the thing insured that the effect is the same as that of an actual total loss, German law recognizes the special remedy of an abandonment⁴⁰. The remedy has a field of application distinct from that of an actual total loss. If a loss is final or certain there can be

36 Ritter-Abraham, *op cit*, 868.

37 Article 859(2); Ritter-Abraham, *op cit*, 888-892. See also the general discussion of the principles of subrogation in Chapter 12 *infra*.

38 Article 870; Ritter-Abraham, *op cit*, 868.

39 Ritter-Abraham, *op cit*, 868.

40 Hagen, *op cit*, 136. For theoretical views and discussions about the nature and origins of abandonment see Bewer, 'Das Herrschaftsgebiet des Abandon', (1891) 38 *Zeitschrift für das Gesamte Handelsrecht* 372; Aschenheim, *op cit*; Barkhausen, *op cit*; and Helberg, *op cit*.

no room for an abandonment. An abandonment is only required in those cases where an insured event has occurred but it is as yet uncertain what the final effect of that event is going to be⁴¹. This is best demonstrated by an example. If the ship insured should disappear without trace, the case *prima facie* falls within the ambit of the doctrine of abandonment and the assured may abandon her to the insurer, subject to the particular requirements of the *HGB* and the terms of the policy. If, however, it should be found before the prescribed period⁴² has elapsed that the ship has in fact sunk in a place where she cannot be retrieved, then the loss is final and certain and becomes an actual total loss governed by article 854 of the *HGB*.

- 2.6. The presence of a fictitious or presumed total loss is therefore an essential requirement for the right of abandonment to arise⁴³. Although German law does not explicitly recognize a category of loss which would equate that of the English law concept of a 'constructive total' loss or the

41 Hagen, *op cit*, 137.

42 The 'Abandonfrist'.

43 Aschenheim, *op cit*, 3.

French notion of a '*perte légale*' or '*perte fictive*', some theoreticians have suggested that the losses for which the doctrine of abandonment provides should be regarded as constructive total losses rather than fictitious losses⁴⁴. In any event, the consequence of a fictitious or presumed total loss is the same as for an absolute total loss⁴⁵.

- 2.7. The right to abandon vests only in the assured as owner of the insured interest. Only the assured can therefore exercise that right⁴⁶. The assured has a right, not an obligation, to abandon⁴⁷. The abandonment has to be made to the insurer⁴⁸. Various insured interests may be abandoned in German law, namely the ship and cargo⁴⁹, the freight⁵⁰, the anticipated profit⁵¹, and

44 See for example Max Pappenheim's comment on Aschenheim's thesis in (1899) 44 *Zeitschrift für das Gesamte Handelsrecht* 602. Aschenheim, *op cit*, 4 was of the view that the English terminology should be avoided.

45 Aschenheim, *op cit*, 4.

46 Because the abandonment transfers property, it can only be made by the owner of the insured interest or his duly authorised agent.

47 Helberg, *op cit*, 130 and 137.

48 For the same reason, namely that the abandonment operates as transfer of ownership and therefore can only be made to the person entitled to receive such transfer.

49 Article 854.

50 Article 855.

bottomry and average monies⁵².

- 2.8. The HGB provides for a more limited right to abandon than the codes of other continental countries⁵³. In terms of article 861(1)⁵⁴ of the HGB the assured may⁵⁵ claim the full amount⁵⁶ insured against abandonment⁵⁷ of his rights in respect of the insured effects to the insurer in

51 Article 856.

52 Article 857.

53 As did the Hamburg Ordonnance of 1731.

54 Article 861(1): 'Der Versicherte ist befugt, die Zahlung der Versicherungssumme zum vollen Betrage gegen Abtretung der in Ansehung des versicherten Gegenstandes ihm zustehenden Rechte in folgenden Fällen zu verlangen (Abandon):
1. wenn das Schiff verschollen ist;
2. wenn der Gegenstand der Versicherung dadurch bedroht ist, dass das Schiff oder die Güter unter Embargo gelegt, von einer kriegführenden Macht aufgebracht, auf andere Weise durch Verfügung von höher Hand angehalten oder durch Seeräuber genommen und während einer Frist von sechs, neun oder zwölf Monaten nicht freigegeben sind, je nachdem die Aufbringung, Anhaltung oder Nehmung geschehen ist:
a) in einem europäischen Hafen oder in einem europäischen Meere einschliesslich aller Häfen oder Teile des Mittelländischen, Schwarzen und Asowschen Meeres oder
b) in einem anderen Gewässer, jedoch diesseits des Vorgebirges der guten Hoffnung und des Kap Horn, oder
c) in einem Gewässer jenseits des einer jener Vorgebirge.' ('(1) The assured is entitled to demand payment of the sum insured in full against the assignment of his rights in respect of the insured items in the following cases (Abandonment): 1. when the ship is missing; 2. when the subject-matter of the insurance is endangered in such a way that the ship or cargo is laid under embargo, captured by a belligerent power, or otherwise detained by a decree of rulers or taken over by pirates, and is not released for a period of six, nine or twelve months respectively after the occurrence of the capture, detention or piracy in question: (a) in a European port or in a European sea, including all ports or parts of the Mediterranean, Black Sea or the Sea of Azov, or (b) in other waters, but on this side of the Cape of Good Hope and of Cape Horn, or (c) in other waters on the far side of either of those Capes.')

55 He is not obliged to abandon; Ritter-Abraham, op cit, 903 and 915. The right to abandon vests in the assured alone and creditors holding mortgages over the ship have no right to abandon the ship or goods insured; (1971) 56 BGH 339 (Landgericht and Oberlandesgericht Köln).

56 Ritter-Abraham, op cit, 903.

57 The word actually used in article 861(1) is 'Abtretung'.

only two categories of cases. The first is when the ship or goods insured are endangered in such a way that the ship or cargo is placed under embargo, captured by a hostile⁵⁸ power, detained by a decree of foreign rulers or captured by pirates. The second is where the ship is missing⁵⁹.

- 2.9. It is not the event itself which gives rise to the right to abandon. In the case of the missing ship she must not have been found and in the cases of embargo, detention and capture the ship or goods must not have been released during a period of six, nine or twelve months after the relevant event. The precise period depends on the area or place where the occurrence takes place⁶⁰. While the requirement that the appropriate period must elapse before the assured may abandon may at first be thought to be one of the supplementary rules of abandonment, it is in effect a substantive requirement of the law without which no right to abandon arises at all. The purpose of this period is to determine whether the insured thing is not

58 *'kriegführenden Macht'*.

59 The missing ship is provided for separately in article 862.

60 Article 861 (1); De Smet, *op cit*, Vol II, para 982; Ritter-Abraham, *op cit*, 911.

recovered during that period⁶¹.

2.10. The missing ship

2.10.1. Article 861(1)(1) allows the abandonment in the case of the ship which is missing⁶². A ship is deemed to be lost if she fails to reach the port of destination within a period of six, nine or twelve months (depending on the destination⁶³) and no news concerning the ship⁶⁴ has reached the assured during that period⁶⁵. If news were to have been received of the demise of the ship, this would not disentitle the assured from claiming the sum insured⁶⁶. The periods are calculated from the date on which the ship commenced the voyage, save, however, in the case where news of the ship

61 Aschenheim, *op cit*, 21.

62 'wenn das Schiff verschollen ist', ('when the ship is missing'). While other continental legal systems place the emphasis on the absence of news in their empowering articles, (e.g. 'tjdingloosheid' in the Netherlands and 'défaut de nouvelles' in France), German law goes to the heart of the matter by referring to it as the case of the missing ship.

63 In case of doubt the longer period applies; Aschenheim, *op cit*, 15.

64 It is news of the ship which is relevant. 'Die letzte Nachricht muss eine Nachricht "von dem Schiff" gewesen sein', ('The last news must have been news of the ship'); Ritter-Abraham, *op cit*, 902,

65 Articles 862 (1) and (2); De Smet, *op cit*, Vol II, para 983. The cause of the absence of news does not appear to be important. In the case of the 'Green Park' (1981) 80 BGH 55 (Landgericht and Oberlandesgericht München) the absence of news was brought about by or with the concurrence of the charterer. The court held that that did not detract from the assured's right to abandon.

66 Ritter-Abraham, *op cit*, 902.

is received after the day of departure, in which event the period runs from the day on which the most recent news was received⁶⁷.

2.10.2. As with the case of detention and capture, the provisions of the *Allgemeine Deutsches Seeverversicherungsbedingungen* ('the ADS'), which comprise the standard policy conditions used by German marine underwriters, have shortened the periods laid down in article 862 of the *HGB*. This brought the operation of the presumption into line with the pace of modern shipping. Article 72 of the ADS provides that the 'Abandonfrist' for the presumption is three times the time the ship would require in normal circumstances to cover the distance from the position from where the last news was received to the next port of call or destination, but at least two months if the ship is power-driven or three months if she is a sailing ship. In war-time when the receipt of news may be delayed, the time limit is six months.

2.10.3. The assured bears the onus of proving that no news concerning the ship has been received during the

67

Article 863; De Smet, *op cit*, Vol II, para 983; Ritter-Abraham, *op cit*, 902.

whole of the applicable period⁶⁸. In a time policy the assured bears the onus of proving that the loss occurred during the period of cover⁶⁹, unlike the position in Dutch⁷⁰ and French law⁷¹.

2.11. Detention

2.11.1. There is no single word which covers all the different scenarios which give rise to the right to abandon under the first part of article 861(1)(2) of the *HGB*, which defines the events under this head by the use of the terms '*unter Embargo gelegt*', '*aufgebracht*', '*angehalten*' and '*genommen*'⁷². Helberg's classification of the relevant events is more specific. He allocated to the first group of cases the title '*Verfügungen von Höher Hand*'⁷³. This descriptive title is also used in article 71 of the *ADS*. The events falling under this head in German law may be equated with

68 Ritter-Abraham, *op cit*, 906.

69 Aschenheim, *op cit*, 17; Helberg, *op cit*, 46.

70 Article 674 of the *Wetboek van Koophandel* of 1838 ('the *WvK*') before repeal.

71 Article 376 of the *Code de Commerce* of 1807 ('the *CdeC*'). See also Helberg, *op cit*, 47 fn 39.

72 These may be translated as '*laid under embargo*', '*captured*', '*detained*' and '*taken*' respectively. There is a certain amount of overlapping between these concepts.

73 *Op cit*, 51.

the 'prise' and 'arrêt' of article 369 of the French Code de Commerce ('the CdeC') and the 'capture, arrest, detention and embargo' of English law⁷⁴. Helberg identified five different circumstances where the event occurs by the hand of a governmental power, namely 'Nehmung', 'Aufbringung', 'Beschlagnahme', 'Anhaltung' and 'Zurückhaltung'⁷⁵.

2.11.2. 'Embargo' was defined by Tecklenborg as the action of a government by means of which a ship which is in port is prevented from leaving⁷⁶. There are thus three aspects involved. The ship must be in port. She must be prevented from leaving. The act preventing the sailing must be that of a government. Martin⁷⁷ mentioned Park's definition, which explained the circumstances under which embargo commonly occurred, namely that an embargo was

'an arrest laid on ships or merchandise by public authority, or a prohibition of state commonly

⁷⁴ Aschenheim, *op cit*, 18.

⁷⁵ *Op cit*, 51.

⁷⁶ *Handlexikon für Reeder, Versicherer und Schiffskapitäne*, (1856), s.v. Embargo.

⁷⁷ *Op cit*, 56-57.

issued to prevent ships from putting to sea in time of war, and sometimes also to exclude them from entering our ports.'⁷⁸

2.11.3. '*Nehmung*' or capture is the taking of the ship or cargo insured by a military power who acts with the intention of keeping the taken ship or cargo permanently. The ship or cargo is declared forfeit by the taking authority in such a case. It does not matter that the taking is unlawful or that the state involved is not recognized by other states in terms of public international law⁷⁹.

2.11.4. '*Aufbringung*' or detention is the forceful taking of possession of the ship or cargo and their proceeds in the port of the possessing state, who takes such possession for the purpose of an initial investigation and a possible subsequent condemnation of the ship or cargo⁸⁰.

2.11.5. '*Anhaltung*' may also be termed detention, and is the forceful prevention of the continuation of the ship's voyage after it has already commenced, for

⁷⁸ . A System of the Law of Marine Insurances, (1786), (Philadelphia reprint, 1789), 88.

⁷⁹ Helberg, *op cit*, 51-57.

⁸⁰ Helberg, *op cit*, 57-58.

the purpose of an eventual appropriation by the detaining power⁸¹. According to Martin, 'Anhaltung' in ordinary language means that a restraint is placed on the free movement of the ship⁸².

2.11.6. 'Zurückhaltung' or retention is distinguished from 'Anhaltung' in that it is the forceful prevention of the commencement of the voyage, for the same purpose, namely appropriation⁸³.

2.11.7. In all these cases the act which removes the ship or cargo from the possession or control of the assured has to be an act by a public power or authority⁸⁴. The essence of this requirement lies in the fact that the act which dispossesses the assured or takes his property beyond his control is an act of a superior force or power, hence the notion of a higher hand, 'höher Hand'.

2.12. 'Nehmung' or capture by pirates is distinguished from the other events covered by article

81 Helberg, *op cit*, 58-59.

82 *Op cit*, 60.

83 Helberg, *op cit*, 59 fn 90.

84 Ritter-Abraham, *op cit*, 911.

861(1)(2). Piracy used to be common and was universally regarded as the scourge of the seas. In the case of piracy there is thus no state involved in the taking, pirates being the enemy of all states. Although piracy no longer occurs as frequently as it used to, it has not completely disappeared as a risk to shipping in some areas⁸⁵. Because an act of piracy does not vest ownership of the ship or goods in the pirates and remains a crime according to the laws of all states, there always remains some prospect that the ship or goods may be recovered. For that reason a taking by pirates satisfies the basic principle which underlies the doctrine of abandonment in German law, namely that there must be some uncertainty as to the final outcome of the event⁸⁶. Whilst some other countries may regard a capture by pirates as an actual or absolute total loss, German law only regards it as a case for abandonment⁸⁷.

2.13. In both the case of '*Verfügungen von höher Hand*'

85 The seas and ports of West Africa, some South American waters, the Singapore Strait and the Far East are still problem areas. In the case of pleasure boats and yachts the Caribbean waters are still subject to forms of piracy such as hijacking and the theft of vessels.

86 Helberg, *op cit*, 76.

87 Aschenheim, *op cit*, 20.

and capture by pirates, the assured is not allowed to abandon immediately on receipt of news of the detention or capture because it is at that time still uncertain whether the ship or goods may be released after a while⁸⁸. Although article 861 of the *HGB* lays down periods of six, nine and twelve months for short, intermediate and long voyages respectively, these periods are hardly in keeping with the pace of modern means of navigation and communication. A uniform period of two months has therefore been introduced in German marine insurance policies by article 73 of the *ADS*⁸⁹. The periods are computed from the day on which the loss is communicated to the insurer by the assured⁹⁰.

- 2.14. Only in the cases expressly mentioned in articles 861(1) and 862 of the *HGB* is there a right to abandon. Even in similar cases, for example a barratrous taking by the master and crew, the loss is treated as a total loss and not as a case of abandonment⁹¹.

88 Ritter-Abraham, *op cit*, 911.

89 See also Ritter-Abraham, *op cit*, 911.

90 Article 861 (2); De Smet, *op cit*, Vol II, para 982.

91 Aschenheim, *op cit*, 20 and the case cited in fn 5.

- 2.15. As soon as the requirement relating to the time period has been fulfilled, the assured may abandon. However, the factual circumstances upon which the abandonment is based must continue to exist and must still exist at the time of giving notice of abandonment⁹². If, therefore, the missing ship is found or the detained or captured goods released, the assured has no right to abandon⁹³. If the lost goods are recovered before the insured sum is paid and the assured wants to keep them, their value on recovery must be deducted from the amount otherwise recoverable⁹⁴.

Partial loss

- 2.16. All losses which are not total losses or losses giving rise to the right to abandon are average losses⁹⁵ dealt with under articles 872 to 881.
- 2.17. German law thus deals systematically with different types of loss. A clear distinction is

92 Reichsgericht I 4.4.1917, 90 Entsch. 140 (premature notice of abandonment); Reichsgericht I 23.2.1923, 92 Entsch. 240; Oberlandesgericht Hamburg 13.7.1915, 1918 APV 98 (proof of the fact that the ship had not been released during the relevant period).

93 Hagen, *op cit*, 138.

94 The 'Green Park', *supra*.

95 'Teilverlust'.

drawn between actual total losses and those losses which give rise to the right to abandon. The right to abandon is granted only in those cases where an event has occurred which has the effect of depriving the assured of control and beneficial possession of the subject-matter insured⁹⁶ but it is as yet uncertain whether the assured will be permanently deprived of the subject-matter insured⁹⁷. It is this uncertainty which distinguishes an actual total loss from an abandonment loss, for in the former case the loss is final and irreversible from the outset⁹⁸.

3. THE SUBSIDIARY RULES OF ABANDONMENT

- 3.1. The abandonment is made by way of a declaration to that effect⁹⁹. There is no prescribed form for the notice of abandonment, but the assured's election must be made clear¹⁰⁰. It is not necessary for the insurer to accept the

⁹⁶ The ship or cargo, (article 854), freight, (article 855), anticipated profit or commission, (article 856), bottomry and average moneys, (article 857).

⁹⁷ It is also this uncertainty which underlies the German theoretical explanation for the concept of abandonment.

⁹⁸ Hagen, *op cit*, 132.

⁹⁹ Aschenheim, *op cit*, 24.

¹⁰⁰ Helberg, *op cit*, 130.

abandonment for it to be effective¹⁰¹. The abandonment is a unilateral act on the part of the assured¹⁰². The right to abandon has to be exercised, as in other countries, within certain time limits and according to certain subsidiary rules.

- 3.2. Notice of abandonment must be tendered to the insurer within specified time limits¹⁰³. The period provided for notice is six months in the case of disappearance of the ship where the port of destination was a European port, and also in the case of capture, detention or taking by pirates, where the loss took place in a European port or in a European sea, including all ports or parts of the Mediterranean, Black Sea or the Sea of Azov. In all other cases notice of abandonment must be given in nine months. This period begins to run from the expiration of the applicable period laid down for the ship to be deemed to be

101 But such an acceptance has the effect of an acknowledgement that the abandonment has been made properly; Helberg, *op cit*, 138.

102 Aschenheim, *op cit*, 25. Aschenheim criticised the view held by Voigt to the effect that once an abandonment was accepted by the insurer, the abandonment took on a bilateral character. Aschenheim was of the view that while this might be so in French law (article 385 of the *CdeC*), that was not the case for German law.

103 Article 864 (1); De Smet, *op cit*, Vol II, para 985.

lost or for the ship to be released¹⁰⁴. In the case of reinsurance the period for notice of abandonment begins to run on the expiration of the day on which the assured gave notice of abandonment to the insurer (reinsured)¹⁰⁵. The requirement that the abandonment has to be made within a prescribed period prevents speculation by the assured at the expense of the insurer¹⁰⁶.

- 3.3. If notice of abandonment is not given within the period laid down, the assured loses his right to abandon without prejudice to his right to seek indemnification for the damage in accordance with other legal principles¹⁰⁷. If, in a case where the assured failed to give notice of abandonment within the period laid down, the missing ship should be found, the insurer becomes entitled to renounce his rights in the recovered ship in favour of the assured, in which event he is entitled to repayment of the sum insured less such amount as the assured may be entitled to as a

104 Article 864 (2); De Smet, *op cit*, Vol II, para 985.

105 Article 864 (3); De Smet, *op cit*, Vol II, para 985.

106 Helberg, *op cit*, 135.

107 Article 865 (1); Helberg, *op cit*, 131; De Smet, *op cit*, Vol II, para 985. The assured is thus limited to a claim for a partial loss.

partial loss¹⁰⁸.

- 3.4. The notice of abandonment must be unconditional¹⁰⁹, requires no acceptance in order to be valid and is irrevocable¹¹⁰. If, however, the insurer declines to accept it, the assured may withdraw it¹¹¹. It must extend to the whole of the subject matter of the insurance¹¹², save in the case where the insurance was for less than full value, in which event the assured is obliged to abandon a proportionate part of the subject matter of insurance¹¹³. In the case of double- or multiple insurance the abandonment is made *pro rata* so that each insurer receives that proportion which is equal to his share of the loss¹¹⁴.

108 Article 865 (2); De Smet, *op cit*, Vol II, para 985.

109 Helberg, *op cit*, 130.

110 'Die Abandonerklärung ist unwiderruflich', ('the abandonment is irrevocable'); Ritter-Abraham, *op cit*, 904. See also Hagen, *op cit*, 138; Oberlandesgericht Hamburg 6.7.1917, 1919 *Juristenzeitung* 280; Reichsgericht I 2.1.1918, 88 *Entsch.* See also Aschenheim, *op cit*, 23. This irrevocability exists from the moment of notice; Helberg, *op cit*, 139.

111 Aschenheim, *op cit*, 26; Barkhausen, *op cit*, 34; Helberg, *op cit*, 140; Reichsgericht I 5.1.1918, 1918 *JW* 507.

112 Article 866 (1) and (3); Aschenheim, *op cit*, 26; Helberg, *op cit*, 135-136; De Smet, *op cit*, Vol II, para 984-985.

113 Article 866 (2); Helberg, *op cit*, 136-137; De Smet, *op cit*, Vol II, para 984-985.

114 Aschenheim, *op cit*, 46; Barkhausen, *op cit*, 42; Helberg, *op cit*, 137.

3.5. The notice of abandonment is of no force or effect if the facts upon which it is based are not objectively true or no longer exist at the time of communication of the notice¹¹⁵. Once valid, however, it remains binding¹¹⁶ on both parties even if the circumstances were to change later to the extent that the assured would not have been entitled to abandon had the circumstances changed before notice was given¹¹⁷.

3.6. The assured has to provide security to make good any liens or real rights over the abandoned ship or cargo unless such real rights are based on risks insured against¹¹⁸. If the ship is abandoned, the insurer of the ship is entitled to such freight as is earned after the notice of abandonment¹¹⁹. If the freight is independently insured, the loss suffered by the assured in respect of the freight has to be borne by the insurer of the freight¹²⁰.

115 Ritter-Abraham, *op cit*, 904.

116 Ritter-Abraham, *op cit*, 904.

117 Article 867; De Smet, *op cit*, Vol II, para 988.

118 Article 868 (2); De Smet, *op cit*, Vol II, para 989.

119 Article 868 (3); De Smet, *op cit*, Vol II, para 989.

120 Article 868 (4); De Smet, *op cit*, Vol II, para 989.

3.7. The assured is obliged to do a number of things when giving notice of abandonment, including delivering to the insurer the documents of title in the things abandoned¹²¹ and giving details of any loans on bottomry and other securities against the insured ship or goods¹²². The assured may not claim payment of the sum insured before he has provided documentary proof in support of his right to abandon and the insurer has had sufficient time for the examination of that proof. In the case of the abandonment of a ship because it is lost, credible documents showing the time of sailing and the failure to arrive have to be furnished as well¹²³. The assured is obliged at the time of giving notice of abandonment and so far as he is able to do so, to notify the insurer of any other insurance on the thing abandoned, and whether any bottomry loans or other real rights attach to the ship or goods¹²⁴. The insurer may refuse to pay the sum insured until such notification is

121 Aschenheim, *op cit*, 49.

122 Aschenheim, *op cit*, 50.

123 Article 869 (1); De Smet, *op cit*, Vol II, para 987; Ritter-Abraham, *op cit*, 907.

124 Ritter-Abraham. *op cit*, 907.

ultimately given¹²⁵.

3.8. The assured is obliged, even after notice of abandonment, to attend to the salvage of the insured ship or goods and to prevent such further damage to them as he can, until such time as the insurer himself is able to take over the care of the ship or goods¹²⁶. If the assured discovers that the ship or goods thought to have been lost have been found, he must immediately advise the insurer and if requested to do so, must assist in the recovery or disposal of the recovered ship or goods¹²⁷. In such an event the insurer is obliged to reimburse the assured his expenses and also to furnish to him a reasonable advance if he requests such¹²⁸.

3.9. If the insurer accepts the abandonment, the insured must furnish him on demand and at the insurer's expenses with authenticated documents acknowledging the transfer of the assured's rights

125 Article 869 (2); Aschenheim, *op cit*, 50; Helberg, *op cit*, 144; De Smet, *op cit*, Vol II, para 986; Ritter-Abraham, *op cit*, 907.

126 Article 870 (1); Aschenheim, *op cit*, 50; Helberg, *op cit*, 142; De Smet, *op cit*, Vol II, para 989. See also the discussion by Hagen, *op cit*, 139.

127 Article 870 (2); Helberg, *op cit*, 142; De Smet, *op cit*, Vol II, para 989.

128 Article 870 (3); Helberg, *op cit*, 143; De Smet, *op cit*, Vol II, para 989.

to the insurer by virtue of the abandonment. Documents of title to the abandoned ship or goods must also be delivered to the insurer¹²⁹.

4. THE CONSEQUENCES OF THE ABANDONMENT

4.1. There are two main consequences of a proper abandonment in German law, as in other legal systems. In the first place the assured becomes entitled to the full amount of the insurance. In the second, his rights in and to the thing insured are transferred to the insurer¹³⁰. The right to claim the sum insured is enforced in the ordinary manner, by legal proceedings if necessary.

4.2. According to some writers the essence of abandonment lies therein that the ownership of the insured thing is transferred thereby to the insurer¹³¹. The notice of abandonment ('*Abandonerklärung*') has the effect that all the rights which the assured possessed in respect of the insured and abandoned effects are transferred

129 Article 871; Helberg, *op cit*, 145; De Smet, *op cit*, Vol II, para 989; Hagen, *op cit*, 138; Reichsgericht I 6.11.1918, 1919 APV 71. The delivery of the bills of lading is not necessary when they are also lost or taken; Reichsgericht I 15.10.1916, 89 *Entsch.* 40.

130 Aschenheim, *op cit*, 31; Martin, *op cit*, 95.

131 Aschenheim, *op cit*, 7.

to the insurer¹³². In German law the transfer takes place at the moment of the abandonment¹³³, unlike English law, where the transfer occurs retroactively to the moment of the event giving rise to the right to abandon. In French law¹³⁴ the transfer also takes place at the moment of the abandonment. The rights which are transferred are those in and to the ship or goods insured and which existed and vested in the assured at the time of the abandonment¹³⁵. These rights are transferred in the state they are at the time of transfer, together with such obligations as attach to the thing abandoned¹³⁶. The insurer therefore receives transfer of the ship together with such burdens as attach to her. Further, the transfer operates only to the extent of the insurance so that the assured who is under-insured retains that proportion of the particular insured effects in

132 Article 868 (1); De Smet, *op cit*, Vol II, para 989. '*Mit dem Verlangen nach die Versicherungssumme gehen die Rechte des Versicherungsnehmers am Schiff über*', ('The rights in the ship transfer to the insurer when the claim for payment of the insured sum is made'); Ritter-Abraham, *op cit*, 906. Hagen, *op cit*, 138 put it differently: '*Durch die Erklärung gehen die Rechte des Versicherungsnehmers auf den Versicherer über*', ('The assured's rights transfer to the insurer through (by means of) the declaration.')

133 Aschenheim, *op cit*, 30-32; Helberg, *op cit*, 94.

134 Article 385 of the CdeC.

135 Ritter-Abraham, *op cit*, 906.

136 Ritter-Abraham, *op cit*, 906-907.

respect of which he was self-insurer¹³⁷.

- 4.3. The insurer becomes the owner of the ship through the abandonment. The question which arises is whether the insurer as owner of the ship also becomes entitled to the freight earned by the ship¹³⁸. In the draft *HGB* article 751 provided that where the ship was abandoned the freight earned after the abandonment belonged to the insurer. In the subsequent discussions and consideration of the draft *HGB* this provision was changed to the effect that the insurer of the ship as owner did not become entitled to the freight. The conclusion thus reached was based on the theory that the ship and the freight are independent things and that the contract of affreightment under which the assured earns freight is of no concern of the insurer¹³⁹. The consequence would thus have been that under German law no part of the freight earned by the ship passed to the insurer of the ship upon abandonment. It is only where freight is earned by the ship in terms of a contract of affreightment

137 Aschenheim, *op cit*, 46.

138 Aschenheim, *op cit*, 33.

139 According to Aschenheim this conclusion is without doubt correct; *op cit*, 33-34.

concluded by the insurer as owner after the abandonment that he would be entitled to such freight, but that entitlement would obviously arise out of the contract concluded by the insurer himself and not from the contracts of affreightment concluded earlier by the assured. However, article 868(3) as eventually enacted makes it clear that the freight earned after the abandonment accrues for the benefit of the insurer of the ship.

4.4. The effect of the abandonment so far as the transfer of property or rights is concerned is therefore as follows:

4.4.1. Ownership of the ship or goods insured passes to the insurer¹⁴⁰.

4.4.2. In the case of the abandonment of bottomry and average monies the right or claim which the shipowner/assured has passes to the insurer¹⁴¹.

4.4.3. While the concept of an abandonment of anticipated profits gives rise to some difficulties, the

140 Aschenheim, *op cit*, 33.

141 Aschenheim, *op cit*, 42.

abandonment of anticipated profits is possible¹⁴².

- 4.5. Abandonment by an assured to his insurer has to be distinguished from the act of the owner of the ship who gives her over to his creditors. In the case of abandonment by an assured, it is made by a creditor. In the case of the abandonment made by the shipowner to his creditor, that is made by him as debtor¹⁴³. One could add that, in the case of abandonment by the shipowner to his creditors, ownership in the ship does not pass. For that reason abandonment by the assured to the insurer is possible after abandonment to creditors has already taken place. The converse is not possible because, once having abandoned to the insurer, the shipowner is no longer able to give her over to creditors as he is no longer the owner of the ship.

5. CONCLUSION

- 5.1. The retention of the right to abandon, not only in the *HGB* but also in the *ADS*, tends to indicate

¹⁴² Aschenheim, *op cit*, 42.

¹⁴³ Aschenheim, *op cit*, 6.

that there is a continuing need and demand for abandonment and that insurers are still prepared to grant insurance against such risks. In this regard the German approach differs completely from that of the Dutch, who have abolished the right to abandon altogether because it was being excluded in the standard Dutch policies.

5.2. The precise classification of different types of losses in German law is another aspect worthy of comment. South African law may not have a separate type of loss known as a total loss, although the concept is well known in practice. The *HGB* took the concept over from English law, but did so without taking over the concept of a constructive total loss at the same time.

5.3. The narrowness of the circumstances under which an abandonment is allowed in German law distinguishes German law from Dutch, French and English and American law¹⁴⁴. The lastmentioned legal systems recognize a host of other *causae* giving rise to

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It is almost as if the draftsmen of the *HGB* have heeded the call by Tecklenborg that abandonment be done away with because the wide concept of a total loss requires the insurer to pay the full amount of the insurance while the assured is in any event obliged to work actively towards the saving of the ship or goods (article 819(1)) and to account to the insurer for the proceeds obtained by his efforts. Under such circumstances, Tecklenborg, *op cit*, 358 argued, it is unnecessary to saddle the insurer with possession of the ship or goods when they are saved.

the right to abandon, like shipwreck, stranding with breaking up, innavigability or unseaworthiness, and damage to the extent of three quarters of the value of the ship or goods (in the case of Dutch and French law) or half (in the case of American law) or in excess of the repaired value (in the case of English law). In German law these additional *causae* are treated as actual total losses or partial losses, as the circumstances of each case demand. Yet these additional *causae* could affect the assured in exactly the same way as the cases of the missing ship and capture and detention in that the assured may be equally deprived of the power to dispose over his property by such events and therefore suffer an economic loss¹⁴⁵.

- 5.4. Nevertheless, there appears to be a distinguishing feature shared by the case of the missing ship with that of the captured or detained ship. This feature is to be found in the circumstance that in both these cases it is uncertain what the final outcome will be. Will the ship or goods be found or released? That question remains unanswered for a while, and only after the '*Abandonfrist*' has

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An economic loss exists where the ship or goods insured continue to exist but have become economically worthless.

elapsed does German law assume and provide finality. In all the other *causae* mentioned in the previous paragraph, however, there is no such uncertainty, or if there is uncertainty it can be cleared up within a relatively short time. Take the case of the ship which sinks or is stranded as an example. Within a relatively short time, having regard to modern means of communication, navigation and travel, the assured or his representatives can reach the scene to make an assessment whether the ship and cargo can be saved or not and to assess the extent and quantum of the loss. Finality is therefore capable of being reached in a relatively short time in such a case, and the assured is enabled to present a motivated claim under the policy for either a total or a partial loss.

- 5.5. It would therefore appear that the most prominent feature distinguishing German law from the other legal systems mentioned is the uncertainty about the final fate of the insured ship or cargo; which uncertainty has to prevail for the duration of the '*Abandonfrist*' before the right to abandon arises. This is amply demonstrated by the fact that the assured in German law in no case has the right to abandon immediately upon the mere happening of the

defined event, as he may do in other legal systems, and by the fact that the assured may immediately claim for an actual total loss if it should turn out, during the 'Abandonfrist', that the ship has sunk irretrievably.

5.6. Nevertheless, it would appear that in German law the same basic principles, with one notable exception which demonstrates the point made in the preceding paragraph, apply to abandonment as in Dutch law as it was under the *WvK*. These principles can be restated and summarised as follows:

5.6.1. The assured has a right, not an obligation¹⁴⁶, to abandon in the circumstances recognised by law. The insured effects which may be abandoned are the ship, her cargo, freight, bottomry and average monies and anticipated commissions and profits¹⁴⁷.

5.6.2. The assured may claim the full amount of the insurance in the instances where abandonment is allowed only against an abandonment, 'Abtretung',

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Helberg, *op cit*, 130 and 137; Ritter-Abraham, *op cit*, 903 and 915.

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Article 861 of the *HGB*; Aschenheim, *op cit*, 33-42.

of his rights in favour of the insurer¹⁴⁸.

5.6.3. Where the loss is certain and irreversible the loss is a total loss, '*Totalverlust*'¹⁴⁹, in the sense of an actual total loss, and not a loss giving rise to the right to abandon, and requiring an abandonment before the full amount of the insurance becomes payable. In this respect German law differs from Dutch law under the *WvK*¹⁵⁰, and also from French law, English law and American law.

5.6.4. The assured is not allowed to abandon until the prescribed period, the '*Abandonfrist*', has elapsed without the insured effects being recovered or freed¹⁵¹. This is in consonance with one of the categories of loss recognized by Dutch law under the *WvK*¹⁵².

5.6.5. The insured effects may also be abandoned in the case of the missing ship, after the prescribed

148 Article 861(1) of the *HGB*.

149 Articles 854-860 of the *HGB*.

150 Under the *WvK* this type of loss would have given rise to an immediate right to abandon.

151 Article 861(1) of the *HGB*; Ritter-Abraham, *op cit*, 911.

152 See Chapter 6 *supra*, para 6.6.4.

period has elapsed without the ship being found¹⁵³.

5.6.6. Certain formalities are required to be observed in the exercise of the right to abandon. These include the obligation to give a clear notice of abandonment¹⁵⁴ within stipulated time limits¹⁵⁵ and the obligation to declare other insurances over the abandoned effects and loans on bottomry and other securities against the ship or goods¹⁵⁶.

5.6.7. The abandonment may not be partial nor conditional and is irrevocable¹⁵⁷.

5.6.8. The abandonment results in the insurer being obliged to pay the full amount of the insurance¹⁵⁸ and ownership of the abandoned effects vesting in the insurer¹⁵⁹.

153 Article 861(1) of the *HGB*.

154 Helberg, *op cit*, 130.

155 Article 864(1) of the *HGB*.

156 Article 869(2) of the *HGB*.

157 Article 866 of the *HGB*.

158 This is implied by article 861 of the *HGB*.

159 Article 868(1) of the *HGB*; Aschenheim, *op cit*, 31-32; Helberg, *op cit*, 94.

5.7. Some differences between Dutch and German law have become apparent in the discussion so far, notwithstanding the fact that marine insurance was originally introduced into German law by Dutch underwriters. In the discussion of French law in the next chapter one may determine if there are significant differences between German and French law, and if so, what lessons can be learned therefrom.

CHAPTER EIGHT

FRANCE

1. INTRODUCTION

- 1.1. The contract of insurance was known in France in the sixteenth century already and was quite common at Rouen¹. In the last three centuries France has experienced legislative and academic activity in the field of marine insurance which is unrivalled in any other country. France has excelled in the introduction of universally acclaimed compilations and statutes on marine insurance, like the *Guidon de la Mer* and the *Ordonnance de la Marine* of 1681. The provisions of the *Guidon* and the 1681 ordinance were analysed and discussed by some of the most famous commentators on marine insurance matters like Valin², Pothier³ and Émerigon⁴, and served as models for statutes enacted in other countries. They even influenced the law in common law countries where marine insurance law is not

¹ Pardessus, *Collection de Lois Maritimes antérieures au XVIII^e Siècle*, Vol IV, 370 fn 3. The oldest known original French policy is that on the 'St Ilary' issued in Marseilles in 1584; Den Dooren de Jong, 'De Praktijk der Amsterdamsche Zeeverzekering in de 17^e eeuw', (1927) VIII *Verzekerings-Archief* 1 fn 3

² *Commentaire sur l'Ordonnance de la Marine du Mois d'Aout 1681*, (1760).

³ *Traité du Contrat d'Assurance*, (1768-1778).

⁴ *Traité des Assurances et des Contrats a la Grosse*, (1783).

codified or was only codified at a late stage⁵. The provisions of the *Ordonnance de la Marine* were eventually succeeded by a chapter of the *Code de Commerce* of 1807, (the '*CdeC*'), which in turn influenced the development of the law in faraway countries, and was also subjected to intense scrutiny by more modern French commentators like Boulay-Paty⁶, J.V. Cauvet⁷, E. Cauvet⁸, Danjon⁹, Ripert¹⁰ and De Smet¹¹. The marine insurance chapter of the *CdeC* in turn was replaced in 1967 with a totally new act¹².

1.2. The first traces of abandonment in French law are said to be found in the *Guidon de la Mer* of the

5 See, for example, the discussion of English and American law in Chapters 9 and 10 *infra*.

6 *Traité des Assurances et des Contrats a la Grosse d'Émerigon*, (referred to as Boulay-Paty, *Traité*), (1827) and *Cours de Droit Commercial Maritime, d'après les Principes et Suivant l'Ordre du Code de Commerce*, (referred to as Boulay-Paty, *Droit Commercial*), (1854).

7 *Traité sur les Assurances Maritimes*, (1862).

8 *Traité des Assurances Maritimes*, (1881).

9 *Traité de Droit Maritime*, (1914).

10 *Précis de Droit Maritime*, 7th ed, (1956).

11 *Traité Théorique et Pratique des Assurances Maritime*, 2nd ed, (1959-1960).

12 Law 522 of 1967. The Act has attracted academic interest and its provisions have already been analysed by Rodière and Pontavice, *Précis Dalloz: Droit Maritime*, 10th ed, (1986).

second half of the sixteenth century¹³. While the Barcelona Ordonnances passed between 1435 and 1484 shaped early French law in the Mediterranean, the *Guidon* was the guiding light on the Atlantic. French recognized only two types of loss, namely average losses and losses giving rise to the right to abandon. The ordinary or usual remedy is to claim for an average loss. Abandonment has been regarded as a special or extraordinary remedy, unique to marine insurance¹⁴, and limited to only those cases where the law unequivocally and specifically creates the right to abandon.

- 1.3. In France abandonment has always been linked to the indemnity principle and is regarded as a quick and simple remedy, as opposed to an average claim which takes time to finalise and is more cumbersome and difficult to quantify¹⁵. Charles Maclou¹⁶ explained that abandonment gives rise to two rights; the assured to the full amount of the insurance and the insurer to transfer of what is

13 Rodière and Pontavice, *op cit*, para 634. Rodière, *Droit Maritime: assurances et ventes maritime*, (1983), para 180 expresses the opinion that abandonment has its origins in the missing ship provisions of early marine insurance policies, but that theory is, it is submitted, flawed for the reasons given in Chapter 5 *supra* and Chapter 13 *infra*.

14 Rodière and Pontavice, *op cit*, para 633.

15 Rodière and Pontavice, *op cit*, para 642.

16 *Le délaissement dans l'assurance maritime*, (1954), 156-169.

saved. This extraordinary right is given to allow the investor to recover his investment as soon as possible to be able to re-invest his capital. The effect of abandonment is then to transfer the property abandoned to the insurer¹⁷.

2. ABANDONMENT UNDER THE CODE DE COMMERCE OF 1807¹⁸

2.1. INTRODUCTION

2.1.1. From its inception in 1807 until 1967 the CdeC regulated marine insurance matters in French law. Its provisions have not entirely lost their force as a result of their repeal by Law 522 of 1967 as would normally be expected. The provisions of the CdeC relating to abandonment closely followed the example of the *Guidon de la Mer* and the *Ordonnance de la Marine* of 1681 and, in turn, formed the basis of the provisions of Law 522 of 1967.

2.1.2. The CdeC recognized the same seven *causae* for abandonment as the *Ordonnance de la Marine* of

¹⁷ Maclou, *op cit*, 156-169. This theory is generally the same as that espoused by the Dutch and German theorists discussed in the previous chapters.

¹⁸ The CdeC was based on the *ordonnance* of 1681. The provisions of the Belgian *Wetboek van Koophandel* were virtually identical to those of the CdeC, a fact brought about by the history of the Napoleonic conquests.

1681. However, while the 1681 ordonnance allowed abandonment in the case of total loss, the CdeC allowed it if the damage exceeded three quarters of the value¹⁹.

2.2. THE CIRCUMSTANCES WHICH GAVE RISE TO THE RIGHT TO ABANDON UNDER THE CdeC

2.2.1. Article 369²⁰ of the CdeC allowed²¹ the assured to abandon the insured ship or goods in a limited number of circumstances²², namely in the cases of capture²³, shipwreck²⁴, stranding and breaking

¹⁹ J.V. Cauvet, *op cit*, Vol II, 21.

²⁰ Article 369 was based on article 46 of the *Ordonnance de la Marine*, which in turn was based on article 1 of Chapter VII of the *Guidon de la Mer* and article 25 of the Amsterdam Ordonnance of 1598. Article 46 of the 1681 ordonnance was amended in 1779 to provide that stranding had to be accompanied by breaking up before it gave rise to the right to abandon. Article 369 of the CdeC re-enacted article 46 of the 1681 ordonnance as thus amended, with one exception. The total loss provision ('perte entiere') was substituted by damage exceeding three quarters ('perte au moins des trois quarts') of the value of the thing insured; Pardessus, *op cit*, Vol IV, 376 fn 3; Abbink, *op cit*, Vol II, 189-196. On the construction of these requirements, see De Smet, *op cit*, Vol I, as follows: on capture ('prise') paras 533-541; on shipwreck ('naufnage') paras 542-544; on stranding with breaking up ('échouement avec bris') paras 545-547; on unseaworthiness ('innavigabilité par fortune de mer') paras 548-563; on loss or damage more than three quarters of the goods' value ('perte ou détérioration des trois quarts') paras 564-577; and on detention ('arrêt') paras 578-583.

²¹ Abandonment was regarded as a right vesting in the assured, who could choose between abandonment and average; J.V. Cauvet, *op cit*, Vol II, 33-34. In *Comp la Gironde v Amanieu* (the 'La Louise-Marie') 1854 (2) DJG 15 (Cour Impériale) the court held that the right to abandon is a 'pure faculté' and the assured has the choice between that and 'l'action d'avarie'. 'Il a le choix', said the court. In *Compagnie le Palladium v Pérès* (the 'Virgen del Carmen') 1855 (1) DJG 315 (Cour de Cassation) it was held that the assured may bring an average action in the alternative or subsidiary to an action based on abandonment. Abandonment is a 'simple faculté', the court said. The average action may, however, not be brought cumulatively with an abandonment action.

²² The policy could limit the right to abandon further; J.V. Cauvet, *op cit*, Vol II, 34.

²³ 'Prise.

up²⁵, unseaworthiness (innavigability) of the ship as a result of a maritime peril²⁶ and detention by a foreign power²⁷. In the case of damage to the insured ship or goods, the assured could also abandon them if the damage or the loss amounted to at least three quarters of the value²⁸. The missing ship was dealt with separately in article 375²⁹. If no news were received of the ship within a period of six months for ordinary voyages or one year for long voyages, the assured could abandon and claim the sum assured without proof that the ship had been lost³⁰.

24 'naufrage'.

25 J.V. Cauvet, *op cit*, Vol II, 24.

26 'Innavigabilité.'

27 J.V. Cauvet, *op cit*, Vol II, 30.

28 Droz was of the opinion that damage to the extent of three quarters of the value effectively amounted to a dispossession and therefore entitled the assured to abandon; *Traité des assurances maritimes, du délaissement et des avaries*, (1881), Vol I, 276. In the case of goods carried on a ship there was some overlapping as the goods could be abandoned by the mere fact that the ship had been shipwrecked and could also be abandoned if part, but not more than a quarter, were saved. This was so because the ship was regarded as having been totally lost as soon as it was shipwrecked. See 'La Manilla' 1859 (2) DJG 20 (Cour Impérial).

29 Article 375 re-enacted articles 12 of the *Guidon*, 5 of the Amsterdam Ordonnance of 1598 and 58 of the 1681 ordonnance, with some improvements suggested by Valin in his commentary on the 1681 ordonnance; Pardessus, *op cit*, Vol IV, 378 fn 1; De Smet, *op cit*, Vol I, paras 583-590; Abbink, *Het Zeerecht en de Zee-assurantiewetten aller volken*, (1847), Vol II, 191. Article 375 was amended by a law of 3 May 1862 which halved the periods laid down; Enschedé, *De Hoofdbeginselen van het Zee-Assurantie-Recht*, LLD thesis, Amsterdam, (1886), 152; Ripert, *op cit*, para 711.

30 This was regarded as an ancient and indispensable cause without which the assured would be unable to prove the loss; Ripert, *op cit*, para 711.

2.2.2. The cases for which the CdeC made provision can be categorised as follows:

- (a) the deprivation of possession of the thing insured for such a long period that it became commercially lost, namely by an event or process such as a capture or detention;
- (b) the occurrence of a loss or damage making it impossible to preserve the thing insured, such as shipwreck, stranding with breaking up and innavigability;
- (c) the case where the cost of repair in respect of the goods exceeded three quarters of their value; and
- (d) the case of the missing ship.

The CdeC allowed abandonment only in these events of major loss or damage, referred to as '*les sinistres majeurs*'³¹. These losses are also described as legal losses or presumed losses³²,

³¹ J.v. Cauvet, *op cit*, Vol II, 21; Ripert, *op cit*, para 710.

³² '*perte légale*' or '*cas de présomption de perte*'; J.V. Cauvet, *op cit*, Vol II, 21.

in apparent contradistinction to actual losses.

2.3. The most important principles regarding the various heads of loss giving rise to the right to abandon under the *CdeC* were as follows:

2.3.1. Capture. Capture is in essence a war risk rather than a risk attaching to the action of the sea, and occurs when a public power in the nature of a state, in the course of some military or similar type of conflict takes, by force if necessary, the property of an enemy state or of an enemy state's subject³³. It includes '*juste ou unjust*' capture³⁴.

2.3.2. Shipwreck. Shipwreck was distinguished from stranding in that the former is often a complete breaking up of the ship so that she ceases to be a ship³⁵. There was shipwreck as contemplated by article 369 of the *CdeC* where the ship had been reduced by '*les coups de mer à l'état d'une coque*

³³ Rodière and Pontavice, *op cit*, para 635.

³⁴ J.V. Cauvet, *op cit*, Vol II, 22. This principle is important in the consideration of the case of the '*Morning Star*', which is discussed in Chapter 18 *infra*.

³⁵ J.V. Cauvet, *op cit*, Vol II, 23.

rasée'³⁶ which the master could not save and was forced to abandon, even if the ship were thereafter saved and taken into port by another ship³⁷. However, it was not necessary for the ship to be broken up to constitute shipwreck, nor did it matter that she had sunk in a port³⁸. The word shipwreck in article 369(1) implied '*la rupture et la perte du navire, de manière que les débris seuls surnagent à la surface de l'eau*'³⁹. Thus a ship which had been submerged for three days but was refloated was not considered as shipwreck⁴⁰.

2.3.3. By virtue of articles 369, 371 and 381, read together⁴¹, shipwreck of the ship did not entitle the assured to abandon the cargo insured when it

36 'by the action of the sea to a bare hulk'.

37 *Assurances maritimes v Bilard ('Le Charles-Adolphe')* 1857 (2) DJG 77 (Cour Impérial).

38 *Compagnie d'assurances La Foncière v Poret-Lobez ('L'Aiglou')* 1925 (2) DJG 63 (Cour Douai).

39 'the rupture and damaging of the ship in such a manner that only debris remains on the surface of the water'.

40 *Durand de la Bédouandière et comp v Sellier et Autres ('Le Juste')* 1858 (1) DJG 392 (Cour de Cassation). Under the terms of the particular policy which restricted the right to abandon to shipwreck, the assured was held not to have the right to abandon.

41 *Comp d'assurances générales v Fournier ('La Neustrie')* 1856 (2) DJG 173 (Cour Impérial).

was entirely saved⁴². But when the goods were only partly saved, the assured could abandon them by virtue of article 369 read with article 381(1)⁴³.

- 2.3.4. Innavigability. Innavigability or unseaworthiness means that the ship can no longer put to sea. There is a distinction between absolute and relative innavigability⁴⁴. It is absolute if the ship cannot be put back in a seaworthy condition. It is relative if she cannot be repaired through lack of funds or means or the lack of equipment at the place where she lies⁴⁵. Even the ship sold of

42 There was some controversy about this question between Valin, Pothier and Émerigon; See De Smet, *op cit*, Vol I, para 544. De Smet approved of Émerigon's view, to the effect that the presumption of a total loss was a presumption of law so that the assured was entitled to recover the full amount of the insurance in respect of the goods insured as soon as there was a shipwreck of the ship.

43 *L'Union de ports v Wanner Langer et autres ('L'Oriental')* 1851 (1) DJG 33 (Cour de Cassation). See also the case of *'La Manilla'*, *supra*.

44 Martin, *L'Abandon du Navire et du Fret en Droit Français*, doctoral thesis, Bordeaux, (1957), 219.

45 In *Laporte v Guildbaud et autres ('Le Jules')* 1851 (1) DJG 289 (Cour de Cassation) it was held that the difference between relative and absolute innavigability lies therein that in the case of relative innavigability there is a lack of funds to repair the ship. In such a case the inability to obtain the funds to repair has to be established by the assured. In *Assureurs v Delrue* 1852 (1) DJG 118 (Cour de Cassation) it was held that the ship was innavigable and abandonment permissible under article 369(1) if, in the opinion of experts, it was necessary to demolish a large part of her and to reconstruct her at a cost more than it would cost to build from new. But where the ship can be repaired, raised and put in service again to continue to her destination, the assured would not be entitled to abandon. In *Georges et comp v Sargent et comp ('Le Mussa-Pacha')* 1859 (1) DJG 356 (Cour de Cassation) it was held that relative innavigability also gave rise to the right to abandon. It existed not only where there were no funds to repair although the ship was repairable, but also in the case where she had to be sold to defray the repair cost. This is also the case where the insurer who is aware of the casualty refuses to advance the funds to enable the ship to be repaired, a principle of relevance to the case of the *'Morning Star'*, which is discussed in Chapter 18 *infra*. See also the case of *Société Maritimes d'Agde v Puginier et Abbal ('Le Théodécée')*

necessity to pay the cost of repairs arising from a maritime peril could be abandoned validly in terms of article 369 (2)⁴⁶. The innavigability had to be the result of some maritime event or effect however⁴⁷.

2.3.5. Innavigability differed from shipwreck and stranding in that it did not automatically give rise to a presumption of loss in respect of the cargo, which had to be dealt with in accordance with the requirements of article 394⁴⁸. In the case of shipwreck there is nothing left which resembles a ship, but in the case of innavigability there remains something in the form of a ship⁴⁹.

2.3.6. The assured was not entitled to abandon as a result of innavigability if the ship could be refloated, repaired and enabled to continue its voyage to its destination. In such a case the

1870 (1) DJG 305 (Cour de Cassation); Martin, *op cit*, 220-222 and the case of the 'L'Atlantique' there referred to.

46 *Assurance Mutuelle v Riedman* ('La Bonne Clemence') 1851 (2) DJG 243 (Cour d'Appel); *Blandin et autres v Bergès* ('Le Gaston et Félicie') 1860 (1) DJG 439 (Cour de Cassation).

47 Martin, *op cit*, 220.

48 J.V. Cauvet, *op cit*, Vol II, 25-26.

49 Martin, *op cit*, 219.

assured retained his right to recover the cost and damage arising from the event from the insurer as average⁵⁰.

- 2.3.7. Innavigability was a '*perte légale*' giving rise to the right to abandon in respect of the cargo only if the goods could not be transhipped⁵¹. If the ship was declared unseaworthy the assured became obliged to give notice to the insurer of such declaration within three days of receipt of news to that effect⁵². In such a case the master was obliged to take all reasonable steps to acquire another ship to carry the cargo to its destination⁵³. The insurer then carried the risk in respect of the cargo carried in the substitute ship until it arrived at the destination contemplated and was discharged from the substitute ship⁵⁴. The insurer was in such a case also liable for the cost of transhipment, carriage and any additional freight or other costs incurred

50 Article 389; De Smet, *op cit*, Vol I, para 548; Abbink, *op cit*, Vol II, 194; Boulay-Paty, *Droit Commercial*, 232.

51 J.V. Cauvet, *op cit*, Vol II, 21.

52 Article 390; De Smet, *op cit*, Vol I, paras 555-556; Abbink, *op cit*, Vol II, 194.

53 Article 391; De Smet, *op cit*, Vol I, para 556; Abbink, *op cit*, Vol II, 194.

54 Article 392; De Smet, *op cit*, Vol I, paras 556 and 559; Abbink, *op cit*, Vol II, 194.

to save the cargo⁵⁵. If the master could not obtain another ship to carry the cargo to its destination within the period allowed by the *CdeC*, the assured could abandon the cargo⁵⁶.

- 2.3.8. Detention. Detention only gave rise to the right to abandon if it was done by a foreign governmental power, whether that government was recognized in international law or not⁵⁷. In *Régis v Leray et Lafargue ' (L'Arabie)'*⁵⁸ the ship was seized in Mauritius by virtue of the master's inability to pay for repairs which were effected to sea damage of the hull of the ship. The court held that the seizure and subsequent sale of the ship in terms of the order of a foreign court by virtue of the master's blameless inability to procure the necessary funds to pay for the repairs gave rise to the right to abandon on the ground of innavigability. The court further ruled that the order of the foreign court which authorized the seizure and sale amounted to '*une fortune de mer*' ,

55 Article 393; De Smet, *op cit*, Vol I, paras 556 and 559; Abbink, *op cit*, Vol II, 195.

56 Article 394; De Smet, *op cit*, Vol I, paras 559-560; Abbink; *op cit*, Vol II, 195.

57 De Smet, *op cit*, Vol I, para 533.

58 1880 (1) DJG 132 (Cour d'Appel).

a sea peril, as contemplated by article 369 (1) of the *CdeC*⁵⁹.

- 2.3.9. Loss or deterioration. In the case of loss or damage to the extent of three quarters in respect of the ship, the value was fixed without regard to the freight, the wages of the crew and any average contribution⁶⁰. In ships the deterioration was usually calculated with reference to the estimated cost of repair⁶¹. The three quarters was also calculated by reference to the agreed value, which could be less than the true value⁶². In the case of goods, the value was determined at the port of destination, through expert evidence or actual sale, according to the value the goods would have had if undamaged⁶³.

59 This decision is directly relevant to the problematic case of the 'Morning Star', which is discussed in Chapter 18 *infra*.

60 J.V. Cauvet, *op cit*, Vol II, 26-27. French policies could and often did restrict the right to abandon, as the case of the 'Barbel' (1978) 30 DMF 328 (Cour de Cassation Chamber Commerce 11/10/77) demonstrates. Clause 22 of the current French hull policy sets 2 conditions for a claim based on abandonment. In the first place the total repair cost has to equal or exceed the agreed value of the ship. In the second place the ship must not have been condemned solely by reason of the lack of funds to pay the damages due to third parties. See also the note by the author on the last three pages of this judgment.

61 J.V. Cauvet, *op cit*, Vol II, 29. In *Basse v Assureurs Maritime* ('La Nanine') 1853 (2) DJG 4 (Cour Impériale) it was held that, when considering whether there has been deterioration by three quarters as contemplated by article 369, one had to compare the cost of repair with the value of the ship at the time of conclusion of the contract.

62 Ripert, *op cit*, para 713.

63 Ripert, *op cit*, para 714.

2.3.10. The missing ship. In the case of the missing ship the assured had to have an honest belief in the validity of the abandonment⁶⁴. The period of six months or one year commenced to run from the date of the departure of the ship, or the date on which news was last received about her, whichever was the later⁶⁵. Article 377 defined what constituted long voyages⁶⁶. In the case of insurance for a limited period, it was presumed that the ship had been lost during the term of that insurance if she were to disappear during a voyage part of which was covered by the insurance⁶⁷. In the case of successive policies, the loss was presumed to have occurred on the date of sailing or the last news of the ship, and the insurer on the policy then in place and effect was held liable for the whole loss.

2.4. According to article 370 the assured could not

⁶⁴ J.V. Cauvet, *op cit*, Vol II, 32.

⁶⁵ J.V. Cauvet, *op cit*, Vol II, 33; Ripert, *op cit*, para 711.

⁶⁶ The definition of a long voyage was imported by a Declaration of 22 August 1673, and taken up in article 59 of the 1681 ordonnance, which in turn was taken up in article 377 of the CdeC; Pardessus, *op cit*, Vol IV, 378 fn 2. There is some acknowledgement of the improvements in modern means of communication in the absence of a similar provision in Law 522 of 1967.

⁶⁷ Article 376. But for this presumption the assured would still be unable to prove the loss had occurred within the policy period; Ripert, *op cit*, para 711; J.V. Cauvet, *op cit*, Vol II, 33; De Smet, *op cit*, Vol I, para 588; Abbink, *op cit*, 191.

abandon before the voyage had commenced, except in the case of detention by the domestic government⁶⁸.

2.5. In terms of article 371 all other losses were regarded as average losses and were determined between the assured and the insurer according to their respective interests in the goods insured⁶⁹. This article gave effect to the long-standing principle of French law that the circumstances giving rise to the right to abandon were a *numerus clausus*⁷⁰.

2.6. THE SUBSIDIARY RULES OF ABANDONMENT UNDER THE *CdeC*

2.6.1. Various formalities had to be complied with by the assured when he exercised his right to abandon and a number of time limits were imposed⁷¹. In terms of article 373 the assured could not give notice

68 The equivalent articles in the *Guidon* and the 1681 ordonnance were 4 and 52 respectively; Pardessus, *op cit*, Vol IV, 377 fn 4.

69 Article 371. The usual manner of claiming the indemnity was by particular average. The assured, who was entitled to claim the indemnity by way of the unusual procedure of abandonment, had to exercise that right by giving notice as failure to do so led to the conclusion that he did not intend to make use of it; De Smet, *op cit*, Vol I, para 614. The notice could be oral or in writing as no formality was prescribed; De Smet, *op cit*, Vol I, para 614; Abbink, *op cit*, Vol II, 189.

70 J.V. Cauvet, *op cit*, Vol II, 33.

71 J.V. Cauvet, *op cit*, Vol II, 36.

of abandonment until the expiry of a period of six months, one year or eighteen months, depending on whether the loss occurred in what could be described as European waters in the first instance, the Atlantic Ocean in the second instance and the rest of the world in the third instance⁷².

- 2.6.2. More specific time limits and requirements were laid down for different eventualities. In the case of capture by pirates⁷³ or enemies or detention by a foreign power, the assured had to give notice of abandonment within three days after receipt of the news. Abandonment of the insured goods was not permitted before the expiry of a period of six months or one year, depending on whether the capture or detention occurred in the vicinity of Europe or elsewhere. In the case of perishable goods the periods were a month and a half and three months respectively. If the insured thing were declared a prize or forfeited, the assured was allowed to abandon immediately upon receipt of

72

This provision is the same in effect as German law where the assured has to wait for the prescribed period (the 'Abandonfrist') to elapse before he may abandon.

73

On the definitions of pirates and piracy see Nicolas, '*Piraterie maritime dans la "guerre du thon"*' (1994) 46 DMF 622. Nicolas refers to numerous recent instances of piracy and the conclusion is that piracy still continues to constitute a maritime risk. See also '*The Medipas Star*' (1995) 47 DMF 313 (Cour d'Appel D'Aix-en-Provence).

that information⁷⁴. Overall the position in French law under the *CdeC* was similar to that of English law where notice of abandonment is required at an early stage, thereby enabling the insurer to take steps to protect his interests.

2.6.3. During the periods referred to, the assured was obliged to take all reasonable steps to try to achieve the release of the captured or detained goods⁷⁵. The insurers were entitled to take some of the steps with or without the assured's co-operation⁷⁶.

2.6.4. In the case of detention by a foreign power, time only commenced running after the expiry six or twelve months, depending on the ship's destination⁷⁷. In all cases time ran from receipt

⁷⁴ The first part of article 387 re-enacted article 12 of the Rotterdam Ordonnance of 1604 and article 49 of the *Ordonnance de la Marine* of 1681. The second part of the article re-enacted articles 6 of the *Guidon* and 50 of the 1681 ordonnance; Pardessus, *op cit*, Vol IV, 376-377 fn 1. See also De Smet, *op cit*, Vol I, paras 534-540; Abbink, *op cit*, Vol II, Vol II, 194.

⁷⁵ In the '*Bage*' (1930) 8 DMF 220 (Tribunal de Commerce de Marseilles 7/4/30) the assured failed to preserve the insurer's right against the carrier and his claim was therefore reduced by virtue of the damages suffered by the insurer.

⁷⁶ Articles 381 and 388 of the *CdeC*, which confirmed the principles laid down in articles 5 and 6 of the *Guidon* and 45 and 51 of the 1681 ordonnance; Pardessus, *op cit*, Vol IV, 376 fn 2 and 377 fn 3. See also De Smet, *op cit*, Vol I, para 538; Abbink, *op cit*, Vol II, 194.

⁷⁷ Article 373 considerably simplified the provisions of its predecessors, articles 12 of the *Guidon* and 48 of the 1681 ordonnance, by providing time limits which were specific to abandonment. Time limits for other matters were set out in article 432; Pardessus, *op cit*, Vol IV, 376 fn 5. See also De Smet, *op cit*, Vol I, paras 606-610; Abbink, *op cit*, Vol

of news of the defined event⁷⁸. After expiry of these periods the insured was no longer entitled to abandon⁷⁹, and had to content himself with an average claim. The insurer who had re-insured was also obliged to abandon to the re-insurer⁸⁰.

2.6.5. In cases where the assured had the right to abandon as in all other cases where incidents occurred which could affect the liability of the insurer, the assured was obliged to disclose to the insurer any news received with regard to the subject matter of the insurance, failing which he was held liable for any loss suffered by the insurer as a result of his failure. The disclosure of this information had to occur within three days of the receipt thereof by the assured⁸¹. When the assured transmitted the news received by him about

II, 190. Article 373 was amended from 3 May 1862; Enschedé, *op cit*, 152. In Belgium the insurer may, prior to the expiry of the periods within which notice has to be given, call upon the assured to abandon, and if the assured fails to do so, he will no longer be entitled to abandon in terms of article 227 of the Belgian *Wetboek van Koophandel*, ('the Belgian *WvK*'), which had no equivalent in the *CdeC*. In Belgium the assured in the case of re-insurance has to give notice of abandonment to the re-insurer within the period determined by article 57 of the law of 20th May 1872, which period commences to run on the day on which the re-assured receives notice of abandonment from his assured; Article 228 of the Belgian *WvK*, which also had no corresponding article in the *CdeC*.

78 Ripert, *op cit*, para 717.

79 Ripert, *op cit*, para 717.

80 Ripert, *op cit*, para 715.

81 Article 374 had its equivalent in articles 1 and 4 of the *Guidon* and 42 of the 1681 ordonnance; Pardessus, *op cit*, Vol IV, 375 fn 7. See also De Smet, *op cit*, Vol I, para 612; Abbink, *op cit*, Vol II, 190.

the ship or insured goods, he could abandon immediately and demand payment of the insured sum or he could reserve his right to abandon later during the period laid down by the *CdeC*⁸².

- 2.6.6. No specific form of notice was prescribed⁸³ but article 372 provided that the abandonment had to be total⁸⁴ and unconditional⁸⁵. It extended only to the goods insured and could only be made if the loss occurred as a result of a risk insured against⁸⁶. When the owner of the ship insured abandoned her he also had to abandon to the insurer of the ship the freight prepaid in respect of lost cargo if the freight was non-refundable⁸⁷.

82 Article 378 was based on articles 1 of Chapter III and 2 of Chapter VII of the *Guidon* and article 43 of the 1681 ordonnance; Pardessus, *op cit*, Vol IV, 375 fn 8. See also De Smet, *op cit*, Vol I, para 612; Abbink, *op cit*, Vol II, 191.

83 Ripert, *op cit*, para 716.

84 Articles 7, 8 and 9 of the *Guidon* allowed the assured to abandon part and to retain the rest of the goods insured. However, article 47 of the 1681 ordonnance forbade a partial abandonment and this provision was then taken up unchanged in the *CdeC*; Pardessus, *op cit*, Vol IV, 376 fn 4. The abandonment could not be partial because it transferred property. This applied to underinsurance too, as there had to be a proportional abandonment; J.V. Cauvet, *op cit*, Vol II, 34-35.

85 Its effect of transferring property required it to be unconditional; J.V. Cauvet, *op cit*, Vol II, 35.

86 De Smet, *op cit*, Vol I, paras 591-596, 615; Abbink, *op cit*, Vol II, 189.

87 In *Picard, Terrieux et comp v Compagnie d'assurances générales maritimes ('La Bella-Cubana')* 1880(1) DJG 131 (Cour de Cassation) the court held this requirement to be in accordance with articles 302 and 386 (1) of the *CdeC* as well as long-standing custom.

2.6.7. Article 379 imposed further obligations on the assured who elected to abandon. He had to notify the insurer of all other insurances taken out by him or his agent, and of all other insurances taken out on the goods by others and of which he had knowledge⁸⁸. This enabled the insurer to determine whether his liability was reduced⁸⁹. The time for payment which ordinarily ran from the date of abandonment, did not commence to run until the assured had provided this information⁹⁰. The period within which the assured was obliged to institute action against the insurer was not extended and ran against the assured notwithstanding that he had not furnished the relevant information⁹¹. In the case of a fraudulent return of the required information, the onus of proof being on the insurer, the assured

88 J.V. Cauvet, *op cit*, Vol II, 37. It was held by the Commercial Court of Marseilles (on 26 January 1820) that this provision was designed to prevent fraud, and that the assured was obliged to make a return even to declare that there was no other insurance or loan on bottomry in place; J.V. Cauvet, *op cit*, Vol II, 39.

89 Ripert, *op cit*, para 716.

90 The sanction for the assured's failure was a delay in payment; Ripert, *op cit*, para 716.

91 Article 379 re-enacted article 53 of the 1681 ordonnance with some improvements suggested by Valin; Pardessus, *op cit*, Vol IV, 377 fn 5. See also De Smet, *op cit*, Vol I, para 616-620; Abbink, *op cit*, Vol II, 192.

lost all the benefits of the insurance⁹².

- 2.6.8. The assured was obliged to deliver proof of the loading of the goods and of the loss to the insurer before he was entitled to institute action for recovery of the insured sum⁹³. The insurer was entitled to lead evidence to disprove the facts alleged in the assured's documents and exhibits. The acceptance of the abandonment by the insurer contemplated by article 385 (1) could be tacit or express⁹⁴. Further, in a case where a dispute arose about the assured's right to abandon, the insurer could be compelled to make a provisional payment of the insured sum, provided the assured put up security for restitution. The security lapsed if no action was instituted by the assured within two years⁹⁵.

92 J.V. Cauvet, *op cit*, Vol II, 38; De Smet, *op cit*, Vol I, para 619; Abbink, *op cit*, Vol II, 192. Article 380 restated the provisions of article 54 of the 1681 ordonnance with an amendment suggested by Valin while article 55 of the 1681 ordonnance provided for exemplary punishment in the case of a fraudulent return of the information, but the latter provision was not taken up in the *CdeC*; Pardessus, *op cit*, Vol IV, 377 fn 6 and 7.

93 Article 383 reproduced article 56 of the 1681 ordonnance, which was in turn based on article 2 of the *Guidon*; Pardessus, *op cit*, Vol IV, 377 fn 8. See also De Smet, *op cit*, Vol I, para 621; Abbink, *op cit*, Vol II, 192.

94 *Vanderlenne et Bulot v Sauvage ('La Notre-Dame-de-Mer')* 1903 (1) DJG 447 (Cour de Cassation).

95 Article 384 was based on article 61 of the 1681 ordonnance and article 2 of the *Guidon*; Pardessus, *op cit*, Vol IV, 377 fn 8. See also De Smet, *op cit*, Vol I, para 628; Abbink, *op cit*, Vol II, 192-3.

2.7. THE CONSEQUENCES OF THE ABANDONMENT UNDER THE CdeC

2.7.1. As soon as the notice of abandonment was served and accepted or was declared to be valid by a judgment, the insured goods were transferred⁹⁶ to the insurer with effect from the date of abandonment. Such a transfer occurred by operation of law and it was unnecessary to give a special cession or subrogation to the insurer⁹⁷. Since the abandonment transferred ownership in the thing insured, it could only be made by the assured or a person acting on his authority⁹⁸.

2.7.2. The insurer was not entitled to avoid payment of the insured sum if the ship were recovered or returned after the date of abandonment⁹⁹. The transfer was also conditional upon the insurer

96 Article 385. The abandonment transferred property in terms of the law and did so unilaterally. '*Il y a là un mode d'acquisition de la propriété propre droit maritime*'; ('It is a method of acquiring property in terms of maritime law.') Ripert, *op cit*, para 719.

97 *Comp. la Gironde v Amanieu* ('*La Louise-Marie*') 1854 (2) DJG 15 (Cour Impériale); *Basse v Assureurs Maritime* ('*La Nanine*') 1853 (2) DJG 4 (Cour Impériale).

98 In *Comp de Gironde v Amanieu* ('*La Louise-Marie*') 1855 (1) DJG 162 (Cour de Cassation) it was held that the master cannot abandon without a power of attorney from the owner even though he has the power to sell the ship in certain circumstances. An abandonment so made without a power of attorney does not transfer ownership.

99 De Smet, *op cit*, Vol I, para 629-633. Article 385 departed from the provisions of article 60 of the 1681 ordonnance by adding the words '*et accepté ou jugé valable*'. The automatic transfer of rights provided for by article 60 of the 1681 ordonnance thus came to an end, and henceforth the co-operation of the insurer or a judgment of the court was necessary to effect the transfer; Pardessus, *op cit*, Vol IV, 378 fn 3.

making payment of the sum insured¹⁰⁰.

2.7.3. There was some dispute whether the transfer operated from the time of notice or the time of acceptance or validation. The main argument against retro-activity beyond the date of notice was that the insurer could not be the owner of the insured thing without his knowledge. Ripert was of the view that the transfer operated from the time of notice because it was unilateral¹⁰¹, but this view does not appear to be supported by case law.

(a) In the case of the 'Terzic'¹⁰² the hull insurer declined to accept the transfer of the ship upon the abandonment. The court held that the cost of refloating the ship was for her owner's account (the assured's) and not for the insurers' where liability for such costs was based on ownership.

(b) In the case of the 'Alésia'¹⁰³ the insurer also declined to accept transfer of

100 Ripert, *op cit*, para 719.

101 Ripert, *op cit*, para 721.

102 (1966) 18 DMF 540 (Cour d'Appel de Rennes 1st Chamber 4/1/66).

103 (1965) 17 DMF 674 (Tribunal de Grande Instance de Morlaix 21/10/64).

ownership after an abandonment but paid the full indemnity. The ship was thereafter refloated by the assured. The Court held that the insurer was not entitled to share in the proceeds. All the profit of the assured's efforts thus went to the assured¹⁰⁴.

- (c) In the case of the '*Césarée*'¹⁰⁵ the court held that the right to abandon to creditors can no longer be exercised by the shipowner who, as assured, has abandoned the ship to his insurers as he no longer owns the ship.

2.8. In the absence of agreement to the contrary, the insurer was obliged to pay the insured sum within three months after receipt of the notice of abandonment¹⁰⁶. In some cases the assured was obliged to deliver proof of ownership such as bills of lading and other documents of title to the insurer to enable him to exercise his rights

104 See also the comment on this case in (1965) 18 *Revue Trimestrielle de Droit* at 934.

105 (1932) 10 DMF 179 (Tribunal de Commerce d'Alger 6/1/32).

106 Article 382 was based on article 44 of the *Ordonnance de la Marine*, which in turn followed the period laid down in article 25 of the Amsterdam *Ordonnance* of 1598 and article 23 of the 1573 *Ordonnance* of Philip II. The *Guidon* did not lay down any time for payment; Pardessus, *op cit*, Vol IV, 376 fn 1. See also De Smet, *op cit*, Vol I, para 626; Abbink, *op cit*, Vol II, 192.

as owner¹⁰⁷. A valid abandonment, accepted or validated by the court, was final in its effect¹⁰⁸.

2.9. The acceptance or validation of the abandonment created a legal link between the assured and insurer from which neither could withdraw without the consent of the other¹⁰⁹. In case of fraud, however, it could be set aside¹¹⁰. The effect of an abandonment which had been accepted or validated was thus twofold. In the first place, it transferred ownership of the insured property, and in the second place, it entitled the assured to payment of the sum insured¹¹¹.

2.10. The assured could abandon the ship to the insurer and give her up to creditors¹¹². The insurer's position vis-a-vis creditors was that he stood in the shoes of the assured through the subrogation,

107 Ripert, *op cit*, para 719.

108 Ripert, *op cit*, para 718. The abandonment could be withdrawn prior to acceptance or validation by the court; J.V. Cauvet, *op cit*, Vol II, 40.

109 J.V. Cauvet, *op cit*, Vol II, 40.

110 J.V. Cauvet, *op cit*, Vol II, 42.

111 J.V. Cauvet, *op cit*, Vol II, 41.

112 Ripert, *op cit*, para 720. The giving up of the ship to creditors is called 'l'abandon', which could lead to confusion. But the assured can no longer give the ship up to creditors after ownership has passed to the insurer by virtue of a valid abandonment; The 'Césarée', *supra*.

and was therefor entitled to revoke the 'abandon' to creditors if it was not accepted by creditors against a total discharge of the assured's debts. The insurer was also entitled to oppose claims and could claim the ship and freight as owner¹¹³.

- 2.11. The freight saved had to be abandoned to the insurer of the ship, not the insurer of the freight¹¹⁴, and this had to be done at the same time as the abandonment of the ship in terms of article 386. The freight saved was regarded as being '*accessoire de l'objet délaissé*'. It is apparent that the CdeC originally contemplated abandonment of the freight as merely an adjunct to the abandonment of the ship. Article 386 was repealed on 12 August 1885, and from that date the freight could be abandoned separately¹¹⁵.

- 2.12. When the freight was abandoned¹¹⁶, the insurer of

113 J.V. Cauvet, *op cit*, Vol II, 51. The abandonment to creditors did not transfer ownership; it is in the nature of a *solutum datio*; J.V. Cauvet, *op cit*, Vol II, 52.

114 *Lemaître et comp v Assurance Mutuelles ('La Ceres')* 1853 (2) DJG 61 (Cour Impériale).

115 Danjon *op cit*, Vol V, para 1511; De Smet, *op cit*, Vol I, para 596. This situation has changed again with the enactment of Law 522 of 1967; see the text *infra*.

116 J.V. Cauvet was of the opinion that the freight, including freight paid in advance was abandoned with the ship, as the abandonment transfers all the assured's rights, which would include any profit made or to be made on the voyage; *op cit*, 45-46.

the freight became entitled to that portion of the freight earned on the cargo saved so far as the freight had been earned up to the moment of the disaster, even if it had been paid in advance or during the voyage. The insurer's rights to the freight were subject to the rights of those who had advanced money on bottomry and the rights of the crew to payment of the salary, the cost of repatriation and the cost and expenses incurred during the voyage¹¹⁷.

- 2.13. The *CdeC* dealt with abandonment in conventional fashion. There was no great difference between its principles and those of the *Ordonnance de la Marine* of 1681, nor between the *CdeC* and the codes of neighbouring countries such as the Netherlands and Belgium¹¹⁸. The *CdeC*'s provisions were in force for a hundred and sixty years during which they exerted great influence in not only the

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Article 386, which had no equivalent in either the *Guidon* or the 1681 ordonnance; De Smet, *op cit*, para 596-598; Abbink, *op cit*, 599. The insurer of anticipated profit had no claim on the goods in the case of abandonment in Belgium; article 240 of the Belgian *WvK*. There was no similar provision in the *CdeC*; De Smet, *op cit*, para 600-602; Abbink, *op cit*, Vol II, 193. In Belgium in the case of abandonment of the freight the insurer is allowed to deduct from the sum insured those amounts which the assured no longer needs to pay for the salaries of the crew and other expenses for which the assured is no longer liable but the premium for the amount deducted has to be repaid in terms of article 242 of the Belgian *WvK*. There was no equivalent article in the French *CdeC*.

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In the case of the Dutch and Belgian codes the cause of the almost complete correspondence with the *CdeC* is to be found in the history of the Napoleonic conquests and their effect on the Dutch and Belgian codification processes.

French colonies, but also in other countries where the *CdeC* and its great predecessor, the *Ordonnance de la Marine* of 1681 were revered. Inevitably, however, their time had come to pass and the call for a new approach was being heard more and more frequently.

3. ABANDONMENT UNDER LAW 522 OF 1967

3.1. INTRODUCTION

3.1.1. The winds of change which caused the Netherlands to reconsider the abandonment provisions of the *Wetboek van Koophandel* of 1838 ('the *WvK*') were also blowing in France. The ancient provisions of the *CdeC* began to be regarded as outdated¹¹⁹ and thus came under the spotlight increasingly from the middle of this century. According to Juglart¹²⁰ abandonment had undergone a number of changes over the years which had 'disfigured' it. One could well ask, he wrote, if abandonment hasn't fallen into desuetude in current practice, because when one uses the word '*délaissement*' one envisages a transfer of property. By reason of the

119 See the editorial comment in (1968) 20 DMF 7-9.

120 '*Droit maritime*', (1965) 18 *Revue Trimestrielle de Droit Commercial* 934.

onerous charges inherited from the assured, insurers in recent years have habitually declined to accept transfer of ownership of the ship. The essence of the doctrine of abandonment was thus being eroded in practice. Maclou even spoke of '*un perte totale sans transfert de propriété*'¹²¹.

- 3.1.2. The case of the '*Alesia*'¹²² demonstrates some of the problems which arise as a result of the attitude of insurers to the onerous obligations imposed on them when they become owners of the ship or goods insured through the abandonment. In the '*Alésia*' the insurer declined to accept the transfer but paid the full amount of the insurance. The assured thereafter recovered the ship and sold her advantageously. The insurer claimed to be entitled to a repayment from the assured. The court found against the insurer. Since the assured had remained the owner of the ship and had borne all the risks and expenses in recovering her, he was held to be entitled to retain all the profit from his enterprise. This

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Op cit, 151 note 153. ('A total loss without transfer of property.')

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Supra.

result is in consonance with Maclou's opinion¹²³, but it smacks of a degree of enrichment on the part of the assured.

- 3.1.3. The practice of the French insurers in recent years has been to reduce the number of causes giving rise to the right to abandon from the seven allowed by the *CdeC* to two, namely disappearance or total destruction of the ship and innavigability caused by an insured peril¹²⁴. Nevertheless, contrary to the approach followed by the Netherlands to abolish the institution of abandonment completely because, *inter alia*, it had virtually fallen into disuse, the French Parliament has retained abandonment in its latest legislation. Law 522 of 1967 came into operation in France with effect from 4th July 1967. Its provisions were amplified by Decrete 64 of 1968, promulgated on 25th January 1968¹²⁵. The main

123 *Op cit*, 163: '*L'assuré a conservé les risques de la propriété; il est juste qu'il en perçoive le profit.*' ('The assured carried the risk of ownership; it is just that he should reap the profits.')

124 Martin, *op cit*, 207-208. In the case of insurance of the goods, the standard policy allows abandonment in four cases, namely disappearance without news, sale by reason of material damage, impossibility to complete the voyage and deterioration by more than three quarters of the value; Rodière and Pontavice, *op cit*, para 635.

125 Harrel-Courtès, *Le Nouveau Droit Français de L'Assurance Maritime et des Événements de Mer*, (1968), 3; Chauveau, *Assurances Maritime*, 2. Apart from the Canadian Marine Insurance Act 1993, which did not change Canadian law so far as abandonment is concerned, the French statute (with the decreete) is the most modern code of marine insurance, and its provisions, especially with regard to abandonment, reflect the changes in means of communication which have occurred in the last fifty years.

effect of the new provisions is that France has moved away from the outmoded provisions of the CdeC to a more simplified set of rules of abandonment¹²⁶.

- 3.1.4. The substantive provisions of the law are now set out separately in Law 522 itself while the formal requirements like time limits and the return to be made by the assured are set out in the decreet. The parties are also allowed considerable latitude in choosing their own terms, but they are not allowed to deviate from the provisions of certain articles of Law 522¹²⁷. For example, articles 18, 55 and 56 lay down the circumstances under which an assured may abandon, but those sections are not imperative and the parties are at liberty to discard or modify them.

3.2. THE CIRCUMSTANCES GIVING RISE TO THE RIGHT TO ABANDON UNDER LAW 522 OF 1967

- 3.2.1. Article 28 of Law 522 restates the well-

126 For a more complete discussion of the important changes brought about by Law 522 and the decreet see Lureau, '*La nouvelle législation des assurances maritimes*', (1968) 20 DMF 193, 257.

127 Article 2: '*Ne peuvent être écartées par les parties au contrat les dispositions des articles 3, 6, 7, 10, 12, 13(alinéa 1), 17(alinéa 2), 21, 24, 25, 26, 32, 35, et 40.*' ('The parties may not depart from the provisions of articles ...')

established rule of French law that all losses and damages are particular average losses, except where the assured has the right to abandon in such cases as are determined by the law or the policy¹²⁸. There thus remain two main categories of loss under French law, namely a partial loss and a loss giving rise to the right to abandon¹²⁹. Article 28 is phrased in such a way that it still gives effect to Émerigon's statement that the circumstances under which the law allows an assured to abandon are exclusive in that the law is prohibitive, disallowing abandonment in any case other than one of the defined ones¹³⁰. The assured has a choice between a claim based on an abandonment or a claim for a partial loss¹³¹.

3.2.2. Article 48 of Law 522 of 1967 names the circumstances under which an assured may abandon

128 Article 28: '*Les dommages et pertes sont réglés en avarie, sauf faculté pour l'assuré d'opter pour le délaissement dans les cas déterminés par la loi ou par la convention.*' ('Losses and damage constitute particular average, unless the right to abandon has been granted to the assured in those cases determined by the law or the contract.')

129 The latter category includes cases which may be described, in English terminology, as cases of actual total loss.

130 *Traité des Assurances et des Contrats à la Grosse*, (1783), (Meredith's translation), 665-666. In the '*Barbel*' (1975) 27 DMF 49 (Tribunal de Commerce de Paris 29/1/74) the court confirmed that an abandonment cannot be made in any cases other than the cases expressly provided for by the law or the contract.

131 Under the CdeC the assured had the same right to choose between abandonment and particular average; Harrel-Courtès, *op cit*, 34.

the ship¹³². These grounds are total loss¹³³, damage to the extent that the repair costs exceed three quarters of the agreed value¹³⁴, impossibility of repair, and the absence of any news for more than three months. In the latter instance the loss is presumed to have occurred on the date of the last news. Article 48 is also applicable to contracts of insurance of ships which are not secured for the duration of their stay, in port or in the roads or other place but are afloat or chocked up, and to ships under construction¹³⁵. It is apparent that some of these causes may amount to an actual total loss where, under English or German law, there would be no obligation on the assured to abandon¹³⁶. In French law, however, the assured will have to

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Article 48: '*Le délaissement du navire peut être effectuée dans les cas suivantes:*

1. *Perte totale;*
 2. *Reparation devant atteindre les trois quarts de la valeur agréée;*
 3. *Impossibilité de réparer;*
 4. *Défaut de nouvelles depuis plus de trois mois; la perte est réputée s'être produite à la date des dernières nouvelles.'* ('The abandonment of the ship may be made in the following cases: 1. Total loss; 2. Damage resulting in a loss to the extent of three quarters of the agreed value; 3. Impossibility of repair; 4. Absence of news for more than three months; the loss is presumed to have occurred on the date of the last news.')

133

Total loss includes shipwreck and stranding with complete breaking up; Rodière and Pontavice, *op cit*, para 636.

134

A deduction 'new for old' is made in the computation; Rodière and Pontavice, *op cit*, para 636.

135

Article 51.

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Nevertheless, under both German and English law the amount of the indemnity will take into account the value of what remains in the hands of the assured.

abandon formally if he wishes to recover the full amount insured¹³⁷.

- 3.2.3. In terms of article 55¹³⁸ abandonment of the goods¹³⁹ may be effected in the cases of total loss, loss or damage to three quarters of the value of the goods¹⁴⁰, sale of the goods during the voyage due to material damage to the goods insured by a peril insured against, and in terms of article 56¹⁴¹ innavigability of the ship, if

137 In such a case he would be entitled to the full amount of the insurance without any deduction for the value saved as the thing saved belongs to the insurer.

138 Article 55: '*Le délaissement des facultés peut être effectué dans les cas où les marchandises sont:*
1. *Perdues totalement;*
2. *Perdues ou détériorées à concurrence des trois quarts de leur valeur;*
3. *Vendues en cours de route pour cause d'avaries matérielles des objets assurés par suite d'un risque couvert.*' ('The abandonment of the goods may be made in the cases where; 1. The goods are totally lost; or lost or damaged to the extent of at least three quarters of their value; the goods are sold during the course of the voyage as a result of material damage of the insured goods as a result of an insured peril.')

139 The '*facultés*' referred to are the goods themselves; Rodière and Pontavice, *op cit*, para 532. Although the freight may be insured in terms of article 3 of Law 522 of 1967, (Harrel-Courtès, *op cit*, 3-4), there is no provision for the abandonment of the freight to the insurer of the freight. Presumably the freight will accrue to the insurer of the ship as part of the parcel of rights which is transferred to the insurer of the ship on abandonment.

140 See the '*Djurdjura*' (1975) 27 DMF 123 (Tribunal de Commerce de Paris 13/2/74). In the '*Ismene*' (1988) 18 DMF 170 (Cour d'Appel de Paris 29/5/87) the court ruled that the abandonment of the goods insured on the ground that the damage thereto exceeded three quarters of their value still had to be in accordance with the terms of the policy. Thus, where the policy restricts the right to abandon or imposes conditions the assured is bound by those terms.

141 Article 56: '*Il peut également avoir lieu dans les cas:*
1. *D'innavigabilité du navire et si l'acheminement des marchandises, par quelque moyen de transport que ce soit, n'a pu commencer dans le délai de trois mois;*
2. *De défaut de nouvelles du navire depuis plus de trois mois.*' ('It may evenly be done in the circumstances of the cases: 1. Of innavigability of the ship, if the progress of the goods by such other means of transportation as may be available, cannot commence without a delay of three months; 2. Of absence of news of the ship for a period of more than three months.')

the progress of the goods through such means of transport there may be has not commenced within three months¹⁴², and absence of news of the ship for more than three months. As in the case of abandonment of the ship, some of these causes appear to amount, or may amount under certain circumstances, to an actual total loss¹⁴³.

3.2.4. There is no mention in Law 522 of the abandonment of the freight, even though it is expressly provided that it may be insured¹⁴⁴. The conclusion is irresistible that the legislature intended to revert to the stance of the early French law that the freight earned after the disaster had to be abandoned to the insurer of the ship as an accessory of the ship and accruing to the owner by virtue of his ownership¹⁴⁵.

3.2.5. With the amendments brought about by these

¹⁴² In the '*Giota's*' (1985) 37 DMF 613 (Cour d'Appel de Paris 29/10/84) the assured abandoned the goods insured on the ground that the ship could not complete the voyage as a result of innavigability and that the goods could not be carried on without a delay of more than four months. The court found in favour of the assured in that the facts justified the assured's contentions.

¹⁴³ The last two causes, namely innavigability of the ship resulting in a substantial delay in the onward carriage of the goods insured and the goods carried on the missing ship appear to be true abandonment cases as there might remain something of value to pass on to the insurer.

¹⁴⁴ Article 3.

¹⁴⁵ Émerigon, *op cit*, Vol II, 255-259. The freight already earned at the time of the disaster is not included and accrues to the assured; Émerigon, *loc cit*; Boulay-Paty, *Traité*, 259-260.

articles, France has not broken completely from the earlier categories of circumstances giving rise to the right to abandon, and has not enlarged the ambit of the right to abandon. The '*perte totale*' contemplated in the case of the ship is a loss such as occasioned by the traditional causes mentioned in article 369 of the *CdeC*, namely capture, shipwreck, stranding and breaking up, unseaworthiness as a result of a maritime peril and detention by a foreign power¹⁴⁶.

- 3.2.6. Two new causes have been added in respect of abandonment of the ship, namely where the damage is so severe that the cost of repair would exceed three fourths of her value, and the case where the ship cannot be repaired at all. The missing ship is still dealt with separately.

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Harrel-Courtès, *op cit*, 49; Rodière and Pontavice, *op cit*, para 636.

3.3. THE SUBSIDIARY RULES OF ABANDONMENT UNDER LAW 522
OF 1967

3.3.1. Law 522 does not contain the formal requirements for the notice of abandonment. These formalities are laid down in articles 4 and 5 of Decree 64 of 1968. The articles of the Decree basically restate the principles of the *Guidon de la Mer*, the *Ordonnance de la Marine* of 1681 and the *CdeC* so far as the more formal aspects of abandonment are concerned.

3.3.2. Article 4 of the Decree introduced a new principle, namely that the notice of abandonment has to be given by registered letter or by judicial writ. Such notification also has to be given within three months of the receipt of news of the event which gives rise to the right to abandon¹⁴⁷. The giving of notice of abandonment serves as the making of an election on the part of the assured. The insurer can neither demand that the assured should abandon nor insist that he

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Article 4: 'Le délaissement est notifié à l'assureur par lettre recommandée ou par acte extrajudiciaire. Il doit intervenir dans les trois mois de la connaissance de l'événement qui y donne lieu, ou de l'expiration du délai qui le permet.' ('Notice of abandonment is given to the insurer by a registered letter or judicial writ. It must be interposed within three months of knowledge of the event giving rise to it, or such delay as the law permits.')

should be satisfied with an average claim¹⁴⁸. The longstanding rule that the abandonment may not be made conditionally or partially remains in force¹⁴⁹. If the insurer accepts the abandonment the parties' rights are fixed irrevocably. If the insurer refuses to accept the abandonment the assured is left with no alternative but to institute legal proceedings for an order validating the abandonment¹⁵⁰.

- 3.3.3. Article 5 of the Decrete requires the assured to declare all other insurances taken by him on the same ship or goods or of which he has knowledge. This declaration has to be made when the notice of abandonment is delivered¹⁵¹. If the insured in bad faith makes a false return of this information, he forfeits the benefit of the insurance in terms of article 32 of Law 522¹⁵².

148 Rodière and Pontavice, *op cit*, para 638.

149 Article 31. See also the '*Barbel*', *supra*; Rodière and Pontavice, *op cit*, para 637.

150 Rodière and Pontavice, *op cit*, para 638.

151 Article 5: '*En notifiant le délaissement, l'assuré est tenu de déclarer toutes les assurances qu'il a contractées ou dont il a connaissance.*' ('When he gives notice of the abandonment the assured has to declare all the insurances he has taken (on the ship or goods) or of which he has knowledge.') See also Harrel-Courtès, *op cit*, 36. The article re-enacts article 379 of the *CdeC*.

152 Harrel-Courtès, *op cit*, 17, calls this a traditional doctrine, and a consequence of the good faith required in insurance contracts. See also Rodière and Pontavice, *op cit*, para 637.

3.3.4. It is apparent that Law 522 of 1967 and its accompanying decree contain very few formal requirements for the abandonment. This is in keeping with the general approach of Law 522 to leave it to the parties to the contract to regulate their rights and obligations by their agreement rather than to force such requirements upon them.

3.4. THE CONSEQUENCES OF THE ABANDONMENT UNDER LAW 522 OF 1967

3.4.1. A proper abandonment still transfers the rights of the assured in the goods insured to the insurer, against the obligation on his part to pay the whole of the sum assured¹⁵³ and the effect of such transfer operates between the parties from the moment the assured notifies the insurer of his election to abandon¹⁵⁴. The insurer may, however, without affecting his obligation to pay the sum insured, refuse to accept transfer of ownership¹⁵⁵. The first part of article 31

153 Rodière and Pontavice, *op cit*, para 639.

154 Rodière and Pontavice, *op cit*, para 640.

155 Article 31: 'Il transfère les droits de l'assuré sur les objets assurés à l'assureur, à charge par lui de payer la totalité de la somme assurée et les effets de ce transfert remontent entre les parties au moment où l'assuré notifie à l'assureur sa volonté de délaisser. L'assureur peut, sans préjudice du paiement de la somme assurée, refuser le transfert de

restates the previous position¹⁵⁶, but it then provides certainty in respect of the question when the transfer becomes effective by stating explicitly that it operates from the moment of notice. Because the abandonment transfers rights or property, it cannot be partial or conditional¹⁵⁷. The last part of the article makes it clear that the insurer may decline the transfer of ownership and thus avoid the situation where it, as owner of the property, may incur liability to third parties. Nevertheless, the transfer is conditional upon the actual payment of the sum insured by the insurer¹⁵⁸. Further, an abandonment properly made obliges the insurer to pay the full amount of the insurance, as was the position under the *CdeC*.

4. CONCLUSION

4.1. The French have through the centuries remained

propriété. ('It transfers the rights of the assured in the objects insured to the insurer, subject to the obligation (of the latter) to pay the full amount of the insurance, and the effects of this transfer operate between the parties from the moment the assured notifies the insurer of his election to abandon. The insurer may, without prejudice to payment of the sum insured, decline the transfer of ownership.')

¹⁵⁶ Article 271 of the *CdeC*; Harrel-Courtès, *op cit*, 36.

¹⁵⁷ Rodière and Pontavice, *op cit*, para 639.

¹⁵⁸ Rodière and Pontavice, *op cit*, para 641.

loyal to the idea that abandonment is the extraordinary remedy while the usual or ordinary remedy is a claim for a particular average loss. Indeed, French marine insurance only recognizes these two kinds of loss, unlike Dutch law, which recently introduced the category of total loss in the place previously occupied by abandonment, German law which has a special category of total loss, and English law which has the concept of an actual total loss standing entirely separate from abandonment losses.

- 4.2. Until the recent abolishment of abandonment in Dutch law there were close similarities between Dutch and French law. In both systems some losses which amounted to an actual total loss in English law or a '*Totalverlust*' in German law gave rise to the right to claim the full amount of the insurance against an abandonment. While this approach may be theoretically unsound as the abandonment would be an empty gesture in cases where there remains nothing of value worth transferring to the insurer, there are other reasons which justify an 'abandonment' in such cases. For example, both Dutch and German law require the assured who is paid for an actual total loss to transfer his rights in the remains

of the insured thing to the insurer. The same applies in English law. This ensures that there is no possibility of an over-indemnification. This is an important consideration when one considers that new technology has made it possible in recent years to reach ships which sank or disappeared a long time ago¹⁵⁹. It therefore appears that French law, by maintaining only two categories of loss and by requiring an abandonment in all cases where the insurer pays for a total loss, jealously guards the indemnity principle, albeit in its own unique way.

- 4.3. Apart from the Canadian Marine Insurance Act 1993, which has not added any new thinking to the concept of abandonment as applied in English law, Law 522 of 1967 is the most modern legislation in a western European or English common law country. It continues the tradition of innovation and leadership France has enjoyed as its trademark in marine insurance law from the time of the *Guidon de le Mer* and continued with the *Ordonnance de la Marine* of 1681 and the *CdeC* of 1807. At the same

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Not only the Spanish, Portuguese and Dutch bullion ships of past centuries are being traced and their valuable cargo recovered regularly by the use of modern technology, but such famous shipwrecks as the *Titanic* (see *National Geographic*, Vol 170, No 6, December 1986) and the *Lusitania* (see *National Geographic*, Vol 185, No 4, April 1994) have been found and explored in the past fifteen years.

time the French legislature has had to be careful not to be out of step with the rest of the world and in particular its trading partners in the European community. Re-insurance business is often placed across national boundaries, and marine insurance is itself a branch of commerce which does not respect such boundaries¹⁶⁰. The innovations introduced by Law 522 of 1967 therefore had to be compatible with the law in neighbouring European states and in England.

- 4.4. An important feature of Law 522 is its approach, which to a large extent respects the right of freedom of contract by allowing the parties to structure their contract according to their own commercial needs¹⁶¹. Only in a few matters does Law 522 lay down the law rigidly, and abandonment is not included among those. By allowing the parties to contract on such terms as they can agree on in respect of abandonment Law 522 of 1967 has placed abandonment on the same footing as that which was applicable in the very earliest days of marine insurance when mercantile usage and custom played a large and important role in determining

160 Editorial comment (1968) 20 DMF 8.

161 Editorial comment in (1968) 20 DMF 7.

the terms and conditions under which the policy operated. This amounts to a tacit recognition by the French legislature that mercantile usage and custom are better equipped than legislative processes to keep up with changing circumstances and the ever-changing requirements of trade and commerce.

- 4.5. The retention of the institution of abandonment by the French lawmakers in 1967 when abandonment was in danger of falling into disuse is also a significant indication that there was still a perceived need for abandonment in 1967. Whether this should still be the position today with the improved means of communication and navigation is an open question. The Netherlands has abolished the doctrine of abandonment recently¹⁶², and it remains to be seen whether other countries will follow suit. In practice French insurers have narrowed the number of cases giving rise to the right to abandon considerably¹⁶³. Only a total loss, which includes an actual total loss and the ship which disappears without trace, and innavigability are recognized in terms of the

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With effect from 1 January 1993.

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See Martin, *op cit*, 212 et *seq* for a discussion of the standard policy conditions.

standard policy conditions¹⁶⁴. There is much to be said for the French approach, however, because it leaves it to the parties to decide for themselves whether there is a need for abandonment in the circumstances of each sailing.

4.6. The essence of French law so far as it pertains to abandonment may be summarised as follows:

4.6.1. The assured has a right, not a duty, to abandon in the circumstances allowed by law¹⁶⁵, but only in respect of the insured ship and her cargo¹⁶⁶.

4.6.2. However, if the assured elects to exercise that right, he must make a proper abandonment to the insurer. Otherwise his claim is treated as an average loss¹⁶⁷.

4.6.3. The right to abandon in the prescribed cases is not delayed in French law, as it was in some cases

164 Martin, *loc cit.*

165 This is apparent from the wording of articles 48 and 55, which specifically use the verb '*pouvoir*', meaning 'may'. See also Rodière and Pontavice, *op cit*, para 638.

166 Articles 48 and 55 of Law 522 of 1967.

167 This follows from article 28 which provides as follows: '*28. Les dommages et pertes sont réglés en avarie, sauf faculté pour l'assuré d'opter pour le délaissement dans les cas déterminés par la loi ou par la convention.*' ('Loss and damage is regulated by average, except where the assured has the right to abandon in the cases determined by the law or the contract.')

under the WvK in the Netherlands and in all cases where abandonment is allowed in German law. In French law the assured may abandon immediately one of the events defined in articles 48, 55 or 56 of Law 522 has occurred.

4.6.4. The assured's right to abandon is expressly subjected to a time limit within which no right to abandon exists in only one case. In the case of the missing ship and her cargo the assured is entitled to abandon and claim the full amount of the insurance after a period of three months has elapsed without news¹⁶⁸.

4.6.5. The main formalities required to be observed in making an abandonment are the following: Notice of abandonment must be given formally, by registered post or by judicial writ¹⁶⁹. This must occur within three months of the knowledge of the event which gives rise to the right to abandon¹⁷⁰. The assured is obliged to declare, when he gives notice of abandonment, other insurances taken by

168 Articles 48(4) and 56(2) of Law 522.

169 Article 4 of the Decrete.

170 Article 4 of the Decrete.

him or of which he has knowledge¹⁷¹, and if he in bad faith makes a false declaration in this regard, he forfeits the benefit of the insurance¹⁷².

4.6.6. The abandonment may not be partial nor conditional¹⁷³.

4.6.7. The consequences of the abandonment are that the insurer becomes obliged to pay the sum insured¹⁷⁴ and that the insured effects vest in the insurer unless the insurer elects not to receive ownership of them, which election does not excuse him from paying the sum insured¹⁷⁵.

4.7. A comparison of current French law and practice with Dutch, German and English law demonstrates that abandonment has become a very restricted doctrine on the continent. English law, however, treats the subject as part of the doctrine of a constructive total loss, which allows abandonment

171 Article 5 of the Decrete.

172 Article 32 of Law 522.

173 Article 31 of Law 522.

174 This provision is not contained in either Law 522 or the Decrete, but follows as a matter of logic.

175 Article 32 of Law 522.

in a much wider variety of factual circumstances.
In the next chapter the unique character of
English law will be considered in the light of the
provisions of the Marine Insurance Act 1906.

CHAPTER NINE

ENGLAND

1. INTRODUCTION

1.1. It was pointed out in Chapter 5 that English law developed along its own unique path so far as abandonment was concerned, notwithstanding that it had initially received the practice and principles of marine insurance from the Lombard and Hanse traders who had settled in London and other places within the King's realm. The concept of a constructive total loss which emphasised the consequences of the event which caused the loss in the first place was thus created by English law whereas continental law maintained its own approach which emphasised the species of the underlying event which caused the loss. English law was inherited by the most important British colonies¹ who, with the exception of America, have followed the English example by codifying their marine insurance laws after 1906.

1.2. At first marine insurance contracts fell within the jurisdiction of the English Courts of Admiralty, but in the struggle with the common law

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These include America, Canada, Australia, New Zealand and India. There are even some African countries who have also adopted the Marine Insurance Act 1906 ('the MIA'), like Nigeria.

lawyers that jurisdiction was lost. Subsequently the principles of marine insurance were refined and developed in the common law courts adding precedent upon precedent. Finally there were literally thousands of precedents on the subject by the end of the nineteenth century. In the meantime the great codification process had swept the continent. The French *Code de Commerce* ('the CdeC') had set the tone in 1807 by restating and reformulating the whole of French commercial law in one code. In the Netherlands the *Wetboek van Koophandel* ('the WvK') followed suit in 1838. In Germany the *Handelsgesetzbuch* ('the HGB') came into force in 1900. Each set out the principles of marine insurance and abandonment in detail.

- 1.3. England was forced to follow suit in respect of marine insurance, partly to reduce the number of relevant precedents to manageable proportions, and partly to make the law accessible to its trading partners in a palatable form. In the process a few changes were made to the common law, notably in respect of the principles of abandonment².

2

English marine insurance law is a codified version of the Law Merchant which had developed over centuries of business transactions and litigation. The Law Merchant was set out in numerous decisions of the courts, which were not always accessible or known. The legal principles relating to marine insurance were mainly shaped and refined by Lord Mansfield, during his term of office; Vance, 'The Early History of Insurance Law', *Select Essays in Anglo American Legal History*, (1907), Vol I, 116; Dover, *Handbook to Marine Insurance*, 8th ed, (1975), 48-50.

- 1.4. The Marine Insurance Act 1906 ('the MIA') was initially to be a codification of the existing common law, but in its final form amended the common law in some important respects. Its principal draftsman, Judge MacKenzie Chalmers, dealt with loss and abandonment logically, clearly and concisely in the space of nine sections, sections 55 to 63 of the MIA³. It is apparent from the classification adopted that English marine insurance law recognizes four different categories of loss, namely actual total loss, presumed total loss, constructive total loss and partial loss, (also called particular average or simply an average loss).

James Allan Park wrote a pioneering work on the subject, *A System of the Law of Marine Insurances*, (1786). (The edition referred to in the following footnotes is the first American edition, printed in Philadelphia in 1789 from the same plates as the 1786 London edition. The 8th edition is also used where new material was included.) Hassoun said: 'Before the introduction of the Marine Insurance Bill in 1884, there had been little attempt to codify the law as it applied to marine insurance. The principles which existed prior to this rested almost entirely on common law rulings ...'; *The Marine Insurance Act, 1906 and its Interpretation by the Courts*, M Phil thesis, University of London, (1970), 1. In English law a strict precedent system applies; the common law is built upon precedent, and the Privy Council serves as final appeal tribunal for other common law countries, notably Canada, Australia, New Zealand and India, whose courts follow English precedent. English precedent has maintained a superior position of over those of the countries referred to by reason of the dominance of Lloyds over other insurance markets, the almost invariable practice of submitting insurance disputes to litigation or arbitration in London, the vast reservoir of legal precedent on marine insurance principles available in English law, coupled with the fact that the common law countries mentioned have copied the MIA. The result is that there are not many decisions emanating from the courts of those countries which break new ground rather than merely applying English precedent. Where cases decided in those jurisdictions are referred to in the following footnotes, the country concerned will be indicated in brackets.

These sections of the MIA have been copied in the marine insurance legislation of Canada, Australia, New Zealand and India, and the law in those countries is therefore the same as that of England. Canada has recently passed a new Marine Insurance Act, 1993, which will be referred to when appropriate. In the footnotes which follow, reference will also be made to the decisions of the courts of those countries.

1.5. Section 55(1) restricts the liability of the insurer to losses proximately caused by a peril insured against. It should therefore be remembered in the following discussion of abandonment that the right to claim the sum insured on the grounds of a constructive total loss can only exist if the loss has been proximately caused by an insured peril⁴. Wilful conduct of the assured, loss proximately caused by delay and ordinary wear and tear, ordinary leakage and breakage, inherent vice, loss proximately caused by rats or vermin and injury to machinery not proximately caused by maritime perils are expressly excluded by section 55(2), unless the policy provides otherwise.

1.6. Section 56(1) divides losses into two main classes, namely total loss and partial loss. Partial loss is dealt with separately in sections 64 to 66, while section 56(2) divides total losses into actual total loss on the one hand and constructive total loss on the other⁵. Sections

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This principle has been confirmed recently in the cases of *The 'Popi M'* [1985] 2 LLR 1 (HL) and *The 'Marel'* [1994] 1 LLR 624 (CA). It was further pointed out in the two judgments that the onus of proving a loss as a result of a marine and insured peril rested on the assured and did not 'shift' to the insurer at any stage of the proceedings.

5

Section 56(1): 'A loss may be either total or partial. Any loss other than a total loss, as hereinafter defined, is a partial loss.'
 Section 56(2): 'A total loss may be either an actual total loss, or a constructive total loss.'

56(3) to (5) restate the common law with regard to subsidiary matters⁶. Section 57(1) defines an actual total loss⁷, and section 57(2) provides that it is unnecessary to give notice of abandonment in such a case⁸.

1.7. Section 58 deals only with the missing ship⁹, and maintains the long-standing English tradition of treating it as a case of a presumed, but actual total loss¹⁰. Section 59 provides for the problematic case where the voyage is interrupted and the master lands and reships or tranships the cargo, stipulating that the cover continues if the

⁶ Section 56(3): '*Unless a different intention appears from the terms of the policy, an insurance against total loss includes a constructive, as well as an actual, total loss.*'

Section 56(4): '*Where the assured brings an action for a total loss and the evidence proves only a partial loss, he may, unless the policy otherwise provides, recover for a partial loss.*'

Section 56(5): '*When the goods reach their destination in specie, but by reason of obliteration of marks, or otherwise, they are incapable of identification, the loss, if any, is partial, and not total.*'

⁷ Section 57(1): '*Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.*'

⁸ Section 57(2): '*In the case of an actual total loss no notice of abandonment need be given.*'

⁹ Section 58: '*Where the ship concerned in the adventure is missing and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed.*'

¹⁰ It is immediately apparent that English law differs from Dutch, German and French law in this respect as those legal systems treat the missing ship as an abandonment case.

master's actions are justified¹¹.

1.8. The next four sections of the *MIA* deal exclusively with constructive total loss and abandonment. Section 60(1) defines a constructive total loss generally while section 60(2) gives a more specific description of what constitutes a constructive total loss in particular circumstances. Section 61 maintains the position prevailing on the continent by giving the assured an election to claim for a total loss or for a partial loss. The detailed requirements for a proper abandonment are then set out in the nine sub-sections of section 62, while section 63 succinctly states the insurer's rights following upon a proper abandonment¹².

1.9. Since the *MIA* came into operation the function of

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Section 59: 'Where, by a peril insured against, the voyage is interrupted at an intermediate port or place, under such circumstances as, apart from any special stipulation in the contract of affreightment, to justify the master in landing and reshipping the goods or other movables, or in transhipping them and sending them on to their destination, the liability of the insurer continues, notwithstanding the landing or transhipment.'

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Section 63(1): 'Where there is a valid abandonment the insurer is entitled to take over the interest of the assured in whatever may remain in the subject-matter insured, and all proprietary rights incidental thereto.'

Section 63(2): 'Upon the abandonment of a ship, the insurer thereof is entitled to any freight in the course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it after the casualty; and, where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss.'

the courts has mainly been to interpret the provisions of the *MIA* rather than to develop the principles of marine insurance law. The extent to which the *MIA* may have deviated from the common law as found in the judgments of the English courts over the two hundred years preceding the *MIA* may be considered against the provisions of the sections referred to.

2. THE CIRCUMSTANCES GIVING RISE TO THE RIGHT TO ABANDON

- 2.1. A constructive total loss is expressly distinguished from an actual total loss. The latter is defined by section 57 (1) and requires the destruction of the thing insured, or damage to it which causes it to cease to be a thing of the kind insured, or the irretrievable deprivation of possession thereof. Cases decided by the courts before and after the *MIA* came into effect on the question of what does and what does not constitute an actual total loss have been collected and discussed in all the most important works on English marine insurance law¹³. A few examples

13

See for example Park, *op cit*, Chapters VI, VII and IX; Marshall, *A Treatise on the Law of Insurance*, Book I, Chapter XIV; Benecke, *A Treatise on the Principles of Indemnity in Marine Insurance, Bottomry and Respondentia*, (1824), Chapter VIII; Hannen & Pritchard, *Pritchard's Digest of Admiralty and Maritime Law*, 3rd ed, (1887), Vol I, paras 1925-

will suffice to make the point that in such cases there is nothing left to abandon to the insurer.

- 2.2. There is an actual total loss if the ship or cargo is destroyed by fire¹⁴. If the ship is so damaged that she is broken up she is no longer a ship and there is an actual total loss¹⁵. The same result follows when the assured is irretrievably deprived of possession of the ship or goods because they have sunk in water too deep for salvage¹⁶, or have been captured by an enemy in a time of war, or have been taken by pirates¹⁷. Although they continue to exist in the last-mentioned case, the ship and goods are no longer available to the assured¹⁸. The same applies to the goods,

2028; Pollock & Bruce, *A Compendium of the Law of Merchant Shipping*, 4th ed, (1881), Vol I, 525-538; Eldridge, *Marine Policies*, (1938), 155-165; Ivamy, *Marine Insurance*, 4th ed, (1985), 346-361; Mustill and Gilman, *Arnould's Law of Marine Insurance and Average*, 16th ed, (1981), (cited as 'Arnould'), paras 1134-1167; Lambeth, *Templeman on Marine Insurance*, 5th ed, (1981), Chapter V. In the selection of these works an endeavour was made to consult a broad spectrum of commentaries, written in different styles and at different times.

14 Brown, *Marine Insurance- Vol I- Principles and Basic Practice*, ('Principles'), 130.

15 Eldridge, *op cit*, 156; Brown, *Principles*, 130.

16 Brown, *Principles*, 130-131.

17 Capture by the enemy was regarded as an original method of acquiring ownership in ancient times; that is, the acquisition of ownership without the co-operation or consent of the previous owner.

18 Eldridge, *op cit*, 156. Piracy as a risk no longer occupies the important position which it did when piracy was rife. In theory a taking by pirates ought to constitute a constructive total loss rather than an actual total loss because there is no acquisition of ownership by the pirates and the insurer, when the abandonment has taken place, is entitled to recover the ship as owner. A different situation applies when the taking occurs at the hand of a government where there is in law

although it does not necessarily follow that, because there is a total loss of the ship, there is a total loss of the goods. There is an actual total loss where the ship or goods cease to be available to their owner for any purpose whatever, except waste or refuse¹⁹.

- 2.3. The definition of a constructive total loss in section 60 is a complete one²⁰, and it has been held that section 60(1) and section 60(2) contain two separate definitions which may be applied to different circumstances²¹. The definition in section 60(1)²² is a more general one, while section 60(2)²³ provides particular circumstances

a transfer of ownership.

19 Eldridge, *op cit*, 156; *Cologan v London Assurance* 5 M & S 447.

20 Ivamy, *Marine Insurance*, 363; *Petros M Nomikos Ltd v Robertson*, [1939] 64 LLR 45 (HL); *Irvin v Hine* [1950] 1 KB 555 at 568.

21 *Petros M Nomikos Ltd v Robertson*, *supra*, at 50. Lord Wright in *Rickards v Forestal Land, Timber and Railways Co Ltd* [1941] 3 All ER 62 (HL) said at 79: 'Sub-section (2), as compared with sub-s (1), is thus additional, and not merely illustrative'. See also Ivamy, *Marine Insurance*, 364-365.

22 Section 60(1): 'Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.'

23 Section 60(2): 'In particular, there is a constructive total loss-
(i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or
(ii) In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired. In estimating the cost of repair no deduction is to be made in respect of general average contributions to

where there will be a constructive total loss of the ship or goods. In general there is a constructive total loss where the assured is deprived of possession of his ship or goods and it is unlikely that he can recover them or likely that the cost of recovering them would exceed their value when recovered²⁴. In the case of damage to a ship, there is a constructive total loss if the cost of repair would exceed the value of the ship when repaired²⁵. In the case of goods, there is a constructive total loss if the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival²⁶. A constructive total loss of freight must be dealt with according to the general principle in section 60 (1) as it is not mentioned in section 60 (2)²⁷.

those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future average contributions to which the ship would be liable if repaired, or (iii) In the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival.'

24 *'Losses are constructively total when the subject-matter of the insurance, although still in existence, is either lost to the owners, or beneficially lost to them, and notice of abandonment has been given to the underwriters'; Pollock & Bruce, op cit, 528.*

25 Section 60(2)(ii); Ivamy, *Marine Insurance*, 372-374.

26 Section 60(2)(iii); Ivamy, *Marine Insurance*, 374-375.

27 Ivamy, *Marine Insurance*, 363, footnote 5. The concept of a constructive total loss of freight is 'from a legal point of view highly artificial' and it may even be doubted if such a thing exists at all, in Mustill and Gilman's opinion; Arnould, para 1233. Sarlis, on the other hand, not only believes that there is a place for a constructive total loss of freight, but gives examples to justify his opinion; Sarlis, *Abandonment*

2.4. The definition in section 60(1) is subject to the terms of the policy, and the parties are therefore at liberty to widen or limit the circumstances which would amount to a constructive total loss²⁸. This has been done on occasions in the past, before and after the MIA was promulgated²⁹.

2.4.1. Section 60(1) states that there is a constructive total loss where the subject-matter is '*reasonably abandoned on account of its actual total loss appearing unavoidable*'. The abandonment contemplated by the section in this context is the physical abandonment of the ship or goods, the giving up of the subject-matter insured as lost or beyond saving, not the act whereby the assured abandons his rights therein to the insurer. The requirement that the abandonment has to be reasonable imports an objective test into the definition of a constructive total loss in that section. It must therefore be reasonable on the objective facts which prevail for the assured to abandon the ship or goods insured, and he cannot

in *Marine Insurance Law*, thesis, University of London, (1960), 64-66.

28 Ivamy, *Marine Insurance*, 375; Arnould, para 1168 fn 9. It is now customary for hull policies to qualify the circumstances giving rise to a constructive total loss of the ship; Brown, *Principles*, 132.

29 *Rowland and Marwood's SS Co v Maritime Insurance Co* (1901) 6 Com Cas 160; *Sailing Ship Holt Hill v United Kingdom Marine Association* (1919) 2 KB 789; *Western Assurance Co v Scanlan* 33 LC Jur 301, (Canada).

recover for a constructive total loss merely because he honestly and reasonably believes that an actual total loss is unavoidable³⁰. The objective nature of the test in section 60(1) is emphasised by the interpretation given to the words 'appearing to be unavoidable' as meaning appearing to be unavoidable on the true facts as known and not merely on the facts known to the assured³¹. Whether the abandonment is reasonable is a question of fact³².

- 2.4.2. The first part of the definition of a constructive total loss in section 60(2)(i) requires recovery of the ship or goods to be 'unlikely'. The words 'within a reasonable time' should be implied as forming part of the definition³³. The test to be satisfied to show that recovery is unlikely is the test of probability, and no heavy probability in

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Hassoun, *op cit*, 297. In *Wilson Brothers Bobbin Co Ltd v Green* [1917] 1 KB 860 a claim for a constructive total loss of a cargo of wood squares was held not to be maintainable because it could not be said that a total loss was unavoidable, nor that it was unlikely that the cargo would reach its destination. In *Lind v Mitchell* [1928] 32 LLR 70 (CA) the court disallowed a claim for a total loss on an abandonment which was held to have been unreasonable on the facts, as the ship which was abandoned by the crew because they believed her to be sinking when she was damaged by ice and took on water was later found to be floating high in the water, apparently not in danger of sinking. See also *Rose v Weekes* (1984) 7 CCLI 287 (Fed. T.J.), (Canada); *Harkley v Provincial Insurance Co* (1868) 18 UCCP 35 (CA), (Canada).

31

Marstrand Fishing Co Ltd v Beer [1937] 1 All ER 158.

32

Cunningham v St Paul Fire Insurance Co (1914) 16 DLR 39, (Canada).

33

Polurrian SS Co Ltd v Young [1915] 1 KB 922 (CA); *Lambeth, op cit*, 231-232.

favour of irrecoverability is required. '(A)ny degree of unlikelihood would seem to shift the balance, however slightly.'³⁴ The words 'deprived of possession' would include any interference with the free use of the ship or goods insured, including capture, seizure, arrest and embargo³⁵. Further, if a ship were to be stranded and cannot be freed, her owner is deprived of possession of her as contemplated by the subsection³⁶. Section 60(2)(i) has changed the common law. Under the common law the assured could abandon and claim for a constructive total loss if he was deprived of possession of the ship or goods and it was 'uncertain' that he would recover her or them³⁷. The MIA now requires recovery to be unlikely, an important change.

- 2.5. A presumption of an actual total loss operates in the case of a ship which is missing without news of her being received for a reasonable period³⁸.

34 Lord Wright in *Rickards v Forestal Land, Timber and Railways Co Ltd*, *supra*, who added: 'It is not required that the scale should spring up and kick the beam.' See also *Marstrand Fishing Co v Beer*, *supra*.

35 Hassoun, *op cit*, 299.

36 *Hall v Hayman* [1912] 106 LT 142; *British Dominions General Insurance Co v Duder* [1915] 2 KB 394.

37 Hassoun, *op cit*, 300; Kennedy LJ in *Polurrian SS Co Ltd v Young*, *supra*.

38 Section 58.

What is a reasonable time is a question of fact³⁹. The presumption may be rebutted by the insurer⁴⁰. There is no presumption in English law that the loss was caused by an insured peril, and the assured bears the onus of proving that the loss occurred by such a peril⁴¹. It has been pointed out that the *MIA* does not specifically state that the insurer is liable for the loss⁴². The *MIA* also does not expressly require the assured to make an abandonment in such a case.

- 2.6. The concept of constructive total loss is peculiar to marine insurance⁴³, and as with actual total loss, cases on what constitutes a constructive total loss in English law abound⁴⁴. In essence it appears that it must be established that the

39 Section 88.

40 This means that the proximate cause of the loss still has to be determined to establish whether the loss is one which is covered by the policy; Brown, *Principles*, 131. It is nevertheless the practice of insurers to treat such a loss as one caused by war risks in time of war, and by an ordinary marine peril insured against in peace time; Brown, *loc cit.* (This is a good example of the kind of practice or custom on which marine insurance principles are based, and which eventually acquire the force of law.)

41 *Compania Naviera Martiartu v Royal Exchange Insurance* [1924] 1 KB 650; Lambeth, *op cit*, 209. See also *Compania Maritima of Barcelona v Wishart* [1918] 23 Com Cas 264; *Munro Brice & Co v Marten* [1920] 25 Com Cas 112.

42 Brown, *Principles*, 131.

43 *Moore v Evans* [1918] AC 185 at 194; *Assicurazioni Generali v Bessie Morris & Co* [1892] 2 QB 652; Ivamy, *Marine Insurance*, 362.

44 Hannen & Pritchard, *op cit*, para 1925-2028; Ivamy, *Marine Insurance*, 362-377; Arnould, para 1168-1258.

assured has been deprived of the ship or goods and that it is unlikely (improbable) that he can recover her or them⁴⁵.

*'The nature of a constructive total loss can best be understood by comparing it with an actual total loss. The latter is a total loss in law and in fact; the former is a total loss in law, but not in fact, and must be converted, by a properly notified abandonment into a total loss in fact, to entitle the assured to claim a total loss against his insurers. Constructive total loss exists when the subject-matter insured is not in fact totally lost, but is likely to become so, from the improbability, impracticability or expense of repair or recovery.'*⁴⁶

The test is often stated to be an enquiry into what a prudent uninsured owner would have done in the state in which the vessel was placed by the peril insured against. If he would not have repaired the vessel it is deemed to be lost⁴⁷. He

45 Ivamy, *Marine Insurance*, 367; *Polurrian SS Co Ltd v Young*, *supra*.

46 Arnould, para 1168. See also Ivamy, *Marine Insurance*, 362 *et seq*. The ship or goods must continue to exist under circumstances allowing the assured to take possession of them, and in circumstances where it would be reasonable to expect him to do so; *Holdsworth v Wise* 7 B & C 799.

47 *Irving v Manning* 6 CB 419; *Providence-Washington Insurance Co v Almon* (1885) 1885 Cas SC 390 (S.C.C.), (Canada).

is then entitled, upon making a valid abandonment, to recover as for a total loss.

- 2.7. In terms of section 61⁴⁸ the consequence of a constructive total loss is that it entitles the assured to treat the loss as an actual total loss and to abandon the subject-matter of the insurance to the insurer. He may therefore claim the full amount of the insurance on giving due notice of abandonment⁴⁹. He is not obliged to abandon, and may elect to claim for a partial loss⁵⁰. Before the passing of the MIA in 1906, the assured could not claim for a constructive total loss if circumstances had changed to reduce the loss to a partial loss in the interval between the occurrence of the loss and the date fixing the parties' rights arising from the loss⁵¹. The date

48 Section 61: 'Where there is a constructive total loss the assured may either treat the loss as a partial loss, or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss.'

49 Ivamy, *Marine Insurance*, 375-376; Arnould, para 1168; *Western Assurance Co of Toronto v Poole* [1903] 1 KB 376 at 383. Section 61 of the MIA, it should be noted, gives the assured the right to abandon; he therefore has an election to make; Ivamy, *Marine Insurance*, 375; Arnould, para 1170. He is not obliged to abandon as cases decided before the MIA came into operation also make clear; Park, *op cit*, 162; *Goss v Withers* 2 Burr 683; *Hamilton v Mendes* 2 Burr 1198; Pollock & Bruce, *op cit*, 539; *Mellish v Andrews* 15 East 13.

50 Section 61; Ivamy, *Marine Insurance*, 379; Lambeth, *op cit*, 218.

51 *Patterson v Ritchie* (1815) 4 M & S 393; *Taylor v Smith* (1868) 12 NBR 120 (CA), (Canada). In *Kenny v Halifax Marine Insurance Co* (1840) 1 NSR 141 (CA), (Canada) the ship was given up as beyond saving when she was stuck on rocks and could not be got off. Notice of abandonment was then given to the insurer. However, she was thereafter lifted off the rocks by a gale and was saved. The assured's claim for a constructive total loss

fixing the parties' rights is the date of commencement of action by the issue of a writ⁵². The *MIA* is silent on this point, and it may be argued that the intention was to abrogate the rule of the common law so that the right to claim for a total loss, once having arisen, would not be diminished by any subsequent change of circumstances⁵³. Lord Wright, however, expressed the view that '(t)he old rule is ... still the law'⁵⁴, a view which takes into account that the contract is one of indemnity and that the assured may otherwise recover more than his actual loss⁵⁵, which might occur if he were to be allowed to recover while the ship was in fact safe. This reasoning begs the question, Mustill and Gilman contend, as restoration after the abandonment would be made to the insurer and the

was denied on the ground that the facts as at the time the action was brought did not prove a constructive total loss.

52 *Polurrian SS Co Ltd v Young, supra*; Arnould, paras 1177, 1178 and 1216. The cases on the point dating back to the time of Lord Mansfield are collected in *Ruys v Royal Exchange Assurance Corporation* (1897) 2 QBD 135.

53 Ivamy, *Marine Insurance*, 376; Arnould, para 1178. But see Lambeth, *op cit*, 222 and *The Sailing Ship "Blairmore" v Macredie* (1898) AC 593 for a case where the underwriters raised the abandoned ship and the court held that they could not, by such conduct, convert the loss into a partial or average loss.

54 *Rickards v Forestal Land, Timber and Railways Co Ltd, supra*. See also *Polurrian SS Co Ltd v Young, supra*.

55 The point has become largely academic in the light of the practice of insurers to agree that the parties' rights are fixed as if a writ had been issued on the day they decline to accept the notice of abandonment; Lambeth, *op cit*, 222-223.

assured would not receive a double benefit⁵⁶. Restoration after commencement of action also does not affect the assured's right to recover on the basis of a constructive total loss⁵⁷.

3. THE SUBSIDIARY RULES OF ABANDONMENT

3.1. The rule that in cases of constructive total loss notice of abandonment has to be given to the insurer '*was introduced by the unanimous consent of shipowners and underwriters and has therefore become part of their contract.*'⁵⁸

3.1.1. Abandonment must be distinguished from the notice of abandonment itself⁵⁹. The MIA uses the word abandonment in different senses and does not define it⁶⁰. In one sense the word is used to indicate the physical giving up of the ship or goods for lost. This is the sense in which the word is used in section 60(1). In another sense

56 *Op cit*, para 1178.

57 *Roura & Forgas v Townend* [1919] 1 KB 189; *Hassoun, op cit*, 326. See also *Providence-Washington Insurance Co v Almon, supra*, (Canada).

58 Brett LJ in *Kaltenbach v MacKenzie* (1878) 3 CPD 467 (CA) at 471.

59 *Arnould*, para 1259; *Anchor Marine Insurance Co v Keith* (1884) 9 SCR 483, (Canada).

60 *Hassoun, op cit*, 294.

the word means the voluntary cession by the assured of his rights in what remains of the subject-matter insured. The provisions of the MIA relating to notice of abandonment refers to abandonment in the latter sense, namely as a voluntary cession of rights⁶¹.

3.1.2. Since the effect of the abandonment, if it is accepted, is to transfer the assured's rights in the ship or goods or their proceeds to the insurer, it follows that notice of abandonment can only be given by the assured or someone lawfully acting on his behalf⁶². For the same reason the notice must be given to the insurer or his authorized agent⁶³.

3.1.3. The requirements for a proper notice of abandonment are set out in sections 62 (1) to (3)

61 Hassoun, *op cit*, 328.

62 Ivamy, *Marine Insurance*, 380; *Stewart v Greenock Marine Insurance Co* (1848) 2 HL Cas 159; *Rankin v Potter* (1873) 42 LJ Rep 169 (HL); Pollock & Bruce, *op cit*, 539. This principle has been applied in two South African cases, *Chiappini v Jones* (1837) 3 Menzies 181 and *South African Railways & Harbours v Wm Anderson & Co* 1917 CPD 121, and in Australia in *Corr v Standard Fire & Marine Insurance Co of New Zealand* (1881) 7 VLR (L) 504, (Australia). In Canada the mandate given to an agent to insure the ship *prima facie* includes authority to give notice; *McGhee v Phoenix Insurance Co* (1890) 18 SCR 61, (Canada).

63 Ivamy, *Marine Insurance*, 387; *Vacuum Oil Co v Union Insurance Society of Canton* [1926] 25 LLR 546 (CA).

of the MIA⁶⁴. Notice must be given with reasonable diligence after the receipt of reliable information of the loss in terms of section 62(3)⁶⁵. By virtue of section 88 'the question what is reasonable is a question of fact'⁶⁶.

- 3.1.4. The purpose is to give the insurer the earliest opportunity to safeguard his interests⁶⁷. An unnecessary delay on the part of the assured in giving notice will amount to a waiver of the right to abandon⁶⁸, but the assured is entitled to a reasonable period to acquire full knowledge of the true state of affairs before he is bound to make

64 Section 62(1): 'Subject to the provisions of this section, where the assured elects to abandon the subject-matter insured to the insurer he must give notice of abandonment. If he fails to do so the loss can only be treated as a partial loss.'
 Section 62(2): 'Notice of abandonment may be given in writing, or by word of mouth, or partly in writing and partly by word of mouth, and may be given in any terms which indicate the intention of the insured to abandon his insured interest in the subject-matter insured unconditionally to the insurer.'
 Section 62(3): 'Notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss, but where the information is of a doubtful character, the assured is entitled to a reasonable time to make inquiry.'

65 Arnould, paras 1270-1271. This provision repeated the longstanding rule of the common law as applied in *Kelly v Walton* (1808) 2 Camp 155, *Aldridge v Bell* (1816) 1 Stark 498; *Hunt v Royal Exchange Insurance Association* (1816) 5 M & S 47 and *Corr v Standard Fire & Marine Insurance Co of New Zealand*, *supra*, (Australia).

66 Ivamy, *Marine Insurance*, 387-9. The requirement that notice must be given at the earliest opportunity dates back a long time; *Park*, *op cit*, 92; *Benecke*, *op cit*, 420; *Pollock & Bruce*, *op cit*, 540; *Gernon v The Royal Exchange Assurance Company* (1815) 6 Taunt 383; *Mitchell v Edie* 1 JR 608. See also *Singer Manufacturing Co v Western Assurance Co* (1896) 10 Que SC 379 (CA), (Canada).

67 *Pollock & Bruce*, *op cit*, 540; *Roux v Salvador* 3 Bing (NC) 286.

68 *Mitchell v Edie*, *supra*.

his election⁶⁹. The assured is, however, not allowed to delay his decision in the hope or speculation that things will become clearer on the question whether he stands to lose or gain by abandoning⁷⁰.

- 3.2. The facts upon which the notice is based must, objectively⁷¹, justify the abandonment on the facts as they were at the time of notice⁷², and also as they were at the time the action is brought⁷³. Without abandonment the assured may only claim for an average loss⁷⁴. Nevertheless,

69 Ivamy, *Marine Insurance*, 387; Arnould, para 1273; Benecke, *op cit*, 421; *Gernon v Royal Exchange Assurance Company*, *supra*; *McGhee v Phoenix Insurance Co*, *supra*, (Canada).

70 Arnould, para 1274; *Gernon v Royal Exchange Assurance Co*, *supra*, at 387; *Roux v Salvador*, *supra* at 286; *Fleming v Smith* (1848) 1 HL Cas 513; *Kaltenbach v MacKenzie*, *supra*; *Singer Manufacturing Co v Western Assurance Co*, *supra*, (Canada).

71 'The words "appearing to be" unavoidable in s 60 (1) of the Marine Insurance Act 1906 mean "appearing on the true facts as known". They do not mean "appearing on the facts as known to the assured"; *Marstrand Fishing Co. Ltd v Beer*, *supra*. See also Ivamy, *op cit*, 366; Arnould, paras 1176-1177. This was also the position prior to the MIA; see Park, *op cit*, 165; *Da Costa v Firth & Burr* 1966, where Lord Ellenborough said: 'But it is not enough if it was properly made upon facts supposed to exist at the time, if it turn out that circumstances existed, unknown to the parties, which did not entitle the assured to abandon'. See also *Naylor v Taylor* 9 B & C 718.

72 Arnould, para 1176; *Meagher v Aetna Insurance Co* (1861) 20 UCQB 607 (CA), (Canada). Successive notices are sometimes given to cover changing circumstances in order to ensure that the assured complies with this requirement; See for example *Panamanian Oriental Steamship Corporation v Wright* [1970] 2 LL R 365 (QB).

73 Park, *op cit*, 165; *Hamilton v Mendes* 2 Burr 1198; Ivamy, *Marine Insurance*, 376; Arnould, para 1177; Hassoun, *op cit*, 327.

74 Park, *op cit*, 8th ed, (1842), 373; Eldridge, *op cit*, 166; Section 62(1) of the MIA. See also *Sunshine Fisheries v Lambert-Pain Pty Ltd (The 'Lady Amelia')* (1991) 6 ANZ Insurance Cases No 61-069, (Australia). See also the discussion of this case by Tapp & Chivers, 'No Licence, No Disclosure, No Abandonment', 1992 *LMCLQ* 25.

the abandonment is not necessary to for the loss to constitute a constructive total loss; only for a claim for a constructive total loss⁷⁵.

- 3.3. Section 62 (2), like the common law, does not provide for any special form of notice⁷⁶, but provides that the notice has to be unmistakable in its terms⁷⁷, and absolute and unconditional⁷⁸. An offer of compromise, for example, does not constitute notice of abandonment⁷⁹, while notification that a total loss has occurred together with a claim for payment of a total loss

⁷⁵ In *Bank of America National Trust and Savings Association v Christmas and Others (The "Kyriaki")* [1993] 1 LLR 137 (QB) Hirst J held that notice of abandonment was not part of the cause of action for a claim for a constructive total loss but was essential for the right to sue for such a loss. It serves as the assured's notification of his election between a claim for a constructive total loss and one for an average loss.

⁷⁶ Park, *op cit*, 8th ed, 401; Benecke, *op cit*, 422. Written notice is usual, but not required; Pollock & Bruce, *op cit*, 539; Parmeter v Todhunter (1808) 1 Camp 541, 546; Hassoun, *op cit*, 339.

⁷⁷ The common law was to the same effect; see Park, *op cit*, 8th ed, 401; Pollock & Bruce, *op cit*, 539. 'There is no implied abandonment by a demand of a total loss. It would be very well to prevent parol (oral) abandonment entirely; but if they are allowed, I must insist upon their being express. An implied parol abandonment is too uncertain and cannot be supported. The abandonment must be express and direct, and I think the word "abandon" should be used to render it effectual', said Lord Ellenborough in *Parmeter v Todhunter*, *supra*. The statement that the word 'abandon' should be used was an obiter dictum and has not been followed in subsequent cases; Ivamy, *Marine Insurance*, 385; Arnould, para 1266; *Panamanian Oriental SS Corporation v Wright* [1970] 2 LLR 365 (QBD). See also *Singer Manufacturing Co v Western Assurance Co*, *supra*, (Canada); *Barrs v Merchants' Marine Insurance Co* (1887) 26 NBR 339 (CA), (Canada).

⁷⁸ Benecke, *op cit*, 423; Magens, *An Essay on Insurances*, (1755), 175; Park, *op cit*, 162; Pollock & Bruce, *op cit*, 539; Ivamy, *Marine Insurance*, 385; Arnould, paras 1262 and 1265. A conditional and consequently invalid abandonment occurred in *Russian Bank for Foreign Trade v The Excess Insurance Co Ltd* [1919] 1 KB 39 (CA).

⁷⁹ *Russian Bank for Foreign Trade v Excess Insurance Co*, *supra*.

has been held to be proper notice⁸⁰. The purposes of the notice are twofold, namely to enable the insurer to take over the care of the ship or goods and to achieve certainty as between assured and insurer as to the time from which the ship or goods vest in the insurer⁸¹. In practice the notice is in writing and is given by the assured's broker. It has become fairly common practice for the letter giving notice to incorporate a rejection of the abandonment, which the insurer signs to indicate his rejection and also records that he agrees to place the assured in the same position as if a writ has been issued⁸².

- 3.4. The refusal by the insurer to accept a proper notice of abandonment does not prejudice the rights of the assured⁸³. Acceptance of the abandonment may be express, or implied from the conduct of the insurer, but mere silence on the

80 *G Cohen Sons & Co v Standard Marine Insurance Co Ltd* [1925] 41 TLR 232; *Barrs v Merchants' Marine Insurance Co*, *supra*, (Canada).

81 *Ivamy, Marine Insurance*, 381; *Vacuum Oil Co. v Union Insurance Society of Canton*, *supra*, 553.

82 *Brown, Principles*, 139. This procedure saves time and costs, and preserves the assured's position in relation to the sufficiency of the circumstances then prevailing in order to constitute a constructive total loss; *Brown, loc cit.*

83 Section 62 (4): 'Where notice of abandonment is properly given, the rights of the assured are not prejudiced by the fact that the insurer refuses to accept the abandonment.' See also *Ivamy, Marine Insurance*, 389.

part of the insurer is not regarded as an acceptance of the abandonment⁸⁴. The acceptance has to be made by the insurer or his authorized agent⁸⁵. It is a question of fact whether there has been an acceptance⁸⁶. Once the notice is accepted, the abandonment becomes irrevocable⁸⁷, such acceptance constituting a conclusive acknowledgment of liability for the loss (and an admission of the sufficiency of the notice) on the part of the insurer⁸⁸. Further, once an

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Section 62 (5): 'The acceptance of the abandonment may be either express or implied from the conduct of the insurer. The mere silence of the insurer after notice is not an acceptance.' Examples are given with reference to cases in *Arnould*, paras 1278-1279 and *Ivamy*, *op cit*, 389. But there may be a constructive acceptance; *Pollock & Bruce*, *op cit*, 540; *Benecke*, *op cit*, 423; *Hudson v Harrison* 3 Brod & Bing 97; *The Provincial Insurance Company v Leduc* (1874) LR 6 PC 224, a case originating in Canada; *Captain J A Cates Tug and Wharfage Co Ltd v Franklin Insurance Co* 1927 AC 698, another case which originated in Canada, in which MacDonal JA stated the test as follows: '(I)f the underwriters by their acts adopted a course consistent only with acceptance of abandonment they (the jury) ought to find such acceptance or assent: also that if they (the (underwriters) acted in such a way as to alter the rights of the owner, the same result would follow ... To amount to assent the acts of the insurers must be of such a character as could only be justified on the assumption that the wreck was treated as their own property.' See also *McLeod v Insurance Co of North America* (1901) 34 NSR 88 (CA), (Canada).

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In *Berner v Sun Insurance Office Ltd* [1952] ILR 1-069 (Ont. H.C.), (Canada) the insurer sent an adjuster to survey the salvage. The adjuster advised the assured to abandon and helped him to prepare the notice. The insurer gave no indication that it was not accepting the notice, but the court held that the insurer's silence together with the conduct of its agent, the adjuster, constituted acceptance.

86

Hassoun, *op cit*, 341. In *Baker v Brown* (1872) 9 NSR 100 (CA), (Canada) the insurers refused to accept the notice, but bought the ship at the sale, repaired her, and navigated her for their own profit. A so-called 'Boston-clause' in the policy decreed that their conduct would not amount to a waiver. The court nonetheless held that their failure to repair and return the ship to the assured amounted to an acceptance of the notice of abandonment.

87

But it may be revoked by mutual consent, or as a result of a fundamental mistake; *Arnould*, para 1280.

88

Section 62 (6): 'Where notice of abandonment is accepted the abandonment is irrevocable. The acceptance of the notice conclusively admits liability for the loss and the sufficiency of the notice.' See also *Ivamy*, *Marine Insurance*, 390; *Provincial Insurance Co v Leduc*, *supra*, (Canada). A fundamental mistake of fact may vitiate the acceptance;

adjustment has taken place subsequent events do not entitle the insurer to reverse the effects of the abandonment⁸⁹. By the same token, the assured cannot undo the effect of the abandonment once the transfer has taken place if he finds it to operate in favour of the insurer⁹⁰. But, if the notice is not accepted by the insurer, the assured may withdraw it, as the notice of abandonment constitutes no more than an offer⁹¹. The wording of section 62(6) makes it clear that the irrevocability of the notice of abandonment arises from the acceptance of the abandonment.

- 3.5. Notice may be waived by the insurer⁹². Payment of a total loss by the insurer after a demand therefor by the assured amounts to a waiver by conduct on the part of the insurer of his right to

Ivamy, *Marine Insurance*, 390-391; Arnould, paras 1277 and 1280. In *Norwich Union Fire Insurance Society v William H Price Ltd* (1934) AC 455, which emanated from Australia, both the assured and the insurer laboured under a fundamental mistake of fact, which gave rise to the assured giving notice of abandonment and to the insurer accepting it. The Court allowed a claim for repayment of the sum paid by the insurer. Some authors say the acceptance of the abandonment creates an estoppel; Hannen & Pritchard, *op cit*, para 2068; Eldridge, *op cit*, 173.

89 Park, *op cit*, 8th ed, 355; Benecke, *op cit*, 385-386; *Da Costa v Firth* 4 Burr 1966.

90 Benecke, *op cit*, 386.

91 *Pesquerias y Secaderos de Bacalao de Espana SA v Beer* [1946] 79 LLR 417; Hassoun, *op cit*, 331-332. This approach echoes the common law as expressed in *Brotherston v Barber* (1816) 5 M & S 418.

92 Section 62 (8): 'Notice of abandonment may be waived by the insurer.' Waiver may be implied; Ivamy, *Marine Insurance*, 392; Arnould, para 1269.

notice of abandonment⁹³. Notice of abandonment is unnecessary where, at the time the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given⁹⁴. It is difficult to imagine circumstances where there would be no possibility of benefit to the insurer without the loss being an actual total loss in any event. No notice is necessary in the case of re-insurance⁹⁵. The reason the re-insurer is not entitled to notice is probably an instance where there would be no possibility of benefit as contemplated by subsection (7)⁹⁶. Another reason could be that the first insurer has nothing to abandon unless and until he accepts the notice of abandonment⁹⁷.

93 *Houstman v Thornton* (1816) Holt NP 242.

94 Section 62 (7): '*Notice of abandonment is unnecessary where, at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given.*' See also Arnould, para 1268; *Rankin v Potter*, *supra*. This would be the case where there is nothing left to pass to the insurer upon abandonment; *Ivamy, Marine Insurance*, 382; *Watson v Mercantile Marine Insurance Co* (1873) 9 NSR 396 (CA), (Canada).

95 Section 62 (9): '*Where the insurer has re-insured his risk, no notice of abandonment need be given by him.*' See also Arnould, para 1268; *Ivamy, Marine Insurance*, 385.

96 *Hassoun, op cit*, 332.

97 *Hassoun, op cit*, 332. But one would have expected the first insurer to be obliged to abandon if he, in turn, wanted to rely on a constructive total loss. It appears rather that his loss is in the nature of an actual loss where no abandonment is required.

4. THE CONSEQUENCES OF THE ABANDONMENT

4.1. Once there is a valid abandonment, section 63 (1) comes into play. While the section is plain enough in its provision that the insurer is entitled to take over the interest of the assured in the subject-matter of the insurance as well as all proprietary rights incidental thereto⁹⁸, disputes have nonetheless arisen in cases where ownership of the abandoned ship would place onerous duties on the insurer⁹⁹. In such cases the insurer may elect not to take over the interest of the assured, and the ship may well become *res nullius*¹⁰⁰. Prior to the MIA it was thought that the payment of a total loss by the insurer after receipt of notice of abandonment itself passed the property and the rights incidental thereto to the insurer as a benefit of salvage¹⁰¹. It was

98 On the extent of the rights passing by abandonment, see Arnould, para 1285.

99 Ivamy, *Marine Insurance*, 393-394; Arnould, para 1288; *Allgemeine Versicherungs-Gesellschaft Helvetia v Administrator of German Property* [1931] 144 LT 705 at 711. Prior to the MIA it was said that ownership of the 'whole property and interest in the thing insured' was transferred to the insurer 'as from the date of the loss'; Pollock & Bruce, *op cit*, 541; *Camell v Sewell* 3 H & N 617; *S.C. in Cam. Scacc.* 5 H & N 728.

100 *Boston Corporation v France Fenwick & Co. Ltd* [1923] 15 LLR 85 (KB) at 91. See, however, *Oceanic Steam Navigation Co Ltd v Evans* [1934] 50 LLR 1 (CA) at 3 and *Blane Steamship Ltd v Minister of Transport* [1951] 2 LLR 155 (CA); Ivamy, *Marine Insurance*, 384; Arnould, para 1290. The subject is discussed more fully in Chapter 14 *infra*.

101 *Allgemeine Versicherungs-Gesellschaft Helvetia v Administrator of German Property*, *supra*.

realised though that there may be circumstances under which the insurer would prefer not to be vested with ownership of the thing insured because such ownership could be accompanied by onerous obligations¹⁰². Section 63(1) makes it clear that the insurer has a right to take over the rights in question, not an obligation. If the insurer exercises that right, he

*'becomes ... entitled to proprietary rights incidental to the subject-matter insured as from the time of the loss. He is put in the same position as though the subject-matter insured was assigned to him by way of a sale immediately after the event which constitutes the loss.'*¹⁰³

When the insurer accepts the notice of abandonment the proprietary rights therefore vest in him with retro-active effect back to the time of the loss¹⁰⁴. Obligations arising from ownership of

102 The owner of a ship which has been wrecked in a harbour or of a stranded ship may be held liable for the cost of removing them or for the cost of preventing or fighting a threat of pollution.

103 *AG v Glen Line Ltd and the Liverpool and London War Risks Insurance Association Ltd* [1930] 37 LLR 55 (HL) at 61. This statement harks back to the language of the simulated sale and may well be the result of centuries' worth of traditional thinking along such lines. Indeed, the retro-active operation of the transfer to the insurer can really only be justified if the simulated sale is in fact the parent of the institution of abandonment.

104 *Arnould*, para 1283. This rule is based on the common law, not the MIA, which is silent on the point. See also *Stalker v Wier* (1854) 2 NSR 248 (CA), (Canada); *Barrs v Merchants' Marine Insurance Co*, *supra*, (Canada).

the abandoned thing fall upon the insurer, if he accepts the abandonment, and the assured is freed from those obligations¹⁰⁵. The retro-active effect of the transfer of the proprietary rights in question entitles the insurer of the ship to the freight earned after the casualty giving rise to the abandonment, on the basis of his ownership of the ship earning that freight¹⁰⁶. However, the right of the insurer to sue a wrongdoer for causing the loss giving rise to the abandonment does not arise from the abandonment but from subrogation, and only vests in the insurer from the time and to the extent that he pays the loss¹⁰⁷. If a proper notice of abandonment has been given by the assured, no further steps like a formal cession or other act of transfer is necessary¹⁰⁸.

- 4.2. The insurer of the ship is entitled to the freight in the course of being earned at the time of the casualty as well as freight earned after the

105 Arnould, paras 1288-1289.

106 *AG v Glen Line Ltd and the Liverpool and London War Risks Insurance Association Ltd*, *supra*; Ivamy, *Marine Insurance*, 393. The common law was to the same effect; *Case v Davidson* (1816) 5 M & S 79.

107 *AG v Glen Line Ltd and the Liverpool and London War Risks Insurance Association Ltd*, *supra*, at 61.

108 *Anchor Marine Insurance Co v Keith*, *supra*, (Canada).

casualty, less the expenses incurred by him to carry the goods to their destination¹⁰⁹. It has, however, become the practice of insurers to waive their right to such freight by a suitable clause in the policy¹¹⁰, thereby allowing the assured to abandon the freight separately, to the insurer of the freight. Where the ship is carrying her owner's own goods, the insurer is entitled to reasonable remuneration for the carriage after the casualty¹¹¹. The freight earned before the casualty accrues to the assured as shipowner¹¹². The insurer of the ship's right to the freight earned by the ship after the abandonment takes precedence over the rights of the insurer of the freight¹¹³. The age-old controversy¹¹⁴ about the effect of the abandonment of the ship on the rights of the insurer of the freight has been laid to rest. Such freight accrues to the insurer of the ship, if it was in the course of being earned

109 Section 63(2); Lambeth, *op cit*, 246.

110 Brown, *Marine Insurance- Vol 3- Hull Practice*, ('Hull Practice'), 117; Lambeth, *op cit*, 246-247.

111 Section 63 (2); Ivamy, *Marine Insurance*, 395-396; Arnould¹¹¹, paras 1284-1285.

112 This principle was an established one under the common law; See *Stewart v Greenock Marine Insurance Co* (1848) 2 HL Cas 159; Ivamy, *Marine Insurance*, 395.

113 *Case v Davidson*, *supra*; Ivamy, *Marine Insurance*, 395.

114 *Case v Davidson*, *supra*.

at the time of the casualty, or thereafter¹¹⁵.

5. CONCLUSION

5.1. Marine insurance legislation based on the MIA applies in Canada¹¹⁶, Australia¹¹⁷, New Zealand¹¹⁸ and India¹¹⁹. In these countries the law relating to abandonment is the same as in England, and heavy reliance is placed on the English precedent system and the decisions of the English courts¹²⁰. American law, however, while derived from the English common law of marine insurance, has its own unique characteristics and differs from English law in material respects.

115 Arnould, paras 1253-1254; *Stewart v Greenock Marine Insurance Co*, *supra*.

116 In Canada the various provinces previously had their own Marine Insurance Acts. There was no central legislation on the subject. The five provinces which had Marine Insurance Acts had similar acts based on the MIA; Brown & Menezes, *Insurance Law in Canada*, (1982), 30, fn 76. With effect from the 6th May 1993 an act of the central parliament, the Marine Insurance Act 1993 applies to all the Canadian provinces.

117 Australia has a Marine Insurance Act 1909.

118 In New Zealand the Marine Insurance Act 1908 as amended by the Marine Insurance Amendment Act 1975 regulates marine insurance on the basis of the MIA.

119 Sections 55-63 of the Indian Marine Insurance Act 1963 are word-for-word identical to the identically numbered sections of the MIA, and in the interpretation and application of these sections the Indian courts follow the precedents of the English courts. The Indian act embodies some, but not all, of the principles of the MIA, although the loss and abandonment provisions are identical. See Battacharjee, *The Marine Insurance Act 1963*, (1969), 3, and on the question of loss and abandonment, 100-121.

120 Reference has been made in the footnotes to the text on English law where appropriate, as it is apparent that the law on abandonment in these countries does not merit any discussion separate from the discussion of English law.

- 5.2. The retention of abandonment and the concept of a constructive total loss in the Canadian Marine Insurance Act 1993 is the strongest testimonial in favour of a continued need for the concept of abandonment¹²¹. In this regard English law stands in sharp contrast to Dutch law, which has abolished abandonment altogether, German law, which has narrowed the circumstances giving rise to the right to abandon to two cases, and French practice, which has reduced the number of causes entitling an assured to abandon to only two.
- 5.3. The principal difference between English law and the law of the continental countries discussed in the preceding chapters reposes in the English concept of a constructive total loss. This concept was created by the English common law and is unique to English law. It provides for a much wider range of factual circumstances under which the right to abandon arises, as opposed to continental law where the circumstances giving rise to the right to abandon are restricted to a small number.

121

Khurram, 'Total Loss and Abandonment in the Law of Marine Insurance' [1994] 25 *Journal of Maritime Law and Commerce* 95 at 117 expressed the opinion that the incidents giving rise to loss and abandonment are the same today as they were years ago and that the law of constructive total loss and abandonment will continue to challenge and inspire maritime lawyers.

5.4. There is also an important difference in approach between German law and English law in relation to when the right to abandon arises. In English law the right to abandon arises when it is clear that recovery is unlikely to occur within a reasonable time, and the abandonment then has to be made with reasonable diligence after receipt of reliable information of the loss¹²². In German law the assured merely has to wait for a prescribed period, (the 'Abandonfrist'), to pass and he may then abandon if the insured effects have not been recovered.

5.5. The basic principles of abandonment in English law may now be enunciated by way of a summation as follows:

5.5.1. The assured has a right, not an obligation, to abandon when a constructive total loss is present¹²³. The categories of assets which may be abandoned in the appropriate circumstances are a ship, her cargo, freight, profits and commission, wages, loans, advances and disbursements¹²⁴.

122 Section 62(3).

123 Section 61 of the MIA.

124 Section 61 of the MIA allows the abandonment of the 'subject-matter insured'. See also Ivamy, *Marine Insurance*, 8-10.

- 5.5.2. However, if the assured elects to claim for a total loss which is constructive in its nature rather than an actual total loss as defined, he must make a proper abandonment¹²⁵.
- 5.5.3. The assured may recover the full amount of the insurance in the case of a constructive total loss. What constitutes a constructive total loss is determined by section 60 of the *MIA*. The losses which are envisaged are in the nature of economic losses in the sense that there is no complete loss or destruction of the thing insured yet the assured's patrimony is reduced just as much and as effectively as it would have been had there indeed been an actual total loss. The missing ship is regarded as a case of actual rather than constructive total loss and there is no specific requirement of an abandonment in such an event¹²⁶.
- 5.5.4. When English law is compared to Dutch and German law, the concept of a constructive total loss appears to be no more than a legal device utilised to determine when the right to abandon arises. In

125 Section 62(1) of the *MIA*. See also Khurram, *op cit*, 105.

126 Section 58 of the *MIA*.

Dutch law there are special provisions which determine when a loss is sufficiently certain and final to justify an abandonment. These provisions include measures relating to the facts as well as to time¹²⁷. German law, on the other hand, always interposes a time delay, the so-called 'Abandonfrist', which has to elapse before the right to abandon arises¹²⁸. It is submitted that the purpose of these provisions or devices, including the concept of a constructive total loss, is merely to ensure that there is indeed an economic loss worthy of an indemnification before the assured is allowed to claim the full amount of the insurance.

5.5.5. The right to abandon also arises in the case of the missing ship, by way of a presumption of loss after the effluxion of a reasonable time, which depends on the circumstances of each individual case¹²⁹.

5.5.6. In English law there is a minimum of formality with regard to the exercise of the right to

127 Se Chapter 6, para 2.5, *supra*.

128 See Chapter 7, para 5.4, *supra*.

129 Section 58 of the MIA.

abandon. Nevertheless, notice of abandonment must be given with reasonable diligence after reliable news of the casualty¹³⁰. If no notice is given the loss is treated as a partial loss¹³¹.

5.5.7. It is an important principle of English law that the objective facts must constitute a constructive total loss both at the time the notice of abandonment is given and when action is commenced.

5.5.8. The abandonment has to be unconditional¹³² and may not be partial¹³³.

5.5.9. The consequences of the abandonment are twofold. In the first place, the insurer becomes liable to pay the full amount of the insurance. In the second place, the insurer becomes entitled to take over the interest of the assured in the subject-matter of the insurance including all proprietary rights in the insured and abandoned effects¹³⁴, but only to the extent of the insurance.

130 Section 62(3) of the *MIA*.

131 Section 62(1) of the *MIA*.

132 Section 62(2) of the *MIA*.

133 This is according to the common law. See Park, *op cit*, 162; Marshall, *op cit*, (1865), Book I, 486-487; Pollock & Bruce, *op cit*, Vol I, 539.

134 Section 63(1) of the *MIA*.

- 5.6. The *MIA* has now been in force for almost ninety years and calls for its revision have started to be made. It is still being subjected to scrutiny in the courts, almost on a daily basis, and cases discussing or explaining its provisions still appear regularly in the law reports. Notwithstanding the innumerable cases on the *MIA*, it still provides a good example of a very accurate codification of merchant custom which has, over centuries, developed into a workable body of law.

CHAPTER TEN

THE UNITED STATES OF AMERICA

1. INTRODUCTION

1.1. While the concept of a constructive total loss and its abandonment component are also part of the English law which has been inherited by other English common law countries like America, Australia, New Zealand and Canada, it is only in America that the subject is not defined by statute¹. A brief comparison between the statutory English law currently applying in England (and the other English common law countries mentioned) and the common law as it developed in America during the last two hundred years shows important differences. The emphasis in this chapter falls on those differences which relate to abandonment.

1.2. The marine insurance law of America is English law in its uncodified form². The American colonies inherited their laws from England. The basic

¹ Because American law is a common law system based on English law, it is not only very similar to English law, but also relies heavily on precedent. These precedents are collected in a variety of textbooks and digests which are often no more than very elaborate collections of precedents and contain little or no analysis of principles. In marine insurance statute law plays a very limited role, and the main sources of the law are precedents from both sides of the Atlantic.

² Schoenbaum, *Admiralty and Maritime Law*, (1987), 561.

English common law was retained when the colonies won their freedom from the British Crown in the War of Independence in 1777³. Before independence the colonists were not involved in much overseas trade, with commercial matters being controlled from England. However, the French Revolution as well as their own opened new and extensive sources of profitable trade and gave impetus to maritime trade and allied business, which included insurance⁴. The increased trade gave life to an insurance business which was rather sluggish at first. This changed as the ports became busier and busier. The rise to the Bench of eminent jurists like Kent and Story also saw to it that the courts began to give reasoned, written judgments which could be reported and used as precedents. By 1810 marine insurance litigation had become commonplace in New York and Philadelphia⁵. While Park's

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It is not without some irony in the context of this study that the conflict between the American colonies and their British masters came to a head with the Boston Tea Party, which in marine insurance terms constituted an event of damage to marine cargo.

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Fletcher, *'The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance'*, (1984) 97 *Harvard Law Review* 1513, 1555.

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Fletcher, *op cit*, 1555. Between 1800 and 1806 the New York Supreme Court alone decided almost twenty marine insurance cases a year, more than any other single category of commercial cases; Fletcher, *op cit*, 1557.

work⁶ had been available since its printing in Philadelphia in 1787, the first American treatise on marine insurance was published in Boston in 1823⁷. By 1820 the doctrinal framework of American insurance law was well established⁸. Since then an extensive body of case law has been built upon the English common law by the American courts. As a result of these circumstances American law on abandonment is the same as English law in all but a few respects.

- 1.3. The basic substantive law of American marine insurance is federal law⁹. The courts, however, look to English law to keep American law in harmony with the former¹⁰. In the absence of an applicable rule of federal maritime law, the

6 A *System of the Law of Marine Insurances*, (1786). This work was printed from the original plates and was the first book on insurance and one of the first legal textbooks to be printed in America.

7 Phillips, *A Treatise on the Law of Marine Insurance*, (1823). At this time there was already a substantial body of American precedent in place, but notwithstanding that Phillips relied heavily on the judgments of the English courts, a pattern which has endured ever since.

8 Fletcher, *op cit*, 1557. Kent's own work, *Commentaries on American law*, was published in four volumes between 1826 and 1830. The 12th edition, (1873), edited by Oliver Wendell Holmes, is used as a reference in these footnotes.

9 Schoenbaum, *op cit*, 561; Gilmore & Black, *The Law of Admiralty*, 2nd ed, (1975), 68; *Delovio v Boit* 7 F Cas 418.

10 Schoenbaum, *op cit*, 561; *Queens Insurance Co of America v Globe & Rutgers Fire Insurance Co* 263 US 487.

courts apply the rules of state law¹¹. Marine insurance is regarded as a maritime subject and is dealt with in admiralty jurisdiction¹².

2. THE CIRCUMSTANCES GIVING RISE TO THE RIGHT TO ABANDON

- 2.1. American law also distinguishes between an actual total loss and a constructive total loss, allowing the assured to abandon in the latter case¹³. Decisions on what constitutes an actual total loss in American law show that the law is generally the same as English law¹⁴.
- 2.2. There is a constructive total loss if the thing insured, though existing in fact, is lost for any

¹¹ Schoenbaum, *op cit*, 561; *Wilburn Boat Co v Firemans Fund Insurance Co* 348 US 310. This case has been described as 'persistently problematic' and 'nightmarish' by Gilmore & Black, *op cit*, 68-69.

¹² *Delovio v Boit*, *supra*. Story J said that marine insurance is a contract which relates 'to the navigation, business or commerce of the sea'. See also *Jeffcott v Aetna Insurance Co* 129 F 2d 582.

¹³ Gilmore and Black, *op cit*, 83; Kent, *op cit*, Vol III, 511; *Calmar S.S. Corp v Scott* 109 F. 2d 852. A constructive total loss is sometimes called a 'technical total loss'; *Corpus Juris Secundum-A Complete Restatement of the Entire American Law*, by the editorial staff of West Publishing Co, (1946 with annual supplement), Vol 45, Insurance, para 956; (cited as 45 C.J.S. Insurance para ...). See also Phillips, *A Treatise on the Law of Insurance*, 4th ed, (1854), Vol II, para 1491.

¹⁴ Parks, *The Law and Practice of Marine Insurance and Average*, (1988), Vol I, 431. Examples of cases which confirm or apply the approach of English law include *Great Western Insurance Co Ltd v Fogarty* (1873) 86 US 640; *Alexander v Baltimore Insurance Co* (1808) 8 US 370; and *Lenfest v Coldwell* 525 F 2d 717. See also Phillips, *op cit*, Vol II, para 1495.

beneficial purpose to the owner¹⁵. The object of abandonment is to allow the assured to recover his capital promptly to be re-invested in a new enterprise¹⁶. This highlights the role of abandonment where the loss is of an economic nature, either in whole or in part. The right to abandon is not limited to the causes mentioned in the French *Code de Commerce*¹⁷, (the 'CdeC'), but exists in every case where a peril insured against causes the loss¹⁸.

- 2.3. An important difference between American and English marine insurance law is that the assured in American law may abandon on the grounds of a constructive total loss if the cost of repair, reconditioning, refloating, or the like would exceed half the value¹⁹. The American rule

15 Kent, *op cit*, 511; *Hampton Roads Carriers Inc v Boston Insurance Co* 150 F Supp 338; *Globe Insurance Co v Sherlock* (1874) 25 Ohio St 50; Appleman & Appleman, *Insurance Law and Practice*, Vol 6, para 3707; Schoenbaum, *op cit*, 586; Gilmore & Black, *op cit*, 83.

16 Kent, *op cit*, Vol III, 511

17 Capture, shipwreck, stranding with breaking up, innavigability caused by a peril insured against, arrest by a foreign power, arrest by the assured's own government after commencement of the voyage, and loss or damage amounting to three fourths of the value; Article 369 of the CdeC.

18 Kent, *op cit*, Vol III, 515.

19 Phillips, *op cit*, Vol II, paras 1535-1539; Gilmore and Black, *op cit*, 84; Abbink, *Het Zeerecht en de Zee-assurantiewetten aller volken*, (1847), Vol III, 199; Appleman & Appleman, *op cit*, para 3706; Schoenbaum; *op cit*, 587; *Continental Insurance Co v Clayton Hardtop Skiff* 367 F 2d 230; *Jeffcott v Aetna Insurance Co*, *supra*. The rule has its origin in the *Guidon de la Mer*; Kent, *op cit*, Vol III, 521; The

appears to be based on the *Guidon de la Mer* rather than English law, which never allowed the right to abandon in such a case. In English law section 60(2)(ii)(b) of the Marine Insurance Act 1906 ('the 'MIA') requires, in the case of damage to a ship, the cost of repair to exceed her repaired value, and section 60(2)(iii) requires, in the case of damage to the goods, the cost of repair together with the cost of forwarding them to their destination to exceed their value on arrival.

- 2.4. An equally important difference is to be found in the contrast between the test laid down in section 60(2)(ii)(a) of the MIA and the test applied in American law. Where the assured is deprived of possession of the ship or goods by an insured peril, English law requires recovery to be unlikely within a reasonable time before allowing the assured to abandon. American law, on the other hand, allows the assured to abandon in such cases if it is uncertain, not necessarily unlikely, that he will recover the ship or goods within a

value of the ship at the time and place of the accident is the true basis of the calculation; Kent, *op cit*, Vol III, 522; *Jeffcott v Aetna Insurance Co*, *supra*. No deduction 'new for old' is made; Kent, *op cit*, Vol III, 527. There is some controversy whether damage of only fifty percent is sufficient; 45 C.J.S. *Insurance* para 956 fn 35 & 36. In *Continental Insurance Co v Clayton Hardtop Skiff*, *supra*, repair costs equalling half the agreed value was held to be sufficient.

reasonable time²⁰. When it is impossible for the owner to form any reliable estimate of the prospective expense of recovery and repair after the ship has become innavigable by an insured peril, the assured may also abandon on the grounds of a constructive total loss²¹.

- 2.5. Contrary to the position in English law²², the missing ship is deemed to be a constructive total loss, depending in each case on the facts, particularly the time since last heard of, the circumstances of the disappearance and the type of ship²³. However, in some early cases it was held that the missing ship gave rise to a presumption of a total loss by a peril of the seas and the assured could then recover for a total loss on the ship, cargo or freight without an abandonment²⁴.

20 *Calmar S.S. Corp v Scott* 209 F 2d 852; *Peele v Merchants' Insurance Co* 19 Fed Cas 98, where Story J said: '(T)he right to abandon exists, whenever from the circumstances of the case, the ship, for all the useful purposes of a ship for the voyage is, for the present, gone from the control of the owner, and the time when she will be restored to him in a state to resume the voyage is uncertain, or unreasonably distant, or the risk and expense are disproportionate to the expected benefit and objects of the voyage.' (The statement equating loss of the voyage with loss of the ship is no longer representative of American law: see *Calmar S.S. Corp v Scott*, *supra*, 855.)

21 *Calmar S.S. Corp v Scott*, *supra*, 854. For a discussion of the case see (1953-1954) 67 *Harvard Law Review* 1427.

22 . Section 58 of the MIA.

23 *Continental Insurance Co v Clayton Hardtop Skiff*, *supra*.

24 Phillips, *op cit*, Vol II, para 1496 and the cases there referred to in fn 3.

- 2.6. The principles of abandonment apply to both the ship and goods insured, although there are some differences, usually dictated by the facts. The inability of the ship to continue the voyage, for example because she has been detained or has become innavigable, may or may not give rise to the right to abandon the cargo, depending on whether the venture so far as the cargo is concerned has been defeated²⁵. The assured has the right to abandon the freight if there is a constructive total loss of the ship as he then lacks the means to earn the freight²⁶. Freight earned after the abandonment accrues to the insurer²⁷, as in English law.

3. THE SUBSIDIARY RULES OF ABANDONMENT

- 3.1. As in English law, the assured is not obliged to abandon and may claim for a partial loss²⁸, even

25 Kent, *op cit*, 518.

26 Phillips, *op cit*, Vol II, para 1502, thought there was some difference between English law and American law with regard to freight, as English law stood then, in that the freight already earned went to the insurer of the ship upon an abandonment of the ship in English law but not in American law, where the ship and freight were seen as entirely distinct interests.

27 Phillips, *op cit*, Vol II, para 1502; Kent, *op cit*, Vol III, 529.

28 Phillips, *op cit*, Vol II, para 1493; Schoenbaum, *op cit*, 588; 45 C.J.S. Insurance, para 958; Parks, *op cit*, Vol I, 442; *The St. Johns*, 101 Fed 469.

to the extent of a hundred percent of the value of the ship or goods²⁹. The election to abandon has to be made within a reasonable time³⁰ and is made by notice to the insurer³¹. Abandonment is essential to convert the loss into a constructive total loss if the thing insured continues to exist *in specie*³², otherwise the assured may only claim for a partial loss. Abandonment is only necessary if there remains something to pass to the insurer³³.

- 3.2. The right to abandon is determined and fixed in American law on the basis of the facts as they are when notice of abandonment is given³⁴. In English law the facts as they are at the time when action is instituted must also prove a constructive total

29 Parks, *op cit*, Vol I, 443.

30 Phillips, *op cit*, Vol II, para 1494; Kent, *op cit*, Vol III, 512; 45 C.J.S. Insurance, para 962. Time runs from receipt of reliable information that a loss entitling the assured to abandon has occurred; *Harvey v Detroit Fire & Marine Insurance Co* 120 Mich 601. What a reasonable time is depends on the facts; 45 C.J.S. Insurance, para 962.

31 Kent, *op cit*, Vol III, 512-513.

32 Kent, *op cit*, Vol III, 513.

33 Kent, *op cit*, Vol III, 513; C.J.S. Insurance, para 958; *Standard Marine Insurance Co Limited of Liverpool v North Beach Lighterage & Transportation Co* 133 F 636. In *Rock Transport Properties Corp v Hartford Fire Insurance Co* 312 F Supp 341 at 347 it was held that no abandonment need be made if it would be a 'futile act or idle ceremony, as where the damaged property has already been sold or captured'.

34 Phillips, *op cit*, Vol II, para 1520; Gilmore and Black, *op cit*, 84; Schoenbaum, *op cit*, 587 fn 10; C.J.S. Insurance, para 959; *Calmar S.S. Corp. v Scott*, *supra*,

loss³⁵, whereas a change in the circumstances after notice of abandonment does not affect the validity of the abandonment in American law³⁶. The validity of the abandonment is tested against the actual facts at the time of abandonment and not on the facts as perceived by the assured³⁷. If the tendered abandonment is accepted³⁸, the rights of the parties are fixed irrespective of whether or not the facts actually justified an abandonment³⁹.

- 3.3. The abandonment has to be made within a reasonable time⁴⁰ but no particular form of notice is

35 Colinvaux, *Arnould's Law of Marine Insurance and Average*, 16th ed, (1981), para 1177; Ivamy, *Marine Insurance*, 376; *Naylor v Taylor* 9 B & C 718. This is the position only if the insurer has not accepted the abandonment: see section 62 (6) of the MIA.

36 Phillips, *op cit*, Vol II, paras 1704-1706; Gilmore and Black, *op cit*, 85; Kent, *op cit*, 517; Appleman & Appleman, *op cit*, para 3715; 45 C.J.S. *Insurance*, para 959. In *Wood v Lincoln & Kennebeck Insurance Co* (1810) 6 Mass 479, at 482 the following was said: 'If the plaintiff, when he made the offer to abandon, had a legal right to abandon, the verdict must stand, notwithstanding the subsequent recovery and arrival of the vessel. The right to abandon is a vested right, and when legally exercised, the assured is entitled to recover as for a total loss; which subsequent events cannot prevent ...'.

37 Phillips, *op cit*, Vol II, para 1520; Kent, *op cit*, Vol III, 517; Appleman & Appleman, *op cit*, para 3705; C.J.S *Insurance*, para 959; *Fireman's Fund Insurance Co v Globe Navigation Co* 236 F 618.

38 By the insurer or someone authorized to do so on his behalf; Phillips, *op cit*, Vol II, para 1690; 45 C.J.S. *Insurance*, para 964.

39 Phillips, *op cit*, Vol II, para 1697; Gilmore & Black, *op cit*, 85; 45 C.J.S. *Insurance*, para 964; Parks, *op cit*, Vol I, 446; *Copelin v Phoenix Insurance Co* 9 Wall 461; *Peele v Merchants' Insurance Co*, *supra*.

40 Phillips, *op cit*, Vol II, paras 1668-1677; Parks, *op cit*, Vol I, 458.

prescribed⁴¹, so long as the insurer is informed that the assured intends giving up the interest insured because it has been totally lost⁴². The abandonment must be unconditional⁴³ and must cover the whole interest insured⁴⁴. It must also be made by the assured or his authorized agent⁴⁵ to the insurer or his authorized agent⁴⁶. There is no need for an abandonment between the insurer and his re-insurer⁴⁷.

4. THE CONSEQUENCES OF THE ABANDONMENT

4.1. The effect of the abandonment in American law is that the assured becomes entitled to claim for a total loss⁴⁸. Unlike current English law,

41 Phillips, *op cit*, Vol II, para 1678; 45 C.J.S. Insurance, para 960; *Chicago S.S. Lines v U.S. Lloyds* 12 F 2d 733.

42 45 C.J.S. Insurance, para 960; *Canada Sugar-Refining Co v Insurance Co. of North America* 175 US 609; *Mattson v Connecticut Fire Insurance Co of Hartford* 80 F Supp 101.

43 45 C.J.S. Insurance, para 960; *Chicago S.S. Lines v U.S. Lloyds*, *supra*.

44 45 C.J.S. Insurance, para 960; *Bidwell v Northwestern Insurance Co* 19 NY 179.

45 45 C.J.S. Insurance, para 961; *Murray v Great Western Insurance Co* 25 NYS 414.

46 45 C.J.S. Insurance, para 961; *Burnham v Boston Marine Insurance Co* 139 Mass 399.

47 Phillips, *op cit*, Vol II, para 1506.

48 Kent, *op cit*, Vol III, 511; Schoenbaum, *op cit*, 588.

however, the abandonment also

*'of itself, and without any deed of cession, and prior to actual payment of the loss, transfers the right of property to the insurer to the extent of the insurance'*⁴⁹.

- 4.2. This transfer so effectively divests the assured of his rights in the ship or goods that he is even accorded the status of salvor if he should save the ship or goods after the abandonment⁵⁰. The insurer acquires the entire interest insured, including anything incidental thereto, and all claims against third parties arising from the injury⁵¹. Anything thereafter saved therefore accrues for the benefit of the insurer. The co-operation of the insurer is thus not necessary in American law to effect the transfer of the insured

49 Kent, *op cit*, Vol III, 511-512. See also Phillips, *op cit*, Vol II, para 1707; *Continental Insurance Co v Clayton Hardtop Skiff*, *supra*. The transfer is subject to the rights of third parties; 45 C.J.S. Insurance, para 965; *Delaware Mutual Safety Insurance Co v Gossler* 96 US 645; Phillips, *op cit*, Vol II, paras 1714-1721.

50 *Continental Insurance Co v Clayton Hardtop Skiff*, *supra*, at 235-236.

51 45 C.J.S. Insurance, para 965; *Mason v Marine Insurance Co* 110 F 452. The shipowner's personal defences are not available to the insurer; *Republic of China v National Union Fire Insurance Co of Pittsburgh* 163 F Supp 812.

interest to the insurer⁵².

5. CONCLUSION

- 5.1. It is apparent that American law is based on the case law which developed over a period of just more than two centuries of independent judicial interpretation in the field of marine insurance. Statutes enacted in England after American independence never applied in America, and since marine insurance is regarded as a matter of state law, the different states have developed their own brand of marine insurance law, within the ambit of the *Wilburn Boat Co* decision of the Supreme Court.
- 5.2. But for five main differences the basic principles of abandonment are the same in English and American law. In the first place, uncertainty of recovery or unreasonable delay in recovering the ship or goods is sufficient to constitute a constructive total loss in American law, but English law requires recovery to be unlikely. In the second place, American law allows an

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In this regard American law is in consonance with the law in England as it was before the MIA 1906, the Netherlands under the *Wetboek van Koophandel* (article 678), and Germany (article 868 of the *Handelsgesetzbuch*.)

abandonment where the cost of repairs to the damaged ship or goods exceeds half their repaired value, while English law provides that the cost of repair of the ship must exceed her repaired value and that the cost of repair to the damaged goods plus the cost of forwarding them to their destination must exceed their value on arrival. In the third place the missing ship is a case of constructive total loss in America but an actual total loss in England. The fourth difference lies therein that in American law the facts as they are at the time of the abandonment are conclusive so far as the assured's right to abandon is concerned, while English law requires the facts to establish that right also at the time action is brought. Lastly, under American law the effect of an abandonment is that ownership in the ship or goods is transferred to the insurer, but under English law there is no automatic transfer of ownership and the insurer has the right to decline taking over the assured's proprietary rights in the subject-matter of the insurance.

- 5.3. In the main, the basic principles of abandonment are the same in the five legal systems discussed in this Part of this work. A notable exception to

this uniformity is the contrast between continental law and English law so far as the concept of a constructive total loss is concerned. Another difference lies therein that some legal systems provide for an automatic vesting of ownership of the abandoned effects in the insurer⁵³ when the abandonment occurs while others give the insurer the election not to accept or receive such ownership⁵⁴. When the principles of abandonment which apply in South African law are traced later a comparison between the basic principles distilled in this Part may be compared to South African law before recommendations for the future of South African law are made⁵⁵.

53 Dutch, German and American law.

54 French and English law.

55 This discussion takes place in the last chapter.