

# GA, maritime averages, marine insurance, and risk management in the Southern Low Countries (fifteenth-sixteenth centuries)

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My thesis research looks at the development of General Average (GA) and other varieties of maritime averages (hereafter: averages) in the southern Low Countries in the fifteenth and sixteenth centuries, more specifically in the commercial cities of Bruges and Antwerp during their respective ‘Golden Ages’.<sup>1</sup> GA, which redistributes extraordinary damages and/or costs in maritime ventures across the interested parties to share the risk, already existed in Roman law and still exists today under the York-Antwerp Rules (YAR).<sup>2</sup> Even though some studies exist on the Roman and medieval law of jettison, primarily in the framework of discussions on the (non-)existence of a *lex maritima*, its development in the early modern period has been largely neglected.<sup>3</sup> Contrary to narratives that focus solely on marine insurance as the core of maritime risk management in the early modern period, my research shows that risk management was marked by complex arrangements, as merchants used insurance, GA, bottomry and more basic forms such as cargo spreading at the same time to deal with risks at sea.<sup>4</sup> Moreover, other varieties of averages were developed to manage costs within the venture, for example the common expenses such as pilotage and port duties. Risk is defined here as an *anticipated*, possible and involuntary hazard; cost as an *anticipated*, voluntary payment in exchange for a service.

This thesis therefore aims to fill a major lacuna in the history of the maritime sector and maritime risk management, which is especially apparent in the case of the Southern Low Countries. The Southern Low Countries offer an excellent case study for the development of this institution: foreign merchants from all over Europe lived in Bruges and Antwerp using GA and other varieties of averages, whilst ongoing state formation also spurred new regulations and developments both on GA and insurance. Whereas other studies in the ERC project offer quantitative observations, my project is primarily based on qualitative, primarily legal sources, such as court records of the Castilian consular court in Bruges, the Antwerp municipal court and the superior Great Council of Mechlin, as well as aldermen records, notarial archives and the records of insurers such as the Antwerp-based Juan Henriquez.<sup>5</sup>

Given the unique non-market structure of the instrument, the analytical value of GA is significant for both economic and legal historians. Besides historical insights, it also adds a much-

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<sup>1</sup> See for two recent works on the two cities: A. Brown & J. Dumolyn (ed.), *Medieval Bruges, c. 850-c.1550* (Cambridge 2018); J. Puttevils, *Merchants and Trading in the Sixteenth Century: The Golden Age of Antwerp* (London 2015).

<sup>2</sup> See for a historical approach: J.A. Kruit, ‘General average – General Principle *plus* varying Practical Application *equals* Uniformity?’, *Journal of International Maritime Law*, 21 (2015), 190-202.

<sup>3</sup> See e.g.: W. Tetley, ‘The General Maritime Law – the Lex Maritima’, *Syracuse Journal of International Law & Commerce*, 20 (1994), 105-146; E. Frankot, ‘Of Laws of Ships and Shipmen’: *Medieval Maritime Law and its Practice in Urban Northern Europe* (Edinburgh 2012); A. Cordes, ‘Lex Maritima? Local, Regional and Universal Maritime Law in the Middle Ages’, in: W. Blockmans, M.M. Krom & J.J. Wubs-Mrowewicz (eds.), *The Routledge Handbook of Maritime Trade around Europe 1300-1600* (Abingdon/New York 2017), 69-85.

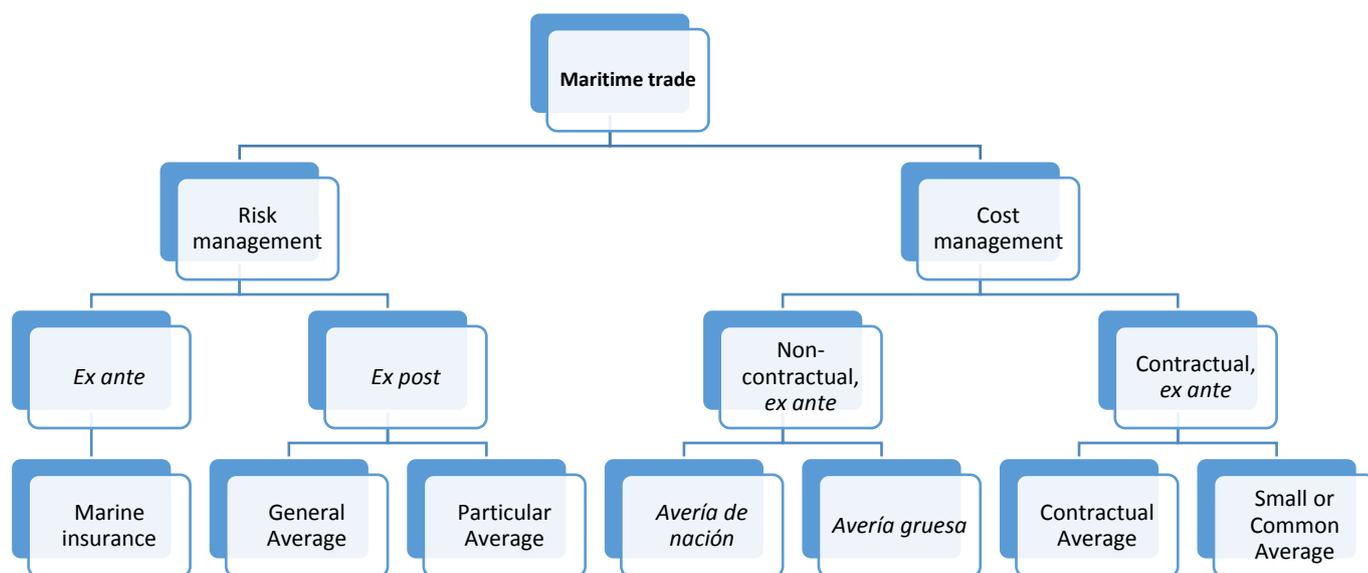
<sup>4</sup> G.P. Dreijer, ‘Maritime Averages and the Complexity of Risk Management in Sixteenth-Century Anwerp’, *Tijdschrift voor Sociale en Economische Geschiedenis / Low Countries Journal of Social and Economic History*, 17, 1 (2020), 31-54.

<sup>5</sup> See <http://humanities.exeter.ac.uk/history/research/centres/maritime/research/avetransrisk/> for the project.

needed nuance to contemporary debate about the ‘usefulness’ of GA.<sup>6</sup> Assumptions that GA was already obsolete in the medieval or early modern period can easily be challenged: discussions about the instrument were primarily jurisdictional and should more properly be studied as a political problem with economic consequences. Rather than question the instrument, GA’s application was deliberately broadened during the fifteenth and sixteenth centuries and other varieties were developed to cover different risks and manage costs. GA and insurance complemented each other, making new legal arrangements necessary to incorporate both tools into mercantile practice.<sup>7</sup> Insurance allowed merchants to transfer risk *ex ante*, GA enabled to share damages *ex post*.

The thesis consists of two major parts: one on the role of GA in *risk management*, for example *vis-à-vis* marine insurance, and the second on the role of other averages in establishing a system of *cost management*. This distinction between risk and cost management derives from the polysemic meaning of the term averages: following Addobbati, the thesis shows that the meaning of averages always denoted a form of contribution, but that the goal of these contributions varied.<sup>8</sup> The thesis contributes to three major debates: first, the already mentioned *lex maritima*, a debate with a more legal-historical angle; second, the debate on maritime risk management, particularly with regards to the relation between insurance and GA; and third, the debate on institutions, transaction costs and protection costs, for which GA provides an ambivalent case study as it had both positive and negative effects on transaction costs, for example as enforcement was for a long time the domain of the so-called particularized *nationes*, the foreign merchant communities in Bruges and Antwerp.<sup>9</sup>

Figure 1: Risk and cost management for maritime trade



<sup>6</sup> For critical voices on GA see: K.S. Selmer, *The Survival of General Average: a Necessity of an Anachronism?* (Oslo 1958); P.K. Mukherjee, ‘The Anachronism in Maritime Law that is General Average’, *WMU Journal of Maritime Affairs*, 4, 2 (2005), 195-209. See for another view: Kruit, ‘General Average’.

<sup>7</sup> J.P. Van Niekerk, *The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800* (2 vols.) (Hilversum 1998), 60-80.

<sup>8</sup> See: A. Addobbati, ‘Principles and Inferences of General Average: Statutory and Contractual Loss Allowances from the *Lex Rhodia* to the Early Modern Mediterranean’, in: M. Fusaro, L. Piccinno & Addobbati (eds.), *Sharing risk: General Average, 6<sup>th</sup>-21<sup>st</sup> Centuries* (forthcoming).

<sup>9</sup> D.C. North, ‘Law and Economics in Historical Perspective’, in: F. Cafaggi, A. Nicita & U. Pagano (eds.), *Legal Orderings and Economic Institutions* (London 2007), 46-53. For the *nationes*: O.C. Gelderblom, *Cities of Commerce – The Institutional Foundations of International Trade in the Low Countries, 1250-1650* (Princeton 2013), 109-118.

In medieval compilations of maritime law such as the *Vonnisse van Damme* (a Dutch translation of the famous *Rôles d'Oléron*), rules on jettison and mast cutting (the most common acts leading to a GA contribution) were primarily rules of thumb rather than abstract legal principles and were strictly confined to actual damages.<sup>10</sup> This changed during the sixteenth century, as four major developments can be observed: first, the freedom of action of the shipmaster was broadened to perform an act of GA, but his liability also became stricter in case of preventable damages<sup>11</sup>; second, new causes for GA were allowed besides jettison and mast cutting, such as uninsurable expenses for wounded seamen fighting off pirates and artillery, as well as those to prevent greater damages, like extraordinary pilotage or voluntarily running aground<sup>12</sup>; third, lawyers gradually started to distinguish between various forms of averages, such as General, Small (also known as Common), and Particular Average (*averij-grosse*, *averij-commune*, and *simplepe averij*), moving from largely rules of thumb to actual legal principles, as the 1551 *Ordonnance* of the Habsburg sovereign Charles V offered a legal definition of the argument<sup>13</sup>; fourth, Antwerp legal practice pushed towards the liability of insurers to pay for GA claims.<sup>14</sup>

Most developments can already be observed in legal practice before either royal legislation or Antwerp municipal law codified this.<sup>15</sup> The liability of insurers to pay for GA claims, for example, was allowed by the Antwerp aldermen in the 1540s, long before the 1608 compilation of municipal law which allowed it.<sup>16</sup> Moreover, the insurer Juan Henriquez incorporated GA payments into his business dealings in the 1560s, suggesting widespread acceptance.<sup>17</sup> The Bruges-based Castilian *natio* published the *Hordenanzas* in 1569, a compilation of Castilian insurance customs, detailing many of the rules.<sup>18</sup> Insurers could be held liable in two ways: first, when the others in the interest community had largely reimbursed the damages to cargo, but when the remaining own risk to the cargo was insured; and second, when insured cargo was used to determine the contribution to another persons' loss.<sup>19</sup> Antwerp municipal law subsequently also defined Particular Average (PA), to clarify the liability of insurers to pay both for PA (i.e. incurring the full loss) or GA (i.e. only part of the loss).<sup>20</sup> Moreover, uninsurable costs following from pirate attacks were folded under the GA principle, clearly showing there was a complementarity of the two tools of risk management. The study of GA confirms Hunt's and Murray's observation that most innovations in business techniques were gradual adaptations rather than radical new ideas.<sup>21</sup> It also shows it was not solely marine insurance which allowed for the transfer from 'uncertainty into risk', but that GA also played a (major) role in this process.<sup>22</sup>

Part 2 shifts the focus to cost management. As Figure 1 shows, the structures for cost management can be divided into two distinct types: the contractual forms of averages and the non-contractual compulsory contributions that were only used by the Castilian and Biscayer *nationes* in Bruges. For the first category notarial records show that a distinction was drawn between 'freight' (a fixed fee) and 'averages', the common operational costs of the venture which could vary, for example

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<sup>10</sup> D. De ruysscher, 'Maxims and Cases: Maritime Law and the Blending of Merchant and Legal Culture in the Low Countries (16<sup>th</sup>-17<sup>th</sup> centuries)', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanistische Abteilung*, Accepted/In Press.

<sup>11</sup> A development observed in other places in Europe as well: G. Rossi, 'The Liability of the Shipmaster in Early Modern Law: Comparative (and Practice-Oriented) Remarks', *Historia et Ius*, 12 (2017), paper 12, 1-47.

<sup>12</sup> Kruit, 'General Average', 198-199; Frankot, 'Of laws of Ships', 27-28.

<sup>13</sup> Van Niekerk, *The Development*, 64-65; Kruit, 'General Average', 198-199.

<sup>14</sup> Van Niekerk, *The Development*, 76-80.

<sup>15</sup> A point in a larger framework also made in: L.M. Friedman, *The Legal System: A Social Science Perspective* (New York 1987).

<sup>16</sup> See e.g.: Antwerp Municipal Archives (hereafter BE-SAA), *Judgment Books*, V1241, fol. 283r-v.

<sup>17</sup> Puttevels & M. Deloof, 'Marketing and Pricing Risk in Marine Insurance in Sixteenth-Century Antwerp', *The Journal of Economic History*, 77, 3 (2017) 796-837, there 824.

<sup>18</sup> Rossi, *Insurance in Elizabethan England: the London Code* (Cambridge 2016), 148-157.

<sup>19</sup> Van Niekerk, *The Development*, 76-80.

<sup>20</sup> *Ibidem*, 64-65.

<sup>21</sup> E.S. Hunt and J.M. Murray, *A History of Business in Medieval Europe, 1200-1550* (Cambridge 1999), 178-179 & 249.

<sup>22</sup> F. Knight, *Risk, Uncertainty and Profit* (Boston/New York 1921), 247-253.

as ordinary pilotage was necessary, explaining why they were agreed upon before the venture but only paid upon safe arrival. Merchants often agreed to pay these costs in freight contracts, raising costs but also guaranteeing legal security and a safe(r) venture. In sixteenth-century Antwerp, even protection costs such as artillery were included in freight contracts, suggesting that merchants used contractual forms of averages to manage all sorts of costs.<sup>23</sup> Both the Castilian and Biscayer merchants in the Low Countries also administered a similar cost management tool, the so-called *flete y averías*, primarily for pilotage.<sup>24</sup>

Second, the Spanish compulsory contributions were primarily instruments of the respective *nationes* to manage protection costs. The Castilians and Biscayers were the only foreign merchant communities to use the members' contribution to the *natio*, the so-called *avería de naçion*, for both common expenses of the *natio* (e.g. political representation costs) and for maritime protection costs (e.g. artillery and convoy ships), in contrast to for example the membership contributions of the Portuguese and the Genoese, two other major *nationes*.<sup>25</sup> This was a form of cost management drawn from their privilege to levy so-called 'consular averages', although the protection measures also lowered risk and were hence an effort to create protection rents for the Spanish wool trade.<sup>26</sup> Given the fact that more ventures were cross-national enterprises, legal practice also established that the Castilians and Biscayers were allowed to levy the *avería de naçion* on Italian merchants when the latter were using Spanish ships.<sup>27</sup> Following new rules meant to combat the threat of French and Scottish pirates around 1550, the Castilians also established the confusingly termed *avería gruesa* to equip the 'Flanders fleet' with artillery and convoy ships.<sup>28</sup> In the end, these protection efforts to create 'protection rents' were only moderately successful, whilst significantly raising protection costs.<sup>29</sup>

The conclusions of the thesis are threefold. First, the research makes clear that there was no *lex maritima* in north-western Europe, even if some general trends could be recognized. Rather than go with simplified narratives of an autonomous mercantile and maritime law, (economic) historians should instead accept the murky, complex and pluralistic nature of law and legal institutions in their analysis.<sup>30</sup> Second, economic historians should acknowledge that maritime risk management was a complex business, as insurance did not sweep away older systems of risk management such as GA and bottomry, but rather developed in tandem with the other tools, creating a complementary system of risk management tools.<sup>31</sup> Insurance moreover incentivized the development of new forms of averages and the widening application of GA.<sup>32</sup> Third, the thesis points out that GA and other averages had both intrinsically and in terms of its jurisdiction had ambivalent consequences for both transaction and protection costs. Notwithstanding the many stakeholders of the maritime sector trying to vie for influence in GA legislation and its governance, an operationally efficient set of risk management

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<sup>23</sup> Dreijer, 'Maritime Averages', 46-49.

<sup>24</sup> R. Fagel, *De Hispano-Vlaamse wereld: de contacten tussen Spanjaarden en Nederlanders 1496-1555* (Nijmegen 1996), 484.

<sup>25</sup> As opposed to what has long been assumed, for example in: L. Gilliodts-Van Severen, *Cartulaire de l'ancien consulat d'Espagne à Bruges: recueil de documents concernant le commerce maritime et intérieur, le droit des gens public et privé, et l'histoire économique de la Flandre* (Bruges 1901-1902), 595-596.

<sup>26</sup> Following: F.C. Lane, *Profits from Power: Readings in Protection Costs and Violence-Controlling Enterprises* (New York 1979), 37 & 44.

<sup>27</sup> See e.g.: Belgian Archives of the Realm (hereafter BE-ARB), Great Council of Mechlin, *Registers of extended sentences*, inv. T107, nrs. 815.12 (fol. 70-88) & 815.13 (fol. 90-106v).

<sup>28</sup> Fagel, *De Hispano-Vlaamse wereld*, 419-422.

<sup>29</sup> *Ibidem*.

<sup>30</sup> As also argued by: E. Kadens, 'Order within Law, Variety within Custom: the Character of the Medieval Law Merchant', *Chicaco Journal of International Law*, 139 (2004), 39-65, there 42.

<sup>31</sup> De ruysscher, 'Antwerp 1490-1590: Insurance and Speculation', in: A.P. Leonard (ed.), *Marine Insurance: Origins and Institutions* (Basingstoke 2016), 79-105, there 95.

<sup>32</sup> As also argued by: Hunt and Murray, *A History of Business*, 178-179 & 249.

institutions came into existence.<sup>33</sup> That this set was relatively efficient was nevertheless not so by design, as complex jurisdictional, legal, and political struggles and negotiations over the insurance business severely impacted the development of GA in a complex web of institutional development.<sup>34</sup>

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<sup>33</sup> See for example: L.H.J. Sicking, *Neptune and the Netherlands: State, Economy, and War at Sea in the Renaissance* (Leiden/Boston 2004), 247-253.

<sup>34</sup> S. Ogilvie, "Whatever is, is Right?" Economic Institutions in Pre-industrial Europe', *Economic History Review*, 60, 4 (2007), 649-684, particularly 681.