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## Innovating Financial Law in Early Modern Europe: Transfers of Commercial Paper and Recourse Liability in Legislation and *Ius Commune* (Sixteenth to Eighteenth Centuries)

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DAVE DE RUYSSCHER\*

**Abstract:** In this contribution it is demonstrated how in the seventeenth and eighteenth centuries Dutch rules concerning negotiable credit instruments (i.e., bills obligatory to bearer and bills of exchange) transformed financial law throughout the European continent. The Antwerp and Amsterdam authorities devised precepts of law on such issues that went against substantial principles of the academic *ius commune*. In the course of the seventeenth century, the former's success brought about their insertion into financial legislation of German cities. This phenomenon came along with a new comparative approach of legislators in the whole of Europe, which was typical of that period. During the seventeenth and eighteenth centuries, the continental *ius commune* system was indeed increasingly reoriented towards adoption of legal solutions existing alongside the traditional university-based literature. These developments facilitated the introduction of the Dutch norms of law into legal treatises and codifications to the disadvantage of older theories of civil law. As a result, by 1800, Dutch rules relating to the assignment of commercial paper and recourse liability of assignors had become firmly established. Even today, they form a part of the private law of many continental European countries. However, the implementation of these modern ideas has never been complete. As a result, some existing and inconvenient differences between arrangements of transfers of debts and claims could be harmonized in the spirit of the work of the early modern Dutch jurists.

**Résumé:** Cet article démontre l'influence que des règles néerlandaises touchant à des instruments de crédit négociables (lettres obligatoires au porteur et lettres de changes), qui datent des seizeième et dix-septième siècles, ont exercée sur le droit financier du continent européen. Des juristes travaillant pour les gouvernements d'Anvers et d'Amsterdam ont créé de nouvelles normes officielles en matière de finances. L'application au dix-septième siècle de ces solutions dans des villes allemandes s'inscrit dans une transformation générale des approches juridiques. A cette époque, le système du *ius commune* devint plus comparatiste et des juristes commencèrent à élaborer de nouvelles pratiques, même si pour celles-ci ils ne trouvèrent pas d'arguments dans le corps de la littérature juridique. Ce phénomène a facilité l'introduction, dans des traités et dans des codifications, des principes néerlandais mentionnés, et ce au désavantage de théories académiques. Il en résulta, vers 1800, une reconnaissance générale de cessions d'effets commerciaux, ainsi que d'un droit de recours dans le chef du bénéficiaire d'un tel

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transfert, règles qui appartiennent toujours au droit privé de plusieurs pays du continent européen. Cependant, à ce moment et plus tard, l'intégration de ces idées modernes dans le droit positif fut incomplète. Certains inconvénients qui sont toujours liés aux différents types de transferts de droits et dettes peuvent être interprétés dans l'esprit des solutions des anciens juristes néerlandais.

**Zusammenfassung:** Der vorliegende Aufsatz zeigt, wie die aus dem sechzehnten und siebzehnten Jahrhundert stammenden niederländischen Regeln bezüglich übertragbarer Kreditinstrumente (Inhaberschuldscheine und Wechselbriefe) das Finanzmarktrecht des europäischen Kontinents beeinflussten. Damals kreierten die in den Behörden der Städte Antwerpen und Amsterdam tätigen Juristen neue offizielle Normen im Bereich des Finanzwesens. In Europa wurde in dieser Periode die rechtsvergleichende Methode vermehrt in das gemeine Recht (*ius commune*) einbezogen. Juristen wendeten Handelsgewohnheiten an, auch wenn diese keine Verankerung in den Regeln des allgemeinen Rechts fanden. Dieses neue Phänomen vereinfachte die Aufnahme der genannten niederländischen Prinzipien in Traktate und Kodifikationen und führte zu einer Änderung der gelehrt Theorien. Zu Beginn des neunzehnten Jahrhunderts waren Übertragungen von Wertpapieren, und Rechten der Inhaber dieser Instrumente allgemein anerkannt. Dennoch war die Verschmelzung der modernen Ideen mit dem positiven Recht zu dieser Zeit und auch im späteren Verlauf nicht vollständig. Einzelne Regeln bezüglich Schuldübernahme und Forderungsübertragung, die auch noch heute bestehen, können unter dem Gesichtspunkt der frühmodernen Überlegungen der niederländischen Juristen interpretiert werden.

## 1. Introduction

In the wake of a worldwide financial crisis that was – at least partly – caused by the bundling of diverse credit risks into non-transparent securities, it is important to reflect on the contents and foundations of rules regarding transfers of claims and debts. Fundamental ideas that determined the building blocks of present-day private law on such issues can be found in early modern legal texts. In the sixteenth and seventeenth centuries, it had become clear that Roman law was unwieldy for flexible bond trading, and doctrine and legislation started to move away from traditional theoretical insights that had been based on the *Corpus Iuris Civilis*.

The formulation and application of new legal views regarding negotiability of commercial paper marked a turning point in the history of trade. In the later Middle Ages, bills of exchange and acknowledgements of debt (IOU)<sup>1</sup> were given to the creditor of the debt mentioned therein, and the latter was the only person legally

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<sup>1</sup> Hereinafter, acknowledgements of debt will also be referred to as bills obligatory and debt certificates. According to a sixteenth-century Antwerp legislation, an acknowledgement of debt (an IOU) was transferable and negotiable if it contained a (mixed) bearer clause ('to X or bearer'). Technically speaking, such instruments cannot be compared with the French *billet à ordre* or the English *promissory note*. Both were order notes, and they emerged only in the course of the seventeenth century.

entitled to the debt contained in the instrument.<sup>2</sup> By contrast, in the seventeenth century, such documents could, once issued, be used for new agreements. They had become negotiable, and commercial paper was juristically deemed to be the embodiment of a claim rather than the reflection of a contract. Moreover, assignments of credit instruments were combined with recourse liability, allowing compensation for the holder in case the document remained unpaid. The person having transferred a bond, that is, the assignor, bore the financial risk of its dishonour. If the instrument could not be cashed, the assignor had to settle the debt. Assignment of commercial paper was held to be definitive on the condition that the beneficiary was satisfied.

The crux of this new legal thinking can be traced back to the Netherlands between 1450 and 1650. When Antwerp was the leading commercial metropolis in Europe, in the first half of the 1500s, its City Council of aldermen accepted informal transfers of acknowledgements of debt containing bearer clauses ('payable to X or bearer') as lawful agreements. At the end of the sixteenth century and in the early seventeenth century, during the war following the secession of the Northern provinces of the Netherlands, Amsterdam profited from Antwerp's decay and evolved to become an important banking centre. In first half of the 1600s, provisions of Antwerp law and commercial practices of that city were applied and acknowledged in Amsterdam's legal scenes.<sup>3</sup>

Due to a local perspective in scholarly literature regarding early modern financial practices, the influence that Dutch ideas exercised on legal doctrine that was written elsewhere and on ordinances of other European trading centres has not received much attention. The diffusion of the Antwerp and Amsterdam rules was nonetheless clearly following trade and was also more generally related to the fundamental changes taking place within the continental European legal system. Between 1500 and 1800, continental jurists were increasingly intent on implementing forensic and locally crafted precepts of law, even when the latter were structurally incompatible with views propagated in late-medieval civil law writings. Along with this attitude came a growing comparative approach of legislators and legal scholars. In their opinion, all rules and even foreign ones could be adopted when considered valuable.<sup>4</sup> That is why legal precepts and concepts regarding

<sup>2</sup> R. DE ROOVER, *L'évolution de la lettre de change XIVe-XVIII<sup>e</sup> siècles*, SEVPEN, Paris 1953, pp. 29–42.

<sup>3</sup> J.W. BOSCH, 'Remarques sur quelques influences, exercées en matière de droit, par les provinces méridionales sur les provinces septentrionales des Pays-Bas jusqu'en 1795', p. 19. *Tijdschrift voor Rechtsgeschiedenis (The Legal History Review)* 1951, 133–157; D. DE RUYSSCHER, 'Antwerp Commercial Legislation in Amsterdam in the 17th Century: Legal Transplant or Jumping Board?', 77. *Tijdschrift voor Rechtsgeschiedenis (The Legal History Review)* 2009, pp. 459–479.

<sup>4</sup> M. BELLOMO, *The Common Legal Past of Europe 1000–1800*, The Catholic University of America Press, Washington 1995, at pp. 222–223; K.O. SCHERNER, 'Allgemeine Rechtsgrundsätze und Rechtsvergleichung im europäischen Handelsrechts des 17. und 18. Jahrhunderts', 7. *Jus commune. Zeitschrift für europäische Rechtsgeschichte* 1978, at pp. 118–135.

negotiability of commercial paper could spread from the Netherlands to other areas and why they became regularly mentioned in doctrine written by legal scholars of foreign universities.

## **2. Negotiable Instruments in Antwerp and Amsterdam Law (Sixteenth to Seventeenth Centuries)**

In the early sixteenth century, Antwerp legislation and judicial practice resolutely broke with the dominant doctrinal views concerning the substitution of debtors and with respect to the nature of credit instruments. In late-medieval legal literature, it was traditionally stated that contracts had to be honoured by the parties present at their drafting and by them alone. It was deemed possible that persons other than the ones involved in the agreement received payment of the debt, but in that case they had to have power of attorney (*mandatum* or *procuratio*). Furthermore, transforming a third party into a creditor could only be done with a new contract, and this brought about annulment of the original contract. The former debtor could, as a result, not be held liable when the debt remained unpaid, which was expressed with the maxim '*solvit qui reum delegat*' (substitution of debt is payment). According to late-medieval civil law, a *delegatio (ad solvendum)*, which was the Roman law substitution of debt, was a definitive transaction, for it was considered to imply *novatio* (novation).<sup>5</sup>

As a result of these academic convictions, jurists of the late Middle Ages had generally not viewed contractual instruments as negotiable paper. However, in the course of the 1400s, issuing acknowledgements of debt to bearer became normal practice in Bruges, and at the fairs of Bergen op Zoom and Antwerp. As a result, in the later decades of the fifteenth century, jurists working in Bruges and Antwerp started implementing these routines into judgments of their city courts. Between 1474 and 1476, William van der Tannerijen († 1499), a jurist who had started his career as secretary of the city of Antwerp, wrote that holders of debt certificates to bearer could bring suit against the debtor and that they were allowed to transfer such instruments to other persons.<sup>6</sup> Some time later, in the early 1500s, the Bruges jurist Philip Wielant († 1520) stressed that similar rules applied in the County of Flanders.<sup>7</sup> In 1507, the Antwerp government acknowledged that a holder of a bill to bearer was fully entitled to the debt contained therein and that he was not to submit proof of his power of attorney. The bearer bill was deemed to be sufficient evidence

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<sup>5</sup> D. MAFFEI, ‘Delegazione (diritto intermedio)’, in *Enciclopedia del diritto*, vol. 9, Giuffrè, Milan 1962, at pp. 925–929; J.J. VERHOEVEN, *Schuldoverneming: een vergelijking van de schuldoverneming met de passieve schuldvernieuwing*, doctoral dissertation, University of Groningen 2002, pp. 77–94.

<sup>6</sup> W. VAN DER TANNERIJEN, *Boec van der loopender pracycken . . .*, vol. 1, E.I. STRUBBE (ed.), Gobbaerts, Brussels 1952, pp. 59–60.

<sup>7</sup> F. WIELANT, *Practijke civile*, Van der Loe, Antwerp 1572 [first written around 1519], at p. 125, Part 3, Ch. 24, no. 1.

of his rights.<sup>8</sup> Over the following years, the circulation of bearer bills was further supported with a rule of recourse liability. The assignor of a bill to bearer remained liable until the debt was paid. The Antwerp law provided that, if the holder of the bill did not succeed in obtaining compensation from the debtor of the bill, he could turn to the assignor.<sup>9</sup> This arrangement was called '*assignatie*', after the canon law arrangement for the assignment of pensions and prebends (*assignatio*) and which in the late Middle Ages had commonly been practised by public administrators.<sup>10</sup>

In the course of the sixteenth century, bills of exchange had become popular in Antwerp. After 1550, the Spanish government signed *asiento* loans, and the borrowed sums were provided in Antwerp by means of bills of exchange, where they served to pay out salaries to the Spanish troops. Genoese *paguistas* residing in Antwerp introduced practices of financial exchange into the city's legal environment, which further sustained innovations in this area. In 1571, Genoese banking associates made a statement on the customs pertaining to bills of exchange, which the Antwerp lords recognized as lawful.<sup>11</sup> The 1582 and 1608 compilations of Antwerp private law provided certain rights for receivers of bills of exchange that went beyond the traditional civil-law ideas. A holder that had been given rights on the funds was also legally deemed to be autonomous. If the holder was acting on his own behalf, the lender, who had received the bill as compensation for his credit, could not revoke the bill. The holder could also act against the drawer, which was a right that according to civil law literature was acknowledged only for the lender, because the latter was considered to be the only creditor in the exchange contract with the drawer.<sup>12</sup>

After 1610, bills of exchange were traded. In Antwerp and Amsterdam, due and even matured bills of exchange were passed onto persons that had not been involved in the exchange contract. This was done with an order note that was written on the reverse side of the bill (hence '*endossement*', from the French '*en dos*'), in which the original beneficiary of the bill ordered the debtor of the bill to pay to another party. The latter, often being a creditor of the beneficiary, received the bill and could cash it with the debtor if the latter accepted the bill. Early-seventeenth-century indorsement, which was essentially an order note, closely mimicked practices that were used in Florence and Venice in that period. There, order notes called *girata* served to assign bills of exchange.<sup>13</sup>

<sup>8</sup> Antwerp City Archives (ACA), Vierschaar (V), no. 68, f. 13.

<sup>9</sup> H. VAN DER WEE, 'Anvers et les innovations de la technique financière aux XVIe et XVIIe siècles', 22. *Annales: économies, sociétés, civilisations*, 1967, p. 1077.

<sup>10</sup> R. SPRÄNDEL, *Das mittelalterliche Zahlungssystem nach hansisch-nordischen Quellen des 13.–15. Jahrhunderts*, Hiersseman, Stuttgart 1975, at pp. 43–45; J.F. WILLARD, 'The Crown and Its Creditors, 1327–1333', 42. *The English Historical Review* 1927, pp. 12–19.

<sup>11</sup> ACA, V, 69, f. 18.

<sup>12</sup> G. DE LONGÉ (ed.), *Coutumes du pays et duché de Brabant. Quartier d'Anvers. Coutumes de la ville d'Anvers*, vol. 2, Gobbaerts, Brussels 1871 (hereinafter '*Coutumes 1871*'), at pp. 408–410.

<sup>13</sup> DE ROOVER, see n. 2, at pp. 100–106.

Around the same time, in the first decades of the seventeenth century, the Amsterdam Bank (*Wisselbank*), which had been modelled after the central bank of Venice, introduced the Italian ‘*assegno in banco*’ on the Amsterdam market. Order notes, which were called *assignatiën*, were given to creditors. They contained orders of payment directed at the commissioners of the Bank of Amsterdam. Until 1621, the Amsterdam lords stimulated the use of order paper and they generally condemned bonds to bearer. This policy proved indirectly supportive for the newly practised indorsement. Because bills of exchange were generally considered to be more delicate financial instruments than bearer bills, they were almost never made to bearer. Therefore, indorsement, as the bill of exchange itself, was ‘to order’. This implied that a holder had to provide proof of his power of attorney, which could nonetheless be deduced from a note written on the brought instrument and containing his name. After 1621, the Amsterdam government overcame its first hesitations and started supporting the use of the Antwerp-styled bearer bills, by applying the Antwerp precepts of law. In 1635, for example, the Amsterdam rulers expressly agreed that the assignor of a bearer bill remained liable for payment.<sup>14</sup>

The Antwerp government soon accepted the validity of indorsed bills of exchange. In a 1630 public statement, the Antwerp rulers underscored that the indorsee, that is, the receiver of the indorsement, was entitled to the same legal actions as the beneficiary that had been mentioned in the bill of exchange.<sup>15</sup> The 1630 Antwerp ruling is the first known example in Europe in which indorsement is acknowledged as a legally sound business method and the first official measure unequivocally supporting transfers of bills of exchange. In the slipstream of Antwerp legislation, the Amsterdam government expressly approved indorsement as well.<sup>16</sup> Near the end of the seventeenth century, in Amsterdam and Antwerp, recourse liability of all indorsers was imposed, and they were held to be jointly and severally liable for the debt.<sup>17</sup> Other commercial cities outside the Netherlands were much more reluctant to approve the new technique. As early as 1607, Naples had banned indorsement, and other Italian and German cities had soon followed its example.<sup>18</sup> However, the latter would soon reconsider their policies, when they accepted the Dutch rules.

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<sup>14</sup> DE RUYSSCHER, see n. 3, at pp. 474.

<sup>15</sup> ACA, V, 70, f. 41, f. 149v, f. 224.

<sup>16</sup> J.G. VAN DILLEN (ed.), *Bronnen tot de geschiedenis van het bedrijfsleven en het gildewezen van Amsterdam*, vol. 1, Martinus Nijhoff, The Hague 1929, at pp. 104–105.

<sup>17</sup> D. DE RUYSSCHER, ‘Naer het Romeinsch recht alsmede den stiel mercantiel’, *Handel en recht in de Antwerpse rechtkbank (16de–17de eeuw)*, UGA, Kortrijk 2009, at p. 273.

<sup>18</sup> DE ROOVER, see n. 2, at pp. 104 and 114.

### **3. The Reception of Dutch Rules in Western Europe (Seventeenth to Eighteenth Centuries)**

The Dutch legal ideas concerning transactions of bonds found their way to European financial centres. They were diffused following commercial contacts and because of the comparative attitudes of urban legislators. The Antwerp and Amsterdam provisions concerning bearer bills and bills of exchange were inserted into legislation in German-speaking territories and in France. Moreover, the Antwerp principles of assignment were elaborated on in learned legal literature that was written in those regions.

The Dutch precepts regarding assignment and bearer bills were imported into German cities together with merchandise coming from the Netherlands, and they were projected onto earlier commercial routines. Already in the middle of the sixteenth century, German cities had rules regarding debt certificates, which relied on older legal convictions.<sup>19</sup> The Frankfurt government was the first to harmonize its legislation with the customs of Dutch merchants visiting its markets. In the second half of the sixteenth century, the city on the Main welcomed many refugees from the Netherlands. Up to one fourth of them had Antwerp roots. Many Dutchmen became part of Frankfurt's financial elite, among them the Antwerp-born banker Johan von Bodeck. In the 1620s, most financers in Frankfurt came from the Netherlands,<sup>20</sup> and they met at the 1586 erected Frankfurt *Börse*, which was an imitation of the 1531 Antwerp exchange building.<sup>21</sup> The 1578 and 1611 Frankfurt *Stadtrecht* added to older precepts that '*überweisung*' implied the condition that the debt would be paid. This allowed the payee to turn to the assignor if it proved impossible to collect the debt.<sup>22</sup> The latter precision was most probably written down on the instigation of Dutch immigrants. The older idea had been that dishonour of the debtor upon *überweisung* was a risk to be taken by the assignee and that the assignor was no longer liable after he had passed on the debt.<sup>23</sup> In the first half of the seventeenth century, Frankfurt's financial infrastructure closely resembled that of Antwerp. Clearing was done by cashier-brokers, and the Frankfurt City Council did not establish a central public bank, as had been done in Amsterdam. At the Frankfurt fairs, a clearing system functioned that was closely tied to the fairs of Bisanzone and Piacenza. However, in many respects, Frankfurt's approach

<sup>19</sup> For example, *Der Stat Nurnberg verneute Reformation 1564...*, s.n., Hessel 1564, f. 46v.

<sup>20</sup> R. VAN ROOSBROECK, *Emigranten. Nederlandse vluchtelingen in Duitsland (1550–1600)*, Davidsfonds, Leuven 1968, at pp. 315–316.

<sup>21</sup> C.-L. HOLTFRERICH, *Frankfurt as a Financial Centre. From Medieval Trade Fair to European Banking Centre*, Beck, Berlin 1999, at p. 77.

<sup>22</sup> *Der Statt Franckenfurt erneuwerte Reformation, Frankfurt am Main...*, Feyerabend, Frankfurt am Main 1578, f. 130v (sec. 10); *Der Statt Franckfurt am Mayn erneurte Reformation...*, Rose, Frankfurt am Main 1611, f. 144v.

<sup>23</sup> G. KÖBLER (ed.), *Reformacion der Stat Franckenfort am Meine des heiligen Romischen Reichs Cammer anno 1509*, anastatic reprint, Arbeiten zur Rechts- und Sprachwissenschaft Verlag, Giessen 1984, f. 31 (ch. *De fideiussoribus – Von Bürgen*).

differed from the policies of rulers in the Netherlands. Tendencies of centralization went no further than the creation of a *scudo di marche*, a Frankfurt currency against which foreign money had to be exchanged.<sup>24</sup> An orientation towards the South - Italian City Councils were notoriously adverse to commerce in bills of exchange - explains why during the first half of the seventeenth century the Frankfurt authorities banned indorsement, although it was at the same time approved as a lawful business method in Antwerp. In 1620 and 1635, the Frankfurt lords outlawed the 'forwarding' (*fortschreiben, girieren*) of bills of exchange, and these measures were reversed only after 1660.<sup>25</sup>

Similar developments took place in early seventeenth-century Hamburg. Already in the 1560s, Hamburg harboured many immigrants from the Netherlands and Antwerp, in particular.<sup>26</sup> The commercial relations with Antwerp resulted in a Hamburg exchange building in 1558, which was modelled after its Antwerp counterpart.<sup>27</sup> After 1585, the considerable number of Antwerpeners already residing in Hamburg grew even further.<sup>28</sup> The commercial contacts prompted the introduction of Dutch techniques in the city on the Elbe. For example, Antwerp newcomers imported marine insurance, which had never before been used in the hanseatic trade.<sup>29</sup> Hamburg legislation demonstrated the affinity of its trade with the Netherlands and also for matters other than marine insurance. The 1603 Hamburg *Stadtrecht* contains a paragraph on 'Wechsel und Wechselbriefe' (exchange, and bills of exchange), of which three articles paraphrase provisions of the 1582 Antwerp *costuymen* on acceptance by third parties and regarding the prohibition to revoke a bill of exchange given to an autonomous beneficiary.<sup>30</sup>

<sup>24</sup> HOLTFRERICH, see n. 21, at p. 69; M. NORTH, 'The Great German Banking Houses and International Merchants, Sixteenth to Nineteenth Century', in A. Teichova, G. Kurgan-Van Hentenryk & D. Ziegler (eds), *Banking, Trade, and Industry: Europe, America and Asia from the Thirteenth to the Twentieth Century*, Cambridge University Press, Cambridge 1997, at pp. 38-39.

<sup>25</sup> A. AMEND-TRAUT, *Wechselverbindlichkeiten vor dem Reichskammergericht: Praktiziertes Zivilrecht in der Frühen Neuzeit*, Böhlau, Cologne 2009, at pp. 267-269.

<sup>26</sup> W. SILLEM, 'Zur Geschichte der Niederländer in Hamburg von ihrer Ankunft bis zum Abschluss des niederländischen Contracts 1605', 7 *Zeitschrift des Vereins für Hamburgische Geschichte* 1883, pp. 503-562.

<sup>27</sup> M.A. DENZEL, *Das System der bargeldlosen Zahlungsverkehrs europäischer Prägung vom Mittelalter bis 1914*, Franz Steiner, Wiesbaden 2008, pp. 68.

<sup>28</sup> R. VAN ROOSBROECK, 'Die Niederlassung von Flamen und Wallonen in Hamburg (1567-1605). Ein Überblick', 49/50 *Zeitschrift des Vereins für Hamburgische Geschichte* 1964, 63 and 76.

<sup>29</sup> G.A. KIESSELBACH, *Die wirtschafts- und rechtsgeschichtliche Entwicklung der Seever sicherung in Hamburg*, Gräfe & Silem, Hamburg 1901, pp. 116-117.

<sup>30</sup> *Der stadt Hamburg Statuta und Gerichts-Ordnung . . .*, Volckers, s.d., Hamburg 1603, at pp. 201-203, secs 9-11. The corresponding Antwerp provisions are: *Coutumes* 1871, at p. 410, secs 5-7. An influence of the Antwerp 1582 compilation on Hamburg legislation concerning bills of exchange has been suggested earlier. Cf. G.F. VON MARTENS, *Versuch einer historischen Entwicklung des wahren Ursprungs des Wechselrecht*, Dieterich, Göttingen 1797, at p. 64; J.E. KUNTZE, *Deutsches Wechselrecht auf Grundlage der allgemeinen Deutschen Wechselordnung und der Nürnberger Novellen*, Hinrichs, Leipzig 1862, at p. 161; L. SEDATIS, *Über den Ursprung der Wechselstrenge*:

After 1660, the reception of Dutch ideas became more intense. The notion of *assignatie* appeared in *Wechselordnungen* of German cities and in France. An extensive 1666 Frankfurt ordinance regarding financial techniques, which repeated the earlier rules concerning recourse liability, labelled such arrangements *assignationes*.<sup>31</sup> Another example was the 1672 Breslau exchange bylaw, which fused ‘*anweisungen*’ together with *assignationes*.<sup>32</sup> The Dutch ‘indorsement’ was mentioned in the French 1673 *Ordonnance de commerce*<sup>33</sup> and thereafter in German *Wechselgesetze*, which now accepted indorsement as lawful. The latter notion slowly replaced such older words as ‘*weiterschreiben*’ and ‘*girieren*’.<sup>34</sup>

The profusion of Antwerp and Amsterdam legal terminology and solutions in Western Europe coincided with a renewal of legal doctrine on commercial matters. The Italian supremacy in that area gradually declined, which had much to do with the conservative approach of Italian city governments towards the new financial techniques. Outdated Italian legal literature on such themes contrasted with the fresh ideas that could be found in doctrine written in Transalpine Europe. Before 1710, Italian jurists still produced substantial writings on commercial issues,<sup>35</sup> but thereafter, it was French and German authors compiling the most important treatises on bills of exchange. Robert Joseph Pothier wrote a monograph on bills of exchange, for example, and the *Elementa iuris cambialis* (1742) by the German law professor Johann Gottlieb Heineccius († 1741) remained authoritative even in the nineteenth century. Such texts elaborated on the Dutch findings and fitted them into the framework of the *ius commune*.

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Eine historisch-dogmatische Untersuchung der Lehre vom rigor cambialis, Duncker & Humblot, Berlin 1967, at p. 37. Sometimes a 1601 Amsterdam ‘ordinance’ is compared with the 1603 Hamburg *Stadtrecht*. Cf. NORTH, see n. 24, at p. 39. However, the 1601 Amsterdam text is merely a statement of witnesses at a *turbe* inquiry, that is, an official investigation into the contents of local rules. The therein adduced rule cannot be found in Hamburg legislation.

<sup>31</sup> J. PHOONSEN, *Wissel-styl*, vol. 2, Van Damme & Ratelband, Amsterdam 1711, at p. 128, sec. 17, 18 Sep. 1666: ‘Es sollen auch alle assignationes auff gefahr der Assignanten geschehen, es sey dan dass der Assignatus die Anweisung absolute acceptire undannehme.’

<sup>32</sup> PHOONSEN, see n. 31, at p. 230, sec. 23, 28 Nov. 1672: ‘Obwohl blosse Anweisungen vor wurckliche Zahlung nicht zu achten seyn, so sollen doch alhier um vielerley disputationes unter den kaufleuten zu vermeiden, die bey noch lauffenden respit-tagen gegebene assignationes, wan der assignatus solche absolute acceptirt, oder auch den assignations zettel ohne gewisse bedingungen uber vier und zwanzig stunden...bey sich behalten hat....’

<sup>33</sup> *Ordonnance de Louis XIV, roy de France et de Navarre pour le commerce donné à S. Germain en Laye au mois de Mars 1673*, s.n., Paris 1725, at p. 26-27, Ch. 5, secs 23-25.

<sup>34</sup> A 1682 Leipzig ordinance was the first example. Cf. J.K. WEISSNER, *Codex der europäischen Wechsel-Rechte oder Sammlung der heutzutage in Europa geltenden Wechsel-Gesetze*, vol. 1, Schrag, Nürnberg 1836, pp. 281-301, 2 Oct. 1682, at p. 285, sec. 11. See also the 1739 *Frankfurt Wechselordnung*: *Ibid.*, vol. 1, pp. 854-878, 26 May 1739, at p. 859, sec. 10.

<sup>35</sup> Important treatises were *Discursus legales, de commercio, et mercatura* (1698) by the Florentine Ansaldo Ansaldi († 1719) and *Discursus legales de commercio* (1707) by Giuseppe Casaregi († 1737) from Genoa.

The eighteenth-century authors used older Dutch legal literature that had adopted the Antwerp solutions. The Leuven law professor Jean Wamèse († 1590), for example, had applied the Antwerp terminology. In his legal advices dating from the middle of the sixteenth century, he mentioned the Latin *assignatio* in order to describe the Antwerp arrangement of debt substitution.<sup>36</sup> Leonard Lessius († 1623), writing in the early 1600s, also applied this formula when referring to the Antwerp technique.<sup>37</sup> These early acknowledgements by scholars added little to the contents of the Antwerp rules, but as a result of such writings the Antwerp precepts regarding debt substitution were integrated into the body of learned law. From then on, legal authors all over the continent could comment on them. The aura of the scholarly works of Hugo De Groot († 1645) in particular contributed to the spreading of these ideas. In his *Inleidinge tot de Hollandsche Rechtsgeleerdheid* (1619–1621, published in 1631), De Groot defined ‘*aenwijzing*’ by diligently separating it from ‘*oversetting*’. The latter was defined as the traditional Roman law *delegatio (ad solvendum)*, which De Groot qualified as a definitive transfer in view of older theories. The former, by contrast, referred to the Antwerp and Amsterdam *assignatio* and did not relieve the assignor until the debt was paid.<sup>38</sup> The rules concerning *aenwijzing* were clearly copied from the Antwerp 1582 private law compilation, which De Groot consulted when devising solutions for commercial cases.<sup>39</sup> De Groot was the first to consider *assignatio* as a legal figure of private law, as a variety of substitution of debt. He did not associate it with commerce, as had often been done in Antwerp. Instead, he handled it as an integral part of the general law of obligations. A few decades later, Dutch legal authors such as Simon Groenewegen van der Made († 1652) and Simon Van Leeuwen († 1682) formulated the mentioned rules regarding *assignatio* and its corresponding Antwerp recourse liability principle as established precepts. They condensed the recourse liability rule into the maxim ‘*assignatione facta debitor non liberatur*’ (the debtor is not discharged following an assignment).<sup>40</sup>

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<sup>36</sup> J. WAMÈSE, *Responsorum sive consiliorum . . . centuria quarta*, Hastein, Leuven 1632, at p. 52.

<sup>37</sup> See the citation of the *Variorum casuum conscientiae resolutiones* in W. DECOCK, ‘Lessius and the Breakdown of the Scholastic Paradigm’, 31. *Journal of the History of Economic Thought* 2009, pp. 57–78, at p. 70, n. 53. Compare with F. VAN DER ZYPEN, ‘Notitia Iuris Belgici’, in *Opera omnia*, Verdussen, Antwerp 1675 [first published in 1635], at p. 55 (book 4, ch. *De actionibus et obligationibus*).

<sup>38</sup> H. DE GROOT, *Inleiding tot de Hollandsche rechts-geleertheyd*, anastatic reprint, vol. 1, L.J. VAN APELDOORN (ed.), Quint, Arnhem 1939 [1631], at pp. 200–201.

<sup>39</sup> H.F.W.D. FISCHER, ‘Het oud-vaderlandse handelsrecht en Hugo de Groot’, *Rechtsgeleerd Magazine Themis* 1952, pp. 598–610; L. WAELKENS, ‘Ius Quaesitum Tertio. Dutch influence on Grotius’, in E.J.H. SCHRAGE (ed.) *Ius quaesitum tertio*, Duncker & Humblot, Berlin 2008, at pp. 175–189.

<sup>40</sup> This phrase is mentioned in the index of S. GROENEWEGEN VAN DER MADE, *Tractatus de legibus abrogatis et inusitatibus in Hollandia vicinisque regionibus . . .*, de Haro, Leiden 1649, at p. 713 (sub A). See also, for the same rule, S. VAN LEEUWEN, *Het Rooms-Hollands-regt, waer-in de Roomse wetten, met het huyden-daagsche Neerlands-regt, in alles dat tot dagelykse onderhouding kan dienen . . .*, Boom, Amsterdam 1676, at p. 429 (book 4, Ch. 27).

German scholars, being influenced by these writings and by the ordinances of cities in their home regions, picked up the Dutch rules on debt substitution. The German jurist Samuel Stryk († 1710), for example, expanded on *assignatio* in his *Specimen usus moderni Pandectarum* (1690), starting from De Groot and from legislation of the mentioned German commercial centres.<sup>41</sup> The Dutch norms concerning negotiability influenced French doctrine as well. In 1761, Pothier spoke of ‘*simple indication*’ when describing debt substitution together with the Dutch recourse liability rule.<sup>42</sup>

#### 4. Substitution of Debt and Assignment of Claims Reconsidered

The mentioned doctrine provided materials that were ultimately written into eighteenth- and nineteenth-century codifications. The latter commonly contained rules for complete and incomplete substitution of debt. Pothier’s views regarding *simple indication*, for example, were copied into the 1804 *Code civil*.<sup>43</sup> In nineteenth-century Germany, the Dutch *assignatio* was not forgotten, and precepts concerning this arrangement were ultimately inserted into the *Bürgerliches Gesetzbuch*, under the label of ‘*Anweisung*’.<sup>44</sup> The 2009 Draft Common Frame of Reference, too, states that substitution of debtors can only bring about discharge of the original debtor if that is expressly agreed. If the parties at the contract of substitution do not provide this, the substitution is not held to be complete. In that case, the first debtor remains solidary liable for the debt together with the new debtor (III 5:202(2)). This twofold scheme of complete and incomplete substitution of debtors goes back to the Roman law *delegatio* and the Dutch *aenwijzing* (*assignatio*), respectively.

Next to *delegatio* and *assignatio*, another legal figure survived until the present day. In the twelfth and thirteenth centuries, the glossators did not generally distinguish substitution of debt from assignment of rights, both of which they categorized as *cessio*. In the following centuries, *cessio* was defined as an assignment of a claim onto a new creditor. The views of the late-medieval jurists as to the effect of a *cessio* of rights, which they thought to be comparable with *traditio* of a corporal thing, became a basis for restricted recourse liability of the *cedens*, that is, the assignor.<sup>45</sup> In the eighteenth century, *cessio* of claims was more often viewed as sale, which allowed the theory of hidden defects to be applied. As a result, because

<sup>41</sup> S. STRYK, *Specimen usus moderni Pandectarum ad libros XXII priores . . .*, vol. 14, Joseph Cellus, Florence 1840, at pp. 811–813 (book 18, Ch. 4, nos 24 and 25). He referred to De Groot’s distinction between *aenwijzing* and *oversetting*. Cf. *ibid.*, vol. 14, 1840, at p. 810 (no. 22).

<sup>42</sup> R.J. POTIER, *Traité des obligations*, Langlet, Paris 1835, at p. 98.

<sup>43</sup> *Code civil*, sec. 1277. ‘*La simple indication faite par le débiteur, d’une personne qui doit payer à sa place, n’opère point novation.*’ This provision is still in force in Belgium and France.

<sup>44</sup> BGB, secs 783–792, in particular sec. 788.

<sup>45</sup> G. ASTUTI, ‘*Cessione (premessa storica)*’, in *Enciclopedia del diritto*, vol. 6, Giuffrè, Milan 1960, pp. 805–822, at pp. 813–816.

the seller could only be held liable for flaws that he knew or could have known at the time of the sale, unforeseen insolvency of the debtor of the assigned claim was ruled out as a ground for recourse.<sup>46</sup> Following Pothier, *cessio* of claims and its restricted recourse liability were written into the *Code civil* under the name of ‘*transport*’ and under the heading of sale (sections 1689–1701).

Even today, the philosophy of the mentioned early modern solutions can be helpful for pushing existing rules some steps further. The Draft Common Frame of Reference and the mentioned continental European codifications contain different sets of rules for on the one hand more or less complete assignments of claims in combination with a restricted recourse on the assignor (*transport de créances, assignment*) and for substitutions of debt with full recourse liability in case of unforeseen insolvency of the debtor (*simple indication, Anweisung, incomplete substitution of debtors*) on the other.

When a claim is passed onto a creditor, the characteristics of those types of assignment and substitution are in some respects contradictory. In that situation, indeed, there is both assignment of rights and substitution of debt. The assignor (A) passes his right with respect to a debtor (B) onto a creditor, that is, the assignee (C). The assignor (A) is then substituted as debtor for B. As a result of this mixture of legal arrangements, in this case, it is not clear whether the assignor (A) remains liable or not, and if he does, to what extent he must respond for the non-performance of B.

The will of the creditor (C) cannot be taken as a benchmark for making distinctions in this respect, because rules must detail solutions that apply in case the contract does not provide one, or when the intention of the parties at the contract is not clear. The involvement of the new or appointed debtor (B) is not a criterion either. De Groot argued that *oversetting* and *aenwijzing* differed as to the position of this debtor. In his view, *oversetting* implied the consent of the new debtor (B) and, as a result of the cooperation of the latter, a completely new contractual bond with C emerged, on the basis of novation. By contrast, according to De Groot, *aenwijzing* concerned a debtor (B) that was not in the know of the arrangement of substitution. It was, therefore, not unlikely that the latter would refuse to pay out to the beneficiary (C), whose existence he was unaware of. With a cooperating debtor, this was not to be expected.<sup>47</sup> De Groot’s argument was obviously constructed, since in the Antwerp and Amsterdam practice, *aenwijzing* had involved a debtor (B) that had signed an acknowledgement of debt containing a bearer clause. Such a debtor

<sup>46</sup> R.J. POTHIER, ‘Traité du contrat de vente’, in *Œuvres de R.-J. Pothier contenant les traités du droit français*, vol. 1, [A.M.J.J.] DUPIN (ed.) (Brussels, Jonker, Ode-Wodon, Tarlier, 1829): 413: ‘Le transport-cession contient une vente de la dette qui est transportée.’ On the same page, the effects of *transport-cession* in case of unforeseen insolvency of the debtor are detailed. See also, for a comparable qualification of *cessio* as sale by Tomasso Maurizio Richeri in his *Universa civilis et criminalis iurisprudentia* (1774–1782), ASTUTI, see n. 45, at p. 819.

<sup>47</sup> See n. 38.

was aware of the possibility of assignment. The rationale behind the Dutch *aenwijzing* had been to build in an extra security against the risk of the debtor's insolvency, in the form of a recourse liability against the assignor (A), even if the new debtor (B) was a party to the contract of debt substitution.

Arguably, the persisting coexistence of *delegatio*, *assignatio* and *cessio* is, in the detailed respects, problematic. Jurists of the eighteenth and nineteenth centuries simply used the older traditions without questioning, and without much understanding of the historical sedimentation. Respect for legal authorities prevented them from weeding the overgrown garden of legal rules regarding assignment of debts and claims. It was only tradition that allowed the divergent rules regarding risk transfer to be fully preserved. The traditional divisions had already, in the 1700s and 1800s, lost much of their meaning. Of course, an assignment of a right is in many cases fundamentally different from a substitution of debt. Yet, this is not so when the acquiring party stands in a credit relation to the transferor. Assignment of rights and substitution of debt then overlap. It is easy to understand how the use of the one or other terminology could mislead a beneficiary of an assignment as to his eventual recourse. Would it therefore not be recommendable to change existing legislation in favour of a general subsidiary liability of assignors in that hypothesis and to devise it as *ius commune* from which contracts can derogate?

## 5. Conclusion

At the end of the eighteenth century, the Dutch principle of '*assignante debitor non liberatur*' competed with the older Roman-law maxim of '*solvit reum qui delegat*'. The former rule emerged in early-sixteenth-century Antwerp, where the urban authorities generally acknowledged mercantile opinions concerning debt certificates to bearer. Thereby, they largely ignored the contents of learned literature concerning contracts. The holder was considered to be a lawful claimant of a bearer bill, and recourse liability of the assignor was devised. Indorsement of bills of exchange, which developed foremost after 1610, was another innovation not corresponding with learned insights, for it comprised the transfer of a bill of exchange onto a person who had not been a party to the exchange contract. The routines surrounding indorsement, which was based on order notes, went back to Italian practices that also infiltrated the activities of the Amsterdam *Wisselbank*. Because in those early years of the seventeenth century, order notes were deemed safer than bearer bills, the Antwerp and Amsterdam governments could easily accept the method of indorsement. After 1660, cities in German-speaking countries gradually acknowledged indorsement as a viable business technique, following the Dutch example. Even before that time, the Dutch rules relating to negotiable commercial paper had arrived there. Due to an increased awareness of legislators all over continental Europe with respect to solutions applied in other areas, recourse liability and a general recognition of holder rights gained ground outside the Netherlands. As a result of this, the Dutch theories relating to assignment were

described in German and French legal doctrine, which over the course of the seventeenth century attached more importance to solutions that were applied in practice. During the 1600s and 1700s, the older academic reluctance towards holder rights and incomplete substitutions of debt slowly faded away, and the Dutch *assignatio* gained a place next to *delegatio (ad solvendum)*. The codifications of the eighteenth and nineteenth centuries reflect this process, and even today, the results of old Dutch legal engineering persist. Varieties of *delegatio* pertain to present-day private law, together with *cessio* of rights. Differing rules as to the risk of the beneficiary of such arrangements could – also for the sake of legal clarity – be changed for a general principle of *assignatio* in the seventeenth-century sense, which should apply if the assignee receives the right as payment.

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