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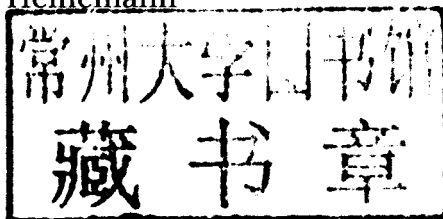
Transnational Insurance Law and the
Great San Francisco Earthquake

By

Tilman J. Röder

Translated by

Frederik Heinemann



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Cover illustration: Policy of the Californian insurance company Fireman's Fund from 1905. The company W. J. Sloane & Co. from San Francisco insured itself against fire damages of up to US \$ 10,000 for an annual premium of US \$ 86. After the catastrophe, the Fireman's Fund compensated for the damage. Source: Fireman's Fund Archive. Courtesy of the Fireman's Fund Insurance Company, San Francisco.

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LIST OF ABBREVIATIONS

Generally known abbreviations (such as vol.) are not included in the following list.

<i>ADHGB</i>	<i>Allgemeines Deutsches Handelsgesetzbuch</i> ('General German Commercial Code')
<i>AGB</i>	<i>Allgemeine Geschäftsbedingungen</i> ('general business conditions')
Ass.	Assurance
Assn.	Association
<i>AVB</i>	<i>Allgemeine Versicherungsbedingungen</i> ('general insurance conditions')
<i>avv.</i>	<i>avvocato</i>
cif	cost, insurance, freight
<i>C.I.I.</i>	<i>Concordato Italiano Incendio</i> ('Italian Concordat of Fire Insurance Companies')
Civ.	<i>tribunal civil</i> (French 'civil court')
Co.	Company
Cologne Re	<i>Kölnische Rückversicherungs-Gesellschaft</i> / <i>Kölnische Rück</i> (today's Gen Re)
Comm.	<i>Commissario</i> (Italian 'Commissioner')
<i>CVDI</i>	<i>Centralverband Deutscher Industrieller</i> ('central federation of German industrialists')
Dept.	Department
Dem.	Democratic Party (California)
Diss.	Dissertation
DJZ	<i>Deutsche Juristen-Zeitung</i>
F.O.C.	Fire Offices Committee
fob	free on board
FUAP	(The) Fire Underwriters' Association of the Pacific
G.	Gesellschaft
Habil.	Habilitation
HZ	<i>Historische Zeitung</i>
Hon.	Honorable (American judge's title)
ICC	International Chamber of Commerce
I.L.	Independent League (California)

ILA	International Law Association
Ins.	Insurance
J.	Justice (English judge's title)
KR	(in footnotes) <i>Kölnische Rückversicherungs-Gesellschaft</i> (Cologne Re)
L. Rev.	Law Review
L.J.	Lord Justice (English judge's title)
LZ	Leipziger Zeitschrift für Handels-, Konkurs-, und Versicherungsrecht
<i>MdR</i>	<i>Mitglied des Reichstages</i> ('member of the <i>Reichstag</i> ')
MP	Member of Parliament (GB)
MR	(in footnotes) <i>Münchener Rückversicherungs-Gesellschaft</i> (Munich Re)
M.R.	Master of the Rolls (Vorsitzender des Court of Appeals im britischen House of Lords)
Munich Re	<i>Münchener Rückversicherungs-Gesellschaft/Münchener Rück</i> (today's Gen Re)
N.Y.	New York
ÖRev	Österreichische Revue
ÖVZ	Österreichische Versicherungs-Zeitung
RA	<i>Rechtsanwalt</i> ('advocate')
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
Rep.	Republican Party (California)
rev.	revisor
RJ	Rechtshistorisches Journal
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen (official collection)
RGBL	Reichsgesetzblatt
ROHG	[Decisions of the] Reichsoberhandelsgericht ('Imperial Supreme Court for Commerce')
SR	(in footnotes) <i>Schweizerische Rückversicherungs- Gesellschaft</i> (Swiss Re)
Swiss Re	<i>Schweizerische Rückversicherungs-Gesellschaft/Schweizer Rück</i> (today's Swiss Re)
trans.	translated
U.L.	Union Labour (California)
Vers.-Bank	<i>Versicherungs-Bank</i> ('insurance bank')
Vers.-G	<i>Versicherungs-Gesellschaft</i> ('insurance company')

vs.	versus
VSWG	Vierteljahreshefte für Wirtschafts- und Sozialgeschichte
VVG	<i>Versicherungsvertragsgesetz</i> (German 'Insurance Contract Law')
ZHR	Zeitschrift für Handelsrecht
ZVersWiss	Zeitschrift für die gesamte Versicherungs-Wissenschaft
ZVMEV	Zeitschrift des Vereins Mitteleuropäischer Eisenbahn-verwaltungen

LIST OF REFERENCES AND SOURCES

ARCHIVE DOCUMENTS: LIST OF LOCATIONS

- BA Bundesarchiv, Potsdamer Str. 1, 56075 DE-Koblenz
- BL Bancroft Library, University of California, Berkeley, CA 94720–6000, USA
- CSL California State Archives, 1020 “O” Street, Sacramento, CA 95814, USA
- FFA Fireman’s Fund Archives, 777 San Marin Drive, Novato, CA 94998, USA
- KR/A General Cologne Re (formerly Kölnische Rückversicherungs-Gesellschaft), Theodor-Heuss-Ring 11/Sedanstr. 8, D-50668 Köln
- MR/A Munich Re (formerly Münchener Rückversicherungs-Gesellschaft), Königinstr. 107, DE-80802 München
- StUB Stadt- und Universitätsbibliothek Frankfurt a.M., Bockenheimer Landstr. 134–13; DE-60325 Frankfurt am Main
- SR/FA Swiss Re (formerly Schweizerische Rückversicherungs-Gesellschaft), Mythenquai 50/60, CH-8022 Zürich

FOREWORD

This book is a translation of my dissertation published in 2006 by Vittorio Klostermann, the dedicated humanities publisher from Frankfurt am Main. Just like the title of the German edition, *“Rechtsbildung im wirtschaftlichen Weltverkehr. Das Erdbeben von San Francisco und die internationale Standardisierung von Vertragsbedingungen (1871–1914)”*, the English title tries to put the main elements of my research in a nutshell. However, this has once again proven impossible. I hope that the book will find its readers among the legal historians and legal theorists, researchers studying the development of the insurance business or the perception of risk and disaster, and those interested in the standardising impact of the industrial revolution on human culture in general. I have updated this edition by including the literature available by September 2011.

The German version was awarded the prize *“Geisteswissenschaften International—Preis zur Förderung der Übersetzung geisteswissenschaftlicher Literatur”* by the Fritz Thyssen Foundation, the German Publishers’ and Booksellers’ Association and the Federal Foreign Office of Germany. The award included financial support for the cost of this translation, aiming at the worldwide dissemination of the German humanities research. I cordially thank the donors as well as the jury which defined “humanities” wide enough to accept a dissertation which was originally handed in at the Law Faculty of Frankfurt’s Goethe University. I am deeply grateful to Vittorio E. Klostermann and his colleagues Anastasia Urban and Christina Müller who proposed the book for the award and dedicated much of their time to this project for over two years, as well as to Rosanna Woensdregt, Hylke Faber and Marti Huetink of Brill Publishers who helped me during this marathon, notably the editing process, until I held the printed result in my hands. I am equally grateful to the series editors Remco van Rhee, Dirk Heirbaut and Matthew C. Mirow, who accepted this publication into the present book series.

The translator deserves special attention. Frederik Heinemann did not just translate this book. He studied the works of Giedion, Trakman and Harriman in order to learn the language of the time and transferred sentences into English which I thought were untranslatable. Fritz, I think the worst was *“Die in dieser Hinsicht wichtigsten Klauseln enthalten neben Haftungsbegrenzungen oder-ausschlüssen und Beweislastregelungen auch*

Vertragsstrafen und Verbote, Ansprüche abzutreten”, wasn’t it? Thank you for mastering this and so many other intractable phrases. This book is also your book.

Before the translation could go to press, Mihan Rouzbehani and Theodor Shulman helped me with the footnotes and annexes and thousands of terrible details. This was a hard and tiring work that took months. I will not forget your patience and commitment. Many thanks.

I dedicate this book to my parents, Hedda and Uwe Röder, who gave me the necessary education and discipline which enabled me to write my dissertation, and to my beloved wife Viktoria Draganova and our daughter Vivien. I thank them for their tolerance when I worked on this study at intolerable times.

Frankfurt, September 2011
Tilman Röder

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INTRODUCTION

THE SUBJECT AND FOCUS OF THE PRESENT STUDY

Did the internationalisation of important branches of business from the 1870's onwards lead to the development of a *lex mercatoria*¹ or similar transnational legal structures? This question formed the starting point for my investigations of the law that was applied in transnational contractual business relationships between 1871 and 1914. The present book is the result of this research.

At first glance, an autonomously created international business law in the nineteenth and early twentieth centuries seems hardly conceivable. The law of Nation States—especially their commercial and civil law codes and the international private law that refers to them—would scarcely seem to allow for the non-governmental formation of law. But reality apparently looked different for large parts of economies entering into the process of industrialisation. In comparison to the needs of business under the dynamics of rapid fundamental changes, national law became the victim of a 'cultural lag'.² Neither legislatures, administrative bodies nor judiciaries were successful in keeping up with economic developments. On the international level, the situation was even worse. Frequently, national negotiations on multilateral agreements or the establishment of common arbitration tribunals dragged on for decades. Thus, businessmen themselves updated contract law. At the same time, they adapted the regulations to their own interests as profit-oriented participants in market activities. A central instrument was the 'general conditions of contracts'³ that they drafted themselves and that, to a large degree, regularly took precedence over national law. These 'general conditions' developed into a general phenomenon that in the course of the nineteenth century—

¹ The English term 'law merchant' is used synonymously.

² Ogburn 1964, 86.

³ The German term is *Allgemeine Vertragsbedingungen*. Legal scholars distinguish between general terms and conditions of business which must be introduced to the individual agreements made between parties and general contracts existing in standardised pre-printed forms which do not need to be expressly approved. This distinction is irrelevant for the purposes of this study.

according to the thesis of this study—dominated international business relations from the 1870's onwards in a large part of the business world.

The first part of the present study will discuss the creation and expansion of general business conditions in the national economies and in the beginning world commerce. The term 'standardisation' will serve as an analytical category. The decision in favour of this rather technical term is based on two reasons. Firstly, the standardising of contractual texts points to functionally important parallels between technical and legal standardisation. Both phenomena appear at the same time in history and develop simultaneously. They are also structurally so similar that they can be regarded as a uniform appearance. At the beginning of the industrial revolution, standardisation extended to many fields in all countries, developed rapidly within a few decades and eventually dominated the resulting industrial culture.

Secondly, the concepts of the formation of norms developed by legal theorists do not offer an alternative to the category of standardisation, as they do not live up to the historical development of the complex pre-formulated contract conditions that spread on the national and international level. Of course, specific business conditions did achieve the quality of legal norms, for example, when they received State approval or when their enforcement within a legal system seemed likely. Moreover, from the perspective of systems theory it could then be ascertained that their code value be allocated in the relevant discourses as lawful or unlawful.⁴ However, in numerous cases, this classification is questionable. Many of the pre-formulated contract texts were regarded as not legally relevant by their users. Other contract forms did not really make an appearance in practice—for example, in court. Only hypothetically was it possible here and there to determine whether a legal norm had emerged or not. An exclusive examination of the general business conditions as products of the formation of legal norms would contradict the contemporary discourses and must be open to the accusation of being ahistoric. The category of 'standardisation' circumvents these limitations through its wider normative meaning. By directing the focus to the factuality of the business conditions, the concept of standardisation sharpens the view for parallel phenomena in other areas of life.

The survey in Part A of the development of general terms and conditions of business on the national and international level also allows for a

⁴ Luhmann 1981, 53 *et seq.*; 1993, 69.

better understanding of the case study that follows. Parts B and C discuss how in 1906 and 1907, a specific standard clause in spontaneously activated networks of the insurance business came into existence and how its implementation in national legal codes in the period following was carried out. The results of the efforts at standardisation were determined according to methods of comparative legal analysis and organised by "ideal type"; three chapters deal with the adoption of the standard clause in various legal orders (C.I), their rejection in others (C.II), as well as the absence of a coherent reaction in yet other cases (C.III).

The choice of the 'earthquake clause' in the contracts existing in the fire insurance business to serve as an example of standardised business conditions was made for three reasons: firstly, before 1914, this business branch discussed no other topic so intensively on the international level as the treatment of fire damage caused by earthquakes. This great interest resulted from the experience of the earthquake-fire catastrophe in San Francisco in April of 1906 that drove many insurance companies to the brink of bankruptcy. Secondly, the extant historical material enables the precise reconstruction of a legal change that almost exclusively depends upon the self-organisational activities within a particular branch of business. Thirdly, this example demonstrates the circumstances in which several legal orders succeeded in introducing a standard clause and others failed to do so.

At the end of the investigation, conclusions will be drawn as to the functions, the possibilities and the limitations of international standardisation of the general terms and conditions of business before 1914. Finally, a legal-historical appraisal of the phenomenon of the general terms and conditions of business as a transnational legal structure will be postulated based upon said conclusions.

STATE OF RESEARCH AND SOURCES

Few legal scholars have paid much attention to the history of the international standardisation of contracts prior to 1914. The same holds largely true for the origins of the contract law form on the national level.⁵

For this reason, the present investigation mainly relies on primary sources. In the investigation of the changes in the contract conditions in

⁵ Among the exceptions are Scherner (1992, 42 *et seq.*) and Lammel (1993, 89 *et seq.*).

the fire insurance industry that resulted from the San Francisco earthquake, the 'grey literature'—that is, contemporary publications in the insurance branch—proved especially informative. This also holds true for the historical consequences of the catastrophe in business and science. The journals that were primarily consulted are American, Austrian, French, German and Italian.

Moreover, the correspondence between the directors of the European and American reinsurance and fire insurance companies that discussed and promoted the project of introducing an internationally unified earthquake clause was of major importance. The most important extant source for these materials is the Archives of the Swiss Re in Zurich.

The holdings of the following archives and collections that were additionally consulted in this study are:

Allianz Versicherungsgesellschaft—Archives, Munich
 Deutscher Verein für Versicherungswissenschaft—Library, Berlin
 Deutsches Bundesarchiv (The Federal Archives), Koblenz
 General Cologne Re—Archives, Cologne
 Institut für Versicherungswissenschaft—Library, Cologne
 Munich Re—Archives, Munich
 Archivio centrale dello Stato, Roma
 Assicurazioni Generali—Archives, Trieste
 Riunione Adriatica di Sicurtà—Archives, Trieste
 The Bancroft Library, Berkeley, Ca.
 California State Archives, Sacramento, Ca.

The historical contextualising of the study arose from the engagement with very different legal, technical and cultural-historical literature. Pride of place is occupied by the published work of Atiyah,⁶ Giedion⁷ and Berz⁸ as well as that of Harriman.⁹

⁶ 1979. Considering the reality of the practice of contract forms, the work of Hofer (2001) proved to be less useful.

⁷ 1948.

⁸ 2001.

⁹ 1928.