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Abstract

Grotius's ideas on proportionate and limited liability, as mentioned in the *Inleidinge* and *De iure belli ac pacis*, were novel in comparison to the civilian doctrine of his time. Grotius drew from sources of local law and statutes regarding maritime law but was nonetheless original in his interpretations. Grotius proposed to consider the liability of co-owners of ships (*reders*, *exercitores*), who acted as organizers of maritime expeditions, and of others that were participating in these expeditions, as broad. At the same time, their liability was limited to the maximum of the value of the ship and cargo. In this regard, Grotius's conceptions hinged on a view of a ship's voyage as engendering a community of risk among all stakeholders. However, in spite of the underlying connections, Grotius did not eradicate all inconsistencies which the originality of his combinations brought forward.

Keywords

limited liability – commercial law – maritime law – shipmaster – Dutch East India Company (VOC) – *partenrederij*

1 Introduction

Many of Grotius's views on private law have been considered as original in comparison to the civilian tradition. Several authors have highlighted the foremost Thomist (neoscholastic) influence on his private law ideas. In this article, the rules on limited liability, as presented by Grotius, are analyzed. It will be argued that the rules on the proportionate and limited liability of merchants and shipowners, as explained in the *Inleidinge* and *De iure belli ac pacis*, were only partially referring to Thomist or civilian scholarship. This article shows that inspiration from maritime rules and commercial practice is likely, but also that Grotius's originality in combining and reworking the different elements was considerable. Moreover, some inconsistencies can be identified in Grotius's thought.

2 Grotius's Views on Proportionate and Limited Liability in Trade

In the third book of his *Inleidinge tot de Hollandsche Rechtsgeleertheyt* (1619, but published in 1631),[1] Grotius mentions both proportionate and limited liability in mercantile affairs. He first refers to merchants and shopkeepers. Both are bound by the agreements that are made by their agents, 'on water and land', within the confines of their mandate. In contrast to Roman law, Grotius adds, in Holland merchants-associates are only individually held for a share of the debt, proportionate to their stake in the business. The Roman rule of *in solidum* liability is explained as 'damaging for trade' (III.1.31). Thus, according to Grotius, in Holland creditors cannot opt to reclaim the entire debt from only one of the merchants who are associated in a communal enterprise for which the debt was made. Instead, in Holland, creditors have to address all partners or joint debtors,[2] and they each pay a share of the debt corresponding to their stake in the business (*pro parte*).

1 The edition used hereafter is Hugo de Groot, *Inleidinge tot de Hollandsche Rechts-geleerdheid met de te Lund teruggevonden verbeteringen, aanvullingen en opmerkingen van den schrijver en met verwijzingen naar zijn andere geschriften*, ed. by F. Dovring, H.F.W. Fischer, and E.M. Meijers (Leiden: Universitaire Pers, 1952).

2 Please note that Grotius does not explicitly refer to *maetschap* (*societas*) here. Grotius did not distinguish sharply between co-debtors and associates in trade, even though the *ius commune* tradition was different in this regard. See further below.

In the next paragraph (III.1.32), Grotius mentions that *reders*, that is co-owners of ships,[3] are liable towards the merchants, owners of the cargo, for all acts and damages caused by the shipmaster when they occur within the latter's mandate ('*int stuck van sijn ampt*') (III.1.32). One can assume that this liability according to Grotius is proportionate, even though the author does not explicitly state this. In addition, the *reders* can abandon their parts ('*aendeel*') when being confronted with acts of the shipmaster that cause costs, except for acts that are expressly demanded (III.1.32 *in fine*). Elsewhere in the *Inleidinge*, Grotius states that *reders* are vis-à-vis shipmasters held to the maximum of their part in the ship and what 'they further have in the *reedinge*' (III.20.48).

In his *De iure belli ac pacis* (1625) Grotius adds more details on the capped liability of *reders*. Grotius mentions that the *in solidum* liability of civil law, existing among shipowners (*exercitores*, the Roman equivalent of *reders*), is not applicable in Holland. Grotius considers the Roman rule as being against equity. He then adds a policy consideration that is more detailed than the one in the *Inleidinge*: Grotius mentions that with *in solidum* liability of *reders* everybody would abstain '*ab exercendis navibus*' out of fear of liability for the actions of the shipmaster-agents (*magistri*).[4] Grotius implies that the rule would deter potential investors in maritime expeditions. He also states that the liability of *exercitores* is restricted to the value of the ship and of the merchandise in the ship.[5]

It is tempting to consider the abovementioned passages as general statements, proclaiming limited liability in trade. However, one must be careful when reconstructing Grotius's reasoning. Grotius analyzed legal arrangements

3 Grotius states in this paragraph that the *reder* must be understood as the one receiving the freight of the ship. Grotius occasionally mentions '*bevrachters*', in the sense of *cargadores*, in the *Inleidinge*. They lease a ship which is typically co-owned by *reders*. See *Inleidinge* III.20.13. The *cargador* was the one profiting from the bill of lading freight (that is, the remuneration paid for the chartering and voyage by merchant-owners of the merchandise-cargo in the ship). However, the *cargador* himself paid charter party freight to the *reders*, which was the compensation for the lessor of the ship. See Johan P. van Niekerk, *The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800* (Kenwyn: Juta & co, 1998), vol. 1, p. 311. The *bevrachter-cargador* could qualify as *exercitor* in terms of Roman law, even though Grotius never pursued this categorization. See *Inst*. 4.7.2. '*... exercitor appellatur is ad quem cottidianus navis quaestus pertinet ...*'. However, in the *Inleidinge* '*bevrachter*' is mostly used with the meaning of merchant-owner of cargo. See *Inleidinge*, ed. by Dovring, Fischer, and Meijers, p. 256, footnote 6. In the passage of *Inleidinge* III.1.32 discussed here '*bevrachter*' has this latter meaning. It will be explained further that according to Grotius the *bevrachter*-merchant also had a right of abandonment.

4 Hugo de Groot, *De iure belli ac pacis libri tres in quibus ius naturae et gentium: item iuris publici praecipua explicantur* (Paris: Nicolas Buon, 1625) (hereinafter *IBP*), p. 270 (II.11.13).

5 *IBP* II.11.13 *in fine.*

against the background of existing legal doctrine, which distinguished in a detailed fashion between different circumstances and situations. On the other hand, differences in the scope of rules, as mentioned by Grotius, may be mere appearances. It could be that similarities were intended but escape the modern reader. Therefore, a first way to unlock Grotius's thoughts lies in the analysis of the connections to broader themes in his own work.

The term of *reder* is important to gain access to Grotius's intentions. Grotius considers *mederederschap*, in which two or more *reders* are co-owners of a ship or involved in a communal enterprise with the same ship, as a special type of *societas*. Applicable rules that are different from those of *societas* relate to specificities that follow from the risk community that exists during maritime expeditions. Grotius mentions a community of '*nooddruft*' (urgency, necessity) 'on a bottom' (on a ship) in this respect (III.29.17).[6] Rules in different chapters of the *Inleidinge* strongly hint at connections that are clustered around this ship-focused *communio*, thus explaining for rules that are different from those of *societas*.

In his general definition in the *Inleidinge*, Grotius defines *mederederschap* as implying a partnership (*maatschap*) (III.23.1). *Maatschap* is defined as a venture with the aim of making profits out of communal goods or service (III.21.1); in the case of *mederederschap* the partners not only use a ship to generate profits but also have the ship in joint ownership (III.20.46). Therefore, in *mederederschap* also a *gemeenschap* (*communio*) of joint owners is involved. However, this is not the only *communio* in *mederederschap*.

When talking about communities (*gemeenschap*, *communio*), Grotius goes into 'communities of property' (*gemeenschap des zaecks*), in which certain obligations exist between persons who jointly manage a *res* and have not entered into an agreement of *societas* (III.28). Besides communities of property, Grotius mentions communities 'of fate' (*gemeenschap des uitkomsts*) (III.29). In reference to the latter he discusses the community between all those involved in a ship's voyage, including those who are not on board, that is the merchant-owners of cargo and the co-owners of the ship (III.29.1). For Grotius, the existence of the community of fate that is centered around a ship's voyage explains why damages in gross average are compensated by the co-owners of

6 In *IBP* II.12.25 Grotius mentions a *societas navalis* in reference to the equal distribution of costs among merchant-owners and shipowners that come from the defense against privateers. It is said that defense is 'to the common advantage' (*utilitas communis*). However, it is not clear whether the term *societas navalis* must be understood as 'risk community' or 'ship-centered community' as such. The notion of '*communio utilitatum*', which refers to 'communal benefits' of partners in *IBP* II.12.24.3, may resonate in '*utilitas communis*' in *IBP* II.12.25 and then imply a community of some sort.

the ship and the merchants having cargo in the ship (III.29.12; III.29.16; *IBP* II.12.25; *IBP* II.10.9 *in fine*). In accordance thereto, if the shipmaster-agent or his crew fight off privateers and get hurt or die, their costs of treatment or funeral must be paid by the merchant-owners and the co-owners of the ship as well (III.29.9; *IBP* II.12.25).

The community of the ship is connected to the idea that if a mishap occurs during maritime voyages, the damages are distributed if they are due to *force majeure*. Therefore, this community is a community of risk. Unanticipated damages in maritime trade have to be shared. For example, Grotius mentions that when a shipmaster-agent of a merchant is confronted with the unforeseen arrest of the ship by a foreign power, the shipmaster is still entitled to half of the negotiated freight (III.20.3). Another example is Grotius's reference to the mandatory payment of half the projected wage in case of unsolicited and non-faulty dismissal by the shipmaster of a crewmember (III.20.23).

The idea of sharing of risk can be identified as underlying the above mentioned rules of gross average. This arrangement existed in maritime practice in the later Middle Ages and was commented on by legal authors as well, with reference to the *lex Rhodia* (*Dig*. 14.2). In fifteenth-century legal writings the philosophy of gross average, referring to the shared responsibility for communal risks, was copied onto other situations.[7] Slowly the academic views changed maritime rules of local jurisdictions. In some late-medieval towns adjacent to Holland, such as for example Kampen, freight had been payable by merchant-owners only upon safe arrival of the merchandise. This rule put the risk of unforeseen events on the shoulder of the shipmaster.[8] Princely statutes of 1551 and 1563, which were also in force in Holland, altered this rule and apportioned the costs of unforeseen damages among the merchant-owners.[9] This provision notwithstanding, some of the older views persisted as well. According to the 1551 statute, if liquid merchandise is spilled,

7 Giovanni Ceccarelli, 'Risky Narratives: Framing General Average into Risk-Management Strategies (Thirteenth-Sixteenth Centuries)', in *General Average and Risk Management in Medieval and Early Modern Maritime Business*, ed. by M. Fusaro, A. Addobbati and L. Piccino (London: Palgrave, 2023), pp. 80–2.

8 Edda Frankot, *'Of Laws of Ships and Shipmen'. Medieval Maritime Law and its Practice in the Towns of Northern Europe* (Edinburgh: Edinburgh University Press, 2012), p. 42.

9 Rules on the payment of wages in case of unexpected circumstances can be found in art. 27 of the statute of July 1551, as well as in chapter 3, art. 16, chapter 4, art. 12 and chapter 9, art. 3 of the statute of October 1563. See *Recueil des Ordonnances des Pays-Bas*, 2nd series, vol. 6, ed. by J. Lameere and H. Simon (Brussels: Gobbaerts, 1910), pp. 163–77 (princely law, 19 July 1551, hereinafter statute of 1551). For the statute of 30 October 1563, see Jean-Marie Pardessus, *Collection de lois maritimes au XVIIIe siècle*, vol. 4 (Paris: Imprimerie royale, 1837), pp. 61–102 (hereinafter statute of 1563).

even without any liability of the master, the merchant-owner can abandon these goods and refuse to pay freight for them (art. 42 *in fine*).

Stakeholders are required to pay shared damages in case of materialization of risks, but there is a maximum. The latter is connected to ideas about pledge. *Inleidinge* III.29.7 states that the shipowners are held with the maximum of the ship for the wages of the shipmaster's crew (see also II.48.19). This expresses the idea of collateral, but also of the risk one enters into when venturing in maritime expeditions. If the voyage is unsuccessful and costs exceed the amount of wages that are due, then the shipowner(s) can leave the ship to the crewmembers. Another example is mentioned in *Inleidinge* III.20.41 *in fine*. There a reference is made to *voering*. This is portage, i.e., merchandise which crewmembers acquire and sell for their own account and store on board of the ship (see also III.20.25-27). The passage in III.20.41 says that if the shipmaster hires a new crewmember with insufficient goods on board the former can withhold payment until the crewmember has worked enough. This means that the *voering* was considered as pledge for eventual claims arising out of damage or costs caused by crewmembers.

In the chapter of *Inleidinge* III.20, Grotius elaborates the liability of shipmasters and their crew, but rules relating to the risk community of the maritime expedition are prominent there as well. The shipmaster who is engaged by merchants for bringing their merchandise elsewhere keeps the merchandise as pledge for the payment of his freight (III.20.16, also in II.48.19 and III.20.48). However, the pledge idea also works in the other direction. If the costs exceed the value of the cargo that was bought by the shipmaster, the merchant can forfeit the merchandise and the shipmaster loses the part of the freight that is not covered by the value of the cargo (III.20.17). Moreover, Grotius mentions that a shipmaster (most probably meaning the owner of the ship)[10] can leave his ship to the merchants if their claims outweigh the value of the ship (III.20.17). The rules mentioned in III.20 in regard of the use of the ship as collateral tie in with III.29.7, where the ship is discussed as pledge for the wages of the crew. This shows that the same idea, of rules that follow from a risk community, are mentioned in different chapters. In III.20 Grotius discusses the contractual relations between shipmasters, crew, shipowners and merchants; in III.29 he analyzes communities of fate.

The right of abandonment of *reders* must be considered against the background of the mentioned maritime risk community. This latter element explains why the right of abandonment encompasses stakes, not just co-owned

10 This follows from III.29.7, which specifies that shipmasters who are shipowners are held with the ship towards crewmembers.

parts in the ship. Moreover, it also clarifies why the right of abandonment applies for *reders* who are not co-owners.

In *Inleidinge* III.20.48, it is said that the *reders* are liable towards the shipmaster for his freight and advanced payments not only with their part in the ship but also with what they have 'further in the *reeding*'. This refers to their share in the capital, that is the investments and accrued profits that are generated by the shipmaster-agent in the course of the expedition. In *IBP* II.11.13 the liability of *reders* is limited to the part in the ship and '*eorum quae in navi sunt*'. The latter, referring to merchandise, implies participation as partner; the *reders* meant here have given funds to the shipmaster, their agent, to buy merchandise. As a result, merchandise bought that is present in the ship is the *reders'*. In *Inleidinge* III.1.32 the same is true. The *reders* can abandon their part in the *medereder*schap; they are not held to more than what they have invested and gained out of contracts signed on mandate by the shipmaster.

These rules demonstrate that the liability of *reders* vis-à-vis the shipmaster and others is not connected to the former's co-ownership of the ship or their quality as partner, but rather to the risk community. Because of the risk that is linked to maritime expeditions, participants venture with what they have at stake in the expedition, and nothing more. Explanations of the mentioned rules starting merely from *societas* or pledge would fall short. The *reders* do not *invest* their ship, they simply operate it for the expedition. Another argument against a partnership-based explanation would be that limited liability also seems to have applied in a principal-agent relationship involving only one *reder*.[11]

A focus on pledge, in combination with the co-ownership of the *reders*, cannot explain why *reders*, not being co-owners, equally enjoy limited liability. Indeed, Grotius acknowledges that shipmasters who do not co-own the ship are allowed to participate in the venture of a voyage with the jointly owned ship and can then be considered partners in the project. Under those circumstances they do not receive a fixed wage, but instead venture for a share of the profits (III.20.46; III.23.2). Thus, some *reders* can be partners without being co-owners in the ship. Moreover, co-owners of the ship can refrain from participating in a particular expedition with the ship in which they have fractional ownership (III.23.3).[12] In these passages, a distinction is made between '*deel hebben*' (having a share in ownership), on the one hand, and

11 *Inleidinge* III.1.32 and *IBP* II.11.13 are about *medereder*schap, but III.20.17 implies that also one *reder* is limitedly liable.

12 Most likely, this means that they do not participate in the expedition, only if they expressly renounce their participation. Co-owners of ships are then presumed to be associates in the maritime venture for which their ship is used.

'*reeden*' (participating as partner in an expedition with the communally owned ship), on the other. However, '*mede-reeder*' is used both for a co-owner of the ship (either an associate in the expedition, or not) and for a stakeholder in the maritime venture (including those who are not co-owner) (III.23.4).

According to Grotius, partners in the *mederederschap* who are not co-owners of the ship have a right of abandonment. Grotius does not say this explicitly, but it follows from his rules. In III.20.46 and III.23.2 Grotius refers to shipmasters who are partners and not co-owners. In III.1.32 and *IBP* II.11.13 he refers to investors. The limited liability of the latter is underpinned with reference to the policy consideration that *in solidum* liability would scare off investors. This must refer to outsiders, wanting to inject sums into a partnership of *mederederschap* with a view to potential profits. Another argument, besides the reference to outsider investors, is the fact that Grotius mentions that he considers *mederederschap* as a *species* of partnership and not simply as a partnership, *because* shipmasters are commonly co-owners or participate in the *mederederschap* as partners which, according to Grotius, explains why there are special rules for *mederederschap* that are not applicable to partnerships (III.23.2). And a final argument relates to the right of abandonment for merchants. Investors in kind, who give merchandise to the shipmaster to have it sold abroad, can abandon this cargo as payment for the freight. It is indeed likely that III.20.17 also refers to such investors. Not only merchants entering into a contract of charter party, which was a contract that leased the transport of merchandise, were meant. Partners investing with their merchandise seem to have been intended as well. And if the shipmaster participates in the expedition as partner, he stands on the same level as an investing merchant-owner of cargo. As a result, both the participating shipmaster and the investor who injects capital (in sums or in kind) but does not buy a part of the ship can opt out in case of high damages or costs. The investor only risks his investment and nothing more. The shipmaster, when acting as partner in the *mederederschap* and not being co-owner, forfeits the remuneration for his labour.

From the abovementioned fragments it is clear that Grotius's considerations on the maritime risk community meant that rules referring thereto could be concerned with either damages or debts, both for as much as they related to the stakeholders in the maritime expedition. The listed rules were mostly, yet not exclusively, about – or connected to – the contractual relations between those involved in a maritime venture, as including the co-owners, the shipmaster, merchants, and crewmembers. However, since the shipmaster normally advanced costs and then claimed payment of these advances afterwards from the merchants and *reders*, these costs could be concerned with debts to third

parties. Even for those, the merchants and *reders* could limit their liability (III.1.32; III.20.17, and also III.20.48), which must mean that the limited liability also applies externally outside the community of stakeholders. If third parties claim debts from the co-owners of the ship directly, on the basis of contracts signed with the shipmaster-agent, the co-owners no doubt could cap their liability. Grotius does not enter into this point, most probably because in practice the situation did not arise often.

Grotius's emphasis on the community aspects of *mederederschap* and the specificity of maritime risk explains why Grotius does not extend limited liability to all merchant associations, but instead restricts it to maritime expeditions.[13] Another consequence of the maritime connotations of capped liability for *reders* is that the rules on limited liability of *reders* are not exclusively applicable in situations in which the agent is negligent or commits a fault. In addition, when the shipmaster-agent is non-negligent, the capped liability applies, except for cases in which the damages are due to imposed actions (III.1.32).

Therefore in the *Inleidinge* three variants of liability for trading partners can be identified, that is *in solidum*, proportionate, and limited liability. *In solidum* liability grants the creditor the right to recover the entire debt from one of the partners. From the perspective of the associate who is addressed, this external liability is unlimited, meaning that it includes personal belongings

13 However, many scholars interpret Grotius's ideas as entailing limited proportional liability among trading associates, also when they are not *reders*. See Willem D.H. Asser, In solidum *of* pro parte. *Een onderzoek naar de ontwikkelingsgeschiedenis van de hoofdelijke en gedeelde aansprakelijkheid van vennoten tegenover derden* (Leiden: Brill, 1983), pp. 98 and 103; Matthijs de Jongh, Societas *of* universitas. *De beursvennootschap en haar aandeelhouders in historisch perspectief* (Deventer: Kluwer, 2014), p. 13; Martijn Punt, *Het vennootschapsrecht van Holland, Zeeland en West-Friesland in de rechtspraak van de Hoge Raad van Holland, Zeeland en West-Friesland* (Deventer: Kluwer, 2010), p. 81; Egidius J.J. Van der Heijden, *De ontwikkeling van de naamloze vennootschap in Nederland vóór de codificatie* (Amsterdam: Van der Vecht, 1908), pp. 51–2. When interpreting Grotius, Simon Groenewegen (d. 1652) and Johannes Voet (d. 1713) (the latter, with doubts) merged the limited liability of *reders* and merchants, not being *reders*. See Asser, In solidum *of* pro parte, p. 122 and pp. 127–8. The main argument supporting this extension of scope is the combination of references to the *actio* (*quasi-*)*institoria* and the *actio exercitoria* in *IBP* II.11.13. However, the part of *IBP* II.11.13 on capped liability points to the *actio exercitoria*. Also, III.1.31 *in fine* refers to the '*aendeel*' as maximum of the liability which here means the proportionate share of the merchant-associate, because Grotius emphasizes the contrast with the *in solidum*-rule of Roman law. See also, for the interpretation of limited liability as exclusively envisaged for *reders*, Wouter Druwé, *Loans and Credit in Consilia and Decisiones in the Low Countries* (*c. 1500–1680*) (Leiden: Brill, 2020), p. 578.

beyond the share in the partnership (hence, the liability is *pro toto*). Payment by one associate is considered as extinguishing the debt. Thereafter, the paying debtor is allowed to reclaim the proportionate shares from his fellows, because proportionate liability is the rule in the internal relations between partners (III.21.5; *IBP* II.12.25). *In solidum* liability is a rule of civilian doctrine. By contrast, proportionate external liability (or, *pro parte*) is the general rule for trading partners in Holland, according to Grotius. Creditors are required to address all partners for their proportionate share in the debt. This proportionate liability is unlimited, as well: associates are liable for all debts, even if they exceed the company's stock, and the personal estate of the partners can be required to pay. The third variant, limited liability, according to Grotius applies for *reders* only. This liability is proportionate as well, but limited to what they invest and gain in the expedition for which the debt is incurred.

3 Digressing from Traditions

The abovementioned rules departed from the civilian tradition. And Grotius drew on sources of local and maritime law. Even so, the rules which he derived from the latter were equally recast in an original fashion. The novelty of Grotius's thoughts is threefold. First, because Grotius expressly goes against the civilian rule that partners in a *societas* are jointly and severally liable, *in solidum* and *pro toto*, for acts delivered on mandate. The trend in later sixteenth-century scholarship and local commercial law, the latter in particular as it was applied in Antwerp, was to extend the scope of the joint and several liability of partners in their external relations. Secondly, Grotius partially separates *rederij* from *societas*, thereby combining internal and external liability for the former, neither of which was common in the civilian legal writings of his day. Thirdly, Grotius blurs the demarcation lines between delictual and contractual liability. In this respect, Grotius went against the civilian approaches, yet also the traditions of local and maritime law.

For the theme of external liability, the legal literature which Grotius read was complex. In the writings of the commentators, the *actio institoria* was combined with *societas*. According to the Digest, an *institor* binds his principals *in solidum*.[14] For co-owners and operators of ships (*exercitores*), the external liability *in solidum* for debts made by the *magister navis*, the shipmaster-agent,

14 *Dig.* 14.3.13.2.

is also stipulated in the Justinianic sources.[15] However, in Roman law, *socii* were individually responsible and could not be held to pay to third parties a debt that had been made by other *socii*. *Societas* did not entail joint and several liability of the partners. During the era of the reception of Roman law, from the later eleventh century onwards, these rules were changed through interpretation. The commentators combined *societas* with the rules on the *institor*, which resulted in a gradual acceptance of situations in which *socii* were held liable *in solidum* for acts that had been performed on behalf of the *socii*.[16] Bartolus defines some situations in which the mandate between *socii* is presumed, for example if the partners are in different locations for the same trade.[17] Bartolus interprets *Dig*. 14.1.4*pr*, which imposes proportionate liability of associated *exercitores*, in such a fashion that the *praepositio* among associates can only be presumed if they do not factually co-sign a deal together. This results in, from a present-day perspective, rather curious results. For example, if all associates are present at a business deal, they are liable jointly yet proportionally. If the same deal is signed by only one of them, having a mandate to do so, the absent associates are held liable jointly and severally, that is *in solidum* and *pro toto*.[18]

In the later sixteenth and early seventeenth centuries, there were more openings in scholarly writings going in the direction of a generalized reciprocal and silent mandate between associates. In the days when Grotius was writing his *Inleidinge*, it was nearly universally accepted that a *societas* in trade automatically implied a silent *praepositio* among the associates.[19] This meant that only in the specific context of the few remaining exceptions, *socii* were held to be liable *pro parte*, that is in proportion to their share in the *societas*. Grotius thus stuck to an older interpretation of *Dig*. 14.1.4*pr*, as imposing a general principle of proportionate liability. Other early seventeenth-century scholars

15 *Dig*. 14.1.1.25.

16 Peter Stein, 'Mutual Agency of Partners in Civil Law', *Tulane Law Review* 33 (1958–59), 599–601; Reinhard Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Cape Town: Juta & co, 1990), p. 469.

17 Asser, In solidum *of* pro parte, pp. 163–7, pp. 175–9.

18 See for example also a *consilium* by Jean Wamèse in the 1540s: Wouter Druwé, *Loans and Credit in* Consilia *and* Decisiones *in the Low Countries* (*c. 1500–1680*) (Leiden: Brill, 2020), p. 576.

19 In 1589, Gothofredus added a note in his edition of the *Corpus Iuris* in this sense. See Stein, 'Mutual Agency', p. 599 ('*socius in causa socii censetur habere tacitum mandatum*'). On the innovative interpretations in this regard, of Ettore Feliti (*Felicius*), in his *De communione* (1606), see Dave De ruysscher, 'A Business Trust for Partnerships? Early Conceptions of Company-Related Assets in Legal Literature, and Antwerp Forensic and Commercial Practice (Later Sixteenth-Early Seventeenth Century)', in *Companies and Company Law in Late-Medieval and Early Modern Europe*, ed. by B. Van Hofstraeten and W. Decock (Leuven: Peeters, 2016), pp. 20–22.

could take such a 'humanistic' stance, even though this was exceptional. In the second quarter of the seventeenth century, Paul van der Christijnen (*Christinaeus*) (d. 1631) for example referred to a rule, as applied in a judgment of the Great Council of Mechelen in 1537, that absent associates are held liable proportionally, except for when the signing partner acts as *institor*. The latter's mandate has to be evidenced and is not presumed.[20]

Furthermore, Grotius knew the printed law of the city of Antwerp of 1582 (the so-called *Consuetudines Impressae*) very well.[21] This law stipulates that associates of business partnerships are held *in solidum* for debts relating to the partnership. The Antwerp law of 1582 imposed an irrebuttable presumption that partners in trade are jointly and severally liable towards creditors for company-related debts.[22]

A second point where Grotius diverges from the tradition, in this case again the civilian one, is related to the combination of *societas* and the *actio exercitoria*. With regard to external contractual liability, it was very common in the writings of the commentators that *exercitores* and *socii* were treated on the same footing.[23] Also, in case files of the Supreme Court of the Dutch Republic of the early seventeenth century the liability of *exercitores* and partners was

20 Druwé, *Loans and Credit*, pp. 578–9, p. 586.

21 The part of the *Inleidinge* on bills of exchange closely followed the contents of the Antwerp *Impressae* of 1582, which had been copied into the Amsterdam *Hantvesten* of 1597 as well. See *Handt-vesten ende Privilegie van Amstelredam, Mitsgaders sekere Costuymen, Oudeghebruycken ende Willekeuren der zelver Stede …* (s.l., 1597), pp. 165–9. The Amsterdam *Hantvesten* were part of Grotius's library in 1618. See Philip Ch. Molhuysen, *De bibliotheek van Hugo de Groot in 1618* (The Hague: Royal Academy, 1943), p. 19 (nos 322 and 324). However, Grotius also read the *Impressae* first-hand. In his annotations of the 1636 copy of the *Inleidinge* he mentions a custom of Antwerp and Amsterdam, and he uses the wording which can only be found in the Antwerp law book. See *Inleidinge*, ed. by Dovring, Fischer and Meijers, p. 53. On this Antwerp influence on Grotius see Dave De ruysscher, 'Antwerp commercial legislation in Amsterdam in the 17th century. Legal Transplant or Jumping Board?', *Tijdschrift voor Rechtsgeschiedenis* 77 (2009), p. 473 and p. 476, and Herman F.W.D. Fischer, 'Het oud-vaderlandse handelsrecht en Hugo de Groot', *Rechtsgeleerd Magazijn Themis* (1952), pp. 606–7.

22 *Coutumes du pays et duché de Brabant. Quarter d'Anvers. I. Coutumes de la ville d'Anvers*, ed. by G. De Longé, vol. 2 (Brussels: Gobbaerts, 1871), p. 392 (ch. 52, art. 1).

23 For example, Asser, In solidum *of* pro parte, pp. 177–9 (*glossa* of Jacopo di Arena). The rules of *Dig*. 4.9.7.5 and *Dig*. 14.1.1.25 were interpreted such that *exercitores* co-owning a ship are for joint ventures considered each other's principals. This interpretation went together with a restrictive interpretation of *Dig*. 14.1.4*pr*. See Asser, In solidum *of* pro parte, pp. 172–9, p. 197; Stein, 'Mutual Agency', pp. 601–2.

not clearly separated, with references being made to *actiones pro socio* between *exercitores*.[24]

In this regard, Grotius's emphasis on the community-like aspects of *mederederschap*, in reference to maritime risk, is different. Because Grotius derives rules from the risk community that exists for the purpose of a maritime voyage, external and internal liability is blended to a large extent. The shipmaster-agent recovers advanced sums from merchants and *reders*. The latter's limited liability applies both in that situation and in the one in which third parties directly enforce contracts negotiated by the agent.

To some extent, Grotius may have followed a trend that was bridging gaps between *societas* and *communio*. In the course of the sixteenth century, civilian scholars had smoothed out some inadequate links between ownership and partnership. According to classical Roman law, *societas* is *in personam*, and *dominium in rem*. Partners in a *societas* can be co-owners if they buy *res* together, but co-ownership does not always follow from a *societas* and is not a defining characteristic. In fact, the estates of partners remain separate; there is no pooling or a business trust when a *societas* is established. Those were the rules of Roman law, as they had been recorded in the Justinianic *Corpus Iuris Civilis*.[25] In his commentary on the chapter in the Digest regarding partnerships (*Dig*. 17.2, *Pro socio*), dating from 1534, the Louvain law professor Gabriel Van der Muiden (Mudaeus) (d. 1560) paid more attention to this subject and he stated that what a *socius* obtains for the partnership has to be shared (*communicare*) with his partners. However, the act of sharing was considered as distinct from the acquisition itself. It is only after the 'communication' that an acquired asset can be regarded as *communis* to the partners, i.e., as their joint property. Mudaeus explained this by underscoring that the *actio pro socio* is *in personam*, and not *in rem*, and that being a partner does not as such procure rights in the assets that are bought by and delivered to partners. As a result of this, what a *socius* receives by means of *traditio* after a sale is his own, even when he paid for the bought assets with money of the partnership, and this remains so until he formally 'communicates' the ownership to his partners.[26] In the course of the later 1500s, these highly theoretical rules were slowly left. In Leonardus Lessius's (d. 1623) *De iustitia et iure* (1605) it is stated that acquisition by one

24 For example in the Ponte-case of July 1603, see Tim Lubbers, 'The Capture of the Ponte: The Development of Vicarious Liability of Shipowners and its Limitation in Roman-Dutch Law', *Tijdschrift voor Rechtsgeschiedenis* 90 (2022), p. 187.

25 Zimmermann, *The Law of Obligations*, pp. 451–65.

26 Gabriël Van der Muiden (Mudaeus), *De contractibvs, I. Pro socio …* (Frankfurt-am-Main, 1586) 53 (*l. si quis societatem*, nos 6–7).

partner '*nomine communi*' conveys the title to all associates, without a required subsequent *traditio*.[27] Grotius may have been inspired by Lessius when he merged the notions of *societas* and *communio* to a large extent. As was mentioned above, it is likely that Grotius envisaged that co-ownership entails a presumption of participation in expeditions that are set up with the co-owned ship. The ownership rights on merchandise bought by the shipmaster-agent are according to Grotius shared between the partners of the *mederederschap*, from when the shipmaster receives them and before their handing over to the associates.[28] However, entering as investor into the *mederederschap* can be for the expedition only (the so-called *open rederij*, see further), without acquiring a part of the ship that is used for the maritime venture.

The third peculiar approach of Grotius lies in the blending of delictual liability and contractual liability. In *Inleidinge* III.1.32, besides contractual debts negotiated by the agent, both the latter's 'negligence of mandate' (*'verzuim … int stuck van sijn ampt'*) and *misdaeden* (Grotius's term for delicts) outside the ambit of the mandate are mentioned. For negligence, the *reders* are in principle bound, albeit with preservation of their right of abandonment. With regard to *misdaeden*, the *reders* are liable only to the extent that they profit from the delict. In civilian doctrine, liability for contracts and delicts were separated. *Socii* were not liable for the delictual behavior of their agents, whether they were *socii* with a mandate or not. Admittedly, for *exercitores* the rules were different. According to *Dig*. 44.7.5.6, the *exercitor* can be held liable for damages or theft committed by the ship's crew (*nautae*), even when there is no *culpa*. *Dig.* 4.9.7*pr.* states a similar rule, providing for an *actio in factum legis Aquiliae* against the *exercitor* for damages caused by *nautae*. However, even though *exercitores* are liable both for costs out of contracts negotiated by the shipmaster and delictual damages of the latter or his crew, there is a sharp distinction between the two. The differences are due to the fact that the *actio exercitoria* requires that the act of the shipmaster is within the confines of the mandate (*Dig*. 14.1.1.12). Liability for non-contractual damages must be attested

27 Wim Decock, 'In Defense of Commercial Capitalism: Lessius, Partnerships, and the Contractus Trinus', in *Companies and Company Law in Late Medieval and Early Modern Europe,* ed. by B. Van Hofstraeten and W. Decock (Leuven: Peeters, 2016), p. 36.

28 See for example III.20.7, which states that the shipmaster-agent must pay damages to merchants, owners of the cargo, which were caused before arrival to the merchandise on board due to his negligence.

with the *actio de furto aut damno* or the *actio in factum legis Aquiliae*.[29] Grotius emphasizes the mandate as criterion as well. However, the abovementioned examples of capped liability or pledges for stakeholders can be for reasons of both delict (for example, the pledge in III.20.41 *in fine* and the liability limited to 'ship and goods' in III.20.11) or contract (for example, capped liability and pledge for freight in III.20.16 and II.48.19). Therefore, the liability of *reders* and other stakeholders, when limited, can be for both.

Grotius's approach of limiting the liability of *reders* for any damages or costs, delictual or contractual, that were caused or negotiated by the shipmaster-agent, was also in opposition to local and maritime law. In the Antwerp law the idea was that when the *reder* appoints the crew, he is held liable for their acts, even if they transgress the given mandates. Negligence causing harm is thus attributable to the *reder*. The *reder* is not liable only if the shipmaster has acted maliciously (with *dolus*), because then it is deemed that the act was not linked to the mandate. The Antwerp compilation of municipal law of 1608, the so-called *Consuetudines Compilatae*, contain the rule that damages caused by the negligent behavior of the shipmaster or crew have to be compensated by the *reders*. They cannot make use of a right of abandonment if they have hired the ones who had caused the damages or costs.[30] It is unclear whether Grotius knew this 1608 version of the Antwerp law, which was markedly different from the 1582 compilation.[31] The Antwerp rule of 1608 implicitly refers to the idea of *culpa in eligendo*, which is mentioned in *Dig*. 44.7.5.6. According to this latter law, the *exercitores* are held to pay the costs of damage or theft inflicted by *nautae 'quod opera malorum hominum uteretur'* (because they employ the work of bad men).

29 On the vicarious liability of *exercitores*, see E. Descheemaeker, 'Obligations *Quasi ex Delicto* and Strict Liability in Roman', *The Journal of Legal History* 31 (2010), p. 9; Wouter Druwé, 'Qualitative Liability in the Early Modern Low Countries (ca. 1425–1650)', *Grotiana* 42 (2021), pp. 46–8; Annette Ruelle,' Les responsabilités du fait d'autrui en droit romain dans la ligne de mire de Domat et de Pothier', available at https://dial.uclouvain.be/pr/boreal/object/boreal%3A246060/datastream/PDF_01/view (last consulted 1 August 2023), p. 17, pp. 20–22, pp. 31–32.

30 *Coutumes de la ville d'Anvers*, ed. by G. De Longé, vol. 4 (Brussels: Gobbaerts, 1874), p. 94 (part 4, ch. 8, art. 21–22). Another rule stated that *reders* had to pay for costs of a bottomry loan which had been signed by the shipmaster out of necessity. If a bottomry loan had been made without authorization or necessity, the *reders* could abandon the ship. See Ibid., p. 110 (part 4, ch. 8, art. 59–60).

31 On the differences between the two versions, see Dave De ruysscher, 'Normative Hybridity in Antwerp Marine Insurance (c. 1650-c. 1700)' in *The Law's Many Bodies, Studies in Legal Hybridity and Jurisdictional Complexity c1600–1900*, ed. by S. Donlan and D. Heirbaut (Berlin: Duncker & Humblot, 2015), pp. 149–51.

Views of limited liability existed in the Hollandic maritime sphere, where a restriction of the liability of *reders* applied in case of accidental ship collisions. Already in the early fifteenth century, the *Ordinancie* of Amsterdam, which was a local enhanced version of the *Rôles d'Oléron*, stipulated that if there is collision between ships without fault, damages are split between the two ships. But if one of the ships is wrecked in such a scenario, then the values of both ships are added together, as well as the values of the cargos of both ships, and damages are paid *pro rata portionis*. (A wealthier ship thus covers more damages than a poorer ship).[32]

Here again the idea is that if damages are caused by unforeseen maritime risks, all those involved have to contribute. These rules were not in line with legal scholarly insights; Roman law adhered to the indemnity principle. Damages in maritime collisions according to Roman law are deemed compensation for loss and they are not capped by the pooled and combined values of the ships and/or cargos involved. In this regard, the abovementioned princely ordinances of 1551 and 1563 were closer to the Romanist tradition, since they contained the rule of equal division in shipping accidents that were force majeure but not the pooling of value in case of wreck.[33] Grotius in the *Inleidinge* mentions accidental ship collisions but sticks to the rules of the 1551 and 1563 statutes (III.38.16).

Starting from the middle of the sixteenth century, in the local laws of port cities a right of abandonment was occasionally accepted in contractual affairs, in the relationship between principal and agent, when negligence was presumed. In the middle of the 1400s, in Hanseatic areas the merchant-owner had the right to refrain from paying the freight to the shipmaster if merchandise was damaged during the voyage, on the condition that the former left the merchandise with the latter. It seems that this rule was at first applied to cases of jettison.[34] Later, deterioration on board of the ship was also covered by the rule. The 1551 and 1563 statutes, as well as the Antwerp 1582 law book, contain the latter version of the rule.[35] The Danish sealaw of 1561, the

32 Pardessus, *Collection*, vol. 4, p. 30. See also Tim Lubbers, 'Jacob Coren's *Observatio* 40: Shipowner Liability for Inculpable Ship Collision and its Limitation in Roman-Dutch Law', *Tijdschrift voor Rechtsgeschiedenis* 90 (2022), pp. 423–4.

33 Art. 46 statute of 1551; Ch. *Van Schepen die malkanderen beschadigen*, art. 1 statute of 1563.

34 Frankot, *'Of laws and shipmen'*, pp. 29–30, p. 160, p. 169.

35 Art. 42 statute of 1551; Ch. *Vande schippers ende cooplieden*, art. 9 statute of 1563; *Coutumes de la ville d'Anvers*, vol. 2, p. 406 (ch. 54, art. 16). According to the articles of the mentioned statutes, the merchant-owner tapped the barrels or boxes three times; when he assessed that the contents had expired during the voyage, he could relinquish the barrels or boxes to the shipmaster who did not receive freight for them. The tapping was not mentioned in the Antwerp law.

Stadtrecht of Hamburg of 1603 and the *Hansisches Seerecht* of 1614 mention the same rule as well.[36] Moreover, the abovementioned connotations with pledge had influence. In 1591, the Hansa decided that a pledge granted by a shipmaster on behalf of the *reder* is limited to 'ship and goods'.[37] It is known that Grotius had a version of the 1551 and 1563 statutes, as well as the *Ordinancie*, in his library.[38]

In the second half of the sixteenth and at the beginning of the seventeenth century the abovementioned situation of accidental collision was commonly added to the scope of these latter rules.[39] *Reders* who are confronted with an accidental shipwreck can forfeit their part in the ship and merchandise if the damages are too high. It is possible that in Holland this was an emergent practice in the 1560s.[40] This rule appeared in the Hamburg *Stadtrecht* of 1603[41] and the Antwerp compilation of law of 1608.[42] In 1611, the Estates of Holland issued an ordinance according to which damages caused by fishermen can be claimed from the *reders* of the fishermen's ship to the extent of the value of the ship and shipped cargo.[43]

All the aforementioned sources allow us to think that a general right of abandonment, as encompassing both contractual and delictual liability of

36 Götz Landwehr, *Das Seerecht der Hanse* (*1365–1614*). *Vom Schiffordnungsrecht zum Seehandelsrecht* (Hamburg: Vandenhoeck und Ruprecht, 2003), p. 113. For the Danish sealaw of 1561, see Jean-Marie Pardessus, *Collection de lois maritimes*, vol. 3 (Paris: Imprimerie royale, 1834), pp. 254–5 (art. 39). For the Hamburg rule: *Der Stadt Hamburg Statuta und Gerichtsordnung* (Hamburg: Heinrich Volckers, 1645), p. 258 (ch. 15, art. 1).

37 Paul Rehme, *Die geschichtliche Entwicklung der Haftung des Reeders* (Stuttgart: Enke, 1891), p. 113.

38 Molhuysen, *De bibliotheek van Hugo de Groot*, p. 63 (no 335, *Zee-rechten dat is: Dat hooghste en oudtste Gotlantsche Water-recht, dat die gemeene coopluyden ende schippers geordineert ende gemaect hebben tot Wisbvy* (Amsterdam: Barend Adriaensz, 1603)). This volume was a compilation of ordinances and statutes relating to maritime law.

39 Some authors have considered that maximum liability in reference to the value of the ship was a principle of Germanic sealaw, and therefore older. See, for example, Rehme, *Die geschichtliche Entwicklung*, p. 90. Until the early 1600s, however, in Hanseatic cities the principles of pooling of value and payment *pro rata portionis*, as was mentioned in the Amsterdam *Ordinancie* of the early fifteenth century (see above), were most prominent. See Frankot, *'Of laws and shipmen'*, p. 50. However, already in 1306, the rule of capped liability for the shipowner having caused the accidental wreck of another ship was mentioned in a Hamburg compilation. See Pardessus, *Collection*, vol. 3, p. 348 (art. 2).

40 As may be deduced from arguments brought in a case of 1567 before the Court of Holland. See Asser, In solidum *of* pro parte, p. 106, footnote 69; Lubbers, 'Jacob Coren's *observatio*', p. 427.

41 *Der Stadt Hamburg Statuta …*, p. 268 (ch. 17, art. 7).

42 *Coutumes de la ville d'Anvers*, vol. 4, p. 144 (book 4, ch. 8, art. 141).

43 Asser, In solidum *of* pro parte, p. 104.

reders, did not exist before Grotius put it to text. The abovementioned rules on the right of abandonment in agency relations had narrow scopes. Moreover, the capping of liability was accepted only in some jurisdictions, and mostly under the circumstances of ship collisions. Therefore, Grotius's innovations in interpretation were manifold.

4 The Influence from Commercial Practice

To what extent was Grotius representing commercial practices in the Holland of his day? In the later 1500s and early 1600s in Holland there were partnerships for overseas trade in which silent investments were accepted. What the rules were that applied to them is not always clear. In the early twentieth century, Dutch economic and legal historians waged a fierce debate over the legal characteristics of these so-called *voorcompagnieën*,[44] and historical understandings have to this day been influenced by the discussions.

Voorcompagnieën were special-purpose partnerships. They were involved with maritime voyages that typically lasted a few years. From 1594 onwards, regular expeditions were set up in Holland and Zeeland for exploring the Asian coasts.[45] In his doctoral dissertation of 1908 on the history of corporations in Dutch law, Egidius Van der Heijden (d. 1941) stated that in the *voorcompagnieën* the directors were initially *reders*. As such they were the only associates of the company, even though each of them had silent investors with which they formed an association of their own.[46] It was only after the incorporation of the Dutch East India Company (VOC, in 1602), which was formed out of several *voorcompagnieën*, that the *reders* became *bewindhebbers*, that is directors, who represented the interests of the investors (now, in the company, and not of an individual *reder*).[47] For the investors (*participanten*) in both the *voorcompagnieën* and the VOC, Van der Heijden used the notion of '*commenda-participant*',[48] which referred to the limited partnership (*commanditaire vennootschap*) of his day. Van der Heijden considered that the limited,

44 The category '*voorcompagnie*' is not a historical term but was coined by Heert Terpstra in 1938. See Heert Terpstra, *De Nederlandsche voorcompagnieën* (Amsterdam: Van den Vondel, 1938).

45 On the *voorcompagnieën*, see Johannes G. van Dillen, *Het oudste aandeelhoudersregister van de Kamer Amsterdam der Oost-Indische Compagnie* (The Hague: Nijhoff, 1958), pp. 5–11; Henk den Heijer, *De geoctroieerde compagnie: de VOC en de WIC als voorloper van de naamloze vennootschap* (Deventer: Kluwer, 2005), pp. 9–36.

46 Van der Heijden, *De ontwikkeling*, p. 71 and p. 77.

47 Ibid., pp. 82–3.

48 Ibid., p. 79.

non-active partner was excluded from participating in the activities of the *compagnie* and did not have a right of say, not even towards the director with whom he invested. He simply had to accept decisions that were taken by the directors.[49]

Shortly after Van der Heijden, also in 1908, Simon van Brakel (d. 1953) defended his doctoral dissertation on historical company law. Van Brakel reacted against van der Heijden's thesis: he emphasized that the non-active investors in the *voorcompagnieën* were partners. He warned against considering the *voorcompagnieën*, which he labelled *factorijvennootschappen* (commission companies), as limited partnerships that were related to Italian *commenda*-like arrangements.[50] Van Brakel considered the *societas*-like characteristics of the *voorcompagnieën* as more important than their *commenda*-like features. In particular, he stressed that in the *voorcompagnieën participanten*, even though they had few rights, could be urged to pay extra for costs, on top of their

49 Ibid., p. 73. In the Dutch legal writings of the times in which Van der Heijden wrote his dissertation, it was normal to construe an investment in a limited partnership as a forfeiture of title. The limited partner was a mere depositor and had a claim for repayment on the company, yet upon investing was no longer owner of his investment. See *Hoge Raad* 13 May 1864, *Weekblad van het Regt* 14 July 1864; Willem Binger, *De commanditaire vennootschap zonder aandeelen* (Amsterdam: Binger, 1865), p. 110, pp. 120–1; Justus G. Kist, *De maatschap of vennootschap. Beginselen van Nederlandsch burgerlijk en handelsregt omtrent de verschillende soorten van vennootschappen* (Amsterdam: Gebhard & co., 1863), p. 128. This contrasted to the general partnership in which partners were co-owner of the stock. These rules had largely been crafted in case law. The Dutch Commercial Code of 1838 had initially not followed the French model, but the interpretation of its articles by courts resulted in the adoption of French views nonetheless. In the French *Code de commerce* of 1807 (art. 23, first part), the *associé commanditaire* is a 'simple' partner, a '*bailleur de fonds*' (a depositor). His name is not mentioned in the company statutes (art. 43 first part) or in the name of the firm (art. 25). The investor cannot participate in the business, and if he does so he is considered an unlimitedly liable director (art. 27). By contrast, the 1838 Dutch Commercial Code (art. 20) considers the investor-*commanditaire* more as partner compared to the French rules ('partner by way of commandite', which is different from the French '*bailleur de fonds*'). His name is mentioned in the statutes, which was not the case in France (art. 26, °3). But over the course of the nineteenth century, French influence in Dutch commercial law became stronger, and this resulted in stricter interpretations of the 1838 Dutch Code by the Dutch courts. On the nineteenth-century influence of French approaches with regard to the *société en commandite* outside France, see Erik Röder, 'Die Kommanditgesellschaft im Rechtsvergleich: Hintergründe der unterschiedlichen Karriere einer Rechtsform', *The Rabel Journal for Comparative and International Private Law* 78/1 (2014), pp. 111–20.

50 Simon van Brakel, 'Vennootschapvormen in Holland gedurende de zeventiende eeuw', *Rechtsgeleerd magazijn Themis* 36 (1917), pp. 9–10, pp. 26–27, and pp. 171–2.

investment, and denied that there was evidence of their limited liability.[51] The difference – according to van Brakel – between a general partnership and the *voorcompagnieën* was that in the former partners had an equal and reciprocal obligation to disclose accounts and decisions had to be taken jointly.[52] Moreover, shares in the former could in principle not be passed on to others.[53] Van Brakel denied continuity between the *rederij*, the *voorcompagnieën* and the VOC.[54]

In this respect, both van der Heijden and van Brakel referred to the theories of Karl Lehmann (d. 1918). In 1895, Lehmann had challenged the widespread theory that the nineteenth-century corporation had its roots in the Italian *commenda* or the Genoese *Banco di San Giorgio*. Instead, Lehmann stressed that the company law of the Middle Ages had been imbued with features of sociability and communality, precluding that investors were mere non-active capitalists. Therefore, the element of limited liability in combination with active trade came from the *rederij*.[55] Lehmannn was clearly influenced by the German law of his time, because he did not use the dichotomic scheme separating Italian, capitalistic from 'Germanic', community-orientated types of companies. In the German ADHGB of 1861, the *commenda* still had features of a 'silent partnership', because earlier it commonly had been considered an association of partners, active and non-active.[56] Lehmann's argument was that in the *rederij* each co-owner of the ship had a say according to the share in the ship and expedition. The shipowners formed an association, and each of these partners invested in expeditions with the communally owned ship according to the needs.[57] At the same time, the ship was considered a *corpus*. This meant that creditors of debts relating to the ship or its expedition had the ship as preferential object of debt enforcement.[58] Silent investors, for the same reason, remained outside the focus of creditors; the true associates were the *reders*.[59] The stock of the *rederij*, in combination with the partitioning

51 van Brakel, 'Vennootschapvormen', pp. 26–7, pp. 171–2, and pp. 186–7.
52 Ibid., pp. 14–5.
53 Ibid., pp. 180–3.
54 Simon van Brakel, 'Bijdrage tot de geschiedenis der naamlooze vennootschap', *Rechtsgeleerd magazijn Themis* 31 (1912), pp. 263–4.
55 Karl Lehmann, *Die geschichtliche Entwicklung des Aktienrechts bis zum Code de commerce* (Berlin: Carl Heymann, 1895), pp. 4–28; Karl Lehmann, *Das Recht der Aktiengesellschaften* (Berlin: Carl Heymann, 1898), pp. 26–9.
56 Röder, 'Die Kommanditgesellschaft', pp. 115–6.
57 Lehmann, *Die geschichtliche Entwicklung*, pp. 34–5.
58 Ibid., p. 49.
59 Ibid., p. 56.

of shares in the company (both in the ships and profits),[60] according to Lehmann announced the limited liability that came after. These features were strengthened in the seventeenth century, when the *rederij* was transformed into an *Aktiengesellschaft*.[61]

Lehmann thus considered the shareholders' meeting and the proportionality of votes, in combination with a tangible capital, as normal characteristics of the corporation. As such, in his historical analysis, he was implicitly referring to the main paradigms of the company law of his day. In 1870 and 1884, the *Aktiengesellschaft* had been made the cornerstone of German company law and the emphasis was on the controlling powers of the shareholder meeting.[62] In addition, Lehmann's opinion was based on a recent proliferation of the German legal arrangement of *Reederei*. The term '*reder*' for ship-owner had migrated from Dutch into German. The liability of *reders* for damages caused by the shipmaster, for which they could abandon their part in the ship, was detailed in the Prussian *Seerecht* of 1727 and in the *Allgemeines Landrecht* of Prussia of 1794.[63] The 1807 French *Code de commerce*, which during the French occupation was introduced in the Rhineland, contained the same rule.[64] And later, the German ADHGB of 1861 stipulated the same limitation of liability to the maximum of the value of freight and ship.[65] As a result of these new legal rules, the search of lawyers for historical foundations of company law now also came to encompass a legal-historical scrutiny of the features of *Reederei*, which in the ADHGB had been put under the chapters of companies. In 1891, Paul Rehme (d. 1941) published a monograph on the liability of shipowners, combining historical and legal-analytical arguments.[66]

Whereas Lehmann had mainly considered the *rederij* as an 'ideal-type' precursor of the seventeenth-century corporation, the abovementioned Dutch authors of the early twentieth century would take his view into consideration when analyzing the *voorcompagnieën.* Their attention was mostly focused on the relationship between the investors, the directors and the company. Even though Van der Heijden did not explicitly embrace Lehmann's views and was

60 Ibid., pp. 24–8.
61 Ibid., pp. 49–54.
62 Jan Lieder, 'Aktienrechtsnovelle vom 11. Juni 1870', and Sibylle Hofer, 'Das Aktiengesetz von 1884 – ein. Lehrstück für prinzipielle Schutzkonzeptionen', in *Aktienrecht im Wandel*, ed. by W. Bayer and M. Habersack, vol. 1 (Tübingen: Mohr Siebeck, 2007), respectively pp. 318–87 and pp. 388–414.
63 Justus Meyer, *Haftungsbeschränkung im Recht der Handelsgesellschaften*, vol. 2 (Berlin: Springer, 2000), pp. 41–2.
64 Art. 216 *Code de commerce* 1807.
65 Meyer, *Haftungsbeschränkung*, p. 42.
66 Rehme, *Die geschichtliche Entwicklung*.

critical of his opinion,[67] van Brakel nonetheless considered van der Heijden as siding with Lehmann in his appraisal of the 'silent' bond between investors and directors of the *voorcompagnieën*.[68] Van Brakel viewed Lehmann's focus on the *reder*-directors as an interpretation that excluded the rights of investors, even though Lehmann had not taken *participanten* into consideration. In his dissertation of 1908, van Brakel stated that in the *voorcompagnieën* investors had minimal rights, but that nonetheless they were considered as partners. One of his arguments related to the possibility to have investors sued if they did not pay their promised investment.[69] Another one was concerned with the fact that investors received an equal dividend and that they did not negotiate fixed returns with the directors with whom they invested.[70] As Lehmann had done, van Brakel seemed to emphasize characteristics that were crucial in his own day (equal dividends, decision power). That meant that he differentiated the *factorijvennootschap* from the limited partnership on the grounds of whether the investors were partners or not. In the former, the investors could hold the director accountable; in the latter, they could not.[71]

In the 1920s, among German historians Lehmann's arguments were considered as having been reinforced by van der Heijden and van Brakel's books. The famous economic historian Richard Ehrenberg (d. 1921) in 1896, well before the Dutch historians' publications, had corroborated Lehmann's views by categorizing the *voorcompagnieën* as a blend of *rederij* and *commenda*. The investors were silent partners, the directors were jointly and severally liable for the debts of the venture. The investors were only tied to individual directors, with whom they had negotiated their investment, and not to the company or the other directors.[72] Ehrenberg's authority was difficult to ignore. In a remarkable book review of van Brakel's dissertation, which was published in the *Hansische Geschichtsblätter* of 1910, Walther Vogel (d. 1938) stated that van Brakel had polemically argued against Lehmann but had nonetheless unwillingly confirmed the latter's thesis. Vogel argued that Lehmann had not considered the *rederij* as merely referring to co-ownership, but also to the joint trading venture between the ship's co-owners. Therefore, van Brakel had been wrong in arguing against *rederij* as a mere association of co-owners. In

67 E.g. Van der Heijden, *De ontwikkeling*, pp. 97–8.
68 van Brakel, 'Bijdrage', p. 270.
69 Simon van Brakel, *De Hollandsche handelscompagnieën der zeventiende eeuw. Hun ontstaan – hunne inrichting* (The Hague: Nijhoff, 1908), pp. 95–6.
70 van Brakel, *De Hollandsche handelscompagnieën*, pp. 97–8
71 Ibid., pp. 95–7; van Brakel, 'Vennootschapsvormen', pp. 5–7.
72 Richard Ehrenberg, *Das Zeitalter der Fugger. Geldkapital und Creditverkehr im 16. Jahrhundert*, vol. 1 (Jena: Fischer, 1896), pp. 325–30.

that regard, Vogel did not entirely capture van Brakel's arguments, who had emphasized that the directors in the *voorcompagnieën* were also (yet, not exclusively) shipowners.[73]

In 1922, a Dutch doctoral dissertation by Willem van Mansvelt (d. 1945) pushed these – arguably German – views even further. He considered the *voorcompagnieën* as *rederijen* with non-active investors teaming up with individual directors, as Ehrenberg and Van der Heijden had done. But, in contrast to Van der Heijden, he considered the East India Company as a *rederij* in which the investors were at the level of the *reders* in the preceding *voorcompagnieën*. This meant that they could co-decide on matters of trade, but also that they had a right of abandonment. Creditors of the company could not realistically pursue their debts against the investors because the latter could relinquish their share in the company in response.[74]

Van der Heijden's appreciations have not seriously been challenged since the 1920s. In 1922, the famous Dutch law professor Willem Molengraaf (d. 1931) in a book review heavily criticized Mansvelt's categorizations: according to Molengraaf, the Dutch East India Company was a partnership with participation by *commenda*-like investors.[75] However, in 1958 the Amsterdam historian and archival specialist Johannes Van Dillen (d. 1969) considered van Brakel's view on the partnership-qualities of the *voorcompagnieën* as more correct than Van der Heijden's opinion.[76] But in spite of these opinions, Van der Heijden's view remained more or less accepted. In fact, contemporary economic historians still commonly refer to the Dutch East India Company as being rooted in the arrangement of *rederij*. Niels Steensgaard (d. 2013) has followed Lehmann's view in saying that the VOC entailed an upgrade of investors' rights as compared to the rights of investors in the *rederijen* that were the *voorcompagnieën*.[77] In 2004 and 2010, Oscar Gelderblom and Joost Jonker considered *partenrederij* as a precursor of the *voorcompagnieën*, and ultimately the Dutch VOC. They emphasized the continuity in the features of

73 Walther Vogel, *Hansische Geschichtblätter* 16 (1910), pp. 593–608.

74 Willem M.F. Mansvelt, *Rechtsvorm en geldelijk beheer bij de Oost-Indische Compagnie* (Amsterdam: Swets & Zeitlinger, 1922), pp. 40–9. Mansvelt's assessments of the positions of van Brakel and Van der Heijden are often inaccurate.

75 *Rechtsgeleerd magazijn Themis* (1922), p. 550.

76 van Dillen, *Het oudste aandeelhoudersregister*, pp. 22–3.

77 Niels Steensgaard, 'The Dutch East India Company as an Institutional Innovation', in *Dutch Capitalism and World Capitalism. Capitalisme hollandaise et capitalisme Mondial*, ed. by M. Aymard (Cambridge: Cambridge University Press, 1982), p. 240 and p. 242.

fractional ownership and of limited liability of both directors and investors.[78] However, recently Martijn Punt and Matthijs de Jongh have challenged this consensus. Punt pointed to the fact that participants in the *voorcompagnieën* did not have a right of abandonment, but were factually limitedly liable, because they were silent investors. Other arguments that can be raised against the origins of the East India Company in the *rederij* according to Punt are that the capital of the *voorcompagnieën* was not split up in portions, as was the case in the *rederij*, and that the goal of the *voorcompagnieën* was trade, not the exploitation of a ship.[79]

The abovementioned debates were concerned mostly with the legal categorization of the investors and the liability of directors. The differences of opinion were often based on the assumption that the *voorcompagnie* was a specific type of company. However, divergence in organizational structures was quite broad, and also with regard to the rights of investors and directors. For example, in an expedition of 1594 it was provided in the company agreement that investors could not ask for access to the accounts; they had no control over the policy decisions of the directors.[80] In the Old Amsterdam company and the Delft company the investors only had contacts with 'their' director, with whom they negotiated the investments.[81] But in 1601 the company of Zeeland stipulated that investors with substantial investments had the right to consult the books of the company.[82] Even though in most *voorcompagnieën* the investors were not on the same footing as the directors, the exact relationship between them could vary.

The *voorcompagnieën* were not only involved with an expedition, for which stock was gathered, but also with the co-owning of ships that were used to sail abroad. This explains the confusion among legal scholars, who struggled when categorizing the *voorcompagnieën* with co-owned ships in legal terms. As was explained above, the legal rules of partnership (*societas*) and the co-owning of ships were different. Ship co-owning associations had grown out of the co-ownership of ships. Such '*partenrederij*' had been used at least since the beginning of the fifteenth century. It was a fractional joint

78 Oscar Gelderblom and Joost Jonker, 'Completing a Financial Revolution: The Finance of the Dutch East India Trade and the Rise of the Amsterdam Capital Market, 1595–1612', *The Journal of Economic History* 64/3 (2004), p. 649, footnote 41, and pp. 653–54; Oscar Gelderblom, Abe de Jong, and Joost Jonker, 'An Admiralty for Asia: Business Evolution and the Evolution of Corporate Governance in the Dutch Republic, 1590–1640', in *Origins of Shareholder Advocacy*, ed. by J. Koppell (London: Palgrave MacMillan, 2010), pp. 33–5.

79 de Jongh, Societas *of* universitas, p. 21; Punt, *Het vennootschapsrecht*, pp. 110–1.

80 van Brakel, 'Bijdrage', p. 267.

81 Ibid., p. 268.

82 Ibid., pp. 268–9.

ownership, which allowed for pooling investments in costly ships.[83] Later on, such co-ownership associations became mingled with the so-called *open rederij*. The former arrangement was concerned with co-ownership of ships, but did not refer to the pooling of stock to be used for expeditions with the co-owned ship. By contrast, *open rederij* was related to the raising of money for maritime trading expeditions. Whereas the co-owners of a ship had a stake in the ship, the participants in an *open rederij* were simple investors in a stock that was not the ship itself.[84] Investors in an *open rederij* were considered associates along the lines of the *societas* of Roman law. The blending of both abovementioned arrangements of *partenrederij* and *open rederij* is very clear in Grotius's appraisals in the *Inleidinge*, which, as mentioned, combines the *communio* of joint ownership with rules of partnership, in combination with a risk community.

Next to the maritime and local law, practices surrounding VOC shares also seem to have been a source of inspiration for Grotius. Investors in the VOC were called '*participanten*'. This term had a history of its own. A *particeps* was, according to the 1588 *Statuta* of Genoa,[85] a *socius* of a mercantile company who did not work in the firm's trade, who only shared in profits and who did not have the right to decide on the course of business.[86] The qualification of partner related to the internal relationship with the other partners.[87] A *particeps* was not held liable vis-à-vis creditors for debts of the company for more than his investment.[88] When at the liquidation of the company debts

83 Jelle C. Riemersma, 'Trading and Shipping Associations in 16th-Century Holland', *Tijdschrift voor Geschiedenis* 65 (1952), pp. 330–8; Simon Hart, 'Rederij', in *Maritieme geschiedenis der Nederlanden*, vol. 2, ed. by G. Asaert et al. (Bussum: De Boer, 1978) pp. 106–25; den Heijer, *De geoctrooieerde compagnie*, pp. 12–3.

84 Nicolaas W. Posthumus, *De uitvoer van Amsterdam, 1543–1545* (Leiden: Brill, 1971), pp. 69–83.

85 *Statvtorvm civilivm reipvblicae Genvensis …* (Genoa: Hieronymus Bartolum, 1589), pp. 139–42. The position of the *particeps* is further detailed in some decisions of the Genoese *Rota*. See in particular *decisiones* 39 and 46, also in *Decisiones Rotae Genua de Mercatura …* (Genoa: s.n., 1589), pp. 118–21 (dec. 39) and pp. 124–5 (dec. 46).

86 *Decisiones Rotae Genuae*, p. 67 (dec. 14, no 133).

87 Gennaro Bosco, 'Partecipazione ed accomandita nella storia del diritto italiano', *Studi e documenti di storia e diritto* 20 (1899), p. 249. The *actio pro socio* could be initiated by the *particeps*. One may infer from this that the *particeps* also responded to the *actio pro socio* of the associates, for example for paying up for costs if that had not been excluded in the partnership contract.

88 Bosco, 'Partecipazione', p. 254. Yet, it may have been possible for creditors to sue the *particeps pro parte sua* if he had not fully paid up for his investment. The Genoese Rota seems to have changed its position over time, stating initially that the *particeps* was liable externally as well for his investment. See *Decisiones Rotae Genuae*, p. 50 (dec. 14, nos 21 and 111).

exceeded the stock, then the investment of the *particeps* was considered forfeited. In terms of ownership rights, a *particeps* was a co-owner of the capital of the company in which he had invested. In later sixteenth-century Genoa, a *particeps* was not deemed a *commendator* (sometimes called *committens* or *deponens*), which was an investor that handed over the ownership rights on money invested, even though he was engaging in a contractual relation with the ones to whom he ceded his investment.[89] Underlying the legal notion of *participatio* was an economic arrangement of 'participation', which in Genoa was not only used in partnerships.[90] The Genoese company law distinguished between silent partners (that is, *socii* defined as such in the company contract, but not mentioned in the firm's name) and *participes*. The former, when resigning, dissolved the partnership, whereas the latter could not withdraw from the partnership before its expiry.[91]

This *participatio* was slightly different from the South German *Teilhaber*-arrangement.[92] In the first half of the 1500s, it became common in Nuremberg and Augsburg to distinguish between *Hauptgesellschafter* (i.e., main associates) and *Teilhaber* (i.e., investors). The former were liable with both investments

89 It was said in the later sixteenth century that a *deponens* who deposited money transferred ownership. See Vincenzo Carocci, *Tractatus practicabilis de deposito …* (Venice: Damianus Zenarius, 1593), fol. 111v (*quaestio* 47, no 4). The *particeps* was sometimes considered a *deponens*. This (erroneous) interpretation of Genoese law can be found already in a decision of the Roman Rota, stating: '*Accommendans vero est creditor capitalis immissi, et dicitur habere interesse per participationem, non vero per proprietatem*,' which suggests that *participatio* and *proprietas* are mutually exclusive. This decision referred to decision 39 of the Genoese Rota, which did not state any such rule. Levin Goldschmidt and Max Weber rightly did not consider *participatio* as a legal arrangement that was fundamentally distinct from *societas*. See Wilhelm Endemann, *Studien in der romanisch-kanonistischen Wirthschafts- und Rechtslehre bis gegen Ende des Siebenzehnten Jahrhunderts*, vol. 1 (Berlin: Guttentag, 1874), p. 402 and p. 405; Levin Goldschmidt, *Universalgeschichte des Handelsrechts* (Stuttgart: Enke, 1891), p. 270, footnote 125; Max Weber, *The History of Commercial Partnerships in the Middle Ages* (Lanham: Rowman & Littlefield, 2003), p. 71, footnote 21.

90 Bosco, 'Partecipazione', p. 243 and pp. 250–1.

91 *Decisiones Rotae Genuae*, p. 124 (*decisio* 46, no 1, the mentioning of the investors in the firm's name means that they are *socii* and not *participes*). The majority opinion in Genoese case law and doctrine (the Italian jurists Casaregis (d. 1737) and Ansaldus (d. 1719)) considering the *particeps* as a *socius* referred to the duties as partner, not to the *actio pro socio*. See for an overview: Bosco, 'Partecipazione', pp. 251–2; Endemann, *Studien*, vol. 1, pp. 400–6.

92 *Contra*, referring to the example of the *Kapitaleinlage zu Gewinn und Verlust*: B. Van Hofstraeten, 'Limited Partnerships in Early Modern Antwerp (1480–1620)', *Forum Historiae Iuris*, https://forhistiur.de/2015-11-van-hofstraeten/, note no. 4.

and personal properties, the latter only with their investments. A further distinction was made between active and passive *Teilhaber*. The former were members of staff or working partners who received remuneration by way of an (extra) share in the profits. They only participated in profits, not in losses.[93] The passive *Teilhaber* injected sums of money into the partnership and were liable for losses as well, to the extent of their investment. They had to refrain from any activity in the partnership if they wanted to keep their liability limited towards third parties.[94] In contrast to the Genoese *participes*, it seems that passive *Teilhaber* in South German companies could withdraw their share before the end of the partnership, in which case the partnership continued to exist;[95] they could have voting rights as well.[96] Yet, as was also the case for the *participes* in Genoa, *Teilhaber* were second-rank associates, and they kept their investment in ownership (they were not depositors).[97] The South German characteristics, being different from the Genoese ones, followed from the practice that large partnerships had lots of *Teilhaber*,[98] whereas the *participes* in Genoese firms were usually few and for high investments.[99]

93 Josef Strieder, *Zwei Handelsgesellschaftsverträge aus dem 15. und 16. Jahrhundert, ihre Geschichte und ihr Recht: ein Beitrag zur Entwickelungsgeschichte des Gesellschaftsrechts* (Leipzig: s.n., 1908), p. 56. This meant that their work was not valued as investment.

94 Limited liability was not absolute. Partners could have a recourse on the *Teilhaber* if the former had responded with their personal estates for company-related debts. This issue was sometimes raised but not clearly solved in mercantile practice or municipal law. See Clemens Butzert, *Investitionen und ihre Risiken. Zur Lage nicht geschäftsführende Anleger in Unternehmen des Späten Mittelalters und der Frühen Neuzeit in Italien und Deutschland* (Berlin: Duncker & Humblot, 2016), pp. 169–70 and pp. 197–201.

95 Johannes Apelbaum, *Basler Handelsgesellschaften im fünfzehnten Jahrhundert mit besonderer Berücksichtigung ihrer Formen* (Bern: Stämpfli, 1915), p. 90; Aloys Schulte, *Geschichte der Großen Ravensburger Handelsgesellschaft: 1380–1530*, vol. 1 (Stuttgart: Deutsche Verlags-Anstalt, 1923), p. 62.

96 Reinhard Hildebrandt, 'Unternehmensstrukturen im Wandel. Familien- und Kapitalgesellschaften vom 15. bis 17. Jahrhundert', in *Struktur und Dimension. Festschrift für Karl Heinrich Kaufhold zum 65. Geburtstag*, vol. 1 (Stuttgart: Steiner, 1997), p. 99, footnote 32. This was commonly excluded, however. See Martin Schimke, *Die historische Entwicklung der Unterbeteiligungsgesellschaft in der Neuzeit* (Berlin: Duncker & Humblot, 1991), p. 47. Most authors consider that only *Hauptgesellschafter* had voting rights. See Elmar Lutz, *Die rechtliche Struktur süddeutscher Handelsgesellschaften in der Zeit der Fugger*, vol. 1 (Tübingen: Mohr Siebeck, 1976), p. 359; Schulte, *Geschichte*, vol. 1, pp. 57–8 (only active partners and factors may have had voting rights).

97 Katharina von Ciriacy-Wantrup, *Familien- und erbrechtliche Gestaltungen von Unternehmen der Renaissance. Eine Untersuchung der Augsburger Handelsgesellschaften zur frühen Neuzeit* (Berlin: LIT, 2007), pp. 163–4; Sandra Kischka, *Todesbedingtes Ausscheiden eines Gesellschafters aus der Personenhandelsgesellschaft. Die Entwicklung bis zu den Naturrechtskodifikationen* (Münster: LIT, 2005), pp. 45–6.

98 Schulte, *Geschichte*, vol. 1, pp. 61–2.

99 See the *decisiones* 14 and 39 in *Decisiones Rotae Genuae de mercatura.*

In the 1608 Antwerp law book, the term of '*deelhebber*' referred to the Genoese *particeps*,[100] not to the South German *Teilhaber*. According to the 1608 Antwerp law compilation, the *deelhebber* was a silent investor; he was considered a partner, but only internally. According to the 1608 compilation, an exception to the principle that partners were held liable *in solidum* and *pro toto* for partnership debts was made for participants (*participanten*) who had invested but did not engage in trade. The exception was restricted to those financiers who were not mentioned in the firm's name and who were not defined as a partner in the partnership agreement. With the exception of this last part, the Antwerp arrangement was clearly copied from rules in the 1588/89 Genoese municipal statutes regarding *participatio*.[101]

In the 1602 VOC charter there are clear indications that 'participant' was used in the Genoese sense: article 9 provided that *participanten* could take out their money but only at the end of the fixed period,[102] which hinted at their continued ownership rights after investment,[103] in combination with a prohibition of early withdrawal. The 1608 collection of Antwerp law was less clear as to the legal characteristics of a *participatie* in terms of ownership.[104]

To what extent did all this matter for Grotius? In *De iure belli ac pacis*, Grotius uses the notion of '*particeps*', when explaining that the *socius* can contractually arrange for a limitation of liability.[105] Grotius accepts that partners negotiate a reduction of risk. He allows that the rule of proportionate liability *pro toto* among associates is changed in the contract. According to Grotius it is possible even to provide investors with capital guarantee, in order to have them share only in the profits but not in the costs.[106] In this regard, Grotius was clearly

100 *Coutumes de la ville d'Anvers*, vol. 4, p. 180 (book 4, ch. 9, arts 17, 19 and 20). For an extensive discussion on the Genoese origins of this section, see De ruysscher, 'A Business Trust for Partnerships?', pp. 17–8, and footnotes 36–7.

101 This was mentioned in the *Memorieboeken*, memorandum books which served to support the contents of the 1608 Antwerp law compilation. See Antwerp City Archives (FelixArchief), *Vierschaar*, 28bis, *ad* part 4, ch. 9, art. 8. '(…) *ita expresse habent etiam statuta Genuensium lib. 4 cap. 12 art. incipit Socii* (…)'.

102 *Groot Placaet boeck inhoudende de placcaten ende ordonnantien …*, vol. 1 (The Hague: Wouw, 1657), c. 532 (art. 9).

103 Further indications thereof are that 'shares', that is, the receipts of investment in the VOC, were part of inheritances and could be seized by creditors, and thus were considered as collateral for debts of the investor.

104 *Coutumes de la ville d'Anvers*, vol. 4, p. 176 (part 4, ch. 9, art. 8).

105 *IBP* II.12.24.3.

106 *Inleidinge* III.21.5; *IBP* II.12.24.3. In *IBP* Grotius qualifies such a contract as a mixed contract, of *societas* and insurance.

inspired by Lessius, who had argued for the legitimacy of such contracts.[107] However, it is rather clear that Grotius only had internal, and not external liability in mind. This notwithstanding, the term of *particeps* directly connects with the Genoese concepts. What is meant is that a partner can be made a silent partner in the partnership contract and then is internally liable only to the extent of his investment. This 'participant' is not known externally. In that regard, the limited liability of '*participanten*' in the VOC was comparable.

It seems that in the later sixteenth century, in Holland the Genoese idea of limiting the liability of partners, contractually, in combination with their continued quality of *socius*, was copied into the practice of general partnerships that had been set up for maritime expeditions. In that regard, this alternative route of 'limited liability' makes a generalized right of abandonment in the contractual relations of *reders*, as pre-dating Grotius's conceptions, less likely. If Grotius largely construed a general right of abandonment for *reders*, this does not preclude that limited liability was still slowly burgeoning and gaining legal form by his time. The *rederij* is not the only possible route to limited liability. Moreover, the combined features of *societas* and *communio*, of *partenrederij* and *open rederij*, in the so-called *voorcompagnieën*, are not hampering an explanation of limited liability as an arrangement that was created incrementally. Grotius then came at the end of this development. It is probable, therefore, that between approximately 1590 and 1602, the Genoese idea of *participatio* had been most important as legal support for participation in a partnership without *pro toto* liability. Grotius's categorization of the restricted liability of participants, now labelled in terms of *reders*, as a right of abandonment, was built on these and other elements, the latter of which came from maritime and local legal sources. And, quite ironically, it was due to this interpretation by Grotius that later scholars and historians could no longer evacuate a company type of *rederij* from their analysis of the emergence of limited liability. Punt and de Jongh's arguments only hold when at the end of the 1500s *rederij* (in the sense of *open rederij*) and general partnerships were sharply separated, which arguably they were not.[108] All in all, many of the abovementioned arguments support van Brakel's intuition that limited liability developed from within the general partnership, by way of contractual

107 Decock, 'In Defense of Commercial Capitalism', p. 67–88; André Lapidus, 'Grotius on Usury: Acknowledging the End of the Scholastic Argument', *The European Journal of the History of Economic Thought*, available at www.tandonline.com (published 27 June 2023).

108 The argument that in the *rederij* the capital was split up in portions, whereas this was not the case in the general partnership, is not very strong. There is little evidence of one or the other.

modifications in the relations between investors and managing partners. In any case, Grotius stood on the sideline of this development, even though legal and historical interpretations later placed him at its center.[109]

5 Conclusion: Consistency and Grotius's Method

The analysis of Grotius's appraisal of the liability of associates and *reders* allows for some assessments of the internal logic of his proposed solutions. The blending of rules for both internal (for example, the shipowners vis-à-vis the shipmaster-agent) and external relations (the shipowners versus parties who negotiated with the shipmaster being agent of the former) was not without its problems. How according to Grotius *reders* had to cope with a peer who abandoned his share when being confronted with a debt that was too high is unclear. One can surmise that in that case the debt accrued to the other *reders* if they agreed to perpetuate their venture of co-ownership (*rederij*).[110] But the abandonment of shares by several associates meant that the size of the debt to be paid by the others increased, and thus in turn the chances that the latter reneged on the obligations of the company became higher as well.

Associates in the *mederederschap* not having a share in the ship itself (such as the abovementioned shipmaster who shared in the profits or an outsider-investor) could limit their liability as well. This is another inconsistency. Grotius interprets the relationship within the *mederederschap* starting from a community of risk idea, which underpins a principle of limited liability, but nonetheless cuts the bond with ship owning. In this regard, it is difficult to see why, in terms of external liability, venturing in a maritime expedition was different from any other association in trade. The analysis above renders it improbable that Grotius had distance between agent and principals in mind. In the Grotian schemes, if the investor had no control over the agent working with his investments, this did not always bring about limited liability. Grotius does not extend the rule of capped liability to trading associations outside the scope of the *actio exercitoria*, for example.

Both of the abovementioned aspects, namely adverse effects of abandonment for the remaining partners, and inconsistency in the scope of limited liability, render it likely that Grotius did not consider them. He

109 See for example David Johnston, 'Limiting Liability: Roman Law and the Civil Law Tradition', *Chicago-Kent Law Review* 70 (1995), 1534–6.

110 Following *Inleidinge* III.21.8: '(…) *vergaet ooc de maetschap: als oock indien iemand van de vennoten alle sijne goederen door misdaed ofte door schulden weerloos is geworden, 't en waer in dezen ghevalle de andere te vreden waren in maetschap te blijven.*'.

conflated the circumstances of silent investors, in *voorcompagnieën* and the VOC, with specific rules of maritime law on the rights of shipowners and abandonment. Most probably he saw similarities between the lack of control by *participanten* and *reders*, and therefore considered them as principals who had to be protected, in the same vein as under the *actio exercitoria*, but did not give this much more thought. On a deeper level, Grotius's blending of *communio* and *societas* should have made him careful when extending rules that were tied to the former onto the latter. For example, how can his rules on notice of resignation of partners be reconciled with the right of abandonment? In *Inleidinge* III.21.8 Grotius states that a partner who withdraws from the partnership cannot do so in a manner that causes harm to the partnership. Exerting a right of abandonment would fit that description. Yet, in a way that is hardly convincing, Grotius added in *Inleidinge* III.21.9, immediately following the rule on cautious resignation, that for *mederederschap* different rules apply.

Moreover, one wonders to what extent Grotius envisaged his rules on capped liability for *reders* as applicable to the VOC. In the *voorcompagnieën* directors could qualify as agents of the investors, and the right of abandonment could serve as means of protection against unduly behaviour of the directors. However, in the VOC, investors did not instruct the chambers, or their directors, in any way. And buyers of VOC shares could not be required to invest extra in case the company was in need. But Grotius may have pushed the idea of similarity with *exercitores* because investors in the VOC could forfeit their shares easily, by selling them. Already shortly after 1602, there was a vibrant secondary market for VOC shares.[111]

One may wonder whether the above demonstrates that Grotius was combining rules because of sensed similarities in scopes and underlying circumstances. However, even though this exercise could come together with instances of brilliance, Grotius did not always reason further, to the extent that all loopholes and inconsistencies were solved. What the above shows is that this was not merely a matter of genre. The goal of the *Inleidinge*, which was intended as a handbook summarizing the principles of Hollandic law, arguably did not allow for extensive legal reasoning. However, there are other examples of combinations, regarding important rules, which resulted in problematic effects. In the *Inleidinge*, Grotius extended the scope of the lien of the unpaid seller on merchandise delivered that has remained unpaid in ways that were incongruent with Hollandic practice. According to the rules of the province, the unpaid seller had priority in the effects of the buyer and a lien on the unpaid goods that had been delivered. Grotius turned this into a

111 Gelderblom and Jonker, 'Completing a Financial Revolution', p. 643.

reivindicatio, which meant that alienations by the buyer to third parties, even when the latter were unaware, could be reversed. The Grotian innovation, and its progressive reception in practice, had disruptive effects, and then triggered municipal governments to pass legislation that curtailed its application.[112]

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112 Dave De ruysscher and Ilya Kotlyar, 'Local Traditions v. Academic Law: Collateral Rights on Movables in Holland (c. 1300-c. 1700)', *Tijdschrift voor Rechtsgeschiedenis* 86 (2018), 365–403.