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A MODERN MANSFIELDIAN JURY: The Global Reinsurance Roundtable on Model Wordings 2006

By
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Introduction

Lord Mansfield famously laid much of the solid foundations of our commercial law, including, of course, the law of insurance and reinsurance. The strength of these foundations is largely attributable to his having done so with the collaboration of his special juries of commercial men, from whom he learned the realities of commercial practice and brought the lex mercatoria into Anglo-American law. No such juries have been seen in our courts and, except for the rare commercial lawyer on the bench, judges gain their knowledge of the field from the narrowly tendentious arguments in an occasional case.

The nearest to such juries today are not found in courts at all but in occasional symposia or panel discussions. One such, the Global Reinsurance Roundtable on Model Wordings, December 2006, would have been highly qualified as a special jury of Lord Mansfield. Although this was an English “jury”, the discussion is relevant in America, where the same wording processes go on, in the same language (approximately) and with many wordings that originated in England.

Reinsurance contracts aren’t written in literary English; nor should they be. When they come to court for interpretation and construction, counsel and court need to be aware of the large reservoir from which they may have been drawn and the consequent possibility, and indeed probability, that even small variations are meaningful rather than accidental. This well-informed symposium on model wordings implicitly involves also standard wordings and institute clauses and also “bespoke” clauses that are none of those. A knowledge of how and why they are formed and used can be invaluable in construing a contract. I ignore here other points of importance in the market discussed in the Roundtable and deal with those expressed or implied that might be useful to consider in the matrix by which we hope to avoid a superficial reading.

Background

The special interest in model wordings has been stimulated by the demand of the Financial Services Authority (FSA)¹ for the development of Contract Certainty in

¹ The FSA describes itself as “an independent non-governmental body, given statutory powers by the Financial Services and Markets Act 2000 … a company limited by guarantee and financed by the financial services industry.”
the insurance industry, of which the FSA’s definition can be fairly summarized as the complete and final agreement of all terms between the insured and insurers before inception and prompt issuance of the policy. It is well-known that in the London market policies with final wordings might not be issued until well after inception, a practice that affects American cedents.² An example closer to home is found in the litigation following 9/11 as to whether there were one or two occurrences under clauses contemplated in insurances of the towers bound but not yet documented in final policies, with mixed results for the insurers.³

The movement for Contract Certainty has led to the Market Reform Programme in London, and the Head of the Programme Office chaired the Roundtable discussed here. Including the Chairman, the “jurors” at the table were nine, representative of managers and legal counsel with concerns for wordings from all corners of the market.⁴ Two of them were from organizations maintaining large archives of model clauses for reference. Several of those present had resort to one or more of the English collections⁵ in the course of business. No judge attended at its conference table so far as I know and, of course, it would be impracticable for our many modern judges to do so. The views exchanged were recorded, however, and distributed by Global Reinsurance for its subscribers and interested others. The quotations below follow the names of the speakers and are not all in order or complete and continuous.

**Model Wordings and their Uses**

The significance of the topic lay somewhat concealed under its brief handle, “Model Wordings”. Of the many wordings held in collections, some are maintained in “current” status and others (probably many more) in “historical” archives.⁶ Most are accessible to those who pay their dues but not generally to the rest of us.

**Some definitions**

“Model” does not mean standard or prescribed or certainly ideal. It transpires that these collections are evidently vast in total, and perhaps individually. “Model” was

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⁴ Andy Brookes, Head, and Steve Hulm, Consultant, Market Reform Programme Office; Kristin van Niekerk, Legal Counsel, Aspen Re; Victoria Price, Legal Counsel, Reinsurance for ACE European Group; Simon Kilgour, Partner, Reynolds Porter Chamberlain (London law firm); Simon Robinson, Head of UO & I, Allianz Global Corporate & Specialty (a large specialist insurer—marine, aviation and others); Paul Hopkin, Technical Director, AIRMIC (an association of professional risk managers); Martin Roberts, Manager Non-Marine, Lloyd’s Market Association; and Barbara Chandler, Head of Operations, Xchanging (a firm providing financial and insurance business processing services).
⁵ Identified as Xchanging’s Model Wordings Library, the Lloyd’s Market Association’s Wordings Repository and The Insurance Workplace.
⁶ E.g., LMA Wordings Repository advertises “Actively managed content”, “in current use … and approved by market-based groups of underwriters and wording technicians” and an archive section for “wordings no longer current”.

used very broadly to refer to clauses that have been used or advanced for use, especially repeatedly, and sometimes but not necessarily recommended.

Miss CHANDLER: “[T]here are some classes of business that are standard and lend themselves to model wording. …[O]ther classes … need to be particularly designed for a client’s business needs, and these may at some point become common use. The definition of a model wording may be a wording that is used by a number of different organizations separately for clients…”

One may conclude that “models” are not very precisely defined, especially as to quality.

“Standard” clauses can be defined as “generally accepted by insurers in a market”, and some are proposed or recommended by market organizations. They are certainly included in model clauses and perhaps are to be distinguished but nevertheless considered for the purpose of interpretation discussed here. “Institute” clauses are standard wordings approved by a market committee, published and treated as “default” clauses, mostly in the marine field, but not compulsory and subject to agreed variations; they are unlikely to be encountered in reinsurance other than marine. In the discussion Mr. Kilgour referred once or twice to “institute clauses” but none are identified; perhaps the reference is to clauses published by the Reinsurance Services Office. Wordings are “bespoke” when they are adopted for consistent use, and perhaps originated, by a party. Some are regarded as secret, although they can hardly be so after use. Miss Chandler pointed out that “[I]nnovation … that starts off in a bespoke wording … can become a model wording over time.”

**Uses and variations**

The discussion concerned the use of model clauses in forming the wordings of contracts of reinsurance and ranged somewhat beyond those contracts to underlying insurance as well, since problems commonly involve the relationships of wordings at the two levels. The discussion is therefore of interest in approaching the construction of a questioned term in both fields.

The evidence of many opinions and other writings is that placements ordinarily result from proposals by cedents, usually through their brokers. Reinsurance is highly varied, not off the shelf at published rates, and is therefore negotiated. It starts, however, with what the cedent asks for, and we may assume that the cedent, and the assiduous broker, anxious to buy the best package for the cedent’s wants, may make a skillful choice of wordings, looking forward to the possible range of risk. According to Mr. Kilgour,”The broker’s job is to get the best coverage for his client at the best price and that creates tension …” Here, of course, is where the choice of wordings enters into the proposal. In the process

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7 See Witherby’s Dictionary of Insurance 290 (3rd ed. 1997)
8 E.g., the Reinsurance Services Office in England and the Brokers and Reinsurance Markets Association and the Insurance Services Office (ISO) in the United States.
9 See Witherby’s, *supra* note 7, 159.
of negotiation, however, an underwriter (perhaps with the advice of a wording specialist) may add or substitute words he prefers. Indeed, the indications are that underwriters who used to focus on price to the neglect of coverage are looking more closely at coverage and pricing its variants.

Evidently model clauses may be chosen in whole or part or with modification, and in combinations of parts, and more than probably elements from those no longer "current" may also be included in framing a proposal. There are many to choose from.

Mr. KILGOUR: [T]here are over 60 different war and terrorism exclusions so which one is your model clause? …[F]or reinsurance treaties …there are 21 different variables for the limits provisions. Some of these variables are important. It is down to the underwriters who are on the front line to be satisfied which clauses they regard as their model form.

Mr. BROOKES: Martin [Roberts], do you recommend any one of those 60 to your membership?
Mr. ROBERTS: We do not even recommend our own [LMA] clauses!

Mr. ROBERTS: There are certain clauses that have established themselves in reinsurance. We published a special termination clause—the LMA5001—two years ago which has established itself … as a default clause and there are variants of that. However, there are no front-to-back wordings or policy forms in reinsurance.

Mr. ROBINSON: [I]f you have a relatively common base for your model to start with, it actually allows measurement and analysis of that deviation. It highlights if there is a need your models do not address and allows you to do something special for that particular contract … [which is preferable to] the cutting and pasting and drafting of different clauses into a wording which does not stretch the mind."

Miss PRICE: From a lawyer’s point of view, you can see when a policy has been put together from a building blocks [cut-and-paste] basis. It does not necessarily fit together and so there are more disputes than when a model has been tailored to your needs.
Mr. BROOKES: [P]erhaps the first [tip] would be: “Beware of mindless cutting and pasting.”
Miss VAN NIEKIRK: However it keeps some of us [lawyers] in business!

Mr. KILGOUR: Yes, we spend a lot of time looking at the variables. Certainly at the treaty reinsurance level, a lot of these contracts are very similar, but they are different. The trick is not necessarily identifying what is an institute clause, but identifying the institute clause where it changes slightly. … it is difficult to identify that …variable so the question is: how dangerous is [it]? Does it produce fantastically broad coverage for the cedent that the insurer did not realize it was giving and did not price for and is there unnecessary legal risk?
Experts

I have mentioned above the existence of wordings experts by underwriters, evidently a growing practice, reflecting more interest on their part in questions of wording and coverage in relation to price.

Mr. KILGOUR: I think some of our insurer clients are now more interested in trying to price legal risk in contracts [and] would be willing to agree more generous clauses on the basis that they were receiving more money because there is inherently more risk [e.g., in agreeing to an unfamiliar law].

Miss CHANDLER: One [issue] is the role of the wordings expert in producing these wordings in all organizations... [W]e are at risk of losing some very good experience in this market by going down the model wording route. This creates an expectation that you can take something off the shelf, cut and paste your clauses, and have a wording, because you have used a model wording. ... A lot of wording teams are at the front of the process rather than being the afterthought in the back office, but we need to ... make sure that we have fresh blood coming in so we can build that knowledge and experience base going forward.

Mr. ROBERTS: Yes, the MLA ... established a group called the Wordings Forum four years ago. If I wanted to see any of the members of that forum, I would have to phone them up in their offices. Now I can see half of them if I walk through the room because they sit alongside the underwriters.

Mr. ROBINSON: Ultimately there is a career path for a broker and for an underwriter and there should be one for a wordings expert...

Pro and con

The promise of model wordings for greater uniformity is countered by reservations about quality, illusiveness when slightly altered, and competition.

Miss PRICE: I would have thought that if the whole market is using the same model wording then there is no cutting edge from the seller’s point of view; no one has an edge over anyone else.

Mr. KILGOUR: [W]e are in a better position than we were before the contract certainty initiatives. ... However, contract certainty does not equal contract quality. ... [A]re people taking false comfort in the new environment where, despite what we have said, there is no standardisation in model wordings? As Victoria [Price] mentioned, people do not all want to sell the same product because there is no differentiation. If the brokers try to get the best job for their client by dangerous bespoking—not making some of the amendments clear—that could lead to controversy. If people are not interested in coverage, they may continue to regard coverage disputes as [no more than] a transactional risk. Preventing unnecessary coverage disputes seems important to us as lawyers ...However, you really have to ask the practitioners of the market what sort of market they want to operate in. You need to ask if they think eliminating unnecessary coverage disputes is a good thing.
Mr. BROOKES: I think Simon [Kilgour] was saying that we have not [got the right amount of transactional risk] and that we should be reducing the frictional cost.

Miss PRICE: [I]t seems quite dangerous to use a repository when the clauses do not have health warnings. …[Y]ou might pick one from the library but will not necessarily know the problems associated with that.

Mr. KILGOUR: To give you one example … if you insert the two words “sole judge” into a standard clause, they effectively create a very big discretion on the part of the cedant … If you put those words into an institute clause—for instance a “follow the settlements” clause—it would have a huge legal impact. If an underwriter does not know that and does not check for it, and agrees the institute clause as amended with those words in it, it makes a huge difference … If a broker is doing his job properly, he might be wanting to put lots of spices like that into the wording, and while those variations might only constitute one or two percent of the overall menu, if they are not identifiable they could create controversy. …[M]ost people do not expect to pay a Skoda price for a Mercedes, but the question is whether people are willing to make these additional exposures visible and to pay money for them. If they are not visible, and the name of the game is that they hope no one will spot it, then that is a different sport.

Mr. BROOKES: [T]here seems to be a tension here between saying, “we would like people to use a smaller number of wordings so we can refer to them”, and the actual market reality that firms will bespoke these. In your car analogy, they will “Pimp My Ride”. Are the insurers pimping their rides?

**Realization in the construction of contract terms**

Both in England and here commercial contracts are expected to be interpreted and construed in a substantive rather than formal way.

In a commercial contract it is certainly right that the Court should know the commercial purpose of the contract and this, in turn, presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating … What the Court must do must be to place itself in thought in the same factual matrix as that in which the parties were.\(^{10}\)

\[T\]he trial court [should] consider evidence which includes testimony as to the circumstances surrounding the making of the agreement including the object, nature and subject matter of the writing so that the court can place itself in the same situation in which the parties found themselves at the time of contracting.\(^{11}\)

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It must be obvious that such evidence includes the selection of model or standard wordings and variations introduced in them and such evidence as may be found of the motivations for the choices and changes.

That is not to say the process should be repeated every time a clause appears in litigation. When a wording appears repeatedly in contracts of the same class, e.g., reinsurance, marine, etc., the starting position will properly be that it means the same as it has meant before. “The meaning of such provisions is not an issue of fact to be litigated anew each time a dispute goes to court….12

Assumptions that slightly different wordings have the same meaning, however, are dangerous and in some instances presumptively wrong, as when the question is whether the reinsurance coverage and limits are congruent with the underlying policy. This was convincingly demonstrated by Lord Mustill for a unanimous court in explaining why the lower courts were wrong in thinking congruity was probably intended and a reinsurance aggregating losses by events meant the same as a policy aggregating by originating cause. Congruity is easily achieved by using the same words; a cedent might probably propose them and a reinsurance underwriter may plausibly have reason to prefer others.13

There may a place for an archaeologist in this field. I recall I was once asked to advise on some points of the insurance coverage of the loss of an offshore platform. One of them concerned a clause affecting quantum that was obscure, if not ambiguous, as to whether it applied to partial or total loss. Where had the brokers found it? Not in one of the present libraries of model wordings, but probably in some unpublished private archive. If they had been asked, I suppose they didn’t remember. Brokers of our acquaintance had never seen it. We found it quoted in a 1920 opinion in Massachusetts.14 It was a rider to a Massachusetts standard fire policy evidently added pursuant to statutory authority to avoid a certain earlier decision in a case of partial loss, and it was carefully analyzed by the Supreme Judicial Court to apply to partial loss only. While not determinative, that was a discovery of more than passing interest.

It is tempting to think how helpful it would be if the reinsurance market developed institute clauses as in the marine market, where interpretations tend to become well-established and variations are fairly easy to spot. But comparison of the markets is illusory because the forms and substances of reinsurance are far more numerous, almost infinite, reflecting the financial needs, risks and business practices of all types of insurance. It could be done, however, and probably is done in fact in the most commonly repeated contracts, although not formalized by name and institutional cachet.

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Conclusion

When wording’s unfamiliar
And loss or gain obscured,
Why not try
To find out where it came from,
By whom and how procured,
And why?