Some Questions About Interpretation, Ecto-Ambiguity, Tradition, And Conflicts Of Law And Fact

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Introduction

A reinsurance case heard in New York under Ohio law a few years ago highlighted two novel devices in contract law and prompts some provocative questions about foreign contract interpretation as conflict of foreign law and when if ever facts are law.

The insured had been sued by workers charging injurious exposure to metalworking fluids used in its machine shops. Uncertain about the application of its pollution exclusion, the general liability insurer paid settlements of the claims. The reinsurer declined payment on the strength of its pollution exclusion, probably the broadest imaginable, and was sued here by the reinsured. In a final decision, the district court granted the reinsured summary judgment, under Ohio law, by the application of what it called the “following fortunes” doctrine. In this it followed an Ohio precedent and neglected to refer to or require a following settlements clause. This confusion of doctrine with clause and fortunes with settlements is not our subject here, as it is by no means novel and I have thoroughly canvassed it elsewhere.

The case had been effectively decided earlier in an opinion denying summary judgment to the reinsurer. In the motion leading to the earlier decision, the reinsurer contended unsuccessfully that the breadth of its exclusion clause must embrace the claims. The clause comprehended “contamination of any environment by pollutants that are introduced at any time, anywhere, in any way” and “[a]ny bodily injury, [or] personal injury … arising out of such contamination”. “Contamination”, “environment” and “pollutants” were each defined very inclusively. The court decided that the exclusion was too broad and not sufficiently specific to apply to the facts.

In deciding here that the greater should not include the lesser, the court cited as evidence of the governing law a decision of the Ohio Supreme Court holding a broad pollution exclusion in a direct policy inapplicable to inhalation of carbon monoxide under a standard of specificity in exclusionary clauses. The Ohio court had said that pollution exclusion clauses had been used historically to avoid the “enormous expense and exposure resulting from the ‘explosion’ of environmental litigation,” and that the exclusion should not be applied to situations that “do not remotely resemble traditional environmental contamination.” The New York court in turn


4. Id. at 209.
declared that the underlying lawsuits “were not a result of traditional environmental pollution”,
citing an affidavit apparently of an employee of the reinsured.\(^5\) Then, based on the purported
purpose of the exclusion stated in the Ohio case, the expectation of coverage of the reinsured was
declared reasonable, “[b]ased on the traditional understanding of pollution exclusions.”\(^7\) The
court declared the clause ambiguous because of its generality, and explained the ambiguity this way:

> Ambiguity is created because the pollution exclusion could reasonably be understood by
National Union in two different ways: First, in the traditional understanding that pollution
exclusion clauses only exclude coverage for traditional environmental pollution; (citation
to Ohio decision quoted above omitted) and second, in a literal, but broader,
understanding that would exclude coverage for any range of injuries or damages.\(^8\)

The court’s conclusion was reached by raising notions of tradition to a new and unfounded legal
significance, extending the concept of contractual ambiguity beyond the contract, and treating as
a conclusion of governing law a foreign court’s finding of the fact of intent of the parties before it
by the process of legal construction. The concern here is not with the result but with the devices
used in reaching it under the Ohio precedent.

### Presupposition As A Source Of Ambiguity

Ambiguity is normally considered in law to be the uncertainty of meaning of an expression in a
written instrument.\(^9\) It is well defined in the Second Circuit (quoting from earlier decisions) as:

> [a] word or phrase … capable of more than a single meaning “when viewed objectively
by a reasonably intelligent person who has examined the context of the entire integrated
agreement and who is cognizant of the customs, practices, usages and terminology as
generally understood in the particular trade or business\(^10\).

This definition is found and repeated in the reinsurance contract cases cited and stated to be the
same as in contract law generally. References by some counsel and courts to an initial uncertainty
as an “ambiguity” is premature. The process of determining whether there is ambiguity is
inherent in the definition. The ambiguity clearly must be found in the agreement itself, and only

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\(^{5}\) Anderson, Admr. v. Highland House Company \textit{et al.}, 93 Ohio St.3d 547,551-52, 757 N.E.2d 329, 334
(2001) (internal quotations omitted).

\(^{6}\) National Union, \textit{supra} note 3, at 211.

\(^{7}\) \textit{Id.}

\(^{8}\) \textit{Id.}

\(^{9}\) I do not refer to latent ambiguity, which depends on an extrinsic fact, most commonly trade usage, as
in the classic instance of white selvage being black; see Mitchell v. Henry, 15 Ch. Div. 181 (1880).

\(^{10}\) U.S. Fire Ins. Co. v. General Reinsurance Corp., 949 F.2d 569, 572 (2nd Cir. 1991); British Int'l Ins.
Co. v. Seguros La Republica, S.A., 342 F.3d 78, 82 (2nd Cir. 2003) (alleged industry custom to pay
expenses not provided in contract); American Home Assurance Co. v. Hapag Lloyd Container Linie,
GMBH, 446 F.3d 313, 316, 2006 AMC 1239, 1241 (2nd Cir. 2006); Lightfoot v. Union Carbide Corp.,
110 F.3d 898, 906 (2nd Cir. 1997) (“any and all inventions created by him”); Nowak v. Ironworkers
Local 6 Pension Fund, 81 F.3d 1182, 1192 (2nd Cir. 1996) (all quoting earlier opinions).
after full examination of the agreement and its context according to the ordinary rules of interpretation fails to resolve the meaning intended.  

“After interpretation has called to its help all those facts which make up the setting in which the words are used … the words themselves remain the most important index of intention…”

Express terms are to be preferred over even course of performance and usage of trade. Even authentic parole evidence cannot be admitted until it is found that the plain words of the contract cannot be understood. And even then extrinsic evidence may be received to resolve ambiguity only if “not inconsistent with the terms of the written integration.” Clearly the law does not recognize ambiguity from a party’s “subjective perception of [the] terms.” Nor can it be created by an asserted tradition, which would lie outside the contract, with no intrinsic force, and could not override its express terms.

**Query:** If “any environment… any time, anywhere, in any way” will permit exceptions, what words might be adequate?

**Tradition As A Legal Norm**

“Tradition” is used ordinarily, and used here, as a description of repeated practice. Repeated practice is known to be significant in the law in three ways, as customary law, as industry practice and trade usage, or as personal practice indicating ability or inclination. Only the first two are relevant here; was tradition meant to refer to one of them? Certainly not customary law; there was not only no evidence cited, but not the slightest plausibility, of there being a compulsory practice from time immemorial with respect to pollution exclusions. Usage fails also, because there was no evidence, or any source of it, cited for practice or understanding in the insurance industry as to the content or meaning of the clause in question, “so well settled, so uniformly acted upon, and so long continued as to raise a fair presumption that it was known to both contracting parties and that they contracted in reference thereto”. Moreover, usage has no effect contrary to words actually used in the contract. The traditions referred to must then refer to what we ordinarily understand by that word, distinct from, and much less than, custom or usage. Custom binds a people or nation with the force of law, and “has virtually no conceivable application in garden-
variety commercial contracts, including reinsurance”. Usage binds a trade or business in a limited market or community, and is a fact that must be proved by qualified persons. How is tradition proved and does it bind anybody? Let us see.

Tradition as a norm is perplexing and unlikely ever to be otherwise. While the word refers to practice, it does not connote the uniform acceptance or compulsion of trade usage or customary law, or the required longevity of the one or antiquity of the other. Tradition is a portmanteau word, with many and various sociological uses, ranging from undocumented history and old sayings to family holiday dinners, that has almost no recognition in law. It lies in the realm of emotions, village life, marriage and livelihood choices, of cherished thoughts of ancestry and culture. Only one of the two major legal encyclopedias attempts to define it, and then only to make clear that it has no evidentiary significance beyond possibly family practices and historical facts.

There doesn’t appear to be much literature about the nature of tradition. We find one book that records “traditions” invented for political or social purposes. The editors and authors were concerned mainly with political and anthropological traditions but a passage from the introductory chapter describing this oxymoron exposes the malleability of the word “tradition” and indefinitude of its content:


22. See, e.g., British Int’l Ins. Co, supra note 10, at 84 (testimony inadequate to establish usage absent ability to say always and invariably done); American Guaranty Co. v American Fidelity Co., 260 F. 897, 899 (6th Cir. 1919), cert. denied, 251 U.S. 559 (1920) (must be “established by clear and satisfactory evidence”); see generally Hoffman, supra note 20, at 33-37.

23. Hear Traditions sung by Tevye and his family in Fiddler on the Roof:
   Who, day and night, must scramble for a living,
   Feed a wife and children, say his daily prayers? …
   The Papa, the Papa! Tradition….
   Who must raise the family and run the home,
   So Papa's free to read the holy books?
   The Mama, the Mama! Tradition! …
   At three, I started Hebrew school. At ten, I learned a trade.
   I hear they've picked a bride for me. I hope she's pretty.
   The son, the son! Tradition!
   And who does Mama teach to mend and tend and fix,
   Preparing me to marry whoever Papa picks?
   The daughter, the daughter! Tradition!

24. See C.J.S. Evidence § 284 (not sufficiently probative to warrant inference of truth, with limited exceptions).

25. ERIC HOBSBAWN & TERENCE RANGER (EDS.) THE INVENTION OF TRADITION (Cambridge 1992), see esp. ch. 2 by Hugh Trevor Roper, The Highland Tradition of Scotland, describing the manipulation of dress by “literary ghosts, forged texts and falsified history” (p. 41).
“Invented tradition” is taken to mean a set of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behaviour by repetition, which automatically implies continuity with the past. In fact, where possible, they normally attempt to establish continuity with a suitable historic past.... However, insofar as there is such reference to a historic past, the peculiarity of ‘invented’ traditions is that the continuity with it is largely fictitious. In short, they are responses to novel situations which take the form of reference to old situations, or which establish their own past by quasi-obligatory repetition.26

Familiar ones include Fathers Day and others created for the sale of cards and gifts. Perhaps the newest is the parodic Talk Like a Pirate Day (Sept. 19) launched in 1995.27

Thus a “tradition” may be no older than last year. Where did this one start? The invention of “traditional environmental pollution” can be traced through the Ohio Supreme Court’s citation to an opinion in Illinois on the escape of carbon monoxide from a broken furnace, where in context “traditional” means nothing more than “with which we are acquainted”. From “traditional environmental pollution” it appears to have metastasized to “traditional understanding” as those terms were finally joined in the court’s finding of ambiguity.

Queries:
With whom is environmental pollution traditional?
Will anyone lay claim to this tradition?
How much time and distance from the source would satisfy tradition--pollution of the plant yard?--exhaust of toxic gas to an outside work area?
Are these distinctions sensible?

Law And Fact

Probably no one supposes a contract between private parties, or any of its clauses, to be a law. The contract is therefore a fact and the words of it are no more than facts. An ambiguity arises from an apparent contrariety of words, for the resolution of which the law prescribes a process to settle the facts of the relationship of the parties. But nothing in that process purports to turn the facts found into law, that is to say, a regime affecting anyone beyond the parties. (I do not refer here to standard clauses the meanings of which may come to be regarded as usages.)

Queries:
Does one’s intent cease to be fact when discovered by a legal process of construction?
When even usage is no more than fact, can tradition be law?
Should a finding of tradition, or of intent based on interpretation, be a precedent governing a contract of other parties?
Should such findings be treated as state law under conflict rules?

Conclusion

I do not attempt to answer these questions by citing grammarians on or off the bench. Lord Coke attributes to Aristotle an aphorism of ageless experience that he translates: “Stultum est absurdas

26. Id. at 1.
27. See Wikipedia, International Talk Like a Pirate Day.
opiniones accuratius refellere," and I would render: “It is folly to refute absurd opinions with nice details.”