

## Lord Mance gives keynote speech to Association internationale de Droit des Assurances, Copenhagen

In the beginning is the market, in the end it is the law

12 June 2015

1. I must start by questioning your conference's title, at least if read chronologically. The law should of course be a last resort. That is true of all business and personal relations. But, if you are going to avoid legal problems, the right thing is to begin with some law and to have it in mind when you place or underwrite business.
2. In reality, insurance and the law are inextricably linked at all points. Insurance is not like making cars or widgets. It depends on agreements and wordings for its force and effect, and agreements and wordings depend on the law for their force and effect. That is why great insurers of the past, like Dr Klaus Gerathewohl of the Munich Re or, a personal friend, Dr Edward Gumbel of Willis have also been lawyers. My father was also an insurer, ultimately chairman of Lloyd's. Appreciating the value of law, he started a law course during the war years, but ultimately focused on economics. Law, I remember him saying, made him feel sleepy. I have sometimes wondered if I took up law to finish something that he did not complete.
3. You will gather that I see the law and insurance as symbiotic. Each should inspire the other. History bears this out. Insurance as practised by the Babylonians was recorded in the Code of Hammurabi - dating from 1750 BC and safely preserved in the Louvre. The code's provision for insurance is more appealing than other provisions such as "an eye for an eye, and a tooth for a tooth". More so, also, I would say, than its provision that "a judge who reaches an incorrect decision is to be fined and removed from the bench permanently".
4. I do however readily concede that insurance was developed by the enterprise and ingenuity of merchants and their financiers, not by lawyers. The early British merchants who met in Lloyd's coffee house from about 1688 had to wait nearly 80 years before Lord Mansfield encapsulated in his famous judgment in *Carter v Boehm* in 1766 the fundamental principle of good faith. Before Lord Mansfield, said Mr Justice Park in 1787 in the Introduction to his

famous study of Marine Insurance, it was “almost impossible to determine from the reports upon what grounds [a] case was decided”.

5. So incomplete was the law that in the hard-fought case of *Fitzgerald v Pole*, decided in 1754, two years before Mansfield became Chief Justice, the House of Lords gave no reasons when dismissing an action in three lines. But, within 15 years, Blackstone could note that “the learning relating to marine insurance hath of late years been greatly improved by a series of judicial decisions which have now established the law in such a variety of cases that (if well and judiciously collected) they would form a very complete title in a code of commercial jurisprudence”. A code of marine insurance was not in fact achieved in the United Kingdom for another 125 years, until the Marine Insurance Act 1906, which has in turn taught us that codification can have both good and problematic elements.
6. Lord Mansfield’s weaving together of legal analysis and principle with the commercial understanding which he gained from experts and his close connections with the City is a model for all of us. But insurance practice and the law have not always stayed as closely in touch as they did in his time or should do. I take three examples. First, for a very long period until the mid-1970s, reinsurance in particular was conducted out of sight of the law. I remember the surprise then with which lawyers began to see reinsurance disputes involving allegations of non-disclosure coming to court. Soon however it became apparent that all was not well in all parts of the market, and that there were practices, including I remember in one case the underwriting of a slip in a bedroom, which merited both publicity and condemnation. Second, in other areas, the Marine Insurance Act, despite the skill of its draftsman, Sir Mackenzie Chalmers, proved to operate as somewhat of a fetter on the sound development of the law in accordance with generally accepted practice and public expectations.
7. Thirdly, many insurance and reinsurance disputes were and still are conducted behind closed doors before arbitration tribunals. Points of great importance may be decided by such tribunals in awards which are in principle confidential to the parties, without the market being able to regard them as in any way settled. In the early 1990s, I was counsel in *Home & Overseas Insurance Co v Mentor Insurance Co (UK) Ltd*, where an award was made on the vital words “actually paid” in the ultimate net loss clause in an excess of loss reinsurance. Although some publicity was given to the result, it was some years before the meaning of these words was authoritatively clarified by the House of Lords in *Charter Reinsurance Co Ltd v*

*Fagan* [1997] AC 313. Arbitration awards have become even less likely to be scrutinised in court or publicly known since the Arbitration Act 1996.

8. In what follows, I shall look briefly at each of these three topics, insurance litigation, the relationship between judge-made and statute law and arbitration. Taking the first, although the courts may not have investigated or provided authority on all the more exotic types of insurance and reinsurance in the market, it is I think fair to say that since the 1970s there has been a considerable volume of insurance and reinsurance litigation before British courts. When such litigation has come before them, British courts have, I believe, sought to resolve it in the spirit of Lord Mansfield. It is particularly important that they should do so in matters of interpretation, where parties often argue that words are so clear that they can only have one meaning, whatever the consequences.
9. In response to such a submission, Lord Bingham said, in *Arbuthnot v Fagan* (30 July 1993), in words which I later cited in *Charter Re v Fagan* (at p.323G-H), that construction should be seen as “a composite exercise, neither uncompromisingly literal nor unswervingly purposive”. In recent years, we have carried the significance of commercial considerations even further, holding in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 that commercial considerations are always relevant, and, if there are two possible constructions, the court will prefer the construction which makes better business sense – and, I stress, taking into account the viewpoints in this connection of both insured and insurer. Like many of the law’s analytical tools, including the reasonable man or the famous man on the Clapham Omnibus, this apparently objective approach carries the risk that the judge may simply be giving effect to his or her own subjective impressions of the merits. But that is why it so important to assimilate Lord Mansfield’s appreciation of the commercial communities’ needs and aims. That is why associations like yours and in the UK the British Insurance Law Association fulfil a crucial role in bringing together lawyers, brokers, insurers and others interested in insurance.
10. Let me take one particular area, where courts have sought to achieve sensible results in difficult contexts. In *Forsikringsaktieselskabet Vesta v Butcher* [1989] AC 852 and *Groupama v Catatumbo CA Seguros* [2000] 2 Ll. R 350, courts were faced with identical warranties in an original insurance and its reinsurance, which however were subject to different governing laws, which in the case of the insurance made breach of the warranty irrelevant unless it was causative, but in the case of the reinsurance would have treated the reinsurer as discharged

whether or not the breach was causative. The courts avoided the obvious disconformity, by reliance on the principle that the reinsurance should, as far as possible, be treated as back-to-back with the insurance, so that the warranty should in this reinsurance carry the same “special dictionary” meaning as it did in the insurance. But how far does such policy based reasoning go? This is a difficult question, confronted in *Wasa International Ltd v Lexington Insurance Co Ltd* [2010] UKHL 40, [2010] 1 AC 180, where the Supreme Court of Washington had decided to apply Pennsylvanian law to all policies taken out by Alcoa regardless of their particular circumstances, terms or actual governing law, with the result that the particular policy which came before us was held to cover losses outside its period in circumstances which had no warrant in its terms, construed according to its actual governing law. There was obviously no special dictionary meaning to that effect which could be carried through into the reinsurance, and so the House of Lords held that the reinsurance could not be read back-to-back with this, to British eyes at any rate, somewhat extravagant Washington approach.

11. Where it appears necessary however courts can go a long way in reshaping well established approaches in order to achieve a result which is back-to-back. In both the USA and in the UK, exposure to asbestos has proved a catastrophe, primarily of course for those who have suffered the terrible diseases, such as asbestosis, but above all mesothelioma, to which it gives rise. The aetiology of such diseases is imperfectly understood, and it is, in particular, scientifically impossible to attribute the occurrence of mesothelioma as a matter of probability to any particular exposure, but a single or limited exposure may well be all that is necessary. Yet a sufferer, typically a worker, may have been exposed by a considerable number of sources, typically different employers.
12. Eventually, the bold common law decision was taken in *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 to hold all sources who had negligently exposed a sufferer liable, and Parliament decided in the Compensation Act 2006 that such liability should be in full, with the various sources of risk able to seek contribution among themselves. How were insurances to respond? The search for the *causa proxima* or dominant or effective cause is an article of faith in insurance law, but here none could be proved. All that could be shown was a risk that the mesothelioma might have been triggered by any one of the exposures. In *Durham v BAI (Run Off) Ltd* [2012] 1 WLR 867 (the “Trigger” litigation), the Supreme Court held that traditional notions of causation must be put aside under any relevant insurance, just

as they had been in tort in the litigation against employers. Insurers thus became liable for the risk that their insured had in a conventional sense caused the loss, not because their insured could show that they had actually done so.

13. In *International Energy Group Ltd v Zurich Insurance Plc* [2015] UKSC 33, the Supreme Court had to consider the implications in a case where one employer only had insurance cover with the Zurich for six out of 27 years throughout which the employer had negligently exposed Mr Carré, the victim of mesothelioma, to asbestos. Could IEGL recover the whole of its liability towards Mr Carré from Zurich? By a narrow majority, the Supreme Court held, yes, but subject to a right on the part of Zurich to claw back a percentage from any other surviving insurer of IEGL or, failing any, from IEGL itself. If IEGL had been insolvent, that solution might enable Mr Carré to recover in full from Zurich, leaving Zurich to carry the risk of IEGL's insolvency. The minority would have adopted a different solution, limiting IEGL's right to indemnity by Zurich at the outset to a proportion (6/27ths) of its liability towards Mr Carré. The minority criticised the majority's approach as policy-driven.
14. That policy has an important role in the development of the law can hardly be denied. The common law of both tort and contract is largely judge-based. In each case it is based on general judicial conceptions about when it is right that one person should bear responsibility for loss caused to another. The law of contract is founded on a belief in the value of autonomous decision-making, but that is in turn qualified by protective principles such as misrepresentation or, in insurance law, non-disclosure, undue influence, mistake, illegality, etc. The minority criticism of *IEGL v Zurich* was that it construed the insurance in a way which protected victims but did so in disregard of the insurance period. The majority justification was that its conclusions followed ineluctably from the prior decisions in *Fairchild* and *Trigger*.
15. Whatever the rights or wrongs of this particular issue, courts have to accept that certain decisions are best made by legislatures. When this is so may be a matter of philosophy. A number of voices have recently expressed the view that the courts would have better off never to have embarked on the development started by *Fairchild*, but to have left Parliament to intervene. But there is much to be said for cautious case-by-case development of the law. That is how the law developed to the stage when it could be codified in the Marine Insurance Act 1906. Unfortunately, legislative intervention can bring rigidity, especially when the law

takes the usual detailed British form. As is well known, the 1906 Act codified the duty of good faith, the right of avoidance for its breach, the principle of discharge by breach of warranty in sweeping terms. The Act was moreover treated as a template for non-marine as well as marine insurance. For years this led to criticism that English insurance and reinsurance law were unduly favourable to insurers. Insurers could pick and choose when to run one of the available defences, and could, for example, run a somewhat technical defence of non-disclosure, when they really suspected but could not prove fraud. That made insurers judge in their own cause. The position came to be modified in practice in a consumer context by statements of insurance practice, latterly formalised under the aegis of regulatory authorities. Finally, the law was changed formally, first by the Consumer Insurance (Disclosure and Representations) Act 2012 and now, with effect from August 2016, by the Insurance Act 2015.

16. This is not the place to attempt a detailed study of these two Acts. They must be read together. As its title discloses, the 2012 Act deals only with the presentation of risks under consumer insurance contracts. Part 2 of the 2015 Act completes the picture regarding presentation of risks by addressing non-consumer insurance contracts. But the 2015 Act goes on in Part 3 to reshape the whole law governing warranties, in Part 4 to state the general principles applicable to fraudulent claims, in Part 5 to abrogate the right to void on the ground of breach of good faith and to restrict the right to contract out of the protections provided by both the 2012 and 2015 Acts and in Part 6 to put some final amending touches to another reforming Act, the Third Party (Rights against Insurers) Act 2010, which will improve the position of third parties with claims against insolvent insureds.
  
17. The distinction between consumer and other insurance contracts is therefore important. Consumers owe no more than a duty to take reasonable care not to make a misrepresentation, though failure to confirm or amend previously given particulars can amount to a misrepresentation. Assuming that a misrepresentation is careless, rather than deliberate or reckless, the insurers' rights are tailored according to whether the insurer would have declined the risk altogether (in which case the insurer is released), or required different terms (in which case those terms are treated as applying) or a higher premium (in which case the insurer must pay pro rata). In non-consumer contracts, on the other hand, there remains a general duty of fair presentation of every material circumstance of which the insured knows

or ought to know, or failing that of information sufficient to put the insurer on notice that it needs to make further enquiries.

18. Where I think the 2015 Act may give rise to some interesting questions is in relation to what an insured knows, which is defined to include what is known to any individual part of its senior management or responsible for its insurance. This illustrates the slight danger of legislation in crystallising notions. Since the Act was drafted, the Supreme Court has commented on the context-specific nature of any rule of attribution of knowledge: *Jetivia SA v Biltta (UK) Ltd* [2015] UKSC 23. Care may need to be taken to avoid reading the reference to “senior management” in a formulaic way, e.g. as a reference to the company’s board or chief executives. There is also a, to my mind rather surprising, provision, according to which an agent responsible for the insured’s insurance is not taken to know “confidential” information acquired through a business relationship with a person not connected with the contract of insurance. Does this really mean that such a person can continue to act and place a valid insurance for his principal without disclosing to anyone the critical knowledge which he has, without the insurer having, so far as appears, any recourse against anyone?
19. More importantly, the Act appears to omit a third well-recognised category of agent whose knowledge has traditionally been treated as that of the insured, namely an agent responsible for managing the property or activity which is the subject-matter of the insurance. Instead, it is provided that “an insured ought to know what should reasonably be revealed by a reasonable search of information available to the insured (whether the search is conducted by making enquiries or by any other means)”. This gives rise to two problems. One is that a requirement to make a reasonable search or to make enquiries is sensible, if you do not expect already to have information. In the case of an agent managing the insured property or activity, you expect him to tell you without being asked. Does that mean that it is reasonable not to ask, so that the insurer will be on risk if you do not? Or is every employer to be regarded as acting unreasonably if he does not ask every manager before every insurance whether the manager knows something new and relevant to the insurance? The other problem is to know what “ought reasonably to have been revealed”. What if the manager of the insured property or activity fails to answer fully or accurately? Is the insured then in breach of the duty of fair presentation? What if an inaccurate reply is given by a third party who is asked for information (for example, a recently retired manager, or an independent consultant who has given the company specialist advice from time to time)? I have no doubt

that the courts will work out sensible answers, but, as with any new statutory scheme, there will be a teething period.

20. As to warranties, the 2015 Act abolishes the rule that breach results in automatic and irremediable discharge of an insurer's liability. It substitutes, first, a rule discharging the insurer only in respect of losses occurring, or attributable to something happening, after the breach, but before it has been remedied, and, second, a rule entitling an insured to recover even in respect of such a loss, if it can show that the non-compliance with the warranty (or any similar term) "could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred". No doubt this also gives scope for disputes, but it is generally welcome.
  
21. One thing omitted from the Act is the topic which was the subject of the paper to which you gave a prize yesterday – damages for late payment. Damages are not currently payable. This is technically because under English law an insurance claim is a claim for damages, and there is no right to damages for non-payment of damages (a rule which we declined to change in *Wasa v Lexington*). But a more substantive consideration is that any damages would often be too unforeseeable or remote, and interest is regarded as all that can and should be awarded. The Law Commission recommended that damages should be payable upon showing that an insurer had delayed payment beyond a reasonable time "without reasonable grounds for disputing the claim". To my mind, Parliament was right to reject this proposal:
  - a. It would change the nature of an insurance contract and of the disputes likely to arise out of it.
  - b. It could become common to add a complaint that the insurer had delayed unreasonably.
  - c. The insurer could then have the effective onus of disclosing what was motivating it behind the scenes, including perhaps information about suspected fraud still under investigation and might face a choice between giving no information and having to waive privilege as to legal advice and ongoing investigations.
  - d. More fundamentally, it would risk turning property and liability insurance claims into business interruption claims – claims for amounts defined by the insured's loss or settlements into open-ended damages claims, raising all sorts of issues of fact, foreseeability and remoteness.



22. The present law is, as I have said, that interest can be and is awarded, e.g. at 1% or 2% above base rate, from a date when the claim would in the ordinary course have been expected to be paid. This avoids enquiry whether the insurer delayed unreasonably, but of course it applies only when a matter comes to court. An insured can however always put pressure on an insurer who refuses to pay interest in a pre-litigation settlement by threatening to start court proceedings. Maybe the position of an insured could and should be further improved by recognising a positive right to interest in relation to any claim, settlement of which was, however reasonably, delayed beyond a minimum period. Assuming that an insured loss has occurred, the fact that the insured has not been paid while the insurer has the money, could in principle justify such interest being recoverable on a compound basis: see by analogy *Sempre Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34. There the House of Lords recognised a restitutionary right to compound interest, where one party had wrongly received and held money during a period when it should not have had it. To apply this by analogy to insurance, we would have, however, to abandon our traditional but arguably anachronistic insistence that insurance claims sound in damages, and focus simply on the benefit to the insurer of retaining the insurance monies from the date of the insured event to the date of payment of the claim. However reasonable the investigation of the claim or the period taken in investigation, this is a benefit which no insurer has any right to expect will accrue to it in any particular case, even if insurers may (at present) factor it overall into their accounting and premium calculations.
23. Finally, let me touch on insurance and reinsurance arbitration. All judges see themselves of course as future arbitrators, and in that context understand why commercial parties wish to conduct their affairs in private, avoid appeals and believe that there are advantages in being able to choose their arbitrators – not or not necessarily because they believe in the undesirable phenomenon of the party-serving appointee, but for perfectly legitimate reasons, such as (a) to ensure appropriate expertise on the tribunal, (b) to avoid someone dragging them into inappropriate and perhaps unreliable overseas courts and (c), in some cases of course, to be able to take advantage of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
24. The problem for the market in general is the consequent lack of binding authority on important principles or standard wordings, which may have been the subject of arbitration awards, perhaps even conflicting arbitration awards. I can offer no ready remedy for this

situation, save to suggest (i) that standard arbitration wordings might conceivably be framed so as to permit parties to choose to publish at least outlines of significant decisions, and (ii) that Commercial Court judges in the United Kingdom do, I am confident, understand the market's need for guidance on truly significant points and can be relied upon to identify and give permission to appeal if a good market case is put before them that such guidance is required. That failing, the market will have to rely upon fora like the present, to discuss and work through some of the difficult issues which arise as the ever inventive insurance market seeks to provide products responding to ever wider and changing commercial and financial needs. Thank you for your attention and may I wish you a continued very successful conference.