UK & European Asbestos
GIRO XXX
2003 Convention

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UK & European Asbestos

- Background
  - Exposures
  - Diseases
- Asbestos Compensation Systems across Europe
- Comparison with the US Compensation System
- Recent Legal Cases across Europe
- The UK Situation
  - Court Cases
  - Public Liability
  - Future Exposures (CAWR 2002)
- Estimates of the Cost of European Asbestos Exposures
What is Asbestos?

- Word is derived from ancient Greek and means “inextinguishable, unquenchable or inconsumable”
- Naturally occurring silicate with 6 varieties
  - actinolite
  - amosite
  - anthophylite
  - crocidolite
  - tremolite
  - chrysotile
- Once considered as a “miracle mineral”
- Many favourable properties
  - flexible, strong and durable
  - resistant to fire, heat and corrosion
- Available in abundant quantities, hence inexpensive
Uses of Asbestos

- Heavily used in many industries in hundreds of products
  - shipbuilding (insulator)
  - construction (insulation, roofing and flooring)
  - railroads (brake linings)
- Used in virtually every industrial process involving heat or friction
- Used for over 2,000 years
- Classified by the US Government as a strategic material during World War II
- Global annual consumption:
  - 3.5 to 5 million tons in 1980
  - 2.5 million tons in 2000
Asbestos Diseases (1)

- Recognised cause of disease since 1920’s
- Evidence suggests even known about in Roman times - Pliny the Elder noticed sickness in his servants
- Long latency periods - can be in excess of 50 years
- Malignant and non-malignant diseases
- “Signature” diseases make liability fairly straightforward to establish
- White asbestos tends to be softer and more flexible and is therefore supposedly broken down by the body more easily
- Asbestos kills over 3,000 people per annum in Great Britain
## Asbestos Diseases (2)

<table>
<thead>
<tr>
<th>Disease</th>
<th>Symptoms / Comments</th>
<th>Malignant (Y/N)</th>
<th>Latency Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mesothelioma</td>
<td>Cancer of membranes that cover &amp; protect lungs. Fatal within 2 years of diagnosis</td>
<td>Yes</td>
<td>Typically 30-40 years - can be as long as 50 years</td>
</tr>
<tr>
<td>Lung Cancer</td>
<td>Cancer of the bronchial covering of the lungs. Often fatal</td>
<td>Yes</td>
<td>Typically 20-30 years</td>
</tr>
<tr>
<td>Other Cancers</td>
<td>Tumours of the throat, larynx, oesophagus, stomach, colon, lymphoid</td>
<td>Yes</td>
<td>Typically 20-30 years</td>
</tr>
<tr>
<td>Asbestosis</td>
<td>Non-cancerous scarring of interior lung tissue. Many cases do not involve significant impairment</td>
<td>No</td>
<td>Typically 15-30 years</td>
</tr>
<tr>
<td>Pleural Plaques/ Pleural Thickening</td>
<td>Scarring or thickening of pleural tissue surrounding lungs. No detectable impairment or injury</td>
<td>No</td>
<td>Depends on when detected</td>
</tr>
</tbody>
</table>
Emergence of Asbestos Diseases in Europe

- Emergence of asbestos-related disease in Western Europe appears to be repeating that seen in the US
- Projections anticipate higher incidence rate per head of population
- Time-lag – European emergence appears on average to be around 20 years behind the US
  - Worse affected generation in the UK born in 1940’s (US 1920’s)
- Exposure in the US is likely to be earlier due to:
  - Heavy exposure in US during WWII due to ship building effort
  - Tighter controls may have been brought in earlier in US
  - Imports in some European countries continued until mid-1990’s
  - Mined in some European countries (France, Greece, Italy)
Peto’s Forecasts of Number of Mesothelioma Deaths in Western Europe


Peto’s Estimates from 1999 Study “The European Mesothelioma Epidemic”
Asbestos Compensation Systems in Europe

- Significant variations exist between different countries
- Occupational diseases are typically compensated through different channels:
  - No-fault: workers compensation or social security
  - Tort: employers liability, public liability or general/products liability
- The potential sources of compensation differ not only in what must be proven but also in the diseases and damages they will compensate
- In general, no-fault systems do not pay for non-economic losses, which are, at least in theory, available from the tort systems
- In general, awards from tort system are higher than those from the no-fault systems
Asbestos in France

Before 8/2/2002: 75% 25%

After 28/2/2002:

1. Paid by FIVA with subrogation rights against employer
or
2. Direct lawsuit against employers invoking Inexcusable Fault

then

⇒ Employers recover claim from insurer
Asbestos in Italy

1. INAIL pays loss of income and medical expenses also pain and suffering (post 2000)

or

2. Direct lawsuit against employers for moral damages and pain and suffering (pre 2000)

then

- INAIL can subrogate claims against the employer

and

- Employers recover claim from insurer under RCO policy
Asbestos in the Netherlands

1. Obtain compensation from Institute of Asbestos Victims (IAV)
   or
2. Obtain compensation from Government Asbestos Institute (GAI)
   or
3. Direct lawsuit against employers then
   • Employers recover claim from insurer
Asbestos in the UK

DWP / DoE

Insurer

1. Claim benefits from Department of Work and Pensions
2. Compensated under Pneumoconiosis Act
3. Direct lawsuit against employers
   then
   Employers recover claim from insurer or FSCS
Asbestos in Germany

Claim benefits from Occupational Health System

covers
- Life annuity to victims or dependants
- Rehabilitation costs
- Temporary annuity during medical/professional rehabilitation

does not cover
- Pain and suffering
Insurance and European Asbestos (1)

- Exposure of insurance industry to European asbestos varies from country to country.
- Despite recent increases in legal activity still relatively little insurance involvement from European asbestos exposure.
- This means that important insurance issues still need to be resolved in some countries:
  - trigger of coverage
  - allocation across triggered policies
  - application of exclusions
  - lost policies
  - treatment of uninsured periods (intent or insolvency)
  - application of reinsurance.
Insurance and European Asbestos (2)

- Impact of European exposures on the insurance industry may differ from that of US exposures due to differences in:
  - Legal systems
  - Compensation systems (ie who pays)
- Recent legal developments in some countries suggest a narrowing of some of those differences
Key Features of US Asbestos Litigation

- Litigious culture
- Tried by jury
- Unimpaired claimants
- Consolidated trials
- Forum shopping
- Contingent fees
- Union involvement
- Product liability coverages
- Punitive damages insurable in some states
Comparison of US and European Asbestos Litigation

- Litigious culture
- Tried by jury
- Unimpaired claimants
- Consolidated trials
- Forum shopping
- Contingent fees
- Union involvement
- Product liability coverages
- Punitive damages insurable in some states
- Less litigious
- Tried by Professional Judges
- Currently not compensated
- Typically not permissible
- Judicial systems more uniform
- Not permitted in most of Europe
- Not as active?
- Workers’ Comp/EL/Public Liab?
- Less common, much smaller and typically not insurable

Significant differences remain between the US and the European legal systems, despite European evolution towards tort and insurance involvement.
Legal Developments in Europe - France

- February 2002 – Supreme Court of Appeal
  - Made it easier to invoke “inexcusable fault” against employers
  - “As part of contract of employment, employer has a obligation to provide safe workplace, especially in relation to products manufactured or used”
  - “Failure under this obligation regarded as an inexcusable fault where employer was, or should have been, aware of dangers and did not take precautionary measures”
  - Likely to transfer financial responsibility from social security system to employers and their insurers

- June 2002 – Court of Appeal, Rennes
  - All statutes of limitations on asbestos related occupational diseases lifted, provided first medical observation occurred between July 1947 and December 2001
Legal Developments in Europe - Italy

- 1997 Trial involving State Railways
  - Award made in favour of workers due to use of asbestos in insulating railway cars
  - Court awarded €2.6 million to 11 victims
  - State Railways established fund of €6.7 million to pay potential future claims
  - No public clarification over extent to which insurance policies will cover these liabilities
Legal Developments in Europe - Netherlands

- 28 April 2000 – Supreme Court ruling on Statute of Limitations
  - Statute did not apply in exceptional cases
  - Consideration was given to the fact that it may take longer than 30 years for disease to become apparent
  - Outlined series of considerations for determining whether or not statute should apply
- 14 December 2000 – Ruling by Dutch Parliament
  - Accepted a statute of limitations of 5 years after discovery of disease where exposure occurred after 14 December 2000
- 22 May 2003 – Eternit Case
  - Victim exposed to asbestos dust from Eternit products through brother’s clothing and through debris
  - Judge applied Supreme Court ruling that statute of limitations did not hold
The UK situation
Recent court cases and developments

- Fairchild case
  - Defendants held jointly and severally liable
  - Each party responsible for all of the claim – apportionment issue not addressed

- Recently strengthened – Phillips vs Syndicate 992
  - Non-insured or unidentified years are still covered by the remaining insurers

- Allocation issues remain

- MOD case – no exposure to pre-87 exposures

- Recent record award - £4.37m (versus £100k average)

- Risk of move from claims from EL to public liability policies
Estimation of numbers and costs - UK
How the exposure occurred - Uses

- Exposure - based on imports, and on use and re-use

Mining
- SA
- Australia
- US
- Canada

Imported into the UK

Primary Uses
- Shipbuilding
- Cement
- Building
- Walls
- Boilers
- Insulation
- Friction products

Re-uses
- Ship repairing
- Building work
Estimation of numbers and costs - UK
How the exposure occurred - Imports

UK asbestos imports

Annual UK asbestos imports (thousands of tons)
Estimation of numbers and costs - UK
How this affected workers

- How many people have been exposed???
- Different numbers of people in asbestos-use industries
- Peaking in 1960-70
- Projection of number of people affected relies heavily on:
  - Severity of exposure
  - Length of exposure
  - Number of people exposed
  - Ages of those exposed
- Different diseases are influenced by different exposure types
Actual mesothelioma deaths in British men and UK asbestos imports

- Estimation of numbers and costs - UK
- Reported mesothelioma deaths

Graph showing:
- Annual UK asbestos imports (thousands of tons)
- Annual number of male mesothelioma deaths

Legend:
- Imports
- Actual
Estimation of numbers and costs - UK
Future mesothelioma cases

Predicted mesothelioma deaths in British men and UK asbestos imports

Annual UK asbestos imports (thousands of tons)

Annual number of male mesothelioma deaths

Imports  Actual  Peto1999  HSE
Estimation of numbers and costs - UK
Other asbestos related diseases

- Other diseases are associated with lower costs than for mesothelioma
- However numbers of claims can be very high - see the US experience for example
- Latency differs significantly, indicating that mesothelioma will be a much longer term problem
- Anecdotal evidence is that the costs for other diseases could be the same again as for mesothelioma
### Estimation of numbers and costs - UK

**Estimates of claim cost in the UK**

<table>
<thead>
<tr>
<th>Basis</th>
<th>Low</th>
<th>High</th>
</tr>
</thead>
<tbody>
<tr>
<td>Undiscounted</td>
<td>£9bn</td>
<td>£22bn</td>
</tr>
<tr>
<td>Discounted</td>
<td>£4bn</td>
<td>£10bn</td>
</tr>
</tbody>
</table>

Source: PwC, Number of mesothelioma deaths from ‘The European Mesothelioma Epidemic - Peto 1999’

- Includes costs for all asbestos related diseases
- Costs met by all sources - insurers, government and companies
Estimation of numbers and costs - UK
Insured basis

- Insurance only compulsory from 1972 (UK) and 1975 (NI).
- As this was the time where exposure was declining, insurers may have escaped some of the claims cost (fall back on companies)
- Claims in UK currently being primarily made under EL policies (not products liability as in US)
- However, insurers are beginning to receive more public liability claims
- No consolidated trials currently
Estimation of numbers and costs - UK
Impact of insolvent companies

- Two major Employers’ Liability insurers are insolvent:
  - Chester Street
  - Builders Accident

- What are the problems faced by other companies?
- Companies insured for Employers’ Liability Insurance (from 1972) with these insurers can get 100% of claim costs from the FSCS, less the payments from the insolvent insurers.
- FSCS has raised a levy on all insurers to pay for these claims
- However, for pre-1972 there is no cover for companies insured by insolvent insurers
Estimation of numbers and costs - UK
3rd party rights

- Under 3rd party rights if the company a worker was employed by is insolvent, then they can claim directly against the insurer.

- If both the insurer and company are insolvent, the claimant can claim directly to the insolvent Scheme, or the FSCS.

- This also protects workers for pre-1972 where insurance was in place, but both company and insurer are insolvent.
Estimation of numbers and costs - UK
Financial impact on insurance market

- Need to assess insurer costs of total:
- Assume at least 50% of losses insured
- Thus insurer portion roughly £2-5bn discounted
- 6-15% of current market premium of £32bn
- In reality, reserves have been strengthened over a number of years as the size of the problem emerged
- Also, the impact on individual insurers can vary significantly from the market experience
Estimation of numbers and costs - Europe
Estimated undiscounted costs - £bn

<table>
<thead>
<tr>
<th>Country</th>
<th>Low</th>
<th>-</th>
<th>High</th>
</tr>
</thead>
<tbody>
<tr>
<td>• UK</td>
<td>9</td>
<td>-</td>
<td>22</td>
</tr>
<tr>
<td>• France</td>
<td>8</td>
<td>-</td>
<td>20</td>
</tr>
<tr>
<td>• Germany</td>
<td>7</td>
<td>-</td>
<td>18</td>
</tr>
<tr>
<td>• Italy</td>
<td>5</td>
<td>-</td>
<td>13</td>
</tr>
<tr>
<td>• Netherlands</td>
<td>5</td>
<td>-</td>
<td>11</td>
</tr>
<tr>
<td>• Switzerland</td>
<td>1</td>
<td>-</td>
<td>2</td>
</tr>
<tr>
<td>• Other Western Europe</td>
<td>6</td>
<td>-</td>
<td>14</td>
</tr>
<tr>
<td><strong>Total Europe</strong></td>
<td><strong>40</strong></td>
<td>-</td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

Source: PwC, Number of mesothelioma deaths from ‘The European Mesothelioma Epidemic - Peto 1999’
Looking to the future
Future exposures

- Significant amount of asbestos still contained in buildings (estimated 500,000 buildings)
- HSE estimates that around 100 deaths a year may continue from current exposure levels
- Control of Asbestos at Work Regulations (CAWR 2002)
  - Place duty on those responsible for workplace premises
  - Very stringent – require identification and assessment of any risk of asbestos exposure
  - Firms fined even where no evidence anyone was exposed
Looking to the future
Final impact still uncertain

- Claim numbers still rising
- Significant revisions in projections over the past 5 years - could be changes of opinion as new data is available
- Europe still has a relatively low proportion of non-impaired claimants
- Will take many more years before more certainty is gained
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