



Asbestos Clauses Workgroup

Report to LUG conference
Cambridge

September 5 2006

Background

- market situation in 2002/2003 – growing application of asbestos clauses
- concern at variety of clauses and the need to understand the clauses being used in the London subscription market

Background

Other developments

- regulation of Asbestos – CAWR 2002
- regulation of insurers - Contract Certainty
- significant legal cases
- handling of OD claims – new proposals

Asbestos clauses

Recap

- Production and use
- Impact at the individual level
- Impact on society and economy
- Impact on insurance industry

Asbestos clauses

Production and use

Global

- world production 1900 – 2000 : 173 m tons (estimated cumulative figure by R. Virta quoted in IAWG)
- *current production (2004) = 2.4 m tons from 18 key producing countries (British Geological Survey 2006)*
- Peak - 1975 (2000 figure around 40% of 1975 level)
- Largest producer (first half 20th cent) = Canada
- *Largest producer (second half 20th cent) = Russia*
- Russia (around one third of global production)
- *Production in China peaked in 2000 at around 50% of Russian levels*

Asbestos clauses

Consumption

Global

- Peaked in 1980 at 4.8m tons
- 2000 figure = 1.48m tons

Where is it still being used ?

- in 2000 Brazil, China, India, Japan, Russia and Thailand were the largest consumers of asbestos each consuming more than 60,000 tons of asbestos
- '60 countries still favour the controlled use approach regarding chrysotile asbestos ' (R. Virta 2003)

Asbestos clauses

Production and use / consumption

UK

- Imports 2004 – 2150 tonnes (BGS 2006)
- Exports 2004 (un manufactured asbestos) – nil (BGS 2006)
- Current use in manufacturing
- Presence in buildings

Asbestos clauses

Impact

UK

- Each year - 3500 cancer deaths due to asbestos exposure (HSE figs)
- 2003 110 deaths from asbestosis (HSE)
- Mesothelioma
1874 deaths in 2003 (compare 153 in 1968) (HSE)
- Projected to peak at up to 2450 mesothelioma deaths p.a. between 2011 and 2015 (HSE)
- Projected 53,000 mesothelioma deaths from 2002 - 2050
- New disablement benefit cases from asbestosis – peaked at 750 in 2004 (HSE)

Asbestos clauses

Impact

UK

ABI occupational disease figs (latest 2005)

- 2001 – 2005
% of asbestos claims to all OD claims ranged between 21% to 26%
(but compare 1991 at 2%)
- Trend has been consistent over past 5 years with no significant deterioration (but NB figs can only be used to see trends)
- Number of claims notified ?

Asbestos clauses

Impact

UK

Total estimated future cost to UK insurance industry OD claims

- £4b - £10b (Institute of Actuaries 2004) (on top of £1.3b of past claims)
- Relates to injury only (does not take into account any potential property damage issues) and assumes that all future claims costs will be incurred under EL policies
- Projection in part based on HSE stats and questionnaire to a number of UK insurers

Asbestos clauses

- Aims of workgroup
- Methodology

Asbestos clauses

Members of the wordings workgroup

- David James
- Neville White
- Peter Furby
- Peter Roedling
- Mark Gibson

Asbestos clauses

Aims of workgroup

To review

- the range of asbestos clauses and exclusionary language used in the UK market
- the implications of their use and impact on cover

To analyse

- common features and general differences

Asbestos clauses

Overall Objective

- To provide a report which would enable the market to better understand the wordings in use against the current and potential future exposures

Asbestos clauses

Methodology

Focus

- on clauses used in general insurance market
- on general liability contracts

Review

- principally based on those specimen wordings submitted by LUG members

Compare

- wordings available; identify common features

Identify

- potential loss scenarios

Asbestos clauses

Key discussion points

- Triggers
- Link to pollution/contamination/toxic clauses
- Fear of claims
- Total exclusions (how total is total ?)

Other significant discussion points

- Secondary asbestos losses
- Secondary liabilities (Vicarious work done on behalf of the insured)

Asbestos clauses

What the group was not aiming to do

- Produce a recommended wording
- Recommend any particular approach to underwriting asbestos exposures, past or future
- Produce any detailed analysis of asbestos or asbestos exposures or liabilities

Asbestos clauses

Other factors

- Contract Certainty
- FSA prudential standards

Asbestos clauses

Contract Certainty

Market Reform CC attributes

- All terms to be “clear and unambiguous”
(“accurate and clear” ABI/BIBA/IIB guidance)
- Principle 2 : All conditions to be clearly expressed

Asbestos clauses

FSA regulation

- ICOB
- Prudential Standards 7.1 (Insurance Risk Systems and Controls)
- *“A firm should pay close attention to its wordings to ensure that these wordings do not expose it to more, or higher, claims than it is expecting. In so doing the firm should consider(4) reviewing the documentation used by other insurance companies....”*

Asbestos clauses

General Comparison of clauses

Considerable divergence in the areas of :

- Operative triggers
- Definition of asbestos
- Linkage to general pollution coverage or exclusions
- Linkage to other toxic substances
- Total exclusions vs named processes
- Additional coverage issues costs and expenses
- Exceptions to basic exclusion

Asbestos clauses

examples of variations in clause construction

Operative trigger

- a. Will not apply to legal liability
- b. Will not cover /apply to any legal liability directly or indirectly arising
- c. Does / shall not cover any actual or alleged liability
- d. Will not indemnify....in respect of any loss, cost or expense

Asbestos clauses

examples of variations in clause construction

Types of loss (subsequent trigger)

- a. No mention
- b. Property damage / bodily injury
- c. Damage / injury
- d. All cover provided by the policy
- e. Fear of
- f. Exposure to
- g. Existence of

Asbestos clauses

examples of variations in clause construction

Costs /expenses

- a. May be specifically mentioned
- b. May not be mentioned
- c. Reference may be included in operative wording
- d. May be incorporated into asbestos / process definition
- e. NB excluding duty to defend may be also specifically mentioned in some wordings

Asbestos clauses

examples of variations in clause construction

Asbestos defining language

- a. Asbestos
- b. Asbestos or materials containing asbestos
- c. Asbestos, Asbestos fibre dust any materials containing asbestos or respirable ceramic fibres
- d. Asbestos, Asbestos Hazard (actual or threatened exposure or presence)
- e. List of types of Asbestos (crocidolite ...etc)

Asbestos clauses

examples of variations in clause construction

Total or named processes or activities

- a. None
- b. *Manufacture, mining, processing, distribution, detection or testing for, remediation of, stripping out or demolition, removal storage transportation or disposal or sale*
- c. Use of
- d. *Exposure to*
- e. Assessing presence of
- f. *Presence of*
- g. Premises disposed of by the insured
- h. *Detection or testing for*
- i. Inhalation, ingestion , absorption of....

Asbestos clauses

examples of variations in clause construction

Other toxics incorporated

- a. No reference
- b. Asbestos one of a large list
- c. Restatement of all other toxics / irritants where asbestos may also be released

Asbestos clauses

examples of variations in clause construction

Reference to pollution

- a. No reference
- b. Allusion to pollution within link to other exclusions
- c. Specific reference to asbestos as pollutant

Asbestos clauses

examples of variations in clause construction

Exceptions to exclusion (or buy back)

- None
- *Where injury or damage not related to asbestos content of buildings or products*
- Provided such damage or injury would have resulted irrespective of the nature of the substance
- *Only that part of any injury or loss or damage which is directly or indirectly arising out of the mfr mining etc is excluded*
- Only that part of any such liability, cost or expense which is directly or indirectly caused by contributed to or arising out of asbestosis excluded
- *Liability arising from the failure to perform intended function*
- Liability unrelated to the known or suspected harmful injurious or damaging effects of asbestos products fibres or dust
- *Invariably on same trigger basis as main policy (NB impact of Bolton ...?)*

Asbestos clauses

Inherent risks - checklist

Exposure of people who work in, or people who are exposed to,

- *Basic extraction and processing*
Mining, extraction, primary processing

- *Basic manufacture*
Manufacture or processing of products mainly/totally of asbestos
Manufacture or processing of products partly of asbestos

- *Sale/distribution of products mainly /totally of asbestos*
Sale/distribution of products partly of asbestos

- *Warehousing and transport and storage*

- *Service or installation or contracting work*

- *Use of products and equipment in business that contain asbestos*

- *Places of work that contain asbestos*

- *Domestic premises that contain asbestos*

- *Removal and disposal*

- *Landfill / contaminated land*

Asbestos clauses

Inherent risks - checklist

Primary loss and damage risks

- *Costs of remedying the presence of asbestos*
- *Cost of repair /testing /management in premises*
- *Costs of removal of products and disposal (inc demolition)*
- *economic loss due to the presence of asbestos including diminution of value*
- *Liability of landfills and operators*
- *Premises liability*

- *Costs of remedying contamination in the ground*
- *Statutory liability to clean up*
- *Contamination in buildings*
- *Contamination in the ground*
- *Financial liability –failure to identify (PI)*
- *Storage or handling*
- *Damage to ecological systems / Environmental damage costs*

Asbestos clauses

Residual or secondary exposures - checklist

Secondary exposures – type 1

- *Release of ACM's in accident or fire at the premises*
- *Accidental contamination of products in the course of manufacture*
- *Unwitting import of products or goods containing asbestos*

Secondary exposures – type 2

- *Injury or damage unconnected with the inherent nature of asbestos*
- *Injury or damage caused by the failure of the asbestos product or good to perform its basic function unconnected with its inherently harmful nature*
- *Injury or damage arising out of the transport of asbestos*
- *Injury or damage arising out of asbestos remediation work but unconnected with the inherent nature of asbestos (& consider impact of new asbestos regs.)*

Asbestos clauses

Primary or secondary liabilities - checklist

Primary liabilities and costs

- *Legal costs*
- *Costs of defence*
- *Compensation for injury and damage*
- *Products liability*
- *Premises liability (including liability under Defective Premises Act)*
- *Occupiers Liability*
- *Environmental liabilities*
- *Transport (motor) liabilities*
- *Employers liability*
- *Contract liability*
- *Financial liabilities*

Secondary liabilities

- *Vicarious liability arising from acts of independent contractors (removal, disposal, remediation etc)*
- *Fear of suffering (whether already diagnosed with pleural plaques or a general fear from past exposure)*

Asbestos clauses

- Summary and pointers for future discussion



- *The Liability Underwriters Group (LUG) would like to make clear that the information given out or addressed in this report are being raised as personal observations and comments. The hope is that this report will provide some useful reference point and facilitate useful market discussion. You will of course reach your own conclusions on the relevance of any points to your position.*
- *LUG shall not be responsible or liable for any loss, damage, liability, cost or expense which may arise from the use or reliance thereon of any part of this report by any other party. or reliance thereon.*

Asbestos clauses

Selected sources of information

Institute of Actuaries report 2004 (The definitive guide)

DKW report March 2005

British Geological Survey 2006

Asbestos /APH bulletin (monthly)

British Asbestos Newsletter (Q)

Worldwide Asbestos Supply and Consumption Trends from
1900 to 2000 Robert L. Virta (quoted in IAWG report)