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Indemnification of asbestos victims in the United States and France

Exposure and financial impact on insurers

Introduction

In 2001 world production of asbestos was at the level of the late 1950s and, in comparison with the peak production levels achieved in the second half of the 1970s, still over 40%. However, in contrast to that period asbestos is almost exclusively utilized outside the traditional industrial countries. Many of those affected by this utilization will contract diseases in consequence of having inhaled asbestos fibres up to the middle of this century.

Against the background of their experience of the financial consequences of previous asbestos claims in the United States and Western Europe liability insurers must exclude the possibility of their being held liable for the financial consequences of the risk of disease stemming from the current impact of asbestos. Such an exclusion is also necessary for the purpose of avoiding being affected under current covers by claims which in the next few decades will result from incidences of asbestos utilization up until the middle of the 1980s, particularly in the traditional industrial countries. No-one can foresee how the legal situation and high court rulings will develop in this regard. In France jurisdiction relating to the issue of liability for asbestos claims has recently begun stirring. Due to the greater proximity of the French legal system and against the backdrop of a common European legal tradition, the development in that country merits particular consideration.

The utilization of asbestos and resulting illnesses

Up until the 1950s the United States utilized more than half of the world's asbestos production. By the end of the 1970s this had declined to 15%, though, in absolute values, it remained stable at a high level. By the end of the 1980s it had sunk to 1% (1).

In view of the fact that it had been cut off from the deposits in Canada and South Africa, it was only possible to utilize a very small amount of asbestos in France during the Second World War. Utilization values have been secured with effect from the middle of the 1970s. At that time they were 25% of American utilization and declined more slowly than in the United States during the 1980s. Asbestos has no longer been utilized in France since the middle of the 1990s (2).

Against this background, the rate of asbestos-induced cancer cases in the United States has consistently totalled several thousand per year (3) for a considerable period of time. Since the average latency period between exposure and the outbreak of asbestos-induced lung and mesothelioma cancer is between thirty and forty years (4), from 2015 onwards, thirty-five years following the end of the high utilization period in 1980, it will decline and be virtually zero by 2025. In France the rate will remain high for some years longer and subsequently decline to virtually zero by 2030. In the territory of the old Federal Republic of Germany the rate has more than doubled in the last ten years; in 2001 workman's compensation fund associations recognized over 1500 cancer cases as asbestos-occasioned occupational disease (5).

Asbestosis, a disease which restricts lung capacity to a degree ranging from slight to very severe, regularly occurs after a latency period of between ten and twenty years (6), meaning that the rate of these diseases will probably already be undergoing a rapid decline in France and the United States.

As a general rule, swellings and deposits in the pleura, which may likewise be predicated upon the impact of asbestos, do not impair the affected parties.

Approaches to indemnification stemming from employment contracts

In France, as in the United States, a no-fault system designed pursuant to the prevailing social security legislation is in place which provides for benefits depending on the severity of an occupation-induced impairment. A French employer is only required to indemnify any additional prejudice suffered by an employee given the existence of an "inexcusable fault (*faute inexcusable*)" (7) and, generally speaking, an employer in the United States only if they have deliberately occasioned such prejudice (8).

Once the scale of the asbestos problem had become apparent, in France it was pleaded that the conduct of employers in exposing employees to asbestos fibres should be classed as *faute inexcusable*. A high court ruling accepted this plea in 2002 (9). An employer which could have been cognizant of the exposure to asbestos on the part of their employees must, insofar as they are not covered under social security, render compensation for any resulting prejudicial consequences, in other words, for loss of earnings not indemnified under social security and the intangible prejudice suffered by an asbestos victim and their relatives (10). At the same time, a law entered into force pursuant to which, in accordance with the prevailing tort legislation, a "fund for the indemnification of asbestos victims (*fonds d'indemnisation des victimes de l'amiante - FIVA*)" grants, via a simplified procedure, compensation to all sick persons suffering from the consequences of asbestos irrespective of whether or not their condition arose on an occupationally induced basis (11). In the event of asbestos victims declining to opt for this solution they are at liberty to continue pursuing their claims within the framework of ordinary jurisdiction (12).

It is also due to the centralized jurisdictional system obtaining in France that the additional claim items and the associated process costs which arise in the case of *faute inexcusable* are calculable for employers; they are likewise able to rely on the legal situation that does not allow social security funds to take recourse with regard to the benefits they paid.

In the United States employers were not, as a general rule, forced to address the accusation that they had deliberately caused the asbestos ailments of their employees (13). Therefore, on the basis of their employment contracts, employees suffering from asbestos-related complaints were only able to obtain the relatively low payments under social security legislation for which provision is made in their home states (14).

Approaches to indemnification under general tort legislation

In view of the fact that, pursuant to the prevailing tort legislation, all asbestos victims already receive full compensation via social security institutions /employers/ FIVA, lawyers in France have not needed to develop any further bases for claims under tort legislation for the purpose of securing compensation for their clients over and above the benefits which are standardized under the prevailing social security legislation.

Unlike in the United States: here, lawyers began filing suits in the 1970s for the claims of asbestos victims, in each case against all the producers with whose asbestos-containing

products the victims had come into contact as consumers (15); however, excluded from these suits were producers which, at the same time, were the employers of such asbestos victims so that it was not necessary to address the issue of their liability privilege under employment contract legislation.

In the United States courts consistently rule that manufacturers had not issued sufficient warnings pertaining to the risks emanating from products containing asbestos; also, that the asbestos producers which had concealed certain carcinogenic effect of asbestos owe the asbestos victims of their products punitive damages (16). The majority of the more important asbestos producers, led, in 1982, by the then largest manufacturer of construction materials, Johns-Manville, have since become the subject of bankruptcy proceedings. As a general rule, they do not end in the liquidation of these companies, but in the establishment of funds from which claims on the part of asbestos victims of these producers which have already materialized and which will materialize in the future are serviced in conjunction with the relevant bankruptcy dividend. Along with the assets coverage claims under policies which liability insurers had concluded with the now bankrupt entity may constitute a major part of these funds. These latter now increasingly relate to public liability covers which previously – unlike product liability covers – were not maximized, i.e. are unlimited in that they extend to all loss occurrences up to the agreed limit per occurrence as far as attaching to the respective period of cover (17). For this purpose coverage claims due to ailments of asbestos victims must not be related to products containing asbestos, but to asbestos-contaminated production processes, e.g. installations or asbestos-contaminated plots of land.

By 2002 it is said that US\$ 54 billion had already been spent on asbestos claims; a large part of which on lawyers, other consultants and internal costs at the companies which had been sued – whose number is now put at in excess of 6000 (18), twenty times more than twenty years ago (19). In addition, of the money which affected parties ultimately receive from their lawyers a considerable proportion is accounted for by persons in respect of whom, while asbestos-induced physiological changes can be demonstrated, no palpable disturbed functions can be demonstrated whatsoever. In other words, relatively little has gone to the truly asbestos-related sick. There are some claimant lawyers who, by means of x-ray and lung test stations, have specialized in tracing as many as possible of the hundreds of thousands of persons who live wholly unimpaired lives with swollen pleura or mild asbestosis and retain from these clients as a contingency fee 40% or more of the indemnification which they secure on their behalf (20).

Fairness in Asbestos Injury Resolution Act project in the United States

In 2003 the unusual circumstance in particular that only a fraction of the expenditure to date has gone to sufferers of asbestos-induced ailments led to a legislative initiative in conjunction with which it is intended that tort law liability for incidences of asbestos-induced bodily injury should be superseded by a no-fault fund solution (21). As far back as 1984 an American higher court had called for this in order to avoid American courts being further burdened by lawsuits on the part of asbestos-affected persons. In 1991 the American Supreme Court, whose Presiding Judge criticized the volume of asbestos-related lawsuits as being in urgent need of regulation (“elephantine mass which cries out for legislation”), seconded this call (22).

The political climate for this became more favourable once the Republicans provided the President and enjoyed narrow majorities in the Senate and the House of Representatives from 2001 onwards. However, the legislative initiative termed the Fairness in Asbestos Injury Resolution Act still needs the support of the Democratic Party leadership because it requires a 60:40 majority in the Senate, in other words at least nine Democratic senators must vote in favour (23).

Industry, insurers and trade unions have been holding intensive negotiations for a year under the moderation of committed senators and judges (24). What is particularly at dispute is whether or not the US\$ 115 billion which industry and insurers have already conceded will be sufficient for the purpose of being able to furnish the future parties entitled to benefits, who would be assigned to the ten degrees of severity defined in the Act (25), with the indemnification rates derived from the pertinent court ruling. The Congressional Budget Office recently put the costs necessary for implementing the Act at US\$ 140 billion (26). The chances of the legislative initiative being implemented in this year's legislative period have now become nil (27) also due to the impending November 2004 presidential elections.

In France, in a report to Parliament which has just been published the French Government estimates that the payments which will arise in the next twenty years in consequence of benefits under social security legislation and additional indemnification owed under employment contract law due to *faute inexcusable* will total between €11.7 billion and €22.1 billion. This large fluctuation margin is explained by the fact that the biometric basis has not yet been secured (28).

Concluding remarks

In France asbestos victims are indemnified under social security legislation and on the basis of employment contract legislation stemming from *faute inexcusable*. That all asbestos victims are indemnified in accordance with this approach is guaranteed by the fund for the indemnification of asbestos victims (*Fonds d'indemnisation des victimes de l'amiante – FIVA*) established by law. The question as to the extent to which liability insurers are required to exempt employers from indemnification claims deriving from *faute inexcusable* on their part *vis-à-vis* their employees suffering from the effects of asbestos (29) is currently the subject of a court of appeal dispute.

According to the most recent supreme court ruling the French state is additionally liable *vis-à-vis* asbestos victims for a breach of duty in that it failed to ensure that asbestos was safely processed and that certain asbestos applications were banned (30) in good time.

In the United States companies and their insurers finance incidences of asbestos-induced bodily injury not in consequence of a breach of any duties obtaining *vis-à-vis* employees to provide safe places of employment, but rather due to the fact that they subjected unenlightened or insufficiently enlightened third parties to asbestos-contaminated products, production processes and buildings.

The individual states of the U.S.A. and the United States as a federation apparently enjoy sufficient immunity to avoid being liable for their regulatory shortcomings regarding asbestos in the past.

In macro-economic terms, the treatment of the issue of asbestos claims in France is much less expensive than in the United States. In addition, in France it receives its legal response where it actually belongs: in the law addressing employment contract and the law on governmental liability as it attaches to factory health and safety control.

Footnotes

- (1) Asbestos Statistics, David A. Buckingham, Mineral and Materials Analysis Section USGS, and Robert L. Virta, USGS Asbestos Commodity Specialist, date: 26 August 2002.
- (2) Overview of the Institut National de la Statistique et des Etudes Economiques, Paris, date: 16 January 2003.
- (3) Environmental Group Says 10,000 Die Annually From Asbestos, Paul Rogers, San Jose Mercury News, 5 March 2004.

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- (4) Quoted from a table contained on page 25 of the report: Asbestos 3 To infinity and beyond, Richard Hewitt, Jason Kalamboisis, Eva Olsson, Dresdner Kleinwort Wasserstein, London, 8 October 2002.
- (5) Overview of the number of asbestos-induced cancer cases per year in West Germany since 1980, Hauptverband der Berufsgenossenschaften, 53754 Sankt Augustin, date: August 2002.
- (6) See (4).
- (7) In this regard, see Claims against insurers running into millions feared in France following asbestos lawsuits, Florian Endrös, law office attorney at Baum&Cie., Paris, PHI 3/2002, 108 ff.
- (8) National Council on Compensation Insurance. The Asbestos Crisis-Yesterday Today and Tomorrow, 1983, 12 ff.
- (9) Cour de Cassation, 28 February 2002, arrêts no 835, 837, 838, 842, 844,845.
- (10) See (7).
- (11) In this regard, see Most recent implications of asbestos risks on court rulings and legislation in France, Florian Endrös and Nancy Dubois, law office attorneys at Baum&Cie., Paris, PHI 1/2004, 2 ff.
- (12) In this regard, see Fonds d'Indemnisation des Victimes de l'amiante – FIVA – Rapport d'activité au Parlement et au Gouvernement établi par le Conseil d'Administration - July 2002/June 2003.
- (13) See (8).
- (14) Annals of Law, Asbestos-Part IV, Paul Brodeur, The New Yorker, 1 July, 1985, 63 ff.
- (15) Borel v. Fibreboard 493 F.2d 1076 (5th Cir., 1973).
- (16) Annals of Law, Asbestos-Part I, Paul Brodeur, The New Yorker, 10 June, 1985, 49 ff.
- (17) Hazardous Times – The Reemergence of Asbestos: More Claims, More Defendants, More Dollars, GeneralCologne Re, Cologne, November 2001, 5; December 2001, 5.
- (18) Asbestos Litigation Costs and Compensation: An Interim Report, Stephen Carroll et al., Rand Institute for Civil Justice, 2002.
- (19) In this regard, see US asbestos claims – A problem for insurers and courts, Ulrich Jaeger, Cologne, PHI 1983, 130 ff.
- (20) Asbestos Litigation & Tort Law: Trends, Ethics, & Solutions, Lester Brickman, 2003, Pepperdine University School of Law, 31 Pepp.L. Rev. 33, 62 ff.
- (21) In this regard, see The Fair Act - A Freeze-Frame, Patrick M. Hanlow, Mealey's International Asbestos Liability, August 2003, 1 ff.
- (22) Asbestos Litigation: A History of Congressional Consideration 1977 to 2000, Mary S. Lyman and Letitia Chambers, Mealey's International Asbestos Liability, September 2003, 1 ff.
- (23) Insurers Condemn Senate Vote Killing Class Reform, Chris Grier, Best Wire Services, 23 October 2003.
- (24) Federal Judge Is Optimistic About Talks on Asbestos Legislation, Dennis Kelly, Best Wire Services, 26 March 2004.

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- (25) See Section 121 of the FAIR Act legislative initiative that nine senators have submitted to the Senate plenum for adoption on 7 April 2004.
- (26) Congressional Agency Estimates Federal Asbestos Trust Fund Is Underfunded, Dennis Kelly, Best Wire Services, 23 April 2004.
- (27) Asbestos Negotiations With Retired Judge End With No Agreement, Dennis Kelly, Best Wire Services, 10 May 2004.
- (28) Rapport du Gouvernement au Parlement présentant l'impact financier de l'indemnisation des victimes de l'amiante pour l'année en cours et pour les vingt années suivantes, 2003.
- (29) See (11).
- (30) Communiqué de Presse, Le Conseil d'Etat, 3 March 2004 (see further Florian Endrös on page 118 of this journal, also in footnotes 7 and 11).