MEETING THE DEMANDS OF THE REGULATOR AND LITIGATOR – AN INTERNATIONAL APPROACH

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The impact of health and safety regulations on both the employer and the employee has resulted, in general, in improved working conditions and a healthier workforce. However, accidents are still occurring and whilst the regulator, in the form of the under resourced Health and Safety Executive, can effect prosecution, employees are increasingly turning to the litigator to obtain financial compensation for their injuries or ill health.

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INTRODUCTION

American multinational companies appear to be more vulnerable from the litigator than from the regulator. The reason for this lies in the fact that actions for damages are often sought not just from within America but also from people in countries outside the United States.

Increased environmental and societal awareness has led individuals and organisations to challenge industry to put its house in order in a way which the regulator may never hope to succeed. Recent examples of such challenges are;

- Bhopal
- Brent Spa
- Multinationals operating in Third World countries

Bearing in mind that where America leads today others tend to follow, how can multinational companies meet the demands of both the litigator and the regulator and still hope to remain viable? This paper will discuss some areas of business risk and possible means of minimising exposure to such risks as considered by a UK subsidiary of an American parent company.

INTERNATIONAL BUSINESS RISKS

Although prevention of injury to people and damage to the environment should be of equal concern to any enterprise as making a profit, multinational companies are also subject to other forms of business risk.

Business risk can be defined as any risk that has the potential to affect the earning capacity of a company. Increasing public and social awareness in terms of the environment, public liability and product liability has opened up further avenues of risk - particularly with respect to company image. Increasingly, the source of this risk now includes both the regulator and the litigator.

The requirement to do 'all that is reasonably practicable' to ensure that the public at large are kept free from harm from both the manufacture and use of goods produced by the company has far reaching consequences for multinational companies.

Direct and indirect financial risks arising from accidents and incidents

Up until recently, actions for damages against a company were taken only in the country where the accident occurred however, things are changing. The disaster at the Union Carbide plant at Bhopal in India is regarded as the worst accident to occur in the chemical industry. The size of the disaster varies according to different reports, but it is generally believed that about two thousand people were killed and hundreds of thousands injured. The reason for such a large scale incident was the proximity of the plant to the local community. In addition to the cost in terms of human life, Bhopal also paved the way for the litigator to seek damages in the country of the parent multinational company.

To ensure that their assets are maintained parent companies are increasingly inclined to audit their subsidiaries. For American multinationals this could mean auditing a spread of countries from Europe through Asia to the Pacific rim. Here lies the dilemma as varying standards will be found from country to country. Third world countries struggle to integrate increasing industrialisation from chemical and petrochemical companies into their ancient culture in which age equates to wisdom. Their legislation designed to protect the health and safety of the workers and the environment is in its infancy but industry and technology within those countries continues to expand.

However, having identified a risk exposure in the form of audit findings, a plan of action will be required from that particular subsidiary. Disclosure of information gathered about accidents, incidents and their means of prevention is often hampered by US lawyers concerned about claims for damages. How then can the parent company be sure that appropriate actions will be taken and standards met if information is not shared and, if action is not taken, how serious are the consequences likely to be and how will they impact the business?

Risks arising from the provision of information. Documentation will exist from an audit highlighting the risk and usually categorising it as high, medium or low. In the event of an accident, awareness by the parent company of the existence and magnitude of the risk clearly places the responsibility and any claims for damages with the parent. This is especially true if the risk is in a third world country where the appropriate skills may not be available and the location in terms of the population, less than desirable. In addition, what if the risk is not recognised by the auditor - where then does the responsibility for this omission and consequences of potential claims lie?

The increasing use of the Internet as a means of communication has opened up new areas of potential exposure. Both electronic and paper copies of documents can be cited as 'discoverable' and used in court against the company. So much so that some American owners are going to great lengths to ensure that, for potentially 'sensitive' information, procedures for handling and communicating such information are developed by their legal departments.

This raises another issue. Information about industrial chemical hazards and their means of control are required to be published for acceptance by the Health and Safety Executive (HSE) and the Environment Agency in order to comply with specific legislation (as discussed later in this paper). These 'safety cases', and also details of any enforcement action taken against a company, are placed in the public domain.

Although information which could be considered to be commercially sensitive is not published there could, in the aftermath of an accident or incident, be sufficient information available for an astute lawyer to make a case for civil action to be laid at the door of the highest payer.

America is notorious for exceptionally large financial settlements and is likely to be the focus for future civil claims from overseas subsidiaries - especially for incidents that are the scale of Bhopal or as politically sensitive as the Pan Am disaster at Lockerbie. The effects on the business may be sufficient to impact the viability of company and all of its subsidiaries.

Risks arising from the loss of public image. Further exposure lies in the easy access to the Internet by organisations such as Greenpeace whose increasing following and newspaper coverage can result in considerable damage to company image. The disposal of the redundant oil platform Brent Spa is recent an example of the power of Greenpeace and the resistance of society to bow to the pressure and actions of multinational companies. Although Greenpeace admitted later that their case had some weaknesses, by then the damage was done.

Multinationals operating in third world countries also attract other forms of criticism from the public. The expansion of industry in these countries has increased the need for manual labour usually from women and children. The apparent 'exploitation' of third world cheap labour and its effect on the health and life span of the workers is being publicised by outside organisations and agencies campaigning for the rights of workers in these third world countries. The results can be seen on the shelves of our supermarkets where products from Traidcraft, an organisation who pay a living wage to third world workers, are sold alongside for example coffee produced by traditional suppliers.

How does this use of third world labour by multinationals sit with the often heard phrase 'People are our most valuable asset' ?

Nearer to home pharmaceutical companies, soft drinks manufacturers and suppliers of every type of food product are particularly at the mercy of the public should their product fail in any way. The brand name associated with a company's product has real value in financial terms as Perrier discovered to its cost. In 1990 Perrier water was found to be contaminated with benzene. This, together with poorly handled publicity, took the company from being the market

leader in bottled water to a position whereby Nestle were able to take advantage of the low share price and buy 40% of the company.

Companies can also suffer loss of image and loss of business even when products do not cause physical harm. Nike caused offence to the Arab world by using a logo which resembled the Arabic word for Allah. All of their training shoes bearing this logo had to be recalled.

Risk transfer, by means of insurance and / or the use of contracts will do nothing to save the company image when civil action is taken in the pursuit of damages against the company for injury or death caused during the manufacture or use of one of its products. Unfortunately it is only the catastrophic disasters that get publicity and huge payouts, not the annual death toll of child labour in third world countries.

MINIMISING EXPOSURE TO BUSINESS RISK

One approach that can be used by multinational companies to ensure that their risks are minimised is for them to:-

- look at what the local regulator requires,
- examine what standards exist both from local and international legislation and within industry,
- be aware of what society expects from producers and manufacturers.

Means of minimising risk

The reaction of the regulator to major incidents in the past has been to create more regulations. The Control of Industrial Major Accident Hazards Regulations (CIMAH) was the work of an Advisory Committee on Major Hazards which considered the implications of Flixborough in 1974. This incident resulted in twenty-eight deaths on site and extensive injuries and damage. An equivalent European reaction was the Seveso Directives. In 1976 more than two hundred people and large areas of land were affected by the release of Dioxins at Seveso in Italy. The Seveso directive is implemented in the CIMAH regulations in the UK.

In both Flixborough and Seveso, though interestingly not in Bhopal, the regulator intervened with what many consider to be an over reactive approach largely as a result of public pressure.

Companies are faced with the challenge of meeting the requirements of the regulator and the litigator whilst maintaining a viable business and staying ahead of competitors. American owned companies based in the UK and Europe are required to satisfy their national health, safety and environmental legislation and also to meet corporate standards which are usually based on Occupational Safety and Health Agency (OSHA) Regulations. Examination of the regulations in the country of the affiliate operation can often be seen to overlap many 'in house' standards set by the American parent

OSHA Process Hazard Reviews *v* CIMAH accident scenarios. Companies who have sites which are required to comply with CIMAH Regulations should currently be producing their

safety cases. These safety cases detail the risks to the public and to the environment and identify the appropriate control measures to be taken. New legislation in the form of the Control of Major Accident Hazards Regulations (COMAH), which will be in force from February 1999, extends this requirement to those companies whose inventory of chemicals had previously fallen below CIMAH thresholds. The result will be that many more companies will be required to assess the off-site impact of potential accidents involving chemicals listed in the schedule to the Regulations.

Whilst this might seem to increase the burden on American owned subsidiaries who may have minimal resources, it also provides opportunities to apply holistic and cost effective approaches to the assessment and control of these and other business risks. One way forward is through combining these demands by extending OSHA Regulation for process safety management to encompass the requirements of our Management of Health and Safety at Work Regulations and the impending enactment of the Seveso 2 directive i.e. the COMAH regulations.

OSHA requires Process Hazard Analysis (PHA) to be carried out to identify and analyse the significance of hazardous accident scenarios associated with a process or activity. PHA is used to pinpoint weakness in design and operation of facilities that could lead to accidental chemical releases, fires or explosions and the resultant on or off site effects.

It provides a basis for a Process Safety Management (PSM) programme and the techniques used are those that anyone in the chemical industry will be familiar with, e.g. HAZOP, What-If-Analysis etc. The key being correct selection of the technique appropriate to the risk and awareness of the strengths and weaknesses of the that technique.

The objectives in conducting a PHA are to:-

1. Identify those hazards inherent in the process or activity,
2. Identify credible failures, both human and / or equipment that could lead to accident scenarios,
3. Assess the risk of those scenarios in terms of likelihood and consequence,.
4. Mitigate the risk by making changes to the design and / or operation of process conditions,
5. Document the findings and actions.

These objectives reflect the requirements in broad terms of both the Management of Health and Safety at Work Regulations 1992, CIMAH and the proposed COMAH Regulations. The main difference being that, for CIMAH and COMAH, the documentation will be accessible to the public and thereby also to the litigator.

Application of standards. With the UK affiliation to the European Community we are seeing British standards gradually being replaced by European and international standards. These

changes are reflected in the 'working' standards such as BS 5304 Code of Practice for Safety of Machinery and its replacement BS EN 292 'Safety of Machinery - Basic Concepts', and in items of machinery and equipment which now carry the CE mark as opposed to the British 'Kite' mark. The quality standard BS 5750 and the environmental standard BS 7750 are mirrored by the international standards BS EN ISO 9000 and BS EN ISO 14001.

All of these standards also have equivalents in America. For example respiratory protection and other personal protective equipment use the National Institute for Occupational Safety and Health (NIOSH) standards. Protection appropriate to the risk of exposure will be used by the American employee but what if any form of protection will be being worn in the Far East by the company employee facing similar risks?

Is it acceptable that 'almost' equivalent but differing standards (or even no standards) are used throughout an organisation? It potentially exposes a multinational company to a litigator arguing that differing 'equivalent' standards in some countries afford a lower degree of protection to the employee and therefore cite negligence or breach of duty of care of those exposed to the risk.

Many companies, because of decreased resources and the need to meet customer demand, are now looking to an integrated approach to quality, health and safety, environmental and even financial management. The new British standard for safety BS 8800 'Guide to Occupational Health and Safety Management Systems' has a similar approach to ISO 14001 thus giving companies no excuse for setting universal standards in these areas.

The advantages of an integrated approach to business risk are;

- the visibility of the major risks from both inside and outside the company
- the use of one management system
- better use of limited manpower and other resources

Risk perception and society. In the western world the public are no longer sitting back and allowing the big names in industry to make a profit without considering the impact on the local populations, the earth's resources and the environment.

In the past any adverse comments went largely unheeded. Now however facts and figures right or wrong, as in the case of the previously mentioned Brent Spa, are being used to support the publics' arguments. Companies are being challenged to demonstrate that their actions will not have harmful long term effects on the environment or on the public. Industry should not underestimate the use of pressure groups as a means of risk control.

Although Environmental and now Health and Safety legislation require risks to be reduced or adequately controlled, the decreasing numbers of regulators means that the first awareness of a problem is the incident itself. At this stage the use of legislation is often too late. Prosecution and fines will do little to mitigate further damage or to reduce the loss of lives. The regulator's focus on plant and product design in particular is very limited and therefore contributes little to the control of business risk

FUTURE CHALLENGES

The Health and Safety at Work etc. Act of 1974 and its relevant statutory provisions promote self regulation and are goal setting in their requirements. Conversely, both OSHA and European legislation lean towards prescriptive requirements. COMAH, although basically goal setting, also tends towards a prescriptive approach. It is certainly much harder for a company to argue the case for compliance when legislation is prescriptive.

With CIMAH (and now COMAH) however, are we seeing a shift towards prescriptive legislation in the UK and is it a move in the right direction? The idea of risk being the basis for action is sensible and logical. It was the intention of the Roben's report, which led to the 1974 Act, that those who create the risks should also control them. This has been reinforced from an unexpected direction. In 1992, the Cadbury report on the financial aspects of Corporate Governance [1] recommended that the Board of a corporate body should formally address issues relating to "investments, capital projects, authority levels, treasury policies and risk management policies".

Although Insurance companies have paid out hundreds of millions of dollars in response to major incidents that is not the end of the story. This cost is borne by industry in the form of increased premiums, and in the added cost of rebuilding plant and replacing equipment, to demonstrate to the public and the regulator that chemical plants are safely designed, operated and managed. It seems that when one chemical plant has a major incident the whole of the chemical industry suffers financially.

As discussed, Globalisation of companies for manufacturing and production introduces varying standards (in design, equipment and construction etc.), in the perception of risk and in cultural behaviour and expectations. Can multinationals keep costs down and their shareholders happy by using cheap labour and at the same time apply universal standards ensuring the safety of their employees, the public and the environment?

Setting standards is an integral part of the risk assessment process i.e. the provision of control measures. The means of control must be appropriate to the risk therefore any standard set internationally should give a universal level of protection whether it be for the design of a building, plant or process or for respiratory protection or interlocks on machinery.

Acceptance of one particular standard whether it is American, European or international may not be the answer. The aim should be for the adoption of the highest standard of controls for the protection of the most vulnerable worker wherever they are located.

1. Cadbury Sir A: *1992 Report of the Committee on the Financial Aspect of Corporate Governance*