

ESTABLISHING HEALTH AND SAFETY REQUIREMENTS OUTSIDE YOUR NATIVE COUNTRY

Ian Reed (Chairman, IOSH International Specialist Group)

Traditionally organisations looking to establish operations outside their home country were major corporations who would have their own in-country professionals or have developed a limited number of professionals with multi-country knowledge. Other organisations either hired in local consultants or relied upon their country business managers to provide such knowledge. Few small enterprises would be engaged in any significant activity outside of national boundaries.

The globalisation of markets and the increase in outsourcing of work and services is making demands on more and more safety professionals to understand how things work outside their own country. Whilst employing consultants is still a valid approach, there is a need to broaden the understanding of professionals who are advising more and more companies on setting up or acquiring operations or ventures around the world. Networking of professionals through institutions is increasing and mechanisms to support them when distributed across globe are starting to evolve. More importantly the ability to obtain basic information about relevant safety legislation and aspects of enforcement now exist if you know where to look. The internet offers safety professionals the ability to access information about a country of interest from their office PC, what is more the majority of this information is free, if you can find it!

In the UK the professional institution for safety professionals, the Institution of Occupational Safety and Health — IOSH, established an International Specialist Group to look after the increasing numbers of members with interests outside their home country. Firstly the Group established the names of over a thousand people who were working, or had interests, outside of their native country, subsequently this has grown dramatically. A questionnaire was developed and sent to the initial group, asking for their assistance in establishing requirements for information and services of interest to likeminded practitioners.

We also identified that a number of organisations already had good websites and those that were likely to be of general interest have been identified in a downloadable file off our website under the International Specialist Group News page via the link titled: International resources: Organisations in occupational safety and health worldwide. The website is also being used to place topical articles of common interest that we believe should be in the public domain, in line with our charitable status, rather than closed forum.

The survey results however provided a perspective on what people were looking for and where. This survey of practitioners who practice internationally yielded a relatively poor response, only 12%, but a number of interesting requirements emerged. In terms

of the top 10 countries of interest the list was the US, UK, Australia, France, Canada, Germany, China, Japan, Singapore and Ireland. In terms of services the top priority was web-based access to information followed by the ability to generate email enquiries on specific topics and countries.

The information people wanted to see was firstly detailed H&S legal requirements, then information on the overall legal framework followed by information on specific topics, regulatory arrangements/enforcement, professional bodies and finally commercial H&S services. More details on the survey response can be found in the Appendix to this paper.

The top topics of interest are General H&S law, Fire legislation, Occupational Health requirements, Construction practices, Chemical legislation, Transport systems legislation, Electrical installations standards, Factory operations requirements, Occupational Hygiene practices and finally Radiation legislation and practice.

More telling was the willingness of practitioners to assist others with areas they were familiar with in return for access to information on countries and topics they would value. More than 40% indicated they would assist populating a database of information, and another 40% were willing to receive requests for information via email and provide access to others who might have specialist knowledge in that country.

The work of identifying a suitable web site structure to support these requirements commenced but the practical difficulties of finding English language free access sites for many of the countries on the specific topics have slowed down the task. A key finding early on was the growing database of country specific safety legislation provided by the International Labour Organisation, this provides a fallback for those countries where more specific information has yet to be identified.

Initial population of the various countries was slow but following changes in the website and the appointment of a web champion we are making more rapid progress. At the time of writing this paper 25 countries are listed on the website.

Australia: Austria: Belgium: Canada: Czech Republic: Denmark: Finland: France: Germany: Greece: India: Ireland: Italy: Japan: Korea: Latvia: Lithuania: Malaysia: Mexico: The Netherlands: New Zealand: Oman: South Africa: Spain: USA:

We are taking up the offer of around 200 practitioners to fill in the gaps in for a further 25 countries to put on the site. We also plan to allocate the remaining countries and set up an alphabetical index to enable people to find what is available more easily, also what default information can be obtained if the country of interest is not populated, e.g. ILO site.

These initial results are available on the IOSH website, on free access, whilst a dedicated site for members of the Specialist Group will increasingly be used for information sharing that is not in the public domain. This also allows us to put people in touch with others having county and topic knowledge, alongside a general Q&A forum and articles relating to working in specific countries. This member's only forum enables the anonymous emailing of requests for information on specific topics and or on specific countries via a mediator. This is to allow practitioners to opt out of the task when they are busy or no longer wish to participate. We will also try to even out the workload given this

is a voluntary unpaid service borne out of mutual interest, and a desire for improved standards of safety and health in workplaces under the control of organizations not native to the country or region.

In line with the policy of IOSH membership of the International Specialist Group is open to anyone with an interest in the topic, not just safety practitioners, however the scope of the service is not aimed at identification of detailed standards and specifications but only broad legislative and industry requirements. This means that whilst it can provide the basis for researching requirements and practices in particular countries it is unlikely to be sufficient for full commercial purposes. Consultants and particularly international law firms offer services for such purposes and it is outside of our scope of work to facilitate such resources, although information on IOSH registered consultants is available elsewhere on the main website.

One area that has generated a lot of interest relates to understanding the culture behind the subject of 'black letter' law. Having access to the full letter of the law in a particular country is only part of the picture, equally, indeed in some practitioners experience more relevant, is the question of the enforcement regime and social values driving implementation of the law.

Research papers dealing with these aspects are being sought and put into the members' only area as a means of providing underpinning knowledge rarely if ever found in the public domain. An illustration of the nature of this research relates to the cultural differences between the UK the US and Germany. The UK and the US are considered to be nearer to one another than the UK to Germany, notwithstanding the increasing influence of the European Union. That their respective legal frameworks reflect key aspects of their underlying culture is not a recent phenomenon, it is the product of the long development of legal systems in reflecting the social and political mores of a society over a long period of time.

Analytical jurisprudence of Health and Safety in the three countries provides a number of conclusions: firstly that the UK and US have so many parallels is due in no small part to the export of the common law system whilst still a colony. What has changed since that time reflects the different culture arising from the entrepreneurial multi-ethnic development of the US and its values of individual freedom, suspicion of the role of the state and a willingness to use the law to limit regulatory interventions. The "US approach to enforcement [in part] is a product of that country's history and in particular of the hostility that business commonly shows towards any state intrusion into its affairs"[1].

Secondly that the Germanic culture is more rule based and accepting of the role of the state and other actors to regulate by setting standards, participation in the application of those standards and a more general reluctance to establish precedents through the courts. Therefore acceptance of a more comprehensive system of codification and the concomitant need to comply therewith means that litigation is not an essential element

[1]Gunningham, N and Johnstone, R; *Regulating Workplace Safety*; Oxford, Oxford University Press; (1999) at p. 383.

of a system for establishing health and safety responsibilities or liabilities. Contrast that to the US, where contractual and regulatory dispute is an accepted part of the working environment.

The UK, with its common law base does have an ongoing level of adjudication on responsibilities and liabilities, and interpretation of the regulatory requirements, that means the liabilities and responsibilities are subject to almost constant minor adjustment, and occasionally major ones too. Whilst business participates in the process of regulatory requirements, often with strong opinions, there is no equivalent to the US legal challenge to regulatory orders. The US culture is always to limit the role of the central government and hence regulatory requirements, leaving the position more open to local interpretation within States as well as more significantly the wording on the contracts.

These frameworks clearly derive from the expression of will of society in those countries over many years, in some cases reflecting the divergence between English and Roman law over more than 1000 years. More recent developments, such as the establishment of the European Union, can be seen in the shape of the various all-encompassing Directives but these still sit primarily within the frameworks of the individual countries. As one observer noted, Europe is only now trying to come to terms with a federal approach encompassing a wider variety of cultures, whereas the US has been doing so for more than 200 years.

Thirdly the various legal frameworks for health and safety can be more closely attributed to the culture of the country than that they derive from a common need or philosophy of protection of the individual against workplace hazards. Witness the issue of substances hazardous to health, relatively well provided for in both German and the UK pre the various Directives that have served more to provide a common approach than to extend the level of protection. Contrast the position in the US where attempts to issue similar framework protection was effectively challenged in the courts and to this day only a relatively few substances fall within the current legal framework.

There are differences in the liabilities and responsibilities for health and safety between all three countries; the respective cultures are evident in their respective legal and social frameworks. In attempting to work in any of these countries therefore an appreciation of the ‘way they do things around here’ (i.e. the culture) is a necessary foundation to understanding the nuances of practical application of the black letter law.

The cultural and legal systems of the three countries partly explain the regulatory systems and approaches that have evolved and whilst similarities exist between the US and Germany in the detailed codification of requirements and workers compensation schemes they share little in common in terms of standard setting or enforcement.

On the subject of workers compensation imposition of no fault schemes in both the US and Germany has respectively limited and prevented the development of civil claims from employees as a result of failings by their employer to protect their safety and health. This is a major difference for the UK where the extension of rights to bring a claim under statutory breach has no real equivalent in the other jurisdictions. Nevertheless the experience modification rating approach needs improvement in all three countries to

help incentivise employers to improve as an alternative to regulatory (or for the UK employee liability) pressures.

The enforcement split in the UK between the HSE and Local Authorities is more clear-cut than that between the Lander and BGs in Germany whilst the US model gives reasonable clarity between OSHA federal responsibilities and those states that have an approved program. Where enforcement does appear to differ markedly is in relation to the action taken by Compliance Officers in the US and Inspectors/EHOs in the UK. The former have a reputation for citing any and all regulatory contravention's whilst the latter ignore or only verbally indicate minor contraventions. The position in Germany is that BGs prime role is to advise, guide and inspect every workplace on a regular basis which, coupled with more significant employee involvement, appears to reduce the necessity for formal regulatory action. The number of actions taken against employers continues at a low level.

The effectiveness of all three systems and enforcement is difficult to compare. Statistical analysis uses different bases and often there is a lack of certainty about the true level of reporting, it being argued that the higher rate of workplace fatalities in German reflects a higher degree of risk in the workplace than the UK. Nevertheless socially there appears to be a more general level of satisfaction with the system and enforcement arrangements in Germany, reflecting perhaps the greater level of employee participation in the overall administration and working of the system. The UK generally is satisfied with its system although the enforcement approach is more subject to debate and the current decline in Local Authority resources a matter of concern as well as the variability between them[2].

In contrast the US, whilst apparently used to challenges of its regulatory bodies, appears engaged in a further round of criticism[3] such that key areas regulated in Europe are being tackled via guidance only in the US. The statement made in 1999 by the ASSE President[4] seems apt "As a national organisation we are distressed to see that the critical issue of occupational safety and health is still not getting its due." The position appears not to have concerned the new US Administration, and whilst the fatality rate is nearly twice that found in the EU it appears not to cause much concern or debate in the US.

Thus comparing and contrasting the three countries does not reveal any one as having the ideal system or enforcement approach, however a more consensual one is evident in Europe than in the US. In conclusion therefore it appears we all have something to learn from each other but that what works has to account for cultural and framework differences even though the hazards and risks might be common to all.

[2]Centre for Corporate Accountability website, "Variations in Local Authority enforcement — post code lottery".

[3]General Accounting Office 2002 "Report — OHSA Can Strengthen Enforcement Through Improved Program Management" GAO-03-45.

[4]Fleming F, American Society of Safety Engineers, "ASSE call to action — the need is now to safeguard the national focus on occupational safety and health" ASSE website Press release 1/13/99.

It was put forward that "On balance, the American approach to . . . regulation is the most rigid and rule oriented to be found in any industrial society, the British is the most flexible and informal"[5]. "In contrast the German [approach] is considered to be based upon a normative policy style . . . and legalistic and formalistic"[6]. Broadly the descriptions of the systems and their application appear to support this view.

In terms of case law, the basis of the common law developed in Britain and exported to North America, this has been of much less importance and significance in Germany with its civil law system. This historical less significant role for courts in shaping the law has its roots in the extensive nineteenth century codification of German law "which the courts were expected simply to apply and not to interpret"[7]. These systems are nevertheless coming closer together, indeed it has been said "due [in part] to the increasing importance of case law in Germany, the consolidation of statute in the UK and the membership of both countries in the European Union"[8].

The civil liability regimes in the three countries share the aspects of duty of care owed by one person (legal or natural) to another that form the basis of obligational relationships. That said the roles of courts to interpret and adapt the law are very different between the civil law systems, as in German, and the common law systems, as in the UK and the US. Again all the systems define vicarious liability, strict liability and building and occupiers liability, again with the civil law courts looking to interpretation whilst the common law courts consider intent.

The contractual basis of liability and risk allocation are common to the western world and increasingly the world, that said there are differences between the complexities of the German civil codes and the complexities of the common law position (constantly evolving through new cases). The role of contract in health and safety also brings in the contract of employment but increasingly this is heavily regulated and generally places the greatest responsibility upon the employer.

The value of contracts between persons, more particularly legal 'persons' or organisations, to move health and safety liabilities are increasingly constrained by statute and interpretation, common law or no. Overall it appears to place the UK at the forefront of retained liability by a client for the health and safety of work done on his behalf with limited ability to contract away. That said Germany with its requirements for full and appropriate co-ordination of parties from the outset of work gives the clearest definition of the responsibilities and liabilities resulting. The US appears to place more reliance upon the wording and structure of contracts to move liability and risk, relying upon the courts to interpret them in the light of precedent and statute.

[5]Vogal, D 1986, "National Styles of Regulation", Ithaca: Cornell University Press quoted in Lange, B 1999 "National Environmental Regulation? A Case-Study of Waste Management in England and Germany" JEL.
[6]Dyson, K 1982 "West German: The Search for a Rationalist Consensus" in Richardson, J "Policy Styles in Western Europe" London: George Allen and Unwin 1982, pp. 17–46 at 19.
[7]N Foster & S Sule 2002, "German Legal Systems and Laws", Oxford University Press, at p. 27.
[8]N Foster & S Sule 2002, "German Legal Systems and Laws", Oxford University Press, at p. 3.

The US cherish rugged individualism and resent the role of the state, pushing back regulatory pressures through judicial review and challenging the role of regulators not only to make rules but to enforce them. The UK and Germany take a more consensual approach to rule making and more accepting of the regulatory role, with the Germans taking more time and care with the drafting and adoption of extensive technical rules which once in place would be generally followed. Also their approach to co-determination and long term-ism engenders a more stable set of working relationships. These conclusions seem consistent with the observation that the German approach is the antithesis of the Anglo-Saxon laissez-faire traditions of the UK and US[9], with the UK moving more to the centre these days as our involvement in European strengthens.

This analysis illustrates the need for care in relying upon the 'black letter' law to guide decision making regarding commercial and technical activities. Whilst the availability of information is improving the interpretation remains as complex and fraught as ever, thus our search for more research to aid practitioners and interested parties in understanding the culture and context of a country.

To assist us with this we gauging interest from, and seeking the support of, other professional organisations in a truly global network dedicated to the improvement of safety and health at work. So far links have been established with the American Society of Safety Engineers to work co-operatively with them on sharing information relevant to the international scene. Tentative discussions with the Canadian Society of Safety Engineers have also taken place.

The opportunities to see this expanded into more detailed industry areas, particularly process and high risk businesses, are clear, however the requirement and the support of like minded organisations and willing members needs to be tested.

[9]B Harper, A comparison of Management's role in Monitoring, Implementing and Determining Health and Safety Issues in Germany and the United Kingdom (South Bank University, London) 2000 at p. 14.