

Adviser

Risks arising from extradition



Introduction

Changes in the UK extradition regime in respect of certain territories, coupled with the recent high profile case of the so-called 'NatWest Three', have raised questions with regards to how these costs would be funded and if directors' and officers' liability (D&O) insurance would cover the costs associated with extradition. Marsh has been considering the implications of the new regime and seeking clarification from underwriters on our clients' behalf.

Background

The UK Extradition Act and the UK-USA Extradition Treaty came into force in 2003. The Act created a new 'fast track' regime for dealing with extradition requests from so called 'category 2' territories. This means that a request from one of these countries for a UK citizen to face charges in that country is no longer examined by the courts to see if there is a prima facie case. The courts simply ensure that procedures have been complied with and do not assess the merits of the claims.

An extraditable offence does not have to be very serious but must be one that could carry a 12 month sentence or more in the UK or the requesting state. Although the UK authorities may have decided not to investigate a particular case, that is not a barrier to extradition.

The Act and associated UK-USA treaty were introduced in the aftermath of the World Trade Center terrorist attack and were seen principally as a response to concerns following September 11, providing the ability to speed up extradition procedures related to terrorism. However, recently it has become clear that the US is using the new fast track procedures against white-collar crime.

Implications

The changes in the extradition regime and the case of the NatWest Three have heightened awareness among UK directors that there is a risk that they could be extradited to face criminal charges. It is also possible that the prosecuting authorities in the extraditing state may add other charges once the businessman arrives in their jurisdiction.

An added consideration is that the conduct leading to the request of extradition need not have taken place in the territory concerned but simply have affected a party in that territory. For example, there are cases where the US is seeking extradition because an email server is based in the US and the alleged fraud or criminal activity has been conducted in part by e-mail. Under the new regime, a telephone call made in the US which furthered the alleged criminal activity could also justify a request for extradition.

The regime covers a wide range of countries, in some of which a serious business problem has the potential to become a political problem that could result in extradition proceedings. At present, the US has taken more advantage of the fast tracking procedures than the other category 2 territories but these have similar rights. The bottom line is that a director or officer could be extradited to any of the 91 Category 2 countries where they are not familiar with the legal system and potentially face imprisonment in a foreign jail that will differ greatly from the UK.

The length of sentences in such jurisdictions can also vary from those in the UK. Periods of imprisonment in the US can be double those awarded in the UK for the same offence.

Managing the risk

Since the new extradition regime provides 'fast tracking' for a large number of territories, it is important to examine the 'country risks' associated with the regions your company is involved with, understand the criminal law regime and assess the stability of the government and volatility.

Other strategies include reviewing and strengthening internal controls as necessary, for example ensuring robust anti-money laundering procedures, training staff, and documenting the actions taken. Such mechanisms can make it harder for would-be extraditing countries to pursue individuals and would help directors in their defence against extradition proceedings.

In respect of the articles of association of the company and any agreements to indemnify directors and officers faced with a claim, directors probably would be wise to seek clarification that the commitment by the company to finance defence costs would also include those defence costs incurred in resisting extradition proceedings.

Some of the confusion surrounding D&O insurance stems from the wording in the policies not being clear in relation to extradition and there being little consistency of approach from insurers. In our experience, insurers' stances vary and we are seeing boardroom requests for explicit confirmation of cover for the cost of opposing extradition and obtaining a bail bond.

Many insurers have now drafted an endorsement to expressly provide coverage for defence costs for extradition proceedings. This may include some enhancements which include:

- The services of a public relations firm to assist in contesting extradition.
- The cost of psychological counselling to assist the defendant in dealing with the stress of extradition.
- The cost of tax advice in the requested country if the defendant spends enough time in the country to become subject to its tax laws.
- The premium for a bail bond if the requested country permits bail for those facing extradition. If a defendant does not have the cash to cover the bail amount, obtaining a bail bond backed by an insurance contract is an alternative option. The bail bond insurer may also want sufficient collateral to cover the full amount of the bail if the defendant misses their court date, as the D&O insurer will cover the premium, but will not provide the collateral.

It is important to be cautious, take advice and consider amending or extending the D&O policy to achieve clarity for your directors and officers. Analysis is also important when reviewing any cover provided by a prospectus liability policy, as similar liabilities are covered under such policies and directors could face extraditable offences.

Some UK companies without obvious US exposure have arranged D&O cover that excludes the US, benefiting from reduced premiums. Traditionally, US claims have involved exposures relating to securities, and companies that are not listed in the US have not considered themselves vulnerable. However, the 'catch all' nature of the UK-USA Extradition Treaty brings companies with even remote dealings or operations in the US in the net.

Marsh believes that clients should review their operations and consider including US exposure in their D&O liability policies unless they can be totally confident that no business operation or decision will in any way touch upon any US jurisdictional area. Inevitably, including US exposure will mean higher premiums for some companies. Clients should also review their limits of liability because having to defend or resist extradition proceedings could be costly.

Conclusion

The new extradition regime means the directors of UK companies that have any dealings or involvement in the US and other category 2 territories face a very real risk. Well drafted D&O policies should provide coverage for the legal fees incurred in contesting a petition for extradition and many associated expenses.

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Most notably, the extradition of the NatWest Three has highlighted the potential vulnerability of UK directors and officers.

In that particular case, the UK Serious Fraud Office decided not to prosecute the individuals concerned. However, the offence they are being charged with in the US is a qualifying offence under the new extradition regime because, if they had been prosecuted and found guilty in the UK, they would have potentially faced a prison sentence of a year or more.

The NatWest Three invested a significant amount of time, effort and money to generate public opinion and support behind their case for refusing extradition. It seems likely also that they were concerned at the prospect that, if extradited to the US, they would not have an automatic right to bail, unlike US individuals facing similar charges. As foreign nationals extradited to the US, they could have been regarded as a high 'flight risk' and have been held in a maximum security prison for 18 months or more while they awaited trial.

In the event, the NatWest Three were unsuccessful in their attempt to resist extradition. However, the publicity they generated, the backing of civil rights groups and concerns that the UK did not have reciprocal arrangements in respect of extraditing US citizens to face trial in the UK, probably went some way to prompting Prime Minister Tony Blair to intervene, to ensure that bail would be set when they arrived in the US.

The information contained in this publication provides only a general overview of subjects covered, is not intended to be taken as advice regarding any individual situation and should not be relied upon as such. Insureds should consult their insurance and legal advisors regarding specific coverage issues.

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