



Extradition arrangements in the US and UK

MANAGING THE RISKS

Recent events have provided the UK's corporate community with an opportunity to reflect on its exposure to the criminal justice system in the US. This month, after a long battle, the NatWest Three were flown to Texas to face charges of fraud linked to the collapse of Enron. The US is still pursuing the extradition of Ian Norris, the former CEO of Morgan Crucible, in connection with alleged illegal price fixing.

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In March 2003, the US and UK signed, with some speed and anti-terrorism objectives, an extradition treaty (the Treaty) that introduced the notion of 'fast-tracking' extradition by removing the need to establish a prima facie case against the individual whose extradition is sought. The Treaty was ratified in the UK and its terms were enacted in the Extradition Act 2003 (the Act). The Act outlines the procedure that must be followed for extradition to category 1 territories (mainly European countries, thereby implementing various Community law obligations, unconnected with the Treaty) and category 2 countries. Within category 2, certain countries have been singled out as designated territories by Order in Council and this designation means that a country can seek to extradite using the fast-tracking procedure outlined above. It follows that, when using the fast track, a foreign prosecutor must allege conduct that (i) occurs in (or is subject to the extra-territorial jurisdiction of) his country and (ii) would be an offence under the law of the UK punishable by more than 12 months.

The US is a category 2 territory under the Act and has been identified as a designated territory. It therefore enjoys the benefits of the fast-track scheme.

Assessment of the extradition risk

These new extradition arrangements are considered controversial for a number of reasons.

- For the UK to extradite from the US it must still produce evidence to show probable cause. The asymmetry is created because the US has not ratified the Treaty and so the 1972 treaty between the parties (and its test of probable cause) continues to apply to requests for extradition from the US. However, even if the Treaty is ratified, an asymmetry will persist, as the Treaty itself entrenches the need for the UK to show 'such information as would provide a reasonable basis to believe that the person sought committed the offence' without requiring the same of the US in its requests for extradition from the UK.
- The Home Secretary's discretion to refuse extradition, if considered inappropriate in all the circumstances, has been removed by the Act. Although this political power was rarely exercised, it provided an avenue of last resort that is no longer available. It is doubtful, however, that this discretion would ever have been exercised to prevent an extradition to a friendly country with a stable criminal justice system, such as the US, where there were clearly reasonable grounds.
- The UK is increasing the scope of criminal sanctions (see, for example, antitrust law and liability for overseas corruption). This trend may increase the scope for and likelihood of the double criminality test for extradition (that is, the facts must give rise to criminal liability in both the UK and the US) being satisfied.

Combined with the US's rapidly increasing criminalisation of corporate activities and an active prosecution environment, there seems to be an increased risk of UK citizens being extradited to the US. The expansive view of jurisdiction taken by US prosecutors has meant that acts

involving limited US contact (for example, the use of a US telephone line when calling from abroad) can (as a matter of theory) be prosecuted. As a consequence, companies that do not 'do business' in the US still need to be aware that the limited contact they have with the US means they must comply fully with US laws.

Moves to redress the imbalance

Reacting to negative public sentiment generated by the Norris and NatWest Three proceedings, the Home Office Minister, Baroness Scotland, travelled to Washington this month to urge rapid ratification of the Treaty. In addition, earlier this month, the House of Lords proposed an amendment to the Act that would remove the US as a designated territory thereby revoking its access to the fast-track procedure. The current extradition arrangements were also debated in the House of Commons. Consequently, it remains possible that the asymmetry of procedure will be removed. However, this will not necessarily lead to the eradication of risk of extradition to the US. More difficult to assess is whether extraditions using the fast track procedure will also eventually become available for UK prosecutors, but this will be problematic given the recent general political stance of the US in terms of making its citizens vulnerable to criminal process overseas.

Managing the risk

In reality, it is difficult to manage the risk of extradition. It is important that companies and corporate advisers pay strict attention to the individual criminal risks in the UK and the US, including antitrust, corruption, fraud/misrepresentation and conspiracy. They need to be sensitive to such issues in the working world and to take advice at an early stage if they feel that they are in dangerous waters. An imaginative and proactive strategy with the criminal authorities, perhaps with clear corporate support, will often help to deal with such problems if they arise.

Directors' and officers' (D&O) insurance policies generally exclude losses arising from criminal activity; however, the costs of defending criminal proceedings are often covered if the defendant is ultimately acquitted. The wording of many current UK policies is unclear as to whether the (potentially substantial) costs of defending extradition proceedings are covered. Many underwriters are modifying their policies to deal expressly with the point.

Companies and their boards would be well-advised to check their policy wordings carefully and to seek clarification from their brokers where necessary. In addition, companies may wish to check the terms of any indemnities offered to directors to ensure that they are clear and operate smoothly and consistently in conjunction with the company's D&O insurance.

Companies should also review carefully their coverage relating to US liabilities, including US defence costs. Many UK companies conducting little or no material business in the US have comparatively low limits for US liabilities, or even a specific exclusion. In light of the potentially increased risks, previous levels of protection may now seem inadequate.

It is important to keep this in context, however. In both the Norris and NatWest Three cases, it has been suggested that it may have been possible for the prosecutor to have met the probable cause test and it was by no means obvious that the Secretary of State would have exercised his discretion against extradition, on the facts of either case. If so, their position would have been the same in the pre-Act world.

Moreover, the Department of Justice and the Serious Fraud Office have been anxious to send out signals recently both that (i) the actual frequency of extradition requests has been lower than some more alarmist comments would suggest, and mostly occurred in cases that were obvious, and (ii) there was no expectation of a wave of such applications. In the light of the recent political furore, it seems likely that there will be some restraint. Thus, the message is probably to be cautious in areas where there might be risks of criminality (as would be expected from all well-run companies), to be vigilant on all aspects of compliance and good governance, including systems and controls and their effective operation, but not to over-react, evaluating the experience over the next year as the intense heat of these recent events fades.

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