

1,2&3

D&O main concerns
JLT's panel

Will the floodgates
open for extradition?

4&5

UK corporate
law reform

6&7

Global vs. local
coverage

8&9

Regulatory
investigation

10&11

Any Questions?

12

Cover for
extradition costs

OCTOBER 2006

Directors' and Officers' Liability *Special*

What are the main concerns for corporate buyers of Directors' and Officers' liability insurance (D&O) – and those that provide the cover?

JLT Risk Solutions tackled four of the most topical issues in a briefing held at the group's London head office at Crutched Friars on September 28. More than 100 people attended a lively session, which reviewed recent developments in the D&O market and went on to focus on four specific areas:

- US extradition
- The UK Corporate Law Reform Bill and the insurance implications
- The importance of locally admitted insurance
- Regulatory investigation

As JLT's Chief Executive Dominic Burke, observed in his introduction, D&O insurance continues to play a key role in the boardroom, as directors increasingly come under the investor and regulatory spotlight. In this environment the quality of a company's insurance and risk management programme is vital.

JLT's panel of D&O experts

Michael Lea Head of D&O Practice at JLT Risk Solutions Limited talked about the insurance market and chaired the discussion

Simon Goldring Partner at the firm of Reynolds Porter Chamberlain LLP focused on US extradition

Julian Elms Underwriter, UK D&O and Pension Trustees Liability for Catlin Insurance Company Limited discussed UK Corporate Law Reform

Cameron McLisky Chief Operating Officer, Financial Lines, for AIG Europe (UK) Limited provided his insight into global vs local cover

William Amos Head of Department in Enforcement Division at the Financial Services Authority gave the investigators perspective





Will the floodgates open for extradition?

The issue of US extradition continues to attract media attention and cause concern in UK boardrooms.

Simon Goldring, an expert in this field believes that while extradition was a “hot topic” to fill newspaper columns over the summer, it has also excited press attention because of the nature of the Extradition Act, the creative approach of the US authorities and xenophobia.

A portent of things to come?

It is clear the NatWest 3 would have been extradited irrespective of the new Extradition Act, so the change makes little difference. It might seem unfair, but is unlikely to cause an increase in either extraditions or claims.

What might trigger an increase is the creative approach being taken by the US authorities.

They may attempt to extradite UK executives even when there is a very tangential connection with the US. Let's take one example – US authorities can extradite for wire fraud. Although this sounds very grand, all it actually means is that the individual sent an email using the American telephone network.

The NatWest 3, although a UK centric situation, arose out of the collapse of Enron – an emotive subject for US authorities and Americans generally. It explains why they pursued them when the UK authorities did not. So we must wait and see whether this increased appetite is maintained. But unless there is another Enron or major corporate collapse to unleash a further wave, evidence suggests the floodgates are not about to open.

<p>1. Nature of the Extradition Act</p>	<p>Outrage that a measure, ostensibly passed to deal with the war on terror, was used to extradite company directors and executives. They also focused on the fact that the Act was not reciprocal, as it only applies to the UK. So it takes away protection from UK executives, while keeping it in force for US executives. The burden of proof for US authorities to extradite a UK director is much lower than the equivalent burden would be in the US. The right of appeal to the Home Secretary has also been removed – extradition is no longer at his discretion.</p>
<p>2. Creative approach of the US authorities</p>	<p>Reflected in two very difficult cases and marked by some press sympathy for the directors involved. The first is the NatWest 3, where the press took the attitude: “if the English authorities are not prosecuting these guys, why the hell are the Americans?” The second, recently reported in the FT, involves Ian Norris, ex-chief executive of engineering group Morgan Crucible. To extradite someone you must establish that he has or may have committed a crime both (in this case) in the US and the UK. Mr Norris allegedly committed price fixing in the US, but the difficulty was that there was no equivalent statutory crime in the UK until 2002. So what did the US authorities do? They re-characterised his alleged crime as being one of conspiring to defraud.</p>
<p>3. Xenophobia</p>	<p>There's a perception that a director who faces trial in Texas will face a kangaroo court, and will not get justice. It's also assumed that he is much more likely to be imprisoned and the sentence will be huge – maybe 30 years against a possible two or three years here in the UK. Costs there are also massive, so that adds to the mix.</p>

Reasons for increased press attention.

Risk management is no panacea

What can UK companies do to mitigate the effect of extradition orders against their executives? When risk managers consult their lawyers, they are told to exercise good risk management, conduct an audit of their risk profile and review where their risks lie.

However, it is difficult to reduce the risk of extradition. For example, a few years ago Wembley Plc's US subsidiary, which was involved in leisure and gambling, wanted to increase the number of gambling machines on a specific site. One employee decided it might be a good idea to pay a very large bonus to a lawyer whose brother was actually in the Senate and could approve the licensing. He approached Nigel Potter, then CEO, for direction and risk managers would be pleased with the CEO's response. He approached his board for their views and was told: "act cautiously and consult our auditors and lawyers". Which is what he did.

After seeking their advice, he decided the company would not make any offer of a bonus. But despite practising good risk management, he was still indicted in the States and imprisoned for three years.

So risk management is not necessarily a panacea, but it still remains important that you ensure your document retention programmes are adequate and take other similar practical measures to ensure the risk is mitigated as far as possible, or at worst you have evidence to support a defence.

Why has a soft market returned for D&O?

What lies ahead?

See Michael Lea's market commentary at www.jltgroup.com or ask your Account Manager for a copy of the bulletin.



What's on the radar for UK corporate law reform?

The Corporate Law Reform Bill, looks set to come into force soon. It is an epic saga eight years in the drafting, which aims to outline the duties of directors of both public and private companies. The Bill can be seen as an attempt to lift the corporate veil and have directors directly exposed to stakeholders in the company, environmental agencies or the general public.

Julian Elms set out the insurance implications and potential effect on the D&O market, in particular the changes he anticipates in the frequency and severity of lawsuits against directors and officers.

The reform updates what is essentially laws dating back to Victorian legislation and the 1985 Companies Act. In the UK, D&O claims frequency has been particularly low. This partly reflects the fact that our laws are complicated and do not easily allow for litigation. Nor is our culture a litigious one. Moreover, the number of D&O policies in existence here has grown only gradually since the 1980s – another reason for the low frequency.

Since the late 1990s, when law reform started, people have attempted to predict the operating environment directors will face in future. A key word used at the time by Margaret Beckett (before becoming Foreign Secretary) to promote the change was “accountability”.

We now have the Bill going through Parliament. Some believe the storm clouds that have gathered over British boardrooms are about to burst. There were similar concerns in the 1980s when the Insolvency Act introduced concepts such as wrongful trading. But that earlier legislation led to only a small number of claims, and it took several years for the ramifications to work through.

Codification is the key

So, what can we expect in terms of changes to the law and how this will affect claims frequency?

The new Bill places a duty on directors to promote the success of the company, to exercise reasonable care, skill and diligence and to avoid conflicts of interest. Opinion within the legal profession divides as to whether this increases the threat of personal liability actions against directors. For example, in promoting the success of the company, directors must have regard for the interests of employees and for the long-term consequences of any decisions on the community and the environment. One concern is that directors will face an increased workload in making any decision.

We are in an era where corporate governance is far more rigorous, there are more D&O policies and the coverage provided is much wider. In addition, auditors' liability is to be capped. That means apportionment of blame, when there is a corporate failure, is far more likely to involve directors.

So it's realistic to expect an increase in claims frequency and more severe losses, although we are coming from a very low base. We may need to wait a few years, as with the *Insolvency Act*, to gauge the impact. It could be intensified if the new laws coincide with economic downturn and more corporate failures – a worrying prospect for insurers, as the economic situation always has a major effect on claims.

Codification is also planned for derivative actions allowing shareholders to bring claims in respect of directors' negligence. They must approach the court for permission to continue their claims, but obtaining it is going to be much easier.

This has again raised fears of opening the floodgates to litigation, as it creates possibilities for large institutional shareholders as well as frivolous claims intended, perhaps, to intimidate or pressurise boards of directors.

A shakeup for D&O policies?

According to Elms the UK market now have more D&O insurers than ever before. More than 20 compete, although only around five are serious players when it comes to heavyweight D&O risks – that is the FTSE 100 companies. Any significant increase in claims activity and payouts could push rates higher, we are coming from a low claims base. Whilst there may be an initial knee jerk reaction it is likely competition, and the innovation this creates, will counter any effects.

Elms explained that he expects further clarification of policy wordings, such as that for extradition. There have already been endorsements from the market to clarify the situation on corporate manslaughter, as well as wordings that specifically address the topic.

Danger could lurk in following the US, where, in the 1990s, coverage was broadened with the addition of features such as Securities Entity cover. That proved a step too far and losses proliferated.



The introduction of derivative actions in the UK could result in the major shareholder restriction becoming an issue, as it is still commonly used. Higher retentions for the company (B side of the policy), by way of policy deductibles, are another possibility – UK levels are often small or even non-existent.

On the issue of the major shareholder exclusion, Michael Lea suggests that frequently it is limited to claims brought by specifically named entities. JLT often recommends that clients consider having a buy-back on the exclusion for shareholder derivative claims where they emanate from a genuine third party or brought in a capacity other than as a shareholder. Different considerations apply when the third party bringing a claim is also a supplier, a customer or a creditor of the company and brings the claim in that capacity,

Individual cover

Is this an opportunity for more entrepreneurial markets to offer either individual director liabilities, independent director liability policies, or for a director to have a portable policy for each of the positions he holds?

It's acknowledged that the risk to reward ratio for non-executive directors compares poorly with that of their executive colleagues said Elms. So independent non-executives are, justifiably, concerned about sharing their policy limit. For that reason you could see a split away from the main corporate policy for non-executives and the independent director making a play for his or her own policy.



Why has global versus local coverage become an issue?

Global versus local D&O cover has received attention in recent years – possibly due to increased insurance regulation and the growing focus on corporate governance.

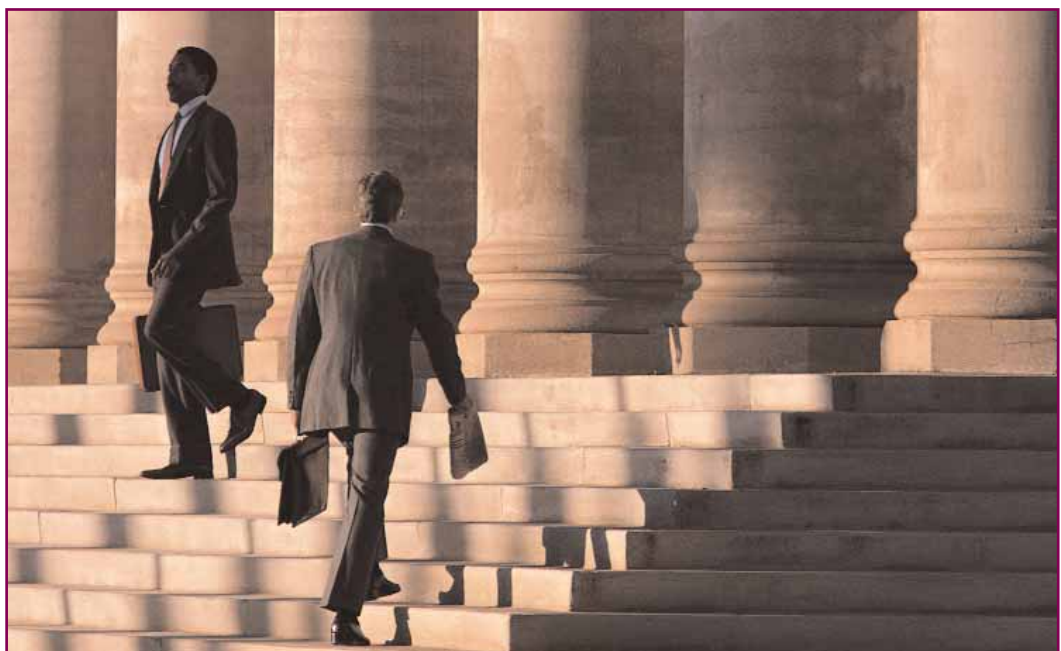
Whether public or private, a company with overseas subsidiaries or operations that buys a global D&O policy faces a dichotomy of global cover and multi jurisdictional exposures.

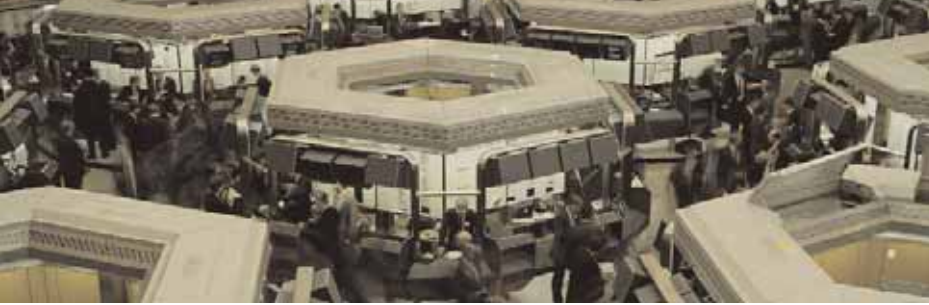
Cameron McLisky was asked why the issue has achieved prominence – given that D&O policies go back to the 1930's and have always been global? He agreed the issue has gained attention relatively recently and some insurers have begun promoting their policies on the basis that they offer truly global D&O programmes. More major clients now request both a London-based global programme, but also – for operations overseas – local D&O policies for each of those operations.

An admitted insurance policy is usually issued when, in a particular jurisdiction, the company is legally compelled to place that insurance locally. But in many jurisdictions it is unclear whether local placement is necessary. For this

and the following reasons more companies are looking to purchase a local D&O policy specifically to cover potential gaps:

- **An increased focus on compliance** – not only from companies buying a D&O policy, but also from insurers who don't want to breach local laws and incur penalties.
- **Premium tax** – some countries apply a local tax for a risk located there that is covered by insurance. Even when companies buy from a multinational insurance group, it's still difficult to pay and collect local premium unless the insurer has an office there. A locally admitted policy makes premium payment much easier.
- **Total premiums** – D&O has become a major class of business, with premium income running into billions. As it has grown, local regulators and local tax collectors have taken a greater interest in the cover.





- **Worldwide loss profile** – D&O claims occur more frequently worldwide, with significant claims developing both in Australasia and Asia. Strong economic growth in Russia, Eastern Europe and South America means we will soon see more claims in those jurisdictions.

Even where there is no requirement to buy a local admitted policy, clients may query whether the global policy is appropriate in a particular jurisdiction. There is an obvious benefit in getting a locally crafted and locally signed off policy for an operation abroad. It is possible to adapt the global policy to cover non-indemnifiable acts – for example allowing a UK company to pay a Russian director of a Russian subsidiary. However, in reality, what usually happens is that the full Side A and Side B policy is put in place.

Limit of indemnity

D&O insurers and specialist brokers can help buyers decide whether locally admitted policies are needed, although the client and their legal advisers will ultimately make the final choice. The limit that the company buys in each of those jurisdictions need not be the limit of the global policy – £1 million may suffice.

You could limit this to non-indemnifiable acts only in anticipation of the fact that there is no insurance admitted issue if the company pays, say, the Russian Director of a Russian subsidiary, but in practice, a full side A and side B policy is put in place.

This indemnity limit can be an important issue as D&O carries an aggregate limit and an insurer only has so much capacity to offer. For example, suppose we have a £25 million global policy based in London with 20 jurisdictions where the insured has a locally admitted policy, each with a

limit of £5 million. The net result is a potential limit of £125 million, more than the insurer may willingly provide.

There are some solutions to this potential problem:

- A time-limit endorsement – in other words, the total limit that the insurance company provides is still £25 million globally and the limits are all tied together.
- A parental indemnity – if the insurer were unfortunate enough to have claims in each local territory the client parent company would reimburse it via a parental indemnity. This could be unworkable, however, if the aggregate exposure vastly exceeded the global limit.

However, in certain countries, notably Brazil and India, this solution would not work, as you cannot share the limit of the local policy with the global policy. In both countries you must buy separate limits and pay premium and tax locally, which presents a problem for insurers with a finite amount of capacity.

The issue is really the same one that insurers and clients have dealt with for years on compulsory insurances that must be bought locally such as property, motor, public liability. The most efficient way to solve that problem is to have a locally admitted policy in each of those jurisdictions with the global policy acting as difference in conditions/limits.



What should firms know about regulatory investigation?

Although the UK D&O market has experienced relatively benign claims experience, investigation costs coverage is increasingly being triggered. A recent FT headline termed this “regulatory creep”.

D&O policies provide insurance cover by way of an extension, which usually is offered for the full policy limit and applies to all regulatory investigations into the affairs of the company. It pays the cost of representing a director at official hearings – as distinct from a wrongful act by a director that becomes a claim and is covered by the main policy.

William Amos set out the matters that can spark regulatory scrutiny and how the FSA decides on investigation.

The FSA's enforcement division works closely with supervisors, but has no set enforcement targets. Potential cases are reviewed carefully against criteria that assess the threat of potential misbehaviour against the FSA's prime objectives. For example, it would examine the potential loss to retail customers, the impact on the efficiency of UK markets, or the impact of actual or potential financial crime.

A key element is the company's behaviour. Does it have a history of things going wrong? Is there evidence of past issues that don't appear to have been managed as well as they should? If the company has suffered continuous problems, it is more likely to come under scrutiny.

The company's reaction to any problem is very important and the action taken by FSA Supervisors may well suffice. Frequently the company itself will identify the problem, coming to the FSA, explaining what has happened and presenting its own remedial plan and schedule. Such an approach gives the FSA a sense of confidence that the problem is taken seriously. Supervisors deal with most problems, discussing relatively few with the Enforcement Division and

an even smaller number actually going through to the formal investigation stage.

The Enforcement Division currently has 100 to 150 ongoing cases, a significant reduction from when the FSA first acquired its powers in 2001. The reason is that it tends to focus on fewer, but more significant cases. That might influence corporate decisions on the sorts of cover that need to be taken out. The cases the FSA deal with are relatively big and therefore, this means they can substantially impact the company's resources.

A three stage investigation process

1. **Referral** – limited impact on the company. Mainly internal discussion within the FSA, although the company may be asked to provide more information about exactly what has happened.
2. **Investigation** – usually takes up most time, both for enforcement and the company being investigated. Generally involves requests for documentation and interviews.
3. **Decision** – using the settlement process, Regulatory Decisions Committee or Tribunal Hearing.

The documentation required can vary massively. A market abuse case might involve no more than three or four traders. In terms of documents, compliance procedures and, possibly, training records and the training programme would be examined.

On the other hand, a large retail selling case might see a review of systems and controls running from senior management down to the distribution network. Enforcement would look at issues such as how compliance assesses and follows procedure and considering how senior management perceive their risk.



This means understanding how senior management works, how board committees are structured and how risk and responsibility is delegated. All of which involves significant requests for data, increasing of a digital nature.

Not all cases result in disciplinary action. Last year, about 40% of cases closed without any formal action.

The decision stage

Under the settlement option, the FSA will put to a firm near or at the end of its investigation, what it believes has happened, what it means in terms of breaches of FSA requirements and the potential penalty. There is scope to have without prejudice discussions to agree a form of words to go public at the end of the investigation and to agree the penalty. The penalty may be reduced by up to 30% to reflect the company's acceptance of wrong-doing.

An alternative process is through the Regulatory Decisions Committee (RDC). This is an administrative decision making process. It is part of the FSA, but individuals on this committee have no other responsibilities within the Authority. The RDC includes people from industry, consumer groups and members of the judiciary.

Under this process, evidence is submitted and recommendations made to the committee. A notice is issued to the company, which has the opportunity to make representations to the RDC on how management perceives the case. Clearly, that has a greater impact on the company's resources than going through a settlement procedure.

The other option is through the tribunal; effectively a court of law where full evidence is submitted from both sides. Witnesses can be cross examined and the issue is looked at afresh. Hearings can take from a day and several weeks. In terms of resources, it clearly makes much greater demands on both sides.

Who is involved?

So, who does the FSA typically require access to within a company and how much time are they expected to commit to the investigation?

This also depends on the type of investigation. As mentioned above, for a limited and small market abuse case, interviews may be confined to two or three traders who were involved, and someone in compliance.

Broader cases, such as systems and controls, might involve senior management all the way through the company's structure. What messages are coming from the top, how they are passed down, how are procedures formulated and how are they implemented at ground level. Finding out involves much more interviewing and more time. It will also involve the company's general counsel or compliance.

Normally, there will be a person whose specific role is to be main contact point with the FSA. If it is a large case, a significant amount of their working day could be taken up with not just talking to the FSA, but with its requests for documents.

It may be that the items requested are no longer live and have been replaced by other versions. The individual will be talking to IT departments and this can place considerable demands on them, over and above their normal business role.



Any other questions?

At the briefing, JLT's panel of experts took questions from the audience:

Q1 Given that one of the most significant areas that came out of the new Combined Code (2003) was the concept of board performance and individual director performance, how much is that keeping underwriters awake at night? Surely that links up with our fiduciary duties and opens up a can of worms?

JE In terms of the Combined Code, it's both good and bad. You know that they will be acting as they should be but, at the same time, if they don't, they will be caught out. There are more rules to break. Again, the whole regulatory environment in which we are now in is a good thing, but there is a downside for us if any problems come out of it. In such an environment, when things go wrong, you look to your insurance.

ML In my experience, the one constant is directorial malfeasance. The thing you can rely on is that people will do wrong. The difference is that here you have rules that identifiably place duties on directors. It makes it easier for dissenting shareholders or stakeholders to bring a claim because of a breach of those rules. I don't think it has changed behaviour in the boardroom, as UK corporate governance has always been pretty good. What I think it will change is the tendency for dissenting shareholders to bring a claim because they have an identifiable breach.

Q2 Given the corporate law reform and increasing awareness by directors about D&O issues, are you seeing or do you foresee changes to the structure of D&O covers with respect to Side A and Side B – for example, a move to Side A only policies more?

ML The answer is a resounding 'yes'. What we traditionally were faced with was ABC style coverage in a huge tower up to, say, £100 million for most corporations. The first thing to note is that the £100 million is still placed on an ABC basis, so it isn't a reduction in coverage for Side B or Side C, but what we have seen is directors requesting that there is a separate limit for non indemnifiable claims. Of course, there are fewer non indemnifiable claims than there used to be following the Companies Act, because companies can issue very broad indemnities now. What we are seeing is a move towards the US model, over the longer term, which would be A Side difference in conditions (DIC) products. You will see directors insisting on them being non rescindable and ring fenced, sometimes even limited to the non executives only or to a group of individuals only.

The decision making and purchasing philosophy is now being driven by directors, whereas it was something that fell more into risk management and corporate balance sheet management before. What we are seeing is a lot more insurance literacy from directors themselves, and we are getting increasing numbers of questions from their attorneys as well.

JE Side A lends itself, as a product, more to the larger companies that are less concerned about their balance sheets, because they are very strong. The company isn't going to be unduly harmed by a D&O claim where they reimburse. Side A is more for the large FTSE 100 company.



Q3 When did it first come to light that global programmes might be less effective in certain jurisdictions? Is that a recent development and was it predicated on any case law or any wrong doing?

ML The Kvaerner tax decision highlights the allocation of premium tax for a D&O policy.

CM I believe it's a very recent issue. I've seen a number of instances of clients requesting these programmes – requesting quite significant multinational programmes with, in some cases, dozens of underlyers around the world. It is, first and foremost, a compliance issue – ensuring they comply with countries where they have to buy local policy. More and more, it is also a realisation that there is perhaps a benefit in looking at a policy that is crafted for a local jurisdiction and has been signed off by local lawyers. Also perhaps, local courts have a precedent about how the policy is constructed and how it is interpreted, which is obviously of benefit.

ML At JLT, we've seen that risk management departments don't necessarily drive the issue. The corporate risk management department has typically taken a blind eye approach to admitted/non admitted global jurisdictions. It is being driven more by local directors who are saying, 'My duties have now been codified in local law. I need to show that I have a protection, especially where I cannot be indemnified by the company.' Hence Brazil and India have become the real focus.

ML Another trend that we've seen for certain major assureds is either to take out entity coverage – because of the bankruptcy element and whether that becomes an asset of the corporation – or to sub limit the entity coverage, so it doesn't significantly erode the personal protection of the directors. I think that's a responsible approach. A number of our major multinational assureds have a philosophy where they do not want any entity coverage at all. They will have a predetermined allocation of defence costs; say 80/20, in favour of the directors.

CM One reason for entity cover being introduced was to sort out allocation issues. What we are now seeing are pure entity or Side C claims, where the entire policy limit may be blown because the company is liable and has a claim made against it. We are going to see creative use of D&O capacity a lot more. It may be through using capacity for a separate tower for the directors and a separate tower for the company; it may be by having a Side A policy that sits on top of the tower, which is there to protect the individual directors in the event of a rescission by or the insolvency of a primary insurer.



Cover for extradition costs

It is essential to check the breadth of your D&O cover. Most insurers have clarified that their policies include cover for extradition costs as the definition of a claim will include criminal prosecution, which can be any kind of proceeding against a director. However, some policies may contain a North American exclusion clause. Michael Lea said that this was particularly common for UK private companies that have no North American assets. We would urge companies to negotiate removal of this exclusion, which has become a major concern in the market as extradition can affect any company that trades in the US.

Simon Goldring was able to confirm that UK companies can indemnify directors for costs associated with extradition either by using a D&O policy or by paying the costs directly. These can be significant, for example the NatWest 3 have reportedly spent US\$3 million in criminal defence costs. The question is where are those costs to come from? English law was recently amended so it's now lawful for companies to enter into agreements with their directors to indemnify them against these costs.

This raises the question, why have some high profile directors not had the benefit of indemnities from their companies? There are probably two reasons. Firstly, the change in the law was only introduced in April 2005. Some high-profile

extradition cases go back further than that. Secondly, many companies have not caught up and have yet to issue Deeds of Indemnity to their directors. If this applies to your own company, you really should ask "why not?"

Even where the company has a Deed of Indemnity, it does not mean it always bends over backwards to support directors (and the NatWest 3 were ex-directors when extradition charges were brought). Companies may well have become insolvent or been purchased – NatWest was acquired by Royal Bank of Scotland.

So employer indemnification for directors facing extradition charges is not automatic. That's a good reason for directors to consider D&O as part of their package. It is important to remember that even if the company does advance costs to a director, if he or she is indicted in the US and found guilty – not necessarily of crimes of dishonesty – they must reimburse these costs. But the individual covered by a D&O policy does not have to repay them, unless he or she is found guilty of dishonesty.

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