

# Extra-territorial risk for professionals is increasing

**Extra-territorial risk is risk to UK based professionals as a result of events in foreign jurisdictions.**

One prominent example is the internet gambling saga. For several years politicians and authorities in the United States have been zealously pursuing internet gambling companies and their officers for alleged breaches of US law.

Alarming for professionals and their insurers, it was reported recently that US authorities were no longer content to pursue the companies operating internet gambling and their directors but that a number of UK professional firms which had advised those companies had also received requests for 'assistance' and for production of documents.

It doesn't take a huge leap of logic to infer that the US authorities might see the professional as a party of interest if they have advised on transactions which lead to an allegedly illegal activity.

This raises a significant business risk because whenever it is asserted in the US that a corporate crime has been committed the claimant bar is quick to emerge and seek civil redress.

## **Anti-competitive behaviour**

The same concerns arise in relation to advisors to companies alleged to have engaged in anti-competitive behaviour. Rules against cartels in the US are far broader in application to that of those in the EU. US courts have jailed more than 30 non-US directors since 1999 and there is a pending House of Lords appeal against the extradition of the former chief executive of Morgan Crucible. Could he have a claim against his professional advisors? If a situation arose after 1 October 2007, when minority shareholders can bring derivative actions against directors, is it possible a professional could be joined by a director as a third party to a shareholder's derivative action?

## Nationalisation

Consider also this hypothetical situation: a multi-national oil producer enters a joint venture with a Russian company to extract oil and natural gas from the former Soviet Union. The joint venture is majority-owned by the multi-national company. Just as the project is about to come online the Russian authority suspends licences on the basis of alleged tax deficiencies. The problem is only resolved after the multi-national cedes effective control of the joint venture to a Russian state-owned oil company.

To the extent that there was a share offering or revenue raising for the joint venture from public markets, claims might be made against the advisors – the stock brokers, the accountants, or the lawyers, depending upon what they advised the directors to say in the offering documentation about this ‘political’ risk.

## The insurance position

How do the professionals’ insurers respond? Most professional indemnity policies have an insuring clause which indemnifies against civil liability. The minimum terms for solicitors provides that the policy must insure against “civil liability to the extent that it arises from private legal practice”. The ICAEW by contrast insures in respect of any “civil liability whatsoever or whensoever arising in connection with the conduct of any professional business carried on by, or on behalf of, the insured”.

In the case of internet gambling, an allegation by the US authorities that a professional firm conspired to conduct internet gambling in the US is clearly not a civil liability, but a claim by Gamblers Anonymous to the effect that the professionals had promoted and facilitated gambling to addicted gamblers (which can only be compensated by damages) would be a civil liability. Any claim by an investor that they were misled by statements in a circular or prospectus for a share offering or bond issue could easily give rise to a civil liability.

## Investigation

Even if claims wouldn’t fall into the civil liability category, most professional indemnity policies include extensions to the insuring clauses, including in respect of defence costs in relation to investigations or enquiries. Notably, exclusion 6.7 of the Minimum Approved Wording for solicitors excludes a) fines or penalties; or b) orders or agreements to pay the costs of a complainant, regulator, investigator or prosecutor of any professional conduct complaint against the insured. There is no blanket US exclusion and ‘defence costs’ includes “investigating, reducing, avoiding or compromising any actual or potential claim”.

The ICAEW wording contains exclusionary language in relation to US exposures but only if the action is brought in the US or arises from the professional business carried out from an office situated in the US.

It is by no means certain that a claim for investigation costs is covered. But equally there is ‘wiggle room’.

All things considered, it is my view that professionals have more to fear from unexpected happenings of this type than professional indemnity insurers. But some policy terms are ambiguous, and as professionals recognise the risks to their clients – especially from e-commerce and governments with protectionist agendas – the prospects of unusual claims arising increases.

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