

COLLAS DAY | DISPUTE RESOLUTION

Financial Services Regulation- an update

June 2009

Guernsey will not remain unaffected by the push for tighter regulation and enhanced international co-operation, and, as an important player in that global economy, cannot afford to stand still in response to it. Guernsey's OECD 'White-listing', released in conjunction with, and noted by, the G20 statement is proof of the benefits of action as opposed to inaction, when it comes to riding the tide of international sentiment. In particular, Guernsey will feel pressure to both enact and employ domestic legislation that enables and assists other States in enforcing their laws. One relatively recent piece of Guernsey legislation, although not exclusively directed towards the financial services sector, will likely be felt most keenly and immediately within that sector against this current backdrop of promoting international co-operation.

Evidence of progress

Relatively recently, an amendment to the Criminal Justice (International Co-operation) (Bailiwick of Guernsey) 2001 has come into force in Guernsey. The amended legislation allows evidence to be given at criminal trials in other jurisdictions using television and telephone links. This new legislation underlines Guernsey's commitment to, and exceptional reputation for, excellence in the field of international law enforcement.

Financial criminality is invariably highly sophisticated in its nature, especially when it involves off-shore jurisdictions. The Bailiwick of Guernsey often provides assistance to other jurisdictions in relation to complex fraud investigations. Primarily, the Criminal Justice (International Co-operation) (Bailiwick of Guernsey) Law 2001 provides for the mutual service of process; the service of overseas process in the Bailiwick of Guernsey and the service of Bailiwick process overseas. The law also provides for the mutual provision of evidence and as such, in certain circumstances the use in overseas proceedings of evidence gathered within the Bailiwick.

Prior to the enactment of The Criminal Justice (International Co-operation) (Bailiwick of Guernsey) (Amendment) Law 2007, evidence obtained in the Bailiwick of Guernsey was often given at the trial by way of a written witness statement which was read out to the court. There was no express statutory power in the Bailiwick of Guernsey to allow for witnesses based in Guernsey to provide evidence to foreign courts via a live television link.

This obviously provides for limitations in the cross-examination of the witness. The legal status of any evidence provided in this way could therefore be questioned. In such a technological age, coupled with the progressive nature of international law enforcement, Guernsey's inability to assist foreign jurisdictions in the provision of evidence in this way for the want of local legislation could have been potentially very embarrassing.

Still more needed?

The Bailiwick of Guernsey does not currently have its own laws pertaining to extradition. However the States of Guernsey has indicated that an extradition law will be introduced for the Bailiwick in the near future.

At present, extradition proceedings in Guernsey remain governed by otherwise obsolete UK legislation. Whilst the UK's Extradition Act 2003 has repealed the Extradition Act of 1989, the 2003 Act has not been incorporated into Bailiwick Law and as such does not apply within the Bailiwick. Accordingly, extradition proceedings in Guernsey are therefore still dealt with under the 1989 Act, which extends parts of the Act to the Channel Islands, stipulating that it "shall have effect as if each of them were part of the United Kingdom".

Pursuant to the 1989 Act, consideration must first be given to whether the countries contemplating the instigation of extradition proceedings have extradition arrangements between themselves. Such arrangements can be determined by statute or alternatively, there are a number of international conventions which provide for extradition between ratifying States in the absence of a bi-lateral extradition arrangement.

Once an 'extradition relationship' has been established between the two jurisdictions, the nature of the crime of the accused individual must be considered. A person will only be liable for extradition proceedings if they are accused of, or unlawfully at large after conviction of an 'extradition crime' as defined by the Act. An extradition crime is an offence which is punishable by a prison sentence of 12 months or more in the foreign jurisdiction and which, if the conduct was committed within the Bailiwick, would constitute an offence punishable by a prison sentence of 12 months or more under Bailiwick law.

Importantly, under the provisions of the 1989 Act, the Guernsey courts must be satisfied that there is a prima facie case that the subject has committed the crime of which he is accused. This imposes a significantly greater evidential burden on the requesting country than the information-only based requests that operate within the UK under the 2003 US-UK Extradition Treaty and the extradition law that now exists in Jersey. In such extradition requests, 'information' as opposed to 'evidence' is sufficient for determining an individual's liability for extradition.

In developments which our local financial service professionals will find interesting, the new Jersey extradition laws will soon be tested with the extradition hearing of a Jersey based accountant who is wanted in Australia as part of a multi million dollar tax fraud investigation.

The Jersey and Australian authorities made full use of the flexibility of the modern Jersey process, with the person being arrested by the Jersey authorities in December 2008. A formal request by the Australian authorities was not lodged until later in January, with the determinative hearing not being scheduled until late June.

Considering the ease of international travel, particularly in Europe, the vast sums involved and the intricate complexity at the heart of most financial crime, any new enforcement measures must be responsive and flexible if they are to be effective. Whilst it has been indicated that Guernsey will shortly have its own law relating to extradition, one can only speculate as to whether it will follow directly in Jersey's footsteps and adopt an 'information-only' based approach as opposed to its current robust stance which requires evidence of wrongdoing on the part of the extradition subject. Should Guernsey wish to reinforce its hard won position as a respectable offshore jurisdiction, it should seriously consider following Jersey's lead.

Conclusion

Whilst the outcomes of the G20 summit are driving towards a world more cognisant of the need for tighter regulation, more effective co-operation and genuine openness across international borders, it is clear that those who embrace the ongoing changes will be best placed to benefit from the inevitable economic gains to come as calm, order and confidence are restored. It is reassuring to note that as an influential financial jurisdiction, Guernsey remains committed to a path that ensures it remains as competitive, safe and viable in the new global framework as it was in the old.

For further information please contact:

Christian Hay

t: +44 (0)1481 734290

f: +44 (0)1481 718800

e: christian.hay@collasday.com

Michael Adkins

t: +44 (0)1481 734231

f: +44 (0)1481 723637

e: michael.adkins@collasday.com



► **collas day** PO Box 140, Manor Place,
St Peter Port, Guernsey GY1 4EW

► **t:** +44 (0)1481 723191 **f:** +44 (0)1481 711880

e: inbox@collasday.com ► **w:** collasday.com

► **collas day** PO Box 140, Manor Place, St Peter Port, Guernsey GY1 4EW
► **t:** +44 (0)1481 723191 **f:** +44 (0)1481 711880 **e:** inbox@collasday.com ► **w:** collasday.com