The Key

Kennedys

Legal advice in black and white

October 2006

Greater comfort for banks

The House of Lords has relieved the pressure on financial institutions when it comes to preserving funds that have been frozen by court order.

In the May 2005 edition of The Key, we reported on the Court of Appeal's decision in *Commissioners of Customs & Excise v Barclays Bank plc*. In that case, the court ruled that a third party (Barclays Bank) – which had not been involved in the original proceedings but was subsequently served with a freezing injunction in respect of certain customer accounts – owed a duty to the claimant (Customs & Excise) to take reasonable care to ensure that no payments were made from the designated accounts. The House of Lords has recently overturned the Court of Appeal's decision.

The case is particularly important for two reasons. The first is that there is now a final decision on the impact of freezing orders on third parties – and who owes a duty to whom. The second is the question of which test should be used by a court when deciding

whether or not a party owes a duty of care in pure economic loss cases. On this issue, however, the House of Lords' answer is less clear-cut.

Background

The Customs and Excise Commissioners had obtained freezing injunctions against two separate companies – Brightstar Systems and Doveblue – in respect of outstanding VAT. Both companies held accounts at Barclays Bank that were in credit.

The matter came before the Court of Appeal as a preliminary issue and the court proceeded on the assumption that the facts set out in the particulars of claim (especially the allegations of negligence) were true. There was no suggestion that Barclays was in contempt of court.

In the case of Brightstar Systems, a copy of the freezing injunction had been faxed to Barclays. The bank had acknowledged the injunction but – within two hours of its receipt and as a result of what was described as "operator error" – permitted three payments out of Brightstar's account in breach of the injunction. As regards Doveblue, the bank had, as a result of a systemic fault,

Inside this issue:

Page 3
Beating the swindlers
Financial Services Authority fine a professional services firm

Page 4
Sharing the blame
Following the radical decision in the Viasystems case

Page 5
Class actions in France
A draft law establishing certain types of class action

Page 6
Insuring in Oz
Australia is generally considered to be more insurer-friendly

Page 8
Directors' and officers' liabilities in Iberia
Implications for insurers

allowed payments out of Doveblue's account contrary to the freezing order.

Customs sued the bank for negligence to try and recover the amounts transferred out of the accounts, plus interest. The bank opposed the claims on the basis that it did not owe Customs a duty of care.

Court of Appeal judgment

The Court of Appeal considered in turn the following three tests established by case law to determine whether one party owes someone else a duty of care in economic loss disputes:

(1) the *Caparo v Dickman* (1990) threefold test of foreseeability, proximity and whether it is fair, just and reasonable for one party to owe another a duty of care;

(2) the voluntary assumption of responsibility test (that is, did a defendant assume responsibility for what it said or did in relation to a claimant, or should it be treated by the law as having done so?); and

(3) the incremental test (namely, that the law should develop novel categories of negligence incrementally and by analogy with established categories).

The Court of Appeal held that Barclays owed Customs a duty to guard against the funds in the frozen accounts being dispensed in breach of the freezing injunction. The court took the view that freezing orders would be pointless unless financial institutions took reasonable care to ensure that any funds in frozen accounts were preserved until the proceedings had finished.

Final ruling

In contrast, the House of Lords has now decided that the bank did not owe Customs a duty of care after all.

Starting with the question of which of the three tests should be used to decide whether such a duty exists in a particular instance, the law lords concluded (not very helpfully perhaps) that it all depends on the individual circumstances of each case. There is no automatically right choice between the three options. However, Lord Bingham was particularly dismissive of the incremental test, saying that it was of little value in itself and only helpful when used in combination with another test or principle that identifies the legally significant features of a particular case.

All five law lords ruled that, in this instance, there was no assumption of responsibility by Barclays once it had been notified of the freezing injunction. For one thing, the bank was bound by law to comply with the court order: if it breached the injunction in a sufficiently culpable way, then it risked being fined, having its assets sequestrated and its employees imprisoned. In addition, Customs could not be said to have *relied* on the bank in any meaningful sense: Customs had availed itself of the only remedy available open to it – a freezing injunction – and nothing the bank did or did not do after that point altered Custom's limited scope for action. There was, in short, no *relying* to be done.

The House of Lords then turned its attention to the threefold *Caparo* test of foreseeability, proximity and fairness. It generally agreed that the forseeability part was satisfied but that the "notoriously elusive" proximity element (as it was described by Lord Bingham) was not met. However, the law lords reserved their fiercest fire for the third aspect of the *Caparo* test.

For Lord Bingham, it was unjust and unreasonable that the bank should – on being notified of a freezing order out of the blue – suddenly become exposed (for no reward) to a liability which could conceivably run to many millions of pounds. Indeed, the bank's only protection was Customs' promise to make good (if ordered to do so) any loss which the order might cause the bank. That kind of protection was hardly consistent with any duty of care owed to Customs and, in any event, was valueless in a case such as the present one.

Lord Rodger was equally certain that it was unfair to fix the bank with a duty of care to the claimant. Given the factual circumstances of the case, the only thing a court could demand was that a third party such as Barclays which had been notified of a freezing injunction did not knowingly undermine the court's purpose in granting that order. Consequently, it would be inconsistent to rule that the claimant could demand a higher standard of performance from the bank simply because of the notification, and then claim damages as a result.

For Lord Mance, the determining factor was that Barclays' involvement in the freezing injunction was a wholly involuntary one, and therefore it would be unfair to insist that the bank had a duty of care towards Customs. Lords Walker and Hoffmann also rejected the existence of any such duty in clear terms. It would be unfair, unjust and unreasonable, said Lord Walker, to impose on a bank a novel and substantial liability that could be triggered if the bank failed to comply with a freezing order out of mere carelessness. And Lord Hoffmann concluded that a duty of care could not possibly derive from a court order because the order carries its own remedies and its reach does not extend any further than that.

Conclusion

This decision is good news for banks. Freezing injunctions are becoming an ever more frequent part of the litigation landscape, imposing onerous duties on banks for which they generally receive a nominal payment by way of administration fee. It is clear from this decision that the bank owes a duty to the court – but not to the claimant – to comply with the order. A claimant therefore has no right to bring proceedings against the bank for negligence if it subsequently fails to comply with the order.

But that is not to say that banks have a free hand to do whatever they like when served with a freezing injunction. Clearly, they do not. They will need to have proper systems in place to ensure that, if they are served with such a court order, they comply with it. However, if things do go wrong, it will at least be up to the court – rather than the claimant – to determine what penalty, if any, should be imposed.

Clark Hood
London
c.hood@kennedys-law.com

Clare Hitchcock
London
c.hitchcock@kennedys-law.com

Beating the swindlers

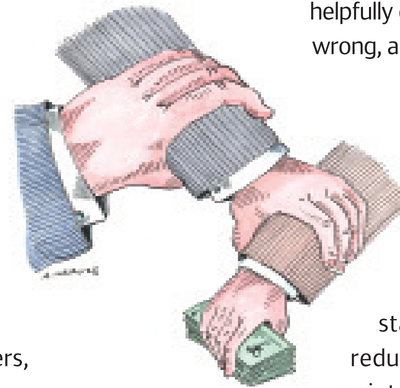
For the first time, the Financial Services Authority has fined a professional services firm for not doing enough to stop its clients being defrauded.

Fraud is an expensive activity: in 2004, for instance, the total national cost was an estimated £16bn, according to Norwich Union. Individual businesses lose substantial sums through criminal deception and, in some instances, their reputation as well. City firms have perhaps been the heaviest losers in the past: Barings collapsed as a result of Nick Leeson's fraudulent activities, for example, and Morgan Grenfell was badly damaged by star fund manager Peter Young.

But fraud is also a regulatory issue. The Financial Services Authority (FSA) has made it clear that FSA-regulated firms with inadequate anti-fraud controls face the risk of disciplinary proceedings. This warning was heavily underlined by the Authority's enforcement action against Capita Financial Administrators Ltd (CFA) earlier this year, with the FSA's financial crime sector leader Philip Robinson concluding: "With fraud becoming an increasing menace, firms must fully understand the risks they face and have robust anti-fraud controls in place. Our recent report on fraud governance [February 2006] found that parts of the financial services industry can do more to protect themselves and this case demonstrates that we take a firm's failures seriously."

The CFA case

In March 2006, CFA – a third-party administrator of collective investment schemes and part of the Capita Group – was fined £300,000 by the Financial Services Authority. It was held to be in breach of FSA Principles 2 and 3 of the FSA's Principles for Businesses and also in breach of Senior Management Arrangements, Systems and Controls SYSc 3.2.6R: essentially, CFA had not properly considered the risks posed by fraud and had not operated effective risk management systems.



These failures contributed significantly to a number of actual and attempted frauds on the firm's customers, whose identities were stolen. Embarrassingly for CFA, the actual frauds totalling £328,341 were discovered as a result of client inquiries rather than by the firm itself. On a happier note, CFA did manage to stop further fraudulent requests for payments totalling £1,134,938.

The FSA concluded that Capita Financial Administrators was too focused on the risk of external fraud: the firm should have been more alert to the risk of criminal deception across the business, including internal fraud. While acknowledging that it is not always possible to stop a determined swindler, the FSA emphasised that regulated firms must not only have appropriate anti-fraud systems in place – as evidenced in Philip Robinson's remarks quoted above – but they must also review and test those systems. The Financial Services Authority's final notice to CFA (see http://www.fsa.gov.uk/pubs/final/capita.pdf) helpfully gives examples of what can go wrong, and how to minimise the risk.

Anti-fraud measures

It is hardly surprising that the FSA is highly critical of regulated firms that have weak anti-fraud controls, given that three of its four statutory objectives are the reduction of financial crime, maintaining market confidence in the financial system and protecting consumers. The FSA's tough stand against Capital Financial Administrators is also consistent with its principles-led approach to regulation, as it has not stipulated detailed rules which financial services organisations must obey in fighting fraud.

The FSA has encouraged firms to share best practice and to work together against fraud, commenting favourably on various industry-wide initiatives against criminal deception. These include data sharing and the recent establishment of the Insurance Fraud Bureau, both of which should improve insurers' ability to detect and prevent organised insurance swindles.

Main lesson of *CFA* case

Regulated firms, such as insurers and intermediaries, should check their systems and controls regularly to ensure they are doing what they can to combat the increasing problem of fraud. As the *CFA* case makes clear, the Financial Services Authority will take disciplinary action if high standards are not met. Where necessary, the FSA will proceed against senior management as well as businesses.

Fines imposed by the FSA will, of course, be on top of any losses suffered by the erring firm, so financial services organisations that fall below the required standard will effectively end up being penalised twice over. This really is a case, therefore, where prevention – or, at least, a determined effort at prevention – will prove a lot cheaper than cure.

Claire Hitchcock
London
c.hitchcock@kennedys-law.com

Sharing the blame

Following the radical decision in the *Viasystems* case, employers need to be very careful when supervising the work of other people's employees.

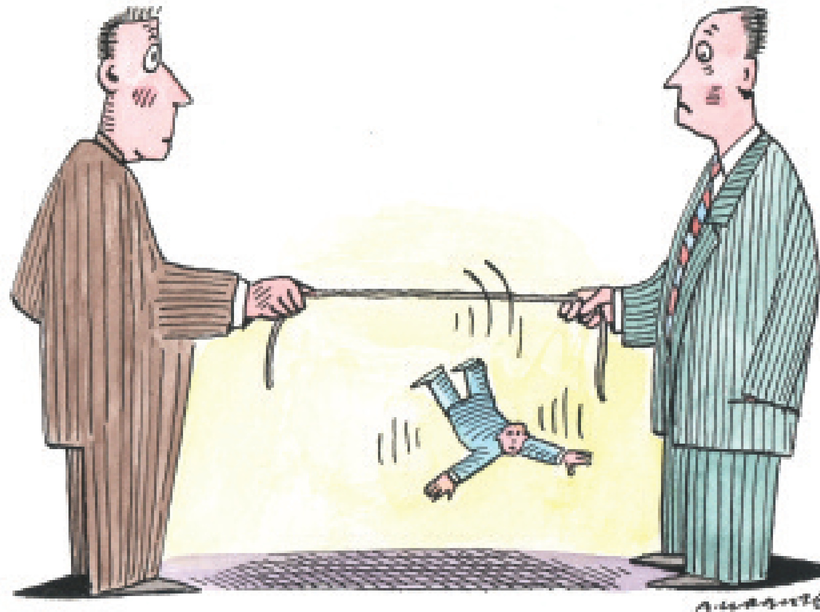
For nearly two centuries, it has been assumed that where an employee is lent by one employer to another, only one or other of the employers – but not both – will be vicariously liable for any negligence of the employee. All that has now changed, following last autumn's decision by the Court of Appeal in *Viasystems (Tyneside) Ltd v Thermal Transfer Northern Ltd* [2005] EWCA Civ 1151, where the court ruled that joint vicarious liability is possible in circumstances where the erring worker has in effect two bosses.

What happened

In *Viasystems*, the claimant company hired the first defendant to install air conditioning in its factory. The first defendant then subcontracted the ducting work to the second defendant, who, in turn, contracted with the third defendant to supply fitters and fitters' mates on a labour-only basis.

Mr Megson was one of these fitters. His mate was Darren Strang. Both of them were employed by the third defendant. Mr Megson and Mr Strang were installing the ductwork under the supervision of Mr Horsley, a self-employed fitter contracted to the second defendant. When crawling through some sections of ducting, Mr Strang negligently caused a flood, resulting in considerable damage.

The trial judge decided that the third – rather than the second – defendant was vicariously



liable for the negligence of the fitter and his mate. The third defendant appealed against this decision, arguing that the second defendant alone carried responsibility, it not being legally possible for both defendants to be vicariously liable.

Appeal hearing

On appeal, the court said that, when considering vicarious liability, the real question was, "Who was entitled to exercise control over the act or operation of the employee causing the damage?" It was important to concentrate on the relevant negligent act and then ask who carried the responsibility of preventing it from happening. On the facts of this particular case, Lords Justices May and Rix concluded that the fitters employed by both the second and third defendants were entitled to exercise control over Mr Strang and were correspondingly obliged to prevent his negligence, providing they were in a position to do so. Both defendants failed this test. The court ruled that joint vicarious liability was possible and that both defendants were vicariously liable for Mr Strang's negligence on a 50/50 basis.

In deciding the case, the court had a careful look at the seminal authority of *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd* (1947) AC 1. In *Mersey Docks*, the claimant was injured by a negligently driven crane. The crane had been let by the harbour board to a firm of stevedores in order to load a ship, along with a crane driver who was employed by the harbour board. The stevedores had immediate control of the relevant operation which the crane was performing but, crucially, had no power to direct how the crane driver should control the crane. The House of Lords finally upheld the decisions of the lower courts that the harbour board, as the general employer of the crane driver, remained responsible for his negligence.

However, the central point in *Mersey Docks* was that the stevedores were not responsible for the way in which the crane driver actually drove his crane, and it was this that caused the accident. By contrast, in *Viasystems*, a

number of defendants were supervising the fitter's mate. Consequently, it was possible to distinguish the 1947 case from the present one.

Factors to be considered

Lords Justices May and Rix made it clear, though, that making this kind of distinction will depend on the particular facts of the case in issue. When considering those facts, there are a number of key principles and questions to take into account. These include the following:

(1) The general employer has the heavy burden of showing that it does not retain all responsibility for the employee's actions.

(2) Who engaged the negligent employee – and who pays them? Who has the power to dismiss them? In *Viasystems* case, the answer was the general employer – namely, the third defendants.

(3) Who has the immediate direction and control of the relevant work? Who is entitled to tell the employee how they are to carry out the work on which they are engaged?

(4) When investigating the facts of a particular case, the court should concentrate on the relevant negligent act, and then ask who carries the responsibility for preventing it.

(5) Vicarious responsibility should rest with the employer in whose actions some degree of fault, though remote, may be found.

In future

The decision has major implications for future cases as, from now on, vicarious liability can be apportioned between defendants, even if the employee of one defendant is being supervised by another defendant. This is the position even if the employee is not hired by the defendant supervising the work. The court will look at the facts of each case and decide, on balance, whether liability can be shared. This is an issue that may well arise in public liability claims involving personal injury and property damage, especially in cases arising out of construction site activity

Employers should monitor carefully their supervision of the work of anyone else's employees. Following *Viasystems*, both they and any other individual who could (and should) have prevented the negligent act carry a significantly greater burden of responsibility. However, everything will depend on the facts of the individual case, and each case may well be interpreted differently. Public liability insurers will therefore have to be especially vigilant when dealing with claims of this nature.

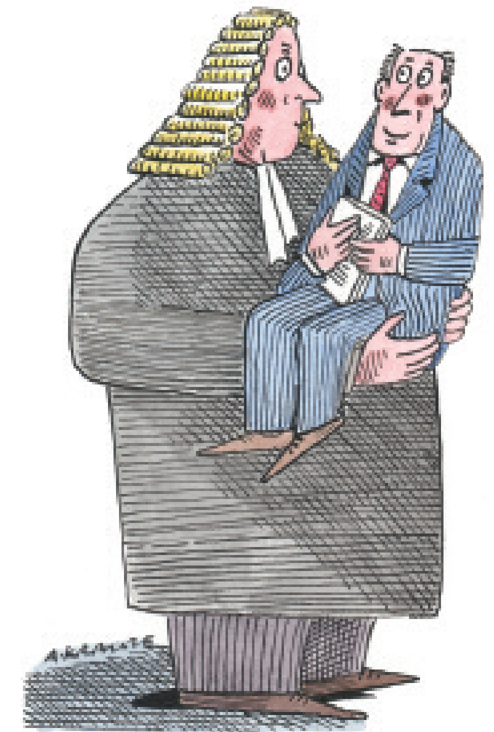
Joanne Kelly
Chelmsford
j.kelly@kennedys-kennedys-law.com

Andrew Caplan
Chelmsford
a.caplan@kennedys-kennedys-law.com

Class actions in France

A draft law establishing certain types of class action could become law in France by the end of this year.

Class actions are available as legal weapons in the US, Quebec, Sweden, Portugal, and England and Wales. They allow consumer, employment and environmental claims to be pursued through the courts. A judgment in favour of the claimant benefits others with identical or similar rights. The scope of the class is determined either by an opt-in (as in Sweden) or an opt-out. The judge decides whether or not (1) the issues are common to all members of the class; (2) there is a prima facie case; and (3) the class is representative.



Present position

Since 1973, authorised consumer associations in France have been able to bring claims on four bases:

- as a civil suit in the collective interest of consumers,
- to prevent unlawful practices or to suppress unlawful (or unfair) terms of business,
- by way of voluntary joinder, and/or
- joint representation.

However, the associations are unable to claim for damage suffered by individuals or to represent a class of consumers in claims for compensation. They say this is unfair to consumers. For example, in the banking and internet service provider (ISP) sectors, individuals often only suffer comparatively small losses as a result of unfair practices by banks or ISPs. Consequently, consumers are put off going to the trouble and expense of seeking redress. Meanwhile the companies involved earn considerable profits from such practices and consumers' understandable reluctance to take action against them.

New class action proposal

On 4 January 2005, on the initiative of President Chirac, the French government put forward proposals for a new law allowing consumer groups to bring class actions for various unfair market practices.

A working party – drawn from representatives of consumer groups, commercial interests and the legal profession – produced a report in December 2005, proposing two possible legal structures for such class actions, involving either:

- a civil procedure similar to that used for class actions in the US; or
- a new cause of civil action for group loss (the "*action en déclaration de responsabilité pour prejudice de masse*").

Last April, the French opposition in the Upper House (the Sénat) and a member of the majority party in the Lower House (the *Assemblée Nationale*) proposed two draft laws. As a result, the French government agreed to produce a draft law for consideration by the Council of Ministers. This is currently being considered by the Council of State (the *Conseil d'Etat*).

Structure of proposal

The US and Canadian experience of class actions has been mixed. Claimants have often benefited only minimally from damages awards because of the large contingency fees paid to lawyers. On occasions, some members of the class have benefited to the disadvantage of others. Frivolous actions have also resulted in increased insurance premiums or driven defendant companies into insolvency.

The French proposal does not follow the US and Canadian models. Instead, consumer groups will only be able to bring actions up to a financial limit of EUR2,000 on the grounds of breach of contract for the supply of goods or professional services.

The procedure envisages a two-stage action:

- Stage One: The judge will determine whether the defendant is liable. If yes, any affected consumer will have a month in which to submit a letter of claim for compensation.
- Stage Two: The consumer and the defendant try to negotiate a settlement. The judge will only have to make an award of compensation if the defendant offers no – or clearly inadequate – compensation.

The future

The draft law has had mixed reactions. Consumer groups argue that its scope and financial limit are too restrictive. On the other hand, businesses say that the law will jeopardise the French economy. Insurers' exposure obviously lays in the aggregate effect of such claims. Given President Chirac's enthusiasm for the draft, all camps look set to be disappointed: the new proposals could make it to the statute book by the end of 2006.

Mike Walker
London
m.walker@kennedys-law.com

Mathieu Doublet
Paris
m.doublet@kennedys-law.com

Insuring in OZ

The insurance regime in Australia is generally considered to be more insurer-friendly than its equivalent in many other jurisdictions.

The Australian insurance sector is subject to three types of statutory control: the Insurance Act 1973 (Cth); the Corporations Act 2001 (Cth) and certain state legislative rules.

The basic position is that an insurer is only allowed to carry on general insurance business in the country if it has authorisation under the Insurance Act. If it does not have such authorisation and tries to carry on business regardless, then it will be penalised. The Act sets down minimum standards required for authorisation and says that corporations can be permitted – and that Lloyd's underwriters (of whom, more later) are automatically authorised – to conduct general insurance business under the Act.

In addition, a person who carries on a financial services business as covered by the Corporations Act (section 766A) must also obtain a financial services licence from the Australian Securities and Investments Commission (ASIC). This licence requirement goes far wider than those who issue insurance contracts but does include them, unless the insurer is dealing only in its own wholesale products

Lastly, there is further regulation at state level. In Victoria, South Australia, the Northern Territory and the Australian Capital Territory, a person may not conduct insurance business unless they are also registered under the statutory stamp duty rules.

When it comes to the need (or otherwise) for authorisation, the key question for an

overseas insurer is whether or not it is carrying on insurance business in Australia. As will be discussed later, this is not always a straightforward question to answer. But if it is conducting such business, then (with one major exception) it will have to meet the same statutory and prudential standards as Australian-owned and incorporated insurers. Apart from anything else, this helps protect policyholders.

The one exception is capital adequacy. Only Australian insurers – and Australian branches of foreign insurers – need to meet the revised $5m capital adequacy minimum announced in July 2002. Above that figure, the capital requirement for insurers is risk-based reflecting the view that certain kinds of cover (including reinsurance and liability insurance) carry greater exposure than others (such as property insurance, for instance).

Overseas insurers

As mentioned earlier, it is not always obvious when an overseas insurer will be found to be carrying on an insurance business in Australia. Take the example of a foreign insurer who issues a policy to cover risks across a number of jurisdictions, one of which happens to be Australia. It would be impractical (and unfair) to insist that such an insurer meets the authorisation and licensing requirements of all the jurisdictions it covers. It would also reduce the range of risks that the insurer would be prepared to cover and necessarily increase the premiums for its remaining exposures.

As far as the Insurance Act is concerned, an overseas insurer that has no offices in Australia is very unlikely to be regarded as carrying on business in the country, even if it regularly insures risks in Australia. This will still be the case even if the insurer has a locally operating broker with a binding authority, so that it is effectively acting as its agent in the jurisdiction.

Things are rather different when it comes to the Corporation Act though. An insurer located overseas that directly targets Australian consumers or markets its insurance products in the country will be considered to be carrying on business in Australia for the financial services provisions of the Act, even if it has no physical onshore presence.

Foreign offices

A foreign incorporated insurer may seek to establish a locally incorporated head office to carry on insurance business in Australia – a foreign-owned subsidiary. Alternatively, it may apply for permission to operate in Australia through a branch office – a foreign insurer.

There is no limit placed on the number, size or mix of the commercial operations of foreign-owned subsidiaries or insurers operating in the Australian insurance market. However, foreign insurers who actively market products in Australia must appoint an agent who is actually resident in the country. Foreign insurer applicants must also fulfil two other conditions: they have to be authorised as insurers in their home country and they must also have the permission of their domestic supervisory body to set up an insurance business in Australia.

Insurance Contracts Act regime

In broad terms, policies issued in Australia will be covered by the Insurance Contracts Act 1984 (Cth) unless they fall within a number of exceptions.

To be specific, the Act will apply to all classes of insurance contracts whose proper law is that of an Australian state or territory except for:

- reinsurance contracts;
- marine, health, workers compensation, compulsory third party and commercial aviation insurance; and
- contracts entered into by a friendly society, the Export Finance and Insurance Corporation or in the course of state or Northern Territory insurance.

On the other hand, if the policy is not issued in Australia, then its governing law will depend both on the actual terms of the contract and also on the circumstances surrounding the placing of the insurance.

In theory, it is possible – thanks to what is known as the closest connection test – that in certain circumstances policies issued outside Australia will still be subject to Australian law. (As is perhaps obvious from its shorthand description, the closest connection test involves forming a judgment about the jurisdiction with which the insurance contract has its closest and most immediate connection.) However this is in reality unlikely to happen where a policy has been issued overseas that contains an express choice of law and forum clause specifying another jurisdiction.

Taken overall, the Insurance Contracts Act regime is widely regarded as being friendly towards insureds. From the point of policyholders, it is certainly more favourable than the corresponding rules in many other jurisdictions, including the UK common law and a number of the US jurisdictions.

Lloyd's underwriters

A substantial amount of insurance business in Australia is placed with Lloyd's underwriters, who are automatically authorised to conduct general insurance business in the country, subject to certain conditions.

Lloyd's underwriters are in the same position as other authorised insurers under the Australian Insurance Contracts Act and the Corporations Act. Consequently, insurance contracts entered into in Australia with such underwriters are subject to those Acts.

Unauthorised foreign insurers

As explained above, foreign insurance carriers may be allowed to provide insurance in the Australian market without authorisation or a licence. But an Australian company contracting with an unauthorised overseas insurer does so at their own risk. In April 2002, the Australian Prudential Regulatory Agency (APRA) warned consumers to be careful before taking out an insurance policy with an unauthorised insurer. As well as highlighting the difficulties of obtaining legal redress in foreign jurisdictions, the Agency was particularly concerned about the financial strength of an unauthorised insurer both at the time the policy is taken out and in the future – especially as regards long-tail risks.

This may be a problem where the foreign insurer is located in a jurisdiction that does not have a regulatory regime comparative to that in Australia with a similar robustness for the authorisation of insurers located there. It is not really a concern though where the same rigorous standards apply in the other jurisdiction, such as in the UK for example where the market still provides much needed global capacity, especially for the more specialist type risks.

Sumiya Basha
Sydney
s.basha@kennedys-law.com.au

Directors' and officers' liabilities in Iberia

Implications for insurers

Directors and Officers insurance is a popular product in Spain and Portugal (Iberia) and is bound to become even more popular. Due to recent changes in the Portuguese Company Code, introduced by Decree-Law nr. 76-A/2006 of 20 of March, it is now mandatory for the directors of any kind of company registered in Portugal to have their liability guaranteed, or insured, for a minimum of EUR50,000 or EUR250,000 in the case of listed companies.

Although we expect that this will be subject of negotiation between the directors and their companies, according to the letter of the law directors are responsible for paying the premium of taking out such insurances. Only if there is a top up in the maximum indemnity insured, will the director be entitled to ask his or her company to pay for the additional premium.

Non-listed companies may opt out of the new regime by exempting directors of this requirement each time a director, or a Board of Directors is nominated or elected, or by providing a blanket exemption in the company's articles of association.

These changes do not respond to the implementing of any EU-wide legislation, but to a purely local initiative. The position in Spain remains unaltered – the taking out of D&O policies is purely optional.

The other development worth noting is that, from now, the group of those with title to sue directors in Portugal broadens. Until now, directors could only be sued by their own company. Under the new regime, there is room for arguing – and it will be argued – that the position is identical to that of Spain, where besides the company itself, shareholders, creditors, and even aggrieved third parties can have a go at directors.

The position in Spain is that company directors are required to carry out their duties diligently, and are personally accountable for any breach of law, articles of association, or negligent conduct. Directors are held jointly liable unless they can prove that they did not take part in the adoption or carrying out of the activity in question, or that they opposed the passing of the resolution or did whatever was in their hands to avoid the damage. This is the case even if the activities of the directors are confirmed at the shareholders' annual meeting. Confidentiality is also an onerous duty on directors. Put simply, the principle is that "once a director, always a director" since directors must keep their duties of confidentiality indefinitely, beyond their term of service.

Contrary to what one might think at first instance, the claims ratio in D&O insurance remains relatively low in Iberia. This is good news for those offering, or thinking of offering, this type of cover. There is no claims culture yet, and the few claims that are lodged against directors are dismissed in the majority of cases.

Augusto Athayde
Lisbon associate office
almeida.athayde@mail.telepac.pt

Jesús Vélez
Madrid
j.vélez@kennedys-law.com

UK
Longbow House
14-20 Chiswell Street
London EC1Y 4TW
T 020 7638 3688
F 020 7638 2212
DX 46628 Barbican
mailbox@kennedys-law.com
www.kennedys-law.com

Belfast
64-66 Upper Church Lane
Belfast BT1 4QL
T 028 90 240067
F 028 90 315557
DX 490 NR Belfast 1

Hong Kong
11th Floor
The Hong Kong Club Building
3a Charter Road
Hong Kong
T 00 852 2848 6300
F 00 852 2848 6333

Auckland
Level 6
70 Shortland Street
PO Box 3158
Auckland
New Zealand
T 00 64 9 379 9011
F 00 64 9 379 9025

Madrid
c/Montalbán No 10
2˚ Ext Dcha
28014 – Madrid
Spain
T +34 91 523 7210
F +34 91 523 7212

Dubai
Po Box 212620
403 Sheikh Essa Tower
Sheikh Zayed Road
Dubai
United Arab Emirates
T +971 4 321 5685
F +971 4 321 5695

Sydney
Level 31
Citigroup Centre
2 Park Street
Sydney NSW 2000
Australia
T +61 2 8215 5999
F +61 1300 761 156

Kennedys

Legal advice in black and white

Associated offices
Dubai, Dublin, Karachi, Lisbon, Mumbai, New Delhi, New York, Pakistan, Paris, Poland, Santiago and Warsaw

For further information about any of the articles within this issue please contact the author concerned or your usual partner. This newsletter is designed to provide a summary of recent case law. It does not purport to be comprehensive or to offer legal advice. All rights reserved.