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Hayes' Fate No Sea Change For White Collar Extradition Fears

By **Melissa Lipman**

Law360, London (October 7, 2016, 6:46 PM BST) -- The 11-year jail term handed to former swaps trader Tom Hayes in late 2015 for Libor manipulation shocked long-held perceptions that British courts are softer on financial crime than their U.S. counterparts, but attorneys said the case doesn't herald a sea change in white collar defendants' prospects on either side of the Atlantic.

British financial fraudsters who also have fallen afoul of U.S. laws often work hard to avoid extradition to America, calculating that U.K. courts tend to be more lenient. U.S. public appetite for prosecuting bankers is still running high, plus maximum sentences in the U.S. generally are longer and early releases few and far between.

Hayes, a former UBS AG and Citigroup Inc. trader who was indicted by the U.S. Department of Justice in 2012 for rigging the London Interbank Offered Rate, later claimed in court that he was "suicidal" over the possibility of being extradited to the U.S. But ultimately, his play to court prosecution in the U.K. netted him sentence that, reduced from 14 years on appeal, dwarfed the two years given a former Rabobank trader after being convicted in New York in the DOJ's only Libor trial so far.

"People might think that the sentence in the Hayes case, which was extraordinary by English standards, has changed the way people think about [extradition], but I think Hayes is a fairly distinct case," said Skadden Arps Slate Meagher & Flom LLP's Elizabeth Robertson. "It was distinct because he made 80 hours of full admissions before the trial, then changed his mind and fought a very expensive, contentious trial. His conduct was found at trial to be at the more serious end of the scale, and I think his sentence reflected that."

While Hayes originally tried to stave off a U.S. trial by confessing to the U.K.'s Serious Fraud Office, he later reneged on his deal with the U.K. prosecutor. That led the SFO to take Hayes to trial with the benefit of his hours of confessions to present to the jury.

"It is quite something to make a whole series of admissions ... and then challenge that case," said Morrison & Foerster LLP's Kevin Roberts. "I hear what he's saying about trying to avoid being prosecuted in the states, but the way it's played out it didn't work out for him. It's very much a live point."

The Hayes case, part of broader efforts to prosecute individuals and banks for a global benchmark rate manipulation scandal, made waves in late 2015 when Hayes was the first defendant to be convicted and sentenced for rigging Libor.

Since then, the Serious Fraud Office has tried 11 more individuals for Libor-rigging, scoring convictions of three with two more set for retrial next year. Though none of the new sentences have approached Hayes' total, the SFO did get fairly significant penalties: six and a half years for the accused ringleader, four for the junior rate submitter and two years, nine months for a junior trader.

U.S. prosecutors, meanwhile, have tried only two Rabobank traders, winning the conviction of former Rabobank global head of liquidity and finance Anthony Allen and former trader Anthony Conti. Their sentences: two years and a year and a day, respectively. Four others have pled guilty in the U.S. but have yet to be sentenced. The U.S. Department of Justice also dropped its prosecution of three brokers who were acquitted in one of the SFO's cases.

All of which begs the question: If Hayes, as he has said, originally turned himself in to the SFO in a bid to avoid being extradited to the U.S. before ultimately deciding to fight the agency, was that a smart move?

Probably not, attorneys said.

For starters, the U.S. still allows longer sentences for crimes like insider trading — 20 years versus seven in the U.K. And on average, that means U.S. courts tend to mete out heavier sentences.

In 2011, the most recent year for which statistics are available for both jurisdictions, the average money laundering conviction yielded 37 months in prison in the U.S. but only 21.6 in the U.K. Likewise, the average fraud sentence in the U.S. in 2011 was 30 months, compared to a little less than 15 in the U.K.

And that's to say nothing of the kind of headline-grabbing sentences U.S. courts occasionally dole out in high-profile cases, like the original 24 years for ex-Enron Corp. CEO Jeffrey Skilling or the 150 years handed to Ponzi schemer Bernie Madoff.

"You hear these headlines of prison sentences that would exceed human life span and that obviously puts the fear of god into you," said Cooley LLP's Louise Delahunty.

The reality is that white collar defendants serving sentences in the U.K. will almost certainly only do half their time in an actual prison given the overcrowding in the British penal system.

"Our prisons are struggling and difficult places to be, but if you're sentenced for financial crime, as long as you pay your penalty, you find yourself fairly quickly in a decent open prison environment with a very early release date," Robertson said. "You won't ever serve more than half your sentence. In the states, after a contested trial you can find you don't necessarily get any kind of early release."

Bankers can also get another key benefit in the U.K.: the prospect of legal aid.

The price to retain similar kinds of counsel, whether it's a large international law firm or a smaller white collar practitioner, tend to be the same on both sides of the Atlantic. But for white collar defendants who have lost their jobs, there is still some legal aid available in the U.K.— even if the amount and the number of firms who accept it is dwindling.

"If you, for example, are a relatively low-level banker and you are dismissed and didn't have any savings ... you could potentially get all of it covered," Roberts said. "If you've got some means, got some money

saved up, you're going to have to make some contributions toward it."

Moreover, going to trial in the U.K. can be a smart bet in some more complex white collar cases given a public more skeptical of sending individuals to prison for financial offenses and less pressure to plea bargain.

For example, in the SFO's second Libor trial, it took the jury just a day to acquit five of the six brokers accused of conspiring with Hayes, and only one more day to find the sixth broker not guilty.

"The speed with which the jury returned unanimous acquittals is consistent with the complicated relationship the U.K. public has historically had with white collar crime and whether it constitutes criminal conduct in the traditional sense," said White & Case LLP's Joanna Dimmock. "That's part of the reason why the U.S. has historically had greater success in bringing these prosecutions than they have in the U.K."

At the same time, the U.S. Department of Justice, responding to public frustration over the failure to put bankers in jail after the financial crisis, recentlyissued the Yates memorandum calling for more prosecutions of individuals as well as corporations.

Nonetheless, even if defendants continue to face better odds in the U.K. than the U.S., experts warned against trying to play the system by convincing the U.K. to investigate like Hayes did. Indeed, it is a ploy tried famously by the NatWest Three, a trio of U.K. nationals who tried and failed to avoid extradition to the U.S. in the Enron scandal by suing the SFO to force it to investigate.

In the wake of that case, U.K. lawmakers created what is known as a forum bar that allows British judges to refuse extradition if the interest of justice favors keeping a defendant in the U.K. Under the law, courts can look at where the harm occurred, where the alleged victims are and where U.K. prosecutors believe a crime should be handled, among other things.

"Although that is there now ... I don't think a judge has yet decided people should not be extradited," said Clifford Chance LLP partner Roger Best. "If you're caught playing the system, then you're going to suffer."

--Editing by Katherine Rautenberg.
