Annual insurance review

2023





ADVISORY | DISPUTES | REGULATORY | TRANSACTIONS

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Introduction

Robert Morris | Partner

Welcome to RPC's 2022/2023 Annual Insurance Review, where we herald the start of a new year by looking back at the key developments for the insurance market in the last 12 months and hypothesising on what to expect in the year to come. As always, the Review looks at the trends across key lines of business and also jurisdictionally, with great insight from our Global Access partner firms.

The clearly dominating theme of this year's Review is ESG – especially the battle against climate change, both how it is impacting the insurance market and how the market can be a force for positive change. Across the various sector and geographical updates, you will read how mixed public/private initiatives are providing solutions to cover those at greatest risk of climate disasters; how green tech and sustainable project investments are booming; how the insurance market is acting as a positive force for change; and how various insurance industry wide initiatives are seeking to drive that change.

ESG as a source of claims is also a common theme this year, including the growing risks of "greenwashing" claims as national and international regulatory reform in this area is looking to drive broader ESG transparency and good governance.

In addition to reading how ESG is impacting the insurance market from Africa through to the Warranty & Indemnity sector, another common theme this year relates to how many years of rising markets and ultra-low interest rates has now emphatically ended. With the war in Ukraine and increasing economic headwinds vexing global policymakers, economic volatility promises to be the "new normal" in 2023.

In the UK, corporate insolvencies have been rising sharply in 2022 albeit against the backdrop of record low insolvency during the pandemic. By June, they had reached their highest quarterly level since 2009. Of course, economic downturns and high levels of insolvency often drive claims activity, and given the expectation that many of the world's leading economies will tip into recession in 2023 (with the UK's recession projected to be one of the worst on record) many sectors anticipate increased claims activity in the coming years.

Thanks in particular to our Global Access partners for once again providing international insights from their markets.

Unsurprisingly the key areas impacting the UK are also being felt further afield with climate change and environmental challenges again being highlighted as areas insurers need to be wary of in 2023. As you will see from reading the Review, many countries are embarking on their own sustainability journey as well as joining forces to make a difference globally. The role of insurance in realising these global targets cannot be understated.

It's been another extraordinary year for the insurance industry, we hope you find the review useful and if you have any questions on any of the topics raised, please do not hesitate to get in touch with the authors directly.

From all at RPC we look forward to working with you to help you make the best of whatever challenges and opportunities await and wish you all a prosperous and healthy New Year.


Simon Laird
Partner
+44 20 3060 6622
simon.laird@rpc.co.uk


Robert Morris
Partner
+44 20 3060 6921
robert.morris@rpc.co.uk


Toby Higginson
Partner
+44 20 3060 6581
toby.higginson@rpc.co.uk

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Key developments in 2022

Overall, insurance premium rates have continued to increase in Asia in 2022 across many lines of business, however at significantly lower levels than seen in late 2020 and 2021. Asia insurance premium rate rises were again much lower than the global average (with the exception of India, which saw a double digit rise in gross direct premiums underwritten across the non-life insurance sectors). Rate rises in the financial lines and cyber space remained among the strongest, though still at a slower pace to 2021.

Most jurisdictions in Asia (with the exception of China and Hong Kong) saw the significant easing or removal of COVID-19 measures in 2022, which in turn eased supply chain issues in the construction sector, and (together with the adoption of infectious disease exclusions) meant that insurers received fewer COVID-19 closure related business interruption and event cancellation claims. However, the war in the Ukraine has affected the already stuttering global economy bruised by the effects of the pandemic and added to supply-chain disruptions, increased energy prices (both feeding into claims inflation) and increased geopolitical risk.

In China, the zero COVID-19 policy saw continued restrictions and lockdowns across the country, which slowed economic growth and affected foreign trade. In an effort to counter the slowdown in foreign trade, the Chinese government in early 2022 stepped up support for export credit insurance. The real estate crisis in China has continued, with the Evergrande property development group still in the process of restructuring following its 2021 default on a US$83.5m interest repayment. While the Chinese government is overseeing its rescue and seeking to quell fears of a disorderly collapse, the top 100 Chinese property developers still saw sales plunge by 40% in 2022. Significant losses in the Chinese property market therefore continued to affect insurers invested in the Asian real estate market.

The Insurance Authority in Hong Kong again amplified enforcement actions against rule-breaking insurers issuing a reprimand and fine of HK$7m to Metlife and an affiliate in January 2022 for several violations of Hong Kong's anti-money laundering laws. A potent reminder to all insurers to ensure that have in place effective anti-money laundering and counter-terrorist financing controls and procedures.

Asian organisations experienced the most cyberattacks in the world in the third quarter of 2022, with an average of 1,778 weekly attacks per organisation. The prevalence of cyberattacks continues to focus attention on the need for adequate cyber insurance and cyber security, causing continued growth in the sector. As do changes in legislation with Thailand and Indonesia recently having introduced new data privacy laws, and the Singaporean High Court recently clarifying that the right to private action exists under the Singapore data protection legislation.

While insolvencies in 2022 have not materialised to the levels which many had anticipated, economic uncertainty has meant that the demand for trade credit insurance in Asia has on average continued to increase. In response, insurers are increasing their capacity for trade credit insurance and creating greater competition in the market.

What to expect in 2023

Across most product lines, inflation, supply-chain disruptions, and geopolitical risk (together with the increasing cost of outwards reinsurance protection) are expected to keep pushing insured losses and premium rates higher in 2023.

Continued growth in the cyber sector is expected in 2023, with estimates that a significant majority of all cyber risks still remain uninsured (some reports say as high as 90%). The pressure on corporates to adequately protect data is also expected to increase with the effect of new or bolstered data protection laws in a number of countries expected to take effect.

While trade credit insurance demand and capacity increased in 2022, underwriters may see increased claims in 2023 with reports by Singaporean businesses of a 50% increase in bad debts that must be written off in 2022 as compared to 2021.

In the D&O space in particular, high levels of inflation, insolvencies (which are expected to rise by 19% globally), slow economic growth, cyber risks and ESG concerns top the list of key risk trends for 2023.

While the political violence market showed signs of contraction in 2022, with insurers carefully reviewing their aggregate exposures, terms and pricing adequacy, current global political/economic conditions and conflicts are likely to lead to increased pricing for political violence and terrorism insurance globally.

The war in the Ukraine, the associated energy crisis and the increasing number of global catastrophes linked to climate change has accelerated the growth in demand for renewable energy and 2023 will see more renewable energy projects coming online (and more funding for the construction of wind and solar projects), particularly in the solar and onshore/offshore wind spheres.

Finally, with the announcement of the launch of the market's first cyber catastrophe bond, backed by Insurance-linked securities (**ILS**) investors, we expect to see further growth in the catastrophe bond market in 2023 and beyond.

CONTACTS

Mark Errington
Partner
+65 6422 3040
mark.errington@rpc.com.sg

Iain Anderson
Partner
+65 6422 3050
iain.anderson@rpc.com.sg

Antony Sassi
Managing Partner, Asia
+852 2216 7101
antony.sassi@rpc.com.hk

Carmel Green
Partner
+852 2216 7112
carmel.green@rpc.com.hk

AUSTRALIA

COLIN BIGGERS & PAISLEY

Jonathan Newby | Partner
Cathryn Prowse | Partner
Keith Bethlehem | Partner

A look back at 2022

Australia has not been immune to the disruption and uncertainty that many countries are facing both locally and globally. While the threat of COVID-19 infections is no longer the number one concern for Australians and their governments, it has been replaced by an uncertain economic outlook (high inflation, increasing borrowing prices, falls in house prices and labour shortages), global supply chain issues, heightened awareness of cyber risks and the social contracts that prevail in the areas of wage theft, privacy and climate change.

However, as with past economic cycles, underlying economic fundamentals are strong and export revenue in mining is close to record levels such that Government expenditure is not under the same pressure as in other nations.

It has been a volatile 12 months for the Australian class action market. Litigation funders have seen increasing levels of regulation and new competition from plaintiff firms running new class actions on a speculative basis for contingency fees in the Supreme Court of Victoria. The change of Federal Government back in May 2022 has seen a range of foreshadowed amendments to unwind or water-down previous legislation and regulations affecting litigation funders and class actions.

In contrast to the stance taken by the UK courts, the Australian High Court upheld the 2021 decisions in COVID related business interruptions claims, with a ruling in favour of insurers.

Cyber risk and security has remained a top risk for corporate, government and individuals alike. Australia has seen a number of high profile data breaches throughout 2022, including Medibank and Optus, which impacted close to 40% of Australia, bringing the vulnerability of personal data and the reality of cyber-crime into the headlines.

In the courts, *ASIC v RI Advice Group Pty Ltd* [2022] FCA 496 was the first cyber security focused Australian judgment, which has become a catalyst for companies and their boards to sit up and realise that cyber security is not 'an IT issue' – it is a risk that needs to be managed and is a director duty.

The legacy of the Financial Services Royal Commission continues, with industry-wide self-reporting and remediations schemes, and increasing regulatory pressure to audit advice provided against the existing and new ASIC regulatory guides RG256 and RG277.

The major consumer class actions against the 'Big Four' banks and other institutions are maturing, with many now settled, including the so-called 'junk insurance' class actions against ANZ, Westpac and CBA. Others will come to trial or be mediated in 2023.

Consistent with the hardening market for Financial Advisor PI, the coverage space has seen a number of carriers litigating the scope of exclusions. Most recently the Queensland Court of Appeal applied an exclusion which referenced investments not included in the insured licensee's approved product list, where an authorised representative had recommended a non-complying product. The Court upheld that the financial advice to be covered by the policy be limited to advice on products within the list.

The construction industry faced both significant commercial pressure and a hard insurance market. The increased material and labour costs, global supply chain issues and subcontractor insolvency is threatening the viability of projects and increasing the risk of disputes and potential for public liability claims.

The fallout of the cladding crisis continues with regulatory changes that came into effect to improve building standards, including 2022 National Construction Code. In NSW, improved standards for training and accreditation introduced by the *Building and Development Certifiers Act* and *Regulations* have come into effect. In Victoria, compliance authorities such as the VBA have shown an increased willingness to bring disciplinary action against practitioners for failure to comply with relevant standards of conduct.

Compounding the issues in the construction industry is the state and federal government spending on large scale infrastructure projects (including road, rail and Brisbane Olympic projects) is causing further disruption to the availability of contractors and project staff.

Australia's eastern seaboard saw unprecedented catastrophic flooding in 2022, with the NSW floods predicted to be Australia's most expensive ever natural disaster. Many regions flooded three or more times within the year, raising questions about whether some regions will be uninsurable.

Insurance industry groups have been engaging with state and federal governments to consider short and long term issues raised by catastrophic weather events, including issues around insurability and the rising cost of insurance. The scale of recent natural disasters, coupled with existing commercial pressures on the building industry is impacting the timeliness and cost of any remediation work.

Dust disease has been an ongoing concern for insurers in the Australian market. There is continued upward pressure on damages awards in asbestos cases and reluctance from appeal courts to interfere with trial decisions in this space.

A growing concern is disease linked to work related exposure to crystalline silica dust, particularly in Queensland.

Various faith-based, social and government institutions across Australia continue to face claims relating to historical instances of child abuse. A high profile area, 2022 saw the largest general damages award in Australia, setting a new high watermark for future claims and in NSW, the *Civil Liability Act 2002* (NSW) was amended to enable a court to set aside previous settlements of child abuse claims.

In the transport sector, 2022 saw major issues arising from port congestion around the world and Australia was not immune to the impacts of labour shortages, high demand for imported goods and COVID-affected vessel crews. This led to an increase in spoilage claims for perishable goods, increased repositioning costs and an ACCC investigation into potential collusion among lines over surcharges.

Marine insurers have also been feeling the effects of cyclone, storm and flood damage, with loss of vessels, damage to ports and cargo, and freight train derailments following rail washouts.

Looking forward to 2023

Cyber risk is expected to continue to be a top priority in 2023. With two attempts to introduce legislation around ransom payments, neither surviving the change of government, the appointment of a Minister for Cyber Security will keep this issue on the legislative agenda for 2023.

The significant data breaches in 2022 have put the sufficiency of Australia's privacy laws under the microscope, with a push for Australia to move to the 'gold standard' GDPR.

The deteriorating economic climate caused by inflationary pressure will also test the boundaries of when courts will permit the direct joinder of insurers. In *Count Financial v Pillay*, London based insurers successfully resisted joinder to proceedings under the *Third Party Rights Against Insurers Act* in New South Wales, a case which gives encouragement to the industry that the Australian courts will determine the application of exclusions when exercising their discretion whether to permit joinder. Conversely, courts are increasingly open to allowing joinder of insurers rather than deprive claimants of their ability to bring claims to final determination.

2023 is expected to sharply demonstrate the difficult balancing act that Australian directors and officers now find themselves in, with a significant increase in large insolvencies, shareholder and oppression disputes, privacy claims and class actions.

A wild card for 2023 is the potential for class actions not only with the Privacy Commissioners but also for breach of contract and securities class actions.

The FI market and major financial institutions, including a number of the 'Big Four' Banks are yet to reach consensus on policy response to the post-Financial Services Royal Commission consumer class actions. We anticipate that the claims on the policies will be determined in 2023 where multiple class actions have now settled or will settle early in 2023.

There is also a likelihood for increased employment claims and potential class actions arising with non-compliance with industrial instruments. There has already been an initial wave of large scale claims arising from underpayments and break entitlements, and this is expected to continue.

There is expected to be no change to the pressures faced by the construction industry, with wage and material cost inflation and ongoing high fuel prices contributing to further insolvencies across the board.

The effect of recent legislative changes aimed at enhancing consumer protection will increasingly be felt. In NSW, courts have begun deciding practitioner liability cases under the *Design and Building Practitioners Act*. In Victoria, the state combustible cladding rectification authority has taken first steps to join proceedings against builders and building professionals to recover cladding remediation costs.

While the industry is being optimistic about tapering off of price increases, the construction market remains challenging. There is likely to be considerable underinsurance given the higher construction costs and inflation.

A challenge for liability insurers will come from the ongoing emergence of the gig economy, where there is likely to be continuing litigation involving the issue of whether gig workers are employees or independent contractors. If a gig worker is deemed an employee and causes loss, their employer may be found vicariously liable for their conduct.

Generally, climate change related weather events are expected to continue, causing claims pressure for the insurance sector. A huge number of catastrophic flood claims will continue to be lodged with insurers and, by sheer weight of numbers, greater numbers of disputes with the Australian Financial Complaints Authority and legal proceedings are expected.

There is likely to be sustained pressure on damages awards in dust disease claims, with plaintiffs pointing to recent decisions as guideposts in settlement negotiations, and there will be a question as to the impact of Victorian reforms on contingency fees and legal costs.

In the institutional liability space, the new 'deed set aside' legislation will be tested in early 2023. While the legislation refers to factors a court may consider, it is ultimately likely to be whatever a court considers 'just and reasonable'. This will be watched very closely to determine the scope of past settlements that could potentially be re-opened.

AUSTRALIA (continued)

With the National Redress Scheme (which has a AU$150,000 cap) entering into its fifth year and an increase in highly publicised large civil settlements, a reduction in the number of redress claims is anticipated and an increase in those that choose to pursue their claims via civil litigation.

Plaintiff firms are increasingly using the media to publicise large settlements and judgments, and call into disrepute defendant institutions. We see this trend continuing, inflating plaintiff expectations and maximising pressure on defendant institutions and their stakeholders.

Finally, transport and marine insurers will be watching out in 2023 for a report from the Strategic Feet Taskforce to further strengthen Australia's maritime supply chain channels.

CONTACT

Jonathan Newby
Partner
+61 2 8281 4406
jonathan.newby@cbp.com.au

CANADA

MILLER THOMSON

Mark R. Frederick | Partner
Vanessa De Sousa | Associate

Key developments from 2022

2022 brought with it the economic, social, and political reverberations of the COVID-19 pandemic, impacting insurance companies and the regulation of insurance more broadly. In this chapter we recap some of the major changes impacting the insurance industry moving into the new year.

Business loss coverage

We continued to see the pursuit of business interruption claims and pandemic-related insurance in 2022. *202135 Ontario Inc et al v Northbridge General Insurance* was the first business loss coverage case related to COVID-19 to come before the Ontario Court of Appeal. The insured owned seven daycare locations which were insured for property and business losses. Due to the pandemic, all seven daycare centres were closed for three months between March and June 2020, resulting in business losses. The insured was holding a business insurance policy with their insurer that included a special endorsement to cover business losses arising from a pandemic with liability for business interruption limited to $50,000. The insurer took the position that its liability was limited to $50,000 as a global total for all of the seven locations. The insured brought an application seeking a declaration that the $50,000 limitation applied per daycare location so as to entitle them to a global total of $350,000. The Court found in favour of the insured, that the limit of liability clause, read in the context of the policy as a whole, clearly and unambiguously meant that the limit of liability was $50,000.00 per location.

Duty to defend and the pollution exclusion

In *Kin v Ecclesiastical*, the insureds brought applications against their insurers seeking a duty to defend in an underlying action. The insured sold a property to the plaintiff in the underlying litigation. The plaintiff in the underlying action alleged that two underground fuel storage tanks (**USTs**) were not disclosed at the time of the sale. The underlying claim specifically alleged that the USTs had leaked. The insurers denied coverage based on a pollution liability exclusion in the policies. The Ontario Superior Court of Justice concluded that the pollution exclusion applied and the insurers had no obligation to defend or indemnify the insureds in the underlying action. The Court gave effect to the clear language of the policy reading the contract as a whole.

Social inflation and inflation more broadly

The cost of living continues to rise with Canada's official inflation rate seeing year over year increases throughout 2022. With supply chain issues continuing to hamper the economy, we see increased exposure on insureds in the construction industry.

Social inflation refers to all the ways in which insurers' claims costs rise over and above general economic inflation, including shifts in societal preferences and trends. Social inflation has a direct effect on claims-related losses and insurance costs.

In a series of lectures done for the Lloyd's Marketplace, Miller Thomson raises the question of how social inflation is affected by economic inflation and how economic inflation often is yet another trigger for the societal and judicial factors that affect social inflation.

Contractor Course of Construction

Miller Thomson were successful coverage counsel in a large claim involving construction of a railway embankment in Western Canada (see *Kelly Pantaluk Constuction Ltd v Lloyd's Underwriters*, 2022 SSKB 227). The issue was whether the "Course of Construction Wrap-Up Policy" (the **Policy**) issued to the insured obligated Lloyd's to defend the action. There was no dispute that the claim fell within the grant of coverage, rather that certain exclusions applied concerning own works. The Court analysed the effect of the exclusions to find that they could be properly applied in a case of this nature.

Following the three-step analysis mandated by the Supreme Court's decision in *Progressive Homes Ltd v Lombard General Insurance Co. of Canada*, 2010 SCC 33 (CanLII), [2010] 2 SCR 245 (*Progressive Homes*), in deciding whether the duty to defend has been triggered, the court must determine:

- whether the claims as alleged against the insured possibly fall within the duty to indemnify;
- whether the claims are excluded from coverage; and
- whether the claims fall within an exception to an applicable exclusion clause.

The court analysed the Operations Exclusion and the Project Damage Exclusion to find both applied to exclude coverage. The issue was whether the railway company's claim against the contractor alleged property damage to the "principal's existing surrounding property, not forming part of the project works." The insured contractor argued that the foundational soils beneath the embankment were surrounding property, not forming part of the project works.

The court applied the Supreme Court's analysis of the exclusion clauses in play in *Progressive Homes*, one of which excluded "property damage to that particular part of your work arising out of it or any part of it." The phrase "that particular part of your work" meant that the insured's work could be divided into component parts. This narrowed the scope of the exclusion clause so that coverage might remain for non-defective components of the insured's work. The insured presented argument that a restrictive interpretation of "that particular part" should apply so as to look only at the last lift of soil on the embankment so as to allow for coverage below the last lift and restrict the exclusion to the most recent lift of soil.

The question became whether the railway Claim contemplated that the contractor's work on the embankment could be subdivided into component parts and whether the claim alleges that only the final layer of soil was defective as opposed to there being "ongoing warning signs" of a predictable embankment failure.

Mr Justice Layh distinguished this case from the facts of *Progressive Homes*: he found that successive and repetitive works of an identical nature cannot be separated into component parts.

His Lordship also addressed the contractor's argument that it was not performing operations "at the time of the damage" (as the damage had occurred at night when work had shut down). He agreed with Lloyd's position that construing the exclusion clause so narrowly that it only applies when the insured is touching the property would read it out of the policy. The fact that the contractor was not actively performing works when the embankment failed does not make the exclusion inapplicable.

Next, his Lordship considered KPCL's argument that, since the railway claim against the contractor alleged wrongdoing by various consultants, the contractor was entitled to a defence for damages arising from their failures. However, the court noted that the railway pleading noted the insured was the general contractor for the project, responsible "for all aspects of construction, project management, safety, traffic management, testing and commissioning ..." The judge observed that clause 8(c)(i) excludes from coverage "operations... performed by or on behalf of the Insured". The words "on behalf of" also distinguish the present case from *Progressive Homes*.

Continuing the three-step analysis, his Lordship then turned to the contractor's reliance on Endorsement 22 to determine whether it creates an exception to the Operations Exclusion. This turns on whether the railway Claim alleged damage to the railway's "existing surrounding property, not forming part of the project works." The Contractor argued that the "foundational soils" were not part of the project works, while Lloyd's responded that "the foundation soils were an integral part of the embankment, with which his Lordship agreed. First, the foundation soils are an integral part of the embankment. Second, monitoring the stability of the foundation soils was part of the contractor's scope of work, as alleged in the railway's Claim.

Justice Layh was alive to a possible objection that he was reading Endorsement 22 to narrowly. He noted that the endorsement could apply if, for example, the collapse had damaged nearby equipment which was not used for construction on the project.

Summing up, Justice Layh addressed briefly the distinction we had raised between wrap-up policies and builders all risk policies. He noted that the substance of the policy, not its label, is determinative and he had not relied on the distinction to reach his decision, which was that Lloyd's did not have a duty to defend KPCL and awarded Lloyd's costs.

Note: The above case is now on appeal to the Saskatchewan Court of Appeal.

The risk environment, increasing interests rates and regulatory responses

The Canadian Office of the Superintendent for Financial Institutions (OSFI) published its Annual Risk Outlook for Fiscal Year 2022-23. In the latter half of 2022, OSFI observed a material shift in its risk environment. Higher inflation and monetary policy tightening has triggered a material rise in interest rates. Rising costs of debt, given a relatively robust level of private sector indebtedness altered OSFI's analysis of its risk environment for 2022-23. OSFI noted that further rate hikes and a house price correction could lead to increased borrower defaults, credit losses and a broader housing-led softening of the economy.

OSFI recently issued an advisory that applies to all Canadian mortgage insurance companies. It implements administrative interpretations to the Mortgage Insurer Capital Adequacy Test (MICAT) with respect to the determination of requirements for variable mortgages and adjustable-rate mortgages. The amortisation of these loans could temporarily extend until the payment amount is set to align with the original amortisation period. OSFI will continue to assess whether mortgage underwriting standards are well-adapted and sufficient.

What to look out for in 2023

We expect to see the continued economic and social fallout of the COVID-19 pandemic to impact the claims environment and insurance industry at large. Coupled with this we will see continued inflationary pressures on the real estate and other fields that rely upon real estate with potential downward effect on values, which will influence many other markets.

With respect to business loss coverage, we will continue to see more claims and applications addressed by Canadian appellate courts. We expect that there will be further litigation in the business loss space in the context of class actions that are starting to crystalise.

We foresee that the economic uncertainty going into the new year will continue to shape regulatory responses to increased risks related to private sector indebtedness and mortgage underwriting.

CONTACTS

Mark Frederick
Partner
+1 416 595 8175
mfrederick@millerthomson.com

Tom Whitby
Partner
+1 416 595 8561
twhitby@millerthomson.com

FRANCE

HMN PARTNERS

Romain Schulz | Lawyer of counsel

Key developments in 2022

COVID-19 Pandemic

We mentioned in last year's review the issue of coverage of operating losses when there is no physical damage, in the context of the COVID-19 pandemic.

The question of coverage of operating losses sustained by professionals following the lockdown received various answers and the decisions rendered by various courts (of first instance and on appeal) in France left an impression of chaos.

Litigation is now maturing. A general trend is that courts of appeal are less favourable to the insured than courts of first instance. They are more prone to admit validity and then application of the exclusion aiming pandemic.

Cour de cassation (French Supreme Court) rendered on 1 December 2022 four identical decisions finding that the exclusion regarding pandemic is valid. In each of these four matters the decision rendered by the court of appeal of Aix-en-Provence is quashed and the case is to be ruled again by the same court (composed by other magistrates).

As to the impact of this case law, we may remind that ACPR (French authority supervising insurance) conducted an audit of damage insurance contracts available in France and as at June 2020, the result was that 93% of the contracts expressly excluded an event as exceptional as the pandemic. The wording may of course differ from a contract to another, but *Cour de cassation* provided clear guidelines.

We may however expect that some insured do not admit the position expressed by *Cour de cassation* and that some lower courts resist.

A large number of matters have been settled out of court, but litigation remains, and is going nowhere in the near future.

Remote sale of insurance contracts

ACPR (*Autorité de Contrôle Prudentiel et de Résolution*: French authority supervising insurance) pursues its surveillance of remote sale of insurance contracts, especially through telephone.

The Sanction Commission of ACPR rendered on 17 October 2022 a decision sentencing an insurance broker. This decision calls few remarks.

The first remark is that the broker had previously been sentenced on 28 February 2020, under a different name but for the same breach of duty. Still, ACPR shows strict vigilance, and it is obvious that this responds to a policy of protection of consumers.

The second remark is that the broker operated through a call centre established out of the European Union. This is not illegal in itself but requires that the broker operates a control through its employees based there.

What to look out for in 2023

Insurance and new technology

NFTs (non-fungible tokens) have rapidly met insurance. As any valuable artwork, they can be subject to insurance. Regarding property insurance, an interesting question is to determine whether the damage guaranteed is material or immaterial. NFTs can also involve other types of insurance. High volatility of prices can lead to suspect price manipulation and then claims involving fraud insurance or PI insurance.

Parametric insurance

Parametric insurance is not exactly a new trend: it has existed for several years but remains limited in France. Its development is still to come. As there is no specific regulation, such contracts should be subject to insurance law when they are deemed insurance, or alternatively to common contract law.

This poses questions insofar as even when parametric insurance is presented as a simplified insurance, it remains insurance and simplification cannot lead to the rules of insurance law being overlooked.

Parametric insurance most often covers meteorological hazard. It is then likely that there is multiple insurance policies active when parametric insurance covers natural disasters, which are subject to a compulsory coverage in property insurance contracts. The issue is all the more complex that some properties and some types of damage are not subject to the compulsory coverage of natural disasters and to this extent, the parametric insurance remains relevant.

The most serious issue regarding parametric insurance is the principle according to which the indemnity paid under insurance cannot exceed the damage actually sustained by the insured (article L. 121-1 of French Insurance Code). There is then a risk that the lump sum granted through parametric insurance exceeds the actual damage. In order to prevent this, it is often stipulated that the amount of indemnity is the lower of the following: either the lump sum or the damage actually sustained. This implies that a loss is declared and instructed in a classic and well-known fashion, but the wished simplification is then limited.

CONTACTS

Simon Ndiaye
Partner
+33 1 53 57 50 41
sndiaye@hmn-partners.com

Gérard Honig
Partner
+33 1 53 57 50 37
ghonig@hmn-partners.com

NETHERLANDS

KENNEDY VAN DER LAAN
Marieke Opdam | Professional Support Lawyer

Key developments in 2022

Class actions

In the Netherlands we have seen a flurry of new cases under the new Dutch regime for class actions (60+ since inception in 2020), including class actions against tech platforms that are related to breaches of EU privacy laws and competition law (eg Apple, google, TikTok). The new regime has also led to the establishment of plaintiff-side, boutique law firms that are related to foreign litigation funders. The first decisions were published regarding admissibility of claim vehicles (ie actual class needed) and the applicability of the new regime (regarding the cut-off date of November 2016).

Furthermore, the first major investor's claim against Netherlands-based Airbus and its D&O's was initiated. The plaintiffs state investors suffered losses after buying shares in Airbus that were overpriced because the company withheld information about corruption at the company.

As another concrete example of a class action, shareholders organisation 'VEB' has held Philips liable for the damage caused to shareholders. In the past, certain apnea devices from Philips contained a defect which could cause severe health damage for the user. The problems with the ventilators were first reported in 2021. After Philips has reported problems with the ventilators, the market value had decreased considerable. According to the VEB more than €16bn in direct damage can be traced back to inadequate provision of information about the apnea affair. The VEB has informed Philips that the VEB is prepared to go to court to obtain compensation for the shareholders.

Statute of limitations for asbestos claims

As of 21 October 2022 insurers will no longer invoke the absolute limitation period in the event of a claim from an asbestos victim against a (former) employer. In principle, an asbestos claim from a(n) (former) employee expires 30 years after the exposure to asbestos. Often, this period has already expired when the (former) employee becomes ill. Recently, the Dutch Association of Insurers, a large employer's organisation and various trade unions have made new agreements about the statute of limitations for an asbestos claim. This agreement is laid down in the Covenant Institute Asbestos Victims. As a result, for an asbestos claim from an employee, it is no longer relevant when the victim was exposed. In practice, a lot of insures already ceased to invoke the absolute limitation period.

2022 showed a relevant Supreme Court rulings regarding salvage costs

The roofs of an agricultural business contain asbestos. When material containing asbestos was found in the drainage zones of the roof, the insured claimed compensation under his 'environmental damage insurance' for the costs of remediation of the soil and the costs of replacing the roof plates. On 22 April 2022 the Supreme Court ruled that a measure that is required to avert an imminent danger must be regarded as a 'special' measure even if would form part of normal maintenance in other circumstances. Compensation is in order if removal of the roof plates must be regarded as salvage.

What to look out for in 2023

Climate change

In last year's update we included a report from the Authority for the Financial Markets (AFM) on climate change related losses that are getting more and more uninsurable in the Netherlands, and the need for insured parties to be aware of that. Flood damage is one of these risks. In the Netherlands, individual insurers have so far failed to offer comprehensive flood insurance on a large scale.

The Dutch insurers have now proposed to introduce a mixed public and private system that enables citizens and (small) businesses to protect their assets against all types of flood damage. In this system the Dutch government could enable a solidarity (compulsory) nature of an insurance solution and ideally even participate in a reinsurance pool. Time will tell if this is a realistic proposal and if the government is willing to participate and to what extent.

Furthermore, in terms of climate change, it is worth mentioning that Shell is appealing the 2021-ruling of the Court of The Hague that Shell is obliged to reduce the $CO2$ emission of the group's activities by 45% net at the end of 2030, compared to 2019. The procedure was initiated by parties including 'Milieudefensie' and Greenpeace Netherlands. With this ruling, the Court gave substance to the unwritten standard of care in Dutch law on the basis of the relevant facts and circumstances, the best available science on (the tackling of) dangerous climate change, and the broadly supported international consensus that human rights offer protection against the consequences of dangerous climate change and that businesses must respect human rights. Regarding the activities of the Shell group, this obligation to reduce is an obligation to achieve results. Regarding the business relations of the Shell group, including the end users, this is a serious best-efforts obligation.

Shell has appealed against the decision. Shell states that there are aspects of the court's judgment that are not feasible and/or reasonable, to expect Shell to achieve. Furthermore, Shell argues that customers would buy fossil fuels from other companies if – for example – Shell decided to stop selling petrol.

Pending the outcome of the appeal, Shell states it is taking steps to comply with the ruling of the Court. The first hearings in the appeal case are expected to take place in 2023/2024.

Class actions in 2023

In 2023 more clarity is expected as to competing claim vehicles and open questions regarding the admissibility bar for class actions. We also expect more cases, in particular related to tech companies. Lastly, the new EU class-action regime for consumer cases enters into force on 25 June 2023.

CONTACTS

Marit van der Pool
Attorney at law
+31 20 5506 838
marit.van.der.pool@kvdl.com

Peter van den Broek
Partner, Attorney at law
+31 20 5506 669
peter.van.den.broek@kvdl.com

LATIN AMERICA

RPC

Alex Almaguer | Partner, Head of Latin America Practice
Chris Burt | Senior Associate
Martin Jimenez | Mexican Qualified Lawyer

Key developments in 2022

2022 has been marked by a slow recovery in the global economy after the COVID-19 pandemic. However, Russia's invasion of Ukraine in late February 2022 and the severe lockdowns in China have limited regional recovery and injected great uncertainty.

COVID-19 has continued to affect the insurance market in Latin America during 2022, especially in those business sectors which had to close due to government-imposed lockdowns. There are still many unresolved COVID-19 insurance claims in the region and some of them have already escalated to litigation or arbitration.

There remains a debate as to whether BI losses should be payable in circumstances where physical damage could be considered to be no longer the direct cause of the interruption.

It is still unclear whether local courts and insurance authorities will rely on the English Supreme Court's FCA Test Case decision when determining the pending COVID-19 claims.

2022 has been marked by the increase in extreme weather events in the region, which can be seen as an effect of climate change, producing billions of dollars in losses, mainly under property policies. For instance, the extreme droughts in Argentina, Brazil, Paraguay, and Uruguay have increased claims in the agriculture and power generation sectors.

We have noticed an increase in awareness amongst (re)insurers regarding the implementation of corporate policies to reach the Net Zero goal by 2050, especially in the energy sector where there have been many discussions on how to drive the transition to a low-carbon economy.

These climate change-related developments have impacted how (re) insurers calculate their premiums in Latin American countries. For instance, insureds in Chile and Peru have faced significant increases in the cost of coverage for natural disaster exposures during 2022. We expect that insurance premiums will continue to increase.

What to look out for in 2023

Several global factors, such as the continuing consequences of the pandemic; the increase in production costs, Russia's invasion of Ukraine and the political, social, and economic instability in some countries, have are having an impact on the global economy.

Inflation will be a "hot topic" in 2023. Inflation will have a direct impact on claims during 2023 across all lines of insurance business. In particular, in sectors such as Property, Construction and Energy, due to the increase in the cost of material and labour.

Also, these sectors will be impacted by delays in getting spare parts, as the supply chain will have "bottlenecks" caused by the closure of ports during the pandemic, which is resulting in port congestion.

In addition, the conflict in Ukraine is having a considerable impact on the energy sector.

Inflation will likely create the risk of under-insurance. Low valuations of insured assets will mean that the limits purchased will be not sufficient to cover the costs of reconstruction, repair, or replacement of the insured risks. Accurate declared values will be crucial.

Finally, social conflict and political violence have increased in Latin America in recent years. Protests against austerity and increasing inequality in Argentina, Brazil, Chile, Colombia, Ecuador, Mexico and Peru have led to numerous, substantial losses.

We expect that political violence related losses will increase during 2023.

CONTACTS

Alex Almaguer
Partner, Head of Latin America Practice
+44 20 3060 6371
alex.almaguer@rpc.co.uk

Lucy Dyson
Partner
+44 20 3060 6308
lucy.dyson@rpc.co.uk

USA

HINSHAW & CULBERTSON

Scott M. Seaman | Pedro E. Hernandez | Co-Chairs Global Insurance Services Practice Group

Key developments in 2022

After a brief abatement due to pandemic-related litigation delays and court closures, social inflation returned with a vengeance replete with numerous nuclear jury verdicts. Although a case in any state is capable of resulting in a nuclear verdict, Georgia, Pennsylvania (Philadelphia), California, New York, Illinois (Cook, Madison, and St. Clair counties), South Carolina (for asbestos litigation), Louisiana, Florida, Missouri (St. Louis), New Jersey, and Texas have been characterised as problematic jurisdictions.

With economic inflation at a 40-year high in the US, insurers found themselves looking down the dangerous double barrel of social inflation coupled with economic inflation, presenting underwriting and claim challenges. ESG remains an overriding issue for insurers and their policyholders and has given rise to greenflation.

Covid-19 business interruption, cyber and privacy, hurricanes, and forever chemicals were major subjects for litigation and claims.

ESG/Sustainability

The Biden administration and many states continue to push ESG on an "all of government" basis. The US Securities and Exchange Commission proposed an onerous climate-related disclosure rule and its announcement of enforcement results for 2022 makes clear it is stepping up enforcement activity with respect to ESG. The US Department of Labor announced a final rule, styled as Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, promulgated by the Employee Benefits Security Administration that allows retirement plan fiduciaries to consider ESG factors in investment choices. The US Department of Justice announced the formation of an Office of Environmental Justice to target corporate polluters causing harm in underprivileged communities.

The US Supreme Court, in the *West Virginia v EPA* case, struck down a rule promulgated by the US Environmental Protection Agency (EPA) to address carbon dioxide emissions from existing coal and natural gas-fired power plants, ruling the agency exceeded its authority under the Clean Air Act. This may delay, but is not likely to derail. the EPA's efforts.

Although ESG momentum continues, there has been some backlash. For example, several states have proposed or passed legislation in the form of boycott bills that prohibit states from doing business with institutions that discriminate against companies in specified industries or bills prohibiting state from employing ESG considerations in their investment decisions. Two Los Angeles California trial court decisions struck down laws relating to composition of boards of directors on equal protection grounds.

COVID-19 business interruption and other pandemic coverage litigation

By 1 October 2022, 3,262 COVID-19 coverage cases have been filed throughout the US, with approximately 2,124 involving business interruption, 1,927 extra expense, 1,833 civil authority, 256 ingress/egress, 125 contamination, 98 event cancellation, and 91 sue and labour. More than 475 cases were filed as putative class actions and 834 cases include allegations of bad faith. At the trial court level, insurers have prevailed in almost 80% of rulings on motions to dismiss in state courts and in more than 95% of the rulings by federal courts, mostly on the grounds that the virus claims do not involve "direct physical loss or damage" to property as required under most US policy wordings, governmental orders do not constitute loss of property, and/or virus exclusions preclude coverage. Insurers have prevailed on the majority of summary judgment rulings as well.

Insurers have prevailed in decisions before the US Courts of Appeal for the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits (the Third Circuit has not rendered a ruling as of 1 December 2022). Insurers also have prevailed in appeals before State Supreme Courts in Iowa, Massachusetts, Ohio, South Carolina, Oklahoma, Washington and Wisconsin. Policyholders were handed a victory in the Vermont Supreme Court allowing a lawsuit to go forward. Insurers have prevailed in the majority of state intermediate appellate court decisions to date. Many cases and appeals remain pending, but few new business interruption filings are expected as the contractual limitations period has expired under most first-party policies. None of the legislative proposals seeking to provide coverage by fiat or creating a government-backed fund have become law.

Cyber

For twelve consecutive years, the US has experienced the highest average costs of a data breach of any country at US$9.44m. Remote work, which exploded during the Covid-19 pandemic, increased the average costs by US$1m, where it was a factor in the data breach. Ransom attacks and state sponsored cyber-attacks remain key concerns for insurers and policyholders and supply chain attacks have become a growing challenge.

A New Jersey trial court ruled that a hostile/warlike action exclusion in various property policies did not prohibit coverage for the NotPetya cyberattack launched by the military arm of the Russian Federation government against Ukraine because such an exclusion only intended to exclude "traditional" forms of war. Another coverage action in Illinois was settled in advance of trial. US insurers continue to assert historic war exclusions bar coverage, but are including newer exclusions in policies.

The vast majority of cyber coverage decisions to date involve silent cyber claims (ie claims under traditional first-party, third-party and crime/fraud policies). However, decisions under cyber policies are now being rendered with no clear trend of decisions.

Privacy

The US still lacks an encompassing federal law comparable to the GDPR, but several states enacted their own data privacy and security laws. Data breach notification laws are in place in all 50 states (which have varying rules and definitions as to the definition of breach, the extent of any exemptions, and the timelines for providing notice to affected individuals). There are now at least five different comprehensive state privacy laws and 25 different state data security laws in the US. California leads the way with the most comprehensive data privacy and security laws, which goes into full effect in January of 2023. Illinois' biometric privacy act continues to generate cases, liabilities, and requests for insurance coverage. The California Supreme Court recently ruled that the right to privacy includes the right to seclusion in a fax blasting case involving Yahoo, an issue upon which US courts are divided.

Lead paint

Coverage issues relating to the US$400m plus lead paint abatement fund involving three lead paint manufacturers have been subject to three separate coverage actions. Insurers prevailed at the trial court and on appeal in California in the *ConAgra* case based upon the insured's predecessor having actual knowledge of the harms associated with lead paint when it promoted lead paint for interior residential use. In the *Sherwin-Williams* and *NL Industries* cases, the policyholders prevailed in the intermediate appellate courts in New York and Ohio even though the same underlying judgement was involved.

Forever chemicals

Forever chemicals have been around since at least the 1940s and have been used in so many products they are said by many to be ubiquitous. Yet, forever chemicals only recently became one of the most fervent areas for civil litigation. There are now thousands of cases pending across the US, with some eye-opening settlements such as a 3M settlement of $850m, $70m by Wolverine, and DuPont's settlement with its spin-off Chemours culminating in the creation of a $4bn fund for future liabilities. Over a dozen states are suing manufacturers and others for contaminating drinking water and damaging natural resources.

Governmental regulators in the US arrived late to the scene. It was not until September 2022, that the Biden administration announced it would designate some forever chemicals as hazardous substances under the nation's Superfund cleanup program. The 2020 National Defense Authorisation Act requires the US Environment Protection Agency to get an inventory on PFASs made in and imported into the US since January 2011. Recently, it was reported that a rule proposed by the EPA would require small businesses to pay over $863m to report the production and importation data required as opposed the less than $2m previously projected by the EPA. Now, several states have been regulating and/or banning these chemicals.

Some forever chemical coverage actions have been filed with many more to come. Numerous issues will be presented. The early results have been mixed with respect to the application of pollution and hazardous waste exclusions.

In a case involving EtO emissions from a Medline facility, an Illinois appellate court ruled there was no coverage under a pollution liability policy because the discharges had been occurring since 1994, long before the policy's September 2018 retroactive date.

Opioids

A 2022 bipartisan congressional report found that the opioid epidemic costs the US approximately US$1tn annually. Approximately, 3,000 state and local governmental entities have been seeking to recover costs of public services associated with opioids from drug manufacturers and distributors. The US$26bn settlement a coalition of state attorneys general reached with Johnson and Johnson and three distributors in 2021 grabbed the headlines.

A California federal judge ruled that Walgreens, a drug store chain, substantially contributed to the public nuisance in San Francisco associated with opioids. The court stated that a subsequent trial will be held to determine the extent to which Walgreens must abate the public nuisance that it helped to create. The tort of public nuisance is a growing concern in some states, including California.

Opioids coverage litigation has produced mixed results, but many courts have recognised that liability insurance policies do not provide coverage. The Delaware Supreme court led off 2022 by ruling that distributor Rite Aid was not entitled to a defense because recovery was sought for economic damages, not personal injury. Similarly, the Ohio Supreme Court ruled that Masters Pharmaceutical was not entitled to coverage because the local governmental entities are attempting to recover economic losses as opposed to damages because of bodily injury. A California federal court ruled insurers had no duty to defend a drug distributor as the policyholder's over-distribution of opioids led to the foreseeable diversion of prescription painkillers did not arise out of an accident or occurrence. This decision is on appeal.

Construction defect and weather-related claims

Florida and the gulf coast remain reliable bastions for construction defect and weather-related claims. Florida property insurers have been impacted heavily and, in some cases, have been rendered insolvent. Florida enacted two statutes that interposing litigation reform impacting first-party claims, particularly with respect

USA (continued)

to claims involving roof damage and creating a US$2bn reinsurance program.

D&O and securities law

Delaware passed laws authorising the use of captive insurance to cover D&O liabilities subject to conditions and permitting enhanced legal exculpation of officers of Delaware corporations. The Delaware Supreme Court declined to apply the "larger settlement rule" for allocation where covered and uncovered matters were involved and decided a related claims case. These decisions underscore the need to refer to particular policy language rather than reliance upon generic standards.

The US Securities and Exchange Commission issued final rules requiring issuers to disclose the relationship between executive compensation actually paid and the company's financial performance and requiring exchanges to establish rules requiring "clawback" protocols where incentive compensation was based on erroneously reported financial information.

Through Q3 2020, the trend of decreased securities class actions continued. Initial public offering activity was down substantially in 2022 and proposed SEC rules and government scrutiny of SPACs may portend a decreased use of SPACs. Nonetheless, new case filings continue. Cyber-attacks, regulatory risks, and health and safety, environmental issues remain prominent areas of concern. Cyber-related securities class actions so far have received mixed success. ESG activities have produced numerous lawsuits in a variety of contexts.

What to look out for in 2023

Social inflation and ESG will continue in 2023. Additional appellate and trial court

COVID-19 decisions will be rendered. Cyber and privacy claims will continue to mount. Although silent coverage decisions will continue to be rendered, an increasing number of coverage decisions under cyber specific policies are expected. Hurricane Ian claims and coverage litigation will wage on for several years. With Florida law makers in special session, additional legislation impacting first-party claims may be passed.

CONTACTS

Scott Seaman
Partner
+1 312 704 3699
sseaman@hinshawlaw.com

Pedro Hernandez
Partner
+1 305 428 5043
phernandez@hinshawlaw.com

<< Home >>

MIDDLE EAST AND AFRICA

RPC
Karolina Lewicki | Trainee Solicitor

Key developments in 2022

Middle East

Last year we predicted that investments in green technology and sustainable projects would continue to grow in the Middle East in line with the region's ambitious targets in respect of renewable energy sources. As anticipated, the transition to greener energy has remained steady in 2022. The UAE's solar projects are making significant progress and the use of renewables is accelerating in Saudi Arabia, which has recently committed $2.5bn to the Middle East green initiative.

We also noted that ESG-related financing would remain at the centre of post-pandemic transformation planning in 2022 and the years beyond. This trend is still ongoing across business sectors in the Middle East, including the insurance sector. Recently, the topic also resurfaced at the Dubai World Insurance Congress, during which it was noted that insurers and brokers who undercut ESG standard will "face catastrophic consequences".

Africa

In our previous Annual Insurance Review we predicted that the African insurance market will need to maintain its focus on digital innovation and wider distribution to aid the post-pandemic growth of the industry.

As a result of its 48th Conference and General Assembly, the African Insurance Organisation identified technology, innovation and data as key drivers to ensure the progression of the continent's insurance market. While the African insurance industry is still amongst the least penetrated in the world, Insurtech is continuously gaining traction especially in Sub-Saharan regions. Casava, a particularly successful Nigerian Insurtech company, has announced its $4m pre-seed funding in February 2022, which was the largest pre-seed round for an African company in the space, and has since grown significantly leading the way for other businesses to follow.

What to look out for in 2023

Middle East

Continued efforts to shift to sustainable energy sources are to be expected in 2023. Middle East and North African countries will see increasing investments in decarbonisation, renewables and clean energy, with Morocco and Jordan currently being closest to achieving the renewable energy targets set in the region.

According to the Mena Energy Investment Outlook report issued by the Petroleum Investments Corporation for 2022-2026, the region is expected to add 33 gigawatts of installed capacity from renewables by 2026. The UAE is also set to capture roughly 25% of the global hydrogen market share by that time. In relation to this, the Abu Dhabi National Oil Company, clean-energy company Masdar and BP signed a partnership agreement to further develop clean hydrogen and explore related opportunities resulting out of the energy transition.

Africa

Expect more focus on innovative and tech-driven solutions, which will help accelerate the expansion of the African insurance sphere in the years to come. Projections by Research and Markets indicate a compounded annual growth rate of 7.45% in Africa's insurance industry for the period leading up to 2027. This growth ratio is expected to translate into a market size of $115.9 billion in 2027, in stark contrast to $75.3 billion in 2021.

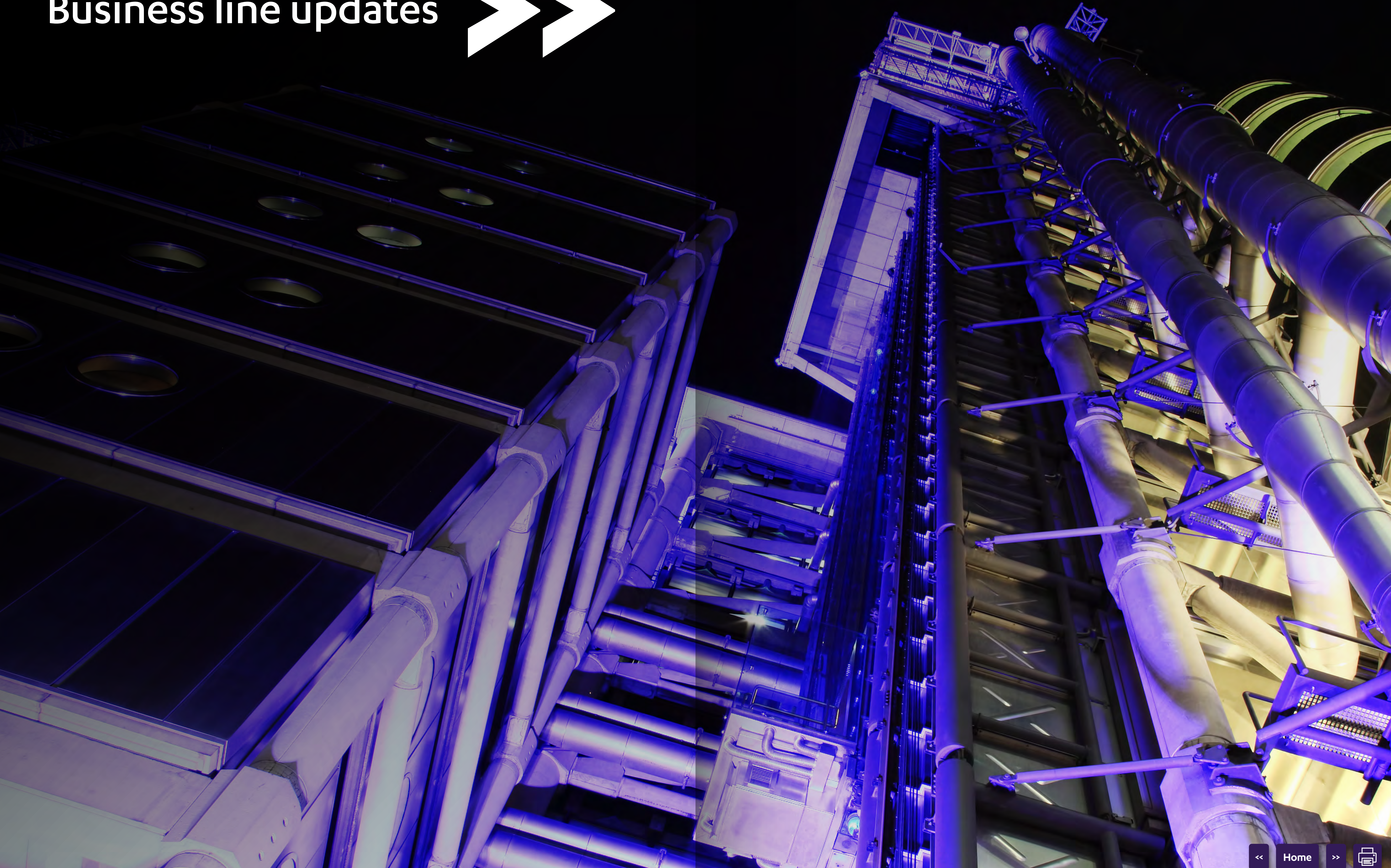
Developments in relation to the impacts of climate change in African countries should also be expected. In 2022, the launch of the African Climate Risk Facility was announced at COP27 with $14bn to cover losses and damages resulting from climate change. The initiative is meant to help the continent's most vulnerable communities deal with the consequences of climate disasters. It is supported by 85 insurers, who pledged to extend climate cover, and will cover a total of 1.4 billion people.

CONTACT

Toby Savage
Partner
+44 20 3060 6576
toby.savage@rpc.co.uk

Mark Errington
Partner
+65 6422 3040
mark.errington@rpc.com.sg

Business line updates



Accountants

Sarah Dowding | Senior Associate
James Lee | Associate

Key developments in 2022

As anticipated in our last annual review, following on from the Government's "Restoring trust in audit and corporate governance: proposals on reforms" consultation in 2021, audit reform has remained high profile for accountants this year.

The long-awaited reforms, which seek to restore public trust in the way the UK's largest companies are run, follow on from several sudden high-profile corporate collapses in the last 4-5 years. In May 2022, the government published its final proposals for reform, which include further transferring power away from professional bodies to a new regulator. The Financial Reporting Council will be replaced by the Audit, Reporting and Governance Authority (ARGA), whose overarching objective will be to "protect and promote the interests of investors, other users of corporate reporting and the wider public interest." The intention is that ARGA will have increased enforcement powers.

Substantial changes are expected as a result. Key amongst the intended reforms is to make reporting more useful, with better information about the risks a company faces, improving the quality of audit reporting and boosting competition and choice within the audit market. Further, it is intended that ARGA will have the power to set minimum enforceable standards for audit committees in relation to both the appointment and oversight of auditors.

It had been hoped that the government might publish a draft bill, detailing the necessary legislative changes by the end of this year. However, against the current economic and political backdrop, this is now expected in 2023, with the changes themselves likely to come into effect in 2024.

In Asia, Hong Kong is also undergoing significant regulatory reforms. On 1 October 2022 the Financial Reporting Council (FRC) was renamed as the Accounting and Financial Reporting Council (AFRC) and has now become a full-fledged regulator regulating the entire accounting profession. Under the new regime, the AFRC is now vested with expanded statutory functions including registration, inspection, investigation and disciplinary.

On 26 August 2022, the US Public Company Accounting Oversight Board (PCAOB) and the PRC China Securities Regulatory Commission (CSRC) and Ministry of Finance (MoF) signed a Statement of Protocol that would allow US regulators access to audits of Chinese companies listed on the US stock exchanges. This marks a landmark agreement between US and Chinese regulators on a longstanding issue stemming from the PRC regulations prohibiting disclosure of audit working papers to foreign regulators.

What to look out for in 2023

Under the proposed new reforms, it is expected that the new definition of Public Interest Entity (PIE) will bring audits of around 600 more companies and LLPs under the remit of the new audit regulator ARGA.

Given the wider definition of PIE and the need for FTSE350 companies to allocate at least a proportion of their audits to non-Big 4 accountants, more audit firms will now need to familiarise themselves with the existing and new PIE audit requirements. The additional regulatory burden of carrying out PIE audits (together with the need for firms and registered individuals to specifically register for PIE audit work) should not be underestimated.

Further guidance from the government, the FRC and ICAEW will inevitably be published shortly. With the new reforms now very much in sight, audit firms will need to establish suitable processes to identify the further guidance provided and ensure the same is considered and adhered to within their businesses.

Additionally, given the current economic climate, the impending and potentially long-lasting recession may result in a sustained rise in corporate insolvencies. With the appointment of administrators /liquidators there is a likelihood that investigations into whether the failed company has any potential claims against their professional advisers, will lead to an increase in claims against accountants/ auditors, who are often a prime target. Some audit firms that have taken on larger (sometimes riskier) audits previously undertaken by the more experienced and better resourced Big 4 may find themselves exposed.

In Asia, the PCAOB's inspection of Chinese audit working papers mentioned above will be closely monitored by the entire industry. The US-listed Chinse companies selected for inspection include household names such as Alibaba and Yum China Holdings Inc, and the onsite inspection would be carried out in Hong Kong. The success of this cross-border inspection is important to all Chinese companies currently being listed in the US as the US has threatened to delist these companies if their audits are not made available to the US regulators for inspection.

It also remains to be seen how the new regulator in Hong Kong, the AFRC, will implement its new disciplinary process. It is expected that with a more complicated process now being put in place, accountant respondents will likely spend more time and costs dealing with contested disciplinary hearings, and there will potentially be more appeals to the Courts if the respondents are not satisfied with the disciplinary outcomes.

CONTACTS

Karen Morrish
Partner
+44 20 3060 6521
karen.morrish@rpc.co.uk

Antony Sassi
Managing Partner, Asia
+852 2216 7101
antony.sassi@rpc.com.hk

Robert Morris
Partner
+44 20 3060 6921
robert.morris@rpc.co.uk

George Smith
Partner
+44 20 3060 6976
george.smith@rpc.co.uk

Art and specie

Nadia Asfour | Associate

Key developments in 2022

In a year that has seen flash floods, record high temperatures and wildfires, the physical protection of insured artworks has been a prominent issue in 2022.

The increasing number of claims resulting from damage caused by extreme weather means that insurers are seeking to mitigate the risks they face by either excluding climate and environmental damage in at risk areas or, if such risks are to be covered, requiring policy holders to put additional safeguards in place at their properties. Such safeguards are not unheard of within the art world and museums and galleries in high-risk areas (such as the Whitney Museum of American Art in New York and the Pérez Art Museum in Miami) have been investing heavily in protecting against flood and hurricane risks respectively for several years now. However, if an additional burden is to be placed on private policy holders by insurers, this may lead to a rise in the use of secure art storage facilities in less vulnerable locations where, in addition to having secure (and often fire and flood-proof) facilities, the temperature, humidity and light is controlled to ensure that artworks are kept in optimum conditions.

What to look out for in 2023

Artificial intelligence is having an increasing influence on the art market, both as the artist (through software such as Dall-E) and as an expert 'eye' authenticating works of art.

Historically, the attribution or authentication of a work of art (and thus its valuation) was based on an expert opinion and perhaps bolstered by technical analysis, such as infrared reflectography or an x-ray. Artificial intelligence is now entering this space. Its technology works by analysing hundreds of images of works by an artist (including their brushstrokes, object placement, use of colour and compositional elements) and then comparing a given piece against this bank of images. Where the AI analysis results in a conflicting opinion to that reached by an expert, it can pose difficulties for owners, experts and insurers alike.

By way of example, this year, a Swiss-based company called Art Recognition used its artificial intelligence software to determine that the only Titian painting in Switzerland (*Evening Landscape with Couple* in the Kunsthaus Zürich) is not, in fact, by Titian. Whilst this analysis was carried out without the consent of the museum and without a high-resolution image from them, the company claims that its AI software is 90% accurate and has now publicly called into question the authenticity of the work. The use of this technology thus makes it more difficult to assess the correct position when attributing an artwork and there is a risk that, as this technology becomes more commonplace, professionals become exposed to litigation if an attribution is later found by AI technology to be inaccurate. Where there are competing opinions, it will also make it more difficult for insurers to value works of art under policies.

CONTACTS

Rupert Boswall
Partner
+44 20 3060 6487
rupert.boswall@rpc.co.uk

Davina Given
Partner
+44 20 3060 6534
davina.given@rpc.co.uk

Brokers

Anna Murley | Senior Associate

Key developments in 2022

COVID-19 related cases did not make the impact that was anticipated by the market in 2021. However, COVID-19 related issues have not gone away. The vigilant broker may be considering policy wordings in this regard, particularly in respect of business interruption and whether a policy provides sufficient protection for a particular client's needs.

Overall, the brokers market appears to have weathered the recent storms well in terms of the war in Europe and political uncertainty. However, there is significant uncertainty with regards rocketing inflation, supply chain issues and the cost-of-living crisis. This has inevitably brought new challenges and opportunities to brokers. For example, the rising costs of construction materials have meant that many commercial and residential properties are currently significantly underinsured. The savvy broker will be considering current policies and will look to optimise the potential for new business.

There has been a significant rise in natural disasters which has also created new opportunities for brokers, for example in developing new products together with insurers. There are also new opportunities in the ever-popular topic of Cyber insurance. Cyber policies are notoriously complex and technical. Therefore, a detailed understanding of a policy wording is required before it is recommended to a client. As with all complex policies, there are risks, for example with misrepresentation. A client may claim that it misunderstood the extent of cover provided on the basis of how the policy was presented to them by its broker before inception. Whether such a claim will have any merit will of course depend on the scope of cover that was discussed, and the advice given before inception and perhaps more importantly, the records kept by the broker. Brokers are reminded to keep detailed records of all communications in this regard. As we reported in the last edition, the law places a very high bar on brokers. The high-profile case of ABN Amro Bank NV v Royal & Sun Alliance Insurance Plc and others serves as a stark reminder of the onerous duties a Court will place on brokers.

What to look out for in 2023

Inflation and the cost-of-living crisis has driven customers to shop around for more competitive deals and reconsider essential expenditure. The threat of a recession may lead to commercial and personal customers seeking to reduce cover or allowing a policy to expire in order to save money, which could in turn result in underinsurance and uninsurance. As with all economic downturns, Insurers are likely to take more points against cover and brokers are likely to be in the firing line. Brokers need to be particularly vigilant about their own E&O, ensuring that everything has been well documented, particularly if a customer decides to choose a cheaper but less protective option.

The drive for a more sustainable planet will continue into 2023, meaning that there will be an acceleration for climate risk mitigation. This will result in more innovation, from new products, services and premium incentives to risk management. We anticipate that this may create opportunities for brokers as the demand for sustainable products increases.

CONTACTS

Tim Bull
Partner
+44 20 3060 6580
tim.bull@rpc.co.uk

Robert Morris
Partner
+44 20 3060 6921
robert.morris@rpc.co.uk

Kirstie Pike
Partner
+44 20 3060 6967
kirstie.pike@rpc.co.uk

Claims handling

Sarah Armstrong | Head of Legal

Key developments in 2022

The first full year of operation of the Official Injury Portal has materially reduced the volumes of work handled by law firms in the low value injury sector. In addition, there have been a number of decisions that have had an impact on the volume consumer litigation model by removing the ability to recover costs. For example, in *Warren v DSG Retail Ltd* [EWHC] 2168 the High Court struck out the claimant's claim for breach of confidence, misuse of private information and negligence, leaving standing only a breach of statutory duty claim in respect of a data breach following a cyber-attack on Dixons Carphone.

The impact of lower volumes of claims being handled by law firms is likely to lead to an overall reduction in claims volumes against solicitors and other professionals in litigation over time. There are claims farmers continuing to look for consumer litigation that will deliver recoverable costs. But for now, it seems that legislation and the Courts have closed down access to costs recovery across a range of low value litigation against professionals.

However, funding of litigation remains an area of difficulty and is likely to continue to produce claims against legal professionals. The decision of Mr Justice Foxton in *Royal & Sun Alliance Insurance Ltd and Others v Tughans (a Firm)* [2022] EWHC 2589 as to the scope of a professional indemnity insuring clause provide indemnity in respect of a success fee provided confirmation of the wide scope of the insuring clause. We understand that the decision is going to appeal. Insurers will be watching for the decision which will apply across many professional indemnity policies.

What to look out for in 2023

With the downward turn strongly predicted in the housing market we anticipate a wave of lender claims against solicitors and surveyors following housing repossessions. These will include a significant volume of properties that are owned as buy to let properties with sitting tenants. Whilst the government has stated its intention to ban no fault eviction for tenants within this Parliament, such legislation is not on the Statute books at the moment. It remains to be seen how this will play out for landlords and tenants. Unfortunately, though it seems likely that housing insecurity will increase for renters as repossessions increase alongside claims against professionals.

For the first time in many professionals' working lives inflation will need to be taken into account. For third party liability claims, the increased costs of expert advice and counsel will have to be factored into existing reserves. The further out the anticipated date of resolution for a claim, the higher the upward revision. For the first time in a long time interest will also increase the costs of claims resolution and interest will be a larger head of loss with potential to impact the settlement value of a claim. Claims handlers will need to work closely with their panel lawyers to manage the inflationary impact and ensure that there are no nasty surprises to absorb at the resolution of claims.

CONTACTS

Toby Higginson
Partner
+44 20 3060 6581
toby.higginson@rpc.co.uk

Angela Marsden
Operations Consultant
+44 7511 027284
angela.marsden@rpc.co.uk

Sarah Armstrong
Head of Legal
+44 20 3060 6545
sarah.armstrong@rpc.co.uk

Climate and biodiversity risk

Lucy Dyson | Partner
Marcela Calife Marotti | Associate

Key developments in 2022

2022 has been eventful year, with both the COP27 and COP15 conferences taking place at the end of the year, and a continued uptick in climate change related litigation, with over 2,000 cases having been filed worldwide. We are also seeing an increase in litigation concerning biodiversity, with a growing enclave of cases brought on behalf of individual species and the environment.

COP27 focused on the financing of greener energy projects and compensating developing countries for loss and damage as the result of extreme weather events. Whilst world leaders were able to commit to a US$100bn compensation fund by 2023, no deal could be negotiated in relation to the phasing down or reduction of fossil fuels. In particular, it had been hoped that discussions regarding the phasing out of coal could progress. However, the war in Ukraine has seemingly led to several EU countries re-opening coal plants or extending the lifespan of existing ones.

Although this was a disappointing end to COP27, other important topics were discussed including water and drought resilience, biodiversity and carbon removal initiatives. De-forestation and forest protection were also discussed, with 26 countries (accounting for 35% of the world's forests) agreeing to partner and launch the Forest and Climate Leaders Partnership. There were also encouraging discussions led by the Global Mangrove Alliance and Coral Reefs Resilience Action.

COP15 focused on biodiversity and the protection of ecosystems. Most prominently featured throughout COP15 was the "30-by-30" target whereby countries committed to protecting 30% of their land and sea territories by 2030. COP15 concluded with the adoption of a framework aimed at setting in motion concrete measures to halt and reverse biodiversity loss. Featured in its 23 targets, the framework also outlined the phasing out of subsidies that harm biodiversity by at least USD500bn per year.

2022 also saw the world move closer to reaching a consensus on solutions for plastic pollution, with 173 countries agreeing to negotiate the terms of a global plastics treaty which will address the lifecycle of plastics (themselves a derivative of petroleum and linked to the climate crisis). There is a long road to go, however, in terms of regulation. Whilst the UK has just announced a ban on single-use plates, cutlery and cups, water bottles and plastic bags are yet to be addressed.

The "Carbon Majors" cases brought against various oil companies concerning historic GHG emissions, remain at an early stage in the US courts (the majority still litigating whether they should proceed in federal and state courts). This type of "climate impact" case has not yet got off the ground outside of the US, except in *Lliuya v RWE*, which has been brought in the German courts in relation to the melting of a glacier in Huarez, Peru. *Lliuya* is brought on nuisance grounds and is regarded as a test case for whether a private corporation can be held liable for historic GHG emissions, by reference to its percentage contribution to global emissions (using attribution science to calculate RWE's 0.47% share). The case is currently at the evidential stage and the outcome will be highly anticipated.

The *Enrol Vert et al v Casino* "value chain" case continues in the French courts. This case is brought by eleven NGOs (representing Amazonian tribes) against French supermarket chain, Casino, in relation to the cattle industry in Colombia and Brazil and deforestation and Casino's responsibility in the supply chain. ClientEarth has just announced similar litigation against Danone, in relation to plastic pollution and its global supply chain. It is alleged that Danone has failed to devise a solution (only considering recyclability and not the use of plastics in its products) and in 2021 used more than 750,000 tonnes of plastic. Both the *Casino* and *Danone* cases are brought under French vigilance law, under which parent companies must identify and prevent adverse human rights and environmental impacts resulting from their own activities and those of subsidiaries and contractors (ie the supply (value) chain).

Climate change cases in a fiduciary context are also gathering pace, with ClientEarth having targeted Shell's directors in relation to carbon emissions commitments. We are also seeing governments targeted in relation to failures to respond to the climate crisis. The Torres Strait Islanders' complaint to the UN was successful, with the UN finding that the Australian government had violated human rights by failing to adequately respond to the devastation of the islanders' home and crops due to storms, heavy rains and rising sea levels contributing to flooding. This follows the Providencia Island case brought against the Colombian government following Hurricane Iota and the displacement of communities and failure to carry out emergency work.

What to look out for in 2023

In 2023, the climate change litigation movement will continue, including tactical, injunctive relief seeking cases in relation to plastics and the preservation of biodiversity. In Latin America there is a well-established tutela and, in particular, it is recognised that indigenous tribes have a special relationship with the land. Globally, the concept of environmental legal personality is becoming much more widely understood and there is increasing willingness for these types of case to be heard/ facilitated. This is all against the backdrop of the courts' willingness to permit both collective redress and claims against multinationals concerning the environment.

CONTACT

Lucy Dyson
Partner
+44 20 3060 6308
lucy.dyson@rpc.co.uk

Construction

Sarah O'Callaghan | Associate

Key developments in 2022

Whilst the Building Safety Act 2022 (BSA) presents a major challenge to the whole construction industry, some aspects may assist all parties to the industry, including Insurers, by improving standards within it and making it a more attractive sector to write. The BSA aims to strengthen fire safety regulation and to clarify who is responsible for this. A lot of the associated regulations are yet to be published. To date, the key changes include the introduction of (a) a Building Safety Regulator with powers to enforce building safety and compliance with standards, with a particular focus on high rise buildings and (b) new duty holders, including accountable persons, whose obligations under the BSA include the assessment and management of building safety risks which are contained in the BSA.

The BSA has also broadened the potential for liability under the Defective Premises Act 1972 (DPA). The limitation period for a potential claimant to bring a claim under the DPA has increased from six years after the completion of a dwelling to either 30 years for dwellings completed before 28 June 2022, or 15 years for dwellings due to complete after 28 June 2022. The BSA also establishes a new potential right of action against any person who *"takes on work in relation to any part of"* a dwelling. Therefore, claims can now be brought in respect of remedial works completed on an existing building after 28 June 2022, subject to the new 15-year limitation period.

As of 9 August 2022, 49 developers have signed a pledge committing to remediate life critical fire safety works in buildings over 11 metres that they have played a role in developing or refurbishing over the last 30 years in England. This is a major discussion point between construction professionals (including developers) and their insurers.

On a separate note, we continue to see a rise in regulatory investigations by RICS and ARB into their members. These investigations are extremely stressful for those being investigated (and their families and friends). We would strongly recommend that the question of whether or not an entity or an individual would be covered by such an investigation is clarified when insurance policies are being put in place.

What to look out for in 2023

The question of "who pays for cladding repairs" will remain a primary focus. More generally, next year's outlook for the UK construction industry is quite pessimistic given the current recession (in addition to Brexit, the war in Ukraine and the ramifications of the pandemic) and the ongoing increase in the cost of labour and materials. By way of example, in the residential housing sector, the third largest sector of the UK construction industry, demand is hard to predict due to the anticipated slowdown in UK house price inflation, which will inevitably impact the market.

The financial environment also means construction companies continue to be in a vulnerable position. Of course, in a construction project, when one company 'folds' it has serious consequences for the whole project. This can, in turn, lead to fingers being pointed at other parties to the project, who may have done very little wrong, to recover losses (particularly if they are, or should be, insured). This is likely to continue.

As well as the general interest rate rise, supply chain pressures (increased lead times and rising costs) and the demand for labour has inevitably led to increases in the costs of construction claims (ie the works required to correct an error). Unfortunately, this seems likely to continue.

CONTACTS

Alan Stone
Partner
+44 20 3060 6380
alan.stone@rpc.co.uk

Tom Green
Partner
+44 20 3060 6536
tom.green@rpc.co.uk

Ben Goodier
Partner
+44 20 3060 6911
ben.goodier@rpc.co.uk

Zoe Eastell
Partner
+44 20 3060 6163
zoe.eastell@rpc.co.uk

Construction (all risks)

Helena Payne | Associate

Key developments in 2022

In 2022, the construction industry experienced strong growth despite facing challenging issues that impacted the global economy.

The world (with the exception of China) tentatively moved on from COVID-19, and public health measures such as mandatory site shutdowns and social distancing, which had caused severe delays to projects in 2020 and 2021, were far less prevalent in 2022. However, supply chains, already disrupted by COVID-19, were constrained further and many projects suffered significant material shortages, with procurement times increasing dramatically.

The war in Ukraine and economic sanctions against Russia impacted markets and supply chains for raw materials and machinery (and caused energy prices to rocket), increasing project costs. Critical delays have been felt across construction sites globally due to supply chain issues, leading to a large volume of extension requests to insurers.

Labour shortages also continued to affect the construction industry. The significant skills gap in the market shows little sign of abating, with the industry struggling to attract and retain workers. Without the appropriate levels of manpower on site, projects experienced further delays and higher costs, including as a result of wage inflation. Insurers have often been the ones picking up the bill, with significant concerns arising around claims inflation.

The construction industry has not been able to escape the impact of inflation and higher interest rates in 2022, experienced in varying degrees across the world. Coupled with shortages in materials and labour, project costs including raw materials and freight have soared and remain volatile. Insurers have found claims rising in parallel, with the costs of rectifying damage increasing significantly against original construction costs. Quite often, the premium and terms of cover agreed have not been sufficient for the conditions experienced in 2022.

Hard market conditions persisted throughout 2022 although with rate increases moderating. Underwriting discipline has been the name of the game (following significant losses in the sector in recent years), with insurers insisting on stricter terms and higher deductibles (and a more restrictive approach to automatic extensions of cover).

What to look out for in 2023

Despite the challenges seen in 2022, the outlook for the construction industry broadly remains strong. We expect growth to be driven by large demand for infrastructure projects, particularly from governmental investment in many countries (for example Biden's Infrastructure Investment and Jobs Act) which is likely to be further spurred by a widening global recession. Negative global economic headwinds do however mean that construction in the residential sector is likely to experience a downturn (as is already being witnessed in China).

Inflation is starting to show signs of slowing and lead times for materials are decreasing. However, the increased demand in the infrastructure space is likely to mean that material and labour shortages will continue to be felt in 2023. Prices for raw materials, labour, and fuel will likely remain above pre-pandemic levels for the foreseeable future. Project delays will continue as contractors fight to clear backlogs. Rates may continue to harden (albeit with increases moderated) and with a continued focus by insurers on improving terms.

Positively, as the world takes ever-increasing steps to tackle climate change, there will be opportunities in the renewables and green energy space, with significant wind farms, power storage and solar farm projects in the pipeline (as well as facilities for innovative technologies such as green hydrogen). The nature of power and energy risks is changing, along with construction methodologies and materials. Contractors will not be immune to the digital transformation impacting all areas of our lives. Insurers will need to consider these changes and play their part in bringing about net-zero. We therefore expect closer collaboration between insurers and contractors as both parties improve their learning in this space, appropriate terms of cover are agreed, and more capacity in the market opens up.

CONTACTS

Mark Errington
Partner
+65 6422 3040
mark.errington@rpc.com.sg

Alan Stone
Partner
+44 20 3060 6380
alan.stone@rpc.co.uk

Tom Green
Partner
+44 20 3060 6536
tom.green@rpc.co.uk

Contingency

Naomi Vary | Partner

Key developments in 2022

2022 should have been a return to normal on the events front. The removal of COVID restrictions heralded a hope for a return to "business as usual" as eager festival goers dusted off their wellington boots and threw away their masks. With pubs, restaurants and theatres once more filled to capacity, 2022 appeared to be shaping up to be a year of celebration following the restrictions of the past two years. The May Jubilee celebrations brought crowds to London and the expectation of street parties throughout the country. Although later in the year some events were cancelled out of respect following the death of Her Majesty Elizabeth II, cancellations due to COVID seemed to be a thing of the past. Although our 2021 chapter we considered whether vaccine passports may continue to be a requirement for large events, this has not proved to be the case.

The effects of COVID have however lingered. The summer saw a number of festivals cancelled due to the financial hangover of the pandemic. Many smaller events beseeched patrons to roll their tickets to next year rather than seek a refund, as the cost of ticket refunds would likely sink the organisers. Some have aimed criticism at the insurance industry, indicating that the lack of support following COVID has made smaller festivals untenable. The removal of restrictions may make it more difficult to resolve any insurance issues. Although nobody seeks a return to COVID swabs and masks, insurers may have been more prepared to provide cover for COVID-related cancellations to an event that had safeguards in place. Now that those restrictions would not be accepted by patrons, the issue may be trickier to resolve.

Lack of insurance however may be one of several reasons for event cancellations, with festivals also citing the current economic conditions, spiralling staging costs and the squeeze on household disposable income as reasons for short notice cancellations.

What to look out for in 2023

Before COVID, our predictions for disruption in the events world focussed on the increasing weather extremes being seen across the globe. The UK has this year experienced both searing summer temperatures and monsoon-like rainfall, leading to flooding as the torrents of water failed to soak into the dry terrain. Storms have battered the landscape and the early December Arctic snap saw temperatures plummet. The days where events could rely on some predictability at certain times of year may be in the past. It may therefore be that after the intervention of COVID the events cancellation market's focus returns to the weather, although the ongoing cost-of-living crisis may also play a part in curtailing the availability of events. It remains to be seen whether it is smaller and more local events, or the grandstanding large national events, which better weather these collective storms.

CONTACT

Naomi Vary
Partner
+44 20 3060 6522
naomi.vary@rpc.co.uk

Cyber

Elizabeth Zang | Associate

Key developments in 2022

As predicted in last year's edition of the Annual Insurance Review, 2022 has seen the level of standalone cyber insurance products increasing and the price of cyber insurance products remaining high.

According to Industry Arc's Cyber Insurance Market Forecast, the global cyber insurance market was valued at $12.86bn in 2022 compared with $10.33bn in 2021. Within this context, standalone cyber insurance policies have a CAGR (compound annual growth rate) of 31.1% and are growing quickest when compared with packaged insurance, which is being phased out.

The price of cyber insurance products in the UK has seen a rise of 102% in the first quarter of 2022 according to the Global Insurance Market Index released by Marsh. These increased premiums, alongside more complicated application processes for cyber policies, have resulted in a strain on some organisations trying to obtain cyber insurance. With the increased cost of cyber threats on insurers, it is no longer feasible to simply transfer the risk of cyber threats over to insurers. Internal investment in security is needed. Market pressures, as well as ever greater sophistication in cyber-attacks, meant that insurers are tending towards insisting on a base level of security standards being in place.

However, over the course of 2022, we have seen a drop overall in large-scale ransomware incidents. Whilst ransomware is still a very significant risk, the majority of cyber incidents we have dealt with in 2022 have been attempted frauds, often through business email compromise. The drop in hard-hitting ransomware incidents may help the cyber insurance market to rebalance. However, whilst the price of cyber insurance policies is settling, the security standards policy holders are required to have is likely to remain a permanent shift.

What to look out for in 2023

As the cyber insurance market continues to develop, we are seeing changes being made to balance the needs of the insurance market in insuring knowable risk, the needs of the commercial sector in managing the risk of cyber threats, and the mutual need to keep premiums competitive and manageable.

Lloyds of London has announced that there will no longer be coverage for some state-backed attacks from March 2023. Alongside its announcement, Lloyds produced four new LMA clauses for use in cyber policies, which exclude cover for losses incurred due to war and/or due to cyber operations launched during war, in retaliation by specific states, or which cause major detrimental impacts to the functioning of a state. The LMA clauses state that in assessing such exclusions, the primary factor that will be looked at is whether the government of the state in which the computer system affected by the cyber operation is physically located attributes the cyber operation to another state or those acting on its behalf.

However, it can be very difficult if not impossible to make such an attribution as those carrying out state sponsored attacks will very rarely openly align themselves with the state's war efforts. Further, even if the affected government was able to determine which state carried out the cyber operation, they may choose not to make such information public for political or other reasons. Therefore, it may be difficult for insurers to assess attribution and make use of the new war exclusion clauses in practice.

In 2023, we are likely to see some claims being made under cyber policies that include the above exclusions. It will be interesting to observe how the clauses are analysed and navigated within the inherently opaque and shadowy context of cyber operations.

CONTACTS

Richard Breavington
Partner
+44 20 3060 6341
richard.breavington@rpc.co.uk

Daniel Guilfoyle
Partner
+44 20 3060 6912
daniel.guilfoyle@rpc.co.uk

D&O

Alexandra Jones | Senior Associate

Key developments in 2022

It seems that nobody could have predicted the "bumper pack" of socio-political and geo-political events that have unfolded in 2022; yet, as a society, we continue to become increasingly desensitised to the scale and gravity of these events and their effects on our day-to-day lives. In the D&O sphere, the past twelve months have brought about a mix of "much the same" in terms of claims. However, the aforementioned events of 2022 have brought to the forefront additional risk factors and concerns which are impacting carriers' choice of risk and the terms they are willing to offer their insureds.

COVID-19 related shareholder litigation has not abated, although it appears that the courts – particularly in the US are taking a robust approach; for example, in the Southern District of New York, the recent dismissal (with prejudice) of a shareholder claim brought against AstraZeneca in relation to alleged misrepresentations and omissions it had made in respect of its vaccine clinical trials. More generally speaking, the filing of US securities claims has decreased slightly, whilst the price of settlement of existing US securities claims had increased for the first half of 2022.

As expected, the number of company insolvencies continues to steadily rise in the UK, largely due to macro-economic factors such as Russia's invasion of Ukraine (and the consequent disruption in supply chains, increased operational costs and the general destabilisation of the global financial markets), the impending recession and the withdrawal of COVID-19 related governmental financial support. However, we still await the uptick in claims against insolvent company directors (see, also, the recent UK Supreme Court decision which confirmed that, whilst a director will owe a duty to the company's creditor, it is only once an insolvency is inevitable does that creditor's interest become paramount).

What to look out for in 2023

We expect that ESG issues shall continue to be ever-present in D&O litigation in 2023. As corporates and their directors are increasingly taking steps to attract investors with promises of being ESG responsible (with a specific focus on the "E"), there has been, and is likely to continue to be, an increase in securities-related actions being brought against these corporates with regard to the steps they take. It is the (seemingly) more "pro ESG" companies that are becoming the target of shareholder claims, with allegations pertaining to alleged "greenwashing" gaining increasing prominence. Carriers will want to reflect on the veracity of the ESG measures actually taken.

The "S" in ESG is getting more of a look in. Earlier this year, the FCA published rules which require UK listed companies to report information and disclose against targets on the representation of women and ethnic minorities on their boards and executive management. The SEC published a similar requirement last year for NASDAQ listed companies. Investors will be looking more closely at the composition of the board; subject to how companies respond to the new requirement, disclosure related litigation could ensue.

In light of the geo-political crises of 2022 (and the subsequent economic downturn), we expect company insolvencies to increase and for directors and officers to face an increase in claims brought against them, particularly as litigation funding continues to be readily available.

Finally, we note the very recent SFO conviction of Glencore, pursuant to which Glencore was ordered to pay a fine of c.£281m, the largest ever for the SFO. Whilst the anti-bribery investigations into the individual directors and officers at Glencore remains ongoing, this recent victory could result in an emboldened SFO, and a refocussed spotlight, both on the part of insureds and their insurers, on what corporates (and their directors) are doing to ensure compliance with anti-bribery and anti-money laundering regulations.

CONTACTS


James Wickes
Partner
+44 20 3060 6047
james.wickes@rpc.co.uk


Ben Gold
Partner
+44 20 3060 6911
ben.goodier@rpc.co.uk


Michael Newham
Partner
+44 20 3060 6018
michael.newham@rpc.co.uk


Carmel Green
Partner
+852 2216 7112
carmel.green@rpc.com.hk

Energy

Karolina Lewicki | Trainee Solicitor

Key developments in 2022

In our last Annual Insurance Review, we anticipated a number of developments in the energy insurance market for 2022. As a leading theme, we predicted a move to greener energy, noting especially insurers' net zero targets, a shift towards more sustainable energy sources, such as hydrogen, and a growing focus on ESG.

Market trends in 2022 have shown that climate change management continues to be a central theme for insurers. In an endeavour to tackle the accelerating consequences associated with climate change, insurers are increasingly adopting net zero strategies. A prime example of this is the UN-convened Net Zero Insurance Alliance, which is currently joined by over 29 leading insurers who have all committed to the goal of achieving net zero GHG emissions by 2050 and other targets set by the Paris Agreement on Climate Change.

In an effort to tackle the effects of climate change, insurers are also refining their business offerings by expanding into the sustainable insurance market. In an innovative move, Marsh launched the world's first insurance for hydrogen projects in August 2022. The product was developed in collaboration with AIG and Liberty Specialty Markets and provides up to $300m of cover in the start-up phase of hydrogen ventures. The aim is to provide adequate insurance for greener technologies which is still lacking and holding up investments.

Tying in with this push for sustainability, ESG considerations now constitute another commercial focal point. Shareholders, and the insurance industry as a whole, place more and more importance on insurers' approach to ESG as reported by Fitch Ratings. Insurers in the energy sector have been reacting to this trend by refining their ESG strategies in a variety of ways. Notably, 62% of companies in the reinsurance sector have introduced coal exclusion policies, while 38% have oil and gas exclusions, setting a clear tone for their ESG focus moving forward.

What to look out for in 2023

A continued strive for greener energy and the expansion of sustainable insurance offerings are to be expected in 2023. Likewise, the adherence to ESG strategies will remain in the spotlight.

Insurers will continue with their efforts to tackle the consequences of climate change. In addition to pledging themselves to UN-convened (or other) initiatives, insurers also set their own internal sustainability targets which they will need to keep working towards. For instance, Allianz aims to phase out coal-based business models across its proprietary investments as well as property and casualty related insurance portfolios by 2040. Zurich Insurance Group, in turn, is aiming to reach its net zero target in operations as early as 2030. We are likely to see more insurers setting similar goals for themselves accompanied by appropriate changes to their insurance offerings, which will translate into stricter terms in relation to "non-green" solutions.

In particular, the increasing pressure to move towards renewable energy sources and away from fossil fuels, means that insurers will need to adjust their underwriting portfolios to reflect this transition. In 2023, especially look out for the launch of Marsh's new hydrogen project insurance facility and its impact on the insurance market as it gains momentum over the first months of its roll-out. It is to be anticipated that other insurers will join this sector and announce their own initiatives related to hydrogen in the coming years.

Finally, also expect a continued shift in insurers' business strategies as a response to the growing importance of ESG. This can already be observed as major market players, such as Munich Re, Swiss Re and Hannover Re announce their exit of the oil and gas project sector. These types of moves are to be anticipated as the insurance market is faced by increasingly restrictive ESG pressure in relation to investments and insurance.

CONTACTS

Leigh Williams
Partner
+44 20 3060 6611
leigh.williams@rpc.co.uk

Mark Errington
Partner
+65 6422 3040
mark.errington@rpc.com.sg

Toby Savage
Partner
+44 20 3060 6576
toby.savage@rpc.co.uk

Gary Walkling
Partner
+44 20 3060 6165
gary.walkling@rpc.co.uk

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Financial institutions

Matthew Wood | Senior Associate

Key developments in 2022

As we predicted last year, Environmental, Social and Governance (ESG) matters continued to set the agenda for financial institutions and their insurers in 2022.

"Greenwashing" remains a focus of global regulators. One hindrance to effective regulation has been the lack of a universal definition of ESG, which has led to rating agencies and other market participants using their own (often inconsistent) methodologies. In a June 2022 feedback statement, the FCA noted that the Treasury was considering bringing ESG data and rating providers within the regulatory perimeter, subject to which the FCA will develop a regulatory regime for such providers with a focus on transparency and good governance. The FCA has made clear that it will scrutinise, and challenge regulated firms on their fund strategies and disclosures pertaining to ESG, and we expect that increasing standardisation will bolster regulators' efforts in this respect.

Other jurisdictions also continued to develop their regulatory frameworks for ESG matters. In May 2022, the United States Securities and Exchange Commission (SEC) proposed rules which, if adopted, will require firms to make enhanced ESG disclosures in fund prospectuses and similar documents.

The focus on ESG-related misconduct is already driving claims activity, with the United States leading the way. In April 2022, the SEC brought enforcement action against a mining company alleging misleading statements in ESG disclosures, and in May 2022, the SEC brought a further action against an investment adviser for failing to act consistently with ESG disclosures when making investment choices for mutual funds.

Faced with the maturing regulatory environment, allied with the potential for civil claims by aggrieved investors, financial institutions will wish to ensure that their words and actions continue to be aligned on matters pertaining to ESG.

What to look out for in 2023

Whilst punctuated by the COVID-19 pandemic, recent years have seen relatively benign economic conditions, characterised by rising markets and ultra-low interest rates. That cycle has now emphatically ended. With the war in Ukraine and increasing economic headwinds vexing global policymakers, volatility promises to be the "new normal" for financial institutions in 2023.

Sanctions have been a mainstay of policymakers' response to the Russian invasion of Ukraine, and with the conflict becoming increasingly attritional, we expect that to continue in 2023. Banks and other financial institutions will continue to be on the sanctions frontline. The core risks include: (i) ensuring compliance with complex and rapidly evolving packages of sanctions (especially in cross-border transactions, where the laws of involved jurisdictions may conflict); and (ii) the possibility of claims (eg for breach of contract) where the bank has been required to cease dealings due to sanctions risk.

Speaking more broadly, economic downturns often drive claims activity, and that pattern may repeat itself if the world's leading economies tip into recession in 2023. Whilst many financial institutions may welcome the return of higher interest rates, they also carry risks. The abrupt increase in rates can be expected to dampen inflation, but the effect will not be instant, and the two factors combined will in the meantime place borrowers under pressure and may cause a deterioration in credit quality.

A consequence of the 2007-08 financial crisis is that banks are well capitalised and better equipped to withstand systemic risk. Newer market participants, including fintechs and challenger banks, may however face unique challenges in adverse market conditions.

As for crypto firms, we can expect a significant fallout from the collapse of FTX, including multi-jurisdictional litigation, greater regulatory scrutiny and a more challenging crypto insurance environment for buyers and underwriters alike.

CONTACTS

James Wickes
Partner
+44 20 3060 6047
james.wickes@rpc.co.uk

Ben Gold
Partner
+44 20 3060 6911
ben.goodier@rpc.co.uk

Michael Newham
Partner
+44 20 3060 6018
michael.newham@rpc.co.uk

Carmel Green
Partner
+852 2216 7112
carmel.green@rpc.com.hk

Financial professionals

Esme Watson | Senior Associate

Key developments in 2022

To continue with tradition, defined benefit pension transfers remained high on the agenda throughout 2022, specifically the British Steel Pension Scheme (BSPS) and the FCA's consultation on a consumer redress scheme under s.404 of The Financial Services and Markets Act (FSMA), published in March. The proposed redress scheme will cover BSPS members who were advised to transfer out of BSPS but excludes advice given by firms that have entered insolvency given the Financial Services Compensation Scheme (FSCS) is available to those individuals. The review period itself is yet to be finalised and we're eagerly waiting to see if the Final Rules will include an opt-in process.

The National Audit Office confirmed that 7,834 of 30,000 BSPS members transferred out into personal pensions with around 4.000 of these transfers likely to fall to the review. Of those who transferred out 95% were advised to do so. The total amount transferred was c.£2.8bn. The scope for redress remains significant but one welcome development for the advisory community is that recent increases in Gilt yields have generally led to lower redress being payable on pension transfer cases.

Full details of the consultation were set out in the FCA Consultation Paper CP22/6 and the Rules for the redress scheme are due to be published shortly. To what extent these will take into account the industry's submissions on the Consultation Paper is anyone's guess.

What to look out for in 2023

The current 'cost of living crisis' is causing people to look to stored wealth (such as pensions and equity in property) to meet day to day expenses. When combined with a change in regulatory focus toward ensuring good outcomes for retail customers as a consequence of the impending implementation of the FCA's new Consumer Duty (FCA Principle 12), the scope for claims is considerable.

The first battleground could concern pension drawdown; the FCA is currently gathering information on retirement strategies following their work with pension transfers. No specific concerns have been identified yet, but advisors who allowed clients to take excessive income (leading to a risk of running out of money in retirement) could be targeted. This marks the first wholesale consideration of this market since the pension freedoms and is prompted by the size of the market and the number of people drawing down their pension for the first time.

Furthermore, the FCA's 2022/2023 business plan noted that they would be looking at the equity release market amidst concerns that the market was not operating in the best interests of borrowers. As with drawdown, advisors will need to be able to evidence that the decision to access funds was in the client's best interests – simply facilitating access to capital would likely be in breach of the Consumer Duty.

The advent of the Duty is dovetailing with spiralling living costs and could create a perfect storm – expect the FCA to focus heavily on areas such as these, where the temptation to put short term needs ahead of long-term benefits is greatest.

CONTACTS

Rachael Healey
Partner
+44 20 3060 6029
rachael.healey@rpc.co.uk

Robert Morris
Partner
+44 20 3060 6921
robert.morris@rpc.co.uk

David Allinson
Partner
+44 20 3060 6954
david.allinson@rpc.co.uk

Antony Sassi
Managing Partner, Asia
+852 2216 7101
antony.sassi@rpc.com.hk

General liability

Jonathan Drake | Senior Associate

Key developments in 2022

Whilst the pre-action EL/PL injury claims portal for claims with a value of up to £25,000 has been with us for some time, the extension of a similar process for dealing with claims after issue in the County Court has only just arrived. Parties who have legal representation are now expected to issue claims and to file Defences and propose a timetable for disclosure of evidence in the Damages Claims Portal. Whilst the claim thereafter becomes more traditional, the trend towards filing and exchange of documents electronically is likely to continue.

The Court of Appeal decision in *Belsner v Cam Legal Services* on 27 October 2022 gave the Court the opportunity to examine the practice of Claimant's solicitors of securing deductions from damages secured by their clients, and entitlement to do so.

Although the court disapproved of much of the current practice in connection with the retainer agreed between Claimant's and their solicitors, the court's decision that there was no fiduciary duty between the prospective Claimant and solicitor at the stage when terms of engagement were being negotiated meant that the agreement to deduct the agreed sum from the Claimant's damages was valid. The importance of this decision lies in the fact that the likely seismic effect of potential financial ruin for many Claimants' solicitors has been avoided.

What to look out for in 2023

Fixed legal costs have been a feature of money claims up to £25,000 for some time. The introduction and implementation of costs budgeting for claims of higher value has not been successful and has taken up considerable judicial time. The Civil Procedure Rule Committee has decided to extend fixed cost to many claims with a value of between £25,000 and £100,000.

The intention is that this change will entirely avoid costs budgeting at the beginning of the claim and costs assessment at the end and give both parties certainty about the costs they will have to pay if unsuccessful. It is likely that there will be several bands of costs, with fees being dependent upon the value and complexity of the claim.

It was originally intended to introduce this change in April 2023, but this has now been delayed and is not expected to be introduced until October 2023. The reason for the delay is not currently known but it is likely that the Committee will want to take the opportunity of correcting some of the anomalies arising from the current fixed costs rules.

Overall this change is likely to be welcomed, particularly by the judiciary and Defendants.

CONTACTS

Gavin Reese
Partner
+44 20 3060 6895
gavin.reese@rpc.co.uk

Fiona Hahlo
Partner
+44 20 3060 6121
fiona.hahlo@rpc.co.uk

Health and safety

Rashna Vaswani | Associate

Key developments in 2022

The introduction of flexible-working policies and the return to 'office' working environments places further emphasis on the importance of mental health. Statistics published by HSE show in 2020/21 of the 1.7 million workers suffering from a work-related illness, 822,000 were due to stress, depression or anxiety. 21/22 statistics published recently show that of the 0.4 million increase in work-related ill-health cases, 0.3 million related to mental health issues.

It is considered to be only a matter of time before prosecutions for causing work-related stress occur. There have already been examples of such cases abroad, such as in France where a spate of suicides among employees led to a prosecution against the employer, France Telecom. Notwithstanding previous indications that the HSE would be building up to take legal action against organisations failing to manage work-related stress, we have not seen much in the way of enforcement in the United Kingdom as yet. However, mental health clearly remains a key focus of the HSE, demonstrated by its continued work on its Working Minds campaign (launched in November 2021) by joining forces with the Burnt Chef Project in April 2022, who provide mental health support for the UK hospitality trade and the International Stress Management Association (ISMA), in November 2022.

2022 also saw the HSE being named as the new Building Safety Regulator by the Building Safety Act 2022, to oversee safety and standards of all, but mainly high-rise, buildings. The new legislation means new roles and responsibilities for high-rise residential building owners and management, including accountable persons and building safety managers, and a new regulatory framework for high-rise buildings to include the regulator as the building control authority. The Regulator is expected to work closely with local authorities and fire and rescue authorities to hold to account those who break the rules and/or fail to properly manage safety risks, including taking enforcement action where needed (and recovering costs from regulated parties).

What to look out for in 2023

The HSE have confirmed that reducing work related ill health with a specific focus on mental health as one of its key strategic objectives in their 2022/2032 strategy. It is therefore imperative for organisations to have clear processes in place to demonstrate that they can identify and appropriately support employees who are suffering from work-related stress or anxiety.

Turning to new legislation, the bombing at an Ariana Grande's concert at the Manchester Arena in May 2017 set in motion a series of events which has led to one of the biggest legislative changes to policing terrorism in decades – the 'Protect Duty' legislation, expected to be introduced in early 2023. It will mainly apply to public venues (eg sport venues and shopping centres), large organisations and event organisers using public spaces, imposing a legal requirement to formally assess terrorism risk and put measures in place to reduce that risk.

Tightening of fire safety law post-Grenfell has led to the introduction of the Fire Safety (England) Regulations 2022, which is expected to come into force in January 2023. The rules broadly cover high-rise buildings, some relating to those over 11 metres and some to those 18 metres or at least seven storeys with communal areas. Named Responsible Persons of high-rise buildings will have new duties, including the provision of key information to the Fire and Rescue Services and annual checks of flat entrance doors in residential buildings with storeys over 11 metres in height.

Hot on the heels of the 'hosepipe ban' resulting from several months of drought and the surmounting pressures of tackling climate change, water and sewerage companies must produce drainage and wastewater management plans (DWMPs) with a focus on current and future capacity, pressures, and foreseeable risks. The government has produced detailed guidance on how companies will need to produce their business plans which must cover a minimum of 25 years. Production of DWMPs is expected to be made statutory through the Environment Act but are currently being produced on a non-statutory basis for early 2023.

CONTACTS

Gavin Reese
Partner
+44 20 3060 6895
gavin.reese@rpc.co.uk

Fiona Hahlo
Partner
+44 20 3060 6121
fiona.hahlo@rpc.co.uk

Mamata Dutta
Legal Director
+44 20 3060 6819
mamata.dutta@rpc.co.uk

Intellectual property (IP)

Joshy Thomas | Knowledge Lawyer

Key developments in 2022

In September 2022, the UK government introduced the Retained EU Law (Revocation and Reform) Bill 2022-23. This will lead to certain retained EU legislation being revoked or amended and will provide higher courts with scope to depart from EU case law. A sunset clause deadline of the end of 2023 means the Government will have limited time to decide what retained EU law to keep and what to repeal or amend. Considerable activity is expected early in 2023 which will impact those scoping, bringing or defending intellectual property (IP) claims.

In the Intellectual Property Enterprise Court, costs caps increased from £50,000 to £60,000 for liability trials and £25,000 to £30,000 for quantum trials.

Lifestyle Equities CV v Amazon UK Services, a consumer targeting case, will have significant impact for businesses operating websites across borders and their potential to be liable for IP infringements (the case increases the scope for this). As a result of the Court of Appeal's judgment, businesses should consider whether to geoblock certain territories to avoid inadvertently targeting consumers in non-core territories, which could give rise to infringement.

In *Shazam*, the Court gave a landmark ruling that the character 'Del Boy' from the TV show Only Fools and Horses is protected under UK copyright law as a literary work. This is a significant departure from previous case law and has opened the door to copyright protection assertions in relation to well-known characters across all media.

What to look out for in 2023

In our 2021 Review, we covered *Sky v Skykick* which, on its return to the High Court from the Court of Justice, found that Sky had registered trademarks in bad faith. That court had limited the scope of Sky's registration to goods and services that Sky actually used (or intended to use). In 2021, in a more evenly balanced judgment, the Court of Appeal partly reversed the High Court's ruling, finding that applying to register a trademark without an intention to use it in every 'species of goods or services falling within a general description' did not alone constitute bad faith. This was on the basis that the applicant may have a strategy of seeking broad protection to cover further, as yet unformulated, goods within the same category.

The Court of Appeal's decision provides a quandary for defendants to infringement proceedings (and their insurers) when it comes to running a counterclaim based on bad faith. To succeed, they are currently required to evidence that an application was made with the intent to be broad enough to stymie competition, rather than being part of a genuine strategy that is not yet completely formulated. The Supreme Court has granted Skykick permission to appeal and a decision, which will provide much needed clarity, is expected in 2023.

The developments covered in this issue all move the dial to some extent. For those without access to valuable current legal expertise, this could therefore result in incorrect pleadings or a failure to identify an important point of defence.

CONTACTS

Ciara Cullen
Partner
+44 20 3060 6244
ciara.cullen@rpc.co.uk

David Cran
Partner
+44 20 3060 6149
david.cran@rpc.com.hk

International casualty

Lucy Dyson | Partner
Sarah Hennessy | Senior Associate
Marcela Calife Marotti | Associate

Key developments in 2022

2022 heralded major developments in the ESG-focused, cross-border group litigation landscape which liability insurers are now routinely navigating. The English courts are now firmly near the top when claimants are shopping for a forum. Multinational companies can no longer hide behind the corporate veil and parent liability/duty of vigilance concepts are being developed to hold tortfeasors to account on a group basis.

Group claims in relation to environmental disasters/legacy exposures are increasingly commonplace against multinational companies in relation to subsidiary operations. In particular, oil and mining corporates continue to be targeted both in the jurisdictions where the torts occurred and where the parent company is domiciled. Following the Supreme Court judgments in *Vedanta* and *Okpabi* in 2019 and 2021, the English courts are now much more amenable to permitting group claims to be brought by foreign litigants against multinationals, particularly where there are concerns that claimants will not have adequate access to justice/compensation in their home jurisdiction.

The Court of Appeal's July 2022 judgment in *Municipio de Mariana v BHP* concerning claims arising from the 2015 Fundão Dam disaster in Brazil, goes even further. Notwithstanding parallel litigation and a compensation scheme in Brazil, group litigation valued at £10bn+, will nevertheless be allowed to proceed against BHP in the English courts (BHP having a dual listing in the UK and Australia). The *BHP* case was a ground-breaking development in establishing the English courts as a hub for environmental and mass tort claims.

Braskem has been targeted by litigation in both the Brazilian and Dutch courts, in relation to mass property damage allegedly caused by subsidence in the Maceió region, as the result of salt mining over four decades. Braskem has been targeted in the Netherlands on the basis that key decisions were taken at its European headquarters.

Claimant law firms and litigation funders are becoming more and more adept at formulating claims. The past five years have seen an uptick in the number of group litigation orders (GLOs) sought by foreign claimants, in particular from Africa and Latin America. US law firms continue to look to the UK as a new hub for mass tort litigation and at the end of 2022, group litigation against Johnson & Johnson in the English courts in relation to talc (following multi-billion-dollar litigation in the US), was announced.

We have already seen "modern slavery" allegations brought against Nestle in the US. In late 2021, it was announced that cocoa manufacturer, Olam (which supplies Cadbury, Nestle and others) will be targeted by group claims in the English courts in relation to child labour and unlawful, exploitative and dangerous working conditions in Ghana.

Whilst not imminent, we may be seeing a gradual shift towards a more "US-style" of "opt-out" class action in the English courts. With the advent of large-scale litigation such as *BHP* (thought to affect approximately 400,000 claimants) and "opt-out" class actions for competition law damages claims, it remains to be seen whether the English courts will further adapt legal mechanisms under English law for collective redress for other types of mass claim.

What to look out for in 2023

During 2023 we can expect more environmental/climate/biodiversity risk related litigation to be brought in the English courts and elsewhere in Europe. We will continue to see multinationals targeted by cases concerning their supply chains and/or decisions taken at group level which impact the environment. It follows that we will therefore also continue to see an uptick of group claims, as the global legal movement for collective redress gathers pace.

CONTACTS

Lucy Dyson
Partner
+44 20 3060 6308
lucy.dyson@rpc.co.uk

International property

Karolina Lewicki | Trainee Solicitor

Key developments in 2022

In our last Annual Insurance Review we predicted insurers' continued strive towards achieving a low carbon economy and a focus on insurance offerings linked to renewables. Additionally, we noted that the appetite for catastrophe bonds and other insurance linked securities (ILS) would remain steady in 2022.

As anticipated, insurers have continued to push for innovative solutions to tackle the effects of global warming. Topics surrounding sustainable insurance were included in the agenda at COP27. During the conference, the Global Federation of Insurance Associations called on parties to prioritise resilience-building against climate change and future natural disasters. Amongst other things, the Insurance Adaptation Acceleration Campaign was announced as a result of the COP27 discussions. The initiative seeks to mobilise some 3,000 companies, making up 50% of the insurance market, by the time of COP28 and is co-sponsored by Marsh McLennan which issued a detailed report about climate risk reduction and adaptation in the insurance sector.

Climate change has continued to lead to extreme weather events with losses to international property amounting to roughly $65bn in the first half of 2022, according to Munich Re. This statistic includes heatwaves, floods, earthquakes and storms, though the overall losses for 2022 are estimated to be much higher. Notably, Gallagher Re reports that the damages resulting from Florida's Hurricane Ian alone may exceed $100bn. In light of these damages, heavy losses may be expected for catastrophe bond holders alongside a decrease in ILS investor appetite. However, elsewhere, Swiss Re also reports that even in times of volatility, the catastrophe bond and ILS market has once again demonstrated its resilience, indicating that it is a space to watch.

What to look out for in 2023

Expect more of the same in 2023. Insurers will continue to progress towards more sustainable products to tackle the impacts of climate change and help prevent the potential increase in natural disasters. Managing the risks associated with these changes will be key for insurers in the transition into more sustainable sources.

Numerous insurance companies have set goals for themselves in respect of achieving net zero emissions. In order to hit these ambitious targets, insurers will be introducing new green products into their underwriting portfolios and will simultaneously phase out insurance covering fossil fuel. The Boston Consulting Group estimates that green assets will comprise 66% of the property and casualty market by 2050, in the UK alone. This shift will also be visible on a global scale. Setting an example, Marsh, AIG and Liberty Specialty Markets have launched the world's first insurance for hydrogen projects in August 2022, which is expected to kick off in 2023.

The rise in extreme weather events and natural disasters is also to be anticipated. Climate change disasters will have a strong impact especially on the reinsurance sector with catastrophe and other types of reinsurance expected to soar in the years to come. The pressure on reinsurers will translate into an increase in premiums, as exemplified by Swiss Re implementing a significant 12% rise in the premiums for its property and casualty lines. We predict more adaptive measures of this type across the global insurance industry in 2023 and beyond.

CONTACTS

Toby Savage
Partner
+44 20 3060 6576
toby.savage@rpc.co.uk

Mark Errington
Partner
+65 6422 3040
mark.errington@rpc.com.sg

Legal practices

Charlotte Thompson | Associate

Key developments in 2022

2022 has proven to be an eventful year for solicitors' firms, their advisers and the Solicitors Regulation Authority (**SRA**). Indeed, the latter half of the year saw influential case-law emerge, including *RSA v Tughans* [2022] EWHC 2589, on coverage of solicitors' fees.

However, one of the defining features of the year for RPC has been the continuing surge of buyer-funded development scheme claims. The issue has been on the SRA's agenda for years, and its concerns are encapsulated in the Warning Notice of 2017, updated in 2020, about unregulated Collective Investment Schemes and the use of solicitors to legitimise such schemes. The claims are typically high value, with multiple claimants, and generate up complex liability and coverage issues, including questions over dishonesty and aggregation. There is also obviously potential regulatory exposure for firms in receipt of such claims.

This year, new case law has emerged on the subject, including *Various North Point Pall Mall Purchasers v 174 Law Solicitors Ltd v Key Manchester Ltd* [2022] EWHC 4. That case considered when investors' deposits can be released by solicitors acting for developers in the capacity of stakeholder. The Judge held that the deposits were lawfully released with the authorisation of the buyers and the claimants' solicitor. This is an encouraging outcome for defendant solicitors and their insurers.

As we reported in September 2022, the SRA has decided to reduce the profession's contributions to the SRA Compensation Fund because an expected spike in pay-outs to investors has not transpired. Despite this, we have seen a number of new claims this year, and we foresee the trend continuing into 2023 and beyond.

What to look out for in 2023

For the last few years, the SRA has been consulting upon what is most easily described as lawyers' "social" lives: the non-work activities which take up their time whether inside or outside the office, including social media, interrelations between lawyers and their colleagues, and behaviour in lawyers' private lives.

SRA consultations usually forecast increased enforcement, and for this reason we think 2023 will see a crackdown by the SRA in this area. Indeed, 2022 saw an SRA thematic review on Workplace Culture, followed by a consultation on proposed changes to enhance SRA powers to deal with risks stemming from poor workplace culture. In 2023 we will likely see the results of this.

In September 2022 the SRA also published updated guidance on sexual misconduct, the purpose of which was to lay out the SRA's approach as well as identify the boundary between an individual's behaviour in their private and professional lives. We anticipate that 2023 will see the application of this guidance.

Additionally, the SRA is consulting on how its greater fining powers (up to £25,000, as of July 2022) should be best used, and has identified cases involving sexual misconduct, discrimination or harassment as so serious that a financial penalty is highly unlikely to be an appropriate sanction. In other words, this category of case is to be sent to the Solicitors Disciplinary Tribunal almost always, unless exceptional circumstances exist (for more, see RPC's article on this from September 2022).

The SRA's fining powers may also be increased by the Government during 2023, as part of a wider set of measures linked to a crackdown on economic crime (see the Economic Crime and Corporate Transparency Bill 2022).

CONTACTS

Nick Bird
Partner
+44 20 3060 6548
nick.bird@rpc.co.uk

Rhian Howell
Partner
+44 20 3060 6708
rhian.howell@rpc.co.uk

Karen Morrish
Partner
+44 20 3060 6521
karen.morrish@rpc.co.uk

Will Sefton
Partner
+44 20 3060 6924
will.sefton@rpc.co.uk

Marine and shipping

Iain Anderson | Partner

Key developments in 2022

2022 has been a waiting game for many of the world's marine insurers and will continue to be so in 2023. 24 February 2023 has a very large red circle around it on most marine underwriter's calendars.

The Russian invasion of Ukraine in the early hours of 24 February 2022 led to the closure of all Ukrainian sea ports – stranding a significant number of ships, seafarers and cargoes. The International Maritime Organisation reported that at the end of July 2022, 84 merchant vessels and 450 seafarers remained stranded in Ukrainian ports.

On 22 July 2022 the Istanbul Agreement established a safe maritime corridor to allow movement of foodstuff cargoes (and vessels) in and out of three Ukrainian ports – Odesa, Chornomorsk and Yuzhny. That Agreement (recently extended to mid-March 2023) permitted the safe departure of some stranded vessels and cargoes. But the Agreement's vessel inspection process is slow and there are significant delays. It is fair to say that the Agreement's priority has been to get "fresh" cargoes out from Ukrainian grain silos. Vessels already laden with their cargoes at the outbreak of the invasion are not exactly near the head of the queue. Vessels carrying non-foodstuffs remain (for now) outside of the Agreement altogether.

Ukrainian advances in the south-east and the liberation of Kherson in November 2022 led to renewed hope that ports in the Mykolaiv region might be included in the Agreement. However, continued Russian occupation of the Kinburn spit – a small peninsula 5km from the Ukraine mainland – means vessels and cargoes going in and out of Mykolaiv ports would remain within range of Russian artillery, preventing any safe passage.

Marine products are pretty good at dealing with this scenario. In general, marine war risks insurance pays out when vessels and their cargoes are restrained or detained for a particular period of time. The war risks cover on your merchant vessel or cargo is likely to include a blocking and trapping clause in some form, which can pay out if your vessel or cargo is stuck in a closed or blocked port for an agreed period. The only question is how long you have to wait. Some clauses provide for six months, others for 12. If the vessel or cargo gets out on day 179 or day 364 there is no claim under the clause. But if the vessel or cargo is still stuck there on day 180 or 365, the clause can pay out an immediate total loss.

And so the marine insurance market waited. For those on 180 day covers, that milestone passed from late August 2022 onwards and with it, some very significant and immediate total losses. But as we reach the first anniversary of the Russian invasion on 24 February 2023, and of the closure of Ukrainian ports, those vessels and cargoes that remain stranded in Ukraine in 2023 are likely to trigger further total losses.

When you think of the impact that events in Ukraine have had on the marine insurance market this year, you would forgive it for not wanting to touch anything in the Black Sea ever again. But the world needs Ukrainian foodstuffs – and to get the grain and edible oils where they are most needed, the vessels and cargoes still have to carry insurance. Due credit must be given to the marine insurance community for engaging with international bodies to insure these essential transits, and for coming up with innovative products to plug the insurance gap created by the Russian invasion, which allowed vessels to go into the permitted Ukrainian ports, load their cargoes and deliver them safely out to the world. As of 21 December 2022, the United Nations Joint Coordination Centre that facilitates the Agreement reports that there have been 643 outbound voyages from Ukraine carrying grain and edible oils – over half of which were declared for delivery to developing countries.

What to look out for in 2023

In 2023 please spare a thought for seafarers in Ukraine, looking after stranded vessels and cargoes, and for the shipping staff and port workers who continue to facilitate safe passage of vessels and cargoes out of Ukraine, all amidst on-going hostilities. As we hope for further positive developments. 2022 taught us that, even in the most difficult circumstances, constructive dialogue and engagement can lead to practical and positive outcomes.

CONTACTS

Iain Anderson
Partner
+65 6422 3050
iain.anderson@rpc.com.sg

Toby Savage
Partner
+44 20 3060 6576
toby.savage@rpc.co.uk

Gerald Yee
Partner
+65 6422 3060
gerald.yee@rpc.com.sg

Media

Jessica Kingsbury | Associate

Key developments in 2022

Mrs Justice Steyn dismissed a libel claim brought by Arron Banks against the investigative journalist Carole Cadwalladr, in a decision widely celebrated as an important victory for press freedom and public interest journalism. Banks, the largest donor and head of the pro-Brexit Leave.EU campaign, sued Cadwalladr over comments made in a TED Talk and a Tweet relating to interference in democratic elections and his relationship with the Russian government.

The judge held that Banks had initially met the threshold for serious harm in respect of the TED talk, but not the Tweet. She also accepted that, despite the fact that Cadwalladr had intended to convey a different defamatory meaning to the one which was found by the Court, she had nevertheless made out her public interest defence under s4 Defamation Act 2013.

However, Cadwalladr's reasonable belief in the public interest (a key element to the defence) ceased after the Electoral Commission's later determination that there was no evidence that Banks had broken the law. At that point the defence fell away. Nevertheless, the judge found that continued publication after this time did not cause Banks serious reputational harm. Banks has been granted permission to appeal this part of the judgment. The appeal will consider whether the court was correct to redetermine the serious harm test at the time the defence failed (as opposed to referring back to the original determination at the time of publication).

Mrs Justice Steyn's judgment is a welcome victory for public interest journalism, free speech and public participation. It will be interesting to follow the outcome of the appeal, particularly how the courts will interpret and apply the serious harm requirement in cases where a defence ceases due to a change in circumstances after the original publication.

What to look out for in 2023

In July 2022, the Government published a response to its Call for Evidence regarding the prevalence of 'Strategic Lawsuits Against Public Participation' (**SLAPPs**) in the courts of England and Wales, signalling its intention to bring in reforms to this controversial area.

There is no legal or statutory definition of SLAPPs, but the term is used to describe litigation threatened or brought by powerful and wealthy individuals or corporations against reporters and publishers. The aim is to intimidate and censor them, stifling acts of public participation which are of societal importance. This issue has been thrown into sharper light following Russia's invasion of Ukraine, which highlighted the need to dispose of baseless legal claims threatened by oligarchs and Russian-controlled entities connected to Putin's regime.

The Government has committed to introducing a statutory early dismissal process to avoid protracted and expensive litigation by identifying and striking out SLAPPs at the earliest opportunity. It will apply to any claim, including in defamation, data protection, or privacy. The three parts will include:

- A definition of public interest.
- A set of illustrative, non-exhaustive factors for the courts to determine whether a case should be classified as a SLAPP.
- A merit test.

Cost exposure is often the most significant element of SLAPPs which overwhelms and intimidates defendants. To tackle this, the Government has also proposed a cost protection scheme designed to shield SLAPP defendants from excessive cost risk.

It remains to be seen exactly how these reforms will be formulated in legislation, but it is hoped that once implemented, they will reduce claims aimed at stifling public interest publications.

CONTACTS

Keith Mathieson
Partner
+44 20 3060 6486
keith.mathieson@rpc.co.uk

Alex Wilson
Partner
+44 20 3060 6397
alex.wilson@rpc.co.uk

Medical malpractice

Natalie Drew | Senior Associate
Sian Morgan | Partner

Key developments in 2022

The thorny issues of vicarious liability and non-delegable duty have dominated the medical malpractice legal landscape for the last decade and 2022 was no different. The case of *Hughes v Rattan (Appellant)* [2022] EWCA Civ 107 saw the Court of Appeal consider whether a former owner of a dental practice was liable for treatment provided by three self-employed dentists.

The Court ruled that the practice owner owed a non-delegable duty of care to the patient. The patient was in the practice owner's care and had signed a treatment plan with the practice. She also had no control over who treated her. On vicarious liability however the Court found that that the relationship between the practice owner and the associate dentists was not sufficiently akin to employment since, for example, the associate dentists chose the hours they worked; were responsible for their own tax, national insurance and share of bad debts; had their own indemnity insurance; and had given an indemnity to the practice owner in respect of any claims made against him.

Notwithstanding the vicarious liability decision, the finding of a non-delegable duty of care meant that the patient's claim succeeded; and the case sets a helpful precedent for patients bringing similar claims in the future. No longer will they need to identify each individual practitioner who has given them treatment and name them as a defendant in their proceedings, they can simply sue the owner of the practice.

The take-away for insurers is that more claims are likely to be brought directly against healthcare entities and practice owners than in the past and, even if the care was appropriate, costs will be incurred in defending those claims.

Insurers will therefore want to satisfy themselves that their Insureds have robust contractual arrangements in place with their self-employed clinicians and that those clinicians' own indemnity cover is confirmed. Insurers can then look to recover their expenditure from the clinicians' indemnity providers once the main claim is resolved.

What to look out for in 2023

2022 has seen extensive discussion of two Government proposals, either of which if adopted will bring a sea change to claims against healthcare professionals. The first: a fixed costs regime and the second: the House of Commons Health and Social Care Committee's "*NHS Litigation Reform*" report. The latter, which would introduce an independent administrative body to investigate harmful medical events in the NHS thus reducing costs and delays, has been deemed unworkable by critics and it seems unlikely that it will gain much impetus in 2023.

As for fixed costs, however, we have been waiting what seems like forever, but the Department of Health and Social Care insists that they are soon on their way for all medical malpractice cases valued at less than £25,000. This is despite loud opposition from those representing claimants who say that the proposed costs are too low, and the regime will not accommodate the complexities that come even with some low value claims. For Insurers, fixed costs are a light at the end of the tunnel after the frustrations of the QOCS (Qualified One-Way Costs Shifting) regime. The incentive for patient lawyers to accept unmeritorious claims will be dramatically diminished and insurers' defence costs spend on low value claims will surely reduce. Bring on the changes we say!

CONTACTS

Dorothy Flower
Partner
+44 20 3060 6481
dorothy.flower@rpc.co.uk

Sian Morgan
Partner
+44 20 3060 6953
sian.morgan@rpc.co.uk

Miscellaneous professional indemnity

Joanna Makin | Senior Associate

Key developments in 2022

Last year we were still in the grips of the COVID-19 pandemic and predicted that lockdowns and new variants were likely to mean that HR and IT professionals continued to face a greater risk of claims in 2022. It is clear that 2022 has not been as overshadowed by COVID-19 as was feared. However, the continued economic impact of the pandemic, the repercussions of Brexit and the war in Ukraine has triggered a significant impact on the economy in the UK.

IT professionals (and their customers) remain exposed to the ever-increasing risk of cyberattacks on businesses and are blamed for insufficiently robust systems. It is estimated that 95% of cyberattacks are caused by human error and according to the Latest 2022 Cyber Crime Statistics (updated in October 2022), there are an average 97 cybercrime victims per hour.

There has been some positive news though on data protection. In the last few years, we have seen an increased number of claims against businesses and professionals for minor data breaches, disguised as breach of privacy claims (thereby allowing claims companies to sell such claims to lawyers who could rely on CFAs). However, in *Lloyd v Google* the Supreme Court rejected the idea that claims could be brought with no evidence of actual damage, and *Warren v DSG Retail Ltd* has indicated that an accidental data breach could not be brought as a breach of privacy claim. The recent decision in *UI v Osterreichische Post AG* has clarified this; the mere fact of a breach of GDPR is not itself damage.

What to look out for in 2023

The International Monetary Fund (IMF) believes we are about to enter one of the worst recessions on record. Inevitably that will have consequences for everyone.

Property prices are falling, utility bills are rising and there appears to be a significant lack of rental property available (pushing up the prices in many areas for those who rent). We predict that 2023 could be a very difficult year for those involved in the property market – estate agents, property managers and rental companies. Advising on the levels of rent to charge if utility bills keep rising when fixed rents are in place is likely to prove difficult and expose those entities to potential claims.

IT professionals will need to ensure that they regularly review clients' IT security to try to stay one step ahead of criminals to prevent the sort of data breaches that have serious implications for insurers.

Advisors may find themselves vulnerable as the companies they advise struggle in difficult financial conditions. Whilst some claims may be spurious, attempts may be made to seek recoveries from company advisors/consultants for financial losses.

On a positive note, however, in light of the helpful case law from 2021 and 2022 on data breaches, we hope to see a continued decline in the number of low-level data breach claims generally as lawyers struggle to justify the level of costs that would be incurred in those claims, and claimants find it hard to evidence damage.

CONTACTS

Ben Goodier
Partner
+44 20 3060 6911
ben.goodier@rpc.co.uk

Claire Revell
Partner
+44 20 3060 6828
claire.revell@rpc.co.uk

Pensions

Andrew Oberholzer | Associate

Key developments in 2022

Following the "mini budget" questions were asked over Defined Benefit (**DB**) schemes' use of liability driven investment (**LDI**) strategies. The mini-budget saw increases in gilt yields which led to collateral calls on DB schemes adopting LDI strategies, the sell-off of gilts to meet collateral calls, the intervention of the Bank of England to shore up the market (and stop the "doom loop" between the sell-off of gilts and soaring gilt yields) and questions raised by parliament and regulators alike over the use of LDI.

LDI strategies use derivatives to manage the risk of a shortfall between a scheme's assets and liabilities from market volatility – in very broad terms working in a way where it appears a DB scheme holds more bonds to manage the potential volatility of the DB scheme on a company's balance sheet.

There is continued interest in the fall-out of the LDI crisis with the potential that the shortfall in DB scheme liabilities is arguably larger than it might otherwise have been had trustees not pursued the LDI strategy.

There are three potential periods that could be looked at:

- the use of LDI in the run-up to the mini budget and whether LDI was the right strategy for a pension scheme together with whether the strategy had the right amount of liquidity sat alongside it,
- the period between the mini-budget and the Bank of England pulling out of buying gilts on 14 October and whether the "right" assets/calls were made during that period to meet collateral calls and preserve hedges, and
- what trustees are doing now to review their investment strategy in light of the increase in gilt yields and pressure on the LDI market.

To the extent that any losses have arisen during any of these periods (and the latter period is ongoing) such losses may be "hidden" for now with the increase in gilt yields resulting in the better funding of pension schemes but as employers start to consider the DB scheme funding position questions may be asked of trustees and in turn their advisers.

What to look out for in 2023

The impact of the LDI crisis in 2022 is likely to rumble on in to 2023, and there could be ramifications for trustees (together with actuaries and investment managers) in 2023 and beyond. Trustees are primarily responsible for the investment strategy of a DB scheme albeit they delegate many of the day-to-day functions and rely on advisers when it comes to a strategy. We may well see the investment obligations of trustees tested in 2023 and with that the roles of their advisers.

2023 will also see the introduction of pension dashboards, with some schemes being required to connect from August 2023. The dashboard will be a digital service allowing members of all pension schemes (not just DB schemes) to be able to see their pension information in one place, including their State Pension. Trustees and scheme managers will need to match members to their pension based on the data they currently hold and ensure that they retain accurate data for members to access information about their pensions going forward. The introduction of the dashboard is likely to mean pension schemes look again at their data and potential issues such as incorrect benefit calculations may be identified as a result (and this could lead to claims on over-looked beneficiary policies in particular). There are also lots of questions as to the responsibility for the accuracy of data on the dashboard yet to be answered, but trustees should be wary of the regulatory fines of £5,000 (for individuals) to £50,000 (for corporate trustees) of failing to be ready for the dashboard.

The DB pension profession also continues to deal with the fall-out of the various Lloyds judgments involving guaranteed minimum pensions (**GMP**) where we are likely to continue to see administration issues identified as part of GMP equalisation exercises.

CONTACTS

Rachael Healey
Partner
+44 20 3060 6029
rachael.healey@rpc.co.uk

Robert Morris
Partner
+44 20 3060 6921
robert.morris@rpc.co.uk

Political risk and trade credit

Naomi Vary | Partner

Key developments in 2022

Last year's version of this chapter, as had the chapters for the years before it, saw trade related issues as the hot topic for the Political Risk and Trade Credit market. We focussed on the Trade Credit market's cautious optimism that the COVID-19 storm may have passed over without the widespread losses expected at the outset, whilst warning that international trading conditions may still lead to some rough seas ahead. We feared that fallout from both COVID-19 and Brexit may continue to exert pressure on traders, with COVID-related buyer defaults eventually finding their way to the market once Government assistance was removed. To the extent that there was concern about political risk or political violence, this too was most likely to be linked to COVID, as populations weary of ongoing restrictions pushed back against Government intervention. Events in China have shown this prediction to be correct where the population's desire to start living with COVID clashed with the Government's zero COVID strategy.

Events during 2022 have however relegated COVID and its effects to the back of the class. Since February 2022 the Russian invasion of Ukraine has dominated the headlines. What may initially have been thought to be a short-lived incursion has instead become a protracted and entrenched conflict with devastating consequences for Ukraine and a global impact. Ten months into the conflict there remains uncertainty about the effect on the Political Risk and Trade Credit market.

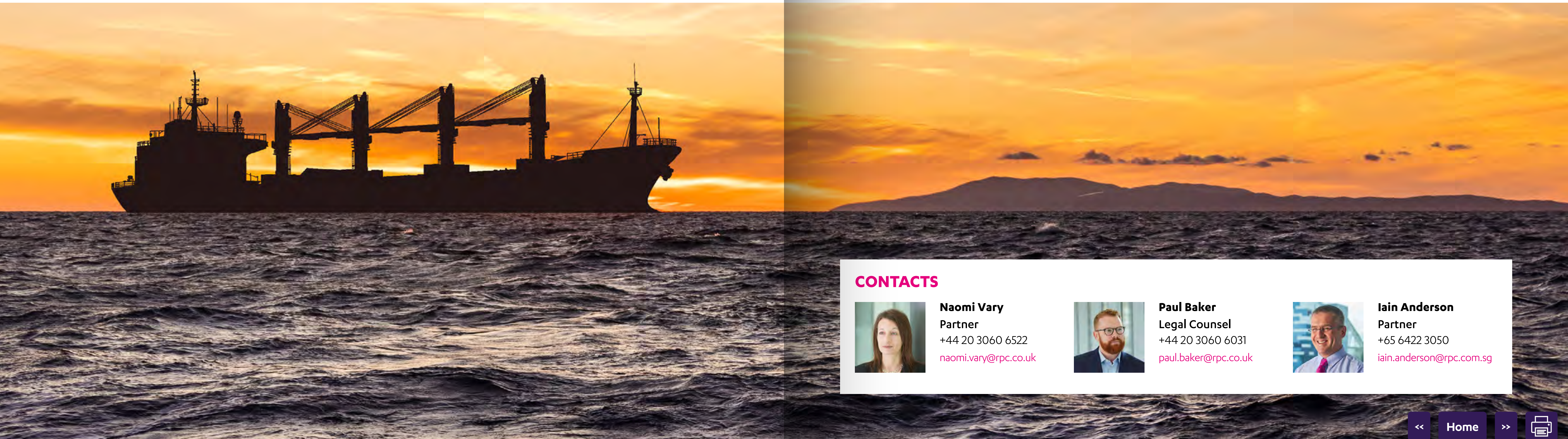
It may have been expected that Russia's reaction to the UK, EU and US economic sanctions, and its reaction to the resulting exodus of Western companies from Russia, would have been widespread and well publicised expropriations of foreign property. This has not materialised. Similarly, we understand that the Trade Credit market has not seen the volume of claims relating to Ukrainian debt that may have been expected, although inevitably War and Political Violence policies face exposure from damage arising from Russian bombardments. There is always a lag between the geopolitical events hitting the headlines and the resulting claims to the Political Risk and Trade Credit markets, and the effects of the conflict may not be seen until we revisit this chapter at the end of 2023.

What to look out for in 2023

At the time of writing there is no way to tell how long the war in Ukraine may last, or what its lasting consequences may be. Increasing desperation within Russia in the face of unexpectedly successful Ukrainian resistance, and the ramp-up of Western sanctions, may lead to unpredictable developments in the political risk arena.

Turning to trade, the fragile Black Sea grain deal eased global food supply issues but its temporary suspension within days of its initial agreement showed how quickly global food supply could be affected by the conflict. Ongoing sanctions against Russia, including the prohibition on the purchase of certain oil products, will cause knock-on effects in countries already suffering from fuel instability. Many countries – the UK included – are struggling with spiralling debt following COVID. The cost-of-living crisis has seen substantial increases in energy bills and a range of basic raw materials; businesses may be unable to pass their increased production costs on to a population where many are already struggling with limited disposable income. Increasingly unpredictable weather patterns, whilst a natural rather than political phenomenon, are also putting pressure on food production and prices. The wave of defaults feared by the Trade Credit market during COVID may not be too far away.

When the war in Ukraine ends the country will face the uncertain consequences of peace in the coming years. By way of comparison, the Tigray war in Ethiopia reached a partial uneasy ceasefire in November 2022, after two years of fighting. In addition to the humanitarian crisis facing the population, the costs of rebuilding are estimated to run into billions of dollars. Companies thinking of investing in the repair of the country will want protection for their investment. Although there will no doubt be careful risk analyses to be done, this will be a time for the Political Risk market to step up, as it has done so many times before, and support the investment of those seeking to rebuild in areas ravaged by war.



CONTACTS

Naomi Vary
Partner
+44 20 3060 6522
naomi.vary@rpc.co.uk

Paul Baker
Legal Counsel
+44 20 3060 6031
paul.baker@rpc.co.uk

Iain Anderson
Partner
+65 6422 3050
iain.anderson@rpc.com.sg

Procedure, damages and costs

Aimee Talbot | Senior Associate

Key developments in 2022

A tweaked version of the controversial disclosure pilot was made permanent from 1 October 2022 for all Business & Property Courts cases this year as the new Practice Direction 57AD. Those hoping that the time for disclosure of adverse documents would be brought forward to aid in earlier settlements will be disappointed. There remains no obligation to search for adverse documents until and unless extended disclosure in Models C, D or E is ordered. Adverse documents already identified must be disclosed within 60 days of the first CMC or when complying with an extended disclosure order.

The front-loaded costs of disclosure are therefore here to stay, although the recent addition of a "Less Complex Claims" route is a welcome potential off-ramp. The parties can agree – or the court can order – that a claim usually worth less than £1m is a "Less Complex Claim" which then benefits from a simpler Disclosure Review Document (a behemoth that is painstaking and costly to complete).

The disclosure pilot commenced on 1 January 2019, so its transition to a permanent feature of the Civil Procedure Rules marks the end of a three-year period of refinement based on practitioner and court feedback. For the new trial witness statements rules also just in the Business & Property Courts (PD57AC, which came into force on 6 April 2021 without a pilot) that process is just beginning.

2022 has seen the first few cases dealing with the new rules, with mixed results: some litigants being sanctioned for failure to comply with the rules (such as in *Greencastle MM LLP v Payne and others* [2022] EWHC 438 (IPEC)); while in *Curtiss v Zurich Insurance plc* [2022] EWHC 1514 (TCC), the complaining party was penalised with an order for indemnity costs for running up £275,000 worth of costs in its "oppressive and disproportionate" application.

What to look out for in 2023

While 2023 should bring us more guidance from the Courts on the trial witness statements rules and on the application of the new Guideline Hourly Rates (introduced in late 2021), it may also bring another contentious development: compulsory mediation in smaller cases.

While there is not yet a proposed start date, the Ministry of Justice consulted this year on its plans to impose a requirement on all County Court claims (starting with small claims) to engage in a "free" 1-hour telephone mediation.

The idea of compulsory mediation has been debated at length in many jurisdictions, with the overriding concern that it may be unlawful as it interferes with access to justice. However, a recent Civil Justice Council report concluded that compulsory mediation is legal provided it is not "disproportionately onerous" and does not preclude a party's "effective access" to the courts. The details of the MOJ's proposals have not yet been set out, although the sanction of striking out a claim or defence if a party does not "adequately engage" has been suggested. Clear guidance will be needed to govern the use of this draconian sanction as this has the obvious potential to impede access to justice.

Assuming the rules are sufficiently clear, the plans are likely to lead to more settlements (MOJ estimates 13-55% more settlements). Whilst imposing mediation will not change the fact that some parties simply will not want to settle, the involvement of an independent, trained mediator at an early stage in the process is likely to be beneficial, particularly for litigants-in-person, who will not have had the benefit of advice from a lawyer about ADR.

Costs for all County Court litigants are likely to increase earlier in the case to reflect the need to prepare for and attend what is essentially a mini mediation, but substantial costs will be saved in those cases that settle.

CONTACTS

Jonathan Wyles
Of Counsel
+44 20 3060 6415
jonathan.wyles@rpc.co.uk

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Product liability and recall

Andrew Martin | Associate

Key developments in 2022

On 31 March 2022 the British Standards Institution (**BSI**), with the support of the OPSS, published PAS 7050:2022 and 7100:2022. This guidance applies to all new and second-hand non-food consumer products. The aim of PAS 7050 is to ensure businesses bring products to the market safely with the primary recommendation being that all businesses should have a Product Safety Management Plan (**PSMP**) in place. This should, amongst other things, set out measures to ensure product safety through an entire life cycle, set out a Product Safety Incident Plan (**PSIP**) and consider who is responsible for ensuring continued product safety across the entirety of the supply chain.

PAS 7100 supersedes its predecessor, PAS 7100:2018 and is to be read in conjunction with PAS 7050. PAS 7100 includes guidance on how businesses should incorporate a PSIP into their PSMP with an importance placed on monitoring safety and traceability. This is to ensure that businesses can efficiently take corrective action when an issue with product safety arises. If this guidance is followed it should help identify any issues with product safety before they reach the market or make any corrective action efficient which could reduce any claims resulting from defective products.

In relation to defects, the Supreme Court also handed down their judgment in *Hastings v Finsbury Orthopaedics* [2022] UKSC 19 and reinforced the approaches of the *High Court in Wilkes v DePuy* [2016] EWHC 3096 and *Gee v Depuy* [2018] EWHC 1208 to interpreting a defect.

"The test of whether a product is defective is whether the safety of the product is not such as persons generally are entitled to expect. The test is not what is expected but one of entitled expectation. The test is an objective one. The standard of safety is measured by what the public at large is entitled to expect."

This decision in Hastings provides clarity as to the relevant test to be used when interpreting a defect and it will assist manufacturers and insurers consider any complex cases in the product liability sphere.

What to look out for in 2023

Last year's Annual Insurance Review set out the expectation that manufacturers would invest in artificial intelligence (AI) products that depend on machine learning. Technology continues to develop at a rapid pace with products becoming more complex and reliant on AI to function.

The European Commission has recently published a new *"Directive on adapting non-contractual civil liability rules to AI."* The proposals would increase litigation risk for companies that design and/or deploy AI within their products.

A study published by the OPSS in May 2022 highlighted the challenges and risks of incorporating AI systems into manufactured consumer products. These included issues with transparency, threats to physical safety or cyber security and data privacy. Given the grey areas within the current legislative framework it will be interesting to see whether the EU's proposals are considered in the UK with a view to adapting the strict liability imposed on manufacturers under the Consumer Protection Act, especially where AI is involved.

The European Commission has also published its proposals for a new Product Liability Directive (**PLD**) to modernise the existing product liability regime ensuring it is fit for purpose in the 21st century. The Consumer Protection Act, 1987 implemented the existing PLD. The proposals, if introduced, are likely to have a significant impact on product manufacturers and have the potential to lead to an increase in product liability litigation due to the broader scope and wider definitions of products which would include software, digital services and AI systems.

Previously product liability claims have been limited to personal injury and property damage but the scope of the PLD would also allow for strict product liability claims to be made for defective products that cause "loss or corruption of data". Manufacturers will also be liable for defects caused as a result of changes they make to products they have already placed on the market, ie software updates or machine learning.

An explanatory memorandum was published in October 2022 acknowledged the EU proposals in respect of the PLD and confirmed that there has been no consultation on the proposed changes in the UK and that any decisions made would benefit the UK interest. It will be interesting to see if PLD is adopted into UK law, in whole or part to avoid any significant divergence with the EU on issues related to product liability, especially given the importance of importing and exporting of goods between the UK and EU.

CONTACTS

Gavin Reese
Partner
+44 20 3060 6895
gavin.reese@rpc.co.uk

Lucy Dyson
Partner
+44 20 3060 6308
lucy.dyson@rpc.co.uk

Dorothy Flower
Partner
+44 20 3060 6481
dorothy.flower@rpc.co.uk

Fiona Hahlo
Partner
+44 20 3060 6121
fiona.hahlo@rpc.co.uk

Property and business interruption

James Adams | Senior Associate

Key developments in 2022

COVID-19 business interruption claims

The FCA Test Case in 2020 addressed issues of coverage under various example non-damage extensions to business interruption cover from across the market, but it did not consider other important issues such as whether, and if so, how such losses would aggregate. It also left questions as to how certain points decided by the Divisional Court which were not appealed were to be reconciled with aspects of the Judgement of the Supreme Court on the points which were appealed.

In *Corbin & King v Axa* [2022], the High Court addressed the difficulty in reconciling the Divisional Court's decisions that certain prevention of access wordings provided local-only cover with the Supreme Court's rejection of a traditional "but for" test for causation. In favour of a multiple concurrent cause approach. In *Corbin*, the High Court applied the multiple concurrent cause approach to an extension requiring *"the actions taken by police or any other statutory body in response to a danger or disturbance at your premises or within a 1-mile radius of your premises"*. Having regard to the policy terms and the fact that, properly construed, the policy provided cover for a number of separate insured entities on a composite (not joint) basis, the court found in the policyholder's favour on the question of whether the relevant sub-limit applied once, or several times on a per-premises basis.

2022 has also seen a triumvirate of cases in the High Court addressing several issues on one of the wordings considered in the Test Case (namely, RSA4 aka the Marsh Resilience wording). The three cases were *Stonegate Pub Co Ltd v MS Amlin Corporate Member Ltd, Greggs v Zurich Insurance Plc and Various Eateries Trading Ltd v Allianz Insurance Plc* [2022] (together, "**Stonegate etc**").

The issues addressed in the case included:

- **Covered Events/triggers:** The claimants claimed under three non-damage business interruption extensions, covering disease, enforced closure and prevention of access. Under these perils, cases of COVID-19 in the vicinity and the commencement of periods of relevant restrictions/closures were Covered Events and indemnity period(s) would run from when these Covered Events first caused interruption or interference. New restrictions may not constitute a separate trigger where they were materially of the same effect as existing restrictions.
- **Aggregation:** The question of whether or not the insureds losses could be aggregated and therefore subject to one or a small number of £2.5m sub-limits was a question to which significant value was attached (In the case of *Stonegate*, the claim was valued by the claimant at over £800m). The Court's decision indicates that it is possible to aggregate COVID-19 business interruption losses. Aggregation on this wording required identification of a "single occurrence" with a relatively loose causal connection (namely "in connection with") to the business interruption losses. Events surrounding the initial development of the pandemic in China were held too remote. However, particular Government measures were not too remote and had the necessary degree of unity (judged from the perspective of an informed observer in the position of the insured) to constitute a "single occurrence" by reference to which losses could be aggregated.
- **Furlough:** Payments from the Coronavirus Job Retention (aka furlough) Scheme and reductions in business rates were costs savings and could reduce the total indemnity payable to the insureds.

The judgments in *Stonegate etc* give rise to an element of uncertainty. They arise from preliminary issue trials, and they did not therefore determine the precise application of the issues decided to the particular facts of each case. Furthermore, issues arising on other cases will depend on the wording of the policy. Nevertheless, *Stonegate etc* helpfully provide an indication as to the likely approach of the courts to such issues.

What to look out for in 2023

Stonegate etc are likely to be the subject of an appeal in 2023, so the issues they decided should not be regarded as entirely settled at this point in time. 2023 is also likely to see further cases on other issues not addressed by the FCA Test Case such as the approach to be taken in relation to extensions triggered by COVID-19 at the insured's premises.

The Building Safety Act 2022

The Building Safety Act 2022 (**BSA**), relevant aspects of which came into force on 28 June, implements broad reform to the legislative and regulatory landscape governing fire safety for buildings. It introduces greater accountability and responsibility for those involved in all stages of the design, development and construction of residential dwellings, adopting recommendations from the public inquiry commissioned by the UK government in the aftermath of the Grenfell Tower tragedy.

Key elements of the BSA include:

- The introduction of a new Building Safety Regulator, with powers to enforce building safety and compliance with standards, particularly in relation to "higher risk buildings".
- Expanding the scope of duties owed by construction professionals under the Defective Premises Act 1972 (**DPA**) and Building Act 1984, and increasing the redress available to residents, building owners and leaseholders for breach of those duties (including through the introduction of retrospective limitation periods applicable to certain claims).
- Strengthening the regulatory framework that oversees the supply of construction products used in new buildings.
- The creation of Building Liability Orders (**BLOs**), establishing a new avenue for Claimants to seek redress from "associated companies" of insolvent wrongdoing construction firms where the Court considers it "just and equitable" to do so. The aim is to make it easier to "find the money" where complex corporate structures have been utilised.

As new legislation of significant scope and complexity, it is likely that disputes regarding the interpretation and effect of the BSA will come before the courts for consideration. It remains to be seen which aspects of the BSA will give rise to the first judgments. However, issues such as the requirements for satisfying the "just and equitable" test for BLOs and the extent to which the expanded duties under DPA as expanded by the BSA applies to large scale residential buildings may benefit from clarification by the courts before long.

CONTACTS

Victoria Sherratt
Partner
+44 20 3060 6263
victoria.sherratt@rpc.co.uk

Catherine Percy
Partner
+44 20 3060 6848
catherine.percy@rpc.co.uk

Mark Errington
Partner
+65 6422 3040
mark.errington@rpc.com.sg

Restructuring and insolvency

Will Beck | Of Counsel & Knowledge Lawyer

Key developments in 2022

Corporate insolvencies have been rising sharply in 2022 albeit against the backdrop of record low insolvency filings during the pandemic. By June, they had reached their highest quarterly level since 2009 and the depths of the global financial crisis.

The uptick in insolvency filings follows the gradual withdrawal of the Government's COVID stimulus and support packages, including the restrictions that had previously been imposed upon creditors from issuing winding-up petitions. The last of these restrictions expired on 31 March 2022.

Unfortunately, it now seems likely that this upward trend in insolvencies will continue in 2023. The Bank of England is predicting that the UK faces its longest recession since records began. Many companies are facing multiple challenges all at once, just as they are seeking to bounce back from the effects of the COVID pandemic creating a 'perfect storm', of increased costs, higher energy prices, supply chain disruption, employee shortages, low consumer spending and the prospect of higher debt service levels as a result of rising interest rates.

In a survey undertaken by the Office for National Statistics in August 2022, more than one in ten businesses reported a moderate to severe risk of insolvency. Whilst this figure is lower than that recorded at the start of 2021, it illustrates that there remains a considerable perceived risk of insolvency amongst the management of a significant proportion of UK businesses.

What to look out for in 2023

It appears that 2023 will be a challenging year for many UK businesses. Insurers and their brokers will need to consider carefully how best to mitigate this and deal with the impact of the projected slow-down in the UK economy.

More insolvencies are likely to lead to an increased risk of D&O cover being triggered. This is because once appointed, insolvency practitioners have a statutory duty to investigate the circumstances leading up to the insolvency of a company, including examining the conduct of the directors and transactions entered into in the period prior to insolvency. With the lifting of the temporary suspension of the wrongful trading rules on 1 July 2021, the risk of directors being found liable, and their D&O policies being engaged, is now even greater.

Business interruption and events insurance policies are also likely to be at greater risk of being called upon as companies face increasing levels of financial distress. The premiums for such policies, as well as for D&O policies, may increase as a result.

Insurance matters can also feature high up the list of priorities for the insolvency practitioner, who will need to carefully consider the insurance arrangements entered into by the companies over which they are appointed. Claims under insurance policies can be an important asset of an insolvent company, which the officeholder may seek to recover and/or sell to a third party for the benefit of the company's creditors. The officeholder will also need to consider what insurance cover may be needed in respect of the company whilst it is in an insolvency process, particularly if the intention is that the company will continue trading. All of these matters naturally can have important consequences for insurers and reinsurers.

CONTACTS


Finella Fogarty
Partner
+44 20 3060 6158
finella.fogarty@rpc.co.uk


Paul Bagon
Partner
+44 20 3060 6646
paul.bagon@rpc.co.uk

Surveyors

Mahsheed Ibram | Associate

Key developments in 2022

Last year, we reported on the Fire Safety Act 2021 (**FSA 2021**), which was due to come into force earlier this year. You can view last year's update here. Sections 1 (premises to which the FSO applies) and 3 (risk-based guidance about the discharge of duties under the FSO) of the FSA 2021 came into force on 16 May 2022.

Following enactment of the FSA, the Fire Safety (England) Regulations 2022 (**FSER**) have been made under article 24 of the Regulatory Reform (Fire Safety) Order 2005 (**FSO**), implementing the majority of the recommendations made by the Grenfell Tower Inquiry in its Phase 1 report. The FSER imposes further duties on 'responsible persons' as defined in Article 3 of the FSO. The FSER is due to come into force on 23 January 2023.

In order to assist responsible persons in complying with their duties under the FSO, the Fire Safety Act Commencement Prioritisation guidance (**Prioritisation Guidance**) was published in May this year, alongside the FSA. The Prioritisation Guidance includes a Fire Risk Assessment Prioritisation Tool which Responsible Persons can use to help determine the priority of updating or reviewing fire risk assessments for buildings. The Prioritisation Guidance is voluntary but will prove a useful reference tool for Responsible Persons when considering the fire risk assessments under the FSA.

Managing agents and their insurers should be aware of the new duties imposed upon them by the FSA, FSO and FSER and refer to the Prioritisation Guidance to assist them in meeting their duties, to avoid potential enforcement action or prosecution against them.

What to look out for in 2023

In October 2022, RICS consulted its members and the public on a draft Standard '*Valuation approach for properties in multi-storey, multi-occupancy residential buildings with cladding*' (**Standard**) which is intended to come in force on 1 December 2022. The Standard is applicable to England only at this stage.

The Standard is intended to help surveyors undertaking valuations for secured lending purposes of residential blocks of five or more storeys or 11 metres or more tall, in line with the remediation schemes and leaseholder protections which were brought into force by the Building Safety Act 2022. It should be referred to by valuers where remediation work to cladding for fire safety purposes has been identified, a route to funding the remediation is clear and lenders have indicated their willingness to lend. The Standard provides guidance on the proper assessment of value and the appropriate use of assumptions and special assumptions of properties where remediation works have not been commenced or completed.

Following publication, the Standard will remain under review to ensure a proportionate approach continues to be taken, balancing the impact of combustible cladding on homeowners/leaseholders with lenders' and valuers' obligations to accurately report property value. The Standard will be pivotal in shaping the approach taken by surveyors and lenders, and in turn on home buyers and sellers, in properties with combustible cladding.

Surveyors undertaking valuations of multi-storey, multi-occupancy residential buildings with combustible cladding should be aware of the valuation guidance provided by the Standard. Failure to consider the guidance or carry out valuations in accordance with the Standard may result in negligence claims.

CONTACTS

Alex Anderson
Partner
+44 20 3060 6499
alexandra.anderson@rpc.co.uk

Katharine Cusack
Partner
+44 20 3060 6965
katharine.cusack@rpc.co.uk

Felicity Strong
Partner
+44 20 3060 6546
felicity.strong@rpc.co.uk

Ben Goodier
Partner
+44 20 3060 6911
ben.goodier@rpc.co.uk

Technology

Helen Monachan | Associate

Key developments in 2022

During 2022, Governments and their Regulators have demonstrated a willingness to impose responsibility on 'Big Tech' to ensure the safe use of their platform, particularly in relation to vulnerable users of social media.

In the UK, on 3 March 2022, the Financial Conduct Authority (FCA) used its supervisory powers to crack down on an investment app's use of social media platforms to promote services. This move was to protect vulnerable investors. The action follows concerns that social media promotions are pushing young, unexperienced consumers into investments in high-risk products. The FCA will hold firms responsible for ensuring that sponsored influencer promotions comply with FCA rules.

On 21 June 2022, the European Commission enforced consumer and advertising changes on social media platform, Tik Tok, following a complaint filed against them in 2021. Tik Tok had to commit to aligning its practice with EU consumer and advertising rules by the end of Q3 2022. Some of the changes include reporting ads that trick children into purchasing, banning promotions of "get rich quick schemes" and transparency over the platform's own currency, reward schemes and gifts.

This move follows a trend of regulators getting hands on with popular social media platforms to protect vulnerable users. With the EU's Digital Markets Act and Digital Services Act just around the corner (discussed below), it is time for platforms to start reviewing their online services to ensure that they are able to comply. The changes imposed on Tik Tok are a useful guide of practical changes that other platforms should review to understand what the regulators expect.

What to look out for in 2023

The Digital Services Act (DSA) came into force on 16 November 2022 and the Digital Markets Act (DMA) came into force on 1 November 2022. These Acts will become applicable to the tech sector's biggest players in 2023. Other intermediary services will be seeking advice on how to prepare for the DSA's implementation during 2023.

The DSA applies to providers of intermediary services that offer services to a significant number of recipients in the EU. Some obligations include voluntary investigations to remove illegal content, providing user-friendly and electronic single point of contact, specific requirements for terms and conditions, transparency on advertising on online platforms, and informing consumers of a sale of an illegal product or service. While the DSA will become directly applicable to all digital services by 1 January 2024, "very large online platforms" or "very large online search engines" will be impacted by January 2023.

The DMA enters into force in the spring of 2023 and applies to core platform services provided or offered by 'gatekeepers' to business and end-users established or located in the EU, irrespective of their place of establishment and national law otherwise applicable to their service. It aims to ban certain practices used by online platforms by imposing various obligations on them in relation to interoperability, data access, advertising and access to app stores.

Businesses that do not comply with the requirements of the DSA and DMA risk enforcement action against them including large fines for non-compliance.

CONTACTS

Richard Breavington
Partner
+44 20 3060 6341
richard.breavington@rpc.co.uk

Daniel Guilfoyle
Partner
+44 20 3060 6912
daniel.guilfoyle@rpc.co.uk

Jonathan Crompton
Partner
+852 2216 7173
jonathan.crompton@rpc.com.hk

Toxic tort and legacy exposures

Lucy Dyson | Partner
Marcela Calife Marotti | Associate

Key developments in 2022

The next five to ten years will see liability insurers forced to grapple with a new wave of long tail environmental, injury and damage claims. 2022 was the year that PFAS (per-and polyfluoroalkyl) substances or "forever chemicals" emerged as a truly global legacy exposure, following two decades of litigation which has largely been concentrated in the US courts. Films such as Dark Waters previously shone a light on the pervasive use of PFAS chemicals in myriad consumer and industrial products and their presence in groundwater, soil, the air and our bloodstreams.

The majority of litigation/attention has focused on the more widely known chemicals, PFOA and PFOS, but the recognised list of PFAS chemicals is rapidly increasing and there are thought to be several thousand chemical compounds which qualify. Their ability to withstand water and not to break down/degrade is why they have been dubbed "forever chemicals" which cannot easily be eliminated from the environment. PFAS have been linked to various health issues, including cancers, thyroid complications, liver inflammation and weakening of the immune system.

Various lawsuits and federal multi-district litigation have been brought in the US courts against the main manufacturers of PFAS, which include DuPont, 3M and others, most notably in relation to fire-fighting foam (AFFF) and groundwater/watercourse remediation. The litigation is ongoing but there have been several hundred-million-dollar settlements.

During 2022, McDonalds and Burger King were targeted with PFAS lawsuits relating to their packaging. At the end of 2022, Coca Cola had been served with proceedings alleging the presence of PFAS in an orange juice drink and false/misleading advertising concerning the product being free of artificial ingredients. There was also a US$5m settlement in relation to allegations that Thinx menstrual underwear contained harmful PFAS, despite being marketed as sustainable and free of toxic chemicals. Litigation against cosmetic manufacturers, firms producing school uniforms and the wider textiles industry, is also emerging.

Future PFAS litigation and regulations (particularly in the ESG-focused corporate and legal landscape) will almost certainly take on a cross-border context, however. July 2022 saw a €571m settlement for remediation between 3M Belgium and the Flemish government concerning alleged groundwater contamination in Flanders, allegedly as the result of pollutants released at 3M's Zwijndrecht manufacturing site. This settlement only relates to remediation of the area – as yet there have been no personal injury/property damage claims. It is therefore speculated that this will pave the way for large-scale third-party claims in Europe and elsewhere, similar to those brought in the USA.

The interaction of PFAS with other pollutants such as microplastics (which derive from petroleum and contain various harmful chemicals) further exacerbates the effect of these man-made compounds on the environment. PFAS is widely being heralded as the new asbestos and given its omnipresence and many decades of use by mankind, we are merely at the beginning of litigation which will undoubtedly have significant effects on supply chains and the regulatory landscape.

Directors will need to be alive to emerging regulations on PFAS and the make-up of products/supply chains, particularly in view of ESG reporting requirements and obligations to shareholders.

As regards plastics, we have already seen cases brought against Crystal Geyser, Coca Cola and Proctor & Gamble, which seek to hold these companies accountable for historic plastic pollution. Most recently, we have seen ClientEarth announce a "duty of vigilance" action against Danone in its capacity as a global manufacturer and supplier, in relation to its policies on plastic production and mitigating the harmful effects on the environment. Cases brought by shareholders such as *Perri v Danimer Scientific*, concerning allegedly inaccurate statements by directors regarding the biodegradability of plastic products, are likely to become more commonplace.

Litigation against chemical manufacturers continues, with ongoing lawsuits concerning paraquat (which allegedly caused Parkinson's and other diseases) and chlorpyrifos (a pesticide which allegedly causes neurological conditions in children). These are the latest in a spate of chemical cases, following the ongoing glyphosate litigation (widely used weed killer alleged to have caused various cancers) which has already seen US$10bn in settlements.

What to look out for in 2023

In 2023 we can expect an uptick in both environmental/ESG-related group claims, in particular those concerning PFAS and plastics and crucially, litigation against manufacturers/users of these products further down the supply chain. We will also closely watch the development of talc group litigation expected to be brought against Johnson & Johnson in the English courts (which will follow multi-billion-dollar settlements in the US). Liability insurers will likely have to grapple with issues including policy trigger and historic exposure (all too familiar in the context of asbestos-related claims and occurrence-based policies) and the scope of coverage/exclusions for pollution.

CONTACTS

Lucy Dyson
Partner
+44 20 3060 6308
lucy.dyson@rpc.co.uk

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Warranty and indemnity (W&I)

Amisha Jobanputra | Senior Associate

Key developments in 2022

Although global M&A activity in the first half of 2022 was strong, economic and geopolitical events in the second half of 2022 have caused a reduction in both global deal value and deal volume. Despite the slowdown, the demand for warranty and indemnity (W&I) insurance has remained relatively stable in circumstances where cautious dealmakers are seeking to protect their positions further.

Alongside cyber risk (which we discussed as an emerging risk in last year's Annual Insurance Review) environmental, social and governance (ESG) risks are now also at the forefront of M&A, and in turn, the W&I underwriting process. ESG both broadens and alters the scope and reporting of due diligence. As such, underwriters are now seeking to ensure that deal advisers have undertaken a more detailed analysis of areas that are generally covered by traditional due diligence (such as supply chain issues) as well as analysis on newer areas, such as diversity on boards. In addition, ESG has also impacted transaction fundamental, and underwriters are now paying closer consideration to how ESG risks impact target valuation (how, for example, an ESG breach might be "valued") as well as the breadth of certain warranties (whether these are general "compliance with laws" type warranties or more specific ESG warranties). In circumstances where ESG is a relatively new area of focus, there is little data available in respect of how ESG impacts claims made under W&I policies, although we expect this information will become available in the coming years.

What to look out for in 2023

Global M&A is likely to face a number of challenges in 2023, including rising interest rates leading to higher cost of acquisition financing, as well as general economic uncertainty associated with a global recession. That said, there are still likely to be some drivers for M&A activity, such as the availability of undervalued or distressed targets as well as the amount of "dry powder" in the private equity space. As in 2022, the demand for W&I insurance is likely to prove resilient.

From an underwriting perspective, we expect that cyber, compliance and ESG risks will continue to be key areas of focus. From a claims perspective, we expect 2023 to produce a material uptick in W&I claims due to a combination of three factors – the high number of policy placements in 2021; the tail between policy conception and notification; and the reduction in the number of claims notifications made during the COVID-19 pandemic.

Going forward, the use of W&I insurance more generally is likely to expand across new regions such as the Middle East, where the demand for W&I insurance is increasing as a result of familiarity with these products.

Outside of the "traditional" W&I offering, 2023 is likely to see the W&I market continue to evolve with an increase in the number of synthetic and stapled W&I insurance products, more niche offerings (eg W&I insurance for SME deals or the private equity secondaries market) and even the potential use of W&I insurance on commercial transactions outside of M&A.

CONTACTS

James Wickes
Partner
+44 20 3060 6047
james.wickes@rpc.co.uk

Antony Sassi
Managing Partner, Asia
+852 2216 7101
antony.sassi@rpc.com.hk

Contacts

David Allinson
Partner
+44 20 3060 6954
david.allinson@rpc.co.uk

Alex Almaguer
Partner, Head of Latin America Practice
+44 20 3060 6371
alex.almaguer@rpc.co.uk

Alex Anderson
Partner
+44 20 3060 6499
alexandra.anderson@rpc.co.uk

Iain Anderson
Partner
+65 6422 3050
iain.anderson@rpc.com.sg

Sarah Armstrong
Head of Legal
+44 20 3060 6545
sarah.armstrong@rpc.co.uk

Paul Bagon
Partner
+44 20 3060 6646
paul.bagon@rpc.co.uk

Paul Baker
Legal Counsel
+44 20 3060 6031
paul.baker@rpc.co.uk

Nick Bird
Partner
+44 20 3060 6548
nick.bird@rpc.co.uk

Rupert Boswall
Partner
+44 20 3060 6487
rupert.boswall@rpc.co.uk

Richard Breavington
Partner
+44 20 3060 6341
richard.breavington@rpc.co.uk

Tim Bull
Partner
+44 20 3060 6580
tim.bull@rpc.co.uk

David Cran
Partner
+44 20 3060 6149
david.cran@rpc.com.hk

Jonathan Crompton
Partner
+852 2216 7173
jonathan.crompton@rpc.com.hk

Ciara Cullen
Partner
+44 20 3060 6244
ciara.cullen@rpc.co.uk

Katharine Cusack
Partner
+44 20 3060 6965
katharine.cusack@rpc.co.uk

Mamata Dutta
Legal Director
+44 20 3060 6819
mamata.dutta@rpc.co.uk

Lucy Dyson
Partner
+44 20 3060 6308
lucy.dyson@rpc.co.uk

Zoe Eastell
Partner
+44 20 3060 6163
zoe.eastell@rpc.co.uk

Mark Errington
Partner
+65 6422 3040
mark.errington@rpc.com.sg

Dorothy Flower
Partner
+44 20 3060 6481
dorothy.flower@rpc.co.uk

Finella Fogarty
Partner
+44 20 3060 6158
finella.fogarty@rpc.co.uk

Davina Given
Partner
+44 20 3060 6534
davina.given@rpc.co.uk

Ben Gold
Partner
+44 20 3060 6282
ben.gold@rpc.co.uk

Ben Goodier
Partner
+44 20 3060 6911
ben.goodier@rpc.co.uk

Carmel Green
Partner
+852 2216 7112
carmel.green@rpc.com.hk

Tom Green
Partner
+44 20 3060 6536
tom.green@rpc.co.uk

Matthew Griffith
Partner
+44 20 3060 6382
matthew.griffith@rpc.co.uk

Daniel Guilfoyle
Partner
+44 20 3060 6912
daniel.guilfoyle@rpc.co.uk

Fiona Hahlo
Partner
+44 20 3060 6121
fiona.hahlo@rpc.co.uk

Rachael Healey
Partner
+44 20 3060 6029
rachael.healey@rpc.co.uk

Toby Higginson
Partner
+44 20 3060 6581
toby.higginson@rpc.co.uk

William Hogarth
Partner
+44 20 3060 6240
william.hogarth@rpc.co.uk

Rhian Howell
Partner
+44 20 3060 6708
rhian.howell@rpc.co.uk

Simon Laird
Partner
+44 20 3060 6622
simon.laird@rpc.co.uk

Keith Mathieson
Partner
+44 20 3060 6486
keith.mathieson@rpc.co.uk

Angela Marsden
Operations Consultant
+44 7511 027284
angela.marsden@rpc.co.uk

James Mee
Partner
+44 20 3060 6424
james.mee@rpc.co.uk

Sian Morgan
Partner
+44 20 3060 6953
sian.morgan@rpc.co.uk

Robert Morris
Partner
+44 20 3060 6921
robert.morris@rpc.co.uk

Karen Morrish
Partner
+44 20 3060 6521
karen.morrish@rpc.co.uk

Michael Newham
Partner
+44 20 3060 6018
michael.newham@rpc.co.uk

Catherine Percy
Partner
+44 20 3060 6848
catherine.percy@rpc.co.uk

Kirstie Pike
Partner
+44 20 3060 6967
kirstie.pike@rpc.co.uk

Gavin Reese
Partner
+44 20 3060 6895
gavin.reese@rpc.co.uk

Claire Revell
Partner
+44 20 3060 6828
claire.revell@rpc.co.uk

Antony Sassi
Managing Partner, Asia
+852 2216 7101
antony.sassi@rpc.com.hk

Toby Savage
Partner
+44 20 3060 6576
toby.savage@rpc.co.uk

Will Sefton
Partner
+44 20 3060 6924
will.sefton@rpc.co.uk

Victoria Sherratt
Partner
+44 20 3060 6263
victoria.sherratt@rpc.co.uk

George Smith
Partner
+44 20 3060 6976
george.smith@rpc.co.uk

Alan Stone
Partner
+44 20 3060 6380
alan.stone@rpc.co.uk

Felicity Strong
Partner
+44 20 3060 6546
felicity.strong@rpc.co.uk

Naomi Vary
Partner
+44 20 3060 6522
naomi.vary@rpc.co.uk

Gary Walkling
Partner
+44 20 3060 6165
gary.walkling@rpc.co.uk

Contacts (continued)

James Wickes
Partner
+44 20 3060 6047
james.wickes@rpc.co.uk

Alex Wilson
Partner
+44 20 3060 6397
alex.wilson@rpc.co.uk

Jonathan Wyles
Of Counsel
+44 20 3060 6415
jonathan.wyles@rpc.co.uk

Leigh Williams
Partner
+44 20 3060 6611
leigh.williams@rpc.co.uk

Jonathan Wood
Consultant
+44 20 3060 6562
jonathan.wood@rpc.co.uk

Gerald Yee
Partner
+65 6422 3060
gerald.yee@rpc.com.sg

Jonathan Newby
Partner
Colin Biggers & Paisley
+61 2 8281 4406
jonathan.newby@cbp.com.au

Simon Ndiaye
Partner
HMN Partners
+33 1 53 57 50 41
sndiaye@hmn-partners.com

Peter van den Broek
Partner, Attorney at law
kennedy van der laan
+31 20 5506 669
peter.van.den.broek@kvdl.com

Tom Whitby
Partner
Miller Thomson
+1 416 595 8561
twhitby@millerthomson.com

Gérard Honig
Partner
HMN Partners
+33 1 53 57 50 37
ghonig@hmn-partners.com

Scott Seaman
Partner
Hinshaw & Culbertson LLP
+1 312 704 3699
sseaman@hinshawlaw.com

Mark Frederick
Partner
Miller Thomson
+1 416 595 8175
mfrederick@millerthomson.com

Marit van der Pool
Attorney at law
kennedy van der laan
+31 20 5506 838
marit.van.der.pool@kvdl.com

Pedro Hernandez
Partner
Hinshaw & Culbertson LLP
+1 305 428 5043
phernandez@hinshawlaw.com

rpc.co.uk