RPC

Annual Insurance Review
2020

ADVISORY | DISPUTES | REGULATORY | TRANSACTIONS

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Introduction

Hello and welcome to the 2020 edition of RPC's annual insurance review. Here you will find updates from our experts across a whole range of business classes as well as from around the world. In the articles that follow you will be able to read our take on key issues that have impacted your market in the year gone – and our thoughts on the issues likely to affect you in the year to come.

In the introduction to our 2017 Annual Insurance Review we spoke about how political upheaval resulting from the twin shocks of the result of the Brexit referendum and Donald Trump's election victory would impact on the insurance market. Three years on and perhaps now more than ever there is a sense that matters are coming to a head and that the geo-political instability as a whole is dominating the risk outlook.

Notwithstanding the result of December's general election, Brexit uncertainty still hangs over us. Whilst fewer of our individual articles, perhaps, mention Brexit as a key risk factor this year, there is a sense that this may simply be because we're all tired of mentioning it! The reality remains that Britain's trade arrangements with its traditionally closest partners will remain in a state of flux for some time to come.

Add to this that Donald Trump will be contesting an election once again. (The only difference being that this time it will be less of a surprise if he wins.) Tension with Iran and impeachment proceedings only create more global uncertainty. Quite what international trade will look like by the time of the US elections towards the end of the year – your guess is as good as ours.

But unlike 2017, when these issues seemed fresh, daunting but (dare one say it) possibly exciting, now there is a sense of more wide ranging and deep-rooted political activism across the world, exemplified by the protests in Hong Kong that have been running since June and which show no signs of abating.

2019 was also the year of the Extinction Rebellion and Greta Thunberg – political activism in the cause of a call to action on climate change. Whilst our review of 2019 saw the impact of climate change as a significant issue across many classes, this year we can see across the articles that climate change and the increased pressure to decarbonise our energy industries and economies as a whole has climbed very much to top of the risk agenda.

Of course this generates fascinating opportunities around the world (you can read about huge solar farm projects in Australia and Africa and vast offshore wind turbine fields). But now we can even talk of the insurance market being the drivers of political change – with many refusing to provide cover to traditional coal powered energy companies. (Even US insurers against (presumably) the will of their president.)

So perhaps 2020 will be the year that insurers will be more aligned with the political activists than with governments?

Elsewhere you will be able to read about the "weaponised" use of GDPR in medical malpractice claims, the continued increase in the use of technology in adjusting and evidence gathering and much, much more.

From all at RPC, we wish you a very happy New Year.

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Accountants

By George Barratt

Key developments in 2019

The duty of care in accountancy claims was the subject of two key cases in 2019.

In *AssetCo*, the High Court stated for the first time that auditors can be liable for a company's trading losses caused by a negligent audit.

This widening of the scope of auditors' liability may appear to be bad news for accountancy firms and their insurers; however there are caveats in the judgment which soften the blow.

Firstly, there is a carve-out in relation to dividends and other 'intervening acts' on the part of directors which do not fall within the scope of an auditor's duty. It also appears likely that in cases such as this one (particularly those involving dishonesty by management) the company will be liable for contributory fault, which will reduce the loss attributable to the negligent auditor.

The profession can also draw some comfort from the earlier decision of *Manchester Building Society*, in which the Court of Appeal reiterated the basic principle that auditors will only be liable if they assume responsibility for the decision-making that leads to losses.

The key question was held to be whether the auditor was giving 'advice' or merely providing 'information'. Where an auditor is 'responsible for guiding the whole decision-making process' they may be liable for all foreseeable financial consequences. Otherwise, the negligent auditor can only be responsible for the direct consequences of their advice being wrong. In this case, that meant a liability of just a few hundred thousand pounds instead of tens of millions. This decision provides a useful framework for Insurers to assess the potential exposure to a claim at an early stage.

What to look out for in 2020

A long-anticipated shake-up of the audit sector remains on the cards and has been thrown into the spotlight once more following the collapse of Thomas Cook (which is being investigated by the FRC).

Following reviews of the audit market by Sir John Kingman and the CMA, we now await the results of a third independent review into the sector (this time led by Sir Donald Brydon).

We have already seen an overhaul of the audit regulator, which is due to be replaced by a new oversight body, the Audit, Reporting and Governance Authority. As predicted in our last annual insurance review, the 'going concern' standard has also been strengthened in response to recent enforcement cases and well-publicised corporate failures.

The regulatory environment is however set to change further. A key area to watch out for will be whether or not the scope of audit is extended to specifically include the detection of fraud (which has never been a statutory requirement).

The market already appears to be gearing up for the possibility of joint-audits, creating opportunities for so-called 'challenger firms' outside of the big four. We expect this trend to continue; however there are unresolved issues in relation to litigation risk, such as the scope of joint and several liability in the case of mandatory joint-audits.

While there appears to be a renewed momentum behind the calls for audit reform, much depends on the level of political will to implement proposed changes in the coming year.

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Art and specie

By Emily Rome

Key developments in 2019

Crime in art

When the French authorities seized the painting "Venus", attributed to Lucas Cranach the Elder in March 2016, as a potential forgery, they unknowingly kicked off a scandal that has continued to snowball. A dealer called Giuliano Ruffini sold dozens of Old Master paintings for millions over the past few decades – and it now seems that many of them may be modern fakes.

Buyers are already turning on the professional intermediaries who sold the paintings. In one such claim last year, Sotheby's compensated a buyer who was sold an allegedly fake Franz Hals, and then sought to recover its losses of circa US$11m from the seller, Mark Weiss, a British art dealer, who had purchased the painting from Ruffini in 2010, and Fairlight Arts Venture Company, who were also involved in the deal. A settlement in the sum of US$4.2m was reached with Weiss and we await the court's decision as to Fairlight's liability.

The Ruffini scandal is thought to extend to internationally recognised museums and respected intermediaries. In 2017, Sotheby's in New York refunded US$840,000 to the buyer of a Parmigianino sold in 2012 that had originated with Ruffini. In September 2019, the possible creator of the works sold by Ruffini was arrested. Expect more Ruffini-related claims under professional indemnity policies.

What to look out for in 2020

Climate change

With the phenomenon of Greta Thunberg and the UK Parliament declaring a climate change emergency, it is timely to reflect on the impact of climate change on the art market. An obvious risk is in respect of art left in storage facilities. There is more art in existence than ever before resulting in more art being left in storage facilities.

When hurricane Sandy hit America in 2012 a huge amount of art was damaged in facilities, leading to numerous claims. By way of example, insurance companies brought a US$11.5m claim against Christie's Fine Art Storage citing negligence, and pointing specifically to 500 pieces of art being left on the facility's ground floor throughout the storm. Christie's was by no means alone in having artwork damaged by the storm; Manhattan's Chelsea neighbourhood was also hard hit. In 2017, the Louvre was partially flooded and two Poussins damaged.

If art is damaged it is sometimes possible to restore it, but when this is not possible the claim may be the full value of the art. Assessing damage to work and deciding whether it can be repaired or if it is a total loss is a largely subjective process, requiring multiple experts. This is both expensive and time consuming.

With extreme weather intensifying, in 2020 and beyond, close scrutiny of measures taken by art storage providers, museums and collectors to protect against unpredictable extreme weather will be essential. Nevertheless, insurers are likely to see more claims in respect of damage caused by weather and they will have to grapple with the losses arising to both storage facilities and the art.

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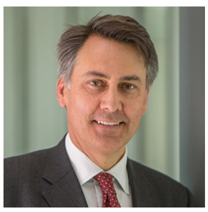

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Brokers

By Kirstie Pike

Key developments in 2019

For insurance brokers, 2019 was all about the hardening UK insurance market. A combination of unprecedented natural and weather-related disasters and a downturn in economic activity forced insurers to try to recoup losses through tightened underwriting and increased premiums. This happened far quicker – and hit far harder – than many had predicted, affecting nearly every line, and it brought with it a number of issues for the UK's insurance broking profession.

Brokers tend to be in the driving seat in a soft market environment. The vast majority of brokers in practice today will never have experienced a hard market; they won't have seen a situation where demand outstrips supply, let alone to the point where the ability to find competitive quotes becomes all-but impossible, and the 'deals' that have been the hallmark of our perennially low-cost market for so many years entirely dry up.

What to look out for in 2020

As the market tightens even further, insurers will look to decrease the number of brokers they do business with. From a risk perspective, now is the time when brokers, who have relied less on the technical presentation of risks and more on relationships built on volume, will start to be exposed. Insureds have grown used to extensive covers at ever decreasing prices but, in a market that is in a state of very rapid flux, insurers are finding themselves in the position of being able to offer less and charge more. The broker's job of discerning the best deal – in circumstances where they may now only have access to one market or receive one quote – has suddenly become very difficult indeed. It will be essential for brokers to get ahead of the game: get out into the market early, ensure good quality submissions, explain to clients why their premium is going up, and be prepared to re-market.

The Insurance Act will now assume even greater significance than it might have done in more benign 'soft' times. Insurers will look to control their losses by scrutinising claims more closely. Brokers would be well advised to re-familiarise themselves with its obligations and duties in 2020.

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Construction

By Adrian Hurlock

Key developments in 2019

Perhaps unsurprisingly, the consequences of the Grenfell Tower fire have continued to affect the construction industry. With the market continuing to harden, and those construction professionals with actual or potential exposures to cladding finding it challenging to obtain renewal terms, we have continued to see a large number of both claims and block notifications relating to cladding.

Claims against other professionals involved in cladding/construction projects (as opposed to the traditional claims against architects and design & build contractors), have increased. High-profile contractor insolvencies have pushed claimants to seek damages from a wider range of construction professionals; further, the increase in the number and diversity of claims has caused a corresponding spike in recovery actions against those in the contractual chain.

Against this background, the decisions in *Zagora Management v Zurich*, and *Herons Court v NHBC*, provided some welcome relief to insurers of privately appointed approved inspectors. The decisions confirmed that such approved inspectors did not owe a duty of care under the Defective Premises Act and therefore would not be liable under that Act if they failed to identify defects when inspecting and certifying a property for Building Regulations purposes.

The decisions will also make it much harder for claimants, particularly third parties, to bring claims in tort against approved inspectors. Indeed, we have already seen a number of claims withdrawn as a result of these decisions and, unless claimants can overcome the high hurdles in pleading deceit or fraudulent misrepresentation, or the inspector has provided a collateral warranty (each of which may give rise to policy coverage issues), then insurers may be able to 'close the book' on these claims.

What to look out for in 2020

Brexit, and the uncertainty surrounding the UK's future relationship with the European Union, will continue to impact the construction sector. Currency fluctuations and the historic weakness of the Sterling has caused, and will continue to cause, difficulties in tendering and will put further pressure on already tight margins. Contractor insolvencies may, therefore, continue to increase.

A number of reports and studies, including by the Royal Institute of Chartered Surveyors, have highlighted the potential for large drops in commercial and residential property values. If correct, we anticipate an increase in the frequency and severity of claims against surveyors and valuers.

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Contingency

By Damon Brash

Key developments in 2019

In last year's review we focussed on the impact on the contingency market of extreme and unpredictable weather patterns. It appears that these extremes may be here to stay. Perhaps the most high profile case of this during 2019 was Typhoon Hagibis, which hit Japan during, amongst other events, the Rugby World Cup and the Japanese Grand Prix.

Typhoon Hagibis was a major tropical cyclone causing widespread damage and a large number of deaths. The typhoon necessitated the cancellation of three group stage matches in the Rugby World Cup and the postponement of the qualifying session for the Japanese Grand Prix. In the end, both events continued with comparatively minor disruption given the size of the typhoon and its impact on Japan as a whole. This suggests that organisers of major sporting events are becoming more adept at preparing for and accommodating major weather interruptions.

In addition to weather, increasing uncertainty during 2019 has exacerbated tensions in many parts of the world. This has impacted events and event planning and will doubtless have a consequential impact on the contingency insurance markets. Examples of this include the ongoing protests in Hong Kong and the recent protests and civil unrest in Barcelona.

The Hong Kong protests have resulted in, amongst other things, the indefinite postponement of the 2019 Hong Kong Open Women's Tennis Tournament, originally scheduled to take place between 5-13 October 2019. Unrest in Barcelona has meant that the football match between FC Barcelona and Real Madrid, always a major fixture in the Spanish football calendar, has been postponed from 26 October 2019 until 18 December 2019. The unrest arose from the jailing of Catalan separatist leaders for sedition for their role in organising an independence referendum in Catalan in October 2017. Spain's Constitutional Court subsequently declared the referendum to be illegal.

What to look out for in 2020

Given that weather extremes may be the new normal, their ongoing impact is inevitable. For 2020, however, the bigger issue to look out for may well be the impact on contingency risks of increased tension and uncertainty in world events, both economic and political.

The ongoing Hong Kong protests are one example of this tension and uncertainty spilling over and impacting events. These protests show no sign of abating. It should be borne in mind, however, that widespread civil unrest is not the only way that events can be disrupted. The current tenor of political discourse has made well-organised but targeted protests more likely, which can equally disrupt events. The recent "uprising" by the Extinction Rebellion group that was organised for the 5 day period of 14-19 October 2019 is a good example. Look for more co-ordinated campaigns of targeted disruption in large cities in 2020, motivated by issues such as climate change, Brexit (in the UK) and concerns over social and economic inequality, similar to the Occupy Movement in late 2011 and early 2012.

Another area that may come to the fore is the boundary between a specific threat and a general fear, when protests or social unrest lead to the fear of harm even where there is no reason to think a specific event will be impacted. Policyholders faced with reduced attendance arising from such general concerns may well prefer to postpone an event. Depending on the wording in place and the true severity of any threat, this may lead to the boundaries of the contingency cover in place being tested.

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D&O

By Lara Stacey

Key developments in 2019

As predicted in last year's Annual Insurance Review, we have seen an increase in market abuse investigations by the Financial Conduct Authority (FCA) impacting directors and officers cover. This corresponds with the FCA's mission statement that "preventing, detecting and punishing market abuse is a high priority for us" and their goal to crack down on individuals who fail to meet their obligations under the Market Abuse Regulations (MAR).

As with Serious Fraud Office (SFO) investigations, FCA market abuse investigation costs and subsequent defence costs are significant, as it is common for the FCA to investigate multiple directors. The FCA also requires numerous other individuals to assist them in their investigations, made possible due to the FCA's broad powers to compel information relevant to its investigations.

The knock-on effect of market abuse investigations for Directors and Officers Insurers has been an increase in claims by shareholders against companies under section 90A of the Financial Services and Markets Act 2000. Most Directors and Officers policies will cover the companies' costs of defending a securities claim and these claims are extremely costly to defend. We understand that litigation funders have agreed to fund the following shareholder actions (which are either related to market abuse or closely connected) against Petrofac, Metro Bank and Glencore and are investigating shareholder actions in relation to Patisserie Valerie.

What to look out for in 2020

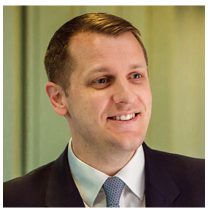
We anticipate that in 2020 we will see a rise in claims against directors related to the environment and climate change. We expect that efforts to increase publicity around the dangers of climate change will become more sophisticated and there will be an increase in activists purchasing shares in "environmentally unfriendly" companies to allow them to bring derivative claims against the directors and/or companies.

Whilst this is likely to be of more concern to directors/companies where the companies are engaged in high profile "environmentally unfriendly" activities (oil and gas companies), there are many companies indirectly involved including transportation and manufacturing companies. Claims could extend to asset managers (and other professionals) who have failed to consider the risk of climate change when considering what investments to buy/sell.

We expect that claims will be framed in breach of directors' duties. Directors have a duty to promote the success of the company for the benefit of the members as whole and should have regard to "the impact of the company's operations on the community and the environment" (section 172(1)(d) Companies Act 2006). In the current political climate this is likely to take on increased importance in directors' decision making and reporting to the company/shareholders.

Potential claimants will be watching to see how the high profile cases involving ExxonMobil play out. The first concerns the New York Attorney General's claim against ExxonMobil for allegedly defrauding investors by downplaying climate change risks to the business. The second involves the shareholders claim against several ExxonMobil directors for failing to protect their investments and company from the risks of climate change.

Directors and Officers Insurers should carefully review their policy wordings to ensure they cover the risks that they intended to cover.



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Energy

By Gary Walkling

Key developments in 2019

In our last Annual Insurance Review, we predicted that divestment from the coal industry would remain a pertinent issue in 2019. The strategic shift away from underwriting coal-generated energy has indeed been one of the major trends of the past year, with insurers looking to more sustainable alternatives.

In July, Chubb announced that it would no longer sell new insurance policies, or invest in businesses which generate more than 30% of their revenue from coal-mining or coal-fired electricity. The announcement also stated that Chubb would gradually phase out existing investments and policies by 2022. Similar plans for divestment have been announced by other insurers including the Uniqa Group, Mapfre and QBE.

The majority of insurers that have announced divestment plans to date have been headquartered in mainland Europe. However, Chubb's announcement is particularly significant because they are the largest provider of commercial insurance to the US market. Indeed, in the past year we have seen increased pressure placed on US-based insurers. Organisations such as Unfriend Coal publish lists comparing the steps taken by insurers and there has been a considerable level of interest from the press, as well as engagement from institutional investors.

As a result of this shift, insurers have been looking to refocus their search for premium in other parts of the energy market. One of the main beneficiaries of this trend has been the renewable energy market. With insurers keen to burnish their green credentials, there has been an abundance of capacity and rates have, so far, remained low.

What to look out for in 2020

In circumstances where the underwriting of coal powered assets is increasingly being eschewed, insurers are looking for alternative sources of premium income. A look to the future of renewable energy insurance provides an indication of where some of this capacity might be headed.

The global supply of solar, wind and hydro power has been growing faster than expected, and renewable sources now generate more energy than their traditional fossil fuel counterparts. Renewable energy output is projected to grow by 50% within the next five years. This boom is partially a result of the increasing affordability of renewable power sources, almost all of which are now on par with oil, coal and gas.

Whilst limits, and therefore premiums, on renewables projects tend to be smaller than those on conventional power stations, the number of sites is quickly increasing. Despite high capacity in the market, we understand that insurers are beginning to have some success with modest rate increases and restrictions of cover, and that this could continue this year. This will be important for insurer profits, given that claims on renewables projects have also been increasing.

The types of claims that are particularly prevalent in renewables often relate to defective design and damage caused to structures by extreme weather conditions. One of the challenges for underwriters to contend with in 2020 is the speed at which new technologies are developed (for example larger wind turbines) and how these changes can affect the risk profile of the project.

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Financial institutions

By Matthew Wood

Key developments in 2019

As we foreshadowed in 2018, 2019 saw a sea change for financial services regulation. On 9 December 2019, the Senior Managers and Certification Regime (SMCR) replaced the Approved Persons Regime (APR) for authorised firms regulated solely by the Financial Conduct Authority (FCA). "Dual-regulated" institutions (including banks and insurers) were already subject to SMCR, but the extension presents compliance challenges for the 47,000 "solo-regulated" firms, which tend to be smaller and more diverse.

SMCR aims to strengthen market integrity by enabling firms and regulators to hold individuals to account. Its essence is therefore individual responsibility. SMCR has three core elements, the first being the Senior Management Functions (SMF) regime. This replaces the controlled functions regime and introduces a statutory duty of responsibility, which requires senior managers to take reasonable steps to prevent regulatory breaches from occurring or continuing.

Many SMFs will "map across" from the old regime, but the other two elements of SMCR may prove more burdensome, especially for smaller solo-regulated firms. The second element is the Certification Regime, which requires firms to assess and certify individuals who could potentially put the firm or its customers in "significant harm". The third element is the new Conduct Rules, which set out expected behaviours for almost all employees of authorised firms. Both require significant planning and investment in compliance processes, as well as staff training.

We are already seeing an increase in FCA enforcement investigations focusing on senior management responsibility, and we expect this trend to continue as SMCR becomes more embedded.

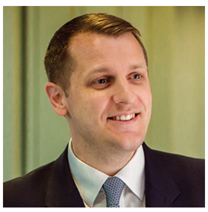
What to look out for in 2020

The FCA's guidance on the regulation of cryptocurrencies and other "cryptoassets", published in July 2019 following a six-month consultation, heralds increasing regulatory scrutiny in this area. In particular, the guidance emphasises that those dealing in more sophisticated cryptoassets should consider carefully whether they are carrying on regulated activities, which require FCA permissions.

The guidance distinguishes between three types of cryptoassets, namely exchange tokens, utility tokens and security tokens. Exchange tokens include cryptocurrencies such as Bitcoin, which serve as a means of exchange akin to traditional currency. Utility tokens grant access to a product or service – for example, a token issued by an online casino and used solely to play that casino's games. Exchange tokens, and most utility tokens, are not "specified investments" and fall outside the regulatory perimeter. A cryptocurrency exchange is therefore not carrying on a regulated activity by facilitating transactions in exchange tokens such as Bitcoin.

In contrast, security tokens are cryptoassets which are inside the regulatory perimeter because they share characteristics with traditional securities, and are therefore "specified investments". For example, a security token might entitle the holder to a proportion of the issuer's profits – resembling traditional shares in the issuer. Regulated activities involving security tokens are likely to require similar FCA permissions as if they involved traditional securities. For example, an exchange which facilitates trading of security tokens may require permission to "arrange deals in investments".

Whilst the FCA's guidance clarifies the position rather than making new rules, it highlights that the increasing sophistication of cryptoassets is well and truly on the regulator's radar. Firms and their insurers should also be aware of the incoming FCA-supervised anti-money laundering regime for UK cryptoasset businesses, which takes effect from 10 January 2020 and carries registration requirements.



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Financial professionals

By David Allinson

Key developments in 2019

Once again, defined benefit pension transfers dominated the landscape for financial professionals.

In 2019, the Financial Conduct Authority (FCA) completed an extensive survey of firms holding pension transfer permissions, with 3,015 firms responding to a data request. The results caused the FCA yet more cause for concern. One issue was the volume of transfers that have taken place; between April 2015 (the advent of Pension Freedoms) and September 2018 234,951 customers received advice, with 69 per cent being advised to transfer – a worry for the FCA given the starting assumption is that a transfer will be unsuitable for most. Furthermore, the sums involved are significant, with the average transfer value being £352,303 and a total sum transferred of £82.8 billion.

The FCA has now made further enquiries of firms where the potential for harm to clients exists. The increased pressure has led to some big players leaving the market and continues to cause headaches for remaining firms. What we don't know yet is how exactly the FCA will look to rectify the perceived issues; a heavy handed approach could lead to a massive burden on the Financial Services Compensation Scheme (FSCS) in circumstances where (at present at least) actual complaint volumes have been low as customers are presumably happy with the significant capital sums obtained.

As well as defined benefit pension transfers, claims against self-invested personal pension (SIPP) administrators and operators have continued to blossom, though many are still awaiting the outcome of the now well overdue decision in *Adams v Carey* (likely to be the first judgement ruling on SIPP operators' legal duties).

Finally, the rash of interest only mortgage claims pursued by ambulance chasing law firms continue to proliferate and will need careful and coordinated handling into next year.

What to look out for in 2020

2019 was the year in which the FCA published its finalised guidance on crypto assets, and scrutiny in this area is set to ramp up in 2020, as the FCA will become the anti-money laundering and countering terrorist financing supervisor for firms carrying on crypto asset activities from 10 January. The FCA is already part of the Cryptoassets taskforce, which also includes HM Treasury and the Bank of England.

The FCA's new role comes about as a consequence of increased concern about crypto assets being used to fund illicit activities; the Treasury has noted that the pseudo-anonymous nature of such assets (and their global reach) made it possible to obfuscate the source of funds, making them attractive to criminals. Beyond this, crypto assets are viewed by FCA as high risk and speculative.

From 10 January 2019 onwards, all businesses carrying on certain crypto asset activities need to be registered with the FCA, whose consultation on proposals for recovering the costs involved with their new role closed in December – we await the final rules in early 2020.

Such assets may appear attractive in times of flat growth but advisors should be aware that this is an area of regulation that is very much in its infancy. However, given the high risk nature of such assets, combined with the money laundering risk, we can expect a heavy degree of involvement from the regulator and the scope for claims here is potentially significant.

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General liability

By Jonathan Drake

Key developments in 2019

The calculation of a lump sum for future financial loss includes applying a discount rate which represents the rate of return that Claimants are expected to earn when investing it. The discount rate is intended to ensure that the opportunity to invest does not result in either over or under compensation, and assumes risk-averse investment.

In February 2017, the Lord Chancellor had changed the discount rate from 2.5% (the level at which it had stood since 2001) to minus 0.75%.

Last year we anticipated implementation in 2019 of a new discount rate applicable to future losses.

When the result of the further review arrived, it did so in an unexpected way. With effect from 5 August 2019 the discount rate was increased from the existing rate of minus 0.75% to minus 0.25% for England and Wales. However, on 27 September 2019 the Scottish Government Actuary announced that the discount rate in Scotland will remain unchanged at minus 0.75%.

The difference arises because the analysis used by the Scottish Government Actuary Department is based upon different investment and risk assumptions to those used when setting the rate in England and Wales.

The current actuary report for England and Wales envisages the possibility of more than one rate in the future, determined for example by the length of time of the anticipated loss. The Court also has an inherent power to apply different interest rates on a case by case basis.

However, we consider this further development to be unlikely because it would introduce unwanted further complexity and uncertainty into calculation of future loss. Since 2001 no Court is thought to have departed from the standard rate.

What to look out for in 2020

Assuming that the result of the December general election or continuing uncertainty over Brexit does not derail the whole process, the proposed increase to the small claims limit for injury casualty claims to £2,000 and increase for road traffic injury claims (other than pedestrians, cyclists, motorcyclists and horse riders) to £5,000 is expected to take place in April 2020.

At the same time claimants will be able to make a claim with insurers through an on-line portal. There will be a tariff for whiplash injury claims with a value of up to £2,000 and it will be mandatory to obtain a medical report before injury claims are settled.

All these proposed changes are subject to implementation by Regulations. There has already been some slippage in the timetable; the changes were originally anticipated to have been in place by now. The current political situation makes the timing and even the implementation of the proposed changes uncertain.

One of the consequences of the proposed increases to the small claims limit could be the use of Damages Based Agreements, which make a Claimant liable to pay his legal fees only if the claim is successful. Such agreements have been permitted since 1 April 2013 but have not been popular, and Claimants have preferred to use Conditional fee Agreements.

Proposals for potential reform to the Damages-Based Agreements Regulations 2013 have been with the Ministry of Justice for several months. One of the obstacles to developing the use of the Agreements appears to have been the absence of a uniform model Damages Based Agreement, but the existing Regulations are considered to be flawed. The anticipated increases to the small claims limit and the potential extension of fixed costs for claims other than personal injury might expedite the creation of a model agreement so that Damages Based Agreements are more widely used.

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Health and safety

By Mamata Dutta

Key developments in 2019

Last year, we mentioned that the Health and Safety Executive (HSE) would be focusing on mental health in 2019. The HSE highlight that one in four will suffer with a problem with their mental health at some point, and that stress is a major cause of sickness absence in the workplace at a cost of over £5 billion per year. According to the Labour Force Survey published on 30 October, 595,000 workers suffered from work-related stress, depression or anxiety in 2017/18, while 15.4 million working days were lost to these conditions. The total number of cases in 2018/19 was reported as 602,000. Given the significant impact that problems with mental health have on our day-to-day lives, the HSE's continued focus on this important topic has been welcomed.

Following on from the updated first aid guidance on the issue of mental health issued by the HSE at the end of 2018, in March 2019 they released a work book "Tackling work related stress using the Management Standards approach", designed to help employers assess the risks of their employees suffering stress at work and providing practical guidance. It forms part of a suite of practical guides and toolkits that the HSE has produced to help confront the issue of work related stress and promote the well-being of employees – all of which are available to download online from the HSE's website, free of charge.

What to look out for in 2020

Last year there were two high profile inquests into deaths caused by severe allergic reactions to food – Natasha Ednan-Laperouse, who suffered a fatal allergic reaction after eating a roll containing sesame seeds, and Owen Carey, whose allergy to dairy prompted a fatal reaction after he was served a chicken burger which contained buttermilk.

Following a campaign led by Natasha's parents, legislation officially known as the Food Information (Amendment) (England) Regulations 2019 was introduced on 5 September. The government has confirmed that 'Natasha's Law' will come into force in October 2021. It will require all businesses serving pre-packed food to ensure it has a list of all ingredients and allergens noted on a label which must be affixed to the product.

The Food Standards Agency (FSA) has already implemented a plan of improvements expected to modernise food regulation by 2020. This includes a plan to have online registration of all food businesses to assist their regulation by the relevant Local Authority. Specific to the death of Owen Carey, the FSA have also confirmed their intention to produce a simple aid memoire for Environmental Health Officers and Trading Standards Officers to assist in their regulation of food safety. They also intend to publish an updated version of "Safer Food Better Business" which will involve a review of allergen information. There will be a clear focus on the labelling of food allergens and the regulation of businesses in this area.

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Intellectual property

By Ciara Cullen and Josh Charalambous

Key developments in 2019

One of the most interesting IP decisions of the year came from the world of luxury beauty and retail. Charlotte Tilbury successfully sued Aldi, for copyright infringement in relation to look-alike make-up products.

Traditionally brands have relied upon trade mark and/or passing off actions to protect against look-alikes. A passing off case requires the brand to show that the copycat had made a misrepresentation as to the origin of the look-alike product, which causes (or is likely to cause) confusion to the average consumer. That was not the case here, as Aldi is open about its "like brands only cheaper" motto – nobody would have been confused thinking that the product (being sold at £4.99) was actually from Charlotte Tilbury.

Charlotte Tilbury therefore had to be creative. The lid of the Charlotte Tilbury palette contained an art-deco style starburst design, and there was a debossed design on the powder itself. Charlotte Tilbury progressed the claim as copyright infringement, alleging that the starburst design and the debossed design were artistic works and therefore protected automatically by copyright.

The Court agreed with Charlotte Tilbury and dismissed Aldi's counter-argument that the designs were too generic to attract copyright. Once copyright was deemed to subsist, it was simple for the Court to find that it had been copied – Aldi's designers admitted to having access to the Charlotte Tilbury designs and were unable to satisfy the Court that the similarities between the look-alike and the original were coincidental and a result of independent creations (ie not copied).

The case is important to brands looking to take-on copycats and/or fakes. Popular stores selling cheaper look-alikes can cause significant harm (monetary and reputational) to established and luxury brands. We expect to see an uplift in the number of copyright infringement claims being brought to combat look-alikes, together with an uplift in the use of the Shorter Trials Scheme which was implemented in this case.

What to look out for in 2020

We continue to await the final decision from the European Court of Justice (CJEU) in *Sky v SkyKick*. There was a time when it looked as though the UK could leave the EU without a Brexit deal, throwing into the air whether the CJEU would even deliver its decision to the UK Courts at all. The Attorney General's (AG's) Opinion, if followed, suggests that there could be significant ramifications for trade mark owners in 2020 – which will need to be navigated alongside the impact of Brexit.

The underlying case itself is an action by Sky alleging trade mark infringement against SkyKick (a global provider of cloud management software). SkyKick counterclaimed against Sky attacking the validity of Sky's trade marks on the basis that: (i) Sky's trade marks lacked the clarity and precision in terms of the specifications in which they were registered (eg a trade mark encompassing "computer software" was too broad); and (ii) Sky registered its trade marks in bad faith, because the specifications contained goods and services which were clearly never going to be utilised by Sky – the example frequently cited is the registration for cleaning products.

The AG Opinion has indicated that: (i) the trade marks did lack the clarity and precision required; and (ii) it can in certain circumstances be "*bad faith*" to register trade marks without any commercial logic or as part of a strategy to prevent third parties from using the mark.

The impact could be significant and see a number of brands' trade mark portfolios face validity challenges. In particular, we would recommend that Insurers offering pursuit cover take steps at the proposal stage to enquire as to which goods/services the marks are being used/have been used in, together with undertaking an assessment of the specificity of the specifications used.

We also expect that Brexit generally will have a significant impact on the licensing of trade marks and other IP rights. Specifically, parties may use Brexit as an excuse to get out of unfavourable licensing deals – if that trend does develop, it seems inevitable that contractual disputes will follow.

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International arbitration

By Jonathan Wood

Key developments in 2019

Technology in motion! As this is being written, the case of *Halliburton v Chubb* Insurance is being argued and aired via livestream direct from the Supreme Court where the Court is hearing submissions on whether and when an arbitrator should disclose multiple appointments. Watching by livestream in itself is an example of how the courts are adapting to and embracing technology. No longer do we have to queue to have our pockets turned out and our bags security checked to gain access as an observer to a hearing before the Supreme Court. It's all there at the flick of your mouse on the screen of your personal computer.

So what was the case about and why was it important to the insurance industry, and, perhaps more widely, as it affects London as a centre for international arbitration? It is all to do with the extent to which an arbitrator accepting multiple appointments gives rise to an appearance of bias on the part of the arbitrator and whether disclosure should be made in such circumstances.

The case itself arose out of the Deepwater Horizon incident. The court-appointed arbitrator accepted two appointments as Chubb's party-appointed arbitrator in relation to two policy coverage disputes. This was not disclosed to Halliburton. The scope of a duty of disclosure is controversial from a variety of standpoints. Multiple appointments are a feature of, for example, London Maritime Arbitration Association and commodity arbitrations.

There is a view that in an age of transparency, there is a need for more rigorous disclosure so as to preserve the integrity of the process which may deter overseas parties from selecting London as the seat for their arbitrations. This in turn may affect the approach to dispute resolution in international insurance and reinsurance policies. We now await what stance the Supreme Court will take on all of this. But, as a side comment, there is little likelihood of watching a commercial arbitration publicly by livestream, as confidentiality remains the major selling point for arbitration as an effective means of dispute resolution.

What to look out for in 2020

Diversity and "green awareness" are themes which are likely to dominate discussion about arbitration. There is a justified view that arbitrators are still of the "pale, male and stale" brigade. More needs to be done to improve the diversity of arbitral panels from different points of view – gender, ethnicity, race, religion as well as social background. At a time when diversity is increasingly an issue for the insurance market, so too does it have an impact on the selection of arbitrators; there are many diverse candidates available for selection, and yet we continue to see the widespread selection of male QC's and judges as arbitrators in insurance and reinsurance disputes.

As for "green awareness", the number of trees felled for the purposes of a major arbitration is mind boggling. Research is being conducted into this, and encouragement is being given to ways of reducing the carbon footprint of arbitration by the use of technology and more hearings by video link thereby reducing the need for both national and international travel. But it is the little things that count: abolishing the use of paper cups for coffee during a hearing might well be a good start.

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International property

By Hannah Ridzuan-Allen

Key developments in 2019

As predicted, the property and casualty market continued to experience rate increases in 2019. There was a slight acceleration in this trend as against the previous four quarters. Following large catastrophic losses in 2018, insurers withdrew capacity in geographical areas hit repeatedly by natural disasters. Underwriters also imposed significant rate increases on accounts which had experienced heavy losses.

Insurance linked security (ILS) structures remained a hot topic. Demonstrating their increasingly varied use, Pool Re launched the first cat bond to cover the risk of terrorism. Elsewhere in the world, IAG launched the first ILS bond in the Singaporean market. However, ILS investors suffered as a result of the large losses in 2017 and 2018, and likely as a result of this, the first quarter of 2019 was the second lowest for ILS uptake in the past eight years.

With awareness around the potential cyber risk loopholes in property policies having increased, insurers have moved to tighten their wordings. Property underwriters have not been offering non-damage cyber cover as standard. Where it is offered, it is for an additional premium. Pricing has faced some adjustment as further data on cyber losses and their quantum gradually becomes available.

Natural catastrophe losses for 2019 have come in below the yearly average. The hurricane season presented some "strange" conditions, with all but two of the Atlantic Ocean storms having been relatively weak and short-lived; Hurricane Dorian caused a historic tragedy in the Bahamas and Hurricane Lorenzo travelled the furthest east of any hurricane recorded at that strength. The key drivers of 2019's losses have been regional flooding and thunderstorms.

What to look out for in 2020

2020 is set to be an exciting year for technology in the property market. Following a number of years of investment by insurers, technologies are starting to have an impact on the day to day work of underwriters and claims teams.

Advances in hyperlocal weather analytics provide the opportunity for claims teams to gain a quick understanding of how likely insured properties are to be impacted by natural disasters and to plan and execute their response appropriately.

Drones are increasingly becoming the norm for carrying out property inspections. They allow entry into unstable structures and inspections of roofs and large items such as boilers without the construction of scaffolding and risks to workers. However, with several jurisdictions tightening their laws, this could put the brakes on drone use in 2020 as insurers must ensure that their use is compliant in different jurisdictions.

As cyber-attacks have become increasingly sophisticated, a number of insurers and start-ups have developed tools that assist with the modelling of the potential quantum involved in risks. These provide an opportunity for underwriters to back up their decisions in what is still a relatively new (but growing) market, and consider how to price cyber as an add-on to property policies.

Alongside these technological developments, we have seen optimism about a return to profitability in 2020. Rates are projected to continue to increase and, as 2019 was a relatively benign year for losses, we may see some returns after a challenging few years. That said, the property market is always at the mercy of the weather.

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Legal practices

By Simy Khanna

Key developments in 2019

It has been an exciting year for loss of chance in solicitors' claims. There have been two big judgments:

Perry –v- Raleys: The Claimant argued that, because of bad advice, he had lost his chance to pursue a claim for special damages in his personal injury claim. The solicitors argued that the Claimant did not qualify for special damages and so he had not been in a position to pursue that claim honestly.

The argument concerned the extent to which the Court could examine the merits of the underlying claim that Perry alleged he had lost the chance to bring. The Supreme Court decided that there is a burden of proof on a Claimant to demonstrate that the claim they would have brought would have been an honest one. A Claimant cannot succeed by showing that he would have brought a claim that would have been dishonest. A Court is entitled to determine that issue on a full forensic examination of the facts at trial.

Edwards and Hugh James: The Claimant had a potential claim for special damages. A medical report obtained at that time verified that. Due to the negligence of his solicitors, he failed to pursue that claim.

The Court rejected the claim against the solicitors on the basis of an expert's report in the professional negligence case which essentially said that there was no claim for special damages. The Claimant appealed, arguing that it was wrong to take account of the expert's evidence because it had not and could not have been available at the time of the notional trial date. The Court of Appeal reversed the decision. The key issue was not what the Claimant could prove now. Crucially, it is: *"what was the value of what he lost then"*.

The Court of Appeal judgment seems logical: what the Claimant is getting is damages for his loss of chance to pursue the original action. Taking account of developments after the notional trial date would be inconsistent with that.

The appeal to the Supreme Court was heard on 25 July 2019 and the judgment is awaited. This area of the law will continue to develop.

What to look out for in 2020

We anticipate that 2020 is going to be all about regulation. New SRA codes of conduct came into effect on 25 November 2019. The old Code has been split into two: the Code for Solicitors which addresses the expected standards of professionalism and the Code for Firms setting out the standards and business controls expected from firms. There are also new accounts rules.

Notwithstanding objections from the Law Society, solicitors are now also able to carry out 'non-reserved' legal work from within a business not regulated by a legal services regulator. They are also able to provide reserved legal services on a freelance basis. This change is aimed at allowing solicitors to work in more flexible ways and to allow clients to access solicitors without the extra costs imposed by a firm, but it may also lead to different tiers of solicitors operating under different requirements for professional indemnity insurance. This might result in confusion for the clients about the protections offered by the solicitor they instruct.

The new Codes include obligations on a solicitor to 'put matters right'. There is also an obligation to notify the client that they may have a claim against the firm. This is likely to be concerning to insurers.

The Codes have been streamlined and consolidated. They use much plainer English. However, there is a greater use of subjective words which we fear may lead to interpretational confusion. There is also far less actual guidance. We suspect that this may lead to compliance challenges.

A lot of work has already been done by firms to prepare but these are significant changes, the effects of which will be felt strongly over the coming years.

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Life sciences

By Peter Rudd Clarke

Key developments in 2019

Insurers in the UK took note of the headlines generated by opioids litigation in the United States. Towards the end of 2019, a first federal trial was abandoned as distributors and manufacturers came to a $260m settlement just hours before the trial was due to commence. It remains to be seen whether the remaining thousands of opioid lawsuits brought by states and local governments in the United States will proceed to trial or be resolved via negotiation.

Although not on the scale seen in the United States, the problems over opioid addiction in the UK are well documented. Opioid prescribing more than doubled in the period 1998 to 2018, as did the number of Britons taken to hospital after overdosing on opioid products. As the risks are understood better, so regulators have started to take action. The General Pharmaceutical Council in 2019 tightened guidelines relating to online prescribers. Also during 2019, an expert working group under the auspices of the Medicines and Healthcare products Regulatory Agency (MHRA) began considering steps to combat the escalating problems.

We have started to see claims arising from opioid use/over-use in the UK but it is not clear yet what the scale of litigation will be. In our view, "pinning the blame" on one component of the supply chain appears problematic, whether that is the manufacturer, distributor, prescribing clinician or dispensing pharmacist. Opioid products are regulated and widely accepted as the best medication option in certain circumstances. In any given case, the extent to which clinicians followed up with patients (particularly where online prescriptions are involved) and the extent to which manufacturers acted appropriately on performance data may vary and will be part of a complex wider picture.

Throughout 2020 the various entities in the supply chain, as well as their insurers, will continue to watch developments in the United States, as well as investigations such as the MHRA's, with interest.

What to look out for in 2020

As the public grows increasingly frustrated with difficulties in obtaining GP appointments, we expect telemedicine to become even more popular during 2020 and for there to be an increase in demand for insurers to cover such services.

People are becoming more accustomed to accessing health services remotely, at a time of their choosing, and paying for it.

The law governing telemedicine is derived from a patchwork of EU regulations, national laws and guidance published by regulators. Underwriters should scrutinise providers to ensure they are compliant.

Insurers of companies providing a telemedicine service, such as via a website, will want to check that companies adhere to the legislation governing the supply of medicines over the internet. Insurers of clinicians providing a telemedicine service, such as doctors contracted by a website provider, will want to ensure that they are compliant with their duties over remote consultations and the online prescribing of drugs.

Issues over online opioid prescribing illustrate the need for prescribers, website hosts and dispensing pharmacists to be alert to the particular challenges posed by online consultations and remote prescribing of drugs. The companies that get it right will tap into a growing market in 2020.

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Marine and shipping

By William Jones

Key developments in 2019

In our update last year we anticipated that 2019 would see a number of judgments under the Insurance Act 2015 concerning fair presentation and/or warranty breach. However, aside from a Scottish case on waiver, the courts are yet to provide any decision or guidance on the "new" insurance law rules.

That is not to say that there haven't been any cases of interest.

From a marine insurance law perspective, in 2019 the *Brillante Virtuoso* has continued to be the gift that keeps on giving. Following a 2015 High Court judgment concerning whether the vessel was a constructive total loss, and a 2016 High Court judgment concerning the assured shipowner's failure to disclose documents to underwriters, in 2019 the High Court has ruled that the motor tanker, *Brillante Virtuoso*, was scuttled by its owner.

Mr Justice Teare's judgment in the *Brillante Virtuoso* provides marine insurance lawyers and claims professionals with useful guidance on the legal tests for establishing "wilful misconduct" on the part of an insured. In addition, the judgment provides war risks underwriters with commentary on other, often associated, perils including piracy, persons acting maliciously, vandalism, sabotage, and capture/seizure.

Although cases of scuttling are, thankfully, rare, the *Brillante Virtuoso* judgment builds upon a body of reasonably recent case law in which the English High Court has found that an owner has deliberately connived to destroy its vessel, including The *Milasan* (2000) and The *Atlantik Confidence* (2016).

The key takeaway point from the *Brillante Virtuoso* judgment is that scuttling cases are heavily fact-dependant and require insurers to be able to provide the Court with a compelling narrative that supports a clear and irresistible finding that the owner wilfully damaged its own vessel.

What to look out for in 2020

The names *Yantian Express*, *APL Vancouver*, and *Grande America* (amongst others) are likely to cause some discomfort to cargo underwriters following a year in which the cargo market was hit with an increased number of substantial claims arising from ship fires.

The last year has seen an increase in both (i) the number of major fires on container ships, and (ii) the carrying capacity of container ships. These trends are not interdependent, as larger capacity ships are more likely to be carrying a consignment of mis-declared cargo (the source of many fires) and once a fire starts it is more difficult for the crew to extinguish. This is due to the crammed configuration of the containers, the height of the container towers, and the size of the ship.

As a result of the increased size of the ships, the salvage and GA costs associated with these fires have also increased. This is due to the requirement for specialist tugs, the scarcity of ports with sufficient capacity to berth the ships, and, due to difficulties faced in firefighting, the duration of the firefighting efforts (the *Maersk Honam* burned for over a month).

In an effort to tackle these increasing losses, and aside from investigating means of combatting cargo misdeclaration, the marine insurance industry has recognised a need to improve the standards for fire detection and firefighting on board container vessels. The International Union of Marine Underwriters (IUMI) has called on "*responsible authorities, class and relevant industry stakeholders engage in discussions on how to further improve the fire detection, protection and firefighting capabilities*".

During 2019 we expect to see discussion and engagement with the International Maritime Organization (IMO) concerning the adequacy of existing firefighting regulation, potentially culminating in an amendment to the international Safety of Life at Sea (SOLAS) Convention concerning shipowners' fire detection and firefighting obligations.

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Media

By Samantha Thompson

Key developments in 2019

On 12 June 2019, the Supreme Court handed down judgment in *Lachaux v Independent Print Ltd & Anor* determining, finally, the meaning of the serious harm threshold imported into defamation law by s1(1) Defamation Act 2013.

At first instance, the court found that s1(1) required claimants to prove on the balance of probabilities that a statement had caused or was likely to cause serious harm in order to establish defamation, meaning that the 2013 Act had effectively abolished the common law presumption of damage in libel. This was reversed by the Court of Appeal which instead found the threshold for serious harm had merely been raised by the 2013 Act from "substantial" to "serious", but the common law presumption remained intact.

The Supreme Court reversed the decision again (and for the last time) back in favour of defendants to defamation actions. It established that the question of whether or not a statement is defamatory is no longer established solely by reference to the meaning of the words and their tendency to damage the claimant's reputation. However, it remains open to the court to infer serious harm taking account of the circumstances of the case, including (but not limited to) the meaning of the words, the extent of publication, and the likelihood of the publication reaching people known to the claimant.

The upshot: claimants remain entitled to invite the court to infer serious harm with reference to the particular circumstances of the case. However, it is now much riskier to rely on inference. We are likely to see less defamation actions being brought in the absence of actual evidence demonstrating the extent of harm caused to reputation.

What to look out for in 2020

In March 2020 the Court of Appeal will hear the appeal of *ZXC v Bloomberg*. The case concerns an article published by Bloomberg about an investigation into the Claimant relating to fraud, bribery and corruption allegations. Significantly, no charges had been made against the Claimant at the time of publication.

At first instance it was found that publication of the article amounted to a misuse of the Claimant's private information. Damages and an injunction were awarded.

Permission to appeal was granted by the Court of Appeal on 20 June 2019. Bloomberg have been allowed to appeal on nine out of ten grounds including, importantly, a challenge to the judge's finding that there is a general rule that individuals under criminal investigations have a reasonable expectation of privacy in information relating to the investigation up to the point of charge. Bloomberg is also appealing the court's consideration of confidentiality in its assessment of the Claimant's privacy claim, as well as its ruling that the admittedly high public interest in the allegations of corruption had only an indirect bearing on the case.

This is the first time the Court of Appeal will determine a case related to privacy in criminal investigations since the landmark case of *Sir Cliff Richard v BBC*, which has had a significant chilling impact on the extent of detail reported in relation to criminal investigations.

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Medical malpractice

By Natalie Drew

Key developments in 2019

2019 saw Claimant solicitors seek to weaponise the GDPR in pursuit of medical malpractice claims. Almost all requests for medical records are now being framed as subject access requests, often also specifying that investigation documents should be included. This is a transparent attempt to seek information that will bolster their claim well in advance of the disclosure phase. Responses to such requests need to be carefully considered to ensure Insureds are complying with their legal obligations without prejudicing their position in any forthcoming claim. Requests that fall outside of the Claimant's personal data (such as internal policies) should be robustly denied.

Greater knowledge of consumer rights under the GDPR has led to a sharp increase in data breach claims against healthcare professionals and providers. Healthcare data is, by its very nature, sensitive and extremely personal and so Claimants will find it easy to argue that an unauthorised disclosure has caused them distress. In such cases the damages are unlikely to be high and so it is important any claims are disposed of efficiently to avoid costs on both sides becoming disproportionate.

The recent case of *Andrea Brown v Commissioner of Police of the Metropolis* has, however, brought welcome relief to Defendants in data breach claims. This was a mixed claim for both personal injury (psychiatric damage) and non-personal injury damages arising out of a data breach. The case provided judicial clarification for the first time that, where a claim for personal injury is unsuccessful, the Claimant is not entitled to Qualified One-way Costs Shifting protection in relation to the remainder of the claim; meaning the Defendant is entitled to seek its costs.

What to look out for in 2020

The issue of consent is one that has dominated the medical malpractice legal sphere over the last few years, with the 2015 case of *Montgomery v Lanarkshire Health Board* bringing the issue of informed consent to the fore. For medical practitioners, and their Insurers, allegations relating to consent (or the lack thereof) can be difficult to manage, and extremely difficult to defend (particularly if medical records are sparse).

Given this evolving and increasingly litigious topic, in 2020 we expect to see an increase in the use of visual and audio recordings of examinations and consultations, by both patients and clinicians. Perhaps this is of no surprise given the developments in other professions (including, for example, the use of cameras on police vests), and the recent case of *Mustard v Flowers & Ors*, where Master Davison opted to admit as evidence visual and audio recordings, which had been taken *covertly* by the Claimant when undergoing an expert examination.

But what does this mean for medical practitioners and their Insurers?

Well, firstly, whilst it may seem daunting, it's our view that, if done in the correct manner, such recordings could in fact be extremely helpful to clinicians defending a claim based on consent. Currently, a consent claim generally has to be considered on the basis of relatively scant medical records, and the parties' recollection of events. If visual and audio evidence, which captures what the practitioner told the patient (word for word) was available, the position would become much clearer, much earlier on, meaning any consent claim could be managed accordingly.

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Miscellaneous professional indemnity

By Claire Revell

Key developments in 2019

Miscellaneous professional indemnity remains a difficult category in which to identify sector wide trends; the inherent nature of the class is that it covers a disparate range of professionals. Nevertheless, last year we predicted that the class would refine itself into subclasses (which would then arguably no longer be 'miscellaneous', but rather emerging professions). One such class we foresaw was agriculture. In fact, whilst agriculture continues to evolve, it is equine which has emerged as a big risk area.

There is no real definition as to what equine entails save that, naturally, it must relate to horses. However, with an estimated 1.8 million horse riders (and rising) in the UK, it is perhaps unsurprising that equine claims are increasing. Claims arise from many aspects of horse ownership and riding, such as personal injury, misrepresentation arising from the sale and purchase of horses, doping, stable management and damage to property. We also see claims from the care of horses, both in stables and riding schools.

With many animal related claims, and particularly those arising from personal injury and damage to property, essentially amounting to strict liability (see *Mirvahedy v Henley*), there is plenty of potential for claims against horse owners and riders, and plenty of scope for insurers to smell out an opportunity.

What to look out for in 2020

One current area of business that will continue to attract attention in 2020 is claims against Approved Inspectors i.e. inspectors authorised by Construction Industry Council Approved Inspectors Register (CICAIR) to carry out the inspection of plans and building work. Once virtually immune from harm due to their employ by the local authority, Approved Inspectors are increasingly privately employed and, following the events at Grenfell, have attracted attention. The Hackitt Review recommended the restriction of their role, albeit this was strongly resisted by the Approved Inspector community.

However the Courts have, this year, clarified the duties owed by Approved Inspectors. The case of *Heron's Court v NHBC Building Control Services Ltd & others* confirms that they do not owe duties to lessees under the Defective Premises Act. This has provided welcome clarification and we anticipate will prevent an increase in claims. The case established that the essential function of the Approved Inspector is to certify whether the design or construction is lawful in a building sense, and not to check whether the work was done in a workmanlike or professional manner with proper materials so that the dwelling would be fit for habitation when completed (which duty still lies with other construction professionals).

However, it will be interesting to see what happens in 2020. Contractors and insured professionals have looked to recover sums paid out in claims, and it is possible that Approved Inspectors will continue to be the target of recovery claims in certain (albeit more limited) circumstances. This is therefore arguably an emerging class of risk in its own right, rather than merely a miscellaneous risk.

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Pensions

By George Smith

Key developments in 2019

Operators of self-invested personal pensions (SIPPs) continued to face significant challenges in 2019.

FOS complaints data demonstrates that SIPP complaints have grown rapidly over the last ten years, from fewer than 400 complaints in 2008/2009 to almost 4000 in 2018/2019. Interim data suggests that complaint numbers for 2019/2020 are likely to remain at this high level. We have also seen similarly high increases in civil claims.

In these difficult conditions several SIPP operators ceased to trade in 2019, which led to the Financial Services Compensation Scheme (FSCS) awarding compensation to SIPP members. This may well lead to the FSCS pursuing recoveries against insurers in due course.

Berkeley Burke was amongst the operators entering administration last year, resulting in its appeal of its failed judicial review of an adverse FOS decision falling away. This leaves SIPP operators in a position where they are likely to struggle to defend FOS complaints unless they can establish that they conducted appropriate due diligence. The FCA then compounded SIPP operator concerns by immediately asking them to consider whether the outcome of the Berkeley Burke case called into question their ability to continue to trade. The FOS also reminded firms that where FOS decisions went against them they should consider proactively contacting customers who have not complained, to give them an opportunity to obtain redress.

SIPPs are likely to remain a topical issue in 2020 as we await the delayed judgment in the case of *Adams v Carey Pensions*, where the Court is considering SIPP operators' legal duties. Many SIPP operators are also seeing complaints relating to the Elysian Fuels investment, alleged to have been a tax-avoidance scheme involving the sale of shares by members into their SIPPs.

What to look out for in 2020

Over the coming year we can expect to see yet more regulatory scrutiny on pensions.

Master Trusts now have to be authorised by the Pensions Regulator (tPR) and over the last year 37 schemes have obtained authorisation, with many other providers dropping out of the market. tPR has made clear that Master Trusts, which hold 16 million pension pots, will be heavily supervised, with a higher intensity of supervision for those schemes presenting a higher risk due to size, complexity and previous record. This will be of interest to the insurers of Master Trust trustees but the high standards to which tPR intends to hold Master Trust trustees will no doubt have an influence on the wider pension trustee market in due course.

The government also demonstrated a commitment to increased regulatory scrutiny for pensions by introducing the Pension Schemes Bill in the recent Queen's Speech, which introduced major new powers for tPR. This proposed: the introduction of new criminal offences and civil penalties around avoiding employer debts and risking accrued benefits; further grounds for the issuing of Contribution Notices; and new information gathering powers. Whether these proposals become law will depend upon the outcome of the general election but they are symptomatic of a wider picture of increased regulation of pensions and are likely to have broad cross-party support.

2020 will also see further judicial guidance on the equalisation of guaranteed minimum pension (GMP) benefits, expected following the Court's scheduled further hearing in *Lloyds Banking Group Pensions Trustees Ltd v Lloyds Bank plc and others*, in April/May 2020. Many schemes were left in limbo by the Court's initial ruling in October 2018, which held that schemes have an obligation to equalise GMPs but left unanswered a number of related practical questions.

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Political risk and trade credit

By Paul Baker

Key developments in 2019

2019 has seen an increasing shift in the geo-political landscape. Traditional alliances have been stretched, arguably to a greater extent than at any point since the second-world war.

Turkey's incursion into Syria in October 2019 was decried by its NATO allies, although Turkey's actions are reported to have been predicated on a telephone call with the US President. The fall-out from this incursion continues, with Turkey's purchase of the S-400 surface to air missile system from Russia perhaps signalling a potential willingness to form closer ties with the Putin regime. This is just one example of the shifting sands of international diplomacy. Uncertainty as to the political alliances of a particular state also gives rise to uncertainty as to that State's approach to private investors. These uncertain times can give reason (and headaches) for underwriters to reconsider the rating (and pricing) of country risk in states previously considered not to represent a significant issue from a political risk insurance perspective.

Similarly, escalating tensions in the Middle-East, including proxy wars in Yemen and Syria, appear to have spilled out into direct attacks on infrastructure. In September 2019, drones were used to attack the state-owned Aramco oil processing facilities in Abqiq and Khyrais in eastern Saudi Arabia. While the Houthi movement in Yemen claimed responsibility – linking the attack to the Saudi-led coalition's intervention in Yemen – Saudi Arabia and the United States asserted that Iran was directly behind the attack. Meanwhile, France, Germany and the UK jointly asserted that Iran bears responsibility for the attack.

This is just a single example of how geo-political factors can significantly impact political risk, war and terrorism cover and/or exclusions. In the Aramco facility scenario, issues such as whether Saudi Arabia is at war with either (i) the Houthis in Yemen and/or (ii) Iran would require consideration, together with whether or not the attack could be considered Terrorism on the basis of its 'standard' definition in many policies. Perhaps regrettably, it is all too easy to see these sorts of issues continuing to trouble claims determinations in the short to medium term.

What to look out for in 2020

Two significant events are due to take place in 2020 – the UK's long-delayed departure from the European Union (albeit this is still somewhat uncertain) and the US presidential election. Both events have the potential to significantly impact upon the global economy.

While the current (at the time of writing) UK government has negotiated a withdrawal agreement that provides for a transitional period, the deadline in place to agree an EU-UK free trade deal is December 2020. This appears incredibly tight considering the time it normally takes parties to agree such wide-ranging economic treaties. As such, from a UK/EU-domiciled company perspective, the Brexit uncertainty will not stop with departure.

In July 2019, UK company insolvencies rose to a five-year high in what the FT described as a 'possible sign of Brexit-related political uncertainty weighing on business'. Given the coming year's likely negotiations, businesses are unlikely to see this uncertainty yield.

Similarly, the US presidential election has the potential to significantly impact the global economy. The US/China trade war shows no sign of abating and could be used in the context of President Trump's re-election campaign – by achieving a deal to demonstrate the President's oft-touting deal-making abilities or continuing the fight in order to maintain the 'America First' approach. Either way, this also creates financial uncertainty.

Paradoxically for any insurance market, uncertainty is to be avoided if possible. This is especially true of the trade credit market. Financial institutions seeking cover will, naturally, wish to ensure that their own due diligence on obligors is thorough. However, given continuing pressures on insurer protections in wordings, trade credit insurers will likely need to be exceedingly vigilant on the financials and related risk factors of the companies against whom they are taking the credit risk.

With continued talk of the dark clouds of another financial crash on the horizon, trade credit insurers will want to ensure that their foundations are as secure as possible. Given the above, this could be easier said than done.

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Power

By Hugh Thomas

Key developments in 2019

Only four years after the US signed the Paris Agreement (along with 194 other nations), President Trump announced in October his intention to withdraw the country from the treaty. This is another move intended to meet his pledge of stimulating the US energy industry, particularly US coal.

However, a free market economy is proving that just because Trump digs coal it doesn't necessarily follow that the industry will pick up their shovels and follow suit. To a large extent coal remains financially unattractive compared to lower-cost power sources including natural gas and renewables. In the US at least, power companies continue to reduce their coal consumption with coal-fired plants being retired or switched over to natural gas.

Those companies that continue to burn coal have an increasingly smaller pool of carriers willing to cover their operations. The US insurer Chubb announced this year that it will not sell new policies to companies which build or operate coal-powered plants, or those that generate more than 30% of their revenue from coal mining or supplying coal-fired electricity.

Chubb follow a number of large European carriers who implemented similar policies last year. Around a third of the global reinsurance market has now restricted its cover for coal. This year Zurich took its commitment to a low-carbon future one step further by becoming the first insurance company to sign the Business Ambition for 1.5% Pledge aimed at limiting global temperature increases to 1.5% above pre-industrial levels by 2030.

What to look out for in 2020

The International Energy Agency (IEA) predicts that global supplies of renewable electricity could expand by 50% in the next five years. The higher forecasts are driven by falling technology costs and more direct governmental policies. The predominant renewable sources behind these forecasts are wind and solar. The IEA points to the enormous potential of offshore wind as turbines grow in size and efficiency and as the next generation of floating turbines capable of operating in deeper waters come on-stream. The IEA predicts that the offshore wind industry will be worth £780bn in the next 20 years.

As far as solar infrastructure projects are concerned, the $20bn Sun Cable project was announced in 2019. It promises to build the world's largest solar farm in Australia's Northern Territory. The majority of the electricity produced will be transported to Singapore via a high-voltage direct-current submarine cable which will run for 3,800km weaving its way around the Indonesian archipelago. It aims to provide one-fifth of Singapore's electricity needs.

Whatever the power source, the industry must remain alive to cyber threats. A report published by Siemens and the Ponemon Institute notes that the risk may be worsening. Of the utility professionals consulted, 56% reported at least one shutdown or operational data loss per year, and 25% report having been impacted by mega attacks, which are frequently aided with expertise developed by nation-state actors. As we noted last year, organisations require fully integrated, comprehensive plans and frameworks to address these risks.

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Procedure, damages and costs

By Aimee Talbot

Key developments in 2019

Practitioners are grappling with the new disclosure pilot (in force on 1 January 2019) and discovering that perhaps unsurprisingly, it has not yet led to a reduction in costs, but rather to further front-loading of costs – another reason to engage in Alternative Dispute Resolution (ADR) at an early stage. The question whether the courts can compel parties to engage in ADR is once again in issue.

The Court of Appeal in *Lomax v Lomax* held that the court could compel an unwilling party to engage in Early Neutral Evaluation (ENE) without both parties' consent. ENE is a little-used form of ADR involving the appointment of an independent evaluator (who can be a judge; not the one who hears the trial) to give the parties an assessment of the merits of the case. The evaluator does not decide the case, but gives the parties an objective view of the strengths and weaknesses of each case to encourage settlement.

The prevailing view, following the seminal Court of Appeal decision in *Halsey v Milton Keynes NHS Trust*, is that the court could not force unwilling parties to engage in ADR. The judge at first instance in *Lomax* (an Inheritance Act dispute) followed this approach but suggested that the Civil Procedure Rules Committee (CPRC) clarify the rules on this point. The CPRC considered that the Civil Procedure Rules (CPR) did not require clarification (a conclusion with which the Court of Appeal agreed as it considered that the CPR do permit the court to order an ENE in the absence of consent), but have asked the Civil Justice Council to consider the issue further. Watch this space.

In the meantime, defendants should consider whether ENE can be used to their advantage to force claimants to face up to weaknesses in their cases and, therefore, accept a reasonable settlement. In cases where the defendant is exposed, it will be difficult to resist submitting to ENE if the claim is in litigation and the claimant insists. Consider settlement before the first CMC to avoid the court having the chance to impose ENE and alert the claimant to the weaknesses in the defendant's case.

What to look out for in 2020

The Commercial Court working group considering reform of the rules on witness evidence received about 1,000 responses to their consultation and has split into two sub-groups to examine the results before publishing their first report.

The aim of the review is to try to address criticism that witness statements are an expensive part of the litigation process which often result in lengthy, carefully crafted documents in the words of the lawyers, rather than in the client's own words. Commentators suggested this could be addressed by the courts simply taking a stricter approach to enforcing the current rules and the courts have taken up the mantle.

In *Cathay Pacific Airlines Ltd v Lufthansa Technik AG*, Mr Kimbell QC ordered the parties to identify in their pleadings the extent to which they proposed to rely on witness evidence, but this direction was apparently unwelcome as the parties asked him to reconsider. The judge referenced the working group and concluded that there was no reason why the court ought not to take steps to enforce the existing rules. He considered that, as the parties' relationship had spanned a long period (10 years) and there was a large amount of documentation, there was a real risk of witness statements being served which contained a lengthy and unnecessary commentary on documents. He therefore adopted the approach of Sir Rupert Jackson requiring the parties to identify the factual witnesses they intend to call and which of the pleaded facts the various witnesses will prove. In practice, this involves filing an annotated version of the parties' statement of case indicating where witness evidence will be relied upon to prove a particular fact.

This approach is generally to be encouraged as, if the parties comply with the existing rules, the costs of preparing witness statements are likely to be reduced. However, for defendants, this practice, if adopted more widely, may result in costs that would ordinarily be incurred at a later stage being brought forward to the CMC stage, providing a further incentive to settle early.

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Product liability

By Peter Rudd-Clarke

Key developments in 2019

2019 saw the food industry grappling with the challenges posed by allergies as food recalls relating to allergens jumped by 20%.

Whilst deaths from allergic reactions to food products are, thankfully, extremely rare, a combination of media interest and Government intervention is driving demand from the industry for enhanced product liability and product recall cover.

Allergy recalls impacted all of the major supermarkets in the UK in 2019, with withdrawn products ranging from soup and nuts to beer and ice-cream.

Industry is increasingly aware of the costs posed by injuries or death due to serious allergic reactions - including reputational damage, litigation and regulatory investigations. By comparison, the costs of recalling a product - involving legal fees, collection and destruction of the product, advertising and communications - can seem to be money well spent.

"Natasha's Law", named after the teenager who tragically died after eating a baguette from a sandwich chain that contained undeclared sesame, will require all businesses that sell food to print a full list of ingredients on pre-packaged food from October 2021. Whilst the new law does not take effect until next year, it is clear that 2019 was a year in which the food industry, buffeted by regulatory and media scrutiny, focused on the risks associated with allergens.

What to look out for in 2020

Claimant law firms in the UK have picked up on well-publicised litigation in the United States concerning e-cigarettes. Whilst we expect claimant law firms to make a push to sign up clients in 2020, we expect that litigation over these products is unlikely to succeed.

Litigation in the United States has been framed as personal injury cases where addictive products have led to strokes, seizures and respiratory problems. Such claims would be less likely get off the ground in this jurisdiction, for a number of reasons, including:

- Manufacturers here can rely upon recent judgments in which the courts have found in favour of manufacturers of highly regulated products. A point emphasised by the courts is that a product is less likely to be found to be defective if it is compliant with regulations designed to make products safe. E-cigarettes fall into this category as they are regulated under either the Tobacco Products Directive or, depending on the manufacturer's intended usage, under regulations concerning medicinal products.
- The body of scientific opinion suggests that manufacturers could deploy a successful "risk v benefit" argument that e-cigarettes promote discontinuance of smoking amongst the population as a whole. This supports the argument that e-cigarettes meet the standard set out in consumer protection legislation.
- Claimant law firms may struggle to present data as evidence of wide-spread injury attributed to manufacturers of e-cigarettes (as opposed to other factors). The recent metal-on-metal hip litigation (in which manufacturers were successful) serves as a warning to claimant lawyers tempted to bring claims citing scientific opinion that is based on unreliable data that does not stand up to judicial scrutiny.

If claimant law firms persist in bringing litigation during 2020 concerning e-cigarettes, we can expect manufacturers and their insurers to present robust defence arguments based on scientific data and recent case law concerning regulated products.

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Property and business interuption

By Christopher Neilson

Key developments in 2019

The decision of *Young v Royal and Sun Alliance plc* is the first to consider the duty to make a fair presentation of the risk under s.3(1) of the Insurance Act 2015 (the Act). It involved a claim for £7.2 million arising out of a fire at the Insured's property.

Insurers sought to avoid the policy for non-disclosure of the claimant's involvement in four insolvent companies. Insurers argued that the Insured had incorrectly answered the moral hazard questions in the market presentation (prepared by the broker), giving rise to the non-disclosure.

The Insured argued:

- that it had correctly answered the question; and/or,
- in a subsequent email, Insurers had waived disclosure of the information by restricting their questions to insolvencies and bankruptcies of the 'Insured' only which would not include insolvency of other companies.

The Court found for Insurers on the question of waiver and, in doing so, confirmed that the Act did not change the law on waiver. In this case, Insurers' email was a confirmation of the representations made in the market presentation which were incorrect. It was not a question seeking further information or a limiting question waiving matters outside the scope of the question.

The Court warned that to 'uncritically' interpret Insurers' responses to a presentation as enquiries defining or limiting the scope of what Insurers consider are material would be counter to the aim of the Act to simplify the process of presenting a risk. To do so would lead to Insurers having to ask further questions to ensure no waiver point could be argued.

What to look out for in 2020

The Court of Appeal will hear the appeal of *Sartex Quilts & Textiles Limited v Endurance Corporate Capital Limited*.

The claim arises out of a fire in 2011 which destroyed the Insured's manufacturing premises. The policy provisions provided for payment on a reinstatement basis if those costs have been incurred. If not, the Insured was entitled (under the Insuring Clause) to be indemnified against loss or destruction or damage to the property. Insurers and the Insured accepted that this permits payment on a reinstatement or market value basis.

Insurers made a payment of £2,141,527 on a market value basis. The Insured claimed that it was entitled to receive an indemnity on a reinstatement basis. Insurers accepted that this could be the case if it reflected the Insured's actual loss. Therefore, reinstatement would only be appropriate if the Insured intended to reinstate the property.

Insurers argued that the Insured did not have a genuine and fixed intention to reinstate the premises. It had been eight years since the fire and the Insured had considered other premises. On that basis, it should not be paid any further sums.

The Court held that the Insured was entitled to receive an indemnity on the reinstatement basis. The first area of attention was the position at the time and immediately before the fire. At this point, the Insured had intended to continue its business at the premises. While subsequent events were, and must be, looked at to ensure the Insured was not overcompensated, the Court found that exploring different options had only confirmed to the Insured that reinstating the premises would be the best option. The Insured was awarded an additional £1.3 million.

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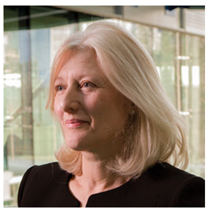

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Regulatory

By Lauren Murphy

Key developments in 2019

2019 marked a significant year for regulatory developments relevant to the insurance industry. Building on the themes and more prescriptive regulation introduced by the insurance distribution directive in 2018, and alongside work in other key areas such as Brexit, regulators have been focusing on value and governance in the distribution chain.

The Spring publication of the Financial Conduct Authority's (FCA) General Insurance Distribution Chain Thematic Review adopted a critical tone, with the regulator noting that it was "extremely disappointed", given the prior focus on third party governance and oversight, and warning that newly introduced rules, Senior Managers and Certification Regime (SM&CR) and other initiatives will help it take a more interventionist approach .

Evidence of this included the £30 million fine levied against Standard Life for failures related to the sale of annuities.

The FCA emphasised the same themes in its Business Plan 2019/2020 and its General Insurance Values consultation. Lloyd's has also announced a number of initiatives following similar themes including its acquisition costs review and its new approach on third party oversight.

To respond to these developments, firms should focus particularly on product governance and how they are managing their oversight of third parties. Insurers, and brokers acting as manufacturers, should ensure that they have up to date policies and processes to identify vulnerable customers and protect their interests and understand the role of other parties in the distribution chain. Given the FCA's concerns and recent enforcement actions confirming that insurers will be held responsible for outsourced functions, insurers should also ensure that they have effective systems and controls in place.

What to look out for in 2020

Expect continued scrutiny from the regulators on value, governance and remuneration.

The 'value' theme will continue through the FCA's and Prudential Regulation Authority's (PRA) planned review of life insurers' outsourcing arrangements, and the assessment of cloud infrastructure used by PRA regulated firms. The FCA is expected to have a particularly busy year in 2020. It is scheduled to carry out a second review following its 2017 Assessing Suitability Review and expects to publish a report reviewing the impact of its measures in relation to mis-sold payment protection insurance (PPI).

The year should see the culmination the FCA's work on value measures reporting in early 2020. It has, so far, put in place four pilots and is likely to propose additional requirements for firms to use value measures data as part of their monitoring and governance of insurance products. The regulator hopes that, by publishing this data, market transparency and competition will be improved, as well as providing an additional supervision tool. Accordingly, insurers should prepare to submit data on how customers use their products and whether consumers are satisfied with them.

At Lloyd's, its Strategy 2018-2020 articulates that, by the end of 2020, it intends to have explored differing distribution channel options that reduce the market's overall expense ratio. Jon Hancock, Lloyd's Performance Management Director, has said that Lloyd's will demand to see more progress on expense ratio reduction during the 2020 planning process.

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Restructuring and insolvency

By Vanessa Beazley

Key developments in 2019

In one of the leading insurance insolvency and restructuring cases of 2019, Ballantyne Re, plc (Ballantyne) used an Irish scheme of arrangement to restructure its reinsurance obligations and outstanding indebtedness (the Scheme).

Ballantyne was an Irish special purpose vehicle formed to enter into and perform a reinsurance agreement in relation to a defined book of life insurance policies issued in the United States.

RPC advised one of the key creditors under the Scheme, enabling the Scheme to smoothly progress through to sanction and implementation.

The use of English schemes of arrangement to carry out restructurings in the insurance run-off field is, of course, well established. The Ballantyne Scheme is an example of the development and use of schemes in jurisdictions with similar restructuring frameworks outside of the UK.

It remains to be seen if this trend develops further in light of Brexit, particularly with progress being made on the long-mooted Dutch scheme equivalent. However, in the short term, we expect that the UK will continue to be the preferred jurisdiction for complex international insurance restructurings, due to its well-developed jurisprudence and knowledgeable and experienced judiciary. UK lawyers can also look forward to continued involvement in overseas schemes, in which the import of their knowledge and experience is likely to be valuable.

What to look out for in 2020

Having seen, in readiness for Brexit, a number of large corporate groups relocate their head offices to Europe, especially Luxembourg, we believe that restructuring will continue apace.

Run-off consolidations will increasingly utilise the laws and regulations of the jurisdictions where the risks are located outside the UK by setting up subsidiaries in the target jurisdiction in order to run-off the business in a process of ongoing commutation. This process will complement the scheme of arrangement process which can be used in the UK and certain other jurisdictions permitting a similar process (eg off shore jurisdictions, Singapore and in the future, The Netherlands) where finality solutions are needed, ie, lump sum payments of claims under the cram-down provisions of a scheme.

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Surveyors

By Felicity Strong

Key developments in 2019

The recent unreported case of *Ryb v Conway Chartered Surveyors* highlights the importance for surveyors in being able to recognise Japanese Knotweed. In this case, the surveyor, carrying out a building survey, advised that the property was in an excellent condition. The purchaser, Mr Ryb, subsequently identified Japanese Knotweed in the garden and paid some £10,000 for it to be removed. He then brought a claim in negligence against the surveyors and was awarded £50,000 in damages, including for diminution in value.

Importantly, the case indicates that a surveyor's duty of care may extend to cover the grounds of a property as well as the property itself. Surveyors should ensure they have undergone sufficient training so that they can competently recognise Japanese Knotweed. Further, having not taken any photographs of the garden, the surveyor had no evidence with which to support an argument that the plant was not clearly visible – another reminder of the importance of keeping adequate photographs and notes of any inspection.

Perhaps most interestingly, in arriving at a figure for diminution in value, the Judge applied a number of elements to establish the impact the plant would have on market value of the property, including: desirability of the property (generally the more desirable, the lower the impact); use of the affected land; and risk of spread.

The Royal Institution of Chartered Surveyors (RICS) is due to consult on an amended guidance note for surveyors in early 2020. It has also produced a new Home Survey Standard, which was launched on 18 November 2019 and which comes into force in April 2020, to give greater clarity to all RICS surveyors as to what they should cover in their surveys and in their terms and conditions. It will be interesting to see what effect these two developments have on the number and nature of claims faced by surveyors relating to Japanese Knotweed. If they follow the guidance, it is hoped that surveyors should have a robust defence in the event that any claim is made.

What to look out for in 2020

Whilst we await the outcome of the RICS's consultation on its new guidance note on Japanese Knotweed, another 'one to watch' in 2020 is the potential for an increase in claims arising from peer to peer lending.

The difficulties in accessing finance since the economic crisis, and the reduced number of lenders willing to make loans at a high loan to value ratio has led, in recent years, to a rise in peer to peer lending, providing access to finance for borrowers without going to the bank. Significantly, many of these peer to peer loans are at the 'subprime' end of the market. Unsurprisingly, this has led to a concern amongst surveyors and their professional indemnity insurers that their valuation reports and surveys could be relied on by multiple investors in the particular lending scheme, with whom the surveyor has had little or no contact, thereby leading to multiple claims arising from one report.

As always, surveyors should keep the scope of any standard reliance clause used in their reports under close review and as limited as possible.

Although prudent for Insurers to keep an eye on any such development, were multiple claims to be brought against a surveyor arising out of just one report, we anticipate that the courts would apply the doctrine of reflective loss, to prevent the surveyors facing the risk of liability to multiple parties, adopting the same approach as the Court of Appeal did in the case of *Titan v Colliers*, in connection with securitised lending.

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Technology and cyber

By Bethan Griffiths

Key developments in 2019

In 2019 we expected to see the ICO catch up on data breaches reported under the new GDPR regime that came into force in July 2018. The ICO reported an unprecedented year in 2018/2019 with 13,840 personal data breach reports, an increase from 3,311 in 2017-18. This demonstrates the increased public awareness of data protection and aligns with the increased onus on organisations to be proactive in their approach to data processing. However, the ICO also closed 12,385 of these reports without any further action. This was frequently the result of the measures already in place or being taken as a result of the breach which highlights the importance of the initial breach response approach.

We saw an increased number of personal data breaches arising out of cyber incidents. The ICO received around 2,500 cyber security incident reports during 2018-19 with 44% of those incidents being the result of phishing attacks. This accords with the types of cases handled through our ReSecure breach response service. Recent reports from the Anti-Phishing Working Group also recorded a three-year peak in phishing attacks during 2019.

With the ICO's increased regulatory powers, it is ever more important for organisations to implement adequate security measures to try to prevent these attacks. Measures can include using multi factor authentication, rule alerts, suitable firewalls and e-mail scans. Also, the importance of training for staff can never be underestimated as it is the human element of these attacks which often makes them so successful.

We have also seen record breaking ICO fines. While our experience has tended to be that the ICO takes a reasonable approach in investigating breaches generally, the fines are a reminder of the teeth that the ICO has, where it chooses to use them.

What to look out for in 2020

The ICO are preparing for 2020 with an increase in their workforce. In 2019 this increased 40% from around 500 to around 700 permanent staff. This is expected to increase to around 825 by 2021 with a focus on the appointment of skilled staff able to deal with a wide range of technology issues and developments. This is in line with the ICO's Technology Policy and Innovation Directorate which is aimed at working closely and collaboratively with the technology industry as it influences the data protection landscape. It is yet to be seen how this will affect the ICO's approach to cyber breaches and technology implementation. There is expected to be a closer working relationship with the National Crime Agency (NCA) and National Cyber Security Centre (NCSC) as more cyber incidents are reported.

This setting could well result in an increase in data breach litigation. On 4th October 2019, the High Court granted a Group Litigation Order paving the way for possible mass legal action by British Airways customers as a result of their data breach.

2020 will also see the Supreme Court review the Court of Appeal decision in *WM Morrison Supermarkets Plc*. The Court is being urged to overturn the ruling that found Morrisons to be vicariously liable for a data breach carried out by a disgruntled employee. The outcome of this decision will have significant implications for organisations processing personal data. It has also highlighted the growing potential exposures for data breaches as well as the increased importance of cyber insurance to cover these eventualities.

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Asia and Australia

By Rebecca Wong

Key developments in 2019

Regulatory

On 23 September 2019, the Hong Kong Insurance Authority (IA) took over as the sole regulator of insurance intermediaries in Hong Kong. Insurers and intermediaries have been investing heavily into compliance with the new statutory regime, pursuant to which the IA became responsible for setting licensing requirements, supervising insurance intermediaries' compliance with relevant legislation and regulations, handling and investigating complaints brought against intermediaries and taking disciplinary action as required. In October 2019, the IA granted its first virtual general insurance licence to Avo Insurance, a digital insurer which sells its products online without the use of agents or brokers.

In Australia, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry released its long-awaited final report on 4 February 2019. In late 2017, the Royal Commission was tasked with investigating whether the conduct of financial services entities fell below industry standards. The Commission received over 10,000 public submissions and conducted public hearings spanning 68 days. The final report observed that existing legislation was not being enforced, made 24 separate referrals to regulators for potential prosecution and set out 76 recommendations. Notable recommendations included extending the practice of holding individuals within an organisation accountable for their division/product line to all regulated financial institutions, including insurance and superannuation.

In July 2019, the China Banking and Insurance Regulatory Commission unveiled a series of measures aimed at opening up the country's financial system. These included removing restrictions requiring insurance companies to have at least 30 years' history before they can apply to enter the Chinese market and clearing the way for foreign investors to hold majority stakes in insurance companies. On 14 November 2019, Allianz (China) Insurance Holding Company Limited received approval from the Commission to become the first wholly owned insurance holding company by a foreign insurer.

Natural Catastrophes

The region experienced a series of further natural disasters and extreme weather events throughout 2019. India received its heaviest monsoon rainfall in 25 years between June and October, estimated to have claimed over 1,850 lives and caused losses exceeding USD10 billion. Rainforest blazes in Sumatra and Borneo islands not only forced the cancellation of hundreds of flights, but also caused a minor diplomatic row with neighbouring Malaysia as toxic smog from forest fires dispersed across the region.

More recently, Japan was hit by two destructive typhoons (Typhoon Faxai and Typhoon Hagibis) and a magnitude 5.7 earthquake in the space of just six weeks. Typhoon Hagibis is considered the strongest tropical storm to have hit Japan in more than six decades and insurers are therefore braced for record-high claims, currently estimated in the range of US$8-16 billion. One particularly complicating factor for insurers is the additional damage caused by Hagibis to properties first damaged by Faxai, but not repaired in time.

Amid climate change and environment degradation, researchers estimate that the annual economic loss from natural disaster events for Asia-Pacific is now around US$675 billion –approximately 2.4% of the region's overall GDP. Given the significant time and costs of quantifying such losses, insurers across the region are exploring more innovative technologies to support these claims. Solutions include the use of automated indices to trigger payment immediately upon the relevant insurable event occurring (such as by reference to the intensity of an earthquake or the extent of rainfall). This dispenses with the usual proof of loss and/or loss adjusting requirements, which inevitably give rise to delays in making payment.

Cyber Security

2019 saw a number of high-profile cyber breaches affecting a range of corporates and institutions across the region. Indonesia's low-cost airline, Malindo Air, Uniqlo and the Australian National University were among those targeted. Singapore's Cyber Security Agency reported a total of 6,179 cybercrime cases in 2018 with Singaporean businesses suffering close to US$42 million in losses – an increase of about 31% from 2017.

Asia's high overall digital connectivity, relatively low cybersecurity awareness and vulnerable IT infrastructures make for an optimal environment for cyberattacks and an effective logistics hub for hackers. Governments are seeking to tackle the threat through domestic legislation and international co-operation. ASEAN member states have responded by forming a working-level committee to advance norms of responsible state behaviour to enhance cybersecurity and stability.

Riot and Terrorism Risks

Hong Kong's "summer of discontent" has escalated from what started out as peaceful protesting and "sit-ins" at Hong Kong airport to increasingly violent clashes between police and protesters, with police firing live bullets and tear gas, and protesters retaliating with violence and vandalism. Industry insiders estimate the insurance claims arising out of the protests to be worth some US$80 million, which would make it the third largest insurance claims event in Hong Kong's history (after Typhoon Hato in 2017 and Typhoon Mangkhut in 2018).

On Easter Sunday, Sri Lanka was the victim of a coordinated terrorist attack involving eight bomb explosions at churches and luxury hotels across Colombo that left more than 250 people dead and hundreds injured. In retaliation, significant anti-Muslim riots spread across the Northwestern province with mosques and Muslims-owned businesses being the main targets. This follows reports of anti-Muslim mob violence in 2018 in central Sri Lanka which prompted the national government to declare a state of emergency.

In light of increasing social and political instability in the region, insurers are reexamining the terms of their insurance policies, particularly as it relates to coverage and/or exclusions for loss arising from strike, riot, civil commotion and terrorism.

Construction

Emerging markets continue to invest in large-scale public projects aimed at promoting economic development and regional integration. Notable projects under construction include Hong Kong's Shatin to Central Link (HKSCL), costing some US$12.4 billion, making it the city's most costly rail project to date, and the Mumbai-Ahmedabad High Speed Rail Corridor, India's first high-speed rail line. As an anchor investment of China's Belt and Road Initiative, the Kunming-Vientiane railway project connecting Southwestern China with the capital of Laos is only the first phase of a broader scheme to construct a Pan-Asia railway network spanning Southeast Asia. The multi-jurisdictional nature of these projects brings with it challenges for insurers and reinsurers in terms of understanding the different legal systems, regulations and cultural and political landscapes.

We are also seeing increased public scrutiny into workmanship standards in the industry. In Hong Kong, a Commission of Inquiry into contractors taking shortcuts in the construction of the HKSCL, which raised concerns about public safety, is ongoing and expected to complete in 2020.

What to look out for in 2020

Notwithstanding projections by the International Monetary Fund that M&A activity across Asia is set to slow in 2020, as trade tensions continue to rise between China and the US, the M&A insurance sector continues to grow – particularly for the emerging markets of South East Asia, which present as attractive targets for overseas investors. This presents opportunities for M&A insurers in Asia to continue to grow their portfolios. This growth inevitably brings increased competition to the market, which may start to soften as a result. In particular, warranties traditionally excluded from cover, such as environmental and tax warranties, are likely to become an area of more intense focus as part of the underwriting process.

In an increasingly competitive insurance market, investment in InsurTech is ever increasing. Market research estimates that the global InsurTech market will be worth US$1.1 billion by 2023. The bulk of this growth is expected to occur in the Asia Pacific's unique ecosystem of emerging markets and technological hubs. InsurTech investment in Asia is currently focused on digital distribution channels; technologies offering consumers the ability to purchase policies directly online, online brokerage services, and online policy comparison portals – which we expect to continue with the grant of further virtual licenses to digital insurers. Asia is also set to jump on the global trend of investing in technologies that support policy administration and management systems, and the claims handling and settlement processes. For example, HOVER, a Californian based startup, now offers a technology that allows for the transformation of smartphone photos of any property into a 3D model, thereby dispensing with the need for onsite inspections. Given the upward trend in natural disasters and extreme weather events in Asia, such technologies are likely to be of significant interest to property and casualty insurers across the region.

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Europe

Key developments in 2019

HMN • PARTNERS

France – HMN

At the end of 2019 the authorities, consumers associations and members of French Parliament issued various statements/guidelines, which insurance professionals (mainly insurers and brokers) had to implement in relation to telephone sales of insurance products. These important developments are set out below.

The ACPR (Autorité de Contrôle Prudentiel et de Résolution – the French authority supervising the insurance industry and the wider financial sector) repeatedly sentenced insurance brokers in December 2016, February 2018 and May 2019 for breaching their duty to advise and failing to deliver pre-contractual information when telephone canvassing.

Recently, the ACPR took further action, as they conducted an audit of the Moroccan branch of a French broker. It is remarkable that a French authority decided to extend its remit to outside of France.

On 9 October 2019, the ACPR published a handbook on its website reiterating the rules in this area.

The DGCCRF (Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes: the French authority in charge of protecting consumers) also recently sentenced an insurance broker for telephone canvassing more than 18,000 consumers who were registered on Bloctel (which is a list of individuals who have expressly requested not to be subject to telephone solicitation).

In September 2019, consumer associations issued a press statement requesting the prohibition of telephone solicitation of insurance products, claiming that the French Federation of Insurers and the main French syndicate of insurance brokers are collectively responsible for the current situation.

There are currently four bills before the French Parliament. Two of them were lodged in 2018 and their purpose is to reinforce protection of consumers. Two other bills were lodged in October 2019 aiming to prohibit telephone solicitation or alternatively to make it subject to draconian conditions.

On 19 November 2019, the CCSF (Comité Consultatif du Secteur Financier: Advisory Committee of Financial Sector) issued an advice about the commercial practices of the sale of insurance products via the telephone.

In a press statement dated 26 November 2019, the ACPR invited professionals to follow the recommendations of CCSF. However, some professionals have commented that the scope of the advice issued by CCSF is too limited as it only concerns cold calls.

In November 2019, representatives of the brokers syndicate announced that they are ready to take necessary steps in order to preserve the reputation of the whole profession. Insurers should also control operations carried out by their brokers or cover holders, being reminded that they are potentially liable insofar as they provide the brokers with the script for telephone solicitation.

Following a meeting in November 2019 of insurance professionals, it was decided that the eventual aim is to abandon cold calls and prohibit oral consent (even where the call has been recorded). Written consent will be required, and it is proposed to allow a 24-hour cooling off period to allow the consumer to review the pre-contractual information provided online.

Kennedy Van der Laan

The Netherlands – Kennedy van Der Laan

As we mentioned in last year's Annual Review, the bill 'Class Action Financial Settlement Act' (*Wet afwikkeling massaschade in collectieve actie* (WAMCA) (the "Act")) was adopted in the Netherlands in early 2019. The Act entered into force on 1 January 2020.

This law makes it possible, among other things, to claim damages in a class action, which was not previously possible. Previously parties could only obtain either a (i) declaratory judgment stating that the party sued was liable, or (ii) a binding declaration of a settlement reached between the interest group and the party sued. The WAMCA will now give power to the courts to award damages themselves.

At the same time, the Act aims to make settlement more attractive by improving the quality of collective interest groups, improve the coordination of class action proceedings and provide more finality for all parties.

Furthermore, the class action must have a sufficiently close relationship with the Dutch legal sphere (the so-called scope rule). A sufficiently close relationship exists when (i) the majority of the victims are habitually resident in the Netherlands, (ii) the party sued is domiciled in the Netherlands *and* additional circumstances indicate a sufficient connection with the Dutch legal sphere; or (iii) the event to which the legal action relates has taken place in the Netherlands.

The collective settlement of damages as decided by the court is, in principle, binding on all victim's resident in the Netherlands who have not opted out, and on all victims not resident in the Netherlands who have consented to their interests being defended.

The WAMCA applies to class actions instituted on or after 1 January 2020 that relate to events that occurred on or after 15 November 2016.

The Urgenda Climate Case against the Dutch Government, was the first in the world in which citizens established that their government has a legal duty to prevent dangerous climate change. On 24 June 2015, the District Court of The Hague ruled that the government must cut its greenhouse gas emissions by at least 25% by the end of 2020 (compared to 1990 levels). The ruling required the government to immediately take more effective action on climate change. The case was upheld by the Court of Appeal on 9 October 2018. Following this judgment, the Dutch Government appealed to the Supreme Court, the highest court in the country. On 13 September 2019 two chief advisors to the Supreme Court advised the Court to uphold the Court of Appeal's judgment. The final ruling of the Supreme Court was delivered at a public hearing on 20 December 2019. This rejected the Government's appeal and held that the Dutch government must act "on account of the risk of dangerous climate change that could also have a serious impact on the rights to life and well-being of residents of the Netherlands.". Greenpeace in the Netherlands has called the ruling "an immense victory for climate justice."

The Climate Case, which was brought on behalf of 886 Dutch citizens, made climate change a major political and social issue in the Netherlands and transformed domestic climate change policy. It also inspired climate change cases in Belgium, Canada, Colombia, Ireland, Germany, France, New Zealand, Norway, the UK, Switzerland and against the EU. This is likely to have a dramatic knock on effect on companies and if they fail to act you might expect regulatory investigations and potential D&O claims.

Nctm

Italy – NCTM Studio Legale

In the second part of 2018 the Court of Cassation, confirmed that the "claims made" clause is valid. The Court was asked to decide whether the following principles were correct: (i) the parties cannot quantify a third party claim as "loss" [*sinistro* in Italian] (ii) the claims made clause in civil liability insurance contracts covering third parties does not deserve protection under the Italian Civil Code.

This latest decision of the Court of Cassation has provided much needed clarity on the validity of the claims made clause. It has now been established that third party liability insurance policies on a claim made basis cover the risk of an insureds' losses following a claim. This is valid even though it derogates from article 1917 of the Italian Civil Code.

It remains the case that dissatisfied insureds may still invoke their rights in different ways. In particular insureds will need to focus on remedies relating to (i) damages for pre-contractual liability, (ii) unfair policy terms; (iii) invalidity (or partial invalidity) of the contract where it is not fit for purpose ("*difetto di causa in concreto*") – the remedy will involve amending the contract terms so that it is fit for purpose; (iv) modification of the contract where the policy contains unfair terms. What is clear is that going forward insureds cannot rely simply on the "claims made" clause being invalid.

The judgment represents an important – and hopefully conclusive – step forward to confirm the general validity and admissibility under Italian law of "claims made" clauses after several years of uncertainty and disputes. During 2019, this judgment has had an immediate impact both on claims made products' distribution and sales now that consumers and insurers are more confident in relation to claims made policies. In addition, we expect the increased certainty provided by this judgment to lead to a reduction of coverage disputes relating to the validity of claims made clauses. We consider this trend will continue to benefit insurers and insureds in the third-party liability policies market.

What to look out for in 2020

France – HMN

The coverage of operating losses where there is no physical damage became more and more pressing in 2019 and will continue into 2020.

In particular where a company sustains operating losses following an event that has not caused damage to property.

This was highlighted by the terrorist attacks in Paris a few years ago. This caused operating losses to the tourist industry in Paris but there was no damage to any property but a significant decline in the number of tourists in the months following the terrorist attack.

At the end of 2018 and the beginning of 2019, the "yellow jackets" movement forced many shopkeepers and professionals to close on Saturday (the most profitable day for sales) in order to avoid damages to their property. This resulted in a significant loss of turnover; the irony being that by saving their property, the businesses sustained loss of turnover.

Another example is the explosion at the Lubrizol chemical plant in Rouen in September 2019. The resulting pollution from smoke and ash meant many farmers and breeders in the area had to throw away their products (especially milk). This was not covered by insurance and the question of indemnification by the French government has been discussed.

From an insurance point of view, operating losses sustained without physical damage are non-consequential immaterial losses (or *dommages immatériel non-consécutifs*) are frequently not covered. If they are covered, they are usually subject to sub-limits, which are significantly lower than the overall limit of indemnity.

Therefore, there is a real necessity to review insurance contracts in order to improve coverage. The current position is that insureds must have sustained damage to property in order to be entitled to cover. One possible solution is that this condition is removed. The industry could move towards a system where coverage is triggered by an event that would not be limited to physical property damage.

There is likely to be a capacity issue preventing in a major change. It may be that it could be introduced for large risks and not the small or medium size business who are largely affected by this restriction in cover. We will await to see which direction the insurance industry moves towards.

The Netherlands – Kennedy van Der Laan

The Dutch Consumer and Market Authority (ACM) published guidelines regarding consumer protection and nudging. The ACM points out that companies nowadays have much more personal data about consumers than they did in the past. This makes it possible to personalize offers for specific consumers or groups of consumers. Whilst this might be advantageous for consumers, it could be used to persuade the consumer to make use of an initially less attractive offer. The ACM and the Dutch Authority for Financial Markets (AFM) reiterates the importance of consumer protection in relation to nudging in their *"trend view 2020"*. In this report, the AFM mentions nudging as one of their top priorities for their supervising role in 2020. As an example, the AFM describes the risks of unfair practices in relation to insurance comparison websites.

A concerning trend to look out for in 2020 is the development with regards to the notional interest rates used for the capitalisation of future damages in personal injury cases. Until recently, it has been standard practice to use a notional interest rate of 3%. This year however, there have been three cases in first appeal where the Court, considering the low return on investment of recent years, has decreed the use of a much lower notional interest rate of 0-1% (in one case even use of a negative rate of -0.2%). Considering the current interest rates on the financial market and the low return on investment of recent years, it is feared that other Courts might well follow suit in the coming year. This would be a big blow for the Dutch insurance industry, as these developments might well cost the Dutch insurance industry several tens of millions of euros extra a year.

Italy – NCTM Studio Legale

In March 2009, the Italian Insurance Regulator (ISVAP, at the time) issued Regulation n. 29/2009, dealing with, the insurability of certain risks relating to W&I policies (the "Regulation").

According to Article 4, paragraph 2 of the Regulation "*…insurance undertakings may not provide cover guaranteeing the reimbursement of contingent liabilities or losses on assets due to assessments resulting from undertakings extraordinary operations*". This provision triggered doubts and uncertainties over the validity of W&I policies.

The insurance market raised concerns about the possible impact of such provision on W&I policies. This led to the Italian Regulator (IVASS) issuing a statement on 25 July 2019. This statement was intended to provide clarification on the insurability of W&I risks.

IVASS confirmed the general application of the prohibition set forth by Article 4, paragraph 2 of the Regulation. However, more importantly the regulator clarified that W&I policies do not fall within the scope of such provision when the following requirements are met:

for **seller-side policies**, they cover the risk arising from the seller's indemnity obligations in the event of a breach of the specific representations and warranties given by the seller to the buyer in the context of an extraordinary corporate transaction

for **buyer-side policies**, they (i) are based on limited and identified commitments not deriving from valuations, (ii) refer to risks which can be adequately assessed on an actuarial basis and (iii) provide indemnity which is not linked to the consideration for the extraordinary corporate transaction.

Following this important decision by IVASS, it is expected that the W&I insurance market will grow significantly in the next few years. Although, insurers and broker will have to make sure that marketed W&I policies do meet the above requirements. Private equity and corporate buyers and sellers will – thanks to this development – increasingly make use of W&I policies and, we expect at the same time, that insurers will offer new coverage solutions, making the market more open and competitive, in support of Italian M&A and PE deals.

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Latin America

By Alex Almaguer

Key developments in 2019

Latin America is a region which regularly experiences natural disasters and 2019 was no exception. In May an earthquake in Peru reached 8.0 on the Richter scale. However, the intermediate depth of the earthquake meant that it caused less damage than one of the same strength in 2007. At several points throughout the year, heavy rainfall in Colombia, Nicaragua, Mexico and Chile triggered floods and landslides, causing widespread property damage.

The Amazon's dry season saw an 84% increase in wildfires when compared with the previous year. Some of the fires were started by logging companies and some were as a result of "slash and burn"– whereby farmers cut down and set fire to trees to make space for livestock and crops. Jair Bolsonaro, the president of Brazil, was criticised for failing to acknowledge and address these issues.

2019 also brought greater political instability in the region. Ecuador's president Lenín Moreno faced considerable backlash after cutting fuel subsidies. Bolivia's president Evo Morales fled the country, citing a "coup" after he was accused of rigging ballots during the election. Chile meanwhile saw its worst violence in decades, as thousands took to the street and clashed with police in response to an increase in metro fares. Despite a government U-turn on the policy, Chile's protests have since developed into a broader movement fuelled by discontent with the government.

The property damage associated with these events comes within the context of a market where there is still a considerable insurance gap. Despite an increase in incomes in the region, and competitive insurance rates, many are still unable to afford insurance premiums or do not consider insurance necessary.

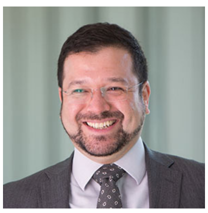
What to look out for in 2020

Given the ongoing political unrest in Chile and elsewhere in Latin America, 2020 is likely to be a year in which insurers have to consider policy coverage for damage caused by political violence.

All Risks Property Insurance policies often contain an exclusion for terrorism. Difficulties can arise where "terrorism" (and/or other elements of political violence) are not clearly defined. Uncertainty around interpretation can lead to increased litigation risk in Latin American jurisdictions where there is little insurance law and where judges may be inexperienced or subject to outside influence.

Applying a terrorism exclusion can also entail other challenges. Insurers must establish that individuals or groups who inflicted property damage did so with a particular motivation (eg political, ideological or religious). It may be hard for an insurer to demonstrate that protestors looted a shop or caused damage to a building for a specific reason (other than their own gain). Whilst terrorism exclusion wordings often purport to impose a reverse burden of proof, it is questionable whether this part of the exclusion would be upheld by the courts in Latin America.

Insurers may also consider the use of a terrorism and/or political violence exclusion unattractive. However, insurers should bear in mind that in choosing not to apply the exclusion, they could create a precedent. Once Business Interruption or Delay in Start-up losses have been quantified the option to apply the terrorism and/or political violence exclusion could become even more valuable.



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US

By Hinshaw & Culbertson LLP

Key developments in 2019

Advancing technology and the gig economy continues to transform the United States insurance industry. On the underwriting side, substantial focus continues on artificial intelligence and predicative analysis. The industry continues to grapple with emerging risks on the technology side from cyber and data breach claims, privacy challenges, and cryptocurrency. Numerous coverage claims are being asserted for data breaches under traditional general liability policies, with many decisions involving issues and analysis presented under coverage B (personal and advertising injury). Several coverage decisions have been rendered under business and crimes policies involving social engineering scams, in which fraudsters attempt to trick or induce employees to take action that compromise corporate security or finance. States continue to adopt privacy regulations. The California Consumer Privacy Act, California's GDPR, was adopted in 2019.

One of the more notable climate change decisions was the ruling by a New York trial court at year-end clearing Exxon Mobil Corp. of accusations that it deceived investors about climate change-related risks to its business. The court ruled the New York attorney general did not prove that Exxon Mobil made any material misstatements or omissions about its practices that misled any reasonable investor, which is a required element under New York's securities law.

The opioid epidemic continues to result in numerous suits brought by states, political subdivisions, third-party payors, hospitals and individuals against pharmaceutical manufacturers, distributors and others seeking a variety of damages allegedly resulting from the diversion and misuse of prescription opioids such as hydrocodone and OxyContin. Multiple million-dollar settlements have been reached, with hundreds of cases pending (most consolidated in federal court in Ohio). Earlier this year, a verdict in excess of $572 million was rendered in an Oklahoma case and several state attorneys general entered into a $48 billion settlement with five major drug manufacturers and health plans. Some predict overall losses may reach $1 trillion.

Previously coverage decisions have addressed the duty to defend. This fall, a federal court in Illinois ruled an insurer was required to indemnify a drug company for a $3.5 million settlement it reached with the State of West Virginia. The settlement resolved an action in which West Virginia alleged that the drug company contributed to the state's opioid addiction epidemic through its negligent distribution of opioid prescription drugs.

Talc litigation continues, with thousands of cases pending against a much more limited universe of defendants. The multi district litigation focused on expert testimony and causation issues. The most interesting development concerned reports that a talc manufacturer knew its talc contained asbestos. A talc mine company filed for bankruptcy court protection. The New Jersey state court handling the insurance coverage dispute over Johnson & Johnson talc claims stayed the action until early 2020.

The public nuisance liability theory failed in lead paint litigation across the U.S. for years until ten California cities and counties scored a $1.15 billion abatement award in California, later reduced to $409 million. Resulting coverage litigation is pending in California, New York, and Ohio.

Sports-related concussion litigation ratcheted up with an Illinois federal court a $75 million settlement of the medical monitoring claims against the National Collegiate Athletic Association. A coverage action is pending before a state court in Indiana.

Allocation of losses continues to be an issue driving long-tail coverage claims in the US. Most states have applied a *pro rata* approach over the inferior "all sums" approach for allocation of continuing or progressive injuries or damages among multiple periods. In most *pro rata* jurisdictions, policyholders are responsible for damages during periods of no insurance, regardless of whether insurance was available for purchase in the market. A notable exception is in Connecticut where the Supreme Court of Connecticut reaffirmed a ruling that a policyholder is not responsible for a *pro rata* share of costs for any period during which it was uninsured.

The headlines of sex scandals and public figures attempting to cover up claims of sexual misconduct gave rise of the #MeToo Movement. This development has cultivated a contempt for a corporate culture of silence and secrecy surrounding sexual misconduct. As a result, nondisclosure agreements have been under siege both at the federal and state level with many jurisdictions limiting enforcement or rending nondisclosure agreements unenforceable altogether in this context.

Most states now have extended or eliminated statute of limitation periods on criminal and civil sexual abuse cases, with laws taking effect in more than 20 states in 2019. The result has been a marked increase in sexual abuse claims and cases.

What to look out for in 2020

Cyber and technology-related claims will continue to flourish. The year ahead promises to produce court rulings under cyber-related policies and additional product offerings to address technology-related risks and emerging gig economy issues.

The American Law Institute's Restatement of the Law – Liability Insurance was adopted last year. It is not controlling authority but has been – as predicted – cited by policyholders and courts alike. This document actually is a policyholder advocacy document that misstates the law on numerous issues. Policyholders will continue to use this document to advocate pro policyholder positions, particularly on principles not well-developed in a given state. Insurers must develop an effective strategy to combat policyholder efforts.

On the first-party side, although the number of named storms was less than in the prior year, hurricane-related claims and coverage activity will continue at a high level. In Florida – which boasts a high volume of constructive defect litigation – insurers may be benefitted by legislative enactments aimed at curving assignment of benefits abuses and permitting contribution claims among insurers for defence.

RPC in alliance with HINSHAW

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Middle East and Africa

By Hugh Thomas

Key developments in 2019

Middle East

In last year's Annual Insurance Review we looked at the UAE's innovation strategy for 2018-2021. During 2019 we saw progress on this – innovation labs were established, underwriting practices were brought in line with new regulations and local talent was promoted. The UAE insurance market also continued to demonstrate strong levels of growth, with premiums up by 9% as of September 2019.

Earlier this year drones were used to attack Saudi Aramco's processing facilities at Abqaiq and Khurais. The attack effectively knocked out 5% of global oil production (almost half of the Kingdom's production) almost immediately (although within a month Saudi Aramco reported that pre-attack production levels had been restored). The US was quick to identify Iran as being responsible for the attacks. However, the UN Secretary General recently reported that the UN was unable to independently corroborate that the missiles and drones used in the attacks were of Iranian origin.

Tensions nevertheless remain high in the Persian Gulf and this event demonstrates the level of disruption that can be caused by a targeted attack and provides food for thought for political risk (re)insurers in the region.

Africa

Last year we predicted that insurers in Africa would need to invest in technology in order to increase market penetration. 2019 has been an exciting year for Insurtech on the continent, with a range of apps launched that simplify user-interfaces and reduce the cost of insurance products. One start-up which has grown quickly provides fire alarms and arranges property insurance for shanty towns. Another is a micro-insurance provider that offers insurance for farmland based on satellite-images.

In March and April of 2019 Southern Africa was hit by two devastating tropical cyclones. The UN's OCHA reports that Tropical Cyclone Idai left more than 600 people dead and an estimated 1.85 million people "in need" in Mozambique alone. Tropical Cyclone Kenneth caused three deaths and left 374,000 in need. A Swiss Re Institute report assessed the overall economic loss for Mozambique, Malawi and Zimbabwe to be in the order of $2 billion, of which only 7% was insured. With waters in the Indian Ocean steadily warming the risk of future cyclones is likely to increase.

In his article published by the World Economic Forum, Beat Strebel of Swiss Re highlighted the need for strongly capitalised insurers and reinsurers in the region to plug this "protection gap".

What to look out for in 2020

Middle East

Following several years of premium growth, the Dubai and Abu Dhabi insurance markets are considered to be relatively saturated. Competition has intensified, particularly in the motor and health markets, and 2020 is likely to bring a softening of rates. There may also be some consolidation in the market, as insurers position themselves to remain profitable.

There are, however, several areas that are likely to continue to drive premium growth. The UAE government has committed considerable sums to improving infrastructure and boosting the non-oil economy over the next decade – this includes a lot more building, representing opportunities for construction and property insurers.

In June of 2019 Saudi Arabia lifted restrictions on foreign ownership of listed entities. It waits to be seen whether this change in regulation will usher in the arrival of foreign brokers and insurers to the Kingdom and an increase in local capacity.

Africa

Looking ahead to 2020, the work done by CIMA, which has co-ordinated insurance regulation in 15 francophone countries, will provide a considerable boost to regional insurers. The harmonisation of insurance rules in these jurisdictions will make it more accessible to offer insurance across all 15 countries.

The International Energy Agency predicts that Africa will be at the forefront of an energy revolution in its use of solar power. This will be driven by the expected population growth (predicted to increase by as much as 800 million in 20 years) resulting in a considerable spread of urbanisation and increased power demands. This poses opportunities for local (re)insurers to offer products covering small to large scale solar infrastructure.

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Offshore

By Richard Booth

Key developments in 2019

Companies located and operating via offshore jurisdictions have grown accustomed to calls for greater levels of transparency in the way they conduct business. Public and governmental disquiet about tax regimes in these territories has led to calls for change. There have also been wider concerns about the opaque way companies have been permitted to hold and process corporate and private information. In 2019 important new legislation was introduced intended to address these negative perceptions.

Triggered by the EU's focus on preferential tax regimes in Bermuda, BVI, the Cayman Islands, the Isle of Man and the Channel Islands, each enacted new 'Economic Substance' laws and regulations. These mean there are now legal requirements in banking, fund management and insurance to ensure their offshore entities' operations are commensurate with the profit creating activities they undertake. As a result, offshore advisory firms (legal and financial) have and will be heavily engaged in providing advice on these new areas of law and each jurisdiction's respective guidance to ensure compliance.

In 2019 the Cayman Islands saw, for the first time, the introduction of data protection legislation affecting all entities established there. Much of the commentary has focussed on its implications for Cayman based investment funds, whether registered with the Cayman Islands Monetary Authority or not.

Pressure exerted by the UK parliament and EU's 5th Money Laundering Directive led to the UK Crown Dependencies announcing in June 2019 the introduction of beneficial ownership registers. Once in place, they will allow wider access to information that reveals the ultimate, not just legal, owner of companies registered in these jurisdictions. We can reasonably expect professional and financial advisers to already be advising clients how the new rules might require changes in the way they choose to organise their offshore financial structures.

What to look out for in 2020

Insurers will know the Cayman Islands continue to pay host to large scale litigation. One particular case for insurers to watch out for will be the high-value Madoff related litigation between Primeo Fund and HSBC. The judgment of the Cayman Island Court of Appeal has been appealed by Primeo to the UK's Privy Council and we expect that appeal to take place towards the end of 2020.

This case should be of interest to insurers as it concerns not only the liability of investment fund administrators and custodians, but also the rule against reflective loss (which acts to prevent claims by shareholders to recover loss considered reflective of loss sustained by the subject company).

The UK Supreme Court is also expected to hand down judgment in another reflective loss case this year (*Sevilleja v Marex Financial Ltd*). This will have implications for how other commonwealth jurisdictions consider the issue.

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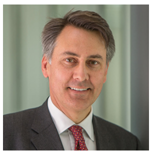

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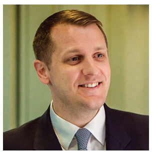

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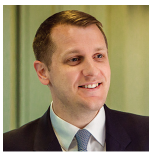

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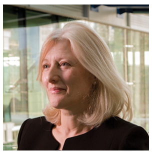

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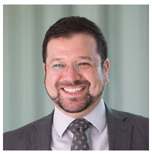

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