DAC BEACHCROFT

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Informed Insurance Predictions 2024

Contents

Welcome 2024

Have you been online on Informed Insurance and seen the video banner accompanying this year's release of our predictions? We are really excited about the opportunities artificial intelligence offers the insurance sector, but how close to human can it become? While the use cases are varied, it is hard to conceive that AI will be able to provide that human touch, in all its glorious imperfection.

This year's predictions reveal a thematic two horse race between Technology/AI and Regulation, while ESG issues and geopolitical risk continue to frame our focus. With over 160 predictions across 19 lines of business, six key themes and multiple jurisdictions, our predictions once again provide a unique insight into the opportunities and risks for the insurance market in the year ahead.

Whether you are looking for inspiration for the year ahead or in search of granular detail, I hope you will find the answers in our Predictions for 2024. Please do reach out to us to discuss any of these topics in more detail.

Please visit **"Informed Insurance"** to read our latest thought leadership and current predictions. **Scan here to access "Informed Insurance". https://insurance.dacbeachcroft.com**

AVIATION

Sustainable aviation fuel will help deliver Jet Zero

With the aviation sector's carbon footprint estimated at 1.8bn tonnes of carbon dioxide by 2050 if left unchecked, sustainable aviation fuel (SAF) as an alternative fuel has been promulgated worldwide. The International Air Transport Association expects a significant acceleration in its production in the 2030s and estimates that SAF could contribute 65% of the reduction in emissions needed by aviation to reach net zero by 2050. The UK government has likewise published a SAF mandate that may be effective as early as 1 January 2025 requiring SAF to account for 10% of all aviation jet fuel. The mandate also sets parameters on what constitutes SAF (i.e. SAF must have 40% less carbon intensity than fossil fuel-derived kerosene etc). Airlines will have to carefully consider the contents of its chosen SAF to avoid greenwashing claims. As the UK government continues to invest its resources in boosting SAF (e.g. the £165mn Advanced Fuels Fund), we expect further regulation, policies and investments to emerge.

Greener skies ahead: electric air taxis offer a sustainable future

Hyundai's Supernal is set to unveil a prototype of its electric flying taxi at the Consumer Electronic Show in 2024, signalling a transformative year for urban mobility. The electric vertical take-off and landing aircraft aims for a test flight in December 2024, marking a new era in efficient, sustainable transportation. Supernal's development suggests a future where clean flight becomes commonplace, offering a swift and environmentally conscious solution to modern transportation challenges. As investments pour into this futuristic venture, companies can redefine the skies and drive us into a greener future. However, in order to make this a reality, regulatory frameworks and infrastructure must also develop in tandem.

Operational resilience will help deliver sustainable airports

Record-breaking temperatures, intense flooding and social awareness around sustainability will all increase pressure to deliver significant airport redesign. As the risks associated with extreme weather events continue to affect airports, many are already considering redesign or are in the assessment phase of performing infrastructure upgrades to mitigate the impacts of these climate stressors. This may include relocating vulnerable electrical equipment to rooftops to protect it from flooding; prioritising energy efficiency; reassessing stormwater infrastructure; implementing permeable pavements to help with drainage; and upgrading runways to handle extreme temperature variations. Operational resilience goes hand in hand with long-term sustainability.

Blockchain will take off in the aviation industry

In 2024 the aviation industry will see growing adoption of blockchain technologies. We expect blockchain to streamline various aspects of aviation, from supply chain management to ticketing and maintenance. The global aviation blockchain market is projected to be worth US$ 5.7bn by 2032. Blockchain is capable of creating immutable records of aircraft maintenance, ensuring compliance with safety standards and minimising the risk of counterfeit components entering the system. Smart contracts powered by blockchain can automate and authenticate transactions, reducing the risk of fraud and errors, while increasing transparency. Passengers may also experience a smoother travel experience with blockchain securing personal data and simplifying the ticketing process. Stakeholders in the industry have an opportunity to leverage this technology to promote safety and efficiency within the sector.

Space debris will impact satellite insurers

In 2024 we expect more regulations around space debris, and increased risk for satellite operators. Insurers will likely need to re-evaluate policies and premiums to account for the heightened risks associated with space debris. The fine imposed by the US government on Dish Network for failing to remove a satellite from orbit is pivotal for the industry, highlighting the growing concern over space debris. This development suggests a shift towards greater accountability for satellite operators if they fail to safely retire satellites or defunct equipment from orbit. In addition, more satellites and space equipment are being launched into space, adding to the risk of collisions. Expect a push for regulations and increased scrutiny to ensure responsible space exploration.

Increased focus on drone risk exposures in the UK

The UK government Risk Register 2023 highlighted the risks associated with a malicious drone incident as being limited but with a moderate impact. This translates into the prospect of such an incident being between 0.2% and 1% (compared to, for example, less than 0.2% chance of an aviation collision over UK skies). The government report highlights the significant increase in drone use, for business and pleasure, in recent years. In 2018, the PwC report "Skies Without Limits" predicted 76,000 drones being in use in the UK by 2030. The second edition of the report, published in 2023, has revised that number to more than 900,000. Increased use and numbers does not automatically mean an increased prospect of accidents, but from a risk analysis perspective, it does potentially speak to greater access to hardware which could be used to malicious ends. It will be interesting to see how the UK government continues to assess and mitigate risk in this arena, against what we predict will be the development of European Union Aviation Safety Agency/EU rules (or as a minimum, guidelines) on counter-drone steps.

Package holidays: all change?

The UK Department for Business and Trade has launched a 'call for evidence' into the Package Travel Regulations 2018 (PTRs), with a more detailed consultation scheduled for early 2024. We foresee that the experiences of the failure of Thomas Cook and, crucially, the COVID-19 pandemic will have a significant influence on any changes. Key proposals include a possible removal of the concept of Linked Travel Arrangements; exempting packages that involve domestic only activities or no travel element; an exemption for lower priced packages; flexibility in the provision of insolvency protection; and simplifying the meaning of "other tourism services". One issue that is sure to be raised is the disconnect between the obligations of Organisers to refund customers in full, and the difficulties faced in recovering those costs from suppliers, including airlines.

CASUALTY

Regulators around the world will continue to focus on PFAS

Growing environmental concern and awareness of the risks associated with PFAS (known as forever chemicals) will lead to an increase in claims by employees, consumers and the general public. Regulators around the world need to focus on the potential health risks caused by PFAS products both to those employees manufacturing the products and the ultimate consumers. PFAS are used in a wide range of commercial and consumer products such as cosmetics, textiles, furniture and food wrappers, but do not break down in the environment. Additional risks are posed by the unsuitable control of waste material containing PFAS leading to contamination of water sources. Manufacturers are already required to remediate pollution and damage caused by PFAS across Europe and in the US, following events such as environmental contamination from firefighting foams. From a casualty claims perspective, if causal links can be established between exposure to PFAS and personal injury in the US, then discussions around possible injury claims in the UK may follow. However, the prospect of large numbers of PFAS injury claims in the next year remains low, with any immediate risk of UK litigation being directed at damage caused by PFAS environmental contamination as seen in the US and Europe.

The condition of rental homes throughout the UK will receive greater attention

The number of claims made for damp and mould will continue to increase. Landlords need to ensure that any rental properties are in a habitable condition and any repairs are made in a timely manner to avoid the risk of claims being made. Both the UK government and the devolved legislatures have introduced provisions to raise the standards of rental accommodation in the private and social sectors. The continued cost of living pressure may mean an increasing number of tenants are unable to heat or adequately ventilate their homes, leading to the development of mould with consequent risks to health. Reduced budgets of landlords, large and small, may limit the ability to inspect rental properties and conduct any necessary repairs. High profile claims involving fatal outcomes following exposure to mould have raised public awareness of this means of redress.

Will there be an uptick in sports-related injury claims?

Sports-related injury claims will remain high on the agenda in 2024. Developments in medical science around the risk of sports-related brain injuries through concussion and other head trauma, as well as recent key decisions in respect of career-ending injuries, continue to draw attention to these claims. The decisions in Tylicki v Gibbons and Fulham Football Club v Jones have provided additional clarity and increased awareness about the duties to sporting competitors, and the subsequent risk of claims for injury following incidents in differing sporting arenas. Beyond competitor-related incidents, the high-profile brain and head injury group claims against rugby union's governing authorities progressed in December 2023. Similar actions involving football and rugby league related head injuries will also likely progress throughout 2024. These matters will continue to create discussion over the responsibility of governing bodies and sporting organisations to protect sports people from long-term injury risk.

Increasing care costs will concern those dealing with and funding high value casualty claims

The increases in care costs will inevitably continue in 2024, being reflected in the hourly rates charged for care. It will therefore be more important than ever that claims and schedules are challenged where appropriate. Figures from a leading provider of expert witness care reports suggest that hourly rates for gratuitous care have increased by more than 50% over the last 10 years, with basic care increasing from £6.85 in March 2013 to £10.60 in April 2023. Commercial hourly rates fluctuate by region, with weekday amounts varying by £15.00 per hour and weekend ranges varying by up to £20 per hour, with average hourly rates now sitting at £26.23 for weekdays and £28.08 for weekends.

Extreme weather-related casualty claims will increase

Extreme weather events will generate an increased range of claims in the casualty space. It is widely predicted that 2024 will see an increase in the number of extreme weather events including temperature highs, increased rainfall and more storms. The focus from extreme weather events is usually directed on property damage but such weather events have the potential to impact casualty claims in a number of areas. Outdoor workers may face extreme heat or similarly unsuitable weather conditions. The increased severity of storms could result in an increased risk of injury from flying debris. Businesses should consider what new precautions will need to be taken to ensure safe working environments.

Changes to the civil justice system will impact casualty claims

Further technological and procedural changes to the civil justice system will affect casualty claims. Initiatives such as the introduction of compulsory mediation for civil claims valued at up to £10,000 are intended to reduce the workload of the courts. Although unspecified personal injury claims will not be within the first tranche of claims to be subject to the compulsory regime (no start dates for any part of the scheme having yet been announced), the change will come. Other developments and initiatives can also be expected. We have seen a huge increase in the use of technology within the civil justice system, ranging from the creation of claims portals for certain work types to virtual hearings. These changes are here to stay and we expect further use of technology in the civil justice system to help reduce the workload of the courts.

CONSTRUCTION AND ENGINEERING

RAAC - cladding equivalent or more millennium bug?

Despite initial panic, how many claims will actually be made against building contractors regarding Reinforced Autoclaved Aerated Concrete (RAAC) in 2024? It is a material that mimics cement rather than concrete, and was always accepted as having a relatively short life expectancy. Was it negligent to use RAAC in the 1960s and 70s? Many prospective claims will be time barred, even under the Defective Premises Act. 30 years only takes us back to 1994. Most RAAC was in place well before then and it wasn't often used in dwellings. We predict that the issue will be more 'millennium bug' and not result in a significant volume of sustainable claims against those involved in the original construction.

Construction industry still suffering higher insolvency rates than other sectors - adaptation required

A record-breaking number of failures occurred in the construction sector over the last 12 months, representing 17% of all insolvencies. In the 12 months to August 2023, 4,263 construction firms collapsed. That has had and will continue to have a domino effect across the supply chain. Firms are also having to deal with labour shortages, though the government has now added construction workers to the 'shortage occupation list', which should mean greater availability of migrant workers. The sector needs to consider how to operate more effectively and efficiently, with a close eye on prudent procurement to avoid a race to the bottom. Regrettably, we forecast that thousands more firms will collapse over the next 12 months.

New impetus to reframing CAR defects exclusions in 2024

A US court has ruled that LEG3 (one of the key defects clauses introduced by the London Engineering Group nearly 30 years ago) is ambiguous and internally inconsistent, and some have queried whether the judgment might challenge the foundation of the clause. On analysis, the decision adds little to the status of what is a complex, but usually reasonably well understood clause. The decision is limited to its own facts, reflects Illinois state law and isn't binding here. However, the court held that 'improvement' means to make the thing better than it would have been if it were not for the defect. Underwriters will need to clearly identify what they say any excluded improvement costs are, because we foresee that this first reported LEG3 case will be oft cited against underwriters. Nonetheless, we predict that the judge's reference to 'egregious' ambiguity and 'tortured language' (along with the earlier Canadian Acciona LEG2 case) might give new impetus to look at reframing CAR defects exclusions for 2024 and beyond.

Go green, go timber - underwriters beware

We expect to see claims as the industry gets to grips with the increased use (and uses) of timber. The use of timber in construction forms an important part of the government's strategy to meet its net zero targets. The benefits are clear: a renewable material which is strong, flexible, lightweight and has excellent thermal insulation properties. The government is encouraging its use by funding research and development, promoting and incentivising the use of sustainable materials and requiring those in the industry to consider the environmental impact of their projects. We are seeing increased use in practice, but despite being used as a primary construction material for over 10,000 years, modern timber products and their innovative uses are relatively untested.

Gateway 2 of the Building Safety Act may slow down the move to modern methods of construction

Modern methods of construction have been employed for some time in the construction industry, including using off-site construction techniques to accelerate on-site construction programmes. However, the introduction of the Building Safety Act 2022 Gateway 2 on 1 October 2023 may cause delays to on-site programmes. Gateway 2 requires the developer to obtain approval from the Building Safety Regulator (BSR) before it is able to commence works on higher risk buildings, and the developer needs to wait 12 weeks for confirmation from the BSR of whether its application has been successful or not. We predict this 'stop/go' issue will cause difficulties for developers – requiring them to incur steep upfront costs prior to works actually commencing.

Enforcement action to make buildings safe faster will add pressure on an already stretched industry

By way of a joint statement issued by the Department for Levelling Up, Housing and Communities on 26 July 2023, the Building Safety Regulator, the Local Government Association and the National Fire Chiefs Council have all committed to working together to see buildings made safe faster. The joint statement promised robust enforcement action to be taken in Spring 2024 for those who have yet to remediate buildings. While this will no doubt put pressure on the industry to act, it will also increase the workload on an already stretched sector. Increased workload and stretched resources inevitably lead to mistakes happening. In addition to the Building Safety Act bringing in new rules and duties with which to comply, it is possible that a new regulator will be created just for architects, which will create more obligations to observe.

To certify or not to certify?

As we continue to see a squeeze on finances and an increase in contractor insolvency in the industry, the focus will turn on the role of professional certifiers, especially in respect of payments. It is common practice for construction professionals to take on roles, either as an employer's agent or contract administrator, that require them to issue payment certificates. While the majority of payment certificates are interim, allowing mistakes to be corrected in the next certificate, problems can arise where a final certificate is issued or where a contractor becomes insolvent part way through the project. A professional certifier always has a tightrope to walk in making sure it is being fair to the contractor while also protecting the employer's interests. However, in the current climate, one misstep could see the professional certifier faced with a claim for negligent certification as employers seek to recoup outlay that cannot be recovered elsewhere.

It's not easy being green

There is increasing pressure on the construction industry to build in an environmentally sustainable manner; this brings with it risks for construction professionals. The construction industry is a heavy emitter of carbon dioxide. The Carbon Emissions (Building) Bill (now withdrawn), which would have required the whole-life carbon emissions of buildings to be measured, is an example of the type of governmental pressure which is likely to be exerted on the industry. We anticipate that this will be coupled with increasing consumer demand for carbon neutral and highly energy efficient buildings. This will bring new risks for all players in the procurement chain including construction professionals. Developers are likely to face scrutiny over ambitious net zero claims. This could in turn spark claims against designers for failure to meet energy performance criteria. Contractors will face risks in terms of the time that construction takes for workforces unfamiliar with green construction and the additional cost of using green materials.

DATA, PRIVACY AND CYBER

Data ethics will play a greater role in guiding the use of personal and non-personal data

We expect many organisations to begin codifying an approach to data ethics in a formal governance framework to guide not just whether they can use personal and non-personal data, but also whether they should use it. Ethical considerations around the use of data are increasingly coming to the fore, particularly in light of rapidly evolving developments around the use of AI. These considerations are not new. In the past they may have manifested informally, taking into account general considerations such as good outcomes for your customer base or employees, public perception, use of the 'cool v creepy' test and your organisation's 'inner conscience'. However, the ever increasing reliance on data has brought - and will continue to bring - about a greater responsibility on organisations to handle data responsibly (in the broadest sense) and deal with the moral challenges arising out of its use.

The UK will rebalance its 'pro-innovation' approach to AI regulation

We expect to see more action and guidance from the UK government and regulators on the management of the risks of AI, whether building on existing regulatory frameworks or implementing new measures. Organisations seeking to engage AI within their business will need to keep abreast of these developments. In recent months, there has been increased pressure on the UK government to shift from its 'pro-innovation' stance on AI towards a more balanced approach. An interim report by the Science, Innovation and Technology Committee on the governance of AI urged the government to "accelerate, not pause, the establishment of a governance regime for AI". Further recent recommendations for greater AI regulation have come from bodies such as the Trades Union Congress and the Ada Lovelace Institute. The UK government has already made a move in this direction through the launch of the Artificial Intelligence Safety Institute and we have seen countries around the world endorsing 'frontier' AI safety under the Bletchley Declaration.

Regulators will increasingly collaborate and expand their traditional functions in respect of AI and digital technology

The Financial Conduct Authority and Competition and Markets Authority will continue to play larger roles in the regulation of AI and digital technologies, and increasingly collaborate with the Information Commissioner's Office. These regulators are already working together as part of the Digital Regulation Cooperation Forum (DRCF) and will shortly launch a multi-regulator sandbox (the DRCF AI and Digital Hub) to support organisations in meeting regulatory requirements for digital technologies. Cross-collaboration is evidently in the minds of policymakers, with the Science, Innovation and Technology Committee interim report on AI governance also concluding that resolving challenges posed by AI "may require a more well-developed coordinating function".

The role of the data protection practitioner will increase in scope

The issues at the forefront of data protection governance have expanded significantly over the past year. At the same time, the role of the data protection practitioner is evolving to keep pace with business needs. As we look to the future, Data Protection Officers (DPO) will increasingly find themselves being asked to opine on considerations outside the confines of the General Data Protection Regulation and Privacy and Electronic Communications Regulations. Some will look to bring issues such as data ethics and governance of non-personal data within their remit. Others may decide to create new roles such as an AI Ethics Officer. However, given the challenges in determining who is best suited to oversee the likes of AI regulatory compliance, many organisations are likely to default to the DPO, at least in the short term.

Connected product legislation will create new risks for insurers of manufacturers and distributors

We predict future discussions within the insurance industry as to whether risks and claims associated with connected products legislation sit within cyber, product liability, technology errors and omissions coverage or whether they will justify an entirely new insurance class. Regulations under the Product Security and Telecommunications Infrastructure Act will come into effect in April 2024, aimed at ensuring that consumer-connectable products are more secure against cyber-attacks. Manufacturers, importers and distributors of such products will need to comply with new security requirements (including bans on default or easily guessable passwords) and provide adequate reporting systems and transparency on a product's security updates. Penalties for non-compliance include compliance, recall and stop notices and large fines up to £10mn or 4% of worldwide revenue. The recoverability of such fines under a policy will be subject to any exclusionary language and/or the usual 'illegality defence' and public policy doctrine(s) surrounding such matters. These are entirely new legal risks for manufacturers and distributors which may prompt discussions as to which insurance line is best suited to meet them.

The ICO will increase enforcement action

Under the UK GDPR (General Data Protection Regulation), the Information Commissioner's Office (ICO) has a range of enforcement powers at its disposal. These include reprimands, enforcement notices and civil monetary penalties. In recent years, commentators have been critical of the limited number of fines that have been issued relative to the number of breaches reported. This is in part due to the limited resources, both personnel and financial, available to the ICO. Another factor might also be the prospect of the ICO having to self-fund subsequent legal appeals of its fines, which can only act as a disincentive against enforcement. However, since 2022, the ICO has been entitled to retain up to £7.5mn a year of the fines it issues to pay for litigation costs. Although implemented in 2022, we predict that we will only now start to see the results, given it will have taken the first year to build up the fund before providing greater confidence in the issuing of fines or in enforcement appeals.

UK/EU data-related class actions will continue to focus on privacy rather than security breaches

While massive security breaches grab headlines, they pose a problem when it comes to establishing class actions (in the UK, representative actions). The security requirements of both the UK and EU versions of the General Data Protection Regulation (GDPR) are not absolute but require levels of appropriateness. This means that any security-based action presents a significant level of litigation risk as to whether a GDPR breach can be proven. Compare this to a non-security-related GDPR breach, such as failing to have correct consent mechanisms in place for processing children's data or marketing data, where the breach is binary. The data was either lawfully collected or not. There is no interpretation of appropriateness. In such cases, class actions can skip straight to establishing commonality of damage in order to determine a viable claim.

Low value breach claims will stack up

Claimant representatives will continue to try and circumvent small claims allocation for data breach claims in order to seek recoverable costs. This is despite the courts clearly indicating that low value data breach claims should be allocated to the small claims track and dealt with in the County Court. Recent trends have included data breach claims being pleaded as personal injury claims, with supporting medical reports submitted, in order to seek fast track allocation. These claims are not being submitted in the appropriate low value EL/PL portal, bypassing the fixed costs regime. Another trend is to 'stack' data breach claims together on one claim form, bringing the total damages sum above the small claims track threshold, circumventing existing group litigation mechanisms. There is some uncertainty as to whether these are appropriate routes for such claims to be brought and it is likely that future judgments will give greater clarity on these points.

Further exclusions for war and cyber operations will emerge

We predict further exclusions will be circulated and this topic will continue to generate controversy. At the time of writing, 29 'approved' clauses have been published by the LMA, and we know of more to follow. In addition, there may be as many variants that have not been published. This represents a huge change since the first LMA clauses were finalised in November 2021. Despite their proliferation, the clauses have yet to resolve all issues to the satisfaction of all participants in the cyber market. While we expect convergence over time, we anticipate that further iterations will yet emerge as the issues are debated. As and when the clauses result in judicial interpretation, in whatever jurisdiction, further scrutiny can then be expected.

D&O AND FINANCIAL INSTITUTIONS

Shareholder activists will find creative ways to generate publicity and further their climate agenda against corporations

Climate activists have received a significant setback with the High Court of England and Wales refusing ClientEarth (a minority shareholder in Shell Plc) permission to continue a derivative action against the directors of Shell, and permission to appeal that decision being denied. ClientEarth could not demonstrate that Shell's directors were mismanaging climate risks and offered no engagement on how the directors' alleged wrongful actions constituted an approach that no reasonable director could have adopted. The decision endorsed the UK courts' inherent unwillingness to interfere with the invariably difficult decisions directors must take when managing climate risks and carbon transition. While ultimately unsuccessful, publicity is second only to victory and the publicity generated by this litigation was invaluable. The activists' appetite to challenge corporate behaviour will not have waned and they will find creative ways to circumnavigate company law obstacles and continue their fight. Corporations remain firmly under the spotlight to embed climate change into their business strategies and evidence progress. It is important to implement climate change strategies now and mitigate the risk of litigation and reputational damage.

UK companies and directors will remain under the microscope for the activities of subsidiaries and their supply chains

While a parent company is not automatically liable for the wrongdoings of its subsidiary, a series of recent decisions in the Courts of England and Wales (culminating in the 2021 case of Okpabi v Royal Dutch Shell plc) have made it clear there are various circumstances where the parent company might inadvertently assume responsibility for its subsidiary. Companies are at the same time being required to monitor and address human rights and environmental risks along their supply chains. Last summer, the Dyson Group successfully resisted a novel and ground-breaking claim by Malaysian factory workers who accused Dyson of unjustly benefitting from forced labour conditions while they worked for a company manufacturing components in Dyson's supply chain. The High Court's finding that there was insufficient connection to England to allow the claim to continue will no doubt have come as a great relief for UK company directors, but unquestionably the obligations and responsibilities of parent companies are under intense scrutiny.

Litigation funding will innovate and find creative solutions

The litigation funding market, increasingly used by insolvency practitioners or other stakeholders to provide a 'fighting fund' for claims against directors, received a seismic blow last summer. In R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents), the Supreme Court held that litigation funding agreements (LFAs), where the funder receives a percentage of any damages recovered by the successful claimant, are unenforceable damages-based agreements (DBAs). Litigation funders had, until this judgment, proceeded on the basis that LFAs were not DBAs and did not need to comply with the statutory requirements for DBAs. The decision has unsettled the collective action landscape. Disputes have followed with claimants refusing to reimburse funders from damages successfully recovered on the basis their LFAs are unenforceable. Claimants are being challenged by opponents on the recoverability of costs that have been advanced pursuant to unenforceable LFAs and their ability to satisfy adverse costs orders. We have already seen funders successfully amending their LFAs (see Alex Neill v Sony Interactive Entertainment Europe Limited) to navigate the statutory obstacles. The current uncertainty dampening funding activity is therefore likely to be short-lived as greater clarity is provided from the courts or Parliament.

US style class actions are coming to the UK

The growth of group litigation in the UK continues to be exponential. Growth has been fuelled by a booming litigation funding market and greater judicial acceptance of 'opt out' group claims, where a representative brings the action on behalf of a class of claimants without seeking the consent of claimants within the class. Last March, the High Court ruled an 'opt out' representative claim could proceed despite differences in the claims and remedies sought by the claimants. The court clarified that the "same interest" test in CPR19.6 does not require identical claims or interests, but rather confirmation that the differences can be managed with litigation safeguards to avoid conflict or prejudicing the position of other claimants within the class. The decision was hailed as signifying a willingness by the courts to evolve the legal framework and find solutions which promote greater access to the representative action regime and allow more 'opt out' actions. With funders and claimant law firms working together to identify new opportunities for bringing mass claims, the risk of US-style class actions for corporations and their directors has never been greater.

Flexible working is here to stay: 2024 will see an increase in flexible and remote working claims

The number of remote working claims recorded by the UK Employment Tribunal has grown significantly since the start of the COVID-19 pandemic, rising from just 6 claims in 2019 to 27 in 2021 and 42 in 2022. Over the same period, there was a 52% increase in flexible working claims. These types of claims are predicted to hit a record high in 2024. Surveys of workers also suggest more people expect flexibility in their workplace as a day one right. These trends, coupled with the changes to flexible working laws in 2024 brought in by the Employment Relations (Flexible Working) Act, which will give workers greater rights to request variations in their work arrangements, will inevitably lead to more claims against businesses who do not embrace flexibility.

Financial institutions driving efficiency and productivity through automation must manage AI-vulnerabilities and the risk of consumer claims

AI has reshaped the financial services industry. It is widely used to interpret information, automate credit and loan decisions, detect and prevent fraud, and is said to drive operational efficiency and productivity, reducing human errors. But if AI learns from incomplete or imperfect data, there is a significant risk of unintended discrimination or unconscious bias and this might inadvertently affect a financial institution's approach. Customer privacy and moral considerations may also be overlooked. Unchecked reliance on AI could affect large communities within a customer base and ultimately lead to large claims for consumer redress. Financial institutions that carefully manage AI vulnerabilities, balancing the opportunities against systemic risks, will be less exposed than those who only focus on efficiencies and enhanced revenue. A more holistic approach could improve the quality of management information, spot anomalies or longer-term trends that currently go unnoticed, and avoid discriminatory decision-making.

While cryptocurrencies may become less volatile, investment firms must exercise caution to avoid investor claims

When interest rate rises are seen to have peaked and even begun to reverse, investment firms will look again at digital assets as an investment class. It is likely that sentiment will return so investment in cryptocurrencies is seen as a risky but likely rewarding venture. In a more benign financial environment, however, any investment firm taking this step for even moderately risk averse investors risks claims being made against it if further failures hit the crypto-market. Investors must understand that despite some forms of regulation, mostly around marketing to consumers, it remains largely unregulated and therefore inherently risky as an asset class.

EDUCATION

The number of education related claims will continue to increase substantially

The number of pupils that require special educational needs (SEN) support has increased appreciably over the last few years, with 1 in 5 of all school pupils now requiring SEN support. Given the duties on schools, colleges and universities to provide such support and make reasonable adjustments, it is unsurprising that the increased demand is placing a real burden on all educational establishments, especially those already grappling with stretched budgets. Against this backdrop, it is also unsurprising that there was a 29% increase in Special Educational Needs and Disability (SEND) Tribunal applications in 2021-22 and we predict that the volume of claims and/or applications to the SEND Tribunal will continue to increase substantially for the foreseeable future.

The closure of schools, colleges and universities affected by RAAC may result in an increase in claims for failure to educate and discrimination

The widely publicised collapse this summer of three Reinforced Autoclaved Aerated Concrete (RAAC) concrete planks that were previously classified as non-critical prompted the decision to close over 100 schools just before the start of the new term. The number of schools affected has since risen to 214, together with 16 universities. The government has pledged to spend whatever it takes to keep children safe, but there is concern in some quarters that this will come at the expense of the promised investment in special educational needs and disability provision. With the number of students requiring such support only increasing, we consider that an increase in claims for failure to educate and/or discrimination may come as a knock-on effect of the investment required to remedy RAAC issues, as well as claims relating to failure to educate for those students affected by closures and amended timetables.

Universities will face more claims arising from failure to protect against harassment and sexual misconduct

In 2020 the Office for Students (OfS) published guidance to Higher Education (HE) providers in England about the effective systems, policies and processes that they needed to implement to prevent and respond to incidents of harassment and sexual misconduct. Following a review in 2022, they identified clear variations in practice and an overriding view that not enough progress had been made. In light of those concerns, OfS have consulted on whether to impose regulations designed to ensure that students are protected from harassment and sexual misconduct. Harassment and sexual misconduct remain a big issue on campus, particularly targeted against females. Given the failure of some HE providers to adopt strong prevention strategies, we predict an increase in the number of cases, including those arising from student on student incidents, being made against HE providers including discrimination claims for breach of the Equality Act 2010.

Expect more data breach claims in the education sector

Following the move to online tuition during the COVID lockdowns, recent years have seen a number of education establishments fall victim to cyber-attacks, with threat actors obtaining personal data and seeking to extort ransoms, and as a result some data subjects affected presenting claims for damages. While claims for damages following cyber-attacks may be expected, data breaches also arise where data is disclosed accidentally, as the Information Commissioner's Office has highlighted following recent losses of data by police forces. Despite a number of recent judgments and the extension of fixed recoverable costs, given the financial pressures faced by many claimants, claims for damages following data breaches are expected to continue to be presented.

Increased risk of fires caused by e-scooters in student accommodation

With the increased use of e-scooters and e-bikes comes the challenge of how and where students charge the batteries given the shortage of suitable and secure communal charging points. Where students do not use the correct charging points and instead charge batteries within their own accommodation, this may be in breach of the terms of building insurance cover which the accommodation owner or provider has put in place. Damage to the accommodation or part of the wider building may not then be covered, leaving the building owner with an uninsured loss and potentially having to bear the costs of making good the damage. The increasing risk of such fires, and the resultant claims, is potentially magnified across a large portfolio of properties. Accommodation providers should ensure tenancy agreements reflect the provisions of insurance policies.

INSURANCE ADVISORY

The FCA and PRA will drive greater diversity and inclusion in the workplace

Consultation proposals by both regulators are more far-reaching than expected. They include controversial elements, such as a requirement to set targets to address underrepresentation at all levels of the work force. The proposals are set out in the FCA's consultation paper entitled "Diversity and inclusion in the financial sector – working together to drive change" and the PRA's counterpart consultation paper entitled "Diversity and inclusion in PRA regulated firms", both published on 25 September 2023. Insurers will be required to publish diversity and inclusion (D&I) strategies (including a plan for meeting the goals set out); monitor diversity and inclusion internally; collect and report data across a range of demographic characteristics to the regulators; and make public disclosures of D&I data. It will be challenging to set targets based on characteristics such as sexual orientation or religion, given the heightened sensitivity around the processing of this information on an identifiable basis. Though many larger firms will already have D&I policies and some level of diversity monitoring in place, careful consideration will be needed to ensure compliance with the prescriptive requirements proposed.

Plan now for the changing role of the insurance professional in the face of AI…

The sector will need to grapple with the changing role of the insurance professional in the face of AI. One aspect of this is the looming skills gap. The industry will need experts in both insurance and AI and it should be looking to get ahead of this now, with extensive education and upskilling and, where required, recruitment. This should also involve developing a strategy for ongoing education and training to ensure that organisations keep up with the pace of technological and regulatory change. Another aspect is the issue of job displacement. As the technology evolves, automation may lead to changes for the workforce, with roles reimagined or replaced and a need for retraining. The industry should be planning now for the ethical and economic issues that flow from this.

…And consider too the impact of AI on insurance products

While there is plenty of commentary on the risks and rewards of AI to the insurance sector, what is considered less is the impact that AI may have on insurance products themselves. One issue will be the insurance of AI-related risks. This will require an assessment of the fitness for purpose of traditional policies to manage and mitigate enhanced AI risks and consideration of whether new types of products are required. There is also the threat of "silent AI". The industry will need to be mindful of potential exposures contained within more traditional policies which may not specifically deal with AI risks. Another issue will be the challenges around policy wordings and coverage more broadly. A specific issue, similar to what we saw with cyber, will be establishing an adequate definition of AI. There will also be the related challenge of how to establish effective and credible exclusions and endorsements. The sector will also need to consider the impact of AI, and the additional data it gives access to, on the duty of fair presentation, which is somewhere we see that AI could really shift the balance.

The Consumer Duty will continue to challenge the market in 2024

The Consumer Duty, which came into force on 31 July 2023, has been described by the FCA's CEO as its "most significant reform for decades". The FCA will assess the impact of the Consumer Duty closely, with a particular focus on the value of insurance products and the effectiveness of the measures taken by insurers to address the needs of vulnerable customers. The Consumer Duty will be an increasing feature of regulatory enforcement action against firms. Insurers and intermediaries will need to show they have taken all reasonable steps to ensure good customer outcomes. It will no longer be enough to show that the relevant rules were complied with; firms will have to demonstrate the additional measures they identified as necessary to meet the four cross-cutting obligations that make up the Consumer Duty, and the steps they took to ensure those measures were carried out.

The Consumer Duty will affect price and value, and may require products to be withdrawn

The Financial Conduct Authority (FCA) will continue its work on fair value for insurance products, but with added impetus under the Consumer Duty. The FCA has expressed surprise at the small number of insurance products withdrawn following firms' fair value assessments. It is also clear where the FCA will be directing its sights; it has highlighted GAP insurance as being a product it thinks often fails to provide fair value, with claims costs representing as little as 4% of premiums. The FCA has also seen examples of firms paying up to 70% of the value of insurance premiums in commission to distributors of GAP insurance. Products previously highlighted by the FCA as often representing poor value include policies sold as add-ons to non-insurance goods and services, and policies where the distributor's remuneration represents a high proportion of the premium paid by the customer, particularly where the distributor's role is limited to non-advised sales. Insurers and distributors with products which may represent poor value should ensure that their value assessments are robust and up-to-date.

Consultation on new framework for captives in Spring 2024 will require bold stance by government and regulators

The UK government, along with the Prudential Regulation Authority and Financial Conduct Authority, will continue to reshape the UK rulebook, taking advantage of the greater flexibility resulting from the UK's departure from the European Union. Progress continues to be slow and cautious, although there are encouraging signs (for example, the abolition of the cap on bonuses) of a willingness to make changes which make regulatory sense even at the risk of unfavourable headlines. In this light, the announcement in the Autumn Statement on 22 November of a consultation in the Spring of 2024 on the design of "a new framework for encouraging the establishment and growth of captive insurance companies in the UK" is welcome. However, the measures will be successful only if the government and regulators are sufficiently bold to put the UK's regime at least on a par with those of established captive centres.

Expect greater scrutiny around third party service providers in the name of operational resilience

Financial regulators are becoming increasingly alive to the need for operational resilience around services obtained by regulated firms from third party service providers (TPSPs). TPSPs can pose unique systemic risks where firms are dependent on a limited number of providers; the Bank of England has identified a significant concentration of cloud-based service providers for banks and insurance companies. The Financial Services and Markets Act 2023 establishes a new Critical Third Party (CTP) regime, giving the UK regulators new powers to directly regulate CTPs, rather than rely on firms to manage the risks themselves. This regime will apply where HM Treasury identifies a CTP as 'critical' – this is likely to apply to just a small number of TPSPs. In the EU, the Digital Operational Resilience Act will apply broadly similar requirements to EU firms and TPSPs. Firms and potential CTPs alike will need to prepare for much closer regulatory scrutiny than previously. Even where a TPSP is unlikely to be found to be providing 'critical' services, more intensive regulatory scrutiny of such arrangements is on its way.

International ESG initiatives will continue to drive sustainable finance regulation in the UK

On 19 September 2023 the Taskforce on Nature-Related Financial Disclosures (TNFD) released its final recommendations. It provides a framework enabling companies to assess, disclose and manage nature-related risks and impacts with the aim of consistent and comparable reporting by businesses and financial institutions worldwide. This has been described as a "game changer" for corporates and financial institutions. The output of the TNFD complements that of the Task Force on Climate-Related Financial Disclosures (TCFD), enabling financial institutions that are already acting on climate risks to use TNFD's integrated approach to address nature-related financial risks at the same time. Though the framework is currently a voluntary one, as happened with the TCFD we can expect governments and regulators around the world, including the Financial Conduct Authority in the UK, to move to introduce compulsory nature-related financial disclosures in line with TNFD alongside the current compulsory climate-related financial disclosures for in-scope firms.

Insurers need to focus on the supervision of appointed representatives

The Financial Conduct Authority (FCA) will continue to focus on firms' supervision of appointed representatives (ARs), including testing whether firms have fully implemented the FCA's recently enhanced supervisory requirements. We can expect enforcement action where firms have failed to do so, and in the longer term where failings on the part of the AR are the result of poor oversight or due diligence on the part of the principal. Insurers and intermediaries with ARs should review both the terms of their current arrangements and their policies and procedures for overseeing new and renewed appointments. It is likely that the willingness of insurers and intermediaries to take on such responsibilities will reduce given the greater regulatory scrutiny, particularly where the appointment of an AR is not key to the firm's strategy.

INSURANCE WORDINGS

We predict more focus on the definition of terrorism

One of the definitions of terrorism commonly incorporated into insurance policies derives from the Terrorism Act 2000. This immediately gives rise to issues: the definition in that Act has twice been amended and this is often not reflected in clauses adopted. It is materially different from the definition in the Reinsurance (Acts of Terrorism) Act 1993 which set up Pool Re. These definitions also differ from the terms used in other jurisdictions, including the Terrorism Risk Insurance Act in the USA. Some definitions require a declaration by a government body (such as the Articles for the MIB, which require a certificate to be issued by HM Treasury). Other definitions do not have this requirement, though a government declaration would likely have evidential weight. These all predate the emergence of state-backed terrorism as a concept. Recent events may put this into sharp focus. Clarity and consistency on this topic are essential if coverage disputes are to be minimised.

Expect further exploration of 'greening' insurance

We predict that insurers will incentivise policyholders to make investments to protect against climate change risks. Measures that insurers may use to encourage insureds to take climate change mitigation action (i.e. to reduce greenhouse gas emissions) include pricing structures and changes to cover. Terms may add a reward, or a warranty that insureds will take certain measures, or an exclusion. This may require insurers to provide information on climate mitigation and adaptation to raise awareness. Further support is required from regulators.

Insurers will seek to reduce exposure to climate change risks

We predict that insurers will seek to reduce exposure to climate change risks. We have already seen a degree of movement in this space from a wordings perspective. For example, LMA5570 seeks to exclude liabilities arising out of any claim alleging that an insured caused or contributed to climate change or its consequences. This is hardly surprising, considering the increase in climate change litigation over the last few years: 2,341 cases had been captured in the Sabin Center's climate change litigation database by May 2023 and the diversity in cases and number of countries in which such litigation is identified continues to increase.

Principles-based regulation will increase

Principles-based regulation has become more widespread in the UK in recent years and the Consumer Duty is a further example. This is to be distinguished from rules-based regulation where the limits of permitted or proscribed conduct are defined. It tends to be outcomes based and, when it works well, prevents technical compliance which ignores the intended purpose of regulations. The Consumer Duty does not attempt to set out what insurers must do in relation to specific underwriting or claims practices, or when drafting policy documents. Instead, it sets out broad principles and it is for insurers to interpret them and modify their practices and policy wordings to ensure compliance. Treating Customers Fairly was an earlier manifestation of this but it has been taken much further. The Financial Conduct Authority is likely to use this tool more widely going forward.

INTERNATIONAL CASUALTY

New life in old PFAS and opioid claims yet

Coverage discussions surrounding long-standing claims notifications arising from the use of/exposure to PFAS (perfluoroalkyl/polyfluoroalkyl substances) and opioid related exposures will move forward in 2024 after years of stasis. On PFAS, the latter half of 2023 saw settlements progressing and accelerating in relation to the first phase of the Aqueous Film-Forming Foams (AFFF) Products Liability Litigation in North Carolina. Those settlements will lead to distributors and manufacturers of AFFF products calling on their insurance carriers for coverage. The settlements will also naturally prompt a shift of focus from the current wave of water supplier plaintiffs to the next wave of individual plaintiffs. At the same time, in the long running opioids saga, the US Supreme Court heard oral arguments in December on whether Purdue Pharma's Chapter 11 Plan of Reorganization is appropriate (focusing on whether the Plan can survive with the non-consensual third-party releases that the Sackler family has insisted on in exchange for their contribution of billions of dollars to the plan). If the plan is again approved, Purdue and its creditors committee will then look to progress the extant coverage disputes with its foreign (Bermudian and European) insurance carriers that have been sitting in abeyance as the plan worked its way through the US bankruptcy system.

The glyphosate debate, and litigation, seems set to continue

Prospective regulation and litigation will continue to keep glyphosate on the agenda for insurers in the next year. Glyphosate is the world's most widely used herbicide, despite the World Health Organisation describing it as "probably carcinogenic" in 2015. In the US, recent awards of $175mn and $300mn in compensatory and punitive damages against Bayer in California to those bringing claims in relation to its weedkiller, Roundup, will cause apprehension for manufacturers of like products and their insurers. However, proposed legislation in the US may prevent similar claims in the future. Pre-emption measures in the Agricultural Uniformity Labelling Act would make the Environment Protection Agency the sole US authority on pesticide labelling and packaging requirements, reducing states' capacity to implement their own restrictions and subsequent prospect of litigation. While there are no significant examples of glyphosate litigation in Europe, an ongoing class action in Australia involving 800 plaintiffs may change that, with a judge-only decision likely to be more persuasive than decisions in US jury trials.

Aloha to climate change exclusions

The evolution of climate change litigation means the prospect of a claim for damages against a defendant for its contribution to climate change is no longer far-fetched. The immediate risk to liability insurers is the exposure to defence costs for this type of litigation, as seen in the claim brought by Aloha Petroleum against its insurer under its commercial general liability policy. The claim follows the insurer's refusal to pay costs incurred in Aloha's defence of the underlying action relating to the alleged impact of fossil fuel production on the Earth's climate and communities in Hawai'i. One key question currently before the Hawai'i Supreme Court is whether greenhouse gas emissions constitute "pollutants" for the purposes of the pollution exclusion. We would expect liability insurers to start addressing this uncertainty through the use of exclusions specific to climate change.

Biodiversity risk will move centre stage in 2024

While it may have been waiting in the wings of the ESG space in 2023, we predict the spotlight will fall on biodiversity risk this coming year. This is based in part on the publication in September 2023 of the recommendations of the Taskforce on Nature-related Financial Disclosures, providing companies and financial institutions with a risk management and disclosure framework to report and act on nature-related issues. Biodiversity risk also sits in the slipstream of climate change risks and will benefit from a general increase in awareness, despite being a separate risk focused on the direct harm we cause our environment and nature. For liability insurers, new laws and regulation will widen the scope for claims and litigation risks. But the big question is whether we will follow other jurisdictions, such as New Zealand, Canada and Colombia, in giving legal personhood to natural objects, such as rivers and forests. The risk of reputational harm should also not be underestimated.

Social inflation will grow in Europe

While social inflation has been somewhat of a paper tiger in Europe in recent years, we may now see it start to affect insurance pricing across the continent. Some of the key drivers associated with the phenomenon, such as punitive damages and civil jury systems, remain largely irrelevant in Europe. However, the implementation of the Representative Actions Directive increases the likelihood of class actions across an increasing number of claim types. Public sentiment on issues such as greenwashing, climate change and corporate mismanagement will generate increased awareness of and claimant involvement in class actions. Although third party litigation funding in Europe may be the subject of further regulation, this is indicative of an expected increase in its use. These factors are all consistent with increasing social inflationary trends, and insurers will need to be mindful of their exposure.

Regulation of European litigation funding will progress

Formal proposals for the regulation of third-party litigation funding in Europe will become clearer in 2024. In October 2022, the European Parliament made recommendations to the Commission for the introduction of minimum standards for funders, including a limit on sums that could be paid from settlements or damages to funders. Progress has been slow, with the Commission needing to balance the desire to prevent abusive claims with the crucial role that funding can play in promoting access to justice. By comparison, the UK's litigation funding market remains largely self-regulated on a voluntary basis, with funders currently focused on the implications of the Supreme Court's decision in PACCAR. Our guess is that the regulation in Europe, when it comes, will be relatively light touch, so as not to strangle the growth of mass actions for consumer claims now provided for by the Representative Actions Directive.

Bermuda renewal pricing will remain hard in light of polycrisis

Several macro-economic global factors, combined with weak investment and the absence of new capital, will mean that Bermuda re/insurance renewal pricing will continue to harden in 2024. Issues such as high inflation, the lingering effects of COVID-19, extreme weather events, the war in Ukraine and escalating tensions in the Middle East are affecting investment appetite. Despite the Bermuda market being historically robust when faced with unexpected events, the complex and interconnected nature of the current global landscape will continue to pose a unique risk. We expect that underwriters' efforts to maintain profitability will mean that renewal pricing in the next year will continue the upwards trend.

LEGAL INDEMNITIES

Increased approvals of onshore wind farms will lead to an increase in judicial review applications

Recent changes in UK government national planning policy mean that Local Planning Authorities are now directed to approve planning applications for onshore wind farms if the sites have been identified in the local or neighbourhood plans and provided that the proposals have community support. The concerns of affected individuals must have been appropriately addressed but projects can no longer be vetoed by a single objector. Onshore wind farms remain a controversial and emotive subject, with opponents ranging from conservation charities to community interest groups concerned about the impact on the landscape in terms of visual and noise intrusion, including the impact on birds. We anticipate an increased focus on judicial review as local communities and conservationists attempt alternative redress to prevent development. Developers will seek to mitigate this risk by arranging robust legal indemnity insurance.

Construction costs inflation and increased borrowing costs will continue to depress housing output

The year-on-year increases in the cost of key construction materials, including aggregates and insulation, and post-Brexit labour shortages will continue to squeeze housing developers' profits. High borrowing costs for developers and home buyers will compound the problem and create a challenging environment for developers. Legal indemnity insurers are likely to be impacted by the difficulties suffered by their targeted market.

Policy changes will give rise to new opportunities in the renewable energy sector

The Energy Act 2023 established the groundwork for the UK's future energy sector, focusing on net zero energy project delivery. We expect the energy infrastructure sector to buck the trend and promise profitable growth. Renewable energy infrastructure projects involve complex development on land often blighted by defects in title, such as access issues and restrictive covenants. Developers and their funders will need legal indemnity insurance to mitigate the costs and delays that would be caused by property and planning disputes.

The end of low interest fixed-rate mortgages will cause an upsurge in claims against lender policies

The Bank of England recently commented that the full effect of the significant rise in interest rates has only just begun to impact households. Three quarters of homeowners' fixed-rate mortgages are due to expire by 2026. The struggle by households to meet repayments, coupled with the finely balanced risk of the country falling into a recession, causes us to anticipate an upturn in lender policy claims as lenders repossess and look for opportunities to recover shortfalls from lender policies.

MARINE, ENERGY, AND TRANSPORT

Lithium ion batteries at sea: an ever growing risk for marine insurers

2024 will see a continued increase in fires on container ships, with lithium ion (li-ion) batteries a main contributor. There is an inherent risk associated with such batteries being carried at sea and the rise in demand should be at the forefront of marine insurers' minds, especially in cargo classes. Li-ion batteries can release energy after trauma, increases in temperature, overcharging, exposure to water or cell faults due to manufacturing defects. The Global Battery Alliance anticipates a year-on-year industry growth of 25% by 2030. This is expected to lead to an increased risk of untested 'counterfeit' battery production, with manufacturers/consignors either intentionally mis-declaring cargo to avoid trade restrictions or negligently applying the wrong label. If mislabelled batteries are stored next to other dangerous goods, any energy release can be catastrophic to the vessel, crew on board and other cargo. If larger consignments of li-ion batteries are exposed to water, the resulting chemical reaction can produce extremely combustible by-products which act as an accelerant. Sometimes, without suitable extinguishers, the only effective way of eliminating the fire is to allow the li-ion battery to self-extinguish, which can take several days. This highlights the very high level of risk associated with carrying li-ion batteries.

New marine fuels will face greenwashing risks

The technology for carrying and burning methanol as an alternative fuel is already well advanced, with Maersk taking delivery of the world's first, ocean-going methanol powered container ship in June 2023. However, the infrastructure for delivery of the quantities of 'green' methanol required by the industry is woefully inadequate. The severe restriction on supply suggests that, at least in the short term, some vessels will be forced to use 'grey' methanol. Shipowners and operators switching to methanol will therefore face increasing accusations of greenwashing, unless they can readily demonstrate the provenance and truly green credentials of the fuel on a well-to-wake basis.

Insurers will need to do more to support decarbonisation R&D

In order to meet the International Maritime Organisation's 2050 and interim targets, shipping will need to ramp up its investment in new fuel and propulsion technologies. This will require significant investment in research and development, with pilot schemes to demonstrate proof of concept, safety, and that any new technology can be scaled. Equipment manufacturers and shipowners who are willing to make such investments will need the support of the marine insurance market to ensure that these projects are viable, helping to lower the barriers to innovation. This collaboration will in turn provide insurers with valuable data on the risks of insuring these solutions, should they be adopted at scale.

Fuelling crew safety: the vital role of seafarers in decarbonisation

As the shipping industry strives to decarbonise, in 2024 we expect to see significant developments in seafarer training to facilitate this transition while safeguarding seafarers' welfare. With the shift towards LNG, hydrogen, ammonia and other low-carbon fuels, seafarer training must evolve to accommodate the safe handling and operation of these fuels. Alternative fuels pose new risks and the lack of specialised training around them is dangerous for seafarers, vessels and the environment. For example, hydrogen is more flammable than diesel and ammonia fumes are highly toxic to humans. Specialised education is necessary, for example, on fuel-specific safety measures, emergency response and equipment maintenance. Balancing the demand to adopt new, cleaner fuels with the need to protect seafarers' wellbeing will require industry-wide commitment. Underwriters will be interested in investment in training, safety protocols, and support systems, which will be vital to ensure that as the industry pursues a greener future for shipping, it also prioritises the welfare of those who make it possible.

Marine cyber threats will move from external to internal

Shipowners and operators will continue to adopt solutions for greater connectivity at sea, bringing more equipment and crew online. Increased connectivity will increase the external cyber threat landscape, making internal threats easier to overlook. Older legacy technology, where patches or updates are no longer being published, could create a new internal threat of equipment failure. New International Association of Classification Societies regulations coming into force in 2024 will embed cyber security by design into new build vessels but vulnerabilities for existing vessels and equipment will remain, whether through improper integration of individual equipment into the vessel's overarching cyber-security plan or through outdated equipment that is not properly segregated.

Transport companies need to prepare for a surge in new regulations

EU ETS, CRSD, CII, CSDDD, ESG…the acronyms, and compliance requirements, for maritime supply chain regulation are seemingly endless. With increasing focus from regulators on supply chain transparency and emissions reporting, this trend is likely to continue, forcing companies to better understand their supply chains and their role in the supply chains of others. As key nodes in global supply chains, transport companies will need to ensure they are able to provide visibility to customers and provide accurate and complete reporting to satisfy the regulators. This will almost inevitably mean getting to grips with a lot of data and using digital tools to ease the compliance burden. For cargo insurers this should translate into better risk management, and better data availability for risk analysis, as their insureds gain a greater understanding of who their suppliers are and how their goods are transported.

Extreme weather events will continue to disrupt and divert supply chains

As climate change continues to alter weather patterns, intensifying extreme weather conditions and causing prolonged periods of drought, global shipping routes will continue to face significant disruption as inland waterways become impassable to all but the shallowest-drafted ships. Key pinch points such as the Panama Canal continue to operate at reduced capacity. As delays increase, we will likely find some cargoes being diverted either to multimodal alternatives or via longer routes, changing (and in some cases increasing) both the cargo and hull risk for those journeys.

Increased focus on wind assisted propulsion systems

The shipping industry is aiming to achieve net zero emissions by 2050 and as part of the efforts to decarbonise we expect further research into the viability of wind assisted propulsion systems (WAPS). WindWings, a type of WAPS and the result of a collaboration between BAR Technologies and Yara Marine Technologies, is already gaining traction in the industry. It is estimated that the technology could increase the fuel efficiency of a vessel by up to 30% thereby reducing CO2 emissions. To date, WindWings have been retrofitted on two bulk carriers in collaboration with Cargill and MC Shipping on the Pyxis Ocean and Berge Bulk on the Berge Olympus. However, given the early stage of this initiative, there is little data on their effectiveness in a commercial environment. We anticipate that there will be further advancements in WAPS including competing technologies in the market as well as further trial runs of WindWings on other types of vessels. Marine insurers will need to get to grips with the potential new risks these modifications will bring to the operation and structure of the vessel.

Continued trouble with subsea cabling

The Global Underwater Hub has estimated that approximately 85% of the total value of insurance claims emanating from offshore wind projects is related to subsea cables, with the average settlement claim being approximately £9 million. Subsea cables are a critical part of the infrastructure of offshore wind projects as the conduits for transferring the energy generated by the wind turbines to the onshore grid. Failure of these cables not only disrupts the transmission of energy but is also very costly to remedy. With the number of offshore wind farm projects predicted to increase, we expect there will be further significant claims on insurance policies which will likely lead to higher premiums and a knock on effect on the financial viability of these types of projects. However, we also expect new technologies to emerge that seek to address the issues regarding the durability of subsea cables.

MEDICAL MALPRACTICE

Healthcare AI litigation will raise liability apportionment issues and litigation costs

The benefits of healthcare AI are already being seen in radiological analysis. However, as more AI devices come to market, there will also be increased risks. For example, as the devices self-learn, the thought processes by which they make decisions may not be transparent (known as the ‘black box problem’). The present law of medical negligence is ill-equipped to deal with AI, causing uncertainty over how claimants will litigate AI claims. Will they pursue AI claims through Bolam negligence, on the basis that the AI product should be judged according to the same principles as a human clinician? Will they pursue these claims as product liability claims? Or even a mixture of both? In addition, there will be the question of how blame should be apportioned between clinicians and AI producers. These factors will increase litigation complexity and costs.

New discount rate review in 2024 may impact insurance reserves

Following the implementation of Part 2 of the Civil Liability Act 2018, the first review of the Personal Injury Discount Rate took place in July 2019, when the Discount Rate was set at minus 0.25%, where it has stayed to date. As a review must take place every 5 years, we can expect the next review to commence by July 2024. Underwriters will therefore want to keep a close review on reserves towards the last quarter of 2024 and the first quarter of 2025. Following a government consultation looking at the discount rate in other jurisdictions, we wait to see whether a dual rate approach will be adopted in the UK for the first time. This may allow longer-term losses to benefit from a higher discount rate (and therefore reduction in overall quantum) but may be offset by higher legal costs per claim amid more use of financial specialist evidence.

Financial pressures in the NHS and long waiting times will increase demand for private hospital provision

We expect the surge of self-pay patients in the UK private healthcare market to continue. With incessant financial pressures in our primary care system, acute shortages of doctors and nurses and a record 7.3mn people on the NHS surgical waiting list, the number of patients purchasing medical insurance or who elect to self-pay for their treatment to skip the queue is at a record high. This provides significant opportunities for growth in the medical malpractice market for healthcare providers, independent surgeons and their insurers.

The rise of private General Practice will continue as NHS GPs struggle with soaring demand and bureaucracy

As General Practitioners struggle with ever-growing patient lists and it becomes increasingly difficult for patients to get appointments, more GPs and patients are moving across to private GP practice. While this will create opportunities for insurers to provide med-mal cover for private GP providers, paying patients may expect a higher standard of care than they may have received in primary care, and increased patient expectations may lead to increased complaints and claims over time.

Fundamental dishonesty will be firmly under the spotlight in 2024

The last 12 months have seen an increased number of findings of fundamental dishonesty – claimants exaggerating their injuries when making claims - in the medical malpractice space. This may be due to the availability of good surveillance evidence, the continued cost of living crisis, and the appetite of the NHS and insurers to take on cases where the evidence warrants it. DACB has secured a record number of decisions on fundamental dishonesty in the last year, and we have also been instructed on appropriate cases to bring contempt of court proceedings, to highlight this practice as a means of deterrence against others.

Expect greater regulation of non-surgical cosmetic procedures to promote higher standards and best practice

The non-surgical cosmetic procedure sector contributed over £24bn to GDP in 2022, and has increased exponentially over the last 10 years. Anti-wrinkle injections (commonly known as Botox), dermal fillers and chemical peels are increasingly popular and now commonly available on most British high streets. However, concerns over safety and outcomes of unlicensed treatment have caused the government to consult on the introduction of a licensing regulation scheme, including a practitioner licence and a premises licence, potentially to be administered and enforced by local authorities. Insurers of cosmetic treatment providers will want to keep a close eye on the scope of this consultation, so that their evaluation and underwriting of risks in this space are updated accordingly.

Med mal claims will be impacted by the new fixed costs regimes

After several years of speculation and several consultations, two regimes will introduce fixed recoverable costs into medical malpractice claims. The first applies to the introduction of fixed costs for all money claims valued over £25,000 up to £100,000, where the cause of action accrued after 1 October 2023. Clinical negligence claims will be included in this regime if breach of duty and causation are admitted, so long as no exception applies. The second regime, expected in April 2024, will introduce fixed costs for all clinical negligence claims valued up to £25,000 (excluding stillbirth and neonatal claims). This will introduce early exchange of evidence and a neutral evaluation (to be paid for by the defendant) if a matter is not resolved. Where claims fall within scope, healthcare providers and their insurers will need to accelerate investigations and decisions on admissions or defensibility at the earliest opportunity in order to benefit from better proportionality of costs.

MOTOR

Automated Vehicles Bill will face bumpy road to become law

The Automated Vehicles Bill will face significant challenges in becoming law before the conclusion of the current parliament. Adopting a number of the Law Commission's recommendations, the draft legislation focuses on a safety framework, clear legal liability, data sharing and security, and responsible marketing. It also accommodates the divergence in regulation as between private cars and automated passenger service vehicles. There will need to be substantial stakeholder involvement on multiple points before secondary legislation can be finalised. The Automated and Electric Vehicles Act 2018, a relatively narrow piece of legislation forming part of the rolling programme of regulation for AVs, concluded its parliamentary journey in around 9 months. The proposed Automated Vehicles Bill will deal with many of the fundamental issues necessary for the effective deployment of automated vehicle technology. If there is a general election in May 2024, then the Bill is unlikely to pass. A later election would allow more parliamentary time, but would still not guarantee the Bill's passage onto the statute books. In addition, a Labour government may not prioritise automated vehicles in its initial transport agenda.

Limited respite expected in the continued rise in repair and vehicle costs

Third party property damage costs in motor claims will continue to increase, with a corresponding effect on motor insurance premiums. With added costs related to advanced driver assistance systems and sensor calibration, as well as increases to the Auto Body Professionals' labour rate and additional charges like the new-for-2023 energy cost supplement, motor premiums hit a record high in 2023. Insurers are also facing significant claims relating to electric vehicles, with higher repair costs and a shortage of trained repairers. Despite a reduction in general inflation, we expect that the continuing increased repair and vehicle costs will keep motor premiums high.

Long-awaited clarity for mixed injury claims

In 2024 there will be, at last, clarity on how claims for general damages should be valued in motor injury claims where there is both a tariff whiplash and non-tariff injury. These injuries have become known as 'mixed injuries' and the method for valuing them has been contentious. The Supreme Court will determine definitively the correct construction of Part 1 of the Civil Liability Act 2018, giving parties the necessary clarity as to how to approach settlement. The split Court of Appeal decision did not provide the clarity needed.

Review of Judicial College Guidelines and whiplash tariff will see injury claims inflation

Inflationary pressures will lead to an increase in the guideline figures for injury in the 17th Edition of the Judicial College Guidelines expected in March 2024. Any changes may impact the track to which cases are allocated. The whiplash tariff also established in the 2021 regulations must also be reviewed by May 2024, in line with the three year anniversary of the Civil Liability Act coming into force. Any increase will serve to dissipate the intended benefits of the reforms and should be accompanied by a corresponding increase in the small claims limit, to account for inflationary pressures on general damages.

Mandatory mediation will herald a change in claims handling processes for low value fixed sum claims

Mandated use of mediation in low value, fixed sum claims will require parties to re-think their approach to pre-action processes and disclosure. This will be especially prevalent in areas such as alternative vehicle hire claims for a specified sum, where claims are often document and evidence heavy. As yet, there is no specific date for the implementation of the Ministry of Justice's intention to mandate the use of the Small Claims Mediation Service on specified claims post-filing of a Directions Questionnaire. We expect this will occur in 2024. The intention is to help reduce backlogs and free up court lists to enable judges to hear more complex cases.

Cross-jurisdictional collaboration will help inform the approach to setting the personal injury discount rate

A cross-jurisdictional approach will help to inform whether a single or dual personal injury discount rate (PIDR) should be used across the UK jurisdictions. The PIDR is under review in all three UK jurisdictions during 2024. We are likely to see a further call for evidence before the review commences. The panel of experts appointed will be advising the Lord Chancellor on issues including whether there should be a single or dual rate, and what form a dual rate should take. The review must commence by 15 July 2024 and be completed by 10 January 2025. The review process for Scotland and Northern Ireland is different. If changes are to be made to the process, methodology for calculating or structure of the rate, those changes need to be in place before the Government Actuary's Department starts its review by 1 July.

The digital transformation of low value claims will pick up pace

A combination of market forces and the reform agenda will drive a continued focus on digital claims solutions. The recent establishment of a new Online Procedure Rules Committee, coupled with the Civil Justice Council's recommendations to mandate and regulate pre-action processes and behaviours will demand greater use of technology to help front load claims investigations and drive process efficiencies.

There will be a better understanding of the impact of a proposed cold calling ban on motor claims

The proposal to ban cold calling for consumer financial services and products has the potential to significantly impact the motor claims market. The response to the HM Treasury consultation is expected during 2024. A ban would have the potential to impact both insurers and those providing claimant-related services. The intention, as stated in the consultation, is that the products and services intended to fall into scope would include credit and debt, including individual voluntary arrangements. Given the non-exclusive nature of the examples and the potentially extremely wide ambit of "credit and debt" services (in particular, going well beyond just those services that are regulated by the Financial Conduct Authority), the impact of any ban could be wide-ranging.

Claimant arguments on interpretation of fundamental dishonesty require clarity from courts

The next year will bring clarity to submissions being deployed by claimant representatives regarding the application of s57 Criminal Justice and Courts Act to property-related losses where they are associated with a personal injury claim. The issue needs to be tested on appeal to secure a binding decision on the interpretation of s57 in these circumstances. Finding the right case is important: our next trial of interest is due to commence in January 2024.

POLITICAL RISK AND TRADE CREDIT

Structured trade credit insurance can give the green light

The world will increasingly recognise the positive impact of trade credit insurance. The transition to net zero is difficult, even without the political considerations associated with the costs in post-COVID economies. Trade credit insurance can and does contribute to the battle against climate change, albeit the industry could perhaps be louder in pointing this out. Structured trade credit insurance can de-risk certain financial aspects for banks/investors by insuring against loan defaults. These insurance products enable capital exposure to be spread across the banking and insurance industries; smarter use of capital and risk sharing ensures that more green projects are developed, especially in developing states.

Political rains down in Africa

Political upheaval on the continent may drive political risk claims. The past three years have seen multiple coup d'etats in Africa, culminating in the ousting of the Gabonese president, Ali Bongo Ondimba, in August 2022. Political change, especially when driven by populism, brings with it significant risk for foreign investors. New regimes can have differing views to those with whom investors have dealt previously – including the respecting of private rights of ownership. New regimes may also seek to justify their ousting of prior governments on the, often unjustified, basis of fraud and corruption – with successful investors seen as relatively easy targets for a quick domestic political win. These are all unwelcome developments for investors and for political risk insurers who may have insured against the risk of confiscation, expropriation, nationalisation and deprivation by host governments.

Ukrainian shipping route indirectly increases risk of political violence in developing nations

Political violence risk increases the longer the Black Sea corridor remains exposed. Pre-war, Ukraine was one of the world's leading exporters of grain in the world, especially to developing nations. It provided more than 50% of the UN's World Food Programme supply of wheat grain in 2022, to help people in Afghanistan, Ethiopia, Kenya, Somalia, Sudan, and Yemen. With the status of the Black Sea Grain Initiative still unclear, those in developing nations face significant uncertainty around food security – especially as the impact of climate change affects domestic harvests. Increased civil unrest related to a government's (in)ability to feed its population is a significant risk as the war in Ukraine continues. Whether the corridor reopens will be watched keenly by underwriters in both the political violence space and political risk (as those seeking power may seek to take advantage of impending humanitarian catastrophe for their own ends).

Tech developments will take on the pretenders

Trade credit insurance will benefit from greater use of electronic trade documents. Credit insurance granted to the traders of commodities brings with it elements of risk beyond non-payment. The nature of international trade and shipping has become increasingly complex, and trade credit insurers who thought they were insuring simple seller A and buyer B transactions can now find themselves faced with multiple (alleged) intermediate trades between A and B, potentially increasing the risk of fraud. The market has been exposed to sophisticated attempted frauds in the past, with perpetrators using fraudulent bills of lading to evidence the existence of alleged insured trades. Developments in technology, increased digitisation and the use of e-bills of lading ought to reduce fraudulent claims as evidence of title to goods becomes automated and far harder to fake by those with nefarious intentions.

PRODUCT SAFETY, LIABILITY AND RECALL

Integration of AI into products highlights defects in UK product liability legislation

The development of new products with increasingly sophisticated software or AI capabilities will challenge the efficacy of the UK's existing product liability regime. The recent consultation on reforming product safety in the UK highlighted succinctly that existing definitions such as 'product' and 'defect' in the context of product liability are not adequate for consumer connected products with or without AI. Manufacturers, importers and distributors have been provided with guidance on security requirements for connected products via upcoming regulations pursuant to the Product Security and Telecommunications Infrastructure Act. However, UK businesses lack clarity on liability triggers in the event that AI or software integrated into a product fails, causing injury and/or damage. The proposed EU Product Liability Directive will extend the definition of product to include software. Manufacturers of components, which can include those integrated or interconnected with products, would also be liable for defects caused by those components. This may serve as a backdrop against which UK legislative change is made.

Products will be at the heart of class action growth in Europe

The impact of the Representative Actions Directive means that manufacturers and distributors of products, as well as their insurers, will have to contend with an increase in class actions for defective or unsafe products in the coming years. At the heart of this expected increase is legislative change in relation to consumer protection in Europe. Consumer protection is nothing new but product safety is currently the focus of widespread reforms aimed at updating and enforcing standards and facilitating access to justice. The new General Product Safety Regulations will introduce new requirements on the reporting of accidents caused by products, labelling and the advertising of product recalls. In parallel, the new Product Liability Directive (PLD) is a legislative proposal intended to update the product liability framework in Europe. The PLD is intended to replace the existing 40-year old Directive, bringing software and certain digital services into the scope of EU product liability, raising the prospect of mass claims following incidents such as defective software updates.

Product liability reform may be a victim of political timing

The prospect of detailed legislative proposals to reform the UK's product liability regime in the next 12 months are slim in our view. The recent wide-ranging consultation on the UK's product safety framework concluding in October 2023 did seek responses commenting on the defects of the current liability regime and did highlight concerns raised within the Call for Evidence 2021. Specific problems around the existing regime were identified but overall the consultation was light on detail and proposed changes. The UK lags behind the EU, with the Product Liability Directive being updated to cover connected products and software. We have no doubt there is an appetite to ensure that UK legislation covers recent technological advances, but any discussions around responsibility for non-physical elements of products will be complex. Against this backdrop, lengthy legislative timetables and a General Election to occur sometime in 2024, product liability reform is likely to fall within the remit of the next government, irrespective of political leaning.

Vigilance needed regarding potential deliberate acts of food contamination

Insureds and, by extension, product liability/recall insurers will need to ensure that robust procedures are in place across the entire food supply chain to protect against potential acts of sabotage and terrorism. The risk of spill over from geopolitical events is significant. Reactions of those watching events unfold in the Middle East and Ukraine are often visceral, especially in the social media age. With this comes the increased risk of radicalisation of individuals thousands of miles from the epicentre of events; the acts of these radicalised individuals are, regrettably, often unpredictable. The risk of terrorist action is not limited to direct attacks on individuals or property – history has shown that it is necessary to be wary of the indiscriminate targeting of civilians through the deliberate introduction of contaminates into the food chain.

New international medicines recognition scheme will reap benefits

The Medicines and Healthcare Products Regulatory Agency (MHRA) has announced a new licensing route for medicines which started operation on 1 January 2024. Companies that have already received a marketing authorisation for the same medicine can apply under the new International Recognition Procedure for expedited access to the Great Britain market based upon the regulatory decisions of one of the MHRA's specified Reference Regulators. These trusted competent authorities are Australia, Canada, Switzerland, Singapore, Japan, the United States Food and Drug Administration and the European Medicines Agency. The MHRA retains the power to conduct a full assessment where considered necessary. With companies needing to make decisions on which markets to prioritise, this is a welcome move. It also demonstrates the regulatory flexibility which the MHRA, as a sovereign regulator, can now use for the benefit of patients.

UK clinical trials will get back on track

Clinical trials are a key element of healthcare innovation but the UK has experienced a sharp decline in clinical trial activity in recent years. Recognising that clinical trials regulation should be flexible and proportionate to the risks, the Medicines and Healthcare products Regulatory Agency (MHRA) has announced a new streamlined notification scheme for the lowest-risk Phase 3 and 4 clinical trials. The scheme will see applications processed by the MHRA in half the current time, with about 20% of UK applications expected to be eligible. The scheme is based on that outlined in the MHRA's Clinical Trial consultation. Its goals were to enhance the UK's attractiveness as a home for clinical research as well as giving UK patients quicker access to potentially life-saving medicines. This initiative is just part of the biggest overhaul in UK clinical trials regulation in over 20 years, with this boost for clinical trials presenting an opportunity for insurers who offer coverage for clinical trial risk to write additional policies.

Will the UK vaping epidemic go up in smoke?

The recent policy paper and consultation published by the UK government on tackling the rise in youth vaping is a precursor to legislative change aimed at enabling vape use by adult smokers to help with cessation, but limiting uptake by young people. Existing legislation has not prevented widespread use by young people, and recently announced curbs in Australia to be underpinned by legislation may serve as a template for measures in the UK. For example, in Australia, vapes containing nicotine will only be available with a prescription from pharmacies, and other restrictions include limits on flavours, colouring and other ingredients. As mentioned in the King's Speech, the UK government already intends to take tougher measures to restrict the sale of disposable vapes, restricting the marketing of vapes and strengthening enforcement activity. It is possible that additional attempts to limit risks to public health caused by counterfeit or unregulated products in supply chains may form part of other measures proposed following the conclusion of the consultation. Insurers may choose to exercise restraint when writing liability risks covering both vaping devices and liquids in the face of further regulation.

PROFESSIONAL LIABILITY

All professions: The re-emergence of 'deep pocket' professional indemnity claims

Technology, ESG and the broader economic horizon will continue to combine to frame the challenges confronting the professions and their risk and liability exposures. Construction professionals, lawyers, auditors, accountants and surveyors are all facing climate change risks and sustainability demands from their clients, consumers and regulators. At the same time, cyber risks in all of their forms continue to be top of the list of threats for professional services firms, and this runs hand-in-hand with the need to achieve appropriate risk safeguards around the increasing use of AI in the provision of services. Finally, the broader economic environment presents headwinds for 2024. The Insolvency Service commented on 31 October 2023 that Q2 and Q3 2023 saw the highest quarterly insolvency numbers since Q2 2009. Combined with an apparent slowing in the real estate sector, and the consequent defaults, the potential for the re-emergence of 'deep pocket' professional indemnity claims must be real.

Accountants: Financial Reporting Council regulatory activism will continue

Increasing numbers of audits being investigated by the Financial Reporting Council (FRC) and increasing headline fines are trends that are set to continue. Audit quality is improving but until a homogenisation of improved audit practices is achieved across the board, accountancy firms remain vulnerable to findings that their audit work falls beneath the low bar justifying investigation and sanction. Historic audit work will also come under scrutiny in the event of corporate insolvencies, which are on the rise due to challenging economic conditions, interest rate hikes and the corresponding rise in the cost of debt. As regards level of sanctions and fines, the Carillion investigation headline fine for the firm under investigation of £26.5mn (reduced by 30% to £18.5mn to reflect the firm's co-operation and admissions) may be an outlier due to the unusual facts, however it has unarguably raised the overall ceiling for fines, and deterrence, not just fairness, is an important objective for the FRC, which explains why with each passing year we have seen FRC fines increase rather than stabilise.

Accountants: Expect a significant volume of trading loss 'audit' claims in 2024

The AssetCo and Manchester Building Society decisions started a trend of 'broadly-cast' trading-loss claims against auditors, and ensuing years have seen a run of settled cases in the absence of settled law. Multiple claimant law firms have been running such claims, structuring the arguments creatively. With litigation funders encouraged by recent successes, and the tide of corporate insolvencies rising along with interest rates, we predict more such claims in 2024.

Accountants: Capping audit liability – a new trend?

17 years after the Companies Act 2006 provided a legislative route for audit firms to seek to cap their liability, auditors are for the first time regularly looking to do so. Until now auditors, reflecting market pressures, held back from requesting any limitation on the financial liability that may be faced because of an error in the audit. However the tide has finally turned with many firms, including some of the big six, now considering making it a precondition of their appointment. With predictions about increasing audit claims and more Financial Reporting Council regulation, and with auditors and their insurers understandably nervous about both, it is perhaps surprising this has taken so long. How will the audit market and its clients address this evolution? Will this discourage claims where the amounts to be recovered are capped or help change the ongoing perceptions of auditor and client being too close? Could it even be the start of a new era of directors being more culpable for the errors in financial statements and, if so, will we witness an increase in D&O cover?

Construction Professionals: It's not easy being green

There is increasing pressure on the construction industry to build in an environmentally sustainable manner; this brings with it risks for construction professionals. The construction industry is a heavy emitter of carbon dioxide. The Carbon Emissions (Building) Bill (now withdrawn), which would have required the whole-life carbon emissions of buildings to be measured, is an example of the type of governmental pressure which is likely to be exerted on the industry. We anticipate that this will be coupled with increasing consumer demand for carbon neutral and highly energy efficient buildings. This will bring new risks for all players in the procurement chain including construction professionals. Developers are likely to face scrutiny over ambitious net zero claims. This could in turn spark claims against designers for failure to meet energy performance criteria. Contractors will face risks in terms of the time that construction takes for workforces unfamiliar with green construction and the additional cost of using green materials.

Construction Professionals: To certify or not to certify?

As we continue to see a squeeze on finances and an increase in contractor insolvency in the industry, the focus will turn on the role of professional certifiers, especially in respect of payments. It is common practice for construction professionals to take on roles, either as an employer's agent or contract administrator, that require them to issue payment certificates. While the majority of payment certificates are interim, allowing mistakes to be corrected in the next certificate, problems can arise where a final certificate is issued or where a contractor becomes insolvent part way through the project. A professional certifier always has a tightrope to walk in making sure it is being fair to the contractor while also protecting the employer's interests. However, in the current climate, one misstep could see the professional certifier faced with a claim for negligent certification as employers seek to recoup outlay that cannot be recovered elsewhere.

Financial Advisers: Post-implementation challenges presented by the new Consumer Duty

With the Consumer Duty in force from 31 July 2023, the implementation phase is now over but the challenges will continue. The Financial Conduct Authority (FCA) has emphasised that it is not a one-off duty but something advice firms will need to continue to monitor and improve upon. And the FCA will be testing firms' implementation and taking action where it is deemed insufficient. Firms will have to grapple with the challenge of what this means for the way they conduct their business. In the complaints area, firms now have an enhanced obligation to take appropriate action (including providing redress) where they have caused foreseeable harm to a retail customer. The likelihood is that this will lead to more voluntary and enforced past business reviews.

Financial Advisers: Unprecedented losses in bond markets come home to roost

Unprecedented losses in bond markets may lead to claims from those investing at the 'safer' end of the spectrum. In the past, volatility in markets has typically resulted in those with adventurous portfolios suffering the greatest losses. The period 2022-23 has been quite different with fortune favouring the bold. Assets viewed as lower risk, such as government and corporate bonds, have suffered significant capital losses. That means investors in cautious or balanced portfolios have incurred losses. As these losses are understood and crystalise, complaints and claims may be directed towards financial advisers on the basis that the risks of bonds weren't properly communicated and/or customers attitude to risk was underestimated.

Insurance Brokers: Embrace AI but don't lose the personal touch

The rapid acceleration of the use of AI in insurance will see brokers engage urgently with the opportunities, and threats, it brings. As insurers increasingly automate their underwriting and claims processes, through use of big data and algorithms, the distribution model is set to change. In personal lines, such as motor and household insurance, the broker has already largely been replaced by online channels and machine-driven underwriting. While commercial clients tend to prefer to deal with humans, brokers can no longer afford to ignore the AI tools that will enable them to find the best products and premiums to meet their clients' insurance needs. Brokers must ensure their talent strategy promotes those who are comfortable interacting with AI and other technological advances, and those already in the market must ensure that they upskill. It is at the interface with their clients, in forming deep and meaningful business relationships and really understanding their clients' business and current and future insurance requirements, that the broker will continue to add value in delivering a truly bespoke service – a skill which cannot (yet) be replicated by AI.

Lawyers: SRA presses for increased fining powers

A further expansion of the Solicitors Regulation Authority's (SRA) power to impose fines without referral to the Solicitors Disciplinary Tribunal (SDT) is anticipated. In 2022, the maximum fine for traditional law firms was raised from £2,000 to £25,000, however the SRA is lobbying for more. Although solicitors often prefer to resolve conduct issues directly with the SRA to avoid the costs and adverse publicity associated with a referral to the SDT, there is a balance to be struck between the efficient disposal of cases and access to justice. This has been brought into sharp focus by the Economic Crime and Corporate Transparency Act 2023 which removes the statutory cap on the SRA's power to levy financial penalties for cases involving financial crime including so called Strategic Litigation Against Public Participation. The Law Society and the SDT have expressed opposition to this proposal and have voiced concerns about the SRA acting as "investigator, prosecutor and judge". The SDT provides a transparent and objective forum for the consideration of more serious cases and it remains to be seen whether the Legal Services Board will act on the concerns expressed by the Law Society. For larger firms whose turnovers would result in the imposition of higher fines this could have a significant impact.

Lawyers: Building Safety Act advice an emerging risk area

It is likely that claims will be made against solicitors arising from new requirements under the Building Safety Act 2022. The Act introduced protections for certain leaseholders from liability for cladding and fire-related remediation works. The costs of these works can be ruinous to a leaseholder, and lenders have been reluctant to lend against properties without assurances that the statutory protections apply to the lease in question. Mistakenly identifying a property as being protected by these provisions may result in claims against conveyancers by purchasers and lenders. Lenders require existing leaseholders to complete and send to their building owner a Leaseholder Deed of Certificate, in which the leaseholder certifies whether, as at 14 February 2022, the lease met the requirements for a "Qualifying Lease" under the Act. The risk for solicitors is checking whether the information provided is accurate. Solicitors acting for sellers may be put under pressure to sign undertakings, pursuant to which strict liability for errors would result – something to be avoided!

Lawyers: The risks associated with the use of AI

AI is set to fundamentally alter the practice of law but with it brings the prospect of claims. Law firms have been using AI for some time, for example in litigation disclosure platforms. What is new is generative AI that creates or 'generates' content so as to assist legal research, the review of contracts and summarising legal documents. Crucially, although the current generation of AI chatbots can possess huge amounts of information, they cannot evaluate its truth. The result is that the answers they provide may not be accurate; so-called 'hallucinations'. It follows that if lawyers use AI without proper thought or exercise of human judgement, mistakes will be made and claims will follow. The use of AI also creates the likelihood of other types of claims such as breach of confidentiality, intellectual property infringement, breaches of cybersecurity and privacy laws and publication of defamatory content. It can also be used to develop deepfakes, malware, ransomware, phishing attacks and other tools that facilitate cybercrime. In short, AI will bring huge advantages to the legal sector but lawyers who fail to appreciate its risks use it at their peril.

Lawyers: The claims environment will heat up in respect of climate change advice

We predict that the incidence of claims against lawyers in relation to climate-related advice will increase unless firms and in house legal teams support their colleagues to upskill in this area. In October 2023, the Law Society issued guidance to the profession on climate change, governance and the risks associated with greenwashing. The Law Society distinguished between the advice on issues such as greenwashing, that in-house lawyers may be under a duty to provide to their company's Board, and advice given to clients by solicitors in private practice. The Law Society also identified the areas of risk for companies and clients and the relevant legislation that lawyers should have in mind when advising. The message from this is two-fold. Training is key to ensure that solicitors are competent to give advice in this critical but emerging area. In addition, solicitors must scope out their retainers carefully, so that clients are clear about the limits of the advice they will receive and when they may need to instruct a specialist.

Media and Lawyers: Reforms will curb Strategic Litigation Against Public Participation

A new early dismissal mechanism will be coming into effect next year to address Strategic Litigation Against Public Participation (SLAPPs) in economic crime proceedings (under the Economic Crime and Corporate Transparency Act 2023). If a claim is held to be a SLAPP, the court will only allow it to continue if the claimant can show that it is likely to succeed at trial. If it does proceed, a court may not order a defendant to pay the claimant's costs (except where misconduct of the defendant justifies such an order). The reforms will give defendants an opportunity, for the first time, to be able to strike out SLAPPs. Where a SLAPP case is allowed to proceed, defendants will not face the risks of excessive costs burdens in paying the claimant's costs. However, the test to determine if a claim is a SLAPP may include an assessment of the claimant's conduct of the litigation and we anticipate that this will be an area of dispute, given the lack of clarity around the threshold for improper conduct. It could also result in SRA scrutiny and professional negligence allegations against claimant solicitors where the conduct of the litigation is held to have been improper.

Pensions: A consolidation agenda

Significant changes and reform should continue to be expected by all those in the pension industry. This time it is the efficiencies of scale and using investments to drive growth which is the focus of the proposals. In July 2023, the Chancellor announced a number of reforms for Defined Contribution (DC) and Defined Benefit (DB) schemes which had consolidation at their heart. For DC schemes, the Chancellor indicated that "a programme of DC consolidation" was required to deliver diverse portfolios and best possible returns. Schemes that do not deliver "the best possible outcomes" will face regulatory intervention and wind up. For DB schemes, the Chancellor said the market was too fragmented and the government would introduce a new 'Superfund' in which public sector funds may lead the way. A change in government is unlikely to derail this consolidation agenda, with Labour making similar proposals. The Pensions Regulator is also supporting this direction of travel, announcing in October 2023 that its regulatory approach is evolving to "help shape the pensions market to fewer, larger well-run schemes" and, only a month later, approving the first DB Scheme transfer into new Superfund, Clara-Pensions. As insurers will know all too well, years of reform in this sector have illustrated that there are always mistakes to be made or discovered when changes are introduced.

Pensions: Prolonged high inflation rates may lead to claims

With the Bank of England confirming in November 2023 that it does not expect inflation to reduce to its target of 2% until 2025, there is the risk that pensions advisers or providers may face claims from those whose pension payments are failing to keep pace with inflation. While the application of the triple lock means that the state pension will increase by 8.5% in 2024, for occupational pension schemes the majority of the increases are likely to be capped at 5%. As the Consumer Price Index is 6.7% and Retail Price Index was 8.9% (September 2023), pensions in payment (like wages) are therefore falling behind inflationary increases. While some schemes may voluntarily consider discretionary increases, this is going to be rare. Public pressure to reassess this may well escalate over time given the stubbornness of inflation in the UK economy. For those who bought their annuity during decades of a low inflation economy and have no inflation proofing, the lack of any increase will be causing a significant challenge. The concern is, will they start questioning their advisers or providers about why this was recommended or permitted?

Surveyors and Valuers: Risk minimisation will be crucial as the use of PropTech and specialist third party suppliers increases

The use of PropTech and specialist third party providers will increase professional risk exposures if not carefully sourced. Reliance on technology to optimise the provision of valuation, property/facilities management, climate analysis and building design/cost services is on the rise. So too the use of specialist third party providers to assist with innovation and service delivery. The appropriate attribution of risk is, however, crucial to ensuring that professionals do not sleepwalk into potential liabilities for which they should not be responsible or, if genuinely unavoidable, that those exposures are properly understood, managed and priced. Never has it been more crucial to ensure that terms of business, with both those third-party service providers and the end recipients of the professional's advice, minimise potential risk exposures wherever system/third party supplier defaults arise. The importance of reviewing those terms, particularly reasonable exclusions and/or limitations of liability and clauses designed to legitimately restrict responsibility and reliance, cannot be understated.

Surveyors and Valuers: Sustainability and ESG matters should form an integral part of the valuation approach

It is inevitable that a multi-tiered approach to real estate valuation will emerge and, with it, a greater exposure for those who fail to factor sustainability, in all its guises, into their advice. The Royal Institution of Chartered Surveyors, in its UK supplement issued in October 2023, notes that "wherever appropriate, the relevance and significance of sustainability and ESG matters should form an integral part of the valuation approach and reasoning supporting the reported figure". In short, minimum energy efficiency standards, energy performance certifications and flood (or subsidence) risk assessments, not to mention the maintainability of income (and capital expenditure required to preserve it) wherever revenues are likely to influence the value of an asset over the anticipated life of the loan, look set to play an ever-increasing role in valuation methodology and, in consequence, valuation conclusions. The profession needs to have sustainability at the forefront of its mind when both valuing assets and caveating its conclusions.

Surveyors and Valuers: Deteriorating claims environment for 2024

The predominantly benign climate that has prevailed in recent times looks set to deteriorate, although the impact is likely to be far more localised and muted than before. While nonprime lending is just subprime rebadged, residential loan default rates remain low despite recent interest rate growth. High employment, providing it continues, coupled with a better understanding among the experienced lenders of the pitfalls of early foreclosure, will restrict claim volumes as the market softens rather than falls. Claims growth is most likely in the commercial space as mid-tier development projects come unstuck due to rapid cost inflation and reductions in returns. Retail, office and hospitality venues remain under serious pressure and the landlord exodus from the private rented sector gathers pace. Likely claimants will be those in the higher risk arena, including short term/mezzanine funders, peer to peer, crowdfunding and niche investment lenders. Aggrieved borrowers can also be expected to fuel LPA Receivership claims. However, even where claims emerge, the automated valuation model tech processes many professionals have introduced since 2008 should enhance defence prospects.

Technology Professionals: More AI in judicial decisions

The topic of AI will feature increasingly in judicial decisions. We already have the first cases which discuss the use of AI in an intellectual property, regulatory and data protection context. The prevalence of (elements of) AI in software will mean that the use of AI and the AI's performance itself will soon become the central topic of legal proceedings. While we expect the resulting decisions to be made along previously established principles governing the liability of the individuals behind the development of the software, the ability of AI to change the human output and to do so at a scale and speed otherwise not achievable means an increased exposure to risk for insurers (including the risk of class actions should the software be widely enough used).

PROPERTY

COVID-19 BI litigation: will it be resolved by the five year mark?

2024 is set to be another crucial and busy year for COVID-19 litigation. At the time of writing, we anticipate that the Court of Appeal judgment in Various Eateries in early 2024 will bring further clarity to the insurance market on aggregation. Although policyholders continue to seek blanket recoveries under the various "at the premises" disease clauses, insurers' appeals in the London International Exhibition Centre litigation are also due to be heard early in the Summer of 2024. The "prevention of access" clauses test cases should also have judgment handed down in early 2024 and insurers will then be able to determine the extent to which the Divisional Court's findings in the FCA test case remain unaffected by the Supreme Court. Coverage, causation and evidential issues arising from deaths, long COVID and cancellations have yet to be aired. Should certain aspects of these cases go to the Supreme Court, the five year mark may only signal the end of the beginning.

The Terrorism (Protection of Premises) Bill will bring positive outcomes for property insurers

Having been included in the Queen's Speech in May 2022, the Terrorism (Protection of Premises) Bill (also known as Martyn's Law) was included again in the King's Speech in November 2023. While the Bill is of significant interest for liability insurers, requirements for proportionate protective security measures are likely to have a positive knock on effect for property insurers as well, potentially reducing other crime and antisocial behaviour and in turn the likelihood of material damage and theft claims. As to when the new legislation may be passed, our prediction is that it will not be this side of the general election, whether in Spring or Autumn 2024, in light of the King's Speech reference to the need for a further consultation on standard tier venues. Regardless, this is a Bill that should be high on the radar for insureds, brokers, underwriters, claims handlers and reinsurers alike.

RAAC - cladding equivalent or more millennium bug?

Despite initial panic, how many claims will actually be made against building contractors regarding Reinforced Autoclaved Aerated Concrete (RAAC) in 2024? It is a material that mimics cement rather than concrete, and was always accepted as having a relatively short life expectancy. Was it negligent to use RAAC in the 1960s and 70s? Many prospective claims will be time barred, even under the Defective Premises Act. 30 years only takes us back to 1994. Most RAAC was in place well before then and it wasn't often used in dwellings. We predict that the issue will be more 'millennium bug' and not result in a significant volume of sustainable claims against those involved in the original construction.

Lithium-ion batteries fires will increase but may raise causation issues on recoveries

The rise of lithium-ion battery fires in the UK will continue in 2024. These cells are extensively used in modern technologies, including in laptop computers, mobile phones, vacuum cleaners, DIY tools, electric cars, electric bikes and e-scooters. Lithium-ion batteries are able to store a large amount of energy in a small space and if they do ignite, they burn aggressively and can cause widespread catastrophic damage with multiple seats of fire. With the shift to flexible home working environments, we predict that this type of fire will become more prevalent. This is exacerbated by the trend of replacing batteries at end of life with cheaper versions that can increase the fire risk. The characteristic of multiple seats of fire may also provide causation issues for subrogated recoveries.

Shining a light on solar energy challenges for insurers

The rise in solar energy and photovoltaic installations is anticipated to be a growing challenge for property insurers in 2024. In August 2023, the Microgeneration Certification Scheme announced that 2023 was the first year to reach a monthly average of more than 20,000 domestic solar panel installations. With a largely unregulated market and a cost of living crisis, we predict customers will increasingly opt for cheaper installation options (often compromising on safety and quality). Insurers will also need to be mindful of the impact of severe weather, maintenance issues, theft and ever improving technologies.

Expect an increase in property fraud in 2024

The cost of living crisis in the UK will continue into 2024 and, as more businesses and individuals find themselves in financial difficulties, this is likely to cause an increase in the number of fraudulent property insurance claims. We predict a rise in repeat claims for low value items as policy holders seek to take advantage of the friction-free customer journey on low value household insurance claims. Such fraud tends to take the form of either repeat claims with the same insurer for the same peril or repeat claims for the same item across multiple insurers using the same evidence in support. Even if the underlying insurance claim is genuine, customers may see an opportunity to deliberately exaggerate the claim and try to recover additional monies that would not otherwise be payable. It is essential that insurers have the systems and procedures available to identify these issues and deal with them appropriately.

Climate change will impact the frequency and resolution of subsidence claims

With our summers getting hotter and drier, we predict an increase in tree root subsidence claims as trees seek out moisture in clay subsoils. Such claims will extend to areas not previously associated with subsidence, for example further north in the UK. We will also see reoccurring damage as previous engineering solutions fail as the soil becomes dryer at greater depths. Also relevant to subsidence claims is the Environment Act 2021, which adds a consultative process to the potential removal of council-owned trees. While tree removal is generally a quicker and cheaper solution, with less invasive repairs and permanent resolution, we predict that tree owners will increasingly rely on the Act to pursue alternative substructural repairs. These can however have a greater environmental impact than tree removal.

Insurers will Build Back Better in 2024

Flooding remains an ongoing challenge for insurers in ensuring that they support their customers through distressing circumstances while managing their own significant financial impact. As the UK suffers further bouts of flooding, the benefits of Flood Re's Build Back Better Scheme is brought into sharper focus. The scheme enables homeowners to install flood resilience measures up to the value of £10,000 when repairing properties after a flood. This ensures that the home is better prepared to keep more water out next time the area floods and, when the water does enter, it is quicker and safer for homeowners to clean up and move back in. We predict that more insurers will sign up to the scheme and we will see continued developments in technology in support of flood defence systems for residential properties.

Increased global instability will exacerbate already difficult coverage assessments

Global geopolitical instability and the increase in large scale protests around the world mean that underwriters writing terrorism and/or political violence cover should be nervous about exposures over the next 12 months. Recent events in the UK show how even peaceful protests can lead to civil disturbances by a small number of those taking part. For property damage resulting from these events, determining whether losses fall to a certain policy rather than another can be a difficult and very fact-intensive assessment. Some terrorism clauses are so broad that damage one would not expect to be considered terrorism could be caught. Similarly, an insured whose property is damaged by protesters may, depending on the specific circumstances, find losses falling outside of cover due to a strikes, riots and civil commotion exclusion. Both insureds and insurers would be well advised to check existing policies and consider whether additional cover should be sought/provided in future.

REINSURANCE

The insurance market will continue to develop new forms of cover for war risks

Generally speaking, insurance of war risks has been confined predominantly to marine and aviation hull, although there are classes which may be viewed as adjacent, such as political risk, political violence and terrorism. Cyber underwriters in the Lloyd's market have been specifically directed not to write state-backed cyber-attacks. While not an absolute ban, engagement with Lloyd's is required for such risks to be written. Developing war risk products is not straightforward. There are different ways to approach this topic. One option may be to develop a simple buy-back for policies which otherwise exclude war. Another option is to adopt a parametric trigger, based, for example, on disruption to critical national infrastructure. With the escalation in geopolitical risk, the need for insurance solutions has become more pressing.

War or terrorism – the reinsurance question

2023 has seen further ideological and national instability, resulting in various violent acts. It is often difficult to identify the appropriate classification of such acts, including the dividing line between acts of terrorism and acts of war. This is particularly pertinent to reinsurers that may exclude terrorism losses but not war, and vice versa. To further complicate matters, political violence designations under a local insurance contract may not be the same under the corresponding reinsurance contract and contracts may include aggregation language for acts of terrorism (e.g. a 72 hours clause) but not (of course) for acts of war. As a result, we will see increased reinsurance disputes activity around differentiating terrorism and an act of war.

Is ESG the new asbestos for reinsurers?

Asbestos has had a significant impact on global reinsurers. Reinsurers have entered liquidation and losses remain from asbestos exposure in the 1960s. For reinsurance contracts with damage occurring triggers, exposure may date back to any period in which the claimant was exposed to asbestos. There are similarities with ESG claims, especially climate change litigation, which relate to exposure over several years, if not decades. Companies, whose practices or products are found to contribute to climate change, may face claims for damages. We expect reinsurance contracts responding on a damage occurring basis to see increased activity as cedants seek to maximise recoveries by notifying losses to multiple years of account, which means reinsurers from years ago will have to dust off their reinsurance contracts.

Is there scope for parametric triggers in cyber (re)insurance?

We predict that a cyber loss index is only viable with cross-border co-operation and government imposed reporting obligations. There would need to be wide agreement that data should be submitted to a single entity. This would require an obligation to participate, rapid responses, processing and publication of consolidated data. A common approach to data privacy would also be essential. In light of these obstacles, another model is for a single company to assess whether cover has been triggered, based on agreed objective standards and its own metrics. Intangic has undertaken interesting work in this area and we watch their progress with interest. Another issue is whether a cyber loss index could trigger exclusions rather than cover. This might be part of the solution to alleviating regulators' concerns about state-backed cyber-attacks. We anticipate further innovation as the market grapples with these challenges.

There will be greater focus on autonomous vehicles and cyber risk

As vehicles become increasingly connected, there will be an increasing exposure to cyber risk. Cyber-attacks can take many forms and may target a single vehicle, or type of vehicle, or all vehicles that have adopted common operating systems. Beyond the constraints of Part VII, Road Traffic Act 1988 and Part 1, section 2, Automated and Electric Vehicles Act 2018, insurers need to consider to what extent such risks should be written as standard and whether they should be sub-limited or excluded. Such risks also require consideration in relation to reinsurance contracts. These may not be entirely back to back to the extent that motor policies protect against more risk than is mandated by the Road Traffic Act.

TRANSACTIONAL LIABILITY

AI will speed up the M&A process

M&A activity has slowed in recent years and the deals which are going through are taking time to complete as buyers investigate a range of factors including the impact of recent economic challenges, regulatory compliance, tax, ESG and litigation risk. AI technologies will increasingly be used to speed up the due diligence process. AI enables the swift review of large data sets, efficiently flagging inconsistencies and potential risks for further investigation by the buyer and its legal team. Providing sensible human oversight is applied, the opportunities for using AI in the M&A process are significant.

ESG factors will be an important focus in M&A deals

Corporations recognise that tackling environmental, social and governance (ESG) issues can give them a competitive advantage and provide opportunities for growth. With greater scrutiny of ESG targets by consumers, employees, investors and regulators, ESG considerations are increasingly an important focus in M&A deals. Buyers are critically assessing sellers' commitments to energy savings, operational efficiencies and social responsibility as part of the acquisition process, to ensure ESG statements stack up and their merging corporate cultures will align. Significant differences in ESG ideology and performance criteria could be an obstacle to integration post-merger and may result in claims if mismanaged. ESG scoring – which uses quantitative measurements to independently verify ESG factors – is a growing market and it is expected to become more common place in the M&A due diligence process.

Challenging economic conditions will drive demand for warranty and indemnity insurance

Geopolitical instability, rising inflation, interest rate hikes, currency fluctuations and supply chain disruption have fuelled market uncertainty over the last two years and caused a slowdown in M&A activity. But this slower pace is perhaps not all bad news. It is giving deal makers breathing space to undertake due diligence, reflect on strategies and think innovatively. Deals that promote greater operational resilience, improve certainty of delivery, reduce production costs – such as joint ventures or vertical mergers with those in the supply chain - will be a key feature in 2024. This challenging environment will drive up demand for warranty and indemnity insurance, with greater recognition that insurance can protect buyers against undisclosed risks and help them weather this period of economic uncertainty.

Transactional risk insurers will continue to evolve their products and claims response to steal a competitive edge

The difficult market conditions mean competition among insurers remains fierce. There are fewer deals but there are still high value premiums to be won as deal makers look for certainty in these uncertain times. We continue to see brokers and insureds press insurers to provide wider, US-style cover. Insurers will need to remain vigilant with their policy wordings to avoid giving more cover than intended. On the claims side, insureds and brokers demand almost instant responses and insurers can differentiate themselves from the market by retaining experienced and knowledgeable legal and expert advisers.

ASIA PACIFIC

Australia: Class action wave looms after Australian court's landmark decision

The recent Australian court decision against Carnival Cruises is expected to trigger a wave of class action litigation related to COVID-19 outbreaks aboard cruise ships. The judge found Carnival was negligent and misled passengers about the safety of the cruise on the Ruby Princess, marking the first class action victory against a cruise operator globally. The cruise industry, already tarnished by its association with various COVID-19 outbreaks, may face further scrutiny as passengers seek to pursue claims for negligence. Cruise operators in response may need to reassess their safety protocols and risk management to prevent future legal challenges. This landmark decision could expose cruise operators linked to COVID-19 and other virus outbreaks to a large number of claims in Australia and beyond.

China: Tensions may ease between China and the West

In 2024 we will hopefully see some easing of tensions between China and the West, following the successful visit to China by Mr Albanese, the Australian Prime Minister, and the recent APEC Summit in San Francisco in November 2023. The prospect of any easing continuing beyond 2024, is of course subject to the US general election, as well as the impact of geopolitical events happening in the world including in Ukraine and Gaza. Last year we also correctly predicted the ending of China's 'Zero-COVID' policy, and it is encouraging to see that, amid some serious economic woes (including a real estate crisis) that China is going through, the Chinese authorities are focusing more on boosting the confidence of both foreign investors and China's own private sector players. If China keeps the momentum, we expect that the speed of supply chain diversification will slow down and its trade with the West will stabilise in the new year.

Indonesia: Aviation sector will grow from strength to strength amid global supply chain issues

Despite positivity surrounding the Indonesian aviation sector, the country is not immune to the global supply chain crisis, and Hull All Risks insurers should anticipate a rise in claims stemming from the shortage of aircraft components. Ranked as the 7th fastest growing aviation industry in the world and the 2nd (behind China) in terms of aircraft orders and business value, the Indonesian aviation sector continues to thrive with passenger numbers at 80% of pre-pandemic levels. ASEAN and domestic passenger connectivity is set to increase with the development of new airports throughout the archipelago and collaboration between airlines through codeshare arrangements. The overall market outlook in Indonesia remains attractive for aviation insurers, with insurance premiums growing 7.7% in the first semester of 2023 while claims paid were down by 6.5%.

Singapore: Insurers will continue to face additional pressure to manage environmental risks

Although guidelines from the Monetary Authority of Singapore urging enhanced environmental resilience to environmental risks are not yet binding, they represent 'best practice' for the industry and we anticipate that they will become baseline standards in the near future. Since 2020, the Monetary Authority of Singapore has released several guidelines and information papers urging insurers to enhance their resilience to environmental risks and to develop tools and metrics to assess their exposure to such risks. The latest information paper in 2022 emphasised active monitoring of environmental risk exposures, climate scenario analysis, and shared measures that some insurers have implemented, such as limiting investment on sovereign debts from countries with reportedly higher environmental risk.

Singapore: Climate change is likely to contribute to spiking natural catastrophe losses and demand for cover in APAC

As extreme weather events become increasingly predictable, it is anticipated that developers and governments will likely place an increased importance on obtaining adequate levels of insurance to mitigate such disasters. By August 2023, the APAC region saw a reported USD 7 billion in overall losses in natural disasters (most significantly in flooding and landfall incidents in New Zealand and Cyclone Mocha in Myanmar, Bangladesh and India). However, only USD 3 billion of those losses were insured. China and Malaysia in particular have been seeing heavy losses from floods and rain-triggered disasters. Chinese insurers reported receiving 245,000 insurance claims amounting to an estimated loss of 9 billion yuan during this year's flood season alone. Malaysia has likewise been incurring heavy flood losses since 2021 almost as an annual event.

Singapore: More MASS technology expected

We predict that Singapore will continue to be at the forefront of advances in Maritime Autonomous Surface Ships (MASS) technology. The Singapore flagged Maju 510 was the first harbour tug to receive Autonomous and Remote Control Navigation Notation from the American Bureau of Shipping classification society and the Smart (Autonomous) Notation from the Maritime and Port Authority in Singapore. In preparation for an increase in use of MASS, the Singapore government is rolling out a dedicated maritime 5G network across Singapore's waters with an aim of having this completed in 2025. One of the uses of the network will be for further sea trials of MASS projects.

EUROPE

France: Climate change litigation will be in the spotlight in 2024

In the world's first climate-related lawsuit against a commercial bank, French environmental NGOs are demanding BNP Paribas adopt and implement a robust vigilant plan to combat environmental harm (as required by France's Duty of Vigilance Law for large companies based in France), stop investing in fossil fuel expansion projects and exit the oil and gas sector by 2050. The pressure of litigation (which started in February 2023) and adverse publicity has been partially effective. The bank has since implemented a new climate policy with a commitment to no longer finance new oil and gas fields, but the NGOs maintain this does not go far enough to align with the Paris Agreement, and so the proceedings continue. We now eagerly await the French Court's decision on the interpretation and application of this new duty of care obligation, whether the bank will be required to pay damages or take corrective measures (or both), and the extra jurisdictional reach of the legislation given the global impact of environmental damage.

Germany: Will the Lliuya case change climate change litigation?

To date, climate change litigation has not been a significant issue in Germany, especially when compared to other jurisdictions such as the US. This is in part due to the strict civil law principle of causality required for alleged climate-related damages, which is proving a greater hurdle in Germany than in the US. This all might change with the ongoing lawsuit of a Peruvian farmer, Saul Luciano Lliuya, against the German energy giant RWE. The claim, which alleges that RWE has contributed to a greater risk of flooding in Peru through climate change, was initially unsuccessful in Essen in 2016. An appeal is now pending before the Court of Appeal in Hamm. Experts travelled to Peru in 2022 and delivered their report to the court in the Summer of 2023. Should Lliuya succeed, the landscape for German climate change litigation would be reborn. A decision is hotly anticipated.

Germany: New directive on IT security requirements will impact cyber and D&O insurance

The NIS2 Directive (Network and Information Security Directive) was passed at EU level at the end of 2022. The member states of the European Union must transpose it into national law by October 2024. The NIS2 Directive extends the economic sectors to which it applies and reduces the thresholds (turnover and number of employees) further. In addition, the Directive specifically sets out the requirements for IT security in companies for the first time. The Directive provides detailed requirements for IT systems and risk management systems, as well as liability provisions if managers do not implement the requirements adequately. Initial implementation proposals are already being discussed intensively in Germany. Insurers should keep a close eye on this discussion, both due to its relevance for cyber insurance and for its impact on the liability of directors and officers.

Germany: The environment for cyber insurance will remain difficult

In 2024, the vast majority of cyber claims in Germany will again originate from ransomware attacks. The challenges posed by these incidents for insurers lie mainly in claims processing. However, the liability risks associated with cyber losses are also becoming increasingly apparent. Data protection claims are the primary driver for this development. There are now law firms in Germany that specialise in pursuing mass claims for data protection-related damages. At the same time, the liability of managed service providers is increasingly coming into focus. For insurers, this will also increasingly involve the question of whether the respective policyholder is responsible in the event of inadequate IT security or whether recourse claims exist. This also makes the cases important for professional indemnity insurers.

Germany: Is classic business interruption insurance outdated?

In light of climate change, the pandemic and further digitalisation, classic business interruption insurance will come under scrutiny. Problem areas include the determination of the sum insured and the liability period, which have to take into account changing business models, such as outsourcing, globalisation and new production methods. It is precisely the change in business models that leads to more complex and riskier loss potentials, for example from increasingly complex supply chains, insolvencies and the disruption of transport routes.

Germany: Supply chain risks are set to increase for corporations operating in the EU

Germany's Supply Chain Due Diligence Act, which came into effect on 1 January 2023, also applies to smaller companies (with 1000 employees) from 1 January 2024. Additionally, the EU's Supply Chain Directive is expected to be finalised shortly. This will be stricter than Germany's legislation and will oblige companies operating in the EU with 500 or more employees to investigate their suppliers along the entire supply chain (including all global suppliers and indirect suppliers) to ensure compliance with human rights and environmental protection standards. Corporations must adopt risk management strategies and ensure responsible governance if they are to reduce the risk of future D&O claims.

Germany: D&O policies are becoming less broad in cover

Many years of a soft D&O market in Germany have shaped D&O policies into broader "all risk" policies. Policyholders and brokers have criticised such broad covers as they often do not provide the depth of coverage that corporations require, particularly D&O exposure to new risks, and exclusion clauses can be broad in application. Now the D&O market is bouncing back and this turnaround is expected to see D&O policies return to covering core D&O risks.

Germany: ESG and technology will influence the M&A landscape

Given the uncertainties in the European M&A landscape, industry players remain cautious and are trying to capitalise on opportunities while managing challenges effectively. Due to the difficult macroeconomic circumstances, deal activity is predicted to remain rather reserved. In addition to geopolitical risks, inflation and high financing costs in particular play a role here. Nevertheless, European ESG and climate change regulations will open up opportunities for transactions and ESG aspects will become increasingly important in mergers and acquisitions. In terms of sectors, growth is most likely to be seen in the technology (especially AI) and energy sectors. The majority of deals in Germany will continue to be cross-border, with more foreigners acquiring companies in Germany than vice versa. The US will remain by far the most important buyer/target nation here. This development - as well as the numerous insolvencies to be expected - will most likely lead to a continued high demand for transaction insurance, with contingent risk insurance to become increasingly important as well.

Ireland: Ireland's new framework for consumer collective actions may pave the way for third party funding reforms

On 11 July 2023, the Representative Actions for the Protection of the Collective Interests of Consumers Act 2023 was signed into Irish law. The Act gives effect to the EU's Representative Actions Directive and creates a new litigation mechanism allowing consumers to bring collective actions (represented by a "qualified entity") for breaches of EU-derived consumer protection legislation occurring on or after 25 June 2023. The Act, once in force, may lead to an increase in collective actions against corporations in Ireland (with implications for their insurers) but claims volume will not be significant without funding reforms. Ireland currently prohibits third party funding of civil claims, so unless this prohibition is relaxed, there will not be the appetite (or ability) to bring collective actions as there is in jurisdictions like England, where litigation funders provide essential funding for consumer claims.

Ireland: Expect a rebalancing of the Irish occupier's duty of care in 2024

It is predicted that the overall defensibility of public liability claims will increase in Ireland in 2024. The recent amendments to the Occupier's Liability Act in Ireland reflect a series of decisions from both the Court of Appeal and the High Court over the last few years that have effectively re-balanced the duty of care and reduced the burden on occupiers of premises to guard against any and all accidents. It is expected that an increased emphasis will be placed by Irish courts on the voluntary assumption of risk in the context of public liability cases and that the bar for Plaintiffs to succeed in personal injury litigation against occupiers will be heightened generally across the board.

Italy: Recent climate-related catastrophes are paving the way for compulsory property insurance in Italy

Climate change-related disasters are on the rise around the world and Italy has been hit hard in recent years. The growing rise of floods, landslides, forest fires and other natural disasters such as earthquakes and volcanic eruptions has been exponential and has significantly strained Italy's public finances. The Italian government is exploring ways to address the low take-up 'insurance culture' which prevails and has prepared draft legislation, which is currently under review by the Italian parliament, that would provide for insurance against natural disasters to become compulsory for all companies with a registered office or permanent establishment in Italy in 2024.

Italy: An increase in insolvencies will see a rise in claims against directors and officers

According to a recent report published by a leading insurance group, 2024 is expected to see an increase in insolvencies globally. The main reasons are challenging economic conditions including high inflation and energy costs, geopolitical turmoil and restrictive monetary policies. These challenges increase credit risks for corporations and consequently a carefully managed trade credit strategy is key. Also, as is well known, an increase in insolvencies may lead to an increase in claims against directors and officers (in most cases brought by insolvency practitioners pursuing investor and creditors' claims).

Italy: W&I insurance is gaining popularity in M&A deals in Italy

Warranty and indemnity (W&I) policies, which offer buyers protection in mergers and acquisition deals against unknown risks, are becoming more widely used in Europe. In Italy, the market has grown significantly in recent years and new W&I insurance players continue to enter the market. With competition, insurers are keen to differentiate themselves by offering different pricing and coverage options. Italy, along with much of the rest of Europe, has had to ride challenging economic conditions but there is now heightened awareness that large companies and SMEs can better weather these financial challenges through growth, consolidation and economies of scale. The pursuit of M&A activity will continue to fuel the appetite for W&I insurance.

Nordics: Increased flooding will see changes to the provision of insurance, policy wordings and subrogated recoveries based on failure to adapt

Local governments should expect a more challenging insurance market and more subrogated recoveries brought against them for failure to take sufficient climate adaptation measures. For example, many sewer systems have been neglected for a number of years and are unable to withstand the demands brought about by climate change and increased rainfall, resulting in more flooding and property damage. Looking forward, insurers are likely to refrain from insuring local governments who cannot evidence the steps they are taking to adapt to climate change, as well as restricting cover where it is provided.

[With thanks to Nordia for submitting this prediction.]

Spain: Mandatory insurance of e-scooters could soon become a reality

Personal mobility vehicles (PMVs), the most popular of which is the electric scooter, have completely changed the urban landscape in Spain. Cities such as Madrid and Barcelona are at the forefront of European cities with the highest number of PMV users. This has led to an increase in the accident rate associated with PMV use. However, in Spain, there is still no regulation requiring PMVs to be insured.

Recently, a preliminary draft law on civil liability and insurance of motor vehicles has been approved, transposing the EU's Motor Insurance Directive 2021/2118 which establishes that each Member State may regulate the compulsory insurance of PMVs. With this in mind, mandatory insurance of PMVs may become a reality soon. The aim of this is to ensure that victims of an accident caused by an electric scooter or PMV are not left unprotected if the scooter user is liable and cannot provide compensation.

THE AMERICAS

Argentina: Non-fungible tokens have the potential to transform the aviation landscape

2024 is likely to see more airlines in Latin America using non-fungible tokens (NFTs) to transform the passenger experience. The use of NFTs by airlines is an exciting approach to ticketing, as NFTs are unique digital assets that can be linked to a passenger's identity, making ticket transactions secure and personalised. They also offer unprecedented flexibility to passengers when exchanging or gifting tickets. Flybondi's forward-thinking initiative is likely to inspire other airlines in the region and has the potential to modernise not only the passenger experience but also the operational landscape of aviation.

Argentina: Inflation and currency devaluation will shape insurance market and court decisions

Argentina has been grappling with rising inflation and devaluation of the Argentine Peso over the past few years, as a result of, among other things, the global recession, the ongoing foreign exchange control restrictions and emergency taxation regime. As sums insured for mandatory insurance (such as motor) have not been properly adjusted to reflect inflation and devaluation of the currency, it is very likely that in 2024 we will continue to see court rulings in excess of the sum insured and that declare high deductibles denominated in foreign currency unenforceable. Finally, because of the crisis that the local insurance entities are suffering, they may also look for alternatives to maintain their net worth, such as portfolio divestments and M&A.

Brazil: New controversial Insurance Law expected in 2024

After a decade of discussion in Congress, a bill for a new insurance law in Brazil may finally be about to be passed. Currently, the legal framework of an insurance contract is governed by 46 articles of the Civil Code of Brazil. The new law will revoke the Insurance chapter of the Civil Code and replace it with a more detailed and comprehensive set of rules which will predominantly provide protection for insureds. Examples of the changes include: restricting the opportunities to void cover on the basis of aggravation of risk; disclosure of an adjuster's report to the insured; a requirement for insurers to provide guidance on salvage and mitigation of damages; a requirement for insurers to confirm, within 120 days, their position on coverage for "large losses" (as provided by regulatory rules to be set by SUSEP (Superintendência de Seguros Privados)); for "non-large losses", a requirement for insurers to carry out claims adjustment within 30 days, failing which coverage will be automatically confirmed; a 2% penalty for delay in making payment to the insured; and Brazilian law and jurisdiction to be mandatory even where an arbitration clause applies. The proposed rules are highly controversial as they set out strict rules which will apply to an insurance contract, as opposed to the civil code which is structured in terms of general principles. The new law will also apply to arbitration and reinsurance, and conflicts with existing regulation. The final draft of the bill is still under discussion, but it is expected to be approved soon.

Chile: New economic crime legislation will increase demand for D&O cover

A new law enacted in August 2023 has reclassified around 230 current crimes as "economic crimes" and introduced different and higher penalties. This is relevant for the insurance market both locally and abroad, in particular in relation to D&O policies. There will be more criminal exposure for directors and officers, which could mean a higher take up in D&O cover and a greater willingness to pay higher premiums. Other existing covers will also be key: defence costs (administrative and criminal), environmental damage, experts expenses, administrative penalties, unintentional homicide, freezing of assets and deprivation of liberty. Insurers and reinsurers should ensure they have sub-limits in place for these or relevant deductibles. Another significant issue will be the adequacy of the questions asked of the insured prior to cover.

Colombia: Rise in ransomware attacks will lead to stricter underwriting

The indisputable rise in ransomware attacks in recent years has led to stricter underwriting in respect of cyber insurance. As a trend, we have seen higher insured coverage limits for ransomware attacks, but also for other types of incident, such as denial of service attacks. Increased ransomware attacks are likely to increase the cost of insurance policies, but also impact the costs of coverage for defence costs in respect of regulatory investigations which may be undertaken against an insured following a ransomware incident. Cyber risks are definitely representing an increasing share of the market today.

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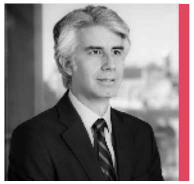

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